



AUSTRALIAN COMPETITION
& CONSUMER COMMISSION

Telecommunications non-discrimination obligations

Non-discrimination obligations

In September 2021 the ACCC released telecommunications non-discrimination guidelines (Guidelines). The non-discrimination obligations prohibit access providers from discriminating in favour of themselves or between access seekers when supplying certain services or carrying on related activities.

The non-discrimination obligations are set out in Part XIC of the *Competition and Consumer Act 2010* ('Cth') (CCA) and Part 8 of the *Telecommunications Act 1997* ('Cth'). The legislation does not define discrimination.

- See Table 1 of the Guidelines

The non-discrimination obligations apply to:

- (a) NBN Co
- (b) certain access providers if:
 - (i) they are a person exempt from the wholesale only obligations under the Telecommunications Act that apply to local access lines used to supply superfast carriage services to residential customers
 - (ii) they are a person subject to the wholesale only obligations
 - (iii) there is a functional separation undertaking in force.

- See page 1 of the Guidelines

Assessing discrimination

The ACCC uses an explicit discrimination test to determine whether an access provider has treated access seekers the same or an implicit discrimination test to determine whether conduct has a discriminatory effect.

Explicit discrimination will exist when an Access Provider fails to provide access seekers a *reasonable opportunity* to acquire the *same services* on the *same terms*.

Implicit discrimination will exist when an Access Provider provides services in a way that *impedes access seekers' ability to compete* in a relevant telecommunications market.

- See Part 3 of the Guidelines

Note:

This summary is intended as a quick reference. More detail is provided in the Guidelines. Neither this document or the Guidelines are legal advice.

Explicit discrimination test

Does an Access Provider fail to provide access seekers a reasonable opportunity to acquire the same services on the same terms?

For this test we consider:

- Are all services or related activities available to all access seekers on the same terms? E.g. has the same contract, business support or rate card been offered to all access seekers?
- Has there been a reasonable opportunity? Have access providers had regard to the capacity of access seekers to satisfy the supply terms and information generally available or provided to them by access seekers?

OR

Implicit discrimination test

Does an Access Provider provide services in a way that impedes access seekers' ability to compete in a relevant telecommunications market?

For this test we consider:

- What is the effect of the relevant offer having regard to the circumstances of the access seeker and the relevant market (or the customer, geographic or other segment)?
- What is the effect of the conduct on a relative basis across access seekers?
- Is the conduct unlikely to impede an access seeker's ability to compete because the comparative effect between access seekers is very small?
- For price related conduct: Does the conduct place one or more access seekers at a unit access cost advantage (or disadvantage) in the relevant wholesale market segment for the same access products? E.g. a volume discount.
- What practicable and reasonable steps are open to an access seeker to benefit from the offer?

