

## Commerce Commission issues new guidelines for broadband suppliers

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**Misleading performance claims by broadband suppliers are an increasing concern for the Commission. We think a prosecution sooner or later is inevitable. Suppliers should carefully read these new guidelines.**

One of the Commerce Commission's key roles is to ensure that ads and promotional material aren't misleading. It can prosecute under the Fair Trading Act, and it frequently does. This is usually accompanied by some press fanfare, the reputational risk being often greater than the amount of the fine.

Following similar guidelines released by the Australian regulator, the Commerce Commission has issued guidelines for broadband suppliers<sup>1</sup>. They are essential reading. While suppliers need to know the rules anyway, the risk of being prosecuted increases exponentially if the suggestions aren't followed

In part because of the vagaries of broadband, it can be difficult to craft promotional material, in this highly competitive environment. For example, a DSL customer near the DSLAM gets much faster speeds than someone 5km away. It's hard to have a simple message aligned with, say, 6 Mb/s speeds, when some customers can only get 2Mb/s. That's made harder when factors such as contention ratios make even a 2 Mb/s message difficult to sustain.

Then, converting the technical performance metrics into language that consumers can understand can be a further challenge.

Additionally some techniques won't work. Take speed claims as an example. As the guidelines point out:

<sup>1</sup><http://www.comcom.govt.nz/FairTrading/BroadbandGuidelines/ContentFiles/Documents/Guidelines%20for%20broadband%20suppliers.PDF>

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.

Putting qualifications in the small print generally won't work either. Usually, a diluting provision in the terms and conditions is ineffective to avoid Fair Trading Act liability. The same goes for qualifications in the small print in an ad, on a website, etc. This is illustrated in our article, *\$189 Airfares to Sydney? Yeah right!*<sup>2</sup>

With care and legal advice, there are ways through this, to get the promotional outcomes that suppliers such as ISPs need.

The new guidelines include helpful pointers on issues such as statements about:

- Price
- Bundling of services
- Fair Use Policies (always a challenging issue)
- "Free" services
- Speed
- The fine print
- Access and coverage

Other providers face the same issues. For example, in September, the Australian regulator started court action against Telstra over coverage claims for its Next G mobile

<sup>2</sup> <http://www.wigleylaw.com/Articles/LatestArticles/fares-to-sydney-yeah-right/>

network.<sup>3</sup> Among other things, Telstra's TV ads claimed the new service was "Everywhere you need it". The regulator alleges that's misleading, as the whole of Australia is not covered.

There is no doubt that ISPs and other telecommunications providers need to be very careful in their promotional claims.

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<sup>3</sup><http://www.accc.gov.au/content/index.phtml/itemId/798658/fromItemId/2332>

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*We welcome your feedback on this article and any enquiries in relation to its contents. This article is intended to provide a summary of the material covered and does not constitute legal advice. We can provide specialist legal advice on the full range of matters contained in this article.*

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