

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

DDT No. 80 / 2011

BETWEEN: CALTEX REFINERIES (NSW) PTY LIMITED
Plaintiff

AND: WALLABY GRIP LIMITED
First Defendant

AND: WALLABY GRIP (BAE) PTY LIMITED
Second Defendant

AND: AMACA PTY LIMITED
Third Defendant

AND: ACI OPERATIONS PTY LIMITED
Fourth Defendant

AND: QANTAS LIMITED
Fifth Defendant

AND: UNILEVER AUSTRALIA LIMITED
Sixth Defendant

AND: CSR LIMITED
Cross-Defendant

CONTRIBUTIONS ASSESSMENT DETERMINATION

1. The Registrar of the Dust Diseases Tribunal has referred this matter to me, pursuant to Regulation 49(1) of the *Dust Diseases Tribunal Regulations 2007* (hereinafter referred to as "the Regulations") for a determination of apportionment as between the Plaintiff, the Defendants and the Cross Defendants.
2. Regulation 49(4) of the Regulations provides that this determination is to be made on the assumption that each of the parties are liable and I am to rely solely upon the Statement of Particulars and any replies thereto.
3. The *Dust Diseases Tribunal (Standard Presumptions – Apportionment) Order 2007* (hereinafter referred to as "the Standard Presumptions Order") provides that the apportionment is to be in accordance with the Tables set forth in paragraph 5(1) of the Standard Presumptions Order.

James Robert Gifford's position

4. James Robert Gifford (hereinafter referred to as "the Plaintiff") by way of an Amended Statement of Claim, alleged that:

- (a) Between May 1962 and 1984 the Plaintiff was employed by Caltex Refineries (NSW) Pty Limited (hereinafter referred to as "Caltex") as an Assistant Shift Engineer, Charge Engineer at the Kurnell Oil Refinery (hereinafter referred to as "the Refinery").
- (b) In the course of his employment with Caltex, the Plaintiff worked in and around the Refinery. In the course of his employment the Plaintiff was exposed to asbestos dust and fibre.
- (c) As a consequence of inhaling asbestos dust and fibre the Plaintiff suffered injury, namely mesothelioma and shock.

5. By his Statement of Particulars filed on 27 January 2009, the Plaintiff asserted

- (i) While working for Caltex, he worked with and using products containing asbestos. The Plaintiff asserted that the asbestos products containing asbestos were made and manufactured and supplied by Wallaby Grip Limited, Wallaby Grip (BAE) Pty Limited (hereinafter jointly referred to as "Wallaby Grip") and Amaca Pty Limited (hereinafter referred to as "Amaca"). With Caltex he removed asbestos lagging and he worked underneath boilers where asbestos was released and also was present during shutdown and present while others performed asbestos related duties.
- (ii) Additionally, that he was employed by Qantas Limited (hereinafter referred to as "Qantas") and in the course of his employment, sustained injury by reason of his exposure to asbestos dust and fibre. Qantas employed the Plaintiff from October 1986 to July 1992 as a steam plant operator. With Qantas there was an old boiler plant with asbestos everywhere over the boilers and pipes and the pipes were lagged and he was present while others pulled off lagging and during shutdowns.
- (iii) Additionally, that he was employed by Unilever Australia Limited (hereinafter referred to as "Unilever") and in the course of his employment, sustained injury by reason of his exposure to asbestos dust and fibre. Unilever employed the Plaintiff from July 1992 to 1st September 1996 as a boiler attendant. With Unilever, where the Plaintiff worked as a boiler attendant, when the boiler was lagged with asbestos everywhere and that there was a furnace explosion while he was employed there.
- (iv) Additionally, that he was employed by ACI Operations Pty Ltd (hereinafter referred to as "ACI") employed the Plaintiff from January 1948 to 1953 as an apprentice fitter and turner, during which time the Plaintiff was exposed to asbestos dust and fibre. With ACI, including exposure to boilers and the batch house where there was "dust everywhere" and ladders who performed work and when they did this "dust went everywhere". Additionally, the Plaintiff personally removed lagging.
- (v) Additionally, that he was employed by Crown Crystal Glass at Waterloo from 1953 to 1955 as a boiler house fitter, and again from October 1961 to May 1962 as a combustion engineer. Crown Crystal Glass was owned by ACI. While employed by Crown Crystal Glass there was a boiler, which needed to be rebuilt and was re-lagged, which caused dust to go everywhere. Additionally, the Plaintiff personally removed lagging.
- (vi) Additionally, a copy of Professor Breslin's report dated 29 March 2009 is relied upon, which estimates, under the Peto concept that 70% of the Plaintiff's mesothelioma was due

to his work at ACI/Crown Crystal Glass, 15% due to his time at Caltex and 15% with other employers or other exposures

Caltex's Position

6. On 21 July 2011, Caltex filed an Amended Reply which relevantly alleges:
- (a) Caltex was the Defendant in the original claim brought by the Plaintiff in matter No 8137 of 2008.
 - (b) Caltex should be determined to be a Category 2 Defendant.
 - (c) Wallaby Grip and Amaca should be determined to be Category 1 Defendants.
 - (d) ACI, Qantas and Unilever should be determined to be a Category 2 Defendants.
7. Caltex provided a Further Amended Reply on 18 October 2011 which, relevantly, alleged that Caltex should be a Category 2 Defendant, while Amaca and Wallaby Grip should be Category 1 Defendants and ACI, Qantas and Unilever should be Category 2 Defendants and annexes the following documents:
- (a) The original Claim by the Plaintiff and his Statement of Particulars of 27 January 2009.
 - (b) Report of Professor Breslin of 24 March 2009.
 - (c) Transcript of proceedings of the Plaintiff's evidence taken on 31 March 2009.
 - (d) Exhibits referred to in the original Claim.
 - (e) Plaintiff's transcript of the proceedings
 - (f) JRG-1 - Statement of Particulars dated 27 January 2009
 - (g) JRG-2 – Page 20 of the Hardie's catalogue
 - (h) JRG-3 – Bestobell Insulation page
 - (i) JRG-4 – Page 79 of Bells Products of Repute Catalogue.
8. It alleged that apportionment should be as follows:

ACI	6.6%
Caltex	14.9%
Qantas	9.35%

Unilever	9.15%
Amaca	30%
Wallaby Grip	30%

Unilever's Position

9. On 19 August 2011, Unilever filed a Reply which relevantly alleges:
- (i) It does not dispute that the Plaintiff was employed by Unilever from 6 June 1994 until 1 September 1996 at its premises at 160 Burwood Road, Concord.
 - (ii) Denial of any exposure to asbestos during any period of employment and that if he was exposed to asbestos during such period of employment, then such exposure was *de minimis*.
 - (iii) That the transcript of the Plaintiff's evidence given on 31 March 2009, the Plaintiff asserted that at Unilever the boiler was "reasonably clean" and there was only one incident when the boiler blew up and asbestos went everywhere, but a special crew was employed to remedy it and everything was "sealed" and cleaned up in about 3 or 4 days.
 - (iv) Professor Breslin, in his report, has a history that the Plaintiff was not present during the clean up and that in a subsequent report of Professor Breslin he expressed the opinion: "It is doubtful whether there was any asbestos exposure from this event but if there was, it would have been extremely light ... This man's exposure at Unilever was not only very light, if at all ...". Professor Breslin expressed the view that any exposure at Unilever made no material contribution to the development of the Plaintiff's malignant pleural mesothelioma.
 - (v) In a statement of William Sheringham, he asserted that the Plaintiff was not present at the time that the boiler house blew up. Additionally, Mr Sheringham provided, in his statement, assertions that the exposure to asbestos was minimal while employed by Unilever.
 - (vi) That Caltex, Wallaby Grip and Amaca should be considered Category 1 Defendants, and Caltex ACI, Qantas and Unilever should each be considered to be Category 2 Defendants.
 - (vii) Unilever asserts that it is an "innocent defendant" pursuant to clause 53 of the Regulations.
 - (viii) Additionally, Unilever asserts that there was insufficient lag time for it to be considered as being responsible in any way for the Plaintiff's mesothelioma.
 - (ix) Attached to the reply is a full copy of the transcript of evidence taken on 31 March 2009, a statement of William Sheringham dated 17 June 2011, a Certificate of Service, report of Professor Breslin of 24 March 2009 and a report of Professor Breslin of 20 June 2011.

- (x) Unilever relies upon Regulation 53, which relates to the question of costs. I am bound by the terms of Regulation 49, which requires me to assume that Unilever is liable and I have proceeded on that basis.

Amaca's Position

- 10. On 2 June 2001 Amaca filed a Cross-Claim against CSR Limited (hereinafter referred to as "CSR") claiming that if the Plaintiff inhaled asbestos dust and fibre as alleged by Caltex, then the asbestos dust and fibre so inhaled by the Plaintiff included dust and fibre liberated from the installation, maintenance or removal of products manufactured in partnership by Amaca and CSR and supplied to Caltex at the Refinery between 28 September 1964 and 30 June 1974.

- 11. On 27 August 2011, Amaca provide a Reply which relevantly alleged:
 - (a) That Wallaby Grip, CSR and Caltex should be considered Category 1 Defendants while Caltex, ACI, Qantas and Unilever should be considered Category 2 Defendants.
 - (b) There should be a variation in the Standard Presumptions against Caltex by the maximum percentage points (20%).
 - (c) The Plaintiff did not make any allegations against Amaca, nor did they identify any of Amaca's products by trade name.
 - (d) Amaca does not admit that it was the manufacturer and/or supplier of any of the asbestos products to which the Plaintiff was allegedly exposed.
 - (e) That if there is liability then that liability between September 1964 and June 1974 is to split with CSR.
 - (f) That the Plaintiff's periods of exposure were:
 - (i) January 1948 to 1953 while employed by ACI (Period 1);
 - (ii) Between 1953 and 1955 while employed by Crown Crystal Glass (Period 2)
 - (iii) Between 1961 to May 1962 while employed by Crown Crystal Glass (Period 3).
 - (iv) Between October 1962 and May 1984 while employed by Caltex at the Refinery (Period 4).
 - (v) Between October 1986 and July 1992 while employed by Qantas (Period 5).
 - (vi) Between July 1992 and 1 September 1996 while employed by Unilever (Period 6).

(vii) The Plaintiff's exposure to asbestos should be apportioned on a time basis by reason of the fact that the Plaintiff was unable to identify the severity or intensity of his exposure at any one particular place of his exposure.

(g) The periods of employment are:

- Period 1, being 5 years of 41 years is 12%.
- Period 2, being 2 years of 41 years is 7%.
- Period 3, being 1 year of 41 years of exposure is 2%.
- Period 4, being 22 years of 41 years is 54%.
- Period 5, being 6 years of 41 years is 18%.
- Period 6 represents 4 years of 41 years is 10%.

(h) Periods 1, 2 and 3 are the responsibility of ACI; for period 4 the apportionment should be Caltex – 31.4%, Amaca – 5.7%, CSR – 5.7%, Wallaby Grip – 11.4%; for period 5 Qantas is the only Defendant in this period and in period 6, Unilever is the only Defendant.

12. Accordingly, Amaca submits that the apportionment should be:

Caltex	31%
Wallaby Grip	11.3%
Amaca	5.7%
CSR	5.7%
ACI	21%
Qantas	15%
Unilever	10%

13. Amaca attached a copy of Dr Johnson's report of 4 December 2008, a report of Professor Henderson, various medical reports and correspondence.

CSR's Position

14. On 19 August 2011, CSR filed a Reply which relevant alleges:

- (i) It does not concede that a Contributions Assessment Determination is enforceable under clause 52 of the *Dust Diseases Tribunal Regulations 2007* in these proceedings and reliance is placed upon *Bradford Insulation Industries Pty Ltd and Anor v Babcock Australia Pty Limited and Anor* (2011) NSWCA 117 per Hodgson JA in that the claim by Caltex was not commenced "very promptly".
- (ii) Amaca, CSR, Wallaby Grip should be classified as Category 1 Defendants while Caltex, ACI, Qantas and Unilever should be placed in Category 2.
- (iii) Caltex should also be placed in Category 1. Reliance is placed upon Professor Breslin's report which estimated, according to the "PJPETR" formula that 70% of the Plaintiff's mesothelioma

was due to his exposure while employed by ACI and Crown Crystal Glass, 15% while employed at Caltex and the remaining 15% due to other work exposure.

- (iv) During the period 28 September 1964 to 26 June 1974, CSR and Amaca were partners in the Hardie-Bi Partnership, which manufactured certain asbestos containing products, including 85% magnesia, pre-formed hard pipe sections.
- (v) CSR's liability is limited to the Hardie-Bi period.
- (vi) That while working for ACI, between 1948 and 1953 and for Crown Crystal Glass between 1953 and 1955 and between 1961 and 1962, the Plaintiff experienced 70% of his total exposure.
- (vii) That the Plaintiff alleged that he had been exposed to Hardie's Pre-formed Pipe Sections and Asbestos Rope at ACI and Crown Crystal Glass, which, of necessity, falls outside the Hardie-Bi period and accordingly ACI Wallaby Grip and Amaca, should be liable for this period of exposure.
- (viii) While working for Caltex at the Kurnell Refinery between May 1962 and 1984 (15%, pursuant to the total exposure), the Plaintiff asserted that he was exposed to asbestos pipe sections and asbestos rope. Caltex, Amaca, Wallaby Grip should be liable for this period.
- (ix) CSR's liability is limited to the period of the Plaintiff's employment with Caltex during the period 22 October 1964 to 26 June 1974.
- (x) While employed by various employers between 1955 and 1961, and between 1984 and 1996 (15% of the total exposure) the Plaintiff was exposed to pre-formed asbestos pipe sections, asbestos rope, asbestos lagging and this period fall outside of the Hardie-Bi period.
- (xi) That the apportionment should be: ACI - 18%; Caltex – 7.5%; Qantas – 3.6%; Unilever – 3.6%; Wallaby Grip – 44.88%; Amaca 21.85%; CSR – 0.57%.
- (xii) The Plaintiff's Statement of Particulars dated 27 January 2009, which details the Plaintiff's alleged history of exposure to asbestos dust, and fibre was attached to the Reply.

Wallaby Grip's Position

15. Wallaby Grip provided a Reply on 8 September 2011 which relevantly alleges:
- (a) At no stage did either of the two Wallaby Grip companies operate simultaneously and therefore they should be treated as one entity for the purposes of apportionment.
 - (b) There is no identification of the asbestos composition to which the Plaintiff was exposed.

- (c) Wallaby Grip denies that it manufactured asbestos pre-formed sections but admits supplying to the general market James Hardie 85% Magnesia, K-lite and high temperature ranges of hard pipe sections between 1962 and 31 December 1969.
- (d) Wallaby Grip did manufacture, amongst others, asbestos rope between 1967 and 1971 but not otherwise and does not know whether the asbestos rope was supplied by it.
- (e) That Amaca, Wallaby Grip and Caltex should be considered Category 2 Defendants Caltex, ACI, Qantas and Unilever should be considered Category 1 Defendants.
- (f) The Standard Presumption should be varied against Caltex by 20 percentage points by reason of its size sophistication and actual or at least constructive knowledge.
- (g) That the periods of employment may be divided as to: ACI – 20.97%; Caltex – 54.84%; Qantas – 14.11%; and Unilever – 10.08%.
- (h) That ACI should be solely responsible for its period, as should Qantas and Unilever.
- (i) Attached to the Reply are various brochures of Hardie's products, a copy of the Decision of *Caltex Refineries (Qld) Pty Ltd v Stavar* (2009) NSWCA 258, an Amended Contributions Assessment Determination in the matter of *William John Harvey* made by Paul Blackett SC, ASIC Current Extracts as to Caltex, a document entitled "The Kurnell Story" relating to Caltex, a copy of the Caltex Star of January/ February 1967, Caltex Oil (Australia) Pty Ltd Annual Report for year ending December 1979.
- (j) That the apportionment should be:

ACI	20.97%
Caltex	36.61%
Wallaby Grip	7.75%
Amaca	10.48%
Qantas	14.11%
Unilever	10.08%

Qantas' Position

16. On 20 September 2011, Qantas filed a Reply, which relevantly alleges that.
- (a) The Plaintiff worked between 1 October 1986 and 1 July 1992 with Qantas but does not admit that the Plaintiff was exposed to asbestos in such premises as alleged.
 - (b) Qantas relies upon the history obtained by Professor Breslin.
 - (c) That Caltex, Wallaby Grip and Amaca should be classified as Category 1 Defendants, while Caltex, ACI, Qantas and Unilever should be classed as Category 2 Defendants.

- (d) Qantas employed the Plaintiff for less than 6 years and its share of responsibility in relation to exposure to asbestos amounts to 4.73%.
- (e) The Standard Presumptions should be varied, given the other responsible Defendants in accordance with the assessments of Professor Breslin.

ACI's Position

17. ACI has not filed a Reply, and accordingly I have proceeded on the material placed before me by the Caltex and the Defendants and the Cross Defendant.

Discussion

18. Initially, the Contributions Assessor must determine the existence of any separate periods of exposure pursuant to clause 5(8) of the Standard Presumptions Order and make a determination of what proportion of the whole each separate period bears having regard to the number of such periods, the length of each period, the duration and the intensity of exposure to asbestos present in each such period.
19. It is thus not appropriate to determine the relative contributions simply on the basis of the elapsed years between the various periods of exposure.
20. In the present case the difficulty is the lack of precision by the Plaintiff as to the intensity of any exposure to asbestos dust and fibre to which he was subjected. However, the Plaintiff provided a detailed history to Professor Breslin, who with the benefit of that history and applying the Peto formula has estimated the culpability of the Plaintiff's exposure in causing his mesothelioma. Accordingly, I determine that it is not appropriate to simply look at the years of exposure to determine the proportion that any period bears to the total period of exposure
21. Based upon the material available to me I determine the contributions between the periods to be:
- (a) ACI periods (Periods 1, 2 and 3 as identified by Amaca) while representing 21% of the total period of exposure, is 70% responsible for the Plaintiff's mesothelioma;
 - (b) Caltex period (Period 4 as identified by Amaca) while representing 54% of the total period of exposure, is 15% responsible for the Plaintiff's mesothelioma;
 - (c) Qantas period (Period 5 as identified by Amaca), is 13% responsible for the Plaintiff's mesothelioma;
 - (d) Unilever period (Period 6 as identified by Amaca), is 2% responsible for the Plaintiff's mesothelioma
22. I determine that WGL and BAE are to be treated as one Defendant.
23. I determine that Wallaby Grip, Amaca and CSR were Category 1 Defendants.

24. I determine that Caltex, ACI, Unilever, Qantas should be classified as Category 2 Defendants.
25. I determine that Amaca and Wallaby Grip should be responsible for 50% of the supply during the Caltex period. I determine that the liability of CSR and Amaca during the relevant period should be borne equally, and thus for the Caltex period Amaca is liable for 60% and CSR for 40%.
26. In the present case the Standard Presumptions take into account the various aspects of the liability of the Defendants and accordingly there should be no variation in the Standard Presumptions.

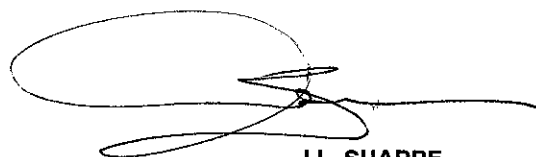
27. Thus, the following calculations as to liability could be made (rounding off):

Caltex	15% (percentage of total) \times 35% (Period B - 1961 – 1978 = 17 years out of a total of 22 years = 77%) \times 77% + 15% (percentage of total) \times 40% (Period C -1979 – 1984 = 5 years out of a total of 22 years) \times 23% = approximately 5%
ACI	70%
Qantas	13%
Unilever	2%
Wallaby Grip	15% (percentage of total) \times 65% (Period B - 1961 – 1978 = 17 years out of a total of 22 years = 77%) \times 77% + 15% (percentage of total) \times 60% (Period C -1979 – 1984 = 5 years out of a total of 22 years) \times 23% = 9.5775% \times 50% = approximately 5%
Amaca	15% (percentage of total) \times 65% \times 77% + 15% \times 60% \times 23% = 9.5775% \times 50% = 4.78875 \times 60% = 2.87325 + 4.7885 \times 40% = 1.9154% = approximately 3%
CSR	15% (percentage of total) \times 65% \times 77% + 15% \times 60% \times 23% = 9.5775% \times 50% = 4.78875 \times 40% = approximately 2%

28. I therefore determine the total liability of the Defendants and Cross-Defendant as follows:

(a)	Caltex	5%
(b)	Wallaby Grip	5%
(c)	Amaca	3%
(d)	CSR	2%
(e)	ACI	70%
(f)	Qantas	13%
(g)	Unilever	2%

29. Pursuant to clause 61 of the Regulations, I appoint Caltex (given the absence of ACI) as the Single Claims Manager under clause 61(9).



J.L. SHARPE
Contributions Assessor