



Draft for Comment

**Criteria for the Identification of
Non-Government Monopoly Business
Activities**

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SUBMISSIONS

This report is a draft only and is subject to revision. Public involvement is an important element of the decision-making processes of the Queensland Competition Authority (the Authority). Therefore submissions are invited from interested parties concerning the Authority's proposed Criteria for the Identification of Non-Government Monopoly Business Activities. The Authority will take account of all submissions received by the due date.

Written submissions should be sent to the address below. While the Authority does not necessarily require submissions in any particular format, it would be appreciated if two printed copies are provided together with an electronic version on disk (Microsoft Word® format) or by e-mail. Submissions, comments or inquiries regarding this paper should be directed to:

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The **closing date** for submissions is Monday 6 October 2008.

Confidentiality

In the interests of transparency and to promote informed discussion, the Authority would prefer submissions to be made publicly available wherever this is reasonable. However, if a person making a submission does not want that submission to be public, that person should claim confidentiality in respect of the document (or any part of the document). Claims for confidentiality should be clearly noted on the front page of the submission and the relevant sections of the submission should be marked as confidential, so that the remainder of the document can be made publicly available. It would also be appreciated if two copies of each version of these submissions (i.e. the complete version and another excising confidential information) could be provided. Again, it would be appreciated if each version could be provided on disk.

Where it is unclear why a submission has been marked "confidential", the status of the submission will be discussed with the person making the submission.

While the Authority will endeavour to identify and protect material claimed as confidential as well as exempt documents (within the meaning of the *Freedom of Information (FOI) Act 1989*), it cannot guarantee that submissions will not be made publicly available. As stated in s187 of the *Queensland Competition Authority Act 1997* (the QCA Act), the Authority must take all reasonable steps to ensure the information is not disclosed without the person's consent, provided the Authority is satisfied that the person's belief is justified and that the disclosure of the information would not be in the public interest. Notwithstanding this, there is a possibility that the Authority may be required to reveal confidential information as a result of an FOI request.

Public access to submissions

Subject to any confidentiality constraints, submissions will be available for public inspection at the Brisbane office of the Authority, or on its website at www.qca.org.au. If you experience any difficulty gaining access to documents please contact the office (07) 3222 0555.

Information about the role and current activities of the Authority, including copies of reports, papers and submissions can also be found on the Authority's website.

PREAMBLE

While government business activities have always been potentially subject to the monopoly prices oversight provisions of the *Queensland Competition Authority Act 1997* (the QCA Act), non-government business activities have only recently been brought within the ambit of the QCA Act.

In order to assist the Premier and the Treasurer (the Ministers) to decide whether or not to declare a non-government business activity to be a monopoly business activity, recent amendments to the QCA Act require the Authority to develop criteria for the Ministers to use in making the necessary decision.

Not unexpectedly, the criteria proposed by the Authority for non-government business activities follow very closely the criteria already developed by the Authority to assist the Ministers to decide whether or not to declare a government business activity to be a monopoly business activity. In this regard, it is the monopoly characteristics that are the key issue, not the ownership of the monopolist.

The proposed criteria differ from the existing criteria only in their scope, as the scope of the business activities, covered by the QCA Act, differs between government and non-government business activities. All government business activities are potentially subject to declaration. However, only those non-government business activities that involve trading in services provided by an infrastructure facility are potentially subject to declaration.

The absence of vigorous rivalry and the existence of barriers to entry constitute the primary test for a monopoly business activity. Where the primary test is inconclusive, for example through a lack of relevant information, the second test relating to the evidence of the exercise of substantial market power is applied.

It is important to note that declaration as a monopoly business activity does not automatically subject the monopoly business activity to a prices oversight investigation by the Authority. This requires a separate decision by the Ministers. In this regard, the Ministers may refer the monopoly business activity to the Authority for an investigation into its pricing practices or for ongoing monitoring of its pricing practices.

**CRITERIA FOR DECIDING WHETHER TO DECLARE
A NON-GOVERNMENT BUSINESS ACTIVITY TO BE
A MONOPOLY BUSINESS ACTIVITY**

A non-government business activity should be declared a monopoly business activity wherever competitive pressures do not effectively constrain its provider's commercial behaviour.

The criteria to be addressed in determining this are:

- (a) [**business activity**] The activity involves a trading in goods or services;
- (b) [**non government business activity**] The business activity involves services provided by means of a facility and is carried on by a person other than a government agency. A facility includes: rail transport infrastructure; port infrastructure; electricity, petroleum or gas transmission and distribution infrastructure; and water and sewerage infrastructure, including treatment and distribution infrastructure; and
- (c) [**commercial behaviour not constrained by competitive pressures**]
 - There is an absence of vigorous rivalry in the market in which the activity occurs **and** barriers to entry into that market exist.

OR

- If the evidence regarding rivalry and barriers to entry is inconclusive, there is evidence that the provider of the activity is exercising substantial market power. This may include that it is earning an excessive return, would be earning an excessive return were it not operating inefficiently, or is cross subsidising.

The attached paper elaborates on the criteria.

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EXECUTIVE SUMMARY

Both government and non-government business activities have always been potentially subject to declaration under Part 5 of the *Queensland Competition Authority Act 1997* (the QCA Act). This Part relates to third party access to the services provided by essential infrastructure.

In addition, government business activities have always been potentially subject to declaration under Part 3 of the QCA Act, which deals with prices oversight of monopoly business activities. The criteria to which the Premier and the Treasurer (the Ministers) must have regard in deciding whether or not to declare a government business activity to be a monopoly business activity were developed by the Authority in 1997.

Recent amendments to the QCA Act make non-government business activities potentially subject to declaration as monopoly business activities. The amendments require the Authority to develop criteria the Ministers must have regard for in deciding whether to declare a non-government business activity to be a monopoly business activity.

The draft criteria (on page [iii](#)) and supporting information are provided as a basis for consultation.

The test for identifying non-government monopoly business activities is based upon an assessment of whether these business activities have sufficient market power that they are capable of persistently behaving in a manner different to that which would occur in a competitive market. In competitive markets, sellers increase their prices or reduce the quality of their products or services at their peril, as consumers are able to find alternatives relatively easily.

Where an incumbent possesses substantial market power, the rigours normally provided by competition to protect customers and to innovate are substantially weakened. This is likely to occur where:

- (a) a business activity enjoys a substantial influence in a market;
- (b) a business activity can act to an appreciable degree independently of its competitors¹; or
- (c) a business activity's competitors are unable or unwilling to effectively compete with it.

Figure 1 gives a simplified description of the framework within which the Authority recommends non-government monopoly business activities be identified. Basically, a three-step process is envisaged:

step 1 - determines whether the activity is a non-government business activity;

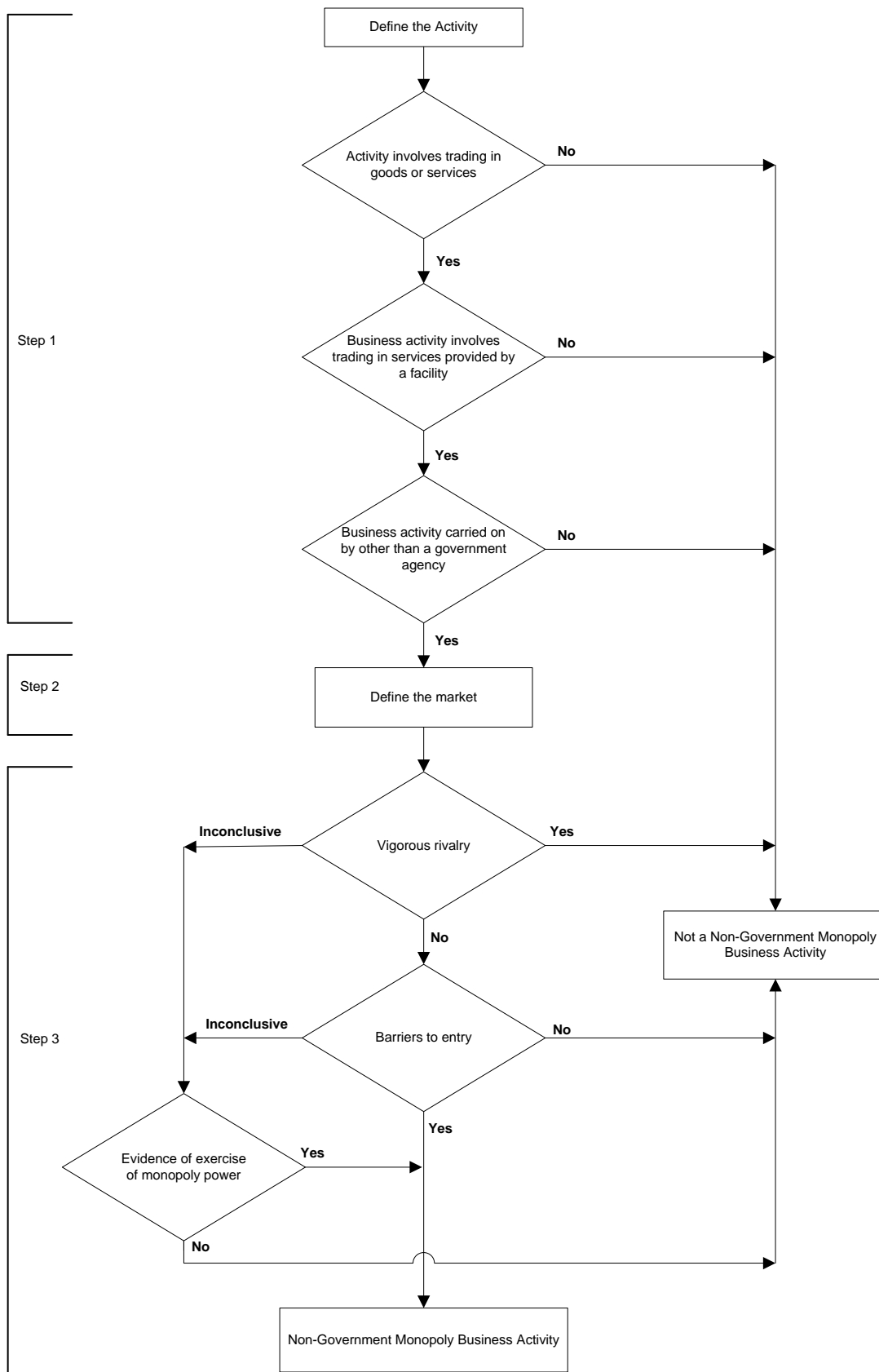
step 2 - defines the markets in which the non-government business activity operates;

step 3 - assesses the intensity of competition in those markets relevant to the enquiry.

Declaration as a monopoly business activity does not automatically subject the monopoly business activity to a prices oversight investigation by the Authority. This requires a separate decision by the Ministers. In this regard, the Ministers may refer the monopoly business activity to the Authority for an investigation into its pricing practices or for ongoing monitoring of its pricing practices.

¹ The term "competitor" refers to actual or potential competitors.

Figure 1: Simplified Framework for Identifying Non Government Monopoly Business Activities



Step 1 - Determining Whether the Activity is a Non-Government Business Activity?

The first step in the process is to properly define the activity that is to be the subject of the analysis with a view to determining whether it is a non-government business activity. There are two requirements under the QCA Act to be addressed in this context. The first requirement is that the business activity is being carried on by a person other than a government agency.

The second requirement is that the activity must involve trading in services provided by means of a facility. A facility includes: rail transport infrastructure; port infrastructure; electricity, petroleum or gas transmission and distribution infrastructure; and water and sewerage infrastructure, including treatment and distribution infrastructure.

In practical terms, a non-government business activity is:

An activity undertaken by the private sector that involves trading in services provided by means of an infrastructure facility.

It should be noted that:

- (a) 'trading' requires services to be provided to another legal entity;
- (b) 'trading in' requires actual trading as opposed to the mere potential for trading. Therefore, a refusal to supply services to any other legal entity will not constitute a business activity for the purposes of Part 3. [Depending on the circumstances, a refusal to supply services may be able to be addressed under Part 5 or Part 5A of the QCA Act];
- (c) only trading in 'services' is encompassed by the definition. Trading in goods is not; and
- (d) a 'facility' is limited to the infrastructure examples given in the QCA Act or infrastructure of a similar nature to the examples given.

A non-government entity may undertake several distinct business activities. Consequently, precisely defining the service that is the subject of the analysis is essential to correctly identify the business activity and to define the relevant market, which is the next step in the process.

Step 2 - Market Definition

A market is an area of close competition or rivalry. If there is no close competition this can, of course, indicate a monopolistic market. Defining a market involves drawing a line in the chain of substitutes for a service that potentially compete with it. In defining and analysing a market, it is important to consider the purpose of the investigation, which, in the case of identifying non-government monopoly business activities, is to assess the extent of competitive pressure.

The analysis will need to address the service market (alternative services that can be used instead of those provided by the business activity), the geographic market (the geographical region from which alternative sources of supply may be found), the relevant functional level of the market under consideration and the period of time allowed for an effective competitor to enter the market.

Once the relevant market has been defined, the intensity of the competitive pressures can be assessed and other relevant factors, such as the extent of barriers to entry, can be considered.

Step 3 - Assessing the Level of Competition in the Market

The principal factors that assist in determining whether a non-government business activity is not effectively constrained by competitive pressures in a market are:

- (a) the absence of vigorous competition in the market together with barriers to entry for new entrants into the industry (or to the expansion of existing rivals); and
- (b) evidence of the exercise of substantial market power by the business activity (e.g. by way of excessive pricing, inefficient operations or cross-subsidisation).

An absence of vigorous rivalry and the existence of barriers to entry constitute the primary test. If there is an absence of vigorous rivalry and barriers to entry exist then the activity is a monopoly business activity. If there is evidence of vigorous rivalry or if no barriers to entry exist, then the activity is not a monopoly business activity.

Where the primary test is inconclusive or there is insufficient information for it to be applied, the second test relating to evidence of the exercise of substantial market power is applied.

1. INTRODUCTION

1.1 Need for Criteria

Both government and non-government business activities have always been potentially subject to declaration under Part 5 of the *Queensland Competition Authority Act 1997* (the QCA Act). This Part relates to third party access to the services provided by essential infrastructure.

In addition, government business activities have always been potentially subject to declaration under Part 3 of the QCA Act. This relates to the prices oversight of monopoly business activities. The criteria that the Premier and the Treasurer (the Ministers) must have regard for in deciding whether or not to declare a government business activity to be a monopoly business activity were developed by the Authority in 1997.

Recent amendments to the QCA Act make non-government business activities potentially subject to declaration as monopoly business activities. The amendments require the Authority to develop criteria the Ministers must have regard for in deciding whether to declare a non-government business activity to be a monopoly business activity.

1.2 Implications of Declaration as a Monopoly Business Activity

Declaration as a monopoly business activity does not automatically subject the monopoly business activity to a prices oversight investigation by the Authority. This requires a separate decision by the Ministers.

In this regard, the Ministers may refer the monopoly business activity to the Authority for an investigation into its pricing practices or for ongoing monitoring of its pricing practices.

2. MARKET POWER

The explanatory note to the QCA Act in 1997 made it clear that the use of the term “monopoly” was not intended to limit prices oversight to a situation where there is only a single supplier in a particular market. It was intended to extend to “near monopolies” where an entity conducting a business activity has substantial market power.

Market power arises where an incumbent is capable of persistently behaving in a manner different to that which would occur in a competitive market (including markets where potential competition is an effective fetter). In competitive markets, sellers increase their prices or reduce the quality of their products at their peril, as consumers are able to find alternatives relatively easily. Where an incumbent possesses substantial market power, the rigours provided by competition to:

- (a) price and produce efficiently;
- (b) satisfy customers with quality relative to price; and
- (c) innovate,

are substantially weakened.

2.1 Sources of Market Power

A non-government business activity’s market power may arise from its superior performance or innovation, or from other factors, such as:

- (a) legal restrictions which preclude competitive provision of a service (e.g. due to patent or other intellectual property legislation);
- (b) a natural monopoly, where the least costly means of meeting demand is through production by a single entity; and
- (c) poorly contestable markets, where competition does not operate effectively in markets despite the absence of legal restrictions.

Entrenched market positions enjoyed by incumbents often provide them with substantial advantages relative to new entrants. These “first mover” advantages may mean that a non-government monopoly business activity retains much of its market power, at least for a prolonged period. Consequently, for example, the end of formal intellectual property protection of itself may not cause a non-government business activity to cease to be properly categorised as a monopoly business activity.

2.2 Market Power Threshold for Non-Government Monopoly Business Activities

The extent of an entity’s market power is a question of degree and reflects the extent to which competitors constrain its conduct. The question arises as to the appropriate market power threshold for a non-government business activity’s market power to characterise it as a monopoly business activity.

If it is to be classified as a monopoly business activity, a non-government business activity’s commercial behaviour should not be effectively constrained by competitive pressures (exerted by either actual or potential competitors). This is likely to occur where:

- (a) a business activity enjoys a substantial influence in a market;

- (b) a business activity can act to an appreciable degree independently of its competitors; or
- (c) a business activity's competitors are unable or unwilling to effectively compete with it.

A business activity may be taken to have a substantial influence on a market if its commercial behaviour is not subject to the disciplines competitive markets normally impose. It may also be able to use that influence to its advantage in shaping the market as it evolves over time, especially if it controls access to an essential input. However, absolute control of the market is not necessary for a substantial influence to be established.

A non-government business activity with a substantial influence on a market may choose to (or may have already chosen to) "give less and charge more" without suffering at the hands of its actual or potential competitors. Accordingly, a non-government business activity with a substantial influence on a market may have the capacity to influence the competitive conduct of its rivals, in turn enabling it to act, to an appreciable degree, independently of its competitors. This may occur, for example because rivals choose simply to "follow the lead" of the non-government business activity instead of competing with it.

The capacity to act, to an appreciable degree, independently of rivals may be demonstrated by evidence that a non-government business activity has in the past been able to alter its relationship with its customers to its advantage without adversely affecting its market share. There are many dimensions to the supplier-customer relationship.

Perhaps the most obvious aspect of the relationship is the price a customer must pay for a service. The capacity of a non-government business activity to increase the price that customers are required to pay where that increase is not related to some general change in its costs, and then to maintain its price at a premium above that which reflects efficient costs, indicates a capacity to act independently of rivals.

Other dimensions to this relationship include the capacity to reduce service quality, or impose onerous terms and conditions, such as requiring the customer to purchase other products or accept take-or-pay conditions. Of course, in some instances, these conditions may be reasonable, such as where contracts underpin a substantial investment which will be sunk once it is made. The nature of the contractual terms must therefore be considered in the context of the commercial relationship between the parties. The responsiveness of customers to a change imposed by the non-government business activity will assist in ascertaining its degree of independence from its competitors.

Competitors may be unable or unwilling to compete with the non-government business activity. They may be unable to compete because they lack the capacity to do so sustainably without jeopardising their long-term future or because they rely upon a non-government business activity for an essential input that is not available elsewhere. Alternatively, they may be unwilling to effectively compete because they perceive doing so is incompatible with the pursuit of their commercial objectives.

This will particularly be the case where the non-government business activity is in a strong position to "punish" competitors. One way in which a non-government business activity can punish competitors is to heavily discount its service in particular markets or otherwise act to inflict economic harm on an "excessively aggressive" competitor and then subsequently raise prices above a competitive level. In such a situation, would-be competitors may carefully calculate their strategy so as not to attract the business entity's attention. In such an environment, competitive rivalry in the market may be severely constrained.

The meaning of competitors in this context is not limited to actual competitors (i.e. those actually involved in the same market as the business activity), but extends also to potential competitors (i.e. those most likely to be capable of successfully entering the market). That is, if the market is

contestable, it is not a monopoly or near monopoly. However, actual competitors, with a current presence and operational capacity in the market, will normally be a far more effective constraint on the conduct of non-government business activities than potential competitors.

2.3 Matters to be Taken into Account in Assessing the Effectiveness of Competitive Pressure

In assessing the effectiveness of competitive pressures as a constraint on a non-government business activity, the following factors are relevant:

- (a) the extent to which vigorous rivalry exists and the extent of barriers to entry; and
- (b) whether there is any evidence of the non-government business activity exercising substantial market power, which may include, for example, pricing excessively.

An absence of vigorous rivalry and the existence of barriers to entry constitute the primary test. If there is an absence of vigorous rivalry and barriers to entry exist then the activity is a monopoly business activity. If there is evidence of vigorous rivalry and no barriers to entry exist then the activity is not a monopoly business activity.

Where the primary test is inconclusive or there is insufficient information for it to be applied, the second test relating to the evidence of the exercise of substantial market power is applied.

3. PROCESS FOR IDENTIFYING NON-GOVERNMENT MONOPOLY BUSINESS ACTIVITIES

In ascertaining whether or not competitive pressure is exerted upon a non-government business activity, it is necessary to thoroughly investigate the relevant industry. Basically, a three-step process is envisaged:

step 1 - determines whether the activity is a non-government business activity;

step 2 - defines the markets in which the business activity operates;

step 3 - assesses the intensity of competition in those markets that may be relevant to the enquiry.

3.1 Step 1 - What are Non-Government Business Activities?

The first step in the process is to properly define the product or service that is to be the subject of the analysis. This will also enable the non-government business activity to be defined.

The QCA Act defines a non-government business activity as a business activity:

- (a) carried on by a person other than a government agency. Government agencies include all government owned corporations, other government companies, government departments (or parts of departments), other state instrumentalities and local government entities; and
- (b) involving services provided by means of a facility. A facility includes: rail transport infrastructure; port infrastructure; electricity, petroleum or gas transmission and distribution infrastructure; and water and sewerage infrastructure, including treatment and distribution infrastructure.

The QCA Act defines a business activity as a trading in goods or services. Taken in conjunction with the definition of non-government business activity, a practical definition of a non-government business activity becomes:

An activity undertaken by the private sector that involves trading in services provided by means of an infrastructure facility.

With respect to the definition of a non-government business activity, it should be noted that:

- (a) 'trading' requires services to be provided to another legal entity. Supplying services to separate legal entities, even if wholly or partly owned subsidiaries, is likely to constitute trading as this would involve a sale and invoice to the acquiring entity. However, 'trading' does not include internal transfers within a single entity for which there is some allocation of cost. Whether a particular transaction is 'trading' may depend on the circumstances of the case;
- (b) 'trading in' requires actual trading as opposed to the mere potential for trading. Therefore, a refusal to supply services to any other legal entity will not constitute a business activity for the purposes of Part 3. [Depending on the circumstances, a refusal to supply services may be able to be addressed under Part 5 or Part 5A of the QCA Act];
- (c) only trading in 'services' is encompassed by the definition. Trading in goods is not; and
- (d) a 'facility' is limited to the infrastructure examples given in the QCA Act or infrastructure of a similar nature to the examples given.

Put differently, a non-government business activity does *not* include:

- (a) services that are provided to other parts of the same legal entity; or
- (b) a refusal to provide services to another legal entity; or
- (c) trading in goods; or
- (d) trading in services provided by facilities other than infrastructure of the type identified.

It is important to recognise that a non-government entity may undertake several distinct business activities. For example, each major traffic category of a railway operator is likely to constitute a separate business activity. Accordingly, coal, minerals and grain traffics could be separate business activities.

Moreover, even within a traffic class, there may be more than one business activity if, for example, there are distinct markets served by that class of traffic. For example, a rail operator may have less market power for the transport of a particular commodity in the domestic market than in the export market. In such a case, the two markets served may be considered as separate business activities.

Consequently, it is critical to precisely define the service that is the subject of the analysis. This is essential in order to correctly define the relevant market, which is the next step in the process.

3.2 Step 2 - Market Definition

Market definition is a critical step in the process of identifying market power. Adopting too narrow a market definition will tend to exaggerate the degree of market power ascribed to a business activity. Conversely, defining a market too widely could effectively "hide" a position of market power.

This highlights the very important role of market definition in providing insight into the likelihood of an incumbent's ability to charge more or offer less. Indeed, the processes of market definition and assessing market power are intertwined - it is only for analytical convenience that they are considered separately.

What is a Market?

A market for a service includes all services that are in close competition or rivalry with that service. However, some suppliers face little or no competition for the services they sell. Indeed, a single service may constitute its own market.

Defining a market involves drawing a line through the chain of substitutes for a service which potentially compete with it. Although there is no single universal or definitive test that can be applied, one approach is to look for a marked gap in the chain of substitution possibilities. Alternatively, one may consider the range of suppliers who are likely to respond to a significant price increase (or to a change in some other variable in the customer supplier relationship, such as quality or availability) within a reasonable period and the extent of that response in terms of the likely volume of transactions.

In determining the magnitude of the price increase, one approach is to consider a 5-10% increase, which is broadly that currently adopted by the Australian Competition and Consumer Commission (ACCC). However, the critical issue is not the size of the price increase per se, but the relationship between price and profitability.

In addition, care must be taken in applying this test as it can lead to the perverse result where markets with prices currently above competitive levels appear to be more competitive than otherwise identical markets already experiencing competitive pricing. This is because a 5% price increase in an already competitive market may not attract any new entrants; yet induce new entrants into an otherwise uncompetitive market. This could lead to the conclusion that a market is competitive when in fact substantial market power had already been exerted.

In defining and analysing a market, it is important to consider the purpose of the investigation. In the case of identifying non-government monopoly business activities, the purpose will be to assess the extent of competitive pressure exerted upon the business activity. Pricing at levels above those which could be obtained in competitive markets by monopoly business activities has the capacity to undermine the international competitiveness of the Queensland economy, hinder the efficient development of this State's resources and cause adverse equity effects.²

Accordingly, the market should be defined from the perspective of the business activity under consideration by analysing the competitive pressures exerted upon it with a view to ascertaining the extent to which it is constrained by those pressures.

The analysis will need to address the following dimensions of market definition:

- (a) the service market (i.e. alternative services or substitutes which can be used instead of the incumbent's products or services);
- (b) the geographic market (the geographical region from which alternative sources of supply may be found);
- (c) the relevant functional level of the market under consideration; and
- (d) the period of time allowed for an effective competitor to enter the market.

In practice, it is often found that market definition involves a particular dimension of the market being contentious and consequently, in such a case, the analysis may need to focus especially on that issue. For example, if there are no close substitutes for a product, attention may focus on the geographic dimension of the market.

Services comprising a Market

The services market comprises services that are substitutes for the service in question³. For example, services may be substitutes for one another in markets if a modest increase in the price of the distribution of one service causes consumers to readily purchase another instead (although this may not be the case for consumers who can only switch after undertaking expensive alterations to their plant and equipment).

² From an economic perspective, the process of raising prices and forcing users to poor alternatives or going without, creates distortions in resource allocation because resources are directed away from their highest value use. For example, if a monopolist were able to charge very high prices for services that were well above the cost of supply, users could, over time, consume alternatives even though the cost of producing these alternatives was higher than the cost of supplying the original service. In addition, monopolists often devote considerable resources to protecting their position in a market, by investing in a way which discourages new entrants.

³ An example of a service is a rail transport service.

Alternatively, substitutes may exist where suppliers are able to switch production in response to a price change. For example, an increase in charges at one port for containers may encourage other ports to increase their capacity to handle containers in response.

The degree of substitution depends upon the current prices for the two services. A monopoly may increase its prices to the point where it faces some competition from other services. Indeed, it will often be in a monopoly business activity's commercial interest to raise its price to just below the point where customers are forced to consider what should be poor substitutes or do without altogether.

Consequently, a non-government business activity may have substantial market power despite it appearing to face competition. This situation can arise because the business activity may have exercised its market power to the point where prices have risen sufficiently to induce new entrants into the market. This is discussed in more detail in step 3 below.

The past behaviour of buyers and suppliers of possible substitutes (for example, in the past, what price movement has been required before buyers and suppliers have altered their behaviour) can assist in ascertaining market boundaries. In reviewing this past behaviour, it will also be relevant to assess the relative price levels and price movements of the service compared to potential substitutes. Where the prices of the service and substitutes closely follow one another, it may be evidence they are good substitutes. Other factors that may be relevant include buyer and supplier attitudes and technological change.⁴

Customer inertia occurs because of switching costs. Switching costs include all of the costs involved in a customer switching to an alternative supplier. The existence of switching costs means that customers may be reluctant to change supplier if they perceive the cost of doing so outweighs the benefit (even if this is not the case).

Switching costs and customer inertia may be critical in market definition. For example, it may be expensive for customers to switch from one type of service to another. Similarly, the cost of establishing production and distribution systems for a product that is closely substitutable with the relevant products will be critical in defining the extent of the market. If these costs prevent entry, then possible substitutes will in fact be poor substitutes.

Geographical region

The geographic region of a market is determined by assessing whether an increase in price in one location substantially affects either the sources of supply for that region or price in another region (where both regions are affected by the same market conditions).

Accordingly, defining the geographic market involves a similar process to that taken in defining the service market. The geographic dimension of the market is defined by the economic feasibility of sourcing alternative services from elsewhere, including imports from overseas (although many of

⁴ There appears to have been a greater preparedness by Australian courts to take account of factors other than substitution possibilities, such as "commercial realities", when defining markets. Commercial realities provide greater recognition of matters such as dynamic factors, potential competition, industry viewpoints and public attitudes. Again, however, one must also be wary of the prospect of monopoly pricing inducing new entrants which would not be attracted into a market if it were not for the high prices charged by the non-government business activity. In such a case, the non-government business activity could have substantial market power. In addition, care must be taken because price movements may be correlated for other reasons, such as reliance upon a common input or because of collusion across markets. One must always analyse the underlying circumstances.

the services provided by non-government monopoly business activities are unlikely to be subject to import competition).

Factors that may impinge upon the geographic dimension of the market include:

- (a) transportation costs for alternative sources of supply - for example, the cost of transporting water may increase substantially with distance due to higher leakage or evaporation (where transported in open channels); and
- (b) constraints on suppliers selling to the non-government business activity's customers - for example, once the capacity of the existing water distribution system is approached, the line becomes constrained.

Just as is the case with service markets, the cost of extending or switching production and distribution systems to supply the customers of the non-government business activity and the cost, or inconvenience, for customers in switching to alternative sources of supply, will be factors affecting market definition.

For example, ports many hundreds of kilometres apart compete for the traffic to be provided by new projects, but once a port user is committed and establishes the necessary infrastructure for a particular port, then it may be very expensive to change to another port. Similarly, a price rise for water in one region is unlikely to entice other water boards to compete because of the need to establish infrastructure.

Functional level

In defining a market, it is also important to remember there can be several distinct phases to the production process (e.g. manufacturing services is distinct from wholesaling services, which is distinct again from retailing services). Manufacturers do not generally "compete" with wholesalers or retailers, and therefore do not form part of the same market.

For example, water bought at the retail level by an end user is often comprised of a range of products and services, including natural and manufactured supply sources, distribution and reticulation services. In addition, the end user may use water as an input to the production of a wide range of products and services. Each step in the production chain can constitute a different functional market with a different level of competition.

It is important that focusing on one functional level does not obscure the analysis of an entity's market power, which may arise through vertical integration with other functional levels. For example, an analysis of market power in above-rail services may overlook the fact that the railway operator's market power arises from its control over rail tracks. Accordingly, when defining the functional market for a business activity, one should be aware of the impact of vertical integration with other functions that may have greater significance for market power.

Time

The time dimension refers to the period over which substitution possibilities ought to be considered for the purpose of defining the market. The scope of the market will expand with the period of time allowed for a market definition.

Potential competition is not as effective a constraint as actual competition. Consequently, if a potential competitor requires new investment to enter a market, then it will not normally be included in the relevant market definition for a non-government business activity. This is

principally because these potential competitors are not in a strong position to exert competitive pressure upon an entrenched business activity.

For example, if a two-year delay is involved in sourcing rolling stock to enable a rail provider to compete with an incumbent, then that potential competitor may exert competitive pressure for a new mine due to open in two year's time. However, that potential competitor is unlikely to be in a position to effectively exert competitive pressure for the incumbent's existing traffic. Consequently, in general, it is proposed that only imminent developments should be taken into account for market definition for assessing whether non-government business activities should be classified as monopoly business activities (although the approach will vary depending upon the circumstances of each case).

Once the relevant market has been defined, the intensity of the competitive pressures can be assessed and other relevant factors, such as the extent of barriers to entry, can be considered.

3.3 Step 3 - Assessing the Level of Competition in the Market

The principal factors that assist in determining that a non-government business activity is not effectively constrained by competitive pressures in a market are the absence of vigorous competition in the market together with the existence of barriers to entry for new entrants into the industry (or to the expansion of existing rivals).

If the above factors are inconclusive, for example as a result of a lack of relevant information, a second test relating to evidence of the exercise of substantial market power by the business activity (e.g. by way of excessive pricing, inefficient operations or cross-subsidisation) is applied.

3.4 Lack of Vigorous Competition with Barriers to Entry

This element considers two factors, a lack of vigorous rivalry and the existence of barriers to entry. A non-government business activity will be a monopoly business activity if there is a lack of vigorous competition in the market accompanied by the presence of barriers to entry.

Evidence of Vigorous Competition

Market share may appear an intuitive indicator of the effectiveness of competitive pressures in a market. A non-government business activity's market share represents the proportion of market demand it fills, in terms of capacity or the value or volume of sales.

Generally, a non-government business activity must have a significant market share for it to be not effectively constrained by competitive pressure. Leaving aside the underlying reasons why a particular market structure may have evolved (which are considered below), the principal reason why a large market share is accepted as demonstrating a lack of vigorous rivalry is due to the practical inability in the short term for small competitors to increase their market share sufficiently in response to the business activity increasing its prices. Consider, for example, a business activity with a 90% market share. Assuming demand remains at current levels, competitors must be able to effectively double their market share from 10% to 20% in order to reduce the business activity's market share by 10%.

However, there is no agreement amongst competition agencies around the world on what thresholds are relevant. This is due to many reasons, including:

- (a) a market share provides no information on the underlying market characteristics; and

- (b) a business activity's market share does not indicate how it was achieved. For example, an entity's market share may be attributable to its relatively low prices, rather than its market power. Moreover, a business activity with a low market share may have set prices so high that firms offering inferior substitutes are induced into the market.

Accordingly, whilst a substantial market share will be relevant in characterising a business activity as a non-government monopoly business activity, a minimum threshold requirement should not be applied. Instead, the focus of the analysis should be on the more significant issue concerning the intensity of the competitive pressure within the market and the consequences of the incumbent charging more or giving less.

For example, volatile market shares (assuming there is no trend towards increasing the market share of the most significant supplier) can suggest a competitive market, even if one of the participants has a relatively high market share. This is because the changing market shares themselves can demonstrate that competitive pressures are operating within the market.

Whilst circumstances will vary, the existence of at least one vigorous competitor is critical to establishing the existence of a competitive market. A vigorous rival is one who actually exerts effective competitive pressures on a business activity. The presence of a vigorous rival substantially reduces the likelihood of a non-government business activity being characterised as a monopoly business activity (unless rivals have been induced into the market by the business activity's monopoly pricing).

In this context, at least one vigorous rival's presence in the market place must be sufficiently substantial to ensure it is not only capable of exerting, but in fact exerts, effective competitive pressures upon the non-government business activity. Generally, a vigorous rival must have the capacity to substantially increase its output within a reasonably short period of time in order to ensure the incumbent cannot successfully "charge more or give less" and preferably be an entity with significant financial backing.⁵

Another related means by which competitive pressures may be imposed is through import competition, where it is feasible. This is because it is possible to rapidly expand imports in response to a non-government business activity's higher prices, especially where the import competition already has an established presence in local markets. However, import competition will not generally be feasible in markets involving monopoly business activities.

Vigorous rivalry is unlikely to exist where a non-government business activity, through its position in the market, has the capacity to "punish" aggressive competitors, by, for example, deeply discounting services in particular markets that adversely affect particular competitors and subsequently raising its prices above a competitive level. This tactic can be used to ensure competitors do not encroach upon a business activity's market leadership. The capacity for an incumbent to engage in this type of conduct is facilitated where price discrimination is possible or where barriers to entry enable business activities to retain their market power.

The absence of vigorous competitive rivalry in the market raises the issue of the existence of barriers to entry.

⁵ The existence of a highly concentrated market structure may give rise to concerns about collusion (or tacit collusion) between the market participants. The experience of competition policy has been that it is easier for a smaller number of firms to collude and behave as a single monopoly than for a larger number of firms. However, the appropriate response to collusive activity is to take action under the *Trade Practices Act 1974* rather than attempt to undertake prices oversight (unless such collusive behaviour is determined to be in the public interest by the ACCC).

Barriers to entry

Any person, be it a government or non-government business activity, able to charge excessive prices will generate large profits in the short term. However, in general, these high profits will attract new entrants into the market and ultimately lead to increased competition and innovation. The existence of barriers to entry can frustrate this process by discouraging the new investment that market forces would normally be expected to entice.

Any factor that discourages new entry into an industry, so that non-government business activities are not constrained to act competitively, can be accepted as a barrier to entry. Barriers to entry may be regulatory, structural, or strategic (i.e. created by an incumbent specifically in order to discourage entry). Thus any feature of an industry or a market that puts a potential entrant at a long run competitive disadvantage relative to incumbents, thereby preventing market forces from eroding an incumbent's market power, will be a barrier to entry.⁶

Barriers to entry can include:

- (a) sunk costs, which are perhaps the best known structural barrier to entry. Sunk costs are the costs necessarily incurred in becoming a viable competitor that cannot be recovered if entry fails. In assessing the significance of sunk costs, it is not just the amount that is sunk that is important, but also the length of time expected to be required before these costs are recovered. Examples of sunk costs include the construction costs for a gas pipeline (since virtually all of these costs will be lost by investors if entry is unsuccessful), staff training and advertising and promotional costs associated with establishing a recognised presence in the market;
- (b) legal or regulatory restrictions, such as patent or other intellectual property legislation;
- (c) access to scarce resources (including know-how and intellectual property);
- (d) cost advantages enjoyed by incumbent firms (not related to the incumbent's superior productive efficiency directly attributable to the incumbent's performance);
- (e) informational advantages enjoyed by incumbents - for example, where the market structure is such that a non-government business activity immediately becomes aware of any existing customer changing supplier, it enables the business activity to subsequently target that customer - for example, where an incumbent will become aware of any customer seeking to use another provider;
- (f) the nature of relationships in the market - for example, the existence of long term contracts (or vertical integration) in an industry can represent a major barrier to entry for a potential entrant due to these contracts (or the market structure) effectively rendering a proportion of the market non-contestable;
- (g) brand loyalty and customer inertia. Whilst a degree of buyer loyalty exists for any product, in certain instances, the need to gain market acceptance of a new product can significantly delay successful entry and therefore constitute a barrier to entry. Inertia can arise for many reasons, including fear and uncertainty of change, lock-ins (e.g. where the customer will remain dependent on the business activity for some of its services), information and changeover costs, the nature of customers' decision making processes and any other marketing advantages possessed by an incumbent;

⁶ Barriers to entry may also arise from superior performance by a non-government business activity.

- (h) insufficient demand - for example, where the minimum efficient scale of an enterprise in the industry (i.e. the minimum size necessary for an entrant to compete with incumbents in the industry) is large relative to current demand, with limited opportunities for trade, the number of efficient firms in a market will be small. In such instances, the presence of an incumbent may preclude entry by prospective efficient entrants because the market simply may not be big enough to support them. This is likely to be the case where there are economies of scale or scope associated with production technology, or where there is already excess capacity in the industry;
- (i) where a non-government business activity controls an “essential facility” or a natural monopoly⁷ such as rail track for the transportation of coal. For example, control over rail infrastructure potentially provides a substantial advantage to the owner as it could use its control to stifle competitive activity in the provision of above-rail services (e.g. scheduling maintenance to interrupt its competitor’s traffic)⁸;
- (j) where a non-government business activity can undertake strategic behaviour to discourage competitive conduct or entry. There are many forms of strategic behaviour which are designed to discourage competitive conduct or entry, including exacerbating customer inertia (described above), investing in excess capacity or otherwise generating uncertainty for any prospective entrant about the prices that are likely to prevail in the market after entry.

When assessing the impact of barriers to entry for a prospective competitor, it is important to consider the interaction of the barriers taken together, as they affect the best-qualified competitor (i.e. the competitor most likely to successfully enter, or increase its share in, the market). In this regard, actual competitors are more likely to effectively constrain a business activity than potential competitors.

Examining the success or failure of new entrants in the past or the total absence of any new entry in an industry that has generated high long-term profits may also indicate that barriers to entry exist.

Accordingly, in the absence of vigorous competitive rivalry, the presence of barriers to entry is likely to indicate that the non-government business activity is a monopoly business activity, especially if the best qualified entrant does not have an established presence in the market.

3.5 Evidence of Exercise of Market Power

Evidence of an absence of vigorous rivalry and the existence of barriers to entry is the primary test for a monopoly business activity. However, the absence of relevant information may render the first test inconclusive. For example, where there is more than one supplier, there may not be enough information in the public domain to conclude whether there is vigorous rivalry. Further, barriers to entry may hinge on contractual arrangements that are not publicly available.

Where the primary test is inconclusive, the second test relating to the evidence of the exercise of substantial market power is applied.

⁷ A natural monopoly arises where the most cost effective means of meeting market demand is with a single facility, rather than any combination of smaller or more specialised facilities.

⁸ Although the extent to which this occurs will depend in part upon the effectiveness of Part 5 of the QCA Act, which deals with third party access to the services provided by these facilities.

In order to ascertain whether a non-government business activity is exercising substantial market power, the following considerations are relevant:

- (a) the extent to which the business activity's economic income represents an excessive return on its asset base;
- (b) whether there is a material difference between the productive efficiency of a non-government business activity relative to best practice benchmarks (an example of a lack of productive efficiency arises with gold plating of assets or poor operational efficiency) and there is evidence that the business activity's economic income would be excessive were it not for its inefficient operations;
- (c) whether the non-government business activity cross-subsidises between profitable and loss making activities⁹.

Clear evidence of a non-government business activity's pricing or production behaviour persistently incorporating any of these elements suggests competitive pressures may not be exerted on the entity. In this regard, it should be noted that in competitive markets firms that persistently engage in these forms of conduct normally do not survive in the long run.

3.6 Summary of Analysis of Competitive Pressures

If the analysis of the market indicates effective competitive pressures are being exerted, because of vigorous rivalry or a lack of barriers to entry, then the business activity will not be considered to be a monopoly business activity. If there is an absence of vigorous rivalry and barriers to entry exist, then the activity is a monopoly business activity.

Where the primary test is inconclusive, for example as a result of insufficient information for it to be applied, the second test relating to the evidence of the exercise of substantial market power is applied. In this instance, if there is evidence of substantial market power being exercised, then the activity is a monopoly business activity for the purposes of Part 3 of the Act.

⁹ A cross-subsidy arises where a business activity receives less commercial benefit from a transaction (including, for example, the reasonably expected benefit of a customer's future business) than the cost to the business activity of the transaction.