

nbn submission to ACCC – Review of NBN SIO RKR and NBN Wholesale Market Indicators Report – Consultation Paper

1 August 2017





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1. Introduction

1. **nbn** is pleased to respond to the ACCC’s Consultation Paper in regard to its Review of the NBN Services in Operation Record Keeping Rules (**the RKR**) and NBN Wholesale Market Indicators Report.
2. **nbn** has no objection to the extension of the RKR for a specified period of time. The RKR has been in place for a relatively short time and **nbn** does not see the need to change its scope unless there is clear evidence that the RKR is targeting the wrong information or is incomplete in some way. There does not appear to be any evidence that the RKR is not working appropriately. Hence, **nbn** submits that the RKR should be extended without further amendment.
3. **nbn** notes the ACCC’s view that the RKR provides oversight of NBN services being offered and allows the ACCC to monitor how competition is developing over the NBN. **nbn** understands that the RKR might assist the ACCC in monitoring downstream competition and **nbn** believes this should be the focus of collecting and using the RKR data.
4. However, there are a number of assertions made by the ACCC in the Background section of the Consultation Paper with which **nbn** does not agree. The ACCC states that **nbn** is “a monopoly provider” without appearing to acknowledge the presence of other companies which provide wholesale broadband access, including other fixed and wireless providers. The ACCC then goes on to say that this monopoly status requires ACCC oversight to ensure the terms and conditions of access are in the LTIE and that the NBN SIO RKR “facilitates this” by providing information on the rate and level of take up of different NBN access services.
5. The ACCC appears to directly link the rate and level of take up of different NBN access services in the ACCC’s Consultation Paper with the terms and conditions of access as the only influencing factor. However, the rate and level of take up of NBN access services is influenced by a wide range of factors. For example, different RSPs will have different business models and will target different end user groups and these factors will play a strong role in relation to the take up of different NBN access services (e.g. how much CVC is ordered per AVC and the market segments that are the focus of marketing efforts). Another factor relevant to the rate and take up of NBN access services in different geographic areas will be the cost of backhaul beyond the point of interconnect.
6. **nbn** submits that the ACCC should take account of a wide range of factors influencing downstream competition, including any legacy market power issues, before drawing conclusions about the impact of one factor or another. Information gathered under the RKR is only one source of information which is relevant to the ACCC’s assessment of downstream competition.
7. Our comments are set out below and relate to the following aspects of the Consultation Paper:
 - (a) continued operation of the RKR;
 - (b) variation of the RKR; and



- (c) the Disclosure Direction.

2. Continued operation of the RKR

2.1 Extension of the RKR

- 8. As discussed in the introduction section, **nbn** has no objection to the extension of the RKR, without further amendment. Any extension should be for a limited period only and not exceeding three years.
- 9. **nbn** submits that it is good practice to include a sunset date to prompt a subsequent review of the ongoing need for and design of the RKR, and it is important to note that the **nbn**TM network is still being rolled out and the market environment in which **nbn** supplies services is rapidly evolving.

2.2 Application of the RKR to other superfast broadband access providers

- 10. **nbn** submits that all superfast broadband access providers, not just services provided by **nbn**, should be subject to this RKR, if extended, and disclosure directions. Information about the rate and take up of superfast broadband access services would provide for a more complete understanding of the development of superfast broadband (at a wholesale level) and downstream competition across the fixed segment as a whole.

3. Variation of the RKR

3.1 General comments

- 11. **nbn** submits that the RKR should be extended without any further variation. As discussed in the introduction, the RKR has only been in place for a relatively short time.
- 12. **nbn** does not see the need to change the scope of the RKR unless there is clear evidence that the RKR is targeting the wrong information or is incomplete in some way. Any variations then need to be clearly (and specifically) justified with reference to the relevant statutory provisions.
- 13. **nbn** highlights that any variations may impose additional up-front and ongoing costs on **nbn** and may require lead time to implement. **nbn** has already devoted considerable resources in establishing a framework and processes to report in accordance with the RKR. The ACCC needs to carefully consider any proposed variations in terms of their cost and benefit.
- 14. In addition, the ACCC's consideration of any variations needs to take into account other relevant initiatives underway (e.g. the ACCC's broadband performance monitoring program), the appropriate balance between ex-ante and ex-post information gathering, and from whom (**nbn** or RSPs) information should be gathered. There is also the potential to vary the RKR in future as and when it becomes apparent that reporting of additional information may be justified.



3.2 AVCs per CVC link

15. It is unclear to **nbn** how varying the RKR to include additional information on the number of AVCs per CVC link is justified with reference to the matters specified under sub-section 151BU(4) of the *Competition and Consumer Act 2010 (CCA)*.
16. With regard to the ACCC's role under Parts XIB and XIC of the CCA, it is unclear what relevant insight the ACCC would gain from reporting of AVCs per CVC link that could not be gained from the existing scope of the RKR. The RKR already requires **nbn** to report the number of AVCs (by access technology, data transfer rate tier and traffic class) acquired by each RSP at each POI, as well as the contracted capacity, traffic class and utilisation of each CVC acquired by each RSP at each POI. This facilitates analysis of CVC contention (i.e. CVC per AVC) at the POI level for each RSP, and represents an appropriate level of granularity.

3.3 Number of hours per day that CVC utilisation exceeds 95%

17. It is unclear to **nbn** how varying the RKR to include additional information on the number of hours per day that CVC utilisation exceeds 95% (or some variant of such a threshold-based metric) is justified with reference to the matters specified under sub-section 151BU(4) of the CCA.
18. As noted above, the RKR already provides for reporting of the contracted capacity, traffic class and utilisation (average and peak period) of each CVC acquired by each RSP at each POI.
19. Regarding a threshold-based metric, **nbn** highlights the following points.
 - (a) There is no specific percentage utilisation threshold (e.g. 95%) that will be relevant/meaningful in every context – the interaction between the capacity of the CVC, the traffic profile and the nature of the RSP's retail product offerings are also highly relevant to whether a CVC is appropriately dimensioned.
 - (b) RSPs shape their own traffic before it reaches the **nbn**TM network. Such shaping may be quite sophisticated and involve prioritising certain types of traffic and deprioritising other types of traffic. Although an RSP may have high (e.g. above 95%) CVC utilisation at some times of day, this does not, on its own, support any definitive conclusions regarding end-user experience.

3.4 Frequency of reporting

20. It is unclear to **nbn** how varying the RKR to increase the frequency of reporting (for some or all of the items in the RKR) from quarterly to monthly is justified with reference to the matters specified under sub-section 151BU(4) of the CCA.
21. It is unclear what relevant insight the ACCC would gain from monthly reporting that could not be gained from the existing quarterly reporting frequency. Monthly data would simply highlight that



there are some (month to month) fluctuations around the trends that are evident in the quarterly data.

22. Furthermore, it is not clear that monthly data would provide any additional insights than the current quarterly data. In the Consultation Paper, the ACCC states that monthly reporting “would enable the ACCC to more closely monitor changes to AVC-CVC utilisation and the impact of CVC pricing changes on the provisioning behaviour of access seekers.”
23. **nbn** disagrees with this statement. **nbn** notes again its comments that CVC pricing is only one factor that influences provisioning behaviour of access seekers.
24. Furthermore, it is not clear what additional insights will be obtained from this monthly data. Any price change will take some time to filter through to how RSPs will provision CVC capacity. There is no direct correlation between the exact timing of CVC price changes and CVC provisioning. Sometimes CVC provisioning changes will happen quickly and sometimes they will happen slowly or not at all (e.g. the price reduction will not result in any additional capacity being acquired). Directly correlating the timing of wholesale price changes and provisioning is misleading at best, and dangerous at worst. It does not justify monthly RKR reporting.
25. Monthly reporting would also place a significant ongoing burden on **nbn**, tripling the resources required¹ to support RKR reporting over the course of a year.
26. **nbn** notes that the CAN RKR (applicable to Telstra) has always required reporting on a quarterly basis. Given that the RKR has been developed to replace the legacy CAN RKR, it is not clear why the RKR should require more frequent reporting.

4. Disclosure Direction

27. If the ACCC reissues (and potentially varies) the Disclosure Direction, its decision needs to be clearly (and specifically) justified with reference to the relevant statutory provisions.
28. **nbn** notes that the ACCC will conduct a separate consultation in regard to the Disclosure Direction in due course. In the meantime, **nbn** highlights the following points.
 - (a) The ACCC’s consideration of how to proceed with the Disclosure Direction needs to take into account other relevant initiatives underway (e.g. the ACCC’s broadband performance monitoring program). There is also the potential to vary the Disclosure Direction in future as and when it becomes apparent that disclosure of additional information may be justified.

¹ For each reporting cycle, **nbn** has to undertake a range of activities related to data extraction, validation, compilation, presentation and explanation. Although automated reports are used to start the process, the other activities are largely manual, and need to be repeated for each reporting cycle.



- (b) In relation to the possible variations to the Disclosure Direction outlined in the Consultation Paper, there are many factors that determine the end to end performance of an end user's service, and many of these do not relate to the **nbn**TM network. In view of this, any disclosure of information on CVC dimensioning (i.e. CVC per AVC) or CVC utilisation would need to be accompanied by detailed explanations and caveats to aid interpretation (and avoid mis- or over-interpretation).