

# Aussie broadband speed guidance a warning for NZ ISPs

James Young-Drew

Solicitor

March 2017

## Speed Read

Following research showing that 80% of Australians find it difficult to compare the broadband speeds of rival internet service providers (ISPs), Australia's regulator has issued [six marketing principles](#) for ISPs to help consumers better understand their actual broadband speed offering.

Broadband speed transparency is a big legal compliance issue in NZ too.

In this article, we explain that these new principles usefully highlight what NZ ISPs should be doing to ensure compliance, given that Fair Trading Act obligations are materially the same as Australian consumer law.

With care, strong marketing claims promoting broadband speed can still be made. But once again, Australia is the [FTA compliance resource](#) that keeps on giving...



*Australia's approach to broadband speed promotions has even made it to the UK, as seen in this 2015 BT Infinity broadband advertisement featuring Australian actress Rebel Wilson.*

## The Detail

Recent public consultation by Australia's equivalent of the NZ Commerce Commission, the ACCC, has found that a whopping 80% of Australian consumers struggle to compare the broadband speeds of different ISPs, such as between Telstra and Optus. The issue, says the ACCC, is "raising consumer search costs, inhibiting competition and feeding into an increasing level of consumer complaint".

The ACCC has [responded](#) with six broadband speed marketing principles for ISPs, and is undertaking further consultation with industry to develop best practice guidelines to implement these principles:

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
2. Wholesale network speeds or theoretical speeds taken from technical specifications should not be advertised without reference to typical busy period speeds
3. Information about the performance of promoted applications should be accurate and sufficiently prominent
4. Factors known to affect service performance should be disclosed to consumers
5. Performance information should be presented in a manner that is easily

Aussie broadband speed guidance a warning for NZ ISPs

*comparable by consumers, for example by adopting standard descriptive terms that can be readily understood and recognised, and*

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

The ACCC also provides examples of problematic market practices in Australia, noting the lack of a standard industry methodology for broadband speed, and, for example, that where ISPs do make claims about speed:

*... they typically use vague or imprecise descriptors such as 'fast' or 'high-speed', or visual representations (such as animals or athletes). We are concerned that this practice inhibits consumers from assessing whether the advertised plans would meet their speed requirements and readily comparing the offers that [ISPs] advertise.*

The key takeaway is that broadband speeds should be marketed in a manner which is accurate, easily comparable, and descriptive of speeds that consumers can actually expect to receive in a “**typical busy period**”.

This point aligns with the NZ Commerce Commission’s existing guidelines for broadband suppliers from back in 2007 (which we wrote about [here](#). On broadband speed, the 2007 guidelines state:

*Representations that suppliers can provide speeds “up to” a theoretical maximum may breach the Fair Trading Act if that maximum speed is not realistically achievable by consumers.*

NZ ISPs would do well to take note of Australian developments, lest broadband speed become an increasingly prominent issue in a NZ consumer law context.

The Commerce Commission’s [Consumer Issues Report 2016](#) notes that telecommunications is already the most

complained about industry in NZ, with non-availability of broadband (as a direct result of unclear claims about availability) being a notable theme of complaint.

Relatedly, the ACCC prosecuted an Australian telco provider in 2014 for marketing an “unlimited” mobile service package which, in reality, limited the daily calls and messages that could be made. The marketing had overreached. We [observed](#) that “unlimited” claims also appear in a NZ broadband context (as to both data and speed), and that performance claims based largely on theoretical speeds could be risky under the Fair Trading Act.

A regulatory focus on broadband speed is also likely to heighten in response to market trends. The Commerce Commission’s most recent [Annual Telecommunications Monitoring Report](#), in the context of price benchmarking, observes that:

*In most of the rest of the world, fixed-line broadband services are differentiated only by speed, and data is usually unlimited.*

As this state of affairs becomes increasingly the case here, NZ ISPs will be looking for more inventive ways to differentiate their broadband speed from their competitors through headline marketing claims.

Using the new ACCC principles as an indicative benchmark of compliance, it’s apparent that while it’s clearly possible to make strong marketing claims about broadband speed, ISPs need to take care around their legal obligations.