

COMMUNICATIONS
ALLIANCE LTD



**Consultation on further enhancements to the
*Broadband Speed Claims – Industry Guidance***
COMMUNICATIONS ALLIANCE SUBMISSION
AUGUST 2020

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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>.

INTRODUCTION

Communications Alliance appreciates the opportunity to provide input on the proposed revisions to the ACCC's Broadband Speed Claims Industry Guidance (the Guidance).

We have offered some comments in this submission, and while we do not support all of the proposed changes, we understand the ACCC's interest in reviewing the Guidance in light of recent industry developments. We also note that some of our members will be providing individual submissions with additional input.

However, this in fact demonstrates the evolving nature of this market – and thus a need to reconsider the prescriptive nature of this Guidance as a whole.

Generally, the Guidance is intended to outline how the ACCC will apply the Australian Consumer Law (ACL) in relation to Broadband Speed Claims. However, the significant level of prescription has led to the Guidance becoming – in effect – its own regulation, above and beyond the ACL.

This level of prescription is particularly problematic in a quickly evolving industry and in a space with significant regulatory overlap between the ACL, the ACMA's related Consumer Experience rules, and the Telecommunications Consumer Protections (TCP) Code. Some of our comments in the submission address this regulatory confusion and recommend either clarification or not adding language that creates additional duplication.

The existing prescribed labels are likely to create confusion for consumers when they do not align with the newly emerging products on offer. Labels are becoming less relevant due to the publication of typical busy period speeds and broader consumer understanding of these services, and at this point appear to be too static of a tool to be appropriate for this market.

Additionally, we are concerned with the ACCC's continued addition of examples throughout the Guidance. This approach – adding examples for each new type of plan or application – could continue indefinitely, creating an inflexible regime preventing telco providers from creating new and varied offerings for consumers. The focus at this point in time should instead be educating RSPs on the intentions of the ACL – the original purpose of the Guidance – so they can apply the Guidance's principles to new products.

We hope to continue engaging with the ACCC about the future of the Guidance.

RANGES AND BURST SPEEDS

3.10

3.10. An RSP can provide the access speed as a measure of the ~~typical~~ off peak speed provided this is a reasonable approximation of the plan speed that is generally available across the off peak times. Where wholesale product specifications provide a range of speeds, and RSPs rely on those specifications for their off peak speed claims, the lower end of the range should be used.

Example product A: An RSP makes available a plan that utilises the wholesale access network service 500-1000/50 Mbps on the FTTP and HFC network, and the wholesale access provider specifies that at most times this product will operate between 500 to 750 Mbps. The RSP advertises its product as having an off peak speed of 500 Mbps.

Example product B: An RSP makes available a plan that utilises the wholesale access network service 500-1000/50 Mbps on only the FTTP network, and the wholesale access provider specifies that the maximum speed of 990 Mbps is typically achievable. The RSP advertises this product as having an off peak speed of 990 Mbps.

The responses to Questions 1 and 2 are only on behalf of Communications Alliance's RSP members.

Question 1: RSPs currently use a variety of methods to determine how best to communicate with consumers about >100 services, and this will continue to evolve – particularly considering the ongoing work by network providers and RSPs to increase speeds on all access technologies.

This variety – a sign of a healthy market – means that the proposed Examples A & B may create confusion may introduce confusion by implying that RSPs can only use the product specifications, versus – as outlined in the consultation paper – the valid option to advertise more specifically as long as “the RSP is confident that consumers will be able to achieve a higher off peak speed.”

The Guidance and ACL are both clear that RSPs must have reasonable grounds for any representation they make, and the proposed guidance provided in 3.10 is sufficient without the additional examples.

Question 2: We do not have any concerns about utilising the lowest end of the provided range where an RSP is relying on that information.

3.11

3.11. Where information about burst speeds is available, being speeds faster than off peak speeds that may occasionally be achievable for short periods of time, that information 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 cause consumers to believe that they could consistently achieve those speeds during off peak times.

Question 3: We agree with the ACCC's position that burst speeds should not be used as a proxy for off-peak speeds or to make headline claims, and support the proposed drafting for 3.11.

3.13

3.11-3.13. 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.

Question 4: We are not clear on the necessity of this addition.

The line testing requirements in the ACMA's Service Migration Determination already require the advisement of lower speed capabilities to a customer, and we would be somewhat concerned about the potential for confusion and regulatory overlap due to the addition of this clause. It may be more useful to point RSPs to the Service Migration Determination here, instead of presenting this step as separate Guidance.

For example, it could read: "Where the actual off-peak speed available to a particular consumer is lower than the off peak speed advertised by the RSP, the RSP needs to be aware of their obligations under the Telecommunications Service Provider (NBN Service Migration) Determination 2018."

We do have concerns about the addition of guidance regarding the availability of higher speeds. Many consumers are aware of this and may still have intentionally chosen a lower speed tier than what their line is capable of. While RSPs may choose to provide this information, there is no additional consumer protection provided by this piece of Guidance, and it may cause confusion for consumers and additional obligations for RSPs. It also goes significantly above and beyond the requirements of the ACL, which is not the intention of the Guidance.

APPLICATIONS

3.16. RSPs should consider the typical speeds of their retail plans during the busy period, as well as other elements of the retail plan (such as any traffic prioritisation that is applied, 'throttling' practices, the quality of the supplied modem and usage quotas) when making their claims around suitability for particular uses or applications.

Example A: A plan would have insufficient speed to allow it to be promoted as suitable for a type of application, such as a video streaming application, if high quality access to that type of application requires speeds that exceeded those available on the plan. This could be due to the typical busy hour speed of the plan or any time-of-day, or location-specific, throttling that the RSP can apply, on an ad hoc or predetermined basis.

Example B: A plan would not have sufficient included data quota to allow it to be promoted as suitable for a type of application, such as a streaming application, if reasonable use of that type of application would exhaust the included quota, trigger speed throttling or other service restrictions to be applied, and/or the imposition of additional charges.

Example C: A plan would not be suitable for online gaming applications, if factors within the RSPs control mean that online gaming traffic demand would not be appropriately prioritised or met so as to give the consumer a good experience.

3.17. RSPs should take care not to apply blanket claims, or to market specific retail plans, on the basis that their plans support particular uses or applications where the speed and other performance attributes of the relevant plan are unlikely to provide that support at a reasonable quality including during the busy period.

Example: An RSP that promotes one or more plans as suitable for accessing video streaming applications, and also offers other plans that are not suitable for video streaming in high quality, should make clear to consumers which of its plans are and are not suitable for that purpose.

Question 5: While there are not specific barriers to RSPs provisioning their networks for gaming, we have concerns about the continued addition of specific examples to this part of the Guidance.

Our concern with adding additional specific guidance to this topic has two main drivers. The first is that RSPs will take different steps to provision their services for specifically advertised applications. This is necessary for a competitive market. While we appreciate that the proposed draft language does not preclude these differing methods, we are concerned that it may set a precedent and/or be a first step towards prescriptive expectations on exactly how these services should be provisioned.

The second is that we anticipate different plans being developed in the future for a range of applications – for example, a plan that is particularly suitable for videoconferencing. It would create confusion for the ACCC to continue adding examples each time a new plan is developed.

Ultimately, it is quite clear that RSPs must not make false or misleading statements – which includes being able to provide evidence of differential performance to the ACCC in their role of enforcing the ACL if/when appropriate - and must clearly disclose information about the appropriateness of a plan for a promoted use or application.

DISCLAIMERS

Question 6:

3.24

3.24. If a modem with particular 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.

While we do not have any strong objections to this addition, it once again raises concerns of regulatory overlap and unnecessary prescription.

If the modem is a mandatory part of the offer, that information is already required to be included in the Critical Information Summary (CIS) per 4.2.2 b) (ii) of the Telecommunications Consumer Protections (TCP) Code. When a modem is not a mandatory part of the offer, the ACMA's Consumer Information Standard requiring a Key Facts Sheet (KFS) to "state that other factors at the consumer's premises can affect or reduce the speed or performance of their NBN broadband service, provide common examples of such factors..."

If this information is included in the CIS or KFS, we do not want there to be confusion that this new point of guidance would require additional information beyond that.

3.26

3.26. RSPs should make appropriate disclosure where they offer plans with download speeds that exceed 100 Mbps and the underlying wholesale access network used for those plans does not support those speeds across the entirety of the access providers' fixed line footprint. The disclosure could contain words to the effect of 'services available in limited areas'.

Overall, we do not have any concerns with the proposed added guidance.

However, we would like to comment that, while the consultation paper raises a concern about a "risk" for consumers on this topic, we are not clear where there is risk for any consumer detriment. RSPs are already required to include disclosures about speed availability in advertising and ensure consumers are able to access the speeds of a service they sign up for – both through existing points in this Guidance and the ACMA's Service Migration Determination. It is important that the ACCC keep in mind the broader structure of consumer protections when considering this Guidance.

DESCRIPTIVE LABELS

[3.50](#). The method preferred by the ACCC has a number of interrelated qualifying criteria, including minimum typical busy period speeds and the minimum wholesale access service needed to supply a retail plan that qualified for that label. The particular usage profile that corresponds with each standardised label is set out in Attachment A. The set of label descriptors is as follows:

Label	'Basic evening speed' ¹⁴	'Standard evening speed'	'Standard plus evening speed'	'Premium evening speed'
Minimum typical busy period speed		15 Mbps	30 Mbps	60 Mbps
Minimum wholesale service	Applies to plans supplied over 12/1 NEBS ¹⁵ , and other plans for which typical busy period speed slows significantly to less than 15 Mbps	25/5 NEBS minimum; can also be used for plans built over other NEBS where typical busy period speed slows below qualifying criteria for other labels	50/20 NEBS minimum; can also be used for plans built over 100/40 NEBS where typical busy period speed slows below qualifying criteria for highest speed label	100/40 NEBS minimum <u>and 100/20 NEBS minimum; can also be used for plans built over services where the wholesale download speed exceeds 100 Mbps</u>

Question 7: Per our comments in the Introduction, we don't think that labels remain an appropriate level of detail for this Guidance. With the inclusion of typical busy period speeds in consumer information, universal labels across the market are not helpful or necessary for consumers and go significantly beyond requirements under the Australian Consumer Law.

This is particularly true considering the ongoing work to develop plans responding to consumer interests. In light of this, we think that speed tier labelling should be removed from the Guidance altogether.

If that step is not taken in this revision, then new labels should certainly not be developed for <100 Mbps services – RSPs should be able to market them as appropriate for their offerings. It is not ideal to expand 'Premium' to these levels, as that may also create confusion that there is no difference - but it is preferable to developing new labels. We note and welcome the ACCC's use of the word "can" in the language proposed to be added.

Question 8: While we understand that some stakeholders see benefits in 'comparability' across providers, using standardised labels across the industry for >100 Mbps services could actually mislead consumers.

As noted by the ACCC, >100 Mbps plans tend to appeal to a subset of consumers with specific needs, and RSPs will typically provision these services in various ways to best serve their customers and differentiate themselves in the market. Thus, plans offered by two RSPs on the same wholesale 'plan' may actually provide very different experiences, meaning that the relevant information for consumers will be the typical speed information RSPs must already include – and that having the same labels for those two plans would create a false sense of equivalence.

Additionally, we anticipate that offerings in this section of the market will be continually evolving. Prescribed labels would not be able to keep up with these changes, and once again, having to use the same labels for plans that have evolved to offer a different consumer experience would create confusion in the market.

Question 9: The currently existing labels are not necessarily ideal for this purpose – however, they would be significantly preferable to adding more labels, as plans will continue to evolve and additional prescribed labels would generate significant confusion in the marketplace for consumers as plans change. So, while we do not object to the revised guidance as proposed – particularly because the relevant information for consumers is the speed information not the label - we see this question as an example that prescribed labels are no longer fit for purpose regulation in this space, and it would be more appropriate to remove the labels altogether.

Question 10: We do not have any additional input on the proposed enhancements, but once again encourage the ACCC to consider how the Guidance can be best used to educate RSPs on the principles of the ACL without creating inappropriate prescriptive regulation.



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