EXPOSING THE TRUTH

EVIDENCE FILE 1

The story of how the Australian corporate giant Telstra failed to address the many phone problems that were affecting the capacity of small businesses.



ALAN SMITH

Evidence File 1 Chronolgy

Statement of Author

Chronology of Events

I, Alan Smith, author of this chronology of events, emphasize that most—if not all—of the content herein discussed in The Arbitrator, as well as the reports published on absentjustice.com and absentjustice.com.au, has been provided since 2015 to numerous Australian authorities. These include:

- The Prime Minister's Office
- The Deputy Prime Minister's Office
- The Secretary of the Senate
- The Speaker of the House of Representatives
- Consumer Affairs Victoria
- Two sitting Ministers for Communications, Information, Technology and the Arts (DCITA)
- The Chairman of the Australian Consumer Affairs Commission
- The Chairman of the Australian Communications and Media Authority
- The Australian Securities Commission
- The Telecommunications Industry Ombudsman
- Telstra and the Board of Management
- The Victorian State Attorney General and the Federal Attorney General's Office
- The Institute of Arbitrators and Mediators Australia
- The Australian Federal Police

Despite my requests to these government and non-government agencies to assist me in rectifying the deplorable discrimination that some of the COT Cases were subjected to—as well as the appalling way their matters were arbitrated—none of these offices have refuted the evidence I submitted to support my claims.

Officials within these departments have, however, insinuated that the confidentiality clause in my arbitration agreement of 21 April 1994 forbids such investigations. This assertion was made even though those officers were aware that between 2:00 PM on 19 April 1994 and 10:00 AM on 21 April 1994—when I and two other COT Cases signed the agreement—four clauses were altered: three removed entirely, and one changed. Our lawyers and two sitting Senators had advised us to sign only because those clauses, in their original form, gave the agreement credibility.

In simple terms, the altered arbitration agreement has prevented government officials and regulators from investigating the story now documented in absentjustice.com and The Arbitraitor.

Judge G.D. Friedman's Review

It is important to clarify that Mr. G.D. Friedman, serving as a Judge and Senior Member of the Administrative Appeals Tribunal, undertook a meticulous review of the same information presented to the officials listed above. This information included crucial documents that were requested under the Freedom of Information (FOI) Act, which were unfortunately withheld by both Telstra and the government during my arbitration proceedings spanning from 1994 to 1995.

Between 17 February 2008 and 3 October 2008, Mr. Friedman conducted a comprehensive investigation, as he indicated in open court while two Australian Government lawyers were in attendance. During this time, he made a point to address me directly, emphasizing the seriousness of the situation:

"Let me just say, I don't consider you, personally, to be frivolous or vexatious – far from it.

"I suppose all that remains for me to say, Mr Smith, is that you obviously are very tenacious and persistent in pursuing the – not this matter before me, but the whole – the whole question of what you see as a grave injustice, and I can only applaud people who have persistence and the determination to see things through when they believe it's important enough."

The Arbitrator and Casualties of Telstra

While my book, titled The Arbitraitor, spans a mere 230 or more pages, this bleak companion tale, Casualties of Telstra (COT for short), could have easily reached another 230 pages. Yet to extend further would risk obscuring the chilling human experience at its core: the collapse of a business not through natural disasters—fire, flood, or earthquake—that one might accept as fate, but through calculated, malicious sabotage.

This sabotage was orchestrated by a nefarious alliance of lawyers, arbitrators, and accountants, all operating within a sinister agenda.

Evidence Files and Senate Investigation

It is on this note that I advise all readers to visit promoteyourstory.com.au and my two websites (absentjustice.com and absentjustice.com.au) where several Evidence Files (including Evidence File 1) will be displayed in 2026. These will contain copies of the exact material, naming the evidence exhibits provided to the government and non-government agencies over the past two

decades, pleading for those agencies to help the remaining sixteen COT Cases find the same type of justice the other five COT Cases received via the June 1997 to March 1999 Senate Investigation.

The first Evidence File 1, which will be launched on promoteyourstory.com.au, was originally provided to Barrister Peter Hiland, on behalf of Consumer Affairs Victoria (CAV), in the company of a former highly decorated senior Victoria police officer from the Major Fraud Group (who is also a recipient of the "Order of Australia"), who had assisted me in preparing the documents that Peter Hiland was now agreeing to investigate. Yet after eighteen months, the CAV abandoned their inquiry without making a finding for or against.

Why I Am Still Seeking Justice

That Senate Investigation found in favour of the first five "litmus test" cases. Yet instead of honouring the agreement reached between several COT Cases and members of the John Howard Liberal Government—that if the Senate found in favour of the five litmus test cases, then the remaining sixteen cases would be treated in a similar manner—the promise was broken.

Those five litmus test cases not only received more than 150,000 previously withheld FOI documents during their arbitrations but also received over $18 million in compensation. The sixteen remaining cases are still being denied their withheld FOI documents and have not received equal punitive damages.

For those who dare to delve into the murky depths of promoteyourstory.com.au, let me shed some light on the convoluted web I've woven with the fourteen government and non-government agencies that have received my submissions. Each agency has been inundated with a barrage of evidence files—some containing thousands of documents, while others have received one to four separate, but equally potent, submissions.

My sinister plan is to meticulously orchestrate the release of these Evidence Files, starting from File 1 and potentially extending to File 30. I hope that when the Australian Government finally confronts a dozen—perhaps even just six—of these files lined up in stark succession, they will be forced to confront the dark truth: they have erred grievously and discriminated against me in a truly reprehensible manner.

These files will serve as a damning testament to the corrupt practices that have plagued our bureaucracies for far too long. After three decades of suffering, the Australian Government must finally come to terms with the reality that enough is enough. The evidence will unambiguously unveil the insidious nature of the bureaucrats' actions since 1995, revealing the treachery that has festered unchecked.

It is time for a reckoning, as their attempts to bury the truth will be cast into the harsh light of accountability.

General Information

COT Cases

26th September, 1992: The newly formed *Casualties of Telstra* (COT) Group, comprising Graham Schorer, Alan Smith, Ann Grams, Bruce Dowding (representing Shelia Hawkins) and Amanda Davis (AUSTEL's General Manager for Consumer Affairs), met with three representatives of Telstra at the IBIS Hotel in North Melbourne to discuss the ongoing phone problems being experienced by the members of COT. One of the Telstra's representatives at that meeting, Ted Benjamin, was later appointed as Telstra's arbitration liaison officer for Graham and Alan's arbitrations. The *Alan Smith CAV Chronology LGE file* and supporting documentation has shown that Mr Benjamin had a conflict of interest as the arbitration officer whilst he was still a member of the TIO Council as the TIO's office was the administrators of the COT arbitrations.

Graham Schorer had already been elected as official spokesperson. During this meeting the COT Cases advised Telstra that they now knew, contrary to what each of had been individually advised by Telstra in the past, that they were NOT the only businesses in their areas complaining about faults with their telephones: Telstra fault documents confirm that during October and November 1992 alone, fourteen Cape Bridgewater residents had complained to Telstra about problems with their phones. **(AS 8)**

On 13th April 1994, AUSTEL provided the then-Minister for Communications, the Hon Michael Lee, with a report entitled *AUSTEL COT Cases Report,* which discussed at length the telecommunication problems experienced by Graham, Alan and other COT members. Most of the information in the report was supposed to provide an unbiased view of the issues which AUSTEL had investigated by obtaining from Telstra each of the COT Case telecommunication fault registered with the carrier.

The information contained in our exhibits attached (attached herewith) confirms that, throughout the COT arbitrations, Telstra continued to withhold documents from the claimants. It is also apparent that AUSTEL was unable to access all the information they requested from Telstra to enable them to properly prepare a more detailed report.

AUSTEL COT Cases Report

In late 1993 the Minister for Communications, David Beddall, requested AUSTEL to investigate the COT claimant's complaints against Telecom.

In April 1994, a report was released to the COT claimants as well as to the Minister. What was not revealed at the time, and has only been discovered in subsequent FOI documents, was that in March 1994 AUSTEL released an earlier 'Draft' version to Telecom **(AS 495).** Certain amendments and concessions were made in this report before the official copy was released.

Such amendments were not in accord with the *Telcommunications Act 1991*, which in section 342 states that

(2) After concluding an investigation under subsection 335 (3) AUSTEL must

prepare and give to the Minister a report under this section.

(3) A report under this section must cover:

(a) the conduct of the investigation concerned; and

(b) any findings that AUSTEL has made as a result of the investigation.

Even after though certain condemnatory material was removed (see pages 9 and 10 below), the final *AUSTEL CoT Cases Report* was far from flattering to Telecom, as can be seen from the following points.

Point 1.6

Until recently, Telecom's approach to the COT Cases might reasonably have been perceived by the COT Cases as one of indifference. But, more recently, the COT's persistence, AUSTEL intervention, Ministerial involvement the threat of a Senate inquiry and adverse publicity has resulted in Telecom adopting a more positive, conciliatory approach.

Point 1.18

When the initial settlements were reached with the original COT Cases, the standard of service then applicable was not objectively established and there is a reason to believe that difficult network faults may have continued to affect their services.

Point 5.46 on page 95

Where, as part of its direction, AUSTEL sought to obtain detailed information on each of the exchanges involved in terms of performance standards, actual performance, maintenance requirements and achievements, Telecom initially responded with advice in terms of a few generalisations. Very specific requests were necessary to obtain data which a co-operative approach may well have been expected to deliver. Indeed, throughout this inquiry it has been apparent that Telecom has chosen to interpret AUSTEL's request for information in the narrowest possible terms. The net effect of this was to minimise the amount of relevant data it put before AUSTEL and lengthen the process necessary to extract it.

Point 5.25 on page 89

Mr Smith was the first of the original COT Cases to reach an initial **'settlement'** with Telecom. It is understood that he –

- identified the type of faults which his business had experienced
- indicated the incidence of the faults by way of –

o statements by individuals who had sought unsuccessfully to contact him

o demonstrating a reduced effectiveness of advertising he had undertaken.

Telecom has a acknowledge of at least some of the faults impacting on Mr Smith's business as well as having access to relevant fault records and monitoring data. It was also aware of the extent of the problems and difficulties at its local exchange servicing his business.

Point 5.30 on page 91

Understandably the original Cot Cases, having reached an initial 'settlement' involving –

- compensation for past losses
- restoration of an adequate telephone service

expected that they might be able to resume their business activities afresh.

Point 5.31 on page 91

Unfortunately that did not prove to be the case. Soon after his initial 'settlement' Mr Smith reported continuing problems to AUSTEL. Even prior to her settlement, Mrs Garms reported continuing faults to AUSTEL. The decision by Mrs Garms and Mrs Gillan not to report faults to Telecom in order to hasten a financial settlement is noted above. Mr Schorer continued to report faults to AUSTEL throughout the period.

Point 5.32 on page 91

The fact that faults continued to impact upon the businesses in the period following the settlement shows a weakness in the procedures employed. That is, a standard of service should have been established and signed **off** by each party. It is a necessary procedure of which all parties are now fully conscious and is dealt with elsewhere in this report. Its omission as far as the initial 'settlement' of the **original COT Cases** were concerned meant that there was continued dissatisfaction with the service provided without any steps being taken to rectify it. This inevitably led to dissatisfaction with the initial **'settlement'** and to further demands for compensation. To avoid this sort of problem in the future, AUSTEL is, in consultation with Telecom, developing –

- a standard of service against which Telecom's performance may be effectively measured
- a relevant service quality verification test.

The original commercial negotiation process leading up to the AUSTEL facilitated *Fast Track Arbitration Procedure* (FTAP) details that no future assessment process should be signed **off** until Telstra had demonstrated that their verification testing had located and/or fixed the phone problems that had affected the COT Cases businesses. Telstra agreed to carry out the Service Verification Tests (SVT) as specified by AUSTEL and by doing so proving to AUSTEL's satisfaction that the services provided to Alan were now up to network standard was one of the main reasons why Alan signed the FTAP. Leading up to the signing of the Arbitration Agreement 21st April 1994 and before the final COT report was provided to the Communications Minister on 13th April 1994, Alan and various other COT Cases attended a two-day, lock-up, confidential viewing of the incomplete report at AUSTEL's headquarters in Queens Road, Melbourne. At this meeting Robin Davey, AUSTEL's Chairman, reminded Graham Schorer (COT Spokesperson) and Alan of commitments made in a letter dated 23rd September 1992, from Telecom's Commercial Consumer Group Managing Director to Graham, (see at point 5.7 *AUSTEL COT Case Report,* which stated 'As I explained at our meeting, we cannot move to settlement discussions or arbitration while we are unable to identify faults which are affecting these services.'

At the time of the AUSTEL lockup meeting, Graham and Alan refused to change from the commercial agreement to arbitration. It was then that Mr Davey noted that the original agreement to properly identify the phone and fax faults still stood because an assessor (or arbitrator) would not be able to hand down findings if the problems and faults that had sent the claimants into the

process in the first place had not been rigorously tested. At this lock-up meeting Alan was alerted by Mr Davey to various sections of the AUSTEL report where AUSTEL clarified that Service Verification Testing would be conducted on Difficult Network Fault (DNF) customers, which is how the COT claimants had been classified.

It has been shown previously that, in Alan's case, false results were generated for the Service Verification tests **(AS 499 and AS 500)** even after AUSTEL had written twice to Telstra, on 11th October and 16th November 1994, clearly advising Telstra that the tests carried out at Alan's business premises (as part of the arbitration process) were deficient.

Point 5.46 on page 95 '

Where, as part of its direction, AUSTEL sought to obtain detailed information on each of the exchanges involved in terms of performance standards, actual performance, maintenance requirements and achievements, Telecom initially responded with advice in terms of a few generalisations. Very specific requests were necessary to obtain data which a co-operative approach may well have been expected to deliver. Indeed, throughout this inquiry it has been apparent that Telecom has chosen to interpret AUSTEL's request for information in the narrowest possible terms. The net effect of this was to minimise the amount of relevant data it put before AUSTEL and lengthen the process necessary to extract it.

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On 21st November 2007 Alan received from the ACMA, under FOI, a copy of AUSTEL's original draft findings dated March 1994, regarding the telephone problems experienced by the Cape Bridgewater Holiday Camp during 1988 to 1994. Copied below are some of the page numbers and points in the report. The reason this has been included is to show the difficulties that AUSTEL as the Government regulator had in obtaining documents from Telstra (at the time a fully Government owned Corporation). Given these difficulties, the non supply of documents to the COT claimants during their respective arbitrations is not particularly surprising. The following list identifies some areas where AUSTEL had problems with access to Telstra records on the service provided to Alan:

- **Point 43 on page 20** 'As no fault report records remain in existence from Cape Bridgewater residents prior to this period, or these records have not been provided to AUSTEL, it is difficult to gauge the level of problems in the area.'

- **Point 48 on page 22** 'AUSTEL has been hampered in assessing Telecom's dealings with Mr Smith by Telecom's failure to provide files relating to Mr Smith's complaints.'

- **Point 71 on pages 28 and 29** 'AUSTEL has not been provided with the documents on which the conclusion in this briefing summary were reached, such as fault reports from other Cape Bridgewater subscribers over this period or the details of the final selector fault. It would have been expected that these documents would have been retained on file as background to the summary. It can only be assumed that they are contained within the documentation not provided to AUSTEL.'

- **Point 140 on page 49** 'It should be noted that AUSTEL's investigation of matters relating to the RCM problem has been hampered by Telecom's failure to make available to AUSTEL a file

specifically relating to the Pairs Gains Support investigation of the RCM. The file was requested by AUSTEL on 9 February 1994.'

- **Point 160 on page 55** 'It should be noted that it is hoped that a number of issues in regard to the Cape Bridgewater RCM will be clarified when Telecom provides the documentation requested by AUSTEL.'

Exhibit **(AS 495),** dated 22nd September 1994, is a transcript taken during an oral interview at the Commonwealth Ombudsman's Office, with AUSTEL's representatives Bruce Matthews and John McMahon. On page 7 of this manuscript the Commonwealth Ombudsman's officer, John Wynack, asked: 'What was the date the report was issued, the AUSTEL report? And Mr Matthews replied: 'The final report was April – I can't remember the date in April, but April 1994. The draft report was produced in March 1994 and Telecom received their copy of that at the time.'

While it is clear from the statement made by Bruce Matthews (see above), that Telstra received a copy of AUSTEL's draft findings 'NONE' of the information in this draft report, which enabled the Government Communications Regulator (AUSTEL), to arrive at their adverse findings, was ever made available to either the Arbitrator or Alan.

- **Point 209 on page 68** 'Cape Bridgewater Holiday Camp has a history of service difficulties dating back to 1988. Although most of the documentation dates from 1991 it is apparent that the camp has had ongoing service difficulties for the past six years which has impacted on its business operations causing losses and erosion of customer base '

- **Point 210 on page 69** 'Service faults of a recurrent nature were continually reported by Smith and Telecom was provided with supporting evidence of this in the form of testimonials from other network users who were unable to make telephone contact with the camp '

- **Point 212 on page 69** 'In view of the continuing nature of the fault reports and the level of testing undertaken by Telecom doubts are raised on the capability of the testing regime to locate the causes of faults being reported '

15th July 1995: Amanda Davis's open letter lends her support

I am writing this in support of Mr Alan Smith, who I believe has a meeting with you during the week beginning 17 July. I first met the COT Cases in 1992 in my capacity as General Manager, Consumer Affairs at Austel. The "founding" group were Mr Smith, Mrs Ann Garms of the Tivoli Restaurant, Brisbane, Mrs Shelia Hawkins of the Society Restaurant, Melbourne, Mrs Maureen Gillian of Japanese Spare Parts, Brisbane, and Mr Graham Schorer of Golden Messenger Couriers, Melbourne. Mrs Hawkins withdrew very early on, and I have had no contact with her since.

The treatment these individuals have received from Telecom and Commonwealth government agencies has been disgraceful, and I have no doubt that they have all suffered as much through this treatment as they did through the faults on their telephone services.

One of the most striking things about this group is their persistence and enduring belief that eventually there will be a fair and equitable outcome for them, and they are to be admired for having kept as focussed as they have throughout their campaign.

During my time at Austel I pressed as hard as I could for an investigation into the complaints. The resistance to that course of action came from the then Chairman, Mr Robin Davey. He was eventually galvanised into action by ministerial pressure. The Austel report looks good to the casual observer, but it has now become clear that much of the information accepted by Austel was at best inaccurate, and at worst fabricated, and that Austel knew or ought to have known this at the time **(AS 501)**

Assessment/Arbitration

Initially, the COT cases agreed to a Commercial Fast Track Settlement Proposal (FTSP), but, when they could not obtain the requisite documents from Telecom to prove their cases, moved into the Fast Track Arbitration on the assurance that an arbitrator would be able to force Telecom to supply the information needed.

It should be noted that, had AUSTEL provided all their findings to the Minister and the CoT claimants, the COTS would have not needed to enter into the FTAP as AUSTEL had already shown the validity of their claim. Therefore, they could obtain suitable assessment under the FTSP.

In turn, this would have meant that further injustices could have been avoided – the arbitration agreement being drawn up on Telstra's preferred rules of arbitration (rather than independently, as alleged); the secret changes to the arbitration agreement; Telecom/Telstra's continued refusal to supply technical documentation and the failure of the arbitrator to consider Alan's full submission, to name a few.

21st December 1993: Telstra and Warwick Smith discussed the FTSP. There is no mention in this letter of an arbitrator being appointed only the appointment of an assessor because the process is to be a 'flexible, quasi-judicial process.' **(AS 48-E)**

7th January 1994: Internal Federal Government memo from Tom Dale, of Minister Lee's Office with the subject *cot cases* **(AS 48-F)** states

I spoke with Warwick Smith in light of today's reports that he is investigating the telephone monitoring allegations. ...

He also mentioned that the fast-track claim settlement process was not getting anywhere due to the COT cases knocking back the TIO's proposal for people to determine their claims. We should not give the Minister the impression that the fast-track would fix things: it is far from certain.

The issue being discussed regarding whether the 'fast-track' would fix these matters should have been addressed prior to the commencement of the FTSP. Robin Davey had already written to the

previous Minister, the Hon David Beddall MP, on the 26th August 1993, advising him that Telstra was aware of faults still affecting Cape Bridgewater. Exhibit **(AS 48-G)** states on page 4

Cape Bridgewater – '...Telecom has admitted existence of unidentified faults to AUSTEL.'

This raises the following questions of the TIO, as the administrator:

(a) Why was this admission by Telstra to AUSTEL and the advice given by AUSTEL to the Minister regarding these unidentified faults in existence in Cape Bridgewater hidden from Alan and his technical advisors during his arbitration?

(b) Why did AUSTEL and the Government allow Telstra to submit under oath, in their arbitration defence of Alan's claims, that during Telecom's fault investigation at Cape Bridgewater during 1993 and 1994, they found no faults that would have affected Alan's business endeavours?

It is important to remind the Telecommunications Industry Ombudsman (TIO) and the Australian Communications and Media Authority (ACMA) that Telstra's Corporate Secretary Jim Holmes, was advised in all three emails A01554, A06507 and A06508 that the Leopard Fault data had been destroyed once it was more than twelve months old, was a member of the TIO Board when the first four COT claimants, Gillan, Garms, Schorer and Smith, signed the arbitration agreements, but it seems that Mr Holmes, Telstra's Corporate Secretary, did not warn the Government which, after all, had endorsed the arbitration agreements or the TIO, who administered the arbitrations, that the claimants would not be able to support their claims effectively because Telstra had destroyed all the historic data, at least from 1992 on. Have Jim Holmes, Trevor Hill, the TIO Board or the ACMA Board ever stopped to consider what followed, after Telstra kept this information secret? Have they ever considered the financial cost to each claimant as they tried to access this Telstra information? All of the COT cases accumulated costs that ran into hundreds of thousands of dollars trying to access this non-existence fault data (and other Telstra data) in support of their claims **(AS 641)**

20th January 1994: This letter from Ms Philippa Smith, Commonwealth Ombudsman, to Jim Holmes, notes:

I received complaints from three of the 'COT Cases' Mr Graham Schorer, Mr Alan Smith and Ms Ann Garms, concerning TELECOM's handling of their applications under the Freedom of Information Act (FOI Act) of 24 November 1993 and 21 December 1993 respectively. All three assert that they require the information to support their submissions to the imminent review in accordance with the Fast Track Settlement Proposal (FTSP) agreed between TELECOM and AUSTEL, and endorsed by the then relevant Minister. **(AS 51)**

Ms Smith raised these issues again with Telstra's Frank Blount, **(AS 64)** on the 25th March 1994, stating

Insofar as Telecom's actions relate to decisions on the valid FOI applications ... it is my view that delaying release of the documents to Mr Smith and Ms Garms is unreasonable...

It was unreasonable for Telecom to require the participants to make the assurances while Telecom was considering the agreement and thereby denying the participants the opportunity to consider the rules that Telecom wished to have included in the Agreement. ...

Your officers also informed Mr Wynack (Commonwealth Ombudsman Officer) that they expected the vetting of the documents would take a couple of days.'

PLEASE NOTE: At no time prior to arbitration was Alan ever informed that Telstra was going to be allowed to vet which documents they supplied to him and which they would withhold.

24th January 1994: Warwick Smith writes to Ms Fay Holthyuzen, Assistant Secretary Regulatory Branch Parliament House, and attached a public media release that Dr Gordon Hughes had been appointed as the Assessor to the COT Fast-Track Settlement Proposal (FTSP). There is no mention in this media release of an arbitration process. **(AS 49-B)**

27th January 1994: As no official guidance from Warwick Smith on how the COT Cases should submit their claims to the assessor was provided, Alan submitted an interim testament of the problems and faults his business had experienced stating 'I present these summaries for your viewing. This should give an insight into some of the difficulties experienced during my years when trying to run a telephone dependant business.' It can be noted from exhibit **(AS 322-A)** that this letter and attachments was addressed to Warwick Smith, Dr Hughes, Peter Bartlett and John Rundell.

None of the material provided by Alan during the Fast Tracks Settlement Process on 27th January 1994 seems to have been passed onto the Fast Track Arbitration Process. Furthermore, in Alan's letter of claim dated 15th June 1994, **(AS 322-B)** Alan's advisor, Garry Ellicott reminded Dr Hughes of Alan's interim claim supplied to him in his letter of 27th January 1994.

Robin Davey prepared the AUSTEL draft FTSP document dated 5th October 1993 for Ian Campbell of Telstra. At point 40 in this document, Mr Davey expresses his concerns regarding the involvement of Freehill Hollingdale and Page (FHP) in the Fast Track Settlement Procedure, when he states

If the attached letter dated 7th July 1993, from Freehill Hollingdale & Page to one of the COT cases solicitors is indicative of the way 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.

During the process of drafting the FTSP rules and until Warwick Smith became involved in the FTSP, AUSTEL became very concerned at the requirement for Alan to report his phone complaints to Denise McBurnie (Freehill's) before Telstra actively did anything about fixing the ongoing problems. It seems that an important point has been lost here: AUSTEL was a government funded regulator and they had made it quite clear that FHP should not be used in COT matters. This did not prevent Warwick Smith from allowing Telstra to continue to use FHP anyway.

17th February 1994: Graham Schorer, Telstra representatives, Peter Bartlett and Dr Hughes met to discuss the settlement proposal as compared to arbitration process. Telstra's transcript of this meeting confirms that the COT claimants still wanted a commercial settlement process and not an arbitration procedure. On page three of the transcript, Dr Hughes stated that arbitration would be more effective and that, as arbitrator, he 'would not make a determination on incomplete information. **(AS 584)**

Comment:

In the case of Alan Smith, Dr Hughes made his determination on incomplete information when he handed down his award even though his own technical consultants, DMR & Lanes, had asked for 'extra weeks' to complete their findings – a request that Dr Hughes denied. Dr Hughes also did not access documents for Alan under the discovery process, even though he was aware Telstra had not provided this information under FOI. This is a complete about-face to the commitment he made to the COT claimants at this meeting.

In the case of Ann Garms, Maureen Gillan and Graham Schorer, Dr Hughes continued to arbitrate on his matters after 12th May 1995, when he wrote to Warwick Smith and declared the Arbitration Agreement not credible.

Robert McGregor of FHP signed off these minutes on behalf of Telstra.

23rd February 1994: This letter from Mr Black to Dr Hughes refers to the 17th February 1994 letter from Mr Black to Dr Hughes. This letter also documents changes to the FTAP but makes no comment on the removal of the words '… each of the Claimants claims' from clause 10.2.2.

Steve Black states on page 3 of this letter

Telecom is of the view that Special Counsel and the Resource Unit should be accountable for any negligence on their part in relation to the arbitration process, given that these parties are acting in their capacity as experts. Therefore, this clause should not be amended so as to include an exclusion from liability for Special Counsel and the Resource Unit. **(AS 585)**

It is important to also note that Graham and Alan believed that the Special Counsel, Ferrier Hodgson Corporate Advisory, and DMR Group Australia would be made accountable for any negligence on their part in relation to the arbitration process.

It is also confirmed that at the 19th April 1994 Dr Hughes' office was still of the opinion that the Special Counsel, and the Resource Unit would not be excluded from liability.

In March 1994, during this negotiation period, a number of documents faxed from Peter Bartlett at Minter Ellison (the TIO's Legal Counsel) did not arrive at Alan's office. Page 33 of Alan's claim document *Cape Bridgewater Holiday Camp – CBHC - Part 1* shows that he advised the arbitrator of at least three businesses who complained of not receiving faxes from Alan during the FTSP negotiation period. CBHC Part 1 was an eighty-page bound document which Alan submitted to the FTSP but it appears that Ferrier Hodgson Corporate Advisory did not pass it on to DMR and Lanes for their assessment **(AS 66)**

Numerous documents (attached) confirm the continuing problems with Alan's fax line and show how it affected the submission of his claim at the time of the FTSP and FTAP including raising the question about how his business losses could be commercially assessed if the phone and fax problems were still apparent. It was a futile exercise until Telstra fixed the problems and faults.

Because of the complexity of the matters that the arbitrator was going to address, it was agreed to base the arbitration rules on the original commercial FTSP; in other words, the rules of the Arbitration Agreement (FTAP) would incorporate the rules of the original FTSP.

3rd March 1994: Confirmation from AUSTEL to Steve Black that the regulator was adamant that

If the Fast Track Settlement Proposal was to be effective then the COT members must be given access to the documentation in Telecom's possession necessary for them to prepare their cases. **(AS 56)**

Given that they had already signed a commercial assessment agreement, Graham and Alan refused to be a party to Telstra's preferred rules of arbitration. It was evident to them that Telstra was attempting to force the COT four down the legal track so that their cases would not be commercially assessed.

Other details of these meeting minutes show that Dr Hughes

stated that he was aware of the dispute between the parties but did not have any idea as to the nature, and indicated that, from this point in time, there were two ways to proceed in relation to the problem of outstanding documents:

· the procedure is put on hold until all the documents are exchanged in accordance with the FOI procedure; or

· the arbitration procedure commences and then the arbitrator gives appropriate productions of documents.

The second point above was Alan's main reason for finally agreeing to sign for arbitration, as Telstra had still only provided him with a very limited quantity of documents. However, as can be seen from the arbitration process itself, Dr Hughes went back on his commitment to access documents from Telstra on his behalf.

22nd March 1994: Confirmation of a meeting attended by Steve Black, David Krasnostein (Telstra's General Counsel), Simon Chalmers, Peter Bartlett, Dr Hughes, Warwick Smith and the TIO's secretary, Jenny Henright. The meeting discussed the FTAP arbitration agreement (Rules) without any COT claimants or their representatives.

It was not until 1998, three years after his arbitration, that Alan received FOI documents from Telstra which recorded this clandestine gathering. Given that Telstra, their lawyers, Dr Hughes and the TIO's office all attended this meeting but it was not attended by any representative of the COTs shows the disregard that Dr Hughes and Warwick Smith, had for the claimants rights even before they had signed the agreement.

7th April 1994: In Telstra Internal Memo R11908 memo Steve Black states

Peter Bartlett tells me that Graham Schorer is putting pressure on Gordon Hughes to read the AUSTEL Report and see if it contains anything which would necessitate a change in the Arbitration Rules. I told Mr Bartlett to tell Dr Hughes that Telecom would seriously object to such a course of action. **(AS 68)**

14th April 1994: AUSTEL's General Manager for Consumer Affairs, John MacMahon, writes to Ann Garms stating

This letter is to confirm that the Fast Track Settlement Proposal drafted by AUSTEL and signed by Telecom on 18 November 1993 and by you 23 November 1993, refers to an "assessment process" and an "assessor" and makes no reference to "arbitration" or to an "arbitrator. **(AS 69)**

14th April 1994: Ann Garms writes to Warwick Smith, with the signatures of Graham Schorer, Alan Smith and herself stating

We are all in agreement that we wish to be assessed by Dr Gordon Hughes under the Fast Track Settlement Proposal authorised by AUSTEL and signed by Mr Jim Holmes, Corporate Secretary of Telecom on 18 November 1993, and by COT members on 23 November 1993.

We acknowledge the confirmation by AUSTEL on 14 April 1994, that the Fast Track Settlement Proposal confirms the assessment process for COT members **(AS 586)**

14th April 1994: Warwick Smith responds to Ann Garms' letters of 14th April 1994 stating

I am not sure where Alan Smith or Graham Schorer are with regard to proceeding. They have been in regular contact with Peter Bartlett, but I still hope the matter can proceed and am of the view the Procedure endorses the 'Fast Track' Agreement and is important for the arbitrator in his role. **(AS 587)**

15th April 1994: Warwick Smith writes to Mr Schorer stating

I *met with Mr Bartlett last evening. He will arrange a meeting with Dr Hughes on his return to seek his position on what I understand to be the desire of "COTS" on the Procedure and "Fast Track Settlement. There are apparently several* **(AS 588)**

14th April 1994: This letter from Telstra's Steve Black to Detective Superintendent Jeff Penrose states that Telstra only voice-monitored Alan's telephone service from June to August 1993 **(AS 558).** This corresponds to Steve Black's statement in a letter to Warwick Smith which is recorded, at Exhibit **(AS 109)**. Exhibit **(AS 559)** attached here is page six from a transcript of an AFP interview with Alan on 29th September 1994, which records the AFP asking Alan about a hand-written reference to a bus company that Telstra appeared to have added in the top right corner of a letter Alan had written preciously, on 19th September 1992, to Telstra, when that name was not mentioned in that letter attached here at **(AS 560).** It is true that Alan was tendering to a number of bus companies during 1992, including Nuline Bus Services, Centre Road Bentleigh, Mooney Valley Bus Lines, Mooney Valley, Warrnambool Bus Lines, and O'Meara's Clayton Victoria (the name that had been hand-written in the corner of this letter). Alan had contacted all four companies for the same tender in an attempt to use one of their service to bring people from Melbourne to Cape Bridgewater but, since O'Meara was not mentioned anywhere in the letter it had been added to, it would seem that Telstra was actually voice monitoring Alan's phone calls or intercepting his faxes, or possibly his road mail as early as September 1992.

18th May 1994: Alan wrote to Dr Hughes, asking him to extend his claim preparation time to 15th June 1994 because of Telstra's delaying FOI tactics. Dr Hughes replied to Alan's request on 23rd May 1994, advising him that Telstra had agreed to an extension until 15th June 1994, further stating that Telstra's '…Mr Rumble has indicated that Telecom would be opposed to a further extension of time beyond 15 June 1994.' **(AS 81)**

25th May 1994: Graham Schorer writes to Dr Hughes noting

Due to circumstances and events beyond the direct and/or indirect control of Graham Schorer plus other related claimants, companies etc, I am formally applying for an extension of time on behalf of Graham Schorer, plus other related claimants, companies etc, pursuant to clause 7.1 in the "Fast Track" Arbitration Procedure …

The reason (sic) for this request are as follows:-

1. *A substantial burglary in Golden's premises on the 4 March, 1994 and the theft of vital equipment and records …*

1. …

a. *One of two word processors with its laser printer and back up disks containing Golden's sales quotas, customer agreements, facsimiles and all the correspondence facsimiles and most of the documentation relating to telephone service difficulties, problems and faults in relating to our present claim.'* **(AS 589)**

Please note

On the 4th March 1994, approximately one and a half hours after Golden Messenger's burglary, another COT claimants business, Dawson Pest Control, was also burgled. Mr Dawson later remarked that he found strange that the burglars only stole business records and Telstra related information. On the 11th October 1994, during Alan Smith's (taped) arbitration hearing he informed the arbitrator that the Cape Bridgewater Holiday Camp booking information and banking statements disappeared from his office. Telstra FOI documents provided to the Australian Federal Police in 1994, by Alan, confirmed that Telstra was able to document the dates when Alan would be in Melbourne away from his business. In one instance Telstra documented an intended Melbourne trip weeks before the intended trip.

11th July 1994: Steve Black writes to Warwick Smith

Telecom will also make available to the arbitrator a summarised list of information which is available, some of which may be relevant to the arbitration. This information will be available for the resource unit to peruse. If the resource unit forms the view that this information should be provided to the arbitrator, then Telecom would accede to this request.

The statement in Mr Black's letter *'if the resource unit forms the view that this information should be provided to the arbitrator'* confirms that both Warwick Smith and Mr Black were aware that the TIO-appointed Resource Unit Ferrier Hodgson Corporate Advisory (FHCA) had also been assigned to vet most if not all the arbitration procedural documents en route to Dr Hughes. In other words, if FHCA

decided that a particular document was not relevant to the arbitration process, it would not be passed on to Dr Hughes or other parties. **(AS 590)**

On page 5 of the Commercial Arbitration Act 1984, under Part 11 – Appointment of Arbitrators and Umpires - it clearly states:

(6) Presumption of single arbitrator

An arbitration agreement shall be taken to provide for the appointment of a single arbitrator unless –

(a) the agreement otherwise provides; or

(b) the parties otherwise agree in writing.

The Fast Track Arbitration Procedure FTAP (Agreement) signed by Graham and Alan, 21st April 1994, mentions only one arbitrator. There is likewise no written agreement in existence seen by Alan or Graham that allows a second arbitrator to determine what information the first arbitrator will see.

11th October 1994: When Alan was unable to comply with Telstra's interrogatories, Telstra asked the arbitrator to convene a hearing, which he did. Dr Hughes advised Alan that he should attend this hearing alone since Telstra's lawyers wouldn't be involved but, as the transcript of this five-hour, non-stop examination (FTAP rules prohibited cross-examination) shows, Telstra were actually represented by two officers who had some legal expertise: Steve Black and Ted Benjamin.

The transcript of this hearing also shows that Dr Hughes accepted Alan's claim material as factual and entered it into evidence. Claim document SM18 was highlighted at this hearing and discussed at great length. Other evidence inadvertently provided by Dr Hughes' secretary in August 1995 confirms that documents SM 18 & SM 19 do not appear on the list of documents that appear in the DMR and Lanes report as being assessed by the arbitration process (see *Alan Smith Relevant Information File,* exhibit 5, DMR & Lanes report).

15th November 1994: A letter faxed from Dr Hughes to Alan reads 'As I have indicated previously, I believe it would be inappropriate for me to order the production of documents in connection with the preparation of your claim until Telecom has submitted its defence. I will then understand the parameters of the claim' **(AS 118)**

21st November 1994: After sending his letter of 15th November but before Alan's reply had been drafted, Dr Hughes wrote to Alan again **(AS 120)** 'If I form the view, or if the Resource Unit forms the view, that there are relevant documents in the possession of either party which have been deliberately or inadvertently withheld, I shall make an appropriate order for production.'

After Alan's arbitration, he received a letter from Telstra under FOI. This letter, arbitration number L69364/5, confirms that Dr Hughes wrote to Telstra on 30 November 1994 **(AS 121)** stating

whilst I am prepared to grant an extension of time in the Smith arbitration, I am doing so in the hope that, in the spirit of co-operation, Telecom will use its best efforts to submit its defence in Garms and Valkobi on or before the same date.

If Telecom is able to submit all three defences on or about the same date, I shall prevail upon the claimants to submit their replies (if any) prior to Christmas. ...

I do not propose forwarding a copy of this letter to the claimants as I do not consider it appropriate for me to discuss any individual's claim with other Claimants.

How could the COT claimant Garms, Valkobi and Smith (Alan), successfully submit their replies (*if any*) by Christmas, when Dr Hughes knew that Telstra had still not supplied the documents they needed to support their claims?

27 November, 1994: Alan's frustration is clear from his response to Dr Hughes **(AS 119)**:

In paragraph three you have noted that, if newly released F.O.I. material is made available by Telecom, and if that makes it necessary for me to amend my claim, I should advise you accordingly.

I have continually corresponded with both yourself and Telecom about my concerns with regard to the conduct of Telecom Management; Simon Chalmers; Freehill, Hollingdale & Page and their delaying tactics. Their drip feeding procedure, where the release of these F.O.I. documents is some twelve months late, has disadvantaged me in the preparation of my submission under the Fast Track Arbitration Procedure.

Telecom Management, by using this destructive system, has disadvantaged C.O.T. and its members throughout this Arbitration Procedure. By not allowing all the evidence to be viewed by C.O.T., Telecom has stopped us from substantiating all our claims with all the available material. "A Jigsaw Puzzle Can Only Be Finished When All The Pieces Are Tabled": and didn't Telecom Management play this to a break!...

18th April 1995: A letter from John Rundell to Warwick Smith and copied to Peter Bartlett and Dr Hughes states 'It is unfortunate that there have been forces at work collectively beyond our reasonable control that have delayed us in undertaking our work' **(AS 160).** Alan was never told about these 'forces at work', nor were they ever warned that, under the noses of the arbitration administrator and his legal advisor Peter Bartlett, unnamed forces had been allowed to infiltrate and manipulate the arbitration process.

12th May 1995: This letter dated 12th May 1995 **(AS 561-a)**, declared that the rules used for Alan's arbitration's was not credible. Clearly though, whoever had access to Telstra's network, and therefore the TIO's office service lines, knew – during the designated appeal time of Alan's arbitration – that his arbitration had been conducted using a set of rules (the Arbitration Agreement) that the arbitrator had declared 'not credible'. There are three fax identification lines across the top of the second page of Dr Hughes' letter:

a) The third line down from the top of the page (i.e. the bottom line) shows that the document was first correctly faxed from Dr Hughes' office (Hunt & Hunt), on 12-5-95, at 2:41pm to the Melbourne office of the TIO – 61 3 277 8797;

b) The middle line indicates that it was faxed on the same day, exactly one hour later, at 15:41, from the TIO's correct fax number, followed by the words *"TIO LTD"* to *"SMITH (HOME)*;

c) The top line, however, begins with the words *"Fax from"*, followed by the correct fax number for the TIO's office, and then the date (12/05/95) and the time (14:50).

If we look specifically at the order of the time stamps of these three fax processes it can be seen that the top line relates to the second sending of the document, at 14:50, nine minutes after the fax from Hunt & Hunt (bottom line) so, between the TIO's office receiving the first fax, which was sent at 2.41pm (14:41) and sending it on at 15:41, exactly one hour later, to the TIO himself (Smith) at his home (middle line), someone else re-sent the fax at 14:50 (top line), nine minutes after it had been sent from Hunt & Hunt (Dr Hughes). In other words, the document sent nine minutes after Dr Hughes letter reached the TIO office, was intercepted.

Exhibit **(AS 561-b)** show that these four TIO documents were faxed on 12th May 1995, between 16:27 and 16:28, to the office of Telstra's Ted Benjamin were received with the correct TIO identification on all pages, further confirmation that selective fax interception was rife during the COT arbitrations. Alan has raised this issue because he has always insisted that the TIO's office breached their duty of care during his appeal period by not providing him with a copy of this letter from Dr Hughes, but this document now suggests that this fax might have originally been sent to Alan on 12th May 1995, but whoever intercepted it failed to redirect it on to his office, thereby cancelling any chance Alan might have had to use this most relevant document to appeal Dr Hughes' award.

8th January 1996: Alan wrote to Laurie James, President of the Institute of Arbitrators and Mediators Australia (IAMA) Mediators condemning the way Dr Hughes conducted his arbitration. **(AS 204)**

18th - 19th January 1996: Alan Smith raised a number of complaints with Laurie James, concerning the unethical way in which his arbitration had been conducted.

23rd January 1996: Dr Hughes wrote to John Pinnock the new (TIO) concerning a letter he had received from Laurie James, concerning the two letters written by Alan to Mr James on 18th and 19th January 1996, stating

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:

· the cost of responding to the allegations;

· the implications to the arbitration procedure if I make a full and frank disclosure off the facts to Mr James. **(AS 205)**

15th February 1996: Dr Hughes wrote to Mr Pinnock regarding a draft of a letter he is proposing to send to the Institute of Arbitrators in response to one of Alan's complaints. Dr Hughes' letter states: **(AS 206)**

I would appreciate your confirmation that there is nothing in the proposed letter which would embarrass your office or jeopardise the current arbitrations.

You may consider it appropriate for you to provide an independent letter of support. This is of course a matter for your discretion.

16th February 1996: Dr Hughes wrote a letter to Mr James that had many inaccuracies in it. The most important is on page 2, where Dr Hughes states that 'contrary to Mr Smith's assertion on page 3, his 24,000 (*sic*) documents were all viewed by me, Ferrier Hodgson Corporate Advisory, DMR Group Inc (Canada) and Lane Telecommunications.' **(AS 157)** (Note: the '(sic)' is Dr Hughes'.)

The FOI documents referred to by Dr Hughes in his letter to Mr James relate to Alan's original letter to Senator Evans (see **(AS 208)**) which was also copied to Laurie James. On page 4 of this letter Alan alerts Senator Evans to the 24,000 documents stating 'As a result of viewing the previously referred to 24,000 late FOI documents and sorting them into bound volumes it became apparent that there were still many areas I could not include in my written submission since I did not have enough technical knowledge.'

Page 3 in Alan's letter to Senator Evans Alan states

Telstra presented their defence on 12th December 1994. At this time I was still waiting for FOI documents to be supplied. Eleven days after Telstra presented their defence I was finally supplied with 24,000 plus documents. The first notification I had of these documents arriving was a phone call from Kendall Airways on 23rd December 1994, announcing that 72-74 Kilograms of documents, addressed to me, had arrived at the Portland Airport.

It is shown quite clearly that Dr Hughes' letter of 16th February, 1996 misled Laurie James concerning Alan's arbitration. There is no reference in this letter from Dr Hughes admitting that had already advised the TIO 12th May 1995 that the arbitration agreement was not credible.

7th May 1996: Mr Pinnock writes to Alan

If you have complaints about the conduct of your arbitration procedure, I suggest you seek legal advice on the availability of review or an appeal. ...

In your letter of 3 May 1996, you request that I ask Telstra why they chose not to defend allegations raised in your claim regarding your 008 service. As this matter was raised in your claim, it would have been considered by the Arbitrator, regardless of Telstra's failure to respond.

I advise that any further request by you for a review or investigation of (or comment on) the substantive issues in your completed arbitration will not be answered. **(AS 215)**

As shown in **(AS 213)**, Telstra waited until five months after Dr Hughes had deliberated on Alan's claim before attempting to address the 008 billing arbitration issues.

It is important to note, in that COT faxes, including those travelling between Graham Schorer (COT Spokesperson) and his lawyer, William Hunt, were being intercepted when the new arbitrator was being appointed, and this is supported by:

1. Alan Smith's two fax interception lever arch files (see the conclusion to this report);

2. The Scandrett & Associates report, particularly the sections discussing 7th and 18th January 1999;

3. Documents from between 25th March 1998 and 4th January 1999 (see Scandrett & Associates report).

A letter from William Hunt to Graham dated 10th February, 1999 states

We further advise that the telephone line to which the facsimile machine is connected namely 9670 6598 has been converted to FaxStream without any action by us or Godfrey and Godfrey with whom we share this facsimile and telephone line **(AS 521)**.

Exhibit **(AS 522-a)** contains material that proves that correspondence between Alan Smith and Graham Schorer with William Hunt was not exempt from interception.

A letter from William Hunt to Alan on 29th June 1998 states 'There are enclosed six sheets of paper which are the material received by fax from you this morning. I have numbered each of the pages at the bottom in ink and signed my name on the two blank pages' **(AS 552-b)**.

William Hunt supplied his fax journal proving that the two blank pages were part of the material received. Needless to say, even if Alan had included these blank documents mistakenly in his transmission, they would have recorded Alan's business identification **(AS 552-b)** shows these two pages were received blank).

Faxstream was an 'opt-in' service. Why did Telstra deem it necessary to put it in place on the fax service of parties that Telstra was involved in litigation with?

9th July 1998 a letter to Graham Schorer from John Wynack (Commonwealth Ombudsman Director of Investigations, and Chair of the Senate Estimates Committee Working Party) was faxed to Graham without the Commonwealth Ombudsman's proper identification. Instead of the correct identification, this fax records that it had been sent to Graham at *"15:01"* with the identification as *"Fax from: 61 6 249 7829"* which, although it is the correct number for the Commonwealth Ombudsman's office, it is not the correct fax identification **(AS 562)**

Exhibit **(AS 563),** on the other hand, is a letter faxed from John Wynack, on the following day – 10th July 1998 – to Telstra's John Armstrong at *"11:25"*. This letter, however, has the correct Commonwealth Ombudsman's identification, which states: *"from Com Ombudsman"* – clear proof that this fax was NOT intercepted – because, after all, why would Telstra need to intercept a fax addressed to themselves?

When Graham and Alan began to suspect that Telstra was still intercepting their faxes Alan started faxing all his in-confidence documents from his residence (03 5526 7265) or from the Holiday Camp phone line (03 5526 7267), instead of using the designated business fax line (03 5526 7230). Exhibit **(AS 563),** Alan's residence phone service account, for 03 55267265, confirms a fax sent to Graham's fax number (0392877001) at 01:28pm and records that it took 3.55 minutes to

transmit. Normal fax transmissions are recorded page by page at the receiving end, with the time that each page was received printed across the top of the page, but when a multi-page document has been intercepted the fax only records a single time for the entire, multi-page document. Each of the pages that Alan faxed to Graham on 1st December 1998, see **(AS 564):**

- Recorded the time that the first page left his fax machine, 12:27, but not individual transmission times for each page; and

- Showed that Alan's business identification *From/Cape/Bridge/Hday/Camp'*, had been replaced with the words: *"Fax from: 0355267230"*. (Alan's fax machine was one hour out as it had not been re-programmed to the one hour day-light saving).

It is important to note that when Alan's Panafax UF-123 facsimile machine was installed in March 1994, only Alan's business identification – CAPE BRIDGE HDAY CAMP appeared on the received faxes. A new Xerox facsimile machine installed at Alan's business in 1998 displayed the wording – CAPE/BRIDGE/CAMP – ID: 0355267230 on all the faxed documents received.

Important Comment Exhibit **(AS 563)** has no identification on this Telstra account advising Alan, that his private phone line 55 267265 had been connected to Telstra's FaxStream service

16th July 1998: Wally Rothwell writes to Alan 'I further outlined your concerns about fax pages which you considered did not reach the arbitrator. … With regard to the 1800 and Gold Phone matters, I have received information from Mr Bartlett and have asked Dr Hughes about his consideration of the matters during arbitration' **(AS 251)**

It is important to note: Alan has never seen the 'information from Mr Bartlett'.

24th July 1998: Alan writes to Wally Rothwell regarding lost faxes during Alan's arbitration

Another chronological list of faxes which have been lost in transit to Dr Hughes is enclosed. The pieces of the puzzle are beginning to fit together now that it appears that neither the Arbitrator nor the resource team actually saw all the claim documents I believed I had submitted and which I intended Telstra to address in their defence of my claims. **(AS 252)**

Alan has attached three testaments from business associates who have documented the type of phone and fax problems they experienced since Alan's arbitration **(AS 253, AS 254** and **AS 256-A)**

Attached also is a letter dated 31st December 2005, from Linda Johnson, Alan and Cathy's resident caretaker at the Holiday Camp from 1997 to 2000. Linda has documented the problems she and her husband experienced with the phone service during this three year period see **(AS 256-B)**

30th July 1998: Alan writes to Wally Rothwell regarding lost faxes during Alan's arbitration

A copy is now attached of a four page letter dated 25/5/95 to Sue Hodgkinson of Ferrier Hodgson Corporate Advisory (FHCA) is now attached. Please note that the pages are clearly numbered 1 to 4. The alarming thing about this letter is that it seems that only 1¼ of the original pages reached the Arbitrators office. Further, and even more alarming, the page marked "extended page 3.1" was not part of my claim at all. Not only is the identification information from my fax missing from these documents, including the date and time sent, but there is no identification for the third page either.

As a matter of natural justice, the TIO's office should demand an answer from both Telstra and the Arbitrator: they should be required to explain where the remaining 2¼ pages of the fax to Sue Hodgkinson went and, even more importantly, who the page marked "extended page 3.1" actually belongs to'. **(AS 502)**

PLEASE NOTE: The business identification had been removed from this second COT claim document *("extended page 3.1"*), possibly by the *'forces at work'* (see below), which means that the arbitrator could not possibly determine whose claim it actually belonged to. This is just one of many examples of proof that not all the COT claimants' documents (in this instance, both Alan's and this other unfortunate COT claimant) were assessed according to the agreed arbitration process.

Amazing as this Sue Hodkinson 1¼ page document is, that when Alan faxed a copy of this 30th July 1998, letter to Graham Schorer at 14:49 on 29th December 1998 from Alan's residence this letter was intercepted before arriving at Graham's office resulting in Alan's business identification Cape/Bridge/Hday/Camp being removed from the top of each page and replaced with the wording – *Fax from 055 267230* **(AS 502)**

25th August 1998: Mr Pinnock writes to Alan noting

The only issues that I am considering, as the former Administrator of your arbitration, are the alleged overcharging for your 1800 service and matters pertaining to your Gold Phone service, and whether they were considered in the final award. **(AS 257)**

4th November 1998: Wally Rothwell writes to Mr Peter Bartlett

In light of Dr Hughes' response, the Ombudsman has asked to seek your advice as to whether you would therefore be of the opinion that both matters were, for all intents and purposes, addressed in the arbitration. **(AS 259)**

On 28th April 1995 Peter Bartlett drafted a letter to Warwick Smith pressuring him to write to Dr Hughes, before he left for a two week trip to Greece, 'It would be unacceptable to contemplate the delivery of the Award being delayed until after your return.'

On 30th April 1995, DMR & Lanes presented the draft of their arbitration technical report to Dr Hughes, noting that the report was still incomplete stating the report needed extra weeks to investigate the billing faults raised in Mr Smith's claim. The extra weeks needed to complete this report, was denied, even though Alan's billing claim documents showed that the phone problems were still occurring.

The draft of the technical report was then altered and Dr Hughes presented it as the final and complete report, still dated 30th April 1995.

How this equates to all matters being 'addressed in the arbitration' is not known

26th May 1999: Mr Pinnock writes to Alan stating

I refer to numerous letters addressed to the Chairman of the TIO Council, the Hon Tony Staley, and which I have forwarded to him. The Chairman has asked me to advise you that Council will discuss the matters raised in your letters at its next meeting scheduled for 21 June 1999' **(AS 264)**

Alan is yet to receive details the outcome of that meeting.

12th April 1994: Dr Hughes writes to Peter Bartlett noting

Further in relation to clause 25, and 26, both Ferrier Hodgson Corporate Advisory and DMR Inc are concerned about their potential liability'

…and on page 2 last paragraph notes:

I appreciate that one claimant has already executed the agreement in its current form. The others will no doubt be pressed to do likewise over the next few days. I further appreciate you will be reluctant to introduce additional changes to the draft procedure at this delicate stage of negotiations but it is of course also fundamental that account be taken of the concerns raised by members of the Resource Unit. Perhaps the agreement should be executed in its current form and then agreement sought from the parties to vary the terms to take account any proposals by Ferrier Hodgson or DMR which you agree are reasonable **(AS 333)**

Question

How can the agreement (only be a draft) when COT claimant Maureen Gillan, had already executed the agreement on 8th April 1994, and her advisor Amanda Davis was preparing Ms Gillan's claim?

19th April 1994: Dr Hughes' secretary, Caroline Friend, faxed two documents to William Hunt and Alan Goldberg, QC. It is clear from the fax imprint on these documents that they were faxed between 1:20 and 2:00 pm on 19th April 1994. Each fax included an unsigned copy of the arbitration agreement (*Graham Schorer Exhibit 2 – CAV Relevant Information* file and exhibits **(GS 186-a)** and **(GS 186-b)**). Ms Friend sent the faxes from her office after Graham Schorer had asked his solicitor, William Hunt, for advice in relation to signing the arbitration agreement that had been drawn up by Frank Shelton of Minter Ellison and Mr Hunt then contacted Dr Hughes' office and asked Ms Friend to send one copy to Mr Goldberg and one to Mr Hunt, for assessment.

20th April 1994: Graham Schorer and Alan met with William Hunt to discuss the FTAP agreement and whether the DMR (Australia) and FHCA liability caps of $250,000 were sufficient given the size of the claims. They believed that the Special Counsel, as the legal adviser to the process, would have no liability cap.

Covert Alterations to the Agreement

21st April 1994: Graham Schorer and Alan met Peter Bartlett (the TIO's Legal Counsel) in the Minter Ellison offices and were told by Mr Bartlett that the TIO would withdraw from administering the already-signed Fast Track Settlement Proposal if Graham and Alan did not sign the arbitration agreement by close of business that day. If Peter Bartlett had provided Graham and Alan with a copy of the altered agreement early in the day, before they were presented with it for signing, and allowed them to take it away for relaxed discussion between themselves, a comparison between the altered version and the version faxed to Mr Goldberg and Mr Hunt would have uncovered the secret alterations. As it was, they had no opportunity to discover that the agreement they were pressured to sign was not the agreement that Dr Hughes' secretary had faxed to Mr Goldberg and Mr Hunt thirty-six hours earlier.

The following three clauses are included on page 12 of the version of the agreement received from Dr Hughes' secretary:

[Clause 24] Neither the Administrator nor the Arbitrator shall be liable to any party for any act or omission in connection with any arbitration conducted under these Rules save that the Arbitrator (but not the Administrator) shall be liable for any conscious or deliberate wrongdoing on the Arbitrator's own part.

[Clause 25] The liability of Ferrier Hodgson and the partners and employees of Ferrier Hodgson for any act or omission in connection with any arbitration conducted under these rules (other than in relation to a breach of their confidentiality obligations) shall be limited to $250,000 jointly.

[Clause 26] The liability of DMR Group Australia Pty Ltd and the directors and employees of DMR Group Australia Pty Ltd for any act or omission in connection with any arbitration conducted under these rules, other than in relation to a breach of their confidentiality obligations) shall be limited to $250,000 jointly.

In the agreement that was presented to the COT claimants to sign, the liability clauses 25 and 26 had been removed and Clause 24 had been amended. The final version of Clause 24 reads (in part) 'Neither the Administrator, the Arbitrator, the Special Counsel, a partner or employee of the legal firm of which the Special Counsel is a partner, a member of the Resources Unit, Ferrier Hodgson or a partner or employee of Ferrier Hodgson, DMR Group Australia Pty. Ltd. shall be liable to any party' This resulted in Clause 24 having quite a different meaning to that presented by the original three separate clauses (24, 25 and 26). It protected Peter Bartlett and Minter Ellison from any risk of being sued for misconduct associated with their role as legal advisors to the process.

Consider that

(a) Graham Schorer sought a legal opinion from Mr Goldberg (through Mr Hunt, and at the 'eleventh hour' on 19th April 1994) regarding what the COT claimants had been led to believe was the final version of the Arbitration agreement. This meant that the COT claimants' legal opinion was provided on a document that was later secretly altered.

(b) On the day Graham Schorer and Alan Smith signed the FTAP in the Special Counsel's office (21st April 1994), no reference was made to the alterations, either by Mr Bartlett or anyone else, but the claimants were told that they had to sign the agreement before close of business that day because Mr Bartlett's instructions were that the TIO would not administer even the already-signed Fast Track Settlement Proposal if the FTAP was not signed by then.

(c) On 19th April 1994, when Mr Goldberg and Mr Hunt were assessing the unaltered version of the agreement, not only could they not have known that alterations would be made AFTER they had completed their assessment, neither did they know that another clause 10.2.2 had already been changed by the removal of the words 'each of the Claimants claims' because neither Graham Schorer nor Alan Smith knew of this change either

When Graham and Alan were pressured into signing the arbitration agreement on 21st April 1994, they believed it was the agreement that was faxed to Mr Goldberg and Mr Hunt.

13th December 1995: This letter from Lawyer Partners, Barrister & Solicitors to Alan note:

We refer to the above matter and our discussions of the events and circumstances surrounding your claim against Telstra. We have had the opportunity to carefully consider and evaluate the information you have provided to us in relation to the "fast track arbitration process" (FTAP) in which you were recently involved.

From the extensive discussions we have had with you and the correspondence and documentation we have had the benefit of considering it would appear that the FTAP failed to meet its objectives of being a non legalistic, unbiased, speedy and cost effective form of resolving your dispute with Telstra.

Overall however, we are of the opinion that the FTAP was fundamentally flawed given its objectives. The actions of Telstra and other key figures in the process were to say the least, against the spirit of the FTAP. In short we believe it would be possible to set aside the arbitrator's decision on the basis of failure of natural justice during the course of the FTAP **(AS 555)**

It was during October, 1995 when Alan discovered that the liability clauses were apparently missing from the agreement he had signed. This was when Law Partners, suggested that, since these clauses could have been annexed as a separate document, he should apply to the Telecommunication Industry Ombudsman (TIO) for access to all his arbitration material, in order to find out where that separate document might be.

From December 1995 to December 1996, John Pinnock (TIO) continued to refuse to supply Alan any arbitration documents held by the TIO office.

10th January 1997: Mr Pinnock wrote to Alan noting:

I refer to your letter of 31 December 1996 in which you seek to access to various correspondence held by the TIO concerning the Fast Track Arbitration Procedure…

I do not propose to provide you with copies of any documents held by this office' **(AS 556-a)**

This letter from Mr Pinnock however didn't mention that the arbitrator chose to base his findings for the award on the anecdotal, historic, fault complaints that Alan submitted to the arbitration, rather than investigating, any of the ongoing telephone problems that were also raised in Alan's claim.

2nd June 1999: John Pinnock writes to the Hon Tony Staley, Chairman of the TIO Council, regarding the pending Brian Purton-Smith Arbitration process stating 'In part my position has hardened because of the many problems and deficiencies in the Arbitration process.' **(AS 266)**

Mr Pinnock didn't tell Mr Staley, however, that thirty-six hours before Graham Schorer and Alan Smith signed the Telstra-established arbitration agreement, two very important clauses were removed without Graham and Alan's knowledge and then, also without their knowledge, the clauses were later put back into the agreement for the remaining twelve COT claimants to sign. Mr Pinnock was, though, completely correct in his assessment that the process had 'many problems and deficiencies.'

Arbitration Submission

30th March 1994:

The report by Sue Hodgkinson of FHCA, to Warwick Smith, TIO, confirms that Warwick Smith and his Resource Unit were fully aware Alan didn't receive the bulk of his requested FOI documents until two weeks after Telstra had submitted their defence. In this letter **(AS 103)**, Ms Hodgkinson states

Alan Smith ... has included volumes of documents and the direct relevance of all this information is difficult to ascertain. Nonetheless, Smith has gone to a lot of trouble to assemble his FOI information which, as you may be aware, was not provided in full by Telecom until 23rd December 1994. ...

- Smith's claim was formally certified as complete in November 1994.
- On 13 December 1994, Telecom delivered its defence to the Arbitrator.
- Smith has stated to me verbally that, on 23 December 1994, he received 90 kilograms of FOI material. As his claim was 'finalised', he did not have the ability to examine these documents and add to his claim.

Principal Submission

- Most of the allegations are unsubstantiated and many are not verified by statutory declaration.

With regard to Ms Hodgkinson's difficulty understanding the relevance of the material Alan submitted, these were highly technical documents he was dealing with, and they had been presented to him, by Telstra, in apparently unrelated batches, some of them not even arriving until long after he had submitted his claim. Ms Hodgkinson's second contention that Alan's claim was certified as complete in November 1994 is correct, according to the resource unit. This means that the attachments Alan later forwarded to Dr Hughes were never addressed.

The last point made here by Ms Hodgkinson, regarding the weight of the documents delivered to Alan on 23rd December 1994, is also correct: Alan was aware of the weight because they were delivered to him by air-freight.

Alan recalls that he asked Ms Hodgkinson how the arbitrator could expect any claimant to look through all this information in the eleven days he had left to reply to Telstra's defence of his claim. Part of Alan's assessment process would have had to include revision of documents that had been provided, as previously noted, in separate batches, and which had been delivered in February, May, July, August, September and November 1994. Furthermore, these documents often contradicted each other, as the following example illustrates.

Telstra stated, in their B004 defence report, on page 25, that a lightning strike on 21/11/92 damaged RCM equipment, and that the fault lasted four days **(AS 149)**.

DMR and Lanes' Technical Evaluation Report **(AS 150)** agrees with this, on page 23 when, under the heading: *RCM 1 Failure due to lightning strike 21st November 1992. Affected Service for Four Days* point 2.8 states

A lighting strike on 21st November damaged the Cape Bridgewater RCM equipment: Telecom received 22 customer complaints from CB customers for No dial tone, No ring received, noisy. No complaint was identified from CBHC, however RCM 1 was affected and this was the unit CBHC services were on. The condition affected for 4 days, before restorative action was taken, which may have been less than successful

After Alan had lodged his interim letter of claim, he received Telstra FOI document K01173, confirms that, contrary to the two reports above, he DID report this fault. K01173 is dated 9th February 1993, and states

I contacted Don Bloomfield (Portland Customer ops) to discuss Alan Smith's problems. It is his opinion, and this is supported by data retrieved from ops, that there were problems in the RCM caused by a Lightning strike to a bearer in late November. These problems (damaged PCB's etc) appeared to be resolved by late January **(AS 151)**.

On page 33 in the arbitrator's award Dr Hughes goes one step further by stating that 'damage was caused to Cape Bridgewater RCM equipment by a lightning strike on 21 November 1992, resulting in a variety of complaints which affected services for 4 days before restorative action was taken. The restorative action "may have been less than successful".' **(AS 152)**

Clearly, Telstra provided incorrect information which not only affected the arbitrator's decision, but also swayed the technical resource unit into believing that a long-standing problem only existed for four days, instead of sixty or more days.

In Dr Hughes' award he downplayed of many of the faults that affected Alan's business due to the incorrect information supplied by Telstra in their defence. In the DMR & Lane findings it is noted at point 2.23: 'Calls Directed to RVA, March 1992', Mr Read only uses Telstra's defence figures. If he had read the AUSTEL information, or my fault material, Mr Read would have seen that this fault lasted for eight months and not the sixteen days he reported.

Some of the information supporting this MELU fault is attached at Exhibits **(AS 12)** and **(AS 13)**. However, it is important to also attach page 21 of the DMR & Lanes findings as shown in their report which states that this MELU fault lasted 'for at least 16 days and possibly longer' **(AS 153)**. On page 32 of the arbitrators Award he also acknowledges this fault lasted for 16 days and possibly longer **(AS 154)**.

Exhibit **(AS 16)** is an AUSTEL FOI document 95/0603-01 number 75 a Telstra internal Minute that states 'It is my understanding of the sequence of events:- Aug '91 - Cutover from RAX to RCM When? – approx 7/8 mths 50% maximum' and a hand written document which states 'SERVICE DIFFICULTIES . . . Cutover to RCM when? - Likely length of MELU problem.'

In Telstra's arbitration defence and in the DMR & Lanes report they acknowledge this MELU RVA (a recorded message saying the number called is not connected) was fixed on the 16th March 1992. The cutover from the old RAX to the RCM was in August 1991. Therefore the fault had lasted between 7 and 8 months – much longer than the recorded 16 days.

It was this kind of problem, and the disadvantages that came with it, that Alan tried to explain to Ms Hodgkinson.

The downplaying of the MELU fault could have been avoided as this information was submitted in Alan's claim. Unfortunately for Alan, during the FHCA vetting process they decided that this part of Alan's submission to DMR & Lanes (see the two varying lists of documents provided in **(AS 26)**, was irrelevant to Alan's overall claim. It has also been acknowledge by Telstra that in 1991 and 1992, 33% - 50% of all Metro calls to Cape Bridgewater during this period would have gone via the MELU route.

Important

When Ms Hodgkinson referred to Alan's claims at dot points 4, 5 and 6 on page 2 of her report under the heading Principal Submission:

- most of the allegations are unsubstantiated and many not verified by statutory declaration,
- Smith has relied upon records kept in his diaries as his primary record of complaints,
- The magnitude of faults complaints reported is unsubstantiated and appears overstated,

Ms Hodgkinson was, entirely incorrect because, in March 1994 (see above), before Alan signed the arbitration agreement, AUSTEL prepared their **covert** Cape Bridgewater Holiday Camp draft Report which substantiated Alan's claims against Telstra. Unfortunately, AUSTEL then chose to provide a copy of that draft report to the defendants (Telstra) but not to anyone else involved in the arbitration process, not even the arbitrator. AUSTEL's decision to conceal their adverse findings against Telstra and their validation of Alan's claims confirms just how undemocratic the COT arbitration process was. Could it be that the concealment of these findings against Telstra was connected to the number of ex-Telstra executives who were holding senior positions with AUSTEL during Alan's arbitration?

5th May 1995: Dr Hughes wrote to Alan

I refer to your telephone message of 4th May and your facsimiles of 4 and 5 May 1995 and advise I do not consider grounds exist for the introduction of new evidence or the convening of a hearing at this stage' and reiterated his previous instructions that 'any comments regarding the factual content of the Resource Unit reports must be received … by 5:00pm on Tuesday 9 May 1995. **(AS 171)**

Alan telephoned and faxed Dr Hughes in a vain attempt to submit a report compiled from some 24,000 FOI documents that Telstra had been delinquent in supplying.

Although Dr Hughes' refused to accept and review this late submission, his letter of 16th February 1996 **(AS 503)** Dr Hughes wrote to Laurie James, President of the Institute of Arbitrators Australian stating that '[Alan's] 24,000 *(sic)* documents were all viewed by me, Ferrier Hodgson Corporate Advisory and Lane Telecommunications Pty Ltd in accordance with the arbitration procedure.'

Although Dr Hughes makes the above claim of reading 24,000 documents, he had previously stated in Alan's 11th May 1995 award at point 2.2 **(AS 504)** 'In all, I have read in excess of 5,000 pages of documentary evidence submitted by the parties.'

DMR & Lane report **(AS 505)** states on page three that 'More than 4,000 pages of documentation have been presented by both parties and examined by us.'

It is not clear how over 24 000 (the amount arrived at by counting the final not accepted submission based on 24 000 documents plus earlier submissions), 'excess of 5,000' and 'more than 4,000' could refer to the same quantity of documents.

Despite Dr Hughes being alerted by Alan that Telstra was denying him access to relevant documents, as well as receiving advice on 18th April 1995 from Ferrier Hodgson Corporate Advisory **(AS 506)** that 'It is unfortunate that there have been forces at work collectively beyond our reasonable control that have delayed us in undertaking our work,' he was still prepared to deceive the Institute of Arbitrators Australia regarding the documents supposedly reviewed.

7th August 1995: John Pinnock writes to Alan regarding the impracticable BCI tests

You have also complained that on 26 May 1995 you received further FOI documents from Telstra which you state, would have assisted your claim significantly. …

As administrator of the FTAP, I have a duty to ensure the integrity of the procedure. Your complaints go to this issue, and accordingly, I would be pleased if you would provide me with:

· all documents supplied to you by Telstra on or after 26 May 1995 together with covering letters, schedules or annexures which may identify those documents.' **(AS 187)**

It has been established in numerous documents that Alan did provide Mr Pinnock a comprehensive list of all the relevant information Telstra supplied to him after his arbitration.

26th May 1999: Mr Pinnock writes to Alan stating

I refer to numerous letters addressed to the Chairman of the TIO Council, the Hon Tony Staley, and which I have forwarded to him. The Chairman has asked me to advise you that Council will discuss the matters raised in your letters at its next meeting scheduled for 21 June 1999. **(AS 264)**

Alan has never received a response to the outcome of that meeting.

Claim documents

The first part of Alan's claim was lodged with Dr Hughes on 15th June 1994. Paul Rumble, of Telstra's Customer Response Unit and Graham Schorer, COT spokesperson, were also at that meeting. At the time, Alan made it very clear to Dr Hughes & Mr Rumble that:

1. The FOI documents Telstra had supplied had not been supplied with the requited schedule FOI numbing system;

2. It had been extremely difficult to submit a complete claim when Telstra had provided so much documentation without schedules and heavily censored;

3. Because of these problems Alan would therefore be submitting further documents to support his original claim submission; and

4. George Close, Alan's technical advisor, had not yet received the relevant technical data Alan had requested under FOI and so his report would be somewhat delayed.

The Arbitration Agreement states quite clearly that the arbitrator should pass the claim on to Telstra when the claim was complete and allow Telstra one month to complete their defence. George Close was not able to submit his report until late in August 1994, but a letter from Dr Hughes to Mr Rumble on 22nd June shows that Dr Hughes had sent Alan's interim claim on to Telstra on 15th June. Since Alan's claim was not complete until George's report was submitted, this meant that Dr Hughes was arranging for Telstra to have at least two months, from first receiving Alan's interim claim, to present their defence. As it happened, Telstra did not submit their defence until 12th December 1994, almost six months after receiving Alan's interim claim.

Two relevant pages attached here confirm that FHCA noted that Alan's claim was not complete until November 1994 **(AS 103)**

What this FHCA letter doesn't address is that, due to Telstra periodically withholding FOI documents from him, Alan continually presented new claim material to Dr Hughes, but this material was never assessed.

George Close was forced to use the AUSTEL COT Report findings during Alan's arbitration because Telstra was not supplying the documents that had been requested under FOI, which meant that Mr Close's technical findings were based on flawed information. Letters dated 16th and 25th August 1994 (see *Obtaining Information*) confirm that, on Alan's behalf, Mr Close asked the arbitrator, under the arbitration agreement discovery process, to seek from Telstra all the relevant BCI information Telstra had used to arrive at their findings.

Telstra's Defence Documents

Telstra's 12th December 1994 defence document B004 included numerous inaccuracies and misleading witness statements. The flawed defence documents have been discussed previously, but it is important to refer to a letter from Telstra to Dr Hughes on 23rd December 1994, which includes the statement: 'The purpose of this letter is to update you on the status of a voluntary review that Telecom had conducted of exemptions applied to documents referable to requests made by the above persons for access under the Freedom of Information Act.' (The names referred to were Smith, Garms and Gillen). This shows that, eleven days after Telstra submitted their defence they had still not provided Alan with all the relevant documents he needed to support his claim. This meant that Telstra therefore only had to defend what they wanted to defend, which were the documents that had already been vetted.

Page 26 (index) **(AS 122 - H)**

On **23rd June 1994**, Smith reported he received a call from Canberra. A minute after hanging up his phone he received one burst of ring. Few mins later Schorer rang from 287 7099. Said he had just called & received busy tone. Smith believes his phone takes up to 90 secs to release. ...

On **23rd 1994**, Smith reported that his 008 number service had long post dialling delays and the phone would give 1-2 bursts of ring after he finished a call.

Page 50 **(AS 122 - B)**

On 19th August 1994, Smith reported that the Australian Federal Police had been trying to call him from Canberra via his 008 number and got busy for 1 hour at approximately 11.10 am

These examples show very clearly that Telstra are defending faults which Alan registered AFTER he had submitted his letter of claim. How could the arbitrator arrive at an accurate compensation figure when it was obvious that the faults were still on going?

IMPORTANT

Please note: the statement made by Telstra on 23rd June 1994 **(AS 122 H)** regarding a post dialling complaint which Alan had just registered regarding ongoing problems he had been experiencing with his 008/1800 service since 1993. The following exhibits attached here as **(AS 122 - C) (AS 122 – D)** and **(AS 122 - E)** are three Telstra FOI documents that confirm Telstra was aware in October and November 1993, that this post dialling delay 008/1800 fault was a national RVA problem, see also exhibits **(AS 35, AS 36,** and **AS 37).** Also attached here as exhibit **(AS 122 – F)** is a letter from AUSTEL to Telstra's Steve Black dated 27th January 1994, alerting him to the same type of 008 short duration calls Alan's customers complained about, citing a statutory declaration provided to AUSTEL by Ms Tina Velthuyzen, declaring having heard repeatedly a recorded message when ringing my 008 number that *'the number you are calling is not connected'* (see Ms Velthuyzen's sworn testament attached to exhibit **(AS 39). (AS 122 -G)** is a Telstra internal letter dated 25 November 1993, with the subject – *Short Duration Calls- Mr A Smith*. This letter states 'The following is an assessment of the individual disputes highlighted by Mr Smith. From the information given, little more can be offered for explanation than 'This is not the way it should work, we need to investigate to find the cause.'

When Frank Blount, Telstra's CEO, left Telstra in 1996 he co- published a manuscript entitled, *Managing in Australia*. On pages 132 and 133 from this manuscript the problems that Telstra was hiding from their 1-800 customers are exposed:

A young woman arrived in his office whom Blount learned was a bright MBA graduate with responsibility for the 1-800 product. Blount recalls the conversation

Blount: I want to talk about the 1-800 service.' Staff: Yes sir' Blount: There are some issues that have arisen on the product management side, specifically maintenance of the product, fixing some problems with it how it is billed.' Staff: 'I know the type of things you are talking about sir, because we studied product management in school, but strictly speaking, my job was to launch the product. I have no way of knowing how it performs once it has been launched.

Blount was shocked, but his anxiety level continued to rise when he discovered this wasn't an isolated problem. The picture that emerged made it clear that performance was sub-standard **(AS 122–i)**

Resource Unit

4th October 1994: AUSTEL's Bruce Matthews wrote to Steve Black, regarding the discrepancies on Alan's 008 service line and the on average, 11% incorrect charging on his facsimile 267230 line. (**AS 126)**

11th November 1994: Ted Benjamin responds to Bruce Matthews' letter

Each of the questions put by you in your letter 4 October 1994 will be answered as part of Telecom's defence to Mr Smith's claims lodged under the Fast Track Arbitration Procedure. **(AS 127)**

1st December 1994: Bruce Matthews to Ted Benjamin regarding *A Smith 008 faults*:

I note that your letter states that "Each of the questions put by you in your letter of 4 October 1994, will be addressed as part of Telecom's to Mr Smith's claim lodged under the Fast Track Arbitration Procedure. **(AS 128)**

16th December 1994: Ted Benjamin to Dr Hughes regarding *FTAP – Smith*. Accompanying this letter Mr Benjamin attaches the aforementioned letters (**AS 126, AS 127,** and **AS 128**). In this letter Mr Benjamin states

The question has also been raised of whether discussions between yourself and Austel on the content of the claim and defence in Mr Smith's arbitration might itself breach the confidentiality rules of the Fast Track Arbitration Procedure.

The simplest way forward may be for Mr Smith and Telecom and yourself to all confirm in writing that this information can be provided to Austel if this meets with your approval. **(AS 129)**

Clause 6 of the Arbitration Agreement states 'A copy of all documents and correspondence forwarded by a party to the Arbitrator shall be forwarded by the Arbitrator to the Special Counsel and the other party' **(AS 130)**.

Please note: Sue Hodgkinson, FHCA, wrote to Dr Hughes on the 2nd August, 1996, fifteen months after Alan's arbitration, admitting to withholding the aforementioned four letters (see below (**AS 220).**

24th March 1995: This letter from Alan to Dr Hughes states:

I have included a six testaments from various Social Club patrons dated from 22nd March 1991 to 13th April 1994 confirming that not only have we been catering for schools at the lower end of the market where the tariff is much lower we have created a venue where our facilities provided for Social Clubs and large family groups where our profit margin is three-fold comparable to the rates charged for schools. While this was conveyed by me during the time Ms Sue Hodgkinson was at the Holiday Camp I did provide the attached material to support this matter although, there are many references in my letter of claim and supporting documents confirming we are a convention as well as a school camp **(AS 583)**

4th May, 1995: Alan faxed Dr Hughes, advising him that the FHCA had not taken into account a similar type business (that had a reliable phone and fax service) Camp Rumbug which he had previously helped set up in Foster in South Gippsland, Victoria. **(AS 172)**

In this fax Alan also asked Dr Hughes to look at the late evidence he had provided to Sue Hodgkinson. This evidence confirmed that the operators of six other Camps had written to Cathy and him in support of their view that booking two different groups into a camp at the same time was a good way to create more revenue and would also encourage group bookings in the future. Dr Hughes' response **(AS 171)** shows that he would not accept this and labelled it as 'new' evidence. Alan raised the same issues again in a second letter faxed to Dr Hughes on 5th May 1995, but to no avail **(AS 173)**. Pages 100 to 102 from the hearing held on 11th October 1994 confirm that Alan had attempted to submit similar evidence, eight months earlier, but this was also to no avail. The transcripts of the hearing **(AS 174)** confirm the sensitivity of the information Alan was attempting to submit.

The refusal of the submission of material at the hearing surprised Alan, as it was contrary to advice that Dr Hughes had earlier provided. The attached phone/fax account for 4th October 1994 **(AS 175)** shows that Alan phoned Dr Hughes' office at 5:06 pm and spoke for 5 minutes and 11 seconds. As Alan remembers, he made this phone call to discuss Telstra's reluctance to provide FOI documents and to request a meeting to discuss the matter further **(AS 100)**. Alan also believe that he had detailed his reasons for not submitting the list of names and addresses of the proposed singles club patrons with his letter of claim, because of the sensitivity of the private information. Alan believes Dr Hughes would remember this conversation as it was his suggestion that Alan bring the singles club material to the hearing for discussion. These documents, including the contact information for the prospective singles club patrons, were relevant to Alan's claim because they showed the kind of business clientele Alan was losing and proved that it was not only the school market that Alan was missing out on because of the continuing phone problems.

FHCA only looked at the school booking rate per head when valuing the lost camp bookings. However, a multiple group student price per two night stay during 1993/94 with all meals provided cost approximately $50 per person. A single club patron for a two night stay during the same period cost approximately $140.00 to $160.00 per person (see also **AS 583**)

9th May 1995: DMR Corporate lodged their response to the FHCA financial report. Alan's accountant, Derek Ryan, of DMR Corporate, received the FHCA report on the 5th May 1995 and by the 9th May duly presented the report to Dr Hughes' office. Mr Ryan made it very clear that, in his professional opinion, the FHCA financial report was factually incomplete and this made it impossible for him to address the way FHCA had arrived at their findings.

Derek Ryan was so incensed with the FHCA report that, without Alan's knowledge, he wrote to the then Shadow Minister for Communications, Senator Richard Alston, on the 6th December 1995, to alert him to what Mr Ryan believed was a miscarriage of justice. In this letter, Mr Ryan noted that

The FHCA report was inaccurate and incomplete. I have since been advised by a staff member of FHCA that a large amount of information was excluded from their final report at the request of the arbitrator. This has left the report in an incomplete state and it is impossible for anyone to recalculate how FHCA loss figures were determined**' (AS 177a)**.

20th December 1995: John Pinnock wrote to Derek Ryan

In that letter you state, among other things, that

I have since been advised by a staff member of FHCA that a large amount of information was excluded in their final report at the request of the arbitrator.'

I have been informed by Ferrier Hodgson Corporate Advisory that it is not in fact the case that a large amount of information, or indeed any information, was excluded from the Resource Unit's report at the request of the Arbitrator. **(AS 177-b**

22nd December 1995: Derek Ryan responds to Mr Pinnock's letter

On May 8th 1995 I telephoned FHCA and spoke to John Rundell and requested a meeting to discuss how the FHCA loss figures were determined. He was reluctant to talk to me at the time however we set a tentative date of 17th May 1995 for us to discuss this matter again.

My response to the FHCA report was lodged on 9th May 1995.

On 17th May, I telephoned John Rundell and he stated that he was unable to discuss anything with me until the appeal period had expired. During the telephone conversation, I told him I was unable to recalculate the FHCA figures and that the report was deficient in this regard. He then stated that he understood my problems and that FHCA had excluded a large amount of information from their final report at the request of the arbitrator **(AS 178-B)**

Please note: Although Alan has the full 39 page letter referred to above from Derek Ryan, dated 9th May 1995, to Dr Hughes, only the first and final pages have been attached due to the lengthy nature of the document (see exhibit **(AS 178-A)**).

Among documents received in 2001/2 from the TIO's office was a copy of a letter dated 13th February 1996, from John Rundell of FHCA to Mr Pinnock, which admits that Mr Rundell's financial report was incomplete. This letter states 'I did advise Mr Ryan that the final report did not cover all material and working notes.' In the same letter, Mr Rundell all but accuses Alan of causing criminal damage to his personal property and notes that the Brighton CID were intending to interview Alan. When Alan found this comment, he contacted the Brighton CIB and was told that they had never intended to interview him regarding this matter and, in fact, they had no record of Alan at all. **(AS 179)**

26th June 1996: Alan pens another letter of disgust to Mr Pinnock

I find it very sad to be in possession of so many FOI documents which support my allegations that many, many copies of internal correspondence I forwarded to Dr Hughes during the FTAP were never seen by the Resource Unit or Telstra.

It is equally sad that copies of Telstra letters, which were also part of the FTAP, were not forwarded to me.

When this letter was later returned from the TIO, it also had a hand-written note stating

These are quite serious allegations, we need to respond to specific letters Smith says weren't forwarded or received and provide answers on each. **(AS 217)**

2nd August 1996: Sue Hodgkinson knowingly misinforms Dr Hughes when she states

I refer to your letter dated 31 July 1996 (received 1 August 1996) concerning Mr Smith's letter dated 25 June 1996. I have not received a copy of Mr Smith's letter however I have reviewed Matt Deeble's summary and provide the following information concerning Mr Smith's allegations: ...

At the time of the letter from AUSTEL, Mr Smith's telephone problems were being addressed in the Arbitration. Due to a number of factors including confidentiality, it was felt not appropriate to answer Austel's comments in detail, in particular the issue was under consideration in the Arbitration. As agreed, the Resource Unit did not respond to the Austel letter. **(AS 220)**.

Please note: Mr Deeble was a lawyer who was seconded from Minter Ellison to the TIO's office.

The first document referred to in this memorandum, dated the 16th December 1994, was addressed to Dr Hughes attaching three AUSTEL and Telstra related billing documents (see **(AS 129)**). This was to be another document not forwarded on to all parties as directed by Clause 6 of the arbitration agreement.

Please Note: Alan has NEVER received a response from John Pinnock as to why these

specific letters weren't forwarded to him according the transparency clause 6 in the agreement which clearly shows it was mandatory that Alan received this correspondence.

Could the covert alterations to clause 26 of the arbitration agreement which exonerated Ferrier Hodgson Corporate Advisory (the Resource Unit) from being sued for negligent acts such as withholding documents from the claimants have been part of the reason to why the Resource Unit couldn't be bothered sending Alan copies of these documents?

Arbitrator's Award

28th April 1995: Warwick Smith and Peter Bartlett produce a draft letter dated 28th April 1995, confirming that Warwick Smith and his Legal Counsel, Peter Bartlett, were prepared to pressure Dr Hughes to conclude Alan's award even though the 008/1800 billing issues were still weeks away from being assessed. This letter states

However, I understand you are to present a paper in Greece in mid May. I would expect that the Award would be delivered prior to your departure. It would be unacceptable to contemplate the delivery of the Award being delayed until after your return. **(AS 169)**

This letter further suggests Alan's continuing assertions that the arbitration was not a transparent process and that the arbitrator was not independent.

12th May 1995: Dr Hughes writes to Warwick Smith; Alan did not receive a copy of this letter from the TIO's office until 2001/2 **(AS 180)**.

Dr Hughes states 'as far as I could observe, both Telecom and Smith co-operated in the Smith arbitration.'

In the same letter, Dr Hughes made the following comments, which would benefit from being explained by the TIO's office

· 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; ...

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.

On receipt of this letter, as the administrator of the Arbitration Agreement, Warwick Smith should have abandoned the process and intervened to allow a review and give Alan more time to obtain further particulars, produce documents and prepare his technical report. John Rundell's letter to Mr Pinnock on 15th November 1995 **(AS 508)** regarding the inadequate time frame and how it affected the completion of the DMR & Lane technical report adds further weight to the allegation that the process was severely flawed.

In Dr Hughes' draft award (inadvertently provided by the TIO office in 2001) point 2.23 states: 'Although the time taken for completion of the arbitration may have been longer than initially anticipated, I hold neither party and no person responsible. Indeed, I consider the matter has

proceeded expeditiously in all the circumstances. Both parties have co-operated fully'. **(AS 115** and **AS 504)**

What has not been revealed to-date is who hand wrote the statement at the side column at point 2.23: *"…Do we really want to say this?* Please note: there is NO point 2.23 in the final award!

23rd October 1995: Portland Solicitors Bassett & Sharkey write to John Pinnock, stating that Alan was of the view that Telstra had used BCI test results that were known to be impracticable to support their arbitration defence of his claims and therefore required answers. **(AS 198)**

9th November 1995: Mr Pinnock responds to Bassett & Sharkey **(AS 202)** 'If Mr Smith feels the process was flawed or the Award tainted, he has legal avenues available to him.'

Post Arbitration

24th February 1997: Mr Pinnock writes to Alan 'Since the arbitrator delivered his award, you have written many letters to me asserting, variously, that the arbitrator, and/or the Resource Unit, erred in their duties under the Arbitration procedure' **(AS 225)**

27th May 1997: Mr Pinnock writes to Alan 'I refer to your latest correspondence and advise that it has been twelve (12) months since the arbitration of your claim for compensation as a Casualty of Telecom (Cot). My role as Administrator has ceased.' **(AS 229)**

18th June 1997: Telstra's Corporate Secretary, Mr Montalto writes to Alan

In those letters you made allegations as to Telstra's conduct in relation to a report prepared by Bell Canada International. I am advised that you raised these same allegations in your arbitration claim made against Telstra. I am advised further that you again raised these allegations with the Arbitrator after an award had been delivered and he referred those matters to the Telecommunication Industry Ombudsman. Telstra responded to the Ombudsman's queries in relation to this matter. **(AS 230)**

8th October 1997: The Hon Peter Costello notes

I am quite seriously concerned about the allegations you make regarding the Telecommunications Ombudsman, Telstra Senior Management, the Arbitrators and the Resource Unit attached to the Arbitration. Any information you have of allegations of impropriety should be brought to the attention of Senator Alston and the Australian Federal Police. **(AS 234)**

When Alan contacted the parties as suggested by Mr Costello, they all declined to become involved.

10th January 1997: John Pinnock writes to Alan Smith

I refer to your letter 31 December 1996 in which you seek to access to various correspondence held by the TIO concerning the fast Track Arbitration Procedure. The arbitration of your claim was completed when an award was made in your favour more than eighteen months ago and my role as Administrator is over.

I do not propose to provide you with copies of any documents held by this office. **(AS 203)**.

21st May 1998: John Pinnock writes to David Hawker, Federal Member for Wannon noting

As you may be aware, Mr Smith has written to this office on numerous occasions concerning aspects of his Arbitration which was completed in May 1995.

The vast majority of Mr Smith's complaints seek, in effect, to review the conduct of the Arbitrator, or the Resource Unit or both, as well as the Arbitrators Award. ...

Recently, Mr Smith has raised a question as to whether the Arbitrator's Award dealt with his complaint that he had been overcharged on his 008 (now 1800) freecall service. As this is a matter which I can properly consider, I have made preliminary enquiries of Telstra and have also sought advice from Mr Peter Bartlett, Special Counsel, Minter Ellison**. (AS 245)**

Mr Pinnock's statement is somewhat confusing since he told Mr Hawker on 28th March, 1996 that the faults were addressed in Alan's arbitration. Mr Pinnock concealed his own knowledge that FHCA had admitted on 15th November 1995 that DMR & Lanes didn't address the 008 billing problems and there was no further progress likely to be made on these matters: 'the formal version of the Technical Evaluation Report did not leave the billing issues 'open' **(AS 508).** This statement by FHCA on 15th November 1995 is also somewhat confusing because it does not match the statement in the DMR & Lane formal Technical Evaluation Report because at point 2.23 it states: 'Continued reports of 008 faults up to the present. As the level of disruption to overall CBHA (*Cape Bridgewater Holiday Camp*) service is not clear, and fault causes have not been diagnosed, a reasonable expectation is that these faults would remain "open" **(AS 509)**

While these two varying statements **(AS 508** and **AS 509)** are confusing enough, the statement in Telstra's arbitration defence regarding the same 008 billing issues note: ' 2.23 The Resource Unit refers to complaints relating to the Claimant's 008 service. Although the Resource Unit would have preferred such complaints to have been left "open", there is no evidence of any "real fault" which may have had an impact on the Claimants telephone service' **(AS 510)**

Are we to assume that Telstra was provided a different technical report to the one that Alan had to respond to? What we do know is that Telstra's letter to Dr Hughes, dated 27th April 1995, (which is full of discrepancies) was not passed onto Alan or his technical advisors for their right of reply **(AS 511)**

2nd June 1999: John Pinnock writes to the Hon Tony Staley regarding the pending Brian Purton-Smith Arbitration process, stating that

I am even more strongly of that view today. In part my position has hardened because of the many problems and deficiencies to the Arbitration process which Telstra established. **(AS 266)**

Mr Pinnock didn't tell Mr Staley, however, that thirty-six hours before Graham Schorer and Alan Smith signed the Telstra-established arbitration agreement, two very important clauses were removed without Graham and Alan's knowledge and then, also without their knowledge, the clauses were later put back into the agreement for the remaining twelve COT claimants to sign. Mr Pinnock was completely correct in his assessment that the process had "many problems and deficiencies."

19th October 1999: Mr Pinnock writes to Alan

I have reviewed the resources which the TIO has devoted to dealing with your extra ordinary number of complaints and letters over the past four years and advise you that I do not propose to take any further action in relation to these matters.' **(AS 267)**

9th May 2000: Alan writes to Ms Roslyn Kellcher (acting chairperson) ACA Melbourne, clearly defining in point form where Telstra broke the law during his arbitration, including detailing where the arbitrator and/or TIO treated his valid allegations with utter contempt. **(AS 274)**

13th June 2000: Frank Nolan, ACA, Manager Codes and Consumer Safeguards wrote to Alan noting **(AS 273)**

I refer to your letter of 9 May 2000, in which you raise yet again a number of concerns relative to your Fast Track Arbitration Procedure and subsequent events. You raised similar issues in a letter to the ACA dated 26 January 2000. In his response to that letter dated 15 February 2000, Neil Whitehead indicated the ACA's position with respect to such issues.

This position has not changed, and I have nothing further to add save to emphasise that it is not of the ACA's role to pursue these matters and that it does not intend doing so.

16th August 2001: Senator Eggleston threatens Alan with possible legal action noting

The fact that you have received unauthorised confidential committee documents is a serious matter, but if you disclose these documents to another person, you may be held in contempt of the Senate. **(AS 278)**

One of the Senate documents referred to by Senator Eggleston is an In-Camera-Hansard dated 6th & 9th July 1998, which shows that a group of Senators were attempting to address Telstra's conduct during and after the COT arbitrations. Ted Benjamin, who was being asked a number of questions in the Senate, was Telstra's liaison officer to Graham and Alan's arbitration and also a member of the TIO Council at the time.

Senator TIERNEY … Can you see the whole thing is unfair? …

Senator SCHACHT - When I said 'starve people into submission,' Mr Benjamin shook his head in opposition to my comment, which he is fully entitled to do. Madam Chair, about the difficulty of

those who have had their cases resolved under arbitration. Many of them will tell you that, if they did not accept it, they could not fight on. Some people are fighting on. **(AS 278)**

Was it reasonable for the Coalition Government to not want Telstra's unethical conduct towards the COT Cases exposed whilst they were selling off this government asset?

14th September 2001: Senator Nick Minchin's Electorate Officer writes to Alan noting

I have been in contact with the office of the Hon Richard Alston, the Minister for Communications, Information Technology and the Arts, and I have been advised that a reply will be sent to you shortly addressing the matters raised. **(AS 279)**

18th October 2001: John Neil, Executive Manager ACA, responds to a letter from Alan, stating

I advised you on 30 July 2001 that it is not the role of the ACA to address these matters. I note you have previously raised them with other authorities including the Commonwealth Ombudsman and the Victoria Police. I do not propose to engage in further correspondence with you on these matters. **(AS 280)**

7th November 2001: Senator Brett Mason writes to Alan

As advised in my first contact with you, the Minister for Communications, Information Technology and the Arts had undertaken to investigate your concerns and respond to you on behalf of the Coalition. **(AS 282)**

28th December 2001: Alan writes to a number of Government Ministers that he

recently sold [his] business, the Cape Bridgewater Holiday Camp and Convention Centre. The new owner Jenny and Darren Lewis took over on 23rd December 2001.

Alan alerts the Ministers that Mr and Mrs Lewis are experiencing phone problems and then asks

How is it that, although the TIO, John Pinnock, is more than fully aware of the problems I have faced because of Telstra (problems which lasted for fully five years after the so-called "completion" of my arbitration), he has never done anything to assist me? **(AS 281)**

19th February 2002: Alan offered to provide Senator Richard Alston fresh evidence via David Hawker's office concerning his allegations that the phone problems raised in his 1994/95 arbitration had continued and was now affecting the new owners of the Cape Bridgewater Holiday Camp noting

Ms Sue Owens, Barrister, received the following information from the Telecommunications Industry Ombudsman's office early this year. The information confirms the role played by the TIO's office in covering up criminal behaviour by Telstra, and others, during my arbitration. ...

Would you prefer me to forward this fresh evidence to your office or to Senator Alston's office? **(AS 283)**

15th March 2002: David Hawker, MP, writes to Alan

I have ensured the Minister for Communications and Information Technology is aware of your offer to provide fresh evidence.' **(AS 284)**

Senator Richard Alston's Chief of Staff, David Quilty, later became Telstra's Government Liaison officer. On the 3rd March, 2006, during Alan's Independent Assessment process, which was endorsed by the coalition government, the assessor(s) emailed David Quilty - david.quilty@team.telstra.com - asking for his assessment of the validity of Alan's claims against Telstra.

Although Alan submitted evidence of Telstra's perversions of justice, including submission of false evidence to the arbitrator during Alan's 1994/95 arbitration as well as intercepting Alan's faxes for at least seven years after Alan's arbitration, the government assessor found in favour of Telstra.

Mr Quilty later became a senior executive of Telstra.

For the Coalition Government Assessors to ask Telstra their opinion of the validity of Alan's claims is no different than the police asking a suspect if he should be arrested for committing a crime.

27th March 2002: David Hawker conveys to Alan information that he has received from Senator Alston, stating

I have received an interim response from the Minister for Communications, Information Technology and the Arts, Senator the Hon Richard Alston MP, informs me the matter is currently receiving attention and will be responded to shortly.' **(AS 285)**

12th July 2002: Senator Alston responds to David Hawker MP

As the material provided by Mr Smith relates to the arbitration undertaken by Dr Gordon Hughes of Hunt and Hunt, under the administration of the Telecommunications Industry Ombudsman (TIO), I have referred your letters to the TIO for advice. **(AS 286)**

17th July 2002: The Minister's office writes to Alan regarding his offer to provide irrefutable evidence that his arbitration was not conducted transparently by the TIO-appointed arbitrator and resource unit -

I would, therefore, ask that you refrain from providing any further material until the Telecommunications Industry Ombudsman has provided advice on the material you have supplied to date. **(AS 287)**

14th October 2002: Senator Alston's office writes to David Hawker

Thank you for your representation of 23 September 2002 on behalf of Mr Alan Smith concerning Telstra. The issues raised in your letter are receiving attention and the minister will respond to your shortly. **(AS 288)**

16th October 2002: Telstra FOI folio I00264 concerning Mr Lewis' phone faults.

Customer has contacted MP again re service to his premises. States he is losing business as he is not receiving calls on message bank or *10#. Customer is aware previous owner of business also

had problems with service. Customer said he was told by Telstra that there was a problem in his exchange. **(AS 289)**

18th October 2002: Telstra FOI folio I00266 regarding Mr Lewis' phone problems states

The TIO have now raised a Level 1 complaint on behalf of Mr & Mrs Lewis. The TIO have specifically mentioned in their correspondence that the TIO have previously investigated a number of complaints raised by [censored – blacked out section possibly longer than the expected 'Alan Smith'] the previous account holder for this service.' **(AS 290)**

8th November 2002: This Portland Observer Newspaper article entitled *Holiday Camp still plagued by phone and fax problems* notes

The telecommunications problems which plagued former Cape Bridgewater Holiday Camp operator Alan Smith continue to beset current owner Darren Lewis. **(AS 592)**

It should be noted here that, although Alan phone problems began in 1988, it is now believed that many of the phone and fax problems, at least those that occurred post-1991, were due to moisture and were exacerbated by heavy rain falls in the area. Cape Bridgewater faces the Southern Ocean and has always had problems with moisture. This was not taken into account (or even discussed in passing) in any of the technical findings of the arbitrator or his technical resource unit, even though Alan included this information in his submissions.

8th November 2002: Alan received a letter from a Barry Sullivan, stating:

I am writing to you following viewing the Channel 9 Sunday Programme on 3/11/02, After viewing the Sunday programme, I realise the similarities your business and others had with Telstra ten years ago with the similarities our building business had, when we lived at Bridgewater. During a period of time between the late 1980s and early 1990s we had considerable amount of difficulty with our phone. Our phone problem had such a negative effect on our building business over a period of time that our work dried up.

This *letter* corresponds with AUSTEL's draft report *(see page7, above)* when it noted:

Given the range of faults being experienced by Mr Smith and other subscribers in Cape Bridgewater it is clear that Telecom should have initiated more comprehensive action than the test call program.

Service faults of a recurrent nature were continually reported by Smith and Telecom was provided with supporting evidence of this in the form of testimonials from other network users who were unable to make telephone contact with the camp.

In view of the continuing nature of the fault reports and the level of testing undertaken by Telecom doubts are raised on the capability of the testing regime to locate the causes of faults being reported **(AS 643)**

23rd December 2002: This letter from Alan to Tony Shaw, Chairman of the ACA (now the ACMA) has since been returned under FOI. It is clear that the fax identification at the top of this two-page document is the same as the identification across the top of the documents assessed by Scandrett

& Associates and Peter Hancock in their report, which they identified as having been intercepted *(see Scandrett / File exhibits 1 to 20).* Not only was this letter intercepted in the same way that earlier documents were intercepted from Alan's business fax line 55 267230, in this case this letter was intercepted after it had left Alan's private residence phone line, 55 267265, which was NOT a designated fax line **(AS 513),** see also exhibits **AS 543, AS 544** and **AS 545**.

ACA Fax interception

14th July 1998: Alan faxed the first two pages of this exhibit to Wally Rothwell, Deputy TIO.

The hand-written notes on these two pages explain that, on the 13/7/98, Alan had received, via fax, two receipts from Seiver's Jewellers at the Crown Casino complex. Alan's telephone account (attached) shows that Alan telephoned Seiver's on 0396545100 on 14th July 1998 at 09:05am and spoke for 03:16 seconds: during this conversation Seiver's advised Alan that they had certainly not faxed these receipts to a phone number with a prefix resembling Alan's fax number of 55 267230 **(AS 631)**

This letter to Wally Rothwell, states:

So far I have been able to show that at least 43 documents and attachments which were faxed to Dr Hughes during my Arbitration did not reach his office. I have also sent you copies of faxes that I have received which consisted of pages which were blank except for a single symbol at the top as well as copies of faxes that have arrived through my fax but which were supposed to go to elsewhere from a variety of different sources in Melbourne

Exhibit **(AS 498)** dated 22nd January 1998, from the Department of Communications, Information Technology and the Arts, to John Pinnock (TIO), was sent in relation to a meeting with Telstra's Lyn Chisholm at Alan's business premises on 14th January 1998, to discuss the 008/1800 billing problems that had continued to affect the viability of Alan's business. Ms Chisholm prepared the three file notes attached to the fax, which were prepared by Ms Chisholm as a record of the discussion she had with Alan on that day, support Alan's claim that the 008/1800 problems continued after the end of his arbitration but does not record the evidence that Alan provided regarding a fax that had arrived at Alan's business with birthday greetings for one of the Melbourne Crown Casino receptionists. Ms Chisholm could not explain how or why this fax ended up at Alan's office, even though Alan pointed out that one of the members of COT, Ann Garms, was staying at the Casino at the time because of her Supreme Court action against the arbitrator.

Are the Crown Casino two exhibits provided to Lyn Chisholm by Alan on 14th January 1998, related to the two Seiver's exhibits also from the Crown Casino which arrived six months after Ms Chisholm's 14th January 1998 visit?

16th July 1998: This letter from Wally Rothwell, Deputy TIO, to Alan, notes:

I refer to our telephone conversation this morning and your serious concerns about the recorded message left on your answering machine. I spoke to Mr Pinnock this afternoon about this matter. I

further outlined your concerns about the fax pages which you consider did not reach the arbitrator, during you arbitration, and the mysterious blank pages. Regarding the blank fax pages, I have asked Telstra, without mentioning your name, how this could happen.

Alan, however, has never received any further advice on this matter, not from Wally Rothwell and not from anyone else in the TIO's office, so it seems that no-one can explain:

a. How blank pages can be faxed from both of Alan's fax machines, for more than five years;

b. How his fax account from Telstra registered these blank pages as taking more than two minutes each to transmit;

c. How these blank pages arrived without even a date or an identification regarding who sent them **(AS 632)**

30th July 1998: Alan's letter to Wally Rothwell, Deputy TIO, states:

A copy is now attached of a four page letter dated 25/5/95 to Sue Hodgkinson of Ferrier Hodgson Corporate Advisory (FHCA). Please note that the pages are clearly numbered 1 to 4. The second attachment is a copy of three pages marked "extended page 3.1". The first two pages are copies of part of the original letter I sent to Sue Hodgkinson via Dr Hughes' office by fax on 25/5/95 at 02.10pm. The alarming thing about this letter is that it seems that only 1¼ of the original pages reached the Arbitrator's office. Further, and even more alarming, the page marked "extended page 3.1" was not part of my claim at all. This raises the question of who this document belongs to or who it came from and this leads to the inevitable conclusion that someone else's claim is probably incomplete.

A copy of this letter was later faxed by Alan to Graham Schorer, at 14:49 on 29th December 1998. It is clear from the wording on all three faxed pages that Alan's business identification FROM CAPE BRIDGE HDAY CAMP was removed during transit and replaced with the wording: Fax from 055 267230 **(AS 633)**

7th January 1999: The report by Steven Scandrett of Scandrett and Associates Pty Ltd states:

We were briefed on the background situation and made several tests of Tivoli services. The hard evidence given to us, showing possible interception related to unexplained changes in the header strip of some faxes sent between these parties and others with an interest in COT matters.

These changes are not normal, as the header strip is a record of a handshake between the machines to enable setup of the calls, that is to say it indicates a conversation or exchange of information between fax machines and is not normal to be modified by the receiving party (the human). For example the receiver of a fax from say the Ombudsman's office could not change the header information sent by the Ombudsman's machine.

We canvassed examples, which we are advised are a representative group, of this phenomena they show that:

- The header strip of various faxes is being altered
- The header strip of various faxes was changed or semi overwritten
- In all cases the replacement header type is the same
- The sending parties all have a common interest and that is COT
- Some faxes have originated from organisations such as the Commonwealth Ombudsman Office
- The modified type face of the header could not have been generated by the large number of machines canvassed, making it foreign to any of the sending services.

We understand that originals of all the examples viewed are held along with many more.'

11th January 1999: The sworn testament by Peter Ross Hancock, Victoria, acknowledges he has given Telecommunications services to Golden Messengers since 1992. Mr Hancock concurs that

After extensive fax testing at Golden Messengers, Queensberry Street, North Melbourne on 4th January 1999, and 11th January 1999, (that he observed) "…the discrepancies (that is the second footprint) in the fax headers raised by the tests referred to above and the differences in the fax headers attached (marked "B") relating to faxes". Mr Hancock then investigated further exhibits of faxes that had either been received and/or sent between Golden Messengers and their Lawyers, COT case premises and "…Alan Smith at Cape Bridgewater.

I have also reviewed a large number of facsimiles from mid 1998 to 4th January 1999 provided by Mr Schorer, which clearly include a second imprint on the facsimile foot print. It is my opinion from the evidence provided that a third party has been intercepting all of the faxes referred to above.

In my experience there is no other explanation for the discrepancies in the facsimile footprints in question. I have read the report of Scandrett & Associates Pty Ltd and concur with it's findings".

24th October 1999: A statutory declaration sent by Cathy Ezard Alan's partner to David Hawker MP states

Mr John Pinnock (Telecommunication Industry Ombudsman) has refused to address a number of Alan's complaints. Living with this type of no win situation has left both Alan and I exhausted and unsure if we can trust our business future. **(AS 268)**

8th November 1999: Alan's letter to Roslyn Kelicher, ACA states:

In the attached AFP transcript dated 21/9/94 it can be seen that Constable Timothy Dahlstrom was aware of the previous material supplied by me to the AFP supported a number of separate issues where Telstra had breached the Privacy Act 1988.

i.e. Questions 16 to 20 contained in this transcript show the AFP had in their possession Telstra internal archive documents K01410 and K01411 which I had previously supplied to both the TIO Warwick Smith, the Arbitrator Dr. Gordon Hughes and the AFP. **(AS 645)**

The fax identification at the bottom of the transcripts referred to by Alan (**AS 646**) read: *"Fax from"* but Alan's correct fax identification was *"FROM CAPE BRIDGE HDAY CAMP"*. According to the report prepared by Steven Scandrett (see above) this difference indicates that the faxes were intercepted and then redirected on to their intended destination.

4th July 2001: Alan's fax identification on the first fax dated 8th May 2001, to Ms Kirsten Musgrove FOI Coordinator ACA (and two-page accompanying letter) see Exhibit **(AS 514)** reads: 18-5-2001 – 11:33 – FROM CAPE BRIDGE HDAY CAMP to 0262195499 P.01, is Alan's correct fax identification;

The fax identification on the copy of Alan's letter dated 4th July 2001, to Ton Shaw, Chairman of the ACA after it had been faxed to Mr Shaw's Canberra office see Exhibit (**AS 515)** on 5th July 2001, reads: Fax from: 055 267 230 – 05/07/01 – 04:41, is **incorrect** because the CAPE BRIDGE HDAY CAMP identification has been removed;

Alan's telephone account see Exhibit **(AS 516)** lists Exhibit **(AS 515)** as having transmitted successfully to Tony Shaw's Canberra office, 0262195200 at 04:42am. The 4:44 minute transmission time shown on Exhibit **(AS 516)**, confirms Exhibit **(AS 515)** (nine documents) were faxed from Alan's private residence 03 267265. It is clear from the covering Telstra page to this account Exhibit **(AS 516)** Alan's service was not on FaxStream.

Why was the Telstra Corporation intercepting faxes leaving Alan's private residence (six years after his arbitration)?

29th April 2006: Alan's letter to the Hon David Hawker, Speaker in the House of Representatives notes:

Over the years however I have explained to you some of the problems I have encountered with faxes and emails that 'go missing' or arrive late or faulty. The enclosed email from Sandra Wolfe is

another demonstration of the kinds of problems I have had to deal with, although the recent, different email problems have only arisen since the DCITA process began. The apparent interference in my emails has now forced me to arrange for Ronda Fienberg, my Melbourne editing service (rondaf@optusnet.com.au) to send emails out on my behalf, from her computer and email address, because emails often don't arrive at their correct destination when I attempt to send them from my emails address.'

Please note the footnote in Alan's letter from Ronda Fienberg states:

Mr Hawker, I feel obliged to add to the information Alan has provided here. I have run a small editing support business from my home since 1991 and first began assisting Alan in mid-1994. Until then I had never had a problem receiving or sending faxes for myself, or on behalf of my clients, to anywhere in the world, but I continually (still) have problems with Alan's faxes which often come through with the words drawn out down the page and therefore unreadable, or with the page cut off half way down. Since I first began to use email, in August 1998, I have also never had problems with emails, either sending or receiving, except for those gong to Alan. Emails that don't get to him don't 'bounce' as they would if I had attempted to send them to an incorrect email address, they simply vanish into the ether for days at a time, before finally finding him! I find it difficult to believe that this is all simple coincidences or that nothing can be done to ether prove that someone is interfering in the transfer of faxes and emails between his office and mine, or to stop it occurring. **(AS 574)**

5th June 2006: Alan's partner Cathy wrote to the Hon David Hawker, MP noting:

I am writing to you to voice my current unease due to information Alan Smith has forwarded to the DCITA claim process. As you are aware our emails have been going missing throughout the above process.

Mail and faxes have gone missing at other times when the Telstra matters have been under scrutiny by various sources in the past. Our phones have also been monitored.' **(AS 575)**

13th June 2006: The Hon David Hawker, MP responded to Cathy's letter (see above) noting:

Whilst I sympathise with your ongoing concerns relating to your phone, fax and email service, it is difficult for me to offer any fresh suggestions those we have already canvassed in previous letters.

As you would be aware there are avenues of recourse, including the Commonwealth Ombudsman, Telecommunications Industry Ombudsman and in respect of your qualms about personal safety, the police.'

Ironically, the Hon David Hawker's suggestion that Cathy should contact the Commonwealth Ombudsman or the TIO's office regarding the invasion of privacy issues, particularly in relation to the fax transmission of in-confidence documents, that suggestion was clearly useless because the

Scandrett & Associates Pty Ltd report (attached) confirms that neither of these organisations can manage to secure the transmission of their own faxes, not even during a Senate Estimates Committee investigation or a Government-endorsed, TIO-administered arbitration process **(AS 576)**

23rd August 2006: Alan's letter to the Hon David Hawker, Speaker in the House of Representatives, notes:

At our last meeting in Portland it seemed to me you were finding it hard to comprehend all that Cathy and I have had to deal with over the past years, in relation to our claims against Telstra and their Protective Services division. You will find attached a section of a recent fax journal printout from my fax machine. This is the third fax machine I have installed at my business since my arbitration – each one purchased in a futile attempt to improve the fax service. As I have explained to you, I still have problems receiving and sending faxes from my residence, even during my recent DCITA Independent Assessment Process during February to May this year. **(AS 577)**

31st August 2006: David Hawker MP wrote to Alan noting:

Many thanks for keeping me informed. As requested, issues concerning privacy breaching have been raised with Senator Coonan's office for your meeting with the Minister set for 6 September 2006 **(AS 578)**

Alan is prepared to swear under oath that, on the morning of this meeting in Parliament House, just before meeting with Senator Helen Coonan, Alan explained to Senator Barnaby Joyce that, before he (Alan) entered into the DCITA assessment process, he had been promised that his invasion-of-privacy issues would be addressed as part of the process but not only were they not addressed then, they had still not been addressed. Senator Joyce's response was yet another promise, this time that, during the meeting they were about to attend, he would remind Senator Coonan of that commitment but, again, the privacy issues were not addressed during that meeting either.

8th August 2011: George Close, technical advisor to the Senate Estimates Committee and Commonwealth Ombudsman Office, during the Committee's investigation into the COT Cases FOI issues sent an email Alan noting that he recalls:

a discussion with Senator Ron Boswell during the late 90's. He had been shown faxes, which had clear indication of changes in the headers, indicating interruption in transmission by a third party or parties. He questioned whether it was possible that faxes to and from senators could be interrupted, read or copied. My response in the affirmative brought about an expression of extreme anger. Stating that if it could be proven that it occurred, the offenders(s) would be jailed. If required I am prepared to re-state this on an affidavit'. **(AS 649)**

Obtaining information

12th January 1993: The one meeting that Alan and Graham were informed of and hence could attend was in the Melbourne office of the TIO, Warwick Smith. It was also attended by Peter Bartlett and Ann Garms. It was at this meeting that Peter Bartlett confirmed that the arbitrator could only make a final determination based on documents provided to him according to the arbitration agreement. **(AS 65)**

25th March 1994: The Commonwealth Ombudsman Ms Philippa Smith wrote to Telstra's CEO Frank Blount regarding the complaints raised by Graham Schorer and Alan Smith regarding '*Telecom's handling of their applications under the Freedom of Information (FOI ACT) of 24 November 1993 and 21 December 1993 respectively.'* She advised Mr Blount that Telstra officers had already stated to John Wynack, Director of Investigations Commonwealth Ombudsman

that they were concerned at the publicity and significant diversion of Telecom resources caused by the recent release of certain information by Mr Smith and that the delay in release of documents was due to the need for Telecom to check all documents prior to release so that Telecom is alert to the possible use/misuse of sensitive information. Your officers also informed Mr Wynack that they expected the vetting of the documents would take only a couple of says.

Ms Smith reiterated that

It was unreasonable for Telecom to require the participants to make further assurances while Telecom was considering the Agreement and thereby denying the participants the opportunity to consider the rules that Telecom which to have included in the Agreement **(AS 64)**.

At no time during the lead up to Alan signing the FTAP, was he advised by Warwick Smith (TIO), Peter Bartlett (the TIO's Special Counsel), nor Dr Hughes (the arbitrator) that Telstra was going to be vetting which documents they thought were 'too sensitive' to be released to the claimants. During Senator O'Chee's cross examination of ex-Telstra employee Lindsay White, during a Senate Estimates Committee Hearing on 24th June 1997, *twenty-five months* after Alan's arbitration had been completed. In response to Senator O'Chee's question, Mr White stated:

In the first induction – and I was one of the early ones, and probably the earliest in the Freehill's area – there were five complainants. They were Garms, Gill and Smith, and Dawson and Schorer. My induction briefing was that we – we being Telecom – had to stop these people to stop the floodgates being opened

Senator O'CHEE – 'What, stop them reasonably or stop them at all costs – or what?

Mr White – 'The words used to me in the early days were that we had to stop these people at all cost.' **(AS 553)**

14th May 1994: Before Alan signed the arbitration agreement, Warwick Smith, Peter Bartlett and Dr Hughes assured him that the documents he required from Telstra would begin to flow through to him once his signature was on the agreement. By May 1994, one month before Alan had to submit his claim, it was clear that the flow of documents had stopped, so he arranged to go to Melbourne

on the 14th May 1994 to look at some FOI documents which Telstra had stated they would show him in their offices.

Alan arrived at Telstra House in Exhibition Street a little after nine and then discovered that a room had been set aside for him from 8 am to 6 pm. Alan was introduced to Telstra FOI staff, including George Sutton and Rod Pollock and was then provided with some of the documents which he should have received under his December 1993 and February 1994 FOI requests. Some thirty or so heavily blanked out documents were provided by Mr Pollock, including about fifty-six fax cover sheets, with attached documents. One of the documents referred to the MELU exchange, which had caused Alan massive problems between August 1991 and March 1992 so he asked Mr Pollock if he could supply the document, without the blanking-out. Mr Pollock went away for some time and Alan continued to check the documents that had been provided.

Alan had taken with him that day some of the documents that Telstra had previously supplied him with and, while Mr Pollock was away from the room, he noticed that some of the fifty-six fax cover sheets he had seen before now had different material attached. Nothing seemed to match. For example, documents relating to a fault in 1991 were attached to a fault record dated 1993 which stated that no fault had been found. Alan was so alarmed at this discovery that he phoned Detective Superintendent Jeff Penrose of the Australian Police and described the situation to him. At his suggestion, Alan prepared a Statutory Declaration and provided it to both the TIO and the arbitrator **(AS 76)**

In Alan's statutory declaration **(AS 76)**, Alan named Rod Pollock as one of the culprits who had not supplied him with the correct FOI documents.

This was not the only place that Rod Pollock's name arose in conjunction with the problematic supply of FOI documents.

On the 29th September 1994, Graham Schorer was interviewed by two senior Commonwealth Ombudsman offices Mr Hind and Mr Wynack, regarding the non-supply or drip supply of FOI documents.

Graham states that he 'rang a gentleman by the name of Rod Pollock ... and I put the question to him. All he would say to me was "Graham, my instructions are you get no documents until such time as you're fully immersed in the arbitration procedure." I said, "Whose instructions?" He said, "I can't tell you that; but I can tell you that I've got instructions you won't get them until that happens" **(AS 78).**

On the 13th October 1994, a Telstra Whistleblower (possibly Lindsay White) wrote to Minister Lee stating that Steve Black and Rod Pollock were altering and changing information on FOI documents being requested by the COT Cases, in their attempt to minimise Telstra's liability. At the side column of the first page of this letter someone has hand-written the statement 'Warwick Smith has been critical of Pollock on same issue.' **(AS 593)**

Please note: the FOI identification numbering on this letter is from AUSTEL. Perhaps someone from AUSTEL hand wrote this statement?

15th August 1994: Alan again wrote to Dr Hughes, copying same to Paul Rumble.

In this letter he asks Dr Hughes to convene a meeting so that the Resource Unit and the claimants can view technical documents which Telstra is withholding under legal profession privilege, stating

I forwarded you a very interesting document last week which was tabled under this Professional Privilege Act. That document was of a network fault. That document has since been viewed by John Wynack, Commonwealth Ombudsman, FOI as being illegal under the Act to be umbrellaed *(sic)* in legal privilege documents. **(AS 90)**

Page two of exhibit **(AS 93)** gives an example of the type of material withheld from Alan under Legal Professional Privilege.

16th August 1994: A letter to Paul Rumble from Dr Hughes

As requested in my covering facsimile enclosing a copy of Mr Close's letter, I would be grateful if you would provide me with your initial reaction to the request so that I can consider appropriate directions on the matter.

Mr Smith also makes a second request, that is, for me, the Resource Unit and certain claimants to view privileged information in the possession of Telecom. I am seeking further clarification of this request from Mr Smith but my inclination is to disallow it. **(AS 92)**

The 17th February 1994 arbitration minutes confirm that Mr Bartlett stated that because some of the COT Cases had still not received their FTSP documents the arbitration should be started as the arbitrator could order the production of documents. Dr Hughes stated that there were two ways in which to solve the problem with the non-supply of documents. Either ' the procedure is put on hold until all the documents are exchanged in accordance with the FOI procedure; or the arbitration procedure commences and then the arbitrator gives appropriate directions for the production of documents.'

Dr Hughes indicated that each party could ask for documents once the arbitration had commenced and that he 'would not make a determination on incomplete information' **(AS 53)**

18th September 1994: Alan's letter to Mr Wynack Commonwealth Ombudsman's Office regarding BCI FOI documents, once again criticising Telstra for the way in which they have not abided by the FOI Act, or the spirit of the arbitration agreement. This letter was copied to Dr Hughes, Paul Rumble and Warwick Smith. **(AS 98)**

Please note: In the entire arbitration process from 21st April 1994, to 11th May 1995, Alan did not receive a notification from either Dr Hughes or Warwick Smith advising him that they were concerned Telstra would not provide him the relevant FOI documents he needed to support his claim.

23rd September 1994: In the Alan Smith CAV Relevant Information file – exhibit 12 are pages 18 & 19 of a thirty-two page transcript of a Commonwealth Ombudsman interview with Graham Schorer, which confirms that Graham swore under oath that Rod Pollock had told him:

Graham, my instructions are you get no documents until such time as you're fully immersed in the arbitration procedure. I said, 'whose instruction?' He said, I can't tell you that; 'but I can tell you I've

got instructions you won't get them until that happens,' He said, 'I follow instructions – *I'm not prepared to debate the matter with you – end of story*

The TIO File note for 14th and 16th May 1994 **(AS 76 and AS 77)** shows that Alan Smith warned the TIO's office and the arbitrator Dr Hughes, that Rod Pollock was not providing Alan with the correct FOI documentation that should have been attached to various documents Alan had requested during his time at Telstra's FOI viewing room. The TIO internal memo dated 16th May 1994 confirms that Alan left samples of altered documents with the deputy TIO, Sue Harlow.

11th November 1994: This letter to John Wynack, Commonwealth Ombudsman Office, dated 11th November 1994, to Telstra's CEO Frank Blount, states

'At the request of Ms Geary, I am notifying you of the details of the complaints made to the Ombudsman by Alan Smith.

24.3.94 Telecom claimed that documents given to Telecom by Mr Smith in 1992 had been destroyed or lost.

Telecom unreasonably refused to give any further documents to Mr Smith.

Telecom has lost or destroyed a number of files relating to his contacts with Telecom prior to 1991. ...

5.5.94 Telecom unreasonably delaying providing access to many documents. ...

7.11.94 Telecom unreasonably refused to provide the Portland/Cape Bridgewater Log Book associated with the RCM at Cape Bridgewater' for the period 2 June 1993 to 6 March 1994.

Alan believes that Mr Wynack made it quite clear to Mr Blount that he would be more than a little concerned if Alan's allegations were proved to be correct in regard to Telstra knowingly blanking out information on documents previously supplied under FOI and/or knowingly withholding relevant documents from Alan. Mr Wynack's concerns have been shown to be justified. **(AS 114)**

Exhibit **(AS 517)** are two Sworn Statements one by Bob Hynninen, ATO Officer and ex-Victoria Police Detective Sergeant one dated 8th August 2006, and the other from Des Direen, an Ex – Telstra Protective Service officer dated 10th August 2006, confirming at points 20, 21 and 22 that:-

(20)...I had cause to travel to Portland in western Victoria in relation to a complaint involving suspected illegal interference to telephone lines at the Portland telephone exchange.

(21) As part of my investigation, I first attended at the exchange to speak to staff and check the exchange log book which was a record of all visitors to the exchange and a record of work conducted by the technical officers.

(22) When I attended at the exchange, I found that the log book was missing and could not be located. I was informed at the time by the local staff that a customer from the Cape Bridgewater area south of Portland was also complaining about his phone service and that the log book could have been removed as part of that investigation.

Alan has never been provided the Portland/Cape Bridgewater Log Book. Telstra's withholding of this vital information from Alan stopped him using up-today documentation which would have assisted him in showing the arbitrator the problems and faults were still ongoing.

At this point it is particularly important to discuss these two Sworn statements because both of these documents refer to a belief that Rod Kueris of the Victoria Police Major Fraud Group was kept under both physical and electronic surveillance between 1998 and 2002, during the Major Fraud Group investigations into COT allegations that Telstra had perverted the course of justice during the COT arbitrations.

28th December 1994: Dr Hughes faxes Alan's letters to Ted Benjamin noting

As you are aware, I have the power under clause 7.6 of the Fast-Track Arbitration Procedure to order the production of documentation.' At no time during Alan's arbitration did Dr Hughes execute this power. '**(AS 132)**

30th January 1995: Alan wrote to Dr Hughes, explaining among other things, the reason for his slow submission of material

A ruling regarding information associated with the Defence Documents being presented in this manner must be addressed. I had no intention of drip feeding information to the Arbitration Dr Hughes, once my final Submission had been completed.

It is now thirteen months since the first of four FOI applications was presented to Telstra and yet, even after all this time, Telecom have not supplied the material sought, NNI documentation, technical diary notes, ELMI raw data, CCAS7, CCAS and EOS data and voice monitoring fault records. Very little of this information has been supplied under the Arbitration Procedure.' **(AS 146)**

9th August 1995: Alan submits yet another FOI request to Ted Benjamin regarding T200 report explaining to Mr Benjamin that, because neither Telstra nor Dr Hughes had accessed, on his behalf, the working laboratory notes regarding Telstra's 'beer in the phone' TF 200 report, he was therefore now making a fresh FOI request, with the appropriate $30 application fee, for these documents. This letter was also copied to John Pinnock, who played a continuing role in having the truth surround this falsified TF200 report concealed from the public domain **(AS 188)**

On 21st June 1995, before William Hunt wrote this letter, Dr Hughes had already corresponded with Telstra and the TIO (without copying the letters to Alan Smith) regarding the issue of late-received FOI documents which provided conclusive proof that Telstra had knowingly used impracticable Bell Canada test results to support their defence of Alan Smith's arbitration. **(AS 189)** is a letter dated 21st June 1995, from Steve Black to John Pinnock which states 'I refer to Dr Hughes' letter to you dated 21 June 1995, which enclosed a copy of a facsimile from Mr Smith to Dr Hughes dated 20 June 1995. Dr Hughes copied his letter to Telstra,' clear evidence that Dr Hughes was still corresponding with the TIO and Telstra six weeks after Alan's arbitration regarding the same Bell Canada impracticable tests.

Exhibits **(AS 594) (AS 471)** include:

1. A fax dated 22nd June 1995, from the TIO's office to Peter Bartlett, the TIO's Legal Counsel, regarding Alan Smith's arbitration matters. It refers to the possibility of a 'can of worms' that could be opened if the TIO re-visited Alan Smith's post arbitration matters.

2. A letter dated 12th September 1995, from John Pinnock to Telstra's Ted Benjamin relate directly to the FOI documents that Alan Smith received two weeks after Dr Hughes had handed down Alan's award. Together, these documents establish the reality of William Hunt's concerns that Graham Schorer might end also up receiving vital claim material only after Dr Hughes had deliberated on his arbitration.

1. When I commenced at Telstra, rudimentary work had already commenced compiling the Excel spreadsheets. I do not know precisely when that work commenced. **(AS 595)**

It is quite clear that this was not the only statutory declaration with a discrepancy. On 21st March 1997, Mr Pinnock wrote to Mr Benjamin stating

I would appreciate your advice concerning the matters raised by Mr Smith, in particular and arising out of your letter of 23 December 1994 to Dr Hughes:

1. any explanation for the apparent discrepancy in the attestation of the witness statements of Ian Joblin

2. were there any changes made to the Ian Joblin statement originally sent to Dr Hughes, compared to the signed statement? **(AS 596)**

The matter concerning why Telstra allowed FHP to sign a statutory declaration without the witness being present was not addressed by Dr Hughes during Alan's arbitration.

The most alarming points in relation to Ian Joblin's Witness statement are:

a. Before Mr Joblin met with Alan, Telstra provided Mr Joblin with a copy of the Bell Canada International (BCI) addendum report which stated that some 13,590 test calls that were carried out over a staggered five-day period, into the Cape Bridgewater RCM, using the TELELEC CCS7 monitoring equipment, had a success rate of 99%;

b. Telstra asked Mr Joblin to assess Alan's mental state, <u>after</u> he had read the BCI report.

c. Neither Mr Joblin nor the arbitrator was told that the nearest exchange that could accommodate the TELELEC CCS7 equipment was the Warrnambool exchange, 120 kilometres from Cape Bridgewater.

d. When Alan finally received a copy of the BCI evidence, under FOI, on 26th May 1995 (two weeks after the end of Alan's arbitration) he provided Telstra, the arbitrator and the TIO with this information, but they all refused to investigate.

Late delivery of FOI documents

6th January 1995: Alan again wrote to Dr Hughes asking him to access from Telstra numerous documents so that Alan could substantiate his claim of incorrect details as presented in Telecom's Defence Documents. Alan did not receive a reply because, as he discovered later, on 12th January, Dr Hughes was away on holiday for a further week and there was no-one in his office who could help Alan regarding an extension of time to submit his reply to Telstra's defence. Alan further stated that he was 'now disadvantaged even further. It is the 6th January 1995, and still my own Resource Team have not been provided with Telecom's defence on disk.' **(AS 133)**

Alan had only one month after Telstra's submission of their defence, on 12th December, to prepare and lodge his reply. Making this more difficult was that this was the busiest time of the year for Alan's business. To make the situation even wors , Telstra released 24,000 FOI documents which arrived on 24th December. Was this time-line pre-planned to cause him the most possible trouble in preparing his reply? Did Telstra plan to dump all these documents on Alan at his busiest time AND while the arbitrator was away on holidays? Did Telstra deliberately and maliciously use the two week Christmas legal fraternity shut down by lawyers as the period to submit their defence?

Under enormous stress, Alan, without access to the arbitrator, began to process the documents in the hope that he would find something to help him with the preparation of his reply which he finally managed to lodge on 20th January 1995, incomplete.

24th May 1995: Mr Benjamin's letter to Alan regarding late released FOI documents again confirms that Alan and Graham had limited chance of success. On 26th May 1995, two weeks after Dr Hughes had deliberated on Alan's claim, Telstra released 745 new FOI documents under the heading *Your FOI Request of May 1994* and including the following **(AS 183)**

Further documents have recently come to light that fall within your FOI request of 1994. Copies of these documents are enclosed. At this time a table has not been prepared giving decisions in relation to these documents as it was considered by Telecom more important you receive copies of the documents now.

Twelve months after Alan had originally asked for these documents Telstra finally considered important that he get arrived too late as the arbitrator had gone to Greece on holiday.

4th October 1997: John Wynack writes to Telstra regarding Alan's FOI request of 18th October 1995, which has still not been fully responded to. Mr Wynack repeats his request to Telstra to inform him: 'of the actions which Telstra has taken as to ascertain the whereabouts of the specific the file which Ms Gill described as the "arbitration file". **(AS 233)**

The draft AUSTEL Report in relation to Alan and the Cape Bridgewater Holiday Camp and local exchange was not released to Alan either before or during his arbitration. He finally received a copy in November 2007 (See above). In short, even after Alan signed the arbitration agreement - one of the provisions under which the draft findings would be released - he still wasn't provided with a copy of the draft

A letter from Telstra to AUSTEL and Warwick Smith states:

· Information obtained from Telecom, in the course of AUSTEL's regulatory functions, and relevant to any parties involved in a formal arbitration process with Telecom under the control of the

Telecommunications Industry Ombudsman (TIO) will only be released after consultation with the TIO and Telecom.

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

· The AUSTEL draft report will be released to the parties involved in the fast track arbitration process for comment in accordance with a process agreed with the TIO, and only after each party has signed a formal document committing to keeping the contents of the report confidential and giving an undertaking not to comment either privately or publicly on the report until after it has been released publicly by AUSTEL **(AS 62-a)**

On 22nd September 1994, AUSTEL's Bruce Matthew's told John Wynack: 'The draft report was produced in March 1994 and Telecom received their copy of that at that time **(AS 495)**.

Why did it take AUSTEL (now the ACMA) from March 1994, to November 2007 to provide Alan a copy of this most relevant draft report?

Briefcase Saga

On 3rd June 1993: Two Telstra technicians, David Stockdale and Hew Mackintosh, visited Alan's business to investigate his continuing complaints regarding his phone service and inadvertently left behind a briefcase. The contents of this briefcase revealed that Telstra had known before Alan's settlement on 11th December 1992 that major faults existed in their network but they did not disclose this to Alan. ((**AS 5), (AS 9)** and **(AS 10)**). A letter dated 9th June 1993, from AUSTEL to Telstra is part of the briefcase saga, as it confirms that AUSTEL was concerned that Alan may well have been misled by Telstra during his settlement. **(AS 27),**

On page one, paragraphs four and five, when referring to Alan's allegations that Telstra had withheld this information from him on 11th December 1992, this letter states

Further, he claims that Telecom documents (found in the briefcase) contain network investigation findings which are distinctly different from the advice which Telecom has given to the customer concerned.

In summary, these allegations, if true, would suggest that, in the context of the settlement, Mr Smith was provided with a misleading description of the situation as the basis for making his decision. They would also suggest that the other complainants identified in the folders have knowingly been provided with inaccurate information.

I ask for your urgent comments on these allegations. You are asked to immediately provide AUSTEL with a copy of all the documentation which was apparently inadvertently left at Mr Smith's premises for his inspection.

In light of Mr Smith's claims of continuing service difficulties, I will be seeking to determine with you a mechanism which will allow an objective measurement of any such difficulties to be made.

During Alan's arbitration he received a number of FOI documents from Telstra **(AS 518)**. One of these – FOI document K03273 - contained information that related to the briefcase saga. The document shows that Telstra's Portland technician, Gordon Stokes, had been monitoring Alan's fax line the day after the briefcase had been left and states 'Micky, This is a note from Gordon Stokes, if you want me to type up some info please advise ASAP. The information regarding the telephone numbers called by this customer following this incident are available from Network Information and my information was verbal from Gordon Stokes,'

17th June 1993: Telstra FOI folio K03281 is an internal memo by Rosanne Pittard

I refer to our telephone conversation regarding the material contained in Mr Macintosh's briefcase. Please find attached a letter from AUSTEL requesting information regarding that incident. Whilst I can respond to the details regarding the information provided to him at the time of settlement I cannot comment on the variation between what Mr Smith was told and the contents of the Network Investigation files. **(AS 28)**

The 9th June 1993 AUSTEL letter and this memo show quite clearly that Telstra were prepared to deceive the COT Cases concerning their telephone services.

28th July 1993: AUSTEL's John MacMahons' letter to Telstra states 'In my letter of 9 June I asked for a copy of all documentation left inadvertently at Mr A Smith's premises. ... It has now been suggested that there was other documentation in the file. Would you please clarify this issue and if so, arrange for a copy of the documentation to be made available to me immediately.' **(AS 33)**

23rd August 1993: Telstra internal email subject The Briefcase FOI R09830 between Don Pinel and David Shepherd. Don Pinel states 'Telecom is in receipt of minutes from Austel that suggest that not all documents have been provided as requested'

David Shepherd responds

The files on Smith and Dawson have been provided to Austel via Craig Downing of Regulatory at the request of Austel following a meeting with Austel on the issue. The other papers were not requested and not provided. ...

Subsequently it was realised that the other papers could be significant and these were faxed to Craig Downing but appear not to have been supplied to Austel at this point.

The loose papers on retrofit could be sensitive and copies of all papers have been sent to Ross Marshall. **(AS 37**

Legal Professional Privilege

19th August 1993: Telstra FOI folio R10606 confirms that Telstra's Ms Pittard was contemplating seeking legal advice regarding how to withhold COT FOI information under Legal Professional Privilege. **(AS 598)**

This internal email, Subject: AUSTEL Directions Regarding COT Cases, states

1. The request for files and other documents are onerous. … How much do they want? A warehouse is not out of the question. Who will copy these? I don't have the resources or money for agency people to spend time photocopying. Will Austel pay? (The last question was a joke – I know the answer).

2. … I believe we should quarantine any papers associated with legal action, refuse to supply papers associated with settlements and refuse to supply any papers marked Legal Professional Privilege – but we should see legal advice on same.

3. **The results of the tests are of a concern to me**. What confidentiality will be guaranteed? Austel has had close contact with these customers – **what will ensure they don't pass test results on**? What are the legal implications if they do? …

6. **What promises have been made to the COTS as a result of the testing**? None I hope.

7. The **testing at customer premises** causes great difficulties for us.

(emphasis mine)

The sentences marked in bold above refer to a number of tests carried out by Telstra at various COT Case businesses. This email also suggests that Ms Pittard was in charge of most of the COT Cases issues and the aforementioned tests.

FOI folio N00749 to N00760, entitled *Cot Case Strategy*, from Denise McBurnie to Telstra's Corporate Solicitor Ian Row, confirms Ms McBurnie is attempting to convince Mr Row that it would be appropriate to hide relevant COT information under Legal Professional Privilege FOI folio N00750 confirms Mr McBurnie appears to have singled out four of the COT Cases businesses Golden Messenger, Tivoli Theatre Restaurant, Japanese Spare Parts and the Cape Bridgewater Holiday Camp, for Legal Professional Privilege. **(AS 599)**

Associate Professor Sue McNicol, Australia's leading specialist in Legal Professional Privilege, has assessed this document. Prof McNicol has advised that by withholding non-legal FOI documents under Legal Professional Privilege, Telstra was knowingly making false or spurious claims to privilege **(AS 600)**

September 1993: Telstra FOI folio R00524 document marked *Sep/-* notes that, on occasions, it might be desirable to install recording equipment at customer's premises and then states 'All technical reports that relate to customer's services are to be headed 'Legal Professional Privilege', addressed to the Corporate Solicitor and through the dispute manager.' **(AS 601)**

4th July 1995: Telstra writes to Ms Philippa Smith. Ms Joy M Geary of reluctantly acknowledged in this letter that Telstra were defective in not supplying a number of FOI documents during Alan's arbitration. Because of the voluminous nature of this letter and the relevance to the information it is not attached in this exhibit. The letter can be found at the back of *Ted Benjamin Exhibit 4*, entitled *Examples of Telstra's abuse of Legal Professional Privilege (LPP)*. Had Telstra abided by the FOI Act, Taits would not have had to write the letter of the 29th June 1995.

October 1997: The Senate became involved. They expressed outrage that Telstra had knowingly censored relevant sections of documents which were being supplied to the COTs under FOI, particularly in relation to Telstra 'Excel' files, which were then being given to Alan but which he had not sighted during his arbitration. Under pressure from the Senate, Telstra provided some two hundred previously unseen documents. Due to the quantity, all of which can be provided upon request, only three (those attached to page 23) have been attached here as **(AS 93)**.

Page 8, 2xls, fault 185, 27th July 1992

Tr report caller from 057 981 622 getting RVA when calling 267 267. Action – asked Ballarat OSC for assistance. They made test calls from BRAX and Bendigo. DAM in BRAX and Bendigo AXE checked. Chris Doody requested all Nodes & ARF's to make test calls.

Page 23, 2xls, fault 592, 11th December 1992

Poor performance of Telecom – historically March data problem, local Portland problem fixed in October, wiring and cabling issues and RVA on congestion.

Slow resolution by Telecom of past problems of Smith – both technical and claims.

Mr Smith's service problems were network related and spanned a period of 3 – 4 years – possible immunities.

Page 90, 2xls, fault 2283, 3rd March 1994

Black states a BCI study, specifically to address Smith's network segment, showed that 12,000 test calls encountered no network problems and percentage completion was within world standard. Black will comment on audit of complaint handling 1/194

Page 90, 2xls, fault 2298, 7th March 1994

Refers to assessment of Smith's service by Bell Canada International Result no major network problems in over 13,000 test calls. Bell Canada advised Telecom that completions world standard.

Please note: document page 90, at 2283 and 2298 is discussing the BCI tests which Alan declared during his arbitration were flawed. As previously discussed above, Technical consultant Brian Hodge, B Tech; MBA (B.C. Telecommunications) has concluded that BCI could NOT have generated the 13,590 (through the CCS7 system) because the unmanned Cape Bridgewater RCM could not facilitate this test call trapping device.

Faults

Billing Problems – Level Playing Field

It was important to link the statements often made by Australia's Politicians (those who away from Canberra reside in Australia's major cities) who maintain all business operators within Australia have a level playing field, this was never the case for Alan Smith or the new owners of his business Darren and Jenny Lewis Darren's letter of 19th January 2003, to David Hawker MP shows **(AS 671)**

28th April 1993: an open letter To Whom It May Concern from the Centre for Adolescent Health (Melbourne Royal Children's Hospital) notes:

A group from the Centre for Adolescent Health (Royal Children's Hospital) in Melbourne recently spent a week from Monday 19th April to Friday 23rd April at the campsite. Two of our leaders attempted to make phone calls at 6.25 pm on Tuesday evening and experienced a deal line when trying to ring out. A number of our campers attempted to make calls on the Gold phone during the week and were unsuccessful.

Many of our campers and leaders had chronic illnesses therefore it was vitally important that our group had easy access to an operating telephone system 24 hours a day, in the event of a medical emergency. We would require a guarantee that the telephone system was fully operational before considering Cape Bridgewater Camp as a future venue **(AS 673)**

From the date of this letter to when Alan sold his business in December 2001, Alan never tried to entice the Children's Hospital to try his venue one more time because nothing had changed from April 1993 to December 2001, as the Darren Lewis Exhibit **(AS 671)** so clearly shows.

21st May 1993: **(AS 26)** is a copy of Alan's 008 billing account for that date. This document demonstrates how Alan proved conclusively that Telstra continued to charge him for calls, which couldn't have connected to his service during the period in which the MCT equipment was installed on this service line (see **AS 25**) due to the 90 second delay-lockup period between each previous successful terminated call. However, Telstra 008 accounts for 21st May, 1993 show 5 second to 20 second calls terminating at Alan's business one immediately after another. The person who tried to ring Alan on this particular day, Mrs Haddock, of Ringwood Victoria, later wrote of her concerns. She was also one of the people who referred to a woman's voice on what she thought was Alan's answering machine, when she arranged her bookings. In late 1992 had Alan recorded a complete answering message in his own voice on the answering machine. Who did Ms Haddock leave her particulars with? **(AS 31)**

On page 28 in the Cape Bridgewater Holiday Camp DMR & Lane Technical Evaluation report dated 30th April 1995, they note: 'this is known as Partial Calling Line Identification, Partial CLI). As a

result, if parties attempted to call Mr Smith within this 90 second period, they would not be able to do so. Likewise, if Mr Smith attempted to make calls during this 90 second period, his phone would appear to be 'dead' with no dial tone' **(AS 519)**

Although the document **(AS 519)** from DMR & Lane states that Telstra's David Stockdale warned Alan that Telstra test equipment would produce a ninety second 'lock-up' delay on the line, no such advice was ever received. Another alarming issue related to this MCT equipment and the 'dead' / no-dial-tone matter is that this problem continued to affect Alan's business line (55 267 267) for more than eight years after Telstra had disconnected the MCT equipment in September 1993. After Alan sold the business in December 2001, this same problem haunted the new owners, on the same service line, until November 2002, ten months after the new owners took over the business in December 2001 **(AS 520)**.

17th August 1993: Mrs Cullen from Daylesford Victoria attempted to phone Alan's business but only reached a dead line. Once more Alan was charged for these attempts as four short duration calls on his 008/1800 service **(AS 34).** This evidence was submitted into arbitration in a variety of ways, but never addressed. When Mrs Cullen finally made her booking

arriving in February 1994, Ms Cullen's partner wrote of the problems he and Mrs Cullen experienced when trying to use the Holiday Camp coin operated 'Gold Phone' service. **(AS 35 A)**

11th October 1993: Telstra internal email H36291 confirms Telstra's knowledge of the 1800 network billing problems Nigel Beaman states to Peter Zeagers 'I am receiving a disturbing number of reports of instances where the 1800 prefix 'does not work' in the Network.' **(AS 35)**

Telstra's own billing records, including documentation given to Telstra by John Wynack of the Commonwealth Ombudsman's Office, show that Telstra continued to incorrectly charge Alan on the 008/1800 line up until at least 1997. Finally, as a direct result of this faulty charging, Alan asked Telstra to disconnect this service.

It could be reasonably assumed that with the continuing complaints about the bill faults that were still apparent in Alan's arbitration, this would have prompted John Rundell of Ferrier Hodgson Corporate Advisory to re-assess the merit of the Verification Testing process. Instead, FHCA blamed the limited time frame allowed in the arbitration agreement for the technical resource unit to investigate technical issues like the billing faults.

Mr Rundell wrote to the TIO John Pinnock, 15th November 1995, alleging Alan only raised the billing faults in April 1995 **(AS 457).** The attached 4 transcript pages, 91 to 94 from the oral arbitration hearing on 11th October 1994, which John Rundell attended, confirm that Alan discussed the billing problems then which had been attached to his letter of claim dated15th June 1994. **(AS 101)**

9th December 1993: Alan received a letter from his Federal Member of Parliament, David Hawker MP noting

I appreciate being kept informed of developments and would like to congratulate you in your persistence to bring about improvements to Telecom's country services. I regret that it was at such a high personal cost. **(AS 672)**,

On the 26th August 2004: Darren Lewis the new owners of Alan's business also received a letter from David Hawker MP (eleven years later) stating

I had the opportunity to discuss your concerns yesterday when I met with Telstra Countrywide's new Area Manager South West Victoria, Mr Grant Wiltshire. I understand the product you are inquiring about is known as Telstra's Duet – Phone and Fax Multiple Number.

As you are aware, this feature is not yet supported at your local exchange. To date Telstra hasn't set a date for upgrading the Cape Bridgewater exchange, however, upgrades are in continual planning **(AS 671)**

16th December 1993: This letter from Denise McBurnie to Alan states

I refer to your letter of 6 December 1993 and our subsequent telephone conversation.

With respect to your comment concerning a customer from Mount Gambier, South Australia, who has reported to you that he had difficulty contacting you on your 008 service, if you are able to provide our client with more details (such as the caller's telephone number) our client may be able to investigate and comment on the problem which this customer reported to you. **(AS 602)**

Neither Telstra nor FHP explained why this Mt Gambier customer and numerous other customers were all experiencing the same problems. What this document does confirm is that Alan Smith, where his telephone problems and faults were concerned, had to deal directly with FHP before a resolution was reached.

30th April 1995 Page 6, from the DMR & Lane, Technical and Evaluation Report on Alan's claims before Dr Hughes (arbitrator) it is noted:

Telecom recorded and responded to Mr Smith's complaints in a variety of ways. But Mr Smith did not express his satisfaction, in his claim of June 1994, he states [p3] to "the continuing problems that I am experiencing" and states "my phone service is still operating at a totally deficient level". The alleged faults were not rectified up to the time of the claim **(AS 674)**

3rd October 1995: As Alan has noted previously, during the AUSTEL COT Report period in April 1994, Cliff Mathieson, a technical advisor to AUSTEL, asked him to keep AUSTEL informed of any evidence that Alan found during his arbitration, which might assist AUSTEL in their investigations into 008/1800 billing and short-duration call problems **(AS 201)**. In fact, AUSTEL actually wrote to Telstra's Steve Black on 10th June 1994, on Alan's behalf, expressing concern at the problems he was then experiencing with sending and receiving faxes. Because of AUSTEL's request that Alan keep them up to date, he wrote to them on 3rd October 1994, providing evidence, using Telstra's own data, which showed that they had charged Alan for two non-connected recorded voice faults (RVA) on 27th May 1994. Alan's evidence was supported by the fact that the person who complained about these two faults was his arbitration claim advisor, Gary Ellicott, ex National Crime Detective.

16th October 1995: Five months after Alan's Arbitration had been deemed to be completed (and therefore outside the arena of the arbitration process,) AUSTEL allowed Telstra's original defence liaison officer, Steve Black, to address the 27th May 1994, non-connected recorded voice Faults which Alan's claim advisor, Garry Ellicott had experienced. These were the same arbitration billing faults which the Resource Unit admitted to not passing onto the arbitrator for evaluation. This clandestine operation by AUSTEL allowing Telstra to address arbitration issues outside of Alan's arbitration meant that he could not legally challenge Telstra in relation to the ongoing billing problems that were still affecting the viability of his business **(AS 213)**

When AUSTEL allowed Telstra to covertly address these billing issues without the involvement of the original 'umpire' (in Alan's case that was the arbitrator) AUSTEL could not have known that, in Alan's 18th January 1995 reply to Telstra's original 12th December 1994 defence of Alan's arbitration claims, his claim advisor, Garry Ellicott, had already proved to the arbitrator that the witness statement submitted by Telstra's Ross Anderson was full of inaccuracies (a copy of that reply is attached as Exhibit **AS 666**). That, however, didn't stop Telstra re-submitting Mr Anderson's witness statement to AUSTEL, even though Telstra was, by then, fully aware that AUSTEL didn't know what Mr Ellicott had been able to prove.

It should be of public interest that as soon as AUSTEL became aware that the 008/1800 billing information provided to them by Telstra on 16th October 1995 was false and misleading they wrote to Alan on 6th December 1995 noting:

I write to request additional information from you to assist AUSTEL in its investigation of charging discrepancies associated with Telstra's 008/1800 service. Your assistance in this matter would be appreciated **(AS 210-b)**

AUSTEL did not advise Alan that they had allowed Telstra to use Telstra arbitration legal documents, including sworn witness statements, in a clandestine operation conducted outside the legal forum of Alan's arbitration.

19th December 1995: Darren Kearney, Senior Policy Analyst, for AUSTEL's Carrier Monitoring Unit wrote to Alan noting:

I refer to my most recent correspondence advising you that AUSTEL had again written to Telstra regarding the issues relating to charging discrepancies concerning its 008/1800 service originally raised by you in 1994. I write to request additional information from you to assist AUSTEL in its investigation of charging discrepancies associated with Telstra's 008/1800 service.

AUSTEL received information from you on 3 October 1994 regarding this matter, including test sheets and itemised billing sheets for your 008/1800 service. As previously advised, AUSTEL has forwarded this information to Telstra for a response **(AS 210-b)**

26th February 1996: This internal AUSTEL report prepared by AUSTEL's Darren Kearney, notes:

The following is a guide to documentation provided by Alan Smith on 19 December 1995, in support of his claim of massive incorrect charging on his 008/1800 account.

It is clear from the 27 examples in this report prepared by Darren Kearney, that the billing information Alan provided to Mr Kearney on the 19th December 1995, was substantial enough to prove that Alan's phone faults and billing problems were still affecting the viability of his business right through during the period of his arbitration. **(AS 210-c)**

28th March 1996: Mr Pinnock wrote to David Hawker MP, regarding billing issues **(AS 211)** in response to Alan's allegations to Mr Hawker that the incorrect billing he had raised in his claim had not been investigated, addressed or rectified during his arbitration. Mr Pinnock stated

It is incorrect for Mr Smith to assert that the TIO has avoided dealing with over-charging practices. My office refers questions of general charging practices to AUSTEL and deals with particular problems itself. Mr Smith's allegations of over-charging for his service formed part of the claim submitted to the Arbitrator. Consequently, this matter was dealt with in his arbitration.

As already discussed, the matter had not been dealt with in Alan's arbitration and AUSTEL had advised Mr Pinnock so by forwarding the TIO a copy of AUSTEL's letter to Telstra on 3rd October 1995, which stated exactly that – the billing faults Alan had raised in his claim had NOT been addressed **(AS 201)**. Mr Rundell also admitted in writing to John Pinnock that NONE of the billing faults documented in Alan Smith submission had been investigated as part of the arbitration procedure **(AS 104)**.

27th February 1998: The Hon David Hawker MP wrote to Alan noting:

Thank you very much for the material recently forwarded to my office. I will be writing to the Minister for Communications asking him to carefully examine your claims

The evidence Alan provided to Mr Hawker confirmed that none of the billing claim documents Alan legally submitted to the arbitration procedure for assessment was investigated and/or addressed by either Telstra, in their defence, the TIO-appointed technical consultants DMR & Lane or the arbitrator Dr Hughes **(AS 668)**

16th October 1998: The Hon David Hawker MP wrote to John Pinnock noting:

Please find enclosed correspondence I have received from my constituent, Mr Alan Smith of Cape Bridgewater Holiday Camp, Portland, 3305. I would appreciate your assistance in resolving Mr Smith's complaint **(AS 669)**

29th January 1999: Mark Dunstone, Department of Communications Information Technology and the Arts wrote to John Pinnock noting:

Previous advice from your office concerning Mr Smith was to the effect that you were still considering whether or not you would investigate his claims of overcharging on his 1800 number. I would be grateful if you could advise the status of the TIO's investigation into Mr Smith's claim of overcharging – I understand this matter has been before the TIO for some years **(AS 670)**

Fax Issues

22nd April 1994: The day after Alan signed for arbitration, Alan returned to Cape Bridgewater to find two notes on his desk, reporting that staff had registered two more phone faults. Alan also faxed AUSTEL three 008/1800 incorrectly charged billing accounts. AUSTEL's fax journal registered three faxes from Alan as lasting from 1minute 40 seconds to 2 minutes 20 seconds, but only blank paper appeared. **(AS 70)** Where did the information on these faxes end up? How can a fax transmit through to the receiving end, without the sender's identification (date and time the fax was sent) being displayed on the document received?

10th June 1994: AUSTEL's John MacMahon wrote to Telstra's Steve Black stating

Mr Smith at Cape Bridgewater continues to express concern about his ability to receive and send facsimiles. Mr Schorer at North Melbourne continues to claim that customers are reporting an inability to make successful phone calls to his business.' **(AS 84)**

23rd May 1994: This attached fax billing account confirms there were five attempts from Alan's office to fax this information to Dr Hughes failed. Telstra's B004 defence document **(AS 82)** states that the fax couldn't be delivered because Dr Hughes' fax machine was busy. If this is so, why was Alan charged for the six 'calls'? **(AS 81)**

Finally, after numerous faxes sent from Alan's office to Dr Hughes had not reached his office, Alan became more and more agitated, in particular with Dr Hughes' secretary, when he could not understand why she could not find the faxes he had sent, of which there was no indication where or why they may have gone.

Documentation obtained from Ferrier Hodgson Corporate Advisory (FHCA), the TIO-appointed Arbitration Resource Units report, confirms that numerous documents forwarded to Dr Hughes' office do not appear on their list of documents as being received.

17th November 1997: Wally Rothwell, Deputy TIO, writes to Alan confirming that Mr Pinnock had written to Telstra on 28 October regarding charges related to Alan's fax line **(AS 236)**

Exhibit **(AS 250)** is Telstra FOI document K01489 dated 29 October 1993 which states that

During testing the Mitsubishi fax machine, some alarming patterns of behaviour were noted, these affecting both transmission and reception. Even on calls that were not tampered with the fax machine displayed signs of locking up and behaving in a manner not in accordance with the relevant CCITT Group 3 fax rules. A half A4 page being transmitted from this machine resulted in a blank piece of paper 4cm long, the relevant protocol printout in sample #2 shows that the machine sent the correct protocol at the end of the page. Even if the page was sent upside down the time and date and company name should have still appeared on the top of the page, it wasn't.

The following exhibits are further examples of faults in fax transmissions originating in Alan's office

(AS 253), dated 24th July 1998, confirms Chrissy Hawker, Secretary Services has also recorded her experience of receiving similar half pages, including blank pages while doing work for Alan during 1998.

(AS 254), dated 24th July 1998, confirms Ronda Fienberg, Secretary Services, recorded similar experiences between August 1994 and July 1998.

(AS 255), dated 25th July 1998, confirms Robert Palmer, Education Consultant has recorded experiencing similar transmission problems over a two year period when receiving faxes from my office.

(AS 270), dated 30th January 2 000, confirms Margaret Van Run, Secretary Services recorded experiencing fax problems when working over the Christmas period of 1999.

26th February 1999: Alan fax account **(AS 265)** confirms he faxed three separate documents to Graham Schorer's office at 10:55 am, 11:20 am and 01:37 pm. Graham's facsimile journal for this date confirms there was no 11:20 pm document received by Graham **(AS 265)**

Fax journal printouts taken from Graham's fax machine **(AS 255)** do not match up in relation to faxes that they each were charged for as being sent and the Graham Schorer and Alan Smith fax interception files that Alan offered to the Australian Communications & Media Authority (the ACMA) on 9th February 2011, confirm frequent problems with faxes being sent between their offices. Their fax interception files also confirm that sensitive, legal, client to Solicitor, Telstra-related faxes were intercepted and then forwarded on, by Telstra, to the original intended destination.

9th March 1999: Alan writes to John Pinnock

As you can see from this one example, my fax problems continued for some considerable time after the completion of my arbitration. My main concern is not with the phone/fax line to my residence,

since I have only experienced two faults since I connected the fax macine to this line. What does seriously concern me, are all the problems I experienced with the fax prior to Kuly of 1998, when it was not uncommon to lose faxes on a regular basis, even after my arbitration had completed **(AS 667)**

21st September 1999: Alan again writes to John Pinnock concerning his continuing fax problems

Since the problems with my fax line were not addressed in my arbitration procedure I would be grateful if you would now ask Telstra the following questions:

· How can they charge me for a fax delivery to Mr Schorer's office when it did not arrive there?

· Since, according to my Telstra account, I dialled the correct number when I sent this fax, and since it clearly did not go to that number, where did this fax go to? **(AS 266)**

It is important to note that Alan provided Mr Pinnock a copy of Graham Schorer's fax journal and Alan's Telstra account proving that the fax was transmitted.

30th January 2000: A general letter from Rhonda Fienberg, Dial-A-Secretary, reads

To Whom It May Concern

On the 28th December, 1999 I was contacted by Alan Smith from Cape Bridgewater Holiday Camp re doing some computer work for him. … Alan rang and we organised for him to fax the work through. One page and a small portion of the next came through and then the line disconnected. Alan tried numerous times to get the fax through, but to no avail he eventually had to make other arrangements for the work to be d one nearer to him.

On 5th January 2000 Alan again contacted me regarding doing some work for him. He tried so many times over a period of about 3 hours and finally the work came through. **(AS 270)**

Attached is Alan's fax account for this period in question showing Telstra charged for these non transmitted calls.

11th January, 2001: Alan writes to David Hawker MP advising that

Phil Carless and Lyn Chisholm (both from the same department as David Thompson) did subsequently visit my business early in 1998 and were both provided evidence confirming that Telstra had, in fact, billed me incorrectly on the following three on my business phone lines:

1. Facsimile service 55 267230
2. Free call 008/1800 service
3. Goldphone service 55 267260 **(AS 276)**

Network and Exchange

Cape Bridgewater Holiday Camp was routed through an unmanned RCM multiplexer system at Bridgewater to the Portland AXE exchange. Graham Schorer's business, Golden Messenger, is also serviced by an AXE exchange.

19th April 1988: Telstra records one of Alan's complaints **(AS 1).** One of the problems Alan experienced himself. He had driven approximately twenty kilometres from the Camp into Portland to shop and then realised he had left his list behind so he found a public phone and rang his wife, Faye, intending to ask her to read the list to me. He was stunned when, instead of reaching Faye, he twice reached a recorded message stating that the phone had been disconnected. He rang Telecom's fault centre and was told Telecom would investigate so he continued, attempting to shop from memory. Finally, he decided to ring the camp again to check the purchases against the list. This time the phone was engaged and he assumed my Faye was talking to a friend or, hopefully, a prospective customer.

When Alan arrived back at the camp Faye advised him that she had not answered, or made, any phone calls in the entire time he had been gone.

26th April 1988: Telstra records another one of Alan's complaints **(AS 1)**. When Alan accessed Telecom's fault records during his arbitration, he could not find any record of the many faults reported to Telecom in the early days after he took over the business. In those first, early days, it didn't occur to him that he needed to record the faults reported to Telecom and so Alan can't designate any particular date for the complaint he lodged during the shopping trip to Portland, but he does recall that the first recorded message (RVA) fault certainly occurred within two months of moving in.

2nd & 24th May 1988: Telstra records two more on Alan's complaints **(AS 1**). One of the faults frequently experienced with the phone at the camp were call drop-outs (i.e. when talking on the phone the line would just go dead). If Alan or his wife Faye had rung the person themselves, this was not such a great problem at first since they could just redial, although it did cost them another STD call. The problem became much worse if they couldn't reconnect (and often the line remained dead for some time), or if the call was inbound (as the caller had to bear the cost of redialling). If the call had come in to the camp, particularly if it was one of the few business enquiries that managed to get through at all, it was very frustrating for them to wait and wait for the caller to ring back, without the phone ringing at all

2nd & 6th September 1988: Telstra continues to record Cape Bridgewater complaints. The phone problems worsened. Often the line remained dead for some time after the preceding call had been terminated, i.e., the line locked-up. This problem often was not noticed until the receiver was lifted to dial out of the business. **(AS 1)**

1st September 1992: Ms Pittard, Telstra's General Manager sends Alan a letter

Whilst our recent tests indicate that your service is now performing to normal network standards. I am initiating a further detailed study of all the elements of your service and the tests which have been conducted.' **(AS 12)**

18th September 1992: Mr Beard, Telstra's Service Manager in a letter to Alan says

We believe that the quality of your telephone service can be guaranteed and although it would be impossible to suggest that there would never be a service problem we could see no reason why this should be a factor in your business endeavours.' **(AS 13)**

Telstra FOI document R01444 confirms that Telstra had documented people experiencing the RVA recorded message that Alan's service was not connected from at least March 1992. This document also confirms that a Heywood resident, Mrs Savill, also complained of the same RVA fault when trying to ring Alan on 2/9/92. Document R01444 confirms that the fault was not fixed until 7/10/92 **(AS 14)**

23rd November 1992: Don Lucas, of Telecom Commercial Vic/Tas Region, wrote to Alan advising that the RVA MELU fault had only lasted for three weeks and had been fixed by 19th March 1992. **(AS 15)** Another Telstra FOI document K02643, which Alan received during his arbitration under FOI, confirms that Telstra considered this particular RVA MELU fault to be apparent from the cut-over from the old exchange to the new RCM at Cape Bridgewater that is from August 1991 to at least 19th March 1992 **(AS 523)**

In his letter, Mr Lucas further states that another software 'register' problem relating to RVA local faults had only lasted from 2nd to 7th October 1992, while document R01444 **(AS 14)**, received under FOI, confirms that Telstra knew this fault was apparent from at least 9th September 1992. Another Telstra document, Folio 95/0603-01 **(AS 524)**, which was received from the ACMA under FOI in 2007, states: *"Aug '91 – cutover from RAX to RCM. When? – approx 7/8 mths 50% maximum"*. This means that a fault accepted by the arbitrator as lasting for only 16 days, had actually lasted for at least seven to eight months so, for all those months, the RVA MELU fault message in question was advising 50% of ALL callers from metropolitan Melbourne to Alan's business that the phone number they were ringing was no longer connected. The result of the arbitrator's findings regarding this fault (see page 16 of the arbitrator's award **(AS 526)** was not just the immediate lost revenue, it was also the long-term affect of so many callers not bothering to ring again because they believed that Alan was no longer trading. Telstra however knowingly misled the arbitrator on this issue – just more of the same Telstra conduct that is recorded throughout this report.

11th December 1992: Alan provided Telstra four letters from clients who had documented their own phone problems when trying to contact his business **(AS 19)**

During Alan's settlement with Telstra, he produced at least four letters which he had written to the local rural fault centre at Hamilton, somewhere between June 1988 and September 1989 (refer Cape Bridgewater Holiday Camp documents), including four letters from the operators of the Empress of Tasmania, Heywood Primary School, Collingwood Half-way House and the Haddon Community Health Centre. All these organizations had experienced difficulties in contacting Alan because of the RVA phone message. John Wynack, Commonwealth Ombudsman Office, wrote to Telstra 11 November 1994, asking why Telstra has never returned 'a number of files relating to his contacts with Telecom prior to 1991' (the four letters referred to are at **(AS 14)**

18th February 1993: Telstra FOI documents, folio G95153 to G95159 **(GS 67)**, are minutes taken during a scheduled conference held to discuss on-going communication problems within the Telstra network. These documents were only released to Graham on 13th October 1998, under pressure applied to Telstra by the Senate Working Party and were not made available to the various COT Cases during their respective arbitrations. This minute confirms that the lock-up problems which Graham and Alan had complained about were not imaginary.

· (folio G95156) – **(3) Discussion of recent faults**: 'MELH IOG-11B EX-A node restarted and remained in isolated blocked state. Attempts to recover the node by reloading and deblocking node A were unsuccessful.'

· (folio G95157) 'The variations in data in different regions across the county raise concerns about the repeatability and consistency of the data regeneration program (ELISA). Martin Spear advised that a conversion prerequisite is that data is checked to be at a defined /36 standard. The standard exists and work has been initiated for South Melbourne (SMEX) The problems experienced when taking the AX62 model to /66 has reduced confidence in the ELISA data regeneration programme.'

· (folio G95158) 'The number of software blocks with used correction area greater than 75% is a continuing concern. Colin Campbell advised of an upcoming CAN which will address some of the critical blocks.'

13th April 1994: AUSTEL's Chairman Robin Davey provided the Hon Michael Lee, Minister for Communications, with the following advice

AUSTEL had agreed to the study being so limited on the basis that other monitoring it had requested Telecom to undertake on AUSTEL's behalf should provide AUSTEL with the data on the efficacy of the customer access network **(AS 57)**

Please note: prior to Graham Schorer and Alan signing the FTSP, AUSTEL was alerted by them that they were still experiencing phone and fax problems. Alan was adamant that the RVA message faults which wrongly advised customers calling his 008/1800 number that the line had been disconnected was crippling the singles club side of his business. Alan's arbitration reply to Telstra's interrogatories see **(AS 24)** confirms he received numerous letters (80 plus) from clients and tradespersons all documenting their own experience with when trying to make a booking. The RVA billing problem was threefold: first, Alan lost the incoming call; secondly, he was charged for the non-connected call; thirdly, Telstra allowed Alan to continue to promote his business using the 008/1800 service (wasted advertisement costs) aware of that the RVA post dialling problems would not bring Mr Smith any business.

26th April 1994: Alan telephoned Mr Mathieson using the EXICOM TF200 on his 055 267 230 line. During their conversation, Alan mentioned the lock-up problems he had been experiencing and described how numerous people had commented on this strange phenomenon. Mr Mathieson thought they should run a series of tests themselves and suggested that Alan put the receiver back in the cradle and count aloud to ten before picking it up again to see if it was still connected. It was. They then tried going to fifteen seconds and still the line remained open. Mr Mathieson then suggested that Alan take the phone off the 055 267 230 line and switch it with the phone which was connected to his 055 267 267 line (a TF2000 ALCATEL phone). More tests confirmed that the lock-up fault was still occurring. Mr Mathieson confirmed Alan's belief that the fault therefore must have been originating in the exchange. According to Mr Mathieson, since Alan was in arbitration at the time, he suggested Alan should bring this fault to the attention of Peter Gamble, Telstra's Chief Engineer.

Alan then switched the phones back to their original lines and phoned Mr Gamble, but did not tell him that Mr Mathieson and Alan had already tested two phones on the 055 267 230 line. Mr Gamble and Alan then carried out similar tests on the 055 267 230 line, with Alan first counting aloud to ten and then to fifteen. Mr Gamble's response was that he would arrange for someone to collect the phone for testing purposes on the following day. Two separate Telstra emails, the first one FOI K00941 dated 26th March 1994, show that (name blanked out) believed this lock-up fault was being caused by a problem in the RCM exchange at Cape Bridgewater **(AS 71)**. Document K00940 dated the day the tests were performed with Mr Mathieson and Mr Gamble also suggests that Mr Gamble believed the problem was caused by heat in the exchange **(AS 72)**

MELU Fault

Exhibit **(AS 523** and **524)** Alan has used Telstra's own file notes, to show that the Lonsdale exchange RVA software error problem had existed for at least seven to eight months (not sixteen days) with a call loss of 50% (not the 33% claimed by Telstra).

On 21st November 2007 (see page 10 above) Alan received from the Australian Communication Media Authority (ACMA) a sixty-nine-page draft report prepared by AUSTEL on 2nd March 1994 regarding Alan's claims against Telstra. At point 103 this report is most critical of Telstra for misleading and deceptive statements in relation to the MELU Lonsdale exchange RVA problem, noting 'It is apparent from Telecom's documentation that no investigation of the duration of the MELU data error problem would have been initiated without the persistence of Mr Smith's complaints on the matter.' And, at point 104, the report further states 'The assessment provided to Mr Smith that up to 50% of STD calls from Melbourne to the Cape Bridgewater Holiday Camp would have been affected by the MELU RVA problem appears to be accurate.' **(AS 525)**

Page 32 of the arbitrator's award is clear (see **(AS 526)**): Dr Hughes accepted Telstra's assertion that this fault only lasted for sixteen days with a loss of about 20% of the calls into the business when the truth is that the fault lasted for at least seven to eight months and a call loss of 50% to Alan's business during that time.

There is another relevant document that was also not provided by Telstra during Alan's arbitration, which is directly related to the condition of the Cape Bridgewater RAX exchange before the cutover to the new, unmanned RCM: this internal Telstra Minute, dated July 1991, Subject *"Portland – Cape Bridgewater PCM HBER"*, states: 'When the 'A' direction of system 2 was initially tested, approximately 11000 errors per hour were measured. In the 'B' direction, approximately 216 errors per hour were measured, 72 errors per hour is the specified number allowable. It was found that when the third PCM system was turned off, zero errors occurred in the 'A' direction of the second system, but errors still occurred at the same rate in the 'B' direction. The initial design of the PCM regenerator housing layout was done with the intentions that only 2 PCM systems to Cape Bridgewater would be used and with the stipulation that all regenerator housing must be located at existing load coil locations **(AS 527).** If this document had been made available to the arbitrator when he was assessing Alan's claim, which included the period from April 1998 to the cutover date of August 1991, then the arbitrator's award would have awarded a far greater loss of revenue figure than it did.

11th March 1996: At point 11, on page 15 of Telstra's Briefing Document B003 report (Appendix E) Telstra notes

on 11 March 1996 the Claimants' complained of receiving 3 different recorded voice announcements (RVA's) when calling mobile 019 925*** and 041*****. The Claimant's advised of the exchange code heard at the end of the RVA's. The exchange code given appeared to be a mobile Network exchange. Clear codes indicate that the fault existed in privately maintained equipment. **(238)**

EXICOM

FOI folio R37011, **(GS 49),** states

This T200 is an EXICOM and the other T200 [which was connected to Alan Smith's 267267 line] is an ALCATEL, we thought that this may be a design 'fault'??? with the EXICOM so Ross … tried a new EXICOM from his car and it worked perfectly, that is, released the line immediately on hanging up. We decided to leave the new EXICOM and the old phone was marked and tagged

However, the problem Alan Smith was experiencing with the EXICOM TF200 tagged and taken away was it used to lock-up **intermittently** after a terminated call. One of the side faults was while the EXICOM was in a lock-up state people could hear Alan in his office sometime minutes after he had terminated the call.

Exhibit (GS 50), Telstra FOI folio D01026/27 confirms that, Telstra knew there were lock-up problems in moisture prone areas affecting the EXICOM T200 that were manufactured after week 7 of 1993. This document confirms that one of the known lock-up side affects to this problem was while the line was that in this lock-up mode one party could hear room noise of the 'locked' party after the call had terminated. Document D01026 confirms that instead of destroying these faulty EXICOM phones Telstra allowed their technical staff to deploy new and re-deploy some 45,000 phones back into service in areas where their local technicians believed moisture wasn't a problem.

It would be unreasonable for Telstra senior executives to assume that local Telstra staff would have meteorological experience, or be aware that Coastal regions early morning to early afternoon moisture is a problem in place like Cape Bridgewater, where Alan Smith had his business. While it is evident from documentation Alan had problems with the EXICOM TF200 collected 27th April 1994, the new EXICOM left behind was still in service on his 55 267230 line until at least 1999, when it was removed to the Camp kiosk.

27th April 1994: Telstra collects Alan's faulty TF200 EXICOM Telephone. During the FTAP, Alan received Telstra document R37911 under FOI. This document shows that on the day after the testing of the TF200, Ross Anderson, a Telstra technician from Portland, tested the TF200 EXICOM fax phone at least eighteen times without it once displaying this lock-up fault. Had he first visited the RCM at Cape Bridgewater (ten minutes away) to release hot air from the RCM unmanned exchange? In his Witness Statement to the FTAP, he acknowledges connecting a fan to the RCM to alleviate the heat problem **(AS 73).** Telstra FOI document folio K00942/3 **(AS 528)** suggests the lock-

up problem could have been related to heat or moisture or a combination of both. There is no mention in this document suggesting that alcohol spillage by Alan, might have caused this problem.

TF200 Report

The TF200 report was one of the main documents submitted by Telstra in their defence. It refers to the EXICOM TF200 problem that was originally raised with Cliff Mathieson of AUSTEL on 26th April 1994, and which Alan has referred to previously **(AS 71** to **AS 74)**. Mr Mathieson believed that the fault had to be in the RCM exchange at Cape Bridgewater

Telstra's Peter Gamble tested Alan's TF200 via his Melbourne office on 26th April and, after testing the phone, reported that he believed that a heat build up in the unmanned Cape Bridgewater RCM was causing the problem. Exhibits **(AS 71)** and **(AS 72)** also supports this theory.

Telstra fault records FOI R37911 **(AS 73)** show that Ross Anderson, a Portland Telstra technician, collected the EXICOM phone on 27th April and then used it to make eighteen test calls without encountering any lock-up faults at all. Mr Anderson then forwarded the phone to Telstra's laboratories for further testing. The report included a number of photos of the dissected phone, and stated that it was received at Telstra's laboratory in a very dirty condition and was found to contain a sticky substance.

After Mr Anderson completed his testing on 27th April, the phone took nine days to reach the laboratory, where it arrived on 6th May and where it then waited another four days before laboratory testing commenced. Ray Bell, the author of the TF 200 report, was adamant that his staff found a wet and sticky substance in the phone which was later identified as beer residue. The laboratory staff decided that the 'beer in the phone' had caused the lock up faults (which Ross Anderson had been unable to find on the day after he took the phone from Alan's premises).

Attached here are pages 68 and 69 from Telstra's main B004 arbitration report indexed as **(AS 137)** and **(AS 138).** This report also uses part of the TF200 report as defence material stating

A brown sticky liquid substance which contained chemicals typically found in beer was found in the T200. This was causing the switch hook mechanism in the T200 to lock up. It is the customer's responsibility to ensure that foreign substances are not introduced into their CPE (reference document to 4.02 which includes a detailed report of analysis of T200 which is also known as a TF200).

After Alan received this report he asked Dr Hughes to access from Telstra, on his behalf, all the laboratory working notes so Alan could discover how the laboratory technical staff arrived at their conclusion. On 3rd March 1995 Alan wrote again with the same question. On 12th April 1995, Telstra gave Dr Hughes a copy of the original completed report that they had already submitted in their defence. On 17th April 1995, Alan wrote to Dr Hughes yet again, expressing his disgust at the thirty-five days it had taken Telstra to supply the wrong document, and saying:

I believed, when I asked the Arbitration Process to access, from Telecom, all written, original notes regarding the TF 200 (267 230), that this would include all original report notes and the contents of

the TF 200 report, however, all I received from your office, by courier, was a copy of the report, in printed form, which had already been viewed in Telecom's Defence documents. **(AS 159)**.

On 28th November 1995, six months after Dr Hughes had deliberated on Alan's claim, Telstra finally sent some of the laboratory working notes and graphs, under FOI. One file note, FOI A64535 **(AS 529),** dated 26th May 1995, confirms that they tested an unidentified TF 200 twice, by pouring beer into it and leaving it overnight. The note recorded that the beer had dried out within twenty-four hours. The second set of tests state the beer dried out within 48 hours. Since Alan's TF 200 had been removed from his premises sixteen days before it was tested, the 'beer' residue is clearly suspect.

There are many discrepancies in Telstra's TF200 defence report compared to the second report prepared two weeks after the first. Had this second TF200 report been supplied during Alan's arbitration then this information alone would have been enough evidence to instigate an investigation by the arbitration technical resource unit.

Two Concerned Victoria Police Officers

In July 2001, two senior Victorian Police Officers, who had been staggered to discover that the Communications Minister's officers had stopped the Senate Estimates Committee Investigation in 1997/99 from assessing Alan's Telstra FOI matters, passed on to him a damning document headed Senate Estimates Committee Hansard In-Camera 6th and 9th July 1998, and stamped 'Confidential'. Alan is convinced that this document was provided to him after the Victoria Police Major Fraud Group had been in contact with technical consultants who had dismissed as total rubbish Telstra's arbitration report that the Telstra laboratory had found a 'wet and sticky substance', which they identified as 'beer', inside Alan's EXICOM TF200 phone **(AS 634),** and that this had caused the phone to lock up.

On 28th November 1995, six months after Alan's arbitration, he received evidence confirming that Telstra had actually carried out two separate investigations of his EXICOM, two weeks apart, and that the second test report dated between 24th and 26th May 1994, proved that the first one, which had been provided to the arbitrator, was not a true account of the testing process at all but was a total fabrication. Photos and graphs by Telstra laboratory staff proved that, when wet beer was introduced into the TF200 phone it dried out completely in forty-eight hours. Alan's phone, however, was collected from his business on 27th April 1994 and not tested until 10th May – a gap of fourteen days. Alan now believe that the members of the Major Fraud Group who had been involved in Alan's case were staggered to learn about this fresh evidence, but still neither the TIO Board nor AUSTEL would investigate this new information. On 9th February 2001, Alan offered to provide the ACMA, in the public interest, with a copy of Telstra's original, twenty-nine-page TF200 EXICOM Report, and the second set of Telstra's laboratory findings – the ones that denounce the first report as nothing more than a bogus document that stopped a full and proper investigation into why my telephone service was locking up.

It is alarming to note that these two pages (**AS 634**) from Telstra's arbitration TF200 EXICOM report discuss various stages of the testing process from between 1st and 20th June 1994, and clearly show that even though Telstra knew their 24th to 26th May 1994 second investigation had proved the first

arbitration report dated between 10th and 12th May 1994, was fundamentally flawed, they still submitted this ***first*** flawed report to the arbitrator as Telstra's true findings.

Exhibit (**AS 635)** is a confidentiality agreement dated 16th April 1995, prepared by Paul Westwood, Forensic Document Services Pty Ltd in response to Alan's request. Alan then forwarded copies of this agreement to the arbitrator and the TIO's Special Counsel, Minter Ellison. Mr Westwood prepared this confidentiality agreement after agreeing to investigate Alan's claims that Telstra's TF200 report had been fraudulently manufactured. A comparison of document (**AS 636)** with the photos in Exhibits **(AS 637)** and **(AS 638)** clearly shows that Telstra fudged the TF200 EXICOM report. It is also important to note that, like the Westwood confidentiality agreement (**AS 635)**, the fax imprint on all four pages identifies the sender as Minter Ellison and the date as 19th April 1995 but the receiving party is not identified. Since Minter Ellison was the TIO-appointed Special Counsel to Alan's arbitration it is surprising that, when they saw these photos, they didn't immediately and officially call for an enquiry into why Telstra fraudulently manufactured this report. There was, however, no such enquiry at all; and this was the same Special Counsel who, along with the arbitrator's Resource Unit, was secretly exonerated from all legal liability when the arbitrator sanctioned the covert alterations to Alan's arbitration agreement.

3rd March 1995: Alan writes to Dr Hughes attacking the TF200 report

I believe, as I have already stated in my reply to Telecom's Defence Documents, that Telecom must show not only the phone and original photos taken of the phone when it was given to the Laboratories, but also all evidence used by the laboratories to derive this information. **(AS 141)**

At point 5.8 (a) in the arbitrator's draft award entitled: Faults Caused by Claimant the author states: 'Examples are said to be leaving the phone off the hook or damaging the equipment by spilling a liquid into it' **(AS 142)**.

Compare this to the arbitrator's final awards, which at point 5.8 (a) in the arbitrators final award in the section *Faults Caused by Claimant,* the author states 'A simple example is said to involve the claimant leaving the phone off the hook' **(AS 143).**

Why was the issue of a spilt liquid removed from the final award? Did the author and/or Dr Hughes unbeknown to me investigate the TF200 report issue and discover the report had been manufactured?

12th April 1995: Ted Benjamin provides Dr Hughes with TF200 information

I refer to your facsimile of 7 March 1995 and the attached facsimile of the letter of 3 March 1995 from Mr Smith. … I advise that Telecom is prepared to make available the further data being sought by the Claimant. … A copy of the Technical Report is enclosed.'

Please note: it took over a month for Telstra to respond to a simple request for further and better particulars, and when they did finally respond they provide a replica of the information they had already provided in their defence 12th December 1994. **(AS 158)**

12th February 2000: Alan decided to contact Ray Bell, author of the TF200 Report.

In this letter Alan asked Mr Bell to consider his position stating

Many years ago, in the Court of Tiflis [sic] of then Empire of Russia, the following legal precedent was set

...that no man can take advantage of his own wrong, and that it is a principal of law that no action can be maintained on a judgement of a court either in this country or in any other, which has been obtained by fraud of the person seeking to enforce it. That the defence is good...**(AS 271)**

General

12th July 1993: Telstra FOI documents M34204 - M34205 **(AS 30) c**onfirm that Alan had been complaining of cut-offs in March 1993. In this document Telstra states that there were 45,993 degraded minutes recorded in the Cape Bridgewater RCM exchange yet, in the Arbitration Technical Report, DMR and Lane Telecommunications (30th April 1995) refers to only 405 degraded minutes. The Technical Report also claims there were only 43,500 errored seconds (ES) when the Telstra document shows 65,535. It seems that, for some unknown reason, DMR and Lane downplayed the actual number of faults.

A Telstra Minute **(AS 527)** from July 1991 notes that: 'When the 'A' direction of system 2 was initially tested, approximately 11,000 errors per hour were measured. In the 'B' direction, approximately 216 errors per hour were measured, 72 errors per hour is the specified number allowable', thereby confirming that similar numbers of errors per hour were recorded at the old RAX exchange before the Cape Bridgewater RCM was installed but point 2.23 of the DMR and Lane arbitration report **(AS 535)** only lists twenty-three reported faults as being investigated over the whole 6½ years from April 1988 that was covered by Alan's arbitration claim. Then, at point 3 in the same exhibit, DMR & Lane further state:

About 200 fault reports were made over December 1992 to October 1994. Specific assessment of these fault reports other than where covered above (the twenty-three assessments) has not been attempted.

This is clear evidence, produced by the consultants themselves, that out of the two hundred recorded fault complaints that Alan lodged between December 1992 and October 1993 only 11% were assessed. Exhibit **(AS 108)**, a graph that Alan prepared using Telstra's own fault and CCAS data, shows that, in fact, more than 1,068 faults were registered over the years covered by Alan's claim but his graph, *Exhibit S19* (*Smith Claim Document 19*), is not included in the list of claim documents that were assessed by DMR and Lane (see *Exhibit* **(AS 535)**).

25th November 1993: Telstra Memo *Short Duration Calls, Mr A Smith* **(AS 46a)** states

The following is an assessment of the individual disputes highlighted by Mr Smith. From the information given, little more can be offered for explanation than "This is not the way it should work, we need to investigate to find cause". ...

Calls to Traralgon, being charged on busy - This situation should not have occurred. ...

Calls to RVA ... being charged for RVA is not correct operation.

6th December 1993: This internal Telstra memo from Ted Benjamin to Group Manager Director Commercial & Consumer, states 'The survey found that 4% of the 2644 small business (ie. Commercial) customers surveyed perceive that they have experienced incoming call problems over the past month which they regard as significantly or Very significantly affecting their business. **(GS 126)**

17th December 1993: Len Budge, Manager TELCATS (Telstra's Customer Attitudes to Service, the division that performed customer surveys) sends an Internal Memo to Harvey Parker, Group General Manager, Commercial and Consumer stating

For your information please find enclosed the final Cot market research report which was delivered to AUSTEL this week. As indicated in the draft report, 4% of the small business customers surveyed indicated that they were experiencing incoming call difficulties which they judge as significantly, adversely affecting their business. **(GS 130)**

This 4% of small business customers experiencing incoming call difficulties is addressed below at 11th April 1994.

21st January 1994: FOI document folio K00094 is an email addressed to 'Trevor' and discusses CCAS connections including making the statement that 'several faults have been reported as originating from this number. 312 3796 is the operations Manager for Golden Messengers they have reported difficulties in getting thru to G.M. frequently.' **(GS 152)**

25th February 1994: The Minister's office writes to Telstra's Jim Holmes

Attached are copies of correspondence received by the Hon Michael Lee MP from Mr Alan Smith of Cape Bridgewater Holiday Camp, Victoria, outlining further difficulties he is having with his telephone and facsimile service.

I ask that you investigate Mr Smith's allegations and take all appropriate steps to resolve his problems. **(AS 54-A)**

Compare with **(AS 48-G)**, where, among other issues, Robyn Davey advises the then Minister for Communications, the Hon David Beddall, that Telstra had admitted to there being unidentified faults in the network.

The Call Charge Analysis (CCAS data for the 27th April 1994 shows that after Alan's faulty EXICOM had been collected and a new EXICOM installed in his office there was still a lock-up problem affecting his service. The CCAS data confirms that at 22:23 hours the incoming caller waited for 3599 seconds (nearly an hour) before the call was answered. This CCAS data also confirms that after this phantom caller had waited 3599 seconds, the conversation lasted a further 14718 seconds (over four hours) **(AS 74)**.

In his official report, George Close, Alan's technical advisor, used the limited amount of Telstra's own data which was received under FOI during the FTAP to show that the lock-up fault was apparent from at least December 1993 through to February 1994. He then calculated that 863 hours were lost of 77 days due to this one fault **(AS 75).** It is interesting to note that Mr Close also found a similar pattern of faults in other FOI documents relating to Alan's Gold Phone coin-operated service which recorded a fault rate of 59% blockage over the same period.

During the FTAP, Alan received Telstra FOI documents K01031, -32, - 33, K00957 and K01398 which further substantiate the relationship between the fault and the exchange. First, in document K01398, Tony Watson of Telstra states that faults were 'probably caused by RCM, no need to investigate. Spoke to Bruce, who said not to investigate also'. Then, in document K01032, Bruce Pendelbury, Telstra's Fault Manager tells Jim Holmes, Telstra's Corporate Secretary that three test calls to Cape Bridgewater appeared to be answered, but no conversation took place. How could three test calls be designated 'successful' if they were not answered at the receiving end? How did the technician know what the receiving person was (or was not) hearing?

According to Telstra archival documents this lock-up fault was apparent on Alan's phone/fax line as early as August 1993. The new owner of Alan's business, Darren Lewis, provided a statutory declaration and other testaments to the Hon David Hawker MP, stating that the lock up problems on the fax line was severe at least up and until to November 2002 **(AS 520).**

12th July 2001: Alan and Ronda Fienberg, his Melbourne based secretary, do a number of line tests on the incoming and outgoing fax line. Prior to Ronda doing these line tests, both Cathy and Graham had also experienced the same lock-up problems when doing similar line tests during this period. This note from Ronda clarifies there were lock-up problems still apparent on Alan's business service lines mid July, 2001. **(AS 277)**

Please note: this was the same type of lock-up fault that Telstra acknowledged was a moisture related problem experienced with the EXICOM TF200.

RCM

The AUSTEL COT Report dated 13 April 1994, (on pages 163 to 165), confirm that from when the new RCM was installed at Cape Bridgewater in August 1991 until at least July 1993, numerous problems affected the RCM at Cape Bridgewater.

Ex-Telstra employee Gordon Stokes, swore a witness statement that was used in the FTAP (12th December 1994), noting

I transferred to Network Operations Portland in 1989 and between 1990 and 1994 I was responsible for maintaining switching equipment at the Portland exchange. ...

After the Portland to Cape Bridgewater RCM systems were installed, I became aware that the performance of the systems could be measured using the facility known as CRC. I checked the CRC error counters regularly between the date the RCM systems were installed and February 1994, when I left Telecom. Checking the CRC counters in this way was normal maintenance practice. I can recall checking the CRC counters prior to March 1993. When I checked the CRC counters pre-March 1993, I did not observe any errors that could have impacted upon the telephone service provided to cape Bridgewater customers. A typical reading for each RCM system was 5 to 10 errored seconds, no degraded minutes and severely errored seconds. **(AS 20)**

Telstra's internal Minute dated July 1991 see above (**AS 527)** states that: '72 errors per hour is the specified number allowable.'

If Mr Stokes did check the RCM regularly, as he states, why didn't he notice that the fault alarm system had not been installed after the RCM replaced the RAX exchange in August 1991, twenty

months before? Furthermore, Mr Stokes's statement does not correlate with a report made after a visit to the Portland exchange by the Melbourne Pair Gain Support Group states

It is also important also note here that in the more adverse findings by AUSTEL in their draft Alan Smith report on the ongoing problems at the Cape Bridgewater RCM (see page 10 above) it is noted at

- **Point 210 on page 69** 'Service faults of a recurrent nature were continually reported by Smith and Telecom was provided with supporting evidence of this in the form of testimonials from other network users who were unable to make telephone contact with the camp '

- **Point 212 on page 69** 'In view of the continuing nature of the fault reports and the level of testing undertaken by Telecom doubts are raised on the capability of the testing regime to locate the causes of faults being reported '

30th January 1994: Telstra FOI document K01398 confirms that Telstra's Tony Watson knew that the lock-up problem Alan had complained about was caused by a fault at the RCM but Telstra's Bruce Pendelbury told him not to investigate this fault, further proof of the recurring problems. **(AS 58)**

23rd January 2003: Darren Lewis, the new owners of Alan's business wrote to the TIO John Pinnock noting:

As well as speaking to David Hawker's representative this morning, I also had a disturbing discussion with Tony Watson, the Telstra fault technician assigned to my case. Mr Watson informed me (in a round-about way) that he is reluctant to supply me with any more information in relation to our phone faults because he knows I am in contact with Alan Smith, the previous owner of the business. Apparently Telstra is afraid that, when talking to Alan, I might bring up the phone problems and therefore provide him with information he could use in an attempt to reopen his arbitration.

Why would Telstra's Tony Watson be refusing to help Darren Lewis with the recurring phone problems at the RCM that, nine years before, Dr Hughes (arbitrator) and Telstra had failed to investigate transparently? Surely the reader will see that something was terribly wrong for Mr Watson to still be holding a grudge against Alan in 2002/03, because of something that was supposed to have been fixed at the **RCM** prior to the arbitrator bringing down his findings.

1800/008 Faults

1st November 1993: Telstra internal email H36293, states

All admin groups are being inundated with complaints from customers who have advertised their numbers as 1800 but their customers are simply unable to get through to them. I have spoken to our fault staff at Waverley who are also inundated with same complaints.' **(AS 45 A)**

5th November 1993: Telstra Internal Memo H36178**.** Telstra's Greg Newbold Group Communications Manager, alerts Harvey Parker, Group Managing Director – Commercial and Consumer about the short duration post dialling delays affecting Telstra's 1800 customers

Bruce is concerned that the matter requires fixing at a national network level not just on a fault by fault basis. He also raises the question whether we should be actively promoting 1800 in the current circumstances.' **(AS 45 B)**

Please note: Alan was neither informed that Telstra was aware that his 1800 complaints were valid, nor to withdraw his 1800 advertising until the problem was rectified.

26th January 1995: Alan writes to Dr Hughes providing accompanying material detailing his 008/1800 account that showed Telstra had a billing software problem in their network at least up and until13th January 1995, four months after Telstra submitted the deficient SVT results. **(AS 139)**

3rd October 1995: Cliff Mathieson, AUSTEL, writes to Telstra's Steve Black regarding 008/1800 faults 'I write concerning charging discrepancies raised in 1994 by Mr Alan Smith of Cape Bridgewater Holiday Camp regarding his 008 service, and the wider issues these discrepancies raise for Telstra's 008/1800 service. … To date, AUSTEL has not received a response from Telstra which allays AUSTEL's concerns about this issue.' **(AS 201)**

Please note: this letter was copied to John Pinnock

28th October 1997: Mr Pinnock writes to Ted Benjamin regarding *Mr Alan Smith: Dispute 1800 Charges* noting

For your information I enclose a copy of a letter received from Mr Smith. I would appreciate your detailed advice concerning call charges for Mr Smith's 1800 line, in particular whether Telstra agrees that this matter was not addressed in Mr Smith's arbitration' **(AS 212)**

Alan has not seen a response to this letter. Compare this with the letter Ted Benjamin wrote to Bruce Matthews of AUSTEL on 11th November 1994, confirming that Telstra would address the billing faults raised by Alan Smith in their defence of his claims lodged under the FTAP.

Correspondence provided to Mr Pinnock by AUSTEL on 3rd October 1995 and referred to above shows that he had been advised that Telstra had still not addressed the billing issues five months after Dr Hughes had deliberated on Alan's claim. Telstra responded to AUSTEL's letter on 16th October 1995, again confirming that the 008/1800 billing issues were not addressed in Alan's arbitration and also confirming that Telstra was trying to address these same unaddressed issues from Alan's arbitration, including short duration and RVA calls, and fax faults in secret - outside the legal structure of the Fast Track Arbitration Procedure **(AS 213)**.

Please note: when AUSTEL allowed ONLY Telstra to defend this 008/1800 arbitration claim matter (without advising the previous arbitrator they had done so) AUSTEL disallowed Alan's his legal right to challenge Telstra's 16th October 1995 defence on this matter.

22nd January 1998: Ms Toni Ahkin, Communication Minister's Office, writes to Mr Pinnock

Further to our recent phone conversation I am forwarding Telstra's transcript of its meeting with Alan Smith, held on 14 January 1998 concerning his claim of overcharging on his 1800 number.' **(AS 239)**

23rd January 1998: Ms Ahkin writes to Mr Pinnock 'I am forwarding copies of our proposed replies (that will be sent to the Minister's office today) to David Hawker and Alan Smith in response to recent Min Rep's concerning the arbitration process and overcharging on Mr Smith's 1800 number.'

This fax from Toni Ahkin suggests that John Pinnock is being provided with a draft copy of information regarding Alan's arbitration and billing problems, for his comment, before even the Minister and David Hawker received the completed letter. **(AS 240)**

4th February 1998: Ted Benjamin writes to Mr Pinnock noting that

Telstra has examined the information forwarded by your office with regard to Mr Smith's 1800 telephone service and is currently conducting an investigation into Mr Smith's complaints.' Attached to this letter was a three-page file note/transcript from Telstra's Lyn Chisholm who had investigated Alan's billing fault evidence on 14th January 1998, as referred to by Ms Ahkin in her letter to Mr Pinnock on 23rd January 1998. **(AS 241)**

26th February 1998: Wally Rothwell Deputy TIO writes to Alan advising him that his office had received Alan's letters of 17th and 18th regarding billing information that was withheld from Alan during his arbitration. He notes that

the Ombudsman [John Pinnock] has asked me to seek the opinion of the Special Counsel to the TIO under the FTAP, as to whether the aspects raised in those letters are matters which were or should have been decided by the Arbitrator in the Award he made.' **(AS 243)**

In her letter of 2nd August 1996 to Mr Deeble of the TIO's office, Sue Hodgkinson had already admitted, to both Dr Hughes and the TIO's office, that these billing documents WERE withheld from Dr Hughes and from Alan during his arbitration. **(AS 220)** Therefore, how did Dr Hughes either address the billing issues, or include them in his award?

Mr Pinnock's statement is somewhat confusing since he had already told Mr Hawker, on 28th March 1996 that the faults were addressed in Alan's arbitration. Once more Mr Pinnock concealed his own knowledge that Ferrer Hodgson Corporate Advisory (FHCA) had admitted on 15th November 1995 that DMR & Lanes didn't address the 008 billing problems or diagnose the causes of the faults, but left the problems 'open'.

17th March 1998: Even though John Rundell (FHCA) had written to Mr Pinnock, on 15th November 1995, advising him that DMR and Lanes had not addressed Alan Smith's billing claim documents **(AS 104)** Mr Hodgson, Chairman of (FHCA) told Mr Alan Cameron, Chairman of the Australian Securities Commission, that 'DMR and Lanes did address all the claim documents submitted to the Arbitration.' **(AS 244)**

16th October 1998: The Hon David Hawker, MP, writes to Mr Pinnock 'I would appreciate your assistance in resolving Mr Smith's complaint. I look forward to receiving your advice in due course.' **(AS 258)**

11th November 1998: Ms Southwell, Minister's office writes to Mr Pinnock **a**sking for advice on the likely time-frame for finalising Mr Smith's claim of overcharging on his 1800 number. A meeting has been proposed between Mr Smith and Senator Ian Campbell and your response will form the basis for the proposed meeting.' **(AS 260)**

29th January 1999: Mr Dunstone, from the Minister's office writes to Mr Pinnock

I would be grateful if you could advise the status of the TIO's investigation into Mr Smith's claim of overcharging – I understand this matter has been before the TIO for some years. **(AS 261)**

10th February 1999: Mr Pinnock writes to The Hon David Hawker, MP, in response to a letter from Mr Hawker on 11 December 1998,

The only matter outstanding which the TIO is considering is whether the Arbitrator considered Mr Smith's claim for overcharging on his then 008 service when he made his award.' **(AS 262)**

This statement shows that Mr Pinnock had still not told Mr Hawker that the TIO-appointed Arbitration Resource Unit had admitted that none of Alan's billing claim documents had been investigated and/or addressed during his arbitration. It also confirms that, although Mr Pinnock appears to have received advice from both Dr Hughes and Peter Bartlett on these same issues, at this time he was still considering the matters.

10th February 1999: Mr Pinnock again misleads an interested party concerned about Alan's continuing billing complaints when he advised Mark Dunstone, from the Minister's office that

'Mr Smith, however, raised issues in 1998 which I considered merited investigation, viz. whether the arbitrator had, in his Award, dealt with Mr Smith's claim that he had been overcharged on his 800 *(sic)* (now 1800) telephone service as well as complaints concerning his fax line. The TIO has carried out some preliminary, if protracted, investigation of the former claim. **(AS 263)**

Please note: Mr Pinnock had discussed these billing issues with AUSTEL 3rd October 1995, and with John Rundell, FHCA 15th November 1995. What made Mr Pinnock state that Alan only raised the billing issues in 1998?

Monitoring and Testing of faults

Technical Evaluation

To the casual observer Dr Hughes' letter may seem quite reasonable, but to the COT claimants who suffered because Dr Hughes did not ensure that Telstra acted honestly and the Resource Unit remained independent, it is a cloak and a smoke screen. How could Dr Hughes and the people this letter was copied on to (except, perhaps, Ted Benjamin) not know that, in his incomplete draft report dated 30th April 1995, Paul Howell had advised Dr Hughes **(AS 532),** that

One issue in the Cape Bridgewater case remains open, and we shall attempt to resolve it in the next few weeks, namely Mr Smith's complaints about billing problems. Otherwise, the Technical Report on Cape Bridgewater is complete?

How could Dr Hughes forward the same report to Alan, with the same date, but without the reference to the report still being incomplete, and instruct Alan to respond within five days?

31st January 1994: A comparison of Alan's phone/fax account, 055 267230, with Telstra CCAS documents with FOI numbers K01410 and K01411 confirms that someone within in Telstra hand-wrote the names of the people Alan had spoken to and/or faxed. Transcripts from Alan's interview with the AFP 26th September 1994 **(AS 50-A)** and **(AS 50-B)** confirms that the AFP were alarmed that Telstra had gathered private information about Alan including documenting on this CCAS data the names of the people who Alan rang on a daily basis. This CCAS data information was supplied to Warwick Smith and the Commonwealth Ombudsman's office.

DMR

When Alan's summary **(AS 322-A to F)** is compared with **(AS 108)** it shows first hand 'pages upon pages' of a comprehensive log of Alan's complaints that he provided to the arbitrator during his arbitration. Despite this, page 2 in the DMR & Lanes report see exhibit **(AS 322-C)** DMR & Lane state 'A comprehensive log of Mr Smith's complaints does not appear to exist.' Each of the listed numbers in the far right column of this log was the number of not only the claim document but gave a brief description of the actual document itself.

Service Verification Tests

As information provided to AUSTEL confirmed that telephone problems for the COTs had persisted after respective settlements and court actions, AUSTEL turned to Coopers & Lybrand, who were auditing the way in which Telstra had previously dealt with COT legitimate complaints. It was during this period that Robin Davey made a statement to the four COT Cases words to the affect that, 'before any appointed assessor can bring down a finding on your matters an end to end testing of your service at your premises will have to be implemented, as we don't want you back here again a third time.' The group later learnt the process was to be called Service Verification Tests (SVT)

20th January 1994: AUSTEL's Cliff Mathiesons and Michael Elsegood counter sign a letter to Telstra's Mr A Humrich, General Manager, Cental Region Network Operations, which states

As discussed late last year with Mr J Gitsham, the following comments are offered on your draft set of verification test for public switched telephone services with recurring service difficulties. ... Where test results do not meet the essential outcome, remedial action should be taken and the relevant tests repeated to confirm correct network operation. **(AS 611)**

Graham had originally agreed to the Service Verification Testing on the condition that Telstra provided 'Call Line Identification' on all answered test calls which alleviated possible tampering with the test results. Telstra however refused to comply with this request.

There were serious deficiencies in Telstra's Service Verification Testing process at Alan Smith's business and yet Telstra still used the corrupt test results to support their arbitration defence claims that the lines into Alan's business were operating correctly. The following information for 29th September 1994, in relation to these Service Verification Tests, Alan has confirmed, using Telstra's own Call Charge Analysis System (CCAS) data, that the tests carried out on all three of his business lines were, beyond any doubt, fundamentally flawed. In light of this, it is interesting to consider Telstra's refusal to carry out the Service Verification Test calls at Golden Messenger with Call Line Identification operating for each test call.

29th July 1994: On page 4 of AUSTEL's first quarterly report, 'Status of implementation of recommendations of COT Cases report', under the heading *Service Verification Tests* it states *'In its briefing, Telecom indicated (and we will seek confirmation and further detail in writing) that if the SVT indicates an unacceptable level of service then the required replacement of network equipment will be undertaken.'* **(GS 199)**

29th September 1994: Peter Gamble, Telstra's arbitration engineer, experienced major problems with getting his Service Verification Testing equipment to work correctly at the Cape Bridgewater Holiday Camp and then blamed Alan's telephones, saying that the problems were being caused because the phone in the camp kiosk had been left connected to the phone line (there were three separate lines with three separate phones) The kiosk phone was connected on to the office so that staff could answer it if they were in the kitchen or the office, which were about 100 metres apart. Cathy Ezard and Alan disagreed: they had disconnected the phone themselves immediately after the Telstra technicians arrived on site. It was clear that Mr Gamble was unable to get the other two service lines 55 267230 and 55 267260 to work either – nothing made sense. Cathy and Alan both later prepared and signed Statutory Declarations confirming their belief that Mr Gamble was less than professional and that it had seemed that there were problems with the Verification equipment. These documents were both forwarded to Dr Hughes.

Despite the problems with this equipment, Mr Gamble later swore under oath in Telstra's arbitration defence that the tests had a success rate of 99.8% see point 37 to 39 **(AS 540)**

11th October 1994: AUSTEL wrote to Peter Gamble regarding the 'deficient' verification testing and asked what Telstra intended to do about this deficiency **(AS 123)**.

16th November 1994: AUSTEL wrote to Steve Black of Telstra under the heading 'Service Verification Test Issues', outlining their concerns regarding the deficiencies in this testing process as it was conducted at the Cape Bridgewater Holiday Camp. **(AS 124)**.

Even though AUSTEL expressed serious concerns about obvious deficiencies in this Service Verification testing process, Telstra still used the test result to support their arbitration defence. Telstra's CCAS data for the actual day the testing took place at Alan's premises 29th September 1994 confirms that none of the separate tests on Alan's three business 055 267267, 055 267230, and 055 267260 lines had met the regulators requirements.

In the technical report prepared by Brian Hodge, B Tech, MBA (B.C. Telecommunications), on 27th July 2007, after viewing the Cape Bridgewater Holiday Camp (SVT) CCAS data dated 29th September 1994 (**AS 541)** he concludes:

Examination of the CCAS printout for the day specified (29 Sept 1994):

20 calls from each service number DID NOT take place: The calls attempted WERE NOT held for the prescribed 120 seconds; NO incoming test calls were made to the services in question. The CCAS printout for the period DO NOT indicate any calls to or from the service numbers in question. As this data is used for billing purposes ALL such call activity must be recorded.

It is my opinion that the reports submitted to Austel on this testing programme was flawed, erroneous, fictitious, fraudulent & fabricated, as it is clear that no such testing has taken place as Telstra's own call charge system DOES NOT record any such activities. Therefore the results are flawed or did not occur' **(AS 486).**

2nd October 1994: Alan complained to Ted Benjamin about the deficient service verification tests conducted at his premises. **(AS 106)** On 6th October 1994, Telstra wrote to Dr Hughes, asking him to order Alan to comply with their interrogatories and to 'direct the claimant to provide Telecom, on or before 20th October 1994, with the particulars set out in Schedule 1 of this letter, and the documents set out in Schedule 2 of this letter'. Some of the documents they were seeking could only be supplied by Telstra themselves, under one of the many FOI requests which they had not yet complied with. Under these conditions it was not feasible for Alan to accurately respond to the interrogatories.

10th October 1994: Alan again complains to Telstra regarding the SVT tests. **(AS 107)**

Similar to his letter of the 2nd October 1994, **(AS 106)** this SVT complaint was also copied to Dr Hughes and Warwick Smith. It likewise received no response

15th February 1995: Alan's letter to Dr Hughes again raises the SVT problems noting

My previous letters to you in January 22nd and 26th also confirmed we were still experiencing problems with our service lines. …

As you are aware the verification testing was prepared in consultation with Austel and was to form the basis for determining whether the Cot cases individual telephone service was operating satisfactory at the time of our arbitration. Our previous statutory declarations confirmed the testing was not conducted as they should have under the agreed testing process. **(AS 140)**

BCI testing

Prior to the COT four signing the FTSP, Telstra called in Bell Canada International Inc (BCI) to carry out a study on a number of the service lines and exchanges which were allegedly causing the problems being experienced by the COT's businesses. After the completion of the BCI tests, AUSTEL and the COT Cases argued that the actual faults and problems they had complained of had not been highlighted correctly in the testing process. The problem was that, if BCI found a fault while they were testing they halted the test at once and fixed the problem before they re-tested. In other words, even though they found faults along the way, their final report specified that the Telstra network had a clean bill of health and there was no record of the faults they had fixed during the

testing process. Despite this, the report was still used to support Telstra's defence of the network being up to standard for the eight previous years in a number of the COT cases.

18th July 1994: Dr Hughes accepts the BCI report as arbitration evidence. A letter from Dr Hughes to Paul Rumble states

On 13 July 1994, the Resource Unit requested copies of the Bell Canada Report, the Coopers & Lybrand Report and the Telecom response to these Reports. The purpose of the request was to enable the Resource Unit to commence perusing relevant background documentation. **(AS 88)**

16th August 1994: Dr Hughes writes to Telstra's Paul Rumble, under the heading Arbitrations – Garms, Schorer, Gillan, Smith stating

You will note Mr Close is seeking information to which he has apparently not yet had access. Presumably this may lead to a formal application one or more of the Claimants pursuant to clause 7.5 of the 'Fast Track Arbitration Procedure.'

Before I give consideration as to what course to follow, do you wish to provide an initial response to the matters raised in Mr Close's letter? ***(AS 91).***

16th August 1994: Dr Hughes writes to Mr Rumble

If Mr Smith does seek to rely upon the raw data or the results of any analysis of the raw data, and if such information is to be made available to him, then I could not accept his submission as being 'complete' as at 18 August 1994'

At the time of writing this letter, Dr Hughes had already provided the BCI Report to the Resource Unit for their perusal. Alan did seek to rely on this data, but it was not made available and therefore his submission could not be complete, according to Dr Hughes statement above. Dr Hughes still brought down his findings. **(GS 202-c)**

28th August 1994: Alan again writes to Dr Hughes regarding FOI BCI matters. This letter acknowledges that Alan contacted Telstra's David Stockdale as he 'wanted to identify which person in National Network Investigations was advising in writing the telecom staff responsible for making decisions to exempt or delete information from me under the FOI procedures on the basis that the information contained in the documents that he was supplying would be considered harmful to Telecom.' **(AS 94)**

16th September 1994: Alan responds to Telstra's interrogatories. On page 15 and 16 of this 42 page reply addressed to Dr Hughes Alan questions Telstra how he can respond information as requested in the interrogatories when Telstra has still not supplied that information noting

produce this raw data to the resource team and I shall prove calls came in as answered but they were not. Go on, prove I am wrong. If I am right, then you produce all raw data that I have asked for, including Bell Canada, if I am wrong then let the Assessor decide and make a judgement for 1992'.

Another Telstra question, that at point 2, could have been better answered on the BCI matter had Alan received the BCI Raw Data under FOI or through Dr Hughes. **(AS 97)**

21st September 1994: Dr Hughes to Paul Rumble **(AS 99)**

I confirm I have not directed the production by Telecom of any Bell Canada International documents. At this stage I would be encouraging Mr Smith to defer any request for discovery until Telecom's defence documents have been submitted.'

Didn't Dr Hughes think that Alan was entitled as the claimant to be provided with the correct information so that he could correctly substantiate his reply to Telstra's interrogatories and to further support his claim?

27th October, 3rd of November 1994: **(AS 111** and **AS 112)** Alan wrote to Telstra seeking relevant CCS7 and CCAS Bell Canada International data. Some of this data had been included in the documents that were supposedly held in Telstra's archives and which Telstra had previously advised the arbitrator was ready for release

8th December 1994: Alan faxed two letters to Dr Hughes asking for access to all CCS7 and CCAS data, including all the Bell Canada working notes covering tests at Cape Bridgewater on 5th, 8th and 9th November 1993, because he was concerned that Telstra had misled the arbitration process with this report. Alan concluded this letter by saying 'This information sought by the Cape Bridgewater Holiday Camp is vital to assess Telecom's defence of their network during the Bell Canada testing period.' **(AS 131)**

13th January 1995: Ted Benjamin writes to Dr Hughes 'I refer to your letter dated 27 [sic] December 1994 enclosing a copy of a letter dated 28 December 1994 from Mr Smith. ...

Mr Smith has now requested CCAS and CCS7 call statistics for the dates 5 November, 8 November and 9 November 1993. Telecom has not denied Mr Smith access to these documents but is unable to provide documents which do not, as far as I am aware, exist for the specific dates requested by Mr Smith.' **(AS 134)**

The BCI Report used by Telstra as defence material and provided to the resource unit by the arbitrator as arbitration library material states they used the CCS7 data at Cape Bridgewater RCM to trap the tests calls generated on 4, 5, 6, 8 and 9 November 1993. It has now be confirmed by Brian Hodge (B Tech, MBA) in his report dated 27th July 2007 that the RCM system could never have facilitated the CCS7 data which the BCI Report states captured the 13,590 successful tests generated to Cape Bridgewater. Brian Hodge has provided a detailed report see **(AS 486).** Ted Benjamin was right when he stated the CCS7 data for those dates did not exist. What exchange did these alleged 13,590 BCI tests transmit to?

On the 26th May 1995, two weeks after Dr Hughes brought down his award, Telstra supplied Alan (under FOI) documents numbered N00005, N00006 and N00037. These documents confirm Telstra knew as early as 23rd August 1994, (three months before they submitted the BCI tests as defence material) that at least one day's testing was impracticable **(AS 135** and **AS 136)**.

The report prepared by Brian Hodge confirms that none of these tests conducted over a five day period between the 5th and 9th of November 1993 could have terminated through the TELELEC CCS7 monitoring system installed at the Cape Bridgewater RCM. In the BCI addendum report dated 10th November 1994, **(AS 546)** it is noted, under the heading

Additional Tests

15.10 Glen Water Fish Farm

15.20 Cape Bridgewater Holiday Camp

'As shown in 15.13 and 15.23, the TELELEC CCS7 monitoring system was used to monitor all CCS7 links terminating to the homing exchanges of the two COT clients.'

Two of Telstra's employees (who were then unaware of Alan's later claims that BCI could not have installed the TELELEC CCS7 system at the Cape Bridgewater RCM to capture the alleged 13,590 test calls) submitted sworn witness statements regarding other tests that Telstra had conducted themselves, including confirmation that the nearest exchange that could handle the CCS7 system was the Warrnambool exchange, 120 kilometres from Cape Bridgewater (see point 20 of (**AS 547)**, David John Stockdale's witness statement dated 8th December 1994, and point 4 of (**AS 548)**, Christopher James Doody's witness statement dated 12th December 1994).

During the Senate Estimates Committee investigations into COT FOI issues, Graham Schorer raised the possibility of the deficiencies in the Cape Bridgewater BCI tests with Senators Ron Boswell and Chris Schacht. Pages 108 and 109 of Senate Hansard records **(AS 549)** confirm that Telstra deflected the issue of impracticable tests, stating that Alan Smith's claim that the report was fabricated was incorrect and the only problem with the report was an incorrect date relating to one of the tests. The Senate then put Telstra on notice to provide evidence of that error.

Exhibit **(AS 551)** includes four pages dated 26th September 1997, covering questions put on notice by Telstra to Senator Ron Boswell. I have marked these questions as a, b, c and d. These four pages clearly show that Telstra did not advise Senator Boswell that NONE of the 13,590 tests that were allegedly carried out at Cape Bridgewater could have passed through the TELELEC CCS7 equipment installed at Cape Bridgewater, because it was not possible to use that equipment at the unmanned Cape Bridgewater RCM, or even the main Portland exchange. Point 'c' refers to a letter dated 11th August 1995, from Gerald Kealey, the BCI consultant to Telstra, alleging that he did carry out the BCI Cape Bridgewater tests (see **(AS 552),** attached). In this letter Mr Kealey states

I also reviewed my personal travel log to verify the times and dates of my movements from Melbourne to Portland during the testing period.

Why would Mr Kealey travel to Portland when the Portland exchange is 102 kilometres away from the Warrnambool exchange, which was the only exchange in South West Victoria that could accommodate the TELELEC CCS7 monitoring equipment? It is therefore clear that Telstra not only misled and deceived the arbitrator in Alan's arbitration procedure they also misled and deceived the Senate Estimates Committee hearing into this matter. If the Senate had been told the truth about this fundamentally flawed BCI Cape Bridgewater report, an investigation into Alan's long-standing complaints to the TIO and the Ministers' offices – that his telephone problems were still occurring, even after the end of his arbitration – might have received the response they deserved, instead of being ignored.

28th April 1995: Mr Schorer writes to Ms Lesley Gordon, AUSTEL's FOI Co-ordinator stating

Austel know from their own experience, as a result of the Austel investigation and report, the relevance, and more importantly, the importance and dependency of myself to receive the document contained in the following Austel categories:-

D. Early papers/drafts COT Case Report. 6 files.

F. Bell Canada, Coopers and Lybrand Reports and assoc papers. 4 files.

G. Telecom internal docs. 4 files.

H. Monitoring and testing: general. 5 files.

J. Telecom monitoring, qualitative main, difficult network fault data. 2 files. **(GS 216)**

By the 28th April 1995, Alan and Graham had still not received all the required raw Bell Canada International data requested under FOI.

Among the papers that Alan was given by Telstra on the 24th May, 1995 (see *Late Delivery of FOI Documents*) Alan found two particularly relevant documents, numbered N00005/6 and N00037 **(AS 135, AS 136, GS 219)**.

Document N00005/6 is a letter dated 6th September 1994, from Telstra to Gerald Kealey of Bell Canada International in Ottawa, which confirms that **the BCI tests conducted at Cape Bridgewater on 5th November 1993 were impracticable.**

N00037 is an internal Telstra memo dated 23rd August 1994, which acknowledges that Alan was correct: **the BCI tests conducted at Cape Bridgewater on 5th November 1993 were impracticable.**

29th June 1995: On behalf of Alan Smith, Taits Solicitors of Warnambool wrote to AUSTEL asking for information associated with the BCI and NEAT testing process conducted at the Cape Bridgewater RCM in November 1993. **(AS 185)**

12th July 1995: Cliff Mathieson of AUSTEL replied **(AS 186)**

The tests to which you refer were neither arranged nor carried out by AUSTEL. Questions relating to the conduct of the test should be referred to those who carried them out or claim to have carried them out.

Cliff Mathieson had, however, previously commented on the conduct – he wrote to Telstra on the 9th December 1993, before Telstra used the BCI report as defence material, advising Telstra that they had to provide the 'assessor(s)' of the COT processes with a copy of his letter regarding the BCI tests which he declared were not thorough enough.

This letter was not provided to Dr Hughes as AUSTEL had directed.

8th August 1995: Alan wrote to Ted Benjamin regarding the flawed BCI tests that Telstra knowingly using in their defence document as well as withholding FOI documents until after Dr Hughes had deliberated on Alan's claim. **(AS 196)**

21st August 1995: Mr Black writes to Mr Pinnock

I refer Dr Hughes' letter to you dated 21 June 1995, which enclosed a copy of a facsimile from Mr Smith to Dr Hughes dated 20 June 1995. Dr Hughes copied his letter to Telstra. **(189)**

Exhibit **(AS 190-B)** is a copy of a letter from BCI to Telstra's Alan Humrich, dated 14 December 1993, on BCI letterhead.

Attached to Alan's 20th June, 1995 letter to Dr Hughes **(AS 192)** there were three other BCI related documents showing in Alan' opinion he had reason to raise the flawed BCI tests during his arbitration **(AS 193, AS 194, AS 195)**.

24th August 1994: Ted Benjamin responds to Alan's letter 8th August 1995, stating

I refer in particular to the last paragraph of your letter in which you state that Telstra had "…internal knowledge that the Bell Canada International Addendum report was not a true and correct document". Telstra rejects outright your claim'. **(AS 197)**

26th October 1995: Minter Ellison, on behalf of the TIO, drafted a letter to be used in reply to Bassett & Sharkey. This letter included the statement 'Although the Arbitrator had a copy of the Bell Canada Report, it does not appear to have ever formally been put into evidence.'

This was false and misleading because both Minter Ellison and the TIO's office also had a copy of Telstra's arbitration defence and a copy of the Arbitrator's Award which states that the BCI was placed into evidence. **(AS 199)**

Exhibit **(AS 554)** is a copy of a sworn witness statement prepared by Ian Joblin, a consulting

Forensic Psychologist, which notes.

I have been retained by Messrs Freehill Hollingdale & Page, the solicitors acting for Telstra Corporation Limited ("Telecom") to review a report on the psychological status of Mr Alan Smith which had been prepared by Mr Christopher Mackey dated 10 June 1994, to an interview Mr Smith on behalf of the Cape Bridgewater Holiday Camp in which Mr Smith has, I understand, asserted a claim for psychological harm. In order to prepare for the interview with Mr Smith I read the following written material. (f) A Bell Canada International Inc addendum to its report dated 10 November 1993.

This Bell Canada International Inc addendum covers BCI's findings regarding tests allegedly carried out on the Glen Waters Fish Farm and the Cape Bridgewater Holiday Camp **(AS 546).**

I would imagine that, if Ian Joblin had known that the 13,590 tests calls allegedly carried out by BCI had **not** terminated through the TELELEC CCS7 monitoring system as the reports provided to him by Freehill Hollingdale & Page claimed, because the unmanned Cape Bridgewater RCM and Portland's main exchange could not accommodate the CCS7 system, then his assessment of Alan's mental state might have been somewhat different, he might have been distressed himself, if he had been aware that Telstra had misled and deceived him concerning the alleged BCI Cape Bridgewater tests, just as the Senate Estimates Committee was later misled and deceived by Telstra, as exhibits (**AS 546), (AS 547), (AS 548),** (**AS 551)**, and (**AS 552)** so clearly show.

22nd November 1995: Ted Benjamin again refutes Alan's BCI claims, stating in a letter to Alan

I note that you raised issues in relation to the Bell Canada International testing results in the arbitration process. As you are aware, the arbitration process dealt with the complaints by you in relation to your telephone service. That process has been completed and consequently, Telstra does not propose to comment further or enter into debate with you on these matters.' **(AS 200)**

Lane Telecommunications

6th April 1995: Because of David Read's of Lane Telecommunications involvement with Telstra management (Alan and Graham are led to believe at the time he had been a Telstra employee for some twenty years) the COT Cases argued that Lanes should not being assessing their matters. Warwick Smith compromised on their involvement agreeing that Lanes would only assist DMR Group (Canada) who would be the principal technical consultants. This is further confirmed from the statement in Warwick Smith's letter 9th March, 1995 **(AS 161)**. However, while he was in Cape Bridgewater, Mr Read did not make one visit to assess the phone configuration Alan complained of to him regarding the incoming lines to the Camp Kiosk, and the extension line to his office.

It is well documented that Alan had continued to complain about phone and fax problems throughout and after his arbitration, including complaints to local technicians where Alan enquired about the phone alarm system and associated wiring, which had been installed by Telstra during ELMI monitoring of his service lines in 1991/2.

Alan asked Mr Read to look at the wiring and some of the evidence he had which proved that there was incorrect billing on all his phone lines. Mr Read made it quite clear that Dr Hughes had ordered him not to look at any new evidence during his site visits. Dr Hughes later confirmed these orders in a letter to Laurie James, President of the Institute of Arbitrators **(AS 157)**. Mr Read did relent and peruse one of the examples Alan had, which showed two calls to Alan's 00/1800 service on 13th January 1995 which had been wrongly charged to his account by Telstra.

At the conclusion of his visit, Mr Read left with Peter Gamble, Telstra's arbitration Technical Engineer.

A newspaper article in the Portland Newspaper on 8th November 2002 reported that the new owner of the Holiday Camp, Darren Lewis, said that 'he had experienced several problems with the phone and fax service since taking over the Cape Bridgewater Holiday Camp.' **(AS 167)**. The significance of raising a 2002 issue here is that exhibit **(AS 168)** relates to a TIO letter dated 28th January 2003, describing to Telstra's Level 3 Complaint unit that since Telstra rewired Mr Lewis' business 'the phone problems have decreased dramatically.' Had David Read inspected the wiring when he was asked to on 6th April 1995 there is a possibility he would have condemned the wiring and had it replace under the umbrella of the arbitration process, thereby eliminating one source of the recurring problems.

13th April 1995: **(AS 155)** is in response to the letter from David Read of Lane Telecommunications dated 31 March 1995. Please note in this letter Ted Benjamin states

Attached is a copy of a facsimile from Peter Gamble of Telecom to David Read of the Resource Unit dated 31 March 1995. It is being made available to you for your information and in case you consider Mr Smith should be provided with a copy.

The letter confirms David Read contacted Peter Gamble and discussed relevant technical issues concerning the increase Call Line Identification (CL) issue at the Warrnambool AXE Exchange during March 1993. Alan has no way of knowing what discussions followed between Mr Gamble and Mr Read after this telephone conversation and what information was provided regarding the Warrnambool AXE Exchange - Call Line Identification (CL) issue. What information did Mr Gamble provide Mr Read? Was it information similar to the MELU or TF200 issues? How many other private telephone conversations were generated in this fashion discussing technical issues which Alan's technical advisor George Close and he were not privy to?

On the 16th February 1996, Dr Hughes wrote to the President of the Institute of Arbitrators, Laurie James stating

Mr Smith's assertion on page 4 that a technical expert, Mr Read refused to discuss technical information at his premises on 6 April 1995 is correct – in this regard, Mr Read was acting in accordance with his interpretation of my direction which prohibited him from speaking to one party in the absence of the other party at any site visit **(AS 157)**.

30th April 1995: There were many problems with this report, not the least being that DMR and Lanes skipped a six-month period of Alan's claim, from August 1994 to April 1995, as well as only assessing 23 fault claim examples from 200 fault complaints. They also failed to investigate or address numerous bound volumes of evidence which demonstrated Telstra's continuing incorrect charging on all of Alan's service lines.

One of the documents in **(AS 26)** is a list from the DMR & Lanes Report dated 30th April 1995, which Alan has hand marked 'Arbitrators copy'. The other document in **(AS 26)** is marked 'Final copy' and is a list from the DMR & Lanes Report dated 30th April 1995. Both lists include the words 'The information provided in this report has been derived and interoperated from the following documents.' The arbitrator's list of sourced documents is short 13 bound claim documents (comprising over 3,000 documents) to that which appear of the final report list. Who added the 13 sets of claim documents to the final list?

In the arbitrator's copy of the DMR & Lanes Report there are other differences, although not technical matters. Included on page 2 of this report are the words 'There is, however, an addendum which we may find it necessary to add during the next few weeks on billing, i.e. possible discrepancies in Smith's Telecom bills' and on page 3 'one issue in the Cape Bridgewater case remains open, and we shall attempt to resolve it in the next few weeks, namely Mr Smith's complaints about billing problems. Otherwise, the technical Report on Cape Bridgewater is Complete.

The report that Dr Hughes provided for Alan's official written response (as directed by the arbitration agreement) was different to the one that needed weeks to finish and was therefore incomplete. Not only had an extra thirteen volumes of sourced documents been added but then reference to billing discrepancies had been removed, along with the reference to the report being incomplete.

This serious deception had to involve Dr Hughes, two Resource Units (Ferrier Hodgson Corporate Advisory and DMR & Lane) and the new TIO (John Pinnock), at the very least. Mr Pinnock has been alerted many times since 1995 to the discrepancies between the two different versions of this report and has received various exhibits **as supporting evidence. These exhibits include two pages from the draft version of the report, which discuss billing issues (AS 532) and two pages labelled *Exhibit* (AS 533), from the final version of the same report. Exhibit AS 532 and AS 533 are almost identical except that AS 533 does NOT refer to billing issues. Page 27 from Dr Hughes' version of the report (AS 534)** lists all of the material that was really addressed (from both the claimant**s and the defence); *Exhibit* (AS 535) is page forty from the final version of the report that Alan Smith received – it includes fourteen more sets of claim and defence documents than *Exhibit* (AS 534).**

This has to raise the question of how one version of two identical technical reports, both dated 30th April 1995, can list fourteen more bound submissions containing approximately

3000 claim documents than the other version of the report. How can both reports state

that the same 4,000 documents were sourced when the list at Exhibit **(AS 535)** has fourteen more spiral bound submission (containing approx 3,000 billing claim documents) and perhaps more important, if one version of the report shows that there are fourteen sets of claim documents (3,000 more documents to be assessed and the other version), apparently produced on the same day, notes that those documents had been properly assessed, how could the resource consultants have assessed 3,000 extra technical documents in the space of one single day?

As an exercise in logic, let us assume that DMR & Lane were able to magically assess, collate and understand the relevance of those 3,000 technical documents in just the one day available on (30th April) – then where are the results of that magic assessment? There are no references to assessments to the study of the billing documents in the so-called 'final' version of the report and/or draft report the only reference to billing issues in Dr Hughes' version indicates the need for extra weeks to assess Smith's billing claim documents – making it blatantly obvious that DMR & Lane were not able to magically assess, collate and understand the relevance of those 3,000 billing claim documents at all.

As a second exercise in logic, let us assume that the two consultants from DMR & Lane Paul

Howell DMR (Canada) and David Read (Lane) were each able to read, collate and understand one technical document per minute, and there are 3,000 technical documents to read in all, or 1,500 each. If these two consultants did read one document per minute, or sixty per hour, for ten hours, without breaks, they would still only manage to read and collate six hundred documents each per day, or, if they worked for twenty-four hours non- stop, they might manage 1,440 documents each. Reading so many uncomplicated pages under those circumstances would be a problem on its own but an even worse problem with this is that many of the 3,000 documents we are discussing were related to technical data and telephone billing problems, and most of those billing documents would require a number of mathematical calculations to be completed if the consultants were to properly check Telstra's call charging analysis data CCAS for the calls billed. Obviously it is not

humanly possible to read all 3,000 documents even briefly, let alone check complex calculations too.

The submission of this technical report which was still incomplete is deception on a very wide scale, involving some very prominent Australian identities, all of whom should have known better than to go along with this level of deceit in the first place, let alone remain involved in this deception for another seventeen years.

On 5th May 1995, Dr Hughes wrote to Alan, advising that he had five days in which to respond to the DMR and Lanes report. Alan was forced to prepare this response himself since he could no longer afford to pay his technical advisor. Even though he had no technical expertise or experience in the telecommunications field, he was still able to refute many of the assertions in this so-called 'independent' report, but had to agree with some assessments due to his inexperience in technical issues. Alan could not understand why the billing part of his claim had not been addressed in the report. Alan didn't completely solve this problem until early in January 2001, when he discovered that John Rundell of FHCA had written to the TIO on 15th November 1995, advising the TIO that DMR and Lanes did not to investigate the billing evidence Alan had included in this part of his claim **(AS 104)**. At point 2.23 in this report DMR & Lanes state 'Continued reports of 008 faults up to the present. As the level of disruption to overall Cape Bridgewater Holiday Camp (CBHC) service is not clear, and fault causes have not been diagnosed, a reasonable expectation is that these faults would remain "open"' **(AS 170)**

18th April 1995: John Rundell (FHCA) writes to Warwick Smith **(AS 160).** Part of this document advised Warwick Smith that

Paul Howell, Director of DMR Inc Canada arrived in Australia 13th April 1995 and worked over Easter Holiday period, particularly on the Smith claim. Any technical report prepared by draft by Lanes will be signed off and appear on the letterhead of DMR Inc'.

The relevance of this letter is split up in the following two points:

· DMR (Australia) signed an agreement with the TIO Warwick Smith in April 1994, (as displayed in the Arbitration Agreement) that they would act as the independent arbitration technical resource unit.

· March 9, 1995, Warwick Smith advised Alan that DMR Australia was unavailable to provide locally based technical assistance. This letter confirms that Paul Howell of DMR (Canada) would be appointed as the principal technical advisor to the Resource Unit and Lanes (based in Adelaide) would assist Mr Howell, stating 'Could you please confirm with me in writing that you have no objection to this appointment so the matter can proceed forthwith' **(AS 161)**.

Please note: the above statement by Mr Rundell in his letter confirms he was prepared to transfer Lanes technical findings onto the letterhead of DMR (Canada) as a guise that Paul Howell prepared the final report **(AS 160)**

Document **(AS 162)** confirms Paul Howell, on 21st March 1995, only received three of Alan's 22 submitted claim documents along with Telstra's defence.

Document **(AS 163)** confirms that FHCA advised Mr Howell on the 5th April 1995 that David Read would have his draft technical report prepared by 7th April 1995.

Dr Hughes' draft Award on page 3 states

(i) pursuant to paragraph 8 of the arbitration agreement, I had power to require a "Resource Unit," comprising Ferrier Hodgson, Charted Accountants, and DMR Group Australia Pty Ltd, to conduct such inquires or research as I saw fit;

(j) On 21 February 1995, by the time I was satisfied that the submissions of all relevant material by both parties was complete, I instructed Ferrier Hodgson (and, through them DMR) to conduct certain inquiries on my behalf' **(AS 164).**

Dr Hughes' **final** Award modifies these points so that they read

(i) pursuant to paragraph 8 of the arbitration agreement, I had power to require a 'Resource Unit' comprising Ferrier Hodgson, Charted Accountants, and DMR Group Australia Pty Ltd, to conduct such inquires or research as I saw fit. **By consent of the parties, the role of DMR Group Australia Pty Ltd was subsequently performed jointly by DMR Group Inc and Lane Telecommunications Pty Ltd**;

(j) On 21 February 1995, by which time I was satisfied that the submissions of all relevant material by both parties was complete, I instructed the Resource Unit to conduct certain inquires on my behalf **(AS 165).** (emphasis mine)

Summary of document **(AS 160)** to **(AS 165)**:

1. Paul Howell didn't receive any of the technical claim and defence material until 21st March 1995 see **(AS 162)**

2. Paul Howell and David Read weren't officially appointed by the TIO until 9th March 1995 and/or officially accepted by letter of consent **(AS 161)**

The technical findings in both the draft and final Awards (except for the removal of the alleged liquid spillage segment) are the same. However, in the draft Award the author states by 21st February 1995, he called on DMR Group Australia Pty Ltd to conduct inquires, who had been sacked prior to this date for conflict of interests.

16th August 1996: Mr Pinnock writes to Alan regarding his concerns that Mr Paul Howell, author of the DMR & Lanes technical report, didn't sign off the report. Mr Pinnock wrote 'I note that the Arbitrator was not obliged to forward a copy of this covering letter to you, as it did not, strictly speaking, form part of the Technical Evaluation Report.' **(AS 221)**

Exhibit **(AS 222)** is a copy of a statutory declaration Alan provided Senator Helen Coonan's office 23rd February, 2006. On page 2 of this document Alan states

I collapsed with a suspected heart attack and was rushed to hospital by ambulance. On my return, five days later, Mr Paul Howell of DMR Canada telephoned me at home. I had not spoken to Mr Howell before, but he told me he had heard that I had been in hospital and was phoning to wish me well. Mr Howell then went on to tell me that my arbitration was the worse process he had ever been associated with and that, had it been conducted in North America, it would never have been allowed to continue under such an atrocious administration. I told him I appreciated his concern, but was disappointed with his technical report and asked him why he had not signed it off. He replied in words to the affect that he hadn't signed the report.

If Paul Howell was telling Alan the truth he did not sign off his report, then who wrote the 30th April, 1995 letter? The 30th April 1995 letter was attached to the 16th August 1996 letter provided to Alan by Mr Pinnock (**AS 223).**

On 9th March 1995 **(GS 296-b)** the TIO appointed Lanes as the technical resource unit for the TIO-administered COT arbitrations. During the next two years Lanes assessed the COT claimants' technical claims but during the same period (as shown above) Lanes was purchased by Ericsson. Alan and Graham have always maintained that once this contact with Ericsson had occurred, the TIO was obliged to arrange for the COTs' technical claims to be re-assessed to ensure that Lanes had not hidden any known problems with the Ericsson AXE exchanges to which Graham and Alan's businesses were routed through.

Lanes prepared the draft of their Cape Bridgewater report on 6th April 1995, before Paul Howell of DMR Canada had arrived in Australia. In the final DMR & Lanes Cape Bridgewater Report (dated 30th April 1995), twenty-two of the twenty-three faults discussed relate to problems Alan had experienced before 1994 even though, when David Read of DMR had visited Cape Bridgewater on 5th April 1995, Alan had shown him Telstra's own list of seventy-two separate complaints registered by various Cape Bridgewater residents between February and August 1994. None of Alan's up to-date 1994/95 evidence of the ongoing billing problems associated with the Cape Bridgewater RCM system that routed through the Portland Ericsson AXE exchange equipment was ever addressed.

24th July 1997: John Pinnock's letter to Ann Garms shows that she too has had some concerns about the independence of Lane Telecommunications **(GS 298)**:

1. By letter dated 14 November 1995 I advised you that I did not have the power to dismiss the Arbitrator or the Resource Unit. I advised that pursuant to the *Commercial Arbitration Act* 1984 (Vic) the Supreme Court has the power to remove an arbitrator in certain circumstances. ...

2. In November 1995 you had concerns regarding the independence of Lane. By letter dated 6 November 1995, having made considerable enquires of the relevant parties on the issue of independence, I advised you of my view that your concerns regarding the independence of Lane were unfounded. ...

3. On 8 March 1995 you advised the TIO that Mr David Read of Lane was unacceptable on the basis that he was a former employee of Telecom. However on 13 March 1995 you advised the TIO that 'after meeting with Mr David Read I feel confident that he and his company Lane

Telecommunications Pty Ltd possess the necessary integrity, professionalism and expertise to do justice to the assessment of our claim.

However, Mr Pinnock did not reveal to Ann Garms is that Alan Smith had already provided him irrefutable evidence confirming David Read had either acted on his own violation or in concert with DMR (Canada) when addressing only 23 of Alan's 200 claim documents. (see *Alan Smith CAV Chronology file*).

Other Investigations

28th November 1994: Telstra's Peter Gamble wrote to AUSTEL's Norm O'Doherty about an AUSTEL letter dated 16th November 1994 **(AS 500),** in which AUSTEL warned Telstra that the Cape Bridgewater Holiday Camp Service Verification Testing process had been deficient. Independent communications expert Brian Hodge, B Tech; MBA (B C Telecommunication **AS 486**) and the attached CCAS data see **(AS 541)**, confirm these deficiencies and prove that the required regulatory Service Verification Tests that were supposed to have been carried out on all incoming calls to the Cape Bridgewater Holiday Camp were not carried out at all. Mr Gamble's letter to Mr O'Doherty states:

Norm, As agreed at one of our meetings and as confirmed in your letter of 16th November 1994, attached please find the detailed Call Delivery Test information for the following customers.

- Bova – Ralphies Pizza, Mordialloc, Vic
- Love – Loveys Restaurant, Dixons Creek, Vic
- Main – Glen Waters Fish Farm, Glenburn Vic
- Smith – Cape Bridgewater Holiday Camp, Vic
- Turner – Gourmet Revolution, Moorabbin, Vic
- Trzcionka – Trzcionka Hairdressing, Glenelg SA

This information is supplied to Austel on a strict Telecom-in-confidence basis for use in their Service Verification Test Review only and not for any other purpose. The information is not to be disclosed to any third party without the prior written consent of Telecom.' **(AS 569)**

Mr Gamble's letter appears to be a veiled and sinister attempt to hide Telstra's use of deficient arbitration defence documents using the government Crimes Act 1914 – Privacy Act, and raises the following questions:

- Does the Crimes Act take precedent over Australian law?
- Can Australian citizens actually be muzzled by the Crimes Act 1914 and therefore forced to conceal the truth about crimes they know have been committed against fellow Australians?

On 3rd October 2008, during an Administration Appeals Tribunal (AAT) Hearing into Alan Smith's claim ACMA agreed to release to him, free of charge, all the FOI documents he had requested outside of the Act, Alan provided both the Chairman of the Australian Communication Media Authority (ACMA – previously called AUSTEL), and the entire ACMA Board, with conclusive proof that AUSTEL/ACMA has known since Mr Gamble's letter of 16th November 1994 that Telstra knew the SVT results they used to support their defence of Alan's arbitration claims were false. Because of Graham Schorer's position as official spokesperson for the COT group, Graham was called as a witness during this AAT hearing. Transcripts of his evidence record Graham declaring:

But as has been demonstrated here today everybody seems to feel as though, because these matters are a long time ago, that there is no public interest. What I am saying is that the public interest, and I believe that I have become a very good advocate of what is in the public interest as the spokesperson, is that these crimes that have been committed under the veils of secrecy and confidentialities are of public interest and no secret veil of confidentiality covers a criminal offence **(AS 570)**

It is also shown in Peter Gamble letter to Graham Schorer on 22nd November 1994 **(AS 571)** in an attempt to entice Graham to enter the SVT process, without ever providing him the same advice that six days earlier AUSTEL's Norm O'Doherty, General Manager Consumer Affairs, informed Telstra's Steve Black and Peter Gamble by letter **(AS 568)** that the SVT tests carried out at Alan Smith's business was deficient.

In other words, Peter Gamble and/or Telstra as the defendants in the COT arbitrations, were only prepared to advise the regulator in **secret** about the known deficiencies in their SVT monitoring equipment but not the claimants, and I again quote from this letter: 'This information is supplied to Austel on a strict Telecom-in-confidence basis for use in their Service Verification Test Review only and not for any other purpose. The information is not to be disclosed to any third party without the prior written consent of Telecom.'

Are we to assume that once again AUSTEL was muzzled because of the Public Service Privacy Act contained in the Australian Crimes Act 1914, which prohibited AUSTEL from disclosing: *"to any third party without prior written consent of Telecom"* that they were relying on false tests results as arbitration defence material?

15th December 1994: Mr M Rumsewicz submitted a report titled Report on Telecom Australia's Verification Tests (G.001), which he had prepared on behalf of the Government Regulator, AUSTEL **(AS 572)**. This report was based entirely on documentation provided by Telstra but still, on pages 3, 10 and 13 **(AS 572)** of this report, it shows that Mr Rumsewicz noted his concerns surrounding the SVT process. Therefore, AUSTEL should have notified either the TIO (administrator to the COT

arbitrations) or the arbitrator to the concerns Mr Rumsewicz had in regards to the correctness of the SVT data being collected by Telstra. It is quite from the points raised below, that Telstra's should not have used the results of their Service Verification Tests (SVT) in a legal process (the COT arbitrations) because those results were not conclusive. Exhibits **(AS 541)** confirms that if the CCAS data regarding Telstra's SV testing at Alan Smith's business had been provided to Mr Rumsewicz in regard to even one single incident, then Mr Rumsewicz would have had to come to the conclusion that Telstra had 'fudged' the Cape Bridgewater Holiday Camp SVT process.

On page 10 of his report, Mr Rumsewicz notes:

Telecom Australia, as part of document G.001, applies a standard technique based on hypothesis testing. Hypothesis testing is used to determine whether there is sufficient evidence to reject one hypothesis (known as null hypothesis) in favour of another (known as the alternative hypothesis). If insufficient evidence exists to reject the null hypothesis, the nul hypothesis is accepted. It is critical to note this is not the same as saying that the null hypothesis has been verified.

and on page 13 he reports:'...

We believe that given the stated purpose of the Service Verification Tests supplied in the telecom Australia Customer Fault Procedures document (000 8410 and that of the AUSTEL Cot Cases Report, the statistical test being applied to the collected data is inappropriate. We believe the alternative test described above is more suitable and, in addition, promotes customer confidence in the test procedure and analysis. We believe that the analysis of collected data should be expanded to include an examination of call failures broken down by originating exchange, time of day and type of failure. In the event that correlations in the failures are found, further investigations, as appropriate, should be undertaken.

These comments indicate how AUSTEL became a party to Telstra's deceit when they wrote to Minister Lee MP, then the Minister for Communications, on 2nd February 1995, supporting both Mr Rumsewicz's report and the COT SVT process noting on page 29 of AUSTEL's Third Quarterly Report:

Service Verification Tests have been completed for seven customers. Reports have been completed and forwarded to six of the customers, and the seventh report is in preparation. All six of the telephone service subjected to the Service Verification Test have met or exceeded the requirements established.

In Alan's Administrative Appeals Tribunal, Statement of Facts and Contentions dated 9th February 2011, provided to the Respondents the ACMA and the AAT Alan noted:

If we can prove that, during s Government-endorsed arbitration process (even if it was sixteen years ago), AUSTEL, which was then the Government Telecommunications Regulator, knowingly allowed the defendants in the process (Telstra) to state, under oath, that their SVT process had met all of AUSTEL's requirements, even though both Telstra and AUSTEL knew this was not true, and that they then concealed their knowledge from the relevant Communications Minister (then the Hon Michael Lee MP, then I believe the Australia public would definitely believe it was in the public interest for this information to be revealed. I am therefore now placing on record, as part of my AAT Statement of Facts and Contentions, a formal request for Mr Chris Chapman, Chairman of the ACMA, to appoint Emeritus Professor Reg Coutts, Part-time ACMA Board member, Managing Director of Coutts Communications Pty Ltd and Chairman of Red Button Technologies to assess the two pages of CCAS data records referred to above for the purpose of determining the actual level of ACMA's independence in relation to my matters.'

The COT arbitrations were facilitated by the Government Regulator AUSTEL (now the ACMA). Before the COT arbitrations began AUSTEL had already confirmed in the *AUSTEL Cot Cases Report* that when previously dealing with COT claimants, Telstra's conduct had been *"...less than that which might be expected of a model corporate citizen."* Therefore, AUSTEL should never have allowed Telstra during their arbitration procedure as the defendants (under any circumstances), to provide Dr Rumsewicz with the raw SVT data before it had been scrutinised by either the TIO-appointed technical consultants or AUSTEL.

Surely the only reason Mr Chapman could have had, for not agreeing to Alan's request that this CCAS data be properly assessed, would be that, if he had agreed, then the ACMA would have had to alert the present Minister and the TIO to:

1. Telstra's use of test results they knew to be false, in their defence of Alan's arbitration claims; and

2. Telstra falsely informing the arbitrator, under oath, that the Telstra tests had met all of AUSTEL's mandatory requirements, when this had never been the case.

And if AUSTEL had followed through with the investigation of the CCAS data then this would have raised questions regarding AUSTEL's decision to allow this deficient SVT process to stand, rather than insisting that it be repeated, both properly and transparently, during Alan's arbitration and while AUSTEL was investigating Alan's evidence of ongoing 008/1800 billing problems.

14th January 1998: When Telstra's Lyn Chisholm and Peter Carless arrived at Alan's residence (not the Camp) they discussed the continuing fax lock-up problems and the billing faults associated with the line still being connected even after a fax had gone through. Alan provided fax journal printouts that did not match with Telstra's accounting for those calls. They also discussed the just-disconnected 1800 billing service and the problems experienced during and after Alan's arbitration. Alan provided examples showing how the Commonwealth Ombudsman's Office had

officially provided Telstra with a document that confirmed that the COO had made forty-three calls to his business, on Alan's 1800 line, until February 1997, but Telstra had charged him for ninety-six calls from the COO. He also gave Ms Chisholm one of two documents that confirmed he was receiving faxes from different locations within the Crown Casino complex. **(AS 238)**

It is important to digress a little here, because Cathy told Alan that when Darren Kearney from AUSTEL visited the Cape Bridgewater Holiday Camp on 19th December 1995, and subsequently took some of the arbitration billing claim documents back to Melbourne, those that were not addressed during the arbitration, he commented to Cathy that he had never seen such well-documented evidence. Alan believes that Lyn Chisholm and Phil Carless had the same thought and he later followed Ms Chisholm's suggestion and provided some of this evidence, via the TIO's office, to Telstra. Alan's records confirm that he continued to provide evidence of fax and phone problems that were occurring throughout 1998 and 1999, to the TIO office and that Mr Pinnock wrote to tell him that these billing issues were still being investigated. Other letters confirm that Mr Pinnock was advising both Mr Hawker and the Minister's office that these matters were still 'under consideration' as late as February 1999.

Alan was not informed that, on 22nd January 1998, Telstra had provided both the Minister's office and the TIO with copies of Lyn Chisholm's file notes confirming her opinion that the billing faults he raised in his arbitration appeared to have continued after his arbitration.

Investigation, interception and watching

Two letters between Telstra and Freehills, C05313 and R20084, listed in this document under *Freehill, Hollingdale and Page* at the 16th March, 1993 and 8th April, 1993, supported Graham's belief that, during late 1992 and early 1993 the COT businesses were under surveillance **(AS 536).** During this same period, Cathy Ezard (now Alan's partner) was a professional associate of Alan's having previously visited his business with a social club from Ballarat. Cathy later signed a statutory declaration dated 20th May 1994, explaining a number of sinister happenings when she attempted to collect mail on Alan's behalf from the Ballarat Courier Newspaper office **(AS 22)**. This declaration leaves questions unanswered as to who collected Alan's mail and how did they know there was mail to be collected at the Ballarat Courier mail office. On both occasions when this mail was collected by a third person, Alan had previously telephoned Cathy, informing her that the Ballarat Courier had notified Alan there was mail addressed to Alan waiting to be picked up.

On pages 12 and 13 transcript from the AFP inquiry into Alan's allegations that Telstra had unlawfully intercepted his telephone conversations, the AFP state Q59 'And that, I mean that relates directly to the monitoring of your service, where it would indicate that monitoring was taking place without your consent?' **(AS 50 B)**

12th August 1993: A letter from Ms Elisie Espinoza from a singles club to Alan describes the constant engaged problems she experienced when trying to book a week-end during April and May 1993. **(AS 34 A)** Telstra FOI document K03870 dated 17th June (assume 1993) refers to the same Elisie Espinoza and her friend Rita Stenoya **(AS 34 B)**.

This document does not only record the two personal phone numbers of these ladies, it also verifies that Telstra was fully aware of the times Alan's office girl left the business when Alan went to Melbourne. This document does not state any location other than Melbourne. Alan used to visit Melbourne on a regular basis during 1992 to 1993, visiting singles clubs owners who might be interested in using the Cape Bridgewater for their next club getaway.

29th October 1993: Graham and Alan were still experiencing problems sending faxes. Telstra internal FOI document K01489, **(AS 250)** confirms that while Telstra were testing Alan's Mitsubishi fax machine, using the office of Golden Messenger as the testing base, 'some alarming patterns of behaviour was noted both transmission and reception'. This document further goes on to state 'Even on calls that were tampered with the fax machine displayed signs of locking up and behaving in a manner not in accordance with the relevant CCITT Group fax rules. Even if the page was sent upside down the time and date and company name should have still appeared on the top of the page, it wasn't.

14th January 1994: Telstra admits to capturing Alan's telephone conversations in Telstra FOI document K00604, subject *Voice monitoring of Priority Investigation Services*. The local Portland Technical Officer, Gordon Stokes, had been trapping Alan's telephone conversations from at least June to August 1993. (**AS 48-H)**

Neither Telstra nor Dr Hughes addressed the unauthorised telephone tapping issues in either Graham's or Alan's arbitration.

From mid 1992 until January 1994, Peter Turner from the Australian Social Centre (ASC) in Hartwell, Victoria, acted as Alan's agent for the over-forties singles weekends away because of the number of complaints registered by hopeful holiday weekenders regarding the difficulties of reaching him by phone **(AS 21)**. During two separate periods from May to July 1993, two different ladies informed Alan that they had left a message on my answering machine regarding their intended travel to Cape Bridgewater. Both these women noted a female voice on the answering machine, although the voice on Alan's machine was his. One of these women particularly asked if client details were ever given out or if details of female clients were passed on to male clients. She was reassured that this certainly would never happen without permission. It was found that the reason for asking was because since speaking to Peter Turner and Alan she had received strange and vaguely suggestive phone calls where the caller clearly knew that she was single.

Telstra documentation provided by Alan Smith to the Australian Federal Police (AFP) confirms that they admitted to live voce monitoring Alan's phone conversations. However, this documentation states that Telstra only listened to Alan's telephone conversations from June to August 1993 **(AS 22)**. Questions raised on page 6 of the AFP transcript taken during Alan's interview 26th September 1994, shows the AFP were amazed that Telstra was able to document the name of O'Meara bus line, the company Alan was discussing work with a tender during 1992, before June 1993 **(AS 537).**

· Telstra FOI document A10148 & A10233 also verifies that COT telephone conversations were taped **(AS 24).**

· The DMR & Lane report, submitted during the arbitration, further confirms that a Malicious Call Trace (MCT) was placed on both Alan's 055 267 267 and 055 267 230 services, late in May

1993. The MCT equipment is a different monitoring device than the phone interception device (the EOS) that Telstra admitted to using to listen to Alan's telephone conversations. The MCT equipment was disconnected on 19th August 1993 and September 1993 **(AS 25).**

8th February 1994, The Hon Michael Lee Minister for Communications writes to the Minister for Justice, the Hon Duncan Kerr, MP

I am writing to inform you that members of the group known as the Casualties of Telecom (COT) have contacted my Office regarding the Australian Federal Police inquires into voice monitoring by Telstra of their telephones.

Both Mr Graham Schorer and Mr Alan Smith of COT have informed my Office that they have information on Telstra's activities in relation to these matters. **(AS 52-A)**

25th February 1994: Internal Minute for the Department of Communications and the Arts, Subject: Casualties of Telecom (COT) Complaints by Alan Smith, Cape Bridgewater Holiday Camp **(AS 54-B)** states

The Australian Federal Police has been asked to investigate possible breaches of the Telecommunications (Interception,) Act 1979 and it would be inappropriate for you to make any further comments of details of the allegations while the matter is before the Federal Police. A draft letter to Mr Smith has been cleared by Legal and General Branch of the Department. We have provided both Telecom and AUSTEL with copies of Mr Smith's letters requesting that they investigate his allegations.

(AS 106) , pages 37-41 of the transcript of Dr Hughes' clear direction that, if Alan wanted him to address the phone bugging issues in his claim Alan had to be aware that Telstra had the right to order him to provide relevant information to support the claim. Twice in this transcript Alan confirmed that he wanted the phone bugging and privacy issues to remain in his claim, regardless. Steve Black's letter to Warwick Smith, dated 17th October 1994, regarding the voice bugging issues states 'Mr Smith has also raised Telecom's fault investigation procedures (including voice monitoring) as an issue in his claim which is under arbitration. Telecom is currently in the process of responding to that claim under the agreed arbitration procedure' **(AS 109)**

Please note: neither Telstra in their defence nor Dr Hughes (in his Award) addressed the phone bugging claim issues even though the Arbitration Agreement clause 11 states 'The Arbitrator's reasons will be set out in full in writing and referred to in the Arbitrator's award' **(AS 110)**

17th March 1995: This letter is from the Australian Senate to Graham Schorer, and is headed: *Telecommunications (Interception) Amendment Bill 1994.* It states

Thank you for agreeing to participate in the Committee's hearing on 21 March in Canberra. ...

The Committee members who will be attending on the day will be Senators Cooney (Chair), Spindler, (Deputy Chair), Ellison, Evans, Vanstone, McKieran and O'Chee.

The hearings are conducted with minimum formality. Witnesses are usually grouped in blocs although we suggest that you be available at the commencement of the hearing. You may wish to give some consideration to making a brief statement, 10 – 15 minutes' **(AS 612)**

Alan, Graham, Ann Garms and Robert Bray (from Ballarat) all spoke at this hearing and all introduced documents to support their claims that Telstra had voice monitored the COT cases conversations over an extended period.

Before Alan left Melbourne to go to Canberra for this hearing, he phoned Warwick Smith to discuss the evidence regarding the inte rception of his phone calls that he had obtained from Telstra, AUSTEL and the Australian Federal Police. He had already forwarded this evidence to the TIO's office and Dr Hughes. Alan made this call to the TIO because he was concerned that his appearance before the Senate Committee hearing might interfere with the arbitration process, particularly regarding the phone interception matters. Warwick Smith reassured Alan that his arbitration interception issues were confidential and stressed that it was important to provide the evidence to the Senate Committee as well. Not long after this conversation, Alan and Warwick Smith had a chance meeting at Tullamarine airport, and these same interception issues were discussed again. At this point Warwick Smith told Alan that, before his appointment as administrator of the COT arbitrations, he had believed that the COT claimants, including Graham Schorer, were 'paranoid' in their belief that they were all under surveillance and/or being voice monitored but since he had seen the evidence that was going through his office he had changed his mind. This not only shows that the evidence the COT claimants were supplying was convincing but also raises the question of who within the TIO's office was reading and/or vetting the claim material before it was passed on to the arbitrator.

The TIO's office vetting interception documents relates to the letter Steve Black wrote to Warwick Smith on 11th July 1994, which states 'If the resource unit forms the view that this information should be provide to the arbitrator, then Telecom would accede to the request'

3rd October 2008: as part of Alan's 2008 FOI claims before the Administrative Appeals Tribunal (AAT), Alan included proof of Telstra intercepting his faxes for years after his arbitration and, during the conclusion of that investigation Senior Member Mr G. D. Friedman, hearing Alan's claims stated:

Let me just say, I don't consider you, personally, to be frivolous or vexatious – far from it. Yes, I suppose all that remains for me to say, Mr Smith, is that you obviously are very tenacious and persistent in pursuing the – not this matter before me, but the whole – the whole question of what you see as a grave injustice, and I can only applaud

people who have the persistence and the determination to see things through when they believe it's important enough.

9th February 2011: in another AAT FOI investigation in relation to the ACMA and similar FOI matters, Alan formally requested that the ACMA assess two lever arch files of fax interception evidence as part of those AAT matters. The ACMA, however, declined.

Please note that the following privacy issues are not covered in those two lever arch files:

a) From February to September 1994 the Australian Federal Police interviewed Graham and Alan a number of times, regarding the alleged illegal interception of their telephone conversations;

b) Warwick Smith and Peter Bartlett agreed that, under the arbitration agreement, the claimants could submit their interception issues to the arbitrator, as part of their claims;

c) Evidence included in Alan Smith's two *fax Interception* files confirm that Telstra wrote to Warwick Smith on 17th October 1994, agreeing to address the voice monitoring issues raised by Alan Smith in his arbitration claim **(AS 109),** as part of Telstra's defence of Alan's claim;

d) On the 10th November 1994 Dr Hughes wrote to Graham Schorer to notify him that Telstra had agreed to address his allegations of phone interception as part of Telstra's defence of Graham's arbitration claim **(AS 444)**

e) Telstra did not address the phone interception issues, either in Alan's arbitration nor in Graham's

It would be reasonable to assume that while the Australian Federal Police were investigating the COT interception issues they might have discussed some of these matters with Warwick Smith although clearly they would have limited this to matters relevant to Warwick Smith as the administrator of the COT arbitrations. It is most unlikely that the AFP investigators would have allowed or instructed Warwick Smith to interview Telecom employees regarding these same interception issues, as that would have cut across the AFP investigations (see attachment to point (g) above).

In his public statement of 24th March, Warwick Smith also stated 'There are still matters of concern. The recent decision by the director of Public prosecutions not to proceed with a prosecution, following an Australian Federal Police investigation into voice monitoring issues raises questions which have already been canvassed elsewhere and are not appropriate for me to discuss.'

Warwick Smith's further public statement that he had been asked to 'enquire as to whether or not there has been a breach of internal privacy arrangements by Telecom' indicates that he was investigating the interception issues as the administrator of Alan and Graham's arbitrations, but without consulting Alan or Graham's arbitration technical advisors and without providing either Alan or Graham with an opportunity to challenge (as was their right) any statements made by Telstra's employees. This means that this part of the arbitration process was therefore conducted in camera by the administrator (and, it also now seems, by the arbitrator too) without allowing the claimants their legal right to challenge the information that Telstra people provided to the administrator, even though the transparency process included in the arbitration agreement clearly provided the claimants with a right to challenge evidence submitted by the defendant.

Warwick Smith's public statement 'I am yet to conclude that enquiry' confirms that the TIO's office would have on record a report regarding the interception issues that the four original COT claimants raised with him and the arbitrator as part of their arbitration claims. Such a report should have been provided to the COT claimants and the arbitrator during their respective arbitrations. Graham and Alan are entitled to a copy of this report since they both raised these interception issues during the TIO-administered arbitration process.

24th June 1997: Senate Hansard, **(GS 289)** page 77, Senator Carr states to Ted Benjamin

Senator CARR – In terms of the cases outstanding, do you still treat people the way that Mr Smith appears to have been treated? Mr Smith claims that, amongst documents returned to him after an FOI request, a discovery was a newspaper clipping reporting upon prosecution in the local magistrate's court against him for assault. I just wonder what relevance that has. He makes the claim that a newspaper clipping relating to events in the Portland magistrate's court was part of your files on him. ...

Senator SHACHT – It does seem odd if someone is collecting files. ... It seems that someone thinks that is a useful thing to keep in a file that maybe at some stage can be used against him. ...

Senator CARR – Mr Ward, we have been through this before in regard to the intelligence networks that Telstra has established. Do you use your internal intelligence networks in these CoT cases?

29th October 2000: Alan writes to the Hon David Hawker's secretary Megan Campbell

In support of these allegations of phone taping I have enclosed two documents. ... In relation to problems with my mail, I enclose a copy of a letter recently sent to me from the Portland Post Office, and dated October 28, 2000. This letter confirms that overnight mail that I had posted had not arrived at its intended destination five days later.' **(AS 274)**

19th December 2000: Alan alerts a number of Senators regarding material he has uncovered from the TIO latest release of document under the Privacy Act. This letter discuses his concern regarding: privacy issues, including mail either lost completely or having been opened by persons unknown before delivery and phone interception issues. The letter also discussed Telstra FOI documents that confirmed that they carried out surveillance of COT Case premises. **(AS 275)**

10th March 2006: In this letter from Alan to Liz Forman, Acting General Manger, Department of Communications, Information Technology and the Arts (DCITA) who had been appointed to assess Alan's claims as part of the promise given to Senator Joyce in return for his crucial vote for the privatisation of Telstra, Alan stated that:

Although you have stated in your letter that "...the assessment process will not extend to an examination of whether the law was broken by Telstra...." I have been advised that it is mandatory, under Commonwealth law, for DCITA and/or the Minister to notify the Attorney General of any unlawful activities they may uncover during official department investigations.'

17th March 2006: David Lever, Manager, Consumer Section, Telecommunications Division wrote to Alan noting:

Thank you for your letter of 10 March 2006 to Ms Forman concerning the independent assessment process. If the material you have provided to the Department as part of the independent assessment process indicates that Telstra or its employees have committed criminal offences in connection with your arbitration, we will refer the matter to the relevant authority.

19th April 2006: Alan's letter to the Hon Senator Helen Coonan notes:

In regard to my current claim, Mr Lever of DCITA had notified me that, if DCITA found I have proved that Telstra had carried out any unlawful acts during my arbitration, then the evidence would be provided to the relevant authority. Then in a later telephone conversation with Mr Lever, I was told that he had <u>not</u> found any evidence in my claim to show that Telstra had perverted the course of justice.

Jeremy Fields, one of the DCITA parties involved in Alan's independent assessment process, made it clear the Department already held considerable correspondence from Alan and that this information would also be considered. It is clear from Alan's submission to the DCITA assessment process, which included many examples of Telstra intercepting relevant arbitration faxes, against the Telecommunications (Interceptions Act) 1979, including proof of Telstra relying on two false defence documents, that Telstra **did** commit criminal offences in relation to Alan's arbitration. Some of Alan's exhibits, which also made up part of the Scandrett report of 7th January 1999, again show that Telstra committed other unlawful acts for a further four year period after Alan's arbitration had ended, including intercepting relevant arbitration faxes.

Since Senator Ron Boswell was also provided with a copy of the Scandrett report, and David Lever was clear that he did not find any unlawful conduct, the question must be asked: Was the Scandrett report ever provided to the DCITA?

3rd November 2006: Senator Helen Coonan wrote to David Hawker, Speaker In the House of Representatives, stating:

Thank you for your representation of 17 August 2006 on behalf of Mr Alan Smith regarding Mr Smith's allegations that Telstra monitored his phone calls and emails during an arbitration process with Telstra. The interception of emails and monitoring of phone calls is an offence under the Telecommunications (Interception and Access) Act 1979. Mr Smith should consider his dispute through the dispute resolution bodies, including his State Office of Fair Trading, the Competition and Consumer Commission, the Australian Communications and Media Authority state, and the courts.

17th May 2007: This letter from Senator Helen Coonan to Alan notes:

I have now made both formal and informal representations to Telstra on behalf of the CoTs. However, Telstra's position remains that this is a matter that is most appropriately dealt with through a Court process. Telstra is not prepared to undertake an alternative means of pursuing this matter. I also appreciate the depth of feeling regarding the matter and suggest you consider whether any court proceedings may be your ultimate option.

Please consider the statement made by Senator Coonan (see above) that Alan should consider whether any court proceedings against Telstra may be his ultimate option with the statement made by George Close see **(AS 449)** that:

I recall a discussion with Senator Ron Boswell during the late 90s. He had been shown fax's which had clear indication of changes to the headers, including interruption in transmission by a third party or parties;

He questioned whether it was possible that faxes to and from senators could be interrupted, read or copied. My response in the affirmative brought about an expression of extreme anger. Stating that if it could be proven that it occurred the offenders (s) would by jailed.

Alan believes that it was the responsibility for Senator Helen Coonan, as the then Minister for Communications Information Technology and the Arts the person who agreed to the DCITA independent Assessment process to have instigated an official enquiry into why Telstra had perverted to course of justice during Alan's arbitration and their continued interception of his private in-confidence documents leaving his office and private residence phone service which Alan's two separate billing accounts for those service show Telstra did NOT document on those accounts they had connected those services to FaxStream.

As exhibits 10 shown in the Scandrett & Associates report Alan's faxes were also intercepted during the period of the Senate Estimates Committee investigation so it was not for Alan to take Telstra to court for this interception it was the relevant Minister.

The Hon Senator Helen Coonan, Minister, for Communications, Information, Technology and the Arts (DCITA) and the Senator's Independent Assessors were provided Exhibit **AS 639**, headed *"Department of Communications Information Technology and the Arts – Casualties of Telstra (COT) Background And Information For Ministers Office"* as a guide to the validity of the COT case issues including Alan's previous arbitration and fax interception issues, but Exhibit **(AS 639)** does not include:

a. Telstra's use of known fundamentally flawed arbitration defence documents;

b. Many of the relevant privacy issues that Alan raised with the TIO and the arbitrator, both during and after their his arbitration;

c. AUSTEL's adverse findings against Telstra in their draft Cape Bridgewater Holiday camp report (which were concealed from the then-Minister, Michael Lee MP, and Alan;

d. The fax interception report that Graham Schorer submitted to Senator Ron Boswell on the 18th January 1999, which was prepared by Steven Scandrett & Associates Pty Ltd on 7th January 1999 and seconded by Peter Hancock of Total Communications Solutions on 11th January 1999;

e. The evidence that the Hon David Hawker, Speaker in the House of Representatives, provided to Senator Richard Alston and Senator Helen Coonan as proof that Telstra had perverted the course of justice during Alan's arbitration; or

f. Telstra's prolonged interception of the 'Alan's' communication services.

In other words, the DCITA report that the Department used to decide whether or not Alan had legitimate claims against Telstra was fundamentally flawed and should not have been used by the Department as a guide for the Government assessors.

23rd May 2011: Many of the statements made by Ms Melissa Gangemi, a Solicitor representing the Australian Government Solicitor, and Ms Alison Jermey, Senior Lawyer for the ACMA, show that neither of them knew about this deficient DCITA report when they advised the Administrative Appeals Tribunal, on 23rd May 2011, that the DCITA assessors had not found any evidence against Telstra during their investigations into Alan's DCITA assessment process. And neither would they have made the statements they made at Alan's May AAT Hearing if they had each been given copy of Exhibit **AS 640** (an email dated 29th September 2005, from David Lever, one of the DCITA assessors, to fellow DCITA assessors, which noted that:

I think Jodi may be getting confused about what the assessment is meant to do (or at least what we are recommending i.e. an assessment of process and what further resolution channels may be available to people. We are arguing strongly that the assessment should not be about the merits of each case.

Furthermore, Alan spent well over $10,000 preparing his DCITA claim but no-one told him that his DCITA claim material was not going to be assessed on its merit.

TIO

16th and 22nd June 1993: The Telecommunication Industry Ombudsman (TIO) Board and Council was formed. The TIO office was to deal with the ongoing phone problems and faults as a separate identity to AUSTEL

(AS 48-B) is an unnumbered page from the first Telecommunication Industry Ombudsman (TIO) Annual Report for 1993/94. This page, marked *Appendix B,* confirms that Telstra's Ted Benjamin (who had been involved in the COT matters since1992), was appointed to the TIO Council 22nd June 1993. Telstra's Corporate Secretary, Jim Holmes, Telstra's Corporate Affairs Officer, Chris Vonwiller, were both appointed to the TIO Board on 16th June 1993.

10 November 1993: Details of information disclosed by Warwick Smith is given in Telstra FOI document A05993. This was not made available to Alan prior to signing the FTSP. It is marked CONFIDENTIAL Subject – Warwick Smith – COT Cases. In this Telstra email addressed to Telstra's Corporate Secretary Jim Holmes, copied to Frank Blount Telstra's CEO, author Chris Vonwilla states **(AS 48-A)** and **(GS 116)**

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

Advice from Warwick is:

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

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

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

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

Could you please protect this information as confidential?'

Exhibit **(AS 48-B)** confirms that Chris Vonwiller and Jim Holmes were both members of the TIO Board when this email went into circulation. Exhibit **(AS 48-C)** confirms that Ted Benjamin was reporting confidential information he had been privy to as a TIO Council member to Senior Telstra Executives

30th November 1993: This Telstra internal memo FOI document folio D01248, from Ted Benjamin, Telstra's Group Manager – Customer Affairs and TIO Council Member writes to Ian Campbell, Customer Projects Executive Office. Subject: *TIO AND COT*. This was written seven days after Graham and Alan had signed the TIO-administered Fast Track Settlement Proposal (FTSP). In this memo Mr Benjamin states 'At today's Council Meeting the TIO reported on his involvement with the COT settlement processes. It was agreed that any financial contributions made by Telecom to the Cot arbitration process was not a matter for Council but was a private matter between Telecom, AUSTEL and the TIO. I hope you agree with this.'

At the bottom of this memo Ian Campbell has added a hand-written comment 'Don Pinel. – Seems ok to me when I spoke to Warwick Smith I suggested that at least for the first group etc etc.' **(GS 124-a)**

Senate Hansard information dated 26th September 1997 **(GS 124-b)** confirms that:

1. Ted Benjamin, Telstra's main arbitration defence liaison officer in Graham and Alan's arbitrations, was also a member of the TIO Council; and

2. During a Senate hearing into COT issues, the then-new TIO, John Pinnock, agreed that Mr Benjamin had not removed himself from Council discussions of COT matters:

Senator SCHACHT – 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 decision about Cot case 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.

Exhibit **(124-c)** is page 19, from the In Camera Senate Hansard dated 9 July 1998, where Senator Schacht asked Ted Benjamin -

Senator SCHACHT – Mr Benjamin, when did you first get involved in dealing with CoT cases?

Mr Benjamin – In 1994.

As for the date 26th September 1992, Mr Benjamin has been involved in dealing with the COT cases since 1992, not 1994.

12th January 1994: Similarly, a letter from Steve Black to AUSTEL's John MacMahon states

In accordance with our agreement reached in the meeting with yourself and your Chairman, these documents will be released through the TIO at the appropriate stage of the arbitration process. It is my view that the appropriate time for release as after the assessor is appointed and the procedural rules for the arbitration process have been agreed by all parties. However, as indicated in our agreement, this decision will be taken in consultation with the TIO. **(GS 137)**

What has been established from another letter to Warwick Smith, from Steve Black, dated 11th July 1994 **(AS 438-a),** is that the TIO-appointed resource unit was given authority to access arbitration documents provided by Telstra during the arbitration process, before the material was seen by the arbitrator and claimants.

16th May 1994: A TIO file note, which Alan received late in December 2001 (under the TIO Policy Privacy Act), confirms that, on the 14th May, Alan also visited the TIO's office (two blocks from Telstra House) and asked that they provide a witness to accompany him back to the Telstra viewing room to see the altered documents for themselves. **(AS 77)** Even though the TIO was acting as administrator to Alan's arbitration, they refused to send anyone back with him. Considering that, as already noted, on 11th January and 11th July1994, Telstra's Steve Black wrote to Warwick Smith regarding the TIO-appointed Resource Unit and AUSTEL censoring Telstra documents before the COT claimants were allowed to use them to support their claims we have to ask if this is why no-one from the TIO's office would help to investigate this discovery matter. In the last paragraph of this document the deputy TIO Ombudsman, Sue Harlow wrote to Warwick Smith, and referred to

the proof Alan left with her confirming Telstra had altered information on the supplied documents noting 'He left an example of this with us' (also attached)

Grant Campbell: exhibit **(AS 542)** confirm that Grant Campbell signed official TIO letters on behalf of Warwick Smith (TIO) during the FTSP. Mr Campbell was acknowledged as 'Manager of Disputes', which included Alan's faxing capacity and FTSP problems. Although the TIO's Annual Report of June 1994 includes a list of all the staff employed in the year to that date, Mr Campbell's name however is not on that list as a TIO employee.

Pia Di Mattina was seconded from Minter Ellison around the same time that Grant Campbell apparently assisted Warwick Smith in the administration of the COT arbitrations but, like Mr Campbell, Ms Di Mattina's name is not on the TIO's employee list either.

Since Ms Di Mattina was only seconded to the TIO's office it is likely that Minter Ellison continued to pay her salary but who was Grant Campbell paid by? From Alan Smith's *CAV list of contacts and supporting targets* it is obvious that in January 1995, just a week or so after apparently working with the TIO's Arbitration Unit, Mr Campbell was working in Telstra's Arbitration Unit, with Ted Benjamin.

Neither Graham nor Alan were ever told exactly when Mr Campbell started working for Telstra, nor what confidential arbitration material he might have had access to prior to the transfer. Exhibit (**GS 193-a)** confirms that both the TIO and Telstra knew that documents would be vetted by the TIO's resource unit before they were passed on to the arbitrator and, if they were lucky, the claimants.

Among the material Alan received under the TIO Privacy Policy Act in 2001/2 Act were a number of documents which confirmed that Mr Pinnock, the TIO during the time of Alan's arbitration, allowed numerous episodes of Telstra's unethical conduct during Alan's arbitration to go unaddressed. One of these was a copy of a letter dated 7th September 1995, from Telstra to Mr Pinnock **(AS 116)**. In this letter, Telstra acknowledged that one of the BCI test results (which they used to support their defence) was impracticable.

Another document included in those received from the TIO in 2001/2 was a fax cover sheet to Peter Bartlett of Minter Ellison from the TIO regarding some of Alan's letters to Dr Hughes and his subsequent letter to Mr Pinnock on 21st June 1995. This fax cover sheet outlines 'what the approach should be regarding parties seeking to revisit post Arbitration. This position is not to open the 'can of worms' **(AS 184)**.

30th July 1996: Mr Pinnock drafted a letter intended for Alan **(AS 219).** Alan did not see a copy of this letter until 2001/2. The hand-written notes in the top right corner of this letter included dates that coincided with a number of arbitration letters that were withheld from both Dr Hughes and Alan during Alan's arbitration **(AS 127** to **AS 129; AS 220)**. Alan only received these letters under the TIO Privacy Policy Act, late in 2001/2 and early in 2002.

Although the author of the handwritten note is unknown, compare it to Ms Di Mattina's handwritten note **(AS 184)**

24th October 1997: John Pinnock writes to Ms Pauline Moore, Secretary Senate Environment, Recreation, Communications and the Arts Legislation Committee in a document stamped *CONFIDENTIAL* **(AS 621)**

I refer to previous correspondence and discussions with the Committee's Research Officer, Ms Ducker, concerning a series of questions put on notice by Senator Boswell and arising out of the Committee's proceedings of 26 September 1997. ...

The COT Arbitration Procedures contain provisions relating to the confidentiality of the proceedings which bind the parties. Those provisions also bind the Arbitrators, the Resource Unit, the Special Council and the TIO in my role as Administrator.

Please note: only Telstra and the COT claimants signed the confidentiality agreement. Mr Pinnock also noted

Accordingly, I ask that the answers given below to the questions on notice be treated as confidential by the Committee and not published.

1. In November 1995 I received correspondence from a COT member expressing concern about the Technical Resource Unit. The COT member:

· expressed concern that the purchase by Pacific Star of Lane Telecommunications compromised the independence of the Technical Resource Unit;

· stated that there were inaccuracies and biases evident in the Lane Telecommunications/DMR Technical Evaluation Report. ...

2. On 6 November 1995 I was advised by Steve Black of Telstra that Lane Telecommunications and Pacific Star had already worked together on several Pacific Star contracts in Queensland and Western Australia and for the then Federal Government.
...

6. Apart from the evidence I gave to the Committee on 26 September 1997 concerning the purchase of Lane Telecommunications by Ericsson Australia. I have recently been advised by one of the Arbitrators [Dr Hughes] that he will be transferring his legal practice to Blake Dawson Waldron, Solicitors. I am aware that that firm is currently acting for Telstra in relation to a number of matters. Arrangements are being made to discuss with Blake Dawson Waldron any possible conflicts of interest. ...

8. It is my recollection that I have never stated in person or by telephone to individual COT members and/or their representatives that the arbitration has failed. ...

9. Yes, from time to time I received complaints from foundation COT members, concerning a range of matters, including alleged non-compliance with the rules of the Fast Track Arbitration Procedure by Telstra and/or the Arbitrator and/or the Technical and Accounting Resource Unit. Identifying individual instances of complaints and detailing. The response taken will require a huge amount of administrative resources in searching TIO files.

Yes, I have refused to provide COT members with a copy of Telstra's Preferred Rules of Arbitration. A copy of this document was not provided because it was historical interest only, and the COT members did not advance any argument as to why it was relevant to their arbitration. A copy is provided for the information of the committee

Comprehensively addressing all of Mr Pinnock's letters would take some considerable time: in this context. It is more useful to address specific statements, such as those pertaining to the alleged non-compliance with the rules of the Fast Track Arbitration Procedure by Telstra and the arbitration units. Resource Unit issues have been addressed elsewhere in this document.

The following list of exhibits, although elsewhere in this document, show that point 9 above is not strictly accurate and that it was to the disadvantage of the COT claimants that Telsra's preferred rules of arbitration were not made available.

Exhibit **AS 622** is a letter dated 24th January 1994, from Mr Shelton of Minter Ellison to Dr Hughes, the arbitrator, noting: *'Following our meeting on Thursday last, I now enclose revised Procedure for your consideration.'*

Exhibit **AS 623** is a letter dated 25th February 1994, from Mr Shelton to Dr Hughes, detailing amendments made to the Fast Track Arbitration Procedure by Mr Shelton.

Exhibit **AS 624** is an internal Telstra email dated 3rd March 1994, noting *'My course therefore is to force Gordon Hughes to rule on our preferred rules of arbitration.'*

Exhibit **AS 625**, dated 22nd March 1994, is the transcript of a secret arbitration meeting attended by Telstra and their lawyers (Simon Chalmers & David Krasnostein from Telstra's Legal Directorate), Dr Hughes, Peter Bartlett and Warwick Smith. The COT claimants were not represented and were not even aware of this meeting until late in 1998. At point 2 in this transcript Telstra notes: *'Mr* [Warwick] *Smith stated his view he would not endorse the rules as fair unless clause 10.2.2 repeated clause 2(f) of the Fast Track Settlement Proposal.'*

Exhibit **AS 626** is a copy of Telstra's 'Preferred Rules of Arbitration', which was attached to Mr Pinnock's letter to Ms Pauline Moore (see Exhibit **GS 318-b**). With the exception of some minor cosmetic changes, this document is the same as that allegedly drafted by Mr Shelton

Exhibit **AS 627** is page two from the award that Dr Hughes handed down on 11th May 1995 in Alan's Smith's arbitration. In this document, at point (h), the arbitrator notes ' at my request, an arbitration agreement was prepared by Mr (now Judge) Frank Shelton of Messrs Minter Ellison and settled by Messrs Minter Ellison in consultation with me, Telecom and the four COT case members concerned.'

It may be argued that Frank Shelton's amended agreement was prepared collectively by Mr Shelton, Dr Hughes and the COT claimants and only included some clauses from Telstra's preferred rules but it is clear that almost all of the amended FTSP Agreement was based on Telstra's preferred rules.

There appear to be two possible motivations therefore for not allowing the COT claimants access to Telstra's preferred rules of arbitration. Firstly, to prevent the COT claimants from realising that the agreement they signed, was, in effect, Telstra's preferred rules of arbitration with only cosmetic changes, or secondly, due to concern that the COT claimants and their advisors might compare Telstra's FTSP rules, Minter Ellison's arbitration agreement and the final FTAP agreement that Graham and Alan signed and discover that another alteration that had been made to the version

provided to Dr Hughes, so that Minter Ellison (as Special Counsel) and the two Resource Units (FHCA and DMR) were exonerated from any liability resulting from negligence and/or wrongdoing.

The original Fast Track Settlement Proposal was originally based on the AUSTEL-facilitated commercial review, which was never intended to be a legalistic arbitration. The TIO, Telstra, the TIO's Special Counsel and the assessor (Dr Hughes) were all involved to some degree in turning the commercial review into a highly legalistic and unworkable arbitration process. And, after all this, Dr Hughes then wrote to Warwick Smith on 12th May 1995, warning the TIO that the whole process was 'not credible' anyway. On 26th September 1997, John Pinnock (the new TIO) advised the Senate Estimates Committee that

Firstly, and perhaps most significantly, the arbitrator had not control over that process, because it was a process conducted entirely outside the ambit of the arbitration procedures.

This secret alteration to the arbitration agreement, either by Warwick Smith and Peter Bartlett alone, or with Dr Hughes' assistance, took away the only life-raft the COT claimants had – the right to sue the Special Counsel, FHCA or DMR (Australia) for misconduct.

It is interesting to note that Graham's solicitor William Hunt, showed concern in his file notes (see 8th December 1997, below) that Mr Pinnock wouldn't even provide him (a solicitor) copy of Telstra's preferred rules noting:

Pinnock will not make available the first draft of the fast track arbitration procedure sent in early 1994 by the then TIO to Bartlett of Minter Ellison. Telstra has refused to make the first draft available under FOI. Schorer says Pinnock has a copy and made it available to the Senate on a confidential basis.

Schorer is convinced that it will show a complete programme altering the intention of the fast track settlement proposal and commercial assessment which was the subject on the November 1993 arrangement.'

27th April 1995, Ted Benjamin writes to Dr Hughes**.** The attachments that the information refer to were not provided to Alan or his technical advisor George Close. This letter includes 7 separate points that had apparently been sourced by DMR & lanes directly from Telstra, without any formal request directed through the transparency process of the arbitration. Had George Close and Alan received a copy of this letter during the arbitration procedure they would have been entitled to request from Telstra through Dr Hughes copies of all the technical data tthat Mr Benjamin based this letter on. **(AS 166)**

*AFP

31st June 1994: Mr Rumble was angry that Alan had supplied a number FOI documents to the AFP which he had previously received from Telstra under FOI. The documents which Alan supplied to the AFP were provided to assist them in their interception investigations. Mr Rumble stated to the effect that if Alan promised not to supply any more FOI documents to the AFP, Telstra would assist him by supplying the rest of the relevant claim material he needed. Due to the stressful situation Alan found himself in, including having no support from either the arbitrator or the TIO, he gave his

word to Mr Rumble, in the blind hope that he could reach an early end to this dreadful saga. Exhibit **(AS 543)** is page-12 from the transcript of Alan's AFP interview regarding this matter.

4th July 1994: Alan responded to Mr Rumble's threats in his letter stating

I gave my word on Friday night that I would not go running off to the Federal Police etc, I shall honour this statement, and wait for your response to the following questions I ask of Telecom below. **(AS 85)**

At the time of writing this letter Alan had no intention of providing the AFP with more FOI documents. However, when the AFP came back to Cape Bridgewater 26th September 1994, they started asking a number of questions concerning this Paul Rumble letter

On page 12 of the AFP transcript of Alan's second interview at Q57, they state

The thing that I'm intrigued by is the statement here that you've given Mr Rumble your word that you would not go running off to the Federal Police etcetera

It is clear from the statements made by the AFP in this transcript that they believed Telstra had been intercepting Alan's telephone calls without his knowledge or consent **(AS 86)**

29th November 1994: Senator Ron Boswell asked Telstra's Legal Director David Krasnostein a number of matters concerning the AFP investigations into Telstra's interception of the COT telephone conversations including

Why did Telecom advise the Commonwealth Ombudsman that Telecom withheld FOI documents from Alan Smith because Alan Smith provided Telecom FOI documents to the Australian Federal Police during their investigations? **(AS 87)**

Alan copied the 4th July letter to Dr Hughes and Warwick Smith, stating that Telstra had breached the Privacy Act including confirmation that Mr Rumble had refused to supply him with any further FOI documents until Alan had agreed not to pass the information on to the Australian Federal Police (AFP). Like Graham, Alan received no support from either Dr Hughes or Warwick Smith regarding access to documents.

*Telstra Minimise their liability

13th October 1994: This AUSTEL FOI document folio 94/0269-05 (22) is a letter originally sent by a Telstra whistleblower (name deleted) to Parliament House Canberra, ACT 2600 and was received by the Office of the Hon Michael Lee, MP Minister for Communications. This letter makes allegations against Steve Black and Rod Pollock, as the two Telstra executives who were involved in altering and removing information on documents requested by the COT claimants under FOI.

Please note: someone has added a hand-written comment on page one, pointing to Rod Pollock's name and noting *'Warwick Smith has been critical of Pollock on same issue.'* It should be noted that Sue Harlow (Deputy TIO), passed on to Warwick Smith, together with his statutory declaration from Alan, showing that he had also named Rod Pollock as one of the Telstra employees who had removed information on requested documents and/or had not provided the correct documentation that should have accompanied existing received FOI documents. **(GS 206)**

Comment:

Warwick Smith must have told someone – either in the Government, or in a regulatory position – that Rod Pollock had been named by two different sources.

In this letter under the heading *'Concerns and issues'*, this document states

Mr Steven Black, Group General Manager of Customer Affairs, who has the charter to work to address and compensate Telecom's 'COT' customers as well as the management of other customer issues related to Telecom, is involved in and initiates conduct and work practices that are totally unethical. ...

There are three main areas in which Steve Black and his senior executives have sought to influence and manipulate:

1. *Remove or change clear information on the position of liability.*
2. *Diminish the level of compensation payable to COT customers.*
3. *Dismissive of breaches in relation to matters regarding customer Privacy.*

21st March 1999: This letter from J R Perry, Perry & Associates Pty Ltd to Casualties pf Telstra C/- The Small Business Show Channel Nine states:

I watched your show on Sunday morning carrying the piece on Telstra. I was interested to hear of Telstra's lies under oath, destruction of evidence, etc etc.

I started a law suit 21/2 years ago against Telstra for breach of contract during their cable TV rollout. They have placed ever obstacle in our way and dragged the case out to try to bleed us dry. They sent dozens of contracting companies such as mine to the wall by manipulating markets and breaching contracts. Only 3 companies have had the resources to fight them. Unfortunately two company owners have allegedly committed suicide due to the loss of their homes and families as a consequence of Telstra's actions, although this would be difficult to prove.

As a direct consequence I have lost my home, separated from my wife, lost hundreds of thousands of dollars and a twenty year old business and fought a very dirty legal battle. My other partners have had to sell or re mortgage homes and one has retired without any of the security he should have had from owning a business for over twenty years.

We also have found the following:

- Destruction of evidence from the firts day of the suit.
- False affidavits from Telstra management.
- Withholding discovery documents.

And the list goes on **(AS 642)**

Senate

<u>26th September 1997:</u> Mr Pinnock writes to The Senate Environment, Recreation, Communications and the Arts Legislation Committee**,** regarding the many deficiencies in the COT arbitration process

one of the potential deficiencies should have been obvious from the outset. ...

In the process leading up to the development of the Arbitration procedures, the claimants were told that documents would be made available under the Freedom of Information Act.

For present purposes, it is enough to say that the process was always going to be problematic, chiefly for three reasons.

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

Finally, as I have remarked previously, the arbitrations have been bedevilled by the inability of the parties to treat the disputes as matters of a commercial nature and to put behind them the atmosphere of mutual suspicion and mistrust that had built up over a long period of time. **(AS 232-A)**

Exhibit **(AS 232-B)** consists of pages 109 & 110 from Senate Hansard for the date 26th September 1997, the day Mr Pinnock discussed the aforementioned issues.

Senator SCHACHT – ... 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.

Mr Pinnock addresses the Senate Part 2 (GS 312-b)

<u>26th September 1997:</u>

On pages 99 to 100 **(AS 473)**, Mr Pinnock discusses the problems the COT claimants encountered when they attempted to access documents from Telstra but he fails to mention that Alan Smith had proved to Mr Pinnock's predecessor, Warwick Smith, that there were many instances of Telstra's unethical behaviour during the C.O.T arbitrations, e.g., altering and changing information on requested documents in an attempt to minimise Telstra's liability. In the second paragraph on page 100 of the Hansard report, in relation to arbitration technical reports – the most important issue in the entire COT arbitration process – Mr Pinnock states

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 until, 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 the process was for it to be exclusively and really a matter for advice to the arbitrator.

This Senate Hansard report is relevant to both Graham's and Alan's arbitration, because it shows quite clearly that, when he addressed the Senate, the TIO was deliberately selective about the information he provided. He also implied wherever possible that the COT claimants were as much at fault as Telstra.

It is also important to highlight how the health and financial problems that followed for the ten years after the Alan's arbitration may well have been avoided if only Mr Pinnock had told the Senate on 26th September 1997 (regardless of how painful it may have been for him to do that at the time) that**:**

a) Someone with access to the arbitration agreement secretly altered some sections of the document, after the original version had been provided to Alan's legal advisors for assessment, and without ever advising any of the claimants of these changes, and

b) Because these secret alterations exonerated the resource unit and the Special Counsel from any liability arising from conscious negligence, they benefited the resource unit and the TIO's Special Counsel, to the detriment of both Alan Smith and Graham Schorer, thereby removing from the resource unit and the Special Counsel any incentive to look after Graham and Alan's common interests.

23rd October 1997: The office of Senator Schacht, Shadow Minister for Communications, faxes Senator Ron Boswell the proposed terms of reference for the Senate Working Party for their investigation into the COT arbitration FOI issues. This document shows there were two lists of unresolved COT case FOI issues that were to be investigated five on Schedule A and 16 names of Schedule B. Alan's name appears on Schedule B list **(AS 475)**. In this list states:

1. The working party must develop a list ('List') of all documents which:

· were reviewed by Telstra in the course of preparation of its defence;

· were brought into existence after Telstra prepared its defence, but which would in the opinion of Telstra's solicitors have been reviewed by Telstra if it were preparing its defence today; or

· were lost or destroyed before Telstra prepared its defence, but which would in the opinion of Telstra's solicitors have been reviewed by Telstra if they had been in existence at the time Telstra was preparing its defence

including documents in relation to

a) the:

· arbitration cases

· response to request under FOI; and

· appeals in respect of cases already decided

described in Schedule A to these terms of reference

b) if the Working Party becomes aware of relevant case additional to those listed in the Schedule, *or relevant documents*, the Working Party will advise the Senate Environment Recreation, Communication and the Arts Legislation Committee in writing of these cases or documents and the reason why the Working Party considers they are relevant. The working Party will not proceed with any investigation of such additional cases or documents unless and until the Senate Environment, Recreation, Communications and the Arts Legislation Committee reserves the right to amend the Schedules to this document.

It is important to point out the heading above the 16 other COT case names shown in Schedule B:

Unresolved Matters, Including The Amount Of Settlement Offered Or Paid In Respect Of Persons Listed In Schedule B

Graham was told that the five claimants included in list 'A' were to be investigated first because they were to be used as a 'litmus test'. He was also told that it would have taken too long to investigate all twenty-one cases, including the sixteen on the 'B' list, and that would have impacted on the privatisation of Telstra. It has since been proved beyond all doubt that Graham never received anywhere near the number of FOI documents he should have received in response to his various FOI requests, even through the Senate Working Party involvement. In other words, if the Government of an alleged democratic country couldn't obtain documents from a government owned corporation like Telstra, then what hope did any of the COT Cases and their arbitrator have of obtaining documents?

7th November 1997: Mr Pinnock writes to Ms Catelli, The Minister's office**.** This letter was written in response to Alan's letter to the Minister regarding Alan's allegations that his arbitration wasn't conducted in a transparent manner. Mr Pinnock made no reference to Dr Hughes continuing to arbitrate using an agreement he knew was not credible. Instead, Mr Pinnock advised the Department that he had 'considered each and every one of these various allegations which I found to be without substance.' **(AS 235)**

15th November 2002: Senator Alston's Office writes to David Hawker MP

Thank you for your representation of 8th November 2002, on behalf of Alan Smith concerning Telstra. The issues raised in your letter are receiving attention and the Minister will respond to you shortly. **(AS 291**

External Support

23rd March 1994: The Hon Minister Lee MP writes to Alan

Thank you for your letters of 3rd February 1994, concerning problems with your telephone and facsimile service. ...

I have also arranged for your letters to be sent to senior management in Telecom with a request that they fully investigate your allegations. ...

It would be inappropriate for me to comment on any allegations of improper monitoring while the matter is under investigation by the Federal Police. **(AS 63-A)**

18th August 1997: Sister Burke, Loretto College, writes to Alan

Dear Alan, Thank you for the opportunity to read the working draft of your book and to view your promotional video. Only I know from personal experience that your story is true. I would find it difficult to believe. I was amazed and impressed with the thorough detailed work you have done in your efforts to find justice.

May your venture at Bridgewater now go from strength to strength. **(AS 231-A)**

Alan first met Sister Burke in March 1992, when she was attempting to organise a trip to the Holiday Camp for a group of under-privileged children from the Ballarat region. When she had been unable to contact Alan by phone over a couple of weeks she decided to drive the three hours to visit instead

Twelve months after Sister Burke's charity camp another of the Sisters from Lorretto College, Sister Karen Donnellon, attempted unsuccessfully, to phone Alan to arrange another camp and finally wrote **(AS 231-B)**

During a one week period in March of this year I attempted to contact Mr Alan Smith at Bridgewater Camp. In that time I tried many times to phone through.

Each time I dialled I was met with a line that was blank. Even after several re-dials there was no response. I then began to vary the times of calling but it made no difference.

PLEASE NOTE: Over the years Alan received more than eighty similar letters. However, these seem to have been withheld from DMR & Lane and therefore precluded from being assessed during Alan's arbitration (see exhibit**(AS 322-C)**), even though he submitted them to the arbitrator as supporting material attached to his letter of claim. He also covered his letter of claim with a statutory declaration as per clause 6 of the Arbitration Agreement which states that 'All written evidence shall be in the form of an affidavit or statutory declaration.'

However, in their report, DMR state that 'A comprehensive log of Mr Smith's complaints does not appear to exist'. Why would they state this unless they believed it to be true?

If it is true that DMR & Lane did not see the aforementioned letters and comprehensive log of fault complaints, who withheld this information from them?

20th August 1997: Mr Ben Dunn (lawyer) writes to Alan confirming his belief that Alan was 'less than fairly dealt with by Telstra and the arbitrator.'

Not long after he wrote this letter, Ben Dunn would not agree to meet Alan, nor would he return Alan's phone calls. Even his office secretary seemed to be annoyed with him on one occasion when Alan had travelled from Portland only to discover that Mr Dunn couldn't be found. **(AS 231-C)**

Alan was in Senator Boswell's office when he received Mr Dunn's letter and he passed a copy to Steve Boswell (Senator Boswell's son), who was working at the time as a young solicitor in Minter Ellison's Sydney office. Steve later phoned Alan to offer assistance but he decided not to accept

because by then Senator Boswell and Senator Alston had left him off the Senate 'A' litmus investigation into the COT arbitrations and he didn't want to come between father and son.

*Telstra Avoidance of Issues

Exhibit **(GS 180-c)** Telstra FOI folio 101115 to 101117 this document states

A total of 8% of all businesses stated they had experienced problems themselves; 5% had, by inference from comments made by callers assumed they had problems; and 8% claimed they had both experienced problems themselves and also received comments from callers regarding difficulties in getting through to the business. 73% of customers who felt the problems associated with incoming calls has seriously affected their business had reported the problems to Telecom with varying degrees of success regarding resolution.

It is also interesting to note that, on 6th December 1993, Telstra's Ted Benjamin warned Telstra's Group Managing Director, Harvey Parker, that 4% of the 2644 Commercial Business Customers surveyed by TELCATS (on behalf of Telstra) reported experiencing significant phone problems that had affected their businesses.

Four percent of 2644 is one hundred and six businesses that experienced COT-type problems – a significant number. Four percent of all Telstra's Commercial Business customers, nation-wide, would be well over 120,000 – the number that AUSTEL's Chairman, Robin Davey, wanted to have included in the AUSTEL COT Report, rather than the 'fifty or more' customers Telstra insisted on.

*Exposing lies and lack of action

Personal Attacks

28th November 1995: Alan made a telephone call to Dr Hughes' residence to inform him that his latest FOI application dated 9th August 1995, which he had asked Ted Benjamin to process **(AS 188),** had been successful. Alan's application had been seeking working notes explaining how Telstra laboratory staff had concluded 'sticky' beer had been the cause of his EXICOM TF200 phone lock-up problems. The TF200 information Alan had just received was a completely different set of testing results than the ones Telstra had previously used in their arbitration defence. Dr Hughes wasn't home – Mrs Hughes informed Alan that he was away on business. Alan was immediately concerned that perhaps Dr Hughes had told his wife about his continued frustration regarding his arbitration and so, when she asked who was calling so that she could let Dr Hughes know who had rung, Alan was worried that she would become upset if he gave his real name and quickly decided to use the first name he could think of that was unlikely to upset her, but who he was sure Dr Hughes knew – John Rundell.

27th March 1996: A corollary to the above event is that Mr Pinnock attacked Alan's credibility in a letter he assisted Dr Hughes write to Laurie James. Mr Pinnock knowingly misinforms Mr James that Alan had rung Dr Hughes' wife at 2 o'clock one morning noting 'Mr Smith has admitted to me in writing that last year he rang Dr Hughes' home phone number (apparently in the middle of the night, at approximately 2.00am) and spoke to Dr Hughes' wife, impersonating a member of the Resource Unit.' **(AS 209)**

Who advised Mr Pinnock that Alan telephoned at approximately 2.00am? The attached telephone account for the evening in question confirms Alan called at 8:02pm see **(AS 210)**

Just as alarming as the lying about the time frame in which Alan made this telephoned call is the concealment from Laurie James as to the reason Alan telephoned. Alan had just received vital arbitration documents under FOI documents which should have been supplied to Alan during his arbitration was now released on that day 28th November 1995 (six months after his arbitration) documents proving Telstra had fraudulently prepared their TF200 EXICOM defence report.

It was also concealed from Mr James that Mr Pinnock had refused to investigate why Telstra had used manufactured evidence using this falsified information in defence of Alan's claims.

25th June 1996: Alan writes to Mr Pinnock, saying

Your statement to Mr Laurie James, President of the Institute of Arbitrators, regarding a telephone call to Dr Hughes. To date I have had no response from you, personally, as to why you chose to tell Mr James that I phoned Dr Hughes' residence at 2.00am on 29th November 1995 and that, in making this alleged call I behaved unethically.' **(AS 216)**

When Alan later received a copy of this letter back from the TIO's office, a hand-written note had been added, stating 'John, we are still waiting on a response from Gordon on this.'

10th May 2006. **During the Coalition Government-endorsed, DCITA Independent Assessment process that Alan was involved in, David Lever (DCITA) sent an email to John Pinnock (TIO) asking various questions about the COT Fast Track Arbitration Procedure and COT claims that the process was flawed. Astra Taurins responded to this email, on behalf of John Pinnock, noting: 'At no stage did I or, as far as I am aware, the Arbitrator, conceal anything from the COTS.'**

It is clear however, from the secret alterations to clause 24 and the removal of the $250,000.00 liability caps in the arbitration agreement, and from Dr Hughes' letter dated 12th May 1995 (see above) declaring that the agreement was not credible and therefore, should not have been used in Alan's arbitration, that the arbitrator and the TIO both withheld these two pieces of valuable information from Alan during his appeal process. This is clearly concealment of the worst possible kind.

24th February 2008: The following example is the type of situation Alan and his partner, Cathy Ezard, have lived with since Alan's arbitration of 1994. Cathy wrote this letter to Alison Jeremy, Senior Lawyer, Australian Communications & Media Authority, stating:

I reported the damage to the Telephone Junction Box in front of our premises in April 2007. The junction box was initially damaged when local council contractors built a footpath adjacent to our property. The box was inspected on April 4th 2007, by Telstra's technician (Steve). The box has been

further damaged and is now a public safety issue in spite of a follow up letter dated 3rd December 2007, in which I was given a fault reference number **1-120114744**, I followed up with a further letter 4th February 2008.

Over the years I have experienced many Telstra related issues – continuous complaints from customers unable to connect, faxes stopping half way through transmission (3 fax machines – same problem) line drop-outs, dead lines, weird noises and music on lines. Letters written to the TIO have been ignored during period 1995 to 2001 when I was Alan Smith's partner in the Cape Bridgewater Holiday Camp. I hope the Junction Box issue is an isolated incident and not a follow on from lack of co-operation due to our previous experience with Telstra.'**(AS 579)**

24th April 2008: Alan wrote to the Administrative Appeals Tribunal noting:

'I hope that you understand why I used a friend's name and address on the envelope when I first sent my submission, and my apparent paranoia won't affect your assessment of my claim.'

13th December 2008 **Darren Lewis wrote to Registrar Caporale of the Federal Magistrates Court of Australia, noting:**

Yesterday I telephoned Ms McCormic because I was concerned I had not received clarification from the Federal Court that they had received my latest submission dated 2nd & 3rd December 2008 prepared in support of my petition File No (P) MLG1229/2008 before the Magistrates Court. I was advised by Ms McCormic that the Federal Magistrates Court had only received, on 5th December 2008, an affidavit prepared by Alan Smith dated 2nd December 2008. PLEASE NOTE: I originally enclosed with Alan Smith's affidavit in the (envelope) overnight mail the following documents.

This letter from Mr Lewis (attached) discusses four Telstra-related files that Alan prepared to help with Mr Lewis's court case and relates how he had put those four files in an envelope, along with my affidavit, but that none of the files were in the envelope when it arrived at its intended destination noting:

I have attached herewith dated 3rd December 2008, a copy of the Australia Post overnight mail receipt docket numbers SV0750627 and SV0750626 confirming the total cost to send the above aforementioned information was $21.80. I am sure Australia Post would confirm that a large amount of documents would have been enclosed in these two envelopes when they left Portland.

9th February 2011: On pages 16 and 17 from Alan's most recent Administrative Appeals Tribunal Statement of Facts and Contentions (FOI claims) the Respondents the ACMA states:

On 23rd December 2002 and 7th January, 2003 I wrote to Tony Shaw, Chairman of the ACA. Copies of both these letters have since been returned to me from the ACA (now the ACMA) and it is clear that these two letters were also intercepted (seven years after my arbitration) before being redirected on to the ACA. The markings on these two documents are the same markings on the documentation assessed by Scandrett & Associates and Peter Hancock (see above), which they labelled as having been intercepted.

I believe most Australians would want to know, if the ACMA has nothing to hide on behalf of Telstra, then why would they not investigate these on-going interception issues in the public interest? I have two lever arch files that confirm that numerous COT claimants' commercial in-confidence documents were still being intercepted years after these COT cases went into arbitration. Surely, if the Government Communications Regulator refuses to address fax interception evidence I have offered to provide them that confirm someone with access to Telstra's network was intercepting faxes during and after the end of their arbitration, then this is a matter of public interest?

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7th July 2011: Graham's statutory declaration notes:

In early February 1994, our premises were broken into and all cables including the power cables were severed, as well as all power connections to the main server which was in a special constructed room. The perpetrators forced entry into the building in what the police described as a "ram raid", where something similar to pneumatic tyre attached to the front of a vehicle was used to hit the front door with enough force to dislodge the steel frame attached to the brick work. According to the time on the server backup battery, the power was cut just prior to 2am.

Part of the microfiche copier and viewer was stolen, as well as the PC on my desk which contained all of my COT information and correspondence between regulators, politicians, etc. Also stolen was a book that contained a catalogue of computer file numbers against their description.

The police who attended our premises the next morning stated that it was a professional job, where the invaders had a specific mission or were disturbed. As there was no alarm system to alert them, it was more likely that it was a specific mission. The police asked questions about any sort of irregular business we had been involved in and who we may have upset.

The same day I spoke to Garry Dawson, from Dawson Weed and Pest control (another COT case) on the phone, who told me that his business premises in Sunshine had also been broken into just after midnight and burgled. The only thing stolen was the Dictaphone tape which held a recording he had made of a meeting between him and two Telstra executives on the previous day.

After I signed the arbitration agreement on 21st April 1994 I received a phone call after business hours when I was working back late in the office. This call was to my unpublished direct number. The young man on the other end asked for me by name. When I confirmed I was the named person, he stated that he and his two friends had gained internal access to Telstra's records, internal emails, memos, faxes, etc. He stated that he did not like what they had uncovered. He suggested that I should speak to Frank Blount (*Telstra's CEO*) directly. He offered to give me his direct lines in his Melbourne and Sydney offices, the numbers to in his Sydney and Melbourne vehicle phones plus his personal mobile phone number, plus the number for his Melbourne apartment at the Como Hotel and his home phone number in Sydney.

After this call, I spoke to Alan Smith about the matter. We agreed that while the offer was tempting we decided we should only obtain our arbitration documents through the designated process agreed to before we signed the agreement. I informed them of our decision when they next rang. I requested that they did not ring again.

I was troubled by these events and after great deliberation I contacted Warwick Smith and informed him of the events. After a considerable period of time had passed I asked Warwick Smith if there had been an outcome from the information I had supplied him. He told me that the hackers had been apprehended. **(AS 580)**

11th July 2011: Alan wrote a combined letter to the Hon Robert McClelland MP, Federal Attorney-General and the Hon Robert Clark MP, Victorian Attorney-General noting:

Half way through our 1994 arbitration, Casualties of Telstra (COT Cases) Spokesperson Graham Schorer was contacted by three computer hackers (see covering page) and the attached statutory declaration dated 7th July 2011...

I recall Graham telling me that these young hackers were prepared to provide us with copies of the evidence they had uncovered which supported Telstra was acting unlawfully towards us. It should also be noted that, before this contact, at the suggestion of Detective Sergeant Jeff Penrose of the Australian Federal Police, and covered by a sworn declaration dated 14th May 1994, I had already provided the Telecommunication Industry Ombudsman (Warwick Smith) and the arbitrator (Dr Gordon Hughes) with the very same type of documented evidence concerning this unlawful conduct that the hackers appeared to have uncovered. When Graham and I discussed the internal emails and faxes that these hackers were offering to provide, we did not know that Telstra's unlawful conduct towards us would be ignored by the TIO and arbitrator.

Please now carefully consider what the computer hackers could have uncovered in Telstra's 'Arbitration File' that would have prompted them to phone Graham and, since we don't yet know the answer to that question, I therefore believe it would be in the best interest of all parties if a joint application could be made, from your offices to the Victorian State Police, asking for any archival records the police may have, in relation to the computer hackers who were apprehended during 1994 **(AS 631)**

'Arbitration File'

The Telstra and TIO 'Arbitration File' issues and Telstra's 'Proposed Rules of Arbitration' are important because they confirm that the COT claimants had nowhere to go with their complaints or their concerns, including the matter of the secret alterations they believed had been made to the arbitration agreement, and it now seems that they were correct to believe (see the FOI chronology below) that, if they had detailed their complaint in full regarding the varying agreements, the TIO and Telstra would have immediately destroyed any evidence they had in relation to these issues. Alan and Graham Schorer believed at the time that the only safe avenue they had was to attempt to access the information under FOI and, as you can see, this alternative turned out to be fruitless too.

By the time this document has been read it will be fully understood why the COT Claimants had good reasons not to trust anyone involved in the administration of their arbitration's, so Alan and Graham couldn't risk stating that they believed the agreement might have been altered after it had been couriered to Telstra to sign. They did believe that Dr Hughes had used Telstra's version of the agreement (and not the version supposedly independently drafted by Frank Shelton, President of

the Institute of Arbitrators Australia). The only avenue they could see that was open to them, was to get the relevant arbitration documents through FOI, or to access the various agreements directly from the TIO however, as can be seen from the chronology shown below that door was shut also.

18th October 1995: Alan's letter to Telstra's FOI Unit asks for

all correspondence, letters and documentation forwarded from Telecom .Telstra to Dr Hughes during the fast Track Settlement Proposal and the fast Track Arbitration Procedure, including: "all correspondence, letters and documentation forwarded from Telecom/Telstra to Dr Hughes during the Fast Track Settlement Proposal and the Fast Track Arbitration Procedure, all material associated with the drawing up of the Telstra Preferred Rules of Arbitration, and all material and letters associated with the Fast Track Arbitration Procedure which were sent by Telecom/Telstra to Warrick [sic] Smith at the TIO office, during the Fast Track Arbitration Procedure.

20th November 1995: Telstra's Bettina Evert wrote to Alan noting

I refer to your Freedom of Information o f 18 October 1995 in which you sought "all correspondence, letters and documentation forwarded from Telecom/Telstra to Dr Hughes during the Fast Track Settlement Proposal and the Fast Track Arbitration Procedure. I note that you are also seeking: 1. all material associated with the drawing up of the Telstra Preferred Rules of Arbitration. 3. all material and letters associated with the Fast Track Arbitration Procedure which were sent by Telecom/Telstra to Warrick [sic] Smith at the TIO office, during the Fast Track Arbitration Procedure.'

10th January 1996: John Pinnock wrote to Alan stating

I refer to your letter of 31 December 1995 in which you seek to access to various correspondence held by the TIO concerning the Fast Track Arbitration Procedure. I do not propose to provide you with copies of any documents held by this office.

15th January 1996: Alan's letter to Telstra's Paul Haar notes

This letter is in response to our telephone conversation on Friday 12 January, 1996 and also further to my FOI request of 18th October 199. 5 The following list of the documents required under FOI. (6) Minutes of the conversations which took place between parties associated with the FTAP, during the setting-up process of the FTAP (7) All correspondence sent by Telstra to Peter Bartlett of Minter Ellison Morris Fletcher during the FTSP and the FTAP, November 1993 to May 18th 1995

12th February 1997: Telstra's John Armstrong wrote to John Wynack Director of Investigations Commonwealth Ombudsman Subject Alan Smith

Your comment that you believe Telstra "should have taken steps to protect documents covered by [Mr Smith's]request while it consulted with Mr Smith in an attempt to scope down the FOI scope. Mr Benjamin instructed Mr Black's personal assistant that it was in order to dispose of the material as none of it appeared to be relevant to any current or ongoing matters.

11th March 1997: John Wynack wrote to Telstra's John Armstrong noting:

I refer to previous communications concerning our investigation of the complaints by Mr Alan Smith. In particular I refer to our investigation pf the complaint alleging that Telstra unreasonably delayed providing documents requested in his October 1995 FOI application. On 7 March 1997 I

sought information from three Telstra officers about one aspect of your response to that complaint viz the disposal of some of Mr Black's papers after Mr Black left the employ of Telstra.

13th March 1997: John Wynack wrote to John Armstrong noting

On 20 December 1996 you informed the Ombudsman: "Telstra has been unable to locate Mr Black's further general files which included copies of the correspondence received from Hunt & Hunt in relation to the development of the fast Track Arbitration Process and I am advised that these files, along with other documents, were disposed of by his personal assistant sometime after he left Telstra's employ.

14 March 1997: John Wynack's further letter to Mr Armstrong is one of disbelief stating

I refer to my letter of 13 March 1997 concerning the complaint by Alan Smith alleging that Telstra unreasonably has delayed providing documents requested under the FOI application of 18 October 1995. I should be grateful if you would notify Mr Benjamin, Mr Kearney and Ms Gill of my opinion that 'On the basis of the information given to me by Mr Benjamin and Ms Gill, it is extremely improbable that Ms Gill disposed of the documents in the 'arbitration file'. Or indeed any other documents from Mr Black's office which would have been included in Mr Smith's FOI application of 18 October 1995.

4th October 1997: This letter from John Wynack to Telstra's John Armstrong notes

I refer to my letter to Telstra dated 13 March 1997 (copy attached for your convenience? In which I asked you to inform me of the actions which Telstra has taken to ascertain the whereabouts of the specific files which Ms Gill described as the 'arbitration file', and whether Telstra asked Mr Black whether he has any knowledge of the whereabouts of the file. I have no record of receiving a response to my inquiries.

24th October 1997: John Pinnock (TIO) wrote to Ms Pauline Moore, Secretary to the Senate Environment, Recreational, Communications and the Arts Legislation Committee noting:

The COT Arbitration Procedure contains provisions relating to the confidentiality of the proceedings, which bind the parties. Those provisions also bind the Arbitrators, the Resource Unit, the Special Counsel and the TIO in my role as Administrator. Accordingly, I ask that the answers given below to the questions on notice be treated as confidential by the Committee and not published. **(9)** Yes, from time to time I received complaints from foundation COT members, concerning a range of matters, including alleged non-compliance with the rules of of the Fast Track Arbitration Procedure by Telstra and/or the Arbitrator and/or the Technical and Accounting Resource Unit. **(10)** Yes, I have refused to provide COT members with a copy of Telstra's Preferred Rules of Arbitration. A copy of this document was not provided because it was of historical interest only, and the CORT members did not advance the arguments as to why it was relevant to their arbitrations.

5th March 1998: Alan's letter to John Pinnock (TIO) notes:

I have continued to seek a copy of Telstra's 'Preferred Rules of Arbitration', right through the whole of my Arbitration in 1994/95, and since. The TIO's office would not supply a copy of this document to me and Telecom/Telstra have not supplied a copy to the Commonwealth Ombudsman's Office, even though I made my request under the FOI Act.

1st September 1998: Graham Schorer wrote to John Pinnock noting

Re Point in the TIO's letter dated 30 June 1998 re the document entitled, *"Telstra Corporation Limited 'Fast Track' Proposed Rules of Arbitration"*. In Point 3, you state you cannot be certain that the document I provided to Mr Bartlett on 22 May 1998 is a copy of the document Telstra provided to Warwick Smith on or before 12 January 1994. Are you suggesting the TIO received more than one draft of the document entitled, "Telstra Corporation Limited 'Fast Track' Proposed Rules of Arbitration?

13 May 1999: In Alan's letter to George Sutton, Telstra's FOI Coordinator he noted

Last week I spoke to you on the phone regarding a number of FOI documents which are still outstanding on my amended FOI request of 18 October 1995. This FOI request covered all FOI documents and correspondence relating to my Fast Track Settlement Process (FTSP) and My Fast Track Arbitration Procedure (FTAP) which had been sent during time periods 1 January 1994 to April 1994 and 1 September 1994 to 31 May 1995 both from Telstra to Dr Hughes and From Dr Hughes to Telstra. Telstra has not yet provided to me under the aforementioned FOI claim of 18 October 1995.Please now advise me, by close of business Monday 17 May 1999, if you intend to furnish the documents, listed above, which I am still seeking under already submitted FOI requests.

21st January 2000: This letter to Alan from Kathryn Taylor FOI Legal Group, Australian Communications Authority notes

I refer to your letter of 7 January 2000 to Ms Roslyn Kellcher, in which you sought access to documents of the ACA/Austel in relation to the arbitration in which you were involved. In your letter, you request to documents obtained by Austel from the TIO's Office, Telstra and the Office of Hunt & Hunt Lawyers, and Dr Gordon Hughes (arbitrator). It is implied that some of the documents to which you are seeking access may relate to the COT arbitrations. Depending on the exact content of the documents, some of this information may be exempt due to privilege.

12th November 2002: George Sutton Telstra's FOI Coordinator wrote to Alan noting:

You have narrowed your original request to the "Fast Track Arbitration file of: Steve Black, Joy Geary and David Krasostein. My recollection is that the files of Steve Black have been sourced for previous requests made by you and I am of the opinion that there would be very little material in these files which you have not already had access to.

22nd August 2004: Alan's letter to George Sutton, Telstra FOI coordinator states:

Please find enclosed a $30 (cheque)the required application fee for the following documents to be supplied under the Freedom of Information Act

1. **Fast Track Settlement Proposal** – all draft/working notes exchanged between AUSTEL and Telecom/Telstra during October and November 1993.

2. **Fast Track Settlement Proposal** – all three version signed by Jim Holmes, Telecom/Telstra Corporate Secretary

3. **Fast Track Settlement Proposal –** all three versions signed by Ann Garms, Alan Smith and Graham Schorer between 22nd and 23rd November 1993

4. **Fast Track Arbitration Procedure -** all three versions signed by Ann Garms, Alan Smith and Graham Schorer between 22nd and 23rd November 1993

5. **Fast Track Arbitration Procedure** – all correspondence exchanged between Telstra, Warwick Smith (TIO), Peter Bartlett of Minter Ellison, John Rundell of Ferrier Hodgson Corporate Advisory and Dr Gordon Hughes of Hunt & Hunt Lawyers during the period of February – April 1994, in relation to Ann Garms,Alan Smith and Graham Schorer

6. **Fast Track Arbitration Procedure** – all three versions of the agreement witnessed by Barry Sullivan on the 21st April 1994 (two signatures only)

7. **Fast Track Arbitration Procedure** – all three versions of the agreement signed by Steve Black on 21st April 1994 (three signatures.'

29th June 2009: Alan lodged an FOI request with the (Department of Broadband and Communications and the Digital Economy), was for a copy of all the various Telstra Rules of Arbitration which the TIO Mr Pinnock (see above) provided to Ms Pauline Moore, Secretary to the Senate Environment, Recreational, Communications and the Arts Legislation Committee on 24th October 1997. On 31st July 2009 Ms Andrea Hookway (FOI Officer) from the Department of Broadband Communications and the Digital Economy responded to this FOI request stating:

I refer to your letter of 29th June 2009 seeking access under the Freedom of Information Act 1982 (the FOI Act), to 'copies of all documents provided to Ms Pauline Moore, Secretary to the Senate Environment, Recreational, Communications and the Arts Legislation Committee, between October and December 1997. The Department staff have conducted a thorough search of department records, both electronic and hard copy, for documents falling within the scope of your request and have found no relevant documents.

It is clearly obvious there has been deliberate collusion, over many years, by many powerful people, who have, so far, managed to conceal the disgraceful way in which many of the COT Cases arbitration's were conduct. Government regulatory public servants appear to have been afraid to speak out on what they know in regards to Telstra's submission of known false defence documents and Dr Hughes' covert alterations to the original COT 'four' arbitration agreement due to Section 70 of the Crimes Act 1914 forbidding such discloser by government officials. It is quite clear from the above chronology that Graham and Alan have tried all the avenues that are legally available to them to obtain the Steve Black 'arbitration file' referred to by John Wynack, Director of Investigations, Commonwealth Ombudsman's Office. Graham and Alan have always been legally entitled, as a claimant, to be provided with all the various versions of the arbitration agreement. If either Mr Pinnock (TIO) or Telstra had provided them back in 1995 or 1996, they could have brought action against the various parties who benefited from the indemnities included in the agreement they signed seventeen years ago.

The non provision of the arbitration agreements by the TIO is addressed in a letter from John Pinnock to Ms Pauline Moore, Secretary to the Senate Environment, Recreational, Communications and the Arts Legislation Committee, where he states that

Yes, I have refused to provide COT members with a copy of Telstra's Preferred Rules of Arbitration. A copy of this document was not provided because it was of historical interest only, and the COT members did not advance the arguments as to why it was relevant to their arbitrations.

As far as it goes, this letter is correct – an argument was not provided. It does not address why an argument was not provided.

The reason for this omission was that neither Alan nor Graham felt that they could trust the TIO – not after they discovered that Telstra held three senior positions on the TIO Board and Council during the COT TIO administered arbitrations. How were they supposed to trust such a body to act impartially?

By comparing the various arbitration agreements with existing bits and pieces that slipped through Telstra's FOI vetting process Graham and Alan hoped to see who really drafted the first agreement.

It has now become clear that it was not drafted independently by the TIOs special counsel as Dr Hughes advised, but rather adapted from, Telstra's Proposed Arbitration (Agreement).

In other words, when Dr Hughes' wrote to Warwick Smith on the 12th May 1995 declaring the agreement (Rules) as not a credible agreement and should be revised because

the time frames 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,

it was Telstra's *original* Arbitration Agreement Dr Hughes was referring to. These were the same 'production of document and obtaining further particulars' issues that the Senate Estimates Committee investigated between October 1997 and March 1999. Who knows what might have been the final outcome had the Senate Estimates Committee investigating the COT FOI document issues had they been provided a copy of Dr Hughes' 12th May 1995 letter.

IAMA

Ethics and Professional Affairs Committee

29th December 2008: Graham and Alan wrote a joint letter to Peter Bartlett and Dr Gordon Hughes noting:

On 17th September 2008, Mr Chris Chapman, Chairman of the ACMA, was provided with proof that our FTAP Arbitration agreement was altered after it had been distributed as the final version, to the three remaining foundation COT claimants, between 13th and 19th. We were not advised of the intended or the actual changes before we signed the agreement on 21st April 1994. The changes made included the removal of clauses 25 and 26 and alterations to clause 24, which exonerated Minter Ellison (Special Counsel) Ferrier Hodgson Corporate Advisory and DMR Inc, from legal suit.

On the day that we actually signed our agreement we were told that Steve Black would not be signing on behalf of Telstra at the same time because he was unable to be at Minter Ellison for 'business reasons' and that you, Mr Bartlett would courier the document to Telstra for later signature. It has since been shown that it took a further six days for the document to be delivered to us with Mr Black's signature added and we are both prepared to sign a sworn statement to this effect. Evidence only received earlier this year suggests that the signature on (page 12) of the agreement could well have been altered during the six days after we has signed the agreement.

We would now like clarification of exactly when the agreement was altered and whether that was before or after we signed the agreement.' **(AS 581)**

A similar letter dated 29th December 2008, was written by Graham and Alan to Ms Deirdre O'Donnell, Telecommunication Industry Ombudsman stating:

The document attached to the letter dated 17th to Mr Chapman demonstrates how both Telstra's Steve Black and the then-TIO, Warwick Smith, were both totally opposed to the removal from the arbitration agreement, of the legal liability clauses 24, 25 and 26, that were later altered and/or removed without our prior knowledge consultation and/or agreement. In relation to these legal liability clauses, we are therefore now asking you to confirm:

· Was the TIO ever informed prior to 21st April 1994, that clause 24 would be altered and the original clauses 25 and 26 were to be removed, so that the TIO's Special Counsel and the arbitrator's Resource Unit would be exonerated from legal suit?

· Was the TIO ever warned that the FTAP agreement (page 12) could have been altered, without our knowledge or consent, during the six-day period after we had signed the agreement, but before we received it back with a Telstra representative's signature?

As the claimants in this process, we are entitled to establish the truth regarding these matters' **(AS 582)**

Graham and Alan have so far received no advice from either, Peter Bartlett, Dr Gordon Hughes or Ms Deirdre O'Donnell, regarding these covert alterations.

6th July 2009: Graham Schorer (COT Spokesperson) wrote to the Hon Alan Henry Goldberg AO Federal Court of Australia. The Hon Mr Goldberg had previously assisted Graham as a Queens Counsel in the presence of William Hunt solicitor in persuading Graham to advise his members into signing the arbitration agreement which had been faxed to both Mr Goldberg and Mr Hunt's office by Dr Hughes' secretary Caroline Friend on the 19th April 1994.

In this letter Mr Schorer notes:

After the end of Alan Smith's arbitration in 1995, Alan has continually registered his concerns with the appropriate regulators that his arbitration was not conducted in accordance with the official arbitration agreement, the agreement you assessed on behalf of Alan Smith and Golden Messenger in April 1994.

As Alan has already explained in previous correspondence sent to you, the arbitration agreement presented to Alan Smith & Golden Messenger for signature by the TIO special council [sic] Mr Peter Bartlett, was materially altered without our knowledge of consent, or knowledge or consent, after both you and William Hunt (now deceased) had evaluated the arbitration document forwarded to William Hunt and yourself by Dr Hughes' (the arbitrator) secretary.

These covert alterations clearly favoured the TIO;s Special Counsel and the Arbitration Resource Unit over the claimants and placed us in a position where we are defenceless as the TIO Special Counsel and the Arbitration Resource Unit are not liable for their respective negligence and or wrong doing.

9th July 2009: The Hon Michael D Kirby AC AMC wrote to Alan stating:

On 2 July 2009, you wrote to me raising a complaint concerning the conduct of an arbitrator who is a member of the Institute of Arbitrators & Mediators Australia. You wrote to me in my capacity as President of the Institute.

In accordance with established procedure, I have referred the complaint to the Ethics and Professional Affairs Committee of the Institute. In due course, you will be informed following this reference. Please direct future correspondence to the Chief Executive Officer of the Institute, Mr Paul Crowley. **(AS 649)**

Mr Paul Crowley, contacted Alan within a week of Mr Kirb's letter and was informed by Alan that although the Institute had on two separate occasions once in 1996 and again 2002, started an investigation into Alan's claim there had been no real evidence against Dr Hughes until most recently when William Hunt (now deceased) son Julian Hunt supplied Alan some 16 large lever arch files and 22 large storage box that now shed a new light into Dr Hughes conduct as arbitrator to the COT arbitrations. It was after this short conversation statement by Alan that Alan believes prompted Mr Crowley to state that the IAMA Ethics and Professional Affairs Committee would investigate this fresh evidence advising Alan to contact the IAMA by the end of July with his completed submission.

20th July 2009: Alan submitted 21 sets of claim documents attached to his letter to Paul Crowley, CEO IAMA, C/o the Ethics and Professional Affairs Committee **(AS 650).**

20th to 23rd October 2009: These four emails from Richard Atherton of the IAMA confirm that the IAMA Ethics and Professional Affairs Committee was certainly investigating Alan's submitted claim documents even stating they did not require any further documentation up to that date, but reserved their right to call upon further information if required. These four emails **(AS 651)** do not coincide with the statements made by Warren Fischer, President of the IAMA, see Exhibit **(AS 652)** and the statement made by Peter Shears CEO IAMA see Exhibit **(AS 653)** that Alan's arbitration matters had been addressed eight years previously on 10 April 2002 **(AS 654)**

9th May 2011: Warren Fischer, President of the Institute of Arbitrators & Mediators Australia (IAMA) wrote to Alan noting:

I have to hand your correspondence dated 2 May 2011. I observe that in that correspondence you state that you *"have some concern that the IAMA Ethics and Professional Affairs Committee has not yet responded to my claim against Dr Hughes, which was lodged in July 2009"*.

I advise that my receipt of your other recent correspondence, dated 17 April 2011, caused me to enquire of the IAMA CEO as to the status of this matter as I had understood that the IAMA Ethics and Professional Affairs Committee had concluded itd deliberations and notified you accordingly. In response to that enquiry, I was advised by the CEO that a response was dispatched to you in late December 2010.

In light of your most recent correspondence, I have today requested that the CEO forward you a further copy of that correspondence **(AS 652)**

17th May 2011: A one line with compliments documents was received by Alan from Peter Shears IAMA (no introduction that he was the CEO) stating: 'Dear Mr Smith, Copy of letter sent to you on December 21st, 2010 Regards Peter Shears' **(AS 653).** The letter referred to was only four lines stating:

The Ethics and Professional Affairs Committee advises that this complaint was dealt with eight years ago. We enclose a copy of our letter dated April 10, 2002 communicating our decision. We remind you that IAMA's involvement is restricted to examination of the professional conduct of its arbitrators, not to the correctness or otherwise of a decision or to the conduct of the other parties **(AS 650)**

The letter of the 10 April 2002, attached to Mr Shears' letter notes in its closing statement that:

I note that your most recent actions have involved making a complaint to the police, alleging fraud – at least on the part of Telstra – and I do not propose to conduct any further enquiry in relation to the matter if you are pursuing police action. I do not say this to dissuade you from taking that action if you wish. That is a matter for you. I have returned your papers to Mr Peter Condliffe, the Chief Executive Officer of the Institute of Arbitrators and Mediators Australia. Will you kindly contact him to make arrangements to collect them **(AS 654).**

Alan is prepared to take a lie detector test and/or swear under oath or be cross examined by a professional investigator that when he collected his claim documents from the Melbourne office of the IAMA, he managed to speak with Mr Condliffe in the presence of a witness and it was Mr Condliffe you made the statement his disbelief at the conduct of Dr Gordon Hughes, including those who assisted Dr Hughes during his deliberation on my claims.

Alan is aware that Mr Condliffe and Dr Hughes have together conducted various IAMA seminars over the last few years and any reference to the above matters might place Mr Condliffe in a precarious position, but the truth is the truth after all said and done.

It was important to raise the IAMA Ethics and Professional Affairs Committee because as Alan's statutory declaration of 16th May 2011 **(AS 655)** states he certainly did not receive Peter Shears letter of 21st December 2010, which appears to have gotten its self lost as did a similar Telstra related set of documents in the case of Darren Lewis' mail which never arrived at Federal Magistrates Court in December 2008 see Exhibit **(AS 629)**

In Leibler v Air New Zealand Ltd (No 2) [1999] 1 VR 1, the Court of Appeal upheld an order for rectification, on the ground of a unilateral mistake, where the mistaken party's solicitor had

erroneously deleted from an agreement a clause which should only have been amended, not deleted, and the other party, knowing that a mistake had been made, concluded the agreement without drawing attention to the mistake. Winneke P and Phillips JA said (at 4):

His Honour found … that, when the parties executed the shareholders' agreement not long afterwards, the one was continuing to labour under the mistake that cl. 10.9 had not been deleted but merely amended and the other remained aware that the former was labouring under that mistake. His Honour found further that although cl.10.9 had been solely for the benefit of the respondents and had been deleted by the respondents' own solicitors (albeit by mistake), the appellants ought to have drawn the mistake to their attention and, not having done so, had acted unconscionable. In short, his Honour made all the findings of fact necessary to sustain an order for rectification…" **(GS 379)**

CATCHWORDS:

Unilateral mistake – Claim for rectification – Deletion of material provision – Solicitors acting – Mistake by solicitor – Actual knowledge of other party – **Failure of other party to bring mistake to mistaken party's attention** [emphasis mine] – Assessment of witnesses by trial judge – whether findings of trial judge justified order for rectification.

Of course the respondents faced considerable difficulties in their claim for rectification, not the least being that clause 10.9 had been deleted by their own solicitors; it was not something sought or even suggested by the appellants. Moreover, there were subsequent negotiations over clause 2(1)(f) which might have been expected to draw the respondents' attention to the mistake over clause 10., if such it was; secondly, the relevant board, acting for the respondents, authorised the execution of the shareholders' agreement and indeed the other agreements, in the form in which they were finally settled by the respondents' solicitors and those solicitors were certainly not unaware of the deletion of clause 10.9

And on page 4 and 5

In a careful and comprehensive judgement, the trial judge examined the evidence, such as it was, and resolved all of the issues of fact were necessarily involved in the respondents' suit, Thus he found that the inclusion of a right of pre-emption such as that accorded by clause 10.9 was of fundamental importance to the agreement.

Important

The COT case mutually accepted version of their agreement was signed on the 8th April 1994 by the first of the four COT claimants, Maureen Gillian. Clauses 24, 25 and 26 were still present and worded as agreed to.

The fax imprint on page twelve of the arbitration agreement (one of two identical pages faxed by Dr Hughes' office) was faxed on 19th April 1994 at 2:06pm Exhibit **(AS 648-b).** This is a copy of the unsigned agreement which had already been executed by Maureen Gillian on 8th April 1994 (see above). It is this agreement that Senator Richard Alston and Senator Ron Boswell, Alan Goldberg QC, William Hunt, Graham Schorer and Alan Smith believed was the agreement signed on 21st April 1994, still had the $250,000.00 liability caps still in place. Please Note: William Hunt has no association with Dr Hughes' office of Hunt & Hunt.

Exhibit **(AS 648-c)** is a copy of page twelve from the agreement signed by Alan on 21st April 1994, with clause 24 now stating:

Neither the Administrator, the Arbitrator, the Special Counsel, partner or employee of the legal firm of which the Special Counsel is a partner, a member of the Resource Unit, Ferrier Hodgson or partner or employee of Ferrier Hodgson, DMR Group Australia Pty Ltd, shall be liable to any party for an act or omission in connection with any arbitration conducted under these Rules or involved in the preparation of these rules save the Arbitrator (but not the Administrator) shall be liable for sny conscious or deliberate wrongdoing exonerated on the Arbitrator's own part

Exhibit **(AS 648-c)** shows that the $250,000.00 liability caps which were firmly in place in clause 25 and 26 see **(AS 648-b)** have now been totally removed and two completely new clauses 25 and 26 have been added to the agreement.

PLEASE NOTE: Unlike the *Leibler v Air New Zealand Ltd* case, this alteration to the agreement was not a mistake, it was an orchestrated act of deception by the arbitrator and TIO Special Counsel.