

29 January 2018

Ms Hannah Ransom  
Australian Competition and Consumer Commission

By email: [adjudication@accc.gov.au](mailto:adjudication@accc.gov.au)

Dear Ms Ransom

**PORT OF BRISBANE AND CARNIVAL APPLICATION FOR AUTHORISATION AA1000399**

We refer to the following:

1. The application by Port of Brisbane Ltd (**Port of Brisbane**) and Carnival plc (**Carnival**) (collectively, the **Applicants**) for interim authorisation and authorisation dated 9 October 2017 (**Application**).
2. The ACCC's interim authorisation decision dated 2 November 2017.
3. The anonymous submission of interested parties dated 3 November 2017 and 15 November 2017.
4. Carnival's response to the ACCC's questions dated 20 November 2017 (**Carnival's Response**).
5. The Applicants' response to the anonymous submissions dated 21 December 2017 (**Applicants' Response**).

Further to our previous submissions to the ACCC regarding the Application, we provide the following responses to submissions made in Carnival's Response and the Applicants' Response.

**1. Competition from other terminals is negatively affected**

In Carnival's Response, they argue that the proposed take or pay agreement (**Proposed Agreement**) does not contain exclusivity provisions and that Carnival are free to use other terminals as it sees fit.

A copy of the Proposed Agreement has not been provided on the public register. However, it is clear that under the Proposed Agreement, Carnival would be granted preference to 100 foundation priority berthing days at the proposed facility, in exchange for committing to take or pay obligations with Port of Brisbane. It is understood this means Carnival would have an obligation to pay for at least 100 days regardless of whether it actually berths at the proposed facility on those days or not.

If the Proposed Agreement were put into effect, it is not realistic to suggest Carnival would reasonably elect to berth at an alternative berth in circumstances where it had already committed financially to berth at the proposed facility.

Carnival's Response goes further to state *"Carnival intend to use the New Cruise Facility for the majority of its Brisbane berthing requirements, including any home porting requirements in Brisbane"*. The reasons provided by Carnival for choosing the new facility (as opposed to the Portside facility) include that *"it considers it to be a modern fit for purpose terminal facility that is better suited to its commercial requirements, enabling future growth of its cruise itineraries which port in Brisbane."*

These submissions from Carnival demonstrate they believe there are valid reasons to elect, and are already committed to using the proposed facility. The validity of these reasons is of course subjective, and there are counter-arguments to the perceived advantages of the proposed facility.

However, if the reasons stated by Carnival are valid, then they exist regardless of whether the Proposed Agreement was in place. That is, Carnival is free to elect the proposed facility for the reasons they have outlined without the need for the Proposed Agreement. The Proposed Agreement would serve only to restrict Portside's ability to compete for ships it would otherwise be able to take, on all factors (including for example, price, improvement of facilities, etc).

In the Applicants' Response, the Applicants claim that if Carnival chose to switch all its utilisation from Portside to the proposed facility, that this would be a pro-competitive outcome (even if it resulted in Portside becoming unviable). Again, it is open for Carnival to do this without the need for the Proposed Agreement. However, if Carnival were to make this decision with the Proposed Agreement in place, then such a decision would clearly have been influenced by the existence of the Proposed Agreement. It is difficult to see how such a decision made in those circumstances (or the consequences arising out of such a decision) could be described as pro-competitive.

It is relevant to reiterate that generally speaking, Portside has no ability to compete for ships larger than 270m. If the Proposed Agreement is put into effect (and is not restricted for example to apply only to ships greater than 270m that are unable to berth at Portside), there is potential for Carnival to elect to apply its 100 priority days entirely to sub-270m ships. These are ships that Portside would have ordinarily been able to compete for, if the Proposed Agreement was not put into effect. As noted in the Applicants' Response, the new facility would be the only facility in Brisbane able to accept ships larger than 270m, meaning there would be no competition locally (at a terminal level) for those ships.

## **2. Carnival already has a dominant market position**

In Carnival's Response, they note they are the only cruise operator that operates in Australia year round, with others only operating during the Summer season. This is the reason they state their market share is higher on a year round basis. In the Applicants' Response they argue that Carnival did not achieve their position in the market through anti-competitive means.

It is important to consider Carnival's position in the market may already allow it certain preferences or abilities unavailable to its potential competitors, even without the Proposed Agreement (for example, its ability to make consistent and consecutive bookings, which is desirable from the perspective of a cruise terminal operator). Carnival's dominant position may be a contributing factor as to why other operators have yet been able to successfully enter the market outside the Summer months.

Regardless of the means by which it attained its dominant market position, it does not change the fact that Carnival is the dominant operator. As noted in the anonymous submissions dated 15 November 2017, by allowing the dominant operator to enter into the proposed take or pay agreements would only serve to entrench its dominance within the market.

### **3. The proposed development is likely to proceed regardless**

In the Applicants' Response, Port of Brisbane claim it would not make investment into the proposed facility *"unless it can guarantee a base level of custom and revenue, in order to make its investment viable"*.

The Applicant's own submissions included reports and data<sup>1</sup> that predicts growth in the Brisbane cruise market. If the Applicants are confident in these forecasts, then it is unclear why they would require the Proposed Agreement to underpin the proposed development. Further, given its clear dominance in Australia, growth will actually be largely driven by the actions of Carnival.

In the Application, the Applicants stated they would not commence construction work on the proposed development without interim authorisation for the Proposed Agreement. Interim authorisation was refused by the ACCC on 2 November 2017. In the Applicants' Response, they repeated their claim that the proposed development would not proceed without being granted authorisation for Proposed Agreement.

Contrary to the above representations, and despite the application for interim authorisation being refused, a significant amount of construction works has since been carried out on site. Aerial images of the site contained in **Annexure A** show the progress of works on the site from above between September 2017 and January 2018. Photograph images taken on 22 January 2018 contained in **Annexure B** depicts the works at ground level.

Given the above, it is clear the Applicants' claims that the proposed development will not proceed without authorisation of the Proposed Agreement is not accurate.

Additionally, a number of recent media articles not only comment on the commencement and proposed programme of works (*"Early works began in November, with construction of the wharf*

---

<sup>1</sup> NineSquared Demand Forecast Report attached as Attachment C to the Application

*expected to start mid 2018*)<sup>2</sup> but also confirms the appointment of consultants including an architect and design engineers.<sup>3</sup> This confirms the Applicant's commitment to proceed with the proposed development.

#### **4. Applicant's arguments against conditions of authorisation not substantiated**

In the Applicants' Response, they have submitted that authorisation should be granted without conditions (for example, a restriction to apply only to ships over 270m, or for a shortened term). Specifically, the Applicants have claimed that if a shorter term of authorisation were granted, this would have the effect of discouraging investment in large scale new projects. Other than making a general statement to this effect, the Applicants provide no details to substantiate this claim.

Further, the Applicants have now seemingly amended their request for authorisation to apply for a term of 18 years, commencing from the time the new facility is complete. This is not what was originally requested by the Applicants in the Application, where authorisation was requested for a term of 18 years (effective immediately), contemplating 2-3 years of development and 15 years of operation. The Applicants have provided no further information regarding this amendment to the proposed term. The Applicants have yet to adequately substantiate why a 15 year operational term for authorisation (as per the Application) is required; let alone substantiate why now, an extended operational term of 18 years is required.

We reiterate our position that based on the reasons outlined in our previous submission and also above, authorisation should be refused.

In the alternative, if the authorisation is granted, it should be restricted to apply only to vessels which Portside is physically unable to dock (and that the priority berthing days be significantly reduced to reflect this). Further, the term of the authorisation, if granted, should be shortened to not more than five years.

---

<sup>2</sup> See for example, Global Construction Review "Arup to design new Brisbane cruise terminal" (10 January 2018), accessed at <http://www.globalconstructionreview.com/news/arup-design-new-brisbane-cruise-terminal/>

<sup>3</sup> See for example, The Construction Index "Arup team to design Brisbane cruise terminal" (10 January 2018), accessed at <http://www.theconstructionindex.co.uk/news/view/arup-team-to-design-brisbane-cruise-terminal>



**Annexure A - Aerial photo of Luggage Point (Source: Nearmaps)**

**At 19 September 2017**



**At 16 January 2018**





## Annexure B



