

# NBN Co submission to ACCC consultation on NBN Services in Operation Record Keeping Rules

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Public version





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## Introduction

**nbn** would like to thank the ACCC for the opportunity to comment on its *Proposed changes to the NBN Services in Operation Record Keeping Rules Consultation Paper (the Consultation Paper)*.

The Consultation Paper proposes a number of fundamental changes to the NBN Services in Operation Record Keeping Rules (**NBN SIO RKR**) which, if implemented, will have significant cost and resource implications for **nbn**. Additionally, the proposed changes would provide limited benefit to the ACCC or other interested parties in their assessment of competition in both the **nbn** wholesale broadband services market, and the market for superfast broadband access services more generally.

In our view, this consultation process represents a missed opportunity for the ACCC to better understand the major changes taking place across the market for superfast broadband access services, and to oversee that critical market. This is an outcome that could be achieved by broadening the NBN SIO RKR to include other providers of superfast broadband access services. As **nbn** has noted in previous submissions to NBN SIO RKR consultations, information about the rate and take up of *all* superfast broadband access services would provide for a more complete understanding of the development of the market for superfast broadband (at a wholesale level) and downstream competition across the superfast broadband market as a whole.

It is disappointing that instead, the ACCC has decided to consult on proposals submitted by Telstra and Optus in the context of the “Extension of the NBN SIO RKR” consultation process held in 2020. As we note throughout this submission, these proposals would harm **nbn** commercially, and would have limited benefit to the ACCC’s assessment of competition across a highly competitive industry. For example, the proposed inclusion of **nbn**’s Enterprise Ethernet services in the NBN SIO RKR is at odds with accepted principles of good regulation, given **nbn** represents only a small fraction of the dedicated fibre market for business services, and **nbn** is unaware of any proposal from the ACCC to capture providers of the majority of those services.

The proposal to include service level reporting in NBN SIO RKR is even more concerning. **nbn** already provides detailed service level performance information to RSPs via commercially negotiated arrangements, and voluntarily publishes aggregated service level performance data on a monthly basis on its website. We are not aware of any other providers that transparently publish information of a similar nature for public scrutiny. Such information also appears to be entirely unrelated to the original intention of the NBN SIO RKR.

In the Ministerial Statement of Expectations put to the ACCC by the Minister for Communications, Urban Infrastructure, Cities and the Arts, the Minister indicates his preference to “encourage the commercial operation of the telecommunications sector and to keep regulation and intervention to a minimum except where a clear market failure has developed.” As we note throughout our response, there is little evidence of market failure either in practice or set out in the Consultation Paper to justify the proposed new rules and interventions. If the ACCC is of the view that there is a market failure, then it must ensure that any new regulation applies to *all* participants in the market for superfast broadband services.

**nbn** is also strongly of the view that commercially negotiated arrangements should take precedence over regulated requirements, with regulation only acting as a backstop when commercial arrangements are not delivering appropriate end user outcomes. It is concerning that in the service level performance reporting context, the ACCC is considering leveraging outcomes of the WBA commercial negotiation process by applying a regulatory overlay on those outcomes. Such an approach could affect future negotiations between **nbn** and access seekers.



**nbn** has worked constructively with the ACCC over a number of years to meet the requirements of the NBN SIO RKR. To achieve this, **nbn** has devoted considerable resources towards establishing a framework and processes to report in accordance with the current NBN SIO RKR. Any changes to the scope of the RKR will impose additional upfront and ongoing costs on **nbn** and will require lead time to implement. **nbn** is firmly of the view that the ACCC should carefully consider any proposed variations in terms of their cost and benefit to ensure that any expenditure is an efficient use of **nbn**'s resources.

If there are any changes to the current NBN SIO RKR, we request that the ACCC engage further with **nbn** in regard to:

- setting an appropriate timeframe for implementation, noting that **nbn** will need to make changes to its systems and current processes to meet varied recording and/or reporting requirements; and
- the proposed drafting of any variations to the RKR.

Our detailed responses to the ACCC's questions are set out at **Appendix A**. As is always the case, **nbn** would be pleased to further discuss any of the comments made in this submission.



## Appendix A - Responses to questions

### 1. Do you support the introduction of a requirement on NBN Co to notify the ACCC when it is preparing to introduce a new product or service? Please provide reasons.

**nbn** does not support a requirement to notify the ACCC when preparing to introduce a new product or service. **nbn** is already subject to, and complies with, a range of transparency measures that ensure the ACCC, access seekers and other interested parties are aware of new products and services offered by **nbn**.

There are at least three existing mechanisms by which the ACCC can inform itself of any upcoming or new **nbn** products or services:

- the Integrated Product Roadmap, published on the **nbn** website<sup>1</sup> on a quarterly basis which sets out upcoming product developments and product changes;
- by monitoring **nbn**'s supply agreements, including the Wholesale Broadband Agreement, on the **nbn** website<sup>2</sup>. These supply agreements are updated whenever a new service or product is declared; and
- **nbn**'s Access Agreement Quarterly Report, lodged on a quarterly basis with the ACCC, which sets out new access agreements made during the quarter and access agreements already in place with access seekers.

These existing processes, which are resource intensive in their own right, are designed to provide industry and other key stakeholders such as the ACCC with enough guidance to determine when **nbn** has introduced, or plans to introduce, a new product or service.

If the ACCC is proposing to introduce a new process for notifying it of new products or services, it should consider how it will reduce or make neutral the regulatory impact of the existing framework on **nbn**. Further, if the ACCC continues to consider it necessary to impose this additional reporting step on **nbn**, it should consider applying the same requirement on other providers of superfast broadband services for the purpose of obtaining relevant 'services in operation' information from those providers.

#### *Unintended consequences of an additional reporting requirement*

When **nbn** declares a product or service, it is required to publish or update a standard form of access agreement (SFAA) on the **nbn** website before supplying that product or service. In some cases, publication of SFAAs occurs multiple times a week. Any requirement to notify the ACCC in advance of publishing an SFAA would likely result in delays to product launches to comply with the ACCC's reporting requirements to provide the ACCC with information which it already has alternative means of obtaining. These delays could have an adverse impact on **nbn**'s ability to respond to changing market circumstances and harm **nbn** commercially.

Given the WBA or other agreements can be updated multiple times during a week, the ACCC would potentially be inundated with notifications of new products or services. If the ACCC were to introduce the proposed change, it would need to carefully and clearly define the meaning of a new product or service to ensure it was only made aware of product or service changes that are meaningful to its assessment of competition. For example, while a change to the NPIS may require an update to the WBA SFAA because the change amounts to a minor change to a service, the practical effect of the change may not have any meaningful relevance to competition or analysis of the market.

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<sup>1</sup> **nbn**<sup>TM</sup> Integrated Product Roadmap can be accessed here: <https://www.nbnco.com.au/sell-nbn-services/products-services-pricing/product-roadmap>

<sup>2</sup> **nbn**'s supply agreements can be accessed here: <https://www.nbnco.com.au/sell-nbn-services/supply-agreements>



**2. Should the notification period in rule 14 be reduced from 90 calendar days to a shorter period, such as 28 calendar days? Please provide reasons.**

**nbn** does not support a proposal to reduce the period in which it would be required to comply with record keeping obligations, once notified by the ACCC.

In order to meet a new reporting requirement under the NBN SIO RKR, in almost every case, **nbn** has to implement systems changes that require planning, development and testing to generate accurate outputs. **nbn** would have to invest in new processes or divert existing resources to meet the proposed timing requirements and, depending on the complexity of the reporting requirement, may still not meet the proposed timeframe. IT and systems changes typically operate on a three month cadence at **nbn**, meaning the current requirement under Rule 14 can typically be met within that existing framework. The proposed change would require **nbn** to prioritise a Rule 14 request, which would likely come at the expense of other IT or systems work which could, for example, delay a product launch, and materially impact **nbn**.

Setting aside the challenges of meeting the requirement, it is unclear to **nbn** how the reduced timeframe would materially benefit any assessment of competition in the market, and how any additional investment by **nbn** to prioritise implementing a rule 14 request would represent efficient investment by **nbn**. As the product or service would only have just been put into the market, it is not clear what benefit to competition accrues from **nbn** providing SIO information on the proposed shorter timeframes, when (presumably) there would be minimal impact on the market at that early stage.

*Sky Muster Plus*

The ACCC's assertion in the Consultation Paper that Sky Muster Plus (SMP) is a recently introduced service, is incorrect. **nbn** launched SMP on 8 August 2019<sup>3</sup>. As noted above, **nbn** is required to publish an SFAA prior to launching a new product. The SFAA relating to SMP has been published and has been publicly available on **nbn**'s website for over two years. Additionally, **nbn** has been reporting on SMP access seekers in its Access Agreement Quarterly Reports since October 2019. Thus, there is no information asymmetry on the part of the ACCC in relation to this service, which in any case is not covered by the definitions of the current NBN SIO RKR, as it does not use the same Layer 2 traffic class product construct as those services currently reported on by **nbn**.

**3. Are there any other changes that should be made to the NBN SIO RKR rules to improve reporting timeliness and ensure that information provided to the ACCC and publicly disclosed is relevant?**

As noted in response to questions 1 and 2, the current timeframes for disclosure are appropriate.

On the issue of relevance, the NBN Wholesale Market Indicators Report would have greater relevance to all interested parties, and to the ACCC's assessment of the state of competition, if all superfast broadband access providers were subject to the record-keeping requirements of the NBN SIO RKR. This would provide a clear and consistent understanding of the development of the superfast broadband market at the wholesale level.

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<sup>3</sup> The launch of Sky Muster Plus was accompanied by the following media release: <https://www.nbnco.com.au/corporate-information/media-centre/media-statements/nbn-sky-muster-plus-provides-unmetered-data-for-essentials>



## *CVC Overage*

### **4. Do you have views regarding the introduction of CVC overage reporting?**

**nbn** does not support the introduction of a CVC overage reporting requirement.

Any changes to the SIO RKR should have regard to the objectives of the *Competition and Consumer Act 2010* (the CCA), and align with the statutory requirements for requesting information set out in section 151BU of the Act. **nbn** is not convinced that the proposed changes to introduce CVC overage reporting meet either of these thresholds. For example, the Consultation Paper does not establish:

- how CVC overage information is a relevant factor in assessing competition in the market,
- how the proposed change would facilitate the operation of the regulatory framework, or
- what market failure the ACCC is seeking to address through the requirement.

The Consultation Paper seeks to justify the proposed CVC overage reporting requirement by noting that, “CVC overage is an important element of the costs of access seekers obtaining NBN TC4 services”. In reality CVC overage comprises a very small part of the cost of a bundled TC-4 service (approximately 0-4 percent of total costs).

Additionally, CVC overage information does not provide any real insight into how an access seeker manages its CVC that is not already available to the ACCC through the existing CVC reporting provided under the NBN SIO RKR. Access seekers with customers on predominantly higher speed tiers will likely be charged less overage on the basis that they have more “pooled” CVC. This does not mean that the access seeker in this scenario is better or worse than another access seeker, it simply means they have a higher proportion of end users on higher speed plans. Likewise, smaller access seekers will derive more benefit from the Overage Waiver Threshold of 1500Mbps that is applied before any overage charges are applied, and hence are more likely to be reported as not being charged for overage, even if their actual level of CVC provisioning is higher on a per-AVC basis. We are concerned that this information will be used to form incorrect assumptions on the state of the market (particularly if publicly disclosed), and harm competition at the price sensitive end of the market.

#### *CVC relief payments*

Over the past 18 months as various parts of Australia have experienced COVID-19 related lockdowns, there have been corresponding fluctuations in CVC demand. There have also been unanticipated spikes in usage as governments have moved quickly to enforce stay at home orders. **nbn** has responded to these spikes in CVC overage by providing financial relief to RSPs with the aim of reducing the impact of unanticipated CVC overage costs on RSPs.

Although it is unclear what exactly is driving the ACCC’s interest in CVC overage reporting, if it is to avoid scenarios in which there are unanticipated costs to RSPs, we would suggest that an additional reporting requirement is not the right mechanism to address this. The COVID pandemic has been a once in a generation event, and **nbn** responded in good faith to work voluntarily with RSPs to address the overage issue in a timely



manner. It would be a perverse outcome of this market-driven approach if the ACCC were to effectively penalise **nbn** for working constructively with the industry on this matter.

#### *IT development costs and timing of implementation*

If the ACCC does decide to introduce this change, it should be aware that it will have a cost impact on **nbn**, as we would be required to build the functionality to report CVC overage information in the way that is requested by the ACCC. We would also need to test this functionality to ensure the accuracy of any outputs.

[c-i-c]

[c-i-c]

#### *SAU variation context*

We note that changes to **nbn**'s pricing construct are currently being considered as part of the ACCC's Review of the NBN regulatory framework, as **nbn** seeks to develop a variation to its Special Access Undertaking (SAU). If changes are made to **nbn**'s pricing arrangements as part of that process, the CVC overage construct may change. Given there will be IT development costs associated with implementing the proposed reporting requirement, it would be pre-emptive and inefficient to require **nbn** to make changes to implement a reporting requirement that may be redundant in 12 months.

The better approach is to defer consideration of CVC overage reporting until the conclusion of the SAU Variation process, when **nbn**, access seekers and other interested parties have greater certainty as to the longer-term **nbn** pricing framework.

### **5. What level of disaggregation should CVC overage reporting be provided?**

**nbn** does not consider that any level of disaggregation of CVC overage reporting is appropriate or that it will provide material benefit or insight to the ACCC in its assessment of competition, or in any assessment of how RSPs provision CVC for their retail customers. As noted in response to question 4, any decisions in respect of CVC overage reporting should be deferred until the completion of the SAU Variation process to avoid the inefficient use of **nbn** or ACCC resources.

### **6. Do you have views regarding the publication of high-level CVC overage information in the NBN Wholesale Market Indicators Report, or elsewhere?**

The threshold for a disclosure under section 151BUC of the *Competition and Consumer Act 2010* is that it "would be likely to" promote competition or facilitate the operation of Part XIB or Part XIC. Before making changes to the SIO RKR, the ACCC must consider whether this level of certainty, which is required by sub-section 151BUC(2), has been achieved. **nbn**'s view is that this threshold has not been met, and therefore the ACCC should not disclose CVC overage information.

As noted above in response to question 4, there is a risk that disclosure of CVC overage information may be misinterpreted or misunderstood by consumers, which could have a detrimental impact on competition. Additionally, disclosure of CVC information could distort the market if it is not carefully caveated, as it may lead to consumers forming a view of the perceived "performance" of access seekers in a manner that does not reflect the reality of their service provisioning. The safer approach is to not disclose CVC overage information, even at a high level, and particularly in the absence of a compelling reason to do so.





## Enterprise Ethernet

### 7. Do you have views regarding the size and scope of the enterprise Ethernet market in Australia?

The direct fibre business market is well-developed and highly competitive at both wholesale and retail segments. Multiple network owners provide direct fibre connectivity to end customer premises, data centres, and/or non-premises via Internet Multiprotocol Label Switching (MPLS) networks or layer 2 point to point connectivity. This provides end users and service providers an extensive choice of network and vendor.

While **nbn** believes there are still underserved segments of the market and enhanced competition will improve service, increase innovation and potentially lower prices, there is already robust competition in the market. [c-i-c] [REDACTED]

[c-i-c]

Since launching the Enterprise Ethernet product in 2018, **nbn** has brought considerable innovation to the market. This includes deferred charges for fibre builds, the introduction and subsequent expansion of Business Fibre Zones, fibre build guarantees and lower, simplified pricing to make the technology available to more small and medium businesses. This has undeniably expanded the enterprise services market by making the product available at lower prices and offering \$0 upfront fibre build in more outer metro and regional areas – but not to the point that **nbn** has acquired significant market share. [c-i-c] [REDACTED]

[c-i-c]

### 8. Do you support the introduction of Enterprise Ethernet reporting? Please provide reasons.

**nbn** does not support the introduction of Enterprise Ethernet reporting.

Noting the extent of competition within the direct fibre business market, there is no market failure to justify additional reporting requirements being placed solely on **nbn**. If the ACCC does decide to regulate the reporting of **nbn**'s Enterprise Ethernet services via the NBN SIO RKR, then the ACCC should ensure that all firms operating across the business fibre market (including those who directly supply retail services over their own networks) are captured by the same regulation. This is essential to levelling the playing field in enterprise services market in which **nbn** is already at a distinct competitive disadvantage. Any regulation that applies to **nbn** only, risks skewing outcomes in favour of non-**nbn** entities.

As the ACCC is aware, **nbn** already faces a substantial disadvantage in the highly competitive business market because of the statutory obligations that apply to it but not its competitors. **nbn**'s non-discrimination obligations, and publicly accessible price lists, for example, are unique in the market and place a far higher hurdle in front of **nbn** when competing to sell wholesale services. **nbn** has substantially less flexibility to meet its competitors' pricing, while competing providers always have access to **nbn**'s best price wholesale offer. Given the current regulatory construct already puts at risk **nbn**'s ability to operate efficiently and compete on a level playing field in the business market, any new proposals that further reduce **nbn**'s competitiveness in this market relative to its competitors will likely entrench the advantage of retail and wholesale incumbents, place less downward price pressure on the market, and ultimately result in worse outcomes for end users.

The Consultation Paper states that "some public reporting of Enterprise Ethernet SIOs may promote competition". As noted in response to question 7, the market for enterprise services in Australia is already a highly competitive one – particularly in metropolitan areas, and in the absence of any justification in the



Consultation Paper, it is unclear what market failure the ACCC is seeking to address through this proposal. Additionally, in the absence of evidence that the enterprise market is not competitive, there is no justification for why any reporting requirement should only apply to **nbn**. **nbn** represents only a fraction of the overall direct fibre market, meaning that any requirement to provide information will place an unfair burden on **nbn**, and this information, on its own, would be unlikely to provide any insight into the state of competition in the market. In fact, we would go further and say that reporting provided by a single participant in a competitive market provides no insight into the state of competition in that market, and would only provide insight into the commercial outcomes of that single participant. Such reporting would give competitors an insight into **nbn**'s performance and alert them to competitive threats, which they might respond to by pre-emptively retaining customers or diverting their investments to thwart **nbn**.

Importantly, any requirement on **nbn** to report on Enterprise Ethernet SIOs will have an immediate cost impact. **nbn** will need to invest in IT development to enable us to generate the information required by the ACCC in the form that it prescribes. We may need up to 6 months to implement the change due to **nbn**'s ongoing program of IT development work. This represents a material cost to **nbn** that will likely be passed on to RSP customers.

#### **9. What level of disaggregation in Enterprise Ethernet reporting should be required?**

**nbn** does not consider that any level of reporting on its Enterprise Ethernet services is appropriate. To reiterate our response to question 8, there is no clear justification, statutory or otherwise, for accessing any Enterprise Ethernet SIO records.

In relation to the proposed speed tier reporting, we note that there are currently 23 speed tier profiles for Enterprise Ethernet and **nbn** is developing an additional range of higher Enterprise Ethernet speed tiers above 1 Gbps. The Consultation Paper makes no case for the benefits of such highly disaggregated information. Given that a requirement to report on individual speed tiers will drive additional IT development cost into **nbn**, we would first ask that the ACCC consider the value of such highly disaggregated speed tier information and what benefit it would provide from a competition assessment standpoint, particularly when no other provider of enterprise services will be required to report on even the total number of services they have. An alternative approach would be to review the speed tier profiles provided by other wholesale providers and potentially aggregate speed tier profiles into bands such as: 10-100 Mbps, 150-500 Mbps, 600-1000 Mbps, and 1,000+ Mbps, and then to require all providers (not just **nbn**) to provide reporting to the ACCC.

#### **10. What level of detail regarding Enterprise Ethernet services should be publicly disclosed in the NBN Wholesale Market Indicators Report, or elsewhere?**

**nbn** emphatically disagrees with any proposal to publicly disclose Enterprise Ethernet SIOs. This information is highly commercially sensitive, and will have severe consequences on **nbn**'s ability to compete effectively in the direct fibre market. Our view is that even the threat of regulation could discourage RSPs from purchasing **nbn** Enterprise Ethernet services on the basis that commercially sensitive access seeker group information could be made public. For example, smaller Access Seeker Groups who may be trying to build market presence may be looked at less favourably by some consumers. Again, measures that will reduce **nbn**'s attractiveness to downstream providers will only harm competition in the market, and ultimately, end customers.



There is no reasonable argument to justify publishing only **nbn**'s SIO records in a public forum when the applicable market is functioning effectively from a competition standpoint. If the ACCC is concerned that the market is functioning inefficiently, or ineffectively, then the first step is gathering evidence from across the entire industry, rather than a single (non-dominant) provider of services, to demonstrate that further intervention is required.

**nbn** also assumes that where the ACCC proposes to disclose confidential information belonging to an RSP, that the ACCC will account for feedback from RSPs on this question and in certain cases, seek specific written feedback from affected RSPs who may not have the resources to respond to this consultation.

**11. Do you have views regarding the size and scope of the business satellite market in Australia?**

The business satellite market in Australia is a highly competitive one, with a number of providers competing to provide services to business consumers. **nbn**<sup>™</sup> is in direct competition with companies such as Asiasat, Intelsat (now ViaSat), Starlink, and OneWeb to name a few.

We are not aware of any market failure in the business satellite services space that would necessitate additional regulation of **nbn**'s provision of BSS services.

**12. Do you support the introduction of Business Satellite Service reporting? Please provide reasons.**

**nbn** does not support the inclusion of reporting on **nbn**<sup>™</sup> Business Satellite Services (BSS) for similar reasons to those set out in response to question 9 on **nbn**<sup>™</sup> Enterprise Ethernet services. In summary:

- **nbn** is already at a commercial disadvantage in the business satellite market as it is subject to a highly restrictive regulatory framework that other providers are not;
- **nbn** already publishes its price and non-price terms and conditions on the **nbn** website, which other providers are not required to do;
- **nbn** only represents a small part of the overall market, meaning any assessment of the wholesale business satellite market will be incomplete; and
- there is no evidence of market failure or other justification to require **nbn** to report on BSS SIOs.

If the ACCC does impose reporting requirements on **nbn**, it must impose the same requirements on all other providers of business satellite services.

**13. What level of disaggregation in Business Satellite Service reporting should be required?**

On the basis that there should be no requirement on **nbn** to report on its BSS services, it follows that there is no appropriate level of disaggregation of reporting on those services.

**14. What level of detail regarding Business Satellite Services should be publicly disclosed in the NBN Wholesale Market Indicators Report, or elsewhere?**

If the ACCC does require **nbn** to provide information on its BSS services, that information should not be disclosed. **nbn** currently supplies in the order of [c-i-c] [REDACTED] [c-i-c]. If the ACCC discloses these SIOs at an Access Seeker Group level, it may be extremely commercially harmful to smaller RSPs that are still



building their presence in the market. This could have the effect of reducing competition if end users are more inclined to purchase services from retailers that sell the majority of **nbn** BSS services.

As noted throughout this submission, **nbn** also assumes that where the ACCC proposes to disclose confidential information belonging to an access seeker, that the ACCC will account for feedback from those access seekers on this question and in certain cases, seek specific written feedback from affected access seekers who may not have the resources to respond to this consultation.

### *CVC acquired*

#### **15. Do you consider that TC4 CVC capacity acquired data should be publicly reported for access seekers? Please provide reasons.**

The ACCC should not publicly disclose TC4 CVC capacity acquired data for access seekers.

While the ACCC should factor in guidance from access seekers on this question, it should note that any such disclosure could have a detrimental impact on competition rather than achieving the stated purpose of improving transparency and aiding contextualisation. It will be important for the ACCC to appropriately weight the views of access seekers as some may stand to benefit commercially more than others from disclosure of this data.

Unless the information disclosed by the ACCC is carefully caveated there is a risk of consumers being misled into believing that RSPs dimensioning more CVC per end user will provide a better customer experience outcome – which is not necessarily the case. RSPs have a number of different end-user profiles, and CVC acquired will vary depending on the speed-tier mix of the services sold by that access seeker. Access seekers that purchase a higher proportion of wholesale higher speed tier plans will appear to provision more CVC per end user than an RSP that purchases a lower proportion of high speed tier plans, or one that predominantly sells plans to consumers at the lower end of the market. This is one of the reasons why, when **nbn** provides CVC acquired and CVC utilisation data to the ACCC, it provides detailed interpretive notes including information on data quality and completeness. Publicly disclosing this information without such detailed interpretive notes would be misleading and potentially harmful to competition.

We are particularly concerned about the potential harm to the reputation of access seekers that serve the lower end of the market. If CVC acquired data is an input into an end user's decision on which RSP to select, it can be assumed that the end user would be more inclined to select an RSP that provisions more CVC per end user. Not only could this result in an overall worse customer experience for the end user, but it could reduce the quality of offerings for lower speed tier products. While for some consumers CVC overage considerations would be an appropriate basis to select an RSP on, for many, their **nbn** experience should factor in a much wider range of inputs.

CVC acquired information is also highly sensitive from a commercial perspective. If RSPs are made aware of how much CVC other RSPs have acquired, they only need to know the AVC profile of competing RSPs to determine their Overage amount and better understand the commercial margins applying to their services.

**nbn** assumes the ACCC will directly engage with affected access seekers on this potential disclosure prior to finalising any arrangements. This is because it is not sufficient to assume that all affected access seekers whose detailed information may be disclosed under the proposal will have the resources to make submissions in response to the Consultation Paper.



**16. Do you consider that TC4 CVC capacity acquired data should be publicly reported each quarter across a wider range of timeframes (e.g. weekly, monthly)? Please provide reasons.**

TC4 CVC capacity acquired data should not be publicly disclosed across wider timeframes. Weekly and monthly data is likely to be very “noisy”, reflecting temporary fluctuations in CVC capacity acquired, rather than showing trends in the data. This again would create issues with respect to interpretation and potentially result in information being misunderstood.

It is also unclear from the Consultation Paper how the ACCC envisages this proposed cadence (either weekly or monthly) would help in its assessment of competition in the market. We note that the proposed changes would require investment by **nbn** into its IT systems to produce weekly or monthly CVC data. The upfront and ongoing costs associated with providing this data should be underpinned by a more robust justification as to how it would be useful to the ACCC in meeting the disclosure objectives set out in Part XIB.

**17. How should TC4 CVC capacity acquired data be best presented to provide stakeholders with an appropriate level of information?**

As noted above, in our view, TC4 CVC capacity acquired data should not be disclosed. If the ACCC is inclined to disclose this data, it should make clear the reasons for disclosing it, which can inform access seeker consideration of how best to present the relevant data.

**18. Should the ACCC make any changes to TC1 or TC2 CVC capacity reporting? Please provide reasons.**

**nbn** does not support any changes to TC1 or TC2 CVC capacity reporting. We are not aware of any concerns in relation to the current approach to reporting this data, and as noted above, any potential changes to the RKR that may arise from feedback to this question should be further consulted on.

*CVC utilised*

**19. Do you consider that CVC utilisation data should be reported publicly? What level of disaggregation is appropriate? Please provide reasons.**

For the same reasons as those set out in response to question 15, we do not support public disclosure of CVC utilisation data.

**20. How should CVC utilisation be best presented to provide stakeholders with an appropriate level of information?**

Refer to response to question 21.

**21. Is using a 7-day average (e.g. for Week 13 of each quarter) appropriate to present utilisation data, or another methodology? Please provide reasons.**

This responds to questions 20 and 21.



As noted in response to earlier questions, CVC utilisation data should not be publicly disclosed. If the ACCC is inclined to disclose this data, it must first outline the purpose of these disclosures. Once we understand the purpose, we can provide a view as to what the most appropriate way to present that data is, and how that data should be averaged.

We note that utilisation data varies from day-to-day and week-to-week based on a range of factors: seasonality, school and public holidays, major releases such as game or software updates, and significant sporting or other online streaming events. Any disclosures will need to acknowledge these events to ensure that readers have context for any significant changes in utilisation.

**22. Do you consider that the NBN SIO RKR should incorporate data on NBN Co's delivery of service standards? Please provide reasons.**

**nbn** does not support the inclusion of service standard and rebate payment information in the NBN SIO RKR. While we recognise the ACCC is likely to have an *interest* in accessing this information, it is not clear from the Consultation Paper what issue or market failure the ACCC is seeking to address through this proposed rule, particularly given:

- **nbn** is already required under WBA 4 to provide RSPs with detailed information in respect of service level performance, and
- there are already strong economic, regulatory, and broader incentives to motivate **nbn** to meet or exceed service levels.

The Consultation Paper states that the provision of service level performance information would give the ACCC “more effective oversight on the delivery of NBN wholesale services and the NBN wholesale market”. In **nbn**'s view, this reasoning does not meet the threshold for requiring **nbn** to provide records, as set out in section 151BU(4) of the CCA. If the ACCC considers that provision of this service level performance information is necessary to enhance its monitoring of competitive outcomes in the market for superfast broadband services, **nbn** submits that the ACCC should make clear: (1) why, in its view, the information should be provided (with reference to the relevant criteria in section 151BU(4)), and (2) how the information will be used to meet the objectives of the CCA (with reference to the long term interests of end users). Without establishing a clear rationale for a record-keeping request, the ACCC must consider whether the upfront and ongoing costs that **nbn** will incur to meet any requirement represents an efficient use of expenditure.

In considering these questions, the ACCC should factor in the potential harm that any service level reporting requirement would have on future commercial negotiations between **nbn** and access seekers. **nbn** agreed to the service level arrangements in WBA 4 following a protracted negotiation with access seekers and made a number of good faith concessions on service levels and service level performance reporting. By requiring **nbn** to report on service level information to the ACCC, the ACCC is signalling that any service levels or performance information **nbn** agrees to share for commercial purposes in future may be subject to a regulatory overlay. This potentially undermines both:

- the regulatory hierarchy, which prioritises commercially negotiated arrangements, and
- future WBA commercial negotiation processes as **nbn** will need to factor in potential regulation of reporting obligations into its service level arrangements.



The ACCC must therefore carefully consider whether the benefits of its proposed service level reporting arrangements (which are largely unspecified in the Consultation Paper) will exceed the potential detriments of doing so.

If the ACCC is of the view that greater oversight of network performance will help address perceived issues across the network, then it should set out clear expectations for what an appropriate level of performance is. As **nbn** has noted in previous submissions, telecommunications networks are highly complex systems with many potential points of failure. The price that RSPs pay for **nbn** wholesale services has been negotiated on the basis that these services will not be fault-free. These arrangements promote economically efficient investment by **nbn** in its infrastructure, which in turn facilitates lower costs for RSPs and consumers than would be the case for a network that is designed to have even higher standards of reliability.

*Existing incentives provide sufficient motivation to meet service levels*

**nbn** has obvious and strong incentives to perform well against its service levels, and to ensure that service levels reflect the needs of RSPs and end users. These existing incentives should demonstrate that additional regulation of service levels is not required and, would in fact represent an inefficient use of **nbn** resources.

There are at least three categories of incentives that drive **nbn** to perform against its service levels:

- *Economic incentives:* as a wholesale only provider, **nbn** is almost entirely reliant on RSPs to generate its revenue, so it must supply services in a manner that responds to the needs of RSPs and end users, including through service level performance. **nbn** must also perform against service levels to manage costs associated with the WBA 4 rebate regime. It also faces competitive pressure across multiple fronts:
  - o In the fixed line market, **nbn** competes with service providers primarily in high value multi-dwelling units (MDUs), where FTTN/B services are generally offered, but also new developments.
  - o While mobile data services remain a complimentary product for most fixed line users, a growing number of consumers are choosing to go “mobile” only.
  - o In areas where 5G wireless technology is being deployed.
- *Regulatory incentives:* the potential for increased regulation where there is a market failure encourages **nbn** and RSPs to negotiate effectively to avoid the uncertainty of a regulated outcome. This led to the significant enhancements of the rebate regime in WBA4.
- *Broader incentives:* **nbn** is subject to broader external factors that incentivise it to deliver against its contracted service levels to provide a positive customer experience, such as reputational risk, RSP reporting requirements in its service level framework, **nbn**'s voluntary public transparency metric reporting, and the practical necessity to perform above set performance objectives to increase the probability of meeting performance objectives.

As the ACCC would note from **nbn**'s voluntary public transparency metric reporting<sup>4</sup>, **nbn**'s performance against its service levels has continued to improve over time (excepting for unexpected challenges following the recent implementation of a new appointment scheduling system). This should indicate that the current arrangements are operating effectively, and **nbn**'s incentives are appropriate.

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<sup>4</sup> <https://www.nbnco.com.au/corporate-information/about-nbn-co/updates/dashboard-september-2021>



### *Potential for misalignment between ACCC and RSP reports*

**nbn**'s service level reporting reflects the commercially negotiated service level arrangements set out in WBA 4. This ensures that RSPs have access to reporting that is relevant to the services they are ordering, and that there is a clearly understood framework in which service level performance is measured. **nbn** is concerned that reporting rules made under the NBN SIO RKR may be misaligned with the WBA, or may fall out of alignment if new arrangements are developed as part of any future WBA process. These misalignments could result in **nbn** having to make two sets of different reports relating to service level performance, which is likely to result in additional cost to **nbn**. Maintaining consistency with the SIO RKR requirement may also act as a disincentive to improve or enhance service levels so as to reduce costs for **nbn**.

### *Complexity and cost concerns*

There is a high degree of complexity associated with reporting on service level performance. While **nbn** already produces reports for some of the information that the ACCC has listed as examples, it does not provide or even collect metrics for some of the information suggested. [c-i-c] [REDACTED]  
[REDACTED]  
[REDACTED] [c-i-c] Where **nbn** is required to report on a performance metric that it does not currently collect, it will need to better understand what the ACCC is seeking to collect and the purpose of any such requirement.

If there are any changes to the current RKR to include service level reporting, we request that the ACCC engage further with **nbn** in relation to:

- agreeing to 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
- the proposed drafting of any variations to the RKR.

### *Regulatory neutrality*

If the ACCC intends to proceed with a requirement for **nbn** to provide service level performance information, it must apply the same or similar reporting and disclosure requirements on other superfast broadband access providers. This would provide the ACCC with a clear and consistent understanding of service level performance across the wholesale market, and put **nbn**'s performance in context. Importantly, we would expect that any such requirement would apply to providers of wholesale superfast broadband services, whether supplying fixed or wireless services.

If the ACCC does not intend for this requirement to apply to all providers, it should clearly set out why **nbn** is the only service provider subject to this requirement, and how service level information from a single service provider, could be used to inform the ACCC's assessment of competition in the market.

### *Other processes looking at **nbn** service levels*

In addition to there not being a clear justification to incorporate this data in the NBN SIO RKR, we note the current Department of Infrastructure, Transport, Regional Development and Communications' process on Statutory Infrastructure Providers Standards.

Any decision relating to the inclusion of service standard information in the NBN SIO RKR should be deferred until this process has concluded. This will ensure that any approach is underpinned by certainty that the





framework will not experience any significant changes in the short term, and provide for the most efficient use of any expenditure by **nbn** into systems changes.

*Public reporting of service standard information*

As noted in response to other questions, but again highly relevant in this context, the ACCC must ensure that disclosure meets the threshold set in section 151BUC of the CCA. That is, whether disclosure “would be likely to” promote competition or facilitate the operation of Part XIB or Part XIC. Before making changes to the SIO RKR, the ACCC must consider whether this level of certainty, which is required by sub-section 151BUC(2), has been achieved. **nbn**’s view is that this threshold has not been met.

While **nbn** already provides some performance reporting information in its voluntary public transparency metric reporting, this information is presented with sufficient context and explanatory material to ensure that the information does not mislead, and that it provides interested parties with information that is of use.

**23. If so, which information should be included and at what frequency? Please provide reasons.**

**nbn** does not support any service standard information being required under the NBN SIO RKR. However, for completeness, we have addressed the proposals set out in the Consultation Paper in the table, below. It should be noted that even where **nbn** does already provide information to RSPs, it does not mean that there will not be a cost associated with providing similar information to the ACCC. As the ACCC would be aware, its requirements may require information be provided in a format which differs from how it is presented to RSPs, or be provided on a different cadence.

Consultation paper proposal	nbn comments
<p>NBN Co’s performance against service levels or performance objectives for the delivery of connections, faults and appointment attendance which could be measured for all retail service providers, or broken down by location, service class and technology type.</p>	<p><b>nbn</b> provides RSPs with a detailed breakdown of its performance against service levels under WBA 4, and we also provide an aggregated, high-level view of some service level performance data through our voluntary public transparency metric reporting.</p> <p>Given detailed data is already supplied to RSPs, and other interested parties can access similar data via <b>nbn</b>’s website, it is unclear what benefit the ACCC is seeking to gain by requiring this information through the NBN SIO RKR.</p> <p>Although we already provide this information to RSPs, providing it to the ACCC in a format that it prescribes will be likely to impose some IT development costs on <b>nbn</b> and take time to implement. If the ACCC does include this requirement in the NBN SIO RKR, we would expect that it would consult on the detail of the requirement.</p>
<p>Network availability.</p>	<p>As above, network availability information is provided to RSPs in a monthly network performance report and is publicly accessible via <b>nbn</b>’s voluntary public transparency metric reporting.</p>



<p>Number of customers impacted by planned/unplanned outages and the length of time that services were unavailable.</p>	<p><b>nbn</b> provides detailed outage information to RSPs, but we do not have information on outage length for individual services. As noted in the body of the submission, this would come at significant expense to <b>nbn</b>.</p>
<p>Number of delayed connections and failed connections on each network.</p>	<p><b>nbn</b> provides “right first-time” and “faults after connection completed” information in its voluntary public transparency metric reporting. <b>nbn</b> also agreed to provide “new service never worked” information to RSPs in WBA 4.</p> <p>The ACCC would have to clarify what it means by “delayed” and “failed” connections for <b>nbn</b> to assess whether it can provide this information. In defining these faults, the ACCC should also specify the purpose of requiring <b>nbn</b> to provide this information.</p>
<p>Number of different types of faults on each network. For example, end-user faults, performance incidents and network activities (including percentage of time that services are not available) and the number of services experiencing recurring performance incidents and end-user faults.</p>	<p><b>nbn</b> provides detailed network fault information to RSPs.</p> <p>In relation to performance incidents and network activities, <b>nbn</b> has undertaken significant improvements in its outage communications to support RSPs in managing communications with customers impacted by outages – and continues to progress this in conjunction with RSPs.</p>
<p>Speed information for services on the fixed line, fixed wireless and satellite networks. For fixed line services this could include line rate, information rate and achieved peak information rate (PIR) data. For fixed wireless services, average busy hour cell performance by upload and download throughput, list of priority forecast upgrade cells, congested cells and congested backhaul links.</p>	<p><b>nbn</b> provides RSPs with detailed line rate information for its FTTN/B and C access technologies, and we provide congestion reporting for Fixed Wireless and HFC services.</p> <p>In relation to fixed wireless services, <b>nbn</b> provided the ACCC with average busy hour cell performance reporting, priority forecast upgrade cell reporting and reporting on congested cells and congested backhaul links under the terms of the section 87B voluntary undertaking submitted to the ACCC in September 2018. This reflected the performance challenges faced by that network at the time, and <b>nbn</b>’s recognition that additional scrutiny was reasonable. Since then, the performance of <b>nbn</b>’s Fixed Wireless network has improved significantly. <b>nbn</b> no longer provides this reporting to the ACCC (except priority forecast upgrade cell reporting, which is provided voluntarily), however we continue to provide this information to RSPs under WBA 4. Given <b>nbn</b> has made significant</p>



	<p>improvements to the Fixed Wireless network and the obligations under the section 87B Undertaking no longer apply, it is unclear why <b>nbn</b> would now be required to resubmit this information. <b>nbn</b> also reports publicly on the performance of its Fixed Wireless network via our voluntary public transparency metric reporting.</p>
<p>Wholesale rebates incurred by NBN Co under WBA4 for missed appointments, late and failed connections, unrectified faults and speed assurance.</p>	<p><b>nbn</b> provides rebate information to RSPs that is relevant to their customers. It is unclear, however, what purpose the ACCC is seeking to achieve by requiring this information and how it relates to the objectives of the CCA.</p>
<p>Number of priority assistance customers.</p>	<p>As above, it is unclear what purpose or grounds the ACCC is seeking this information.</p>

**24. Should the ACCC make any other changes to the NBN SIO RKR and/or Disclosure Direction?**

As noted throughout this response, the most effective change the ACCC could make to facilitate and oversee competition in the market for superfast broadband services would be to broaden the application of the NBN SIO RKR to apply to all providers of superfast broadband access services.