



AUSTRALIAN COMPETITION  
& CONSUMER COMMISSION

# Telecommunications non-discrimination obligations – Guidelines

**Consultation report**

September 2021

Australian Competition and Consumer Commission  
23 Marcus Clarke Street, Canberra, Australian Capital Territory, 2601  
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ACCC 09/21\_21-77

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# 1. Introduction

## 1.1 About this report

In June 2021, we consulted on proposed revisions to our non-discrimination guidelines. We published a paper titled [non-discrimination guidelines – consultation paper \(May 2021\)](#) and sought views from stakeholders about three proposed key changes:

- Refining our approach to testing for discrimination in light of our experience and market developments since 2012 when we first issued guidance.
- Updating for legislative changes to the *Competition and Consumer Act 2010* (Cth) (CCA) and *Telecommunication Act 1997* (Cth) (Telecommunications Act).
- Including illustrative examples of conduct that would, or would not, be likely to raise concerns under the non-discrimination obligations.

This report summarises key aspects of the 7 submissions that we received during the Consultation and explains the positions that we have adopted in our revised non-discrimination guidelines (2021 Guidelines). Submissions are available on the ACCC [website](#).

## 1.2 Background

Non-discrimination obligations were introduced in April 2011 via the *Telecommunications Legislation Amendment (National Broadband Network Measures – Access Arrangements) Act 2011* (Cth) which amended Part XIC of the CCA. The obligations were expressed to apply to NBN Co and other ‘superfast’ fixed-line network operators that were supplying a declared access service.

A number of exceptions had been proposed to apply to the non-discrimination obligations, however many of these were not included in the provisions as enacted. Consequently, the non-discrimination obligations do not provide exceptions for discrimination that aids efficiency or that result from measures approved by the ACCC in a written instrument.

Section 152CJH required the ACCC to publish explanatory material relating to the non-discrimination obligations as soon as practicable and to keep this up to date. The intent of this provision is to explain how the ACCC views the operation of, and approaches the enforcement of, the non-discrimination provisions in Part XIC of the CCA<sup>1</sup>. In August 2012, the ACCC published guidelines relating to the non-discrimination obligations (Previous Guidelines).

In 2020, the non-discrimination provisions relating to non-NBN networks were moved into the Telecommunications Act by the *Telecommunications Legislation Amendment (Competition and Consumer) Act 2020* (Cth) (Telecommunications Reforms).

In September 2021, after seeking feedback on a draft version of the guidelines (Consultation Draft), we published our 2021 Guidelines. The 2021 Guidelines take into account the Telecommunications Reforms as well as market developments and issues raised in our consultation.

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<sup>1</sup> *National Broadband Network Companies Bill 2010 Telecommunications Legislation Amendment (National Broadband Network Measure- Access Arrangements) Bill 2011- Revised Explanatory Memorandum* p 163.

## 2. Issues raised in submissions and our response

In this section we outline the key issues raised in our consultation and how we have taken these into account in issuing the 2021 Guidelines.

Overall parties agreed that we should revise our Previous Guidelines and agreed with our general approach to providing worked examples and simplifying where possible. That said, a number of parties raised at least one aspect of our proposed approach for further consideration or elaboration. Generally speaking, some parties argued for a stricter approach towards our approach to discrimination, while others proposed we adopt a more flexible approach insofar as the obligations applied to them.

### 2.1 Overview of our approach to testing for discrimination

Most issues that parties raised concerned our proposed approach to assessing whether the provision of particular services is likely to contravene the non-discrimination obligations. This tests for both explicit and implicit discrimination.

Our test for explicit discrimination is directed towards whether, as a consequence of the services provided, an Access Provider fails to provide access seekers a *reasonable opportunity* to acquire the *same services on the same terms* (explicit discrimination test).

This requires that all such services are available to all access seekers on the same terms, for example, pursuant to the same contract and rate cards. It also requires that access seekers get a reasonable opportunity to access services on those common (or equal) terms.

Our test for implicit discrimination asks whether the services are provided in a way that would *impede access seekers' ability to compete* in a relevant telecommunications market (implicit discrimination test). We have included this further perspective as discrimination could be 'hard-wired' into the terms of a standardised product or pricing offer, or by the manner in which ancillary activities are undertaken across all access seekers, as much as by offering different contracts and rate cards, or levels of business support to each access seeker.

For price related conduct, the implicit discrimination test focuses on whether the proposed conduct places one or more access seekers at a unit access cost advantage (or disadvantage) in the relevant wholesale market segment for the same access products. For instance, a common rate card could include volume or other discounts that would favour those that qualify for the discount (or disfavour those that do not) by allowing them to achieve a lower unit cost.

After applying these tests, we then consider whether an exemption or authorisation applies. Part 3 of the 2021 Guidelines discusses authorisations and exemptions.

### 2.2 The retention of an implicit discrimination test

One access provider disputed that we should test for implicit discrimination, stating it is not within the objective of the non-discrimination provisions. It proposed instead that we adopt a narrower approach that looks at whether it offers its access seekers equivalent "inputs".

We disagree. We consider that the possibility of NBN Co favouring certain access seekers is something the non-discrimination provisions are intended to address, without seeking to differentiate whether this is done explicitly or implicitly.

We also note that the Telecommunications Legislation Amendment (National Broadband Network Measures – Access Arrangements) Bill 2010, which introduced the provisions, initially included exceptions that would have permitted discrimination in limited circumstances. This included

discrimination that arose implicitly from a volume discount arrangement, or aided efficiency. However, these exceptions were removed from the Bill (following concerns that discrimination could otherwise be permitted, including discrimination implicit in the qualifying conditions of a generally available discount arrangement). We consider that this demonstrates it was Parliament's intent that the provisions test for implicit discrimination.

The same access provider also posited that the retention of the implicit discrimination test would require a wide ranging inquiry to determine whether an action would have different outcomes for any access seeker.

In this regard, we note that the non-discrimination obligations attach to the supply of Layer 2 access services in the wholesale market, which necessarily restricts the number of parties that could fall within their ambit. In addition, a number of these access seekers will have common characteristics in terms of their scale, and business and operating models, which will limit the range of likely effects of relevant conduct amongst access seekers. Hence, we consider that an access provider could readily mitigate its risk of engaging in implicit discrimination based on its understanding of its customers' businesses and the information that access provider holds, in the course of its ongoing engagement with its customers that is necessary to effectively carry on its business.

Consequently, the 2021 Guidelines maintain our approach to testing for implicit as well as explicit discrimination.

## 2.3 The form of the implicit discrimination test

We consulted on a proposed change to how we test for implicit discrimination by considering the effect of conduct on an access seeker's ability to compete in a relevant communications market.

We received a number of submissions on this. Some respondents wanted the test to be more expansive, for instance by also having regard to the effect of conduct in additional markets. Others wanted a more restrictive approach that would consider whether the conduct would significantly lessen competition in a market.

After considering the submissions on these points, we have proceeded with the approach that we had proposed. The approach taken aligns closely with the legislative provisions. We do not test conduct for its effect in markets that are not telecommunications markets. We note that the non-discrimination provisions prevent discrimination between 'access seekers' or 'wholesale customers' as defined in the legislation. Conduct that results in a significant lessening of competition is dealt with separately in the CCA.

## 2.4 Treatment of volume discounts

One respondent suggested that the guidelines should more clearly state that volume discounts would amount to discrimination, citing the amendments made to the Telecommunications Legislation Amendment (National Broadband Network Measures – Access Arrangements) Bill 2010 prior to its enactment.

In this regard, the 2021 Guidelines provide that we will test for implicit discrimination, which includes assessing whether the terms to qualify for a volume or other form of discount would have a discriminatory effect on one or more access seekers. The 2021 Guidelines also include examples of such arrangements that we consider would be discriminatory.

## 2.5 Adopting a reasonable opportunity versus equal opportunity to gain access on same terms and conditions standard

Some access seekers raised concerns with us adopting a reasonable opportunity test for considering whether offering a range of access terms would amount to explicit discrimination. These access seekers proposed that we apply an equal opportunity standard instead. On the other hand, one access provider questioned whether a reasonable opportunity standard was achievable and suggested a more pragmatic approach.

The issue arises as an access provider could offer a range of access terms, or different systems and processes, to support its access seekers. An example of this is that access seekers that have limited scale will likely prefer simple systems and processes that they can implement quickly, whereas those access seekers already at scale will prefer an approach that supports greater automation.

In our view, provided that all access seekers have a reasonable opportunity to choose from the available systems and processes, and choose the option that best suits them, then it is unlikely that slight differences in modes of access available would constitute explicit discrimination.

That said, we do not consider that it would be appropriate to adopt an approach that did not give access seekers a reasonable opportunity to choose between different forms of access.

Consequently, we have retained a reasonable opportunity test in testing for explicit discrimination arising from an access provider offering a range of access methods.

## 2.6 Treatment of discrimination that could promote competition

Two respondents submitted that the 2021 Guidelines should permit discriminatory conduct provided that it promoted competition, or amounted to positive discrimination. This approach could, for instance allow an access provider to charge an affiliate or an entrant less for access relative to others where this lowered a barrier to entry for the recipient of the discount. We have not adopted this approach.

We note that the non-discrimination provisions themselves lower barriers to entry by discouraging favouritism that could exclude an access seeker. Further, the approach that we have adopted in the 2021 Guidelines, and in particular our test for implicit discrimination, already addresses this issue to the extent that is consistent with the non-discrimination provisions.

We have not adopted an exception to the explicit discrimination test or the implicit discrimination test on the basis of promoting competition.

## 2.7 Discrimination which could promote the long term interests of end-users, or is objectively justifiable

Some respondents proposed that our approach to the non-discrimination obligations should allow discrimination where this served another beneficial purpose. In this regard, our Previous Guidelines included a step that considered the effect of the conduct on the long-term interests of end-users, and one respondent stated that this step should be retained.

We have decided not to retain a long-term interests of end-users step. Our experience in applying our Previous Guidelines demonstrated that the very broad considerations that underpin the long-term interests of end-users are difficult to apply in a timely and readily predictable way due to the need to balance competing considerations. That element detracted from the utility of the Previous Guidelines.

One respondent suggested that we adopt an approach that allowed discrimination where it was justifiable on objective grounds. We note that New Zealand allows for discrimination that is both objectively justifiable and unlikely to harm competition in any telecommunications market. We consider

that our approach to testing for implicit discrimination will lead to similar outcomes, but prefer our proposed formulation, which focuses squarely on the effects of the conduct on an access seeker's ability to compete.

Although the long-term interests of end-users is not an express step in our revised assessment framework, in developing the updated guideline, we have taken it into account and the objective of promoting competition in markets for listed services. For example, the implicit discrimination limb of the framework takes into account the effect of an offer on an access seeker's ability to compete in the downstream market.

## 2.8 Testing for discrimination between access seekers versus class of access seekers

In our Previous Guidelines we included a step that assigned access seekers to different classes. We had adopted that approach to counter findings of discrimination due to different access costs that resulted only from access seekers purchasing a different mix of access products. That is, access seekers could be allocated to a class on the basis of the mix of access products they have chosen to demonstrate whether or not members of that same class could achieve the same access as one another.

Our experience in applying the Previous Guidelines has shown that this step is unnecessary as differences in product mix can effectively be accounted for by applying the tests in the context of the access products that are acquired. Further, we have observed that there is potential for this step to lead to outcomes that are inconsistent with the non-discrimination provisions depending on how access seekers are allocated to classes.

Consequently, the 2021 Guidelines have removed this step so that our approach will test for discrimination between access seekers directly.

## 2.9 Approach to other superfast fixed line networks

Two access providers argued that we should take a more flexible approach when testing for discrimination on superfast fixed line networks other than the NBN. This was on the basis that they consider that other network operators would not have the same degree of market power as NBN Co.

We note that the provisions that apply to NBN Co on the one hand and other superfast fixed network operators on the other are contained in different Acts, but that the wording of the provisions are essentially the same. A market power test is not contained in either set of provisions.

When the government recently amended the provisions that apply to non-NBN network operators in 2020 to move them to the Telecommunications Act, it noted that these non-discrimination provisions are based on those in the CCA.<sup>2</sup> Further, the accompanying explanatory materials stated:

...that all eligible services supplied by a person must be made equally available to all wholesale customers, and those customers would be able to receive the services on the same terms and conditions of supply. This promotes equal access to local access lines that are subject to Part 8 of the Tel Act and precludes a person who controls a local access network from favouring specific customers.<sup>3</sup>

Consequently, we do not consider there is scope to distinguish our approach and adopt a more flexible approach to testing for discrimination on other superfast fixed line networks. We will apply a consistent framework across access providers.

That said, in choosing how to respond to particular conduct that we assess as discriminatory, we will apply the ACCC's compliance and enforcement policy and priorities. This weighs factors such as extent of the conduct and associated harm and ensures our response takes them into account.

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<sup>2</sup> Explanatory Memorandum, p.119.

<sup>3</sup> Explanatory Memorandum, p.120.



## 2.10 Approach to other matters raised

Some stakeholders suggested new examples be included in the illustrative examples in tables 2 to 4 of the Consultation Draft. In response, where we consider that additional examples are likely to have sufficiently wide application they have been added to the 2021 Guidelines. The new additions relate to facilities access (see table 2, example 2), price discrimination (see table 4, example 2) and bundled services (see table 3, example 4).

Some stakeholders sought explanations about certain terms used in the Consultation Draft, about the specific application of some provisions and about legislative definitions or ancillary matters. Having considered these points, we have made some changes to the Consultation Draft for clarity. These appear in the 2021 Guidelines.

A small number of stakeholders also provided views and asked questions in relation to matters outside scope or the current legislation. While we considered those matters, we have not made changes to the Consultation Draft in response to them.

We note that the 2021 Guidelines are intended to assist parties familiar with the industry and that stakeholders should seek their own legal advice as to the application of the non-discrimination provisions to their specific circumstances.

The ACCC will review the 2021 Guidelines periodically and will update them as required.



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