

Regulatory Submission

On the requirements for an
Open Access
National Broadband Network

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Contents

| | |
|--|----|
| 1. Introduction | 3 |
| 2. Executive Summary | 5 |
| 3. An 'outside-in' deployment..... | 7 |
| 4. Structural Separation | 7 |
| 5. A 'No Disadvantage' test..... | 8 |
| 6. Unbundled services | 8 |
| 7. Exemptions | 10 |
| 8. Code of Practice | 11 |
| 9. NBN Access Guarantee Board | 11 |
| 10. Dispute resolution | 12 |
| 11. Price setting powers..... | 12 |
| 12. Transparent Terms & Conditions | 13 |
| 13. Customer transfer processes..... | 13 |
| 14. Stranded assets..... | 14 |
| 15. Investment certainty..... | 15 |
| 16. Conclusions | 16 |
| 17. Contact Details..... | 17 |

1. Introduction

The Government's pre-election policy stated that building a national broadband network is a major and historic step and one that is critical for Australia's future economic prosperity.

Critically, the network's construction is not only an historic step, but a major and historic opportunity to set in place an access and regulatory regime that will secure the future growth, innovation and competition in the information, communication and telecommunications sector.

The Government's pre-election policy, *"New Directions for Communications – Building a National Broadband Network"*, correctly identifies the relatively parlous position of Australia's access to broadband.

It also correctly identifies the benefits of a more extensive and comprehensive broadband availability. In doing so, it highlights that the lack infrastructure investment has left many Australians with no access to fixed line broadband.

While this in part is true, the level of access to high-speed broadband and expansion of the Australian ICT industry has also been affected by the lack of genuine open access to the current infrastructure.

Notably, where genuine open access is available, either due to competition or enforced by determinations of the Australian Competition and Consumer Commission (ACCC), many Australians have access to broadband at higher speeds than proposed by the Government's National Broadband Network policy.

For example, iiNet can provide high speed ADSL2+ broadband to more than 90 percent of metropolitan Australians as a result of its investment in more than 300 exchanges using competitive access to other infrastructure.

In considering the implementation of the National Broadband Network, the Government and its advisers must recognise and consider this important fact: *"many Australians have been left with no access to fixed line broadband"* not just because of a lack of infrastructure investment, but also because of a lack of genuine open access to existing infrastructure and a regulatory regime that promotes, encourages and protects competition.

In this context, 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"* is welcomed.

Additionally, the Government's commitment that a pre-requisite for all proposals made under the policy must provide genuine open access to bottleneck fibre to the node infrastructure is also welcomed.

As noted in the pre-election policy, genuine open access must require equivalence of access charges and full scope for access seekers to differentiate their product offerings; by allowing the customisation of access speeds, quality of service and contention ratios.

Further, the recent High Court judgement in *Telstra Corporation v The Commonwealth* (6 March 2008) reinforces the critical importance of setting in place a statutory access regime in advance of awarding any consortium the rights to build

the National Broadband Network. That statutory access regime must be directed at expressly *“promoting ... competition in the telecommunications industry generally and among other carriers”* and seeks to achieve this goal by *“giving each carrier the right ... to obtain access to the services supplied by other carriers”*.

The future access and regulatory regime will be a key determinant of the ability of the Federal Government to successfully implement its election policy and deliver on its commitment to put *“Australian back into the fast lane of the information super-highway.”*

The following submission is designed to provide the Government’s Expert Panel with specific and critical factors for its consideration of responses to the Request for Proposals for a National Broadband Network.

It is based on the extensive experience gained from investing in, and delivering, high-speed broadband to hundreds of thousands of Australians with existing and new infrastructure and under the current access and regulatory regime.

2. Executive Summary

The opportunity to provide input to the Government's plan to move to a next generation telecommunications network is an opportunity to address some of the shortcomings inherent in the existing regulatory regime.

By utilising the \$4.7 billion made available by government to establish equity in the NBN, government will have a vested interest in guiding the deployment of the NBN in such a way that government objectives are met.

Ensuring the funding is exchanged for equity in the network allows the government a stronger say in the pursuit of a social dividend over the long term rather than simply aiming for a short-term, financial dividend.

The general principles that need to be applied to the regulatory improvements are those aimed at a social dividend, that have been in place for some time and are expressed by government policy:

- Promoting competition;
- Promoting long term interests of the end user;
- Ensuring equitable service provision to all Australians.

Additionally, these improvements should address obvious deficiencies in the powers provided to the regulatory authorities charged with pursuing these principles. These include:

- Eliminating conflicts of interest between commercial interests and public policy objectives;
- The establishment of reasonable access terms;
- Improving the efficiency of arbitration processes.

Improving regulatory settings right will ensure consumer interests are promoted and the benefits of competition are realised in months rather than decades.

Leaving regulatory settings unchanged at this significant opportunity will lead to a reduction in competition and a return to higher prices, less choice and reduced product innovation.

Deployment of a new telecommunications infrastructure provides a unique opportunity to achieve a true open access regime, unsuccessfully pursued by Australian Governments since 1991.

Getting the access framework right, so that markets can operate efficiently is the key. Failing to address the known deficiencies while changing the architecture of the network platforms will destroy the competitive gains achieved to date.

In light of the importance of the regulatory framework in Australian telecommunications, it is essential that a central role for the Australian Competition and Consumer Commission (the ACCC) is ensured. A regulatory regime which requires the ACCC to exercise an oversight role in respect of capital expenditure for the NBN, the price and non-price terms and conditions on which access to the NBN is provided and the structural separation regime, is essential.

The summary objectives of the NBN regulatory environment must be -

- Structural Separation between any access provider and all access seekers;
- Streamlined and strengthened dispute resolution;
- Broad price setting powers incorporated into dispute resolution;
- Development of customer transfer processes including service provider to service provider and old to new networks;
- Preserving beneficial existing services and terms by the use of a 'No Disadvantage' test; including -
 - Maintenance of existing service types;
 - Price performance compared to pre-NBN services;
 - Bundling choices;
 - Security for aged and infirm.

Transitional arrangements are essential and should be aimed at meeting public policy objectives rather than shoring up anti-competitive structures -

- An 'outside-in' deployment of service starting with areas and customers currently without service. This includes non-metropolitan customers as well as those in 'broadband black-spots'
- Interconnection with current network technologies;
- Compensation for stranded assets;
- Migration not enforced until five years from the commencement of NBN services in a given location.

3. An 'outside-in' deployment

The network should be commissioned in under-served areas prior to those areas that already enjoy choice, high speed service and competitive prices.

Starting with those areas and customers that are currently without service, the network construction and commissioning should first benefit those with the most to gain. This includes non-metropolitan customers as well as those metropolitan customers in 'broadband black-spots'.

4. Structural Separation

The existing customer access network owner is fatally conflicted. It is required, by law, to provide network access to its retail competitors. It is expected to do this in the long term interests of all end users (not just its own customers).

It is also required by law to maximise the return to its shareholders.

It views these obligations as mutually exclusive and is forced to choose between the two.

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 letter of the current law is loose and provides many opportunities to avoid efficient access provision or public policy compliance. Conflicts of interest cannot be resolved by notions of good behaviour or the expectation of goodwill between commercial opponents.

Accounting separation and operational separation requirements do nothing to address the conflict of interest issue, in fact they may be seen to highlight the conflict by reporting the differences. The ineffectiveness of the current regime has been publicly commented upon by the ACCC.

The current access regime allows the network owner to dictate the pace that competitive services are deployed. Restrictive work practises are the norm and infrastructure deployment and interconnection is progressed, delayed or blocked without negotiation and at the whim of the dominant access provider.

There is no third party auditing, no justification for unilateral decisions and no appeal.

There is no incentive for any other approach by the incumbent.

Structural separation between the access provider and any and all access seekers will resolve this conflict of interest. A network owner or operator who 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.

The NBN should be owned, operated and maintained as entirely separate legal and commercial entity with the its key business objective to deliver "a genuinely open access national fibre to the node network".

In doing so it must have at its core a genuine commitment to deliver and supply the

equivalent products and services to all access seekers at all times.

At a minimum this independent entity should also have the following characteristics:

- Have its own corporate structure responsible for building maintaining and repairing the NBN;
- Independently determine which products the NBN will support;
- Independently determine appropriate maintenance and enhancements to the NBN
- Have a independent management team with a CEO who reports solely to and directly to the Board of the NBN
- The CEO, management team and NBN employees may not be an employee or serve on the Board of any access seeker entity;
- The NBN entity must be at separately located premises as well as having secure and separated systems, including commercial information, customer records and financial systems;
- Remuneration and incentives for all NBN entity employees should only be based on the successful delivery of a genuinely open access NBN with equivalency in provision of products and services to all access seekers; and
- The NBN entity should have a separate brand, logo, website etc.
-

5. A 'No Disadvantage' test

A 'No Disadvantage' test should preserve existing services and terms including –

- A 'no change' choice for those not wishing to avail themselves of changed technology. Customers should not be immediately forced by the network design to change services or providers.
- Maintenance of existing service types to allow the use of appropriate technology and the continuation of services that do not depend upon high speed broadband for efficient operation.
- Price performance parity compared to pre NBN services to retain existing price points and service definitions.
- Bundling choices must be retained - allowing continued selection of individual services from different suppliers.

6. Unbundled services

Customers are currently able to choose from a menu of service providers for a selection of services. This range of choice is an outcome of competition and is a driver of innovation in the telecommunications market.

The NBN must be able to extend this flexibility so that an individual customer retains the ability to choose internet access from one provider, telephony from another and TV or other services from others suppliers without being obliged to

purchase from any.

Customers who have no alternative provider today, are being forced to purchase telephony when all they seek is internet access. Where there is choice, customers are demanding unbundled services in significant numbers.

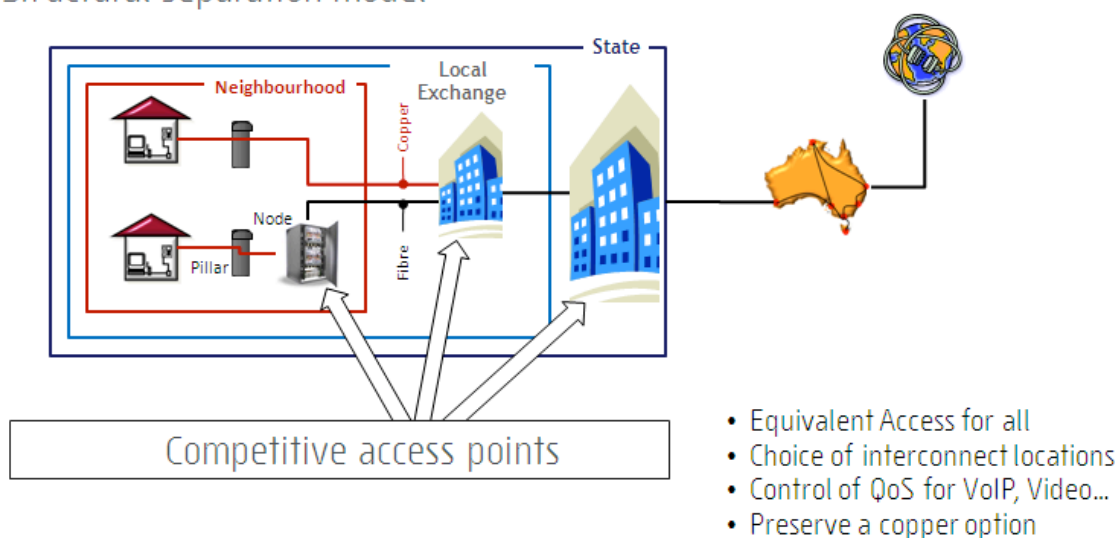
Functionally equivalent wholesale services (to that available pre-NBN) must be available to access seekers, in particular the maintenance of choice for unbundling of access services. Economies of scale and innovation are not mutually supportive and simple re-sale of services permits no product innovation, other than by the access provider who is remote from the end-user.

While it is understood that access seekers adopt varying business models, innovation is driven by those who have control over the network elements that are used to build products and services.

By designing the network so that access is possible at different levels, opportunities for investment and innovation are optimised. This means not only different versions of the same service, but opportunities for the development of types of service, as yet unseen.

Current arrangements allow unbundling at a number of points of access. New arrangements must not reduce these opportunities to add value for consumers or the development of new products and services overlooked or decided against by an access provider.

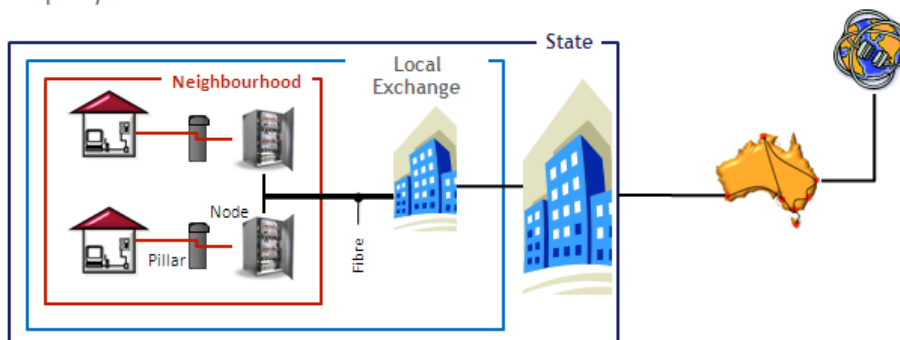
Structural separation model



Access is a method of obtaining the right to use network components used in the construction and delivery of services. **Open** access means a transparent, equitable, auditable and sustainable framework of providing that network access on reasonable terms.

Making available a fully-configured retail product at a reduced price in return for bulk purchases is NOT access. It is simple resale and does not allow for innovation or significant differentiation. All control of product definition is in the hands of the wholesaler, as is evidenced by the beige sameness of broadband offerings of those re-sellers acquiring the limited broadband available services from Telstra in 2008.

Monopoly model



No Competitive access points

- Resale only
- No Control of QoS for VoIP, Video...
- No copper option from exchange
- Service differentiation only

There is no natural requirement to force the bundling of different classes of service in an NBN and neither is there any natural requirement to block access to certain classes of service. In particular, excluding competitive access providers from providing telephony or Pay TV would be a significant reduction in competitive opportunity since these are services which current infrastructure operators are able to deliver via their own equipment over ULL copper pairs today.

An NBN must support:

- Open Access to network components at varying access points;
- Delivery of multiple streams of service to each end user;
- Delivery of services by multiple service providers to each end user;
- Delivery of multicast IP and ATM to each end user;
- Delivery of a basic PSTN access bearer to each end user;
- Each of these services must be able to be connected to different service providers;
- End users must be able to choose between providers for each service.

The ultimate driver for these connections must be the end user who must have the right to freely choose a service provider as is the case today.

7. Exemptions

Consideration must be given to end users who are currently serviced by technology other than ADSL over copper pairs. Numerous end users are currently serviced by dial modems on PSTN or ISDN. Other users are in estates serviced by Fibre to the Home from a variety of carriers, often with no access to Telstra copper or competitive services. Many rural users receive internet service via a wireless access using proprietary protocols, WiMax or 3G¹.

¹ These examples are not meant to be exhaustive.

These customers must not find themselves casualties of a hasty deployment of an NBN.

Technical and commercial provisions to allow exemptions from forced migrations to the NBN must be incorporated in the successful bid.

8. Code of Practice

The NBN should have a detailed and public Code of Conduct which sets out not just the rules on provision of the products and services on an equivalent basis, but also the “good faith” intentions and objectives of its operation.

The Code of Practice must reinforce the entity’s principle objective of providing a genuinely open access network with an equivalency of product and service delivery to all communications providers.

The Code should also cover areas such as confidentiality of the entity’s commercial, management, consumer, product pipeline and financial information.

The Code must also include a reporting mechanism for breaches of the Code of Conduct.

All NBN employees must receive an induction on the Code of Conduct with 3 months of commencement and its mandatory compliance spelt out and adhered to at all times.

9. NBN Access Guarantee Board

A NBN Access Guarantee Board should be established to monitor report and advise on the delivery of the genuinely open access network with a specific focus on the provision of equivalency of access.

The NBN Guarantee Access Board should be appointed by, and be responsible to the Federal Minister. It must be independent of the NBN.

It should report annually to the Federal Minister on the operation of the NBN, including specifically advising on the delivery of an open access network, equivalency of access, review the nature, type and pattern of complaints.

The annual report to the Minister must be tabled in the Federal Parliament not more than 60 days after it is received by the Minister.

The NBN Access Guarantee Board membership should consist of experts in the field of telecommunications. To ensure its independence the Chair of the Board should not have been employed by an access seeker company with the previous 18 months.

Membership of the Board should reflect a broad cross section of the industry and community. It is recommended the membership may take the following form:

- Independent Chair
- 1 Representative of the Department of Broadband, Communications and the Digital Economy

- 1 Representative of the Australian Competition and Consumer Commission
- 1 Representative of the Australian Communications and Media Authority
- 3 representatives from access seeker entities
- 3 independent Government appointed members

10. *Dispute resolution*

Dispute resolution between access seekers and access providers is an area which is in dire need of improvement. In specifying an 'open access' regime for the NBN, there are areas where improvements are overdue.

The existing regulatory regime has a number of shortcomings which are easily identified by parties wishing to 'game' the regime. This has resulted in, for example nine years of dispute over the cost of the regulated ULL service, with no conclusion in sight for even the most basic commercial term – the price.

This continues to limit progress in the deployment of ULL services and presents a hurdle to investment for competitive entrants. Investors see the uncertainty of the regime, the inability of the regulator to conclude the process and the blocking power of the network owner as significant barriers to enter into the market.

These shortcomings also militate against Government competition policy.

All parties must have incentives to conclude negotiations quickly and reasonably priced, efficient access provision must be pursued as an attractive commercial proposition by the access provider (rather than a regulatory obligation). This is best achieved by removing the conflict of interest between access provider obligations and retail commercial imperatives. Structural separation of the access provider from a retail business unit is essential.

11. *Price setting powers*

Broad price setting powers should be incorporated into dispute resolution.

There are no current price setting arrangements in place. Instead, parties are expected to negotiate commercially. If negotiations break down, the ACCC has the power to arbitrate, those determinations are only binding on the parties to the dispute. Any other parties wishing to obtain the same result must negotiate/arbitrate separately and serially. Binding arbitrations between parties A and B have no flow-on to an identical dispute between parties A and C or B and C.

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.

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, no

negotiation takes place, so the arbitration step is employed as an unsatisfactory substitute for a bilateral talks. The Arbitration process, as it stands, is subject to ACT and ADJR oversight. Given the starting point is that one party does not want to be in negotiations to start with, the arbitrations are taken to their maximum time-frames and then appealed.

The current process is clearly not a suitable method for establishing prices in a dynamic market with hundreds of participants.

In the event that the negotiate / arbitrate model is to continue, the minimum change required would be for a single arbitration to automatically be applied to all similar arbitrations brought during the life of the declaration. An arbitration determination would, therefore, have the power of price setting for the industry at large.

This concept should be broadened to cover any determination relating to a dispute on access provision as price is not the only basis for dispute or in need of arbitration.

12. *Transparent Terms & Conditions*

Transparency in the provision of (what will effectively be) monopoly access services is essential to reduce disputes and provide for accountability. It assists in driving down costs and encourages access seekers to develop innovative products on the platform. It is implicit in the concept of 'Open Access'.

There are two types of barrier in the current environment which may be transferred into an NBN world if they remain unchecked. Financial barriers include Access Seekers being forced to wear disproportionate commercial risk in the form of unnecessary security deposits, onerous payment and trading terms and a loss of commercial security over their own customers.

Additionally, the instability of service brought about by the Access Provider retaining the right and capability to withdraw wholesale service from access seekers with minimal notice, leaving access seekers without recourse or the ability to provide alternative services for their end users.

Access terms and conditions must be submitted to the regulator in the form of access undertakings, they must be transparent, comprehensive, complete and available for publication.

13. *Customer transfer processes*

Customer transfer processes are essential and should include service provider to service provider as well as transfers from old to new networks.

Customers must be able to choose providers or service types and be able to switch without penalty.

Under the current network arrangements, there is no consistency of transfer arrangements between infrastructure or service types. Number portability arrangements vary as does platform portability.

Some existing transfer arrangements are non-existent and customer transfers between providers or even between different access arrangements with the same provider can be accompanied by enforced outages which create barriers to switching. Some customer transfer processes are voluntary and some are not.

A fully automated and compulsory customer transfer regime must be put in place in order to provide customer choice and drive competition. This process should be implemented as an industry code and negotiated via the ACIF process. This transfer regime must incorporate current network to NBN transfers as well as provider to provider transfers.

Monitoring and compliance with the transfer codes should be the responsibility of the ACCC.

14. Stranded assets

Compensation for stranded assets must be provided for all existing asset owners and appropriate customer migration processes must be in place to move customers off the infrastructure to a service provider of choice.

The impact of stranded assets is not restricted to access seekers, but also extends to customers who have purchased equipment compatible with the services offered by their provider and which will no longer remain functional under an NBN.

A managed migration away from stranded assets must be available. Stranding must not be at the whim of the network operator or owner. Investors under the current regime are still expected to commit to infrastructure even while the NBN process is underway.² A reasonable period in which to generate a return on investments is important to retain investment in the sector.

Under the current regulatory regime, in line with the 'Ladder of Investment' concept and synchronised with government policy, many investors have developed infrastructure at great cost of both time and resources.

Transitions from current network to NBN must be possible without significant outages or compulsion;

A no-disadvantage test for access seekers must be satisfied prior to services being migrated to NBN (E.g. telephone numbering remains the same; service performance and price must be equal to or better than the service being replaced);

Interconnection between current network and NBN must be developed to allow a continuation of any-to-any connectivity.

In addition the principles above, end users are particularly vulnerable to sweeping technology changes which have the potential to render their own current hardware investment worthless. Hundreds of millions of dollars have been invested by end users on ADSL Customer Premises Equipment (CPE) in the last two years alone. Business users must be allowed to continue to depreciate this equipment appropriately.

A guiding principle for an NBN must be:

End users must be able to use existing ADSL CPE for at least five years from the commencement of an NBN; or

The NBN builder must replace and configure the ADSL CPE of an end user

² ACCC Draft decision on Telstra's exemption application.

<http://acc.gov.au/content/item.phtml?itemId=825675&nodeId=bbb2e02d887843e0b9ccfc546f3296bf&fn=Draft%20decision%20on%20Telstra's%20exemption%20applications.pdf>

acquired within five years of the commencement of an NBN; such that the end user can transition from current networks to NBN without outages.

15. *Investment certainty*

In the current Australian regime (and in other jurisdictions), the concept of a 'ladder of investment' encourages new entrants to previously monopoly markets. It suggests that a new entrant can enter a market with limited investment, gain market share and then expand that market share by targeted investment in infrastructure (which offers efficiencies and improved profitability), proceeding, over time, to a point where the new entrant has comparable infrastructure to the incumbent.

In the telecommunications market, this has been illustrated by new entrants investing initially in sales and marketing (call centres, billing systems, CRM, etc) and re-selling fully developed retail products and services purchased from others.

A next step has included the installation of voice switches, transmission systems and interconnection facilities. Later, data switches, DSLAMs, and access networks have been deployed (see below).

The introduction of a monopoly NBN platform brings to an end most of this investment ladder and leaves only those on the top rung with a path for investment.

Opportunities for competitive investment in the NBN must not be excluded. Legitimate infrastructure owners must be either compensated for stranded assets or allowed to retire assets in line with reasonable investment returns or product life-cycles.

Providing certainty for competitive investment without an overhanging risk of stranding as a result of inappropriate use of market power will encourage further investment in this sector. This is best achieved by removing the conflict of interest between access providers and retail commercial imperatives. Structural separation of the access provider is essential.

16. Conclusions

- Structural Separation between access provider and access seekers must be the starting point for the provision of an NBN that will outlast any government putting it in place
- The NBN must be owned, maintained and operated by a separate legal and commercial entity
- A detailed and compulsory Code of Conduct entrenching rules and intentions of an open access NBN must be established
- A NBN Access Guarantee Board should be established to monitor, report and advise on the operation of the open access NBN with a specific focus on the provision of equivalence of access
- Dispute resolution should be streamlined and strengthened
- Price setting powers should be incorporated into dispute resolution.
- Customer transfer processes are essential and should include service provider to service provider as well as current network to NBN
- No Disadvantage test should preserve existing services and terms including -
- Security for aged and infirm
- Maintenance of service types
- Price performance compared to pre NBN services
- Bundling choices
- Transitional arrangements are essential -
- Interconnection with current network must be available
- Compensation for stranded assets must be incorporated for all existing asset owners
- Migration to an NBN Should not be enforced prior to five years from the commencement of NBN services in a given location.

17. Contact Details

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