

One NZ submission on the Commerce Commission's draft broadband marketing guidelines

13 November 2024

Introduction

1. We welcome the opportunity to comment on the Commerce Commission's (**the Commission**) draft broadband marketing guidelines (**draft guidelines**). One NZ is a signatory of the TCF Broadband Marketing Code, which was developed based on the Commission's initial guidelines. We support the principle of keeping consumers informed about broadband options available to them and protecting consumers against misleading marketing claims in relation to different broadband technologies. We were pleased to see that the Commission's review of compliance with the current guidelines did not find any systemic failures across industry.¹
2. We welcomed the additional week provided by the Commission for industry to provide feedback on the draft guidelines. Some changes proposed by the Commission are materially new or different from those previously indicated and have not been consulted on with industry previously. We support the broad consumer outcomes that the Commission is seeking to achieve, and we want to work constructively with the Commission to get to these outcomes

¹ https://comcom.govt.nz/_data/assets/pdf_file/0027/362709/Marketing-Alternative-Services-Guidelines-Review-15-October-2024.pdf

in a practical and efficient way. Meaningful consultation, supported by the evidence base for proposals, is a critical ingredient of constructive industry engagement. We therefore hope that further discussions with industry are held on the specific issues raised in our and the TCF's submissions before the final guidelines are published.

Summary of key points

3. Summary of One NZ's key points:

- a. The guidelines should be addressed to any provider that markets broadband services, not just Retail Service Providers (RSPs), to address asymmetric regulatory settings that currently exist.
- b. The requirement for all technology options to be presented to consumers should be amended to require providers to do so specifically when the consumer is undecided as to the best services or technology or has not already made a decision about the services or technology they wish to buy. This will help ensure that the guidelines reflect the practical reality of sales processes and do not introduce undue friction to sales journeys.
- c. The proposal regarding differential sales incentives should not be included in the final guidelines unless and until the Commission can demonstrate that differential incentive structures necessarily create a conflict of interest in terms of actual sales behaviour that would warrant the need for intervention.
- d. The proposal regarding broadband usage and spend information should not be included in the final guidelines until the Commission has carried out analysis to demonstrate that there is a genuine need for this intervention, in the same way that it carried out significant work on this issue before introducing transparency initiatives in the mobile market.
- e. The guidelines should be amended to enable providers to use the results of **either** SamKnows Whitebox testing or a third-party testing provider specifically approved by the Commission for embedded testing in all cases, even where a SamKnows Whitebox testing figure is available for particular services. This will help ensure that the Commission promotes innovation and competition in relation to broadband performance testing.
- f. The Commission should carry out analysis on whether the lack of a standardised approach in regards to broadband speeds materiality threshold is causing harm to consumers to warrant further intervention. If the Commission decides to proceed with its proposal to introduce an industry standard, it should hold workshops with industry

to help ensure that the thresholds are practical and do not favour specific technologies.

Application

4. The Commission proposes that the guidelines ‘apply to any RSP that offers Broadband retail telecommunications services to consumers.’ We believe that this scope is too narrow. The guidelines are intended to address specific issues relating to the marketing of broadband services, and therefore they should apply to any party that markets broadband services, including fibre wholesale providers and broadband comparison tools (e.g. Broadband Compare).
5. The Commission agrees that the outcomes and principles in the s 234 guidelines are applicable to and capable of adoption by ‘any party marketing alternative telecommunications services to consumers, including wholesale providers who may not sell telecommunications services directly to consumers.’² The guidelines should therefore be addressed to Chorus and LFCs in respect of their direct-to-consumer advertising, as well as to RSPs. Should the Commission decline to do so, it should properly explain why the guidelines capable of applying broadly to all entities performing this activity are instead directed only to a particular segment of the industry. The Commission should also explain how this approach is consistent with the principle it has previously endorsed that all marketing of alternative telecommunications services should take place **on a level playing field** and should **be consistent with the guidelines** as far as possible.³ If the Commission thinks Chorus and others should act consistently with the guidelines, then it should say this in the guidelines. Whether or not the Commission could subsequently impose binding obligations on

² Letter: Andrew Riseley (Commerce Commission) to Tom Thursby (Vodafone), 22 December 2021, §5.1

³ Ibid, §5.2

wholesalers under Commission RSQ codes is irrelevant to whether it can and should record expectations for wholesaler behaviour under non-binding guidelines.

6. The Commission is already aware that Chorus is continuing to generate a significant volume of direct-to-consumer marketing, including marketing that makes direct comparisons between fibre and other broadband access technologies. Despite this, Chorus and other LFCs have refused to become signatories to the TCF Broadband Marketing Code on the basis that the Commission's guidelines, and therefore this Code, sit under Part 7 of the Telecommunications Act 2001 (the Act) and consequently only apply to retailers. This ignores the fact that the TCF Codes are designed to be broad and inclusive industry Codes that anyone, including Chorus, other LFCs and Broadband Compare, can sign up to.
7. Instead, the LFCs confirmed their commitment 'to the outcomes and principles applicable to wholesaler marketing' in a letter to the Commission, dated 6 May 2022. This letter states that LFCs 'are committed to assisting the industry in ensuring that all consumers are treated fairly and are equipped to make fully informed decisions about their broadband choices.'⁴ In taking this approach, LFCs have been able to pick and choose which rules they want to commit to, an approach that is not allowed for other industry participants, highlighting the asymmetric regulatory settings that currently exist. Despite having the flexibility to decide what parts of the marketing guidelines it wants to follow, Chorus has breached its own commitments in its latest direct-to-consumer marketing campaign, namely that 'LFCs must avoid making claims or comparisons about one service that are liable to mislead Consumers directly or indirectly in relation to the performance or characteristics of another service.'⁵ Chorus' latest campaign includes claims that i) fibre is 'NZ's best broadband', suggesting that fibre is a better broadband technology on every potential measure of end user demand,

⁴ https://comcom.govt.nz/___data/assets/pdf_file/0020/283601/Letter-to-Commerce-Commission-on-LFC-Commitment-6-May-2022.pdf

⁵ Ibid.

including performance related metrics, price, mobility and ease of install, when this is not necessarily the case (e.g. One NZ FWA broadband is cheaper than most fibre plans)⁶

8. As a retailer required to follow the Commission's broadband marketing guidelines and being a signatory to the TCF Broadband Marketing Code, One NZ currently cannot market broadband services in the same way as Chorus does. We have raised several examples of Chorus and LFC direct-to-consumer marketing with the Commission over the past few years. Continuing asymmetric regulation of how operators can market different technologies to end users is skewing the market, distorting competition and impacting end users. A genuine level playing field requires Chorus and other LFCs to do the same as RSPs and remind consumers that other technology options may be available to them that may better suit their needs and not make misleading comparisons between technologies.
9. The Commission has approved a significant expenditure allowance of \$108.5m for Chorus' product, sales and marketing for the next price-quality regulatory, starting in 2025. In a recent letter to One NZ, Chorus states: 'We are planning further marketing activities promoting the benefits of fibre, and you'll see those adverts in all the usual places soon.'⁷ The Commission has specifically enabled Chorus to offset significant marketing spend against the Maximum Allowable Revenue⁸ while continuing to allow Chorus to conduct its direct-to-consumer marketing activity outside of the broadband marketing guidelines that apply to other industry participants. Chorus' business strategy is predicated on increasing uptake of higher specification plans, e.g. >25% of end users on >1Gbps plans.⁹ Achieving this strategy

⁶ Chorus' advertising includes the following statement: "To avoid other people affecting your internet performance, get fibre, not wireless." <https://campaignbrief.co.nz/2024/09/23/chorus-highlights-wireless-broadband-fine-print-in-latest-campaign-blitz-via-saatchi-saatchi/>

⁷ Letter from Chorus to One NZ, 15 October 2024

⁸ The Commerce Commission's draft decision on Chorus' PQP2 expenditure states that the Commission 'was not able to undertake a full review of Chorus' marketing spend within the PQP2 evaluation process.' Chorus' expenditure allowances for the second regulatory period (2025 – 2028), Draft decision – Reasons paper, p. 154

⁹ Chorus FY24 Results Presentation, slide 33, Chorus reported last year that "1Gig share of net adds -40% vs 24% share of connections" Chorus FY23 Results Presentation, slide 25

will require Chorus to convince consumers to move to fibre plans that will simply exceed the needs of many. There is clearly a risk consumers being misled and oversold services they don't need, which makes the Commission's decision to exclude Chorus from broadband marketing guidelines even more difficult to understand, especially given the broader intention of the guidelines to enable consumers to make fully informed choices about broadband services they actually need.

10. If the Commission is genuinely concerned with broadband marketing practices to all consumers, then the guidelines need to reflect this and be directed at all industry participants that are generating this advertising.
11. The Commission's letter accompanying the draft guidelines states: '[i]f we see widespread compliance across the industry, but ongoing non-compliance by some providers, we would consider using the Commission's Fair Trading Act powers to close the compliance gap.'¹⁰ This statement assumes that the Fair Trading Act addresses all types of behaviour that are addressed through guidelines and industry codes (when, in fact, these impose much higher and more specific standards). It also embeds and endorses a scenario in which two different groups performing the same marketing activities are subject to different regulatory requirements.

Presentation of technology options

12. The draft guidelines state that 'RSPs should tell consumers what technology options are available at their address from that RSP when joining or switching Broadband services or technologies.' The intention behind the inclusion of this principle in the original guidelines was to address the issue of 'consumers coming off copper not being informed about the full range

¹⁰ https://comcom.govt.nz/___data/assets/pdf_file/0026/362708/Letter-from-Telco-Commissioner-summary-of-review-and-proposed-amendments-15-October-2024.pdf

of options available to them when being presented with offers to move to alternative broadband services.’¹¹ In this sense, the proposal was a response to a specific, identified issue. We were supportive of this principle at the time.

13. The Commission’s review of compliance with its guidelines gave a ‘green’ rating to the principle of providers ‘remind[ing] consumers that they are likely to have the choice of several alternative telecommunications service options depending on their location.’¹² The Commission is now proposing that *all* technology options are presented to consumers in *any* join or switch scenario, not only when they transition off copper services. The implication is that providers would be required to provide the information about *all* technologies in *all* sales journeys, including telesales and retail. It is unclear what specific issue this additional requirement is intended to address, or how it reflects the actual demands of end-users of telecommunications services.
14. Currently, our sales process involves One NZ sales agents asking a series of questions to identify the customer’s specific needs, e.g. how many people there are in the household, what they use their broadband for, how many devices they have connected to the internet etc. We also ask questions to identify what aspects of the service they value the most, e.g. performance vs price. Based on the information from the customer, we recommend a plan that is best suited for the customer’s needs. We ask for the customer’s feedback and if the recommended option is not quite right for them, or if they ask about other options, we then talk through alternative options. This is a nuanced process during which frontline agents respond to customer cues, and the information elicited about what they want and need. Introducing a requirement to incorporate disclosure of *all* technologies available to the customer – even where a customer has themselves clearly indicated that they have made a

¹¹ https://comcom.govt.nz/_data/assets/pdf_file/0027/362709/Marketing-Alternative-Services-Guidelines-Review-15-October-2024.pdf

¹² https://comcom.govt.nz/_data/assets/pdf_file/0027/362709/Marketing-Alternative-Services-Guidelines-Review-15-October-2024.pdf

purchasing decision and do not want to consider other products or services - will create friction and confusion for consumers. For example, in a scenario where a customer has informed themselves proactively and determined that a Fibre300 plan is best suited to their needs, we would still (under the approach proposed in the updated guidelines) be required to inform the customer that other fibre plans, fixed wireless, ADSL and VDSL plans are also available to them and provide key information relating to these plans. This type of scenario is likely to create a 'pain point' for customers, with significantly extended call handling times, and will ultimately drive customer complaints. The customer has reviewed the information on our website and decided that this service is best suited for their needs. It is clearly not consistent with the actual demands of the end-user in this case for One NZ to force them to reengage with all the other technology options available. In the same way that if a customer comes into our store determined to buy an iPhone, we will not try to convince them of the merits of other device brands – we will sell them what they have asked us for.

15. The Commission's expanded proposal intervenes in the design of sales journeys and discussions in a way that is not feasible or practical. Standardising these interactions in the way that's suggested risks creating a substantial additional customer pain point, by removing the discretion that frontline agents need to respond to the requirements of each customer. The expanded proposal appears to assume that the provision of more information will inevitably be welcomed and used by consumers, regardless of whether they have asked for it. Our experience of dealing with frontline sales suggests this is incorrect.
16. We therefore recommend that Principle (b) under Outcome 1 is amended to: *'RSPs should offer any consumer joining or switching broadband services or technologies information about technology options available from that RSP in any instance where the consumer is a) undecided as to the best services or technology; or b) has not already made a decision about the services or technology they wish to buy.'*
17. The draft guidelines also state that 'RSPs should present the Broadband services they offer in a consistent way to enable effective comparison and choice by consumers.' In the explanatory comments, the Commission goes on to state that 'if an RSP chooses to have an individual webpage dedicated to one type of Broadband service (such as "wireless"), then it should also have individual webpages for other Broadband services offered (such as "Fibre", "Hyperfibre", or "Satellite") to be consistent.' If the Commission decides to retain this explanatory comment, 'Hyperfibre' should be removed as an example as it is a type of fibre service, not a separate technology.

Sales incentives

18. The Commission proposes a new requirement in the draft guidelines that ‘RSPs with differential sales incentive structures should have policies addressing the risk of misselling and processes for remedying any misselling that occurs.’ Consumer protections against misselling already exist.
19. The draft guidelines include a specific requirement for RSPs to ‘recognise and address the conflict of interest created by differential incentive structures in their policies and training and ensure they have procedures in place to remedy any misselling that occurs. Remedying misselling could include moving the consumer onto the most appropriate service, compensating the consumer and recovering the commission paid to the agent where the misselling was wilful or deliberate on the part of the agent.’
20. It is unclear what evidence the Commission relies on for its belief that differential incentive structures necessarily create a conflict of interest in terms of actual sales behaviour. No research or analysis is offered to support the existence of widespread misselling. Nor is it apparent that instances of misselling have been examined and the proposed interventions are framed to address their underlying causes. The Commission’s proposal includes material additional processes that providers would need to put in place beyond general protections against misselling that already exist. We recommend that this proposal is removed from the final guidelines unless and until the Commission can demonstrate that there is a genuine need for the additional measures it has proposed, backed by a clearer demonstration of why existing measures to address misselling are insufficient to meet the demands of end users.

Broadband usage and spend information

21. The draft guidelines state that ‘RSPs should ensure that existing customers have the usage and spend information required to meaningfully compare different services and service providers, including access to their Broadband usage and spend details over a minimum period of 12 months.’ The Commission has explained its justification for this proposed new requirement in its letter accompanying the draft guidelines, saying: ‘[n]ot all RSPs are giving their customers the information they need to be able to determine whether they are on the

best plan for their usage and spend. We are concerned that this could reinforce inertia in the residential broadband market.¹³

22. It appears that the Commission is wanting to replicate the usage and data transparency initiatives implemented by retailers on a voluntary basis in the mobile market to broadband. The mobile market usage and data transparency initiatives were implemented following a period of analysis and consultation. This included, for example, analysis of anonymised billing data for a random sample of almost 80,000 mobile service customers. This analysis itself followed the Commission's 2019 mobile market study which had identified potential issues of consumer inertia in the residential mobile market.
23. In contrast to the analysis that preceded the Commission's request that retailers address mobile market usage and data transparency, we are aware of no analysis or evidence that indicates a problem of inertia in the residential broadband market, let alone that this is at risk of being reinforced.
24. In any event, it is difficult to understand how usage information will be relevant for the majority of end users. Broadband plans are mostly sold on the basis of average speed, rather than a data allowance. As such, we do not believe that usage information is demanded by broadband end users generally (indeed, it is likely to be of interest only to an extreme minority of end users). If the Commission considers the provision of fixed usage information is in fact useful for this minority of end users, then it should specify what that segment is and reference the specific demands of that segment. Any requirement should apply only to that segment.

¹³ https://comcom.govt.nz/___data/assets/pdf_file/0026/362708/Letter-from-Telco-Commissioner-summary-of-review-and-proposed-amendments-15-October-2024.pdf

MBNZ speeds in marketing

25. The draft guidelines state that ‘RSPs should always use MBNZ speeds in appropriate marketing when MBNZ speeds are available so that consumers understand what they can expect before making their purchasing decision.’ While we support the principle of providing broadband performance information to consumers to enable informed decisions, we have concerns with the mandatory nature of this requirement and the assumption that SamKnows testing carried out for the MBNZ programme is the only possible means of substantiating a speed claim.
26. The Commission’s guidelines state that ‘RSPs are expected to stand behind the speeds they choose to use when marketing Broadband services and work with consumers to address any material gap between performance and expectations.’ The industry-wide average speed figure may not always be one that an RSP is confident they can ‘stand behind’. Making the publication of industry-wide MBNZ/SamKnows Whitebox average speeds in marketing mandatory places RSPs at risk where they do not believe an MBNZ/SamKnows Whitebox average speed accurately represents what the customer is likely to experience with a particular RSP. This risk is exacerbated by the Commission’s view elsewhere that consumers should be able to exit services if their experience differs from what they expected based on advertising. Simultaneous requirements that retailers **must** i) use MBNZ/SamKnows Whitebox speed test results in marketing, with retailers bearing all FTA risk if those claims are incorrect; and ii) stand behind speed claims by offering customers an exit right if they are not met is a contradictory, untenable and unacceptable position.
27. All providers technically have the option to enter into an agreement with SamKnows to facilitate embedded testing, as Spark have done, for a more accurate view on the performance of their broadband services.
28. Mandating an entity with which the Commission has a commercial relationship as the only provider of speed test results that can be accepted establishes SamKnows as a testing monopoly and forecloses the ability to use other providers that could undertake testing equally well. This approach could only be justified if it could be shown that SamKnows is the only entity that can produce robust, reliable results capable of substantiation, but this is not the case. One NZ does not support the establishment of SamKnows, through agreement with the Commission or otherwise, as the monopoly provider of speed test substantiation to the exclusion of other entities and testing methods that can equally well perform this function.
29. The guidelines currently state that ‘[w]here MBNZ data is not available for particular services, the TCF may agree an interim approach to speed indications provided that: i) the approach is consistent with MBNZ methodology; ii) RSPs use such an approach for no longer than

necessary until MBNZ results become available.’ We propose that the Commission amends the guidelines so that providers can use the results of **either** MBNZ/SamKnows Whitebox testing or a third-party testing provider specifically approved by the Commission for embedded testing in all cases, even where an MBNZ/SamKnows Whitebox testing figure is available for particular services. In this case, the Commission would have the ability to verify the integrity of the third-party testing provider and ensure comparability of results with the MBNZ programme, whilst ensuring the regulatory regime does not limit innovation and promotes competitive outcomes.

Materiality threshold

30. The current guidelines include a principle that ‘RSPs should allow consumers to move to a different service, or exit their service, without penalty, if the selected service materially fails to meet expected requirements and this cannot be remedied within 30 calendar days of a customer complaint.’ Following the publication of the guidelines, the TCF developed the Broadband Marketing Code which sets out additional guidance on how this principle should be met by providers in practice. The TCF Code currently specifies that the exit right should only apply in cases where the ‘material fail’ is within the provider’s control. For example, if a customer experiences issues with the speed of their FWA broadband, we identify that the issue is caused by the modem being placed in a suboptimal place within the home, but the customer refuses to move their modem to fix the issue, it would not be reasonable to require providers to allow the customer to exit a fixed term contract because the issue is completely out of the RSP’s control. We note that One NZ’s standard ‘network guarantee’ policy would still apply for such cases, enabling customers to exit a fixed-term FWA contract within 30 days and receive the money back if the service fails to meet the customer’s expectations.¹⁴ The

¹⁴ <https://one.nz/broadband/wireless-broadband/?srsltid=AfmBOop5XURXtpGrMiXYQiy2MxMVggMA5CZ5vacjUQBtJhkYFnCvgazl>

Commission's guidelines should make it clear that the 'right to exit' beyond the initial 30 days applies only where consistent speed degradation is caused by an issue that's within the operator's control, such as network congestion or technical fault.

31. Furthermore, the draft guidelines propose specific 'materiality thresholds' for each broadband technology that should be used across industry to determine if a customer 'qualifies' for the right to exit. Following the publication of the Commission's initial guidelines and the development of the TCF Broadband Marketing Code, One NZ developed an internal process for dealing with complaints regarding speed issues, which includes specific materiality thresholds for different technologies as guidance for our agents.
32. The Commission's review of compliance with the current guidelines states: 'RSPs are not charging early termination fees when services materially fail to meet consumer expectations. However, definitions of "materiality" vary widely across providers. RSPs all have different interpretations which means consumers are unlikely to know, without consulting their provider, if their service would be regarded as materially failing to deliver.' The Commission has not provided any evidence to show that varied definitions of 'materiality' are causing consumer harm, such as consumers being locked in contracts when their service is consistently not meeting expectations or where consumers are unaware of their exit rights. We understand that in the last quarter, the Telecommunications Dispute Resolution Service (TDR) received only 8 complaints that related to the broadband speed issues, and at least 6 of these relate to high-speed fibre broadband (mostly 1Gbps and Hyperfibre services) - for which customer expectations of service performance are largely set by Chorus and LFCs.
33. It appears that the Commission is proposing an intervention to introduce specific standards based on its belief that consumers are 'unlikely to know' what their exit rights are. No evidence is provided to show that this is actually the case or that there are any problems with the current approach of RSPs having exit right policies that are not standardised. We therefore recommend that the Commission accepts the current approach of each RSP being required to have an exit right in place, with an accompanying policy for 'material failure'. To ensure that consumers are aware of their rights, the guidelines could include a requirement for RSPs to make the information about the exit right easily accessible on their website.
34. If the Commission decides to proceed with a standardised 'material fail' approach, we suggest that it holds further discussions with industry on how this could be implemented in a practical way. We are particularly concerned about the proposed 70% materiality threshold for FWA and satellite technologies. These technologies by their nature perform differently to fixed technologies and retailers offering these services make this clear to customers at point of sale. It is not appropriate for a threshold for these technologies to be the same as fixed. The TCF has carried out some modelling to show what applying a 70% materiality threshold for

FWA would mean in practice, which is set out in their submission. In short, it shows that 49% of 4G FWA customers tested in September 2024 MBNZ report would fail the 70% threshold. In contrast, there are no Fibre300 users in the September 2024 MBNZ report receiving less than the 70% threshold, and only 6% Fibre Max users receiving less than the 70% threshold. This illustrates that different technologies have different characteristics.

35. A 'one-fits-all' approach for all technologies is not appropriate and would result in the Commission inadvertently favouring fixed technologies over others. Applying this approach to another sector, it would be akin to investment fund managers being required to make the same performance commitments to investors in a high-risk equity fund as they do to an investor in a low-risk fixed interest fund when the inherent nature of the investment products and their potential performance is clearly and obviously different.
36. The proposed approach of basing a materiality threshold on an average speed is flawed. An average speed is not (and never has been) a guarantee of the speed that a customer will experience at all times. The actual speed a customer gets may be higher or lower than this average. An average is also not a static figure; it will increase as those below the threshold are allowed to exit their service, resulting in the threshold itself increasing, and consequently more customers qualifying for the right to exit.
37. The Commission is seeking to condition consumers to interpret average peak time broadband speeds as the speed they should always expect to receive. This is at odds with what this metric measures and how it should be understood by customers. Moreover, this wrong interpretation is exactly what industry was concerned about when the change was initially proposed, which is why we advocated for an ability to continue to use 'up to' speed references or a speed range. Setting impractical materiality thresholds that are derived from an average will further embed consumers' perception that they should always get the average. This ignores the reality of what an 'average' is and how it works.
38. We support the TCF's proposal to hold a workshop with industry technical experts and the Commission to agree a practical way forward. Until this issue has been more fully explored through a workshop, we do not support materiality threshold proposals.
39. In regards to the threshold for satellite broadband, we encourage the Commission to engage directly with Starlink as New Zealand's dominant satellite broadband provider. One NZ is a reseller of Starlink broadband for business customers, and we currently provide a range for the download and upload speeds that customer can expect to experience. We note that Starlink itself, and other resellers in the market, do not use 'average' speed indications in their marketing.

40. Please contact the following regarding any aspect of this submission.

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