



AUSTRALIAN TELECOMMUNICATIONS AUTHORITY

93/596(6)

5 October 1993

Mr Ian Campbell
Managing Director, Commercial
Telecom

Fax 634 3876

Dear Mr Campbell

COT CASES SETTLEMENT PROPOSAL

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

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

Starting point

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

The *Settlement Proposal* in context

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

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

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

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

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

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

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

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

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

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

Clauses 1-4

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

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

Clause 5

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

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

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

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

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

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

Clause 6 (a)

"6. The proposed procedure for settlement is -

(a) Each COT member will provide the "Circuit Breaker" with details of their claim and whatever supporting material they have available."

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

Clause 6 (b)

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

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

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

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

Clause 6 (c)

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

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

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

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

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

Clause 6 (d)

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

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

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

Clause 6 (e)

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

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

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

"(f) COT members will be bound in advance by the outcome of the evaluation of one or more of the following arrangements:

- (i) by signing an irrevocable power of attorney authorising the "Circuit Breaker" to accept settlement on their behalf.*
- (ii) by agreeing that no payout need be made by Telecom to any COT member until all have agreed to the evaluation of their respective claims."*

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

Clause 6 (f) (iii)

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

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

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

Clause 6 (f) (iv)

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

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

Clause 6 (g)

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

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

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

Clause 7

"7. Timing: The whole process would be expeditiously handled, and would take about ten-fifteen working days comprising -

- one-two days spent with each COT member to verify each claim, examine the basis of claim and documentation*
- a few days to report on each case and to seek agreement (if possible) to the evaluation*
- a few days to reconcile not only between Telecom and each COT member but across all four members (see 6 (f) (ii) above)."*

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

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

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

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

Other matters

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

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

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

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

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

Old v new claims

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

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

35. Mr Holmes' states in that regard -

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

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

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

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

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

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

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

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

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

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

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

"Telecom has no liability"

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

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

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

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

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

Yours sincerely

Robin C Davey
Chairman

