



DRAFT Broadband Marketing Guidelines 2024

Public Version

Commerce Commission

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Executive Summary

1. New Zealand's broadband markets are served today by a growing number of competing technologies, each with different technological and economic characteristics, that appeal to different segments of those markets. While still nascent, this infrastructure-based competition is exactly what competition-focussed regulatory frameworks seek to encourage.
2. And so it is important that the Commission's Broadband Marketing Guidelines recognise, and encourage, the different characteristics of these technologies.
3. Similarly, the Guidelines are intended to assist consumers in making confident broadband service purchasing decisions. Accordingly, the Commission should be alive to the risk that the amount of information RSPs are required to provide to customers overwhelms and confuses consumers rather than assist them.

Exit Thresholds

4. The original Guidelines, implementing through TCF Codes have been highly successful in creating consistent marketing for broadband across RSPs. While the variability in expected performance of wireless broadband services and satellite broadband services is higher than for fibre technologies, RSPs have on the whole been supportive of the Commission's preference to drive consistent reporting of average speeds to increase consumer confidence in broadband technologies and switching between them.
5. The original Guidelines also introduced a right to exit for consumers who face persistent performance issues with their broadband which are in the control of the RSP, but which cannot be resolved. These processes have been successfully implemented by RSPs and consumers have been able to take advantage of these exit rights.
6. But the Commission's proposal to standardise the 'thresholds' at which a customer becomes eligible to take advantage of their exit right requires careful consideration to ensure it does not unfairly tilt the competitive balance by implementing a minimum guaranteed speed regime that is more difficult for satellite and wireless broadband services than for fibre services.
7. If the objective is to build confidence in broadband technology and switching, and to create an incentive on providers to improve service levels over time, then we think this can be addressed through RSPs being transparent on their own, individual, guidance thresholds that reflect performance variability on their own network – a much simpler concept to manage than an industry average. If a customer is consistently measuring speeds below their provider's threshold they can raise the issue with their provider.

8. We propose these guidance thresholds should be published on the RSP's support pages, and that RSPs should also be able to publish the 20% - 80% percentile speed ranges experienced by customers for that technology on the support page to provide a balanced view of typical performance for different technologies, and avoid giving the misleading impression that the customer will only get a speed between the average and the guidance threshold.
9. With this approach, the focus shifts to customers with outlying performance rather than the roughly 40-50% of 5G and 4G customers who get less than 70% of the average according to the Commission's most recent MBNZ report.

Anyone Who Markets Broadband To Consumers Should Comply With The Guidelines

10. The Guidelines focus on RSPs marketing, and we observe that generally RSPs are complying with the Commission's expectations.
11. We remain concerned, though, about other organisations who are marketing broadband services to customers in ways which are not consistent with the Guidelines or the TCF Codes.
12. We observe that some fibre wholesalers who have committed in writing to the Commission that they will comply with the principles of the Codes, have subsequently adopted broadband marketing practices that are demonstrably not in compliance with the Codes. These contraventions are not one-offs, either, they are persistent and targeted at a very wide audience of consumers.
13. Of particular concern are wholesalers promoting higher speed services directly to consumers without being clear on the personas or usage profiles for which these higher speeds are appropriate. The result is consumers paying more for services they do not need because they are presented with information that does not facilitate fully informed decision making. Mis-selling to customers in this way should also be a priority for the Commission.
14. Similarly, price comparison websites promote themselves as independent services providing customers with unbiased whole of market comparisons. However, these services do not make it clear that their recommendations are influenced by their financial arrangements with RSPs and wholesalers. They also do not present information about broadband technologies (including speeds, availability and suitability) in a Code-compliant way.
15. We have seen examples of a real estate website which only promotes fibre broadband at an address and does not make it clear that other technologies may be available to customers in that location.
16. The Codes can only be effective in building consumer confidence if there is widespread and consistent compliance with them by those parties that most commonly market broadband services. Fibre wholesalers and price comparison sites fit this description but are wilfully acting in contravention of the Codes. The Commission should make it clear that it expects all providers who market

broadband to consumers to comply with its Guidelines, and that it will use the Guidelines as its benchmark when investigating misleading advertising under its Fair Trading Act investigation powers.

The Current Guidelines Appear To Be Working Well

17. Spark welcomes the opportunity to comment on the Commerce Commission's review and proposed updates to the Broadband Marketing Guidelines. RSPs have made considerable changes to their marketing as a result of the original Guidelines and the associated TCF Codes.
18. Consumers can now easily compare the products and plans offered across the market and make informed purchasing decisions. This is true whether the customer is doing their own research or needs to make decisions as part of a transition off a copper-based service.
19. The Commission's review of compliance against the Guidelines confirms a high level of compliance with none of the principles or outcomes rated as red. There are a few areas where the Commission notes "most RSPs are aligned with the Guidelines, with some exceptions". We suggest that the Commission engage directly with those providers to work with them to resolve those issues. Where there are significant issues the Commission notes it can use its Fair Trading Act powers to close the compliance gap.
20. Other than their scope, which we discuss below, our view is that the Guidelines are working as intended. The Commission has not shown any compelling evidence that further incremental regulatory intervention against RSQ marketing is needed.

A Workable Alternative For Speed Thresholds

21. The original Guidelines required RSPs to have a process to allow customers to exit their plans if their broadband services is consistently failing to perform to the expected standard. The Commission is now proposing to update the Guidelines to align the speed thresholds for which broadband exit rights apply.
22. In our experience customers are able to take advantage of exit rights today and we have seen no suggestion that the thresholds used by RSPs to determine if a customer has problems are set too high.
23. We propose small amendments to the Commission's proposed approach to more clearly target it at customers with outlier performance and to avoid inadvertently capturing customers who have performance within an expected range.

24. We believe the threshold can be set as an absolute speed for a technology (eg 10Mbps) or as the bottom few percentages of RSP's customer base (eg the bottom 3% of customers by speed).
25. If a customer consistently gets below the guide threshold speed, then they can raise their concern with their provider who will work with the customer to resolve the issue.
26. Importantly, though, the thresholds would be set with regard to both the particular technology and the particular network the customer is served on. As the Commission's MBNZ programme shows, each wireless broadband network will have different performance characteristics.
27. We do not see a policy reason for why speed thresholds not need to be aligned across all providers. However, we accept there is benefit in RSPs providing their threshold information to customers on a dedicated support webpage on their sites.
28. The challenge of publishing the thresholds is that it focusses attention on the outliers and provides a misleading impression for customers on the performance of a technology. Showing the average on the plan card and the guide threshold on the support page skews expectations towards speeds lower than the average. This is not the case in practice and around half of customers can expect to get speeds faster than the average.
29. On the same support webpage, we propose that RSPs should also be able to show the 20th to 80th 24-hour average percentile speeds so customers are given appropriate expectations of what speeds they may receive with a particular technology.
30. We think this is a pragmatic approach which provides transparency to customers of the range of speeds seen by customers while allowing those with genuinely poorly performing services to exit without penalty.
31. We discuss the challenges with the Commission's proposed threshold formula later in this document.

Many Of The Changes Proposed Will Have Significant Impact For Providers And Need Further Consultation

32. The changes proposed by the Commission – particularly those related to materiality thresholds - are not minor and need more in-depth consultation. Even with the extension to the deadline, four weeks has not been enough time to properly evaluate the proposals, particularly where the Commission has not provided evidence of the problem it is seeking to address, or provided explanation for how it has made its proposals.
33. The Commission should undertake further consultation on the more contentious issues (such as broadband performance thresholds, scope of the Guidelines and

incentives structures) to avoid over regulating or creating rules which could result in worse outcomes for consumers.

Misselling Fibre Should Be As Much Of A Concern As Mis-selling Wireless

34. The Guidelines, and the suggested amendments suggest there is continued concern about the misselling of wireless services. We have not seen evidence to suggest this is the case in practice, especially since the original Guidelines were published. If the Commission continues to see issues in this area, we encourage it to raise these issues directly with the RSP involved.
35. As we have noted previously, 4G fixed wireless services are a great solution for a segment of consumers. We make this clear by showing personas, as well as the MBNZ speed numbers on our plan cards. 5G fixed wireless offers much faster speeds and are suitable for a further segment of consumers. We have a dedicated webpage¹ which clearly sets out whether wireless is the right option for particular consumers.
36. In a similar way, fibre plans are not suitable for all customers – especially higher speed services. Marketing messages which overstate the need for faster speeds or imply multi-gigabit fibre services are mass market services are misleading customers in to paying more for services they do not need.
37. Spark uses personas to help explain the relative benefits of services across their portfolio of products, including our fibre-based services, to show the type of customers who would benefit from a particular service. We explain the benefits of fibre broadband on a dedicated webpage.²
38. We remain concerned that fibre wholesalers marketing messages overstate the need for higher speed broadband services. We accept that wholesalers should be able to promote their technologies, but this needs to be done in a fair way that does not undermine the rules set out in the Guidelines which RSPs are required to follow.
39. We therefore would like to see the Guidelines give similar weight given to mis-selling of fibre services (eg by providing some fibre specific examples), as well as the scope of the Guidelines being extended to include wholesale providers.

¹ <https://www.spark.co.nz/online/shop/broadband/about-wireless-broadband>

² <https://www.spark.co.nz/online/shop/broadband/about-fibre-broadband>

The Guidelines Should Apply To Any Party Who Markets Broadband Services

40. One key area where we consider the Guidelines should be amended is in their scope. The Application section only states the Guidelines apply to RSPs that offer broadband retail services to consumers (including as part of a bundle).
41. Broadband is not only marketed by RSPs:
 - a. Wholesale broadband providers market their own technologies and make statements about alternative technologies directly to customers.
 - b. Broadband comparison websites also market and sell broadband plans on behalf of third parties (without making these partnerships clear to customers) yet are not covered by the Guidelines.
 - c. Real estate websites inform customers of the broadband options available at an address.
42. The Guidelines aim to create consistency in how technologies and products are marketed to avoid misleading consumers. Any organisation making representations about broadband in their communications directly to consumers should, from a policy perspective, be subject to the same rules.
43. It seems to us a clear omission that the Guidelines only apply to a subset of the market. By restricting the application of the Guidelines to RSPs the Commission is ignoring the increasingly active marketing of broadband by wholesalers. Recent examples of wholesaler marketing include TV and online marketing making what we believe to be unfair comparative claims between technologies. This is precisely the type of activity the Guidelines are designed to cover.
44. There is a market distortion if there are not a consistent set of rules across all broadband marketing, irrespective of the organisation making the claim. We see wholesale providers making statements in their advertising which Spark as an RSP would not be able to make under the Guidelines and the TCF Code.
45. The Guidelines are intended to ensure consumers can trust broadband marketing. This trust is called into question if there are some parties marketing broadband to consumers who are exempt from the rules, or choose to only follow a subset of the rules.
46. The Commission has previously shared its views that wholesalers are outside the scope of the RSQ legislation and therefore are not 'caught' by the guidelines. We do not support this interpretation: it clearly wouldn't have been Parliament's intent to distort the market by placing greater restrictions on RSP marketing than wholesaler marketing the same and similar products.
47. The Guidelines are written in the context of the Commission's RSQ obligations, but we see no reason why the Guidelines cannot be extended so that any party actively

marketing broadband technologies or services to consumers should comply with the outcomes and principles as they apply to their activities.

48. The TCF Broadband Marketing Code is written in such a way as to allow any party to sign up and demonstrate their commitment to fair and transparent broadband marketing. Signatories to the Code agree to meet the requirements in the Code and be covered by the TCF's code compliance framework.
49. Chorus and the LFCs have made a clear statement of their intent by refusing to become signatories to the TCF Code.
50. We welcome the Commission's comment that it can use its Fair Trading powers to address outliers where it sees the majority of providers complying with the guidelines, but a small number of parties do not. We encourage the Commission to use its powers when looking at wholesalers' marketing.
51. The Commission should make it clear that it expects all providers who market broadband to consumers should comply with its Guidelines, and that it will use the Guidelines as its benchmark when investigating misleading advertising under its Fair Trading Act investigation powers.

Case study: Chorus

52. Chorus regularly engages in consumer marketing. Recent examples include direct to consumer communications on platforms such as TVNZ on demand, television adverts and billboards, and by direct marketing emails to end users. The purpose of Chorus' adverts are to encourage customers to purchase fibre services in preference to other technologies, and to encourage consumers to take faster speed fibre services.
53. Our view is Chorus' advertising is misleading and damaging to industry trust. Beyond the Fair Trading Act concerns, their consumer marketing is not in line with the Commission's Guidelines, the TCF Broadband Marketing Code (which Chorus has refused to sign up to) nor the LFC Letter Of Commitment to the Telecommunications Commissioner.
54. The LFC Letter Of Commitment (which Chorus has signed up to) makes the following commitments:

We 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. It is essential that consumers are provided with clear and accurate information that does not mislead them about the type, quality or performance of services.

55. Chorus argued that it couldn't sign up to the TCF Codes because they were not covered by the RSQ regime. The RSQ regime is irrelevant – TCF Codes are not Commerce Commission RSQ Codes and the TCF Codes were deliberately written in

a way that allowed anyone who markets broadband to sign up so they could demonstrate their commitment to clear and accurate information that does not mislead about the type, quality or performance of services.

Chorus Are Unfairly Comparing Technologies

56. Chorus' current campaign seeks to denigrate wireless broadband with the tagline "Avoid this. Get Fibre"; and cites "NZ telco wireless broadband fine print" and "NZ wireless broadband provider fine print".
57. The overall impression of this campaign is that limitations apply to wireless and that they do not apply to fibre, which is not the case. This is misleading to consumers.
58. It is disingenuous to claim that connections using fibre networks are never subject to congestion. For examples, factors related to home networks, network and end user devices, and the variable quality of internet itself are common to all technologies.
59. Chorus fibre connections use GPON technologies which is a shared access network and congestion can occur in an RSP's network if they do not correctly dimension backhaul.
60. We have seen multiple TDR complaints which relate to poor speed performance on hyperfibre services (these relate to services offered by other RSPs). It is clear that fibre is not immune to performance issues despite what Chorus implies in its advertising.
61. Conversely Chorus does not talk about the benefits of fixed wireless services or acknowledge that fibre is not suitable for some segments of the market.
62. Importantly they do not acknowledge that the issues they highlight only apply to a proportion of fixed wireless customers, around half of which are likely to see speeds faster than the average, and a small proportion significantly faster.

Chorus Are Implying RSPs Are Hiding Key Information About Wireless Services

63. Chorus implies that wireless providers are hiding information about broadband performance in their 'fine print'. The advertisement is designed to create the impression that these RSPs are engaged in unscrupulous conduct by not making this information clear to their customers.
64. This is factually incorrect. We are required by the Guidelines and TCF Codes to use MBNZ averages when we talk about speed. We are required to be clear that they are a national peak time average speeds, and that consumers may receive lower or higher speeds than the average. We also make it clear that there are a range of factors which can affect performance with examples listed.
65. This information is available directly on our plan cards and is shared with the customer as part of our disclaimers as part of the purchasing journey.

Chorus Are Implying Only Fibre Is Available When Other Technologies Are Also Available

66. We wrote to Chorus in July 2024 that there are a number of representations on realestate.co.nz that mislead customers by giving the overall impression that fibre is the only broadband technology available at certain properties featured on the website, which is not always the case.
67. As there were references to ‘powered by Chorus’ and links to websites Chorus described as ‘partner’ we strongly suspect these misleading representations were being made with Chorus’ input and endorsement, or at the very least, Chorus consent.

Chorus Are Misleading Customers In Their Promotion Of Faster Speeds

68. Chorus promotes its hyperfibre service as suitable for those whose “internet connection is straining under the data load or you simply want more bandwidth so you can enjoy a smoother online experience”³.
69. Chorus presents a range of benefits of hyperfibre on its website which it implies are not achieved on lower speed fibre services. These include sending large files, content creation, gaming, data moving, sharing a single internet connection and “smart home fanatic”.
70. Other than benefits in moving large files (which also depends on the target destination connectivity and physical location) we consider all these options are highly likely to be achievable using slower speed services.
71. ‘Sharing a single internet connection’ with multiple family members is achievable with any technologies faster than ADSL.
72. In its 2024 Annual Monitoring Report⁴ the Commission published a list of services which are achievable with each technology. This notes that 5-40Mbps can be used to stream multiple HD services, with 100-500Mbps needed for multiple users to stream UHD video without interruption.
73. The Commission notes with 500-1000Mbps you can download even the largest video games very quickly (120GB at 1,000Mbps takes 16 minutes).

³ <https://www.chorus.co.nz/residential/broadband/hyperfibre>

⁴ Broadband Speed Page 116 https://comcom.govt.nz/__data/assets/pdf_file/0033/361959/2023-Telecommunications-Monitoring-Report-15-August-2024.pdf

Broadband speed

Download and upload speed, as measured in our MBNZ programme, is the speed data travels between the internet and the router in the home.

The table below provides a guide on what activities various download speeds allow. Note that other factors such as latency and the location of hosted content will impact the online experience.

Upload speeds should be considered alongside download speeds. The main applications where the impact of upload speed is apparent are file transfers and video conferencing. For example, a lower upload speed will mean that it takes longer for files to sync or email attachments to be applied.

Download speed	Online experience
0–5Mbps	Browse the internet, use search engines, use email, watch videos in lower resolutions (up to 720p). Individual large files take a long time to download (1GB at 5Mbps takes over 25 minutes).
5–40 Mbps	Possibly able to stream up to UHD on one device, or stream HD (1080p) on multiple devices. Able to download large individual files in a reasonable amount of time (1GB at 40Mbps takes just over 3 minutes).
40–100Mbps	Comfortably able to stream UHD without interruption, and have multiple people use streaming services. Able to download larger files, such as smaller modern game releases, in a reasonable amount of time (20GB at 100Mbps takes just over 25 minutes).
100–500Mbps	Multiple users can stream UHD video without interruption. Large files download very quickly (1GB at 500Mbps takes 16 seconds). Larger game releases download in a reasonable amount of time (80GB at 500Mbps takes just under 22 minutes).
500–1,000Mbps	Able to download even the largest video games very quickly (120GB at 1,000Mbps takes 16 minutes).

74. We are not aware of any current game that needs faster than 1 Gigabit per second connection, and hyperfibre services have no noticeable improvement in latency (which is important for gaming) than slower fibre speeds. In addition to the website, Chorus also specifically call out latency in their online marketing⁵
75. Chorus' marketing is designed to encourage consumers to sign up to faster, broadband plans which they do not need and are more expensive.

Summary Of Our Concerns With Chorus Behaviour

76. Chorus has cherry picked which rules it would like to follow by signing a letter of commitment rather than signing up the TCF Code. However, it has chosen to ignore these commitments and market misleading messages to consumers by not giving a fair comparison between technologies and by implying customers need faster services than needed by their personas. Unlike TCF Codes, the letter of Commitment has no formal compliance process to hold them to account.
77. Chorus should be required to comply with the Guidelines – whether by direct inclusion in scope or by the Commission clearly setting their expectation that the Guidelines will be used to interpret for Fair Trading Act compliance in any party's

⁵ <https://www.youtube.com/watch?v=PPLiibaYFr8>

marketing of broadband services and technologies. If Chorus is not required to comply with the Guidelines, we anticipate seeing a significant rise in their curtailment of the promises made in the Letter of Commitment for Chorus' own benefit.

78. Chorus has told Spark they are planning further high visibility marketing activities promoting the benefits of fibre. Chorus absolutely should be subject to the same rules as RSPs and held similarly accountable for its marketing.

Case study: Price Comparison Website

79. Price comparison websites position themselves as being independent and trusted, giving customers unbiased recommendations from their comprehensive databases of New Zealand broadband plans. There is a focus on saving money and 'finding the best plan for you'.
80. However, despite listing broadband plans and directly marketing these to consumers, these sites are not subject to the ComCom Broadband Guidelines and have not signed up to the TCF Broadband Marketing Code.
81. A quick look through the plans presented on Broadband Compare at a given address shows non-MBNZ speeds presented for different plans, with an information pop up next to the speeds which is misleading as it suggests the speeds show are the maximum speed the network can deliver rather than the peak time national average. This is not consistent with the TCF Code or the Guidelines.
82. It is also misleading as plans on the same input technology are using different non-MBNZ speeds – for example Fibre Max speeds for some RSPs are presented as 950/500 while others are 900/500. Neither of these are MBNZ numbers.
83. Plans are presented in a default order of 'rating: high to low' without explanation of what rating means, or how it is calculated. We know that price comparison websites receive Commission from some retailers in exchange for customer referrals and we suspect this is a strong determinant of the rating.
84. Price comparison services should be caught by the Guidelines as they present themselves as independent, transparent advocates for customer choice. Our view is they should be held to higher account than RSPs as they are presenting multiple RSPs' plans and claim to be helping customers make independent, informed choices. The lack of transparency over commission payments in their results page and how that impacts the order of recommendation is of particular concern.

Justification Is Needed For An Industry Aligned Material Failure Threshold

85. The Commission has proposed a formula for an industry aligned material failure threshold. We have not seen evidence which suggests that the current lack of industry consistency is causing consumer harm.
86. The original Guidelines required providers to implement a process to allow customers to exit their service if the performance was poor. It allowed RSPs a period of time to work with the customer to identify and resolve the issue, and if the issue could not be resolved the customer was able to exit the service without penalty.
87. The approach is based on the UK regulatory model. However, the regulatory context is very different in the UK as consumers are generally locked into long duration contracts (typically one or two years) and are required to pay for the rest of their contract even if they leave their service early. This can see customers 'trapped' if they have poor performance because they can end up paying for up to 24 months' worth of service that they cannot use, costing them \$1000s.
88. In New Zealand we have neither problem – long duration contracts are rare, and even where they exist we don't see large exit fees. Strong competitive pressure has kept contracts short and switching is easy. The UK regulatory remedy is designed to address a significant consumer harm and therefore is not directly relevant to the New Zealand context.
89. However, we accept that the Commission has required this remedy to be in place and the requirement has been implemented via the TCF Code. Spark, like most RSPs, now has a formal process for customers to exit their broadband plan where the service we provide is at fault.
90. It should be noted that the TCF Code is clear that the exit right only applies where the issue is with the RSP's service and excludes issues outside of the RSP's control. For example, the exit right does not apply if the issue is found to be with the customer's device or home setup.
91. Our experience of running our process has shown a mix of customer scenarios and outcomes. We can find no evidence that there are issues with the current process. Where customers have used the process we have found problems caused by a variety of factors including some which were in our control and some which were due to in-home issues that were the responsibility of the customer.
92. As far as we can tell, all these cases were resolved to the customer's satisfaction and none of these were escalated to the TDR.
93. We judge each complaint on its merits. We see no compelling reason to extend the current implementation or to formalise the exit thresholds across retailers.

The Commission Mandates Averages In Marketing

94. In the early days of broadband RSPs promoted their broadband products using ‘up to’ speeds. Using ‘up to’ speeds was deemed misleading because the Commission identified a concern that customers were being misled in to thinking they would achieve the maximum speed.
95. Spark chose not to promote our 4G wireless broadband plans by reference to any specific speeds until an MBNZ average was available. Similarly, we did not talk about 5G speeds until we had a SamKnows average we were comfortable using.
96. Through its Guidelines, the Commission directed providers to use peak time averages, along with clear information telling customers that the speeds are averages and that customers may get higher or lower speeds.
97. The Commission’s latest draft implies that customers are being misled by average speeds despite the various additional information RSPs provide in their marketing alongside the MBNZ speeds, and so further work on minimum thresholds is needed. This feels like a problem of the Commission’s own making.

Is The Threshold Designed To Address Misleading Advertising?

98. The Commission should explain what it is trying to do with the threshold formula.
99. If the issue is that customers don’t understand averages, or the fact they may get more or less than the advertised average speed, then the regulatory discussion should be around the appropriate use of averages and a focus on providing clear information explaining what an average means in practice.

Is The Threshold Designed To Be A Minimum Speed Guarantee?

100. If the threshold formula is intended to be a minimum speed guarantee, then there are a range of policy and operational issues which need to be considered including what it means for coverage, and for customers who are unable to achieve these speeds using the technologies available at their location. It will also have implications for retailers of these services who will need to restrict their services availability and revisit investment strategies.
101. A minimum speed guarantee is a significant regulatory intervention and has social implications. This nature of intervention is usually a political initiative as it is a deliberate distortion of the market and essentially selects winners and losers. Such policy discussions are usually accompanied by discussions on universal coverage along with the funding mechanisms to achieve these goals.
102. If the absolute minimum is set by the Commerce Commission (either as an absolute Mbps figure or as a fixed percentage of an industry average) then that sets the bounds of the technology coverage. This would be a significant regulatory intervention which steps into detailed product design.

103. If the minimum speed is left to individual RSPs to decide then competition will likely incentivise providers to offer faster minimum guarantees (eg a minimum speed guarantee of 20Mbps sounds better than a minimum speed of 10Mbps). To deliver the minimum speed guarantee providers would need to reduce their coverage footprint and cause providers to be conservative in their availability checkers.
104. This is not a good outcome for consumers and calls in to question issues of connectivity and ultimately inclusivity for those outside the network footprint. It would be an adverse outcome for consumers to have options available because of regulatory rules around marketing.
105. Conventional objectives for competition authorities is to maximise output and minimise price for any given level of quality. This would do the reverse and is beyond the scope of the interventions envisioned under the Commission's RSQ powers.

Is The Threshold Designed To Address Outliers?

106. Alternatively, the Commission may be considering a threshold as a way to address outliers who have particularly poor performance. These are customers who may have a technical problem with their service which needs to be fixed, or the service is simply not suitable for their location.
107. If this is the problem the Commission is seeking to address then the number of customers likely to fall within the definition is likely to be relatively small. We think this is a more legitimate approach.

Using a Proportion Of An Average As A Threshold Leads To Strange Outcomes

108. The threshold formula suggested by the Commission is theoretically flawed.
109. If all the customers whose performance is below the threshold leave then this increases the average speed of those left (without actually increasing anyone's connection speed) which in turn leads to the threshold being raised, capturing a new set of customers. This creates a spiral of higher thresholds and more customers eligible to leave. Mathematically over time this will converge on a higher average number with a higher minimum threshold. The time it takes will depend on the distribution of data and the movement of customers.
110. This is particularly significant where the proportion of the customer base captured by the threshold is large.
111. By way of example, using a sample our 4G customer speed distributions then the 70% threshold count could result in up to []SPKCI of our current customer base being eligible for an exit right.

- d. The current 24hr average download speed during September was []SPKCI. A threshold of 70% would be []SPKCI which would capture []SPKCI of our customers.
- e. If all those customer left our average would increase to []SPKCI (without any change being experienced by any of the remaining customers) and the new threshold is []SPKCI. []SPKCI of our base would now be captured.
- f. If everyone with an average of less than []SPKCI left this would increase the average to []SPKCI and give a new threshold of []SPKCI, and so on.
- g. This would continue until the new average is []SPKCI for 4G wireless with a threshold of []SPKCI. []SPKCI of our current customer base would have left and the average speed would be more than double.
- h. If we were to reflect the threshold in our coverage maps then there would be hardly any 4G wireless services available!

112. The effect is even stronger for 4G upload speeds which converges on around []SPKCI of the base being able to exit.

113. The threshold approach results in a system where the vast majority of fixed 4G wireless customers would be eligible to leave their broadband service for unexpected performance. However the 'cause' of the unexpected performance is a misunderstanding of an average speed number (as required by the Guidelines) rather than anything technically being wrong with their service.

114. The table below summarises this based on the 70% threshold and our actual customer 24 average speeds. We have also modelled a 50% threshold and a 15% threshold using our internal SamKnows test data.

115. Note that this data is using 24 hours average speeds (rather than peak time speeds) and uses the average from the data set tested rather than the MBNZ average for consistency.

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70% Threshold	Initial Average speed (Mbps)	Threshold at 70% (Mbps)	% of base below the threshold	Final Converged Average (Mbps)	Final Converged Threshold (Mbps)	% of base below the converged threshold
4G download						
4G upload						
5G download						
5G upload						

50% Threshold	Initial Average speed (Mbps)	Threshold at 50% (Mbps)	% of base below the threshold	Final Converged Average (Mbps)	Final Converged Threshold (Mbps)	% of base below the converged threshold
4G download						
4G upload						
5G download						
5G upload						

15% Threshold	Initial Average speed (Mbps)	Threshold at 15% (Mbps)	% of base below the threshold	Final Converged Average (Mbps)	Final Converged Threshold (Mbps)	% of base below the converged threshold
4G download						
4G upload						
5G download						
5G upload						

]SPKCI

116. The data shows that the higher the threshold percentage then the more customers fall below the initial threshold. This in turn creates a more dramatic change to the average, with consequential impact on the threshold.
117. Ultimately this can lead to the majority of customers being eligible to leave their service because their performance is below what the Commission believes the customer might expect when they see an average in marketing.
118. The smaller threshold of 15% focusses more on the outliers. This still represents []SPKCI of 4G customers and []SPKCI of 5G customers.

Technologies are different:

119. The Commission’s September MBNZ report⁶ publishes both technology speeds and the spread of speeds achieved by the customers.
- a. 49% of 4G fixed wireless MBNZ volunteers in non-fibre areas meet the 70% threshold.
 - i. Figure 14 shows peak time average speed is 37Mbps.
 - ii. 70% of the average speed is 25Mbps.
 - iii. Figure 20 shows that 49% of MBNZ volunteers saw a peak hours speed of less than 25Mbps.

⁶ https://comcom.govt.nz/_data/assets/pdf_file/0019/362521/Measuring-Broadband-New-Zealand-Report-21-September-2024.pdf

- b. No Fibre 300 MBNZ volunteers meet the 70% threshold:
 - i. Figure 14 shows the peak time average speed is 313Mbps.
 - ii. 70% of this average is 219Mbps.
 - iii. Figure 19 shows 0% MBNZ volunteers saw less than 250Mbps at peak times.

120. The spread of customers is consistent with analysis of our own SamKnows data measured during the month of September 2024 of a representative sample of 5G customers. We see the top []SPKCI of customers achieve average speeds above []SPKCI and only our bottom []SPKCI have an average below []SPKCI.

121. When we look at a sample of fibre max customers (which currently has an MBNZ average of []SPKCI) the spread is much tighter: Only []SPKCI get less than 900Mbps and []SPKCI get faster than []SPKCI as the spread is considerably tighter. Our SamKnows data shows no fibre customers get less than the 70% threshold.

122. This can be further illustrated by looking at the impact of the 70% threshold for fibre using our September data. None of the fibre max customers we sampled had speeds below either the download or upload threshold.

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70% Threshold	Initial Average speed (Mbps)	Threshold at 15% (Mbps)	% of base below the threshold	Final Average (Mbps)	Final Threshold (Mbps)	% of base below the threshold
Fibre Max download						
Fibre Max upload						

]SPKCI

The Thresholds Proposed Do Not Reflect Current Best Practice

123. Spark’s current threshold (which is a flexible guide for our reps rather than an absolute rule) are considerably different from what the Commission is proposing. These are absolute guide thresholds rather than representing proportions of an average:

	Spark's current threshold (Mbps)	ComCom proposed thresholds based on September 2024 MBNZ report (Mbps)
Wireless 4G		45.5
Wireless 5G		231.7
Fibre 50		35
Fibre 300		217.7
Fibre Max		637.7

ADSL		5
VDSL		22.5

- 124. We use slightly higher absolute Mbps thresholds for fibre than proposed by the Guidelines as a guide for performance due to the lower level of variability from the average.
- 125. We do not understand why the Commission has chosen 70% for fixed wireless and we would be surprised if any fixed wireless provider would have indicative performance thresholds which equate to anything like these numbers.

The Commission Risks Favouring Fibre Technology Over Fixed Wireless

- 126. The impact of the proposal is to clearly favour technologies with a lower standard deviation from the mean such as fibre above fixed wireless and satellite services.
- 127. Zero percent of fibre customers would be caught by the proposed thresholds while roughly 40 to 50% of 5G and 4G fixed wireless would fall below the thresholds and consequently be able to exit their service without penalty.
- 128. While we don't expect this proportion of customers will take advantage of their right to leave, the fact that they have the right to leave without penalty adds an overhead to wireless services and needs to be factored into the RSPs' business plans.
- 129. We do not believe this to be the case, but if the Commission believes that industry should not be selling fixed wireless services, or restricting where these are available then it should be clear about this so industry knows where to invest.
- 130. Fixed wireless has an important role in the broadband eco-system and a regulatory intervention which limits the availability of fixed wireless needs to take account of the impact on price sensitive customers and those who do want or need fibre services.

An Alternative Approach Involving Percentiles And Ranges

- 131. The Commission's approach seems to be based on the assumption that customers are being misled by RSPs using an average being used to describe broadband speeds for fixed wireless (despite this being the Commerce Commission's remedy to prevent RSPs talking about 'up to' speeds). We are not aware of high levels of confusion, and we would like to see research from the Commission that shows an issue, together with the level of misunderstanding.
- 132. If customers are confused by what an average means then the first step should be to look at the wording used by providers to describe the average to see if this can be improved. Introducing thresholds that provide incentives for up to half of the customers on a service is not a proportionate approach.

- 133. However, if the Commission is looking at creating a regime where RSPs must show their minimum thresholds for customer on the plan, then RSPs should be able to provide more guidance for customer than just the average.
- 134. For example, an RSPs should be able to show a range for its service, using percentiles. Eg fixed wireless could be shown using 20% and 80% percentiles as a range and a fixed threshold as a minimum speed Guarantee⁷:

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	Download percentiles range (Mbps)	Upload percentiles range (Mbps)	Minimum Speed Guarantee (download Mbps)
5G fixed wireless			
4G fixed wireless			
Fibre Max			

]SPKCI

- 135. This would be too much information to be mandated to include in marketing but could be linked from plan cards and shown on the providers support pages on their website alongside information on how to raised complaints about broadband performance.

Information Overload

- 136. We still remain concerned about the amount of information that we are required to prominently display to consumers. Overwhelming people with too many details can result in consumers glossing over or ignoring crucial information, which compromises their ability to make informed decisions.
- 137. Important warnings or instructions can be missed and the well-intentioned requirement of providing prominent information can ironically undermine its purpose by bombarding consumers with more information than they can effectively process.
- 138. The risk is customers will simply start ignoring our messaging and only those really motivated will read the details. Those motivated customers would have sought out the information they required anyway so there's no net benefit.
- 139. As part of our 111 Contact Code annual compliance validation we have provided the Commission with a sample audio file which contains the information we are required to provide to consumers as part of the sales process.
- 140. This audio file is over three minutes long

⁷ This examples | figures are based on September 24x7 averages

141. We have tried to condense the information as much as possible to make it easier for consumers to understand, but we question how much information is actually understood and retained by customers.
142. The more information the Commission asks us to prominently display on our marketing and website information, the more we overwhelm customers, with the result that they end up ignoring important information. We suspect we are already in a position where additional information is having negative effect on consumer understanding.
143. We encourage the Commission to test comprehension of information provided as part of marketing and the sale process. If this reveals problems which are caused by the volume of information then the Commission should prioritise what information we need to provide.
144. It is important that we make the right information about our products available to customers, but we would argue that not all of it needs to be provided up front to every customer. We encourage the Commission to review what information we are required to provide to customers across all its Codes and Guidelines to prioritise what information we need to provide to customers at which parts of the customer journey.
145. We also encourage the Commission to test the proposed changes to the Guidelines with consumers to see if they will actually benefit from the additional information. Consumers will always say they want more information without realising the consequences for intelligibility of the services they are looking to purchase. We recommend mocked up examples are tested to see how effective they are at conveying the volume of information required to be provided to consumers.
146. If the Commission thinks it has a better way of presenting the information to consumers then we are open to further discussion.

Sales Incentives

147. The Commission is proposing a new principle on differential sales incentive structures. This is a significant proposal which has not previously been consulted with industry.
148. The explanatory comments detail the policies and training which RSPs should be put in place. These are particularly prescriptive and presented without any prior consultation with industry. The Commission is increasingly moving to detailed product design.
149. Spark already has processes in place to prevent, and remedy, misselling if these were to occur. We are not aware of any evidence of incentive structures driving systemic issues for consumers.

150. We ask that the Commission consults further on these proposals.

Telling consumers what technology options are available at their address

151. Outcome 1, Principle (b) proposes that RSPs should tell customers what technologies options are available at their address from that RSP when joining or switching services or technologies. We do not think this will always be helpful.
152. There are situations where we might not want to share with a customer all of the options that are available. For example, we might not want to share that copper services are available if these are being withdrawn. Or if the customer has made it clear they want a fibre service then we should not have to inform them we also have wireless services available. As we have set out above, RSPs already have to provide consumers with considerable information. Adding further information risks overloading those consumers and confusing, rather than assisting them.
153. Rather than requiring RSPs to tell the customer about all technology options which are available at their address, we instead suggest it is acceptable to inform customers of where to find this information by referring them to the RSP's address checker. This will provide a more comprehensive information on the services available.
- 154.

Presenting options in a 'consistent way'

155. The Commission proposes that RSPs should arrange and present their services in a consistent way (such as lowest price to highest price). This is another example of the Commission stepping unnecessarily into detailed product design without clear evidence of consumer harm or a competition problem.
156. RSPs should be free to present information how they like. If a customer is looking to specifically buy a fibre service then there is little point listing all our products in order of price when these plans span different technologies including ADSL, VDSL, 4G wireless, 5G wireless, and fibre.
157. Similarly there is a large segment of the market who do not need fibre services and for whom fixed wireless is more suitable. We should not be required to prominently display high speed and more expensive fibre services to these customers to avoid overselling them solutions.
158. Many retailers organise their products based on their 'best sellers', with other options shown around them. The order will be 'consistent' in that they are based on common rules so they are shown the same way each time. They just won't necessarily be from low to high price.

159. If the Commission has examples of current marketing practices which are misleading customers it should provide those and seek consultation from the sector on the most efficient way to address them. It is unlikely that forcing all RSPs to display broadband products in exactly the same way will be either efficient, or consistent with the long-term interests of end-users.

Geographic Limitations

160. All current broadband services are subject to geographic limitations. Fibre, wireless and copper services are only available in certain locations. This is why RSPs have coverage maps and require customers to enter their address before purchasing products.
161. We are unsure of the concern the Commission is looking to address so we ask the Commission provide examples of current marketing practices which are misleading customers.

Role of examples in guidelines and relationship to TCF Codes

162. The Guidelines contain Outcomes and Principles. The Principles contain examples. The examples are useful where they provide an implementation of the principles but in some cases they appear to introduce new requirements. We assume that where examples are in conflict with, or go further than the principles then the examples can be ignored.

Timeframes For Changes To Implementation

163. As noted throughout this submission, the changes proposed by the Commission are significant and will require changes to RSPs processes. The Commission proposes 6 months to implement the changes and intend to publish their final guidelines in December.
164. This does not give enough time for industry to implement their proposals directly, or via TCF Codes.

Twelve Months Usage Information

165. Spark provides information to its broadband customers on data usage, including for customers on unlimited data plans.
166. We question whether there is value in providing annual summaries for customers where information is readily available to review online at any time.

167. RSPs should have the option of providing a minimum of either 12 months usage data or sending an annual reminder. Both are not needed.

Mandatory Use Of MBNZ Numbers In Marketing

168. The Commission is suggesting that providers should always include MBNZ speed numbers in their marketing. This considerably extends the current regime.
169. Currently providers can decide not to include broadband speeds in their marketing. This can be because of space limitations or because the focus of the marketing is on non-speed elements. The customer will always see the speed information when they go through the sales process so it will not escape the customer's attention.
170. We propose this requirement is amended to say that if the customer uses speeds on one technology they are required to use it similarly for other technologies featured in the same piece of marketing.
171. We also question the requirement to include MBNZ numbers in marketing. There are times when an RSP may wish to use a different (lower) number:
172. Where the RSP is marketing a national service but MBNZ report fibre and non-fibre figures, the RSP should be able to select the lower of the two figures in national marketing.
173. Where a service is 'overclocked' and there is not an MBNZ speed then the RSPs should be able to use a speed it knows will be achievable by customers. This is consistent with the TCF Code and would allow an RSP to refer to a Fibre 50 service as 50Mbps. A Fibre50 service will offer speeds in excess of 50Mbps because of how it is technically configured so we have a high expectation the average speed will be higher than 50Mbps (as demonstrated by the Fibre 300 average).
174. As long as the numbers used by the RSP are LOWER than the relevant MBNZ number then there should not be a problem as consumers are not being overpromised on average performance.