



Australian  
Competition &  
Consumer  
Commission

# Broadband Speed Claims

## Industry guidance

August 2017

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### Version Control

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Version 1

# 1. Executive Summary

- 1.1. The ACCC is providing more detailed guidance concerning how to implement its principles for advertising the speeds of retail fixed-line broadband plans.
- 1.2. This guide has been prepared in consultation with network operators, retail service providers (RSPs) and consumer representatives. It has been designed to improve the information and support available to broadband consumers and to promote competition among RSPs, having regard to practicalities that RSPs may face in developing and substantiating their speed claims.
- 1.3. This guide is intended to promote best practice advertising by RSPs. The Australian Consumer Law (ACL)<sup>1</sup> applies to RSPs irrespective of compliance with this guide and it is the responsibility of RSPs to comply with that law.
- 1.4. The four key guidelines for RSPs are that they should:
  - indicate, in their plan descriptions and when marketing broadband plans that they supply over the National Broadband Network (NBN) and similar fixed-line based broadband access networks, the speeds at which the plans typically operate during the busy evening period
  - in order to assist consumers to readily compare plans, adopt a standardised labelling system (basic evening speed, standard evening speed, standard plus evening speed and premium evening speed) that indicates a minimum ‘typical busy period speed’<sup>2</sup> for the plan
  - take steps to provide remedies to those customers that cannot obtain the speeds at which their selected plan typically operates due to their particular network connection. This may include taking steps to deliver the speeds promised under the plan<sup>3</sup>, providing billing refunds and reductions, supplying a more appropriate plan and/or offering to those customers the option to exit the contract without penalty
  - for services supplied over FTTB and FTTN<sup>4</sup> connections, where there is clear potential for some consumers to not receive typical plan speeds, RSPs should include clear and prominent disclosure in product descriptions and marketing, and give point of sale or post sale information and assistance to affected customers.
- 1.5. This guide will be reviewed in 12 months to ascertain whether it has been effective in addressing consumer concerns about broadband speed claims and the comparability of fixed line broadband plans.

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<sup>1</sup> The Australian Consumer Law (ACL) is Schedule 2 to the *Competition and Consumer Act 2010* (Cth). Sections 18 and 29 of the ACL prohibit conduct in trade or commerce that is false, misleading or deceptive or likely to mislead or deceive. Section 29(g) of the ACL prohibits a corporation in trade or commerce from making certain representations that goods or services have, amongst other things, performance characteristics, uses, or benefits they do not have and Part 3-2 sets out the consumer guarantees that apply to goods and services.

<sup>2</sup> For residential customers, this is in the evening between 7pm to 11pm: see paragraph 4.7 and 5.3 below.

<sup>3</sup> Where this is technically possible and within the control of the RSP.

<sup>4</sup> Fibre to the basement (FTTB); Fibre to the node (FTTN).

## 2. Introduction

- 2.1. The ACCC is aware of high levels of consumer complaint and dissatisfaction about perceived 'slow data speeds' and a desire among consumers for easily comparable speed and performance information.<sup>5</sup> This guide has been prepared in response to those concerns. The concerns broadly manifest in two ways:
- i. first, some consumers have purchased a broadband plan that is not suitable for their needs as a result of a misunderstanding as to the performance capabilities of that plan, or factors influencing the performance of the service in their household
  - ii. second, some consumers have purchased a plan that is appropriate to their needs but are experiencing significant speed and performance issues in the RSP's delivery of the services promised.
- 2.2. This guide seeks to address both sets of issues, and applies to the practices RSPs use to describe and promote their fixed-line broadband retail plans. These promotions may be through television, radio, the internet, print media, billboard advertising and the broad range of customer service channels. It applies to information presented by RSPs, and information which consumers could reasonably expect to be disclosed, including during pre-sale advertising or 'claims', sign up processes, fault and complaints diagnosis and resolution.
- 2.3. This guide is designed to assist RSPs in providing consumers with reliable and clear information about the performance of their fixed-line broadband services. It is the product of extensive consultation with network operators, RSPs and consumer representatives. This guide is drafted in accordance with the best practice principles for marketing (both sales and after-sales practices) released by the ACCC in February 2017:
- 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, and
  - Principle 6: RSPs should have systems in place to diagnose and resolve broadband speed issues.

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<sup>5</sup> Complaints about internet data speed increased by 48 per cent during the 2015-16 financial year. It was the top issue for new complaints to the Telecommunications Industry Ombudsman (TIO) during the year: TIO, *Annual report 2015-16*, November 2016. Approximately 81 per cent of consumer respondents to the ACCC consultation indicated it is currently difficult to compare RSPs and plans, and most support RSPs providing accurate information about actual speed, a speed range and an estimate of speed during peak periods. There was a high level of consumer interest in receiving comparable information, as well as information about other performance factors and the overall reliability of services.

- 2.4. This guide applies to fixed-line broadband plans offered to residential and small business customers on the NBN and other next generation broadband networks (NGNs). However, a number of the principles can also be applied to other broadband plans.
- 2.5. There have been significant changes in the retail fixed-line broadband market since the ACCC provided advertising guidance in 2007 and 2011.<sup>6</sup> The introduction of the NBN has changed the ways in which broadband products are constructed and advertised to consumers. In the context of forced migration, consumers must now purchase plans that are marketed as having different speeds, which necessitates consumers having a better understanding of both their household broadband needs and the products that are being offered to them. The information RSPs provide about their products and their suitability for different uses is key to making sure consumers are making informed choices.<sup>7</sup>
- 2.6. Information about broadband speed and performance is therefore increasingly important to consumer purchasing decisions as NGN services expand and speed-dependent applications are becoming more widely available and popular. However, there is currently limited scope for consumers to access this information in a way that reduces their search costs and promotes competition and market efficiency.
- 2.7. In accordance with the Principles, the ACCC considers:
- the prevailing practices of describing and promoting broadband plan speeds using ideal, theoretical and non-busy conditions, and/or using ambiguous, RSP-specific descriptors of 'speed' should be discontinued
  - consumers should be provided with good quality information about their particular service and its speed and performance characteristics, including improved pre and post sale information
  - consumers should be provided with prompt and effective remedies in the event that their particular service does not meet the typical performance of the service as it was promised to them.
- 2.8. The ACCC will be monitoring steps taken by RSPs to apply this guide in accordance with the timeframes set out in Section 6. The ACCC will review this guide in 12 months.

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<sup>6</sup> See 'Background' section below for further detail.

<sup>7</sup> Since the ACCC last provided industry guidance on broadband speed advertising, the range of technologies available to deliver internet services has expanded, as has the reach of NGNs that are capable of supporting higher download speeds (for instance, speeds in excess of 25 megabits per second (Mbps)).

### 3. Compliance with the Australian Consumer Law

- 3.1. The ACCC is responsible for administering compliance with the ACL. The ACL establishes legal protections to promote fair trading by businesses and provides for the protection of consumers in their dealings with businesses, including ensuring consumers are not misled when purchasing goods and services and that businesses have reasonable grounds for representations about future matters.<sup>8</sup> It includes provisions underwritten by the principle that consumers should receive what was represented to them and paid for, and that suppliers are responsible for delivery of the promised service or for providing an appropriate remedy in the event of non-delivery.
- 3.2. The ACL also includes specific guarantees in relation to the provision of services including that they will be provided with due care and skill, are fit for purpose and are provided within a reasonable time. The provision of broadband services to consumers is captured by the ACL.<sup>9</sup>
- 3.3. The ACCC has a Compliance and Enforcement Policy which outlines how the ACCC will exercise its discretion in directing resources to matters that provide the greatest overall benefit for competition and consumer protection. Speed and performance claims in relation to retail fixed-line broadband plans are an ACCC Compliance and Enforcement Priority for 2017.<sup>10</sup>
- 3.4. While the ACL applies to RSPs irrespective of compliance with this guide, one of the factors the ACCC may consider in assessing future enforcement matters in this area is the extent to which an RSP has taken steps to apply the measures in this guide.

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<sup>8</sup> These requirements are contained in sections 4, 18, 29(1)(b), 29(1)(g), 29(1)(m) and 34 of the ACL.

<sup>9</sup> These requirements are contained in Part 3-2 of the ACL.

<sup>10</sup> ACCC, *2017 ACCC Compliance and Enforcement Policy (24 February 2017)*, <https://www.accc.gov.au/publications/compliance-and-enforcement-policy>.

## 4. Background

### Updated guidance informed by consultation

- 4.1. This guide updates two previous ACCC Information Papers on broadband speed claims (2007 and 2011) into one consolidated guide. It has been informed by: our consultation on the *Broadband Speed Claims – Discussion Paper* (July 2016) (the Discussion Paper); market enquiries conducted by the ACCC throughout 2016; international experience; focused engagement with key stakeholders on the implementation of the principles completed during 2017; and independent expert advice.
- 4.2. Further background information about the principles and issues covered in this guide is provided in the Discussion Paper, consultation responses available on the ACCC Consultation Hub, the *Broadband Speed Claims – Consultation outcomes report* (February 2017) and the *Focused Implementation Consultation Report* (July 2017).<sup>11</sup>

### Current consumer information and marketing practices

- 4.3. There have been some important developments since the ACCC's 2011 Information Paper which increase the need for accurate speed information.<sup>12</sup> Key developments include the expanding presence of NGNs (which in turn provide a more homogenous service), the growing consumer demand for data and speeds that support data intensive applications, and the migration to NBN services which requires consumers to choose between retail services.
- 4.4. As compared to legacy networks, NGNs support a broad range of speeds, and speed has become one of the plan features that RSPs use to differentiate the price and quality of their retail offers. This means that as more consumers transition to NGN services, they will be increasingly reliant on the quality of information provided by RSPs about the speeds that their services support.
- 4.5. Current marketing of retail broadband services focuses on price and download quotas, while providing little quantified information about real life service speed. Advertising tends to restrict descriptions of speed to imprecise, inconsistent qualitative statements (for example, RSP-specific use of 'quick', 'fast' or 'boost'), uses pictures of animals or athletes, or relies on statements of the speed of the underlying access (wholesale) network. This makes it difficult for consumers to accurately assess and compare offers and may mislead consumers about the nature of the service they are buying, especially during busy periods (peak demand times) when most consumers will want to use the service. Communications Alliance, the leading industry body representing RSPs, has stated in relation to 'peak hour' speeds:

*During the busiest hours, an individual's upload and download speed tests may vary from the maximum access connection speed down to significantly slower speeds. During the busiest hours, for example, typical off-peak average speed of 10Mbps may slow significantly during busy periods (i.e. 7.00 pm to 10.00 pm).*

*In some cases, congestion may be the key determining factor for speed outcomes during peak hours. Those outcomes may differ widely across different ISPs. Some consumers are very cost conscious and will prefer to pay*

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<sup>11</sup> See ACCC, 'Broadband 'speed' claims - information papers', <https://www.accc.gov.au/regulated-infrastructure/communications/compliance-anti-competitive-conduct/broadband-speed-claims-information-papers>

<sup>12</sup> ACCC, *HFC and Optical Fibre Broadband "Speed" Claims and the Competition and Consumer Act 2010 – An ACCC Information Paper*, July 2011.

*for a lower-priced more congested service even if the average performance is not as strong as that of higher priced offerings.<sup>13</sup>*

- 4.6. Consequently, in the absence of typical busy period performance information, services described by reference to underlying wholesale access speeds are likely to create consumer confusion and risk misleading consumers about the overall performance of their services.
- 4.7. The overriding objective of this guide is that RSPs present a reliable indicator of the speeds at which the relevant plan typically operates during the period in which their residential services are busiest, currently between 7pm and 11pm. Consequently, RSPs should be satisfied that their representations of busy period speeds achieve this objective.

## **The ACCC's broadband performance monitoring and reporting program**

- 4.8. The ACCC's broadband performance monitoring and reporting program (BPMR) will support the provision of improved performance information to consumers. The BPMR was announced on 7 April 2017, and will produce its first report by the end of 2017. It will involve testing and reporting on the typical speed and performance of broadband plans provided over the NBN, as well as the speed and performance of some additional networks.
- 4.9. The BPMR (along with other relevant data) will assist the ACCC in assessing whether the claims that RSPs make concerning the speed and performance of their retail broadband services during the busy period are accurate.
- 4.10. The BPMR data will similarly provide RSPs with a further point of reference in developing their advertising claims.

## **Resellers**

- 4.11. In addition to the four major RSPs (and their related entities) which provide services directly to over 90 per cent of all Australian consumers<sup>14</sup>, there are other RSPs that connect directly to the NBN, or have announced plans to do so, to supply retail services to consumers.
- 4.12. These RSPs can access speed and performance related information in respect of the network access services that they acquire, either by way of online tools or portals, or via periodic reports that the network operator provides. In this respect, in relation to representations to consumers, they are in the same position as the larger providers.
- 4.13. There are other RSPs that do not directly connect to the access network but rather resell services from wholesale service providers, and other RSPs that use a mixture of both. RSPs reselling services have less control over the speed and performance of their retail services and in a practical sense are dependent upon their wholesaler for information about the speed and performance of their services. Despite this dependence, these RSPs remain responsible for the representations they make to consumers and for delivery in accordance with those representations, or the provision of remedies if delivery is not in accordance with them.

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<sup>13</sup> Communications Alliance, 'Broadband Education Package', accessed on 3 July 2017, <http://www.commsalliance.com.au/BEP>.

<sup>14</sup> ACCC, *Competition in the Australian telecommunications sector: Price changes for telecommunications services in Australia* (February 2017) p. 4, [https://www.accc.gov.au/system/files/ACCC%20Telecommunications%20reports%202015%E2%80%9316\\_web.pdf](https://www.accc.gov.au/system/files/ACCC%20Telecommunications%20reports%202015%E2%80%9316_web.pdf).

## **Information provision between wholesale service providers and their resellers**

- 4.14. In order to enable smaller RSPs (like the four major RSPs) to provide appropriate information to their customers, wholesale service providers should support their resellers by providing relevant information to them. This would assist resellers to understand the speed and performance of the wholesale service up until the point at which the aggregated broadband traffic is handed over to them and to know the limitations of individual services (for example, FTTN services).
- 4.15. This speed and performance information could be very similar to the speed and performance information relating to any retail services that the wholesale service provider supplies to consumers (either directly or via an affiliate). This would likely be the case where the wholesaler hands off traffic to the reseller at a central point, such as a data centre in close proximity to where popular internet content is stored; the capacity of the handover links are sufficiently provisioned; the customer premises equipment or gateway supplied to the customer is not dissimilar in performance to devices supplied to other retail customers using the same wholesale supplier; and the wholesale service provider does not discriminate traffic priority on its network by RSP. Any such discrimination should be fully disclosed to the affected reseller.

## **Reseller use of wholesale service provider information**

- 4.16. Resellers that obtain speed and performance information from their wholesale service provider could use that information to reach a view on the speed and performance of the wholesale product. However, in order to accurately describe their retail services to consumers, those resellers should also:
- actively monitor any additional network resources from the point of interconnection with their wholesale service provider so that, at all times (including during the busy period), these additional resources do not degrade the speed and performance of their retail service, and
  - keep network logs or other records to demonstrate this.

## **RSPs that use a mix of wholesale inputs**

- 4.17. An RSP could use a mix of upstream wholesale inputs in order to supply retail services over the NBN. For example, an RSP could use a wholesale service from a wholesale service provider in some localities and directly connect to the NBN in other localities, or use a mix of wholesale service providers. Consequently, there is potential for the speed and performance of retail services to differ materially based upon the upstream wholesale input being used to supply them.
- 4.18. Where an RSP uses a mix of wholesale inputs and supplies retail services with materially different speed and performance characteristics during the busy period, the RSP will need to consider the range of these speed and performance outcomes in representing the quality of their services to consumers.

## 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.<sup>15</sup>
- 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'<sup>16</sup> 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).
- 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

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<sup>15</sup> 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.

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

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.<sup>17</sup>

### **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.<sup>18</sup>
- 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.
- 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.

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

<sup>18</sup> 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.

## **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.
- 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.
- 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, 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 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 provided<sup>19</sup> 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 or other factors specific to the end-user connection will or will likely result in service limitations.
- 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)
  - (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.

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<sup>19</sup> 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.

## ***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, 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.
- 5.24. 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 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***

- 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). The RSP should also check that information before entering into a contract with a consumer 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
  - (b) if the maximum attainable line speed 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 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.

### ***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.

## **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**

- 5.31. 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, 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.
- 5.32. 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.
- 5.33. 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.
- 5.34. 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' <sup>20</sup>	'Standard evening speed'	'Standard plus evening speed'	'Premium evening speed'
<b>Minimum typical busy period speed</b>		15 Mbps	30 Mbps	60 Mbps
<b>Minimum wholesale service</b>	Applies to plans supplied over 12/1 NEBS <sup>21</sup> , 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

- 5.35. 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.
- 5.36. 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.<sup>22</sup>
- 5.37. 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 in presenting a description of their retail plans in the Critical Information Summaries required under the Telecommunications Consumer Protection Code.<sup>23</sup>

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

<sup>21</sup> NBN Co Ethernet Bitstream Service.

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

<sup>23</sup> ACMA, 'Critical Information Summaries for telco consumers', accessed 3 July 2017, <http://acma.gov.au/theACMA/critical-information-summaries-for-telco-consumers>.

## 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

- 5.38. 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.
- 5.39. 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).
- 5.40. Under section 64 of the ACL, guarantees cannot be excluded, modified or limited by contract.
- 5.41. 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).
- 5.42. 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.
- 5.43. 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.

5.44. 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.

## 6. Guidance Implementation Timetable

- 6.1. The ACCC recognises this is a voluntary and best practice guide. However, given the significant consumer detriment currently being reported in relation to these issues, the ACCC encourages RSPs to immediately implement measures in accordance with this guide, save for those elements of the guide that are informed by network, which testing may require up to 3 months to implement.
- 6.2. The ACCC will continue to investigate matters referred to it in relation to broadband speed and performance issues that may contravene the ACL.

# Attachment A – 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.<sup>24</sup>
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.

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<sup>24</sup> 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 CVCs<sup>25</sup> and locations<sup>26</sup> 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)<sup>27</sup>
  - 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.

## 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 have changed materially from when the last sample was taken, a new sample should be undertaken and labels reassessed (unless the material change in network utilisation is to be immediately redressed by the RSP so as to restore the previous utilisation rates).

## 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.
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.<sup>28</sup>

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<sup>25</sup> Connectivity virtual circuits.

<sup>26</sup> Services sampled should be taken across multiple CVCs and locations in a way that is representative of the RSP's customer base.

<sup>27</sup> See 'Extent of sampling' below – which sets out the minimum number of services that should be sampled and the frequency of sampling.

<sup>28</sup> 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

## 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 feasible<sup>29</sup>, 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.

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experience speed issues that are beyond the control of the RSP and 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.

<sup>29</sup> The ACCC will likely seek substantiation of any claim made by an RSP that the required provisioning was not 'reasonably foreseeable'.

## Attachment B

### Models for the marketing of FTTB/FTTN products in the absence of accurate pre-sale line 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 it is 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 supply<sup>30</sup> 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.

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<sup>30</sup> Sections 61 and 63 of the ACL.