

3. In determining apportionment, regard has been had to the Statement of Particulars provided by the Plaintiff and the replies as filed by the Defendant and Cross-Defendants.
4. 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.
5. The Plaintiff issued a Statement of Claim on 8 October 2009 against Macquarie Generation (hereinafter referred to as “Macquarie”) alleging that between April 1969 and May 1971 the Plaintiff worked at Liddell Power Station and in the course of such employment was exposed to asbestos products and, as a consequence thereof, the Plaintiff has contracted mesothelioma.
6. On 26 October 2009 the Plaintiff filed a Statement of Particulars which, so far as is relevant, provides that:
 - (i) Apart from working with Macquarie, the Plaintiff was exposed to asbestos in various other employment situations.
 - (ii) The Plaintiff worked at the Liddell Power Station during the construction phase of that power station being employed by three different employers, but not by Macquarie.
 - (iii) The Plaintiff was employed by
 - (a) Lightweight Structures Pty Ltd [hereinafter referred to as “Lightweight”] as a roof plumber between April 1969 and January 1970;
 - (b) Gilbarco Australia Pty Limited [hereinafter referred to as “Gilbarco”] as a pipe fitter for about one month from January 1970 to February 1970;
 - (c) Brightside Engineering [hereinafter referred to as “Brightside”] as a pipe fitter from March 1970 to May 1971.
 - (iv) The Plaintiff worked a total of 2 years at the Liddell Power Station working on boilers 1 and 2 and was exposed to asbestos throughout his employment at Liddell.
 - (v) The exposure with Lightweight was less than with Gilbarco and Bright Side where the exposure was heavy. In such employment the Plaintiff was exposed to asbestos from other workers, including workers being boilermakers, high-pressure welders and ladders.
 - (vi) By the time the Plaintiff finished at Liddell, boiler 1 was operational but boiler 2 was still being installed.
 - (vii) The work with Lightweight was different to the work with Gilbarco and Bright Side and

mostly involved outdoor work but others working within 2 metres were installing insulation on pipes.

(viii) There were many representatives of Macquarie on-site, and they included safety inspectors who monitored safety issues but did nothing about asbestos dust.

7. Thus on the Plaintiff's account, the three periods of exposure represented 34%, 8%, and 58% respectively on a time basis. However, given the Plaintiff's assertions that the level of exposure during the first period was less than with the later exposures, the following determinations can be made:

- (i) Period 1 – Lightweight = 20%
- (ii) Period 2 – Gilbarco = 12%
- (iii) Period 3 – Brightside = 68%

8. On 9 November 2009 Macquarie Generation issued a Cross-Claim against 8 Cross-Defendants under the provisions of s.5 (1)(c) of the *Law Reform (Miscellaneous Provisions) Act 1946* and such claims are:

- (i) A claim against Power Technologies Pty Ltd (hereinafter referred to as "Power") on the basis that Power constructed tested and/or maintained the boilers during the construction at Liddell.
- (ii) A claim against Alston Australia Ltd (hereinafter referred to as "Alston") in relation to the design and construction of the turbines at Liddell and it occupied the Liddell Power Station.
- (iii) A claim against Wallaby Grip BAE Pty Ltd (hereinafter referred to as "BAE") on the basis that it was a manufacturer, supplier and installer of asbestos dust and fibre between the period 1966 and 1972.
- (iv) A claim against Wallaby Grip (NSW) Pty Ltd (hereinafter referred to as "NSW") on the basis that it supplied, manufactured and installed asbestos products.
- (v) A claim against Amaca Pty Ltd (hereinafter referred to as "Amaca") on the basis that the asbestos dust and fibre to which the Plaintiff was exposed emanated from products containing asbestos fibre manufactured and/or supplied by Amaca and/or Hardie BI Partnership.
- (vi) A claim against CSR Ltd (hereinafter referred to as "CSR") on the basis that the asbestos dust and fibre to which the Plaintiff was exposed emanated from products contained in asbestos fibre manufactured and/or supplied by CSR and/or the Hardie BI

Partnership.

- (vii) A claim against Bradford Insulation Industries Pty Ltd (hereinafter referred to as "Bradford") on the basis that the asbestos dust and fibre to which the Plaintiff was exposed emanated from products containing asbestos dust and fibre supplied by Bradford Insulation.
- (viii) A claim against Gilbarco Australia Pty Ltd (hereinafter referred to as "Gilbarco") on the basis that Gilbarco employed the Plaintiff at the Liddell Power Station and, while so employed was exposed to and inhaled asbestos dust and fibre.

9. On 25 November 2009 Macquarie provided a Reply which relevantly provides that:

- (i) While it was the occupier of the Liddell Power Station, during the construction period the Power Station was occupied and controlled by contractors and subcontractors which contractors and subcontractors had their own site offices, resident engineers and supervisors and controlled their staff and work practices within the construction site.
- (ii) Macquarie should be placed in Category 2.
- (iii) Power should be placed in Category 1 and also placed in Category 2.
- (iv) Alston should be placed in Category 1 and also placed in Category 2.
- (v) BAE should be placed in Category 1.
- (vi) NSW should be placed in Category 1.
- (vii) Amaca should be placed in Category 1.
- (viii) CSR should be placed in Category 1.
- (ix) Bradford should be placed in Category 1.
- (x) Gilbarco should be placed in Category 2.
- (xi) The Standard Presumption should be varied against Amaca.
- (xii) The Plaintiff's employment should be broken into three separation periods, and that the second and third periods should be allocated twice the weighting as that in the first period.
- (xiii) Period 1 is from April 1969 to January 1970 whilst employed by Lightweight, representing approximately 26% of the total period of exposure.
- (xiv) Period 2 is from January 1970 to February 19790 whilst employed by Gilbarco, representing 6% of the total period of exposure.
- (xv) Period 3 is from March 1970 to May 1971 whilst employed by Brightside representing

68% of the total period of exposure.

(xvi) All three periods fall within "period B" of the Standard Presumption.

(xvii) Macquarie provides a number of scenarios and various totals.

10. On 7 December 2009 Amaca provided a Reply which, so far as is relevant, alleges that:

- (i) In accordance with the Deed of Agreement dated 23 September 1964 whereby Amaca and CSR agreed to enter into partnership to be known as Hardie-BI Company to manufacture in Australia and distribute and sell in Australia certain products. As a result, liability should be apportioned equally with CSR and Bradford in respect of the period 24 September 1964 to 30 June 1974.
- (ii) Macquarie should be placed in Category 1 and in Category 2.
- (iii) Power should be placed in Category 1 and Category 2.
- (iv) Alston should be placed in Category 1 and Category 2.
- (v) BAE, NSW, Amaca, CSR and Bradford should all be placed in Category 1.
- (vi) Gilbarco should be placed in Category 2.
- (vii) The entire period of the Plaintiff's employment at Liddell falls within period B (of the Standard Presumption).
- (viii) The Standard Presumption should not be varied.
- (ix) The apportionment of liability should be: Macquarie 18.04%; Power 18.04%; Alston 18.04%; BAE 9.29%; NSW 9.29%; CSR 4.64%; Amaca 4.64%; Bradford 9.29%; Gilbarco 8.75%.

11. On 8 December 2009 CSR and Bradford jointly filed a Reply which relevantly alleges that:

- (i) During the period September 1964 to June 1974 CSR and Amaca were partners in the Hardies-BI partnership, which partnership manufactured asbestos containing product with Bradford being the agent of the Hardies-BI partnership.
- (ii) CSR and Bradford admit that Hardie-BI manufactured and supplied K-Lite, 85% Magnesia and K-Lite Calcium Silicate between September 1964 to June 1974.
- (iii) Amaca, CSR, Bradford, BAE and NSW should be placed in Category 1.
- (iv) Macquarie should be placed in Category 1.
- (v) Power should be placed in Category 1.
- (vi) Alston should be placed in Category 1.
- (vii) Any liability due to exposure to Hardie-BI products should be apportioned 50% to Amaca and 50% to CSR.

- (viii) Macquarie was the owner and occupier of Liddell Power Station and, accordingly, should be liable for 50% contribution towards the Plaintiff's damages.
 - (ix) The remaining 50% should be apportioned between Power, Alston, Gilbarco, BAE and Hardie-BI as Category 1 Defendants.
 - (x) The apportionment should be: Macquarie 50%; Power 8.33%; Alston 8.33%; BAE 8.33%; NSW 8.33%; Hardie-BI 8.34%; Gilbarco 8.34%.
12. On 9 December 2009 Power provided a Reply which relevantly alleges that:
- (i) Macquarie should be placed in Category 2.
 - (ii) Gilbarco should be placed in Category 2.
 - (iii) All other Cross-Defendants should be placed in Category 1.
 - (iv) The Standard Presumption should be varied as against Macquarie to reflect its size, position as owner, occupier and person with ultimate control over all activities carried on at Liddell Power Station, coupled with actual knowledge of the dangers of asbestos at the relevant time.
 - (v) The Standard Presumption should be varied to increase the liability of Gilbarco to reflect its responsibility as the Plaintiff's employer.
 - (vi) The Standard Presumption should be varied to increase the liability of Macquarie and Gilbarco by 20 percentage points.
13. On 14 December 2009 Gilbarco filed a Reply which relevantly asserts the following:
- (a) It cannot confirm employment.
 - (b) With the exception of Gilbarco, all other Defendants/Cross-Defendants should be placed in Category 1.
 - (c) There are three periods of employment, namely: the Lightweight Structure employment between April 1969 and January 1970 (9.5 months); the Gilbarco employment – January 1970 to February 1970 (1.5 months); and the Brightside Engineering employment – March 1970 to May 1971 (15 months).
14. On a strict time basis, the Plaintiff's apportionment would be seen to be:
- (a) Lightweight – 36.5%
 - (b) Gilbarco – 5.8%
 - (c) Brightside - 57.7%

15. However, in his Statement of Particulars the Plaintiff has alleged that his exposure to asbestos while employed by Gilbarco and Brightside was more intensive than his exposure while employed by Lightweight and accordingly, Gilbarco submits that the apportionment should be:
- (a) Lightweight – 15%
 - (b) Gilbarco – 10%
 - (c) Brightside - 75%
16. Gilbarco then provides a series of calculations, the end result of which is:
- (a) Gilbarco – 3.5%
 - (b) Macquarie Generation – 9.5%
 - (c) Power Technology 9.5%
 - (d) Alston – 9.5%
 - (e) Bells Group – 17%
 - (f) Amaca – 17%
 - (g) Bradford – 17%
 - (h) CSR – 17%
17. On 11 December 2009, Wallaby Grip (BAE) Pty Ltd and Wallaby Grip (NSW) Pty Ltd provided a reply which relevantly alleges that
- (i) Macquarie Generation should be placed in Category 1 because its predecessor (the Electricity Commission of New South Wales) was an installer of asbestos products and comes within Part 5(2)(a) of the standard presumptions.
 - (ii) All of the other cross-defendants, with the exception of Gilbarco, should be placed in Category 1, while Gilbarco should be placed in Category 2.
 - (iii) The standard presumptions should be varied as against Macquarie, to take into account its actual knowledge.
 - (iv) Macquarie should be placed in both Categories 1 and 2.
18. Alston has not provided a Reply.
19. In this matter, there is no direct evidence that Macquarie could be considered to be a Category 1 Defendant, and the Plaintiff does not so allege directly.
20. Turning to the question as to the Plaintiff's medical condition, I determine that the Plaintiff's

condition of mesothelioma is indivisible.

21. The Contributions Assessor must first determine the existence of any separate periods of exposure pursuant to clause 5(8) of the Standard Presumptions and make a determination of what proportion of the whole each separate period bears, having regard to the number of such period, the length of each period, the duration of and intensity of exposure to asbestos present in each such period.
22. Based upon the material before me, I determine the contribution between the three periods to be:
 - (i) Period 1 – Lightweight = 20%
 - (ii) Period 2 – Gilbarco = 12%
 - (iii) Period 3 – Brightside = 68%
23. All periods of employment fall within Period B of the Standard Presumptions, and thus, in so far as it is relevant, the Category 1 Defendants are presumed to be 65% liable and the Category 2 Defendants are presumed to be 25% liable.
24. The question then arises as to whether the Standard Presumptions should be varied in any way. In the present case the Standard Presumption should be varied as between Category 1 and Category 2 Defendants in relation to Macquarie, having regard to the level of its knowledge, its size and its operations, so as to increase their its liability as a Category 2 Defendant by 15 percentage points. In particular I note the allegations of the Plaintiff as to presence of Macquarie while the work was being carried out.
25. In respect of all other Defendants, the Standard Presumptions take into account the various aspects of liability and, accordingly, there should be otherwise no variation in the Standard Presumptions.
26. On the information presently before me, I determine the relevant categories of each of the Defendant and Cross-Defendants to be as follows:

Macquarie	Category 2
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Power	Categories 1 and 2
Alston	Categories 1 and 2
BAE	Category 1
NSW	Category 1
Amaca	Category 1
CSR	Category 1
Bradford	Category 1
Gilbarco	Category 2

27. Insofar as Amaca and CSR are concerned, they should be treated as one entity and I have accordingly done so, and accordingly there are 6 Category 1 Defendants.

28. In respect of the Period 1 [Lightweight] being 20% of the Plaintiff's exposure, the following determination is made [rounding off the respective liabilities]:

Macquarie	Category 2: 35% being one of three Category 2 Defendants + 15% = 26.66 x 20% = 5.32%
Power	Categories 1 and 2: a one sixth share of the Category 1 Liability and one third of the Category 2 Liability = 4%
Alston	Categories 1 and 2: a one sixth share of the Category 1 Liability and one third of the Category 2 Liability = 4%
BAE	Category 1: a one sixth share of the Category 1 Liability = 1.67%
NSW	Category 1: a one sixth share of the Category 1 Liability = 1.67%
Amaca	Category 1: a one sixth share of the Category 1 Liability = 1.67% x 50% = 0.835%
CSR	Category 1: a one sixth share of the Category 1 Liability = 1.667% x 50% = 0.835%
Bradford	Category 1: a one sixth share of the Category 1 Liability = 1.67%

29. In respect of the Period 2 [Gilbarco] being 12% of the Plaintiff's exposure, the following determination is made, [rounding off the respective liabilities]:

Macquarie	Category 2: 35% being one of four Category 2 Defendants + 15% = 2.8%
Power	Categories 1 and 2: a one fifth share of the Category 1 Liability and one quarter of the Category 2 Liability = 2.1
Alston	Categories 1 and 2: a one fifth share of the Category 1 Liability and one quarter of the Category 2 Liability = 2.1
BAE	Category 1: a one fifth share of the Category 1 Liability. = 1
NSW	Category 1: a one fifth share of the Category 1 Liability. = 1
Amaca	Category 1: a one fifth share of the Category 1 Liability. = 1 x 50% = 0.5%
CSR	Category 1: a one fifth share of the Category 1 Liability. = 1 x 50% = 0.5%
Bradford	Category 1: a one fifth share of the Category 1 Liability. 50% x 20% x 20% = 1
Gilbarco	Category 2: one quarter of the Category 2 Liability = 1

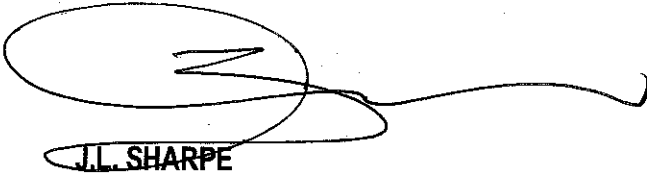
30. In respect of the Period 3 [Brightside] being 68% of the Plaintiff's exposure, the following determination is made, [rounding off the respective liabilities]:

Macquarie	Category 2: 35% being one of three Category 2 Defendants + 15% = 18%
Power	Categories 1 and 2: a one fifth share of the Category 1 Liability and one third of the Category 2 Liability = 13.50
Alston	Categories 1 and 2: a one fifth share of the Category 1 Liability and one third of the Category 2 Liability = 13.50
BAE	Category 1: a one fifth share of the Category 1 Liability. = 5.75
NSW	Category 1: a one fifth share of the Category 1 Liability. = 5.75
Amaca	Category 1: a one fifth share of the Category 1 Liability. = 5.75 x 50% = 2.875%
CSR	Category 1: a one fifth share of the Category 1 Liability. = 5.66 x 50% = 2.875%
Bradford	Category 1: a one fifth share of the Category 1 Liability = 5.75%

31. Thus the following determination is made:

Macquarie	26.12% [5.32 + 2.8 + 18]
Power	19.6% [4 + 2.1 + 13.5]
Alston	19.6% [4 + 2.1 + 13.5]
BAE	8.42% [1.67 + 1 + 5.75]
NSW	8.42% [1.67 + 1 + 5.75]
Amaca	4.21% [1.67 + 1 + 5.75 = 8.42 x 50%]
CSR	4.21% [1.67 + 1 + 5.75 = 8.42 x 50%]
Bradford	8.42% [1.67 + 1 + 5.75]
Gilbarco	1

32. Pursuant to clause 61 of the Regulations, I appoint Macquarie as the Single Claims Manager as it is the Primary Defendant defined under clause 61(9).



J.L. SHARPE

Contributions Assessor

30th December 2009