

The logo for Optus, consisting of the word "OPTUS" in a bold, teal, sans-serif font.

Submission in response to
ACCC Consultation Paper

**Review of the Measuring
Broadband Australia
programme**

Public Version

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INTRODUCTION

1. Optus welcomes this opportunity to provide views on the ongoing role of the Measuring Broadband Australia (MBA) programme.
2. Optus agrees that the MBA programme has been a useful source of consistent industry-wide fixed-line speed data. It has played an important role in ensuring that speed claims made in the industry are based on comparable and public data.
3. An independent consistent industry-wide fixed-line speed measurement programme should continue. But to maintain the programme's credibility going forward material improvements should be made.
4. The key test for the MBA programme is that it remains consistent with the overarching obligation that it reflects the way in which the majority of customers actually access internet content. The current design of the MBA programme does not always do this. Specifically, Optus has ongoing concerns with the host of the SamKnows servers, which does not have direct connection to any Tier 1 internet provider. Optus is materially disadvantaged as the test server locations do not reflect the way in which our customers access the internet – and as a result, SamKnows produces inferior results than actually experienced by our customers.
5. Optus recommends that the ACCC improve the MBA programme by moving the SamKnows infrastructure to a server provider which has direct connections to the majority of RSPs – better reflecting how the internet actually works.
6. The consultation paper contains several claimed benefits of the MBA programme. Optus does not agree with many of the statements made, which overstate the impact of the programme on market outcomes. The MBA programme has not had a causal impact on consumer choice nor has it led to increased competition. Rather, these impacts are due to changes in NBN Co pricing and the reporting of typical busy period speeds in NBN advertising. Notwithstanding this, Optus supports the continuation of the MBA programme.
7. Optus strongly disagrees with the proposal to extend the MBA programme to any wireless based technology – be it NBN or 5G. The purpose of the MBA programme is to assist consumers but its extension to wireless will likely cause the congestion it is supposed to measure. Any extension to wireless services may deliver a worse consumer outcome. Further, there is no policy basis on which to justify such an extension to competitive mobile networks.

CONSULTATION PAPER OVERSTATES THE IMPACT OF THE MBA

8. Optus supports the retention, and improvement, of the MBA programme as a credible independent source of comparable information. However, the consultation paper overstates the impact of the programme on market outcomes.
9. While such overstatement is not required to continue the current programme, we are concerned that such claims may be used to justify the extension of the MBA programme beyond its current remit. More importantly, many claims are made without factual support. We discuss these concerns below.

10. First, the consultation paper claims that it is an “easily understandable” measurement of performance that “has helped to drive competitive outcomes within the market”.¹ Optus does not agree that the MBA reports produce easily understandable result that drove competition in the market. The bigger market impact has come from RSPs being required by the ACMA regulations to state typical evening speeds in any advertising. This allows simple and transparent information for consumers to compare different products.
11. But such metrics do not come from the MBA programme. The MBA programme does not report actual typical evening speeds, rather it reports the average speed as a percentage of the maximum off peak speed (of wholesale speed tier). Such a measure provides little assistance to consumers, as maximum speeds are not used by RSPs in advertising – in fact RSPs are explicitly excluded from using maximum speeds.
12. Second, the consultation paper claims that “consumer engagement in the competitive process” has been improved due to decreases in pre-purchase search costs, and reduction in consumer harm. While the paper acknowledges the benefits are difficult to quantify, the paper states that:
 - (a) Broadband services now run faster; and
 - (b) Consumers now have more confidence to purchase higher speed tier plans, as evidenced by the shift to 50 Mbps services.²
13. Optus observes that to attach any causality between the MBA programme and improvements in NBN speed and the shift to 50 Mbps services is demonstrably incorrect and misleading. The ACCC is fully aware that that improvements in CVC congestion are directly due to changes in NBN Co’s approach to CVC pricing – and notably to the adoption of bundle wholesale pricing and the material increase in CVC allocation at the same price point. These changes had the effect of making the 50 Mbps wholesale bundle the entry-level NBN product. The shift to 50 Mbps reflected this pricing change.
14. Third, the consultation paper states that the MBA programme checks the ability of RSPs to potentially conceal information in order to obtain a more favourable outcome.³ Optus is concerned that the consultation paper contains such a serious allegation. If the ACCC has sufficient evidence to make this claim it should pursue action under the ACL. Absent such evidence, the ACCC should not be making such claims.
15. Fourth, the consultation makes claims that the MBA programme has directly influenced the CVC purchasing decisions of RSPs and in identifying the speed limitations of FTTN/B lines.⁴ Further, the consultation paper claims that the decrease in speed limited FTTN lines is attributable to the MBA programme.⁵ While we acknowledge the ACCC has made some public statements off the back of MBA reports on this issue, the reduction in underperforming lines is due to improvements by NBN Co to its infrastructure as well as decisions by RSPs in compliance with legally enforceable undertakings. There is no evidence to attach a causal link between the MBA and improvements in FTTN lines.
16. We further observe that the consultation paper makes little note of the experienced problems with the MBA programme, like the ongoing congestion at servers locations and the inability of the SamKnows servers to provide a consistent speed test environment that has led to the dropping of weeks of results in some testing periods.

¹ ACCC, Consultation Paper, p.6

² ACCC, consultation paper, p.10

³ ACCC, consultation paper, p.11

⁴ ACCC, consultation paper, p.13-5

⁵ ACCC, consultation paper, p.15

17. Notwithstanding the above, Optus does agree that an independent testing regime managed by the ACCC is an important part of a three-pronged approach to compliance and enforcement.⁶ However, to ensure that the MBA can be used as an efficient tool to identify potential competition and consumer issues, it is important that the MBA reflects as much as possible the rules set out under ACL and the speed claims industry guidance. As explained below, Optus believes the MBA can be materially improved.
18. Optus repeats that we support the MBA programme. But it is important that policy makers and the public get a proper understanding of the actual costs and benefits of the programme which is based on evidence and proven causal relationships.

IMPROVEMENTS NEED TO BE MADE TO THE SAMKNOWS TEST

19. The ACCC is aware of material issues with the reliability of the current SamKnows testing programme. Indeed, the ACCC acknowledged periods of underperformance across recent testing periods and excluded large periods from the test. While we welcome the ACCC's management of these issues, Optus submits the underlying issues with the SamKnows test infrastructure must be addressed.
20. Optus understands that these problems stem from issues with the server in which the SamKnows devices sit. We understand that the server provider has not always acquired sufficient capacity to manage the scheme. We also understand that the server provider that SamKnows utilises is not a major provider and does not have direct connections to any of the major RSPs in Australia. In other words, the SamKnows test does not accurately represent the way in which Australian consumers acquire their internet traffic.
21. **[CiC]**
22. Optus is concerned that SamKnows results underestimate the broadband quality experienced by Australian consumers. **[CiC]**
23. We remain concerned that the SamKnows testing servers do not accurately measure the way that Australians obtain access to the internet. Optus recommends that the ACCC require that SamKnows moves its infrastructure to a Tier 1 or equivalent provider that has connections to the major Australian RSPs.

SCOPE OF FUTURE MBA PROGRAMME

24. The consultation paper queries whether the MBA programme should be extended beyond the current NBN fixed-line network and measure NBN fixed wireless and satellite services and competitive 5G networks.
25. Optus strongly disagrees with any extension of the MBA programme beyond the current NBN fixed-line footprint. Any speed testing regime on wireless networks – and especially testing outside the control of the network provider – is likely to be the cause of congestion and drive bad customer outcomes rather than just measure congestion. **[CiC]** The risk that an ACCC-sponsored testing programme drives rather than measuring congestions undermines the justification of extending the MBA programme to wireless networks.

⁶ ACCC, consultation paper, p.26

26. With regard any extension to 5G networks, Optus is very concerned over any proposal that would introduce a level of network congestion onto our mobile network. Of most concern, the MBA programme would not have any congestion management over its use and would itself likely drive peak congestion.
27. Further, due to the natural variation in environment factors over wireless networks, a testing regime would need to have materially greater number of customers than under the fixed network. We note that the current number of NBN fixed participants for Optus already falls below the minimum number required by the ACCC under the industry guidance. It cannot be assumed that the ACCC would find sufficient customers to produce a reliable measure of speed.
28. **[CiC]**
29. **[CiC]**
30. The consultation paper claims that the lack of independent and reliable (i.e. the ACCC MBA programme) speed testing is likely preventing consumers full engagement in the competitive process.⁷ Such claims are not supported by evidence. There is no basis to the claim that a competitive market (or process) is dependent on the presence of a regulated speed measurement programme. Using this logic, there would not be competition in any communications market outside the NBN fixed-line market. This is demonstrably incorrect. Optus would be concerned if the ACCC makes any regulatory decisions based on such claims.
31. Further, the discussion paper does not recognise that all mobile networks – and especially 5G networks – are designed to different performance and product requirements. For example, a network designed for fixed wireless applications will perform differently than a network designed for broad area mobile application. Importantly, the same network could have different designs based on spectrum ranges. Moreover, 5G architecture allows for localised design features, so that there may not be uniform national design. It is extremely difficult for third party testing provider to be able to account for these differences and to have a like-for-like comparison.
32. Optus is concerned that the proposal to extend MBA testing to the competitive mobile market appears to be an example of a regulatory proposal looking for a problem. The mobile market is competitive. Reflecting this level of competition and positive consumer outcomes there are few retail-level regulations, consistent with regulatory best practice and the Government's deregulation and red-tape reduction policies. We observe that any proposal to impose an undue burden on the competitive mobile market would appear to be counter to the ACCC Statement of Expectations from both the Treasurer and the Minister for Communications which, among other things, requires robust evidence of a clear problem before intervention is considered.

⁷ ACCC, consultation paper, p.33