



Asia-Pacific
Economic Cooperation

APECTEL REGULATORY TRAINING PROGRAM

Program Resource

MODULE FOUR

INVESTIGATION

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MODULE SPECIFICATIONS

MODULE CODE AND TITLE

04 Investigation

Module Description

This module will provide the successful participant with the knowledge and skills required to contribute to a telecommunications regulator investigation program.

Module Objectives

For participants to be able to:

Objective 1 – Recall and explain the principles of investigation

Objective 2 – Describe applications for investigation practices in a national telecommunications regulation program

Objective 3 – Recommend methods to conduct investigations in a telecommunications regulatory environment

PRE-REQUISITES

Introduction Module 01.

SUGGESTED REFERENCES

The Sixth APEC Ministerial Meeting on the Telecommunications and Information Industry (TELMIN 6) 1-3 June 2005 Lima, Peru, LIMA DECLARATION, Annex C.

APEC TEL Compliance and Enforcement Principles; *APEC Telecommunications and Information Working Group*, 30th Meeting 19-24 September 2004 Singapore

Effective Compliance and Enforcement Guidelines and Practices; *APEC Telecommunications and Information Working Group*, 31st Meeting 3-8 April 2005 Bangkok, Thailand

Australian Telecommunications Ombudsman website:
<http://www.tio.com.au/policies/investigation.htm>

APEC TEL Best Practices for Implementing the WTO Telecoms Reference Paper, *APEC Telecommunications and Information Working Group*, 31st Meeting 3-8 April 2005 Bangkok, Thailand

Briefing Note on Investigation Report on Cable TV Service Interruption at Lai Chi Kok Bay Garden (“Bay Garden”):

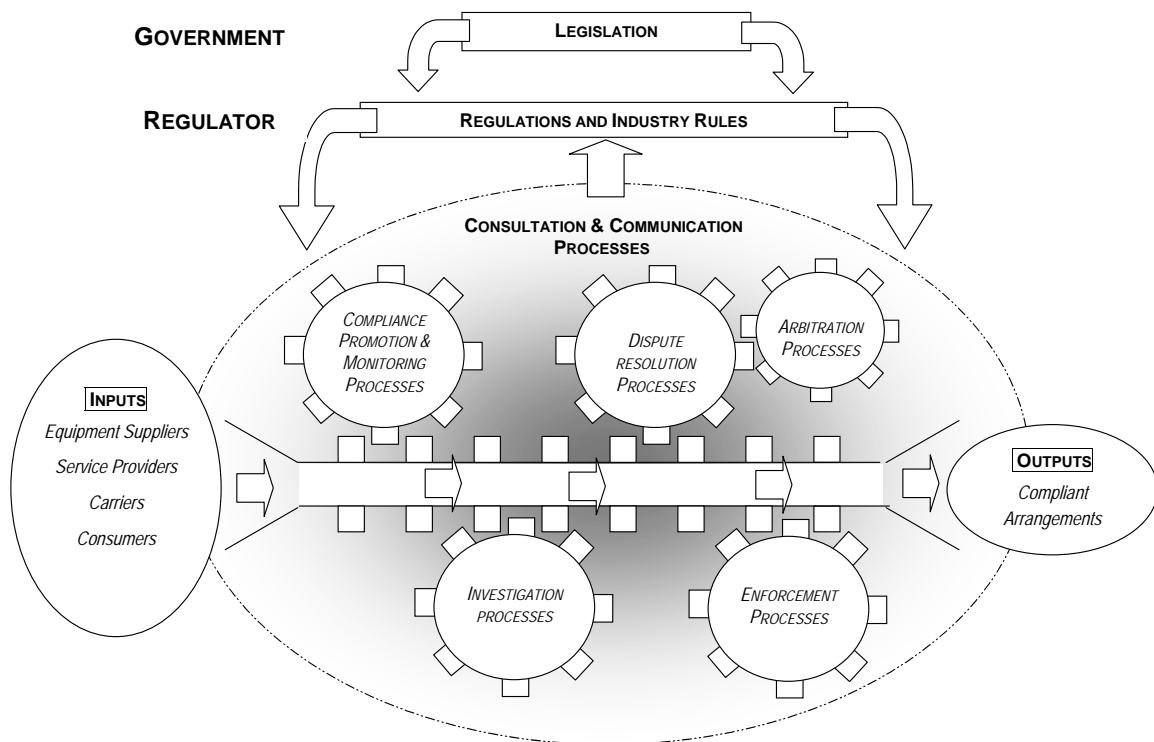
http://www.ofta.gov.hk/en/report-paper-guide/report/rp20030507_brief.pdf

Using this Guide

The presenters, facilitator or workshop coordinator will present and discuss most of the content in this module. They will also advise you on the learning activities to undertake.

You will have this guide as a reference over the duration of the workshop and when you have completed the workshop.

There are some built in guidelines to help you use this resource after the completion of the workshop.



MODULE OVERVIEW

Elements of Effective Investigations

The use of the following elements will lead to a compliant environment:

- Consumer Complaints
- Carrier Complaints
- Compliance Monitoring
- Letter of Inquiry
- Inspection
- Legal order

Module Topics

This module is made up of five topics:

Topic 1 - Case Study: The Scenario

This topic introduces a situation which requires detailed investigation. We return to this later in the module.

Topic 2 - Principles

This topic looks at the principles which form a foundation for fair and good quality investigation

Topic 3 - Process Model

This topic looks at a series of process that can be used to run a systematic investigation

Topic 4 - Case study: Outcomes

This topic returns to the case study and ask you to suggest ways of conducting the investigation and to evaluate the outcomes of the investigation.

Topic 5 - Application

This topic looks at ways the ideas and methods covered can be used in your telecommunications environment or jurisdiction.

This module will require up to 4 hours to complete.

TOPIC 1 – CASE STUDY: THE SCENARIO

This report covers an investigation into a moderately technical situation. The regulator was called in to determine how to respond to the situation and what actions needed to be taken as a result.

Introduction and Scope Of Investigation

In December 2002, Hong Kong Cable Television Ltd. (“HKCTV”) lodged a complaint with the Office of the Telecommunications Authority (“OFTA”) alleging that the Owners of a residential complex had removed or disconnected the horizontal drop cables of subscribers of HKCTV in the “Premises” from HKCTV’s network, interrupting the subscription television service to HKCTV’s subscribers at the “Premises”.

The horizontal drop cable is the cable connecting the television wall plate in each individual flat/unit to the vertical coaxial cable system for distribution of television programme services. At the same time, OFTA also received a number of complaints from HKCTV’s subscribers about the service interruption.

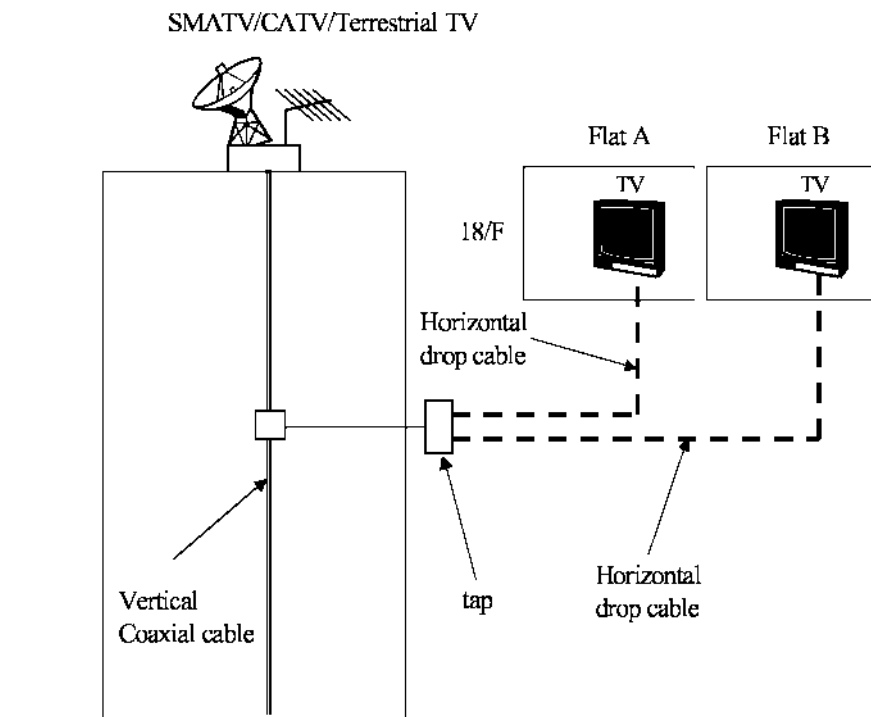


Fig. 1 The Schematic of the Existing SMATV System

OFTA has conducted investigation and organized a number of mediation meetings among the owners of the premises and HKCTV since receiving the complaints.

It transpired that there had been a service contract between the owners and the suppliers of SMATV service to the residents at the Premises. The SMATV service was provided by a System¹ which comprised the equipment installed in the Premises, vertical coaxial cable and horizontal drop cables leading into individual units occupied by residents of the Premises. The horizontal drop cables were installed when the Premises were built. The owners right on using the horizontal drop cables can be demonstrated by its right of entering into Service Contract for the Existing SMATV System. Three years after the installation of the Existing SMATV System, HKCTV used the Existing In-building Coaxial Cable Distribution System to provide subscription television service. (The vertical coaxial cable and the horizontal drop cables of the Existing IBCCDS therefore formed part of the “HKCTV’s network” used for the delivery of HKCTV’s subscription television service.)

DISCUSSION POINT

What conclusions can you draw from the information provided up to this point? There will be more information supplied at the end of this module.

What principles and procedures should be followed when investigating this or any other situation?

The next two sections will supply the answer.

TOPIC 2 – PRINCIPLES

Overview of Investigation Process

Investigation is a critical step in the broader enforcement process. Any investigation needs to be conducted under the same principles that apply to enforcement generally. The APEC TEL 31 LSG - Effective Compliance Enforcement Guide states that:

“Enforcement procedures should take into account the principles of fast, fair, firm and flexible, but it is critical that procedures fit the country’s legal system in appropriate cases to make the process familiar, as well as facilitate appeals to the court system. Every part of the enforcement process needs a clear timeline and well-defined procedures for the sake of clarity and promptness. There must also be ample opportunity for parties to contribute to the process, whether by supplying information, or arguing innocence.

Confidentiality is also critical in an enforcement system. If a company does not feel that its business information will be protected, then it will be less likely to be cooperative. This will only make the job of the regulator more difficult. Therefore, clear confidentiality guidelines need to be set forth before any enforcement action is pursued.”

In summary every investigation needs:

- to be fast, fair, firm and flexible
- to be suited to the economy’s legal system
- to have a clear timeline
- to have well-defined procedures
- to have clear confidentiality guidelines

The principles and procedures that follow are based on these needs.

DISCUSSION POINT

Which of these principles presents the greatest challenge in the telecommunications environment you are most familiar with?

NOTIFICATION OF AN INVESTIGATION

Generally, investigations only proceed after the carrier or service provider concerned has been notified that the regulator intends to investigate them in relation to a complaint.

The regulator will normally send a letter outlining:

- the level to which a Complaint has been raised
- the reasons why the complaint is being formally investigated
- information to identify the complainant
- an investigation reference number
- the name of the investigation officer
- the issue(s) in dispute from the complainant's or regulator's perspective
- the information and/or documentation the regulator requires
- any interim requirements such as restoration of services
- the date by which the regulator requires the carrier's response.

DISCUSSION POINT

Are such letters sent in the economies you know? If not what do you think the reasons might be?

OBLIGATION TO SUPPLY ALL RELEVANT DOCUMENTATION

Legislation or regulations normally provide that the carrier or service provider is obliged, within a fixed period (perhaps 21 days) after receiving notification of an investigation, to provide all documentation relevant to the complaint. The regulator should include this obligation in any request for documentation as part of an investigation.

In some jurisdictions the carrier or service provider is obliged to supply all documentation it considers to be relevant to the complaint, regardless of whether or not they were specifically requests it.

DISCUSSION POINT

What are the obligations on carriers?

PRINCIPLES FOR HANDLING INVESTIGATIONS

There are a range of sources for investigation principles and processes. We will present a set here compiled from APEC, ITU and specific economy sources. Part of your role is to make decisions about those principles and processes that can be adopted into you telecommunications environment and the culture of your economy. Discussion points along the way will provide opportunities to start making these decisions.

When to go public

In a regulator-initiated investigation, there is the question of when to open the process to the public. The whole investigation should not necessarily be public since the regulator may not find any violation. A good point to make the proceeding public would be when the regulator issues the first official document stating that a violation has been discovered.

DISCUSSION POINT

What is the correct time to go public?

Correspondence Requirements

There are some simple broad rules that can be applied to correspondence.

Informal communication in handling an investigation need not be in writing.

Formal approvals and advices usually should be in writing to document the actions taken by the regulator. Typically, the following must be in writing:

- Notification of intention to investigate
- Reasons for any binding decision or recommendation
- Standard procedural correspondence issued in the course of investigating a complaint
- Decisions taken as a result of the investigation

DISCUSSION POINT

Do these rules generally apply?

Discretion Not To Investigate

The regulator should have the discretionary power to decline to continue an investigation if in the regulator's opinion:

- the investigation is frivolous or vexatious or was not made in good faith
- the complainant does not have a sufficient interest in the subject matter of the complaint
- is not warranted on the basis of the merit evidence to hand
- the investigation is better handled by another authority

DISCUSSION POINT

Who has the authority to decline to investigate for each of these reasons?

TOPIC 3 – PROCESS MODELS

Summary of Investigation Process Model

The investigation process is relatively simple. An investigation is started due to one of three triggers:

- Regulator decision
- Consumer Complaint
- Carrier to carrier dispute

The complaint is usually classified into one of four levels – minor/simple to major/complex. The regulator open lines of communication between the parties and obtains information concerning the matter raised. This information is used to seek a resolution of the matter. If a resolution is not reached the matter moves on to become an enforcement issue.

(Enforcement is a separate process dealt with in other modules of this course.)

Fig 1 on the following page shows the steps.

Discussion Point

Which of the steps shown are usually used?



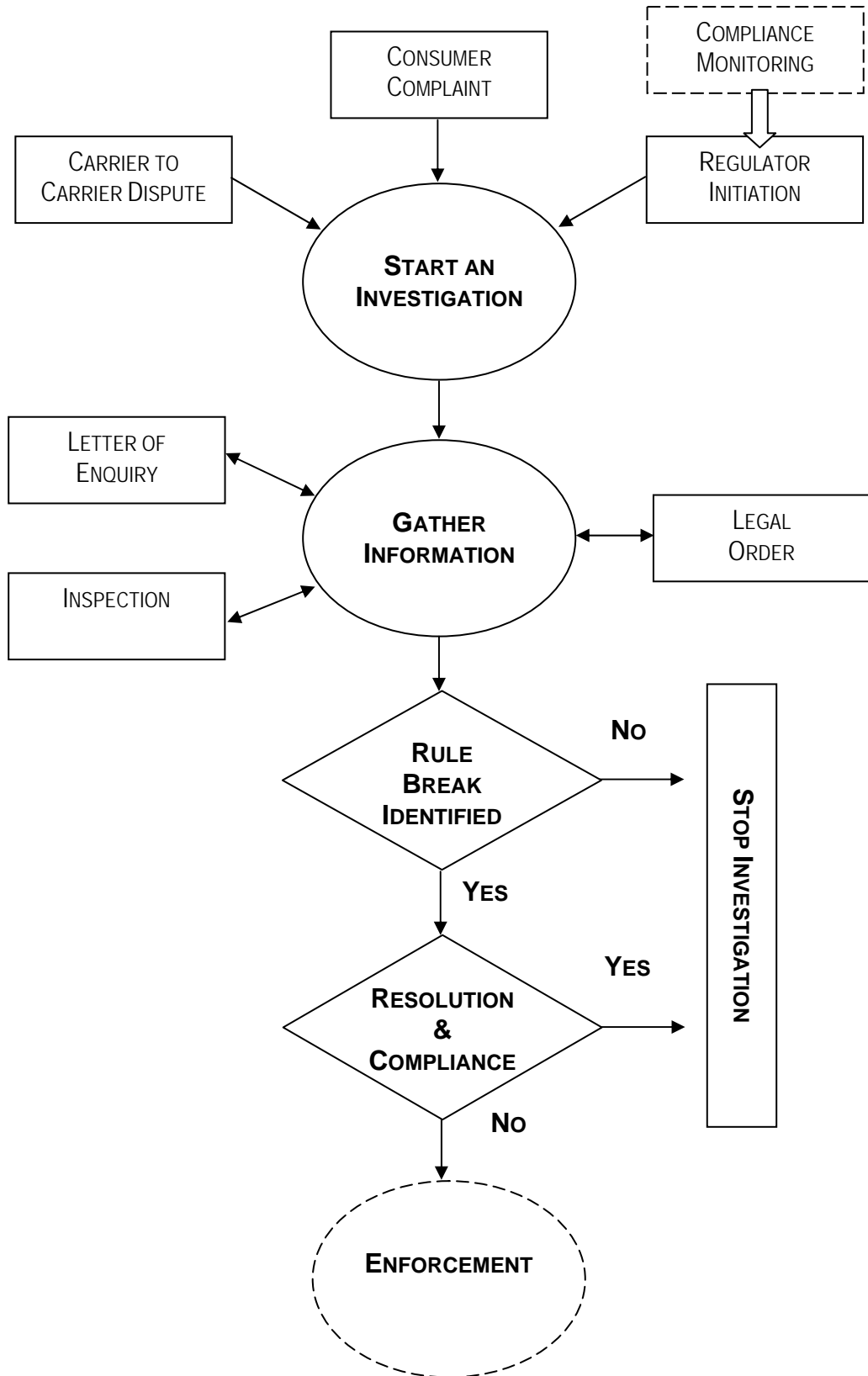


Figure 1 – Overview of Investigation Process

Processes for Conducting Investigations

WHERE DOES AN INVESTIGATION START?

An investigation starts when there is evidence or allegation of a violation of telecommunications legislation, regulations or industry rules. There are many ways that alleged violations can come to a regulator’s attention.

There are three primary ways of dealing with these situations:

- regulator-initiated investigations
- consumer complaints
- carrier-to-carrier complaints

Regulator Initiated

In a regulator-initiated investigation, the regulator has complete control over the investigation – the regulator initiates the investigation, proceeds with it as it chooses, and ends it however it deems appropriate.

Individuals or companies could informally request an investigation, but they would not be a party with rights in the investigation. The regulator may decide to start an investigation for a variety of reasons: When licensees are subject to inspections, violations may be uncovered. Some companies may voluntarily report their violations. Violations could become public in future license application process if there are objections filed to the application.

Consumer Complaint

Consumers would also be able to bring complaints to the regulator. To facilitate this process, the consumer would have the option of filing an “informal” complaint, which the regulator takes as seriously as any other complaint, but has simpler filing requirements. If the regulator sees a pattern of abuse through tracking complaints filed by consumers, the regulator could start an investigation.

Carrier to Carrier Complaint

A violation could also come to light in carrier-to-carrier disputes. In this situation, “formal” complaints can be filed by another licensee, a competitor, or some other interested party. This method is a useful tool for companies that want to take another party to court, but would like the expertise of the regulator. Carrier-to-carrier complaints have detailed

filing requirements, much as a judge in a courtroom; the regulator simply acts as an adjudicator.

DISCUSSION POINT

Do all these causes for investigation usually apply in an economy you are familiar with?

COMMON INVESTIGATION METHODS

An investigation, depending upon its scale or level of importance, involves some or all of the following:

- categorisation of the matter
- development of an investigation plan
- collection and analysis of documentation
- review and analysis of the complainant's case and any supporting documentation
- requesting of specific testing and collection and analysis of test results
- communication and consultation with carrier or service provider
- communication and consultation with the complainant
- consideration of the Law or Industry Rules;
- obtaining legal or other specialist advice.
- forming a decision based on the evidence
- documenting the investigation

DISCUSSION POINT

Discuss with others in your group how this might vary from one economy to another.

COMPLAINT CLASSIFICATION

At the start of the investigation process it is good practice to classify the complaint or matter for investigation. This help determine the methods and actions that are used to deal with the matter.

Complaints are classified at one of four levels and can be classified at levels 1 to 3 at the outset. Level 4 Complaints must be escalated from Level 3.

The following factors will determine how a Complaint can be classified based on the assumption that the complaint has not been resolved:

- prior opportunities to resolve the complaint;
- length of time the complaint has been ongoing;
- length of time that will be required to investigate and respond to the complaint;
- complexity of the complaint; and
- amount of money in dispute.

Further guidance as to the classification of Complaints is provided in the Complaint Classification Table (Tab 1) below.

DISCUSSION POINT

Use the table to classify three or more of the complaints you are familiar with.

Table 1 Complaint Classification Table

	LEVEL 1	LEVEL 2	LEVEL 3	LEVEL 4
Prior opportunities to resolve complaint	Complaint previously considered but not at high level	Complaint previously considered sometimes by high level	Complaint previously considered by high level	Previously considered at Level 3
Length of time complaint has been ongoing	A short time	A short to medium time	A relatively long time	Usually a long period of time
Extent of regulator involvement	Minimal involvement – complaint primarily referred back to carrier or service provider	Some but not substantial involvement	Substantial involvement	Substantial involvement with no upper time limit
Time estimated to resolve, or investigate	Up to 30 days to resolve with complainant directly	Up to 60 days to investigate and respond	Up to 90 days to investigate and respond	No upper limit

INVESTIGATION PLANNING

Having classified the complaint and, in doing so set some parameters for the investigation, an ‘investigation plan’ should be developed to ensure the investigation has a positive direction and is clearly accountable.

An investigation plan typically includes:

- Statement of purpose which can include the cause or initiating incident leading to the investigation;
- The relevant laws, regulations or rules applicable to the issue under investigation;
- Statement of the specific matter to be investigated;
- Operations and personal to be involved – what methods will be used and by whom;
- Expertise required to complete the investigation – technical specialists, legal advisors;

- Timelines and costs for the investigation – an operational framework;
- Milestones or reference points within the timeline – dates for documents to be supplied, responses to be given, resolutions to be implemented;
- Possible outcomes – best case, worst case, other possibilities; and
- Possible appeal processes to which the regulator may be subjected.

The level of planning will, of course, vary according to the scale of the investigation. A level 1 investigation would need virtually no planning, a level 2 investigation might only need a statement of the complaint and a timeline, and so forth. Levels 3 and 4 would have detailed planning and documentation.

In undertaking any investigation the list above should be addressed early in the process to give the investigation the appropriate level of structure.

DISCUSSION POINT

Discuss with others in your small group how important an investigation plan is

What types of investigation would not need a formal plan?

What types of investigation would be difficult without a plan?

GATHERING INFORMATION

Regulators can use a range of processes to gather the information it needs for an investigation. Three main methods are:

- Letter of inquiry
- Inspections
- Legal Orders

What does each of these entail?

Letter of Inquiry

A letter of inquiry is a way to get information directly from a licensee or other relevant entity. It could be used in a variety of situations. For example, the letter may be used to initiate an investigation. Alternatively, a letter could be used to determine whether to continue a proceeding beyond a preliminary stage, or to gather more information during the course of an on-going investigation. If such a letter is used, the recipient should be given a specific period of time in which to respond. It is useful for the regulator's rules, or the law, to prohibit misrepresentations or wilful material omissions in responses to such a letter. Based on the response received, the regulator may decide to end the investigation without further action, send a follow-up letter requesting additional or clarifying information, or take enforcement action.

Inspections

In response to a complaint, on the regulator's own motion, or as a part of license requirements, the regulator could conduct inspections of licensed or regulated facilities. In many cases, these inspections reveal violations of the rules such as operation with excessive power or operation with an expired license. Based on the results of an inspection, the regulator may take no further action, request additional information, or take more severe enforcement action.

Legal Order

A legal order (called a subpoena in some economies) would require the recipient to release all information related to a particular matter under investigation. The regulator could have the authority to issue legal orders to obtain information necessary to complete an investigation. The information obtained through a legal order can be used as a basis for further enforcement action or for referral to the Ministry that handles criminal matters.

TYPES OF INFORMATION

The regulator can request a wide range of information from the carrier in order to conduct an investigation. The types of information can include:

- Test results
- Customer care records
- Carrier or dealer statements

- Statements by the complainant and/or persons associated with the complainant
- Call data, including phone records ordinarily sent to customers as well as additional network data
- Contracts
- Correspondence between parties, including email
- Complainant record
- Financial records such as profit and loss statements
- Copies of advertisements.

DISCUSSION POINT

Which types of information would be obtained by?

Letter of inquiry?

Inspections?

Legal Orders?

RECORD OF COMPLAINTS AND ENQUIRIES

Investigations should be accurately documented at each stage in the process. Investigation Officers should attempt to record the following information for each investigation undertaken:

- Complainant's name and details
- Any co-complainant details
- Date and time of the inquiry or complaint
- Category or level of the investigation
- The carrier or service provider details
- Details of the service identifier to which the enquiry or complaint relates (i.e. Service number, user-id and/or account number)
- A summary of the complaint including specific details wherever possible (i.e. Specific dates, names, locations etc)

- Details of advice given by the regulator
- Time taken to handle the investigation
- The outcome of the investigation

All progress, including escalations, and any subsequent contact with parties should be recorded in the database.

For all investigations that are Level 2 and above it would be beneficial to establish a document file.

Document files contain a hard copy of all correspondence in relation to the investigation and all diary notes of conversations with the complainant, the carrier, and any other party pertaining to the complaint.

A database could be established to meet these needs. This database would have applications in a wide range of other regulator functions such as enforcement, compliance and dispute resolution.

DISCUSSION POINT

What methods are you most familiar with?

Compare these with others in your group. Could these be improved?

OUTCOMES OF INVESTIGATIONS

Investigations produce evidence that can be used in a number of ways:

- Complaint handling – usually resolved by the carrier or service provider
- Dispute resolution and arbitration – a separate set of processes
- Enforcement - a separate set of processes that may include penalties

How these matters are handled is the subject of several other modules in this program and will also be shaped by the environment, culture and characteristics of the economy in which you operate.

The central purpose of the investigation process is to obtain evidence to support a fast, fair, firm and flexible result for all parties.

RULES OF EVIDENCE

Any piece of evidence obtained in an investigation should meet these ‘rules of evidence’ wherever possible. If the outcome of the investigation is challenged in a court evidence that fails to meet these rules will be deemed inadmissible and will not support the case.

The following summary of the rules of evidence is provided as a general guide to regulators. These are drawn from the more general rules of evidence that apply in criminal or commercial litigation. The extent to which they apply in a specific economy or telecommunications environment is a matter of judgement for the person or people in authority.

1. Types of Evidence:

a) Real evidence - evidence supplied by material objects, as distinct from documents produced for the inspection of the court.

b) Documentary evidence:

- **Primary** - the original document and is regarded as the most reliable
- **Secondary** - a photocopy, or a witness using notes taken from the original or a recollection of its contents. Secondary documentary evidence is usually only submitted when:
 - the document is in the possession of another party who fails to produce it
 - the original is lost or destroyed
 - the production of the original is physically impossible (eg, inscription on a wall)
 - the removal of the original is not allowed (eg, certain public documents).

c) Corroborating evidence

Confirms or supports other evidence that was or will be given. Such evidence should connect or tend to connect the carrier with the complaint or matter raised.

2. Sources of evidence

These have been outlined earlier. In the context of ‘rules of evidence’ they include:

- Exhibits: - representative samples of goods, original documents, records or test data
- Searches or inspections.
- Information from public, informers, departmental officers.
- Inspection of records.
- Surveillance (Where appropriate permissions have been obtained.)
- Interviews

3. Validity

The proof of the validity or admissibility of documentary evidence rests with:

- the party who made (signed) it;
- someone who saw it being made or signed;
- someone who knows the writing and can identify it; or
- expert (forensic) testimony.

4. Relevance

Evidence is relevant to an issue if it tends to prove or disprove the existence of the facts in dispute.

5. Admissible

Evidence is admissible if in addition to being relevant, it does not infringe any of the following exclusionary rules:

- Hearsay.
- Similar acts or facts.
- Opinion.
- Character of the accused.

6. Inadmissible Witnesses

Evidence given by children, insane people and those suffering from senility is inadmissible.

In certain situations, a person cannot be compelled to give evidence (eg, where they may incriminate themselves).

DISCUSSION POINT

To what extent do these rules of evidence apply in different economies?

Compare with others in your group.

If there are differences, what are they?

TOPIC 4 – CASE STUDY: OUTCOMES

This report covers an investigation into a moderately technical situation. The regulator was called in to determine how to respond to the situation and what actions needed to be taken as a result. We have repeated some of the information given earlier. Have you changed your point of view?

This case study is taken directly from the regulator report and gives an indication of the types of information usually included. The original report is listed in the references for this module.

Introduction and Scope of Investigation

1. In December 2002, Hong Kong Cable Television Ltd. (“HKCTV”) lodged a complaint with the Office of the Telecommunications Authority (“OFTA”) alleging that the Incorporated Owners of Lai Chi Kok Bay Garden (the “IO”) and/or Cheung Hing, the new Satellite Master Antenna Television (“SMATV”) service operator of Lai Chi Kok Bay Garden had removed or disconnected the horizontal drop cables of subscribers of HKCTV in Lai Chi Kok Bay Garden (the “Premises”) from HKCTV’s network, interrupting the subscription television service to HKCTV’s subscribers at the “Premises”.

The horizontal drop cable is the cable connecting the television wall plate in each individual flat/unit to the vertical coaxial cable system for distribution of television programme services. At the same time, OFTA also received a number of complaints from HKCTV’s subscribers about the service interruption.

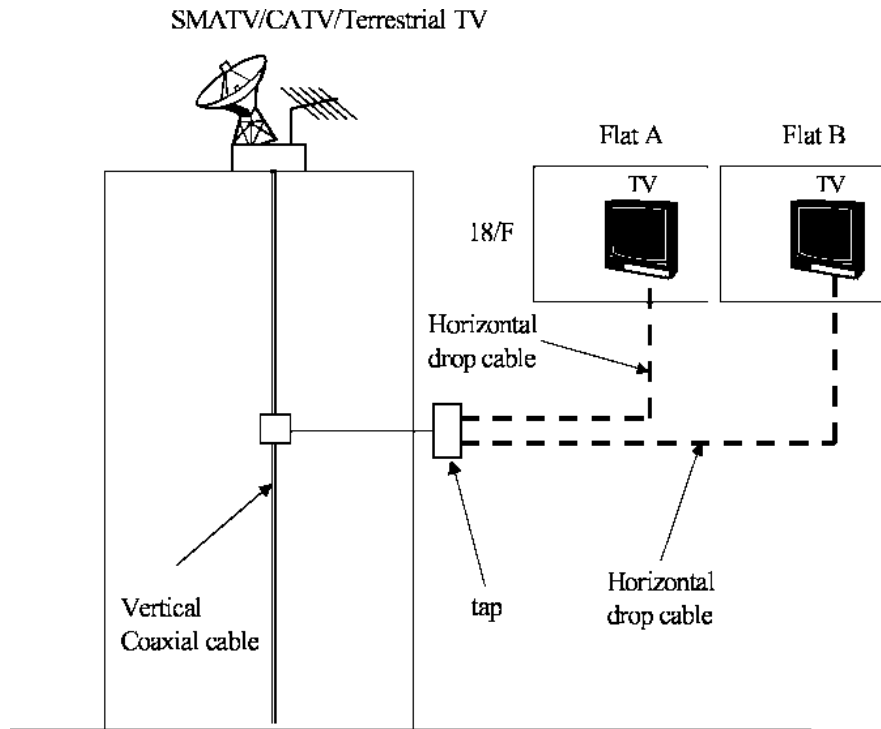


Fig. 1 The Schematic of the Existing SMATV System

2. OFTA has conducted investigation and organized a number of mediation meetings among the IO, Cheung Hing and HKCTV since receiving the complaints.

3. It transpired that there had been a service contract between the IO and Rediffusion on the provision of SMATV service to the residents at the Premises (hereunder called the “Service Contract”). Rediffusion provided SMATV service by using the Existing SMATV System which comprised the equipment installed in the Premises, vertical coaxial cable and horizontal drop cables leading into individual units occupied by residents of the Premises. According to the IO, the horizontal drop cables were installed when the Premises were built. The IO’s right on using the horizontal drop cables can be demonstrated by its right of entering into Service Contract for the Existing SMATV System and same right should be exercisable by the IO upon expiry of the Service Contract to ensure the residents at the Premises to continue to receive SMATV services. Three years after the installation of the Existing SMATV System, HKCTV used the Existing In-building Coaxial Cable Distribution System (the “Existing IBCCDS”) of Rediffusion (i.e. the Existing SMATV System without the terrestrial and satellite television receiving head-end for receiving free TV and satellite TV services) to provide subscription television service. (The vertical coaxial cable and the horizontal drop cables of the Existing

IBCCDS therefore formed part of the “HKCTV’s network” used for the delivery of HKCTV’s subscription television service.)

DISCUSSION POINT

Before proceeding outline the following:

What is the trigger for the investigation?

DISCUSSION POINT

Classify this complaint into one of the four levels mentioned earlier.

DISCUSSION POINT

Assume this case study occurred in a telecommunications environment you are familiar with.

Write out a short investigation plan for this investigation?

Statement of purpose

Statement of the specific matter to be investigated

Operations and personal to be involved

Expertise required to complete the investigation

Timelines and costs for the investigation

Milestones or reference points within the timeline

Possible outcomes

Conduct of the OFTA's investigation

As you read the findings note your own reactions. If you were the regulator what would be your immediate response?

Compare your reactions with others in your group. How would you act on the findings?

What would you ask the carriers to do as a result of the findings?

Some questions have been added to help you.

THE INCIDENT

4. After the termination of the Service Contract, Rediffusion transferred the ownership of the existing SMATV system (but not including the horizontal drop cables owned by the IO) to i-Cable which is the holding company of HKCTV. HKCTV continued to use the existing IBCCDS to provide subscription television service at the Premises. For the provision of the SMATV service, the IO has appointed a new SMATV licensee, Cheung Hing, to build a New SMATV System to replace the Existing SMATV System. The IO had, prior to expiry of the Service Contract, informed HKCTV that HKCTV could not use the Existing IBCCDS (which includes the horizontal drop cable) for provision of the subscription television service and the IO requested HKCTV to make appropriate arrangement to maintain the continuity of the subscription television service. No agreement was ever reached by the IO and HKCTV on the use of the horizontal drop cable. The IO then instructed Cheung Hing to connect the horizontal drop cables on each floor of the Premises to the New SMATV System. As a result, HKCTV's television signals transmitted by the horizontal drop cables were interrupted.

5. After OFTA's mediation, the IO installed 4-way combiners at the horizontal drop cables of the New SMATV System to enable different services to be connected to the horizontal drop cables via the combiners. Cheung Hing reconnected the output signals from HKCTV's network to the combiners at the Premises to enable HKCTV's subscribers to receive HKCTV's television service. At the same time, HKCTV removed the terrestrial television and the Closed Circuit Television ("CCTV") signals from the Existing IBCCDS to avoid interference to the terrestrial television and the CCTV signals provided via the New SMATV System. The subscription television service at the Premises was restored in March 2003.

DISCUSSION POINT

Is there a need for further action by the regulator?

FINDINGS OF THE TELECOMMUNICATIONS AUTHORITY**Section 27 of the Ordinance**

6. Section 27 of the Telecommunications Ordinance (the “Ordinance”) provides,

“Any person who damages, removes or interferes in any way whatsoever with a telecommunications installation with intent to –

- *prevent or obstruct the transmission or delivery of a message; or*
- *intercept or discover the contents of a message,*
- *shall be guilty of an offence and shall be liable on summary conviction to a fine of \$20, 000 and to imprisonment for 2 years.”*

7. The words “damage”, “remove” or “interfere” should be understood to have acting without right or authorisation. For example, a user disconnect his own fax machine from the wall socket would not be considered as committed the act of “damaging”, “removing” or “interfere with” a telecommunications installation in contravention of section 27. For this case, the IO (or Cheung Hing under instruction of the IO) re-deployed the horizontal drop cables and such action had the effect of preventing or obstructing the delivery of HKCTV’s subscription television service to the residents. However, whether the IO had been acting with right or authorisation would depend on the authorisation under the relevant instrument (e.g. the Deed of Mutual Covenant) in managing of the common parts (including the horizontal drop cable) and whether authorisation had been given to the IO by the residents served by cables for disconnection. In the case, the right of the IO to use horizontal drop cables can be demonstrated by its right of entering into the Service

Contract for establishment of the Existing SMATV System and the contract with Cheung Hing for the New SMATV System. Considering that the IO has the right of use and disposal of the cables and HKCTV could have occupied the cable without authorisation after the expiry of the Service Contract, the Telecommunications Authority (the “Authority”) is not satisfied that there is evidence to prove beyond reasonable doubt that the IO or Cheung Hing had acted without right or authorisation in re-deploying the cables.

8. The Authority is also not satisfied that there is evidence to prove beyond reasonable doubt that the IO and Cheung Hing have the “specific” intent of disrupting HKCTV’s services. Their intention was to establish a New SMATV System and sufficient advance notice had been given to HKCTV to make appropriate arrangement to ensure continued provision of subscription television services.

9. After careful evaluation of facts and surrounding circumstance, the Authority is not minded to proceed against IO or Cheung Hing for offence under section 27. Although sufficient evidence for criminal standard of proof for an offence under section 27 is not available in this case, it does not mean that section 27 would not be applicable in other cases. Furthermore, such activities are also regulated under the relevant licence conditions. The Authority will take regulatory action under appropriate provision to regulate such activities.

DISCUSSION POINT

Would this usually be the case?

10. In the process of the investigation, the Authority has considered whether or not the IO is a class licensee for the in-building telecommunications systems and whether or not the IO has breached any licence conditions under the Class Licence for In-Building Telecommunications Systems. During the validity of the Service Contract, the horizontal drop cables formed part of the Existing SMATV System under regulation of the SMATV licence of Rediffusion. After the

expiry of the Service Contract with Rediffusion, the IO retained Cheung Hing to install the New SMATV System. The horizontal drop cables form part of the New SMATV System under the regulation of the SMATV licence of Cheung Hing. The Authority considers that the issue should be addressed under the relevant SMATV licence. In other case, if the in-building telecommunications system is not governed by other telecommunication licence, the IO shall ensure compliance of the obligations imposed under the in-building telecommunications system class licence.

General Condition 3(1) of SMATV Licence

11. Cheung Hing is a SMATV Licence holder (licence No.0030). Under General Condition (“GC”) 3(1) of the SMATV Licence, the licensee shall operate the system in such a manner as not to cause interference with any other means of telecommunications. “Interference” under GC 3(1) includes electrical and physical interference.

12. Both the vertical coaxial cable and the horizontal drop cables of the Existing IBCCDS formed part of HKCTV’s network for the delivery of subscription television service. By disconnecting the horizontal drop cables from the vertical coaxial cable of the Existing IBCCDS, Cheung Hing has caused physical interference with means of telecommunications of HKCTV and has contravened GC 3(1) of its SMATV Licence. The instruction of the IO does not release Cheung Hing from the licence obligation to prevent interference with other means of telecommunications. Cheung Hing, as an SMATV licensee, should have advised IO that it had to comply with its licence obligations in the establishment of the New SMATV system.

DISCUSSION POINT

In your opinion should Cheung Hing receive a penalty under this ruling?

Condition 54 of the Subscription Television Broadcasting Licence

13. Under Condition 54 of the Renewed Subscription Television Broadcasting Licence (the “Subscription TV Licence”), HKCTV shall not in providing, establishing, operating, adjusting, altering, replacing, removing or maintaining any telecommunications line or telecommunications installation in, over, upon any land for the purpose of the licence, obstruct, interfere with, or cause or permit damage to, any other telecommunications line or telecommunications installation, or means of telecommunications or telecommunications service.

14. The IO has the right to re-deploy the use of the horizontal drop cables after the expiry of the Service Contract including to provide new SMATV services through the horizontal drop cables. Evidence emerged from OFTA’s investigation indicates that the IO has more than 6 months prior to the expiry of Service Contract expressed its intention to establish a new SMATV system. The IO therefore requested Rediffusion to dismantle the receiving head-end and the vertical coaxial cable of the Existing SMATV System owned by Rediffusion from the Premises upon the termination of the Service Contract. The IO has also informed HKCTV that HKCTV will not be permitted to use the Existing IBCCDS to provide subscription television service. The IO has repeatedly requested HKCTV to make appropriate arrangement for HKCTV to continue to provide its subscription television service in the building. However, without reaching agreement with the IO on the use of horizontal drop cables, HKCTV continued to provide subscription television service at the Premises through the Existing IBCCDS. Although the horizontal drop cables are not obstructed from functioning, the Authority considers that HKCTV behaviour may have contravened Condition 54 of the Subscription TV Licence which imposes HKCTV an obligation not to obstruct lawful use of any telecommunications line by other person with lawful right to use the telecommunications line, i.e. the lawful use of the horizontal drop cables by the IO in this case.

After considering all facts and surrounding circumstances of the case, the Authority is not minded to conclude that HKCTV has breached Condition 54 of the Subscription Television Licence. 15. However, the Authority is to express the disagreement with this practice which has the effect of depriving the IO’s right to re-deploy the horizontal drop cables for the establishment of a new SMATV system to serve the residents. HKCTV’s conduct also contradicts with the Government’s policy of allowing customers to have unimpeded access to telecommunications service as the

continued use of the Existing IBCCDS by HKCTV without appropriate arrangement to enable the IO to establish a new SMATV system will prevent the right of access to both subscription television and SMATV service concurrently although it is technically feasible for both services to be made available for his choice. Appropriate arrangement should be made to resolve this matter. Should commercial negotiation fail, sections 36A and 36B of the Telecommunications Ordinance offer a solution to enable co-existence of the two services by interconnection.

DISCUSSION POINT

Under what conditions would it be appropriate to impose a penalty on HKCTV?

Regulatory Action

16. The facts from the investigations indicated that each of the parties might have committed malpractice in some way or another. The Telecommunications Authority (the “Authority”) has carefully considered the special circumstances of the case, including:

- the IO might be aggrieved by the inaction of HKCTV in responding to the IO’s request to make appropriate arrangement in relation to continued use of the Existing SMATV System;
- Cheung Hing might be following the instruction of the IO to deploy the horizontal drop cables which the IO has the right to use in installing the New SMATV system for the benefit of the residents of the Premises;
- HKCTV might also have been aggrieved by the interruption to the subscription television service transmitted through a telecommunications installation; and
- all parties have been cooperative in taking remedial actions to rectify the situation.

17. After careful evaluation of the evidence and surrounding circumstances of this case, the Authority considers that it is not appropriate in the circumstances to take regulatory or enforcement action

against any party in relation to this incident. Rather, the Authority considers that public interest could better be protected if guidance can be offered as a result of this incident to deter future occurrence of such malpractice. The Authority however wishes to express disagreement with the conduct of the parties and reminds the parties that they should ensure compliance with the provisions of the Ordinance and licence conditions. Particularly, as the Authority has found that Cheung Hing has contravened GC3(1) of the SMATV Licence, the Authority hereby gives a warning to Cheung Hing that it should ensure compliance of GC3 (1) of the SMATV Licence and that any like conduct in future may likely result in financial penalty under section 36C of the Telecommunications Ordinance or other regulatory action as the Authority thinks fit. In relation to allocation of costs of the remedial actions taken by the parties, all the parties should negotiate for a commercial agreement on the cost sharing. In case a commercial agreement cannot be reached, either party may request the Authority to determine pursuant to section 36A of the Ordinance.

DISCUSSION POINT

Would this usually be the case?

CONCLUDING COMMENTS

18. In order to resolve complex issues involving interests of different parties, interested parties are advised to observe the following guiding principles for similar situations in future:

a. Before the termination of a service contract between an operator and the incorporated owners, owners of the building or the property management company (the “building owner”) for the maintenance and operation of a SMATV system including the IBCCDS, the operator and the building owner should discuss the necessary arrangements so as to ensure that upon termination of the service contract, the broadcasting and telecommunications services to be delivered to the residents in the building are not to be affected.

- b. The necessary arrangements referred to in (a) above include interconnection agreements or commercial agreements to use the telecommunications lines or installation, etc., and should be negotiated and entered into before the termination of the service contract.
- c. Operators shall comply with the relevant licence conditions which prohibit obstruction and interference to other telecommunications line or installation.
- d. Any party may ask the Authority for assistance in the form of mediation or determination, etc., under section 36A of the Ordinance, or direction for securing interconnection under section 36B, if there is any difficulty arising from (a) to (c) above.

It is to emphasize that there is a basic legal obligation for relevant parties to comply with the provisions of the Telecommunications Ordinance and the relevant licences, and the absence of guidance should not be used as an excuse or defence for any non-compliance which has already occurred. In dealing with situations similar to that in the current case, the Authority will take into consideration whether the party concerned has adhered to these guiding principles in deciding if the party has been in breach of section 27 of the Ordinance or the relevant licence conditions.

DISCUSSION POINT

What is your reaction to these guiding principles?

How could these types of comments be used in helping to regulate telecommunications in an economy?

TOPIC 5 – APPLICATION

Workplace Activities

It is not possible to conduct an investigation in the training workshop so the content of this module cannot be applied until participants are back in their workplaces if this is one of their roles.

What we can do here is suggest ways that you can increase your learning and experience when back at work.

As you have worked through this module you may have been able to compare the module's information with experiences and knowledge of an economy you are familiar with.

If you need to carry out an investigation it is helpful to work with a more experienced regulator, a mentor* in your organisation if that is possible. This could be approached by:

- stepping through the methods outlined in this module;
- asking which of the principles and processes are used in your organization;
- asking what other principles and process are used;
- asking your mentor for examples of these principles and process in past cases;
- asking your mentor which of the principles or process could be adopted by your organisation; and
- discussing how they could be adopted.

Before you leave the training workshop discuss with your facilitator and others in your group how you, and they, may be able to apply the learning from this module. Try to agree on some common methods similar to those suggested above.

**Mentor – a person of greater experience who can provide advice, guidance and direction towards worthwhile experience that can improve you capability as a regulator.*

APPENDIX – CASE STUDY 2

This report covers a complex investigation into a tragic case history. The regulator was called in to determine how to respond to the situation and what actions needed to be taken as a result. We have repeated some of the information given earlier. Have you changed your point of view?

This case study is taken directly from the regulator report and gives an indication of the types of information usually included. A complete version of the report can be seen on the ACA website at:

http://internet.aca.gov.au/ACAINTER.131186:STANDARD:1255399151:pc=PC_2399

Introduction and Scope of Investigation

This report is the result of an investigation conducted by the Australian Communications Authority (ACA) pursuant to its power under Part 26 of the *Telecommunications Act 1997* (the Act).

On 14 February 2002, the Minister for Communications, Information Technology and the Arts (the Minister) asked the ACA to investigate circumstances surrounding the inoperability of the telephone service supplied to the Boulding family home by Telstra in January and February 2002. In particular, the Minister was concerned to ascertain whether, in providing the service to the Boulding family, Telstra had fulfilled its legislative obligations.

This investigation has been particularly concerned with establishing:

- the telecommunications related experience of the Boulding family;
- the telecommunications related circumstances of the service supplied by Telstra;
- the obligations attached to the circumstances and the extent of regulatory compliance associated with the supply of the service by Telstra;
- whether the experiences represented an isolated incident or was indicative of a systemic deficiency; and
- the appropriateness of Telstra's internal systems, processes and procedures in regard to fulfilling its legislative obligations.

The investigation was announced in an ACA media release of 15 February 2002. Terms of reference for the investigation were also made available on application to the ACA. The terms of reference are at Appendix A.

BACKGROUND TO THE ACA'S INVESTIGATION

The Boulding family resides in the small township of Kergunyah in north-eastern Victoria, 37 kilometres south-east of Wodonga. As of February 2002, Telstra's Kergunyah telephone exchange provided 186 telephone services.

Over the period from 26 January 2002 to 7 February 2002, the Boulding family of north-eastern Victoria experienced a series of telecommunications difficulties on both of its available services. On 6 February 2002 the services could not be used in relation to a child (Sam Boulding) suffering a severe asthma attack.

Summary of the Boulding family's account of their telecommunications circumstances

The Boulding family has described the primary service to their home as experiencing continuing problems over a number of years. The problems have included a constant ticking on the phone during the phone call (which the Boulding family attributed to an electric fence), a deafening screech when the receiver was picked up for a series of attempted calls, difficulty in hearing the other party, loss of service for up to four days at a time, callers ringing but the phone not ringing at the residence, and callers ringing and getting an engaged signal (when the phone was not in fact in use).

During winter 2000, Telstra replaced the physical line providing the telephone service from within the property to their house.

Around May 2000, the Boulding family requested a second service

The Boulding family recall that a series of faults began around 20 January 2002. The Boulding family's telephone services began working again around 22 and 23 January, but again became inoperative on 24 January 2002. Faults were always reported about the primary service, although both services were inoperative.

At various times from 24 January to 7 February 2002, the Boulding family's telephone service(s) worked for short periods of time, but then would not work again shortly after.

On several of these occasions—including twice on 4 February 2002 and again on 6 February 2002—members of the Boulding family informed Telstra of the family's medical circumstances. - that Mrs McMillan-Boulding was blind, her husband was away for work, and that she had a baby, two asthmatic children and a daughter with a broken leg to care for.

On the afternoon of 6 February 2002, Ms McMillan-Boulding again reported the fault to Telstra. The operator acknowledged the fault on the service and noted that it was in the process of being repaired. After informing the Telstra operator of her medical circumstances the operator queried her as to whether it was a medical emergency. Ms McMillan-Boulding confirmed that it was.

Sam Boulding suffered a chronic asthma attack that evening. As the phones at the house were not operative, the ambulance service was contacted from a neighbour's house and then later from the Kergunyah general store. Sam died before the ambulance arrived

As indicated above, the ACA's focus in this investigation was on the telecommunications related circumstances at the Boulding family's home, and particularly on the extent to which Telstra fulfilled its legislative obligations in the provision and maintenance of telephone services to Ms Rose McMillan-Boulding and her family.

DISCUSSION POINT

When should a regulator investigation have occurred? Why do you think it didn't occur?

DISCUSSION POINT

Before proceeding outline the following:

- *What is the trigger for the investigation?*
- *What could have triggered an investigation?*
- *What methods could be used to conduct this investigation?*

DISCUSSION POINT

Classify this complaint into one of the four levels mentioned earlier.

DISCUSSION POINT

Assume this case study occurred in a telecommunications environment you are familiar with.

Write out a short investigation plan for this situation.

Statement of purpose

Statement of the specific matter to be investigated

Operations and personal to be involved

Expertise required to complete the investigation

Timelines and costs for the investigation

Milestones or reference points within the timeline

Possible outcomes

CONDUCT OF THE ACA'S INVESTIGATION

The investigation was conducted by a dedicated investigation team consisting of ACA staff members and consultants, comprising:

- a technical consultant tasked with appraisal of Telstra's network architecture, configuration and customer equipment;
- a KPMG consultant to obtain information regarding Telstra's key information systems and the comprehensiveness of information available from these systems;
- an investigative consultant to assist the ACA in investigating the provision and maintenance of services to the Boulding family; and
- ACA specialist staff.

Key features of the investigation included:

- conducting two face-to-face interviews with the Boulding family;

- obtaining information from Telstra in relation to the circumstances surrounding the Boulding family’s telephone services, Telstra’s fault restoration processes and interviewing Telstra staff;
- contracting KPMG to conduct a review of Telstra’s key systems, processes
- and procedures in regard to fault maintenance and rectification;
- review of the PricewaterhouseCoopers draft report of its examination of Telstra arrangements relating to the provision of services to the Boulding family—this review included examination of source information provided to PricewaterhouseCoopers by Telstra and interviewing of PricewaterhouseCoopers staff; and
- considering the extent of compliance by Telstra with its legislative obligations.

It has been necessary for the ACA’s investigation to be conducted over a brief period of time, with the objective of quickly establishing the salient facts and significant issues associated with the telecommunications circumstances of the Boulding family over the period 26 January to 7 February 2002.

DISCUSSION POINT

How does your plan compare with the outline above?

Executive Summary - Findings

As you read the findings note your own reactions. Compare your reactions with others in your group.

As a regulator what is your immediate response? How would you act on the findings? What would you ask the carrier to do as a result of the findings?

Some questions have been added to help you.

1. Telstra, within its fault management processes, uses a work activity identified as a 'recall'. A 'recall' is a request to repair service after normal business hours. The recall arrangements in Telstra's NSW Country Region require an Area Service Manager (ASM) who may be remote from systems providing access to customer details to make decisions based on information conveyed over the telephone by the recall officer. In other Telstra operational regions in Australia the responsibility for decision-making on the merits of a recall rests with a Telstra recall officer, who has access to customer information available from Telstra's systems. The basis for ASMs making a decision on recall is therefore not standardised and is subject to individual discretion not based on standardised decision criteria.

DISCUSSION POINT

Do you think a regulator should make comments on this?

2. The information sharing between Telstra's separate customer and fault management systems is deficient in that these systems do not ensure that adequate information relevant to a customer's service and fault report is conveyed to all parties to the fault rectification.

DISCUSSION POINT

Do you think a regulator should make comments on this?

3. On the basis of an independent assessment, conducted by the ACA and assisted by Comtest Laboratories Pty Ltd in Melbourne, the ACA concludes that neither the Boulding family's customer cabling nor customer equipment contributed to the telecommunications faults and difficulties the family experienced between 26 January to 7 February 2002.

DISCUSSION POINT

On this basis did the Boulding family contribute to the problem?

4. The technical characteristics of the Kergunyah customer access network (CAN) infrastructure, in combination with the digital pair gain system providing services to the Boulding family, were not conducive to long-term reliable service in this instance. These technical characteristics around the time of January 2002 were not consistent with those recommended by Telstra for the type of electronic equipment installed on this infrastructure.

5. The conclusions from the ACA's technical analysis of the Kergunyah CAN arrangements for providing services to the Boulding family are that:

- the cable and its jointing arrangements pose a significant longer term service reliability risk for that digital pair gain system;
- important fault diagnosis information that was available was either not appreciated or not effectively used by technical staff at the time of the first fault report;
- the absence of system information about key CAN components (particularly the presence of loading coils) extended fault repair activity related to the second fault;
- although service has been restored, the cause of the third fault report remains unknown;
- the multiple faults on the services over 26 January to 7 February 2002, although recorded in Telstra's systems, did not accelerate repairs to these services;

- the failure to identify and record the root cause of the first fault extended the period of restoration of the Boulding family’s telephone services; and
- the technical information for this CAN suggests that there is a need for Telstra to ensure that its CAN enhancement program target areas where network performance is low.

DISCUSSION POINT

What types of expertise would be needed to obtain this evidence? How important is it to the investigation?

6. Telstra did not breach the provisions in its standard marketing plan (SMP) relating to the offer and supply of interim services, as these provisions were not triggered by the fault events occurring on the telephone services of the Boulding family over the period 26 January to 7 February 2002. (Note: Telstra’s SMP set outs how it will fulfil its universal service obligation.)

DISCUSSION POINT

Is this a valid excuse for the level of service provided?

7. Telstra’s management of the three faults on the Boulding family’s telephone services, over the period 26 January to 7 February 2002, indicates a deficiency in its fault management processes. Telstra’s current treatment of recurring faults, while triggering escalation in Telstra’s fault management system, does not result in additional urgency or expertise in repair at the first escalation level.

DISCUSSION POINT

How should a regulator respond to this finding?

8. Telstra did not breach the regulatory obligation concerning priority status (for repair of service) specified in its SMP, as no application was received from the Boulding family to be assigned this status.

9. Telstra's priority status arrangements and associated offerings in its SMP were not known to the Boulding family. The arrangements described in Telstra's SMP are:

- not well articulated for ready use in assessing a customer's eligibility; and
- not clear in the benefits that attached to being classified as a priority status customer.

DISCUSSION POINT

How should a regulator respond to this finding?

10. Telstra did not breach the performance standard for rectification of faults and service difficulties set by the *Telecommunications (Customer Service Guarantee) Standard (No.2) 2000* in relation to the first and third faults on the Boulding family's services over the period 26 January to 7 February 2002.

The performance standard did not apply in the case of the second fault because it was exempt from the performance standard and SMP requirements in relation to that second fault. However, at the time a

decision was made on a repair timetable for the second fault, Telstra made a deliberate decision which resulted in the CSG and SMP fault repair timeframes being exceeded.

DISCUSSION POINT

Now, reflect on the comments and response you have noted as you worked through the findings. Thinking about this case study occurring in an economy you are familiar with:

- *What conclusions would you draw?*
- *What other actions would you recommend?*

Conclusions

Other actions



Asia-Pacific Economic Cooperation

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