



TCF Submission to
The Commerce Commission on
Draft Broadband Marketing Guidelines
13 November 2024

A. Introduction

1. Thank you for the opportunity to provide feedback on the Commerce Commission’s draft Broadband Marketing Guidelines 2024 (the Guidelines). The Telecommunications Forum (TCF) values the Commerce Commission's (Commission) commitment to establishing clear, transparent guidelines that aim to enhance the accuracy and consistency of broadband marketing.
2. This submission is provided on behalf of the TCF, reflecting a collective industry position on the specific points and principles covered in this submission. The feedback contained herein represents alignment across members to support fair practices while ensuring the Guidelines remain practical and able to be operationalised. Members may provide their own submissions and include information on points that have not been covered by this TCF submission.
3. The TCF endorses the primary aims of the Guidelines—to promote transparency and accuracy in consumer-facing broadband information. These align with industry values on fair competition and consistent and accurate information to inform consumer choice.

B. General Comments

1. The TCF welcomes the Commission’s alignment to the TCF approach of separating the general broadband marketing principles from those that specifically focus on marketing broadband services when consumers are transitioning away from copper services. Clear division allows the industry to maintain broad marketing standards, with additional specific guidance to those RSPs who are transitioning customers off legacy technologies. Additionally, renaming the Guidelines to "Broadband Marketing Guidelines" reflects a clear focus on broadband services and alignment to the TCF Broadband Marketing Code.

2. The Commission's review of the Guidelines indicated that compliance with the principles of the Guidelines by Code signatories is high. This is supported by the TCF's recent compliance review of the TCF Broadband Marketing Code and the TCF Copper and PSTN Transition Code (the TCF Codes).
3. The TCF Codes provide further guidance for how the principles in the Guidelines could be operationalised. We therefore recommend that the Commission point to the TCF Codes to provide operators that are not members of the TCF an example of best practice for complying with the Guidelines. The TCF Codes are not limited to TCF members, and any provider who markets broadband is able to sign up to the TCF Codes.
4. The TCF acknowledges that regulation may be necessary where market competition fails or where there are demonstrable harms to consumers or the public health and safety. The introduction of new regulation, or exercise of existing powers, should require cost benefit analysis and be evidence-based. Industry self-regulation should be considered first, and duplication and overlap across regimes should be avoided. When reviewing the draft revised Guidelines we have posed the question: has the Commission provided enough evidence in its review to justify the introduction of new requirements into the Guidelines?
5. We understand that the intention of the explanatory comments is to help providers interpret the principles to ensure accessibility and ease of implementation. Avoiding generalised terms or being overly prescriptive where possible would promote adherence to the Guidelines and make them more actionable. We comment on particular points where explanatory comments could give the impression of setting additional requirements to the overarching principles.

For example, Part 2, outcome 1, principle (c) requires RSPs to present services in a consistent way. The following explanatory comment then states that "The services in each category should also be arranged and presented in a consistent way (such as lowest price to highest price)." This reads like a prescriptive requirement that goes beyond the principle.

Some of the explanatory comments are very prescriptive and it is not clear whether adherence to them is optional. Could the Commission please clarify whether the intention is to monitor RSPs compliance to the Guidelines against both the principles and the explanatory comments?

6. Once the final Guidelines have been published, the TCF will review its Codes. The TCF has communicated to the Commission that this review will cover all elements of the Codes, not just alignment to the Guidelines.
7. The Code review is a TCF process, and the industry is incentivised to work expeditiously on Code development. However, we reserve the right to take the time needed to complete a comprehensive Code review including a proper consultation process with industry and key stakeholders.

C. Definitions

The TCF makes following points on two of the three new definitions included in the Guidelines:

1. Broadband

The proposed definition for Broadband could be open to interpretation, for example it is not clear whether a de-prioritised service would count as broadband under this definition. The definition should cover all services offered as broadband to consumers over any technology.

Due to the consultation timeframe we were not able to provide more detail on this point, but we are happy to consult further with the Commission on this point.

2. Personas

The TCF recommends the Commission aligns to the TCF Code definition which has already been adopted by the industry. This would reduce confusion among both members and consumers. There is little value in the introduction of a new definition when the current definition (below) works well:

TCF Definition of Personas: Means non-speed descriptions intended to help Consumers decide between different broadband services. This may include factors such as descriptions of what applications are likely to be possible and types of users best suited to different services, technology or wholesale inputs.

D. Feedback on proposed new principles in the draft Guidelines

1. Part 2, outcome 1, principle (b)

The current wording of this draft principle could be interpreted that RSPs must tell consumers about all technology options available to them in all cases, including for example when a customer contacts the RSP to enquire about a specific broadband plan.

Presenting all options may not be appropriate in all contexts. To avoid an unsatisfactory customer experience, a level of pragmatism is required on behalf of the RSPs to achieve the best customer service delivery experience depending on the channel the customer is contacting the RSP and what service they require. For example, if a customer calls an RSP and requests to sign up to a specific broadband plan, it would not be good customer experience for the RSP to then be required to go through the other options available before giving the customer what they had asked for.

2. Part 2, outcome 1, principle (c)

The TCF Broadband Product Disclosure Code sets out clear guidance to RSPs on how to present a summary of each of their broadband services in a consistent manner to enable ease of comparison for consumers, in the form of their offer summaries. The Commission could point to this information for further guidance to RSPs.

The second explanatory comment to this principle lists different services which are in effect different types of technology. Hyperfibre is a type of fibre technology; we suggest that the comment refers only to fibre in this example.

3. Part 2, outcome 1, principle (d)

We support the intent of this new principle and suggest the wording should align to the TCF Broadband Marketing Code.

4. Part 2, outcome 1, principle (h)

The Commission explains in its review paper the rationale for this requirement is based on a perceived level of risk “that consumers could be sold technologies that do not fully meet their needs.”

We are interested to understand more about this and relating this back to clause 5 in our submission, could the Commission share this evidence against the existing consumer safeguards

which have been put in place through the TCF Codes such as exit rights and obligations to remedy issues and against existing regulation such as the Fair-Trading Act.

5. Part 2, outcome 1, principle (j)

We support the addition of this new principle; it is already a requirement in the TCF Broadband Marketing Code.

6. Part 2, outcome 1, principle (n)

The Commission's proposal for a 12-month view of the customer's usage and spend information to be provided appears to be based on similar initiatives implemented in the mobile market. The TCF notes that the changes in the mobile market were introduced following a reasonable period of analysis and consultation, including analysis of anonymised bill data. These initiatives were also based on evidence presented in the Commission's 2019 mobile market study which had identified issues of consumer inertia in the residential mobile market.

The TCF would support further research and analysis to be carried out to demonstrate that the proposed changes meet the demands of telecommunications end-users, given that the proposed changes will impose implementation costs on industry.

7. Part 2, outcome 1, principle (p)

The TCF Code provides clear and appropriate guidance on how 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. See clauses 23.1, 23.2 and 23.5 of the TCF Code and the TCF's Approved Alternative Testing Methodology document for more details.

For example, RSPs use 50Mbps as the advertised speeds for retail services that use Fibre 50 inputs. These services are 'overclocked' so the customer can expect to get at least 50Mbps and the RSP is confident that the average will be higher than 50Mbps. Another example is a 4G wireless provider who advertises their service nationally. MBNZ provide both a fibre-areas and non-fibre-areas figure for their services, but not a combined view. In this case the provider uses the lower of the two regional figures. We suggest the Commission adopts the wording in the TCF Code.

8. Part 2, outcome 1, principle (r)(iii)

We support the addition of this new principle.

9. Part 2, outcome 2, principle (a), (b) and (c)

The addition of Outcome 2 is aligned with the TCF Code; however, we would like to raise some points about the principles in this section.

Principle (a)

The TCF Broadband Marketing Code requires RSPs to have processes in place for dealing with complaints about performance, refer to the TCF Code clause 59, with clause 59.3 describing what RSPs must take into account when considering what 'materially fails' means. There are two key points in this process that we think are not reflected by principle (a) of this section in the Guidelines:

- The TCF Code allows RSPs a *30 working day* period to attempt to remedy the performance issue. Principle (a) states 30 calendar days. When developing the TCF Code there was significant discussion on the process RSPs follow to resolve an issue, which requires interaction with the customer and then a period of time to analyse if the issue has been remedied. We recommend principle (a) should be changed to 30 working days to align with current practice required by the TCF Code.
- The TCF Code makes it clear that the exit right should only apply to unresolved broadband performance issues that are within the provider’s control. We recommend that principle (a) makes a similar distinction. If the performance issue is due to something that is outside the RSP’s control, for example the customer continuing to use an unsuitable modem, or choosing to place the modem in a suboptimal location, despite RSP advice to the contrary, then the right to exit without penalty should be at the discretion of the RSP.

Principle (b)

When developing the TCF Code in 2022, the TCF consulted extensively with industry and key stakeholders on the matter of materiality threshold, we have provided some quotes taken from submissions received during that consultation:

“TDR does not currently have a mechanism for testing or defining materiality. The word ‘materially’ is not commonly used from a legal perspective.”

“While the Commission has suggested that the TCF could develop a standard approach to defining this term, it has also noted that this must be assessed with a customer lens based on the customer’s actual experience relative to the performance they were led to expect.”

The outcome of this consultation resulted in a defined process set out in the TCF Code.

The Commission’s rationale for the thresholds is to give consumers clear guidance on what the level is, although it has not presented any additional evidence in its review that indicated defining ‘materiality’ is necessary and that further regulatory intervention in the form of specified materiality thresholds is required¹. On the contrary, the Commission noted that RSPs are not charging early termination fees when services materially fail. This supports the TCF’s view that RSPs are taking into consideration the customer’s concerns, investigating these and attempting to resolve issues. Where issues are not able to be resolved, then enacting the exit right for consumers.

Proposed percentage thresholds

RSPs have carried out some initial analysis to consider the implications of the proposed thresholds presented in this principle, which demonstrates how the speeds that consumers receive can vary materially from the average, depending on the technology delivering that service. This analysis is presented in the Appendix.

The TCF recommends a workshop and can assist in facilitating this with the Commission to discuss this principle in further detail and ensure that the industry is consistently delivering the principle that allows customers to “move to a different service, or exit their service, without penalty, if the selected service materially fails to meet expected requirements.” The TCF is

¹ The TCF reviewed TDR complaint data from 1 April 2024 to 30 September 2024 as part of the research carried out on broadband performance. Six complaints had been received by TDR.

offering to coordinate this workshop within the next few weeks, to fit in with the Commission's schedule.

10. Part 3, outcome 3, principle (a) and (b)

11. We support the addition of this new principle; these are already covered in the Section K of the TCF Copper and PSTN Transition Code.

E. Conclusion

In summary:

1. This submission is provided on behalf of TCF members who participate in our Broadband Marketing Working Party. Whilst this submission reflects the general views of the working party, not all our members have participated in this process. TCF members may provide their own submissions to reflect their individual perspectives and experience.
2. The TCF supports the Commission's objective to promote accuracy and transparency in broadband marketing. These goals align with TCF's commitment to fair competition and the provision of reliable, consumer-focused information.
3. We recommend the Commission refer to the TCF Codes as best practice, particularly for non-member providers, providing further guidance to RSPs and promoting industry-wide consistency.
4. The TCF requests that the Commission clarify whether it is their intention to monitor RSPs' compliance to the Guidelines against both the principles and the explanatory comments to avoid any inconsistent interpretation on how these Guidelines should be applied.
5. The TCF proposes a collaborative workshop with the Commission to refine certain requirements set out in the Guidelines, particularly around materiality thresholds for service performance, to ensure adequate consumer protection without imposing undue complexity on RSPs.
6. The TCF is happy to answer any questions the Commission might have on the views set out in this submission, please contact: [REDACTED].

APPENDIX: Analysis of material thresholds

The Commission proposes thresholds based on a ‘percentage of the MBNZ average speeds’. If a customer’s broadband connection performs below this threshold ‘more often than not’ then the broadband service is deemed to ‘materially fail’ because it does not meet the expected requirements. The thresholds are presented as 70% of the average for all technologies except DSL which is 50%.

The latest MBNZ report (September 2024) has information on both average speeds and distributions of speeds for different technologies, allowing us to directly model what the Commission is proposing with these thresholds.

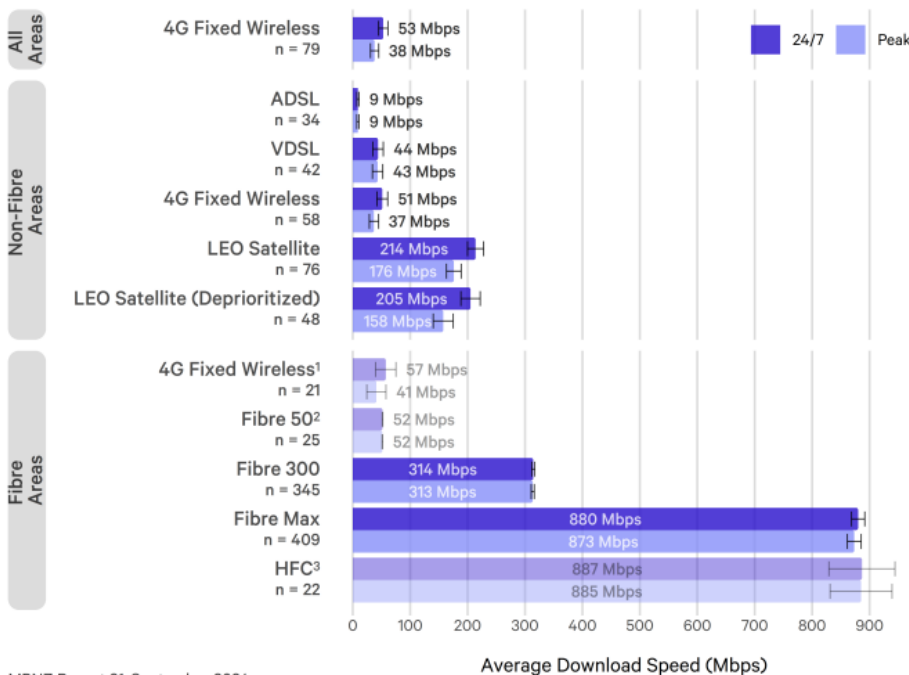
Figure 14 from the MBNZ report (below) shows the 4G peak time national average speed for 4G fixed wireless in non-fibre areas is 37Mbps. 70% of this figure is 25.9Mbps.

Figure 14: Average Download Speeds by Plan

Average of monthly household weighted averages. Peak hours are Monday - Friday, 7pm - 11pm.

The number of Whiteboxes contributing to each result is shown under each plan name (eg n = 79).

Error bars show 95% confidence intervals of the mean.

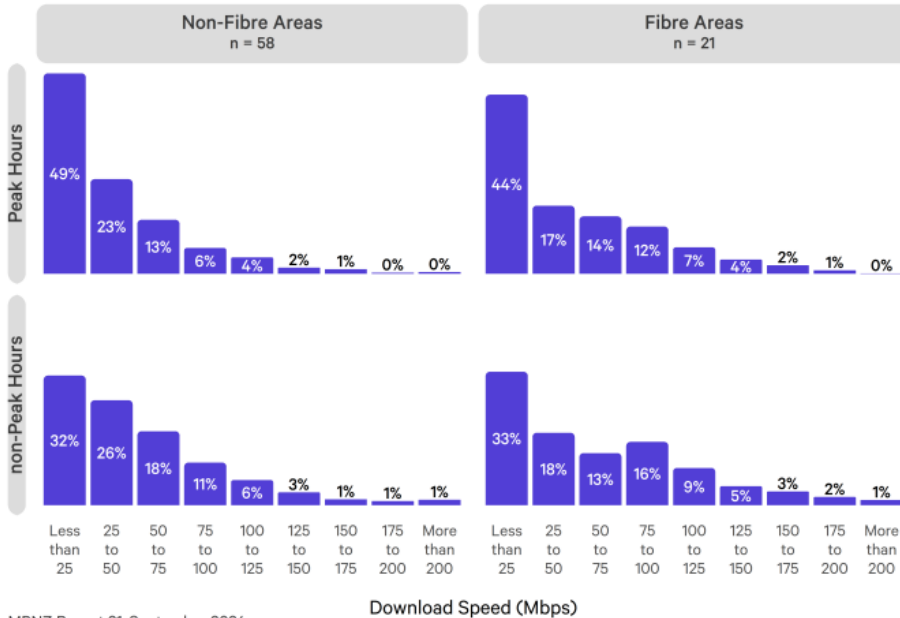


MBNZ Report 21, September 2024

Figure 20 of the report (below) shows the spread of speeds for fixed wireless.

Figure 20: Download Speeds on 4G Fixed Wireless Plans.

Distribution of test results. Average (24/7) download speeds for 4G Fixed Wireless plans is 51 Mbps in non-Fibre areas and 57 Mbps in Fibre areas; this varies by RSP and over time.



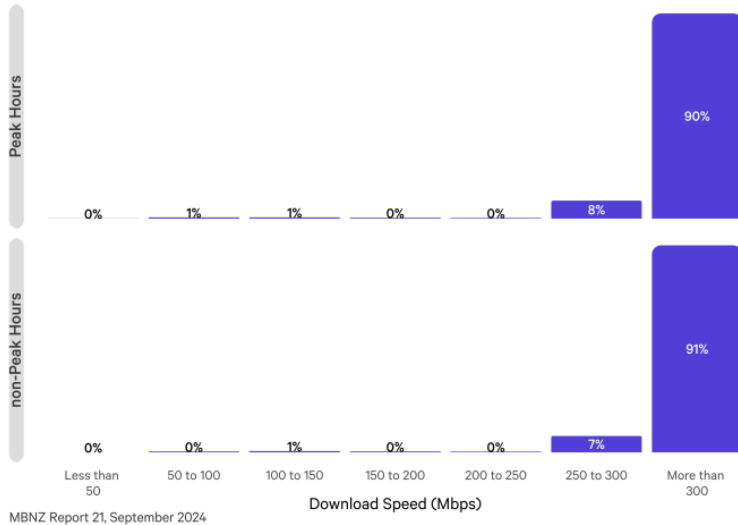
This graph shows that 49% of tests had peak time average speeds of less than 25Mbps. This suggests that almost half of 4G FWA customers would fail the 70% threshold.

The Commission is therefore suggesting that the speeds experienced by half of 4G fixed wireless customers are materially failing customers’ expectations.

Different technologies have different characteristics. For example, fibre services are more concentrated around the average, so there are very few Fibre 300 tests in the latest MBNZ report receiving less than the 70% threshold of 219Mbps, as indicated by figure 19 of that report shown below.

Figure 19: Download Speeds on Fibre 300 Plans.

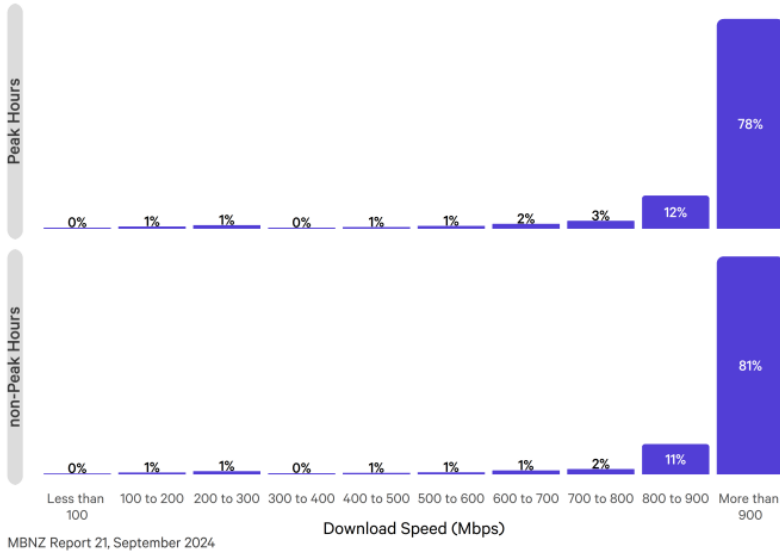
*Distribution of test results across 345 Fibre 300 households
Average (24/7) download speeds for Fibre 300 plans is 314 Mbps; this varies by RSP and over time.*



Fibre Max has fewer than 6% of tests getting less than the 70% threshold of 611Mbps, as indicated in Figure 18 of the MBNZ report shown below.

Figure 18: Download Speeds on Fibre Max Plans.

*Distribution of test results across 409 Fibre Max households
Average (24/7) download speeds for Fibre Max plans is 880 Mbps; this varies by RSP and over time.*



The purpose for presenting this data is to demonstrate how the speeds that consumers receive can vary materially from the average, depending on the technology delivering that service. The use of a threshold derived from an average is a flawed concept unless the relative percentage reflects the different standard deviations that apply to different technologies. Even then, there are problems with referencing a threshold to an average, because the average is not static; it will increase as those below the threshold leave, which in turn increases the threshold so more people can leave.