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The Australian Competition and Consumer Commission

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Consultation on further enhancements to the Broadband Speed Claims- Industry Guidance

ACCAN thanks the ACCC for the opportunity to comment on the consultation on further enhancements to the *Broadband Speed Claims- Industry Guidance*. The industry guidance continues to play a fundamental role in ensuring consumers are accurately informed when purchasing fixed line broadband services.

It is appropriate that the guidance be updated periodically as the fixed line broadband market evolves. In light of the recent development in the wholesale products offered by NBN Co with broadband service download speeds in excess of 100 Mbps (>100 Mbps Services) ACCAN agrees that the guidance should be updated to reflect this. Although as at March 2020 only 2,237 services offer greater than 100Mbps in Australia,¹ and only 50% of fixed broadband homes can access speeds beyond 100Mbps,² this number is anticipated to increase as more product offerings are brought to market.

As per the last update of the ACCC's Broadband Speed Claims Industry Guidance in May 2019, any further enhancements to the Industry Guidance should be guided by the ACCC's February 2017 best practice principles for marketing (both sales and after-sales practices). These principles are:

Principle 1: Consumers should be provided with accurate information about typical busy period speeds that the average consumer on a broadband plan can expect to receive.

Principle 2: Wholesale network speeds or theoretical speeds taken from technical specifications should not be advertised without reference to typical busy period speeds.

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

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

¹ <https://www.accc.gov.au/regulated-infrastructure/communications/national-broadband-network-nbn/nbn-wholesale-market-indicators-report/march-quarter-2020-report>

² The Gigabit Gap <http://huaweihub.com.au/wp-content/uploads/2020/06/The-Gigabit-Gap.pdf>

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Principle 5: Performance information should be presented in a manner that is easily comparable by consumers, for example by adopting standard descriptive terms that can be readily understood and recognised.

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

It is with these guiding principles in mind that ACCAN has sought to address the following four overarching issues raised by the ACCC's consultation paper on enhancing the *Broadband Speeds Claims - Industry Guidance*:

1. How wholesale access speed information can be used where the wholesale product specification gives multiple speeds or a range of speeds achievable.
2. When particular products can be promoted as supporting a good online gaming experience.
3. Ensuring that the limited geographic availability of products is brought to consumer's attention and requirements for specific hardware such as modems.
4. Whether there is a role for descriptive labels for >100 Mbps Services.

Issue 1: How wholesale access speed information can be used where the wholesale product specification gives multiple speeds or a range of speeds achievable.

Principles 1 and 2 state that consumers should be provided with accurate information about the broadband speeds consumers can expect on their plan.

Off peak

The guidance currently states that wholesale network speeds taken from technical specifications should not be advertised without reference to typical busy period speeds where the wholesale network speed can be provided as a typical 'off peak' speed.

ACCAN agrees that in the revised guidance RSPs should use the lowest end of any ranges provided by 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. Providing consumers with the minimum attainable speeds will contribute to their understanding of the baseline quality of the service and help manage a consumers' expectations.

Where the actual off-peak speed available to a particular consumer is lower than the off-peak speed advertised by the RSP, this should be advised to the consumer. Where the actual off-peak speed available to a consumer is higher than the off-peak speed advertised by the RSP, it would be best practice to also provide that information to the consumer.

In addition, we agree with the proposed revision that if an RSP subsequently becomes aware that a consumers' off-peak speed is different from what was described in the RSP's general marketing, the RSP should advise the consumer. This will prevent considerable frustration that consumers experience in not reaching expected speeds. Many consumers, particularly those buying the premium services, will likely already be aware that the service may not be reaching the advertised speeds. If RSPs are proactive in addressing these issues, consumers are more likely to have a better impression of retailers.

Burst speeds

ACCAN agrees that RSPs should not use burst speeds, defined in the consultation paper as speeds that are faster than typical off-peak speeds that may occasionally be achievable for short periods of time, as a proxy for off-peak speeds, and it would be deceptive to advertise off peak speeds using this metric. Because burst speeds are intermittent in nature, in cases where RSPs provide information about burst speeds, their limitations should be clearly drawn to consumers' attention.

Information about burst speeds may be given to consumers in addition to off peak speeds, provided the limitations of burst speeds are clearly drawn to consumers' attention. Burst speeds should not be used as off-peak speeds because they could mislead consumers into believing that they could be consistently achieve those speeds during off peak times.

Issue 2: When particular products can be promoted as supporting a good online gaming experience.

Principles 3 states that information about the performance of promoted applications should be accurate and sufficiently prominent.

Games and their updates are slowly getting bigger and bigger. Because of their size, downloads of game updates have a huge impact on the network effect. Aussie Broadband reports that each time Call of Duty releases an update the network experiences a 30% uplift in traffic, and network technicians have cited that at 4pm on the day updates are released, there may be 200G to 300G more usage than normal.³

This increased demand is compounded when more than one gaming update is released. Aussie Broadband reports that, on the night when consumers were downloading updates for both Call of Duty and Fortnite, their 40% boost in NBN provision across the network was insufficient. Combined with the already higher broadband usage due to stay at home restrictions, the bandwidth needed well exceeded 40% and created the highest bandwidth event ever seen on the network.⁴

Server throttling also means that as more people access their platform's servers to download games and updates, the server may only allow certain speeds to ensure that it can keep up with the amount of people accessing the download. This is outside the ISP's control as the speed has been set before it reaches the ISP. Slower speeds affect network speeds experienced not only by gamers, but also non-gaming consumers using the broadband network for other purposes.⁵

In the context of COVID-19, when lockdown measures are driving increased online gaming, RSPs need to be transparent about the suitability of their plans for online gaming applications. Similarly, particular products should not be promoted as consistently providing a good online gaming experience if this is not accurate. Consumers need to be provided with realistic estimations of the

³ Aussie Broadband, *The Impact of Gaming Updates – and why your streaming may also be affected*, 19 August 2020 – accessed at <https://www.aussiebroadband.com.au/blog/the-impact-gaming-updates-why-your-streaming-may-also-be-affected>

⁴ Ibid

⁵ Ibid

quality of online gaming experiences, not only when the network is operating at optimal speed, but also when it is overloaded.

In addition, if RSPs advertise applications as being suitable for online gaming, it is essential that they make additional provision for increased online gaming traffic demand. A plan should not be promoted as being suitable for online gaming applications if factors within the RSPs control meant that traffic demand could not be met in order to deliver an optimal customer experience.

ACCAN therefore supports the guidance that a plan is only suitable for online gaming applications if the RSP appropriately prioritises online gaming traffic demand. Faster connection speeds need to be provided by the RSP in order to deliver the consumer a good experience.

Issue 3: Ensuring that the limited geographic availability of products is brought to consumer's attention and requirements for specific hardware such as modems.

Principle 4 states that factors known to affect service performance should be disclosed to consumers.

ACCAN is aware that 100 Mbps services are not available over the entire NBN geographic footprint, and that currently only 50% of fixed broadband homes can access speeds beyond 100Mbps. ACCAN therefore fully supports the proposals that:

- The limited geographic footprint of >100Mbps services should be disclosed to consumers; and
- Where specific equipment at an additional cost is required to achieve the full speeds of an RSPs plan, this should be prominently brought to the consumers attention

In cases where >100Mbps services have a limited geographic footprint, ACCAN agrees that these RSPs should make appropriate disclosure of these limitations. Where providers offer plans with download speeds that exceed 100 Mbps, but the underlying wholesale access network for those plans does not support those speeds across the entirety of the access providers' fixed line footprint, the provider should disclose this using words to the effect of 'services available in limited areas'.

In cases where specific equipment at an additional cost is required to achieve the full speeds of an RSPs plan, ACCAN agrees that this should be prominently brought to the consumers attention. For example, if a modem with certain specifications is required to achieve the full speeds of an advertised plan, and that modem is not included in the cost of the advertised plan, the additional cost and requirement should be prominently drawn to the consumer's attention.

Issue 4: Whether there is a role for descriptive labels for >100 Mbps Services.

Principle 5 states that performance information should be presented in a manner that is easily comparable by consumers, for example by adopting standard descriptive terms that can be readily understood and recognised.

Although ACCAN supports any move that will facilitate informed consumer choice and increased consumer protections, the benefits and downsides to consumers from the development of new labels in addition to 'Premium' to apply to >100 Mbps Services will depend on method of implementation. The introduction of additional labels, which may be difficult to place in the

hierarchy of tables, has the potential to create additional consumer confusion rather than greater clarity.

With regard to creating additional labels for >100 Mbps services, ACCAN supports the view that, as consumers purchasing a >100 Mbps service are likely to be at the premium end of the market, additional labels are unlikely to be required. These consumers are likely to understand the meaning of the 'premium' label, and this labelling will adequately reflect the fact that the services are suitable for all applications.

However, in cases where wholesale products have the same download speeds but different upload speeds, ACCAN supports differentiated labelling for download and upload speeds. In the context of COVID-19, consumers are increasingly reliant on optimal upload speeds. RSPs will need to transparently disclose upload and download speeds during busy periods in order for consumers to make informed purchasing choices that suit their individual needs.

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