

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

Submission in response to
ACCC consultation

**Consultation on revising
the Broadband Speed
Claims – Industry
Guidance**

Public Version

March 2022

INTRODUCTION

1. Optus welcomes the opportunity to provide comments on the ACCC's proposed changes to the Broadband Speed Claims – Industry Guidance (the Guidance). The ACCC proposes the Guidance be amended to state that Retail Service Providers (RSPs) should (i) provide typical busy period upload speeds information in their broadband marketing material for fixed line and fixed wireless services and (ii) to provide further disclosure in regard to factors known to affect fixed wireless performance.
2. Optus does not consider that typical busy period upload speeds are required in marketing materials. Rather, Optus considers that existing Guidance to the effect that typical busy period speeds should be included in any plan descriptions or plan-specific marketing that refers to a wholesale access speed ensures sufficient transparency.
3. Optus submits that it is not evident there is a specific problem that would be addressed by the ACCC's proposal. Generally, reasons for publishing typical busy period download speeds do not apply to upload speeds. Optus appreciates that a key reason for requiring disclosure of typical busy period download speeds, particularly for NBN services, is to provide consumers with transparency about how their service might perform at those times when congestion may impact performance to the extent that download speeds may be below advertised wholesale speeds.
4. Such congestion concerns simply aren't relevant to upload speeds as CVC capacity is provisioned on a symmetrical basis and the volume of upload traffic remains significantly lower than download traffic, is not affected by congestion and is also less variable throughout the day. Optus considers that the approach to determining busy hour upload speed claims proposed by the ACCC is not simple and could ultimately lead to confusing messaging to customers.
5. Optus considers if there are any legitimate concerns about upload speed performance over the NBN these are due to factors largely outside of an RSP's control including:
 - (a) NBN Co's product and pricing structure;
 - (b) Technical limitations of lines in NBN Co's network, and
 - (c) Lack of NBN Co overhead allowance for upload data.
6. The factors affecting actual upload performance can only be addressed by action from NBN Co to improve product and/or line capability. Further, it remains unclear whether there is any consumer concern about upload speed performance. In this context, expecting RSPs to provide typical busy period upload speeds based on the methodology outlined by the ACCC appears disproportionate and Optus submits that the existing Guidance, that typical busy period speeds should be included if marketing materials refers to wholesale access speeds, remains fit for purpose.
7. Optus is also extremely concerned about extending Industry Guidance on typical busy period upload speeds to cover to fixed wireless or 5G services. There would be a significant burden related to upload speed testing and considerable risk that this could cause increased congestion and actual performance issues for 5G services.
8. In regard to the proposal to require to further disclosure of factors that may affect fixed wireless services, Optus notes that it is not aware of any inadequacies in

current disclosures arrangements. The ACCC has not provided any specific examples related to its proposal to amend the Guidance regarding factors that are known or ought reasonably to be known to affect services and has not provided proposed mark-up of the Guidance.

9. The vast majority of customers have limited technical knowledge and even for those customers that are more technologically knowledgeable, information about the potential impact of such factors can only ever be provided in a generalised form. In that case, Optus notes that services remain subject to the consumer guarantees (such as being fit for purpose) under the Australian Consumer Law.

PROPOSED CHANGES

10. The ACCC has proposed two main changes to its Broadband Speed Claims Guidance to offer clarification on interpretation of the Australian Consumer Law (ACL). These include:
 - (a) For fixed wireless and fixed line services: Amend the Guidance to provide that RSPs should determine the four busiest hours on their networks for upload speeds and use those hours to determine their typical busy hour upload speed claims (as per the existing guidance methodology).
 - (b) For fixed wireless services: amend the Guidance to provide further explanation/assistance to RSPs on best practice for disclosing to consumers the factors known, or ought reasonably to be known, that would affect download or upload speeds.
11. Optus discusses these proposed changes below.

No clear problem to address

12. The ACCC is considering amending the Broadband Speed Claims Guidance to provide that upload speeds should be made available as part of marketing materials. It notes this for the following reasons:
 - (a) The ACCC states that in around 2020 many RSPs began removing references to upload speeds for NBN services.
 - (b) NBN Co introduced a wholesale product differentiated on the basis of upload speeds;
 - (c) The ACCC alleges that upload speeds have become more important to consumers as they have engaged in more work and study from home.
 - (d) Fixed wireless products are becoming increasingly available from a greater range of fixed wireless networks and service quality differences may be more apparent.
13. Optus does not consider any of these reasons provide evidence of a specific problem to be addressed, or if there is an issue, that it could be addressed by providing information about typical busy period upload speeds.
14. The ACCC alleges that in around 2020 many RSPs began removing references for upload speeds for NBN services and that upload speeds have become more important to consumers as they work and study from home more.
15. However, Optus does not consider upload speeds to be a key factor in end-users' plan decisions. **[CiC begins]**
16. **[CiC ends]**
17. The general lack of emphasis on upload speeds can even be seen in the ACCC's own public reporting (on its website) of NBN Co's wholesale market indicators which groups NBN wholesale SIOs by download data rate and does not distinguish or report SIOs based on upload data rate. That is, the ACCC does not report separately on

100/20 Mbps or 100/40 Mbps tiers – see, for example, Table ii ‘Number of services in operation by download data rate’.¹

18. In addition, the ACCC hasn’t included any discussion of issues or complaints caused by lack of information about typical busy period upload speeds. Therefore, it is difficult to understand if there is an issue with consumers feeling inadequately informed about upload speeds at the time of selecting a plan or if there is any issue with actual performance of upload speeds. In any event, Optus considers neither of these ‘potential’ issues would be meaningfully addressed by information about typical busy period upload speeds.
19. The ACCC also noted that NBN Co introduced a wholesale product differentiated on the basis of upload speeds (Optus assumes the ACCC means the introduction of the 100/20 Mbps ‘Home Fast’ wholesale access speed tier).
20. Given the 100/20 Mbps plan has a more attractive wholesale price, there is much greater incentive for RSPs to take up that product. Some RSPs now only offer the 100/20 Mbps product. As such the amount of differentiation in upload speeds across retail products has reduced because this tier has the same upload speed as the 50/20 Mbps wholesale access tier (which makes up approximately 62% of NBN fixed line TC4 SIOs.²
21. As Optus noted, if an RSP chooses to offer the 100/40 Mbps and 100/20 Mbps wholesale access tiers and differentiates them by reference to the wholesale access tiers then the existing Guidance, that typical busy period speeds should be included if there is reference to the wholesale access speed, sufficiently addresses any potential transparency issue.
22. Otherwise, Optus considers that concerns that prompted typical busy period speeds for download traffic are not relevant and that if there are any actual upload performance issues, these are due to factors outside of an RSP’s control and could be addressed by NBN Co.

Upload traffic does not suffer the same issues as download traffic

23. Optus notes that generally speaking, concerns that have led to requirements for typical busy period download speeds do not apply to upload speeds.
24. That is, a key reason for requiring calculation and disclosure of typical busy period download speeds is because of the impact the amount of CVC capacity an RSP provisions can have on customer experience. This is because there is a distinct significant peak of download traffic during the evenings (7pm-11pm for consumer traffic). It was known that if an RSP did not provision enough CVC capacity to accommodate this increased traffic peak during this busy time and advertised speed tiers with reference to wholesale access speeds, then customers could experience poorer download speeds due to increased congestion, potentially significantly below wholesale access speeds.
25. However, the potential for congestion affecting upload speeds is highly unlikely. This is because CVC capacity is purchased from NBN Co on a symmetrical basis and in

¹ ACCC, Wholesale market indicators report, December 2021. Available at: <https://www.accc.gov.au/regulated-infrastructure/communications/national-broadband-network-nbn/nbn-wholesale-market-indicators-report/december-quarter-2021-report>

² Figures exclude wireless and satellite SIOs. ACCC, December 2021 Market Indicators Report, available at: [NBN SIO RKR - Disclosure Tables - 31 December 2021 - Updated.xlsx \(live.com\)](#)

order to ensure download speeds and experience are not impacted by congestion the amount of CVC capacity provisioned is significantly higher than upload volumes of traffic. **[CiC begins] [CiC ends]** The ACCC itself notes that RSPs have generally met or exceeded their advertised download speed claims during busy hours.³

26. CVC capacity (or any potential lack thereof) is simply not a limiting factor for upload speed performance.

Any performance issues are likely caused by factors outside an RSP's control

27. Optus considers that if there are any upload performance issues (and Optus is not convinced that there are), these are likely to be caused by factors largely outside of an RSP's control. These include:
 - (a) NBN Co's product and pricing structure;
 - (b) Technical limitations of lines in NBN Co's network, and
 - (c) Lack of NBN Co overhead for upload data as compared with download data.
28. Firstly, the vast majority (91%) of fixed line customers (TC-4) have an upload speed of less than 20 Mbps.⁴ While the 100/40 Mbps wholesale speed tier continues to be available at a higher price, it is Optus' experience that since the introduction of the 100/20 Mbps speed tier that increased upload speeds are not a significant driver of plan choice. While Optus does offer the 100/40 Mbps speed tier with the higher upload speed as an 'add on' to upload speeds **[CiC begins] [CiC ends]**
29. Further to this, a sizeable proportion of fixed line TC-4 customers (21%) have an upload speed of 5 Mbps or less (i.e. those tiers that are effectively equivalent to legacy ADSL/ADSL2+ services). This could be because:
 - (a) As a result of NBN Co's product pricing and design retail NBN plans have become increasingly expensive due to the need for RSPs to buy more and more CVC capacity to service increasing traffic. Consumers who are concerned about price will look for the cheapest plans available which have lower upload speeds; and
 - (b) there may be technical limitations to a line that mean the line is not capable of supporting higher speed tiers. This is a relevant consideration as underperformance of lines is a well-known issue.
30. These are not factors that information on typical busy period speeds would address, particularly as underperforming lines are excluded from typical busy period speed calculations (noting again the typical busy period speeds were to give an indication of typical service performance during the busiest time due to congestion).
31. The final factor that could impact actual upload performance is the lack of an overhead allowance in NBN Co's supply of upload speeds. NBN Co traditionally did not provide any overhead allowance for download or upload speeds

³ See for example, ACCC, Communications market Report 2020-2021, Dec 2021, pp. 21-22 (Figure 3.6).

⁴ ACCC, Wholesale market indicators report, December 2021. Available at: <https://www.accc.gov.au/regulated-infrastructure/communications/national-broadband-network-nbn/nbn-wholesale-market-indicators-report/december-quarter-2021-report>. Figures derived from data in Table 1 for fixed line TC 4 SIOs.

32. However, NBN Co has changed this to provide an overhead allowance for download speeds so, assuming there is no congestion, a customer could receive the full wholesale download speed (e.g. 12, 25, 50 or 100 Mbps). If NBN Co made the corresponding change to overhead allowances for upload speeds, upload speeds should easily be able to achieve the 1, 5 or 20 Mbps upload speeds as offered by NBN Co).
33. Therefore, Optus does not consider typical busy period upload speed information goes any way to addressing any actual performance issues. Optus considers the existing Guidance adequately addresses upload speeds by noting that RSPs should include typical busy period speeds if RSPs refer to wholesale access speeds.

Practical implementation issues with the ACCC's proposal

34. Notwithstanding Optus' views that there is no clear issue that needs addressing, nor would any potential issue be addressed by typical busy period upload speed information, Optus considers there are some impracticalities with the approach proposed by the ACCC.
35. The ACCC has proposed that RSPs determine the four busiest hours on their networks and use those hours to determine their typical busy period upload speed claims. However, this is predicated on an assumption by the ACCC that upload traffic volumes have similar characteristics as download traffic volumes, yet this is not the case.
36. There are different characteristics between upload traffic volumes and download traffic. **[CiC begins]**
- 37.
- 38.
39. **[CiC ends]**
40. If the typical busy period changes within a day or changes when weekdays are compared to weekends or when compared to the typical busy period for download speeds, this is likely to create increasingly detailed, complex and confusing information for consumers. There is limited space in marketing material (including Key Facts Sheets) and presenting different periods for typical busy period upload speeds as suggested by the ACCC is not a practical or feasible solution.
41. It is Optus' view that instead of prescribing such an approach, the ACCC should simply consider that if an RSP makes any upload speed claims it does so consistently with overarching principles of consumer law – that is, the RSP has a reasonable basis for making such claims. This, in combination with the existing Guidance, that typical busy period speeds be included where there are references to wholesale access speeds, should provide sufficient transparency.

Requirements should not drive congestion on fixed wireless services

42. Optus has concerns with the ACCC's comments and proposals regarding fixed wireless services to the extent that these may relate to 5G services, particularly as non-NBN fixed wireless services remain a very small portion of services.⁵

⁵ See for example, ACCC, Communications market Report 2020-2021, Dec 2021, p. 23 (Figure 3.7).

43. Optus has previously provided its views on 5G services being subject to additional testing when this was canvassed as part of the Measuring Broadband Australia programme in its submission to the ACCC as part of the review of the MBA programme.⁶ In particular, Optus was concerned that increased testing of 5G services could negatively impact actual service performance and customer experience.
44. Optus conducts testing of its 5G services to determine typical download speeds. Such testing is very carefully managed to minimise the impact on end-users. **[CiC begins]**
- 45.
- 46.
47. **[CiC ends]**
48. Optus strongly objects to any proposal that could introduce congestion on mobile networks and does not support proposals that RSPs include typical busy period upload speeds, particularly where there is no clear evidence that a problem exists.
49. Optus contends that the overarching principles of consumer law, that a company have a reasonable basis for making any specific claims, is sufficient protection to ensure customers are not misled about speeds.

It's not clear existing disclosures are inadequate

50. The ACCC also proposes that the Guidance be amended to provide further direction on the best practice for disclosing to consumers the factors known, or that ought reasonably be known, that would affect the download or upload speeds received by an end-user.
51. Optus is not aware that existing disclosures are inadequate and the ACCC has not included any specific examples of inadequate or confusing disclosures nor proposed mark-up of the Guidance to illustrate its concern.
52. Disclosures of various technical factors that can impact performance (in particular, fixed wireless performance) can only be talked about in a generalised way and it can be difficult to be certain about the extent of any impact. It is not necessarily evident to Optus that information about technical factors such as frequency band used would be particularly meaningful to the vast majority of customers.
53. Optus notes, for example, that certain customers, such as gamers, can be more technologically savvy about technical factors that can affect service performance. In this case, Optus makes clear that its 5G Home Internet services may be appropriate for casual gamers and/or if latency is not a critical concern, but, the technology is not yet evolved enough to offer single digit millisecond latency. Therefore, if a prospective end-user is a professional gamer or if this attribute is important, the 5G Home Internet may not be the right product for that user at that time. Optus considers this type of disclosure is explained in an appropriate way.
54. **[CiC begins] [CiC ends]**
55. If a customer contacts Optus with service performance concerns, Optus will investigate. In those cases, Optus notes that services are subject to the usual

⁶ Optus, Review of the Measuring Broadband Australia programme (confidential version), November 2020.

consumer guarantees and warranties (i.e. must be fit for purpose) under the Australian Consumer Law. Optus considers that existing protections such as these adequately address any service performance concerns.