

BETWEEN:

**JOSEPH AQUILINA**

Plaintiff

AND

**ERARING ENERGY**

Defendant

**BABCOCK INTERNATIONAL LIMITED**

Cross Defendant

**CONTRIBUTIONS ASSESSMENT  
DETERMINATION**

1. By letter dated 14 January 2009 I was appointed the Contributions Assessor by the Registrar pursuant to Clause 49(1) of the *Dust Diseases Tribunal Regulation 2007* (NSW) (**the Regulations**).
2. The plaintiff is Joseph Aquilina (**Aquilina**) and he sues Eraring Energy (**Eraring**) alleging that the asbestosis and lung cancer he has been diagnosed with occurred as a result of exposure to asbestos as an employee of Eraring.
3. Babcock International Limited (**BIL**) is joined as a cross defendant by Eraring. Eraring alleges that BIL is a joint tortfeasor as it supplied the asbestos containing material that Mr Aquilina was exposed to.
4. Each of Eraring and BIL have filed Replies to Mr Aquilina's Statement of Particulars.
5. The determination is to be made by me on the papers, on the assumption that the defendant and cross-defendant is liable, and applying the standard presumptions prescribed in the *Dust Diseases Tribunal (Standard presumptions – Apportionment) Order 2007* (**the Standard Presumptions**).

## Mr Aquilina's History of Exposure

6. Mr Aquilina had a 50+ year history of employment in Australia and overseas. He worked in food preparation in Malta between 1942 and 1948. There was no history of exposure in this role.
7. Between 1948 and 1954 he worked aboard a Swedish tanker the MTA Ida as an assistant motor man in the engine room. He recalls that some of the pipes in the engine room were covered in asbestos. He didn't handle this asbestos but recalls brushing up against it.
8. Mr Aquilina's recollection of his exposure whilst working on the ship is summarised at paragraph 4.5 of his Statement of Particulars as "*I had very little exposure to asbestos during this employment*". He describes the level of intensity of exposure as low.
9. Mr Aquilina's next period of employment that involved exposure to asbestos was between 1954 and about 1960 with the Electricity Commission of New South Wales (now Eraring Energy). Mr Aquilina was employed as a rigger's assistant in this role. His responsibilities included erecting the staging so that fitters and boilermakers could carry out repair on the pipework. He occasionally helped with the repair work. When he helped with this work he was in close proximity and breathed in the dust.
10. He recalls that when removing the asbestos it crumbled into pieces as it was removed. Asbestos rained down on Mr Aquilina as the work was undertaken above him. The next stage of his work was to remove the staging. He recalls the staging was covered with pieces of asbestos as well as asbestos dust. He picked up pieces of lagging and placed them into the rubbish. He breathed in the dust doing the work.
11. As is sometimes recounted by men who worked in these conditions in the 1950s and 1960s Mr Aquilina recalls how he would throw handfuls of asbestos at his colleagues as if it was snow. He recalls once being thrown into a tub of asbestos and coming out looking like a snowman.
12. He believes he was exposed to asbestos every day of his employment at Eraring. He was not provided with protective gear.

13. Mr Aquilina does not recount any other event of exposure to asbestos after 1960 in his Statement of Particulars. He was employed by Pacific Power between 1982 and January 1996. At Part 3 of his Statement of Particulars he states that he had no exposure to asbestos in that period.

### **Evidence of other Exposure**

14. Contrary to the evidence given by Mr Aquilina in his Statement of Particulars the solicitors for BIL point to two documents which they say shows that Mr Aquilina was indeed exposed to asbestos at Pacific Power. The evidence, which is annexures A and B to the BIL Reply is as follows:

(a) Annexure A - A history of exposure extracted from the Dust Diseases Board File (dated 3 September 2007). That includes references to a possible exposure to asbestos as a labourer between 1982 and 1990;

(b) Annexure B – A letter from Julie Tsounis to the Dust Diseases Board following a conversation on 3 September 2007 which recounts her conversation with Mr Aquilina (her father) and which says:

*“As per our conversation on Monday 3/9/07, this page indicates that there was more asbestos exposure during the period of 1982 to 1996. After speaking to my father (Joseph Aquilina) his concern was that the exposure would have been more dominant during 1954 to 1961, as they used to throw it down to one another also”.*

15. There was an exchange of correspondence regarding these annexures between the legal representatives. BIL’s solicitors noted that there appeared to be an inconsistency between Mr Aquilina’s evidence of his history of exposure in the Statement of Particulars and the evidence in annexures A and B. BIL’s solicitors invited Mr Aquilina’s solicitors to provide an affidavit sworn by Mr Aquilina which clarified the seeming discrepancy.

16. I delayed commencing the preparation of this Contributions Assessment whilst the issue of further evidence was resolved. On 22 January 2009 I was a cc recipient of a letter between Mr Aquilina’s solicitors and BIL’s solicitors which said:

*“The plaintiff does not intend to provide a further affidavit in this matter. The plaintiff relies upon his Form 1 Statement of Particulars sworn 3 November 2008, which post dates annexures A and B to your letter..”.*

17. In light of the content of that letter I think the matter of Mr Aquilina’s exposure post 1990 can go no further. I understand the approach taken by BIL to the evidence in the

annexures because there appears to be some indication that Mr Aquilina had some recollection of exposure in this period however I find, for the purposes of this Contributions Assessment, that there was no relevant exposure post 1990 for the following reasons:

- (a) The Statement of Particulars is verified by Statutory Declaration. Mr Aquilina has given a history of exposure to a solicitor at a time when the issue of actual exposure and the accuracy of his recollection would be tested to ensure the contents accord with the declaration. With the requirement to verify his exposure Mr Aquilina has deliberately not recounted any exposure post 1990. In the absence of a verified statement of his exposure post 1990 I would be largely speculating as to the period and intensity of his exposure – relying on a single file note of a third party.
- (b) Mr Aquilina was invited to supplement his evidence but declined to do so. It is reasonable to assume he has taken that course after discussing the matter with his solicitors.
- (c) It is not clear to me what Mrs Tsounis is attempting to communicate by the contents of Annexure B particularly the reference to “this page”.

18. The factual matters that are relevant to my apportionment determination (see clause 3 of the Standard Presumptions) include:

- (a) Mr Aquilina suffers from asbestosis, pleural plaques and non small cell lung cancer. Asbestosis and pleural plaques are divisible diseases;
- (b) He was exposed to asbestos in two periods 1948 – 1954 aboard the MTA Ida and 9 November 1954 and 1960 whilst employed by Eraring (both period A exposures). Neither defendant submits that the exposure aboard the foreign vessel is relevant to this determination;
- (c) It cannot be said with certainty the type of asbestos he was exposed;
- (d) The lag time between his exposure and diagnosis is consistent with the latency period of asbestosis and pleural plaques; and
- (e) No effective steps were taken to advise Mr Bolton of the dangers of exposure to asbestos or to protect him against exposure.

### **Categorisation of Defendants**

19. Eraring submits that it should not be designated as a category 1 defendant as it (and its predecessor) was not responsible for the installation of asbestos products, plant or

equipment. It relied on companies such as BIL for that purpose. It submits that BIL should be placed in category 1.

20. BIL submits that Eraring should be designated as both category 1 on the basis that it was an “installer” of asbestos for the purposes of Cl 5(2)(a) of the Standard Presumptions. It further submits that Eraring should also be placed in category 2.

21. I prefer Eraring’s submissions on the categorisation of the parties. I find that BIL is a category 1 defendant on the basis that it was an installer of asbestos products. I reject the submission that the repair work undertaken by Eraring meant that it should be categorised in category 1 too. Accordingly, the categories are:

Eraring	Category 2
BIL	Category 1

### **Submissions on the variation of the Standard Presumptions**

22. Eraring reviewed and referred to a series of authorities in which its knowledge of the effects of exposure to asbestos (and its predecessors) has been considered by the Dust Diseases Tribunal. It referred to *Re Royal; Babcock Australia Ltd v Eraring Energy & Babcock International Ltd* (2001) NSWDDT 5 in which Judge Curtis found there was no actual knowledge that could be imputed to Eraring (and its predecessor Elcom) as at 1957. It referred also to the decision that no actual knowledge could be imputed to Elcom as at 1959 as found in the decision of Walker J in *Re Hood; Eraring Energy v SC Cheadle Hulme Ltd* [2005] NSWDDT 46. There are various other decisions of the DDT which found that Eraring had no actual knowledge until as late as 1969 or 1970 – see *Hay and Gynes*. It sought to distinguish the decision of Judge Johns in *Nichols v Pacific Power* which attributed actual knowledge in Eraring’s predecessor in the mid 1950s.

23. For those reasons Eraring submitted that there should be no variation in the Standard Presumptions against it.

24. BIL submits that the Standard Presumptions should be varied as against Eraring by increasing them 20%. It relied on the finding of actual knowledge made by Judge Johns in *Nichols*. It further submits that given its size and sophistication if it did not have actual knowledge then it should be found to be “wilfully blind” to the dangers of asbestos

generally: referring to *Nichols, Re Hay (No 4)* [1999] NSWDDT 5; *Re Raynor* [1999] NSWDDT 12 and *BHP Billiton v Amaca (Lawrence)* [2003] NSWDDT 18.

25. On balance I do not consider it appropriate to make a variation to the Standard Presumptions. I am not in a position, on the evidence before me, to decide when Eraring acquired actual knowledge of the dangers of exposure to asbestos. I do not have the benefit of all the material that would be read and tested in cross examination in a contested hearing in the DDT. There are cases in the Dust Diseases Tribunal which go each way but I prefer to apply the Standard Presumptions without variation on the basis that I do not have sufficient before me to warrant adjusting them on the facts of this case.

26. BIL made submissions based on scenarios that included taking into account the exposure post 1990 as well as based on categorising Eraring as a category 1 defendant and with a maximum increase to the variation in liability. For the reasons set out above I do not propose to apply those scenarios.

27. Accordingly, applying the Standard Presumptions to the Period A exposure at Eraring Energy I ascribe the following liabilities:

Eraring	25%
BIL	75%

28. I have not been asked to appoint a Single Claims Manager.

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David Jay

Contributions Assessor

27 January 2009