

## State of NSW v Austeel Pty Ltd

[2003] NSWSC 1077 (21 November 2003 - Palmer J) Supreme Court of New South Wales

Arbitration - notice of dispute - meaning of 'dispute'

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In this case, the State sought a declaration that a document entitled "Notice of Dispute" given by Austeel was not a valid notice of dispute within the meaning of an arbitration clause in an Agreement under which Austeel was to construct a large steel mill at Newcastle. The clause required that *"If any difference or dispute arises out of or in connection with this Agreement, the following procedure must be followed in order to resolve it ... a party may give written notice of the dispute to the other party..."*

Justice Palmer set out the contents of the Notice of Dispute relied upon as follows:

"9 The Notice relevantly states:

*"Austeel Pty Ltd ("Austeel") hereby gives formal notice of dispute or difference to The Crown in the Right of the State of New South Wales ("NSW") that a dispute or difference exists between Austeel and NSW in respect of the Austeel Steel Agreement ("Agreement"). Under the Sections below setting out Further Particulars and Breaches which is headed "Further Particulars" further definitions are set out therein relate only to that Section. The existence of such dispute or difference is evinced by NSW performance of its obligations under the Agreement and Austeel correspondence to the State and further confirmed in letters sent to Austeel by the State dated 10 September 2003, 27 August 2003, 21 August 2003 and the State's legal representative Freehills letter dated 1 October 2003 and 6 November 2003 (on page 3 number point 3).*

*Austeel in essence seek resolution of the dispute or, alternatively, inter alia the following:*

- (a) a declaration that the State is in breach of the Austeel Steel Agreement;*
- (b) an order for specific performance of the State's obligations under the Austeel steel Agreement; and*
- (c) an award of damages to Austeel for delay and/or opportunity;*
- (d) a declaration that, by its conduct and statements:*
  - (i) the State has repudiated the Austeel Steel Agreement, entitling Austeel to damages and, at Austeel's option, an entitlement to terminate the Austeel Steel Agreement; or*
  - (ii) alternatively to (i), the State is in breach of the Austeel Steel Agreement such as to give rise to a right in Austeel to damages and, at Austeel's option, a right to terminate the Austeel Steel Agreement*
- (e) further damages and/or costs.*

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1. Immediate Past President IAMA, Barrister-at-Law, Arbitrator and Mediator.

DETAILS

*Austeel has alleged that the State has breached the Agreement. The State has denied that it has. This constitutes a dispute or difference.*

*Particulars include but are not limited to the following."*

*Then follow thirty numbered paragraphs in each of which Austeel alleges a breach of a specified clause in the Agreement or a representation falsely made, and gives brief particulars.*

- 10 Under a heading "FURTHER PARTICULARS" appears:

*"Austeel asserts that the State is in breach of the Austeel Steel Agreement in numerous respects and that it has suffered loss and damage. The State has denied that it is in breach and there is, therefore a difference or dispute that has arisen out of the Austeel Steel Agreement. Further, Austeel has sought confirmation from the State as to the status of numerous aspects of the State's performance of the State's obligations under the Austeel Steel Agreement. The State has failed and/or refused to respond to those requests, in breach of clause 3.4(c) of the Primary Austeel Steel Agreement.*

*Austeel hereby gives written notice of the differences or disputes that have arisen out of or in connection with the Austeel Steel Agreement that Austeel says gives rise to.*

*Further Particulars of differences or disputes are as follows:*

*Failure to rezone steel mill site*

*Failure to pay for electrical studies*

*Failure to provide information*

*Failure to progress Multi-user Infrastructure (Other Infrastructure)*

*Failure regarding Site Contamination*

*Hindering and delaying negotiations and documentation for Dredging Infrastructure and Other Infrastructure*

*Failure to prepare and lodge EIS*

*Failure to provide security of tenure of the Land Corridor*

*Failure to progress development of the Port Site*

*Hindering and delaying the Project*

*Loss and Damage"*

*Then follow thirteen pages of particulars in respect of each of these allegations, divided into forty-two paragraphs and numerous sub-paragraphs.*

- 11 *The Notice concludes by nominating Professor Clive Palmer and Mr William Hasseler as Austeel's representatives for the meeting to be held in accordance with clause 14.1(a) of the Agreement."*

Justice Palmer rejected the State's submission that the Notice was not valid for the purposes of clause 14.1 of the Agreement. He said:

"13 *First, the State says that a notice under clause 14.1 must identify the dispute clearly and unequivocally. It says that the function of a dispute notice is in many respects analogous to the function of a pleading and the concepts of natural*

*justice that inform the rules of pleading are apt to be taken into account when considering the adequacy of a dispute notice. The purpose of a dispute notice under clause 14 is, so it is said, to enable the recipient to prepare and obtain appropriate material and evidence for its conduct of meetings, a mediation and, most importantly, an arbitration.*

- 14 *The State submits that the Notice does not identify the dispute sufficiently. Reliance is placed on the opening paragraph of the Notice which, it is said, is in the most general terms and does not provide "any adequate or particular identification of the asserted dispute or difference ... there can be no doubt that had a pleading been served in those terms it would immediately be struck out".*
- 15 *I am unable to accept this submission. It ignores the fact that the first paragraph of the Notice is prefatory only: it serves as a general introduction to the following nineteen pages of the Notice which set out carefully and with particularity each of the breaches of the Agreement and the alleged misrepresentations which are said to give rise to the issues in the dispute and to the relief which Austeel claims. The Notice is certainly repetitive and a little discursive but not to the extent that the allegations made by Austeel against the State cannot be sufficiently ascertained.*
- 16 *Second, it is submitted that the Notice is unclear and equivocal because it is incomplete on its face. Reliance is placed on words such as "Austeel in essence seek resolution of the dispute or, alternatively, inter alia the following" and "particular include but are not limited to the following".*
- 17 *I am unable to accept that phrases such as these render the whole Notice invalid. The submission equates the Notice with a pleading or with other notices, referred to in cases cited by the State, given under very different contracts and for very different purposes. The dispute resolution clause in this Agreement is highly unusual: it provides a tiered series of dispute resolution mechanisms, beginning with the most informal and unstructured – a meeting between the parties' representatives, possibly even by telephone – proceeding through a more serious but still unstructured meeting between the parties' most senior executives, then either to expert determination or mediation and finally, if all other steps fail, to a structured arbitration under the Commercial Arbitration Act 1984 (NSW).*
- 18 *Clause 14.1(a) does not require a notice to have any particular content or to set out any particular matter, although obviously it must set out sufficient particulars of the dispute to enable the recipient to know the general range of subject matter to be discussed at the first meeting of representatives, unstructured and informal although that meeting may be. Most importantly, there is nothing in clause 14 which requires the issues comprising the dispute to be defined or confined by the content of the Notice if the dispute reaches mediation or, ultimately, arbitration. It would be reasonable to expect that some issues in the dispute referred to*

*in the Notice may be resolved completely by the discussion process between executives, and others may be narrowed or expanded as the discussions and mediation processes continue. If an arbitration under the Commercial Arbitration Act is held, the arbitrators have ample power under s.14 to require that the remaining issues for determination be further refined by Points of Claim and Points of Defence. The sole requirement for valid submission of the matter to arbitration is that the dispute which is submitted is the same dispute in respect of which the Notice was given.*

- 19 *This observation brings me to the State's principal submission, namely, that the language of clause 14.1 requires that only one difference or dispute may be the subject of any Notice. The State submits that the nineteen page Notice raises "a multitude of differences or disputes" each of which, if persisted in, is required by clause 14 to be the subject of a separate Notice, the subject of separate executive meetings, separate mediations and separate arbitrations.*
- 20 *There are, on my rough count, twenty-seven breaches of separate, specified clauses of the Agreement alleged in the first six pages of the Notice. The State's submission is that each one of these allegations constitutes a separate difference or dispute: the consequence is that if the dispute resolution process goes the whole distance there must be at least twenty-seven Notices, fifty-four meetings of executives, twenty-seven mediations in which twenty-seven different mediators could be appointed, and twenty-seven arbitrations in which a minimum of eighty-one different arbitrators could be appointed. The State's fall-back submission was that the allegations in the Notice could be grouped under five broad headings, so that there were five separate disputes requiring five separate Notices, ten meetings of executives, five mediations and five arbitrations in which a minimum of fifteen arbitrators could be appointed.*
- 21 *I am unable to accept these submissions. There is one dispute between the parties although, as one would expect in such a large and complex project governed by such a compendious agreement, there are very many issues in the dispute. The dispute arises out of one Agreement and one common substratum of facts and circumstances. The subject matter of the dispute is whether the State has committed any, and if so what, breaches of the Agreement and whether Austeel is entitled to rescind the Agreement or to elect for any other, and if so what, remedy for any such breach. A subsidiary issue is whether the State has made any wrongful representations inducing Austeel to enter into the Agreement and, if so, what remedy Austeel may have.*
- 22 *The parameters of this dispute are set out in paragraphs (a) to (e) commencing on the first page of the Notice. What follows thereafter is particularisation of each of the alleged breaches and representations and*

*particularisation of how the loss and damage flowing therefrom is said to arise: see e.g. paragraphs 41 and 42 commencing on page 18 of the Notice.*

- 23 *In support of its construction that clause 14.1(a) requires a separate Notice in respect of each of the alleged breaches of the Agreement, the State points to the fact that there is a strict and short time limit for the hearing of an arbitration. By clause 14.3(c) the hearing is not to exceed ten days and each party is to have five days to present its case. The State says that if "the dispute" comprises all of the issues raised in the Notice it would impose considerable hardship on both parties to have to cram such a massive case into such a short arbitration hearing.*
- 24 *I am not persuaded by this argument. The project the subject of the Agreement is a very large one involving expenditure of hundreds of millions of dollars over a considerable time. It must have been within the contemplation of the parties that it was likely that disputes would arise between them, some straightforward and capable of relatively easy resolution and others extremely complex and difficult. Yet one dispute resolution mechanism is provided for all disputes, whether large or small, straightforward or complex. Clearly, clause 14 requires that, whatever the character of the dispute, it will be resolved speedily and within a strict time frame, no doubt in the interests of commercial expediency. If the dispute happens to be extremely complex, then the lawyers conducting the arbitration are required to adopt Procrustean measures to accommodate it to the available arbitration time.*
- 25 *The State's final submission is that the Notice is invalid because there was no pre-existing difference or dispute between the parties, as clause 14.1 contemplates. I am unable to accept that submission.*
- 26 *The affidavit of Professor Palmer exhibits a chain of prior correspondence between the parties in which the issues comprising the dispute were raised, to the extent that Austeel issued a number of Notices under clause 14.1 prior to the Notice of 7 November 2003. Prior notices were withdrawn and the issues severally raised therein were consolidated into the Notice of 7 November, as Austeel made clear to the State's solicitors at the time. The parties had clearly joined issue in the dispute by the time the Notice of 7 November was served." (emphasis added)*

