



Australian
Competition &
Consumer
Commission

**Explanatory material issued under section
152CJH of the CCA —
consultation process and ACCC response to
submissions**

April 2012

Background

On 19 April 2012, the ACCC published on its website the “Part XIC non-discrimination guidelines” (the Guidelines). The Guidelines are explanatory material issued pursuant to section 152CJH of the Competition and Consumer Act 2010 (the CCA). Under section 152CJH of the CCA, the ACCC must, as soon as practicable after the commencement of the section, publish on its website explanatory material relating to the Part XIC non-discrimination provisions.

The purpose of this document is to summarise the public consultation process run by the ACCC to assist in the development of the Guidelines and the ACCC’s response to submissions through that consultation process.

Consultation process

On 11 July 2011, the ACCC released an issues paper providing background to the non-discrimination provisions and seeking views from interested parties to assist in the preparation of the ACCC’s Guidelines. The ACCC received submissions from NBN Co, Telstra, Optus, AAPT, Vodafone-Hutchison Australia (VHA) and Francis Young.

On 13 December 2011, the ACCC released draft Guidelines for consultation. Those draft Guidelines outlined a ‘non-discrimination principle’ that the ACCC proposed to apply to assess whether it would consider that differences in terms, conditions or manner of treatment between access seekers were discriminatory under Part XIC. The principle was as follows:

A network service provider will not be taken by the ACCC to have ‘discriminated between access seekers’ where either:

- (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).

The remainder of the draft Guidelines provided additional details over how the ACCC would apply each aspect of this principle, as well as worked examples of potential conduct of concern.

The ACCC received submissions to the draft Guidelines from NBN Co, Telstra, Optus, AAPT, Vodafone-Hutchison Australia (VHA), Competitive Carriers Coalition (CCC), CCC (prepared by Maddocks) and Herbert Geer (on behalf of iiNet, Internode and Adam Internet).

Submissions to draft Guidelines

NBN Co submitted that it generally supported the approach in the draft Guidelines. In particular, NBN Co submitted that the first limb of the non-discrimination principle was more workable than not allowing any differences between access seekers and the second limb appeared to ensure consistency with the statutory objectives of Part XIC.

However, NBN Co submitted that some aspects of the Guidelines could be clarified to ensure that NBN Co understands the scope of its non-discrimination obligations.

Telstra and VHA also supported the ACCC's broad approach as outlined in the draft Guidelines.

The CCC (prepared by Maddocks), Optus, AAPT, and Herbert Geer (on behalf of iiNet, Internode and Adam Internet) submitted that the ACCC should re-consider its approach. These parties submitted that allowing differences between access seekers would be contrary to the legislative intent of the provisions. Further, these submitters contended that the approach outlined in the draft Guidelines re-introduced the 'like circumstance' exemption contained in previous drafts of the non-discrimination provisions and placed too much weight on the efficiency component of the Long Term Interests of End-users (LTIE).

Some submissions commented on whether a broad non-discrimination principle should apply to all types of differences between access seekers:

- Herbert Geer considered that the Guidelines should expressly prohibit differences in prices between access seekers, and provide guidance on the scope of differences in non-price terms that are permitted.
- Optus and the CCC considered that there should be no differences in terms and conditions of access between access seekers; however Optus notes that there should be scope for greater flexibility for the terms of engaging in related activities (such as conducting trials or testing new services).
- AAPT submitted that the ACCC should adopt an approach whereby differences in terms and conditions between access seekers should not be permitted except where it can be shown that there will be no discriminatory effect (direct or indirect) from the differences.

A number of access seekers also commented on the approach to defining 'classes of access seekers' under the non-discrimination principle. VHA, while supportive of the ACCC's broad approach to the Guidelines, submitted that the approach to classes should focus on the implications for competition, rather than on whether access seekers have particular technical or operational requirements. Optus submitted that it is uncertain how the ACCC will define classes of access seeker. AAPT considered that classes should not be pre-defined and overly restrictive.

Telstra submitted that a number of 'minor but significant' adjustments should be made. It submitted that the Guidelines should not preclude the existence of a class consisting of one access seeker. It also submitted that the Guidelines should explicitly recognise that the examples in the Guidelines do not preclude other legitimate differences that may arise as part of a commercial relationship.

Finally, a number of submissions commented on the approach to enforcing the non-discrimination provisions and the information required by the ACCC to be contained within a statement of difference. NBN Co considered that the Guidelines should require access seekers to raise any concerns of discrimination with the network access provider and take reasonable steps to resolve those concerns before approaching the

ACCC. Telstra considered that a statement of difference should not be required to outline the broad objectives and effects of the differences.

Final Guidelines — ACCC response to submissions

The non-discrimination principle

As noted above, some submissions considered that allowing differences between access seekers would be contrary to the legislative intent of the non-discrimination provisions.

The ACCC has a legislative obligation to issue explanatory material under the CCA on the application of the non-discrimination provisions. This obligation does not prevent other parties whose interests are affected by what they consider to be a contravention of the non-discrimination provisions from applying to the Federal Court for compliance orders, compensation for loss or damage and/or any other order the Court thinks appropriate.

The ACCC notes that the non-discrimination provisions contained in Part XIC do not define what constitutes ‘discrimination’ or ‘discrimination between access seekers’. In considering the meaning of these terms, the ACCC does not consider that all differences between the terms, conditions, or a manner of treatment between access seekers is ‘discriminatory’ under Part XIC. The ACCC considers that this is consistent with standard interpretations of discrimination.

As stated in the Guidelines:

The ACCC does not consider that any and all differences in terms, conditions or manner of treatment between access seekers amounts 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.¹

The ACCC considers that the approach taken in the Guidelines is consistent with the legislative framework under Part XIC. Therefore, while the ACCC notes that some submissions have suggested alternative interpretations should be adopted, the ACCC has decided to broadly retain the approach adopted in the draft Guidelines. However, the ACCC has amended some aspects of the Guidelines to clarify that it will adopt a default position that differences between access seekers are discriminatory, unless they satisfy the non-discrimination principle.

¹ Guidelines, p. 3

The ACCC notes that the non-discrimination provisions contained in Part XIC are unique in the CCA, and are relatively new and untested. The ACCC considers that as terms and conditions of access are negotiated between network access providers and access seekers over time, the ACCC will be able to further develop the guidance it is able to provide regarding its interpretation of the provisions and their application in practice.

The application of the LTIE criteria

Some submissions suggested that the ACCC had put too much weight on the efficiency component of the LTIE criteria.

The ACCC has amended the Guidelines to make clear that in considering the LTIE criteria the ACCC will have regard to each of the limbs of the LTIE objective. In particular, the ACCC will have regard to the potential impact on competition and the competitive process in downstream markets as well as the implications for efficient use of, and investment in, telecommunications networks.

In addition, the ACCC has clarified that it would expect network access providers to demonstrate the existence of efficiency gains. For example, if a network access provider contends that a difference in price is justified because of differences in the underlying cost of supplying different access seekers, the ACCC would be unlikely to accept the claim unless these cost differences can be quantified.

Differences in price-related terms

A number of stakeholders considered that differences in prices between access seekers should not be permitted under the non-discrimination provisions. Stakeholders expressed concern that an access seeker that negotiates a lower access price from the network access provider could gain advantage over other firms in the sector. A key example provided in submissions was volume discounting.

The non-discrimination provisions apply to both price and non-price terms and conditions. However, given the issues raised in submissions, the ACCC considered it appropriate to provide further explanation of how differences in price-related terms and conditions will be treated by the ACCC under the non-discrimination provisions. The ACCC has clarified that under the non-discrimination principle, it will consider differences in price-related terms and conditions to only be non-discriminatory in very limited circumstances.

The Guidelines provide two specific example of how the ACCC would apply the non-discrimination provisions to differences in prices. The two examples relate to volume discounting and differences in prices based on whether access seekers supply upstream network infrastructure. The ACCC considers that a volume discount would be unlikely to satisfy the ACCC's non-discrimination principle. This is because a volume discount would likely be inconsistent with the LTIE. The ACCC considers that differences in prices based on whether the access seeker supplies upstream network infrastructure to the network access provider would also likely be inconsistent with the non-discrimination principle.

Classes of access seekers

A number of stakeholders commented on the approach to determining classes of access seekers. In particular, stakeholders raised issues about the ACCC's objectives in determining classes of access seekers.

Having considered the issues raised in submissions, the ACCC has amended the discussion of 'class' in its final Guidelines.

Access seekers will be now considered to be in the same class if they operate in the same market and/or acquire the same product or service. This approach will likely result in broad groups of access seekers that should be offered the same terms and conditions. The ACCC no longer intends to consider the particular technical or operational characteristics of the relevant access seekers in defining classes; this factor will be relevant to a consideration of whether differences in opportunity between access seekers are consistent with the statutory object of Part XIC.

The ACCC notes that the amendments to the Guidelines make clearer that the use of classes by the ACCC is an analytical tool for determining whether it considers differences to constitute 'discrimination' for the purpose of Part XIC.

On a related note, while the Guidelines do not explicitly state that the existence of a class of a single access seeker is not possible, the ACCC considers that it is difficult to envisage the circumstances in which such a class could exist given the ACCC's approach to defining classes (on the basis of markets served and products purchased).

Applying the non-discrimination principle to related activities

Optus submitted that there should be greater flexibility for the terms of engaging in related activities. The ACCC addresses related activities in section 5 of the Guidelines. The ACCC has provided examples of the application of the non-discrimination principle to related activities. Depending on the terms and activities in question, the application of this principle may allow for flexibility in engaging in related activities.

Statements of Differences

The ACCC has clarified in the Guidelines that it encourages access seekers to take reasonable steps to resolve complaints around discriminatory conduct with the relevant network access provider before approaching the ACCC.

In regards to statements of differences, sections 152BEBA, 152BEBB, 152BEBC, 152BEBE and 152BEBF of the CCA allow the ACCC to require that a statement of difference set out other information. The Guidelines notes that the ACCC requires the form of the statement to contain one of two pieces of information:²

- if the network access provider intends to offer the differences to other access seekers, the cover letter must indicate when these differences will be available;

² This requirement is permitted under sections 152BEBA(1)(j), 152BEBB(1)(j), 152BEBC(1)(j), 152BEBE(1)(k), and 152BEBF(1)(k).

- if the network access provider intends not to offer the differences to other access seekers, the cover letter must outline broadly the implications the differences are likely to have for the long-term interests of end-users.

As outlined in the Guidelines, the ACCC considers that these pieces of information will enable access seekers to identify when there is an opportunity to obtain differences in terms and conditions. It will also allow the network access provider to justify why it considers that any differences that are not being offered are consistent with the LTIE.

Other issues

Telstra has submitted that the Guidelines should recognise that the examples in the Guidelines do not preclude other legitimate differences that may arise as part of a commercial relationship. The ACCC has clarified in the Guidelines that the examples are not intended to be exhaustive. However, the ACCC notes that the application of the non-discrimination principle means that the ACC is only likely to consider differences between access seekers to be non-discriminatory in limited circumstances.

In response to NBN Co's submission that aspects of the Guidelines could be clarified:

- The ACCC has amended the discussion of 'equal opportunity' (section 3.1.2) to clarify that the actual terms, conditions, or treatment that the access seekers received through the operation of contractual terms and conditions is important in assessing whether equal opportunity has been provided.
- The Guidelines also state that the non-discrimination obligation under s 152AXC applies where NBN Co is supplying a declared service or permitting interconnection at a listed point of interconnection.