

## Article Information

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## ACCC: Broadband Speed Claims - Industry Guidance

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The ACCC has previously stated that speed and performance claims regarding **retail fixed-line broadband plans** are one of its **Compliance and Enforcement Priorities** for 2017. It has now taken another step in this direction.

In response to a high volume of consumer complaints about 'slow data speeds' and regulatory uncertainty, on **21 August 2017**, the Australian Competition and Consumer Commission (**ACCC**) published Industry Guidance (**Guidance**) for Retail Service Providers (**RSPs**) on advertising speeds for fixed-line broadband services. The Guidance follows extensive consultation with telecommunications network operators, RSPs and consumer representatives, and builds on the six principles for best-practice marketing (presales and after-sales) it published in February 2017.

**Andrew Barling, senior associate** and **Oliva Dalton, law graduate**, discuss the Guidance and its implications for RSPs and consumers.

### Disclose "busy period" internet speeds

Typical "busy period" broadband internet speeds should now be included in all plan descriptions and when marketing broadband plans (whether supplied over the National Broadband Network (**NBN**) or similar fixed-line broadband access networks). For residential plans, "busy period" means **between 7pm and 11pm each day**. This raises a number of potential compliance implications and challenges for RSPs, which we touch on below.

### Avoid problematic advertising claims

RSPs should now **avoid using 'up to' internet speed claims** in advertising. Undefined speed related descriptors should be avoided unless clear information is also present that **moderates** the consumer's interpretation of these terms, such as **typical busy period internet speeds**. (Examples of imprecise terms discussed unfavourably in the Guidance include "quick", "fast" and "boost", and advertising using images of athletes or fast animals.) References to the speed of the **underlying wholesale network (e.g. NBN)**, or **theoretical speeds** taken from technical specifications, should also now be **avoided** unless similarly qualified.

### Adopt standardised plan labels

To assist consumers in comparing plans and making informed purchasing decisions, the ACCC encourages RSPs to adopt the following standardised plan labels: "basic evening speed", "standard evening speed", "standard plus evening speed" and "premium evening speed", each of which is associated with a minimum typical busy period speed for the plan concerned. It also considers that the last three plan labels represent minimum typical busy period speeds of (respectively) 15 Mbps, 30 Mbps and 60Mbps.

The Guidance outlines a method for measuring and verifying busy period speeds, including around frequency of testing and extent of sampling. However, it remains to be seen whether this will be commercially practical, particularly for smaller RSPs who may struggle to resource any associated system changes or testing activities, and whether it will be truly immune from upstream factors or end user issues that are beyond the RSP's control.

## **Provide remedies for consumers**

The Guidance recommends RSPs provide prompt and effective remedies to consumers who cannot actually obtain the advertised speeds of their broadband plan due to their particular network connection, including taking steps to deliver the speeds that were promised, providing refunds to consumers, migrating consumers to a more appropriate plan or giving consumers the option to exit their contract without penalty. Although the ACCC does not mandate these remedies, it considers these to be consistent with a supplier's obligations under the Australian Consumer Law where a consumer has been misled into purchasing particular goods or services or where a service is not fit for purpose or not provided with due care and skill or within a reasonable time.

## **Implementation timetable**

Although the Guidance is stated to be voluntary and best practice, under the Telecommunications Consumer Protections Code (**TCP Code**) suppliers must effectively have regard to it when advertising or promoting to "Consumers" (under the TCP Code) broadband speeds or data transfer rates on their networks. (This is because the Guidance updates a previous ACCC Information Paper on "HFC and Optical Fibre Broadband "Speed" Claims and the Competition and Consumer Act 2010" which is itself referenced in the TCP Code in this context.)

The ACCC recommends immediate implementation of the Guidance recommendations except for those which are dependent upon the network, in which case, the ACCC recognises that testing may require "up to 3 months" to implement. This is an aggressive timetable, particularly for smaller RSPs who may lack the resources and systems of their larger competitors.

## **Next steps**

The potential impacts of the Guidance for an RSP's operations include, but are not limited to:

- **Retail product specifications and design:** although the ACCC states that retail product design is not intended to be limited by their application of the new evening speed labels, it seems that RSPs will have to factor the new "minimum typical busy period" speeds into their specifications and roadmaps for their fixed line broadband retail products.
- **Advertising and marketing:** all marketing collateral and proposed advertising material for fixed line broadband retail products should be immediately reviewed for completeness, accuracy, potential mis-representation and general compliance with the Guidelines. Theoretical maximum speeds of the wholesale access network or line should **not** simply be repeated and, if used, will need to be carefully qualified. These requirements are additional to applicable requirements under the TCP Code, including for example the prohibition on a supplier making broadband speed claims in advertising unless it can substantiate them.
- **Terms and conditions:** Service caps and other limitations should be clearly disclosed upfront and throughout the retail contract. The Guidance also contemplates offering consumers plan downgrades and an ability to exit without penalty in certain circumstances. These are just two areas where plan terms and conditions should be immediately reviewed and any areas of potential inconsistency or non-compliance addressed. As the Guidance notes, these matters are additional to an RSP's obligations to provide **Critical Information Summaries** of each of its current plan offers under the TCP Code. Although the Critical Information Summaries must be in a separate document to the full contractual terms and conditions, it is appropriate to review them and any relevant standard forms of agreement together.
- **Operations or business support systems:** Potential implications for OSS and BSS include the need to have systems in place to diagnose and resolve broadband speed issues in a timely manner, and provide information and remedies should service delivery be inconsistent with the speed and performance represented. RSPs may also need to push their wholesale service supplier to provide appropriate information to enable them to understand the speed and performance of the associated wholesale service.
- **Compliance and record keeping:** RSPs need to have mechanisms in place to monitor speed and performance of retail plans, including during off peak periods, and keep records supporting any off peak speed claims, and retain network logs or other records to verify testing and the representations made to consumers by applying the new labels. These record-keeping requirements are additional to those under the TCP Code.

If you would like to know more about the ACCC Guidance or any of the issues raised in this article, please contact **Tim Clark** or **Andrew Barling**.