



16 June 2021

ACCC Consultation on proposed non-discrimination guidelines

Email:

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To whom it may concern,

Telstra's submission to the ACCC Consultation on proposed non-discrimination guidelines

Telstra welcomes the opportunity to provide feedback on the proposed non-discrimination guidelines. We support the approach being taken by the ACCC to update the guidelines in light of legislative changes, alongside experience and market developments since the current guidelines were issued in 2012.

In particular we support:

- The introduction of the two-test approach to assessing potentially discriminatory conduct. In particular, Telstra considers the inclusion of a test for inherent discrimination will address shortcomings of the current approach.
- The Guidelines identifying not only conduct that would likely be problematic, but assisting in the development of commercial or operational approaches in wholesale markets that are unlikely to raise concerns.

The remainder of this submission addresses the questions set out in the Consultation Paper.

How the ACCC proposes to assess non-discrimination

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?

As set out in the Consultation Paper, the main change in the ACCC's approach is to more directly assess potentially discriminatory conduct using a two-test approach. Specifically, the ACCC proposes to first test for explicit discrimination and then for inherent discrimination.

Telstra agrees with the ACCC adopting the changes set out in the Consultation Paper and proposed Guidelines to test for discriminatory conduct.

The test for explicit discrimination appears consistent with the current guidelines in that it assesses whether all access seekers have a 'reasonable opportunity' to obtain the same service on the same terms. Further, while 'reasonable opportunity' is somewhat open for interpretation, the proposed guidelines include sufficient explanation and examples. As the ACCC is aware, Telstra has previously had concerns that it has not had a 'reasonable opportunity' to obtain the benefit of funding that nbn has made available to RSPs. Most recently and as part of the **[c-i-c begins] [c-i-c ends]** Nevertheless, Telstra was left feeling



that it had not been afforded a 'reasonable opportunity' to access the same funding as other RSPs and it was purely by chance that this issue was resolved.

The introduction of the second test for inherent discrimination is a welcome addition. Telstra's experience is that instances of discrimination between access seekers are often not immediately evident and would not be identified through the application of the first test nor (potentially) the current approach. The test for inherent discrimination is likely to address such instances.

We agree with the ACCC that "...at its simplest, the non-discrimination obligations provide that access seekers should not be treated more or less favourably than other access seekers." The shift from assessing whether any differences in treatment are in the long-term interests of end-users to assessing the effect of conduct on relative ability to enter and compete within a market is more meaningful in this regard and, in Telstra's view, consistent with the intent of the non-discrimination obligations. For example, nbn's [c-i-c begins] [c-i-c ends] The same view applies to the proposal to apply the tests from the perspective of each access seeker rather than allocating an access seeker to a particular class.

Setting out the obligations

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

Telstra considers the key non-discrimination obligations set out in Table 1 of the proposed Guidance are accurate and comprehensive.

Examples of potential discrimination issues

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

Telstra agrees with the positions outlined in the illustrative examples in the proposed Guidance. We do, however, have additional forms of conduct that we consider should be addressed. These are set out in response to Question 4 below.

Question 4: Do you wish to nominate other forms 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?

Telstra's experience of the application of the non-discrimination guidelines to date is that they are sometimes used as justification for an access provider not taking action. For example, in the past Telstra requested [c-i-c begins] [c-i-c ends] In the end the issue was resolved, but only after a number of meetings and a significant amount of time. This is an example of a rigid application of the non-discrimination obligations, which failed to take into account the actual circumstances facing Telstra and failed to consider a longer term view of RSPs' requirements.

Based on the examples provided in this submission, we propose the following forms of conduct should be addressed in the guidelines to provide further clarification on what is acceptable.

Likely to be discriminatory		
Scenario	Element of Test	Assessment



An access provider is requested to provide additional facilities access by an access seeker who has reached specified limits set out in an agreement that applies to all access seekers.	Reasonable opportunity to obtain on the same terms?	Yes – all access seekers are subject to the same terms set out in the agreement
	Impedes ability to compete in telecommunications market?	Yes – the access seeker is impeded from competing further in the market due to its market share, which means it has met pre-determined limits in advance of other access seekers.
An access provider is offering access seekers an incentive to enter into an agreement before a specified date. The access seeker is aware that access seekers are subject to different corporate governance requirements that place legitimate constraints on when the agreement can be signed. However, the access provider rejects a request to change the date on the basis that this would breach its non-discrimination obligations.	Reasonable opportunity to obtain on the same terms?	No – access seekers who are subject to different corporate governance requirements do not have a reasonable opportunity to obtain the incentive offered,
	Impedes ability to compete in telecommunications market?	Yes – the absence of the incentive means that access seekers who cannot take advantage of it will face additional implementation costs that could impede their ability to compete in the telecommunications market.

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Yours sincerely

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