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10 January, 1994

Telecommunications Industry Ombudsman  
Ground Floor  
321 Exhibition Street  
MELBOURNE VIC 3000

Dear Mr Smith

"Fast Track" Arbitration Procedure

*TELSTRA REPRESENTATIVE*

I refer to your recent correspondence with ~~me~~ concerning the procedures and timing to apply to the "Fast Track" dispute reviews.

Originally, there was attached to the "Fast Track" agreement a set of detailed draft rules which were being developed for general use in relation to the arbitration of telephone-related disputes. Those draft "standard" rules are referred to in clause 1(b) of the "Fast Track" agreements. The "standard" rules are still being finalised, but they are now relatively close to finalisation.

Telecom has modified a copy of the current draft "standard" rules so as to be specifically suitable for use in relation to the arbitration of the "Fast Track" disputes. The modifications take into account the following:

- the provisions of the "Fast Track" agreements,
- some relevant comments which Austel has recently made concerning the draft "standard" rules, and
- our further views on the rules which should apply to these cases.

A copy of those modified rules is enclosed for your consideration for use in relation to the arbitration of the "Fast Track" disputes.

You no doubt appreciate that there is a need for such rules and procedures to be set before any "Fast Track" review is commenced. That is because the "Fast Track" agreements signed by Mr Schorer, Mrs Garms, Mrs Gillan and Mr Smith, only constitute agreements to enter into an arbitration process. As such, they do not fully document the rules and procedures to be applied to that arbitration process.

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In the absence of agreed rules and procedures, the following problems could arise:

- the reviews could be seen to be unfair if rules or procedures are applied without prior agreement;
- the reviews could be constantly delayed if agreement is sought to set rules or procedures part way through a review; and/or
- the reviews could fail to achieve resolutions which are legally binding if rules which have not been agreed to, are applied.

It is important that the process to agree and adopt a set of rules and procedures be implemented quickly in the light of your planned timetable for the review of the "Fast-Track" disputes. Please be assured that Telecom will provide every assistance in this regard.

I would appreciate being kept informed of any decision made concerning any rules and procedures to be adopted for these reviews.

Yours faithfully

GROUP GENERAL MANAGER  
CUSTOMER AFFAIRS

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TELSTRA CORPORATION LIMITED  
"FAST-TRACK" PROPOSED RULES OF ARBITRATION

Scope of the Procedure

1. This Procedure ("the Procedure") provides arbitration as a final and binding method of resolving the disputes listed in Schedule A ("the Disputes") between the customers listed in Schedule B (jointly and severally "the Claimants") and Telstra Corporation Limited ("Telecom Australia").
2. The Claimants and Telecom Australia will be bound by the Arbitrator's decision, and the Claimants, by accepting the application of the Procedure to the Disputes will be deemed to have waived their respective rights to commence proceedings in any court or other forum in respect of the facts giving rise to the Disputes.
3. Arbitration under the Procedure will be administered independently by the Telecommunications Industry Ombudsman ("the Administrator") and conducted by X ("the Arbitrator").
4. A request for arbitration under the Procedure in respect of a Dispute does not relieve any Claimant from any obligation that Claimant may have to pay Telecom Australia any other amounts which are due and are not part of the Dispute the subject of arbitration.



### Commencement of Arbitration

5. (a) Each Claimant will complete and sign a prescribed request for arbitration form as set out in Schedule C annexed in respect of their Disputes. The form must be completed and returned to the Administrator by the Claimant within X days of receipt of the form by the Claimant.
- (b) On receipt of the duly completed request for arbitration form, the Administrator will immediately forward the application form to Telecom Australia for signature and return within X days. Upon return of the signed request for arbitration form to the Administrator Telecom Australia will become a party to the arbitration.
6. Arbitration commences for the purpose of this Procedure when the Administrator has received and accepted the request for arbitration form signed by the Claimant and Telecom Australia. Upon receipt and acceptance of the signed request for arbitration form the Administrator will dispatch written notice to the Claimant, Telecom Australia and the Arbitrator of that acceptance.

### Arbitration Proceedings

7. Unless the Arbitrator otherwise specifies, the arbitration will be on documents and written submissions only. The Arbitrator may form the opinion that the arbitration requires one or more oral hearings in which event the Arbitrator will advise the parties of a date, time and venue for those hearings. Any oral hearing will not be open to the public nor any other non-parties to the arbitration. In an oral hearing no cross examination of any witnesses is to be allowed.

All written evidence shall be in the form of a statutory declaration. All oral submissions shall be on oath or affirmation. Either party may request a transcript of any oral evidence or submission given at the hearing. The cost of the transcript shall be borne by the party requesting the same.

Subject to any directions of the Arbitrator the Procedure will be as follows:

- (a) The Claimant is required, within X weeks of receipt of notification of acceptance of the request for Arbitration by the Administrator, to send to the Administrator, in duplicate, its Statement of Claim and any written evidence and submissions ("the Claim Documents") in support of that claim. The Statement of Claim shall, with sufficient particularity, state the following:
  - (i) the identity of the Claimant or Claimants;

- (ii) the faults in the telecommunications service which are alleged to have occurred including the dates and periods over which such faults allegedly occurred;
  - (iii) the loss allegedly suffered and particulars of how that loss is calculated.
- (b) A copy of the Claim Documents will immediately be sent by the Administrator to Telecom Australia which is required, within X weeks of receipt of the Claim Documents, to send to the Administrator, in duplicate, Telecom Australia's Statement of Defence, including any counterclaim or set off and any written evidence and submissions ("the Defence Documents") in support of that defence, counterclaim or set off. The Statement of Defence shall, with sufficient particularity state the following:
- (i) Telecom Australia's answers to the allegations referred to in the Statement Claim; and
  - (ii) any affirmative defence which Telecom Australia will seek to rely upon.
- (c) A copy of the Defence Documents will immediately be sent by the Administrator to the Claimant. The Claimant may send to the Administrator within X weeks of receipt of the Defence Documents a defence to any counterclaim made by Telecom Australia and/or a reply to the Statement of Defence together with any supporting documents. Such reply will be restricted to points arising in the Statement of Defence, and may not introduce any new matters, points, or claims.
- (d) At any time after the commencement of the Procedure, either party may request the Arbitrator to require the other party to produce further documentary information and/or particulars of claim or defence. The request for further documentary information and/or particulars by a party must be made in writing to the Arbitrator and must be supported by written reasons for the request which shall state the relevance of that further documentary information and/or particulars to the arbitration. The Arbitrator will consider the request and if the Arbitrator reasonably believes that the further documentary information and/or particulars requested is or are relevant to the arbitration, the Arbitrator will require the other party, by notice in writing, to provide the further documentary information and/or particulars.
- (e) The Arbitrator may, through the Administrator, require by notice in writing, either the Claimant or Telecom Australia to provide any further documentary

information and/or particulars which the Arbitrator reasonably considers would assist the Arbitrator in the Arbitrator's decision.

(f) If the documentary information and/or particulars are supplied within such time as the Arbitrator prescribes under Clause 9(d) and 9(e), then the documentary information and/or particulars shall be copied to the other party to the arbitration by the Administrator on the same basis as the Defence Documents are to be sent to the Claimant under clause 9(c), and the party receiving the copies of the documentary information and/or particulars shall be afforded an opportunity to make submissions in relation to them within such times as the Administrator reasonably prescribes.

(g) If either party does not within X weeks of receiving a notice from the Arbitrator under clause 9(d) and (e), comply with the notice, the Arbitrator shall stay the arbitration until either the notice is complied with or the Arbitrator determines that the party receiving the notice has given a reasonable explanation for non-compliance.

(h) If the Claimant does not furnish the Claim Documents within the time allowed and does not remedy this default within two weeks after dispatch to the Claimant by the Administrator of written notice of that default, the Claimant will be treated as having abandoned the Claimant's claim under the Procedure, and the arbitration will not proceed.

(i) If Telecom Australia does not furnish the Defence Documents within the time allowed and does not remedy this default within X weeks after dispatch to Telecom Australia by the Administrator of written notice of that default, then subject to any directions the Arbitrator may give, the dispute will be decided by the Arbitrator by reference to the Claim Documents only.

(j) Either party, may prior to the expiry of any of the deadlines specified in these Rules, request an extension of time to meet a deadline. No request for an extension made after the expiration of a deadline will be allowed. The other party will be notified of such request and if there is any objection then the Arbitrator will be asked to give directions and the Arbitrator may make such direction as to the grant of further time as the Arbitrator deems appropriate in the circumstances.

(k) The Arbitrator will make an award having regard to the questions of Telecom Australia's liability and questions of loss as set out in this clause 9(k).

(aa) In relation to Telecom's liability, if any, to compensate for any demonstrated loss on the part of the Claimant the Arbitrator will:

(i) give effect to any contractual or statutory limitations on Telecom Australia's legal liability, and any limitations on Telecom Australia's liability to the Customer as determined by Austel pursuant to section 121 of the Telecommunications Act 1991 which limitations may apply in respect of some period or periods of time covered by the Claimant's claims and for that reason in making the findings the Arbitrator will:

(A) determine for the time covered by the claim, the period or periods for which Telecom Australia is not strictly liable or has no obligation to pay and the period or periods for which Telecom Australia is liable and has an obligation to pay;

(B) determine in respect of each such period the amount of loss, if any, incurred by the Claimant;

(C) recommend whether, notwithstanding that in respect of a period or periods that Telecom Australia is not strictly liable or has no obligation to pay, Telecom Australia should, having regard to all the circumstances relevant to the Claimant's claim, pay an amount in respect of such a period or periods and, if so, what amount.

(ii) set off against any amounts found by the Arbitrator to be otherwise owing by Telecom Australia to the Claimants any amounts paid to, rebates granted to, or services carried out for the Claimant by Telecom Australia to date.

(bb) In relation to any assessment as to the Claimant's loss, the Arbitrator:

(i) will take into account the Claim and Defence Documents, sworn written evidence and submissions made by the parties and, if applicable, any sworn or affirmed oral evidence presented to the Arbitrator by the parties to the arbitration;

(ii) will make a finding on reasonable grounds as to the causal link between each of the Claimant's claims and the alleged faults or problems with the relevant telephone service and, as appropriate, may make reasonable inferences based upon such evidence as is

presented by the Claimants and by Telecom Australia (ie. unless the Arbitrator is able to conclude on reasonable grounds that Telecom caused the loss claimed, there will exist no basis for a claim against Telecom.)

- (iii) apply normal Australian accounting standards as applicable at the time of the claimed loss and the rules of evidence relating to causation and assessment of loss.
- (l) The award made by the Arbitrator shall be compensatory only and not of a punitive nature.
- (m) The Arbitrator's reasons will be set out in full in writing and referred to the Arbitrator's award.
- (n) The parties shall not comment publicly on the conduct of the arbitration proceedings at any time after the commencement of the arbitration. The Arbitrator shall suspend, dismiss or otherwise refuse to deal with the arbitration proceedings in the event that the Claimant contravenes this rule.
- (o) Subject to Clause 9(p), confidential information relevant to the arbitration including the Claim and Defence Documents ("Confidential Information") shall not be disclosed by any party to the arbitration. The Arbitrator shall suspend, dismiss or otherwise refuse to deal with the arbitration proceedings in the event that any party contravenes this rule.
- (p) The following is not Confidential Information for the purposes of clause 9(o):
  - (i) information which at the time of disclosure to a party to arbitration is in the public domain.
  - (ii) information which, after disclosure to a party to the arbitration, becomes part of the public domain otherwise than as a result of the wrongful act of the party to whom the information was disclosed.
  - (iii) information which was received from a third party, provided that it was not acquired directly or indirectly by that third party from a party to the arbitration.
- (q) The Administrator will publish the Arbitrator's award by sending copies of the award to each of the parties to the arbitration. The Arbitrator's award shall be kept strictly confidential by the Administrator, the Arbitrator and all of the parties to the arbitration. Telecom Australia has submitted to the arbitration in consideration



of the conduct of the Procedure, the Confidential Information and the Arbitrator's award being kept strictly confidential by the Claimant. Any disclosure of the conduct of the Procedure, the Confidential Information or the Arbitrator's award by the Claimant will render any obligation of Telecom Australia to pay any sum to the Claimant null and void. Any payment already made by Telecom Australia to the Claimants pursuant to the Arbitrator's award under these rules shall be wholly and immediately refundable by the Claimant to Telecom Australia as liquidated damages in the event of a breach of the obligation of confidence owed by the Claimant to Telecom Australia pursuant to the rules embodied in the Procedure.

- (r) Telecom commits in advance to implementing any recommendation made by the arbitrator pursuant to clause 9(k)(aa)(i)(C).
- (s) Subject to clause 9(q) and unless directed otherwise in the Arbitrator's award or the parties otherwise agree, within three weeks of dispatch to the parties of the Arbitrator's award, payment shall be made of any monies directed by the award to be paid. Such payment shall be made by the party liable direct to the party entitled, and not through the Administrator. If the Arbitrator determines in respect of a Claimant's claim an amount less than that paid under an earlier settlement, Telecom agrees not to recover the difference.
- (t) If either party has sent original or copy documents in support of its case to the Administrator that party may within six weeks of publication of the award request the return of those documents. Subject to that, case papers will be retained by the Administrator and may in due course be disposed of in accordance with the Administrator's policies from time to time.
- (u) The Arbitrator and Administrator shall conduct and progress the arbitration as quickly as justice to all the parties reasonably permits.

#### Costs

- 9.- The Arbitrator's fees and expenses shall be paid by the Administrator and are part of the administrative costs of the Procedure.
- 10. The administrative costs of the Procedure are subject to a separate agreement between the Administrator and Telecom Australia.
- 11. Each party bears its own costs of preparing and submitting its case.

**Liability of Administrator and Arbitrator**

12. Neither the Administrator nor the Arbitrator shall be liable to any party for any act or omission in connection with any arbitration conducted under these Rules save that the Arbitrator (but not the Administrator) shall be liable for any conscious or deliberate wrongdoing on the Arbitrator's own part.

## Schedule A

("the Disputes")

- (a) In respect of each of the Claimants other than Graham Schorer (+ other related claimants):
- (i) the liability of Telecom Australia to the Claimant in respect of alleged faults in the provision to the Claimant of telecommunication services;
  - (ii) the adequacy of the amounts paid by Telecom to the Claimant under earlier settlements in relation to alleged faults in the provision to the Claimant of telecommunication services;
  - (iii) the liability of Telecom Australia to the Claimant in respect of alleged faults in the provision to the Claimant of telecommunication services since the date of the settlement payment for the respective Claimant's earlier claims, up to the date of the Arbitrator's decision;
  - (iv) If Telecom Australia is found liable in accordance with (i) or (iii) above, the quantum of compensation payable by Telecom Australia to the Claimant for the Claimant's proven loss.
- (b) In respect of Graham Schorer (+ other related claimants):
- (i) the liability of Telecom Australia to Graham Schorer (+ other related claimants) in respect of alleged faults in the provision to Graham Schorer (+ other related claimants) of telecommunication services;
  - (ii) If Telecom Australia is found liable in accordance with (i) above, the quantum of compensation payable by Telecom Australia to Graham Schorer (+ other related claimants) for Graham Schorer's (+ other related claimants) proven loss.

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