

**COMMUNICATIONS
ALLIANCE LTD**



**Part 2 - Response to ACCC Consultation Paper on
Broadband Monitoring and Performance in the
Australian Context**

COMMUNICATIONS ALLIANCE MANAGEMENT
SUBMISSION

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1. INTRODUCTION

Communications Alliance welcomes the opportunity to provide this submission in response to the Australian Competition and Consumer Commission's (ACCC) "*Broadband performance monitoring and reporting in the Australian context*" Consultation Paper (the Consultation Paper).

This submission is provided by Communications Alliance as a formal industry view, following the comments provided by Communications Alliance management on 16th September 2013.

About Communications Alliance

Communications Alliance is the primary telecommunications industry body in Australia. Its membership is drawn from a wide cross-section of the communications industry, including carriers, carriage and internet service providers, content providers, equipment vendors, IT companies, consultants and business groups.

Its vision is to provide a unified voice for the telecommunications industry and to lead it into the next generation of converging networks, technologies and services. The prime mission of Communications Alliance is to promote the growth of the Australian communications industry and the protection of consumer interests by fostering the highest standards of business ethics and behaviour through industry self-governance. For more details about Communications Alliance, see <http://www.commsalliance.com.au>.

2. Evidence, or Otherwise, of Market Failure

Communications Alliance contends that the Consultation Paper does not adequately demonstrate the existence of a market failure or source of consumer detriment that needs to be addressed by the monitoring scheme that the ACCC is proposing.

While the ACCC has indicated some reasons why it is 'considering this program', it has not supported these reasons with evidence of consumer detriment or potential consumer benefit that cannot be delivered today or provided through alternative approaches.

We note that at the time of our discussion with the ACCC in September 2013:

- the ACCC had apparently not conducted any research to establish whether consumer detriment exists as a result of uninformed consumer choices of broadband providers;
- the ACCC had not yet engaged with the Telecommunications Industry Ombudsman (TIO) as to whether the TIO's complaint data demonstrated any evidence of consumer detriment; but that
- the ACCC was already taking steps to seek inputs from potential market suppliers on the proposed program and is seeking on-budget funding for the program – throwing some doubt in the minds of industry as to whether the consultation process being conducted held any prospect of influencing the ACCC's plans to implement such a program.

The Office of Best Practice Regulation's *Best Practice Regulation Handbook* provides guidance on the development of evidence based policy making:

"Good policy-making processes can ensure that public policy achieves a desired objective in a cost-effective manner. By providing an evidence base for regulatory decision-making, the best practice regulation process seeks to deliver regulation where it provides greatest benefit to the community, and to reduce opportunities for poor regulation.

...

Where the proposed solutions to a policy problem involve possible regulation, regulatory impact analysis (RIA) determines whether the problem can be adequately addressed through non-regulatory arrangements. RIA also examines whether a regulatory solution is in the public interest.

1.8 The RIA framework encourages an evidence-based approach to policy development, which helps ensure that a number of options for addressing the problem have been analysed.

1.9 The information on which regulatory decisions are based should, in turn, be made public for reasons of transparency, to ensure that stakeholders and the public are aware of what decision has been taken and why.

1.10 The decision to regulate is often one of a number of different policy approaches considered by a government in response to a particular public issue. Hence, the decision whether or not to regulate is a policy decision. For this reason, the preparation of an adequate regulation impact statement (RIS) is an integral part of regulatory policy development.

Communications Alliance contends that the ACCC's Consultation Paper does not meet the Best Practice Guidelines because it provides no quantitative evidence of a market failure or a definition of the existing problem that needs to be addressed. Rather, the Paper states that

“as broadband services become more widely available through the NBN rollout... the ACCC expects that the quality of broadband services will become more and more important for consumers”. While this may be an accurate assumption, it does not define a problem, nor provide any evidence that there is consumer detriment arising from a problem, nor demonstrate that consumers will research the quality of broadband services when making a purchasing decision.

The ACCC has identified some perceived potential benefits associated with the introduction of this program, as outlined in the Consultation Paper. In industry's view, these do not appear to be compelling. Communications Alliance notes that the ACCC considers that ISPs may benefit from the availability of the information captured by the monitoring regime. However, Communications Alliance is not convinced at this stage that much or any benefit will be derived from the availability of this information.

In another forum the ACCC has indicated that:

“...we are not looking to solve a single discrete consumer protection issue or isolated market failure. Rather, we consider that a monitoring and reporting program could deliver tangible benefits on several fronts: pre-purchase consumer information, competition on service quality, compliance with consumer protection frameworks and informing regulatory decision making.

Communications Alliance contends that there is, again, no apparent evidence that consumers are seeking this information or would use this information if it were available. Industry requests that the ACCC provide some clarification as to the current consumer detriment and evidence that it is necessary to make the monitoring information available.

3. Alternative Solutions

The ACCC states in section 1.2.1 of the Consultation Paper that: *“Information on the real-world performance of broadband services is important to enable consumers to choose the right services for their needs – whether acquiring a new service or considering renewing an existing service.”*

In the case of consumers considering renewing an existing service, it should be noted that there is a wealth of widely-used internet speed-test tools available on-line to enable consumers to test the download and upload-speed performance of their service in a matter of seconds at any time of the day or night. A probe-based survey report about the typical overall performance of the services provided by a consumer's internet provider would offer less real-world information to the consumer than they would receive by simply taking advantage of the existing on-line tools.

In the case of consumers looking to compare the user-experience of consumers of a range of internet providers, there is also no shortage of on-line fora and comparison web-sites that can provide this type of information to consumers who wish to be more fully informed.

Further, the Consultation Paper envisages publishing data on highly technical service performance parameters including latency and jitter. Communications Alliance seriously questions whether the average consumer is likely to want to receive such data, or to understand the significance of the data, or make meaningful use of such data to inform their decision as to which internet provider to choose.

Typically, the decision to pursue regulatory intervention is subsequent to the identification of a market failure and the quantification of consumer detriment. At this point, Best Practice Regulation would dictate that a number of options to address the issue should be considered.

"The decision to regulate is often one of a number of different policy approaches considered by a government in response to a particular public issue. Hence, the decision whether or not to regulate is a policy decision."

Industry is concerned that the ACCC has proposed a single solution to a problem which is inadequately defined.

In its Consultation Paper, the ACCC has proposed a single solution to the 'problem' that consumers do not have access to sufficient information relating to broadband speed and the services that a broadband connection can support. Communications Alliance contends that a significant reason why industry is unable to compete on grounds other than price is a result of the ACCC's Information & Industry Guidance Paper: *Broadband Internet Speed Claims and the Trade Practices Act 1974*. In this paper, the ACCC provides the following guidance:

"ISPs should avoid using hypothetical speeds in headline claims describing a service and in the names or titles that ISPs give to particular plans... ISPs must be able to substantiate stated maximum or "up to" speeds as being achievable by users of their services. "

The ACCC guidance also requires ISPs to take account of a wide range of factors when they wish to make any statement about the data transfer rates available to consumers using their services.

Some of these factors – including the need to consider the numbers of users of a broadband service within a customer's premises, as well as the nature of the modem-device connection (e.g. cable or Wi-Fi) - are unrealistic for ISPs to identify on a customer-specific basis, thus making it difficult or impossible to make any claim about data transfer rates.

As is stated in the Consultation Paper, the ACCC's activities in relation to broadband speeds have historically focussed on enforcement activity. Communications Alliance contends that the expectations in the Information & Industry Guidance paper, as well as the focus on enforcement, has resulted in a situation in which ISPs have focussed on competing on price and other features, rather than speed.

As such, best practice dictates that a number of options should be considered in order to address the problem, and a cost benefit analysis should determine the most effective option.

4. Rollout of the National Broadband Network (NBN)

Communications Alliance notes that one of the drivers for the consideration of this program is the rollout of the NBN. Industry submits that, it is for this very reason that the consideration of this program is premature.

The broadband service landscape in Australia is changing fundamentally. The types of plans and services that will be available to consumers in the coming years are likely to be vastly different to those available now. There will be a broader mix of technologies, price points, speeds, applications and features available to consumers.

In particular, A Fibre-to-the-Home service architecture is not subject to the vagaries of distance in the same way that ADSL connections are – auguring for a more consistent broadband service delivery performance.

Communications Alliance submits that the consideration of this program should be delayed until the ACCC has a better understanding of how the NBN affects consumer choice and user experience, and whether it does have any impact on consumer detriment.

5. Broadband Monitoring in Overseas Regimes

Industry cautions against placing too much emphasis on the operation, or perceived success, of similar programs implemented in overseas jurisdictions.

While it may be possible to make some comparisons across jurisdictions, the competitive landscape, regulatory framework and operation of the market will be unique to each case. It cannot be assumed that the implementation of a particular program will result in the same or similar behaviour of participants in a different market.

Communications Alliance notes that the objective of the FCC's Measuring Broadband America is stated as:

"The basic objective of the Measuring Broadband America study is to measure broadband service performance as delivered by an ISP to the consumer... this report has given rise to benefits beyond its mere publication..."

...service level performance metrics based upon the work of the Measuring Broadband America program are being incorporated into other programs of the Commission. We are encouraged that many broadband providers have found this ongoing measurement study sufficiently valuable to adopt our methodology, develop their own internal broadband performance testing programs, and make improvements to their ongoing disclosures to consumers."¹

As stated earlier, there is no evidence provided by the ACCC that in Australia there is a systemic gap between what is conveyed to a customer as the expected general performance of their broadband service, and what is delivered. We also question any implication that providers of such services do not already have broadband performance testing programs in place. The ACCC has alluded to the fact that market participants do not compete on speed and that this information is not readily available for consumers. As stated previously, this may be due to a range of other factors.

Further, Communications Alliance cautions against assuming that simply participating in a broadband monitoring program will be an incentive for ISPs to offer increased speeds or change the way in which they markets/advertise their products. For example, OfCom's May 2013 report on its broadband monitoring program states:

"The average speed of connections with a headline speed of 'up to' 30Mbit/s or higher continued to increase in the six months to May 2013, up by 2% (0.7Mbit/s) to 45.3Mbit/s. This rate of increase was much lower than the 23% and 6% respective increases in the average speeds of cable and fibre broadband services over the same period (see Figure 2.4).

The main reason for this was that the significant increase in overall actual cable broadband speeds was the result of Virgin Media's 'double-speeds' upgrade programme, which doubled the speeds of most of its broadband connections. However, this did not lead to a significant increase in the proportion of Virgin Media superfast broadband connections that were 'up to' 60Mbit/s or 'up to' 100/120Mbit/s (rather than 'up to' 30Mbit/s), and the average speed of superfast cable connections did not show a similar increase to that of all cable connections.

Communications Alliance contends that businesses make commercial decisions with regard to the way in which they choose to compete in the marketplace. These decisions are based on a range of strategic commercial factors. In addition, differentiation in the market can be impacted by the availability of capital to invest in network infrastructure. It is not simply the participation in a monitoring program that will drive this decision making. As stated above, the rollout of the NBN will also significantly change the Australian competitive landscape.

¹ <http://www.fcc.gov/measuring-broadband-america/2013/February#Findings>

6. Costing & Methodology – Consultation with Industry

The ACCC Consultation Paper is silent on the potential costs of a scheme – which inevitably would be a function of numerous factors including:

- what equipment is used and what volumes would apply;
- how many ACCC administrative resources are committed to running the scheme;
- how much the ACCC spends to promote the scheme;
- how many volunteers are recruited;
- how many regions/cities/communities are reported on individually;
- how many internet providers are captured by the scheme;
- the cost of maintaining the scheme, including faulty equipment, customer movements etc; and
- how often results would be compiled and reported.

Communications Alliance understands that the ACCC plans to seek additional on-budget funding from the Federal Government in the 2014 Federal Budget to pay for the scheme.

Communications Alliance would welcome greater transparency from the ACCC about the likely costs of such a scheme if it is to be progressed.

Whatever the quantum, Communications Alliance questions whether this is the best use of scarce national funds, particularly in circumstances where - in industry's view – a compelling case for a scheme of this kind has not yet been made, and more cost-effective alternative solutions already exist and/or may be developed.

Communications Alliance is also wary of the risk that there may be a push at the Government or Regulator level to impose the costs of such a scheme on industry – a scenario in which consumers would ultimately end up contributing to the costs of a program that might not be of any material benefit to them.

If the ACCC does pursue the implementation of this program, Communications Alliance would stress the importance of developing such a program in close consultation with industry. Such consultation is essential to ensure:

- the robustness of the methodology used to measure broadband performance; and that
- industry is assured that a range of variables, such as distance from serving node and in-home configurations, that may affect network performance, are taken into account.

Communications Alliance also seeks clarity from the ACCC about how it intends to account for the fact that internet performance is subject to factors outside the immediate control of Australian ISPs. Examples include the performance of international submarine cable and satellite links, as well as content sourced from overseas that depends on the performance of overseas servers.

There are also many other questions relating to logistics, cost and reporting that industry would seek to be involved in developing.

In summary, Industry urges the ACCC to delay its push for the proposed monitoring program, to give itself time to:

- better define and assess the issue it is trying to tackle
- establish whether any consumer detriment presently exists; and
- work closely with industry to explore various models to address the defined and quantified issues.



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