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Dear Mr Riordan

NBN Services in Operation Record Keeping Rules

This letter relates to the draft NBN Services in Operation Record Keeping Rules and explanatory statement, released by the ACCC for consultation on 4 August 2014 (**Draft RKR**). Telstra welcomes the opportunity to comment on the Draft RKR.

Approach to issuing the Draft RKR

The Draft RKR has been developed by the ACCC in accordance with its powers under section 151BU of the *Competition and Consumer Act 2010* (Cth) (**CCA**). While section 151BU(1) of the CCA grants the ACCC the power to make record-keeping rules, section 151BU(4) sets out limitations in relation to the exercise of that power. In this regard, Telstra understands that the ACCC is exercising its powers “*in order to obtain information that is relevant to the operation of Part XIB and XIC of the CCA.*”¹

Telstra notes that the Productivity Commission’s Regulator Audit Framework proposes that regulators apply a ‘risk-based’ approach to reporting and monitoring requirements:

*“The most important high level principle to minimise the cost of monitoring and compliance while achieving the objectives of the regulation is for the regulator to apply a risk-based and proportionate approach. ‘Light-handed’ approaches, including allowing businesses flexibility in how they meet their compliance obligations, should be taken where possible.”*²

Furthermore, in its Statement of Intent, the ACCC “*notes the Government’s deregulation agenda and commits to acting in accordance with regulatory best practice*”.³ Although the Statement of Intent does not outline specific areas of priority in terms of the deregulation agenda, or refer to specific initiatives aimed at reducing the cost and burden of regulation, it does set out general commitments to reduce compliance costs and to apply a “*principled and risk based approach*”.⁴

In exercising its statutory powers, Telstra believes that the ACCC should look to reduce compliance costs and avoid intervention unless it is absolutely necessary.⁵ The test for intervention is therefore one

¹ NBN Services in Operation Record Keeping Rules, Explanatory Statement, August 2014, at p 1 (**Explanatory Statement**).

² Productivity Commission, ‘Regulator Audit Framework’ (2014) at p 21.

³ ACCC Statement of Intent, p 1, available at <http://www.accc.gov.au/system/files/ACCC%20Statement%20of%20Intent%20-%202026%20June%202014.pdf>.

⁴ ACCC Statement of Intent, p 2, available at <http://www.accc.gov.au/system/files/ACCC%20Statement%20of%20Intent%20-%202026%20June%202014.pdf>.

⁵ See also, Telstra’s Submission to the NBN Panel Experts Cost-Benefit Analysis and Review of Regulation: Response to Telecommunications Regulatory Arrangements Paper 16 April 2014.

of both relevance (as required under section 151BU(4) of the CCA) and necessity, weighed against the costs of compliance.

While Telstra cannot speak to NBN Co's compliance cost assessment,⁶ Telstra believes that various aspects of the Draft RKR are neither "relevant to the operation"⁷ of Parts XIB and XIC of the CCA nor are they necessary at this time.

Telstra encourages the ACCC to reconsider the need for the Draft RKR. If the ACCC still considers there is a need for monitoring and reporting through use of record-keeping rules, then Telstra considers that the Draft RKR should be narrowed to address the specific information that is necessary to monitor CVC usage. Further information on this is set out below.

Telstra also considers that the ACCC should prepare a "Regulation Impact Statement" (**RIS**) prior to issuing any record-keeping rules, consistent with the Government's best practice regulation requirements.⁸

Scope of the Draft RKR

The Draft RKR requires NBN Co to provide information in relation to a number of matters, including (a) Access Virtual Circuit (**AVC**) services in operation, (b) Connectivity Virtual Circuit (**CVC**) capacity / utilisation and (c) new network access services and product features / components.

As noted by the ACCC, the Draft RKR provides the ACCC with oversight to facilitate the long term interest of end users (**LTIE**) "by providing information on the rate and level of take-up of different NBN access services, as well as individual components and features of these services, and the resulting market shares by NBN Retail Service Provider".⁹

The Draft RKR provides for NBN Co to retain and provide a variety of access seeker related information in this regard, including the provision of disaggregated information about each access seeker's acquisition of FTTP access services, wireless services and satellite services at each Point of Interconnection (**POI**).

In its submissions on NBN Co's Special Access Undertaking, Telstra noted that the ACCC could use its existing powers (under Part XIB of the CCA) to make record-keeping rules to monitor CVC pricing and usage. Through this mechanism, the ACCC could ensure that CVC pricing develops in a way that is not detrimental to the LTIE. Telstra maintains that this is an appropriate option for the ACCC at the right time.

However, Telstra is concerned to ensure that any record-keeping rule is only issued if there is a genuine need to do so, and when it is issued it applies only to the extent necessary. At this point in time (particularly given current regulatory settings),¹⁰ Telstra considers:

- there is no justification for any record-keeping rule in relation to AVC services in operation, CVC pricing and usage or new network access services; and
- even if justified, the scope of the Draft RKR exceeds what is necessary, particularly given the extent to which the information goes to the downstream market share of access seekers.

⁶ Explanatory Statement, p 3, which provides that NBN Co considers the compliance burden to not be significant.

⁷ A statutory requirement under sections 151BU(4)(c) and 151BU(4)(d).

⁸ The Australian Government Guide to Regulation, available at http://www.cuttingredtape.gov.au/sites/default/files/documents/australian_government_guide_regulation.pdf.

⁹ Explanatory Statement, p 2.

¹⁰ Including NBN Co's status as a wholesale-only provider, its non-discrimination obligations and the various commitments made under the SAU.

Telstra considers that the ACCC does not need information about each access seeker's individual demand at each POI for NBN services in order to ensure compliance with section 151AK or for the operation of Parts XIB or XIC of the CCA. Monitoring for the purposes of Part XIB should only occur in relation to potential bottleneck competition issues and a detailed breakdown of access seeker information is not necessary at this time for either of Part XIB or XIC. Telstra believes the ACCC's focus should be on NBN Co's conduct, rather than the downstream market shares of access seekers and information retention in this regard.

Furthermore, in the Explanatory Statement of the Draft RKR, the ACCC states that:

"...in relation to legacy fixed-line services supplied over Telstra's copper customer access network (CAN) the ACCC has for a number of years used the CAN RKR to obtain detailed information about the take-up of wholesale line rental, ADSL, ULLS and LSS services."¹¹

The ACCC goes on to state that:

"At present the ACCC has no similar source of information about the take-up of NBN access services, including by geographic area and among different NBN access seekers. This creates a gap in terms of the ACCC's understanding of the state and evolution of competition on the NBN. Such information has been essential for the ACCC to be able to perform its regulatory functions under Parts XIB and XIC of the CCA over the legacy copper network and will continue to be on the NBN."¹²

Telstra considers that the Draft RKR extends to information that is even more comprehensive than the information it requires in relation to legacy services. Furthermore, the implementation of the CAN RKR was part of a package designed to collect information in order to promote regulatory roll-back. As explained by the ACCC:

"Where the market is delivering effective, sustainable competitive outcomes, the ACCC has indicated that declarations should be wound back if they are no longer required to promote the interests of end-users. Any decisions in this regard should be based on robust geographically delineated empirical data. However, while the Commission receives data on an ad hoc basis to various reviews and assessment processes, this information is generally not provided by parties in a manner amenable to time series analyses. This is a significant impediment to the ACCC's capacity to consider future adjustments to the scope of declarations.

Accordingly, in order to properly examine this issue, the ACCC issued a discussion paper in March 2007 proposing a Communications Infrastructure Audit which would utilise the RKR framework to collect (and regularly update) information regarding the nature and location (including take-up in certain circumstances) of competing infrastructure.² The discussion paper proposed issuing record keeping requirements covering a number of categories of information including Telstra's CAN. A clear majority of submissions supported the audit."¹³

These same incentives and circumstances do not exist in relation to NBN services at this time.

Narrow the scope of the Draft RKR to aggregated usage for CVC

¹¹ Explanatory Statement, p 2.

¹² Explanatory Statement, p 2.

¹³ ACCC, Regulatory Impact Statement, Telstra customer access network recording keeping and reporting rule, September 2007, p 5.

Telstra considers, in a number of respects, that the Draft RKR goes beyond what is required under section 151BU or necessary at this point in time. If the ACCC does decide to issue record-keeping rules in relation to NBN Co at this time, then Telstra believes these should be confined to aggregate CVC demand and accompanied by a RIS on the options for assessing CVC demand. With this information, the ACCC would be able to perform its regulatory functions under both Parts XIB and XIC of the CCA through the period of transition from the legacy copper network to the NBN.

Telstra is available to provide further information in relation to the detail of the Draft RKR if required.

Yours sincerely,



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