Submission on review of the MAS Guidelines

13 November 2024

CHORUS

Introduction

1. Chorus welcomes the Commerce Commission's (**Commission**) review of the *Marketing alternative telecommunications services during the transition away from copper Guidelines* (**Guidelines**). We support most of the Commission's proposals. Our submission aims to assist the Commission to ensure changes target and are proportionate to addressing current retail service quality (**RSQ**) issues in the market.

2. This submission does not contain any confidential information.

The RSQ issue

3. It is critical that consumers can make meaningful comparisons and informed decisions about their broadband service. Our recommendations focus on the Commission's ability to enable informed consumer choice by addressing misleading and aggressive marketing practices.

4. Mobile network operators (**MNOs**) are rapidly increasing their 5G fixed wireless access (**FWA**) market share using sales tactics that omit key information, putting consumers at risk of being sold services that don't meet their needs. MNOs leverage the lack of regulatory oversight of their services to prioritise selling FWA services over other broadband services, to the detriment of consumers who are unable to make price-quality trade-offs. Consumer harm will likely increase if the Commission doesn't address this as a matter of urgency through its RSQ framework and Guidelines update.

5. When the Guidelines were issued in 2021, the 5G mobile network rollout was in a very early stage.[1] FWA connections (at that time limited to 4G services) made up approximately ~15% of all broadband connections.[2] By 2023, that grew to ~19%[3] and 5G networks had expanded to cover 26.8% of the population.[4] New Zealand ranked fourth in the OECD for the number of FWA connections per 100 inhabitants and had the third highest penetration of FWA services.[5]

6. MNOs continue to expand their 5G networks and at least one plans to make 5G ubiquitous in urban locations within the next two years.[6]

7. The competitiveness of fibre against unregulated alternatives, such as 5G FWA, is constrained by layers of regulation, while FWA providers enjoy commercial freedom. This creates incentives for FWA providers to obstruct consumer access to information about FWA services and not be transparent about the inherent limitations of FWA services.

8. The Guideline changes must address the current RSQ gap and stop MNOs from selling 5G FWA without providing upfront performance information and enable consumers to make an informed decision for their household. Unlike fibre which performs as it says "on the

[1] For example, Spark had rolled out 5G to only nine locations. Spark, *2021 Annual Report*, at page 12, published 2021, 2021 Annual Report 2021 FINAL.pdf.
[2] Commerce Commission, *2021 Annual Telecommunications Monitoring Report*, at page 5.
[3] Commerce Commission, *2023 Telecommunications Monitoring Report*, at page 9.
[4] Commerce Commission, *2023 Telecommunications Monitoring Report*, at page 141.
[5] Commerce Commission, *2023 Telecommunications Monitoring Report*, at page 51.
[6] Spark has now expanded its 5G network to 103 locations, two thirds of the way through its FY26 ambition to have 5G in all towns with a population greater than 1,500. Spark New Zealand, *FY24 Results Summary*, at page 6, published 2024, https://investors.sparknz.co.nz/FormBuilder/_Resource/_module/gXbeer80tkeL4nEaF-kwFA/FY24%20Results%20Summary%20FINAL.pdf.

tin", MNOs are selling 5G without disclosing the level of performance their services are likely to deliver – appealing to consumers solely based on price.

9. In other words, consumers can't complain when their service doesn't deliver what 5G FWA says "on the tin" because the "5G FWA tin" doesn't say anything. This must change for the Guidelines to deliver the intended outcomes.

10. As the Guidelines rely on Measuring Broadband New Zealand (**MBNZ**) reporting to substantiate retail marketing, the Commission must ensure that both the Guidelines and MBNZ evolve with the market and are recalibrated to improve RSQ to reflect the demands of consumers now and into the future.

11. If left unaddressed, consumers will be left with small print and disclaimers aimed at reducing MNO legal risk rather than providing clear upfront information about expected 5G FWA service performance.

Consumer transparency must improve

12. Ensuring the right RSQ settings is critical – absent other regulatory intervention – to ensure consumers benefit from healthy retail competition. Consumers are not receiving the right information at the right time to make an informed purchasing decision.

13. We **strongly support** the Commission updating the Guidelines and have identified additional changes to help ensure consumers are better served.

14. Importantly, the Guidelines must strike the right balance between ensuring consumer transparency and industry workability. The Commission must not inadvertently discourage or disincentivise retailers from entering the market or risk existing retailers exiting. Regulatory intervention should only be introduced or extended if the Commission is satisfied that intervention will deliver net benefits for consumers. [7] Our recommendations aim to strike this balance by directly targeting the key issues we see in the market relating to RSQ – namely how 5G FWA is being (mis)sold to consumers by MNOs.

15. The Commission should encourage further industry feedback on how to achieve the objectives of the Guidelines and how to implement them to ensure a workable and enduring solution.

16. **We recommend**:

    a) **MBNZ reporting keeps up with the market and reports across all MNO 5G FWA services**

        i. **Include all MNO 5G FWA services.** Consumers cannot make meaningful comparisons until all services are included. Consumers shopping for 5G FWA services only receive an indication of the level of service they can expect from that service if they purchase from Spark, and do not have a reliable way to know whether they can exit underperforming services. That is, they need to know the performance they can expect and what the price-quality trade-off is before they buy, and to then understand if their service is under-performing.

[7] See Treasury, *Government Expectations for Good Regulatory Practice* (April 2017) at Part A.

ii. **Accurately reflect the limitations and performance variability of 5G FWA.** 5G FWA performance cannot be accurately reported as an average. MBNZ reporting shows that ~50% of 5G FWA speed test results perform slower than the reported peak time speed.

Consumer understanding and transparency over the variability of 5G FWA service performance is important. When shopping and comparing bundles and offers, consumers need to know that fibre and 5G FWA are not comparable when it comes to service quality. The need for accurate MBNZ reporting is further supported by the analysis contained in **Appendix A**.

b) **Consumers receive the right information at the right time to make an informed choice**. The Guidelines must require:

i. **Prominent disclosure of key (MBNZ) performance metrics alongside price and cost information.** In addition to the Commission's proposal that RSPs should always disclose MBNZ speeds, consumers need prominent disclosure of upload speeds, and other metrics such as latency and/or disconnection rates.

Consistency across disclosure of quality information will help enable consumers to make meaningful comparisons between services at the start of their shopping journey and make price-quality trade-offs between options.

This is particularly important because (as we discuss in the section above and **Appendix A**) different technologies deliver fundamentally different performance.

ii. **Disclosure of address-specific performance information for services that are materially variable.** Consumers should have access to accurate, address-specific performance information for services - particularly where performance is highly variable. During the shopping journey, consumers are encouraged to use an address search tool to identify which broadband options are available at their address. However, there is no requirement to disclose the performance of the available options at an address level. This is a gap that should be addressed.

The Australian Competition and Consumer Commission (**ACCC**) already expects this disclosure at the point of sale.[8] For example, disclosure is expected where services in the end-user locality are congested and where other factors (including line of sight to a cell tower) will or will likely result in service limitations.

iii. **Proactive disclosure of any material service deterioration.** The Commission recognises that consumers need an industry-consistent materiality threshold to better ensure consumers can (and know when they can) exit a service without penalty. There is currently no reliable way for consumers to know whether their service performance meets that threshold.

Once onboarded, customers need access to information about actual, or likely, material deterioration in service. RSPs should have an obligation to disclose any such deterioration where it falls below set materiality thresholds, enabling the customer to consider whether they want to trigger an exit right in the event the deterioration cannot be resolved.

[8] Australian Competition and Consumer Commission, *Broadband Speed Claims – Industry Guidance*, at Principle 4, published 2020, https://www.accc.gov.au/system/files/CCS%20-%20BSC%20Guidance%20Review%20-%20Revised%20Industry%20Guidance%20-%20October%202022.pdf.

As the Commission has acknowledged,[9] 5G networks may be lightly loaded in the early stages of deployment, and peak speeds may appear high for early adopters, but may degrade as more users are added due to the shared nature of the networks (as is seen in 5G rollouts internationally). The onus should not be on consumers to identify and prove a material deterioration in performance of their service.

The ACCC expects disclosure of limitations or factors that will likely cap the speed at which the consumer's connection can operate (including current and anticipated network congestion).[10]

c) **Swift implementation and monitoring.** Consumer outcomes won't improve until the issues described above are addressed. It is critical the Commission makes these changes now, and requires compliance with the amended Guidelines before they are implemented.

17. We also recommend the Guidelines make it clear where appropriate, that that the principles do not apply to copper services. This reflects the purpose of the Guidelines, i.e., to ensure that consumers transitioning off copper-based services are able to make fully-informed decisions about what alternative (to copper) service is best for them.[11] It also reflects that copper connections continue to rapidly decline as consumers switch to better alternatives, copper stop sell in place, and the network is being retired within the decade.

18. Additional comments on proposed amendments to the Guidelines are contained in **Appendix B**.

[9] Commerce Commission, *Fibre fixed line access service deregulation review under section 210 of the Telecommunications Act: Reasonable grounds assessment of draft decision,* at page 46 paragraph 3.101, published 2024, https://comcom.govt.nz/__data/assets/pdf_file/0025/362149/Fibre-fixed-line-access-service-deregulation-draft-decision-27-August-2024-5242543.1.pdf referencing *'Are 5G Networks Meeting Consumers' Expectations?' Ookla Insights Articles, February 2023.*

[10] Australian Competition and Consumer Commission, *Broadband Speed Claims – Industry Guidance*, at Principle 4, published 2020, https://www.accc.gov.au/system/files/CCS%20-%20BSC%20Guidance%20Review%20-%20Revised%20Industry%20Guidance%20-%20October%202022.pdf.

[11] Commerce Commission, *Marketing alternative telecommunications services during the transition away from copper Guidelines*, 8 October 2021 at paragraph 2.

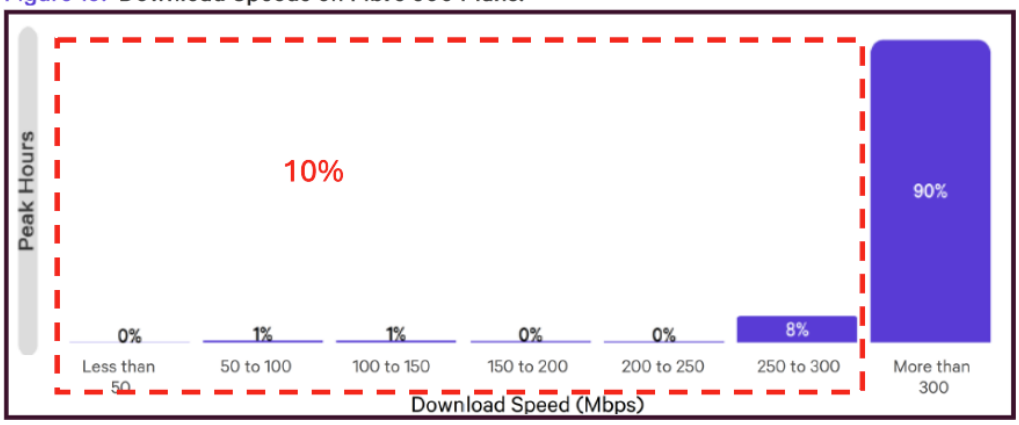
Appendix A: MBNZ reporting must reflect the limitations and performance variability of FWA

1. The success of the Guidelines in meeting their purpose depends on MBNZ reporting accurately reflecting what consumers will receive from a service.

2. When thinking about fibre broadband as a consumer "product", it is reasonable to use an "average MBNZ speed" metric as a descriptor of what the consumer should expect to get. Due to the physical nature of fibre technology that "average MBNZ speed" is very close to what everyone, everywhere will get at all times of day. However, MBNZ results show that the same cannot be said for FWA performance - FWA is a fundamentally different technology. Directly comparing FWA to fibre by using "average speed" is comparing "apples with oranges".

3. Two graphs help illustrate the inherent differences across the two technologies.[12] Below, you can see very little variation in fibre speeds received at a customer's premises. At least 90% of fibre 300 tests perform at the headline speed (300 Mbps), demonstrating the consistency and reliability of fibre.

Figure 19: Download Speeds on Fibre 300 Plans.

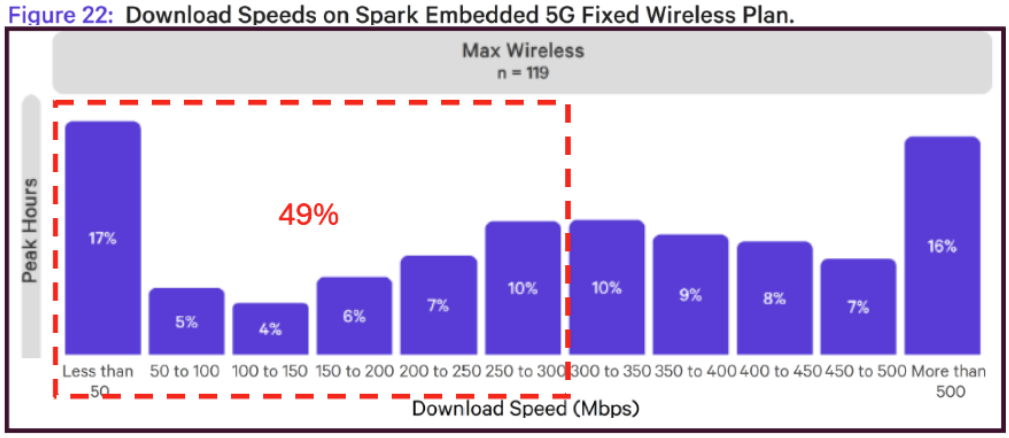


4. Given the narrow distribution and significant weighting of fibre speed tests results, the use of an average is appropriate to fairly represent the expected performance of fibre. In other words, consumers can expect to receive the performance advertised.

5. In contrast to fibre, the performance of 5G FWA shows that 49% of 5G FWA tests returned less than the advertised speed (331 Mbps):

[12] Commerce Commission, *Measuring Broadband New Zealand – Report 21,* September 2024 at Figures 19 and 22.

Figure 22: Download Speeds on Spark Embedded 5G Fixed Wireless Plan.



6. Given the 5G FWA tests result in a non-normal distribution, an average is not the most suitable metric to represent the performance of the technology and risks misleading consumers about the performance they can expect to receive from the service. This undermines Outcome 3, clause (d) of the Guidelines which expects RSPs to use likely actual peak time download and upload speeds in marketing "…so that consumers understand what they can expect before making their purchasing decision".

7. A better approach is to highlight to consumers that they *might* receive the peak average but will more likely see *variations* because of the nature of the wireless network and premises-by-premises variability based on factors, including location and distance from the cell tower etc. At a minimum, 5G FWA speeds should not solely rely on peak time download to set consumer expectations.

8. The effectiveness of the Guidelines hinges on the accuracy and efficacy of the MBNZ programme.

9. Securing an appropriate reporting metric for 5G FWA performance is also fundamental to the workability of the Commission's proposed materiality thresholds. As noted above, the wide distribution of 5G FWA test results shows that a third of 5G FWA tests 'materially failed' – they did not meet the proposed 70% threshold, meaning a significant number of customers could likely consider exercising their penalty-free exit right.

Appendix B: Chorus' response to the Commission's proposals

Proposal	Comment
RSPs should tell consumers what technology options are available at their address from that RSP when joining or switching Broadband services or technologies	We **support** this new principle and **recommend** that the performance information of each option is also made available at an address level for services that are materially variable.
RSPs should present the Broadband services they offer in a consistent way to enable effective comparison and choice by consumers	We **support** this.
RSPs with differential sales incentive structures should have policies addressing the risk of misselling and processes for remedying any misselling that occurs	We **support** principles that address the risk of misselling. However, the current proposal doesn't go far enough to prevent technology-biased sales practices. We **recommend** the Commission: • Amend the principle to clarify that sales incentives for outbound calling must be symmetrical. • Provide draft principles that can be implemented in policies across the industry to ensure consistency in approach. We note the Australian Communications and Media Authority (**ACMA**) has provided related feedback to the Communications Alliance to update the Telecommunications Consumer Protection Code to protect consumers from irresponsible selling at the point of sale.[13] • Clarifies that this principle applies only to RSPs that retail more than one broadband technology. We do not consider the proposed principle, as drafted, will have any meaningful effect on preventing (or reducing the risk of) misselling. This is because we expect many providers will already have policies addressing this issue (noting Fair Trading Act obligations, for example), or may otherwise interpret this principle widely with little-to-no practical effect on preventing or reducing the risk of misselling.
Any modem supplied by an RSP as part of a marketed plan should be capable of delivering the marketed speed	We **support** this principle and **recommend** it be expanded to require RSPs to provide simple, easy to understand information supporting consumers to receive the best in-home experience alongside the modem. For example, in-home experience is influenced by modem placement, setup and (if relevant) configuration, application and device use as well as the age and specifications of the modem. This information could be developed by the Commission in collaboration with the industry and an independent consumer-focused organisation. This will help to ensure consumers receive the best in-home experience from their chosen plan and service.
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	We **recommend** the principle is expanded to ensure that performance metrics accompany usage and spend information, in relation to the particular service. We **do not support** this principle as drafted because usage and spend information is only part of the key information consumers need to be able to make meaningful comparisons between services. Without disclosure of associated performance metrics, consumers will be unable to make price-quality tradeoffs.

[13] Australian Communications and Media Authority, *Telecommunications Consumer Protections (TCP) Code Review: May 2024 draft,* published 29 August 2024, ACMA-to-CEO-CA-re-TCP-Code-29-Aug-2024.pdf.

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	We **support** this principle. However, the success of this principle (and ultimately the Guidelines) requires accurate and reliable MBNZ reporting to enable consumers to know what they can expect from a service before purchasing it. We **recommend** this principle be expanded to ensure prominent disclosure of other key performance indicators including upload speeds, and other metrics such as latency and/or disconnection rates.
RSPs do not suggest MBNZ testing is underway unless that is actually the case	We **support** this principle.
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: • Fibre: consistently less than 70% of average MBNZ speeds • DSL: consistently less than 50% of average MBNZ speeds • HFC: consistently less than 70% of average MBNZ speeds • Wireless: consistently less than 70% of average MBNZ speeds where available • Satellite: consistently less than 70% of average MBNZ speeds where available	We **support** the implementation of a standardised materiality threshold to help consumers to know when their service has 'materially failed', enabling them to consider whether to exercise the existing penalty free exit right. However, it is critical that this is workable from a consumers' perspective – which requires consumers to know upfront (before purchase) what performance they can expect from a service, to know when (post-sale) it has materially failed, and to know how to raise this with their RSP. We also **recommend**: • The Guidelines clarify that the relevant speed is measured at the residential gateway (e.g. fibre ONT, and FWA modem). • The materiality threshold framework provides sufficient detail to avoid being 'gamed' and can be practically implemented by RSPs.
RSPs should provide information regarding materiality thresholds in a way that is transparent and easy to understand for consumers	We **support** this principle.