

2. Regulation 49 of the Regulations provides that this determination is to be made on the assumption that each of the Defendants and Cross-Defendants are liable and I am solely to have regard to the Plaintiff's Statement of Particulars and the Defendants' and Cross-Defendants' Replies (Regulation 47 (1) requires that Cross Defendants be treated as Defendants), and the Standard Presumptions Order.
3. The *Dust Diseases Tribunal (Standard Presumptions – Apportionment) Order 2007* (hereinafter referred to as "the Standard Presumptions Order") provides that apportionment is to be in accordance with the table set forth in paragraph 5(1) of the Standard Presumptions Order.
4. **Anthony Robinson** (hereinafter referred to as "the Plaintiff") commenced proceedings in the Dust Diseases Tribunal of New South Wales by means of a Statement of Claim filed on 19 March 2010, in which he alleged that from on or about 1966 to 1968 he was employed by **ABB Industries Pty Ltd** (hereinafter referred to as "ABB") as an electrician and in the course of his employment was exposed to asbestos dust and fibre. In letters of particulars, the Plaintiff confirms his period of employment being from mid 1967 until early 1969 [which appears to total approximately 18 months]. Additionally, the Plaintiff alleges that while employed by ABB between 1967 and 1968 [for a period of approximately 6 months], the Plaintiff worked on Power Station sites owned by **Delta Electricity** and while so employed was exposed to and inhaled asbestos dust and fibre.
5. The Plaintiff alleges that he suffers from a pleural mesothelioma, which is an indivisible condition.
6. In support of the Plaintiff's case, a Statement of Particulars was filed on 24 March 2010 in which he alleges that:
 - (a) He worked with ABB for a period of 18 months to 2 years.
 - (b) The longest period on site was with ABB while electrical wiring work was performed at Vale's Point Power Station and the Plaintiff was at the Vale's Point Power Station for a period of approximately six months
 - (c) While the Plaintiff was at Vale's Point Power Station it was under construction and Babcock & Wilcox were contracted to install the boilers.
 - (d) A new section of the Power Station was under construction.

- (e) While working for ABB, the Plaintiff did a lot of electrical wiring work throughout wheat sheds in rural New South Wales and this involved drilling into asbestos cement fibro sheets to pass the conduits through.
 - (f) The Plaintiff describes his exposure
 - i. At Vale's Point over six months as being "intermittent daily exposure"
 - ii. While other sites as work done".
 - (g) The Plaintiff describes his level of exposure as "medium".
7. On 7 April 2010, **Delta** issued a Cross-Claim against **ABB, Power Technologies Pty Ltd** (hereinafter referred to as "Power"), **Alstom Australia Ltd** (hereinafter referred to as "Alstom"), **Rexel Australia Ltd** (hereinafter referred to as "Rexel"), **Amaca Pty Ltd** (hereinafter referred to as "Amaca"), **Wallaby Grip Ltd and Wallaby Grip (NSW) Pty Ltd** (hereinafter collectively referred to as "Wallaby Grip") The Cross-Claims are brought pursuant to s.5 (1)(c) of the *Law Reform (Miscellaneous Provisions) Act 1946*.
8. The allegations against each of the Cross-Defendants may be summarised as follows:
- (a) As against ABB, the claim is brought because ABB was the employer.
 - (b) Power was a designer of boilers and associated plant and it designed the boilers for Vale's Point Power Station.
 - (c) As against Alstom, the claim is that it contracted to build turbines and associated plant at Vale's Point.
 - (d) As against Rexel, it contracted to construct a 275 MW turbine, known as turbine No 4 at Vale's Point Power Station and that after its installation in 1960, Rexel performed maintenance works at Vale's Point Power Station.
 - (e) Amaca, as a major manufacturer and supplier of products containing asbestos fibre.
 - (f) Wallaby Grip was the supplier of asbestos dust and fibre.
9. Delta filed a Reply on 22 April 2010 which, so far as is relevant, alleges the following:
- (a) As an electrician, the Plaintiff worked at various locations during the period between 1966 and 1969 ("the First period").
 - (b) He worked as an electrician at Vale's Point Power Station in September 1967 to March 1968 ("the Second Period").
 - (c) ABB should be placed in Category 2 as it was the Plaintiff's employer during both the First and Second periods of exposure.

- (d) Delta should be placed in Category 2.
- (e) Power should be placed in Category 1 because it was a supplier of asbestos or asbestos containing products, the designer of products, plant and equipment which contained or required asbestos and manufacturer, supplier and/or installer of products, plant and equipment which contained and/or required asbestos.
- (f) Alstom should be placed in Category 1 because it was a supplier of asbestos or asbestos containing products, the designer of products, plant and equipment which contained or required asbestos and manufacturer, supplier and/or installer of products, plant and equipment which contained and/or required asbestos.
- (g) Rexel should be placed in Category 1 because it was a supplier of asbestos or asbestos containing products, the designer of products, plant and equipment which contained or required asbestos and manufacturer, supplier and/or installer of products, plant and equipment which contained and/or required asbestos.
- (h) Amaca should be placed in Category 1, as it was a manufacturer of products, which contained asbestos and the supply of asbestos, or products, which contained asbestos.
- (i) Wallaby Grip should be placed in Category 1 as it was a supplier of asbestos or asbestos containing products and manufacturer, supplier or installer of products, plant and equipment which contained and/or required asbestos.
- (j) Subject to comments concerning Amaca, the Standard Presumptions Order should not be varied.
- (k) The First period of employment represents 86% of the time that the Plaintiff was exposed, while the Second period represents 14% of the time that the Plaintiff was exposed.
- (l) ABB should be wholly responsible for the First period.
- (m) In respect of the Second period, there should be division in accordance with 65%, being the responsibility of the Category 1 Defendants and 35% being the responsibility of ABB and Delta.
- (n) In the final result, the following:

ABB	88.45%
Power	1.5%
Alstom	1.5%
Rxel	1.5%

Hardies	1.6%
WGL	1.5%
WG (NSW)	1.5%
Delta	2.45%
Total	100%

(o) Various items of correspondence are attached.

10. ABB filed its Reply on 17 May 2010 wherein it is alleged:

- (a) Power, Alstom, Rexel, James Hardie and WGL should be Category 1 Defendants, while ABB and Delta should be Category 2 Defendants.
- (b) The Standard Presumptions Order should not be varied.
- (c) The allegation that the Plaintiff worked in wheat sheds in rural New South Wales from mid-1967 to early 1969, excluding the period of September 1967 to March 1968, which equals 1.75 years and is to be known as Period 1.
- (d) The period of employment between September 1967 and March 1968 at Vale's Point Power Station is Period 2.
- (e) 70% of the Plaintiff's exposure occurred at Vale's Point and 30% when working in rural New South Wales.
- (f) In respect of Period 1, ABB is solely responsible for 30% of this period.
- (g) In respect of Period 2, 70% of this period should be apportioned, namely 65% amongst the Category 1 Defendants and 35% amongst the Category 2 Defendants.

11. Amaca filed a Reply on 8 May 2010 and so far as is relevant, alleges:

- (a) The Plaintiff has identified working with pipe sections, lagging pipes with slurry and asbestos cement fibro sheeting.
- (b) There is no direct allegation by the Plaintiff against Amaca.
- (c) The Plaintiff has been unable to identify exposure to asbestos dust and fibre emanating from asbestos containing insulation materials.
- (d) That ABB, Power, Alstom, Rexel, Amaca and Wallaby Grip should be placed in Category 1, while Delta should be placed in Category 2.
- (e) There should be no variation of the Standard Presumptions Order.

12. Power filed a Reply on 11 May 2010 which alleges:

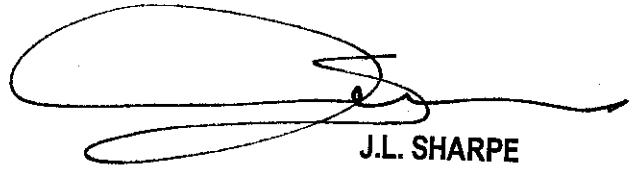
- (a) The Plaintiff, in his Statement of Particulars does not support an allegation that he was exposed to asbestos in circumstances where such exposure was caused by or was the responsibility of Power.
 - (b) Power did work in connection with the construction of boilers in specified areas at Vale's Point Power Station.
 - (c) The Plaintiff nominates exposure in the turbine area or in a boiler house.
 - (d) The Plaintiff referred to the boilers being constructed by Babcock & Wilcox.
 - (e) Power never did any work in connection with the construction of turbines at Vale's Point Power Station.
 - (f) Power never did any work in connection with the construction of boilers using Babcock & Wilcox as a contractor or subcontractor.
 - (g) That ABB and Delta should be placed in Category 2.
 - (h) All other Cross-Defendants be placed in Category 1.
 - (i) The Standard Presumptions Order should be varied to increase the liability of ABB as the Plaintiff's employer.
 - (j) The Standard Presumptions Order should be varied to increase the liability of Delta to reflect its size and its position as the owner and occupier of Vale's Point Power Station site and the person with ultimate control over all activities carried on at that site.
13. Wallaby Grip filed a Reply on 14 May 2010 which, so far as is relevant, alleges:
- (a) The two Wallaby Grip companies should be treated as one entity by reason that their work did not overlap, and in any event during the period in question Wallaby Grip Limited did not operate at all.
 - (b) It alleges it did not supply any of the products that the Plaintiff alleges he was exposed to at the Power Station.
 - (c) Amaca manufactured the pipe sections referred to by the Plaintiff.
 - (d) That ABB and Delta should be placed in Category 2 while Power, Alstom, Rexel, Amaca and Wallaby Grip should be placed in Category 1.
 - (e) That Wallaby Grip Ltd was not in operation at the time the Plaintiff was first exposed at the Power Station in September 1967 and therefore it is an innocent Defendant. [Please note that for the purposes of this assessment I have determined that the Wallaby Grip Companies should be treated as one entity].
 - (f) The Standard Presumptions Order should be varied in relation to Delta.

- (g) The Power Station exposure accounts for 16% of the exposure, while 84% of the exposure occurred in times when only ABB is liable.
14. Alstom and Rexel have not filed a Reply.
15. Initially, the Contributions Assessor must determine the existence of any separate periods of exposure, pursuant to clause 5(8) 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 of and intensity of exposure to asbestos present in each such period.
16. It is apparent that the total period of employment with ABB was for approximately 18 months, of which approximately 6 months was spent at Vales Point Power Station.
17. Notwithstanding the periods of time being in the order of 66%/33%, the level and intensity of exposure at Vales Point Power Station was far greater than the level and intensity of exposure while otherwise working for ABB.
18. Based on the material before me, I determine the contribution between the periods to be:
- (a) The period while employed by ABB independently of working at Vale's Point Power Station to be 35% and while working at Vale's Point Power Station at 65%.
- (b) I have reached this conclusion having regard to the extent and level of exposure to asbestos, the intensity of exposure, and have had regard to the fact that the non-Vale's Point Power Station exposure was intermittent and limited.
- (c) In respect of the period of employment while at the Vale's Point Power Station, this falls within Period 2 and thus Category 1 Defendants are presumed to be 65% liable and Category 2 Defendants 35% liable.
- (d) I determine that ABB and Delta are Category 2 Defendants, while Power, Alstom, Rexel, Amaca and Wallaby Grip are Category 1 Defendants.

19. The Defendants do not agree that a particular Defendant should not be assumed to be liable to contribute (clause 49(5)) and although it is requested by Power that clause 49(5) applies, I must assume each of the Defendants to be liable. However it is apparent that some if not all of the Cross Defendants may prove to have no liability at all, but I am required to presume liability.
20. Insofar as Amaca and Wallaby Grip are concerned, I note the submissions as to the claimed lack of particulars relating to their products or identification of their products. Notwithstanding the alleged lack of particulars, I am required to determine that Amaca did supply its products, as did Wallaby Grip.
21. The question then arises as to the contribution between Category 1 and Category 2 Defendants, which are, according to the Standard Presumptions Order, to be on the basis of 65%: 35%.
22. In the present case, the Standard Presumptions Order does not take into account the nature and size of Delta's operation or its involvement in the overall operation and construction of Vales Point Power Station, and its liability should be varied upwards by 20%, as against the Category 1 Cross-Defendants.
23. Thus, the following determination as to liability is made

(a)	ABB bears 35% (being the non- Vale's Point Power Station exposure) + 11.375% [17.5% of 65%] (Vales Point Power Station exposure)	46.375%
(b)	Delta bears $17.5\% \times 65\% = 11.375\% + 20\%$	31.375%
(c)	Power bears $65\% \times 65\% - 20\% = 22.25\% \div 5$	4.45%
(d)	Amaca bears $65\% \times 65\% - 20\% = 22.25\% \div 5$	4.45%
(e)	Alstom bears $65\% \times 65\% - 20\% = 22.25\% \div 5$	4.45%
(f)	Rexel bears $65\% \times 65\% - 20\% = 22.25\% \div 5$	4.45%
(g)	WGL bears $65\% \times 65\% - 20\% = 22.25\% \div 5$	4.45%
	Total	100%

24. Pursuant to clause 61 of the Regulations, I appoint ABB as the Single Claims Manager as it is the primary Defendant defined under clause 61(9).

A handwritten signature in black ink, consisting of several loops and a long horizontal stroke extending to the right.

J.L. SHARPE
Contributions Assessor

21 May 2010