

**The Hon Malcolm Turnbull,  
Prime Minister of Australia**

**Mr Dan Tehan, Federal Member for Wannon**

**Ms Sue Laver, Telstra General Counsel**

**Mr John P Mullen, Telstra Board Chair**

**The Hon Barnaby Joyce**

**Deputy Prime Minister**

**Cape Bridgewater Holiday Camp  
Service Verification Tests (Report)  
Collision, Deception, Misleading and Deceptive Conduct**

**Exhibits 31-A to 46-E**

**Alan Smith  
Seal Cove  
1703 Bridgewater Road  
Portland (Victoria) 3305**

SENT BY: HUNT & HUNT

: 12- 5-95 : 2:41PM :

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12 May 1995

Our Ref: GLH

Matter No:

Your Ref:

BY FAX: 277 8797

Mr Warwick Smith  
Telecommunications Industry Ombudsman  
221 Exhibition Street  
Melbourne VIC 3000

Dear Warwick

### FAST-TRACK ARBITRATION PROCEDURE

You have asked me for my comments on the arbitration process, now I have delivered my first ruling.

Upon my return from leave in 2 weeks, I would be happy to discuss this matter with you in detail.

In simple terms, my observations are as follows:

- as far as I could observe, both Telecom and Smith co-operated in the Smith arbitration;
- the time frames set in the original Arbitration Agreement were, with the benefit of hindsight, optimistic;
- in particular, we did not allow sufficient time in the Arbitration Agreement for inevitable delays associated with the production of documents, obtaining further particulars and the preparation of technical reports;
- there have been allegations by Smith and other claimants that Telecom deliberately slowed the process by delaying the production of documents under FOI - certainly the FOI claims have caused delays but I am unable to comment as to whether there has been a deliberate delaying tactic;
- request for further particulars are, I think, unavoidable - although the emphasis in the arbitration process is upon a quick resolution of the dispute, a party (in this case Telecom) faced with a significant claim

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against it is entitled to be presented with particularised complaints, not generalised and unsubstantiated allegations;

- the preparation of technical reports by the claimants is always going to be a problem - in simple terms, Telecom has all the information and the claimant has to pay a technical expert to examine and interpret it.

In summary, it is my view that if the process is to remain credible, it is necessary to contemplate a time frame for completion which is longer than presently contained in the Arbitration Agreement.

There are some other procedural difficulties which revealed themselves during the Smith arbitration and which I would like to discuss with you when I return. These centre principally upon the fact that claimants, who are often seeking large sums, are generally unable to specify the legal basis for their claim (eg negligence, breach of contract, Trade Practices Act), yet it is necessary for me to base my rulings upon a breach of legal duty. This means that I have to in part rely upon Telecom to identify the legal basis of the claim made against it (which is somewhat perverse and which was in any event handled by Telecom in a less than satisfactory manner), and/or I have to search myself for a legal basis without assistance from the parties (which inevitably contributes to the time and expense associated with the proceedings).

I wonder whether some pro forma document could be developed which could point claimants in the right direction.

I apologise for the brevity of these comments. I am happy to provide you with a more detailed written report when I return from leave in 2 weeks. Ultimately, I think we should have a conference involving you, me and Peter Bartlett to consider these and related issues.

Yours sincerely

  
GORDON HUGHES

31A

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

  
**Hunt & Hunt**  
LAWYERS

23 January 1996

Our Ref: GLH  
Matter No:

Mr J Pinnock  
Telecommunications Industry Ombudsman  
321 Exhibition Street  
MELBOURNE Vic 3000

Dear Mr Pinnock

**INSTITUTE OF ARBITRATORS - COMPLAINT BY ALAN SMITH**

I enclose copy letters dated 18 and 19 January 1996 from the Institute of Arbitrators Australia. I would like to discuss a number of matters which arise from these letters, including:

- (a) the cost of responding to the allegations;
- (b) the implications to the arbitration procedure if I make a full and frank disclosure of the facts to Mr James.

Yours sincerely

  
GORDON HUGHES

Encl.  
cc P Bartlett

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James M. Highmore  
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Neville G.J. Deane  
Craig D. Selman  
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3 August 1995

Our Ref: GLH  
Matter No: 5126900  
Your Ref:

Mr E Benjamin  
National Manager  
Customer Response Unit  
Telecom Australia  
Level 37, 242 Exhibition Street  
MELBOURNE Vic 3000



Dear Mr Benjamin

**ARBITRATION - SCHORER**

I telephoned the claimant on 3 August 1995 in order to determine whether he was now in a position to proceed.

Mr Schorer advised me that due to a combination of factors, including the current state of his health, the commercial pressures imposed by his business and an impending FOI claim, he is unable to submit a claim at present.

Mr Schorer has advised me, however, that he remains anxious to pursue a claim as soon as he is able to devote adequate time to its preparation.

Yours sincerely

**GORDON HUGHES**

cc [redacted] Pinnock, P Bartlett, J Rundell

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4 September 1995

Our Ref: GLH.

Matter No:

Your Ref:

Mr G Schorer  
 Golden Messenger  
 493-495 Queensberry Street  
 NORTH MELBOURNE Vic 3051

ENTERED  
 15-9-95

TB ✓  
 SB ✓

Dear Mr Schorer

## ARBITRATION - TELSTRA

I refer to our telephone discussion on 3 August last and would be pleased to know if you are yet in a position to indicate whether, and if so when, you intend proceeding with the submission of your claim documentation.

Yours sincerely

**GORDON HUGHES**

CC E Benjamin, J Pinnock, P Bartlett, J Rundell

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 Benjamin ✓  
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 Evert  
 Armstrong  
 Phillips  
 Davie

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6 November 1995

Our Ref: GLH

Matter No:

Your Ref:

Mr G Schorer  
Golden Messenger  
493-495 Queensberry Street  
NORTH MELBOURNE Vic 3051

RECEIVED  
19-11-95

TB  
SB

Dear Mr Schorer

## ARBITRATION - TELSTRA

Please advise me within 7 days when you expect to complete the submission of your claim.

If you anticipate a delay of considerable or indeterminate length, I will give consideration to the question of whether this arbitration should be abandoned.

Yours sincerely

**GORDON HUGHES**

CC E Benjamin, J Pirrock, P Bartlett, J Rundell

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**Recommendation 24:** Telecom introduce a national system whereby a fault which reduces the level of service below a level determined by AUSTEL and which cannot be identified or resolved within a specified time frame at one level is escalated to the next level of management for resolution (cf: Coopers & Lybrand Recommendation 3).

**TELSTRA Status Comment - 30 June 1995**

*The time escalation parameter is one of the central planks of the new fault management process which has now been implemented nationally.*

*As noted in AUSTEL's third quarterly report of 2 February 1995 "Telstra has substantially fulfilled the requirements of this recommendation, which is the introduction of a national system for escalation of faults in specified circumstances".*

*Action to implement this recommendation is now completed.*

**AUSTEL Comment**

Telstra has provided AUSTEL with information which provides a numerical summary of escalated faults under the new fault management process during the December 1994, March 1995 and June 1995 quarters. AUSTEL is examining this data and will be arranging a meeting with Telstra to discuss the effectiveness of its new escalation procedures.

As noted above, AUSTEL is examining issues recently brought to its attention by Telstra customers concerning Telstra's current fault recording and escalation procedures.

**Recommendation 25:** Telecom commit itself to rectify the majority of difficult network faults which reduce the level of service below a level determined by AUSTEL within three to six months and all within a period of twelve months.

**TELSTRA Status Comment - 30 June 1995**

*Telstra has now completed its program of Service Verification Tests on the sixteen DNF Customers referred to Telstra by AUSTEL with the exception of three customers who have refused to allow the tests to take place. As indicated previously, the program of SVT did not include those services where the service either no longer existed in the same form as previously, or was a mobile service, or where the difficulties related to*

*CPE and not the network. All services on which the SVT was carried out have met or exceeded the SVT requirements.*

*Should any of the customers who have refused permission for the Service Verification Tests to be carried out withdraw that refusal, then Telstra will carry out the tests.*

*Telstra considers that this recommendation is finalised.*

#### **AUSTEL Comment**

Telstra has provided AUSTEL with a summary of the Service Verification Test (SVT) results for the services of customers identified in AUSTEL's *COT Cases* report and has advised that the services for which testing was completed passed the SVT. The summary notes that following initial approval to conduct the SVT, three of these customers subsequently withdrew that permission. The SVT for these services were therefore limited to the Call Delivery Tests. Telstra has advised AUSTEL that each of these services passed the Call Delivery Tests.

AUSTEL notes Telstra's comment that - "should any of the customers who have refused permission for the Service Verification Tests to be carried out withdraw that refusal, then Telstra will carry out the tests"; and agrees that this recommendation is finalised. Further comment is provided on the SVT under recommendation 41.

**Recommendation 26:** Telecom devise plans with time-frames for resolving difficult network faults which reduce the level of service below a level determined by AUSTEL and inform its customers accordingly (cf: Coopers & Lybrand Recommendation 24, Bell Canada International's Rotary Hunting Group Study Recommendation 8.2).

#### **TELSTRA Status Comment - 30 June 1995**

*The new Complaint and Fault Management Processes provide time frames for resolving faults. (See also Rec 25)*

*Telstra considers that this recommendation is finalised.*

#### **AUSTEL Comment**

AUSTEL agrees that this recommendation is finalised.

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