CAV

CHRONOLOGY

LGE

Exhibits 923 to 946

CONFIDENTIAL

FREEHILL
HOLLINGDALE
& PAGE

Melbourne Office

CONFIDENTIAL

To:	Ian Row Corporate Solicitor	From:	Denise McBurnie
At:	Telecom Australia	Direct line: Switch:	(03) 288 1383 (03) 288 1234
To fax:	634 8832	From fax:	(03) 288 1567
		Date:	10 September 1993
Phone:	634 3300	Matter No:	1660521 Pin No: 274
Page 1 of		Approval:	Denise McBurnie

Dear Ian

N00749

"COT" Case Strategy

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

923

LEGAL PROFESSIONAL PRIVILEGE

CONFIDENTIAL/COMMERCIAL IN CONFIDENCE

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.

N00750

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.

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.

8. 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 fails 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.

N00752

6. "Divide and conquer" approach does not engender a workable settlement environment.

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

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.

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:

(a) should be or can continue to be dealt with as a customer relations exercise and the proper manner for doing so; or

(b) 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 Tel[illegible]

(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.

N00756

(g) Determine if independent legal and other expert assistance is required.

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 to 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.

N00757

(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.

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 minimise 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 Messengers) which has

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

- 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 EXPERT

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

(i) The cases of *NCA v S* and *Esso*, referred to above, make it clear that a claim to privilege must expose sufficient facts to justify the claim. A vague or bald assertion of the privilege is seen as no claim at all.

(ii) The definition of privilege indicates that only communications between a lawyer and a client for the dominant purpose of providing or receiving legal advice or for litigation (and communications between a lawyer or client and a third party for the dominant purpose of litigation) will be protected by privilege (see *Baker v Campbell* and *Esso's* case referred to above).

It is difficult to see how a document, or documents, merely described as "Network Data" would fall within the definition of a communication between a lawyer and client for the dominant purpose of advice or for litigation, or communication between a lawyer or client and a third party for the dominant purpose of litigation.

There appear to be 39 claims to legal professional privilege, which are merely listed as LPP in *Attachment 1*, being further detailed in *Attachment 2*. Further, there appear to be 74 claims to legal professional privilege listed in *Attachment 2* (it is not clear why there is such a variation between these two amounts of claims). A perusal of the file descriptions in *Attachment 2* indicates not only incomplete and inadequate claims to privilege but also claims which appear to be erroneously made.

For example, it is difficult to see, without further information being supplied, how a "Chart – Call analysis with handwritten annotations", a "Map – Bova Enterprises Call per exchange", a "Table – Bova 's directory listings" or a "Fax confirmation report" could be covered by legal professional privilege.

(3) made defective or erroneous claims to privilege, and/or

There is also some evidence of (3) i.e. making defective or erroneous claims to privilege.

For example, in the letter from Mr John Armstrong of Telstra to Mr Ross Plowman dated 28 September 1998, Telstra concedes that it has erroneously classified some documents as privileged.

(4) knowingly made false or spurious claims to privilege?

There is also some potential prima facie evidence of (4) i.e. knowingly making false or spurious claims to privilege. For example, there is a potential structure set up for the possible abuse of the doctrine of legal professional privilege in the faxed document entitled "COT" Case Strategy, marked "Confidential" dated 10 September 1993 from Ms Denise McBurnie of Freehill Hollingdale and Page, Melbourne Office to Mr Ian Row, Corporate Solicitor, Telecom Australia.

I refer in particular to section 4 on page 6, which states:

> "Of critical importance in the constitution and function of the DMA (Dedicated Management Area) 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."

LEGAL OPINION

Domzal, Nora

From:	Pinel, Don
To:	Sayer, Janet; Beattie, Ken; Pittard, Rosanne
Cc:	Brabazon, Paul; Holmes, Jim; Hambleton, Dennis V; Hill, Trevor; Halliday, Trevor
Subject:	Customer correspondence
Date:	Thursday, 23 September 1993 6:58PM

In the current climate Telecom needs to be particularly careful with its correspondence to the CoT customers. I have engaged Denise McBurnie from Freehills to participate on an "as required" basis in this matter and it is appropraite that all correspondence from the CoT (and near CoT) customers should be channeled through Denise for either drafting of a reply from Telecom or for reply direct from Freehills as our agent. The particular approach will vary from customer to customer and circumstance to circumstance but the general philosophy should be followed.

The merit of this approach is:

It relieves the Regions of onerous correspondence

It applies a rigorous legal regime to the dialogue

It provides a consistent approach to these matters

Would you please ensure that with all customers that are, (or have the potential to become) serious complaints, correspondence is processed through Freehills with initial acknowledgement by the Region.

Ultimately, the response to customer correspondence is a matter for Regional decision but I would encourage serious consideration of Freehills advice and discussion with either myself or Jim Holmes if an alternative approach is preferred.

Don

P03022

925

Consumer will undertake an immediate inspection of all elements of the CAN and certify that the service is constructed in a manner that complies with standard practice. Any defects/abnormalities will be noted and corrected. Pairs will be "clean" between the exchange and the customer's premises with any common pairs cut away. Consumer will formally certify that the inspection has been carried out and record the results of their investigation.

Commercial will test the customer's service and record the test results. This test will be repeated at regular intervals (at least weekly) to ensure stability and consistency. Where appropriate, CPE will be tested. On occasions it may be desirable to install recording equipment at the customer's premises.

All technical reports that relate to the customer's service are to be headed "Legal Professional Privilege", addressed to the Corporate Solicitor and forwarded through the dispute manager.

The only contact with the customer will be by the dispute manager or the Regional Manger unless the MD Commercial chooses to become personally involved. All contacts with other individuals will be referred back to the dispute manager.

The Regional General Manager will ensure that all other elements of Telecom are advised of the declaration of a Category A dispute. The managers of these other elements will ensure that all parts of their organisation are aware of the existence of a dispute and that staff are advised that they are not to comment on the customer's service. On all occasions only staff with exceptional "intelligence" and who have been fully briefed on the dispute are to be assigned to any dealings with the customer or related activities.

It is important that operational systems (including DCRIS, LEOPARD, Service*Plus) should be made capable of displaying an appropriate warning mark against the customer's record indicating that a sensitive customer dispute is in progress and identifying the dispute manager. Local instructions should be issued to advise staff to refrain from commenting on service performance issues but to refer these to the dispute manager.

SEP/-

R00524

926

AUSTEL

AUSTRALIAN TELECOMMUNICATIONS AUTHORITY

93/596(6)

5 October 1993

Mr Ian Campbell
Managing Director, Commercial
Telecom

Fax 634 3876

Dear Mr Campbell

COT CASES
SETTLEMENT PROPOSAL

AUSTEL has been asked by the *COT Cases* to facilitate their agreeing with Telecom the terms of the proposal they have put to it on how their claims against it may be settled.

2. I understand from the terms of the letter, dated 29 September 1993, from your Corporate Secretary, Mr Holmes, to Mr Schorer, Spokesperson for the *COT Cases*, that Telecom agrees with AUSTEL's intervention as a facilitator.

Starting point

3. I am taking as my starting point the *"Settlement Proposal"* at Attachment 'A' which was prepared by Telecom for the purposes of clarifying its understanding of the nature of the proposal put by the *COT Cases*.

The *Settlement Proposal* in context

4. The *Settlement Proposal* is to apply to the following four *COT Cases* -

- G Schorer: Golden Messenger (Spokesperson)
- A Garms: Tivoli Restaurant
- M Gillan: Japanese Spare Parts
- A Smith: Cape Bridgewater Holiday Camp.

5. The *COT Cases* put their proposal against a background of -

- long standing disputes between each of the *COT Cases* and Telecom involving, amongst other things, allegations of poor quality of service provided by Telecom and shortcomings in customer equipment supplied by it
- the effect of the matters in dispute on their businesses

927

A06648

5 QUEENS ROAD, MELBOURNE, VICTORIA
POSTAL: P.O. BOX 7443, ST KILDA RD, MELBOURNE, VICTORIA, 3004
TELEPHONE: (03) 828 7300 FACSIMILE: (03) 820 3021

- dissatisfaction with Telecom's responses to their complaints
- prior payments made by Telecom to each of the *COT Cases* in connection with their disputes.

6. When there is agreement between Telecom and the *COT Cases* as to the nature of their proposal, Telecom's Executive Council will consider it and Telecom will inform the *COT Cases* whether Telecom will adopt it.

Comments by the *COT Cases* on the *Settlement Proposal* at Attachment 'A'

7. The *COT Cases* have indicated to AUSTEL that the *Settlement Proposal* at Attachment 'A' does not accurately reflect their proposal because it does not include an opportunity for Telecom to proceed without reference to the proposed Circuit Breaker. That is, the Circuit Breaker is seen by the *COT Cases* as a last resort mechanism that would operate only if -

- a direct offer by Telecom were unacceptable
- Telecom chose not to make an offer.

8. While there may be merit in an opportunity for Telecom in the first instance to negotiate directly with the *COT Cases* and to have the Circuit Breaker as a fall back position, the history of the matter suggest to me that direct negotiations between Telecom and the *COT Cases* would not provide a resolution of the matters more quickly than an immediate move to a Circuit Breaker and I understand that the *COT Cases* do not press for that part of their proposal to be recorded in the *Settlement Proposal*.

Clauses 1-4

> "1 *Both Telecom and the four remaining active COT Cases are seeking a final settlement of the outstanding matters between them if that is possible.*
>
> 2. *A final settlement is one that will be absolutely binding and, once entered into, has no chance of becoming unstuck.*
>
> 3. *The settlement process envisaged requires a "Circuit Breaker" that is a person accepted by all parties as an honest broker who will investigate the claims of the COT members and propose terms for commercial settlement.*
>
> 4. *The "Circuit Breaker" will be a person of clear independence and integrity who will have had experience in commercial assessment, mediation and arbitration."*

9. I understand that the *COT Cases* agree with Clauses 1-4 of the *Settlement Proposal*

Clause 5

> *"5. The person nominated as "Circuit Breaker" is Mr Barrie O'Sullivan of Freeman, Plumber & Pullinger, Loss Assessors of Brisbane."*

10. My understanding is that Mr O'Sullivan is the *COT Cases'* first preference but that if it were necessary for the *Settlement Proposal* to proceed, the *COT Cases* would be prepared to accept another person.

11. One suggestion that they have made in that regard is Mr Gordon Hughes. I understand that Mr Hughes is an immediate past President of the Victorian Law Society and is the Managing Partner of Hunt & Hunt, Solicitors of Melbourne. I further understand that Mr Hughes' personal expertise is one of information and communications technology law and the resolution of disputes in those areas. I also understand that if he were to be chosen he would undertake the task personally.

12. Another suggestion is a person nominated by the President of the Queensland Law Society.

13. Alternatively, I understand that a person nominated by AUSTEL skilled in alternative dispute resolution with a mandate to call upon others of his or her choice with professional skills (for example, accounting skills) relevant to the task would be acceptable to the *COT Cases*.

14. Would you please let me know which of the alternatives you would want to follow.

Clause 6 (a)

> *"6. The proposed procedure for settlement is -*
>
> *(a) Each COT member will provide the "Circuit Breaker" with details of their claim and whatever supporting material they have available."*

15. The *COT Cases* agree with Clause 6 (a).

Clause 6 (b)

> *"(b) The "Circuit Breaker" will check the circumstances of the business and industry of each COT member."*

16. I understand that the *COT Cases* intend that the Circuit Breaker should compare the performance of each of the *COT Cases'* businesses with the performances of other like businesses over a relevant period so that the Circuit Breaker may draw conclusions on how the *COT Cases* might have performed but for the matters in dispute between them and Telecom.

17. I suggest that Clause 6 (b) be amended to reflect that understanding as followings -

> *"The "Circuit Breaker" will check the circumstances of the business and industry of each COT member and compare the performance of COT members' businesses with the performances of other like businesses over a relevant period so that the "Circuit Breaker" may draw conclusions on how the COT members' businesses might have performed but for the matters in dispute between them and Telecom."*

Clause 6 (c)

> *"(c) The "Circuit Breaker" will verify the claim of each COT member, and will make adjustments to claimed amounts as seem justified by the investigation. Call losses need not be proved to be causally linked with amounts claimed."*

18. I understand that the *COT Cases* have in mind that the Circuit Breaker will, amongst other things, be looking at the circumstances of the *COT Cases* both individually and as a whole and at how Telecom responded not only to individual cases but also to the *COT Cases* as a whole.

19. I further understand that the *COT Cases* are not seeking to deny that there should be some causal link between Telecom's quality of service and their claims but that because not all call losses and other problems experienced by them have been recorded they should not have to be put to strict proof of each and every call loss or other problem.

20. Having regard to my above understandings, I suggest that the Clause 6 (c) be amended as follows -

> *"The "Circuit Breaker" will verify the claim of each COT members and will make adjustments to claimed amounts as seem justified by the investigation. In carrying out the investigation, the "Circuit Breaker" will, amongst other things, look at the circumstances of the COT members both individually and as a whole and how Telecom responded not only to individual cases but also the COT members as a whole. As not all call losses or other problems experienced by the COT members have been recorded, the "Circuit Breaker" will not require strict proof of a causal link between each and every call loss or other problem experienced by the COT members but may draw from the available information and material reasonable conclusions about the extent of the call losses and problems and their impact on the performance of the COT members' businesses."*

Clause 6 (d)

> *"(d) Each COT member will be bound to accept the evaluation of the "Circuit Breaker" in advance, including an evaluation that is less than the total amount of the member's claim, or less than the payments already made by Telecom to date."*

21. The *COT Cases* agree to Clause 6 (d) as stated above.

22. The *Settlement Proposal* would be enhanced if Clause 6 (d) were also to include words to the effect that the Circuit Breaker may not assess a sum greater than the amount claimed by any COT Case and what those sums are in respect of each COT Case. That is a matter of detail that can be addressed if Telecom agrees to adopt the proposal.

Clause 6 (e)

> *"(e) Telecom will also be bound to accept the evaluation of each claim in advance."*

23. The *COT Cases* agree to Clause 6 (e).

Clause 6 (f) (i) and (ii)

> *"(f) COT members will be bound in advance by the outcome of the evaluation of one or more of the following arrangements:*
>
> *(i) by signing an irrevocable power of attorney authorising the "Circuit Breaker" to accept settlement on their behalf.*
>
> *(ii) by agreeing that no payout need be made by Telecom to any COT member until all have agreed to the evaluation of their respective claims."*

24. While the *COT Cases* agree that Clause 6 (f) (i) and (ii) as expressed above accurately reflects their proposal as they put it to Telecom, they have accepted my advice that further down the track Clause 6 (ii) may give individual *COT Cases* cause for concern and could lead to delays and real difficulties in individual *COT Cases* achieving a satisfactory settlement. Also, the clause seems to me to be unnecessary if Telecom is to commit itself to the Circuit Breaker's determination. Accordingly, I suggest that Clause 6 (f) (ii) be deleted.

Clause 6 (f) (iii)

> *"(iii) by withholding a portion of the payout for up to two years to ensure public acceptance by each COT member in practice."*

25. I think that it might be useful to specify in this clause that the *"... portion of the payout ..."* is to be determined by the Circuit Breaker having regard to the financial circumstances of individual *COT Cases*. I suggest that the clause be recast as follows -

> *"by withholding a proportion, to be determined by the "Circuit Breaker" having regard to the financial circumstances of each COT member, of the payout for up to two years to ensure public acceptance by each COT member in practice."*

Clause 6 (f) (iv)

> *"(iv) each COT member will sign in advance letters to the Minister and to AUSTEL publicly acknowledging the fairness of the process and that it is a model for reconciliation of commercial differences."*

26. The *COT Cases* agree to Clause 6 (f) (iv).

Clause 6 (g)

> *"(g) Telecom would be bound to accept the outcome of the process by entering into a bank guarantee to the maximum of each claim."*

27. As I understand what is intended by this clause, it might be better expressed as follows -

> *"Telecom is to provide to the "Circuit Breaker" a guarantee that it will meet any claim as assessed by the "Circuit Breaker" to the maximum of the claim."*

Clause 7

> *"7. Timing: The whole process would be expeditiously handled, and would take about ten-fifteen working days comprising -*
>
> - *one-two days spent with each COT member to verify each claim, examine the basis of claim and documentation*
> - *a few days to report on each case and to seek agreement (if possible) to the evaluation*
> - *a few days to reconcile not only between Telecom and each COT member but across all four members (see 6 (f) (ii) above)."*

28. While the *COT Cases* agree that Clause 7 accurately reflects the proposal as they put it to Telecom, they recognise that the timing of the implementation of the *Settlement Proposal* will need to be reviewed having regard to -

- the history of the matters
- the need for the Circuit Breaker to become familiar with the cases
- the nature of the investigations to be conducted by the Circuit Breaker
- the travel involved
- the need for the Circuit Breaker to consult with third parties.

29. Accordingly, I suggest that the clause as it stands be deleted and replaced with a clause to the following effect -

> *"Timing: Speed is of the essence. The "Circuit Breaker" will be instructed accordingly and to give priority to preparing a mutually acceptable timetable for consideration by the parties."*

Other matters

30. I consider that it would be desirable for the *Settlement Proposal* to address the issues of -

- who will bear the costs of the Circuit Breaker - as I understand it the *COT Cases* would have Telecom bear the costs
- an indemnity for the Circuit Breaker - as I understand it the *COT Cases* would have Telecom indemnify the Circuit Breaker.

No

31. For ease of reference I have recast the *Settlement Proposal* at Attachment 'A' to reflect the above amendments - see Attachment 'B': *COT Cases - Settlement Proposal Mark II.*

32. The *Settlement Proposal Mark II* is acceptable to the *COT Cases.* As I understand it, the *Settlement Proposal Mark II* would also remove most of Telecom's difficulties with the earlier version as listed on page 3 of Mr Holmes letter of 29 September 1993 to Mr Schorer. I deal separately below with what I understand to be Telecom's difficulties with old claims versus new claims.

33. I should also add that Mr Schorer has addressed point 2 in Mr Holmes' letter and has obtained from the other three *COT Cases* written acknowledgments (Attachment 'C') that he is authorised to act as their Spokesperson.

Old v new claims

34. I understand from Mr Holmes' letter of 29 September 1993 to Mr Schorer that Telecom takes the position that -

> *"... all matters in issue up to the dates of individual settlements have been formally resolved, and that no outstanding (as opposed to possibly new) claims will be made."*

35. Mr Holmes' states in that regard -

> *"If there are, indeed, any new claims which, in the view of COT members, have arisen since settlement, details should be provided to Telecom or our solicitors, Freehill, Hollingdale & Page."*

36. While in normal circumstances that might be a reasonable position for Telecom to adopt, the circumstances of the *COT Cases* are beyond the norm - if Telecom is satisfied that from its perspective the prior *"... individual settlements ..."* it affected with the *COT Cases* were reasonable, it should not be concerned that an independent third party (the Circuit Breaker) might look at them anew. The terms of the *Settlement Proposal Mark II* enable the Circuit Breaker to make a finding to the effect that the prior *"... individual settlements ..."* were reasonable and, if so, the *COT Cases* would be bound by such a finding.

37. Also, as I understand it, the *COT Cases* claim, in effect, that when the prior *"... individual settlements ..."* were arrived at -

- not all relevant facts were taken into account
- they were under duress by virtue of their financial circumstances and forced to accept the settlements.

39. As a model corporate citizen Telecom would, no doubt, want all relevant facts to have been taken into account. The terms of the *Settlement Proposal Mark II* provide an opportunity to clear the air - they would enable the Circuit Breaker to test whether, as claimed by the *COT Cases*, all relevant facts were not taken into account and, to the extent they were not, to take them into account. Alternatively, the Circuit Breaker's investigation may confirm Telecom's position and from that perspective should be welcomed by Telecom.

40. Finally, if the attached letter (Attachment 'D') dated 7 July 1993 from Freehill, Hollingdale & Page to one of the *COT Cases'* solicitors is indicative of the way that Freehill, Hollingdale & Page have approached the *COT Cases* in the past, I would be more than a little concerned if they were to have a continuing role. I say that because in the context of the letter their selective quotation of what were then Telecom's general conditions of trading misleadingly omit critical qualifications in the clauses they were relying on to deny liability.

41. This is not the first occasion that I have had to take Telecom to task for misleading statements of its liability in the context of the *COT Cases* generally - see my letters of 30 August and 9 September 1993 re Dawson's Pest & Weed Control and my letter of 20 September 1993 re The Gourmet Revolution. While I am addressing those occasions separately from my consideration of the *Settlement Proposal*, combined with Freehill, Hollingdale & Page's letter they do reinforce my view that there would be merit in Telecom adopting the *Settlement Proposal Mark II*.

42. I am further reinforced in my view that Telecom should not resile from the Circuit Breaker looking anew at the claims by the four *COT Cases* by -

- the admission in your letter of 16 September 1993 to Senator Alston that -

  "We are also concerned (and can't deny) that, on occasions, Telecom officers may have made statements which were inaccurate or rude, such as:

  "You are the only one in the area with the problem"

  "Telecom has no liability ...."

  Such statements are typical of those claimed by the *COT Cases* to justify their allegations of misleading and deceptive conduct by Telecom.

- the statement in Mr Holmes' letter of 13 September 1993 to the Minister for Communications that Telecom's -

  "... responses to these customers have at times not been everything, which, in hindsight, we would have wished them to be."

43. Again, I stress the urgency of the matters and look forward to your early advice that the *Settlement Proposal Mark II* has received favourable consideration by Telecom's Executive Council.

44. I am available at your convenience or at the convenience of Telecom's Executive Council to elaborate on any of the above points.

Yours sincerely

Robin C Davey
Chairman

Holmes, Jim

From:	Newbold, Greg
To:	Beattie, Ken; Adermann, Gregory C; Pinel, Don; Blake, Ed; Campbell, Ian; Pittard, Rosanne; Benjamin, Ted; Holmes, Jim; Hambleton, Dennis V; Marshall, Ross
Cc:	Vonwiller, Chris; Anderson, Keith
Subject:	COT media latest
Date:	Tuesday, 28 September, 1993 6:30PM

Steve Lewis is following up on his own yarn NOT with the Davey letter to the minister but with the Davey letter to the CEO raising concerns about our use of Freehills. I have told Lewis that its is utterly inappropriate for us to comment on the private correspondence between the industry regulator and Telecom and have drawn his attention to the release on the C&L appointment.

Ben Potter also has a letter. His is from Davey to Ian Campbell wherein Davey calls on Telecom to look favourably on interim payments to some of the COTs. Same drill for Potter including the C&L release.

Given the amount of paper flowing around on this matter, it is hardly surprising that some should fall into the hands of the fourth estate. I tried to get a feel for Potter's source but my only surmise is that Davey is giving a strong feed to Schorer and Schorer is passing the paper on. I say this because Potter also raised the Freehills matter after being told by Schorer of a letter from Davey to WFB.

Greg.

~~103258~~
C02840

928

FAX FROM:	ALAN SMITH	DATE:	15.8.94
	C. O. T.		
FAX NO:	055 267 230		
PHONE NO:	008 816 522	NUMBER OF PAGES (including this page)	
FAX TO:	DR GORDON HUGHES HUNT & HUNT LAWYERS MELBOURNE FAST TRACK ARBITRATOR		4

Dear Dr. Hughes,

My submission will be a day late because of a telephone call I had from Paul Rumble's Office. I am now told any information regarding the RCM, numbers of customers will now be forwarded to me early this coming week.

This is too late for my binding and finished process of the final submission. I had hoped for this information by Tuesday of last week, however, this wait for information which never comes from Telecom has put me behind once again.

Thursday, 3 o'clock, at your office is my final dead-line. There will be no more claims for written submissions to be re-introduced.

However, again, I must draw your attention to Telecom's reluctance to forward relevant documentation to produce the evidence. Had I been given my true F.O.I. documentation, much more of this evidence, in support of my allegations of an inadequate phone service over these past years, would have been substantiated. I feel like a blind man without his stick. Telecom has in their favour the fact of what has been supplied.

My claim, as it is produced in this second interim submission, will, I feel sure, show you and your Resource Team many alarming facts.

I am asking, though the Arbitration Chair, for you to direct Telecom to produce the Bell Canada Raw Data. My two interim requests are for Telecom to respond in writing to the Arbitrator showing that there was incorrect documentation: calls which could not have possibly over-dialled other calls connecting to the PTARS at Cape Bridgewater at the time of the Bell Canada testing.

Telecom, likewise, did not test my 008 account at any time during this Bell Canada testing. This must be addressed through the Chair of this Arbitration process. I shall not write a response to their claim. I shall leave this in the hands of the Arbitration team, the Resource Team.

I have forwarded you a letter found by Ann Garms yesterday, while going through her F.O.I. I did not receive this Raw Data, as mentioned by Simon Chalmers. It did exist; I knew it did, but time has beaten my health and patience. Telecom has timed much to suit themselves.

I wish only for the second interim request to be granted: for Telecom to allow C.O.T. to view documentation under the Professional Privilege Act, to be done at their centre. This, of course, will be viewed under the secrecy agreement, the confidential agreement of this Arbitration. No copies will be made for distribution, other than for your perusal, and that of the Resource Team. If you think this information is a valid document then it will be submitted only, without a written submission as to the contents.

I forwarded you a very interesting document last week which was tabled under this Professional Privilege Act. That document was of a network fault. The document has since been viewed by John Wynack, Commonwealth Ombudsman, F.O.I. as being illegal under the Act to be umbrellaed in legal privilege documents.

On Thursday I will present you with my claim, plus a further 8 pages of documents I believe are of importance to my claim (Privilege documents).

I thank you for your time and patience in these trying months.

Respectfully,

Alan Smith.

cc. Mr Paul Rumble
Customer Resource Unit
Telecom fax: (03) 634 8441

HOLLINGDALE & PAGE

Melbourne Office

To:	Don Pinel		
Copy to:	Jim Holmes Greg Newbold	From:	Denise McBurnie
At:	Telecom Australia	Direct line: Switch:	(03) 288 1383 (03) 288 1234
To fax:	634 8444	From fax:	(03) 288 1567
		Date:	19 October 1993
Phone:	634 5736	Matter No:	1680521 Pin No: 274
Page 1 of		Approval:	

[redacted] - [redacted]

LEGAL PROFESSIONAL PRIVILEGED
CONFIDENTIAL/COMMERCIAL IN CONFIDENCE

Current status:

* Duesburys & FHP continuing process of evaluating [redacted] claim - final report to Telecom will be privileged and will not be made available to [redacted].

* Telecom preparing report for FHP analysing data available on [redacted] services (ie. CCAS, Leopard, CABS and file notes) - this report will be privileged and will not be made available to [redacted].

* [redacted] has requested Duesburys to return all documentation which he has provided to Duesburys. This request is being complied with.

* [redacted] sent a fax to Cheryl Prins this morning (copy enclosed). [redacted] has been provided with information today. (see copy of covering letter enclosed).

* [redacted]er told Peter Crofts at Duesburys that he will be taking the TV, press etc. to Telecom tomorrow. Given [redacted] past conduct it is not clear whether he intends to carry out this threat.

A067961

930

CO23687/CO

19 October 1993

Please contact Denise McBurnie if you have any further queries about this matter.

Yours sincerely
FREEHILL, HOLLINGDALE & PAGE
Per

Denise McBurnie

Denise McBurnie
Solicitor

A06797 930

CO23687/CO

COT Cases

Holmes Jim

From:	Vonwiller, Chris
To:	Campbell, Ian; Parker, Harvey; Holmes, Jim
Cc:	Stanton, John; Blount, Frank; Rizzo, Paul
Subject:	Warwick Smith - COT Cases
Date:	Wednesday, 10 November, 1993 6:58PM

CONFIDENTIAL

Gentlemen:

Warwick Smith contacted me in confidence to brief me on discussions he has had in the last two days with a senior member of the parliamentary National Party in relation to Senator Boswell's call for a Senate Inquiry into COT Cases.

Advice from Warwick is:

> Boswell has not yet taken the trouble to raise the COT Cases issue in the Party Room.

> Any proposal to call for a Senate Inquiry would require, firstly, endorsement in the Party Room and, secondly, approval by the Shadow Cabinet.

> This would appear highly unlikely at this stage, given Boswell's apparent lack of interest of raising it within the Party Room.

> The intermediary will raise the matter with Boswell, and suggest that Boswell discuss the issue with Warwick Smith. Warwick sees no merit in a Senate Inquiry.

He has undertaken to keep me informed, and confirmed his view that Senator Alston will not be pressing a Senate Inquiry, at least until after the AUSTEL report is tabled.

Could you please protect this information as confidential.

Chris Vonwiller

98

95/0614

Telecom
AUSTRALIA

Commercial & Consumer
Customer Affairs

Locked Bag 4960
Melbourne Vic 8100

Telephone (03) 632 7700
Facsimile (03) 632 3241

128

RECEIVED
13 JAN 1994

11 January, 1994

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

Dear Warwick,

I have attached for your information a copy of a letter sent to AUSTEL providing the results of two additional studies undertaken by Telecom to test the Rotary Hunting Groups and to provide supplementary inter-exchange network tests and the details of the tests. The additional testing was undertaken to provide further information on the reliability of the telecommunications services provided to those customers complaining of difficult network faults.

As you will see from the attached letter, the documents are rated "Commercial in Confidence" and are provided for the information of the TIO and not for release or disclosure to third parties without the permission of Telecom Australia. I would ask that this rating of the documents be respected.

It is anticipated that the release of these documents to the four customers currently proposed for the fast track arbitration process will be agreed at an appropriate time in consultation with yourself. The timing of the release can be finalised once the assessor has been appointed and the procedures for the arbitration have been agreed.

I also wish to confirm to you my previous advice regarding arrangements made with AUSTEL for the release of documents obtained from Telecom to the four customers currently proposed for the Fast Track arbitration process.

It was agreed at a meeting between Mr. Graeme Ward and Mr. Steve Black of Telecom and Dr Bob Horton and Mr Neil Tuckwell of AUSTEL on 7 January 1994 that:

- Information obtained from Telecom, in the course of AUSTEL's regulatory functions, and relevant to any parties involved in a formal arbitration process with Telecom under the control of the Telecommunications Industry Ombudsman (TIO) will only be released after consultation with the TIO and Telecom.
- The AUSTEL draft report will be expedited to ensure that it is available at an early stage of the arbitration process.
- The AUSTEL draft report will be released to the parties involved in the fast track arbitration process for comment in accordance with a process agreed with the TIO, and only after each party has signed a formal document committing to keeping the contents of the report confidential and giving an undertaking not to comment either privately or publicly on the report until after it has been released publicly by AUSTEL

Yours sincerely,

Steve Black

Steve Black
GROUP GENERAL MANAGER - CUSTOMER AFFAIRS

932

Telecom AUSTRALIA

Paul J Rizzo
Group Managing Director
Finance and Administration
242 Exhibition Street
Melbourne Vic 3000 Australia
Telephone (03) 204 9991
Sydney (02) 204 9991
Facsimile (03) 934 5418

11 January, 1994

Dr R Horton
Acting Chairman
AUSTEL
PO Box 7443 St Kilda Road
Melbourne Vic 3004

Dear Dr Horton

VOICE MONITORING

As you would be aware, there has been substantial media comment on Telecom's action in recording the telephone calls on the services of Mrs Gillan and Mrs Garms in the context of a detailed fault investigation. Information was received at about 4.30 pm on 5 January 1994 from the Australian Financial Review that the AFR was in possession of documents from AUSTEL which advised that this monitoring had taken place and these documents formed the basis of the AFR's question and subsequent public comment on the matter.

I have now received a letter from Mr MacMahon (copy attached) confirming that he advised both Mrs Garms and Mrs Gillan that Telecom had undertaken recording on their services. These letters were based on information provided by Telecom on the 24th December 1993.

Telecom's primary concern is that the information was released to a party that is currently involved with a dispute with Telecom, and who has entered into a formal arbitration process to resolve that dispute. The action taken has inflamed the dispute, aggravated the parties, led the parties to actively seek to raise the dispute to public comment and has put at risk the arbitration process.

The release of the information in these circumstances raises issues of principle which need to be resolved. Under the circumstances it was inappropriate for this information to be released in this way. Once a quasi judicial process such as the agreed arbitration

A10235

process has been entered into, information which may be material to that process should only be released through that process if at all. As AUSTEL participated with Telecom in the establishment of that process it is clear that AUSTEL was fully aware of the existence of the process and the formal agreement between the parties.

It is Telecom's view that arrangements should be put in place to ensure that information gained from Telecom in the course of AUSTEL's regulatory functions is only released in an appropriate way. To this end I wish to confirm the agreement reached between Mr. Graeme Ward and Mr. Steve Black in a meeting with you and Mr Neil Tuckwell today that:

- Information obtained from Telecom, in the course of AUSTEL's regulatory functions, and relevant to any parties involved in a formal arbitration process with Telecom under the control of the Telecommunications Industry Ombudsman (TIO) will only be released after consultation with the TIO and Telecom.

- The AUSTEL draft report will be expedited to ensure that it is available at an early stage of the arbitration process.

- The AUSTEL draft report will be released to the parties involved in the fast track arbitration process for comment in accordance with a process agreed with the TIO, and only after each party has signed a formal document committing to keeping the contents of the report confidential and giving an undertaking not to comment either privately or publicly on the report until after it has been released publicly by AUSTEL.

Yours sincerely

Paul J Rizzo
GROUP MANAGING DIRECTOR
FINANCE & ADMINISTRATION

File Fast Track
FYI J Geary, FHP

Telecom AUSTRALIA

11 July 1994

COMMERCIAL AND CONSUMER
CUSTOMER AFFAIRS

37/242 EXHIBITION STREET
MELBOURNE
VICTORIA 3000
Australia

Telephone (03) 632 7700
Facsimile (03) 632 3235

FAXED
11/7/94

Mr Warwick Smith
Telecommunications Industry Ombudsman

Facsimile No. 277 8797

Dear Mr Smith

The purpose of this letter is to confirm our discussion of 7 July 1994 at which Telecom outlined a proposal to provide confidential information to the arbitrator subject to the confidentiality provisions of the Rules of Arbitration governing the claims of the four COT claimants.

As discussed, it is proposed that Telecom will provide to the arbitrator a series of confidential reports which the arbitrator may then make available to the four COT claimants subject to the confidentiality provisions of the Rules of Arbitration. It is understood that, if the arbitrator makes this information available to the COT claimants, they will be required to keep the information confidential and return all copies of such documents and material to Telecom at the end of the arbitration.

Telecom will also make available to the arbitrator a summarised list of information which is available, some of which may be relevant to the arbitration. This information will be available for the resource unit to peruse. If the resource unit forms the view that this information should be provided to the arbitrator, then Telecom would accede to this request. It is recognised that this information may then be made available to the four COT claimants, subject to the confidentiality provisions of the Rules of Arbitration.

Yours faithfully

Steve Black
GROUP GENERAL MANAGER
CUSTOMER AFFAIRS

934

K54215

Hunt & Hunt
LAWYERS

5 May 1995

Our Ref: GLH
Matter No: 5126886
Your Ref:

Mr Alan Smith
Cape Bridgewater Holiday Camp
RMB 4408
CAPE BRIDGEWATER
Portland Vic 3305

Dear Mr Smith

ARBIRATION - TELECOM

I refer to your telephone message of 4 May and your facsimiles of 4 and 5 May 1995 and advise I do not consider grounds exist for the introduction of new evidence or the convening of a hearing at this stage.

I reiterate that any comments regarding the factual content of the Resource Unit reports must be received by me in writing by 5.00 p.m. on Tuesday 9 May 1995.

Yours sincerely

GORDON HUGHES

cc E Benjamin, W Smith, P Bartlett, J Rundell

L69483

11459723_ACZF/CF

935

Level 21, 459 Collins Street, Melbourne 3000, Australia. Telephone: (61-3) 614 8711.
Facsimile: (61-3) 614 8730. G.P.O. Box 1533N, Melbourne 3001. DX 252, Melbourne.

DENIS NAPTHINE MP

Member for South West Coast

Electorate Office
94 Liebig St, Warrnambool
Tel: (03) 5562 8230, Fax: (03) 5562 6145
Email: denis.napthine@parliament.vic.gov.au
Web: www.denisnapthine.com.au

All correspondence to:
PO Box 5075, Warrnambool, Victoria, 3280

22 January 2014

Mr Alan Smith
1703 Bridgewater Rd
CAPE BRIDGEWATER VIC 3305

Dear ~~Mr Smith~~, Alan

Thank you for your letter dated 19 December 2013 regarding Consumer Affairs Victoria.

I have forwarded your letter to the Minister for Consumer Affairs, the Hon Heidi Victoria, for her attention and response.

Thank you for taking the time to write to me on this matter.

Yours sincerely,

Denis Napthine

Denis Napthine MP
PREMIER
MEMBER FOR SOUTH WEST COAST

936

Caring Active Local

CAPE BRIDGEWATER
Holiday Camp
Host - Alan Smith
RMB 4408
Cape Bridgewater
Toll Free 008 816 522
Ph. 055 267 267
Fx. 055 267 230

Country Get - Aways
Historical Portland
Victoria's first permanent settlement

Coopers & Lybrand Consultants

Attention Mr Robert Nason

As I stated during our telephone conversation this morning, I am concerned that Coopers & Lybrand is not addressing Telecom's deceptive and misleading conduct on their charter

I , along with 11 other persons who were at Austel's headquarters in Melbourne with yourself last week, are of the same opinion that you stated that you were not looking at this common fault of all the C.O.T. cases and associated businesses you have interviewed. We all feel that the deceptive and misleading conduct is the main worry of all the business persons who were present at this meeting. All of us at different times have stated to various media outlets, to Austel and likewise to Telecom, that we can accept that there would be telecommunication problems from time to time and could understand major breakdowns at certain times. This we could all have taken on board had we been advised by Telecom of such faults. However, this has not been the case in the majority of the negotiations of these number of businesses mentioned above

I now speak for myself as one of the foundation members of C.O.T. I along with other business persons have had many years of deceptive and misleading representation from a very small division within Telecom. I believe this division, this minor few who represent the management within Telecom, will be at a later date, the downfall of Telecom

As an Australian and a concerned business person, I along with all the members of C.O.T. have never ever set out to hurt Telecom. We have only wanted to stop Telecom from hurting us and our fellow Australians. If you have now decided to take the deceptive conduct into your charter or if we have misunderstood your original charter to incorporate deceptive and misleading conduct, then so be it. I hope to, in this letter, clearly show you where Telecom have knowingly withheld evidence from me, here at Cape Bridgewater Holiday Camp, and been deceptive to me while negotiating a settlement within good faith at Telecom's Commercial Division in Waverley on 13th December 1992.

I have two written documentations from Telecom referring to one of my four complaints (a repeated recorded message that "this number is not connected") as to only being a two day problem. At a later date, because of my persistence in telling Telecom management that it had to be a far greater period to that than of two days, I get a second letter saying that a fault was found prevailent on my line, but for no longer than a three week period. I quote Telecom as saying, " This could have attributed to a loss of 50% of my business calls during this period." We now come to the "deceptive conduct". On obtaining the internal working documents which inadvertently were left at my premises in June this year, records show clearly that my RVA problem (firstly a two day problem, then a three week problem) that Telecom knew it to be an eight month problem on 24/7/92. The last letter stating this three week period was sent to me on 24/11/92 which clearly shows, beyond any shadow of doubt Telecom knew they were being deceptive at this period of time. I quote the last two lines of the internal document, "Network investigation should have been brought in as fault has gone on for eight months."

937

We now look at the dates of 24/7/92 and 24/11/92 and my first letter sent to me as a two day fault on 10/3/92. At the time of the report it clearly shows again the extent of this known problem before 1992. I have letters from customers complaining that they received repeated RVA as early as October 1991 which was reported to 1100 on many occasions. Again this shows the extent of this one problem that this business had to contend with over many months. I will go on to say as late as May 1993, I have had at least five letters from various sources complaining of this RVA problem.

Austel has likewise information obtained from me that clearly shows Telecom was deceptive on the day that I took a settlement in good faith believing my telecommunication faults were not as severe as they were on this one complaint. I do not wish to confuse the issue by going over old ground, on information that can be obtained via Austel. I now refer to the attached letter which has been sent to our politicians and to our media alike. You will see a section in this letter which defines another area where Telecom has been deceptive by withholding the information that they knew of a problem in May this year but told two duly elected ministers namely Mr Richard Alston and Mr David Hawker MP that I had no known problems after February 1993. Again and again I can show not only this one fault where deception has been perpetrated by Telecom on myself but also on other Australians.

I trust Coopers & Lybrand [illegible] end of the day will [illegible] what I am saying, and also that of the other businesspersons who were [illegible] at the Austel meeting [illegible] you also participated, that our main issues are of the deceptive and misleading conduct of Telecom.

I wish to make it clear, and I am certain this goes for all the [illegible] business persons who were present at this meeting, that our main arguments with Telecom are not just the fault issues but the way all of us business people have been treated.

You, as a representative and partner of the international company Coopers & Lybrand, should be concerned that the charter which has been given to you by Telecom is not seen to be biased against the persons you interviewed in relation to that charter. One should remember that those businesses also represented other businesses who likewise have had years of Telecom denials and deceptive conduct.

Yours sincerely

Alan Smith

28/10/93

PARLIAMENT OF AUSTRALIA · THE SENATE

SENATOR RICHARD ALSTON

Deputy Leader of the Opposition in the Senate
Shadow Minister for Communications

3 November 1993

Mr Robert Nason
Partner
Coopers & Lybrand
Fax: (03) 6064605

Dear Mr Nason

I refer to our telephone conversation of 1 November and to correspondence which I understand you have recently received from several COT members.

I have at last received a copy of your terms of reference and these make it clear that the review requires Coopers & Lybrand to "conduct an independent audit of (the) adequacy, reasonableness and fairness (of) Telecom's approach to Difficult Network Faults reported by customers over the last 5 years".

The review also explicitly requires Coopers & Lybrand recommendations to take "into account Telecom's legal obligations".

Despite the clear nature of these terms of reference I am disturbed to learn from several COT members that your review will not deal with questions of misleading and deceptive conduct.

the Trade Practices Act clearly covers such matters a failure by the report to address these issues would be a matter of very grave concern and would render any ultimate report substantially irrelevant, as well as underlining the need for a Senate inquiry.

I would therefore appreciate your immediate confirmation that your report will not only take into account a number of allegations of bad faith on the part of Telecom but will also come to a clear judgement on the merits of such claims.

Yours sincerely

Richard

RICHARD ALSTON
Deputy Leader of the Opposition
in the Senate
Shadow Minister for Communications

938

Canberra Office

2 Review of Approach to Difficult Network Fault Cases

2.17 *Telecom's use of legal advisers to handle complaint inquiries was inappropriate.*

Procedures were established to route any calls from DNF customers to senior executives to a firm of solicitors. This led to DNF customers, who attempted to telephone senior executives, being called back by a solicitor. We believe this to be an inappropriate response to calls of a non-legal nature from customers who may not be legally represented at the time.

2.18 *DNF customers have experienced delays in receipt of information under FOI provision due to inadequate procedures for dealing with FOI requests and the disaggregated manner in which information on DNF cases was maintained.*

Telecom managers who are required to provide information requested under FOI provisions were unaware of the adherence required for these provisions.

DNF customers have received varying advice on information and cost of provision of information under Freedom of Information provisions.

Findings Regarding Settlement Actions

2.19 *While we have not conducted an examination of the adequacy of settlements we have reviewed the procedures under which settlements were negotiated and found that Telecom delegated settlement of compensation to regional levels without having procedures or corporate guidelines to establish a consistent approach to compensation claims. This resulted in settlements which appear arbitrary and cannot claim to have been derived by a reasonable and fair approach.*

No independent verification of loss was used in a number of settlements.

No external advisers were used in calculating the amount of settlements in some cases.

In some cases, offers were arbitrarily made without any evaluation.

939

2 Review of Approach to Difficult Network Fault Cases

2.20 ***Some customers were put under a degree of pressure to agree to sign settlements which in our view goes beyond normally accepted, fair commercial negotiation practices.***

We have found evidence that an inappropriate use of legal representation and aggressive tactics were used in negotiating settlements and attempting to develop a resolution process.

We are concerned that Telecom statements to the press about these settlements, in the light of the above, were bound to be considered inflammatory by the customers concerned and have contributed to the failure of the settlements to achieve a resolution to the case. Examples of statements in the media include:

> ".....in "very generous" settlements with several small businesses that complained of service faults in what critics believe was a bid to buy their silence"
>
> " ....in Telecom's opinion, very generous and have contained a not insignificant component beyond that which could be supported by objective analysis of the factual evidence"

2.21 ***Telecom's control of external advisers has not been sufficiently rigorous.***

Our analysis of legal and accounting work done on behalf of Telecom has indicated that some functions performed at this level have been inappropriately managed and controlled. We were not supplied any evidence of a specific briefing by Telecom for work currently being performed by accounting advisers or evidence that Telecom Management had an understanding of their role.

Customers have been required to produce technical information for external advisers which should have been made available from Telecom staff.

2.22 ***Telecom placed an unreasonable burden on DNF cases to provide evidence to substantiate claims for situations where all telephone fault information that could reasonably determine loss should have been held by Telecom.***

While Telecom is considered to be entitled to obtain information on business performance from customer we believe Telecom unreasonably used its inability to adequately document faults and test for causes as a defence against claims.

2 Review of Approach to Difficult Network Fault Cases

2.17 ***Telecom's use of legal advisers to handle DNF customers was inappropriate.***

Procedures were established to route any calls from DNF customers to senior executives to a firm of solicitors. This led to DNF customers who attempted to telephone senior executives being called back by a solicitor. We believe this to be an inappropriate response to calls of a non-legal nature from customers who may not be legally represented at the time.

2.18 ***DNF customers experienced delays in receipt of information under FOI provision due to inadequate procedures for dealing with FOI requests and the disaggregated manner in which information on DNF cases was maintained.***

While FOI procedures appear to be understood by the staff and managers dealing directly with them, other Telecom managers who are required to provide the information under an FOI request did not respond quickly to requests for information.

DNF customers received varying advice on information and cost of provision of information under the Freedom of Information Act.

Findings Regarding Settlement Actions

2.19 ***Although we have not conducted an examination of the adequacy of settlements, we have reviewed the procedures under which settlements were negotiated. Our finding is that Telecom delegated settlement of compensation to regional levels without having procedures or corporate guidelines to establish a consistent approach to compensation claims. This resulted in settlements which appear arbitrary and in our view were not derived by a reasonable and fair approach.***

No independent verification of loss was used in a number of settlements.

No independent external advisers were used in calculating the amount of settlements in some cases.

In some cases, offers were arbitrarily made without any evaluation.

2.20 ***Some customers were put under a degree of pressure to agree to sign settlements which in our view goes beyond normally accepted, fair***

commercial negotiation practices employed by organisations such as Telecom.

We believe that in some cases an inappropriate use of legal representation and aggressive tactics were used in negotiating settlements and attempting to develop a resolution process.

We are concerned that given the above, Telecom statements to the press about these settlements, were bound to be considered inflammatory the customers and contributed to the failure of the settlements to achieve a resolution to the cases. Examples of statements in the media include:

> ".....in "very generous" settlements with several small businesses that complained of service faults in what critics believe was a bid to buy their silence"

> "....in Telecom's opinion, very generous and have contained a not insignificant component beyond that which could be supported by objective analysis of the factual evidence"

2.21 ***Telecom's control of external advisers was not sufficiently rigorous.***

Our analysis of legal and accounting work done on behalf of Telecom indicates that some functions performed by external advisers were inappropriately managed and controlled by Telecom. We were not supplied with any evidence of a specific brief by Telecom for work currently being performed by accounting advisers or evidence that Telecom senior management had an understanding of their role.

Customers have been required to produce technical information for external advisers which should have been made available by Telecom staff.

2.22 ***Telecom placed an unreasonable burden on DNF cases to provide evidence to substantiate claims for situations where all telephone fault information that could reasonably assist to determine loss should have been held by Telecom.***

To determine settlement of a dispute Telecom is considered to be entitled to obtain information on business performance from customers. In relation to information on the nature of complaints and their incidence, it is Telecom's responsibility to collect the information and we believe Telecom unreasonably used its inability to adequately document faults and test for causes as a defence against claims.

940

COPY

Hunt & Hunt
LAWYERS

2 May 1994

Our Ref: GLH
Matter No:
Your Ref:

BY HAND

Mr John Rundell
Ferrier Hodgson
Chartered Accountants
Level 11, 459 Collins Street
Melbourne VIC 3000

Dear Sir

TELECOM AUSTRALIA - COT CLAIMS

As you are aware, Maureen Anne Gillan signed (through her power of attorney) the Request for Arbitration on 8 April 1994.

Ann Garms (on behalf of herself and other related claimants), Alan Smith and Graham Schorer (on behalf of himself and other related claimants) signed the Request on 21 April 1994.

Mr Steve Black signed each agreement on behalf of Telstra Corporation Ltd.

Pursuant to clause 5 of the "Fast-Track" Arbitration Procedure, the Administrator, Warwick Smith, has formally notified the parties and me in writing that he has received completed and signed Request for Arbitration forms from both parties in each instance. Pursuant to clause 7.2 of the Fast-Track Arbitration Procedure, each claimant must, within four weeks of receipt of Mr Smith's notice, send to Telecom and to me its Statement of Claim together with supporting claim documents.

I have been advised by the Administrator that formal notice pursuant to clause 5 was delivered to Garms, Smith and Schorer on 27 April and to Gillan on 3 May 1994.

I am anxious for these matters to proceed as expeditiously as possible. In the circumstances I believe it would be appropriate for the Resource Unit to familiarise itself with documentation which will unquestionably be placed in evidence, namely:

Level 21, 459 Collins Street, Melbourne 3000, Australia. Telephone: (61-3) 614 8711.
Facsimile: (61-3) 614 8730. G.P.O. Box 1533N, Melbourne 3001. DX 252, Melbourne.

941

1. Bell Canada International Inc, "Report to Telecom Australia", 1 November 1993;

2. Coopers & Lybrand, "Review of Telecom Australia's Difficult Network Fault Policies and Procedures", November 1993;

3. Telecom Australia, "Response to Coopers & Lybrand Report and Bell Canada International Report", December 1993;

4. AUSTEL, "The COT Cases: AUSTEL's Findings and Recommendations", April 1994.

I believe a thorough understanding of this documentation will assist you in anticipating the scope and extent of investigations which the Resource Unit may be called upon to carry out.

I suggest also that you familiarise yourself with the *Commercial Arbitration Act* 1984 (Vic).

Yours sincerely

GORDON HUGHES

cc P Bartlett, W Smith, M Gillan,
A Garms, A Smith, G Schorer, P Rumble

11241692_GLH/AK

Internal Memo

Telecom AUSTRALIA

Network & Technology

To Ian Campbell
Managing Director, Commercial

From D. C. Campbell
Group Managing Director

Subject Coopers & Lybrand Report on DNF Costs

Australia
Telephone 03 632 5600
Facsimile 03 632 6622

Date 9 November 1993

File

Attention

Dear Ian

I have perused the executive summary of this report and I am concerned that it does not reflect a professional, responsible approach and I believe that Coopers & Lybrand should be approached and requested to reconsider the entire tone and direction of the report

Items like R10 and R11 on page 9 appear to go beyond their terms of reference and do not at first reading, appear to be commercially reasonable. Item 2.7 on page 24 at the end of the first paragraph in connection with testing by Telecom states that we could have pursued the testing further in spite of customer rejection. This conclusion ignores a letter from Austel advising that they considered further testing inappropriate and the omission of this additional fact completely misrepresents the situation. I am concerned that this may reflect a sloppy, incomplete approach of the full report.

I believe that it should be pointed out to Coopers & Lybrand that unless this report is withdrawn and revised, that their future in relation to Telecom may be irreparably damaged.

D C CAMPBELL

MAR 30 '98 12:14PM

942

EXECUTIVE SUMMARY

14 Two further issues arise from paragraph 11 above. Firstly, because of the complexity of Telecom's network and the increasing sophistication of the service and the electronic devices which provide them, not all faults will be repaired, or even found, in the repair time - scales published in the tariff. It is therefore a requirement that proactive escalation takes place to ensure that sufficient resource, expertise and management attention are applied to faults of increasing difficulty. In particular, timescales must be set to allow reasonable time for investigation, but which also result in resolution of the problem in a period which is reasonable for the customer.

15 Secondly, in the regulated environment in which Telecom is operating, when customers contact them to purchase new, amended or enhanced public switched telephone services and they intend to use, add to or amend their own premises equipment, Telecom should advise customers that they have an obligation to meet the specifications laid down in Austel's technical specifications (particularly TS002 and TS004). Failure of the customer premises equipment to comply with these, or the way it is configured or used, could result in the service provided by Telecom not meeting its published performance. Further, when investigating faults in such situations, Telecom should satisfy itself that the customer premises equipment complies with Austel's technical specification or seek assurance from the customer that this is the case to ensure that the services supplied by Telecom are fit for purpose under the 1974 Trade Practices Act.

Adequacy, Reasonableness and Fairness

16 In commissioning our review, Telecom asked us to "conduct an independent audit of their [approach to and the related technical, operational and commercial policies and procedures] adequacy, reasonableness and fairness." We have defined *adequate* as equal to any defined requirements or, where requirements are not clearly defined, being just sufficient in our judgement; *reasonable* as not giving less or more than might be expected without incuring extortionate cost and in accord with reason but not impractical; and *fair* as legitimate, equitable between Telecom and the customer and unbiassed towards any one or group of customers.

943 AG1582

16 Secondly, in the regulated environment in which Telecom is operating, when customers seek to purchase new, amended or enhanced Public Switched Telephone Services and the customers intend to use, add to or amend their own premises equipment, Telecom should advise them that they have an obligation to meet the requirements laid down in AUSTEL's technical specifications (particularly TS002 and TS004). Failure of the customer premises equipment to comply with these specifications, or the way the equipment is configured or used, could result in the service provided by Telecom not meeting its published performance targets. Further, when investigating faults in such situations, Telecom should satisfy itself that the customer premises equipment complies with AUSTEL's technical specification or seek assurance from the customer that this is the case to ensure that the services supplied by Telecom are within or will stay within the performance criteria and standards of service stated in the published tariff (see paragraph 9).

Adequacy, Reasonableness and Fairness

17 In commissioning our review, Telecom asked us to "conduct an independent audit of the adequacy, reasonableness and fairness of its approach to Difficult Network Faults and the related technical, operational and commercial policies and procedures". We have defined *adequate* as equal to any defined requirements or, where requirements are not clearly defined, being just sufficient in our judgement; *reasonable* as not giving less or more than might be expected without incurring excessive cost and in accord with reason but not impractical; and *fair* as legitimate, equitable between Telecom and the customer and unbiassed towards any one customer or group of customers

Overall Findings

18 Assessing whether and by how much specific cases may have been affected by Difficult Network Faults over the last five years was outside the scope of the review. Accordingly, we offer no findings and recommendations on these aspects. Neither were we asked to comment on the suitability of the level of compensation made or offered to customers whose experiences were used as case studies for this review.

EXECUTIVE SUMMARY

investigation and rectification of Difficult Network Faults. Telecom needs to extend and reorientate its training, measurement, analyses, and repair philosophies.

R20 ***Customer Service and Customer Contact Training***: Telecom needs to develop a specific training programme dealing with treatment of the disastisfied customers. This should then be povided to all staff dealing with escalated faults, complaints and settlements.

Other Recommendations

R21 ***Customer Communications for Faults and Associated Complaints:*** Complete the current initiative which is producing customer advisory leaflets and guides. Ensure they incorporate information on internal and external services and customer rights. Publish by sending leaflets with bills, print a precis on the back of the bills; and redesign the front of the "White Pages" phone book to provide clear, detailed advice.

R22 ***Advice to and Obligations of Customers in respect of CPE:*** we recommend that Telecom produces and publishes a succinct plain English statement document defining the service levels provided by the PSTS to make customers aware of the service characteristics. The statement should also advise business customers that they have an obligation to evaluate whether the standard of service will impact their business and that they should consider what actions are open to them to manage this.

R23 ***Fitness for Purpose:*** Telecom needs to issue, inter alia, instructions to sales, installation, maintenance, fault investigation and repair involved with PSTS and/or CPE work that checks must be made to ensure the PSTS will meet or continue to meet the "fitness for purpose" requirements of the 1974 Trade Practices Act for the circumstances they are dealing with.

R24 Communication Standards: Telecom need to prepare these for all normal staff dealing with customers on a verbal or written basis specifically adressing:

- the approach to be taken to deal with customer issues:
- the avoidance of inflamantory, misleading, inaccurate or evasive language: and
- record keeping.

R24 ***Standard Instructions:*** Telecom needs to issue, inter alia, instructions to sales, installation, maintenance, fault investigation and repair staff involved with Public Switched Telephone Service and/or CPE work that checks must be made to ensure the Public Switched Telephone Service will meet or continue to meet the standards of service set out in the published tariff.

R25 ***Quality of Service Statement.*** We recommend that Telecom produces and publishes a succinct, plain English document defining the service levels provided by the Public Switched Telephone Service to make customers aware of the service characteristics. The statement should also advise business customers that they have an obligation to evaluate whether the standard of service will impact their business and that they should consider what options are open to them to manage this.

R26 ***Other Organisational Changes.*** We recommend that the following organisational changes be made.

- The role of National Network Investigations should be formalised. This should include quality assurance (QA) of regional investigations and mandatory involvement when defined escalation criteria have been met. NNI's procedures should also be formalised using the activities described in short term action plan the basis.

- NTG should assign a fault support role to CAN, CPE, and end-to -end systems architecture and design groups. Their role should be to take ultimate responsibility for solving relevant DNF cases. The NTG design group should also perform a QA role for the NNI investigations of DNF cases.

Action Plan

Current Difficult Network Fault Cases With Registered Claims

22 Telecom is discussing compensation claims with customers in this group. Although it is outside of our terms of reference to comment or make recommendations on specific claims, we would support the use of independent arbitration as a method of settling these claims.

946

guidelines which take an end-to-end service view. Two versions are required: a detailed manual produced in the standard format of the Commercial Customer Services Manuals and a concise (pocket sized) version for use by regional Fault Management and Diagnostic and National Network Investigation staff in the field and/or on customer premises.

Training

R20 ***Technical Training.*** The current training regime for Telecom's technicians is comparable with those employed elsewhere in the world, but is focused on individual infrastructure components (eg. CPE, and the Customer Access Network). It does not completely fulfil the needs for system testing, investigation and rectification of Difficult Network Faults. Telecom needs to extend and re-orientate its training, measurement, analyses, and repair philosophies.

R21 ***Customer Service and Customer Contact Training.*** Telecom needs to develop a specific training program dealing with treatment of dissatisfied DNF customers. This program should also ensure staff understand the legal framework and Telecom's obligations under its licence. It should then be provided to all staff dealing with escalated faults, complaints and settlements.

Other Recommendations

R22 ***Customer Communications for Faults and Associated Complaints.*** Complete the current initiative which is producing customer advisory leaflets and guides. Ensure the material incorporates information on internal and external services and customer rights. Publish by sending leaflets with bills and printing a precis on the back of the bills. Redesign the front of the "White Pages" directory to provide clear, detailed advice.

R23 ***Communication Standards.*** Telecom needs to prepare and disseminate communication standards for all staff dealing with customers on a verbal or written basis specifically addressing:

- the approach to be taken in dealing with customer issues;
- the avoidance of inflammatory, misleading, inaccurate or evasive language; and
- record keeping.

to the Governor-General to replace her and yet it takes six months or more to replace Mr Arena.

Senator Collins—Just before Mr Hutchinson responds to that, I just want to say that that is not unusual in terms of the sort of different mix of skills that you are looking for. I must also say that quite often what happens in my experience in this portfolio is that you approach a large number of people and find that, because of other obligations, they are not available.

Just in passing, I noted a senior executive from one of our major companies on the ABC the other day making this point, and it certainly has been my experience in the case of women particularly, I guess because of the lower numbers involved, that it is particularly difficult because the ones that are of obvious note and skills get so many requests. I actually heard this fellow say the other day that a lot of the senior corporate women executives are approached on an average of once a week to fill directorships and so on on boards. The reason I am saying that is that quite often you can fill one particular appointment very quickly, because the first person that you go to says, 'Yes, I can do that', and in other cases on other boards it can take months, because you approach a whole series of people and they then have to think about it eventually come back to you and say, 'No, I cannot do it because I have got too much on my plate at the moment'.

Mr Hutchinson—In the case of Mr Tuckwell's appointment to Austel, I would not want the conversation in any way to be interpreted as that somehow being a last resort. As the minister has effectively said, good people are very difficult to find and sometimes you have to wait until they are ble. Neil Tuckwell has a contract with Communications and it was a condition e imposed on accepting the position that uld fulfil his contractual obligations to Given that he had the attributes that the er was seeking for this appointment, the nment decided to wait to make the ntment until Neil Tuckwell was avail- and that is why it is taking so long for take up duty.

Senator BOSWELL—Mr Davey, would you agree with the previous officer that was at the table when he said that the payments made to the COT cases were goodwill, or would you say they were compensation?

Mr Davey—My understanding of them was that they were paid by way of compensation. I have seen a cheque butt or a cheque slip that so described the payment, as a compensation or out of a compensation account.

Senator BOSWELL—So you disagree with the previous gentleman. How long have the COT cases been going on?

Mr Davey—They first came to Austel's attention, as is set out in the letter dated 12 August, in August last year. At that time we were trying to facilitate those settlements that have been referred to. Some of them took place sooner and some took longer. What has happened since those settlements is that the faults have continued, or they are said to continue, and that is possibly one of the more disturbing aspects of the thing, that the payments have been made but the faults continue.

Senator ALSTON—And in some instances payments were made on the basis that there would not be any future problem.

Mr Davey—Austel has not been privy to the actual terms of settlement, but that is what has been conveyed to me.

Senator BOSWELL—Does Austel, in your view, have any power to resolve the difficulties? Are you happy with the power that you have under the legislation, or do you feel frustrated that you are not able to accommodate these people?

Mr Davey—Depending on what the findings are, I think we can see a way forward. We do not have the power to order a monetary sum settlement and I think you would understand that, as I said before, that would be usurping the power of the courts.

Senator Collins—The only people that really can fix it, Senator, and I am sure you agree, at the end of the day are Telecom.

Senator BOSWELL—Yes, I know that in a perfect world that would be the way it would happen, but we do not live in a perfect world and any small business that wants to

take the might of Telecom on is not going to stay the distance very long. There has been one that tried and it cost him a lot of money. They just wait you out. So we do not live in a perfect world. We have not got the choice of taking our telephone business to another provider of service; Telecom is the only one that provides a domestic service. So what I am suggesting to you, Mr Davey, if you have not got the power to act as the watchman and provide some justice, is that perhaps you ought to make an appointment to see Senator Collins and point out to him that you need to have an adequate act to provide the—

Senator Collins—I do not think that is correct at all, Senator, as Mr Davey's letter makes very explicitly clear in terms of remedies that are available.

Senator BOSWELL—If Mr Davey cannot give a payment commensurate with the loss, and the only alternative is to go to the court to get that payment, then justice is not going to be—

Senator Collins—With the greatest respect, I disagree. That is the situation at the end of the day that we are in in most situations. At the end of the day the courts—

Senator BOSWELL—No, that is nonsense. If I do not want to deal—

Senator Collins—I mean in terms of getting money. Mr Davey can answer the question, but just as a general proposition—

Senator BOSWELL—I can tell you where your proposition falls down. If I go to a provider of a service and he does not give an adequate service, I can then leave him and go somewhere else. But in the case of Telecom I am stuck; I cannot get any other service.

Senator Collins—Mr Davey can certainly answer. I was responding to your particular concern that you raised a minute ago about getting legal redress. I just pointed out that the change that was made to the act in 1991 in that respect was very deliberately done, and it is referred to in the Austel letter.

Mr Davey—We have legal advice which I am quite prepared to make available to you, Senator—I apologise that I have not got a copy with me at the moment—to the effect that, if we were to find misleading and deceptive conduct, as distinct from sheer incompetence, then we could direct Telecom to engage in an assessment process to assess the quantum. Having assessed the quantum, we do not have the power to enforce the quantum, but I am sure that at that point that would not be necessary. I think there would be such a moral persuasion at that point—

Senator ALSTON—It might be aided if you actually make public your finding in the first instance.

Mr Davey—As I indicated before, we intend to make public, after having given the relevant people the opportunity to be heard—

Senator Collins—Madam Chair, I know the hour is late but in fact Mr Davey has provided all that information previously.

Mr Hutchinson—Senator, can I perhaps add to that answer by drawing attention to sections 121 and 122 of the Telecommunications Act. Section 122 provides for there to be a limit on the amount of damages that a telecommunications customer can seek from the telecommunications company. That limit is imposed by a determination made by Austel. Austel has in fact made no such determination. Therefore, by not making such a determination, Austel has provided scope for people with cause of action against Telecom to use their rights under the act to sue. I am no lawyer but the word here seems to be tort. So there is a link there between Austel's powers and the amount that is recoverable in an action.

Senator BOSWELL—If you were BHP or one of the big companies, you may be able to afford to take that response in court. But what we are talking about here is small business that unfortunately in real terms cannot do that.

Senator Collins—If he was BHP he would not be here.

Senator BOSWELL—No, if he was BHP, he would not be here. Do you believe that the cash payments made to the COT case members realistically reflect the business losses, assuming at the moment that these losses were as a result of an adequate phone service?

Mr Davey—I personally do not have knowledge of the amounts paid to the COT victims. I know of one amount. It has been

Mr Davey—I have got the general manager of the consumer affairs branch and one of his people. John MacMahon and Bruce Matthews are working almost full time on this.

Senator BOSWELL—What about all these other people that are coming in?

Mr Davey—The other complainants?

Senator BOSWELL—Yes.

Mr Davey—What we are trying to do is reasonably well set out in the directions we have given Telecom. We are trying to analyse the documentation that Telecom is being asked to produce in that direction. If I could take you to that direction, it is the letter dated 12 August—

Senator BOSWELL—We have got that—we are multiplying paper here.

Mr Davey—It is the letter of 12 August to Homes. If you go over to page 3, paragraph 14, we have asked for a series of documents to be produced by Telecom and we will be pursuing those documents in any areas that might lead out of there. One of the allegations that has been made and made by a number of people in this series of cases is that Telecom tells them, 'You are the only one in the district that has this complaint, you are unique—

Senator BOSWELL—That has been told to me by at least eight or nine people, that Telecom seems to have a standard reply: you are the only one, you are unique; you do not know how to use the phone; it is your commander system and you need a new system. It seems just to go on as though they have been given a sales memo to recite.

Senator ALSTON—Are you able to identify whether that is the case?

Mr Davey—This documentation we have sought should give us hard information to e that issue. What we are looking for ırd information upon which we can ı report which we will publish, to the at privacy and commercial-in-confisues allow, and people can test that. will be given the opportunity to t on that report before it is put into c arena. People who are affected by that report will be given the opportunity to comment.

Senator ALSTON—What ultimate sanctions are there for either unethical practice or, as you said in that earlier letter, misleading and deceptive conduct?

Mr Davey—That raises a very interesting question. In terms of the Austel powers to investigate either anti-competitive practices or consumer protection issues. the way the act is structured we are given the investigation power and it is made very clear in the course of that that we refer appropriate matters to the Trade Practices Commission or to the ombudsman, depending on which way it is appropriate. We have certain powers of direction; we have sought advice on our powers of direction.

I do not have a copy of the legal advice that we have received on it, but there are certain courses open. If misleading and deceptive conduct as distinct from sheer incompetence is shown, then we may be able to move down some tracks. We cannot order Telecom to pay a certain amount of compensation, or we would be usurping the power of the courts. But we have received advice to the effect that we can direct them to engage in an assessment process. At the end of the day, as I said, I do not want to prejudge the outcome of any findings that we might make. All I am outlining is a possible course of action.

Senator ALSTON—But take that case where the regional manager says that under the act they are not liable which, on the face of it, would seem to be clearly untrue. Is that something that could lead to a prosecution of Telecom?

Mr Davey—I am not sure on what grounds in a prosecution it is a misleading or deceptive conduct. I do not see how it would fit under the criminal provisions of the Trade Practices Act. The letter is written without prejudice to any action that might be taken. It is put in now as, 'Put your hand up. Stop doing that sort of thing'. Then, before I decided, I would want to hear Telecom's side of the story. That is only one side of the story.

Senator ALSTON—Indeed ,and obviously you cannot make the next decisions. But what options do you have? Can you refer it to the TPC, and are they able to take action?

Mr Davey—I have had a preliminary discussion with the TPC about the matter. That has only been a oral discussion. Again, when we get Telecom's side of the story, we may—

Senator ALSTON—Let us be theoretical for a moment. Just take a situation where an untrue statement is made by Telecom to a customer. Is that then able to be dealt with by way of prosecution or not?

Mr Davey—Possibly a prosecution under the Trade Practices Act. But it would have to fit one of the categories of the conduct that is prohibited under the Trade Practices Act. In terms of the Telecommunications Act which Austel administers, it probably is not able to be prosecuted, unless it is deemed to be in some way a breach of one of the licence conditions.

Senator BOSWELL—Mr Davey, did you refer Mrs Garms's case to the Trade Practices Commission, or did she take it there herself?

Mr Davey—My recollection is that she approached the Trade Practices Commission herself. The COT cases approached the Trade Practices Commission in a group and my recollection is that the chairman indicated to them that he would probably be unable to help their particular case; he saw it not so much as misleading and deceptive conduct but more maladministration or incompetence.

Senator Collins—In view of information that has been provided already by Mr Davey and the fact that I will ask Mr Beddall to take this matter up directly with the chairman of the board tomorrow, I wonder if we can take it much further tonight.

Senator ALSTON—Can I just deal with another matter. When does Mr Tuckwell take up his duty?

Mr Hutchinson—Sorry, I was just checking. The fact is that Mr Tuckwell's appointment has in fact been made and therefore we can discuss the matter. Mr Tuckwell will take up his appointment on 8 November.

Senator ALSTON—How long will that be since Mr Arena left?

Mr Hutchinson—February 5.

Senator ALSTON—And when does Ms Plante leave?

Mr Davey—24 September.

Senator ALSTON—And is Mr Horton already designated as an acting member to replace her?

Mr Davey—If your concern is the loans, I do have associate members that I can call on to tide us over in the interim.

Senator ALSTON—Minister, can you provide—

Senator Collins—I can. The matter is in fact being progressed now, but it has not actually gone to the Governor-General. It is in the process of doing so.

Senator ALSTON—A replacement for Ms Plante?

Senator Collins—Yes.

Senator ALSTON—A full-time replacement?

Senator Collins—Yes that is correct. I was just checking whether it actually had been signed off. It has not yet been.

Senator ALSTON—Can you provide any satisfactory explanation for that six-month gap? Surely, it is an unsatisfactory situation. As I recall Mr Beddall's ATUG speech in May, he said it would be an act of the highest priority, so it is going to be six months after that date before the actual replacement becomes a reality.

Senator Collins—That is true. It is just hard to find good help these days.

Senator ALSTON—Are you not offering enough? I understand your situation.

Senator Collins—No, that is the reason. I have to say that it is often a difficult problem, not just with respect to this appointment but in many others, to actually find the people that you are really looking in terms of their skills for these positions. I think that that is literally the case here.

Senator ALSTON—But you are just telling me that, within a matter of days of Ms Plante's foreshadowed departure, you are off