Telecommunications
Industry
Ombudsman

John Pinnock
Ombudsman

Senate Environment, Recreation, Communications and the Arts Legislation Committee

Statement by the Telecommunications Industry Ombudsman, John Pinnock

26 September 1997

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"... providing independent, just, informal, speedy resolution of complaints."

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The Committee's proceedings on 24 June 1997 were concerned with administrative problems revealed by Telstra's handling of the COT (Casualties of Telstra) cases, and tended to focus on individual cases.

I thought it might be of assistance to the Committee if I provided an assessment of the COT Arbitration Procedures from my perspective as Administrator of the process, focusing on the essential features, analysing any deficiencies and drawing some conclusions and recommendations for the future.

Before doing so, however, it is appropriate to advise the Committee on the status of the remaining Arbitrations.

Four claims remain to be determined by the Arbitrators.

Lane Telecommunications, which is one part of the technical component of the Resource Unit has withdrawn from the process as a result of a conflict, or perceived conflict, of interest, after being purchased from Pacific Star by Ericsson Australia, a major supplier of equipment to Telstra, including equipment whose performance is central to some of the claims.

Mr Paul Howell remains as a technical adviser to the Resource Unit, but a decision will have to be made by the Arbitrators as to whether to replace Lane Telecommunications and if so, who that replacement should be. The Arbitrators may also have to determine when the conflict of interest arose, there being no consensus on this issue.

I am consulting with three of the four Claimants as to a number of possible replacements, but at the moment no agreement or consensus has been reached.

At the time of Lane's withdrawal one of the claims was very close to being determined, while the second and third claims are at various stages. In one case, the Arbitrator has already made a direction to refer information obtained to date to Mr Howell for preliminary technical assessment.

In the fourth matter, the claimant has elected to proceed with the Arbitration on the basis of Lane Telecommunications continuing as part of the Resource Unit. I expect this Arbitration to be completed in the near future, with a Financial Evaluation Report to be issued by the Resource Unit in the next week.

Turning to the process itself, the COT (Casualties of Telstra) arbitration procedures were designed to provide a means of resolving a number of outstanding claims which had several common features:

- the Claimants were all small business customers of Telstra;
- the businesses were heavily dependent on their telephone service and/or other telecommunications services;
- all claimed to have suffered substantial business losses as a result of Telstra's failure to provide a reasonable level of fault-free service and a failure to properly record and investigate reports of a variety of faults characterised by Telstra as 'Difficult Network Faults';
- although some Claimants had previously sought and been paid compensation by Telstra, all of the claims had been outstanding for a long time.

Initially, the Fast Track Arbitration Procedure (FTAP) was developed to deal with claims by Claimants described as the 'original COT' or 'COT 4'. This was followed by a Special Arbitration Procedure (SAP) developed to handle claims by the remaining COT Claimants.

Both procedures provided for the Telecommunications Industry Ombudsman to act as Administrator of the processes. Independent Arbitrators with the power to give directions to the parties and to make a final determination of the claims were appointed by the Administrator, either with the express consent and approval of, or after consultation with, the Claimants.

The procedures also provided for the Administrator, upon the request of the Arbitrator, to appoint an independent Resource Unit, comprised of expert technical and financial components, to assist the Arbitrator in reaching his determination. Again, the components of the Resource Unit were appointed either with the express consent and approval of, or after consultation with, the various Claimants.

Finally, the procedures provided for the appointment of an independent Special Counsel to advise the Administrator. In addition, a solicitor from the Special Counsel's firm was seconded on a full-time basis to the TIO to assist the Administrator.

All of these administrative costs of the arbitration procedures, with the exception of the Administrator's time, were to be met by Telstra.

Subsequently, a 'third generation' procedure known as the Standard Arbitration Rules (SAR) was developed by the TIO, in consultation with Telstra, Optus and Vodafone, and approved by AUSTEL, to deal with any future cases which would otherwise involve claims for compensation, beyond the usual powers of the TIO to make binding Determinations or Recommendations. Most of the features of the Standard Arbitration Rules are derived from and in common with the earlier procedures.

The FTAP and SAP required the Claimants and Telstra to maintain confidentiality as to the proceedings. However, under the rules of the FTAP the 'original COT' Claimants were entitled to discuss their respective proceedings and claims with each other.

Where the rules of the FTAP, and the SAP were silent, the proceedings were to be governed by the Victorian Commercial Arbitration Act, 1984. This provides that an Award by the Arbitrator is registerable as an order of the Victorian Supreme Court. The Act also confers a limited right of appeal against any Award by the Arbitrator.

The FTAP and SAP had amongst their objectives that they were to:

- be non-legalistic;
- operate in accordance with the principles of natural justice (procedural fairness); and
- allow the Arbitrator to relax certain rules of law or evidence.

The procedures required that:

- a claimant was to lodge a written Claim;
- Telstra was to lodge a written Defence in response;
- the claimant was to lodge a Reply to the Defence.

Time limits were set for each of these steps, although these could be varied by Direction of the Arbitrator, upon request of either party.

The Arbitrator also had a specific power to order a party to produce documents to the other party, upon request by the other party.

Evidence was to be supported by Statutory Declaration and although provision was made for evidence to be given on oath during an oral hearing ordered at the discretion of the Arbitrator, cross-examination of parties or witnesses was not permitted.

When Claim, Defence and Reply documents had been lodged, the Resource Unit could be formally appointed to review the issues, carry out any necessary site inspections and other investigations and to prepare separate Technical and Financial Evaluation Reports, in that

order, for the Arbitrator. The Arbitrator was required to provide these reports to the parties for comment and submissions.

At the completion of these stages, the Arbitrator would make a determination and Award.

Those are the salient features of the process.

The procedures as developed, envisaged a number of benefits both for the Claimants and for Telstra. From the point of view of the Claimants, the benefits were to be:

- a fast, non-legalistic, procedure, operating in accordance with natural justice to produce a fair outcome;
- all administrative costs were to be borne by Telstra;
- strict rules of evidence and of law were relaxed, in favour of the Claimants.

From Telstra's point of view the benefits were:

- finality and certainty in the determination of the Claims, as opposed to the uncertainties of other methods of resolution such as mediation or negotiated settlements which had already occurred with some of the COT cases
- confidentiality of the process.

Experience has shown that not all of these benefits have materialised. In my view, however, one of the potential deficiencies should have been obvious from the outset.

This deficiency revolves around the vexed question of the best method of enabling the Claimants to obtain documents held by Telstra. In the process leading up to the development of the Arbitration procedures, the Claimants were told that documents would be made available under the Freedom of Information Act.

The Commonwealth Ombudsman has reported on the problems encountered by Claimants in using the FOI process and I won't reiterate her findings. For present purposes, it is enough to say that the process was always going to be problematic, chiefly for three reasons.

Firstly, the Arbitrator had no control over the process, because it was conducted outside the ambit of the Arbitration Procedures.

Secondly, in providing documents, Telstra was entitled to rely on exemptions under the FOI Act. This often resulted in the Claimants receiving documents which were difficult to understand, because information had been deleted.

In contrast, the Claimants could have sought access to documents under the Arbitration Procedures. Provided that documents were relevant the Arbitrator could have directed Telstra to produce the documents without deletions. The Arbitrator could also have directed Telstra to produce documents to him for inspection, in order to determine any argument as to relevance. However, the Claimants would have been bound by the confidentiality provisions of the Arbitration Procedures in relation to documents provided to them in this way.

Thirdly, the FOI process as administered by Telstra was extremely slow and this contributed to much, but not all, of the delay in some Claimants prosecuting their claims.

As to the lessons learnt from experience, while Arbitration is inherently a legal or quasi-legal process, Telstra's approach to the COT Arbitrations was clearly one which was excessively legalistic. In many instances it made voluminous requests for further and better particulars of the legal basis of a Claimant's case when it was in a much better position to judge this issue than almost all the Claimants.

Since my appointment as Telecommunications Industry Ombudsman, my public comments on this aspect have been recorded in the Annual Reports of the TIO, and through the medium of AUSTEL's quarterly reports, on Telstra's implementation of the recommendations flowing from AUSTEL's original COT Report.

One consequence of Telstra's approach was that the Claimants tried not only to match their opponent's legal resources, but also felt it necessary to engage their own technical and financial experts. This was a significant expense for the Claimants because these costs were not 'administrative costs' of the Arbitration Procedures, and those Procedures made no provision for the payment of a Claimant's legal or other costs where the Claimant received an Award in his or her favour.

Although this deficiency has been largely remedied by Telstra agreeing to contribute to a successful Claimant's reasonable costs, by way of an ex gratia payment, the absence of such a guarantee in the Arbitration Procedures was a deficiency.

Next, there have been significant delays, over and above those delays associated with the FOI process in bringing the Arbitrations to completion. In some cases these delays have been due to Claimants being unable to provide information to substantiate their business losses.

These delays have been exacerbated by the extensive arguments by both sides as to the accuracy and merits of the Technical Evaluation and Financial Evaluation Reports produced by the Resource Unit.

Finally, as I have remarked previously, the Arbitrations have been bedevilled by the inability of the parties to treat the disputes as matters of a commercial nature and to put

behind them the atmosphere of mutual suspicion and mistrust that had built up over a long period of time.

An objective and dispassionate analysis of the Arbitration Procedures must, however, recognise that the Claimants have benefited from certain aspects of the process.

First, the Claimants under the FTAP had the significant benefit of Telstra effectively waiving any statutory immunity it may have otherwise been able to plead in legal proceedings.

In particular, Clause 10.1 of the FTAP provides:

> In relation to Telecom's liability, if any, to compensate for any demonstrated loss on the part of the Claimant, the Arbitrator will:
>
> 10.1.1.3 recommend whether, notwithstanding that in respect of a period or periods that Telecom Australia is not strictly liable or has no obligation to pay, due to a statutory immunity covering that period or periods, Telecom Australia should, having regard to all the circumstances relevant to the Claimant's claim, pay an amount in respect of such a period or periods and, if so, what amount.

Clause 13 of the FTAP provides:

> Telecom commits in advance to implementing any recommendations made by the Arbitrator pursuant to sub Clause 10.1.1.3.

Secondly, the Claimants under both the FTAP and SAP had the general benefit of the relaxation of rules of law.

In particular, Clause 7.1.1 of the SAP provides:

> In relation to loss the Arbitrator will make a determination:
>
> 7.1.1.3 giving due regard to the normal rules of evidence and legal principles relating to causation, subject to any relaxation which is required to enable the Arbitrator to make a determination on reasonable ground as to the link between the Claimant's demonstrated loss and alleged faults or problems in the Claimant's telephone service, and to make reasonable inferences based upon such evidence as is presented by the Claimant and by Telstra.
>
> (emphasis added)

Although one must be cautious in assessing their effect, these provisions may have been the difference between Claimants succeeding under the Arbitration Procedures, where they might have otherwise failed, or failed in relation to parts of their claims, if they had litigated the matters.

Based on the above analysis, if the Standard Arbitration Rules are to be, and are seen to be effective, changes clearly need to be made to the process.

Before suggesting any changes a number of matters need to be borne in mind.

Firstly, the SAR were developed in consultation with Telstra, Optus and Vodafone to deal with commercial disputes involving customers of those carriers. If the SAR are to be generally available though the TIO, those and other new members of the TIO will have to be consulted about any changes.

Secondly, the SAR have been developed to deal with commercial disputes involving small business which have suffered losses due to faults or problems with their telecommunication services. The procedure is not well suited to deal with other varieties of disputes involving e.g. breaches of privacy, or other conduct unrelated to the provision of telecommunication services.

Thirdly, in conformity with the concept of the TIO as an alternative dispute resolution forum, neither a Claimant nor a member of the TIO can be forced to enter arbitration, although Telstra was required to advise AUSTEL of any occasion when it declined to do so.

The following changes to the SAR need to be considered:

1. Where Telstra is a party to the SAR, Claimants should be encouraged to obtain relevant documents through the Arbitration process, rather than under FOI, thus putting this matter under the control of the Arbitrator.

   While a Claimant could not properly be required to give up rights under the FOI Act, the Arbitrator could ensure that documents were produced speedily.

   In the case of a carrier other than Telstra, a Claimant would only be able to obtain documents through the SAR.

2. Provision must be made for successful Claimants to recover their reasonable legal and other costs.

3. The Resource Unit was intended to provide expert assistance to the Arbitrator. The requirement that its reports were to be provided to the parties appears to have

been written into the arbitration procedures to meet the perceived requirements of natural justice or procedural fairness. However, those principles do not necessarily require this step.

Much time could be saved if the Resource Unit provided expert advice solely to the Arbitrator, as occurs in other types of commercial arbitration where technical expertise is made available to assist an Arbitrator.

4. The problem of excessive legalism is easy to identify but, given the nature of Arbitration, much less easy to remedy.

   One solution would be to prohibit the parties from making requests for further and better particulars of any aspect of their respective cases. In the event of any obvious 'gap' the Arbitrator would have a discretionary power to direct a party to provide more material.

5. In general, the Arbitrator should have greater discretionary powers to control delays which have otherwise been inherent in the process to date.

6. Above all, major disputes which might be candidates for Arbitration should be identified at an early stage and a Claimant offered this option if the carrier considers it appropriate.

   Because of adverse perceptions about the Arbitration Procedures, only one dispute has been dealt with under the SAR since that procedure was established.

   It is interesting to note that of the 43 Dispute cases finalised by the TIO in 1996-97 only 15 were the subject of a formal and binding determination or direction by the Ombudsman.

   The balance of 28 cases, which involved claims in excess of the TIO's powers to make a determination or recommendation, were resolved either by conciliation or by mediation.

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TELECOMMUNICATIONS INDUSTRY OMBUDSMAN

PROOF

COMMONWEALTH OF AUSTRALIA

SENATE

ENVIRONMENT, RECREATION, COMMUNICATIONS AND THE ARTS LEGISLATION COMMITTEE

Reference: Matters arising from Telstra annual report 1995-96

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resolution by mediation or negotiation. In several cases settlements had already occurred in the past with some of the CoT claimants, but had not achieved finality. The second benefit was the confidentiality of the process as opposed to, for instance, litigation in open court. The experience has shown that not all of these benefits have emerged or materialised.

In my view, there was one potential difficulty that should have been obvious from the outset. I do not make any apology for coming along to this committee and saying that outright, because it should have been obvious, in my view, to the parties and everyone involved from the beginning. This deficiency revolves around the vexed question of how the claimants were to obtain, and the best method of obtaining, documents from Telstra which were to assist them in the process. In the process leading up to the development of the arbitration procedures—and I was not a party to that, but I know enough about it to be able to say this—the claimants were told clearly that documents were to be made available to them under the FOI Act. The Commonwealth Ombudsman has already reported on the problems encountered by the claimants in that process, and I do not propose to reiterate her findings.

Senator SCHACHT—Do you disagree with her findings?

Mr Pinnock—No. For present purposes, though, it is enough to say that the process was always going to be problematic, chiefly for three reasons. Firstly, and perhaps most significantly, the arbitrator had no control over that process, because it was a process conducted entirely outside the ambit of the arbitration procedures. Secondly, in providing documents Telstra was entitled to rely on whatever exemptions it might be entitled to under the FOI Act, and this often resulted in claimants receiving documents, the flow of which made them very difficult to understand. In some cases, there were obviously excisions of information. In contrast to this, the claimants could have sought access to documents on a regular basis under the arbitration procedures. Provided that those documents were relevant, the arbitrator could have directed Telstra to produce those documents without any deletions. If there was any argument as to the relevance of documents, the arbitrator would have had the power to require their production and inspection by him to make that determination in the first place. Thirdly, we know that the FOI process as administered was extremely slow, and this contributed to much, but certainly not all, of the delay which the claimants encountered in prosecuting their claims through the arbitration procedures.

With the benefit of hindsight, I will turn now to the lessons that are learnt from experience of the process. Firstly, arbitration is inherently a legalistic or quasi-legalistic procedure. It does not really matter how you might finetune any particular arbitration. It has the normal attributes of a quasi-legal procedure, where you have parties opposing each other with someone in the middle having to make a determination. Even having said that, I am on record as saying that Telstra's approach to the arbitrations was clearly one which was excessively legalistic. For instance, in many instances it made voluminous requests for