



AUSTRALIAN COMPETITION  
& CONSUMER COMMISSION

# NBN Services in Operation

# Record Keeping Rules

# Disclosure Direction

## Explanatory Statement

**March 2018**



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## Executive Summary

The ACCC has varied a direction to NBN Co to enable the ACCC to publish a quarterly report on National Broadband Network (NBN) access services.

Pursuant to the Disclosure Direction, NBN Co is required to prepare and provide to the ACCC for publication a tabular report setting out a summary of selected information collected by NBN Co under the NBN Services in Operation Record Keeping and Reporting Rules (NBN SIO RKR).

The revised report (known as the *NBN Wholesale Market Indicators Report*) includes eight tables setting out the number of NBN access services for each access network technology, geographic region, speed tier, traffic class, Point of Interconnection (POI) and in some cases NBN access seeker or access seeker group. The report also includes information on the aggregate contracted capacity across all NBN connectivity virtual circuits (CVC) and the number of NBN access seekers at each NBN POI.

Reporting this information will continue to provide insight into the development of NBN markets as the NBN rollout continues and provide a basis for market outcomes to be observed and assessed by a range of stakeholders.

This will promote competition in services supplied over the NBN and facilitate the operation of Part XIB and XIC of the *Competition and Consumer Act 2010* (Cth) (CCA). This will in turn promote competition and the efficient investment in, and use of, infrastructure and benefit end-users through lower prices and/or a wider choice of services that better meet their requirements.

The revised Disclosure Direction provides for:

- a change in reporting to state and territory specific reporting, rather than by 'state groups', this will increase the level of detail provided in the reports
- lowering the threshold for identifying individual access seekers and access seeker groups in the market share tables. This will increase the information available about key industry participants while protecting the identity of smaller industry participants, and
- publication of an additional table outlining the number and type of Access Virtual Circuits (AVC) and the amount of CVC acquired on a POI by POI basis. This will provide more information on the extent of NBN Co's geographic rollout and the corresponding changes to wholesale market share and competition.

Publishing the report will increase the amount of publicly available market information and allow market participants to make better and more informed decisions. The ACCC considers that the changes will promote competition by improving transparency and providing greater detail on:

- the status of the NBN rollout in particular geographic areas
- the number of access seekers and/or access seeker groups and their respective market shares, and
- AVC and CVC data for each of the 121 NBN Listed POIs.

The ACCC considers that the report will facilitate the operation of Part XIB and XIC of the CCA by making available detailed market information that will assist stakeholders and the ACCC in their assessment of the market for NBN wholesale services.

# 1. Background

## 1.1. Authority to issue a disclosure direction

The ACCC may issue a direction to a carrier or carriage service provider under section 151BUC of the CCA requiring that carrier or carriage service provider to provide periodic reports or extracts from reports prepared in accordance with the record-keeping rules.

In order to issue a disclosure direction, the ACCC must be satisfied that the disclosure of each report in a series or particular extracts from each report would be likely to:

- promote competition in markets for listed carriage services, or
- facilitate the operation of certain statutory provisions, including Part XIB and Part XIC of the CCA.<sup>1</sup>

In deciding whether to issue a disclosure direction, the ACCC must have regard to the legitimate commercial interests of the carrier or carriage service provider that will provide the report and such other matters as the Commission considers relevant.<sup>2</sup>

Before issuing a disclosure direction, the ACCC must invite the carrier or carriage service provider concerned to make a submission on a draft of the disclosure direction, and consider any submission made by it within the time limit.<sup>3</sup>

The disclosure direction may require the carrier or carriage service provider concerned to make copies of each of those reports or extracts available for inspection and purchase by the public.<sup>4</sup>

## 1.2. 2017 NBN SIO RKR Disclosure Direction consultation

In December 2017 the ACCC sought submissions from NBN Co and stakeholders regarding a draft of the NBN SIO RKR Disclosure Direction. The proposed revisions were developed following the initial consultation to vary the RKR in June 2017. The proposed variations to the NBN Wholesale Market Indicators Report included:

- changing the reporting from a by 'state groups' basis to state and territory specific reporting
- lowering the threshold for identifying access seekers in the market share tables, and
- publication of an additional table outlining the number and type of AVCs and the amount of CVC acquired on a POI by POI basis.

The relevant submissions to these consultations and the ACCC's views regarding the matters are set out in Section 2 below.

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<sup>1</sup> CCA s 151BUC(2)

<sup>2</sup> Ibid s 151BUC(5)

<sup>3</sup> Ibid s 151BUC(6)

<sup>4</sup> Ibid s 151BUC(2)

## 2. Revised NBN Wholesale Market Indicators Report

### 2.1. Overview

The information to be included in the NBN Wholesale Market Indicators Report is extracted from the confidential reports that NBN Co provides to the ACCC under the NBN SIO RKR. In broad terms, the revised NBN Wholesale Market Indicators Report will provide a count of NBN access services by:

- network access service technology
- state and territory
- each listed NBN Point of Interconnection.
- contracted speed tier
- traffic class
- region, and
- selected NBN access seeker (where it meets the one per cent market share threshold).

The report also includes information on the aggregate contracted capacity across all NBN CVCs and on a POI by POI basis at the end of each quarter. The report will also include the number of NBN access seekers contracted to acquire CVC at NBN POIs.

Further details about the contents of each of the tables are provided in Section 3 below.

It is important to note that the NBN Wholesale Market Indicators Report only provides a view of the wholesale market for NBN access services. It does not include market indicators for the retail NBN market. This is because an NBN access seeker may use an NBN Access Service to 1) provide a retail service directly to an end-user or 2) provide a wholesale service to a retail service provider (RSP) that then provides the service to an end-user. In some scenarios, an NBN aggregation acquirer may resell services to another wholesale customer who then retails the NBN product.

### 2.2. Requirements when issuing a disclosure direction

The ACCC may issue a disclosure direction where it is satisfied that disclosure of the resulting report would be likely to promote competition in the market for listed carriage services or facilitate the operation of one of the statutory regimes identified in sub-section 151BUC(2) of the CCA.

The ACCC is of the view that disclosure of the information in the NBN Wholesale Market Indicators Report would be likely to:

- promote competition in markets for listed carriage services supplied over the NBN
- promote competition in upstream and downstream markets related to the NBN, and
- facilitate the operation of Part XIB and Part XIC of the CCA as those Parts apply to NBN access services.

Part XIB sets up a special regime for regulating anti-competitive conduct in the telecommunications industry and provides the ACCC with authority to prevent such practice by, for example, issuing a competition notice. Persons that consider that anti-competitive conduct is occurring can make a complaint to the ACCC for investigation under this Part.

Part XIC details the telecommunications access regime which applies to declared services pursuant to which an access provider of an active declared service is required to supply the service on terms and conditions agreed with the access seeker. Where mutually agreeable

terms of supply cannot be reached, then there are specified regulatory processes to determine what the terms of access should be. Relevantly, NBN Co is an access provider of declared services for the purpose of NBN access services.

## 2.3. Changes to the Disclosure Direction

The ACCC consulted on changes to the Disclosure Direction during its consultation reviewing the NBN SIO RKR in June 2017. The RKR was subsequently varied in December 2017. In accordance with section 151BUC(6) of the CCA, the ACCC again consulted on a draft Disclosure Direction in December 2017. Having carefully considered the submissions received in response to the consultations the ACCC has made changes to the Disclosure Direction in three key areas.

### 1. *Publishing data by state and territory*

Submissions to the June 2017 consultation broadly agreed that information should be published by state or territory, rather than state based grouping. The original state grouping categorisation related to the operation of the five Interim POIs, but since these now only account for a very small number of NBN services, the rationale for state groupings is significantly reduced.

Some stakeholders considered that publishing data by state and territory would provide increased visibility of the development of the wholesale market. Stakeholders also indicated that reporting by state and territory would assist in targeting resources to areas where market shares are uneven and as such ensure all end users have access to competitive products.

The ACCC also proposed the publication of additional CVC related information in the NBN Wholesale Market Indicators Report, including average CVC to AVC ratio for NBN access seekers and more detailed information about CVC utilisation. Submissions from Telstra, Optus, NBN Co and Comms Alliance indicated that due to differences in how NBN access seekers acquired and provisioned CVC across their NBN services, such information might be misinterpreted if published.

Other submissions from ACCAN, CCC and New Street Research indicated that publishing the proposed CVC related metrics would improve transparency and improve public understanding of NBN product provisioning.

The ACCC considered stakeholder submissions on these matters and, on balance, decided not to proceed with the additional disclosure of CVC utilisation at this point in time because of the sensitivity of the information and potential for misinterpretation of the different CVC provisioning levels between NBN access seekers.

The ACCC will continue to internally monitor and analyse the confidential CVC utilisation information that NBN Co reports under the NBN SIO RKR. This analysis will be improved further by the implementation of the recent NBN SIO RKR variation to require more detailed reporting of CVC information and other data collected by the ACCC.

In accordance with the proposal, the revised Disclosure Direction provides for reporting by state and territory rather than state grouping.

### 2. *Reducing the threshold for identification of access seekers*

The previous Disclosure Direction provided a count of TC-4 AVC services acquired by NBN access seekers with greater than five per cent of the TC-4 services in operation relevant to each Network Access Service type. The services of all other NBN access seekers were aggregated under the 'Other access seekers' line item. However, as the quantity of NBN services grew and the proportions of new SIOs added changed for each technology type the five per cent threshold meant that fewer smaller access seekers were being reported in the tables. The ACCC notes that the previous five per cent threshold meant that for all

technology types other than satellite, only the top four NBN access seeker groups were reported.

The ACCC sought submissions on a lower threshold for naming NBN access seeker groups in Tables 4, 5, 6 and 7. For example, the ACCC indicated that the market share threshold could be reduced from five per cent to one per cent of the AVCs per NBN Access Service type, or alternatively, set to a minimum number of access services (such as 1,000).

Submissions from ACCAN, Comms Alliance and New Street Research supported a reduction in the threshold for identifying NBN access seeker groups individually to one per cent. Telstra submitted that it did not have a preference in relation to the options proposed, but in principle supported reducing the threshold from the current level.

The ACCC considers identifying more NBN access seeker groups will promote competition through increased transparency as to the level of competition developing on the NBN. Lowering the threshold to one per cent market share for each technology type means that several more NBN access seeker groups will be reported, but smaller NBN access seeker groups will continue to be reported under the 'Other access seekers' grouping.

Applying a percentage rather than an absolute number (e.g. minimum number of services) provides a balance between providing some relativity (through use of a percentage) to total number of services and setting a fixed number in terms of reporting as the total number of services increases as the NBN continues to be rolled out.

The revised Disclosure Direction requires reporting of access seekers with more than one per cent market share.

### *3. Publishing more detailed AVC and CVC data for each POI*

The ACCC considers publishing AVC and CVC related metrics for each Listed POI would improve transparency and improve public understanding of the NBN rollout, NBN product provisioning and the geographic distribution and take-up of NBN services.

In its submission on the proposed changes to the Disclosure Direction Telstra submitted that the publication of AVC and CVC information on a POI by POI basis will provide valuable information to NBN access seekers and NBN aggregation providers about NBN take-up on a more granular geographic basis.

NBN Co noted that the information in the proposed Table 8 could be used to calculate average CVC dimensioning per AVC in respect of each Listed POI. NBN Co stated that some caution would be required in interpreting any apparent differences between POIs, because the progress of the rollout is at different stages at each POI. NBN Co suggested that if the ACCC decided to proceed with Table 8, the table should include only the count of AVCs and count of NBN access seeker groups with contracted CVC capacity at each POI and exclude the sum of contracted CVC capacity

The ACCC notes that the information will enable the calculation of how much CVC capacity has been contracted at each POI (on the last day of the reporting period) on a per user basis. The ACCC considers that, at a high level, information on CVC per user (at each POI) over time will provide greater transparency and visibility into how much CVC capacity is being acquired over the NBN. Importantly, this time series information will give a high level insight of how the industry is meeting the capacity demand of customers.

Further, the acquisition of CVC capacity is an operational decision that individual NBN access seeker groups make based on a range of factors including individual RSP marketing plans, existing RSP customer base and the RSP's technology mix at each POI. This means that there will be variations between the reported CVC (i.e. the aggregate contracted CVC of all access seekers at the POI) and the actual CVC acquired by individual NBN access seekers. However at a high level, the amount of CVC acquired at each POI will provide increased insight into the acquisition of CVC on a more granular geographic basis.

The ACCC notes the possibility that CVC per user variability at POIs has the potential to be misinterpreted, however it considers the importance of understanding how much CVC is provisioned at a more detailed geographic level outweighs any potential for misinterpretation.

The ACCC considers that publication of AVC and CVC information on a POI by POI basis will provide valuable information to stakeholders regarding NBN take-up.

## 2.4. Promotion of competition

The ACCC considers that publishing the report will improve the availability of reliable market information and allow market participants to make better and more informed decisions. The ACCC considers that the changes will promote competition in the following ways.

- Publishing data by state and territory will improve transparency, provide greater detail on the status of the NBN rollout in particular geographic areas and improve public understanding of NBN product provisioning.
- Reducing the market share threshold to identify more NBN access seeker groups will promote competition through increased transparency as to the level of competition developing on the NBN.
- Publishing selected AVC and CVC data for each of the 121 POIs will further improve the range of information regarding NBN markets and therefore improve the ability of service providers to deliver innovative products and improve economic efficiency.

Publishing this additional information is likely to reduce information asymmetries that would otherwise exist between NBN access seekers, those considering entry as an NBN access seeker and NBN retail service providers and application service providers, amongst others, in respect of NBN access markets.

Such improvements in transparency allows NBN market participants to compete efficiently on their respective merits as service providers on the NBN, rather than on the basis of some having access to richer or timelier market information.

## 2.5. Facilitate the operation of Parts XIB and XIC of the CCA

The ACCC is satisfied that publishing the report will be likely to facilitate the operation of Parts XIB and XIC of the CCA.

The ACCC considers that the report will facilitate the operation of Part XIB of the CCA by making available detailed market information that will assist parties should they have any concerns relating to the roll out of the NBN and the potential for anti-competitive conduct. The report will provide stakeholders with a better opportunity to assess whether the market conduct that they are concerned about may be having a substantial effect on emerging market outcomes.

The ACCC considers that the report will also facilitate commercial negotiation between NBN Co and NBN access seekers, which is the principal means envisaged by Part XIC to establish the terms of supply of NBN access services. The report will, for example, provide visibility on the extent to which a range of NBN access seekers have secured access to different types of NBN access services. This will likely provide NBN access seekers with greater confidence to agree to NBN access arrangements, or alternatively pursue negotiations with NBN Co for alternative access arrangements where they consider that efficient market outcomes are not emerging.

Publication of the report would also facilitate the operation of Part XIC by making important market information that the ACCC would likely rely upon in making and explaining its decisions under this Part available to interested parties. This will in turn lead to more

informed submissions to ACCC regulatory processes and ensure that the regulatory regime is appropriate and promotes competitive market outcomes.

The new requirement to publish information on a POI by POI basis will further improve the consideration of Part XIB and Part XIC issues by stakeholders as set out above.

## 2.6. Legitimate commercial interests

In deciding to vary the Disclosure Direction to NBN Co the ACCC had regard to the legitimate commercial interests of NBN Co and NBN access seekers and has formed the view that doing so would not harm those interests.<sup>5</sup>

The ACCC notes that the current Disclosure Direction has been in force since March 2016 and that the ACCC has now published eight NBN Wholesale Market Indicators Reports. The reports are widely accepted and have been the subject of regular media reports. The ACCC has not received any complaints regarding adverse impacts on commercial interests from publication of the report.

The ACCC raised the potential to lower the threshold for naming individual access seekers in its June discussion paper and sought comment on the impact of this proposal. The proposal raised little comment from smaller RSPs. Some stakeholder groups considered lowering the threshold would improve transparency and would be a positive outcome.

While some additional access seeker groups will be identified those with under one per cent market share will be categorised as ‘other’ and as such not identified individually. Additionally, the ACCC will directly notify each current NBN access seeker outlining the revisions to the NBN SIO RKR Disclosure Direction and the potential impact in terms of identification of individual access seekers.

## 3. Explanation of Included Tables

### 3.1. NBN services in operation data

Table 1 reports services in operation data as at the end of the calendar quarter for each Network Access Service (access technology) by AVC traffic class on a national basis. It includes the count of the total number of AVCs and the sub-count of AVCs for each data transfer rate ‘tier’.

Table 1 includes commercially available NBN access technologies. New technologies (for example, fibre-to-the-curb) will be added to the table as these are rolled out.

### 3.2. CVC data

Table 2 provides the sum of contracted CVC capacity for each CVC traffic class by each state or territory at the end of the calendar quarter.

### 3.3. NBN access seeker groups at POIs data

Table 3 provides a count of Listed POIs that have a specified number of NBN access seeker groups with contracted CVC capacity at the POI, and the same count relating to non-Listed POIs at the end of the calendar quarter.

For example, Table 3 will state, for each type of POI, the number of POIs at which no NBN access seekers have contracted to acquire CVC capacity, the number with one NBN access seeker group that has contracted capacity, and so on, until the maximum number of NBN

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<sup>5</sup> Ibid s 151BUC(5)

access seeker groups that have contracted to acquire CVC capacity at a single POI is reached.

Acquiring CVC capacity at a POI is an essential pre-condition for an NBN access seeker to supply services from a POI. Hence Table 3 will give an indication of the breadth and depth of the NBN access seeker footprint across the NBN.

### 3.4. Access seeker services in operation data

Tables 4, 5, 6 and 7 provide a count of TC-4 AVC services acquired by NBN access seekers with greater than one percent of the TC-4 services in operation relevant to each Network Access Service type at the end of the calendar quarter. The services of all other NBN access seekers will be aggregated under the 'Other access seekers' line item.

Table 4 provides the count of TC-4 AVCs by NBN access seeker group for each relevant Network Access Service.

Table 5 provides the count of TC-4 AVCs on a national basis by NBN access seeker group and by contracted speed tier across all Network access services.

Table 6 provides the count of TC-4 AVCs by NBN access seeker group by state or territory.

Table 7 provides the count of TC-4 AVCs on a national basis by NBN access seeker group by metropolitan/outer metropolitan/regional/non-Listed POI designation.

For the purposes of Table 7, an AVC that is supplied as a Satellite Access Service will be designated as *regional*. For other Network Access Services, an AVC that is supplied on a Network Access Service that is connected to a Listed POI is to be designated as *metropolitan*, *outer metropolitan* or *regional* as per the table provided in "Listed Points of Interconnection – NBN Corporation", published by the ACCC on 2 November 2012.

Otherwise, the AVC is designated as *non-Listed POI* because a NBN Access Service supplied from a non-Listed POI could be supplied to a metropolitan, outer metropolitan or regional area, and hence cannot be geographically identified.

### 3.5. Point of Interconnection services in operation data

Table 8 provides the count of AVCs by traffic class across the specified Network access services for each Listed POI at the end of the calendar quarter. This table will also include the sum of contracted CVC capacity for each traffic class and count of NBN access seeker groups with contracted CVC capacity at each POI.

Specifically, for each Listed POI, the table will include the following information:

- count of TC-1, TC-2 and TC-4 AVCs for FTTP, FTTN, FTTB and HFC access services
- count of TC-1, TC-2 and TC-4 AVCs for the Wireless access service
- sum of contracted TC-1, TC-2 and TC-4 CVC capacity, and
- count of NBN access seeker groups with contracted CVC capacity at the POI.

AVCs supplied on a Satellite Access Service will not be reported in Table 8 and Satellite-only NBN access seeker groups will not be reported in the count of NBN access seeker groups with contracted CVC capacity.

Table 8 expands the level of detail in published information regarding the geography of NBN access services and CVC capacity provisioned. The ACCC considers that introducing a reporting requirement in this level of detail at this stage of the roll out, rather than at an earlier stage, is appropriate.