

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

Submission in response to
ACCC Discussion Paper

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

Public Version

August 2020

INTRODUCTION

1. Optus welcomes the opportunity to provide comment on the ACCC's further consultation on the proposed amendments to the *Broadband Speed Claims – Industry Guidance*.
2. Optus notes that the majority of the amendments to the guidance proposed by the ACCC are further clarifications and are consistent with long standing interpretations of the Australian Consumer Law.
3. However, two particular aspects warrant further comment:
 - (a) Optus has concerns with the proposal that RSPs should use the lowest end of any wholesale range provided if they rely on wholesale product specifications for their off-peak speed information to the extent that this may impact the advertising of FTTN/B/C plans below 100Mbps; and
 - (b) Optus considers the use of labels is redundant and are no longer serving a purpose given requirements to include typical busy speeds. If labels are needed for newly introduced tiers >100Mbps then Optus considers the wholesale product name would suffice.

PROPOSED CHANGES

4. The ACCC has proposed four main areas for amendment to offer clarification on interpretation of the Australian Consumer Law (ACL). These include:
 - (a) Clarifications regarding use of wholesale access speeds
 - (b) Clarification regarding representations relating to gaming
 - (c) Limitations on availability of services should be clear and
 - (d) Clarifications regarding use of descriptive labels.
5. Optus discusses each of these below.

Burst speeds should not be used as a proxy for off-peak speeds

6. The ACCC proposes to amend the guidance so that:
 - (a) RSPs should use the lowest end of any wholesale 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.
 - (b) 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.
 - (c) Burst speeds should not be used as a proxy for off-peak speeds due to their intermittent nature;
 - (d) Where RSPs provide information about burst speeds, their limitations should be clearly drawn to consumers' attention.

7. Optus considers this is broadly consistent with interpretation of the ACL. Optus supports the general propositions regarding burst speeds, noting that these should not be used as a proxy for off-peak speeds or in headline claims. Optus notes it may be necessary for RSPs to explain burst speeds in more detail (for example, where RSPs have more detailed information about NBN speeds on websites) to manage consumer expectations and explain why a customer may notice performance above what has been advertised but that such speeds should not be expected consistently.
8. Optus has concerns with the potential impact on speeds below 100 Mbps of the proposed guidance that RSPs should use the lowest end of any wholesale ranges provided for off-peak speed information. The 50/20 and 100/40 products have wholesale product specifications with a download speed range beginning at 25Mbps and upstream speeds with a range beginning at 5Mbps for FTTN/B/C technologies (see NBN Co's Wholesale Broadband Agreement, NBN ethernet product module – Product Description).
9. A strict interpretation of the guidance could result in multiple retail products advertised with the same off-peak speeds of 25/5 but would have different typical busy period speeds and likely different prices (or alternatively advertised this way for FTTN/B/C customers). This raise concerns over ease of implementation and how confusing this would be for consumers.
10. Optus does not believe that this is the intended outcome of the proposed guidance.
11. However, Optus considers that RSPs should use the lowest end of any wholesale ranges provided for off-peak speed information for the recently introduced Ultrafast wholesale speed tier with extremely wide download speed range (500Mbps - ~1000Mbps) where so far only test data is available regarding the speeds achievable on these tiers. Optus considers the guidance that RSPs should use the lowest end of any wholesale ranges for off-peak speed information should be clarified that this is applicable for wholesale speed tiers above 100Mbps.

Promoting on-line gaming applications should be consistent with the ACL

12. The ACCC proposes amendments 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.
13. Optus considers this guidance would also be consistent with the ACL.

Information relevant to high speed broadband products should be disclosed

14. The ACCC proposes that the guidance be amended to clarify that where high speed tiers (>100Mbps) are only available in limited geographic areas, this should be disclosed to consumers. In addition, where specialist equipment is required to access those tiers, this should be prominently brought to the consumer's attention.
15. Optus considers this is consistent with the ACL.

Descriptive labels are no longer relevant

16. The ACCC is considering whether it would be helpful to consumers to develop label descriptors for products >100Mbps. The ACCC does not consider that additional labels are required for >100Mbps services and that these should be labelled Premium to avoid additional labels which may be difficult to place in the hierarchy of labels.

17. The ACCC is also proposing 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.
18. Optus supports the clarification 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.
19. However, Optus considers that labels are no longer relevant. Labels were intended to assist with comparison of plans and were to be determined based on the speeds those plans achieved. However, given RSPs are required to publish typical busy period speed information, we consider the labels no longer serve a useful purpose.
20. We consider consumers are more likely to examine the typical evening speed and other key factors, like price, when making a purchasing decision rather than look to the label as the speed identifier.
21. Ultimately, retaining the use of labels is unnecessarily prescriptive and effectively over complicates the introduction of new products. If the ACCC is minded to persist with labels, we consider that the wholesale product labels should be adequate for new >100Mbps speed tiers (e.g. 'Superfast' or 'Ultrafast') and would be less confusing for consumers than having multiple plan options at different price points all called 'Premium'.