Queensland Competition Authority

Draft recommendations

Declaration reviews: Aurizon Network, Queensland Rail and DBCT

December 2018

Level 27, 145 Ann Street, Brisbane Q 4000
GPO Box 2257, Brisbane Q 4001
Tel (07) 3222 0555
www.qca.org.au

We wish to acknowledge the contribution of the following staff to this report:

Ravi Prasad, Manish Agarwal, Emma Green, Annie Xu, Rebecka Hicks, Annette Seargent, Paul Gold and Trish Worland

SUBMISSIONS

Closing date for submissions: 11 March 2019

Public involvement is an important element of the decision-making processes of the Queensland Competition Authority (QCA). Therefore submissions are invited from interested parties concerning its draft recommendations on whether the services described in s. 250 of the QCA Act should be declared, declared in part, or not declared. Submissions are invited from interested parties by 5pm Brisbane time on 11 March 2019. The QCA will consider all submissions received by this date. There will be a further four-week period for cross submissions.

Submissions, comments or inquiries regarding this paper should be directed to:

Queensland Competition Authority
GPO Box 2257
Brisbane Q 4001

Tel (07) 3222 0555
Fax (07) 3222 0599
www.qca.org.au/submissions

Confidentiality

In the interests of transparency and to promote informed discussion and consultation, the QCA intends to make all submissions publicly available. However, if a person making a submission believes that information in the submission is confidential, that person should claim confidentiality in respect of the document (or the relevant part of the document) at the time the submission is given to the QCA and state the basis for the confidentiality claim.

The assessment of confidentiality claims will be made by the QCA in accordance with the *Queensland Competition Authority Act 1997*, including an assessment of whether disclosure of the information would damage the person's commercial activities and considerations of the public interest.

Claims for confidentiality should be clearly noted on the front page of the submission. The relevant sections of the submission should also be marked as confidential, so that the remainder of the document can be made publicly available. It would also be appreciated if two versions of the submission (i.e. a complete version and another excising confidential information) could be provided.

A confidentiality claim template is available on request. We encourage stakeholders to use this template when making confidentiality claims. The confidentiality claim template provides guidance on the type of information that would assist our assessment of claims for confidentiality.

Public access to submissions

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

Contents

EXECUTIVE SUMMARY

Draft recommendation

In accordance with s. 87A of the *Queensland Competition Authority Act 1997*, the QCA is considering whether to recommend that the services described in s. 250(1) of the QCA Act be declared, declared in part, or not be declared.

These services are provided by Aurizon Network, Queensland Rail and DBCT Management.

Following consideration of stakeholder submissions, the QCA's draft recommendations are that the coal handling and below-rail service provided by DBCT Management and Aurizon Network respectively be declared, while the below-rail service provided by Queensland Rail be declared in part.

Aurizon Network

The QCA's draft recommendation is that 'the use of a coal system for providing transportation by rail' as defined by s. 250(1)(a) of the QCA Act be declared. This service reflects the below-rail service provided by the Central Queensland Coal Network, which includes the service provided by the Blackwater, Goonyella, Moura and Newlands systems.[1]

The QCA's draft recommendation is a declaration period of 15 years.

Queensland Rail

The QCA's draft recommendation is that the below-rail service provided by Queensland Rail as defined by s. 250(1)(b) be declared in part.[2] The QCA recommends that the following parts of the service, each of which is itself a service, be declared:

- the North Coast Line service
- the Mount Isa Line service
- the West Moreton system service
- the Metropolitan system service.[3]

The QCA's draft recommendation is a declaration period of 15 years.

The parts of the service not recommended for declaration are:

- the South Western system service
- the Western system service
- the Central Western system service
- the Tablelands system service.

[1] Specifically, the service relates to the use of a coal system for providing transportation by rail, with the coal system defined in ss. 250(3) and (4).

[2] Specifically, the service relates to 'the use of rail transport infrastructure for providing transportation by rail if the infrastructure is used for operating a railway for which Queensland Rail Limited, or a successor, assign or subsidiary of Queensland Rail Limited, is the railway manager'.

[3] For a detailed discussion of this draft recommendation, see Part B, section 1.6.

DBCT Management

The QCA's draft recommendation is that 'the handling of coal at Dalrymple Bay Coal Terminal by the terminal operator' as defined by s. 250(1)(c) of the QCA Act be declared. These services include the inloading, outloading and stockyard operations at DBCT.

The QCA's draft recommendation is a declaration period of 10 years.

THE ROLE OF THE QCA — TASK, TIMING AND CONTACTS

The Queensland Competition Authority (QCA) is an independent statutory body which promotes competition as the basis for enhancing efficiency and growth in the Queensland economy.

Key dates

Submissions are due by 5pm Brisbane time on 11 March 2019. The QCA will consider all submissions received by this date when making its final recommendations to the Minister.

Stakeholders should note that there will be a further four-week period after 11 March 2019 for making cross-submissions.

Contacts

Enquiries regarding this project should be directed to:

ATTN: Ravi Prasad
Tel: (07) 3222 0533

All correspondence should be sent to: www.qca.org.au/submissions

cc: ravi.prasad@qca.org.au; manish.agarwal@qca.org.au; annie.xu@qca.org.au; emma.green@qca.org.au; rebecka.hicks@qca.org.au

1 INTRODUCTION

1.1 Scope of the third party access declarations

The object of Part 5 of the *Queensland Competition Authority Act 1997* (Qld) (QCA Act) is:

> to promote the economically efficient operation of, use of and investment in, significant infrastructure by which services are provided, with the effect of promoting effective competition in upstream and downstream markets.[4]

Section 250 of the QCA Act provides that three specific services are each taken to be declared by the Ministers under Part 5, Division 2 of the QCA Act. In summary, those services are:

- the use of a coal system for providing transportation by rail. The relevant 'coal system' is defined in the QCA Act[5] and includes the Blackwater, Goonyella, Moura and Newlands systems
- the use of rail transport infrastructure for providing transportation by rail where (in summary) the railway manager is Queensland Rail, or its successor, assign or subsidiary
- the handling of coal at Dalrymple Bay Coal Terminal (DBCT) by the terminal operator.

Declaration gives rise to rights and obligations in relation to the negotiation of the terms of access to the declared service. These rights and obligations are contained in the QCA Act, as well as access undertakings for the declared service approved by the QCA or, if parties are unable to agree on access to the declared service, by determinations made by the QCA under Part 5 of the QCA Act. The declarations do not apply to the entities themselves but relate to relevant services provided by these entities.

1.2 The QCA's role in the declaration reviews

Each of the existing declarations expire on 8 September 2020.[6] At least six months, but not more than 12 months, before the expiry date of each declaration, the QCA must recommend to the Minister that, with effect from the expiry date: (a) the service be declared; or (b) part of the service, that is itself a service, be declared; or (c) the service not be declared.[7]

In each case, the relevant declared service is defined in s. 250 of the QCA Act. These are the services about which the QCA must make a recommendation under s. 87A of the QCA Act. The only flexibility given to the QCA by s. 87A(1) is to consider whether all or a part of that service (which is itself 'a service' within the meaning of s. 72 of the QCA Act) should be declared. The QCA Act makes no other provision for the QCA to modify the scope of the declared services through this review process.

[4] Section 69E of the QCA Act.
[5] Sections 250(3) and 250(4) of the QCA Act.
[6] Section 250(2) of the QCA Act states that the existing declarations stop having effect at the end of the 'expiry day' or when revoked. Section 248 states the 'expiry day' 'means the day that is 10 years from the day this section commences'. Section 248 commenced on the date the *Motor Accident Insurance and Other Legislation Amendment Act 2010* (Qld) received assent (8 September 2010).
[7] Section 87A of the QCA Act.

1.3 Process matters

On 29 March 2018, the access criteria in Part 5 of the QCA Act were amended.[8]

On 4 April 2018, the QCA commenced its review of whether the declared services defined in s. 250 of the QCA Act should be declared in whole or in part following the expiry of the existing declarations on 8 September 2020. In doing so, the QCA issued notices of review and investigations to Aurizon Network, Queensland Rail and DBCT Management and DBCT Holdings relating to the declared services in ss. 250(1)(a), (b) and (c) respectively.[9] At the same time, QCA staff released a staff issues paper to facilitate the making of submissions.

Nine submissions were received by the due date of 30 May 2018, with two stakeholders (Queensland Rail and DBCT Management) providing additional information on 18 June 2018. A late submission from DBCT Management was received on 29 June 2018. As advised, the QCA did not take this submission into account in making its draft recommendation in respect of the DBCT service.[10] However, the QCA now invites submissions in relation to DBCT Management's submission of 29 June 2018. The submissions received in relation to the DBCT Management submission of 29 June 2018 will be taken into account in the final recommendation to the Minister.

Following the conclusion of the initial submissions period on 30 May 2018, stakeholders were given six weeks to provide comments on the initial submissions received (a cross-submissions process) and to consider a range of staff questions published in relation to the initial submissions. A further 11 public cross-submissions and 1 confidential submission were received in this process.

On 7 November 2018, the QCA received further correspondence from DBCT Management containing updated information about DBCT Management's customer contracts and stating that the facility is now fully contracted. Due to the time at which this information was provided, the QCA has been unable to take it into account in making its draft recommendation in respect of the DBCT service. The QCA will take this updated contract information into account in preparing its final recommendation. A redacted version of this correspondence has been published on the QCA's website. Confidential information contained in the correspondence will be handled in accordance with the procedures already in place. Interested parties are invited to comment on this information in their submissions in response to the draft recommendation. Additionally, DBCT Management's further correspondence refers to an estimate of DBCT's capacity prepared by the Integrated Logistics Company (ILC).[11] To the extent stakeholders consider the ILC report relevant to this review, stakeholders are requested to consider it in making their submission.

All public submissions are available on the QCA's website, including cross-submissions that were not previously published.

---

[8] *Queensland Competition Authority Amendment Act 2018* (Qld).

[9] In accordance with ss. 87B, 87D and 87E of the QCA Act.

[10] On 3 July 2018, the QCA updated its website and sent an email to its subscribers regarding the DBCT. Management late submission of 29 June 2018.

[11] The ILC report, provided to the QCA in the context of DBCT Management's November 2018 review event application, is available on the QCA website. See, Integrated Logistics Company Pty Ltd, *DBCT Capacity Estimates*, prepared for DBCT Management, 19 October 2018, http://www.qca.org.au/Ports/Access-to-Ports/DBCT-2015-Draft-Access-Undertaking/Ongoing-Compliance/Review-Events/Final-Report/Reference-tonnage-change-Nov-2018#finalpos.

Stakeholder submissions on the QCA's draft recommendations are due by Monday 11 March 2019. The QCA will consider all submissions received by this date. There will be a further four-week period for cross-submissions.

The QCA's final recommendations will be provided to the Minister in accordance with s. 87A(1) of the QCA Act. The QCA will publish its final recommendations in accordance with s. 87A(3) once the Minister publishes a decision in accordance with ss. 85 and 86 of the QCA Act.

1.3.1 Process for approval of Queensland Rail recommendation

Prior to his appointment to the Board of the QCA on 5 June 2018, Dr Warren Mundy advised the Government, via the Treasury, that he had provided significant advice to Queensland Rail on the renewal of its declaration under Part 5 of the QCA Act and indicated that if appointed, he would exclude himself from the QCA's consideration of this matter. At the Board meeting held on 21 June 2018, Members agreed that Dr Mundy would absent himself from discussions on this issue and not have access to drafts and other working papers relating to the Queensland Rail declaration. Dr Mundy first became aware of the recommendations set out in the Executive Summary on 11 December 2018 but did not have access to the reasoning contained in Part B of these Draft Recommendations until they were made publicly available. Dr Mundy will continue to have no role in the formulation of the QCA's recommendation in relation to the declaration of Queensland Rail.

1.4 Assessment detail

The QCA's approach to the assessment criteria across each of the reviews is contained in Chapter 2. The QCA's assessment of why the services described in s. 250 of the QCA Act should be declared, declared in part, or not declared, following the expiry of the existing declarations on 8 September 2020, is set out in the following parts of this report:

- Part A: the Aurizon Network service
- Part B: the Queensland Rail service
- Part C: the DBCT service.

2 QCA'S APPROACH TO THE STATUTORY CRITERIA

2.1 The access criteria

Section 76 of the QCA Act sets out the access criteria which the QCA must apply in making the required recommendations (Box 1).[12]

[12] Section 76 was most recently amended by the *Queensland Competition Authority Amendment Act 2018* (Qld). These amendments commenced on 29 March 2018.

Box 1: Section 76—Access criteria

(1) This section sets out the matters (the access criteria) about which —

- (a) the authority is required to be satisfied for recommending that a service be declared by the Minister; and
- (b) the Minister is required to be satisfied for declaring a service.

(2) The access criteria are as follows:

- (a) that access (or increased access) to the service, on reasonable terms and conditions, as a result of a declaration of the service would promote a material increase in competition in at least 1 market (whether or not in Australia), other than the market for the service;
- (b) that the facility for the service could meet the total foreseeable demand in the market:
  - (i) over the period for which the service would be declared; and
  - (ii) at the least cost compared to any 2 or more facilities (which could include the facility for the service);
- (c) that the facility for the service is significant, having regard to its size or its importance to the Queensland economy;
- (d) that access (or increased access) to the service, on reasonable terms and conditions, as a result of a declaration of the service would promote the public interest.

(3) For subsection (2)(b), if the facility for the service is currently at capacity, and it is reasonably possible to expand that capacity, the authority and the Minister may have regard to the facility as if it had that expanded capacity.

(4) Without limiting subsection (2)(b), the cost referred to in subsection (2)(b)(ii) includes all costs associated with having multiple users of the facility for the service, including costs that would be incurred if the service were declared.

(5) In considering the access criterion mentioned in subsection (2)(d), the authority and the Minister must have regard to the following matters:

- (a) if the facility for the service extends outside Queensland:
  - (i) whether access to the service provided outside Queensland by means of the facility is regulated by another jurisdiction; and
  - (ii) the desirability of consistency in regulating access to the service;
- (b) the effect that declaring the service would have on investment in:
  - (i) facilities; and
  - (ii) markets that depend on access to the service;
- (c) the administrative and compliance costs that would be incurred by the provider of the service if the service were declared;
- (d) any other matter the authority or Minister considers relevant.

2.1.1 The required recommendations

The QCA is required to make each recommendation pursuant to s. 87A of the QCA Act. Section 87A(1) of the QCA Act requires:

> At least 6 months, but not more than 12 months, before the expiry date of a declaration of a service, the authority must recommend to the Minister that, with effect from the expiry date -
>
> (a) the service be declared; or
>
> (b) part of the service, that is itself a service, be declared; or
>
> (c) the service not be declared.

Section 250 of the QCA Act identifies each service taken to be declared.

Pursuant to s. 87C of the QCA Act, the QCA:

- must make a recommendation that 'the service be declared' if the QCA is satisfied about all of the access criteria for the service (s. 87C(1) of the QCA Act)
- must make a recommendation that 'the service not be declared' if the QCA is not satisfied about all of the access criteria for the service (s. 87C(2) of the QCA Act)
- despite ss. 87C(1) and (2), may make a recommendation that 'part of the service, that is itself a service, be declared' if the QCA is satisfied about all of the access criteria for the part of the service (s. 87C(3) of the QCA Act).

Under s. 87D of the QCA Act, the QCA's power to conduct an investigation for making a recommendation under s. 87A of the QCA Act is about 'the service'.

The QCA is required, in the first instance, to consider and assess the access criteria with respect to each of the services defined in s. 250 of the QCA Act. That is, the service as a whole must first be considered against the access criteria.

Aurizon Network submitted a different approach requiring consideration of each distinct service within the declared service:

> As the declared service has not been subject to a comprehensive assessment against the access criteria, the QCA review must ensure that all parts of the declared service satisfy the access criteria before making a recommendation to declare any particular part of the service to the Minister. Such a recommendation would require that the QCA reach an affirmative conclusion, based on the application of sound principles to facts, that each distinct service within the declared service met all of the access criteria.[13]

The QCA does not consider that it is required to separately determine whether each 'part' of a service satisfies the access criteria before it can recommend that the service be declared. The QCA must decide whether to recommend declaration of each service defined in s. 250 of the QCA Act. If the QCA is satisfied each of the access criteria are satisfied for a service, it is required by s. 87C(1) to recommend that the service be declared. Nothing in the QCA Act requires the QCA to deconstruct a service into a series of smaller services and then apply the access criteria to each one. The QCA considers the necessary starting point for its analysis is to consider whether the service defined in s. 250 satisfies the access criteria.

To start from this position is not to preclude consideration of whether only part of a service satisfies the access criteria. If, for example, there was a part of a service which did not satisfy one of the access criteria, the QCA could still recommend declaration of the remainder of the

[13] Aurizon Network, sub. 6, p. 8.

service provided that what remained (a) was itself a service and (b) satisfied each of the access criteria. Whether such an investigation is required will depend on the information before the QCA and whether there is reason to believe that any part of a service exhibits characteristics which suggest it may not satisfy one or more of the access criteria. Only where such characteristics are identified is it necessary to undertake an in depth investigation into whether part of the service satisfies the access criteria.

2.1.2 Period of declaration

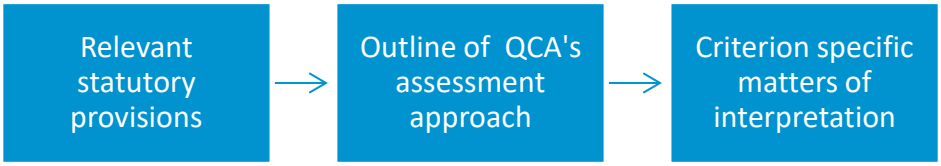
If the QCA recommends that the service, or part of the service, should be declared, the QCA must also recommend the period for which that declaration should operate.[14] The QCA considers that potentially relevant factors to forming a view on the period of declaration may include:

- the importance of long-term certainty to service providers who may have made (or may need to make) significant investments in infrastructure facilities, and to access seekers who may make significant investments as part of gaining access to a declared facility
- the duration of time for which users may seek access to the facility (for example considering average mine lives)
- the certainty of demand forecasts over the foreseeable period for assessing demand
- the foreseeable timing of potential changes in the market environment, including the likelihood that the service no longer satisfies the natural monopoly test in criterion (b)
- the need for periodic reviews of declaration arrangements.[15]

The period for which a service is to be declared must be a period over which each of the access criteria are satisfied. The QCA considers that the QCA Act does not necessarily require it to recommend declaration of a service over the longest period in which each of the access criteria may be satisfied. The QCA might, having regard to the matters listed above or other considerations, determine that a shorter period of declaration would be appropriate. For example, the QCA might consider a shorter period of declaration if there was a degree of uncertainty about forecasts in later years.

2.2 Approach and interpretation

The QCA's consideration of the approach to, and interpretation of, each access criterion is set out in this chapter in the following sequence:



Criterion (b) is considered first, before criterion (a), as the QCA considers it simplifies its analysis to begin by identifying the market in which the relevant service is provided before turning to the question of dependent markets.

[14] In accordance with s. 87A(4) of the QCA Act.
[15] Refer also to NCC, *Declaration of Services*: *A guide to declaration under Part IIIA of the Competition and Consumer Act 2010 (Cth),* April 2018 edn, p. 47.

This is followed by a consideration of criterion (a), criterion (c) and criterion (d), respectively. The analysis of each service (Parts A, B and C) follows this sequence.

This consideration is undertaken in the context of Part 5 (Access to services) of the QCA Act, which has the following express object:

> The object of this part is to promote the economically efficient operation of, use of and investment in, significant infrastructure by which services are provided, with the effect of promoting effective competition in upstream and downstream markets.[16]

2.3 Criterion (b): meet total foreseeable demand at least cost

2.3.1 The statutory provision

Section 76(2)(b) of the QCA Act is expressed as follows:

> that the facility for the service could meet the total foreseeable demand in the market–
>
> (i) over the period for which the service would be declared; and
>
> (ii) at the least cost compared to any 2 or more facilities (which could include the facility for the service)

This provision is referred to as 'criterion (b)'.

Sections 76(3) and (4) of the QCA Act further state:

> (3) For subsection (2)(b), if the facility for the service is currently at capacity, and it is reasonably possible to expand that capacity, the authority and the Minister may have regard to the facility as if it had that expanded capacity.
>
> (4) Without limiting subsection (2)(b), the cost referred to in subsection (2)(b)(ii) includes all costs associated with having multiple users of the facility for the service, including costs that would be incurred if the service were declared.

2.3.2 Summary of approach to criterion (b)

The QCA has applied the following approach to criterion (b):

- Identify the relevant service.
- Identify the facility used to provide the service (and define its features including existing capacity).
- Identify the market in which the service is provided.
- Identify total foreseeable demand in the market.
- Identify whether the facility for the service (expanded where relevant) could meet total foreseeable demand, and over what period.
- Where there is more than one actual or potential supplier in the market, identify the cost of any two or more facilities to meet total foreseeable demand.
- Consider whether the facility for the service (expanded where relevant) could meet total foreseeable demand in the market over the relevant period at the least cost compared to any two or more facilities (which could include the facility for the service).

The criterion is satisfied only if the answer to the final dot point is affirmative. The period of the declaration is the period for which the QCA is satisfied the facility for the service could meet

[16] Section 69E of the QCA Act.

total foreseeable demand in the market at least cost. In determining this period the QCA has also had regard to the factors set out in section 2.1.2 above.

Individual matters of interpretation for criterion (b) are set out below.

2.3.3 The service

The QCA's view is that the starting point to the interpretation of criterion (b) is identification of the relevant service.

The QCA must recommend to the Minister that, with effect from the expiry date, the service be declared, or that part of the service (that is itself 'a service') be declared, or that 'the service' not be declared.[17]

For the purpose of Part 5 of the QCA Act, 'service' is defined in s. 72 of the QCA Act as follows:

> (1) Service is a service provided, or to be provided, by means of a facility and includes, for example -
>
> (a) the use of a facility (including, for example, a road or railway line); and
>
> (b) the transporting of people; and
>
> (c) the handling or transporting of goods or other things; and
>
> (d) a communication service or similar service.
>
> (2) However, service does not include -
>
> (a) the supply of goods (except to the extent the supply is an integral, but subsidiary, part of the service); or
>
> (b) the use of intellectual property or a production process (except to the extent the use is an integral, but subsidiary, part of the service); or
>
> (c) a service -
>
> (i) provided, or to be provided, by means of a facility for which a decision of the Australian Competition and Consumer Commission, approving a competitive tender process under the Competition and Consumer Act 2010 (Cwlth), section 44PA, is in force; and
>
> (ii) that was stated under section 44PA(2) of that Act in the application for the approval.
>
> (3) Subsections (1) and (2) apply only for this part.

In each present case, s. 250 of the QCA Act identifies each service which is taken to be declared. Accordingly, the QCA considers the relevant 'service' is the declared service as identified in s. 250 of the QCA Act.

Aurizon Network submitted it provides a number of discrete services and each should be assessed separately as a 'part' of the service.[18]

For the reasons previously discussed, the QCA has first considered the service as defined in s. 250(1)(a) of the QCA Act as a whole.[19] Having done this, the QCA has then considered whether any of the services identified by Aurizon Network have characteristics which require different or further consideration from that given to the service as a whole and, if so, whether only a part of the relevant service should be declared. Where the QCA decides on the material before it to

[17] Section 87A(1) of the QCA Act.
[18] Aurizon Network, sub. 6, p. 38.
[19] Section 2.1.1 of this chapter.

assess a part of the service, the QCA must also consider whether a part of the service, is itself a 'service'.[20]

Queensland Rail also submitted it provides eight services, each using facilities it has separately identified and for which:

> it is appropriate that any assessment against the access criteria of whether or not to declare the service, or part of the service, be performed on a rail system by rail system basis.[21]

The QCA has applied the same approach as outlined with respect to Aurizon Network's submission above.

2.3.4 The facility

The QCA's view is that the interpretation of criterion (b) also requires identification of the relevant facility for each service, and defining material features, including existing capacity.

A 'facility' is defined in s. 70 of the QCA Act as follows:

> (1) Facility includes -
>
> (a) rail transport infrastructure; and
>
> (b) port infrastructure; and
>
> (c) electricity, petroleum, gas or GHG stream transmission and distribution infrastructure; and
>
> (d) water and sewerage infrastructure, including treatment and distribution infrastructure.
>
> (2) In this section -
>
> GHG stream see the Greenhouse Gas Storage Act 2009, section 12.

Also, s. 73 of the QCA Act provides:

> In this part [Part 5 of the QCA Act], a reference to a facility in association with a reference to a service or part of a service is a reference to the facility used, or to be used, to provide the service or part of the service.

In each present case, s. 250 of the QCA Act identifies each service taken to be declared by reference to the use of certain specified facilities. The QCA considers the descriptions in s. 250 of the QCA Act identify 'the facility' for each relevant service.

2.3.5 The market

Central to determining whether criterion (b) is satisfied is identifying the relevant market.

Considering the purpose of defining the market in the context of criterion (b) requires the QCA to consider whether the facility for the service could meet total foreseeable demand 'in the market' on the terms specified. The QCA considers this is the market in which the service taken to be declared is provided.

The concept of a 'market' is defined in s. 71 of the QCA Act as follows:

> (1) A market is a market in Australia or a foreign country.
>
> (2) If market is used in relation to goods or services, it includes a market for–
>
> (a) the goods or services; and

[20] As defined under s. 72 of the QCA Act.
[21] Queensland Rail, sub. 8, p. 3.

> (b) other goods or services that are able to be substituted for, or are otherwise competitive with, the goods or services mentioned in paragraph (a).

Accordingly, in identifying the scope of the market, it is relevant to identify:

- the service taken to be declared (section 2.3.3 above)
- any other service able to be substituted for, or that is otherwise competitive with, the declared service.

Defining the boundaries of a market for a service by reference to the service and its substitutes is consistent with the principles articulated by the Trade Practices Tribunal in *Re Queensland Co-operative Milling Association Ltd*, which defined a market as:

> the area of close competition between firms or, putting it a little differently, the field of rivalry between them. (If there is no close competition there is of course a monopolistic market.) Within the bounds of a market there is substitution — substitution between one product and another, and between one source of supply and another, in response to changing prices. So a market is the field of actual and potential transactions between buyers and sellers amongst whom there can be strong substitution, at least in the long run, if given a sufficient price incentive. Let us suppose that the price of one supplier goes up. Then on the demand side buyers may switch their patronage from this firm's product to another, or from this geographic source of supply to another. As well, on the supply side, sellers can adjust their production plans, substituting one product for another in their output mix, or substituting one geographic source of supply for another. Whether such substitution is feasible or likely depends ultimately on customer attitudes, technology, distance, and cost and price incentives.
>
> It is the possibilities of such substitution which set the limits upon a firm's ability to "give less and charge more". Accordingly, in determining the outer boundaries of the market we ask a quite simple but fundamental question: If the firm were to "give less and charge more" would there be, to put the matter colloquially, much of a reaction? And if so, from whom? In the language of economics the question is this: From which products and which activities could we expect a relatively high demand or supply response to price change, i.e. a relatively high cross-elasticity of demand or cross-elasticity of supply?[22]

This approach was endorsed by the High Court in *Queensland Wire Industries Pty Ltd v Broken Hill Proprietary Co Ltd*.[23]

The QCA notes Justice McHugh in *Boral Besser Masonry Ltd v Australian Competition and Consumer Commission* observed:

> Thus, the market is the area of actual and potential, and not purely theoretical, interaction between producers and consumers where given the right incentive – a change in price or terms of sale – substitution will occur. That is to say, either producers will produce another similar product or consumers will purchase an alternative but similar product …[24]

Having referred to the above passage, Kiefel CJ, Bell and Keane JJ in *Air New Zealand Ltd v Australian Competition and Consumer Commission; PT Garuda Indonesia Ltd v ACCC* further stated:

> [G]iven that the TPA regulates the conduct of commerce, it is tolerably clear that the task of attributing to the abstract concept of a market a geographical location in Australia is to be approached as a practical matter of business. It is important that any analysis of the competitive

[22] (1976) 25 FLR 169 at 190.
[23] (1989) 167 CLR 177.
[24] (2003) 215 CLR 374 at [252].

> processes involved in the supply of a service is not divorced from the commercial context of the conduct in question.[25] [footnotes omitted]

The QCA also notes that the Federal Court in *Arnotts Limited & Ors v Trade Practices Commission* stated:

> But the fact that, upon some occasions, some consumers select one product rather than another does not establish that the two products are "substitutable", so as to be within a single market ...[26]

Accordingly, identifying strong substitutes, both actual and potential, is crucial to defining the relevant market. A market is typically defined by reference to its product and geographic dimensions, and, where relevant, its functional dimension.

Substitution possibilities will be influenced by a range of factors, including: economic considerations (such as the cost of switching to alternative services); regulatory/legislative frameworks; and geographic and operational constraints (e.g. transportation costs or long-term contracts that may limit substitutability between otherwise similar services).

Evidence of users switching between facilities may demonstrate that facilities are substitutes. However, it is also necessary to understand why users switch. Generally, products will be substitutable only where switching occurs (or would occur) as a result of price or quality incentives.

DBCT Management submitted one approach to defining the relevant market as set out by the expert it engaged, HoustonKemp. Having identified the product, functional and time dimensions of the market, HoustonKemp's proposed approach to the geographic scope of the market is summarised by DBCT Management as the following three-step framework:

> 115.1 begin with the narrowest reasonable geographic dimension of the market;
>
> 115.2 evaluate whether it would be profitable for a hypothetical monopolist controlling all suppliers serving the geographic area of demand in the candidate market to impose a SSNIP; and
>
> 115.3 if the SSNIP is not profitable, the candidate geographic dimension of the market should be expanded to include the area from which the competitive constraint came to prevent the SSNIP being profitable, then repeat the previous step.[27]

DBCT Management submitted that based on step 1 of this framework, HoustonKemp 'identifies this area as the region within which mines would prefer to use' the relevant service.[28] DBCT Management said '[s]tep 2 of the framework involves testing whether a SSNIP applied to the starting geographic market would be profitable'.[29]

Employing a SSNIP analysis to identify substitutes and the boundaries of a market has been foreshadowed or endorsed in numerous contexts.[30]

---

[25] (2017) 344 ALR 377 at [14].
[26] (1990) 24 FCR 313 at 332.
[27] DBCT Management, sub. 1, para 115.
[28] DBCT Management, sub. 1, para 119.
[29] DBCT Management, sub. 1, para 124.
[30] For example, Productivity Commission, *National Access Regime*, inquiry report no. 66, October 2013, p. 163, http://www.pc.gov.au/inquiries/completed/access-regime/report/access-regime.pdf; the ACCC *Merger Guidelines*, pp. 15–16, paras 4.19–4.22; *ACCC v Metcash Trading Limited* [2011] FCAFC 151 at [247] describing the hypothetical monopolist test.

The QCA notes that defining the market depends on the specific circumstances and evidence presented. DBCT Management's approach is discussed further in the DBCT assessment (see Part C).

2.3.6 Total foreseeable demand in the market

Having identified the scope of the relevant market, the QCA considers it appropriate to identify the customers in that market, their foreseeable demand, and the period over which their demand can be foreseen. Ultimately, what is 'foreseeable' is a matter of judgment for the QCA having regard to the information before it and its confidence in the forecasts that are produced.

2.3.7 Section 76(3)—'reasonably possible to expand'

To identify whether the facility for the service could meet total foreseeable demand in the market, the QCA must identify the capacity of the facility.

Section 76(3) of the QCA Act provides that:

> For subsection (2)(b), if the facility for the service is currently at capacity, and it is reasonably possible to expand that capacity, the authority and the Minister may have regard to the facility as if it had that expanded capacity.

Accordingly, where the facility is at capacity the QCA must determine if it is 'reasonably possible to expand that capacity', in which case the QCA may have regard to the facility as if it had that expanded capacity in assessing criterion (b).

The phrase 'reasonably possible to expand' is not defined in the QCA Act. Section 76(3) of the QCA Act was introduced by the *Queensland Competition Authority Amendment Act 2018*, which came into effect on 29 March 2018.

In its submission to the QCA, DBCT Management submitted:

> [76] …a capacity expansion for a particular facility may be reasonably possible if it is reasonably capable of occurring during the declaration period. We note in this regard that the relevant definition of 'possible' in the Macquarie Online Dictionary is 'capable of existing, happening, being done, being used'.
>
> [77] Determining whether a capacity expansion for a particular facility is reasonably possible or capable of occurring will depend on the circumstances of the particular facility and factors such as the work involved in the expansion, the legal and regulatory constraints or impediments to the expansion, the costs of the expansion and whether the ability to expand the facility is within the control of the service provider.
>
> [78] Given the significant consequences of a finding that a capacity expansion for a particular facility is reasonably possible, the capacity expansion must not be merely theoretical. Rather, a QCA determination that it is reasonably possible to expand the capacity of the facility over the declaration period must be based on material that has some probative value in the sense that it tends logically to show the existence of facts consistent with the finding.[31]
>
> [footnotes omitted]

The QRC submitted:

> In the absence of clear case law, reports or extrinsic material, the notion of 'reasonably possible' should be interpreted in accordance with general principles of statutory interpretation and in the context of relevant interpretations given to that phrase at common law.
>
> 'Reasonably' is a form of 'reasonable', which in a simple form can be understood as 'not excessive'. The concept of reasonableness is regularly applied in a legal context, with a common

[31] DBCT Management, sub. 1, paras 76–78.

> test for reasonable foreseeability involving consideration of 'expense, difficulty and inconvenience'.
>
> 'Possible' can be understood as 'capable of happening'. As a result, 'reasonably possible' means that something is capable of happening without excessive difficulty or inconvenience. This is a lower bar than 'reasonably likely' or 'reasonably practicable' (which require some degree of likelihood).[32]
>
> [footnotes omitted]

Attempts to give a definitive meaning to each component of this term are likely to add little to the QCA's understanding of this provision, or aid in its application. Ultimately, the QCA considers this requires judgment about whether the expansion of the relevant facility is reasonably possible (as opposed to, for example, being merely theoretical or fanciful). The QCA also considers any assessment it makes of whether it is reasonably possible to expand capacity must be informed by the facts of each case.

2.3.8 At the least cost

Where the facility for the service could meet the total foreseeable demand in the market, the central issue to be considered by the QCA is, at what cost. Specifically, the QCA must assess whether the facility for the service could do so 'at the least cost' compared to any two or more facilities.

Criterion (b) was amended by the *Queensland Competition Authority Amendment Act 2018*, which was intended to reflect the amendments introduced to Part IIIA of the CCA.[33]

The amendments to Part IIIA of the CCA were introduced with effect on 6 November 2017 by the *Competition and Consumer Amendment (Competition Policy Review) Act 2017*. The Explanatory Memorandum to the Commonwealth amending Act indicated the intention of the new criterion (b):

> The amendment to this paragraph [44CA(1)(b)] is intended to refocus the test to a 'natural monopoly' test instead of a 'private profitability' test.[34]

The so-called 'private profitability test' was the approach adopted by the High Court of Australia to the previous criterion (b) (i.e. 'that it would be uneconomical for anyone to develop another facility to provide the service').[35] Before the decision of the High Court in *Pilbara*, there had been two approaches used in applying criterion (b) in its earlier form, described by the High Court as:

> The first of these "economic" constructions of criterion (b) directs attention to whether the facility in question can provide society's reasonably foreseeable demand for the relevant service at a lower total cost than if it were to be met by providing two or more facilities [*Re Fortescue Metals Group Ltd* (2010) 242 FLR 136 at 278 [850]; 271 ALR 256 at 394]. This construction directs attention to the costs of producing the service. The Tribunal adopted this test in these cases and described [(2010) 242 FLR 136 at 275 [838]; 271 ALR 256 at 391; see also at 269-270; 386 [815]] it as a "natural monopoly approach".
>
> A second, and different, understanding of criterion (b) drawing from the study of economics would adopt what was described [(2010) 242 FLR 136 at 275 [838]; 271 ALR 256 at 391] as a "net social benefit approach". That test, adopted [*Re Sydney Airports Corporation Ltd* (2000) 156 FLR

[32] QRC, sub. 7, p. 30.
[33] Explanatory Notes to the Queensland Competition Authority Amendment Bill 2018, p. 2.
[34] Explanatory Memorandum to the Competition and Consumer Amendment (Competition Policy Review) Bill 2017, para 12.22.
[35] *Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal and Ors (2012)* 246 CLR 379.

> 10; *Re Duke Eastern Gas Pipeline Pty Ltd* (2001) 162 FLR 1] in earlier Tribunal decisions, would seek to decide what is "uneconomical" by taking account not only of productive costs and benefits but also considerations of allocative efficiency and dynamic efficiency. … The central question, if a net social benefit approach were to be adopted, was described by the Tribunal in *Re Duke Eastern Gas Pipeline Pty Ltd* [(2001) 162 FLR 1 at 32 [137]] as being "whether for a likely range of reasonably foreseeable demand for the services provided by means of the [facility], it would be more efficient, in terms of costs and benefits to the community as a whole, for one [facility] to provide those services rather than more than one".[36]

The High Court rejected both of these approaches, in favour of a 'private profitability' test, which held the criterion to be satisfied if it would be profitable for any person (including the incumbent operator) to duplicate the relevant facility.

Clearly, the criterion (b) amendments intend to move away from a private profitability test in favour of a test focusing on natural monopoly characteristics. While earlier decisions applying criterion (b) in its previous form may provide guidance, it is the language of the statute today that is paramount. The QCA has approached this criterion by focusing on the text of the statute, rather than assuming that Parliament intended to adopt one of the approaches previously taken in applying criterion (b) in its earlier form.

The QCA Act discusses how 'at the least cost' is to be determined only in s. 76(4):

> Without limiting subsection (2)(b), the cost referred to in subsection (2)(b)(ii) includes all costs associated with having multiple users of the facility for the service, including costs that would be incurred if the service were declared.

This section does not purport to limit the costs that may be considered in undertaking the assessment required by criterion (b). However, it does state, for the avoidance of doubt, that the costs of meeting demand using the facility for the service include the costs of having multiple users and the costs that would be incurred if that service were declared. Whether similar costs would also be relevant in assessing the cost of meeting foreseeable demand using any two or more facilities will depend on the facilities being considered.

The QCA notes the Explanatory Memorandum to the Commonwealth amending Act, which expresses the intention that, in determining the costs of meeting total foreseeable demand, the administrative and compliance costs of regulation are not considered to be relevant to criterion (b), but are to be separately considered under criterion (d).[37] However, s. 76(4) expressly states the costs that would be incurred if the service were declared are relevant, and will be applied in this case.

The QCA considers 'cost', for the purpose of s. 76(2)(b), is to be construed widely, so as to capture all costs of meeting total foreseeable demand in the market using the facility in question, or using two or more facilities.

Similar views (on the potential breadth of relevant costs) were expressed by stakeholders, in particular the QRC, where counsel advising QRC stated:

> In our view, the text, context and purpose of the statutory provision support the conclusion that "cost" has a meaning that is broader than the costs directly arising to the facility operator from the use of the facility to meet demand, and would include costs arising from the use of the

[36] *Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal and Ors* (2012) 246 CLR 379 at [79]–[80].
[37] Explanatory Memorandum to the Competition and Consumer Amendment (Competition Policy Review) Bill 2017, para 12.33.

> facility to meet demand whether those costs are incurred by the facility operator or by the facility user or other downstream market participants.[38]

DBCT Management also said:

> HoustonKemp explains in its report that the costs referred to in criterion (b) should not be limited to those incurred by the provider of the facility for the service. To limit costs in this way would overlook the fact that coal handling services are part of a supply network and to meet foreseeable demand in the market requires costs to be incurred throughout that supply network.
>
> It follows that the least cost assessment must consider all the costs that may be incurred in the coal supply network to meet the foreseeable demand. This includes costs associated with both rail access and rail haulage, as well as the port terminal infrastructure and handling costs …
>
> …
>
> HoustonKemp observes that, in principle, the costs to be considered should also include any other costs incurred in the supply network that may be affected by any decision as to whether foreseeable demand is met at DBCT or any two or more facilities. These may include, for example, the costs associated with the provision of other port services such as pilotage and port security, or the costs associated with dredging shipping channels, where incurred to meet foreseeable demand.[39]
>
> [footnotes omitted]

Relevance of sunk costs

DBCT Management argued in its submission to the QCA that sunk costs are to be excluded from the analysis undertaken for the purpose of applying criterion (b).[40] The QCA considers that this may be appropriate in some cases, but not others. For example, the QCA might be asked to consider whether demand can be met at least cost by expanding an existing facility or by constructing a second facility to meet the additional demand that cannot be satisfied without such an expansion. In either scenario, the existing facility will be used, and the capital cost of that facility will be incurred. It would therefore not be necessary to quantify the capital cost of the existing facility.[41] However, in other scenarios, capital or sunk costs might be relevant; for example, if the QCA is asked to decide whether demand can be met at least cost using two or more existing facilities. The relevance of capital or sunk costs will depend, in each case, on the scenarios being considered.

In summary, the QCA considers that assessing whether the facility for the service could meet total foreseeable demand in the market over the determined period 'at the least cost', compared to any two or more facilities, requires consideration of:

- the costs of meeting demand using the existing facility[42]
- the costs of expansion of an existing facility (if that is relevant)
- the costs of meeting demand using a new facility (if that is relevant).

The task of the QCA is to determine whether the facility providing the service offering can satisfy total foreseeable demand more cheaply than a combination of facilities. In doing so, it

[38] QRC, sub. 7, att. 3, para 47.
[39] DBCT Management, sub. 1, pp. 36–37, paras 178–180.
[40] DBCT Management, sub. 1, p. 35, para 171.
[41] See *Re Fortescue Metals Group Ltd* [2010] ACompT 2 at [907].
[42] In this exercise, existing tariffs (in particular those approved through a regulatory process) may be an appropriate indicator of the cost of meeting demand.

may not be essential to quantify the precise costs of service provision for each alternative service offering. This will depend on the nature of the costs involved between different alternatives and the disparity between them. Further, if quantitative cost information is unavailable, a qualitative analysis may need to be undertaken.

2.3.9 Any 2 or more facilities

Section 76(2)(b) requires the QCA to consider whether the facility providing the service could meet total foreseeable demand in the market over the period for which the service would be declared and at the least cost compared to any two or more facilities (which could include the facility for the service).

Based on the statutory language, the relevant comparison to 'any 2 or more facilities' could include the facility for the service. However, the provision appears to contemplate at least the possibility there may be an alternative scenario that does not include the facility for the service.

Also based on the statutory language, the QCA considers it is open for it to consider whether a yet-to-be constructed facility should be part of the assessment. While such a facility may or may not be in contemplation, the QCA considers that criterion (b) only requires consideration of such a facility if it could meet at least part of the total foreseeable demand over the period for which the service would be declared. If the development of such a facility (or more than one such facility) was not technically feasible (or not feasible over the period of the declaration) then criterion (b) would not require consideration of the cost of meeting demand using such a facility.

The issues that may be relevant to forming a view on whether yet-to-be constructed facilities should be considered as part of the assessment process for criterion (b) may include:

- whether development of the facility is technically feasible
- the likelihood of the facility being developed over the period of the declaration
- when such a facility is expected to become operational (i.e. early or late in the period for assessing foreseeable demand)
- the availability, accuracy and certainty of cost of service provision information for these facilities.

The QRC submitted that criterion (b) allows an assessment of hypothetical facilities when assessing 'least cost'.[43] Counsel advising QRC stated:

> [70] …The Criterion requires a comparison between the costs that would arise if total foreseeable demand in the market were to be served by the facility in question and the costs that would arise if the demand were to be served by 2 or more facilities. It is not relevant to that enquiry whether a second facility has been constructed or is in contemplation. The natural monopoly question is answered by reference to cost considerations in the relevant market. The Criterion does not invite, or require, any consideration of the question whether the facility is likely to remain a monopoly into the future; as such the Criterion does not invite, or require, any consideration of the extent of existing competition in the market, or the likelihood of competition emerging in the relevant market. The natural monopoly question is, by definition, a hypothetical or theoretical question.
>
> ...

[43] QRC, sub. 7, p. 33.

> [72] The existence of present or potential future competitors in the market may also conceivably be relevant to the cost comparison. The alternative facility or service may provide useful cost information of a second facility, and thereby aid the "least cost" analysis.
>
> [73] However, the "least cost" question posed by Criterion (b) is not limited to an analysis of costs of using alternative facilities that are in existence or likely to be built.[44]

The QCA has difficulty in viewing the question posed by criterion (b) as a purely theoretical question. Section 76(2)(b) constrains this question, by taking as its starting point the cost of meeting foreseeable demand not with any single facility, but with a specific facility, namely, the facility for the service. The QCA considers that the application of this criterion is further constrained in relation to the consideration of other facilities which might also meet part or all of the foreseeable demand in the relevant market. It is questionable whether the natural monopoly characteristics of the facility for the service would be properly identified or assessed if, for example, the existing facility was to be compared with two or more facilities which could not, in any feasible scenario, meet any part of this foreseeable demand.

2.4 Criterion (a): access as a result of declaration would promote a material increase in competition in at least one market

2.4.1 The statutory provision

Section 76(2)(a) of the QCA Act is expressed as follows:

> that access (or increased access) to the service, on reasonable terms and conditions, as a result of a declaration of the service would promote a material increase in competition in at least 1 market (whether or not in Australia), other than the market for the service

This provision is referred to as 'criterion (a)'.

2.4.2 Summary of approach to criterion (a)

Criterion (a) is a critical aspect of the access criteria as it focuses on the effect of declaration in dependent markets, and specifically whether the requisite access as a result of declaration would promote a material increase in competition in market(s) other than the market for the service.[45]

The QCA has applied the following approach to criterion (a):

- Identify the market for the service.
- Identify the relevant dependent (upstream or downstream) markets.
- Confirm that the relevant dependent market is separate from the market for the declared service.
- Consider whether access (or increased access) to the service, on reasonable terms and conditions, as a result of declaration would promote a material increase in competition in at least one market (whether or not in Australia), other than the market for the service.

The criterion is satisfied only if the answer to the final dot point is affirmative.

Matters of interpretation of criterion (a) are set out in sections 2.4.3 to 2.4.6 below.

---

[44] QRC, sub. 7, att. 3.

[45] See Productivity Commission, *National Access Regime*, inquiry report no. 66, October 2013, p. 167—the Productivity Commission stated that the promotion of competition is a proxy for more efficient outcomes, reflected in lower prices and/or higher output in a dependent market.

2.4.3 The market for the service

See section 2.3.5 above.

2.4.4 Dependent markets

Criterion (a) requires that the requisite access will promote a material increase in competition in at least one market (whether or not in Australia) other than the market for the service.

Having identified the market for the service, the QCA's view is criterion (a) requires the identification of at least one other market (which may be referred to as a dependent market) and confirmation that it is separate from the market for the service. Depending on the facts in each case, there may be more than one dependent market for consideration under criterion (a).

The QCA has applied the principles of identifying a market as set out in section 2.3.5 above.

Whether a market is 'dependent' will depend on whether access to the relevant service, in the sense described in criterion (a), would affect the competitive environment in that market. That is considered at a later stage of the analysis. At this point in the QCA's analysis, the task is to define the relevant market and be satisfied it is separate from the market in which the relevant service is provided.

2.4.5 Access (or increased access), on reasonable terms and conditions, as a result of a declaration of the service

Criterion (a) requires a consideration of the relevant impact of 'access (or increased access) to the service, on reasonable terms and conditions, as a result of a declaration of the service'.

These words were introduced into criterion (a) by the *Queensland Competition Authority Amendment Act 2018* (Qld), with effect from 29 March 2018. This amendment is consistent with the amendment to the equivalent criterion under Part IIIA of the CCA, introduced by the *Competition and Consumer Amendment (Competition Policy Review) Act 2017* with effect from 6 November 2017.

The Explanatory Memorandum to the Commonwealth amending Act describes in some detail how criterion (a) in Part IIIA is intended to operate as a result of these amendments:

> [12.19] The amendments require the Council and the Minister to consider whether access (or increased access) on reasonable terms and conditions as a result of declaration would promote a material increase in competition in a market other than the market for the service. That is, the amendments focus the test on the effect of declaration, rather than merely assessing whether access (or increased access) would promote competition.
>
> [12.20] This requires a comparison of two future scenarios: one in which the service is declared and more access is available on reasonable terms and conditions, and one in which no additional access is granted. That is a comparison of either: no access without declaration compared with some access as a result of declaration; or some access without declaration to additional access as a result of declaration. In comparing these two scenarios, it must be the case that it is the declaration resulting in access (or increased access) on reasonable terms and conditions that promotes the material increase in competition.
>
> [12.21] What are reasonable terms and conditions is not defined in the legislation. This is an objective test that may involve consideration of market conditions. It does not require that the Council or Minister come to a view on the outcomes of a Part IIIA negotiation or arbitration. The requirement that access is on reasonable terms and conditions is intended to minimise the detriment to competition in dependent markets that may otherwise be caused by the

> exploitation of monopoly power. Reasonable terms and conditions include those necessary to protect the legitimate interests of the owner of the facility.[46]

The approach outlined in the Explanatory Memorandum is similar to the approach the Australian Competition Tribunal took in the *Sydney Airport* decision. In applying an earlier form of criterion (a), the Tribunal stated:

> … the task of the Tribunal is to compare:
>
> · the opportunities and environment for competition in the dependent market if the Airside Service is declared; with
>
> · the opportunities and environment for competition in the dependent market if the Airside Service is not declared.[47]

The Tribunal's decision was reversed on appeal by the Full Federal Court, which found criterion (a) called for an enquiry into the effect of access (or increased access), not the effect of declaration under Part IIIA.[48] It is, however, clear the amendments to criterion (a) were intended to re-focus the enquiry not merely on the effect of access, but rather on the effect of access *as a result of declaration*.

Consistent with the approach taken in earlier decisions, the QCA has applied criterion (a) using a future with and without approach. That is, by comparing a scenario in which there is no declaration, with a scenario in which there is access (or increased access) on reasonable terms as a result of declaration.

If, in a scenario without declaration, the QCA finds there would still be access on reasonable terms for a reason other than declaration (e.g. because of constraints imposed by competition or some other regulatory regime), such that there would be no material increase in competition in a dependent market, it would follow that criterion (a) is not satisfied.

The inclusion of the words 'on reasonable terms and conditions' does not require the QCA to embark on an analysis of the terms that can be expected in the factual scenario (i.e. as a result of declaration), or a detailed comparison with terms anticipated in a counterfactual scenario. The QCA notes a similar view was expressed by DBCT Management.[49] Rather, the QCA considers these words are intended to describe what access or increased access look like for the purpose of applying the criterion. It might, for example, be the case that competition in a dependent market would be promoted if a person were to have access on terms that were unreasonably favourable to the access seeker. This is not, however, what the criterion is concerned with. It asks whether access (or increased access) *on reasonable terms* would promote competition.

In relation to the words 'increased access', the QCA has applied a similar approach to the ordinary meaning of the words as applied by the Tribunal in the *Sydney Airport* decision:

> It was generally agreed between the parties that the ordinary meaning of the terms meant that where "access" is used in criterion (a), it is a noun meaning a right or ability or opportunity to make use of the service, and that "increased access" is therefore an enhanced right, ability or opportunity to make use of the service.[50]

---

[46] Explanatory Memorandum to the *Competition and Consumer Amendment (Competition Policy Review) Bill 201*, at [12.19]–[12.21].
[47] *Re Virgin Blue Airlines Pty Limited* [2005] ACompT 5 at [153].
[48] *Sydney Airport Corporation Limited v Australian Competition Tribunal* [2006] FCAFC 146 at [82]–[83].
[49] DBCT Management, sub. 13, para 300.1.
[50] *Re Virgin Blue Airlines Pty Limited* [2005] ACompT 5 at [137].

2.4.6 Promote a material increase in competition

The words 'material increase' were first introduced into criterion (a) by the *Motor Accident Insurance and Other Legislation Amendment Act 2010*. The Explanatory Notes to that amending Act states that the purpose of the amendment to s. 76 of the QCA Act is to:

> amend section 76(2)(a) to clarify that access (or increased access) to the service should be expected to promote a material increase in competition in order for this criterion to be satisfied. This will prevent the declaration of services where only a trivial increase in competition is expected to result…[51]

The Australian Competition Tribunal, in *Sydney Airport*, stated:

> In *Sydney International Airport* the Tribunal considered the meaning of "promoting competition" at [106]-[107], 40,775, as follows:
>
> *"The Tribunal does not consider that the notion of 'promoting' competition in s 44H(4)(a) requires it to be satisfied that there would be an advance in competition in the sense that competition would be increased. Rather, the Tribunal considers that the notion of 'promoting' competition in s 44H(4)(a) involves the idea of creating the conditions or environment for improving competition from what it would be otherwise. That is to say, the opportunities and environment for competition given declaration, will be better than they would be without declaration.*
>
> *We have reached this conclusion having had regard, in particular, to the two stage process of the Pt IIIA access regime. The purpose of an access declaration is to unlock a bottleneck so that competition can be promoted in a market other than the market for the service. The emphasis is on 'access', which leads us to the view that s 44H(4)(a) is concerned with the fostering of competition, that is to say it is concerned with the removal of barriers to entry which inhibit the opportunity for competition in the relevant downstream market. It is in this sense that the Tribunal considers that the promotion of competition involves a consideration that if the conditions or environment for improving competition are enhanced, then there is a likelihood of increased competition that is not trivial."*[52]

The NCC describes the relevant test in the following terms:

> The promotion of a material increase in competition involves an improvement in the opportunities and environment for competition such that competitive outcomes are materially more likely to occur.[53]

Broadly, the QCA endorses the approach to criterion (a) described in these passages, and has approached this criterion in the same way, recognising that the test to be applied requires promotion of a 'material increase' in competition.

In so doing, the QCA has considered the extent to which the service provider for the relevant service would, in both a factual and counterfactual scenario, have the ability and incentive to exert market power such that, in the absence of declaration, it could restrict access or unreasonably increase its access price, thereby materially impacting on competition in markets that are dependent on access to the service.[54]

The NCC stated in its Declaration of Services guide:

---

[51] Explanatory Notes to the *Motor Accident Insurance and Other Legislation Amendment Act 2010* (Qld), p. 16.
[52] Re Virgin Blue Airlines Pty Limited [2005] ACompT 5 at [146].
[53] NCC, *Declaration of Services, A guide to declaration under Part IIIA of the Competition and Consumer Act 2010 (Cth)*, April 2018 edn, p. 32, para 3.23.
[54] For example, NCC, *Declaration of Services, A guide to declaration under Part IIIA of the Competition and Consumer Act 2010 (Cth)*, April 2018 edn, pp. 33–34, paras 3.26–3.32; *Re Duke Eastern Gas Pipeline Pty Ltd* [2001] ACompT 2 at [117].

> [3.30] There are a number of ways the use of market power in the provision of the service for which declaration is sought by a service provider may adversely affect competition in a dependent market. For example:
>
> - a service provider with a vertically related affiliate may engage in behaviour designed to leverage its market power into a dependent market to advantage the competitive position of its affiliate
> - where a service provider charges monopoly prices for the provision of the service, those monopoly prices may suppress demand or restrict entry or participation in a dependent market, and/or
> - explicit or implicit price collusion in a dependent market may be facilitated by the use of a service provider's market power. For example a service provider's actions may prevent new market entry that would lead to the breakdown of a collusive arrangement or understanding or a service provider's market power might be used to 'discipline' a market participant that sought to operate independently.[55]
>
> [footnotes omitted]

The NCC also stated in this guide, in relation to the concept of competition, that:

> [3.24] As provided in the objects of Part IIIA (s 44AA of the CCA), the reference to 'competition' in criterion (a) is a reference to workable or effective competition, rather than any theoretical concept of perfect competition. 'Workable or effective competition' refers to the degree of competition required for prices to be driven towards economic costs and for resources to be allocated efficiently at least in the long term. In a workable or effective competitive environment no one seller or group of sellers has significant market power. The subject matter of the criterion (a) assessment involves an assessment of the competitive conditions in a real-life industry.
>
> [3.25] Where a dependent market is already workably or effectively competitive, improved access is unlikely to promote a material increase in competition and an application for declaration of a service that seeks to add to competition in such a dependent market is therefore unlikely to satisfy criterion (a).[56]
>
> [footnotes omitted]

The QCA has been guided by the principles outlined by the NCC in deciding whether criterion (a) has been satisfied in this instance. The NCC's comment above[57] supports the conclusion that if a dependent market would be workably competitive in a future without declaration, access (or increased access) to the service on reasonable terms as a result of declaration is not likely to materially increase competition in that dependent market. In the present case, however, the QCA must decide whether to recommend the declaration of certain services, which are already declared (and have been for some time). This means the existing competitive conditions in a dependent market do not necessarily represent the 'future without' declaration; they in fact may reflect the 'future with'. Even if a dependent market is workably competitive today, it is relevant to consider whether, and to what extent, competitive conditions in the dependent market are attributable to the fact that the relevant service is (and has been for some time) declared.

[55] NCC, *Declaration of Services, A guide to declaration under Part IIIA of the Competition and Consumer Act 2010 (Cth),* April 2018 edn, pp. 33–34, para 3.30.

[56] NCC, *Declaration of Services, A guide to declaration under Part IIIA of the Competition and Consumer Act 2010 (Cth)*, April 2018 edn, pp. 32–33, paras 3.24–3.25.

[57] In paragraph 3.25 of its 2018 guide to declaration.

2.4.7 The relevance of s. 46 of the Competition and Consumer Act

One of the questions raised in submissions to the QCA is whether access to the relevant services, as a result of declaration, would promote a material increase in competition in a dependent market, or would be in the public interest, in circumstances where service providers are subject to s. 46 of the CCA.[58] This is potentially relevant to whether criterion (a) would be satisfied, as well as criterion (d) (discussed further below).

Numerous authors have previously canvassed the relative merits of s. 46 and Part IIIA as mechanisms for securing access to essential facilities on reasonable terms.[59] There have also been some cases where s. 46 has been invoked, with mixed success, by parties who have been denied access to the type of infrastructure services to which Part IIIA of the CCA (or Part 5 of the QCA Act) might apply.[60] However, the amendments to s. 46, enacted in 2017, invite further consideration of the relevance of s. 46 to the application of the access criteria.

The Hilmer Review, which recommended the introduction of the national third party access regime upon which Part 5 of the QCA Act is based, discussed whether the prohibition against the misuse of market power in s. 46 was sufficient to overcome what it described as the 'essential facilities problem'.[61] The report noted that Australian courts had declined to introduce, through s. 46, an approach similar to the 'essential facilities doctrine' that has developed in US antitrust jurisprudence, stating:[62]

> unless s.46 were amended in some way, access would only be available where a firm was able to prove that it had been denied access, or access on reasonable terms, because of a proscribed purpose.[63]

Following its amendment in 2017, proof of a proscribed purpose is no longer essential. Section 46 is now contravened if a firm with a substantial degree of market power engages in conduct that has the purpose of substantially lessening competition, or has or is likely to have that effect. Further, it is no longer necessary to prove that a firm has taken advantage of its market power in order to successfully invoke s. 46.

Notwithstanding these amendments, there remain some material differences between the scope and application of s. 46 and the access regime under Part 5 of the QCA Act.

---

[58] See DBCT Management, sub. 1, pp. 85–86 in relation to criterion (a), p. 98 in relation to criterion (d); DBCT Management, sub. 13, pp. 70–71; Aurizon Network, sub. 6, pp. 9, 32 in relation to criterion (d); Aurizon Network, sub. 19, pp. 14–16 (in relation to criterion (d)) and the Frontier Economics report, pp. 11, 23–24 (Frontier Economics report). See also QRC, sub. 20, p. 11 and att. 1.

[59] For example, A Abadee, 'The essential facilities doctrine and the National Access Regime: A residual role for section 46 of the Trade Practices Act*?* ', *Trade Practices law Journal*, vol. 5, no. 1, 1997, p. 27; B Marshall, 'The resolution of access disputes under section 46 of the Trade Practices Act', *University of Tasmania Law Review*, vol. 22, no. 1, 2003, pp. 9–51; W Pengilley, 'The Man from Mars would have done better: Commentary on the declaration and arbitration provisions of the access regime under Part IIIA of the Trade Practices Act', *Queensland University of Technology Law and Justice Journal*, vol. 7, no. 1, 2007.

[60] For example, *NT Power Generation Pty Ltd v Power and Water Authority* [2004] HCA 48 (successful); *Pacific National (ACT) Limited v Queensland Rail* [2006] FCA 91 (unsuccessful).

[61] Committee of Inquiry into Competition Policy in Australia, *National Competition Policy* (the Hilmer Review), Australian Government Publishing Service, Canberra, August 1993, pp. 242–44, http://ncp.ncc.gov.au/docs/National%20Competition%20Policy%20Review%20report,%20The%20Hilmer%20Report,%20August%201993.pdf.

[62] Hilmer Review, p. 243.

[63] Hilmer Review, p. 243.

- Section 46 now requires conduct that has the purpose, or is likely to have the effect, of substantially lessening competition in the market in which the relevant firm (or a related body corporate) has market power, or any other market in which it supplies or acquires goods or services. This requirement may be satisfied in the case of a refusal to deal by a firm which is vertically integrated into a dependent market, but may be less evident in a case of a service provider which is not.
- Section 46 has, as its object, the prohibition of specific conduct that substantially lessens competition; for example, conduct that might be described as 'exclusionary'.[64] In contrast, Part 5 is concerned with creating rights of access for all users in circumstances where access on reasonable terms as a result of declaration would, among other things, promote a material increase in competition in a dependent market. It is not necessary to prove that there has been any unlawful or exclusionary conduct in order to satisfy the access criteria. The Full Federal Court, in the *Sydney Airport* decision,[65] described the operation of Part IIIA in the following terms:

  > [77] … Part IIIA is not, and was never intended to be, a regime to set right what might be said to be unacceptable conduct …
  >
  > [78] The context and background and evident purpose of the legislation make clear that the regime is not only engaged when some denial, or restriction of supply of the service can be demonstrated. Such a construction would limit the operation of this Part and impede it by an anterior and collateral factual enquiry. Further, to the extent that the found denial or restriction acts as a focal point or governor of the enquiry as to the promotion of competition contemplated by s 44H(4)(a) the section would be acting more like a remedy for a wrong, rather than as a public instrument for the more efficient working of essential facilities in the economy.

- The threshold for satisfying criterion (a) (i.e. promoting a 'material' increase in competition) is different to the threshold for engaging s. 46 (i.e. a 'substantial' lessening of competition). When Part IIIA was amended to add the word 'material' to criterion (a), it was viewed as a lower threshold than 'substantial'.[66] It is at least possible that access might promote a material increase in competition, in circumstances where a refusal to allow access might not result in a substantial lessening of competition.
- Section 46 remains an avenue by which a litigant (either the ACCC or a private litigant) may be able to obtain redress in a specific case of a denial of access on reasonable terms. It does not, however, provide a means by which reasonable terms and conditions of access can be set, on an ex ante basis, for existing or prospective users of a service. It is, for example, difficult to see how s. 46 would or could be used to resolve the competing claims of parties who were seeking access to scarce capacity, or pressing for the expansion of a facility.
- The Hilmer Review recognised that the remedies available to a court, tasked with enforcing s. 46, may be ill suited to setting and administering reasonable terms and conditions of access to essential facilities.[67] The Productivity Commission made similar observations in its 2013 review of Part IIIA.[68] Courts can make orders to rectify a specific breach of the CCA (or

[64] For example, GA Hay & RL Smith, '"Why can't a woman be more like a man?"—American and Australian approaches to exclusionary conduct', *Melbourne University Law Review*, vol. 31, no. 3, 2007, pp. 1099–134.

[65] *Sydney Airport Corporation Limited v Australian Competition Tribunal* [2006] FCAFC 146.

[66] For example, Productivity Commission 2004, *Review of the Gas Access Regime*, report no. 31, p. 223.

[67] Committee of Inquiry into Competition Policy in Australia, *National Competition Policy* (the Hilmer Review), 1993, pp. 243–44.

[68] Productivity Commission, *National Access Regime*, inquiry report no. 66, 2013, p. 96.

award compensatory damages for such a breach) but generally cannot make orders which will address, on an ex ante basis, the rights of access for existing and future users generally.

Ultimately, the question for the QCA is whether, as a consequence of s. 46 (as amended), one or more of the access criteria are not satisfied; in particular criterion (a) or criterion (d).

This, in turn, depends on two questions:

- would the threat of being liable for a contravention of s. 46 (as amended) result in a service provider choosing to offer access to the relevant service on reasonable terms and conditions?
- if not, could s. 46 be used as a mechanism to produce such an outcome?

The QCA is not satisfied that either question can be answered in the affirmative.

As to the first question, the QCA recognises that the amendments to s. 46 have potentially expanded the reach of the prohibition. However, those amendments have also introduced new thresholds (in relation to both purpose and effect) that need to be satisfied before s. 46 can be successfully invoked. It is apparent from the debate that surrounded the passage of these amendments that the circumstances in which s. 46 will apply to a firm with a substantial degree of market power are not yet settled, and may not be for some years.[69]

If the threat of liability for a contravention of competition laws of general application (including s. 46) was sufficient to motivate operators of 'essential' facilities to offer access on reasonable terms, it is possible that the access criteria would rarely, if ever, be satisfied. While each case is to be considered on its merits, very clear evidence would be needed to enable the QCA to find that criterion (a) or criterion (d) would not be satisfied for this reason. In its consideration of the declaration of Sydney Airport under Part IIIA, the Australian Competition Tribunal stated:

> We agree with the submission of the Parliamentary Secretary that the economics of law enforcement, which was initially put forward by some of the expert economists as a means of analysing the threat of re-regulation, provides little assistance in the present case. As the Parliamentary Secretary pointed out, discussions of law enforcement in the context of economic incentives depends on the level of detection and enforcement of the law across a large number of potential lawbreakers. That context is of little relevance in the present circumstances.[70]

Notwithstanding the amendments to the CCA, the QCA is not satisfied that the threat of liability under s. 46 would, in the absence of declaration, result in service providers choosing to offer access to services on reasonable terms and conditions.

As to the second question, the QCA believes that s. 46, even as amended, remains an enforcement tool, rather than an effective mechanism by which terms and conditions of access can be determined and administered on an ex ante basis for all users and prospective users. While the enforcement of s. 46 may provide a remedy for a specific contravention of the CCA, the uncertainty around the operation of the amended legislation, combined with the limitations on the remedies available to the courts if a breach was found, means that s. 46 is still, at best, only a partial substitute for declaration under Part 5 of the QCA Act as a means of ensuring access to services on reasonable terms and conditions.

---

[69] The QCA notes, for example, that 15 years passed between the enactment of s. 46 and the seminal decision of the High Court in *Queensland Wire Industries Pty Ltd v The Broken Hill Proprietary Company Ltd* (1989) 167 CLR 177.

[70] *Re Virgin Blue Airlines Pty Ltd* [2005] ACompT 5 at [507].

2.5 Criterion (c): State significance

2.5.1 The statutory provision

Section 76(2)(c) of the QCA Act is expressed as follows:

> that the facility for the service is significant, having regard to its size or its importance to the Queensland economy

This provision is referred to as 'criterion (c)'.

2.5.2 Summary of approach to criterion (c)

The QCA has applied the following approach to criterion (c):

- Identify the service.
- Identify the facility for the service.
- Consider whether the facility for the service is significant, having regard to its size or importance to the Queensland economy.

Matters of interpretation of criterion (c) are set out in sections 2.5.3 to 2.5.5 below.

2.5.3 The service

See section 2.3.3 above.

2.5.4 The facility

See section 2.3.4 above.

2.5.5 The facility for the service is significant

Criterion (c) is in identical terms to when it was first introduced into the QCA Act by the *Motor Accident Insurance and Other Legislation Amendment Act 2010* (Qld).[71] According to the Explanatory Notes for this amending Act, criterion (c) was inserted 'to ensure that a service can only be declared if it is provided by an infrastructure facility that is significant'.[72]

Criterion (c) requires 'significant' to be determined having regard to the facility's size or importance to the Queensland economy. The QCA considers this requires it to be satisfied of the significance of a facility on only one of these two considerations, although depending on the facts, it may be satisfied as to both.

The QRC and the South West Producers submitted that the size of the facility requires an assessment of factors such as the physical capacity and the throughput of goods and services using the facility, as identified by the NCC.[73]

The QCA considers the following considerations are relevant to this criterion:

- size of the facility—including the physical and geographic dimensions of the facility (for example, the size of its footprint or its start and end points), the physical capacity of the facility, and the throughput of goods and services using the facility

[71] The text of the equivalent provision of 'national significance' in Part IIIA of the CCA (that is, s. 44CA(1)(c)), was unchanged by the *Competition and Consumer Amendment (Competition Policy Review) Act 2017* which most recently amended the declaration criteria with effect from 6 November 2017.

[72] *Motor Accident Insurance and Other Legislation Amendment Bill 2010* (Qld), Explanatory Notes, p. 16.

[73] Queensland Resources Council, sub. 7, p. 23; South West Producers, sub. 4, p. 44, para 8.1.

- the importance of the facility to the Queensland economy—including by reference to its contribution to exports, employment and gross state product (GSP). The QCA also generally considers state significance to be established if the facility is an essential element of a supply chain, and enables significant revenues to be earned by businesses participating in dependent markets (i.e. markets in which access would materially promote competition).[74]

The QCA notes that in *Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal and Ors*[75] the High Court (by majority) observed that the equivalent provision of 'national significance' in Part IIIA of the CCA (which is broadly consistent with criterion (c) but not in identical terms),[76] 'may also direct attention to matters of broad judgment of a generally political kind'.[77]

Accordingly, the QCA has approached the assessment of state significance as a matter of judgment rather than determination by precise calculation.[78]

2.6 Criterion (d): promote the public interest

2.6.1 The statutory provision

Section 76(2)(d) of the QCA Act is expressed as follows:

> that access (or increased access) to the service, on reasonable terms and conditions, as a result of a declaration of the service would promote the public interest

This provision is referred to as 'criterion (d)'.

Section 76(5) of the QCA Act further states:

> In considering the access criterion mentioned in subsection (2)(d), the authority and the Minister must have regard to the following matters –
>
> (a) if the facility for the service extends outside Queensland –
>
> (i) whether access to the service provided outside Queensland by means of the facility is regulated by another jurisdiction; and
>
> (ii) the desirability of consistency in regulating access to the service;
>
> (b) the effect that declaring the service would have on investment in –
>
> (i) facilities; and
>
> (ii) markets that depend on access to the service;
>
> (c) the administrative and compliance costs that would be incurred by the provider of the service if the service were declared;
>
> (d) any other matter the authority or Minister considers relevant.

2.6.2 Summary of approach to criterion (d)

The QCA has applied the following approach to criterion (d):

- Identify the service.

---

[74] See also NCC, *Declaration of Services, A guide to declaration under Part IIIA of the Competition and Consumer Act 2010 (Cth)*, April 2018 edn, p. 40, para 5.10.
[75] (2012) 246 CLR 379.
[76] At the time of the High Court decision, this was s. 44G(2)(c) of the CCA and is now s. 44CA(1)(c).
[77] (2012) 246 CLR 379 at [43]. This observation follows on from the majority's views in relation to the application of the equivalent of criterion (d) at [42]; see section 2.6.4 below.
[78] See also NCC, *Declaration of Services, A guide to declaration under Part IIIA of the Competition and Consumer Act 2010 (Cth)*, April 2018 edn, p. 39, para 5.4.

- Consider whether access (or increased access) to the service, on reasonable terms and conditions, as a result of declaration of the service would promote the public interest.

Matters of interpretation of criterion (d) are set out below.

2.6.3 Access (or increased access) to the service, on reasonable terms and conditions, as a result of declaration

See section 2.4.5 above.

2.6.4 Promote the public interest

Based on the text of the statutory provision, criterion (d) requires satisfaction of a positive test (i.e. the requisite access 'would promote the public interest'). In contrast, prior to the amendments made by the *Queensland Competition Authority Amendment Act 2018*, the equivalent of criterion (d) was worded as a negative test (i.e. 'that access (or increased access) to the service would not be contrary to the public interest').

This approach to the test is consistent with the relevant explanatory materials to the amending legislation. The amendments made by the *Queensland Competition Authority Amendment Act 2018* were intended to reflect the amendments introduced to Part IIIA of the CCA.[79]

Criterion (d) is identical in wording to s. 44CA(1)(d) of the CCA[80] (as amended with effect from 6 November 2017 by the *Competition and Consumer Amendment (Competition Policy Review) Act 2017)*. The Explanatory Memorandum to the Commonwealth amending Act states this criterion is 'an additional positive requirement which must be met before a service can be declared'.[81]

The QCA considers criterion (d) accepts the results of the application of the other criteria, but it further enquires whether the requisite access as a result of declaration would promote the public interest.[82]

The QCA considers the broad scope of this additional positive test is informed by:

- s. 76(5) of the QCA Act, which expressly requires the QCA and the Minister to have regard to the matters listed therein (see section 2.6.5 below)
- the majority judgment of the High Court of Australia in *Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal and Ors* in relation to the equivalent of criterion (d) under Part IIIA of the CCA (albeit the previous formulation worded as a negative test, as set out above)[83]
- the Explanatory Memorandum to the *Competition and Consumer Amendment (Competition Policy Review) Bill 2017*, which provides that the question asked by this criterion 'means that a decision maker must be satisfied that declaration is likely to generate overall gains to the

[79] Explanatory Notes to the Queensland Competition Authority Amendment Bill 2018, p. 2.
[80] Although the matters to which the QCA and the Minister must have regard under s. 76(5) of the QCA Act in respect of criterion (d) are expressed differently to the considerations of the NCC and the Minister under s. 44CA(3) of the CCA.
[81] Explanatory Memorandum to the Competition and Consumer Amendment (Competition Policy Review) Bill 2017, para 12.39.
[82] This is consistent with the Explanatory Memorandum to the Competition and Consumer Amendment (Competition Policy Review) Bill 2017, para 12.40.
[83] (2012) 246 CLR 379 at [42].

community'.[84] It also provides examples of costs and benefits that may be relevant to the assessment of criterion (d) depending on the circumstances.[85]

DBCT Management submitted that the threshold of the test requires that '[t]he QCA must be satisfied not only that increased access on reasonable terms and conditions as a result of declaration would promote the public interest, but also that it will do so in a way that is not merely trivial or ambiguous. Put another way, it is necessary for the QCA to find that significant net public benefits will result from declaration'.[86] The QCA considers the requirement of 'significant' net public benefit is a higher threshold than contemplated by the Explanatory Memorandum to the Commonwealth amending Act (referred to above).

The QCA notes the argument that criterion (d) would not be satisfied if the public interest would be promoted only to a trivial degree. In practical terms, however, it is unlikely that a qualitative judgment, such as the promotion of the public interest, can be made with such precision. Criterion (d) will be satisfied only if the decision maker concludes that access (or increased access) to the service, on reasonable terms and conditions, as a result of a declaration of the service would promote the public interest. The QCA considers that this criterion is clear on its terms and does not require further qualification.

Aurizon Network also submitted that criterion (d) 'imposes a positive obligation on the QCA to demonstrate that a recommendation to declare part, or all, of the service will result in improved outcomes for society relative to the potential alternatives'.[87] While the QCA considers its task is to decide whether it is satisfied about this criterion (rather than to 'demonstrate' outcomes), the QCA considers that criterion (d) calls for a weighing of the costs and benefits to the public resulting from access (or increased access) to the service, on reasonable terms and conditions, as a result of declaration.

In weighing these matters, it would be appropriate to use a 'future with and without' approach in order to identify those costs and benefits that can be expected to result from access (or increased access) to the service, on reasonable terms and conditions, as a result of declaration (as opposed to costs and benefits that may be expected anyway).

2.6.5 Section 76(5) of the QCA Act

Section 76(5) of the QCA Act lists the matters to which the QCA and the Minister must have regard in assessing criterion (d).

The Explanatory Notes to the *Queensland Competition Authority Amendment Bill 2018* provide:

> The new section 76(5) provides a non-exhaustive list of matters to which the Authority and the Minister must have regard to when considering the new section 76(2)(d). It replaces the existing section 76(3).
>
> While the new section 76(5) simplifies the range of matters the Authority and the Minister must have regard to when assessing the public interest criterion, under the new subsection (5)(d) the Authority or the Minister can still have regard to any of the matters that were previously listed in the existing section 76(3), if considered relevant.[88]

[84] Explanatory Memorandum to the Competition and Consumer Amendment (Competition Policy Review) Bill 2017, para 12.37.
[85] Explanatory Memorandum to the Competition and Consumer Amendment (Competition Policy Review) Bill 2017, para 12.41, examples 12.1 and 12.2.
[86] DBCT Management, sub. 1, p. 92, para 413.
[87] Aurizon Network, sub. 6, p. 13.
[88] Explanatory Notes to the Queensland Competition Authority Amendment Bill 2018, p. 6.

Matters previously listed in the repealed s. 76(3) are:

(a) the object of this part;

(b) legislation and government policies relating to ecologically sustainable development;

(c) social welfare and equity considerations including community service obligations and the availability of goods and services to consumers;

(d) legislation and government policies relating to occupational health and safety and industrial relations;

(e) economic and regional development issues, including employment and investment growth;

(f) the interests of consumers or any class of consumers;

(g) the need to promote competition;

(h) the efficient allocation of resources;

(i) if the facility for the service extends outside Queensland – whether access to the service provided outside Queensland by means of the facility is regulated by another jurisdiction and the desirability of consistency in regulating access to the service.

2.6.6 Section 76(5)(a)—if the facility extends outside Queensland

Section 76(5)(a) of the QCA Act is only enlivened if the facility for the service extends outside Queensland.

Where this occurs, this section requires regard to be had to whether access to the service provided outside Queensland by means of the facility is regulated by another jurisdiction and the desirability of consistency in regulating access to the service.

The QCA notes that none of the facilities for the declared services extend outside of Queensland. This fact is not in contention among stakeholders.

2.6.7 Section 76(5)(b)—effect on investment

Section 76(5)(b) of the QCA Act requires the QCA to have regard to the effect that declaring the service would have on investment in facilities and markets that depend on access to the service.

The QCA's view is the term 'facilities' encompasses not only consideration of investment in the facility that provides each service (the subject of review), but any other facility in which investment may be affected by the declaration. The QCA does not consider that it is necessary to confine its consideration to the effect on investment in the facility for the service (see s. 76(5)(d) of the QCA Act).

The importance of incentives for economically efficient investment in infrastructure is expressed through the objects clause underlying the access to services regime in Part 5 of the QCA Act:

> The object of this part is to promote the economically efficient operation of, use of and investment in, significant infrastructure by which services are provided, with the effect of promoting effective competition in upstream and downstream markets.[89]

In having regard to the effect that declaring the service may have on the requisite investment, the QCA considers this may raise consideration of matters such as:

- additional risk for investments in facilities and the level of return on that investment[90]

[89] Section 69E of the QCA Act.

- declaration providing a mechanism for certainty and transparency in terms of access and access disputes for participants in dependent markets, on which future investment decisions can be based.

2.6.8 Section 76(5)(c)—administrative and compliance costs

Section 76(5)(c) of the QCA Act requires the QCA to have regard to the administrative and compliance costs that would be incurred by the provider of the service if the service were declared.

The administrative and compliance costs could include, for example, the regulatory costs of submitting and complying with access undertakings, negotiating access and arbitrating access disputes.

Practically, many administrative and compliance costs may be recoverable by the service provider, for example, through access charges or other terms and conditions. The NCC stated that, '[c]osts to a service provider that can be compensated for through access charges are unlikely to be relevant to the assessment of the public interest'.[91]

2.6.9 Section 76(5)(d)—any other matter

Section 76(5)(d) of the QCA Act requires the QCA to have regard to 'any other matter' which the QCA considers relevant. The QCA considers this could include matters listed in the repealed s. 76(3) or any other matter it considers relevant.

[90] See also NCC, *Declaration of Services, A guide to declaration under Part IIIA of the Competition and Consumer Act 2010*, April 2018 edn, p. 44, para 6.11.

[91] NCC, *Declaration of Services, A guide to declaration under Part IIIA of the Competition and Consumer Act 2010,* April 2018 edn, pp. 44–45, para 6.17.

PART A: ACCESS CRITERIA ASSESSMENT — AURIZON NETWORK SERVICE

See separate document

PART B: ACCESS CRITERIA ASSESSMENT — QUEENSLAND RAIL SERVICE

See separate document

PART C: ACCESS CRITERIA ASSESSMENT — DBCT SERVICE

See separate document

GLOSSARY

AAPT	Adani Abbot Point Terminal
ACCC	Australian Competition and Consumer Commission
ARR	annual revenue requirement
ARTC	Australian Rail Track Corporation
att.	attachment
AU1	Queensland Rail's Access Undertaking 1, which came into effect on 11 October 2016
BFO	beneficial freight owner
BITRE	Bureau of Infrastructure, Transport and Regional Economics (Department of Infrastructure, Regional Development and Cities), Australian Government
CCA	Competition and Consumer Act 2010 (Cth)
cl., cls.	clause, clauses
CQCN	Central Queensland coal network
DAU	draft access undertaking
DBCT	Dalrymple Bay Coal Terminal
DTMR	Department of Transport and Main Roads, Queensland Government
GAP	Goonyella to Abbot Point
GAPE	Goonyella to Abbot Point expansion
gtk	gross tonne kilometre
HPCT	Hay Point Coal Terminal
MAR	maximum allowable revenue
mt	million tonne
mtpa	million tonne per annum
NCC	National Competition Council
NDP	network development plan
NECAP	non-expansion capital expenditure
NGBR	Northern Galilee Basin Rail
NMP	network management plan
NNSW	northern New South Wales
NWMP	North West Minerals Province
PSA	Port Services Agreement
QCA	Queensland Competition Authority
QCA Act	*Queensland Competition Authority Act 1997 (Qld)*

QRC	Queensland Resources Council
s., ss.	section, sections of an Act
SAA	standard access agreement
SEQ	South East Queensland
SSNIP	small but significant non-transitory increase in price
SUFA	standard user funding agreement
TIC	terminal infrastructure charge
TSC	Transport Services Contract
UT4	Aurizon Network's 2016 access undertaking (approved October 2016, as amended)
UT5	Aurizon Network's 2017 access undertaking (once approved)
WACC	weighted average cost of capital
WICET	Wiggins Island Coal Export Terminal
WIRP	Wiggins Island rail project

LIST OF SUBMISSIONS

For a detailed discussion of submissions received, see Chapter 1, section 1.3.

Name	Submission number	Date
Anglo American	14	16 July 2018
Aurizon Network	6	30 May 2018
	19	16 July 2018
Aurizon Operations (Aurizon Coal)	21	16 July 2018
Australian Rail Track Corporation (ARTC)	22	16 July 2018
BHP	18	16 July 2018
DBCT Management[92]	1	30 May 2018
	10	18 June 2018
	13	16 July 2018
DBCT User Group	3	30 May 2018
	15	16 July 2018
Glencore	5	30 May 2018
	17	16 July 2018
	23	20 July 2018
Pacific National	9	30 May 2018
Peabody	2	30 May 2018
	12	16 July 2018
Queensland Rail	8	30 May 2018
	11	18 June 2018
Queensland Resources Council (QRC)	7	30 May 2018
	20	16 July 2018
South West Producers (New Hope and Yancoal)	4	30 May 2018
	16	16 July 2018

[92] DBCT Management also submitted correspondence on 29 June and 7 November 2018 (see Chapter 1, Section 1.3).

REFERENCES

Abadee, A, 'The essential facilities doctrine and the National Access Regime: A residual role for section 46 of the Trade Practices Act?', *Trade Practices Law Journal*, vol. 5, no. 1, 1997, p. 27.

Adani, *Carmichael project: new narrow gauge rail design*, fact sheet, 2018, https://s3-ap-southeast-2.amazonaws.com/adani/pdf/ADI0010_Factsheet_v6%5B3%5D.pdf.

Adani Abbot Point Terminal Pty Limited, *Statement of claim*, submission in *Adani Abbot Point Terminal Pty Limited v Lake Vermont Resources Pty Limited & others*, S9440/17, 5 December 2017.

Annett, T, 'Miner makes cash offer as $3.9bn WICET debt continues to bite', *The Observer*, 24 September 2017, viewed 5 November 2018, https://www.gladstoneobserver.com.au/news/miner-makes-cash-offer-as-39bn-wicet-debt-continue/3227097/.

Aurizon Holdings Ltd, *Regional Freight Transport Services*, fact sheet, n.d., https://www.aurizon.com.au/~/media/aurizon/files/what%20we%20do/services/intermodal%20freight/guides/regional%20freight%20transport%20services%20contract%20fact%20sheet.pdf.

——*Livestock Transport Services*, fact sheet, n.d., https://www.aurizon.com.au/~/media/aurizon/files/what%20we%20do/services/bulk%20freight/fact%20sheets/aur2465_a4%20livestock%20transport%20fact%20sheet%20fa_rr.pdf.

Aurizon Network, *2011 AT5 DAAU*, explanatory submission, December 2011.

——*Network Development Plan 2016–17*, n.d., https://www.aurizon.com.au/~/media/aurizon/files/what%20we%20do/network/network%20development%20plans/ndp/networkdevelopmentplan_2016-17.pdf.

——*Aurizon Network's 2016 Access Undertaking (UT4)*, approved by the QCA on 11 October 2016, https://www.aurizon.com.au/~/media/aurizon/files/what%20we%20do/network/undertaking%20downloads/aurizon%20network%202016%20access%20undertaking%20ut4.pdf.

——2016 *Baseline Capacity Assessment Report,* public release version, 2016, http://www.qca.org.au/getattachment/c8618c44-b380-4391-9ca0-40d9d84d8161/Aurizon-Network—Baseline-Capacity-Assessment-Repor.aspx.

——*2017 Draft Access Undertaking,* submission, November 2016, http://www.qca.org.au/getattachment/f2e21ac5-eb97-4ad9-b01b-142d9250a45f/Aurizon-Network-submission-on-the-2017-DAU.aspx.

——*Delivering for the long haul: 2017 Sustainability Report,* 2017, https://www.aurizon.com.au/~/media/aurizon/files/sustainability/aurizon_sustainability_report_2017.pdf.

——*Blackwater System: Information Pack,* version 7.0, March 2017, https://www.aurizon.com.au/~/media/aurizon/files/what%20we%20do/network/network%20downloads/cqcn%20info%20packs/auz014_infopack_blackwater_ia.pdf.

——*Blackwater System, summary sheet,* version 7.0, March 2017, https://www.aurizon.com.au/~/media/aurizon/files/what%20we%20do/network/network%20downloads/cqcn%20info%20packs/auz014_summarysheet_blackwater_ia.pdf.

——*Goonyella System: Information Pack,* version 7.0, March 2017, https://www.aurizon.com.au/~/media/aurizon/files/what%20we%20do/network/network%20downloads/cqcn%20info%20packs/auz014_infopack_goonyella_ia_r1.pdf.

——*Goonyella System, summary sheet,* version 7.0, March 2017, https://www.aurizon.com.au/~/media/aurizon/files/what%20we%20do/network/network%20downloads/cqcn%20info%20packs/auz014_summarysheet_goonyella_ia.pdf.

——*Moura System: Information Pack,* version 7.0, March 2017, https://www.aurizon.com.au/~/media/aurizon/files/what%20we%20do/network/network%20downloads/cqcn%20info%20packs/auz014_infopack_moura_ia_r1.pdf.

——*Newlands System: Information Pack,* version 7.0, March 2017, https://www.aurizon.com.au/~/media/aurizon/files/what%20we%20do/network/network%20downloads/cqcn%20info%20packs/auz014_infopack_newlands_ia.pdf.

——*Newlands System, summary sheet,* version 7.0, March 2017, https://www.aurizon.com.au/~/media/aurizon/files/what%20we%20do/network/network%20downloads/cqcn%20info%20packs/auz014_summarysheet_newlands_fa.pdf.

——*2017 Electric Traction Draft Amending Access Undertaking,* submission, November 2017, http://www.qca.org.au/getattachment/ecea63ba-680a-4a72-bf6d-9a5ee11d6745/Aurizon-Network—submission-supporting-DAAU.aspx.

——*Below Rail Services provided by Aurizon Network: Financial Statements for the year ended 30 June 2017,* December 2017, https://www.aurizon.com.au/~/media/aurizon/files/what%20we%20do/network/network%20downloads/financial%20information/an%20brfs%20fy17-signed.pdf.

——*Network Development Plan 2018,* n.d., https://www.aurizon.com.au/~/media/aurizon/files/what%20we%20do/network/network%20development%20plans/ndp/2018%20network%20development%20plan.pdf.

——*FY2018 Revenue Adjustments Amounts—Explanatory Memorandum,* 28 September 2018, http://www.qca.org.au/getattachment/73f00793-f537-4e02-8c4c-8b48ab27bf12/AN-Explanatory-Memorandum.aspx.

——*FY2018 Maintenance Cost Report,* October 2018, https://www.aurizon.com.au/~/media/aurizon/files/what%20we%20do/network/network%20downloads/maintenance%20costs/aurizon%20network%20annual%20maintenance%20cost%20report%202017-2018.pdf.

Australian Broadcasting Corporation (ABC), 'Freight to increase on north Queensland roads as Glencore moves some transport operations to trucks', *ABC Rural*, 23 February 2017, viewed 2 October 2018, http://www.abc.net.au/news/rural/2017-02-23/more-freight-to-hit-north-queensland-roads-glencore/8296554.

Australian Competition and Consumer Commission (ACCC), *Application by the RG Tanna Coal Export Terminal Producers in respect of collective negotiations with Gladstone Ports Corporation Limited*, determination, 16 April 2014.

——*Brookfield consortium—proposed acquisition of Asciano Limited*, Statement of Issues, 15 October 2015, https://www.accc.gov.au/system/files/public-registers/documents/MER15%2B10579.pdf.

——*Merger Guidelines*, November 2017 (original published 2008), https://www.accc.gov.au/system/files/Merger%20guidelines%20-%20Final.PDF.

——*Pacific National/Linfox—Proposed acquisitions of intermodal assets from Aurizon*, Statement of Issues, March 2018, https://www.accc.gov.au/system/files/public-registers/documents/MER18%2B2552.pdf.

——*ACCC will not oppose proposed sale of Aurizon's Queensland intermodal business*, media release, 12 October 2018, viewed 22 October 2018, https://www.accc.gov.au/media-release/accc-will-not-oppose-proposed-sale-of-aurizon's-queensland-intermodal-business.

Australian Government, *Parliamentary Debates*, Legislative Assembly, 22 June 2001, p. 1838, http://www.parliament.qld.gov.au/documents/Hansard/2001/010622ha.pdf#search=dbct.

Australian Rail Track Corporation Ltd (ARTC), *Memorandum between the Commonwealth of Australia, the State of New South Wales and the Australian Rail Track Corporation Ltd*, 4 June 2014, https://www.artc.com.au/uploads/Final_Tripartite_Agreement.pdf.

Australia's Mining Monthly, 'WICET reported to be in court over unpaid dividends', 1 August 2018, viewed 5 November 2018, https://www.miningmonthly.com/logistics/international-coal-news/1343630/wicet-reported-to-be-in-court-over-unpaid-dividends.

Balance Advisory, *DBCTM Declaration Review*, report for the Queensland Competition Authority, 31 August 2018, http://www.qca.org.au/Other-Sectors/Access/To/Infrastructure/DeclarationReviews/In-Progress/2020-Declaration-Review.

BHP Billiton, *Regulation for the future of Australia's natural resources sector*, white paper, April 2008, submitted to the NCC, http://ncc.gov.au/images/uploads/DeRaRrSu-055.pdf.

——*New BMA Hay Point Coal Terminal boosts Queensland's coal exports*, media release, 16 December 2015, https://www.bhp.com/media-and-insights/news-releases/2015/12/new-bma-hay-point-coal-terminal-boosts-queenslands-coal-exports.

Biggar, D, 'Is protecting sunk investments by consumers a key rationale for natural monopoly regulation?', *Review of Network Economics*, vol. 8, no. 2, pp. 1–28, https://www.accc.gov.au/system/files/Darryl%20Biggar%20paper.pdf.

Bligh, A & Nolan, R, *Premium price for Abbot Point Coal Terminal boosts disaster recovery*, media release, Queensland Government, 3 May 2011, http://statements.qld.gov.au/Statement/Id/74576.

BMA, submission to the Standing Committee on Transport and Regional Services, *Inquiry into integration of regional rail and road networks and their interface with ports*, submission 47, 8 June 2005, https://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees.aspx?url=trs/networks/subs.htm.

Bureau of Infrastructure, Transport and Regional Economics (BITRE), *Road and rail freight: competitors or complements?,* information sheet 34, Australian Government, July 2009, https://bitre.gov.au/publications/2009/files/is_034.pdf.

——*Freightline 4—Australian coal freight transport*, 2016, https://bitre.gov.au/publications/2016/files/Freightline_04.pdf.

——*Trainline 5*, statistical report, Australian Government, 2017, https://bitre.gov.au/publications/2017/files/train_005.pdf.

Committee of Inquiry into Competition Policy in Australia (Professor F Hilmer, Chairman), *National Competition Policy*, Australian Government Publishing Service, Canberra, August 1993, http://ncp.ncc.gov.au/docs/National%20Competition%20Policy%20Review%20report,%20The%20Hilmer%20Report,%20August%201993.pdf. (the Hilmer Review)

Commodity Insights, *Market Demand Study: Australian Metallurgical Coal*, report to the Minerals Council of Australia, 12 October 2018, viewed 1 November 2018, http://www.minerals.org.au/sites/default/files/181012%20Commodity%20Insights%20Met%20Coal%20Report.pdf.

DBCT Management, *2010 Access Undertaking submission*, supporting submission, March 2010, http://www.qca.org.au/getattachment/157669e5-ec4a-4814-8702-71d4a6017747/DBCT-Management-2010-DAU-Supporting-Submission.aspx.

——*2016 DAU Submission*, 9 October 2015, http://www.qca.org.au/getattachment/5814e3ed-0665-4c80-b52d-63b9f5da5305/TEST-FILE.aspx.

——submission to the QCA, *Differential Pricing DAAU—draft decision*, June 2015, http://www.qca.org.au/getattachment/2d818ec4-0a25-473a-bab0-791958995164/DBCT-Management.aspx.

——*Master Plan 2016*, 2016, http://www.qca.org.au/getattachment/d4141799-c9d9-4460-b15b-753c0e91d63f/DBCT-Management-Master-Plan.aspx.

——submission to the QCA, *DBCT Management's 2015 DAU—draft decision*, 8 July 2016, http://www.qca.org.au/getattachment/f4531182-ec59-4e6c-9870-51d1c38fdaa9/DBCTM-Submission-Redacted.aspx.

——*Dalrymple Bay Coal Terminal 2017 Access Undertaking*, http://www.qca.org.au/getattachment/62e90399-3506-4176-a33e-ea7a3ac90512/DBCTM%e2%80%94Trading-SCB-DAAU-clean.aspx.

——*Master Plan 2018: Expansion Opportunities at the Dalrymple Bay Coal Terminal*, 2018, http://www.dbctm.com.au/_files/Documents/MP2018.pdf.

——*DBCT 2017 Access Undertaking—Trading SCB DAAU*, June 2018, http://www.qca.org.au/getattachment/62e90399-3506-4176-a33e-ea7a3ac90512/DBCTM—Trading-SCB-DAAU-clean.aspx.

——*DBCT Review Event—Change in Reference Tonnage*, letter to the QCA, 11 July 2018, http://www.qca.org.au/getattachment/15f5ec80-d3c7-4318-9c42-970006a4bf07/DBCTM—Reference-Tonnage-Review-Event.aspx.

Department of Natural Resources and Mines, *Annual exploration program 2017–18*, Queensland Government, 2017, https://www.dnrm.qld.gov.au/__data/assets/pdf_file/0008/1280474/annual-exploration-program-report-2017-18.pdf.

Department of State Development, *A Strategic Blueprint for Queensland's North West Minerals Province*, Queensland Government, 2018, https://www.statedevelopment.qld.gov.au/resources/plan/nwmp/nwmp-strategic-blueprint.pdf.

Department of Transport and Main Roads (DTMR), N*orth Coast Line Capacity Improvement Study*, final report, Queensland Government, 2015.

——*Trade Statistics for Queensland Ports*, Queensland Government, 2017, https://www.tmr.qld.gov.au/-/media/busind/Transport-sectors/Ports/Trade-statistics/Trade-Statistics-Report-2017.pdf?la=en.

——*Master plan: Priority Port of Gladstone*, Queensland Government, November 2018, https://www.tmr.qld.gov.au/business-industry/Transport-sectors/Ports/Sustainable-port-development-and-operation/Master-planning-for-priority-ports/Master-planning-for-the-priority-Port-of-Gladstone.

Doyle, G, *South Western Rail System*, Queensland Rail, presentation to Rail Forum: Explore best utilisation of existing rail infrastructure on the South West line, Goondiwindi, 4 December 2015, http://www.grc.qld.gov.au/documents/17518/41793789/12.35%20QLD%20Rail%20-%20Goondiwindi%20Rail%20Forum%20Presentation%2004122015%20Final%20pdf1.pdf.

Duran, P & Regan, J, 'Glencore-led Australia coal port eyes $3 billion debt rejig: sources', *Reuters*, 6 October 2017, viewed 25 September 2018, https://www.reuters.com/article/us-glencore-coal-australia/glencore-led-australian-coal-port-eyes-3-billion-debt-rejig-sources-idUSKBN1CB0I2.

FIIG Securities Ltd, *Adani Abbot Point Terminal (AAPT)*, 2015.

Geoscience Australia, *Australian Operating Mines Map 2017*, 18th edn, Australian Government, February 2018, https://d28rz98at9flks.cloudfront.net/115542/115542_Operating_Mines_Map_2017.pdf.

Glencore, submission to the QCA, *Queensland Rail's 2015 Draft Access Undertaking*, 5 June 2015, http://www.qca.org.au/getattachment/d381820a-b7fd-4ff0-94a4-af80e306aa80/Glencore-Submission-on-QR-2015-DAU-June-15.aspx.

——submission to the QCA, Q*ueensland Rail's 2015 Draft Access Undertaking*, draft decision, 23 December 2015, http://www.qca.org.au/getattachment/fa7086bc-74c7-4ae8-b65c-1552da1ad054/Glencore-Submission-on-Queensland-Rail-2015-DAU.aspx.

Hay, GA & Smith, RL, '"Why can't a woman be more like a man?"—American and Australian approaches to exclusionary conduct', *Melbourne University Law Review*, 2007, vol. 31, no. 3, pp. 1099–1134, https://law.unimelb.edu.au/__data/assets/pdf_file/0007/1707793/31_3_13.pdf.

Hilmer Review, 1993. See Committee of Inquiry into Competition Policy in Australia.

Integrated Logistics Company Pty Ltd 2018, *DBCT Capacity Estimates*, prepared for DBCT Management, 19 October 2018, http://www.qca.org.au/Ports/Access-to-Ports/DBCT-2015-Draft-Access-Undertaking/Ongoing-Compliance/Review-Events/Final-Report/Reference-tonnage-change-Nov-2018#finalpos.

Lynham, A, *New coal exploration opportunities up for grabs*, media release, Queensland Government, 3 May 2018, viewed 25 August 2018, http://statements.qld.gov.au/Statement/2018/5/3/new-coal-exploration-opportunities-up-for-grabs.

Marshall, B, 'The resolution of access disputes under section 46 of the Trade Practices Act', *University of Tasmania Law Review*, vol. 22, no. 1, 2003, pp. 9–51, http://www.austlii.edu.au/au/journals/UTasLawRw/2003/2.pdf.

Mizutani, F & Uranishi, S, 'Does vertical separation reduce cost? An empirical analysis of the rail industry in European and East Asian OECD countries', *Journal of Regulatory Economics*, vol. 43, no. 1, 2013, pp. 31–59.

Moneylife, 'Adani bags lease for Australia's Abbot Point Coal Terminal', 3 May 2011, https://www.moneylife.in/article/adani-bags-lease-for-australiarsquos-abbot-point-coal-terminal/16066.html; http://statements.qld.gov.au/Statement/Id/74576.

Morgans & CIMB Securities (Australia), *Special report: Wiggins Island Coal Export Terminal*, May 2014, viewed 17 May 2018, http://www.wicet.com.au/irm/PDF/1017/2014MorgansResearchNote.

National Competition Council (NCC), *Central Queensland Coal Rail Network: Applications for declaration of four services comprising the Central Queensland Coal Network under Part IIIA of the Competition and Consumer Act 2010 (Cth)*, draft recommendation, September 2010, http://ncc.gov.au/images/uploads/DERaQRDR-001.pdf.

——*Queensland Rail Access Regime: Application for certification under s 44M of the Trade Practices Act 1974*, final recommendation, November 2010, http://ncc.gov.au/images/uploads/CERaQldFR-001.pdf.

——*Declaration of the shipping channel service at the Port of Newcastle*, final recommendation, November 2015, http://ncc.gov.au/images/uploads/DEPONFR-001.pdf.

——*Declaration of Services: A guide to declaration under Part IIIA of the Competition and Consumer Act 2010 (Cth)*, April 2018, http://ncc.gov.au/images/uploads/NCC_Declaration_Guide_-_Version_6_-_April_2018.pdf.

North Queensland Bulk Ports, *Annual Report 2016–17*, https://nqbp.com.au/__data/assets/pdf_file/0016/2842/NQBP-2201-Annual-Report-2017_PRINT_low-res-2.pdf.

Palaszczuk, A, *New BMA Hay Point coal terminal berth boosts state coal exports*, media release, Queensland Government, 16 December 2015, http://statements.qld.gov.au/Statement/2015/12/16/new-bma-hay-point-coal-terminal-berth-boosts-state-coal-exports.

Paul, S, 'Glencore, partners in Australian port face heavy cost of boom era bet', *Reuters*, 17 March 2016, https://www.reuters.com/article/us-australia-coal-idUSKCN0WJ0IV.

Pengilley, W, 'The man from Mars would have done better: A commentary on the declaration and arbitration provisions of the access regime under part IIIA of the Trade Practices Act', *Queensland University of Technology Law and Justice Journal*, vol. 7, no. 1, 2007, http://classic.austlii.edu.au/au/journals/QUTLawJJl/2007/3.html.

Productivity Commission, *Price Regulation of Airport Services*, inquiry report no. 19, January 2002, https://www.pc.gov.au/__data/assets/pdf_file/0004/19714/airports.pdf.

——*Review of the Gas Access Regime*, inquiry report no. 31, June 2004, https://www.pc.gov.au/inquiries/completed/gas/report/gas1.pdf.

——*Review of Price Regulation of Airport Services*, inquiry report no. 40, December 2006, https://www.pc.gov.au/__data/assets/pdf_file/0019/20638/airportservices.pdf.

——*Economic Regulation of Airport Services*, inquiry report no. 57, December 2011, https://www.pc.gov.au/inquiries/completed/airport-regulation/report/airport-regulation.pdf.

——*National Access Regime*, inquiry report no. 66, October 2013, https://www.pc.gov.au/inquiries/completed/access-regime.

QCoal Group (QCoal Pty Limited, Byerwen Coal Pty Limited & Sonoma Mine Management Pty Limited), *Notice of intention to defend, submission in Adani Abbot Point Terminal Pty Limited v Lake Vermont Resources Pty Limited & others*, S9440/17, 28 February 2018.

Queensland Competition Authority (QCA), *Dalrymple Bay Coal Terminal Draft Access Undertaking*, draft decision, October 2004, http://www.qca.org.au/getattachment/dd6f9368-3c28-44e5-9350-7549981b461e/2004-Draft-Decision-re-DBCT-Draft-Access-Undertaki.aspx.

——*Dalrymple Bay Coal Terminal 2006 Draft Access Undertaking*, decision, June 2006, http://www.qca.org.au/getattachment/1e3051ac-748d-43b9-a07c-601188601dd2/DBCT-2006-Draft-Access-Undertaking.aspx.

——*DBCT Management's POST-85 Mtpa Expansion Study Costs*, final decision, April 2013, http://www.qca.org.au/getattachment/eaa1d5b4-c43d-47cc-81df-9c8d7d6c05fd/POST-85-Mtpa-Expansion-Study-Costs.aspx.

——*QCA Levy for 2013–14*, letter to Queensland Rail, 2 July 2013.

——*Goonyella to Abbot Point Expansion Reference Tariff*, draft amending access undertaking, July 2013, http://www.qca.org.au/getattachment/32486a45-7b53-4c2e-a839-917b70357a0f/Draft-Decision.aspx.

——*QCA Levy for 2014–15*, letter to Queensland Rail, 18 June 2014, https://www.queenslandrail.com.au/business/acccess/Documents/CurrentAccess/QCA%20Levy_2014_15.pdf.

——*DBCT Management Differential Pricing Draft Amending Access Undertaking*, draft decision, May 2015, http://www.qca.org.au/getattachment/e84109bc-e6e9-41ff-917e-a69a8026de33/QCA-Draft-Decision-DBCT-Differential-pricing-DA.aspx.

——*Queensland Rail's Access Undertaking 1*, approved by the QCA 11 October 2016, https://www.queenslandrail.com.au/business/acccess/Access%20Undertaking%20and%20related%20documents/Queensland%20Rail%20Access%20Undertaking%201%202016.pdf.

——*DBCT Management's 2015 draft access undertaking*, final decision, November 2016, http://www.qca.org.au/getattachment/081401b3-903e-4aea-b9fd-9da8e544cf94/Secondary-Undertaking-Notice—Attachment—QCA-decisi.aspx.

——*DBCT Management 2016–17 non-expansion capital expenditure*, decision letter, 13 July 2017, http://www.qca.org.au/Ports/Access-to-Ports/DBCT-2015-Draft-Access-Undertaking/Ongoing-Compliance/Non-expansion-capital-expenditure/Archive/NECAP-2017.

——*Aurizon Network's 2017 draft access undertaking*, draft decision, December 2017, http://www.qca.org.au/getattachment/7183cb8a-1be0-4de7-a451-a299e0f97896/QCA-Draft-decision.aspx.

——*Declaration reviews: applying the access criteria*, staff issues paper, April 2018, http://www.qca.org.au/getattachment/3d21a810-6838-4492-b60e-e4a9d23f32ff/Declaration-Review-Staff-Issues-Paper.aspx.

——*DBCT Management's 2018–19 RAB roll-forward, reference tonnage change, NECAP 2018 and terminal infrastructure charge*, decision letter, 21 June 2018, http://www.qca.org.au/getattachment/1f27a900-e656-4203-8d85-0b962c3f5762/QCA—DBCT-annual-revenue-and-reference-tonnage-2018.aspx.

——*Queensland Rail's 2017–18 QCA levy*, decision notice, attachment to the QCA's letter to Queensland Rail, 21 June 2018, http://www.qca.org.au/getattachment/14dba471-af75-4e5a-af12-caa6c12870c8/QCA-Final-decision-on-QR-s-QCA-levy-2017-18.aspx.

——*DBCT Management's applications under section 5.4(k)(5) and Schedule C, Part A, section 4(e)(1) of the 2017 AU*, decision letter, 19 July 2018, http://www.qca.org.au/getattachment/d30f9fe0-f3a3-4856-b76f-ca237c7386af/QCA—Reference-Tonnage-Review-Event-Approval.aspx.

——*Aurizon Network's 2017 Electric Traction DAAU*, final decision, August 2018, http://www.qca.org.au/getattachment/e403ddd1-830f-4ec1-927c-f6524431eeba/QCA—Final-Decision—2017-Electric-Traction-DAAU.aspx.

——*DBCTM's Trading SCB DAAU*, final decision, September 2018, http://www.qca.org.au/getattachment/4ca249a1-25cc-4a13-b7ed-df91cbbe9377/QCA—Decision.aspx.

——*Aurizon Network's 2017–18 revenue adjustment,* draft decision, November 2018, http://www.qca.org.au/getattachment/e14fd7ad-884e-465a-ac2a-09e8f0dda18f/Draft-decision-—-2017–18-revenue-adjustment.aspx.

Queensland Government, *Application to the National Competition Council for a recommendation on the effectiveness of an access regime*, 2010, http://ncc.gov.au/images/uploads/CECTQlAp-002.pdf.

——*Coal industry 5 year summary*, Coal industry review tables 2016–17 spreadsheet, viewed 3 September 2018, https://data.qld.gov.au/dataset/coal-industry-review-statistical-tables/resource/9278538e-668b-4803-bfd6-5dc25c9fab2b.

——*Total value of exports per year*, Coal industry review tables 2016–2017 spreadsheet, viewed 3 September 2018, https://data.qld.gov.au/dataset/coal-industry-review-statistical-tables/resource/fccfc461-7673-4d4b-a03f-321314501edb.

——*Overseas exports and imports of goods, value, Queensland and Australia, 1988–89 to 2017–18*, Queensland Government data, viewed 3 September 2018, https://data.qld.gov.au/dataset/os-exports-imports-goods-qld-aus/resource/fe46ac75-52ea-468f-b6eb-8d3835a83621.

——2017 calendar: Coal sales statistics, Queensland Government data, https://data.qld.gov.au/dataset/annual-coal-statistics/resource/c522fcaa-89d7-4c76-bd6e-064d39617d38.

——*Queensland Budget 2018–19, Budget Strategy and Outlook: Budget Paper No. 2*, https://budget.qld.gov.au/files/BP2-2018-19.pdf.

Queensland Rail, *Draft Queensland Rail Access Undertaking 1*, explanatory submission, March 2012, http://www.qca.org.au/getattachment/e5518877-0458-492a-aa80-a3c49b937a31/QRail-Explanatory-Document-re-2012-DAU.aspx.

——*Mount Isa Line Rail Infrastructure Master Plan*, 2012, https://www.queenslandrail.com.au/business/acccess/Documents/Maps/QR4159.1%20Infrastructure%20Master%20Plan%202012_Updated_LR.pdf.

——*Central Western System Information Pack*, 2016, https://www.queenslandrail.com.au/business/acccess/Documents/Central%20West%20System%20Information%20Pack%20-%20Issue%203%20-%20October%202016.pdf.

——*North Coast Line System North Information Pack*, 2016, https://www.queenslandrail.com.au/business/acccess/Documents/North%20Coast%20Line%20North%20System%20Information%20Pack%20-%20Issue%203%20-%20October%202016.pdf.

——*North Coast Line System South system Information Pack*, 2016, https://www.queenslandrail.com.au/business/acccess/Documents/North%20Coast%20Line%20South%20System%20Information%20Pack%20-%20Issue%203%20-%20October%202016.pdf.

——*South Western System Information Pack*, 2016, https://www.queenslandrail.com.au/business/acccess/Documents/South%20Western%20System%20Information%20Pack%20-%20Issue%203%20-%20October%202016.pdf.

——*West Moreton System Information Pack*, 2016, https://www.queenslandrail.com.au/business/acccess/Documents/West%20Moreton%20System%20Information%20Pack%20-%20Issue%203.1%20-%20October%202016.pdf.

—— *Western System Information Pack*, 2016, https://www.queenslandrail.com.au/business/acccess/Documents/Western%20System%20Information%20Pack%20-%20Issue%203%20-%20October%202016.pdf.

——*Tablelands System Information Pack*, 2016, https://www.queenslandrail.com.au/business/acccess/Documents/Tablelands%20System%20Information%20Pack%20-%20Issue%203%20-%20October%202016.pdf.

——*Access Undertaking 1*, 2016, https://www.queenslandrail.com.au/business/acccess/Access%20Undertaking%20and%20related%20documents/Queensland%20Rail%20Access%20Undertaking%201%202016.pdf.

——*Mount Isa System Information Pack*, 2017, https://www.queenslandrail.com.au/business/acccess/Documents/Mt%20Isa%20System%20Information%20Pack%20-%20Issue%203.1%20-%20February%202017.pdf.

——*Annual and Financial Report 2016–17*, 2017, https://www.queenslandrail.com.au/about%20us/Documents/QueenslandRail_AnnualFinancialReport_2016-17_LR.pdf.

——*Annual and Financial Report 2017–18*, 2018, https://www.queenslandrail.com.au/about%20us/Documents/Queensland%20Rail%20-%20Annual%20and%20Financial%20-%20Report%20-%202017-18.pdf.

——*2016–17 Annual Performance Report, Queensland Rail Access Undertaking 1*, December 2017, https://www.queenslandrail.com.au/business/acccess/Compliance%20and%20reporting/Queensland%20Rail%20-%20Annual%20Performance%20Report%202016-17.pdf.

——*Financial Statements for the Year Ended 30 June 2017: Below Rail Services Provided by Queensland Rail*, 2017, https://www.queenslandrail.com.au/business/acccess/Compliance%20and%20reporting/Below%20Rail%20Financial%20Statements%20for%20the%20year%20ended%2030%20June%202017.pdf.

——*2017–18 Queensland Competition Authority Levy, Queensland Rail Access Undertaking 1*, January 2018, http://www.qca.org.au/getattachment/bea6e4bb-3eba-47c3-8039-c076941c73e9/Queensland-Rail-2017-18-QCA-Levy-report.aspx.

Queensland Government Statistician's Office (QGSO), *Bowen Basin population report, 2017*, Queensland Government, 2017, http://www.qgso.qld.gov.au/products/reports/bowen-basin-pop-report/bowen-basin-pop-report-2017.pdf.

Queensland Resources Council (QRC), *What is Queensland's coal industry worth to Queensland, 2016–2017 financial year*, https://www.qrc.org.au/contributiontoqueensland/.

——submission to the Queensland Economics and Governance Committee, *Queensland Competition Authority Amendment Bill 2018*, 28 February 2018, http://www.parliament.qld.gov.au/documents/committees/EGC/2018/CompetitionAuth2018/submissions/003.pdf.

Resource Management International, *Assessment of Coal Volume Forecasts for Aurizon Network's 2017 Draft Access Undertaking*, report for the QCA, May 2017, http://www.qca.org.au/getattachment/47b6f9aa-0826-4aad-90e0-b474c2e22ea6/Resource-Management-International-Assessment-of.aspx.

Reuters AfricaTech, 'Fitch Rates DBCT Finance's Senior Secured Debt 'BBB-'/Stable', 7 June 2016, https://af.reuters.com/article/africaTech/idAFFit961210.

Southern Downs Regional Council, *Major rail service company Watco invests in Southern Downs*, 20 September 2018, viewed 2 October 2018, https://www.sdrc.qld.gov.au/council/alerts-news-notices/2018-news/major-rail-service-company-watco-invests-in-southern-downs.

S&P Global Platts, *Benchmarks give way: How global met coal markets are changing with the adoption of spot price indexes*, Metals special report, April 2018, viewed 1 November 2018, https://platts.com/IM.Platts.Content/InsightAnalysis/IndustrySolutionPapers/sr-global-met-coal-benchmarks-give-way042018.pdf.

TerraCom, *ASX Announcement: Blair Athol Update—Mining, Sales and Market*, 8 August 2017, http://terracomresources.com/wp-content/uploads/2017/08/1699015.pdf.

Legislation

Competition and Consumer Act 2010 (Cth)

Motor Accident Insurance and Other Legislation Amendment Act 2010 (Qld)

Queensland Competition Authority Act 1997 (Qld)

Queensland Competition Authority Amendment Act 2018 (Qld)

Queensland Competition Authority Regulation 2007 (Qld)

Queensland Competition Authority Regulation 2018 (Qld)

Legal cases

ACCC v Metcash Trading Limited [2011] FCAFC 151

Air New Zealand Ltd v Australian Competition and Consumer Commission; PT Garuda Indonesia Ltd v Australian Competition and Consumer Commission (2017) 344 ALR 377

Arnotts Limited & Ors v Trade Practices Commission (1990) 24 FCR 313

Application by Glencore Coal Pty Ltd [2016] ACompT 6

Boral Besser Masonry Limited v Australian Competition and Consumer Commission (2003) 215 CLR 374

In the matter of Fortescue Metals Group Limited [2010] ACompT 2

NT Power Generation Pty Ltd v Power and Water Authority [2004] HCA 48

Pacific National (ACT) Limited v Queensland Rail [2006] FCA 91

Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal and Ors (2012) 246 CLR 379

Queensland Wire Industries Pty Ltd v The Broken Hill Proprietary Company Ltd (1989) 167 CLR 177

Re Duke Eastern Gas Pipeline Pty Ltd [2001] ACompT 2

Re Queensland Co-operative Milling Association Ltd (1976) 25 FLR 169

Seven Network Limited v News Limited [2007] FCA 1062

Sydney Airport Corporation Limited v Australian Competition Tribunal [2006] FCAFC 146

Virgin Blue Airlines Pty Limited [2005] ACompT 5