



Submission in response to the ACCC's
Consultation Paper

**Broadband performance monitoring and
reporting**

September 2013

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Section 1. Executive summary

- 1.1 The ACCC is considering a performance monitoring and reporting program for broadband internet services. In broad terms it is assumed that increased transparency is likely to encourage competition and thereby provide significant benefits to consumers.
- 1.2 Optus supports the principle that consumers should have clear, simple and relevant information to allow them to make an informed decision about the services to acquire. Optus does not, however, consider the ACCC's case is sufficiently well developed to proceed with its proposal at this stage.
- 1.3 There are a number of issues that require further consideration, including that:
 - (a) The ACCC has not sufficiently identified the problem that its solution is supposed to address. No evidence has been provided to suggest that consumers are dissatisfied with the current marketing and promotion of speed claims by ISPs. Further, customers already have access to a range of online tools that can provide accurate and real time information on the speed of their service;
 - (b) Current marketing and promotional activities have been influenced directly by past action undertaken by the ACCC, including the release of information papers on the promotion of broadband speed claims and enforcement action against ISPs. The potential inconsistency between the ACCC's guidance on broadband speed claims and its current proposal needs to be properly considered and resolved;
 - (c) The utility of much of the information made available in overseas schemes remains unclear. Further there is a real risk that without proper context such information could result in customer confusion; and
 - (d) The industry is entering a period of transition with the roll-out of the NBN. The NBN raises a threshold question for the ACCC's proposal. Given that an objective of the NBN is to increase competition in the retail market, it is unclear why ACCC intervention in the retail broadband market is warranted. Further the recent change of Federal Government is likely to lead to changes to NBN Co's product suite which may impact retail offers promoted by ISPs. Any proposal should be delayed so that it can be refined as a result of changes resulting from the Coalition Government's "Broadband audit".
- 1.4 Until the above issues are resolved, Optus considers that it would be premature to proceed with the ACCC's proposal. However, Optus remains willing to engage with the ACCC and the industry to work through these issues in a constructive and collaborative way.

Section 2. Background

- 2.1 The ACCC is considering a performance monitoring and reporting program for broadband internet services. The ACCC's proposal would involve equipment being deployed in a sample of end-user locations to test the data transfer rates and other quality metrics for broadband services.
- 2.2 The ACCC has identified a number of potential benefits from such a scheme. This includes:
- (a) Improved transparency for consumers about the "real-world" performance of broadband services that may be available to them. The ACCC indicates that this information will help to ensure that consumers are *"informed and can make the right choices for their needs"*;
 - (b) The material would also assist the ACCC by making data available to assess whether certain claims made by ISPs might be in breach of Australian Consumer Law;
 - (c) Providing a means for ISPs to differentiate their service offerings. In turn the ACCC considers that this could provide increased incentives for investment; and
 - (d) Provide ISPs and the ACCC with an ability to identify potential performance issues with wholesale networks and to take action to help address these.
- 2.3 In discussions with industry the ACCC has elaborated on its rationale. Specifically it has noted that whilst ISPs compete on price today and there is substantial material around price points, there is little information on service quality of broadband services. As a result, the ACCC contends that it is difficult for customers to make an informed choice before committing to a service or switching service providers. The ACCC has indicated that it would improve the efficiency of consumer decision making if additional information on service quality was made available in the market.
- 2.4 Optus supports the principle that customers should have sufficient relevant information to enable them to make informed decisions. A critical question in considering the ACCC's proposal is whether they have sufficient information today; whether the ACCC's proposal adds to the level of information; and whether the incremental benefits to end-users outweigh the costs, including the increase in the red-tape burden on industry.
- 2.5 The design, implementation and maintenance of the monitoring regime proposed by the ACCC is likely to impose significant administrative burden and, therefore, cost to the taxpayer. Prior to imposing such a scheme on the industry it is incumbent on the ACCC to demonstrate that its proposal will deliver tangible benefits that exceed the costs. The critical questions to be addressed in such an analysis include:
- (a) What is the problem that is being addressed;
 - (b) Will the ACCC's proposed monitoring regime deliver the benefits it identifies;
 - (c) Will the benefits outweigh the costs of the proposed monitoring regime; and
 - (d) Are there alternatives ways to address the problem and is the ACCC's proposal superior to these.

- 2.6 Optus believes there needs to be greater definition of the problem the ACCC is seeking to address. Until this occurs it by no means clear that the proposed course of action would necessarily help advance consumer interests in a cost effective manner.

Section 3. What is the problem to be addressed

- 3.1 Regulation of fixed line wholesale access services by the ACCC has promoted increased competition in the provision of retail broadband services. It has contributed to rapid take up of services and increasing use of bandwidth by enabling retail providers to obtain wholesale needs on a timely and transparent basis. Such regulation responded to clearly identified market obstacles that were not able to be remedied by alternate means. It is not clear such gaps exist in the retail broadband market.
- 3.2 As at June 2012 there were 11.6 million broadband subscribers in Australia of which 5.76 million are serviced by fixed broadband platforms with another 5.86 million using wireless based services¹. Not only has there been high take-up of services but consumers are increasing their use of broadband as evidenced by rapid growth in data usage. In the quarter to June 2012 consumers used 389,130 Terra Bytes of data an increase of 52.6% over the previous year² and a 274% increase since June 2010.
- 3.3 These trends are likely to continue as the industry transitions to the National Broadband Network (NBN). The NBN is expected to deliver a substantial uplift in the capability of fixed broadband services as well as a more competitive industry structure.
- 3.4 The ACCC has acknowledged these aspects of the market in its discussion paper. Nevertheless, the discussion paper does not provide analysis or evidence of market failure in the promotion of broadband services. The ACCC has provided no evidence to indicate that there is significant disquiet amongst consumers that the broadband services they acquire are not meeting their expectations or the representations made by ISPs about the service.
- 3.5 The industry serves the broadband needs of millions of customers on a daily basis. If there were general concerns about the quality of services being delivered to customers then this would be evident through complaints to the regulatory authorities and/or in media commentary about the industry. Whilst Optus acknowledges that there are complaints about broadband services, these tend to focus on other issues. There is very little evidence that customers are concerned that the services they receive are of a lesser standard than has been represented in ISP's marketing and promotional material.
- 3.6 Optus's internal records for August indicate that we received only one complaint relating to broadband speed. Optus also understands that the TIO statistics similarly indicate that speed is a very infrequent factor in customer complaints.

Current marketing is consistent with ACCC guidance

- 3.7 A review of broadband plans in the market place today indicates that ISPs tend not to seek to differentiate on the basis of speed of their services. For example, the extracts below are taken from the websites of Optus and Telstra.

¹ ACMA Communications Report 2011-12

² ACMA Communications Report 2011-12

Broadband and Phone Bundles **Naked Broadband Plans** Designed for Seniors Mobile Broadband

CHAT WITH OUR PEOPLE? LET'S CHAT

Casual

50GB

Naked Broadband

◀ MORE

\$55 per month

Min. Total Cost is \$1,410 over 24 Months

Cost of 1MB of data is \$0.0011

Wifi Modem included for new customers

Connection and delivery fees apply

Optus Security

Next Step
(Check Availability)

Critical Information Summary

Social

120GB

Naked Broadband

◀ MORE

\$75 per month

Min. Total Cost is \$1,890 over 24 Months

Cost of 1MB of data is \$0.0006

Wifi Modem included for new customers

Connection and delivery fees apply

Optus Security

Next Step
(Check Availability)

Critical Information Summary

Surfer

300GB

Naked Broadband

◀ MORE

\$85 per month

Min. Total Cost is \$2,040 over 24 Months

Cost of 1MB of data is \$0.0003

Wifi Modem included for new customers

No connection and delivery fees

Optus Security

Next Step
(Check Availability)

Critical Information Summary

Ultimate

500GB

Naked Broadband

◀ MORE

\$100 per month

Min. Total Cost is \$2,400 over 24 Months

Cost of 1MB of data is \$0.0002

Wifi Modem included for new customers

No connection and delivery fees

Optus Security

Next Step
(Check Availability)

Critical Information Summary

3.8 Similarly, Telstra’s website sets out the following information on its broadband plans.

EXPLORE OUR
BIGPOND ELITE
LIBERTY PLANS

from

\$29⁹⁵

per month

BigPond Elite 5GB

from

\$49⁹⁵

per month

BigPond Elite 50GB

from

\$69⁹⁵

per month

BigPond Elite 200GB

from

\$89⁹⁵

per month

BigPond Elite 500GB

BigPond Elite® - 50GB Liberty® - from \$49.95

Do you also have a Telstra full service home phone?	Contract term	Price per month	Minimum cost
<p>Telstra full service home phone customer with the BigPond Broadband Benefit</p>	24 months	<p style="font-weight: bold; font-size: 1.2em;">\$49⁹⁵</p> <p>0.1c per MB</p>	<p>Min. cost \$2192.60 + \$9.95 delivery¹</p>
<p>Telstra full service home phone customer</p>	Casual Plan	<p style="font-weight: bold; font-size: 1.2em;">\$69⁹⁵</p> <p>0.14c per MB</p>	<p>Min. cost \$356.90 + \$9.95 delivery²</p>
<p>Standalone plan</p>	Casual Plan	<p style="font-weight: bold; font-size: 1.2em;">\$79⁹⁵</p> <p>0.16c per MB</p>	<p>Min. cost \$330.95 + \$9.95 delivery³</p>

1. Minimum cost based on broadband plan with HomeLine® Plus, and self-install Home Network Gateway with BigPond Broadband Benefit (\$85.90/mth + \$72 for modem + \$59 activation fee for new Bigpond broadband customers).
2. Minimum cost based on broadband plan with HomeLine® Plus for one month and self-install Home Network Gateway (\$105.90/mth + \$192 for modem + \$59 activation fee for new Bigpond broadband customers).
3. Minimum cost based on broadband plan for one month with self-install Home Network Gateway (\$79.95/mth + \$192 for modem + \$59 activation fee for new Bigpond broadband customers).

- 3.9 It can be seen that broadband services are typically promoted on price and the capacity (data allowance) made available for that price point. To the extent that speed is mentioned then it is often only referenced in the more detailed terms and conditions and it is done in a way that clearly highlights the various limitations that attach to the achievement of that speed. For example, in the Frequently Asked Questions relating to Telstra’s plans above, the following representations are made about the speed available of its services.

*“BigPond Ultimate Cable plans can provide download speeds of up to a maximum of 100 Mbps into the home for sharing across multiple users in a household. These speeds are so fast that they exceed the capabilities of many content servers and individual PCs. Average download speeds will be lower and actual download speeds a single user will get will vary due to a number of factors including customer hardware, equipment and software, server limitations, type of content being accessed and the number of users online”.*³

- 3.10 Optus submits that there are two drivers as to why speed no longer features prominently in the advertising and promotional material of RSPs.
- (a) Firstly, it reflects direct intervention from the ACCC in response to previous marketing practices where speed featured prominently in promotional material; and
 - (b) Secondly, it also reflects the evolution of the market as services have become more established and mature.

- 3.11 The above examples indicate that major ISPs are not currently seeking to differentiate their services on speed. To the extent that speed is referenced, Optus suggests that the current marketing practice of ISP’s is likely to reflect pro-active action taken by the ACCC since 2007 to tighten up the marketing practices of ISPs.

- 3.12 In 2007 the ACCC released an industry information paper in response to concerns it had about how ISPs were promoting broadband services. This paper provided specific guidance to industry in terms of what the ACCC considered to be acceptable and unacceptable in the marketing of speed claims. In particular, the ACCC noted its concern that:

*“Hypothetically, speeds of 24 megabits per second (Mbps) downstream and 1Mbps upstream are said to be achievable on ADSL2+. However, because a number of factors affect download speeds these hypothetical speeds are rarely achieved or achievable. Accordingly, the ACCC is concerned with ADSL2+ being described as a 24Mbps/1Mbps service and with blanket claims that 24Mbps/1Mbps is an “up to” or “maximum” speed. Other broadband services also have hypothetical maximums which are also affected by a range of factors”.*⁴

- 3.13 To address this concern, the ACCC recommended that

“ISPs should avoid using hypothetical speeds in headline claims describing a service and in the names or titles that ISPs give to particular plans.

Example 1 – Headline Claims: *Headline claims like “Broadband up to 24Mbps” should be avoided*

³ <http://www.telstra.com.au/latest-offers/broadband-offer/>

⁴ ACCC Information Paper: Broadband Internet Speed Claims and the Trade Practices Act 1974, page 5

Example 2 – Plan Names: Plan names like “Our 24000/1000kpbs Super Plan” should be avoided”.⁵

- 3.14 A follow up information paper was released in 2011 which extended the ACCC’s guidance to services offered over cable and fibre networks.
- 3.15 Further, Optus notes that in September 2009, in response to concerns it has about advertising of telecommunication services more generally the ACCC secured enforceable undertakings under 87B of the Trade Practices Act from Telstra, Optus and VHA in respect of their advertising and promotion of telecommunications services.
- 3.16 This included undertakings specifically directed at the advertising of broadband speed. In this respect each party committed that it will not:

“advertise or promote headline broadband speeds unless those speeds are or will be generally available to consumers on the network on a regular basis:

Advertises or promote network coverage unless the network coverage is available to consumers throughout the claimed coverage area on a regular basis”⁶

- 3.17 These commitments were clearly aimed at eliminating the practice of RSPs’ advertising speeds, particularly in “circumstances where the headline speed is a maximum theoretical speed and/or not generally available to consumers”.
- 3.18 In announcing these undertakings, the then Chairman of the ACCC Graeme Samuel stated that:
- “I remind all companies involved in telecommunications that the ACCC will continue its vigilant monitoring of their advertising practices, and will without hesitation take legal action to deal with any future flouting of the law”.⁷*
- 3.19 The undertakings clearly built on the ACCC’s 2007 guidelines and provided a very strong signal to ISPs that the ACCC would take enforcement action against ISPs if they continued to make speed claims that could not be backed up. In fact, to ensure these undertakings applied to all ISPs, and not just Telstra, Optus and VHA, the content of the undertakings were inserted into the Telecommunications Consumer Protections (TCP) Code C628:2012. The TCP Code is a registered code, and enforceable on ISPs by the Australian Communications and Media Authority.
- 3.20 Further, Optus notes that the ACCC has demonstrated a clear willingness to take action against RSP’s, where it suspects that has been misrepresentation of broadband services. For example, in 2012 the wholesale broadband provider CNT Corp paid infringement notices and

⁵ i.b.i.d, page 5

⁶ Undertaking to Australian Competition & Consumer Commission Given for the purposes of section 87B By Telstra Corporation Limited, Singtel Optus PTY Limited, Vodafone Hutchison Australia PTY Limited

⁷ <http://www.accc.gov.au/media-release/telecommunications-market-leaders-agree-to-raise-the-bar-on-clarity-in-advertising>

agreed to court enforceable undertakings after misrepresenting the speeds on its fibre broadband network to its wholesale customers.⁸

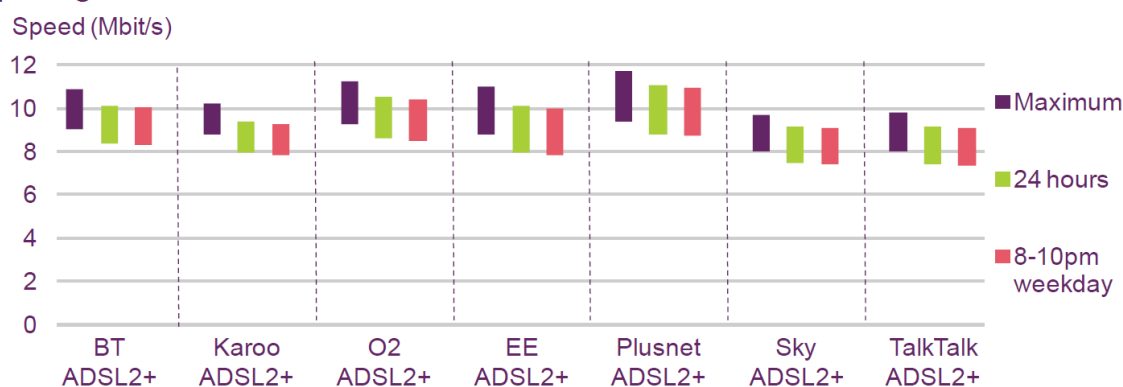
- 3.21 Optus submits that the ACCC's guidelines and the 2009 undertakings have directly influenced the current marketing practices of ISP's. Given the various technical limitations of existing broadband platforms, which are outlined in more detail below, the ACCC's guidelines set a reasonably high threshold in relation to the promotion of speed claims. It is not surprising, therefore, that ISPs no longer give prominence to speed claims in promotional material and that where speed is referenced it is done so in a way reflects the many technical factors that are likely to influence and limit the achievement of that specified speed. However, as indicated above there is no evidence that the way speed is currently referenced in ISP's promotional material is resulting in customer confusion or concern.
- 3.22 A second factor to consider in the marketing and promotion of broadband services is that the broadband market has matured. In 2007 when the ACCC issued its guidelines the market was in transition from legacy dial-up and ADSL services to ADSL2+ based services and cable based services. At that time speed was perceived as a potential "selling point" for the new services. However, these broadband services, which are provided over the Telstra copper network and the Optus and Telstra cable networks, have been in the market for several years. It is questionable whether speed is a significant point of differentiation between these networks. Further, given that customers have been using these services for a considerable period of time there is likely to be some level of appreciation that current broadband services are best efforts reflecting the fact that there are many factors that can influence an end-users experience at any particular time.
- 3.23 Optus's experience indicates that customers are far more concerned about the overall value of their broadband service, which is largely driven by price and the included data allowance.
- 3.24 In summary, Optus notes that ISPs do not seek to differentiate on the basis of the speed of their services. This is not surprising given the technical limitations of legacy broadband platforms and the very clear signals from the ACCC in terms of what is and is not acceptable in the marketing of broadband services. Notwithstanding this, Optus notes that there is no evidence to suggest that the current approach causes customer concern and detriment.

⁸ <http://www.accc.gov.au/media-release/trader-pays-infringement-notice-for-misrepresenting-the-speed-of-fibre-to-the>

Section 4. The benefits of additional reporting are unclear

- 4.1 As indicated in the analysis above, Optus does not accept the ACCC starting point that the information provided by ISP's on the capability of their services is deficient. No evidence has been put forward to support such a proposition.
- 4.2 Notwithstanding this, it is useful to consider whether the proposed benefits of increased transparency provided by the ACCC's monitoring scheme are likely to be realised in practice.
- 4.3 The ACCC has indicated that the increased transparency about broadband performance will assist consumers in making informed choices about the services that meet their needs. Whilst in principle this might appear to be a reasonable proposition in practice much will depend on the type of information that is likely to be made available. It will also be influenced by the importance consumers attach to speed compared to other factors in determining perceptions about the quality of broadband services.
- 4.4 The ACCC has indicated that it has a preference for reporting in the format used by Ofcom in the UK and the FCC in the US. Optus notes that the information in the Ofcom reports is of a highly aggregated nature; with reporting of maximum, average, and peak-time download speeds for each ISP. The information from Ofcom's November 2012 report on the service quality of ADSL2+ services that is included in the ACCC's discussion paper is replicated below.

Figure 2.1 Maximum, average and peak-time download speeds for ADSL2+ ISP packages: November 2012



- 4.5 In analysing this information it is useful to look at two questions:
- Is this information likely to be useful to customers?
 - Will the proposed monitoring really drive a change in the market?

Is this information likely to be useful to customers?

- 4.6 Optus accepts the proposition that there is likely to be some utility in providing increased transparency on broadband performance to the market. However, it is difficult to determine the tangible benefits such information will deliver.

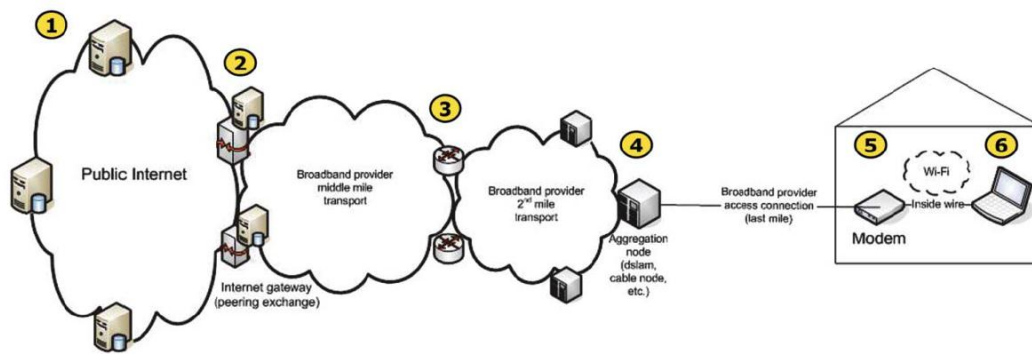
- 4.7 The reports of both Ofcom and the FCC contain a considerable amount of data about the quality of broadband services offered by different providers, across different platforms and at different times of day. However, it is not clear how this information will be useful to customers since it is put forward with little context or qualitative analysis. No information is given to help customers understand what they can or cannot expect to achieve with their service at a given speed compared to speeds achievable from other ISPs or platforms.
- 4.8 Taking the analysis from the UK in the table above, it can be seen that there are differences in the speeds both across the reported measures for each ISP and also between different ISPs. In respect of the ADSL2+ services, the reported differences range from around 8 to 11 Mbps. In percentage terms these differences are significant; at 28%. In practice the differences are modest and are unlikely to have any meaningful impact on an end-users experience. However, there is no qualitative analysis provided by Ofcom to help customers evaluate and understand the data it has provided. Nor is there any analysis to suggest that consumers actually use this information.
- 4.9 Similarly, the FCC reports provide little if any context or qualitative analysis to help explain the reported data. The following is an extract from the FCC reports for February 2013:

Actual Sustained Download Speed (Mbps)	Advertised Download Speed Tier (Mbps)	Provider	Actual Sustained Speed / Advertised Speed Tier
8.61	12 Mbps	Windstream	72%
8.97	10 Mbps	Insight	90%
9.48	10 Mbps	TWC	95%
10.1	12 Mbps	Qwest	84%
10.88	12 Mbps	AT&T	91%

- 4.10 Comparing the service offered by AT&T and Windstream suggests that AT&T is offering a significantly better level of performance. But the reality is that there is likely to be no discernible practical difference to end-users between these two services. There are real risks in providing such data without proper qualitative analysis. Acting on these reports a customer could choose to churn from Windstream to AT&T, incurring transaction costs and inconvenience in the process. But having switched they may find their actual experience has not improved and could be worse.
- 4.11 A further problem with this reporting is that its relevance is limited by the nature of how internet services are delivered. The following provides a schematic of the end-to-end broadband service⁹.

⁹ Measuring Broadband America, August 2011 report

Figure 1: Network diagram



DEFINITIONS

- 1 **Public Internet content:** public Internet content that is hosted by multiple service providers, content providers and other entities in a geographically diverse (worldwide) manner
- 2 **Internet gateway:** closest peering point between broadband provider and public Internet for a given consumer connection
- 3 **Link between 2nd mile and middle mile:** broadband provider managed interconnection between middle and last mile
- 4 **Aggregation node:** First aggregation point for broadband provider (e.g. DSLAM, cable node, satellite, etc.)
- 5 **Modem:** Customer premise equipment (CPE) typically managed by a broadband provider as the last connection point to the managed network (e.g. DSL modem, cable modem, satellite modem, optical networking terminal (ONT), etc.)
- 6 **Consumer device:** consumer device connected to modem through internal wire or Wi-Fi (home networking), including hardware and software used to access the Internet and process content (customer-managed)

4.12 It can be seen that many of the factors that might influence the actual performance of a broadband service are outside the control of an ISP. Such factors will include:

- (a) The equipment in an end-users premise such as the modem, Wi-Fi router, the configuration and performance of the computer or other devices being used to access the service.
- (b) The nature of the service being accessed, whether this is a high bandwidth content or low bandwidth data.
- (c) The speed and/or quality of the network links over which the service is provided and the distance of a premise from the electronic equipment. (Distance from the exchange is a particular limiting factor in the speed achievable on copper based services and since each customer premise will have a unique distance from the exchange, then speed is likely to vary from customer to customer).
- (d) The quality of the servers and equipment of the sites/services being accessed.
- (e) The location and configuration of the servers being accessed.
- (f) The number of users sharing the network at any particular time.
- (g) The general levels of congestion in particular links at that particular time.
- (h) The overall level of network traffic.

4.13 The key point is that an individual customer's circumstances are likely to be unique. As such their actual experience or perception of their experience is unlikely to align with the reported data, which is highly aggregated. If a customer's broadband connection is slow because of congestion in the servers they are accessing or the state of their equipment, it is unclear what value they will gain from these reports which are likely to smooth out such fluctuations in quality of service over time.

- 4.14 Given the above issues it is likely that the reports published by Ofcom, the FCCC and those proposed by the ACCC can only ever be useful in a directional sense. It is unlikely to provide any direct guide to an individual user's actual service.

Will the proposed monitoring really drive a change in the market?

- 4.15 The ACCC has indicated that it expects that the introduction of the proposed monitoring and reporting regime will encourage ISPs to provide additional information on their services. It also suggests that the proposed programme will allow ISPs to differentiate their products and services from other ISPs by highlighting differences in performance based on the ACCC's reports.
- 4.16 Optus questions this claim. It is likely that ISPs routinely monitor and test their network performance today. This means that they are already in a position to make claims about their performance. However, as indicated above ISPs have moved away from advertising speed in their marketing and promotional material. The ACCC's assertion, therefore, needs further justification.
- 4.17 Optus notes that the ACCC's current marketing and promotional guidelines and the requirements of the TCP code will continue to set a high standard for ISPs in respect of the representations they are able to make about their services. Any claims made, even based on the ACCC's reports, will have to be qualified significantly and it is likely that ISPs will continue to take a cautious approach in making representations on the speed of their services.
- 4.18 It is notable that in its May 2012 report Ofcom acknowledges that notwithstanding its monitoring and reporting the recent introduction of a code of practice in the UK on the advertising of broadband services has led ISPs to be more cautious in making speed claims. This is evidenced by the following statement in Ofcom's May 2012 broadband performance report:

*"As regards advertising and headline speeds, we have observed that ISPs have changed the way they advertise their broadband services since new CAP and BCAP guidance on broadband speed claims in advertising came into force on 1 April 2012. For example, Plusnet's DSL2+ service is now advertised as being 'up to' 16Mbit/s (rather than 'up to' 20Mbit/s as it was previously) while BT's basic fibre-to-the-cabinet (FTTC) service is now advertised as being 'up to' 38Mbit/s (rather than 'up to' 40Mbit/s as it was previously). In fact, **some ISPs no longer advertise their services on the basis of speed, instead focussing on price or added value features such as free security software**". (Emphasis added)*

- 4.19 Further, Optus notes that the reports issued by Ofcom are themselves subject to a number of significant qualifications. For example, in the conclusions to its May 2012 and November 2012 reports Ofcom notes that:

*This report presents a snapshot of the average performance of fixed-line residential UK broadband connections and of the individual ISP packages included in the research in May 2012. The broadband market is changing rapidly as operators invest in their networks in order to make faster broadband available (as has been seen in the last six months), and the results set out in this report **will therefore not necessarily reflect the future performance of networks and providers**.*

Despite these anticipated changes, in order to help ISPs' current and new customers to make better-informed purchasing decisions, based on their individual needs, it is important that

*consumers understand that there are **significant variations in the performance of ISP packages, and that these are largely attributable to the technology used by the ISP**".*
(Emphasis added)

- 4.20 In summary, it remains to be proven that the increased transparency proposed by the ACCC in its monitoring and performance reporting will deliver the changes it expects. Providing customers with more data is only useful if that data is informative and reflects their needs. Further, the opportunities for RSPs to use speed as a differentiator will continue to be limited given the high bar set by the ACCC's broadband advertising guidelines.

Section 5. Impact of the National Broadband Network

- 5.1 Any discussion of broadband speed must consider the NBN and its likely impact on the future of broadband services.
- 5.2 The NBN has clearly brought speed back to the forefront of perceptions about the quality of broadband services. Much of the public debate around the NBN has focused on its ability to offer significantly faster services than are capable on existing platforms. Speed has been conflated with a better quality of service offering from NBN Co's fibre to the premise technology compared to legacy technologies. Further, NBN Co has delineated its current suite of wholesale services on the basis of speed. Given this context Optus assumes that the roll-out of the NBN has been a catalyst for the ACCC to develop its current proposal.
- 5.3 Optus anticipates that a central consideration for the ACCC is the likely interplay between wholesale access service with certain speed characteristics and downstream retail offerings based on these wholesale access services. NBN Co has structured its wholesale services into two parts:
- (a) An access component (AVC); and
 - (b) A capacity or usage component (CVC).
- 5.4 NBN Co's consumer grade wholesale access services are delineated by speed, with current access services starting at 12/1 Mbps and rising up to 100/40 Mbps. Achieving these speeds, however, is directly dependent upon the additional amount of CVC capacity purchased by each ISP to support its end to end service offerings. To guarantee achieving a particular speed for an end-user an ISP would need to provision CVC capacity on a one-to-one basis with its AVC. Given NBN Co's current pricing of the CVC component it would be prohibitively expensive.¹⁰
- 5.5 Nevertheless, it is the usual practice for ISPs to assume some level of sharing of CVC capacity between customers. In practical terms this means that the speed a customer actually achieves on their service at any particular time might be less than the expected capability of the underlying NBN AVC speed tier. That is, if a customer has purchased a service that is supported by a 100 Mbps AVC service, the customer's actual speed is likely to be lower depending on the contention ratio used. If a ratio of 50 is used, this allows for 50 users to share the backhaul link. If all 50 users used the 100Mbps link at the same, the maximum speed per user would be 2Mbps. ISPs determine the contention ratio based on customer experience, cost, and probability that all customers will be active at the same time.
- 5.6 Whilst the NBN has clearly elevated the focus of speed, Optus submits that the ACCC needs to be mindful of a number of important considerations:
- (a) ISPs will continue to have to comply with the existing Consumer Law, the TCP Code and the ACCC's guidelines in marketing services on the NBN. This is likely to mean that ISPs will continue to take a cautious approach in making speed claims. In this

¹⁰ For example, providing a guaranteed 12Mbps service would require 12 Mbps of CVC capacity at \$20 per Mbps per month – resulting in a monthly wholesale price of \$24 for AVC plus \$240 for CVC backhaul charges.

respect Optus' NBN services are primarily promoted based on price and data allowance. Customers are given the option to upgrade to a higher access speed although it is made clear that this speed is by no means guaranteed. The speed is described as "up to" and is qualified by the following statement: *"Many factors affect speed such as internet traffic, your line condition, your hardware and software, the data source or destination and your location"*;

- (b) The impact of CVC pricing on downstream end-user services. There is likely to be a direct link between CVC pricing and the differential between the underlying NBN AVC tier and the speed an end-user actually experiences. Optus notes that the ACCC has control over the CVC price charged by NBN Co through its Part XIC powers;
- (c) That the roll-out of the NBN is at an early stage so there is inherent uncertainty about how the market will develop. That said, the NBN is expected to decrease barriers to entry in the retail market, increase the number of retail ISPs, and increase the ease at which end-users can switch. It is therefore somewhat incongruous for the ACCC to be proposing a form of retail intervention, when the NBN is expected to increase competition at the retail level;¹¹ and
- (d) The recent change of Federal government is likely to lead to material changes to the NBN. These changes are likely to relate to the underlying mix of technologies, which in turn may lead to changes in the wholesale access product suite offered by NBN Co.

5.7 Optus submits that given the above considerations it is questionable whether now is the right time for the ACCC to implement the monitoring and performance reporting programme it has proposed. Further, if the proposed monitoring regime is being driven by concerns with clarity of the NBN Co access products, Optus notes that the ACCC has direct power to set the price structure and levels proposed by NBN Co. In so far as consumer confusion arises from NBN Co advertising, Optus suggests that the ACCC can consider this issue separately.

¹¹ <http://nbnco.com.au/get-an-nbn-connection/certified-service-providers.html>

Section 6. Regulatory best practice

- 6.1 In order to comply with regulatory best practice it is incumbent on the ACCC to assess the any policy proposal against all available alternatives and to weigh up the benefits of a policy against the likely costs. These issues are considered further below.

Alternatives

- 6.2 In properly considering the merits of the proposed monitoring and reporting programme, it is important for the ACCC to consider all alternative solutions. Since the Discussion Paper provides no analysis of possible alternative solutions, it remains unclear to what extent the ACCC has considered any alternatives.
- 6.3 Optus notes that there are numerous existing speed tools available to consumers. These can be readily assessed from the internet and are usually free of charge. Unlike the probe-based program proposed by the ACCC these tools have the advantage of providing real-time information on an individual customer's actual service performance. Further, there are websites that enable customers to compare broadband services offered by different ISP's. As an example, the following comparison sites provide speed tests and/or compare broadband offers by different providers: www.broadbandnow.gov.au; www.whirlpool.net.au; www.ozspeedtest.com; www.pcpitstop.com/internet; and www.choice.com.au. These are in addition to speed tests that might be offered by ISPs, such as Optus' speed test (URL: http://optus.custhelp.com/app/answers/detail/a_id/52/~speed-test-your-optus-broadband).
- 6.4 Another issue to consider in this respect is the impact of the ACCC guidelines on the current level of information that ISPs provide on the speed of broadband services.
- 6.5 As indicated in the discussion above, the ACCC needs to properly identify the problem it is trying to resolve. Once it does this then there are likely to be different solutions available to address any issue and the merits of these needs to be properly assessed.

Cost benefit analysis

- 6.6 An important consideration in assessing the merits of the ACCC's proposal is the costs that it will entail. It is likely that the total costs of the scheme will be considerable. They will extend beyond the direct costs of the equipment and will include the considerable administrative burden in implementing and managing the ongoing reporting programme. However, to date the ACCC has provided no estimation of the likely costs of its scheme.
- 6.7 Regulatory best practice requires that the ACCC should conduct a thorough cost benefit analysis prior to implementing a regulatory policy. Further, industry should be given the opportunity to comment on such an analysis. Given that this scheme is likely to be funded by taxpayers, it is incumbent for the ACCC to demonstrate that its proposed scheme delivers value for taxpayers, is relevant for consumers and will not impose unrewarded regulatory compliance costs on industry.

Next steps and way forward

- 6.8 Optus submits that additional analysis is required to properly assess the merits of the ACCC's proposal. In particular, the ACCC should:

- (a) Obtain further evidence about customer's attitudes to the current speed claims made by their broadband providers. A useful starting point for such an analysis would be to examine the current TIO complaints to assess the extent to which misrepresentation of speed is a significant issue;
 - (b) Consider the implications of the ACCC's guidance on advertising speed and whether these will need to be relaxed to facilitate ISPs providing further information on broadband speeds;
 - (c) Better analyse the impact of the reporting regimes in the US and the UK on consumer attitudes and behaviour. The ACCC should seek information on the extent to which such reports are accessed and understood by consumers and whether they have positively influenced customer decision making;
 - (d) Examine alternative options to assess whether these can better facilitate customer needs in a more cost effective way; and
 - (e) Consider the issues raised above in respect of the roll-out of the NBN.
- 6.9 Before the ACCC proceeds with any full-scale monitoring and reporting regime it would be useful to undertake a small trial of the process to test out its merits.
- 6.10 Optus would be pleased to engage with the ACCC and the industry to work through these issues in a constructive and collaborative way.