Facsimile

File COT Cases Fast Track

Telecon AUSTRALIA

To	David Krasnostein	From	Simon Chalmers
Facsimile	42358		
Company	Telecom		
Location		File	
		Date	22 March 1994
		Total Pages	3
Distrib.	Steve Black		

Commercial & Consumer

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242 Exhibition Street
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Fast Track Arbitration Procedure

Dear David

I enclose minutes of our meeting with the TIO and the arbitrator earlier today.

Simon Chalmers.

Simon Chalmers

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MEETING TO DISCUSS FAST TRACK RULES OF ARBITRATION

Date: 22 March 1994
Attendees: Steve Black, David Krasnostein, Simon Chalmers, Peter Bartlett, Gordon Hughes, Warwick Smith, Jenny Henright??

Mr Bartlett stated that he agreed with the majority of the changes in Telecom's amended rules, however he did not agree with the provisions set out below.

1. **Confidentiality**

Mr Bartlett stated that he thought the confidentiality clauses in Telecom's amended rules were not consistent with the Fast Track Settlement Proposal. He stated that Mr Archibald QC's advice was that the clause proposed by Telecom was "not inconsistent with the Fast Track Settlement Proposal", which is different to the clause being consistent with the Fast Track Settlement Proposal.

Dr Hughes only commented to the effect that the differences between the confidentiality clauses in Telecom's amended rules and Mr Bartlett's earlier proposed rules were material.

Mr Krasnostein stated that in the circumstances of conversations which Telecom had had with some of the claimants, and given their conduct leading up to entering into the arbitration process, the confidentiality provisions set out in Telecom's amended rules were justified.

Mr Smith stated that he thought it was fair to include wider confidentiality clauses in the rules than those expressly set out in the Fast Track Settlement Proposal. He stated that the confidentiality clauses in Mr Bartlett's earlier proposed rules appeared fair.

2. **Establishing a Causal Link**

Mr Bartlett stated that he thought the removal of the words "on reasonable grounds" from the phrase "will make a finding as to the causal link" appearing in clause 10.2.2 of Telecom's amended rules was not fair because it did not reflect the wording of the Fast Track Settlement Proposal. He said that Mr Archibald's advice did not cover this key clause of Telecom's amended rules. He acknowledged that neither he nor Mr Smith had been given access to correspondence leading up to the formation of the Fast Track Settlement Proposal.

Dr Hughes stated his view that the inclusion of these words would not make 'a jot of difference' to the outcome of the arbitration. He said that in giving effect to the words "on reasonable grounds" in this context, he would apply normal rules of law as that was the proper basis for his decision being on reasonable grounds.

Mr Smith stated that he would not endorse the rules as fair unless clause 10.2.2 repeated clause 2(f) of the Fast Track Settlement Proposal, and in particular that the words "on reasonable grounds" were inserted in the phrase "will make a finding as to the causal link". He asked Telecom to have regard to the assurances given by

Dr Hughes as to how he would make a determination in relation to causal link based on "reasonable grounds".

3. **Punitive Damages**

Mr Bartlett stated that in his view punitive damages would not be recoverable under his earlier proposed rules.

Dr Hughes did not expressly state a position on this matter when it was raised, however he did subsequently say that none of the changes set out in Telecom's amended rules other than the amended confidentiality provisions, would make 'a jot of difference' to the outcome of the arbitration.

Mr Smith stated that in his view Telecom would not be disadvantaged by agreeing to arbitration without Telecom's new clause 10.3. He also subsequently commented generally that Telecom should have regard to the assurances given by Dr Hughes as to how he viewed the effect of the amendments.

6. **Exclusion of Liability for Arbitrator's Advisers**

Mr Bartlett stated that he was unhappy that Telecom did not appear prepared to allow his firm an exclusion from liability.

Dr Hughes stated that the resource unit was also not satisfied with a capped liability, but that he did not have a position in relation to this matter as it did not affect him or the performance of his functions.

Mr Smith stated that he thought it was reasonable for the advisers to incur some liability, and that the only matter left to be negotiated on this issue was the quantum of the liability caps.

Mr Black said that he thought the liability caps proposed by Telecom in the amended rules were already reasonable.

It was agreed that Mr Bartlett would produce a re-drafted set of rules which Mr Smith and Mr Bartlett would agree was fair. It was further agreed that the likelihood of negotiating an agreement as to the form of the rules which was acceptable to all parties, was small. Mr Smith indicated that he proposed to have the re-drafted rules simply put to both Telecom and the four COT Claimants for signature.

Hunt & Hunt
LAWYERS

12 April 1994

Our Ref: GIII
Matter No:
Your Ref:

BY FACSIMILE: 617 4666

Mr Peter Bartlett
Messrs Minter Ellison Morris Fletcher
Solicitors
40 Market Street
Melbourne VIC 3000

Dear Peter

COT MATTERS

On 11 April I met with John Selak and John Rundell of Ferrier Hodgson to discuss the impact of the latest draft of the "Fast-Track" Arbitration Procedure on the Resource Unit.

They made the following points:

(a) in relation to clause 8.1, services will in fact be provided by Ferrier Hodgson Corporate Advisory (Vic) Pty Ltd, not Ferrier Hodgson Chartered Accountants. Either the name should be substituted or the words "(incorporating Ferrier Hodgson Corporate Advisory (Vic) Pty Ltd)" should be inserted in the third line after the words "Chartered Accountants";

(b) also in relation to clause 8.1, technical input will be provided by DMR Inc, not DMR Group Australia Pty Ltd. DMR wishes this substitution to be made;

(c) the above changes should be reiterated in clauses 25 and 26 as presently drafted;

(d) further in relation to clauses 25 and 26, both Ferrier Hodgson Corporate Advisory and DMR Inc are concerned about their potential liability. As the clauses presently read, they would be liable to a maximum of $250,000.00 per claim. This is likely to significantly exceed their professional fees in relation to each claim. Ferrier Hodgson's preference (and also the preference of DMR)

Melbourne
Sydney
Canberra
Adelaide
Perth

would be for a total exclusion of liability but, failing that, they would accept a lower cap more commensurate with their anticipated fees;

(a) In relation to the Confidentiality Agreement appended as Schedule E, Mr Selak and Mr Rundell believe reference should be made to the Administrator in clause 2. They would also prefer a single undertaking to be executed by Ferrier Hodgson Corporate Advisory (and another by DMR Inc) rather than by the various individuals within the organisation. They would remain vicariously liable for breaches by their employees.

I appreciate that one claimant has already executed the agreement in its current form. The others will no doubt be pressed to do likewise over the next few days. I further appreciate you will be reluctant to introduce additional changes to the draft procedure at this delicate stage of negotiations but it is of course also fundamental that account be taken of the concerns raised by members of the Resource Unit. Perhaps the agreement should be executed in the current form and then agreement sought from the parties to vary the terms to take into account any proposals by Ferrier Hodgson or DMR which you agree are reasonable.

Could I suggest that you liaise direct with Mr Selak or Mr Rundell about these concerns? Perhaps they could also speak direct to Warwick Smith.

Yours sincerely

GORDON [illegible]

cc W Smith
J Selak, J Rundell

[illegible]

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APR 13 '94 01:24PM
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13/04/94 12:26

Hunt & Hunt
LAWYERS

FACSIMILE TRANSMISSION

Our Ref: GLH
Matter No:

Date: 19 April 1994

To: MR GOLDBERG

Fax No: 670 8389

From: CAROLINE FRIEND

Subject: TIO ARBITRATION

Further to my telephone discussion with Mr. Graham Schorer of todays date, please find attached "Fast Track" Arbitration Procedure as of 31st March 1994 for your attention.

Yours faithfully
HUNT & HUNT

Att.

We are transmitting 20 (twenty) pages (including this cover sheet). If you have problems with this transmission call

Level 21, 459 Collins Street, Melbourne 3000, Australia. Telephone: (61-3) 614 8711.
Facsimile: (61-3) 614 8730. G.P.O. Box 1333N, Melbourne 3001. DX 252, Melbourne.

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Mr Paul Rumble
National Manager-Customer Response Unit
Telecom Australia
Level 8
242 Exhibition Street
Melbourne Victoria 3000

by being delivered by hand or sent by prepaid mail.

Liability of Administrator and Arbitrator

24. 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.

25. The liability of Ferrier Hodgson and the partners and employees of Ferrier Hodgson for any act or omission in connection with any arbitration conducted under these rules (other than in relation to a breach of their confidentiality obligations) shall be limited to $250,000 jointly.

26. The liability of DMR Group Australia Pty Ltd and the directors and employees of DMR Group Australia Pty Ltd for any act or omission in connection with any arbitration conducted under these rules (other than in relation to a breach of their confidentiality obligations) shall be limited to $250,000 jointly.

Return of Documents after Arbitration

27. Within 6 weeks of publication of the Arbitrator's award, all documents received under this Procedure by the parties the Administrator, the Resource Unit and/or the Arbitrator and all copies thereof, shall be returned to the party who lodged such documents.

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Mr Paul Rumble
National Manager-Customer Response Unit
Telecom Australia
Level 8
242 Exhibition Street
Melbourne Victoria 3000

by being delivered by hand or sent by prepaid mail.

Liability of Administrator and Arbitrator

24. Neither the Administrator, the Arbitrator, the Special Counsel, a partner or employee of the legal firm of which the Special Counsel is a partner, a member of the Resources Unit, Ferrier Hodgson or a partner or employee of Ferrier Hodgson, DMR Group Australia Pty. Ltd. or a Director or employee of DMR Group Australia Pty. Ltd. shall be liable to any party for an act or omission in connection with any arbitration conducted under these Rules or involved in the preparation of 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.

Return of Documents after Arbitration

25. Within 6 weeks of publication of the Arbitrator's award, all documents received under this Procedure by the parties the Administrator, the Resource Unit and/or the Arbitrator and all copies thereof, shall be returned to the party who lodged such documents.

Conflict of Rules

26. In the event of any inconsistency between these rules and the provisions of the Act, these rules shall prevail to the extent of that inconsistency.

Steve Black

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"FAST-TRACK" ARBITRATION PROCEDURE

Scope of the Procedure

1. This Procedure ("the Procedure") provides arbitration pursuant to the Commercial Arbitration Act 1984 (Victoria), as amended, ("the Act") as a final and binding method of resolving the disputes listed in Schedule A ("the Disputes") between the customer named in Schedule B ("the Claimant") and Telstra Corporation Limited ("Telecom Australia").

2. The Claimant and Telecom Australia will be bound by the Arbitrator's decision, and the Claimant, by accepting the application of the Procedure to the Disputes, subject to the Appeal provisions of the Act, will be deemed to have waived all rights to commence proceedings in any court or other forum in respect of the facts giving rise to the Disputes or the Disputes themselves.

3. Arbitration under the Procedure will be administered independently by the Telecommunications Industry Ombudsman of 321 Exhibition Street, Melbourne ("the Administrator") and conducted by Dr Gordon Hughes C/- Hunt & Hunt, Solicitors, 21st floor, 459 Collins Street, Melbourne, 3000 ("the Arbitrator").

4. A request for arbitration under the Procedure in respect of the Disputes does not relieve the Claimant from any obligation the Claimant may have to pay Telecom Australia any other amounts which are due and are not part of the Disputes the subject of this arbitration.

Commencement of Arbitration

5. Each party shall complete and sign a Request for Arbitration form as set out in Schedule C in respect of the

David,
Relevant correspondence
as discussed yesterday (Monday).
Simon.

Telecom AUSTRALIA

23 February 1994

COMMERCIAL AND CONSUMER
CUSTOMER AFFAIRS

37/242 EXHIBITION STREET
MELBOURNE
VICTORIA 3000
Australia

Telephone (03) 632 7700
Facsimile (03) 632 3241

Mr Gordon Hughes
Hunt & Hunt
Level 21
459 Collins Street
MELBOURNE VIC 3000

Dear Mr Hughes

"Fast Track" Arbitration Procedure

I refer to your letter dated 21 February 1994 setting out your recommended amendments to the proposed procedure.

Subject to the following amendments and our agreement to the final wording of the procedure, Telecom is prepared to submit to the proposed procedure in respect of the "Fast Track" claims.

Clause 6

In relation to Ferrier Hodgson's suggestion that they be permitted as of right to be present at an oral hearing, if this suggestion is accepted then Telecom would also require its accountants to be present at such hearings. In the normal course of Telecom's business, accounting issues would be addressed by qualified accountants and therefore it is appropriate that, if Ferrier Hodgson are to be present to deal with accounting matters, then Telecom's accountants should also be present.

Clause 8

In relation to Ferrier Hodgson's suggested rewording of clause 8.2, the parties should retain the right to be able to make submissions in relation to any evidence considered at any inspection, and any findings of fact arising out of an inspection or other enquiry reached by the Resource Unit, and the wording of the clause should reflect this.

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Clause 9

Telecom agrees to your recommendation on the understanding that findings of fact will only be considered common between the cases with the agreement of all the parties concerned. However, Telecom reiterates that the disputes are independent and concern different customers operating different telephone equipment from different parts of the telephone network, and running different businesses. It is considered unlikely that findings of fact will be common between any of the cases.

Clause 10

(a) Telecom agrees to the insertion of a reference to Clause 2(g) of the Fast Track Settlement proposal in the opening lines of Clause 10, conditional on a reference to Clause 2(f) also being included in that clause.

(b) In respect of Clause 10.2.2, Telecom notes that this clause does not fully reflect Clause 2(f) of the Fast Track Settlement Proposal as the COT claimants have suggested. The words "unless the assessor is able to conclude that Telecom caused the loss claimed there will exist no basis for a claim against Telecom" should be inserted in Clause 10.2.2.

Clause 2(f) of the Fast Track Settlement Proposal was intended by the parties to evidence an agrement that the standard of proof for determining the extent of call loss would be based on reasonable inferences drawn from the existing evidence. Telecom agreed with the COT claimants that, because not all call losses and other problems reported by the claimants are documented, they should not have to be put to strict proof of each and every call loss. However, clause 2(f) does not imply, and Telecom did not agree that any relaxation of other general principles of law (including causation) would apply. This position is supported by Austel and the surrounding correspondence. In order to clarify this, clause 10.2.2 should be amended to reflect the above position.

(c) In respect of Clause 10.2.3, I would appreciate your advice on what standards you intend to apply in relation to the arbitrations if this Clause is omitted.

In Telecom's view, generally accepted accounting principles, Australian accounting standards (to the extent they are applicable) and general principles of law (other than in relation to the issue of burden of proof as discussed above) must apply. Accordingly clause 10.2.3 should either be amended to reflect the parties' agreement in relation to burden of proof as discussed in this letter, or incorporated with clause 10.2.2.

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Clauses 16 and 17

I note that the objection to Clause 16 has been withdrawn and no side agreement with Mr Bartlett or the arbitrator is proposed. Confidentiality is an essential requirement of the arbitrations. In order to ensure confidentiality is maintained, Telecom requires the following amendments to be made:

(a) The words ", existence or subject matter" added after the word "conduct" in line 2 of Clause 16; and

(b) The words "and any other documents provided in, or oral evidence given in, the arbitrations by either party" added after the word "Documents" in line 3 of Clause 17.

Clause 24

Telecom is of the view that Special Counsel and the Resource Unit should be accountable for any negligence on their part in relation to the arbitration process, given that these parties are acting in their capacity as experts. Therefore, this clause should not be amended so as to include an exclusion from liability for Special Counsel and the Resource Unit.

Yours sincerely

Steve Black
GROUP GENERAL MANAGER
CUSTOMER AFFAIRS

File note

Telecom Arbitration

Date: 18 February 1994

Matter no: 1673136

On 17 February 1994, between the hours of 9:00 a.m. and 1:00 p.m., I attended the offices of Hunt & Hunt for the purpose of having a discussion in relation to the arbitration rules prepared by Hunt & Hunt (the "Rules").

The meeting started at 9:30 a.m. and in attendance were Gordon Hughes, Peter Bartlett, Ann Garms, Graham Schorer and myself.

Record of Meeting

Ann Garms started by attempting to read from a letter by R Davey (Austel) but was interrupted.

The history of the negotiations leading up to the fast track settlement procedure ("FTSP") was discussed.

Ms Garms stated that all the Cot Claimants wanted was a commercial settlement of the matter, not an arbitration. The FTSP came out of a proposal put by Mr Schorer to John Holmes and I Campbell.

Mr Schorer stated that the Cot Cases had wanted a loss assessor and not an assessment procedure prone to "fine print". The proposal put forward by the Cot Cases was not backed by Telecom and subsequently negotiations got off the rails. Then the Austel investigation began and the media became involved. R Davey acted as a facilitator between Telecom and the Cot Cases. Previously, a draft agreement had been put to the Cot Cases which Telecom had stated would not be changed (which turned out to be incorrect).

The FTSP came out of several meetings and was put forward by R Davey.

Mr Schorer and Ms Garms agreed that the FTSP was the agreed way to resolve the dispute between Telecom and the Cot Cases.

Mr Schorer advocated that instead of having a claim, a break and then a defence being filed, both parties ie. the Cot Case and Telecom should do their presentation at the same time to the assessor. Mr Schorer did not like the arbitration procedure and the procedure he advocated was consistent with his understanding of the FTSP.

It should be noted that the FTSP does not refer to an arbitrator but an "assessor".

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Mr Hughes expressed his view that the powers of an arbitrator under the Commercial Arbitration Act made an arbitration a more effective way of determining the issues in dispute between the parties.

Mr Hughes stated the problems with an "assessor" were that it was a toothless position and that he was not convinced that it could guarantee the result as either party could withdraw or would not be bound by the result.

Mr Schorer asked if he could pull out of an "assessment" during the process if he did not like the way it was going. Mr Hughes and Mr Bartlett advised that this was not the case as he was contractually bound by whatever the terms of the assessment were.

Mr Hughes stated that an arbitrator had more powers and considering the current facts surrounding the Cot Cases ie. suspicions and the long period of antagonistic negotiations, the adjudicating party would need powers to ensure that all material relevant for the decision was obtained.

Mr Bartlett stated that Telecom and the Cot Cases wanted a method of resolution as a final settlement of the problem - no right of appeal, no resource to the Courts.

Ms Garms agreed with this conclusion.

Mr Schorer stated that he needed documents from Telecom to prepare his case and without this material, he could not go to arbitration. Mr Schorer had raised the issue of documents with Austel and was unsatisfied with Telecom's response.

Mr Schorer stated that there was nothing in the Rules which provided that the Cot Cases were to get the relevant documents. Mr Schorer was disappointed at this stage that since 18 November 1993 2 of the Cot Cases did not have any documents.

Mr Bartlett stated that this was a reason for starting the arbitration as the arbitrator could order the production of documents.

Mr Hughes stated that he was aware of the dispute between the parties but did not have any idea as to the nature and indicated that from this point in time, there were two ways to proceed in relation to the problem of outstanding documents:

(1) the procedure is put on hold until all the documents are exchanged in accordance with the FOI procedure; or

(2) the arbitration procedure commences and then the arbitrator gives appropriate directions for the production of documents.

Mr Hughes indicated that one party can ask for documents once the arbitration has commenced. Mr Hughes advocated this course of action as more effective and that as arbitrator, he would not make a determination on incomplete information.

Mr Schorer asked Mr Bartlett why the FOI law was not as broad as the discovery procedure.

Mr Bartlett did not answer this question directly but confirmed that he believed it was wider and that documents would not be partially deleted as was claimed by Mr Schorer.

Ms Garms stated she had three concerns about the Rules as drafted:

(1) causal link;

(2) flow on effects of treatment by Telecom - adequately compensated; and

(3) Telecom's liability amended to give assessor the right to make recommendations.

Causal Link

In relation to this matter, Ms Garms stated that it was agreed that there would not be a strict application of legal burdens of proof, etc., in relation to the proving of the loss suffered by the Cot Claimants. Reference was made to discussions with Ian Campbell and two Senators. Ian Campbell admitted that Telecom had been remiss. Ms Garms stated that Telecom was in a difficult position and queried the current drafting of the Rules in relation to a requirement that the strict causal approach be applied.

Mr Schorer stated that Telecom was in a difficult position because a lot of the relevant documents either did not exist or had been destroyed.

Mr Bartlett referred to clause 2(c), (f), and (g) of the FTSP in relation to the causal connection. Ms Garms had received advice from R Davey that there was a difference between the FTSP and the old rules that had previously been prepared by Telecom, (not the Hunt & Hunt Rules).

Mr Schorer accepted that W Smith had been appointed as administrator. W Smith had invited the Cot Cases to talk to the TIO and had requested input in relation to the rules beforehand. Mr Schorer was disturbed that once Mr W Smith was in place, there was a document prepared by Telecom of proposed rules for the arbitration. Mr Schorer considered Telecom was already moving away from the spirit of the FTSP.

Mr Bartlett and Mr Hughes both stated that they had not received this document and had not read it and that it was irrelevant.

Ms Garms returned to discussion about causation which was her point no. 1.

She stated that clause 10.2.3 was not consistent with the FTSP.

Mr Schorer agreed with this and stated that "accepted legal principles" were narrower than the "reasonable burden" that had previously been discussed between R Davey and himself. Mr Schorer believed that R Davey had said that the "assessor" would look at the whole history and would base his decision on reasonable evidence.

Mr Hughes queried whether clause 10.2.3 was deleted, this would reflect what the Cot Cases believed was the result in relation to the issue of causation.

Mr Schorer stated that he did not like all of clause 10.2.3, not just the reference to accepted legal principles.

Ms Garms stated that she had spoken to R Davey re causation and that R Davey should contact Mr Hughes to explain what was agreed in relation to the causation issue.

Mr Schorer referred to Lovey's Restaurant by way of example of the problem when one party alleges that telephone calls did not come through, how it is necessary in relation to a legal burden to prove the loss from each telephone call.

Mr Bartlett asked how would the assessor be expected to calculate the quantum of the claim?

Mr Schorer replied there were several ways, for example the arbitrator could:

(1) look at the incoming and outgoing calls and the volume of the business and look at the background to the business; or

(2) look at similar businesses and breakdown of calls coming in and look at the positioning in the market etc. of the business.

Mr Hughes said that he would consider the Cot Cases position on the causation issue at a later time.

Clause 2.C

Ms Garms states that the Rules should be amended particularly schedule A to reflect clause 2.C of the FTSP which seemed to relate to her claim that the assessment of the damage suffered by the claimants should include "flow on" losses, including pain and suffering, etc.

Ms Garms stated that if Telecom had taken different action in relation to the settlement of this matter Ms Garms would have adopted a different approach and subsequently damage would have been reduced.

Mr Schorer stated that if the past treatment or lack of processes or behaviour by Telecom had caused further losses beyond the mere business losses relating to the faulty telephone services, then they should be assessed.

Mr Schorer agreed that what he was trying to say was that if the "flow on losses" due to the past relationship between Telecom and the claims were proved to be caused by Telecom's behaviour then the arbitrator could decide that they should be compensated.

Mr Bartlett referred to Schedule A(3) of the Rules.

Mr Hughes suggested that if paragraph 2(c) of the FTSP was inserted in the Schedule then it would remedy the Rules in relation to the flow on losses.

Mr Schorer queried whether the assessor's role was only to establish the legal liability and quantum, whatever the cause of action, not just the quantum in torts but the total liability including other causes of action.

Mr Hughes stated that the clause 10.1.1 did not limit Telecom's liability to Telecommunications Act and it was queried whether it would be appropriate to insert in clause 10.1 after the expression "liability" the phrase "in the procedure".

Ms Garms stated that previously Telecom had pleaded that Telecommunications Act in defence to the actions by the Cot Cases.

Mr Hughes stated that Telecom is in a position to plead the Act.

Ms Garms queried whether because of the history of the complaint whether Telecom was entitled to rely on the exemption as its defence.

Mr Bartlett and Mr Hughes stated that the arbitrator could make an order notwithstanding the fact that statutory liability would prevent the award of damages.

Mr Hughes suggested that the word "demonstrated" in clause 10 should be deleted and that clause 10 should incorporate paragraph 2(g) of the FTSP.

Both Mr Bartlett and Mr Hughes were to review the Rules.

Mr Schorer referred to clause 11 of the Rules and stated that he did not like it.

Mr Hughes stated that "compensatory" referred to actual loss where "punitive" implies some form of punishment of the guilty party. Mr Hughes stated that in determining the amount payable by Telecom, it was the loss suffered that was relevant, not the fact that Telecom's behaviour was deserving of punishment.

Ms Garms stated that the manner in which things have been conducted in the past was relevant to the quantification of the loss. Ms Garms stated that her problems went back to 1984. Ms Garms referred to the fact that her husband could no longer work and suffered from agoraphobia, has panic attacks, is withdrawn and unhappy.

Ms Garms stated that Telecom knew of her anxiety in relation to her husband's behaviour and asked how his personal claim would be dealt with.

Mr Bartlett referred to "losses" and the FTSP.

Mr Schorer said that there should be an ability in the arbitration to add to the liability and that "loss" was not just to be based on trading documents. He had raised this question with R Davey who had replied that "loss" was the widest possible term and it would cover things like pain and suffering.

R Davey gave verbal advice. Telecom was not present during this meeting.

Mr Bartlett stated that the Rules and that the FTSP was focused on "compensation" and that the actual loss that was to be compensated would include the monetary loss plus any other loss capable of compensation.

Mr Bartlett stated that compensatory damages and not punitive damages were appropriate.

Ms Garms stated that she wanted the full loss that was proved to be compensated and not just commercial loss.

Paragraph 2(c) of the FTSP was referred to.

Mr Hughes advised that "punitive" damages should not be payable by Telecom.

Mr Hughes advised them that "compensatory" was the appropriate measure and it would be a matter for the arbitrator what amount of loss should be recovered.

Ms Garms stated that R Davey, after she had expressed her dissatisfaction with her previous treatment and that she was not happy with the settlement, etc. and that these matters should be taken into account in determining the "loss".

Mr Hughes advised that what loss was compensated by the FTSP was open to argument.

Mr Schorer referred to a letter of understanding that was sent to R Davey.

R Davey had rung up Mr Schorer about the letter of understanding.

Mr Schorer admitted that he was stuck with the FTSP.

Mr Schorer stated that J McMahon had also been present in the room when R Davey had referred to the question of loss.

R Davey had asked whether he should send the "letter of understanding" to Telecom and had objected to the use of a tape recorder.

Mr Bartlett stated that any loss claimed should be set out in the points of claim document and evidence should be given if the word "losses" was meant to be wider than monetary losses.

Ms Garms stated that she had trusted R Davey and that the assessment of the losses were up to the assessor.

Mr Hughes stated that it was his opinion that this matter should be left to the arbitration at which time he would hear submissions on the meaning on the word "losses" in the arbitration procedure and at that point he would make his determination as to what sort of losses would be compensated by Telecom.

Mr Schorer again referred to the fact that he had considered a joint presentation would be more appropriate.

Mr Bartlett confirmed that he believed a joint presentation would be unhelpful as Telecom would not have an appreciation of the Cot Claimants' claims.

Mr Bartlett stated that the proposed procedure would be faster than the method proposed by Mr Schorer.

Mr Schorer stated that the current procedure as proposed takes the onus off the plaintiff and the procedure should accept that losses have occurred.

Mr Hughes stated that as arbitrator, he must have all relevant information that after he received the claim, he would look at Telecom's defence and look at what other evidence he needed to satisfy himself that he had everything.

Ms Garms stated that to date, the procedure of the dispute had been long and drawn out and that Telecom knew the substance of the claimants' defence and that she wanted the time frames shortened.

Mr Hughes stated that he would be happy to reconsider the time frames issue after submission.

Ms Garms referred to a letter where it was stated that these matters were to be settled by the end of April.

Ms Garms requested an explanation of the Commercial Arbitration Act 1984.

Mr Bartlett and Mr Hughes agreed that Mr Bartlett would send to Ms Garms Queensland legal advisers a copy of the Victorian Commercial Arbitration Act.

Mr Schorer was still unhappy with the structure of the procedure on the basis that Telecom knew what everything was about and therefore he would be unhappy for any departure from the joint presentation method that was discussed with him prior to signing the settlement.

Mr Hughes said that he disagreed with the method proposed by Mr Schorer and that it would be appropriate to have a claim document and then a defence document filed.

Ms Garms referred to the fact that she had attempted to contact Coopers & Lybrand and they had advised her that she was no longer to approach them for documents and that it was appropriate for her to go to Telecom and not Coopers & Lybrand.

Mr Schorer put forward a proposition of the compromise in relation to the joint presentation but Mr Hughes confirmed that a claimant can always come back and reply to the loss submissions of the other party considered appropriate by the arbitrator.

Mr Hughes asked when Ms Garms and Mr Schorer would be in a position to file claim documents.

Ms Garms stated that she needed documents that were currently being sought through an FOI application but that she was currently preparing her claim.

Mr Hughes indicated that he would be happy to receive documentation and a letter explaining her claim and a letter from Telecom broadly stating its claim and documents dealing with it and then he would meet with Mr Bartlett and discuss the appropriate time frame.

Ms Garms stated that she was putting together her claim and that she had written to Telecom re the Bell Canada and Cooper & Lybrand reports. Ian Campbell had promised that Telecom would give Telecom's response to the reports and further testing results to her. Telecom had not complied with this.

Mr Schorer indicated that he would not start the arbitration until he had the full documents and that was his present position.

Mr Hughes argued that once the procedure was up and running, it would be easier for him to obtain documents.

Mr Schorer was emphatic that he would not waive any rights in relation to documents that could be obtained under the FOI request if they were obtained in the litigation by way of "discovery".

Mr Schorer reiterated that he would not waive his rights.

Mr Bartlett queried the effect of the confidentiality of the arbitration in relation to this stance.

Mr Schorer argued that Telecom had been playing ducks and drakes in relation to the FOI application and that he had no intention to sell himself "down the river".

Mr Schorer stated that Telecom was denying access to documents to cover documents by the arbitration.

Ms Garms stated that Telecom had made concessions in relation to its statutory liability and that there should be a sense of give and take between itself and the Cot Cases.

Mr Schorer maintained its position that he should not waive his rights in relation to any documents he got under the arbitration which should have been provided by Telecom under the FOI application.

Mr Bartlett indicated that it would be difficult if after the submissions were made by the claimants and Telecom, if the matter was then debated in the press.

I stated that the request for confidentiality was fundamental to the arbitration although I have no instructions expressly in relation to the particular clauses.

Ms Garms stated that there was a lot of anger in the Cot Claimants which had been enhanced by Telecom's reluctance to provide the documents under the FOI application which had not been dealt with in a businesslike manner.

Mr Schorer maintained that he would not weaken his position as he considers himself in total conflict with Telecom until the matter was resolved.

Mr Schorer stated that both parties were not fully co-operating and it was like pulling teeth and that he was not going to weaken his position and that he was not going to give away anything as to what his concerns were but he would not give away his rights under the FOI Act. There were allusions to the fact that Mr Schorer believed he would discover incriminating things against Telecom that would give him further rights to be compensated.

Mr Schorer stated that if Telecom had acted in a reasonable manner he would have all the relevant documents and the documents would be his documents and any document obtained under FOI would be available to be used later and he was not going to remain silent on certain information for example, police tapping.

Mr Schorer stated that he believed Telecom had engaged in industrial espionage and he would not remain silent in relation to documents evidencing this.

Bartlett indicated that in relation to a Court proceeding, if documents were used for other :poses than the actual proceeding, it would be contempt.

r Bartlett stated that if the evidence indicated illegal tapping and unfair means had been used en there may be some "moral" duty on the party to go forward.

again confirmed the essential nature of confidentiality.

Ms Garms stated that she believed that from her sources a senate inquiry was definitely going to ıappen in relation to the telephone bugging.

Mr Schorer would not elaborate on his concern any further.

Mr Bartlett indicated that there may be a duty to disclose to the police criminal matters.

As there seemed to be a stumbling block in relation to this clause, Mr Schorer and Mr Bartlett went out of the room to draft a particular clause for him.

Ms Garms advised in Mr Schorer's absence that Mr Schorer's strained mental state was because of his rather tragic life which included his wife leaving him and a car accident subsequently that rendered one of his sons, now approximately 22-23 years old, a quadriplegic. Ms Garms stated that Mr Schorer's related anxiety was his family.

Mr Bartlett and Mr Schorer returned into the room and put forward the following proposal which was that:

> "If Mr Schorer believes that he should go to public in relation to a particular document or information, then he would ask Mr Bartlett and provide Mr Bartlett with reasons as to why he should go public, if Mr Bartlett says no, then Mr Schorer has a right of appeal to Mr Hughes whose determination will be absolutely final."

Mr Bartlett was asked as to what criteria he would apply and indicated that going to the press would have to "sit together" with the integrity and neutral position of himself and the arbitrator and the paramount concern of the arbitration being that the integrity of the fast track procedure should be maintained.

Ms Garms indicated that she would not require such a clause in relation to her and that she would not go to the press as she considered the arbitration procedure would be a final binding resolution of her dispute with Telecom. It appeared that Ms Garms spoke on behalf of the other claimants and that Mr Schorer was in a special position.

Subject to the above issue, Mr Schorer and Ms Garms agreed with Mr Hughes that if the amendments suggested were made they would be happy with the Rules. Mr Schorer indicated that this was subject to him receiving legal advice in relation to the final draft of the Rules.

Mr Hughes would send out a summary of today's meeting and suggested changes once he had received Telecom's suggested amendments and then he would deal with them.

Mr Schorer queried whether in the preparation of the claim they should be entitled to go to the Research Unit to see if the documents were put together properly. Mr Hughes indicated that he considered there was a risk that this would interfere with the independence of the research unit and therefore it was inappropriate. All the parties seemed to agree.

Points of Issue

Set out below are the main points of issue that were to be considered by Mr Hughes:

1. clause 10.2.3 should be deleted;

2. paragraph 2(c) of the FTSP was not reflected in the agreement and should be inserted in Schedule A;

3. the issue of "loss" covered by the arbitration should be left to submissions at the arbitration;

4. the question of confidentiality and Graham Scorer to be resolved;

5. in section 10, the word "demonstrated" should be deleted and that clause 2(g) of the FTSP should be included.

Robert McGregor

I subsequently had a meeting with S Chalmers and briefly went through the above.

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