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

further and better particulars of the legal basis of claimants' cases when in fact it was probably in a much better position to judge those issues than almost any or all of the claimants.

I am on record as making some general remarks about that issue, both in the reports through the TIO and through the medium of Austel's quarterly reports on Telstra's implementation of its recommendations flowing from its original CoT report. One consequence of Telstra's approach was that the claimants tried not only to match their opponent's legal resources, but also felt it necessary to engage their own technical and financial experts. This was a significant expense for the claimants because those costs were not administrative costs of the arbitration procedures. Those procedures, as we know, made no provision for the payment of a claimant's legal or other costs when the claimant received an award in his or her favour. Although this deficiency has now largely been remedied by Telstra agreeing to contribute to a successful claimant's reasonable costs by way of its ex gratia payment agreement which Mr Ward referred to, the absence in my view of such a guarantee in the arbitration procedures at the outset was a deficiency.

Next, there have been significant delays over and above those delays associated with the FOI process and, in some of those cases, some of those delays have been due not to Telstra but to claimants being unable to provide the sort of information that was required to substantiate their business losses. Those delays have also been exacerbated by extensive arguments by both sides, but particularly by the claimants, as to the accuracy and merits of the technical evaluation and financial evaluation of reports produced by the resource unit, so much so, I might say, that the resource unit has almost been in danger of being dragged into the fray when the original intention of that process was for it to be exclusively and really a matter for advice to the arbitrator. However, perhaps the most difficult issue, and one that has bedevilled the arbitrations almost from the beginning, was the inability of the parties to treat these disputes as matters of a purely commercial nature. They simply were unable to put behind them the attitude of mutual suspicion and mistrust that had built up over those years. It is natural but, nevertheless, it has been an issue which has turned these arbitrations into mini-battles.

On an objective and dispassionate analysis in my view of the procedures, there are nevertheless benefits that have been derived, particularly for the claimants, although I am the first to admit that they do not necessarily agree with my view on these matters. I should interpolate there that when we talk of the CoT payments it is a self-descriptor, and beyond those common features that I mentioned earlier, in my view one cannot talk of the claimants as a homogeneous group. They have very many different views on a whole range of issues, although I suppose the CoT four—the original claimants with perhaps the exception of one—do tend to feel some common cause. I simply put that on record to indicate that, with any proposition that is put forward by anyone who says, 'Well the CoTs say this', I deal almost on a daily basis with various claimants saying to me, 'We do not agree with this; we do agree with that.'