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# Guide to declaration under Part 5 of the Queensland Competition Authority Act (Qld) 1997

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June 2021

## Notice

This guide is designed to provide general information on declaration of services for the purposes of third party access under Part 5 of the *Queensland Competition Authority Act 1997* (QCA Act). It also explains the Queensland Competition Authority's indicative process for considering requests for declaration.

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

The guide therefore:

- (a) is non binding and should not be taken as definitive of our views on any particular matter, which may be updated from time to time<sup>1</sup>
- (b) does not cover all aspects of the relevant processes and procedures—it is not intended to be exhaustive of all issues that may arise
- (c) does not use formal or legal language
- (d) should not be considered a substitute for independent professional advice.

This guide should also be considered in conjunction with the approved form for any request for declaration of a service. This form is available on our website and, for convenience, is also provided in Appendix A of this guide.

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<sup>1</sup> We may, from time to time, revise this guide at our discretion.

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## CONTENTS

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Notice	i
CONTENTS	I
DECLARATION FOR THIRD PARTY ACCESS	III
1 THE ACCESS CRITERIA AND OUR PROCESS	1
1.1 Access criteria	1
1.2 The assessment process	2
1.3 Making a request	2
1.4 Assessing a request	3
1.5 Steps in making a recommendation	3
1.6 QCA fee	4
2 THE SERVICE AND THE FACILITY THAT PROVIDES THE SERVICE	5
2.1 The service	5
2.2 The facility	6
2.3 Examples of how a service can be defined by reference to the facility	6
2.4 What an application should contain	7
2.5 The access criteria	8
3 CRITERION (B): MEET TOTAL FORESEEABLE DEMAND AT LEAST COST	9
3.1 Our approach	9
3.2 Identify the market in which the service is provided	10
3.3 Identify the period over which total foreseeable demand should be assessed	10
3.4 Determine total foreseeable demand in the market	10
3.5 Identify whether the facility for the service (expanded where relevant) could meet total foreseeable demand	11
3.6 Identify the cost of any two or more facilities to meet total foreseeable demand	11
3.7 Meet total foreseeable demand at least cost	11
3.8 What an application should contain	11
4 CRITERION (A): ACCESS AS A RESULT OF DECLARATION WOULD PROMOTE A MATERIAL INCREASE IN COMPETITION IN AT LEAST ONE MARKET	12
4.1 Our approach	12
4.2 Identify the relevant dependent (upstream or downstream) markets	12
4.3 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	13
4.4 What an application should contain	14
5 CRITERION (C): STATE SIGNIFICANCE	15
5.1 Our approach	15
5.2 Identify the service	15
5.3 Identify the facility for the service	15

5.4	Size of the facility	15
5.5	Importance of the facility to the Queensland economy	15
5.6	What an application should contain	16
6	CRITERION (D): PROMOTE THE PUBLIC INTEREST	17
6.1	Our approach	17
6.2	Identify the service	17
6.3	Access (or increased access), on reasonable terms and conditions, as a result of a declaration of the service	18
6.4	Promote the public interest	18
6.5	What an application should contain	19
7	THE PERIOD FOR DECLARATION	20
APPENDIX A: FORM FOR A REQUEST TO RECOMMEND DECLARATION OF A SERVICE UNDER PART 5, DIVISION 2 OF THE QUEENSLAND COMPETITION AUTHORITY ACT 1997		21
Information to include in the request		21
Confidential information		22

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## DECLARATION FOR THIRD PARTY ACCESS

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The Queensland Competition Authority (QCA) is Queensland’s economic regulator. Our role in the declaration process is to consider requests for declaration and make a recommendation to the Minister responsible for administering the *Queensland Competition Authority Act 1997* (QCA Act).<sup>2</sup> We can recommend declaration of a service only if we are satisfied that all of the access criteria set out in the QCA Act are satisfied.

Declaration of services for third party access is dealt with under Part 5 of the QCA Act.<sup>3,4</sup> The Act sets out the object of Part 5:

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.<sup>5</sup>

The third party access regime in Part 5 provides a regulatory framework to enable access seekers to gain access to significant infrastructure services where there may be a lack of effective competition. It is important to note the emphasis placed on competition in upstream and downstream (related) markets. The purpose is not to restrict or moderate the ability of a service provider to set prices *per se* but this is often one of the processes that enhances competition in related markets.

Part 5 was put in place as part of Queensland’s response to the 1995 Competition Principles Agreement between the Commonwealth, state and territory governments. It has many similarities with Part IIIA of the *Competition and Consumer Act 2010* (Cth) (CCA) but a number of important differences, including that it is administered by us and the relevant Queensland Minister.<sup>6</sup>

This guide is primarily applicable in relation to applications for declaration, but the same considerations will apply in relation to applications for revocation of declaration.<sup>7</sup> It does not address other Part 5 issues, such as the resolution of disputes<sup>8</sup> or the content and approval of access undertakings.<sup>9</sup>

A person may ask us to recommend that a particular service be declared by the Minister under Part 5 (s. 77). For a service to be declared, the Minister must be satisfied that all of the access criteria in the QCA Act for the service are satisfied (s. 86).<sup>10</sup> The process for a declaration request has three main steps (Figure 1).

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<sup>2</sup> The relevant minister is the Treasurer of Queensland.

<sup>3</sup> Part 5, division 2 sets out matters relating to the declarations of services (including revocation of declaration).

<sup>4</sup> Unless otherwise stated, references in this document to a section or part are to the relevant provision(s) within the QCA Act.

<sup>5</sup> Section 69E.

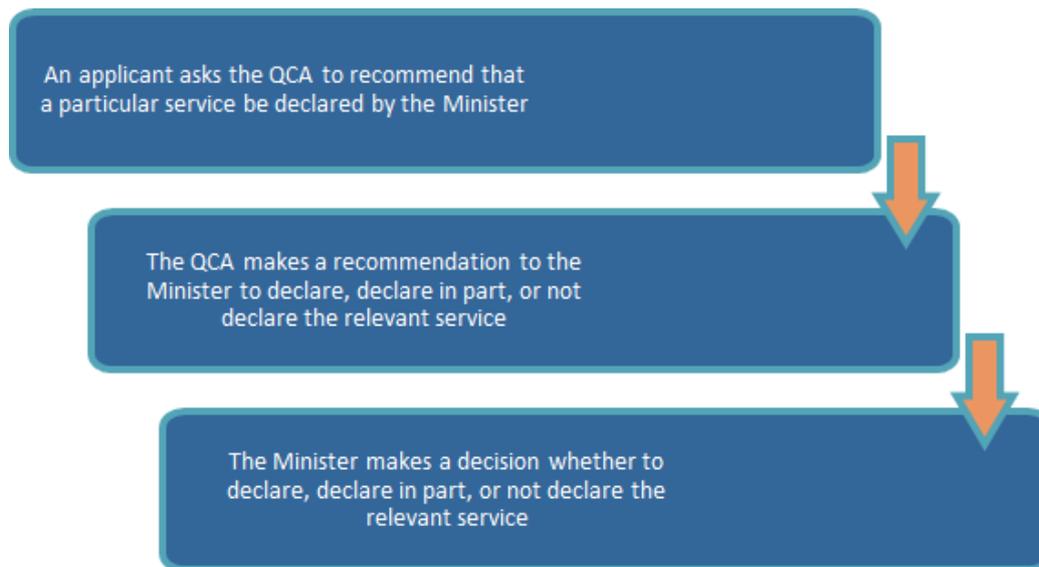
<sup>6</sup> Declaration under Part IIIA of the CCA is administered by the National Competition Council and the relevant federal minister.

<sup>7</sup> Matters concerning revocation are dealt with in ss. 88 to 94.

<sup>8</sup> Part 5, division 5.

<sup>9</sup> Part 5, division 7.

<sup>10</sup> The access criteria are in s. 76.

**Figure 1 Process for a declaration request**

If a service is declared by the relevant Minister, it is then subject to regulatory oversight by us under Part 5. This oversight may include us arbitrating disputes about access to the service, including in relation to price and non-price terms. It may also involve us approving an access undertaking for the relevant service, which can set out detailed terms and conditions by which the owner or operator of the service provides access to the service.



This guide explains the requirements under the QCA Act for having a service declared. It provides both direction on the information we seek from an applicant and general guidance on our approach to assessing the application.

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# 1 THE ACCESS CRITERIA AND OUR PROCESS

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## 1.1 Access criteria

For us to recommend that a service be declared, we must be satisfied that all of the access criteria for the service in s. 76 are satisfied. Likewise, for a service to be declared, the Minister must be satisfied that all of the access criteria for the service are satisfied.

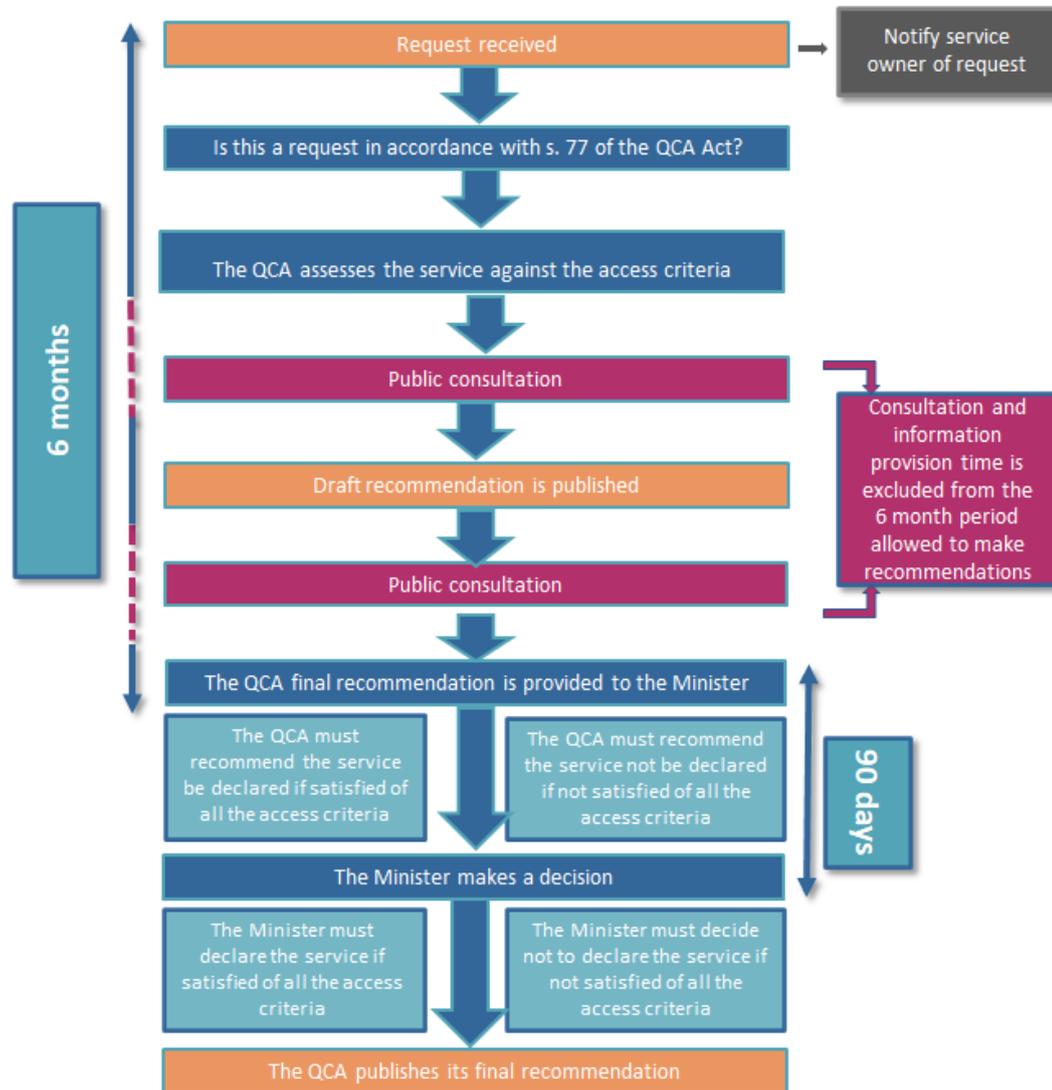
### Box 1: Section 76—Access criteria

- (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.

## 1.2 The assessment process

Once we receive a request, we check that it is properly a request under s. 77 before proceeding to consider whether to recommend that the service be declared. An indicative overview of our process is set out below.<sup>11</sup>

**Figure 2 Indicative QCA process**



## 1.3 Making a request

A person may ask us to recommend that a particular service be declared by the Minister.<sup>12</sup> We then notify the service owner/operator that we have received such a request.

<sup>11</sup> This is only an indicative summary of the process. The approach we take in conducting the investigation and consultation process will be determined on a case-by-case basis. For example, we may choose to also seek cross-submissions, release discussion papers for comment or conduct public forums as part of the investigation.

<sup>12</sup> Section. 77(1). Also, the Minister may ask us to consider whether a particular service should be declared by the Minister (s. 77(2)).

An application to us to recommend the declaration of a service under Part 5 must be in a QCA-approved form.<sup>13</sup> For this purpose, an applicant must follow the approved form, which is available on our website and, for convenience, is also provided in Appendix A to this guide.

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

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

A declaration request should (so far as possible) seek to:

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



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

## 1.4 Assessing a request

When we receive a request that a service be declared, we first assess whether it is properly a request under s. 77, including whether it is in the approved form (as per Appendix A).

We note that s. 72(2) expressly states that the definition of a 'service' does not include certain matters. These include

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

We cannot consider a declaration request if it does not relate to a service as defined by the QCA Act.

## 1.5 Steps in making a recommendation

Upon receipt of a declaration request in the approved form, we may:

- conduct an investigation about the service—this may include consideration of written submissions, public seminars and/or hearings<sup>14</sup>

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<sup>13</sup> Section 77(3).

<sup>14</sup> Section 81. The procedures in Part 6 apply to an investigation.

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

The steps we take in conducting the investigation and consultation process are determined on a case-by-case basis. We provide further guidance on the specific process at the relevant time. While this may vary depending on circumstances, we aim to complete our assessment and provide our final recommendation to the Minister within six months (excluding consultation and information provision periods).<sup>15</sup>

Our final report to the Minister will be to recommend either to declare, declare in part, or not declare the service in question, based on our assessment of whether the access criteria are satisfied in relation to that service.<sup>16</sup> If our recommendation is to declare the service (or part of the service), then we will also recommend the period for declaration. Section 7 of this guide discusses some of the factors we may examine in forming a view on the period for declaration.

We may recommend that a service not be declared by the Minister if we consider the request for declaration was not made in good faith or is frivolous.<sup>17</sup>

The Minister has 90 days to make and publish their decision (s. 85).<sup>18</sup> As a last step, we publish our final recommendation on our website, ordinarily following publication of the Minister's decision (s. 79(3)).

## 1.6 QCA fee

We are permitted to levy fees for our services, including for considering requests to make a recommendation under Part 5 for declaration by the Minister of a particular service.<sup>19</sup>



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

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<sup>15</sup> Section 79A. Section 79A(4) applies if we do not make the recommendation within the six month period.

<sup>16</sup> Sections 79(1) and 80.

<sup>17</sup> Section 80(3). This does not apply to a request made by the Minister (s. 80(4)).

<sup>18</sup> The 90 days commences when the Minister receives the declaration recommendation, unless the recommendation is for the declaration of a service provided by means of a facility owned by a local government entity (in which case the 90 days only commences after the relevant period of consultation between the Minister and the local government entity and responsible local government for the entity, under s. 84(3)).

<sup>19</sup> QCA Act, s. 245; and the Queensland Competition Authority Regulation 2018, s. 3 and sch. 1 (item 3). The fee payable is the amount that the QCA considers to be reasonable and that is not more than the reasonable cost of providing the service or performing the function.

## 2 THE SERVICE AND THE FACILITY THAT PROVIDES THE SERVICE

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

### 2.1 The service

The service that is the subject of the request must fall within the meaning of a 'service' under Part 5.

#### Box 2: Section 72—Meaning of *service*

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

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



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

While we interpret the scope of the service described in an application, we do not redefine or expand the scope of the service for which declaration is sought.<sup>20</sup>

<sup>20</sup> See *Rio Tinto Limited v The Australian Competition Tribunal* [2008] FCAFC 6 (14 February 2008) at [58]–[59].

It may be useful for an application to specify the purpose for which access to the service is sought. This will help to ensure that any right to negotiate access to the service following declaration is consistent with that purpose.

A description of the applicant's efforts, if any, to negotiate access to the service should also be provided.

## 2.2 The facility

The QCA Act defines a 'facility' for the purpose of Part 5 on an inclusive basis rather than providing an exhaustive list.

### Box 3: Section 70—Meaning of *facility*

**Facility** includes—

- (a) rail transport infrastructure; and
- (b) port infrastructure; and
- (c) electricity, petroleum, gas or GHG stream<sup>21</sup> transmission and distribution infrastructure; and
- (d) water and sewerage infrastructure, including treatment and distribution infrastructure.

The facility is the minimum physical asset or assets by which the service is provided. Assets which are not necessary to use the service will be outside the minimum bundle of assets that comprise the facility.<sup>22,23</sup>

In considering what assets comprise the minimum bundle of assets, we may consider the degree of interconnectivity between the various assets at the facility that provide the service. In other words, is the relevant service able to be produced by a discrete set of assets at the facility, or is the service only able to be produced by an integrated set of assets at the facility?

## 2.3 Examples of how a service can be defined by reference to the facility

Examples of services which have been either subject to declaration or for which declaration has been sought include:

- the use of a coal system for providing transportation by rail<sup>24</sup>

<sup>21</sup> Section 70(2). GHG stream is defined in the *Greenhouse Gas Storage Act 2009*, s. 12.

<sup>22</sup> In this respect, the Australian Competition Tribunal in *Re Sydney International Airport* (in the context of Part IIIA of the CCA) said, 'A key issue is the minimum bundle of assets required to provide the relevant services subject to declaration. The more comprehensive the definition of the set of physical assets essential for international aircraft to land at [the airport], unload and load freight and depart in a safe and cost effective manner, the less likely it is that anyone (even the incumbent infrastructure owner) would find it economical to develop "another facility" within a meaningful time scale. Conversely, the narrower the definition of facility, the lower the investment hurdle and inhibition on development facing the incumbent or a new entrant.' See *Re Sydney International Airport* [2000] ACompT 1 at [192].

<sup>23</sup> For example, the service to which access is sought may be the use of rail transport infrastructure between point X and point Y, where the relevant facility providing the service is the rail transport infrastructure of facility Z. Aspects of facility Z that are not necessary to provide the service between points X and Y are outside the minimum bundle of services.

<sup>24</sup> Section 250(1)(a).

- 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<sup>25</sup>
- the handling of coal at Dalrymple Bay Coal Terminal by the terminal operator<sup>26</sup>
- the provision of the right to access and use all the shipping channels and berthing facilities required for the export of coal from the port, by virtue of which vessels may enter a port precinct and load and unload at relevant terminals located within the port precinct, and then depart the port precinct<sup>27</sup>
- the use of runways, taxiways, parking aprons and other associated facilities (Airside Facilities) necessary to allow aircraft carrying domestic passengers to (i) take off and land using the runways at Sydney Airport; and (ii) move between the runways and the passenger terminals at Sydney Airport (Airside Service).<sup>28</sup>



Declaration relates to access to a service provided by means of a facility, rather than the facility itself.

It is up to an applicant to determine how to specify the service that is provided by a facility and to which access is sought.

## 2.4 What an application should contain



See the approved form in Appendix A. The section of an application on the service and facility should provide details of the service, including:

- the specification of the service
- a description of the facility that provides the service
- details of the owner(s) and (where different) operator of the service.

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<sup>25</sup> Section 250(1)(b).

<sup>26</sup> Section 250(1)(c).

<sup>27</sup> New South Wales Minerals Council, *Application for a declaration recommendation in relation to the Port of Newcastle*, July 2020, p. 7.

<sup>28</sup> *Sydney Airport Corporation Limited v Australian Competition Tribunal* [2006] FCAFC 146 at [51].

## 2.5 The access criteria

Once an application has identified the service and facility, it should seek to demonstrate how the service for which declaration is sought satisfies the access criteria (in s. 76).

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

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

We must be satisfied of the access criterion in s. 76(2)(b). This is referred to as criterion (b) and is set out, together with other relevant provisions, in Box 4.

#### Box 4: Criterion (b)—meet total foreseeable demand at least cost

Section 76(2)(b) states:

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);

Section 76(3) and (4) 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.

#### 3.1 Our approach

When we assess whether criterion (b) is satisfied, our indicative approach is to follow the steps below (Figure 3).

**Figure 3 Our approach to assessing whether criterion (b) is satisfied**



### 3.2 Identify the market in which the service is provided

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

The concept of a 'market' is defined in s. 71.

#### Box 5: Section 71—meaning of *market*

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

A market is typically defined by reference to its product and geographic dimensions, and, where relevant, its functional dimension. Identifying strong or close substitutes for the relevant service, both actual and potential, is crucial to defining the relevant market. As the then Trade Practices Tribunal (now the Australian Competition Tribunal) observed:

A market is 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.<sup>29</sup>

Substitution possibilities may be influenced by a range of factors, including economic considerations (such as the cost of switching to alternative services); regulatory/legislative frameworks; and geographic and operational constraints (e.g. transportation constraints).

### 3.3 Identify the period over which total foreseeable demand should be assessed

We form a view on the period over which total foreseeable demand should be assessed. When we form a view on the period for declaration, the factors we examine could include:

- the importance of long-term certainty to service providers who have made significant investments in infrastructure facilities
- the duration of time for which users may seek access to the facility
- the certainty of demand forecasts over the foreseeable period
- the foreseeable timing of potential changes in the market environment
- the need for periodic reviews of declaration arrangements.

### 3.4 Determine total foreseeable demand in the market

Having identified the scope of the relevant market and the period for assessing total foreseeable demand, we identify the customers in that market and an estimate of their foreseeable demand.

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<sup>29</sup> Re *Queensland Co-Op Milling Association and Defiance Holding Limited* (QCMA) (1976) 8 ALR 481 at [518].

Ultimately, what is 'foreseeable' is a matter of judgment. We have regard to the information before us, including forecasts provided, and our degree of confidence in those forecasts.

### 3.5 Identify whether the facility for the service (expanded where relevant) could meet total foreseeable demand

To identify whether the facility for the service could meet total foreseeable demand in the market for the declaration period under consideration, we must identify the capacity of the facility. Where the facility is at capacity, we must determine if it is 'reasonably possible to expand that capacity', in which case we may have regard to the facility as if it had that expanded capacity in assessing criterion (b) (s. 76(3)).

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

Where the facility for the service could meet the total foreseeable demand in the market for the declaration period under consideration, we must consider at what cost that would be. Specifically, we must assess whether the facility for the service could do so 'at the least cost' compared to any two or more facilities.

'Costs' capture all costs, including those associated with any expansion of the facility during the proposed declaration period, of meeting total foreseeable demand in the market for the service provided by the facility in question, or using two or more facilities.

### 3.7 Meet total foreseeable demand at least cost

Finally, we must 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).

While the relevant comparison to 'any 2 or more facilities' could include the facility for the service, 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.

### 3.8 What an application should contain



**See the approved form in Appendix A. This section of an application on whether the facility for the service satisfies criterion (b) should include information about:**

- the market in which the service is provided
- whether there are substitutes for the service in the relevant market
- the period for which the service should be declared
- expected demand in the market over the proposed declaration period
- whether the facility for the service can meet expected demand in the market either in existing or expanded form (if relevant)
- whether the facility for the service can meet expected demand in the market at lower cost than any two or more facilities.

## 4 CRITERION (A): ACCESS AS A RESULT OF DECLARATION WOULD PROMOTE A MATERIAL INCREASE IN COMPETITION IN AT LEAST ONE MARKET

We must be satisfied of the access criterion in section 76(2)(a). This is referred to as criterion (a) and is set out in Box 6. For the purpose of this guide, we use the term ‘dependent market’ when considering a market other than the market for the service.

### Box 6: Criterion (a)—promote a material increase in competition

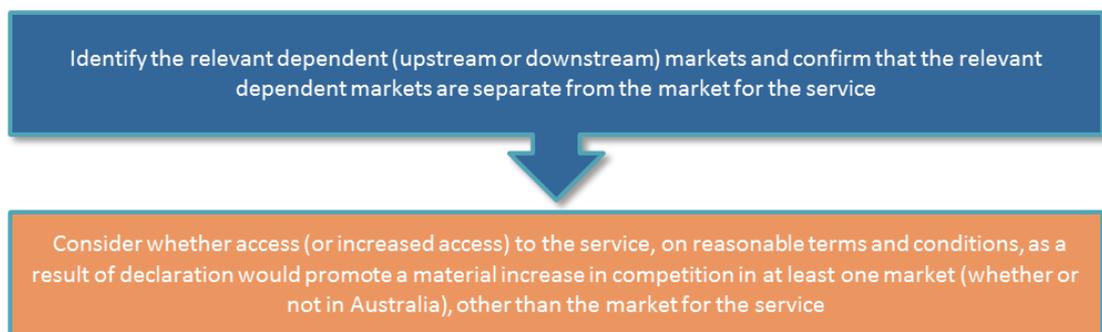
Section 76(2)(a) states:

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

### 4.1 Our approach

We consider the effect of declaration in dependent markets, and specifically whether access or increased access on reasonable terms and conditions as a result of declaration would promote a material increase in competition in market(s) other than the market for the service (Figure 4).

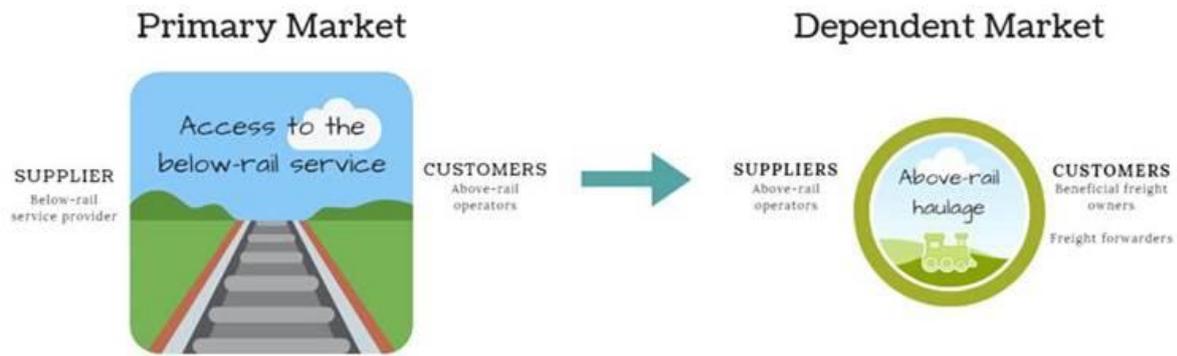
**Figure 4 Our approach to assessing whether criterion (a) is satisfied**



### 4.2 Identify the relevant dependent (upstream or downstream) markets

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). An example of the relationship between the market for the service and a dependent market in the case of a below-rail service is shown below (Figure 5).

Figure 5 Below-rail service - example of relationship with a dependent market



#### 4.3 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

We apply criterion (a) using a 'future with and without' approach. This approach involves comparing a future 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. We therefore form a view on the likely future conditions in both of these scenarios.

In doing so, we consider the ability and incentive of the service provider to exert market power in the absence of declaration. We may also consider whether dependent markets are already workably competitive. If a dependent market would be workably (or effectively) competitive in a future without declaration, access (or increased access) to the service on reasonable terms as a result of declaration is not likely to materially increase competition in that dependent market.<sup>30</sup>

The focus of this assessment is on the specific competition impacts that declaration of the service would have in dependent markets.

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<sup>30</sup> *Fortescue Metals Group Limited* [2010] ACompT 2 at [1068]. See also NCC, *A guide to declaration under Part IIIA of the Competition and Consumer Act 2010 (Cth)*, 2018, pp. 32–33, paras 3.24–3.25. The NCC said: "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." (para 3.24).



### The increase in competition must be 'material'

Criterion (a) requires us to consider competitive conditions in the dependent market(s) in a future with and without declaration. We need to compare conditions in each of those scenarios to determine whether declaration would promote a material increase in competition.

It is relevant to consider whether the dependant market is workably competitive in the absence of declaration. If so, it may be unlikely that declaration would promote a material increase in competition.

We consider that a trivial increase in competition is not 'material'.

## 4.4 What an application should contain



**See the approved form in Appendix A. This section of an application on whether the service satisfies criterion (a) should include information that identifies:**

- a market or markets that are separate to, but dependent on, the market for the service
- the ability and incentive of the service provider to exert market power
- how access (or increased access) to the service as a result of declaration would promote a material increase in competition in one or more dependent markets.

## 5 CRITERION (C): STATE SIGNIFICANCE

We must be satisfied of the access criterion in section 76(2)(c). This is referred to as criterion (c) and is set out in Box 7.

### Box 7: Criterion (c)—State significance

Section 76(2)(c) states:

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

### 5.1 Our approach

We apply the approach set out in Figure 6 when assessing whether criterion (c) is satisfied.

**Figure 6 Our approach to assessing whether criterion (c) is satisfied**



### 5.2 Identify the service

See section 2.1 of this guide.

### 5.3 Identify the facility for the service

See section 2.2 of this guide.

### 5.4 Size of the facility

Having identified the service and the facility for the service, we must consider whether the facility is significant, having regard to its size.

Relevant factors may include the physical and geographic dimensions of the facility (e.g. 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.

### 5.5 Importance of the facility to the Queensland economy

We must also consider whether the facility for the service is of importance to the Queensland economy. In doing so, relevant factors may include reference to its contribution to exports, employment and gross state product. State significance may be established if the facility is an essential element of a supply chain and enables significant revenues to be earned by businesses.

The criterion does not require that a facility must be significant in terms of both its size *and* importance to the Queensland economy.

## 5.6 What an application should contain



See approved form in Appendix A. This section of an application on whether criterion (c) is satisfied should include information addressing whether:

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

## 6 CRITERION (D): PROMOTE THE PUBLIC INTEREST

We must be satisfied of the access criterion in section 76(2)(d). This is referred to as criterion (d). In considering criterion (d), we must have regard to the factors listed in section 76(5) (see Box 8).

### Box 8: Criterion (d)—Promote the public interest

Section 76(2)(d) states:

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

Section 76(5) further states:

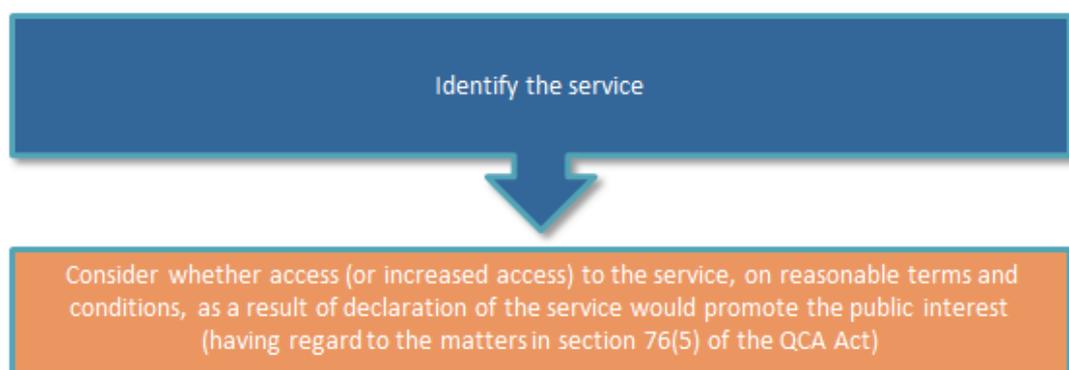
In considering the access criterion mentioned in subsection (2)(d), the authority and the Minister must have regard to the following matters—

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

### 6.1 Our approach

We apply the approach set out in Figure 7 when assessing whether criterion (d) is satisfied.

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



### 6.2 Identify the service

See section 2.1 of this guide.

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

See section 4.3 of this guide.

### 6.4 Promote the public interest

Criterion (d) requires satisfaction of a positive test (i.e. the requisite access as result of declaration 'would promote the public interest').

We consider that 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. The scope of this positive test is informed by, among other things, the specific matters mentioned in s. 76(5) (discussed below).

That said, the matters that are able to be considered under the public interest are broad and are not exclusively defined.<sup>31</sup>

Our approach to criterion (d) is to weigh 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 declaration (as opposed to costs and benefits that may be expected in any event).

#### 6.4.1 Section 76(5)

Section 76(5) lists the matters to which we must have regard in assessing criterion (d).

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

Section 76(5)(a) only applies if the facility for the service extends outside Queensland.

Where this occurs, this section requires us to have regard to whether access to the service provided outside Queensland by means of the facility is regulated by another jurisdiction. We also have to look at whether it is desirable to maintain consistency in the way access to the service is regulated.

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

Section 76(5)(b) requires us 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 term 'facilities' encompasses not only consideration of investment in the facility that provides the service (the subject of the request), but also any other facility in which investment may be affected by the declaration (including other facilities in the supply chain). We do not consider that it is necessary to confine our consideration to the effect on investment in the facility for the service.

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<sup>31</sup> This is consistent with the broad interpretation given to the public interest test (under the access regime of Part IIIA of the CCA) by the High Court in the *Pilbara* matter that 'when used in a statute, the expression "public interest" imports a discretionary value judgment to be made by reference to undefined factual matters ... when a discretionary power of this kind is given, the power is "neither arbitrary nor completely unlimited" but is "unconfined except in so far as the subject matter and the scope and purpose of the statutory enactments may enable the Court to pronounce given reasons to be definitely extraneous to any objects the legislature could have had in view'. See *The Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* [2012] HCA 36 at [42].

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

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

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

In considering this criterion, we also have regard to the administrative and compliance costs that would exist in the absence of declaration.

### Section 76(5)(d)—any other matter

Section 76(5)(d) requires us to have regard to 'any other matter' we consider relevant. These matters may be any other matters that we, at our discretion, consider appropriate as part of forming a view on whether declaration would be in the public interest. We are also guided by stakeholder submissions on this matter. Examples of other matters include environmental costs and benefits, impact on royalties and the compliance costs of declaration on those that will use the service.

## 6.5 What an application should contain



**See the approved form in Appendix A. This section of an application on whether criterion (d) is satisfied should include information addressing whether access (or increased access) to the service as a result of declaration of the service would promote the public interest. This should include addressing the matters in s. 76(5), namely:**

- if the facility extends outside Queensland and is regulated by another jurisdiction, the desirability of consistency in regulating access to the service
- the effect of declaration on investment in facilities and markets that depend on access to the service
- the administrative and compliance costs that would be incurred by the service provider if the service were declared
- any other relevant matter.

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## 7 THE PERIOD FOR DECLARATION

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If we recommend that a service or part of a service be declared, we must also recommend the period for declaration (s. 79(4)).

The period for declaration should balance the interests of access seekers with the interests of the access provider in having the service declared for only as long as is considered necessary.

The factors we will have regard to in determining the relevant period will depend on the circumstances and may include those factors relevant in determining the period over which total foreseeable demand will be assessed (see section 3.3).

The period for which a service is to be declared must be a period over which each of the access criteria are satisfied. The QCA Act does not necessarily require us to recommend declaration of a service over the longest period in which each of the access criteria may be satisfied. We might, having regard to the matters listed in section 3.3 or other considerations, determine that a shorter period of declaration would be appropriate—for example, the timeframes within which a substitute facility may be built in the future.

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## APPENDIX A: FORM FOR A REQUEST TO RECOMMEND DECLARATION OF A SERVICE UNDER PART 5, DIVISION 2 OF THE QUEENSLAND COMPETITION AUTHORITY ACT 1997

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This form sets out the matters to be addressed in a request made to the QCA to recommend declaration of a service. We encourage applicants to provide us with all the relevant information that they reasonably can, as this will help us in assessing the application. Where possible, matters should be supported with evidence.

However, we understand that not all of this information may be readily available. Therefore, in relation to the matters listed in this form, if a particular matter is not relevant to the request, or if relevant information is not readily available to the applicant, the applicant should provide a brief explanation.

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

### Information to include in the request

#### Applicant details

The applicant's name, address and contact details.

#### Identify the service and the facility that provides the service

Details of the service the subject of the request, including:

- the specification of the service
- a description of the facility that provides the service
- details of the owner(s) and (where different) operator of the service.

#### Address the access criteria

The applicant should address whether the service in question meets the access criteria in s. 76 of the *Queensland Competition Authority Act 1997* (QCA Act). This should include, where possible, the matters outlined below.

#### **Criterion (b)—Meet total foreseeable demand at least cost**

Details of:

- the market in which the service is provided
- whether there are substitutes for the service in the relevant market
- the period for which the service should be declared
- expected demand in the market over the proposed declaration period
- whether the facility for the service can meet expected demand in the market either in existing or expanded form (if relevant)
- whether the facility for the service can meet expected demand in the market at lower cost than any two or more facilities.

**Criterion (a)—Access as a result of declaration would promote a material increase in competition in at least one market other than the market for the service**

Details of:

- a market or markets that are separate to, but dependent on, the market for the service
- the ability and incentive of the service provider to exert market power
- how access (or increased access) to the service as a result of declaration would promote a material increase in competition in one or more dependent markets.

**Criterion (c)—State significance**

Information addressing whether the facility for the service is significant having regard to its size or importance to the Queensland economy.

**Criterion (d)—Promote the public interest**

Information addressing whether access (or increased access) to the service as a result of declaration of the service would promote the public interest. This should address the matters in s. 76(5), namely:

- if the facility extends outside Queensland and is regulated by another jurisdiction, the desirability of consistency in regulating access to the service
- the effect of declaration on investment in facilities and markets that depend on access to the service
- the administrative and compliance costs that would be incurred by the service provider if the service were declared
- any other relevant matter.

**Confidential information**

If claiming confidentiality in respect of the request (or any part of the request) in accordance with the QCA Act<sup>32</sup>, the applicant should provide a public version as well as a clearly marked confidential version.

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<sup>32</sup> In particular, s. 187 and/or s. 239.