

(05) 617 4851  
24 January 1994

Solicitors  
floor  
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).

105

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

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,

enclosure

105