

22 March 2010



Dear Members and Friends

The Asbestos Diseases Society of Australia Inc (ADSA) will hold its Annual General Meeting (AGM) on Sunday 18th April 2010 at 2pm at the City of Stirling Library - Osborne Park Community Centre. The Centre is located almost diagonally from our office in a north-east direction. The Centre is actually in Royal Street next to the BP Service Station on the corner of Main and Royal Street - opposite the car park of the Osborne Park Hotel.

All members and friends are cordially invited to attend the AGM. As in previous years afternoon tea and light refreshments will be served upon the conclusion of the AGM. Notification of members and friends attendance will be greatly appreciated as it will assist us with catering arrangements.

The formal part of the Agenda for the AGM will include a number of reports from the ADSA Office Bearers and will be followed by the election of the Executive and Ordinary Committee. Upon completion of the formal part of the Agenda several guest speakers will address the meeting on medical and legal issues. The following guest speakers have confirmed their attendance, Professor AW Musk, Professor Keith Brian Shilkin, Professor John Alvarez, Dr Gregory Pierre Deleuil, the Medical Consultant of our organisation.

Professor Musk will provide an extensive presentation on pleural plaques and pleural disease, and the impact on patients who have had exposure to asbestos. Professor Keith Shilkin will speak on the complex role of a pathologist and difficulty associated to establish pathologic diagnosis, ie lung cancer and malignant mesothelioma. Professor John Alvarez will inform us with the latest information on surgical intervention of malignant mesothelioma. The current members of the Asbestos Diseases Society of Australia Inc Management Committee have consented to accept nominations for the 2010 Calendar Year. However, all additional nominations shall be accepted provided that, they are in writing, signed by two financial members of the ADSA, accompanied by the written consent of the candidate and received by the ADSA Electoral Officer, PO BOX 1394, Osborne Park 6916, before 15th April 2010.

2009 Calendar Year

During the calendar year 2009 we have sadly lost more than 250 members and friends to asbestos caused diseases. Also a large number of members friends were diagnosed with Mesothelioma, Lung Cancer, Asbestosis and Pleural Diseases.

Pleural Plaques (Pleural Disease)

Benign asbestos-related pleural diseases are the most common pathologic and clinical abnormalities related to asbestos exposure. Our organization has lobbied both Federal and State jurisdictions for more than a decade to accept pleural plaques as a compensable industrial disease. Finally, late last year the State of WA has accepted pleural disease ie, pleural plaques as a compensable industrial disease. It has been a painful and heart wrenching experience to many members of our organisation particularly those who had employment in WA and consequently developed disabling pleural disease and then being told that Statutory Law in WA does not recognise such impairment as being compensable.

Most of the Eastern States have already recognised industrially caused pleural diseases as work related injuries both within the Statutory Law and indeed Common Law. It was the Compensation Court of New South Wales in February 2000 in the matter of Mr TGO found that pleural plaques can cause pain and impairment.

We are appreciative of Professor Musk's generosity to attend our AGM and give a lecture on pleural plaques and pleural disease, in particular Prof Musk will explain the meaning of pleural plaques and their prevalence. Prof Musk will explain if pleural plaques constitute a risk of malignancy development ie, mesothelioma or lung cancer. Also what impairment are pleural plaques likely to cause and can pleural plaques be detectable on plain chest x-ray screening technique or is the HRCT Scan a more preferable technique.

Asbestos Litigation

On 3rd March this year the High Court of Australia delivered in our opinion a disgraceful decision on the issues relating to our member who died from lung cancer caused through asbestos exposure and smoking.

Mr. Paul Cotton was a member of our organisation and was exposed to asbestos in the course of his employment with the Millennium Inorganic Chemicals LTD in W.A and the Engineering and Water Supply Department of the State of South Australia. Mr Paul Cotton was diagnosed with lung cancer in 2000. All his treating Doctors/Specialists even the Defendant's Doctors/Specialists agreed that the cause of his cancer was smoking cigarettes and indeed exposure to asbestos dust in two employments for a number of years.

Our organisation represented Paul Cotton within the provisions of the Workers Compensation Law in Western Australia. The Workers Compensation litigation process involved at least 70 sitting days both in Bunbury and in Perth. More than 30 exhibits were tendered and some 30 plus witnesses were called to give evidence. Sadly Mr Cotton passed away (2002) before the conclusion of his Workers Compensation claim. Several months later the compensation claim succeeded in favour of Mr Cotton's partner Teresa and their four children. However, the Review Officer's decision was appealed to the Compensation Magistrate's Court and the Supreme Court of WA. Both of the Appeals were unsuccessful and the original Review Officer's finding was upheld "that the material increase in risk of lung cancer was due to the nature of the employment in which Mr Cotton was employed."

Mr Cotton's Executrix (his partner) Ms Ellis initiated Common Law proceedings against the State of South Australia, Millennium Inorganic Chemicals and Amaca alleging that the asbestos exposure contributed to the development of her late partner's lung cancer; from which he died. The claim succeeded at in the Western Australian Supreme Court before Justice Heenan. The Defendants subsequent appeal of the decision before the Full Court of the Supreme Court of Western Australia failed.

The Defendants sought special leave of the High Court of Australia to appeal the decision of the Full Court of the Supreme Court of Western and to shock and disbelief the leave was granted. The appeal was heard by the Full Court of the High Court of Australia last year and as mentioned already above the High Court's decision ruled in favour of the appellants, Millennium Inorganic Chemicals, State of South Australia and Amaca (James Hardie).

The High Court decision is a great disappointment to Mr Cotton's four children and his partner and indeed members of the Asbestos Diseases Society of Australia Inc. We have read the Hon. Judge's decision and definitely disagree with their Honours reasoning in particular paragraph (2) seems to be somewhat confusing and reads, as follows:

"No scientific or medical examination can say why Mr Cotton developed lung cancer. His cancer was not, as some are, a cancer peculiarly associated with exposure to asbestos. The evidence at trial showed that most sufferers of lung cancer have smoked, some have been exposed to asbestos, and some have neither smoked nor been exposed to asbestos. The evidence also showed that not everyone who smokes, not everyone who has been exposed to asbestos, and not everyone who has smoked and been exposed to asbestos, will develop lung cancer."

One could be excused of thinking that Einstein's "Theory of Relativity" is easier to understand. There is always a remedy available to the Courts to reduce the liability of the smoking component but the asbestos component remains a contributing factor and as long as it is no less than De minimis (extremely low). In our opinion the exposure to asbestos in South Australia and in Western Australia was well above the De minimis.

There are numerous Court decisions including the House of Lords which have dealt with the issues of causation by two or more factors cumulatively where it was impossible to ascertain the proportion in which the factors were effective in producing the injury. It is also a reasonable assumption that the Courts need not require a Plaintiff to prove the impossible, but holds that he is entitled to damages for the injury if he proves on a balance of probabilities that the breach or breaches of duty contributed substantially to causing the injury. There was a breach of the duty owed to the late Mr Cotton by Millennium Inorganic Chemicals, the Engineering Works in South Australia and indeed Amaca Pty Ltd the manufacturer of asbestos products. (James Hardie)

To put it in another way when it is proved on the balance of probabilities, that an employer or employers have been negligent and that their negligence has materially increased the risk of their employee contracting an industrial disease (lung cancer) then they are liable in damages to that employee if he contracts the disease notwithstanding that the employer is not responsible for other factors (tobacco smoking) which have materially contributed to the disease in Mr Cotton's case, lung cancer.

The approach taken by the High Court to criticize the Trial Judge and the Court of Appeal on the issue of assessing causation seems to be inappropriate when one has to have regard for the cumulative nature of the inhalation of asbestos fibres as the necessary causative or contributory agent of injury. The High Court adopted the view that each Defendant would have to be found to have negligently breached their duty of care individually and on the balance of probabilities each have caused the injury to satisfy the test of causation. Such a premise appears to be somewhat inappropriate as asbestos injury (lung cancer) is usually caused by inhalation of carcinogenic fibres. The asbestos fibres can be as small as 2 microns in length and 1 in width and highly unlikely to be readily identified without sophisticated technology. For this very reason the cumulative approach on the balance of probabilities appears to be the best means of assessing causation as one can never be sure which particular fibres from the Defendant A, B, C or D had the fatal implication in cancer development.

It is regrettable that we no longer have further redress in Australia as we had in the past (Appeal to the Privy Council) and for the time being this appalling decision would need to be tested as soon as possible. We can only hope that a future High Court bench has the vision and courage as demonstrated by the High Court in the Mabo decision to overturn this manifestly unfair application of the Common Law.

CSR Demerger (Colonial Sugar Refinery Limited) Asbestos Issues

In the previous newsletter we have alerted our members and friends that CSR are seriously contemplating splitting up the company by demerger which will most likely reduce the capital value of the company making it less able to meet future asbestos liabilities. On 8 October 2009 CSR Limited (CSR) filed an originating process seeking orders pursuant to s411(1) of the *Corporations Act 2001* (Cth). CSR gave notice it would pursue demerger of its Sugar and Renewable Energy business to create two focused companies, both listed on the Australian Stock Exchange (ASX).

- Sucrogen – the leading sugar and renewable energy company in Australia and New Zealand; and
- CSR (New CSR) – a premium branded building products company with an attractive investment in aluminium.

Taking the sugar and renewable energy business out of CSR coupled with the proposed capital reduction would leave the company (New CSR) with the building products, property and aluminium business and considerably less capital than CSR presently has. The proposed demerger and subsequent capital reduction has prompted considerable interest in, and opposition to, the Scheme. The objectors of the CSR Scheme are the New South Wales Government, the Attorney General of New South Wales, Amaca Pty Ltd (Under NSW administered winding up), Asbestos Injuries Compensation Fund (AICF), and indeed our organisation including all persons who were regrettably exposed to asbestos whilst working for CSR or were exposed to asbestos through manufacturing of asbestos products produced by CSR or the users of those products.

The concerns are that only the assets of New CSR would be available to meet current and future asbestos liabilities of CSR. In its financial statements in September 2009 CSR has recognised a provision of \$446.8 million for current and future asbestos liabilities, being the 10% of CSR's total assets. This equates to 18% of New CSR's assets at the same date. Asbestos injuries are progressive latent diseases and can take anywhere from 20 years upwards with an incubation period to 60 years plus. Assessment of future asbestos liabilities must be seriously and carefully considered when assessing adequate financial provision over such a long period in time. It would appear that the ability of New CSR to pay its creditors, including asbestos related claims in the future will depend on future economic conditions and future decisions by the Board of the New CSR. There is also a risk that payments for asbestos related claims will increase in the future as has been the case for the past 10 years.

Given the inherent uncertainties in the actuarial material that had been put before the Court to consider the demerger application Mr MB Oakes Counsel for the NSW Attorney General submitted that the only way forward would be for the Sucrogen Company to provide a deed poll (guarantee) in favour of current and future asbestos claimants and provide an undertaking it will satisfy asbestos related liabilities if New CSR proved unable to do so. It is our understanding that CSR did not regard the suggestion attractive. Its submissions in reply noted that the proposal “would significantly alter the commercial characteristics of the proposed demerger”. In particular it was said that the proposal would subject Sucrogen “to a contingent liability over which it had no effective control, which has no correlation to its business revenue and which offered no commercial return or benefit”.

In our opinion, the guarantee and undertaking is the simplest way of resolving the differences of opinion on issues of protection to safeguard the future rights for asbestos victims and their families. Judge Stone dismissed CSR's application. CSR are appealing Judge Stone's ruling and the appeal will be heard on 29 and 30 March 2010.

For the benefit of our new members and to refresh the memories of long time members CSR and its subsidiary ABA operated the blue asbestos mines at Wittenoom from 1943 to 1966. Asbestos was mined and milled there and transported in bags to the coastal town of Point Samson on open tray trucks upon which sat Aboriginal truck driving assistants (off-siders). The blue asbestos bags were loaded into sheds at Point Samson and then onto boats heading to Fremantle and overseas. At Fremantle, and indeed at other ports around Australia, waterside workers unloaded the bags of asbestos in unventilated holds, many of the bags having torn releasing deadly asbestos fibres into the atmosphere. Some of the asbestos fibre from Wittenoom was used by James Hardie throughout Australia.

Some was exported overseas and some of it was used by CSR Limited and its subsidiaries in the manufacture of its own products containing asbestos including asbestos cement sheets and vinyl floor tiles.

Back at Wittenoom, the residue (tailings) of the mining and milling process was spread throughout the township exposing to the deadly blue asbestos fibres women, children and the miners during their leisure hours.

During 23 years of mining and milling of blue asbestos at Wittenoom there were some 6,700 workers employed by CSRs subsidiary ABA. Approximately 13,000 residents comprised of miners' wives, children and service personnel, that is, hotel staff, postal workers, school teachers, policemen etc.

From about the early 1970s a steady number of asbestos injuries were diagnosed at Sir Charles Gairdner Hospital. In 1974 CSR became worried about the litigation consequences arising out of their conduct of the blue asbestos mine in Wittenoom. The pressure and panic occurred in 1977 when a former Wittenoom miner dying of Mesothelioma lodged a claim. In a memo from one of the CSR executives, Mr NE Irving, suggested that CSR should keep the Wittenoom operating company ABA solvent notwithstanding that its assets were stripped by CSR. Apparently the notion was ABA had operated the mine and should defend the action on limited liability (with limited assets). Mr Irving went on to say "even if the workers die like flies they will never be able to pin anything on CSR." Thus the apparent defence strategy that was to serve CSR for the next 15 years was complete, that is, delay, don't settle, don't be generous, ride it out, keep it quiet, hide the truth and whatever happens make sure they never pin anything on CSR. It nearly worked, but the maxi trials of the late 1980s demolished the CSR defence in Western Australia and later in Melbourne where the Court ordered for the first time in Australian history in a civil matter a punitive damages award against CSR (K. Rabenault). The Judge ruled that CSR acted with 'continuing, conscious and contumelious' disregard for its workers' safety and awarded \$250,000 in punitive damages.

It is our understanding that CSR's provision of \$446.8 million for current and future asbestos liabilities appears to be some what shallow if one has regard for the large number of children which were either born at Wittenoom or arrived there with their parents and had sufficient exposure to blue asbestos dust to put them at serious risk of developing Mesothelioma or Lung Cancer. Therefore in our considered opinion Judge Stone was absolutely right to deny the CSR application. (Note information in relation to the CSR demerger application extracted from the decision of Stone J *CSR Limited, in the matter of CSR Limited* [2010] FCA 33)

Annual Subscriptions

Just a gentle reminder to members the annual subscriptions of \$10 are now due for the 2010 Calendar Year.

Annual Medical Examinations

Medical review/examinations are available at our Osborne Park office every Tuesday and Thursday between 10:30am 12pm with Dr Deleuil. It is strongly recommend that members and friends take advantage of this service. It is important that all members and friends who had substantial exposure to asbestos have at least one review annually. **Please ring our office requesting an appointment for a health check.**

With best wishes and kindest regards



Robert Vojakovic AM JP

PRESIDENT

Very Best Wishes

*To all our members and
friends for a Happy and
pleasant Easter
President, Committee
& Staff*

