

# **CONTRIBUTIONS ASSESSMENT**

## **DUST DISEASES TRIBUNAL**

**MATTER NO: 167 of 2011 & CC1**

**Country Energy**

**Plaintiff**

**Amaca Pty Ltd**

**First Defendant**

**Wallaby Grip Ltd**

**Second Defendant**

**Wallaby Grip (BAE) Pty Ltd**

**Third Defendant**

**Power Technologies Pty Limited**

**Fourth Defendant**

**AWI Holdings Pty Limited**

**Fifth Defendant**

## **DETERMINATION**

### **INTRODUCTION**

By letter dated 11 October 2011 bearing the signature of the Registrar of the Dust Diseases Tribunal I am appointed Contributions Assessor in these proceedings.

I have been provided with the file of the Dust Diseases Tribunal in these proceedings.

The file in these proceedings contains the following material upon which I rely in making this determination:

1. Reply filed by Country Energy
2. Reply filed by Amana Pty Ltd, the First Defendant – “Amaca”
3. Reply filed by Wallaby Grip Limited, the Second Defendant – “WGL”
4. Reply filed by Wallaby Grip (BAE) Pty Limited, the Third Defendant – “BAE”
5. Reply filed by Power Technologies Pty Ltd, the Fourth Defendant – “Power”
6. Reply filed by AWI Holdings Pty Ltd, the Fifth Defendant – “AWI”

In addition to the material described at 1-6 above I rely on the Standard Presumptions set out in Dust Diseases Tribunal (Standard Presumptions – Apportionment) Order 2007.

Where I refer to “exposure” or its derivation this is to be taken to mean exposure to and inhalation into the Plaintiff’s respiratory system of asbestos dust and fibre.

## **MR CROSSINGHAM**

These proceedings arise out of proceedings commenced by Harold Crossingham in the Tribunal against Country Energy. Those proceedings have resolved.

Mr Crossingham was born on 2 June 1937. He was diagnosed with Mesothelioma in March 2009. In his Statement of Particulars he stated that immediately upon hearing the news of his diagnosis he thought of his wife. One of the Replies filed by a Defendant to these proceedings refers to Mr Crossingham only as “Crossingham” without any explication or apology. I would have thought this terminology is capable of causing offence to Mr Crossingham and to his family and friends and in the circumstances is to be avoided.

Mr Crossingham worked at the Koolkahn Power Station (“Koolkahn”) from 1961 to 1975. Koolkahn was owned and controlled by Northern Rivers County Council and the liabilities and obligations for that Council’s operation of Koolkahn now rest with Country Energy.

Mr Crossingham worked at Koolkahn initially as an ash trimmer and then as a fireman. He was exposed to asbestos “most days.” He did not work directly with asbestos but rather in the close and general proximity of others who were handling asbestos, usually ladders employed by Country Energy.

Mr Crossingham describes his exposure in some detail in his particulars. He refers to the removal of dry and dusty lagging from pipes and boilers. Often this was crumbly and fell to the floors

near the boilers and pipes creating dust. It was collected by hand or broom and shovel and placed into a wheelbarrow. New lagging was applied after the contents of a large paper bag were emptied into a “wetting box”, and then mixed with water. The lagging was then applied to pipes and boilers. In the later years of his employment Mr Crossingham describes the application of pre-fabricated asbestos in the form of half cylindrical moulds that were fixed in place with asbestos tape.

Mr Crossingham was never provided with any warning as to the dangers of exposure or any protective gear while he worked at Koolkahn.

Mr Crossingham does not identify the supplier or manufacturer of the asbestos to which he was exposed.

Mr Crossingham experienced exposure during three separate periods of home construction or renovation. The first was in 1948 and 1949 when Mr Crossingham helped his father build a home at Tenterfield “*intermittently after school and on weekends.*” His next exposure of this type was when he built a house at Wooli Wooli using asbestos fibro sheeting. He said there was “*not much to saw*” in reference to his use of asbestos fibro sheets. The third period was when Mr Crossingham assisted his father “*on the odd weekend*” in the construction of a holiday house at Minnie Waters.

Attached to Country Energy’s Reply is also a Statement of Mr Crossingham dated 23 March 2009 and to a very large degree this statement repeats the allegations contained in his Particulars.

## COUNTRY ENERGY'S PARTICULARS

The Reply filed by Country Energy as Particulars is filed pursuant to Clause 56(1)(c) of the Dust Disease Tribunal Regulation 2007, ("the Regulation").

Division 6 of Part 4 of the Regulation concerns "*Special provision for apportionment claims commenced after plaintiff's claim finalised*".

I am to assume that all defendants to these proceedings are liable.

Country Energy seeks contribution from the following Defendants on the following bases:

- Amaca as supplier of asbestos to Koolkahn and the supplier of asbestos on the Wooli Wooli house
- WGL as supplier of asbestos to Koolkahn up to 1 September 1966
- BAE as supplier of asbestos to Koolkahn after 1 September 1966
- Power as supplier and installer of one boiler to Koolkahn
- AWI as supplier and installer of pipes to Koolkahn

Country Energy asserts that all Defendants except it are Category 1 Defendants and that Power and AWI are also Category 2 Defendants.

Country Energy alleges that the exposure Mr Crossingham experienced at Koolkahn should be regarded as having been relatively consistent through his employment. It is submitted by Country

Energy that 92% of Mr Crossingham's exposure occurred at Koolkahn and 8% occurred while Mr Crossingham worked on the home constructions and renovation. I do note that Country Energy attempted to examine Mr Crossingham, I assume for the purpose of Clause 39 of the Regulation. Due to the state of Mr Crossingham's health this was unable to proceed.

## **DEFENDANT'S REPLIES**

I will detail the salient submissions made in each Reply

### **CSR**

It can only be liable for exposure occurring in the period 22 October 1964 to 26 June 1974 being the period that the Hardie - B.I Partnership existed. It is said by CSR that it cannot be held to a contribution determined under the Regulation given (obiter) comments made by Hodgson J in *Bradford Insulation Industries Pty Ltd & Anor v Babcock Australia Pty Ltd & Ors [2011] NSWCA 117* at paragraph 5. I am however to assume each Defendant is liable.

### **WGL and BAE**

It is submitted that WGL and BAE ought to be treated as one entity on the basis that they did not operate simultaneously.

An Affidavit of Peter Stephens sworn 14 January 2002 is attached to the Reply. Mr Stephens worked at Koolkahn in the period spanning 1971 to 1974 as a Trades Assistant helping the logger Mr Geoff Cowan. Mr Cowan is I note one the co-workers identified by Mr Crossingham in his Statement dated 23 March 2009. Mr Stephens observed during his time at Koolkahn bags of asbestos with “*South African Asbestos*” written on them. He used some pre formed asbestos pipe sections “*but not many.*” WGL denies manufacture and supply of tape or pipe sections and identifies Amaca as the manufacturer of pipe sections.

WGL and BAE submit they are properly regarded as “innocent defendants”.

A statement of Geoff Cowan dated 17 February 2009 is attached. In it Mr Cowan confirms he was employed as a logger at Koolkahn and refers to his use of hessian bags full of asbestos with “South Africa” marked on them, and the use of 85% Magnesia, batts or blocks and half pipe sections manufactured by James Hardie. Mr Cowan does not refer to WGL or BAE.

Amaca was the only Australian manufacturer of pipes and WGL/BAE produces a James Hardie catalogue in support of that contention.

WGL and BAE refer to a determination of contribution by Mr James Kearney in which Country Energy was found to have been properly regarded as a Category 1 and Category 2 Defendant for its operations at Koolkahn.

Annual Reports of Northern Rivers County Council for 1963,1966,1972,1975 and 1977 confirm it was a sizable and sophisticated entity and that the Standard Presumptions should be varied upwards against Country Energy by 20%.

## **AWI**

It should be regarded as an “Innocent Defendant.” It is not properly regarded as a Category 1 and Category 2 Defendant.

## **Amana**

Country Energy is a Category 1 and Category 2 Defendant. There ought to be no variation of the Standard Presumptions. Contribution should be calculated by reference to the following figures:

1. Mr Crossingham was employed at Koolkahn for 14 years, would have worked 48 weeks per year, five days per week, and therefore a total of 3360 days.
2. The Hardie BI Partnership exposure was 28 September 1964 to 30 June 1974, a period of 9 years and 36 weeks or 468 weeks at five days per week which is a total of 2340 days.
3. The home building exposure was minimal and would not have been more than a total of 10 days all up

Amaca is critical of WGL and BAE’s submission that James Hardie was the only Australian manufacturer of pipes. It notes the James Hardie catalogue relied on by WGL and BAE is dated

1950. Amaca attaches a version of a Bells Asbestos Catalogue and notes reference to manufacture or supply of several products that Mr Crossingham used at Koolkahn. I note this catalogue on its page 3 has the words “*Bestobell 1939*” and reference to over 70 years experience since the original Bells Asbestos company was formed in 1871, and on page 4 “Palestine” is referred to as a country that has a supplier or distributor of Bells Asbestos products.

### **Power**

The only boiler it installed at Koolkahn was commissioned in 1956. This boiler was the newest boiler in operation at Koolkahn at the time Mr Crossingham worked there and would therefore have required less maintenance than the other boilers. Power cannot be properly categorised as a Category 1 and Category 2 Defendant. The Standard Presumptions should be varied upwards against Country Energy by 20%.

### **CONTRIBUTION**

Dealing first with the question of the proper categorisation of Country Energy there is overwhelming evidence that it employed ladders. I think it could be fairly said of Country Energy that it engaged in a business that could be described as installation of asbestos. It is appropriate to place Country Energy in both Category 1 and Category 2. All other Defendants are in Category 1 only.

The home building and renovation exposure could arguably be considered to have made no material contribution to the development of Mr Crossingham's disease. I accept any exposure described as such would have been of a short duration probably only 10 days in total.

The Koolkahn period of exposure experienced by Mr Crossingham was for 14 years he having commenced other employment in 1975. This is a period of 672 weeks assuming four weeks holiday per year which is 3360 days in total.

Mr Crossingham would on these figures have experienced 3370 days of exposure. Of this the home building and renovation exposure for which Amaca is liable is approximately 0.3%. I find this exposure occurred at a time when the Hardie BI partnership did not exist and therefore CSR is not liable to contribute to it.

Each Defendant makes good arguments as to why its liability to contribute should be less and why the liability to contribute of the other defendants should be greater. I am however to treat each defendant in the same Category as equal in contribution to the percent share of that Category unless satisfied that a variable contribution ought to apply.

I do not consider it appropriate to adjust the Standard Presumptions between Country Energy as a Category 2 Defendant and the Category 1 Defendants. I accept Northern Rivers County Council was a large organisation, had significant resources and had all the powers available to it of a government instrumentality. I think though that a good argument could be made out as to the

size and sophistication of the Category 1 Defendants. Therefore of the 99.7% Koolkahn exposure Country Energy is solely liable for 35% or 34.895%.

I am to split the remaining apportionment of 64.805% equally between the six Category 1 Defendants unless satisfied that a variable contribution ought to apply. The bald application of the Standard Presumptions would result in approximately 10.8% to each Category 1 Defendant and this is not a just and equitable outcome.

Power is responsible only for exposure from one boiler. I do not know which boiler or how much exposure emanated from the boiler. It is however reasonable to conclude the exposure from the Power boiler would have been a smaller percentage than one sixth of the entire exposure experienced by Mr Crossingham at Koolkahn. I consider Power should be liable for 2.5%.

This reduces the liability to be apportioned among the remaining five Defendants to 62.305%.

AWI, for reasons similar to Power, should have its liability to contribute reduced. It is responsible only for exposure Mr Crossingham experienced emanating from pipes. I consider the proper contribution of AWI should be 7.305%.

This leaves 55% contribution for division between Amaca, Country Energy and WGL/BAE. I can make little distinction between the culpability of these three entities.

Country Energy was responsible for the application of all of the lagging at Koolkahn. It employed ladders. It provided no warnings or protective equipment to Mr Crossingham. I consider it appropriate to increase the liability of Country Energy to 20%.

The liability of Amaca on the one hand and WGL and BAE on the other, as suppliers and manufacturers, should be equal. I consider the liability of Amaca should be 17.5%. I consider the liability of WGL should be 7% and BAE 10.5%.

Amaca is entitled to contribution from CSR for the period from 26 October 1964 to 26 June 1974 which is roughly 70% of the entire period that Mr Crossingham was employed at Koolkahn. CSR is liable to contribute 6.125%.

I determine contribution as follows:

- Country Energy – 54.895%
- Amaca – 11.675%
- CSR – 6.125%
- WGL – 7%
- BAE – 10.5%
- Power – 2.5%
- AWI - 7.305%.

It is not my role to appoint a Single Claims Manager.

A handwritten signature in black ink, appearing to be 'Toby Tancred'. The signature is written in a cursive style with a large, sweeping initial 'T'.

Toby Tancred

17 October 2011