



**Australian
Competition &
Consumer
Commission**

Our reference: 51492
Contact officer: Alex Elith
Contact phone: (03) 9290 1837

GPO Box 520
Melbourne Vic 3001
Level 35, The Tower
360 Elizabeth Street
Melbourne Vic 3000
tel: (03) 9290 1800
fax: (03) 9663 3699
www.accc.gov.au

29 October 2013

Open letter

ACCC response to submissions on the proposed broadband performance monitoring and reporting program

The ACCC is currently considering the introduction of a program to provide visibility over the performance of fixed broadband access networks and give consumers reliable and independent information on which to base their purchase decisions. This would involve:

- collecting data on the performance of a representative sample of real world services across various fixed broadband access technologies, and
- making summary information available to consumers in a way that would assist them in assessing the commercial offers that are available to them.

In the coming years the NBN will likely be the only fixed broadband network servicing many areas. An important objective of the ACCC's proposed program is to provide visibility over the performance of NBN Co's wholesale access services as these will form the basis for retail service provider (RSP) offers to consumers. If test results for NBN-based services showed poor performance across a number of different RSPs in the same region, this would be a strong indicator of issues at the network rather than the RSP level.

The proposed program would also provide visibility over the performance of the services RSPs market and deliver to consumers, whether over legacy networks or the NBN. From a consumer perspective, the ACCC considers that there is a lack of independent and reliable information on broadband service performance and this is both impeding competition and preventing full consumer engagement in the competitive process. The information produced by the proposed program would provide consumers with a reliable basis for comparing RSP performance pre-purchase, and would assist them in choosing a service appropriate for their needs.

Increasing visibility over broadband service performance at both the wholesale and the retail level would in turn drive network operators and RSPs to innovate and improve the performance of their offerings, and would encourage efficiency. The ACCC does not consider that the proposed program would increase the regulatory

burden on industry—rather it would increase transparency and facilitate competitive market outcomes. This would likely reduce the need for direct regulatory intervention to address the identified market failures.

As part of its consideration, the ACCC published a consultation paper ‘Broadband performance monitoring and reporting program in the Australian context’ in August 2013.¹ The ACCC took this step as it wished to engage broadly on this initiative and test some initial views it had formed about how such a program could best be implemented. The ACCC welcomes the submissions that it received in response.

The ACCC received a range of views on the proposal. Some submissions (including from ACCAN and CHOICE) expressed strong support for the proposed program and agreed that consumers would benefit from increased transparency over broadband service performance. For example, ACCAN advised:

Performance monitoring and reporting is a high priority issue for ACCAN’s members as the transition to higher-speed broadband continues. In our view broadband has now become an essential service. It is therefore both economically justified and desirable from a public policy standpoint that the ACCC introduce broadband performance monitoring and reporting of a kind already being undertaken in other countries.

Similarly, Google advised that it ‘supports the development of measurement tools and other technologies to ensure that consumers have access to clear, accurate and useful information about broadband offerings to understand what they are paying for’ and argued that broadband measurement is ‘a necessary and complementary part of improving broadband transparency’.

NBN Co indicated in principle support for the introduction of a program such as the one proposed by the ACCC, noting that:

If implemented effectively, a program of this nature could facilitate an increased level of public awareness of the relative performance of different retail broadband services. This would in turn enable consumers to make more informed choices about the broadband services they acquire. The availability of this information may also enable the industry to identify issues affecting the quality of retail broadband services.

In contrast, a number of stakeholders (including Telstra, Optus and AAPT) indicated that they would like greater clarity on the ACCC’s policy objectives and raised concerns around certain features of the proposed program which were outlined in the consultation paper. In particular, Communications Alliance has expressed strong doubts that consumers want or would benefit from the information that such a program would produce.

All submitters expressed a strong preference to remain engaged with the ACCC over the further development of the proposal.

The ACCC has carefully considered all of the questions and issues raised in submissions, and recognises that some issues will need to be explored further with stakeholders. However, the ACCC does not consider that any of the issues raised to

¹ Available at <http://transition.accc.gov.au/content/index.phtml/itemId/1122243>.

date in this consultation call into question the potential for implementing a program of this sort to bring clear and meaningful improvements to competition and consumers.

The purpose of this letter is respond to a number of the issues raised in respect of the need for and benefits of a monitoring and reporting program. Whilst a number of issues remain unresolved, these will form part of future discussions on the project.

Issues raised in submissions

The following issues were raised in one or more submissions in response to the consultation paper:

- **The ACCC's policy objectives:** The ACCC has not identified or provided evidence of a market failure which would necessitate the introduction of a program of this nature. For example:
 - there is sufficient information available to allow consumers to choose the right service for their needs and a wide range of online tools which allow them to test its performance;
 - existing regulatory frameworks are sufficient to protect consumers; and
 - current marketing activities around data transfer rates ('speeds') are constrained by the ACCC's broadband speed claims information papers² and recent enforcement activities.

- **Claimed benefits of the program:** The proposed program is unlikely to achieve the stated benefits and any benefits are unlikely to outweigh the costs. In particular:
 - the information which the ACCC proposes to provide to consumers as part of the program is likely to be confusing and/or meaningless and is unlikely to be useful;
 - the program is unlikely to provide RSPs with information over and above that which they already collect about the performance of their networks and will therefore have no influence on investment decisions;
 - the ACCC should be cautious in drawing conclusions on the effectiveness of international programs and their transferability to the Australian context.

Some submissions also raised concerns that the ACCC's consideration of regulatory intervention in the retail market, and development of the program parameters, is premature in light of the roll out of the NBN and recent Government policy changes.

The ACCC's policy objectives

The rollout of the NBN is a key driver for the ACCC's consideration of a monitoring and reporting program. With higher potential service performance comes a greater risk of consumer detriment if expectations are created and not met. RSPs will have an important role to play both in terms of how they construct and market specific

² Available at <http://transition.accc.gov.au/content/index.phtml/itemId/1030285>.

offerings to consumers and in terms of their wholesale capacity provisioning decisions. However, RSPs will be dependent on NBN Co for the underlying network capability and as such it will be important to provide visibility of any network-based performance issues.

The other key objective in considering the introduction of this program is to increase transparency for consumers and RSPs over the comparative performance of different broadband services and technologies in Australia in order to enhance competition and empower consumers.

The potential for increased transparency to improve market outcomes is well recognised. The Australian Government 'Best Practice Regulation Handbook'³ states that 'markets may not allocate resources efficiently if one party in a transaction has significantly more information about a good or service than another'. In addition, the Organisation for Economic Co-operation and Development (OECD) has found that consumers with 'too little information, poor quality information or mis-information' can dampen the competitive process (reducing the incentives of firms to innovate, improve quality and reduce costs) by paying too much for a service or choosing the wrong service for their needs.⁴ In fact, the OECD considers that access to information, the ability to use that information and the costs/barriers to switching providers are key indicators in the evaluation of competition in telecommunications markets.⁵

The ACCC considers that the national retail market for the supply of fixed broadband services is not effectively competitive overall.⁶ Whilst the retail broadband market exhibits some features of a competitive market, the asymmetry of information between RSPs and consumers on service performance prior to contracting is a form of market failure.

Some submissions suggested that service performance is not an important factor for consumers. The ACCC disagrees with this assertion and considers that performance is an important aspect of the overall customer experience. This is evidenced by the number of consumers taking up services above the base 12Mbps access tier in NBN fibre rollout regions: as at December 2012 around 80 per cent of fibre-based services were at 25Mbps and above, with a weighted average of 56Mbps.⁷ The ACCC is also aware that RSPs consider service performance an important driver of customer satisfaction with at least some investing heavily in their networks with a view to ensuring positive end-user experiences.

The ACCC also disagrees with comments in some submissions that consumers do not appear to be concerned with current service performance. In this regard, the TIO

³ Australian Government, Best Practice Regulation Handbook, July 2013, page 50.

⁴ Organisation for Economic Co-operation and Development, Enhancing Competition in Telecommunications: Protecting and Empowering Consumers, 24 May 2008, page 6.

⁵ Organisation for Economic Co-operation and Development, Indicators for the assessment of telecommunications competition, 17 January 2003, pages 16 and 19-20.

⁶ ACCC Final Decision on the declaration of wholesale ADSL services, Feb 2012, page 26.

⁷ Government Report to Joint Committee on the National Broadband Network on NBN Co Limited—Fourth Report, 31 December 2013 (available at http://www.aph.gov.au/parliamentary_business/committees/house_of_representatives_committees?url=jcnbn/subsfifthreport/sub3.pdf).

advised that 13.2 % of new internet service complaints over the first three quarters of 2012-13 involved complaints about slow data speeds and drop outs.

In its submission, the TIO advised that the most common complaints about internet service performance related to data rates being different to those represented at point of sale or through advertising, fluctuations in data rates experienced during on and off-peak times and variations in what are considered to be acceptable data rates based on the broadband technology.

This aligns with the ACCC's own complaint data which shows that 'slow' data rates are the most common complaint to the ACCC's Infocentre in relation to fixed broadband performance. Consumers have raised concerns about:

- data rates being different than what was represented by the RSPs at point of sale or in advertisements;
- data rates being lower than what is expected of the relevant broadband technology;
- RSPs failing to disclose factors affecting performance at point of sale;
- RSPs continuing to sell services to customers in areas known to be subject to infrastructure or backhaul transmission congestion; and
- the inability to cancel their service as a consequence of ongoing poor performance.

These complaints indicate a gap between customer expectations and the services which RSPs are capable of delivering. The proposed program would provide consumers with greater visibility of the average performance of services from their existing RSP and from alternate providers—including any differences in performance likely to be experienced during peak and off-peak periods. The ability to access robust comparative information pre-purchase would better equip consumers to make judgements on whether a particular service is right for their needs and budget.

Whilst the program would not provide information on the performance of individual services, it would allow consumers and regulators to assess the performance that retail and wholesale service providers deliver on average in real world conditions. This will become particularly relevant as the NBN rolls out across Australia due to the heightened service performance expectations that it will bring.

In addition, the ACCC considers that robust data on the relative service performance of RSPs from a trustworthy and independent source would better enable RSPs to compete through performance-based differentiation. It may also encourage additional investment where a particular RSP or network operator's performance is shown to fall below the average performance of other RSPs or network operators.

Adequacy of existing consumer information

Some submissions to the consultation paper expressed the view that there was already adequate information available on the performance of services to enable consumers to choose the service which is right for their needs. For example, submissions referred to broadband comparison sites as well as online forums such as Whirlpool and online speed test tools.

Broadband comparison sites in Australia essentially replicate the information provided by RSPs in their marketing materials and on their websites in order to give consumers a ‘one-stop shop’ for choosing a service. To date, the information provided by RSPs has focussed primarily on price, data download quotas and ‘headline speeds’ (i.e. maximum data rates). No robust information on the relative performance of different RSP services is available.

The information available on discussion forums such as Whirlpool about service performance is by its nature subjective and does not provide a good overall picture of the performance of a particular RSP’s services. Similarly, while there are a range of online ‘speed tests’ that enable consumers to measure their own existing service, such tools cannot be used by consumers to produce meaningful comparisons between RSPs.⁸ These tools have also been criticised on the basis that they can yield conflicting results, are affected by a range of factors including the design of the tools themselves and tend to be limited to a small number of performance metrics (e.g. upload and download speeds, latency).

Consequently, there is currently no clear way for consumers to compare the performance and reliability of different broadband offerings prior to entering into a contract.

The ACCC’s proposed program would provide consumers with a reliable and trusted source of pre-sale information on various clearly explained metrics which go to the performance and reliability of a particular RSP/access network combination. Such information could be incorporated into broadband comparison sites to provide a better picture for consumers on the options available.

Adequacy of existing regulatory frameworks and consistency of ACCC guidance on speed claims

Some submissions to the consultation paper expressed the view that the existing consumer protection framework, including the Australian Consumer Law (ACL)⁹ and the Telecommunications Consumer Protection Code (TCP Code),¹⁰ is sufficient to promote transparency.

The ACL deals with mis-information through the prohibition of false, misleading and deceptive conduct. It does not place a positive obligation on RSPs to provide specific information to consumers and therefore does not address the situation where there is a lack of information about an important feature of a service or good. Further, the ACL is unlikely to be the most appropriate vehicle for holding network operators such as NBN Co accountable for the performance of their wholesale access services.

⁸ Even where developers of the relevant tools publish comparative results, these are generally so highly aggregated as to be meaningless for consumer decision-making. In addition, because tests are user-initiated there are significant selection bias issues with the resulting data.

⁹ Schedule 2 of the *Competition and Consumer Act 2010*.

¹⁰ Communications Alliance, *Telecommunications Consumer Protections Code C628:2012*, May 2012, clause 4.2, page 33-34.

Some RSPs raised concerns in their submissions that they are ‘unable’ to make performance claims as a result of the ACCC’s guidance on speed claims. The ACCC’s ‘broadband speed claims’ papers have been developed in order to provide RSPs with guidance on the circumstances in which the ACCC is likely to consider that a ‘speed claim’ is false, misleading and/or deceptive in breach of the ACL.

The ACCC’s guidance papers make it clear that RSPs may make claims about performance provided they can substantiate their claims. The ACCC’s two main principles are that in doing so RSPs should avoid advertising ‘headline speeds’ unless the claimed data rates are attainable in practice, and they should provide adequate disclosures about the factors outside the control of the RSP which are likely to affect real-world service performance.

The ACCC accepts that industry may wish to take a cautious approach to ensuring that they only make performance claims that they can substantiate. Whilst it is open for RSPs to use their own network testing results to substantiate claims, they have chosen not to do so.

The proposed program would provide RSPs with comparable testing results using a standard testing methodology which would be applied across all RSPs and networks, which could in turn be used as a basis for substantiating claims about network performance. Furthermore, it would provide oversight over wholesale access networks (including the NBN) and provide visibility over the performance of their services for both consumers and RSPs.

Proposed benefits of the program

Submissions to the consultation paper raised some concerns around the ACCC’s proposed approach to the implementation of a broadband performance monitoring and reporting program—such as the number of probes, the frequency and form of reporting and the type of information that consumers would find useful. The ACCC welcomes these comments and will be considering these issues in further detail.

Inevitably there will be technical and budgetary constraints on any program that is ultimately implemented by the ACCC, should it decide to proceed. However, the ACCC considers that it would be able to provide consumers and RSPs with useful transparency on the performance of broadband services within these constraints.

It is important to note that the ACCC is still considering the design of the proposed program and intends to engage with stakeholders to ensure that any testing methodology ultimately deployed is robust and that results would be published in a way which is meaningful, accurate and useful for consumers and RSPs. The ACCC will be considering different ways to address these issues to ensure that—if the proposed program goes ahead—the ACCC is able to achieve its objectives.

Effect of the National Broadband Network roll-out

As noted previously, a key impetus for the ACCC’s consideration of a broadband performance monitoring and reporting program is the rollout of the NBN.

The ACCC considers that service performance information will be more important to consumers during a transition to and within an NBN environment, where many RSPs will be marketing what appear to be similar products at broadly similar price and included value points. A lack of public information on service performance will likely limit consumers' ability to make meaningful choices and may inhibit some of the benefits of the NBN from being realised.

In addition, while the NBN will significantly increase the potential performance of fixed broadband services, real-world outcomes will still be dependent on provisioning decisions made by both NBN Co and RSPs. The advanced technologies that will be deployed will not guarantee against performance issues; a monitoring and reporting program of the type proposed by the ACCC would assist in 'diagnosing' the cause of any such issues.

Whilst the Government's preferred technology mix for the NBN is still being finalised, the ACCC does not consider this will materially affect its ability to develop the proposed testing parameters and reporting methodology. Testing of existing fixed broadband services and all NBN-based services would be possible under the ACCC's proposed methodology, regardless of the technologies used.

The ACCC recognises that as technologies evolve and new services emerge the proposed program would need to reflect these changes. This too can be readily facilitated by the proposed program as the sample selection exercise would be ongoing as opposed to 'set and forget'. Accordingly, any future decisions by the Government to change the technology mix for the NBN would represent business as usual under the proposed program.

Next steps

The ACCC will shortly be engaging further with parties who provided submissions to the consultation paper, including key industry and consumer groups, in order to progress its thinking on the need for and 'shape of' any monitoring and reporting program. Parties will be contacted directly if further information is required in respect of their submission.

The ACCC is aiming to release a position paper in early 2014 which would outline the proposed program specifications in the event that the ACCC decides to proceed with the program.

If interested parties have any questions about the contents of this letter they should contact Alex Elith on (03) 9290 1837 or alex.elith@acc.gov.au.

Yours sincerely



Sean Riordan
General Manager – Industry Structure & Compliance
Communications Group