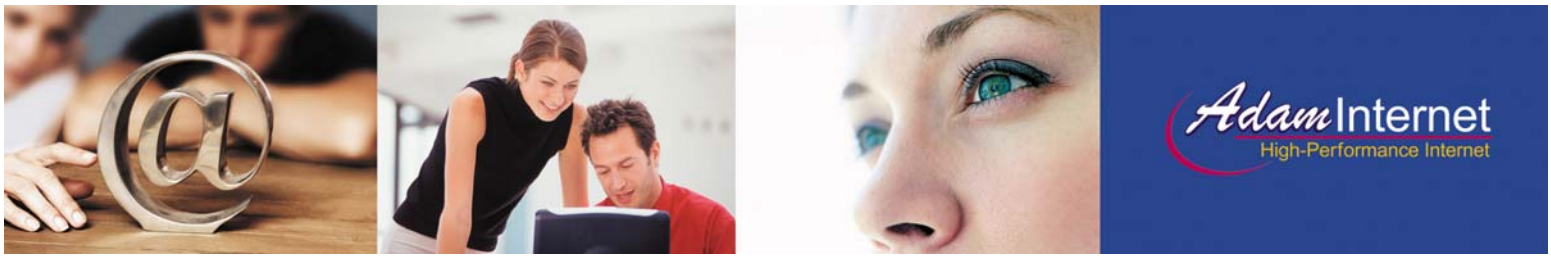

SUBMISSION IN RESPONSE TO THE SENATE SELECT COMMITTEE INQUIRY ON THE NATIONAL BROADBAND NETWORK

1. INTRODUCTION

Adam Internet Pty Ltd ("Adam Internet") welcomes the opportunity to comment with respect to the Senate Select Committee inquiry on the National Broadband Network ("the Inquiry"). As an established provider of telecommunications and broadband services to the Australian public, Adam Internet is well versed to provide the input the Committee seeks in response to its terms of reference ("the Terms"). Adam Internet does not intend to respond to all of the Inquiry questions listed under item 2 of the Terms, but instead shall comment on those questions which relate to the impact of the National Broadband Network ("NBN") on:

- service availability, choice and costs; and
- competition in telecommunications and broadband services.

To this end, Adam Internet will only be specifically addressing questions (a), (b), (d), (e), and (h) of item 2 in the Terms (not in that order).

2. ABOUT ADAM INTERNET

Formed in 1992, Adam Internet is one of Adelaide's first commercial Internet Service Providers. It provides Internet connectivity, co-location services, customer support and security to protect servers from unauthorised access. Adam Internet delivers high-quality data services not only to South Australian residential and enterprise customers but to many national ISPs and multinational corporations. In April 2005, Adam Internet activated its first exchange using its own infrastructure; and ADSL2+ was then available to its customers for the first time. Since then, Adam Internet has steadily increased its ADSL2+ network by investing in further exchanges. In October 2007 Adam Internet released "AdamTalk", Adam Internet's Voice over IP service. April 2008 saw Adam Internet release "Naked DSL" to its residential and business customers.

This submission is based on Adam Internet's extensive experience of investing in, and delivering high speed broadband to Australians with both existing and new infrastructure under the current access and regulatory regime.

3. EXECUTIVE SUMMARY

Adam Internet supports the Government's commitment to "construct a genuinely open access national fibre to the node network and put in place regulatory reforms necessary to facilitate such an investment"[1].

This provides a historic opportunity to implement an access and regulatory regime that will secure growth, innovation and competition in the ICT sector, with the potential to

[1] Labor Government, *A Broadband Future for Australia - Building a National Broadband Network* (March 2007) p 19

deliver significant social and economic benefits. However, if the Government gets its public communications policy or regulatory settings wrong, there is a grave risk that deployment of the NBN will instead lead to a reduction in competition and a return to higher prices, less choice and reduced product innovation to the detriment of Australia's future economic prosperity.

Adam Internet makes the following conclusions in this submission:

- a vertically integrated owner/operator of the NBN will impede the Government's objectives and reinstate a monopoly;
- the current measures of accounting separation, competition law and a negotiate-arbitrate model do not remove the means and incentives of a vertically integrated operator to engage in anti-competitive behaviour;
- structural separation is the single most important policy response to ensure a truly open access regime;
- in addition to a separate legal entity, the model for structural separation should also include minimum operational and functional requirements;
- a Special Access Undertaking should be a mandatory requirement for setting the price terms, at a minimum, of access to the new network;
- the ACCC must to be awarded broader price-setting powers to exercise during arbitrations;
- uniform transfer and migration processes are essential for transitioning end users from the current networks to the NBN, as well as from service provider to service provider;
- roll-out of the NBN should begin with those end users most disadvantaged from a lack of competition;
- exemptions should be made for those end users who are currently serviced by technologies other than ADSL over copper pairs;
- a "No Disadvantage Test" should be put into place to ensure parity between existing service differentiation and prices;
- the NBN owner/operator must be obliged to provide various points of interconnection along the network to ensure the continuation of facilities-based competition; and
- if compensation for 'stranded assets' is not a viable option, a phased-in migration to the new network over a number of years must be mandated to allow investors (and end users) adequate time to retire their assets and allow a reasonable return.

4. RESPONSE TO TERMS OF REFERENCE

4.1 What regulatory barriers may impede the attainment of the Government's stated goal for broadband availability and performance?

(a) ***Problems with a vertically integrated monopoly service provider***

Broadband availability and performance (e.g. price, choice, level of innovation and service characteristics) is dependant on there being a truly open access regime that:

(i) provides wholesale access seekers with equivalence of price and non-price terms and conditions to each-other, and to the access provider, if the access provider has a retail arm;

(ii) enables wholesale access seekers to provide an end-to-end service, by providing open access to the capacity, facilities and points-of interconnection of the access provider's infrastructure where reasonably required; and

(iii) provides wholesale access seekers with wholesale services and products that enables them to differentiate their retail product offerings.

These three key objectives are unable to be fulfilled with a vertically integrated structure. The anti-competitive behaviour associated with vertically integrated operators that control access to essential facilities is well documented.

Over the past decade, Telstra Corporation Ltd ("Telstra") has used its position as the vertically integrated dominant supplier of fixed line services to undermine competition and discriminate against its rivals in favour of its downstream businesses at every opportunity.

That it has done so is not surprising given that it is subject to a serious conflict of interest:

(i) it is required by law to provide network access to its retail competitors and is expected to do this in the long term interests of all end users (not just its own customers); and

(ii) it is required by law to maximise the return to its shareholders.

This inherent flaw may be repeated with the NBN unless the entity that owns, operates and maintains the NBN is a separate legal and commercial entity with the *incentive* to achieve the key objectives of an open access regime as outlined above.

(b) ***Inability of existing regulatory settings to address these problems***

The existing regulatory regime has attempted to prevent anti-competitive conduct of a vertically integrated incumbent through the mechanisms of accounting separation, the competition provisions in the *Trade Practices Act 1974* ("TPA") and oversight of access to declared services by the ACCC through a negotiate-arbitrate model. These mechanisms have been largely ineffective as none of them remove the *incentives* for misuse of control by the incumbent over access to an essential facility.

(i) *Accounting separation*

Accounting separation is hoped to reduce the incentives for uncompetitive behaviour because it increases the risk that such behaviour will be discovered. However, apart from identifying overt examples of price discrimination, it is questionable whether the information collected and reported in the accounts of an accounting-separated business cover, or if covered, have the potential to identify other forms of discriminatory activity. In practice, accounting separation is likely to have little if any influence on a company's ability to engage in the forms of strategic behaviour such as delay tactics and withholding of information, which are effective in frustrating competition.

There has been some form of accounting separation in the Australian telecommunications regulatory regime since 1991. However, no cases of discrimination have ever been identified or reported by the regulator notwithstanding the extensive evidence that discriminatory behaviour is rife.

(ii) *Competition Law*

To date, attempts to use either the telecommunications specific competition provisions in Part XIB and XIC of the TPA, or the general competition provisions of Part IV have simply not worked to prevent or control a vertically integrated incumbent.

The telecommunications-specific Part XIB was introduced in 1997 on the premise that:

> Total reliance on Part IV to constrain anti-competitive conduct, might in some cases, prove ineffective given the still developing state of competition in the telecommunications industry. The fast pace of change and complex nature of horizontal and vertical arrangements of firms operating in this industry mean that any anti-competitive behaviour could cause rapid damage to the competition that has already developed and severely hamper new entry.[2]

It is now over a decade later and the same rhetoric could be used in relation to Part XIB: total reliance on Part XIB to constrain anti-competitive conduct has proven to be wholly ineffective. Nor has it had the intended effect as a deterrent.[3] Instead of arming the ACCC with practical powers to deal with anti-competitive conduct via a quick regulatory fix, a subsequent raft of procedural amendments since introduction in 1997 has seen the regime become as burdensome as traditional litigious battles, whilst ultimately proving less effective. As the ACCC foreshadowed in a media release following the last such (failed) proceedings:

> the decision potentially protracts the procedural process before the ACCC can issue a competition notice. This may

[2] Australia, House of Representatives, *Hansard* (5 December 1996) p 7803
[3] ACCC Productivity Commission, *Telecommunications Regulation Report* (2001) p 157

> delay or frustrate the ACCC's ability to respond quickly to potential anti-competitive conduct. It may also provide the recipient of a notice with incentives to challenge procedural aspects instead of address the substantive underlying conduct.[4]

The ACCC has not issued a competition notice since. It appears the threshold to succeed has been set too high by legislative and judicial interference, and the ACCC is understandably loath to issue any more notices in the face of a heavy-handed and oft-litigious incumbent.

Further, with the ACCC hesitant to issue any more competition notices, it effectively halts an access-seeker's own ability to bring an action for damages or compensation in response to anti-competitive conduct under Part XIB. The legislation is set up so that a competition notice must be in force before a complainant can claim damages or the ACCC can recover a pecuniary penalty[5]. An injunction is available but this is somewhat limp-wristed if it cannot be accompanied by any financial recompense. So with Part XIB unavailable an access seeker is advised to fall back on the general competition provisions in Part IV of the TPA. Yet this is not something the ACCC advises, in its publication entitled the *Telecommunications competition notice guidelines*:

> the competition notice regime in Part XIB applies in addition to the provisions of Part IV of the (TPA). However, the provisions of Part IV are not as broad as those of Part XIB with respect to the taking advantage of market power. Section 151AJ(2) provides that where a carrier or carriage service provider has a substantial degree of power in a telecommunications market and takes advantage of that power with the effect, or likely effect, of substantially lessening competition, the carrier or carriage service provider will be said to engage in anti-competitive conduct. In contrast, s.46 of the (TPA) requires that it be shown that a corporation has taken advantage of its market power for a proscribed purpose.[6]

Hence the thresholds in Part IV of the TPA are also prohibitive to an access-seeker's ability to prevent anti-competitive conduct by a vertically integrated operator. Even if an action were pursued under either Part IV or Part XIB, the access provider enjoys a long period of benefit from the anti-competitive conduct before the matter is resolved. Delays of this nature can result in irreversible damage to the process of competition in a fast moving and dynamic market such as telecommunications[7]. The investigation and conduct of proceedings in the interim is, of course, also lengthy and expensive to

[4] ACCC Media Release, "*ACCC not entitled to issue Competition Notice*" (5 April 2007). The media release followed a Federal Court decision in *Telstra v ACCC (No.2)* (2007) 240 ALR 135, where the Court ruled in favour of Telstra and quashed ACCC-issued 'competition notices' for procedural reasons; namely that the anti-competitive conduct described in the competition notice did not match that described in the preliminary 'consultation notice'.
[5] *Trade Practices Act 1974* (Cth), s.151BY and s.151CC
[6] ACCC, *Telecommunications competition notice guidelines* (2004) p 22
[7] Tristan Gilbertson, *Telecommunications-specific competition regulation in Australia: what next?* (2001) 9 CCLJ 66

the access-seeker complainants, whilst diverting much-needed resources from the ACCC.

The mechanisms under Part XIC of the TPA (such as initiating the declaration process to allow access-seekers to arbitrate on network services previously not available - for example, access to wholesale ADSL2+ services) to address a competition issue is equally unsatisfactory considering the time-consuming public inquiry that must be conducted prior to declaration. The arbitration process following declaration is no better. For example, Adam Internet notified the ACCC of an access dispute regarding the Line Sharing Service ("LSS") in November 2006. It wasn't until over a year later, in December 2007, that the ACCC made a final determination in the arbitration. And when made, 28 days later Telstra launched an ADJR appeal in the Federal Court which is still being heard. Part XIC would be better served by maximum timeframes on arbitrations, or if the ACCC were authorised to base its interim decisions on international benchmarks. Notwithstanding this, the overarching solution is to take the focus off dispute resolution as the primary mechanism to redress anti-competitive behaviour. This could only be achieved with structural separation (discussed below).

(iii) *Negotiate - Arbitrate Model*

As highlighted above, the current 'Negotiate – arbitrate' process is dysfunctional. It is based on the premise that two parties (Access Provider and Access Seeker) will negotiate in good faith to come to a commercial settlement for the provision of services. However, negotiation requires two parties. If one of the parties disagrees with the concept of providing access to its competitors, there is no incentive to participate in discussions on the terms of that access.

The 'arbitrate' step is designed to be a fall-back position in the event that parties cannot agree on an aspect being negotiated. In the current environment, in the absence of any negotiation, the arbitration step is employed as an unsatisfactory substitute for bilateral talks. The arbitration process, as it stands, is subject to an ADJR oversight. Given the starting point is that one party does not want to be in negotiations, the arbitrations are taken to their maximum time-frames and then appealed.

Similar to this, international experience also proves that ex post behavioural regulation cannot adequately address the deeply ingrained power of vertically integrated incumbent operators in communication markets[8]. With respect to the question of structural separation of Microsoft in the U.S, economic experts stated at the time that:

> a major lesson of history is to be wary of remedies that treat the symptoms rather than the causes of monopolisation…Economic theory and the history of anti-

[8] For more information, please see Tristan Gilbertson, *Telecommunications-specific competition regulation in Australia: what next?* (2001) 9 CCLJ 66 and Dr Niloufer Selvadurai, *Ensuring effective competition in rapidly evolving telecommunications markets* (2007) 15 TPLJ 27

> trust remedies indicate, alas, that conduct remedies do not fundamentally change the incentives and the means of the monopolist...The only sure and effective remedy is one which changes the means and incentives of the offending monopolists.[9]

Structural separation is the only remedy capable of changing the *means* and *incentives* of the NBN owner to ensure a truly open access regime.

4.2 **What are the appropriate public policy goals for communications in Australia and the nature of regulatory settings that are needed, if fibre-to-the-node ("FTTN") or fibre-to-the-premise ("FTTH") goes ahead, to continue to develop competitive market conditions, improved services, lower prices and innovation given the likely natural monopoly characteristics and longevity of the proposed network architecture?**

(a) ***Structural separation***

It is unreasonable to expect a listed corporate entity to put the interests of its competitors, the broader industry or Government policy ahead of its fiduciary obligations to its shareholders. The clear solution is to remove the conflict of interest. A network owner or operator that is prohibited from retailing services to end users and licensed to sell only wholesale access will be incited by the commercial success of that wholesale provision, not by retail market share. It will provide the *incentive* to meet the Government's commitment to deliver "a genuinely open access national fibre to the node network."

Because of its desirable effects, structural separation has been implemented as part of the access arrangements in many industries, including electricity, gas, rail and ports. Developments overseas indicate that structural reform is also increasingly gaining acceptance as a necessary strategy for effective competition in telecommunications. The United Kingdom, New Zealand, Singapore and the European Union have all moved to introduce versions of structural reform.

The benefits of structural separation in the Australian context were recently recognised by the ACCC:

> a vertically separated ownership model could reduce incentives for the access provider to discriminate between downstream users of the access service and, therefore, facilitate strong and effective competition between access seekers in retail markets.[10]

Important benefits of structural separation have also been noted by the OECD[11], including:

- creation of a 'level playing field' by forcing the incumbent's wholesale arm to deal with its retail arm on the same terms that it deals with any other competitor;

[9] *United States of America v Microsoft Corporation,* Civil Action No 98-1232 (TPJ), Remedies Brief of Amici Curiae, Professors Litan, Noll, Nordhouse and Scherer, taken from Tristan Gilbertson, *Telecommunications-specific competition regulation in Australia: what next?* (2001) 9 CCLJ 66

[10] ATUG 2008 Annual Conference, Graeme Samuel - 13 March 2008

[11] OECD, "*The Benefits and Costs of Structural Separation*", Draft Report of Working Party No. 2 on Competition and Regulation, DAFFE/COMP/WP2 (2003)2, OECD, Paris, 10 January

- allowing regulators to focus on the wholesale network to guarantee service quality, network reliability, and access to essential network facilities at cost based prices;

- relative simplicity when compared to post behavioural remedies. It is effective as it targets the very reason for the incumbent's impact on competition within the market; that is, its vertically-integrated structure. In contrast, behavioural regulation can never be fully effective in this way as it is reactive, rather than pro-active;

- alignment of the incumbent's incentives with those of non-integrated carriers; and

- reduction of the need for regulation as incumbents have fewer incentives to abuse market power.

(b) ***Model for structural separation***

(i) *public private partnership ("PPP")*

Adam Internet supports the Government's preference to have an equity investment in the National Broadband Network[12]. The Government has stated within the Request For Proposals that it intends this equity investment to earn a return, thus signalling that it wishes to exercise the decision making rights in relation to the NBN that come with equity ownership. This would create a PPP which could be used as the model for structural separation. If the Government holds an equitable share in the entity that owns and operates the NBN, it will mean that this entity is partly owned by the Government and partly owned by the private sector bidder. Under the principles of corporations law it will be a separate legal entity to the successful bidder, and as such would be required to contract at arm's length and on the same terms as any other service providers when supplying the private-sector winning bidder with wholesale services.

(ii) *minimum standards and safeguards*

The ACCC has provided guidance with regards to minimum separation requirements it believes are necessary to support vigorous and sustainable competition in a FTTN context in its draft decision on the FANOC Special Access Undertaking[13]. One of its primary recommendations was to prohibit ownership of the network by all retailers. However, in light of the fact that while this may be the preferable structure, it is an unlikely outcome, and that the level of integration will increase depending on the level of financial interest held by access seekers in the entity which owns the NBN, the ACCC also recommended minimum "safeguards to tighten ownership and control restrictions" such as:

- stricter control restrictions using specific triggers based on ownership or voting thresholds, applying to both individuals

[12] Labor Government, *A Broadband Future for Australia - Building a National Broadband Network* (March 2007) p 21
[13] ACCC, FANOC Special Access Undertaking Draft Decision: http://www.accc.gov.au/content/index.phtml/itemId/788471/fromItemId/356715

and groups of access seekers so that non-compliance can be identified easily. Given the difficulties in identifying maximum 'safe' ownership thresholds, the ACCC would tend to take a cautious approach to determining these thresholds;

- ensuring strict separation of directors, managers and employees of the owner/operator of the NBN and the access seekers as well as business and IT systems; and

- requiring ongoing reporting on compliance with the (principles of structural separation), including ownership interests and voting rights.[14]

In addition to meeting the minimum standards as set by the ACCC above, Adam Internet considers the model for structural separation should also reflect the established underlying principles of functional separation, such as the creation of a separate business unit along with operational rules to establish Chinese walls between the new business unit and the incumbent operator's other operations.

(c) ***Special Access Undertaking to set price terms***

Whether the owner of the NBN is structurally separated or not, it will still require continued regulation as it will be the monopoly provider of high speed broadband. Without regulation there is a real risk that it will charge monopolist prices.

The most appropriate and adapted regulatory framework for setting price terms is to require a TPA Special Access Undertaking ("SAU") as accepted by the ACCC. An SAU is the clearest process by which the access commitments made by the winning bidder during the assessment and negotiations phase can be easily reflected in a legally enforceable model. An SAU would replace the need for a negotiate/arbitrate model (without disposing of the model entirely), and can be enforced by the Federal Court. It would apply generally to all access seekers from the commencement of services, rather than setting price and non-price terms of access in a piecemeal approach, which is generally unsatisfactory for all parties involved - including the regulator - and promotes inconsistencies.

Adopting an SAU approach and removing the emphasis from the negotiate-arbitrate model will be following in the practice adopted in many other jurisdictions around the world, including Europe, and more recently, New Zealand. New Zealand's *Telecommunications Act 2001* was primarily based on the negotiate-arbitrate model, but a Government review after four years acknowledged that the total lack of negotiations where one party has no incentive to participate in discussions (such as a vertically integrated operator), creates a hugely inefficient backlog of multiple bilateral arbitrations and uncertainty within the market. A raft of amendments in 2007 saw a shift away from the negotiate-arbitrate model toward a more efficient undertakings approach, whereby the regulator requires the dominant incumbent to provide undertakings which are ultimately determined by the regulator after a public consultation process.

[14] ibid

(d) ***Continued oversight by the ACCC with additional price setting powers***

Adam Internet submits that the ACCC must retain an independent power as auditor to review the key inputs in any pricing methodology used for setting access prices at regular intervals during the lifespan of the SAU, regardless of whether the access provider is vertically integrated. To do this the ACCC may require additional regulatory functions to those it currently has under Part XIC of the TPA. This may need amendments to Part XIC to accommodate those additional functions - such as if the SAU provides for the ACCC to perform functions or exercise powers in relation to the SAU, the ACCC can do so in accordance with the SAU. One such additional function would be to allow the ACCC to set prices where an SAU is rejected. Adam Internet notes that the ACCC has such a power under the digital radio access regime.[15]

As discussed above, the current negotiate-arbitrate model in Part XIC of the TPA is dysfunctional, although even with acceptance of an SAU by the ACCC, Adam Internet does not recommend displacing the model entirely. Instead, Adam Internet submits that Part XIC needs to be reinforced and the ACCC given broader powers, in the following manner:

- maximum timeframes for arbitrations;
- international benchmarking mechanisms for the ACCC to set prices against; and
- determinations on price and non-price terms made in an arbitration universally applied to all access seekers for as long as the service continues to be declared.

(e) ***Uniform customer transfer processes***

Uniform customer transfer processes are vital to ensure an improvement on the current arrangements and accordance with an open access regime. This means encompassing universal transfer mechanisms for transfers from former services to the NBN, as well as between service providers. Currently there is a severe lack of consistency for transfer arrangements between different platforms and service types, with some transfers (such as LSS to ULLS) unable to be carried out as a mass migration and causing unnecessary outages to the end user's service. Clearly it creates significant barriers to access. This may have been the unfortunate consequence of a somewhat cobbled together access regime in the past, but with the advent of a new network (and incumbent) it is simply unacceptable moving forward.

To this end, such processes should not be dictated by the incumbent provider, but should instead be set out in an industry code as developed by the ACCC or Communications Alliance Ltd.

(f) ***Begin roll-out with most disadvantaged end users***

The end users that are likely to benefit the most from the roll-out of NBN are the ones who currently lack competitive market conditions, improved services, lower prices and innovative products. Therefore, Adam Internet proposes that the network be commissioned to non-metropolitan customers (otherwise

[15] See section 118NF of the *Radiocommunications Act 1992*.

known as “Band 3”), and those in broadband ‘black-spots’ within city areas first.

4.3 **What is the availability, price, level of innovation and service characteristics of broadband products presently available…the likely future improvements in broadband services (including the prospects of private investment in fibre, wireless or other access networks) and the need for this government intervention in the market?**

Adam Internet does not dispute the worth that a properly integrated and managed NBN can deliver to Australian consumers and businesses. Delivered correctly, this is a welcome intervention by the Government in the telecommunications market. However Adam Internet submits that exemptions should be given, or allowances made for those end users serviced by broadband products other than simply ADSL over copper pairs. This includes dial-up on the PSTN, a hybrid fibre coaxial network, and Internet via wireless services including WiMax or 3G. End Users who receive their broadband by means of these alternative methods should not be forced into migrating to the NBN.

4.4 **What are the effects on the availability, price, choice, level of innovation and service characteristics of broadband products if the NBN proceeds?**

(a) ***‘No Disadvantage Test’***

Whilst speed and reach to the population may increase with the advent of NBN, the price, choice, level of innovation and service characteristics of retail broadband products may consequently suffer if there are no limitations made on the introduction of the new network.

Adam Internet supports the concept of a ”No Disadvantage Test”. This would require the access provider of the NBN to outline an imputation analysis for each of its service offerings which shows how all existing customers will not be disadvantaged by the introduction of the new network. For example, all customers currently receiving telephony and broadband services (including both Telstra customers and customers served by access seekers using the LSS and ULL) must be able to continue receiving the *same or better services* (at an equivalent price) after transition to the NBN. As the former consortium known as “G9” explained:

> this requires that the replacement services provide access seekers, and in turn retail customers, with the same flexibility of service offering as they can make available today using the ULL. That is, the replacement services would not satisfy the ‘no disadvantage test’ if they provided materially less scope for service differentiation. For example, the current wholesale line rental and local carriage services would not pass such a test as they would not give access seekers flexibility regarding line services (including voicemail, call back, etc) billing and packaging as is available today using the ULL. Similarly, the replacement broadband services would need to provide the same flexibility as exists today using the ULL.[16]

The ‘No Disadvantage Test” should include a ‘no change’ option for end users who do not wish to avail themselves of the new technology, just because of the network design or change in providers. This is obviously particularly important where there will not be price parity.

[16] *G9 Submission to the Expert Panel for the National Broadband Network* (28 March 2008), p 25

(b) ***Interconnection of networks***

The design of the NBN must support interconnection with other carrier's networks. This is vital for the continuation of facilities-based competition as it will continue to allow access seekers to use their own infrastructure to provide a diversity of services to their customers. As such, the winning bidder of the NBN must be obliged to provide various points of interconnection appropriately placed at a range of physical locations, including at the exchange (preserving the copper) and the node. This will ensure the proper integration with regional broadband initiatives, such as the commercialisation of the Basslink Bass Strait optical backhaul link.

By providing various points of interconnection, it will ensure that levels of innovation are optimised, because simply making available a fully-configured retail product for bulk purchase by the access seeker is only resale, and does not match the diverse selection of products already available in the marketplace (such as telephony and subscription television services, not just ADSL).

The final interconnection design arrangements must ensure that like the "No Disadvantage Test", all end users are able to achieve the same standard of any-to-any connectivity as they receive under the current structure.

4.5 **What is the effect of the NBN proposal on existing property or contractual rights of competitors, supplier and other industry participants and the exposure to claims for compensation?**

Many access seekers under the current regime, including Adam Internet, have invested in DSLAMs and other equipment that will effectively be 'stranded' at the exchange if the NBN is rolled out as FTTN, without preservation of the copper pairs as an alternative. Despite this, the ACCC still expects investors to commit to further DSLAMs even while the NBN process is well underway.[17]

Compensation for stranded assets such as these DSLAMs must be provided for all those access seekers, such as Adam Internet, who have endeavoured to pay heed to the regulator's advice and promote facilities-based competition, only to have it effectively backfire on them. This is not limited to just access seekers either, but also affects those end users who have purchased compatible equipment (such as ADSL modems) and which will also be made redundant by the sudden introduction or forced migration over to the NBN.

If investors are able to seek a reasonable return on their infrastructure there will be less need for 'blanket compensation' for the 'stranding' of assets. This could be achieved with a phased, or paralleled migration across to the new network over a number of years, by allowing a delay of five to seven years before forcing end users to cutover to the new services. This would ensure the transition will be smooth and without any major disruption or outages. It will also enable those service providers who have (and are still being encouraged) to invest in DSLAMs a reasonable period in which to retire those assets and generate a return on their investments. In addition or as an alternative, the owner/operator of the NBN should be obliged to replace or reconfigure the customer equipment currently used by an end user within that same grace period, so that the end user is able to transition to the new network in accordance with the "No

[17] see ACCC, *Telstra's local carriage service and wholesale line rental exemption applications: Draft Decision and Proposed Class Exemption* (April 2008) at page 7, where the ACCC states "the ACCC is satisfied that removal of LCS and WLR access regulation is likely to, on the whole, encourage access seekers to invest in ULLS-based DSLAM/MSAN infrastructure."

Disadvantage Test". This principle is similar to that underlying the delayed introduction and phasing-in of analogue to digital transmission broadcasting. Just because the technology becomes immediately available doesn't mean it should automatically leave service providers and consumers alike, high and dry.

Adam Internet Pty Ltd
15 August 2008