

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

DDT NO. 79 of 2009
79/2009/1

IAN HECTOR McDONALD
Plaintiff

AMACA PTY LTD (formerly James Hardie & Coy Pty Ltd)
First Defendant

AMABA PTY LTD (formerly Hardie Ferrodo Pty Ltd)
Second Defendant

CSR LTD
Cross Defendant

**CONTRIBUTIONS ASSESSMENT
DETERMINATION**

In these matters I have been appointed as Contributions Assessor pursuant to clause 49(1) of the *Dust Diseases Tribunal Regulation 2007* (“the Regulations”).

1. In this matter the plaintiff has brought a claim for provisional damages pursuant to section 11A of the *Dust Diseases Tribunal Act* (“the Act”). He has alleged that as a result of exposure to asbestos he now suffers from, inter alia, asbestos-related pleural disease and asbestosis with consequential restrictions on his social, employment and recreational activities. The plaintiff alleges that between a date in about 1964 and a date in about 1975 he was employed and self-employed as a fitter and turner working on various sites in the Sydney area of New South Wales and at Rochedale, Brisbane, Queensland. In the course of his work as a fitter and turner he claims to have regularly sawn, drilled and otherwise handled asbestos cement fibro sheeting.

2. Further, in or about 1965 he was employed by Contract Engineering Associates Pty Ltd to carry out work for a period of approximately four months at the premises of the second defendant ("Amaba") at its brake lining manufacturing plant in Smithfield in Sydney.
3. He further alleges that for a period of about a fortnight in 1970 he was employed by Contract Engineering to carry out work at Amaca's factory at Camellia.
4. In his statement of particulars filed on 22 April 2009 the plaintiff sets out details of his various employments between 1954 and 1992 and I reproduce the table that appears at paragraph 3.1 of that claim.

Start date	End date	Name and address of employer (including any other names by which the employer may have been known)	Employer's Industry	Occupation, a brief description of duties and status (eg full-time, part-time, casual etc)	Exposure to asbestos?
1954	1960-	Coote & Jorgenson, New South Wales		Apprentice metal machinist	No
1961	1963	Barclay Curl Boilershop, Glasgow, Scotland		Maintenance fitter	No
1963	1963	Borg Warner, New South Wales		Metal machinist	No
1963	1964	Brenco		Sales representative	No
1964	1971	Contract Engineering Associates Pty Ltd, Hunters Hill, Sydney, New South Wales		Engineering	Yes

1971	1983	Self-employed, MEN Engineering		Self-employed engineer	Yes
1983	1986	Austral Brick Company, Sydney, New South Wales		Maintenance fitter	No
1986	1992	Self-employed		Publican	No

5. The plaintiff's industrial history is set out at paragraph 4.1 of his particulars and I reproduce that.

"I was born on 30 January, 1940. I resided at Auburn in New South Wales until 1950 when I moved to Wentworthville in Sydney.

I left school at the age of fourteen.

In late 1954 I commenced an apprenticeship as a fitter and turner with Coote & Jorgenson. This company was taken over by Borg Warner Australia in about 1957. I worked on metal machine processes including the machining of gear boxes, differentials andlor reduction units. I worked with metals only. I did not work with any asbestos.

I left employment with Borg Warner in about 1960 and from 1961 to 1963 I was overseas, For most of the period that I was overseas I worked with a company in Glasgow, Scotland called Barclay Curl Boilershop. I worked as a maintenance fitter repairing hydraulic machines. I worked with hydraulics only. Boilers were manufactured at these premises but there was no asbestos insulation materials used. I never worked on site during the installation of the boilers. I did not have an exposure to asbestos in Scotland.

In 1963 I returned to Australia and worked for Borg Warner for a while carrying out similar work to what I had during my apprenticeship. I had no exposure to asbestos. This employment lasted approximately three months.

I then worked for a period of between twelve and eighteen months for Brenco as a sales representative. Brenco supplied engineering supplies. I had no exposure to asbestos.

From 1964 to 1971 I worked for Contract Engineering Associates Pty Ltd. This company was based at Hunters Hill in Sydney. I had significant exposure to asbestos during this period.

Contract Engineering Associates Pty Ltd generally had its employees out on site carrying out various engineering jobs, One of the first jobs that I worked on was some extensions to the

Hardie Ferrodo plant at Smithfield in Sydney. This work essentially involved in the installation of new plant. I worked for a period of about three to four months installing pipes and machinery which were extensions of the existing production line. I worked immediately adjacent to the processes manufacturing asbestos cement brake linings. We were installing additional machinery for the mixing of the asbestos slurry that was ultimately used for the brake lining materials lower down in the factory plant. This included running steam jacketed lines in these areas although these were not actually lagged. The exposure that I would have had at Hardie Ferrodo factory was from the manufacturing processes itself rather than the use of any asbestos insulation materials during this period. It was a dusty environment in this factory. I would have had exposure to asbestos throughout the three months that I worked at the Hardie Ferrodo factory.

I then worked for several months at the Monier tile plant in Sydney. [carried out grinding work during this employment which generated quite a bit of dust but there was no asbestos.

Then from about 1966 to 1966, for a period of about one year, I worked for Contract Engineering Associates Pty Ltd at the Rochedale plant of the Austral Brick Company in Brisbane. I worked on the installation of a Swindell Dressier kiln which was a brick kiln. I worked on the installation of the pipework and other associated fitting associated with the insulation of the kiln. There were numerous hot oil lines which were run to the kiln. Significant lagging work was carried out on these hot oil lines. Pre-formed sections of insulation materials, which I believe were asbestos insulation materials, were used around the oil pipes which were between one and two inch diameter. This was carried out by ladders who I believe were employed by Peninsula Insulation. The pre-formed lagging sections were cut with a hacksaw. Attached and marked "H" and "I" respectively are pages 14 and 20 from a brochure entitled "Hardie's 85% Magnesia". The pipe sections shown on those pages are the types of pipe sections that were used by the Peninsula Insulation employees. The pipe sections were white in colour. I did not handle the pre-formed pipe sections myself but the ladders were employed to work in areas immediately adjacent to where I was carrying out my own work. They were then fitted to the oil pipes and then wrapped with wire. They were then covered in metal cladding.

I also had exposure to asbestos from the construction work being carried on around me at the brick plant. The sheds in which the kilns were to be located were being constructed using Super Six corrugated sheets. These were constantly being cut by tradesmen with power tools including in the areas immediately above me. This generated significant amounts of dust.

From 1967 to 1968 I was employed on the Austral Brick Plant No. 2 Kiln at Wallgrove in Sydney. This was essentially the same job that I had carried out in Brisbane when I worked on the Austral Brick Plant. Again, I was around ladders who were insulating the hot oil pipes with the pre-formed pipe sections. Super Six sheets were again used on the construction of the sheds. These were being cut with power tools by other tradesmen. These were roofing contractors. I had further exposure to asbestos during this period.

From 1969 to 1970 I was employed at Unanderra, New South Wales at a company called Kaiser Refractories who had engaged Contract Engineering Associates Pty Ltd to set up a kiln which made fire bricks for the BHP plant at Wollongong. I worked in a brick dryer which was lined with sheets which I believe contained asbestos. The sheets had to be cut to size and then to be fixed to brackets. This generated very large amounts of dust in the enclosed area of the dryer. This work lasted approximately one week.

The last job that I worked on with Contract Engineering Associates Pty Ltd involving the use of asbestos was a period of approximately two weeks in late 1970 when I worked at the James Hardie factory at Camellia in Sydney. I worked on the installation of new cutting machinery. The James Hardie factory was very dusty. There was dust all over the floor. The process of manufacturing asbestos cement fibre sheeting was being carried on around me and I would have had exposure to asbestos dust during this period.

In 1971 I started my own business called MEN Engineering. I operated this business from 1971 to 1983. Between 1971 and 1972 I worked on the installation of a Bickley furnace at Belmont in Perth. I do not recall any asbestos insulation was being used on this job.

From 1973 to 1975 I worked on the installation of the No. 3 plant at Austral Bricks Company at Woolgrove, Sydney. This was basically the same type of work as I had carried out during my previous employment with Contract Engineering Associates. Again, the pre-formed pipe sections were used on the oil pipes and Super Six corrugated sheets were used for the sheds. I had further exposure to asbestos during this period.

From 1975 to 1983 our company mostly worked for Monier Concrete Products at Villawood in Sydney. We worked on the repair and setting up of concrete moulds and there was no exposure to asbestos.

From 1983 to 1986 I worked as a maintenance fitter and then research and development officer with Austral Brick Company in Sydney. I do not believe that I had any exposure to asbestos

during this period except for a period of one day when I assisted in the removal of a fire damaged Super Six roof.

In 1986 I left Austral Brick and bought a pub in the Hunter Valley, New South Wales which I operated until 1992. I retired in 1992."

6. The plaintiff attributes (paragraph 4.7) approximately 75% of his overall exposure to asbestos to his employment with Contract Engineering Associates and 25% to his period of self-employment between 1971 and 1983.
7. Of the 75% that he attributes to the employment with Contract Engineering, he says between 5 and 10% would have occurred whilst working at the Hardie Ferrodo factory and about 5% whilst working at the James Hardie factory at Camellia.
8. In replies filed by Messrs DLA Phillips Fox on behalf of the first and second defendants concessions are made that Amaca and Amaba were Category 1 defendants for the purposes of the *Dust Diseases Tribunal (Standard Presumptions – Apportionment) Order* of 2005 and further allege that CSR was also a Category 1 employer. That is not seriously disputed.
9. Amaba admits it manufactured Hardie Ferrodo brake pads and brake linings at the Hardie Ferrodo factory in Smithfield, New South Wales between 1964 and 1965.
10. Amaca in its reply admits that between 24 September 1964 to 30 June 1974 in partnership with CSR, it manufactured asbestos-containing insulation products known as 85% magnesia composition, blocks and sections pursuant to the partnership agreement with CSR and Bradford Insulation. It further admits it manufactured Hardie-BI super high

temperature sections and composition in partnership with CSR as well as K-Lite blocks and sections.

11. Amaca admits that it first became aware in the mid 1950s that the inhalation of asbestos fibres could cause asbestosis but qualifies the circumstances whereby it says that could occur.
12. As Category 1 defendants all are taken to be aware at all material times of the foreseeable risks associated with the handling of asbestos products. Apart from annexing various invoices addressed to Bradford Insulation Industries Pty Ltd, neither Amaba nor Amaca through its solicitor attempts an apportionment of responsibility for any damage that the plaintiff may establish.
13. Both Amaba and Amaca note that the standard presumptions under the regulations should not be varied.
14. CSR as cross defendant primarily submits that the statement of particulars as formulated by the plaintiff merely suggests that he may have worked with "preformed pipe section". It submits that this is a generic description of products supplied by several manufacturers and further submits that none of the invoices attached by Amaca to its reply show that 85% magnesia was supplied to Peninsula Insulation during the Hardies-BI partnership period. I note it does not make that submission in respect of K-Lite blocks and sections.
15. On the basis that it was exposed to 85% magnesia the CSR provided a helpful table setting out the period, the proportion of overall exposure, the premises at which the alleged exposure occurred, the percentage of exposure and the products to which the claimant alleges exposure. It then provides the identity of the relevant manufacturer identified by the claimant during that time.

16. It would seem to me that that table accurately sets out the periods of time based upon the plaintiff's estimate that he worked at the various plants and where he was exposure to asbestos products.
17. I have reproduced the table prepared by CSR. However, rereading the plaintiff's industrial history it seems clear that the 25% attributed to him in self-employment, except for one day, really finished in 1975. Thus to attribute 8.33% of responsibility to Amaca based on one day's removal of Super Six sheets seems to me unrealistic.
18. Adopting a broad brush approach I adopt the percentage of exposure attributable to working at Hardie Ferrodo at 7.5%. This is clearly related only to Amaba.
19. In respect of the balance of 92.5% as both CSR and Amaca are Category 1 defendants and it would appear from the submissions that Super Six was not a Hardies-BI partnership product, it is appropriate, particularly regarding the plaintiff's extensive use of Super Six, that there be some weighting of the percentage which I have done on the basis of 2:1. I have therefore calculated responsibility as to the remaining 92.5% in that ratio and I find that Amaca is 61.66% responsible and CSR 30.84%.
20. As the Hardie-BI partnership ceased on 30 June 1974 i have further downgraded the CSR percentage to take into account the likelihood that he was not exposed to CSR products after that date, although it is possible there may have been some residual stocks. However, doing the best I can I have rounded Amaca up to 62.5% and CSR at 30%.

Period	Proportion of overall exposure	Premises at which the alleged exposure occurred	Percentage of exposure	Products to which the claimant alleges exposure	Manufacturer / installer identified by Claimant	Calculations
1964 - 1971	75% while employed by Contract Engineering Associates Pty Ltd	10% out of 75% whilst working at Hardie Ferrodo factory (3-4 months)	7.5%	Asbestos cement brake linings	Amaba	7.5%
		85% out of 75% whilst working at:	63.75%	1. 85% Magnesia Pipe Sections, Super Six corrugated sheets Pre formed sections insulation materials Pre formed pipe sections	Amaca CSR	15.9375% 5.3125%
		1. Rochedale plant of the Austral Brick Company in Brisbane (two years) 2. Wallgrove in Sydney on the Austral Brick Plant No 2 Kiln (one year) 3. Unanderra (one week)		2. Super Six corrugated sheets Pre formed pipe sections 3. Sheets containing asbestos	Amaca Amaca CSR Amaca	10.625% 5.3125% 5.3125% 21.25%
1973 - 1975	25%	Self-employed Working for Austral Brick Company in Sydney (1 day)	25%	Pre formed pipe sections Super Six corrugated sheets Removal of Super Six sheets	Amaca CSR Amaca Amaca	4.17% 4.17% 8.33% 8.33%
1983 - 1986		5% out of 75% whilst working at James Hardie factory (2 weeks)	3.75%	Asbestos containing products	Amaca CSR	1.875% 1.875%

Accordingly, apportionment should be calculated as follows:

- Amaca 75.83%
- Amaba 7.5%
- CSR 16.67%

21. I have been asked to appoint a single claims manager and I appoint the claims manager of Amaca Pty Ltd to fulfill that role.

22. I have forwarded them my memorandum of fees.

A handwritten signature in black ink, appearing to read 'Paul Blacket', with a stylized flourish at the end.

Dated the 5th day of August 2009

PAUL BLACKET SC
CONTRIBUTIONS ASSESSOR.