Australian
Competition &
Consumer
Commission

Broadband Internet Speed Claims and the Trade Practices Act 1974

An ACCC Information Paper

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Important note

Please note that this Information Paper is a summary designed to give you basic information on the ACCC's approach to assessing potentially misleading and deceptive claims in certain communications markets. This Information Paper does not cover the whole of the Trade Practices Act 1974 (TPA) and does not exhaustively set out the ways in which the ACCC will determine whether claims are misleading. Moreover, because this Information Paper avoids legal language wherever possible there may be some generalisations about the application of the TPA. Some of the provisions referred to have exceptions or important qualifications. In all cases the particular circumstances of the conduct need to be taken into account when determining the application of the TPA to the conduct.

Introduction

1. This Information Paper has been prepared by the Australian Competition and Consumer Commission (ACCC) to assist Internet Service Providers (ISPs) in complying with their obligations under the *Trade Practices Act 1974* (TPA) when advertising broadband internet services. In particular, it provides guidance on how the ACCC approaches claims as to broadband internet speeds.

2. This Information Paper does not cover the whole of the TPA, instead focussing on the consumer protection provisions contained in Part V of the TPA. Section 52 of the TPA prohibits conduct in trade and commerce which is misleading or deceptive or likely to mislead or deceive. Under section 51A of the TPA a corporation must have reasonable grounds for making a representation regarding any future matter, or the representation will be taken to be misleading. Under section 51A(2) of the TPA the burden is on a corporation to show it had such reasonable grounds.

3. If the ACCC discovers conduct it believes breaches the misleading and deceptive conduct provisions of the TPA, it may institute either criminal or civil proceedings where such action is deemed appropriate. Penalties include corrective advertising, injunctions to prevent the prohibited conduct, and fines up to $1.1 million for companies and $220,000 for individuals. The ACCC monitors advertising by ISPs, and will continue to closely monitor advertising of internet speeds to ensure that high-speed broadband services are appropriately qualified.

4. All ISPs must comply with the TPA regardless of their size or whether they are a network owner or a reseller of others' services.

5. In this Information Paper the ACCC focuses on Asymmetric Digital Subscriber Line (ADSL) services and, in particular, on ADSL2+ services. However, ISPs should ensure that all advertisements for internet services comply with the TPA. These principles apply also to cable and wireless broadband as well as 3G High-Speed Downlink Packet Access (HSDPA).

6. The ACCC may update this paper from time to time as necessary. The ACCC would welcome comments from interested parties on the principles outlined in this Paper. Comments or questions on this document should be directed to:

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ADSL Services

7. ADSL stands for Asymmetric Digital Subscriber Line. It is a technology that uses the copper wire network to enable a broadband service to be delivered via a dedicated line from the customer home to a telephone exchange. ADSL is a high bandwidth downstream service, coupled with a lower bandwidth upstream service. ADSL2+ is a high speed service that extends the capability of basic ADSL.

8. The speed at which data can travel along the copper lines is affected by a number of factors. Most significant is the length of copper wire from the local exchange. Although ADSL2+ is often available at distances of 3km or more from the exchange, the speed available drops significantly according to distance (length of copper wire) from the exchange. The downstream and upstream speed achieved is also affected by a number of other factors described in paragraph 23.

The Use of "Hypothetical" and Maximum Speed Claims

9. Hypothetically, speeds of 24 megabits per second (Mbps) downstream and 1Mbps upstream are said to be achievable on ADSL2+. However, because a number of factors affect download speeds these hypothetical speeds are rarely achieved or achievable. Accordingly, the ACCC is concerned with ADSL2+ being described as a 24Mbps/1Mbps service and with blanket claims that 24Mbps/1Mbps is an "up to" or "maximum" speed. Other broadband services also have hypothetical maximums which are also affected by a range of factors.

10. ISPs should avoid using hypothetical speeds in headline claims describing a service and in the names or titles that ISPs give to particular plans.

Example 1 – Headline Claims:

Headline claims like "Broadband up to 24Mbps" should be avoided.

Example 2 – Plan Names:

Plan names like "Our 24000/1000kbps Super Plan" should be avoided.

11. ISPs should consider alternative ways to advertise broadband internet. Headline speed claims could be avoided entirely for descriptions such as "ADSL2+". "Maximum" or "up to" claims could be avoided in favour of typical speeds or a typical range of speeds. Speed claims should have regard to the Communications Alliance – formerly the Australian Communications Industry Forum (ACIF) – benchmarks from ACIF C559:2005 (see paragraph 16)[1]. However, ISPs have an obligation to ensure that any representation they choose to make is not misleading or deceptive.

12. If ISPs do make "up to" or "maximum" speed claims to their customers they should carefully consider their compliance with the TPA and consider seeking legal advice. Such speeds must clearly be stated as maximums. If the stated speed cannot be provided to a single customer then it is misleading to describe a service as reaching "up to" that speed. Similarly, if the stated speed can only be delivered to a limited number of customers, but the advertisement is directed to the public at large, there may be a contravention of the TPA.

13. ISPs must be able to substantiate stated maximum or "up to" speeds as being achievable by users of their services. A stated maximum speed could be substantiated by actual tests of network performance. If an ISP has not conducted such network tests and uses "theoretical" or "hypothetical" maximum speeds, it is unlikely to have reasonable grounds for representing that future users of its network will be provided with speeds "up to" the stated maximum. Consequently, such claims are likely to contravene the TPA.

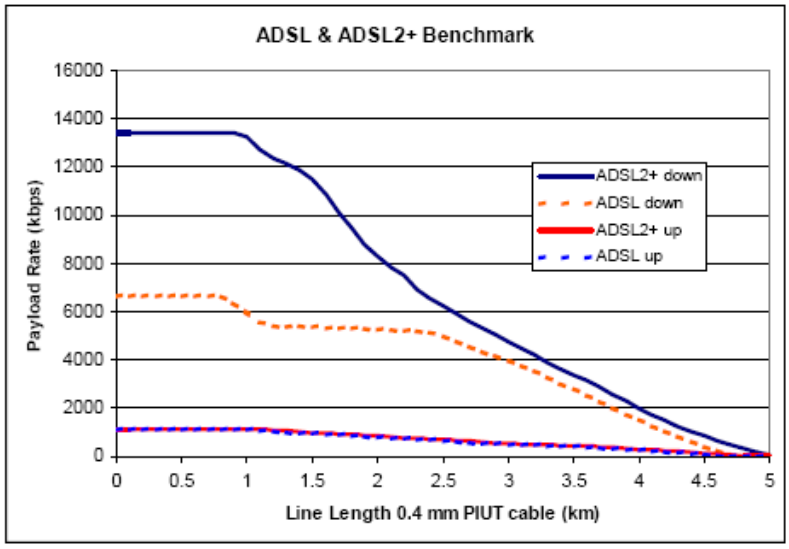
[1] Available at http://www.acif.org.au/__data/page/12739/C559_2_2006.pdf (page 20 and page 21)

14. Network tests should be appropriately designed. A suitably representative sample of the customer base should be selected when undertaking network tests. ISPs may not have a reasonable basis for a representation to the public at large if they base representations as to the speeds to be obtained on network tests from customer bases that are not typical of the population to which the advertisement is directed (e.g. only CBD customers were tested).

15. ISPs could consider the ACIF benchmarks, the hypothetical maximum, and the typical transmission speed of the technology when making representations. The actual speed achievable by consumers will be between the ACIF benchmark and the hypothetical maximum depending on the factors discussed in paragraph 23.

16. Figure 1 below shows the ACIF benchmarks for ADSL and ADSL2+ technology. The ACIF benchmarks represents the expected worst-case scenario.

Figure 1 - ADSL and ADSL2+ Benchmarks



Note: Used with permission from ACIF C559:2005 page 21

17. The Commerce Commission of New Zealand's "Local Loop Spectrum Management" (26 July 2006) contains graphs of the hypothetical maximum speeds for ADSL and ADSL2+ services.[2] The Commerce Commission graphs also plot a 'typical' speed line between the ACIF benchmark and the hypothetical maximum. The typical transmission speed for ADSL2+ falls away from the hypothetical maximum very quickly as distance (length of copper wire from the exchange) increases. At a distance in excess of one kilometre the typical speed is only slightly above the ACIF benchmark speed.

18. ISPs should use this information to consider if their network tests are appropriate and support a representation to the public at large. Alternatively, they might be able to make some speed representations on this basis alone.

[2]The Commerce Commission of New Zealand, "Local Loop Spectrum Management" (26 July 2006) Figure 2 page 7 and Figure 4 page 13, available at http://www.comcom.govt.nz//IndustryRegulation/Telecommunications/Wholesale/BitstreamAccess/ContentFiles/Documents/Local%20Loop%20Spectrum%20Management.pdf

19. An actual test of network performance may give different results depending on when the network is tested. As the number of customers using the service at one time increases, the throughput speed to each customer typically decreases. ISPs should consider increased use of the service in the future through increased subscribers to ADSL2+ services when making representations as to throughput speeds.

Example 3 – Reasonable Grounds to Support Speed Descriptions:

Claims like "Broadband up to 24Mbps" cannot be made without reasonable grounds.

20. Where an ISP has conducted appropriate network tests, it will still need to be careful in the claims it makes based on those tests when advertising to the public at large. A result which shows that certain maximum speeds can be achieved in ideal conditions will not be sufficient to substantiate a claim made to consumers in general, who will not be provided with services under the same ideal conditions. An ISP should describe the maximum speeds it can provide only where network tests indicate that those speeds will actually be provided to consumers by that ISP, and can continue to be provided over time as use of these services grows.

Example 4 – Test-Based Descriptions of Download Speeds:

An ISP has undertaken appropriate network tests as follows:

- 23Mbps was the maximum download speed measured under laboratory conditions using high quality software, hardware and equipment, including copper of less than 500 metres
- 1000 actual services-in-operation were measured
- 10 services were measured as achieving download speeds of at least 22Mbps
- 500 services were measured as achieving download speeds of at least 20Mbps

In these circumstances, the ISP should not claim that it can or will provide services up to 24Mbps. The ISPs should use a lesser speed description based on its network tests. If full details about the network tests and the results are prominently provided, a descriptor of 20Mbps may be appropriate in this case.

Providing Adequate Information to Consumers on the Variability of the Speed of Broadband Services and the Factors Affecting Speed

21. Representations by ISPs should be complete so as to not mislead consumers. For example, because of the nature of ADSL, the service should be sufficiently explained so that consumers understand the speeds they are actually likely to achieve and that these speeds will vary. The ACCC considers that consumers should be informed of the factors that affect the speeds obtained and of the actual speeds or range of speeds that the ISP expects it will provide to a customer or potential customer.

22. When advertising products by reference to potential speed, ISPs should make it clear in their advertising that various factors affect the provision of ADSL speeds. Length of the copper line from the exchange is a particularly important factor but there are a number of other factors affecting ADSL speeds.

23. The data rates available to a particular ADSL customer are affected by many factors, and some by quite significant amounts. These include:
    - The length of copper wire from the exchange
    - The number of, and type of, other services being used over copper pairs in the same cable by other customers
    - The configuration and line quality of the copper wire pair between the exchange and the customer's premises
    - Electrical interference from outside sources (such as electric motors)
    - The configuration of the copper wiring within the customer's premises
    - The software configuration and application on the customer's computer (in particular how it uses the uplink back to the exchange)
    - The customer's hardware or modem
    - The capacity of, load on, and access data rate of the destination host computer which the customer is accessing.

24. The ACCC considers it appropriate for the factors affecting throughput speed to be provided in summary form. However, this summary should be provided wherever a representation as to speed is made: online, in print, or in any other medium.

Example 5 – Providing Further Information to Customers:

Any claims like "Broadband speeds up to 20Mbps" must be accompanied by a prominently displayed summary of the factors affecting the delivery of the stated speeds.

Providing Adequate Information to Consumers as to the Speeds Achievable

25. ISPs must also ensure that consumers are given adequate information as to the speeds achievable by their broadband service. If a maximum speed is stated consumers must not be misled into thinking that they will be provided with the maximum speed if this is not the case. Similarly, advertisements should not convey the impression that a significant number of consumers will be provided with speeds close to, or slightly less than, the maximum stated speed if this is not the case. Without further information as to the range of speeds achievable consumers may be misled into the belief that they will achieve a speed near the maximum, notwithstanding the various factors affecting speed.

26. Full details of actual speeds users or certain percentages of users can expect should be provided in the advertisement by the ISP. For example, an ISP could state that "50 per cent of users obtain speeds of 12Mbps or above, based on network tests" or provide a table of the speeds provided by different quartiles or deciles. In the absence of this information, consumers may be misled into thinking that although speeds may vary they are likely to get speeds near the stated maximum when this is not the case.

Example 6 – Test-Based Descriptions of Download Speeds:

An ISP has undertaken appropriate network tests as follows:

- 23Mbps was the maximum download speed measured under laboratory conditions using high quality software, hardware and equipment, including copper of less than 500 metres
- 1000 actual services-in-operation were measured
- 10 services were measured as actually achieving download speeds of at least 22Mbps
- 100 services were measured as actually achieving download speeds of at least than 12Mbps
- 900 services were measured as actually achieving download speeds of at least 10Mbps

In these circumstances, the ISP should use a speed description that accurately reflects that it will provide between 10Mbps and 12Mbps to the vast majority of customers. If describing download speeds as greater than 12Mbps, the ISP should prominently indicate that only a very small number of consumers will obtain such speeds.

27. This type of information should be included regardless of the medium in which the representation is made. Representations may breach section 52 of the TPA regardless of if they are made in print, online, or in any other medium.

28. In making claims, ISPs should also remember that full information should be provided whenever and wherever a claim is made. It is insufficient to provide further details at a later point, such as over the telephone or on a website.

29. Providing detailed information over the telephone or on a website is good practice. However, this should be done *in addition* to providing information on the speeds available wherever a claim as to speed is made. This information could be provided as a 'frequently asked questions' or a 'further information' page on an ISP's website or could be provided as part of the sign-up process. However, these good practice suggestions do not reduce the responsibility of ISPs to comply with the TPA whenever a speed representation is made.

Example 7 – Providing Information at the time Speeds Claims are made:

An ISP has undertaken appropriate network tests as follows:

- 23Mbps was the maximum download speed measured under laboratory conditions using high quality software, hardware and equipment, including copper of less than 500 metres
- 1000 actual services-in-operation were measured
- 10 services were measured as actually achieving download speeds of at least 22Mbps
- 100 services were measured as actually achieving download speeds of at least than 12Mbps
- 900 services were measured as actually achieving download speeds of at least 10Mbps

The ISP claims in a newspaper advertisement "ADSL2+ up to 22Mbps. Call now". When consumers telephone the ISP, the ISP advises that tests show that only 1 per cent of customers will be provided with up to 22Mbps and that 90 per cent of customers will be provided with up to 12Mbps.

This is insufficient to comply with the ISP's obligations under the TPA. The ISP needs to prominently state in the newspaper advertisement the various factors affecting download speeds (noted in paragraph 23 above) as well as the inability to provide broadband services to the vast majority of its customers other than at download speeds between 10 to 12 Mbps.

30. If further information is to be provided as a "disclaimer" then ISPs should ensure that any disclaimer effectively communicates all information required. To be effective, a disclaimer must be sufficiently prominent, placed in close proximity to the main representation, be clear in meaning and fully address the issue being clarified. If not, the overall effect of the advertisement may be misleading or deceptive, and likely to contravene the TPA.

31. Finally, it is the ISP's responsibility to ensure that the impression conveyed by the combination of the original claim and its qualification is clearly understood by the consumer. In determining whether conduct is misleading or deceptive, the test is whether, on an objective basis, the conduct induces or is capable of inducing error. The ISPs intention or view is not relevant to this test. In assessing the overall impression, qualifications may be used to clarify what the main offer does or does not include. However, qualifications should only be used to clarify the meaning or the intent of a statement and not to correct a misleading impression created by the more prominent aspects of the advertising. Therefore, ISPs should be careful not to rely on blanket "disclaimers" that contradict the main claim in its entirety.

Example 8 – Contradictory Disclaimers:

An ISP has undertaken appropriate network tests as follows:

- 23Mbps was the maximum download speed measured under laboratory conditions using high quality software, hardware and equipment, including copper of less than 500 metres
- 1000 actual services-in-operation were measured
- 10 services were measured as actually achieving download speeds of at least 22Mbps
- 100 services were measured as actually achieving download speeds of at least 12Mbps
- 900 services were measured as actually achieving download speeds of at least 10Mbps

The ISP claims in a newspaper advertisement "ADSL2+ up to 22Mbps*". In smaller print at the bottom of the page it states "*Actual speeds vary. We do not guarantee that customers will achieve this speed and cannot guarantee what speeds customers will achieve."

This is insufficient to comply with the ISP's obligations under the TPA. The ISP needs to prominently state in the newspaper advertisement the various factors affecting download speeds (noted in paragraph 23 above) as well as the inability to provide broadband services to the vast majority of its customers other than at download speeds between 10 to 12 Mbps.

Industry Checklist for Broadband Internet Service Providers

This checklist is important to anyone who promotes or advertises broadband services. It is designed to help you avoid breaches of section 52 the *Trade Practices Act 1974*.

You are likely to breach the Trade Practices Act if:

- ✗ You use maximum theoretical download speeds to describe the speeds available to users of internet services
- ✗ You have no basis to believe the represented speeds will be available to a future customer or your basis is not reasonable
- ✗ You only provide a maximum speed and no further information on the speeds actually available or the factors affecting speeds

You should seek legal advice if your advertising or actions may be in breach of the Trade Practices Act.

You will reduce your chances of breaching the Trade Practices Act by:

- ✓ Avoiding use of "maximum" and "up to" speed claims in headline advertisements and plan names
- ✓ Basing descriptions of speeds (including maximums) on appropriate tests of network performance
- ✓ Prominently and clearly providing full and complete information whenever and wherever claims as to broadband speeds are made
- ✓ Clearly and prominently stating that any claimed maximum download speed is a maximum that can only be provided to some users under limited conditions
- ✓ Basing any maximum speed claims on the speeds that can and will actually be provided to a reasonable number of customers using the network, not speeds achieved using laboratory tests
- ✓ Ensuring that your maximum speed claim relates to a maximum speed that can and will be provided to a reasonable number of your customers
- ✓ Prominently state the factors affecting the provision of the claimed download speeds at the time any speed claims are made
- ✓ Providing, clearly and prominently, full information and details about your actual tests of the network, when describing the download speeds (maximum or otherwise) that can and will be provided. This could be expressed as the speeds or range of speeds actually achieved by the majority of users or by relative percentiles of users
- ✓ Ensuring any "disclaimer" is prominent, proximate to the main representation, clear in meaning, and fully addresses the issue being clarified
- ✓ Clearly and prominently stating the limited conditions under which any claimed maximum download speed can and will be provided to those users
- ✓ Providing details of speeds or ranges of speeds that can and will be more commonly provided to a larger number of users at the time that the maximum speed claim is introduced