



Australian
Competition &
Consumer
Commission

LSS Access Dispute

Telstra / EFTel

Reasons for Final Determination

April 2010



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Abbreviations

ADSL	Asymmetric Digital Subscriber Line
CAN	Customer Access Network
CCWP	Co-ordinated Capital Works Program
CRA	Customer Relationship Agreement
DAC	Data Activation Centre
DSL	Digital Subscriber Line
DSLAM	Digital Subscriber Line Access Multiplexer
ENMU	Emergency Network Modernisation and Upgrade
ESA	Exchange Service Area
FTTN	Fibre To The Node
FTTP	Fibre To The Premise
GAA	General Access Agreement
GAST	General Access Service Terms
IDS	Integrated Deployment Solution
IULLS	In-Use Unconditioned Local Loop Service
LCS	Local Carriage Service
LOLO/LOLIG	Linx On Line Ordering (LOLO) and Linx On Line Interactive Gateway (LOLIG)
LSS	Line Sharing Service
LTIE	Long Term Interests of End-users
LTNR	Long Term Notification Report
MNM	Managed Network Migration
MNMU	Major Network Modernisation & Upgrades
NAB rate	National Australia Bank Business Indicator Rate
NPAMS	National Plant Assignment Management System
NBN	National Broadband Network

PSTN	Public Switched Telephone Network
PSTN OTA	Public Switched Telephone Network Operating / Terminating Access
RBA	Reserve Bank of Australia
SAOs	Standard Access Obligations
SIO	Services in Operation
SQ	Service Qualification
SSS	Spectrum Sharing Service
TSLRIC+	Total Service Long-run Incremental Cost Plus Indirect Costs
TULLS	Transfer Unconditioned Local Loop Service
ULLCIS	Unconditioned Local Loop Carrier Interface System
VoIP	Voice Over Internet Protocol
VULLS	Vacant Unconditioned Local Loop Service
WACC	Weighted Average Cost of Capital
WLR	Wholesale Line Rental
3P	Third Party

Glossary

Access dispute	Is a dispute between an access seeker and an access provider about terms of access relating to a declared service that is notified to the ACCC under section 152CM of the Act.
Access Provider	A carrier or carriage service provider who supplies declared services to itself or other persons as defined under subsection 152AR(2) of the Act.
Access Seeker	Defined in section 152AG of the Act as a service provider who makes, or proposes to make, a request for access to a declared service under section 152AR of the Act (which deals with standard access obligations).
Act	<i>Trade Practices Act 1974 (Cth)</i>
Customer access network	The network which enables the connection of telephones and other customer premises equipment to switching technology. It consists of a network of conduits and pipes in the ground with a mixture of cables containing copper wires and optical fibres.
DSL to LSS Transfer	Is the broadband transfer process by which Telstra transfers Telstra Retail BigPond Asymmetrical Digital Subscriber Line to a LSS.
Line Sharing Service (LSS)	The LSS is a declared service and is defined by its service declaration. The LSS allows access seekers to share the use of a single metallic pair or line. The higher frequency part of the line is used by the access seeker to supply broadband services while another provider supplies a PSTN voice service over the lower frequency part of the same line.
Managed Network Migration	Is a transfer or migration of services that is achieved by the project management of Telstra in coordinating the cancellation and connection of services.
2008 Model Terms	Section 152AQB requires the ACCC to make a written determination setting out model terms and conditions relating to access to core services. Under subsection 152AQB(9) the ACCC must have regard to any model terms and conditions determination that it has made in arbitrating an access dispute that it relates.
Monthly charges	Annual charges are ongoing rental charges payable for the supply of the ULLS or LSS service. They are paid on a monthly basis.

Pricing Principles	Under subsection 152AQA(1) of the Act the ACCC must by writing determinate principles relating to the price of access to a declared service. Under subsection 152AQA(6), the ACCC must have regard to any determination that it has made in arbitrating an access dispute.
Service Qualification	The process of checking whether a particular line is capable of supporting a service.
Single Connection / Disconnection	Occurs when Telstra's standard ordering system and processes are used, and comprise all ULLS or LSS connections that occur outside of a MNM process.
Unconditioned Local Loop Service (ULLS)	The ULLS is a declared service and is defined in the service description. The ULLS involves the use of unconditioned communications wire between the boundary of a telecommunications network at an end-user's premises and a point on a telecommunications network that is a potential point of interconnection located at or associated with a customer access module and located on the end user side of the customer access module.

Dictionary of Reports & Instruments

2002 LSS Pricing Principles	<i>Pricing Principles for the Line Sharing Service(LSS) Determination</i> made 30 August 2002
2007 LSS Pricing Principles	<i>Pricing Principles for the Line Sharing Service(LSS) Determination</i> made 24 October 2007
2009 Draft Indicative Prices	Draft Pricing Principles and Indicative Prices for LCS, WLR, PSTN OTA, ULLS, LSS - 2009
2009 LSS Pricing Principles	<i>Pricing Principles for the Line Sharing Service (LSS) Determination 2009</i> made 3 December 2009
2009 ULLS Pricing Principles	<i>Pricing Principles for the Unconditioned Local Loop Service (ULLS) Determination</i> made 3 December 2009
Access Dispute Guidelines	ACCC, <i>Resolution of Telecommunications Access Disputes – A Guide (Revised)</i> – March 2004
Access Pricing Principles Guidelines	ACCC <i>Access Pricing Principles – Telecommunications: A guide</i> , July 1997
ACIF Code	The ACIF C569:2005 ULLS Ordering and Provisioning Code
Adam Decision	Publication of Final Determination and associated statement of reasons – Adam Internet/Telstra LSS access dispute - December 2007.
Chime Decision	Publication of final determination and associated statement of reasons – Chime Communications/Telstra ULLS access dispute – March 2008
Consultel report	Analysis of ULLS and LSS undertakings and subsequent submissions – February 2006
Layer 10 report	Analysis relating to ULLS access disputes – Primus, Chime, Optus, XYZed, Request, PowerTel and Telstra – January 2008
2008 Model Terms	<i>Model Non-Price Terms and Conditions, Determination 2008</i>
Optus Decision	ULLS access dispute between Telstra and

Optus Networks – Statement of reasons for final determination - March 2008

Primus Decision

Publication of Final Determination and associated statement of reasons – Primus Telecommunications/Telstra ULLS connection charges - March 2008.

Telstra Manual

Telstra Broadband Transfer Process Manual

1. Introduction

1.1. Purpose

1. EFTel Limited (EFTel) and Telstra Corporation Limited (Telstra) are in dispute over certain terms of access to the LSS (EFTel-Telstra dispute). This dispute was notified to the ACCC for arbitration, and the ACCC has made a final determination. This document sets out the reasons for making this final determination.

1.2. Background to arbitration and final determination

2. The ACCC received EFTel's dispute notification on 21 December 2007 (notification dated 18 December 2007). The parties remained unable to resolve the dispute, and raised the following terms of access for consideration in the final determination:

- monthly charges (Schedule 1)
- single' connections and disconnections charges (Schedule 2)
 - DSL/LSS transfer charge
- managed network migration (MNM) charges (Schedule 3)
 - connection charges
 - disconnection charges
 - minimum exchange charges
- MNM non-price terms and conditions (Schedule 4)
 - limit on the number of exchanges per state per day
- network modernisation and upgrade terms (Schedule 5)
- variation of access terms (parity)

1.3. Consultation process

3. The consultation process for the EFTel-Telstra dispute can be classified into two stages.
4. The first stage of the arbitration commenced on 21 December 2007 when the ACCC received notification of EFTel's dispute with Telstra in relation to a number of terms of access in relation to the LSS. The second stage of the arbitration commenced in December 2008 when the dispute was merged into a joint hearing. It was following this that consultation on specific issues in dispute was carried out.

5. A full chronology of the consultation process is outlined in Appendix A.

2. Preliminary Matters

2.1. The Line Sharing Service (“LSS”)

6. The LSS allows access seekers to share the use of a single metallic pair or line. The higher frequency part of the line is used by the access seeker to supply broadband services while another provider supplies a PSTN voice service over the lower frequency part of the same line.
7. After a public inquiry, the ACCC declared the LSS, pursuant to subsection 152AL(3) of the Act, on 30 August 2002. The declaration was published in the *Commonwealth of Australia Gazette* GN41 on 16 October 2002, to apply until 30 October 2007. Since this time, the ACCC has re-declared the service twice:
 - From 1 November 2007 until 31 July 2009 - *Commonwealth of Australia Special Gazette* No. S214 on 29 October 2007, pursuant to subsection 152ALA(4) of the *Trade Practices Act 1974* (the Act).
 - From 1 August 2009 to 31 July 2014 - *Commonwealth of Australia Gazette*, No. GN28 on 22 July 2009 pursuant to subsection 152ALA(4) of the Act.
8. The ACCC made pricing principles on 3 December 2009 - *Pricing Principles for the Line Sharing Service (LSS) Determination 2009* - for the declared LSS pursuant to section 152AQA of the Act.¹

2.2. Access obligations and existence of dispute relating to access

2.2.1. Introduction

9. The ACCC sought the parties’ views on whether access obligations are owed; whether a dispute exists in relation to access and whether the ACCC has jurisdiction to arbitrate.

2.2.2. Submissions

10. Telstra submits that EFTel are seeking a final determination which varies a Customer Relationship Agreement (CRA), as opposed to the terms and conditions upon which Telstra provides access to the LSS.²

¹ ACCC, *Pricing Principles for the Line Sharing Service (LSS) Determination 2009*, December 2009.

² Telstra, *Access Disputes Between EFTel Ltd (“EFTel”) and Telstra Corporation Limited (“Telstra”)-Line Sharing Service (“LSS”)*, 26 March 2008, p. 2.

11. EFTel submits that there is a dispute relating to access, and states that it refers to and repeats the issues in dispute as outlined in their notification.³ In addition, EFTel provides evidence of efforts to reach agreement with Telstra.⁴

2.2.3. ACCC view

12. The ACCC has formed the view that, with respect to the access dispute, the requirements of subsection 152CM(1) of the Act are satisfied. That is:
- Telstra is a carrier
 - Telstra supplies the declared LSS
 - Telstra has an obligation under subsection 152AR(3) of the Act to supply the LSS to the access seeker and
 - the access seeker is unable to agree with Telstra about the terms and conditions of access to the LSS addressed in the final determination.
13. The ACCC is satisfied that a dispute exists in relation to access between the parties, as evidenced by the history of negotiations between the parties as set out by EFTel in Annexure 7(a) of their primary submissions.
14. The ACCC is also of the view that a unilateral variation of a CRA that results in changes to terms of access can form the basis of a determination by the Commission. Under subsection 152CP(2), the determination made by the Commission may deal with any matter relating to access by the access seeker to the declared service, regardless of whether that matter is subject to a CRA.

2.3. Whether the ACCC has jurisdiction to arbitrate the access dispute

2.3.1. Introduction

15. The ACCC asked the parties to provide submissions on whether the ACCC has jurisdiction to arbitrate the access dispute.

2.3.2. Submissions

16. Telstra noted that the ACCC had pre-empted Telstra's request to suspend the conduct of the access dispute because of its proceedings in the High Court challenging the validity of Part XIC asking the ACCC to reconsider its

³ Herbert Geer submission on procedural issues, Annexure D EFTel submission on procedural issues, 13 November 2008, p2; EFTel, *Telecommunications Access Dispute: EFTel-Telstar Line Sharing Service*, 21 December 2007.

⁴ Herbert Geer Primary Submissions, *General and Preliminary Matters Annexure 7(a) EFTel Ltd*, 18 May 2009.

decision.⁵ However, as the High Court dismissed Telstra's challenge on 6 March 2008, this argument is no longer applicable to the current arbitration.⁶

17. Telstra also submits that the LSS Declaration is of no effect by virtue of the operation of section 32 of the *Legislative Instruments Act 2003* (Cth) and that the ACCC should suspend the conduct of the current arbitrations pending the resolution of proceedings challenging the declaration on that basis.⁷ However, as section 152AL of the Act expressly provides that a declaration is not a legislative instrument which needs to be registered under the *Legislative Instruments Act 2003*, this argument is no longer applicable to the current arbitration.
18. Telstra also disputes that the ACCC has the power to make a final determination in relation to parity clauses, in the terms sought by EFTel.⁸ Telstra submits that making determinations as to the contractual rights and obligations under commercial agreements between the parties is not the role of the ACCC in arbitrating an access dispute under Part XIC of the Act.⁹ Telstra submits that such a determination by the ACCC would be ultra vires, as an exercise of judicial rather than administrative power.¹⁰
19. Telstra submits, in a letter sent to the ACCC on 26 March 2008, that EFTel is seeking a final determination that varies the CRA, as opposed to the terms and conditions upon which Telstra provides access to the LSS.¹¹ Telstra submits that section 152CP of the Act does not permit the ACCC to vary an agreement between two parties.¹² Telstra considers that section 152CP provides the ACCC with the power to determine the terms and conditions of access which will prevail over any pre-existing contractual arrangements to the extent that the two are inconsistent.¹³ Telstra further submits that all of the examples of the matters the ACCC may determine as part of an access dispute provided at subsection 152CP(2) of the Act relate to the determination of terms, conditions and aspects of access as distinct from the variation of contracts.¹⁴
20. Telstra submits that a determination made by the ACCC that purported to pass on to EFTel future price determinations would be uncertain, fail to comply with the considerations under section 152CR, and would not fall within the ACCC's powers under Pt XIC.¹⁵

⁵ Telstra, *Access Disputes-EFTel and Telstra-LSS-Confidentiality Order and Direction*, 5 February 2008, p. 1.

⁶ *Telstra Corporation Limited v The Commonwealth* [2008] HCA 7 (6 March 2008)

⁷ Telstra, *Access Disputes-EFTel and Telstra-LSS-Confidentiality Order and Direction*, 5 February 2008, p. 1.

⁸ Telstra, *Access Disputes Between EFTel Ltd ("EFTel") and Telstra Corporation Limited ("Telstra")-Line Sharing Service ("LSS")*, 26 March 2008, p. 1.

⁹ Ibid.

¹⁰ Ibid.

¹¹ Ibid., p. 2.

¹² Ibid.

¹³ Ibid.

¹⁴ Ibid.

¹⁵ Ibid.

21. EFTel submits that the ACCC has jurisdiction to arbitrate the dispute.¹⁶

2.3.3. ACCC view

22. The ACCC is of the view that it has jurisdiction to arbitrate this access dispute. Under subsection 152CP(2) of the Act, the ACCC is empowered to make a determination relating to access by the access seeker to the declared service, including matters that were not the basis for the notification. The existence of a contract between the parties does not restrict the ability of the ACCC to make a determination pursuant to subsection 152CP(2).

2.4. Whether to proceed to make a final determination

2.4.1. Introduction

23. The ACCC sought submissions from the parties as to whether it is appropriate for a final determination to be made in this access dispute.

2.4.2. Submissions

24. Telstra submits that it may be appropriate in the resolution of these disputes for oral hearings to take place.¹⁷

25. Although EFTel has not explicitly commented as to whether it is appropriate for a final determination to be made in this access dispute, they have confirmed that they are unable to agree with Telstra about the terms and conditions of access to the LSS which the Commission proposes to address in the final determination.¹⁸

2.4.3. ACCC view

26. As discussed in detail in the Statement of Reasons, the ACCC is satisfied that it has conducted the arbitration properly, met the relevant procedural fairness requirements in reaching a final determination in this dispute and that the parties have been given a reasonable opportunity to be heard on the issues in dispute in this matter.

27. The ACCC does not consider that it is necessary to conduct an oral hearing as it would not bring a material benefit to the ACCC's decision-making. Any question of how an arbitration is to be conducted is for the ACCC to determine.¹⁹ It considers that it has fulfilled its obligations to conduct a proper arbitration hearing by conducting the hearing on the papers. In coming to this view, the ACCC has had regard to the experience of the parties in the arbitrations, the time allowed for the provision of written submissions (including submissions in reply) on relevant issues, and the manner in which the ACCC sought and obtained information relating to its decision.

¹⁶ EFTel, *Telecommunications Access Disputes: EFTel-Telstra LSS*, 21 April 2008, p. 2.

¹⁷ Telstra LSS Submission, *Preliminary Matters and General Approach*, 18 May 2009, p. 13.

¹⁸ Herbert Geer Primary Submissions, *General and Preliminary Matters*, 18 May 2009, p. 1.

¹⁹ *Trade Practices Act 1974*, subsections 152DB(3) and (4).

28. The ACCC is of the view that it is appropriate for it to make a final determination in this access dispute.

3. Matters in dispute

3.1. Terms in dispute

29. The following sections set out the primary position in relation to the facts of the dispute and the ACCC's decision.

3.1.1. LSS charges

Monthly charges

30. EFTel seeks a \$2.50 charge from Telstra and was rejected.²⁰ EFTel submits that Telstra sought to apply a charge of [REDACTED]²¹

31. The ACCC concludes that \$2.50 was appropriate for the period 1 February 2008 to 31 December 2010. The views of parties and reasons for the ACCC's decision in relation to LSS monthly charges are discussed in Chapter 5 of the Statement of Reasons.

Single connection and disconnection charges

32. EFTel seeks single connection charges of:²²

- \$41.40 ex GST per connection (1 Jan 2008 – 30 June 2008)
- \$ 43.10 ex GST per connection (1 July 2008 – 1 July 2009)

33. Telstra's submissions did not state its proposed charges for single connections. However, EFTel's notification states that Telstra sought [REDACTED] per standard connection (discounted to [REDACTED] if it was not disputed).

34. The ACCC concludes the following single connection charges are appropriate except where the parties subsequently agree otherwise. The single connection charges of a LSS outside of a MNM are as follows:

Period	Single connection charge
1 July 2007 to 30 June 2008	\$41.40
1 July 2008 to 31 July 2009	\$43.10
1 August 2009 to 31 December 2010	\$43.10

35. EFTel seeks single disconnection charges of:²³

- \$37.10 ex GST per disconnection (1 Jan 2008 – 30 June 2008)
- \$38.70 ex GST per disconnection (1 July 2008 – 1 July 2009).

²⁰ EFTel, Notification, p. 4.

²¹ Ibid., p3

²² Ibid., p5

²³ Ibid., p5

36. Telstra's submissions did not state its proposed charges for single disconnection. However, EFTel's notification states that Telstra sought [REDACTED] per standard disconnection (discounted to [REDACTED] if it was not disputed).
37. EFTel's notification seeks a DSL/SSS transfer charge, the ACCC considered this in the context of single connection and disconnection charges.
38. The ACCC concludes that the following disconnection charges are appropriate except where the parties subsequently agree otherwise. The ACCC concludes the charges payable for the disconnection of a LSS outside of a MNM are:

Period	Single disconnection charge
1 July 2007 to 30 June 2008	\$37.10
1 July 2008 to 31 July 2009	\$38.70
1 August 2009 to 31 December 2010	\$38.70

39. EFTel also seeks that no single disconnection charge should be payable where:²⁴
- the disconnection is made pursuant to the Telstra LSS churn process, or
 - EFTel is participating in the LSS churn process and Telstra (BigPond) is not participating in the Telstra LSS churn process.
40. EFTel's notification also states that Telstra sought [REDACTED] per DSL/LSS Transfer Charge (discounted to [REDACTED] if it was not disputed).
41. The ACCC determines that disconnection charges are not payable when:
- the disconnection is made pursuant to the Telstra LSS churn process, or
 - the access seeker is participating in the Telstra LSS churn process and Telstra (BigPond) is not participating in the Telstra LSS churn process.
42. The terms specified above do not apply to LSS disconnections in Band 4.
43. The views of parties and reasons for the ACCC's decision in relation to single connection and disconnection charges is discussed in Chapter 6 of the Statement of Reasons.

²⁴ Ibid.

MNM charges

44. EFTel seeks the following MNM charges (ex of GST) to apply:²⁵

	1 January 2008 until 30 June 2008	1 July 2008 until 1 July 2009
Connection charge – Fixed amount	\$134.50 (per MNM)	\$ 140.10 (per MNM)
Connection charge – Variable amount	+\$30.90 (per connection)	+ \$32.20 (per connection)
Minimum charge per exchange per MNM	\$752.50	\$784.10
Disconnection charge	\$0	\$0

45. Telstra did not specify its proposed MNM charges in its submissions. However, EFTel's notification states that Telstra sought a [REDACTED] variable amount connection charge (discounted to [REDACTED] if it was not disputed).
46. The ACCC concludes the following MNM charges are appropriate:

	1 June 2007 to 30 June 2008	1 July 2008 to 31 July 2009	1 August 2009 to 31 December 2010
Connection charge – Fixed amount (per MNM)	\$134.50	\$140.10	\$140.10
Connection charge – Variable amount (per connection)	+\$30.90	+ \$32.20	+ \$32.20
Minimum charge per exchange (MNM)	\$752.50	\$784.10	\$784.10
Disconnection charge	\$0	\$0	\$0

47. The ACCC also concludes that except where the parties otherwise agree no charge is payable for the disconnection of a LSS where this is done as part of a MNM (e.g., a migration of the LSS to an ULLS or a wholesale ADSL platform).
48. The views of parties and reasons for the ACCC's decision in relation to MNM charges are discussed in Chapter 7 of the Statement of Reasons.

²⁵ EFTel, Notification, p. 3.

3.1.2. Non-price terms

49. EFTel seeks the following amendments in relation to non-price terms.

Maximum number of MNMs

50. EFTel seeks to increase the maximum number of MNMs that can be performed from one to three Telstra exchanges per State per day.²⁶ Submissions from parties did not state Telstra's proposal for this service. However, EFTel's notification also states that clause 2.2 of Part B of CRA 192 states Telstra only has to permit [REDACTED] Telstra exchange [REDACTED],
51. Telstra did submit that historically there has been insufficient demand to exceed the existing limitations.²⁷ Telstra also submits that it may not be able to manage more than one LSS MNM per State per day.²⁸
52. The ACCC concludes that except where the parties otherwise agree, there should not be a maximum number of MNMs at an exchange per State per day. The views of the parties and reasons for the ACCC's decision on the maximum number of MNMs are discussed in section 8.5 of the Statement of Reasons.

Variation to access terms

53. EFTel seeks to vary the definition and application of a relevant access event in CRA 191 and CRA 192 so that its LSS charges will be varied as a result of the ACCC making a final determination in a dispute lodged by another access seeker, when that determination sets access prices that are different to those that EFTel is charged.²⁹
54. Telstra submits that a parity mechanism should not be included in the FD.³⁰
55. The ACCC concludes that it will not to make an FD in relation to this issue. The views of the parties and reasons for the ACCC's decision are discussed in section 10.3 of the Statement of Reasons.

Network Modernisation

56. EFTel seeks to increase its network upgrade notification term from 15 weeks to 12 months notice.³¹
57. The ACCC addressed terms of network modernisation in the final determination. Terms include different types of upgrades including major network modernisations and upgrades, coordinated capital works programs

²⁶ Ibid., p. 5.

²⁷ Telstra LSS Reply Submissions, *MNM Non-Price Terms-Schedule 4 to Draft Final Determination*, 4 June 2009, p. 3.

²⁸ Ibid.

²⁹ EFTel, Notification, p. 5.

³⁰ Telstra LSS Reply Submissions, *Variation of LSS Access Terms to Adopt Terms Specified in Another Final Determination-Schedule 7 to Draft Final Determination*, 9 July 2009, p. 3.

³¹ EFTel, Notification, p. 5.

and terms to apply to emergency network modernisations and upgrades. The views of the parties and reasons for the ACCC's decision on network modernisation are discussed in Chapter 9 of the Statement of Reasons.

3.2. Period for final determination

3.2.1. Commencement date

58. The ACCC's general approach on whether to backdate, and if so, to when, and the parties' submissions on this issue are discussed in the Statement of Reasons at section 4.4. The ACCC applies the principles of backdating as set out in the Statement of Reasons to the facts of this dispute. This reflects the ACCC's view that those principles are applicable to the arbitration of this dispute.

59. The following timeline sets out the efforts made by parties to reach a settlement of the dispute in regards to the LSS charges:

- 26 July 2007 – EFTel and Telstra varied the CRA to include CRA 191 (Telstra [REDACTED]) and CRA 192 (Telstra [REDACTED]). EFTel attempted to negotiate reasonable and competitive terms of access to Telstra's LSS.³²
- 14 November 2007 – EFTel proposed that the following charges to be varied [REDACTED]:
 - LSS monthly rental charge
 - single connection and disconnection charges
 - DSL/LSS transfer charges
 - MNM charges.

EFTel also proposed changes to non-price terms:

- the network modernisation terms which included [REDACTED]
- MNMs non-price terms including [REDACTED]
- expanding the definition of 'relevant access event' in CRA 191 and CRA 192 to include [REDACTED]
- 27 November 2007 – Telstra did not accept EFTel's proposals with the exception of the proposal to reduce the MNM migration plan and forecast timeframe. Telstra also rejected EFTel's initiation of a General Dispute.
- 21 December 2007 - the ACCC received EFTel's notification of an access dispute in relation to LSS access terms.

³² Telstra's LSS is its Spectrum Sharing Service or SSS

- February 2008 – EFTel started supplying services over the LSS.
60. EFTel seeks a commencement date of February 2008.³³ Telstra in response did not propose any specific date to be the commencement date of the FD.
61. The ACCC note that EFTel did not specify the exact date of commencement of supply, however considers a date of 1 February 2008 is appropriate given that this is first day of the month when EFTel commenced installing LSS equipment in Telstra’s exchanges in readiness to supply LSS, and the parties still remained in dispute.

3.2.2. Expiry date

62. The ACCC’s general approach on whether to specify an expiry date, and if so, what it should be, and the parties’ submissions on this issue are discussed in the Statement of Reasons at section 4.4.
63. Both EFTel and Telstra support the proposed expiry date of 31 December 2010.³⁴ The ACCC notes that Telstra caveats this view on the basis that the ACCC must rollover all 2008-09 indicative prices for its fixed network services and apply these prices in arbitrations to all access seekers.
64. Accordingly for the reasons set out in the Statement of Reasons at section 4.4, the ACCC specifies an expiry date of 31 December 2010 to apply to the price terms of the FD of this dispute.

3.2.3. Interest

65. The ACCC’s general approach on whether to require interest and the parties’ submissions on this issue are discussed in the Statement of Reasons at section 4.4. The ACCC adopts this approach in the FD of this dispute because it is satisfied that this approach is appropriate for the purposes of this dispute.
66. Consequently, the ACCC specifies that interest is to be paid on any over/under payments that have occurred. Further, interest is to be calculated daily and compounded, and the rates of interest used over time are to be taken from the Small Business Variable Other Overdraft Rate time series as published by the RBA.³⁵

³³ Herbert Geer Primary Submissions, *General and Preliminary Matters Annexure 7(a) EFTel Ltd*, 18 May 2009, p. 2.

³⁴ Herbert Geer, *Expiry Date for the ULLS and LSS Final Determinations*, 10 December 2009; and Telstra, *Expiry date for ULLS and LSS Final Determinations* 10 December 2009.

³⁵ Reserve Bank of Australia, *Reserve Bank Bulletin, Table F05, Indicator Lending Rates, Small Business Variable Other Indicator Rate referenced from* <http://www.rba.gov.au/statistics/tables/xls/f05hist.xls>.

4. General Approach

4.1. Relevant Legislation

4.1.1. Introduction

67. This chapter of the Statement of Reasons deals with the general and preliminary matters which are relevant to the making of the final determination in respect of the LSS access disputes. During the course of finalising these matters, Request and Primus have withdrawn their notifications. However, these parties have made earlier submissions, and these submissions have been taken into account.
68. In its Consultation Paper issued in April 2009,³⁶ the ACCC identified provisions of the *Trade Practices Act 1974* (the Act), which it considered relevant to the making of the final determination. Parties' views were sought.
69. Parties in dispute with Telstra on the LSS are:
- Chime, EFTel, Wideband, Agile, Saunders and Adam (represented by and referred to as Herbert Geer parties)
 - Primus (provided its own submissions, however due to their similarities with the Hebert Geer parties submissions, Primus' submissions have been referred as a Herbert Geer party, unless otherwise specified)
 - Request, NEC and TPG (represented by and referred to as Nicholls Legal parties)

4.1.2. Submissions

70. The parties identify Part XIC of the Act and predominantly Division 8, as relevant to the making of the Final Determination (FD).
71. Telstra submits that there are two other pieces of legislation which are relevant to the ACCC's decision making process: *Utilities (Network Facilities Tax) Act 2006* (ACT) (Utilities Act) and *A New Tax System (Goods and Services Tax) Act 1999* (Cth) (GST Act).³⁷ Telstra did not state why these pieces of legislation were relevant. Accordingly, the ACCC has not formed a view on the relevance of these pieces of legislation for the LSS, although notes all charges are specified excluding GST.

4.1.3. ACCC view

Applicable sections of the Act

72. The ACCC considers that Part XIC of the Act is relevant to the making of the FD. The ACCC considers that the following sections are of direct relevance to the making of a FD in this dispute:

³⁶ ACCC, Consultation Paper on Final Determination, *Preliminary Matters and General Approach*, April 2009 (Consultation Paper).

³⁷ Telstra Primary Submission, *LSS Preliminary Matters and General Approach*. 18 May 2009, p. 14.

- Subsection 152CP(1) of the Act, which provides that unless the ACCC terminates the arbitration, the ACCC must make a written determination on access by the access seeker to the declared service.
- Subsection 152CP(2) of the Act, which provides that the determination may deal with any matter relating to access by the access seeker to the declared service, including matters that were not the basis for notification of the dispute.
- Subsection 152CP(4) of the Act, which requires that before making a determination, the ACCC must give a draft determination to the parties.
- Subsection 152CP(5) of the Act, which requires that when the ACCC makes a determination it must give the parties to the arbitration its reasons for making the determination.
- Section 152CQ of the Act, which sets out restrictions on access determinations.
- Subsection 152CR(1) of the Act, which requires that in making a final determination, the ACCC must take certain matters into account, including the long-term interests of end-users (LTIE), which is defined in section 152AB of the Act.
- Subsection 152CR(2) of the Act, which provides that the ACCC may take into account any other matters that it thinks are relevant.
- Subsection 152AQA(6) of the Act, which requires that the ACCC must have regard to a pricing principles determination (made in accordance with subsection 152AQA(1)) if the ACCC is required to arbitrate an access dispute under Division 8 in relation to the declared service.
- Subsection 152AQB(9) of the Act, which requires that the ACCC must have regard to a model terms determination (made in accordance with subsection 152AQB(2)) if the ACCC is required to arbitrate an access dispute under Division 8 in relation to a core service.

4.2. Preliminary Matters

4.2.1. Submissions

73. Telstra submits that the ACCC is obliged to comply with the requirements under Division 8 of Part XIC of the Act; accord procedural fairness; act within its powers and where necessary make further inquiry.³⁸ Specifically Telstra submits:

- The ACCC must ensure that Telstra has an opportunity to know the case sought to be made against it and be given the opportunity to reply to it. In this respect Telstra submits that if the ACCC intends to rely upon something, it must bring that to the attention of Telstra.

³⁸ Ibid, p. 4.

- It is neither efficient nor workable for Telstra to be expected to provide evidence on all possible issues. Telstra should only be expected to provide material on issues raised by the ACCC as being relevant.
 - The ACCC must consult with the parties prior to issuing further schedules to the draft final determinations (DFDs) on certain outstanding issues.³⁹
74. Telstra is also of the view that the ACCC must give fundamental weight to the consideration of mandatory relevant factors.⁴⁰ In its view, none of the mandatory relevant considerations is entitled to a fixed weighting, but the consideration of each matter must be given fundamental weight in order for the ACCC to produce a valid decision.⁴¹ Telstra submits that the ACCC is required to:
- weigh up each relevant factor and cannot give a factor a cursory consideration only in order to put it to one side;
 - in its reasons for its decision, set out its findings on all material questions of fact and refer to the evidence on which those findings are based;
 - give reasons for any rejection of Telstra’s evidence;
 - make inquiries or undertake further analysis where information is lacking;
 - exercise its investigative and inquisitorial powers where necessary in making the FD;
 - in appropriate cases, not confine itself to the information placed before it, and “inform itself” in relation to relevant matters.⁴²
75. Telstra also submits that that there should be oral hearings conducted especially in circumstances where there are competing economic models.⁴³
76. The Herbert Geer parties in reply agree with Telstra insofar as the ACCC is obliged to accord procedural fairness to the parties.⁴⁴ However, the Herbert Geer parties submit that Telstra’s arguments relating to the application of procedural fairness appear to be designed to delay and frustrate the dispute process rather than ensuring a process that facilitates resolution based upon a fair exchange of submissions.⁴⁵ The Herbert Geer parties submit that the ACCC must consider its obligation at paragraph 152DC(f) of the Act when arbitrating disputes to generally give all such directions, and do all such things, as are necessary or expedient for the speedy hearing and determination

³⁹ Ibid, pp. 4–10.

⁴⁰ Ibid, p. 7.

⁴¹ Ibid.

⁴² Ibid, pp. 8–10.

⁴³ Ibid, p. 13.

⁴⁴ Herbert Geer Reply Submission, *General and Preliminary Matters*, 18 May 2009, p. 1.

⁴⁵ Ibid.

of the access dispute.⁴⁶ The Herbert Geer parties submit that the ACCC should have regard to this in evaluating any request from Telstra to add additional steps to the arbitration.⁴⁷

77. The Herbert Geer parties also submit that procedural fairness applies to both parties, and not solely Telstra.⁴⁸ The Herbert Geer parties submit that it is for the ACCC to determine the periods that are reasonably necessary for fair and adequate presentation of the parties' cases.⁴⁹
78. The Herbert Geer parties do not agree with Telstra's argument that the ACCC must clearly set out its reasons for rejecting any of Telstra's evidence or material, and submit this will depend upon the relevance of the evidence to the issues at hand.⁵⁰
79. The Herbert Geer parties consider that the parties have been given a fair opportunity to present their cases and that Telstra's request for an 'iterative' process appears designed to impose circular rounds of submissions that would delay FDs and as such is contrary to paragraph 152DC(1)(f) of the Act.⁵¹
80. The Herbert Geer parties agree with Telstra that the ACCC has the power to investigate matters beyond the simple reliance on submissions provided by the parties to the dispute.⁵² The Herbert Geer parties consider that confirmation of the third party (3P) contractor quotes provided by Telstra and independent assessment of any costs that Telstra claims it will incur in implementing a FD is required.⁵³
81. The Herbert Geer parties also submit, in reply, that Telstra has attempted to reframe the ACCC's discretionary right to choose how it gathers information relevant to an arbitration into a mandatory obligation.⁵⁴ The Herbert Geer parties submit that this is incorrect.⁵⁵ The Herbert Geer parties consider that the ACCC has gathered information, such as its previous engagement of Layer 10 to provide expert reports, that goes beyond the information provided by the parties and has clearly assisted the ACCC's consideration of the disputes.⁵⁶
82. The Herbert Geer parties also highlight that contrary to Telstra's claim, the ACCC has a considerable amount of material relating to the outstanding issues in dispute, which have been previously considered in a large number of

⁴⁶ Ibid, pp. 1–2.

⁴⁷ Ibid.

⁴⁸ Ibid, p. 4.

⁴⁹ Ibid.

⁵⁰ Ibid, p. 2.

⁵¹ Ibid, p. 4.

⁵² Ibid, p. 2.

⁵³ Ibid.

⁵⁴ Ibid, p. 7.

⁵⁵ Ibid.

⁵⁶ Ibid.

previous access disputes that have involved Telstra and most of the access seekers involved in the joint hearing.⁵⁷

83. The Nicholls Legal parties submit that they reject all of Telstra’s submissions, unless expressly stated otherwise in their submissions.⁵⁸ In relation to procedural fairness, the Nicholls Legal parties note that Telstra seeks to rely on dicta by Rares J in *Telstra Corporation Ltd v ACCC* [2008] FCA 1758 to construct the argument that paragraph 152DB(1)(b) imposes a positive duty on the ACCC to undertake extensive investigations into those particular matters which are of interest or importance to Telstra.⁵⁹ The Nicholls Legal parties submit that this contention by Telstra is clearly wrong and could not be the intention of Parliament, as it would set the ACCC “off on one wild goose chase after another”.⁶⁰
84. The Nicholls Legal parties consider that paragraph 152DB(1)(b) is about balancing competing considerations, and imposes a primary duty on the ACCC to “act as speedily as a proper consideration of the dispute allows”.⁶¹ The Nicholls Legal parties submit that the subordinate phrase in that provision, to have regard to the need to carefully and quickly make certain inquiries and investigations to the extent that such enquiries and investigations “affect the merits and fair settlement of the dispute” should not be construed as imposing an extra onus on the ACCC to make additional inquiries and investigations at the behest of one of the parties.⁶² The Nicholls Legal parties state that there is nothing in the judgement of Rares J which takes the matter as far as Telstra contends.⁶³
85. The Nicholls Legal parties also submit that Telstra is fundamentally incorrect in submitting a position which would require the ACCC to make Telstra’s case for it.⁶⁴ The Nicholls Legal parties submit that Telstra is responsible for putting forward its best evidence and submissions.⁶⁵
86. The Nicholls Legal parties also submit that Telstra should specifically set out or put the ACCC or the Access Seekers on notice as to the manner in which Telstra contends the ACCC has failed to satisfy paragraph 152DB(1)(b).⁶⁶ The Nicholls Legal parties submit that, for instance, Telstra could specify the materials or matters that it thinks the ACCC has failed to have regard to or what enquiries the ACCC should have made.⁶⁷ The Nicholls Legal parties submit that if Telstra fails to identify its specific concerns regarding the approach and procedures adopted by the ACCC, having seen the ACCC’s

⁵⁷ Ibid, p. 4.

⁵⁸ Nicholls Legal Reply Submission, *Preliminary Matters and General Approach*, 18 May 2009, p. 1.

⁵⁹ Ibid, p. 2.

⁶⁰ Ibid.

⁶¹ Ibid, p. 3.

⁶² Ibid.

⁶³ Ibid.

⁶⁴ Ibid.

⁶⁵ Ibid.

⁶⁶ Ibid.

⁶⁷ Ibid.

Consultation Papers, then it should be estopped from complaining about these matters in the future.⁶⁸

4.2.2. ACCC view

Procedural Fairness

87. The ACCC conducts an arbitration pursuant to subsection 152DB(1) of the Act. This section:
 - (a) provides that the ACCC is not bound by technicalities, legal forms or rules of evidence;
 - (b) requires that the ACCC must act as speedily as a proper consideration of the dispute allows, having regard to the need to carefully and quickly inquire into and investigate the dispute and all matters affecting the merits, and fair settlement, of the dispute; and
 - (c) allows the ACCC to inform itself of any matter relevant to the dispute in any way it thinks appropriate.
88. The ACCC notes that subsection 152DB(1) does not circumvent the ACCC's duty to accord procedural fairness to the parties.
89. The duty to accord a party procedural fairness arises where a decision-maker exercises a power that might prejudice the party's rights, interests or legitimate expectations: *Annetts v McCann* (1990) 170 CLR 596 at 598. The party should also be provided with details of any credible, relevant and significant adverse information which the decision-maker has, and which may affect the decision to be made, and be given an opportunity to respond: *Kioa v West* (1985) 159 CLR 550.
90. The ACCC considers that the measures that it has taken in arbitrating this access dispute are in accordance with its procedural fairness obligations. The ACCC has presented the parties with the information that it intends to rely upon in making its decision; by way of the Consultation Papers issued to the parties, and is of the view that Telstra and access seekers have had sufficient information about the nature of the disputes before it.
91. The ACCC agrees with the views submitted by the Nicholls Legal parties that section 152DB of the Act should not require the ACCC to embark upon extensive, yet unspecified extraneous enquiries, with the objective of requiring the ACCC to make out Telstra's case for it.
92. Throughout the arbitration process, the ACCC has inquired about issues where, in the ACCC's view, information was centrally relevant to the LSS arbitration and the ACCC was able to readily obtain that material. Therefore, the ACCC considers it has made a proper investigation and inquiry into matters which it perceives are in dispute and fulfilled its role as an arbitrator. The ACCC further notes that all parties to the access disputes have an

⁶⁸ Ibid.

obligation to provide information to the ACCC if in the party's opinion it is relevant to the particular dispute.⁶⁹

93. The requirements of section 152CP of the Act impose upon the ACCC an obligation to make a written determination (unless the arbitration has been terminated). Subsection 152CP(4) requires the ACCC to provide parties with a draft determination before it makes a [final] determination. Accordingly, before any FD is made, parties to the arbitration are given an opportunity to be heard on the content of the draft determination. In this case, the parties were provided with consultation papers, along with DFDs and specifically invited to comment on all issues relevant to the access disputes. Parties were also given an opportunity to provide general submissions on any matter it thought relevant.
94. The ACCC is satisfied that it has taken into account all submissions received, including those received following additional consultation with parties and that it is entitled to inform itself in any way it thinks appropriate. As outlined above, the ACCC is satisfied that parties have been given a reasonable opportunity to be heard on the issues in dispute in this arbitration.

Production of Evidence

95. In a number of submissions provided to the ACCC, Telstra has indicated that it does not resile from its submissions that it has previously provided in other ACCC processes, in relation to some issues in dispute and, to the extent that they concern issues which Telstra continues to contest, requests that the ACCC have regard to those submissions in the present arbitrations pursuant to subsection 152CR(2) of the Act.⁷⁰
96. The Herbert Geer parties submit, in reply, that it is impossible for access seekers to respond to Telstra's previous submissions as Telstra has not indicated the specific submissions or parts thereof that they are referring.⁷¹ The Herbert Geer parties submit that it is also impossible to know fully the case that Telstra is seeking to argue as the access seekers may not be privy to Telstra's previous submissions as received by the ACCC.⁷² The Herbert Geer parties submit that the ACCC is unable to know fully the case that Telstra is seeking to argue in these arbitrations unless the ACCC undertakes the unreasonable task of reviewing all submissions that the ACCC has received from Telstra.⁷³
97. The Herbert Geer parties submit that the ACCC issued directions requiring submissions to include as attachments copies of any extraneous material that is relied on with the relevant referenced sections clearly marked.⁷⁴ The Herbert Geer parties submit that as Telstra has not complied with this direction as

⁶⁹ *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24.

⁷⁰ See Telstra's Primary Submission, *Single Connection and Disconnection Charges*, 18 May 2009, p. 1 and Telstra's Primary Submission on Service, *Service Qualification Charges*, 2 July 2009, p. 1.

⁷¹ Herbert Geer Reply Submission, *Single Connection Charges*, 4 June 2009, p. 1.

⁷² *Ibid.*, pp. 1–2.

⁷³ *Ibid.*

⁷⁴ *Ibid.*, p. 2.

regards the introduction of its previous submissions; those previous submissions should not be taken to be before the ACCC for the purposes of these arbitrations.⁷⁵

98. The Herbert Geer parties consider that Telstra's attempt to introduce its previous submissions in such a "global way" may be an attempt to provide grounds for review on the basis of an allegation that the ACCC failed to consider all of the evidence put before it - particularly as the ACCC is provided with such vague references by Telstra.⁷⁶ The Herbert Geer parties submit that Telstra's claim that the ACCC is not entitled to draw any negative inference from Telstra's decision not to supplement information previously provided to the ACCC should be disregarded.⁷⁷ The Herbert Geer parties consider that if Telstra has relevant information, then it should provide it to the ACCC, otherwise the ACCC is entitled to consider that Telstra does not have the information or it does not support Telstra's arguments.⁷⁸
99. The ACCC agrees with the views outlined by the Herbert Geer parties that it is not possible for access seekers to respond to submissions which Telstra have made in previous arbitrations and that the directions require parties to attach extraneous materials. The ACCC has considered all of the evidence that has been put before it by the parties in these arbitrations, and will have regard to previous ACCC decisions where relevant and where it has identified it would do so in its Consultation Papers. However, previous submissions put forward by the parties to the ACCC in separate regulatory processes will not be regarded as being before the ACCC for the purposes of this arbitration unless these submissions have been distributed to the parties and the ACCC as an attachment with the applicable sections marked. As outlined above, the ACCC cannot be held responsible for making Telstra's case for it.
100. The Federal Court has also stated that paragraph 152DB(1)(b) recognises a "need to carefully and quickly inquire into and investigate the dispute and all matters affecting the merits, and fair settlement, of the dispute" although it does not in terms impose on ACCC an obligation so to act".⁷⁹ In this particular case, Lindgren J held that it was incumbent upon Telstra to provide information to the ACCC concerning LSS churn, and that it is not for the ACCC to guess what information Telstra would be seeking to rely upon.⁸⁰
101. The ACCC may have regard to, and rely upon, information used in previous ACCC processes, such as expert economic reports. However, the ACCC does not accept blanket submissions from parties referring to their previous views unless such submissions have been reproduced and distributed to both the ACCC and other parties to the dispute, with the applicable views that are to be relied upon clearly marked.

⁷⁵ Ibid.

⁷⁶ Ibid.

⁷⁷ Ibid.

⁷⁸ Ibid.

⁷⁹ *Telstra Corporation Limited v ACCC* [2008] FCA 1436 at [464].

⁸⁰ Ibid.

102. In a number of submissions made to the ACCC, Telstra has raised concerns regarding the ACCC's timetable for responses to its consultation papers. Telstra states that the timetable has been very short, and consequently it has been forced to abbreviate the material that it submits, and claims that it is neither efficient nor workable for Telstra to be expected to provide all of the evidence on all issues.
103. The Herbert Geer parties submit in reply that the ACCC's timetable was short but that Telstra was not disadvantaged because the same timetable was imposed on all of the parties.⁸¹
104. The ACCC considers that, whilst the timetables for submissions for some parts of the hearing have been relatively tight, all parties have been subject to the same timeframes and consequently, no one party has been disadvantaged when compared to the others.
105. The ACCC also notes that Telstra has made a number of submissions outside of the consultation process. It is the ACCC's view that submissions made outside of the consultation period may not be given equal weight. However in this instance, due to the length of the arbitration process all submissions have been taken into account and given equal weighting in this FD.

Oral Hearing

106. While the ACCC has no in-principle objection to holding oral hearings, the ACCC does not consider it is necessary in this instance. The ACCC does not consider that requiring the parties to prepare for and participate in oral hearings would bring material benefit to the ACCC's decision making.
107. In addition, the ACCC has conducted a number of inquiries regarding the LSS, leading up to and following the original declaration of the LSS, and is well acquainted with the issues that have been raised by the parties in their written submissions in the current arbitration. The ACCC also considers that oral hearings would add considerable delay and expense to the parties and the ACCC.
108. Accordingly, in this instance the ACCC has conducted these hearings on the papers.

Conclusion

109. The ACCC considers that it has conducted the arbitrations in this joint hearing in accordance with procedural fairness requirements in reaching a FD in this dispute, for the following reasons:
 - the ACCC has provided the parties with details of any credible, relevant and significant adverse information which it has, and which may affect the decision to be made, and given the parties an opportunity to respond; and

⁸¹ Herbert Geer Reply Submission, *Parity Mechanisms and Variation of Operational Documents*, 9 July 2009, p. 2.

- the ACCC is satisfied that the parties have been given a reasonable opportunity to be heard on the issues in dispute in this matter.

4.3. Subsection 152CR(1) criteria

4.3.1. Introduction

110. The ACCC must have regard to the criteria specified in subsection 152CR(1) of the Act in making a FD. These criteria are:
- whether the determination will promote the LTIE of carriage services or of services supplied by means of carriage services;
 - the legitimate business interests of the carrier or provider and the carrier's or provider's investment in facilities used to supply the declared service;
 - the interests of all persons who have rights to use the declared service;
 - the direct cost of providing access to the declared service;
 - the value to a party of extensions, or enhancement of capability, whose cost is borne by someone else;
 - the operational and technical requirements necessary for the safe and reliable operation of a carriage service, a telecommunications network or a facility;
 - the economically efficient operation of a carriage service, a telecommunications network or a facility.
111. The ACCC provided the parties with its preliminary views on how these criteria should be interpreted and sought the parties' comment.
112. The ACCC is satisfied with its approach towards the interpretation of the criteria listed in subsection 152CR(1) of the Act. Each of the criteria listed in that subsection has been taken into account in making the FDs.
113. The Federal Court has recognised the potential tension between the subsection 152CR(1) criteria and the need for the ACCC to give each of them varying weight in the decision-making process.⁸²

4.3.2. Paragraph 152CR(1)(a)

Submissions

114. Telstra submits that paragraph 152CR(1)(a) requires the ACCC to take into account the overall object of Part XIC in making a FD on access to a declared service.⁸³ Telstra submits section 152AB provides that this object has three component objectives, and relies on the Full Federal Court to support its view

⁸² Lindgren J in *Telstra Corporation Ltd v Australian Competition and Consumer Commission* [2008] FCA 1436 at [311]-[312]; Rares J in *Telstra Corporation Ltd v Australian Competition and Consumer Commission* [2008] FCA 1758 at [108] – [112].

⁸³ Telstra Primary Submission, *LSS Preliminary Matters and General Approach*, 18 May 2009, p. 14.

that each one of the objectives is a mandatory, relevant consideration in its own right.⁸⁴ Telstra sets out the objectives as being:

- promoting competition in markets for carriage services and services provided by means of carriage services: paragraph 152AB(2)(c) (**competition objective**);
- achieving any-to-any connectivity in relation to carriage services that involve communication between end-users: paragraph 152AB(2)(d); and
- encouraging economically efficient use of and investment in the infrastructure by which carriage services and services provided by means of carriage services are supplied, are capable of being supplied or are likely to become capable of being supplied: paragraph 152AB(2)(e) (**investment objective**).⁸⁵

115. Telstra also submits that in having regard to whether its FD will promote the LTIE, the ACCC must give fundamental weight to the consideration of each of these objectives in its decision making process.⁸⁶ Telstra also submits that each criterion in subsection 152CR(1) is not entitled to a fixed weighting in itself,⁸⁷ and that tensions or apparent tensions between different criteria need to be resolved through a careful weighing of each of them in the particular circumstances of the dispute.⁸⁸

116. The Herbert Geer parties submit that some elements of the subsection 152CR(1) criterion are to have primacy over other elements. The Herbert Geer parties submit that it was acknowledged by Lindgren J that:

The factor that should be given “fundamental weight” as against the others is the LTIE mentioned in para (a) of s152CR(1) because s152AB(1) provides that the object of Part XIC is “to promote the [LTIE]...”⁸⁹

117. The Herbert Geer parties submit that Lindgren J’s statement stands for the proposition that the ACCC should give “fundamental weight” to the LTIE over all other subsection 152CR(1) criterion and that the approach of his Honour is to be preferred.⁹⁰

118. The Nicholls Legal parties submit that they accept the propositions set out in the ACCC’s Consultation Paper concerning paragraph 152CR(1)(a), and make a number of general observations in relation to the LTIE taken from *Re*

⁸⁴ *Telstra Corporation Limited v Australian Competition Tribunal* [2009] FCAFC 23 at [260-270] cited in Telstra Primary Submission, *LSS Preliminary Matters and General Approach*, 18 May 2009, p. 14.

⁸⁵ Telstra Primary Submission, *LSS Preliminary Matters and General Approach*, 18 May 2009, p. 14.

⁸⁶ Ibid.

⁸⁷ Telstra Reply Submission, *LSS Preliminary Matters and General Approach*, 4 June 2009, p. 2.

⁸⁸ Ibid, p. 3.

⁸⁹ *Telstra Corporation v Australian Competition and Consumer Commission* [2008] FCA 1436 at [122] as cited in Herbert Geer Primary Submission, *General and Preliminary Matters*, 18 May 2009, p. 5.

⁹⁰ Herbert Geer Primary Submission, *General and Preliminary Matters*, 18 May 2009, p. 5.

Application by Seven Network Limited [2004] AComp 11 (the “Seven Network case”).⁹¹ These general observations concern the literal meanings of the words within the LTIE formulation. The Nicholls Legal parties also included an extract from the Seven Network case, which accepted the ACCC’s interpretation of the LTIE test in applying TSLRIC pricing principles, and provide a summary of the LTIE test.

Long Term and Short Term Effects

119. Telstra submits that, in consideration of each objective under section 152AB, the ACCC must direct its attention to the “long term”, being:

*the period over which the full effects of the ... decision will be felt, with players adjusting to the decision, including by entering or exiting the relevant markets.*⁹²

120. Telstra submits the concept of ‘long term’ should be interpreted in light of the duration of the investment by the access provider as well as the access seeker.⁹³ Telstra considers the critical issue is that an efficient provider of access recovers its costs from access prices and that below cost pricing has an adverse impact on long-term investment and, hence, on long term competition.⁹⁴ Telstra states that below cost pricing:

- undermines the incentives for access providers to continue to invest and discourages competitive build
- promotes free riding
- leads to unsustainable short term competition
- does not promote dynamic efficiency, and
- in the long run, results in allocative and productive inefficiencies.⁹⁵

121. Telstra submits that the Part XIC concept of “long term” should be equated with the economic concept of “long run”,⁹⁶ and therefore the short term effects on either the access provider or the access seeker are irrelevant in the consideration of this criterion.⁹⁷

122. The Nicholls Legal parties submit that Telstra has provided no authority or evidence to support its assertions that the ACCC must pay “particular regard to the long-term effects of its decision” and that a determination by the ACCC would encourage “short term profiteering and free riding”.⁹⁸ In their reply submission, the Nicholls Legal parties emphasise that the ACCC must have proper regard to the risk that a price that is set too high will discourage

⁹¹ Nicholls Legal Primary Submission, *General and Preliminary Matters*, 18 May 2009, pp. 3–6.

⁹² Telstra Primary Submission, *LSS Preliminary Matters and General Approach*, 18 May 2009, pp. 14–15.

⁹³ *Ibid.*, p. 15.

⁹⁴ *Ibid.*

⁹⁵ *Ibid.*, pp. 15–16.

⁹⁶ *Ibid.*, p. 15.

⁹⁷ *Ibid.*

⁹⁸ Nicholls Legal Reply Submission, *Preliminary Matters and General Approach*, 4 June 2009, p. 5.

investment by access seekers and will have an adverse effect on competition and the long-term interests of end-users.⁹⁹

123. The Herbert Geer parties submit that the ACCC must have regard to the long term effects of its decision but notes that in light of the Federal Government's National Broadband Network (NBN) proposal, long term or continued investment in Telstra's CAN is increasingly unlikely except to the extent that maintenance is required to ensure continued operational integrity until superseded by the NBN.¹⁰⁰

Promotion of competition and economically efficient use of, and investment in infrastructure

124. Telstra notes the observation of the Australian Competition Tribunal in *Telstra Corporation Ltd (No 3)* [2007] ACompT 3, regarding the competition objective:¹⁰¹

*[I]n this context we are considering the likelihood of the promotion of 'competition', not the promotion of competitors.*¹⁰²

125. Telstra notes Rares J's¹⁰³ observations, in relation to the investment objective, that competition cannot be promoted, and thus the LTIE may not be attained, if an infrastructure investment is not economically feasible for an efficient service provider to make or support.¹⁰⁴ Telstra is of the view that the clear implication of his Honour's observation is that the LTIE will not be promoted where the access provider is unable to recover the costs of providing access to its infrastructure.¹⁰⁵
126. The Nicholls Legal parties' submit that the Rares J's statement cited by Telstra is merely an endorsement of the principle that an access provider is "required to charge access prices at a level which both promotes competition and is economically efficient (in the sense that the access provider is not required to make a loss on its investment)".¹⁰⁶
127. The Nicholls Legal parties' submit that both the competition requirement and the efficiency requirement in section 152AB of the Act are intended to be a balancing act,¹⁰⁷ and that the "long-term interests of end-users" test should focus on the interests of end-users, not the interests of the access provider.¹⁰⁸ These parties further submit that in order to satisfy the LTIE test, the prices claimed by an access provider should be based on the forward-looking

⁹⁹ Ibid.

¹⁰⁰ Herbert Geer Reply Submission, *General and Preliminary Matters*, 4 June 2009, p. 2.

¹⁰¹ Telstra Primary Submission, *LSS Preliminary Matters and General Approach*, 18 May 2009, p. 16.

¹⁰² *Telstra Corporation Ltd (No 3)* [2007] ACompT 3 (17 May 2007) at [95].

¹⁰³ *Telstra Corporation v ACCC* [2008] FCA 1758 at [111] as cited in Telstra Primary Submission, *LSS Preliminary Matters and General Approach*, 18 May 2009, p. 16.

¹⁰⁴ Telstra Primary Submission, *LSS Preliminary Matters and General Approach*, 18 May 2009, p. 16.

¹⁰⁵ Ibid.

¹⁰⁶ Nicholls Legal Reply Submission, *Preliminary Matters and General Approach*, 4 June 2009, p. 7.

¹⁰⁷ Ibid.

¹⁰⁸ Ibid, p. 8.

efficient cost of providing the service.¹⁰⁹ In their view, costs which are based on actual costs, rather than forward-looking costs of an efficient operator, are likely to lead to over-investing in the relevant network, i.e. “gold-plating” the network.¹¹⁰

128. Telstra submits that the ACCC should ensure that it does not set prices which do not enable the access provider to recover its costs from the prices of access services, even in the short term.¹¹¹ Telstra further submits that while lower access prices may stimulate short-term but inefficient competition; this is not in the LTIE due to the significant adverse impact on future infrastructure build.¹¹²
129. Telstra submits that lower prices may promote certain competitors but such prices will not necessarily promote competition.¹¹³ Telstra seeks to rely on the Australian Competition Tribunal to support its view, where the Tribunal considered the LTIE and said, “*it is just as important that [Telstra] is able to compete on the basis of its own efficiencies in telecommunications markets as it is that other competitors are able to compete on the basis of their own efficiencies in these markets.*”¹¹⁴
130. The Herbert Geer parties submit that, given the NBN will eventually supersede Telstra’s CAN, economical operation of the CAN requires maintenance to ensure continued operation until it is replaced by the NBN (as opposed to further investment to expand the CAN).¹¹⁵ In response to Telstra’s submission that ‘below cost pricing’ damages the LTIE, the parties submit that they are seeking charges based on efficient costs and not below cost pricing.¹¹⁶ Their view is that charges that are set above efficient cost recovery are contrary to the LTIE by impeding the development of competition, resulting in inefficient use of the infrastructure used to provide services, higher prices, and less diversity in services.¹¹⁷
131. Aside from the issues raised above, the Herbert Geer parties¹¹⁸ and the Nicholls Legal parties¹¹⁹ agree with the ACCC’s assessment and discussion of this criterion in its Consultation Paper.¹²⁰

¹⁰⁹ Nicholls Legal Primary Submission, *Preliminary Matters and General Approach*, 18 May 2009, p. 12.

¹¹⁰ *Ibid.*, p. 13.

¹¹¹ Telstra Primary Submission, *LSS Preliminary Matters and General Approach*, 18 May 2009, p. 16.

¹¹² *Ibid.*

¹¹³ *Ibid.*

¹¹⁴ *Telstra Corporation Ltd (No 3)* [2007] A Comp T 3 at [101] as cited in Telstra Primary Submission, *Preliminary Matters and General Approach*, 18 May 2009, p. 16.

¹¹⁵ Herbert Geer Reply Submission, *General and Preliminary Matters*, 4 June 2009, p. 2.

¹¹⁶ *Ibid.*

¹¹⁷ *Ibid.*, p. 3.

¹¹⁸ Herbert Geer Primary Submission, *General and Preliminary Matters*, 18 May 2009, p. 3.

¹¹⁹ Nicholls Legal Primary Submission, *Preliminary Matters and General Approach*, 18 May 2009, p. 3.

¹²⁰ ACCC Consultation Paper, p. 7.

ACCC view

LTIE

132. The ACCC has published a guideline explaining what it understands by the phrase ‘long-term interests of end-users’ in administering its declaration responsibilities.¹²¹ The ACCC considers that a similar interpretation is appropriate in making a FD in this arbitration.
133. In the ACCC’s view, terms and conditions of access promote the interests of end-users if they are likely to contribute towards the provision of goods and services at lower prices, higher quality or towards the provision of greater diversity of goods and services. In the context of making model non-price terms and conditions, the ACCC has expressed the view that:

*. . . as a general proposition, terms and conditions of access will best promote the LTIE where they facilitate access seekers obtaining core services that are equivalent to the services that the access provider supplies to itself, in terms of technical and operational quality of services and the manner and timing of access.*¹²²

134. As noted by the Nicholls Legal parties, the Tribunal has offered guidance in its interpretation of the phrase ‘long term interests of end-users’ (in the context of access to subscription television services):

Having regard to the legislation, as well as the guidance provided by the Explanatory Memorandum, it is necessary to take the following matters into account when applying the touchstone – the long-term interests of end-users:

**End-users: “end-users” include actual and potential [users of the service] ...*

**Interests: the interests of the end-users lie in obtaining lower prices (than would otherwise be the case), increased quality of service and increased diversity and scope in product offerings. ... [T]his would include access to innovations ... in a quicker timeframe than would otherwise be the case ...*

**Long-term: the long-term will be the period over which the full effects of the ... decision will be felt. This means some years, being sufficient time for all players (being existing and potential competitors at the various functional stages of the ... industry) to adjust to the outcome, make investment decisions and implement growth – as well as entry and/or exit – strategies.*¹²³

¹²¹ ACCC, *Telecommunications services — Declaration Provisions: A Guide to the Declaration Provisions of Part XIC of the Trade Practices Act*, July 1999.

¹²² ACCC Report, *Final determination – Model Non-price Terms and Conditions*, November 2008, p. 7.

¹²³ *Seven Network Limited (no 4)* [2004] ACompT 11 at [120].

135. It is the ACCC's view that the consideration of the long-term does not necessarily exclude consideration of short term effects.
136. To consider the likely impact of particular terms and conditions on the LTIE, the Act requires the ACCC to have regard to whether the terms and conditions are likely to result in the achievement of the following objectives:
- promoting competition in markets for carriage services and services supplied by means of carriage services (listed services)
 - achieving any-to-any connectivity, and
 - encouraging the economically efficient use of, and economically efficient investment in:
 - the infrastructure by which listed services are supplied, and
 - any other infrastructure by which listed services are, or are likely to become, capable of being supplied.¹²⁴

Promoting competition in markets for LSS

137. In determining the extent to which terms and conditions of access are likely to result in the objective of promoting competition, regard must be had to the extent to which the terms and conditions contained in the FD will remove obstacles to end-users of gaining access to listed services.¹²⁵
138. Regarding the LSS, the ACCC considers that it is relevant to consider markets in which DSL services are supplied (retail and/or wholesale), and to consider whether the terms and conditions contained in the FD will remove obstacles to end-users gaining access to DSL services.
139. This is because the LSS is an input to the provision of carriage services on the non-voiceband frequency spectrum of the line, and this spectrum is typically used to provide DSL services. This approach is consistent with the approach adopted by the Australian Competition Tribunal.¹²⁶
140. Obstacles to accessing DSL services could be in the nature of DSL infrastructure not being available in an end-user's area, or the price of services that are available being too high, or their quality (measured by reference to, for instance, data transfer rates) being too low.
141. It is also possible that service providers will offer voice over internet protocol (VoIP) services over an LSS. However, the ACCC does not consider that, over the period to which the FD relates, the LSS will be commonly used in order to supply VoIP services. This is due to the specification in the LSS declaration that Telstra is only obliged to supply the LSS where a PSTN voice service is already being supplied on the line.
142. The ACCC considers that, in assessing whether particular terms and conditions of access will promote competition, it is relevant to consider the

¹²⁴ *Trade Practices Act 1974*, subsection 152AB(2).

¹²⁵ *Ibid*, subsection 152AB(4).

¹²⁶ *Re Telstra Corporation Ltd ACompT 4* [2006] at [97], [149].

LSS market as set out above and to consider whether the terms and conditions will remove obstacles to end-users gaining access to the services supplied in those markets.

143. The ACCC also considers that promotion of competition should allow the access provider to recover their efficiently incurred costs, whilst allowing the access seekers to compete on their respective merits downstream. This is likely to provide an incentive for access seekers to compete – otherwise, if costs are too high, then access seekers will not have the means or the incentive to compete.
144. The ACCC agrees with Telstra’s view that LTIE will not be promoted where the access provider is unable to recover the costs of providing access to its infrastructure. However, the ACCC also agrees with access seekers views that the recovery of such costs should be limited to those that are efficiently incurred.
145. The ACCC considers that its approach promotes LSS /DSL competition, as it removes obstacles to service providers in gaining access, and facilitates prices that reflect efficient costs of supply which will best promote effective competition in the supply of broadband/DSL services. Prices based on efficient costs of supply best enable access seekers to compete on an equal footing with other suppliers, including the access provider, in the supply of downstream DSL services.

Achieving any-to-any connectivity

146. In determining whether the particular terms and conditions of access achieve the objective of any-to-any connectivity, the ACCC is required to consider whether the terms and conditions contained in the FD permit each end-user who is supplied with a carriage service that involves communication between end-users is able to communicate, by means of that service, with each other end-user who is supplied with the same service or a similar service, whether or not the end-users are connected to the same telecommunications network.¹²⁷
147. All of the access seekers submit that they agree with the ACCC’s view that this criterion is unlikely to be of direct relevance in determining the terms and conditions of access in these arbitrations.¹²⁸ Telstra disagreed, and submits the ACCC must give fundamental weight to each of the three component objectives of the LTIE (including any-to-any connectivity)¹²⁹
148. The ACCC considers that this criterion is relevant to ensuring that the terms and conditions it determines would not create obstacles for the achievement of any-to-any connectivity. Whilst the ACCC’s role is not to promote any-to-any connectivity, for each of the terms and conditions in the FD, the ACCC has undertaken an assessment against this criteria and has determined that the

¹²⁷ *Trade Practices Act 1974*, subsection 152AB(8).

¹²⁸ Nicholls Legal Primary Submission, *Preliminary Matters and General Approach*, 18 May 2009, p. 12; Herbert Geer Primary Submission, *General and Preliminary Matters*, 18 May 2009, p. 3.

¹²⁹ Telstra Primary Submission, *LSS Preliminary Matters and General Approach*, 18 May 2009, p. 4.

terms and conditions do not negatively impact the achievement of any-to-any connectivity.

Encouraging economically efficient use of, and investment in infrastructure

149. In determining the extent to which terms and conditions of access are likely to result in the achievement of the objective of encouraging the economically efficient use of and investment in infrastructure, regard must be had to:
- whether it is, or is likely to become, technically feasible for the services to be supplied and charged for, having regard to:
 - the technology that is in use, available or likely to become available
 - whether the costs involved in supplying and charging for, the services are reasonable or likely to become reasonable, and
 - the effects or likely effects that supplying and charging for the services would have on the operation or performance of telecommunications networks
 - the legitimate commercial interests of the supplier or suppliers of the services, including the ability of the supplier or suppliers to exploit economies of scale and scope
 - incentives for investment in the infrastructure by which services are supplied; and any other infrastructure by which services are, or are likely to become, capable of being supplied, and
 - the risks involved in making the investment.¹³⁰
150. The objective of encouraging the ‘economically efficient use of, and economically efficient investment in ... infrastructure’ requires an understanding of the concept of economic efficiency. Economic efficiency consists of three components:
- Productive efficiency – This is achieved where individual firms produce the goods and services that they offer at least cost;
 - Allocative efficiency – This is achieved where the prices of resources reflect their underlying costs so that resources are then allocated to their highest valued uses (i.e. those that provide the greatest benefit relative to costs); and
 - Dynamic efficiency – This reflects the need for industries to make timely changes to technology and products in response to changes in consumer tastes and in productive opportunities.
151. On the issue of efficient investment, it has been stated by the Australian Competition Tribunal that:

*...An access charge should be one that just allows an access provider to recover the costs of efficient investment in the infrastructure necessary to provide the declared service.*¹³¹

*...efficient investment by both access providers and access seekers would be expected to be encouraged in circumstances where access charges were set to ensure recovery of the efficient costs of investment (inclusive of a normal return on investment) by the access provider in the infrastructure necessary to provide the declared service.*¹³²

*...access charges can create an incentive for access providers to seek productive and dynamic efficiencies if access charges are set having regard to the efficient costs of providing access to a declared service.*¹³³

152. The ACCC considers that in the context of the present arbitrations it should set access charges at a level which promotes efficient investment in infrastructure by both the access provider and access seeker.
153. The ACCC considers that it is relevant in these arbitrations to consider the use of and investment in infrastructure used to supply the LSS, as well as the infrastructure used to supply carriage and/or content services over the LSS, for example DSL access multiplexers ('DSLAMs') and/or voice switches. This is consistent with the approach adopted by the Australian Competition Tribunal in its consideration of the ULLS¹³⁴ and LSS.¹³⁵

Other matters

Issues of Weighting of subsection 152CR(1) criterion

154. The ACCC notes the Herbert Geer parties' submission that Lindgren J in *Telstra Corporation v Australian Competition and Consumer Commission* is advocating that the LTIE is to be given "fundamental weight" as against the other criteria because subsection 152AB(1) provides that the object of Part XIC "is to promote the [LTIE]". The Herbert Geer parties also submit this view in relation to the weight to be given to paragraph 152CR(1)(d) – the direct costs of providing access to the declared service.¹³⁶
155. However, the ACCC considers that the Federal Court has confirmed that the weight given to all the relevant considerations in the subsection 152CR(1) criterion is not fixed, and the weighting of each factor will depend upon the circumstances of the access dispute.¹³⁷ On this basis, the ACCC is of the view that the LTIE criterion in paragraph 152CR(1)(a) should not be given "fundamental weight" in the consideration of the subsection 152CR(1) criteria.
156. The ACCC agrees with Telstra's view that the ACCC's consideration of the three component objectives of section 152AB is not to be given a fixed

¹³⁰ *Trade Practices Act 1974*, subsections 152AB(6) and (7A).

¹³¹ *Telstra Corporation Ltd (No. 3)* [2007] ACompT 3 at [159].

¹³² *Ibid* at [164].

¹³³ *Ibid*.

¹³⁴ *Ibid* at [158] to [161].

¹³⁵ *Re Telstra Corporation Ltd* ACompT 4 [2006] at [104].

¹³⁶ Herbert Geer Primary Submission, *General and Preliminary Matters*, 18 May 2009, p. 3.

¹³⁷ *Telstra Corporation Ltd v Australian Competition and Consumer Commission* [2008] FCA 1758 at [112].

weighting, and the consideration of each objective requires careful weighing of each of them in the particular circumstances of the access dispute.¹³⁸

Impact of the NBN

157. The ACCC notes the Herbert Geer parties' views that future investment in the CAN is likely to be limited to maintenance. However, the ACCC must conduct these arbitrations on the factual material and evidence before it and not on a proposed rollout.

Conclusion

158. The Federal Court has recognised the potential tension between the paragraph 152CR(1)(a) matters and the need for the ACCC to give each of them varying weight in the decision-making process.¹³⁹
159. The ACCC is satisfied with its approach towards the interpretation of the criteria listed in paragraph 152CR(1)(a) of the Act. In summary, this approach is as follows:
1. Not to give fundamental weight to paragraph 152CR(1)(a) in the LTIE criteria – but rather give weighting based on the circumstances of the access dispute
 2. To only consider the factual information which is before the ACCC in the assessment of the impact of the NBN
 3. To not discount short term effects in the consideration of the LTIE, and
 4. To have regard to whether the terms and conditions of the FD will remove obstacles to service providers gaining access to services.

4.3.3. Paragraph 152CR(1)(b)

Submissions

160. Telstra notes its agreement with the Australian Competition Tribunal statement that:

*When looked at through the prism of a charge term and condition of access and its relationship to a carrier's cost structure, [the expression 'legitimate business interest'] is a reference to the interest of a carrier in recovering the costs of its infrastructure and its operating costs and obtaining a normal return on its capital.*¹⁴⁰

161. Telstra also states that:

¹³⁸ Telstra Primary Submission, *LSS Preliminary Matters and General Approach*, 18 May 2009, p. 8.

¹³⁹ Lindgren J in *Telstra Corporation Ltd v Australian Competition and Consumer Commission* [2008] FCA 1436 at [311]-[312]; Rares J in *Telstra Corporation Ltd v Australian Competition and Consumer Commission* [2008] FCA 1758 at [108] – [112].

¹⁴⁰ *Re Telstra Corporation Ltd* [2006] ACompT 4 at [89].

*An access provider would not invest in infrastructure if it was unable to achieve a return that recovered its costs and enabled it to make a return commensurate with the risk involved.*¹⁴¹

162. The Herbert Geer parties submit that while they agree that Telstra should be able to recover returns from its investment, access charges that are in excess of normal commercial returns are an abuse of Telstra's dominant position and should not be regarded as legitimate.¹⁴² The Herbert Geer parties also submit that non-price terms which unnecessarily limit the access seekers ability to utilise the ULLS or LSS or to compete with Telstra should not be regarded as legitimate even if such terms are likely to be of considerable benefit to Telstra's commercial interests.¹⁴³
163. The Nicholls Legal parties agree with the ACCC's views as expressed in the Consultation Paper, that the carrier should be able to earn a normal commercial return on its investment, though not compensation for loss of any monopoly profits.¹⁴⁴ The Nicholls Legal parties submit that it is not a legitimate business interest of Telstra, within the meaning of the Act, to continue to derive supra-normal profits from the LSS.¹⁴⁵

ACCC view

164. As outlined in the ACCC's Access Dispute Guidelines (the Guidelines), the ACCC considers it is a legitimate interest for an access provider to earn a normal commercial return on its investment.¹⁴⁶ In this regard, the ACCC is of the view that the concept of 'legitimate business interests' should be interpreted in a manner consistent with the phrase 'legitimate commercial interests' used elsewhere in Part XIC of the Act.¹⁴⁷ For completeness, the ACCC notes that it would be a legitimate interest for an access provider to seek to recover its costs as well as a normal commercial return on investment having regard to the relevant risk involved.
165. The ACCC also considers that an access price should not be inflated to recover any profits the access provider (or any other party) may lose in a dependent market as a result of the provision of access.¹⁴⁸
166. Similarly, the Australian Competition Tribunal has stated that:

The expression "legitimate business interests" is a general expression and is somewhat open-textured. What is "legitimate" conduct or a "legitimate" interest in business may be open to a number of differing interpretations. We consider that a carrier's "legitimate business

¹⁴¹ Telstra Primary Submission, *LSS Preliminary Matters and General Approach*, 18 May 2009, p. 17.

¹⁴² Herbert Geer Primary Submission, *General and Preliminary Matters*, 18 May 2009, p. 3.

¹⁴³ Ibid.

¹⁴⁴ Nicholls Legal Primary Submission, *Preliminary Matters and General Approach*, 18 May 2009, p. 18.

¹⁴⁵ Ibid.

¹⁴⁶ ACCC, *Resolution of telecommunications access disputes – a guide*, March 2004 (Revised), ('Access Dispute Guidelines'), p. 56.

¹⁴⁷ Ibid.

¹⁴⁸ Ibid, p. 10.

*interests” is a reference to what is regarded as allowable and appropriate in commercial or business terms. In the context of s 152AH(1)(b), the expression connotes something which is allowable and appropriate when negotiating access to the carrier’s infrastructure. When looked at through the prism of a charge term and condition of access and its relationship to a carrier’s cost structure, it is a reference to the interest of a carrier in recovering the costs of its infrastructure and its operating costs and obtaining a normal return on its capital.*¹⁴⁹

167. The Tribunal expressly affirmed this approach in its consideration of the ULLS.¹⁵⁰

168. As the ACCC has previously stated in the context of model non-price terms and conditions, it considers that:

*...this consideration supports the view that model terms and conditions should not unduly constrain an access provider’s ability to conduct its overall business operations.*¹⁵¹

169. The ACCC generally agrees with the parties submissions that it is in the legitimate interest for an access provider to be able to earn a normal economic return on its investment. The ACCC considers that the FD is consistent with Telstra’s legitimate business interests.

4.3.4. Paragraph 152CR(1)(c)

Submissions

170. The Herbert Geer and the Nicholls Legal parties agree with the ACCC’s views as set out in its Consultation Paper that:¹⁵²

- access seekers have an interest in being able to compete for end-users on their relative merits, and
- terms and conditions that favour one or more service providers over others distorts competition.

171. The Herbert Geer parties submit that access seekers have a right to use the LSS to compete directly with Telstra in the broadband market.¹⁵³ The Herbert Geer parties also submit that terms and conditions that favour one or more service providers over others distort the competitive process and affect access seekers’ legitimate business interests, as they are unable to win customers, utilise the declared services to their full potential or recoup the returns that should be possible under a competitive environment.¹⁵⁴ The Nicholls Legal

¹⁴⁹ *Re Telstra Corporation Ltd* [2006] ACompT 4 at [89].

¹⁵⁰ *Telstra Corporation Ltd (No 3)* [2007] ACompT 3 at [180].

¹⁵¹ ACCC Report, *Final determination – Model Non-price Terms and Conditions*, 2008, p. 8.

¹⁵² Herbert Geer Primary Submission, *General and Preliminary Matters*, 18 May 2009, pp. 3–4; Nicholls Legal Primary Submission, *Preliminary Matters and General Approach*, 18 May 2009, pp. 18–19.

¹⁵³ Herbert Geer Primary Submission, *General and Preliminary Matters*, 18 May 2009, pp. 3–4.

¹⁵⁴ *Ibid.*

parties submit that access seekers' ability to compete in the market for services supplied by means of the LSS would be enhanced by access prices set in accordance with TSLRIC pricing principles.¹⁵⁵

172. Telstra contends that paragraph 152CR(1)(c) contemplates a balancing of interests between the rights of end-users and the rights of access seekers as the criterion refers to "all persons" which would suggest that it contemplates persons beyond access seekers.¹⁵⁶
173. Telstra submits that although it is arguably in the short term-interests of persons who have rights to use the declared service for the ULLS and LSS to be supplied at below-cost prices, this is not in the long-term interests of either access seekers or end-users.¹⁵⁷ Telstra contends that if access seekers do not have to bear the full costs of the LSS they acquire from Telstra (and therefore will be disincented from building alternative infrastructure that may deliver alternative services), Telstra will be disincented from maintaining, improving or investing in further networks.¹⁵⁸ This, in Telstra's view will mean that in the long-term, investment in infrastructure will be hampered, and end-users will not receive the new services and technologies that proper investment incentives would bring.¹⁵⁹

ACCC view

174. The *Access Dispute Guidelines* state that parties who have rights to currently use a declared service will generally use that service as an input to supply carriage services, or a service supplied by means of carriage services, to end-users. The ACCC believes that these people have an interest in being able to compete for the custom of end-users on the basis of their relative merits.¹⁶⁰
175. The ACCC does not consider, however, that this criterion calls for consideration to be given to the interests of users of 'downstream' services, as they are not access seekers. The interests of end-users are already to be considered under other criteria.
176. The Australian Competition Tribunal has also provided views on this criterion (albeit when it was discussing the same criterion at paragraph 152AH(1)(c) of the Act). In assessing whether an approach that led to a higher LSS Annual Charge should be adopted, the Tribunal stated:

...s 152AH(1)(c) requires us to have regard to the interests of persons who have rights to use Telstra's LSS, that is, access seekers. . . A higher monthly charge would not be in the interests of an access seeker because it would raise its costs and inhibit its ability to compete with Telstra over

¹⁵⁵ Nicholls Legal Primary Submission, *Preliminary Matters and General Approach*, 18 May 2009, p. 19.

¹⁵⁶ Telstra Primary Submission, *LSS Preliminary Matters and General Approach*, 18 May 2009, p. 17.

¹⁵⁷ Ibid.

¹⁵⁸ Telstra Reply Submission, *LSS Preliminary Matters and General Approach*, 4 June 2009, p. 3.

¹⁵⁹ Ibid.

¹⁶⁰ ACCC, *Access Dispute Guidelines*, p. 57.

*the provision of retail services to end-users that could be provided using the LSS.*¹⁶¹

177. In that decision, the Tribunal also stated when discussing the same criterion at paragraph 152AH(1)(c) of the Act:

*The interests of persons who have a right to use the LSS, access seekers, are served by an access price that enables them to compete on their merits (that is, on the basis of their own efficiency) in downstream markets.*¹⁶²

178. As the ACCC has previously stated in the context of model non-price terms and conditions, it considers that:

...this consideration *supports* the view that model terms and conditions should not place unnecessary or excessive obligations on access seekers, as these could exclude them from entering and supplying a market and displacing less efficient service providers.¹⁶³

179. The ACCC acknowledges that it is not in the long-term interests for access seekers or end-users to be supplied with the LSS at below-cost prices. However, the ACCC considers that the LSS charges that it has applied in this FD are not below cost, and that Telstra's concerns are not justified.

4.3.5. Paragraph 152CR(1)(d)

Submissions

180. Telstra notes in its submission that it agrees with the ACCC's definition of "direct costs".¹⁶⁴ Telstra submits that paragraph 152CR(1)(d) should be read consistently with the Commission's obligation under paragraph 152CQ(1)(f) of the Act to refrain from making any determination under which a party would be required to bear an unreasonable amount of the costs associated with extending or enhancing a facility.¹⁶⁵
181. Telstra submits that the direct costs of providing the LSS should also include a contribution to common costs, being the costs incurred in providing the LSS which is incurred in common with the provision of other services. In support of this submission, Telstra cites the Tribunal's decision in *Application by Optus Mobile Pty Limited and Optus Networks Pty Limited (2006) ACompT 8* where the Tribunal recognised that access pricing should also incorporate an appropriate allocation of fixed and common costs efficiently incurred in the long run. The Tribunal in discussing fixed and common costs, made the following statement:

¹⁶¹ *Re Telstra Corporation Ltd* [2006] ACompT 4 at [91].

¹⁶² *Ibid* at [138].

¹⁶³ ACCC Report, *Final determination – Model Non-price Terms and Conditions*, November 2008, p. 8.

¹⁶⁴ Telstra Primary Submission, *LSS Preliminary Matters and General Approach*, 18 May 2009, p. 17.

¹⁶⁵ *Ibid*.

*[D]irect costs are a reference to the total costs of providing access to the relevant declared service which ordinarily include an appropriate allocation of FCCs [fixed and common costs] because without the existence of the assets in respect of which the FCCs are incurred, the relevant access could not be provided.*¹⁶⁶

182. The Herbert Geer parties agree that the costs of complying with a FD are relevant to Telstra's direct costs and therefore should be considered.¹⁶⁷ In the course of establishing direct costs, the Herbert Geer parties are of the view that Telstra is seeking to misconstrue Rares J's judgement in *Telstra Corporation v ACCC* [2008] FCA 1758 to firstly overinflate the costs that it may incur and secondly, argue that anything more than minimal costs are contrary to paragraph 152CQ(1)(f).¹⁶⁸
183. The Herbert Geer parties submit that, in the course of considering subsection 152CR(1) factors, the Commission must give "fundamental weight" to the LTIE (152CR(1)(a)) and disagree with the ACCC's view that the weight given to the direct costs criterion is not fixed, and that the weighting of each factor will depend upon the circumstances of the access dispute.¹⁶⁹ The Herbert Geer parties also submit this view for the weighting to be given in the LTIE criteria. The Herbert Geer parties cite the following statement of Lindgren J in *Telstra Corporation v Australian Competition and Consumer Commission*¹⁷⁰ to support their assertion and submit that His Honour's approach is to be preferred (their emphasis):

*Section 152CR(1) provides that in making a final determination [the] ACCC must take into account the seven matters listed in paras (a)-(g) of that subsection... **The factor that should be given "fundamental weight" as against the others is the LTIE mentioned in para (a) of s 152CR(1) because s 152AB(1) provides that the object of Part XIC is "to promote the [LTIE]...***¹⁷¹

184. The Herbert Geer parties submit this is the correct approach because Rares J approach was based on an application of the High Court decisions in *Minister for Aboriginal Affairs and Another v Peko-Wallsend Limited and Others*¹⁷² (Peko-Wallsend case) and *Foster v Minister for Customs and Justice*,¹⁷³ neither of which involved consideration of the effect of an equivalent provision to section 152AB. In support of this proposition, the parties rely on the judgement of Mason J in the Peko-Wallsend case where his Honour stated (their emphasis):

¹⁶⁶ *Application by Optus Mobile Pty Limited & Optus Networks Pty Ltd* [2006] ACompT 8, at [137] cited in Telstra Primary Submission, *LSS Preliminary Matters and General Approach*, 18 May 2009, pp. 17–18.

¹⁶⁷ Herbert Geer Primary Submission, *General and Preliminary Matters*, 18 May 2009, p. 4; Herbert Geer Reply Submission, *General and Preliminary Matters*, 4 June 2009, p. 2.

¹⁶⁸ Herbert Geer Reply Submission, *General and Preliminary Matters*, 4 June 2009, p. 2.

¹⁶⁹ Herbert Geer Primary Submission, *General and Preliminary Matters*, 18 May 2009, p. 4. [2008] FCA 1436 at [122].

¹⁷⁰ Herbert Geer Primary Submission, *General and Preliminary Matters*, 18 May 2009, p. 5.

¹⁷¹ 162 CLR 24.

¹⁷² 200 CLR 442.

*It follows that, in the absence of any statutory indication of the weight to be given to the various considerations, it is generally for the decision-maker and not the court to determine the appropriate weight to be given to the matters which are required to be taken into account in exercising the statutory power.*¹⁷⁴

185. The Nicholls Legal parties accept the propositions made by the ACCC in relation to this criterion but also contend that the LSS access charges must be cost-based.¹⁷⁵ The Nicholls Legal parties also submit that the ACCC's approach in the LSS pricing principles is the best available proxy for measuring the direct costs of providing the declared service.¹⁷⁶

ACCC view

186. The ACCC considers that paragraph 152CR(1)(d) requires the ACCC to have regard to the actual direct costs of Telstra complying with any FD the ACCC may make. The ACCC also considers that the direct costs of providing access to a declared service are those incurred (or caused) by the provision of access and includes the incremental costs of providing that access.
187. The ACCC notes the Tribunal's view that the direct costs criterion 'is concerned with ensuring that the costs of providing the service are recovered'.¹⁷⁷ The Federal Court has subsequently held that, in the context of an access dispute over price terms, the criterion inevitably raises some question of cost recovery.¹⁷⁸ However, in the context of a non-price dispute, the Court has more recently held that this criterion requires more than considering whether direct costs would be recovered as 'the incurring of a cost is different from its possible recovery'.¹⁷⁹
188. For this reason, the ACCC proposes to consider the level of direct costs of providing access in the prices set in this FD.

Level of direct costs

189. As the ACCC has previously stated in the context of model non-price terms and conditions, it considers that this criterion will support an approach that keeps the level of costs to the minimum necessary.¹⁸⁰
190. The Federal Court has held that the direct costs criterion requires analysis and consideration of Telstra's direct costs of compliance with a FD, and for real

¹⁷⁴ *Minister for Aboriginal Affairs and Another v Peko-Wallsend Limited and Others* 162 CLR 24 at [41] cited in Herbert Geer Primary Submission, *General and Preliminary Matters*, 18 May 2009, p. 5.

¹⁷⁵ Nicholls Legal Primary Submission, *Preliminary Matters and General Approach*, 18 May 2009, p. 19.

¹⁷⁶ *Ibid*, p 20.

¹⁷⁷ *Re Telstra Corporation Ltd* [2006] ACompT 4 at [92].

¹⁷⁸ *Telstra Corporation Ltd v ACCC* [2008] FCA 1436 at [309].

¹⁷⁹ *Telstra Corporation Ltd v ACCC* [2008] FCA 1758 at [117].

¹⁸⁰ ACCC Report, *Final determination – Model Non-price Terms and Conditions*, November 2008, p. 8.

consideration to be given to what Telstra would be required to incur directly as the costs of implementing what the ACCC was considering.¹⁸¹

191. Further, in the context of a dispute over price, the Federal Court has recognised a requirement to:

*...take [the direct costs to Telstra of providing access] into account as a factor in Telstra's favour in the sense of a factor contributing positively to the amount of the periodic charge to be fixed.*¹⁸²

192. However, it is the ACCC's view that the direct costs criterion does not extend to permitting compensation for loss of any 'monopoly profits' that occurs as a result of increased competition. In this regard, the Explanatory Memorandum to the *Trade Practices Amendment (Telecommunications) Bill 1996* states:

*...the 'direct' costs of providing access are intended to preclude arguments that the provider should be reimbursed by the third party seeking access for consequential costs which the provider may incur as a result of increased competition in an upstream or downstream market.*¹⁸³

193. The Tribunal has also confirmed that 'the effects of competition should not be considered as a direct cost of providing access to the ULLS'.¹⁸⁴

194. The ACCC acknowledges that the Tribunal and Federal Court have provided conflicting views over whether indirect costs should be considered under the direct costs criterion.

195. The ACCC notes that the Tribunal in *Optus Mobile* expressed the view that "direct costs" include not only the incremental costs of supplying a service but also a mark-up on those costs for a contribution for the indirect costs of supplying a service.¹⁸⁵ The Tribunal considered it appropriate for direct costs to include the total costs of providing access to the relevant declared service which ordinarily included an appropriate allocation of fixed and common costs because without the existence of the assets in respect of which these 'indirect' costs are incurred, the relevant access could not be provided.¹⁸⁶

196. Before the Federal Court, Telstra sought to rely upon the Tribunal's statement in *Optus Mobile* when submitting that the ACCC is required to take into account the direct costs of providing access to the LSS under paragraph 152CR(1)(d). The Federal Court has described this passage of the *Optus Mobile* decision as 'not helpful, if for no other reason than because it related to something that was not in issue between the parties' in that case.¹⁸⁷

¹⁸¹ *Telstra Corporation Ltd v ACCC* [2008] FCA 1758 at [117]-[118].

¹⁸² *Telstra Corporation Ltd v ACCC* [2008] FCA 1436 at [309].

¹⁸³ Explanatory Memorandum to the *Trade Practices Amendment (Telecommunications) Bill 1996*, p. 43.

¹⁸⁴ *Telstra Corporation Ltd (No 3)* [2007] ACompT 3 at [272].

¹⁸⁵ *Re Optus Mobile Pty Limited and Optus Networks Pty Limited* [2006] ACompT 8 at [137].

¹⁸⁶ *Ibid.*

¹⁸⁷ *Telstra Corporation Ltd v ACCC* [2008] FCA 1436 at [308].

197. The ACCC's view in this arbitration is to consider costs indirectly caused by providing access. Although it is arguable whether this particular criterion requires the ACCC to have regard to indirect costs, taking these costs into account would appear consistent with other criteria, such as the legitimate business interests of the access provider.
198. The ACCC considers that proper consideration of Telstra's direct costs requires the ACCC to critically assess the parties' cost claims and come to its own view of the likely scale of costs to be incurred from the implementation of the FD. The ACCC notes its ability to inform itself of any matter relevant to the dispute in any way it thinks appropriate.¹⁸⁸

Recoverability of direct costs

199. After the ACCC has determined the level of direct costs, it has to consider whether these direct costs could be recovered. The ACCC notes that the Tribunal and Federal Court have considered the allocation and recovery of direct costs. Both the Tribunal and Federal Court have noted that direct costs could conceivably be allocated (and hence recovered) in a number of ways and from numerous sources, and that adopting any of these approaches to recovery is consistent with the direct costs criterion.¹⁸⁹ The Tribunal has stated, in the context of a dispute over price:

...Telstra's approach to estimating a per unit cost is likely to be consistent with ensuring recovery only of direct costs. However, while direct costs will be incurred by Telstra in order to provide the declared service, there are a number of cost allocation methods other than that adopted by Telstra (including those suggested by the ACCC and other interveners in this matter) that would enable it to recover the direct costs of investment in infrastructure necessary to provide a LSS.¹⁹⁰

200. Similarly, the Tribunal in its assessment of Telstra's proposed averaged ULLS price structure noted that the pricing structure chosen would not have an impact on the direct costs criterion, as long as overall costs are recovered:

...the direct costs of providing access to the service are likely to remain unchanged irrespective of whether Telstra were to set averaged or de-averaged charges. Averaged and de-averaged ULLS charges are merely different ways of seeking to recover these costs.¹⁹¹

201. The Federal Court has confirmed that, in assessing recoverability of direct costs, other sources of revenue can be considered in addition to access charges. Lindgren J held that:

In my opinion, there is no basis for saying, however, that ACCC misconstrued s 152CR(1)(d) by not assessing recoverability exclusively through the charge to be made by Telstra for the LSS alone. I do not

¹⁸⁸ Trade Practices Act 1974, paragraph 152DB(1)(c).

¹⁸⁹ Re Telstra Corporation Ltd [2006] ACompT 4 at [139]; Telstra Corporation Ltd v ACCC [2008] FCA 1436 at [305].

¹⁹⁰ Re Telstra Corporation Ltd [2006] ACompT 4 at [139].

¹⁹¹ Telstra Corporation Ltd (No 3) [2007] ACompT 3 at [274].

*accept that s 152CR(1)(d), on its proper construction, requires such an approach.*¹⁹²

202. The ACCC agrees with Telstra's submission that paragraph 152CR(1)(d) should be read consistently with paragraph 152CQ(1)(f) in determining access prices, but considers that there is already an inclusion of a contribution to common costs through the '+' in TSLRIC+.

4.3.6. Paragraph 152CR(1)(e)

Submissions

203. Telstra submits that the ACCC's statement in its Consultation Paper that "it is unlikely that this criterion will be relevant in making the final determinations in these access disputes" is incorrect.¹⁹³ Further, Telstra submits that this criterion is relevant to a number of terms and conditions included in the ACCC's DFDs which, if made final, would require Telstra to make changes to its IT systems and otherwise, at a significant cost, enhance the capability of its facilities in order to comply.¹⁹⁴
204. The Herbert Geer and the Nicholls Legal parties agree with the ACCC's position that the ACCC will have regard to this criterion should it be relevant to an aspect of access that is in dispute, but that it is unlikely that this criterion will be relevant in making FDs in these access disputes.¹⁹⁵

ACCC view

205. As the ACCC has previously stated, it considers that:

*This criterion requires that if an access seeker enhances the facility to provide the required services, the access provider should not attempt to recover for themselves any costs related to this enhancement. Equally, if the access provider must enhance the facility to provide the service, it is legitimate for the access provider to incorporate some proportion of the cost of doing so in the access price.*¹⁹⁶

206. The ACCC accepts that this criterion will be relevant in determining the dispute. The ACCC acknowledges that there may be some level of cost incurred by Telstra in upgrading its IT systems in order to comply with the FDs.

4.3.7. Paragraph 152CR(1)(f)

Submissions

207. Telstra submits that the operational and technical requirements necessary for the safe and reliable operation of the LSS have cost implications for the

¹⁹² *Telstra Corporation Limited v ACCC* [2008] FCA 1436 at [310].

¹⁹³ Telstra Primary Submission, *LSS Preliminary Matters and General Approach*, 18 May 2009, p. 18.

¹⁹⁴ Ibid; Telstra Reply Submission, *LSS Preliminary Matters and General Approach*, 4 June 2009, p. 4.

¹⁹⁵ Herbert Geer Primary Submission, *General and Preliminary Matters*, 18 May 2009, p6; Nicholls Legal Primary Submission, *Preliminary Matters and General Approach*, 18 May 2009, p. 20.

¹⁹⁶ ACCC, *Access Pricing Principles Guidelines*, p. 11.

configuration and operation of the underlying network.¹⁹⁷ Telstra submits that these costs need to be recovered in access pricing so that there is sufficient funds available to Telstra to maintain safe and reliable services.¹⁹⁸ Telstra considers that access prices below the cost of supply risk compromising the safety and reliability of the service.¹⁹⁹

208. The Herbert Geer parties accept that the costs of an efficient operator are and must be adequate to ensure the operational and technical requirements necessary for the safe and reliable operation of a carriage service, a telecommunications network or a facility.²⁰⁰ The Herbert Geer parties consider that the charges that they seek to obtain as part of this arbitration are sufficient to satisfy this criterion.²⁰¹
209. The Nicholls Legal parties submit that they agree with the views expressed by the ACCC in its Consultation Paper.²⁰²

ACCC view

210. The ACCC considers that this criterion requires that terms and conditions of access should not compromise the safety or reliability of carriage services and associated networks or facilities, and that this has direct relevance when specifying any technical requirements or standards to be followed.
211. In assessing the access charges that Telstra submitted in a proposed ULLS undertaking, the Tribunal stated that this criterion calls for consideration of whether the efficient costs of the network will be recovered:

Telstra should have a sufficient incentive to ensure the safe and reliable operation of relevant carriage services, networks and facilities associated with the provision of the ULLS so long as it is able to set an access charge for the service that will enable it to recover the efficient costs (inclusive of a normal return on its investment) of its CAN [customer access network].²⁰³

212. As the ACCC has previously stated in the context of model non-price terms and conditions, it considers that:

...this consideration supports the view that model terms and conditions should reflect the safe and reliable operation of a carriage service, telecommunications network or facility. For instance, the model non-price terms and conditions should not require work practices that

¹⁹⁷ Telstra Primary Submission, *LSS Preliminary Matters and General Approach*, 18 May 2009, p. 18.

¹⁹⁸ Ibid.

¹⁹⁹ Ibid.

²⁰⁰ Herbert Geer Primary Submission, *General and Preliminary Matters*, 18 May 2009, p. 6.

²⁰¹ Ibid.

²⁰² Nicholls Legal Primary Submission, *Preliminary Matters and General Approach*, 18 May 2009, p.20.

²⁰³ *Telstra Corporation Ltd (No 3)* [2007] ACompT 3, at [277].

would be likely to compromise safety or reliability.²⁰⁴

213. Accordingly, the ACCC considers that Telstra's incurred costs for the safe and reliable operation of a carriage service are to be taken into account in LSS access pricing.

4.3.8. Paragraph 152CR(1)(g)

Submissions

214. Telstra submits that it adopts its reasons given under paragraph 152CR(1)(a) and maintains that access prices should not be set below efficient cost recovery levels, as this would lead to long-term economic inefficiencies.²⁰⁵ Telstra states that pricing below cost access pricing creates free-riding incentives and creates economic distortion which is also likely to have a cascading and long-term spill over effect into downstream and related markets.²⁰⁶ By way of example, Telstra suggests that such pricing discourages the access provider from investing in its own network and third parties from efficient investment in other technologies and infrastructure which in its view is contrary to the LTIE.²⁰⁷ Furthermore, below cost access pricing effectively allows economic resources to be diverted away from other forms of competition and into LSS/ULLS based competition, resulting in a resource misallocation and inefficient use of Telstra's infrastructure which in the long-term is not economically efficient.²⁰⁸
215. The Herbert Geer parties' submit that where Telstra's access charges are in excess of the efficient forward-looking costs of the service, access seekers' costs of using the services are unnecessarily raised.²⁰⁹ In their view if charges reflect efficient costs, then the current infrastructure used to supply the services would be more efficiently used and provide more efficient signals for new investment by both Telstra and access seekers.²¹⁰
216. In their reply, the Herbert Geer parties respond to Telstra's submission that 'below cost pricing' damages the LTIE. The parties submit that they are seeking charges that are more accurately described as sustainably low prices, based on efficient costs.²¹¹ In their view, charges that are set above efficient cost recovery are contrary to the LTIE by impeding the development of competition, resulting in inefficient use of the infrastructure used to provide services, higher prices and less diversity in services.²¹²

²⁰⁴ ACCC Report, *Final determination – Model Non-price Terms and Conditions*, November 2008, p 8.

²⁰⁵ Telstra Primary Submission, *LSS Preliminary Matters and General Approach*, 18 May 2009, p. 18.

²⁰⁶ *Ibid.*, pp. 18–19.

²⁰⁷ *Ibid.*, p. 19.

²⁰⁸ *Ibid.*, p. 18.

²⁰⁹ Herbert Geer Primary Submission, *General and Preliminary Matters*, 18 May 2009, p. 6.

²¹⁰ *Ibid.*

²¹¹ Herbert Geer Reply Submission, *General and Preliminary Matters*, 4 June 2009, p. 2.

²¹² *Ibid.*, p. 3.

217. The Nicholls Legal parties submit that they accept the views expressed by the Commission in its Consultation Paper.²¹³

ACCC view

218. The ACCC's *Access Dispute Guidelines* note that the phrase 'economically efficient operation' embodies the concept of economic efficiency as discussed earlier under the LTIE criterion. Paragraph 152CR(1)(g) does not appear to be limited to the operation of carriage services, networks and facilities by the access provider supplying the declared service but would seem to include those operated by others (for example, service providers using the declared service).²¹⁴
219. The *Access Dispute Guidelines* note that in the context of a determination, the ACCC may consider whether particular terms and conditions of access enable a carriage service, telecommunications network or facility to be operated efficiently. This may involve, for example, examining whether they would prevent an access provider from recovering the efficient costs of operating and maintaining the infrastructure used to supply the declared service.²¹⁵
220. Consistent with the approach adopted by the Tribunal, the ACCC considers that in applying this criterion, it is relevant to consider the economically efficient operation of retail services provided by access seekers using Telstra's LSS or by Telstra itself in competition with those access seekers; and, the telecommunications networks and infrastructure used to supply these services.²¹⁶
221. As the ACCC has previously stated in the context of model non-price terms and conditions, it considers that:
- ...this criterion requires consideration of services, networks and facilities of all service providers that are used to supply core services or downstream services ...model terms and conditions best meet this consideration when they strike an appropriate balance between the ability of the access provider and access seekers to operate their respective services, networks and facilities in an economically efficient manner.*²¹⁷
222. The ACCC notes that Telstra's submission raises concerns about the implications of pricing "below cost".
223. The ACCC considers that where there is the economically efficient operation of infrastructure this would allow for incentives for investment in new technologies and infrastructure, as well as encouraging an access provider to invest in its network.

²¹³ Nicholls Legal Primary Submission, *Preliminary Matters and General Approach*, 18 May 2009, p. 20.

²¹⁴ ACCC, *Access Dispute Guidelines*, p. 57.

²¹⁵ Ibid.

²¹⁶ *Re Telstra Corporation Ltd* [2006] ACompT 4 at [94-95].

²¹⁷ ACCC Report, *Final determination – Model Non-price Terms and Conditions*, November 2008, pp. 8–9.

4.3.9. Additional matters and information to which the Commission intends to have regard in making a final determination

Pricing Principles for the LSS

224. Subsection 152AQA(6) of the Act requires that the ACCC have regard to any relevant pricing principles in arbitrating an access dispute in relation to a declared service.
225. At the commencement of the arbitration, the relevant pricing principles were those contained in the *Review of the Line Sharing Service Declaration - Final Decision*, October 2007. However since that time, these pricing principles have been repealed and incorporated into the following instrument which was made on 3 December 2009:
- *Pricing Principles for the Line Sharing Service (LSS) Determination 2009* (2009 LSS Pricing Principles).
226. Accordingly, the ACCC has had regard to the parties' submissions and the 2009 LSS Pricing Principles, as required under section 152AQA(6) of the Act. Parties' submissions in relation to the principles to apply are dealt with in each chapter of the Statement of Reasons.

Model terms

227. Subsection 152AQB(9) of the Act requires the ACCC to have regard to any model terms and conditions determination that it has made in arbitrating an access dispute that is covered by that determination.
228. Although the ACCC is only required to have regard to the 2008 *Model Non-Price Terms & Conditions Determination* (2008 Model Terms) in arbitrations relating to core services,²¹⁸ the ACCC's preliminary view was that the 2008 Model Terms is another matter to which the ACCC may have regard to in LSS access disputes that raise non-price issues.²¹⁹
229. Telstra and the Nicholls Legal parties did not make any submissions in relation to the ACCC having regard to model terms with respect to the LSS.
230. The Herbert Geer parties submit that they agree with the ACCC's proposal to have regard to model terms in arbitrating the LSS access disputes.²²⁰
231. The ACCC considers that it is appropriate to have regard to the 2008 model Terms determination when determining those LSS access disputes that raise non-price issues.

Band Definition

232. In response to the ACCC's Consultation Paper on preliminary issues, Telstra submits that the DFD band definitions:

²¹⁸ *Trade Practices Act 1974*, subsection 152AQB(9).

²¹⁹ *Ibid*, subsection 152CR(2).

²²⁰ Herbert Geer Primary Submission, *General and Preliminary Matters*, 18 May 2009, p. 6.

- are ambiguous; and
 - would require Telstra to constantly monitor the number of SIOs in each exchange.²²¹
233. Accordingly Telstra considers that the notes to the band definitions contained in the DFD should be amended to specify that the applicable band is the band which the relevant service lies as at a specified date.²²² For the purposes of backdating, Telstra considers that the classifications supplied to the ACCC in August 2007 should apply as this would provide consistency with the band classifications used in the IDs.²²³
234. Telstra also submits that there is a typographical error in the definition of Band 4 and that the reference to “6.55” in this definition should read “6.56”.²²⁴
235. The Herbert Geer parties in response submit that should the ACCC adopt Telstra’s request that the band of each ESA be set during the period of the final determination, then it should be based on the most recent ESA population data available and that data should be provided to parties for assessment.²²⁵ The Herbert Geer parties reiterate this view in relation to backdating.²²⁶
236. The ACCC considers it appropriate to continue to use the classifications supplied by Telstra in August 2007 as in its view moving to the classifications supplied by Telstra in May 2009 would lead to uncertainty.
237. The ACCC considers that this uncertainty would arise from having multiple classification dates across the period of the final determination, and notes that the interim determinations utilise the August 2007 classifications.
238. However, the ACCC does accept Telstra’s submission that Note 2 to the band definitions may lead to ambiguity and has amended the note accordingly to provide that the applicable band will be the band in which the relevant service lies at a particular date.
239. The ACCC does not accept Telstra’s claim that the reference to “6.55” in the Band 4 definition should be “6.56”, noting that despite Telstra’s claim that this is a typographical error, the Telstra documents from where this reference was taken by the ACCC still contains this reference in relation to Band 4. These documents are available on Telstra’s website.²²⁷

Other matters

240. Subsection 152CR(2) of the Act permits the ACCC to take into account other relevant matters in making a FD.

²²¹ Telstra Primary Submission, *Preliminary Matters and General Approach*, 18 May 2009, p. 12

²²² Ibid

²²³ Ibid

²²⁴ Ibid

²²⁵ Herbert Geer Reply Submission, *Preliminary Matters and General Approach*, 4 June 2009, p. 7

²²⁶ Ibid

²²⁷ http://telstrawholesale.com//dobusiness/customer-commitment/docs/op_sep_quality_strategy.pdf

241. The ACCC has had regard to the 2009 LSS Pricing Principles, which incorporate indicative prices from 1 July 2005 until 31 December 2010 in setting prices to apply in backdated periods. Submissions concerning pricing guidance from the parties, and ACCC views, are outlined in Chapter 5 of the Statement of Reasons.
242. The ACCC considers that it should also have regard under subsection 152CR(2) of the TPA to:
- Decisions of the Australian Competition Tribunal and Federal Court which are referred to in the ACCC's Consultation Paper dealing with general and preliminary matters, including the Tribunal's decisions regarding LSS monthly charges;
 - Submissions and other materials that parties have given to the ACCC concerning Telstra's LSS undertakings;
 - Information that a party has provided in another access dispute;
 - Statements the ACCC has published in respect of approaches to LSS pricing;
 - Other decisions and publications made by the ACCC which are referred to in the ACCC's Consultation Paper on general and preliminary matters;
 - Information that Telstra provides to the ACCC under record keeping rules, including:
 - the telecommunications regulatory accounting framework rule; and
 - the customer access network rules (a summary of which are published at www.accc.gov.au);
 - Material already provided by the parties during the course of the arbitrations; and
 - Submissions responsive to the Consultation Papers that the ACCC issued;
243. The ACCC has had regard to further materials as necessary to properly assess the parties submissions made in response to the Consultation Papers. The materials which the ACCC has considered has been outlined in each of the respective chapters of the Statement of Reasons.

4.4. Period to which the final determination should apply

4.4.1. Commencement date

Introduction

244. Under subsection 152DNA(1) of the Act any or all of the provisions of a FD may be specified to take effect earlier than the date on which the determination

takes effect. The specified date (which in this Statement of Reasons is referred to as the commencement date) must not be earlier than the date on which the parties to the determination commenced negotiations with a view to agreeing on the terms and conditions of access (subsection 152DNA(2)).

245. In its Consultation Paper, the ACCC proposed a commencement date for each of the terms and conditions of access which was the later of:
- the date of notification of the access dispute to the ACCC, and
 - the start of the period which is the subject of dispute.
246. Parties were advised, however, that if it could be established that they were negotiating over the relevant terms and conditions from an earlier/later date, the ACCC would consider specifying an earlier/later commencement date.
247. Accordingly, the parties were informed that the likely commencement date would be the date negotiations commenced, unless a later date would be more appropriate i.e., where the negotiations were in respect of terms and conditions to apply from a later date only, such as following the expiry of a then current contract.

Submissions

248. Telstra supports the approach that the ACCC proposed in its Consultation Paper save for the following:
- the commencement date should be no earlier than the expiry date for a previous final determination; and
 - a consistent approach should generally be taken across all access disputes.²²⁸
249. Primus²²⁹ and the Herbert Geer parties²³⁰ submit that the access seekers support backdating of the FD relating to disputed price terms to take effect from an earlier date than that of the FD depending on individual circumstances.
250. The Nicholls Legal parties submits that the commencement date of the FD should reflect the date that the parties commenced negotiations for price terms.²³¹
251. The Nicholls Legal and Herbert Geer parties have made submissions in relation to individual access disputes regarding what the appropriate commencement date should be. Individual cases are discussed in chapter 3 of this Statement of Reasons.

²²⁸ Telstra Primary Submission, *LSS Preliminary Matters and General Approach*, 18 May 2009, p. 26.

²²⁹ Primus Primary Submission, *General and Preliminary Matters*, 18 May 2009, p. 6

²³⁰ Herbert Geer Primary Submission, *General and Preliminary Matters*, 18 May 2009, pp 6–7.

²³¹ Nicholls Legal Primary Submission, *Preliminary Matters and General Approach*, 18 May 2009, p. 23.

252. The Nicholls Legal parties in its reply submission confirms the need for backdating as in some cases negotiations commenced well before the date on which the access dispute notification was lodged and therefore, in its view commencement date for the FD should precede the date of lodgement of the respective access dispute.²³² The Nicholls Legal parties also submit that it is the ACCC's policy to backdate unless there are compelling reasons not to.²³³
253. In addition to the views expressed by the ACCC in its Consultation Paper, Telstra submits two other instances where a commencement date later than the date of commencement of negotiations could be considered are follows:
- disputes in relation to Telstra's exercise of its right to unilaterally vary terms and conditions – Telstra suggests that the commencement date would be the date that the variation was to commence; and
 - disputes in which the access seeker had not commenced acquiring the services – Telstra suggests that the commencement date should be the date on which the access seeker first acquired the relevant service.²³⁴
254. Telstra in its reply submission further states that the commencement date should be determined based on the existence of a bilateral exchange of views on the subject.²³⁵ Telstra also submits that another instance where a commencement date later than the date of commencement of negotiations could be applied is when disputes are notified prior to the expiry of commercially agreed terms.²³⁶ In this instance, Telstra submits that the FD could apply from the expiry of those agreements.²³⁷

ACCC view

255. Under subsection 152DNA(8) of the Act, the ACCC is required to formulate guidelines in relation to its approach to backdating and to have regard to those guidelines, as well as any such matters as the ACCC considers relevant (subsection 152DNA(7)).
256. In arbitrating these disputes, the ACCC has had regard to the *Access Dispute Guidelines* in deciding whether to backdate, in addition to the 2009 LSS Pricing Principles and the section 152CR criteria.
257. As noted in the explanatory memorandum to the *Telecommunications Legislation Amendment Bill 1998*, the backdating provisions are intended to:²³⁸

...encourage commercial agreement and co-operation during access arbitrations by removing incentives for delay and to ensure a

²³² Nicholls Legal Reply Submission, *Preliminary Matters and General Approach*, 4 June 2009, p. 10

²³³ Ibid.

²³⁴ Telstra Reply Submission, *LSS Preliminary Matters and General Approach*, 4 June 2009, pp.4-5.

²³⁵ Ibid.

²³⁶ Ibid.

²³⁷ Ibid, p. 4..

²³⁸ Supplementary Explanatory Memorandum, *Telecommunications Legislation Amendment Bill 1998*, p. 33.

considered and reasonable outcome is ultimately applied to the interim period which may otherwise be covered by an interim determination or a commercial agreement which one or more parties may be disputing.

258. The Guidelines provide that the ACCC will, in general, be inclined to backdate determinations.²³⁹ However, each case will be considered on its merits. In particular, the ACCC is likely to consider whether the manner in which the parties have conducted themselves before and during the arbitration provides grounds for not backdating the determination.
259. After considering the parties' submissions, the ACCC has applied a consistent approach to backdating. In this regard, the ACCC has identified:
- when the relevant negotiations commenced i.e., those which gave rise to the dispute over the particular terms or conditions which are to be backdated, and
 - where negotiations extended over time to include additional terms of access separate dates were identified for each.
260. However, where the negotiations were over a (then) future period, the ACCC has identified that date. For instance, parties may have commenced negotiations for prices to apply from when a current contract or determination expired. For any such access terms, the ACCC has adopted this date as the appropriate commencement date.
261. That said, the ACCC has not backdated any non-price terms as this would have no practical effect.
262. This is not to say that the same backdating date will be specified for all of the disputes, as this will depend upon the facts to which the common principles are applied, and the facts will differ by dispute.

4.4.2. Expiry date

Introduction

263. Under subsection 152DNA(4) of the Act, a provision of a determination may be expressed to terminate on a specified date. Although not currently a requirement of the legislation, the ACCC would usually expect to limit the duration of a determination to a certain period for price terms.
264. The ACCC initially proposed to the parties an expiry date for the FD of 30 June 2010. The ACCC reached that preliminary view after considering the views that the parties had expressed in submissions made up until the initial consultation paper was issued in April 2009. This represented a prospective period of around fifteen months from when the initial consultation paper was given.
265. In August 2009, the ACCC gave a further consultation paper to all of the parties in the joint hearing. This concerned annual charge terms. In that consultation paper, the ACCC proposed specifying annual charges up to and

²³⁹ ACCC, *Resolution of telecommunications access disputes—a guide (revised)*, March 2004, p. 62.

including 30 June 2012, consistent with views expressed in the 2009 Draft Indicative Prices.²⁴⁰

266. Concurrently, the ACCC undertook an industry wide consultation in relation to the 2009 Draft Pricing Principles for the fixed network services, including prices for the LSS. As a result of this consultation and the extensive views expressed by parties in relation to the proposed indicative prices, the ACCC wrote to parties involved in the joint arbitration hearing seeking views on the option of rolling over the 2008-09 indicative prices until 31 December 2010.²⁴¹
267. In December 2009, after assessing all of the information the ACCC had obtained during its industry-wide consultation on the pricing principles and indicative prices for fixed network services, the decision to rollover indicative prices for fixed network services was made with consideration given to three key events that introduced a degree of regulatory, industry and pricing uncertainty, namely:
- the introduction of the *Telecommunications Legislation Amendment Bill 2009*;
 - the effect the National Broadband Network will have on the regulation of legacy assets and new telecommunication investments; and
 - the appropriateness of TSLRIC+ as a pricing methodology in light of the above.
268. Of the determinations made as a result of this decision, the ACCC notes that the 2009 LSS Pricing Principles established charges for the periods:
- Until 30 June 2006
 - 2006-07
 - 2007-08
 - 1 July 2008 - 31 July 2009
 - 1 August 2009 – 31 December 2010.
269. Parties were also asked to re-confirm their views in regard to an expiry date for FDs in a letter of 7 December 2009.²⁴²

Submissions

270. Due to the protracted nature of the joint arbitration hearing and against a backdrop of significant change in telecommunications regulation, views on the issue of expiry date were sought from parties on a number of occasions. The following sets out parties views in response to the ACCC letter of 7 December 2009.
271. Telstra submits that it accepts an expiry date of 31 December 2010, subject to rolled over prices being applied in arbitrations. Telstra considers that if the

²⁴⁰ ACCC Consultation Paper, *Annual Charges*, issued on 24 August 2009.

²⁴¹ ACCC Letter to Telstra, Nicholls Legal, and Herbert Geer dated 27 October 2009.

²⁴² ACCC, Letter to parties, *Expiry date for ULLS and LSS Final Determinations*, 7 December 2009.

ACCC is not minded to rollover prices, an expiry date of 30 June 2010 is appropriate.²⁴³

272. The Herbert Geer parties submit that if the ACCC applies the prices from the 2009 LSS Pricing Principles, an appropriate expiry date would be 31 December 2010.²⁴⁴
273. Nicholls Legal on behalf of NEC, Request and TPG do not oppose the rollover of indicative prices for the period until 31 December 2010 for the purposes of making FDs in the relevant arbitrations.²⁴⁵

ACCC view

274. Consistent with the views of all parties, the ACCC has decided an expiry date of 31 December 2010 will apply to the FDs. This is also consistent with the period for which indicative prices for the LSS were made.

4.4.3. Interest

Introduction

275. Subsection 152DNA(6) of the Act provides the ACCC with a discretion to require interest to be paid in instances of backdating at a rate specified in the determination.
276. During consultation on the DFD, the ACCC sought the parties' views on whether interest should be paid on backdated amounts and if so, how interest should be calculated.
277. In previous arbitration decisions, the ACCC has nominated the Reserve Bank of Australia (RBA) Large Business Variable Indicator Rate (which was published as a monthly historical time series statistic) as the interest rate to be applied to the backdated amount. The RBA ceased publishing this particular time series in January 2008.²⁴⁶
278. The ACCC proposed that these disputes use the Small Business Variable Other Overdraft Rate that is published by the RBA, and also drew the parties' attention to other possible time series to use. The parties were asked to comment on these options, as well to nominate any other time series that they considered more appropriate to use.

²⁴³ Telstra, Letter to parties, *Expiry date for ULLS and LSS Final Determination*, 10 December 2009.

²⁴⁴ Herbert Geer, Letter to parties, *Expiry date for ULLS and LSS Final Determination*, 10 December 2009.

²⁴⁵ Nicholls Legal, Letter to parties, *Expiry date for ULLS and LSS Final Determination*, 10 December 2009.

²⁴⁶ Reserve Bank of Australia, *Reserve Bank Bulletin, Table F05, Indicator Lending Rates, Large Business Variable Indicator Rate*, referenced from <http://www.rba.gov.au/Statistics/Bulletin/F05hist.xls>.

Submissions

279. Telstra submits that the appropriate rate is the Large Business Weighted Average Rate on Credit Outstanding Variable Rate (published quarterly by the RBA) as this is the rate that is applicable to large businesses.²⁴⁷
280. Telstra argues that the use of Small Business Interest rates by the ACCC would over-compensate parties, as large businesses are able to access credit at lesser interest rates.²⁴⁸ Telstra considers that all parties to the current disputes are likely to be regarded as large as opposed to small businesses.²⁴⁹
281. The Herbert Geer parties submit that the interest rate should reflect the opportunity cost of not having access to the excess funds paid to the access provider.²⁵⁰
282. Primus and the Herbert Geer parties consider that the National Australia Bank Limited Business Indicator Base Rate (NAB rate) plus 2.5% would be an appropriate rate to use, as this is a rate of interest that has been specified in the customer relationship agreement (CRA) to apply to disputed payments.²⁵¹ These parties also consider that interest should be compounded daily and interest should be calculated based on each disputed price term commencing from when overpayments were made.²⁵²
283. In the alternative, all of these parties suggest that the interest should reflect just the NAB rate.²⁵³
284. Telstra in response does not agree that the CRA rates (or the NAB rates) should apply in the arbitrations.²⁵⁴ Telstra submits that the interest provision in the CRA to which the Herbert Geer parties refer in its submission applies only in the event of a billing dispute which according to Telstra is resolved in favour of access seekers.²⁵⁵ Telstra reiterates its position to adopt the Large Business Weighted-Average Rate on Credit Outstanding Variable Rate provided by the RBA.²⁵⁶
285. The Nicholls Legal parties agree to the use of the Small Business Variable Other Overdraft Rate as published by the RBA²⁵⁷ as the access seekers in these arbitrations consider themselves to be enterprises with less than 200 employees.²⁵⁸

²⁴⁷ Telstra Primary Submission, *LSS Preliminary and General Matters*, 18 May 2009, p. 27.

²⁴⁸ Ibid.

²⁴⁹ Ibid.

²⁵⁰ Herbert Geer Primary Submission, *Preliminary and General Matters*, 18 May 2009, p. 12.

²⁵¹ Ibid, pp. 9–12; Primus Primary Submission, *Preliminary and General Matters*, 18 May 2009, pp. 8–11.

²⁵² Ibid.

²⁵³ Ibid.

²⁵⁴ Telstra Reply Submission, *LSS Preliminary Matters and General Approach*, 4 June 2009, p. 6.

²⁵⁵ Ibid.

²⁵⁶ Ibid.

²⁵⁷ Nicholls Legal Primary Submission, *Preliminary Matters and General Approach*, 18 May 2009, p. 24.

²⁵⁸ Nicholls Legal Reply Submission, *Preliminary Matters and General Approach*, 4 June 2009, p. 9.

286. In response to the reply submission from the Nicholls Legal parties, Telstra submits that in the past the ACCC has considered that the parties to this dispute are large businesses.²⁵⁹ Telstra contends that this view was open to the ACCC given the RBA's definition of large businesses for the purpose of its variable indicator rates, which is related to the quantum of a firm's business loan (greater than \$2 million) and not to its number of employees. Accordingly, Telstra submits that without good reason the ACCC should not depart from this view and should continue to apply the Large Business Rate, but move to a different time series.²⁶⁰

ACCC view

287. Under section 152DNA of the Act, the provisions of a FD may be expressed to take effect earlier than the date on which the determination takes effect. However, backdating is limited to the date on which the parties commenced negotiations with a view to agreeing on the terms and conditions of access as per subsection 152DNA(2).
288. As specified in the Guidelines, where interest is to be paid, it will be calculated on the amounts of money that have been overpaid (or underpaid). The over or under payment can be calculated by reference to:
- the volume of services supplied by the access provider to the access seeker over the backdating period;
 - the charges that are specified in the final determination; and
 - the charges that have been paid.
289. Further, the rate of interest should reflect the opportunity cost of the overpayment (or underpayment) and, in general, daily compounding will be appropriate. Lastly, the Guidelines also suggest that the opportunity cost could be assessed by reference to the rate applicable to debt financing.
290. In these disputes, the ACCC considers that it is appropriate to specify that interest is charged on the under/overpayments that have occurred. Given the time value of money, the party that has been disadvantaged by an under/overpayment would be denied the full benefit of the determination in the absence of an award of interest.
291. After considering the parties' submissions, the ACCC remains of the view that interest should be calculated on a daily basis and compounded. Further, the ACCC remains of the view that the RBA Small Business Variable Other Overdraft Rate should be used.
292. The ACCC notes that the Nicholls Legal parties agreed that this rate would be appropriate, while this rate of interest falls between the lesser rates advocated by Telstra and the higher rates advocated by the Herbert Geer parties and Primus.

²⁵⁹ Telstra, Letter to ACCC – *Joint Hearing of ULLS LSS Access Dispute*, 1 July 2009, p. 1.

²⁶⁰ Telstra Letter to ACCC, *Joint Hearing of ULLS LSS Access Dispute*, 1 July 2009, p. 1.

293. The ACCC considered using the alternative interest rates put forward by the Herbert Geer parties and Primus. The ACCC did not use the NAB rate as it is not published, and so could make the calculation of interest problematic. Nor did the ACCC consider that a mark up above the indicator lending rate would be appropriate. Lastly, although the ACCC accepts that this is the indicator rate cited in CRAs to apply to billing disputes, the information before the ACCC did not indicate that using the NAB lending rate would provide a more accurate measure of the interest rate that a party would face as a result of not having access to the over/under payment.
294. The ACCC also considered the alternative rate proposed by Telstra to use the RBA Large Business Weighted Average Rate on Credit Outstanding. This time series is a quarterly series and the ACCC believes that the calculations would be less precise than a monthly time series. As it is published quarterly it could delay or complicate the calculation of interest on over/under payments that occurred close to the date of the FD coming into effect. Hence, practical issues of implementation arise against using this rate.
295. Further, Telstra's position depends upon its view that the businesses involved in the dispute are large businesses, and so the Large Business Weighted Average Rate published by the RBA is the more appropriate measure.
296. The ACCC considers however that other factors in addition to the size of the business will affect the interest rate that a business will face including the size of the loan, whether the loan is secured, the riskiness of the business activity and the terms of the loan.

4.5. Assessment against subsection 152(1) criteria

4.5.1. Paragraph 152CR(1)(a)

297. The ACCC considers that specifying an expiry date of 31 December 2010 and setting access terms in regard to price to apply up to then and specifying an interest rate to be applied for under/over paid amounts by parties, would best promote the LTIE.
298. The ACCC considers that these terms will promote competition by providing compensation to parties for over (or under) paid amounts with a proper rate of interest for such amounts given the time value of charges. This is because over the long run they lead to conditions that allow the access provider and access seekers to compete in downstream markets on their relative merits, and will remove obstacles to end-users accessing services, including those of higher quality and/or lesser price.
299. Also, setting access terms to apply until 31 December 2010 would provide greater certainty to the parties of the prices to apply, given the history of failed negotiations and the likelihood that they will be unable to agree on prices to apply until 31 December 2010. This greater certainty will of itself promote competition. Further, backdating with interest on over/under paid amounts will ensure that the access charges applied previously could now be considered fair

and reasonable since the interest (compounded daily) applied to that amount reflects the opportunity cost of such payments.

4.5.2. Paragraph 152CR(1)(b)

300. The ACCC considers that addressing charges until 31 December 2010 in the FD is also likely to encourage the efficient use of and investment in infrastructure, and is consistent with Telstra's legitimate commercial interests. Doing so will not prevent Telstra from recovering its direct costs together with a normal risk-adjusted return on its investments, or exploiting economies of scale or scope. Further, by adopting an approach that promotes competition, demand for xDSL services will be encouraged, and this will further drive economies of scale and scope. Telstra remains able to exploit economies of scale and scope across all stages of production of its ADSL services.

4.5.3. Paragraph 152CR(1)(c)

301. Similarly, addressing charges until 31 December 2010 in the FD would promote incentives for investment in infrastructure, such as DSLAM networks and LSS ordering systems provided that the charges that are specified do not preclude the recovery of efficient investments and a normal risk-adjusted return. By allowing for a risk-adjusted rate of return, the ACCC has regard for investment incentives (paragraph 152AB(6)(c)), and the risks involved in making these investments (subsection 152AB(7A)).
302. In relation to the criterion regarding the interests of all persons with rights to use the LSS, the ACCC is of the view that access seekers' interests lie in being able to compete on their relative merits. Setting the access charges up to 31 December 2010 clearly promotes these interests. Further, setting an interest rate for backdated under/over paid amounts will ensure that incentives for delaying such payments are removed thereby securing parties' rights.

4.5.4. Paragraph 152CR(1)(d)

303. The direct costs of providing access to the LSS is concerned with ensuring that Telstra will be able to recover its costs in providing access. Setting an expiry date of 31 December 2010 is not of itself contrary to this interest as Telstra has recovered costs associated with the LSS in past periods and will continue to do so in future periods.

4.5.5. Paragraphs 152CR(1)(e) and 152CR(1)(f)

304. The next two matters are the value to a party of extensions, or enhancement of capability, whose cost is borne by someone else; and the operational and technical requirements necessary for the safe and reliable operation of a carriage service, or a telecommunications network or a facility. The costs of extensions to Telstra's systems necessary to provide services to the access seekers are taken into account in its charges. Therefore, the ACCC considers that in setting an interest rate for backdated under/over paid amounts will not have an impact on this criterion. The ACCC also considers that paragraph 152CR(1)(f) does not materially impact on this decision.

4.5.6. Paragraph 152CR(1)(g)

305. In respect of the economically efficient operation of a carriage service, a telecommunication network or facility, the ACCC has considered the efficient operation of LSS and ADSL services, and Telstra's and the access seeker's networks and facilities used in the supply of those services. The ACCC considers that addressing charges until 31 December 2010 in the FD will of itself promote their economically efficient operation, by bringing greater certainty to Telstra and the access seekers concerning the terms and conditions to apply. The ACCC further considers by adopting the charges set out in the 2009 LSS Pricing Principles in their entirety and allowing parties to settle backdated under/over paid amounts subject to a reasonable interest rate will promote economic efficiency.

5. LSS Monthly charges

5.1. Introduction

5.1.1. Background

306. LSS monthly charges are ongoing rental charges payable for the supply of the service. They are paid on a monthly basis.

307. Parties in dispute with Telstra on this matter are:

- Chime, Wideband, EFTel, Saunders, Agile, Netspace and Adam (represented by and referred to as the Herbert Geer parties)
- Request, and NEC (represented by and referred to as the Nicholls Legal parties).

5.1.2. Current charges

308. The LSS monthly charges that currently apply between the parties are the subject of Interim Determinations (IDs). The ACCC determined a charge of \$2.50 in the IDs. These charges are also the subject of CRAs, Table 191.10.

5.1.3. Prior consideration

309. LSS monthly charges have been considered by the ACCC in a number of proceedings including:

- ACCC, *LSS access dispute between Telstra and Adam Internet – Statement of reasons*, December 2007
- ACCC, *Publication of Final Determination and associated statement of reasons – Chime/Telstra LSS access dispute*, August 2007
- ACCC, *Assessment of Telstra's ULLS and LSS monthly charge undertakings – final decision*, December 2005
- ACCC, *Final report on the assessment of Telstra's undertaking for the Line Sharing Service (confidential version)*, August 2004.

310. LSS monthly charges have also been considered by the Australian Competition Tribunal.²⁶¹

5.1.4. Principles to apply

Introduction

311. Subsection 152AQA(6) of the Act requires the ACCC to have regard to pricing principles for a declared service when arbitrating an access dispute in relation to that declared service. In its Consultation Paper, the ACCC noted that public consultation was being undertaken on all pricing principles, including those applying to the LSS.²⁶²

²⁶¹ Australian Competition Tribunal, *Re Telstra Corporation Ltd* [2006] ACompT 4.

²⁶² ACCC, *Consultation Paper on Final Determination, Annual Charges*, August 2009 (Consultation Paper), p. 3.

312. In its Consultation Paper the ACCC proposed to have regard to the resulting LSS pricing principles in specifying LSS monthly charges in these disputes.²⁶³ As a result of the public consultation process, the ACCC made 2009 LSS Pricing Principles on 3 December 2009. The 2009 LSS Pricing Principles incorporate the 2007 LSS Pricing Principles²⁶⁴ which were repealed by this instrument.
313. Subsection 152AQB(9) of the Act requires the ACCC to have regard to model terms relating to a core service when arbitrating an access dispute in relation to that core service. Although the LSS is not a core service defined under subsection 152AQB(1), the ACCC has had regard to the 2008 Model Terms. However, as the 2008 Model Terms do not address monthly charges, they are not relevant in this context.
314. Subsection 152CR(2) of the Act permits the ACCC to have regard to other matters it considers relevant. The ACCC's view is to have regard to any preceding price determinations (pricing principles or indicative prices) in setting prices for a period when the pricing determination was current. In this respect the ACCC has had regard to the 2002 LSS Pricing Principles.²⁶⁵

Submissions

315. Telstra, in its submission on Preliminary Matters, submitted that the 2007 LSS Pricing Principles and Indicative Prices were invalid.²⁶⁶ The ACCC notes that in July 2009 the Federal Court found them to be valid.²⁶⁷
316. In its Preliminary Matters submission, Nicholls Legal parties submits that the ACCC should have regard to its 2007 LSS Pricing Principles under subsection 152AQA(6) of the Act in setting LSS access price.²⁶⁸ The Herbert Geer parties submit that pursuant to subsection 152AQA(6), the ACCC must have regard to current determination of pricing principles and model terms and conditions.²⁶⁹
317. In a later submission on Preliminary Matters, Telstra submits that the 2007 LSS Pricing Principles should be consulted when determining appropriate LSS pricing principles.²⁷⁰
318. Telstra also acknowledges that the ACCC must have regard to any pricing principles or indicative prices made prior to the issuing of a final determination in an access dispute.²⁷¹ However, given the concurrent

²⁶³ Ibid.

²⁶⁴ The 2007 LSS Pricing Principles are contained in the ACCC, *Review of the Line Sharing Service Declaration – Final Decision 2007*.

²⁶⁵ The 2002 LSS Pricing Principles are contained in the ACCC, *Final decision on whether or not a Line Sharing Service should be declared*, August 2002.

²⁶⁶ Telstra Primary Submission, *LSS Preliminary Matters and General Approach*, 18 May 2009, p. 19.

²⁶⁷ *Telstra Corporation Limited v Australian Competition and Consumer Commission* [2009] FCA 757.

²⁶⁸ Nicholls Legal Primary Submission, *General Approach and Preliminary Matters*, 18 May 2009, pp. 20–21.

²⁶⁹ Herbert Geer Reply Submission, *General Approach and Preliminary Matters*, 4 June 2009, p. 3.

²⁷⁰ Telstra Reply Submission, *LSS Preliminary Matters and General Approach, re Adam*, 9 October 2009, p. 21.

²⁷¹ Telstra Primary Submission, *LSS Annual Charges*, 9 October 2009, p. 2.

consultation on pricing principles and indicative prices, Telstra considers that if final principles or prices vary from the draft, parties should be able to make submissions on the application of those principles and prices in light of the joint arbitration.²⁷²

319. Further, where the ACCC's pricing principles or indicative prices differ from those suggested by Telstra, Telstra submits that they should not be applied.²⁷³
320. The Herbert Geer parties submit that the ACCC should have regard to its submission to the *Draft pricing principles and indicative price for LCS, WLR, PSTN OTA, ULLS, LSS*.²⁷⁴ The Herbert Geer parties also submit that the ACCC should also have regard to its previous and current pricing principles when making FDs.²⁷⁵

5.1.5. ACCC view

321. In light of the repealed pricing principles the ACCC has, in specifying LSS monthly charges, taken into account the 2009 LSS Pricing Principles which incorporates the same pricing principles and indicative prices as those from the repealed 2007 Pricing as required by subsection 152AQA(6) of the Act.
322. Under these principles, relevant to LSS monthly charges:
- a TSLRIC+ pricing principle should be applied to the LSS
 - a specific cost component should be included in the LSS monthly price, calculated by combining 'LSS specific costs' with 'ULLS specific costs' and Telstra's internal equivalent costs for ADSL, and allocating those costs across the number of active ULLS, LSS and ADSL lines
 - a contribution for line costs will not be recovered in the LSS monthly price.
323. The ACCC considers that it is appropriate to apply these principles and prices in their totality when determining the charges. The approach taken in regard to LSS monthly charges is consistent with the approach taken to other pricing issues that have been determined in this arbitration.

5.2. Consultation Process

324. The ACCC undertook two consultations in relation to the proposed monthly charges. The first of these consultations, carried out by way of the ACCC issuing its Consultation Paper and accompanying DFD, related to LSS monthly charges for the periods from 2005-06 until 2011-12.
325. Concurrently with the LSS monthly charges consultation, the ACCC undertook an industry wide consultation in relation to pricing principles and

²⁷² Ibid.

²⁷³ Ibid, p. 3.

²⁷⁴ Herbert Geer Primary Submission, *LSS Annual Charges*, 9 October 2009, p. 1.

²⁷⁵ Ibid, p. 2.

indicative prices for the declared fixed network services, including prices for the LSS monthly charge. As a result of this consultation and the extensive views expressed by parties in relation to the proposed indicative prices, the ACCC wrote to parties involved in the joint arbitration hearing seeking views on the option of rolling over the 2008-09 indicative prices for LSS monthly charges.²⁷⁶

326. Having taken all the parties' submissions into consideration the ACCC has decided to apply the indicative prices from the 2009 LSS Pricing Principles in their totality for the period 1 July 2005 to 31 December 2010 (which includes the rollover of the 2008-09 indicative prices to apply through to 31 December 2010). In the ACCC's opinion, the indicative prices contained in these pricing principles, were in the LTIE when first made, and are still in the LTIE taking into account the current uncertain regulatory environment. The ACCC considers that the subsection 152CR(1) criteria supports this approach and that this approach is consistent with the 2007 LSS pricing principles.
327. In light of the ACCC's decision to rollover indicative prices for the period 1 August 2009 to 31 December 2010, submissions made in respect of an LSS of \$1.00 are no longer pertinent to this decision. However the submissions regarding the implementation of TSLRIC+ remain relevant. The ACCC notes in this respect that it has not changed its approach in how it implements TSLRIC+.

5.3. Consultation on rollover

5.3.1. Introduction

328. On 27 October 2009, the ACCC wrote to parties indicating its preliminary view was to rollover the 2008-09 LSS indicative prices until 31 December 2010 and apply these prices in arbitrations. Parties' views were sought on this proposal.
329. The ACCC also provided a complete schedule of its proposed indicative prices for fixed network services for the period:
- Until 30 June 2006, and
 - 1 July 2006 through to 31 December 2010,
- reflecting the approach the ACCC had taken in respect of the 2009 LSS Pricing Principles.
330. In December 2009, after assessing all of the information the ACCC had obtained during its industry-wide consultation on the pricing principles and indicative prices for fixed network services, the decision to rollover all indicative prices for fixed network services was made with consideration

²⁷⁶ ACCC Letter to Telstra, Nicholls Legal, and Herbert Geer dated 27 October 2009.

given to three key events that introduced a degree of regulatory, industry and pricing uncertainty, namely:

- the introduction of the *Telecommunications Legislation Amendment Bill 2009*;
- the effect the National Broadband Network will have on the regulation of legacy assets and new telecommunication investments; and
- the appropriateness of TSLRIC+ as a pricing methodology in light of the above.

331. Of the determinations made as a result of this decision, the ACCC notes that the 2009 LSS Pricing Principles established LSS monthly charges for the periods:

- Until 30 June 2006
- 2006-07
- 2007-08
- 1 July 2008 – 31 July 2009
- 1 August 2009 – 31 December 2010.

332. The LSS charges are averaged, consistent with previous pricing principles.

333. The indicative charges do not apply to connections in Band 4.

5.3.2. Submissions

334. Telstra submits it would accept the rollover of LSS prices from 1 August 2009 to 31 December 2010, provided the indicative prices for all fixed network services are rolled over for the same period and applied in arbitrations.²⁷⁷

Telstra notes its acceptance of this is based on the indicative prices being rolled over as a “package” for the full period and that the roll over prices will be applied consistently by the ACCC in all decisions across all fixed network services and to all access seekers until 31 December 2010.²⁷⁸

335. The Herbert Geer parties submit that rollover of prices should only apply in relation to the ULLS monthly charge and WLR charges and that the *2009 Draft Pricing Principles and Indicative Prices* (2009 Draft Indicative Prices) should be used for all other charges.²⁷⁹ The parties submit that application of rollover to prices other than the ULLS monthly charge (i.e., LSS monthly charges) would likely fail to meet all of the statutory criteria in subsection 152CR(1) of the Act.²⁸⁰

336. The Herbert Geer parties submit that the rolled over prices cannot be justified for charges other than the ULLS monthly charges, because:

²⁷⁷ Telstra Letter, *ULLS/LSS Joint Hearing: Price Terms-Roll Over Option*, 2 November 2009.

²⁷⁸ Ibid.

²⁷⁹ Herbert Geer Letter, *Roll Over Prices*, 2 November 2009, p. 1; Herbert Geer Letter, *Expiry Date for ULLS and LSS Final Determinations*, 10 December 2009.

²⁸⁰ Herbert Geer Letter, *Roll Over Prices*, 2 November 2009, p. 2.

- there is no price shock concern with the LSS in the 2009 Draft Indicative Prices unlike the ULLS monthly charge which requires an adjustment path;
 - the LSS charges contained in the 2009 Draft Indicative Prices are not based on the network cost model used for the ULLS and the remaining fixed network services, and as such the concerns raised by access seekers with regards to TSLRIC+ do not apply to the LSS; and
 - the LSS charges for both rollover and the 2009 Draft Indicative Prices are based on the same model, with different inputs due to changes in demand.²⁸¹
337. The Nicholls Legal parties of NEC and Request in their most recent submission submit that the ACCC should rollover 2008-09 LSS prices until 31 December 2010.²⁸²
338. The Nicholls Legal parties submit that the ACCC's specific cost model on which the LSS charges are based is a stable model which has been upheld by the Australian Competition Tribunal and Federal Court, therefore parties can be confident that it produces a good proxy for LSS monthly charges which satisfies the requirements of section 152CR of the Act.²⁸³
339. In addition, on 13 November 2009, Macquarie Telecom wrote to the ACCC in relation to the proposed rollover of the fixed network services indicative prices.²⁸⁴ Macquarie Telecom submitted that a rollover of indicative prices was not appropriate and would be disadvantageous to access seekers who have reached agreements with Telstra that adopt lower prices than the 2008-2009 indicative prices.²⁸⁵ As a remedy, Macquarie Telecom proposed that the ACCC rollover 2008-2009 prices by implementing a 'no worse off' principle to protect the interests of these access seekers.²⁸⁶ Macquarie Telecom submits that this would ensure that existing commercially agreed prices would be the de facto indicative price should the 2008-2009 rolled-over indicative price for a particular service be higher.²⁸⁷ Should the ACCC adopt this proposal, Macquarie Telecom supports the rollover of prices until 31 December 2010.²⁸⁸

5.3.3. ACCC view

340. In the course of the joint hearing, the Government proposed significant reforms to the telecommunications access regime in the *Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2009* which, among other things, proposes replacing the negotiate-arbitrate model with an ex-ante regulatory access framework.

²⁸¹ Herbert Geer Letter, *Roll Over Prices*, 2 November 2009, p. 3.

²⁸² Nicholls Legal Letter, *Roll Over Options*, 10 December 2009.

²⁸³ Nicholls Legal Letter, *Roll Over Option*, 2 November 2009.

²⁸⁴ Macquarie Telecom Letter, *Setting Indicative Prices for Fixed Services*, 13 November 2009.

²⁸⁵ Ibid.

²⁸⁶ Ibid.

²⁸⁷ Ibid.

²⁸⁸ Ibid.

341. The proposed reforms include allowing the ACCC to issue ‘access determinations’ and adopt ‘fixed principles’ which are aimed at improving competition and efficiency within telecommunications and promote greater regulatory certainty associated with regulatory processes under Part XIC of the Act.²⁸⁹ The proposed reforms include:
- replacing the negotiate-arbitrate model with a streamlined regulatory process and providing the ACCC with the ability to make up-front access determinations on price and non-price terms of access, and
 - allowing the ACCC to specify pricing methodologies for declared services which would be used to determine prices over successive regulatory proceedings or successive undertakings in order to create greater regulatory certainty.²⁹⁰
342. The ACCC considers that given the status of the Bill in the current Parliament and the nature of the proposed changes it would be prudent to consider the impact of the proposed legislative changes before it made substantial changes to the price of LSS monthly charges. The ACCC is also mindful that the proposed legislative reform Bill has been introduced but not yet debated in the Senate and that there remains uncertainty as to whether the Bill will be passed in its current form or the nature of any amendments to it. The ACCC believes that due to this uncertainty, these matters are relevant considerations in these arbitrations.
343. The ACCC is of the view that applying the indicative prices from the 2009 LSS Pricing Principles in their totality for LSS monthly charges for the period 1 July 2005 to 31 December 2010 will provide a degree of certainty regarding access to regulated services in a period of significant regulatory and industry change and associated uncertainty and is more likely to be in the LTIE.
344. Further, the ACCC considers that the submissions made by the Herbert Geer parties requiring that only ULLS monthly charges should be rolled over but not other charges disregards the ACCC’s views set out in its letter of 27 October 2009. In this letter, the ACCC stated that it was considering the rollover of the 2008-09 indicative prices in their entirety. The ACCC does not consider it appropriate for the setting of charges for the LSS in isolation due to its concerns about the regulatory uncertainty which currently exists.
345. While the Herbert Geer parties and Macquarie Telecom only wish rollover to apply in limited circumstances, in the interests of certainty and consistency, the ACCC considers on balance, it more appropriate in the current environment to rollover prices across all of the fixed network services. This is in line with the ACCC’s decision in its 2009 Pricing Principles and Indicative Prices Inquiry²⁹¹ and is reflected in the 2009 LSS Pricing Principles.

²⁸⁹ Explanatory Memorandum, *Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2009*., September 2009.

²⁹⁰ Ibid.

²⁹¹ ACCC, *Pricing Principles and Indicative Prices for LCS, WLR, PSTN OTA, ULLS, LSS, 1 August 2009 to 31 December 2010*, December 2009

346. The ACCC is also aware that some access seekers have signed contracts with Telstra for the provision of the LSS with a monthly charge of [REDACTED] prior to the release of the 2009 Draft Indicative Prices in August 2009.
347. Some access seekers have sought determinations from the ACCC since the release of the 2009 Draft Indicative Prices. These access seekers contend that Telstra entered into agreements for \$2.50 based upon greater knowledge than the access seekers.²⁹² These access seekers have also argued that should they have to pay \$2.50, compared with the draft indicative rate of \$1 this would lead to some access seekers being unable to compete with Telstra and other broadband providers.²⁹³
348. However, as there is no evidence before the ACCC which would lead it to set different prices in different disputes. In addition, \$2.50 has previously been determined as an appropriate charge, the ACCC does not consider that any party will be at a competitive advantage over any other. Further, there is no evidence to suggest that Telstra held any information which was not available to access seekers or entered into agreements otherwise in good faith.
349. In addition, it is noted that at the time of finalising the 2009 LSS Pricing Principles which apply to the fixed network services, the ACCC also released a discussion paper reviewing the 1997 Telecommunications Access Pricing Principles for Fixed Line Services. This discussion paper sought to review the conceptual underpinnings of the approach to regulated access pricing for fixed line services and will lead to new pricing principles and indicative prices for services in the future. The ACCC is currently assessing submissions to this discussion paper.
350. While the ACCC has decided to rollover the 2008-09 indicative prices, given the current uncertainty of the future regulatory framework, it recognises that LSS charges are unlikely to be greatly affected by the outcome of the review of the 1997 Access Pricing Principles. This is because, in the case of LSS, the costs associated with the copper wire physical infrastructure used to provide the service are considered to be fully recovered by the presence of charges for Telstra retail line services or wholesale line rental on that copper wire. In that sense the LSS is a pure incremental cost.
351. As a result, although the LSS indicative prices have been rolled over and applied in this arbitration, it is expected that absent other changes or evidence presented to the contrary, at the end of the current period the LSS prices could be moved, even in isolation, closer to their incremental cost. This should not however prevent parties from seeking commercial agreements where future charges can be agreed.

²⁹² Herbert Geer Reply Submission, *LSS Annual Charges*, 22 October 2009, p. 7.

²⁹³ Macquarie Telecom Letter, *Setting Indicative Prices for Fixed Services*, 13 November 2009.

5.4. Initial consultation

352. As noted in section 5.2 and 5.4, the ACCC initially consulted on the LSS monthly charges for the periods from 2005-06 until 2011-12. Parties were asked to make submissions on the following matters:
- the application of TSLRIC+ pricing;
 - proposed LSS monthly charges of \$2.50 for until 31 July 2009;
 - proposed LSS monthly charges of \$1.00 for the period 1 August 2009 to 30 June 2010 and for 2010-11, including submissions on:
 - the appropriateness of a line cost contribution;
 - the adoption of a transition price path for the LSS monthly charges;
 - the ‘specific cost’ cost model, including WACC parameters; and
 - international benchmarking, including the Analysys Mason international benchmarking report.²⁹⁴
353. As also noted above, the ACCC considers that it is appropriate to apply the indicative prices from the 2009 LSS Pricing Principles for the period 1 July 2005 to 31 December 2010 in making the FD for LSS monthly charges. As such many of the matters outlined in the initial consultation are no longer relevant.
354. In relation to the ‘specific cost’ cost model, the ACCC notes that concerns with the inputs to the cost model are no longer relevant due to the ACCC’s decision to apply the rolled over 2008-09 indicative prices for the period from 1 August 2009 until 31 December 2010. The ACCC also notes that parties did not raise concerns with the cost model or its inputs for the period 1 July 2005 until 31 July 2009.
355. The ACCC recognises that the adoption of the indicative prices has meant a move away from its views expressed in its Consultation Paper. The rolled over prices remain consistent with the 2009 LSS Pricing Principles and previous LSS pricing principle determinations. The methodology applied in reaching the rolled over indicative prices is consistent with the methodology applied in previous FDs.²⁹⁵
356. The ACCC is of the view that rolling over 2008-09 indicative price for the LSS, and applying them to this arbitration, will provide a degree of certainty regarding access to regulated services in a period of significant regulatory and industry change and associated uncertainty. The ACCC considers that setting different prices at this point in time is not likely to promote industry and regulatory certainty. This view is consistent with the ACCC’s preliminary view, as set out in a letter to parties on 27 October 2009; the charge

²⁹⁴ The ACCC proposed to have regard to chapters 4 and 6 of the Analysys Mason *International benchmarking analysis – Report for the ACCC*, 12 May 2009 which provide information concerning the WLR service and the LSS.

²⁹⁵ ACCC, *Publication of Final Determination and Associated Statement of Reasons – Adam Internet/Telstra LSS Access Dispute*, December 2007.

determined for the period until 31 July 2009; and previous LSS final determinations.

357. Specifically in relation to the LSS monthly charges, the ACCC came to this view on the basis that:
- existing contractual arrangements were being signed by some access seekers prior to the release of the draft pricing principles and indicative prices in August 2009 for a charge of \$2.50
 - the introduction of the *Telecommunications Legislation Amendment Bill 2009* has led to significant industry uncertainty and
 - the roll over of the 2008-09 charges provides certainty for the industry in a period of regulatory transition.

5.4.1. Application of TSLRIC+ Pricing

Introduction

358. The 2009 LSS Pricing Principles advocate the use of TSLRIC+ pricing in setting LSS charges. The ACCC considers that TSLRIC+ can be understood by breaking it down into its component elements:

Total service (TS) – meaning that it is the entire access service that is to be costed (as opposed to a particular supply of that service)

Long run (LR) – meaning the cost assessment has regard to the costs that will be incurred over a period sufficiently long that all production elements can be varied or avoided

Incremental cost (IC) – meaning it is the additional costs incurred as a consequence of providing the service (as defined); or put another way, would be avoided if the service was not supplied

‘+’ – meaning that a contribution is included to common costs, i.e. costs that are incurred by the access provider, but which are not directly caused by, or not attributable to, the supply of a particular service or business activity or group of services / activities.

Submissions

359. Telstra, in its submissions, agreed with the ACCC advocating the use of TSLRIC pricing.²⁹⁶ In its view TSLRIC+ pricing is consistent with the ACCC’s approach since it first started regulating access prices.²⁹⁷
360. Telstra submits the pricing principles and TSLRIC+ must be applied with certainty and predictability²⁹⁸. A departure from the 2002 and 2007 LSS Pricing Principles and TSLRIC+ would be a departure from credibility, the interest of the regulated firms and the LTIE.²⁹⁹

²⁹⁶ Telstra Primary Submission, *LSS Annual Charges*, 9 October 2009, p. 3.

²⁹⁷ Ibid.

²⁹⁸ Telstra Primary Submission, *Preliminary Matters and General Approach*, 18 May 2009, pp. 24–25.

²⁹⁹ Ibid.

361. Telstra also submits for the purpose of the joint arbitration, the ACCC should continue to apply TSLRIC+ in its 2002 LSS Pricing Principles form, and as endorsed by the ACCC and the Australian Competition Tribunal as meeting the statutory criteria.³⁰⁰
362. However, Telstra submits its implementation of TSLRIC+ is correct.³⁰¹ Telstra considers the ACCC's TSLRIC+ implementation will not achieve outcomes that mimic those of a competitive market and cannot be expected to result in reasonable cost recovery by the service provider.³⁰² Such an approach cannot provide the appropriate incentives that are required to promote the LTIE.³⁰³
363. In its preliminary submission, the Herbert Geer parties broadly agree with the ACCC's application of TSLRIC+ pricing.³⁰⁴
364. In response, Nicholls Legal parties submit that the ACCC's approach in its LSS pricing principles is the best available proxy for measuring the direct costs of providing LSS.³⁰⁵ Nicholls Legal also submits TSLRIC pricing principles would enhance access seeker's ability to compete in the market for services supplied by the LSS.³⁰⁶
365. The Herbert Geer parties submit that even though Telstra supports TSLRIC pricing, it ignores the basic premise that TSLRIC is based upon the costs of an efficient operator and not Telstra's claimed costs.³⁰⁷
366. The Nicholls Legal parties agree with the ACCC's general outline of the approach to applying a TSLRIC+ pricing methodology. They consider that the prices proposed by Telstra in LSS regulatory proceedings to date are not consistent with a properly constructed TSLRIC or TSLRIC+ model.³⁰⁸

ACCC view

367. The ACCC notes that the parties support the application of TSLRIC based pricing in this arbitration.
368. The ACCC considers that it is appropriate to have regard to the previous and current pricing principles for the LSS. It is noted that the 2002, 2007 and 2009 LSS Pricing Principles all adopt a TSLRIC+ approach.

³⁰⁰ Ibid, p. 21.

³⁰¹ Ibid.

³⁰² Ibid, p. 25.

³⁰³ Ibid

³⁰⁴ Herbert Geer Primary Submission, *General Approach and Preliminary Matters*, 18 May 2009, p.6.

³⁰⁵ Nicholls Legal Primary Submission, *LSS Annual Charges*, 18 May 2009, p. 20.

³⁰⁶ Ibid, p.19.

³⁰⁷ Herbert Geer Reply Submission, *General Approach and Preliminary Matters*, 4 June 2009, p. 3.

³⁰⁸ Nicholls Legal Primary Submission, *LSS Annual Charges*, 9 October 2009, p. 4.

5.5. Assessment against subsection 152CR(1) criteria

369. The ACCC must take the subsection 152CR(1) criteria into account in making a FD. Not all of these criteria will be relevant to every particular issue that the ACCC must determine.

5.5.1. Paragraph 152CR(1)(a)

370. In assessing the LSS monthly charge against the subsection 152CR(1) criteria, the ACCC must firstly have regard to the LTIE. This calls for consideration of a number of factors identified in section 152AB, being the objective of promoting competition, the objective of achieving any-to-any connectivity, the objective of encouraging the economically efficient use of and the economically efficient investment in infrastructure, and subsidiary matters (paragraphs 152AB(2)(c)-(e), subsection 152AB(4), paragraphs 152AB(6)(a)-(c) and subsection 152AB(7A)).

371. The ACCC considers that adopting a \$2.50 LSS monthly charge from the 2009 LSS Pricing Principles in their totality for the period 1 July 2005 to 31 December 2010 (which includes the rollover of the 2008-09 indicative prices to apply through to 31 December 2010) best promotes the LTIE. This is because of the uncertainties surrounding the *Telecommunication Legislation Amendment Bill 2009* (the Bill). The ACCC considers that applying the rolled over charge of \$2.50 would provide some certainty to industry until the final outcome of the Bill is known.

372. The ACCC considers that the roll over is unlikely to disrupt competition in the market for LSS as access seekers will have well known pricing principles and indicative prices in place to guide negotiations for access to key services.

373. The ACCC does not consider that the approach taken to this issue will affect the objective of achieving any-to-any connectivity.

374. The third criterion is the economic efficiency in use of, and the economically efficient investment in infrastructure used to provide the declared service. The ACCC considers maintaining the \$2.50 charge until 31 December 2010 will assist access seekers and the access provider in aligning business plans as the industry would have some certainty over prices, methodologies, terms and conditions. This may also lead to the continual efficient use of and investment in infrastructure.

375. The ACCC is also aware that there is continuing investment under the approach taken in regard to the 2009 LSS Pricing Principles and that new investment decisions may be impacted by uncertainties associated with the Bill. The roll over would:

- allow current investment plans to play out and
- reduce investment uncertainty and compliance or regulatory burden on the industry until the Bill is released in its finalised form.

5.5.2. Paragraph 152CR(1)(b)

376. The next criterion concerns the legitimate business interests of the access provider and the carrier's or provider's investment in facilities used to supply the declared service.
377. Telstra submits that its legitimate business interests would be adversely affected by a LSS monthly charge of \$1 per month.³⁰⁹ In response, the Nicholls Legal parties submit that maintaining the \$2.50 charge would allow Telstra to earn above normal profits.³¹⁰
378. In this regard, the ACCC is of the view that 'legitimate business interests' can be interpreted as 'legitimate commercial interests'. The ACCC notes 'legitimate business interests' is closely related to efficient investment.
379. The ACCC considers that the adoption of the 2009 LSS Pricing Principles in its entirety would ensure Telstra's legitimate commercial interests are assured through avoiding a potential two stage adjustment when the finalised Bill is released and allows prices to be re-assessed at a later date when there is more certainty around the NBN. These considerations prevent unnecessary burden on the carrier.
380. The ACCC also considers that as the \$2.50 figure is based on efficient forward-looking costs, Telstra would not be able to earn an above normal return.
381. Further, the ACCC considers that the adoption of indicative prices would promote the efficient use of and investment in infrastructure by minimising disruptions to pricing and investments. This is consistent with protecting Telstra's legitimate business interests.

5.5.3. Paragraph 152CR(1)(c)

382. The third criterion is the interests of all persons who have the right to use the service. The ACCC considers that access seekers' interests lie in being able to compete for end-users on the basis of their relative merits, without being impeded in acquiring end-user customers or incurring unnecessary costs.
383. The ACCC considers that the \$2.50 charge is consistent with the interests of access seekers, as persons who have rights to use the declared service. These monthly charges will best allow access seekers to compete on their merits, over those stages of production which are under their control, based upon the relative quality and cost of the downstream services they supply.
384. Further, the ACCC has not been presented with any evidence which will lead to the setting of different prices in different disputes. Accordingly, no access seeker will be at a competitive advantage over any other.
385. In addition, the ACCC is aware that access seekers who entered into the \$2.50 LSS monthly charge agreement with Telstra covers approximately [REDACTED] of

³⁰⁹ Telstra Primary Submission, *LSS Annual Charges*, 9 October 2009, p. 10.

³¹⁰ Nicholls Legal Letter, *Roll Over Options*, 2 November 2009.

LSS connections who did not dispute the agreement until the release of the 2009 Draft Indicative Prices. This suggests that these access seekers considered the \$2.50 figure is within a reasonable range and in their interests.

5.5.4. Paragraph 152CR(1)(d)

386. The next matter is the direct cost of providing access to the LSS. These are the LSS incremental or ‘specific’ costs and possibly a contribution to the indirect costs necessary in providing access to the LSS. In this context, the criterion involves consideration of whether the charges will enable the recovery of Telstra’s direct costs inclusive of a normal risk-adjusted return on efficient investment.
387. The ACCC considers the fact that certain access seekers covering approximately █████ of LSS SIOs had agreed to the \$2.50 until the release of the 2009 Draft Indicative Prices suggests that a majority of the industry consider \$2.50 is within a reasonable range and measure of the direct cost (inclusive of normal risk-adjusted return) of providing access to the LSS.
388. By adopting the 2009 Pricing Principles and indicative price of \$2.50 for the period 1 July 2005 until 31 December 2010, the ACCC considers that this ensures the appropriate recovery of direct costs by Telstra. Given that these same costs have in the past allowed Telstra to recover its direct costs, it follows this situation will not change with the rolling over of indicative prices.

5.5.5. Paragraphs 152CR(1)(e) and 152CR(1)(f)

389. The next two criteria are the value to a party of extensions, or enhancement of capability, whose cost is borne by someone else; and the operational and technical requirement necessary for the safe and reliable operation of a carriage service, or a telecommunications network or a facility.
390. The ACCC does not consider that there are any extensions necessary to Telstra’s ordering systems to supply the LSS. The ACCC does not consider that the ‘operational and technical requirements’ criterion materially impacts on this decision in respect of monthly charges.

5.5.6. Paragraph 152CR(1)(g)

391. The last matter is the economically efficient operation of a carriage service, a telecommunications network or a facility.
392. Consistent with the approach adopted by the Australian Competition Tribunal, the ACCC considers that in applying this criterion, it is relevant to consider:
- economic efficiency
 - the economically efficient operation of downstream services
 - the telecommunication networks and infrastructure used to supply these services.³¹¹

³¹¹ *Re Telstra Corporation Ltd* [2006] ACompT 4 [94-95].

393. The ACCC has considered issues of economic efficiency under section 5.6.1 above.
394. The ACCC considers that the economically efficient operation of carriage services and associated networks and facilities of the access provider and access seekers will be encouraged and continued by applying monthly charges that are based on efficient costs.
395. Further, the charges bring certainty to Telstra and access seekers concerning the terms and conditions to apply until the 31 December 2010. This, in itself, promotes the economically efficient operation of a carriage service, a telecommunications network or a facility.

5.6. Minimum charge periods

5.6.1. Introduction

396. The ACCC's preliminary view was that there should be no minimum period for which monthly charges are payable for the LSS. This reflects the view that connection and disconnection costs are recovered by way of other charges, and hence a minimum connection period is not necessary to recover costs. Further, this access term has the potential of increasing the costs faced by competing access seekers and harm competition, and will not encourage economic efficiency.

5.6.2. Submissions

397. Telstra considers the ACCC must disregard access seekers submissions on minimum charge periods because it was not notified as an issue in dispute by both parties.³¹² The Herbert Geer and Nicholls Legal parties submit they agree with the ACCC's view that there should be no minimum charge period.³¹³

5.6.3. ACCC view

398. Consistent with the views expressed in its Consultation Paper, the ACCC considers there should be no minimum charge period.

5.7. Period of operation

399. In its Consultation Paper, the ACCC sought views from all parties as to the appropriate period of operation for the FD. This is an issue which has been raised in a number of consultation papers and additional correspondence with parties. As such, the ACCC's general approach to determining the period of operation and parties views are discussed in section 4.4.

³¹² Telstra Reply Submission, *LSS Annual Charges*, 22 Oct 2009, p. 3.

³¹³ Herbert Geer Primary Submission, *LSS Annual Charges*, 9 Oct 2009, p.4; Nicholls Legal Primary Submission, *LSS Annual Charges*, 9 October 2009, p. 14.

5.8. Applicable taxes

400. The ACCC did not seek submissions from parties in relation to applicable taxes, however, Telstra sought to provide submissions on the issue.

5.8.1. Submissions

401. Telstra submits that the monthly charges should expressly exclude any applicable taxes to allow them to recover these costs separately.³¹⁴

402. In response, the Herbert Geer parties consider that Telstra must provide details of what taxes it considers are recoverable.³¹⁵ Without this information access seekers are unable to properly assess and comment on Telstra's proposal and therefore the ACCC should disregard Telstra's request.³¹⁶

5.8.2. ACCC view

403. The ACCC notes that Telstra did not specify which taxes should apply to the LSS. Accordingly the ACCC does not consider it appropriate to make a finding in relation to this issue.

³¹⁴ Telstra Primary Submission, *LSS Annual Charges*, 9 Oct 2009, p. 11.

³¹⁵ Herbert Geer Reply Submission, *LSS Annual Charges*, 22 October 2009, p. 7.

³¹⁶ *Ibid.*

6. Single connection and disconnection charges

6.1. Introduction

6.1.1. Background

404. A LSS connection or disconnection can be made using:
- Telstra's standard ordering systems and processes; or
 - a Managed Network Migration (MNM) process.
405. A LSS 'single' connection is when Telstra's standard ordering systems and processes are used, and comprise all LSS connections that occur outside of a MNM process. In this chapter LSS 'single' disconnection charges will also be considered.
406. Parties in dispute with Telstra on this matter are:
- Chime, Wideband, EFTel, Saunders, Agile, Netspace and Adam (represented by and referred to as the Herbert Geer parties)
 - Primus (provided the same submission as the Hebert Geer parties, and as such is in this instance will be referred to as a Herbert Geer party)
 - TPG, Request, and NEC (represented by and referred to as Nicholls Legal parties).

6.1.2. Current charges

407. The charges that currently apply between the parties are the subject of IDs. The charges applying between the parties are also the subject of a CRA or similar.
408. The ACCC sought the parties' confirmation on the terms and conditions that currently apply. Consequently, the ACCC is of the view that single connection and disconnection charges are addressed in CRA 191 for each of the access seekers.
409. Telstra submits that several of the access seekers did not necessarily notify all of the contract charges listed in their submissions as being issues in dispute.³¹⁷ Telstra submits that, in these circumstances, the ACCC should not seek to cover them in its FDs.³¹⁸ The ACCC considers that the access seekers have clearly notified the issues in dispute in their initial dispute notifications and subsequent correspondence. Having issued IDs in relation to these notified disputes, the ACCC considers it appropriate to proceed to making FDs on these same issues.

³¹⁷ Telstra Reply Submission, *LSS Single Connection Charges*, 4 June 2009, p. 2.

³¹⁸ *Ibid.*

6.1.3. Prior consideration

410. LSS single connection and disconnection charges have been considered by the ACCC in a number of proceedings including ACCC, *Assessment of Telstra's LSS undertaking relating to connection and disconnection charges – final decision*, April 2006. They were also considered in ACCC, *Publication of Final Determination and associated statement of reasons – Adam Internet/Telstra LSS access dispute*, December 2007 (Adam Decision).
411. Telstra submits that the ACCC should not consider itself bound by these decisions, and all of the issues must be considered afresh in light of the statutory criteria.³¹⁹ Telstra considers that there could be a danger in referring to the previous decisions should they be set aside on review.³²⁰
412. The Herbert Geer parties disagree with Telstra on this latter point;³²¹ as did the Nicholls Legal parties which noted that, in any event, it was open to Telstra to apply to the ACCC to vary a determination pursuant to subsection 152DT(1) of the Act.³²²
413. The ACCC has taken the view that it can and should take its previous decisions into consideration in making FDs in accordance with subsection 152CR(2) of the Act. The ACCC considers that it should adopt a consistent approach to recurring issues and where changes in its approach are appropriate, acknowledge those changes and explain them.
414. However, the ACCC does not consider itself bound to reach the same conclusions as expressed in previous arbitral determinations. This reflects the fact that there are numerous matters to which it has regard in making a FD. In particular, the individual circumstances of each access dispute and further or better information that becomes available through parties' submissions means that it could be appropriate to adopt a different approach or reach a different conclusion consistent with the statutory criteria.
415. The ACCC does not consider that it will fall into error by having regard to decisions that are subject to court review at the time of making a FD and believes that it is incumbent on it to reach FDs in as timely a manner as possible, irrespective of pending court proceedings. For the purposes of this arbitration the previous determinations which Telstra refers to were subsequently upheld by the Federal Court.³²³

6.1.4. Principles to apply

416. The ACCC, in its Consultation Paper, proposed to the parties that LSS single connection and disconnection charges should be determined having regard to the relevant pricing principles, set out in:

³¹⁹ Telstra Primary Submission, *LSS Single Connection Charges*, 18 May 2009, p. 2.

³²⁰ Ibid.

³²¹ Herbert Geer Reply Submission, *Single Connection & Disconnection Charges*, 4 June 2009, p. 2.

³²² Nicholls Legal Primary Submission, *Single Connection & Disconnection Charges*, 18 May 2009, p. 2.

³²³ *Telstra Corporation Limited v Australian Competition and Consumer Commission* [2009] FCA 757 (17 July 2009).

- *ACCC, Review of the Line Sharing Service Declaration - Final Decision, October 2007.*
- 417. However since that time, the LSS pricing principles have been repealed and incorporated into the 2009 LSS Pricing Principles.
- 418. The ACCC undertook an industry-wide public consultation process in the making of these pricing principles. Parties to this joint arbitration were also consulted on the indicative prices contained in these pricing principles as outlined further in these reasons.
- 419. Telstra submits that while it supports the adoption of a TSLRIC+ approach for determining LSS connection and disconnection charges, it objects to certain aspects of the ACCC's approach, which in its view, results in the ACCC's proposed prices being set below Telstra's efficient costs.³²⁴ Telstra states that as the LSS connection and disconnection charges in the ACCC's indicative prices are averaged it is difficult to understand why the ACCC has proposed to de-average those charges for the first time in these access disputes.³²⁵
- 420. The Herbert Geer and Nicholls Legal parties submit that they accept the ACCC's approach to the principles to apply.³²⁶
- 421. In light of the repealed pricing principles the ACCC has taken into account the 2009 LSS Pricing Principles which incorporates the same pricing principles and indicative prices as those from the repealed instrument.
- 422. Consequently, the ACCC considers it is required by subsection 152AQA(6) of the Act to take the relevant 2009 LSS Pricing Principles into account in specifying LSS single connection and disconnection charges.
- 423. Under these principles, relevant to LSS single connection and disconnection charges are:
 - a TSLRIC+ pricing principle should be applied to the LSS
 - LSS connection and disconnection charges should be set with reference to the amounts charged by third party contractors to Telstra for jumpering work in exchanges, indirect costs and back-of-house costs.
- 424. These pricing principles also contain price-related terms (indicative prices) LSS single connection and disconnections. The ACCC considers that it is appropriate to apply these principles and prices when determining the charges, albeit while taking into account the regulatory environment in which those principles and prices will apply. The approach taken in regard to LSS single connection and disconnection charges is consistent with the approach taken to other pricing issues that have been determined in this arbitration.

³²⁴ Telstra Primary Submission, *LSS Single Connection & Disconnection Charges*, 18 May 2009, p. 2.

³²⁵ *Ibid*, pp. 2–3.

³²⁶ Herbert Geer Primary Submission, *Single Connection & Disconnection Charges*, 18 May 2009, p. 4; Nicholls Legal Primary Submission, *Single Connection & Disconnection Charges*, 18 May 2009, p. 2.

6.1.5. Technical advice

425. The ACCC has received a number of reports (some of a draft or interim nature) in previous arbitrations which in the ACCC's opinion are relevant to the present access disputes. These reports contain analysis concerning the connection of the LSS. The reports that are particularly relevant to ULLS and LSS single connection costs are:
- Consultel, *Analysis relating to Primus-Telstra LSS Dispute - interim report*, February 2006.
 - Consultel, *Analysis of ULLS and LSS undertakings and subsequent submissions – final report*, February 2006.
 - Consultel, *Transferring Services between ULLS and LSS – Draft report*, August 2006.
426. The ACCC, in its Consultation Paper, proposed to the parties that the reports prepared for previous arbitrations should be considered.
427. Telstra submits that much of the technical advice relied upon by the ACCC is unsound in relation to LSS single connections.³²⁷ Specifically, Telstra submits that a number of the reports are either interim or draft reports and that it is inappropriate for the ACCC to rely upon such material in making a FD as a draft report may not reflect the expert's settled views.³²⁸
428. Telstra also expressed its objections to the ACCC's continued reliance on the material prepared by Dr Brooks in determining connection charges and submits that the access seekers have been selective and inconsistent in their reliance on the various reports of Dr Brooks.³²⁹ Telstra's concerns are that Dr Brooks lacks independence, lacks the requisite qualifications and that his previous reports are not soundly reasoned.³³⁰
429. Both the Herbert Geer and Nicholls Legal parties consider it appropriate that the ACCC have regard to the reports it has previously obtained.³³¹
430. The Nicholls Legal parties submit that Dr Brooks is both independent and amply qualified and that the general findings in the Consultel Reports are supported by a body of other submissions and evidence provided to the ACCC during its enquiry into Telstra's proposed LSS and ULLS connection and disconnection undertakings.³³² The Nicholls Legal parties submit that, in the

³²⁷ Telstra Primary Submission, *LSS Single Connection & Disconnection Charges*, 18 May 2009, p. 3.

³²⁸ Ibid.

³²⁹ Ibid, p. 2.

³³⁰ Ibid.

³³¹ Herbert Geer Primary Submission, *Single Connection & Disconnection Charges*, 18 May 2009, p. 4; Nicholls Legal Primary Submission, *Single Connection & Disconnection Charges*, 18 May 2009, p. 2.

³³² Nicholls Legal Reply Submission, *Single Connection & Disconnection Charges*, 4 June 2009, p. 2.

absence of compelling and credible evidence to the contrary, the ACCC is entitled to rely on the Consultel Reports.³³³

431. The ACCC considers that Dr Brooks is qualified to provide advice to the ACCC regarding single LSS connections and disconnections. The ACCC has previously appointed Dr Brooks to advise on these technical matters which are within his field of expertise. It has not called on Dr Brooks to provide expert advice on economic, financial or costing matters.
432. The ACCC considers that Dr Brooks is impartial and does not consider that he could reasonably be perceived to be otherwise. The ACCC notes that Dr Brooks had not performed work for any of the access seeker parties participating in hearings at the time of preparing his reports. Dr Brooks does not have any personal or financial interest in any of the LSS access seekers participating in the joint arbitration hearing.
433. Telstra notes that some of these reports are of a draft or interim nature however the ACCC considers that Telstra has not offered any substantive criticisms of these reports which the ACCC could directly address. The ACCC notes that although the reports are marked as either 'draft' or 'interim', at the time they were compiled the ACCC was satisfied with their findings and did not seek final reports. Consequently, the ACCC is of the view that it should have regard to each of the Consultel reports. The ACCC considers that the reports are appropriately reasoned and the conclusions reached are sound and appropriately explained.

6.2. Consultation Process

434. The ACCC undertook two consultations in relation to the LSS connection and disconnection charges. The first of these consultations, carried out by way of the ACCC issuing a Consultation Paper and accompanying DFD, sought views from parties in relation to the assessment of efficient costs, including:
 - jumpering, travel, vehicle, tool and materials costs
 - indirect costs
 - 'back-of-house' costs.
435. Following the initial consultation, the ACCC undertook an industry wide consultation in relation to pricing principles and indicative prices for the declared fixed network services, including prices for the LSS. As a result of this consultation and the extensive views expressed by parties in relation to the proposed indicative prices, the ACCC wrote to parties involved in the joint arbitration hearing seeking views on the option of rolling over the 2008-09 indicative prices, which included indicative prices for LSS single connection and disconnection charges.³³⁴

³³³ Ibid.

³³⁴ ACCC letter to Telstra, Nicholls Legal and Herbert Geer dated 27 October 2009.

436. Having taken all the parties' submissions into consideration the ACCC has decided to apply the indicative prices from the 2009 LSS Pricing Principles in their totality for the period 1 July 2005 to 31 December 2010 (which includes the rollover of the 2008-09 indicative prices to apply through to 31 December 2010). In the ACCC's opinion, the indicative prices contained in these pricing principles, were in the LTIE when first made, and are still in the LTIE taking into account the current uncertain regulatory environment.
437. The ACCC considers that the subsection 152CR(1) criteria supports this approach.
438. Consequently, while the submissions from the initial consultation phase are no longer relevant for the purposes of this FD, the principles of assessing efficient costs are. Such an approach is in line with the ACCC's decision to rollover indicative prices given that the 2009 LSS Pricing Principles require connection and disconnection charges to be set with reference to these distinct cost categories.

6.3. Consultation on rollover

6.3.1. Introduction

439. On 27 October 2009, the ACCC wrote to parties indicating its preliminary view was to rollover the 2008-09 indicative prices until 31 December 2010 and apply these prices in arbitrations. Parties' views were sought on this proposal.
440. The ACCC also provided a complete schedule of its proposed indicative prices for fixed network services for the period:
- Until 30 June 2006, and
 - 1 July 2006 through to 31 December 2010,
- reflecting the approach the ACCC had taken in respect of the 2009 LSS Pricing Principles.
441. In December 2009, after assessing all of the information the ACCC had obtained during its industry-wide consultation on the pricing principles and indicative prices for fixed network services, the decision to rollover indicative prices for fixed network services was made with consideration given to three key events that introduced a degree of regulatory, industry and pricing uncertainty, namely:
- the introduction of the *Telecommunications Legislation Amendment Bill 2009*;
 - the effect the National Broadband Network will have on the regulation of legacy assets and new telecommunication investments; and
 - the appropriateness of TSLRIC+ as a pricing methodology in light of the above.

442. Of the determinations made as a result of this decision, the ACCC notes that the 2009 LSS Pricing Principles established charges for LSS single connections and disconnections (where payable) for the periods:

- Until 30 June 2006
- 2006-07
- 2007-08
- 1 July 2008 – 31 July 2009
- 1 August 2009 – 31 December 2010.

443. The LSS charges are averaged, consistent with previous pricing principles.

444. The indicative charges do not apply to connections in Band 4, or where the line in which the LSS connection was being used is also being used to supply the ULLS.

6.3.2. Submissions

445. Telstra submits it would accept the rollover of LSS prices from 1 August 2009 to 31 December 2010, provided the indicative prices for all fixed network services are rolled over for the same period and applied in arbitrations.³³⁵ Telstra notes its acceptance of this is based on the indicative prices being rolled over as a “package” for the full period and that the rolled over prices will be applied consistently by the ACCC in all decisions across all fixed network service and to all access seekers until 31 December 2010.³³⁶

446. The Herbert Geer parties submit that the application of rollover should only apply in relation to the ULLS monthly charge and WLR charges and that the 2009 Draft Indicative Prices should be all other charges.³³⁷ The parties submit that the application of rollover to prices other than the ULLS monthly charges (i.e., LSS connection charges) would likely fail to meet all of the statutory criteria in subsection 152CR(1) of the Act.³³⁸

447. While not directly specifying LSS connection charges, the Herbert Geer parties make a submission on the issue of rollover of pricing generally. In their general submission, they submit that the rolled over prices cannot be justified for charges other than the ULLS monthly charges, because:

- there is no price shock concern with the 2009 Draft Indicative Prices released in August 2009, contrary to the ULLS monthly charge which requires an adjustment path;
- the LSS charges contained in the 2009 Draft Indicative Prices are not based on the network cost model used for the ULLS and the remaining fixed network services, and as such the concerns raised by access seekers with regards to TSLRIC+ do not apply to the LSS; and

³³⁵ Telstra Letter, *ULLS/LSS joint hearing: Price Terms-Roll Over Option*, 2 November 2009.

³³⁶ *Ibid.*

³³⁷ Herbert Geer Letter, *Roll Over Prices*, 2 November 2009, p. 1; Herbert Geer Letter, *Expiry Date for ULLS and LSS Final Determinations*, 10 December 2009.

³³⁸ Herbert Geer Letter, *Roll Over Prices*, 2 November 2009, p. 2.

- the LSS charges for both rollover and the 2009 Draft Indicative Prices are based on the same model, with different inputs due to changes in demand.³³⁹

448. The Nicholls Legal parties submit that the ACCC should rollover 2008-09 prices for all fixed line services until 31 December 2010.³⁴⁰

6.3.3. ACCC View

449. In the course of the joint hearing, the Government proposed significant reforms to the telecommunications access regime in the *Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2009* which, among other things, proposes replacing the negotiate-arbitrate model with an ex-ante regulatory access framework.

450. The proposed reforms include allowing the ACCC to issue ‘access determinations’ and adopt ‘fixed principles’ which are aimed at improving competition and efficiency within telecommunications and promote greater regulatory certainty associated with regulatory processes under Part XIC of the Act.³⁴¹ The proposed reforms include:

- replacing the negotiate-arbitrate model with a streamlined regulatory process and providing the ACCC with the ability to make up-front access determinations on price and non-price terms of access, and
- allowing the ACCC to specify pricing methodologies for declared services which would be used to determine prices over successive regulatory periods or successive undertakings in order to create greater regulatory certainty.³⁴²

451. The ACCC considers that given the status of the Bill in the current Parliament and the nature of the proposed changes it would be prudent to consider the impact of the proposed legislative changes before it made substantial changes to the price of LSS single connections and disconnections. The ACCC is also mindful that the proposed legislative reform Bill has been introduced but not yet debated in the Senate and that there remains uncertainty as to whether the Bill will be passed in its current form or the nature of any amendments to it. The ACCC believes these matters are relevant considerations in these arbitrations.

452. The ACCC is of the view that applying the indicative prices from the 2009 LSS Pricing Principles in their totality for the period 1 July 2005 to 31 December 2010 for LSS single connections and disconnections will provide a degree of certainty regarding access to regulated services in a period of significant regulatory and industry change and associated uncertainty.

³³⁹ Ibid, p. 3.

³⁴⁰ Nicholls Legal Letter, *Roll Over Options*, 10 December 2009.

³⁴¹ Explanatory Memorandum, *Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2009*, September 2009.

³⁴² Ibid

453. Further, the ACCC considers that the submissions made by the Herbert Geer parties requiring that only ULLS monthly charges should be rolled over but not other charges disregards the ACCC's views set out in its letter of 27 October 2009. In this letter, the ACCC stated that it was considering the rollover of the 2008-09 indicative prices in their entirety. The ACCC does not consider it appropriate for the setting of charges for the LSS in isolation due to its concerns about the regulatory uncertainty which currently exists.
454. While the Herbert Geer parties only wish rollover to apply in limited circumstances, in the interests or certainty and consistency, the ACCC considers on balance, it more appropriate in the current environment to rollover prices across all of the fixed network services. This is in line with the ACCC's decision in its 2009 Pricing Principles and Indicative Prices inquiry³⁴³ and reflected in the 2009 LSS Pricing Principles.

6.4. Initial consultation

455. As noted in section 6.2 – 'Consultation Process', the ACCC initially broadly consulted on the following matters in relation to LSS single connections and disconnections:

- jumpering, travel, vehicle, tool and materials costs for connections
- indirect costs
- 'back-of-house' costs.

6.4.1. Jumpering, travel, vehicle, tool and materials costs for connections

456. Submissions were sought from parties on the following matters:
- general methodology
 - weighting between singular and multiple tickets.
457. As noted above, the ACCC considers that it is appropriate to apply all of the indicative prices from the 2009 LSS Pricing Principles in making the FD for LSS single connection charges. As such, many of the issues outlined in the initial consultation are no longer relevant.
458. The ACCC also recognises that the adoption of the indicative prices has meant a move away from its views as expressed in the Consultation Paper, specifically in relation to the methodology suggested for use in averaging 3P contractor quotes for setting the LSS connection charges. With the rollover of charges, these suggested methodologies are no longer relevant.
459. The rolled over prices remain consistent with the 2009 LSS Pricing Principles and previous LSS pricing principle determinations. The methodology applied in reaching the rolled over indicative prices is consistent with the methodology

³⁴³ ACCC, *Pricing Principles for the Line Sharing Service (LSS) Determination 2009*.

applied in previous FDs.³⁴⁴ The ACCC notes that the pricing principles require that connection charges should be set with reference to the amounts charged by third party contractors to Telstra for jumpering work in exchanges. They do not specify how those contractor charges should be used to set price.

6.4.2. Jumpering, travel, vehicle, tool and materials costs for disconnections

460. Submissions were sought from parties in relation to LSS single disconnection charges.
461. As with other charges, the ACCC considers that it is appropriate to apply all of the indicative prices from the 2009 LSS Pricing Principles in making the FD for LSS connection charges. As such, many of the issues outlined in the initial consultation are no longer relevant.
462. The ACCC considers that where a LSS disconnection takes place as a result of an end-user churning their downstream services to another service provider, there is the potential for the removal of the existing jumpers to be combined with installing the new jumpers on the relevant line. Overall costs can be significantly reduced by combining the two processes and the costs of removing the jumpers would be subsumed into the relevant connection charge.
463. Accordingly, the ACCC considers that no cost allowance for disconnections should be provided for when a LSS disconnection is made pursuant to an end-user churning their downstream services to another service provider.
464. In its Consultation Paper the ACCC proposed that a disconnection charge would also not be payable where the access seeker is participating in the Telstra LSS churn process and Telstra (BigPond) is not.
465. Consistent with the findings in previous arbitrations the ACCC further considers that disallowing LSS disconnection charges where the LSS access seeker is a participant in the Telstra LSS churn process but BigPond is not, will encourage efficiency as more downstream services will be likely to fall within the ambit of the Telstra LSS churn process.³⁴⁵

6.4.3. Indirect costs

466. Submissions were sought from parties on a mark-up of 10 percent on 3P contractor rates to cover indirect costs such as contract management costs.
467. The ACCC considers that the TSLRIC+ pricing principles which apply to the LSS includes an allocation for common costs. Consistent with the views expressed in the Adam Decision,³⁴⁶ the ACCC acknowledges that the allowance of a 10 per cent mark up for contract management is not set by

³⁴⁴ See for example ACCC *Publication of Final Determination and associated statement of reasons – Adam Internet/Telstra LSS Access Dispute*, December 2007.

³⁴⁵ ACCC *Publication Final Determination and associated statement of reasons – Adam Internet/Telstra LSS access dispute*, December 2007.

³⁴⁶ *Ibid*, p. 98.

reference to Telstra's actual costs, but rather what is considered a reasonable mark-up.

468. Given the ACCC's decision to apply the rollover of the 2008-09 indicative prices, which includes a 10 per cent mark up for contract management costs, the ACCC has maintained the position put forward to parties in its Consultation Paper. This position is also consistent with recent ACCC arbitration determinations, connection charge undertaking assessments and the 2009 LSS Pricing Principles.

6.4.4. 'Back of house' costs

469. Submissions were sought on the single connections costs associated with the following Telstra workgroups and processes, namely:

- Data activation centre (DAC)
- Integrated deployment solution centre (IDS).

470. Costs associated with Telstra's wholesale customer front of house activities are recovered through monthly rental charges.

471. The ACCC proposed in its Consultation Paper to make an allowance for efficient DAC and IDS group costs, on the basis that an efficient operator would incur these costs, and that these are not recovered through other charges.

472. Submissions on the DAC and IDS group costs dealt with:

- salaries; and
- the time allowed for DAC activity.

473. The ACCC considers that the various back of house costs should remain consistent with the 2009 LSS Pricing Principles, in line with the ACCC's decision to rollover the 2008-09 indicative prices for the period from 1 August 2009 until 31 December 2010. This includes the approach the ACCC has previously taken in respect of allowances for the salary component and the time allowed for DAC activity.

474. The ACCC considers that its proposed approach continues to fairly reflect the costs that an efficient operator would incur in providing them.

6.5. Other matters

475. The ACCC also sought submissions on the following issues:

6.5.1. Costs for financial years

476. The ACCC sought submissions on its proposal contained in the Consultation Paper that where it held data for a particular financial year it would apply such

data in calculating the charges for that financial year. Where such data was not available, the ACCC proposed to estimate these costs from known data by either interpolation or by indexation.

477. With the ACCC's decision to apply all indicative prices, this issue is no longer relevant because existing models have been used. The indicative prices up to 2008-09 are based on the use of 3P contractor rates for the 2008-09 period. In line with the ACCC's decision to rollover the 2008-09 indicative prices for the period from 1 August 2009 until 31 December 2010, updated 3P contractor rates for the 2009-10 period have not been applied.

6.5.2. Cost models

478. Submissions were sought on simple LSS connections cost models that adopted the ACCC's views and were attached to the ACCC's Consultation Paper.
479. The cost model distributed to parties is the same as the model used in determining previous determinations, albeit with updated inputs. The model results align with those included in the indicatives prices for the period up to and including 2008-09.
480. In addition, given the decision to consistently apply rolled over rates from 2008-09 indicative prices to the period 1 August 2009 until 31 December 2010, the ACCC has not relied on the cost models sent to the parties for this period.
481. Having considered the various submissions made by the parties the ACCC considers that the rolled over prices will provide certainty regarding access to LSS in a period of significant regulatory and industry change and is in the LTIE.

6.5.3. Averaged or de-averaged charges

482. The ACCC sought submissions on whether LSS single connection charges should be determined on a geographically de-averaged or averaged basis.
483. The ACCC's decision to rollover LSS single connection charges has led the ACCC to the conclusion that LSS prices should continue to be geographically averaged and that this would not be an appropriate time to change methodologies or approaches to such issues.
484. The ACCC has previously specified geographically averaged connection and disconnection charges for the LSS, despite varying travel costs in different geographic regions.³⁴⁷ The ACCC considers that, where the difference in costs between regions is not great, it may be appropriate to geographically average connection charges where the distortionary effect is not significant.
485. While the ACCC's Consultation Paper proposed to de-average LSS single connection charges, the ACCC notes that Telstra's activation and billing

³⁴⁷ ACCC, Access Dispute between Request Broadband and Telstra— LSS, *Final Determination and Associated Statement of Reasons*, published 24 August 2007.

systems do not currently record the geographical band in which an LSS connection occurs. The ACCC considers that it would be inappropriate given the current regulatory uncertainty to require Telstra to change its IT systems in order to implement de-averaged connection charges.

6.5.4. Bands 1, 2, 3

486. The ACCC sought submissions on whether to specify charges to apply to LSS connections in Band 4. This reflected the view that there is little if any demand for LSS connections in Band 4. This position is consistent with the ACCC's decision to rollover LSS single connection charges. In the various submissions the parties supported this approach.³⁴⁸

6.5.5. Commencement date, expiry date and interest

487. The ACCC has backdated the LSS single connection charges. Interest is payable on any over- or under-payment that has occurred. The term of backdating, and reasons for the approach have been discussed previously in section 4.4 of this Statement of Reasons.

6.5.6. Changes to the draft final determination

488. The ACCC provided a DFD to the parties for comment. Some of the terms specified in the FD differ to some extent to those proposed at the DFD stage due to the ACCC's decision to rollover the 2008-09 indicative prices for the period from 1 August 2009 until 31 December 2010 in line with the 2009 LSS Pricing Principles.

6.6. Assessment against subsection 152CR(1) criteria

6.6.1. Paragraph 152CR(1)(a)

489. As discussed at section 4.3 above, the ACCC must take the subsection 152CR(1) criteria into account in making a FD. Not all of these criteria will be relevant to every particular issue that the ACCC must determine.

490. The ACCC notes that the parties did not make submissions addressing LSS single connection and disconnection charges and the subsection 152CR(1) criteria.

491. Having regard to the subsection 152CR(1) matters, paragraph 152CR(1)(a) concerns the LTIE. This calls for consideration of a number of factors identified in section 152AB, namely the objective of promoting competition, the objective of achieving any-to-any connectivity, the objective of encouraging the economically efficient use of and the economically efficient investment in infrastructure and subsidiary matters (paragraphs

³⁴⁸ Nicholls Legal Primary Submission, *Single Connection & Disconnection Charges*, 18 May 2009, p. 4; Telstra Primary Submission, *LSS Single Connection & Disconnection Charges*, 18 May 2009, p. 9; and ; Herbert Geer Primary Submission, *Single Connection & Disconnection Charges*, 18 May 2009, p. 13.

152AB(2)(c)-(e), subsection 152AB(4), paragraphs 152AB(6)(a)-(c), subsection 152AB(7A) and subsection 152AB(8)).

492. The ACCC considers that prices based on the forward-looking costs of an efficient provider best promote competition and use of infrastructure in this current period of significant regulatory and industry change. By rolling over 2008-09 indicative prices for the period from 1 August 2009 until 31 December 2010 parties will be assured of certainty regarding access to regulated services. Further, this state of certainty is also in the LTIE.
493. The ACCC does not consider that the approach taken to this matter affects the objective of achieving any-to-any connectivity, or that the matters identified in paragraph 152AB(6)(a) are relevant here.
494. Turning to efficient investment in and use of infrastructure, the ACCC firstly considers the efficient use of and investment in infrastructure used to supply the LSS. The ACCC also considers consequences for efficient use of and investment in the equipment, such as DSLAMs, that are used to supply downstream voice and data services.
495. The ACCC considers that efficient use of and investment in the infrastructure used to supply the LSS will be encouraged where Telstra is able to recover the efficient, forward-looking costs of making LSS connections, including a normal risk-adjusted return on capital employed. Connection and disconnection charges above this level for LSS access seekers would, however, have the effect of discouraging efficient investment in and use of infrastructure used to supply the LSS. Use of and investment in infrastructure used to supply downstream services would also be likely to be below efficient levels.
496. With the rollover of indicative prices the ACCC considers that Telstra will continue to be able to recover costs and attain a reasonable return. Similarly, the rolled over prices will continue to allow access seekers efficient use of infrastructure. While the realisation of more specific current charges may have effected this balance better, the ACCC considers that rolled over prices provide greater stability and certainty in the current climate of change. This position is ultimately also in the LTIE.
497. Telstra's legitimate commercial interests include its ability to exploit economies of scale and scope. Telstra will better be able to exploit economies of scale and scope to the extent that rolled over charges provides certainty in the current climate and will increase demand for downstream services. As there are fixed costs in providing these services, the increased demand will give rise to economies of scale and scope, which Telstra could exploit.
498. In relation to LSS disconnection charges the ACCC considers where a LSS disconnection takes place as a result of an end-user churning their downstream services to another service provider, there is the potential for the removal of the existing jumpers to be combined with installing the new jumpers on the relevant line.

499. The ACCC considers that disallowing disconnection costs for the LSS (in certain circumstances) represents an efficient process that would promote competition. This best reflects the interests of access seekers and allows for recovery of efficient costs of disconnections. Not allowing separate disconnection charges for all disconnections will give Telstra incentives to invest in efficient churn and disconnection processes for the LSS. Further, by promoting competition, there will be indirectly increased incentives to invest efficiently in the supply of downstream services.
500. Although there is currently the potential for Telstra not to recover its direct costs of disconnecting some LSS that are cancelled, and for Telstra's legitimate business interests to be impaired as a result, whether this remains the case will depend upon Telstra's decision to participate in its own churn process. By choosing to participate in its own churn process, Telstra will be able to recover its direct costs and Telstra's legitimate business interests would not be compromised.
501. Further, disallowing LSS disconnection charges where the LSS access seeker is a participant in the LSS churn process but Telstra (BigPond) is not, is specified in the 2009 LSS Pricing Principles, and hence its adoption here is consistent with those pricing principles.
502. Telstra's legitimate commercial interests include its ability to recover its costs and make a normal commercial return on capital employed. Accordingly a separate disconnection charge is not needed to reflect Telstra's legitimate commercial interests. Disallowing a disconnection cost will encourage Telstra to adopt efficient connection and disconnection processes, which is in its legitimate commercial interests and is consistent with the ACCC's decision to rollover indicative prices.

6.6.2. Paragraph 152CR(1)(b)

503. The next matter concerns the legitimate business interests of the access provider, and the carrier's or provider's investment in facilities used to supply the declared service.
504. The ACCC's views on the effect of this decision on these matters have already been discussed as part of the matters concerning the LTIE. Telstra's legitimate business interests are likely to be met by the rolling over of prices which in the past have proved capable of sustaining Telstra's legitimate business interests.

6.6.3. Paragraph 152CR(1)(c)

505. The third criterion is the interests of all persons who have the right to use the services. The ACCC considers that access seekers' interests lie in being able to compete for end-users on the basis of their relative merits, without being impeded in acquiring end-user customers or incurring unnecessary costs.
506. It is in the interest of LSS access seekers to pay charges that reflect the efficient, forward-looking costs of connecting services as allowed for by the rolling over of prices.

507. The interests noted under 152CR(1)(c) are also promoted by arrangements that provide better access to effective churn and disconnection processes, and not incurring disconnection costs that could be avoided if an effective and efficient process and pricing were employed. As noted above, the ACCC considers that having separate disconnections and reconnections is an inefficient process that leads to higher costs of acquisition for access seekers, and makes access seekers face avoidable costs. Not allowing disconnection costs (in certain circumstances) will be more likely to lead to efficient churn and disconnection processes. Also, creating an environment where pricing is stable and the processes used remain consistent is in the interests of all persons who have the right to use the services in this current climate of change.

6.6.4. Paragraph 152CR(1)(d)

508. The fourth criterion is the direct cost of providing access to the declared service. It calls for consideration to be given to not only Telstra's actual costs but also its ability to recover these costs.

509. The ACCC considers that Telstra will likely recover the direct costs of making LSS single connections in the future under the approach applied in this determination, as the indicative prices are being rolled over. Given that these same prices have in the past allowed Telstra to recover its direct costs, it follows that this situation will not change with the rolling over of indicative prices.

6.6.5. Paragraphs 152CR(1)(e) & (f)

510. The next two criteria are the value to a party of extensions, or enhancement of capability, whose cost is borne by someone else; and the operational and technical requirements necessary for the safe and reliable operation of a carriage service, or a telecommunications network or a facility.

511. The costs of extensions to Telstra's ordering systems necessary to supply the LSS have been taken into account in other charges, such as monthly charges. The ACCC does not consider that the 'operational and technical requirements' criterion materially contributes to this decision.

6.6.6. Paragraph 152CR(1)(g)

512. The last criterion is the economically efficient operation of a carriage service, a telecommunications network or a facility. The ACCC has considered issues of economic efficiency above.

513. The rolling over of prices continues to fairly reflect the costs that an efficient operator would incur in providing them. The restrictions set out in section 152CQ of the Act do not apply to a determination that set single connection and disconnections charges on this basis.

7. Managed Network Migration charges

7.1. Introduction

7.1.1. Background

514. A Managed Network Migration (“MNM”) is a transfer or migration of services that is achieved by Telstra’s project management of a coordinated cancellation and connection of services.
515. Parties in dispute with Telstra in relation to LSS MNM charges are:
- Adam, Agile, Chime, EFTel, Netspace, Saunders and Wideband Networks (represented by and referred to as the Herbert Geer parties);
 - Primus (provided its own submissions, however due to their similarities with the similar submissions as Hebert Geer parties submissions, Primus’ submissions have been referred as , and unless otherwise specified is to as a Herbert Geer party, unless otherwise specified);
 - Request and TPG (represented by and referred to as the Nicholls Legal parties).

7.1.2. Current charges

516. MNM charges that currently apply between the parties are the subject of IDs. The charges are also the subject of a CRA (or similar) that Telstra has entered into with each of the access seekers, except Adam.
517. The ACCC sought the parties’ confirmation on the terms and conditions that currently apply. Parties generally either confirmed these expressly,³⁴⁹ or referred to views expressed by the ACCC and chose not to make any corrections.³⁵⁰
518. Consequently, the ACCC is of the view that LSS MNM charges are set out in CRA 192.

7.1.3. Prior consideration

519. The ACCC proposed in its *Consultation Paper on Final Determination Managed Network Migration Charges*, April 2009 (Consultation Paper) that it should have regard to a previous decision that it made in respect of LSS MNM connection charges. This decision was:
- ACCC in, *Publication of Final Determination and associated statement of reasons – Adam Internet/Telstra LSS access dispute*, December 2007 (Adam Decision).

³⁴⁹ Herbert Geer Primary Submission, *LSS & ULLS MNM Charges*, 18 May 2009, p. 1; Primus, *LSS & ULLS MNM Charges*, 18 May 2009, p. 1.

³⁵⁰ Nicholls Legal Primary Submission, *LSS MNM Charges*, 18 May 2009, p.2; Telstra Primary Submission, *LSS MNM Charges*, 18 May 2009, p. 2.

520. Telstra, Primus and the Herbert Geer parties submit that the ACCC should not consider itself bound by this decision, and that the particular circumstances of these access disputes could mean that the ACCC may reach different conclusions to those expressed in earlier decisions.³⁵¹ Telstra also expresses the view that there could be a danger in referring to the previous decision should it be set aside on review.³⁵²
521. The Herbert Geer parties disagree with Telstra on this latter point³⁵³; as did the Nicholls Legal parties which noted that Telstra could apply to the ACCC to vary determination pursuant to subsection 152DT(1) of the Act.³⁵⁴
522. The ACCC in accordance with subsection 152CR(2) of the Act has taken the view that it can and should take its previous decisions into consideration in making FDs. The ACCC believes that it should adopt a consistent approach on recurring issues but also acknowledges that it must consult and explain any change in approach to those issues where that change is appropriate.
523. However, the ACCC does not consider itself bound to reach the same conclusions as expressed in previous arbitral determinations. This reflects the fact that there are numerous matters to which it has regard in making a FD apart from what is listed in subsection 152CR(1) of the Act. In particular, the individual circumstances of the access dispute and new or additional information that becomes available through parties' submissions in a particular access dispute means that it could be appropriate to adopt a different approach and to reach a different conclusion consistent with the statutory criteria.
524. The ACCC does not consider that it will fall into error by having regard to decisions that are subject to court review at the time of making a FD and believes that it is incumbent on it to reach FDs in as timely a manner as possible, irrespective of pending court proceedings. For the purposes of this arbitration the previous determinations which Telstra refers to were subsequently upheld by the Federal Court.³⁵⁵

7.1.4. Principles to apply

525. The ACCC proposed in its Consultation Paper that LSS MNM charges respectively should be determined by reference to the following LSS pricing principles:
- ACCC, *Review of the Line Sharing Service Declaration - Final Decision*, October 2007.

³⁵¹ Telstra Primary submission, *LSS MNM Charges*, 18 May 2009, p. 2; Herbert Geer Primary Submission *LSS & ULLS MNM Charges*, 18 May 2009, p. 2; Primus Primary Submission, *LSS & ULLS MNM Charges*, 18 May 2009, p. 1.

³⁵² Telstra Primary Submission, *LSS MNM Charges*, 18 May 2009, p. 2.

³⁵³ Herbert Geer Primary Submission, *LSS & ULLS MNM Charges*, 18 May 2009, p. 2; Nicholls Legal Primary Submission, *LSS MNM Charges*, 18 May 2009, p. 1.

³⁵⁴ Nicholls Legal Primary Submission, *LSS MNM Charges*, 18 May 2009, pp. 1–2.

³⁵⁵ *Telstra Corporation Limited v Australian Competition and Consumer Commission* [2009] FCA 757 (17 July 2009).

526. However since that time, these pricing principles have been repealed and incorporated into the 2009 LSS Pricing Principles.
527. The ACCC undertook an industry-wide public consultation process in the making of these pricing principles. Parties to this joint arbitration were also consulted on the indicative prices contained in these pricing principles as outlined further in these reasons.
528. Telstra submitted that the 2007 LSS Pricing Principles were invalid.³⁵⁶ That said, Telstra did not object to setting LSS MNM charges in the same manner as is outlined in those pricing principles and also supports the adoption of a TSLRIC+ approach for determining LSS MNM charges.³⁵⁷ The ACCC notes that in July 2009 the Federal Court found the 2007 LSS Pricing Principles to be valid.³⁵⁸
529. The Herbert Geer parties³⁵⁹, the Nicholls Legal parties³⁶⁰ and Primus³⁶¹ each consider the pricing principles should be taken into account.
530. In light of the repealed pricing principles the ACCC has taken into account the 2009 LSS Pricing Principles which incorporates the same pricing principles and indicative prices as those from the repealed instrument.
531. Consequently, the ACCC considers it is required by subsection 152AQA(6) of the Act to take the 2009 LSS Pricing Principles into account in specifying LSS MNM charges.
532. Under these principles, relevant to MNM connection charges:
- a TSLRIC+ pricing principle should be applied to the LSS;
 - LSS connection charges and LSS disconnection charges should be set with reference to the amounts charged by third party contractors to Telstra for jumpering work in exchanges, indirect costs and back-of-house costs.
533. These pricing principles also contain price-related terms (indicative prices) for LSS MNM connections and MNM minimum exchange charges. The ACCC considers that it is appropriate to apply these principles and prices when determining the charges, albeit while taking into account the regulatory environment in which those principles and prices will apply. The approach taken in regard to LSS MNM charges is consistent with the approach taken to other pricing issues that have been determined in this arbitration.

³⁵⁶ Telstra Primary Submission, *Preliminary Matters and General Approach*, 19 May 2009, p. 19.

³⁵⁷ Telstra Primary Submission, *LSS MNM Charges*, 18 May 2009 p. 2.

³⁵⁸ *Telstra Corporation Limited v ACCC* [2009] FCA 757 at paragraph 469.

³⁵⁹ Herbert Geer Primary Submission, *LSS & ULLS MNM Charges*, 18 May 2009, p.2.

³⁶⁰ Nicholls Legal Primary Submission *LSS MNM Charges*, 18 May 2009, p. 2.

³⁶¹ Primus Primary Submission, *LSS & ULLS MNM Charges*, 18 May 2009, p.2.

7.1.5. Technical advice

534. The ACCC has previously sought the views of Consultel, and later Layer 10,³⁶² on LSS connection processes as an independent expert. These views were sought in the course of considering access disputes involving connection charges and in the ACCC's opinion are relevant to the present access disputes. The reports that are particularly relevant to LSS MNM charges are:
- Consultel, *Small scale MNMs between Wholesale ADSL, ULLS and LSS – Interim report*, March 2007.
 - Consultel, *Analysis relating to Primus-Telstra LSS Dispute - interim report*, February 2006.
535. The ACCC, in its Consultation Paper, proposed to the parties that the reports prepared for previous arbitrations should be considered.
536. The Nicholls Legal parties support the ACCC having regard to these reports, noting that the conclusions expressed in the reports are within the range of views that have been expressed by industry in previous regulatory proceedings.³⁶³ The Nicholls Legal parties state that they adopt the findings of the reports for the purpose of this arbitration.³⁶⁴
537. The Herbert Geer parties and Primus similarly support the use of these reports, noting however that the ACCC should give more weight to a final report rather than an interim report where, if at all, those reports are in conflict.³⁶⁵
538. Telstra expressed the view that the reports should not be considered and that much of the technical advice relied upon by the ACCC is unsound.³⁶⁶ Specifically, Telstra submits that the reports are interim in nature and that it is inappropriate for the ACCC to rely upon such material in making a FD as a draft report may not reflect the expert's settled views.³⁶⁷
539. Telstra also expressed its objections to the ACCC's continued reliance on the material prepared by Dr Brooks in determining the charges associated with MNMs.³⁶⁸ In Telstra's view, the reports go beyond the author's expertise by discussing costing issues and that not all conclusions are fully reasoned.³⁶⁹ Telstra also raises questions around independence on the basis that the author has worked for access seekers.³⁷⁰ The Herbert Geer parties and the Nicholls

³⁶² This change in business name reflects that the reports' author established a separate consultancy business.

³⁶³ Nicholls Legal Primary Submission, *LSS MNM Charges*, 18 May 2009, pp. 2–3.

³⁶⁴ Ibid, p. 3.

³⁶⁵ Herbert Geer Primary Submission, *LSS & ULLS MNM Charges*, 18 May 2009, pp. 2–3; Primus, Primary Submission, *LSS & ULLS MNM Charges*, p. 2.

³⁶⁶ Telstra Primary Submission, *LSS MNM Charges*, 18 May 2009, p. 3

³⁶⁷ Ibid.

³⁶⁸ Ibid, p. 2.

³⁶⁹ Ibid.

³⁷⁰ Ibid.

Legal parties were of the opinion that these objections should not be accepted.³⁷¹

540. The ACCC considers that Telstra has not offered any substantive criticisms of the reports which are of an interim nature and which the ACCC could directly address. Consequently, the ACCC is of the view that it should have regard to each of the Consultel reports. The ACCC also notes that although the reports are marked as either 'draft' or 'interim', at the time they were compiled the ACCC was satisfied with their findings and did not seek final reports.
541. The ACCC is of the view that it should have regard to each of the Consultel reports noted, most of which have been considered in previous arbitrations.³⁷² The ACCC notes that Dr Brooks had not performed work for any of the access seeker parties participating in hearings at the time of preparing his reports. Further, the ACCC considers that the reports are appropriately and independently reasoned and the conclusions reached are sound and appropriately explained.

7.2. Consultation Process

542. The ACCC undertook two consultations in relation to the LSS MNM charges. The first of these consultations, carried out by way of the ACCC issuing a Consultation Paper and accompanying DFD, sought views from parties in relation to the assessment of efficient costs, including:
- jumpering, travel, vehicle, tool and materials costs
 - indirect costs
 - 'back-of-house' costs.
543. Following the initial consultation, the ACCC undertook an industry wide consultation in relation to pricing principles and indicative prices for the fixed network services, including prices for the LSS. As a result of this consultation and the extensive views expressed by parties in relation to the proposed indicative prices, the ACCC wrote to parties involved in the joint arbitration hearing seeking views on the option of rolling over the 2008-09 indicative prices, which included indicative prices for LSS MNM charges.³⁷³
544. Having taken all the parties' submissions into consideration the ACCC has decided to apply the indicative prices from the 2009 LSS Pricing Principles in their totality for the period 1 July 2005 to 31 December 2010 (which includes the rollover of the 2008-09 indicative prices to apply through to 31 December 2010). In the ACCC's opinion, the indicative prices contained in these pricing principles, were in the LTIE when first made, and are still in the LTIE taking

³⁷¹ Herbert Geer Reply Submission, *LSS & ULLS MNM Charges*, 18 May 2009, pp. 2–3; Nicholls Legal Reply Submission, *LSS MNM Charges*, 18 May 2009, pp. 2–3.

³⁷² ACCC Publication *Final Determination and associated statement of reasons – Adam Internet/Telstra LSS access dispute*, December 2007; ACCC, *Publication of Final Determination and associated statement of reasons – Chime/Telstra LSS access dispute*, August 2007

³⁷³ ACCC Letter to Telstra, Nicholls Legal and Herbert Geer dated 27 October 2009.

into account the current uncertain regulatory environment. The ACCC considers that the subsection 152CR(1) criteria supports this approach and that this approach is consistent with previous pricing principles.

545. Consequently, while the submissions from the initial consultation phase are no longer relevant for the purposes of this FD, the principles of assessing efficient costs are. Such an approach is in line with the ACCC's decision to rollover indicative prices given that the 2009 LSS Pricing Principles require MNM charges to be set with reference to these distinct cost categories.

7.3. Consultation on rollover

546. On 27 October 2009, the ACCC wrote to parties indicating its preliminary view to rollover the 2008-09 LSS indicative prices until 31 December 2010 and apply these prices in arbitrations. Parties' views were sought on this proposal.

547. The ACCC also provided a complete schedule of proposed indicative prices for fixed network services for the period:

- Until 30 June 2006, and
- 1 July 2006 through to 31 December 2010,

reflecting the approach the ACCC had taken in respect of the 2009 LSS Pricing Principles.

548. In December 2009, after assessing all of the information the ACCC had obtained during its industry-wide consultation on the pricing principles and indicative prices for fixed network services, the decision to rollover indicative prices was made with consideration given to three key events that introduced a degree of regulatory, industry and pricing uncertainty, namely:

- the introduction of the *Telecommunications Legislation Amendment Bill 2009*;
- the effect the National Broadband Network will have on the regulation of legacy assets and new telecommunication investments; and
- the appropriateness of TSLRIC+ as a pricing methodology in light of the above.

549. Of the determinations made as a result of this decision, the ACCC notes that the 2009 LSS Pricing Principles established LSS MNM connections and LSS MNM minimum exchanges for the periods:

- Until 30 June 2006
- 2006-07
- 2007-08
- 1 July 2008 – 31 July 2009
- 1 August 2009 – 31 December 2010.

550. The LSS charges are averaged, consistent with previous pricing principles.
551. The LSS indicative charges do not apply to connections in Band 4, or where the line in which the LSS connection was being used is also being used to supply the ULLS.

7.3.1. Submissions

552. Telstra submits it would accept the roll over of LSS prices from 1 August 2009 to 31 December 2010, provided the indicative prices for all fixed network services are rolled over for the same period and applied in arbitrations.³⁷⁴ Telstra notes its acceptance of this is based on the indicative prices being rolled over as a “package” for the full period and that the roll over prices will be applied consistently by the ACCC in all decisions across all fixed network services and to all access seekers until 31 December 2010.³⁷⁵
553. The Herbert Geer parties submit that rollover of prices should only apply in relation to the ULLS monthly charge and WLR charges and that the 2009 Draft Indicative Prices should apply to all other charges.³⁷⁶ The parties submit that application of rollover to prices other than the ULLS monthly charge (i.e., LSS MNM charges) would likely fail to meet all of the statutory criteria in subsection 152CR(1) of the Act.³⁷⁷
554. While not directly specifying LSS MNM connection charges, the Herbert Geer parties made a general submission that the rolled over prices cannot be justified for charges other than the ULLS monthly charges, because:
- there is no price shock concern with the LSS in the 2009 Draft Indicative Prices contrary to the ULLS monthly charge which require an adjustment path;
 - the LSS charges contained in the 2009 Draft Indicative Prices are not based on the network cost model used for the ULLS and the remaining fixed network services, and as such the concerns raised by access seekers with regards to TSLRIC+ do not apply to the LSS; and
 - the LSS charges for both rollover and the 2009 Draft Indicative Prices are based on the same model, with different inputs due to changes in demand.³⁷⁸
555. The Nicholls Legal parties submit that the ACCC should rollover 2008-09 LSS prices for all fixed line services until 31 December 2010.³⁷⁹ However,

³⁷⁴ Telstra Letter, *ULLS/LSS Joint Hearing: Price Terms-Roll Over Option*, 2 November 2009.

³⁷⁵ Ibid.

³⁷⁶ Herbert Geer Letter, *Roll Over Prices*, 2 November 2009, p. 1.

³⁷⁷ Ibid, p. 2.

³⁷⁸ Ibid, p. 3.

³⁷⁹ Nicholls Legal Letter, *Roll Over Options*, 10 December 2009.

Nicholls Legal also submits that Macquarie Telecom is opposed to the rollover of the 2008-09 LSS prices.³⁸⁰

556. Macquarie Telecom, on 13 November 2009, wrote to the ACCC in relation to the proposed rollover of the fixed network services indicative prices.³⁸¹ Macquarie Telecom submitted that a rollover of indicative prices was not appropriate and would be disadvantageous to access seekers who have reached agreements with Telstra that adopt lower prices than the 2008-2009 indicative prices.³⁸² As a remedy, Macquarie Telecom proposed that the ACCC rollover 2008-2009 prices by implementing a ‘no worse off’ principle to protect the interests of these access seekers.³⁸³ Macquarie Telecom submits that this would ensure that existing commercially agreed prices would be the de facto indicative price should the 2008-2009 rolled-over indicative price for a particular service be higher.³⁸⁴ Macquarie Telecom submits that should the ACCC adopt the ‘no worse off’ approach, it would support the rollover of prices until 31 December 2010.³⁸⁵
557. Primus submits that they support the ACCC’s proposal to rollover the 2008-09 indicative pricing for the ULLS. Primus made no comment with regards to LSS charges.³⁸⁶

7.3.2. ACCC View

558. In the course of the joint hearing, the Government proposed significant reforms to the telecommunications access regime in the *Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2009* which, among other things, proposes replacing the negotiate-arbitrate model with an ex-ante regulatory access framework.
559. The proposed reforms include allowing the ACCC to issue ‘access determinations’ and adopt ‘fixed principles’ which are aimed at improving competition and efficiency within telecommunications and promote greater regulatory certainty associated with regulatory processes under Part XIC of the Act.³⁸⁷ The proposed reforms include:
- replacing the negotiate-arbitrate model with a streamlined regulatory process and providing the ACCC with the ability to make up-front access determinations on price and non-price terms of access, and
 - allowing the ACCC to specify pricing methodologies for declared services which would be used to determine prices over successive

³⁸⁰ Nicholls Legal – Macquarie Telecom Letter, *Roll Over Options*, 10 December 2009.

³⁸¹ Macquarie Telecom, Letter, *Setting Indicative Prices for Fixed Services*, 13 November 2009.

³⁸² Ibid.

³⁸³ Ibid.

³⁸⁴ Ibid.

³⁸⁵ Ibid.

³⁸⁶ Primus Telecom Letter, *Roll Over of Indicative Prices*, 2 November 2009.

³⁸⁷ Explanatory Memorandum, *Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2009*, September 2009.

regulatory proceedings or successive undertakings in order to create greater regulatory certainty.³⁸⁸

560. The ACCC considers that given the status of the Bill in the current Parliament and the nature of the proposed changes it would be prudent to consider the impact of the proposed legislative changes before it made substantial changes to the price of LSS MNM charges. The ACCC is also mindful that the proposed legislative reform Bill has been introduced but not yet debated in the Senate and that there remains uncertainty as to whether the Bill will be passed in its current form or the nature of any amendments to it. The ACCC believes these matters are relevant considerations in these arbitrations.
561. The ACCC is of the view that applying the indicative prices from the 2009 LSS Pricing Principles in their totality for the period 1 July 2005 to 31 December 2010 for LSS MNM charges will provide a degree of certainty regarding access to regulated services in a period of significant regulatory and industry change and associated uncertainty.
562. The ACCC also notes that LSS MNM charges are consistent with the 2007 and 2002 LSS Pricing Principles.
563. Further, the ACCC considers that the submissions made by the Herbert Geer parties requiring that only ULLS monthly charges should be rolled over but not other charges disregards the ACCC's views set out in its letter of 27 October 2009. In this letter, the ACCC stated that it was considering the rollover of the 2008-09 indicative prices in their entirety. The ACCC does not consider it appropriate for the setting of charges for the LSS in isolation due to its concerns about the regulatory uncertainty which currently exists.
564. While the Herbert Geer parties only wish rollover to apply in limited circumstances, in the interests of certainty and consistency, the ACCC considers on balance, it more appropriate in the current environment to rollover prices across all of the fixed network services. This is in line with the ACCC's decision in its 2009 Pricing Principles and Indicative Prices inquiry and reflected in the 2009 LSS Pricing Principles.

7.4. Initial consultation

565. As noted the ACCC initially broadly consulted on the following matters in relation to LSS MNM charges:
- Jumpering, travel, vehicle, tool and materials (copper pairs) costs; and
 - Indirect costs;
 - 'Back-of-house' costs.

³⁸⁸ Ibid.

7.4.1. Jumpering, travel, vehicle, tool and materials costs for connections

566. The ACCC proposed to the parties in its Consultation Paper that it would assess efficient jumpering, travel, vehicle, tool and materials costs for MNM connections based upon the 3P contractor rates that Telstra had negotiated for the connection of the LSS as part of a MNM.
567. Submissions were sought from parties on the following matters:
- general methodology in applying 3P contractor rates for LSS jumpering works;
 - the possibility of aligning the methodology to derive LSS MNM jumpering costs;
 - having greater regard to contractor rates that have been negotiated with 3P contractors for single stage MNM processes; either in the form of averaging across all 3P rates or setting separate charges for two-stage and single stage MNM processes.
568. As noted above, the ACCC considers that it is appropriate to apply all of the indicative prices from the 2009 LSS Pricing Principles for the period 1 July 2005 to 31 December 2010 in making the FD for LSS MNM charges. As such, many of the issues outlined in the initial Consultation Paper are no longer relevant.
569. The ACCC also recognises that the adoption of the indicative prices has meant a move away from some of the views as expressed in its Consultation Paper. This includes the consideration of pricing based on 3P contractor rates for single-stage MNMs versus two-stage visits to effect connections.
570. The rolled over prices remain consistent with the 2009 LSS Pricing Principles and previous LSS pricing principle determinations. The methodology applied in reaching the rolled over indicative prices is consistent with the methodology applied in previous FDs.³⁸⁹ The ACCC notes that the pricing principles require that LSS connection charges should be set with reference to the amounts charged by third party contractors to Telstra for jumpering work in exchanges. They do not specify how those contractor charges should be used to set price.

7.4.2. Indirect costs

571. Submissions were sought from parties on a mark-up of 10 percent on 3P contractor rates to cover indirect costs such as contract management costs.
572. The ACCC considers that the TSLRIC+ pricing principles which apply to the LSS includes an allocation for common costs. Consistent with the views expressed in the Adam Decision,³⁹⁰ the ACCC acknowledges that the allowance of a 10 per cent mark up for contract management is not set by

³⁸⁹ ACCC Publication, *Final Determination and associated statement of reasons – Adam Internet/Telstra LSS access dispute*, December 2007.

³⁹⁰ Adam Decision at p. 117.

reference to Telstra's actual costs, but rather what is considered a reasonable mark-up.

573. Given the ACCC's decision to apply the rollover of the 2008-09 indicative prices, which includes a 10 per cent mark up for contract management costs, the ACCC has maintained the position put forward to parties in its Consultation Paper. This position is also consistent with recent ACCC arbitration determinations and the 2009 LSS Pricing Principles.

7.4.3. Back of house costs

574. Submissions were sought on LSS MNM connection costs associated with Telstra workgroups and processes, namely the:
- DAC; and
 - IDS centre.
575. Costs associated with Telstra's wholesale customer front of house activities are not considered as these costs are recovered through monthly rental charges.
576. The ACCC proposed in its Consultation Paper to include in LSS MNM connection charges an allowance for efficiently incurred IDS group costs, but not to make such an allowance for DAC costs. This is because little if any DAC involvement is required in LSS MNMs since an ADSL service is already supplied on the line, and costs are recovered through LSS rental charges.
577. The ACCC considers that the various back of house costs should remain consistent with the 2009 LSS Pricing Principles, in line with the ACCC's decision to rollover the 2008-09 indicative prices for the period from 1 August 2009 until 31 December 2010.
578. The ACCC considers that its proposed approach continues to fairly reflect the costs that an efficient operator would incur in providing them.

7.4.4. Other matters

Costs for financial years

579. The ACCC sought submissions on its proposal contained in the Consultation Paper that where it held data for a particular financial year it would apply such data in calculating efficient costs for that financial year. Where such data was not available, the ACCC proposed to estimate these costs from known data by either interpolation or by indexation.
580. With the ACCC's decision to apply all indicative prices, this issue is no longer relevant because existing models have been used. The indicative prices up to 2008-09 are based on the use of 3P contractor rates for the 2008-09 period. In line with the ACCC's decision to rollover the 2008-09 indicative prices for the period from 1 August 2009 until 31 December 2010, updated 3P contractor rates for the 2009-10 period have not been applied.

Cost models

581. Submissions were sought on simple LSS MNM connections cost models that adopted the ACCC's preliminary views and were attached to the ACCC's Consultation Paper.
582. The cost model distributed to parties is the same as the model used in determining previous determinations, albeit with updated inputs. The model results align with those included in the indicative prices for the period up to and including 2008-09.
583. Due to the regulatory uncertainty, the ACCC does not consider it an appropriate time to adopt an alternative method for determining MNM connection charges. In addition, given the decision to consistently apply rolled over rates from 2008-09 indicative prices to the period 1 August 2009 until 31 December 2010, the ACCC has not relied on the cost models sent to the parties.
584. Having considered the various submissions made by the parties the ACCC considers that the rolled over prices will provide certainty regarding access to the LSS in a period of significant regulatory and industry change and is in the LTIE.

Averaged or de-averaged charges

585. The ACCC sought submissions on whether LSS MNM charges should be determined on a geographically averaged basis.
586. Telstra supports setting MNM charges on a geographically averaged basis.³⁹¹ Primus, the Herbert Geer parties and the Nicholls Legal parties support de-averaged pricing, but are willing to accept averaged charges in the case of MNMs.³⁹²
587. The decision to rollover the 2008-09 indicative prices for the period from 1 August 2009 until 31 December 2010 is consistent with the ACCC determining LSS MNM charges on a geographically averaged basis.
588. While these charges may be geographically de-averaged, averaged prices can be justified where the distortionary effect of an averaged charge is not significant. The ACCC notes that the same costs (categories and level) apply to LSS MNMs across the different geographic bands and that averaging across the geographic bands does not, therefore, lead to a different charge.
589. This approach is also consistent with the indicative prices included in the 2009 LSS Pricing Principles. MNM charges are a geographically averaged estimate of the efficient costs of providing MNMs.

³⁹¹ Telstra Primary Submission, *LSS MNM Charges*, 18 May 2009, p. 3

³⁹² Herbert Geer Primary Submission, *LSS MNM Charges*, 18 May 2009, p. 7; Nicholls Legal Primary Submission, *LSS MNM Charges*, 18 May 2009, p. 4; Primus Primary Submission, *LSS MNM Charges*, 18 May 2009, p. 6.

Bands 1, 2, 3

590. The ACCC sought submissions on whether to specify charges to apply to LSS MNM connections in Band 4. This reflected the view that there is little if any demand for LSS connections in Band 4. This position is consistent with the ACCC's decision to rollover LSS MNM charges. The parties support this approach.³⁹³

7.4.5. When disconnection charges are payable

591. The ACCC proposed in its Consultation Paper not to provide for a disconnection charge when a LSS is disconnected as part of a MNM. This is because the disconnection would be co-ordinated with the connection of the new service and disconnection costs are included within the costs of making the connection (as reflected in 3P contractor rates for connections).

592. The parties supported this approach.³⁹⁴ The ACCC has maintained the position that was proposed to the parties in the Consultation Paper, and notes that this position is consistent with the ACCC's decision to apply the rolled over indicative prices contained in the 2009 LSS Pricing Principles.

7.4.6. Minimum exchange charge

593. The ACCC proposed in its Consultation Paper to set the minimum exchange charge on the basis of a MNM involving the connection of 20 services.

594. Telstra submits that a minimum exchange charge should be based on 30 services.³⁹⁵ This is based on its views that MNM project management is not well suited to 20 services, and MNM processes may not be necessary for this scale of migration as up to 15 services a day can already be migrated per day per exchange.³⁹⁶

595. Primus, the Herbert Geer parties and the Nicholls Legal parties agree to minimum exchange charges that are based on a MNM involving 20 services.³⁹⁷ The Herbert Geer parties state that Telstra recovers its costs in any case as a result of the two-part tariff structure.³⁹⁸

596. The ACCC has adopted the approach outlined in its Consultation Paper and which is consistent with its decision to rollover indicative prices. The ACCC remains of the view that a minimum exchange charge can have a role sending appropriate signals to an access seeker as to when it would be more efficient to use a MNM process, and provides assurance that MNM project management

³⁹³ Nicholls Legal Primary Submission, *LSS MNM Charges*, 18 May 2009, p. 4; Herbert Geer Primary Submission, *LSS MNM Charges*, 18 May 2009, p. 7; Telstra Primary Submission, *LSS MNM Charges*, 18 May 2009, p. 6; Primus Primary Submission, *LSS MNM Charges*, 18 May 2009, p. 6.

³⁹⁴ Nicholls Legal Primary Submission, *LSS MNM Charges*, 18 May 2009, p. 5; Herbert Geer Primary Submission, *LSS MNM Charges*, 18 May 2009, p.6; Telstra Primary Submission, *LSS MNM Charges*, 18 May 2009, p. 6; Primus Primary Submission, *LSS MNM Charges*, 18 May 2009, p. 6.

³⁹⁵ Telstra Primary Submission, *LSS MNM Charges*, 18 May 2009, p. 6.

³⁹⁶ *Ibid*, pp. 6–7.

³⁹⁷ Herbert Geer Primary Submission, *LSS MNM Charges*, 18 May 2009, p. 7; Nicholls Legal Primary Submission, *LSS MNM Charges*, 18 May 2009, p.5; Primus Primary Submission, *LSS MNM Charges*, 18 May 2009, p. 6.

³⁹⁸ Herbert Geer Reply Submission, *LSS MNM Charges*, 4 June 2009, p. 6.

resources can be directed towards those migrations that will see a greater number of services cutover.

597. The ACCC is satisfied that a minimum charge based on 20 services is suitable for this purpose. Further, this level of charge is consistent with the 2009 LSS Pricing Principles, as the indicative charges contained in them have been set in this way.
598. This approach is also consistent with the approach that has been adopted in previous arbitrations before the ACCC.³⁹⁹

7.4.7. LSS MNM cancellation charges

Introduction

599. In its Consultation Paper the ACCC proposed to specify cancellation charges that would permit Telstra to recover costs that it reasonably incurred prior to the cancellation of a MNM, or orders that had been forecast as part of a MNM.
600. The ACCC proposed to specify two cancellation-related charges for LSS MNMs. The first charge is an (entire) MNM cancellation charge set by reference to the back-of-house costs that Telstra would efficiently incur in respect of a completed LSS MNM. The ACCC proposed that the charge be levied whenever an access seeker forecasts a MNM at an exchange, and then cancels the entire migration at that exchange. It was not proposed for this charge to be applied in respect of LSS MNMs that proceed with fewer services because in that case the connection charges and minimum exchange charge would ensure that those back-of-house costs are recovered.
601. The second cancellation charge proposed by the ACCC in its Consultation Paper was a LSS pre-jumpering charge. This charge is imposed to recover jumpering costs that Telstra would incur where a service connection is cancelled following pre-jumpering. However, the charge is only imposed where cancellation occurs after pre-jumpering has taken place within 20 Business Days of the scheduled cutover date. This reflects the ACCC's view that Telstra would not have to pre-jumper any earlier than this.
602. The ACCC proposed to calculate the pre-jumpering charge for LSS MNM by applying the lesser of the two rates provided for a two-stage (pre-jumpering and cutover) process.
603. While the ACCC has decided to adopt and rollover the 2009 LSS Pricing Principles in its entirety for the period 1 July 2005 to 31 December 2010, these principles do not specify cancellation or pre-jumpering charges for LSS MNMs. As such, the ACCC has made an assessment against the criteria listed in subsection 152CR(1) taking into account the parties' submissions on these proposals.

³⁹⁹ ACCC Publication *Final Determination and associated statement of reasons – Adam Internet/Telstra LSS access dispute*, December 2007; ACCC, *Publication of Final Determination and associated statement of reasons – Primus/Telstra LSS access dispute*, August 2007

Submissions

604. Telstra submits that it does not object to the ACCC's cancellation charges as proposed in its Consultation Paper.⁴⁰⁰ Telstra agrees with the methodology used to calculate the pre-jumping cancellation charges.⁴⁰¹ However, Telstra submits that it has negotiated new LSS MNM one visit contractor rates which were progressively introduced from September 2007 and are expressed to be valid until 30 June 2010.⁴⁰² Telstra submits that the pre-jumping cancellation charges for these periods should be adjusted to reflect the new contractor rates.⁴⁰³
605. The Herbert Geer parties and Primus submit that while they agree with the proposition that Telstra should be entitled to recover reasonable costs resulting from a cancellation, they do not believe that allowing the recovery of costs relating to pre-jumping is reasonable because pre-jumping is unnecessary and inefficient given their preference for a single stage MNM process.⁴⁰⁴
606. The Nicholls Legal parties accept the propositions as set out in the Consultation Paper in relation to cancellation charges and accept the ACCC's rationale for adopting its proposed approach to cancellation charges.⁴⁰⁵
607. In response, Telstra submits that if the ACCC intends to uniformly adopt the one visit process (and LSS MNM charges reflecting this position) Telstra accepts that the cancellation charge associated with pre-wiring would no longer be necessary.⁴⁰⁶

ACCC view

608. The ACCC has maintained the approach to the cancellation charges proposed in its Consultation Paper. The (entire) MNM cancellation charge is to apply only where the entire MNM scheduled for an exchange is cancelled. It is payable regardless of when the MNM is cancelled. The ACCC is satisfied that this approach allows Telstra's efficient back-of-house costs to be recovered in the case of cancelled LSS MNMs.
609. The Herbert Geer parties and Primus submit that a pre-jumping charge would be unnecessary and inefficient in light of a single stage MNM process. However, given the ACCC's adoption of the 2009 LSS Pricing Principles in its entirety, this has meant a move away from views expressed in the Consultation Paper including the proposal to apply single-stage MNMs rather than two visits to effect connections. Applying the established methodology will provide a degree of certainty regarding access to regulated services in a period of significant regulatory and industry change and associated uncertainty. As such, the ACCC does not accept that in the current

⁴⁰⁰ Telstra Primary Submission, *LSS MNM Charges*, 18 May 2009, p. 7.

⁴⁰¹ Ibid

⁴⁰² Ibid, Annexure A.

⁴⁰³ Ibid, p. 7.

⁴⁰⁴ Herbert Geer Primary Submission, *LSS & ULLS MNM Charges*, 18 May 2009, p. 7; Primus Primary Submission, *LSS & ULLS MNM Charges*, 18 May 2009, p. 7.

⁴⁰⁵ Nicholls Legal Primary Submission, *LSS MNM Charges*, 18 May 2009, p. 5.

⁴⁰⁶ Telstra Reply Submission, *LSS MNM Charges*, 4 June 2009, p. 4.

circumstances it should disallow pre-jumping charges as an inefficient practice.

610. However, these charges are only payable where the cancellation occurs after pre-jumping has taken place within 20 Business Days of the scheduled cutover date. As there is no need for pre-jumping to occur any earlier than 20 Business Days from the cutover date, it is not intended for this charge to be levied for cancellations that occur sooner than this. Further, it is not intended for the charge to be imposed where the order is cancelled prior to performance of pre-jumping work.
611. In line with its decision to rollover the indicative prices contained in the 2009 LSS Pricing Principles, the ACCC has decided not to apply the most recent 3P contractor rates. The ACCC considers that in the present circumstances the LSS MNM pre-jumping charges established in the recent LSS arbitration between Adam and Telstra should apply.⁴⁰⁷ The approach taken in that arbitration is consistent with the general methodology applying to 3P contractor rates for LSS jumping works, i.e. these prices reflect the simple average of charges that contractors have imposed for the period up until 30 June 2008 and which have been subsequently indexed for the period 1 July 2008 until 31 December 2010. This results in the following pre-jumping charges:
- \$24.10 per relevant cancelled service on or before 30 June 2008; or
 - \$25.10 per relevant cancelled service after 30 June 2008.
612. The ACCC is satisfied that this approach in conjunction with the entire MNM cancellation charge allows Telstra's efficient back-of-house costs to be recovered in the case of cancelled MNMs, or MNMs that proceed with fewer services.

7.4.8. After hours cutovers

613. In the Consultation Paper, the ACCC noted that there is the potential for an access seeker to request that MNM cutovers be performed after hours so as to minimise disruption to end-users. The ACCC sought the parties' views on what extra costs may be incurred in performing MNMs after hours and what surcharge would be appropriate to recover these costs.

Submissions

614. Telstra expressed concern at having to offer MNMs to be performed after hours. In Telstra's view, these MNMs offer little additional utility, as some works might not be able to be completed until the following morning; and there is uncertain demand for these MNMs.⁴⁰⁸
615. Telstra provided some information regarding back-of-house costs which supported their view that the operating costs for after hours MNMs could

⁴⁰⁷ ACCC Publication, *Final Determination and associated Statement of Reasons – Adam Internet/Telstra LSS Access Dispute*, December 2007.

⁴⁰⁸ Telstra Primary Submission, *LSS MNM Charges*, 18 May 2009, p. 7.

potentially be greater than for those performed during business hours.⁴⁰⁹ Telstra also provided an estimate of this cost increase on the basis of certain assumptions – e.g., whether 3P contractors would levy higher charges, and if so how much higher those charges would be.⁴¹⁰

616. Telstra also advised that, for LSS MNMs, LOLO (the relevant wholesale online ordering system) would have to be further developed, at an estimated cost of [REDACTED] over a period of [REDACTED].⁴¹¹
617. Primus and the Herbert Geer parties submit that after hours MNMs have the potential to reduce delay and that any additional costs for after hours MNMs should be recovered by way of surcharge and not averaged with MNMs conducted during business hours.⁴¹² Primus and the Herbert Geer parties favour the application of TSLRIC+ principles being used to set this surcharge.⁴¹³
618. The Nicholls Legal parties initially did not make submissions on these issues. However, in its reply submission, the Nicholls Legal parties dispute Telstra's position that after hour MNMs should not be offered.⁴¹⁴ In their view, access to after hour processes is necessary to promote competition.⁴¹⁵ The Nicholls Legal parties endorse a cost based approach to prices for these MNMs, expressing the view that the position on overtime pay set out in relevant awards should be used in estimating additional operating costs.⁴¹⁶

ACCC view

619. Consistent with the position proposed to the parties in the Consultation Paper, the ACCC is of the view that a surcharge should apply to MNMs performed after hours at the request of an access seeker. The ACCC is of the view that this surcharge should be cost based, and reflect the additional operating costs Telstra, operating efficiently, will incur when performing necessary tasks after hours.
620. The ACCC considers that a determination that specifies these principles will be sufficient to resolve this aspect of the relevant disputes. Consequently, the ACCC has not specified a price to apply to these MNMs. The ACCC notes that interest in after hours MNMs is only recent and that the cost data that has been provided is at best speculative, which militates against specification of charges.
621. Further, parties did not press for a charge to be specified; with the dispute before the ACCC being about whether after hours connections should in fact be offered.

⁴⁰⁹ Ibid, pp. 7–8.

⁴¹⁰ Ibid.

⁴¹¹ Telstra Reply Submission, *LSS MNM Charges*, 4 June 2009, p. 4.

⁴¹² Primus Primary Submission, *LSS MNM Charges*, 18 May 2009, p. 7; Herbert Geer Primary Submission, *LSS MNM Charges*, 18 May 2009, pp. 7–8.

⁴¹³ Ibid.

⁴¹⁴ Nicholls Legal Reply Submission, *LSS MNM Charges* 4 June 2009, p. 3.

⁴¹⁵ Ibid.

⁴¹⁶ Ibid.

622. Telstra has raised the issue of systems development work to the LOLO online ordering system used for LSS (and other wholesale services). The information that Telstra has provided does not establish that systems development would in fact be required. The project managed nature of MNMs means that manual advices and billing adjustments can be used, and systems development is not always essential. Further, if demand for after hours MNMs is uncertain and limited, as has been suggested, a manual system would likely (in the current circumstances) be more efficient.
623. In this regard, Telstra's migration plan template provides a field for the MNM charge to be specified, and notes that whether the MNM is completed during business hours is an assumption that affects this charge. The template could be easily adapted to provide a means of confirming between the parties whether a MNM is to be conducted during business hours or after hours.
624. In any event, any necessary systems development costs would not be recovered by way of MNM charges. Systems development costs are recovered by way of monthly rental charges, and as such these costs would form part of the cost base for consideration in respect of those charges.

7.4.9. Definition of MNM

Submissions

625. Telstra, in its primary submissions raised an issue around whether the ACCC should determine prices for MNMs that involve a change in service provider. This was in response to the ACCC proposing to apply the definition of a MNM as used in previous arbitration determinations that refers to both a transfer (which connotes a change in service provider) and a migration.
626. Telstra submits that the definition should be revised to exclude transfers.⁴¹⁷ Telstra advises that its MNM process and its online ordering systems do not support MNMs that involve a change in service provider.⁴¹⁸ In respect of transfers of LSS, other processes exist to achieve transfers from DSL to LSS across service providers.⁴¹⁹ Telstra advised that the systems development would potentially cost ██████████ in order to support LSS MNM transfers.⁴²⁰
627. The Nicholls Legal parties object to this revision. In their view, there is demand for MNMs across service providers within the one group, such as following a consolidation of service providers.⁴²¹ The Herbert Geer parties also confirmed their interest in undertaking MNMs across access seekers.⁴²²

ACCC view

628. The ACCC has not varied the definition of MNM proposed to the parties. The ACCC considers that there is demand for transfer MNMs, and the charges specified for MNMs reflect the efficient operating costs that those charges are

⁴¹⁷ Telstra Primary Submission, *LSS MNM Charges*, 18 May 2009, p. 8.

⁴¹⁸ Ibid.

⁴¹⁹ Ibid.

⁴²⁰ Telstra Reply Submission, *LSS MNM Charges*, 4 June 2009, p.5.

⁴²¹ Nicholls Legal Reply Submission, *LSS MNM Charges*, 4 June 2009, p. 4.

⁴²² Herbert Geer Reply Submission, *LSS MNM Charges*, 4 June 2009, p. 7.

intended to recover irrespective of whether or not there is a change in service provider. .

629. The ACCC considers that should systems developments be required for online ordering systems and National Plant Assignment Management System (NPAMS) in order to support MNMs that involve the transfer of services, then these cost categories would be considered in the cost base for monthly rental charges. However, since DSL/LSS transfers can be managed by existing systems when performed outside a MNM, it is not at all clear that any change in Telstra's systems will be required to accommodate MNMs involving DSL/LSS transfers.

7.5. Assessment against subsection 152CR(1) criteria

630. The ACCC must take the subsection 152CR(1) criteria into account in making a FD. Not all of these criteria will be relevant to every particular issue that the ACCC must determine.

7.5.1. Paragraph 152CR(1)(a)

631. In assessing the MNM price terms against subsection 152CR(1), the ACCC must firstly have regard to the LTIE. This calls for consideration of a number of factors identified in section 152AB, being the objective of promoting competition, the objective of achieving any-to-any connectivity, the objective of encouraging the economically efficient use of and the economically efficient investment in infrastructure, and subsidiary matters (paragraphs 152AB(2)(c)-(e), subsection 152AB(4), paragraphs 152AB(6)(a)-(c), subsection 152AB(7A) and subsection 152AB(8)).
632. The ACCC considers that prices based on the forward-looking costs of an efficient provider best promote competition and use of infrastructure in this current period of significant regulatory and industry change. By rolling over 2008-09 indicative prices for the period from 1 August 2009 until 31 December 2010 parties will be assured of certainty regarding access to regulated services. Further, this state of certainty is also in the LTIE. The same principle of thought was applied to the establishment of LSS cancellation charges, keeping them in line with methodologies used in previous arbitrations.
633. The ACCC considers that efficient use of and investment in the infrastructure used to supply the LSS will be encouraged where Telstra is able to recover the efficient, forward-looking costs of making LSS MNMs, including a normal risk-adjusted return on capital employed. MNM charges above this level for LSS access seekers would, however, have the effect of discouraging efficient investment in and use of infrastructure used to supply the LSS. Use of and investment in infrastructure used to supply downstream services would also be likely to be below efficient levels.
634. With the rollover of indicative prices and application of recognisable cancellation charges the ACCC considers that Telstra will continue to be able to recover costs and attain a reasonable return. Similarly, the rolled over prices

will continue to allow access seekers efficient use of infrastructure. While the realisation of more specific current charges may have effected this balance better, the ACCC considers that rolled over prices provide greater stability and certainty in the current climate of change. This position is ultimately also in the LTIE.

635. By providing a normal, risk adjusted, commercial return on prudent investment in MNM processes, the access price will reward good investment decisions over poor investment decisions. Further, by promoting competition in dependent markets, the access price will provide the pressure for firms in that market to innovate and to continually improve the range and quality of their services.
636. MNM charges which have been and continue to be set on this basis promote competition in dependent telecommunications markets. As the charges are based on the cost of connecting the service as part of a MNM, and do not discriminate between service providers to reduce competition, it will encourage efficient entry and exit in dependent markets.
637. Telstra's legitimate commercial interests include its ability to exploit economies of scale and scope. Telstra will better be able to exploit economies of scale and scope to the extent that rolled over charges provides certainty in the current climate and will increase demand for downstream services. As there are fixed costs in providing these services, the increased demand will give rise to economies of scale and scope, which Telstra could exploit.
638. The ACCC does not consider that the approach taken to this matter affects the objective of achieving any-to-any connectivity, or that the matters identified in paragraph 152AB(6)(a) are relevant here.

7.5.2. Paragraph 152CR(1)(b)

639. The next matter concerns the legitimate business interests of the access provider, and the carrier's or provider's investment in facilities used to supply the declared service.
640. The ACCC's views on the effect of this decision on these matters have already been discussed as part of the matter concerning the LTIE. Telstra's legitimate business interests are likely to be met by the rolling over of prices which in the past have proved capable of sustaining Telstra's legitimate business interests.

7.5.3. Paragraph 152CR(1)(c)

641. The third criterion is the interests of all persons who have the right to use the services. The ACCC considers that access seekers' interests lie in being able to compete for end-users on the basis of their relative merits, without being impeded in acquiring end-user customers or incurring unnecessary costs.
642. The ACCC considers that the decision to apply indicative prices is consistent with the interests of access seekers, as persons who have rights to use the declared service. These MNM charges will allow access seekers to compete on their merits, over those stages of production which are under their control,

based upon the relative quality and cost of the downstream services they supply.

7.5.4. Paragraph 152CR(1)(d)

643. The fourth criterion is the direct cost of providing access to the declared service. It calls for consideration to be given to Telstra's ability to recover these costs.
644. The approach taken in this FD is consistent with the direct costs of providing access (in this case the direct costs of carrying out MNMs to the service), as MNM charges have been aligned with the underlying costs that Telstra can be expected to incur. These charges do not include any recompense to Telstra for consequential profits that might be lost in downstream markets as a result of increased competition.
645. The ACCC considers that Telstra will likely recover the direct costs of MNMs in the future under the approach applied in this determination, as the existing MNM charges are being rolled over. Given that these same charges were capable of allowing Telstra to recover its direct costs, it follows that this situation will not change with the rolling over of the indicative prices.

7.5.5. Paragraphs 152CR(1)(e) & (f)

646. The next two criteria are the value to a party of extensions, or enhancement of capability, whose cost is borne by someone else; and the operational and technical requirements necessary for the safe and reliable operation of a carriage service, or a telecommunications network or a facility.
647. The ACCC does not believe that Telstra will incur additional costs, above those already allowed for, in implementing the MNM processes as per this FD. The processes implemented are no different to those that Telstra has had to implement as a result of previous arbitral determinations.
648. Setting MNM charges on this basis is consistent with network safety and reliability, as the costs are assessed on the basis that operational and technical requirements which promote those objectives are followed.

7.5.6. Paragraph 152CR(1)(g)

649. The last criterion is the economically efficient operation of a carriage service, a telecommunications network or a facility. The ACCC has considered issues of economic efficiency above.
650. The rolling over of prices and the application of established LSS cancellation charges continues to fairly reflect the costs that an efficient operator would incur in providing them.
651. Setting MNM charges on the basis described best promotes the economically efficient operation of relevant carriage services – being downstream voice and/or DSL services – and relevant networks and facilities operated by Telstra and access seekers in this current climate of uncertainty. This is because MNM charges will continue to be aligned with costs and hence access to MNMs will

be sought up to efficient levels. Importantly, by promoting competition, this approach will best ensure that service improvements and cost savings are sought out and exploited on an ongoing basis more generally by Telstra and access seekers.

8. Managed Network Migration Non-Price Terms

8.1. Introduction

8.1.1. Background

652. A Managed Network Migration (“MNM”) is a transfer or migration of services that is achieved by Telstra’s project management of a coordinated cancellation and connection of services.

653. This chapter considers various non-price terms to apply to a LSS MNM, including:

- Pre-requisite number of connections to ordering a MNM
- MNM Forecasting timeframes and notice periods
- Migration Plan Amendment Terms
- Limits on the number of exchanges per State per day
- After hours MNM cutovers.

654. The parties to the dispute with Telstra over LSS MNM non-price terms are:

- Adam, Agile, Chime, EFTel, Netspace, Wideband, Primus and Saunders (the Herbert Geer parties), and
- Request and TPG (the Nicholls Legal parties).

8.1.2. Current terms and conditions of access

655. The contractual terms relating to MNM non-price terms are as follows:

- LSS MNM non-price terms are set out in CRA 192, except Request.
- LSS MNM non-price terms between Telstra and Request are set out in a General Access Agreement (GAA) rather than a CRA.

8.1.3. Prior consideration

656. The ACCC most recently provided its views on MNM non-price terms in a number of decisions made in 2008. The parties were referred to one of these decisions in the Consultation Paper - *ACCC, Publication of Final Determination and associated statement of reasons - Primus Telecommunications/Telstra ULLS connection charges*, March 2008, at pages 146 to 161 (Primus Decision). The ACCC acknowledges that this decision was not available to parties other than Telstra and Primus.

657. The ACCC notes that none of the parties raised concerns with this, and instead referred to a related decision that has been published on the ACCC’s

website - *Chime Communications/Telstra ULLS Final Determination and Statement of Reasons*, March 2008 (Chime Decision), stating that because both decisions were part of a joint hearing it was likely that the Chime Decision would be the same as the Primus Decision in all material respects.⁴²³

8.1.4. Principles to apply

658. In its Consultation Paper, the ACCC proposed to have regard to the 2008 Model Terms made under section 152AQB of the Act in specifying MNM non-price terms in these arbitrations.
659. Telstra submits that the model terms are not a mandatory consideration in relation to the determination of LSS terms and conditions and to the extent that the distinguishing features of the LSS make the application of the 2008 Model Terms inappropriate, this should be reflected in any FD made by the ACCC.⁴²⁴
660. The Herbert Geer parties and Nicholls Legal parties express the view that regard should be had to the 2008 Model Terms in the LSS disputes.⁴²⁵ The Herbert Geer parties note that the 2008 Model Terms do not automatically apply to the LSS as it is not a core service (unlike the ULLS) but consider them to be a relevant consideration pursuant to subsection 152CR(2).⁴²⁶
661. As required by subsection 152AQB(9) of the Act, the ACCC has had regard to the 2008 Model Terms in considering the ULLS MNM non-price terms contained in the FD. The ACCC is also of the view that these model terms are a relevant consideration in respect of the LSS MNM non-price terms under subsection 152CR(2) of the Act.
662. Accordingly the MNM terms and conditions contained in the FD for LSS are consistent with the 2008 Model Terms.

8.1.5. Scope of determinations

663. In its primary submissions, Telstra queried whether the parties and the issues in dispute had been correctly identified.⁴²⁷ After receiving submissions from all parties, the ACCC has addressed Telstra's concerns and confirmed the parties and issues in dispute. Parties disputing particular matters are identified in the appropriate subsection within this chapter.
664. Telstra submits that the ACCC has widened the scope of its consultation by inviting access seekers that have notified MNM charges as an issue in dispute to comment on its Consultation Paper regarding MNM non-price terms.⁴²⁸ Telstra submits that this is contrary to the ACCC's statutory obligations to have regard to the desirability of access disputes being resolved in a timely

⁴²³ Herbert Geer Primary Submission, *LSS & ULLS MNM Non-Price Terms*, 18 May 2009, p. 4.

⁴²⁴ Telstra Primary Submission, *LSS MNM Non-Price Terms*, 18 May 2009, p. 2.

⁴²⁵ Nicholls Legal Primary Submission, *MNM Non-Price Terms*, 18 May 2009, p. 2; Herbert Geer Primary Submission, *LSS & ULLS MNM Non-Price Terms*, 18 May 2009, p. 4.

⁴²⁶ Herbert Geer Primary Submission, *LSS & ULLS MNM Non-Price Terms*, 18 May 2009, p. 4.

⁴²⁷ Telstra Primary Submission, *LSS & ULLS MNM Non-Price Terms*, 18 May 2009, p. 1.

⁴²⁸ *Ibid.*

manner (subsection 152CLA(1)) and act as speedily as a proper consideration of the dispute allows (paragraph 152DB(1)(b)).

665. Telstra also submits that the ACCC's application of the 2008 Model Terms to issues not in dispute results from either error, a failure to consider the merits of each access dispute or a pre-disposition towards implementing an industry wide process.⁴²⁹
666. Both the Herbert Geer parties and the Nicholls Legal parties support the ACCC's application of the scope of the dispute.⁴³⁰ The Herbert Geer parties submit that the intent of the *Telecommunications Competition Act 2002* is such that the ACCC should be pre-disposed towards implementing the 2008 Model Terms to the current arbitrations. With respect to the LSS, the Herbert Geer parties submit that it is also a relevant consideration in accordance with subsection 152CR(2) of the TPA.⁴³¹
667. The Nicholls Legal parties reject Telstra's contentions concerning the ACCC's application of its 2008 Model Terms. The parties submit that the ACCC's use of its 2008 Model Terms amounts to a proper use of paragraph 152DB(1)(b), as it encompasses "all matters affecting the merits, and fair settlement, of the dispute".⁴³² The parties further rely on subsection 152CP(2) of the Act, which gives the ACCC the power to determine any matter relating to access by the access seeker to the declared service including matters that were not the basis for notification of the dispute.⁴³³
668. The ACCC does not agree with Telstra's submission about the application of the 2008 Model Terms. The ACCC considers, in the context of the LSS, the 2008 Model Terms to be a relevant consideration pursuant to subsection 152CR(2). Parties to the dispute were given notice of the ACCC's intention to apply the 2008 Model Terms and also ample opportunity to make submissions on the ACCC's proposed application of the 2008 Model Terms to LSS MNM non-price terms.
669. Contrary to Telstra's submission, the ACCC considers that it has determined MNM non-price terms and conditions that are fair and reasonable. On balance, the ACCC has sought to remove unnecessary delays to MNMs being completed, while not compromising Telstra's ability to efficiently manage MNM processes. The ACCC considers that subsection 152CP(2) permits the ACCC to deal with any matter relating to access by the access seeker to the declared service including matters that were not the basis for notification of the dispute.

⁴²⁹ Ibid.

⁴³⁰ Herbert Geer Primary Submission, *LSS & MNM Non-Price Terms*, 18 May 2009, pp.1-3; Herbert Geer Reply Submission, *LSS & MNM Non-Price Terms*, 4 June 2009, p.2

⁴³¹ Herbert Geer Reply Submission, *LSS & ULLS MNM Non-Price Terms*, 24 May 2009, p. 2.

⁴³² Nicholls Legal Reply Submission, *MNM Non-Price Terms*, 24 May 2009, p. 2.

⁴³³ Ibid.

670. In respect of the ‘pre-requisite number of connections’ non-price term, the ACCC identified in its Consultation Paper,⁴³⁴ that while parties had not notified this as a term in dispute, it considered parties that had disputed MNM connection charges (including the minimum exchange charge) to also be in dispute about this term.⁴³⁵ The ACCC formed this view because the issue of minimum exchange charges intertwines with the issue of the prerequisite number of connections.
671. The ACCC considers that it is possible that Telstra could refuse to perform MNMs where total charges based on the number of connections requested fall below the existing minimum exchange charge. The ACCC considers that MNM connections and minimum exchange charges should not be compromised by a pre-requisite for a certain number of connections. Consequently, it is not possible to resolve the disputes without also addressing the ‘pre-requisite number of connections’ non-price term. The ACCC considers that such an approach neither compromises the timely resolution of the arbitration nor the proper consideration of the matter.

8.2. Pre-requisite number of connections to ordering a MNM

8.2.1. Introduction

672. The following parties dispute the MNM non-price term, ‘pre-requisite number of connections to ordering a MNM’:
- Adam, Chime, Wideband, EFTel, Saunders, Agile, Primus, Request, TPG, and Netspace.
673. Current commercial arrangements between the parties provide that there will be a minimum number of services to be connected at an exchange before a MNM can be ordered for that exchange.
674. The ACCC proposed that there should be no minimum number of services to connect at an exchange as a pre-requisite to ordering a MNM. This would leave the decision as to whether to connect or disconnect services as part of a MNM or as ‘singles’ to the access seeker to advise at the time of placing the order.
675. The ACCC also proposed that there should not be any further restrictions on access to MNM processes where the access seeker considered that it would be more efficient, having regard to cost and timing, to utilise a managed process.

8.2.2. Submissions

676. Telstra submits that it considers such terms as being unnecessary.⁴³⁶ Telstra notes that the ACCC has previously determined that no minimum number of

⁴³⁴ ACCC, *Consultation Paper on Final Determination, Managed Network Migration Non-Price Terms*, April 2009 (Consultation Paper).

⁴³⁵ MNM Charges have been discussed at Chapter 7 of this Statement of Reasons.

⁴³⁶ Telstra Primary Submission, *LSS MNM Non-Price Terms*, 18 May 2009, p. 2.

services should be required to request a MNM, but that the charge for a MNM should be structured as a fixed cost component and a variable cost component with a minimum charge equating to the charge for the migration of 20 services.⁴³⁷

677. Telstra submits that it already enables up to 15 “single” connection services per day per exchange, so project management of batches of 20 services is not required and would be inefficient.⁴³⁸ Telstra further submits that it has designed the LSS MNM process to project manage the migration of a large number of services, and that project management is not suited to migrations of 20 services.⁴³⁹ Telstra states that it is neither practical nor reasonable to offer MNMs for migrations of less than 30 services⁴⁴⁰
678. The Herbert Geer parties agree with the ACCC that there should be no minimum number of services to connect at an exchange as a pre-requisite to ordering a MNM.⁴⁴¹ The Herbert Geer parties also agree that 20 services is an appropriate scale for MNMs to be requested, and that rather than using this scale in respect of imposing a pre-requisite for an order, the scale is more efficiently applied to a “Minimum connection charge per MNM per exchange”.⁴⁴²
679. The Herbert Geer parties submit that the ACCC’s approach promotes the LTIE by removing the delay and uncertainty experienced by access seekers who wish to manage an efficient migration of services to the ULLS or LSS.⁴⁴³ The parties submit that this in turn removes the obstacles to a more varied product and price differentiation in the downstream supply of DSL and voice services.⁴⁴⁴
680. In response the Herbert Geer parties submit that without any evidence provided by Telstra to the contrary, the ACCC has no reason to increase the scale for the minimum MNM exchange charge above 20 services.⁴⁴⁵
681. Submissions on this matter were made by Nicholls Legal but were not taken into account in light of the fact that none of the Nicholls Legal parties notified this matter as being in dispute.

8.2.3. ACCC view

682. The ACCC has decided to maintain the position proposed to the parties in the Consultation Paper. As such, the ACCC has not specified a minimum number of connections to qualify for a MNM. The ACCC considers that access seekers should have flexibility to request a MNM even if there are fewer than 20

⁴³⁷ Ibid.

⁴³⁸ Ibid.

⁴³⁹ Ibid.

⁴⁴⁰ Ibid.

⁴⁴¹ Herbert Geer Primary Submission, *LSS & ULLS MNM Non-Price Terms*, 18 May 2009, p. 4.

⁴⁴² Ibid.

⁴⁴³ Ibid, p. 5.

⁴⁴⁴ Ibid.

⁴⁴⁵ Herbert Geer Reply Submission, *LSS & ULLS MNM Non-Price Terms*, 24 May 2009, p. 3

services to connect if this is the approach that they consider preferable. Access seekers will still pay for the MNM as though they were connecting 20 services given the specification of the minimum exchange charge as outlined in section 8.2 of this Statement of Reasons.

683. The ACCC considers that 20 services is an appropriate scale for the MNM minimum exchange charge as the connection of this number of services can be performed at less cost when done as part of a MNM rather than as separate single connections. This is not to say that access seekers will always request a MNM for this number of connections at an exchange. Access seekers may prefer the shorter connection timeframes offered by 'single' connection processes.

8.3. MNM Forecasting timeframes and notice periods

8.3.1. Introduction

684. Chime is disputing MNM Forecasting timeframes.
685. Current commercial arrangements between the parties provide for a MNM process involving three forecasts; provided at 84 calendar days, 56 calendar days and 20 business days respectively. It is only the last forecast that provides details of the actual services to be cutover; the first two forecasts indicate the number of services and the exchange from which they are supplied.
686. The ACCC proposed that the 84 calendar day forecast is not necessary, and should not be required. The ACCC considered the 56 day forecast to be appropriate and that MNMs should be able to be cutover within 56 calendar days of the order being submitted (or where an unexpected event prevents this, as soon as practicable after that period).

8.3.2. Submissions

687. Telstra submits that the 84 day timeframe fits within the overall lead times for access seekers in planning a MNM, i.e. the 84 day timeframe is not acting as a constraint on access seekers in seeking to effectively manage the migration of their customers.⁴⁴⁶ Telstra further submits that the 84 day timeframe provides it with an appropriate amount of time in which to plan for and resource the MNM.⁴⁴⁷
688. Telstra submits that the reduction in timeframe is unnecessary because its standard CRA no longer requires an 84 day forecast for LSS MNMs and access seekers have already received the benefit of this change.⁴⁴⁸
689. The Herbert Geer parties agree with the ACCC's view that the 84 calendar day forecast for submitting an MNM order is not necessary, and should not be required.⁴⁴⁹

690. The Herbert Geer parties submit that the 84 day notice period imposed by Telstra, along with the mandatory confirmation dates, and inflexible amendment processes appear designed to hinder the MNM process rather than assist Telstra's staff allocation or provide a smooth migration of services.⁴⁵⁰ The Herbert Geer parties submit that no details of the MNM are confirmed until the 56 day mark and that any costs currently incurred by Telstra between the 84 day and 56 day lead time can be contained within the 56 day period.⁴⁵¹
691. The Herbert Geer parties submit that as there is often a greater variation between an access seeker's 84 day to 20 day forecast, compared with a 56 to 20 day forecast, it is in Telstra's interests to remove the 84 day forecast.⁴⁵² Further, the parties submit that as the variations occur more often because of end-user churn the 84 day lead time only acts as a barrier to competition when combined with Telstra's inflexibility with amending migration plans.⁴⁵³
692. In reply the Herbert Geer parties confirm that Telstra's CRA no longer requires an 84 day forecast for LSS MNMs.⁴⁵⁴ Notwithstanding this, the parties request that the ACCC use its powers under subsection 152CP(2) and make a determination on the issue, because the issue of migration plan amendment terms remains in dispute, and removal of the 84 day forecast is a necessary aspect of that.⁴⁵⁵
693. Submissions on this matter were made by Nicholls Legal but were not taken into account in light of the fact that none of the Nicholls Legal parties notified this matter as being in dispute.

8.3.3. ACCC view

694. The ACCC has decided to maintain the position proposed to the parties in the Consultation Paper. As such, the ACCC considers that unless the parties agree otherwise, an 84 day forecast period is unnecessary to perform the project management tasks associated with a particular LSS MNM. The work done within the 84 to 56 day range would not take a substantial amount of time and can be easily accommodated within the 56-day period.
695. The longer forecast period could potentially be supported if for example it is necessary to efficiently manage contractors and it is reasonably necessary for the efficient conduct of all MNMs. However, the ACCC considers that the 84-day forecasts would contribute little to this goal.
696. The ACCC acknowledges that Telstra's CRA no longer requires an 84 day forecast for LSS MNMs.

⁴⁴⁶ Telstra Primary Submission, *LSS MNM Non-Price Terms*, 18 May 2009, p. 2.

⁴⁴⁷ Ibid.

⁴⁴⁸ Ibid.

⁴⁴⁹ Herbert Geer Primary Submission, *LSS & ULLS MNM Non-Price Terms*, 18 May 2009, p. 5.

⁴⁵⁰ Ibid.

⁴⁵¹ Ibid, p. 6.

⁴⁵² Ibid.

⁴⁵³ Ibid.

⁴⁵⁴ Herbert Geer Reply Submission, *LSS & ULLS MNM Non-Price Term*, 4 June 2009, p. 4.

⁴⁵⁵ Ibid.

8.4. Migration Plan Amendment Terms

8.4.1. Introduction

697. Chime is disputing LSS Migration Plan Amendment Terms.
698. Current commercial arrangements between the parties do not provide for access seekers to vary their migration plan, such as in respect of the number of services to be connected. In practice however access seekers have been able to vary these details when submitting their 20 business day forecasts.⁴⁵⁶
699. The ACCC proposed that there should be greater assurance that access seekers can make reasonable changes in the number of services to be cutover without a MNM being cancelled. The ACCC's preliminary view was that variations of up to 10 per cent when submitting a 20 business day forecast should always be accommodated without risk to the nominated cutover day.
700. Further, where a MNM cannot be completed on the nominated cutover day, for example, due to a more significant increase in the number of services to be cutover from a previous forecast, the ACCC proposed that the MNM cutover should be rescheduled to the next day on which necessary technician resources can be made available.

8.4.2. Submissions

701. Telstra considers that the DFD terms proposed by the ACCC are unnecessary because in practice the number of services in an MNM always differs between the 56 calendar day and the 20 business day notice.⁴⁵⁷ Telstra submits that it never cancels a MNM where the number of services in the 20 business day notice differs from that in the 56 calendar day notice.⁴⁵⁸
702. The Herbert Geer parties submit that it is clearly an impediment to competition in the relevant markets, to commercially prohibit access seekers to vary their migration plans.⁴⁵⁹
703. The Herbert Geer parties further submit that they support the ACCC's approach proposed in the Consultation Paper. However, the parties submit that they do not consider that this has been truly reflected in Schedule 4 of the DFD. Specifically, the Herbert Geer parties refer to clauses 5 and 6 of Schedule 4. The parties request that the ACCC insert a "Definition" at the bottom of the section which provides:

For the purposes of this determination:

- (a) *a reference to a significant variation refers to a variation of more than 10 per cent.*

⁴⁵⁶ ACCC, Consultation Paper on Final Determination, *Managed Network migration Non-Price Terms*, April 2009 (Consultation Paper).

⁴⁵⁷ Telstra Primary Submission, *LSS MNM Non-Price Terms*, 18 May 2009, p. 3.

⁴⁵⁸ Ibid.

⁴⁵⁹ Herbert Geer Primary Submission, *LSS & ULLS MNM Non-Price Terms*, 4 June 2009, p. 7.

704. In response, Telstra submits that it does not object to Herbert Geer's request for the addition of a 'Definition' at the bottom of Schedule 4 regarding references made to significant variations.⁴⁶⁰

8.4.3. ACCC view

705. The ACCC considers that unlimited variations to the forecasts once submitted would tend to compromise Telstra's ability to effectively manage its contractors. This is because large fluctuations in individual forecasts will mean that either too many or too few contractor resources will have been allocated to that MNM. However, the same could not be said for small variations in volumes, where the same level of resourcing would remain appropriate.

706. It is also likely that the number of services supplied to the access seeker in the relevant exchange will vary within the eight week forecasts period. The ACCC considers that this is primarily due to end-user churn rather than a lack of care when submitting the initial forecast. Consequently, the ACCC considers that Telstra should not unreasonably refuse variations that are submitted by the access seekers. This reflects an approach that has been adopted in practice between the parties.

707. As general guidance, the ACCC considers that it is likely to be unreasonable to refuse a variation of up to 10 per cent (either above or below the original forecast volume). The ACCC has amended the FD to include a definition specifying that a significant variation refers to a variation of more than 10 per cent.

708. Departures from forecast data will not impede cost recovery, as MNM connection charges (including minimum exchange charges) will fully recover project management costs for MNMs that proceed.

709. Where a MNM cannot be completed on the nominated cutover day the ACCC considers that the MNM cutover should be rescheduled to the next day on which necessary technician resources can be made available.

8.5. Limits on the number of exchanges per State per day

8.5.1. Introduction

710. EFTel is in dispute with Telstra over the limit on the number of exchanges per State at which a MNM can be performed.

711. Current commercial arrangements between the parties provide for a daily limit on the number of exchanges per State at which a MNM can be performed for an access seeker.

712. The ACCC proposed that these limits should not be required as a matter of course, and they should only apply in those periods where it is necessary to ration out access to MNM processes.

⁴⁶⁰ Telstra Reply Submission, *LSS MNM Non-Price Terms*, 4 June 2009, p. 2.

713. Consequently, any such limits should operate for no more than 60 days at a time, and only be imposed pursuant to a written notice ('Limitation Notice') that has been provided to access seekers outlining the nature of the limit, the area to which it relates, and explaining why the limit is presently necessary.

8.5.2. Submissions

714. Telstra submits that the requirement to provide access seekers with a Limitation Notice in order for it to refuse to schedule a cutover for a MNM at an exchange because the access seeker has requested a MNM cutover at other exchanges in that State on the same day is unnecessary and would introduce inefficient complexity and cost into managing the LSS MNM process.⁴⁶¹

715. Telstra further submits that historically, all access seeker forecasts have fallen within the limits of exchange activity per region per day.⁴⁶² Telstra submits that the ACCC's proposed process of requiring Telstra to publish a Limitation Notice is an attempt to solve a problem that does not exist in any practical sense and therefore does not promote the LTIE.⁴⁶³

716. The Herbert Geer parties submit that there is no reasonable explanation why access seekers are restricted to a daily limit of one MNM in each State.⁴⁶⁴ The parties submit that a lead time of 8 weeks provides Telstra with sufficient time to allocate staff or arrange contractors without this restriction.⁴⁶⁵

717. The Herbert Geer parties submit that they believe the intent of the ACCC is to remove the current daily limit, subject to the exception that when a written notice has been provided by Telstra to access seekers, the daily limit will apply.⁴⁶⁶ In their view they do not believe this intention has been properly realised within the current terms in Schedule 4 of the DFD.⁴⁶⁷

718. The Herbert Geer parties submit that they disagree with the inclusion of clauses 8-11 of Schedule 4 of the DFD.⁴⁶⁸ The parties submit that these terms provide a means by which Telstra may unilaterally impose unreasonable limitations on the access seekers' ability to schedule MNMs and could potentially be used as a backdoor method for Telstra to effectively cap exchanges.⁴⁶⁹

719. The Herbert Geer parties request that the ACCC completely remove clauses 8-11 in its Final Determination (and the reference to clause 9 in clause 7).⁴⁷⁰

⁴⁶¹ Telstra Primary Submission, *LSS MNM Non-Price Terms*, 18 May 2009, p. 3.

⁴⁶² Ibid.

⁴⁶³ Ibid.

⁴⁶⁴ Herbert Geer Primary Submission, *LSS & ULLS MNM Non-Price Terms*, 18 May 2009, p. 8.

⁴⁶⁵ Ibid.

⁴⁶⁶ Ibid, p. 9.

⁴⁶⁷ Ibid.

⁴⁶⁸ Ibid.

⁴⁶⁹ Ibid.

⁴⁷⁰ Ibid.

720. Telstra submits that while its regional field and contractor workforces could potentially manage more than one LSS MNM per State per day, there are no guarantees that this would be possible on any given day.⁴⁷¹
721. Telstra further submits that it supports the request of the Herbert Geer parties to remove clauses 8-11 of Schedule 4 of the DFD provided clause 7 is likewise deleted.⁴⁷² Telstra submits that without some mechanism for Telstra to reject MNMs on a per-State basis clause 7 exposes Telstra to substantial risks and is unworkable.⁴⁷³
722. In reply the Herbert Geer parties submit that simply because the MNM process is (according to Telstra) currently used less and less by access seekers this should not be relied upon to forecast future trends in MNM use or the need to limit the number of exchanges per State at which MNMs can be performed by an access seeker.⁴⁷⁴
723. Submissions on this matter were made by Nicholls Legal but were not taken into account in light of the fact that none of the Nicholls Legal parties notified this matter as being in dispute.

8.5.3. ACCC view

724. The ACCC has decided to maintain the position proposed to the parties in the Consultation Paper. The ACCC does not accept that daily limits on MNMs should be left in place simply on the basis that its continuation would be unlikely to delay access seekers by much. That said, it is not clear whether demand for MNMs will remain at current levels. The ACCC remains of the view that fair and reasonable MNM terms would not include daily limits on MNMs on an ongoing basis. Where a limit is necessary, it should only be of limited duration and occur pursuant to a transparent process – that is where the limit and reasons for it have been notified to access seekers.
725. Accordingly, the ACCC considers that except where the parties otherwise agree, Telstra must not refuse to schedule a cutover for a MNM at an exchange because the access seeker has requested a MNM cutover at other exchanges in that State on the same day. The ACCC notes that the FD allows Telstra to refuse a requested MNM cutover date where it would be inconsistent with a Limitation Notice.
726. The ACCC considers that the Limitation Notice must specify:
- the limit that is to apply;
 - the period and the exchange service areas to which it applies; and
 - the reasons for the limit being necessary by reference to forecast demand and available capacity.

⁴⁷¹ Ibid.

⁴⁷² Ibid.

⁴⁷³ Ibid.

⁴⁷⁴ Herbert Geer Reply Submission, *LSS & ULLS MNM Non-Price Terms*, 4 June 2009, p. 5.

727. The ACCC considers that providing access seekers with a Limitation Notice would not be unduly complex or be an unreasonable imposition on Telstra. It would in any case only be if MNM demand strengthened significantly that such a notice could be required.
728. The ACCC considers that clauses 8-11 of Schedule 4 of the DFD should not be removed contrary to Herbert Geer's submission. The ACCC considers that Telstra should be given an opportunity to manage capacity constraints associated with its exchange activity. The ACCC considers that the requirements specified in the FD strike a reasonable balance between the access seekers' need for certainty and Telstra's ability to reliably plan ahead.
729. The ACCC considers that Telstra should not unreasonably refuse requests to vary or withdraw a notice should it be asked to do so by an access seeker. Should the access seeker dispute the appropriateness of a notified limitation, the dispute resolution processes would be available, and if necessary the matter could be notified to the ACCC for arbitration.
730. In any such arbitration, the ACCC would likely look to the access seeker to establish that the limitation will have a material effect on its ability to complete its MNMs in a timely manner. The ACCC would also likely look to Telstra to justify the proposed limit having regard to the prevailing capacity and forecasts submitted by access seekers for the relevant area.
731. Ultimately the ACCC considers that issues pertaining to exchange access are likely to be minimal given that access seeker forecasts tend to fall within the limits of exchange activity per region per day.

8.6. After hours MNM cutovers

732. Request is in dispute with Telstra over 'After hours MNM cutovers'.
733. Current commercial arrangements provide that cutovers may be made after hours at Telstra's election, but do not permit an access seeker to specify after hours cutover.
734. The ACCC proposed that access seekers should have the option of MNM cutovers being performed after hours. Any additional cost that is caused by after hours work would be able to be recovered through appropriate tariff arrangements.
735. The ACCC is of the view that a surcharge should apply to MNMs performed after hours at the request of an access seeker. The ACCC considers that this surcharge should be cost based, and reflect the additional operating costs Telstra, operating efficiently, will incur when performing necessary tasks after hours.
736. See Chapter 7 LSS MNM charges for party submissions and more detailed ACCC views on the matter.

8.7. Assessment against subsection 152CR(1) criteria

737. The ACCC must take the subsection 152CR(1) criteria into account in making a FD. Not all of these criteria will be relevant to every particular issue that the ACCC must determine.

8.7.1. Paragraph 152CR(1)(a)

738. In assessing the MNM non-price terms against subsection 152CR(1), the ACCC must firstly have regard to the LTIE. This calls for consideration of a number of factors identified in section 152AB, being the objective of promoting competition, the objective of achieving any-to-any connectivity, the objective of encouraging the economically efficient use of and the economically efficient investment in infrastructure, and subsidiary matters (paragraphs 152AB(2)(c)-(e), subsection 152AB(4), paragraphs 152AB(6)(a)-(c), subsection 152AB(7A) and subsection 152AB(8)).

739. The ACCC considers that its approach promotes the LTIE by removing obstacles to service providers migrating services to the LSS. By providing an access seeker with a degree of flexibility in its migration plans and the ability to vary forecasts, the ACCC considers this will reduce delay and alleviate any competition concerns. LSS based supply will allow service providers greater ability to differentiate the price and quality of downstream voice and DSL services they offer to end-users, increasing the level of competitive rivalry in the supply of downstream services.

740. The MNM non-price terms will not affect any-to-any connectivity. Nor does the ACCC consider that the matters identified in paragraph 152AB(6)(a) relevant to this issue.

741. Economic efficiency in use of, and the economically efficient investment in infrastructure used to provide listed services, requires consideration of Telstra's infrastructure as well as the infrastructure of LSS access seekers. Restricting MNM processes to larger scale migrations, when MNM processes can result in more efficient outcomes for smaller scale migrations, would tend to discourage otherwise efficient use of and investment in infrastructure used to provide the LSS and downstream services. Similarly, delaying MNM processes by requiring longer timeframes or imposing other limitations would also tend to discourage otherwise efficient use of and investment in infrastructure. This is because those restrictions would delay MNMs completing or prevent existing services being migrated to the LSS at least cost. Uncertainty or delay will discourage take up of the LSS, as well as discourage efficient investment in access seeker's DSLAMs and other infrastructure.

742. The ACCC considers the MNM non price terms satisfy Telstra's commercial interests, including its interest in recovering direct costs, and exploiting economies of scale and scope. Although the minimum number of connections required for a MNM is arbitrary the minimum MNM exchange charges, and MNM connection charges still permit Telstra to recoup the costs associated with MNMs. By better aligning the charge for migrations with cost, and

thereby promoting competition, dynamic efficiencies will be encouraged. These in turn will stimulate demand for the LSS and downstream services, generating economies of scale and scope across Telstra's production processes. Telstra is able to exploit these economies.

8.7.2. Paragraph 152CR(1)(b)

743. The next matter concerns the legitimate business interests of Telstra, and its investment in facilities used to supply the LSS. The legitimate business interests of the access provider are related closely to the matters discussed as part of the first matter.
744. The ACCC considers that with mechanisms such as allowing Telstra to charge a premium for after hour cutovers and the introduction of a Limitation Notice for cutovers performed per day, Telstra's legitimate business interests and investment in facilities will be retained. Through such provisions Telstra will be able to expect an equitable return for services provided as well as efficiently manage their resources.

8.7.3. Paragraph 152CR(1)(c)

745. The next criterion involves the interests of all persons who have rights to use the service. The ACCC considers that access seekers' interests lie in being able to compete for end-users on the basis of their relative merits, without being impeded in acquiring end-user customers or incurring unnecessary costs.
746. The availability of MNM processes is in the interests of access seekers (and ultimately end users) as it promotes their ability to compete on their merits for end user services. Without such processes, access seekers would be less able to transfer their customers onto their own DSLAM networks, and thereby control the range and quality of services that they can supply. The lesser unit costs associated with MNMs also lowers the access seeker's costs base where these are passed on in the form of reduced connection charges. Without these processes access seekers would incur additional costs and only be able to use the single connection process.
747. The ACCC's approach is consistent with access seekers' interests in being able to compete in downstream markets on the basis of the price and quality of the services they can offer by being able to determine the most effective means of transitioning services to end users.

8.7.4. Paragraph 152CR(1)(d)

748. The next matter concerns the direct costs of providing access to the LSS. In this context it calls for consideration as to whether Telstra can recover the costs of smaller scale MNMs. Telstra will be able to do so under the pricing structure that has been adopted regardless of the approach taken to minimum scale. Similarly, Telstra will be able to recover costs for cutovers taking place after hours by charging an appropriate premium for such services to be agreed between the parties.

8.7.5. Paragraph 152CR(1)(e) & (f)

749. The next two criteria are the value to a party of extensions, or enhancement of capability, whose cost is borne by someone else; and the operational and technical requirements necessary for the safe and reliable operation of a carriage service, or a telecommunications network or a facility.
750. The ACCC does not consider that imposing a minimum number of services as a MNM pre-requisite or any of the other MNM non-price pre-requisites are necessary to promote the safe and reliable operation of the network or facilities, or to ensure the recovery of costs Telstra has incurred in making any enhancements that MNM processes may require. The ACCC considers that any technical requirement issues concerning the cutover limits on the number of exchanges per State per day could be alleviated by way of Telstra's provision of a Limitation Notice as outlined in these reasons.

8.7.6. Paragraph 152CR(1)(g)

751. The last criterion is the economically efficient operation of a carriage service, a telecommunications network or a facility. The ACCC has considered issues of economic efficiency above.
752. The ACCC considers that the economically efficient operation of carriage services and associated networks and facilities of the access provider and access seekers will be encouraged by access seekers having greater flexibility in deciding the terms under which they would utilise MNM processes.
753. This is because it will promote competition in downstream services by removing obstacles to connecting to the LSS, while ensuring that efficient costs of connecting the relevant services is able to be recovered. Greater competition in the supply of downstream services will encourage efficiency in the supply of those services.

9. Network Modernisation and Upgrade terms

9.1. Introduction

9.1.1. Background

754. A ‘network modernisation and upgrade’ is a change to the Telstra network. They include matters that have the potential to significantly disrupt services – such as the relocation of exchanges/nodes or altering the deployment class of equipment that the network will support – to matters that will have little consequence for the availability or quality of services. A network modernisation and upgrade could occur in response to an unforeseen change in circumstances and/or emergency, or could be undertaken in implementing planned network changes.

755. Parties in dispute with Telstra on this matter are:

- Adam, Chime, EFTel, Wideband, Agile and Saunders (represented by and referred to as the Herbert Geer parties); and
- Request (represented by Nicholls Legal).

9.1.2. Current terms and conditions of access

756. Network modernisation and upgrade terms are not the subject of IDs. These terms are currently the subject of Telstra’s CRA or similar agreement:

- CRA 191 (clause 6).

757. The standard access terms specify that Telstra will provide the access seeker with not less than [REDACTED] notice of network upgrades that may:

- require the relocation of a point of interconnection from exchange buildings closer to end users;
- alter the deployment class of access seeker equipment;
- require the truncation of services provided from traditional exchange buildings; or
- involve the installation of equipment closer to an end user than an exchange.

758. Telstra’s standard agreement also specifies measures that the access seeker must undertake in order to continue to acquire the LSS in the event of a network upgrade.

9.1.3. Prior consideration

759. The ACCC and the Australian Competition Tribunal (Tribunal) have previously considered network modernisation in the context of an access

undertaking that Telstra proposed for the ULLS.⁴⁷⁵ The ACCC has more recently considered major network modernisation terms in the 2008 Model Terms.⁴⁷⁶

760. The ACCC, in accordance with subsection 152CR(2) of the Act, has taken the view that it can and should take its previous decisions into consideration in making FDs. The ACCC believes that it should adopt a consistent approach on recurring issues but also acknowledges that it must consult and explain any changes in approach to those issues where that change is appropriate.
761. Under section 152AQB, the ACCC is required to have regard to the 2008 Model Terms for core services (such as the ULLS). However, the ACCC also considers that the 2008 Model Terms are relevant when considering access terms for the LSS. Accordingly, in the Initial Consultation Paper the ACCC considered the 2008 Model Terms as an additional matter under subsection 152CR(2).
762. In light of the submissions received in the initial consultation, particularly the significant scope of issues raised by Telstra, the ACCC considered it appropriate to revise the DFD and hold a Supplementary Consultation.

9.2. Initial Consultation

9.2.1. Introduction

763. The ACCC's position in its Initial Consultation paper was to adopt clause G of the 2008 Model Terms. The ACCC considered this was appropriate to address the terms that applied only to Major Network Modernisation and Upgrades (MNMU).⁴⁷⁷ In determining these access terms the ACCC considered the existing commercial arrangements between Telstra and the access seekers were not appropriate. In particular, the ACCC was concerned that the period of notice given to access seekers and the level of negotiation and consultation provided for major network modernisations was inadequate.
764. In the Initial Consultation the ACCC sought to address terms for major network modernisations of a single exchange service area (ESA) that may require the relocation of exchanges/nodes or alteration of the deployment class of equipment that the network will support. The terms consulted upon specified a minimum notification obligation on Telstra of six months (26 weeks) before any such modernisation and upgrade could be scheduled to take effect. This term was coupled with an obligation on Telstra to provide 'equivalent' notification when approving a network upgrade, i.e. Telstra was required to give an access seeker the same amount of notice as Telstra had.

⁴⁷⁵ *Re Telstra Corporation Ltd (No 3)* [2007] ACompT 3; ACCC, *Assessment of Telstra's ULLS Monthly Charges Undertaking, Final Decision*, August 2006.

⁴⁷⁶ ACCC Report, *Final determination—Model Non-Price Terms and Conditions*, November 2008, p. 21.

⁴⁷⁷ ACCC, *Consultation Paper on Final Determination, Network Modernisation and upgrade terms*, June 2009 (Initial Consultation).

765. The ACCC considered the application of clause G of the 2008 Model Terms should encourage greater consultation and negotiation between Telstra and access seekers and achieve agreement and mutual resolution on how network upgrades should be implemented.

9.2.2. Submissions

766. Submissions were received from parties outlining a number of concerns with the ACCC's proposed terms. In particular, Telstra raised concerns that:⁴⁷⁸

- there is no carve out for network upgrades in emergency situations
- the equivalence test provisions are vague and uncertain
- the required content for notification is unworkable
- the obligation to consult and negotiation is unrestricted, and
- it is unclear when the proposed notification procedures apply.

767. Access seekers similarly had concerns, although primarily focused on:⁴⁷⁹

- the minimum period notice period before a modernisation or upgrade should be at least 12 to 24 months
- Telstra should have an equivalent obligation not to withhold its consent to a greater notice period
- Clause 5 should be amended to require Telstra to negotiate in good faith, and
- the exclusion of coordinated capital works programs.

768. In addition, Telstra submits that it is not permissible for access seekers to vary their dispute notifications during the course of the arbitration to include additional issues in dispute and the dispute concerning network modernisation should be addressed via a separate notification (pursuant to section 152CM of the Act). Telstra submits that the ACCC should refrain from determining terms and conditions associated with network modernisation.⁴⁸⁰

769. Telstra submits there has been an incremental expansion of the scope of access disputes over the course of this arbitration which is contrary to the ACCC's statutory obligations to have regard to the desirability of access disputes being resolved in a timely manner (subsection 152CLA(1) and to act as speedily as a proper consideration of the dispute allows (paragraph 152DB(1)(b)).⁴⁸¹ Telstra submits that it is difficult for participants to know which issues are in dispute

⁴⁷⁸ Telstra Initial Primary Submission, *LSS Network Modernisation and Upgrade Terms*, 2 July 2009, pp. 3–10.

⁴⁷⁹ Herbert Geer Initial Primary Submission, *LSS Network Modernisation and Upgrade Terms*, 2 July 2009, pp. 2-8.; Nicholls Legal Initial Primary Submission, *LSS Network Modernisation and Upgrade*, 2 July 2009, pp. 2-4.

⁴⁸⁰ Telstra Initial Primary Submission, *LSS Network Modernisation and Upgrade Terms*, 2 July 2009, pp. 7–9.

⁴⁸¹ *Ibid*, pp.14-17

and the critical factors on which the determination is to turn.⁴⁸² Telstra submits that this results in the risk that each participant may not have a reasonable opportunity to be heard.⁴⁸³

770. The Herbert Geer parties submit that Telstra's submission is unwarranted and intended to frustrate the arbitration process and prevent the efficient resolution of access disputes.⁴⁸⁴ Herbert Geer submits subsection 152CP(2) of the Act gives the power to the ACCC to deal with any matter in relation to the declared service including matters that were not the basis of notification in dispute including specifying other terms and conditions of the access seeker's access to the declared service.⁴⁸⁵
771. The Herbert Geer parties also submit that while some parties only disputed the period of notification the DFD dealt with broader matters.

9.2.3. ACCC view

772. Due to the scope of the issues raised by parties and following consideration of both the primary and reply submissions from the Initial Consultation, the ACCC considered it appropriate to revise the DFD and issued a Supplementary Consultation Paper.⁴⁸⁶ The Supplementary Consultation is discussed in section 9.3.
773. The ACCC notes that subsection 152CP(2) of the Act allows the ACCC to deal with any matters relating to access by the access seeker that is not the basis of notification in each access dispute. The ACCC's view is that although certain aspects or issues related to network modernisation have not been notified in each dispute, the ACCC considers it is appropriate to canvas all the relevant issues via a consultation process to be able to make an informed determination on the relevant terms to apply for each access dispute.
774. The ACCC's view is that by canvassing and considering wider issues relevant to MNMUs in a joint arbitration hearing, this enables the ACCC to account for industry wide considerations that may be common to the arbitration of each access dispute. The ACCC does not consider there is an incremental expansion of the scope of the access disputes, and to the contrary the joint arbitration hearing merely provides the opportunity for access seekers to make submissions on all relevant matters before the ACCC makes a FD.
775. The ACCC considers a joint arbitration hearing allows the ACCC to conduct an efficient process to consider all submissions necessary in making an informed determination and to resolve each access dispute. The ACCC's view is that the joint arbitration hearing allows parties to make submissions on all relevant matters in a structured process and to ensure there is reasonable

⁴⁸² Ibid.

⁴⁸³ Ibid.

⁴⁸⁴ Herbert Geer Initial Reply Submission, *LSS Network Modernisation and Upgrades*, pp. 2–4.

⁴⁸⁵ Ibid.

⁴⁸⁶ ACCC, Supplementary Consultation Paper on Draft Final Determination, *Network Modernisation and Upgrade Terms*, November 2009 (the Supplementary Consultation Paper).

opportunity to make and respond to submissions on all issues relevant to each access dispute.

9.3. Supplementary Consultation

776. As noted at Section 9.2, in light of the submissions received in the Initial Consultation the ACCC conducted a Supplementary Consultation. In the Supplementary Consultation Paper, the ACCC indicated that parties should respond to the additional terms in the DFD. However, the ACCC did not restrict the parties to only responding to the new terms. Where parties submitted on an issue in the Supplementary Consultation and this was inconsistent with submissions from the Initial Consultation, the ACCC has taken the submission to the Supplementary Consultation as the primary view of the party.

9.3.1. Coordinated Capital Works Programs (CCWPs)

Introduction

777. In its Initial Consultation Paper, the ACCC did not specify terms to address unilateral capital works programs undertaken by Telstra to upgrade its network. However, the ACCC sought to address this anomaly that would allow Telstra to implement a capital works program with extended application in multiple ESAs without consulting or notifying access seekers.

778. In the Supplementary Consultation, the ACCC consulted on terms which imposed obligations on Telstra to:

- inform access seekers of intended capital works programs by publishing a three year forecast (updated every six months) outlining expected capital investments to be made over that period, together with the area affected and anticipated timeframes; and
- inform access seekers of CCWPs by giving them a Schedule (12 months in advance of anticipated commencement) detailing the extent of the capital works program and the expected impact on access seekers services.

Submissions

General

779. The Herbert Geer⁴⁸⁷ and Nicholls Legal⁴⁸⁸ parties submit that they accept the inclusion of terms which address CCWPs. However, concerns are raised that the notice period should be consistent with the 24 months provided for in

⁴⁸⁷ Herbert Geer Supplementary Primary Submission, *LSS Network Modernisation and Upgrade Terms*, 16 November 2009, p. 6.

⁴⁸⁸ Nicholls Legal Supplementary Primary Submission, *LSS Network Modernisation and Upgrade*, 16 November 2009, p. 1.

Telecom New Zealand's FTTN (cabinetisation) upgrade,⁴⁸⁹ and not 12 months as currently provided for in the DFD.⁴⁹⁰

780. Telstra submits that while it considers the CCWP provisions unnecessary, if they are to be included the nature and scope of the terms should be reviewed.⁴⁹¹ Specifically, Telstra submits:
- the scope of the CCWP provisions should be narrowed
 - information to be submitted as part of a CCWP schedule should be narrowed
 - greater time is required for the preparation of the initial CCWP forecast
 - CCWP schedules should only be provided to affected access seekers
 - confidentiality of information should be provided and
 - Telstra should not be required to publish CCWP forecasts or schedules on its website.⁴⁹²
781. Telstra, in their reply submission, also considers that the ACCC's definition of a CCWP would require Telstra to determine the number of ESAs that a particular upgrade will affect at an early stage in order to comply with the forecast and notification obligations.⁴⁹³ Telstra considers that this may be extremely difficult and in some cases impossible.⁴⁹⁴

NBN carve out

782. Telstra notes that it had previously announced a proposed rollout of a fibre to the node (FTTN) network.⁴⁹⁵ In relation to the ACCC's proposed terms imposing obligations on Telstra to provide forecasts for, and notifications of CCWP, Telstra submits that it is its understanding that the provisions are intended to assist access seekers in their planning and investment decisions.⁴⁹⁶ However, since the previous round of consultation, it notes that the Commonwealth has announced its intention to establish a fibre-to-the-premises (FTTP) network, introducing legislation that is, in part, intended to facilitate this.⁴⁹⁷ Telstra submits that there is now considerable uncertainty in

⁴⁸⁹ New Zealand Commerce Commission, *Standard Terms Determination for Telecom's Unbundled Copper Local Loop Network Service, UCLL General Terms*, Public Version, 7 November 2007, p. 34 (New Zealand Terms).

⁴⁹⁰ Herbert Geer Supplementary Primary Submission, *LSS Network Modernisation and Upgrade Terms*, 16 November 2009, p. 6; Nicholls Legal Supplementary Primary Submission, *LSS Network Modernisation and Upgrade Terms*, 16 November 2009, p. 1.

⁴⁹¹ Telstra Supplementary Primary Submission, *LSS Network Modernisation and Upgrade Terms*, 16 November 2009, pp. 2–5.

⁴⁹² Ibid.

⁴⁹³ Telstra Supplementary Reply Submission, *LSS Network Modernisation and Upgrade Terms*, 23 November 2009, p. 1.

⁴⁹⁴ Ibid.

⁴⁹⁵ Telstra Supplementary Primary Submission, *LSS Network Modernisation and Upgrade Terms*, 16 November 2009, p. 2.

⁴⁹⁶ Ibid.

⁴⁹⁷ Ibid.

relation to the final structure of the Government's roll-out of a FTTP network although what is clear is that a government controlled entity will be responsible for any FTTP rollout.⁴⁹⁸ It is therefore unclear to Telstra as to what the CCWP provisions are intended to address.⁴⁹⁹

783. Telstra submits that given the circumstances the CCWP provisions were intended to capture and recent significant developments relating to the FTTP rollout, the CCWP provisions are unnecessary and should be deleted.⁵⁰⁰
784. In response, the Herbert Geer parties submit that the legislation introduced to facilitate the NBN is irrelevant to the issue of adequate provision being made for access seekers to have notification of CCWPs that are, by definition, not part of the NBN rollout.⁵⁰¹
785. Telstra submits the scope of the proposed CCWP provisions is too broad because the concept of CCWP covers circumstances beyond a planned, significant FTTP upgrade and much of the information is likely to be subject to change and thus unlikely to provide certainty to access seekers.⁵⁰²
786. Telstra submits that it understands the ACCC's intention of the CCWP provisions to be to give access seekers adequate notice of a FTTN upgrade so it can be considered in planning and investment decisions.⁵⁰³ However, Telstra contends that the current drafting goes beyond a FTTN upgrade and would mean one-off upgrades which happen to impact on more than one exchange area would be covered by the provisions.⁵⁰⁴ Telstra cites an example of where a non-FTTN upgrade is caught by the proposed CCWP definition, but considers that as this type of upgrade is not part of a FTTN upgrade it is not an upgrade that on its understanding is intended to be included by the ACCC.⁵⁰⁵
787. Telstra considers that given the broad definition of CCWP, neither the CCWP forecasts nor the CCWP schedules would provide access seekers with the certainty desired outside of FTTN upgrades because planning for one off upgrades is likely to be more changeable and occur over shorter timeframes.⁵⁰⁶ Telstra also submits that the costs of complying with the FD as currently drafted would be inconsistent with the criteria in subsection 152CR(1).⁵⁰⁷
788. The Nicholls Legal parties submit that the reference to the provision not including a NBN upgrade should be removed from the definition of a

⁴⁹⁸ Ibid.

⁴⁹⁹ Ibid.

⁵⁰⁰ Ibid.

⁵⁰¹ Herbert Geer Supplementary Reply Submission, *LSS Network Modernisation and Upgrade Terms*, 23 November 2009 p. 2.

⁵⁰² Telstra, Supplementary Primary Submission, *LSS Network Modernisation and Upgrade Terms*, 16 November 2009 p. 3.

⁵⁰³ Ibid.

⁵⁰⁴ Ibid.

⁵⁰⁵ Ibid.

⁵⁰⁶ Ibid.

⁵⁰⁷ Ibid.

CCWP.⁵⁰⁸ Access seekers consider that it is important that they are aware of any significant changes to the network which may affect their investment in and use of declared services.⁵⁰⁹

789. In response to the Nicholls Legal parties, Telstra submits that a carve out for the FTTP upgrade associated with any government sponsored NBN upgrade remains necessary.⁵¹⁰ Telstra reiterates its views that arrangements in relation to the NBN upgrade should be addressed in any government consultative process and that it would not be prudent for the FD to constrain any NBN implementation.⁵¹¹
790. In response to Telstra, the Herbert Geer parties submit that upgrades of the nature of FTTN that go beyond a FTTN rollout are the type of upgrades that should be captured by the CCWP provisions and disagree with Telstra's view that information provided pursuant to the CCWP provisions needs to be set in stone before it can be useful to access seekers.⁵¹²
791. Telstra submits that if Telstra ceases to own or control the CAN during the period of application of the FD then the terms of the FD should be amended and explicitly expressed to cease to apply.⁵¹³ The Herbert Geer parties submit if Telstra ceases to own the CAN, it will not be conducting network modernisations to it and therefore the FD terms would not apply⁵¹⁴. The Nicholls Legal parties submit there remains a high degree of uncertainty about the implementation of the NBN.⁵¹⁵

Scope of provisions

792. Telstra submits that some of the information proposed to be provided pursuant to the CCWP provisions is already provided by Telstra in its Long Term Notification Report (LTNR).⁵¹⁶ Telstra contends that the provision of this information under the CCWP provisions would impose additional costs upon Telstra, when some of that information (although in somewhat less detail) is already available to access seekers.⁵¹⁷

⁵⁰⁸ Nicholls Legal Supplementary Primary Submission, *LSS Network Modernisation and Upgrade Terms*, 16 November 2009 p. 1.

⁵⁰⁹ Ibid.

⁵¹⁰ Telstra Supplementary Reply Submission, *LSS Network Modernisation and Upgrade Terms*, 23 November 2009, p. 2.

⁵¹¹ Ibid.

⁵¹² Herbert Geer Supplementary Reply Submission, *LSS Network Modernisation and Upgrade Terms*, 23 November 2009, pp. 3–4.

⁵¹³ Telstra Supplementary Primary Submission, *LSS Network Modernisation and Upgrade Terms*, 16 November 2009, p. 7.

⁵¹⁴ Herbert Geer Supplementary Reply Submission, *Network Modernisation and Upgrade Terms*, 23 November 2009, p. 6.

⁵¹⁵ Nicholls Legal Supplementary Primary Submission, *LSS Network Modernisation and Upgrade Terms*, 16 November 2009, p. 1.

⁵¹⁶ Telstra Supplementary Primary Submission, *LSS Network Modernisation and Upgrade Terms*, 16 November 2009, p. 7.

⁵¹⁷ Ibid.

793. The Herbert Geer parties consider that Telstra's LTNR is not an adequate substitute for the CCWP provisions.⁵¹⁸

CCWP Schedule Information

794. Telstra submits that the information requirements as set out in the DFD should be narrowed.⁵¹⁹ Telstra also submits that it may not be in a position to identify those services that *will* be affected by a CCWP 12 months in advance.⁵²⁰ Instead, Telstra considers it would be more likely that it would have to provide the necessary information to those access seekers that *may* be affected.⁵²¹ Telstra also observes that the Individual Notification process would identify those affected by a CCWP as notice is provided for under the Equivalent Period of Notice definition in clause 3 of the DFD.⁵²² Accordingly, in circumstances where planning over a longer period is required, the obligation to provide information will also arise earlier and may arise more than 12 months in advance.⁵²³
795. In reply the Herbert Geer parties do not object to Telstra's proposed drafting changes to narrow the scope of the FD, which would see Telstra being required to provide information to those access seekers that *may* be affected.⁵²⁴

Time required for preparation of the initial CCWP forecast

796. Telstra submits 60 days is necessary to prepare an initial CCWP forecast.⁵²⁵
797. In reply to Telstra, the Herbert Geer parties submit that it is likely Telstra already has detailed information about its major network modernisation plans in all ESAs and that this information is readily available for use by Telstra business units.⁵²⁶ The Herbert Geer parties acknowledge that it may take some time for Telstra to re-format the information in a manner that would comply with its obligations under an FD.⁵²⁷ However, they consider that Telstra has had advance notice of this requirement through the DFD and consultation papers and therefore it is open for Telstra to commence any preparatory work prior to the FD being made.⁵²⁸

⁵¹⁸ Herbert Geer Supplementary Reply Submission, *LSS Network Modernisation and Upgrade Terms*, 23 November 2009, p. 2.

⁵¹⁹ Telstra Supplementary Primary Submission, *LSS Network Modernisation and Upgrade Terms*, 16 November 2009, p. 4.

⁵²⁰ *Ibid.*

⁵²¹ *Ibid.*

⁵²² *Ibid.*

⁵²³ *Ibid.*

⁵²⁴ Herbert Geer Supplementary Reply Submission, *LSS Network Modernisation and Upgrade Terms*, 23 November 2009, p. 4.

⁵²⁵ Telstra Supplementary Primary Submission, *LSS Network Modernisation and Upgrade Terms*, 16 November 2009, p. 4.

⁵²⁶ Herbert Geer Supplementary Reply Submission, *LSS Network Modernisation and Upgrade Terms*, 23 November 2009, p. 4.

⁵²⁷ *Ibid.*

⁵²⁸ *Ibid.*

CCWP Schedules should only be provided to affected Access Seekers

798. Telstra considers that the ACCC's intention was that only access seekers affected by the relevant CCWP should receive the related schedule.⁵²⁹ Telstra submits that to the extent that it is required to provide the information to access seekers (outside of this arbitration) and for whom it is irrelevant, it is arguable that it is beyond the scope of the ACCC's powers under section 152CP of the Act.⁵³⁰
799. Telstra also considers that information in the CCWP Schedule should not be provided to parties who have already been provided an Individual Notification for the same project, thereby limiting duplication.⁵³¹
800. The Herbert Geer parties, in reply, consider that Telstra hold a significant competitive advantage over access seekers by being able to control the timing of network upgrades, while access seekers are at a competitive disadvantage due to the risk of assets being stranded.⁵³² In their view, the provision of the CCWP schedule does not adequately address these risks if the information is only provided to access seekers that hold existing services.⁵³³ Such information may be of significant assistance to an access seeker who does not have any services within the relevant ESA in guiding its future investment decisions.⁵³⁴ The Herbert Geer parties also see utility in the provision of the CCWP schedule and the Individual Notifications as there is some information included in the CCWP schedule which would not otherwise been made available.⁵³⁵

Confidentiality of information in the CCWP forecast or schedule

801. Telstra submits that any information provided to access seekers as part of the CCWP forecasts or schedules should be subject to confidentiality obligations and limitations on its use and disclosure.⁵³⁶ In its view, if such protection is not provided the FD would fail to give weight to Telstra's legitimate interest in protecting its commercially sensitive business and investment plans.⁵³⁷
802. While acknowledging Telstra's desire to seek to protect its confidential information, the Herbert Geer parties submit that if parties cannot use the information outside of these arbitrations then the provisions will be of no practical use.⁵³⁸ Restrictions on being able to provide reasonable advice to

⁵²⁹ Telstra Supplementary Primary Submission, *LSS Network Modernisation and Upgrade Terms*, 16 November 2009, p. 4

⁵³⁰ Ibid.

⁵³¹ Ibid.

⁵³² Herbert Geer Supplementary Reply Submission, *LSS Network Modernisation and Upgrade Terms*, 23 November 2009, p. 4.

⁵³³ Ibid, p. 5.

⁵³⁴ Ibid.

⁵³⁵ Ibid.

⁵³⁶ Telstra, Supplementary Reply Submission, *LSS Network Modernisation and Upgrade Terms*, 23 November 2009, p. 5.

⁵³⁷ Ibid.

⁵³⁸ Herbert Geer Supplementary Reply Submission, *LSS Network Modernisation and Upgrade Terms*, 23 November 2009, p. 5.

customers about disruptions will be detrimental to the customers and cause significant damage to the access seeker's business reputation.⁵³⁹

Publication of forecasts or schedules on Telstra's website

803. Telstra submits that a FD which requires it to publish CCWP forecasts and schedules on its website would be outside the ACCC's power under section 152CP because the obligation would be to provide the information on an industry-wide basis and not the subject of the bilateral disputes before the ACCC.⁵⁴⁰
804. Telstra also submits that requiring the broad publishing of this data would be inconsistent with subsection 152CR(1)(b) of the Act, particularly where competing carriers that do not acquire the relevant service can obtain long-range information about Telstra's future investment plans.⁵⁴¹ Telstra therefore submits that the publication obligations should be removed.⁵⁴²
805. The Herbert Geer parties submit that should the ACCC agree with Telstra's contention, then it should consider whether it could achieve its desired outcomes of publishing the forecasts and schedules through the use of Division 6 of Part XIB of the Act.⁵⁴³

Coordinated Capital Works Program forecasts & schedules

806. The Herbert Geer parties and the Nicholls Legal parties support the ACCCs Supplementary Consultation and the necessity of the CCWP provisions regarding forecasts and schedules.⁵⁴⁴ However, the Herbert Geer parties and the Nicholls Legal parties submit that the 12 month notice period specified in the DFD is too short and 24 months is more appropriate and in line with the New Zealand Terms relied upon by the ACCC.⁵⁴⁵
807. The Herbert Geer parties submit that the terms of the FD should represent an appropriate balance between the right of Telstra to upgrade its network and the right of an access seeker to have notice of such upgrades.⁵⁴⁶ However, the Herbert Geer parties submit that they disagree about what constitutes an appropriate balance.⁵⁴⁷
808. The Herbert Geer parties submit they would not find the situation acceptable where Telstra was able to perform a capital works program without having to

⁵³⁹ Ibid.

⁵⁴⁰ Telstra Supplementary Reply Submission, *LSS Network Modernisation and Upgrade Terms*, 23 November 2009, p. 5.

⁵⁴¹ Ibid.

⁵⁴² Ibid.

⁵⁴³ Herbert Geer Supplementary Reply Submission, *LSS Network Modernisation and Upgrade Terms*, 23 November 2009, p. 5.

⁵⁴⁴ Ibid, p. 3; Nicholls Legal Supplementary Reply Submission, *LSS Network Modernisation and Upgrade Terms*, 23 November 2009, p. 1.

⁵⁴⁵ Ibid.

⁵⁴⁶ Herbert Geer Supplementary Reply Submission, *LSS Network Modernisation and Upgrade Terms*, 23 November 2009, p. 6.

⁵⁴⁷ Ibid.

provide notice or only required to adhere to the minimum notification obligations specified for MNMUs to implement a planned upgrade. The Herbert Geer parties' reason, as a result, they do not object as a matter of principle to separately address programs of coordinated capital works in the FD.⁵⁴⁸

809. Telstra rejects Herbert Geer claims that the schedule should be extended to a 24 month notice period on the basis that the application of the provisions in New Zealand is different.⁵⁴⁹

ACCC View

810. The ACCC considers the FD terms in relation to CCWP provisions (schedules and forecasts) provide valuable information necessary to enable access seekers to make informed business and investment decisions in relation to declared services. The ACCC considers the terms of the FD reflect a balance between the interests of Telstra in upgrading its network and the access seekers interests in having sufficient notice to incorporate relevant information of any such network upgrade into investment decisions and business decisions which may affect its use of declared services.
811. The ACCC considers that the CCWP provisions should generally apply to planned, significant, coordinated network modernisation affecting more than one ESA, where an access seeker would be required to relocate their equipment from the exchange to an access point closer to end-users premises. The ACCC considers the CCWP provisions should capture situations where Telstra upgrades its network to provision FTTN/P, separately from the Government's proposed NBN rollout, and also where the services in operation are decommissioned as a result of a unilateral capital program by Telstra.
812. As the outcome of the NBN process is at this stage uncertain the ACCC does not seek to pre-empt the government's plans for a NBN rollout. Accordingly, the terms in the FD are not intended to apply to the Government planned NBN capital works program. The ACCC considers that the arrangements that should apply under such circumstances are more appropriately addressed as part of the NBN process.
813. The ACCC does not consider the terms of the FD specified are a duplication of Telstra's existing reporting obligations under its LTNR and that the information specified in the CCWP schedule and forecast contains information that is of a different type and specificity to existing reporting requirements. The ACCC considers Telstra is able to use the information it already has collated for the LTNR in carrying out upgrades and should incur no additional expense in preparing this information. Accordingly, the ACCC considers that there is utility in such information being provided and the benefits outweigh

⁵⁴⁸ Herbert Geer Supplementary Primary Consultation, *LSS Network Modernisation and Upgrade Terms*, 16 November 2009, p. 6.

⁵⁴⁹ Supplementary Reply Submission, *LSS Network Modernisation and Upgrade Terms*, 23 November 2009, pp. 2-3.

any detriment associated with the compliance with these reporting obligations by Telstra.

814. The ACCC notes Telstra's concern in relation to the utility of information based on indicative plans that may be subject to change and the inherent uncertainty of such information. However, the ACCC considers that in the absence of obligations to provide information about indicative investment plans or minimum timeframes stipulated for planned CCWPs the access seekers would be deprived of necessary and valuable information to make informed business and investment decisions in relation to declared services. The access seekers acknowledge that the provision of such information by Telstra is subject to change but still consider some notice would be preferable even if the circumstances in which that information was provided changes. The ACCC considers the provision of such information and notification obligations enables access seekers to make more informed decisions that would enhance competitive outcomes and be in the LTIE.
815. The ACCC notes that providing information on CCWPs as prescribed will require an assessment of the ESAs and the DAs affected and will necessitate an assessment of the likely implications on an ESA and the scope of a planned CCWP. As previously noted, the ACCC considers there is utility in the access seekers receiving information resulting from the assessments and notification which permits better informed decision making in regard to investment in infrastructure. The ACCC view is that improved availability of information relevant to making these decisions would promote investment in infrastructure and result in better competitive outcomes in the telecommunications industry.
816. The ACCC does not accept it should narrow the scope of the existing definition of CCWP to address a particular type of upgrade. The type of upgrades CCWP provisions contemplate concern the relocation of access seeker equipment from an exchange to an access point closer to an end user or the decommissioning of a declared service. The ACCC considers that to address a particular type of network modernisation or upgrade may unduly limit the scope of the application of the FD.
817. The ACCC considers that access seekers other than the parties to the dispute over network modernisation terms have a legitimate interest in receiving information contained in CCWP schedules and forecasts. However, the ACCC does not intend to extend the application of the FD terms to include parties who have not notified network modernisation and upgrade terms as being an issue in dispute.
818. The ACCC notes Telstra's concern that the information contained in the CCWP forecasts and schedules may contain commercially sensitive information. However, the ACCC does not accept that it is appropriate to extend the confidentiality directions of this arbitration. The ACCC notes the requirements in the DFD to publish CCWP forecasts and schedules on its website would make the information available to a broader public. The ACCC however, accepts Telstra's concerns and interests in limiting the disclosure of potentially sensitive information and considers that Telstra should not be required to publish that information to the extent that any of the information is

confidential. The ACCC considers Telstra could also make such information available to other access seekers where it could control conditions of access and use of this information, although it has not mandated this through the FD.

Coordinated Capital Works Program forecasts

819. The FD requires Telstra to provide a CCWP forecast for three years in advance describing generally Telstra's indicative investment plans (as at the date of the forecast). In making CCWP forecasts Telstra is required to make an evaluation of the impact of such plans on individual ESAs and DAs and specify anticipated timeframes for implementation of CCWPs. Telstra is required to regularly update the CCWP forecast at not less than six month intervals for the duration of the FD.
820. The FD requires the initial forecast to be made at the commencement of the FD. As there is a lead in time of 21 days (subsection 152DN(1) of the Act) before the FD comes into effect, the ACCC considers that there is sufficient time to plan and prepare an initial CCWP forecast.
821. The ACCC considers that an obligation to provide a CCWP forecast on the basis of indicative investment plans will provide valuable information relevant to access seekers and give them the ability to make informed investment and business decisions in relation to the declared services. The ACCC notes the limitation of such information is its inherent uncertainty which may have subsequent implications for its usefulness and reliability. However, the ACCC considers on balance, such information is valuable to access seekers.
822. The ACCC's view is that it is unreasonable to impose on Telstra a binding forecast based on long range investment plans which in the ACCC's opinion would be problematic and unworkable. The ACCC considers that it is a fact that such plans can be inherently uncertain and subject to change because of circumstances beyond Telstra's control which may affect the feasibility of a particular CCWP being implemented.
823. The ACCC requires Telstra to comply with the notification requirements in the FD for network upgrades where capital expenditure has already been allocated and the minimum timeframes for notification have not yet elapsed. The ACCC considers the notification obligations for CCWP schedules are to apply prospectively and that access seekers should receive the benefit of MNMU information requirements i.e., Telstra is required to comply with the notification obligations and ensure access seekers receive all relevant information from the date the FD comes into effect. The ACCC considers that the terms should not apply to existing projects where capital expenditure has been allocated and where the minimum timeframes for the notification periods have already elapsed.
824. The ACCC considers that the obligation to negotiate in good faith should be extended to CCWP forecasts, but has limited this obligation so as not to delay implementation of a CCWP.

Coordinated Capital Works Programs schedules

825. The FD prescribes that Telstra must provide a written CCWP schedule to the access seeker by giving notice not less than 12 months before the expected commencement date of a planned capital works program. In the schedule, Telstra must use its best endeavours to provide an assessment of:
- ESAs and DAs affected;
 - Telstra's plan for each ESA;
 - how the access seeker's LSS in that exchange will be affected;
 - the expected impact on the Access Seeker's LSS; and
 - the expected timeframe for the implementation of the CCWP.
826. The ACCC recognises that there will be difficulty in making an assessment of the exact services affected 12 months in advance. However, the ACCC considers that Telstra should use its 'best endeavours' to make an assessment of the services that will be affected.
827. The ACCC considers a 12 month minimum timeframe for a CCWP is appropriate. The ACCC considers that it should not unduly restrict Telstra's ability to invest and upgrade its network and that a 12 months minimum is appropriate given the rate of technological innovation and the timeframes required to make investment and planning decisions regarding implementation of capital upgrades.
828. The ACCC notes the access seekers concerns in relation to a minimum timeframe and has addressed the situation where CCWP upgrades require more notification than the minimum timeframe. In these circumstances access seekers should receive an Equivalent Period of Notice once Telstra has approved and allocated capital expenditure of a CCWP. This should ensure that access seekers receive the required notice.
829. The ACCC considers that providing detailed information on when services will cease to be available is useful information for an access seeker to have access to. However, the ACCC does not consider information of such a detailed nature is appropriate to be included in a CCWP schedule due to uncertainties associated with the longer timeframe of CCWP schedules. Instead the ACCC has determined this information is to be included in MNMU notifications.

9.4. Emergency Network Modernisation and Upgrades

9.4.1. Introduction

830. The terms for Emergency Network Modernisation and Upgrades (ENMUs) were introduced in the Supplementary Consultation Paper to address arrangements where network modernisation and upgrades occur in response to emergencies. The terms in the DFD permitted Telstra to conduct a MNMU

where it was a reasonable response to an emergency and specify the notification requirements that apply to such situations.

9.4.2. Submissions

Telstra submits that it supports the terms in the DFD that exclude emergencies from the notification requirements of other MNMUs.⁵⁵⁰ Telstra considers regardless of how an emergency upgrade becomes necessary, it should be entitled to take timely, if not immediate, action to avoid or remedy it.⁵⁵¹

831. The Herbert Geer parties submit that they do not consider it is necessary for the FD to include a carve-out for EMNUs.⁵⁵² However, they do not object to the inclusion of the terms provided the following principles are adhered to:

(i) there is a strict causative link between an emergency and the need for Telstra to undertake the upgrade; and

(ii) the upgrade is a proportionate response to the emergency.⁵⁵³

832. Telstra submits that the definition of an ‘emergency’ in the DFD is unduly narrow because:

- the list of indicative examples may create uncertainty about whether other, unforeseen sets of circumstances are excluded;
- the current definition may constrain Telstra when a confined or isolated part of the network endangers people or property
- by using the word ‘occurrence’ this may not cover all circumstances in which a emergency response may be required.⁵⁵⁴

833. Telstra provides an alternative definition of ‘emergency’ and terms for an ‘Emergency Network Modernisation and Upgrade’ that it considers is consistent with the statutory requirements under subsection 152CR(1).⁵⁵⁵

834. The Herbert Geer parties submit in reply the definition of ‘emergency’ should not be widened unless the definition of ‘Emergency MNMU’ proposed by Optus is also adopted.⁵⁵⁶

⁵⁵⁰ Telstra Supplementary Primary Submission, *LSS Network Modernisation and Upgrade Terms*, 16 November 2009, p. 5.

⁵⁵¹ Ibid.

⁵⁵² Herbert Geer Supplementary Primary Submission, *LSS Network Modernisation and Upgrade Terms*, 16 November 2009, p. 6.

⁵⁵³ Ibid.

⁵⁵⁴ Telstra, Supplementary Primary Submission, *LSS Network Modernisation and Upgrade*, 16 November 2009, p. 5.

⁵⁵⁵ Ibid.

⁵⁵⁶ Herbert Geer Supplementary Reply Submission, *LSS Network Modernisation and Upgrade Terms*, 23 November 2009, p. 6.

9.4.3. ACCC View

835. In the FD the ACCC specifies that in the event of an ‘emergency’ Telstra may conduct an EMNU. The ACCC qualifies the terms for such network upgrades including that Telstra should use its best endeavours to provide access seekers with notification of the network upgrade (by way of an Individual Notification) prior to the upgrade being implemented. The ACCC considers that where it is not practicable for prior notice to be given, Telstra should provide the notification as soon as reasonably practicable.
836. The ACCC acknowledges that EMNUs were not an issue notified in dispute between the parties. However, the ACCC considers that it is appropriate to address terms in the FD that should apply for a MNMU in the context of emergencies.
837. The ACCC considers that the terms for EMNUs in the FD are intended to address coordinated and or significant emergency upgrades that are required to remedy a network emergency. The ACCC specifies terms and provides numerous indicative examples of circumstances that would typically constitute an emergency (such as fire, flood, storm, earthquake, explosion, accident, vandalism, theft, epidemic or war-like action). This is not an exhaustive indication of events that would normally constitute an emergency. However, the events described provide indicative guidance as to examples that may typically constitute an emergency.
838. The ACCC does not accept Telstra’s proposed definition of an ‘emergency’. The ACCC considers that a definition of an ‘emergency’ as proposed by Telstra has such a broad application that it has the potential to be uncertain and include events and circumstances that may not ordinarily be considered to constitute an emergency. Therefore, the ACCC considers Telstra’s proposed ENMU terms could be misinterpreted to include situations that may not normally be considered an emergency.
839. The ACCC considers that Telstra has a legitimate interest in modernising and upgrading its network and that access seekers do not have an unconfined right to acquire declared services (such as t LSS). The ACCC notes that in the response to an emergency there may be interim and longer term measures required to ensure the ‘emergency’ is managed and rectified in a time-critical manner. However, the ACCC is concerned about the potential for misapplication of such terms for anticompetitive purposes. Accordingly, the ACCC has sought to qualify the terms for an emergency upgrade to circumstances where it is a proportionate and reasonable response to an emergency.

9.5. Major network modernisation and upgrades

9.5.1. Introduction

840. The terms contained in the DFDs supplied in the Initial and Supplementary Consultations address MNMUs of a single ESA that may have implications for the relocation of exchanges/nodes or alter the deployment class of

equipment that the network will support. The terms consulted on specify and impose upon Telstra a minimum notification period of six months (26 weeks) coupled with an obligation to provide an equivalent period of notice to access in circumstances where Telstra approves capital expenditure for a network upgrade.

9.5.2. Submissions

841. The Herbert Geer parties submit that the supplementary DFD is materially different from the initial DFD and have significant concerns with the supplementary DFD in regards to MNMUs.⁵⁵⁷ The Herbert Geer parties submit that the equivalent notification terms in the supplementary DFD fails to have sufficient regard to the principle of equivalence when determining the terms of access.⁵⁵⁸ They consider that the concept of equivalence can be separated into two aspects: procedural equivalence and substantive equivalence.⁵⁵⁹ Procedural equivalence refers to an access seekers ability to consider and plan for an MNMU on the same basis as Telstra while substantive equivalence refers to the need to have regard to the outcome of an MNMU on the ability of an access seeker to continue to compete against Telstra after the MNMU has taken place.⁵⁶⁰
842. The Herbert Geer parties submit that they consider the ACCC has changed its position since the initial DFD because of Telstra's concerns in relation to its workability.⁵⁶¹ Further, the Herbert Geer parties submit that Telstra did not dispute the in-principle approach to equivalent notification, but rather that the drafting in the Initial DFD was unworkable.⁵⁶² Therefore, the Herbert Geer parties submit that the ACCC should consider whether the issues identified by Telstra could be addressed in a way that is more consistent with the ACCC's previous in-principle approach to procedural equivalence.⁵⁶³
843. The Herbert Geer parties submit that access seekers should determine the utility of upgrade notices being provided before capital expenditure is finalised, and not Telstra.⁵⁶⁴ In the parties view, the utility of such notices is self evident if the ACCC's initial in-principle approach to procedural equivalence is accepted.⁵⁶⁵ This is because Telstra is able, in its absolute discretion, to decide whether a particular MNMU should take place, and, subject to applicable notification requirements, when a MNMU will take place.⁵⁶⁶ The parties contend that Telstra will not impose a MNMU on itself unless to do so is in its interests, and much of the determination of whether

⁵⁵⁷ Herbert Geer Supplementary Primary Submission, *LSS Network Modernisation and Upgrade Terms*, 16 November 2009, p. 1.

⁵⁵⁸ *Ibid.*, p. 2.

⁵⁵⁹ *Ibid.*

⁵⁶⁰ *Ibid.*

⁵⁶¹ *Ibid.*, pp. 2–3.

⁵⁶² *Ibid.*, p. 3.

⁵⁶³ *Ibid.*

⁵⁶⁴ *Ibid.*

⁵⁶⁵ *Ibid.*

⁵⁶⁶ *Ibid.*

such an MNMU is in its interests is likely to take place prior to capital expenditure being allocated.⁵⁶⁷

844. The Herbert Geer parties state that if the position in the supplementary DFD is adopted the risks to access seekers of insufficient notice of include:
- the stranding of assets and lost investment;
 - loss of customers and revenue;
 - the adoption of less than optimal solutions; and/or
 - damage to business reputation.⁵⁶⁸
845. The Herbert Geer parties submit that Telstra does not face any of the risks highlighted above by access seekers.⁵⁶⁹ The parties further submit that Telstra should be required to provide information about its plans in relation to MNMUs as part of its CCWP forecasts.⁵⁷⁰
846. In response to concerns in relation to equivalent notification, Telstra reiterate its submission on the unworkability of the terms of the initial DFD.⁵⁷¹ Telstra submits that terms dealing with equivalent notification should be expressed from a clear and identifiable trigger that is based on sensible commercial procedures in order for it to comply with its obligations.⁵⁷²
847. In relation to substantive equivalence, the Herbert Geer parties submit that the principle involves at a minimum the avoidance of:
- access seekers having insufficient time to do what is necessary in response to a MNMU to allow them to continue providing uninterrupted services to end users; and/or
 - access seekers having to cease providing services to end users.⁵⁷³
848. The Herbert Geer parties submit there is ample evidence before the ACCC to establish that a 30 week minimum notice period for a MNMU is insufficient and that a 12 months minimum notification period is more appropriate.⁵⁷⁴ The parties consider that a 12 month notice period would increase the probability of a mutually agreeable solution being found to a MNMU because both parties would be seeking to avoid an outcome which may be undesirable for both parties.⁵⁷⁵ The Herbert Geer parties contend that if the minimum notice period is increased to 12 months this will have the effect of reducing the significant

⁵⁶⁷ Ibid.

⁵⁶⁸ Ibid.

⁵⁶⁹ Ibid.

⁵⁷⁰ Ibid, p. 4.

⁵⁷¹ Telstra Supplementary Reply Submission, *LSS Network Modernisation and Upgrade Terms*, 23 November 2009, p. 11.

⁵⁷² Telstra Initial Primary Submission, *LSS Network Modernisation and Upgrade Terms*, 2 July 2009, p 3.

⁵⁷³ Herbert Geer Supplementary Primary Submission, *LSS Network Modernisation and Upgrade Terms*, 16 November 2009, p. 5.

⁵⁷⁴ Ibid.

⁵⁷⁵ Ibid, pp. 5–6.

imbalance in power between Telstra and the access seekers.⁵⁷⁶ Further, an outcome which is mutually agreeable also promotes the statutory criteria.⁵⁷⁷

849. In reply to the Herbert Geer parties, Telstra submits the minimum notification period should not be increased, as:

- by focusing on the minimum period of notice the Herbert Geer parties ignore the obligation for Telstra to give an “Equivalent Period of Notice” regarding a MNMU. As a result for more significant MNMUs, access seekers would receive a longer period of notice under the existing drafting proposed by the ACCC;
- by including a ‘take it or leave it’ proposition as part of the minimum notification, the Herbert Geer parties fail to give due weight to the obligation for Telstra to consult with the access seekers and negotiate in good faith and have completely ignored Telstra’s responsibility in balancing the competing interests and concerns of all end-users;
- the Herbert Geer access seekers appear to assume an indefinite right to acquire the declared service, which is incorrect;
- imposing a blanket 12 month minimum notice period is not in the LTIE and does not reflect an appropriate balance between the competing interests of Telstra in being able to upgrade its network and the access seekers interests in having as much information as possible on which to base their planning and investment decisions because:
 - many of the upgrades may have a relatively small impact on the service and/or may only affect a small number of access seekers;
 - it ignores the interests of other wholesale customers, end-users and Telstra; and
 - if would effectively give any single access seeker an ability to require Telstra to delay a MNMU for 12 months without any justification even though other access seekers may agree to a shorter notice period.⁵⁷⁸

850. The duty to negotiate in good faith is interpreted in Telstra’s submission as a requirement to consult access seekers about their concerns. Telstra submits that any requirement for consultation or negotiation should explicitly acknowledge Telstra’s right to proceed with a MNMU subject to meeting the notification obligations.⁵⁷⁹ Telstra submits that the obligation to consult and negotiate on any reasonable concerns of the access seekers should be qualified so access seekers must not unreasonably withhold consent notwithstanding

⁵⁷⁶ Ibid, p. 6.

⁵⁷⁷ Ibid.

⁵⁷⁸ Telstra Supplementary Reply Submission, *LSS Network Modernisation and Upgrade Terms*, 23 November 2009, p. 5.

⁵⁷⁹ Telstra Initial Reply Submission, *LSS Network Modernisation and Upgrade Terms*, 10 July 2009, p. 1.

any ongoing negotiations or concerns regarding notification variation or a request for more information.⁵⁸⁰

851. Telstra submits that an duty to *negotiate in good faith* with access seekers should be further qualified in that:
- an access seeker should raise any concerns it has in relation to a MNMU promptly; and
 - if Telstra seeks an access seeker's consent to vary the notice period or information request the access seeker must not unreasonably withhold consent.⁵⁸¹
852. The Herbert Geer parties object to Telstra's proposed amendments as in their opinion, they create the certainty that Telstra could, with unilateral power and discretion, change the minimum period of notice or the information provided in the notice.⁵⁸² The Herbert Geer parties reason that there should be a reciprocal obligation that the access provider, also, should not unreasonably withhold its consent to a request for more time for notification, or for more information being provided in a notification at the request of an access seeker.⁵⁸³
853. The Herbert Geer parties submit that the obligation to negotiate needs to be further clarified by the ACCC in the FD. The Herbert Geer parties also disagree with the Telstra's amendment to oblige access seekers to raise concerns promptly and reiterate if there is an obligation not to unreasonably withhold consent for a lesser period there also should be terms that express a reciprocal obligation that Telstra should not unreasonably withhold consent to a greater timeframe.⁵⁸⁴

Other Issues

854. Telstra submits in the Supplementary Consultation that information and notices should be able to be provided to access seekers in electronic form.⁵⁸⁵ The Herbert Geer parties submit they do not object to this submission.⁵⁸⁶
855. Telstra submits the non-price terms in relation to network modernisation and upgrades will be subject to expiry date in the FD.⁵⁸⁷ Telstra submits that the FDs cannot continue to have effect after they have expired.⁵⁸⁸

⁵⁸⁰ Telstra Initial Primary Submission, *LSS Network Modernisation and Upgrade Terms*, 2 July 2009, p. 8.

⁵⁸¹ Ibid.

⁵⁸² Herbert Geer Supplementary Reply Submission, *LSS Network Modernisation and Upgrade Terms*, 23 November 2009, p. 7.

⁵⁸³ Ibid.

⁵⁸⁴ Ibid.

⁵⁸⁵ Telstra Initial Primary Submission, *LSS Network Modernisation and Upgrade Terms*, 2 July 2009 p. 7.

⁵⁸⁶ Herbert Geer Supplementary Reply Submission, *LSS Network Modernisation and Upgrade Terms*, 23 November 2009, p. 6.

9.5.3. ACCC View

856. The terms of the FD specify access terms for notification of a MNMU and are similar to those proposed in the supplementary DFD which address terms for major network modernisations of a single ESA that may have implications for the relocation of exchanges/nodes or altering the deployment class of equipment that the network will support.
857. The ACCC considers it appropriate that the terms and timeframes in the supplementary DFD are maintained, and that a two stage notification process of a General Notification (30 weeks) in advance of implementation followed by more specific information in the Individual Notification (26 weeks) in advance of an implementation of a MNMU has also been maintained.
858. In determining the notification requirements for a MNMU the ACCC has considered access seeker submissions and adopted the two stage notification process submitted by Telstra. However, the ACCC did not accept Telstra's proposed timing associated with its submissions. The ACCC considers that a 6 month minimum timeframe for MNMUs is also appropriate. In determining the appropriate timeframes the ACCC has considered industry wide factors including technical innovation and the time necessary to plan and consult for the implementation of a MNMU. The ACCC also considered the Herbert Geer parties' submission that the notification timeframe for MNMUs should extend to be the same as CCWPs (i.e. a blanket 12 month period for consultation for MNMU and CCWPs). However the ACCC has concluded that this time period is inappropriate as it could be detrimental and compromise the operational and technical requirements necessary for the safe and reliable operation of the Telstra network.
859. Consistent with the ACCC's view on equivalence expressed in the 2008 Model Terms,⁵⁸⁹ the ACCC is of the opinion that access seekers should generally receive an "equivalent notice" of a planned network upgrade as Telstra effectively receives. The ACCC notes the findings in *Telstra Corporation Ltd (No.3) [2007]*⁵⁹⁰ in relation to the risks and consequences of the timing and location of network upgrades. Accordingly, the ACCC considers the timing and location of network upgrades are relevant to determining appropriate access terms. The FD applies the principle of equivalence in the context MNMUs. The FD specifies that Telstra is required to provide a minimum notification of a MNMU or the 'Equivalent Period of Notice' of a MNMU to that which Telstra receives, where there has been approval of capital expenditure for the upgrade.
860. The ACCC considers it is necessary to specify terms for MNMUs to ensure access seekers receive equivalent notification and as much notice as possible.

⁵⁸⁷ Telstra Supplementary Primary Submission, *LSS Network Modernisation and Upgrade Terms*, 16 November 2009, p. 2.

⁵⁸⁸ Telstra Supplementary Reply Submission, *LSS Network Modernisation and Upgrade Terms*, 23 November 2009, p. 3.

⁵⁸⁹ ACCC Report, *Final Determination on Model Non-price Terms and Conditions*, November 2008, p. 34.

⁵⁹⁰ ACompT 3 at [318].

In determining appropriate access terms the ACCC has sought to balance the interests, risks and consequences of failing to provide sufficient notification to access seekers against the benefits of not unduly constraining Telstra in its ability to efficiently invest to upgrade its network.

861. In specifying a reasonable minimum notification period, the ACCC notes access seekers submissions on previous network upgrades that have taken longer periods than those included in the FD. The ACCC notes that in such circumstances where longer time is necessary and appropriate, Telstra should provide more notice through the operation of the 'Equivalent Period of Notice' terms.
862. The ACCC relies on the submitted fact that it is normal business practice for Telstra to plan in advance and be aware of potential network modernisations and upgrades before it commits capital expenditure to implement these upgrades. Therefore, subject to the minimum terms the ACCC considers that Telstra is capable of giving advanced notice of notification when it allocates capital expenditure or otherwise approves or commits to implementing a planned network upgrade.
863. The ACCC's view is that Telstra is required to consult and negotiate in good faith with access seekers about the planning of a network modernisation and upgrade and how it should be implemented. The ACCC considers it is desirable, where possible, that parties should agree on when and how a network modernisation is implemented and the specific arrangements that apply. The ACCC generally considers this is preferred than attempting to proscribe specific access terms that should apply in all circumstances. Therefore, the ACCC considers that, subject to providing guidance on what it considers reasonable minimum access terms, the terms in the FD include a general obligation to negotiate in good faith.
864. The ACCC considers that the requirement to negotiate in good faith should not be unduly constrained or limited. The ACCC considers it not appropriate to include terms that would overtly prejudice a general obligation by specific qualifications that may effectively operate to undermine a general obligation.
865. The ACCC also considers other than explicitly recognising that Telstra has legitimate interests in upgrading its network, the ACCC does not consider it is in the LTIE to enable Telstra to use its discretion to unilaterally vary the notification or the information requirements.
866. The ACCC notes it would facilitate the planning for network modernisations and upgrades if the access seekers concerns were raised in a timely and prompt manner. The ACCC considers that Telstra should attempt to address and resolve issues related to reasonable concerns, regardless when and how the concerns are raised. However, the ACCC recognises that it may not always be possible or feasible for all access seekers concerns to be articulated promptly, but consider that this should not undermine the weight given to the legitimate concerns an access seeker may have.

867. The ACCC considers the duty to negotiate in good faith is an important aspect of planning and implementation of network modernisations and upgrades. The ACCC considers the obligation to negotiate and consult has a role in the notification and planning stages of both CCWPs and MNMUs. The ACCC considers that the obligation to negotiate in good faith should not be overly cumbersome to Telstra to the extent that it unduly frustrates the planned upgrade of its network. However, the ACCC considers Telstra should be constrained in its ability to implement network upgrades to the extent that it must accommodate the reasonable concerns and legitimate interests that an access seeker may have in relation to a network upgrade.

Other Issues

868. The ACCC considers that it is appropriate to allow Telstra to provide information and notifications to access seekers in electronic form.
869. The ACCC notes Telstra's submission in relation to terms in the FD applying beyond the expiry of the FD. The ACCC considers that due to the benefit derived through the application of MNMU terms, no expiry date has been set. In addition, the ACCC considers that the requirement to update the CCWP forecast every six months would become redundant if an expiry date was applied.

9.6. Assessment against subsection 152CR(1) criteria

870. The ACCC must take the subsection 152CR(1) criteria into account in making a FD. Not all of these criteria will be relevant to every particular issue that the ACCC must determine.
871. The ACCC notes that Nicholls Legal parties did not make submissions against the subsection 152CR(1) criteria. The Herbert Geer parties and Telstra made various submissions in respect of the subsection 152CR(1) criteria in the Initial Consultation and the Supplementary Consultation.

9.6.1. Paragraph 152CR(1)(a)

872. In assessing the MNMU terms against the subsection 152CR(1) criteria, the ACCC must firstly have regard to the LTIE. This calls for consideration of a number of factors identified in section 152AB, being the objective of promoting competition, the objective of achieving any-to-any connectivity, the objective of encouraging the economically efficient use of and the economically efficient investment in infrastructure, and subsidiary matters (paragraphs 152AB(2)(c)-(e), subsection 152AB(4), paragraphs 152AB(6)(a)-(c) and subsection 152AB(7A)).
873. In specifying the notification obligations for MNMU terms the ACCC has sought to address terms that best promote the LTIE. The ACCC considers that by specifying minimum notification requirements in the FD, this will ensure access seekers have access to relevant information to make informed investment and business decisions relating to the declared service.

874. The ACCC considers that by achieving an appropriate balance between Telstra's legitimate interests in upgrading its network while ensuring that access seekers are given sufficient time to incorporate knowledge of any such upgrade into their planning and investment decisions this will promote competitive outcomes, and ensure on-going any-to-any connectivity for customers.
875. The ACCC considers that if the notification time is unduly limited, access seekers face the increased risks of stranding investments/assets and potentially losing customers if there is insufficient time to migrate them to an alternative infrastructure platform. However, the ACCC recognises that if the timeframe is too long Telstra's ability to upgrade its network will be constrained and this may affect Telstra's ability to efficiently invest and upgrade its network.
876. The ACCC considers that the appropriate balance of interests between Telstra and access seekers will result in sufficient time to migrate customer's services from the existing service platform to an alternative and this will also promote the objective of achieving any-to-any connectivity and ultimately the LTIE.
877. The ACCC considers undertaking network modernisations and upgrades are necessary to supply new or additional services or improve the quality of existing services; such changes have a direct and positive impact on the overall efficiency of the network and the LTIE.
878. The ACCC considers that the efficient use of and investment in infrastructure, will be encouraged where Telstra is able to invest in, and upgrade its network in a way that it can accommodate legitimate concerns of the access seekers while not being unduly delayed or exacerbate the time for implementation of a network upgrade. The ACCC considers that the terms in the FD will ensure that Telstra's legitimate commercial interests are protected by being able to invest efficiently.
879. Overall, the ACCC considers that by promoting equivalence of information the ACCC considers the FD will promote competition by allowing access seekers to be more informed of changes to the network that may have implications on existing services or future investment thereby promoting efficient investment in infrastructure and enhancing the LTIE.

9.6.2. Paragraph 152CR(1)(b)

880. The next matter is the legitimate business interests of the access provider and its investment in the facilities to provide the LSS. In determining the appropriate access terms the ACCC has considered the implications of practical notification requirements and the timing of those obligations. It is the ACCC's view that the notification arrangements for MNMUs and CCWPs provide terms to promote more certainty and to encourage efficient investment in the declared services.
881. The ACCC considers that the provision of information and notification obligations in the FD is consistent with Telstra's legitimate business interest. Telstra's legitimate business interests are not serviced by maintaining

information asymmetry, just as information investment asymmetry should not be in Telstra's legitimate business interests.

882. The ACCC also recognises that extending the timeframes for notification, in line with access seekers wishes, would result in undue obstruction to Telstra's ability to implement a network upgrade in a timely and efficient way and also its legitimate interest and ability to invest. It may also result in stifling of investment in facilities and may be detrimental to end-users if modernisations could not be undertaken for an extended period due to onerous notice periods.

9.6.3. Paragraph 152CR(1)(c)

883. The next matter is the interests of all persons who have rights to use the declared service. The ACCC considers that in making terms for MNMUs the ACCC has considered Telstra's wholesale customers, access seekers and end-users interests in the declared services. The ACCC considers in determining terms for such an upgrade the ACCC has given weight to access seekers legitimate interests on being informed of planned upgrades and being consulted in how a network upgrade is to be implemented. The ACCC considers in the absence of terms made in the FD the existing arrangements do not provide sufficient notification of upgrades and allow Telstra to unilaterally determine the arrangements to apply to a network modernisation and upgrade.
884. The notification periods set out in the FD also ensure that access seekers have sufficient notice to make informed investment decisions and compete for customers on their relative merits.

9.6.4. Paragraph 152CR(1)(d)

885. The fourth matter is the direct costs of providing access to the declared service . Telstra submits that the ACCC must ensure that it considers its direct costs of determining the notification requirements and obligations for the FD.⁵⁹¹ Telstra also submits the costs in requiring Telstra to provide information are part of its direct costs and should be weighed against the imposition of obligations that would result in increased compliance costs which would not otherwise significantly promote the LTIE.⁵⁹²
886. The ACCC notes that while parties submitted conflicting views on costs associated with the MNMU terms, no actual cost estimates were provided. Accordingly, the ACCC agrees with the views expressed by some access seekers that costs for reproducing and distributing the information will be minimal because Telstra already provides some of this through the LTNR, and is likely to have access to the required data already. In addition, the ACCC considers that the benefits of the provision of the information in the NMU terms outweigh the costs.

⁵⁹¹ Telstra Supplementary Primary Submission, *LSS Network Modernisation and Upgrade Terms*, 16 November 2009, p.3.

⁵⁹² Ibid.

9.6.5. Paragraphs 152CR(1)(e) and 152CR(1)(f)

887. The next two matters are the value to a party of extensions, or enhancement of capability, whose cost is borne by someone else; and the operational and technical requirements necessary for the safe and reliable operation of a carriage service, or a telecommunications network or a facility.
888. The ACCC does consider that the value of to a party of extension, or enhancement of capability is not relevant to this issues as the FD only requires the provision of information.
889. Further to the operational and technical requirements necessary for safe and reliable operation, the ACCC considers that emergency upgrades are so important that the ACCC could not sensibly determine terms and conditions for MNMUs without giving consideration to how those terms apply in an emergency. In addition, the ACCC considers that by including terms on EMNU in the FD, the operational and technical requirements necessary for the safe and reliable operation of the network are enhanced. By including terms which allow for a MNM to occur in response to an emergency, the ACCC has ensured that Telstra can undertake the most appropriate repairs/upgrades in an emergency situation.
890. The ACCC also considers that it would not be reasonable to require Telstra to delay any action until it had identified a range of alternatives and assessed the impact upon each access seeker; such an obligation would not be consistent with giving fundamental weight to the operational and technical requirements for the safe and reliable operation of the network nor Telstra's legitimate business interests.

9.6.6. Paragraph 152CR(1)(g)

891. The last matter is the economically efficient operation of a carriage service, a telecommunications network or a facility.
892. The ACCC considers that the economically efficient operation of carriage services and associated networks and facilities of the access provider and access seekers will be encouraged by access seekers having greater information available to assist in making investment decisions. This is because it will remove an information asymmetry which may deter investment in the provision of services.

10. Variation of Access Terms

- ‘Parity’ clauses
- Variation clauses in commercial agreements and operational manuals

10.1. Introduction

10.1.1. Background

893. It is generally accepted that terms of access can and should be susceptible to variation. Commercial agreements for the supply of the ULLS or LSS, and operational documents relating to the provision of those services have, in the past, provided for access terms to vary in this way. Division 8 of Part XIC specifically contemplates variations of arbitral determinations.
894. Despite this, there has never been a single, uniform approach to how access terms are to be amended. Various models, including automatic, unilateral and agreed variations have existed.
895. Some agreements have included “automatic” variation clauses. These clauses had the practical effect of incorporating ACCC arbitral determination clauses into existing agreements, irrespective of whether the parties to the agreement were also parties or participants in the relevant arbitration or arbitration hearing. Because these clauses led to uniformity of agreements across the industry, they have been referred to as ‘parity clauses’.
896. In the notifications presently before the ACCC, access seekers have raised the issue of ‘parity clauses’ and Telstra’s ability to unilaterally vary access terms by written notice (‘variation clauses’). The access seekers had a particular interest in the unilateral variation of charge clauses in their CRAs.
897. In seeking to address unilateral variations, the ACCC proposed in its DFD⁵⁹⁵ that an access provider’s ability to unilaterally vary access terms set out in

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⁵⁹⁵ ACCC Consultation Paper on Final Determination, *Variation to access terms specified in commercial agreements or operational manuals / Variation to adopt arbitrated access terms (‘parity’)*, (Consultation Paper).

operational manuals should be determined by reference to the terms contained in the ACCC, 2008 Model Terms, at Clause I.

10.1.2. Previous consideration of ‘parity clauses’

898. The ACCC has not previously considered a parity clause. It has however received submissions from parties in the arbitration about whether a FD could implement a parity arrangement.

10.1.3. Previous consideration of Telstra’s ability to unilaterally vary access terms in commercial agreements and operational manuals

899. The ACCC has previously considered Telstra’s ability to vary access terms upon giving notice to the access seeker in ACCC, *Unconditioned local loop service access dispute between Telstra and Optus Networks – Statement of reasons for final determination*, March 2008 (Optus Decision).

900. Submissions were received from Telstra, Agile and Chime on the relevance of the Optus Decision to the current notifications. Telstra’s submission effectively proceeded on the basis that the Optus Decision was of little relevance to the current disputes because:

- the access seekers state quite clearly that the ACCC’s prior consideration of Telstra’s ability to unilaterally vary operational documents on notice is “not really applicable to a determination of the Charge Variation Clause”;
- the variation of operational documents such as those dealt with in the Optus Decision and the contractual terms providing for the variation of charges, are plainly directed at different subject matters, and their drafting is informed by different considerations.⁵⁹⁶

901. Agile and Chime effectively submitted that the ACCC should not consider itself bound by the Optus Decision because:

- the passage relied upon by the ACCC relates entirely to Telstra’s ability to unilaterally amend operational documents, an issue which was not placed in dispute by any of the access seekers;
- the Optus Decision concerns the Optus Access Agreement, which [REDACTED]
- the notice period for the Operational Variation Clause in the Optus Decision is [REDACTED] [REDACTED] [REDACTED] in the Charge Variation Clause placed in dispute by the access seekers.⁵⁹⁷

⁵⁹⁶ Telstra Reply Submission, *Variation of LSS Access Terms to Adopt Terms Specified in Another Final Determination*, 9 July 2009, pp. 1–2.

⁵⁹⁷ Herbert Geer Primary Submission, *Variation & Parity Terms*, 2 July 2009, p. 3.

902. Agile and Chime were also concerned that, if the ACCC applied the Optus Decision, they would be in a worse position than their pre-notification position.⁵⁹⁸
903. Having regard to the particular circumstances (including the fact that the Optus Decision was upheld on review by the Federal Court) and the submissions of the parties, the ACCC has had regard to the Optus Decision. The ACCC considers that a consistent approach to recurring issues is important. However, the ACCC does not consider itself bound to reach the same conclusions as expressed in previous arbitral determinations. This reflects the fact that circumstances do change and that parties are entitled to make submissions which address these changed circumstances.

10.1.4. Previous consideration of the 2008 Model Terms regarding unilateral variation

904. Clause I of the 2008 Model Terms relates to unilateral variation of terms relating to operating procedures. Clause I does not address unilateral variation of price terms.
905. The ACCC acknowledges that unilateral variation of operational clauses was not part of the originally notified dispute. Charge clauses were part of the original notification. The ACCC has had regard to the 2008 Model Terms (as it is required to do under subsection 152AQB(9)). However, given the submissions of the parties, it is clear that Clause I cannot simply be applied to address unilateral variation of charge clauses.

10.2. Consideration of ‘parity clauses’

906. In its Consultation Paper, the ACCC discussed the potential need for ‘parity’ arrangements in FDs and set out a process whereby either party to a commercial agreement could notify the other party of its intention to vary the commercial agreement by adopting a term from a final arbitral determination.⁵⁹⁹ The arbitral determination in question did not have to involve either of the parties to the commercial agreement. Whether the commercial agreement would be varied would depend on a number of factors, including consent, silence, alternative dispute resolution or arbitral determination.⁶⁰⁰
907. Various submissions were received from the parties. Telstra expressed concerns as to the consultative process and the legislative power of the ACCC to determine a ‘parity’ clause of this kind.⁶⁰¹ Access seekers did not agree with Telstra’s views on either point.⁶⁰² Submissions were also received by both

⁵⁹⁸ Ibid.

⁵⁹⁹ Consultation Paper, pp. 4–5.

⁶⁰⁰ Ibid.

⁶⁰¹ Telstra Primary Submission, *Variation of LSS Access Terms to Adopt Terms Specified in Another Final Determination*, 2 July 2009, pp. 3–5.

⁶⁰² Herbert Geer Reply Submission, *Variation and Parity Terms*, 9 July 2009, p. 5.

parties on whether ‘parity’ clauses should be included in arbitral determinations. Those submissions can effectively be summarised as follows.

908. Telstra submits that a ‘parity’ clause in a FD, *inter alia*:

- would be contrary to the negotiate/arbitrate model under Part XIC. Under this model, parties should attempt to negotiate a mutually acceptable outcome. Where such an outcome cannot be achieved, the parties are able to notify a dispute under Division 8 of Part XIC. The imposition or application of a term from an arbitration not involving the parties does not fall within this model;
- would not meet the requirements set out in subsection 152CR(1) to the particular facts of the dispute in question;
- could potentially cut-across negotiated outcomes;
- may lead to uncertainty;
- would not be possible because the confidentiality arrangements which apply to arbitral determinations mean that FDs will not necessarily be published.⁶⁰³

909. Telstra also submits that the inclusion of a ‘parity’ clause would not be in the LTIE because:

- the ACCC will not know whether the ability of access seekers to vary their access terms to provide parity with a FD will actually promote more reasonable access terms because it has no way of knowing what issues it may be called upon to arbitrate in the future, which could then become the subject of a parity variation;
- a party may decide to notify Telstra of only the favourable terms it intends to adopt, but leave out those that may be essential to balance the interests of both parties;
- there is uncertainty about the terms that could be subject to parity (e.g., the adoption of an alternative expiry date);
- if a FD is held invalid through judicial review, clauses passed on to third-parties through parity may then be invalid, resulting in delay and additional costs;
- the adoption of non-price clauses from other determinations may lead to considerable costs to Telstra—something that the ACCC will not have considered in its original FD. Further, Telstra’s ability to notify the ACCC of a dispute in order to rectify the problem may be of little benefit as Telstra is still obliged to offer the non-price term in the interim.⁶⁰⁴

910. Access seekers submitted, *inter alia*:

⁶⁰³ Telstra Primary Submission, *Variation of LSS Access Terms to Adopt Terms Specified in Another Final Determination*, 2 July 2009, pp. 4–5.

⁶⁰⁴ *Ibid.*, pp. 4–5.

- because the ACCC proposal was based upon consent or arbitration, the proposal fell within the negotiate/arbitrate model;
- where the matter was notified, the subsection 152CR(1) criteria would already have been applied to the dispute out of which the new clause arose;
- the use of parity clauses would provide the smoothest, quickest and most cost-effective way to obtain fair and reasonable terms of access and assist start-up telecommunications service providers;
- notwithstanding that Telstra has unilaterally varied its CRAs to remove ‘automatic parity’ clauses, Telstra continues to have ‘parity’ clauses which adopt access terms in accepted undertakings;
- notwithstanding that different arbitrations may proceed on different facts, more often than not terms specified in LSS and ULLS arbitrations have not differed between access seekers and Telstra;
- a ‘parity’ clause is in the LTIE because it eases administrative burdens and costs and promotes equivalency, efficiency and competition.⁶⁰⁵

911. On balance, and having regard to the various submissions, the ACCC is of the view that it is not appropriate, at this time, to include a ‘parity’ clause in the FD. The ACCC’s reasons for this are as follows:

- the bilateral and confidential nature of arbitrations means that, for the process to be effective, the ACCC would need to publish all its Statements of Reasons—this is not a given;
- Parliament’s current consideration of the *Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2009*—the Bill contains a clause which allows for the adoption of clauses from access determinations to be applied on an as needs basis. The ACCC notes that while the Bill has yet to pass the Senate, the Senate report into the Bill recommends that the Bill be passed. This broader access determination approach (which proceeds on the basis that access determinations are to be drafted having regard to all access providers and all access seekers) appears to be more suitable given the risks that might arise from the adoption of a clause from one bilateral determination into another bilateral commercial arrangement;
- the access seekers who have sought the inclusion of a clause to allow for the variation to adopt an arbitrated access term are also seeking a FD in relation to a number of common terms, therefore the inclusion of such a clause would have little practical effect.

912. Accordingly the ACCC has not inserted a ‘parity’ clause in these FDs.

⁶⁰⁵ Herbert Geer Primary Submission, *Variation and Parity Terms*, 2 July 2009, pp. 7–9.

10.3. Consideration of variation clauses in commercial agreements and operational manuals

913. As noted above, the ACCC in its DFD proposed that Clause I of the 2008 Model Terms be used to assist parties to vary access terms. It is clear from the submissions of the parties that Clause I is not suitable for use in the variation of charges set out in commercial agreements, and may leave access seekers in a position which is more detrimental than is currently the case with the GAST. For example, the GAST requires a two month period of notice before the applicable price list of new charges can be introduced, whereas Clause I specifies 20 business days. Clause I is however suitable to variations of a more general nature, for example, variations to operational manuals.
914. The ACCC acknowledges that it is also clear from the submissions of Agile and Chime that variations to operational manuals are not in dispute, but variations to charges are. This includes Telstra's ability to unilaterally vary existing charges or introduce new charges by giving two months' notice.⁶⁰⁶
915. In respect of the issue in dispute, Agile and Chime accept that Telstra should be able to introduce new charges from time to time in order to respond to changed circumstances; however in their view, this should be contingent upon the agreement of the affected access seeker (not to be unreasonably withheld), or implemented after following a genuine consultation phase.⁶⁰⁷
916. Telstra in response submits that the access seekers' submission ignores commercial reality.⁶⁰⁸ Telstra questions the ability of parties to judge when a refusal to agree to a varied charge would be considered "unreasonable" and consequently would make the variation mechanism inherently uncertain and unworkable.⁶⁰⁹
917. Telstra submits that charge variation clauses are necessary because they provide some level of commercial flexibility and avoid the necessity of entering into entirely new agreements each time a charge is varied which would create additional transaction costs for both Telstra and access seekers.⁶¹⁰
918. Telstra also maintains in its submissions that the ACCC did not have the power to vary a CRA and that in this instance there was no statutory basis upon which the ACCC should address the issue of variations to charge clauses.⁶¹¹ However, Agile and Chime note the ACCC is able to consider matters relating to access by an access seeker that were not the basis for notification of the dispute under subsection 152CP(2) of the Act. On this basis

⁶⁰⁶ Ibid.

⁶⁰⁷ Ibid, p. 5.

⁶⁰⁸ Telstra Primary Submission, *Variation of LSS Access Terms to Adopt Terms Specified in Another Final Determination*, 2 July 2009, p. 3.

⁶⁰⁹ Ibid.

⁶¹⁰ Ibid.

⁶¹¹ Ibid, p. 2; Telstra Letter to the ACCC dated 26 March 2008, p. 1.

they accept the ACCC's intention to apply Clause I of the 2008 Model Terms.⁶¹²

919. Telstra submits that section 152CP of the Act does not permit the ACCC to vary an agreement between two parties.⁶¹³ Telstra considers that section 152CP only provides the ACCC with the power to determine the terms and conditions of access which will prevail over any pre-existing contractual arrangements to the extent that the two are inconsistent.⁶¹⁴ Telstra further submits that all of the examples of determinations provided at subsection 152CP(2) of the Act relate to the determination of terms, conditions and aspects of access as distinct from the variation of contracts.⁶¹⁵
920. The ACCC does not accept Telstra's submissions on this point. Under subsection 152CP(2) of the Act, the ACCC is empowered to make a determination relating to access by the access seeker to the declared service, including matters that were not the basis for the notification. The existence of a contract between the parties does not restrict the ability of the ACCC to make a determination pursuant to subsection 152CP(2).
921. While the ACCC considers it has jurisdiction to make a term in a D concerning variations to charge clauses, in the current arbitration before it, the ACCC acknowledges that Clause I of the 2008 Model Terms may not be suitable to the circumstances of this dispute - the issue in dispute specifically concentrated on where Telstra unilaterally varies a charge or introduces a new charge by giving two months' notice. The ACCC notes that both parties do not wish it to make a FD on the basis of Clause I of the 2008 Model Terms and has therefore decided not to make a determination on the issue of Charge Variation clauses.
922. In addition, contrary to the access seekers submissions, the ACCC considers the two month notice period provided by Telstra in regard to the variation of charge clauses, is reasonable and that parties are given an opportunity to negotiate and consult, albeit unsuccessfully. The ACCC considers that if Telstra will not negotiate with an affected access seeker, in accordance with the negotiate/arbitrate model under Part XIC, the access seeker should first utilise the dispute resolution provisions of its commercial agreement and failing that lodge a dispute notification with the ACCC requesting the making of an ID.

⁶¹² Herbert Geer Primary Submission, *Variation and Parity Terms*, 2 July 2009, p. 4.

⁶¹³ Telstra Letter to the ACCC dated 26 March 2008, p. 1.

⁶¹⁴ Ibid.

⁶¹⁵ Ibid.

11. Appendix

Appendix A: Consultation Process Chronology

The following outlines the consultation process undertaken by the ACCC:

- On 21 December 2007, the ACCC received EFTel's dispute notification under Part XIC of the *Trade Practices Act 1974* (the Act) of a dispute with Telstra in relation to terms and conditions of its access to the LSS.⁶¹⁶
- On 29 January 2008, parties were:⁶¹⁷
 - notified of the constitution of the Commission for the purposes of conducting the arbitration; in this instance the members would be Chairman Graeme Samuel and Commissioner Martin
 - given a confidentiality Order and Direction
 - advised of the ACCC's intent to consider EFTel's request to make an interim determination
 - informed of the case management team and meetings
 - notified of Telstra's request to suspend the arbitrations due to Telstra's High Court & ADJR proceedings.
- On 22 February 2008, the ACCC issued an interim determination which specified various charges for the LSS including MNM charges, monthly charges and 'single' connection and disconnection charges.⁶¹⁸
- On 14 April 2008, the ACCC consulted the parties on the following matters:⁶¹⁹
 - Jurisdiction
 - Constitution of Commission and case management team
 - Whether the parties to the dispute are aware of any person that may wish to become a party to the arbitration
 - Whether there should be a deferral of the arbitration
 - Provision of documents concerning relevant access terms for the LSS
 - Timetable for submissions
 - Validity of the interim determination
 - Parity clauses.
- On 7 May 2008, the ACCC issued a direction requiring the parties' to supply specified documents and information consider relevant to the arbitration. Materials were provided in response to this direction on 21 May 2008.⁶²⁰

- On 26 September 2008, the ACCC commenced public consultation on model non-price terms of access.⁶²¹
- On 16 October 2008, the ACCC sought the view of parties in relation to the procedures the ACCC intends to adopt in making final a determination, including holding a joint hearing. The ACCC also sought the views of the parties about the potential for a joint arbitration.⁶²²
- On 19 December 2008, the ACCC advised parties that on 5 December 2008 the Chairman determined:
 - to hold a joint arbitration hearing under section 152DMA of the Act, for the ULLS and LSS access disputes, and
 - the members would be the Chairman, Commissioner Samuel and Commissioner Willett.

The ACCC also provided its views to the parties on how it would conduct this hearing, and gave the parties a confidentiality order and direction signed by the Chairman to apply to this joint hearing.⁶²³

- On 18 February 2009, the ACCC extended the EFTel LSS interim determination.⁶²⁴
- On 19 February 2009, parties were advised that the Chairman determined that the Amcom dispute should also be considered in the joint hearing process, and a new confidentiality order and direction was issued to the parties. The ACCC also advised the parties of the reconstitution of the Commission; in this instance the members would be Commissioner Willett and Dimasi.
- On 7 April 2009, the first stage of consultation (Initial Consultation) was initiated with parties provided with consultation papers, DFDs and Directions in relation to:⁶²⁵
 - Preliminary matters
 - MNM charges
 - Single connection and disconnection charges
 - MNM non-price terms and conditions.

⁶¹⁶ EFTel, *Telecommunications Access Dispute: EFTel-Telstra Line Sharing Service*, 21 December 2007.

⁶¹⁷ ACCC, *Telecommunications Access Dispute: EFTel-Telstra LSS*, 29 January 2008.

⁶¹⁸ ACCC, *Telecommunications Access Dispute: EFTel-Telstra LSS-Interim Determinations*, 22 February 2008.

⁶¹⁹ ACCC, *Telecommunications Access Dispute: EFTel Limited-Telstra LSS*, 14 April 2008.

⁶²⁰ ACCC, *Telecommunications Access Dispute between EFTel and Telstra regarding the LSS*, 7 May 2008.

⁶²¹ ACCC, *Telecommunications Access Dispute: EFTel-Telstra LSS*, 26 September 2008.

⁶²² ACCC, *Telecommunications Access Dispute: Various LSS and ULLS Disputes*, 16 October 2008.

⁶²³ ACCC, *Telecommunications Access Disputes: Various LSS and ULLA Disputes*, 19 December 2008.

⁶²⁴ ACCC, *EFTel-Telstra Line Sharing Service Access Dispute- Extension to the Interim Determination*, 19 February 2009.

⁶²⁵ ACCC, *Procedural Matters Relating to the Joint Arbitration Hearing*, 7 April 2009.

Submissions in response to this Initial Consultation were received on 18 May 2009 (primary) and 4 June 2009 (reply).

- On 20 May 2009, the ACCC notified parties of a reconstitution of the Commission for the Joint Hearing to include Network Technology, Chime and NEC as ULLS parties.⁶²⁶
- On 12 June 2009, the second stage of consultation was initiated with parties provided with consultation papers, DFDs and Directions in relation to:⁶²⁷
 - DSL/LSS transfer process
 - Network modernisation and upgrade terms, and
 - Variation of access terms (Parity).

Submissions in response to the second stage of the consultation were received on 2 July 2009 (primary) and 9 July 2009 (reply).

- On 1 July 2009, Telstra made additional reply submissions in relation to:⁶²⁸
 - preliminary matters
 - single connection and disconnection charges
 - MNM charges
 - MNM non-price terms and conditions.
- On 4 August 2009, the ACCC issued a draft Direction and consulted parties in relation to providing information on third party contractor rates for MDF jumpering.⁶²⁹
- On 21 August 2009, the ACCC issued a direction to provide information on third party contractor rates for MDF jumpering tasks.⁶³⁰
- On 21 August 2009, the ACCC commenced consultation on the Fixed Services Review: Draft Pricing Principles and Indicative Prices.⁶³¹
- On 24 August 2009, the ACCC commenced the Annual [Monthly] Charges Consultation and provided parties with a consultation paper, DFD and Direction.⁶³²

⁶²⁶ ACCC, *Telecommunications Access Disputes: various LSS and ULLS Disputes*, 20 May 2009.

⁶²⁷ ACCC, *Telecommunications Access Disputes: various LSS and ULLS Access Disputes*, 12 June 2009.

⁶²⁸ Telstra, *Telecommunications Access Disputes: Joint Hearing of ULLS/LSS Access Disputes*, 1 July 2009.

⁶²⁹ ACCC, *Telecommunications Access Disputes: Joint Hearing of ULLS/LSS Access Disputes – Proposed direction to provide information*, 4 August 2009.

⁶³⁰ ACCC, *Telecommunications Access Disputes: Joint Hearing of ULLS/LSS Access disputes – proposed direction to provide information*, 21 August 2009.

⁶³¹ ACCC Media Release, *ACCC issues draft pricing principles, indicative prices for fixed line services*, 21 August 2009.

⁶³² ACCC, *Telecommunications Access Disputes: Joint Arbitration Hearing of Various LSS and ULLS Access Disputes*, 24 August 2009.

Submissions were received in response on 9 October 2009 (primary) and 22 October 2009 (reply). The Nicholls Legal parties provided a reply submission on 26 October 2009.

- On 4 September 2009, the ACCC notified parties of a reconstitution of the Commission to include Adam (LSS).⁶³³
- On 16 September 2009, the ACCC wrote to parties in relation to whether the final determination should set charges for 2010-11 in relation to:⁶³⁴
 - Single connection and disconnection charges; and
 - MNM charges.

Submissions were received in response on 9 October 2009 (primary) and 22 October 2009 (reply).

- On 27 October 2009, the ACCC undertook further consultation with parties proposing a rollover of 2008-09 indicative prices for fixed network services until 31 December 2010.⁶³⁵

Submissions were received in response on 2 November 2009.

- On 4 November 2009, the ACCC issued parties with a Supplementary Consultation Paper on the issue of Network Modernisation and Upgrades.⁶³⁶

Submissions were received on 16 November 2009 (primary) and 23 November 2009 (reply).

- On 3 December 2009, the ACCC made final Pricing Principles and Indicative Prices for the Fixed Network Services.⁶³⁷
- On 7 December 2009, the ACCC wrote to parties seeking final views on the expiry date for the FDs. Responses were received on 10 December 2009.⁶³⁸

⁶³³ ACCC, *Telecommunications Access Disputes: Joint Hearing of ULLS/LSS Access Disputes – Addition of Adam Internet/Telstra Access Dispute*, 4 September 2009.

⁶³⁴ ACCC, *Telecommunications Access Disputes: Joint Arbitration Hearing of LSS and ULLS Disputes – Single Connection and Disconnection Charges, MNM charges and ULLS Call Diversion Charges*, 16 September 2009.

⁶³⁵ ACCC, *ULLS LSS Joint Hearing: Price Terms – Rollover Option*, 27 October 2009.

⁶³⁶ ACCC, *Telecommunications Access Dispute-Joint ULLS LSS Arbitration Hearing-Supplementary Consultation on Network Modernisation*, 4 November 2009.

⁶³⁷ ACCC, *Pricing Principles and Indicative Prices for LCS, WLR, PSTN OTA, ULLS, LSS 1 August 2009 to 31 December 2010*, December 2009.

⁶³⁸ ACCC, *Expiry Date for ULLS and LSS Final Determinations*, 7 December 2009.