



AUSTRALIAN COMPETITION
& CONSUMER COMMISSION

Report on effectiveness of broadband speed claims guidance and consultation on further enhancement

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Contents

Introduction	2
1. Background.....	2
2. Effectiveness of the Guidance to date	3
3. Current and emerging issues and questions for consultation on enhancing the Guidance	7
Issue 1: ACMA Information Standard and Determination	7
Issue 2: Services provided using the NBN fixed wireless network	8
Issue 3: Ensuring consumer information remains current and appropriate	10
Issue 4: Clarity and usability of the Guidance	11
4. Proposed changes to the Guidance	11
5. Responding to this Consultation.....	12
Confidentiality of responses	12
Annexure A - Extract from the Guidance including proposed enhancements	13

Introduction

The Australian Competition and Consumer Commission (**ACCC**) has reviewed the effectiveness of its [Broadband Speed Claims – Industry Guidance \(Guidance\)](#), with reference to the extent of its adoption and the competition and efficiency improvements which occurred in NBN markets from September 2017 until September 2018.

The ACCC considers that the Guidance has been effective in promoting more competitive and efficient markets for the supply of NBN services. That is, it has contributed to circumstances that made these improvements much more likely to occur than would have been the case if the Guidance was not issued.

The Guidance was issued as part of a broader strategy to address failures in NBN markets, the implementation of which was followed by a significant shift in NBN wholesale access pricing. Consequently, it is difficult to isolate the individual contribution each specific element of this strategy made towards achieving the observed market improvements.

In conducting the effectiveness review, it has become apparent that the Guidance could be further improved to respond to market developments and give additional clarity over the operation of some elements of the Guidance. Hence, the ACCC is proposing to amend the Guidance and is seeking input relating to the proposed changes.

1. Background

1.1. On 21 August 2017 the ACCC released the Guidance which is a best practice guide for retail service providers (**RSPs**) on how to advertise fixed-line broadband services. Publication of the Guidance followed detailed public consultation. For more information on the development of the Guidance see the *Broadband Speed Claims - Discussion Paper (July 2016)*, [Broadband Speed Claims – Consultation outcomes report \(February 2017\)](#) and [the Broadband Speed Claims – Focused Consultation Outcomes Report \(August 2018\)](#).

1.2. The Guidance is based on six key principles:

- Principle 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.
- Principle 2: Wholesale network speeds or theoretical speeds taken from technical specifications should not be advertised without reference to typical busy period speeds.
- Principle 3: Information about the performance of promoted applications should be accurate and sufficiently prominent.
- Principle 4: Factors known to affect service performance should be disclosed to consumers.
- Principle 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.
- Principle 6: RSPs should have systems in place to diagnose and resolve broadband speed issues.

- 1.3. When the ACCC released the Guidance it committed to reviewing and reporting on its effectiveness.

2. Effectiveness of the Guidance to date

- 2.1. We have assessed the effectiveness of the Guidance in addressing the market issues that were prevalent at the time that the Guidance was developed. We have done this by assessing the extent to which the Guidance has been adopted by RSPs, and secondly by reviewing market indicators relevant to the extent to which those market issues have corrected or otherwise.
- 2.2. That is, we have looked for indicators that NBN end-users are better satisfied with the information and support available to them in choosing plan speeds that suit their needs and the extent to which RSPs have expanded their competitive behaviour to include the busy hour speeds that they deliver over their NBN plans.
- 2.3. We have considered the period from November 2017 when the nominated implementation period for the Guidance ended until the end of September 2018 when the effectiveness review was undertaken. As discussed below, we are encouraged to observe that key elements of the Guidance have been adopted by most RSPs reviewed, with others taking steps towards adopting the Guidance.
- 2.4. We have also observed that, since the Guidance was issued, NBN Co made changes to its wholesale product construct which was followed by RSPs purchasing more capacity from NBN Co and more consumers acquiring faster broadband plans. The number of complaints made to the Telecommunications Industry Ombudsman (TIO) also fell in the six months after the Guidance was released.

Take up of the Guidance

- 2.5. We focused our review on the largest RSPs and those with a material share of the national retail market for NBN services as well as a number of smaller or niche providers. In total we reviewed the websites of 18 RSPs. The RSPs included in the review represented a very high proportion of all NBN retail services in operation.

RSPs representing over 90% of the market provide typical busy period speed information

- 2.6. The provision of typical busy period speed information is a key principle underpinning the Guidance as it enables consumers to understand how RSPs' plans will perform at the times they are likely to be using the service (7pm–11pm).
- 2.7. The provision of this information in RSP advertisements as the principal indicator of NBN speeds that are available on a plan assists consumers to make informed decisions and encourages competition on its merits among RSPs, and anchors an RSP's commitments to fix or remediate a service that does not meet the plan as advertised.
- 2.8. In December 2017, we issued a media release recognising the RSPs (Telstra, Belong and Optus) that had moved to adopt key elements of the Guidance and also put the industry on notice of the need to improve their advertising practices in line with the Guidance. Since that time, over the period of the effectiveness review, an additional 12 RSPs reviewed have commenced providing typical busy period speed information on their websites. We estimate that this represents over 90 per cent of NBN retail services in operation.

Table 1 – Listing of RSPs by provision of typical busy speeds, September 2018

Provides Typical Busy Period Speed Information		Does not provide Typical Busy Period Speed Information
Amaysim	iiNet	Activ8Me
Aussie Broadband	Internode	MyRepublic
Belong	iPrimus	Skymesh
Dodo	Optus	
Exetel	Spintel	
Foxtel	Telstra	
Harbour ISP	TPG	
	Vodafone	

2.9. We have observed increasing reliance by RSPs on typical busy period speed information as a point of differentiation in their marketing, with a number of RSPs increasing their advertised busy hour speeds over the course of the effectiveness review with media and intermediaries promulgating this information for their readers and customers¹. We consider this to be a positive move away from the historic behaviour of sole reliance on nominal wholesale network speeds.

Maximum attainable speed information

2.10. Principle 4 of the Guidance states that RSPs should provide information to consumers about factors which are known to affect service performance. This includes RSPs alerting consumers about any technology specific service limitations which could affect the service they will receive such as on Fibre to the Basement (FTTB) and Fibre to the Node (FTTN) connections, and providing service specific information at point of sale or activation.

2.11. We have observed a high degree of adoption by RSPs of this element of the Guidance, with 13 RSPs providing the suggested warning disclosure to the effect of “actual speeds for FTTB/N services to be confirmed”.

2.12. In addition, 8 RSPs provided undertakings pursuant to section 87B of the *Competition and Consumer Act 2010 (CCA)*² that they would confirm maximum attainable speeds on activation and offer remedies to consumers who have a maximum attainable speed lower than the advertised speed of the plan.

Use of descriptive labels

2.13. Principle 5 of the Guidance states that 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. The Guidance sets out four suggested labels that could be used by RSPs to differentiate their plans on meeting a minimum busy hour speed. These labels are Basic, Standard, Standard Plus and Premium.

¹ See for example: itnews *NBN speed standards emerge at top tiers*, 16 July 2018 at: <https://www.itnews.com.au/news/nbn-speed-standards-emerge-at-top-tiers-498318> and finder.com.au at: <https://www.finder.com.au/fastest-peak-hour-nbn-providers>.

² See the 87B Undertaking Register on the ACCC Website at: <https://www.accc.gov.au/public-registers/undertakings-registers/s87b-undertakings-register>.

- 2.14. The descriptive labels have been adopted by 10 RSPs reviewed including Optus, Telstra, the TPG Group (including iiNet) and Vodafone. Key RSPs that were not using the labels as at September 2018 were Aussie Broadband, Dodo and iPrimus.

Market indicators

- 2.15. We have reviewed the *ACCC NBN Wholesale Market Indicators Reports* for September 2017 to June 2018 to assess whether the bandwidth available to NBN end-users as a consequence of RSP purchase decisions has increased or decreased and to also assess the extent to which end-users are adjusting their plan speed selections.
- 2.16. We consider that each of these measures are high level indicators of market efficiency and end-users becoming more confident to select a higher speed plan. That said, these indicators are imprecise in that other factors, such as unilateral decisions of RSPs to shift end-users onto higher speed Access Virtual Circuits (**AVCs**) and changes in price relativities, would diminish their ability to measure consumer sentiment to higher speeds.
- 2.17. In May 2018, we issued a media release in connection with our *NBN Wholesale Market Indicators Report*.³ We observed that in December 2017 NBN Co launched its 'Focus on 50' promotion, which included a temporary credit to RSPs for acquiring 50 per cent more Connectivity Virtual Circuit (**CVC**) per user, and reducing the price of the AVC for 50 Mbps services.
- 2.18. The ratio of CVC to AVC increased significantly in response to the Focus on 50 promotion, increasing by 38 percent in the relevant quarter. This ratio has continued to increase in subsequent quarters at a steady rate. While a significant number of services have remained on 25 Mbps plans, and the number of consumers choosing 12 Mbps plans has continued to grow, the strongest trend observed over this period is a shift to 50 Mbps plans. RSPs increased the number of 50 Mbps access services they acquire from 158 959 to 1 455 358 in the six months from December 2017 to June 2018.⁴
- 2.19. The tables below are based upon the ACCC's *NBN Wholesale Market Indicators Reports*⁵ over the period of the review which illustrate the above-mentioned changes to CVC and AVC levels.

Table 2 – Count of AVCs by data rate tiers – September 2017 to June 2018

AVC	Sep 2017	Dec 2017	March 2018	June 2018
12/1	890 965	1 022 494	1 103 421	1 162 988
25/5-10	1 670 210	1 884 662	1 306 760	1 114 905
50/20	122 268	158 959	989 360	1 455 358

³ ACCC Media Release *NBN users shift to higher speeds*, 10 May 2018, ACCC Website at: <https://www.accc.gov.au/media-release/nbn-users-shift-to-higher-speeds>.

⁴ ACCC Media Release *A third of NBN users now on higher speed plans*, 13 August 2018, ACCC Website at: <https://www.accc.gov.au/media-release/a-third-of-nbn-users-now-on-higher-speed-plans>.

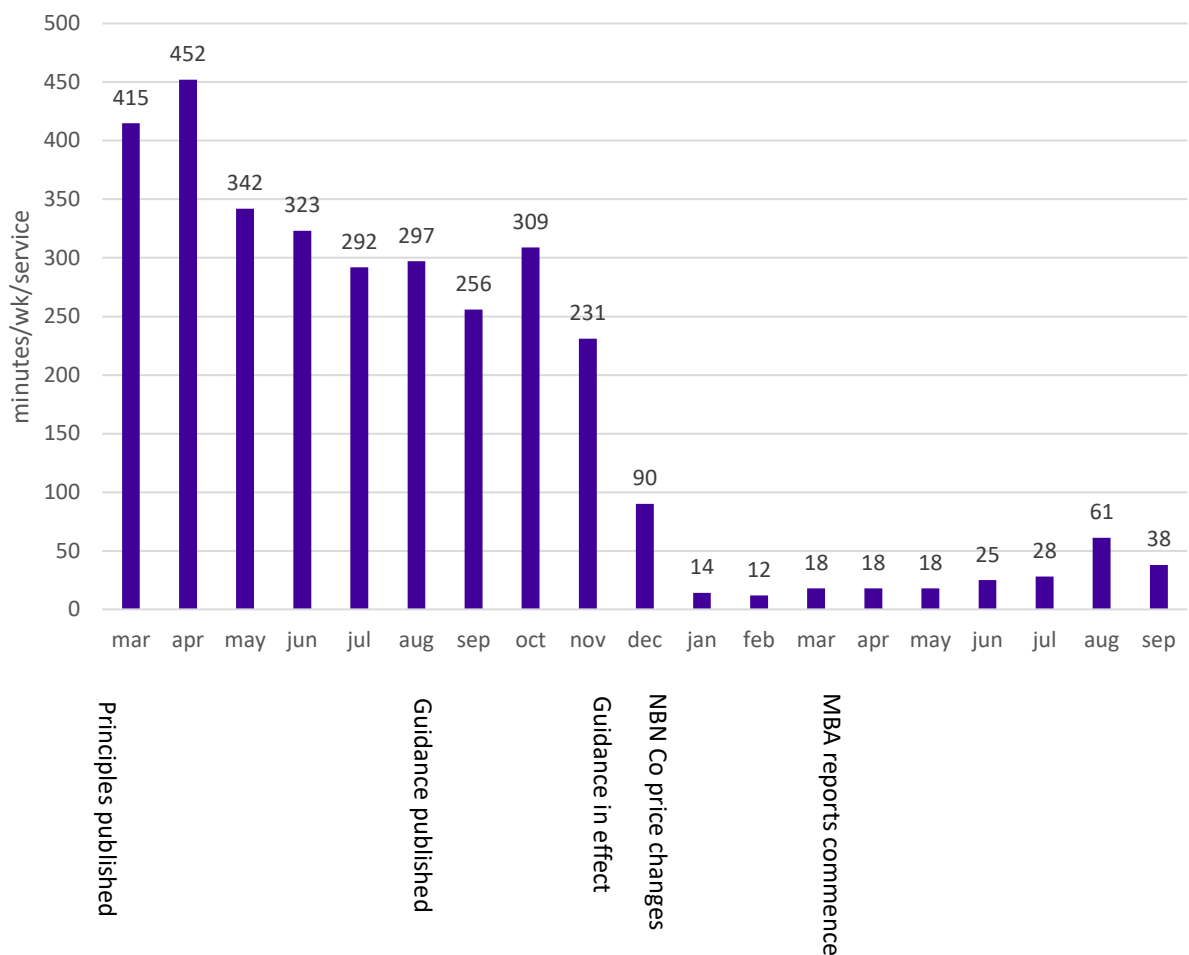
⁵ ACCC website at: <https://www.accc.gov.au/regulated-infrastructure/communications/national-broadband-network-nbn/nbn-wholesale-market-indicators-report/reports>.

Table 3 – Average CVC acquired per AVC – September 2017 to June 2018

	Sep 2017	Dec 2017	March 2018	June 2018
Average CVC per user (Mbps)	1.11	1.52	1.55	1.66
Percentage increase from previous quarter	–	38%	2%	7%

2.20. NBN Co also reports on average network bandwidth congestion across its network. As illustrated by the chart below, NBN network bandwidth congestion started trending down shortly after the principles which underpinned the Guidance were issued in February 2017. Significant step changes occurred following the Guidance coming into full effect in November 2017 and following the introduction by NBN Co of its ‘Focus on 50’ promotion in December 2017.⁶

Chart 1 – CVC congestion March 2017 to September 2018



⁶ Underlying data sourced from NBN Website at: <https://www2.nbnco.com.au/corporate-information/about-nbn-co/updates/dashboard-september.html>.

Consumer complaints

- 2.21. While we are unable to directly measure the benefits to consumers that flow from the improved information available as a result of the Guidance, complaints made to the Telecommunications Industry Ombudsman (**TIO**) may be a reasonable indicator. This is because increased transparency will likely result in RSPs providing better quality services in addition to consumers being better able to understand the performance to expect from those services.
- 2.22. In the *Telecommunications Industry Ombudsman Annual Report 2018*, the TIO reported that complaints about service quality for services delivered over the NBN reduced by 7% in the period July – December 2017 to January – June 2018.⁷ Over the same period the number of NBN services in operation increased by 19%.⁸ As noted above the Guidance came into full effect in November 2017.
- 2.23. Overall we consider the Guidance has assisted in improving the information and support available to broadband consumers and promoting competition among RSPs. However, there is room for further improvement by some RSPs. We propose to enhance the Guidance as discussed in sections 3 and 4 of this report.

3. Current and emerging issues and questions for consultation on enhancing the Guidance

- 3.1. There have been a number of market developments since the Guidance was issued and many RSPs now have practical experience marketing their broadband services in accordance with the Guidance. In this section of the report we consider recent important market developments and feedback we have received from some RSPs in implementing the Guidance. We also identify the corresponding enhancements we are proposing to make to the Guidance, which are provided in section 4 of this report, and seek responses from stakeholders to assist us in finalising an enhanced version of the Guidance.

Issue 1: ACMA Information Standard and Determination

Overview of issue

- 3.2. The Australian Communications and Media Authority (**ACMA**) made the *Telecommunications (NBN Consumer Information) Industry Standard 2018 (Information Standard)* on 21 June 2018 and the *Telecommunications Service Provider (NBN Service Migration) Determination 2018 (Determination)* on 20 July 2018. The Information Standard and Determination both came into effect on 21 September 2018 and are enforceable by the ACMA.
- 3.3. The Information Standard obliges RSPs to show typical busy period speed information in advertising, displayed at least as prominently as any maximum plan speed information. RSPs are also prohibited from using ‘up to’ speed claims in advertising. An RSP must also explain the meaning of any standardised labels used to describe NBN plan speeds on its website.

⁷ *TIO Annual Report 2018*, page 38, TIO Website at: https://www.tio.com.au/data/assets/pdf_file/0006/257325/Telecommunications-Industry-Ombudsman-Annual-Report-2018.pdf.

⁸ *NBN Wholesale Market Indicators Report*, ACCC Website at <https://www.accc.gov.au/regulated-infrastructure/communications/national-broadband-network-nbn/nbn-wholesale-market-indicators-report/reports>

- 3.4. Additionally, the Information Standard requires RSPs to provide a one-page NBN key facts sheet to consumers before they purchase an NBN service. The key facts sheet must include a typical busy period speed and, where the maximum speed is used in advertising, explain that this is the maximum speed possible in off-peak times. Key facts sheets must also provide examples of the common applications and number of people that an NBN service will support. For basic NBN plans (with a maximum plan speed of 12 Mbps) it is also required to state the popular applications that the plan does not support.
- 3.5. For FTTB, FTTN and Fibre to the Curb (**FTTC**) connections, the Determination requires RSPs to confirm the maximum attainable speed after migrating to an NBN service, and if this is below the maximum plan speed, advise the consumer of the maximum attainable speed and offer appropriate remedies. These remedies must also be in the key facts sheet for FTTB/N/C connections.
- 3.6. The provisions of the Information Standard and Determination regarding typical busy period speeds information, maximum attainable speeds and prohibiting the use of 'up to', do not apply to services supplied using the NBN fixed wireless network or satellite network.
- 3.7. Consequently, the Information Standard and Determination and the Guidance complement one another in that there is little risk that an RSP could not comply with one on the basis of a requirement specified in the other.

Proposed enhancements: Update background section of the Guidance to identify complementary nature of the ACMA Information Standard and Determination

- 3.8. We consider that the ACMA Information Standard and Determination is consistent with, and operates in a complementary way to, the Guidance. We propose to identify the ACMA Information Standard and Determination in the background section of an enhanced Guidance.

Issue 2: Services provided using the NBN fixed wireless network

Overview of issue

- 3.9. Consumer concern over their experience on NBN's fixed wireless network has increased since the Guidance was released. In that time it has become increasingly apparent that a number of consumers serviced via the NBN fixed wireless network have been impacted by network congestion, particularly during the busy hours.⁹
- 3.10. Fixed wireless connections can also be impacted by the distance to the tower and other local conditions so that they cannot achieve plan speeds at any time of the day, in a similar way that some FTTB/N connections cannot achieve maximum plan speeds.
- 3.11. In August 2018, NBN Co announced that it would undertake additional investment in upgrading network capacity for its fixed wireless network.¹⁰

⁹ Senate Environment and Communications Legislation Committee, 10 April 2018, page 15: <https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id:%22committees/estimate/1f46b2b5-8cab-4613-97ab-efa5be640e73/0000%22> and 24 May 2018, p.128: <https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id:%22committees/estimate/1ec8fad5-a9bd-4d84-b9ba-38cc3b9c55e2/0000%22>.

¹⁰ NBN Media Release dated 31 August 2018, NBN Website at: <https://www.nbnco.com.au/content/dam/nbnco2/2018/documents/media-centre/media-release-corporate-plan-2019-2022.pdf>.

- 3.12. In September 2018, NBN Co gave the ACCC an enforceable undertaking that included commitments relating to its fixed wireless networks.¹¹ Relevantly, NBN Co undertook to provide weekly reports to RSPs which contain:
- (a) a list of fixed wireless cells that specifies the average busy hour speed of each cell broken down by speed band (0-3Mbps, 3-6Mbps and above 6 Mbps); and
 - (b) forecasts of the month in which NBN Co plans to upgrade congested cells and if any currently uncongested cells will require upgrades in the next six months.
- 3.13. NBN Co also undertook to provide monthly public reporting on its consumer experience dashboard that it publishes on its website.¹² This will include information on the percentage of cells that fall within each average busy hour speed band (e.g. 0–3Mbps, 3–6Mbps, 6–12Mbps) and the average number of hours end users on cells that are below the 6 Mbps metric are experiencing congestion.
- 3.14. Consequently, the ACCC considers that it is now an appropriate time to incorporate NBN fixed wireless connections into the Guidance.
- 3.15. That said, the varying geographical nature of congestion on fixed wireless networks, as well as the presence of maximum speed limited connections, creates challenges in terms of how RSPs can best describe the plans that they offer over fixed wireless connections, and manage consumer expectations during the sales and activation processes.
- 3.16. For example, provision of typical busy period speeds information for retail NBN plans may be a poor indicator of how the plan would perform when supplied over a fixed wireless connection, particularly for a consumer located in a congested cell or too far from a tower (or some other local condition) to receive maximum plan speeds. Even if separate retail plans were developed specifically for fixed wireless networks, it could still be difficult for a single typical speed measure to be representative of the speeds subscribers to the plan could expect as these would differ significantly for the aforementioned reasons.
- 3.17. The levels of congestion can also fluctuate as cells fill up and/or network operators take the necessary steps to add additional capacity, meaning that typical speed measures would likely need to be more regularly ascertained.

Proposed enhancements: elements of the Guidance to apply to services delivered over fixed wireless networks with detailed changes to the Guidance regarding Principle 4 and new Attachment C

- 3.18. RSPs now have access to better information about the likely performance of NBN fixed wireless broadband services than was available when the Guidance was issued. This information has the potential to benefit consumers of fixed wireless broadband services.
- 3.19. We propose to enhance the Guidance to make it clear that elements of the Guidance apply to broadband services supplied over fixed wireless networks. Certain elements of the Guidance will require detailed modification in order to apply to services supplied over fixed wireless networks, as set in Annexure A of this report.

¹¹ 87B undertaking from NBN Co Limited dated 11 September 2018, ACCC Website at: <https://www.accc.gov.au/system/files/public-registers/undertaking/Undertaking%20s87B%20-%20NBN%20Co%20Limited%20-%2011%20September%202018.pdf>.

¹² NBN Co September 2018 Report, NBN Website at: <https://www1.nbnco.com.au/corporate-information/about-nbn-co/updates/dashboard-september.html>.

3.20. In broad terms, we propose to amend the Guidance to apply the same approach to that taken in respect of FTTB/N connections, with some changes to reflect differences in these network types and the information that is available to RSPs in respect of them.

3.21. In this regard, a potential point of difference is that an RSP might not have access to maximum attainable speed data from the network operator for fixed-wireless connections. If this is the case, an RSP should conduct its own testing of the connection to ascertain this information, or if they are not capable of this, provide clear instructions to consumers as to how they can conduct this test for themselves and report the results to the RSP. From that point, an RSP should consider the maximum attainable speed information that it has available and take steps as appropriate in accordance with Principle 6.

Questions regarding services provided using fixed wireless networks

1. Do RSPs require further information to understand and implement the proposed changes to the Guidance regarding services supplied over fixed wireless networks? If so please explain.
2. Do RSPs plan to develop separate retail offerings, in terms of price, data inclusions and advertised speeds, for services provided using fixed wireless networks?¹³
3. Should specific labels be developed for plans that are specific to fixed wireless networks, e.g. to better manage consumer expectations when RSPs are marketing fixed wireless specific plans?
4. Does the Guidance need to be further developed to address issues that may arise in respect of fixed wireless specific plans?
5. Should the Guidance outline a default methodology for testing maximum attainable speeds on fixed wireless connections where this information is not provided by the network operator, e.g. in terms of time of day to test and number of tests to conduct?

Issue 3: Ensuring consumer information remains current and appropriate

Overview of issue

3.22. It is important that consumer information remains current and is updated to reflect changes in retail offerings that may arise when wholesale services change or for other reasons. For example, NBN Co's introduction of its 'Focus on 50' wholesale promotion in December 2017 resulted in reduced congestion, higher busy period speeds for a number of services, and some RSPs moving consumers to plans based on faster wholesale inputs.¹⁴

3.23. NBN Co has recently introduced new wholesale bundle products and prices, and it could reasonably be expected that further changes to wholesale inputs will be made in the future which may have important implications for the typical speeds that RSPs will provide over their retail NBN plans. In addition, RSPs may introduce new types of retail plans that could potentially feature different maximum or typical busy period speeds than they have offered to date, deprioritised traffic, application blocking, and/or very low data quota. In this regard, we propose to modify the Guidance to reinforce that plans should not be marketed as supporting a particular

¹³ To the extent that this information is commercial-in-confidence, please refer to section 5.

¹⁴ NBN Media Release *NBN Co pushes one million to faster speeds*, 16 April 2018, NBN website at: <https://www.nbnco.com.au/corporate-information/media-centre/media-statements/one-million-to-faster-speeds.html>.

online application or online use profile where they could not reasonably support the consumer's expected experience when using that online application.

Proposed enhancements: Further guidance added to Principle 3 and Attachment A

- 3.24. We propose to enhance Principle 3 and Attachment A to provide more emphasis on the need to ensure consumer information remains current, and to provide worked examples of plans that would not support application specific claims.

Question regarding ensuring consumer information remains current

6. In addition to the proposed changes to the Guidance on Principle 3 and Attachment A, are there further enhancements that could be made to assist RSPs in ensuring consumer information remains current and claims based on support for online applications are reasonably based?

Issue 4: Clarity and usability of the Guidance

Overview of issue

- 3.25. We have received feedback from RSPs which indicates some confusion in following the aspects of the Guidance regarding calculating typical busy period speeds as set out in Attachment A of the Guidance. As part of this review, we are also interested if additional clarity over other aspects of the Guidance would assist RSPs in applying the Guidance more completely.

Proposed enhancement: New Attachment D to support Principles 1 and 5

- 3.26. It is proposed that a new Attachment D be added to the Guidance, which includes a worked example and minor clarifying comments to illustrate how to determine typical busy period speeds in accordance with the Guidance.

Questions regarding clarity and useability of the Guidance

7. Is the worked example in Attachment D sufficiently clear? If not, how could Attachment D be improved to ensure RSPs understand how to determine typical busy period speeds in accordance with the Guidance?
8. Are there other refinements to the drafting of the Guidance that would improve its useability?
9. Are there other enhancements that could be made to the Guidance that would improve the information and support available to broadband consumers and to promote competition among RSPs?

4. Proposed changes to the Guidance

- 4.1. The proposed substantive changes to the Guidance would be made to section 5 and Attachment A, with a new Attachment C introduced for fixed wireless services and a new Attachment D with a worked example of calculating typical busy hour speeds. The relevant extracts from the existing Guidance are attached to this paper at Annexure A with the proposed changes highlighted to assist stakeholders to respond to the questions in section 3 of this report. We also outline the intended effect of key proposed changes in the comment boxes in the right hand margin.

5. Responding to this Consultation

- 5.1. We invite responses to the 9 questions posed in section 3 of this report by 5pm on 19 December 2018 via the ACCC's Consultation Hub at:
<https://consultation.accc.gov.au/communications-1/2018-broadband-speed-claims-guidance-consultation>.
- 5.2. We will publish full responses to this consultation on the ACCC website. Further information about how we collect information, and may be required to disclose it, is provided on the ACCC website and below.

Confidentiality of responses

- 5.3. Interested parties wishing to submit material to us should clearly identify any commercial-in-confidence material by replacing the confidential material with an appropriate symbol or 'c-i-c'.
- 5.4. We are committed to treating confidential information responsibly and in accordance with the law. Where we are provided with confidential information, we will, to the extent reasonably possible, seek to protect the confidentiality of that information. In some circumstances we may be legally required to produce confidential information. For example, we may be required to disclose information that is subject to a confidentiality claim pursuant to a court order or subpoena. If this occurs, we will endeavour to notify and consult with you about the proposed release of your information and measures (such as confidentiality orders) that may be taken to protect that information. It is also important to note that we may share confidential information internally with ACCC and AER staff and with our external lawyers and consultants.

Annexure A - Extract from the Guidance including proposed enhancements

5. ACCC speed claims principles

5.1. This section sets out how each of the ACCC's six guidance principles applies to broadband speed and performance representations, providing further detail on the purpose of each principle and an explanation of how the principles can be applied.

Principle 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

Purpose:

- to ensure RSPs present a reliable indicator of the speeds at which the relevant plan typically operates during the busy period
- to enable consumers to make informed purchasing decisions with good information about typical busy period speeds when purchasing a retail **fixed-line** broadband plan
- to assist consumers to identify whether a slowdown in their broadband service is more likely due to limitations of their broadband plan or other factors specific to their household or connection.

Guidance

- 5.2. An RSP acts in line with this principle where it prominently indicates, in retail plan descriptions and all plan-specific advertising, information about the typical busy period speeds at the retail broadband plan level.
- 5.3. The 'typical busy period speed' is the speed that the retail plan as a whole typically delivers, during each hour within the busy period, between the modem located in the customer's premises and a location in a data centre at which most frequently accessed internet content is hosted. For residential plans, the busy period falls between 7pm and 11pm each day.¹⁵
- 5.4. An RSP may also choose to provide an indicator of the typical busy period speed of retail plans it offers to its small business customers, but in that circumstance the busy period would likely fall within standard work hours on work days.
- 5.5. To maximise the benefit to consumers, RSPs should provide consumers with typical busy period performance information at the plan specific level. Further guidance about how and when this should be done is provided in Principle 2 (in relation to presenting busy period performance information when also providing information about 'off peak'¹⁶ speeds) and Principle 5/Attachment A (relating to the use of labels to present performance information in a manner that is easily comparable by consumers).

Intended effect of change: make clear that Principle 1 also applies to services offered over fixed wireless networks

¹⁵ As the performance of individual lines may differ for a variety of reasons, only the typical busy period speeds need to be included in advertising.

¹⁶ The off peak period for residential plans is outside the hours of 7pm to 11pm.

- 5.6. *While the move to NGNs has resulted in greater service homogeneity, some individual services may perform less favourably or more favourably than the typical speed of the relevant plan due to slight differences that will still arise from time to time, e.g., with unexpected demand or operational exigencies that do not affect all services or localities in a uniform manner. Should these speed variations be material, then, as discussed below in relation to Principle 6, RSPs should have in place business systems to identify these issues and take steps to improve service performance for impacted consumers and/or take other remedial action to address past failure to deliver.*
- 5.7. *RSPs should avoid using ‘up to’ speed claims, as these can give the impression that the speed advertised at the top of the range is likely to be achievable at all times, including during the busy period.*
- 5.8. *RSPs should also avoid using undefined speed related descriptors in the absence of clear information that moderates the consumer’s interpretation of these terms, such as typical busy period speeds. Unless appropriately moderated, the use of such terms could convey to consumers that the speed of the advertised service will support all popular uses and applications that require a fast broadband connection at the times that the consumer wishes to use the service when this may not be the case.*

Principle 2: Wholesale (access) network speeds or theoretical speeds taken from technical specifications should not be advertised without reference to typical busy period speeds

Purpose:

- *to ensure consumers are not misled that wholesale access network speeds or maximum attainable line speeds are the real world speeds that consumers can expect to receive at all times, including during the busy period*
- *to ensure RSPs that elect to provide consumers with speed information based on wholesale access network speeds or maximum attainable line speeds clearly label that information as such and accompany it with an equally prominent statement of typical busy period performance.¹⁷*

Guidance

- 5.9. *An RSP acts in line with this principle where it includes, in any plan descriptions or plan-specific marketing based on the download and/or upload speed of the underlying wholesale access network or maximum attainable line speed:*
- i. *a statement that this is an ‘off peak’ measure only, and*
 - ii. *it is accompanied by an equally prominent numerical representation of the typical busy period speed in close proximity to any off peak representation.¹⁸*
- 5.10. *An RSP can provide the access speed as a measure of the typical off peak speed provided this is a reasonable approximation of the plan speed across the off peak times.*

¹⁷ We note that factors such as line specific faults or interference may affect off peak speeds.

¹⁸ The numerical representation may be the minimum speed measure that was most recently used to ascertain the busy period speed indicator used for the plan. Attachment A to the guide may be a helpful reference in that regard.

5.11. An RSP should have mechanisms in place to monitor the speed and performance of its retail plans during off peak periods and keep records that support its off peak speed claims. For instance, where the RSP uses the access speed as a proxy for typical off peak plan speeds, these records should demonstrate that any instances in which the RSP's network resources were unavailable to consumers on the plan, or did not have capacity above what was required to meet their usage requirements in off peak periods, were of a very limited duration and scale.

Principle 3: Information about the performance of promoted applications should be accurate and sufficiently prominent

Purpose:

- to ensure that consumers seeking to use applications which are promoted by the RSP (and which require certain speeds or other network performance characteristics) are better supported in choosing a broadband plan that meets their needs
- to ensure RSPs that promote or offer broadband plans on the basis of the plan's ability to support or provide access to specific applications, make claims that are reasonable and able to be substantiated – for instance, by making available to consumers information about the typical performance of the broadband plan in providing that access and support.

Guidance

5.12. RSPs opting to promote broadband services on the basis of their ability to support or provide access to specified applications should prominently disclose to consumers any performance information concerning the applications.

5.13. RSPs should also disclose any applications the RSP actively limits or 'blocks' (for example, file sharing) such that the typical speed presented for the broadband plan would not give an appropriate indication of the consumer's likely experience in using the application in conjunction with the relevant plan.

5.14. RSPs should consider the typical speeds of their retail plans during the busy period, as well as other elements of the retail plan (such as any traffic prioritisation that is applied, 'throttling' practices, the quality of the supplied modem and usage quotas) when making their claims around suitability for particular uses or applications.

Example A: A plan would have insufficient speed to allow it to be promoted as suitable for a type of application, such as a video streaming application, if high quality access to that type of application requires speeds that exceeded those available on the plan. This could be due to the typical busy hour speed of the plan or any time-of-day, or location-specific, throttling that the RSP can apply, on an ad hoc or predetermined basis.

Example B: A plan would not have sufficient included data quota to allow it to be promoted as suitable for a type of application, such as a streaming application, if reasonable use of that type of application would exhaust the included quota, trigger speed throttling or other service restrictions to be applied, and/or the imposition of additional charges.

Intended effect of change: examples to better illustrate the matters RSPs should consider regarding the suitability of their plans for particular purposes

5.15. RSPs should take care not to apply blanket claims, or to market specific retail plans, on the basis that their plans support particular uses or applications where the speed and other performance attributes of the relevant plan are unlikely to provide that support at a reasonable quality including during the busy period.

Example: An RSP that promotes one or more plans as suitable for accessing video streaming applications, and also offers other plans that are not suitable for video streaming in high quality, should make clear to consumers which of its plans are and are not suitable for that purpose.

5.16. If an RSP elects to refer to a third-party 'league table' or other measures only relevant to a specific application, RSPs should take care that such representations are limited to the RSP's performance in delivering that particular application.

Principle 4: Factors known to affect service performance should be disclosed to consumers

Purpose:

- to assist consumers to make sound purchasing decisions, including via provision of relevant information in marketing material, and assist consumers in trouble shooting and resolving speed and performance issues after purchase
- to ensure RSPs provide at point of sale, or where accurate information is not then available as soon as practicable afterwards, important service or locality specific information, as well as information about any general factors likely to affect the performance of fixed-line and/or fixed wireless broadband services.

Guidance

5.17. An RSP acts in line with this principle where it discloses, upfront, information about service limitations in a clear, accurate and accessible way to the relevant consumer audience, and where this disclosure continues throughout the retail contract. Any limitations that may affect the service should be clearly explained, taking into account the limitations that are likely to be important to consumers. Important service limitation information should not be 'hidden' in information provided by RSPs.

5.18. Some disclosures may need to be actively drawn to the attention of the consumer, especially if there has been a material change in the way a service is being provided¹⁹ as compared to what was represented to the consumer in general marketing and information materials. In particular, an RSP should provide consumers with specific information about performance limitations at the point of sale if the RSP knows, or can reasonably anticipate, it is unlikely to deliver the typical speeds that would otherwise be available to the consumer based upon the plan selection. For example:

- (a) where services in the end-user locality are congested and this cannot be immediately remedied by the network operator and/or RSP, or
- (b) where line length, distance/line of sight to the tower or other factors specific to the end-user connection will or will likely result in service limitations.

Intended effect of change: make clear that Principle 4 also applies to services offered over fixed wireless networks

¹⁹ For instance, at the end of the NBN switchover period it is likely that the maximum attainable speeds that are available over FTTN or FTTB connections would increase to some extent as remaining legacy services are cancelled.

5.19. Information should be disclosed to consumers both at the point of sale, and throughout the retail contract, as to whether there are limitations (in either the access network or the RSP's network) that will likely cap the speed at which the consumer's connection can operate below the wholesale access speed or busy period speeds at which the plan typically operates, either on a short term or on a more permanent basis.

5.20. For instance, disclosures should be made to affected consumers where any of the following matters arise:

(a) technology-specific service limitations, and in particular limitations arising from the copper line that is used to connect a premise to a FTTB or FTTN network (discussed further below) or arising from distance/line of sight for services that use fixed wireless networks

(b) current and anticipated network congestion in specific geographic or network areas

(c) actual or pending outages or relevant changes to the access network or RSP network.

For each such matter, the RSP should identify the resulting short and long term service limitations that are likely to arise, the steps being taken to resolve them, its current status, and an estimated timeframe for resolution (including start and end dates/times).

5.21. Consumers should also be provided with information regarding the factors that may affect service performance that are outside an RSP's control, e.g. settings and positioning of in-home Wi-Fi modems; and consumer equipment specifications and maintenance (e.g. software, viruses and malware). However, this information should be presented in a way that avoids the risk of misleading consumers that any service issues they experience that are caused by the RSP or access network provider, are the result of these other factors.

Services utilising FTTB and FTTN technologies

5.22. Some services utilising FTTB and FTTN technologies may be subject to performance limitations as a result of individual copper lines to such an extent that typical plan speed information would not be an accurate representation of those particular services.

5.23. Consequently, where an RSP sells a service to a consumer that will use FTTB or FTTN technologies, or migrates an existing service to a new plan or plan speed, the RSP should have regard to the best available information they have about the likely performance of that service and provide additional information and/or advice to the consumer, or reconsider migrating the service in the case where it is the RSP that is initiating the change.

5.24. In this regard, NBN Co (and potentially other FTTB and FTTN network operators) currently provides performance information to RSPs in relation to services supplied over FTTB and FTTN technologies. RSPs can also potentially test individual connections themselves independent of the network operator.

5.25. However, for services migrating to a new network, there can be uncertainty as to whether estimated line speeds (derived from engineering models based on copper line length) provide a reliable measure of the

Intended effect of change: consumers receive appropriate disclosure where services are migrated and benefit from migrations

maximum attainable speeds that will be achievable. Those models generate an upper and lower range, however, the actual maximum attainable line speed (which can be confirmed on activation of the service) may be outside of this range due to line-specific factors that were unknown at the time the estimates were made.

Disclosures prior to sale

5.26. Where an RSP advertises retail plans that include FTTB or FTTN products, and in all retail plan descriptions where the plan is available for selection by end-users on FTTB or FTTN connections, it should include prominent and adequate disclosure that clearly conveys that the RSP will seek out information and actively provide the consumer with relevant information about their actual maximum attainable line speed once it is known (which should then be provided in accordance with this guidance outlined below). The disclosure could contain words to the effect of 'actual speeds for FTTB/N services to be confirmed'.

5.27. This disclosure should be included prominently where any plan specific information (such as price) is provided.

Where reliable maximum attainable line speed information is available at point of sale or when migrating an existing service to a new plan/speed

5.28. For services that have been connected to the network and for which actual speed and performance data is available, the maximum attainable line rates can be known with reasonable precision. In these circumstances, the RSP should have access to that information and make it available to consumers at appropriate times (for example, when a consumer contacts the RSP about acquiring a different service, or wishes to contact a different RSP about a new service, or the RSP proposes to migrate the service to a new plan or plan speed). The RSP should also check that information before entering into a contract with a consumer or migrating a service and:

- (a) if the maximum attainable line speed is sufficient to meet the off peak speed specification of the plan that the consumer has expressed interest in ordering, proceed to accept the order or migrate the service
- (b) if the maximum attainable line speed is not sufficient to meet the off peak speed specification of the plan that the RSP is considering migrating the service to, or the consumer has expressed interest in ordering:
 - i. in the case of a service migration that the RSP is initiating – reconsider proceeding with the service migration to the higher plan/speed; or
 - ii. in the case of responding to a consumer contact, disclose the maximum attainable line speed measure to the consumer and prompt the consumer to confirm or change its plan selection
- (c) if the maximum attainable line speed is not sufficient to meet the off peak speed specification of a lesser (cheaper) plan that the RSP offers, then the RSP should inform the consumer accordingly and unless there are cogent reasons why the consumer's selected plan can still represent additional value for the consumer, advise the consumer not to proceed with the order for the higher (more expensive) plan and prompt the consumer to select a more appropriate plan.

Intended effect of change: clarify the best practice approach where RSPs migrate an existing service to a new plan/speed

Where reliable pre-sale maximum attainable line speed information is not available

- 5.29. RSPs have the responsibility to deliver the services consistent with the speed and performance representations they have made, or when they are unable to supply that service, to provide the appropriate remedies, operational support and information.
- 5.30. There are two models that an RSP can adopt when selling FTTB and FTTN services given they may be the subject of performance limitations. Further guidance is provided in Attachment B.

Services utilising fixed wireless technology

- 5.31. Some services utilising fixed wireless technology may be subject to performance limitations due to the distance or line of sight to the tower or other factors that cannot be easily fixed. In some circumstances, these impacts may be so great that typical plan speed information would not be an accurate representation of the speeds that could be expected on the service.
- 5.32. In addition, demand in the busy hours may exceed the installed capacity in some network cells, such that the speeds experienced by consumers located in the congested cell fall significantly below plan speeds.
- 5.33. Consequently, where an RSP sells a service to a consumer that will use fixed wireless technology, the RSP should have regard to the best available information they have about the likely performance of that service and provide additional information and/or advice to the consumer.
- 5.34. In this regard, RSPs should have regard to premise specific information that fixed wireless network operators make available, such as maximum attainable speeds and/or whether the service location is situated in a congested network cell.
- 5.35. Should network operators not provide maximum attainable speed data, RSPs should take either of the following courses of action. The preferred option is for the RSP to test the maximum attainable speeds of individual connections themselves. If it is not practicable for the RSP to test individual connections, they should provide support to consumers undertaking and reporting to the RSP on their own tests. RSPs should accept the validity of those results provided by their customers.

Intended effect of change: improve information provided to consumers about the likely performance of services supplied over fixed wireless networks

Disclosures prior to sale

- 5.36. Where an RSP advertises retail plans that are specific to fixed wireless services, and in all retail plan descriptions where the plan is available for selection by end-users on fixed wireless connections, it should include prominent and adequate disclosure that clearly conveys that the RSP will provide or assist the consumer to obtain relevant information about their connection speeds (in accordance with this guidance outlined below). The disclosure could contain words to the effect of 'actual speeds for fixed wireless services to be confirmed'.
- 5.37. This disclosure should be included prominently where any plan specific information (such as price) is provided.

Where reliable speed information is available at point of sale

5.38. Where likely maximum attainable speed and/or congestion information is available for the location as outlined in paragraph 5.34, the RSP should make it available to consumers at appropriate times (for example, when a consumer contacts the RSP about acquiring a service, or when a consumer contacts a different RSP about a new service). The RSP should also check that information before entering into a contract with a consumer and:

- (a) if the maximum attainable speed of the connection is sufficient to meet the off peak speed specification of the plan that the consumer has expressed interest in ordering, and the service location is not in a congested cell, proceed to accept the order
- (b) if the maximum attainable speed of the connection is not sufficient to meet the off peak speed specification of the plan that the consumer has expressed interest in ordering, disclose the maximum attainable speed measure to the consumer and prompt the consumer to confirm or change their plan selection
- (c) if the service location is in a congested cell area, advise the consumer that their service will likely be impacted by network congestion in the busy hours, and prompt the consumer to confirm or change their plan selection, and/or
- (d) if the maximum attainable speed of the connection is not sufficient to meet the off peak speed specification of a lesser (cheaper) plan that the RSP offers, then the RSP should inform the consumer accordingly and, unless there are cogent reasons why the consumer's selected plan can still represent additional value for the consumer, advise the consumer not to proceed with the order for the higher (more expensive) plan and prompt the consumer to select a more appropriate plan.

Where reliable pre-sale speed information is not available

5.39. RSPs have the responsibility to deliver the services consistent with the speed and performance representations they have made, or when they are unable to supply that service, to provide the appropriate remedies, operational support and information.

5.40. There are two models that an RSP can adopt when selling fixed wireless services given they may be the subject of performance limitations but complete information is not available at the point of sale. Further guidance is provided in Attachment C.

Principle 5: Performance information should be presented in a manner that is easily comparable by consumers

Purpose:

- to assist consumers to readily compare speed and performance information for retail plans offered by an RSP as well as across RSPs
- to ensure RSPs develop and implement standard ways of presenting important, comparable information to consumers.

Guidance

- 5.41. An RSP acts in line with this principle when it presents speed and performance information to consumers in a standardised and readily comparable way. Further guidance, together with a suggested method for measuring and verifying busy period speeds, is provided in Attachment A. The ACCC has considered a number of ways in which RSPs could meet this objective. After consultation with industry, consumer groups and other interested parties, the method the ACCC considers would currently be of most benefit to consumers **of fixed line services**, as well as most practicable for RSPs to implement, is to provide speed and performance information by applying a text-based label as part of all residential plan descriptions and marketing materials.
- 5.42. The advantage of this approach is that it can better support consumers that may not understand a purely quantitative measure. In addition, many consumers may not be in a position to readily assess whether a plan speed would typically support their particular household should only a quantitative measure be presented.
- 5.43. Importantly, this method allows consumers to access verifiable, comparable information about typical busy period performance by use of a label that refers to a residential end-user usage profile. Given labels are applied based on a pre-determined minimum speed, RSPs can have greater confidence determining which label applies to a given plan. This will reduce the potential need for RSPs to frequently update their retail plan descriptions.
- 5.44. The method preferred by the ACCC has a number of interrelated qualifying criteria, including minimum typical busy period speeds and the minimum wholesale access service needed to supply a retail plan that qualified for that label. The particular usage profile that corresponds with each standardised label is set out in Attachment A. The set of label descriptors is as follows:

Label	'Basic evening speed' ²⁰	'Standard evening speed'	'Standard plus evening speed'	'Premium evening speed'
Minimum typical busy period speed		15 Mbps	30 Mbps	60 Mbps
Minimum wholesale service	Applies to plans supplied over 12/1 NEBS ²¹ , and other plans for which typical busy period speed slows significantly to less than 15 Mbps	25/5 NEBS minimum; can also be used for plans built over other NEBS where typical busy period speed slows below qualifying criteria for other labels	50/20 NEBS minimum; can also be used for plans built over 100/40 NEBS where typical busy period speed slows below qualifying criteria for highest speed label	100/40 NEBS minimum

Intended effect of change: clarify that labels apply to services supplied over fixed line networks. New labels for services supplied over fixed wireless networks may also be developed, depending on the response to questions 2 and 3

²⁰ As noted at paragraph 4.7 and 5.3, the busy period for residential users is in the evening between 7-11pm.

²¹ NBN Co Ethernet Bitstream Service.

5.45. RSPs should explain the meaning of the evening speed labels applied to plans, for example, including information from the table above in a prominent link on their online resources. For the avoidance of doubt, qualifying speeds for the application of the labels are not intended to limit retail product design. For example, RSPs selling a service based on an underlying NBN 100/40 Mbps access service can determine how they wish to provision their service during the busy period in order to determine the appropriate label. In this way, RSPs can continue to develop products that have different speed attributes in off peak and evening periods.

5.46. In addition, applying one of the preferred labels is a minimum step only. RSPs can elect to provide additional information, including the quantified speed measure for the plan (or a range around this data point) should it consider that the label alone might not present the full quality of its retail offerings.²²

5.47. Finally, nothing in this guide detracts from the specific obligations of RSPs regarding the presentation of speeds and performance information for their retail plans. An example of this is information about their NBN retail plans under the Telecommunications (NBN Consumer Information) Industry Standard 2018.

Principle 6: RSPs should have systems in place to diagnose and resolve broadband speed issues

Purpose:

- to ensure consumers experiencing unsatisfactory speed and performance issues have their issues promptly and efficiently resolved by the RSP concerned
- to ensure RSPs have effective business systems in place to support the timely diagnosis and resolution of broadband speed and performance issues
- to ensure RSPs provide information, operational support and other remedies to consumers should the performance of the consumer's service be inconsistent with the speed and performance representations made by the RSP.

Guidance

5.48. Assuming Principles 1-5 are adhered to, Principle 6 should primarily relate to those consumers who are not able to achieve the typical speeds available on the plan due to a service or network problem that was not known to the RSP at the point of sale. **An example of this is where a fixed wireless cell becomes congested.**

5.49. 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).

5.50. Under section 64 of the ACL, guarantees cannot be excluded, modified or limited by contract.

Intended effect of change: improve support available to consumers supplied via fixed wireless networks

²² Note, RSPs may already be providing further speeds information in accordance with Principle 2.

5.51. *False or misleading representations about the existence or effect of the consumer guarantees may contravene the ACL (section 29(l)(m)). Additionally, consumers may seek compensation for damages and losses (including consequential loss) they have suffered due to a problem with a broadband service (in addition to any other remedy provided).*

5.52. *RSPs should accept and resolve customer fault reports or complaints about the speed or performance of their retail services, or of the performance of customer premise equipment they supplied. The RSP should deal with the report or complaint promptly, including any communication required with the network operator or other supplier in order to resolve the issue, and not refer their customer to other parties.*

5.53. *RSPs should also provide accurate and timely diagnosis and take all reasonable steps to resolve network issues, and/or faulty individual network connections or equipment that impact the speed or performance of the retail broadband service.*

5.54. *If the consumer is connected to fixed wireless technology, the RSP should check whether the service location is within a congested cell and if so advise the consumer of the forecast upgrade date that the network operator has specified for that cell. The RSP should also follow paragraph 5.55 in respect of that consumer.*

5.55. *In circumstances where an RSP is unable to provide timely resolution of a speed problem (whether as a result of its own network or the underlying access network), the RSP should provide the consumer with:*

- *refunds, compensation or billing reductions or rebates to reflect actual experienced speeds*
- *the option to move to a plan that better reflects the typical busy period speeds able to be achieved for their individual service, and/or*
- *the opportunity to exit their contract without further charge with appropriate refunds or compensations.*

Attachment A to the Guidance – Presentation of typical busy period speeds for residential consumers

Explanatory points

Basic evening speed plans

1. *There is no qualifying minimum speed for a plan labelled as ‘basic evening speed’ given there is no slower speed tier to which a consumer could move. However, in accordance with Principle 2, in order to avoid misleading consumers, the typical busy period speed for all services should be at least equally prominent and in close proximity to any off peak representation and include a numerical representation of the typical busy period speed. The numerical representation should be calculated and presented in the same way as this information is presented for faster plans.*

Standard evening speed plans

2. *The qualifying speed for the ‘standard evening speed’ label is positioned at a little above a speed that has been generally available to the majority of residential consumers over ADSL networks. This means that standard service plans should represent a step up for the majority of consumers that are migrating from ADSL services.*
3. *The ‘standard evening speed’ label is intended to indicate to consumers that the plan will support a popular usage profile of residential consumers, such as a high definition streaming application and one other concurrent application at the premise, during the busy period.²³*
4. *The label is also intended to signpost that the plan will deliver a speed that is associated with most popular residential plans. While there is potential for relative demand to shift over time, current demand data indicates that most residential consumers on fibre networks are selecting retail plans positioned at around this speed range.*

Standard plus and premium evening speed plans

5. *The ‘standard plus evening speed’ and ‘premium evening speed’ labels are intended to indicate where they sit in the overall hierarchy. These labels indicate plans that can provide support in the busy period for Ultra-High Definition streaming services and other, currently more-niche, residential applications that require similar bandwidth. This usage profile also includes premises with a high number of concurrent HD streaming applications or other applications with similar bandwidth requirements.*

Method for measuring and verifying busy period speeds

6. *In order to accurately represent to consumers typical busy period plan speeds, RSPs need to apply a robust approach to measuring speed. This includes the type of speed measure used, the accuracy and frequency of measurements, and by critically assessing the derived measurements.*

Note: All specifications set out below represent a base case; RSPs can choose to conduct more extensive testing.

²³ Some popular video streaming services recommend an internet download speed for the service to be accessed at particular levels of quality. These recommended speeds refer to the constant data rate needed to allow a service to be experienced with that quality. A measure of typical plan speed will need to be above this constant data rate in order for a subscriber to the plan to have confidence that the broadband service would support that quality of streaming.

Type of speed measure

7. The speed measure used to select the standardised label should be based on the speeds observed for a representative sample of services on that plan following the process outlined below:
- individual service speeds across a broad range of CVCs²⁴ and locations²⁵ should be observed during the busy period at least once per hour
 - these individual measures should be averaged to give a single speed measure for each hour of each day of the busy period for the plan during the sample period (that is, 56 hourly averages)²⁶
 - the speed measure used to select the standardised label should be the lowest of these hourly averages, save that no more than two hourly values observed over the sample period can be disregarded to make allowance for one-off network events that could otherwise impact the overall rating (i.e. the third lowest value of the 56 hourly averages in the sample period)
 - Note: the tolerance for lower figures to be discounted is intended to make allowance for one-off and ad-hoc events only, and not to excuse a recurring failure to meet business-as-usual demand peaks.
 - This process is illustrated in the flowchart at Attachment D.

Frequency of testing

8. Sample measures should be taken at least once every quarter, with network utilisation to be monitored each day so that the labels remain an accurate representation of the typical busy period speed of each plan.
9. Should network utilisation rates, or wholesale product inputs used to supply the retail plan, have changed materially from when the last sample was taken, a new sample should be undertaken and labels reassessed (unless in the case of a material change in network utilisation that is to be immediately redressed by the RSP so as to restore the previous utilisation rates). Similarly, should an RSP introduce a retail plan to use a new wholesale access product input or wholesale billing arrangement, then it should be tested as soon as practicable following its introduction.

Example: An RSP changing a wholesale access product or migrating to a materially different billing arrangement for an existing wholesale access product should retest once the plan has migrated to the new access product or billing arrangement.

Intended effect of change:
Assist RSPs in determining typical busy period speeds and ensure quoted typical busy period speeds remain accurate

Extent of sampling

10. The samples should comprise no fewer than 75 services that are connected over the entirety of a 14 day sample period to the relevant plan. These should be randomly drawn across a broad range of the RSP's CVCs, save that the composition of samples for 'Standard evening speed', 'Standard plus evening speed' and 'Premium evening speed' plans should be moderated so that FTTB/FTTN services are not over or under represented as a proportion of the overall sample.

²⁴ Connectivity virtual circuits.

²⁵ Services sampled should be taken across multiple CVCs and locations in a way that is representative of the RSP's customer base.

²⁶ See 'Extent of sampling' below – which sets out the minimum number of services that should be sampled and the frequency of sampling.

Note: A small number of services failing to record a speed measurement in a test hour would not invalidate the results for that data or mean that the RSP had not maintained a suitable test sample over the entirety of the 14 day period; provided that each of the services in the sample were regularly reporting test results over the 14 day period and a high proportion of the services were reporting in each test hour.

11. *Those FTTB/FTTN services that have a maximum attainable line speed (off peak speed) that is less than the off peak speed that has been advertised and less than the minimum speed for a particular label can be excluded if the guidance set out in relation to Principle 4, Principle 6 and Attachment B of this guide has been applied in good faith. This means that an RSP may exclude from its sampling a line which has a limited maximum attainable line speed, or which is experiencing a fault for reasons beyond the control of the RSP, if that issue has been addressed with the consumer in line with the processes set out in this guide.²⁷*

Updating plan labels

12. *It is possible that the busy period speeds observed for an actively monitored and reasonably provisioned network could differ to some extent from quarter to quarter as new samples are drawn and/or network utilisation levels fluctuate with additional services migrating to NBN plans. However, these fluctuations should not be significant or of such a degree as to require a change to the standardised label of any particular plan, and RSPs should generally ensure that the typical busy period speeds promised to consumers at point of sale are maintained (or exceeded) for the duration of each consumer's contracted plan.*
13. *In circumstances where an RSP fails to maintain its provisioning levels prior to the end of a consumer's contracted plan because the level of provisioning required to continue providing the typical busy period speeds promised was not reasonably feasible²⁸, an RSP should:*
- (a) provide notice promptly to the consumer of its failure to maintain provisioning on the plan*
 - (b) advise the consumer of the new minimum typical busy period speed of the plan and provide any other relevant performance and price information that will assist the consumer to make an informed decision about the broadband service that will best meet their needs going forward*
 - (c) compensate the consumer for the period they were paying for a higher speed plan that they could not receive in full*
 - (d) provide the consumer with the option to move to a plan that better meets their needs*
 - (e) advise the consumer they are free to exit the contract without penalty.*

Records to verify testing

14. *RSPs should keep network logs or other records to be able to verify the representations that have been made to consumers by applying the standardised labels and in providing any additional quantified measures.*

²⁷ The ability to exclude services with known network faults or limitations that are being dealt with in accordance with Principle 4, Principle 6 and Attachment B means that RSPs retain the incentive to supply services to customers that may experience speed issues that are beyond the control of the RSP as long as these consumers are managed in accordance with the Principles, e.g. provided with clear information about the limitation of their service and the appropriate associated remedies as a result of these limitations.

²⁸ The ACCC will likely seek substantiation of any claim made by an RSP that the required provisioning was not 'reasonably foreseeable'.

Attachment B to the Guidance – Models for the marketing of FTTB/FTTN products in the absence of accurate pre-sale information

Note: this further guidance operates in addition to paragraphs 5.26 to 5.30 of the Guide.

Model One

1. *The RSP only upgrades a consumer's FTTB and FTTN plan to one that is faster than 25/5 Mbps once it receives actual maximum attainable line speed information after activation.*
2. *Once actual attainable line speed information is available, the RSP advises the consumer of that speed and of the services that are available to them, and moves the consumer to their desired plan. The RSP should clearly state that the maximum attainable rate is not indicative of the typical busy period speed and provide the typical busy period speed of the service.*

Model Two

3. *The RSP sells the plan that the consumer asks for (including those based on the 50/20 Mbps and 100/40 Mbps wholesale network services) and clearly advises the consumer at the point of sale that this service may not be attainable at their location but they can order the service if they would like, disclosing the potential limitation with words to the effect of 'actual speeds on FTTB/N services will be confirmed'.*
4. *Once the service is activated, the RSP must confirm the actual attainable line speed information as soon as practicable.*
5. ***If the actual attainable line speed can deliver the off peak speed (or higher) of the plan selected, it would be best practice for this to be confirmed with the consumer given the RSP's disclosure prior to sale that the FTTB/N service may not be technically able to reach off peak speed of that plan.***
6. ***If the actual attainable line speed is lower than the off peak speed of the plan selected, but higher than the off peak speed of the next plan down (e.g. a consumer purchased a plan with an off peak speed of 100 Mbps, and the maximum attainable line speed is 70 Mbps), the RSP should:***
 - (a) advise the consumer of the maximum attainable line speed of their line, and the typical busy period speed of their service,*
 - (b) advise the consumer that they are able to move to a lower (cheaper) plan at no cost and allow the consumer to do so. If the consumer chooses to move to a lower plan, the RSP should also provide the consumer a refund to compensate the consumer for the period they were paying for a higher speed plan that they could not receive in full,*
 - (c) advise the consumer of the minimum typical busy period speed of the plan selected and any other relevant performance information, in order to avoid any confusion as to the service they are likely to receive, and*
 - (d) advise the consumer they are free to exit the contract without penalty.*

7. ***If the actual attainable line speed is lower than the off peak speed of the plan selected and a lesser (cheaper) plan*** (e.g. consumer purchased a plan with an off peak speed of 100 Mbps, and the maximum attainable line speed is 45 Mbps), the RSP should:
- (a) *inform the consumer accordingly and unless there are cogent reasons why the consumer's selected plan can still represent additional value for the consumer, advise the consumer not to continue on its higher (more expensive) plan and prompt them to select a more appropriate plan,*
 - (b) *provide the consumer a refund to compensate the consumer for the period they were paying for a higher speed plan that they could not receive,*
 - (c) *advise the consumer of the maximum attainable line speed of their line, the automatic redress the RSP has provided and, if no unilateral action was taken by the RSP to move the consumer to a lower plan, advise the consumer that they may elect to move to a lower speed plan without charge,*
 - (d) *advise the consumer of the minimum typical busy period speed of the plan selected and any other relevant performance information, in order to avoid any confusion as to the service they are likely to receive, and*
 - (e) *advise the consumer they are free to exit the contract without penalty.*
8. *The RSP should carry out the above steps as soon as practicable and before the first billing cycle. There are a range of ways that RSPs could provide this information in an effective and efficient manner, including using existing communications channels with their customers.*

Important note about the ACL

9. *The consumer guarantees as to fitness for purpose and reasonable time for supply²⁹ apply to services utilising FTTB and FTTN technologies, including in circumstances where a consumer's actual attainable line speed is lower than the off peak speed of the plan they have purchased. The ACL also provides remedies for false or misleading representations or conduct.*
10. *Consumers are likely to be entitled to exit their contracts without penalty and receive appropriate redress such as refunds or compensation in circumstances where the maximum attainable line speed is slower than the advertised off peak speed/NBN wholesale access speed.*

²⁹ Sections 61 and 63 of the ACL.

Attachment C to the Guidance – Model for the marketing of fixed wireless products in the absence of accurate pre-sale speed information for the service location or network cell

Note: this further guidance operates in addition to paragraphs 5.36 to 5.40 of the Guidance.

Model One

1. The RSP only upgrades a consumer's fixed wireless plan to one that is faster than 12/1 Mbps once actual maximum attainable speed and congested network cell information becomes available.
2. The RSP checks the congested cell information available and either:
 - (a) obtains maximum attainable speed information from the network operator or from its own testing of the service; or
 - (b) supports the consumer obtaining and reporting a reliable measure of maximum attainable connection speed and accepts the consumer's speed measure.
3. Once both actual attainable speed information and congested cell information is available, the RSP advises the consumer whether their service address is in a congested network cell and the attainable speed (unless the consumer made the measure). The RSP should then advise the consumer of the plans that are available to them based on the speed information, and move the consumer to their desired plan. The RSP should clearly state that the maximum attainable connection speed is not indicative of the typical busy period speed and provide an estimate of the typical busy period speed of the service.

Model Two

4. The RSP sells the plan that the consumer asks for (including those based on the 25/5 Mbps or higher wholesale network services) and clearly advises the consumer at the point of sale that this service may not be attainable at their location but they can order the service if they would like, disclosing the potential limitation with words to the effect of 'actual speeds will be confirmed on activation'.
5. Once the service is activated, the RSP must as soon as practicable obtain congested network cell information, as well as obtain actual attainable connection speed information, or support the consumer obtaining and reporting a reliable measure of maximum attainable connection speed and accept the consumer's speed measure.
6. **If the service location is not in a congested network cell and the actual attainable connection speed can deliver the off peak speed (or higher) of the plan selected, it would be best practice for this to be confirmed with the consumer.**
7. **If the service location is in a congested network cell and/or the actual attainable connection speed is lower than the off peak speed of the plan selected, but higher than the off peak speed of the next plan down (e.g. a consumer purchased a plan with an off peak speed of 50 Mbps, and the maximum attainable connection speed is 40 Mbps), the RSP should:**
 - (a) advise the consumer that they are located in a congested network cell and/or that their connection does not support the maximum speed of the plan selected as the case may be,

Intended effect of change: improve information and support for consumers supplied by fixed wireless networks

(b) provide the maximum attainable connection speed, and an estimate of the typical busy period speed of their service,

(c) advise the consumer that they are able to move to a lower (cheaper) plan at no cost and allow the consumer to do so. If the consumer chooses to move to a lower plan, the RSP should also provide the consumer a refund to compensate the consumer for the period they were paying for a higher speed plan that they could not receive in full, and

(d) advise the consumer they are free to exit the contract without penalty.

8. **If the actual attainable line speed is lower than the off peak speed of the plan selected and a lesser (cheaper) plan** (e.g. consumer purchased a plan with an off peak speed of 50 Mbps, and the maximum attainable connection speed is 20 Mbps), the RSP should:

(a) inform the consumer accordingly and unless there are cogent reasons why the consumer's selected plan can still represent additional value for the consumer, advise the consumer not to continue on its higher (more expensive) plan and prompt them to select a more appropriate plan,

(c) provide the consumer a refund to compensate the consumer for the period they were paying for a higher speed plan that they could not receive,

(d) advise the consumer of the maximum attainable speed of their connection along with an estimate of the typical busy period speed of their service and the automatic redress the RSP has provided. If no unilateral action was taken by the RSP to move the consumer to a lower plan, advise the consumer that they may elect to move to a lower speed plan without charge, and

(e) advise the consumer they are free to exit the contract without penalty.

9. The RSP should carry out the above steps as soon as practicable and before the first billing cycle. There are a range of ways that RSPs could provide this information in an effective and efficient manner, including using existing communications channels with their customers.

Important note about the ACL

10. The consumer guarantees as to fitness for purpose and reasonable time for supply³⁰ apply to services utilising fixed wireless technologies, including in circumstances where a consumer's actual attainable line speed is lower than the off peak speed of the plan they have purchased. The ACL also provides remedies for false or misleading representations or conduct.

11. Consumers are likely to be entitled to exit their contracts without penalty and receive appropriate redress such as refunds or compensation in circumstances where the maximum attainable line speed is slower than the advertised off peak speed/NBN wholesale access speed.

³⁰ Sections 61 and 63 of the ACL.

Attachment D to the Guidance – Example of how to determine typical busy period speeds

Test a minimum of 75 services for each retail plan for a 14 day period (Test Period).



For each day of the Test Period obtain a plan specific hourly average for each hour between 7pm and 8pm, 8pm and 9pm, 9pm and 10pm, and 10pm and 11pm



**Intended effect of change:
Assist RSPs in determining typical busy period speeds**

Table 1 – example hourly averages

Day 1

Monday	Plan with maximum speed of 12 Mbps	Plan with maximum speed of 25 Mbps	Plan with maximum speed of 50 Mbps	Plan with maximum speed of 100 Mbps
7pm – 8pm	5 Mbps	20 Mbps	42 Mbps	83 Mbps
8pm – 9pm	8 Mbps	16 Mbps	42 Mbps	82 Mbps
9pm – 10pm	8 Mbps	21 Mbps	44 Mbps	87 Mbps
10pm – 11pm	10 Mbps	22 Mbps	46 Mbps	40 Mbps

Day 2

Tuesday	Plan with maximum speed of 12 Mbps	Plan with maximum speed of 25 Mbps	Plan with maximum speed of 50 Mbps	Plan with maximum speed of 100 Mbps
7pm – 8pm	8 Mbps	20 Mbps	39 Mbps	85 Mbps
8pm - 9pm	8 Mbps	22 Mbps	40 Mbps	78 Mbps
9pm – 10pm	12 Mbps	25 Mbps	20 Mbps	90 Mbps
10pm – 11pm	11 Mbps	20 Mbps	44 Mbps	94 Mbps

...

Day 14

Sunday	Plan with maximum speed of 12 Mbps	Plan with maximum speed of 25 Mbps	Plan with maximum speed of 50 Mbps	Plan with maximum speed of 100 Mbps
7pm – 8pm	6 Mbps	23 Mbps	40 Mbps	80 Mbps
8pm - 9pm	8 Mbps	22 Mbps	42 Mbps	87 Mbps
9pm – 10pm	8 Mbps	10 Mbps	40 Mbps	91 Mbps
10pm – 11pm	11 Mbps	21 Mbps	44 Mbps	92 Mbps

This will provide 56 hourly averages for each plan

Each of the hourly averages stated in table 1 for the 14 day period should then be listed from lowest to highest.



Table 2 - 14 Day Period Results

	Plan with maximum speed of 12 Mbps	Plan with maximum speed of 25 Mbps	Plan with maximum speed of 50 Mbps	Plan with maximum speed of 100 Mbps
1	5Mbps	10Mbps	20Mbps	40Mbps
2	6Mbps	16Mbps	39Mbps	78Mbps
3	8Mbps	20Mbps	40Mbps	80Mbps
4	8Mbps	20Mbps	40Mbps	82Mbps
5	8Mbps	...	...	...
6	8Mbps	...	...	...
7	9Mbps	...	...	...
8	9Mbps	...	...	...
9	9Mbps	...	...	...
...
56	12Mbps	25Mbps	50Mbps	100Mbps



The Typical Busy Period Speed that is used should be the third lowest of the hourly averages taken over the 14 day period from the above results for each plan.

Table 3 - Typical Busy Period Speed Advertised

Plan with maximum speed of 12 Mbps	Plan with maximum speed of 25 Mbps	Plan with maximum speed of 50 Mbps	Plan with maximum speed of 100 Mbps
8Mbps	20Mbps	40Mbps	80Mbps