



Consultation on proposed non-discrimination guidelines

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1. Introduction

We are proposing to update our guidelines for the statutory provisions that prohibit NBN Co and superfast (fixed line) network operators from engaging in conduct that discriminates between their access seekers or to favour themselves.

We are taking this step due to legislative changes that have moved some of the relevant provisions from the *Competition and Consumer Act 2010* (Cth) (**CCA**) to the *Telecommunications Act 1997* (Cth) (**Telecommunications Act**), and to refine our approach to interpreting and applying these provisions in light of our experience and market developments that have occurred after our current guidelines were issued in 2012.

We recognise that these provisions play an important role in implementing the fundamental industry reforms that accompanied the rollout of the NBN and other next generation fixed line access networks, and in promoting competition in dependent markets. Additionally, uncertainty over the ambit of these provisions could potentially stifle legitimate conduct.

Hence, it is our intention for the revised guidelines to not only identify conduct that would likely be problematic, but to also assist in the development of commercial or operational approaches in wholesale access markets that are unlikely to raise compliance concerns.

We have prepared draft guidelines (**proposed Guidance**) and are now seeking input from network operators, access seekers and other interested parties so that we can further develop them prior to issuing the guidelines in final form.

The information in this publication is for general guidance only. It does not constitute legal or other professional advice and should not be relied on as a statement of the law in any jurisdiction. Because it is intended only as a general guide, it may contain generalisations. You should obtain professional advice if you have any specific concern. The decision on whether particular conduct by an access provider contravenes the non-discrimination provisions is ultimately a matter for the Federal Court.

2. Responding to this consultation paper

We encourage industry participants and other stakeholders to consider and respond to the 4 questions set out in this consultation paper. Responses can be made through our [consultation hub](#). Queries can be emailed to communicationscompliance@accc.gov.au

In order to foster an informed and public consultative process, all submissions will be considered public and will be posted on the ACCC website. We may also publish a report that provides a summary of the responses received.

Responses to this consultation paper are due by **Wednesday, 16 June 2021**.

2.1. Confidentiality of responses

Interested parties wishing to submit material to us should clearly identify any commercial-in-confidence material by replacing the confidential material with an appropriate symbol or 'c-i-c'.

We are committed to treating confidential information responsibly and in accordance with the law. Where we are provided with confidential information, we will, to the extent reasonably possible, seek to protect the confidentiality of that information. In some circumstances we may be legally required to produce confidential information. For example, we may be

required to disclose information that is subject to a confidentiality claim pursuant to a court order or subpoena. If this occurs, we will endeavour to notify and consult with you about the proposed release of your information and measures (such as confidentiality orders) that may be taken to protect that information. It is also important to note that we may share confidential information internally with ACCC and AER staff and with our external lawyers and consultants.

Further information regarding the ACCC's Confidentiality Guideline is available on the [ACCC website](#).

3. Proposed changes to the current guidance

Key differences between the current guidance and the proposed Guidance are set out below. We also seek comment from stakeholders on 4 questions related to the changes.

3.1. How the ACCC proposes to assess discrimination

The principal change in our approach is to recast our analysis to more directly assess potentially discriminatory conduct, and to do this using the two tests outlined below.

Importantly, we are proposing to apply these tests from the perspective of each access seeker (including a potential entrant) rather than first seeking to allocate an access seeker to a particular class. This avoids a step in our current guidance which we now consider to be unnecessary given the proposed approach is more direct with a focus on telecommunications markets.

The first test is for explicit discrimination and is directed towards whether, as a consequence of the conduct, all access seekers have a reasonable opportunity to acquire the same access (or ancillary) service on the same terms. 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.

An important point to note is that the proposed test also considers whether access seekers have a reasonable opportunity to access services on those common terms. This contemplates that access seekers could be offered a variety of methods to access a carriage service or ancillary service that involve the use of different business systems or processes. Provided all access seekers have a reasonable opportunity to choose between the range of systems or processes that are available then it is unlikely that this would be discriminatory.

The second test that we propose is to test for inherent discrimination. Under this test, we will consider whether the conduct would impede (relative to others) an access seeker's ability to compete in a relevant telecommunications market or segment. We propose to include 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, this will focus 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 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).

After applying the first and second tests, we then consider whether any exemptions or authorisation applies.

Our current guidelines indicate that we would assess whether differences in treatment are consistent with the long-term interests of end users. This involves more complex analysis than we now consider is necessary to achieve compliance with the provisions. We consider that, at its simplest, the non-discrimination obligations provide that access seekers should not be treated more or less favourably than other access seekers.

Our proposed approach reflects this by requiring that services are available to all access seekers on the same terms and also that access seekers should not be impeded from competing in downstream markets. This shift represents a significant simplification of the test given that a variety of underlying considerations inform the effect that the conduct would have on the long term interests of end-users.

For clarity, we are not proposing to assess the impact of the conduct on the state of competition within a market or segment, but rather on the effect of the conduct on the relative ability of the affected access seeker(s) to enter and compete within a market.

Further, while this approach necessarily calls for some consideration of the wholesale access market or segment to which the relevant conduct is directed, we propose to do this on a purposive basis rather than adopt specific market boundaries. For instance, if the relevant conduct relates to TC-2 access services on the NBN, we will likely consider the implications that the conduct has for the access seeker's ability to acquire those particular access services and compete in downstream markets for business services. Similarly, if conduct has implications for a defined grouping of access services, then we would likely consider in our analysis the consequences for an access seeker to acquire that specific grouping of access services and compete for dependent services.

We propose to undertake the analysis on a forward looking basis, having regard to the current circumstances of the access seeker and prevailing market conditions. This approach takes into account the reasonable and practicable steps that an access seeker could take to qualify for an access arrangement or ancillary service.

In this regard, we would consider the current customer base and pre-existing obligations that the access seeker has in determining what steps it can reasonably and practicably take. Under this approach, for instance, it could be reasonable and practicable for the access seeker to increase marketing spend, make a complementary investment to benefit from service or business support enhancements on offer in the wholesale market, or expand its operations into other market segments.

On the other hand, it is unlikely to be reasonable or practicable for an access seeker to take unilateral steps to vary the terms and conditions on which it acquires access services from other network operators or on which it supplies services to its own customers, or to significantly grow its NBN market share in order to qualify for an access arrangement.

In taking into account market dynamics, we would likely consider, for instance, the ability of the access seeker to compete for and win existing wholesale access services as the NBN migration concludes and the addition of new service addresses reduces to business as usual levels.

The offering of a volume discount can illustrate how we see the above tests operating in practice. Should this discount be offered by way of a rate card that is not made available to all access seekers, then this would, on its face, amount to discrimination under the first of our proposed tests. Similarly, if it was available only to those access seekers using one of many systems or methods of access, then this would also be likely to contravene the first test. On the other hand, if the volume discount had been specified on the face of a common rate card (i.e. has the same qualifying criteria and discounts amounts) that has been made available to all access seekers, we will consider the arrangement under the second proposed test.

This will involve asking whether applying such a discount would put those that do not qualify, or do not qualify to the same extent as others, at a unit access cost disadvantage in the relevant wholesale market segment. In doing so, we would also consider whether access seekers (including a recent or potential entrant) could each take reasonable and practicable steps to qualify for the discount in the near term so that the offer did not have such an effect on unit access costs. If the answer to these two questions respectively are yes, and no, then we would likely see the conduct as discriminatory.

Question 1: Do you agree with us adopting these changes in our approach to testing for discriminatory conduct? Are there any aspects of our proposed approach that you consider should be altered or further developed in these guidelines to better achieve the intended objective?

3.2. Setting out the obligations

Key non-discrimination obligations from the *Competition and Consumer Act 2010* and *Telecommunications Act 1997* are in a table to assist stakeholders to consider those obligations (see Table 1 on pages 3 to 5 of the proposed Guidance).

Question 2: What changes, if any, may need to be made to this information to improve accuracy or comprehension?

3.3. Examples of potential discrimination issues

Tables 3 to 5 of the proposed Guidance contain examples of potential discrimination between access seekers, discrimination in related activities and by an access provider in favour of itself. These examples consider scenarios that are likely and unlikely to be considered discriminatory, as assessed against the proposed analytical framework. We consider that these worked examples will assist stakeholders in understanding how we will apply the non-discrimination obligations.

Question 3: Do you agree with the positions outlined in the illustrative examples? If not, why not?

Question 4: Do you wish to nominate other types of conduct that should be addressed in this manner in the guidelines, remembering these are illustrative examples and not intended to constitute rulings on specific access arrangements or ancillary conduct.

4. Next steps

Following this consultation, we will consider all submissions in order to inform our final view on updating the current guidance. We anticipate that we will communicate the outcomes of this consultation, including issuing a new version of the Guidance, in August 2021.