



Australian
Competition &
Consumer
Commission

***NBN Services in Operation
Record Keeping Rules***

Explanatory statement

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Introduction

This explanatory statement accompanies the NBN Services in Operation Record Keeping Rules.

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 (s. 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.

NBN Services in Operation RKR

The NBN Services in Operation RKR has been developed in order to obtain information that is relevant to the operation of Part XIB and Part XIC of the CCA.

The object 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
- 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 of special access undertakings and anticipatory exemption applications. The ACCC also has ancillary enforcement functions under Part XIC including ensuring

access providers (incl. NBN Co) comply with the standard access obligations set out in sections 152AR and 152AXB 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 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 and how competitive dynamics are changing over time, as well as the efficient use of and investment in telecommunications infrastructure.

In this regard, the NBN Services in Operation RKR will enable the ACCC to receive information on the 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).

With the NBN set to become a key feature of the Australian telecommunications market going forward, it is crucial for the ACCC to be able to monitor how competition develops over this network, and that the use of and investment in the network occurs in an efficient manner. Importantly, whilst NBN Co will operate on a wholesale-only basis, it will still be a monopoly provider requiring ACCC oversight to ensure the terms and conditions of access are in the LTIE.

The RKR will facilitate this 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 (RSP).

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.

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.

In addition, the RKR has been developed to provide insight into whether NBN Co is making efficient use of and investment in the network, including network capacity.

In this regard, throughout the consultation process on NBN Co's Special Access Undertaking (SAU), access seekers raised strong concerns about the level and relativities of AVC and CVC pricing. In particular, access seekers raised concerns that pricing decisions by NBN Co may strike an inappropriate balance between access and capacity charges, and distort market outcomes and/or lead to inefficient use of or investment in telecommunications infrastructure.

Reflecting this, the SAU contains mechanisms to adjust the maximum regulated prices for AVCs and CVCs should it become apparent that NBN pricing is leading to

inefficient outcomes, but the question of the form of market monitoring of CVC demand was left open for the ACCC to consider by way of record keeping rules.¹

The NBN Services in Operation RKR will be a key tool by which the ACCC will monitor this ongoing issue. For instance, it will provide insight into whether there may be pricing or other impediments to RSPs obtaining sufficient amounts of CVC in order to make efficient use of the NBN.

The ACCC notes that while there will be a period in which the proposed RKR would overlap with the CAN RKR, once migration to the NBN is complete the ACCC would anticipate it will be in a position to revoke the CAN RKR.

Consultation

The ACCC first consulted NBN Co on whether it could potentially report the type of information that is sought by the RKR, and if so what form this reporting could potentially take. NBN Co assisted the ACCC during these initial scoping discussions on the basis that record keeping rules would be issued prior to any information being supplied, so that there was clarity over the basis on which any information was to be provided.

In August 2014, the ACCC published the draft RKR on its website and invited comment on them. The ACCC received submissions from NBN Co and Telstra.

NBN Co's submission recommended the rules be changed to provide flexibility on how reports could be delivered to the ACCC. The ACCC has made this change to the rules.

Telstra objected to the RKR as it does not consider all the information required to be provided by NBN Co is relevant or needed to regulate NBN access services. Telstra also questioned whether the possible benefits from the RKR would justify the costs to be borne by NBN Co.

The ACCC is of the view, however, that the information sought by the RKR is relevant and necessary for the ACCC to fulfil its regulatory role in respect of NBN access services. NBN Co has advised the ACCC that its costs in complying with the rules will not be significant as it is already in the process of collecting the information sought under the RKR. Consequently, the ACCC is of the view that the benefits arising from the rules will outweigh the costs borne by NBN Co.

The ACCC has also consulted with the Office of Best Practice Regulation in preparing the RKR.

¹ For example, in Telstra's submission to NBN Co's Varied November 2013 SAU, Telstra stated it was optimistic that 'the ACCC will be able to use many of its existing powers under Part XIB and Part XIC of the CCA to monitor CVC pricing and usage, for example, by making record keeping rules' (available at <http://www.accc.gov.au/regulated-infrastructure/communications/national-broadband-network/nbn-co-special-access-undertaking-2013/consultation-on-sau>).

Explanatory Notes

Commencement (rule 2)

The RKR will take effect for an initial period of 3 years from 1 October 2014 to 30 September 2017.

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

Application (rule 3)

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

It has indicated that the burden associated with doing so would not be significant.

AVC services in operation (rules 6 – 8)

Rules 6 to 8 require records to be kept on the total number of Access Virtual Circuit (AVC) services in operation for FTTP, wireless and interim satellite access services.

The data maintained under rules 6 – 8 will be disaggregated 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)

This information will enable the ACCC to follow trends in the take up of services and the evolution of competition over the NBN across different geographic segments, and thereby support the ACCC in carrying out its various functions under Parts XIB and XIC of the CCA. For example, the ACCC will be able to determine whether competition is developing in certain geographic segments at a quicker rate than others, monitor changes in consumer preferences for different data transfer rate ‘tiers’ and changes in the market shares of access seekers acquiring NBN Layer 2 services.

CVC capacity and utilisation (rules 9 – 11)

Rule 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 will not be broken down across the different access technologies as 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.

Rule 9 also requires records to be kept on the daily average CVC capacity utilisation and CVC capacity utilisation during peak periods. Peak periods are defined as 7.00pm to 10.00pm for TC-1 and TC-4 which are primarily residential services and 9.00am to 5.00pm for TC-2 which is designed for business customers.

In light of concerns around the potential for CVC pricing to develop in a way that is contrary to the LTIE, the ACCC considers that information on the capacity and utilisation of CVC services will assist the ACCC in monitoring whether pricing for

these services is encouraging efficient use of the network. This information will feed into the ACCC's price review mechanisms under the NBN Co SAU, and potentially other regulatory functions under Part XIC of the CCA and its reporting function under Part XIB of the CCA.

New network access services or products features/components (rules 12 – 15)

The RKR only applies to services currently being supplied by NBN Co for which it has released a Standard Form of Access Agreement.

Rule 12 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.

Rule 13 provides that the records must be kept and reported in the same manner as for equivalent access or capacity services under rules 6 to 11 of the RKR. For example, when NBN Co commercially launches its Long Term Satellite Service, it will be required to maintain records equivalent to the Interim Satellite Service for that service.

Rule 14 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 RKR for new services, or additional product components or features.

Duration (rule 16)

Rule 16 provides that NBN Co will only be required to retain the records for 12 months.

Reporting requirements (rules 17 – 21)

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 notice.

Where the contracted capacity for CVC has changed during the reporting period, NBN Co will report a time-weighted average for contracted capacity, average CVC capacity utilisation and average CVC capacity utilisation during peak period.

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

In future, the ACCC will likely publish highly aggregated ‘snapshots’ about the development of competition over the NBN. However these reports would be sufficiently aggregated so as to not identify individual access seekers, which is in line with reports currently published under the CAN RKR.