



Consultation on further enhancements to the *Broadband Speed Claims – Industry Guidance*

July 2020

Version Control

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Version 1

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1. Introduction

The ACCC last updated our [Broadband Speed Claims – Industry Guidance \(Guidance\)](#) in May 2019 and has stated that the Guidance will be reviewed periodically. There has been a recent development in the wholesale products offered by NBN Co which make offering retail broadband services with download speeds in excess of 100 Mbps (**>100 Mbps Services**) more attractive to retail service providers (**RSPs**). This development has promoted the ACCC to consider updating the Guidance.

This consultation paper provides background information on the recent market developments and outlines the changes that we are proposing to make to the Guidance. To assist stakeholders in responding to the consultation, we have provided a marked-up version of the Guidance which contains the ACCC's proposed changes (**Annexure A**).

2. Background

2.1. Guidance history and principles

On 21 August 2017, we released the Guidance which is a best practice guide for 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 \(August 2018\)](#).

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 (access) 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.
- Principle 6: RSPs should have systems in place to diagnose and resolve broadband speed issues.

2.2. Industry developments

On 29 May 2020, NBN Co announced that it had launched three new wholesale broadband products which it advised have peak wholesale download/upload speeds of up to 100/20 Mbps, 250/25 Mbps and 500-1000/50 Mbps (**New NBN Products**).¹

We have observed RSPs offering >100 Mbps Services which appear to use the New NBN Products and expect this to continue.

¹ NBN Co, *NBN launches three new residential wholesale higher speed tiers*, 29 May 2020, <https://www.nbnco.com.au/corporate-information/media-centre/media-statements/nbn-launches-three-new-residential-wholesale-higher-speed-tiers>, viewed 16 July 2020.

3. Responding to this consultation paper

We encourage industry participants and other stakeholders to consider and respond to the ten questions set out in this consultation paper. Responses can be made through our [consultation hub](#).

In order to foster an informed and public consultative process, all submissions will be considered as public and will be posted on the ACCC website. We may also publish a report that provides a summary of the responses received.

Responses to this consultation paper are due by **26 August 2020**.

3.1. Confidentiality of responses

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'.

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.

Further information regarding the ACCC's Confidentiality Guideline is available on the [ACCC website](#).

4. Proposed enhancements to the Guidance

This section identifies the issues relevant to the presentation of consumer information about broadband speeds with a particular focus on >100 Mbps Services. We provide our initial understanding and view of key issues including:

- how wholesale access speed information can be used where the wholesale product specification gives multiple speeds or a range of speeds achievable
- when particular products can be promoted as supporting a good online gaming experience
- ensuring that the limited geographic availability of products is brought to consumer's attention and requirements for specific hardware such as modems
- whether there is a role for descriptive labels for >100 Mbps Services.

Each issue is accompanied by questions seeking information about our proposed approach to enhancing the Guidance.

4.1. Where wholesale product specifications give a range of speeds and burst speeds

4.1.1. Overview of the issue

The New NBN Products express the download and upload speeds available over those wholesale products by reference to a range of speeds in respect of the faster of the offerings.² The range for the fastest of the New NBN Products is significant – 500 to close to 1000 Mbps. In addition, NBN provides information about ‘burst speeds’ being speeds that are faster than typical off peak speeds that may occasionally be achievable for short periods of time. Access to the fastest speeds can be dependent on the underlying technology used to deliver the service.

We consider that typical busy period speed information is the most valuable speed information to consumers, however, where RSPs provide off peak speed information, it is important that the provision of that information does not set unrealistic expectations.

4.1.2. Proposed enhancements

Principle 2 of the Guidance states that wholesale (access) network speeds or theoretical speeds taken from technical specifications should not be advertised without reference to typical busy period speeds. The guidance on principle 2 outlines that an RSP can provide the wholesale access network speed as a measure of typical ‘off peak’ speed if it is accompanied by an equally prominent numerical representation of the typical busy period speed (the **busy period** falls between 7pm and 11pm each day, and the **off peak** period is outside these hours).

We are proposing to enhance the Guidance to provide clarity on how RSPs can rely on wholesale access network speeds that are expressed in ranges when setting off peak speed expectations for consumers.

We propose that RSPs should use the lowest end of any ranges provided if they rely on wholesale product specifications for their off peak speed information, unless the RSP is confident that consumers will be able to achieve a higher off peak speed. We also propose that, if RSPs subsequently become aware that a consumer’s off peak speed is different from what was described in the RSP’s general marketing, the RSP should so advise the consumer.

We also propose to clarify that burst speeds should not be used as a proxy for off peak speeds due to their intermittent nature. We also propose that, where RSPs provide information about burst speeds, their limitations should be clearly drawn to consumers’ attention.

Questions

- 1) Do RSPs plan to market >100 Services uniformly regardless of underlying access technology?
- 2) Are there any issues with specifying that RSPs should utilise the lowest end of a range of speeds provided by a wholesale provider, where RSPs rely on that information in advertising typical off peak speeds?
- 3) Can the meaning of burst speeds be readily conveyed to consumers in marketing

² NBN Co, *NBN Co Wholesale Broadband Agreement Product Description nbn Ethernet Product Module*, 1 May 2020, pp. 11-12, available at: <https://www.nbnco.com.au/content/dam/nbnco2/2020/documents/sell/wba/sfaa-wba-nbn-ethernet-product-description-20200501.pdf>, viewed 16 July 2020.

material?

- 4) Do you have any comments on the proposal that RSPs clarify off peak speed expectations for particular consumers where they differ from what is described in retail marketing?

4.2. Promoting online gaming applications

4.2.1. Overview of the issue

The capacity of broadband services to deliver a high quality gaming experience is of interest to a number of consumers and some RSPs advertise particular plans as suitable for online gaming. There are a number of factors which can impact a consumer's online gaming experience which are within direct control of the RSPs.

4.2.2. Proposed enhancements

Principle 3 of the Guidance states that information about the performance of promoted applications should be accurate and sufficiently prominent.

We are proposing an enhancement to the Guidance to clarify that, where an RSP promotes its services as suitable for online gaming, the RSP should ensure it provisions its network to deliver a high quality gaming experience including ensuring network latency is sufficiently low.

Question

- 5) Are there any barriers to RSPs provisioning their networks to ensure a high quality gaming experience?

4.3. General disclaimers about limited geographic availability of certain broadband products and requirements for specific consumer equipment

4.3.1. Overview of the issue

NBN Co has stated that there is a limited geographic footprint currently available for its >100 Mbps Services³ and some >100 Mbps Services are only available where a modem with particular specifications is used.

4.3.2. Proposed enhancements

Principle 4 of the Guidance states that factors known to affect service performance should be disclosed to consumers.

If RSPs market >100 Mbps Services broadly there is a risk that consumers will be led to believe that those services are available to them when that may not be the case. To reduce this risk we are proposing to clarify that the limited geographic footprint of >100 Mbps Services should be disclosed to consumers.

³ NBN Co, *NBN launches three new residential wholesale higher speed tiers*, 29 May 2020, <https://www.nbnco.com.au/corporate-information/media-centre/media-statements/nbn-launches-three-new-residential-wholesale-higher-speed-tiers>, viewed 16 July 2020.

We are also proposing to clarify that, where specific equipment, at an additional cost, is required to achieve the full speeds of an RSP's plan, this should be prominently brought to a consumer's attention. This is to ensure that consumer are properly informed of the costs of accessing the higher speeds.

Question

- 6) Do you have any comments on our proposed changes to the Guidance in respect of principle 4?

4.4. Descriptive labels

4.4.1. Overview of the issue

When we developed the Guidance the fastest retail product commonly available in the market had an off peak speed of 100 Mbps and the descriptive labels in the Guidance do not reflect that >100 Mbps Services are now readily available.

A further development is that wholesale products with the same download speed, but different upload speeds, are now available.

4.4.2. Proposed enhancements

Principle 5 of the Guidance states the performance information should be presented in a manner that is easily comparable by consumers. The Guidance on principle 5 includes a set of label descriptors for products where the underlying wholesale access network service speed is 100 Mbps or less.

We are considering whether it would be helpful to consumers to develop label descriptors for products where the wholesale download speed exceeds 100 Mbps, in addition to the provision of typical busy period speeds delivered by the plan.

Our current view is that >100 Mbps Services are likely to appeal to a subset of consumers at the premium end of the market. We do not consider that additional labels are required for >100 Mbps services and that they can be labelled 'Premium' which reflects that the services are suitable for all currently available applications for multiple users. This approach avoids introducing two additional labels which may be difficult to place in the hierarchy of labels.

We are also proposing to clarify that products with the same wholesale download speed, but different upload speeds, can be given the same label under principle 5 of the Guidance, and can be tested together for the purposes of determining a typical busy period speed (e.g. 100/40 Mbps and 100/20 Mbps products).

Questions

- 7) Should the 'Premium' label be applied to >100 Mbps Services or should new labels be developed for >100 Mbps Services?
- 8) What would be the benefits and downsides to consumers from the development of new labels in addition to 'Premium' to apply to >100 Mbps Services?
- 9) Is it appropriate to treat wholesale products that have the same download speeds, but different upload speeds, in the same way for the purpose to labels and typical busy period speed claims?
- 10) Do you have any other view on the proposed enhancements to the Guidance?

5. Next steps

Following this consultation, we will consider all submissions in order to inform our final view on enhancing the Guidance to cover the issues outlined. We anticipate that we will communicate the outcomes of this consultation, including issuing a new version of the Guidance, in October 2020.

Annexure A



Broadband Speed Claims Industry Guidance

May 2019

Version Control

August 2017 Version 1

May 2019 Version 2

July 2020 Version 3 Marked up with proposed changes to accompany July 2020
consultation on further enhancements

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1. Introduction

- 1.1. This document is a revised version of the [Broadband Speed Claims – Industry Guidance](#) (**Guidance**) which was released by the Australian Competition and Consumer Commission (**ACCC**) in August 2017. The original Guidance was developed in response to high levels of concern, complaints and dissatisfaction about perceived ‘slow data speeds’ and a desire among consumers for easily comparable speed and performance information.
- 1.2. The key change to this version of Guidance is that it has been updated to also apply to services supplied over fixed wireless networks. The Guidance now applies to all broadband plans offered to residential and small business customers on the NBN and other next generation broadband networks (**NGNs**), other than broadband plans delivered using satellite networks. However, a number of the principles remain applicable to services supplied using satellite networks.
- 1.3. The other changes to the Guidance are intended to ensure consumer information remains current and appropriate and to improve the clarity and useability of the Guidance.
- 1.4. The Guidance was designed to assist retail service providers (**RSPs**) in providing consumers with reliable and clear information about the performance of their fixed-line broadband services.
- 1.5. The Guidance followed extensive consultation with network operators, RSPs and consumer representatives. The Guidance was 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.
 - **Principle 6:** RSPs should have systems in place to diagnose and resolve broadband speed issues.
- 1.6. In November 2018, the ACCC [reported](#) on the effectiveness of the Guidance and consulted on further enhancing it. The ACCC observed that the Guidance had been effective in promoting more competitive NBN markets for the supply of NBN services. That is, it had contributed to the circumstances that made the improvements much more likely to occur than would have been the case if the Guidance were not issued.

- 1.7. The ACCC will continue monitoring steps taken by RSPs to apply this Guidance and will periodically review the Guidance, including considering whether further revisions are appropriate.

Compliance with the Australian Consumer Law

- 1.8. The ACCC is responsible for administering compliance with the Australian Consumer Law (**ACL**) which is contained in Schedule 2 of the *Competition and Consumer Act 2010* (Cth).
- 1.9. 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.¹ It includes provisions underwritten by the principle that consumers should receive what was represented to them and what they 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.
- 1.10. 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.²
- 1.11. 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.³
- 1.12. While the ACL applies to RSPs irrespective of compliance with this Guidance, 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 Guidance.

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

² These requirements are contained in Part 3-2 of the ACL.

³ ACCC, *Compliance and Enforcement Policy*, <https://www.accc.gov.au/publications/compliance-and-enforcement-policy>.

2. Background

The ACCC's broadband performance monitoring and reporting program

- 2.1. The ACCC's [Measuring Broadband Australia \(MBA\) program](#) measures and reports on residential NBN fixed-line broadband speeds on a quarterly basis. The MBA reports provide consumers with accurate and independent information on the performance of NBN broadband services to assist with their NBN purchasing decisions.
- 2.2. Key data in the report includes the speed performance of retail broadband services in the busy period as well as the average busy hour speed recorded for the reporting period. Both measures are benchmarked against the maximum plan speeds for the relevant NBN speed tier rather than against an individual RSP's advertising claims
- 2.3. MBA reports have been released in March, July and November 2018 and February 2019. To date, average busy hour speeds have generally been above 80 per cent of maximum plan speeds. As the volunteer panel has grown, each report has expanded the services included to cover the range of RSPs, plans, NBN technologies and locations.
- 2.4. The MBA (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.
- 2.5. The MBA data will similarly provide RSPs with a further point of reference in developing their advertising claims.

Resellers

- 2.6. In addition to the four major RSPs (and their related entities) which hold around 90 per cent of the NBN market, there are other RSPs that connect directly to the NBN, or have announced plans to supply retail services to consumers.
- 2.7. 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.
- 2.8. 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.

Information provision between wholesale service providers and their resellers

- 2.9. 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, Fibre to the Node (**FTTN**) services).

- 2.10. 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

- 2.11. 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

- 2.12. 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.
- 2.13. 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.

ACMA Information Standard and Determination

- 2.14. During 2018, the Australian Communications and Media Authority (**ACMA**) introduced new instruments which cover the information that RSPs need to provide in respect of their broadband plans. The *Telecommunications (NBN Consumer Information) Industry Standard 2018 (Information Standard)* and the *Telecommunications Service Provider (NBN Service Migration) Determination 2018 (Determination)* came into effect on 21 September 2018 and are enforceable by the ACMA.
- 2.15. 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.
- 2.16. 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.

- 2.17. 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.
- 2.18. For FTTN, Fibre to the Building (**FTTB**) 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 such connections.
- 2.19. 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.

Services provided using the NBN fixed wireless network

- 2.20. Throughout 2018, it became increasingly apparent that a number of consumers serviced via the NBN fixed wireless network were impacted by network congestion, particularly during the busy hours.⁴
- 2.21. 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.
- 2.22. In August 2018, NBN Co announced that it would undertake additional investment in upgrading network capacity for its fixed wireless network.⁵
- 2.23. In September 2018, NBN Co gave the ACCC an enforceable undertaking that included commitments relating to its fixed wireless networks.⁶ 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, and whether the cell is congested according to NBN Co's minimum design standard; 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.

⁴ Senate Environment and Communications Legislation Committee, 10 April 2018, page 15: https://parlinfo.aph.gov.au/parlInfo/search/display/display_w3p;query=ld:%22committees/estimate/1f46b2b5-8cab-4613-97ab-efa5be640e73/0000%22 and 24 May 2018, page 128: https://parlinfo.aph.gov.au/parlInfo/search/display/display_w3p;query=ld:%22committees/estimate/1ec8fad5-a9bd-4d84-b9ba-38cc3b9c55e2/0000%22.

⁵ NBN Co 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>.

⁶ 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>.

- 2.24. NBN Co also undertook to provide monthly public reporting on its consumer experience dashboard that it publishes on its website.⁷ This includes information on the percentage of cells that fall within each average busy hour cell performance category and the average number of hours that end users on cells are experiencing congestion according to NBN Co's minimum design standard.
- 2.25. These issues have been taken into account in updating the Guidance to apply to fixed wireless services.

⁷ NBN Co Monthly Progress Reports, NBN Website at: <https://www1.nbnco.com.au/corporate-information/about-nbn-co/updates/dashboard-january>

3. ACCC speed claims principles

- 3.1. 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 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

- 3.2. 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.⁸
- 3.3. 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.⁹
- 3.4. 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.
- 3.5. 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'¹⁰ speeds) and Principle 5 and Attachment A (relating to the use of labels to present performance information in a manner that is easily comparable by consumers).
- 3.6. 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,

⁸ The Guidance does not apply to broadband services supplied using satellite connections such as NBN Co's Sky Muster service.

⁹ 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.

¹⁰ The off peak period for residential plans is outside the hours of 7pm to 11pm.

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.

- 3.7. 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.
- 3.8. 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.¹¹

Guidance

- 3.9. 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.¹²

3.10. 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 that is generally available across the off peak times. Where wholesale product specifications provide a range of speeds, and RSPs rely on those specifications for their off peak speed claims, the lower end of the range should be used.

Example product A: An RSP makes available a plan that utilises the wholesale access network service 500-1000/50 Mbps on the FTTP and HFC network, and the wholesale access provider specifies that at most times this product will operate between 500 to 750 Mbps. The RSP advertises its product as having an off peak speed of 500 Mbps.

¹¹ We note that factors such as line specific faults or interference may affect off peak speeds.

¹² 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 Guidance may be a helpful reference in that regard.

Example product B: An RSP makes available a plan that utilises the wholesale access network service 500-1000/50 Mbps on only the FTTP network, and the wholesale access provider specifies that the maximum speed of 990 Mbps is typically achievable. The RSP advertises this product as having an off peak speed of 990 Mbps.

3.11. Where information about burst speeds is available, being speeds faster than off peak speeds that may occasionally be achievable for short periods of time, that information may be given to consumers in addition to off peak speeds, provided the limitations of burst speeds are clearly drawn to consumers' attention. Burst speeds should not be used as off peak speeds because they could cause consumers to believe that they could consistently achieve those speeds during off peak times.

3.40-3.12. 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.

3.41-3.13. Where the actual off peak speed available to a particular consumer is lower than the off peak speed advertised by the RSP, this should be advised to the consumer. Where the actual off peak speed available to a consumer is higher than the off peak speed advertised by the RSP, it would be best practice to also provide that information to the consumer.

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

3.42-3.14. 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.

3.43-3.15. 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.

3.44-3.16. 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.

Example C: A plan would not be suitable for online gaming applications, if factors within the RSPs control mean that online gaming traffic demand would not be appropriately prioritised or met so as to give the consumer a good experience.

3.15-3.17. 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.

3.16-3.18. 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

3.17-3.19. 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.

~~3.18.3.20.~~ 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 provided¹³ 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.

~~3.19.3.21.~~ 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.

~~3.20.3.22.~~ 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).

~~3.23.~~ 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.

~~3.24.3.24.~~ If a modem with particular specifications is required to achieve the full speeds of an advertised plan, and that modem is not included in the cost of the advertised plan, the additional cost and requirement should be prominently drawn to the consumer's attention.

~~3.25.~~ If consumers are unlikely to receive better performance during the busy period by moving or upgrading to a higher plan (for example due to congestion in a fixed wireless network), such information should also be disclosed by the RSP.

¹³ 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.

3.26. RSPs should make appropriate disclosure where they offer plans with download speeds that exceed 100 Mbps and the underlying wholesale access network used for those plans does not support those speeds across the entirety of the access providers' fixed line footprint. The disclosure could contain words to the effect of 'services available in limited areas'.

Services utilising FTTB and FTTN technologies

3.22-3.27. 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.

3.23-3.28. 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.

3.24-3.29. 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.

3.25-3.30. 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

3.26-3.31. 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'.

3.27-3.32. 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

3.28-3.33. 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.

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

3.29-3.34. 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.

3.30-3.35. 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

3.31-3.36. 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.

3.32-3.37. In addition, busy hour demand in some network cells may exceed the installed capacity such that the speeds experienced by consumers located in the congested cell fall significantly below plan speeds until the congested cell is upgraded.

3.33-3.38. 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.

3.34-3.39. 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.

3.35-3.40. If different performance attributes exist within a single plan, this should also be explained to consumers.

~~3.36~~3.41. Should network operators not provide maximum attainable speed data, RSPs should take one of two 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.

Disclosures prior to sale

~~3.37~~3.42. 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’.

~~3.38~~3.43. 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

~~3.39~~3.44. Where likely maximum attainable speed and/or congestion information (including when remediation works are scheduled to take place) for a given location is available to an RSP, the RSP should make that information available to consumers at appropriate times (for example, when a consumer contacts the RSP about acquiring a service, when a consumer contacts a different RSP about a new service, or when a particular cell becomes or is likely to become congested). 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, advise the consumer when the congested cell area is expected to be upgraded 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

~~3.40~~3.45. 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.

[3.41-3.46](#). 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

[3.42-3.47](#). 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.

[3.43-3.48](#). 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.

[3.44-3.49](#). 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.

[3.45-3.50](#). 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' ¹⁴	'Standard evening speed'	'Standard plus evening speed'	'Premium evening speed'
Minimum typical busy period speed		15 Mbps	30 Mbps	60 Mbps

¹⁴ As noted at paragraph 3.3, the busy period for residential users is in the evening between 7-11pm.

Minimum wholesale service	Applies to plans supplied over 12/1 NEBS ¹⁵ , 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 <u>and 100/20 NEBS minimum; can also be used for plans built over services where the wholesale download speed exceeds 100 Mbps</u>
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[3.46-3.51](#). 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.

[3.47-3.52](#). 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.¹⁶

[3.48-3.53](#). Finally, nothing in this Guidance 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 information about their NBN retail plans in key facts sheets under the Information Standard.

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

[3.49-3.54](#). 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 is, or becomes congested.

¹⁵ NBN Co Ethernet Bitstream Service.

¹⁶ Note: RSPs may already be providing further speeds information in accordance with Principle 2.

~~3.50~~3.55. 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).

~~3.51~~3.56. Under section 64 of the ACL, guarantees cannot be excluded, modified or limited by contract.

~~3.52~~3.57. False or misleading representations about the existence or effect of the consumer guarantees may contravene the ACL (section 29(1)(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).

~~3.53~~3.58. 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.

~~3.54~~3.59. 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.

~~3.55~~3.60. 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 3.41 in respect of that consumer.

~~3.56~~3.61. 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.¹⁷

Standard plus and premium evening speed plans

4. 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

5. In order to accurately represent typical busy period plan speeds to consumers, 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.

Type of speed measure

6. 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:

¹⁷ 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.

- individual service speeds across a broad range of CVCs¹⁸, locations¹⁹ and access technology types 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)²⁰
- 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

7. 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.
8. 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.

Extent of sampling

9. 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 and access technology types. Samples should be moderated so that FTTB/FTTN and fixed wireless services are not over or under represented as a proportion of the overall sample. That is, the percentage of samples taken from each of FTTB/FTTN and fixed wireless services should be reasonably proportionate to the RSPs customer base on the associated plan serviced by that technology type. For example, if 10 per cent of end users on a particular plan are serviced by fixed wireless technology, approximately 10 per cent of the tests used for the associated typical busy period speed claim should come from connections provided via fixed wireless infrastructure.

¹⁸ Connectivity virtual circuits.

¹⁹ Services sampled should be taken across multiple CVCs and locations in a way that is representative of the RSP's customer base.

²⁰ 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.

10. Those FTTB/FTTN and fixed wireless services that have a maximum attainable line speed (off peak speed) that is less than the off peak speed that has been advertised can be excluded if the guidance set out in relation to Principle 4, Principle 6, Attachment B and Attachment C of this Guidance has been applied in good faith.
11. In addition, fixed wireless services that are subject to network cell congestion outside the control of the RSP as made known to the RSP by its network provider, or identified by the RSPs own testing, can be excluded if the guidance set out in relation to Principle 4, Principle 6 and Attachment C of this Guidance has been applied in good faith.
12. This means that an RSP may exclude from its sampling a service which has a limited maximum attainable line speed, or which is experiencing a fault or network congestion 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 Guidance.²¹

Updating plan labels

13. 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.
14. 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 feasible²², 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.

²¹ 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.

²² The ACCC will likely seek substantiation of any claim made by an RSP that the required provisioning was not 'reasonably foreseeable'.

Records to verify testing

15. 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.

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 3.23 to 3.31 of the Guidance.

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 supply²³ 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.

²³ Sections 61 and 62 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 3.32 to 3.42 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 estimated 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,
 - (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,
 - (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 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
 - (d) 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 supply²⁴ 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.

²⁴ Sections 61 and 62 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



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	5 Mbps	10 Mbps	20 Mbps	40 Mbps
2	6 Mbps	16 Mbps	39 Mbps	78 Mbps
3	8 Mbps	20 Mbps	40 Mbps	80 Mbps
4	8 Mbps	20 Mbps	40 Mbps	82 Mbps
5	8 Mbps	...	...	...
6	8 Mbps	...	...	...
7	9 Mbps	...	...	...
8	9 Mbps	...	...	...
9	9 Mbps	...	...	...
...
56	12 Mbps	25 Mbps	50 Mbps	100 Mbps



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
8 Mbps	20 Mbps	40 Mbps	80 Mbps