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Page 1 of		Matter No:	1660521 Pin No: 274
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(03) 288 1341 Fax (03) 288 1567 (International phone codes + [61 3]) or Telex AA33004  
and return the original facsimile to  
Level 43, 101 Collins Street, Melbourne Vic 3000 Australia

Dear Ian

"COT" Case Strategy

N00749

\* As requested I now attach the Issues paper which we have prepared in relation to Telecom's management of "COT" cases and customer complaints of that kind.

\* The paper has been prepared by us, together with input from Duesburys, drawing on our experience with a number of "COT" cases. If there are any aspects of the Issues paper which you would like us to expand upon or if there are any other issues you would like us to consider please don't hesitate to contact us. Both Freehills and Duesburys would be happy to assist you should any further presentations to Telecom management be required on any of the matters raised in the Issues paper or with regard to any other matters concerning management of "COT" cases and customer complaints.

Yours sincerely

FREEHILLS HOLLINGDALE & PAGE

per:

*Denise McBurnie*

Denise McBurnie

Enc

copy to: Deanne Weir

1-A

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A. PROFILE OF A "COT" CASE

Set out below are some of the common characteristics attributed to "COT" cases. The particulars are drawn from FHP's experience with the following "COT" cases:

- Golden Messengers/Graham Schorer
- Tivoli Theatre Restaurant/Ann Garms
- Japanese Spare Parts/Ann Gillan
- Cape Bridgewater Holiday Camp/Alan Smith

It should be recognised, however, that this list is neither definitive nor exhaustive of those characteristics.

Common Characteristics

1. Single operators of small businesses generally operating in service industries. If partnerships are involved it is usually a husband/wife partnership.
2. Questionable business stability or viability regardless of alleged telecommunications problems.
3. Common distrust of Telecom's network performance and distrust of Telecom's claims that network performance accords with "acceptable standards".
4. Claims of dissatisfaction by the claimant as to the handling of the case by Telecom.
5. Distrust of Telecom's testing procedures.
6. Numerous faults alleged and claimed to be supported by documentary evidence collected by the claimant, but which do not match Telecom's fault reporting records.
7. A high level of understanding (acquired by experience) with FOI procedures and the procedures involved in accessing Telecom documentary information. However, this level of understanding is not necessarily matched with the ability to accurately or correctly interpret the information obtained.
8. There is usually a reluctance to pursue a claim through court action. Apparent or claimed reasons being:
  - cost
  - difficulty of proof
  - claim has a component relating back to when Telecom's statutory immunities applied
  - Telecom's size and ability to defend action proves to be oppressive.

N00750

9. With their strong prejudices against Telecom and notwithstanding the merits of their case, claimants may still attempt to have the claim heard through the media where the claimant is encouraged to present a "sensationalised" story to a sympathetic reporter.
10. A "divide and conquer" approach is used by the claimant when dealing with Telecom during the course of the claim. This can involve approaches made to:
- Technicians
  - Sales Representatives
  - Area Managers/General Managers
  - Company Secretary/CEO
  - AUSTEL

The claimant will attempt to obtain statements or admissions from various Telecom personnel. Those statements or admissions which may well have been harmless when made in the correct context may then be used by the claimant out of context and used to justify their claim against Telecom. In addition, the claimant may exploit Telecom's managerial structure in an attempt to undermine the credibility of those within Telecom and have their claim escalated within that hierarchy.

N00751

B. PROBLEMS AND DIFFICULTIES WITH "COT" CASES

1. Although various divisions within Telecom may have already established a procedure for the handling of and accountability for "COT" cases, there does not appear to be any consistent corporate policy for the handling of "COT" cases and customer claims of their kind.
2. There appears to be a lack of understanding at the customer interface level of the potential for customer claims or disputes to escalate into "COT" case situations.
3. From a liability viewpoint, Telecom's customer relations policy and approach can in certain cases act to the detriment of Telecom where Telecom falls to control the making of admissions (express or implied) to the claimant.
4. Certain claims or parts of claims date back pre 1991 when Telecom enjoyed a statutory immunity against suit in particular circumstances. Whenever this issue is raised against a claim it is viewed by the claimant as unfair or immoral for Telecom to raise such a defence.
5. Telecom's size is not conducive to the handling of "COT" claims. Quite often by the time the claim comes to the attention of senior management the ability to resolve the problem as a customer relations exercise has long since passed.  
In this regard many of the "COT" cases have been treated as customer relations exercises without adequate review or consideration at the initial stage of Telecom's legal liability.
6. "Divide and conquer" approach does not engender a workable settlement environment. N00752
7. Telecom has experienced difficulties in presenting evidence to disprove a claim. This has been complicated by claimants' general distrust of Telecom's testing procedures and record keeping practices. In certain cases, Telecom has not been confident itself with the testing equipment used or available. This situation can result in a claim being neither proven or disproved, but it can create sufficient uncertainty for presumptions of guilt to be made by the claimant, AUSTEL and/or the media.
8. The drain on Telecom resources. Anyone at Telecom who has been involved in a "COT" case is aware of the enormous drain which such cases have on Telecom's resources. Executive attention and the level of involvement required by Telecom technicians devoted to finding or resolving the alleged problem is debilitating and costly for Telecom. Such cases can also create a detrimental effect on the morale of staff and executives.
9. The increasing number of "COT" cases and the publicity co-ordinated by the "COT" case organisation is providing the media with a case history of Telecom "negligence/incompetence". This situation is compounded each time a claimant takes his/her story to the media.
10. In instances where the dispute is longstanding the eventual claim for compensation sought by the claimant often bears no resemblance to the modest claim for compensation which the claimant may have originally sought. Delay in resolving the claim, frustration with Telecom's approach to addressing the claim (whether valid or not), the involvement by the

claimant of independent advice (lawyers, accountants) knowledge of what other "COT" claimants have received in the past and the usually ailing business of the claimant are factors which appear to escalate the size of the claimant's claim.

11. The claimant will generally avoid (for as long as possible) specifying his or her claim in any detail in an attempt to test the limits of Telecom's goodwill and to exploit its customer relations policy. As a result, settlement payments may be made in order to resolve a dispute, notwithstanding the absence of any provable liability.
12. Public profile generated by these cases can and has incurred government criticism of Telecom's senior management. Particular "COT" case claimants have enjoyed a degree of political influence and have used this influence to invoke the support of members of the Senate and make calls for a senatorial enquiry into the handling by Telecom of the "COT" cases. Senatorial involvement has also increased the media profile given to these cases.
13. Involves intrusion of AUSTEL (and potentially the Trade Practices Commission) in the day to day operations of Telecom.
14. These cases become test cases for other potential claims and raise questions as to the adequacy of Telecom's Network, products and services in the competitive environment created by Optus and Vodaphone.
15. Certain of the "COT" cases claimants who have agreed to settlement of their claim continue to pursue media coverage of their claim despite confidentiality undertakings. Further, such claimants and/or the media misrepresent the nature of the payment which they receive from Telecom claiming such payments to be compensation payments made by Telecom in recognition of Telecom's liability. In fact all such payments have been either ex gratia payments or payments into court, both kinds being accompanied with a denial of liability.

N00753

C. RECOMMENDATIONS FOR THE MANAGEMENT OF "COT" CASES

① Awareness Program

An initial priority should be to put in place a legal awareness program to assist personnel to determine whether a customer problem, claim or dispute:

- ① should be or can continue to be dealt with as a customer relations exercise and the proper manner for doing so; or
- ② exposes Telecom to potential liability and which should be handled by referral to a dedicated management area ("DMA") within Telecom.

2. Customer Relations Approaches

It is difficult to set guidelines or directions as to what customer situations will or will not give rise to exposure to liability. In adopting a customer relations approach to fix a customer complaint, management needs to always keep in mind that such an approach may not resolve the complaint to the customer's satisfaction and this complaint could become a "COT" case situation.

Management must always be careful at this stage (and instruct their staff accordingly) not to directly or indirectly admit liability or fault on the part of Telecom or convey information concerning the complaint which could prejudice Telecom's position.

There will also be certain stages of a complaint at which the complaint should be immediately referred to the DMA. These include:

- receipt of a letter of demand from the claimant or his/her representatives.
- a claim for compensation which exceeds Telecom's service guarantee undertakings.
- Telecom's service guarantee undertakings, or procedures are considered unsatisfactory by the claimant.
- Recognition of possible fault on the part of Telecom.
- No fault or problem is found by Telecom, but the claimant continues to complain.
- Complaint not resolved or settled within a period of 6 months.
- Instances of multiple complaints received in respect of a single exchange area.

This list is not exhaustive.

N00754

3. Establishment of a Dedicated Management Area

Establishment of a system whereby upon recognition of potential exposure to liability or receipt of a formal claim, the matter is referred to a DMA within Telecom.

The reasons behind the need for establishment of the DMA are:

- (a) to avoid Telecom becoming subject to a "divide and conquer" approach by the claimant;
- (b) decrease possibility of Telecom staff making statements or admissions which are then used out of context by the claimant

- (c) ensure swift resolution of the claim;
- (d) avoidance of those problems and difficulties set out above in Section B.

In conjunction with this referral, the manager in charge of the issue at Business Unit level must reduce Telecom contact with the claimant to as few individuals as possible.

It is also vital that in the act of referring the matter to the DMA, the manager responsible must exercise caution as to the contents of the referral and to whom it is directed. The relevance of this is dealt with in more detail below.

In recommending isolation of the management of "COT" cases to a particular area in Telecom, the intention is not to denigrate from the role and importance of Telecom's customer relationship focus but to ensure that the importance of this relationship is not compromised. In fact, this approach should be seen as an integral part of that focus in that it is designed to encourage a final resolution of a customer dispute while limiting the risk to Telecom of exposure to liability.

#### 4 Constitution of the DMA

The make-up of the DMA will be of critical importance to the success of this management plan. In the current environment for the provision of telecommunications products and services, Telecom now faces exposure to liability for failure to provide such products and services in accordance with its contractual obligations with each and every customer. Any alleged failure to comply with these obligations will obviously involve potential exposure to legal liability and should be treated accordingly.

Of critical importance in the constitution and function of the DMA is the direction of the first referral of the claim by Business Unit management. The initial point of referral should always be to the Corporate Solicitors Office. This is in order to bring into operation the potential protection of legal professional privilege for documentation and other reporting procedures. It may also be appropriate for the Corporate Solicitors Office to continue as the point of referral and control in order to maintain legal professional privilege (where possible) over information and documentation created during the handling of the "COT" case.

Any area dedicated to the management of a "COT" case claim should be under the control of the Corporate Solicitors Office and involve the input and cooperation of:

- Business unit management.
- Technical/Network advisors.
- Regulatory.

N00755

#### 5. Procedures to be followed by the DMA in managing a claim

Once a "COT" case has been referred to the DMA for future management, the DMA should take the following steps within Telecom:

- (a) Ensure with the assistance of Business Unit management that Telecom contact with the claimant is managed by informed personnel.

- (b) Request from the claimant, if not already provided, a detailed claim in writing setting out the circumstances which he/she alleges give rise to the claim and the extent of the compensation which is sought.
- (c) Collect all information, documentation and files including general information where available about the claimant and his/her line of business.
- (d) Begin the process of obtaining witness statements or affidavits. A common problem in the handling of recent "COT" cases has been the tracing of employees who have had dealings with the claimant and who have either left Telecom or moved to different positions. As early as possible the current relationship with Telecom of potential witnesses must be ascertained together with their possible movements and contact details. This information should then be factored into the timing and manner of gathering evidence. The typical "COT" case claimant is certainly not adverse to approaching past employees of Telecom to assist or support the claimant's case against Telecom.
- (e) An analysis of the complaint(s) being made should be undertaken and such recording or monitoring equipment as Telecom has should be put in place. Given the distrust of Telecom's testing proceedings conveyed by most "COT" cases claimants, Telecom must also seriously evaluate its testing procedures (both in terms of reliability and costs) and factor such analysis into its overall customer complaint procedures.
- (f) If reports are needed i.e. technical, fault reports, and have not already been obtained these should be commissioned by the Corporate Solicitors Office and provided only to the Corporate Solicitors Office for the purpose of obtaining legal advice. This is in an attempt to create the initial protection of legal professional privilege for such reports.
- (g) Determine if independent legal and other expert assistance is required.

N00756

When a dispute situation arises, facing up to its implications early can make the management of the dispute much easier and less costly than attempting to resolve the dispute at a later stage. Pinpointing the true nature of a dispute and the possible approaches to be taken to bring about its resolution will give Telecom a proper basis for proceeding with the management of a dispute or claim. The earlier that independent legal advisors and other expert assistance become involved in a claim or dispute, the more likely it is that such a claim or dispute will proceed to a speedy resolution. Obtaining independent legal advice at this stage will provide the following benefits:

- (i) An overview of possible outcomes and options and the initiation of a stringent due diligence process on the merits of the claim.
- (ii) Prevention of prejudicial phone calls being made or a damaging internal note being written by imposing a disciplined handling of the dispute or claim.
- (iii) Guidelines or estimates can be prepared and the necessary funds allocated as to the likely legal costs involved in pursuing the



resolution of the dispute or claim, and any likely exposure liability.

- (iv) Management are able to provide assurances to the Telecom Board that the dispute or claim is under a controlled dispute management process and that an independent and objective assessment of Telecom's position and options with respect to the claim has been made.

For the Telecom independent advisor relationship to operate properly it is essential that there is a two way flow of information and a team approach in the management of the dispute or claim. In order to facilitate this approach, monthly meetings would be held between the DMA and its independent advisors to review the status of cases referred and to monitor the dispute resolution process. There cannot be a synergy of commercial objectives and available legal options without close and co-operative planning between Telecom and its independent legal advisors (see Part D below).

#### 6. Conduct not to be undertaken without referral to the DMA

There are certain courses of conduct which should not be undertaken without first referring the matter to the DMA. These are:

- (a) Making an ex gratia offer/payment of money which exceeds the level applicable under Telecom's service guarantees.
- (b) Make an offer of alternative products or services ("contra"). For example, a customer complains about the continued non-performance of a product over a period of 2 years and Telecom offers to replace it with a new one or new model together with an admission that the old product was faulty. The customer's immediate problem may be fixed, but by admitting the fault of the old one Telecom may expose itself to a damages claim for the preceding 2 year period.
- (c) No admissions of fault should be made.
- (d) No public comment should be made.
- (e) No written opinions, statements, reports or exchange of internal correspondence which contain admissions of fault should be made.
- (f) When in doubt, the whole matter should be referred to the DMA.

N00757

Referral of the matter to the DMA in these circumstances is necessary to ensure that Telecom obtains the appropriate release and/or indemnity where it is making any settlement payment or contra offer and to minimize the creation and spread of inflammatory and commercially damaging material. It is also necessary to ensure a speedy resolution of the claim.

#### 7. Alternative Dispute Resolution Options

Where all internal procedures and options have been exhausted or are unlikely to generate a favourable outcome, the DMA should in conjunction with Telecom's independent legal advisors, give strong consideration to the alternative dispute resolution ("ADR") options which may be available for the particular claim. In recent experience with "COT" cases there has been only one (Golden Messenger) which has progressed through court proceedings. Telecom has also attempted to

resolve certain other "COT" cases through arbitration by an independent third party. This attempt was unsuccessful due to the withdrawal of acceptance by the claimants concerned of the terms of reference upon which the arbitration was to proceed.

The attractiveness of particular ADR options will of course depend upon each parties agenda and the expected or desired outcome of the claimant. What is important is to consider each case in accordance with such matters and avoid preconceived notions as to what the ADR options entail which may hamper Telecom's strategy and planning process.

The particular ADR options of relevance to "COT" cases and cases of this kind are:

- (a) Arbitration by an Independent Third Party - this option involves the Telecom and the claimant(s) agreeing on an independent third party who would resolve the issues in conflict. On this basis, the parties would agree to terms of reference and agree to abide by the decision of the independent third party.

The advantage of this option is that the hearing of the case would not take place in a public environment and could also be made subject to confidentiality undertakings. The difficulties experienced with this option are generally faced at the initial stage of agreeing on the independent third party and the terms of reference. It may also be against a claimant's desire to receive a public review of its case.

- (b) Mediation - the difference between an independent third party adjudicating on the claim and mediation is that a mediator's task is to merely attempt to make the parties reach a consensus on all issues. The mediator cannot otherwise impose a decision upon the parties.

The advantage of mediation is that like the independent third party arbitration option, the matter is not discussed or considered in a public forum. A further advantage is that since there is not a focus upon a decision being made as to fault of one party the obligations to put evidence before a court or independent arbitrator in order to prove or disprove any allegations against Telecom is diminished. The difficulties with this option is that it may not be acceptable to a claimant's publicity agenda will not be conducive to settlement where a claimant has developed an irreparable distrust of Telecom.

N00758

- (c) Court Proceedings - as noted above the "COT" case claimants have been reluctant for various reasons to progress their claims by instigating court proceedings against Telecom. However, should a claimant bring court proceedings against Telecom there are obvious advantages and disadvantages in such an approach to dispute resolution. The advantages include:

- requirement on the part of the claimant to meet a particular standard of proof in its case against Telecom

- final judgement as to the dispute can be obtained

The disadvantages include:

- dispute argued in a public forum

- can be costly to defend
- exposes Telecom documentation and processes to public scrutiny
- can be a very lengthy process and involve significant corporate attention and time
- could have the potential to set a precedent or encourage further claims.
- a bad decision of the court could involve a precedent being set as to the status of Telecom's network.

N00759

D. REFERRAL OF "COT" CASES TO INDEPENDENT ADVISORS AND EXPERTS

The involvement of independent advisors and experts does not need to be seen as a final resort where all efforts of Telecom have failed to resolve a claim. There are numerous advantages to involving independent legal advisors and other experts at an early stage of a claim. These include:

1. Independent assessment of exposure to liability and assessment of the merits of the claim.
2. Decrease in executive downtime spent dealing with the claim and negotiating its resolution.
3. Distancing of Telecom from a claimant's attempts to divide and conquer and placing of the claim in the hands of those with experience in the handling of such disputes. The DMA will be assisted in preventing enquiries and action by others if they are able to say they have retained independent experts.
4. Increasing potential for legal professional privilege protection.
5. The imposition of a disciplined and dedicated handling of negotiations and procedures to facilitate a resolution while protecting the interests of Telecom.
6. Can create an environment which forces substantiation of a claim to a level of legal proof.
7. It has proven most useful to engage independent accountants, in conjunction with independent legal advisors, for the purpose of evaluation and assessing the validity and quantum of any claim.
8. The giving of credibility to Telecom's assessment of the claim and ensuring that any settlement offer represents a reasonable commercial resolution to the claimant's claim.
9. The distancing of Telecom personnel from conduct of negotiations and allegations of unconscionable conduct in bringing about settlement of the claim.
10. Ensuring adequate and complete release and indemnity undertakings are obtained from the claimant and any other interested parties.
11. Assisting Telecom's internal legal advisors in the handling and management of Telecom's legal exposure to claims of this kind.

N00760

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ATTACHMENT 5.

Melbourne Office

LPP

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To fax:	632 3215	From fax:	(03) 288 1567
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Page 1 of	9	Approval:	<i>DM</i>

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Level 43, 101 Collins Street, Melbourne Vic 3000 Australia

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Dear Jim

Settlement proposals

We refer to our telephone conversation this morning and to your instructions to prepare a comparative table of the Settlement Proposals put forward by the "COT" members (Mark I), Austel (Mark II) and Telecom's preferred settlement proposal (Mark III). We now enclose the table for your consideration.

Could you please let us know if you require any amendments to be made to the table and whether you wish us to prepare the settlement proposal document (and any necessary attachments) for the Mark III version.

Please contact Denise McBurnie on 288 1383 if you have any questions regarding the enclosed table.

Yours sincerely  
FREEHILL HOLLINGDALE & PAGE  
Per:

*Denise McBurnie*

Denise McBurnie  
Solicitor

Enc:

A06694

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**REVIEW OF "COT" SETTLEMENT PROPOSALS**

**MARK I**

**Basia of Proposal**

- Telecom and "COT" members to disregard settlements already made and releases given.
- "COT" member will "relinquish" his/her claims pre and post settlement and submit a revised claim to the "Circuit Breaker".

**MARK II**

As for Mark I

- 
- 
- 

**MARK III**

Telecom is not legally bound to re-open settlements, particularly for Mr Schover; Telecom readily accepts use of the Settlement Proposal for claims which have arisen subsequent to the date of previous settlements.

If Telecom decides to subject past settlements for re-assessment, Telecom's interests must be safeguarded to the maximum extent. This is because Telecom, by the act of agreeing to such re-assessment, may be seen as having tacitly conceded that the previous settlements with "COT" members were unfair and unconscionable.

A06695

**MARK I**

**MARK II**

**MARK III**

Following from the previous point the whole issue of compensation of "COI" members, including quantum, is reopened.

The re-opening of previous settlements and the method of dealing with them set out in the Proposal may set a precedent by which Telecom would be bound, either in relation to future claims by the "COI" members, or in relation to any other customer with which a settlement may have been reached or which may be reached with a customer in the future, to submit to a re-assessment of such settlements.

It would be highly irregular and commercially unacceptable for a corporation to voluntarily re-open for consideration a dispute which had been finally resolved between itself and another party and which was the subject of a formal settlement agreement.

A06696

**MARK I**

**MARK II**

**MARK III**

If Telecom chooses to re-open any aspect of previous settlements it should be made very clear that it does so on the basis of a denial of liability and without any legal obligation to do so, and purely as a matter of good faith and business expediency. Such denials, however would not necessarily absolve Telecom from any liability with regard to a possible claim by any "COT" member that the previously negotiated settlement and the conduct of Telecom leading up to the settlement was unconscionable.

**Final Binding Settlement**

- Settlement to be final and binding for claims up to an agreed date.

As for Mark I

The Proposal, including the terms of reference and an appropriate worded release should be signed by each individual "COT" member and Telecom.

**Appointment of "Circuit Breaker"**

- "Circuit Breaker" suggested was an associate of the "COT" members.
- Person of clear independence and integrity, experienced in commercial assessment, mediation and arbitration.

As for Mark II, but also needs to possess or have access to expertise in legal, technical and accounting issues relevant to the dispute (suggesting a former Judge, QC).

A06697



**MARK I**

**Procedure for Assessment**

**Option 1**

- Telecom may make revised offer to individual "COI" members, but no payment of revised offer until all "COI" members have had their claim determined by the "Circuit Breaker" ("COI" members to publicly acknowledge fairness)

**Option 2**

- (a) "COI" member to give "Circuit Breaker" details of claim and "Circuit Breaker" to verify details of such claim

**MARK II**

No direct equivalent to Option 1

same as Mark I, Option 2, para (a)

(a)

**MARK III**

Option 1 not acceptable

same as Mark I, Option 2, para (a) plus Telecom to have the right to make a submission to the "Circuit Breaker". This right to accord with natural justice and not to be used as a mechanism for delay.

A06698

**MARK I**

(b) Not necessary for "COF" member to link call losses with amounts claimed (b)

No causation between "problems" and claims by "COF" members other than the "Circuit Breakers" reasonable conclusions in relation to causation. (b)

(c) All parties bound to accept "Circuit Breaker's" valuation in advance. (c)

(d) No payments by Telecom until all "COF" members agreed to valuation of their respective claims. (d)

(c) "Circuit Breaker" to "check" the circumstances of the business and industry of each "COF" case member, their "experience", and to take into account their financial positions. (c)

206699

**MARK II**

**MARK III**

the normal rules of evidence relating to causation shall apply subject to relaxation as appropriate, of certain of the rules. eg. rules against hearsay evidence, requirements for original documents.

"Circuit Breaker" required to make a determination on reasonable grounds as to the link between "COF" member claim and alleged faults or problems and, as appropriate, make reasonable inferences based upon such evidence as is presented by each "COF" member and by Telecom.

same as Mark I, Option 2, para (c) (provision for reimbursement from "COF" member if determination less than previous settlement offer??)

no equivalent and not appropriate. Each individual case to be dealt with separately and on its merits.

"Circuit Breaker" to determine what proportion of demonstrated business loss is attributable to factors other than alleged problems with the telephone services. "Circuit Breaker" to determine these factors in accordance generally with (b) above.

**MARK I**

- (f) Telecom to provide a bank guarantee to maximum of each claim.
- (g) 10-15 working days for whole process.
- (h) No equivalent.

**MARK II**

- (f) Corporate guarantee to be given by Telecom to "Circuit Breaker".
- (g) Time of the essence and agreed timetable.
- (h) "Circuit Breaker" to consider members' circumstances individually and as whole and to consider Telecom's response to "COT" members claims individually and as a whole.

**MARK III**

- Guarantee not appropriate given the binding nature of the Settlement Agreement.
- Same as Mark II, para (g)
- Not accepted because no basis for any provision for a penalty or aggravated damages in light of Telecom's previous good faith negotiations.
- Proposal and any terms of reference should specifically exclude from the ambit of the review any consideration of:
  - the manner in which Telecom has handled the complaint.
  - the manner in which the past settlements were handled.
- Same as Mark II, para (i) however claim as inserted into Proposal Mark III by each "COT" member should be as previously specified. This is to avoid unjustified exaggeration of claims in an effort to avoid this restriction.
- Same as Mark II, para (j), except "Circuit Breaker's" hourly costs to be set out and agreed. Out-of-Pocket expenses of "Circuit Breaker" which are verified also to be paid by Telecom.

- (i) No equivalent.
- (i) "Circuit Breaker's" determination not to be greater than "COT" members claims as specified in the final form of the Settlement Proposals.
- (j) Not specified, but assumed to be the same.
- (j) "Circuit Breaker's" costs to be met by Telecom.

A06700

**MARK I**

(k) No equivalent.

**MARK II**

(k) Telecom  
Breaker".

will indemnify "Circuit (k)

**MARK III**

On the face of the Proposal, no basis for the indemnity.

Additional Points

• Strict terms of reference dealing with issues and procedure before the "Circuit Breaker" should be agreed between the parties and should be attached to the Proposal.

• "Circuit Breaker" should have full power to inspect all books and records of all parties, including Telecom, and should have right of oral examination (subject to normal rules of evidence and procedure).

• The "COT" members should be required to take independent legal advice on the Proposal before entering into it and the Proposal itself should include an acknowledgment by each "COT" member to that effect.

• Proposal should make specific reference that the hearing of the claims be in camera and that the "Circuit Breaker's" determination be confidential.

• The "Circuit Breaker" should provide full reasons supporting the determination reached.

A06701

**MARK I**

**MARK II**

**MARK III**

Telecom's acceptance of the Proposal and the determination of the "Circuit Breaker" should be expressly described in the Proposal as without any admission of liability on the part of Telecom.

There should be a hearing before the "Circuit Breaker" because it will be important for the "Circuit Breaker" to make his own direct assessment of the character and veracity of each of the claimants.

A06702

10/1/94



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10 January, 1994

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

Dear Mr Smith

**"Fast Track" Arbitration Procedure**

I refer to your recent correspondence with Ian Campbell concerning the procedures and timing to apply to the "Fast Track" dispute reviews.

Originally, there was attached to the "Fast Track" agreement a set of detailed draft rules which were being developed for general use in relation to the arbitration of telephone-related disputes. Those draft "standard" rules are referred to in clause 1(b) of the "Fast Track" agreements. The "standard" rules are still being finalised, but they are now relatively close to finalisation.

Telecom has modified a copy of the current draft "standard" rules so as to be specifically suitable for use in relation to the arbitration of the "Fast Track" disputes. The modifications take into account the following:

- the provisions of the "Fast Track" agreements.
- some relevant comments which Austel has recently made concerning the draft "standard" rules, and
- our further views on the rules which should apply to these cases.

A copy of those modified rules is enclosed for your consideration for use in relation to the arbitration of the "Fast Track" disputes.

You no doubt appreciate that there is a need for such rules and procedures to be set before any "Fast Track" review is commenced. That is because the "Fast Track" agreements signed by Mr Schorer, Mrs Garms, Mrs Gillan and Mr Smith, only constitute agreements to enter into an arbitration process. As such, they do not fully document the rules and procedures to be applied to that arbitration process.

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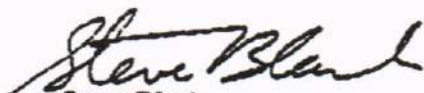
In the absence of agreed rules and procedures, the following problems could arise:

- the reviews could be seen to be unfair if rules or procedures are applied without prior agreement;
- the reviews could be constantly delayed if agreement is sought to set rules or procedures part way through a review; and/or
- the reviews could fail to achieve resolutions which are legally binding if rules which have not been agreed to, are applied.

It is important that the process to agree and adopt a set of rules and procedures be implemented quickly in the light of your planned timetable for the review of the "Fast-Track" disputes. Please be assured that Telecom will provide every assistance in this regard.

I would appreciate being kept informed of any decision made concerning any rules and procedures to be adopted for these reviews.

Yours faithfully



Steve Black  
GROUP GENERAL MANAGER  
CUSTOMER AFFAIRS

D01186

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(e), 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

of the conduct of the Procedure, the Confidential Information and the Arbitrator's award being kept strictly confidential by the Claimant. Any disclosure of the conduct of the Procedure, the Confidential Information or the Arbitrator's award by the Claimant will render any obligation of Telecom Australia to pay any sum to the Claimant null and void. Any payment already made by Telecom Australia to the Claimants pursuant to the Arbitrator's award under these rules shall be wholly and immediately refundable by the Claimant to Telecom Australia as liquidated damages in the event of a breach of the obligation of confidence owed by the Claimant to Telecom Australia pursuant to the rules embodied in the Procedure.

- (r) Telecom commits in advance to implementing any recommendation made by the arbitrator pursuant to clause 9(k)(aa)(i)(C).
- (s) Subject to clause 9(q) and unless directed otherwise in the Arbitrator's award or the parties otherwise agree, within three weeks of dispatch to the parties of the Arbitrator's award, payment shall be made of any monies directed by the award to be paid. Such payment shall be made by the party liable direct to the party entitled, and not through the Administrator. If the Arbitrator determines in respect of a Claimant's claim an amount less than that paid under an earlier settlement, Telecom agrees not to recover the difference.
- (t) If either party has sent original or copy documents in support of its case to the Administrator that party may within six weeks of publication of the award request the return of those documents. Subject to that, case papers will be retained by the Administrator and may in due course be disposed of in accordance with the Administrator's policies from time to time.
- (u) The Arbitrator and Administrator shall conduct and progress the arbitration as quickly as justice to all the parties reasonably permits.

#### Costs

- 9.- The Arbitrator's fees and expenses shall be paid by the Administrator and are part of the administrative costs of the Procedure.
- 10. The administrative costs of the Procedure are subject to a separate agreement between the Administrator and Telecom Australia.
- 11. Each party bears its own costs of preparing and submitting its case.

**Liability of Administrator and Arbitrator**

12. Neither the Administrator nor the Arbitrator shall be liable to any party for any act or omission in connection with any arbitration conducted under these Rules save that the Arbitrator (but not the Administrator) shall be liable for any conscious or deliberate wrongdoing on the Arbitrator's own part.

Schedule A  
("the Disputes")

- (a) In respect of each of the Claimants other than Graham Schorer (+ other related claimants):
- (i) the liability of Telecom Australia to the Claimant in respect of alleged faults in the provision to the Claimant of telecommunication services;
  - (ii) the adequacy of the amounts paid by Telecom to the Claimant under earlier settlements in relation to alleged faults in the provision to the Claimant of telecommunication services;
  - (iii) the liability of Telecom Australia to the Claimant in respect of alleged faults in the provision to the Claimant of telecommunication services since the date of the settlement payment for the respective Claimant's earlier claims, up to the date of the Arbitrator's decision;
  - (iv) If Telecom Australia is found liable in accordance with (i) or (iii) above, the quantum of compensation payable by Telecom Australia to the Claimant for the Claimant's proven loss.
- (b) In respect of Graham Schorer (+ other related claimants):
- (i) the liability of Telecom Australia to Graham Schorer (+ other related claimants) in respect of alleged faults in the provision to Graham Schorer (+ other related claimants) of telecommunication services;
  - (ii) If Telecom Australia is found liable in accordance with (i) above, the quantum of compensation payable by Telecom Australia to Graham Schorer (+ other related claimants) for Graham Schorer's (+ other related claimants) proven loss.



Schedule B  
("the Claimants")

- (a) Graham Schorer [+ other claimants - companies etc.]
- (b) Ann Garms [+ other claimants - companies etc.]
- (c) Maureen Gillan [+ other claimants - companies etc.]
- (d) Alan Smith [+ other claimants - companies etc.]

↓  
ELC003140015.6 - 10 January 1984 (15:47)

Schedule C

[ This form will serve as written evidence of both Telecom and the Claimants having formally agreed to submit to arbitration under the rules ]

CA93349015.6 - 10 January 1994 (25:47)