



**Australian
Competition &
Consumer
Commission**

Mobile and Other Wireless Internet Speed Claims and the Trade Practices Act 1974

An ACCC Information Paper

September 2009

Important note

Please note that this Information Paper is a summary designed to give you basic information on the ACCC's approach to assessing potentially misleading and deceptive claims in relation to mobile and other wireless internet speed claims. This Information Paper does not cover the whole of the Trade Practices Act 1974 (Trade Practices Act) and does not exhaustively set out the ways in which the ACCC will determine whether claims are misleading. Moreover, because this Information Paper avoids legal language wherever possible there may be some generalisations about the application of the Trade Practices Act. Some of the provisions referred to have exceptions or important qualifications. In all cases the particular circumstances of the conduct need to be taken into account when determining the application of the Trade Practices Act to the conduct.

Introduction

1. This Information Paper has been prepared by the Australian Competition and Consumer Commission (ACCC) to assist companies to comply with their obligations under the *Trade Practices Act 1974* (Trade Practices Act) when advertising wireless internet services. In particular, it provides guidance on how the ACCC approaches claims regarding the speed of mobile and other wireless internet services.
2. In January 2007, the ACCC issued “Broadband Internet Speed Claims and the Trade Practices Act 1974” (2007 Information Paper). In the 2007 Information Paper the ACCC focussed on ADSL2+ services, although the ACCC stated that the principles also applied to wireless internet and 3G services.¹
3. Wireless internet is becoming increasingly popular. According to the Australian Bureau of Statistics, wireless internet subscriptions in Australia tripled in 2008, and by June 2009 accounted for 27 per cent of all broadband subscriptions.²
4. In this context, the ACCC is concerned by the trend of wireless service providers to advertise their internet services based on faster and faster headline speeds, when in reality these speeds are not generally available.
5. The ACCC recently put the telecommunications industry on notice in relation to misleading advertising.³ All service providers must comply with the Trade Practices Act regardless of their size or whether they are a network owner, a reseller of others’ services, or a retailer. In particular, resellers and retailers are responsible for representations they make even if those representations are based on information provided to them by others.
6. This Information Paper summarises the ACCC’s approach to assessing potentially misleading and deceptive wireless internet speed claims. The ACCC will closely monitor advertising of internet speeds. If it identifies conduct it considers to contravene the Trade Practices Act, the ACCC will take enforcement action which may include the institution of proceedings in the Federal Court.
7. Comments or questions on this Information Paper should be directed to:

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¹ Available on the ACCC website at: [ACCC home](http://www.accc.gov.au) → [For regulated industries](#) → [Communications](#) → [Anti-competitive and misleading conduct](#) (<http://www.accc.gov.au/content/index.phtml/itemId/779405>)

² Australian Bureau of Statistics, 8153.0 - Internet Activity, Australia, Dec 2008 and June 2009

³ ‘Making phones fair – Australian telecommunications and poor consumer practice’ – Speech by Graeme Samuel at ATUG’s annual conference on 13 March 2009.

The Trade Practices Act

8. This Information Paper does not cover all aspects of the Trade Practices Act. Rather, its focus is upon the consumer protection provisions contained in Part V and Part VC of the Trade Practices Act. Relevant provisions in Part V include sections 52 and 53(c). Part VC contains criminal offence provisions, the most relevant of which is section 75AZC(1)(e).
9. Section 52 of the Trade Practices Act prohibits conduct in trade or commerce which is misleading or deceptive or likely to mislead or deceive. If a corporation makes a representation about a future matter, section 51A places an onus upon that corporation to show it had reasonable grounds for making that representation.
10. Section 53(c) prohibits a corporation in trade or commerce from making certain representations that goods or services have, amongst other things, performance characteristics, uses, or benefits they do not have. Section 75AZC(1)(e), the offence provision, is in identical terms to section 53(c).
11. This Information Paper describes the approach the ACCC generally takes in assessing whether conduct is likely to contravene the Trade Practices Act. The ACCC can take civil proceedings in respect of conduct that it considers contravenes sections 52 or 53(c). In respect of more serious conduct, the ACCC may refer the matter to the Commonwealth Director of Public Prosecutions for consideration of whether criminal proceedings should be commenced pursuant to section 75AZC(1)(e).
12. Representations may contravene the Trade Practices Act regardless of whether they are made in newspapers, magazines, online, on television, on radio, on billboards, in direct mail-out, or in any other medium. Representations made in media releases or in speeches also have the potential to contravene the Trade Practices Act.
13. A corporation's intention or knowledge is not relevant to whether it has contravened sections 52 or 53(c). The Trade Practices Act applies to the conduct of retailers and resellers, not just network owners.
14. On 24 June 2009, the *Trade Practices Amendment (Australian Consumer Law) Bill 2009* (the Bill) was introduced into the House of Representatives. The Bill forms part of the Australian Consumer Law, which is intended to provide a single national consumer protection law throughout Australia. Should the Bill pass in its current form it will introduce new penalties, enforcement powers and consumer redress from early January 2010, including:
 - civil pecuniary penalties of up to \$1 million per contravention and infringement notices for contraventions of specified consumer protection provisions;
 - provisions which enable the ACCC to seek an order disqualifying a person from managing a corporation as a consequence of contravening various consumer protection provisions;

- enabling the ACCC to issue substantiation notices in relation to consumer protection matters in certain circumstances; and
- allowing the ACCC to seek compensation for third parties.

Mobile and other wireless internet

15. There are a variety of different internet services or ways to access the internet. These include dial-up and various broadband technologies, such as ADSL, ADSL2+, cable, mobile and other wireless internet. In some cases accessing the internet service also requires the purchase of a modem or other device.
16. Wireless internet services include mobile, WiMAX (including mobile WiMAX) and Wi-Fi. Mobile internet services commonly use third generation (3G) mobile networks to provide high-speed internet access. WiMAX, or Worldwide Interoperability for Microwave Access, uses waves on the electromagnetic spectrum to transmit to a “WiMAX tower” to connect to the internet. Wi-Fi is a way to access the internet that uses electromagnetic waves over shorter distances to transmit to a local antenna to connect with the internet.
17. Globally applicable technical specifications are set for different types of wireless internet services.
18. For some types of mobile internet, technical specifications are set by the 3rd Generation Partnership Project (3GPP)⁴. The 3GPP is a collaboration between international telecommunications standards bodies. Under the standards, enhancements to 3G technology follow an evolutionary path of 1.8Mbps, 3.6Mbps, 7.2Mbps, 14.4Mbps, 21Mbps, 28Mbps, 42Mbps and beyond. These speeds describe the theoretical maximum speed of part of the network, or peak network specification. They represent the highest transmission rate of the wireless network made possible by the technology.
19. For WiMAX and Wi-Fi, technical specifications are set by the Institute of Electrical and Electronics Engineers (IEEE)⁵. As for mobile internet, the relevant standards (IEE 802.16x and IEE802.11) refer to the highest transmission rate made possible by the technology.
20. The speeds achieved on mobile and other wireless internet services are affected by a variety of factors. Mobile and other wireless internet services are shared capacity services. As the capacity is shared, speeds are heavily affected by congestion, or the number of users using the service. A user will achieve different speeds at different times depending on how many other users are attempting to download at the same time.
21. The speeds achieved on mobile and other wireless internet services are also affected by the customer’s distance from the nearest mobile or WiMAX tower, local conditions, hardware and software, the source from which a customer wishes to download data and general internet traffic.

⁴ Website at: <http://www.3gpp.org/specifications>

⁵ Website at: <http://www.ieee.org/web/standards/home/find.html>

22. The network infrastructure used to provide mobile and other wireless internet is increasingly being upgraded. These upgrades may increase the speeds that are capable of being achieved on the network. However, the speeds actually achieved still depend on a number of factors. When promoting a network upgrade or the speeds available, service providers must be careful not to oversell the benefits or qualities of the service.

Hypothetical and theoretical speeds are likely to mislead consumers

23. The 2007 Information Paper focussed on ADSL2+ and warned that internet service providers were likely to contravene the Trade Practices Act if they used maximum theoretical download speeds to describe the speeds available to users of internet services. This warning is equally applicable to mobile and other wireless internet services.
24. As outlined at paragraphs 17 to 19, globally applicable technical specifications refer to the highest transmission rate made possible by various wireless technologies. However, because a number of factors affect download speeds, these hypothetical or theoretical speeds are rarely achieved or regularly achievable by consumers.
25. A speed claim that conveys the representation that consumers will achieve “up to” a stated speed is misleading if the stated speed is no more than a technical speed achievable in controlled conditions but otherwise unachievable in the real world. Further, representations of maximum, “up to [speed]” or “peak network speeds” are likely to be misleading if in fact only a small proportion of consumers using the network can expect to achieve the stated speed.
26. The ACCC is concerned that the use of maximum, “up to”, or peak network speed claims based on technical specifications conveys to consumers that the claimed speed, or speeds close to the claimed speed, can be achieved, albeit not at all times and in all circumstances. In fact, this is not the case for mobile or other wireless internet.

Example 1 – Headline Speed Claims



Speed claims such as “Broadband up to 7.2Mbps” **should be avoided** where the 7.2Mbps refers to an industry standard and not to the speed generally achievable or likely to be achieved by consumers using the network.

27. The ACCC considers that maximum, “up to”, or peak network speeds based on technical specifications can be misleading even when coupled with further information on the speeds obtainable. A consumer is still likely to understand the reference to mean that the claimed speed has a reasonable basis and is achievable, albeit not at all times and in all circumstances.

Example 2 – Peak Network Speed Claims



Speed claims such as “speeds of 1Mbps to 3Mbps with peak network speed of 7.2Mbps” **should be avoided** where the 7.2Mbps refers to an industry standard

and not to the highest speed generally achievable or likely to be achieved by consumers using the network.

28. Similarly, the ACCC considers such speed claims to be misleading even if described as a “theoretical speed”, “hypothetical speed” or “technology speed”. A consumer is still likely to understand the reference to mean that the claimed speed has a reasonable basis and is achievable, albeit not at all times and in all circumstances.

Example 3 – Technology Speed Claims



Speed claims such as “7.2Mbps Technology” **should be avoided** where the 7.2Mbps refers to an industry standard and not to the highest speed generally achievable or likely to be achieved by consumers using the network.

29. Disclaimers stating that “speeds vary” or disclosing the factors affecting speed are generally insufficient to qualify a headline speed claim and dispel the overall misleading or deceptive impression. A consumer may consider that, although speeds vary, the headline speed has a reasonable basis and is achievable.

Example 4 – Qualified Headline Speed Claims



Speed claims such as “Hypothetical speed of 7.2Mbps, speeds vary” **should be avoided**.

30. Service providers should also avoid using speeds in the names or titles given to particular plans or devices. Consumers are likely to make a connection between the name or title containing a reference to the speed and the actual speeds achievable on the service.

Example 5 – Plan and Product Names



Plan names such as “Super Wireless 7.2” **should be avoided**.
Product names such as “USB stick 7.2” **should be avoided**.

Alternatives to maximum speed claims

31. Service providers should consider alternative ways of advertising wireless internet to ensure that consumers are not misled regarding the speeds generally achievable or likely to be achieved on the service.
32. There is no obligation for a service provider to make a representation as to speeds. However, should a service provider choose to make a speed representation it must ensure that the overall impression is not misleading or deceptive or likely to mislead or deceive. To avoid an overall misleading impression, when making speed claims service providers must provide adequate information to consumers as to the speeds generally achievable on the services.
33. “Maximum” or “up to” claims should be avoided in favour of references to typical speeds or a typical range of speeds. Speed claims, in whatever form,

should have regard to the speed ranges that have been regularly achieved, or can reasonably be expected to be regularly achieved, on the service.

34. The ACCC considers that, should a service provider decide to make a numerical speed claim, it will minimise its prospects of being misleading or deceptive by:
- ensuring that the speed stated is generally achievable or likely to be achieved by consumers using the network a reasonable amount of the time;
 - stating the percentage of time that such a speed is generally achievable or likely to be achieved by consumers using the network, based on network tests (see Network tests below);
 - including additional information on the speeds generally achievable or likely to be achieved by consumers using the network.
35. When stating a speed, service providers should take care to avoid misleading consumers into thinking that they will achieve a speed near the stated speed most of the time when that is unlikely to occur. A customer may form this impression even if the service provider states that speeds will vary or identifies the factors which affect the speeds that can be achieved. Accordingly, the basis of the claimed speed must be sufficiently explained.

Example 6



A service provider advertising “mobile internet” could state:

“Users can expect to obtain speeds of between 550kbps and 3Mbps 50% of the time, based on network tests conducted in January 2009. Different speeds will be obtained at different times, depending on congestion, location, local conditions, hardware, software, and general internet traffic.”

Network tests

36. Service providers must be able to substantiate stated speeds as being generally achievable by users of their services. A stated speed can be substantiated by actual tests of network performance.
37. Network tests should be appropriately designed to ensure a suitably representative sample is chosen. Wireless speeds are affected by local conditions, including the weather and physical obstacles such as trees or buildings. Wireless speeds are also affected by the number of users accessing the service at a particular time. A suitably representative sample should take into account both factors, and be appropriately randomised or these details recorded and disclosed.
38. A result which shows that a particular maximum speed can be achieved in ideal conditions is unlikely to be sufficient to substantiate a claim made to consumers in general, who will not generally have access to services under the same ideal conditions. A service provider should describe the speeds it can provide only where network tests indicate that those speeds will regularly be achievable by consumers, and can continue to be achieved over time as use of the service grows.

39. As the number of consumers using the service at one time increases, the speed to each consumer typically decreases unless capacity is also increased. Service providers should consider increased use of the service in the future through increased subscribers to wireless services when making representations as to speed.

Providing adequate information to consumers as to speed claims

40. Representations by service providers should be complete so as to not mislead consumers. If a speed claim is made, the factors affecting speeds on the service should be sufficiently explained so that consumers understand the speeds they are regularly likely to achieve, and that these speeds will vary.
41. Consumers should be informed of the factors that affect wireless internet speeds. Congestion and physical location are particularly important factors but there are a number of other factors affecting wireless speeds.
42. For mobile and other wireless services the factors affecting speed include:
- a. congestion, or the number of users seeking to use the service;
 - b. the user's distance from the nearest mobile tower, WiMAX tower, or Wi-Fi antenna;
 - c. local conditions, such as the weather and the location of physical obstacles;
 - d. the user's hardware and software;
 - e. the source from which a customer wishes to download data or general internet traffic.
43. The factors affecting wireless speed may be provided in a short summary form, so long as they are readily accessible and understandable to consumers. Further, the ACCC considers that this summary should be provided wherever a representation as to speed is made: online, in print, or in any other medium.

Example 7



A service provider advertising “mobile internet” could state:

“Different speeds will be achieved at different times, depending on congestion, location, local conditions, hardware, software, and general internet traffic.”

Disclaimers and qualifications must be clear and prominent

44. If further information is to be provided as a “disclaimer” then service providers should ensure that any such disclaimer effectively communicates all information required. To be effective, a disclaimer must be sufficiently prominent, placed in close proximity to the main representation, be easy to understand, and fully address the issue being clarified. If not, the overall effect of the advertisement may be misleading or deceptive, and may be found to contravene the Trade Practices Act.

45. Finally, it is the service provider’s responsibility to ensure that the overall impression conveyed by the combination of the original claim and any qualifications is not misleading or deceptive. In determining whether conduct is misleading or deceptive, the test is whether, on an objective basis, the conduct induces or is capable of inducing error. The service provider’s intention or belief is not relevant to this test. In assessing the overall impression, qualifications may be used to clarify what the main offer does or does not include. However, qualifications should only be used to clarify the meaning or the intent of a statement and not to correct a misleading impression created by the more prominent aspects of the advertising. Therefore, service providers should be careful not to rely on blanket “disclaimers” that contradict the main claim.

Example 8 – Contradictory Disclaimers



A service provider **should not** advertise a wireless service as “7.2Mbps” and then state “we do not guarantee that any customer will achieve this speed and make no representation as to speed available on the service”.

Representations at time of purchase

46. Sometimes, further and more detailed and accurate information on speeds is provided when the consumer purchases the product. However, full information should be provided whenever and wherever a claim is made. It is insufficient to provide further details at a later point, such as over the telephone, in store, or on a website.
47. It is good practice to provide detailed and accurate information on speed at the point of sale. However, service providers must still ensure that representations made in advertising or elsewhere are not misleading or deceptive. Good customer service does not reduce the responsibility of service providers to comply with the Trade Practices Act whenever a speed representation is made.

Example 9 – Further information over the telephone



A service provider **should not** publish an advertisement stating “Amazing speeds of 5Mbps. Call now for more information!” but state over the telephone that network tests show that the speed of 5Mbps is only achievable 1% of the time.

This is **insufficient to comply** with the service provider’s obligations under the Trade Practices Act. The claim of “Amazing speeds of 5Mbps” in the advertisement is **misleading** even if further information is provided at a later point.

48. Service providers should ensure that any detailed information they provide on speed at the point of sale is not misleading or deceptive. The Trade Practices Act also applies to representations made verbally.

49. When making point of sale representations, service providers should be aware that the Trade Practices Act also implies certain warranties and conditions into contracts for the supply of goods and services to consumers. These include that the goods are of merchantable quality and that the goods are fit for the purpose for which they are sold.⁶

Example 10 – Providing information at point of sale



Bob visits a shop to purchase a mobile internet USB key and a 24 month internet contract. When making the purchase, Bob asks the salesperson if the speeds available on the service are suitable for a particular online game. The salesperson assures Bob that the wireless service provides typical speeds of at least 1.8Mbps and that these speeds are suitable for the online game Bob wants to play. Bob purchases the mobile internet USB key and a 24 month internet contract.

Later, Bob realises that the mobile internet USB key he has purchased does not regularly deliver speeds of 1.8Mbps and that the particular online game he plays frequently stalls.

As Bob made clear the purpose for which he was acquiring the USB key, he will be able to rely on a statutory warranty.

⁶ More information on warranties and refunds is available on the ACCC website at [ACCC home](http://www.accc.gov.au) → [For consumers](#) → [Your rights, shopping & pricing](#) → Warranties, guarantees & refunds (<http://www.accc.gov.au/content/index.phtml/itemId/3863>)

Industry Checklist for promotion and advertising of mobile and other wireless internet

This checklist is important to anyone who promotes or advertises mobile and other wireless internet. It is designed to help you avoid breaches of section 52 and section 53(c) of the *Trade Practices Act 1974*.

You are likely to breach the Trade Practices Act by:

- ✘ Using “maximum”, “up to” or “peak network” speeds based on theoretical or hypothetical speeds to describe the speeds available to users of mobile and other wireless internet services
- ✘ Having no reasonable basis for believing the represented speeds will be available to consumers using the network
- ✘ Stating a speed for a mobile or other wireless internet service but providing no information on the speeds actually achievable or the factors affecting speeds
- ✘ Stating a speed for a mobile or other wireless internet service to the public at large, in circumstances where network tests demonstrate that speed is only available to a limited number of consumers
- ✘ Using a speed in a plan or product name in circumstances where that speed cannot be achieved all or most of the time.

You will reduce your chances of breaching the Trade Practices Act by:

- ✓ Avoiding use of “maximum”, “up to” and “peak network” speed claims in headline advertisements and plan names
- ✓ Basing descriptions of speeds on appropriate tests of network performance that show the speeds that can and will actually be achieved by consumers using the network
- ✓ Ensuring that the speed stated can be achieved on the network a reasonable amount of the time, stating the percentage of time that a stated speed is achievable on the service, and including additional information on the speeds achievable or likely to be achieved on the service
- ✓ Prominently stating the factors affecting the achievement of the claimed download speeds at the time any speed claims are made
- ✓ Prominently and clearly providing full and complete information whenever and wherever claims as to broadband speeds are made
- ✓ Ensuring any “disclaimer” is prominent, proximate to the main representation, easily understood, and fully addresses the issue being clarified
- ✓ Ensuring consumers are given accurate information at the point of sale, and that sales staff are appropriately trained and informed on the speeds achievable or likely to be achieved by consumers using the network