

BETWEEN:

THOMAS LYTTLE

Plaintiff

AND

TELSTRA CORP LTD

First Defendant

AMACA PTY LIMITED

Second Defendant

**CONTRIBUTIONS ASSESSMENT
DETERMINATION**

1. By letter dated 21 September 2009 I was appointed the Contributions Assessor by the Registrar pursuant to Clause 49(1) of the *Dust Diseases Tribunal Regulation 2007* (NSW) (**the Regulations**).
2. The plaintiff is Thomas Lyttle (**Lyttle**) and he sues Telstra Corp Ltd (**Telstra**) and Amaca Pty Ltd (**Amaca**) for damages as a result of contracting asbestos related lung cancer.
3. Amaca and Telstra have each filed a Reply.
4. The determination is to be made by me on the papers, on the assumption that the defendants are liable, and applying the standard presumptions prescribed in the *Dust Diseases Tribunal (Standard presumptions – Apportionment) Order 2007* (**the Standard Presumptions**).

Mr Lyttle's History of Asbestos Exposure

5. Mr Lyttle was born on 10 August 1938 (aged 71). His only relevant employer was Telstra who he worked for from 1957 – 1998 as an installation technician. He had no non-work related exposure to asbestos
6. Mr Lyttle's exposure to asbestos differs over several periods of his employment. The first relevant period was 1957 – 1967 where Mr Lyttle recalls being employed to install

telephone wires, cabling and switching equipment at locations in Southern NSW, most often at telephone exchanges. The exchanges were constructed of asbestos cement sheeting. The work involved installing asbestos cement racking which held the ducting. Mr Lyttle unloaded the AC racks from a truck which delivered it to the site. The racks were stacked in rows before being fixed to the walls. About 100 holes were drilled into the walls of the room. Once the ducting was secured to the walls the electrical ducting was installed by feeding it through holes in the racks that were drilled into the racks. The holes that the electrical ducting was fed through were “about the size of a cricket ball” and created by drilling 40 smaller holes and removing the piece using a keyhole saw. This technique created large quantities of dust. The task took about 2 – 3 weeks.

7. Mr Lyttle then fed the electrical ducting through the racks. More asbestos dust emanated from the racks. The entire job to construct an exchange took about 4 months. About 70% of his time in the period 1957 – 1967 was dedicated to this type of work.
8. In the period 1967 to 1970 Mr Lyttle did the same type of work but recalls that asbestos materials were being phased out and so he worked in the conditions for only about 40% of his time.
9. From 1970 to 1980 Mr Lyttle worked at larger exchanges around NSW for about 80% of his time. The AC racks were replaced with metal racks but the walls that they were attached to were still made of asbestos. Mr Lyttle drilled holes in the AC walls using power drills and brushed up the AC dust.
10. He also worked in cable pits in this period. The pits were about 2m deep and 3 m in diameter. Mr Lyttle recollects that they were made of asbestos. While in the pits he installed and calibrated “repeaters”. It is not clear from his statement whether this involved drilling into the AC walls and floor. If not, it is less likely that the dust he saw in the space was AC dust as distinct from other generic dust that would accumulate over time.
11. In the period 1980 – 1998 he says that his exposure was “similar to that of 1970 – 1980, but lower due to the consistent removal of asbestos products”. He worked with asbestos products about 10% of his time.
12. Mr Lyttle estimates his level and intensity of exposure to asbestos dust as:
1957 – 1970 High 75%

1970 – 1980 Medium 20%

1980 – 1998 Low 5%

13. Mr Lyttle identifies Amaca as the supplier of the asbestos products he worked with.

14. The factual matters that are relevant to my apportionment determination (see clause 3 of the Standard Presumption Order) include:

- (a) Mr Lyttle alleges that he suffers asbestos related lung cancer, an indivisible disease;
- (b) He was exposed to asbestos continuously, but to varying intensities, from 1957 – 1998;
- (c) His exposure occurred in the workplace while employed by Telstra; and
- (d) No effective steps were taken to advise Mr Lyttle of the dangers of exposure to asbestos or to protect him against exposure.

Categorisation of Defendants

15. Both defendants submit that the parties should be categorised as follows:

Amaca Category 1
Telstra Category 2

Application of the Standard Presumptions

16. In making this determination I must assume that each defendant is liable: Regulations Reg 49(4), unless the defendants agree that a particular defendant should not be assumed to be liable: Regulation 49(5).

Amaca's Submissions

17. In its Reply Amaca submits that none of the products it manufactured or supplied are identified in Mr Lyttle's Statement of Particulars. There are references to "asbestos cement fibro, asbestos cement ducting and corrugated asbestos roofing" but those are generic references only. It makes no admission as to the circumstances of Mr Lyttle's alleged exposure to asbestos products.

18. As to the Standard Presumptions Amaca submits that they should be varied against Telstra by 20% on the basis that Telstra had knowledge of the dangers of asbestos exposure “during the 1960s”. In support of that contention Amaca points to the plaintiff’s evidence that Telstra was deliberately phasing out the use of asbestos in the workplace from the early 1970s.

19. Amaca further submits that Telstra was a large and sophisticated employer and would have had knowledge of the dangers of asbestos when it employed Mr Lyttle. On that basis Telstra should be attributed with actual knowledge of the dangers of asbestos “from the 1960s”.

Telstra’s Submissions

20. Telstra admits that it was Mr Lyttle’s employer. It admits that he suffers from lung cancer but does not admit that it is caused by asbestos.

21. In respect of its own level of knowledge as to the dangers of asbestos Telstra submits that it was a statutory corporation whose purpose was to provide postal, telegraph, telephonic and similar services. It did not manufacture or supply asbestos products. It further submits that there is no evidence to support the contention that Telstra had actual knowledge of the dangers of asbestos.

22. Telstra submits that the Standard Presumptions are sufficient to take account of the relative capacity, nature of industry sophistication. On Telstra’s calculations Amaca should be attributed 66.575% of the plaintiff’s liability and Telstra 33.425%.

Findings

23. I accept Amaca’s submissions that the Standard Presumptions should be varied against Telstra. Telstra was (and is) a large and sophisticated employer. It took steps to phase out the use of asbestos in the workplace from the early 1970s. I propose to increase Telstra’s proportion by 10% with that increased liability applying from 1 January 1970. On that basis the followed adjusted presumptions will apply:

Period	Years	Apportionment Amaca:Telstra	Proportion of Exposure	Months of Exposure
Period A	Jan 1957 – Dec 1960	75:25	75%	48
Period B	Jan 1961 – Dec 1966	65:35	75%	72
	Jan 1967 – Dec 1969	65:35	75%	36
	Jan 1970 – Dec 1978	55:45 (varied)	20%	108
Period C	Jan 1979 – Dec 1979	50:50 (varied)	20%	12
	Jan 1980 – Dec 1989	50:50 (varied)	5%	120
Period D	Jan 1990 - 1998	30:70 (varied)	5%	108
TOTAL				504

24. Adopting Mr Lyttle's estimate of the proportion of exposure and period of exposure and assuming he was employed for 504 months (42 years) gives the following liabilities:

75% of his exposure occurred in the 156 months from 1957 – 1970.

Amaca $48/156 \times 75\% \times 75\% = 17.3\%$
 $72/156 \times 65\% \times 75\% = 22.5\%$
 $36/156 \times 65\% \times 75\% = 11.2\%$ 51%

Telstra $48/156 \times 25\% \times 75\% = 5.8\%$
 $72/156 \times 35\% \times 75\% = 12.1\%$
 $36/156 \times 35\% \times 75\% = 6.1\%$ 24%

20% of his exposure occurred in the 120 months from 1971 – 1980.

Amaca $108/120 \times 55\% \times 20\% = 9.9\%$
 $12/120 \times 50\% \times 20\% = 1.0\%$ 10.90%

Telstra $108/120 \times 45\% \times 20\% = 8.1\%$
 $12/120 \times 50\% \times 20\% = 1.0\%$ 9.1%

5% of his exposure occurred in the 228 months from 1981 – 1998.

Amaca	$120/228 \times 50\% \times 5\% = 1.3\%$	
	$108/228 \times 30\% \times 5\% = 0.7\%$	2.0%

Telstra	$120/228 \times 50\% \times 5\% = 1.3\%$	
	$108/228 \times 70\% \times 5\% = 1.7\%$	3.0%

25. Accordingly the cumulative apportionments are as follows:

Amaca = 63.9%
Telstra = 36.1%

26. I have been asked to appoint a Single Claims Manager. I appoint Amaca.

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David Jay

Contributions Assessor

29 September 2009