



Australian
Competition &
Consumer
Commission

Broadband Speed Claims

Consultation outcomes report

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Executive Summary

Following public consultation, the Australian Competition and Consumer Commission (ACCC) has developed principles to guide retail service providers (RSPs) in informing consumers of the speeds that they typically deliver on their broadband plans. These principles are:

1. Consumers should be provided with accurate information about *typical* busy period speeds that the average consumer on a broadband plan can expect to receive
2. Wholesale network speeds or theoretical speeds taken from technical specifications should not be advertised without reference to typical busy period speeds¹
3. Information about the performance of promoted applications should be accurate and sufficiently prominent
4. Factors known to affect service performance should be disclosed to consumers
5. Performance information should be presented in a manner that is easily comparable by consumers, for example by adopting standard descriptive terms that can be readily understood and recognised, and
6. RSPs should have systems in place to diagnose and resolve broadband speed issues.

The ACCC is issuing these principles as consumers have limited information and support in identifying broadband plans that meet their speed requirements. This is raising consumer search costs, inhibiting competition and feeding into an increasing level of consumer complaint.

In this regard, over 80 per cent of consumers that participated in the ACCC consultation stated it is difficult to ascertain and compare the speeds available across RSPs and plans, and that RSPs could assist them by providing readily-comparable information about the speeds they typically deliver.²

The ACCC considers it is important to address this issue as the National Broadband Network (NBN) and other next generation networks (NGNs) are becoming more widely available to consumers. This is because the migration of services to next generation broadband networks will support greater diversity in the broadband speeds that are available to consumers, depending on their choice of RSP and plan, as well as providing opportunities for RSPs to better inform consumers about the speeds that they typically deliver on their broadband plans.

A number of industry respondents agreed that updated ACCC guidance would assist them in providing information to consumers when marketing their broadband plans.³ As well as

¹ In the provision of broadband services, the 'wholesale network' is the underlying infrastructure or part of the network that Retail Service Providers (RSPs) access in order to connect to and provide retail broadband services to end-user consumers.

² The Discussion Paper and all public responses to the ACCC consultation are available on the ACCC Consultation Hub (<https://consultation.accc.gov.au/communications-1/consultation-on-broadband-speed-claims/>).

³ Telstra Corporation Limited, *Response to the ACCC Broadband Speed Claims discussion paper — Public version*, 1 September 2016, p. 3 (Telstra Submission); Optus, *Submission in response to ACCC Discussion Paper on Broadband Speed Claims — Public Version*, August 2016, p. 11 (Optus Submission); Communications Alliance Ltd and Australian Mobile Telecommunications Association, *Submission to ACCC Discussion Paper: 'Broadband Speed Claims'*, 25 August 2016, p. 2 (AMTACA Submission). NBN Co also agreed with this position: NBN Co, *Broadband Speed Claims — nbn submission in response to ACCC discussion paper — Public*, September 2016, p. 4 (NBN Co's Submission).

facilitating RSPs to better inform and support their customers, adherence to the principles will also allow RSPs to have greater confidence that they would meet their obligations under the Australian Consumer Law (ACL)⁴ when marketing their broadband plans.

The ACCC will work further with industry and key stakeholders and will provide best practice guidance in implementing these principles.

The ACCC also considers that the introduction of an independent broadband performance monitoring program would further assist consumers in identifying the broadband plans that meet their speed requirements, by providing further information to assist RSPs in developing their marketing claims, as well as providing consumers with direct visibility over typical speeds.⁵ If a program is introduced, the ACCC will also provide guidance on how this information can be used by RSPs to improve consumer information.

This report is divided into three sections:

1. Consultation outcomes — market observations
2. Consultation outcomes — best practice in marketing broadband speeds
3. Next steps

1. Consultation outcomes — market observations

Overview of consultation

On 26 July 2016, the ACCC published the *Broadband Speed Claims — Discussion Paper* (the Discussion Paper) calling for views on how consumer information about broadband speed and performance could be improved.

The consultation yielded over 400 responses including 19 submissions from network owners and operators, broadband RSPs, consumer advocates, IT service providers and included over 390 consumer responses.⁶

The consultation primarily focused on issues related to fixed-lined networks, especially in the context of NGNs. Based on feedback obtained through the consultation, the ACCC has decided to prioritise providing guidance related to fixed-line services, as opposed to mobile services, at this time.

Evolving broadband technologies

Since the ACCC last provided industry guidance on broadband speed advertising, the range of technologies available to deliver internet services has expanded, as has the reach of NGNs that are capable of supporting higher download speeds (for instance, speeds in excess of 25 megabits per second (Mbps)).⁷ Consumer demand for data and applications that rely on higher speed broadband services has also increased.

⁴ The Australian Consumer Law (ACL) is Schedule 2 to the *Competition and Consumer Act 2010* (Cth). Sections 18 and 29 of the ACL prohibit conduct in trade or commerce that is misleading or deceptive or likely to mislead or deceive. Section 29(g) of the ACL prohibits a corporation in trade or commerce from making certain representations that goods or services have, amongst other things, performance characteristics, uses, or benefits they do not have.

⁵ ACCC, *The ACCC's Pilot Broadband Performance Monitoring and Reporting Program — Report on findings*, September 2015, <https://www.accc.gov.au/regulated-infrastructure/communications/monitoring-reporting/broadband-performance-monitoring-reporting-program> (BPMR Pilot Report).

⁶ As noted above, the Discussion Paper and all public responses to the ACCC consultation are available on the ACCC Consultation Hub (<https://consultation.accc.gov.au/communications-1/consultation-on-broadband-speed-claims/>).

⁷ 'Superfast' broadband access services are generally defined as broadband services capable of providing a download transmission data rate greater than 25 Mbps: ACCC, *Superfast broadband access service declaration inquiry — Draft decision* (SBAS), 6 November 2015, p. v.

Our consultation confirmed there will be diversity in the dimensioning and network management of retail broadband services supplied over these NGNs, including the NBN. RSPs are deciding how to appropriately provision their broadband services by determining how much capacity to purchase on these access networks, and on backhaul and interconnection networks, all of which has a direct flow-on to the speeds RSPs can deliver (and therefore offer) to their customers particularly during busy times.

Consumers are more reliant than ever on speeds information to compare their broadband choices. RSPs have however been slow to refresh the marketing practices that were used in selling ADSL services so as to make clear and prominent claims about the speed of their services, notwithstanding that many RSPs are differentiating their broadband plans on the basis of speeds.

Our consultation confirmed there have been market and consumer developments that, combined, mean RSPs are now able to provide better speed information to consumers:

- RSPs now have greater access to performance information from a range of sources than was the case when the previous ACCC guidance was published (including information obtained via network owners and operators, and performance information gathered through RSP network monitoring activities).
- The very significant investment that is occurring in NGNs is expected to support much more homogenous speed performance between services provided on the same plan, compared to legacy products.

Current marketing practices

A fundamental issue that we explored during the public consultation was whether marketing practices would meet consumer needs and facilitate performance-based competition during the transition to NGN services.

We were also interested in the steps RSPs were proposing to take to ensure that their marketing and information disclosure practices comply with the ACL, including the obligation not to engage in conduct that is likely to mislead or deceive consumers, and to avoid making false or misleading claims or statements, including about the application of statutory consumer guarantees.⁸

RSPs use a broad range of practices to promote their services, including through television, radio, the internet, print media, billboards and customer service channels. We identified that there are currently three types of problematic practices in the marketing of broadband services:

- *Headline representations* — headline claims typically focus on data allowance/service inclusions and price, rather than stating the speed that the advertised broadband plan typically supports in practice (either by providing a quantified measure or adopting well understood descriptive terms). Currently, where headline claims do refer to speed of service, they typically use vague or imprecise descriptors such as 'fast' or 'high-speed', or visual representations (such as animals or athletes). We are concerned that this practice inhibits consumers from assessing whether the advertised plans would meet their speed requirements and readily comparing the offers that RSPs advertise.
- *Product descriptions and speed tier offers* — some RSPs have moved to advertise broadband services on the basis of wholesale speed 'tiers', usually on an 'up to' basis, without informing consumers of the speeds that their retail products typically

⁸ Further guidance is available on the ACCC website, including ACCC, *Advertising and selling guide*, April 2014, <https://www.accc.gov.au/publications/advertising-selling> (ACCC Advertising and Selling Guide).

deliver. This is generally noted in detailed product information (that is, not in headline representations). For example, it appears that some RSPs are relying on the wholesale speed tiers used in NBN Co's product descriptions when marketing the retail services they provide over the NBN. We are concerned that this does not provide consumers with an accurate impression of the speed they will typically experience, particularly during the busy period, and see this as an emerging issue in consumer complaints and enquiries.

- *Comparable speed information* — few RSPs are presenting quantified speed information to consumers. Further, there is no industry accepted methodology or approach to presenting such information, and therefore no clear pathway to RSPs commencing to provide speeds information to consumers in a consistent and comparable manner. Hence, we are concerned that consumers are unable to compare and test the value of offers when selecting their RSP and plan (and once online), even where they make detailed inquiries with potential suppliers. Verified performance information enabling consumers to make easy comparisons independent of RSP marketing materials would partly address this problem.

We consider RSPs need to significantly change the way broadband services are currently being marketed to consumers, as outlined in Section 2 below.

Consumer detriment

When consumers have too little information or a lack of accurate information to consider when making purchasing decisions, this can result in consumers paying too much for a product or service, not purchasing the service that best suits their needs, and consumer disappointment when the service falls short of expected quality.⁹

In this regard, broadband speed issues continue to feature strongly in consumer complaints.¹⁰ While some industry respondents submitted that current complaint levels should be appreciated in the context of large increases in the volume of data being downloaded,¹¹ the ACCC considers that the complaints signal a concerning level of consumer dissatisfaction and confusion in the market. For example:

- complaints to the Telecommunications Industry Ombudsman (TIO) about internet data speed increased by 48 per cent during the 2015-16 financial year, making broadband speed the top issue for new complaints to the TIO during the year,¹²
- in February 2016, the TIO observed complaints about slow data speed were the highest growing area of consumer complaint (increasing 56.8 per cent in the October–December 2015 quarter compared to the same time in 2014).¹³ More consumers contacted the TIO about slow data speeds, unusable internet services and connection problems than about any other issue in all new complaints during the January–March 2016 quarter,¹⁴ and

⁹ Organisation for Economic Co-operation and Development (OECD), *Enhancing Competition in telecommunications: protecting and empowering consumers — Ministerial Background Report*, June 2008, p. 10.

¹⁰ Telecommunications Industry Ombudsman (TIO), *Discussion paper: Broadband Speed Claims*, 9 September 2016, p. 1 (TIO's Submission).

¹¹ AMTACA Submission, p. 6.

¹² TIO, *Telecommunications Industry Ombudsman 2016 Annual Report*, 16 November 2016.

¹³ TIO, *Complaints statistics — October–December 2015*, 17 February 2016, <https://www.tio.com.au/publications/news/complaint-statistics-october-december-2015>.

¹⁴ TIO, *Complaints statistics — January–March 2016*, 29 April 2016, <https://www.tio.com.au/publications/news/complaint-statistics-january-march-2016>.

- the 2015/16 *Australian Consumer Survey* identified telecommunications and internet services as the top two sectors where consumer problems are likely to arise.¹⁵

Consumers are also consistently contacting the ACCC to report that broadband speeds are not living up to promised performance, or services are performing below expectations, and are contacting the ACCC to report a range of concerns including:

- that they have purchased a particular 'speed tier' (commonly based on the underlying access network speed). Once online consumers are finding the actual speed experienced does not reach the advertised 'up to' speed. Some consumers report achieving less than half of the maximum speed represented by the RSP (or which consumers understood to form part of the retail offer)
- choosing an 'up to 100Mbps' service expecting a premium service however not achieving 100Mbps and continuing to be charged for the premium product
- that RSPs are responding to their complaints by advising that slower than expected speeds are 'acceptable' as the purchased speed is an 'up to' speed (e.g. achieving 30Mbps is acceptable on an 'up to 100Mbps' service and is not considered a technical issue or a failure to meet the promised standard of service)
- that the speed experienced significantly declines (including to an unusable level) during busy periods when consumers most want to use the service, for example in the evening, and
- that when consumers raise issues with their RSP, the retailer does not consider it their responsibility to resolve the problem and will suggest that the limitations are caused by the access network provider.

We consider improved consumer information and business practices, as outlined in Section 2 below, will help address that growing source of consumer complaint and dissatisfaction, and prevent complaints that are costly to consumers and businesses.

Consumers are seeking accurate, comparable information

The Australian Communications Consumer Action Network (ACCAN) submitted that consumers need to be able to easily compare products in order to choose the service that best suits their needs, and that descriptions such as 'fast' or 'up to' speeds 'do not offer the consumer the ability to compare actual performance and match their usage needs in a rational way'.¹⁶

Industry respondents confirmed that while they were using network management and monitoring practices, it was not possible and/or practicable to provide individual consumers with information regarding the actual speeds they will obtain on their particular line.¹⁷ NBN Co noted that although it provides line speed performance information relating to individual services to RSPs,¹⁸ each RSP is responsible for managing their own network capacity and

¹⁵ Ernst and Young Sweeney, *Australian Consumer Survey 2016*, prepared for the Treasury on behalf of Consumer Affairs Australia and New Zealand, 5 May 2016, <http://consumerlaw.gov.au/australian-consumer-survey/>. The survey noted 26 per cent of consumers who made a telecommunications 'purchase' and 25 per cent of consumers who made an ISP 'purchase' experienced a problem. These results improved marginally compared to 2011 (31 per cent and 32 per cent respectively).

¹⁶ ACCAN, *Broadband Speed Claims – Submission by the Australian Communications Consumer Action Network to the Australian Competition and Consumer Commission*, 25 August 2016, p. 10 (ACCAN Submission).

¹⁷ Telstra Submission, p. 20; Optus' Submission, p. 17; TPG Telecom Limited, *Submission by TPG Telecom to Australian Competition and Consumer Commission: Broadband Speeds*, 25 August 2016, p. 3 (TPG Submission); AMTACA Submission, p. 3.

¹⁸ NBN Co Submission, p. 11.

customer services. As such, it is only the RSP that is in a position to communicate its typical busy hour performance. Industry respondents confirmed that where they currently provided information to consumers regarding possible reductions to speed during busy periods or how they prioritised traffic, this was in the form of generalised statements in terms and conditions.¹⁹

While TPG suggested that the state of competition is such that consumers can switch services if they believe they are not getting good value for money or service,²⁰ the ACCC notes that the 'switching costs' can be very high for consumers, even where there is no (or a small) exit fee.²¹ Reducing consumer search and switching costs helps the market operate more efficiently and can reduce the delays and inconvenience experienced by consumers.²²

The ACCC agrees that it is not practicable to include consumer-specific busy-hour speeds in headline speed representations, however, it considers that information regarding performance on a *typical* service is obtainable and would be of assistance to consumers (see discussion below in Section 2, 'Consumer information should focus on "typical speed"').

The ACCC consultation sought views on how consumer information could be improved, and invited broader ('free text') comments from consumer respondents. Consumer consultation respondents noted that comparability is key to decision-making, with about 84 per cent of individual consumers indicating they would be assisted if RSPs adopted a 'nutrition label' template so they could compare performance information across RSPs.²³ Free text responses also indicated a preference for 'apples and apples' comparison and that independently verified information is important to securing consumer trust in performance results.

Templates and similar information disclosure approaches have been adopted in other countries to facilitate the presentation of clear, comparable broadband speed information. For example, in April 2016 the US Federal Communications Commission (FCC) launched a consumer disclosure label for fixed-line broadband marketing called Broadband Facts. The US 'nutrition-style' label encourages RSPs to provide clear, comparable performance information including statements covering:

- typical speed downstream (download)
- typical speed upstream (upload)
- typical latency and packet loss
- application-specific network management practices (yes/no), and
- subscriber-triggered network management practices (yes/no).²⁴

¹⁹ Telstra Submission, p. 20; Optus Submission, p. 19.

²⁰ TPG Submission, p. 3.

²¹ Switching costs include the costs of identifying a better performing service and purchasing compatible equipment, in addition to any contract exit fees. TPG noted that services could be terminated without 'significant penalty': TPG Submission, p. 2.

²² ACCAN Submission, p. 7.

²³ See also StreetSpeed, *ACCC Consumer Consultation on Broadband Speed Claims — StreetSpeed Community Submission*, 25 August 2016, p. 6.

²⁴ 'Application-specific network management practices' and 'subscribe-triggered network management practices' are precautions providers may take to manage heavy traffic on their networks. The FCC template includes a link to each RSP to provide more information to consumers about their network management practices: Federal Communications Commission, *Consumer Labels for Broadband Services*, February 2017, <https://www.fcc.gov/consumers/guides/consumer-labels-broadband-services>.

Where US RSPs use the labels, the FCC notes this will satisfy the FCC's requirement to make transparency disclosures in the proper format, or a format that meets the needs of consumers. The FCC notes that providers may still be in violation of FCC rules 'if the content of their labels is misleading or inaccurate or if they make misleading or inaccurate statements to customers in ads or elsewhere'.²⁵

A number of respondents noted that a range of factors affect service performance, some of which are outside of RSP's direct control (such as the underlying access technology), and some of which occur within a consumers' premises.²⁶ Industry respondents noted the role of public education in improving consumer awareness of these issues,²⁷ however, the importance of consumers having access to accurate information at the point-of-sale was also emphasised by ACCAN.²⁸ The ACCC supports the provision of practical information for consumers regarding the factors that influence performance of their broadband service, in addition to typical speeds information, especially where this information is provided at the point-of-sale.

2. Consultation outcomes — best practice in marketing broadband speeds

ACCC industry guidance

The 2007 and 2011 ACCC Information Papers provided guidance to RSPs about how to avoid presenting claims that could mislead consumers, including attractive sounding headline claims featuring 'hypothetical', theoretical, maximum or 'up to' speeds.²⁹ The 2011 ACCC guidance advised that speed claims should represent 'attainable speeds', with any qualifications clearly presented.

The 2011 guidance noted RSPs should be able to substantiate their claims, and focused on representations about the performance of hybrid fibre coaxial (HFC) and fibre-to-the-premises (FTTP) services. The 2007 guidance provided advice on presenting information about the performance of ADSL services.

The ACCC's updated guidance for industry will be published in 2017 and will focus on the marketing of broadband services delivered by next generation networks. It will articulate positive steps RSPs should take to comply with their existing legal obligations under the ACL to present clear, accurate consumer information including about the typical performance of retail services during the busy periods. While some consultation respondents suggested industry could develop updated guidance,³⁰ the ACCC considers it is best placed and responsible for providing guidance about compliance with and enforcing the ACL as the competition and consumer regulator.

Consumer information should focus on 'typical speed'

The consultation sought views on how information about service performance and speed at different times (including during busy usage periods) can be presented in a way that enables consumers to make informed choices. We also sought views about the ways in which the

²⁵ Ibid.

²⁶ ACCAN Submission, p. 5, AMTACA Submission, p. 3.

²⁷ AMTACA Submission, p. 3; NBN Co Submission, p. 6.

²⁸ ACCAN Submission, p. 6.

²⁹ ACCC, *HFC and Optical Fibre Broadband 'Speed' Claims and the Competition and Consumer Act 2010 — An ACCC Information Paper*, July 2011; ACCC, *Broadband internet speed claims and the Trade Practices Act 1974 — An ACCC information Paper*, January 2007.

³⁰ AMTACA Submission, p. 9.

move to next generation access networks provides opportunities for RSPs to assess more accurately the speeds their services can support in practice, and the tools that are available to RSPs to monitor their network performance.

Broadband performance during busy end-user demand times (generally 6pm–12am) is a specific concern for consumers.³¹ We observed in the Pilot Broadband Performance Monitoring and Reporting (BPMR) program it is more likely that retail broadband service performance and speeds would decline during busy times.³²

The consultation confirmed that busy period speed can be impacted if the underlying networks used to deliver the service are not provisioned to meet the significantly higher demand that occurs in these times.

A decline in busy period performance can either be transitory or entrenched. In some cases, it may be due to an unexpected event such as a systems update (e.g. iOS/Windows) causing a demand spike, or an unscheduled network outage that limits the capacity of the network for a relatively short period. It would be difficult for RSPs and network operators to plan their networks and management practices to prevent these issues arising from time to time.

In other cases it may be a regular occurrence and could stem from network monitoring and management practices of RSPs or network operators and/or network investment decisions over an extended period. If this is the case, services that were operating well in off-peak times will slow down and become less reliable as networks become congested.

Industry respondents noted that they used a variety of methods to monitor network performance in busy times, including monitoring at an aggregate level to ensure minimum average busy period performance and monitoring busy hour utilisation of shared channels.

We note that network congestion is not necessarily a problem in and of itself, and may reflect efficient network management practices by an RSP or underlying network provider, particularly where they are supplying customers that do not value consistently fast services during the busy hour. However, it is an issue to the extent that consumers have not made a properly informed purchase decision and as a result are not provided with the service that they require and/or for which they have paid.

It is important that consumers have access to information about retail busy period performance as they are most likely to rely on their service during these times,³³ and it is therefore a key purchasing consideration. Consumers would benefit from and are entitled to expect clear, accurate, comparable information about busy period performance measurements and service limitations. This information is of most utility where it is disclosed upfront, before the consumer enters into a contract to receive the service, and available to existing consumers looking to understand how their service is performing or to resolve speed problems.

The US FCC has used a 'consistency of speed achieved' measure in its reports on RSP performance since 2014. The '80/80 consistent speed' refers to the minimum speed experienced by at least 80 per cent of broadband monitoring panellists at least 80 per cent of

³¹ The TIO noted the primary issue for internet users in July–September 2015 was slow data speeds, particularly during peak hours. See TIO, *Complaints statistics: July–September 2015*, December 2015, <https://www.tio.com.au/publications/news/complaint-statistics-july-september-2015>.

³² BPMR Pilot Report, p. 6.

³³ Isolated Children's Parents' Association of Australia (Inc), *Submission to the Australian Competition and Consumer Commission into Consultation for broadband speed claims*, p.1.

the time.³⁴ If adopted, informing consumers of the 80/80 consistent speed of a plan would provide consumers with a readily comparable indication of the speed they can typically expect to experience on that plan.

During March 2017, the ACCC will finalise consultation with industry stakeholders about the best way to derive a measurement of busy period speed, noting that a range of approaches have been successfully applied in other countries. This will inform the ACCC's 2017 guidance.

Disclosure of access network speed to consumers

Our consultation identified that there is growing consumer awareness of the speeds NGN services are capable of supporting, and that where this information is provided by retailers it can assist consumers — provided it is accompanied by a measure of typical retail performance and the limitations on achieving the network speed are clearly explained.

The performance attributes and speeds of underlying access services are currently specified in different ways. For example, NBN Co currently offers wholesale fibre technology products to RSPs generally on 12Mbps download/1 Mbps upload, 25/5Mbps, 50/20Mbps and 100/40Mbps speed 'tiers'.³⁵ As these speed tiers generally represent a wholesale product offered to RSPs on an 'up to' basis, they may be considered service speed 'limits' or theoretical maximum speeds across the underlying access service.³⁶ They do not necessarily represent the speed the retail broadband service will be able to deliver to end-users in practice.

Relying on wholesale product information as the sole basis for retail offerings has the potential to misrepresent the speeds that the retail broadband services can achieve, particularly during busy times, and is likely to create a false impression about the nature of the retail service. It is also likely to trigger consumer complaints, dissatisfaction and confusion when the retail service delivers speeds that are lower than the wholesale speed tiers.

Advertising that focuses on the speed of the wholesale network is likely to confuse or mislead consumers about the speeds the RSP is realistically able to deliver to them unless it is accompanied by a statement about busy time performance. If RSPs opt to advertise on the basis of the access network speed, care needs to be taken to ensure 1) there is an equally prominent statement of the RSP's typical busy period performance on the same services, and 2) any relevant service limitations (including in relation to the underlying broadband technology) are clearly stated.

³⁴ Federal Communications Commission, *Measuring Broadband America – 2014 Report*, 'Overview of Reported Results', 1 September 2013, <https://www.fcc.gov/reports-research/reports/measuring-broadband-america/measuring-broadband-america-2014>.

³⁵ NBN Co, *Choosing the right superfast speed on the nbn™ network*, <http://www.nbnco.com.au/learn-about-the-nbn/speed.html>. See also Part 3 of NBN Co, *Product Description — NBN Co Ethernet Bitstream Service — Wholesale Broadband Agreement*, 2016, http://www.nbnco.com.au/content/dam/nbnco2/documents/sfaa-wba2-product-catalogue-nebs-prod-desc_20170109.pdf, pp. 13–17.

³⁶ As noted in NBN Co's Submission, NBN Co provides information to RSPs regarding estimated line speeds and actual speeds once services are connected: p11. In some circumstances some FTTN/B services may not reach the maximum download speed of a particular speed tier, however, the RSP will be advised on this using the processes noted by NBN Co.

Information about the performance of applications

As the demand for data continues to grow, the availability of performance information about specific applications will continue to be a key factor in consumer purchasing decisions. Application performance has been a feature of recent broadband marketing campaigns and is likely to remain in play. Information about the performance of data intensive services, such as Subscription Video on Demand (SVOD) products, is therefore likely to continue to be important to consumers. Consumers will therefore be assisted where they are provided with accurate, comparable information about how applications perform, and advised of any limitations on application performance.

Recent experiences have shown the impact data intensive services can have when they become popular with consumers over a short period of time. When the demand for access to new applications is unexpected or unanticipated, RSPs and network owners/operators may need to quickly adapt to ensure sufficient capacity to meet demand.³⁷ The ACCC's Pilot BPMR program observed deterioration in broadband performance during busy use hours. These results covered the period March to May 2015, which coincided with the period when key SVOD products were launched in Australia.³⁸

RSPs and network owners/operators are best placed to anticipate and meet changes in consumer demand for content when making offers and facilitating access to new applications. In an evolving market not all changes, including increased consumer demand, will be anticipated by industry respondents. However, the availability of diagnostic and performance measurement and information tools will assist RSPs to forecast and monitor performance issues.

RSPs have a direct role in planning and monitoring capacity and traffic, and in shaping offers to provide consumers with an accurate impression of the application performance they can deliver. Once the consumer is online, RSPs should be able to monitor and manage network settings to ensure consumers experience promised or necessary performance levels for that application.³⁹ Providing accurate consumer information is likely to prevent consumers from being misled about (or misunderstanding) the capabilities of the service, and any limitations on service performance. Consequently, consumers would benefit from information about the performance of individual applications and may make poor purchasing decisions in the absence of this information.

Information about how well applications perform is important. For example, consumers will want to know about factors that will affect the quality of the service they obtain, including traffic management or other practices for video streaming applications that provide a higher resolution video stream, and reducing latency improves the experience of online gaming applications. Consumers of data intensive applications that are particularly sensitive to network performance that are not prioritised may experience poorer service performance as a result of prioritisation and should be advised of this.

Consumers are likely to look to their retail provider for this quality of service information, and to compare offers. To ensure consumers are provided with an accurate impression and to avoid engaging in misleading or deceptive conduct, key features and service limitations should be disclosed to consumers.⁴⁰

³⁷ See Ovum Consulting Group, *Australian OTT Video — Creating a New TV Market*, 18 November 2015, <http://www.nbnco.com.au/content/dam/nbnco2/documents/ott-video-in-australia-creating-a-new-market.pdf>, p. 18.

³⁸ ACCC, *Competition in the Australian Telecommunications Sector*, February 2016, p. 6 (ACCC Competition Report).

³⁹ ACCC Competition Report, p. 8.

⁴⁰ ACCC Advertising and Selling Guide, p. 7.

Transparency over key features and disclosure of service limitations is consistent with the general principle that key service characteristics or major limitations on service performance should be disclosed by the business to consumers. This includes providing readily comparable information when seeking to entice consumers with offers of access to new applications.

Referencing information from ‘league tables’

Some applications service providers, such as YouTube and Netflix, have made information available to the market to show how well their applications are delivered over different broadband networks, for example in the form of product-specific speed ‘league tables’. These sites commonly rank RSPs according to the speed at which they may be able to deliver certain data-intensive services such as video streaming. In other cases, league tables rank RSPs according to the results derived from consumer-led software-based testing.⁴¹

Over time, some RSPs have moved to rely on these rankings in their marketing to consumers. Reliance on league table information signals an appetite among consumers and industry respondents for comparable broadband performance information, including about speed of service. In the consultation, consumers confirmed they are seeking accurate, comparable performance information. If opting to market services on the basis of these league tables (for example, as an indicator of broader service speed or performance), retailers need to consider whether the overall impression created by this is accurate, and to take into account the various consumer audiences likely to receive the message.

Templates and standard terms

The ACCC considers that key performance information should be conveyed to consumers using a standard template that would be recognisable by consumers. The updated guidance will provide RSPs with a short template for communicating speed information with consumers, focusing on busy period speeds and application-specific performance. The template encourages use of standard descriptive terms that would be readily understood and comparable by consumers.

Our proposed broadband monitoring program would complement this, by providing directly comparable information to assist consumers and which RSPs could adopt in marketing.

Timely fault diagnosis and resolution

As well as accessing accurate information about the performance characteristics of broadband services, consumers are entitled to expect that problems achieving expected speed levels will be addressed by accurate and timely fault diagnosis and resolution.

In this regard, it can be difficult for consumers to discern whether slower than expected speeds are due to a fault with the service or equipment that the RSP supplies or other factors outside of the RSP’s control. RSPs are well placed to determine the cause of any performance problems, including whether or not any speed issues stem from the broadband service or equipment that they supply.

As we observed in the consultation, the various aspects of network evolution and management mean there is potential for individual services to perform materially below the performance standard an RSP typically delivers. We anticipate that over time next generation access networks will promote more ubiquitous service performance among consumers. However, isolated ad hoc events are likely to arise in the NGN environment and

⁴¹ The limitations of software-based testing are noted in ACCC, BPMR Pilot Report, p. 12.

these may adversely impact service speed and performance. Where RSPs actively consider the impact these events are likely to have on consumers, and plan appropriate steps to mitigate this, this is likely to reduce the potential for consumer harm.

The ACL (including the statutory consumer guarantees contained in Part 3-2) applies to the supply of broadband services to consumers. Businesses that supply broadband services to consumers guarantee that those services will be:

- provided with due care and skill
- fit for any specified or particular purpose (express or implied), including being of sufficient quality to achieve desired results, and
- provided within a reasonable time (when no time is set).

Under section 64 of the ACL, guarantees cannot be excluded, modified or limited by contract. False or misleading representations about the existence or effect of the consumer guarantees may contravene the ACL (section 29(l)(m)). Consumers may seek compensation for damages and loss (consequential loss) they have suffered due to a problem with a broadband service (in addition to any other remedy provided) if their supplier could have reasonably foreseen the problem. Further guidance is provided on the [ACCC website](#).

Both consumers and RSPs are therefore assisted when RSPs have effective systems in place to address and resolve service issues affecting end-user speeds. This includes systems for managing isolated cases of poor performance, such as those caused by an individual line fault, network connection or other anomaly.

Information regarding the typical speed of that type of service during busy periods and standard descriptors for services will assist both RSPs and consumers in determining whether a specific service is 'fit for purpose' under the ACL.⁴² If consumers raise performance issues with an RSP after a service is connected, RSPs should clearly distinguish information for consumers relating to in-home factors that could affect performance from an RSP's obligations to provide timely fault resolution and deliver services pursuant to their responsibilities under the ACL.

Independent monitoring

The consultation identified that there is growing support for a robust third-party system to test performance claims and foster performance-based competition. There is now increasing recognition among consumers, service providers and industry experts that an independent monitoring program is needed.⁴³

The ACCC considers such a program will enable consumers to accurately compare performance across the market which will in turn build trust and consumer engagement and prompt performance-based competition at the retail level.

The ACCC's proposed BPMR program would provide independent, comparable performance information and further support RSPs to provide speed information to consumers. Similar to established international programs, the program will test a range of broadband services and performance metrics and present verified performance information to enable consumers to compare speed offers and make more informed purchasing decisions.⁴⁴ Testing results will also enable RSPs to verify their own performance when

⁴² ACCAN noted that consumers found RSPs' reference to 'acceptable guidelines' for performance frustrating and not typically outlined clearly at the point of sale: see ACCAN Submission, p. 9.

⁴³ For example, ACCAN Submission, p. 10; Optus; Submission, p. 4; NBN Co Submission, p. 7.

⁴⁴ ACCC, BPMR Pilot Report, p. 64.

seeking to make claims, as the proposed program would provide visibility of their own performance and that of competitors.

There is growing evidence that overseas monitoring programs successfully:

- encourage industry respondents to provide better performance information to the market, including information that is directly comparable
- provide clear benefits and cost-savings to industry respondents, with RSPs coming to rely on program data when making product offers; and
- prompt improved speed and performance across markets, year on year following program implementation.⁴⁵

ACCC testing data could be used by RSPs to inform transparent consumer information and marketing (including promoting services on the basis of the BPMR program results), as has been the international experience in established programs (for example, by reporting on typical download and upload speed split by hour of the week, as presented in the ACCC BPMR Pilot Report).

If a BPMR program is implemented, the ACCC anticipates RSPs would be positioned to update their retail offers to ensure they are consistent with (not higher than) BPMR program results (for example, by updating online marketing materials within 10 business days of publication of BPMR program results, and print materials within 20 business days).

Consumer education about broadband performance

Consumers need information about what broadband speed and performance levels would suit their requirements. Given the rapid service and technological developments in this market, industry is well-placed to provide up-to-date information to consumers about what broadband speed and performance is suited to popular applications. In practice, consumers are most likely to seek advice from their RSPs about how to obtain a service that suits their individual needs. The ACCC would welcome an industry developed education package that would complement the ACCC's speed guidance.

Consumers also need information about what issues within the home may prevent them from fully utilising that service. The ACCC is supportive of initiatives by NBN Co and ACCAN to improve public education on relevant factors that may affect broadband performance.⁴⁶ In addition, consumers would be aided by information from their RSPs at the point-of-sale about the in-home factors that affect broadband performance.

3. Next steps

The ACCC considers that timely action is needed to improve the accuracy of broadband advertising as the market transitions and many consumers are considering their options for migrating to new services.

During March 2017, we will conclude consultation with industry respondents and interested stakeholders on how best to implement the ACCC's new principles.

⁴⁵ For example, as noted in the BPMR Pilot Report, p.17, Virgin Media has referred to the Ofcom broadband performance results on its website to evidence the speeds Virgin Media is providing in comparison to its competitors. Virgin Media's website: <http://store.virginmedia.com/discover/broadband/ultrafast.html>.

⁴⁶ NBN Co Submission, p. 6; ACCAN, *What affects the quality of my broadband*, 2016, <https://accan.org.au/tip-sheets/what-affects-the-quality-of-my-broadband>.

In the first half of 2017, we will publish new guidance providing implementation details for the principles. We will then move to actively monitor steps taken by RSPs to apply the ACCC principles and guidance, and to comply with the ACL. Further action may be needed if RSPs elect not to apply the ACCC principles and guidance.

Timeframe	Action
February 2017	ACCC Consultation outcomes report and new guidance principles published
March 2017	Consultation with industry respondents and stakeholders on implementation details concludes
In the first half of 2017	(Anticipated) Updated ACCC industry guidance on broadband speed advertising to be published
2017	ACCC speed claims monitoring commences

4. More information

Further information about broadband speed claims is available:

- [ACCC website](#)⁴⁷
- ACCC *Broadband Speed Claims* — [Discussion Paper](#) (July 2016)⁴⁸
- Consultation papers and responses — [ACCC Consultation Hub](#)⁴⁹
- Join the [ACCC Communications Information Network](#)⁵⁰
- If you have a complaint or enquiry about broadband speed claims, please contact the [ACCC Infocentre](#).⁵¹

⁴⁷ ACCC, *Broadband 'speed' claims – Information papers*, <https://www.accc.gov.au/regulated-infrastructure/communications/compliance-anti-competitive-conduct/broadband-speed-claims-information-papers>.

⁴⁸ ACCC, *ACCC calls for better broadband speed information*, 26 August 2016, <https://www.accc.gov.au/media-release/accc-calls-for-better-broadband-speed-information>.

⁴⁹ ACCC, *Consultation on broadband speed claims*, 15 September 2016, <https://consultation.accc.gov.au/communications-1/consultation-on-broadband-speed-claims/>.

⁵⁰ ACCC, *Communications Information Network*, <https://www.accc.gov.au/media/subscriptions/communications-information-network>.

⁵¹ ACCC, *Contact the ACCC*, <https://www.accc.gov.au/contact-us/contact-the-accc>.