



**COMMONWEALTH OF AUSTRALIA**

# **SENATE**

**ENVIRONMENT, RECREATION, COMMUNICATIONS AND THE ARTS  
LEGISLATION COMMITTEE**

**Reference: Matters arising from Telstra annual report 1995-96**

**CANBERRA**

**Friday, 26 September 1997**

**OFFICIAL HANSARD REPORT**

**CANBERRA**

SENATE

ENVIRONMENT, RECREATION, COMMUNICATIONS AND THE ARTS  
LEGISLATION COMMITTEE

Members:

Senator Patterson (Chair)

Senator Schacht (Deputy Chair)

Senator Eggleston

Senator Lees

Senator Lightfoot

Senator Lundy

Participating Members

Senator Abetz

Senator Allison

Senator Bolkus

Senator Boswell

Senator Brown

Senator Calvert

Senator Carr

Senator Bob Collins

Senator Colston

Senator Coonan

Senator Cooney

Senator Crane

Senator Harradine

Senator Hogg

Senator Faulkner

Senator Ferguson

Senator Mackay

Senator Margetts

Senator Murphy

Senator Neal

Senator Tierney

Matters arising from Telstra annual report 1995-96.

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LEGISLATION COMMITTEE

*Matters arising from Telstra annual report 1995-96*

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Present

Senator Tierney (Chair)

Senator Boswell

Senator Lightfoot

Senator Carr

Senator Schacht

Senator Eggleston

The committee met at 9.11 a.m.

Senator Tierney took the chair.

[9.12 a.m.]

**ARMSTRONG, Mr John, Counsel, Customer Affairs, Telstra**

**BENJAMIN, Mr Ted, Director, Consumer Affairs, Telstra**

**MOUNSHER, Mr Neil, Manager, Customer Response Unit, Telstra**

**PINNOCK, Mr John Edward, Telecommunications Industry Ombudsman, 315 Exhibition Street, Melbourne, Victoria**

**WARD, Mr Graeme Bernard, Group Director, Regulatory and External Affairs, Telstra, 242 Exhibition Street, Melbourne, Victoria**

**WYNACK, Mr John, Director of Investigations, Commonwealth Ombudsman**

**CHAIR**—I declare this hearing open. This hearing is being held pursuant to the committee's powers to examine matters arising from Telstra's annual report under standing order 25(21)(b). It has been agreed by the committee that the hearing will be limited to progress on the CoT and related cases, with specific reference to the administrative problems revealed by Telstra's handling of those cases. The committee prefers that all evidence be given in public, but witnesses may at any time request evidence or part of their evidence or answers to any questions be given in camera and the committee will consider such requests.

I welcome Mr John Pinnock, Telecommunications Industry Ombudsman, Mr John Wynack, Director of Investigations, Commonwealth Ombudsman's Office and the following Telstra officers, Mr Graeme Ward, Mr Ted Benjamin, Mr Neil Mounsher and Mr John Armstrong. Mr Ward, do you or any of your Telstra colleagues wish to make an opening statement?

**Mr Ward**—Yes. Thank you for this opportunity to make a short statement. We understand that the purpose of this hearing is, as you say, to focus on the process and the administration surrounding the CoTs and related cases. Telstra has made a submission to the committee, which we forwarded earlier this week, that updates the progress on the remaining CoT cases and the processes that are in place to address ongoing customer complaints and compensation claims.

It is important to recognise that the arbitration process is independently administered by the TIO. Progress to date is that 11 of the 16 CoT cases are resolved. We understand that the arbitrators are expected to deliver the remaining awards shortly. However, the exact timing of those awards rests with the arbitrator and the TIO, rather than with Telstra. In relation to the award of associated costs, eight of the 11 claimants have been paid costs. Telstra has paid to the TIO the whole of the balance of the \$1.2m

ex gratia payment for the reimbursement of the remaining claimants' costs. Telstra has also advised the TIO that the disbursement of those funds is at his discretion.

With the benefit of hindsight, I think we can all agree that we would have preferred a different approach to resolving the issues. Indeed, some may have preferred a different outcome. However, the focus should now be on addressing any deficiencies of process or administration that may have arisen during the course of managing these disputes.

Telstra is aware that the TIO has flagged a review of the standard arbitration procedure. Telstra welcomes a review of the rules and will be cooperating with the TIO and the rest of industry in developing an improved version of the standard arbitration procedures. Experience over the last few years has highlighted areas for improvement, in terms of both expanding industry coverage for the TIO scheme and streamlining the dispute resolution processes. Indeed, as only two cases have been conducted under the standard arbitration rules, it suggests that the TIO processes and Telstra's internal complaints management schemes are now more effectively resolving consumer complaints. In relation to those other longstanding disputes that lay outside the CoT arbitration processes, there are a range of non-legal remedies available to these individuals. The post-July industry arrangements have significantly broadened the range of remedies available to customers as well as extending the coverage of the TIO scheme to cover service providers and carriers.

One of the options available to customers is through Telstra's internal complaint management process, which provides for the resolution of complaints by customers about all aspects of the service, including billing. Payments or rebates to customers are available under the scheme. When a customer is not satisfied with Telstra's internal process, the matter can be referred to the TIO, who has powers to recommend that Telstra pay a customer up to \$50,000 in compensation. Other external processes, such as the now legislated customer service guarantee scheme, provide remedies for customers of up to \$25,000 for breaches of the guarantee. The industry scheme is currently being implemented by the ACA, the Australian Communications Authority, and I understand that there will be an opportunity for public consultation on the framework.

Finally, in developing enhanced complaints management, Telstra will be guided by the principles established under the TIO scheme and by the ACA's industry code for the customer service guarantee. Important considerations will be given to achieving a balance between efficiency, timeliness and due process in any new dispute resolution procedures that emerge from the current review.

**CHAIR**—Thank you, Mr Ward. Mr Pinnock, do you have an opening statement?

**Senator SCHACHT**—Before Mr Pinnock does that, could we have a resolution that we accept the Telstra submission and have it tabled and made available for

publication. They submitted it to us earlier this week and I do not think that they have put 'in confidence' on it.

**Mr Ward**—If I could add to that, I have the opening statement that I just read and some further details of individual cases that have been sought by the committee since we put in that submission.

**Senator SCHACHT**—We can have them copied and circulated.

**CHAIR**—They will be copied and circulated, there being no objection.

**Mr Ward**—The second document that I referred to details individual cases and contains matters that relate to the negotiations and that we were asked to provide. I believe that those details should be cleared with the claimants before they are made public. Certainly they are available for the committee.

**CHAIR**—Thank you. Mr Pinnock?

**Mr Pinnock**—Thank you, Senator. 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, trying to focus on the essential features, analysing any deficiencies and perhaps drawing some conclusions and recommendations for the future as a way forward.

Before doing so, I thought it appropriate to advise the committee on the status of the remaining arbitrations, although I will not mention them by name. 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, the 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 two arbitrators on whether to replace Lane Telecommunications and, if so, who that replacement should be. The arbitrators may also have to determine when any conflict of interest may have arisen, there being no consensus on this issue at present. I have been consulting with three of the four complainants as to a number of possible replacements, but at the moment no agreement 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 were at various stages. In one case, the arbitrator has already made a direction to refer information obtained to date to Mr Paul Howell for preliminary technical assessment. In the fourth remaining 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 that arbitration to be completed in the near

future, possibly within the next month, with the financial evaluation report to be issued by the resource unit next week.

If we turn to the process itself, I put on record my appreciation of some of the common features of the CoT claims that might distinguish them from subsequent claims. They are all small-business customers of Telstra, they are all heavily dependent on their telephone services, and they all claim to have suffered substantial business losses as a result of Telstra's failure to provide a reasonable level of fault-free service and its failure to properly investigate and record reports 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 otherwise outstanding for a long time. Initially, the fast-track arbitration process was developed to deal with the claims by that group known originally as CoT, or the CoT four. This was followed by a special arbitration procedure developed to handle the remaining claims. Essentially, the procedures provided as follows: for the Telecommunications Industry Ombudsman to act as administrator of the process, and for an independent arbitrator or arbitrators with the power to give directions to the parties and to make a final determination to be appointed by the administrator either with the express consent and approval of or after consultation with all of the claimants.

It also provided for the administrator, upon the request of the arbitrator, to appoint an independent technical resource unit comprised of both 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 the claimants or after consultation with them. Finally, those procedures provided for the appointment of a special counsel to advise me in my role as administrator. In practical terms, a solicitor from the special counsel's office was seconded on a full-time basis to my office. All of the administrative costs of those procedures as outlined, with the exception of the administrator's time, were met by Telstra.

Subsequently, a third-generation procedure known as the standard arbitration rules was developed by the TI in consultation with not only Telstra but also Optus and Vodaphone and approved by Austel. Its purpose was to deal with any similar future cases which would otherwise involve claims outside the jurisdiction of the ombudsman and which would be dealt with by way of determination or recommendation. Most of the features of the standard arbitration rules are derived from and are in common with its predecessors.

The arbitration procedures had the feature that they required all of the parties to maintain confidentiality as to the proceedings. However, under the rules of the fast-track arbitration procedure, the original CoT, or CoT four, claimants were actually entitled to discuss their respective proceedings and claims with each other. Finally, both of the arbitration procedures provided that where their rules were otherwise silent the



proceedings were to be governed by the Commercial Arbitration Act of Victoria. Significantly, that provides that an award by the arbitrator is registrable as an order of the Victorian Supreme Court, and the act confers basically what is a limited right of appeal against any award by the arbitrator. If we look——

**Senator SCHACHT**—Victoria?

**Mr Pinnock**—Yes, Victoria. We know that the arbitration procedures were intended to be non-legalistic. Much time has been spent talking about that point. They were also required to operate in accordance with the principles of natural justice but, significantly, they also allowed the arbitrator to relax certain rules of law or evidence which might otherwise prevent a fair determination of the claims. Essentially, the procedure required the claimant to lodge a written claim, Telstra to lodge a written defence and then, in turn, the claimant had an opportunity to lodge a written reply to that defence. The procedures set down time limits for each of those steps, but these could be varied, and often were, by the direction of the arbitrator or upon request of either party. A fairly significant aspect of the procedures was that they provided the arbitrator with a specific power to order a party to produce documents to the other party upon that party's request. The evidence was and is to be supported by statutory declaration. Although there was a provision for evidence to be given on oath during an oral hearing at the discretion of the arbitrator, cross-examination was not to be permitted.

When the essential documents supporting the claim and defence were lodged, the arbitrator could then make a decision as to whether the resource unit should be brought in. Its formal appointment gave it the opportunity to review all of the technical and financial issues, carry out any necessary site inspections and, ultimately, prepare separate technical and financial evaluation reports which were to be sent to the arbitrator. The arbitrator was, in turn, bound to provide copies of those documents to all of the parties. At the completion of an opportunity to make submissions on those reports, the arbitrator was then in a position to make a determination and an award, if appropriate.

There is no doubt that there were a number of benefits both for the claimants and Telstra, at least as envisaged in those procedures, which were cast as non-legalistic procedures operating in accordance with natural justice to produce a fair outcome—the primary benefit envisaged for the claimants. The administrative costs were to be borne by Telstra, and the committee was provided on the last occasion with the details of the costs of the total process, of which a significant portion, but certainly not the major portion, related to the actual costs of the resource unit, the arbitrators, et cetera.

As I will mention in a moment in more detail, the relaxation of the strict rules of evidence and law was something that was certainly in favour of the claimants. There are two primary benefits, it seems to me, for Telstra. The first is finality and certainty in the determination of claims, as opposed to the uncertainties of other methods, such as resolution by mediation or negotiation. In several cases settlements had already occurred

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

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

**Senator SCHACHT**—Do you disagree with her findings?

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

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

probably in a much better position to judge those issues than almost any or all of the claimants.

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

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

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

Turning to what I regard as the benefits—firstly under the fast-track arbitration

procedure, the claimants had the significant benefit of Telstra effectively waiving any statutory immunity it may have otherwise been entitled to plead in legal proceedings. In particular, clause 10(1) of that procedure provides that in relation to Telecom's liability—the ability to compensate for any demonstrated loss on the part of the claimant—the arbitrator would recommend whether, notwithstanding that in respect of a period or periods that Telecom Australia was not strictly liable or had no obligation to pay due to a statutory immunity covering those periods, nevertheless it should, having regard to all the circumstances relevant to the claim, pay an amount in respect of such a period or periods and, if so, what amount. Clause 13 of the same procedures stated that Telecom commits in advance to implement any recommendations made by the arbitrator pursuant to that clause.

Secondly, under both the fast-track and special arbitration procedures, the claimants had the general benefit of relaxation of rules of law and evidence which might have otherwise made it difficult for them to prove their claims. In particular, in the special arbitration procedure, clause 7.11.3 said that the arbitrator is to make a determination 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 grounds as to the link between the claimants' demonstrated loss and alleged faults or problems in the claimants' telephone service and to make reasonable inferences based on such evidence as presented by the claimants and by Telstra. One has to be cautious in assessing the effect of those particular provisions, but in some cases they may well have been the difference between claimants succeeding under the arbitration procedures in obtaining an award where they might have otherwise failed or failed in significant parts of their claim if they had been litigated in the normal amount.

My view, based on that analysis, in relation to the standard arbitration rules which now exist, is that if they are not only to be effective but to be seen to be effective, then some changes clearly need to be made.

**Senator SCHACHT**—Would they be the rules or notification?

**Mr Pinnock**—Both. The process should follow from the rules that the rules should specifically spell out certain limitations and certain other provisions. But it is important that this committee understand that the standard arbitration rules are not just rules developed by the TIO in consultation with Telstra; they are rules which have been developed in consultation with Telstra, Optus and Vodafone. Not only would those three carriers have an interest if they were to, as it were, sign up to any amendments to those rules, but there may well be other newer members of the TIO who will also want an opportunity, if they were to be expected to commit to those rules, to also be involved in any review of them.

The other point I want to make clear to the committee is that the arbitration rules—whether it is the first, the second or the now existing standard arbitration rules—have been developed to deal with commercial disputes involving small businesses which

have suffered losses due to the faults or problems in their telecommunication services. The procedure and the rules are not well suited to dealing with other types of disputes which, for instance, might involve breaches of privacy or other conduct on the part of carriers or service providers unrelated to the actual provision of telecommunication services.

Thirdly, in conformity with the whole concept of the TIO as an alternative dispute resolution scheme, neither a claimant nor a member of the TIO can actually be forced to enter arbitration. At the present time—certainly up until 1 July 1997—Telstra was required to advise Austel of any occasion when it declined to enter into arbitration when requested to do so by a claimant, but no other carrier was under such an obligation.

In summary, my view to the committee is that the following changes to the standard arbitration rules need to be considered. Firstly, where Telstra is a party to those rules, claimants should be encouraged to obtain relevant documents through the arbitration process itself rather than under FOI, thus putting the matter formally under the control of the arbitrator. No claimant can properly be required to give up his or her rights under the FOI, but the inducement, it seems to me, that can be given to a complainant through the procedures is the direct control of the arbitrator over the production of documents. Of course, in the case of any carrier other than Telstra, FOI would not in any event be available to obtain such documents. Secondly, provision has to be made for successful complainants to recover their reasonable legal and other costs. I am not saying that they recover necessarily every single cost, but they should at least be entitled to recover those costs that they would recover according to the normal rules of litigation. Thirdly, the resource unit was always 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 procedures to meet the procedural requirements of natural justice or procedural fairness. But, in fact, those principles do not necessarily require that step to be taken. In fact, in some commercial arbitration procedures the arbitrator is assisted by a technical expert who provides advice solely to the arbitrator without any reference to that advice being given to the parties. In my view, much time could be saved if the resource unit provided that advice solely to the arbitrator. It would also, in my view, protect the resource unit from, as it were, being drawn into the fray by arguments *ad nauseam* as to the merits and accuracy of its reports.

The problem, however, of excessive legalism, whilst easy to identify, is much less easy to remedy given the nature of any arbitration procedure. However, even there I think there are some things that can be achieved. Firstly, the parties should actually be prohibited from making requests for further and better particulars of any aspect of their respective cases. If they argue that there are deficiencies in the other party's case, that is a matter for the arbitrator to determine. If the arbitrator says, 'I am satisfied', then the matter goes ahead. If the arbitrator thinks there is a gap, then it should be a matter for the arbitrator, in his or her sole discretion, to require a party to produce more information.

Further, in general, the arbitrator should have much greater discretionary powers to control delays which have otherwise been inherit in the process to date. As is always the situation in adversarial proceedings, if for instance one party says, 'I would like an extension of time' and the other party says, 'Well, okay', the tendency of the arbitrator or the judge in many instances is to say yes. My view is that the conditions or the rules of the procedure which lay down time limits should be prescriptive.

Finally, any major dispute which might be a candidate for arbitration has to be identified at a very early stage. If one allows these sorts of disputes to fester, then the chances of resolving them short of full litigation in legal proceedings are much reduced. At the moment, because of adverse perceptions about the effectiveness of the arbitration procedures, only one dispute has been dealt with under the standard arbitration rules since those rules were established.

**Senator SCHACHT**—When were the standard rules established?

**Mr Pinnock**—I am sorry, you have got me on that one.

**Mr Benjamin**—In December 1994. There was one earlier on and then one in about December 1994.

**Mr Pinnock**—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 me. The other 28 cases, which all involve claims in excess of my jurisdiction to make either a binding determination or recommendation, were all resolved either by conciliation or by mediation. I suppose that that says something about the attitude of some claimants to the arbitration procedures.

**CHAIR**—Mr Wynack, do you have an opening statement?

**Mr Pinnock**—If I might interrupt, that statement is available in both printed and electronic form.

**Mr Wynack**—I am the investigation officer handling complaints made by four of the CoTs about actions of Telstra relating to Telstra's handling of the CoTs applications under the Freedom of Information Act. The Commonwealth Ombudsman has received a number of complaints from other CoTs, but these are being handled by other people in our office.

Because the committee had requested a status report on the ombudsman's investigation of complaints by CoTs and related cases, I made inquiries of these people and I have prepared such a report. In preparing that report, it became obvious that the constraints of the Ombudsman Act would prevent me from giving details about some of those. Consequently, I would like to read a statement I have prepared, which will outline

the constraints I have and perhaps give you some understanding if I am a little bit short on detail later.

I am pleased to respond to your invitation to appear at this public hearing, and I hope that I can be of some assistance. I will attempt to provide any information you request, but I should like to mention that I have some statutory obligations which might constrain me in providing some information about some of the complaints which I am investigating.

It is crucial that the ombudsman be completely impartial, investigating complaints thoroughly and testing the validity and veracity of all assertions carefully before making any final conclusions or public statements. Subsection 8 (2) of the act provides that we shall conduct investigations in private. Subsection 8 (5) provides that before the ombudsman makes a final report on an investigation, he must give any agency or individual whom he intends to expressly or impliedly criticise the opportunity to make submissions about the actions to which they relate.

Section 35A of the act empowers the ombudsman to make public statements about investigations. The section also requires that the ombudsman first comply with subsection 8 (5). Similar requirements apply to the ombudsman's annual report and special reports to parliament. Those processes amount to a requirement to act in accordance with the rules of procedural fairness and are an important part of the ombudsman's accountability process. Premature disclosure of tentative opinions untested by natural justice has the potential to damage the agency and individuals complained about and also the credibility and impartiality of the ombudsman's office.

We are currently investigating several complaints from several CoTs, and I and other investigators have not yet notified Telstra of our conclusions on various issues. It would not be appropriate for the ombudsman to release information into a domain where it is likely to become public before Telstra has had an opportunity to respond to any criticisms. The legislature clearly intended, when it enacted the Ombudsman Act, that the ombudsman accord the agencies natural justice in the manner prescribed in the act.

Some of the CoTs have authorised me to provide to you details of the complaints they have made to the ombudsman. I am prepared to provide general details of such complaints, but in respect of those complaints which we are currently investigating, I cannot provide you with any opinions as to whether the complaints are substantiated or whether we believe that Telstra has acted defectively. Within those constraints, I will answer your questions as comprehensively as I am able. Should I be uncertain about whether I should respond, I will seek your agreement to consult the ombudsman and perhaps put a response in writing. Thank you.

**CHAIR**—Are there any questions?

**Senator SCHACHT**—I just want to get a couple of clarifications from Mr Pinnock. When did Lane withdraw from the process because of conflict of interest?

**Mr Pinnock**—The formal date escapes me at the moment, but it was within the last two months. It would have been some time in July.

**Senator SCHACHT**—And they withdrew only after there were consistent complaints from people involved with CoT cases and elsewhere that there may be a conflict of interest; is that correct?

**Mr Pinnock**—Yes. There was no debate about it from Lane's point of view.

**Senator SCHACHT**—Did TIO express to Lane at any stage before July that there would have been a conflict of interest with the takeover of Lane by Ericsson, and Ericsson being a major contractor to Telstra?

**Mr Pinnock**—When I say that they formally withdrew, what happened was this. It was not just the claimants coming to the TIO. We were well aware, when it occurred, that Lane had been purchased by Ericsson.

**Senator SCHACHT**—When was Lane purchased by Ericsson?

**Mr Pinnock**—I believe it was some time in April. Again, the exact date escapes me.

**Senator SCHACHT**—But for three or four months we had this period which I think was a diversion, which unfortunately became a diversion as we are getting to the nub of matters when people were concerned. I think if it had been dealt with more expeditiously and quickly it would not have become a diversion. We could have at least cleared that up. I think in the future the TIO has to be proactive on these matters.

**Mr Pinnock**—It is not a matter of the TIO not being proactive. What happened in fact was that the CoTs came to me at precisely the same time saying, 'There is a perceived conflict here' which we well knew about and we raised it both with Lanes and with the arbitrators.

**Senator SCHACHT**—If Lanes had said that there was no conflict of interest, what was your power?

**Mr Pinnock**—In my view, my power would have been to advise the arbitrator to sack them.

**Senator SCHACHT**—You mentioned a number of recommendations of changes, which I think the way you described them from my perspective of trying to get to the



bottom of the sorry saga would all seem reasonable improvements. What I am interested in is this. I understand about the FOI issue of documents coming from Telstra—that it would be easier and cleaner, you say, for the arbitrator to be in charge of court work and assessing what documents are necessary. You did allude to the question, quite rightly, of whether, when the arbitrator calls for the documents and gets them, that proscribes the complainant being able to use that information in a subsequent independent legal action?

**Mr Pinnock**—That is not exactly clear. The confidentiality provisions that exist at the moment were clearly inserted in my view to make sure that the parties did not, as it were, speak publicly about what was going on in the process. Where they would actually prohibit someone from using those documents in subsequent legal proceedings, I am uncertain.

**Senator SCHACHT**—I think that is a nub issue that ought to be resolved. I think the TIO ought to take that up and get that resolved.

**Mr Pinnock**—In a sense the question does not need to be answered. Can you just bear with me for a moment? If you cannot use the old document it may not matter a great deal at all because, if you know the document exists, you can require in litigation the other party to discover the document to you. If they do not discover it to you, you can prove the failure to discover by possession of the document. I have no doubt about that at all. Effectively, the answer to your question in that sense is: the information would be available or able to be obtained by a litigant.

**Senator SCHACHT**—But that is a costly process. It seems that we are trying to get costs down. I just want to leave it on notice to the TIO that you are looking at changing processes. I think that is an issue. It seems to me not unreasonable, once the arbitrator wants that document, that thereafter, wherever it goes in future legal challenges, that ought to be available without going through another legal battle of having to prove that the document exists and spend another arm and a leg on a lawyer or a QC or a team of them on either side having the argument again. For commonsense, for ordinary lay people, it seems that the document exists and it has been dealt with, so why is it not available for any subsequent legal action? In relation to the suggestion of the changes of the rules to the standard arbitration which you mentioned, has the board or the TIO—have I got the correct title for the board or the council—

**Mr Pinnock**—It would be a matter for the council to consider.

**Senator SCHACHT**—When do we get an answer from them that these new procedures that you have outlined here, which I have to say I personally think are a step forward—they might not solve all the issues, but they are a step forward—will come into action and be adopted?

**Mr Pinnock**—It might be possible to get agreement on that before Christmas.

**Senator SCHACHT**—You can show them the *Hansard* of my remarks.

**Mr Pinnock**—I can do that to them.

**Senator SCHACHT**—It would be in my view extremely short-sighted of them not to adopt what I think are the minimum changes that you have outlined here to the process. If they do not, I suspect the TIO itself—not you personally—will start to have its own credibility undermined because of the influence on the TIO council of the carriers, which is always an issue.

**Mr Pinnock**—With the greatest respect, I correct you there. The carriers do not hold sway in the council at all. I report to my council, I am present at every council meeting and I can state categorically that the influence of the carriers in the council is the influence of the membership of the TIO balanced against the interests of consumers represented by independently appointed and consumer and user group representatives who are employed after consultation with the minister.

**Senator SCHACHT**—I am pleased you put that on the record. I am pleased to hear that again. We have to keep stating that because there is perception that the influence, directly and so on, because of the clout of the carriers—

**Mr Pinnock**—The perception is wrong.

**Senator SCHACHT**—But, being able to hear, I just the same think that this is a test coming up for the council, that these changes if they are not adopted will further increase the perception maybe as wrong as they are now that the influence of the carriers is too strong. I just raise that. I put my hand up back five or six years ago for the TIO to be created and all of that. This is a revolutionary process and with the privatisation of Telstra—the third privatisation under way—the world keeps changing. The state-owned monopoly is now operating in a different area. If further amendments to the Trade Practices Act about unconscionable conduct are strengthened, the officers of Telstra, like any others, are going to have to be witnesses and be available for those actions. That will be an excellent step forward vis-a-vis the power of Telstra versus small business.

Can I now just go to some questions to Telstra. Did Simone Semmens on behalf of Telstra state on Channel 9's *Current Affair* program in August 1996 that the findings of the Bell Canada International report into the performance of the Telstra network substantiate that there were no systematic problems within Telstra's billing system?

**Mr Benjamin**—I am not aware of that particular statement by Simone Semmens, but I think that would be a reasonable conclusion from the Bell Canada report.

**Senator SCHACHT**—Since then of course—not in conversations but elsewhere—we now have major litigation running into hundreds of millions of dollars between various

service providers and so on which are complaints about the billing system. Does that indicate that she may have been partly wrong?

**Mr Benjamin**—From memory, I do not think the Bell Canada inquiry looked at billing systems.

**Senator SCHACHT**—The claim is that she said that Bell Canada's international report substantiated that there were no systematic problems within Telstra's billing system; that was her claim. I am just saying that, since then, you have got major litigation running into hundreds of millions of dollars between various service providers and other telecommunications providers claiming false overbilling running into hundreds of millions of dollars.

**Mr Ward**—I cannot comment on the Simone Semmens statement and I guess we will get that checked if it is not with us today.

**Senator SCHACHT**—So we start at the right place. That is another question being taken on notice.

**Mr Ward**—No, I did not say that. We will check if we can get the information from the people we have here. The comment I was going to make about billing was that, since that time, the development in the wholesale market of service provision between Telstra and service providers has taken off quite significantly, and that is a wholesale, if you like, billing service based on, at that stage, a retail platform. I suspect—and we will have this checked—that the Bell Canada report would not have looked at that aspect of the billing.

**Senator SCHACHT**—Has Telstra received any complaints from CoT members and other people about the BCI report findings being flawed or fabricated?

**Mr Benjamin**—Yes, there have been complaints made—sorry, not fabricated; there have been complaints made by various CoT members about disagreement with aspects of the Bell Canada report.

**Mr Armstrong**—Can I just add I think one of the CoT members has alleged that the Bell Canada report was fabricated.

**Senator SCHACHT**—That is what I am saying: there is a pile of stuff there that has come into my office from a range of CoT case people and I am trying to summarise a range of their complaints. They claim it is fabricated. I do not automatically accept that. I want to get them on the record in order to get the cases into the open. I want to get to the bottom of many of those complaints. As a result of those complaints, did you find that Telstra had to take any action in respect of the BCI report to rectify any inaccuracies or shortcomings in the system?

**Mr Armstrong**—Yes. The basis upon which it was put that the report was fabricated was an apparent clash of dates, as I recall, with two sets of testing. This goes back a couple of years. I believe that claimants raised the matter with the TIO. Telstra went to Bell Canada and raised the clash of dates with it. As I recall, Bell Canada provided a letter saying that there was an error in the report.

**Senator SCHACHT**—Can you please provide us with a copy of that letter from Bell Canada?

**Mr Armstrong**—I do not have it with me.

**Senator SCHACHT**—Can you get it for us?

**Mr Armstrong**—Yes.

**Senator SCHACHT**—I will put that question on notice. As to the complaints to Telstra from the CoT cases—Mr Benjamin, you may think that you have drawn the short straw in Telstra, because you have been designated to handle the CoT cases and so on. Are you also a member of the TIO board?

**Mr Benjamin**—I am a member of the TIO council.

**Senator SCHACHT**—Were any CoT complaints or issues discussed at the council while you were present?

**Mr Benjamin**—There are regular reports from the TIO on the progress of the CoT claims.

**Senator SCHACHT**—Did the council make any decisions about CoT cases or express any opinion?

**Mr Benjamin**—I might be assisted by Mr Pinnock.

**Mr Pinnock**—Yes.

**Senator SCHACHT**—Did it? Mr Benjamin, did you declare your potential conflict of interest at the council meeting, given that as a Telstra employee you were dealing with CoT cases?

**Mr Benjamin**—My involvement in CoT cases, I believe, was known to the TIO council.

**Senator SCHACHT**—No, did you declare your interest?

**Mr Benjamin**—There was no formal declaration, but my involvement was known to the other members of the council.

**Senator SCHACHT**—You did not put it on the record at the council meeting that you were dealing specifically with CoT cases and trying to beat them down in their complaints, or reduce their position; is that correct?

**Mr Benjamin**—I did not make a formal declaration to the TIO.

**Senator SCHACHT**—I have to say that I think that is poor. Mr Pinnock, in the future you ought to get the process right. People should make declarations on the record—in the minutes—and then withdraw from the discussion.

**Mr Pinnock**—You are making certain assumptions, Senator.

**Senator SCHACHT**—Mr Benjamin—

**Mr Pinnock**—Senator, you directed your comment to me. I would like to answer it. Firstly, no discussions were held within the TIO council at any meeting that I went to since I have been ombudsman. My recollection is that I have been to every meeting of council bar one. As to any issue relating to any individual CoT—the issues that were discussed in my status reports to council were simply where each claim was at a particular point in time and how much time I spent personally in relation to those matters. The only discussions that were ever held in council with the TIO when I was present—and as I say, I was present on all but one occasion—were discussions as to the amount of time that I was spending as the administrator of the process as opposed to my other work as ombudsman. Mr Benjamin is correct. In my presence—and I do not know what happened before I became ombudsman—there was no formal declaration. Every member of the council knows, and knew, that Mr Benjamin was involved in the CoT process. For that very reason there was never any discussion as to any of the details of any of the claims, Telstra's attitudes to them, the claimant's attitudes, or any matters that were discussed with me in my role as administrator.

**Senator SCHACHT**—Mr Pinnock, you said that you gave the status report to the council on the various cases being dealt with. Without belabouring the point, it seems to me that Mr Benjamin's involvement— and he was dealing specifically on behalf of Telstra with those cases—should have been declared in the minutes. You should take that on board. There has been so much heat about these issues. These are the sorts of things that lead to a perception that there might well be an advantage to Telstra. It has someone on the council who is dealing with these complaints on behalf of Telstra and who might inadvertently have inside information into what the process is. That is why I think it is more important. The council ought to have a look at that and obtain legal advice about what is appropriate in relation to the declaration of a conflict of interest or association. This is something that you have to get cleared up and absolutely right.

**Mr Pinnock**—I will refer it to my council.

**Senator SCHACHT**—Mr Benjamin, in the future you ought to put up your hand immediately. If I were in your position, I would think it wise to leave the room when any status report is given on a CoT case. One could imagine that, if Mr Schorer were on the council representing a consumer organisation, some lawyer in Telstra would be saying, ‘This is crook. He is sitting there getting inside information from the status report.’

**Mr Pinnock**—It would not influence my council, Senator.

**Senator SCHACHT**—It does not matter whether it influences you; potentially, he gets access to information that other people do not get access to. It is all about perceptions. You have to get it right. Similarly, if Mr Schorer were hoping to be a consumer representative, I would chuck him out of the room too. Declarations would be a very useful development. Mr Ward, is Telstra currently receiving written complaints from CoT members about Telstra’s failure to correctly process CoT members’ FOI requests? If so, what are the natures of those complaints?

**Mr Armstrong**—I will answer that. Telstra is receiving complaints. The bulk of those complaints are also made to the Commonwealth Ombudsman. The complaints vary dramatically, from complaints about Telstra requesting clarification of requests or, as required under the act, sufficient information to enable us to identify the documents sought. They complain about documents that they have not received under FOI which they say fell within the scope of their FOI requests. Basically, there are complaints about not getting documents that they say they ought to have had under either those FOIs or previous ones, or complaints about consultation.

**Senator SCHACHT**—This is an endless chapter. Mr Pinnock has gone to great lengths to explain—and I think he has done so very well today—the ways in which in the future this could be handled better. Are you in a position to say that some finality will be reached soon on the part of Telstra’s response to these complaints?

**Mr Armstrong**—We have responded to the claimants or to the ombudsman’s office on those complaints. If we find something wrong, obviously, we would correct it. But in our opinion, the bulk of these complaints are without any foundation. Since May of 1996, when the Ombudsman published her report in relation to Mrs Garms, to the best of my recollection the Ombudsman has not made any adverse finding against us in relation to any complaints. Obviously, we want finality. Obviously, we want the matters resolved.

**Senator SCHACHT**—This is a matter that has been raised with the Commonwealth, Mr Armstrong.

**Mr Armstrong**—You are assuming that the points have substance.

**Senator SCHACHT**—They may be without substance, but they keep surfacing. This is a major issue that seems to stop a successful arbitration, or people getting satisfaction.

**Senator BOSWELL**—We were told quite clearly at that round that there was an Excel file. One person admitted that his job was to make sure that the information never got to a CoT complainant. It was demonstrated very clearly at the last Senate inquiry that Telstra was not playing the game. A person employed by Telstra said there was an Excel file. He presented the committee with a piece of paper that had everything blanked out. Have you distributed those Excel files to the CoT complainants?

**Mr Armstrong**—To all those who have asked for them since, yes; we have given them to them in full and through the arbitration process. Mr Schorer made a complaint to the Commonwealth Ombudsman about Telstra's refusal to provide that document to him under freedom of information. The ombudsman has not concluded that investigation yet. The only response we have had from the ombudsman to date is a letter that he sent to Mr Schorer in which he noted that he may find that Telstra's stance in that regard was reasonable. Yes, it has been provided to them.

**Senator SCHACHT**—You have provided this information in the month or so since we had the previous hearing, at which these issues were raised. Have the complainants come back to you to say, 'We're now satisfied with the information that you have provided to us', or are they still considering their position?

**Mr Armstrong**—Some are still considering their position. Some are complaining about documents, or saying that documents are listed which are not in our defence documents. I believe one is referring to documents which he has not had under FOI.

**Senator SCHACHT**—So one complainant is saying that there are still documents that he or she wants that you have not yet provided. So is one complainant still complaining that you have not given them all of the documents that they think they should get; is that correct?

**Mr Armstrong**—I do not suppose they are saying necessarily that they should have had them before. They are saying that they do not know whether they have had this document before or whether it is a document that they should have had previously.

**Senator SCHACHT**—Do they now have the document?

**Mr Armstrong**—They have the document.

**Senator SCHACHT**—Are you saying, 'We know that they believe there are still other documents inside Telstra, whether it is associated with Excel or any other document, that you have not provided'? Even if it does not exist, they believe it exists? Mr

Armstrong, can you answer that?

**Mr Armstrong**—Certainly. Mrs Garms, at the very least, and Mr Schorer are complaining that there are documents that Telstra has not provided to them under FOI.

**Senator SCHACHT**—When they say that they have not been given those documents under FOI, have they given some description of what they think those documents are so that you can get at least a rough idea of a response? Instead of saying, ‘Give us a look at any documents’, do they actually try to describe some documents?

**Mr Armstrong**—In some cases they describe very general descriptions. In other cases, such as a complaint that Mrs Garms made to the ombudsman, they identify the document specifically.

**Senator BOSWELL**—Mr Armstrong, you have huge legal and technical teams. You must know what documents are required under the Freedom of Information Act for the CoT claimants to lodge a claim. Why are you obfuscating all the time? Why do you not just release the documents? Senator Schacht, the other senators and I always seem to be fighting a rearguard action on this issue. You must know what is required to lodge a claim with the arbitration commission. Why do you not just put the documents on the table?

**Mr Armstrong**—I can say that to the best of our knowledge we have provided to FOI applicants all of the documents that we can identify that fall within the scope of their FOI requests. Some of them disagree with that, but that is the case. You also flag another difficulty, which I think the TIO touched upon. Within the arbitration process, when the arbitrator has the claim documents and the defence documents and he has the assistance of the technical resource unit to read those documents, obviously you can narrow it down and better identify the issues and you can identify documents which are pertinent to those issues. Throughout these arbitration processes, that technical resource unit has read our defence documents and has come back to us requesting particular information and documents. At the outset when an FOI request is lodged, you might not necessarily know, if you have not received the claim documents or if you have not conducted your investigations, what the issues are and what documents are pertinent to those issues. Those issues may not crystallise until those claim and defence documents are tabled. Hence, throughout the arbitration process, Telstra has provided more documentation. But under FOI we have provided, to the best of our knowledge, all of the documents that fall within the scope of those FOI requests.

**Senator SCHACHT**—Mr Armstrong, I will now turn to Mr Wynack. Have you received complaints from CoT members about Telstra’s failure to comply with the spirit of the FOI act?

**Mr Wynack**—Yes, we have, quite a number.



**Senator SCHACHT**—What are the natures of those complaints?

**Mr Wynack**—The ombudsman has reported publicly on a number of those issues. The major one is probably Telstra's interpretation of the scope of Mrs Garms's FOI applications. Also, we have reminded Telstra that it is open to Telstra to release information outside the FOI act. So the limitation of the wording—

**Senator SCHACHT**—That would have come as a surprise to it?

**Mr Armstrong**—With respect, we have released thousands of pages of documents under the provisions of the FOI act.

**Senator SCHACHT**—If I hear one more time the excuse that you have 10,000 pages stacked away in a cupboard or something, I will scream. That has been your defence for a long time.

**Mr Armstrong**—No, I am not saying that they are stacked away in a cupboard.

**Senator SCHACHT**—At the previous hearing we heard, 'There are too many pages. We don't know which ones you want to look at.'

**Mr Armstrong**—The statement I make is that they have been—

**Senator SCHACHT**—You have a whole—

**CHAIR**—Order! We will hear the witness out.

**Mr Armstrong**—Mr Wynack was making the point that Telstra is exempt from the FOI act in relation to many documents. In particular, many of Mrs Garms's FOI requests have sought documents in respect of which we are exempt under the act. But despite that, we identified those documents and provided them to her pursuant to those FOI requests.

**Senator SCHACHT**—But Mr Wynack just said that he has had a complaint from Mrs Garms and he has advised Telstra that—and this is the way I read his comment just then—he is not happy with your response; is that correct, Mr Wynack?

**Mr Wynack**—No, that is not correct. One issue which we are deliberating on at the moment is a particular complaint that Telstra has applied a very narrow interpretation to a request for documentation relating to some exchanges.

**Senator SCHACHT**—Has it responded to your concern about that narrow interpretation?

**Mr Wynack**—Yes, we have received a response, the most recent one being last week.

**Senator SCHACHT**—What did that say?

**Mr Wynack**—I am not sure that it would be wise for me to give my interpretation of what that says. It was a reasonably detailed response. By and large, it states that the information in three particular files is not information covered by Mrs Garms's FOI applications dating back to 1993. We will soon be forming a view as to whether Telstra's interpretation of the freedom of information request is reasonable and also whether, notwithstanding its interpretation of the freedom of information application, Telstra has acted reasonably in refusing to provide that information to Mrs Garms. But until Telstra has an opportunity to consider and comment upon our views, I do not think it would be appropriate for me to—

**Senator SCHACHT**—When that process is completed, can both of you send the information to the committee?

**Mr Wynack**—There is certainly no problem with that.

**Senator SCHACHT**—Could that be done quickly? This has been going on for 10 years. I am not complaining to the ombudsman. Mr Wynack, you have been brought into this and I appreciate the constraints you are under. Mr Wynack, have you received complaints from CoT members and others that Telstra has withheld documents containing information which relates to the performance of the Telstra network?

**Mr Wynack**—Would you mind repeating that?

**Senator SCHACHT**—Have you received complaints from CoT cases—and Mrs Garms may be one of them—that Telstra has withheld documents containing information which relates to the performance of the Telstra network, such as congestion and switching failures?

**Mr Wynack**—Yes, the Ombudsman has received several such complaints. She has reported publicly that Telstra incorrectly interpreted the freedom of information request in declining to provide information about some exchanges, particularly that in Fortitude Valley.

**Senator SCHACHT**—Are you now satisfied that all of the appropriate information on the Fortitude Valley exchange on congestion and switching failures has been provided to Mrs Garms?

**Mr Wynack**—No.

**Senator SCHACHT**—You are not satisfied?

**Mr Wynack**—No, we are still investigating allegations by Mrs Garms that there is information about the exchanges—

**Senator SCHACHT**—Which is still to come?

**Mr Wynack**—Yes.

**Senator SCHACHT**—How long has this issue that Mrs Garms has raised about the congestion and switching failures at the Fortitude Valley exchange been going on?

**Mr Wynack**—Mrs Garms has raised the issue of congestion—

**Senator SCHACHT**—This issue of congestion with the network at Fortitude Valley about which you have had to go back and tell Telstra that their interpretation of the FOI is too narrow and that they should provide it—how long has this been bouncing backwards and forwards?

**Mr Wynack**—I am not sure that the specific question of congestion at the Fortitude Valley has been the subject of any matters that we have raised with Telstra.

**Senator SCHACHT**—What has been raised about the problem at Fortitude Valley that you now believe that they gave initially a too narrow interpretation of the FOI?

**Mr Wynack**—There are a number of reports on three files which Mrs Garms received under the arbitration. Mrs Garms maintains that that information should have been provided to her under FOI. It is not clear to me yet, from the information I have received from Mrs Garms and Telstra in the past couple of weeks, precisely where those three files were maintained, where the documents on them originated and whether or not they should, therefore, have been located during Telstra's searches for documents.

**Senator SCHACHT**—You are not trying to tell me that they could have been located over in Perth or in Cairns or somewhere? Telstra is not that bad that it has the documents for Fortitude Valley stuck in Tasmania, is it?

**Mr Wynack**—I have read only briefly the response that I received, I think, yesterday but, as I understand it, the documents were located in Brisbane but not within the sections of Telstra which Telstra assure me were covered by Mrs Garms' request.

**Senator SCHACHT**—Do you think that it is important that they were not at Fortitude Valley? Was it a stuff-up rather than a conspiracy on these things? Is incompetence more likely the answer where files are not where they should be? Is that your view, that it may well be a stuff-up?

**Mr Wynack**—I have no idea why Telstra cannot locate these documents. The filing system and record keeping was the subject of adverse comment by the Ombudsman in her May 1996 report.

**Senator SCHACHT**—That was May 1996. It is now over 12 months on and we still cannot find the file.

**Mr Armstrong**—Can I make a comment? There is a particular complaint which Mr Wynack is investigating now which relates to three files.

**Senator SCHACHT**—Can you find the files, Mr Armstrong?

**Mr Armstrong**—Yes, sure. We found them in December 1995. Those files were produced to Mrs Garms in December 1995 pursuant to the arbitration process. Any pages which we took out of those files as not relevant to the arbitrator's direction, the resource unit inspector—

**Senator SCHACHT**—But that was your decision to take them out, was it not?

**Mr Armstrong**—Precisely, and then his resource unit came out, inspected the pages we removed and ascertained whether they fell within the scope of the arbitrator's direction. I do not specifically recall; I think we were asked to provide a further half dozen or so pages. So if your question relates to timing, the files were discovered, or were located and retrieved from Brisbane, in December 1995 pursuant to the arbitrator's direction and provided to Mrs Garms in January 1996. In March 1996, Mrs Garms made the FOI request in question. Telstra provided a large volume of documentation to her pursuant to that request. It is only now in the last—I would guess, and Mr Wynack might correct me—three months or so that Mrs Garms claims that those files which she had in December 1995 she should also have had pursuant to her subsequent FOI request in March 1996. So these files were not recently discovered; they were produced nearly two years ago.

**Senator SCHACHT**—Mr Wynack gave me the impression that there was some difficulty with the files.

**Mr Wynack**—The three files, as I understand it, were provided to Mrs Garms pursuant to arbitration. As I understand it, they have still not been provided under freedom of information. It is my understanding that Mrs Garms has received the three files, albeit with some deletions, under the arbitration process.

**Senator SCHACHT**—If she gets them under FOI, she will get them without deletions; is that correct?

**Mr Wynack**—She would get them without deletions.

**Senator SCHACHT**—Has she got them yet without deletions?

**Mr Wynack**—No.

**Senator SCHACHT**—Why not?

**Mr Wynack**—The Ombudsman would have a right of review if she felt that the entire files were not given to Mrs Garms.

**Senator SCHACHT**—I ask Mr Armstrong and Mr Ward: what is in these files that is so goddamned secret that you still want to have deletions? Why do you not just give them to Mrs Garms and then I can go home?

**Mr Armstrong**—Again, that, with respect, is the wrong basis of the complaint. We are not saying that they are so secret. We are constantly being criticised for flooding people with irrelevant documentation. These documents were produced because of an arbitrator's direction which specified particular categories or classes of documents, and specifically six telephone exchanges in the Brisbane area, that the resource unit deemed were relevant to the claim. Some of the reports contain information about other exchanges that have nothing to do with the claim—no relevance whatsoever. So that information was taken out. We went through and provided the relevant—the pertinent—information pursuant to the arbitration. It is not secret, because the information was given over.

**Senator SCHACHT**—Why do you not give the whole goddamned files? I know how thick they are and how many tonnes they weigh, or whatever. Why cannot they just be given to Mr Wynack or the ombudsman's office as an independent source and let him go through and sort out what the other exchanges are. That would be at least some transparency under FOI. The way we are going, we will be back in 12 months time still bouncing this backwards and forwards. I have to say that by that stage a lot of us will be pretty short tempered.

**Senator BOSWELL**—What will end up is that there will be a Senate inquiry, and we all try to avoid that. We are going around and around the mulberry bush.

**Mr Armstrong**—There is transparency.

**Senator SCHACHT**—This is a Senate inquiry.

**Mr Armstrong**—There is transparency.

**Senator SCHACHT**—You need that like you need a hole in the head, Mr Armstrong, I can tell you.

**Mr Armstrong**—There is transparency. These files were produced to the arbitrator

in the arbitration process. Mr Wynack is welcome to the files. We have not been requested to provide them. We would always provide them as we have provided documentation to him in the past.

**Senator SCHACHT**—But Mr Wynack has said that there is still some dispute about the FOI and about the narrow interpretation of the files under FOI.

**Mr Armstrong**—With respect, the complaints were in writing and we have made a response. It is up to Mr Wynack to make a decision.

**Mr Wynack**—That is correct.

**Senator SCHACHT**—Good. So as at 5 o'clock Friday, today, you will be telling him to give you the whole lot and you will work out what is relevant to Mrs Garms' case and we can get on with it.

**Mr Wynack**—That is the way that we are going to have to go on this case. If I can just advert to a comment that you made a couple of minutes ago, the ombudsman's office would not have the resources to examine all of the documents in Telstra.

**Senator SCHACHT**—What about just Mrs Garms's case—so she can stop annoying me and everybody else and get on with life. She can go back to running her restaurant and I can go back to doing more productive things than having to sit here on this agony.

**Mr Wynack**—We have considered going to Brisbane and requiring Telstra to provide all of the documents from all the exchanges. The reason we have not is that we have been led to believe that there are hundreds of thousands of documents and it is questionable whether we would have the technical expertise to interpret many of them.

**Senator SCHACHT**—Can I ask Telstra: how big do you think the three files are that Mr Wynack has identified cover six exchanges? What I call a file is about half a foot thick. What do you blokes call a file, for God's sake, in this case?

**Mr Armstrong**—The three files would be, I guess, about that thick in total.

**Senator SCHACHT**—You have seen the three files?

**Mr Armstrong**—Yes.

**Senator SCHACHT**—Without excisions?

**Mr Armstrong**—Yes.

**Senator SCHACHT**—They were that thick?

**Mr Armstrong**—Together.

**Senator SCHACHT**—Together. Mr Wynack, you have not got 10,000 pages; you have got probably 500. Can you give them to him before this day is out or by early next week and he can go through them and work out what is relevant and what is not and we can get on with life?

**Mr Wynack**—I would be happy to give to Mr Armstrong a notice requiring him to do so if he wishes.

**Senator SCHACHT**—By 5 o'clock today and we can get this under way next week.

**Mr Wynack**—I must say, Senator, that I thought I had seen the three files. I would suggest that they were less than one third of the quantity that you are indicating.

**Senator SCHACHT**—But Telstra is just trying to say that if you go to the difficulty of going through these three files they could go to thousands of pages. We have just been told that that is right.

**Mr Wynack**—I am sorry, Senator, I must have misunderstood your question. The three files would not be a problem. But that is not the issue. The issue is which files has Telstra not delivered up. How many are there up in Fortitude Valley, and this is Mrs Garms' question, at Edison and Charlotte and these other exchanges?

**Senator SCHACHT**—Has Telstra, leaders in information technology in Australia—or is it still at the quill and inkwell stage—a list of files in the Fortitude Valley exchange or can you actually get out of information technology electronically a list of not actually what is in each file but a list of every file just by title? Do they stack up to 10,000 files or two miles of paper?

**Mr Armstrong**—I do not believe such a list is available. These FOI requests—I cannot recall the dates immediately; I would have to check the date—cover a very long period of time. So we physically sent up people and just went to the exchanges and searched through to find everything that could conceivably fall within the scope of the arbitrator's direction. We went to different offices in Brisbane, checked everywhere where the files might be, and retrieved the files and provided them for Mrs Garms's inspection in December 1995.

**Senator SCHACHT**—Are those files the three files that we talked about here?

**Mr Armstrong**—No, those files are about 60,000 pages worth.

**Senator SCHACHT**—They are about 60,000 pages?

**Mr Armstrong**—Again, I am just guessing.

**Senator SCHACHT**—And those files are all the operating information about a series of exchanges, including Fortitude Valley, in metropolitan Brisbane?

**Mr Armstrong**—They are wider than that. They have all the information that the arbitrator, through the data entry resource unit, directed Telstra to provide in December 1995. I would have to check the exact terms but some of the documentation, I guess, would fall within that description.

**Senator SCHACHT**—Are you saying that in those 60,000 pages—and I do not hold you to 60,000; it might be 100,000, it might be, 20,000, but it is a large amount—there might be bits and pieces that Mrs Garms might believe about her own telephone number, her own account, that show network congestion elsewhere that could have had an impact on her business. Your problem is to go through the 60,000 pages. Has anyone been through the 60,000 pages from Telstra?

**Mr Armstrong**—Yes, they were provided to Mrs Garms and she and her expert perused them during December 1995 and January 1996.

**Senator SCHACHT**—The 60,000 pages?

**Mr Armstrong**—Yes.

**Senator SCHACHT**—What is the dispute then on the FOI? Mr Wynack, you are saying that the definition may be too narrow on the FOI?

**Mr Wynack**—Mrs Garms saw those files in January 1996, or rather we gave her copies. The dispute is that she subsequently made an FOI request which caught much of the material in that room. She says it also caught those three files. We did not interpret her request to catch those three files also.

**Senator SCHACHT**—It seems to me that, at the very least, you are not going to object to those three files going to Mr Wynack?

**Mr Armstrong**—No.

**Senator SCHACHT**—You are not going to object to him receiving them and then he can make a decision.

**Mr Armstrong**—No.



**Senator SCHACHT**—If he does need to give you formally an order to do so—

**Mr Armstrong**—No.

**Senator SCHACHT**—You are not going to object to the order, right?

**Mr Armstrong**—I do not know that he does. He is welcome to call for them.

**Senator SCHACHT**—Would that be a material advance for the work of the ombudsman that they are going to provide you with the three files without excisions, Mr Wynack?

**Mr Wynack**—That will be helpful if we could get actually three original files unedited. That would certainly be helpful.

**Senator SCHACHT**—You will give them to him unedited?

**Mr Armstrong**—We do not need a request.

**Senator SCHACHT**—Can I get my arbitration fee handed over now that I am in the loop of solving these problems?

**Mr Wynack**—We can take that on notice.

**Senator BOSWELL**—Mr Wynack, some time ago you were asked to arbitrate on a claim for Mrs Garms in relation to FOI information. Mr Wynack, or someone, paid Mrs Garms \$173,000. You were responsible to get a claim cleared for a certain amount of money. That was three or four months ago. Has that claim been paid?

**Mr Wynack**—I think that you are referring to a claim made by Mrs Garms in response to a request from Telstra, which is attempting to comply with the ombudsman's recommendation.

**Senator BOSWELL**—Your recommendation was that they pay.

**Mr Wynack**—That they pay, certainly, yes. As I understand it, the process is well under way. An independent assessor was appointed some time ago. There have been delays, with quite a deal of slippage in the time frame in the terms of reference. I was surprised to hear yesterday that Telstra has not yet received notification from the assessor of Mrs Garms' comments on Telstra's response to the claim. I will be speaking to the assessor soon to find out whether or not that can still be attributed to us in any way. As I understand it, it should still be settled within weeks.

**Senator BOSWELL**—I mean, this is the problem, is it not? It starts within weeks,

then it is three weeks, then it is four weeks, then it is five weeks and then it is eight weeks and so it goes on. Could I ask Mr Ward: have you been asked to swear an affidavit that you have disclosed all documents relevant to this claim?

**Mr Ward**—I have not, Senator, but someone in Telstra would have.

**Mr Armstrong**—Is that the FOI claim or the arbitration claim?

**Senator BOSWELL**—That is all relevant documents.

**Senator SCHACHT**—Let us take both, in your own description?

**Mr Armstrong**—No.

**Senator BOSWELL**—You have not been asked?

**Mr Armstrong**—By whom?

**Senator BOSWELL**—I presume that it would be by the arbitrator.

**Mr Armstrong**—Certainly not by the existing FOI cost claim.

**Senator BOSWELL**—I understand that it is normal standard practice that you would give over all disclosure documents.

**Mr Armstrong**—The answer is no. Under the arbitration rules, there is provision for the arbitrator to direct either party to produce documents and the arbitrator would describe those documents, but there has never been any requirement for an affidavit in that regard. So the answer to your question is, in relation to the arbitration, whilst that arbitration concluded in May 1996, to the best of my recollection, no. In relation to the FOI assessment of costs, certainly not.

**Senator SCHACHT**—Can I ask Telstra: in the period particularly in 1994-95, did Telstra prepare any detailed documents in layman's terms explaining Telstra's network and the reasons for the problems being faced by customers?

**Mr Armstrong**—Sorry, in which period?

**Senator SCHACHT**—Any period, but specifically when this thing was really getting a head of steam back in 1994-95 when you had arbitration under way and lawyers being involved. You spent \$18m on lawyers and sundry other costs.

**Mr Armstrong**—Certainly, as part of the arbitration process, as part of the defence documents we filed in the arbitration, we prepared reference documents 1, 2 and 3. Those

documents attempted to explain in layman's terms the operations of the telephone network. That was provided to the arbitrator and it was provided to the claimants with our defence.

**Senator SCHACHT**—Could you provide those three documents? They are in layman's terms, I presume? Even lawyers would need some assistance, like we all do, in the technical terms of running a network. If those documents are in non-technical terms, they may help the committee to understand issues of the network and so on.

**Mr Armstrong**—Yes, I understand that.

**Senator SCHACHT**—And none of those documents or any other documents were claimed to be protected by legal professional privilege?

**Mr Armstrong**—No, they were not. I suppose, strictly speaking, they are because they were part of our defence.

**Senator SCHACHT**—You have never claimed that?

**Mr Armstrong**—We have never claimed that. We may have given assistance to other people to do just that—to explain the telecommunication terms.

**Senator SCHACHT**—I think that might be very useful for the committee. You are not telling me that they are 30,000 pages thick, or something, are they? They are not that thick?

**Mr Armstrong**—It is compelling reading.

**Senator SCHACHT**—Do you have a copy of those, Mr Wynack and Mr Pinnock?

**Mr Wynack**—No, not to my knowledge. They may have been provided in the arbitration procedures but I cannot recall specifically seeing them.

**Senator SCHACHT**—In particular, Mr Wynack, it may be useful for you to have them, in view of the fact that some of the CoT cases deal with the network itself, whether they are legitimate and would stand up on that. I think you having access to this information may be helpful, as it is for all of us non-technical people.

**Mr Armstrong**—Senator, can I just raise one thing that arises from that if you refer to the CoT complaints: the arbitration process was there to hear those complaints and to deal with them. The arbitrator had at his disposal that resource unit to investigate those complaints. I am simply suggesting that there was a process in place to deal with those complaints.

**Senator SCHACHT**—Hang on; you have jumped away from the specific issue of those documents. Though you have said that they would be made available—and I will not claim professional privilege—do you know whether any of the CoT people themselves were given the non-technical documents 1, 2 and 3?

**Mr Armstrong**—Yes, they were all given when we filed these documents.

**Senator SCHACHT**—When you filed the documents?

**Mr Armstrong**—When we were asked that the documents be provided, we gave a copy to the arbitrator, copies to the defendants and a copy to the TIO.

**Senator SCHACHT**—When they are provided to the committee, if someone wants to get information and the best thing to do is to read the documents because they explain the network in a non-technical way, is there anything in commercial confidence to stop them from doing that?

**Mr Armstrong**—Certainly not to my knowledge. I think not, but obviously I will check.

**Senator SCHACHT**—I ask Telstra: a document that has been colloquially called the ‘pink herring’, that was filed with the US Securities Exchange recently, focused on the adverse publicity of the CoT cases. The document was prepared as part of the privatisation and so on. It focuses more on the effect of the publicity on Telstra, apparently, than on the materiality of any sums of money which may ultimately be paid. Will the Australian prospectus for the Telstra sale give a more detailed assessment of the financial effect of the CoT cases on Telstra?

**Mr Ward**—I cannot personally answer that, but we will know in 48 hours.

**Senator SCHACHT**—When you do will you send me a copy out of courtesy.

**Senator BOSWELL**—Are you going to buy shares?

**Senator SCHACHT**—I am not going to buy shares. It would be a conflict of interest. I will go on the record to say that if anyone asks me, I tell them to use their financial judgment in deciding whether to buy or not to buy—buyer beware.

**Mr Ward**—I suspect it would be the same, because I think we should see the document.

**Senator SCHACHT**—When you send the document to me, I will draw my attention to that. I have not seen the so-called ‘pink herring’ document that was lodged in America, but did it attempt to quantify in dollar terms the adverse publicity of the CoT

cases?

**Mr Armstrong**—I believe that, to the best of my knowledge, it quantified the amounts of the claims and it quantified—

**Senator SCHACHT**—I think you told us before what the total of that claim was.

**Mr Armstrong**—It is hard to put a dollar figure on the publicity.

**Senator SCHACHT**—If you put a value on the amount of time Senator Boswell, myself and others have spent sitting here, asking questions and going mad, that would be a pretty useful figure as well.

**Senator BOSWELL**—When you go into a court to have a conflict resolved, normally both sides have to present documentation, which is called the discovery process. Have you given Anne Garms or anyone else involved in the CoT cases your discovery documents?

**Mr Armstrong**—There is no such process in the arbitration rules. The answer is: no.

**Mr Benjamin**—But under the arbitration rules, claimants can make claims for documents, as Mr Pinnock has said, and the arbitrator can rule on their relevance. He can require Telstra to produce those documents. Telstra has complied with all such directions.

**Senator SCHACHT**—The arbitrator?

**Mr Benjamin**—The arbitrator, yes.

**Senator BOSWELL**—I direct this question to Mr Pinnock: has the arbitrator been given discovery documents from both sides?

**Mr Pinnock**—No. Perhaps I could answer in this way: discovery is a process whereby the court can direct a party to discover to the other party either documents within a general class of documents or specific documents. The power to do that exists under the arbitration procedures. If a party approaches the arbitrator and says, ‘I want the other party, Telstra, to produce, to assist me in the case, certain classes of documents’—identified in a general way—‘or particular documents’—identified with specificity—the arbitrator can make such a ruling, provided, as is the case with litigation, that they are relevant to the claim. Of course, under FOI one does not have to establish any relevancy to any particular claim—only that you want the documents and there are no other exemptions. Discovery is a slightly more limited process based on the key concept of relevance or otherwise, but, yes, the arbitrator can do that.

**Senator BOSWELL**—Could Mrs Garms make a request?

**Mr Pinnock**—Could she?

**Senator BOSWELL**—Yes. Could she or Mr Schorer make a request?

**Mr Pinnock**—Mrs Garms could no longer make a request.

**Senator BOSWELL**—Could Mr Schorer make a request that he wants disclosure of the documents?

**Mr Pinnock**—Yes. As long as he can say, ‘I want the arbitrator to order Telstra to produce documents relevant to my arbitration’, he is entitled to make such an application. It would have to have some degree of specificity, obviously. The arbitrator is not going to be able, with confidence, to make an order that Telstra produce all relevant documents. One would need some boundaries to the request. However, the power has always been there. I might say, Senator, that in the early days when Mr Schorer and I were discussing this matter, we clashed very much on this point.

**Senator BOSWELL**—In what way?

**Mr Pinnock**—I put to Mr Schorer precisely what I put to the Senate committee today about the deficiencies of the FOI process. I said that I was of the very strong view that applications for documents ought to be made under the arbitration procedures and, equally forcefully, Mr Schorer put to me that the CoTs had always been promised by all concerned that access to documents would be made and that the best way to do that was under FOI.

**Senator SCHACHT**—I ask Mr Wynack: with all the requests that you have made to Telstra on FOI, have you felt that there has been any deficiency in your powers, even though it may be a belated process, to finally get the information that you need?

**Mr Wynack**—I do not believe that there is any deficiency in our powers. I think that our extremely limited resources have limited the processes we can apply to investigations.

**Senator SCHACHT**—I can understand that, with the amount of paper that apparently could be floating around.

**Mr Wynack**—Precisely.

**Senator SCHACHT**—So the main issue for you is the resources, if there are 60,000 pages. All members of the CoT cases and others have given you authority to act on their behalf to get the FOI matters completed; is that correct?

**Mr Wynack**—Yes, I believe we have the wide authority that we need from the CoTs.

**Senator SCHACHT**—At any stage have they put caveats on or limited anything that you can say here about their side of the case?

**Mr Wynack**—No. The three CoTs who are present this morning have authorised me to make any comments which I think fit about their complaints. I have not had contact with the other CoTs.

**Senator SCHACHT**—Mr Wynack, in your introductory remarks you pointed out the restrictions of the act as far as the processes that are under way and that exist until the matter is completed, and I accept all of that. Given that these matters will, hopefully, be successfully concluded, for future hearings of this committee, the estimates and so on, would you be able to give us, either verbally or in writing, a summary of the whole process: where it has come from, where it has ended up and how it has been dealt with? Would that be covered in reports tabled in the parliament by the ombudsman itself?

**Mr Wynack**—No. At this moment, it is not the ombudsman's intention to issue further formal reports. It is unusual. Usually, we report to the agency and to the complainant in accordance with our act and the matter is finished. In circumstances where the agency does not agree with the ombudsman's conclusions or does not agree to comply with the recommendations, the ombudsman then resorts to a formal report. However, as far as providing the Senate with a report after the investigations are concluded, I see no difficulty with that. We may have to consult with some of the complainants to ensure that they have no problems with some of the personal information, but I do not think that we would have any difficulty.

**Senator SCHACHT**—I ask you to take on notice a request that you provide a report at the end of this process, whenever that may be, about your involvement in it, commenting on the process itself, the difficulties, the time taken and any general comments about how the arbitration process, and the relationship between Telstra and its customers, can be more expeditiously handled so that we do not end up in this sort of process again. With the independence that the ombudsman has as a statutory authority, I think it would be very useful for the ombudsman to make such a report publicly available at the end of your involvement in this affair. That would have a very useful outcome for us all.

**Mr Wynack**—I agree, Senator. I think we would benefit from that, too. This has been a very lengthy investigation and I am quite sure that there are some aspects of it which we could have handled differently.

**Senator SCHACHT**—Also, we can all learn from it.

**Senator BOSWELL**—It seems that the process was broken down by people not being able to get access to freedom of information. I have heard that the arbitrator cannot get it and a witness at our last hearing said that freedom of information was being held up. I forget the gentleman's name, but he had worked for Telstra. He said that it was his job to stymie anything that would be of assistance to CoT cases, otherwise the floodgates would open—I think that was his remark to the Senate.

Can the Senate be provided with a list of discovery documents in relation to the CoT cases and then we can make a judgment? I am asking you to give the Senate a list of the discovery documents in relation to the CoT cases and, with that, we should be able to clear the thing up. I put that request to you. We can either do it by a notice of motion in the Senate, which would require you to do it, or you can do it willingly.

**Mr Ward**—Is this a request to the TIO or to the arbitrators, Senator?

**Senator BOSWELL**—I am requesting Telecom to do it.

**Mr Ward**—We need you to be a bit more specific, Senator.

**Senator BOSWELL**—I am being specific. If you went to court and you were defending an action, you would present your discovery documents. Those documents would relate to the CoT cases. I am asking you to give the Senate that documentation as though you were going to a court.

**Mr Ward**—Are these for the outstanding cases, Senator?

**Senator BOSWELL**—No, for all cases.

**Mr Ward**—All 16?

**Mr Benjamin**—Even cases where the issue has been resolved?

**Senator BOSWELL**—Maybe not where there is no dispute, but where you have a dispute, yes. If you put all of that up and you present a small testimony that these are the discovery documents, remembering that when you give them to the Senate there is a requirement that you give them honestly, I think we could go a long way towards cutting through this.

**Mr Armstrong**—When you say 'in dispute', do you mean those arbitrations that have not been resolved? There are cases where we do not have disputes but there are documents involving some of these people.

**Senator BOSWELL**—Just the ones that you are in dispute with, and that includes Mrs Garms.



**Mr Ward**—I think we understand that element, Senator. Can you just clarify exactly what you mean by ‘discovery’, in terms of how we can interpret that?

**Mr Armstrong**—Are you just asking us to provide a list of everything that we provided to these people under FOI and everything that we have provided in the defences?

**Senator BOSWELL**—Yes. If you went to court, you would have to go through a discovery process. I am asking you to present the documents that you would give to the opposition lawyer. I ask that the Senate be given those.

**Mr Armstrong**—As I say, there was no such process in the arbitration.

**Senator BOSWELL**—I am not saying that. We can do this through a notice of motion in the Senate.

**Mr Ward**—Senator, we are not resiling from your request. We are just trying to get it clear, that is all. Then we can write to the committee and say, ‘This is what we understand you are seeking.’

**Senator BOSWELL**—This is what I would like: a list of all documents relevant to the CoT cases and an affidavit swearing that there are no further documents relevant to the issue in dispute. If we do not have that, we are going to go around the mulberry bush for another 12 or 18 months. My patience is already reaching the breaking point, as is Senator Schacht’s. This way, we can fix it up. We are not getting the information. That is what I propose to ask for.

**Senator SCHACHT**—I was not game to ask for full discovery because I think you will send the equivalent of two plantations of pine forests in paper. Another device may be absolutely, totally perfect—I am looking at the secretary—if a Senate committee asked for this, I suspect that you would dump on top of us 300,000 pages of discovery. Is that not right, Mr Armstrong?

**Mr Armstrong**—Sorry?

**Senator SCHACHT**—If you have full discovery of the documents as Senator Boswell has asked for, we would end up with a room about this size full of paper; is that right?

**Mr Armstrong**—Yes, it is, and that is my concern. In the Garms arbitration, Mrs Garms made a request—

**Senator SCHACHT**—I am not talking about that. We are talking about full discovery.

**Mr Armstrong**—I understand that, but this does relate to that. The arbitrator went through that list and allowed some of the requests and not many of the others. He did not allow the others because he said that those documents, whilst relevant, would be of such marginal relevance that they would not impact on his decision. That indicates that there is probably another mass of documents out there that you could conceivably argue are relevant, so you would receive an enormous mass of material.

**Senator SCHACHT**—As I understand it, Mrs Garms went to the courts directly with her case, and I suspect that is one reason for the FOI argument. If she had asked for full discovery in that court, she would have ended up with a room about this size full of paper; is that right?

**Mr Armstrong**—Yes. You would go back to the court and say, ‘On the face of it you will get a room full of documents. Why not narrow down the issues and produce those which are of real substance?’ If you are asking us to produce everything that could conceivably be relevant—

**Senator SCHACHT**—Better than producing the documents, even though it might take quite a number of pages, are you capable of producing the subject headings of what each file is or what all the paperwork is in an anthology? Can you do that?

**Mr Armstrong**—Yes.

**Senator SCHACHT**—You could do that?

**Mr Armstrong**—We can certainly provide you with the titles of the documentation that has been provided and that has been sought for recovery during those searches, and general subject matters pursuant to the arbitrator’s direction.

**Senator SCHACHT**—That has already been done.

**Mr Armstrong**—Yes. To pursue that request we have to go back out to Brisbane and cover the period 1989 to 1993, which related to the claim. In relation to Mr Schorer, we would need to cover the period since 1985 when his claim commences. It would be a pretty substantial exercise. It would be a massive exercise.

**Senator BOSWELL**—I know that it would be a substantial exercise, but so is this process that we continue to go through about once every two months or so.

**CHAIR**—Senator Lightfoot?

**Senator LIGHTFOOT**—Thank you, Mr Chairman. I support Senator Boswell’s request for those documents that are discoverable. If, as you say, Mr Armstrong, you consider them to be marginal, then they ought to be included in those documents that

Senator Boswell has requested. With respect to Senator Schacht saying that there may be two plantations of timber in those documents, so be it. We may very well use three or four plantations of timber trying to get to the bottom of this. I see Mr Ward is looking quizzically and frowning, as he has most of the meeting; however, that is going to be the case. I support Senator Boswell totally. If there is any ambiguity about what Senator Boswell wants, Mr Armstrong or Mr Ward, then I suggest that you give in to those ambiguities and supply those documents as Senator Boswell has requested. That means that you have had a request from the Labor Party, the National Party and now from the Liberal Party to supply those documents.

**Mr Armstrong**—When you say ‘get to the bottom of this’, I am not sure what issue it is that it addresses. Arbitration had a process whereby it would request relevant, pertinent documents from Telstra and Telstra provided those documents to the arbitrator.

**Senator LIGHTFOOT**—Mr Armstrong, I can advise you again. All that Senator Boswell is asking for are documents that you would take to court in the event of this ever getting to court. If it happens to be that you have to get them from Brisbane, or Perth, or Halls Creek or Timbuktu, I would suggest that you would have to supply those on the request of the Senate, Mr Armstrong.

**Mr Armstrong**—I have no difficulty with that.

**Senator LIGHTFOOT**—Thank you. I do not see anything beyond that. I do not see anything that is still a grey area or ambiguous in what Senator Boswell has requested.

**Mr Armstrong**—We have already collected, I guess, approximately 1,000 pages of documents in relation to Mrs Garms’s case. They are recent. They can be provided readily. My query is: are we now to go further than that—

**Senator LIGHTFOOT**—Yes.

**Mr Armstrong**—and provide documents that are of simply marginal relevance?

**CHAIR**—I remind the committee that the committee agreed that the hearing be limited to the progress on CoT and related matters with specific reference to the administrative problems revealed by Telstra’s handling of those cases. I remind the committee that we are looking at progress.

**Senator BOSWELL**—What is happening is that we are getting in new senators. I think you came in after the start. Senator Eggleston certainly did, as did Senator Lightfoot.

**CHAIR**—No, I was here two years ago, Senator Boswell.

**Senator BOSWELL**—I think it extends to Senator Lightfoot and Senator Eggleston. Telecom promised that, if those people got into an arbitration process, it would be swift, non-legalistic and non-expensive and that it would be fixed up in April 1994. It is now October 1997. The non-expensive process has cost Mrs Garms something like \$500,000 or \$600,000. It has cost everyone else huge amounts of money. Senator Alston did provide some help with legal fees, but he did not have to. The process has got out of control. We go round and round in circles seeking information. Quite honestly, Senator Schacht, I believe this is probably the only way that we are ever going to get to the bottom of it.

**Senator SCHACHT**—I have just been given a note by a member of my staff who has a legal background in this area, which states that the discovery as described will be a monster discovery. I am not here to defend Telstra. I have given my view that this has been handled extraordinarily badly by Telstra. This has all happened because it mishandled this in the beginning.

When full discovery takes place and the committee ends up with 100,000 pages or even more, what do we do then? Do we hand it over to Mrs Garms and say, 'You go through it'? Will it be a public document that anyone can go through and find out from it what they will? If as a committee we say to Telstra, 'Bad luck, go off and have full discovery,' even with court cases, as I understand it, there would be some argument about the limit of the discovery. One side or the other would say, 'We will try to target this down.'

The problem is that there is no trust involved in the process, and I understand why: unless you get full discovery, people believe they will be duded by Telstra not providing the paperwork. That is why we have had this endless argument involving going off to the TIO, the ombudsman, trying to find out what are the relevant documents. That is why I suspect some people are frustrated and want full discovery: no longer is there any trust left. Mr Pinnock said at the beginning that the goodwill has long since disappeared in these CoT cases.

If the committee is of the view that it wants to go to full discovery, I think we have to be aware of what is involved and ask whether we as a committee have the resources.

**Mr Ward**—Senator, I do not want the Senate committee or the Senate to have to make a ruling to us. We are keen to comply with the spirit of your question and with Senator Lightfoot's contribution, too. I think that the issue that Senator Schacht has raised is a very, very real one. Could I make the suggestion that we sit down with the TIO to establish that element of trust, scope out what will be a practical response to the spirit of that suggestion and write to the committee within a week and say what we believe is a reasonable response to the spirit of that suggestion. I could take the whole thing on notice, but I would rather—

**Senator SCHACHT**—I was anticipating that shout from the back saying no. I was going to suggest that, if you want to do that, that is fine, but unless you have the CoT case people, Mr Schorer, Mrs Garms and others, as part of that process and have full discovery, at the end they will say that it has been duded.

**Senator BOSWELL**—If you have full discovery you cannot dud it.

**Senator SCHACHT**—That is right. That is the only way to go. As I understand it, if you went to the court and asked for full discovery, Telstra could put a case to the court saying that the full discovery of 300,000 pages—100,000 pages—is not all material and germane. There would be a big legal argument about the description of what is full discovery. I do not want to restrict the access to it. I would also like to see the ombudsman, because he has been involved in FOI. If this was accessed through FOI, there would be an argument about what was relevant and what was not. I would like to see the ombudsman's office involved in any discussions about the discovery process. It is no use you three getting together unless the CoT case people are involved in the discovery and in even trying to define what it is. You would need to come back to the committee to say, 'These are what we have agreed among ourselves, including the CoT cases. I think we are on better ground.' If you come back and say that you have done that and they are not in the loop, they will reject it and we will be no further advanced.

**Mr Ward**—I am trying not to take this request on notice before an order comes. I am trying to come up with a practical way forward. Could I suggest that the TIO involve the outstanding CoT cases in the scoping of what is a reasonable request for this decision, so we make sure we involve the CoT cases through the TIO in scoping out what we will respond to. I think it needs to be scoped in terms of what is a practical and timely way forward, given that timeliness is part of this.

**CHAIR**—I think the best way forward might to decide, as a committee, what request to make at that point.

**Mr Pinnock**—I do not want to throw a spanner in the works here, but I can see one particular problem with Mr Ward's suggestion in relation to any documents that might be discovered or of a discoverable nature in relation to Mrs Garms's matter. Mrs Garms has lodged an appeal against the arbitrator's award in her arbitration. The actual respondent to that appeal is Telstra, but Mrs Garms has written to me putting me on notice that she intends to join me in my role of administrator in that appeal. I do not think Mrs Garms would want me discussing with Telstra or, as it were, putting my independence on the line to this committee, saying 'These are the documents which are discoverable,' when I may well be a party to the very proceedings that might turn on that discovery. I think I would be in a position where there would be an irreconcilable conflict of interest, at least in Mrs Garms's mind.

**Senator SCHACHT**—I agree with you. You are out, whether that is fortunate or

not.

**Mr Pinnock**—Thank you, Senator.

**Mr Ward**—Perhaps the committee would consider some other way to broker the interests of the CoT cases into the scoping of what we would do. I ask the committee to take on board my response. I do not want to take that whole issue on notice. I am trying to find the practical way forward.

**Senator SCHACHT**—Mr Wynack, are you proscribed from being involved in any formal discussion to try to get an agreement between CoT case people and Telstra because you have applications for FOI? Can you be involved in a discussion as an independent source?

**Mr Wynack**—We can, but we would like to be involved in consultations concerning the requests under freedom of information. For example, Mr Schorer is seeking discovery for his arbitration claim through his applications under the FOI Act, as I understand it, and at the moment Mr Armstrong and I are discussing ways of scoping down Mr Schorer's applications through a formal process of the FOI Act. Section 24 requires Telstra to scope it down if it intends refusing the application because it is too large. Thus far we have not reached agreement as to the agenda for the meeting, but I think we have made progress. I think that the Ombudsman would release me to participate, at least as an observer, at any consultation meetings to enable us to form a view as to whether reasonable attempts are being made by Telstra—and bear in mind that it is in the Ombudsman's charter to look at Telstra's actions—to meet the reasonable requests by CoTs.

**Mr Ward**—That is acceptable to us, Senator.

**Senator BOSWELL**—I know that if we do not take some action we are going to be here for a long, long time. I would like to have a talk to the committee.

**CHAIR**—The committee will be meeting privately as a committee. Senator Carr?

**Senator CARR**—Mr Ward, I think that the approach that you are taking is a very reasonable one in this particular matter. I note the attitude with which you have addressed this particular question. Given that this inquiry is devoted to the issue of process rather than the particularities of individual cases, I preface my remarks with that in mind. I am still at a loss to really appreciate the difference between the Ombudsman's and the arbitrator's roles in this matter. I might be a little slow on this question. Could you, Mr Pinnock, explain that to me more clearly? I am having a bit of trouble appreciating the demarcation.

**Mr Pinnock**—If you look at any of the arbitration procedures which have been

developed, you will see that although the arbitrator's powers and functions are precisely delineated, my role as administrator is not really precisely delineated. Putting it in its most succinct way, the role is to act as an exchange or post office. All of the documents in terms of claim, defence and reply have to be put through my office and thence to the arbitrators, to the resource unit when necessary and copied to the respective parties. Firstly, I have to ensure that, in that sense, the flow of documents gets to where it is meant to go, but I have no powers under the procedures to determine what those documents might be in the first instance. The question as to whether a party is entitled to obtain any particular document from the other party is a matter for the arbitrator.

Secondly, my role is to review all of the accounts that are generated in the arbitration procedure by the arbitrators, the resource unit, special counsel. They come through my office. If I certify that, in my opinion, those costs are fair and reasonable, then they are paid by Telstra. In other words, I have to shield the arbitrators and the resource unit from any question that they might be put under pressure because Telstra has the yea or the nay as to whether they are paid. As long as I sign off on those documents, they are paid. In particular, Telstra does not have access to the detail of those accounts as provided by the arbitrators, lest it get any idea as to anything the arbitrator might have done in consultation with, say, a claimant.

Thirdly, the other role is a role that, in a sense, you do not find delineated or specified. It is to try to keep the process on track, to try to keep it going along. In fact, the vast majority of my time that I have devoted to the procedures since I became ombudsman has been in that particular role. Most of that activity has never seen the light of day. In the time available I am quite happy to give you a run-down on the sort of things that I have been doing in this role over a period of in excess of two years. It might take some time, but I can put it under a number of different heads.

**Senator CARR**—We have only a limited amount of time, Mr Pinnock.

**Mr Pinnock**—Perhaps I can put it in a matter of minutes.

**Senator CARR**—Certainly.

**Mr Pinnock**—Firstly, it became clear to me within a very short time of my appointment that the process was bedevilled by what was clearly a legalistic approach. I tried to exert pressure on Telstra to, as it were, pull the lawyers to heel.

Secondly, given that a number of the arbitrations were clearly stalled, I discussed with Telstra the possibility of taking the matters out of arbitration, leaving the process there—not taking one's rights away, but taking the cases out and trying on a parallel track to mediate them separately. The attitude of Telstra in that respect was non-committal at first. Finally I was told, in effect, 'Well, we don't agree with going down that route, because we cannot assure ourselves that there will be finality in the way in which an

arbitrator's award would achieve finality.'

The third thing that I attempted to address from a quite early stage was the absence of any right of the claimants to be compensated for costs. Telstra's attitude was to some extent positive in that the initial approach met with the response, 'We are prepared to consider that, but not at the present time.'

I attempted to convince both Telstra and a number of the claimants that, by agreement, they could effectively truncate the arbitration procedure as it stood by agreeing to vary some of the conditions under which it was being carried out with a view to speeding the whole process up. From recollection, I discussed that possibility with three, perhaps four, claimants, who had indicated some initial interest in that idea. Subsequently, all but one rejected that as a possibility. One claimant effectively went through a truncated form of procedure.

Finally, in relation to a number of cases, I suggested to the claimants and to Telstra that, notwithstanding Telstra's previous attitude to mediation, it would be possible nevertheless to negotiate a settlement in their particular cases. I am struggling to be precise about this now—and Mr Benjamin may correct me—but I recollect that two matters were settled in that manner. It may have been three, but there were certainly two. In a very potted version, that is the sort of thing that has been going on behind the scenes in my role as administrator.

**Senator CARR**—Can you explain to me why some cases received legal costs and others did not?

**Mr Pinnock**—Yes. Those cases which were settled as a result of negotiation, even after they had gone into the arbitration agreement, were settled by Telstra with the claimants on the basis of an all-inclusive figure. Therefore, that settlement figure took into account claims for costs, or what have otherwise been claims for costs submitted in the normal way. All other eligible claimants—that is to say, those whose arbitrations were completed and in whose favour an award was made—have been paid their costs. There are four claims in respect of which costs have not yet been paid.

**Senator CARR**—Which are those four?

**Mr Pinnock**—Mr Schorer. Mr Schorer never made an application under the procedure in relation to the payment of the costs which was agreed on and discussed by the Senate on the last occasion. The other three claims are those claims which are still subject to a determination by the arbitrator. In respect of those claims, Telstra has paid to the TIO a sum of money based on an interim assessment by me of the legal and other costs of those claimants in the arbitrations to date, as a result of information put to me by those claimants.



**Senator CARR**—There is still the case of a Ms Barbara Oldfield, which I referred to in the last hearings. You advised the committee that she was not happy with the process and that she said it was deeply flawed. I take it you stand by that?

**Mr Pinnock**—What I told the committee on the last occasion was correct. But Ms Oldfield was never in arbitration. It was a mediated settlement. I was not a party to the mediation; I arranged it. As I understand it, the dispute concerned the ultimate figure for the achievement of the settlement. I understood that there was an argument about that. But whatever the figure was, both parties agreed that it was inclusive of costs.

**Senator CARR**—That is the point of dispute. Ms Oldfield says that in fact you did the negotiations.

**Mr Pinnock**—That is not true.

**Senator CARR**—You deny that claim?

**Mr Pinnock**—Yes. After the event, because there was a dispute about what the actual terms of the mediated agreement were, we certainly discussed the matter with both Ms Oldfield and Telstra. But we were not involved in the mediation of the matter at all. We are talking about matters of some confidence. I understood that the dispute arose, initially at least, because Ms Oldfield herself was not physically present but was represented by a legal adviser, who subsequently, she said, had acted outside his instructions. It was then that we attempted, as it were, to come along after the event—not being a party to it—to try to get some resolution as to an agreed figure and its being inclusive of costs.

**Senator CARR**—Mr Benjamin, at the last hearing you indicated that Ms Oldfield had not entered the agreement under duress. Do you still hold that view?

**Mr Benjamin**—Yes. These were negotiations that took place between ourselves and Ms Oldfield. With the course of events that Mr Pinnock has just described that flowed through, in the end she agreed to a negotiated settlement. I do not consider that to be under duress.

**Senator CARR**—You do not?

**Mr Benjamin**—No.

**Senator CARR**—In a letter to me, she said that she left the TIO in absolutely no doubt about the flaws in the process, the nature of the negotiation/mediation process, and what she describes as ‘criminal tactics and acts performed by Telstra’. Have you never been made aware of those claims?

**Mr Benjamin**—No. I cannot imagine what criminal acts she could be talking about.

**Mr Pinnock**—Senator, the TIO is in no doubt that Ms Oldfield was dissatisfied with the outcome. That is why we tried after the event to put the thing back together. Part of the matter that she raised was that there was an element of duress. I have never to this day understood exactly what that was and how it occurred. She was not suggesting that the TIO had been party to that. This is the first I have heard—

**Senator SCHACHT**—Did she tell you what the duress was?

**Mr Pinnock**—No. Without her spelling it out, I gathered that she was in effect saying that she was put in a position such that, financially, it was the only offer available and, if she had really had a choice in the matter she would not have taken it, but there were so many constraints that she had to. It may have been more than that. Senator Carr, this is the first occasion that I have heard of a suggestion of a conspiracy or criminal conduct.

**Senator CARR**—Mr Benjamin, can you advise the committee whether a threat was ever put to Ms Oldfield that if she did not accept the offer by a specified date the file would be closed?

**Mr Benjamin**—We would probably have said that we had reached a position where we were making our final offer. If that was not acceptable to her, we would have to close the file, because there were no further steps that we could take. It would be open to her then to go through other processes, such as arbitration, the TIO or the courts, to resolve the issue. All that we were saying in effect was that we would negotiate with her as far as we could possibly go in respect of the amount.

**Senator SCHACHT**—Did you make it clear that if that was still unacceptable to her other processes were still open? You did not say, ‘If you don’t accept this offer, you’re gone. We’ll close the file and that’s it. You’re gone’?

**Mr Benjamin**—We could not say that, because—

**Senator SCHACHT**—Did you formally tell her, ‘That’s our final offer. We can’t go any further. But if you don’t like it, you have other processes that you can go to’?

**Mr Benjamin**—That would be our normal process, but I would have to check the documentation on that.

**Senator SCHACHT**—Please check that. There may be allegations that it was put in a different light. I think you ought to get that clear.

**Mr Benjamin**—I will make the point that she was legally represented.

**Senator CARR**—By whom was she legally represented?

**Mr Benjamin**—We will have to check that.

**Senator SCHACHT**—Was she legally represented at that last meeting when you said, ‘This is our final offer. We can go no further’?

**Mr Benjamin**—We will have to check the details of that.

**Senator SCHACHT**—We had better be very sure of this. If she was by herself when you put that to her, you get a very different outcome. I want to be sure that her legal representative was sitting next to her when you put the final offer and said, ‘We can go no further.’ Presumably, if the lawyer had half a wit about him, he would already know that further processes were open if the mediation was to go no further.

**Senator CARR**—I am advised that Mr Peter Bartlett rang Ms Oldfield to congratulate her on the acceptance of the offer. She advised him that she had accepted no offer. She states that when she was told it was \$100,000, including costs:

I told him again I did not accept this, and in any case, Hannah (Christian), had indicated that they would pay costs off negotiations with us with Telstra direct and insisted on "pre-mediation" conferences, and asked us to bring all of our case to Melbourne).

She asked her solicitors for a copy of the release form. She was given one. It appeared standard. She has stated:

When Telstra posted a release form again there were two fresh matters.

(1). It contained ridiculous clauses and was quite different to the first (later explained that a clause denying a later claim for wrongful billing was because we had written a letter mentioning a class action, to a Senator—and they—

that is, Telstra—

had seen it).

(2). The accompanying letter threatened to close all negotiations and file if we did not accept within a given—short period—of time.

She also stated:

5. subsequently visited Telstra (Christian Hannah, and found Peter Bartlett present). I made it very clear about the settlement amount, and argued my case regarding the costs, but was given no response other than, take it or leave it. I made it very clear as to my beliefs about the process from

beginning to end and included the fact as to why.

Does that recollection of events, as contained in the material I have just put to this committee, coincide with Telstra's recollection of those events?

**Mr Mounsher**—What was the question?

**Senator CARR**—Was Ms Oldfield's account of the process accurate?

**Mr Mounsher**—Without further work, I am not sure that I could comment on exactly what happened. We certainly had a mediation session in December, I believe, which did not resolve the matter. There were subsequent negotiations over the following three months. I recall that it was probably not until March that there was some movement in respect of Telstra's offer to settle. But we very quickly got to a position where we were not prepared to move any further. That was the offer that was on the table. Ultimately, Ms Oldfield agreed to settle on that basis.

**Senator CARR**—On the basis that the file would be closed, that it was a final offer?

**Mr Mounsher**—Yes, that was the final offer.

**Senator CARR**—Was there a request that she deny claims made for wrongful billing because of the implications it had for a class action?

**Mr Mounsher**—I am unable to comment on that. I have no recollection of that, Senator.

**Senator CARR**—I will ask you to take that on notice and establish whether an additional clause was placed in the release form sent to Ms Oldfield. I am sure that could be verified one way or another. Her account is either right or wrong on that matter.

**Mr Mounsher**—Yes.

**Senator CARR**—I take it you have confirmed that the accompanying letter threatened to close all negotiations and the file, if the offer was not accepted within a short time?

**Mr Benjamin**—I do not know about the word 'threatened'. In negotiations you reach a point at which you can go no further in respect of the amount. I do not know that it is fair to portray that as a threat. What that is saying is, 'We have got to this limit. We can't see our way clear to go any further. If you believe that you can't settle at this figure, then the negotiations are at an end.' I do not think it is fair to portray that as a threat.

**Senator CARR**—I understand your point. The claim was made in that letter that this was a final offer and that if Ms Oldfield did not accept it within a short period she would presumably have to seek alternative legal courses of action open to her. That is essentially the proposition that was put?

**Mr Mounsher**—Yes.

**Senator CARR**—Mr Pinnock, given that process, what do you say to the claim that Ms Oldfield makes that the settlement process from beginning to end was nothing but a strategy of wearing down the client until submission resulted from financial hardship causing the inability to continue the process? Court action was beyond Ms Oldfield's financial means.

**Mr Pinnock**—With the caveat that I was not present during the mediation session—and I was not the mediator—I doubt that that would be a fair characterisation. I know the mediator who was appointed. Mr Bartlett is a special counsel in the arbitration procedures. If Mr Bartlett allowed negotiations or mediation to be conducted in that way, I would be extraordinarily surprised. Whether any two parties can agree during the mediation is always the issue.

**Senator CARR**—As I say, it is not my intention to go through the particular cases. Similar to a number of senators, I am getting a great deal of material from Mr Alan Smith in regard to the flawed processes in terms of the BCI report. I have been presented with what I regard as a substantial case concerning the business of Mr and Mrs Bova and their complaints regarding the functioning and conduct of the resource unit. Mr Pinnock and Mr Ward have mentioned Telstra's claims in respect of statutory immunities. Mr Ward, did the statutory immunities apply to all of the arbitration process? Were you completely relinquishing your immunity in regard to the special rules for arbitration?

**Mr Armstrong**—Yes.

**Senator CARR**—Was that true in all respects? So there would be no application by Telstra for the use of your legislative shield of the Crown?

**Mr Armstrong**—Correct.

**Senator CARR**—It is specifically set out in law. You are saying that there was no use by Telstra in the special rules of arbitration of the shield of the Crown provisions?

**Mr Armstrong**—Correct.

**Senator CARR**—On what basis do you think claimants are able to establish the dollar amounts of their losses if they did not have all of the documentation?

**Mr Armstrong**—Is that addressed to me?

**Senator CARR**—This is a question for Mr Wynack. How is that able to be one?

**Mr Wynack**—The Commonwealth Ombudsman has no involvement in the arbitration whatsoever.

**Senator CARR**—So you are not able to establish that? I will ask a general question of the Telstra representatives. How is it that you think claimants are able to establish the dollar amounts of their losses if they do not have access to all of the documentation?

**Mr Armstrong**—That is not a proposition that Telstra puts.

**Senator SCHACHT**—It is true that you do not put the proposition. The process of accessing different information means that it is very difficult for claimants to make an accurate assessment, because the information on which they can base an accurate assessment does not come across, does it?

**Mr Benjamin**—The claimants would know how their business was performing. They are able to put in figures which show when they think the business might have been affected.

**Senator SCHACHT**—Mr Benjamin, from my knowledge of the settlements reached, Telstra has accepted whatever the claim may have been. Your offer has always been under 10 per cent of the claim, usually five per cent of the claim.

**Mr Benjamin**—We have not operated on any basis that says that the offer should be—

**Senator SCHACHT**—I know that there is not a foregone conclusion, but the fact is that whatever the claim may be, even after the end of mediation, arbitration, or whatever, even after your first offer—indeed, even with claims that run into millions—your offer usually never gets into six figures. It is usually \$10,000 or \$20,000 or \$30,000, even though someone may be claiming \$3 million. That might be an extraordinarily stupid claim with no basis. However, I find a consistent pattern: people's claims for loss of their business may run into millions, but Telstra only offers \$50,000, \$30,000, \$160,000 or \$20,000. The percentage figure is very small. I am not saying that the claims that run into millions have any more validity than your counter-offers, but there seems to be an extraordinary difference if you are talking about the economic impact on the business. You do not even accept that.

**Mr Ward**—We distinguish between the percentages that are calculated from what the independent arbitration comes up with and what Telstra may offer during the

process—

**Senator SCHACHT**—There have been approximately 130 cases, but I take the case of Mr Honner. He is not a CoT case. He has made a claim—and he is on the record now—for close to \$2 million or over \$2 million. He has put in a claim that is based on an assessment of economic loss to his business made by, he claims, economists from Adelaide University or people with some credibility.

**Mr Benjamin**—His son provided that analysis.

**Senator SCHACHT**—But he claimed that he had that checked by economists at Adelaide University. He can defend himself. He claims a figure over \$2 million. As I understand it, because he told me this himself, your counter-offer was a matter of a few tens of thousands of dollars.

**Mr Benjamin**—It was \$75,000. The point with that one is that Mr Honner's claim, which we had examined by persons outside Telstra, did not stand up to scrutiny. Our assessment was based on our contribution, if any, to the losses made by that business. There might be all sorts of reasons why a business is in economic trouble, but you cannot say that Telstra picks up the tab for all losses that a business might make. The compensation that we pay is for the damage that we may have caused.

**Senator SCHACHT**—It may be that all the people associated with the CoT cases are unbelievably greedy and are having a real go at Telstra. They may be trying to get a big hand into the till to take a bag full of money by using a political process. You may accuse us of lending a hand to their argument through this political process, and that is fine. However, as I said, there is a consistent pattern. From what I have seen, it seems to me that they claim millions and you offer a few tens of thousands.

**Mr Ward**—I will respond to the macro level. I do not think our offers are very much different from those that the independent arbitration processes have delivered. I do not think that we should confuse the two.

**Senator SCHACHT**—I am just talking about your offers. I am not talking about the independent arbitration.

**Mr Ward**—I think the figures that you have quoted have probably come from the outcomes of the independent arbitration in terms of the—

**Senator SCHACHT**—I have seen a number of cases that show what they have asked for and what you have initially offered or talked about and so on.

**Mr Benjamin**—In one of the CoT cases, the settlement that we came up with was 22 per cent of the claim.

**Senator SCHACHT**—That was the original claim?

**Mr Benjamin**—The original claim in this case was \$504,000 and the settlement was \$115,000.

**Senator SCHACHT**—What were the legal costs?

**Mr Benjamin**—The legal costs were incorporated. This was a total settlement. It was one of those negotiated settlements.

**Senator SCHACHT**—So he got \$120,000 and the legal costs were taken from that?

**Mr Benjamin**—But in this particular case, they would not have encountered much in the way of legal costs at all. This was a settlement made early in the process.

**Senator SCHACHT**—And they had no share in the legal costs before they got to mediation?

**Mr Benjamin**—They put their total costs to us and they agreed to a settlement figure of \$115,000, which was 22 per cent of the claim.

**Senator SCHACHT**—How much were the legal costs?

**Mr Benjamin**—From memory, the legal costs in this case were very small. This claimant could have claimed more if he had wanted to. This claimant voluntarily agreed to this settlement.

**Senator SCHACHT**—Was that the final decision in mediation?

**Mr Benjamin**—It started off in arbitration and we reached a negotiated settlement.

**Senator SCHACHT**—Before you reached that figure, what did you offer? When a claim is in, there is a discussion such as ‘Well, we are not going to accept that, but we will offer you this.’ What did you offer them to start off with?

**Mr Benjamin**—I cannot say offhand.

**Senator SCHACHT**—No, that is right. It would have been a different figure.

**Mr Benjamin**—It might be.

**Senator SCHACHT**—Yes, of course.



**Mr Benjamin**—Normally you would start with a figure—

**Senator SCHACHT**—Of course, you would start with the lowest possible figure that you think that you could get away with, and it costs \$18 million to administer getting away with an offer of a few thousand dollars.

**Mr Benjamin**—In Mr Honner's case, we offered an assessment that we made with the assistance of an outside firm as to what might—

**Senator SCHACHT**—And you had outside advice which disagreed with you completely.

**Mr Benjamin**—Sure. That is right, and his methodology was not based on the losses caused by our network. His was based on a more—

**Senator SCHACHT**—Did he ask for and get access to FOI information on the network operation, not just the local exchange at Stansbury?

**Mr Benjamin**—He had access to FOI information. We made a number of documents available to him.

**Senator SCHACHT**—Be careful, Mr Benjamin.

**Mr Benjamin**—He was given parcels of documents.

**Senator SCHACHT**—I think it is still in dispute about the parcels of documents. I think you ought to be very careful.

**Mr Benjamin**—We have not been in arbitration.

**Senator SCHACHT**—It is not till he gets a satisfactory outcome on the FOI of the documents that he has a chance on arbitration. That is the whole goddamned point for which I have been stuck here for three years.

**Senator BOSWELL**—He says that he cannot get to arbitration because he has not got the documents. That is why I say that we have gone around the mulberry bush for three years, so let us get positive and do this.

**Mr Pinnock**—Senator Carr asked a question earlier about Telstra's exclusion or the winding up of its statutory immunities. Mr Armstrong is not correct on that point. It is certainly correct that in the fast-track arbitration procedure, the arbitrator is given a discretionary power to ignore those immunities. If he says, 'I recommend that they be ignored', Telstra committed in advance to doing just that. The effective answer is that in the fast-track procedure there is a waiver of statutory immunity.

That is not case in the special arbitration procedure. Clause 7 of the special arbitration procedure provides that the arbitrator will determine loss and Telecom's liability. Subparagraph 1.2.1 states that to compensate for any demonstrated loss on the part of the claimant, the arbitrator will take into account Telstra's legal liability, if any, to the claimant, including any contractual or statutory limitations on Telecom's liability and any limitation on Telecom's liability to the claimant as determined by Austel from time to time under section 121 of the Telecommunications Act 1991. In the case of the special arbitration procedure, the arbitrator must have regard to any contractual or statutory limitation of liability—in other words, any immunity that Telstra might have had.

To my knowledge, that has not affected the outcome of any arbitration under the special arbitration procedure, because, effectively speaking, the arbitrator has not had regard to that or has not, as it were, written down any award by virtue of such an immunity. However, the provision relating to the arbitrator having to take into account any immunity is actually there.

**Senator CARR**—Thank you for that clarification.

**Mr Armstrong**—I am sorry if I did not give the correct answer, in the sense that my answer was not entirely correct. That provision in the rule means that the arbitrator is not obliged to apply the statutory immunities or the contractual immunities. He does not have to follow them. He has the discretion in that regard and he has never applied them in any of the special arbitrations. Telstra has not had the benefit of them in the arbitration.

**Senator CARR**—I understand the technical points you are making. My question went to the capacity of Telstra to use its immunity and the implications of that, particularly in regard to the special rules of arbitration. The substantive point remains, however, given that last time Mr Ward indicated that Telstra had a view that the difference between the claims made and the amount eventually paid was an indication of the veracity of the claims. Is that, in effect, the inference you were trying to convey to us?

**Mr Ward**—I think the senators were suggesting that we had invested excessive resources in defending these claims. The point that we were making was that we have a responsibility to our shareholders to ensure that—

**Senator SCHACHT**—It is to the shareholders.

**Mr Ward**—I know, absolutely.

**Senator SCHACHT**—Your performance, in the view of the shareholders as given to this hearing, is not exactly 100 per cent, I have to say.

**Mr Ward**—We have a responsibility to the shareholders to make sure that we properly investigate such claims, particularly when they are very large. I was just making

the point that the independent results of those arbitrations typically came in at less than 10 per cent of what was claimed.

**Senator CARR**—But the problem that you have, Mr Ward, is that if information was not available, claimants were not able to get the material and, presumably, the arbitrator was not able to get the material, so how can there be a fair assessment of the veracity of the claims?

**Mr Ward**—I will ask Mr Armstrong to answer, but the arbitrator has wide powers to seek the relevant documentation.

**Senator CARR**—Has the arbitrator seen the relevant material? Is that not the point of dispute?

**Mr Armstrong**—I am not sure which material you are talking about. There is an arbitration process which gives the arbitrator broad power to direct Telstra to provide documents and information. In exercising those powers, it has recourse to and the assistance of technical and accounting experts. Throughout the arbitrations, they have requested documentation and information of us and we have provided it.

**Senator CARR**—We may be going around in circles at this point and the time is running away from us. At the last hearing you indicated that there were some 5,000 legal matters concerning complaints by individual customers about their home phone or by small businesses. Is that the case? Are there 5,000 complaints on hand or were they complaints primarily from small customers? How many were from large corporations?

**Mr Benjamin**—I do not know where you got the figure of 5,000.

**Senator CARR**—That figure was referred to in the last *Hansard*. It was said that there are 5,000 legal complaints. You have 45 legal firms handling your legal business; is that the case?

**Mr Benjamin**—Yes.

**Senator CARR**—Is it the case that you have 45 legal firms?

**Mr Ward**—Yes.

**Senator CARR**—And there are 5,000 complaints outstanding at the moment?

**Mr Armstrong**—Can I perhaps be referred to the relevant part of the *Hansard*? I cannot recall that. Can you give me the reference?

**Mr Ward**—There may have been a reference to the whole gamut of legal activity

across the board. We need to check that.

**Senator CARR**—Would you do that? Could you also tell us how many of the complaints are from small businesses and individual customers, as distinct from larger corporations? You will obviously have to take an arbitrary definition of those terms. I am sure your business units divide your customer base on the basis of the size of corporations. I will accept Telstra's definition of the differences. What is the breakdown of the legal matters that are on hand? In regard to complaints by small business and individuals, to what extent are they problems that relate to the receiving of calls, charging or billing, harassment by Telstra officials or officers, or unauthorised monitoring of calls? Have any of these complainants sought to obtain information under FOI?

**Mr Ward**—We will check the context of the reference from last time and do that breakdown.

**Senator SCHACHT**—I have another question following on from Senator Carr. Big-business clients may run up very large accounts because of the nature of their businesses and so on. It may be millions of dollars. If they have a breakdown in service, how does Telstra handle those cases? Do you just give them a discount, because of the size of their account?

It suddenly dawned on me—and it is one of the things that I find interesting—that, with all the CoT cases and associated publicity, I have not seen BHP, Ansett, Boral or other very large firms coming forward with complaints about service or about loss of business. Why are only small businesses represented in the CoT cases? If there are problems in the exchanges, whether at Fortitude Valley or other exchanges, surely, from time to time, on the balance of probability, one would have thought that may have affected the services to BHP, Caltex, Coles Myer and so on. However, I have never seen any publicity that they are having a blue with Telstra over service or loss of business. Why is that so?

**Mr Ward**—That perhaps needs a two-part answer. I certainly do not have the distribution of complaints, but a lot of the claims we are dealing with in this committee are of longstanding status.

**Senator SCHACHT**—Let us go back to the mid-1980s. It seems odd that in the mid-1980s when these complaints started only small-business people had phone problems, but if you happen to be a big business using the same network system—

**Mr Ward**—I understand the question.

**Senator SCHACHT**—You never had a complaint, although they were using the system a lot more than small business.

**Senator BOSWELL**—The fellow who owned the airline in Queensland, Grey, he made one.

**Senator SCHACHT**—Qantas or Ansett do not seem to be coming forward.

**Mr Ward**—I understand where you are coming from. All I can suggest is that I am sure that our corporate customers have had some problems from time to time over the years. Maybe those problems have been assessed fairly quickly; I do not know.

**Senator SCHACHT**—This seems to be the case, does it not: if you are a big customer and you have weight to throw around, and if there is a blue about poor service that may have cost you some business, some other arrangement is obviously reached within the corporate section, such as a 10 per cent discount or 15 per cent off next year. Some special arrangement is made. You are not in the court suing Telstra. Fairly small business people seem to be the ones who are hung out to dry. I find that actuarially odd.

**Mr Ward**—I would still make the point that our customer complaints process, as I said in our submission, has been improved—

**Senator SCHACHT**—No.

**Mr Ward**—You have not heard my answer.

**Senator SCHACHT**—Go back to the mid-1980s before you improved it. If, as you were implying, it was bad for small business in the mid-1980s so that we have ended up with all these CoT cases, how come there are no complaints hanging around from big businesses which were using the same system?

**Mr Ward**—When we say that it was bad, you are talking about a small number—

**Senator SCHACHT**—No. Why is it that in all this bloody paper that I have had stuck before me and in all the evidence in the CoT cases, I do not find any of the big companies of Australia that are listed in the top 500 or the top 100, yet they were using the same network system? Why is it that in Fortitude Valley, which is close to the CBD, Mrs Garms has a problem but the big companies in the same area have never had a problem? Have they never complained?

**Mr Ward**—A lot of other small businesses did not complain either.

**Senator SCHACHT**—No, because the poor buggers did not know what to do and they did not know how to help themselves. When they did run into the monster, as your own minister, Senator Alston, calls you—or the 600-pound gorilla—they were chopped up and spat out. I want you to take this on notice. I want you to go back and find out how you dealt with the inevitable complaints from big business about loss of service, customer

access and so on, find out how were they dealt with and come back to this committee. Now, do not say that you do not know or you cannot find it. I do not accept it. Is it in the break-up in the operation of Telstra even in the 1980s, when you were supposedly at your worst, when these faults were occurring? You had business sections that were dealing only with big business. So the records would be there. You have not shredded them all yet, I would have thought.

**Mr Ward**—I will certainly look into this question.

**Senator CARR**—Can I just finish my question? I do appreciate that Telstra would have a very wide range of legal issues to confront. They would go to a whole range of commercial activity that any corporation the size of Telstra would have to deal with, such as things to deal with land usage and other matters. Obviously, I am not concerned about questions that go to maritime law or native title or questions with regard to property law; it is clearly issues that go to customer service. The primary function of Telstra is to provide telecommunication services. Can you understand the point I am making?

**Mr Ward**—I understand. I am just not too sure what the 5,000 answer was.

**Senator CARR**—I have an answer from the supplementary estimates. I understood that that was a figure that you used at the last hearings. You indicated to me that over 5,000-plus matters were being handled by 1,500, involving claims for legal disputes which were brought by or against Telstra by various parties including customers, employers, competitors and other members of the public.

**Mr Ward**—Yes, I thought that it was that wider definition.

**Senator CARR**—Clearly, that is the point that I am making to you. I am interested in the telecommunications customer service issues, not necessarily the broader property questions or, for that matter, the workers compensation questions, although if it is an issue that relates to complaints regarding harassment of Telstra officers—your investigation units—and it does concern those other matters, I would be interested. If I could get that material from you, I would appreciate it. The list of law firms that you have—is it 45? Is that the total number of law firms?

**Senator SCHACHT**—I think that is the number that you gave at the last estimates hearing on this discussion.

**Mr Ward**—Yes. I would like to dispute Senator Schacht's comment about big business.

**Senator BOSWELL**—The Endeavour Foundation is a sheltered workshop in Fortitude Valley.

**Senator SCHACHT**—I said Boral. That has no part in what I said. I shall ask Mr Ward to take on notice that, apparently, Boral did have some complaints about the service sector in the recent past, and I do not know how long ago. What treatment did Boral get in handling the difficulties? Did they have to go to arbitration or mediation? How was the problem settled? Did they get a discount? Did they get a payment? Did they claim that the problems of the delivery of the service had a material effect on their business? Did Telstra accept that there was some economic loss to the business because of the poor performance of the network and make some restitution to them accordingly?

**Mr Ward**—We will certainly follow that up. I do not think that we have any knowledge of that.

**Senator SCHACHT**—I know, but I am talking on notice. I understand that this may be completely wrong information just given to me. Boral was suggested as a company.

**Senator BOSWELL**—While you are taking questions on notice, could you put the following question on notice: the performance of the network in relation to the Endeavour Foundation in the Valley, how many calls they had lost and what effect it has had on their business. Following on from Senator Schacht's question, what have you done to compensate them?

**Mr Ward**—We will take that on notice and reply to you, Senator.

**Senator BOSWELL**—When will that be available?

**Mr Ward**—I think within a week.

**Senator SCHACHT**—We have put quite a few questions on notice. I want to put it to the committee that, when we get our answers, if we are not satisfied that the answers provide the information that we require, any senator of the committee here today can put further questions immediately on notice within a period of a couple of days.

**ACTING CHAIR (Senator Eggleston)**—Yes.

**Senator SCHACHT**—There will be no suggestion that Telstra is not answering fully the questions but we know in this issue that sometimes an answer given will raise another question. Could I also just say in relation to the document that Telstra tabled this morning that listed the processes of different CoT cases detailed by name, Mr Ward quite correctly suggested that they are happy to have it tabled but that they should check with the individual cases concerned and, likewise, table this document and ask the secretary to contact those cases to say whether they have any problem with this material being tabled.

**Mr Ward**—That was our only concern.

**Senator SCHACHT**—If they agree, it then becomes a tabled document of the committee.

**ACTING CHAIR**—It is six minutes past 12, which is six minutes after our closing time. We will adjourn this meeting now and we will have a private meeting of the committee following this when the real chairman returns. So I declare the meeting adjourned and thank you all for your participation.

**Committee adjourned at 12.07 p.m.**