

Facsimile

*File
COT Cases
Fast Track*

Telecon
AUSTRALIA

To David Krasnostein
Facsimile 42358

From Simon Chalmers

Commercial & Consumer

Company Telecom

8th Floor
242 Exhibition Street
MELBOURNE VIC 3000
Australia

Location

File

Date 22 March 1994

Telephone 634 6464
Message Bank
Facsimile 634 6441

Distrib. Steve Black

Total Pages 3

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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SLA

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

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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

James
 Stuart T. Boyce
 Stuart G. Marshall
 Charles A. Gader
 Gordon L. Hughes
 Alan T. Stewart
 Mr. I. Craig
 Peter I. Ball
 Wayne E. Calk
 Stephen G.A. Bohnay
 Andrew L. Morgan
 Peter D. Johns
 Charles Warner
 Andrew Logsdon
 Cameron
 Graham M. Burns
 Robert J. Kelloway
 Jonathan
 Peter A. Corbett
 Peter G. Pitt
 John E. Molloy
 James A. Henderson
 Francis V. Collins
 Ray Bell

12 April 1994

Our Ref: 0111

Matter No:

Your Ref:

BY FACSIMILE: 617 4666

Mr Peter Barden
 Messrs Mintz Ellison Morris Fletcher
 Solicitors
 40 Market Street
 Melbourne VIC 3000

Dear Peter

COT MATTERS

On 11 April I met with John Szlak 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
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Level 21, 480 Collins Street, Melbourne 3000, Australia. Telephone (61-3) 614 8711.
 Facsimile (61-3) 614 8730. G.P.O. Box 18184, Melbourne 3001. DX 282, Melbourne.

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APR 13 '94 01:23PM

13/04/94 12:25

A59257

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13/04/94

cc
W Smith
J Selak, J Rinkell

~~GORDON HODGSON~~

Yours sincerely

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 Peter Hodgson or UMR which you agree are reasonable.

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

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

would be for a total exclusion of liability but (telling that they would accept a lower cap more commensurate with their expanded fees)



Hunt & Hunt

LAWYERS

Partners
 Edward S Boyce
 James G.F. Harrowell
 Christine A. Galley
 Gordon L. Hughes
 Mark T. Knapman
 Ian S. Craig
 Peter J. Erwin
 Wayne B. Cahill
 Neville G.H. Debnay
 Grant D. Sefton
 Charles Veivers
 Andrew Logie-Smith

Consultants
 Kenneth M. Martin
 Richard J. Kellaway

Associates
 Peter A. Cornish
 Shane C. Mird
 John S. Molnar
 Melissa A. Henderson
 Francis Y. Gallichio
 Roy Set
 Randal F. Williams

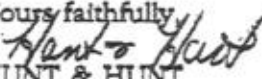
FACSIMILE TRANSMISSION

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

This document and any following pages are confidential, may contain legally privileged information and are intended solely for the named addressee. If you receive this document in error please destroy it and please let us know.

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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

"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").

- please*
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

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

Steve Black (54 D)

for
23 February 1994

*David,
Relevant correspondence
as discussed yesterday/today.
Simon.*

telecom
AUSTRALIA

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 agreement 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

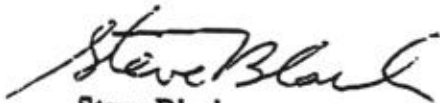
I note that the objection to Clause 16 has been withdrawn and no side agreement with Mr Bartlett or the arbitrator is proposed. Confidentiality is an essential requirement of the arbitrations. In order to ensure confidentiality is maintained, Telecom requires the following amendments to be made:

- (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

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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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