



AUSTRALIAN COMPETITION
& CONSUMER COMMISSION

NBN Services in Operation Record Keeping and Reporting Rules – Disclosure Direction

Explanatory Statement

September 2020

Australian Competition and Consumer Commission

23 Marcus Clarke Street, Canberra, Australian Capital Territory, 2601

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1. Background

1.1. The NBN SIO RKR Disclosure Direction

Under the NBN Services in Operation Record Keeping and Reporting Rules (NBN SIO RKR) 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 SIO RKR. The Disclosure Direction expires once the NBN SIO RKR ceases to be in effect. The NBN SIO RKR has recently been extended until 2025.

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

1.2. Authority to issue a disclosure direction

The ACCC may issue a direction to a carrier or carriage service provider under section 151BUC of the *Competition and Consumer Act 2010* (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.¹

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.²

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.³

1.3. NBN SIO RKR extension consultation - 2020

In July 2020, the ACCC sought comment from stakeholders regarding a proposal to extend the operation of the NBN SIO RKR. Extending the NBN SIO RKR also extends the operation of the NBN SIO RKR Disclosure Direction. The ACCC also invited NBN Co and other stakeholders to make submissions on any other matters.

Stakeholders agreed that the NBN SIO RKR should be extended, with Aussie Broadband, Telstra and Australian Communications Consumer Action Network (ACCAN) supporting the ACCC's preferred period of five year. Optus suggested the NBN SIO RKR should be

¹ CCA s.151BUC(2)

² *ibid* s.151BUC(5)

³ *ibid* s.151BUC(6)

extended indefinitely and NBN Co preferred a three year extension. The ACCC has decided to extend the NBN SIO RKR for five years to cover the period when the NBN roll out is expected to be completed and beyond.

NBN Co made two submissions regarding the NBN SIO RKR Disclosure Direction;

1. Extend the reporting period from 28 calendar days to 30 calendar days, and
2. Remove the requirement to report on non-Listed POIs, which are no longer operating.

The ACCC considers that NBN Co.'s request to extend its reporting period to allow some flexibility for months with public holidays is acceptable and that the removal of reporting requirements for non-Listed POIs is appropriate.

Telstra submitted that average CVC per user should be reported on a POI by POI basis, however the ACCC notes the information enabling this calculation is currently reported under Table 8 in the Disclosure Direction and does not need to be separated published.

Telstra also submitted that reporting on bundled services and CVC overage should be introduced. However, these are not currently reported under the NBN SIO RKR so cannot be included in the Disclosure Direction. The ACCC will consider the scope of the NBN SIO RKR reporting requirements and also the scope of the Disclosure Direction in a separate consultation.

No other submissions were made regarding the NBN SIO RKR Disclosure Direction. The submissions to the NBN SIO RKR extension consultation have been uploaded to the [ACCC website](#).

2. Amendment to NBN SIO RKR Disclosure Direction

2.1. 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)(b) 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
- 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.

2.2. Promotion of competition

The ACCC considers that publishing the NBN Wholesale Market Indicators Report improves the availability of reliable market information and allows telecommunications market participants, including wholesale access seekers, upstream and downstream service providers and alternative network providers, to make better and more informed decisions.

2.3. Facilitate the operation of Parts XIB and XIC of the CCA

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

The ACCC considers that the report facilitates the operation of Part XIB of the CCA by making available detailed market information that assists parties should they have any concerns relating to the roll out of the NBN and the potential for anti-competitive conduct. The report provides 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 also facilitates 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, for example, provides 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 also facilitates 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.

2.4. 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.⁴

The ACCC notes that the current Disclosure Direction has been in force since March 2016 and that the ACCC has now published over four years of NBN Wholesale Market Indicators Reports. The reports are widely accepted and have been the subject of regular media commentary.

2.5. Changes to the Disclosure Direction

The ACCC provided NBN Co with a draft of the proposed Disclosure Direction on 18 September 2020 in accordance with 151BUC(6) of the CCA.

NBN Co advised the ACCC that it had no comment regarding the draft Disclosure Direction. Accordingly, the ACCC has decided to make the following amendments to the NBN SIO RKR Disclosure Direction to:

1. Extend the reporting period from 28 calendar days to 30 calendar days in subclause 1(c)(ii) of the Disclosure Direction, and
2. remove the requirement to report on non-Listed POIs in Table 4 and Table 7 of Schedule 1 of the Disclosure Direction.

These changes will be reflected in the NBN Wholesale Market Indicators Report from the September 2020 quarter onwards.

⁴ Ibid s.151BUC(5)