



# FERRIER HODGSON CORPORATE ADVISORY

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BY COURIER

18 April 1995

*Pra  
19/4/95  
we to discuss*

Mr Warwick Smith  
Telecommunications Industry Ombudsman  
Ground Floor  
321 Exhibition Street  
MELBOURNE VIC 3000

Dear Sir,

RE : Fast Track Arbitration Procedure - Resource Unit  
Arbitrations: Smith, Garms, Gillan/Valkobi

I acknowledge receipt of your letter of 23 March 1995. The matters raised in your letter were discussed at a meeting with Sue Hodgkinson and me on Tuesday, 4 April 1995. I now formally reply to your letter and update you on further developments since our meeting.

I note from the tone of your letter that you are somewhat concerned as to the apparent time frames within which you, as Administrator of the Fast Track Arbitrations, can expect finalisation of the above named arbitrations.

You have requested advice as to when, in terms of weeks, the Resource Unit envisages being in a position to provide its integrated financial and technical assessments to the Arbitrator for the above arbitrations. I now respond accordingly in relation to each:

Smith

The Resource Units role is almost complete, but more work is to be done to tidy our reports (both technical and financial) to a form suitable for submission to the parties by the end of April 1995.

The Resource Unit has completed a preliminary review of the financial material contained in the claim, defence and reply. The interim report has been drafted based on the assumption that technical faults did occur.

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LICENSED INVESTMENT ADVISER

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No further questions are anticipated from the Arbitrator. An important meeting took place between the Resource Unit and the Arbitrator on 10 April 1995 over the need to manage the issuance of Resource Unit reports.

Lane Telecommunications have commenced their detailed review in mid March and now have completed their draft interim report (on 6 April 1995). This report is subject to review and amendment by Paul Howell of DMR Inc prior to issuance.

#### Garms

The Resource Unit has commenced its review of the financial issues. A preliminary report is envisaged to be finalised within three weeks. Lane Telecommunications have commenced their review and, at this stage, they estimate that their preliminary review will be completed within one month (mid to late May) for review by Paul Howell of DMR Inc.

#### Gillan/Valkobi

The Resource Unit has commenced its review of the financial issues. We envisage that our preliminary report will be finalised within three weeks. Lane Telecommunications have commenced their review and, at this stage, they likewise expect their preliminary review will be completed within one month for review by Paul Howell of DMR Inc.

#### Resource Unit (including Technical Support)

I note your comment that the Resource Unit reports issued to the Arbitrator must also be provided to the claimant and Telecom for their comment. We agree that this may prolong the process further, but the fact is that this is a requirement of the fast track arbitration. The Smith report will be available imminently and subsequent reports can, with the benefit of experience be expected to proceed more expeditiously.

I also advise that Mr Paul Howell, Director of DMR Inc Canada arrived in Australia on 13 April 1995 and worked over the Easter Holiday period, particularly on the Smith claim. Any technical report prepared in draft by Lanes will be signed off and appear on the letterhead of DMR Inc. Paul Howell anticipates completing the Smith technical report by the end of April. || W/ho

Further, I advise that additional resources have been applied to the assignments and work on each has been undertaken contemporaneously. We have technical staff and financial support staff working on Garms and Gillan (in parallel) and visits to Brisbane are anticipated by the end of April 1995.





Arbitration

I understand that Dr Hughes will contact you directly (in your capacity as Administrator of the Fast Track Arbitration Procedures) on any legal procedural issues associated with the progress of the Arbitrations.

Conclusion

In conjunction with Dr Gordon Hughes, we are fast tracking the procedure with the aim of arriving at a decision that has regard for due process and investigation.

In conclusion I hope that it is possible for you (in your capacity as Administrator for the above mentioned Fast Track Arbitrations) to continue in that position until we can resolve these claims.

It is unfortunate that there have been forces at work collectively beyond our reasonable control that have delayed us in undertaking our work. It is only now, following the review and acceptance of our Resource Unit (including acceptance of Lane Telecommunications by the COT claimants), that we are in a position to analyse the merits (including technical aspects) of each claim.

Do not hesitate to contact the writer directly on (03) 629 8855.

Yours faithfully,  
FERRIER HODGSON CORPORATE ADVISORY

JOHN RUNDELL  
Project Manager - Resource Unit  
Associate Director

Encl.

c.c. Mr Peter Bartlett, Partner, Minter Ellison Morris Fletcher.  
Dr Gordon Hughes, Arbitrator, Managing Partner, Hunt & Hunt.

BY:HUNT & HUNT

:12- 5-95 : 2:41PM : MELBOURNE OFFICE

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12 May 1995

Our Ref: GLH  
Matter No:  
Your Ref:

BY FAX: 277 8797

Mr Warwick Smith  
Telecommunications Industry Ombudsman  
21 Exhibition Street  
Melbourne VIC 3000

Dear Warwick

### FAST-TRACK ARBITRATION PROCEDURE

You have asked me for my comments on the arbitration process, now that I have delivered my first ruling.

Upon my return from leave in 2 weeks, I would be happy to discuss this matter with you in detail.

In simple terms, my observations are as follows:

- as far as I could observe, both Telecom and Smith co-operated in the Smith arbitration;
- the time frames set in the original Arbitration Agreement were, with the benefit of hindsight, optimistic;
- the Arbitration Agreement allowed insufficient time in the Arbitration Agreement for inevitable delays associated with the production of documents, obtaining further particulars and the preparation of technical reports;
- there have been allegations by Smith and other claimants that Telecom deliberately slowed the process by delaying the production of documents under FOI - certainly the FOI claims have caused delays but I am unable to comment as to whether there has been a deliberate delaying tactic;
- request for further particulars are, I think, unavoidable - although the emphasis in the arbitration process is upon a quick resolution of the dispute, a party (in this case Telecom) faced with a significant claim

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against it is entitled to be presented with particularised complaints, not generalised and unsubstantiated allegations;

- the preparation of technical reports by the claimants is always going to be a problem - in simple terms, Telecom has all the information and the claimant has to pay a technical expert to examine and interpret it.

In summary, it is my view that if the process is to remain credible, it is necessary to contemplate a time frame for completion which is longer than presently contained in the Arbitration Agreement.

There are some other procedural difficulties which revealed themselves during the Smith arbitration and which I would like to discuss with you when I return. These centre principally upon the fact that claimants, who are often seeking large sums, are generally unable to specify the legal basis for their claim (eg negligence, breach of contract, Trade Practices Act), yet it is necessary for me to base my rulings upon a breach of legal duty. This means that I have to in part rely upon Telecom to identify the legal basis of the claim made against it (which is somewhat perverse and which was in any event handled by Telecom in a less than satisfactory manner), and/or I have to search myself for a legal basis without assistance from the parties (which inevitably contributes to the time and expense associated with the proceedings).

I wonder whether some pro forma document could be developed which could point claimants in the right direction.

I apologise for the brevity of these comments. I am happy to provide you with a more detailed written report when I return from leave in 2 weeks. Ultimately, I think we should have a conference involving you, me and Peter Bartlett to consider these and related issues.

Yours sincerely

  
GORDON HUGHES



# MINTER ELLISON

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28 April 1995

**STRICTLY CONFIDENTIAL**

Mr Warwick J. Smith  
 Telecommunications  
 Industry Ombudsman  
 Box 18098  
 Collins Street East  
 MELBOURNE 3000

Dear Warwick  
 Fast Track Arbitration - Smith

Further to our recent discussion, it seems to me that we should put to Gordon Hughes that we expect his Award to be made prior to his departure on 12 May 1995.

Attached is a draft letter to Gordon. It is in reasonably harsh terms.

Could you please consider whether a letter in this form or an amended form, should go to Gordon.

Regards

Peter L Bartlett

enc.

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**DRAFT**



28 April 1995

Dr Gordon Hughes  
Hunt & Hunt  
Solicitors  
GPO Box 1533N  
MELBOURNE VIC 3000

By Facsimile: 614 8730

Dear Gordon

Fast Track Arbitration - Smith

I am becoming increasingly concerned at the delays in the finalisation of this matter.

The Resource Unit tells me that it expects its technical and financial reports to the Arbitrator will be released today to the parties. The parties will then of course have the right to a reasonable period within which to comment on these reports. The extent of this period would of course be in your discretion.

However, I understand you are to present a paper in Greece in mid-May.

I would expect the Award would be delivered prior to your departure.

It would be unacceptable to contemplate the delivery of the Award being delayed until after your return.

Could you please contact me to discuss.

Yours sincerely

Warwick L Smith  
Ombudsman

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resolution by mediation or negotiation. In several cases settlements had already occurred in the past with some of the CoT claimants, but had not achieved finality. The second benefit was the confidentiality of the process as opposed to, for instance, litigation in open court. The experience has shown that not all of these benefits have emerged or materialised.

In my view, there was one potential difficulty that should have been obvious from the outset. I do not make any apology for coming along to this committee and saying that outright, because it should have been obvious, in my view, to the parties and everyone involved from the beginning. This deficiency revolves around the vexed question of how the claimants were to obtain, and the best method of obtaining, documents from Telstra which were to assist them in the process. In the process leading up to the development of the arbitration procedures—and I was not a party to that, but I know enough about it to be able to say this—the claimants were told clearly that documents were to be made available to them under the FOI Act. The Commonwealth Ombudsman has already reported on the problems encountered by the claimants in that process, and I do not propose to reiterate her findings.

**Senator SCHACHT**—Do you disagree with her findings?

**Mr Pinnock**—No. For present purposes, though, it is enough to say that the process was always going to be problematic, chiefly for three reasons. Firstly, and perhaps most significantly, the arbitrator had no control over that process, because it was a process conducted entirely outside the ambit of the arbitration procedures. Secondly, in providing documents Telstra was entitled to rely on whatever exemptions it might be entitled to under the FOI Act, and this often resulted in claimants receiving documents, the flow of which made them very difficult to understand. In some cases, there were obviously excisions of information. In contrast to this, the claimants could have sought access to documents on a regular basis under the arbitration procedures. Provided that those documents were relevant, the arbitrator could have directed Telstra to produce those documents without any deletions. If there was any argument as to the relevance of documents, the arbitrator would have had the power to require their production and inspection by him to make that determination in the first place. Thirdly, we know that the FOI process as administered was extremely slow, and this contributed to much, but certainly not all, of the delay which the claimants encountered in prosecuting their claims through the arbitration procedures.

With the benefit of hindsight, I will turn now to the lessons that are learnt from experience of the process. Firstly, arbitration is inherently a legalistic or quasi-legalistic procedure. It does not really matter how you might finetune any particular arbitration. It has the normal attributes of a quasi-legal procedure, where you have parties opposing each other with someone in the middle having to make a determination. Even having said that, I am on record as saying that Telstra's approach to the arbitrations was clearly one which was excessively legalistic. For instance, in many instances it made voluminous requests for