

Submission

NBN Co submission to ACCC
Consultation Paper on
proposed amendments to the
*Audit of Telecommunications
Infrastructure Assets – Record
Keeping Rules 2007*

January 2013

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Contents

| | | |
|---|---|---|
| 1 | Introduction..... | 4 |
| 2 | Identification of relevant categories of infrastructure | 5 |
| 3 | Disclosure of RKR information – protection of infrastructure information..... | 6 |
| 4 | Consolidated reporting..... | 7 |
| 5 | Issues for comment on ACCC consultation paper..... | 8 |

1 Introduction

NBN Co welcomes the opportunity to comment on the ACCC's Consultation Paper on amendments to the *Audit of Telecommunications Infrastructure Assets – Record Keeping Rules 2007* (Consultation Paper).

The ACCC is proposing to amend the *Audit of Telecommunications Infrastructure Assets – Record Keeping Rules 2007* (the Infrastructure RKR) to update the list of record keepers required to report to the ACCC, as well as require additional information to be reported. NBN Co is proposed to be incorporated as one of the new record keepers that will need to record and report to the ACCC on the information required under the amended Infrastructure RKR.

It is important that the ACCC has access to accurate and up-to-date information from appropriate sources to assist it in making robust regulatory decisions. However, the desirability of having such information needs to be balanced with the regulatory burden placed on industry, including careful consideration of who should most appropriately bear that burden. NBN Co has used this framework in making its comments on the proposed amendments for the Infrastructure RKR.

Any reporting of NBN Co's network under the Infrastructure RKR will be in addition to the detailed network information that NBN Co currently releases publicly, including forward looking information (on an annual, quarterly and monthly basis), relating to NBN Co's proposed network rollout. NBN Co's Special Access Undertaking, currently being assessed by the ACCC, includes commitments in respect of the ongoing provision of such information.¹

¹ Schedule 1H of the NBN Co Special Access Undertaking 18 December 2012.

2 Identification of relevant categories of infrastructure

In order to assist the ACCC to better understand the level of competition within relevant markets (including the extent of infrastructure based competition), the ACCC has proposed to amend the Infrastructure RKR to require record keepers to identify whether core network assets are being leased or operated by another carrier or carriage service provider.²

NBN Co understands that information relating to arrangements for the use or operation of significant core network infrastructure may assist the ACCC in carrying out its regulatory functions.

NBN Co submits, that as a general principle, the regulatory responsibility for providing such information to the ACCC should be clearly placed on the owner of the infrastructure, rather than a third party leasing or operating the infrastructure pursuant to a commercial arrangement. For infrastructure in relation to which a nominated carrier declaration has been made, the nominated carrier is presumably the most appropriate record keeper.

The owner of infrastructure (or nominated carrier in the case of infrastructure covered by a nominated carrier declaration) should be in the best position to provide the most accurate information about the status of their infrastructure. In addition, it is possible that a third party leasing or operating another's infrastructure will be subject to confidentiality arrangements (imposed by the owner) in relation to disclosing the existence and/or nature of the arrangements to a regulator.³ If the ACCC requires additional information in relation to arrangements for the lease or operation of infrastructure (such as the identity of the relevant third party) in order to better understand the competition characteristics of core networks, the ACCC could easily seek this information from the relevant party(ies).

Accordingly, NBN Co suggests that the proposed amendments to rule 6 of the Infrastructure RKR should be revisited to address each of the potential scenarios in relation to which the ACCC appears to be interested in obtaining record keeping information, which may include core network infrastructure owned by the record-keeper:

- and also operated by the record-keeper;
- but operated by the record-keeper on behalf of a third party;
- but operated by a third party (whether on its own behalf, or on behalf of another entity or entities); and
- but leased by a third party.⁴

Rule 6 should also presumably specify that the nominated carrier should be the record keeper for infrastructure in relation to which a nominated carrier declaration has been made. NBN Co suggests that it would also be appropriate to consider including a requirement that the record-keeper confirm (when reporting) that the third party operating or leasing the relevant infrastructure has given any required consents to the provision of information to the ACCC.

² ACCC, Infrastructure Record Keeping Rules: An ACCC Consultation Paper on proposed amendments to the *Audit of Telecommunications Infrastructure Assets – Record Keeping Rules 2007*, November 2012 p.7

³ Although it is also possible that an infrastructure owner may still be required, by the commercial arrangements in place, to seek consent from the relevant third party to disclose the nature and/or existence of the arrangements to the ACCC.

⁴ Further consideration may need to be given to whether rule 6 should only refer to leases or whether there are other forms of access and/or use rights that should be specifically identified (having regard to the purposes for which the Infrastructure RKR may be made), assuming that the ACCC is only intending to capture commercial arrangements.

3 Disclosure of RKR information – protection of infrastructure information

The Infrastructure RKR will collect detailed maps of the location of all major communications infrastructure in Australia.

NBN Co submits that the disclosure of Infrastructure RKR information needs to be carefully considered, even if disclosure may be appropriate at times for the ACCC to be accountable and transparent in carrying out its regulatory functions.

As evidenced by the large amount of network information provided on NBN Co's website, NBN Co does in general support transparent access to information. However, given the sensitive nature of the information collected by the Infrastructure RKR, as a general principle, any disclosure of RKR information should be very limited, in a highly aggregated form and in some cases confidentiality arrangements or other appropriate restrictions should be imposed to protect the information (and thus the assets to which it relates).⁵

In addition to the above general principles, NBN Co notes the provisions of Division 6 of Part XIB of the *Competition and Consumer Act 2010*.

⁵ NBN Co notes the submissions made by various interested parties in response to the ACCC's April 2010 *Discussion Paper* on the disclosure of data collected under the *Audit of Telecommunications Infrastructure Assets – Record Keeping Rules 2007*.

4 Consolidated reporting

NBN Co notes that NBN Co Limited and NBN Tasmania Limited are listed separately in Group B in Part 1 of Schedule 1 to the draft amended Audit of Telecommunications Infrastructure Assets – Record keeping Rules 2013. However, in the Consultation Paper NBN Co is referred to as ‘NBN Co (including NBN Co Tasmania)’.⁶ NBN Co assumes, but would be grateful if the ACCC could confirm, that NBN Co Limited may provide a consolidated report on behalf of both NBN Co Limited and NBN Tasmania Limited.

⁶ ACCC, Infrastructure Record Keeping Rules: An ACCC Consultation Paper on proposed amendments to the *Audit of Telecommunications Infrastructure Assets – Record Keeping Rules 2007*, November 2012 p.6

5 Issues for comment on ACCC consultation paper

The Consultation Paper sets out a number of specific issues on which the ACCC is seeking comments. Set out below are NBN Co's responses to these issues.

- **Are the proposed amendments to the list of telecommunications infrastructure providers required to report under the RKR appropriate?**

NBN Co submits that as a general rule all owners of major telecommunications infrastructure should be included in the list of record keepers. For infrastructure in relation to which a nominated carrier declaration has been made, the nominated carrier is presumably the most appropriate record keeper.

At this stage, NBN Co does not have any specific comments on the proposed amendments to the list of telecommunications infrastructure providers.

- **Are there additional entities that are not included on the proposed list but who should be included on the list?**

As per previous answer.

- **Should any entities on the proposed list not be required to report? For what reason?**

As per previous answer.

- **Are there any significant impediments in providing the additional information proposed to be reported under the amended RKR?**

See section 2. NBN Co submits that record-keeping responsibility should be clearly allocated to the owner of the relevant infrastructure. NBN Co notes that it may be desirable for the owner to specify where infrastructure is being operated by or on behalf of a third party, or where it is leased (or subject to some other form of relevant commercial arrangement with a third party). NBN Co suggests that the proposed amendments to rule 6 of the Infrastructure should be revisited to address each of the potential scenarios in relation to which the ACCC appears to be interested in obtaining record keeping information.

- **Should the information reported under the RKR be updated to include identification of CAN and core infrastructure deployment in the preceding 12 months?**

At this stage, NBN Co does not have any specific comments on this issue.

- **Should the identification of major infrastructure ownership, lease and operating arrangements be reported separately?**

See section 2.

- **Are there any obstacles that might prevent record keepers reporting the decommissioning of infrastructure assets in the preceding 12 months?**

At this stage, NBN Co does not have any comment on this issue.

- **Is the additional six months allowed for compliance with the amended RKR sufficient time to lodge returns? If not, what impediments are there to meeting this timeframe and what period of time would be needed?**

At this point in time, NBN Co anticipates that the additional six months provided for reporting is sufficient time to lodge returns.

- **Do you have any additional comments on the proposed changes to the infrastructure RKR as marked-up in the attached draft instrument?**

NBN Co does not have any additional comments on the proposed changes to the Infrastructure RKR.