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# **TELSTRA CORPORATION LIMITED**

## **Extension of NBN SIO RKR submission**

### **Consultation paper**

#### **Public submission**

**14 August 2020**



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## 01 Introduction

Telstra welcomes the opportunity to submit to the ACCC's consultation on the National Broadband Network Services in Operation Record Keeping Rule (**NBN SIO RKR**). The establishment of nbn co and building of the NBN has brought significant change to the structure of the telecommunications market in Australia. Telstra has been structurally separated and nbn co has been established as the government owned, national monopoly provider of fixed broadband services.

Given the central role nbn co will play in the digitisation of the Australian economy and the flow-on benefits for businesses and consumers, it is important that nbn co faces the right incentives to operate efficiently. Collection and access to relevant information can help drive the desired benefits expected from the NBN and monitor whether those benefits are being achieved.

Telstra therefore supports the proposed extension of the NBN SIO RKR. However, we believe more needs to be done to ensure nbn co faces the right incentives to operate efficiently. We believe there are several market failures which need to be better understood and addressed, and the first step to this is the collection of a wider set of information under the NBN SIO RKR. These information requirements are consistent with requirements applied to other regulated monopoly infrastructure providers, including Telstra when it was the provider of legacy telecommunications services using its copper network.

Ultimately, collection of a wider set of information will help promote efficient market outcomes and the long term interests of end users (i.e. it will be business and household customers that benefit). And just as importantly, it will encourage market outcomes that realise the intended benefits from the NBN.

## 02 Addressing market failures and release of information

This section first discusses why additional information should be collected under the NBN SIO RKR. We believe additional information is required to help understand and address market failures. Second, this section identifies broad criteria for the public release of information collected under the RKR. If the RKR information is to assist in driving efficient market outcomes and removing market failures, some of the information needs to be made public.

### 2.1. Additional information to address market failures

The presence of market failures results in inefficient economic outcomes to the detriment of the economy, businesses and consumers. One factor leading to market failure is the presence of monopolised markets, hence it is usually the case that monopoly infrastructure providers are regulated. While there are a range of regulations and requirements applying to nbn co, overall these do not ensure nbn co faces adequate incentives to drive efficient market outcomes.

Telstra believes there are a range of information gaps which can contribute to market failures and inefficient market outcomes, resulting in the NBN not delivering its full potential and poor outcomes for end users. To help address these gaps additional information should be collected under the NBN SIO RKR. Specifically, information gaps relating to pricing and service standard arrangements, and nbn co's costs and revenues.

#### 2.1.1. Pricing arrangements

nbn co's pricing arrangements, including high prices, pricing uncertainty and gaps in the pricing structure, are leading to a range of market failures. While these pricing arrangements directly impact RSPs, ultimately it is end users who will bear the costs.



High prices will mean some consumers cannot afford to access the NBN. As use of broadband services becomes more important in accessing government, education and health services, as well as employment opportunities and maintaining social connections, there is a risk that some parts of the community will be left behind. Work commissioned by nbn co highlights the contribution the NBN could make to the lives of Australians and the economy.<sup>1</sup> However, for these benefits to eventuate the NBN needs to be accessible to all.

Market failures are also arising because of pricing uncertainty. One of the key concerns raised by industry is the uncertainty created by nbn co's practice of discounting on a temporary basis, the CVC charging structure and the payment of overage. This has implications for pricing and structuring of retail offers, and therefore competition in the retail market and the long term interests of end users. This issue was raised by RSPs in the current ACCC inquiry into NBN access pricing, with the ACCC's position paper noting:

*Stakeholders noted that the resulting uncertainty with future pricing increased the business risks that they needed to consider and had the potential to restrict them when developing their retail offers. Exetel provided an example of a threatened withdrawal of a long-standing pricing arrangement, which would have resulted in it facing a CVC charge of \$17.50 per Mbps. Exetel noted that it had to alter its fundamental approach to supplying retail services over the NBN in order to mitigate the significant risk that such a significant change in pricing posed. This included changing the wholesale products that it acquired and withdrawing products.<sup>2</sup>*

Gaps in nbn co's pricing structure limit the ability of RSPs to offer a range of retail products that covers the varying demands of Australian consumers. This can mean some end users cannot get an NBN service which addresses their needs and/or are facing higher prices as they migrate from legacy copper broadband services to the NBN. The ACCC's inquiry into NBN access pricing noted concerns from Vocus and Telstra:

*Vocus noted that its input costs for basic speed broadband services had increased to approach those for higher speed access products, making basic speed products uneconomic to supply...*

*Telstra noted that it incurred significant losses when supplying voice services over the NBN.<sup>3</sup>*

Some of these industry pricing concerns have been considered by nbn co and the ACCC. [CIC begins]

[REDACTED]

[CIC ends] And ACCC concerns regarding nbn co's use of its Discounts, Credits and Rebates list to introduce new products resulted in nbn co withdrawing its Special Access Undertaking (SAU) variation application. The ACCC has also commenced its inquiry into NBN access pricing and is focussing on the regulation of a 12/1 Mbps service which would act as an "anchor" for higher speed services.

<sup>1</sup> See nbn co 2018, Connecting Australia report, available at <https://www.nbnco.com.au/content/dam/nbnco2/2018/documents/media-centre/nbn-connecting-australia-economic-report-4.pdf>.

<sup>2</sup> ACCC 2020, ACCC inquiry into NBN access pricing, Position paper, April, p. 9, available at <https://www.accc.gov.au/system/files/Inquiry%20into%20NBN%20access%20pricing%20-%20Position%20paper.pdf>.

<sup>3</sup> Ibid., p. 9.



However, Telstra's and industry's core concerns regarding nbn co's wholesale prices — high prices, temporary discounting, complex pricing structure, CVC charges — are yet to be fully addressed. RSPs generally continue to have concerns regarding the efficiency of nbn co's wholesale prices.

#### *Information to address pricing market failures*

A key feature of nbn co's pricing structure is its capacity (CVC) charge. However, despite CVC being a key feature of nbn co's pricing structure and a key driver of RSP angst, there is limited information available on CVC demand. While RSPs are united in seeking for the CVC price structure to be abolished, given the role it plays in RSPs setting retail prices or end user experience the ACCC should consider what additional CVC information can be provided by nbn co and released publicly. This information could include:

- Average CVC per user by POI. Currently the ACCC only publishes an aggregated average CVC per user figure.
- Average CVC per user for non-bundled products, by speed tier and POI. While nbn co has over time introduced bundled products and RSPs have put most customers on these products, there remain customers on the non-bundled products. Importantly, these products form the “fallback” should nbn co decide to remove any of the bundles.
- CVC overage quantity (at a minimum split by POI and traffic class). As noted, CVC is an important feature of nbn co's pricing structure and overage is a concern for RSPs as it leads to cost uncertainty. The collection of overage information serves a similar purpose to the current collection of SIOs with no data limit (compared to total SIOs) under the Internet Activity RKR, i.e. it provides an indication of users potentially facing additional costs for exceeding inclusion limits.

In addition, given the likely focus on a 12/1 Mbps wholesale service as an “anchor” product, the ACCC should consider what additional information may be required to assess the efficacy of this arrangement. For example, this could include data that can test whether the regulation of an anchor has any impact on the average wholesale prices of unregulated plans, or more specifically how regulation of the 12/1 Mbps wholesale service has influenced the price of the 25 and 50 Mbps services.

#### *2.1.2. Service standards*

In competitive markets, appropriate service standards are maintained through the competitive dynamic, i.e. through rivalry between competing firms, as well as by market participants having access to information. If consumers aren't receiving the level of service they demand, they can find an alternative provider. Monopoly service providers do not face similar incentives, and it is this absence of incentives which can lead to market failures. In the case of the NBN, RSPs and in turn end users may face poor service standards, including network performance and availability issues, delays in connecting a service, faulty services, delays in repairs, missed appointments, limited compensation etc.

The wholesale service standards applicable to nbn co and the reporting of performance against those standards are important drivers of nbn co's behaviour as the monopoly provider of fixed broadband services. If the right incentives are not created by the standards and reporting requirements, we cannot be assured that appropriate service levels are being maintained for access seekers, and ultimately for end users.

The importance of service standards to drive positive market outcomes, particularly for end users, is reflected in the current focus on the issue. The Department of Infrastructure, Transport, Regional Development and Communications over recent years has been reviewing the consumer safeguards framework applying to telecommunications. In the review of Part B of the Safeguards, Telstra noted:



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*nbn co's status as a monopoly wholesale broadband provider means it does not have the same commercial incentives to deliver on the service levels it commits to as would be the case in a competitive market. We support a framework which ensures nbn co has the right incentives to deliver on its service commitments.<sup>4</sup>*

In its Consumer Safeguards Review – Part B final report, the then Department of Communications and the Arts concluded:

*On balance, the department considers nbn co and other similar fixed line infrastructure providers of last resort may not face consistent competition from other networks, and regulated wholesale timeframes for connections, fault repairs and appointment keeping matters are therefore appropriate. Enforceable wholesale reliability rules should also encourage improved outcomes for consumers at the retail level, providing more certainty to retailers to develop and offer a range of retail service offerings.<sup>5</sup>*

Further, we note concerns about wholesale service standards ultimately led to the ACCC commencing its nbn wholesale service standards inquiry. While this inquiry is yet to be finalised, it has resulted in the ACCC accepting a court enforceable undertaking from nbn co to make changes to its wholesale service level commitments.

Telstra submitted to the ACCC's review, noting the importance of information collection and reporting:

*... all aspects of nbn co's service will ultimately impact upon the service that is delivered to customers, for example, if nbn co delays providing additional NNI or CVC capacity for a RSP, this could impact customers who may experience congestion on their service. As such, it is important that nbn co includes all relevant aspects of its service delivery in the service levels schedule of the WBA and that it provides ongoing reporting to RSPs to allow them to monitor nbn co's performance. Such ongoing monitoring at an appropriate level of detail is of vital importance to RSPs because it enables them to put pressure on nbn co to take action where performance is lagging.<sup>6</sup>*

This focus on service standards is an indication of the importance of appropriately set standards as a means of avoiding market failures. Telstra believes that the NBN SIO RKR should be expanded to collect and report on nbn co's wholesale service standards.

#### *Information to address service standard market failures*

The service standards provided by nbn co directly affect RSP performance and will have flow-on effects on the broadband experience of end users. It is therefore important that: (i) appropriate standards apply to nbn co, and (ii) incentives to meet those standards are promoted by reporting of performance against those standards.

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<sup>4</sup> See Telstra submission to the Department of Communications and the Arts Consumer Safeguards Review Part B / Reliability of Services, January 2019, p. 5, available at [https://www.communications.gov.au/sites/default/files/submissions/telstra\\_4.pdf](https://www.communications.gov.au/sites/default/files/submissions/telstra_4.pdf).

<sup>5</sup> Department of Communications and the Arts 2019, *Consumer Safeguards Review – Part B (reliability of services) – Final Report*, p. 11, available at <https://www.communications.gov.au/documents/part-b-reliability-services-consumer-safeguards-review-final-report>.

<sup>6</sup> See Telstra submission to ACCC discussion paper, March 2018, p. 20, available at <https://www.accc.gov.au/system/files/Telstra%20-%20NBN%20wholesale%20service%20standards%20inquiry%20-%206%20March%202018.pdf>.



nbn co's performance against service standards at an aggregate level should be reported to RSPs and end users. Additional reporting should cover the service standards and related arrangements in the service level schedule of the WBA. Only some of these standards are currently reported on by nbn co.<sup>7</sup> On service standard reporting, Telstra stated in its submission to the ACCC's NBN wholesale service standards review second discussion paper:

*Further, as set out in our response to the Consumer Safeguards Review – Part B, nbn co should be required to report on how its network is performing against its service standards (amongst other things), similar to that included in the undertaking in relation to its fixed wireless network. While nbn co does provide monthly performance reports to RSPs these are only made available at individual RSP level. In order to provide further incentives for good performance against service standards, aggregated performance reporting should be publicly available. It may also be appropriate to consider whether systemic failure to meet service standards could be addressed via sanctions or fines.*

*Telstra also considers that nbn co should be required to provide aggregate reporting to the appropriate regulator. It is appropriate that nbn co reports to each RSP on its performance in relation to that RSP, but this means that there is a gap in terms of oversight of nbn co's overall performance.<sup>8</sup>*

The reporting of performance against service standards is not something new for providers of essential infrastructure services. For example, the Australian Energy Regulator has established service standards for electricity network providers and these providers are required to submit compliance reports to the regulator.

Another important service standard issue is the number of non-serviceable premises. nbn co should be required to report on the number of non-serviceable premises to allow government, regulators, market participants and consumers to understand the extent of the problem and to see how quickly the problem is being addressed.

### **2.1.3. Transparency of costs and revenues**

nbn co operates across different regions, using different technologies, and serves different customer segments (e.g. residential, small business and large enterprise customers). The breadth of its operations gives rise to the potential for cross subsidies between different parts of its operations, and therefore the potential for market failures to emerge. The establishment of the NBN acknowledges that profitable parts of the network (generally taken to be fixed line technologies) will need to subsidise nbn co's loss making services (generally taken to be fixed wireless and satellite services). However, any cross subsidies need to be efficient, i.e. only efficient costs should be recovered. Perhaps of greater concern is the risk that nbn co can cross subsidise its entry into competitive markets, thereby competing unfairly with private operators and inefficiently overbuilding private investment. Greater transparency of nbn co's costs and revenues can address the risk of market failures occurring.

There is currently limited information on the various parts of nbn co's operations. nbn co provides financial information in its annual report and corporate plans, and as part of the ACCC's annual review of

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<sup>7</sup> See reporting on nbn co's website, available at <https://www.nbnco.com.au/corporate-information/about-nbn-co/updates/dashboard-june-2020>.

<sup>8</sup> See Telstra submission to ACCC second discussion paper, March 2019, p. 10 and 24, available at [https://www.accc.gov.au/system/files/Telstra%20-%20NBN%20wholesale%20service%20standards%20inquiry%20-%20201%20March%202019\\_1.pdf](https://www.accc.gov.au/system/files/Telstra%20-%20NBN%20wholesale%20service%20standards%20inquiry%20-%20201%20March%202019_1.pdf).



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the Long Term Revenue Constraint Methodology (**LTRCM**) under the SAU. This information tends to be highly aggregated.

Concerns about this lack of transparency have been raised as part of the ACCC's LTRCM reviews, including issues with nbn co's entry into the competitive enterprise market and whether this entry is efficient. We note the ACCC has acknowledged these concerns and intends to commence a review of transparency arrangements this year. Further, the passing of legislation to implement the Regional Broadband Scheme (**RBS**), will give the ACCC a role in reviewing the level of the RBS levy and this information will improve transparency of nbn co's cost and revenue information.

Regardless of these developments, the existing NBN SIO RKR can be used to commence collection of nbn co cost and revenue information. That is, the ACCC should move sooner rather than later in starting to improve transparency, and an amended NBN SIO RKR provides an appropriate avenue.

Improved transparency of nbn co's costs and revenues is needed now because it is a competitor with private entities. Private entities operate competing superfast networks and some will be liable to pay the RBS levy, and nbn co competes in the competitive enterprise market. And while it is taken that nbn co's prices already include the RBS levy (since in the absence of any explicit levy, nbn co would be funding its loss-making services through internal cross subsidies from profitable services), private entities will need to add the levy onto their existing prices (or otherwise absorb some or all of the levy). Given this dynamic, it is important to understand the extent to which nbn co is recovering the levy from commercial areas (e.g. from metropolitan areas to cross subsidise regional areas, and from its enterprise market).

This distinction between nbn co and private operators is important, especially for the enterprise market where nbn co is a competitor to the private sector. nbn co has/is setting its enterprise prices to actively compete in a market already characterised by competition, i.e. a market with competitively set prices. It is therefore difficult to see how its prices include an internal cross subsidy to contribute to its loss making services. Relatedly, it is difficult to expect private operators to absorb the levy given their prices are set in a competitive market.

This is an issue that was explored at the Senate Committee Inquiry public hearing, where Telstra noted its concerns that regulations will require nbn co's enterprise market competitors to pay the RBS levy when there is no guarantee that nbn co's enterprise prices are subsidising its loss making services:

*...this tax was originally conceived of as applying exclusively in residential superfast broadband markets. That scope was entirely consistent with the stated purpose of the tax, which was to create a level-playing field for the NBN as it competed for profitable residential markets in which to provide services that are nationally priced... Applying a tax on nbn co's enterprise market competitors, to support a cross subsidy that nbn co does not itself apply, would therefore place competitors at a distinct competitive disadvantage. Consequently, rather than level the playing field, it actually tilts the playing field unfairly and unreasonably in nbn co's favour.<sup>9</sup>*

In its appearance at the Senate Committee Inquiry hearing nbn co stated that its enterprise prices are market led (set by competition) and "*there's no specific enterprise cross-subsidy [into regional]*".<sup>10</sup>

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<sup>9</sup> See Telstra submission, p 7-8, available at [https://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Environment\\_and\\_Communications/TelcoBills2019/Submissions](https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Environment_and_Communications/TelcoBills2019/Submissions).

<sup>10</sup> See Environment and Communications Legislation Committee public hearing transcript, 30 January 2020, p. 37, available at <https://parlinfo.aph.gov.au/parlInfo/download/committees/commsen/d4472233-d546-4169-83f8->





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It is a significant concern if competitors to nbn co are required to pay the RBS levy when nbn co itself is not setting its prices to include the levy. This is one issue that improved transparency needs to address.

#### *Information to address transparency market failures*

nbn co's financial reporting does not provide sufficient insights on the range of its operations. There are several key issues that nbn co's cost and revenue information should address, including:

- What is the cost of nbn co's loss making services?
- What return is nbn co making from its different markets and services?
- Do nbn co's prices include the RBS levy? Or if it is assumed nbn co's prices already include the levy, what return is nbn co making net of the levy receipts and is this consistent with the return assumed in the determination of the RBS levy?
- What return is nbn co making from its enterprise investments (having netted the RBS levy off its revenues)?
- What proportion of nbn co's investments have been undertaken with a target return at least as high as nbn co's WACC, and what proportion is meeting a lower rate of return. This information could be split by geography, technology and customer type.
- What return is nbn co earning when it decides to overbuild private competitive infrastructure?

Some of the information that nbn co should provide is not dissimilar to Telstra's reporting under the Regulatory Accounting Framework RKR (now removed) and Structural Separation Undertaking. And just like these previous Telstra reporting requirements, Telstra acknowledges that not all the suggested nbn co information could be made public. But it would still be relevant for the ACCC to collect the information for its own assessment, for example to ensure investment decisions are efficient.

## **2.2. Information currently collected under the nbn sio rkr**

Telstra notes that the ACCC's wholesale market indicators report (which uses information collected under the NBN SIO RKR) focuses on SIO (i.e. AVC) information. Published capacity (CVC) information relates to contracted CVC, split by traffic class and state/territory.

Telstra believes that some of the CVC utilisation information currently collected could also be released. Specifically, CVC utilisation information could be presented for each traffic class, split by:

- POI
- metropolitan/regional, and
- state/territory.

This information would provide insights on how the industry is responding to demand across different parts of the market and may encourage competitive responses from RSPs. The information would not be commercial-in-confidence.

Telstra would not support release of CVC utilisation information by access seeker, as CVC is one area that allows RSPs to differentiate themselves in the market and should be considered commercial-in-

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confidence. Similarly, the contracted CVC by access seeker information currently collected should be considered commercial-in-confidence.

### **2.3. Deciding what information to collect and release publicly**

Telstra believes that there should be net benefits from the imposition of any regulatory burdens. We would not support collection of information from nbn co (or any market participant) without proper consideration of the benefits and costs of its collection. In the case of the NBN SIO RKR, the information can serve a range of purposes. Released publicly it can inform the market and policy makers on market dynamics, it can influence policy and regulatory direction, it can provide incentives for improved behaviour and it can assist in market competition. Where the ACCC and policy makers are the only recipients of the information, the benefits are more limited, mainly relating to informing policy and regulatory direction. Importantly, the suggested additional information should already be collected in nbn co's processes and reporting, i.e. there would not be a significant cost associated with its provision.

The ACCC should release information that is likely to contribute to the above benefits. The key constraint on information release will be whether it is commercial-in-confidence. We note that where information is aggregated at the industry level, commercial-in-confidence concerns are less likely.