

# **nbn** submission to ACCC – Review of the NBN SIO RKR Disclosure Direction – Consultation Paper

7 February 2018





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## Environment

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## 1. Introduction

1. **nbn** is pleased to respond to the ACCC’s Consultation Paper (**the Consultation Paper**) in regard to its review of the NBN Services in Operation Record Keeping Rules Disclosure Direction (**the Disclosure Direction**).
2. Our comments are set out below and relate to the following:
  - a. requirements for disclosure;
  - b. proposed variations to the Disclosure Direction; and
  - c. extension of RKR and Disclosure Direction to **nbn** wholesale aggregators and other superfast broadband access providers.
3. In addition to our comments below, **nbn** requests that the ACCC engage with us further in regard to the proposed drafting of the varied Disclosure Direction and NBN Wholesale Market Indicator Report tables as set out in Attachments A and B to the Consultation Paper.

## 2. Requirements for disclosure

4. In section 2.1 of the Consultation Paper (‘Regulatory framework’), in accordance with sub-section 151BUC(5) of the *Competition and Consumer Act 2010* (**the CCA**), the ACCC states that “in deciding whether to issue a disclosure notice, the ACCC must have regard to the legitimate commercial interests of the carrier(s) or carriage service provider(s) that provide the report and any other matter it considers relevant”.
5. However, the ACCC does not set out, or refer to at any point in the Consultation Paper, the requirements for disclosure set out in sub-section 151BUC(2). Specifically, sub-section 151BUC(2) states that, in order to issue a disclosure notice, the ACCC must be satisfied that the disclosure of the report, or the disclosure of particular extracts from the report, would be likely to:
  - a. promote competition in markets for listed carriage services; or
  - b. facilitate the operation of certain statutory provisions, including Part XIB and Part XIC of the CCA.
6. The threshold for a disclosure is that it “would be likely to” promote competition or facilitate the operation of certain statutory provisions. Before making the Disclosure Direction, the ACCC must turn its mind to whether this level of certainty required by sub-section 151BUC(2) has been achieved. There is no reference in the Consultation Paper to indicate the ACCC has done so when making its decisions for further disclosure.



7. In this respect, **nbn** expects that, in finalising any variation to the Disclosure Direction, the ACCC will have performed an analysis of how the disclosure of each additional set of information would be likely to promote competition and/or facilitate the operation of Part XIB or Part XIC of the CCA (or the operation of the other listed statutory provisions), and provide reasons supporting that analysis.
8. As described further below, **nbn** does not consider that the ACCC has made sufficiently clear how each set of additional information proposed for disclosure meets the relevant threshold test set out in sub-sections 151BUC(2) or 151BUC(5) of the CCA.

## 3. Proposed variations to the Disclosure Direction

9. **nbn** welcomes the ACCC's decision to not disclose additional information in respect of CVC utilisation. **nbn** also supports the ACCC's proposal to report information in Tables 2 and 6 of the NBN Wholesale Market Indicators Report on a state and territory basis, rather than by state based grouping, noting that the number of services at the interim POIs (and therefore the rationale for reporting by state based grouping) is declining.
10. Our comments on the other variations proposed in the Consultation Paper are set out below.

### 3.1 Lowering the threshold for access seeker inclusion in tables

11. **nbn** does not have a view on whether the ACCC should lower the threshold for identifying NBN Access Seeker Groups individually in the relevant tables in the Disclosure Direction.
12. Nonetheless, **nbn** assumes the ACCC will directly engage with affected NBN Access Seeker Groups on the proposed disclosure prior to finalising any disclosure arrangements. The ACCC notes in the Consultation Paper that it is "cognisant that this may be of concern to the smaller access seekers and therefore seeks views from all NBN Co access seekers regarding this proposed variation". However, it is not sufficient to assume that all NBN Access Seeker Groups whose detailed information may be disclosed under the proposed variation will have the resources to make submissions in response to a consultation process such as this Consultation Paper.
13. In particular, where the ACCC proposes to disclose confidential information directly attributable to a particular NBN Access Seeker Group, the ACCC should (to the extent that it has not already done so) provide specific written notification to the NBN Access Seeker Group, providing an opportunity for them to express any views before the ACCC makes a decision on the proposed disclosure.

### 3.2 Extension of information reported on a POI basis

14. **nbn** expects that the ACCC will explain specifically how the proposed table 8 (count of AVCs, sum of contracted CVC capacity and count of NBN Access Seeker Groups by Listed POI – excluding satellite services) is likely to promote competition and/or facilitate the operation of Part XIB or Part XIC of the CCA. The Consultation Paper states that the proposed POI table "would reduce information asymmetries and may reduce barriers to entry". However, the ACCC has not stated why this



disclosure would be considered “valuable information”, or how the proposed table may reduce barriers to entry.

15. Information is only useful to promote competition as long as it is not misleading. If information is likely to mislead, then disclosure of that information can make the situation worse, with a risk that it will increase barriers to entry and reduce competition instead of promoting it.
16. **nbn** notes that the information in the proposed Table 8 could be used to calculate average CVC TC-4 dimensioning per AVC TC-4 in respect of each Listed POI. Some caution would be required in interpreting any apparent differences between POIs, including because the progress of the rollout is at different stages at each POI. Given this, **nbn** suggests that if the ACCC decides to proceed with Table 8, the table should include only the count of AVCs and count of NBN Access Seeker Groups with contracted CVC capacity at each POI and exclude the sum of contracted CVC capacity. **nbn** highlights that this would be consistent with the decision the ACCC has already made not to proceed with a proposal to disclose CVC information (including average dimensioning) by access seeker because of the potential for misinterpretation.<sup>1</sup>
17. The Consultation Paper seeks views on whether the table should be further disaggregated by technology type or speed tier. Firstly, **nbn** notes that it is not possible to separate out CVC capacity by (non-satellite) technology type, so any disaggregation of the table by technology type would only be possible in respect of AVCs. Second, it is not clear to **nbn** what question the ACCC would be seeking to answer by disaggregating AVCs at each POI by technology type or speed tier, especially given that corresponding CVC capacity (if reported) would not be disaggregated along either of these lines. Tables 4 and 5 in the Disclosure Direction already provide a breakdown of total TC-4 AVCs (by Access Seeker Group) by technology type and speed tier, respectively.
18. If the ACCC decides to further disaggregate the proposed table by technology type or speed tier, **nbn** expects the ACCC will explain how breaking this specific information down by POI would be likely to promote competition and/or facilitate the operation of Part XIB or Part XIC of the CCA.

## 4. Extension of RKR and Disclosure Direction to **nbn** wholesale aggregators and other superfast broadband access providers

19. Obtaining and disclosing certain information about **nbn** Services in Operation under the RKR and associated Disclosure Directions provides visibility over just one part of the market for superfast broadband access services. Without similar information in respect of other superfast broadband

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<sup>1</sup> ACCC, Consultation Paper, p. 6.



access providers as well as **nbn** wholesale aggregators, the ACCC's ability to perform its functions under Part XIB and XIC will be incomplete.

20. As noted in previous submissions<sup>2</sup>, **nbn** considers that all superfast broadband access providers, not just **nbn**, should be subject to the RKR 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.
21. In addition, **nbn** considers that the ACCC should facilitate greater transparency over **nbn** wholesale aggregation services and the terms and conditions on which these are offered by **nbn** wholesale aggregators to retail service providers. The ACCC identified this as an issue in its Draft Report on the Telecommunications Sector Market Study, observing that a number of factors may be limiting retail service providers' ability to compete in downstream markets. In particular, the ACCC observed that "NBN price discounts are not being universally passed through to the purchasers of wholesale aggregation services, that there is limited differentiation between services offered as well as some evidence of these services coming to market more slowly than equivalent retail services"<sup>3</sup>. **nbn** urges the ACCC to further consider this identified issue.
22. Accordingly, **nbn** strongly supports the ACCC consulting on the need to obtain further information from industry via a record keeping rule to monitor the supply of wholesale aggregation services, as proposed by the ACCC.<sup>4</sup> **nbn** considers that transparency over certain aspects of this information via a Disclosure Direction (similar to that applicable to **nbn**) would also facilitate competition and support the ACCC's ability to respond to any identified market failures.

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<sup>2</sup> **nbn**, 'Submission to ACCC – Review of NBN SIO RKR and NBN Wholesale Market Indicators Report – Consultation Paper', August 2017, p. 2; **nbn**, 'Submission to ACCC – Review of NBN SIO RKR – Further Consultation Paper', October 2017, p. 2.

<sup>3</sup> ACCC, 'Telecommunications Sector Market Study – Draft Report', October 2017, p. 80.

<sup>4</sup> ACCC, 'Telecommunications Sector Market Study – Draft Report', October 2017, p. 143.