



Australian
Competition &
Consumer
Commission

Part XIC non-discrimination guidelines

***ACCC explanatory material relating to the Part XIC anti-discrimination provisions and the form of
Statements of Differences***

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1. Overview of the ACCC's explanatory material

These guidelines constitute explanatory material issued under section 152CJH of the *Competition and Consumer Act 2011* (CCA). The ACCC has prepared these guidelines following public consultation with industry and other stakeholders.

These guidelines are designed to provide a set of high level principles to guide NBN Co and providers of Layer 2 bitstream services over designated superfast telecommunications networks (collectively referred to as 'network access providers') as to how the ACCC will consider whether they have complied with the non-discrimination provisions under Part XIC. The decision on whether particular conduct by a network access provider contravenes the provisions is ultimately a matter for the Federal Court.

The ACCC will actively monitor compliance with the non-discrimination provisions via a combination of access seeker complaints and consideration of statements of differences submitted by network access providers. In the event that the ACCC considers that the provisions have been breached, the ACCC can take action under the CCA and the *Telecommunications Act 1997*. Access seekers and any other person that has been affected by a contravention of the non-discrimination provisions may also take action under the CCA.

What is discrimination?

The non-discrimination provisions do not define what constitutes 'discrimination' or 'discrimination between access seekers'.

In this context, the explanatory material provides guidance to industry regarding the ACCC's views on when particular *differences* in terms, conditions or treatment of access seekers are likely to contravene the non-discrimination provisions.

The ACCC does not consider that any and all differences in terms, conditions or manner of treatment between access seekers amount to 'discrimination between access seekers' in all circumstances. Whilst the ACCC considers that, in general, network access providers will be required to offer all access seekers identical terms and conditions and to treat every access seeker in exactly the same manner, there may be circumstances in which such a requirement could lead to outcomes that undermine the competitive process in downstream markets, the efficient use of telecommunications networks and efficient investment in those networks.

The ACCC has therefore developed a principle which it will use to assess whether differences in terms and conditions between access seekers will be considered discriminatory by the ACCC under Part XIC. As a guiding principle, differences which lead to outcomes that are consistent with the objective of Part XIC — the long-term interests of end-users — will not be considered by the ACCC as discriminatory. Under the ACCC's approach, if more favourable supply terms are only offered to a limited number of customers the ACCC will consider this to be discriminatory, except in limited circumstances.

The ACCC has also identified certain conduct which it considers would be at high risk of breaching the non-discrimination provisions. In particular, terms and conditions that favour a particular access seeker based on the size of their customer base by offering volume discounts are likely to be considered discriminatory by the ACCC.

The ACCC is taking this pragmatic approach to interpreting the non-discrimination provisions with the aim of ensuring that the competitive process in downstream markets and efficient outcomes are not undermined — this will promote the interests of both industry and consumers.

Principle for determining whether a difference is discriminatory

The ACCC will assess whether it considers differences in the terms and conditions or treatment between access seekers to be discriminatory based on two broad criteria:

- whether access seekers in the same class have been given an equal opportunity to obtain the terms and conditions or treatment; or if they haven't been
- whether the differences are consistent with the long-term interests of end-users.

Where differences are identified, the ACCC will firstly investigate whether access seekers belonging to the same class have been given an *equal opportunity* to obtain the same term, condition or treatment. Access seekers will be considered to be in the same class if they operate in the same market and/or acquire the same product or service. If access seekers belonging to the same class have been given an equal opportunity to obtain the term, condition, or treatment the ACCC will generally consider that the non-discrimination obligations have not been breached.

This would mean that network access providers are not obliged to unilaterally amend all Access Agreements in response to a difference in term, condition or treatment in a single Access Agreement. Rather, network access providers that give access seekers in the same class an opportunity to request that their Access Agreement be amended within a reasonable timeframe would not be taken by the ACCC to have discriminated between access seekers.

Further, network access providers would be able to bilaterally negotiate with access seekers for terms and conditions which differ from the standard set(s) of terms and conditions, provided access seekers in the same class were subsequently offered the opportunity to amend their Access Agreements in response to the outcomes of those negotiations.

If access seekers within the same class have *not* been given an equal opportunity to obtain the same term, condition or treatment, the ACCC will consider this to be discriminatory, unless it is satisfied that the difference in opportunity leads to outcomes that are consistent with the long-term interests of end-users. That is, if the ACCC considers that a difference in opportunity undermines the promotion of competition, hinders any-to-any connectivity and/or discourages the economically efficient use of and investment in telecommunications infrastructure, the ACCC will consider that difference to be discrimination and will consider enforcement action.

The ACCC considers that the combined effect of these considerations is that differences would only be considered non-discriminatory by the ACCC in the limited circumstance where they do not undermine the competitive process in downstream markets and the efficient investment in and use of telecommunications infrastructure.

2. Introduction

2.1. Legislative framework

Non-discrimination provisions were introduced into Part XIC of the CCA by the *Telecommunications Legislation Amendment (National Broadband Network Measures – Access Arrangements) Act 2011* (the TLA Act).

The non-discrimination provisions apply to NBN Co and providers of Layer 2 bitstream services over designated superfast telecommunications networks¹ (collectively referred to as ‘network access providers’ in these guidelines).

Sections 152ARA(1) and 152AXC(1) of the CCA provide that network access providers must not discriminate between access seekers in complying with their category A and B standard access obligations.

Sections 152ARB and 152AXD of the CCA provide that network access providers must not discriminate between access seekers in the carrying on of activities related to the supply of declared services. Related activities include trials, developing or enhancing services and providing information about these activities.

Sections 152ARA(7) and 152AXC(7) of the CCA provide that a network access provider must not discriminate in favour of itself in the supply of declared services.

In addition to the obligations placed on network access providers, the ACCC is prohibited under sections 152BCB(4A) to (4C), 152BCB(4G) to (4J), 152BDA(4A) to (4C) and 152BDA(4G) to (4J) from making an Access Determination or issuing a Binding Rule of Conduct in relation to services provided by network access providers which has the effect (direct or indirect) of discriminating between access seekers.

There are, however, limited circumstances in which discrimination by network access providers in the supply of declared services or within regulatory decisions made by the ACCC is expressly permitted. Specifically, the provisions expressly allow discrimination where a network access provider has reasonable grounds to believe that an access seeker would fail (to a material extent) to comply with the terms and conditions on which the network access provider complies with its relevant standard access obligations.

2.2. The role of the ACCC

The ACCC has three broad roles in relation to the non-discrimination provisions.

¹ The provisions that apply to other designated superfast telecommunications network operators were introduced as part of broader ‘level playing field arrangements’. The effect of these arrangements is that designated superfast networks must be wholesale-only, and that the operators of such networks must supply a Layer 2 bitstream service on an open-access and non-discriminatory basis. http://www.dbcde.gov.au/broadband/national_broadband_network/level_playing_field_arrangements_and_exemptions; Revised Explanatory Memorandum to the TLA Bill, p. 14.

Firstly, under section 152CJH of the CCA, the ACCC must, as soon as practicable after the commencement of the provisions, publish on its website explanatory material relating to the non-discrimination provisions. This explanatory material must be kept up-to-date. The ACCC will review its explanatory material periodically and provide additional guidance where it is necessary.

Secondly, under sections 152BEBA to 152BEBG of the CCA, network access providers are required to provide the ACCC with a ‘statement of differences’ where an Access Agreement contains terms and conditions which differ from those set out in a Special Access Undertaking, Standard Form of Access Agreement or Access Determination. The ACCC has a role in determining an appropriate form for the ‘statement of differences’ and in maintaining a registry of these statements which is available for inspection on its website. Section 9 of this explanatory material sets out the form required by the ACCC and provides guidance on these processes.

Thirdly, the ACCC has a role in enforcing the non-discrimination provisions under both the CCA and the *Telecommunications Act 1997*. This explanatory material provides guidance on the ACCC’s approach to enforcing the provisions.

2.3. Broader regulatory context

The non-discrimination provisions operate within a broader regulatory and legislative framework that regulates both price and non-price terms and conditions of access to wholesale telecommunications services in Australia.

The non-discrimination provisions are an element of Part XIC of the CCA, which sets out a telecommunications access regime. The object of Part XIC is to promote the long-term interests of end-users of carriage services, or of services provided by means of carriage services. In determining whether a particular thing promotes the long-term interests of end-users, section 152AB of Part XIC states that regard must be had to the extent to which the thing is likely to result in the achievements of the objectives of:

- promoting competition in markets for listed services;
- achieving any-to-any connectivity in relation to carriage service that involve communications between end-users; and
- economically efficient use of, and economically efficient investment in, infrastructure by which telecommunications services are supplied and any other infrastructure by which telecommunications services are, or are likely to become, capable of being supplied.

Part XIC provides a number of different mechanisms for the establishment of terms and conditions of access to declared services.

First, terms and conditions may be set out in an Access Agreement between an access seeker and a network access provider. NBN Co may also formulate a Standard Form of Access Agreement that sets out terms and conditions upon which NBN Co must enter into an Access Agreement upon request. This does not prevent NBN Co from entering

into an Access Agreement that sets out terms and conditions that are not the same as the terms and conditions set out in the Standard Form of Access Agreement.

Second, terms and conditions may be set out in a Special Access Undertaking, an Access Determination and a Binding Rule of Conduct. These are collectively referred to as regulatory mechanisms. Terms and conditions set out in these mechanisms must be reasonable, as defined in section 152AH of the CCA.

Part XIC establishes a 'hierarchy' to determine which terms and conditions of access are to apply between a network access provider and an access seeker to the extent of any inconsistency between an Access Agreement and a regulatory mechanism. According to the hierarchy, terms and conditions in regulatory mechanisms will not apply to the extent that they are inconsistent with terms and conditions contained in Access Agreements.

The non-discrimination provisions therefore do not form the sole basis within the regulatory framework on which terms and conditions (including price) are established. The non-discrimination provisions do not require that terms and conditions be reasonable (as defined in section 152AH of the CCA). Rather, the provisions are designed to address the incentive and ability for network access providers to favour or disadvantage particular access seekers relative to others.

If access seekers do not consider the terms and conditions that are offered by the network access provider to be reasonable, they are able to further negotiate with the network access provider, then seek access to services on the terms and conditions set out in regulatory mechanisms if those negotiations do not lead to agreement.

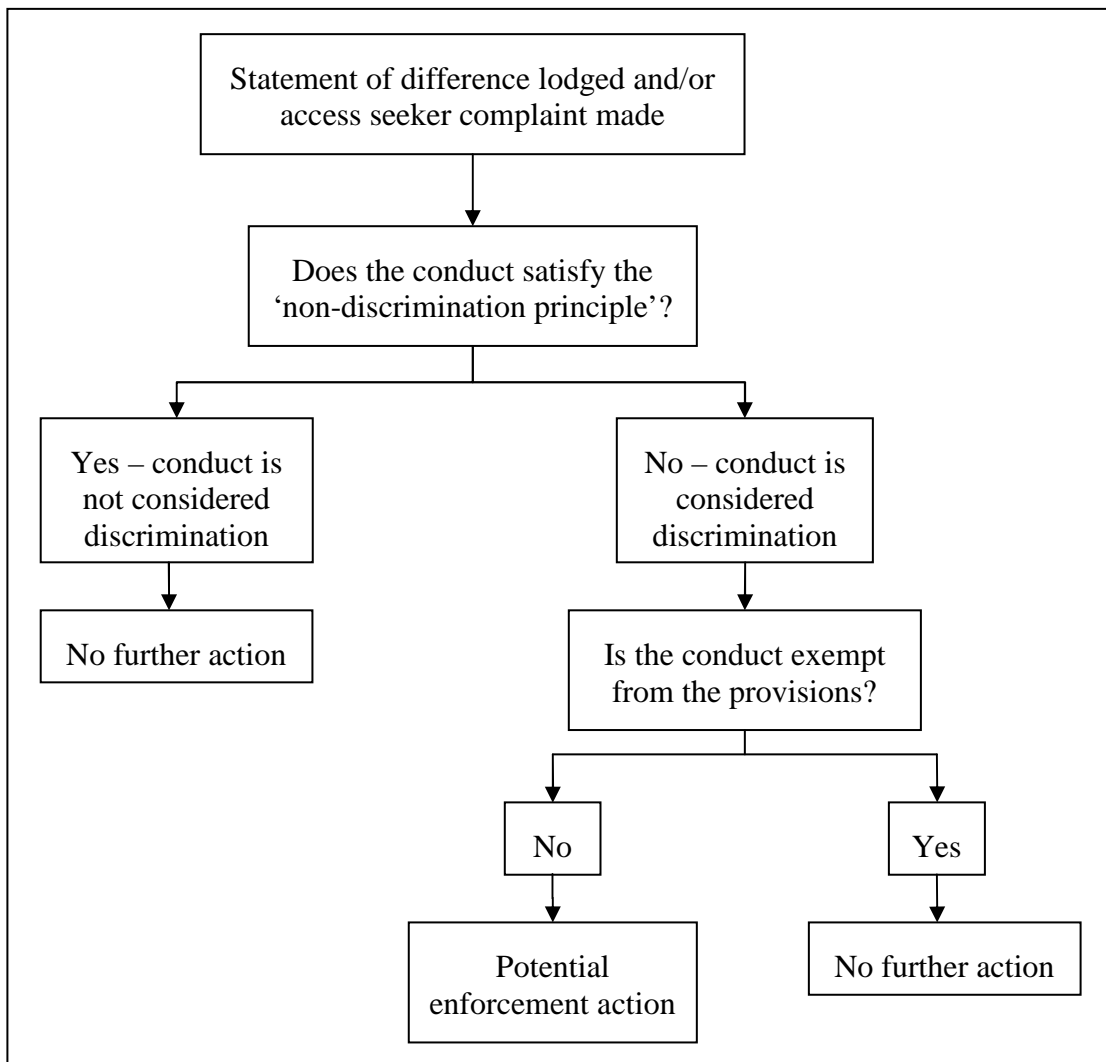
Access Agreements are also subject to the broader competition provisions under Part IV and XIB of the CCA.

3. Application of the non-discrimination provisions

This section outlines the broad approach that the ACCC will adopt in its consideration of conduct against the non-discrimination provisions.

The ACCC's process is outlined in Table 1.

Table 1: ACCC process for applying the non-discrimination provisions



The ACCC does not consider that any and all differences in terms, conditions or manner of treatment between access seekers will amount to 'discrimination between access seekers' in all circumstances. Whilst the ACCC considers that, in general, network access providers would be required under the provisions to offer the same terms and conditions and treatment to all access seekers, there may be circumstances in which such a requirement could lead to outcomes that undermine the competitive process, the efficient use of telecommunications networks and efficient investment in those networks.

When differences between access seekers are identified (likely after a statement of differences is lodged or upon receipt of an access seeker complaint), the ACCC will assess whether it considers the relevant difference to be discriminatory by applying a ‘non-discrimination principle’. Broadly, the application of this principle will involve a consideration of the reasons for the differences between access seekers, and the potential impact of the differences on the competitive process in downstream markets and on efficient investment in and use of telecommunications network infrastructure. The application of the ‘non-discrimination principle’ is discussed in detail in section 3.1 below.

If the ACCC considers that a network access provider has engaged in discriminatory conduct, the ACCC will then assess whether the conduct falls within the limited express exemptions to the non-discrimination provisions. These exemptions are discussed in section 8.

In the event that the ACCC considers that a network provider has breached the non-discrimination provisions, the ACCC will consider the range of enforcement options available as outlined in section 10.

This process does not prevent third parties whose interests are affected by what they consider to be a breach of the non-discrimination provisions from seeking orders from the Federal Court.

3.1. The non-discrimination principle

The ACCC will consider that a difference in the terms, conditions or manner of treatment between access seekers is discriminatory unless it satisfies the ‘non-discrimination principle’. The principle is as follows:

A difference in terms, conditions or manner of treatment between access seekers will be taken by the ACCC to be ‘discrimination between access seekers’ unless it can be shown that:

- (a) access seekers belonging to the same class have been given an *equal opportunity* to obtain the same term or condition, or receive the same treatment (the first limb); or
- (b) any differences in opportunity between access seekers belonging to the same class are *consistent with the statutory object of Part XIC* of the CCA (the second limb).

This principle does not apply to conduct raising concerns under sections 152AXC(7) and 152ARA(7) which prohibit a network access provider from discriminating in favour of itself. The ACCC’s approach to applying these provisions is outlined in section 7.

The following sections discuss the key elements of this principle.

3.1.1. Belonging to the same class

‘Classes’ are an analytical tool that the ACCC will use to assess whether it considers that the non-discrimination provisions in Part XIC have been contravened by an access provider.

The ACCC considers that access seekers will belong to the same class if they operate in the same market and/or acquire the same product or service. This will likely result in broad groups of access seekers that should be offered the same terms and conditions. However, this approach will also allow for access seekers in different markets, or that purchase different products, to be offered different terms and conditions.

This limb of the non-discrimination principle recognises that if access seekers are in different markets, and/or are purchasing different products or services, then a difference in term or conditions will not necessarily be considered by the ACCC to be ‘discrimination’ under Part XIC. However, the ACCC considers that members of the same class – market or product/service grouping – should in general be given an equal opportunity to receive the same treatment.

3.1.2. The first limb: Equal opportunity

The ACCC considers that access seekers belonging to the same class should in general be offered an ‘equal opportunity’ to obtain the different terms, or conditions, or to receive the same treatment.

The ACCC considers ‘equal opportunity’ to mean that network access providers should offer access seekers in the same class the same terms and conditions.

This would mean that, if a network access provider bilaterally negotiates different terms and conditions with access seekers from those set out in existing Access Agreements, the ACCC would consider this to be non-discriminatory if the network access provider subsequently offers these terms to all access seekers in the same class. This would require that network access providers offer to amend existing Access Agreements. However, the network access provider would not be required to amend the Access Agreement of those access seekers that elect not to adopt the new terms and conditions.

The ACCC considers that the network access provider should ensure that new terms and conditions are offered for incorporation into existing Access Agreements within a reasonable period. Whether or not a period of time is reasonable will depend on the terms and conditions in question.

The ACCC considers that ‘equal opportunity’ also means that all access seekers in the same class should be able to fully benefit from a particular term or condition or receive the same treatment. If a standard term excludes certain access seekers from being able to obtain particular benefits of the term due to conditions or requirements attached, the ACCC would consider that equal opportunity has not been given.

For example, a particular term may include a number of options from which an access seeker may select (e.g. quality of service levels). The ability to select the most

favourable option is dependent on the access seeker purchasing a minimum number of services. The implication of this term is that access seekers that purchase a lower number of services will be excluded from selecting the favourable option. These access seekers would not have been given an equal opportunity to obtain all the options provided by the term.

There may be circumstances in which a standard term and condition has different implications for access seekers' business cases. For example, a standard term may be obtainable by all access seekers but require access seekers to incur particular costs. The impact of incurring this cost on each access seekers might depend on the business model adopted by each access seeker. The ACCC would not consider that a network access provider has acted in a discriminatory manner by offering standard terms and conditions in this manner.

The above examples relate to terms and conditions of supply. Equal opportunity should also be ensured in relation to all other manner of treatment of access seekers by network access providers.

3.1.3. The second limb: Consistent with the object of Part XIC

Where an access seeker has not been offered a term, condition or treatment that other access seekers belonging to the same class have, the network access provider will be taken by the ACCC to have discriminated between access seekers, unless it can be shown that the difference in opportunity is consistent with the promotion of the long-term interests of end-users. This means that, in practice, if more favourable supply terms are only offered to a limited number of customers the ACCC will consider this to be discriminatory, except in limited circumstances.

In determining whether a difference in opportunity is consistent with the long term interests of end-users, the ACCC will have regard to whether the differences:

- undermine the promotion of competition in markets for listed services;
- hinder any-to-any connectivity in relation to carriage services that involve communication between end-users; and/or
- discourage the economically efficient use of, and economically efficient investment in, infrastructure by which telecommunications services are supplied and any other infrastructure by which telecommunications services are, or are likely to become, capable of being supplied.

If a difference in opportunity undermines the promotion of competition, hinders any-to-any connectivity and/or discourages the economically efficient use of and investment in telecommunications infrastructure, the ACCC will consider the difference to be discrimination and will consider enforcement action.

Whether a difference in opportunity is inconsistent with the long-term interests of end-users might in some cases require a balancing of these factors. For example, if a difference in opportunity encourages more efficient use of telecommunications

infrastructure, but this comes at the expense of competition in downstream markets, the ACCC is likely to consider that the difference is inconsistent with the long-term interests of end-users. Conversely, a difference that has no, or negligible, impact on downstream competition, but encourages more efficient use of telecommunications infrastructure, will likely be considered to be consistent with the long-term interests of end-users.

When assessing the impact on competition, the ACCC would consider the likely state of competition ‘with or without’ the difference in opportunity. For example, it would consider whether the differentiation is likely to raise barriers to entry for certain access seekers.

In respect of the economically efficient use of and investment in infrastructure, the ACCC would consider factors such as:

- whether the difference in opportunity reflects material and quantifiable differences in the underlying cost to the network access provider of supplying services to different access seekers;
- whether the differences cater to underlying differences in technical or operational characteristics that promote more efficient network usage; and
- the extent to which any difference in opportunity reduces (or increases) the incentives for investment and/or innovation.

4. Non-discrimination in the supply of declared services

This section provides additional guidance on how the ACCC will consider whether a network access provider has, in the ACCC's view, complied with sections 152ARA(1) and 152AXC(1) of the CCA. This includes examples that demonstrate how the ACCC will apply the non-discrimination principle as outlined in section 3.

Under sections 152ARA(1) and 152AXC(1) of the CCA, network access providers must not discriminate between access seekers in complying with their category A and B standard access obligations respectively. The standard access obligations require network access providers to supply declared services on request; permit interconnection at facilities on request; and supply any service by means of conditional-access customer equipment that is necessary for effective access to declared services.² There are a number of limitations to the standard access obligations, including where supplying the service prevents an existing access seeker from obtaining a sufficient amount of the service to meet its actual, or reasonably anticipated, requirements.³

The terms and conditions on which a network access provider will comply with its standard access obligations are set out in an Access Agreement, a Special Access Undertaking, a Binding Rule of Conduct, and/or an Access Determination. These terms and conditions typically relate to:

- Prices;
- product characteristics and technical specifications;
- service provisioning and service quality;
- customer management terms such as ordering and billing, technical support, dispute management and information provisioning; and
- network management terms such as systems testing, network upgrades, fault reporting and rectification.

The ACCC considers that differences in these terms and conditions between access seekers that are not consistent with the non-discrimination principle are likely to breach sections 152ARA(1) and 152AXC(1).

² Sections 152AXB(2), (4) and (5) and 152AR(3), (5) and (8) of the CCA. The category A standard access obligation includes additional equivalence requirements for fault detection, handling and rectification of a technical and operational quality and timing, and billing information.

³ Sections 152AR(4) and (9) and 152AXB(3), (4A) and (6) of the CCA

4.1. Differences in price-related terms and conditions

This section provides guidance on the circumstances in which differences in price-related terms and conditions between access seekers will be considered by the ACCC to comply with the non-discrimination provisions.

The effect of applying the non-discrimination principle is that differences in price-related terms and conditions will only be considered by the ACCC as non-discriminatory in limited circumstances, when they are consistent with the long-term interests of end-users. As discussed in section 3.1.3, determining whether the offering of different prices is in the long-term interests of end-users will involve a consideration of — and in some cases a balancing of — whether the price differences would promote competition and the economically efficient use of, and investment, infrastructure.

Where a price-related term or condition is claimed to encourage the economically efficient use of, and investment in, infrastructure the ACCC will need to consider the evidence in support of any proposed efficiency gain. The ACCC will also consider the potential impact on competition in downstream markets.

Example 1: Volume discounts

Volume discounting is a key example of a difference in price between access seekers. A volume discount means that an access seeker that purchases a large volume of services will receive a lower per-unit access price relative to access seekers that purchase a smaller volume of services. This will result in different per-unit access prices for different access seekers.

Consider an example where an access seeker negotiates a 10% discount on the price of a basic entry level service for purchasing a particular volume of that service. The 10% discount is not subsequently offered to other access seekers that purchase lower volumes of the service.

Access seeker classes

The ACCC would first consider whether the relevant access seekers belong to the same class. This will involve identifying those access seekers that are competing in the same market and/or purchasing the same service or product. If access seekers are purchasing different products and supplying different markets, it may be reasonable for them to be charged different prices.

Equal opportunity

The next consideration is whether those access seekers that purchase the product or serve the same downstream market have been given an equal opportunity to obtain the 10% discount.

In this example, the network access provider has not offered the 10% discount to other access seekers. Therefore, it would not have satisfied the first limb of the non-discrimination principle as not all access seekers in the class have been given an equal opportunity to obtain the discount.

Consistency with the object of Part XIC

Having determined that not all access seekers in the same class have been provided with an equal opportunity to obtain the 10% discount, the ACCC would then consider whether not offering of the 10% discount to other access seekers is consistent with the long-term interests of end-users. That is, whether the term or condition satisfies the second limb of the non-discrimination principle.

It is likely that the volume discount is not consistent with the long-term interests of end-users. The ACCC would need to consider whether providing a larger volume of basic services to an access seeker costs the network access provider less on a per unit basis than providing a lower volume. If this was the case, the discount may promote efficiency. On the other hand, depending on the degree and spread of concentration in downstream telecommunications markets, the discount may provide only one or two access seekers with a systematically lower cost structure than other access seekers. This could in turn enable them to sustain lower retail prices or maintaining higher margins than other access seekers, which would undermine the competitive process in downstream markets.

Example 2: Supply of upstream network infrastructure by an access seeker

Consider another example where a network access provider exempts a single access seeker from having to pay interconnection charges. The single access seeker is exempt because it is supplying upstream network infrastructure to the network access provider. The network access provider requires all other access seekers to pay interconnection charges.

Access seeker classes

The ACCC would first consider whether the single access seeker belongs to the same class as other access seekers. This will involve identifying those access seekers that are competing in the same downstream market and/or purchasing the same service or product. The ACCC considers that an access seeker's situation in upstream markets is not relevant in assessing whether the access seeker operates in the same class as other access seekers.

Equal opportunity

The next consideration is whether the network access provider has provided all access seekers in the class with an equal opportunity to be exempt from the interconnection charges. In this context, equal opportunity has not been given as only a single access seeker has been exempt from paying interconnection charges.

Consistency with the object of Part XIC

Having determined that not all access seekers in the same class have been provided with an equal opportunity, the ACCC would then consider whether exempting only a single access seeker from having to pay interconnection charges is consistent with the long-term interests of end-users.

Exempting the charges for only a single access seeker might have implications for the competitive process in downstream markets if it provides that access seeker with an input cost advantage that other access seekers are unable to obtain.

The ACCC would also consider whether the exemption encourages efficient use of, and efficient investment, in the network. Whilst the arrangements between the access seeker and the network access provider for the supply of upstream network infrastructure may promote efficiency, the ACCC considers that these efficiencies should be reflected in the upstream transaction, rather than through differential charges to access seekers downstream. It is unlikely that exempting a single access seeker on the basis of their supply of upstream services would encourage efficient use of, and investment in, the network over and above any efficiencies that should be reflected in the upstream transaction.

4.2. Differences in ‘non-price’ terms and conditions of supply

This section provides guidance on the limited circumstances in which differences in non-price terms and conditions between access seekers will be considered by the ACCC to comply with the non-discrimination provisions.

In general, the ACCC considers that network access providers should offer the same non-price terms and conditions of supply to all access seekers. However, the ACCC recognises that there may be circumstances where allowing access seekers to choose the supply arrangements that best suit their particular business requirements could promote competition and the efficient use of, and investment in, telecommunications networks. Examples may include adopting differences in billing methods, levels of technical support, liability regimes and quality of service.

Example 3: Differences in billing arrangements

Consider an example where two different access seekers agree to two different billing methods with a network access provider. The different billing methods are tailored to each access seeker’s business-to-business (B2B) system.

Access seeker classes

The ACCC would first consider whether the relevant access seekers belong to the same class. In this example, the access seekers are purchasing the same products from the network access provider and will be competing in the same market. They would therefore be considered to be in the same class.

Equal opportunity

Second, the ACCC would consider whether all access seekers in this class have been given an equal opportunity to adopt the different billing systems.

The network access provider would need to ensure that it offers both billing methods to all access seekers that are purchasing the same products from the network access

provider and are (or will be) competing in the same market. For example, the ACCC may consider whether the network access provider has offered a standard term in its contracts which allows access seekers to select the billing method that suits their particular B2B system.

If the network access provider does not provide all access seekers in the class with an ability to select either billing method, the ACCC will not consider that equal opportunity has been given.

Further, if the network access provider were to offer a different billing method to one of two access seekers that utilise the same B2B system, the ACCC would consider that equal opportunity to access that billing system has not been given.

Consistency with object of Part XIC

If the ACCC considers that equal opportunity has not been given, the ACCC would finally consider whether the difference in offers is consistent with the long-term interests of end-users. The ACCC would consider issues such as whether restricting access to particular billing systems would undermine the efficient use of the network access provider's network, and whether restricting access to particular billing systems would negatively impact the competitive process in downstream markets.

The ACCC also recognises that a network access provider may at times need to treat different access seekers differently in the day-to-day operation of its network in order to efficiently and effectively manage network operational tasks.

Example 4: Providing technical support

Consider an example where a network fault results in a disruption of service to two access seekers. While both seek technical support at the same time, one access seeker receives technical support from the network access provider immediately whilst the other faces a delay in receiving technical support.

Access seeker classes

The ACCC would first consider whether the access seekers belong to the same class. In this example, the access seekers are purchasing the same products from the network access provider and are competing in the same market. They would therefore be considered to be in the same class.

Equal opportunity

Second, the ACCC would consider whether access seekers in this class have been given an equal opportunity to receive technical support. In this example, the network access provider has favoured one access seeker over another in the provision of technical support, which could be considered to mean that equal opportunity to receive technical support has not been given.

Consistency with object of Part XIC

Having considered that equal opportunity to technical support has not been given, the

ACCC would finally consider whether the different treatment of access seekers is consistent with the long-term interests of end-users. In this example, the ACCC would consider whether the prioritisation of technical support promotes any-to-any connectivity and encourages efficient use of telecommunications networks — this may occur if it results in the timely and efficient restoration of services to end-users.

However, the ACCC would also consider whether the outcome of favouring one access seeker over another has implications for the competitive process in downstream markets. The implications for competition will likely depend on whether the network access provider has consistently prioritised one access seeker over others in the class.

5. Non-discrimination in the carrying on of related activities

This section provides additional guidance on how the ACCC will consider whether, in its view, a network access provider has discriminated between access seekers in carrying on ‘related activities’. This includes examples that demonstrate how the ACCC will apply the non-discrimination principle as outlined in section 3.

Under sections 152ARB and 152AXD of the CCA, a network access provider must not, in carrying on activities related to the supply of declared services, discriminate between access seekers. The following are specified to be related activities for the purpose of these provisions:

- developing a new eligible service;
- enhancing a declared service;
- extending or enhancing the capability of a facility or telecommunications network by means of which a declared service is, or is to be, supplied;
- planning for a facility or telecommunications network by means of which a declared service is, or is to be, supplied;
- an activity that is preparatory to the supply of a declared service;
- an activity that is ancillary or incidental to the supply of a declared service; and
- giving information to service providers about any of the above activities.⁴

The CCA does not include any express exceptions that would allow discrimination between access seekers in relation to the carrying on of related activities.

Whilst the ACCC considers that there should be a presumption that network access providers treat access seekers the same with respect to these activities, it also recognises that such a requirement may in some circumstances impact on innovation and improvements to service quality or the negotiation of reasonable terms and conditions of access. The ACCC does not consider that the non-discrimination provisions always require network access providers to ensure that access seekers participate equally in ‘related activities’. Some differences in treatment may be desirable in some cases in order to encourage outcomes that promote the long-term interest of end-users.

The ACCC recognises that differences between access seekers around related activities will not always be reflected in explicit terms and conditions in Access Agreements, and hence may not be reflected in statements of differences. In these cases, the ACCC

⁴ See ss. 152AXD and 152ARB of the CCA.

would need to receive a complaint from affected access seekers in order to identify the differences in treatment and be able to consider whether the differences between access seekers constitute discrimination.

The following sections set out the approach that the ACCC will follow in applying the non-discrimination principle in relation to related activities. Although these principles are described with reference to specific related activities, the ACCC considers that they can also be applied by network access providers in their interactions with access seekers on operational matters more generally.

5.1. Product development, service and facility improvements and preparing for supply of services

This section deals with the related activities in sub-sections (1)(a) to (e) in sections 152ARB and 152AXD.

For product development or service improvement activities that are initiated by a network access provider, or activities that are being undertaken at industry level with co-operation by the network access provider, the ACCC would expect that network access providers ensure that access seekers broadly have a similar opportunity to provide input into the product development or service improvement process. This may take the form of documented processes and procedures, such as the Product Development Forum rules that NBN Co has published with its Wholesale Broadband Agreement.

However, the ACCC does not consider that the non-discrimination provisions would prevent network access providers from engaging with access seekers on product development or service improvements on a bilateral basis. This could ensure that incentives for service innovation are preserved.

Example 5: Bilateral product development

Consider an example where an access seeker approaches a network access provider to facilitate the development of a new product that has been designed or contemplated by the access seeker. The network access provider accepts the access seeker's request and the two parties engage in bilateral product development activities. The network access provider does not notify other access seekers of these activities.

A second access seeker then makes a similar approach to the network access provider to develop a new product. The network access provider refuses this request.

Access seeker classes

The ACCC would first consider whether the relevant access seekers belong to the same class. The first consideration would be whether the access seekers are currently purchasing the same products from the network access provider and are competing in the same market. In this example, the ACCC would also consider whether the access seekers are likely to compete in the same market in the future as a result of

developing their respective products. Unless the access seekers do not, or are not expected to, purchase similar products from the network access provider or compete in the same market, the ACCC is likely to consider that the access seekers belong to the same class.

Equal opportunity

If the ACCC considers that both access seekers belong to the same class, the ACCC would then consider whether they have been given an equal opportunity to develop their products. In this case, the network access provider has not provided equal opportunity to both access seekers to develop their products. The first limb of the non-discrimination principle would therefore not be satisfied.

Consistency with object of Part XIC

Having established that the access seekers were not provided with equal opportunity, the ACCC would only consider the refusal to engage in product development activities with the second access seeker to be non-discriminatory if it was consistent with the long-term interests of end-users.

In this example, the ACCC would consider factors such as whether the refusal to engage in product development activities with the second access seeker would make it more difficult for the access seeker to develop its product, and the implications this could have for competition in the market in which both access seekers operate. The ACCC might also consider whether there was a pattern of consistently favouring some access seekers over others in product development activities and the implications of this. It would also consider whether the refusal was justifiable on grounds that it was inefficient for the network access provider to engage in product development activities with the second access seeker.

The ACCC recognises that there may be circumstances when, for operational or practical reasons, network access providers need to prioritise certain tasks or sequence tasks performed for access seekers in certain ways. The ACCC does not expect network access providers to establish or maintain formal systems for allocating opportunities for participating in these activities between access seekers. Network access providers should, however, be able to explain how access seekers have been chosen for particular activities if this information is sought by the ACCC.

Example 6: Trial of new or enhanced services involving multiple access seekers

Consider an example where a network service provider is preparing to conduct a trial of a new product or an enhanced version of an existing product. A number of access seekers indicate that they would like to participate in the trial, but due to operational constraints, the network access provider cannot accommodate all access seekers in the trial. In order to proceed with the trial, the network access provider selects the access seekers that will participate and those that will not.

Access seeker classes

The ACCC would first consider whether those selected for the trial belong to a

specific class, and those not selected belong to a different class. The ACCC would consider that access seekers belong to the same class if they are currently purchasing the same products from the network access provider and are competing in the same market. For example, if a network access provider undertakes a trial of a new business-grade product, it could be reasonable to include access seekers that only provide, or wish to provide, services to residential users into a different class from access seekers that provide business products.

Equal opportunity

The ACCC would then consider whether access seekers in the same class have received an equal opportunity to participate in the trial. In this example a number of access seekers in the same class requested but missed out on participating in the trial. The ACCC would likely consider a number of factors including:

- whether access seekers were treated in an equal way under a single selection process, despite not all access seekers being selected;
- whether the trial was one in a series of trials undertaken by the network access provider, and whether access seekers who missed out were selected to participate in the same trial in a different location or at another point in time; and/or
- whether an access seeker was previously selected or has future opportunity to participate in a similar trial.

The ACCC may also weigh-up whether there are consistent patterns of favouring or neglecting certain access seekers. The ACCC would likely consider that equal opportunity had not been provided if a consistent pattern of favouritism emerged.

Consistency with object of Part XIC

If the ACCC was not satisfied that access seekers in the same class have received an equal opportunity to participate the trial, it would consider whether this was consistent with the long-term interests of end-users.

The ACCC may consider such factors as whether the network access provider's selections or selection processes (which result in only a subset of access seekers in a class being selected for the trial) would inhibit or enhance product and service quality development in downstream markets; the cost implications of trialling a subset of access seekers in the class versus the whole class; and whether the competitive process between access seekers is undermined (e.g. whether access seekers that are selected to participate in the trial are provided with a competitive advantage by virtue of their selection).

5.2. Ancillary services

The information provided in this section relates to the related activity specified in subsection (1)(f) in sections 152ARB and 152AXD.

Providing ancillary services would be an activity that is ancillary or incidental to the supply of a declared service.⁵ Examples of ancillary services include facilities access services, system interfacing services and installation services.

Example 7: Facilities access

One of the ancillary services that network access providers may provide are facilities access services, which allows access seekers to house and operate equipment used for interconnecting their networks with the network access provider's network.

Consider an example where a network access provider provides a facilities access service that allows access seekers to install equipment in racks inside an exchange building. The number of rack spaces is limited and the network access provider would need to decide how to allocate the rack spaces between access seekers.

Access seeker classes

The ACCC would first consider whether the relevant access seekers belong to the same class. The ACCC will likely consider there to be a broad class based on the products purchased and/or the downstream market served.

Equal opportunity

The ACCC would consider whether the network access provider had offered rack space on the same terms and conditions to all access seekers in this class. The ACCC would then consider the process used, and decisions made, by the network access provider for allocating rack space. If the network access provider used a standard and transparent process for all access seekers that does not systemically favour or neglect certain access seekers, the ACCC is likely to consider that access seekers have been given equal opportunity.

Consistency with object of Part XIC

If the network access provider does not provide equal opportunity through a standard and transparent process that does not favour or disadvantage particular access seekers, the ACCC would need to be satisfied that this was consistent with the long-term interests of end-users. The ACCC would consider the implications for competition of particular access seekers having more favourable access to facilities than others, and whether the favouring of particular access seekers would lead to more efficient use of the network access provider's network.

5.3. Provision of information

This section relates to the related activity specified in sub-section(1)(g) in sections 152ARB and 152AXD.

If a network access provider intends to provide information about related activities that is relevant to all access seekers in a particular class, the ACCC considers that the

⁵ Ancillary services may potentially also be declared services.

network access provider should endeavour to provide the information to access seekers at the same time. In this case, network access providers may consider whether the information could be made available through their B2B systems, or whether it could be made publicly available.

However, the ACCC does not consider that the non-discrimination provisions would prevent network access providers from engaging in bilateral discussions with access seekers on related activities.

Example 8: Provision of information on related activities

Consider an example where an access seeker seeks information from a network access provider about a ‘related activity’ that is relevant to or affects all or a range of access seekers (such as about the terms and conditions of supply of a product that is still under development). The network access provider provides the information to the access seeker. However, the network access provider does not provide this information to other access seekers until it releases it publicly some time later.

Access seeker classes

The ACCC would first consider whether the relevant access seekers belong to the same class. In this example, the class would constitute all access seekers that would be likely to purchase the product when its supply commences.

Equal opportunity

If the ACCC was not satisfied that the first access seeker belonged to a different class from the other access seekers, it would need to consider whether equal opportunity to access the information was given to other access seekers in the class.

The ACCC does not consider that in order to provide equal opportunity, the network access provider is required to provide all information sought by one access seeker to all access seekers in all circumstances. In some cases (such as for information not directly relevant to or affecting other access seekers), the ACCC considers that the network access provider can provide equal opportunity by dealing with all requests for information by access seekers in a similar manner.

However, if the information relates to key aspects of the network access provider’s services and is likely to affect all access seekers in a material way, the ACCC would consider that the information needs to be provided to all access seekers in the class at the same time.

In this example, the ACCC would likely consider that equal opportunity has not been provided.

Consistency with object of Part XIC

If the ACCC considered that equal opportunity had not been provided, the ACCC would need to be satisfied that the advanced provision of information to a single access seeker would be consistent with the long-term interests of end-users.

In considering the impact of the advanced notice of terms and conditions of supply of the new product on competition, the ACCC would consider matters such whether the length of the advanced notice, or the information itself, could provide an advantage to the first access seeker that could harm competition in the downstream market. The ACCC would also consider whether providing more advanced notice to the first access seeker would promote more efficient use of and investment in telecommunications networks.

Although this section relates to the provision of information about related activities, the ACCC considers that network access providers can apply these principles in their provision of information to access seekers more generally.

6. Non-discrimination by a network access provider in favour of itself

Sections 152AXC(7) and 152ARA(7) of the CCA provide that a network access provider must not discriminate in favour of itself in the supply of declared services. This obligation does not extend to the carrying on of related activities.

When considering whether a network access provider has discriminated in favour of itself, the ACCC will assess whether the network access provider has supplied declared services to its own business units on an 'equivalence of inputs' basis.⁶

Equivalence of inputs requires network access providers to:

- supply access seekers with the same products or services on the same terms and conditions and in the same timeframes;
- provide access seekers with the same systems and processes and use these systems and processes in the same way, within the same timeframes; and
- provide access seekers with the same commercial information on products, services, systems and processes in the same timeframes.

To constrain the incentive and ability for network access providers to preference a downstream retail operation over another wholesale customer (i.e. access seekers), all network access providers—subject to limited exemptions—will be subject to 'wholesale-only' obligations.⁷ That is, they will not be able to supply retail end-users over their own networks.

This will not, however, restrict network access providers from supplying services at different layers of the network architecture. For example, network access seekers may choose to start supplying Layer 1 (i.e. dark fibre) or Layer 3 services—in addition to pre-existing Layer 2 bitstream services⁸—to wholesale customers. If that occurs, the incentive may arise for network access providers to preference their upstream and/or downstream business units to the detriment of access seekers.

The ACCC does not expect to see examples of self-supply of declared services by NBN Co in the short to medium term. In the event, however, that network access providers begin to provide Layer 1 or Layer 3 services to access seekers, they will need to ensure that any declared services are offered and supplied on an equivalence of inputs basis. In that case, the ACCC will likely supplement or update this explanatory material wherever additional guidance is necessary.

⁶ Revised Explanatory Memorandum to the TLA Bill, p. 149.

⁷ *National Broadband Network Companies Act 2011*, s. 9 (NBN corporations) and *Telecommunications Act 1997*, s. 143 (designated superfast telecommunications network providers).

⁸ Designated superfast telecommunications network providers will be required to supply a Layer 2 bitstream service. Similarly, NBN Co's service offering is also based on a Layer 2 bitstream service.

7. Non-discrimination in regulatory decisions made by the ACCC

Under sections 152BCB(4A) to (4C) and 152BCB(4G) to (4J) of the CCA, the ACCC is prohibited from making an Access Determination in relation to services provided by network access providers which has the effect (direct or indirect) of discriminating between access seekers. Further, sections 152BDA(4A) to (4C) and 152BDA(4G) to (4J) of the CCA prohibit the ACCC from making a Binding Rule of Conduct that has the effect (direct or indirect) of discriminating between access seekers. This section provides information on how the ACCC intends to apply these provisions in the making of an Access Determination or Binding Rule of Conduct.

For the purposes of these provisions, the ACCC considers that direct discrimination refers to circumstances in which there are differences in terms and conditions between access seekers and the differences do not satisfy the non-discrimination principle. The ACCC considers that indirect discrimination refers to circumstances in which uniform terms and conditions between access seekers have different impacts or outcomes for different access seekers. Of note, if ‘non-discrimination’ meant that no differences were allowed across access seekers, instances of indirect discrimination might be unable to be avoided.

The ACCC will apply the non-discrimination principle when making an Access Determination or Binding Rule of Conduct.

The ACCC considers that if it makes an Access Determination or Binding Rule of Conduct, it is likely that it will include terms and conditions that are available to all access seekers in a particular class (e.g. that purchase the same product or that compete in the same downstream market). In this case, the ACCC considers that the terms and conditions would satisfy the first limb of the non-discrimination principle. The Access Determination or Binding Rule of Conduct would therefore not have the effect of discriminating between access seekers.

However, the ACCC *could* make an Access Determination or Binding Rule of Conduct that made different terms and conditions available to different access seekers in the same class, for example, if it considered that uniform terms and conditions between access seekers would result in different outcomes for different access seekers (indirect discrimination). In making the Access Determination or Binding Rule of Conduct, the ACCC would nonetheless also need to have regard to the long term interests of end-users (as per sections 152BCA and 152BDAA of the CCA). Hence, if different terms were offered in an Access Determination or Binding Rule of Conduct to different access seekers within the same class, under no circumstances could those differences be inconsistent with the long term interests of end-users. Hence, the second limb of the non-discrimination principle would always be satisfied by virtue of the legislative requirement that in making an Access Determination or Binding Rule of Conduct, the ACCC have regard to the long term interests of end-users.

The ACCC does not consider that existing Access Agreements prohibit it from making an Access Determination or a Binding Rule of Conduct that includes different terms

and conditions to those in existing Access Agreements. In any case, presumably the ACCC would only be making an Access Determination or Binding Rule of Conduct in relation to matters on which network access providers and access seekers are unable to reach agreement — hence, it is not clear that terms and conditions relating to these matters would yet be covered by an Access Agreement.

8. Exemptions to non-discrimination

Sub-sections 152AXC(2) and (3) and sub-sections 152ARA(2) and (3) of the CCA permit discrimination by a network access provider against an access seeker in the supply of declared services in limited circumstances.⁹

Discrimination against an access seeker in the supply of declared services is permitted if the service provider has reasonable grounds to believe that the access seeker would fail (to a material extent) to comply with the terms and conditions on which the service provider complies with the relevant standard access obligation.

These exemptions also apply to discrimination in regulatory decisions made by the ACCC.¹⁰

The ACCC considers that whether a network access provider has ‘reasonable grounds’ is an objective test. That is, it must be just and appropriate in all of the circumstances for the network access provider to hold the belief. The ACCC would expect the network access provider to be able to demonstrate why it has come to its belief.

To discriminate against an access seeker for non-compliance with the relevant terms and conditions, the ACCC considers that the reasons would also need to be non-trivial. As a general rule, the ACCC would be unlikely to consider that a single breach of a term or condition constituted evidence of failure ‘to a material extent’, except in circumstances where the breach affects the network provider’s ability in an important or relevant way to comply with its standard access obligations.

The provisions provide the following examples of ‘reasonable grounds’:

- evidence that the access seeker is not creditworthy; and
- repeated failures by the access seeker to comply with the terms and conditions on which the same or similar access has been provided.

8.1. Evidence of creditworthiness

The ACCC considers that this exemption will apply when the network access provider has reasonable grounds to believe that a single access seeker will not be able to pay the charges invoiced by the provider when due. The ACCC considers that the exemption should not apply to all terms and conditions related to credit and creditworthiness. For example, the ACCC considers that the *processes* by which the network access provider will determine whether or not an access seeker is creditworthy *should* comply with the non-discrimination provisions.

⁹ These do not apply to discrimination between access seekers in the carrying on of related activities.

¹⁰ See ss. 152BCB(4B), (4C), (4H) and (4J); ss. 152BDA (4B), (4C), (4H) and (4J) of the CCA.

The network access provider must have reasonable grounds to believe that the access seeker is not creditworthy. The ACCC considers that some examples of evidence of reasonable grounds may include:

- a history of failing to pay money when due;
- receiving multiple breach notices over a reasonable amount of time;
- failing to provide or maintain adequate financial security as required; and
- insolvency.

If the network access provider has reasonable grounds to believe an access seeker is not creditworthy, the ACCC considers that it may discriminate against this access seeker by requiring a higher level of financial security or insurance and performing more frequent credit risk assessments in addition to what it would require from another access seeker. The ACCC considers that the network access provider should not impose other terms and conditions that are unrelated to the lack of creditworthiness.

8.2. Repeated failures to comply

Network access providers are permitted to discriminate against an access seeker if the access seeker repeatedly fails to comply with the terms and conditions on which the same or similar access has been provided.

The ACCC considers that some examples of repeated failures may include:

- repeated failures to rectify breaches of terms and conditions of supply, or failure to rectify a significant breach of a term or condition; and
- inability to reasonably comply with compatibility and systems testing requirements.

The ACCC considers that the form of discrimination against an access seeker for repeated failures would be able to include refusing new service orders from the access seeker; suspending existing orders; reducing service characteristics; and in some circumstances disconnecting a service. The ACCC considers that the network service provider should only discriminate to the extent that the access seeker continues to fail to comply, or has not remedied a breach.

9. Statement of differences

Under sections 152BEBA, 152BEBB and 152BEEC of the CCA, NBN Co is required to provide a statement of differences to the ACCC when an Access Agreement contains terms and conditions that differ from the standard terms or conditions set out in the applicable Special Access Undertaking, Standard Form of Access Agreement or Access Determination.

Similarly, under sections 152BEBE and 152BEBF, designated superfast telecommunications network providers must provide a statement of differences when the terms and conditions in an Access Agreement differ from the applicable Special Access Undertaking or Access Determination.

These statements must be provided to the ACCC within 7 days after the day on which the Access Agreement was entered into.

The explanatory memorandum to the TLA Act notes that the purpose of the registers, and the statements of differences, is to provide transparency to access seekers in cases where an agreement has been reached that deviates from the standard terms.¹¹ In that context, they are likely to be used by access seekers to identify any different terms or conditions which may be available from their network access provider. In addition, they will be used by the ACCC to identify potential contraventions of the non-discrimination provisions.

9.1. Form of statement

The statement of differences must be provided in a form approved by the ACCC.¹² It must identify the parties to the Access Agreement and describe the differences between the terms and conditions set out in an Access Agreement and the terms and conditions set out in the applicable Special Access Undertaking, Standard Form of Access Agreement or Access Determination.

The ACCC is also able to set out such other information (if any) about the Access Agreement as is required by the form of the statement.¹³

The form of the statement of differences required by the ACCC consists of:

- a cover letter to the ACCC; and
- a marked-up copy of the relevant sections of the Special Access Undertaking, Standard Form of Access Agreement or Access Determination.

The cover letter must identify the parties to the Access Agreement, and the commencement date (either of the Access Agreement or the variation to the Access

¹¹ Revised Explanatory Memorandum to the TLA Bill, p. 154.

¹² Sections 152BEBA(1), 152BEBB(1), 152BEEC(1), 152BEBE(1), and 152BEBF(1).

¹³ Sections 152BEBA(1)(j), 152BEBB(1)(j), 152BEEC(1)(j), 152BEBE(1)(k), and 152BEBF(1)(k).

Agreement) and the expiry date of the Access Agreement. The ACCC will also require the form of the statement to contain the following additional information:

- if the statement relates to differences to a Standard Form of Access Agreement, the cover letter must identify whether or not the differences will be reflected in amendments to the Standard Form of Access Agreement, and if so by when these amendments will be made;
- if the differences are also proposed to be offered to access seekers that are under existing Access Agreements, the cover letter must indicate by when these access seekers will be offered the opportunity to amend their Access Agreements; or
- if the differences are not going to be offered to other access seekers, the cover letter must also outline broadly the implications the differences are likely to have for competition, use of the network access provider's network, and investment in that network.

This form of statements will enable access seekers and the ACCC to identify differences between the Access Agreement and applicable Special Access Undertaking, Standard Form of Access Agreement or Access Determination, and whether there is an opportunity to obtain those differences. It will also allow the network access provider to justify why it considers any differences in opportunity to be consistent with the long term interests of end-users.

The cover letter and marked-up document should be sent to the following email address which has been established for the lodgement of statements of differences:

`statementdifferences@accc.gov.au`

The ACCC requests that the statements are lodged in electronic form, either in PDF or Microsoft Word format which allows the statement text to be searched.

9.2. Register of statements

The ACCC is required to keep and maintain registers of statements of differences and make the statements available for inspection on the ACCC's website. The registers are to be known as the Register of NBN Access Agreement Statements and the Register of Layer 2 Bitstream Access Agreement Statements. These registers will be available for inspection at <http://www.accc.gov.au/content/index.phtml/itemId/6047>.

Where information in a statement of difference is identified as confidential or could otherwise be reasonably expected to substantially prejudice the commercial interests of the relevant party, and that prejudice outweighs the public interest in publication of the material, the ACCC may remove that material from the public version of the statement.

The ACCC expects network access providers to clearly identify any confidential or commercially sensitive information that they wish to be excluded from the public registers.

10. Enforcement

Under sections 152AZ and 152BA of the CCA, compliance with the non-discrimination obligations is a carrier licence condition and service provider rule. Accordingly, a breach of the non-discrimination provisions by a network service provider amounts to a breach of its carrier licence conditions and service provider rules pursuant to sections 68 and 101 of the *Telecommunications Act 1997* (the Telco Act). Failure to comply with the non-discrimination provisions will also render a network access provider liable to court orders under section 152BB of the CCA.

The ACCC has a role in enforcing the non-discrimination provisions under both the CCA and the Telco Act. Specifically, where a contravention has occurred, the ACCC has the ability to:

- seek recovery in the Federal Court of a pecuniary penalty of up to \$10 million per contravention for corporations and \$50,000 per contravention for individuals;
- seek restraining or performance injunctions to ensure compliance with the non-discrimination provisions; and/or
- seek an order in the Federal Court requiring the provider to comply with the obligation or compensate any person who has suffered a loss as a result of the contravention, or any other order that the court thinks appropriate.

This does not prevent any other party whose interests are affected by a contravention of the non-discrimination provisions from seeking orders from the Federal Court. Under section 152BB of the CCA, parties may apply to the Federal Court to seek orders directing the network access provider to comply with the provisions; compensate the party for loss or damage suffered as a result of the contravention; or any other order that the court thinks appropriate.

The ACCC's primary aims in enforcing the non-discrimination provisions will be to:

- stop unlawful conduct;
- deter future offending conduct;
- undo the harm caused by contravening conduct;
- encourage the effective use of compliance systems; and
- where warranted, punish the wrongdoer by the imposition of penalties or fines.

These aims can be achieved through a variety of mechanisms. For example, the ACCC could seek to resolve the matter administratively or by accepting a section 87B court enforceable undertaking from the relevant network access provider. Alternatively, the ACCC may choose to pursue litigation to seek penalties, injunctions or orders.

The magnitude of ACCC action will depend on the seriousness of the conduct in question. When determining the seriousness of a breach, and the appropriate enforcement mechanism, the ACCC will consider the following factors:

- the effect that the conduct has had or is likely to have on competition;
- the extent and blatancy of the conduct;
- whether the conduct is on-going; and
- whether the network access provider has co-operated with the ACCC.

The ACCC will consider each of these factors separately and each will be given appropriate weight according to the circumstances of the contravention. These factors are not exhaustive and are not listed in order of priority.

The ACCC will detect potential breaches of the non-discrimination provisions through a combination of statements of differences and complaints from access seekers. A statement of differences will enable the ACCC to identify differences in terms and conditions offered by network access providers. On the other hand, the ACCC will rely on complaints from access seekers who have, for example, experienced discriminatory treatment or have been refused terms or conditions which have been provided to another relevant access seeker (as identified in their statement of differences). The ACCC would encourage that access seekers take reasonable steps to resolve complaints around discriminatory conduct with the relevant network access provider before approaching the ACCC.

Further information on the ACCC's general approach to enforcement is outlined in the ACCC's Compliance and enforcement policy.¹⁴

¹⁴ Available at <http://www.accc.gov.au/content/index.phtml/itemId/867964>.