

**IN THE DUST DISEASES TRIBUNAL  
OF NEW SOUTH WALES**

**DDT No. 290/ 2009**

BETWEEN:

**GEOFFREY EDGAR BARRATT**  
Plaintiff

AND

**BABCOCK AUSTRALIA PTY LTD**  
First Defendant

**ANI DISTRIBUTION PTY LTD**  
Second Defendant

**AMACA PTY LTD**  
Cross Defendant

**BABCOCK INTERNATIONAL LTD**  
Cross Defendant

**ERARING ENERGY**  
Cross Defendant

**CONTRIBUTIONS ASSESSMENT  
DETERMINATION**

1. By letter dated 30 June 2010 I was appointed the Contributions Assessor by the Registrar pursuant to provisions of the *Dust Diseases Tribunal Regulation 2007* (NSW) (**the Regulations**). The Registrar requested that I also appoint a Single Claims Manager (**SCM**).
2. The determination is to be made by me on the papers, on the assumption that the each of the parties joined as defendants or cross-defendants is liable, and applying the standard presumptions prescribed in the *Dust Diseases Tribunal (Standard presumptions – Apportionment) Order 2007* (**the Standard Presumptions**).

3. The plaintiff is Geoffrey Edgar Barratt. He alleges that he has been diagnosed with asbestos related pleural disease.

### **The Parties**

4. The plaintiff joined Babcock Australia Pty Ltd (**BAL**) and, by its Amended Statement of Claim, ANI Distribution Pty Ltd (**ANI**) as defendants to his claim.
5. BAL filed a cross claim against Babcock International Ltd (**BIL**), Amaca Pty Ltd (**Amaca**) and Eraring Energy (**Eraring**).
6. ANI filed a cross claim against Amaca.

### **Mr Barratt's History of Exposure**

7. Mr Barratt was exposed to asbestos dust and fibre in work and non-work related environments between 1952 and 1979 (not continuously).
8. His first exposure was whilst working as an apprentice for BAL. He commenced his apprenticeship with Babcock & Wilcox at Regents Park in December 1952 and was employed by BAL until 1957. His last two years at BAL were "spent most of the time in the office". His recollection is that he was not exposed to asbestos in the latter two years but for the other period of his employment he worked hands on on the factory floor.
9. Amongst his duties was manufacturing and assembling mechanical stoker parts prior to installation in boiler houses and power generation plants. This involved inserting asbestos seals into grooves machined in steel inspection doors. He cut soft asbestos sheeting during assembly work.

10. In the second half of 1954 Mr Barratt moved to the Outside Erection Department at BAL where he worked on the maintenance and repair of commercial boiler houses at a brewery. He removed and replaced asbestos lagging. He describes it as dirty and dusty. He also spent "several weeks" at the boiler house attached to the old Children's Hospital at Camperdown replacing obsolete parts and pipes which contained asbestos insulation.
11. Mr Barratt spent several months on the construction of new stokers and boilers in the Balmain Power Station. He worked adjacent to asbestos ladders. He breathed in asbestos dust in this environment. Other than the 2 years where he was a draftsman he worked principally in and around boilers. He personally handled asbestos lagging and sealing products. He commonly used compressed air to blow away asbestos residue. He worked in confined spaces and was exposed to heavy concentrations of asbestos.
12. Mr Barratt worked as an engineering trainee at Associated Electrical Industries (**AEI**) at Trafford Park, UK. He recalls one project where he was required to wrap asbestos rope around welding cables to act as insulation. He occasionally worked with asbestos rope and gloves. Although the pipes in the factory were lagged he was not present when maintenance work on them was conducted. He finished that job in 1961 and returned to Australia.
13. In about 1964 Mr Barratt got a job with "Comeng in Granville" (being Commonwealth Engineering) in the capacity of Industrial Officer and Personnel Manager. ANI is the successor in title to Comeng. Comeng manufactured trains, buses, locomotives and hot metal cars for transporting molten metal in steel yards. Half of his time was spent in the office and half on the factory floor. He says that "*various forms of asbestos materials and products were used during the manufacture of the machinery and equipment at Comeng*". When he was on the factory floor he was exposed to asbestos which he described as very dirty and dusty.

14. Mr Barratt says that he took apprentices on factory inspections from 1966 to 1970. He regularly went to the James Hardie Factory in Camellia to observe the manufacturing processes of asbestos products. He describes the exposure to asbestos during this period as “significant”.
15. In 1979 asbestos was removed from single deck suburban passenger carriages. There were attempts to limit asbestos exposure during this work but some employees were nevertheless exposed. He regularly visited this work area and was exposed to asbestos. He does not recall any exposure to asbestos after 1979.
16. Mr Barratt was also exposed to asbestos during home renovations. In 1954 he put a corrugated asbestos cement roof on a double garage at his parents’ home in Castle Hill. He didn’t use power tools to do the work.
17. In about 1970 he built an extension to the rear of his home in Pymble. He says that *“Money was tight at the time and after building the walls and roof, I cut and fixed old, previously used, sheeting under the eaves of some of the extension. I do not know whether this sheeting contained asbestos”*.
18. Mr Barratt then says that in the context of his prolonged work related exposure to asbestos with BAL and Comeng he regarded the exposure to asbestos from home building work as “negligible”.
19. Mr Barratt was unable to reliably estimate the proportion that any period of exposure constituted of his total exposure. Further, he could not recall the trade name, manufacturer or supplier of the products he was exposed to.
20. He was not given safety equipment to prevent exposure to asbestos.

## The Defendants' and Cross Defendants' Replies

### BAL

21. BAL admits that it employed Mr Barratt as an apprentice fitter and turner from 1 December 1952 to 10 May 1957. It attaches records of employment as evidence.
22. BAL admits that it was the occupier of the factory premises at Regents Park but does not admit that it occupied or controlled any other premises where exposure occurred.
23. BAL says that it was not aware of the dangers of asbestos during the period of Mr Barratt's employment. It does admit that it that it owed Mr Barratt a common law duty of care.
24. In respect of the other questions put to it BAL indicated that its researches were continuing.
25. BAL submits that the parties should be placed into the following categories:
- |         |            |
|---------|------------|
| BAL     | Category 2 |
| ANI     | Category 2 |
| BIL     | Category 1 |
| Amaca   | Category 1 |
| Eraring | Category 2 |
26. BAL submits that the Standard Presumptions should be varied to increase the apportionment attributable to ANI and Eraring on the basis of "*their knowledge of the risk of injury from asbestos exposure*". It says that ANI was a large and sophisticated entity and should have had actual knowledge of the dangers of asbestos after 1970. As to Eraring it says that it should be attributed with actual knowledge after the mid 1950s and referred to *Nicholls v Pacific Power* (DDT 104/97 – 26 November 1997).

27. BAL also submits that BIL's apportionment should be increased because it had been found to have had actual knowledge of the dangers of asbestos from the 1930s (referring to *BAL v Eraring Energy and Babcock International Ltd* [2001] NSWDDT 5).

28. It says the presumptions against Amaca should be varied to increase its liability because, inter alia, it alleges Amaca made a conscious management decision to take no steps to warn end users of the risks associated with its products and that it actively promoted asbestos as a safe product.

29. BAL submits that Eraring's apportionment should be increased as it alleges it has actual knowledge of the dangers of asbestos citing *Nicholls*.

30. BAL submits that the Standard Presumptions should be varied to reduce its liability because it did not have actual knowledge of the dangers of asbestos whereas the cross defendants to its cross claim did.

31. BAL has made detailed submissions as to calculation of the apportionment which I will not recapitulate here. In summary BAL says that there is a total of 18.5 years exposure which should be attributed as follows:

BAL (with BIL, Eraring and Amaca)	13.5% (2.5 years of 18 years)
ANI	86.5% (being 16 years of 18 years)

32. BAL's submission as to the "ultimate apportionment" (taking into account variations in the Standard Presumptions) is as follows (rounded):

BAL	6.2%
BIL	3.5%
Eraring	1%
Amaca	3%
ANI	86%

### **ANI's Reply**

33. ANI admits that it employed Mr Barratt and that it occupied or controlled premises where he was exposed.

34. ANI says that it was a deregistered company and does not hold sufficient records to be able to respond to many of the specific questions raised in the Reply.

35. ANI says that the parties should be categorised as follows:

BAL	Category 2
ANI	Category 2
Amaca	Category 2

36. It does not submit that the Standard Presumptions should be varied.

37. In respect of the proposed apportionments ANI notes that it is Mr Barratt's contention that he was only exposed to asbestos for half of the time he was on the factory floor during his employment from 1964 to 1979. As an industrial officer and personnel manager it says his exposure would be incidental and analogous to a "bystander". Further from 1966 to 1970 there was significant exposure at the James Hardie Factory at Camellia. ANI does not propose a calculation of the apportionments it says should be attributed to the parties.

### **Amaca's Reply**

38. Amaca does not admit that Mr Barratt has the injury alleged.

39. It admits that in respect of the alleged exposure to asbestos at the Camellia Factory that it occupied or controlled those premises. It does not admit, however, that Mr Barratt was exposed to asbestos at its premises. If it is shown that Mr Barratt was exposed to asbestos at its premises it will admit that it owed him a common law duty

of care, failed to discharge that duty to the standard required and the breach contributed to the plaintiff's condition.

40. Amaca notes that the plaintiff alleges he was exposed to various types of asbestos none of which are identified as being manufactured by it. By reason of that it cannot admit that Mr Barratt was exposed to any products manufactured by it.

41. Amaca submits that the parties should be categorised as follows:

BAL	Category 2
ANI	Category 2
BIL	Category 1
Amaca	Category 1
Eraring	Category 1 and Category 2

42. Amaca submits that all of the Category 2 defendants had actual knowledge (or alternatively constructive knowledge) of the risks of asbestos at the relevant times and so their liability should be increased by 20%.

43. In making its submissions on apportionment Amaca submits that there are three relevant periods being Period 1 (BAL employment 1952 and December 1955), Period 2 (AEI employment between 1957 and 1961) and Period 3 (1964 and June 1979).

44. Amaca submits that Period 1 exposure was directly to asbestos whereas his exposure in Periods 2 and 3 was indirect. The Period 3 exposure was described as "dirty and dusty". To reflect that exposure Amaca submits the apportionment should be as follows:

Period 1	70%
Period 2	5%
Period 3	25%

45. In respect of Period 1 the apportionments are as follows:

Defendant	Category	Calculation with Variation	Total	Calculation (No Variation)	Total
BIL	1	$(55\% \times 90\% / 2) \times 70\%$	17.3%	$(75\% \times 90\% / 2) \times 70\%$	23.6%
Amaca	1	$(55\% \times 90\% / 2) \times 70\%$	17.3%	$(75\% \times 90\% / 2) \times 70\%$	23.6%
Eraring Energy	1	$(55\% \times 10\%) \times 70\%$	3.9%	$(75\% \times 10\%) \times 70\%$	5.3%
Eraring Energy	2	$(45\% \times 10\%) \times 70\%$	3.1%	$(25\% \times 10\%) \times 70\%$	1.7%
BAL	2	$(45\% \times 90\%) \times 70\%$	28.4%	$(25\% \times 90\%) \times 70\%$	15.8%
Total			70%		70%

46. As to Period 2 Amaca submits that it constitutes an “empty chair” as the party responsible for that period of exposure is not a party to the proceedings.

47. Amaca submits a time on risk approach should be applied to Period 3 broken down into the following periods:

1964 – 1965 when Mr Barrett worked at ANI’s factory (Period 3a being 12.5%).

1966 – 1970 when the claimant worked at ANI’s factory and attended the James Hardie factory at camellia (Period 3b being 31.25%).

1970 – 1979 when the plaintiff worked at ANI’s factory and at other unidentified sites (Period 3c being 56.25%).

48. The apportionments with and without the suggested variations are as follows:

**Without variation**

Defendant	Period 3a	Period 3b	Period 3c	Total
Amaca	-	5.1%	-	5.1%
ANI	3.1%	2.7%	14.1%	19.9%
Total	3.1%	7.8%	14.1%	25%

**With variation**

Defendant	Period 3a	Period 3b	Period 3c	Total
Amaca	-	3.5%	-	3.5%
ANI	3.1%	4.3%	14.1%	21.5%
Total	3.1%	7.8%	14.1%	25%

49. The total apportionments for all defendants are as follows:

## With Variation

Empty chair	5%
BAL	28.4%
BIL	17.3%
Eraring Energy	7.0%
Amaca	20.8%
ANI	21.5%

## Without Variation

Empty chair	5%
BAL	15.8%
BIL	23.6%
Eraring Energy	7.0%
Amaca	28.7%
ANI	19.9%

**BIL's Reply**

50. BIL submits that as the plaintiff has not been medically examined it cannot make any admissions as to his condition.

51. BIL submits that the cross claim pleaded by BAL alleges, inter alia, that BAL was BIL's agent in Australia and so BIL owed a duty of care to it and Eraring Energy. BIL will argue that it did not owe a duty of care, had no knowledge or control over Mr Barratt's practices and was not present at the premises where the alleged exposure occurred. Its position is that no claim against it is made by Mr Barratt and that it has no legal obligation to BAL. On that basis any submissions made in respect of apportionment are made in order to satisfy the requirements of the Reply.

52. BIL submits that the parties should be placed into the following categories:

BAL	Category 1 (installer) and Category 2 (employer)
ANI	Category (installer) and Category 2 (employer)
BIL	Category 1
Amaca	Category 1
Eraring	Category 2

53. BIL submits that the category 2 defendants should have their liability increased by 20% because of BAL's superior state of knowledge and the conduct of Eraring as being wilfully blind to the dangers of asbestos.

54. BIL submits that BAL should be fixed with actual knowledge of the dangers of asbestos and that it had that knowledge from the time of its incorporation in September 1948. BIL submits that Eraring should be attributed with actual knowledge of the dangers of developing asbestosis from the early 1950s (citing *Nichols v Pacific Power* (26 November 1997)).

55. BIL made very detailed and considered submissions regarding variation of the Standard Presumptions which I have considered closely. In summary BIL submits that the Standard Presumptions should varied for the following reasons:

Amaca Capacity, size and sophistication

Eraring Capacity, size and sophistication, Failure to minimise harm

BAL Failure to minimise harm

ANI Failure to minimise harm

56. BIL's principal submission is that its liability should be nil. It makes further submissions in the alternative.

57. BIL submits that, taking into account periods of employment where he was not exposed, Mr Barrett had 2.5 years of exposure when employed by BAL and 7.5 years of exposure when employed by ANI. Therefore BAL is fixed with 25% of liability and the ANI period 75%.

58. BIL submits that, once a variation is applied, the following apportionments apply:

Party	Period A	Period B	Total	After Variation
BAL	10.21%		10.21%	12%
BIL	4.58%		4.58%	2%
Amaca	4.58%		4.58%	5%
EE	5.63%		5.63%	6%
ANI		75%		
Total	25%	75%	100%	100%

### **Eraring Energy**

59. Eraring notes that it is joined as a cross defendant in relation to its alleged control of the Balmain Power Station site where Mr Barratt alleges he was exposed to asbestos in about 1955.

60. Eraring has not had the opportunity to examine Mr Barratt and so cannot admit his alleged disability.

61. Based on Mr Barratt's description of his employment with BAL Eraring proposes that he was employed at the Balmain Power Station for approximately 3 months. It admits that its predecessor in title owned and occupied the Balmain Power Station in early 1955.

62. Based on a period of exposure of 3 months in a total of 18.5 years its liability is 1.35% of the total.

63. Eraring submits that the parties should be placed into the following categories:

BAL	Category 2
ANI	Category 2
BIL	Category 1 (supplier/installer)
Amaca	Category 1
Eraring	Category 2

64. Eraring submits that Hardies should bear a higher apportionment because, inter alia, it had actual knowledge of the dangers of asbestos from October 1938 and failed to warn users of the dangers of its products.

65. In respect of the Balmain Power Station period attributed the 1.35% Eraring then submits that the apportionment should be:

BIL	0.51%
Hardies	0.51%
BAL	0.165%
Eraring	0.165%

### **Categorising the Parties**

66. I do not accept the submission that BAL or ANI were installers of asbestos. I categorise the parties as follows:

Category 1

BIL, Amaca

Category 2

Eraring, BAL, ANI

### **Variation of the Standard Presumptions**

67. Each of the defendants submitted that the Standard Presumptions should be varied as against one or several of the co-defendants.

68. In respect of the Category 1 defendants they are each assumed to have actual knowledge of the dangers of asbestos which is reflected in the apportionments in the Standard Presumptions. I do not propose to adjust those amounts.

69. Eraring and BAL are category 2 defendants in the period December 1952 to 1957.

70. As to Eraring there are a series of decisions in the Dust Diseases Tribunal which vary as to when judges have been satisfied that it had actual knowledge of the dangers of asbestos.

71. In *Re Royal; Babcock Australia Ltd v Eraring Energy & Babcock International Ltd* (2001) NSWDDT 5 Judge Curtis found there was no actual knowledge that could be imputed to Eraring (and its predecessor Elcom) as at 1957. There was a finding by Walker J in *Re Hood; Eraring Energy v SC Cheadle Hulme Ltd* [2005] NSWDDT 46 that no actual knowledge could be imputed to Elcom as at 1959. 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*. On the other hand, Judge Johns in *Nichols v Pacific Power* attributed actual knowledge in Eraring's predecessor in the mid 1950s. As the exposure at the Balmain power Station occurred in 1955 it is at the very outer edge of when judges have been prepared to find actual knowledge. In the circumstances of this case I do not propose to vary the Standard Presumptions against Eraring.

72. Equally I do not propose to adopt BIL's submission that BAL had knowledge of the actual dangers of asbestos from its time of incorporation in the 1940s.

73. The party I was most troubled about was ANI (Comeng). It appears from Mr Barratt's description of the works undertaken that it was a large and sophisticated organisation but I am unable to verify that. Further, BAL and Amaca submit that the Standard Presumptions should be increased against it so that ANI is fixed with actual knowledge of the dangers of asbestos. No authorities or documentation were provided to support that contention. In those circumstances I do not propose to adjust the presumptions against ANI.

### **Factual Matters**

74. Having regard to the Standard Presumptions the following factual considerations are noted by me:

- (a) Mr Barratt suffers from arpd, a divisible disease.
- (b) His exposure to asbestos occurred intermittently in the period December 1952 to 1979.
- (c) A negligible amount of exposure occurred whilst employed by AEI in the UK between 1957 and 1961.
- (d) There was a negligible amount of exposure to asbestos in conducting home renovation works in 1954 and 1970.
- (e) The lag time between his exposure and diagnosis is sufficient for the exposure to be causative of the injury.

(f) None of the defendants or cross-defendants in their capacity as employers, occupiers or suppliers of asbestos product took any steps to minimise the risks of Mr Barratt's exposure to asbestos.

75. Mr Barratt was employed by BAL from 1 December 1952 to 10 May 1957 (4.5 years). He had no asbestos exposure in the last two years of his employment. Therefore he had 2.5 years (30 months) of work in a "dirty and dusty environment". He worked for "several months" installing boiler units at the Balmain Power Station where he was exposed to asbestos by working adjacent to ladders. I infer "several months" to be 3 months rather than, for instance, the 9 months suggested by BAL's solicitors.

76. As the description of the exposure for AEI and the home building works was "negligible" I do not propose to include those periods in any final calculations.

77. For the ANI period Mr Barratt spent half of his time on the factory floor and half in the office. The factory floor was described as "very dusty and dirty". His last exposure was in 1979. Therefore I will assume that half of his 15 years of employment resulted in exposure to asbestos (7.5 years/90 months). In the 5 years between 1966 and 1970 Mr Barratt went to James Hardie's Factory at Camellia "regularly". I apply, with a small adjustment, Amaca's submissions that a time on risk analysis of the total ANI period results in the following percentage apportionments:

Period 3a 2/15 years = 13.3%

Period 3b 5/15 years = 33.3%

Period 3c 8/15 years = 53.3%

78. Accordingly, the BAL period is 30 of a total period of 120 months (25%) and the ANI period 90 of 120 months (75%).

79. Based on Mr Barratt's description I have assumed the intensity of exposure in the BAL period and ANI period are comparable.

#### 80. The BAL Apportionments (Non Balmain Power Station) 27 of 30 months

Defendant	Category	Calculation	Total Liability
BIL	1	$(75\% \times 50\% \times 25\%) \times 90\%$	8.45%
Amaca	1	$(75\% \times 50\% \times 25\%) \times 90\%$	8.45%
BAL	2	$(25\% \times 25\%) \times 90\%$	5.6%
Total			<b>22.5%</b>

#### 81. BAL Apportionments (Balmain Power Station) 3 of 30 months

Eraring has not filed a cross claim and so I have not included BIL and Amaca in this calculation

Defendant	Category	Calculation	Total Liability
BAL	2	$(50\% \times 25\%) \times 10\%$	1.25%
Eraring	2	$(75\% \times 50\% \times 25\%) \times 90\%$	1.25%
			<b>2.5%</b>

#### Total BAL Liabilities

BIL	8.45%
Amaca	8.45%
BAL	$5.6\% + 1.25\% = 6.85\%$
Eraring	1.25%

#### 82. ANI Apportionments

Period 3a (1964 – 1965)

ANI	$13.3\% \times 75\% = 9.98\%$
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## Period 3b (1966 – 1970)

Defendant	Category	Calculation	Total Liability
Amaca	1	65%x33.3%x75%	16.25%
ANI	2	35%x33.3%x75%	8.75%
			<b>33.3%</b>

## Period 3c (1971-1979)

ANI      53.3% x 75% = 39.98%

83. Allowing for simple rounding up or down the apportionments are:

BIL	8.45%
Amaca	24.7%
BAL	6.85%
Eraring	1.25%
ANI	58.75%

84. I have been asked to appoint a Single Claims Manager. Applying CI 61(5) of the Regulations ANI, as the primary defendant, is the first possible SCM and Amaca is the second possible SCM. I nominate ANI as the SCM.

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David Jay

Contributions Assessor

9 July 2010