Queensland Competition Authority

Final recommendations

Declaration reviews: Aurizon Network, Queensland Rail and DBCT

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EXECUTIVE SUMMARY

Final recommendation

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

These services are provided by Aurizon Network Pty Ltd (Aurizon Network), Queensland Rail Limited (Queensland Rail) and DBCT Management Pty Ltd (DBCT Management).

The QCA's recommendations follow the outcome of an extensive consultation process.

Aurizon Network

The QCA's final recommendation is that 'the use of a coal system for providing transportation by rail', as described in s. 250(1)(a) of the QCA Act, be declared. The service adopts the relevant defined terms set out in the QCA Act as at the date of this final recommendation, including in ss. 250(3) and (4).

The QCA recommends a declaration period of 20 years.

Queensland Rail

The QCA's final recommendation is that parts of the below-rail service provided by Queensland Rail, as described in s. 250(1)(b) of the QCA Act[1], be declared. Specifically, the QCA recommends that the following parts of the service, each of which is itself a service within the meaning of s. 72 of the QCA Act, be declared:

- the North Coast Route service
- the Mount Isa Route service
- the West Moreton Route service
- the Central Western Route service
- the Western Route service
- the South Western Route service.

The QCA recommends that each of these parts of the service be declared for a period of 15 years.

The QCA recommends that the Tablelands system service not be declared.

Each of these parts of the service is defined in Part B, Appendix B.

DBCT Management

The QCA's final recommendation is that 'the handling of coal at Dalrymple Bay Coal Terminal by the terminal operator', as described in s. 250(1)(c) of the QCA Act, not be declared. The service adopts the relevant defined terms set out in the QCA Act as at the date of this final recommendation, including in s. 250(5).

[1] That is, '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'.

1 INTRODUCTION

1.1 Scope of the third party access declarations

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.[2]

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

- the use of a coal system for providing transportation by rail. The relevant 'coal system' is defined in the QCA Act[3] and includes the Blackwater, Goonyella, Moura and Newlands systems
- the use of rail transport infrastructure for providing transportation by rail where (in summary) the railway manager is Queensland Rail, or its successor, assign or subsidiary
- the handling of coal at Dalrymple Bay Coal Terminal (DBCT) by the terminal operator.

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

1.2 The QCA's role in the declaration reviews

Each of the existing declarations expire on 8 September 2020.[4] At least six months, but not more than 12 months, before the expiry date of each declaration, the QCA must recommend to the Minister that, with effect from the expiry date (a) the service be declared; or (b) part of the service, that is itself a service, be declared; or (c) the service not be declared.[5]

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

The QCA's final recommendations were provided to the Minister in accordance with s. 87A(1) of the QCA Act.

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

1.3 Process matters

On 29 March 2018, the access criteria in Part 5 of the QCA Act were amended.[6]

On 4 April 2018, the QCA commenced its review of whether the declared services defined in s. 250 of the QCA Act should be declared in whole or in part following the expiry of the existing declarations on 8 September 2020. In doing so, the QCA issued notices of review and investigations to Aurizon Network, Queensland Rail and DBCT Management and DBCT Holdings relating to the declared services in ss. 250(1)(a), (b) and (c) respectively.[7]

During an investigation, the QCA may inform itself on any matter relevant to the investigation in any way it considers appropriate.[8] While the QCA has considered submissions properly received from stakeholders in accordance with the QCA Act, the task before the QCA does not require it to resolve differences between stakeholder views. Rather, the QCA's final recommendation is based on the best information available to it, with the views expressed by stakeholders informing that assessment.

In forming its final recommendations, the QCA's consultation process has involved:

- preparation of QCA and staff consultation papers
- stakeholder forums for each of the three services identified in s. 250(1) of the QCA Act
- stakeholder consultation both before and after the QCA's draft recommendations, including through cross-submission processes.

The QCA's website (www.qca.org.au) contains further information on the QCA's process in reaching its final recommendations and the submissions considered by the QCA.

1.3.1 Process for approval of the Queensland Rail recommendation

Prior to his appointment as a Member of the Board of the QCA, Dr Warren Mundy was retained by Queensland Rail to provide advice on this declaration review as it related to Queensland Rail. This was declared by Dr Mundy to the Government prior to his appointment to the Board and to the other Members of the QCA at his first meeting of the QCA on 5 June 2018. Dr Mundy has excluded himself from the QCA's consideration of the recommendation in relation to the declaration of the Queensland Rail service.

On 3 July 2018, stakeholders who had, at that time, provided submissions in relation to the Queensland Rail recommendation[9] were advised of Dr Mundy's disclosure and exclusion from the consideration of the Queensland Rail recommendation. This was also outlined in section 1.3.1 of the Introduction chapter of the QCA's draft recommendation. No responses were received from stakeholders on this matter.

1.4 Assessment detail

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

[6] *Queensland Competition Authority Amendment Act 2018* (Qld).
[7] In accordance with ss. 87B, 87D and 87E of the QCA Act.
[8] Section 173(1)(c).
[9] These stakeholders were Queensland Rail, New Hope, Yancoal, Glencore, Pacific National and Aurizon Operations (Coal).

- Part A: the Aurizon Network service
- Part B: the Queensland Rail service
- Part C: the DBCT service.[10]

[10] Summary tables are included in each Part at the start of each criterion for ease of navigation only. These tables are not a substitute for the QCA's analysis and reasoning set out in full in the respective recommendations.

2 QCA'S APPROACH TO THE STATUTORY CRITERIA

2.1 The access criteria

Section 76 of the QCA Act sets out the access criteria the QCA must apply in making the required recommendations (Box 1).[11]

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

Box 1: Section 76—Access criteria

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

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

(2) The access criteria are as follows—

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

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

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

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

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

2.1.2 The required recommendations

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

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

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

Under s. 87C of the QCA Act, the QCA:

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

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

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

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

> As the declared service has not been subject to a comprehensive assessment against the access criteria, the QCA review must ensure that all parts of the declared service satisfy the access criteria before making a recommendation to declare any particular part of the service to the Minister.[12]

In Aurizon Network's view, an assessment of the type it has described is required by virtue of the operation of s. 87A of the QCA Act—the recommendation requires the QCA to positively affirm application of the access criteria for each of the part services it has identified.[13]

The QRC said a 'wide-ranging assessment' of the type proposed by Aurizon Network is not what is legally required, with the QCA itself best placed to decide what it is required to demonstrate in discharging its obligations.[14]

Queensland Rail agreed it was relevant to start with the service defined in s. 250 of the QCA Act, but said the definition lacks the specificity required for regulation under Part 5 of the QCA Act. In the case of its service, Queensland Rail said the service must be defined with specificity to allow the parties involved in the decision-making process to make assessments and judgments. This should be done by reference to the sections of railway line used to provide the service.

[12] Aurizon Network, sub. 6, p. 8.
[13] Aurizon Network, sub. 6, p. 8, Aurizon Network, sub. 32, p. 3.
[14] QRC, sub. 45, p. 2.

That is, Queensland Rail provides eight services, each corresponding to the use of separate rail network systems.[15]

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

To start from this position is not to preclude consideration of whether only part of a service satisfies the access criteria. If, for example, there was a part of a service that did not satisfy one of the access criteria, the QCA could still recommend declaration of the remainder of the service provided that what remained (a) was itself a service and (b) satisfied each of the access criteria. Whether such an investigation is required, depends on the information before the QCA 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 part of the service satisfies the access criteria.

2.1.3 Period of declaration

If the QCA recommends that the service, or part of the service, be declared, the QCA must also recommend the period for which that declaration should operate.[16] The potentially relevant factors to forming a view on the period of declaration may include:

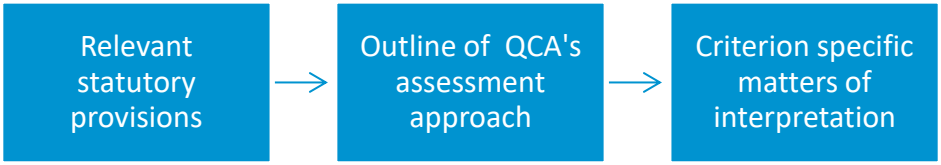
- the importance of long-term certainty to service providers who may have made (or may need to make) significant investments in infrastructure facilities, and to access seekers who may make significant investments as part of gaining access to a declared facility
- the duration of time for which users may seek access to the facility (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 no longer satisfies the natural monopoly test in criterion (b)
- the need for periodic reviews of declaration arrangements.[17]

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 the QCA to recommend declaration of a service over the longest period in which each of the access criteria may be satisfied. The QCA might, having regard to the matters listed above or other considerations, determine that a shorter period of declaration would be appropriate—for example, if there was a degree of uncertainty about forecasts in later years.

[15] Queensland Rail, sub. 33, p. 10.
[16] In accordance with s. 87A(4) of the QCA Act.
[17] Refer also to NCC, *Declaration of Services*: *A guide to declaration under Part IIIA of the Competition and Consumer Act 2010 (Cth),* April 2018 edn, p. 47.

2.2 Approach and interpretation

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



The sequence for considering each access criterion across the three services has varied according to what best informs the analysis.

For assessing the Aurizon Network and DBCT services (Parts A and C respectively), criterion (b) is considered first, before criterion (a), as it simplifies the analysis to identify the market in which the relevant service is provided before turning to the question of dependent markets.

This is followed by a consideration of criterion (a), criterion (c) and criterion (d).

For the Queensland Rail service (Part B), the QCA has commenced with criterion (a) given the multiple dependent markets it considered.

The QCA's assessment is undertaken in the context of Part 5 (Access to services) of the QCA Act, which has the following express object:

> The object of this part is to promote the economically efficient operation of, use of and investment in, significant infrastructure by which services are provided, with the effect of promoting effective competition in upstream and downstream markets.[18]

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

2.3.1 The statutory provision

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

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

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

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

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

2.3.2 Summary of approach to criterion (b)

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

- Identify the relevant service.

[18] Section 69E of the QCA Act.

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

The criterion is satisfied only if the answer to the last point above is affirmative. The period of the declaration is the period for which the QCA is satisfied the facility for the service could meet total foreseeable demand in the market at least cost. In determining this period, the QCA has also had regard to the factors set out in section 2.1.3 above.

2.3.3 The service

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

The QCA must recommend to the Minister that, with effect from the expiry date, the service be declared, or that part of the service (that is itself 'a service') be declared, or that 'the service' not be declared.[19]

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

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

[19] Section 87A(1) of the QCA Act.

(3) Subsections (1) and (2) apply only for this part.

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

Issues relating to the description of individual services are discussed in the Parts of this final recommendation that relate to each service.

2.3.4 The facility

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

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

(1) ***Facility*** includes—

(a) rail transport infrastructure; and

(b) port infrastructure; and

(c) electricity, petroleum, gas or GHG stream transmission and distribution infrastructure; and

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

(2) In this section—

GHG stream see the *Greenhouse Gas Storage Act 2009*, section 12.

Also, s. 73 of the QCA Act provides:

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

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

Queensland Rail submitted that the task of the QCA is to identify the minimum bundle of assets required to provide each relevant service (where it has identified parts of the service to be assessed).[20] The QCA acknowledges that this is the approach used by the Australian Competition Tribunal in *Re Sydney International Airport*.[21] However, as a starting point, this declaration review arises in a different context (i.e. where the descriptions of the relevant services are contained in the QCA Act and refer, in each case, to the use of certain assets). The QCA considers that the QCA Act is the correct starting point in identifying the relevant services and the facilities used to provide them.

If a service described in s. 250 of the QCA Act satisfies the access criteria, the QCA is required by s. 87C(1) to recommend that the service be declared. However, as noted above, the QCA Act also contemplates declaration of a part of a service. Queensland Rail's submissions on whether only certain parts of its service satisfy the access criteria are discussed in Part B, Chapter 2.

[20] Queensland Rail, sub. 33, p. 13, paras 60–61.
[21] *Re Sydney International Airport* [2000] ACompT 1.

2.3.5 The market

Identifying the relevant market is central to determining whether criterion (b) is satisfied.

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

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

> (1) A ***market*** is a market in Australia or a foreign country.
>
> (2) If ***market*** is used in relation to goods or services, it includes a market for—
>
> (a) the goods or services; and
>
> (b) other goods or services that are able to be substituted for, or are otherwise competitive with, the goods or services mentioned in paragraph (a).

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

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

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

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

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

In *Boral Besser Masonry Limited v Australian Competition and Consumer Commission,* McHugh J observed:

[22] (1976) 25 FLR 169 at 190.
[23] (1989) 167 CLR 177.

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

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.[25] [footnotes omitted]

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

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

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

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

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

DBCT Management provided detailed submissions in support of its view that the QCA's approach to the definition of the relevant market in the draft recommendation is incorrect (see Part C, Chapter 2 of this final recommendation). However, the QCA does not consider that any of the submissions it has received undermine the applicability of the key principles relating to market definition outlined above. Rather, the question is how those principles should be applied in the circumstances in each case.

2.3.6 Total foreseeable demand in the market

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

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

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

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[24] (2003) 215 CLR 374 at [252].
[25] (2017) 344 ALR 377 at [14].
[26] (1990) 24 FCR 313 at 332.

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

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

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

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

In its first submission to the QCA, DBCT Management submitted:

> [76] … a capacity expansion for a particular facility may be reasonably possible if it is reasonably capable of occurring during the declaration period. We note in this regard that the relevant definition of 'possible' in the Macquarie Online Dictionary is 'capable of existing, happening, being done, being used'.
>
> [77] Determining whether a capacity expansion for a particular facility is reasonably possible or capable of occurring will depend on the circumstances of the particular facility and factors such as the work involved in the expansion, the legal and regulatory constraints or impediments to the expansion, the costs of the expansion and whether the ability to expand the facility is within the control of the service provider.
>
> [78] Given the significant consequences of a finding that a capacity expansion for a particular facility is reasonably possible, the capacity expansion must not be merely theoretical. Rather, a QCA determination that it is reasonably possible to expand the capacity of the facility over the declaration period must be based on material that has some probative value in the sense that it tends logically to show the existence of facts consistent with the finding.[27] [footnotes omitted]

The QRC submitted:

> In the absence of clear case law, reports or extrinsic material, the notion of 'reasonably possible' should be interpreted in accordance with general principles of statutory interpretation and in the context of relevant interpretations given to that phrase at common law.
>
> 'Reasonably' is a form of 'reasonable', which in a simple form can be understood as 'not excessive'. The concept of reasonableness is regularly applied in a legal context, with a common test for reasonable foreseeability involving consideration of 'expense, difficulty and inconvenience'.
>
> 'Possible' can be understood as 'capable of happening'. As a result, 'reasonably possible' means that something is capable of happening without excessive difficulty or inconvenience. This is a lower bar than 'reasonably likely' or 'reasonably practicable' (which require some degree of likelihood).[28] [footnotes omitted]

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

DBCT Management submitted:

[27] DBCT Management, sub. 1, pp. 19–20, paras 76–78.
[28] QRC, sub. 7, p. 30.

> In considering whether it is reasonably possible to expand a facility to meet total foreseeable demand (section 76(3) of the QCA Act), the timing of capacity expansions within the declaration period are relevant considerations and must be taken into account.[29]

The QCA considers that the time needed to expand the capacity of a facility is a relevant factor in deciding whether expansion would be reasonably possible. The QCA does not, however, consider that it must be possible to expand the facility by the commencement of the declaration period.[30] To read such a requirement into s. 76(3) would see this provision rarely, if ever, utilised in the application of criterion (b).

The QCA considers that if it is reasonably possible to expand a facility for a service, s. 76(3) permits the QCA 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). This is clear from the text of s. 76(3) and its context. One of the consequences of declaration is the possibility that a service provider could be required to expand the capacity of a facility to meet demand for a declared service.[31] Section 76(3) should be viewed in that context. In a scheme that provides for expansion of the capacity of a facility used to provide a declared service, it is logical to be able to take into account the possibility of expansion at the time of deciding whether the service should be declared (since it is declaration that triggers the power to require expansion of the facility). To limit the time frame in which the QCA may take into account the expanded capacity of the facility is to depart from the language of the QCA Act. It is also not supported by the context surrounding the relevant provision.

2.3.8 At the least cost

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

Criterion (b) was amended by the *Queensland Competition Authority Amendment Act 2018* (Qld), which was intended to reflect the amendments introduced to Part IIIA of the *Competition and Consumer Act 2010* (Cth) (CCA).[32]

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

> The amendment to this paragraph [44CA(1)(b)] is intended to refocus the test to a 'natural monopoly' test instead of a 'private profitability' test.[33]

The so-called 'private profitability test' was the approach adopted by the High Court of Australia to the previous criterion (b)—that is, 'that it would be uneconomical for anyone to develop another facility to provide the service'[34] (see section 2.3.8 of the draft recommendation).

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[29] DBCT Management, sub. 26, para. 144.
[30] cf. DBCT Management, sub. 26, para. 155.
[31] QCA Act, ss. 118–119 (and the definition of 'extension' in the dictionary to the Act).
[32] Explanatory Notes, *Queensland Competition Authority Amendment Bill 2018* (Qld), at 2.
[33] Explanatory Memorandum, *Competition and Consumer Amendment (Competition Policy Review) Bill 2017* (Cth), at 98 [12.22].
[34] *Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal and Ors (2012)* 246 CLR 379.

The QCA's approach to this criterion has been to focus on the text of the statute, rather than assume that Parliament intended to adopt one of the approaches previously taken in applying criterion (b) in its earlier form.

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

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

This section 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. As explained in the draft recommendation, the QCA considers that this includes the administrative and compliance costs of regulation.[35] Whether similar costs would also be relevant in assessing the cost of meeting foreseeable demand using any two or more facilities would depend on the facilities being considered.

The QCA considers 'cost', for the purpose of s. 76(2)(b), is to be construed widely, so as to capture all costs of meeting total foreseeable demand in the market for the service provided by the facility in question, or using two or more facilities. Similar views (on the potential breadth of relevant costs) were expressed by several stakeholders both before and after the draft recommendation.[36]

2.3.9 Any two or more facilities

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

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

In the draft recommendation, the QCA expressed difficulty in viewing the question posed by criterion (b) as a purely theoretical question. Section 76(2)(b) takes 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 considered that the application of this criterion was further constrained in relation to the consideration of other facilities that 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 that could not, in any feasible scenario, meet any part of this foreseeable demand.

[35] cf. Explanatory Memorandum to the *Competition and Consumer Amendment (Competition Policy Review) Bill 2017* (Cth), at [12.33].

[36] For example see DBCT Management, sub. 1, pp. 36–37, paras 178–180; QRC, sub. 7, att. 3, para. 47; DBCT Management, sub. 26, p. 126 (Houston Kemp report, p. 24); DBCT User Group, sub. 30, p. 7.

The Explanatory Memorandum to the 2017 amendments to Part IIIA of the CCA stated:[37]

> Broadly, the alternative scenarios to be considered will depend on whether there is a substitute service provided by another facility. Different alternative scenarios could be considered based on whether there are existing substitutable services or not, for example:
>
> – if there is a substitute service provided by another facility there are, broadly, two potential alternative scenarios: the two substitute facilities share total foreseeable market demand; or a third facility is built to provide part of total foreseeable market demand; or
>
> – if there is not a substitute service provided by another facility there may only be one potential alternative scenario, that is the duplication (or partial duplication) of the facility.

The QCA considers that such an approach would be consistent with s. 76(2)(b) of the QCA Act. Viewed this way, criterion (b) might, depending on the circumstances, require a comparison of the cost of meeting total foreseeable demand using an existing facility (possibly expanded) and the cost of meeting total foreseeable demand by duplicating (or partly duplicating) the existing facility. However, the QCA remains of the view that criterion (b) does not require the QCA to compare the cost of meeting total foreseeable demand using the existing facility with the cost of meeting total foreseeable demand using two or more hypothetical facilities.

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

2.4.1 The statutory provision

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

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

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

2.4.2 Summary of approach to criterion (a)

Criterion (a) focuses on the effect of declaration in dependent markets, and specifically whether the requisite access as a result of declaration would promote a material increase in competition in market(s) other than the market for the service.[38]

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

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

[37] Explanatory Memorandum, *Competition and Consumer Amendment (Competition Policy Review) Bill 2017* (Cth), at [12.29].

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

The criterion is satisfied only if the answer to the last point above is affirmative.

2.4.3 The market for the service

See section 2.3.5 above.

2.4.4 Dependent markets

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

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

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

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

> [12.19] The amendments require the Council and the Minister to consider whether access (or increased access) on reasonable terms and conditions as a result of declaration would promote a material increase in competition in a market other than the market for the service. That is, the amendments focus the test on the effect of declaration, rather than merely assessing whether access (or increased access) would promote competition.
>
> [12.20] This requires a comparison of two future scenarios: one in which the service is declared and more access is available on reasonable terms and conditions, and one in which no additional access is granted. That is a comparison of either: no access without declaration compared with some access as a result of declaration; or some access without declaration to additional access as a result of declaration. In comparing these two scenarios, it must be the case that it is the declaration resulting in access (or increased access) on reasonable terms and conditions that promotes the material increase in competition.
>
> [12.21] What are reasonable terms and conditions is not defined in the legislation. This is an objective test that may involve consideration of market conditions. It does not require that the Council or Minister come to a view on the outcomes of a Part IIIA negotiation or arbitration. The requirement that access is on reasonable terms and conditions is intended to minimise the detriment to competition in dependent markets that may otherwise be caused by the exploitation of monopoly power. Reasonable terms and conditions include those necessary to protect the legitimate interests of the owner of the facility.[39]

[39] Explanatory Memorandum to the *Competition and Consumer Amendment (Competition Policy Review) Bill 2017* (Cth), at [12.19]–[12.21].

The approach outlined in the Explanatory Memorandum is similar to the approach the Australian Competition Tribunal took in the *Sydney Airport* decision. In applying an earlier form of criterion (a), the Tribunal in that case 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.[40]

The Tribunal's interpretation was replaced by 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.[41] It is, however, clear that the amendments to criterion (a) 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*.

The QCA has applied criterion (a) using a 'future with and without' approach. This approach involves comparing a scenario in which there is no declaration with a scenario in which there is access (or increased access) on reasonable terms as a result of declaration. This requires the QCA to form a view on the likely future conditions in both of these scenarios. A scenario in which there is declaration does not necessarily involve a continuation of the status quo, although existing conditions can help illustrate this future scenario.[42]

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

The importance of the counterfactual, for the purpose of applying criterion (a), is highlighted by the deeds poll that were executed by DBCT Management and Queensland Rail. Each of these deeds poll set out terms and conditions of access to their respective services in an attached 'access framework'. For the purpose of this chapter we refer to each of these instruments, together with the applicable access framework, as a 'Deed Poll'.

The QCA is not aware of an instance where such an approach was taken in the context of an inquiry into whether a service should be declared (i.e. to execute a deed poll as an alternative to declaration). It is therefore appropriate to explain, as a matter of principle, how the Deeds Poll have been considered in this review.

The DBCT User Group submitted legal advice that concluded that the QCA Act, properly construed, does not permit consideration of the DBCT Deed Poll on the basis that such an approach would:

- be inconsistent with the intent of the legislation
- give rise to absurd and anomalous outcomes

[40] *Re Virgin Blue Airlines Pty Limited* [2005] ACompT 5 at [153].
[41] *Sydney Airport Corporation Limited v Australian Competition Tribunal* [2006] FCAFC 146 at [82]–[83].
[42] *Stirling Harbour Services Pty Ltd v Bunbury Port Authority* [2000] FCA 38 at [113].

- place the QCA and Minister in the position of providing a de facto approval for unilateral contractual constraints that sit at odds with the approach in the QCA Act for the approval of such terms and conditions.[43]

The QCA is not of the view that the QCA Act forbids consideration of a Deed Poll as part of the counterfactual for the purpose of applying criterion (a). The existence of each Deed Poll is a matter of fact. The extent to which each Deed Poll affects competition in the relevant dependent markets, compared to a future where there is access as a result of declaration, is relevant, and is discussed elsewhere in this final recommendation. However, as a matter of principle, the QCA does not see why the QCA Act would forbid a Deed Poll forming part of a counterfactual scenario for the purpose of applying the access criteria.

Similarly, the QCA notes that the DBCT User Group has described the Deed Poll for DBCT as 'artificial' and 'contrived'.[44] The QCA has not made any such assumption in considering the Deeds Poll for the purpose of this review. While the Deeds Poll may have been produced in the context of the declaration review, having been executed, they were assessed on their terms.

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).

Again, this is relevant to consideration of the Deeds Poll. Neither Deed Poll is a draft access undertaking under division 7 of Part 5 of the QCA Act. It is therefore not appropriate to assess either Deed Poll 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.

Nor does the QCA consider it appropriate to assess either 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.[45] These principles are applicable in a very different context to the one currently before the QCA (i.e. whether a legislated access regime in a state or territory should supplant the legislated access regime under Part IIIA).

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

This in turn requires consideration of 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

[43] DBCT User Group, sub. 46, p. 77 and Schedule 7.
[44] DBCT User Group, sub. 46, p. 113.
[45] Queensland Rail, sub. 33, paras 217–23; DBCT Management, sub. 38, p. 11; DBCT User Group, sub. 46, p. 75–76.

QCA Act? This enquiry focuses on the attributes of a deed poll generally, rather than the terms of any instrument provided to the QCA in the context of this review.

(b) When compared to the terms contained in either of the Deeds 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 either 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.

The QCA has considered these matters in detail in Parts B and C.

2.4.6 Promote a material increase in competition

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

> amend section 76(2)(a) to clarify that access (or increased access) to the service should be expected to promote a material increase in competition in order for this criterion to be satisfied. This will prevent the declaration of services where only a trivial increase in competition is expected to result …[46]

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

> In *Sydney International Airport* the Tribunal considered the meaning of "promoting competition" at [106]-[107], 40,775, as follows:
>
> "The Tribunal does not consider that the notion of 'promoting' competition in s 44H(4)(a) requires it to be satisfied that there would be an advance in competition in the sense that competition would be increased. Rather, the Tribunal considers that the notion of 'promoting' competition in s 44H(4)(a) involves the idea of creating the conditions or environment for improving competition from what it would be otherwise. That is to say, the opportunities and environment for competition given declaration, will be better than they would be without declaration.
>
> We have reached this conclusion having had regard, in particular, to the two stage process of the Pt IIIA access regime. The purpose of an access declaration is to unlock a bottleneck so that competition can be promoted in a market other than the market for the service. The emphasis is on 'access', which leads us to the view that s 44H(4)(a) is concerned with the fostering of competition, that is to say it is concerned with the removal of barriers to entry which inhibit the opportunity for competition in the relevant downstream market. It is in this sense that the Tribunal considers that the promotion of competition involves a consideration that if the conditions or environment for improving competition are enhanced, then there is a likelihood of increased competition that is not trivial."[47]

The NCC describes the relevant test in the following terms:

> The promotion of a material increase in competition involves an improvement in the opportunities and environment for competition such that competitive outcomes are materially more likely to occur.[48]

[46] Explanatory Notes to the *Motor Accident Insurance and Other Legislation Amendment Act 2010* (Qld), p. 16.
[47] Re Virgin Blue Airlines Pty Limited [2005] ACompT 5 at [146].
[48] NCC, *Declaration of Services, A guide to declaration under Part IIIA of the Competition and Consumer Act 2010 (Cth)*, April 2018 edn, p. 32, para. 3.23.

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

In so doing, the QCA has considered the extent to which the service provider for the relevant service would, in both a factual and counterfactual scenario, have the ability and incentive to exert market power such that, in the absence of declaration, it could restrict access or unreasonably increase its access price, thereby materially impacting on competition in markets that are dependent on access to the service.[49]

The NCC stated in its Declaration of Services guide:

> [3.30] There are a number of ways the use of market power in the provision of the service for which declaration is sought by a service provider may adversely affect competition in a dependent market. For example:
>
> - a service provider with a vertically related affiliate may engage in behaviour designed to leverage its market power into a dependent market to advantage the competitive position of its affiliate
> - where a service provider charges monopoly prices for the provision of the service, those monopoly prices may suppress demand or restrict entry or participation in a dependent market, and/or
> - explicit or implicit price collusion in a dependent market may be facilitated by the use of a service provider's market power. For example a service provider's actions may prevent new market entry that would lead to the breakdown of a collusive arrangement or understanding or a service provider's market power might be used to 'discipline' a market participant that sought to operate independently.[50] [footnotes omitted]

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

> [3.24] As provided in the objects of Part IIIA (s 44AA of the CCA), the reference to 'competition' in criterion (a) is a reference to workable or effective competition, rather than any theoretical concept of perfect competition. 'Workable or effective competition' refers to the degree of competition required for prices to be driven towards economic costs and for resources to be allocated efficiently at least in the long term. In a workable or effective competitive environment no one seller or group of sellers has significant market power. The subject matter of the criterion (a) assessment involves an assessment of the competitive conditions in a real-life industry.
>
> [3.25] Where a dependent market is already workably or effectively competitive, improved access is unlikely to promote a material increase in competition and an application for declaration of a service that seeks to add to competition in such a dependent market is therefore unlikely to satisfy criterion (a).[51] [footnotes omitted]

The QCA has been guided by the principles outlined by the NCC in deciding whether criterion (a) has been satisfied in this instance. The NCC's comment above[52] supports the conclusion that if a dependent market would be workably competitive in a future without declaration, access (or increased access) to the service on reasonable terms as a result of declaration is not likely to materially increase competition in that dependent market. In the present case, however, the

[49] For example, NCC, *Declaration of Services, A guide to declaration under Part IIIA of the Competition and Consumer Act 2010 (Cth)*, April 2018 edn, pp. 33–34, paras 3.26–3.32; *Re Duke Eastern Gas Pipeline Pty Ltd* [2001] ACompT 2 at [117].

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

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

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

QCA must decide whether to recommend the declaration of certain services, which are already declared (and have been for some time). This means the existing competitive conditions in a dependent market may not necessarily represent the 'future without' declaration; they in fact may reflect the 'future with'. Even if a dependent market is workably competitive today, it is relevant to consider whether, and to what extent, competitive conditions in the dependent market are attributable to the fact that the relevant service is (and has been for some time) declared. On the other hand, it may be necessary to consider whether the current declarations, whilst perhaps constraining the use of market power by DBCT Management, Aurizon Network and Queensland Rail, have had no material impact on competitive conditions in dependent markets.

In response to the draft recommendation, DBCT Management submitted that:

> [212] … criterion (a) requires the QCA to carefully assess the state of competition with and without declaration and, determine whether access as a result of declaration would promote a *material* increase in competition in a dependent market. This assessment will need to be undertaken on the facts of the specific case and involves a three-limb assessment of:
>
> [212.1] the *likelihood* that more efficient firms would be discouraged from entering a dependent market, such that they would not enter that market, in a future without declaration as compared to with declaration; and
>
> [212.2] the *impact* that those efficient firms would have on competition in a dependent market in a future without declaration as compared to with declaration; and
>
> [212.3] whether the impact with declaration compared to without declaration promotes a *material increase* in competition in that dependent market.
>
> [213] The QCA appears to suggest that if (on the first limb) it concludes that there is a possibility that potential entrants would be discouraged from entering a dependent market, then an assessment of the following two limbs is redundant. This does not accord with the statutory test which clearly requires an assessment of the impact that access would have on competition in a dependent market, and an assessment of the materiality of that impact. As such, an application of the QCA's interpretation would result in an error of law.[53] (emphasis in the original)

The suggestion attributed to the QCA does not reflect the QCA's approach to this criterion. An assessment of competitive conditions in a dependent market does not end once it is found that efficient firms would be less likely to enter the market in a future without declaration. That alone would not satisfy criterion (a) if, for example, the downstream market would be workably competitive in either scenario. This is the type of question posed under DBCT Management's 'second limb', and is relevant to the application of criterion (a). The QCA does not consider, however, that the proper application of criterion (a) necessarily requires a staged approach of the type proposed by DBCT Management. Rather, the criterion requires consideration of competitive conditions in the dependent market in a future with and without declaration, and a comparison of conditions in each of those scenarios to determine whether declaration would promote a *material* increase in competition.

Queensland Rail submitted that criterion (a) can be satisfied only if the QCA is affirmatively satisfied that access as a result of declaration would promote a significant and non-trivial increase in competition.[54] The QCA considers that a trivial increase in competition would not qualify as 'material' (supported by the Explanatory Notes above). However, the QCA sees no basis to equate the term 'material' with 'significant'. This is consistent with the Australian Government's response to the Productivity Commission's 2005 inquiry report, which informed

[53] DBCT Management, sub. 26, paras 212–13.
[54] QR, sub. 33, paras 94–99.

the 2010 amendments to the QCA Act, which preferred the use of 'material' as compared to that Commission's recommended 'substantial'.[55] Whether an expected increase in competition qualifies as material is ultimately a matter of judgment. The exercise of this judgment is not aided by seeking to interpret the text of the criterion by reference to other terms.

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

One of the questions raised in submissions before the draft recommendation 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 service providers are subject to s. 46 of the CCA.[56] This is potentially relevant to whether criterion (a), as well as criterion (d), would be satisfied.

The QCA addressed this question at some length in section 2.4.7 of the draft recommendation, concluding that s. 46 of the CCA, as amended, 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 which 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:

- notwithstanding the amendments to the CCA, the QCA is 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
- the QCA believes that s. 46, even as amended, remains an enforcement tool, rather than an effective mechanism by which terms and conditions of access can be determined and administered on an ex ante basis for all users and prospective users.

The DBCT User Group's submission in response to the draft recommendation also noted that s. 46 is only applicable to a substantial lessening of competition in a market in which the service provider (or a related entity) has market power or supplies or acquires goods or services.[57] This means that declaration might restrict conduct in a way that would promote competition in a dependent market in a material way but such conduct would not substantially lessen competition in the absence of declaration. The QCA considers that this further supports the views in the draft recommendation, and the QCA otherwise adopts the comments and conclusions in the draft recommendation in relation to the relevance of s. 46 of the CCA.

[55] Costello, P, *Government response to Productivity Commission report on the review of the national access regime*, Australian Government, 20 February 2004, https://webarchive.nla.gov.au/awa/20080720063618/http://www.treasurer.gov.au/DisplayDocs.aspx?pageID=010&doc=publications/FinalReport_NationalAccessRegime.htm&min=phc.

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

[57] DBCT User Group, sub. 30, pp. 11–12.

2.5 Criterion (c): State significance

2.5.1 The statutory provision

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

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

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

2.5.2 Summary of approach to criterion (c)

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

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

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

2.5.3 The service

See section 2.3.3 above.

2.5.4 The facility

See section 2.3.4 above.

2.5.5 The facility for the service is significant

Criterion (c) is in identical terms to when it was first introduced into the QCA Act by the *Motor Accident Insurance and Other Legislation Amendment Act 2010* (Qld).[58] According to the Explanatory Notes for this Act, criterion (c) was inserted 'to ensure that a service can only be declared if it is provided by an infrastructure facility that is significant'.[59]

Criterion (c) requires 'significant' to be determined having regard to the facility's size or importance to the Queensland economy. This requires the QCA to consider:

- the size of the facility—relevant factors may include the physical and geographic dimensions of the facility (for example, the size of its footprint or its start and end points), the physical capacity of the facility, and the throughput of goods and services using the facility; and
- the importance of the facility to the Queensland economy—relevant factors may include reference to its contribution to exports, employment and gross state product (GSP). The QCA also generally considers state significance to be established if the facility is an essential element of a supply chain, and enables significant revenues to be earned by businesses participating in dependent markets (i.e. markets in which access would materially promote competition).[60]

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

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

[60] See also NCC, *Declaration of Services, A guide to declaration under Part IIIA of the Competition and Consumer Act 2010 (Cth)*, April 2018 edn, p. 40, para. 5.10.

In response to the draft recommendation, Queensland Rail made submissions in relation to the construction of criterion (c). These matters are addressed in the Queensland Rail recommendation (Part B, Chapter 12). Ultimately, 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).

The QCA notes that in *Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal and Ors*[61] the High Court (by majority) observed that the equivalent provision of 'national significance' in Part IIIA of the CCA (which is broadly consistent with criterion (c) but not in identical terms)[62] 'may also direct attention to matters of broad judgment of a generally political kind'.[63]

Accordingly, the QCA has approached the assessment of significance as a matter of judgment rather than determination by precise calculation.[64]

2.6 Criterion (d): Promote the public interest

2.6.1 The statutory provision

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

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

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

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

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

2.6.2 Summary of approach to criterion (d)

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

- Identify the service.

[61] (2012) 246 CLR 379.
[62] At the time of the High Court decision, this was s. 44G(2)(c) of the CCA; it is now s. 44CA(1)(c).
[63] (2012) 246 CLR 379 at [43]. This observation follows on from the majority's views in relation to the application of the equivalent of criterion (d) at [42]; see section 2.6.4 below.
[64] See also NCC, *Declaration of Services, A guide to declaration under Part IIIA of the Competition and Consumer Act 2010 (Cth)*, April 2018 edn, p. 39, para. 5.4.

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

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

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

See section 2.4.5 above.

2.6.4 Promote the public interest

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

This approach to the test is consistent with the explanatory materials to the amending legislation. The amendments made by the *Queensland Competition Authority Amendment Act 2018* (Qld) were intended to reflect the amendments introduced to Part IIIA of the CCA.[65]

Criterion (d) is identical in wording to s. 44CA(1)(d) of the CCA[66] (as amended with effect from 6 November 2017 by the *Competition and Consumer Amendment (Competition Policy Review) Act 2017* (Cth)). The Explanatory Memorandum to the Commonwealth amending Act states that this criterion is 'an additional positive requirement which must be met before a service can be declared'.[67]

The QCA considers criterion (d) accepts the results of the application of the other criteria, but goes on to require consideration of whether the requisite access as a result of declaration would promote the public interest.[68]

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

- s. 76(5) of the QCA Act, which expressly requires the QCA and the Minister to have regard to the matters listed therein (see section 2.6.5 below)
- the majority judgment of the High Court of Australia in *Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal and Ors* in relation to the equivalent of criterion (d) under Part IIIA of the CCA (albeit the previous formulation was worded as a negative test, as set out above)[69]
- the Explanatory Memorandum to the *Competition and Consumer Amendment (Competition Policy Review) Bill 2017* (Cth), which provides that the question asked by this criterion 'means that a decision maker must be satisfied that declaration is likely to generate overall

[65] Explanatory Notes, *Queensland Competition Authority Amendment Bill 2018* (Qld), at 2.
[66] Although the matters to which the QCA and the Minister must have regard under s. 76(5) of the QCA Act in respect of criterion (d) are expressed differently to the considerations of the NCC and the Minister under s. 44CA(3) of the CCA.
[67] Explanatory Memorandum, *Competition and Consumer Amendment (Competition Policy Review) Bill 2017* (Cth), [12.39].
[68] This is consistent with the Explanatory Memorandum to the *Competition and Consumer Amendment (Competition Policy Review) Bill 2017* (Cth), [12.40].
[69] (2012) 246 CLR 379 at [42].

gains to the community'.[70] It also provides examples of costs and benefits that may be relevant to the assessment of criterion (d), depending on the circumstances.[71]

Prior to the draft recommendation, DBCT Management submitted that the threshold of the test requires that '[t]he QCA must be satisfied not only that increased access on reasonable terms and conditions as a result of declaration would promote the public interest, but also that it will do so in a way that is not merely trivial or ambiguous. Put another way, it is necessary for the QCA to find that significant net public benefits will result from declaration'.[72] The QCA considers the requirement of 'significant' net public benefit is a higher threshold than contemplated by the Explanatory Memorandum to the Commonwealth amending Act (referred to above).

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

Again, prior to the draft recommendation, Aurizon Network submitted that criterion (d) 'imposes a positive obligation on the QCA to demonstrate that a recommendation to declare part, or all, of the service will result in improved outcomes for society relative to the potential alternatives'.[73] While the QCA considers its task is to decide whether it is satisfied about this criterion (rather than to 'demonstrate' outcomes), the QCA considers that criterion (d) calls for a weighing of the costs and benefits to the public resulting from access (or increased access) to the service, on reasonable terms and conditions, as a result of declaration.

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

While several interested parties disagreed with the QCA's findings in the draft recommendation that criterion (d) was satisfied for particular services, submissions were directed more towards the QCA's application of the criterion than matters of general principle. Submissions relating to the application of criterion (d) in the context of each service are addressed in the Parts of this final recommendation relating to those services.

2.6.5 Section 76(5) of the QCA Act

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

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

[70] Explanatory Memorandum, *Competition and Consumer Amendment (Competition Policy Review) Bill 2017* (Cth), [12.37].
[71] Explanatory Memorandum, *Competition and Consumer Amendment (Competition Policy Review) Bill 2017* (Cth), [12.41], examples 12.1 and 12.2.
[72] DBCT Management, sub. 1, p. 92, para. 413.
[73] Aurizon Network, sub. 6, p. 13.

> The new section 76(5) provides a non-exhaustive list of matters to which the Authority and the Minister must have regard to when considering the new section 76(2)(d). It replaces the existing section 76(3).
>
> While the new section 76(5) simplifies the range of matters the Authority and the Minister must have regard to when assessing the public interest criterion, under the new subsection (5)(d) the Authority or the Minister can still have regard to any of the matters that were previously listed in the existing section 76(3), if considered relevant.[74]

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

(a) the object of this part;

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

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

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

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

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

(g) the need to promote competition;

(h) the efficient allocation of resources;

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

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

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

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

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

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

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

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

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

[74] Explanatory Notes, *Queensland Competition Authority Amendment Bill 2018* (Qld), at 6.

> 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.[75]

Because of the effect that declaring the service may have on the requisite investment, matters that may need to be considered are:

- additional risk for investments in facilities and the level of return on that investment[76]
- declaration providing a mechanism for certainty and transparency in terms of access and access disputes for participants in dependent markets, on which future investment decisions can be based.

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

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

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

Practically, many administrative and compliance costs may be recoverable by the service provider, for example, through access charges or other terms and conditions. The NCC stated that, '[c]osts to a service provider that can be compensated for through access charges are unlikely to be relevant to the assessment of the public interest'.[77]

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

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

[75] Section 69E of the QCA Act.
[76] See also NCC, *Declaration of Services, A guide to declaration under Part IIIA of the Competition and Consumer Act 2010*, April 2018 edn, p. 44, para. 6.11.
[77] NCC, *Declaration of Services, A guide to declaration under Part IIIA of the Competition and Consumer Act 2010,* April 2018 edn, pp. 44–45, para. 6.17.

PART A: ACCESS CRITERIA ASSESSMENT—AURIZON NETWORK SERVICE

See separate document

PART B: ACCESS CRITERIA ASSESSMENT—QUEENSLAND RAIL SERVICE

See separate document

PART C: ACCESS CRITERIA ASSESSMENT—DBCT SERVICE

See separate document

GLOSSARY

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

QCA Act	*Queensland Competition Authority Act 1997* (Qld)
QRC	Queensland Resources Council
ROM	run of mine
s., ss.	section, sections of an Act
SAA	standard access agreement
SEQ	south east Queensland
SSNIP	small but significant non-transitory increase in price
SUFA	standard user funding agreement
TIC	terminal infrastructure charge
TSC	Transport Services Contract
UT4	Aurizon Network's 2016 access undertaking (approved October 2016, as amended)
UT5	Aurizon Network's 2017 access undertaking (approved February 2019, as amended)
WACC	weighted average cost of capital
WICET	Wiggins Island Coal Export Terminal
WIRP	Wiggins Island rail project

LIST OF SUBMISSIONS CONSIDERED BY THE QCA

Name	*Submission number*	*Date of submission*
Anglo American	14	16 July 2018
	44	26 April 2019
Aurizon Network	6	30 May 2018
	19	16 July 2018
	32	11 March 2019
	54	24 June 2019
Aurizon Operations (Aurizon Coal)	21	16 July 2018
	24	11 March 2019
	39	26 April 2019
Australian Rail Track Corporation (ARTC)	22	16 July 2018
BHP	18	16 July 2018
	27	11 March 2019
	42	26 April 2019
DBCT Management	1	30 May 2018
	10	18 June 2018
	13	16 July 2018
	26	11 March 2019
	35	29 June 2018
	36	7 November 2018
	38	24 April 2019
	55	23 July 2019
	58	28 October 2019
	61	5 July 2019
DBCT User Group	3	30 May 2018
	15	16 July 2018
	30	11 March 2019
	46	26 April 2019
	56	20 August 2019
	60	28 October 2019
	62	5 July 2019
Glencore	5	30 May 2018
	17	16 July 2018

Name	*Submission number*	*Date of submission*
	41	26 April 2019
Glencore Coal Assets	23	20 July 2018
	34	13 March 2019
	43	26 April 2019
Graincorp	52	11 June 2019
Linfox	50	11 June 2019
New Hope	59	28 October 2019
Pacific National	9	30 May 2018
	28	11 March 2019
	37	24 April 2019
	57	28 October 2019
Peabody	2	30 May 2018
	12	16 July 2018
	25	11 March 2019
	47	26 April 2019
Queensland Rail	8	30 May 2018
	11	18 June 2018
	33	11 March 2019
	51	11 June 2019
Queensland Resources Council (QRC)	7	30 May 2018
	20	16 July 2018
	29	11 March 2019
	45	26 April 2019
	53	21 June 2019
South West Producers (New Hope and Yancoal)	4	30 May 2018
	16	16 July 2018
	31	11 March 2019
	40	26 April 2019
Watco	48	8 May 2019
	49	27 May 2019

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