Queensland Competition Authority

Applying for declaration or revocation under Part 5 of the QCA Act—handbook for applicants

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

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NOTICE

Role of the Queensland Competition Authority

We are Queensland's economic regulator. We help prevent monopoly businesses from inappropriately using their market power (by, for instance, manipulating prices or terms in their market)—and we do that by setting or monitoring prices, or through other arrangements. The businesses we regulate are in charge of vital infrastructure in Queensland, such as railways and ports, or they deliver essential services, such as water and energy. Because of regulation, prices are competitive, and those who need to use infrastructure can do so fairly.

An aspect of our role is to provide a pathway for parties to seek regulated access to services provided by essential infrastructure ('third party access'), where the owner or operator of that infrastructure might exert market power. This is done by way of declaration of a service under Part 5 of the *Queensland Competition Authority Act 1997* (QCA Act)[1]—which allows access seekers to negotiate with a service provider and provides recourse to arbitration if negotiation is unsuccessful.

Our role in the declaration process is to consider requests for declaration and make a recommendation to the Minister responsible for administering the QCA Act. We can recommend declaration of a service only if we are satisfied that all of the access criteria set out in the QCA Act are satisfied.

This handbook

This handbook provides detailed information on declaration of services for the purposes of third party access under Part 5 of the QCA Act—with particular focus on the access criteria against which a request for declaration must be assessed (under s. 76).[2] It also explains our indicative process for considering requests for declaration.

We are bound to comply with the provisions of the QCA Act—in relation to the way in which we both carry out our enquiries and provide recommendations regarding declaration of services. However, the QCA Act does afford us certain discretion. To the extent this handbook provides any statement as to how we might exercise such discretion, we are not bound to act in a manner consistent with such statement, recognising that each request about declaration is likely to be different.

This handbook therefore:

- is non-binding and should not be taken as definitive of our views on any particular matter, which may be updated from time to time[3]
- does not cover all aspects of the relevant processes and procedures—it is not intended to be an exhaustive discussion of all issues that may arise
- does not use formal or legal language
- should not be considered a substitute for independent professional advice.

In June 2021, we published a high-level guide and form to assist applicants make a request for declaration of a service, namely:

[1] Unless otherwise stated, statutory sections or parts we refer to in this handbook are from the QCA Act.
[2] The same considerations apply for both declaration and revocation applications.
[3] We may from time to time revise this handbook at our discretion.

- a **guide to declaration** under Part 5 of the QCA Act, which provides a broad overview of the access criteria and related processes[4]
- a **form for making a request for declaration** of a service, which provides information on the material required in any application for declaration.[5]

This detailed handbook should be considered in conjunction with, and is complementary to, the above material. The purpose of this handbook is to provide a comprehensive suite of materials on the access criteria and related application process, including summary references to judicial guidance, where available, in relation to both the Queensland and national access regimes.

[4] QCA, *Guide to declaration under Part 5 of the Queensland Competition Authority Act 1997* (Qld), June 2021.
[5] QCA, *Form for a request to recommend declaration of a service under Part 5, division 2 of the Queensland Competition Authority Act 1997*. This form is available on the QCA website (*Declared infrastructure* web page, under 'Requesting declaration of a service').

1 INTRODUCTION

1.1 The access criteria

Declaration of a service under Part 5 of the QCA Act 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 variously within the QCA Act, access undertakings for the declared service (as approved by us under Part 5, division 7 of the QCA Act), and our determinations in relation to access disputes (under Part 5, division 5 of the QCA Act).

For us to recommend that a service be declared, we must be satisfied that *all* of the access criteria for the service set out in s. 76 are met (see Box 1). Likewise, for a service to be declared, the Minister must be satisfied that all those criteria are met.[6]

This handbook is primarily applicable in relation to requests for declaration, but the same considerations will apply in relation to requests for revocation of declaration.[7]

[6] QCA Act, ss. 80, 86.
[7] Matters concerning revocation are dealt with in ss. 88 to 94 of the QCA Act.

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 [criterion (a)];

(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) [criterion (b)];

(c) that the facility for the service is significant, having regard to its size or its importance to the Queensland economy [criterion (c)];

(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 [criterion (d)].

(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.

1.2 Historical perspective

The origins of the access criteria in Part 5 of the QCA Act lie in the national competition policy reforms implemented by the Commonwealth, states and territories in the 1990s. In 1992, following agreement from all jurisdictions on the need for a national competition policy, the Commonwealth commissioned an independent inquiry into a national competition policy

(chaired by Professor Fred Hilmer).[8] A key focus of the committee that led the review was the extent to which the owner of a significant monopoly infrastructure facility could exert market power in upstream and downstream markets.

> Some facilities that exhibit these [natural monopoly] characteristics occupy strategic positions in an industry, and are thus "essential facilities" in the sense that access to the facility is required if a business is to be able to compete effectively in upstream or downstream markets …
>
> Where the owner of the "essential facility" is not competing in upstream or downstream markets, the owner of the facility will usually have little incentive to deny access, for maximising competition in vertically related markets maximises its own profits. Like other monopolists, however, the owner of the facility is able to use its monopoly position to charge higher prices and derive monopoly profits at the expense of consumers and economic efficiency. In these circumstances, the question of "access pricing" is substantially similar to other monopoly pricing issues, and may be subject, where appropriate, to the prices monitoring or surveillance process ...
>
> Where the owner of the "essential facility" is vertically-integrated with potentially competitive activities in upstream or downstream markets … the potential to charge monopoly prices may be combined with an incentive to inhibit competitors' access to the facility. For example, a business that owned an electricity transmission grid and was also participating in the electricity generation market could restrict access to the grid to prevent or limit competition in the generation market. Even the prospect of such behaviour may be sufficient to deter entry to, or limit vigorous competition in, markets that are dependent on access to an essential facility.[9]

Among other things, the inquiry report (Hilmer Report) recommended the development of a national access regime that would allow third parties (access seekers) to gain access to the services provided by natural monopolies.[10]

While the Hilmer Report's consideration of third party access focused on the competition issues arising from vertically integrated natural monopolies, the recommendations were not limited to vertically integrated entities. The Productivity Commission noted that there are sound reasons for this:

> In some cases, vertically separated service providers will still have an ability and incentive to charge monopoly prices for access to their infrastructure … monopoly pricing of access can lead to allocative inefficiency, and restrict competition and investment in dependent markets.[11]

1.2.1 Legislative adoption of the national competition policy

Following the release of the Hilmer Report, all jurisdictions signed up to the 1995 Competition Principles Agreement (CPA).[12] This agreement provided that:

- the Commonwealth would implement legislation to establish a regime for third party access to services provided by means of significant infrastructure facilities (cl. 6.1)
- the Commonwealth legislation would not cover a service provided by means of a facility where the state or territory has an access regime in place that the National Competition Council (NCC) considers is an effective access regime (cl. 6.2).

As a result of the CPA, the Commonwealth amended the *Trade Practices Act 1974* (Cth) (now the *Competition and Consumer Act 2010* (Cth) (CCA)) to include a new access regime—set out in Part

[8] FG Hilmer, MR Rayner & GQ Taperell, *National Competition Policy*, National Competition Policy Review report, Australian Government Publishing Service, Canberra, 1993 ('Hilmer Report').
[9] Hilmer Report, 1993, pp. 240–241.
[10] Hilmer Report, 1993; Productivity Commission, *National Access Regime*, inquiry report no. 66, 2013, pp. 46–47.
[11] Productivity Commission, *National Access Regime*, inquiry report no. 66, 2013, p. 84.
[12] Council of Australian Governments, *Competition Principles Agreement*, 11 April 1995, as amended to 13 April 2007.

IIIA (the national access regime). A key aspect of Part IIIA was the criteria in respect of which the NCC and the relevant Minister must be satisfied when respectively making a recommendation and decision to declare a particular service for the purpose of third party access.

Likewise, in 1997, the Queensland Government passed the QCA Act, which included a corresponding third party access regime in Part 5, which reflected the state's commitment to the underlying principles and approach in the national access regime. In 1998, the Queensland Government amended the *Queensland Competition Authority Regulation 1997* (Qld) in order to declare certain rail services provided by Queensland Rail.[13] Another amendment followed in 2001, to declare the coal handling service at the Dalrymple Bay coal terminal (DBCT).

It is open for an applicant to request declaration under Part IIIA of the CCA or Part 5 of the QCA Act.

Part 5 has many similarities with Part IIIA of the CCA but also a number of important differences, including that Part 5 is administered by the QCA and the relevant Queensland Minister. Some of the key differences between the two access regimes include that, unlike the national access regime, the QCA regime:

- has no merits review[14]
- allows for fees to be levied for our services, including for considering requests to make a recommendation under Part 5 for declaration by the Minister of a particular service (see section 2.7)
- allows for consideration of both the whole and part of a service (see section 3.1.3)
- requires a test of state significance to be met (criterion (c)), rather than a test of national significance (see section 6.3)
- provides for an automatic review of a declared service under s. 87A.[15]

1.3 Subsequent developments

On 8 September 2010, the *Motor Accident Insurance and Other Legislation Amendment Act 2010* (Qld) received assent. This Act amended the QCA Act to (among other things) insert the above-mentioned declarations in s. 250 of the QCA Act.

On 17 June and 16 December 2010 respectively, the Queensland Government applied to the NCC for certification of the Queensland Rail and DBCT access regimes as effective access regimes for

[13] The Queensland Government restructured the business in 2010 to facilitate the sale of certain assets. A new entity called Queensland Rail was created in 2010 when the Queensland Government split the former QR Ltd. Queensland Rail owns most of the former QR Ltd rail network in Queensland, apart from the infrastructure in the central Queensland coal network—which is owned by Aurizon Network Pty Ltd (formerly QR Network Pty Ltd).

[14] The Commonwealth Government has indicated that it will remove merits review of declaration recommendations of the National Competition Council (Australian Government, Budget 2021–22, *Budget Paper No. 2: Budget Measures*, 2021, p. 189). In December 2021, Commonwealth Treasury published an exposure draft of legislation to remove merits review for declaration and revocation decisions under the national access regime, amongst other proposed changes.

[15] Under Part IIIA of the CCA, a service will remain declared until the expiry date of the declaration, unless the declaration is revoked earlier. In the absence of a further declaration request, the service will become undeclared. In contrast, under Part 5 of the QCA Act, even in the absence of a further request for a service to be redeclared, s. 87A requires the QCA to review whether a service should remain declared (to take place before the expiry date of the declaration) and to make a recommendation to the Queensland Treasurer.

the purposes of Part IIIA of the CCA.[16] A request cannot be made to the NCC to recommend that a service be declared for third party access under the national access regime if it is already the subject of a state or territory access regime that has been certified as effective.[17]

Both regimes were certified—the Queensland Rail regime on 19 January 2011 and the DBCT regime on 11 July 2011—with the Commonwealth Treasurer stating that both regimes were consistent with the principles for an effective access regime in the CPA.[18] The regimes were certified until 19 January 2021 for Queensland Rail/Aurizon Network and 11 July 2021 for DBCT. On 18 January 2021, the Queensland Government made an application for a further certification of the respective regimes for a period of 20 years for the Queensland rail access regime (applicable to both Queensland Rail and Aurizon Network) and 10 years for the DBCT access regime.[19,20] Following consideration by the NCC, the certification period for these regimes has now been extended to January 2036 for the Queensland rail access regime (15 years) and to July 2031 (10 years) for the DBCT access regime.[21]

Pursuant to the High Court's decision on the *Pilbara* matter[22], the Productivity Commission's review into the national access regime[23] and the Harper Review into competition policy[24], the Commonwealth amended the access criteria in Part IIIA of the CCA.[25] The amendments, made through the *Competition and Consumer Amendment (Competition Policy Review) Act 2017* (Cth), took effect from 6 November 2017.

In March 2018, the Queensland Parliament amended the access criteria in s. 76 of the QCA Act through the *Queensland Competition Authority Amendment Act 2018* (Qld). The explanatory memorandum to the bill noted:

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[16] Note that the certification of the Queensland Rail access regime at that time included what is now the Queensland Rail and Aurizon Network services. See Queensland Government, *Application to the National Competition Council for a recommendation on the effectiveness of an access regime: Queensland Third Party Access Regime for Rail Services provided by Queensland Intrastate Rail Network*, June 2010; Queensland Government, *Application to the National Competition Council for a recommendation on the effectiveness of an access regime: Queensland Third Party Access Regime for coal handling services at Dalrymple Bay Coal Terminal*, December 2010.

[17] CCA, s. 44F(1)(a). Section 44F(1)(a)–(e) outlines restrictions on a person making a request for declaration.

[18] D Bradbury, *Statement of reasons—decision on the effectiveness of the Dalrymple Bay coal terminal access regime*, Commonwealth of Australia, July 2011; D Bradbury, *Statement of reasons—decision on the effectiveness of the Queensland Rail access regime*, Commonwealth of Australia, January 2011.

[19] CCA, s. 44NA.

[20] Queensland Government, *Application to the National Competition Council for a recommendation to extend the certification of an access regime, Queensland's third party access regime for rail services provided by Queensland's rail networks*, 18 January 2021; Queensland Government, *Application to the National Competition Council for a recommendation to extend the certification of an access regime, Queensland's third party access regime for coal handling services at Dalrymple Bay Coal Terminal (DBCT)*, 18 January 2021.

[21] See NCC, *Application for certification of the Queensland Rail Access Regime* (final recommendation and decision), NCC website, accessed 1 March 2022; NCC, *Application for certification of the Dalrymple Bay Coal Terminal access regime* (final recommendation and decision), NCC website, accessed 1 March 2022.

[22] *The Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* [2012] HCA 36.

[23] Productivity Commission, *National Access Regime*, inquiry report no 66, 2013.

[24] I Harper, S McCluskey, M O'Brien & P Anderson, *Competition Policy Review,* final report, 2015 ('Harper Review').

[25] In summary, the changes included: amendment of criterion (b) to reflect a natural monopoly test that existed prior to the High Court's *Pilbara* decision (which changed that test to a 'private profitability' test); amendment of the criterion (a) test to focus on whether access as a result of declaration would impact competition in dependent markets rather than simply considering the impacts of access itself; and amendment of the criterion (f) test (public interest—equivalent to criterion (d) in Part 5 of the QCA Act) to require that it be demonstrated that access would promote the public interest, rather than simply not being contrary to the public interest. See also an intergovernmental agreement signed by five jurisdictions (of which Queensland was not one): COAG, *Intergovernmental Agreement of Competition and Productivity-enhancing Reforms*, 9 December 2016.

> While Queensland's access regime is separate from the National Access Regime, the amendments to the access criteria in the Bill are intended to reflect the revised criteria being introduced at the national level.[26]

In March 2020, we completed reviews of whether three services that were declared under s. 250 of the QCA Act should be declared following the expiry of the declarations on 8 September 2020. These reviews related to the services provided by Aurizon Network (2020 Aurizon Network review), Queensland Rail (2020 Queensland Rail review) and DBCT (2020 DBCT review).

In June 2020, the Queensland Treasurer made decisions to declare:

- the Aurizon Network service for a period of 20 years
- the DBCT service for a period of 10 years
- the Queensland Rail service (excluding an aspect of the service relating to the Tablelands system) for a period of 15 years.

These reviews are discussed further in this handbook.

1.4 The purpose of access

The object of Part 5 of the 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.[27]

Applications for declaration should be considered in the context of the object clause. Specifically, the purpose of the third party access regime is to address a lack of effective competition that arises due to natural monopoly infrastructure services.[28]

For instance, the explanatory notes for Queensland's 2018 amendments read:

> The regime provides a framework for access regulation of services provided by significant infrastructure facilities (such as rail tracks, ports and other types of infrastructure facilities) where there may be a lack of effective competition.[29]

These services are typically provided by facilities characterised by large fixed costs and economies of scale.[30]

> Access regulation can address an enduring lack of effective competition, due to natural monopoly, in markets for infrastructure services where access is required for third parties to compete effectively in dependent markets. This is the only economic problem access regulation should address.[31]

It is important to note the emphasis placed on competition in upstream and downstream (related/dependent) markets. The purpose of declaration is not to restrict or moderate the ability of a service provider to set prices as such, but this is often one of the processes that enhances competition in dependent markets.

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[26] Explanatory notes, Queensland Competition Authority Amendment Bill 2018, p. 2.
[27] QCA Act, s. 69E.
[28] Where access is the right or ability to use a service. See *Port of Newcastle Operations Pty Ltd v Australian Competition Tribunal* [2017] FCAFC 124 at [137].
[29] Explanatory notes, Queensland Competition Authority Amendment Bill 2018, p. 1.
[30] Productivity Commission, *National Access Regime*, inquiry report no. 66, 2013, p. 73.
[31] Productivity Commission, *National Access Regime*, inquiry report no. 66, 2013, p. 2.

A monopoly service provider may have the ability and incentive to deny access to a service or to reduce output, where there is a lack of effective competition in the market for that service. This can reduce economic efficiency where access to the service is required for third parties to compete effectively in dependent markets.[32]

A lack of access in the market for the service can impact efficiency by reducing:

- allocative efficiency—by impacting competition and investment in upstream or downstream markets; prices and outputs in those markets then could possibly not reflect the levels that would occur if the market for the service were competitive
- productive efficiency—by leading to inefficient duplication of the facility and output consequently not produced at the lowest cost
- dynamic efficiency—by impeding the efficient allocation of resources in response to changes in technology, the availability of inputs and demand.[33]

A discussion of efficiency impacts is also provided in Chapter 7 in the context of criterion (d) (see Box 26).

Access to the monopoly service on reasonable terms and conditions may promote competition in dependent markets and reduce the prospect of inefficient duplication of the asset providing the service. Depending on the circumstances, such access can address a lack of effective competition and promote the three categories of efficiency mentioned above.

In some circumstances, the exercise of market power may simply lead to a transfer of economic rents between parties in the supply chain.[34] It is not the purpose of access regulation to address such rent transfers. The exercise of market power might have no effect on output, competition or efficiency outcomes in dependent markets and hence might not warrant regulatory intervention.[35] That said, a transfer of rents may be relevant to our analysis where it has competition impacts that fall within the ambit of criterion (a) (see section 5.4.4) or criterion (d).[36]

1.5 Our role

After receiving a request to declare a service, we must recommend to the Minister that:[37]

> (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.[38]

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[32] Explanatory memorandum, Competition and Consumer Amendment (Competition Policy Review) Bill 2017, at [12.2]–[12.4]).

[33] See also Productivity Commission, *National Access Regime*, inquiry report no. 66, 2013, p. 77 (Box 3.4); also Productivity Commission, *Economic Regulation of Airports*, inquiry report no. 92, 2019, p. 69 (Box 2.1).

[34] Economic rents are payments in excess of normal profits and hence do not affect the willingness of existing producers to supply. A transfer of rents within a supply chain that does not have competition or efficiency impacts could occur where a monopolist increases access prices, but not to the point which would be likely to have a detrimental impact on competitive conditions in a dependent market.

[35] Productivity Commission, *National Access Regime*, inquiry report no. 66, 2013, p. 8.

[36] A detailed consideration of the relevance of rents to s. 76 (in respect of criteria (a) and (d)) can be found in our final recommendation on the DBCT service. See QCA, *DBCT declaration review*, final recommendation, March 2020, pp. 106 (footnote 373), 239 ('*DBCT declaration review*'). For further information, refer to section 7.7 (Box 26).

[37] We can only proceed to make a recommendation on a service if we first accept that the application is properly made under s. 77 of the QCA Act (see section 2.4).

[38] QCA Act, s. 79.

Under s. 80 of the QCA Act, we:

- must make a recommendation that the service be declared if we are satisfied about all of the access criteria for the service (s. 80(1))
- must make a recommendation that the service not be declared if we are not satisfied about all of the access criteria for the service (s. 80(2))
- may recommend that a service not be declared by the Minister if we consider the request was not made in good faith or is frivolous (s. 80(3))
- despite ss. 80(1) and (2), may make a recommendation that part of the service (that is itself a service) be declared if we are satisfied about all of the access criteria for the part of the service (s. 80(5)).

We are required, in the first instance, to consider and assess the access criteria with respect to the service as a whole.

If the service as a whole satisfies the access criteria, we are of the view that it is not necessary to consider parts of the service. However, if, for example, there was a part of a service that did not satisfy one or more of the access criteria, we could still recommend declaration of the remainder of the service, provided what remained was itself a service and satisfied each of the access criteria.[39]

Whether such an investigation is required depends on the information we have and whether there is reason to believe that any part of a service exhibits characteristics that 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 only part of the service satisfies the access criteria (see also criterion (c) in section 6.3).

1.6 Interpreting the access criteria

The application of third party access criteria (under Part IIIA of the CCA or Part 5 of the QCA Act) has been variously considered by:

- the High Court of Australia[40]
- the Federal Court of Australia[41]
- the Australian Competition Tribunal[42]
- ourselves, namely in our previous 2020 declaration reviews of the services provided by Aurizon Network, Queensland Rail, and DBCT[43]

[39] If we proceed to consider a service in parts for a criterion, we would adopt the same approach for all criteria, unless there are clear reasons to the contrary. See QCA, *Queensland Rail declaration review*, final recommendation, March 2020. ('*Queensland rail review*')

[40] Including *BHP Billiton Iron Ore Pty Ltd v National Competition Council* (2008) 236 CLR 145; *The Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* [2012] HCA 36.

[41] Refer to the Federal Court of Australia website.

[42] Refer to the Australian Competition Tribunal website.

[43] QCA, *Declaration reviews: Aurizon Network, Queensland Rail and DBCT*, final recommendations, March 2020. ('*Declaration reviews*')

- the NCC, as part of considering applications for declarations or revocations of services, as well as in its general guidelines for assessing applications for declaration or revocation.[44] The NCC is a Commonwealth agency under Part IIIA with a broadly equivalent role to the QCA in terms of recommending whether a service should be declared under the national access regime[45]
- the relevant Queensland Minister (the Treasurer) for Part 5 of the QCA Act
- the relevant Commonwealth Minister (the Treasurer) for Part IIIA of the CCA
- the Queensland Supreme Court, in its decision on DBIM's application for statutory order of review of the Queensland Treasurer's decision to declare the DBCT service[46,47]
- general reviews of competition policy matters, namely the Productivity Commission's reviews of the national access regime in 2001 and 2013,[48] and the Harper review into competition policy in 2015[49]
- sectoral reviews by the Productivity Commission.[50]

Given the similarity in wording of the access criteria under both the Commonwealth and Queensland access regimes, and their origins in national competition policy reforms, in considering the access criteria for a service that is the subject of a request for declaration under Part 5 of the QCA Act, we will have regard to Part IIIA recommendations and decisions, explanatory materials and related guidelines.

While we will draw on the above material—particularly the decisions of the High Court, the Federal Court and the Australian Competition Tribunal[51]—where they are relevant to the amended criteria, our recommendations will be in accordance with the provisions of the QCA Act and will have regard to the circumstances before us in any application.

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[44] See NCC, *Declaration of Services: A guide to declaration under Part IIIA of the Trade Practices Act 1974*, August 2009; NCC, *Declaration of Services: A guide to declaration under Part IIIA of the Competition and Consumer Act 2010 (Cth)*, version 4, February 2013, and version 5, December 2017; NCC, *Declaration of Services: A guide to declaration under Part IIIA of the Competition and Consumer Act 2010 (Cth)*, version 6, April 2018 ('*Guide to declaration*').

[45] However, in contrast to the QCA's role, once a service is declared by the Minister, the service is regulated by the ACCC, not the NCC.

[46] Dalrymple Bay Infrastructure Management Pty Limited (DBIM) was previously named DBCT Management Pty Limited (DBCTM). With effect from 8 December 2020, DBCTM changed its name to DBIM. The name DBIM is used in this handbook.

[47] *DBCT Management Pty Ltd v Treasurer and Minister for Infrastructure and Planning (Qld) & Ors* [2021] QSC 335.

[48] Productivity Commission, *National Access Regime*, inquiry report no. 17, 2001 and *National Access Regime,* inquiry report no. 66, 2013.

[49] Harper Review, final report, 2015.

[50] Including Productivity Commission, *Review of the Gas Access Regime*, inquiry report no. 31, 2004, *Economic Regulation of Airport Services*, inquiry report no. 57, 2011 and *Economic Regulation of Airports*, inquiry report no. 92, 2019.

[51] In *DBCT Management Pty Ltd v Treasurer and Minister for Infrastructure and Planning (Qld) & Ors* [2021] QSC 335, at [103], Davis, J. in considering the proper construction of criterion (a) noted that '[t]he Tribunal consists of a judge of the Federal Court of Australia sitting with other members. There is no reason not to follow these decisions noting of course that they were all decided before the relevant amendment which introduced materiality as a consideration.'

We must take into account the object of Part 5 of the QCA Act in making any recommendation on an application.[52]

[52] See also NCC, *Guide to declaration*, version 6, 2018, para 1.4; the High Court in *BHP Billiton Iron Ore Pty Ltd v National Competition Council* [2008] HCA 45 at[42]; and *The Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* [2012] HCA 36 at [97]–[98] (criterion (b), [132] (criterion (a).

2 THE ACCESS CRITERIA AND OVERVIEW OF OUR APPROACH

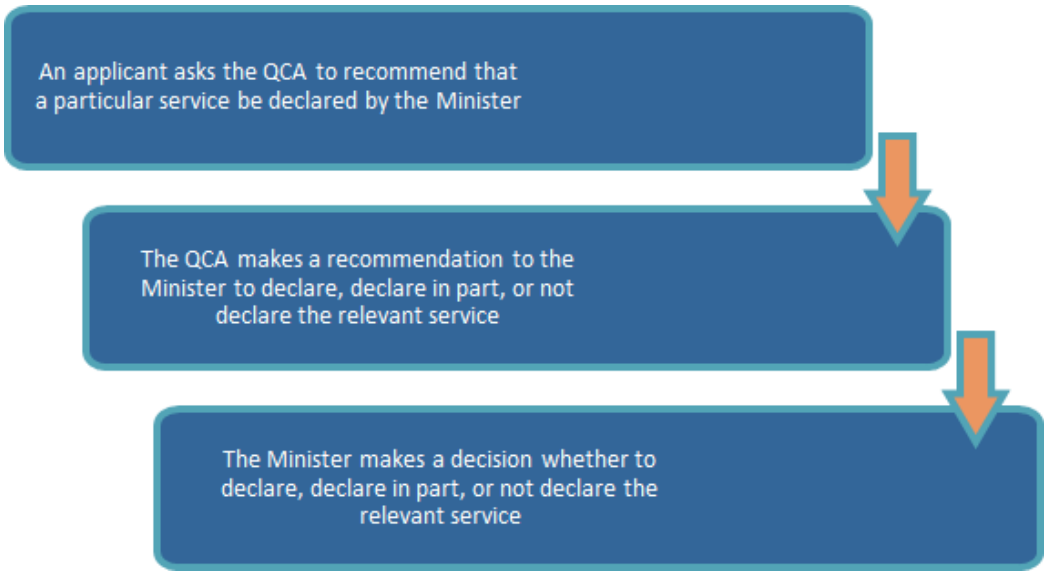
2.1 Our role in declaration

For us to recommend that a service be declared, we must be satisfied that *all* of the access criteria for the service in s. 76 are met. Likewise, for a service to be declared, the Minister must be satisfied that *all* of the access criteria for the service are met. There is no residual discretion for us to not recommend declaration of a service if all of the criteria are satisfied.[53,54]

We may recommend that a service not be declared by the Minister if we consider the request for declaration was not made in good faith or is frivolous.[55]

The process for a declaration request has three main steps (Figure 1).

Figure 1 Process for declaration



If a service is declared by the Minister, it is then subject to regulatory oversight by us under Part 5.

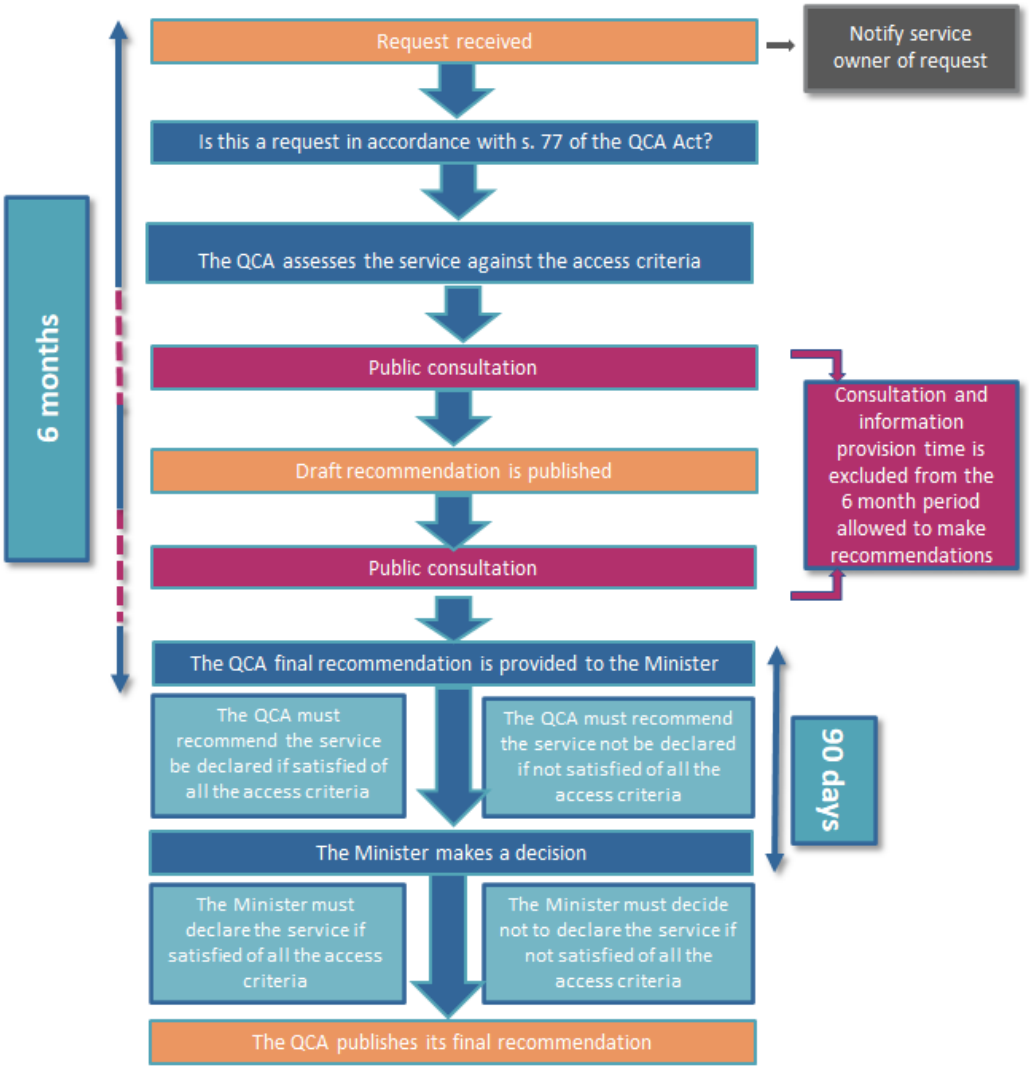
This oversight may include us arbitrating disputes about access to the service (including in relation to price and non-price terms) and approving an access undertaking for the relevant service (which can set out detailed terms and conditions by which the owner or operator of the service provides access to the service).

[53] See also *Pilbara Infrastructure Pty Ltd & Ors v Australian Competition Tribunal & Ors* (2012) 246 CLR 379 at [115]–[119], where the High Court noted that there was no residual discretion in the context of Part IIIA of the CCA.
[54] We must not recommend declaration of the service if we are not satisfied that all the access criteria are met.
[55] QCA Act, s. 80(3). This does not apply to a request made by the Minister (s. 80(4)).

2.2 Our approach

On receiving a request, we check that it is properly a request under s. 77 of the QCA Act before proceeding to consider whether to recommend that the service be declared.[56] An indicative overview of our process is in Figure 2.[57]

Figure 2 Indicative QCA process



2.3 Making a request for declaration

A person may ask us to recommend that a particular service be declared by the relevant Minister.[58] We then notify the service owner of having received such a request.

[56] We may also consider whether s. 80(3) is applicable to the request (i.e. it is not made in good faith or is frivolous).

[57] This is an indicative summary of the process only. The approach we may take in conducting our enquiries (which may entail a formal investigation pursuant to s. 81 and Part 6), and any consultation process is determined on a case-by-case basis. For example, we may choose to seek cross-submissions, release discussion papers for comment or conduct public forums as part of the investigation.

[58] QCA Act, s. 77(1). Also, the Minister may ask the QCA to consider whether a particular service should be declared by the Minister (s. 77(2)).

Parties seeking to use the service in question may be interested in applying for declaration; however, any person may apply.

The QCA Act provides that an application to us to recommend the declaration of a service for third party access must be in the form approved by us.[59] Such a form (to be used for making a request to declare a service) is available on our website.[60] The form sets out the matters to be addressed in a request made to us to recommend declaration of a service.

We encourage applicants to provide us with all the relevant information that they reasonably can, as this will help us in assessing the application. Where possible, matters should be supported with evidence. However, we understand that not all of this information may be readily available. Therefore, in relation to the matters listed in the form, if a particular matter is not relevant to the request, or if relevant information is not readily available to the applicant, the applicant should provide a brief explanation.

Our staff are available to discuss any proposed request before it is formally submitted and to help potential applicants to better understand the relevant requirements and processes. Please contact us on phone 07 3222 0555 or via the contact form on our website.

2.3.1 Matters applicants could consider as part of making a request

Any request should (as far as possible) seek to:

- establish a prima facie case for satisfaction of the access criteria[61]
- anticipate and respond to arguments as to why a service might not be declared.

We encourage potential applicants to have preliminary discussions with our staff on the nature of their request and on the information to be provided before formally submitting a request. This will help to ensure that the request contains the information as outlined in the form.

In making a request for declaration of a service, an applicant may wish to consider whether the request:

- adequately identifies the relevant 'service' for which they seek access (including ensuring that it is appropriately specified to reflect the actual access that the applicant seeks)[62]
- relates to access to a service provided by a facility, which may be distinct from the facility itself (as access must be sought to a service provided by a facility, rather than just access to a facility).

An applicant may also wish to consider including:

- a description of the service they seek access to that is sufficient to enable them to undertake their business activity. For example, if access is sought:

[59] QCA Act, s. 77(3).

[60] QCA, *Form for a request to recommend declaration of a service under Part 5, division 2 of the Queensland Competition Authority Act 1997*. This form is available on the QCA website (*Declared infrastructure* web page, under 'Requesting declaration of a service').

[61] The Australian Competition Tribunal noted the lack of evidence, in some respects, to support the proposition that criterion (a) was not satisfied in *Application by New South Wales Minerals Council (No 3)* [2021] ACompT 4 at [8], [72], [115].

[62] For instance, if an applicant seeks access to rail infrastructure to enable the haulage of wagons, simply seeking access to the service provided by the rail tracks may exclude related infrastructure such as signalling and platforms that are necessary for haulage of wagons.

  - to a below-rail service to enable the transport of coal for export, the description should cover the entire route to be travelled from mine to port
  - to an integrated service provided by a coal terminal, the description could refer to the 'handling of coal at the facility' to encompass all facets of the service required to enable the coal to leave the port (i.e. to cover inloading, stockyard and outloading activities)
- a description of the purpose for which the service is provided, to help ensure the right to negotiate access to the service if declared is consistent with that purpose. Further, incorporating the purpose of the service provision in the definition of that service may help to determine the relevant dependent markets for the assessment of criterion (a)[63]
- detail on the nature of any discussions the applicant has had to date with the owner/operator of the facility (if applicable) regarding access to the service.

Notwithstanding the above, subject to the requirement that the application must be in the form approved by us (s. 77(3)), the content of any application is a matter for the applicant.

At any time before we make a recommendation, an applicant may withdraw the request or, with our written agreement, amend it.[64]

2.4 Assessment of the request

Upon receiving a request to recommend a particular service be declared, we must tell the owner of the service that we have received the request. This obligation arises irrespective of whether we proceed with our assessment.

We then assess whether the request is properly made under s. 77, including whether it is in the approved form.

In addition to this, we cannot consider a declaration request if it does not relate to a 'service' as defined by the QCA Act. Section 72 sets out the relevant definition of 'service', and s. 72(2) expressly sets out certain exclusions, which include:

- the supply of goods (except to the extent the supply is an integral, but subsidiary, part of the service); or
- the use of intellectual property or a production process (except to the extent the use is an integral, but subsidiary, part of the service).[65]

In considering if a request relates to a service as defined in the QCA Act, we may have regard to whether the various features of Part 5 can be applied to the service if it was declared.[66]

[63] See NCC, *Guide to declaration*, version 6, 2018, paras 2.4.
[64] QCA Act, s. 77(4).
[65] A production process is 'the creation or manufacture by a series of operations of a marketable commodity'. (*Hamersley Iron Pty Ltd v National Competition Council* (includes corrigendum dated 3 August 1999) [1999] FCA 867 (28 June 1999 at [32-34])). See also *BHP Billiton Iron Ore Pty Ltd v National Competition Council* [2008] HCA 45 at [37].
[66] The various features of Part 5 are not simply limited to applying the access criteria but extend to matters that may apply if the facility was declared. In relation to a service to be provided by a facility of which construction may as yet be incomplete, the characteristics of the facility (that provides the service) may not be able to be ascertained, since a facility passes through various stages in its development (e.g. design, construction, commissioning).

2.4.1 Request is not made in good faith or is frivolous

We may recommend that a service not be declared by the Minister if we consider the request was not made in good faith or is frivolous (s. 80(3)).

An assessment of whether a request is made in good faith requires consideration of the circumstances of the making of the request, including whether it has been made honestly and for a proper purpose.

For instance (and without limitation), a request may be considered as not having been in good faith if it was not made for the predominant purpose of having the service declared (with a view to promoting effective competition in dependant markets in accordance with the object of Part 5, as stated in s. 69E).

Whether a request was not made in good faith will depend on the circumstances. Relevant factors we may have regard to include, but are not limited to, whether the applicant:

- is an access seeker
- is affiliated with an access seeker or entity representing the interests of access seekers (such as an industry organisation)
- operates in a market that is dependent upon access to the service or is in any other way reliant on access being provided.

Other factors that may be relevant include:

- the timing of any request
- whether the applicant has engaged in negotiations for access with the service provider
- the existence or operation of any alternative access arrangements that may operate in the absence of declaration, and whether access has been sought under these arrangements.

That said, the applicability of s. 80(3) to a request will ultimately depend on the circumstances.

We consider that a request may be frivolous if it lacks merit, for instance if the service clearly does not have natural monopoly characteristics, such that declaration would not address any enduring lack of competition.

We can form a view on whether a request was not made in good faith or is frivolous without forming a view on whether the access criteria are satisfied.[67]

2.5 Steps in making a recommendation

Once we have assessed that a request is properly made, we commence the process of considering the merits of the request in detail. We may:

- conduct an investigation about the service—this may include consideration of written submissions, public seminars and/or hearings[68,69]

[67] For example, while s. 80(1) provides for us to recommend that a service be declared, s. 80(3) says that '*[d]espite subsection (1)*, the authority may recommend that a service not be declared by the Minister if the authority considers the request was not made in good faith or is frivolous' [emphasis added].

[68] QCA Act, s. 81. The procedures in Part 6 apply to an investigation.

[69] While not compulsory, we ordinarily commence a review by issuing a notice of investigation to the owner/operator of the service and any other appropriate persons (s. 82). Issuing a notice of investigation provides the QCA with additional powers, including with respect to information gathering.

- consult with relevant stakeholders[70]
- release a draft recommendation before preparing our final recommendation.

Where we do consult, we will do so in a way that best enables us to inform ourselves of the relevant issues. While the nature of any consultation will depend on the circumstances before us, our consultation process will typically aim to:

- maximise stakeholder input, while providing predictability to stakeholders and managing their expectations about the level of their engagement
- balance our natural justice obligations with ensuring that the review is completed in a timely manner
- be proportional to the nature of the task at hand, including the importance of the service to which access is sought, the complexity and size of the application and the likely nature and scale of submissions.

The steps we will take in conducting the investigation and consultation process are determined on a case-by-case basis. We will provide further guidance on the specific process at the relevant time. While this may vary depending on circumstances, we aim to complete our assessment and provide our final recommendation to the Minister within six months of commencement of an investigation (excluding consultation and information provision periods).[71]

In our final report to the Minister, we will recommend either to declare, declare in part, or not declare the service in question, based on our assessment of whether the access criteria are satisfied in relation to that service. If our recommendation is to declare the service (or part of the service), then we will also recommend the period for declaration (see section 8 which discusses some of the factors we may examine in forming a view on the period for declaration).

The Minister has 90 days to make and publish their decision (ss. 84, 85).[72] As a last step, we publish our final recommendation on our website, ordinarily following publication of the Minister's decision (s. 79(3)).

2.6 QCA fee

We are permitted to charge fees for our services in considering a request for declaration.[73] Whether a fee will be imposed is a matter for us to decide.

Where we decide to charge a fee, the fee payable is the amount that we consider to be reasonable and that is not more than the reasonable cost of providing the service or performing the function.[74]

[70] 'Before making the recommendation, the authority *may* consult with any person it considers appropriate' [emphasis added] (QCA Act, s. 79(2)).
[71] QCA Act, s. 79A. Section 79A(4) applies if we do not make the recommendation within the six-month period.
[72] The 90 day-period commences when the Minister receives the declaration recommendation, unless the recommendation is for the declaration of a service provided by means of a facility owned by a local government entity (in which case the 90 days only commence after the relevant period of consultation between the Minister and the local government entity and responsible local government for the entity, under s. 84(3)).
[73] QCA Act, s. 245, and the Queensland Competition Authority Regulation 2018 (QCA Regulation 2018), s. 3 and sch. 1 (item 3).
[74] QCA Regulation 2018, s. 3.

In deciding these matters, we will have particular regard to the type of investigation process that is proportional to the circumstances and context within which any request is made. Stakeholders should not assume that future review processes will be the same as previous reviews undertaken.

Moreover, we will discuss with an applicant whether a fee is payable, and if it is, we will seek to provide an estimate of the fee before we start our substantive consideration of the request.

3 THE SERVICE AND THE FACILITY BY WHICH IT IS PROVIDED

3.1 The service

A person who requests declaration of a service must clearly identify that service, including the facility that provides the service.

The service that is the subject of the request must fall within the meaning of a 'service' under Part 5 of the QCA Act (see Box 2).

Box 2 Section 72—Meaning of service

(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 a railway line); and
- (b) the transporting of people; and
- (c) the handling or transporting of goods or other things; and
- (d) a communications service of similar service.

(2) However, service does not include—

- (e) the supply of goods (except to the extent the supply is an integral, but subsidiary, part of the service); or
- (f) 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
- (g) 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.

The characteristics of a service may vary according to the nature of the facility by which it is provided.

A service can be defined as being provided at a single location (e.g. a coal handling service provided at a coal terminal). Alternatively, a service can be provided between a set of distinct points (e.g. an end-to-end below-rail service provided by a railway facility).

3.1.1 Service is distinct from a facility

Under s. 72 of the QCA Act, a service is a service provided, or to be provided, by means of a facility (see section 3.2 for discussion of facilities). While a service is distinct from a facility, the service for which declaration is sought can relate to the use of a facility, or part thereof, for example:

- the use of a coal system for providing transportation by rail

- the handling of coal at DBCT by the terminal operator.[75]

3.1.2 Scope to interpret the service

While we interpret the scope of the service described in a request, we do not redefine or expand the scope of the service for which declaration is sought.[76]

In the *RTIO v Tribunal* decision, the Full Federal Court said:

> It is for the Council, the designated Minister and the Tribunal, on review, to interpret the definition of the service. However, it is not for the Council, or the designated Minister, or the Tribunal, to redefine or expand the scope of the "particular service" which is the subject of the application to the Council.
>
> This is not to say that there must be a slavish attachment to the words of the application. A "literal or pedantic adherence" to the description of the service is not required, provided that the substance and essential nature of the service is not altered.[77]

For declaration applications under the national access regime, the NCC said that applicants should ensure that the description of the service is sufficiently broad to enable them to undertake their intended business activity and to enable a material promotion of competition in a dependent market, but not so broad that the service as defined is provided by a facility or facilities which do not satisfy the declaration criteria.[78] Further guidance on how a service should be specified is provided in section 2.3.1.

The relevant service must fall within the meaning of a 'service' under Part 5. A number of exemptions to the meaning of a ‘service’ are noted in s. 72(2) (see section 2.4).[79]

3.1.3 Whole or part of the service

A service may be a single service or a series of part services that themselves each constitute a service. As outlined in section 1.5, if an applicant seeks declaration of a service, we must consider whether the service as a whole satisfies the access criteria. If it does not, we may still recommend declaration of part of the service, to the extent that it is itself a service and satisfies the access criteria (see Figure 3).

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[75] See Queensland Government, *Gazette: Extraordinary*, no. 31, vol. 384, 1 June 2020, pp. 203, 267. A coal system is the railway connecting specific points in the Blackwater, Goonyella, Moura and Newlands systems (s. 250 of QCA Act).

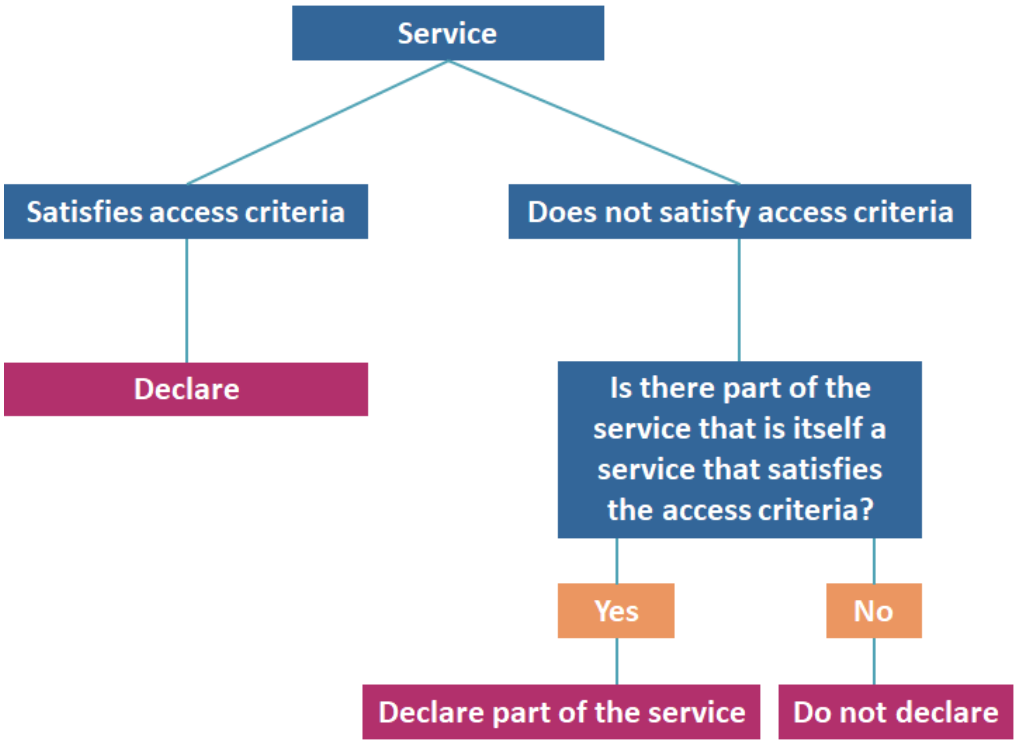
[76] At any time before the authority makes a recommendation about a request, the applicant may, with the written agreement of the QCA, amend the request (s. 77(4)(b)).

[77] *Rio Tinto Limited v The Australian Competition Tribunal* [2008] FCAFC 6 at [58]–[59]. This matter related to whether the NCC acted beyond power by recommending a ‘point to point’ rail service, whereas the applicant (Fortescue Metals Group) sought declaration of an ‘all points service’. In forming a view on whether the recommendation was consistent with the application for declaration, the Full Federal Court considered the purpose for the application, as described in the application and recommendation as well as related supporting text.

[78] NCC, *Guide to declaration*, version 6, 2018, p. 22–23, para 2.3.

[79] For further information on exclusions in the context of Part IIIA, refer to NCC, *Guide to declaration*, version 6, 2018, pp. 24–25, paras 2.8–2.14.

Figure 3 Declaration of the whole service or part of the service



When determining whether a service should be considered as a whole or in part, factors that may be relevant are:

- the degree of interconnectivity of the facility providing the service (i.e. the extent to which all or most parts of the facility are required to provide the service)
- whether a single dependent market or multiple dependent markets for the service can be identified
- whether customers for the service operate in the same dependent market or also in different dependent markets.[80] If customers operate in the same dependent market, it may suggest that only a single service is provided. If customers operate in different dependent markets, it may suggest that different parts of the service (which themselves may be services) are used
- the extent to which the service is used for different purposes (see Box 3).

[80] For example, an above-rail service provider may be the buyer of a below-rail service in the below-rail service market. The above-rail service provider may then be the seller of an above-rail (haulage) service in a range of different dependent markets, including the market for transportation of coal, grain, passengers or livestock.

Box 3 Declare a service or a part of a service

We considered the question of whether to declare a service or part of a service in the 2020 declaration reviews.

2020 Aurizon Network review

Our view was that the Central Queensland coal network (CQCN) provided a single service and it was not necessary to assess any part of the CQCN separately. We noted Aurizon Network's view that the service was the use of an integrated heavy haul transport network.[81,82]

We considered that the service as a whole satisfied the access criteria, including criterion (a) where declaration would lead to a material impact on competition in a single above-rail haulage market.[83]

2020 Queensland Rail review

We considered that the access criteria were not satisfied for the service as a whole. Our view was that there was not a single above-rail haulage market. There was minimal cross-system traffic, and the predominant types of freight hauled on each particular rail system varied.[84]

On that basis, we considered whether parts of the service satisfied the access criteria.

3.2 The facility

The facility is the physical asset or assets by which the service is provided. The QCA Act does not define the term 'facility'; rather, it provides a non-exhaustive list of infrastructure types that meet the definition (see Box 4).

Box 4 Section 70—Meaning of facility

Facility includes—

(1) rail transport infrastructure; and

(2) port infrastructure; and

(3) electricity, petroleum, gas or GHG stream[85] transmission and distribution infrastructure; and

(4) water and sewerage infrastructure, including treatment and distribution infrastructure.

In *Re Sydney International Airport*, the Australian Competition Tribunal said that:

[81] Aurizon Network, *2017 Draft Access Undertaking*, submission, November 2016, p. 3.
[82] QCA, *Aurizon Network declaration review*, final recommendation, 2020, pp. 8–9. ('*Aurizon Network review*')
[83] QCA, *Aurizon Network declaration review*, final recommendation, 2020, p. 24.
[84] QCA, *Queensland Rail declaration review*, final recommendation, 2020, p. 14.
[85] GHG stream is defined in the *Greenhouse Gas Storage Act 2009*, section 12.

> a facility for the purposes of the [CCA] is a physical asset (or set of assets) essential for service provision and which also exhibits the features of a natural monopoly. An asset or group of assets with this characteristic is termed a bottleneck.[86,87]

For example, the service to which access is sought may be 'the use of rail transport infrastructure', where the relevant facility is the 'rail transport infrastructure'.

It is up to an applicant to determine how to specify the service that is provided by a facility and to which access is sought (see also section 2.3.1).[88]

The facility is the minimum physical asset or assets by which the service is provided. Assets which are not necessary to use the service will be outside the minimum bundle of assets that comprise the facility.[89]

In this respect, the Australian Competition Tribunal in *Re Sydney International Airport* noted the link between the breadth of the definition of 'facility' and the feasibility of developing another facility:

> The more comprehensive the definition of the set of physical assets essential for international aircraft to land at [the airport], unload and load freight and depart in a safe and cost effective manner, the less likely it is that anyone (even the incumbent infrastructure owner) would find it economical to develop "another facility" within a meaningful time scale. Conversely, the narrower the definition of facility, the lower the investment hurdle and inhibition on development facing the incumbent or a new entrant.[90]

In that decision, the Tribunal concluded that the facility providing this service was the whole airport.[91] The Tribunal said:

> In order to gain access to the services provided by SIA, namely the use of the aprons and hard stands and other areas for storage of equipment and transfer of freight, it is necessary to gain access to that part of the airport at which international passenger aircraft are parked and passengers disembark and embark. It is not necessary for the Tribunal to define the outer boundaries of the relevant facility, or stipulate whether airport facilities that are marginal to this matter, such as land side car parking and retail outlets, are not part of the relevant facility. Such questions are not material to our decision.[92]

In determining the minimum bundle of assets, an issue to consider is the degree of interconnectivity between the various assets of the facility.

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[86] *Re Sydney International Airport* [2000] ACompT 1 at [82].
[87] *Re Services Sydney Pty Limited* [2005] ACompT 7 at [13].
[88] While criterion (b) refers to the 'facility for the service', the facility may provide more than one service. Interpreting criterion (b) as referring to the facility that provides the service more appropriately targets the economic problem that the access criteria are designed to address–that is the enduring lack of competition in the market for infrastructure services. See also Productivity Commission, *National Access Regime*, inquiry report no. 66, October 2013, p. 154.
[89] For example, the service to which access is sought may be the use of rail transport infrastructure between point X and point Y, where the relevant facility providing the service is the rail transport infrastructure of facility Z. Aspects of facility Z that are not necessary to provide the service between points X and Y are outside the minimum bundle of services.
[90] *Re Sydney International Airport* [2000] ACompT 1 at [192].
[91] *Re Sydney International Airport* [2000] ACompT 1 at [197].
[92] *Re Sydney International Airport [*2000] ACompT 1 at [199].

For instance, when the NCC made its final recommendation on an application for the declaration of two services provided by Sydney Water[93], it referred to the Tribunal's decision in *Sydney International Airport*. The NCC noted:

> [T]he Tribunal accepted that the declared service included the use of the freight aprons and hard stands at Sydney International Airport. The Tribunal did not, however, limit the definition of the relevant facility to the freight aprons and hard stands. Rather, the whole of Sydney Airport was accepted as the relevant facility. The high degree of interconnectivity of the bundle of assets making up the whole airport was an important factor in the Tribunal's conclusion. The issue before the Tribunal was what additional assets to the freight aprons and hard stands should be included in the bundle of assets making up the relevant facility so as to make access meaningful.[94]

The question when considering interconnectivity is therefore whether the relevant service is able to be produced by a discrete asset or set of assets at the facility, or whether the service is only able to be produced by an integrated set of assets at the facility.

Assets that are not necessary to provide the service for which declaration is sought are outside the scope of the review process.

3.3 Examples of defining a service by reference to the facility

Services that have been subject to declaration, or for which declaration has been previously sought, include:[95]

- the use of a coal system for providing transportation by rail[96]
- 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[97]
- the handling of coal at Dalrymple Bay Coal Terminal by the terminal operator[98]
- the use of the facility comprising the narrow-gauge cane tram network, approximately 530 km long, which is owned and operated by Sucrogen (Herbert) Pty Ltd in the Herbert River district[99]
- the right to access and use the shipping channels (including berths next to the wharves as part of the channels) at the port, by virtue of which vessels may enter a port precinct and load and unload at relevant terminals located within the port precinct, and then depart the port precinct[100]

[93] NCC, *Application by Services Sydney for Declaration of Sewage Transmission and Interconnection services provided by Sydney Water*, final recommendation, 2004.
[94] NCC, *Application by Services Sydney for Declaration of Sewage Transmission and Interconnection services provided by Sydney Water*, final recommendation, 2004, p. 16, para 4.18.
[95] A comprehensive list of services for which declaration has been sought under Part IIIA of the CCA can be found on the NCC's website.
[96] See s. 250(1)(a) for declaration of service under Part 5 of the QCA Act. Note that s. 250 of the QCA Act is no longer operative given the Treasurer's decisions on the services described in this transitional provision.
[97] See s. 250(1)(b).
[98] See s. 250(1)(c).
[99] NCC, *Herbert River cane railway: Application for declaration of a service provided by the Herbert River cane railway,* final recommendation, 2010.
[100] Glencore Coal Pty Ltd, *Application for a declaration recommendation in relation to the Port of Newcastle*, application to the NCC, 2015.

- the use of runways, taxiways, parking aprons and other associated facilities (Airside Facilities) necessary to allow aircraft carrying domestic passengers to (i) take off and land using the runways at Sydney Airport; and (ii) move between the runways and the passenger terminals at Sydney Airport (Airside Service).[101]

3.4 Satisfaction of the access criteria

Once the service and facility have been identified, the application should seek to demonstrate how the service for which declaration is sought satisfies the access criteria in s. 76.

The access criteria do not have to be considered in a specific order. However, as criterion (b) considers the important issue of the market in which the service is provided, it is considered first in this guide. Criterion (a) comes next, as it considers markets that depend on the market in which access is sought (dependent markets). Criteria (c) and (d) follow after that.

We must be satisfied that all of the access criteria are met in order to recommend that a service be declared (s. 76(1)(a)) (see also section 2.1).

The QCA's recommendation then triggers the requirement that the Minister under s. 84 make a decision on whether the service should be declared.[102]

[101] *Sydney Airport Corporation Limited v Australian Competition Tribunal* [2006] FCAFC 146 at [51], [94].

[102] In the decision on DBIM's statutory order of review, Davis J noted that '[t]here is nothing in the QCA Act which obliges the Minister to follow or even consider the recommendation' (see *DBCT Management Pty Ltd v Treasurer and Minister for Infrastructure and Planning (Qld) & Ors* [2021] QSC 335, at [30]).

4 CRITERION (B): MEET TOTAL FORESEEABLE DEMAND AT LEAST COST

Box 5 Criterion (b)

Section 76(2)(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);

Sections 76(3) and (4):

> For s. 76(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.
>
> Without limiting s. 76(2)(b), the cost referred to in s. 76(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.

4.1 Purpose of criterion (b)

The purpose of criterion (b) is to identify facilities that give rise to an enduring lack of competition in the markets for infrastructure services.[103]

In this context, criterion (b) focuses on avoiding the inefficient duplication of facilities that have natural monopoly characteristics.[104]

The NCC links this criterion to preventing waste of resources:

> Following the most recent amendments to Part IIIA of the CCA, the Council interprets this criterion to be concerned with the waste of Australian society's resources associated with duplication of facilities that exhibit natural monopoly characteristics, ie where a single facility could meet all likely demand for a service at lesser cost than two or more facilities.[105]

4.2 Our approach

Our approach is to consider whether the facility for the service (either in existing or expanded form) can satisfy total foreseeable demand in the market at least cost compared to other alternatives (see Figure 4).

[103] Productivity Commission, *National Access Regime*, inquiry report no. 66, 2013, p. 154.

[104] Facilities with natural monopoly characteristics have economies of scale in the production of services, with high fixed costs and low variable costs—see also the NCC, *Guide to declaration*, version 6, 2018, p. 36, paras 4.2–4.3. See also Explanatory memorandum, Competition and Consumer Amendment (Competition Policy Review) Bill 2017 at [12.22], which states that criterion (b) focuses on a natural monopoly test. We refer to this Bill in short as 'the CCA Amendment Bill 2017'.

[105] NCC, *Guide to declaration*, version 6, 2018, p. 36, para 4.2.

Figure 4 Our approach to assessing whether criterion (b) is satisfied

4.3 Identify the market in which the service is provided

4.3.1 QCA Act definition

The first step in assessing whether criterion (b) is satisfied is to identify the market in which the service is provided.

The concept of a 'market' is defined in s. 71 of the QCA Act (see Box 6).

Box 6 Section 71—meaning of market

(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

(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 under consideration (see section 3.1)
- any other service that can be substituted for, or that is otherwise competitive with, the service under consideration.

4.3.2 Defining the market

The service and substitutes

There is judicial guidance that the boundaries of a market for a service may be defined by reference to the service and its substitutes.

The Trade Practices Tribunal (now the Australian Competition Tribunal) in *Re Queensland Cooperative Milling Association Ltd* 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?[106]

This approach was endorsed by the High Court in *Queensland Wire Industries Pty Ltd v Broken Hill Proprietary Co Ltd*, which said:

> This process of defining a market by substitution involves both including products which compete with the defendant's and excluding those which because of differentiating characteristics do not compete.[107]

In *Boral Besser Masonry Limited v Australian Competition and Consumer Commission*, McHugh J 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 …[108]

After referring 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*, 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 processes involved in the supply of a service is not divorced from the commercial context of the conduct in question.[109] [footnotes omitted]

The Federal Court pointed out that even seemingly substitutable products may not be within a single market. In *Arnotts Limited & Ors v Trade Practices Commission* it 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. No doubt there are many people who sometimes drink tea and, at other times, coffee. But if, for example, a particular company dominated the sale of tea within Australia, it would thwart the objectives of provisions such as ss.46 and 50 of the Trade Practices Act to deny their application

[106] (1976) 25 FLR 169 at [190].
[107] (1989) 167 CLR 177 at [16].
[108] (2003) 215 CLR 374 at [252].
[109] (2017) 344 ALR 377 at [14].

> because that company did not dominate the "hot beverage market". The fact is that tea and coffee are distinct beverages, for each of which there is a distinct demand ...[110]

The definition of a market, in s. 71(2)(b) of the QCA Act, refers not only to services that are able to be substituted for the service in question but also to goods or services that are 'otherwise competitive with' the service under consideration. A similar reference is included in s. 4E of the CCA. Courts have taken different views regarding the significance of the words 'otherwise competitive with'.[111] In our 2020 declaration reviews, our approach was that, to define the relevant market for the purpose of applying criterion (b), it is necessary to identify those services that are close substitutes for the service in question.[112] This is consistent with the decision of the Federal Court in *Seven Network Limited v News Limited*:

> In the present case the parties do not submit that the words "or otherwise competitive with" should be construed as significantly undermining the principles of substitutability. The better view is that s. 4E addresses constraints upon the supply or acquisition of the relevant goods or services. In that context the word "substitutable" is used in a narrow sense whilst the words "or otherwise competitive with" includes degrees of "substitutability". We accept that the section addresses "close" competition and that "closeness" is a matter of degree.[113]

It is therefore necessary to identify strong substitutes, both actual and potential, when defining the relevant market.

A market is typically defined by reference to its product and geographic dimensions, and, where relevant, its functional dimension.

Market dimensions

Product/service

This dimension of a market describes the products and/or services that are substitutable enough that they can be said to be traded in a single market.

For example, if the service provided is the handling of coal for maritime transportation, it is not substitutable for the service of handling of motor vehicles for maritime transportation. Therefore, having regard to the different nature of these services, they are not in the same market.

Geographic

The geographic dimension of a market identifies the area within which substitution in demand or supply is sufficient for the product(s)/service(s) traded at different locations to be considered to be in the same market.

If a service is provided at a fixed location (such as a coal terminal), the market may reflect a geographic region that is proximate to the fixed location. For example, in our 2020 DBCT review[114], the relevant market for the service was identified as the market for DBCT's coal handling service in the Goonyella system.

If a service is provided between two defined points (such as that provided by a rail line), the market may reflect a geographic transport corridor that is proximate to/served by that facility as defined. In a given transport corridor, other transport services, such as a road transport service,

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[110] (1990) 24 FCR 313 at [332].
[111] See QCA, *Declaration reviews: applying the access criteria*, staff issues paper, Appendix A , April 2018, para 3.6.
[112] The Australian Competition Tribunal took a similar approach in past decisions relating to the declaration of services under Part IIIA of the CCA—for example, *In the matter of Fortescue Metals Group Limited* [2010] ACompT 2 at [1013]; *Re Services Sydney Pty Ltd* [2005] ACompT 7 at [122].
[113] [2009] FCAFC 166, Dowsett and Lander JJ at [621].
[114] QCA, *DBCT declaration review*, final recommendation, March 2020, section 2.4.

may potentially compete with the rail transport service (e.g. a road that is contiguous to the rail line).[115]

Alternatively, if the service is access to a below-rail network, the geographic nature of the market may include the region served by the network. For example, in our 2020 Aurizon Network review[116], we formed the view that the relevant market for the purpose of applying criterion (b) was defined as the market for access to rail infrastructure in the coal basins served by the CQCN. This was because our view was that, in terms of function and capability, road infrastructure cannot be substituted for rail infrastructure for the transportation of coal in the CQCN region and road transportation does not constrain the operation of CQCN rail infrastructure.

That said, depending on the product transported and the nature of the road infrastructure, a road transport service may compete with one or more parts of a rail network in a geographic region.

The Australian Competition Tribunal described the geographic dimension of the market as follows:

> The geographic area of the market (i.e. whether it is local, regional, national or international) takes into account, principally, the area within which buyers choose to purchase their goods (i.e. actual buying patterns) and the areas within which sellers traditionally supply (or could easily supply in response to changed market conditions) their goods.[117]

It is not always possible to define the borders of a market precisely (especially in a geographic sense). There can be some overlaps, particularly at the edge of the market, with other markets. As such, the geographic definition of a market will necessarily include an element of subjectivity.

The geographic delineation of a relevant market may also change over time if there are changes to the accessibility of substitute services—for example, due to changes in transport costs, technology or in the capacity of substitute services.

Functional

Where products/services pass through a number of levels in a supply chain, the functional dimension of a market identifies which market of a set of vertically related markets is being considered. Defining the relevant functional market requires distinguishing between the different vertical stages of production and/or distribution and identifying those stages that comprise 'the field of competition' in a particular case (i.e. are close substitutes). Consideration of the functional dimension of the market often overlaps with consideration of whether a dependent market is separate from the market for the service for which declaration is sought.[118]

For example, although below- and above-rail services may be provided by the same entity, it is not necessary for this to be the case. Accordingly, below-rail and above-rail services are typically regarded as being separate functional markets (see section 5.3.1).

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[115] In our 2020 Queensland Rail review, we said that 'the QCA considers that the extent to which the transportation of freight by road can compete with the transportation of freight by rail depends on the extent to which road transport is substitutable for rail transport for the particular type, volume and distance of freight to be transported. A range of factors determines the appropriate mode for any transport task.' (QCA, *Queensland Rail review*, final recommendation, 2020, p. 41). A detailed discussion of competition between road and rail is provided in section 5.5.2 (pp. 40–50) of the final recommendation.

[116] QCA, *Aurizon Network declaration review*, final recommendation, March 2020, section 2.3.

[117] See *Application by Chime Communications Pty Ltd (No 2)* [2009] ACompT 2 at [21].

[118] NCC, *Guide to declaration*, version 6, 2018, pp. 29–30, paras 3.9–3.11.

Hypothetical monopolist test

Although there are several possible approaches to defining the market[119], the most common approach is the 'hypothetical monopolist' test—the 'small but significant and non-transitory increase in price' (SSNIP) test. Under this approach, the market is defined as a group of products and a corresponding geographic area within which a hypothetical monopolist would be able to raise prices profitably. In simple terms, applying the SSNIP test requires considering what would happen if the price for the service for which declaration is sought increased by 5 to 10 per cent:

- Would buyers of the service switch to another product or service? If so, would the switching be significant?
- Would new suppliers enter the market for the service? If so, would the switching to the market for the service by new suppliers be significant?

As such, the proper application of the SSNIP test ought to prevent the market being defined too narrowly to only reflect the demand for the service in question. Where substitution is likely to occur in response to such a price increase (i.e. a SSNIP), then the alternative products or services may be close substitutes and, hence, may be in the same market as the service for which declaration is sought.

The SSNIP test has been widely used in Australian courts and is a key tool the ACCC uses under its merger guidelines.[120]

An outline of how markets may be defined using the SSNIP test is in Box 7.

[119] These include the 'reasonable interchangeability of use' and 'shipment flows' approaches—see the Australian Competition Tribunal, *In the matter of Fortescue Metals Group Limited* [2010] ACompT 2 at [1018]–[1034].
[120] ACCC, *Merger Guidelines*, 2008, amended November 2017, paras 4.19–4.22.

Box 7 Market definition and the 'hypothetical monopolist' (SSNIP) test

The Productivity Commission outlined the 'hypothetical monopolist' (or SSNIP test) in its 2013 review of the national access regime. It described the test as a conceptual tool for defining markets. Firstly, the market is defined as narrowly as possible. For example, if the task is to define the market in which a rail line operates, the narrowest potential definition of the market would only include the rail line (where the market constitutes the buyers who are the users of the rail line and the seller who is the operator of the rail line). The decision-maker then asks whether a small but significant and non-transitory increase in the price of the rail line service (usually a 5 to 10 per cent increase in price maintained over a year) would be profitable for the rail line operator. This would depend on the degree of substitution on the demand and supply sides of the market. Demand-side substitution occurs when consumers respond to the price increase by purchasing other services instead (such as road transport). Supply-side substitution occurs when competitors respond to the higher price by switching supply to directly compete with the supplier of the service.

If there is enough substitution on the demand and/or supply sides of the market, such that the price increase would be unprofitable, the market has been defined too narrowly. A broader market would then be defined on the basis of the expected nature of substitutability—for example, if a price increase of rail line services is not expected to be profitable because consumers of those services would substitute to road services, the market would be redefined as rail and road transport. The SSNIP test would then be applied to this collection of services. If raising the price of a collection of services would be profitable, the market is defined as including those services.

Source: Productivity Commission, National Access Regime, inquiry report no. 66, p. 163.

The hypothetical monopolist test was described in *ACCC v Metcash Trading Limited* as follows:

> One tool that is used to provide an analytical framework to identify and evaluate substitution possibilities is the "SSNIP test", also referred to in the present case as "the hypothetical monopolist test" (a description which I will use in these reasons). This test involves determining whether a hypothetical monopolist supplier could profitably impose a small but significant non-transitory increase in price (most commonly, but not necessarily, between 5 and 10%) for the supply of a relevant product. Starting with the firm and product in issue, the market boundaries are expanded to include all sources of close substitutes that would defeat the increase. The smallest area, generally in terms of product identification and geographic space, over which the hypothetical monopolist can profitably impose the increase, shows the boundaries of the market.[121]

The ACCC's approach to market definition, as set out in its merger guidelines, is consistent with the approach outlined above:

> [I]dentifying relevant substitutes is key to defining a market ... Market definition begins by selecting a product supplied by one or both of the merger parties in a particular geographic area and incrementally broadening the market to include the next closest substitute until all close substitutes for the initial product are included.[122]

In some cases, data limitations may preclude this test being strictly applied, although it remains valuable as a conceptual framework for defining a market. The comments of Yates J in *Metcash*,

[121] [2011] FCAFC 151 at [247].
[122] ACCC, *Merger Guidelines*, November 2008, amended November 2017, p. 14.

on the application of the hypothetical monopolist test for the purpose of market definition, are relevant:

> [248] The hypothetical monopolist test is predicated on the availability of data on variables, such as costs, prices, revenue and sales, over a sufficiently long period of time to enable a mathematical determination to be made about how changes by a firm to its prices affect its own demand. In competition law, however, the test is not always applied in that way. Sometimes it is applied without data as a "thought experiment" to make a qualitative assessment about the product and geographic dimensions of the market: *Seven Network Limited v News Limited* [2007] FCA 1062 at [1786]. Indeed, paragraph 4.22 of the Commission's own Merger Guidelines promotes and justifies such an approach:
>
> > While the [hypothetical monopolist test] is a useful tool for analysis, it is rarely strictly applied to factual circumstances in a merger review because of its onerous data requirements. Consequently, [the Commission] will generally take a qualitative approach to market definition, using the [hypothetical monopolies test] as an "intellectual aid to focus the exercise".
>
> [249] It is apparent that, when the hypothetical monopolist test is applied in this fashion, conclusions can be reached about the boundaries of a market on which reasonable minds might differ. It follows from this realisation that a difference in opinion in the identification of market boundaries does not necessarily signify the presence of error in the evaluative process.
>
> [250] It is also apparent that, when the test is applied in this fashion, considerations other than price (the ability to "give less") can be accommodated in the evaluative process.[123]

Stakeholders' views will also be relevant in our deliberations on methods that will be used as part of the market definition exercise and on ways these methods should be applied to the service under consideration.

Matters relevant to service/product substitution

Product differentiation may also affect the extent to which other products/services are substituted in response to a SSNIP for the product/service under consideration. As outlined in the ACCC merger guidelines:

> Product differentiation often limits substitution at the margins because certain customers do not view differentiated products as comparable.[124]

Substitution possibilities may also be influenced by a range of other factors, including:

- costs of switching to alternatives, including 'take or pay' contracts where payment obligations will remain (even if switching occurred) and investment or infrastructure costs to enable switching
- legal/regulatory barriers to switching
- distance, logistical and operational constraints, which will determine whether it is economically feasible to switch
- available capacity in alternative facilities to accommodate any switch
- strategic and commercial reasons for using a single or multiple services or products.
- similarities and differences in the nature of the alternative product offerings.

Historical evidence of users switching between facilities may demonstrate that facilities are substitutes. However, it may also be necessary to understand why users switch (or seek access to

[123] [2011] FCAFC 151 at [248]–[250].
[124] ACCC, *Merger Guidelines*, November 2008, amended November 2017, p. 18.

services provided by multiple like facilities). Generally, products will be closely substitutable only where switching occurs (or would occur) as a result of incentives driven by price factors or by non-price factors such as quality.

For example, is the use of another facility's service a response to a price or incentive change, or does it reflect capacity constraints at the facility of the original supplier? If the latter, an issue may arise as to whether the services provided by the two facilities are sufficiently close substitutes to be in the same market.

It may also be the case that another facility exists that can offer the same (or similar) service, but that service is not offered to customers. As stated in *Queensland Wire Industries Pty Ltd v Broken Hill Pty Co Ltd*:

> While actual competition must exist and be assessed in the context of a market, a market can exist if there be the potential for close competition even though none in fact exists. A market will continue to exist even though dealings in it be temporarily dormant or suspended. Indeed, for the purposes of the Act, a market may exist for particular existing goods at a particular level if there exists a demand for (and the potential for competition between traders in) such goods at that level, notwithstanding that there is no supplier of, nor trade in, those goods at a given time- because, for example, one party is unwilling to enter any transaction at the price or on the conditions set by the other.[125]

If there has been no third party access to a service in the past, the market definition task requires consideration of why this is so and what this means for the possibility of substitution between facilities in the future. Generally, products will only be considered close substitutes for the purposes of criterion (b) where switching occurs (or would occur) as a result of price or non-price (e.g. quality) incentives. Whether products are close substitutes will be a matter of degree and judgement.

[125] [1989] 167 CLR 177 at [196], Deane, J.

Box 8 Example of defining the market for a service: the DBCT service

In our 2020 DBCT review, we defined the market for the service by reference to the market served by the DBCT coal handling service and any substitutes in this market. In doing so, we sought to establish whether other coal terminals provide a closely substitutable service. To the extent that they do, the market would include those other coal terminals.

We took a 'purposive' approach to market definition—that is, we focused on what is actually happening in the market as part of determining whether other terminals provide a competitive constraint on DBIM (the operator of DBCT) by providing a substitutable service.

We considered the relevant market by reference to mines that access, or are reasonably likely to access, a particular terminal using a rail system. That is, we considered:

- the demand for coal handling services in the Goonyella system and the extent to which the relevant mines (situated within that system) would consider coal handling services at other terminals as close substitutes for DBCT (for instance, under a SSNIP test)
- the demand for coal handling services outside the Goonyella system and the extent to which the relevant mines (situated outside of the Goonyella system) utilising alternative rail systems on the CQCN would consider switching to DBCT in its existing or an expanded form.

A range of cost and non-cost factors were considered in assessing whether there would be substitution between terminals in response to a SSNIP for the DBCT service. These included the relative costs associated with accessing the DBCT coal handling service compared to potential substitutes; additional costs incurred in switching to a potential competitor (such as contract break costs and the cost of investing in necessary alternative rail and mine infrastructure); and product differentiation of the DBCT service (e.g. co-shipping and blending opportunities).

We considered evidence of miners using alternative terminals and the extent to which this constituted close substitutability:

- Where there were benefits from utilising multiple terminals, we considered that use of multiple facilities will be evidence of substitution if the extent to which a party uses these facilities would vary in response to a SSNIP in the DBCT access charge.
- Similarly, where a customer was considering whether to use one terminal over another (i.e. was not deriving a benefit from using multiple terminals) as a result of relevant cost or non-cost factors, we formed the view that the use of an alternative terminal may constitute evidence of substitution between terminals.

However, the use of an alternative terminal of itself did not necessarily constitute evidence of switching from DBCT to an alternative terminal. It may have been the case that commercial or strategic benefits are derived from accessing more than one terminal, or that the substitution is marginal.

We noted that the geographic dimension of the market can be difficult to precisely define, as there can be some overlaps with other markets, particularly at the edge of the market. We considered that defining the market with reference to the potential customers in the market will result in identification of the entire geographic area in which the DBCT service may be supplied—rather than the narrowest market for the relevant service.

In applying this approach to the DBCT service, we concluded that the relevant market for criterion (b) is the market for DBCT's coal handling service for mines connected to the Goonyella system. We considered that there are no close substitutes to the DBCT service for mines in this market. Rather, it was evident that DBCT was overwhelmingly the dominant coal handling facility in this market.

Source: QCA, DBCT declaration review, final recommendation, March 2020, pp. 13–36.

In summary, defining the market for the purpose of criterion (b) requires:

- identification of the market in which the service is provided
- identification of customers that seek access to the service
- consideration of the extent to which there are other services provided by alternative facilities that customers consider are closely substitutable for the service for which declaration is sought.

4.4 Identify the period over which total foreseeable demand in the market will be assessed

Once the scope of the market for the service has been defined, the next step is to determine the period over which total foreseeable demand in the market must be assessed. This period typically corresponds with the period for declaration.[126]

Depending on the circumstances before us, factors that we may consider in forming a view on the period for assessing total foreseeable demand could include:

- the extent of spare capacity in the facility that provides the service—the greater the spare capacity of the facility, the greater the period over which the facility may be able to satisfy total foreseeable demand at least cost
- the importance of long-term certainty to service providers who have made significant investments in infrastructure facilities
- the operation of existing contracts, including whether they contain 'evergreen' clauses that allow the contracts to be repeatedly renewed (such contracts, depending on their terms, may operate to constrain the access provider for the life of the agreement, even if the declaration ceases)
- the duration of time for which users may seek access to the facility
- the certainty or otherwise of demand forecasts over the foreseeable period—all things being equal, the greater the uncertainty about demand estimates, the shorter the period for assessing total foreseeable demand[127]
- the foreseeable timing of potential changes in the market environment, including:
  - whether new infrastructure is planned for construction that may compete by providing a substitutable service

[126] While the period for declaration may be based on similar considerations as determining the period for assessing total foreseeable demand (Chapter 8), we consider it separately. This is because we are required to determine whether a service should be declared *and* the period for declaration.

[127] Certainty of demand estimates may be less relevant where a facility can satisfy any demand due to its spare capacity or if it is clear that no other facility can satisfy total foreseeable demand.

  - the relevance of international and domestic developments in climate change policy[128]
- the need for periodic reviews of declaration arrangements.

4.5 Consider total foreseeable demand in the market

Once we have identified the scope of the relevant market and the period for assessing total foreseeable demand, we then seek to identify:

- the customers in the market and their foreseeable demand
- competitors in the market, their facilities and the services offered over the proposed period for assessing total foreseeable demand.

The assessment of customers and competitors in the market involves an assessment of the specific market within which the service in question is provided. This market is separate from other markets, particularly dependent markets.

Total foreseeable demand is not simply demand for the service for which declaration is sought. Rather, demand relates to foreseeable demand in the market in which the service is provided (i.e. demand also includes demand for substitute services in the market, if any). Moreover, as the NCC noted:

> The presence of the word 'foreseeable' means that the Council may take into account other future uses of the services, provided they are foreseeable.[129]

In considering total foreseeable demand, the year of anticipated peak demand is relevant, as that level of demand must be satisfied by the facility. Where demand is expected to increase over time, total market demand will ordinarily be estimated until the end of the recommended declaration period. However, demand forecasts may be unnecessary in some instances, where it is clear that the facility for the service has sufficient spare capacity to satisfy total foreseeable demand.[130] That said, it is a matter for the applicant to demonstrate that a facility can satisfy total foreseeable demand.

Ultimately, what is 'foreseeable' is a matter of judgment, having regard to the information available and the confidence in the forecasts that are produced.

4.6 Identify whether the facility for the service (as expanded, where relevant) could meet total foreseeable demand

To identify whether the facility for the service could meet total foreseeable demand in the market, we will have regard to the capacity of the facility.

Whether the facility can support maximum demand is a question of judgement.[131]

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

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[128] Climate change and related policies may be particularly relevant for monopoly infrastructure assets as they typically have long asset lives and are interconnected (such as the coal supply chain that encompasses below-rail and coal terminal assets.) See also Productivity Commission, *Barriers to effective climate change adaption*, inquiry report no. 59, 2021, chapter 12.

[129] NCC, *Guide to declaration*, version 6, 2018, p. 36, para 4.5.

[130] Productivity Commission, *National Access Regime*, inquiry report no. 66, 2013, p. 162; QCA, *Queensland Rail declaration review*, final recommendation, 2020, p. 151–152.

[131] NCC, *Guide to declaration*, version 6, 2018, p. 37, para 4.8.

> [f]or 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.

Criterion (b) therefore requires consideration of capacity under one of two scenarios:

- the facility has spare capacity—can the spare capacity satisfy total foreseeable demand in the market?
- the facility is at full capacity—can it be expanded such that it can satisfy total foreseeable demand?

4.6.1 Facility has spare capacity

If a facility has spare capacity, the assessment is about whether the facility in existing form can meet total foreseeable demand at least cost.

If a facility has sufficient spare capacity to accommodate total foreseeable demand (namely the year of peak demand), criterion (b) is likely to be satisfied where:

- no competitor facility exists; or
- sufficient spare capacity does not exist in competitor facilities.

This is because the marginal costs of the existing facility satisfying total demand in the market are likely to be less than the full standalone costs of expanding existing competitor facilities or constructing new standalone competitor facilities.

Box 9 The NCC's recommendation on the jet fuel supply infrastructure at Sydney Airport— consideration of spare capacity

The NCC considered the matter of spare capacity in the context of criterion (b) under Part IIIA of the CCA (albeit in a previous formulation of the test) in some detail as part of considering the application to declare the services provided by jet fuel supply infrastructure at Sydney Airport.[132]

An aspect of the application concerned access to the service provided by the Caltex pipeline, which transports jet fuel from the interconnection points with off-site jet fuel storage facilities at Port Botany to the Sydney Joint User Hydrant Installation (JUHI).

In its final recommendation, the NCC noted that while a new pipeline may be profitable over its life, its unlikely to be built at a time when there is capacity on the existing pipeline, if it will be more profitable to commission a pipeline later. Specifically:

> it is unlikely to be economical to develop such a facility until such time as demand for jet fuel at Sydney Airport approaches the capacity for jet fuel to be delivered to (or, potentially, for supply to be replenished at) the Sydney JUHI. Until that point, any party developing a duplicate pipeline will face competition from existing capacity such that it is reasonable to expect that its business would be unprofitable at least compared to the development of such a pipeline at a later point of time.[133]

4.6.2 Facility at full capacity

Where the facility is at capacity, we must determine if it is 'reasonably possible to expand that capacity', in which case we 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* (Qld), which came into effect on 29 March 2018.

In our 2020 declaration reviews, we considered that this required judgment about whether the expansion of the relevant facility is reasonably possible in an economic sense (as opposed to, for example, being merely possible in a theoretical or fanciful sense).[134] Similarly, the NCC noted that:

> [i]t is not necessary for the Council and the Minister to have regard to a facility at capacity as if it had expanded capacity, if it is not reasonably possible for that facility to be expanded or extended.[135]

Any assessment we make of whether it is reasonably possible to expand capacity must also be informed by the facts of each case.

In our 2020 declaration reviews, we considered that the time needed to expand the capacity of a facility is a relevant factor in deciding whether expansion would be reasonably possible.

Likewise, when the NCC made its final recommendation on the application for declaration of services provided by jet fuel supply infrastructure, it considered the date at which it would be

[132] NCC, *Jet fuel supply infrastructure at Sydney Airport—Applications under s 44F of the Competition and Consumer Act 2010 for declaration of services provided by the Caltex pipeline and the joint user hydrant installation at Sydney Airport*, final recommendations, March 2012.
[133] NCC, *Jet fuel supply infrastructure at Sydney Airport*, final recommendations, March 2012, p. 45, para 5.21. See also para 5.24.
[134] QCA, *Declaration reviews*, final recommendation, March 2020, p. 13.
[135] NCC, *Guide to declaration*, version 6, 2018, p. 37, para 4.11.

profitable to duplicate the Caltex pipeline and the length of time necessary to commission such a pipeline. The NCC also considered whether there was evidence that a party would undertake such an exercise in the near future.[136]

In the 2020 declaration reviews, we did not consider that it must be possible to expand the facility by the commencement of the declaration period. We noted that, to read such a requirement into s. 76(3) would see this provision rarely, if ever, utilised in the application of criterion (b).[137]

Further, if it is reasonably possible to expand a facility for a service, we consider that s. 76(3) permits us to treat the facility in question as if it had that expanded capacity at all times during the period of declaration under consideration (not just from the time at which the facility could be expanded).[138]

4.7 Identify the cost of any two or more facilities to meet total foreseeable demand

The cost of the service being provided by facility for the service in either existing or expanded form needs to be compared with the costs of the service being provided by any two or more facilities.

4.7.1 Any two or more facilities

The QCA Act does not provide any guidance on the term 'any two or more facilities'. Hence, the relevant comparisons could include:

- comparing the facility for the service with the facility for the service and another yet-to-be-constructed (duplicate) facility—this would occur where there is no other facility that provides a service in the relevant market
- comparing the facility for the service (expanded) with 2 or more alternative facilities[139]
- comparing the facility for the service (expanded) with the facility for the service and one or more alternative facilities.

The comparisons above could include the facility for the service or alternative facilities in either the existing or an expanded form.

The relevant facilities that are considered for the least cost assessment are those that provide substitutable services such that they operate in the same market as the facility whose service is the subject of the declaration application.

[136] NCC, *Jet fuel supply infrastructure at Sydney Airport*, final recommendations, March 2012, p. 48, para 5.34.
[137] QCA, *Declaration reviews*, final recommendation, 2020, p. 14.
[138] QCA, *Declaration reviews*, final recommendation, 2020, p. 14.
[139] See QCA, *Declaration reviews,* final recommendations, 2020, section 2.3.9—we said that '[b]ased 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 that there may be an alternative scenario that does not include the facility for the service'.

Box 10 Approach in the QCA's 2020 declaration reviews

The market circumstances and the corresponding cost and demand estimates over the period for foreseeable demand will depend on the circumstances. In the context of our 2020 Aurizon Network and DBCT reviews, we concluded that there were no other substitutes in the relevant market in which the service was provided:

- For DBCT—the facility needed to be expanded to satisfy total foreseeable demand. The relevant comparison was between DBCT in expanded form compared to the construction of another standalone terminal. As there were stakeholder debates about other terminals being 'in the market', we also undertook a further exercise, for completeness, to examine whether these alternative facilities could satisfy a portion of total foreseeable demand at least cost (i.e. considering DBCT in its existing form plus an alternative facility on the one hand, compared with DBCT in an expanded form on the other hand).
- For Aurizon Network—the network had substantial spare capacity, and it was not evident that competitors could provide a substitute service. Therefore, it was uncontentious that the facility could satisfy total foreseeable demand at lower cost than an alternative facility (i.e. a standalone duplicate network).

Source: QCA, DBCT declaration review, final recommendation, March 2020, section 2.8; QCA, Aurizon Network declaration review, final recommendation, March 2020, section 2.6.

A facility yet to be constructed

Based on the statutory language, it is open for us 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, we consider 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 estimating total foreseeable demand. If the development of such a facility (or more than one such facility) was not technically feasible (or not feasible over the period for estimating total foreseeable demand), 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) include:

- whether development of the facility is technically feasible
- the likelihood of the facility receiving the necessary planning and environmental consents
- 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, or outside this period)
- the availability, accuracy and certainty of information on the cost of providing the service in relation to these facilities.

That said, our view is that it is not necessary to consider the construction costs of purely hypothetical competing facilities. In this context, in the draft recommendations for our 2020 declaration reviews, we said:

> 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.[140]

4.7.2 Least cost

For criterion (b) to be satisfied, the facility for the service must satisfy total foreseeable demand at 'least cost' compared to any two or more facilities.

What costs to consider?

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

> 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 of the QCA Act 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. This includes the administrative and compliance costs of regulation.

The costs in question do not just represent the costs of the facility providing the service (i.e. the standalone costs of service provision reflecting capital and operating costs), but all costs associated with accessing the service (including, for example, the transport costs for an access seeker/applicant to reach the facility). The costs also include the coordination costs of the facility providing the service in having to provide third party access. Coordination costs will be particularly relevant if the facility is not presently a multi-user facility.[141]

In our 2020 declaration reviews, we said that '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 for the service provided by the facility in question or using two or more facilities.[142]

Our approach to the treatment of costs in our 2020 declaration reviews appeared to be broader than that of the Productivity Commission and the NCC.

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[140] QCA, *Declaration reviews,* draft recommendations, December 2018, p. 18.

[141] Coordination costs could include the costs of lost production or of being allocated less of the service's capacity as a result of the facility becoming a multi-user facility (see Explanatory memorandum, CCA Amendment Bill 2017 at [12.31]). Coordination costs include those relating to building the physical access or interface to the facility to allow for third party use, as well as any increased maintenance costs; reduced operational flexibility and efficiency; and measures taken to coordinate investments that are necessary for the facility to meet total foreseeable market demand for the infrastructure service at least cost (Productivity Commission, *National access regime*, inquiry report no 66, 2013, pp. 165, 104).

[142] QCA, *Declaration reviews*, final recommendations, March 2020, p. 15.

Costs are more than 'production costs'

For instance, the Productivity Commission proposed that the costs to be considered under criterion (b) be limited to simply production and coordination costs:

> The costs that are relevant to determining whether a facility can meet total foreseeable market demand at least cost are the production costs that would be incurred in meeting foreseeable demand. This assessment of costs should include an estimate of any production costs incurred by the infrastructure service provider from coordinating multiple users of its facility. A number of participants suggested that coordination costs can be estimated at the declaration stage. The production costs of coordinating infrastructure use with third parties can be significant, particularly in highly integrated supply chains and, in some cases, these coordination costs will outweigh the benefits of access.[143]

However, our view is that if the costs to be taken into account as part of the 'least cost' assessment are limited to just production costs, the assessment will not adequately consider whether there are substitutes in the market for the service.

For instance, if there are other facilities that provide a similar service (to the facility for the service under consideration) but are not geographically proximate, they may not be in the same market, even if the production costs are lower than those of the facility for the service under review. Alternatively, even if the services provided by the alternative facilities are in the same market as those provided by the facility for the service, the costs of customers accessing such facilities (such as transportation costs) are relevant to the least cost assessment.

In our 2020 DBCT review, we considered the costs to miners of using alternative coal handling facilities when we assessed whether there were substitutes for the DBCT service. Our assessment modelled:

- the coal handling costs of DBCT and alternative facilities
- the above- and below-rail costs of using alternative facilities.

We said:

> Higher transportation costs associated with the use of more distant facilities is one of the reasons why, in the QCA's view, other coal terminals are not operating in the same market as DBCT. However, if other facilities are to be considered, the comparison of the different options must still be directed towards ascertaining whether DBCT has natural monopoly characteristics. If supply chain costs are ignored, there is a risk that other facilities may appear less costly in circumstances where, from the perspective of users, total demand in the market would in fact be met at least cost by expanding the facility for the service, rather than using a more distant facility. For this reason, in considering the cost of using alternative facilities, the QCA has taken supply chain costs into account.[144]

Costs of applying for declaration and costs of access regulation

The Productivity Commission and the NCC exclude the costs of access regulation in calculating costs under criterion (b). The NCC also excludes the cost of applying for declaration.

The Productivity Commission said:

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[143] Productivity Commission, *National Access Regime*, inquiry report no. 66, 2013, p. 20.

[144] QCA, *DBCT declaration review*, final recommendation, 2020, p. 62. For example, assume that the terminal facility in question provides the service at $2 per tonne (t) and the transport costs of accessing the facility are on average $1/t. In contrast, an alternative facility can provide the service at $1/t, but the transport costs of accessing the alternative facility are $3/t. Assume both facilities can satisfy total foreseeable demand in the market. Even though the terminal costs are cheaper at the alternative facility, it cannot satisfy total foreseeable demand at less cost than the facility in question.

> Costs that are related to the application of access regulation should not be included since the test should be used to identify facilities that give rise to an enduring lack of effective competition, rather than to identify the costs of access regulation. The administrative and compliance costs that may be imposed once a service is declared should be considered in criterion (f) [i.e. in criterion (d) – the public interest test] …[145]

Likewise, the NCC said:

> The Council will not take into account the costs of application for declaration, as these costs are not relevant to whether the facility is functioning as a natural monopoly. The administrative and compliance costs that may be incurred by the service provider as a result of the declaration would be considered in criterion (d), as they would not be incurred if access was provided without the declaration.[146]

The views of the Productivity Commission and the NCC are consistent with the explanatory memorandum to the Competition and Consumer Amendment (Competition Policy Review) Bill 2017, which says:

> The costs of application for declaration should not be considered, because those are irrelevant to whether the facility is operating as a natural monopoly ….
>
> The administrative and compliance costs that may be incurred by the service provider as a result of the declaration would be considered in criterion (d), as they would not be incurred if access was provided without the declaration ...[147]

However, s. 76(4) of the QCA Act does not limit the types of costs that can be considered, nor does it distinguish between criterion (b) costs and criterion (d) costs. It asks if demand could be met at least cost using the facility for the service, and related questions including whether the facility can be expanded and what the costs of the facility are.

The costs of an application for declaration precede declaration and are not related to the costs of operating the facility.

However, it is not evident that the regulatory cost that would be incurred if the facility was declared (e.g. the costs of submitting and complying with access undertakings) should be excluded from consideration under criterion (b), as they would be necessarily incurred as part of the service being declared. These costs should be considered in the context of any administrative costs that would be incurred in the absence of declaration.

Ultimately, while we will have regard to extrinsic material like the explanatory memorandum to the CCA Amendment Bill 2017, such material is superseded by a plain reading of the text of the Queensland legislation.[148]

In any event, while it would depend on the circumstances in each case, the administrative and compliance costs of access regulation may be relatively less significant in the context of the broader range of costs considered under criterion (b).

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[145] Productivity Commission, *National access regime*, inquiry report no. 66, 2013, p. 162.
[146] NCC, *Guide to declaration*, version 6, 2018, p. 38, paras 4.13–4.14.
[147] Explanatory memorandum, CCA Amendment Bill 2017 at [12.32]–[12.33].
[148] According to s. 14(B)(1) of the *Acts Interpretation Act 1954* (Qld), '[s]ubject to subsection (2), in the interpretation of a provision of an Act, consideration may be given to extrinsic material capable of assisting in the interpretation—(a) if the provision is ambiguous or obscure—to provide an interpretation of it; or (b) if the ordinary meaning of the provision leads to a result that is manifestly absurd or is unreasonable—to provide an interpretation that avoids such a result; or (c) in any other case—to confirm the interpretation conveyed by the ordinary meaning of the provision'.

Price versus cost

There may be a range of ways to analyse what facility or combination of facilities satisfies total foreseeable demand at least cost. However, we noted in our 2020 declaration reviews that, to the extent a uniform access price reflects a building block methodology of all factors relevant in the provision of a service (including a return on sunk costs), we considered that price is a suitable proxy for the costs at the facility for providing the service.[149]

For reference, a hypothetical worked example of applying criterion (b) is included at Appendix A.

Quantification of costs is not necessarily required

More broadly, demonstrating that a facility can provide the service in question at least cost does not necessarily mean that a precise cost of service provision must be estimated and compared to the costs of service provision at competing facilities.

Rather, the criterion requires that the facility that provides the service should do so at least cost. This does not preclude forming a view on the concept of least cost qualitatively, particularly if it is not contentious (for instance, if the relevant facility has sufficient spare capacity to satisfy total foreseeable demand in the market).

4.8 Conclusion on criterion (b)

Criterion (b) is satisfied if it is determined that 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).

[149] QCA, *DBCT declaration review*, final recommendation, 2020, p. 60.

5 CRITERION (A): ACCESS WOULD PROMOTE A MATERIAL INCREASE IN COMPETITION

> **Box 11 Criterion (a)**
>
> Section 76(2)(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

5.1 Purpose of criterion (a)

Criterion (a) requires the Minister and ourselves to consider whether access (or increased access) to the service on reasonable terms and conditions as a result of a declaration would promote a material increase in competition in a market other than the market for the service. The focus of the test is on the effect of declaration, rather than merely assessing whether access (or increased access) would promote competition.

The promotion of competition may be regarded as a proxy for more efficient outcomes.[150]

5.2 Our approach

We need to consider whether declaration of the service would lead to a material increase in competition in at least one market (which may be referred to as a dependent market), other than the market for the service. For the purposes of this criterion, a dependent market can be regarded as a market that is separate to the market for the service and whose operation is impacted by the operation of the market for the service.

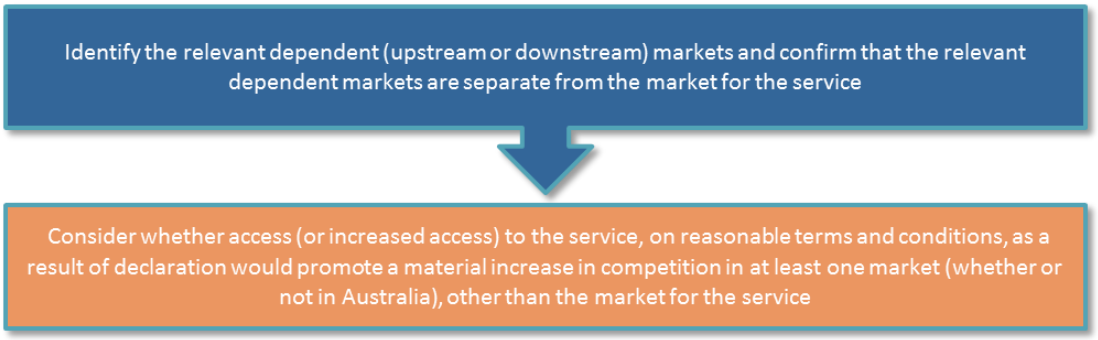
This requires us to compare the likely future environment for competition in dependent markets, both with and without declaration. In doing so, we consider the ability and incentive of the service provider to exert market power in the absence of declaration.[151] We may also consider whether dependent markets are already workably competitive.[152] If the markets are already competitive and/or there are factors that otherwise would constrain the potential exercise of market power, it may be the case that there will be no material impact on competition as a result of declaration. The focus of our assessment is therefore on the specific impacts that declaration would have in dependent markets (see Figure 5).

[150] Productivity Commission, *National Access Regime*, inquiry report no. 66, 2013, p. 167.

[151] The exertion of market power is in the market for the service, which may or may not have an impact on competition in a dependent market.

[152] The NCC has described workable (or effective) competition as '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' (NCC, *Guide to declaration*, version 6, 2018, p. 32, para 3.24). See also section 5.4.4.

Figure 5 Our approach to assessing whether criterion (a) is satisfied

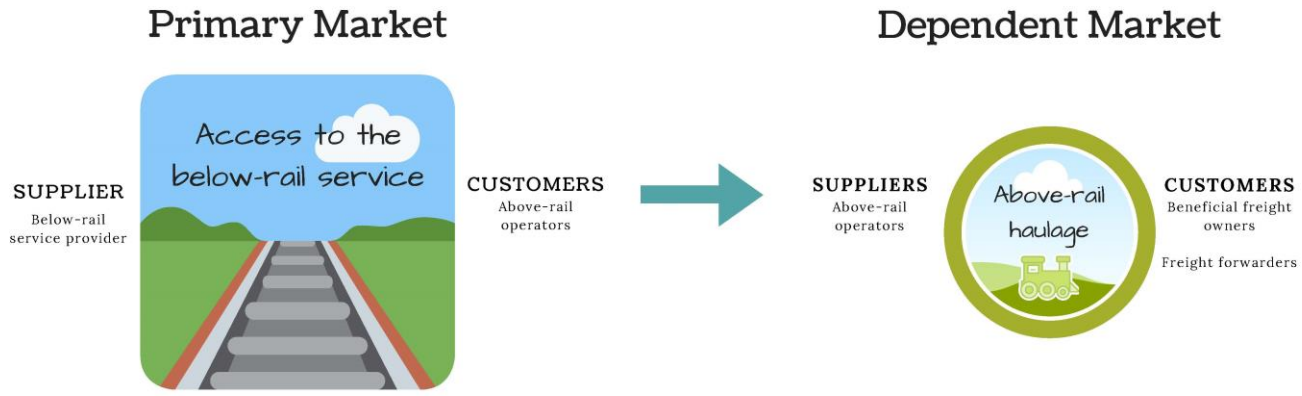


5.3 Identify the relevant dependent markets

Having identified the market for the service (see section 4.3), criterion (a) requires the identification of at least one other market (a dependent market) and confirmation that it is separate from the market for the service for which declaration is sought. There may be more than one dependent market for consideration under criterion (a).[153]

A dependent market is likely to be part of the same supply chain as the market for the service and to be either upstream or downstream to it. An example of the relationship between the market for the service in question and a dependent market in the case of a below-rail service is shown in Figure 6.

Figure 6 The relationship between a below-rail service and a dependent market



5.3.1 Is the dependent market separate from the market for the service?

Vertical integration may be a relevant factor to consider when investigating whether dependent markets are separate to the market for the service. The NCC noted that economic separability (i.e. the services can be provided separately) is a necessary condition for different functional layers to be distinct markets and for a dependent market to be separate from a market for the service in question.[154]

[153] While we may identify multiple dependent markets, the satisfaction of criterion (a) only requires that access as a result of declaration would promote a material increase in competition in one market, other than the market for the service.

[154] NCC, *Guide to declaration*, version 6, 2018, p. 31, para 3.18.

That said, vertical integration (where the provider of a service for which declaration is sought also operates in a related market) does not necessarily mean the services are provided in the same market.

The Australian Competition Tribunal has discussed this question in relation to rail track and airport infrastructure:

> The Tribunal was struck by the parallels here with the provision of railway track and train services. Though in the past usually vertically integrated, track services and the running of passenger or freight trains can be, and increasingly are, provided separately. As such, they operate in functionally distinct markets, even though there is perfect complementarity between them. To put it another way, these complementarities do not appear to give rise to economies of joint consumption or joint production that dictate the services must be performed within the same economic entity.
>
> …
>
> [J]ust because there is a one for one relationship between airport aprons and ramp handling services does not mean that the supply of these two types of services are in functionally the same market.[155]

Therefore, in considering whether a dependent market is separate (from the market for the service for which declaration is sought), a key question is whether the services provided in each market *must* be provided by the same economic entity in order to be economically feasible, or whether they *may* be provided separately (whether or not they are provided separately in a particular case). If it is not economically feasible to provide them separately, the services will not be in functionally separate markets.[156]

5.3.2 Defining dependent markets

In identifying relevant dependent markets for the purposes of criterion (a), it may be necessary to define the boundaries of the dependent market(s) in order to assess the impact of declaration on competitive conditions in those markets.[157] This is done in a similar way to how the market for the service is defined—namely, by defining the markets in terms of their product/service, geographic and functional dimensions (see section 4.3.2).

The geographic boundaries of the primary and dependent markets do not necessarily have to align. We noted in the 2020 DBCT review:

> There is no requirement for the geographic regions for the primary and dependent markets for the purposes of criterion (b) and (a) respectively to be identical. The focus of criterion (b) is the market in which DBCT Management provides coal handling services, whereas the focus of criterion

[155] *Re Sydney International Airport* [2000] ACompT1 at [97].

[156] See: NCC, *Declaration of Services, A guide to declaration under Part IIIA of the Trade Practices Act 1974 (Cth)*, version 3, 2009, p. 32, para 3.27. See also *Re Services Sydney Pty Limited* [2005] ACompT 7 at [117]–[118].

[157] However, it may not be necessary to fully define the scope of the dependent market(s) in all cases. For example, we did not form a definitive view on the geographic scope of the above-rail haulage market in the review of the Aurizon Network service, as our conclusion on criterion (a) did not depend on this (QCA, *Aurizon Network declaration review*, final recommendation, March 2020, p. 24). Similarly, in its assessment of the Port of Newcastle revocation application, the NCC considered that it was not necessary to precisely determine the geographic scope of the tenements market, given its view that if declaration did not promote a material increase in competition where a narrow geographic view of the market is applied, it is even less likely that declaration would promote a material increase in competition in a more broadly defined geographic market (NCC, *Revocation of the declaration of the shipping channel services at the Port of Newcastle*, recommendation, July 2019, pp. 119–20, para 7.304).

> (a) is whether DBCT Management has the ability and incentive to exercise market power, such that competition in a dependent market is materially impacted.[158]

In the *Pilbara* matter[159] and the 2020 declaration reviews undertaken by us, mining tenement markets were identified as key dependent markets in the assessments (iron ore tenements in the *Pilbara* matter and coal tenements in the review of the DBCT, Aurizon Network and Queensland Rail services).

In the *Pilbara* matter, the Australian Competition Tribunal observed that:

> … to a businessperson, a market is a place or area where goods may be sold or, more broadly, where there are people who are sufficiently aware of a firm's product to consider buying it. This concept of a market concentrates its attention on buyers rather than sellers.
>
> We are not here concerned with the businessperson's understanding of a market but rather with the analytical definitions developed by economists …
>
> This economic (or relevant) market, then, consists of groups of buyers and groups of sellers in a geographic region who seek each other out as a source of supply of, or as customers for, products. The interaction of the buyers and sellers determines the price for the products.
>
> We have not referred to a "group" of products because implicit in the classic economists' definition of a market is the assumption that there is only a single homogeneous product and that the firms in the market produce perfect substitutes.
>
> In the real world it is not only homogeneous products of rival sellers that affect price; price is also affected by the products of rival sellers that are close substitutes. Hence it is necessary to expand the definition of a market to include not only identical goods but also close substitutes.[160]

In our 2020 declaration reviews, we also considered that what is relevant is the concept of an 'economic market', and that identifying strong substitutes, both actual and potential—not purely theoretical—is crucial to defining the relevant market. In applying this approach to the DBCT service, we considered that in order to establish the boundaries of the coal tenements market, it was relevant to examine whether tenement seekers would readily turn to acquiring tenements in another location in response to, for instance, an increase in the price of tenements at a given location.[161]

The NCC's view in relation to the *Pilbara* matter was that the geographic dimensions of the market for iron ore tenements are not determined by the geographic location of tenements owners, but by the degree to which tenements in different geographic locations are substitutable. The NCC observed:

> RTIO submits that if there is a market for iron ore tenements, it is global in nature, given that an iron ore producer can theoretically mine ore anywhere in the world.
>
> This argument is supported by the significant levels of international ownership of iron ore projects—the Pilbara operations of RTIO and BHPBIO each involve joint venture partners from

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[158] QCA, *DBCT declaration review,* draft recommendation, December 2018, p. 58, footnote 196.

[159] For instance, refer to: NCC, *Fortescue Metals Group Ltd: Application for declaration of a service provided by the Mt Newman railway line under section 44F(1) of the Trade Practices Act 1974*, final recommendation, 23 March 2006; NCC, *Robe River: Application for declaration of a service provided by the Robe Railway under section 44F(1) of the Trade Practices Act 1974*, final recommendation, 29 August 2008; NCC, *Hamersley Railway: Application for declaration of a service provided by the Hamersley Railway under section 44F(1) of the Trade Practices Act 1974*, final recommendation, 29 August 2008; NCC, *Goldsworthy Railway: Application for declaration of a service provided by the Goldsworthy Railway under section 44F(1) of the Trade Practices Act 1974*, final recommendation 29 August 2008. See also the Australian Competition Tribunal, *In the matter of Fortescue Metals Group Ltd* [2010] ACompT 2 at [1094]–[1131].

[160] Australian Competition Tribunal, *In the matter of Fortescue Metals Group Ltd* [2010] ACompT 2 at [1009]–[1013].

[161] QCA, *DBCT declaration review*, final recommendation, March 2020, p. 128.

> Japan, China and/or South Korea. Further, both RTIO and BHPBIO themselves own and operate iron ore projects overseas.
>
> The nature of modern production of mineral commodities is that ownership and operations are likely to be geographically diverse. For example, BHP Billiton is headquartered in Melbourne and yet controls mining operations on every continent (except Antarctica).
>
> However, the geographic dimensions of the market for iron ore tenements are not determined by the geographic location of tenement owners, but by the degree to which tenements in different geographic locations are substitutable.
>
> ….
>
> Given that most iron ore tenements in the Pilbara are attractive only to parties with access to rail infrastructure in the Pilbara, they are substitutable only for other iron ore tenements in the Pilbara. Accordingly, the market for iron ore tenements is Pilbara-wide.[162]

In the same matter, the Australian Competition Tribunal did not accept the view that the iron ore tenements market was global:

> Most of the experts accept that the market for tenements is at least Pilbara-wide. Dr Fitzgerald supported a global market and pointed to the prevalence of international investors in joint venture arrangements. By the same token, many investors in tenements only participate in Australia. Further, as Mr Houston pointed out, differences in the scale and quality of resources, and different regulatory requirements and business environments, mean that businesses most likely characterise their operations on a region-by-region basis, rather than a global basis. We believe that the market is most likely Pilbara wide, and not global for the reasons given by Mr Houston.[163]

In the 2020 declaration reviews, we broadly adopted the same approach to defining the geographic boundary of the coal tenements market. That is, an important factor was the degree to which coal tenements at different geographic locations are strong substitutes.[164] Box 12 shows two examples of dependent markets identified in the declaration reviews.

[162] NCC, *Fortescue Metals Group Ltd: Application for declaration of a service provided by the Mt Newman railway line under section 44F(1) of the Trade Practices Act 1974*, final recommendation, 2006, pp. 120–122, paras 7.72–7.75, 7.81.
[163] *In the matter of Fortescue Metals Group Limited* [2010] ACompT 2 at [1119].
[164] QCA, *DBCT declaration review*, final recommendation, 2020, p. 129.

Box 12 Dependent markets

In our 2020 Aurizon Network review and 2020 DBCT review we identified the following dependent markets:

- **Aurizon Network**: The market for the service was the market for access to rail infrastructure in the coal basins served by the CQCN. While we identified a range of dependent markets (including coal tenements and thermal and metallurgical coal markets), the key dependent market that was the focus of our assessment was the above-rail haulage market. This market was considered to be separate to the market for below-rail services.
- **DBCT**: The market for the service was the market for DBCT's coal handling service in the Goonyella system. The relevant dependent markets considered included the coal tenements market(s), coal export market, coal haulage services market, DBCT secondary capacity trading market, rail access market and other markets (e.g. port services, shipping services, mining services). Each of these dependent markets were considered to be separate to the market for the service.

Source: QCA, DBCT declaration review, final recommendation, 2020, pp. 74–75; QCA, Aurizon Network declaration review, final recommendation, 2020, pp. 24–25.

5.4 Determine whether access as a result of declaration would promote a material increase in competition in a dependent market

In considering criterion (a), we must determine whether we are satisfied that access (or increased access) on reasonable terms as a result of declaration would promote a material increase in competition in a dependent market compared to a scenario in which the service is not declared.

This section addresses key elements of this assessment, including:

- comparing a future with and without declaration
- the ability and incentive of the service provider to exercise market power
- access on reasonable terms and conditions as a result of declaration
- whether declaration promotes a material increase in competition in at least one market.

5.4.1 A future with and without declaration

We assess criterion (a) using a 'future with and without' declaration approach. That is, a scenario in which there is no declaration is compared with a scenario in which there is access (or increased access) on reasonable terms and conditions as a result of declaration. This requires us to form a view on the likely future environment for competition in dependent markets under both 'with' and 'without' declaration scenarios.

The 'with' declaration scenario—where access is provided on reasonable terms and conditions as a result of declaration—is addressed in section 5.4.3.

The 'without' declaration scenario requires us to consider the commercial environment without declaration. This includes assessing whether there are market factors or other factors that, in the absence of declaration, might constrain the ability and incentive of the service provider from exercising market power—for example, market demand and supply characteristics, the service

provider's incentives and the existence of any contractual and/or regulatory constraints (see section 5.4.2).

Such an approach is consistent with 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.[165, 166]

If, in a scenario without declaration, we find that access may still be provided on reasonable terms (e.g. because of the access providers' incentives or due to market or other constraints), such that there would be no material increase in competition in a dependent market as a result of declaration, it would follow that criterion (a) is not satisfied. The focus of our assessment is therefore on the specific impacts that declaration would have in dependent markets. The question to ask is 'Does declaration promote a material increase in competition in a dependent market(s) compared to a scenario without declaration?'.

5.4.2 Ability and incentive to exercise market power

In assessing a 'future with and without' declaration, we consider whether the access provider has the ability and incentive to exercise market power.[167]

Market power is the ability of a firm to behave in a market for a sustained period, unconstrained to some degree by the conduct of actual or potential competitors, customers or suppliers:

> [M]arket power exists where a firm has the ability profitably to raise prices over a period of time, or to behave analogously for example by restricting output or limiting consumer choice.[168]

The ACCC has described market power as follows:

> Market power comes from a lack of effective competitive constraint. A firm with market power is able to act with a degree of freedom from competitors, potential competitors, suppliers and customers. The most observable manifestation of market power is the ability of a firm to profitably sustain prices above competitive levels. Substantial market power may also enable a firm to raise barriers to entry, profitably reduce the quality of goods or services or slow innovation.[169]

The High Court noted the following definition of market power in *Queensland Wire Industries Pty Ltd v Broken Hill Proprietary Co Ltd*:

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[165] *Virgin Blue Airlines Pty Limited* [2005] ACompT 5 at [153] ('*Sydney Airport*').

[166] The Tribunal's interpretation was replaced by the decision of the Full Federal Court on appeal, which found criterion (a) called for an enquiry into the effect of access (or increased access), not the effect of declaration under Part IIIA (*Sydney Airport Corporation Limited v Australian Competition Tribunal* [2006] FCAFC 146 at [82]-[83]). It is, however, clear that the amendments to criterion (a) under both the national access regime and the QCA Act regime in Part 5 (implemented in 2017 and 2018 respectively) were intended to refocus the enquiry not merely on the effect of access, but rather on the effect of access as a result of declaration.

[167] NCC, *Guide to declaration*, version 3, 2009, p. 36, para 3.46. See also *Duke Eastern Gas Pipeline Pty Ltd* [2001] ACompT2 at [117].

[168] R Whish & D Bailey, *Competition Law*, 7th ed, Oxford University Press, 2012, p. 42.

[169] ACCC, *Guidelines on misuse of market power*, August 2018, p. 6.

> Market power can be defined as the ability of a firm to raise prices above the supply cost without rivals taking away customers in due time, supply cost being the minimum cost an efficient firm would incur in producing the product…[170]

The economic problem posed by the ability and incentive of a service provider to exercise market power that is addressed by the third party access regime is explained in the CCA explanatory memorandum:

> A provider may have the ability and incentive to deny access to a service, or restrict output and charge monopoly prices, where there is a lack of effective competition in markets for that service. This can reduce economic efficiency where access to the service is required for third parties to compete effectively in dependent (upstream or downstream) markets. As a consequence, transactions that would enhance community wellbeing may not proceed.[171]

The absence of such characteristics may indicate that there is no economic problem for declaration to address, as it may indicate that the firm will not act in a manner that will adversely affect competition in a dependent market.

Factors relevant to 'ability and incentive' to exercise market power

The task is therefore to consider whether, in the absence of declaration, the service provider has an ability and incentive to exercise market power—for example, by restricting access, unreasonably increasing its access price, or otherwise imposing unreasonable terms and conditions of access. This assessment will inform the comparison of the likely future environment for competition in dependent markets under both 'with' and 'without' declaration scenarios.

This approach to criterion (a) is consistent with the test set out in *Re Duke Eastern Gas Pipeline Pty Ltd ('Duke EGP')*:

> [116] Whether competition will be promoted by coverage is critically dependent on whether EGP has power in the market for gas transmission which could be used to adversely affect competition in the upstream or downstream markets. There is no simple formula or mechanism for determining whether a market participant will have sufficient power to hinder competition. What is required is consideration of industry and market structure followed by a judgment on their effects on the promotion of competition.[172]

The NCC guidelines further note:

> The Tribunal went on in the *Duke EGP decision* (at [116]-[124]), to consider a range of factors in assessing whether Duke EGP could exercise market power to hinder competition in the relevant dependent markets, including:
>
> - the commercial imperatives on Duke to increase throughput, given the combination of high capital costs, low operating costs and spare capacity
> - the countervailing market power of other participants in the dependent markets
> - the existence of spare pipeline capacity, and
> - competition faced by Duke from alternatives to the use of the Eastern Gas Pipeline in the dependent markets.
>
> Following its consideration of these factors, the Tribunal concluded that Duke did not have sufficient market power to hinder competition in the dependent markets.

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[170] *Queensland Wire Industries Pty Ltd v Broken Hill Pty Co Ltd* [1989] HCA 6; (1989) 167 CLR 177 (8 February 1989), at [17].
[171] Explanatory memorandum, CCA Amendment Bill 2017 at [12.4].
[172] *Duke EGP* [2001] ACompT 2 at [116].

> If a service provider is unable to exercise market power in the dependent market, then declaring the service so as to provide an enforceable mechanism to determine the terms and conditions of access to the service would not promote competition or efficiency in that market.[173]

An assessment of whether the service provider has an ability and incentive to exercise market power may therefore consider a range of factors, including whether:

- the service provider has an incentive to provide access on reasonable terms or not. This includes considering whether the service provider has an incentive to prevent entities from obtaining access or to inefficiently discriminate in providing access (thereby adversely affecting competition in a dependent market). A relevant consideration when considering the service provider's incentives is whether it is vertically integrated into other parts of the supply chain
- there are any close substitutes for the service
- the facility is a natural monopoly
- access is provided (or able to be negotiated) in the absence of declaration and, if so, the nature of that access, including whether there is any constraint on the potential exercise of market power by the service provider. This includes considering if there is any alternative access arrangement in place and, if so, how likely outcomes under this alternative arrangement compare to access under declaration
- any other form of economic regulation is in place (e.g. price monitoring) and whether this is an effective constraint
- contractual arrangements that are an effective constraint are in place
- there is spare capacity at the facility and whether the service provider may be motivated to increase competition in dependent markets (namely upstream markets) to encourage utilisation of the facility[174]
- the facility is in a bottleneck position in the supply chain
- there are sunk or relationship-specific investments by customers[175]
- countervailing market power is held by customers in the relevant market.[176] This includes:
  - the extent to which customers can access substitutable services from alternative service providers
  - the extent of market concentration among customers of the service. For instance, the countervailing market power of a few large buyers of the service may be greater than the countervailing market power of a large number of small buyers

[173] NCC, *Guide to declaration*, version 6, 2018, p. 33, para 3.27–3.29.

[174] The existence of spare capacity and its impact, if any, on the incentives for the access provider to increase capacity utilisation should be considered in the context of the broader economic incentives of the access provider. For example, in the 2020 Queensland Rail review, we noted that a firm with market power has an incentive to maximise profits, not utilisation of capacity, even with spare capacity (see *Queensland Rail declaration review*, final recommendation, 2020, pp. 38–39).

[175] For example, a coal mine that is dependent on access to a coal port, or rollingstock that can only be used on rail tracks.

[176] The Productivity Commission has discussed the countervailing power of airlines to the market power of airports (*Economic regulation of airports*, inquiry report no. 92, 2019, pp. 105–109).

  - the existence of sunk or relationship-specific investments by the service provider[177]
  - the extent to which customers of the service are likely to be relatively well-informed and well-resourced counterparties
- the level of demand for the service means that the average cost of providing the service is higher than what customers are willing to pay[178]
- the threat of declaration will act as a constraint
- there are any other potential contractual, legislative or government policy constraints.

A number of the factors listed above are discussed in further detail below.

Approach to considering the incentives of the firm

We would consider the incentives of the service provider in assessing the 'without declaration' scenario. An incentive to maximise profits may be most likely for commercial entities; however, the specific circumstances of each case would be considered in the context of market conditions. Relevant considerations include whether the service provider is vertically integrated into related markets and whether there is spare capacity. In the Australian Competition Tribunal's 2021 decision regarding the Treasurer's decision not to declare services at the Port of Newcastle, the Tribunal said:

> A consideration of the constraints and incentives facing the facility owner is not, as NSWMC [New South Wales Minerals Council] submitted, an enquiry as to idiosyncratic and subjective attitudes of the facility owner; rather it is an enquiry as to objective market conditions that are likely to influence and constrain the behaviour of a rational profit-maximising facility owner.[179]

The Tribunal further noted the relevance of a facility owner's past conduct:

> We consider that a facility owner's past conduct provides a basis for judgment as to its likely future conduct assuming there has been no change to the commercial, regulatory and economic factors bearing upon the facility owner. A prediction about the future conduct of a firm based upon past conduct is soundly based if due regard is had to the factors that influenced the firm's past conduct and are likely to influence its future conduct.[180]

We considered the issue of spare capacity in the context of the 2020 Queensland Rail review, where we said:

> the presence of spare capacity does not imply that Queensland Rail will not behave in a profit-maximising manner. Put another way, a firm with market power has an incentive to maximise profits, not utilisation of capacity, even with spare capacity.
>
> The QCA considers that a firm with market power would only have incentives to maximise volume in a limited set of circumstances. One such circumstance could be an infrastructure provider that faces previously unanticipated competition from another provider that has recently gained entry into the market. Given the presence of competition for demand, the incumbent provider might have an incentive to decrease its price below the profit-maximising price in order to gain sufficient revenue to cover (at least) its fixed costs. Importantly, this strategy would require some elasticity of demand for the service in order to expand output [footnotes omitted].

[177] For example, a coal terminal that can only be used to handle coal, or below-rail tracks that can only be used by rollingstock.
[178] The Productivity Commission noted that this is the case at some regional airports (*Economic regulation of airports*, 2019, p. 73).
[179] *Application by New South Wales Minerals Council (No 3)* [2021] ACompT4 at [179].
[180] *Application by New South Wales Minerals Council (No 3)* [2021] ACompT4 at [179].

> However, this does not characterise the general situation of Queensland Rail. It is the dominant service provider in most of its markets and does not face the prospect of competition. For example, in the West Moreton and Mount Isa regions, rail is the most economical option for the haulage of bulk minerals and coal. In those markets, Queensland Rail faces a relatively inelastic demand for its service, as there is no economically viable long-term substitute for rail to transport bulk minerals and coal. Accordingly, the QCA considers that economic circumstances in these regions are more likely to support the standard profit-maximising incentive.[181]

In forming this view, we also considered that the circumstances in the *Duke EGP* decision[182] were not analogous to that faced by Queensland Rail.[183]

In relation to the Port of Newcastle, the NCC made the following observation about how capacity utilisation over the relevant declaration period may affect a firm's incentives to provide access:

> Expected changes in the Port's capacity utilisation during the Relevant Term may impact on PNO's incentives to provide access. For instance, if the Port is likely to become capacity constrained over the Relevant Term, it may have altered incentives to provide access to certain types of users (such as those that are likely to generate higher levels of profit for it), or to price discriminate between them. In contrast, where the Port is unlikely to be capacity constrained over the Relevant Term, it is unlikely to have an incentive to deny access, or provide preferential treatment, to particular categories of users.[184]

As a result, the NCC said that it:

> does not consider that the Port is likely to be capacity constrained during the Relevant Term and therefore changes in capacity utilisation are unlikely to rise to a level that would influence PNO's incentives to provide access with or without declaration.[185]

The specific circumstances in each case will be important when considering the incentives of the service provider.

How could market power be used?

The NCC noted examples of how a service provider may use market power to adversely affect competition in a dependent market:

- 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 a service, those monopoly prices may suppress demand or restrict entry or participation in a dependent market.
- Discouraging new entrants into a dependent market may enable the continuation of explicit or implicit price collusion.[186]

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[181] QCA, *Queensland Rail declaration review*, final recommendation, 2020, pp. 38–39.
[182] *Duke EGP* [2001] ACompT 2.
[183] In that decision, the reason maximising utilisation to recover fixed costs was profit maximising was that there was competition between EGP and another pipeline (the Interconnect). For instance, the Australian Competition Tribunal noted a cross-price elasticity of two between the two pipelines (*Duke EGP* [2001] ACompT 2 at [106]).
[184] NCC, *Revocation of the declaration of the shipping channel services at the Port of Newcastle*, recommendation, 2019, p 71, para 7.128.
[185] NCC, *Revocation of the declaration of the shipping channel services at the Port of Newcastle*, recommendation, 2019, p 74, para 7.137.
[186] NCC, *Guide to declaration*, 2018, version 6, pp. 33–34, para 3.30. In our 2020 DBCT review we considered whether market power affected profitability or the valuation of tenement investments.

A vertically integrated service provider may have an enhanced incentive to prevent or hinder access in order to protect its related entity in the upstream or downstream market from competition. An entity that is not vertically integrated may not have an incentive to deny access; however, it may still have an ability and incentive to exert market power in setting price or non-price terms of access, which may have upstream or downstream competition impacts, particularly if the monopoly facility has strong bottleneck characteristics. As noted by the Productivity Commission, monopoly pricing of access can lead to allocative inefficiency and restrict competition and investment in dependent markets (see also discussion of criterion (d), section 7.7, Box 26).[187]

If an access provider has no ability or incentive to exercise market power, such that there is no impact on competition in a dependent market, criterion (a) will not be satisfied.

[187] Productivity Commission, *National access regime*, inquiry report no. 66, October 2013, p. 84.

Box 13 Assessing the ability and incentive to exercise market power

The following are examples of the types of matters that have been considered when assessing service providers' ability and incentive to exercise market power.

DBCT

- Potential competition from other coal export terminals
- Countervailing power of users
- DBIM's lease arrangement with the state
- DBIM's incentives as a non-vertically integrated entity
- The threat of declaration or regulation
- Likely access arrangements in the absence of declaration.[188]

Queensland Rail—North Coast Route service

- Any relevant vertical integration
- Excess capacity
- Competition between road and rail freight transport
- Other constraints:
  - Queensland Rail's statutory obligations and position as a statutory authority
  - Access arrangements in the absence of declaration
  - Threat of regulation or declaration
  - Whether dependent markets were already effectively competitive.[189]

Aurizon Network

- Absence of competition from other rail networks
- Incentives to exert market power by favouring a related above-rail entity
- Provides an essential service to transport coal by rail from mine to port
- Countervailing power of mining companies and haulage operators
- Other regulatory or legal constraints (eg. potential for regulation under Part IIIA of the CCA, general competition laws (e.g. s. 46 of the CCA) and prices oversight under Part 3 of the QCA Act).[190]

Port of Newcastle

- Vertical integration
- Asset life and dependence on upstream customers
- Capacity constraints
- Port of Newcastle Operations Pty Ltd (PNO's) position within the coal supply chain
- Threat of future regulation.[191]

Airports

- Barriers to entry or exit
- Competition from nearby airports
- Opportunities for airlines to switch to another airport
- Nature of passenger demand for air travel, including alternative means of transport.[192]

[188] QCA, *DBCT declaration review*, 2020, pp. 75–108.
[189] QCA, *Queensland Rail declaration review*, 2020, pp. 36–55.
[190] QCA, *Aurizon Network declaration review*, 2020, pp. 26–28.
[191] *Application by New South Wales Minerals Council (No 3)* [2021] ACompT4 at [181]–[199]. These factors were also considered by the NCC in its recommendation.
[192] Productivity Commission, *Economic Regulation of Airports*, inquiry report no. 92, 2019, pp. 73, 89–118.

Approach to considering any alternative access arrangements

The provider of an undeclared service has no obligation under the QCA Act to negotiate with third parties for access to its service[193], and it may or may not have an incentive to do so, depending on its circumstances. It may be the case that access to a service can be negotiated in the absence of declaration. For example, the Gladstone Ports Corporation provides a coal handling service at the RG Tanna coal terminal to multiple users, but it is not declared for third party access under the QCA Act. Thus, for criterion (a), when comparing a future 'with' and 'without' declaration, it is necessary to consider whether access is already provided to the service, regardless of declaration.

In its first decision in which it considered the amended criterion (a) under the CCA[194] (the application by New South Wales Minerals Council (NSWMC) in relation to the Port of Newcastle), the Australian Competition Tribunal noted:

> On its plain terms, the amended criterion no longer requires a comparison of access and no access. The relevant enquiry has become: what effect would access to the service on reasonable terms and conditions as a result of a declaration of the service have on the promotion of competition in a dependent market? That enquiry invites a comparison of (i) access on reasonable terms and conditions as a result of a declaration of the service and (ii) the circumstances that would be likely to prevail with respect to access in the absence of declaration. While the enquiry is forward looking, the prevailing circumstances relating to access (in particular, whether access is presently given and on what terms) will be relevant to the required forward looking comparison.[195]

The Tribunal also said that in assessing 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, it is necessary to assess whether access is likely to be available without declaration and the commercial terms of such access.[196] In explaining the approach to criterion (a), the Tribunal said:

> The criterion necessitates a forward looking analysis focussed on the effect of access as a result of declaration. The necessary comparator is the commercial environment without declaration. An important consideration in applying the criterion is whether access will be, or is likely to be, available without declaration and the commercial features of such access including the nature and scope of access, the terms and conditions of access and any capacity limitations to access. The existing availability of access will be relevant to assessing the likely future availability of access. However, due consideration must also be given to the prospect of future changes in the commercial, regulatory and economic circumstances that might alter the incentives, and likely behaviour, of the service provider.[197]

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[193] It may, however, be subject to other statutory requirements or obligations such as codes or contractual obligations.

[194] Since November 2017, criterion (a) under Part IIIA of the CCA has become '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 one market (whether or not in Australia), other than the market for the service'. The access criteria in section 76 of the QCA Act were amended in March 2018 to reflect the updated criteria introduced at the national level.

[195] *Application by New South Wales Minerals Council (No 3)* [2021] ACompT4 at [46]. We note that this approach is consistent with the approach of the Tribunal in *Sydney Airport* [2005] ACompT 5 at [153].

[196] *Application by the New South Wales Minerals Council (No 3)* [2021] ACompT4 at [144]. The Tribunal noted that in this case, an important part of the argument focused on the existing terms of access to the shipping channel service at the port, particularly under the Producer and Vessel Agent Pricing Deeds, and whether those terms of access would remain available in the future and, if they do, the degree to which the terms will constrain price increases in the future.

[197] *Application by New South Wales Minerals Council (No 3)* [2021] ACompT4 at [51(c)].

In circumstances where access may be provided in the absence of declaration, it is therefore necessary to consider the nature of that access and the likely commercial outcomes. This includes considering the nature of any alternative access arrangements that would apply without declaration, and whether the service provider would have an ability and incentive to exercise market power. While it would depend on the circumstances in each case, relevant factors may include the form of any alternative access arrangements (e.g. voluntary arrangements, government-mandated or agreed arrangements, standard contractual terms) and any matters relevant to the service provider's ability to exercise market power (e.g. attributes such as any pricing constraints). The comparison of the counterfactual 'without' declaration scenario with that of access on reasonable terms as a result of declaration therefore focuses specifically on the effect of declaration. In other words, would declaration promote a material increase in competition in a dependent market compared to no declaration?

An example of how we applied this approach in the review of the DBCT service appears in Box 14.

Box 14 Alternative access arrangements—DBCT service

In our 2020 DBCT review, DBIM submitted that it had developed an access framework, which it said would apply in a future without declaration, in the form of an annexure to an executed deed poll. In outlining our approach to considering this access arrangement, we noted:

- We did not consider that the QCA Act forbids consideration of a deed poll as part of the counterfactual for the purpose of applying criterion (a).
- The deed poll is not a draft access undertaking under division 7 of Part 5 of the QCA Act. Therefore, it is not appropriate to assess it against the criteria that would be applicable to a draft access undertaking, or to perform the type of detailed analysis that would be required in deciding whether to approve a draft access undertaking.
- We did not consider it appropriate to assess the deed poll against the principles that are applicable in deciding whether a state or territory access regime is 'effective' for the purpose of Part IIIA of the CCA (as suggested by DBIM). We noted that these principles are applicable in a very different context to the one before us (i.e. they apply when deciding whether a legislated access regime in a state or territory should supplant the legislated access regime under Part IIIA).

Rather, we noted that our task was dictated by the relevant access criterion in s. 76 of the QCA Act; that is, we had to determine whether we were satisfied that access (or increased access) on reasonable terms as a result of declaration would promote a material increase in competition in a dependent market, when compared to a scenario in which the service is not declared.

This approach required us to consider a number of questions relating to the deed poll:

(a) Is a deed poll an effective means for a service provider of creating a right of access on reasonable terms (as contemplated by criterion (a))? How does access under a deed poll compare to the rights and obligations created by declaration, which exist by force of the QCA Act? This issue focuses on the attributes of a deed poll generally, rather than the terms of the submitted deed poll that go to the application of the deed poll.

(b) When compared to the terms contained in the instrument that DBIM submitted in the context of the review (the deed poll), would access as a result of declaration promote a material increase in competition in a dependent market? This does not entail a clause by clause analysis of the deed poll—rather, it is a question of whether there are any particular terms or conditions that are relevant in comparing competitive conditions in a dependent market with conditions that would prevail if the relevant service were declared.

In applying this approach in the 2020 DBCT review, we assessed the following key aspects of access arrangements under the deed poll submitted as part of this review:

- Whether the deed poll is an appropriate counterfactual in the absence of declaration.
- How effective the deed poll and access framework are as a constraint on DBIM's ability to exercise market power, with particular reference to the following matters:
  - operation of the deed poll and access framework, including
    - the ability to amend the access framework

- access negotiation and arbitration
- compliance and enforcement

– pricing.

Source: QCA, Declaration reviews, final recommendations, March 2020, pp. 19–20; QCA, DBCT declaration review, final recommendation, March 2020, pp. 87–106.

The threat of declaration

The threat of declaration is the risk that if an unregulated entity that has market power seeks to exercise that market power (e.g. by increasing prices beyond an efficient level), it may be declared for third party access.[198] If declared, access regulation may involve the regulator approving terms and conditions of access, including a reference tariff, or arbitrating an access dispute by reference to statutory criteria (such as under ss. 138(2) and 120 of Part 5 of the QCA Act).

In such circumstances, in setting prices (and other terms of access), the entity may have regard to the threat of it being declared for third party access. Whether this is an effective constraint on the exercise of market power and, if so, to what extent, will depend on the circumstances in each case. For example, if the threat of declaration is an effective constraint, an entity may have an incentive to limit any exercise of market power or to seek to exercise it only up to the point before which it could potentially be subject to declaration and regulatory oversight. For instance, in the context of the Part 5 access regime, an entity may have an incentive to exercise some market power to gain rents, but not above the level at which it may be considered that there would be a material impact on competition in a dependent market. However, if the threat of declaration is not an effective constraint, an entity may not have an incentive to moderate its pricing behaviour in this way to avoid declaration. Whether particular access terms have a material impact on competition in a dependent market will depend on the circumstances of each case.

Factors that may be relevant in considering whether the threat of declaration constrains an entity's behaviour include, but are not limited to:

- its behaviour to date, such as whether it has sought to unilaterally constrain its exercise of market power through terms and conditions of access or through voluntary access arrangements that seek to provide a framework for access
- its pricing behaviour to date in the context of substitutes for its service (i.e. whether the entity has limited its price increases where buyers of the service have limited or no viable alternatives)[199]
- the regulation of services provided by other entities providing a similar service
- the time taken and cost associated with applying for declaration[200]

[198] It is also possible that Part 3 of the QCA Act may apply, which deals with pricing practices related to monopoly business activities, including price monitoring investigations and investigations about pricing practices.

[199] For example, the Productivity Commission noted that while Sydney, Melbourne, Brisbane and Perth airports had substantial market power, 'aeronautical revenue and charges, and profitability are within reasonable bounds' (*Economic Regulation of Airports*, inquiry report no. 92, 2019, p. 292).

[200] The issue of time taken and costs associated with applying for declaration was considered in the 2020 DBCT review (see QCA, *DBCT declaration review*, pp. 183–187). The relevance of these factors may vary depending on the circumstances, including the access regime under which declaration is sought. For example, under Part IIIA of the CCA, where any service is declared, there is scope for the ACCC to backdate any access determination (s. 44ZO of the CCA). Likewise, fee arrangements for a declaration application may vary between regimes.

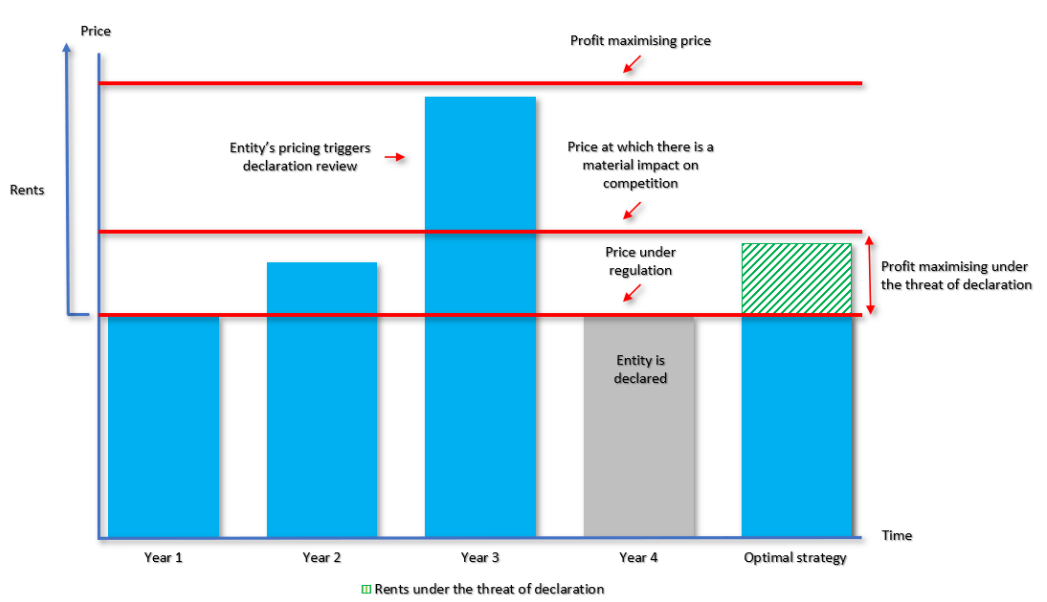
- perceptions about the credibility of the threat of regulation, including regulatory precedent, the ease by which governments could impose regulation and government pronouncements about regulating (or reregulating) the service.[201]

An example of how the threat of declaration, if it is an effective constraint, might influence a monopolist's incentives with regard to pricing is given in Box 15.

[201] For example, the NCC said in relation to the application for declaration of airside services at Sydney Airport that it 'accept[s] that there is a credible threat of re-regulation faced by airports that distinguishes the sector from other monopoly service industries. This is because airports have recently emerged from a regulated environment of price caps and prices notification and are cognisant of the implications (particularly in respect of the costs of operating in a more regulated environment) that would arise from re-regulation. In addition, there is a clear threat from the Government that it will reimpose more heavy-handed regulation if light-handed regulation was considered to be ineffective in addressing market power' (*Application by Virgin Blue for declaration of Airside Services at Sydney Airport*, final recommendation, 2003, p. 78, para 6.174).

Box 15 How the threat of regulation might influence market behaviour

The figure below illustrates how the threat of declaration, if it is an effective constraint, may potentially influence an unregulated monopolist's incentives with regard to pricing. This is an indicative scenario only; the circumstances will vary in each individual case under consideration.



The scenario depicted in the graph is based on the following assumptions:

- There are three pricing points.
  - Profit maximising price > price at which there is a material impact on competition > regulated price.
  - The regulator and the monopolist know where the prices are relative to each other (i.e. above or below in relation to each other).
- The monopolist has no uncertainty about its profit maximising price if it was unconstrained in exerting market power, as it knows, among other things, the elasticity of demand of its customers. However, depending on the circumstances, the monopolist may be uncertain about the regulated price and the price at which there would be a material impact on competition.
- The monopolist has an incentive to increase its prices, as demand for its output is relatively inelastic (as it has market power). Increasing the price, absent regulatory constraints, is profit maximising.
- The monopolist has an incentive to increase prices in year 2 and then again in year 3. But if the price increase in year 3 results in a price at which there will be a material impact on competition in a dependent market(s), the monopolist's service could be declared.
- If the monopolist's service is declared for third party access in year 4, the regulated price would likely be lower than the profit maximising price and the price at which there is a material impact on competition.

In circumstances where the threat of declaration is an effective constraint, the unregulated monopolist's optimal pricing strategy may therefore be to price above the price it thinks the

regulator would approve, but below the price at which it may be considered that there is a material impact on competition in a dependent market(s) (noting that there is uncertainty regarding these prices).

As an example of considering the effectiveness of the threat of regulation as a constraint, in its inquiry into the economic regulation of airports, the Productivity Commission concluded that airports faced a credible threat of experiencing consequences if they exercise their market power. This included, among other things, the threat of the government imposing price regulation by requiring an airport to lodge an access undertaking with the ACCC or deeming airport services to be subject to third party access regulation under Part IIIA of the *Competition and Consumer Act 2010*.[202]

The Productivity Commission noted:

> Each of these measures would have effects on airports. Some, such as declaration under the National Access Regime or the imposition of an access undertaking, would have significant consequences for airports' commercial negotiations and investment decisions. Other measures would lead to increased information disclosure and the threat of increased regulation. Most of these actions could be implemented through a statement or declaration by the Minister. The threshold for taking action depends, in part, on their consequences—some would require a higher level of proof or evidence of a more significant problem.[203]

The Productivity Commission considered that these measures amount to a credible threat that the Australian Government is able to take action if an airport is found to have exercised its market power to the detriment of the community.[204]

Ultimately, whether the threat of declaration is sufficient to constrain the actions of a monopolist will depend on the facts and circumstances in each case.

Other potential contractual, legislative or government policy constraints

Other matters that may potentially constrain a service provider's actions could include, for example, lease arrangements, legislation or government policies. Whether these matters are an effective constraint on the potential exercise of market power will depend on the circumstances in each case.

In the Port of Newcastle revocation matter, the NCC considered a number of potential constraints, including the lease arrangements for the port and certain legislation. It said:

> The NSW Government would be likely to intervene if PNO imposed excessive price increases or other access limitations that had the potential to have a material adverse impact on competition in the dependent markets, or otherwise harm the public interest. Such intervention might be via

[202] Productivity Commission, *Economic regulation of airports*, inquiry report no. 92, 2019, pp. 294–295. See also *DBCT declaration review*, 2020, p. 83; Queensland Government, *Gazette: Extraordinary*, vol. 384, no. 31, 1 June 2020, para 4.3.35 (p. 234), para 4.6.3 (p. 278), para 4.6.9 (p. 279), paras 4.6.17-4.6.21 (pp. 283-285); QCA, *Queensland Rail declaration review*, final recommendation, March 2020, pp. 52–54; NCC, *Revocation of the declaration of the shipping channel services at the Port of Newcastle*, recommendation, 2019, pp. 64–66.

[203] Productivity Commission, *Economic regulation of airports*, inquiry report no. 92, 2019, p. 295.

[204] The Australian Competition Tribunal had previously formed a different view on the impact of the threat of regulation on airport pricing in the *Sydney Airport* matter. In that decision, the Tribunal said 'we are satisfied that any threat of re-regulation is, in reality, quite limited. Although the Government announced that an earlier review would be conducted if there was evidence of unjustifiable price increases or if it were found that airport operators were abusing their market power by unjustifiably raising prices and the Government reserved the right to re-impose price controls, there has been no evidence that the conduct of SACL [Sydney Airports Corporation Limited] to date has stimulated any further Government action or interest.' (*Sydney Airport* [2005] ACompT 5 at [505]).

> the terms of PNO's lease; under the terms of the PAMA Act (by referral to IPART); or by introducing new statutory restrictions.[205]

The NCC said that the requirements under *Ports and Maritime Administration Act 1995* (NSW) and Ports and Maritime Administration Regulation 2012 (NSW) provide some very limited constraint of PNO's pricing practices by promoting transparency. However, they do not act to directly limit or regulate the level at which prices may be set, and the resultant regulatory constraint is at the lighter end of the regulatory spectrum.[206]

In our 2020 DBCT review, we did not consider that the lease agreement with the state (the Port Services Agreement) constrained DBIM.[207] Similarly, in our 2020 Queensland Rail review, we did not consider that Queensland Rail's ability to exercise market power was constrained by the *Queensland Rail Transit Authority Act 2013 (*Qld).[208]

We also considered the relevance of s. 46 (misuse of market power) of the CCA in our 2020 declaration reviews. A summary of our views on this issue, as outlined in the context of the declaration reviews, is given in Box 16.[209]

[205] NCC, *Revocation of the declaration of the shipping channel service at the Port of Newcastle*, recommendation, July 2019, p. 2, para 1.9.
[206] NCC, *Revocation of the declaration of the shipping channel services at the Port of Newcastle*, recommendation, 2019, p. 65, para 7.106.
[207] QCA, *DBCT declaration review*, final recommendation, 2020, pp. 78-79.
[208] QCA, *Queensland Rail declaration review*, final recommendation, 2020, p. 51.
[209] Broadly, the provision prohibits a corporation that has a substantial degree of power in a market from abusing its market power.

Box 16 Section 46 of the CCA—misuse of market power

An issue raised by stakeholders in the 2020 declaration reviews was 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 services providers are subject to s. 46 of the CCA. This provision is a general prohibition on the misuse of market power. Our view was that this is potentially relevant to whether criterion (a), as well as criterion (d), is satisfied.

We addressed the issue of the differences in scope and application of s. 46 of the CCA and the access regime under Part 5 of the QCA Act in our draft recommendations for the 2020 declaration reviews.[210] We concluded that s. 46 does not stand in the way of criteria (a) and (d) being satisfied. Section 46 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 that is vertically integrated into a dependent market, but may be less evident in a case of a service provider which is not. This is an important differentiator to the access criteria.

In this context we:

- were not satisfied that the threat of liability under s. 46, in the absence of declaration, would of itself result in service providers choosing to offer access to services on reasonable terms and conditions
- believed that s. 46 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.

Source: QCA, Declaration reviews, draft recommendations, December 2018, pp. 23–25; QCA, Declaration reviews, final recommendations, March 2020, p. 23, Productivity Commission, National Access Regime, inquiry report no. 66, 2013, pp. 67–69.

5.4.3 Access on reasonable terms as a result of declaration

Criterion (a) requires 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'.

The words 'on reasonable terms and conditions, as a result of a declaration of the service' 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* (Cth), with effect from 6 November 2017.

The explanatory memorandum to the Bill amending the CCA Act describes how criterion (a) in Part IIIA is intended to operate as a result of these amendments:

> 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

[210] QCA, *Declaration reviews*, draft recommendations, December 2018, section 2.4.7.

> amendments focus the test on the effect of declaration, rather than merely assessing whether access (or increased access) would promote competition.
>
> This requires a comparison of two future scenarios: one in which the service is declared and more access 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.
>
> 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.[211]

It is not necessary to form a view on the specific terms and conditions of access under declaration. Access terms that result from us weighing the mandatory considerations in an arbitration[212] or in approving an access undertaking[213] would be 'reasonable terms and conditions' as a result of declaration referred to in criterion (a). This approach is outlined in our final recommendation on the 2020 declaration reviews:

> The inclusion of the words 'on reasonable terms and conditions' in criterion (a) 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. Rather, the QCA considers these words are intended to describe what access or increased access looks like for the purpose of applying the criterion (i.e. 'access' means 'access on reasonable terms and conditions').
>
> The QCA considers that the terms and conditions that would result from the QCA weighing the mandatory considerations in an arbitration or in approving an access undertaking would be 'reasonable terms and conditions' as a result of declaration referred to in criterion (a).[214]

Similarly, in considering what 'reasonable terms and conditions as a result of declaration' are, the NCC said in its final recommendation on the Port of Newcastle revocation matter:

> The Council considers that the notion of 'access, on reasonable terms and conditions, as a result of declaration' takes its meaning from the statutory context within Part IIIA. The determination of terms and conditions of access for a declared service is governed by Division 3. If a party is unable to agree with the provider of a service on one or more terms of access to a declared service and notifies the ACCC of the access dispute, the ACCC is required to determine terms and conditions of access. In determining the dispute, the ACCC has regard to a range of factors including the object of the Part, the legitimate business interests of the provider, the direct costs of providing access to the service and the economically efficient operation of the facility.
>
> The Council therefore considers that the reasonable terms and conditions referred to in criterion (a) can be assumed to be such terms and conditions that would meet or are directed to the mandatory considerations in Division 3.[215]

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[211] Explanatory memorandum, CCA Amendment Bill 2017 at [12.19]–[12.21].
[212] QCA Act, s. 120.
[213] QCA Act, s. 138(2).
[214] QCA, *Declaration reviews*, final recommendation, March 2020, p. 19.
[215] NCC, *Revocation of the declaration of the shipping channel services at the Port of Newcastle*, recommendation, 2019, p. 42, paras 7.25–7.26.

The Australian Competition Tribunal stated in its 2021 decision regarding the Treasurer's decision not to declare services at the Port of Newcastle:

> The assumption inherent in the language of criterion (a) is that declaration will result in access to the relevant service on reasonable terms and conditions. The phrase "on reasonable terms and conditions" is not defined in the Act.
>
> ….
>
> While experience shows that access as a result of declaration may involve considerable disputation with resulting delays and cost, criterion (a) requires the decision maker to assume that declaration will result in access on reasonable terms and conditions. In relation to price terms, the appropriate assumption is that prices would be determined in accordance with the principles specified in Division 3 of Part IIIA (specifically, s 44X) and would provide the facility owner with a normal expected rate of return.
>
> ….
>
> For those reasons, the Tribunal has had no regard to arguments concerning the uncertainty of future access terms and conditions as a result of declaration. The Tribunal makes the assumption that such access terms and conditions will be determined and will be reasonable.[216]

The Productivity Commission similarly expressed the view that it would not be necessary for decision-makers to come to a view on the outcomes of negotiation or arbitration under Part IIIA; it would be sufficient for decision-makers to assume that access may occur on reasonable terms and conditions.[217]

5.4.4 Promotion of a material increase in competition

For criterion (a) to be satisfied, we must be satisfied that the reasonable terms and conditions of access due to declaration would promote[218] a material increase in competition in at least one dependent market compared to a scenario without declaration.

The words 'material increase' were first introduced into criterion (a) in the QCA Act by the *Motor Accident Insurance and Other Legislation Amendment Bill 2010* (Qld). The explanatory notes to that Bill state that the purpose of the amendments to s. 76 of the QCA Act is to:

> [a]mend 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 ...[219]

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

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[216] *Application by New South Wales Minerals Council (No 3)* [2021] ACompT4 at [146]–[148]. S. 44X refers to the matters that the ACCC must take into account in making a determination (a broadly equivalent provision to s. 120 of the QCA Act).

[217] Productivity Commission, *National access regime*, inquiry report no. 66, 2013, p. 172.

[218] In its decision on the NSWMC application, the Tribunal said that the ordinary meaning of the word 'promote' is to support, encourage, facilitate or further, and that this ordinary meaning is consistent with the use of the word in its statutory context. The Tribunal also said that 'would' in criterion (a) should be construed in accordance with its ordinary meaning. This requires the decision-maker to be satisfied that if the service is declared and access given on reasonable terms and conditions, a material increase in competition will be promoted by that access. In the NSWMC matter though, the Tribunal considered that the same ultimate conclusion on criterion (a) must be reached whether the word 'would' is interpreted as the conditional tense of 'will' (which requires it to be satisfied on the balance of probabilities) or is interpreted as including a 'significant finite probability'. See *Application by New South Wales Minerals Council (No 3)* [2021] ACompT4 at [134], [142]–[143].

[219] Explanatory notes, Motor Accident Insurance and Other Legislation Amendment Bill 2010 (Qld), p. 16.

> 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."
>
> …
>
> In order to determine whether access or increased access would promote competition in a dependent market, it is necessary to undertake an analysis of the future with declaration (which is referred to as the factual) as against the future without declaration (which is referred to as the counterfactual).[220]

The NCC described 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.[221]

This is also consistent with the Australian Competition Tribunal's approach in the *Duke EGP* matter, which referred to the Tribunal's decision in *Sydney International Airport*:

> It is in this sense that the notion of 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. We agree.[222]

We broadly endorsed the approach to criterion (a) described in the above quotes in our 2020 review of the declarations of Queensland Rail, Aurizon Network and DBCT, recognising that the test to be applied requires promotion of a 'material increase' in competition.[223]

In relation to the application by the NSWMC regarding the Port of Newcastle, the Australian Competition Tribunal subsequently noted in relation to criterion (a) that a material increase in competition is promoted if the conditions, opportunities or environment for competition are improved in more than a trivial way.[224] Further, it noted that:

> The criterion necessitates a forward looking analysis focussed upon the effect of access as a result of declaration. The necessary comparator is the commercial environment without declaration.[225]

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[220] *Sydney Airport* [2005] ACompT5 at [146], [148].
[221] NCC, *Guide to declaration*, version 6, 2018, p. 32, para 3.23.
[222] *Duke EGP* [2001] ACompT 2 at [75].
[223] QCA, *Declaration reviews*, final recommendation, March 2020, p. 21.
[224] *Application by New South Wales Minerals Council (No 3)* [2021] ACompT4 at [51(b)].
[225] *Application by New South Wales Minerals Council (No 3)* [2021] ACompT4 at [51(c)].

Moreover, the relevant dependent market need not be the most significant market, in which a material impact on competition must be demonstrated. In the decision on DBIM's statutory order of review, Davis J noted:

> The test is not whether the declaration promotes a material increase in competition throughout the chain of supply or whether the market affected is "material". Once a market is identified, the question is whether the declaration would promote a material increase in competition in that market.[226]

That said, the significance of the dependent market may be a relevant factor in forming a view on whether declaration is in the public interest (criterion (d)).

What does 'material' mean in practice?

A trivial increase in competition would not qualify as 'material'.[227] The term 'material' is also distinct from 'substantial'.[228] The Australian Government, in its response to the Productivity Commission's 2001 inquiry report on the national access regime (which in turn informed the 2010 amendments to the QCA Act), preferred the use of 'material', rather than the term 'substantial', which the Productivity Commission preferred:

> The Government considers that, in this context, the term 'substantial' may exclude situations where a small supplier is prevented from gaining access to nationally significant infrastructure. The government therefore will include the word 'material' to ensure access declarations are only sought where the increases in competition are not trivial.[229]

Promoting a material increase in competition is not necessarily equivalent to promoting the greatest number of competitors in the market—as strong competition may exist between a few firms. Rather, it involves the possibility that efficient entry and efficient participation by firms would be promoted in a future with declaration, compared to a future without declaration. A transfer of rents between the entity providing the service for which declaration is sought and other entities in the supply chain is also not in itself necessarily sufficient to demonstrate a material impact on competition.[230]

In the 2020 declaration reviews we considered that if efficient entry is likely to be promoted in a future with declaration (compared to a future without declaration), this would indicate that access as a result of declaration would promote an increase in competition that is material.[231]

The NCC noted in the Port of Newcastle revocation matter:

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[226] *DBCT Management Pty Ltd v Treasurer and Minister for Infrastructure and Planning (Qld) & Ors* [2021] QSC 335 at [38].

[227] See *Sydney Airport* [2005] ACompT 7 at [146]; Explanatory notes, Motor Accident Insurance and Other Legislation Amendment Bill 2010 (Qld) at 16; Explanatory memorandum, Trade Practices Amendment (National Access Regime) Bill 2005 (Cth) 3 at [1.9]; *In the matter of Fortescue Metals Group Ltd* [2010] ACompT 2 at [584]; QCA, *Declaration reviews*, final recommendation, 2020, pp. 20–23.

[228] QCA, *Declaration reviews*, final recommendation, March 2020, pp. 21–22.

[229] P Costello, *Government response to Productivity Commission report on the review of the national access regime*, Australian Government, 20 February 2004, p. 7.

[230] That said, there may be cases where a transfer of rents can have a material impact on competition—for example, if it has an impact on a firm's competitiveness or investment incentives that is sufficient to materially impact competition in the dependent market. For instance, we noted in our 2020 recommendation on the Queensland Rail service that the presence of the risk of hold-up means that socially optimal investments will not proceed, or there will be an underinvestment (QCA, *Queensland Rail declaration review*, final recommendation, 2020, p. 88).

[231] QCA, *Queensland Rail declaration review*, final recommendation, 2020, p. 67.

> [P]romoting the process of competition is not to be confused with promoting the greatest number of competitors. Competition will lead to the displacement of less efficient rivals by more efficient ones in a market.
>
> ….
>
> The purpose of access regulation is not, therefore, to promote the greatest number of competitors in a market irrespective of their relative efficiencies. It is instead to promote the process of competition and the consequent improvements in efficient market outcomes that result from it. As noted by the Tribunal in *Re Telstra Corporation Ltd (No. 3)*:
>
> > [W]e believe it is important not to confuse the objective of promoting competition with the outcome of ensuring the greatest number of competitors. That is, the Act aims to promote competition because of the benefits that result from the process of competition, such as lower prices for consumers and the displacement of inefficient suppliers by efficient suppliers of services. (at [99])[232]

The NCC further noted criterion (a) is not met merely by establishing that the service provider has market power, that prices under declaration may be lower or that regulated access will result in a different share of gains between access seekers and a service provider:

> Criterion (a) is not met merely by establishing that a service provider is a bottleneck monopoly or possesses market power. While it is possible that lower prices for access to a service may arise in a future with declaration of a service compared to a future without declaration, this does not necessarily mean that competition will be promoted in a related market. To the extent that a lower price for access would lead to little (if any) change in consumption or production decisions by participants in related markets, the lower price may merely have the effect of redistributing the economic surplus generated within a supply chain. It is also possible that lower prices for access to a service do not materially impact on the ability of market participants in related markets to compete against each other on their merits. This is especially the case if prices were not significantly lower, and were set at broadly equivalent levels for all access seekers.
>
> Neither is criterion (a) satisfied merely by establishing that regulated access will result in a different share of gains between access seekers and a provider of a service. In a vertical supply chain, parties may disagree about the division of the gains from production and trade. Participants at each stage of the supply chain will want a greater share, necessarily leaving a lesser share for other participants. Actions by one party to secure a greater share of the gains may, but do not necessarily, affect competition in a related market.[233,234]

In its 2021 decision in relation to the Port of Newcastle, the Australian Competition Tribunal said that it is necessary to distinguish between the efficiency consequences of monopoly pricing by the facility owner and the consequences for competition in dependent markets. It observed that

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[232] NCC, *Revocation of the declaration of the shipping channel services at the Port of Newcastle*, recommendation, 2019, p. 43, paras 7.33–7.34.

[233] NCC, *Revocation of the declaration of the shipping channel services at the Port of Newcastle*, recommendation, 2019, pp. 42–43, paras 7.31–7.32.

[234] The Australian Competition and Consumer Commission (ACCC) noted a potentially different approach to criterion (a) in its submission on the 2020 application for declaration of certain services at the Port of Newcastle. In particular, the ACCC said that criterion (a) should be interpreted in a manner consistent with the objects of Part IIIA. It said that '[i]n accordance with the first object, the focus of the criterion (a) assessment should be on whether declaration would promote economically efficient operation of, use of and investment in the infrastructure by which services are provided, thereby promoting a material increase in competition, rather than simply an assessment of…whether a scenario without declaration materially affects competition in a dependent market.' The ACCC considered that the NCC should not disregard the inefficiencies, and the resulting cost to the community, caused by PNO's ability and incentive to earn monopoly profits, and the effect this inefficiency will have on competition in related markets. (See ACCC, submission to the NCC, *Application for declaration of certain services at the Port of Newcastle,* 26 August 2020, pp. 1, 4). Our view is that while criterion (a) should be interpreted having regard to the objects clause, this is in the context of assessing the impact on competition in dependent markets. Otherwise, efficiency matters are more appropriately considered in criterion (d).

the effect of monopoly pricing is simply to raise the price of one of a myriad of input prices to a dependent market, and when one of an industry's costs goes up, there is no presumption of an adverse effect on competition:

> An increase in an industry's cost structure has no necessary effect on the degree of rivalry or the competitive process in the dependent market, because the increase in the cost structure does not affect the market structure and behavioural factors that determine the competitive process.
>
> ….
>
> Indeed, a transfer of economic rents between parties in a supply chain, which does not affect the willingness of existing producers to consume or produce, will not have an adverse effect on allocative efficiency, let alone an adverse effect on competition, in the dependent markets. However, even if monopoly pricing were to cause a reduction in consumption or production, that will not *necessarily* affect the conditions or environment for competition in the dependent market.[235]

However, the Australian Competition Tribunal emphasised that the specific circumstances of each case are relevant:

> The Tribunal emphasises though, that each case is fact specific and depends upon the nature of the facility, the nature and extent of competition in the dependent markets, and the potential significance of access prices (and increases in the access prices) to competition in the dependent markets. The Tribunal acknowledges the possibility that, in a given case, the potential for "mere" monopoly pricing may cause firms to exit a market or prevent firms from entering a market or otherwise create circumstances where it is possible to conclude that there has been a material decrease in the conditions or environment for competition in the market.[236]

Our assessment would therefore consider the likely impact of declaration, including the impact of any price change, on the conditions and environment for competition in dependent markets, having regard to the circumstances of the case.

The Productivity Commission outlined some indicators for assessing the impact on competition (Box 17).

[235] *Application by New South Wales Minerals Council (No 3)* [2021] ACompT4 at [159], [161].
[236] *Application by New South Wales Minerals Council (No 3)* [2021] ACompT4 at [162].

Box 17 The Productivity Commission's indicators for assessing impact on competition

The Productivity Commission noted that promotion of competition can be measured by a number of legal indicators set out in CCA case law. In particular, in the *Queensland Co-Operative Milling Association Ltd* case, the Trade Practices Tribunal linked the scope for competition to the following elements of market structure:

- the number and size distribution of independent sellers, especially the degree of market concentration
- the height of barriers to entry, that is the ease with which new firms enter and secure viable market share
- the extent to which the products of the industry are characterised by extreme product differentiation and sales promotion
- the character of 'vertical relationships' with customers and with suppliers and the extent of vertical integration
- the nature of any formal, stable and fundamental arrangements between firms which restrict their ability to function as independent entities.

Source: Productivity Commission, National access regime, inquiry report no. 66, 2013, p. 168.

Other factors to consider in assessing whether there would be a material impact on competition as a result of declaration might include:

- the incentives for potential entrants to enter the market (which would involve considering the extent to which the environment under declaration for an access seeker differs to the environment without declaration)
- differences in the cost and risk of operations between current market participants and between current participants and potential market entrants
- the proportion of costs in a dependent market that are affected by charges in the market for the service[237]—although this should be considered in the context of:
  - the extent to which the service provider can profitably increase the charges
  - margins in dependent markets
  - availability of substitutes for access seekers in the event of price increases
- whether a dependent market is derivative of another dependent market, such that the impact on competition in that market may depend on the conclusion reached regarding the other market[238]

[237] *Application by New South Wales Minerals Council (No 3)* [2021] ACompT4 at [9(c)], [192], [257], [261]; Productivity Commission, *Economic Regulation of Airports*, inquiry report no. 92, 2019, pp. 101, 234.

[238] The logic of competition analysis in derivative markets being related to the conclusion in respect of other markets was applied by the NCC and the Tribunal in the Port of Newcastle declaration and Port of Newcastle declaration revocation matters. See NCC, *Revocation of the declaration of the shipping channel services at the Port of Newcastle*, recommendation, 2019, paras 7.391–7.392; *Application by Glencore Coal Pty Ltd* [2016] ACompT 6 at [139].

- the number and size of potential new entrants (although the number of potential new entrants is not of itself definitive).[239]

Finally, in considering criterion (a), it is not necessary to demonstrate that a promotion of competition will actually occur. It is sufficient for us to be satisfied that the environment for competition with declaration will be superior to the environment for competition without declaration, such that a material impact on competition is likely to occur.[240]

Box 18 provides an overview of our approach to applying this criterion (a) test in our 2020 DBCT review.

Box 18 The QCA's approach to considering a material impact on competition for development stage tenements market

In our 2020 DBCT review, we said that an assessment of a material increase in competition in the market for development stage tenements requires considering whether a future without declaration would materially impact on the ability of market participants to compete against each other in developing tenements on their merits, compared to a future with declaration, all other considerations remaining unchanged.

Our view was that in a future without declaration, potential DBCT users (new users) would face a less favourable access environment—including a higher terminal infrastructure charge (TIC) than existing users—which would not arise in a future with declaration. The 'materiality' threshold required us to consider whether, for instance, the higher TIC faced by new users would have the effect of making some tenements developed by new users unprofitable—that is, if it would have a detrimental impact on the ability of new users to develop some tenements, relative to those developed by existing users, and compared to if they were developed in a future with declaration, all other things being equal. If the TIC new users would be subject to in a future without declaration would necessarily be at a level to have that effect, we could be satisfied that declaration would promote a material increase in competition in this market. Otherwise, we could not be satisfied that declaration would promote a material increase in competition in that market. In the latter case, a higher TIC may represent a redistribution of the economic surplus generated within a supply chain.

Source: QCA, DBCT declaration review, final recommendation, March 2020, p. 145.

Consider whether markets are already workably competitive

In considering the effect of declaration on competition in dependent markets, we may also consider whether dependent markets are already workably competitive.[241] If a dependent market would be workably (or effectively) 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.[242]

[239] A large increase in small or marginal entrants may not demonstrate a material impact on competition.
[240] *Sydney Airport* [2005] ACompT 5 at [146].
[241] The terms 'workable' competition and 'effective' competition are often used interchangeably—they have the same meaning.
[242] *In the matter of Fortescue Metals Group Limited* [2010] ACompT 2 at [1068]. See also NCC, *Guide to declaration*, version 6, 2018, pp. 32–33, paras 3.24–3.25.

What does 'workable competition' mean?

The NCC explained the meaning of 'workable competition' in its guide to the declaration of services:

> 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.
>
> 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). [footnotes omitted][243]

The Hilmer Report discussed workable competition by considering whether prices could be sustained in the long run:

> In markets characterised by workable competition, charging prices above the level of long run average costs will not be possible over a sustained period, for higher returns will attract new market entrants or lead customers to choose a rival supplier or product.[244]

The Australian Competition Tribunal noted in the *Chime Communications* matter:

> There will be sufficient or effective competition (as opposed to the unobtainable concept of perfect competition) if market(s) experience at least a reasonable degree of genuine rivalry between the constituent firms, each of which suffers some constraint imposed by competitors, customers and suppliers[245]

The Tribunal also said that a market is sufficiently competitive if it experiences at least a reasonable degree of rivalry between firms and some constraint on their use of market power:

> In the Tribunal's view a market is sufficiently competitive if the market experiences at least a reasonable degree of rivalry between firms each of which suffers some constraint in their use of market power from competitors (actual and potential) and from customers. The criteria for such competition are structural (a sufficient number of sellers, few inhibitions on entry and expansion), conduct-based (eg no collusion between firms, no exclusionary or predatory tactics) and performance-based (eg firms should be efficient, prices should reflect costs and be responsive to changing market forces).[246]

Likewise, in the *Pilbara* matter, the Tribunal stated:

> The extent of competition is another matter. Economists describe markets as perfectly competitive, effectively competitive or imperfectly competitive (such as monopolies or oligopolies). The state of competition in a market is the result of internal and external factors which bear upon the nature and extent of the rivalry…
>
> …
>
> There are other descriptions. Professor Brunt says there is effective competition where the availability of substitutes, both in demand and supply act as constraints on each individual firm's market power. (Brunt, supra, 96). Professor Hausman said that by effectively competitive economists mean that no individual firm (or group of firms) is exercising significant market power

[243] NCC, *Guide to declaration*, 2018, version 6, pp. 32–33, paras 3.24–3.25.
[244] Extracted from Houston Kemp, *Assessing market power in aeronautical services*, report for the Australian Airports Association, September 2018, p. 4.
[245] *Application by Chime Communications Pty Ltd (No 3)* [2009] ACompT 4 at [7].
[246] *Application by Chime Communications Pty Ltd (No 2)* [2009] ACompT 2 at [48].

> nor is the price above the competitive price. The Report of the US Attorney General's National Committee to Study Antitrust Laws (1955) (at 320) states that no firm can choose its level of profit by giving less and charging more. This can only occur if there is a lack of availability of substitutes in supply and demand.[247]

The Tribunal also noted that criterion (a) is concerned with workable competition—a view it said was reinforced by the introduction of s. 44AA, which expressly provides that an object of Part IIIA is to promote effective competition:

> The position we take is that if a dependent market is already effectively competitive, intervention is not called for. That is, we read criterion (a) as having no application to a market which is effectively competitive.[248]

This focus on workable competition in the national access regime was noted by the Productivity Commission:

> There was widespread agreement from participants that the market failure the National Access Regime (the Regime) should address is a lack of effective competition that arises due to natural monopoly in infrastructure services. (Effective competition requires that firms should be subject to a reasonable degree of competitive constraint from actual or potential competitors, or from customers, as opposed to a theoretical—and unattainable—ideal of perfect competition.) Where access is required for third parties to compete effectively in dependent markets, a lack of effective competition can impose costs on the community where this allows service providers to restrict output and maintain prices above allocatively efficient levels ...[249]

The promotion of workable competition is also referred to in the object of 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.[250]

In the context of the economic regulation of airports, the Productivity Commission noted the importance of barriers to entry and exit in determining the extent of competition in a market:

> Market entry, or the potential for entry of new competitors, is a precondition for workable competition. If an incumbent firm sets charges at a level that leads to excessive profits or offers a low quality of service, rival firms have an incentive to enter the market, undercut prices and/or offer a better service and make an economic profit. This would result in customers moving from the incumbent to the rival firm. High barriers to entry and exit—as is often the case with airports—can limit this response.[251]

The Australian Competition Tribunal cited the Tribunal in *QCMA* in its 2021 decision in relation to the Treasurer's decision not to declare the Port of Newcastle:

> Effective competition connotes that no one seller, and no group of sellers acting in concert, has the power to choose its level of profits by giving less and charging more, because they will be constrained by existing competitors or potential new entrants.
>
> Competition expresses itself as rivalrous market behaviour. Effective competition requires both that prices should be flexible, reflecting the forces of demand and supply, and that there should be independent rivalry in all dimensions of the price-produce-service packages offered to customers.
>
> While competition is a process rather than a situation, the nature and extent of competition is affected by the conditions of the relevant market, particularly market concentration, the height

[247] *In the matter of Fortescue Metals Group Limited* [2010] ACompT 2 at [1051]-[1052].
[248] *In the matter of Fortescue Metals Group Limited* [2010] ACompT2 at [1068].
[249] Productivity Commission, *National Access Regime*, inquiry report no. 66, 2013, p. 72.
[250] QCA Act, s. 69E.
[251] Productivity Commission, *Economic Regulation of Airports*, inquiry report no. 92, 2019, p. 93.

> of barriers to entry, the extent of product differentiation, the character of vertical relationships between customers and suppliers and the extent of vertical integration and the existence of horizontal relationships between suppliers or between customers.[252]

In summary, 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.[253]

In considering the question of where the hurdle is set on promoting competition under criterion (a), the Productivity Commission noted the following observations by the Australian Competition Tribunal in the *Pilbara* matter:

- 'Access must be "essential" or "necessary" to permit effective competition in a related market for criterion (a) to be satisfied' (para 1067).
- 'If a dependent market is already effectively competitive, intervention is not called for', that is, criterion (a) has 'no application to a market which is effectively competitive' (para 1068).
- If a 'facility could profitably be duplicated … [and] access to the natural monopoly facility or the construction of a substitute facility would equally promote an increase in competition … [then] criterion (a) would not be satisfied' (para 1070).[254]

While the above factors may inform our view on criterion (a), the focus of the assessment will ultimately be on the impact of declaration on competition in dependent markets.

Further, a qualitative assessment of the impact may be sufficient.

Services already declared

If the service under consideration is already declared, or has been previously subject to declaration (potentially for some time), the existing competitive conditions in a dependent market may not necessarily represent the 'future without' declaration; they in fact may reflect the 'future with' declaration (see Box 19).[255]

[252] *Application by New South Wales Minerals Council (No 3)* [2021] ACompT4 at [130(b)]–[130(d)]. See also *Re Queensland Cooperative Milling Association Ltd* (1976) 25 FLR 169.
[253] QCA, *Declaration reviews*, final recommendation, 2020, p. 21.
[254] Productivity Commission, *National access regime*, inquiry report no. 66, October 2013, p. 171.
[255] QCA, *Declaration reviews*, final recommendation, 2020, pp. 21–22.

Box 19 Consideration of an already declared service against the access criteria

In our 2020 declaration reviews, we had to decide whether to recommend the declaration of certain services that were already declared (and had been for some time).

We noted that this meant that the existing competitive conditions in a dependent market may not necessarily represent the 'future without' declaration; they in fact may reflect the 'future with' declaration. 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. On the other hand, we noted that it may be necessary to consider whether the pre-existing declarations, whilst perhaps constraining the use of market power by DBIM, Aurizon Network and Queensland Rail, have had no material impact on competitive conditions in dependent markets.

In applying this approach to the DBCT service, we noted that the terms and conditions of access that existed at that stage (and the state of competition in related markets) reflect the current outcome of declaration, including the application of the QCA Act, the operation of access undertakings and user agreements entered into under these arrangements (although it should not automatically be assumed that the current state of competition in dependent markets is necessarily a result of declaration). We further noted that, while a future scenario in which there is declaration does not necessarily involve a continuation of the status quo, the then existing conditions help illustrate this future scenario.

Source: QCA, Declaration reviews*, final recommendation, March 2020, p. 22; QCA,* DBCT declaration review*, final recommendation, March 2020, p. 85; Queensland Government,* Gazette*:* Extraordinary*, vol. 384, no. 31, 1 June 2020, p. 276, para 4.5.2.*

5.5 Time horizon for the assessment

It is necessary to determine a period of time over which criterion (a) is assessed, as the impact of declaration on conditions for competition in dependent markets may change over time due to changing technology and market circumstances (e.g. new market entry or expansions of capacity). The appropriate time horizon for the assessment will depend on the circumstances of each case. In determining this horizon, the NCC has regard to foreseeable changes in technology and/or market conditions, and the timing and probability of those changes.[256]

In the Australian Competition Tribunal's 2021 decision in relation to the Treasurer's decision not to declare the Port of Newcastle, the Tribunal agreed with the NCC's view, and noted:

> The economic issues with which Part IIIA is concerned indicates that the time horizon relevant to the assessment is across the medium term. By "across", we mean that the effects of declaration should be assessed having regard to the present market conditions, opportunities and environment and forecasting how those conditions, opportunities and environment may evolve and change into the medium term with and without declaration.
>
> ….
>
> What constitutes the medium term in a given case may vary depending on the characteristics of the industries that are the subject of consideration. However, we consider that the assessment of the medium term should be guided by one practical consideration: over what time period is it

[256] NCC, *Guide to declaration*, version 6, 2018, pp. 34–35.

> feasible to make reasonable predictions about the conditions, opportunities or environment for competition in relevant dependent markets with and without declaration? In the present proceeding, the Tribunal defines the medium term as 10 to 15 years.[257]

The NCC also noted that while there is a time horizon to the assessment of both criterion (a) and criterion (b), the time horizon over which it accounts for relevant changes for the two assessments may not necessarily be the same.[258]

Likewise, in our 2020 DBCT review, while we assessed whether criterion (b) was satisfied over a 10-year period (to 2030), we assessed whether criterion (a) was satisfied having regard to a longer time frame (beyond 2030).[259]

[257] *Application by New South Wales Minerals Council (No 3)* [2021] ACompT4 at [151]–[152].
[258] NCC, *Guide to declaration*, version 6, 2018, p. 35.
[259] QCA, *DBCT declaration review*, final recommendation, 2020.

6 CRITERION (C): STATE SIGNIFICANCE

> **Box 20 Criterion (c)—state significance**
>
> Section 76(2)(c):
>
> that the facility for the service is significant, having regard to its size or its importance to the Queensland economy

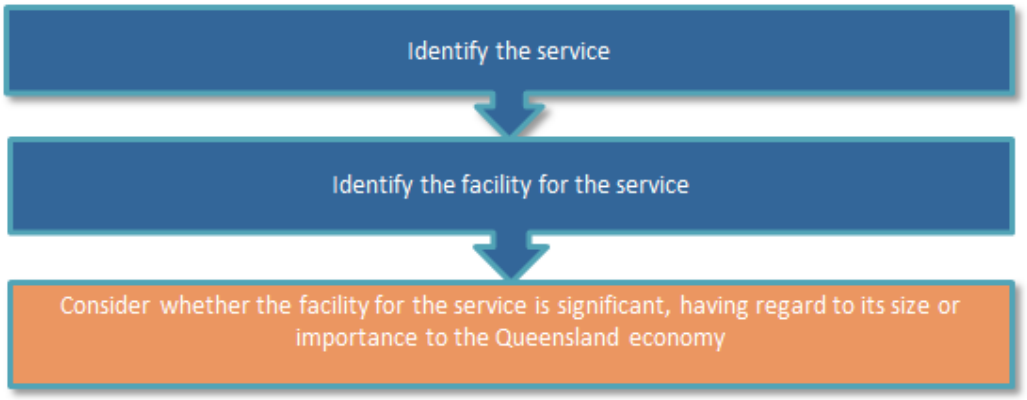
6.1 Purpose of criterion (c)

The purpose of criterion (c) is to ensure that only facilities that play a significant role within the state economy fall within the scope of Part 5.[260]

6.2 Our approach

Our approach is to consider whether a facility is significant, having regard to its size *or* its importance to the state economy. It is not necessary to be satisfied about both elements.

Figure 7 Our approach to assessing whether criterion (c) is satisfied



6.3 Assessing criterion (c)

Criterion (c) is a subjective test and does not require that any technical hurdle or threshold is satisfied.[261] In this context, the High Court noted in the *Pilbara* matter that:

> [criterion (c)] … may direct attention to matters of broad judgement of a generally political kind.[262]

Criterion (c) under the Part 5 access regime in the QCA Act considers whether the facility is of state significance by having regard to the two factors (i.e. size or importance). The satisfaction of the factors by themselves is not sufficient. Rather, it is something to have regard to in assessing state significance.[263] For example, the NCC said:

[260] Similar comments were made by the NCC in relation to criterion (c) in the national access regime in Part IIIA of the CCA about the national significance of facilities. See NCC, *Guide to declaration*, version 6, 2018, p. 39, para 5.1.
[261] Productivity Commission, *National Access Regime*, inquiry report no. 66, 2013, p. 174. Also see NCC, *Guide to declaration*, 2018, p. 39, para 5.4.
[262] *The Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* [2012] HCA 36 at [43].
[263] See NCC, *Guide to declaration*, version 6, 2018, p. 39, para 5.6.

> [it] does not accept … that physical size alone is determinative. Rather, physical size is something to have regard to in assessing whether a facility is of national significance.[264]

In applying criterion (c), we consider whether the facility as a whole satisfies the criterion. Then, if necessary, we may consider the facility in parts. The need to consider the facility in parts may arise if we are considering part services in relation to the other access criteria.

Whether to consider part services was something we examined in the 2020 declaration reviews, for instance:

- In our 2020 Aurizon Network review, we considered whether the CQCN as a whole satisfied the access criteria. We noted that the CQCN was interconnected and we did not consider that any part of the system exhibited characteristics that suggested it did not satisfy the access criteria. We therefore considered criterion (c) on the basis of the facility as a whole.[265] There was no need to consider the facility in parts.
- In our 2020 Queensland Rail review, we considered that the whole of the service did not satisfy the access criteria, primarily as there was no single dependent market for the purposes of criterion (a) and the below-rail service related to discrete route services. We then considered parts of the service against criterion (a).[266]

  For criterion (c), we correspondingly assessed:

  - the facility as a whole
  - the aspects of the facility that provided the part services described in the criterion (a) analysis.

  In other words, given the consideration of the service as a whole and part services for the purposes of criterion (a), we adopted the same approach of assessing whether the facility and part facilities satisfied the other access criteria.

Assessing the whole or parts of the facility for state significance

If the service is assessed as a whole and in parts in relation to other criteria, we may consider whether criterion (c) is satisfied with regard to:

- the facility as a whole
- parts of the facility that provide the part of services.

6.3.1 Size of the facility

The size of the facility reflects its physical characteristics, including:

- footprint—the size of the facility in square metres (relevant where a facility is located in a single position, such as a port)
- length—in kilometres (relevant where a facility comprises a network, for example a sewerage or rail network)

[264] NCC, *Herbert River cane railway: Application for declaration of a service under section 44F of the Trade Practices Act 1974 (Cth)*, final recommendation, 2010, para 7.14 ('*Herbert River review*').
[265] QCA, *Aurizon Network declaration review*, final recommendation, 2020, p. 12.
[266] QCA, *Queensland Rail declaration review*, final recommendation, 2020, p. 14.

- throughput capacity of the facility—the volume of output able to be processed by the facility in a given period (relevant irrespective of the design of the facility)
- area serviced by the facility—in square kilometres.[267]

The size of a facility relative to other facilities can also be considered (although a facility that is larger than other like facilities does not in itself indicate that a facility is of state significance). For example:

- Our final recommendation on the DBCT service compared the nameplate capacity of DBCT to other standalone coal terminals.[268]
- The NCC's final recommendation on the Herbert River Cane Railway compared the size of the railway with the Bondi Reticulation Network.[269]

The level of usage of the facility may also be relevant. For instance, the Australian Competition Tribunal said in *Re Australian Union of Students* (in respect of a computer network):

> It is difficult to envisage how a computer network can be said to have physical dimensions which one may readily find in obvious facilities such as gas pipelines or electricity grids. A computer network may perhaps be said to be sizeable if one examines that question from the aspect of the quantity of information stored by the computer system. Assuming then that a computer network can be said to have size for the purposes of being a facility, the evidence shows that the Austudy data base run by the DEETYA computer network is used to provide Austudy to approximately 485,000 secondary and tertiary students.[270]

Likewise, the NCC in its final recommendations in respect of the Herbert River Cane Railway noted that:

> the Network services a cane growing area of approximately 55 000 hectares with 575 growers … but is fully contained within the Hinchinbrook Shire, which has a population of 12 513.[271]

The assessment of whether a facility satisfies criterion (c) is a matter for judgement (and not a precise calculation), having regard to the particular circumstances of the application for declaration.[272] For example, judgement may be required where a facility may have characteristics that lend itself to competing conclusions on whether it satisfies criterion (c), having regard to its size.

Consistent with this, we noted in our recommendation on the Queensland Rail service that:

> [u]ltimately, whether this criterion is satisfied, and the basis on which this conclusion is reached, depends on the weight given by the decision-maker to the considerations prescribed in s. 76(2)(c).[273]

[267] For instance, in its final recommendations on the *Application by Services Sydney for Declaration of Sewage Transmission and Interconnection services provided by Sydney Water*, the NCC had regard to the population and area (in hectares) serviced by the various reticulation networks (paras 7.6–7.8).
[268] QCA, *DBCT declaration review*, final recommendation, March 2020, p. 214.
[269] NCC, *Herbert River review*, final recommendation, 2010, p. 46, para 7.16.
[270] *Re Australian Union of Students* [1997] ACompT 1.
[271] NCC, *Herbert River review*, 2010, p. 46, para 7.16.
[272] See also QCA, *Queensland Rail declaration review*, final recommendation, 2020, p. 156, section 12.2.2.
[273] QCA, *Queensland Rail declaration review*, final recommendation, 2020, p. 157.

Box 21 Examples of data potentially relevant to size—2020 declaration reviews

In the 2020 Queensland Rail and Aurizon Network reviews, we considered the length of the respective rail networks in kilometres, the geographic coverage of the networks and volume of freight carried.[274] For example, we noted that according to Queensland Rail, its rail network 'extends more than 6,600 km across Queensland' and 'these systems account for approximately 97 per cent of all freight tonnage transported on Queensland Rail's networks'.[275]

In the 2020 DBCT review, we considered the terminal's footprint and rated capacity. We also noted that that DBCT was the largest standalone coal terminal in Queensland.[276]

6.3.2 Importance of the facility to the Queensland economy

The importance of the facility to the Queensland economy reflects its contribution to, among other things:

- exports
- employment
- the state budget
- gross state product
- regional communities.

We may also have regard to:

- the strategic value of the facility
- the facility's bottleneck characteristics, particularly if the dependent markets provide substantial annual sales revenue to participating businesses.[277]

For instance, in the 2020 Queensland Rail review, we noted:

> Importance to the Queensland economy does not merely refer to monetary contributions to the gross state product, but may also include contributions to employment, contributions to regional development and contributions to economic growth and productivity.[278]

A government-subsidised service may also provide some insight on the importance of a facility to the Queensland economy—though the relevance of any subsidy to criterion (c) will depend on the context in which the subsidy is provided. For instance, a subsidy could indicate that:

- the facility is important in terms of the flow-on benefits—for example, to the regional community[279] (hence the facility is of state significance), or

[274] For Queensland Rail, the size of the facility was considered for both the facility as a whole and as parts of the facility (i.e. on a route basis).
[275] QCA, *Queensland Rail declaration review*, final recommendation, 2020, pp. 170–171.
[276] QCA, *DBCT declaration review*, final recommendation, 2020, pp. 214–215.
[277] See also NCC, *Guide to declaration*, version 6, 2018, p. 40, para 5.10.
[278] QCA, *Queensland Rail declaration review*, final recommendation, 2020, p. 175.
[279] QCA, *Queensland Rail declaration review*, final recommendation, 2020, p. 175.

- it may indicate that the commercial value of the activity supported by the facility is small (hence the facility is not of state significance).

Some examples of matters that are potentially relevant when considering the importance of the facility are given in Box 22.

Box 22 Examples of factors potentially relevant to importance

DBCT declaration review

We considered the importance of the terminal to coal exports and royalties.[280]

Queensland Rail declaration review

We considered the access revenue generated and noted that the network supports a range of disparate activities across the state, including mine operations, agricultural and livestock industries, regional communities and the Brisbane metropolitan commuter service.[281]

Aurizon Network review

We considered the importance of the network to the Queensland coal industry.[282]

Sydney and Melbourne international airports

The NCC considered national significance in terms of:

- the volume and value of international trade that depends on the facility
- the airports' strategic importance in the international air freight chain
- the implications for the performance of industries that rely on international airfreight.

The NCC also considered that the assessment of national significance should account for the location of a facility—in particular, whether it acquires greater significance as a result of its co-location with other facilities of the Sydney and Melbourne international airports.[283]

One cannot automatically assume that a facility satisfies criterion (c) where a view is formed that a certain element of size or significance is satisfied but there are contrary indicators.

Separately, the characteristics of a facility that are relevant to the assessments for criteria (a) and/or (b) may also be relevant to the assessment of criterion (c). These characteristics of the facility may include:

- having clear monopoly characteristics (such as high fixed costs, low variable costs, declining average costs)
- being the only facility of its type in a significant geographical region, with users having no viable alternatives
- having market power due to bottleneck features or other characteristics
- being a major source of employment or exports in the state, or an integral part of a supply chain of importance to the state

[280] QCA, *DBCT declaration review*, final recommendation, 2020, pp. 214–217.
[281] QCA, *Queensland Rail declaration review*, final recommendation, 2020, p. 171.
[282] QCA, *Aurizon Network declaration review*, final recommendation, 2020, p. 35.
[283] NCC, *Guide to declaration*, version 6, 2018, p. 41.

- being costly to build or replicate.

Criterion (c) assessments under Part IIIA

To date, applications for declaration of services under Part IIIA of the *Competition and Consumer Act 2010* have typically satisfied the 'national significance' criteria. The NCC's Herbert River Cane Railway recommendation is one exception.[284]

In that matter, the NCC noted that size of itself was not determinative.[285] Rather, size had to be considered having regard to national significance. Therefore, while the length of the tramway was longer than other rail networks that had been declared, it was relevant that the tramway supported a smaller number of users. It was also relevant that while the tramway network was 'big' in some ways (including a maximum track length of 504 to 550 km), it was small in other respects, such as a maximum haulage length of 60 km.[286] The NCC also took into account the number of growers serviced by the railway and the population of the shire in which the railway was located.[287]

We note that the threshold for satisfaction of criterion (c) is lower under Part 5 of the QCA Act than the threshold that applies under Part IIIA of the CCA. This is because under Part 5 of the QCA Act:

- the applicant must satisfy a 'state' significance test, not a 'national' significance test
- if we do not consider a service as a whole satisfies the access criterion, we are required to further consider whether part of the service (which is itself is a service) satisfies the access criterion.

[284] NCC, *Herbert River review*, 2010.
[285] NCC, *Herbert River review*, 2010, p. 46, para 7.14.
[286] NCC, *Herbert River review*, 2010, p. 46, para 7.18.
[287] See also NCC, *Guide to declaration*, 2018, p. 39, para 5.6.

7 CRITERION (D): PUBLIC INTEREST

Box 23 Criterion (d)—Promote the public interest

Section 76(2)(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.

Section 76(5) 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.

7.1 Purpose of criterion (d)

The purpose of criterion (d) is to consider the overall consequences of declaration. The decision-maker must be satisfied that declaration is likely to generate overall gains to the community (compared to the counterfactual of no declaration).[288] Criterion (d) ensures that a service may only be declared if it promotes the public interest.[289] This in turn requires consideration of the likely behaviour of market participants in a future with and without declaration.

In this context, the Productivity Commission said:

> A decision maker can dismiss a declaration application where it concludes that the community would be worse off if there were access (or increased access) to a particular service, even if all other declaration criteria are satisfied.[290]

7.2 Our approach

To consider whether access or increased access promotes the public interest, we conduct a qualitative weighing exercise of the costs and benefits of declaration.

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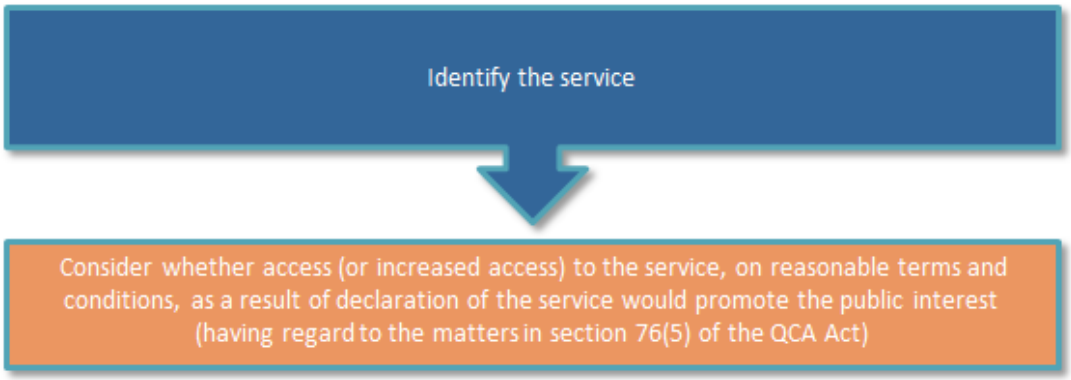
[288] Explanatory memorandum, CCA Amendment Bill 2017 at [12.37]. This is consistent with the views of the Productivity Commission that '[criterion d] is a rigorous test, which only enables the declaration of infrastructure services where the decision maker is satisfied that declaration is likely to generate overall gains to the community' (*National Access Regime*, inquiry report no. 66, 2013, p. 181).

[289] Explanatory Notes, Queensland Competition Authority Amendment Bill 2018, p. 3.

[290] Productivity Commission, *National Access Regime*, inquiry report no. 66, 2013, p. 175.

Figure 8 Our approach to assessing whether criterion (d) is satisfied



7.3 Promote the public interest

7.3.1 Recasting of the public interest test

Following the Hilmer Review in 1993, all jurisdictions signed up to the 1995 Competition Principles Agreement and passed legislation to enable access to services provided by facilities where there was an enduring lack of competition (see also sections 1.2–1.4).

At the time, the public interest test[291] was formulated as a negative test—that is, the party making the recommendation or decision had to be satisfied that access (or increased access) to the service would not be contrary to the public interest.

The Productivity Commission, in its subsequent review of the national access regime in 2013, said the public interest test should provide an opportunity for a decision-maker to consider the overall consequences of declaration and whether the community would be better off as a whole as a result of declaration. However, the Productivity Commission considered that:

> the current construction of the public interest test [current refers to the period when it was formulated as a negative test] sets a hurdle for declaring an infrastructure service that is too low to ensure that access regulation is only applied where it is likely to generate net benefits to the community. In keeping with the broader principle that government intervention should promote community welfare, a service should only be declared where the decision maker is satisfied that access would be in the public interest ...[292]

Accordingly, the Commission recommended that the public interest test be reconfigured as an affirmative test, requiring that decision-makers be satisfied that access would be in the public interest.

The Harper Review also subsequently endorsed reshaping the public interest test into a positive test.

The recommendations of the Productivity Commission and the Harper Review were subsequently accepted by the Commonwealth Government and states and territories. The public interest test was revised to be a positive test in legislation as part of the amendments to the access criteria in both the national and Queensland access regimes (see also section 1.3).

[291] Criterion (f) of Part IIIA of the *Competition and Consumer Act 2010* (Cth) when it was formulated as a negative test; criterion (d) of the *Queensland Competition Authority Act 1997* (Qld).
[292] Productivity Commission, *National Access Regime*, inquiry report no. 66, 2013, pp. 178–179.

7.3.2 Perspectives on criterion (d)

Flow-on effects from applying conclusions for other criteria

Criterion (d) is an additional positive requirement that must be satisfied. Our approach to criterion (d) is that it accepts the results of the application of the other criteria and does not seek to repeat the assessments and conclusions for those criteria. Rather, criterion (d) goes on to consider whether access, as a result of declaration, would promote the public interest.

This approach is consistent with the commentary expressed in the explanatory memorandum to the 2017 Bill amending the CCA:

> Criterion (d) does not call into question the results of subsections 44CA(1)(a), (b) and (c). It accepts the results derived from the application of those subsections, but it enquires whether, on balance, declaration of the service would promote the public interest. It provides for the Minister to consider any other matters that are relevant to the public interest.[293]

In this context, the NCC has previously said that it is appropriate to:

> [give] consideration to likely flow on effects that follow [the NCC's] conclusions on criteria (a) – (c) as well as any other matters that are relevant to the public interest.[294]

The NCC also adopted a broad interpretation of criterion (d), including considering the results of the other criteria, in the context of its final recommendation on the Port of Newcastle revocation matter:

> The Council considers the appropriate approach to criterion (d) is to consider all matters relevant to the public interest applicable in the circumstances. This includes the matters considered under criteria (a) to (c), and the conclusions drawn under them. Moreover, it is consistent with the Part IIIA objective of promoting "the economically efficient operation or, use of and investment in the infrastructure by which services are provided, thereby promoting effective competition in upstream and downstream markets" … The promotion of competition in upstream and downstream markets is the subject matter of criterion (a). The Council considers that taking into account the results of the other criteria in assessing criterion (d), particularly criterion (a), promotes the objects of Part IIIA. To do otherwise would be inconsistent with the legislative scheme. This approach allows the Minister to consider all other matters affecting the public interest and allows him or her to refuse or revoke declaration where the other criteria are satisfied.[295]

We adopted this approach to criterion (d) in our 2020 declaration reviews. For instance, while competition impacts were considered in the context of criterion (a), flow-on investment impacts were considered in the context of criterion (d).

Criterion (d) is a standalone criterion

While the matters of relevance to criterion (d) may draw on considerations that stem from the outcomes from the assessment of other declaration criteria, criterion (d) is a standalone criterion that must be assessed on its merits to determine whether it is satisfied.[296]

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[293] Explanatory memorandum, CCA Amendment Bill 2017 at [12.40].

[294] NCC, *Revocation of the declaration of the shipping channel service at the Port of Newcastle*, statement of preliminary views, 19 December 2018, p. 75, para 9.37.

[295] NCC, *Revocation of the declaration of the shipping channel services at the Port of Newcastle*, recommendation, 2019, p. 157-158, para 10.47.

[296] We note that the explanatory memorandum for the amendments to Part IIIA states. that '[criterion d] now constitutes an additional positive requirement which must be met before a service can be declared. However, *it is only to be considered when subsections (a), (b) and (c) have been met, and it does not necessarily follow from this result that (d) will also be satisfied*' [emphasis added] (at [12.39]). We note that explanatory memoranda are not conclusive as to the construction of legislation and we did not adopt this approach in our recent declaration

Our view is that there is no presumption that criterion (d) is satisfied, where other criteria are satisfied.[297]

In particular, criterion (d) is not satisfied simply because criterion (a) is satisfied. That said, if declaration would promote a material increase in competition in a dependent market (primarily a criterion (a) matter), it may be relevant to considering whether investment and economic efficiency will also be promoted (by declaration) in that dependent market (a criterion (d) matter).

However, ultimately, any relationship between the conclusions for criteria (a) and (d) will depend on the facts and circumstances before us, and there is not necessarily a correlation between outcomes for criterion (a) and (d).[298]

Moreover, there is no materiality threshold for the satisfaction of criterion (d), unlike for criterion (a). That is, criterion (d) does not require that the promotion of the public interest must be material. Rather, criterion (d) is satisfied where we find, on balance, that declaration promotes the public interest.

Matters relevant to the public interest are broad

The matters that can be considered under the public interest are broad and are not exclusively defined. This is consistent with the interpretation given to the public interest test by the High Court in the *Pilbara* matter (when the public interest test was still formulated as a negative test):

> [W]hen used in a statute, the expression "public interest" imports a discretionary value judgment to be made by reference to undefined factual matters … when a discretionary power of this kind is given, the power is "neither arbitrary nor completely unlimited" but is "unconfined except in so far as the subject matter and the scope and purpose of the statutory enactments may enable the Court to pronounce given reasons to be definitely extraneous to any objects the legislature could have had in view". It follows that *the range of matters to which the NCC and, more particularly, the Minister may have regard when considering whether to be satisfied that access (or increased access) would not be contrary to the public interest is very wide indeed*. [emphasis added][299]

In summary:

- Criterion (d) should consider the flow-on effects from the findings for criteria (a) to (c) as well as any other matter relevant to the public interest.
- Criterion (d) is a separate and standalone criterion and should be considered on its own merits irrespective of the outcomes for the other criteria.

review. See also NCC, *Revocation of the declaration of the shipping channel services at the Port of Newcastle*, recommendation, 2019, p. 157, para 10.47.

[297] The NCC expressed a different approach to the public interest test in the Port of Newcastle revocation matter when it said '[a]s the public interest is a matter better weighed by the holder of political office rather than being a technical matter for expert advice, *there would need to be matters that clearly and strongly weigh against the public interest before the Council could arrive at the conclusion that the Minister could not be satisfied that criterion (d) is met'* [emphasis added] (NCC, *Revocation of the declaration of the shipping channel services at the Port of Newcastle*, recommendation, 2019, p. 158, para 10.49). We did not adopt this approach in the 2020 declaration reviews.

[298] For example, it has been contended that there may be some circumstances where access promotes competition but decreases economic efficiency where it enables an excessive number of competitors given the market size and cost structure of the industry. See P Forsyth, *Declaring Airports for Access: A Comment on the National Competition Council Draft Recommendation*, August 2003, pp. 3, 7.

[299] *The Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* [2012] HCA 36 at [42].

- Criterion (d) is satisfied where we find, on balance, that declaration promotes the public interest. There is no materiality threshold for this test (that is, criterion (d) does not require that the promotion of the public interest must be material)
- The matters relevant for consideration under criterion (d) are broad and unconstrained (except to the extent that they are 'definitely extraneous' to the objects of the Act).

7.4 Satisfaction of criterion (d)

We must be satisfied that declaration would promote the public interest. This is a positive test, which means:

- it is not sufficient to be satisfied that declaration would be unlikely to damage/adversely affect the public interest
- a finding should be formed that, on balance, declaration would promote the public interest. As such, if our findings for criterion (d) are inconclusive, criterion (d) is not satisfied.

The broad scope of this additional test is informed by, among other things:

- s. 76(5) of the QCA Act, which requires the QCA and the Minister to have regard to the matters listed therein (but is not expressed in an exclusive manner)
- the explanatory notes to the Queensland Competition Authority Amendment Bill 2018, which provides that a service may only be declared if it promotes the public interest[300]
- the majority judgment of the High Court of Australia in the *Pilbara* matter in relation to the equivalent of criterion (d) under Part IIIA of the CCA (albeit the previous formulation was worded as a negative test, as set out above)[301]
- the CCA explanatory memorandum.[302] It also provides examples of costs and benefits that may be relevant to the assessment of criterion (d), depending on the circumstances.[303]

Neither the legislation nor case law provides further insight on the extent to which net benefits must arise for criterion (d) to be satisfied. All that must be considered is 'whether, on balance, declaration would promote the public interest.'[304]

7.5 Weighing costs and benefits

To form a view on whether criterion (d) is satisfied, we must weigh the relative costs and benefits of declaration.[305] This is consistent with the views expressed in the explanatory memorandum to the 2017 Bill amending the CCA:

> [C]riterion (d) asks if access or increased access to the service as a result of declaration of the service, on reasonable terms and conditions, would promote the public interest. This means *that a decision maker must be satisfied that declaration is likely to generate overall gains to the community*. [emphasis added][306]

[300] Explanatory notes to the Queensland Competition Authority Amendment Bill 2018, p. 3.
[301] *The Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* [2012] HCA 36, including at [42].
[302] Explanatory memorandum, CCA Amendment Bill 2017 at [12.37].
[303] Explanatory memorandum, CCA Amendment Bill 2017 at [12.41], examples 12.1 and 12.2.
[304] Explanatory memorandum, CCA Amendment Bill 2017 at [12.40]; NCC, *Guide to declaration*, version 6, 2018, p. 42, para 6.3.
[305] QCA, *DBCT declaration review*, final recommendation, 2020, pp. 222–223.
[306] Explanatory memorandum, CCA Amendment Bill 2017 at [12.37].

The weighing of costs and benefits is a matter for judgement; a quantitative exercise is not necessary.

In the *Pilbara* matter, the Australian Competition Tribunal noted challenges in respect of quantification in its review of the Treasurer's decisions. In its conclusions on (the then) criterion (f) (the public interest criterion), the Tribunal stated:

> While many factors for and against a declaration and access will be discussed, their impact will, in most cases, be difficult, if not impossible, to quantify … In part the difficulty of quantification arises because many of the alleged costs and benefits of access are esoteric or qualitative in nature. Another reason is that many of the alleged costs and benefits depend upon the occurrence of future events which are necessarily uncertain. Hence, the cost-benefit analysis that the Tribunal performs will not be purely quantitative, and will have significant qualitative aspects.[307]

Likewise, the High Court judgement in the *Pilbara* matter mentioned applying a 'discretionary value judgement' to the public interest test (see section 7.3.2).

While the *Pilbara* matter decision involved the application of the former public interest criterion (regarding an assessment of whether access, or increased access, would *not* be contrary to the public interest), the findings of the case remain relevant to the assessment under the current positive test.

The Productivity Commission also considered the application of an explicit cost–benefit assessment when it made its original recommendations to reframe the public interest criterion under the national access regime to a positive test (which was mirrored by the revised criterion in the QCA Act). While the Productivity Commission saw an explicit cost–benefit analysis as potentially compelling, it said:

> In practice, explicit cost–benefit assessments are unlikely to provide a sound basis for declaration decisions. As the Tribunal acknowledged in its initial consideration of the Pilbara rail case, 'many of the alleged costs and benefits of access are esoteric or qualitative in nature [while others] depend upon the occurrence of future events which are necessarily uncertain' (para. 1169). Consequently, the Tribunal considered that criterion (f) did 'not require a precise quantifiable cost–benefit analysis', but could instead provide 'some order of magnitude value' to the costs and benefits of access (para. 1305). Such order-of-magnitude approaches may be regarded as reasonable in cases where the net impacts of access are unambiguous. However, at least some decisions would require contentious judgment calls.[308]

The Productivity Commission considered that a more formal cost–benefit framework could cast this criterion 'in the same "technical" light' as criteria (a) and (b) and hence make it more open to review.[309] The Productivity Commission saw this as increasing the unpredictability in the application of Part IIIA, and added:

> Given the contestable nature of many of the costs and benefits that must be considered, a high level of judgment will always be required in public interest assessments.[310]

In this respect, we note that the NCC's assessment of criterion (d) in its final recommendation on the Port of Newcastle revocation matter was similarly qualitative in nature.[311]

In weighing matters relevant to criterion (d), it is appropriate to use a 'future with and without' declaration approach in order to identify those costs and benefits that can be expected to result

[307] *In the matter of Fortescue Metals Group Limited* [2010] ACompT 2 at [1169].
[308] Productivity Commission, *National Access Regime*, inquiry report no. 66, 2013, p. 177.
[309] Productivity Commission, *National Access Regime*, inquiry report no. 66, 2013, p. 177.
[310] Productivity Commission, *National Access Regime*, inquiry report no. 66, 2013, p. 177.
[311] NCC, *Revocation of the declaration of the shipping channel services at the Port of Newcastle*, recommendation, 2019.

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).[312]

Our assessment of whether criterion (d) is satisfied will be on the merits of the matter and having regard to stakeholder comments. There is no presumption of a conclusion for criterion (d) given the conclusions for other access criteria.

7.6 Key aspects to criterion (d)

Section 76(5) lists the matters that we must have regard to in forming a view on criterion (d). The term 'public interest' is not exhaustively defined, and we can consider a broad range of matters in addition to the mandatory considerations in the criterion.[313,314]

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

Section 76(5)(a) is only enlivened if the facility for the service extends outside Queensland. Where this occurs, we are required to have regard to whether access to the service provided outside Queensland by means of the facility is regulated by another jurisdiction and to the desirability of consistency in regulating access to the service.

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

Section 76(5)(b) requires us to have regard to investment in facilities and markets that depend on access to the service.

The importance of incentives for economically efficient investment in infrastructure is expressed through the objects clause underlying the access 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.[315]

Investment in facilities (s. 76(5)(b)(i))

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

In our 2020 declaration reviews, we considered the facility that provides the service separately to other facilities.

Facility that provides the service

We may consider whether declaration would reduce the incentives of the facility operator to invest.

In this respect, the Productivity Commission noted:

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[312] QCA, *Declaration reviews*, final recommendation, 2020, p. 27.

[313] See also the explanatory notes to the Queensland Competition Authority Act Amendment Bill 2018, which note that s. 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 s. 76(2)(d)' (p. 6); (also see QCA, *Declaration reviews*, final recommendation, 2020, pp. 27–28).

[314] NCC, *Guide to declaration*, version 6, 2018, p. 42, paras 6.4, 6.5.

[315] Section 69E of the QCA Act. See also QCA, *Declaration reviews*, final recommendations, 2020, pp. 28–29.

> Access regulation also imposes costs, in particular where it adversely affects incentives for investment in markets for infrastructure services. There are costs associated with errors in setting access prices. For example, when prices are set too low, this can lead to delayed investment in infrastructure, or the non-provision of some infrastructure services. Regulated third party access can also impose costs on infrastructure service providers from coordinating multiple users of their facilities.[316]

Factors relevant to assessing the impact of declaration on the facility owner's incentives[317] may include:

- whether the facility owner has invested in the facility to date and the environment in which the investment occurred—if investment has occurred in an environment where the potential returns of the facility owner are constrained (e.g. if there is a voluntary or mandatory access regime in place which imposes such a constraint), it may be relevant to consider whether (and how) circumstances might be different compared to circumstances under declaration
- whether there are other comparable facilities in Queensland or in other jurisdictions that are declared for access and are regulated; and whether those facility owners invested in these facilities and, if so, to what extent
- the regulatory protections under declaration in Part 5 of the QCA Act that require us to have regard to the interests of the owner of the facility and require pricing to provide an efficient return on investment (ss. 138(2)(b), (g) and 120(b), (l)). It should therefore not automatically be presumed that declaration and subsequent Part 5 regulation will discourage investment
- predictability of regulatory returns under declaration, especially under revenue cap arrangements
- the relevance, or otherwise, of regulatory risk under declaration for the owner of the facility.[318,319] Regulatory risk is the perception that the exercise of regulatory discretion will be undertaken in a heavy-handed, arbitrary or uneven fashion.[320]
- risks of regulatory error, particularly as decisions on access are complex and technical, and significant judgment is required on when and how to intervene.[321]

Regulatory risk and regulatory error

Regulatory risk and regulatory error may acquire greater significance for a regulated entity where the gap between asset lives and regulatory cycles are more pronounced.[322]

The Productivity Commission talked about the consequences of uncertainty associated with regulation:

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[316] Productivity Commission *National Access Regime*, inquiry report no. 66, 2013, pp. 7–8.
[317] See also Productivity Commission, *National Access Regime*, inquiry report no. 66, 2013, p. 103, table 3.1.
[318] Regulatory risk can arise as the prices and returns of a regulated entity under Part 5 can be set or influenced by us. The Part 5 regime in the QCA Act is not subject to merits review.
[319] Section 87A requires the QCA to review, prior to the expiry of a declaration, whether the service should be declared (see also section 1.2.1). In contrast, there is no corresponding provision in Part IIIA of the CCA.
[320] ACCC, *Access dispute between Services Sydney Pty Ltd and Sydney Water Corporation*, arbitration report, July 2007, p. 24.
[321] Productivity Commission, *National Access Regime*, inquiry report no. 66, 2013, p. 103. The Productivity Commission also considered regulatory error in the context of airport regulation (*Economic regulation of airports*, inquiry report no. 92, 2019, pp. 27, 83–85, 303–304).
[322] See H Ergas et al., *Regulatory risk*, prepared for the ACCC Regulation and Investment Conference, Manly, 26–27 March 2001.

> access regulation can compound the inherent riskiness of investments in infrastructure services due to uncertainty about how regulation may be applied. This uncertainty can raise the required hurdle rate of return of the proposed investment above the expected rate of return and thereby delay or deter investment.[323]

In this context, the Productivity Commission considered that there are asymmetries in the consequences of regulatory pricing errors.

> • Over-compensation may sometimes result in inefficiencies in the timing of new investment in essential infrastructure (with flow-ons to investment in related markets), and occasionally lead to inefficient investment to by-pass parts of a network. However, it will never preclude socially worthwhile investments from proceeding.
>
> • On the other hand, if the truncation of balancing upside profits is expected to be substantial, major investments of considerable benefit to the community could be forgone, again with flow-on effects for investment in related markets.
>
> In the Commission's view, the latter is likely to be a worse outcome.[324]

While we recognise the risks of regulation, we also consider that such risks ought to be mitigated by the operation of Part 5 of the QCA, including the processes for approving access undertakings and making access dispute determinations, which require us to have regard to a broad range of factors, including the interests of the access provider.

Moreover, regulatory risk and regulatory error may be reduced by consultation and by the amendment provisions in regulatory processes—for example, robust consultation processes during approval of a draft access undertaking and the ability of the access provider to submit amendments to an approved access undertaking.

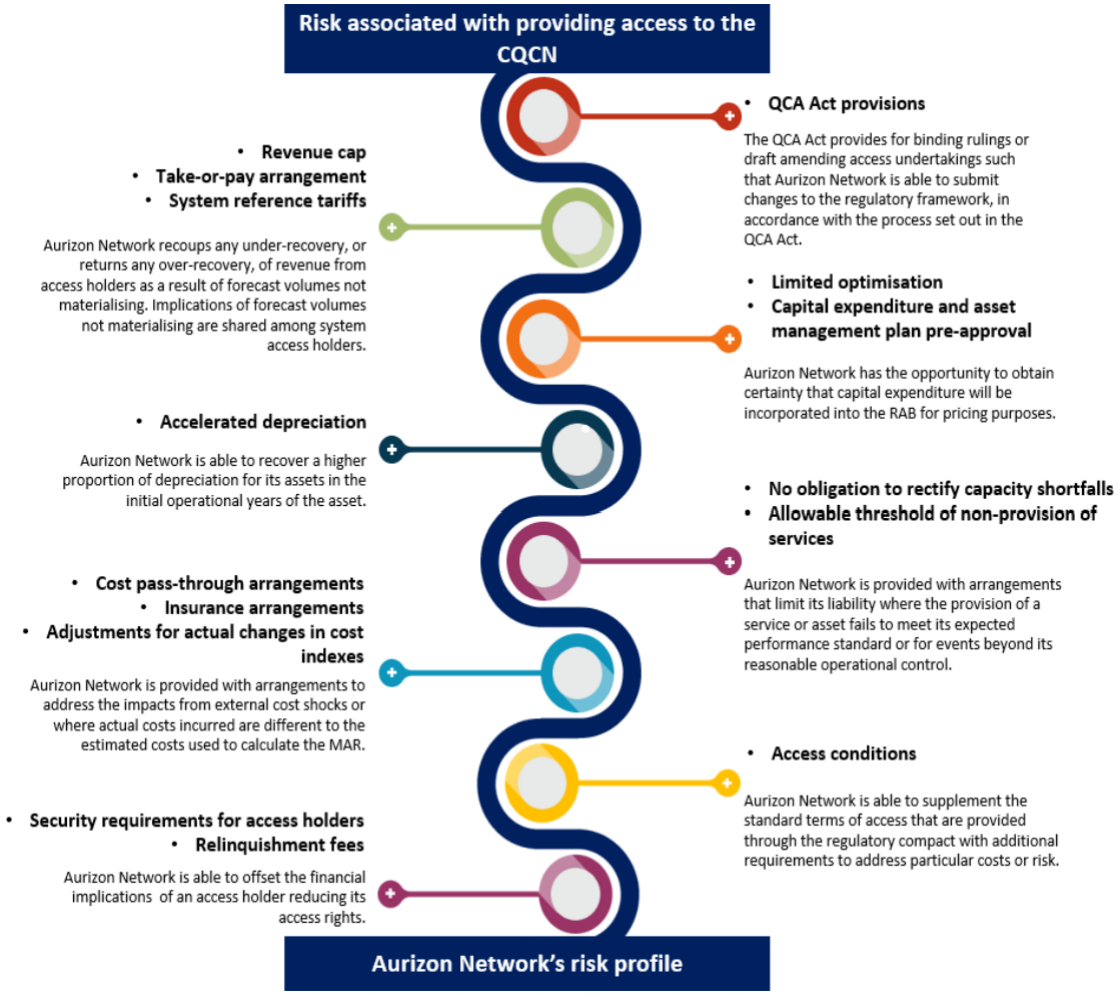
For instance, in the context of our 2020 DBCT review, we said:

> The QCA also typically releases draft decisions, consultation papers and, where appropriate, engages in a cross-submissions process that allows parties to comment on the submissions of other parties. The QCA notes that the comprehensive nature of this consultation process helps to mitigate against the risk of regulatory error. Moreover, the regulated entity can seek an amendment of an approved access undertaking at any time (s. 142).[325]

Where an access undertaking is approved following declaration, it may also include a range of provisions to minimise risks for the regulated entity when investing. For example, our final decision on Aurizon Network's 2017 access undertaking (UT5) provides a summary of the ways in which risk was reduced for Aurizon Network under declaration (see Figure 9).

[323] Productivity Commission, *National Access Regime*, inquiry report no. 66, 2013, pp. 23, 259.
[324] Productivity Commission, *National Access Regime*, inquiry report no. 17, 2001, p. 83.
[325] QCA, *DBCT declaration review*, final recommendation, 2020, p. 227.

Figure 9 Risk and the regulatory framework—Aurizon Network



Note: This summary is not intended to be an exhaustive list of how risk is addressed in the regulatory framework.

Source: QCA, Aurizon Network's 2017 access undertaking, decision, 2018, p. 19.

That said, an entity's perception of how regulatory processes may mitigate regulatory risk may also be influenced by, among other things:

- visibility on the nature of regulation to be imposed, as an entity does not necessarily have visibility ex ante on the nature of provisions in an access undertaking that will underpin regulated access—different regulatory provisions create different regulatory risks (for instance price caps vs revenue caps; regulated access charges vs reliance on negotiate-arbitrate provisions for pricing)
- the frequency of the review process
- the extent to which provisions in an access undertaking vary from time to time and any lack of alignment to the life of investments
- the extent to which regulators may change their views on aspects of regulated access over time, given changing circumstances
- the entity's individual risk profile.

Different views have been expressed on the impact of declaration on investment by a facility owner. The Productivity Commission in particular has noted that declaration can impact on the access provider's investment incentives and that 'the potential for access regulation to deter

investment appear to be well-founded.[326,327] In contrast, the ACCC has previously expressed a view that declaration may encourage investment by the regulated entity.[328]

Whether (and how) declaration will affect the facility owner's investment incentives will depend on, among other things, the matters outlined above and the specific circumstances before us at the relevant time.

In our 2020 declaration reviews, our conclusions were that declaration was unlikely to discourage investment in the facility by the various facility owners. However, at the same time, the review concluded that declaration was unlikely to encourage investment in the facility by the facility owners.

Other facilities

There is clear overlap between the concepts of investment in 'facilities' and investment in 'markets that depend on access to the service'.

Other facilities can include facilities in dependent markets that are explicitly considered as part of the criterion (a) analysis, as well as other supply chain facilities.

To avoid duplication of analysis, the discussion of 'other facilities' under s. 76(5)(b)(i) can be limited to supply chain facilities or to other unrelated facilities, to the extent that investment in dependent market facilities is dealt with at s. 76(5)(b)(ii). Put another way, investment in the criterion (a) dependent markets can be considered under s. 76(5)(b)(ii), and investment in other facilities[329] can be considered under s. 76(5)(b)(i).

While the above approach was adopted for our 2020 declaration reviews, that is not to say there are no other approaches that are appropriate.

Box 24 Example of considering 'other facilities'

In our 2020 Aurizon Network review, when we considered 'other facilities', we had regard to other aspects of the supply chain (namely coal terminals). Investment in the above-rail market (the dependent market that was the focus of the criterion (a) analysis) was considered under the category 'markets that depend on access to the service'.

Investment in markets that depend on access to the service (s. 76(5)(b)(ii))

We may consider under s. 76(5)(b)(ii) of the Act whether declaration would promote investment in the dependent markets that are subject to analysis under criterion (a).

As a broad principle, we note that businesses face a range of uncertainties, and it is specifically the impact of declaration on investment in dependent markets that should be considered. For

[326] Productivity Commission, *National Access Regime*, inquiry report no. 17, 2001, p. 67.
[327] Productivity Commission, *National Access Regime*, inquiry report no. 66, 2013, pp. 227–236.
[328] For instance, in the context of the application for declaration of the service at the Port of Newcastle in 2020, the ACCC said that '[i]f it is accepted that prices are likely to be lower in a future with declaration, the lower prices will elicit a demand response from users of the facility through an increase in mining throughput. This improvement in mining investment and the expansion in use of PNO's services under declaration will result in an increase in the demand for labour inputs, increasing employment across the region. Further, the increase in throughput at the Port would increase the demand for factors of production to service the increase in demand for the Service. This would include an increase in investment in capital inputs' (ACCC, submission to the NCC, *NSW Minerals Council application for declaration at the Port of Newcastle*, 22 August 2020, p. 13).
[329] That is, facilities that are not analysed under s. 76(5)(b)(ii)).

instance, the Australian Competition Tribunal said in its review of the Commonwealth Treasurer's decision to not declare the service provided at the Port of Newcastle that:

> the Tribunal records its general agreement with the following findings of the NCC with respect to the mandatory considerations in s 44CA(3) [the public interest test]:
>
> …
>
> (b) In relation to investment in the coal tenements market, there is a range of commercial and regulatory uncertainties that will impact on investment decisions and, relative to these, uncertainty arising from the difference in the pricing of access to the shipping channel service with and without declaration would be unlikely to be material (at [10.38]).[330]

The assessment should consider the likely impact of declaration on investment in dependent markets. For instance, if declaration will improve terms and conditions of access in the market for the service, a corollary of this is whether, how, and to what extent this will impact on incentives to invest in infrastructure and assets in dependent markets.

Relevant aspects of the criterion (a) analysis that may have an impact on investment in dependent markets include the following:

- Will declaration mean access will be available and able to be negotiated? For instance, if a facility is operating at full capacity and there is no prospect of expansions, it may be that access will not be available. Hence, to the extent that investment in dependent markets relies on access to the facility, the absence of capacity may mean that there can be no corresponding investment in dependent markets with or without declaration.
- Will the process for gaining access to the service be quicker and/or less costly under declaration, such that it would promote investment in the dependent market? For example, in respect of a coal handling service at a coal terminal, if the process for accessing terminal services is made easier, does this promote investment in dependent markets by miners who depend on downstream terminal services?
- Will declaration provide for dispute resolution mechanisms that are unavailable in the absence of declaration? If so, does this impact on dependent markets?
- To what extent is regulated pricing under declaration likely to be different to unregulated pricing? And what is the materiality of the cost of the service as a proportion of total input costs? This should however be considered in the context of:
  - the extent to which the service provider can profitably increase the charges
  - margins in dependent markets
  - availability of substitutes for access seekers in the event of price increases (see also section 5.4.4).
- Will declaration reduce returns or valuations in dependent markets (either for some or all market participants), such that investment will be reduced? In considering this matter, the materiality of any increase in costs in the absence of declaration could be considered.
- Will there be greater certainty or predictability in terms and conditions, or more favourable terms and conditions under declaration, such that investment will be promoted?

[330] *Application by New South Wales Minerals Council (No 3)* [2021] ACompT 4 at [266].

Investment hold-ups

A transfer of rents in itself may not have competition or investment impacts. However, changes in terms and conditions and the certainty of any terms may have an impact on whether hurdle rates for investment are satisfied and whether there is a prospect that investment may be held up. That will depend on the circumstances of the application.

To the extent that declaration impacts on the regulatory environment within which investments decisions are made about long-lived assets, a matter that has been considered by regulators and decision-makers is the relevance or otherwise in natural monopoly regulation of 'investment hold-ups'.

> The basic story is as follows: the users of a monopoly firm routinely have the opportunity to take some irreversible action which will significantly increase the value of or demand for the monopolist's products or services. The users or consumers, however, fear that once they have taken that action and incurred the associated sunk cost, the monopolist will engage in "ex post opportunism" – raising the price for the monopolist service, expropriating the additional benefit or value achieved. Fearing this expropriation, the users or consumers are reluctant to put themselves in a position where they can be exploited by the monopolist. As a result, they fail to take socially efficient actions, or they take other actions which are less socially beneficial, but with lower risk of expropriation. The failure to take efficient actions results in a material economic welfare loss.[331]

Different views have been expressed about the relevance and potential impact of hold-up and on matters that may bear upon the prospect for hold-up, including reputational impacts, the ability to engage in long-term contracting and the size of relationship specific investments:

- We accepted the prospect of hold-up in our 2020 Queensland Rail review.[332]
- We did not accept the prospect of hold-up in our review into the DBCT service (as the circumstances were different to that for the review of the Queensland Rail service), but the Queensland Treasurer formed a contrary view.[333]
- The NCC and the Australian Competition Tribunal did not accept the presence of hold-up in the context of the application of declaration and revocation of declaration matters for the Port of Newcastle.[334]
- The ACCC recognised the issue of 'hold-up' in the context of ports regulation.[335]
- The Productivity Commission outlined its reservations about the concept of hold-up in its reviews of electricity network regulation, airports and the national access regime.[336]

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[331] D Biggar, 'Is protecting sunk investments by consumers a key rationale for natural monopoly regulation?', *Review of Network Economics*, vol. 8, no. 2, 2009, p. 13.

[332] QCA, *Queensland Rail declaration review*, final recommendation, 2020, sections 1.5, 5.6.2.

[333] QCA, *DBCT declaration review*, final recommendation, 2020, pp. 83, 104–105 in particular; Queensland Government, *Gazette Extraordinary*, no. 31, vol. 384, 1 June 2020, pp. 203–306.

[334] NCC, *Revocation of the declaration of the shipping channel services at the Port of Newcastle*, recommendation, 2019; NCC, *Application for declaration of certain services in relation to the Port of Newcastle*, recommendation, 2020; *Application by New South Wales Minerals Council (No 3)* [2021] ACompT 4 at [248]–[261].

[335] R Sims, 'Ports: What measure of regulation', speech at the Ports Australia Conference, Melbourne, 20 October 2016.

[336] Productivity Commission, *Electricity Network Regulatory Frameworks, Appendix B: The hold-up problem*, inquiry report no. 62, 2013; Productivity Commission, *National Access Regime*, inquiry report no. 66, 2013, p. 92; Productivity Commission, *Economic Regulation of Airports*, inquiry report no. 92, 2019. For instance, in the latter review, the Productivity Commission said 'in practice, other factors can reduce the extent to which hold up occurs. In particular, airports and airlines in Australia often mitigate the risk of hold up by using long term contracts. It is

Ultimately, the relevance of hold-up will depend on the circumstances at the time and on the submissions of stakeholders.

Box 25 Example of whether declaration would promote investment in a dependent market

In the 2020 Queensland Rail review, we considered that declaration would improve the terms and conditions of access to Queensland Rail's below-rail service (the market for the service) and provide protections where access rights were renewed.

We concluded this would encourage investment in a range of dependent markets, including the market for mining tenements and the above-rail haulage market where asset lives extended beyond the time frames that Queensland Rail said would apply in the absence of regulation (i.e. under Queensland Rail's deed poll/access framework). Specifically, we concluded that in the absence of declaration, investment hold-up would occur, as miners/above-rail haulage providers would be reluctant to invest in assets with long asset lives when the rents from their investments were susceptible to being extracted in the future.

7.6.3 Administration and compliance costs that will be incurred by the service provider

Three main categories of administration and compliance costs are relevant to criterion (d):

- costs incurred in complying with the regulatory regime
- coordination costs incurred in dealing with multiple users as a result of declaration
- costs incurred by us in administering the regulatory regime and passed on to the service provider (the QCA levy).[337]

Relevantly, criterion (d) refers to costs 'incurred' by the service provider, rather than those costs 'borne' by the service provider.

The QCA ordinarily approves an efficient allowance for costs incurred in complying with the regulatory regime and coordination costs as part of its annual revenue requirement processes (where applicable), with the costs ultimately borne by users through reference tariffs or other charges. Likewise, the QCA levy is subject to pass-through arrangements. Where the QCA does not set a reference tariff for access to declared services (such as for the 2021 DBCT access undertaking), the QCA may nevertheless have regard to such costs in any arbitration under s. 120 of the QCA Act.

Given this, the economic incidence of these costs is on the user. In other words, while the above costs are *incurred* by the service provider, they are *borne* by the user.

The NCC's view is that:

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also not clear that airlines' relationship specific sunk investments are significant, particularly in the case of low cost carriers, which have lower overheads than full service airlines and the ability to change routes relatively quickly' (p. 72).

[337] The costs of an application for declaration are not relevant as they are irrelevant to whether the facility is operating as a natural monopoly—refer to Explanatory memorandum, CCA Amendment Bill 2017 at [12.32]. Likewise, the NCC noted that the costs of an application for declaration should not be taken into account, as they will be incurred irrespective of whether any declaration is made and thus are not costs resulting from access or increased access (see NCC, *Guide to declaration*, version 6, 2018, p. 44, para 6.14).

> Costs to a service provider that can be compensated for through access charges are unlikely to be relevant to the assessment of the public interest.[338]

That said, a contrary view is that even if the costs are borne by users, they are still a cost to society and hence are relevant to the public interest.[339]

Our view is that it is preferable to have regard to such costs as part of considering the public interest in the declaration process, even if they are compensable under declaration (e.g. through allowances under revenue or price caps, or through other arrangements where prices are determined by negotiation and, where necessary, arbitration).

In summary, as this provision is intended to have regard to the administrative and compliance costs that would be incurred by the service provider, it is appropriate to note that:

- the regulated entity may incur costs in complying with the regulatory regime and we will have regard to these costs
- many of these costs may be ultimately borne by users, to the extent that such costs are ultimately passed through to them (i.e. the economic incidence of the costs of compliance falls on the user). This can be considered as a relevant matter under s. 76(5)(d).

Costs incurred in complying with the regulatory regime

Regulatory compliance costs may vary depending on the form of regulation that ultimately applies to the service.

These costs relate to the costs of submitting and complying with access undertakings and the costs of negotiating access under declaration (which could potentially include costs of arbitration).

As mentioned, our practice to date has been to compensate the access provider for the costs of complying with the regulatory regime, with the costs ultimately borne by users through reference tariffs or other charges.

Any consideration of the costs of complying with the regulatory regime under declaration must also occur alongside the counterfactual—that is, what the costs of access will be in the absence of declaration (i.e. if access occurs through commercial negotiations—particularly if access is presently being provided).[340]

Therefore, in determining whether declaration will increase administration costs for the service provider, it may be relevant to consider the administration costs of providing access (if applicable) in the absence of declaration. These costs include the costs of:

- any voluntary (or executed) access regime in place
- bilateral negotiations for access
- dispute resolution.

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[338] NCC, *Guide to declaration*, version 6, 2018, pp. 44–45, para 6.17.

[339] QCA, *DBCT declaration review*, final recommendation, 2020, p. 235.

[340] Refer to the Australian Competition Tribunal's decision in relation to the Port of Newcastle where it 'records its general agreement' with the finding of the NCC that '[t]he administrative and compliance costs that would arise if the shipping channel service were declared are unlikely to be materially different if the service were not declared' (*Application by New South Wales Minerals Council (No 3)* [2021] ACompT 4 at [266]).

In considering the costs to a service provider of complying with the regulatory regime, it may also be necessary to consider the nature of the regulatory regime that may be implemented (e.g. reference tariff arrangements, or a negotiate–arbitrate framework for pricing).

Coordination costs incurred in dealing with multiple users as a result of declaration

Coordination costs are the disruption costs of the regulated entity having to provide access to other users. These costs could include scheduling or delay costs associated with having multiple users access the relevant service.

These costs are likely to be less important when compared to a counterfactual of no declaration where a facility is already a multi-user facility.

Moreover, to the extent that access promotes greater utilisation of a facility (i.e. reduces spare capacity), any increase in coordination costs may be offset by the access provider's ability to spread the fixed costs of operating a facility across more units of production.

Costs incurred by the QCA in administering the regulatory regime and passed onto the service provider (the QCA levy)

The QCA levy imposed on entities regulated under Part 5 reflects the costs of the QCA's regulatory activities. Typically, in circumstances where there is a reference tariff, entities recover the QCA levy from users under straight pass-through arrangements.[341]

The materiality of these costs in the context of the broader range of costs likely to be incurred by the service provider should be considered.[342]

7.7 Other matters

We must have regard to any other matter we consider relevant (s. 76(5)(d)). These may be any other matters that we, at our discretion, consider appropriate as part of forming a view on whether declaration would be in the public interest. While these matters may be guided by stakeholder submissions, we are free to consider other matters as we consider appropriate.

Matters may include those previously listed in the repealed s. 76(3) of the QCA Act, if considered relevant. Those matters include the object of the QCA Act; social welfare and equity considerations; policies on ecologically sustainable development; policies on occupational health and safety and industrial relations; economic and regional development issues; the interests of consumers; the need to promote competition and the efficient allocation of resources.[343, 344] This is a non-exclusive list.

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[341] *Queensland Competition Authority Act 1997*, s. 245; Queensland Competition Authority Regulation 2018, s. 3 and sch. 1.

[342] In the 2020 DBCT review, we said '[t]o the extent that the QCA levy is relevant to an assessment of the administrative and compliance costs incurred by the service provider under declaration, the QCA notes that the levy amounts only to a 'small subset' of these costs, such that it is unlikely to create a consequential difference in the overall costs of declaration, compared to those it would incur in a future without declaration.' (*DBCT review*, final recommendation, 2020, p. 237).

[343] QCA, *Declaration reviews*, final recommendations, March 2020, p. 28.

[344] The NCC noted that it is also open for the Minister to consider other matters relevant to the public interest (NCC, *Revocation of the declaration of the shipping channel services at the Port of Newcastle*, recommendation, 2019, p. 170).

Human rights considerations may also be relevant. Our view is that these should be considered in conjunction with the obligation to 'properly consider' human rights affected by the relevant decision, pursuant to s. 58 of the *Human Rights Act 2019* (Qld) (see section 7.7.1).

In our 2020 declaration reviews, we also had regard to the impact on royalties, costs borne by access seekers and access holders, environmental costs and benefits, and efficiency impacts.

Efficiency impacts include, for example, productive efficiency, including impacts on costs of production; allocative efficiency, including investment in different sectors to reflect demand; and dynamic efficiency, including incentives to change investment decisions and innovation. It is relevant that the efficient operation of infrastructure is part of the object of Part 5 of the QCA Act (s. 69E).[345,346]

[345] See also NCC, *Guide to declaration*, version 4, 2013, p. 50, para 7.20.

[346] We could also consider the impact on competition from declaration as part of criterion (d), notwithstanding that this matter is considered in the context of criterion (a).

Box 26 Relationship between competition impacts (criterion (a)) and efficiency impacts (criterion (d))

The NCC noted that where access promotes workable competition, it is also likely to result in efficiency gains. Reasons for that include the following:

- In the short term, the entry or threat of entry of new firms in upstream or downstream markets may encourage lower production costs for services (the promotion of productive efficiency).
- In the longer term, competitive pressures may stimulate innovation designed to reduce costs and develop new products (the promotion of dynamic efficiency).
- If the terms and conditions of access are appropriate, then all customers who value the service more than its cost of supply will be supplied (the promotion of allocative efficiency).[347]

In the context of our 2020 DBCT review, DBIM said there would be inefficiencies under declaration in three areas:

- productive inefficiency—extra resources involved in administering and complying with the undertaking compared to resources to deal with freely-negotiated contracts. Our view was, however, that costs of disputes are not necessarily precluded by declaration (depending on whether access to the service is subject to negotiation and arbitration even without declaration)
- allocative inefficiency—which arises as a result of uniform pricing. However, our view was that the arrangements to apply in the absence of declaration would be unlikely to materially affect the ability of users to develop tenements into mining operations
- dynamic inefficiency—including reducing incentives to invest in economically efficient practices if there is regulatory error in assessing prices. We considered that with or without declaration, DBIM retained a commitment to use its best endeavours to improve supply chain efficiencies (in its access undertaking).

We concluded in our review of the DBCT service that there was a lack of evidence to conclude that declaration would positively promote the public interest in terms of productive, allocative and dynamic efficiency (see also section 7.3.2).[348]

We will consider other matters on a case-by-case basis, having regard to their relevance, the importance of the service for which declaration is sought and the nature of stakeholder comments. We will also consider other matters, having regard to the object of Part 5 of the QCA Act. It is up to us to determine the weight given to other matters.

[347] NCC, *Guide to declaration*, version 6, 2018, p. 45, para 6.20.
[348] QCA, *DBCT declaration review*, final recommendation, 2020, p. 246.

Box 27 Example of a matter not relevant to the public interest

In the 2020 DBCT review, we did not accept the argument that DBCT was privatised based on an expectation that terminal services would always be regulated as a matter relevant to the public interest.

We noted that this is inconsistent with the intent of the declaration provisions—any decision by the Minister to declare a service 'must state the expiry date of the declaration' (s. 84(4)).

In this context, we also noted that facilities operate in a dynamic market environment and that the factors that impact the decision to declare a service are likely to change through time.[349]

7.7.1 Human rights considerations

As part of considering other matters that may impact on criterion (d), we may also have regard to human rights considerations. Alternatively, human rights consideration may be considered separately.

Under the *Human Rights Act 2019* (Qld), there are positive obligations on us (in our capacity as a 'public entity') concerning compatibility with human rights.[350] Section 58(1) makes it unlawful for a public entity:

- to act or make a decision in a way that is not compatible with human rights (s. 58(1)(a)); or
- in making a decision, to fail to give proper consideration to a human right relevant to the decision (s. 58(1)(b)).

Section 58(5) of the Human Rights Act provides that, for s. 58(1)(b), giving proper consideration of a human right in making a decision includes, but is not limited to:

- identifying the human rights that may be affected by the decision; and
- considering whether the decision would be compatible with human rights.

Our view is that our recommendation to the Minister concerning declaration of a service is a 'decision' for the purposes of s. 58 of the Human Rights Act, and we are therefore obliged to give 'proper consideration' to human rights relevant to the recommendation.

The protected human rights are set out in Part 2 of the Human Rights Act. The relevant human rights that we will focus on (relating to declaration matters) will depend on the circumstances. In the context of a declaration review, rights of particular relevance may, for example, include the rights of individuals not to be arbitrarily deprived of property (s. 24) and (for facilities related to the coal supply chain) human rights potentially relating to climate change (right to life, equality and non-discrimination and right of children to protection of their best interests).

The assessment of human rights under the Human Rights Act is a related but separate exercise to the assessment of such rights under criterion (d). The same rights are likely to be identified as relevant under both processes; however, the implications will be different.

Our assessment under s. 58 of the Human Rights Act will entail the identification of rights that may be affected by our recommendation. However, as we are not the final decision-maker in

[349] QCA, *DBCT declaration review*, final recommendation, 2020, p. 246.
[350] The 23 rights specifically protected under the Human Rights Act are found at ss. 15–37 of that Act.

respect of declaration, our decision does not give rise to any actual limitation of identified rights. As such, our decision will likely be considered compatible with human rights for the purposes of s. 58(1)(b) of the Human Rights Act.

Under criterion (d), the question to be considered is whether the public interest will be promoted by declaration of a service. If it is determined that declaration will adversely affect human rights, this may significantly impact our assessment of criterion (d), possibly to the extent that it is determined that the criterion is ultimately not satisfied.

An example of a detailed consideration of whether a decision to declare a service would impact on human rights pursuant to the Human Rights Act can be found in the Queensland Treasurer's decisions in respect of the Queensland Rail, Aurizon Network and DBCT services.[351]

7.8 Balancing test

Whether the public interest is promoted, involves the weighing of the costs and benefits of declaration. Criterion (d) will be satisfied where the benefits of declaration exceed the costs.

[351] Queensland Government, *Gazette: Extraordinary*, no. 31, vol. 384, 1 June 2020, p. 303, section 7, which is part of the Treasurer's decision on DBCT. In making the decision, the Minister elected to carry out a consideration of the human rights implications of the declaration decision under the auspices of the public interest test of criterion (d).

8 THE PERIOD FOR DECLARATION

If we recommend that a service or part of a service be declared, we must also recommend the period for declaration (s. 79(4)).

The period for declaration should balance, among other things, the interests of access seekers with the interests of the access provider in having the service declared for only as long as is considered necessary. This is because, while declaration can address an enduring lack of competition in markets that require access to services provided by bottleneck facilities, it also imposes costs on the entity that provides the service that is subject to declaration.

The factors to have regard to in determining the relevant period depend on the circumstances but are likely to include those factors relevant in determining the period over which total foreseeable demand will be assessed (see section 4.4).

Relevant factors may include:

- the importance of long-term certainty to the service provider 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 (considering, for example, 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 will no longer satisfy the natural monopoly test in criterion (b)
- the need for periodic reviews of declaration arrangements
- consideration of a period that is long enough to influence the pattern of competition in relevant upstream or downstream markets (which includes consideration of the level of investment by access seekers and the asset lives of such investments)
- technological development, reform initiatives (such as changes in legislation governing access to the relevant service) and future market evolution.[352]

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 Act does not necessarily require us to recommend declaration of a service over the longest period in which each of the access criteria may be satisfied. We might, having regard to the matters listed above or other considerations, determine that a shorter period of declaration would be appropriate—for example, if there was a degree of uncertainty about forecasts in later years, or if a substitute facility was to be built in the near future.

8.1.1 General matters in considering the relevant period

We are not bound to only consider the proposed declaration period submitted by the applicant. While we must consider the period specified in the application, we may also, depending on the

[352] QCA, *Declaration reviews*, final recommendations, 2020, section 2.1.3. Refer also to NCC, *Guide to declaration*, version 6, 2018, p. 47; NCC, *Application by Services Sydney for declaration of sewage transmission and interconnection services provided by Sydney Water*, final recommendation, 2004, chapter 12.

circumstances, consider different periods of declaration, to the extent that it is appropriate to consider whether another period satisfies the criteria for declaration.[353]

In this context, the explanatory memorandum to the 2017 CCA Amendment Bill notes:

> The time period for declaration will be relevant to considerations of foreseeability. If the declaration period being contemplated is only 10 years, it is not necessary to consider demand for the service far beyond that period. While it may be possible to foresee increased demand for the service in 30 years as a result of a long-term development, it is unlikely this demand would affect the natural monopoly status of the service within the declaration period.[354]

However, we are not bound to consider multiple declaration periods in order to attempt to find a period that satisfies the declaration criteria. In our 2020 DBCT review, we said that to do otherwise would mean we:

> should keep assessing criterion (b) based on varying periods until [we find] a period for which criterion (b) is satisfied. This position is not consistent with the object of Part 5 of the QCA Act to promote economically efficient investment, with the effect of promoting effective competition in dependant markets, as it means a declaration period of as short as one year (or even less) could be appropriate.[355,356]

The period for assessing total foreseeable demand/the period for declaration should not be any longer than is necessary for satisfaction of the access criteria.

Determining an appropriate period may require us to balance a range of factors.

Matters that could weigh against us recommending a longer period could include changes in markets over time and uncertainty associated with forecasting demand over a long period (even in those markets where there may be a very large, entrenched monopolist).

In contrast, matters that could weigh against us recommending a shorter declaration period include whether the period is sufficient to promote a material increase in competition in dependent markets (criterion (a)) or result in net benefits that are in the public interest (criterion (d)).

The period should have regard to of the access provider, the applicant and potential future access seekers. For instance, in the 2020 DBCT review, we said:

> [t]he desirability for DBCT users to have certainty over the declaration period must be balanced with the interests of DBCT Management in having the terminal subject to declaration only as long as is considered necessary.[357]

Typically, across state and Commonwealth jurisdictions, the declaration period/period for assessing total foreseeable demand ranges from 10 to 20 years.

Nonetheless, the declaration period/period for assessing total foreseeable demand should ultimately be determined having regard to the circumstances. Further, while there is a time horizon to the assessment of both criteria (a) and (b), the time horizons for the two assessments may not necessarily be the same (see section 5.5).[358]

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[353] See also NCC, *Guide to declaration*, version 6, 2018, p. 36, para 4.6.
[354] Explanatory memorandum, CCA Amendment Bill 2017 at [12.27].
[355] QCA, *DBCT declaration review,* draft recommendation, December 2018, p. 37.
[356] That said, an extremely short declaration period may not lead to a material impact on competition in a dependent market (criterion (a)), nor be in the public interest (criterion (d)).
[357] QCA, *DBCT declaration review*, final recommendation, 2020, p. 37.
[358] NCC, *Guide to declaration*, version 6, 2018, p. 35, para 3.36.

It is open for the owner/operator of a declared service to seek revocation of declaration at any time. In considering any revocation application, we may, among other things, assess whether there have been changes in circumstances since the service was declared, such that one or more of the access criteria are no longer satisfied.

8.1.2 Examples of declaration periods

The following examples show that declaration periods can range widely depending on the circumstances in each case:

- Aurizon Network's below-rail service is declared for 20 years. The factors that were taken into account by us in forming a view on this period included:
  - the interests of all parties in having certainty over the period of declaration, while providing for the declaration to be periodically reviewed to account for relevant new information
  - expected developments impacting demand and other changes in the market for the service
  - the ability of the CQCN to satisfy total foreseeable demand at least cost, either in its existing or an expanded form
  - the nature of the investments that rely on the CQCN—for example, companies who made significant investments in long-life assets in expectation of procuring access, such as investments in rollingstock and mining operations
  - Aurizon Network's planning horizon, which is up to 15 years (and beyond).[359]
- Queensland Rail's below-rail service is declared for 15 years. The following factors were taken into account by us in forming a view on this period:
  - long-term certainty necessary for the long-lived nature of the sunk investments[360]
  - certainty of demand estimates over the foreseeable period[361]
  - the timing of anticipated future market changes.[362]
- Certain airport services at Sydney International Airport were declared for 5 years.[363]
- Airport services at Melbourne International Airport were declared for approximately 10 months. This relatively short declaration period was due to concerns about a possible conflict between declaration and regulatory obligations by a new lessee to lodge an undertaking pursuant to another Act.[364]

[359] QCA, *Aurizon Network declaration review*, final recommendation, March 2020, p. 17.
[360] The longer the typical asset lives, the greater may be the risk of hold-up if access is not provided in the future. Therefore, the period for declaration may have regard to the typical asset lives of investments made by applicants.
[361] We must form a positive view that the facility for the service can satisfy total foreseeable demand over the declaration period. We may consider the level of certainty around demand forecasts in outyears as part of determining whether a longer or shorter period for assessing total foreseeable demand is appropriate.
[362] QCA, *Queensland Rail declaration review*, final recommendation, March 2020, pp. 148–151, 213.
[363] NCC, *Application for declaration of particular services at Sydney and Melbourne international airports*, NCC website, accessed 1 March 2022.
[364] NCC, *Application for declaration of particular services at Sydney and Melbourne international airports*, NCC website, accessed 1 March 2022.

- Sewage and interconnection services provided by Services Sydney were declared for 50 years.[365] Declaration for a long period was recommended, given the significant investments to be made and the need to reduce access uncertainty in relation to these investments

[365] NCC, *Application by Services Sydney for declaration of sewage transmission and interconnection services provided by Sydney Water*, final recommendation, December 2004, pp. 81–82. In 2009, the declaration was revoked. Further information is available on the NCC's website.

GLOSSARY

ACCC	Australian Competition and Consumer Commission
CCA	Competition and Consumer Act 2010 (Cth)
CPA	Competition Principles Agreement
CQCN	Central Queensland coal network
Cth	Commonwealth
DBCT	Dalrymple Bay coal terminal
DBIM	Dalrymple Bay Infrastructure Management
NCC	National Competition Council
NSWMC	New South Wales Mineral Council
PNO	Port of Newcastle Operations Pty Ltd
QCA	Queensland Competition Authority
Qld	Queensland
s., ss.	section(s) of an Act
SSNIP	small but significant and non-transitory increase in price
TIC	terminal infrastructure charge

APPENDIX A: APPLYING CRITERION (B)

Hypothetical worked example—simplified illustration of possible application of criterion (b)

Declared service

The declared service is 'the use of the widget processing facility provided at V'.

The market

V operates in 'the market for processing widgets within approximately 100 km of V'. This is because users up to 100 km away use V, or have previously used V, to process widgets.

Assessment period and market demand

We determine that the declaration period is 10 years, given pending changes to the market structure. Foreseeable market demand for the service is therefore assessed over a 10-year period.

Over a 10-year declaration period, total foreseeable demand in the market for the service provided by V is 200 widgets per year. This reflects total foreseeable demand for the use of widget processing facilities within 100 km of V from users.

The criterion (b) assessment is about whether V in its existing form or an expanded form could meet total foreseeable demand of processing 200 widgets per year at least cost compared to any two or more facilities that can also satisfy this demand.

Criterion (b) is only satisfied where V by itself, in either its existing form or an expanded form, can satisfy total foreseeable demand at least cost.

Facility V

V presently processes 180 widgets at $1 per widget. V can be expanded to process an extra 20 widgets. The incremental expansion cost for the additional 20 widgets is $1.20 per widget.

The cost of V meeting total market demand is:

$$\frac{(180 \times \$1.00\ per\ widget) + (20 \times \$1.20\ per\ widget)}{200\ widgets} = \$1.02\ per\ widget$$

This reflects the average cost at facility V to process widgets, assuming it is expanded to the extent necessary to meet total foreseeable demand in the market.

Facility W

Facility W is the only facility that operates within 100 km of V. It processes 20 widgets at $1.10 per widget, which represents the unit cost of W partially contributing to meeting total market demand of 200 widgets per year.

Conclusion

In non-expanded form, facility V is the cheapest processor of widgets at $1 per widget, compared to facility W, whose cost is $1.10/widget. However, without expansion, facility V is unable to meet total foreseeable demand in the market.

Facility V can be expanded to process additional widgets at an incremental cost of $1.20 per widget.

Facility V's average cost to satisfy total foreseeable demand is $1.02 per widget (assuming it is expanded). The question is whether the total demand can be met at a lower cost using 2 or more facilities. In this scenario, the combination of facilities that can satisfy total foreseeable demand at least cost is:

- facility V in existing form – 180 widgets at $1 per widget
- facility W in existing form – 20 widgets at $1.10 per widget.

The average cost to meet demand for processing widgets is then:

$$\frac{(180 \times \$1.00\ per\ widget) + (20 \times \$1.10\ per\ widget)}{200\ widgets} = \$1.01\ per\ widget$$

As the incremental expansion cost (on a per widget basis) at facility V is greater than the existing cost (on a per widget basis) of using facility W, an expanded facility V cannot satisfy total foreseeable demand at a lower cost than the two existing facilities.

Criterion (b) is not satisfied.

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