

Draft Broadband Marketing Guidelines 2024

Commerce Commission
2degrees Submission

November 2024

PUBLIC





1 Introduction

Thank you for the opportunity to comment on the Commerce Commission *'Draft Broadband Marketing Guidelines 2024'* – proposed changes to the Commission's 2021 'MAS' Guidelines (**Draft 2024 Guidelines**).

As a consumer and competition champion 2degrees strives to provide our customers with great telecommunications services, and we support Kiwis making an appropriately informed choice regarding their services - including based on fair marketing - consistent with our purpose of 'Fighting for Fair'.

Reflecting this, we support the Commission's overall objectives of the MAS Guidelines and Draft 2024 Guidelines, and we're a signatory to the existing TCF 'Broadband Marketing' and 'Marketing of Alternative Services to Consumers during Copper and PSTN Transition' Codes, which help bring these guidelines to life.

We are pleased that the Commission's review of the MAS Guidelines concluded these have improved marketing conduct and outcomes for consumers.

We also agree that there are some opportunities for clarification and improvement of the guidelines, including by updating the title of the guidelines, which we are aware some (non-TCF) operators have found confusing.

Our key concerns regarding the Commission's proposed changes are that:

- Marketing rules are fairly applied to all operators that market telecommunications services to end users. This includes wholesale operators that directly market to retail end users. We note any provider who markets broadband is able to sign up to the TCF Codes, including wholesalers and non-TCF members, and we would support the Commission encouraging this, including given overt consumer marketing by wholesalers.
- Any changes to the guidelines must not undermine market competition, which is a key aspect of the Commission's wider work:
 - We note improving specific 'retail service quality' aspects the Commission expects to be implemented, and the wider impacts on market competition, should not be considered in silos.
 - Relatedly, overly prescriptive regulation undermines market competition and innovation. Given that we compete with other operators, including through marketing, we are keen to ensure any changes to the Commission's guidelines are not unnecessary or unintendedly restricting the ability for operators to competitively market in ways that differentiate themselves, are innovative and improve consumer experience.



- Any changes are proportionate and evidence-based, recognising that unnecessary changes add costs to operators and ultimately consumers, as well as divert resources from other customer-friendly and competitive initiatives. In this respect the Commission should consider whether there is evidence of issues (such as complaints) to justify additional regulatory guidance, and/or whether alternative options are appropriate.
- Any RSQ changes are appropriately considered in their wider market context – which includes not only the competitive marketplace but relevant legislation (including the Fair Trading Act) and multiple other changes the Commission has already made or plans to make (for example, regarding product disclosure).
- Changes are practical and implementable. Operators must be able to realistically implement any proposed changes, across all relevant services/technologies, and any proposed implementation timeframes must be reasonable. We note some of the proposed changes in the guidelines are not simply clarifications for operators and may involve significant changes, alongside other workstreams already in place.

We are particularly concerned with draft proposals that restrict and prescribe competitive marketing and with the proposed ‘materiality thresholds’, which we consider would impose significant and unjustified costs on operators, and unintendedly harm competition and consumer experiences.

We appreciate that these are only draft proposals and that the purpose of this consultation is to enable feedback and update the draft proposals in consideration of that feedback. We welcome the Commission’s willingness to engage further on these issues. To this end, we are supportive of the TCF facilitation of a workshop or meeting to further this work, noting that once the Draft 2024 Guidelines are finalised, we expect the TCF to review the relevant codes in light of both the final guidelines and other issues.

Our submission should be considered complementary to the TCF submission, which 2degrees have inputted to and support.

In the remainder of this response 2degrees set out more detailed comments on the Commission’s key proposed changes.

2 2degrees support the Commission’s updating of the guidelines

2degrees agree the name of the ‘MAS’ guidelines was unclear for some parties, who did not consider it applied due to its reference to copper/PSTN services they did not offer, and we welcome renaming them to the ‘Broadband Marketing Guidelines’, which better reflects the scope of the guidelines and encourages a level playing field.



This approach also better aligns with the TCF's approach, that has a separate TCF Broadband Marketing Code and the TCF Copper and PSTN Transition Code (of which 2degrees are signatory to both).

2degrees also support the refining of explanatory comments within the guidelines, noting that these should not be overly prescriptive or go further than the overarching principle. The explanatory comments should also recognise that the principle applies to a range of scenarios and technologies and we encourage the Commission to ensure explanatory note examples reflect this.

3 Marketing rules should apply to all marketing to end users, including LFCS

We note that all operators, including wholesalers, are able to sign up to TCF Codes, including codes that include 'Retail Service Quality' aspects. Some wholesalers are clearly marketing specific technologies to end-users but are not currently signed up to the TCF Code(s).

This includes:

- Radio, TV and billboard advertising, and
- Direct emails to end-users.

This is mass-market, often 'national' marketing to a very large number of retail NZ consumers. To support a level playing field and not undermine market competition and the guidelines the Commission should prioritise addressing this issue. We note MBIE is currently undertaking a review of the Telecommunications Act and if the Commission has legislative concerns we encourage the Commission to continue to engage with MBIE on this matter. We also consider the Commission could encourage wholesalers to sign the TCF Code – which is not limited by Part 7 of the Telecommunications Act in any case.

While impacting a much smaller number of consumers, similarly we also encourage the Commission to encourage non-TCF members to the sign up to the relevant TCF codes (as well as join the TCF and TDRS). Both the Commission and TCF reviews found high compliance by TCF RSP members with the guidelines, which the TCF has supported with the development of the TCF Code. Operators can also benefit from further guidance TCF Codes provide on operationalising the principles of the guidelines.



4 Interventions should not be overly prescriptive and must be evidence-based

Overly prescriptive regulation stifles competition and regulation. We are concerned that some of the Commission's draft proposed changes actually represent significant and prescriptive change, that unintendedly undermines competition and our ability to innovate.

For example:

- **New Principle (Part 2, Outcome 1, Principle (b))**, could be construed as requiring RSPs to tell consumers all technology options available at their address in all scenarios - even when these are entirely inappropriate based on the information the customer has provided. This would result in a poor customer experience, and stifles innovation in helping consumer identify plans that are right for them (for example, based on more customer friendly personas, rather than technologies). 2degrees does support ensuring information on all technologies is available should the consumer want to view these – however the guidelines must cover all scenarios and this will be inappropriate in some circumstances. For example, offering Hyperfibre 4 to a low data user only requiring internet for emails and web browsing.
- **New principle (Part 2, Outcome 1, Principle (c))**, which suggests businesses must market all the different services they offer in 'consistent' ways (even though other competing businesses, which might not be constrained by the same product sets, could adopt different marketing. While we understand the intent, this proposal appears to undermine competitive marketing. Further, not all services are the same to market consistently.
- **New principle (Part 2, Outcome 2, Principle (b))**, which proposes setting materiality thresholds linked to 'average' MBNZ speeds, which impacts different technologies differently. Importantly, 'average' MBNZ speeds are proposed to be required by the Commission, but these are not marketed as guaranteed or 'expected' speeds.

We provide more detailed comments on each of these principles in section 5. We acknowledge the draft nature of the above proposed principles: in some cases we consider the objective of the proposed requirements will be better achieved through alternative means and less prescription, and we support amendments and future engagement on these.

In addition, and consistent with regulatory best practice and our long-held position, 2degrees supports any relevant regulatory intervention and additional prescription the Commission proposes to finalise in its guidelines:

- being based on real market evidence of an issue,
- being proportionate and targeted to the issue identified,



- with consideration of pros and cons of different solutions (including costs and benefits), and
- avoiding competitive harm, (including unintended regulatory harm).

This necessarily includes consideration of other legislative, regulatory and industry consumer protections already in place.

5 Detailed comments on definitions and principles

The following table sets out more detailed comments on the Commission’s key proposed changes.

| Issue / Principle | 2degrees Comment |
|--|---|
| New Definitions | <ul style="list-style-type: none"> • Broadband – The Commission has proposed to define ‘broadband’ in the draft guidelines as “a network service or connection providing “always on” access to the Internet and high-speed connectivity”. 2degrees are not clear whether this captures all relevant services as intended, and do not consider deprioritized services can be captured by the guidelines, given guideline requirements. We welcome further engagement on this matter , which may be appropriately discussed with the TCF. • Personas - The Commission has proposed to define ‘personas’ under the new Draft 2024 Guidelines differently to under the existing TCF Broadband Marketing Code. 2degrees would support use of the existing definition that the TCF and most RSPs already apply - we are not aware of issues with this definition that would justify a different approach. |
| <p>(NEW PRINCIPLE)</p> <p>RSPs should tell consumers what technology options are available at their address from that RSP when joining or switching Broadband services or technologies. (Part 2, outcome 1, principle (b))</p> | <ul style="list-style-type: none"> • 2degrees supports consumers having access to the broadband options at their address (and we currently provide this through our address checker)¹. • However, the current wording of this draft principle is unclear and it could be interpreted that RSPs must convey to consumers all technology options available to them in all cases, even when this would be a poor customer experience. For example: <ul style="list-style-type: none"> – If a customer calls up for a Hyperfibre 4 service and tells us they are a heavy internet user, it would be inappropriate and a poor customer experience to tell the customer about 4G FWA products. – If a customer tells us they are a low data user and only uses internet for web browsing and emails, it is inappropriate and a poor customer experience to suggest they consider Hyperfibre 4 services. |

¹ Given the copper network is being withdrawn we may not present copper, e.g. where fibre is available.



| Issue / Principle | 2degrees Comment |
|--|--|
| | <p>Both of the above examples would demonstrate ‘not listening to the customer’, a poor customer experience and potentially ‘mis-selling’ - all things we actively strive to avoid.</p> <ul style="list-style-type: none"> • 2degrees support helping consumers make the right broadband choice for them. We note customers can be overwhelmed with choice in broadband services and many need help in choosing the right product. • While we understand the positive intent of the Commission’s draft proposal, we consider it is focused on ‘today’s’ marketing and technology-focussed, when in reality many customers do not focus on the technology itself when making a decision - but rather what they can do with it and whether it meets their needs. It’s important the Commission do not prevent alternative, innovative and more consumer-friendly approaches to help consumers choose the right plan, for example, based on personas: customers should be able to get appropriately filtered results as long as they also have ready access to information on other services if they want to. • As such we support this principle being redrafted to ensure this information on all services/technologies is readily accessible to the consumer, if the consumer would like to access this. This is also more in line with a level playing field – operators with a more limited product set would be less constrained in their marketing / including the simplicity of their marketing for consumers. |
| <p>(NEW PRINCIPLE) RSPs should present the Broadband services they offer in a consistent way to enable effective comparison and choice by consumers. (Part 2, outcome 1, principle (c))</p> | <ul style="list-style-type: none"> • 2degrees is concerned to ensure this principle is not overly prescriptive and does not undermine competition and innovation. It can be appropriate for a business to market different services in different ways, for example due to different target markets, different competitors (that might not have similar complaints) and different product/service characteristics (e.g this could be regarding the hardware upfront, BYO devices, installation requirements, etc). • Importantly, 2degrees already produces offer summaries that are designed, including following Commission guidance, to support consumer’s easy comparison between products (with consistent formatting and ordering). This is also a requirement in the TCF Broadband Product Disclosure Code. |
| <p>(NEW PRINCIPLE) Where a Broadband service is only available in limited geographical areas, this limitation should be stated prominently in any marketing outside</p> | <ul style="list-style-type: none"> • While we understand the intent of this principle we are concerned to ensure that the principle is practicably implementable in all national advertising by operators. • We note that national marketing campaigns are standardized and we only promote products nationally if they are available for most of NZ consumers. • The TCF Broadband marketing code already requires availability limitations to be disclaimed in marketing and we support maintaining this existing wording. |



| Issue / Principle | 2degrees Comment |
|--|--|
| <p>the relevant areas, particularly in national marketing. (Part 2, outcome 1, principle (d))</p> | <ul style="list-style-type: none"> Any wording the Commission adopts as a ‘principle’ in its guidelines should ensure proportionality. For example, depending on the context and interpretation, requiring ‘<i>prominent</i>’ disclaimers in all national marketing may not be reasonable or appropriate, for example when it is not relevant to the vast majority of consumers. |
| <p>(NEW PRINCIPLE) RSPs with differential sales incentive structures should have policies addressing the risk of mis-selling and processes for remedying any mis-selling that occurs. (Part 2, outcome 1, principle (h))</p> | <ul style="list-style-type: none"> We are not clear that there is evidence of a problem, nor that it is appropriate for the Commission to influence internal sales incentive policies, and note that RSP services are already subject to consumer protections such as under the Fair Trading Act and applicable ‘exit rights’. We further note that while the Commission’s explanatory comments focus on mis-selling wireless broadband over fibre, potential mis-selling could be selling a more expensive hyperfibre plan instead of a lower speed fibre plan, or FWA also. If the Commission proceeds with this principle, the Commission should review its explanatory comments to ensure they do not undermine competition from multiple technologies and that they provide a balance of examples. |
| <p>(NEW PRINCIPLE) Any modem supplied by an RSP as part of a marketed plan should be capable of delivering the marketed speed. (Part 2, outcome 1, principle (j))</p> | <ul style="list-style-type: none"> 2degrees support this principle, which is already a requirement in the TCF Broadband Marketing Code to which we are a signatory. |
| <p>(NEW PRINCIPLE) 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</p> | <ul style="list-style-type: none"> While 2degrees supports transparency for consumers, we are not clear that 12 months usage and spend history for fixed broadband is appropriately prescribed by the Commission and we would support further analysis of the market issue the Commission is seeking to address (which was completed before prescribing similar requirements on the mobile market) before such ‘regulatory guidance’ is provided. We note 2degrees customers can already view 6 months of broadband usage and spend (bill) history via their broadband app, and on our self-care portal, which we have made available on a commercial basis (no regulatory guidance required). [C-I-C |



| Issue / Principle | 2degrees Comment |
|---|---|
| <p>details over a minimum period of 12 months. (Part 2, outcome 1, principle (n))</p> | <p style="text-align: right;">1</p> |
| <p><i>(NEW PRINCIPLE) 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. Part 2, outcome 1, principle (p)</i></p> | <ul style="list-style-type: none"> • The current requirement is to refer to MBNZ speeds where numerical speed indications are used. 2degrees currently use numerical speed indications for fibre and copper, but not fixed wireless services. • While we understand the intention of this change, and can provide a caveated number in future if required, we note there are concerns with using the MBNZ average figure “so that consumers understand what they can expect before making their purchasing decision” for fixed wireless services. • The Commission will be aware, including from MBNZ reports, that fixed wireless services have larger standard deviations of speed compared to fibre services, and that - by its very nature - many consumers will not receive the ‘average’ speed: some will be higher and some will be lower. The Commission should therefore not consider the MBNZ average speed to reflect a particular individual consumer expectation. While 2degrees can shift to display average speeds, and look at alternative testing methodologies, we will be clear in our marketing that this ‘average’ should not be considered a speed guarantee and that there will be unders and overs. If the Commission wishes to have a speed indication for consumers, then it should consider including a range – rather than just an average – number more appropriate. This also links to the merits of the materiality threshold proposal discussed below. • We also note: <ul style="list-style-type: none"> – MBNZ does not yet report on either 4G or 5G 2degrees services, or 2degrees hyperfibre services. |



| Issue / Principle | 2degrees Comment |
|--|--|
| | <ul style="list-style-type: none"> As noted in the TCF submission, which we have input into, the TCF Code provides clear and appropriate guidance on how the use of numerical speed indicators should be used, if a provider chooses to use them: Under the TCF Code, RSPs have a degree of flexibility to use numbers other than the specific MBNZ published averages. RSPs can choose to advertise numbers which are less than the MBNZ averages, and in some cases are able to show expected speeds where the fibre inputs are overclocked. |
| <p>Outcome 2: Consumers should be able to exit a Broadband Service that does not meet expected requirements (Part 2, outcome 2, principle (a))</p> <p>A broadband service will be deemed to materially fail if it more often than not fails to meet the following performance levels or when an RSP otherwise agrees it has materially failed:</p> <ul style="list-style-type: none"> Fibre: consistently less than 70% of average MBNZ speeds DSL: consistently less than 50% of average MBNZ speeds HFC: 70% Wireless: 70% Satellite: 70% | <ul style="list-style-type: none"> 2degrees wants its customers to be happy. Consistent with this, we offer network guarantees, exit rights and work with customers on case-by-case basis where issues arise. While we understand the intent, and linked to the comments above, 2degrees has concerns with the Commission’s proposed materiality thresholds, which we are concerned are inappropriate and require further discussion. We are not clear that there is an issue with the current processes requiring further regulatory intervention. The Commission appears to be requiring RSPs to advertise ‘average’ speeds (rather than, for example, a range) - which won’t represent the speeds of a significant number of consumers and is not guaranteed - and then linking a ‘materially fail’ threshold to this number, implying customers are receiving a materially failing service, if they don’t receive a certain percentage of the average (peak) speed. For certain technologies, given standard deviations, this could be a very large number of consumers. As set out in the TCF submission, RSPs have carried out some initial analysis using MBNZ report data to consider the implications of the proposed thresholds presented in this principle, using industry 4G FWA as an example. This initial analysis indicates that 49% of 4G fixed wireless consumers tested would ‘fail’ the proposed 70% threshold, and demonstrates that in practice, we don’t think this is an appropriate approach to quantifying material failure for consumers (many of which may not have an alternative choice to FWA services). The use of this threshold also suggests that a large number of 4G consumers are unhappy with their service, which is patently not the case. We also note that many consumers focus on what they are able to do with plans, not what speeds they get. 2degrees support further work to: <ul style="list-style-type: none"> Understand the size and scope of the issue the Commission is seeking to address. This includes what is not working with the current process. Consumers are already able to move to a different service, or exit their service, without penalty, if the selected service materially |



| Issue / Principle | 2degrees Comment |
|---|--|
| | <p>fails to meet expected requirements and this cannot be remedied within 30 calendar days of a customer complaint.</p> <ul style="list-style-type: none"> – Identify alternative options that may address any issue identified, for example this could be a minimum speed, better understanding of case by case assessment and existing remedies and/or clearer policies for assessment. – Assess the pros and of the different approaches, including costs and benefits and consideration of how this could be implemented at a practical level across different technologies equitably. <ul style="list-style-type: none"> • We support the TCF facilitating further engagement with the Commission on this issue. |
| <p>(NEW PRINCIPLE) RSPs should provide consumers with clear information on how to raise and resolve issues in the transition away from copper (Part 3, outcome 3, principle (a) and (b))</p> | <ul style="list-style-type: none"> • 2degrees support the addition of this new principle; these are already covered in the Section K of the TCF Copper and PSTN Transition Code. |