

# **nbn** submission to ACCC – Review of NBN SIO RKR – Further Consultation Paper

31 October 2017





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## Environment

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# 1. Introduction

1. **nbn** is pleased to respond to the ACCC’s Further Consultation Paper in regard to its Review of the NBN Services in Operation Record Keeping Rules (**the RKR**).
2. As noted in **nbn**’s submission to the ACCC’s June 2017 Consultation<sup>1</sup> (**nbn**’s **previous submission**), **nbn** does not see the need to change the current scope of the RKR and submits that it should continue to operate in its current form (as recently extended for a further three years). There is no clear evidence that the RKR is targeting the wrong information or is incomplete in any way.
3. Consistent with this, **nbn** welcomes the views expressed by the ACCC in the Further Consultation Paper that the current quarterly reporting frequency remains appropriate and that it is not necessary for reporting to be expanded to include the number of AVCs per CVC link at each POI.
4. The ACCC is now proposing a number of other substantive variations to the RKR. Based on the explanations provided by the ACCC in the Further Consultation Paper, **nbn** submits that these variations are not justified. Our comments are set out below and organised into the following categories.
  - (a) general comments;
  - (b) proposed variations to the RKR; and
  - (c) implementation – drafting and timing.

# 2. General comments

5. As noted in the introduction, **nbn** does not see the need to vary the current scope of the RKR. At this stage, the ACCC has not provided clear evidence that the RKR is targeting the wrong information or is incomplete in any way, and has not adequately justified how the proposed variations would meet the relevant statutory provisions.
6. As highlighted in **nbn**’s previous submission:
  - (a) any variations may impose additional up-front and ongoing costs on **nbn** and may require lead time to implement. **nbn** has already devoted considerable resources in establishing a framework and processes to report in accordance with the RKR. The ACCC needs to carefully consider any proposed variations in terms of their cost and benefit.
  - (b) the ACCC’s consideration of any variations needs to take into account other relevant initiatives underway (e.g. the ACCC’s broadband performance monitoring program), the

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<sup>1</sup> ACCC, ‘Review of the National Broadband Network Services in Operation Record Keeping Rules and NBN Wholesale Market Indicators Report’, June 2017.



appropriate balance between ex-ante and ex-post information gathering, and from whom (nbn or RSPs) information should be gathered. There is also the potential to vary the RKR in future as and when it becomes apparent that reporting of additional information may be justified.

- (c) **nbn** submits 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.

## 3. Proposed variations to the RKR

### 3.1 More detailed CVC reporting

7. It is unclear to **nbn** how varying the RKR to require **nbn** to report CVC utilisation on a more granular basis (daily for TC-1 and TC-2 and hourly for TC-4 for the peak period of 7 to 10pm) is justified by reference to the matters specified under sub-section 151BU(4) of the CCA.
8. The RKR already provides for reporting of the contracted capacity, traffic class and average utilisation on a quarterly basis (all times and peak period) of each CVC acquired by each RSP at each POI.
9. The ACCC may only make RKR's requiring the keeping or retention of records where, relevantly, the records contain, or will contain, information that is relevant to the operation of the competition provisions under Part XIB or the access provisions under Part XIC of the CCA. The other matters listed in section 151BU(4) are not relevant for present purposes.
10. In the Further Consultation Paper, the ACCC states that the purpose of the additional CVC capacity reporting requirements is to "provide visibility of access seeker traffic management behaviour" which will lead to an "insight into consumer experiences on the NBN".<sup>2</sup> On their face, these are not related to issues of access or issues concerning actual or potential competition.
11. Specifically, the ACCC directly acknowledges that the variations in reporting are to benefit its understanding of RSP behaviour on the NBN and how it affects end users. The ACCC states in the Further Consultation Paper that it "has found that the utility of such reporting is limited by its aggregate nature, which averages hundreds of thousands of data for each CVC link."<sup>3</sup> The ACCC goes on to state that more granular CVC utilisation information will enable it to "better monitor and understand how access seekers are provisioning their networks over the NBN...allow the ACCC to

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<sup>2</sup> ACCC, Further Consultation Paper, p.6.

<sup>3</sup> Ibid, p.7.



compare and contrast similar RSPs...[and] would also complement information obtained under the Broadband Performance Monitoring and Reporting (BPMR) program”.<sup>4</sup>

12. The reasons for the ACCC collecting the information appear unconnected from the purpose for which information may be required to be kept or retained in RKR under section 151BU(4). The stated reasons why the ACCC wants the information to be kept and retained appear to be related to consumer issues (perhaps to monitor compliance with the Australian Consumer Law (**ACL**)) rather than any issue related to Part XIB or Part XIC of the ACCC. However, RKR may not be made in order to keep or retain records relevant to the investigation of conduct under the ACL or any other Part of the ACCC other than (relevantly) Part XIB or Part XIC. Nor may RKR be made for the purposes of the ACCC gathering information for the purposes of increasing its understanding of the behaviour of market participants or other general research objectives.
13. Unless the ACCC can point to a clear basis for extending the RKR to the operation of Part XIB or Part XIC, **nbn** submits that the ACCC should not make the proposed RKR variations.
14. It also remains unclear:
  - (a) what use the ACCC is currently making of the CVC utilisation information it already receives under the RKR;
  - (b) what specifically the ACCC finds lacking in that information in making use of it; and
  - (c) what specifically would be the benefit of more granular information noting that, as stated by the ACCC in the Further Consultation Paper in relation to information on AVCs per CVC link, “The ACCC is cognisant of the regulatory burden imposed on regulated entities”.<sup>5</sup>
15. **nbn** is concerned that the ACCC is labouring under the misapprehension that by observing CVC utilisation on a more granular basis that this would “enable the ACCC to ... monitor whether access seekers are sufficiently provisioning enough CVC to meet demand.”<sup>6</sup> [Emphasis added]
16. As **nbn** highlighted in its previous submission, the interaction between the capacity of a CVC, the traffic profile and the nature of the RSP’s retail product offerings are highly relevant to whether a CVC is appropriately dimensioned. In addition, it is important to understand that RSPs shape their own traffic before it reaches the **nbn**<sup>TM</sup> network. Such shaping may be quite sophisticated and involve prioritising certain types of traffic and deprioritising other types of traffic. Having a high (e.g. above 95%) CVC utilisation at some times of day, such as the peak period, could well negatively impact end-user experience but does not, on its own, support definitive conclusions regarding end-user experience.

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<sup>4</sup> Ibid.

<sup>5</sup> Ibid.

<sup>6</sup> Ibid.



17. **nbn** submits that the ACCC’s rationale for more granular reporting of CVC utilisation information is erroneous and the proposed variation to the RKR in this regard is unjustified.

### 3.2 Additional reporting requirement

18. **nbn** is very concerned about the ACCC’s proposal to include an additional Rule in the RKR that would allow the ACCC to request reports from **nbn** as and when required. The proposed inclusion of Rule 22 would give the ACCC the power to vary the basis on which **nbn** is required to prepare reports under the RKR. In doing so, the ACCC could bypass consultation about the preparation of different reports from those currently required. **nbn** strongly objects to this proposed provision because it would involve a clear and unjustifiable regulatory overreach and prevents **nbn** and the industry from having the opportunity to comment on any different basis on which the reports are to be prepared by **nbn** for the ACCC, to ensure that they are fair, necessary and not technically and economically burdensome. This is an important process that should not be ignored for the purposes of convenience.
19. In addition, **nbn** is not aware of the ACCC including provisions such as the proposed Rule 22 in other record keeping rules issues under section 151BU, and the ACCC has not proposed a similar provision in the context of its recent consultation on variations to the Infrastructure RKR.<sup>7</sup>
20. Under the proposed variation, the ACCC would be able to require **nbn** to provide reports on an ‘ad hoc’ basis. The ACCC states that such a Rule “will provide the ACCC with further flexibility to require reports on specific situations”. As noted above, **nbn** is already concerned that the proposed variations do not satisfy any direct links to the statutory relevance requirements and submits that requiring further ‘flexibility’ is unnecessary. For instance, the example provided by the ACCC in section 3.6 of the Further Consultation Paper - to request a report relating to a particular POI or access seeker - may be requested without a clear justification under the proposed rule. As a result, there will be no way for **nbn** to know whether or not the requested report is relevant to the matters contained in section 151BU(4). For this reason, each reporting change should be consulted on in order for **nbn** to understand the nature and reasoning for the change.
21. If the ACCC considers at some point in the future that the RKR is targeting the wrong information or is incomplete in some way, it would be more appropriate for the ACCC to vary the RKR at that time (including through consultation with **nbn** and other interested parties) and to provide a clear justification for doing so with reference to the relevant statutory criteria.
22. As noted above, **nbn** has already devoted considerable resources in establishing a framework and processes to report in accordance with the RKR. Any request from the ACCC on **nbn** to report information under the RKR on a different basis or in a different format would potentially impose significant costs on **nbn** and may require lead time to prepare.

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<sup>7</sup> ACCC, Audit of Telecommunications Infrastructure Assets – Record Keeping Rules Consultation paper, 24 October 2017.



## 4. Implementation – drafting and timing

23. If, despite **nbn**'s submissions, the ACCC decides to vary the RKR as proposed, we request that the ACCC engage further with **nbn** in regard to:
- (a) an appropriate timeframe for implementation, noting that **nbn** will likely need to make changes to its systems and current processes to meet varied recording and/or reporting requirements; and
  - (b) the proposed drafting of the varied RKR as set out in Attachment A to the ACCC's Further Consultation Paper