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 CHARLES BROWN BROWN
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 TERENCE J. BROWN
 SYDNEY
 PETER H. BROWN
 GLENN E. A. BROWN
 LONDON
 MICHAEL D. BROWN

40 MARKET STREET
 MELBOURNE VICTORIA
 TELEPHONE (03) 617 4617
 INTERNATIONAL +61 3 617 4617
 FACSIMILE (03) 617 4666
 DX 204 MELBOURNE
 POSTAL ADDRESS
 GPO BOX 769G
 MELBOURNE VIC 3001
 AUSTRALIA
 DIRECT LINE
 (03) 617 4651
 24 January 1994

OUR REFERENCE

PLB 928549 FJS

YOUR REFERENCE

DIRECT LINE

(03) 617 4651

24 January 1994

Dr G Hughes
 Hunt & Hunt
 Solicitors
 21st floor
 459 Collins Street
 MELBOURNE 3000

BY COURIER

Dear Gordon

COT matters

Following our meeting on Thursday last, I now enclose revised Procedure for your consideration.

I make the following comments upon it:-

1. The underlying aim of the Procedure is for it to be workable and fair to both parties as well as being generally in accordance with the "Fast Track" agreements previously entered into.
2. We discussed whether or not the Procedure should come within the ambit of the Victorian Commercial Arbitration Act 1984. We decided that it should. Relevant considerations were that under the Commercial Arbitration Act:

- you are entitled to administer oaths and affirmations (S19 (2));
- subpoenas can be issued to compel the production of documents (S17);
- if a party or witness fails to comply with your directions, application can be made to the Supreme Court (S18).

48 A

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SYDNEY
 (02) 210 4444

BRISBANE
 (07) 533 9000

CANBERRA
 (06) 241 7577

GOLD COAST
 (07) 53 700 444

HONG KONG
 (852) 426 9100

LONDON
 +44 71 831 7871

ADVISORY ASSOCIATE OFFICE: BAKER O'NEILL IN 08 223 5555
 184700 ASSOCIATE OFFICE: MINTER ELLISON MORRIS FLETCHER 08 223 7222

OUR NEW ASSOCIATE OFFICES
 184700 ASSOCIATE OFFICE: MINTER ELLISON MORRIS FLETCHER

Further considerations are:

- . some of the procedures adopted are somewhat novel in the arbitration context e.g. the use to be made of the Resource Unit. However, arbitration procedures are meant to be flexible and, provided the parties agree, as they will have by signing the Request for Arbitration, this does not concern me;
- . under Section 38 of the Commercial Arbitration Act, with the leave of the Court, there is the right to appeal on a question of law arising out of an award. This right of appeal can be excluded under Section 40 by having the parties enter into an "exclusion agreement". Such an exclusion agreement can only be entered into after the arbitration proceedings have "commenced" (Section 40 (6)). Pursuant to Section 3 (5) the arbitration is deemed to have "commenced" once the Request for Arbitration has been signed by both parties. The possibility of having an exclusion agreement could be discussed at your initial meeting with the parties;
- . it is provided in Clause 6 that legal representation is to be at your discretion. This is in line with Clause 2 (e) of the "Fast Track" agreement. Section 20 however states the circumstances in which an arbitrator is required to grant legal representation. This regime cannot be amended by the agreement of the parties. In practice, the issue of legal representation will only arise if you require oral submissions and even then there is to be no cross-examination. I would not anticipate the issue of legal representation being of great moment.

On balance, it was decided that it would be preferable to have the Procedure operating under the Commercial Arbitration Act. ↙

3. You will note that I have amended the Procedure so that it is clear that you are conducting four separate arbitrations and will hand down four separate awards although you may combine some aspects of the four hearings. I have also provided that all four claimants must agree to the Procedure before there is a binding arbitration agreement with respect to any of them. I would be interested in your thoughts upon this.
4. As you would be aware, Section 14 of the Commercial Arbitration Act allows you, subject to the Act and to the Procedure, to conduct the proceedings in such manner as you see fit. This gives you a high degree of flexibility. However otherwise, the Procedure must be conducted in accordance with the rules of natural justice. ↙
5. I will be interested in your thoughts on Clause 8 which relates to the Resource Unit. I thought it best to define the Resource Unit in fairly general terms.
6. In paragraph 1 on page 8, you will note that I have provided for any loss suffered by Telecom as a result of breach of the confidentiality provisions to be determined by arbitration in 48 A

accordance with Section 22 (2) i.e. not according to law but by reference to considerations of general justice and fairness. Following our discussion, I thought this might be a workable manner of dealing with this difficult situation.

7. Once you are happy with the suggested Procedure, I suggest you convene a preliminary conference with the parties to discuss the Procedure and also to discuss the possibility of exclusion agreements. At this conference you could also inform the parties that you will be informing AUSTEL in accordance with Clause 2 (h) of the "Fast Track" Agreement.

I look forward to discussing the suggested Procedure with you after you have considered it.

Yours sincerely,



F. J. SHELTON

enclosure

48A

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(a), 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