



# Non-discrimination guidelines

ACCC explanatory material relating to the  
telecommunications non-discrimination provisions

18 May 2021

## **Important notice**

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 ACCC has made every reasonable effort to provide current and accurate information, but it does not make any guarantees regarding the accuracy, currency or completeness of that information.

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# 1. Introduction

- 1.1. NBN Co and certain other network owners and operators<sup>1</sup> (**Access Providers**) must supply telecommunications wholesale services to access seekers in a non-discriminatory manner under the *Competition and Consumer Act 2010* (Cth) (**CCA**) and *Telecommunications Act 1997* (Cth) (**Telecommunications Act**). The non-discrimination obligations operate within a broader regulatory and legislative framework that regulates both price and non-price terms and conditions of access to wholesale telecommunications services in Australia.
- 1.2. This guidance is intended to be an industry focused plain language guide to assist industry in understanding the telecommunications non-discrimination provisions and how we will consider whether NBN Co and other Access Providers have complied with them.
- 1.3. 'Discrimination' is not defined in the relevant legislation. In undertaking our role in enforcing the non-discrimination provisions we consider discrimination to mean an Access Provider treating itself or one or more access seekers more favourably or less favourably than another access seeker.
- 1.4. In assessing whether conduct is likely to be discriminatory, the framework we will apply is:
  - (a) do access seekers have a *reasonable opportunity* to acquire the *same services* on the *same terms*, or
  - (b) does the conduct *impede access seekers' ability to compete* in a relevant telecommunications market, and
  - (c) do authorisations or exemptions apply?
- 1.5. The ACCC first issued explanatory material about the non-discrimination obligations in Part XIC of the CCA in 2012 (**2012 Guidelines**).
- 1.6. This document replaces the 2012 Guidelines. These revised guidelines have been developed following recent amendments to the CCA and Telecommunications Act which were made as part of the *Telecommunications Legislation Amendment (Competition and Consumer) Act 2020*<sup>2</sup> (**Telecommunications Reform Package**).
- 1.7. Following the Telecommunications Reform Package, Access Providers other than NBN Co now have greater scope to provide both wholesale and retail services. These revised guidelines incorporate the non-discrimination obligations that apply to both NBN Co and other Access Providers.
- 1.8. In this guidance we cover:
  - (a) an overview of the regulatory framework
  - (b) discrimination in how Access Providers supply services
  - (c) discrimination in related activities

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<sup>1</sup> For network operators other than NBN Co, the non-discrimination obligations apply where a person is exempt from the wholesale only obligations under the Telecommunications Act that apply to local access lines. If a person is subject to the wholesale only obligations or if there is a functional separation undertaking in force, the non-discrimination obligations apply.

<sup>2</sup> [Telecommunications Legislation Amendment \(Competition and Consumer\) Act 2020](#), 25 May 2020, accessed 6 May 2021.

- (d) discrimination by Access Providers in favour of themselves
- (e) enforcement of non-discrimination provisions
- (f) discrimination in regulatory instruments
- (g) worked examples of potential discrimination issues.

## 2. Overview of the regulatory framework

- 2.1. The regulatory framework for the telecommunications industry in Australia seeks to promote the long-term interests of end-users (**LTIE**). Part XIC of the CCA is a key element of this framework, establishing a regime under which service providers can access declared telecommunications services in order to supply end-users.<sup>3</sup> The right to access follows declaration of a service by the ACCC. The ACCC has published guidelines on the general approach to declaration issues under Part XIC.<sup>4</sup>
- 2.2. In 2011, the non-discrimination provisions were introduced into Part XIC of the CCA by the *Telecommunications Legislation Amendment (National Broadband Network Measures – Access Arrangements) Act 2011*.
- 2.3. In 2020, the non-discrimination provisions in the CCA were amended and non-discrimination provisions relating to non-NBN Access Providers were inserted into the Telecommunications Act by the Telecommunications Reform Package.
- 2.4. The non-discrimination provisions prohibit Access Providers from engaging in discriminatory behaviour.
- 2.5. The CCA sets out the non-discrimination provisions that apply to NBN Co and that apply in relation to access determinations and binding rules of conduct (**BROC**) made by the ACCC.<sup>5</sup> The Telecommunications Act sets out the non-discrimination provisions that apply to Access Providers other than NBN Co. A summary of these provisions is set out in Table 1 below. Our approach to assessing whether there has been a breach of the non-discrimination provisions will be the same whether under the CCA or Telecommunications Act.

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<sup>3</sup> Declared services are those services declared by the ACCC, as defined in section 152AL of the CCA.

<sup>4</sup> ACCC, '[A guideline to the declaration provisions for telecommunications services under Part XIC of the Competition and Consumer Act 2010](#)', August 2016, accessed 6 May 2021.

<sup>5</sup> Sections 152BCB(4A)(b) and 152BDA(4A)(b) of the CCA.

**Table 1 – Summary of non-discrimination provisions**

Requirement	NBN Co	Other Access Provider <sup>6</sup>
<b>No discrimination in supplying services</b>	An NBN corporation must not, in complying with any of its category B standard access obligations, discriminate between access seekers. <sup>7</sup>	The person must not discriminate between the person's wholesale customers, or the person's prospective wholesale customers, in relation to the supply of eligible services <sup>8</sup> using the line. <sup>9</sup>
Exemptions - limited circumstances where different treatment is permissible	Where NBN corporation has reasonable grounds to believe that the access seeker would fail, to a material extent, to comply with the terms and conditions on which the NBN corporation complies, or on which the NBN corporation is reasonably likely to comply, with the relevant standard access obligation. <sup>10</sup> For example, where the relevant wholesale customer:  (a) is not creditworthy; and  (b) has repeatedly failed to comply with the terms and conditions of supply. <sup>11</sup>  See section 2.1 of this guidance below.	If the person has reasonable grounds to believe that the wholesale customer or prospective wholesale customer would fail, to a material extent, to comply with the terms and conditions on which the person supplies eligible services using the line. <sup>12</sup>  For example where the relevant wholesale customer:  (a) is not creditworthy; and  (b) has repeatedly failed to comply with the terms and conditions of supply. <sup>13</sup>
Authorised Conduct	Differences that relate to uniform national pricing. <sup>14</sup>	N/A

<sup>6</sup> Where class exemptions apply under section 143A of the Telecommunications Act, subsection (3) also sets out non-discrimination rules. These rules are referenced in the footnotes that follow.

<sup>7</sup> Section 152AXC(1) of the CCA.

<sup>8</sup> Section 152AL defines 'eligible service'.

<sup>9</sup> Section 151ZF(1) of the Telecommunications Act. For class exemptions under section 143A of the Telecommunications Act, see section 143A(3)(b) which states 'the person must not discriminate between the person's wholesale customers, or the person's prospective wholesale customers, in relation to the supply of designated carriage services'.

<sup>10</sup> Section 152AXC(2) of the CCA.

<sup>11</sup> Section 152AXC(3) of the CCA.

<sup>12</sup> Sections 151ZF(2), 143A(4) and 143(A)(5) of the Telecommunications Act.

<sup>13</sup> Sections 151ZF(3) and 143A(4) of the Telecommunications Act.

<sup>14</sup> Sections 152AXC(12) and 151DA of the CCA.

Requirement	NBN Co	Other Access Provider <sup>6</sup>
<b>No discrimination between access seekers in relation to ‘related activities’</b>	<p>NBN Co must not, in carrying on any of the following activities, discriminate between access seekers:</p> <ul style="list-style-type: none"> <li>(a) developing a new eligible service;</li> <li>(b) enhancing an eligible service;</li> <li>(c) extending or enhancing the capability of a facility or telecommunications network by means of which an eligible service is, or is to be, supplied;</li> <li>(d) planning for a facility or telecommunications network by means of which an eligible service is, or is to be, supplied;</li> <li>(e) an activity that is preparatory to the supply of an eligible service;</li> <li>(f) an activity that is ancillary or incidental to the supply of an eligible service;<sup>15</sup></li> <li>(g) giving information to service providers about any of the above activities.<sup>16</sup></li> </ul>	<p>The person must not, in carrying on any of the following activities, discriminate between wholesale or perspective wholesale customers:<sup>17</sup></p> <ul style="list-style-type: none"> <li>(a) developing a new eligible service;</li> <li>(b) enhancing an eligible service;</li> <li>(c) extending or enhancing the capability of a facility or telecommunications network by means of which an eligible service is, or is to be, supplied;</li> <li>(d) planning for a facility or telecommunications network by means of which an eligible service is, or is to be, supplied;</li> <li>(e) an activity that is preparatory to the supply of an eligible service;</li> <li>(f) an activity that is ancillary or incidental to the supply of an eligible service;</li> <li>(g) giving information to service providers about any of the above activities.</li> </ul>
Authorised Conduct	Differences that relate to uniform national pricing. <sup>18</sup>	N/A

<sup>15</sup> Providing ancillary services would be an activity that is ancillary or incidental to the supply of a declared service and may also potentially be declared services. Examples of ancillary services include facilities access services (which allow access seekers to house and operate equipment used for interconnecting their networks with the network access provider’s network), system interfacing services and installation services.

<sup>16</sup> Section 152AXD(1) of the CCA: see subsections (a) to (g).

<sup>17</sup> Section 151ZG of the Telecommunications Act. For Access Providers which are subject to a class exemption under section 143A, see section 143A(3)(d) of the Telecommunications Act.

<sup>18</sup> Sections 152AXD(5A) and 151DA of the CCA.

<p><b>Access providers must not discriminate in favour of themselves in the supply of declared services</b></p>	<p>If:</p> <ul style="list-style-type: none"> <li>(a) an NBN corporation is a carrier or carriage service provider; and</li> <li>(b) a declared services relates to the NBN corporation;<sup>19</sup> and</li> <li>(c) the NBN corporation is subject to category B standard access obligation in relation to the service</li> </ul> <p>the NBN corporation must not discriminate in favour of itself in relation to the supply of the service.<sup>20</sup></p>	<p>If:</p> <ul style="list-style-type: none"> <li>(a) a person supplies, or proposed to supply, an eligible service using a local access line: <ul style="list-style-type: none"> <li>i. to itself; and</li> <li>ii. to its wholesale customers or prospective wholesale customers; and</li> </ul> </li> <li>(b) any of the following conditions is satisfied: <ul style="list-style-type: none"> <li>i. section 142C applies to the line;<sup>21</sup></li> <li>ii. section 143 applies to the line;<sup>22</sup></li> <li>iii. neither section 142C nor section 143 applies to the line, and there is in force a functional separation undertaking that relates to local access line services supplied, or proposed to be supplied, using the line;</li> </ul> </li> </ul> <p>the person must not, on or after the designated commencement date, discriminate in favour of itself in relation to the supply of an eligible service.<sup>23</sup></p>
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<sup>19</sup> Under subsections 152AL(8A), (8D) or (8E) of the CCA.

<sup>20</sup> Section 152AXC(7) of the CCA.

<sup>21</sup> Supply of eligible services to be on wholesale basis—lines that come into existence on or after the designated commencement date as identified by section 142C of the Telecommunications Act.

<sup>22</sup> Supply of eligible services to be on wholesale basis—networks in existence before the designated commencement date as identified by section 143 of the Telecommunications Act.

<sup>23</sup> Sections 151ZF(4) and 143(3)(c) of the Telecommunications Act.

<p><b>No discrimination in favour of oneself in respect of related activities</b></p>	<p>N/A</p>	<p>The person must not discriminate in favour of itself in relation to the carrying on of any of the following activities:</p> <ul style="list-style-type: none"> <li>(a) developing a new eligible service;</li> <li>(b) enhancing an eligible service;</li> <li>(c) extending or enhancing the capability of a facility or telecommunications network by means of which an eligible service is, or is to be, supplied;</li> <li>(d) planning for a facility or telecommunications network by means of which an eligible service is, or is to be, supplied;</li> <li>(e) an activity that is preparatory to the supply of an eligible service;</li> <li>(f) an activity that is ancillary or incidental to the supply of an eligible service;</li> <li>(g) giving information to service providers about any of the above activities.<sup>24</sup></li> </ul>
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<sup>24</sup> Sections 151ZG(3) and 143A(3)(e) of the Telecommunications Act.

### 3. Discrimination between access seekers in supplying services

3.1. Access Providers must not discriminate between access seekers in how they supply services to them. In assessing whether the supply of services to access seekers is likely to be discriminatory between access seekers the framework we will apply is:

(a) do access seekers have a reasonable opportunity to acquire the same services on the same terms, or

(b) does the conduct impede access seekers' ability to compete in a relevant telecommunications market, and

(c) do authorisations or exemptions apply?

We explain these concepts below.

#### **Reasonable opportunity to acquire the same service on the same terms**

3.2. We will consider whether Access Providers have given all access seekers a reasonable opportunity to obtain access to the same services on the same terms. We will assess whether the access terms offered by Access Providers are reasonably available to all access seekers who may wish to take up the offering.

3.3. This does not preclude Access Providers from offering different services, or different forms of access to the services (including different terms and conditions), provided each form of access is reasonably available to all access seekers and access seekers' ability to compete is not affected.

#### **Examples**

Price offers that have different eligibility criteria are unlikely to provide access seekers with a reasonable opportunity to acquire the same services on the same terms where access seekers cannot take reasonable steps to fulfil the eligibility criteria that apply to them.

Access seekers may be required to invest in business processes that improve efficiency to gain the benefit of terms offered by Access Providers such as enhanced information flows. Provided access seekers have been given a reasonable opportunity to access the improved terms, this element of the framework would likely be satisfied.

3.4. We will take a pragmatic approach to assessing whether reasonable opportunity has been provided. We expect Access Providers to have regard to the capacity of access seekers to satisfy the supply terms. This does not require Access Providers to make enquiries with all potential access seekers as to their ability to meet the supply terms, but Access Providers are expected to have regard to information generally available to them, including information provided by access seekers.

## **Access seeker's ability to compete in a relevant telecommunications market**

- 3.5. The next element of the framework we will assess is whether the terms and conditions of an access offer themselves impede an access seeker in competing in a relevant telecommunications market. Without this additional consideration, it is possible that discrimination built directly into the terms and conditions of an access offer may not be identified.
- 3.6. We will take a purposive approach to this assessment. This will include assessing the effect of the relevant offer having regard to the market (or the customer, geographic or other segment) to which the conduct is directed. We will undertake our assessment on a forward-looking basis that has regard to the practicable steps that are reasonably open to an access seeker to avoid the terms and conditions of an offer from impeding them from competing.
- 3.7. In undertaking this assessment we will look in particular at the effect of the offer on a relative basis across access seekers. For instance, for a price related matter, we will consider the relative unit costs for different access seekers acquiring the relevant service pursuant to the offer.
- 3.8. Where the comparative effect of an access offer between access seekers would be very small then the access offer would be unlikely to impede access seekers from competing in a downstream market.

### **Example**

Access seekers needing to invest differently in business processes to benefit from more timely service information flows would be a difference that would be unlikely to affect an individual access seeker's ability to compete in a relevant telecommunications market.

- 3.9. Where an Access Provider makes the same offer to access seekers, but this has a materially different effect on the ability of one or more access seekers to compete in a relevant telecommunications market, this is likely to be discriminatory.

### **Example**

Volume or loyalty discounts would have different effects on access seekers' abilities to compete in downstream telecommunications markets and we would consider them to be discriminatory. This is because it is unlikely to be reasonably practicable for all access seekers to meet the eligibility criteria, and those that do not would be impeded in competing with those that did.

- 3.10. More detailed examples of conduct that is, and is not, likely to raise discrimination concerns in respect of supplying services are provided in Part 8 of this guidance at Table 3.

## Authorisations and Exemptions

3.11. The CCA and Telecommunications Act provide limited circumstances where different treatment of access seekers is permissible in the supply of services. This is where the Access Provider has reasonable grounds to believe that the access seeker is not creditworthy or is likely to fail to a material extent to comply with terms and conditions of supply. NBN Co is also permitted to have differences where they are needed to achieve uniform national pricing. These concepts are explained below.

### ***‘Reasonable grounds’***

3.12. We consider that whether an Access Provider has *‘reasonable grounds’* is an objective test. That is, it must be just and appropriate in all of the circumstances for the Access Provider to hold the belief.

3.13. We would expect the Access Provider to be able to demonstrate why it has come to its belief.

### ***‘Material extent’***

3.14. For an access seeker to be likely to fail to a *‘material extent’* to comply with terms and conditions of supply, a single breach by an access seeker needs to affect the Access Provider’s ability, in an important or relevant way, to comply with its standard access obligations.

### ***‘Creditworthiness’***

3.15. In order for an Access Provider to have reasonable grounds to believe that an access seeker is not *‘creditworthy’*, it must be the case that the particular access seeker will not be able to pay the charges invoiced by the provider when due. Reasonable grounds for this include:

- (a) a history of failing to pay money when due
- (b) receiving multiple breach notices over a reasonable amount of time
- (c) failing to provide or maintain adequate financial security as required, and
- (d) insolvency.

3.16. It is not likely to be discriminatory for an Access Provider to require a higher level of financial security or insurance and performance of more frequent credit risk assessments if the Access Provider reasonably believes an access seeker is not creditworthy.

3.17. The exemption may not apply to all terms and conditions related to credit and creditworthiness.

### ***Failure to comply***

3.18. Examples where an access seeker may be likely to *fail* to a material extent *to comply* with terms and conditions of supply include:

- (a) failure to rectify breaches of terms and conditions of supply or failure to rectify a significant breach of a term or conditions, and
- (b) inability to reasonably comply with compatibility and systems testing requirements.

- 3.19. Different treatment is allowed only to the extent that the access seeker continues to fail to comply, or has not remedied a breach.

### ***Uniform national pricing***

- 3.20. In the case of NBN Co, certain differences are permitted in respect of NBN Co offerings where those differences relate to promoting uniform national pricing.<sup>25</sup>

## **4. Discrimination in related activities**

- 4.1. Access Providers are prohibited from discriminating between access seekers in carrying out related activities,<sup>26</sup> which comprise:

- (a) developing a new eligible service
- (b) enhancing an eligible service
- (c) extending or enhancing the capability of a facility or telecommunications network by means of which an eligible service is, or is to be, supplied
- (d) planning for a facility or telecommunications network by means of which an eligible service is, or is to be, supplied
- (e) an activity that is preparatory to the supply of an eligible service
- (f) an activity that is ancillary or incidental to the supply of an eligible service, and<sup>27</sup>
- (g) giving information to service providers about any of the above activities.<sup>28</sup>

- 4.2. We apply the same general framework in assessing whether or not an Access Provider has discriminated between access seekers in carrying out a related activity. However, the focus is on the related activity itself and the exemptions do not apply.<sup>29</sup> That is, we will assess whether:

- (a) access seekers have a reasonable opportunity to participate in, and receive information about, the related activities to the same extent as other access seekers, or
- (b) the conduct impedes access seekers' ability to compete in a relevant telecommunications market.

- 4.3. This assessment is directed at whether an Access Provider has discriminated against access seekers in carrying out the related activities. At a minimum, an Access Provider is likely to have discriminated between access seekers where they each do not have a reasonable opportunity to acquire the services that are enabled by the relevant related activity on the same terms, including at the same time.

- 4.4. However, an Access Provider is also prevented from discriminating between access seekers in carrying out the related activities as a whole. For instance, in deciding which services or facilities an Access Provider will develop or enhance, it cannot

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<sup>25</sup> Sections 152AXC(12) and 151DA of the CCA.

<sup>26</sup> In the Telecommunications Act these are referred to as 'activities'.

<sup>27</sup> Providing ancillary services would be an activity that is ancillary or incidental to the supply of a declared service and may also potentially be declared services. Examples of ancillary services include facilities access services (which allow access seekers to house and operate equipment used for interconnecting their networks with the network access provider's network), system interfacing services and installation services.

<sup>28</sup> Section 152AXD(1) of the CCA: see subsections (a) to (g).

<sup>29</sup> In the case of the NBN, the CCA allows for authorisation in relation to uniform national pricing, as identified in section 151DA.

favour one access seeker over another. Rather the Access Provider needs to provide each access seeker with a reasonable opportunity to nominate such projects for consideration, and not give greater weight to the legitimate interests of one access seeker over another in prioritising the nominated projects that it will or will not undertake.

- 4.5. An Access Provider is also required to give the same information to access seekers about the related activities, including the general progress of projects that are being undertaken so that they are not impeded in competing in a relevant telecommunication market.

### Examples

Minor differences in the timing of information flows may not impact access seekers' ability to compete in a relevant telecommunications market. An important consideration is whether the timing differences impact access seekers' ability to make consequential changes to their retail offerings and inform their customers about any such changes.

If an Access Provider develops a new product at the request of an access seeker without providing other access seekers a reasonable opportunity to nominate other product developments for consideration, it is likely that the access provider will have discriminated between access seekers in conducting the related activity.

If an Access Provider provides different information about its product development between access seekers, such as specifications and associated pricing for a new product, or provides information to some later than others, so that one access seeker is likely to gain a first mover advantage in a telecommunications market, it is likely that the access provider has discriminated between access seekers in giving information about a related activity.

- 4.6. More detailed examples of conduct that is, and is not, likely to raise discrimination concerns in respect of related activities are provided in Part 8 of this guidance at Table 4.

## 5. Discrimination by Access Providers in favour of themselves

- 5.1. Access Providers must not discriminate in favour of themselves in the supply of services or related activities.<sup>30</sup>
- 5.2. Prior to the amendments to the Telecommunications Act made by the Telecommunications Reform Package the circumstances in which Access Providers were able to provide both wholesale and retail services using networks which they owned or operated were more limited.<sup>31</sup>

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<sup>30</sup> Section 152AXC(7) of the CCA, and sections 151ZF(4), 151ZG(3), 143A(3)(c) and 143(3)(e) of the Telecommunications Act.

<sup>31</sup> Certain Access Providers received a ministerial exemption from Part 8 of the Telecommunications Act or were subject to the Carrier Licence Conditions (Networks supplying Superfast Carriage Services to Residential Customers) Declaration 2014.

- 5.3. Certain Access Providers, other than NBN Co, are now able to offer both wholesale and retail services over their networks if they are subject to a functional separation undertaking under Part 8 of the Telecommunications Act or are bound by a class exemption determination under section 143A of the CCA. Further guidance on the superfast broadband network class exemption and deemed functional separation undertaking is available [here](#).
- 5.4. Access Providers that offer both wholesale and retail services, including through related business units, need to have particular regard to the obligation not to discriminate in favour of themselves.
- 5.5. Vertically integrated Access Providers must treat access seekers in the same way as their own retail business units, including in relation to pricing, operational support and the supply of information.
- 5.6. We apply the same fundamental framework to assess whether conduct amounts to discrimination by Access Providers in favour of themselves as we use in assessing whether conduct amounts to discrimination between access seekers, save that the exemption provisions do not apply to discrimination by Access Providers in favour of themselves.<sup>32</sup> That framework is:
- (a) do access seekers have a reasonable opportunity to acquire the same services on the same terms including having a reasonable opportunity to participate in, and receive information about, related activities to the same extent as entities related to the Access Provider, or
  - (b) does the conduct affect access seekers' ability to compete in a relevant telecommunications market?
- 5.7. In applying this framework we will consider whether an Access Provider offers itself and access seekers equivalence of inputs. The issues we will consider include whether an Access Provider has:
- (a) supplied access seekers with the same products or services on the same terms and conditions and in the same timeframes as supplied to itself
  - (b) provided access seekers with the same systems and processes and used these systems and processes in the same way, within the same timeframes as provided to itself, and
  - (c) provided access seekers with the same commercial information relating to products, services, systems and processes in the same timeframes as provided to itself.
- 5.8. More detailed examples of conduct that is, and is not, likely to raise concerns in respect of an Access Provider discriminating in favour of itself are provided in Part 8 of this guidance at Table 5.

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<sup>32</sup> In the case of the NBN, the CCA allows for authorisation in relation to uniform national pricing, as identified in section 152AXC(12).

## 6. Enforcement of non-discrimination provisions

- 6.1. The ACCC has a role in enforcing the non-discrimination provisions under both the CCA and the Telecommunications Act. Our primary aims in enforcing the provisions include to:
- (a) stop contravening conduct
  - (b) deter future contravening conduct
  - (c) undo the harm caused by contravening conduct
  - (d) encourage the efficient use of compliance systems, and
  - (e) where warranted, punish the wrongdoer by the imposition of penalties.
- 6.2. The ACCC has a number of options available where it considers there has been a contravention of the non-discrimination provisions. These options include seeking to resolve the matter via an informal administrative resolution, issuing a formal warning notice, seeking a section 87B court enforceable undertaking or pursuing litigation to seek penalties, injunctions or other orders.
- 6.3. The issues the ACCC will consider when determining the appropriate enforcement response include:
- (a) the effect that the conduct has had or is likely to have on competition
  - (b) the extent and blatancy of the conduct
  - (c) whether the conduct is on-going, and
  - (d) the extent to which the Access Provider has co-operated with the ACCC.
- 6.4. Where a court based outcome is pursued we may:
- (a) seek recovery in the Federal Court of a pecuniary penalty of up to \$10 million per contravention for corporations and \$50,000 per contravention for individuals<sup>33</sup>
  - (b) seek injunctions to ensure compliance with the non-discrimination provisions, and/or<sup>34</sup>
  - (c) seek an order in the Federal Court requiring the provider to comply with the obligation or compensate any person who has suffered as a result of the contravention, or any other order that the court thinks appropriate.<sup>35</sup>
- 6.5. Further information on the ACCC's general approach to enforcement is outlined in the [ACCC's Compliance and enforcement policy](#).
- 6.6. Certain parties may also pursue their own private legal action.<sup>36</sup>

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<sup>33</sup> Section 570(3) of the Telecommunications Act. A contravention of the non-discrimination obligations in the CCA, which contravenes the service provider rule in the Telecommunications Act by virtue of section 98 is also subject to these penalties.

<sup>34</sup> Sections 564 and 565 of the Telecommunications Act. Injunctions are also available for a contravention of the non-discrimination obligations in the CCA, which contravenes the service provider rule in the Telecommunications Act by virtue of section 98.

<sup>35</sup> Section 152BB(1AB) of the CCA and 151ZHA(1) of the Telecommunications Act.

<sup>36</sup> Section 152BB of the CCA and 151ZHA of the Telecommunications Act.

## 7. Prohibition on discrimination in regulatory instruments

- 7.1. The ACCC is subject to a requirement not to make access determinations<sup>37</sup> and issue a BROC that have the effect (whether direct or indirect) of discriminating between access seekers.<sup>38</sup>
- 7.2. In making an access determination or BROC we are required to consider whether the access determination or BROC promotes LTIE.<sup>39</sup> The LTIE considers three objectives:
  - (a) promoting competition in markets for carriage services, or services provided by means of carriage services
  - (b) achieving any-to-any connectivity in relation to carriage services that involve communication between end-users
  - (c) encouraging the economically efficient use of, and economically efficient investment in, infrastructure by which listed services are supplied and any other infrastructure by which listed services are, or are likely to become capable of, being supplied
- 7.3. Our approach to the LTIE assessment is discussed in our Part XIC declaration guidelines.<sup>40</sup>
- 7.4. We consider that the framework explained in this guide for assessing discrimination can also be applied to consider whether the making of an access determination or BROC will have the effect of discriminating between access seekers. We will assess whether the regulatory instrument:
  - (a) is likely to result in access seekers having a reasonable opportunity to acquire the same services on the same terms, and
  - (b) affects access seekers' ability to compete in a relevant telecommunications market.

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<sup>37</sup> Section 152BCB(4A)(b) of the CCA.

<sup>38</sup> Section 152BDA(4A)(b) of the CCA.

<sup>39</sup> Sections 152BCA and 152BDAA of the CCA.

<sup>40</sup> ACCC, '[A guideline to the declaration provisions for telecommunications services under Part XIC of the Competition and Consumer Act 2010](#)', August 2016, accessed 6 May 2021.

## 8. Worked examples of potential discrimination issues

**Table 3 – Discrimination between Access Seekers in supplying services**

Likely to be Discriminatory			Unlikely to be Discriminatory		
<i>Scenario</i>	<i>Element of test</i>	<i>Assessment</i>	<i>Scenario</i>	<i>Element of test</i>	<i>Assessment</i>
<p>In providing a relevant service an access provider offers capacity pricing based on the total amount of capacity that an individual access seeker commits to acquire on a monthly basis.</p> <p>More favourable pricing is offered to access seekers that commit to acquire higher total capacity amounts.</p>	Reasonable opportunity to acquire same services on same terms?	No – pricing based on specific access seeker characteristics. More favourable pricing available to larger access seekers and not available to smaller access seekers.	<p>In providing a relevant service an access provider offers capacity pricing which is determined on the amount of capacity that an access seeker purchases for each individual end user.</p> <p>More favourable pricing is available to access seekers that elect to purchase more capacity per end user.</p> <p>The same pricing methodology applies to all access seekers regardless of their total capacity requirements or commitments.</p>	Reasonable opportunity to acquire same services on same terms?	Yes – same prices apply to all access seekers regardless of access seeker characteristics.
	Impedes ability to compete in telecommunications market?	Yes – access seekers that are offered lower capacity prices are able to offer more attractive offers in the retail market, and are therefore at a competitive advantage.		Impedes ability to compete in telecommunications market?	No – all access seekers have access to the same wholesale inputs and the offer does not impact their ability to compete.
	Do authorisations or exemptions apply?	No.		Do authorisations or exemptions apply?	No.

**Table 4 – Discrimination in related activities**

Likely to be Discriminatory			Unlikely to be Discriminatory		
Scenario	Element of test	Assessment	Scenario	Element of test	Assessment
<p>An access provider is experiencing congestion issues on its network and is unable to increase capacity in a timely way.</p> <p>The access provider imposes a fair use policy which limits access services that exceed a specified usage level where these are provided by some access seekers but not others.</p>	<p>Reasonable opportunity to participate in, and receive information about, the related activities to the same extent as other access seekers?</p>	<p>No – the access terms available to the affected access seekers are inferior to those offered to other access seekers as a result of the application of the fair use policy.</p>	<p>An access provider is experiencing congestion issues on its network and is unable to increase capacity in a timely way.</p> <p>The access provider imposes a fair use policy that limits all access services that exceed a specified level of usage regardless of the access seeker.</p>	<p>Reasonable opportunity to participate in, and receive information about, the related activities to the same extent as other access seekers?</p>	<p>Yes – the same access terms remain available to all access seekers notwithstanding the application of the fair use policy.</p>
	<p>Impedes ability to compete in telecommunications market?</p>	<p>Yes – it is unlikely that the affected access seekers could take practicable steps reasonably open to them to avoid being placed at a competitive disadvantage.</p>		<p>Impedes access seekers ability to compete in telecommunications market?</p>	<p>No – the fair use policy affects the ability of all access seekers too compete in the same way as the service reduction depends on individual end user behaviour only.</p>
	<p>Do authorisations apply?</p>	<p>No.</p>		<p>Do authorisations apply?</p>	<p>No.</p>

Likely to be Discriminatory			Unlikely to be Discriminatory		
Scenario	Element of test	Assessment	Scenario	Element of test	Assessment
<p>An access provider is requested by an access seeker to develop a new access product. Developing the access product is technically complex and there are efficiency gains in the access provider working with one access seeker during the development phase.</p> <p>The access provider works with one access seeker including offering a pilot program with advanced access to the new product.</p> <p>The new access product is offered to the remainder of the market after proof of concept. This occurs after the pilot program has been running for two months.</p> <p>During the pilot program the access seeker gains 10,000 new end users on retail plans based the new product.</p>	Reasonable opportunity to participate in, and receive information about, the related activities to the same extent as other access seekers?	No – Other access seekers would not have a reasonable opportunity to receive access to the new product to the same extent as the favoured access seeker.	<p>An access provider is requested by an access seeker to develop a new access product. Developing the access product is technically complex and there are efficiency gains in the access provider working with one access seeker.</p> <p>The access provider works with the requesting access seeker in developing the product.</p> <p>All information the access provider makes available to the requesting access seeker is also made available to all access seekers within 24 hours of it being made available to the requesting access seeker.</p> <p>Before the new product is made available the access provider consults with all access seekers.</p> <p>The new access product is made available to all access seekers at the same time and on the same terms.</p>	Reasonable opportunity to participate in, and receive information about, the related activities to the same extent as other access seekers?	Yes.
	Impedes ability to compete in telecommunications market?	Yes – the first mover advantage would result in a competitive advantage only available to one access seeker.	Impedes ability to compete in telecommunications market?	No.	
	Do authorisations apply?	No.	Do authorisations apply?	No.	

Likely to be Discriminatory			Unlikely to be Discriminatory		
Scenario	Element of test	Assessment	Scenario	Element of test	Assessment
<p>An access provider is in the final stages of building a network in a multi-unit development.</p> <p>The building owner has asked the access provider to facilitate the ability for end users to access the underlying services as seamlessly as possible. The building owner gives the access provider the date that the building will be completed and a list of the individual units that have been sold and leased directly from the building owner.</p> <p>The access provider approaches its biggest access seeker and provides it with the date that the building will be finished and the list of units sold and leased.</p>	Reasonable opportunity to participate in, and receive information about, the related activities to the same extent as other access seekers?	No – the favoured access seeker has a better opportunity to access the products as a result of the exclusive provision of the specific information.	<p>An access provider is in the final stages of building a network in a multi-unit development.</p> <p>The building owner has asked the access provider to facilitate the ability for end users to access the underlying services as seamlessly as possible. The building owner gives the access provider the date that the building will be completed and a list of the individual units that have been sold and leased directly from the building owner.</p> <p>The access provider puts information on the wholesale section of its website, which all access seekers have the same access to, about the date that the building will be ready for service and notes that immediate demand is expected.</p>	Reasonable opportunity to participate in, and receive information about, the related activities to the same extent as other access seekers?	Yes – all access seekers have access to the same information at the same time.
	Impedes ability to compete in telecommunications market?	Yes – as a result of the exclusive provision of the specific information the favoured access seeker has the unique opportunity engage with the building owner and commence competing for retail customers.		Impedes ability to compete in telecommunications market?	No – all access seekers have access to the same information at the same time.
	Do authorisations apply?	No.		Do authorisations apply?	No.

**Table 5 – Discrimination by Access Provider in favour of itself**

Likely to be Discriminatory			Unlikely to be Discriminatory		
Scenario	Element of test	Assessment	Scenario	Element of test	Assessment
<p>An access provider is subject to a functional separation undertaking under Part 8 of the Telecommunications Act. It supplies services to its related retail unit and independent access seekers. As a smaller new entrant it is nimble and well able to react to the needs of its customers.</p> <p>The access provider's retail unit asks the access provider to develop a new product. The access provider agrees, and advises the retail unit and its other access seeker of its intention to develop the product, and otherwise provides information equivalence during the development and implementation of the product.</p> <p>At a similar time the access provider's largest independent access seeker also asks the access provider to develop a new product. The access provider refuses to engage with the access seeker on the request.</p>	<p>Reasonable opportunity to acquire the same services on the same terms including having a reasonable opportunity to participate in, and receive information about, related activities to the same extent as entities related to the Access Provider?</p>	<p>No – The independent access seeker does not have the opportunity to have a new product developed that suits its business.</p>	<p>An access provider is subject to a functional separation undertaking under Part 8 of the Telecommunications Act. It supplies services to its related retail unit and independent access seekers. As a smaller new entrant it is nimble and well able to react to the needs of its customers.</p> <p>The access provider has a policy for requesting the development of new products which is published on the wholesale section of its website.</p> <p>The access provider applies the same policy for requests for product development from its retail unit or independent access seekers. Requests are addressed on a first come first served basis.</p> <p>The access seeker ensures information equivalence during product development and implementation. New access products are offered to all access seekers at the same time.</p>	<p>Reasonable opportunity to acquire the same services on the same terms including having a reasonable opportunity to participate in, and receive information about, related activities to the same extent as entities related to the Access Provider?</p>	<p>Yes – all access seekers are treated equally in access to the development of a new product that suits their needs.</p>
	<p>Impedes ability to compete in telecommunications market?</p>	<p>Likely. The retail unit is likely to be in a better position to compete by having the access provider develop products that suit its customer base.</p>		<p>Impedes ability to compete in telecommunications market?</p>	<p>No - all access seekers are treated equally in access to the development of a new product that suits their needs.</p>

Likely to be Discriminatory			Unlikely to be Discriminatory		
Scenario	Element of test	Assessment	Scenario	Element of test	Assessment
<p>An access provider operates a network in two new estates. The Access Provider is bound by a class exemption determination under section 143A of the CCA (or a functional separation undertaking under Part 8 of the Telecommunications Act).</p> <p>The access provider makes services available to access seekers including its affiliated retail service providers.</p> <p>The access provider is looking to increase the number of end users taking up faster services</p>	<p>Reasonable opportunity to acquire the same services on the same terms including having a reasonable opportunity to participate in, and receive information about, related activities to the same extent as entities related to the Access Provider?</p>	<p>No – non-affiliated access seekers do not have access to the rebate.</p>	<p>An access provider operates a network in two new estates. The access provider is bound by class exemption determination under section 143A of the Telecommunications Act.</p> <p>The access provider makes services available to access seekers including its affiliated retail service providers.</p> <p>The access provider is looking to increase the number of end users taking up faster services and offers a \$10 per month rebate to all</p>	<p>Reasonable opportunity to acquire the same services on the same terms including having a reasonable opportunity to participate in, and receive information about, related activities to the same extent as entities related to the Access Provider?</p>	<p>Yes – all access seekers have the same access to the rebate.</p>

<p>and offers a \$10 per month rebate to its affiliated retail services providers for the first six months for each end user it signs up to a plan with download speeds of 100 Mbps or above.</p> <p>The rebate is not available to non-affiliated access seekers.</p>	<p>Impedes ability to compete in telecommunications market?</p>	<p>Yes - non-affiliated access seekers have higher input cost which impedes their price competitiveness at the retail level.</p>	<p>of its access seekers, including its affiliated retail brands, for the first six months for each end user it signs up to a plan with download speeds of 100 Mbps or above.</p> <p>The offer is made available only via the access provider's wholesale customer portal. All access seekers are advised of the offer at the same time via email.</p>	<p>Impedes ability to compete in telecommunications market?</p>	<p>No.</p>
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Likely to be Discriminatory			Unlikely to be Discriminatory		
Scenario	Element of test	Assessment	Scenario	Element of test	Assessment
<p>An access provider operates a number of networks in estates and multi dwelling developments. The access provider is subject to a functional separation undertaking under Part 8 of the Telecommunications Act.</p> <p>The access provider has access seekers that are independent and one that is a related entity.</p> <p>The access provider has just completed building a new network in a multi dwelling development.</p> <p>The access provider wants to help end users sign up to broadband services easily.</p> <p>During the installation process the access provider has left flyers in all premises advertising just its related entity.</p> <p>The flyers contain the access providers branding and state</p>	<p>Reasonable opportunity to acquire same services on same terms?</p>	<p>No – non-affiliated access seekers do not have a reasonable opportunity to acquire wholesale products on the same terms in respect of the new building because they are being excluded by the access provider funded and facilitated marketing activities.</p> <p>This is a lack of equivalence of inputs.</p>	<p>An access provider operates a number of networks in estates and multi dwelling developments. The access provider has provided the ACCC with a functional separation undertaking under section 151A of the Telecommunications Act which has been accepted.</p> <p>The access provider has access seekers that are independent and one that is a related entity.</p> <p>The access provider has just completed building a new network in a multi dwelling development.</p> <p>The access provider wants to help end users sign up to broadband services easily.</p> <p>The access provider keeps a current list on its website of all of its access seekers. This is checked and updated on a weekly basis.</p>	<p>Reasonable opportunity to acquire same services on same terms?</p>	<p>Yes – all access seekers are equally promoted.</p>
	<p>Impedes ability to compete in telecommunications market?</p>	<p>Yes – the affiliated access seeker has a competitive advantage because the in-building flyers drive consumers to just the affiliated access seeker.</p>		<p>Impedes ability to compete in telecommunications market?</p>	<p>No – all access seekers are equally promoted.</p>

Likely to be Discriminatory			Unlikely to be Discriminatory		
<i>Scenario</i>	<i>Element of test</i>	<i>Assessment</i>	<i>Scenario</i>	<i>Element of test</i>	<i>Assessment</i>
<p>'This building has been pre-wired with the latest broadband infrastructure. To start your service contact (logo, number and website of affiliated retailer service provider).</p> <p>A number of non-affiliated access seekers have asked the access provider to include their details on the flyers. The access provider has received the requests and decided not to respond to them or update its in-building flyers.</p>			<p>When the network was completed the access provider produced a flyer and left it in all premises.</p> <p>The flyers contain the access providers' branding and state 'This building has been pre-wired with the latest broadband infrastructure. To start your service call one of the following retail service providers (logos, numbers and websites of all current access seekers listed in an equally prominent way).</p>		