



AUSTRALIAN COMPETITION
& CONSUMER COMMISSION

NBN Services in Operation

Record Keeping Rules

Explanatory statement

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1. Introduction

This explanatory statement accompanies the NBN Services in Operation Record Keeping Rules 2017 (NBN SIO RKR).

1.1. Regulatory framework

Under section 151BU of the *Competition and Consumer Act 2010* (CCA), the ACCC can make record keeping rules (RKR) that require one or more specified carriers to keep and retain records and give reports to the ACCC consisting of information contained in those records.

The ACCC cannot require a carrier to keep and retain records unless they will contain information relevant to specified matters, which are:

- determining compliance with the Competition Rule (section 151AK of the CCA)
- determining compliance with tariff filing directions
- the operation of Part XIB of the CCA (other than Division 6)
- the operation of Part XIC of the CCA
- the operation of the *National Broadband Network Companies Act 2011* or regulations under that Act
- the operation of Part 9 of the *Telecommunications (Consumer Protection and Service Standards) Act 1999* which deals with regulation of Telstra's charges
- the operation of Division 3, Part 20 of the *Telecommunications Act 1997* which deals with the Rules of Conduct relating to dealings with international telecommunications operations

Sections 151BUA, 151BUB and 151BUC of the CCA give the ACCC the power to disclose, or to require carriers or carriage service providers to disclose, reports prepared in accordance with an RKR.

1.2. NBN Services in Operation RKR

The NBN SIO RKR was first issued in September 2014 in order to obtain information that is relevant to the operation of Part XIB and Part XIC of the CCA.

Under Part XIB, the ACCC is responsible for enforcing the telecommunications specific anti-competitive conduct provisions as well as providing the Minister with annual reports including a report on competitive safeguards within the telecommunications industry.

The objective of Part XIC of the CCA is to promote the long-term interests of end-users (LTIE), which comprises the objectives of:

- promoting competition
- achieving any-to-any connectivity in relation to carriage services that involve communication between end-users, and
- encouraging the economically efficient use of, and investment in, infrastructure supplying telecommunications services.

The ACCC has a number of statutory functions under Part XIC of the CCA including declaration of listed carriage services, conducting inquiries for access determinations (containing price and non-price terms of access) for declared services and the assessment and enforcement of special access undertakings and anticipatory exemption applications.

The ACCC also has ancillary enforcement functions under Part XIC including ensuring access providers (including NBN Co) comply with the standard access obligations set out in sections 152AR and 152AXB of the CCA.

The ACCC's performance of these statutory functions, and the operation of Part XIB and Part XIC of the CCA more generally, is predicated on the ACCC receiving timely and reliable information concerning the state of competition in telecommunications markets, information regarding how competitive dynamics are changing over time and information on the efficient use of, and investment in, telecommunications infrastructure.

In this regard, the NBN SIO RKR provides for the reporting of highly relevant information on demand for NBN Co services – in terms of services in operation, referred to as access virtual circuits (AVC) and network capacity, referred to as connectivity virtual circuits (CVC). It also provides information on the geographical distribution of NBN services.

Such information is crucial for the ACCC to be able to monitor how competition develops over the NBN and whether the use of and investment in telecommunications networks occurs in an efficient manner. Competition and efficient investment are important for economic efficiency, which in turn leads to outcomes that will be in the LTIE. Where wholesale access seekers are able to acquire identical products, an understanding of the variety of provisioning methods of these products is essential to understand economic efficiency, particularly dynamic and allocative efficiency.

The NBN SIO RKR will continue to facilitate important internal ACCC analysis and consideration of the NBN by providing detailed information on the rate and level of take-up of different NBN services and the resulting market shares by NBN Retail Service Providers (RSPs).

Furthermore, varying the NBN SIO RKR to require the more detailed reporting of CVC information will improve the ACCC's ability to monitor CVC provisioning and usage. This will provide insight into how RSPs are provisioning CVC in order to make efficient use of the NBN and engage fully in downstream markets. More detailed CVC information will also allow the ACCC to better consider NBN Co's development and implementation of its wholesale product offerings, which will continue to evolve over time.

1.3. Consultation

Overview

In June 2017, the ACCC began consulting on whether to extend, or to vary and extend the NBN SIO RKR. In September 2017 the ACCC extended the NBN SIO RKR for a further three years until September 2020.

Submissions to the June 2017 consultation provided feedback regarding a range of proposed variations to the NBN SIO RKR that assisted the ACCC in narrowing the scope of variations. In October 2017 the ACCC released a further consultation paper that sought views from stakeholders regarding the following three matters:

1. Whether drafting amendments should be made to update the RKR to account for the Multi Technology Mix (MTM) services
2. Whether the reporting of CVC information should be changed from quarterly to daily (or hourly for the TC4 peak period), and
3. Whether an additional rule, that would allow the ACCC to request reports based on the NBN SIO RKR information 'as and when required', be incorporated into the RKR.

1.3.1. Multi Technology Mix variations

The proposal to vary the record keeping rule to account for changes to the differing technology types introduced under the multi technology mix was supported by Telstra, Comms Alliance and NBN Co. The revised drafting proposes to streamline the original NBN

SIO RKR by removing reference to specific technologies in Rules 6, deleting Clauses 7 and 8 and incorporating all NBN services under Rule 6 which will refer to Existing Network Access Services.

1.3.2. More detailed CVC reporting variations

June 2017 consultation

The ACCC sought feedback from stakeholders in the June 2017 consultation paper on a new reporting requirement for NBN Co to report more detailed CVC utilisation information. Specifically the ACCC proposed that information, identifying when utilisation by an access seeker exceeded a certain capacity for a CVC link, be recorded and reported under the RKR.

June 2017 consultation - submissions

Submissions indicated that assessing whether an arbitrary CVC utilisation threshold (for example, 95 per cent) had been exceeded would not provide the ACCC with useful insight. This is because each RSP dimension its network according to the characteristics of its customer base. As such, each RSP is likely to dimension its network differently. NBN Co submitted that there is no specific utilisation threshold that would be relevant or meaningful in every context.

NBN Co considered that the interaction between the CVC capacity, the traffic profile and the nature of an RSP's retail product offerings are also highly relevant to whether CVC is being appropriately dimensioned. Comms Alliance and Optus argued that the 95 per cent utilisation threshold was arbitrary and not directly related to download speed. Optus submitted that such a measure could not be used to compare the download speeds experienced by the end users in the busy hours.

Telstra considered that the reporting would not provide the information that the ACCC is seeking and that an alternative means of monitoring network performance would be more appropriate. It argued that RSPs manage traffic and network configuration on a dynamic basis in a range of different ways and that a set threshold would ignore other key factors that influence speed outcomes such as CVC capacity and the mix of different speed tiers sold by an RSP.

October 2017 further consultation

After considering stakeholder submissions, instead of introducing a new record keeping requirement on NBN Co relating to a CVC utilisation threshold, the ACCC proposed that NBN Co should report more detailed CVC utilisation information on both a daily and, during the TC-4 peak period, an hourly basis.

The current NBN SIO RKR requires NBN Co to keep records of CVC utilisation information at regular intervals throughout each day and make a record of the average utilisation on a daily basis (Clause 9, 10 and 11). However, the current rules only require CVC utilisation to be reported to the ACCC every quarter as a figure averaged over the entire reporting period (i.e. usually 90 or 91 days). The ACCC found that the utility of such reporting is limited by averaging over the entire reporting period.

The ACCC considered that more detailed reporting of CVC utilisation would provide a better understanding of the way CVC is acquired and provisioned. The ACCC proposed in the October 2017 further consultation paper that the format of Attachment A of the NBN SIO RKR be amended to include additional columns for:

- the CVC capacity acquired for each day (TC1, TC2 and TC4)
- the average CVC utilisation for each day (TC1, TC2 and TC4), and
- the average CVC utilisation for:
 - 7pm-10pm for each day for TC1, or
 - 9am-5pm for each day for TC2, or
 - each hour of the peak period (7pm-10pm) for each day for TC4.

The above information relates to each CVC link acquired by each access seeker at each POI.

NBN access seeker submissions

Telstra submitted that the proposed CVC reporting variation would provide the ACCC with more meaningful information than the previously proposed 95 per cent utilisation threshold reporting but indicated there would be limitations in its utility to the ACCC. Telstra reiterated that, while additional information will provide some insight into access seeker traffic management behaviour, more granular CVC utilisation data alone cannot be used to compare access seekers in respect of the download speeds received by end users. Telstra further submitted that this CVC information should only be used for the ACCC's internal review because, if disclosed, it may cause confusion and inhibit competition. Telstra noted that the peak hour should be from 7-11pm to align with the ACCCs "Broadband Speed Claims – Industry Guidance". The ACCC considers that implementing a wider peak period is appropriate.

Comms Alliance submitted that its RSP members were concerned about the potential publication of any access seeker-specific CVC information and would oppose the reporting of this additional CVC information if the information is intended to be published. Comms Alliance also submitted that publication of CVC data could potentially be anti-competitive by giving industry participants some insight into the operation of competitors' networks.

The ACCC accepts that the publication of NBN access seeker CVC data, particularly CVC utilisation data, has the potential to be misinterpreted and may not lead to outcomes that are in the LTIE. However, the ACCC considers that it is important that it is able to monitor how access seekers are acquiring and using NBN wholesale products and more detailed CVC data will assist this significantly. The ACCC does not currently see a specific need or scenario where publication of individual access seeker CVC information may be necessary or desirable.

NBN Co submissions

NBN Co submitted that it did not understand how varying the RKR to require it to report CVC utilisation on a more granular basis is justified by reference to the matters specified under sub-section 151BU(4) of the CCA. NBN Co submitted that the stated reasons why the ACCC wanted the information appeared to relate to consumer issues rather than any issue related to Part XIB or Part XIC of the ACCC.

In the October 2017 further consultation paper the ACCC stated that more granular CVC reporting would enable the ACCC to:

- review CVC utilisation by each seeker on a daily basis across the reporting period, rather than just obtaining an average across that period
- compare CVC utilisation data across access seekers, and
- monitor whether access seekers are sufficiently provisioning enough CVC to meet demand.

Accordingly it stated that this will enable the ACCC to better monitor and understand how access seekers are provisioning their networks over the NBN and would allow the ACCC to compare and contrast similar RSPs. The ACCC stated that more granular CVC reporting could complement information obtained under the Broadband Performance Monitoring and Reporting (BPMR) program.

More broadly, the ACCC considers that monitoring the provisioning of NBN wholesale products by NBN access seekers forms a vital part of assessing the LTIE and economic efficiency outcomes in the context of the NBN. A more detailed understanding of how NBN access seekers utilise upstream inputs (e.g. CVC capacity) in downstream retail markets (e.g. residential broadband) and downstream wholesale markets (e.g. NBN aggregation products) will assist the ACCC in considering its various Part XIB and XIC statutory obligations.

NBN Co further submitted that it was unclear how the ACCC currently uses the reported CVC information, what specifically the ACCC finds lacking in that information and what specifically would be the benefit of more granular information.

The ACCC considers that more detailed CVC utilisation information will provide it with a better understanding of access seeker provisioning of NBN wholesale products. An improved understanding of NBN wholesale products will assist the ACCC in a wide range of regulatory decision making.

The ACCC notes that the current level of CVC utilisation reporting is inhibited because it is averaged over an entire three month period.

The ACCC also considers that 151BU does not require it to specify precisely what RKR information will be used for before a carrier can be required to keep and report it.

The ACCC considers that the information that is the subject of the record keeping rules and the reports provided under those rules is relevant to the decision-making and monitoring functions of the Commission that fall within paragraphs (4)(a) to (f). The ACCC has used, and proposes to continue to use, the information collected under the RKR to monitor competition in markets that rely on the NBN. The ACCC considers that the more detailed reporting requirements for CVC utilisation will enhance the ACCC's understanding of the competitive characteristics of the NBN wholesale market.

Accordingly, the ACCC considers that the proposed variation to CVC reporting is appropriate. The ACCC also considers that the variation is an extension of the existing quarterly reporting requirement. Additionally, in the context of the current requirement under the RKR that NBN Co maintain and keep daily records, then the variation will only be incremental to the existing requirements.

1.3.3. Additional clause to prepare reports 'as and when required'

The new Clause 22 states:

NBN Co must prepare any other report containing the information required by Rules 6 to 15 of these Rules as and when required by the ACCC.

This new rule will allow the ACCC to request reports relating to the information kept and recorded by NBN Co under the NBN SIO RKR. The new rule is based on the provisions section 151BU(2B)(a) of the CCA which states that RKR's may provide for 'the preparation of reports as and when required by the Commission'.

NBN Co submitted that it was 'very concerned' about the ACCC's proposed new rule and submitted that it would give the ACCC the power to vary the basis on which NBN Co

prepares reports under the RKR. NBN Co submitted that the variation could bypass consultation about the preparation of reports and involve regulatory overreach. NBN Co submitted that an opportunity for stakeholders to comment would ensure that any varied requirements are fair, necessary and not technically and economically burdensome.

The ACCC considers that the NBN SIO RKR already allowed the ACCC to vary the reporting requirements. Clause 21 (amended Clause 22) of the NBN SIO RKR provides that the ACCC can amend the format of future reports (referred to in Clause 19 (amended clause 20)) by the ACCC providing adequate notice of the amendment to NBN Co.

However, the proposed change would enable the ACCC to request a report without amending the ongoing reporting requirements. The new rule will allow the ACCC to request NBN Co to prepare a report on information kept by NBN Co under the NBN SIO RKR, if and when matters arise. The ACCC notes that the proposed amendment will not allow it to amend the record keeping requirements without consultation and the ACCC would remain bound by administrative law requirements. The purpose of the rule is to allow the ACCC to request a separate report, if required, for purposes relevant to the operation of Part XIB or Part XIC of the CCA. The ACCC considers that the information sought from NBN Co under this rule would address specific issues not provided for by regular reports required under the rules. The ACCC must provide NBN Co with adequate notice of any such request.

The ACCC does not consider that requesting reports on the information that NBN is already required to maintain and keep is an overreach or that wide consultation would be necessary. We note that Telstra and Comms Alliance did not raise concerns regarding the new rule.

NBN submitted that if the ACCC considers that the NBN SIO RKR is targeting the wrong information or is incomplete in some way, it would be appropriate for the ACCC to vary the RKR at that time through consultation. The ACCC considers that if the NBN SIO RKR information is targeting the wrong information or is incomplete, it would be necessary for the ACCC to consult on amending the rules.

1.4. Explanatory Notes

Commencement (clause 2)

The RKR applies until 30 September 2020.

The RKR may be reviewed prior to this date as the roll-out of the NBN progresses and new services become available.

Application (clause 3)

NBN Co is the only party required to provide information under the RKR.

Interpretation (clause 4)

The definitions have been varied to include the MTM technologies and align definitions with the definitions used by NBN Co in its access agreements.

AVC services in operation (clauses 6 – 8)

Clause 6 was revised to require records to be kept on the total number of Access Virtual Circuit (AVC) services in operation for each of the Existing Network Access Technologies including FTTP, FTTB, FTTN, HFC, Wireless and Satellite access services.

The records maintained under clause 6 will be disaggregated, where relevant, by:

- access seeker
- downstream and upstream data transfer rate 'tier' (e.g. 12/1Mbps, 25/5Mbps)
- traffic class (e.g. TC-1, TC-2 and TC-4)
- geographic 'point of interconnect'(POI)

Clauses 7 and 8 that referred to wireless access services and interim satellite services have been deleted.

CVC capacity and utilisation (clauses 9 – 12)

Clause 9 requires records to be kept on the total capacity of Connectivity Virtual Circuit (CVC) in Mbps for each access seeker at each POI. This data is further disaggregated by traffic class.

The data is not broken down across the different access technologies because contracted CVC capacity may be used to carry the aggregated traffic from multiple access technologies.

Where an access seeker has more than one CVC service at the POI, NBN Co must keep separate records for each CVC. For example, separate records will need to be kept for access seekers with multiple TC-1, TC-2 and/or TC-4 CVCs at the one POI.

Clause 9 also requires records to be kept on the daily average CVC utilisation and CVC utilisation during peak periods. Peak periods are defined as 7.00pm to 11.00pm for TC-1 and TC-4 which are primarily residential services and 9.00am to 5.00pm for TC-2 which is intended primarily for business customers. The TC-1 and TC-4 peak period was widened by 1 hour because this better aligns with current industry experience.

Clause 11 specifies that NBN Co should measure the utilisation at regular intervals throughout the day and make a record of the average utilisation on a daily basis. NBN Co has indicated that it records TC-2 and TC-4 in 15 minute increments and TC-1 in 30 minute increments. Clause 12 specifies that NBN Co should measure the TC4 peak period average utilisation at each hour of the 7.00pm-11.00pm peak period and make a record of the average utilisation for each hour of the peak period on a daily basis.

The ACCC has varied Attachment A of the RKR so NBN Co is required to report TC-1, TC-2 and TC-4 CVC capacity and average CVC utilisation for each day and each TC-1 and TC2 peak period and TC-4 CVC average CVC utilisation for each hour of the TC-4 peak period. Previously NBN Co was required to report average CVC utilisation across the entire reporting period. The recording of CVC capacity should be made at the end of the day; that is 11:59pm.

New network access services or products features/components (clauses 13 – 16)

The RKR only applies to services currently being supplied by NBN Co for which it has released a Standard Form of Access Agreement. The RKR has been amended to incorporate other access technologies introduced under the multi-technology mix (MTM) policy including FTTB, FTTN, HFC and Long Term Satellite services.

Clause 13 provides that the ACCC may—upon written notice—require NBN Co to maintain records for new network access services, product components or features for which a Standard Form of Access Agreement has been published. NBN Co must commence maintaining these records within 90 days of the notice.

Clause 14 provides that the records must be kept and reported in the same manner as for equivalent access or capacity services under clause 6 of the RKR. For example, when NBN

Co commercially launches its Fibre to the Curb (FTTC) service, it will be required to maintain records for that service.

Clause 15 provides that if NBN Co is unable to reasonably provide the required information for a new access service, product component or feature, NBN Co may provide written notice to the ACCC which specifies the information which it is able to provide.

Similarly, if NBN Co is unable to keep the required records within 90 days, NBN Co may advise the ACCC when it will be able to maintain those records. The RKR would then take effect from the date specified by NBN Co.

These provisions ensure that the RKR can be updated to require reporting on new services and products features/components as they are launched, whilst also providing flexibility to amend the reporting requirements taking into account any informational limitations arising from different technology and product construct variations.

Nothing in these provisions prevents the ACCC from making other RKRs for new services, or additional product components or features.

Duration (clause 17)

Clause 17 provides that NBN Co will only be required to retain the records for 12 months.

Reporting requirements (clauses 18 – 22)

NBN Co will be required to provide the ACCC with a report containing the information required under the RKR to the ACCC on a quarterly basis.

The form of the RKR report is set out in Attachment A and must be provided in Microsoft Excel format. The form of the report may be amended upon adequate notice.

The report must be provided to the ACCC by email within 28 days of the last day of the calendar quarter (i.e. 31 March, 30 June, 30 September, 31 December).

The ACCC may request that NBN Co prepare a report containing the information required by Rules 6 to 16 of these Rules as and when required by the ACCC. The ACCC must provide NBN Co with adequate notice of any such request.