

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

Submission in response to
ACCC Consultation Paper

**Extending broadband
speed claims guidance to
fixed wireless**

Public Version

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EXECUTIVE SUMMARY

1. Optus supports improvements in the NBN fixed wireless (FW) network to ensure that consumers can receive the level of service that they expect. We also support additional FW congestion reporting and increased consumer transparency.
2. Optus supports many of the principles outlined in the proposed guidance and its application to services provided over the NBN FW network. Further work is required to ensure the proposed guidance accurately reflects the nature of FW networks and captures the difference between services delivered over fixed-line and wireless networks.
3. In contrast to fixed-line services, current congestion issues on the NBN FW network lie solely within NBN Co's network and RSPs have no control or visibility over this congestion. Extending fixed-line speed advertising guidelines will do little to address the problem the ACCC has identified. RSPs should not bear the regulatory burden for an NBN Co network issue.
4. Of most concern to Optus is the proposal to mandate typical busy speed claims for FW services. It is not clear whether it is possible to make network-wide typical speed claims for wireless services. **[CiC]** Optus welcomes further consideration of how this principle could apply to FW services.
5. Optus also supports regulation of the wholesale inputs supplied by NBN Co over its FW network. Without addressing the underlying wholesale issues, RSPs are limited in what they can do to address congestion and other service quality concerns. RSPs' ability to communicate to consumers is also limited by NBN Co reporting and lack of adequate support to RSPs.
6. It is important for retail standards and obligations to reflect the limitations of the underlying wholesale inputs. Without this, there is a risk that imposing further regulatory action at the retail level could make it increasingly difficult for RSPs to continue to sell NBN FW services.
7. To that end, the ACCC should examine the extent to which it can directly deal with issues through regulatory instruments. Currently, where NBN Co can deliver a FW services without adequate performance, RSPs have no avenue for recourse – yet if RSPs sold this service to customers, the ACCC would expect RSPs to offer compensation. The ACCC should ensure that NBN Co delivers a FW product that is in line with retail expectations.

OVERARCHING COMMENTS

8. Optus agrees with the concerns of the ACCC that the NBN FW service suffers, at times and in certain locations, from unacceptable levels of congestion. However, RSPs have no control or visibility over the source of the current congestion as it lies within NBN Co's access network.
9. As a result, RSPs are being sold a product by NBN Co which its FW network cannot always deliver. The continued absence of any regulated wholesale service standards enables the wholesale provider to continue to offer services with variable service quality. Imposing further regulatory burden on RSPs will improve the current situation.
10. Before addressing the specific proposals in the guidelines, Optus wishes to raise the following issues:
 - (a) The recently accepted NBN Co Undertaking will do little to address the congestion issue;
 - (b) Guidance requires updating to reflect changes in the NBN wholesale pricing structure;
 - (c) Rules should reflect wholesale FW service qualification design rules;
 - (d) Peak speed testing would drive congestion rather than address congestion; and
 - (e) 'Typical busy period' speed claims for FW services are more likely to mislead than inform customers.

NBN Co Undertaking will not address the congestion issue

11. On 11 September 2018, the ACCC accepted a court enforceable undertaking from NBN Co to make changes to elements of its WBA with RSPs. In relation to FW congestion NBN Co has undertaken to expand its reporting of service levels, to provide:
 - (a) Reports to RSPs about its service level performance sooner.
 - (b) Additional transparency to RSPs and the public on the performance of its fixed wireless network.¹
12. We note that the effect of this commitment is to increase the frequency of reporting of NBN Co's current FW congestion reports to weekly, which are currently provided to RSPs on a monthly basis.²
13. While the Undertaking will increase the frequency of reports, it does not commit NBN Co to produce any more information than what is currently available. Optus has called for greater disclosure of information from NBN Co, to assist us to effectively inform potentially impacted customers. For example, Optus lodged a Product Idea in the PDF in August 2018 for additional FW information, including:
 - (a) Mean up and down bitrate during peak;
 - (b) Mean up and down bitrate during off-peak; and

¹ <https://www.accc.gov.au/public-registers/undertakings-registers/nbn-co-limited>

² Amended clause 15.5 Part B: Measurement and Corrective Action.

- (c) Location of affected cell
14. NBN Co has not agreed to this proposal. We can confirm that NBN Co currently only provides monthly the following information:
- (a) Wireless Serving Area Name;
 - (b) Site Name;
 - (c) Cell ID;
 - (d) Location ID; and
 - (e) Upgrade Date (if any).
15. Optus cannot provide detailed comments on the proposed increased reporting, as we have yet to receive the reports consistent with the Undertaking. As at time of submission, Optus can confirm that we have not yet had access to weekly reports.
16. If the upcoming weekly report is merely the current monthly report increased in frequency, we do not believe it will provide any greater assistance to RSPs or consumers.

Guidance requires updating to reflect new wholesale product constructs

17. There have been significant wholesale price changes since the introduction of the ACCC Guidance. As a result, it is not clear that the Guidance adequately reflects the way in which NBN wholesale products are now sold in the market.
18. NBN Co wholesale price changes have resulted in the 50 Mbps bundle product (with an included 2 Mbps of CVC) becoming the entry level broadband product. The removal of all existing non-bundle CVC pricing discounts over the course of 2019 will cement this effect.
19. In other words, all wholesale speed tiers below 50 Mbps on a bundled CVC, are priced at the same wholesale price (\$45). As a result, RSPs typically now offer the 50 Mbps as the base retail broadband offer. Optus notes that under this pricing regime with 12 Mbps prices at the same level of 50 Mbps the requirement to move consumers down AVC speed tier becomes redundant, as there is no price impact. In other words, moving consumers down a speed tier does not result in any consumer benefit. Leaving affected customers on the 50 Mbps speed tier offers the opportunity for consumers to experience better speeds should their line improve. It would be a unfortunately outcome if these guidelines prevented such beneficial outcomes.
20. Optus submits the ACCC should update its guidance for remedies related to maximum attainable line speed issues on copper lines. As explained above, the requirement to move customers to speeds below 50 Mbps is no longer reflective of wholesale pricing. Optus agrees there should a requirement not to sell 100 Mbps speeds on lines that cannot support speeds greater than 50 Mbps.
21. NBN Co has recently extended the use of bundled wholesale products for its FW network. NBN Co has introduced a bundled FW product, with included 2 Mbps of CVC, for \$45 per month. The charge will be the same for 12 Mbps, 25 Mbps and 25-50 Mbps AVCs. As a result, the ACCC should not extend the legacy maximum attainable line rules to FW. Moreover, NBN Co is set to introduce a new FW wholesale product, named FW Plus. This is to be introduced in Q2 2019. The FW Plus bundle product is priced at the same level as all other bundled products – \$45 per month – and contains 2 Mbps of

CVC included. The difference with the other products is that the FW Plus product contains no PIR objective. It is a true best efforts product, with claimed theoretical performance of up to 60 Mbps. In conjunction, NBN Co has announced it is withdrawing the 25-50 Mbps FW product.

22. Clearly, if a product which provides up to 60 Mbps is priced at the same level as a product capped at 12 Mbps, there is a strong commercial incentive to migrate customers onto the new FW Plus product.
23. It is not clear how the proposed guidance will apply where there is no speed performance claimed on the underlying wholesale product. This is especially the case for the requirement to measure maximum off peak rates where all wholesale FW products are set at the same price and where NBN Co has advised RSPs not to make any performance claims in relation to the FW Plus wholesale products.
24. Optus submits that the ACCC should:
 - (a) Delay any regulatory action until these new wholesale pricing changes come into force; and
 - (b) Update the guidance to reflect the use of wholesale bundled products.

Regulation should reflect NBN Co FW service qualification rules

25. **[CiC]**

Peak speed testing would drive congestion rather than address it

26. Optus is concerned that a mandated requirement to undertake peak speed testing would likely be a source of congestion rather than a tool to address it. Moreover, peak testing could also cause congestion across different RSPs within the same cell. It is not clear that this would lead to an improvement in customer experience.
27. Unlike fixed line networks, where the access proportion of the NBN network is dedicated to the premises, the capacity of each individual FW cell area is shared across all premises covered by that cell. This makes managing congestion while performing peak speed measurements complicated. It is foreseeable that an RSP's peak speed testing would not only drive congestion for its own customer, but also for all customers in the cell (including other RSPs). It is not clear that the decrease in customer experience due to increased congestion is offset by the benefits of the speed testing.

Provision of 'typical busy speeds' likely to mislead rather than inform

28. Optus is also concerned that the mandated provision of 'typical busy speeds' across all FW connection would likely mislead customers as to their likely service experience. The 'simple' extension of the fixed-line speed guidance to FW services is not appropriate and does not sufficiently recognise the fundamental differences between fixed-line and wireless services.
29. The technological characteristics of wireless services means that the nature of the service received by the end-user is variable. Not only could consumers within the same cell receive different performance, consumers in different cells would receive different levels of performance. The nature of FW services is that each different location has different performance drivers which makes it difficult to extrapolate statements about performance.

30. This can be distinguished from fixed-line NBN services, where each access technology is consistent across lines with the same technology characteristics. In the fixed-line network, it makes sense to inform consumers of 'typical busy period speeds', as most fixed access lines should be able to obtain these levels. For example, a FTTN line in location A is likely to contain similar performance characteristics in location B. It therefore, is possible to make meaningful extrapolations from a sub-set of test locations.
31. However, there are too many localised and unique variables for each FW location to be able to make such general statements. For example, FW consumer experience can be impacted by the following factors:
- (a) Geographical features, including hills, water, vegetation;
 - (b) Density of dwellings and fauna;
 - (c) Weather factors;
 - (d) Building design and materials;
 - (e) Obstructions of line of sight, which can change often;
 - (f) Spectrum allocation and use;
 - (g) Interference from other radio sources;
 - (h) Number of connected premises within the cell.
32. These factors are far from comprehensive. But it can be observed that factors that could impact speed are so locally dependent that Optus is concerned generalised 'typical busy speeds' statements are likely to mislead rather than inform. In other words, an RSP cannot be reasonably confident that 'typical busy speeds' represent achievable peak experience across all our FW customers. Typical busy period speed results from a cohort of 75 FW users cannot be used as a representative sample for any other larger group of FW users. All that can be accurately deduced from that test sample, is the typical speed for that test sample on the date and time at which it was taken.
33. It is for these reasons Optus does not make statements regarding peak performance of its NBN FW products. Optus submits that the proposed guidance in relation to 'typical busy speeds' does not represent a reasonable basis on which to make broad peak speed claims.

COMMENTS ON SPECIFIC PRINCIPLES

34. Optus broadly agrees with the principles stated in the guidance, and the general application to FW services. However, Optus has concerns over the guidance to RSPs on how to comply with the principles. In several cases, for example, the proposed guidance appears to be inconsistent with the principals when applied to FW services.
35. We provide our views on each of the principles, and associated guidance, below.

Principle 1: Provisions of accurate information about typical busy period speeds

36. Optus agrees with the principle that consumers should be provided with accurate information about the performance of FW services during busy periods. However, we do not agree with the proposed guidance.

37. The revised guidelines propose to extend the application of the existing principles to FW services through removing the term “fixed-line”. The ACCC states that the “intended effect of the change is to make clear that Principle 1 also applies to services offered over fixed wireless networks.”
38. Mandating that RSPs make typical busy speed performance claims could result in an RSP making a performance claim which may not accurately reflect real world performance experienced by consumers. Optus is concerned this principle, as it applies to FW services, is requiring RSPs to describe the performance of the FW service in situations where an RSP does not have reasonable grounds to make such performance claims.
39. Given the nature of FW services, it is not reasonable to make generalised peak performance claims from a small number of FW observations. For example, RSPs would not have reasonable grounds to make generalised performance claims on FW services on the basis of testing 75 FW customers. As explained above, each FW cell and each location within that cell have unique performance characteristics which make such claims inaccurate.

Principle 2: Wholesale access or theoretical speeds should not be advertised without reference to typical busy period speeds

40. Consistent with our comments above, Optus agrees with the intent of this principle. Namely, that the use of theoretical or off-peak speeds should not be used in manner which could infer that they represent speeds during busy periods.
41. In the context of fixed-line NBN services, this meant that the use of NBN Speed Tier information should not be used without an equally prominent statement of the typical busy speeds. Such an approach, however, may not be appropriate for FW services. The guidance states that an RSP must provide typical busy period speed information to comply with this principle in relation to FW services. The information provided above shows the difficulty in ensuring an RSP has a reasonable basis on which to make typical busy speed claims for FW services.
42. One option to comply with principle 2 is to avoid making off-peak maximum speed claims with regards to FW services. This would be consistent with Optus’ approach to advertising its own mobile network and would also be consistent with NBN Co’s new FW Plus product, which has no PIR objective. However, such an approach is no longer permissible with the new ACMA Standard that requires all RSPs state the maximum off-peak speed of NBN services when using labelling to compare different NBN plans.³
43. It is not clear how Principle 2 can operate, given the concerns about the ability to make accurate busy period speed claims, in conjunction with the ACMA Standards which mandates disclosure of maximum off-peak speeds. In other words, RSPs are required by law to state the off-peak speed of all FW NBN products, yet are unable to make accurate statements about typical peak speeds.
44. Currently, Optus complies with this principle through the use of maximum off-peak speeds (as mandated by the ACMA) together with thorough and accurate peak speed disclaimers. Optus submits the use of disclaimers continues to be the most accurate way in which to ensure customers understand the nature of FW service during typical busy periods.

³ *Telecommunications (NBN Consumer Information) Industry Standard 2018*

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

45. Optus has no comments

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

46. Optus agrees with the principle that known performance issues should be disclosed to consumers. However, we have concerns regarding the detailed guidance. Specifically:
- (a) Application of this guidance to the new bundled wholesale pricing; and
 - (b) It is not clear that the proposed guidance in relation to FW networks is achievable by RSPs or supported by NBN Co.

Application to new NBN bundled products

47. The original rationale for the guidance, as it applies to fixed-line networks, was that some lines did not have sufficient maximum attainable line speed to deliver the wholesale speed tier sold. As a result, there was a concern some consumers were paying more for service features that could not be delivered.
48. This approach reflected the wholesale charging regime that was prevalent at the time, where retail NBN plans typically charged extra for additional wholesale AVC speed tiers. So that 50 Mbps cost more than 25 Mbps which cost more than 12 Mbps. This meant that for lines with limited maximum attainable line speeds, consumers may have been paying a premium or mark-up for the 50 Mbps speed tier over lines that could only deliver 12 Mbps.
49. In this historic context, the guidance was consistent with the principle and was appropriate. However, the wholesale pricing regime has evolved, and the same logic no longer applies (or will soon not apply).
50. Optus queries how this principle would apply when the 50 Mbps bundle becomes the lowest priced retail product in the market. With NBN Co's new bundled product, all AVC tiers less than 50 Mbps placed within the bundled CVC are priced at the same \$45 wholesale level. That is, the 12 Mbps, 25 Mbps and 50 Mbps bundle all have 2 Mbps CVC included and all cost \$45.
51. In other words, there is no consumer detriment with being on the 50Mbps tier; and there is no consumer benefit of moving down the speed tiers, even where the consumer is on speed-limited access lines.
52. This issue is magnified by the proposed guidance extending the 'line speed testing' to services when migrating from old plans to new bundled plans. This has implications for the ability of RSPs to migrate existing customers to the latest NBN bundled products. **[CiC]**. The proposed changes to the guidance is likely to result in increased compliance costs for RSPs with no offsetting benefit to consumers. In so far as it delays or prevents migration to the lowest priced wholesale NBN product, the proposed change would not drive positive consumer outcomes.
53. Further, Optus is concerned that this guidance could result in some customers being left on legacy plans, which cost more and deliver less. It would be an unfortunate outcome if the proposed changes prevented RSPs from moving consumers to cheaper retail plans.

54. Optus submits there should be recognition of financial disadvantage within the speed tier test. That is, the obligation to test and move consumers down speed tiers, should only apply where there is a retail price difference across the relevant speed tiers.

Application to FW services

55. The proposed changes to the guidance include an additional section dealing with services provided over the NBN FW network. The intent is to improve information regarding the likely performance of services supplied using FW networks.
56. While Optus supports the intent of the changes, we are concerned that:
- (a) Changes give a false impression that accurate performance information over the FW network is possible; and
 - (b) Obligations are being placed on RSPs for an issue over which they have no control or visibility.
57. The overall impact of placing obligations and costs on RSPs for wholesale network issues could create disincentives to the continued sale of FW services.
58. Optus does not support detailed obligations on RSPs which relate to the performance of the underlying wholesale network, over which RSPs have no visibility or control. The guidance raises potential performance issues around “distance or line of site” which cannot be easily addressed. Optus observes RSPs have no information on either of these issues. This principle needs the back-to-back support of NBN Co, which NBN Co does not provide.
59. Optus is concerned that this principle does not apply to the network on which the congestion lies. Optus accepts that could be a performance issue in relation to the NBN FW network, but regulatory best practice would require this problem be dealt with at the source; namely, a wholesale obligation on NBN Co. In other word, NBN Co has knowledge of the factors known to affect service performance over certain cells in its FW network; yet there are no obligations on NBN Co to disclose this to RSPs. It should be a requirement for NBN Co to share this information on a timely basis to RSPs, so that RSPs can inform their current and potential customers.
60. For example, the proposed change to Principle 4 includes disclosure where “line length, distance/line of sight to the tower” could result in service limitations.⁴ Optus queries how an RSP could comply with such requirements when it does not own the FW network, nor is it provided with any information from the network owner in relation to this. Optus can confirm that we have requested cell location information from NBN Co and that NBN Co has rejected this request. Optus seeks further clarification from the ACCC on how it thinks ‘line of sight’ could be measured and investigated by RSPs. Optus is concerned that conditions are being imposed on RSPs with which are, in practice, impossible to comply.
61. Of greater concern, the guidance requires that RSPs pay compensation for faults in the wholesale network, which are outside the control of the RSP. While Optus agrees that consumers should not have to pay for performance they are not getting, it is inequitable that RSPs not NBN Co are liable for compensation. Optus submits that NBN Co should be required to compensate RSPs in the same method that RSPs must compensate consumers. Absent such wholesale compensation, Optus is concerned there would little or no incentive for NBN Co to address the problem.

⁴ ACCC, p.16

62. Finally, it is not clear how this principle relates to principles one and two, which effectively mandate disclosure of 'typical busy speeds'. In other words, RSPs could meet obligations under principle four by ensuring that they have a reasonable basis on which to make their claims. If there is no basis, then a claim should not be made. However, RSPs have no such flexibility when it comes to typical busy speeds, with principles one and two mandating disclosure. Optus submits the ACCC should clarify this potential contradiction.
63. Optus is also concerned that the detailed guidance in Attachment C does not accurately reflect the wholesale FW products. For example, in paragraph 7, it is stated that if the FW speed tier is 50 Mbps, and it has a maximum attainable speed 40 Mbps, consumers should be downgraded. This is incorrect as the FW speed tier is a range of 25 Mbps to 50 Mbps. If the maximum attainable speed was 40 Mbps, this falls within the speed range of the FW product. The customer should not be moved down.
64. Further, NBN Co has announced introduction of new FW products, all of which are priced at \$45 per month. In other words, there is no difference in price between a 12 Mbps FW product and a maximum download PIR of 60 Mbps FW product. Optus submits the same financial detriment test should apply to FW. That is, the obligation to test and move consumers down speed tiers, should only apply where there is a retail price difference across the relevant speed tiers

Principle 5: Performance labels

65. Optus agrees that existing performance labels should only apply to fixed-line services.

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

66. Optus agrees with the principle.
67. However, we repeat our concerns in relation to paragraph 5.55 and 5.56; namely that RSPs are obligated to compensate consumers for faults in the underlying wholesale network input, over which RSPs have no control.
68. The continual disconnect between causation and consequence means there is little if any incentive on NBN Co to address consumers' issues. Further, imposing costs on RSPs for faults which they cannot foresee or control, places further financial disincentive for the ongoing supply of the service. Optus submits the ACCC should take into account the impact on the viability of a retail FW service where RSPs cannot charge consumers but where NBN Co continue to charge RSPs.