



# Determination

Application for authorisation

lodged by

Port of Brisbane Pty Ltd and Carnival

in respect of

contractual arrangements to support the  
construction of a new cruise ship terminal

Date: 10 May 2018

Authorisation number: AA1000399

Commissioners: Sims  
Rickard  
Schaper  
Cifuentes  
Court  
Featherston  
Keogh

## Summary

The ACCC has decided to grant conditional authorisation to Port of Brisbane (PBPL) and Carnival for proposed arrangements between them. Under the arrangements:

- PBPL will construct a new dedicated cruise ship terminal
- Carnival will pay an agreed amount under a ‘take or pay’ arrangement, and
- Carnival will receive preferential berthing rights at the new terminal and will be entitled to berth at the terminal on at least 100 days of its choosing each year for 15 years.

The ACCC has decided to grant authorisation, subject to the following conditions:

- Carnival does not nominate and is not allocated more than two days over any weekend (being Friday, Saturday and Sunday) until other users have had the opportunity to nominate and be allocated the third weekend day. This will mean that competitors to Carnival will be able to apply to berth on a weekend day (Friday, Saturday or Sunday) before Carnival books all three days, and
- if a second berth is to be built, Carnival cannot exercise a first right of refusal to enter into a similar foundation take or pay arrangement for preferential berthing rights at that berth.

These conditions are designed to ensure that competing cruise operators are able to gain sufficient access to the new facility so that consumers can benefit from competition.

The ACCC grants authorisation until 31 May 2036.

PBPL is proposing to build a new terminal that is purpose-built for cruise ships, and is able to berth mega cruise ships (above 270 metres in length). The use of mega ships is increasingly the most popular form of cruising, but currently mega cruise ships are only able to berth in Brisbane at PBPL’s Multi User Terminal, which is a cargo terminal and is not designed for use by cruise ships. The other terminal in the Brisbane area suitable for cruise ships is at Portside Wharf (operated by Brookfield). Although this terminal is a dedicated cruise terminal, mega ships are unable to access it, primarily because of constraints from the width of the river restricting turning circles. Carnival’s ships represent the vast majority of cruise ships that currently dock in Brisbane.

To support the development of the new terminal, cruise operator Carnival has agreed to be bound by take-or-pay obligations (meaning Carnival has agreed it will pay PBPL a significant amount each year, regardless of whether it uses the new terminal or not), in exchange for which it will receive certain preferential berthing rights from PBPL. Carnival will have 100 Foundation Berthing Days each year which it can nominate up to a maximum of 4 per week and 18 per month (**Carnival’s preferential berthing rights**). Under the proposed arrangements, these nominations would have absolute priority over any other parties seeking access to berth cruise ships at the new terminal.

Agreements of this form restrict the access of competitors and may breach competition laws, depending on their effect on competition. To obtain statutory protection from legal

action, parties can apply to the ACCC, which can authorise such conduct, either on the basis that it is satisfied that the conduct would not be likely to substantially lessen competition, or on the basis that it is likely to result in a net public benefit.

Subject to Carnival's preferential berthing rights, PBPL will operate the new facility as a common user terminal and other cruise operators may access the terminal and contract for berthing days.

Demand for cruising has grown very strongly over the past decade, apparently unaffected by fluctuations in the exchange rate, economic crises or public health crises (such as SARS). Nevertheless, the ACCC accepts that the terminal – estimated to cost \$158 million – may not be built without some form of foundation customer arrangement, and that the proposed arrangements provide PBPL with greater certainty about long term baseline volume and revenue.

The ACCC considers the construction of the new terminal is likely to be of benefit to the public. As well as promoting growth in tourism and improving the experience of cruise passengers, the purpose built terminal would better meet the needs of cruise operators, reducing inefficiencies in current arrangements, and it provides the opportunity for increased competition in the provision of pleasure cruises that originate from, or stop in, Brisbane.

However, while the construction of the terminal will benefit the public, an agreement that unduly restricts competition between cruise operators would undermine that benefit. That is, competition benefits will only be achieved if other cruise operators are able to gain sufficient access to berthing days at the new terminal. The ACCC is concerned that the proposed arrangements would create barriers to competition through Carnival's preferential berthing rights.

While some restriction on competition cannot be entirely avoided given the nature of such a contract, the ACCC has considered the degree of restriction on competition and whether the likely public benefits of the proposed arrangements outweigh the likely public detriments.

Carnival's preferential berthing rights over the terminal would provide it with the ability to deter, limit, or potentially prevent the entry of other cruise operators to Brisbane. Carnival's preferential berthing rights, along with its dominant position in the market in Brisbane, provide Carnival with the ability and the incentive to act in ways to protect its position. This is likely to substantially lessen competition and in any event would likely result in a significant public detriment.

In particular, Carnival's first right of refusal to obtain preferential rights in relation to a possible future second berth at the terminal would likely have the effect of locking out or discouraging entry of other cruise operators seeking to enter via use of the second berth. To limit this likely detriment, the ACCC has imposed a condition that the Applicants not give effect to the provisions of their Licence that relate to this right.

Further, the ACCC is concerned that aspects of Carnival's preferential berthing rights would prevent or discourage competing cruise operators from offering cruises out of Brisbane by limiting their ability to access berthing services on weekend days (being Friday-Sunday) or from being able to establish regular itineraries. Weekend days are highly valued by many passengers and hence cruises departing or returning on these days are generally more profitable for cruise operators.

Given the importance and value that passengers and operators see in cruises departing or arriving on a weekend day (being Friday, Saturday and Sunday), the ACCC considers it is necessary for a potential competitor to have the ability to seek at least

some weekend access each week. The inability to do this is likely to deter competitors from entering, or at least limit their entry to fringe operations that impose very little competitive constraint. The ACCC has therefore decided to impose a condition prohibiting Carnival from nominating or being allocated more than two days on any given weekend (being Friday, Saturday and Sunday) until after other users have had the opportunity to nominate and be allocated the third day, in order to provide sufficient access to the new facility.

Subject to this restriction on booking the third weekend day each weekend, Carnival is able to nominate up to four days of its choice each week.

Some interested parties have expressed concern that, even beyond the issue of weekend days, being able to book four days a week would allow Carnival to use its annual 100 priority Foundation Berthing Days to book out the most attractive days over the summer cruising season. Further, that Carnival may vary the days on which it uses its preferential bookings with the result – either by accident or design – that other cruise operators are not able to establish an attractive, consistent and reliable pattern of departures, at least on a regular basis, thereby rendering it insufficiently profitable for other cruise operators to deploy ships at the new facility. This party called for a condition limiting Carnival's use of its preferential berthing rights to a maximum of three days per week.

Carnival has provided multiple assurances that it has no ability or incentive to game its bookings, and that there will be sufficient availability around its bookings for other operators to build viable itineraries. PBPL has also submitted that it will have the ability and incentive to detect and prevent such anticompetitive gaming. On this basis, and taking into account the effects of the weekend day condition, the ACCC does not consider it is necessary to impose a further condition relating to Carnival's use of its Foundation Berthing Days at this time.

The ACCC is satisfied, subject to the conditions it is imposing, that the proposed arrangements would be likely to result in a public benefit that would outweigh the detriment likely to result from the proposed arrangements.<sup>1</sup>

The ACCC has decided to grant authorisation, until 31 May 2036, subject to the following conditions:

- Carnival does not nominate and is not allocated more than two days over any weekend (being Friday, Saturday or Sunday) until other users have had the opportunity to nominate and be allocated the third weekend day, in order to ensure competing cruise operators are able to gain sufficient access to the new facility, and
- the Applicants do not give effect to the provisions in the proposed arrangements that provide Carnival with a first right of refusal in respect of a take or pay obligation in relation to a second berth at Brisbane.<sup>2</sup>

---

<sup>1</sup> The ACCC is not satisfied in all the circumstances that the proposed arrangements would not be likely to have the effect of substantially lessening competition. However, as long as the net public benefit test is met (in this case, subject to conditions), the ACCC may make a determination granting authorisation under s88.

<sup>2</sup> As in footnote 1, this paragraph summarised the conditions. The conditions of authorisation are set out in paragraph 161 of this determination.

# Contents

<b>Summary</b> .....	<b>i</b>
<b>Contents</b> .....	<b>iv</b>
<b>Definitions</b> .....	<b>v</b>
<b>The application for authorisation</b> .....	<b>1</b>
Interim authorisation .....	2
The Applicants .....	3
<b>Background</b> .....	<b>3</b>
Cruise industry .....	3
Brisbane ports .....	4
Other cruise ports .....	5
<b>Consultation</b> .....	<b>6</b>
<b>ACCC assessment</b> .....	<b>6</b>
Relevant areas of competition .....	7
Future with and without .....	7
Assessment of public benefits .....	8
Increased competition in the supply of terminal facilities .....	8
Increased capacity and improved services for cruise operators .....	10
Regional economic benefits and increased demand for tourist services .....	11
ACCC conclusion on public benefits .....	11
Assessment of public detriments including competition effects .....	12
Reduction of competition in the provision of wharf and terminal facilities .....	13
Discouraging or limiting the entry of new cruise operators .....	14
Extent of constraint offered by competition from other cruise terminals .....	22
ACCC conclusion on public detriments including competition effects .....	23
Application of the authorisation legal test .....	24
Substantial lessening of competition .....	25
Net public benefit .....	25
Conditions .....	26
Length of authorisation .....	26
<b>Determination</b> .....	<b>27</b>
The application .....	27
The statutory test .....	27
Conduct which the ACCC has decided to conditionally authorise .....	28
Conditions of authorisation .....	28
Conduct which the ACCC proposes not to authorise .....	29
Date authorisation comes into effect .....	29

# Definitions

ad hoc berthing days	a right granted by PBPL to a user to berth a cruise vessel at the wharf on a day nominated by a user, excluding a Priority Berthing Day and a Foundation Berthing Day
baseport visits	visits by cruises originating from the port
Foundation Berthing Day	a right granted to Carnival under the proposed arrangements under which it gains preferential access to allocation of a berthing day over any other user
homeport vessel	a vessel that is based in a port for more than six months in any cruise season, and has a passenger exchange on each occasion it is berthed at the wharf
Priority Berthing Day	a right granted by PBPL to a user, where the user agrees to pay for access to the cruise facility and wharf on take or pay terms for a period of no less than seven years with a minimum of 20 calls at the facility per cruise season. Priority Berthing Days are allocated after Foundation Berthing Days. A user with a greater number of Priority Berthing Days (User A) shall have priority over a user with fewer Priority Berthing Days (User B) to the extent that the number of User A's Priority Berthing Days exceeds the number of User B's Priority Berthing Days
transit visits	visits by cruise vessels passing through a port, with no passenger exchange
transit vessel	any cruise vessel that is not a homeport vessel or a turnaround vessel
turnaround vessel	a cruise vessel, other than a homeport vessel, which has a passenger exchange at the cruise facility

## The application for authorisation

1. On 11 October 2017, the Port of Brisbane Pty Ltd (**PBPL**) and Carnival (together, the **Applicants**) lodged an application for authorisation (AA1000399) with the ACCC.<sup>3</sup>
2. The Applicants sought authorisation to give effect to provisions in agreements<sup>4</sup> between them under which PBPL will construct a new dedicated cruise ship terminal, and Carnival will be bound by take or pay obligations for the new terminal, in exchange for which it would receive certain preferential berthing rights from PBPL, including a first right of refusal in respect of a take or pay obligation in relation to a possible future second berth (the **proposed arrangements**). The proposed arrangements may contain provisions that have the purpose or effect of substantially lessening competition within the meaning of s45 of the CCA. Authorisation was sought for a period of 18 years to match the underlying agreement, and was requested to commence once the new terminal is completed.
3. The design and construction phase of the terminal, to be situated at Luggage Point at the mouth of the Brisbane River, is anticipated to take 30 – 36 months. The ACCC understands that preparatory works on the site began in late 2017.
4. The licence agreement is for a term of 15 years, with options to renew. Under the agreement Carnival has committed to pay access charges (escalating by CPI per cruise season). In exchange, Carnival is entitled to 100 Foundation Berthing Days per year that it can select prior to PBPL accepting bookings from other cruise operators. Carnival can also elect to purchase additional Priority Berthing Days each year, subject to rules which the Applicants submit are designed to ensure that there is access to the facility for other cruise operators throughout the year.
5. If Carnival wishes to use additional (non-priority) berthing days, it may do so by competing with other cruise operators in accordance with the Priority Berthing Rules whereby:
  1. booking requests must be made 25 months prior to the start of a cruise season and allocated 24 months out by PBPL
  2. cruise vessels have priority over all other vessels
  3. Foundation Berthing Days are allocated first, followed by Priority Berthing Days and then Ad Hoc Berthing Days, with priority given to Homeport vessels, Turnaround Vessels, Transit Vehicles and other vessels in that order
  4. no one user will have allocated to it in the initial allocation more than 4 berthing days in one week or 18 berthing days in a calendar month. PBPL may refuse allocation to a user if the corresponding day of the corresponding week in the immediately preceding cruise season was allocated to another user, that user has made another request, or PBPL

---

<sup>3</sup> Application AA1000399 was made using a Form B, which refers to subsections 88(1) and 88(1A) of the CCA. The Form B applies to conduct that may contain a cartel provision or may have the purpose or effect of substantially lessening competition within the meaning of section 45 of the CCA. The applicants subsequently confirmed that they do not consider that the proposed arrangements give rise to a cartel provision.

<sup>4</sup> Agreement for Licence and a Licence executed on 5 October 2017.

is reasonably of the view that the request is prohibited under applicable competition laws

5. a conflicting bookings resolution mechanism has been established.
6. It is open to any user of the terminal (including Carnival) to purchase Priority Berthing Days. These are available to users who agree to pay for access on take or pay terms for a period of no less than seven years with a minimum of 20 calls at the new facility per cruise season. Foundation Berthing Days (available only to Carnival) are given priority in allocation, followed by Priority Berthing Days (available to any user, including Carnival). A user who has a greater number of Priority Berthing Days (User A) has priority over a user with fewer Priority Berthing Days (User B), to the extent that the number of the User A's Priority Berthing Days exceeds the number of User B's Priority Berthing Days. Ad hoc berthing days are allocated after Priority Berthing Days.
7. The Applicants submit that, without the proposed arrangements, PBPL would not have the incentive or ability to make the necessary investment in the new cruise ship terminal, while Carnival would not have the incentive to guarantee a sufficient base level of business to make the facility viable.
8. The Applicants sought authorisation for a period of 18 years commencing at the time the new cruise facility is completed, which they submit is appropriate given the substantial commitment being made by the Applicants as part of the proposed arrangements. The Applicants submit it also reflects the minimum term of 15 years for the operation of the proposed arrangements, taking into account the anticipated 2-3 years required for the development of the new cruise facility to be completed.
9. On 1 March 2018 the ACCC issued a draft determination proposing to grant authorisation for 18 years, subject to a condition that the parties not give effect to the provisions in the proposed arrangements that provide Carnival with a first right of refusal in respect of a take or pay obligation in relation to a second berth. A conference was not requested following the draft determination.

## **Interim authorisation**

10. The Applicants requested interim authorisation to give effect to the proposed arrangements prior to PBPL commencing construction and while the ACCC considered the substantive application. The Applicants submitted that interim authorisation was required because PBPL requires some level of comfort that the proposed development would be supported by Carnival through the terms of the proposed arrangements, prior to commencing the design and construction phase.
11. On 2 November 2017 the ACCC decided not to grant interim authorisation, because the construction works did not require interim authorisation, there was no urgency in respect of an interim authorisation, and the ACCC had not had the opportunity to fully consult on or consider any substantive issues.<sup>5</sup>
12. PBPL commenced preparatory works on the site in late 2017.

---

<sup>5</sup> See ACCC decision available at <https://www.accc.gov.au/public-registers/authorisations-and-notifications-registers/authorisations-register/port-of-brisbane-pty-ltd-carnival-plc>.

## The Applicants

13. PBPL is the port manager and effectively the port authority of the Port of Brisbane. The Port of Brisbane is one of Australia's largest multi cargo ports with facilities for containers, general cargo, motor vehicles and bulk. PBPL is an Australian proprietary company owned by the APH consortium,<sup>6</sup> whose principal business is the management and development of the Port of Brisbane.
14. Carnival is a global leisure travel company with 10 international cruise line brands. Brands operated in Australia include P&O Cruises (the largest cruise operator in Australia), Carnival Cruise Lines, Princess Cruises, and Holland America Line.

## Background

### Cruise industry

15. In 2017, 25 million passengers globally took leisure cruises. Of these, Carnival has the largest share at almost 50%, followed by Royal Caribbean Cruises (at 23%) and Norwegian Cruise Line (9.5%).<sup>7</sup> Carnival accounts for more than 70 per cent of the total number of Australian and New Zealand cruise passengers.<sup>8</sup>
16. Australia accounted for 5.2% of global cruise passengers in 2016, the fifth largest country in the world.<sup>9</sup> Most large cruise companies that operate in Australia are global companies which do not have locally incorporated subsidiaries. The ACCC understands that Carnival is the only cruise operator in Australia to operate cruise ships year-round, with other operators deploying their vessels to the southern hemisphere during the northern hemisphere winter months.
17. Australian ocean cruise passenger numbers have increased by an annual average of 19.4% since 2007.<sup>10</sup> The industry continues to predict strong growth.<sup>11</sup> Australian harbour infrastructure is expected to struggle to accommodate the increasing number and size of international cruise liners arriving in Australia, and slow rates of infrastructure development limit the potential growth of the industry.<sup>12</sup> The industry predicts that using ships of greater capacity provides the possibility of growth given growing port congestion.<sup>13</sup> Demand for cruising in Australia has historically been less sensitive to external pressures than the wider tourism industry and has continued to grow strongly despite fluctuations in the exchange rate, economic

---

<sup>6</sup> Comprising four infrastructure investors: Caisse de dépôt et placement du Québec; IFM Investors; QIC Global Infrastructure on behalf of its managed funds; and Tawreed Investments Ltd, a wholly-owned subsidiary of the Abu Dhabi Investment Authority.

<sup>7</sup> Cruise Market Watch, *2018 Worldwide Cruise Line Market Share*, <http://www.cruisemarketwatch.com/market-share/>, viewed 22 December 2017.

<sup>8</sup> Cruise Market Watch, *2018 Worldwide Cruise Line Market Share*, <http://www.cruisemarketwatch.com/market-share/>, viewed 22 December 2017; [www.carnivalaustralia.com](http://www.carnivalaustralia.com).

<sup>9</sup> Cruise Lines International Association Australasia, *Cruise Industry Source Market Report: Ocean Cruise Passengers Australia 2016*.

<sup>10</sup> Cruise Lines International Association Australasia, *Cruise Industry Source Market Report: Ocean Cruise Passengers Australia 2016*.

<sup>11</sup> Australian Cruise Association, *Annual Report 2015-2016*, p8.

<sup>12</sup> IBISWorld, *Water Passenger Transport in Australia*, March 2017.

<sup>13</sup> Australian Cruise Association, *Annual Report 2015-2016*, p8.

crises such as the global financial crisis and public health crises such as the SARS outbreak.<sup>14</sup>

18. The Applicants submit that approximately 40% of the cruise vessels operating in Australia currently are over 270m in length (which is too long to berth at the current Brisbane cruise ship terminal), and it seems generally accepted in the industry that there is a strong growing trend amongst international cruise lines to use these mega ships. The majority of contracts to build new cruise ships worldwide are for vessels over 100,000 gross tonnes<sup>15</sup>, with many considerably larger.<sup>16</sup>
19. Around 40% of Australian cruise passengers visit South Pacific destinations, with a further 26% visiting Australian destinations and around 8% visit New Zealand. Around 50% of passengers took cruises of 8-14 days in length in 2016, with around 20% taking cruises of 5-7 days and close to a further 20% cruising for 1-4 days.<sup>17</sup>
20. The ACCC understands that cruises originating in and returning to Brisbane are attractive to passengers, and therefore also to cruise operators, because of their proximity to the Pacific Islands, which means that a shorter cruise itinerary can cover the same number of ports as a cruise 1-2 nights longer out of Sydney.

## Brisbane ports

21. Currently, most cruise ships visiting Brisbane dock at Brisbane's only dedicated cruise terminal, the Portside Wharf, which is owned and operated by Brookfield and located up the Brisbane River close to the Brisbane CBD. Portside can only receive vessels up to 270m in length due to geographic constraints such as the width of the river. The ACCC understands that Carnival is the only cruise operator running regular cruises from Portside at the current time, due to this constraint.
22. There is a small terminal on Moreton Island which had 33 cruise ship visits in 2015/16. This terminal is only a transit call option for cruises that visit the Tangalooma Island Resort on Moreton Island, and cannot accommodate mega ships.
23. The Port of Brisbane, located at the mouth of the river, does not currently have a dedicated cruise terminal, but nonetheless accepts up to 30 cruise liners annually at its Multi User Terminal (MUT). This is because mega cruise liners (over 270m) are physically unable to dock at the Portside Wharf, and because bad weather sometimes prevents smaller ships from travelling up the river to dock at Portside. The Applicants advise that PBPL will not continue to allow berthing by cruise ships at the MUT after the new cruise facility is opened.
24. The current facilities being utilised by cruise ships at the MUT are in a cargo precinct with heavy vehicles operating, and are not designed for use by cruise ships.

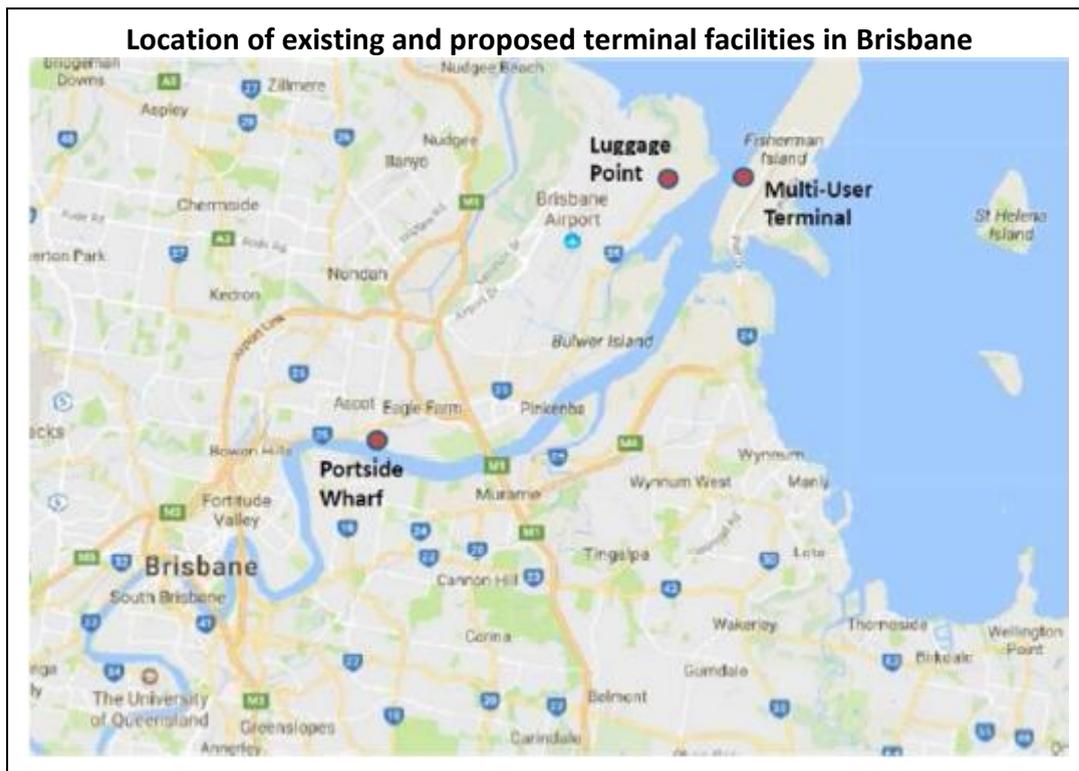
---

<sup>14</sup> House of Representatives Standing Committee on Social Policy and Legal Affairs, *Report from Inquiry Into the Arrangements Surrounding Crimes Committed At Sea*, 24 June 2013, pp10-19.

<sup>15</sup> The ACCC understands that ships of 100,000 gross tonnes or greater are generally at least 270m in length.

<sup>16</sup> Australian Cruise Association, *Annual Report 2015-2016*, p8.

<sup>17</sup> Cruise Lines International Association Australasia, *Cruise Industry Source Market Report: Ocean Cruise Passengers Australia 2016*.



25. In 2017, a total of 159 cruise ships called at Brisbane terminals. An independent demand forecast provided by the Applicants predicts this will increase substantially by 2035/36.
26. The new Luggage Point cruise terminal would be utilised by mega cruise ships (unable to use the Portside Wharf) as well as smaller cruise ships as an alternative to Portside Wharf.
27. The Applicants advise that the design and construction phase of the development is anticipated to take approximately three years. The ACCC understands that construction on the preparatory works (dredging and surcharging) for the project began in late 2017. The construction works are estimated to cost \$158 million.<sup>18</sup>
28. The proposed arrangements allow PBPL to choose to construct a second wharf at the terminal in the future, provided that utilisation of the new facility by cruise vessels has reached 55% of capacity. If PBPL chooses to construct a second wharf, the proposed arrangements give Carnival a first right of refusal in relation to take or pay arrangements relating to the second wharf. PBPL advises that its preliminary estimate of the cost of constructing a second berth and associated additional passenger processing facilities is \$70 million.

## Other cruise ports

29. About 40% of Australian cruise passengers depart from New South Wales, and almost 24% from Queensland.<sup>19</sup>

<sup>18</sup> Port of Brisbane, media release, "Brisbane's international cruise terminal set to launch", 25 October 2017.

<sup>19</sup> Cruise Lines International Association Australasia, *Cruise Industry Source Market Report: Ocean Cruise Passengers Australia 2016*.

30. In financial year 2016-17, 344 cruise ships berthed in Sydney. Newcastle, Wollongong and Eden also host a small number of cruise ships.
31. In the financial year 2016-2017, 391 cruise ships called at Queensland ports.<sup>20</sup> Apart from Brisbane, cruise ships call at Mooloolaba, Gladstone, Townsville, Cairns, Yorkey's Knob and Port Douglas. The ACCC understands that these ports generally cannot be accessed by mega cruise ships, and/or do not have sufficient facilities to permit baseport visits (i.e. cruises originating from the port, as opposed to transit visits which pass through).
32. Construction of a cruise ship terminal at the Gold Coast has been discussed for some years now. The ACCC is not aware of any firm plans for this proposed development.

## Consultation

33. The ACCC tests the claims made by an applicant in support of its application for authorisation through an open and transparent public consultation process.
34. Upon receiving the application, the ACCC invited submissions from more than 30 potentially interested parties including major competitors of the Applicants, industry associations, state and federal government and regulatory bodies.<sup>21</sup>
35. Both prior to and in response to its draft determination, the ACCC received a number of confidential submissions from interested parties, opposing the application. De-identified summaries of these have been placed on the public register.
36. Submissions by the Applicants and interested parties are considered as part of the ACCC's assessment of the application for authorisation.

## ACCC assessment

37. Pursuant to subsection 90(7) of the CCA, the ACCC must not make a determination granting authorisation in relation to conduct unless it is satisfied in all the circumstances:
  1. that the conduct would not have the effect, or would not be likely to have the effect, of substantially lessening competition; or
  2. that:
    - a. the proposed conduct would result, or be likely to result, in a benefit to the public, and
    - b. that benefit would outweigh the detriment to the public that would result, or be likely to result, from the proposed conduct.

---

<sup>20</sup> Australian Cruise Association, *Annual Report 2016-2017*.

<sup>21</sup> A list of the parties consulted and the public submissions received is available from the ACCC's public register [www.accc.gov.au/authorisationsregister](http://www.accc.gov.au/authorisationsregister).

## Relevant areas of competition

38. The Applicants submit that the proposed arrangements will impact on the following markets:
1. the provision of wharf and terminal facilities to passenger cruise liners, and
  2. the market for the supply of pleasure cruises which include an Australian itinerary.
39. The ACCC considers that the relevant areas of competition are likely to be those for:
1. the provision of wharf and terminal facilities to passenger cruise liners in and near Brisbane, and
  2. the market for the supply of pleasure cruises that originate from or stop in Brisbane.

## Future with and without

40. To assist in its assessment of the proposed arrangements against the authorisation test, the ACCC compares the likely future with the conduct for which authorisation is sought against the likely future without the conduct.
41. The Applicants submit that, without the proposed arrangements, the proposed development will not proceed, because PBPL requires Carnival to agree to take or pay commitments in order to provide a secure level of revenue for the facility in order to reduce the risks associated with its investment. PBPL submits that, should Carnival's commitment be any less than that which is proposed, the Board of PBPL would not approve the investment in the new facility.
42. While the construction of the new facility has commenced, the work is general surcharging work. PBPL submits it does not involve any construction that is specific to a cruise terminal, and the work can support any number of projects including the addition of another commercial wharf.
43. An interested party submits that there are myriad potential methods or arrangements, not limited to take-or-pay arrangements, that might have allowed a sufficient commercial case for the development to proceed, noting the increasing popularity of cruising and the trend towards mega cruise ships.
44. Another interested party submits that PBPL does not require the level of underwriting that the agreement provides because there will be more than enough demand for cruise berths at Luggage Point to justify its investment.
45. In considering the likely future without the proposed arrangements, the ACCC has had regard to all information available to it, including public and confidential submissions by the Applicants and interested parties, internal documents provided to the ACCC by the Applicants, and publicly available industry information including reports and demand forecasts.
46. In the development of infrastructure such as the new cruise terminal facility, long term contracts including take or pay provisions may be necessary to ensure that the

parties have the level of commitment necessary to sufficiently address the risks to finance and undertake the development.

47. The ACCC accepts that, without any long term agreement with one or more of its customers, PBPL may decide not to invest in the development of a cruise terminal, because of the risks involved in doing so. Similarly, the ACCC accepts that a foundation customer is unlikely to sign a take or pay contract without some kind of certainty of access, including a degree of preferential access, to the new facility to justify such a commitment.
48. However, the ACCC also considers that the development could proceed with a different form of take or pay contract, that is, the agreement need not be in precisely its current form in order to provide sufficient certainty for the development to proceed. It is also possible, given the steadily growing demand for cruising nationally, the need for a cruise terminal capable of accommodating larger ships in Brisbane, the possible closure of the Portside facility to cruise ships in the next few years, and the attractiveness of Brisbane as a homeport for cruise vessels, that a new cruise terminal may be developed by a different entity.
49. On this basis, the ACCC considers that, in the future without the proposed arrangements, it is likely that the new cruise terminal would be built – by PBPL or a third party – supported by some form of a long term take or pay commitment, but with preferential berthing rights which are less anti-competitive than those granted to Carnival under the proposed arrangements.

## **Assessment of public benefits**

50. The Applicants submit the proposed arrangements will result in a range of public benefits including:
- increased competition in the supply of terminal facilities, both in relation to a new capacity to accommodate larger cruise vessels and more competitive choice for smaller cruise vessels
  - increased capacity and better services in relation to dedicated berthing capacity, operational efficiencies and better land-side facilities
  - significant economic benefits for Brisbane and surrounds, and
  - stimulation of demand for cruise and other tourist services, benefitting the national tourism industry more generally.

51. The ACCC's assessment of the likely public benefits from the proposed arrangements follows.

### **Increased competition in the supply of terminal facilities**

52. The Applicants submit that the addition of the new cruise facility will provide significant new competition for existing terminal facilities, and more choice for terminal facility customers, namely cruise operators. The new facility will be able to accept mega ships over 270m in length, which can currently berth only at the MUT which offered up to 30 berthing days annually to cruise ships, and will offer an alternative choice to the Portside facility for smaller ships.

53. The ACCC understands that Carnival is the only cruise operator to regularly run cruises from the Portside cruise terminal currently, because most other cruise operators do not have ships under 270m which are able to dock there. An interested party submits that, in the event the proposed arrangements are authorised, Portside is likely to close because all of Carnival's mid-sized and smaller ships will go to the new facility, and no other cruise operator has ships of a size which can dock at Portside. This interested party submits that in the near future, Portside will no longer be under any legal obligation to the State of Queensland to operate a cruise terminal and will be free to redevelop the terminal site for another purpose.
54. A second interested party submits that, because the new facility will not be subject to competition from other facilities, any efficiencies resulting from the proposed arrangements are unlikely to be passed through to consumers, and may in fact end up increasing the profits of overseas shareholders and owners.
55. Carnival advises that it intends to use the new cruise facility for the majority of its Brisbane berthing requirements, including any homeporting requirements in Brisbane (meaning ships based in Brisbane), although it may continue to use other cruise terminals within Brisbane from time to time. Carnival advises that it has been unable to reach a commercial agreement with the operator of Portside to secure future berthing options, and notes that Portside's future plans for the site are uncertain given it has no legal requirement to continue to operate post 2021.
56. On the basis of the information before it, the ACCC considers it is likely that the Portside facility will cease to operate as a cruise facility should the proposed arrangements proceed, because it will have insufficient demand from cruise ships and there are alternative commercial uses for the site of the Portside facility. However, it also appears possible that the Portside facility will close even in the absence of the new facility, as the site may be used for other, more commercially attractive purposes after its legal obligations to operate as a cruise terminal cease in 2021.
57. In addition, the ACCC notes that the Applicants advise that PBPL does not intend to accept cruise ships for berthing at the MUT once the new cruise facility is operational. PBPL also submits that it is under significant pressure to utilise the MUT for other uses which are more appropriate to the facility's purpose and more commercially advantageous, and therefore the MUT may not be available for any cruise ships even if the construction of the new terminal does not proceed.
58. The ACCC notes that it seems likely that both of the existing Brisbane terminals currently utilised by cruise ships will no longer be available for this purpose over the medium term, should construction of the new terminal go ahead. In determining whether the new facility will result in benefits through additional cruise terminal capacity in Brisbane, it is relevant to consider what would happen in the absence of the new facility. While it appears that there is also speculation and uncertainty as to whether either of these facilities would continue to offer berths to cruise ships in the absence of the new terminal, the ACCC does not have sufficient information to conclude they are likely to cease offering berths to cruise ships absent the new facility, and therefore assumes that both would continue to operate absent the new facility.
59. Therefore the ACCC considers that, under the proposed arrangements, it is likely that fewer berthing days will be available to cruise ships in Brisbane than are currently available. However, the ACCC notes that the new cruise facility would increase the number of days available for berthing of mega cruise liners (from 30

days at the MUT currently, to – presumably – 365 at the new facility), subject to cruise operators being able to gain access to these under the Priority Berthing Rules. This means that cruise operators who gain access to berthing days at the new facility will have the possibility of providing services to a larger number of passengers (due to the use of mega ships), but would have 30 fewer berthing days in the total pool than is currently available.

60. The result is likely to be a short term increase in competition for the provision of cruise terminal services in or near Brisbane, but in the medium to long term the addition of the new terminal is not likely to provide any significant benefits from increased competition in the supply of cruise terminal facilities because it appears likely that the Portside facility will close, so there will be only one terminal with no competitors.

### **Increased capacity and improved services for cruise operators**

61. The Applicants submit that the addition of berthing capacity will provide a benefit by:

1. enabling current and future demand for services to be met
2. stimulating further demand
3. preventing capacity constraints and associated inefficiencies within Brisbane, and
4. providing an alternative facility for cruise operators who cannot access other ports, particularly Sydney, at times of capacity constraint.

62. The Applicants submit that the new cruise facility could give other operators, particularly with large vessels, the opportunity to have a year round presence in Australia, and the improved services offered at the proposed development are expected to stimulate further demand which may prompt the construction of a second wharf at the terminal.

63. The Applicants also submit that the development provides operational advantages for cruise operators through decreasing transit time for cruise ship calls (as there would be no need to pilot the cruise ship up the Brisbane River to Portside, saving two hours' travelling time each way), through decreasing the need for tugs (as the Applicants advise most cruise ships would be able to manoeuvre into the new facility without requiring a tug), through allowing multiple concurrent work streams during a vessel's turnaround period, and through increasing the options for cruise operators to homeport vessels in Brisbane.

64. The ACCC accepts that there is demand for a dedicated cruise ship terminal in Brisbane capable of berthing mega ships, and that a long term contract may be necessary to ensure that PBPL has sufficient incentive to make the investment in its development. The ACCC also accepts that building the terminal may stimulate further demand for the berthing of cruise ships – particularly mega cruise ships – in Brisbane, and result in benefits through increasing competition in the provision of pleasure cruise services.

65. However, the ACCC considers that this benefit can only be fully realised if other cruise operators are able to gain sufficient access to berthing days at the new terminal (including a possible second berth) to establish a presence. This issue is

discussed in further detail in the detriments section below, and is addressed by the conditions of authorisation the ACCC is imposing.

## **Regional economic benefits and increased demand for tourist services**

66. The Applicants submit that the proposed development will result in significant economic benefits for Brisbane and Australian tourism generally, through stimulating demand and growth in Brisbane's cruise industry, including an increase in homeport vessels (which attract a greater proportion of passenger expenditure in Brisbane than transit calls). The Applicants submit the new development will provide better land side facilities for passengers, which are valued by cruise passengers and are likely to stimulate further demand for cruise itineraries which include Brisbane.
67. The ACCC considers that the proposed new cruise ship terminal is likely to result in significant public benefits in the Brisbane region, including increased employment during the construction phase and broader benefits over the life of the facility. It is also likely to result in an enhanced passenger experience. The new terminal would avoid a number of inefficiencies for mega cruise ships berthing in Brisbane at the MUT and can allow a much larger number of mega cruise ships to berth in Brisbane than current facilities.
68. The ACCC accepts that the proposed arrangements are likely to result in public benefit in the form of regional economic benefits including from increased tourist spending on cruises, but notes these will be reduced to the extent increased tourist spending as a result of the new terminal results from diverting tourist spending that would otherwise occur in other parts of the Australian economy. And, as noted above, this public benefit will only be fully realised if there is competition between cruise operators, and in particular if a competing cruise operator begins operating cruises out of Brisbane.

## **ACCC conclusion on public benefits**

69. The ACCC accepts that the proposed arrangements are likely to result in public benefits in the form of:
1. increased competition in the provision of pleasure cruise services originating from or stopping in Brisbane, to the extent other cruise operators are able to gain sufficient access to berthing days at the new terminal
  2. benefits from avoiding inefficiencies in current arrangements for berthing mega cruise ships and allowing for a significant increase in the number of mega cruise ships that can berth in Brisbane (which will depend in part on the ability of other cruise operators to gain sufficient access to berthing days at the new terminal)
  3. significant regional economic benefits during the construction phase and over the life of the facility, including from increased tourist spending on cruises, to the extent this is additional spending, not merely spending diverted from other parts of the Australian economy
  4. short term increase in competition for the provision of cruise terminal services in or near Brisbane.

70. While the ACCC notes that many of these benefits may also arise without the proposed arrangements (given the terminal is likely to be built by another means should the proposed arrangements not proceed), the ACCC considers that the proposed arrangements increase the likelihood of these public benefits being achieved and on a more timely basis.

## **Assessment of public detriments including competition effects**

71. As noted above, the ACCC may authorise the proposed arrangements either on the basis of a net public benefit, or on the basis that it is not likely to substantially lessen competition. This section is relevant to both of these legal tests, since it deals with public detriments likely to arise from the proposed arrangements, including detriments arising from a lessening of competition. In fact, in many cases the only identifiable detriments will be those constituted by a lessening of competition.

72. All public detriments likely to arise from the proposed conduct for which authorisation is sought can be taken into account as part of the ACCC's assessment. In some circumstances, it may be appropriate for the ACCC to assess detriments that occur outside of the market or markets in which a lessening of competition has been identified.

73. The proposed arrangements would be likely to result in a substantial lessening of competition and significant public detriment in the supply of cruise services that originate from or stop in Brisbane, by discouraging, preventing or limiting the entry of other cruise operators wishing to operate cruises from Brisbane. The arrangements may also lead to (or hasten) the closure of the existing cruise terminal in Brisbane, Portside.

74. Competition in the supply of cruise services would be reduced if the preferential rights to access the new terminal Carnival obtains under the proposed arrangements make it unattractive or uneconomic for other operators to seek to also operate cruises out of Brisbane. Competition would also be reduced if Carnival's preferential berthing rights result in an entrant offering less frequent or less attractive cruises than it may have otherwise offered.

75. The Applicants submit the proposed arrangements will not result in any lessening of competition because:

- they will result in a new purpose-built cruise terminal in Brisbane, with the ability to berth ships over 270m, increasing competition in the market for cruise terminals
- the new terminal will facilitate the entry of cruise operators to Australia, increasing competition in the market for provision of passenger cruises, since priority berthing for Carnival is limited to 100 days per year and a maximum of 4 days in any week.

76. The Applicants submit that the proposed arrangements will not result in detriment from a reduction in competition in the provision of cruise services, because the new terminal will be constrained by significant actual and potential competition from alternative cruise terminal facilities in Australia, including Portside, a proposed new Gold Coast cruise ship terminal, Sydney, and Cairns.

77. An interested party submits that:

- the extent of the commitment in the proposed arrangements means that Carnival will not have capacity to choose to also use alternative facilities in or near Brisbane, and therefore will reduce competition in the provision of wharf and terminal facilities to passenger cruise liners
- there is considerable uncertainty as to whether competition will be offered by alternative terminals, because the alternative terminals named by the Applicants are not strong substitutes
- the ACCC should impose a condition limiting Carnival's commitment to the new terminal so that it only applies to large ships which cannot dock at Portside.

78. Another interested party submits that:

- while a terminal which can accommodate large cruise ships is necessary, the proposed arrangements go well beyond what is reasonably required to justify the investment by PBPL
- the extent of the commitments and rights under the proposed arrangements will create a major barrier to entry for any cruise operator seeking to dock in Brisbane, particularly during the contested summer cruise season, and as a result no other cruise operator is likely to begin operating cruises out of Brisbane. This will have a major restrictive impact on the growth of cruising in Brisbane
- the access of mega ships to operate out of Brisbane is likely to be effectively blocked by the proposed arrangements, because Carnival will be able to choose the best days in the calendar as well as the majority of the available days throughout the season and the year
- Carnival has the additional competitive benefit of being the established operator for cruises from Brisbane, including entrenched marketing and sales positions, and a greater knowledge of existing customers
- the first right of refusal on preferential access rights on a second berth cannot be justified as it would accentuate Carnival's dominance by erecting a further significant barrier to entry
- competition offered by other terminals is misrepresented in the application.

### **Reduction of competition in the provision of wharf and terminal facilities**

79. An interested party submits that the extent of the commitment by Carnival in the proposed arrangements means that Carnival will not have capacity to berth at alternative facilities in or near Brisbane, and therefore the proposed arrangements will reduce competition in the provision of wharf and terminal facilities to passenger cruise liners. The interested party submits that the ACCC should consider imposing a condition limiting Carnival's commitment to the new terminal to ships which cannot dock at Portside (i.e. those over 270m in length).

80. Carnival submits it intends to switch the majority of its berthing requirements to the new facility, but that, even if it switched all its utilisation from Portside to the new facility, this would be a manifestation of competition based on the choice of facilities. If Portside were to become unviable, this would be a pro-competitive outcome as volume would have switched to the more efficient competitor.
81. The ACCC notes that the proposed arrangements do not impose any requirement on Carnival to send ships to the new facility, although it can safely be assumed that Carnival would send ships to the new facility at least to the extent of its 100 Foundation Berthing Days (under the take or pay arrangements). The ACCC notes that Carnival is currently berthing more than 150 days per year in Brisbane. Portside remains free to compete for any excess requirements Carnival would have in excess of its 100 Foundation Berthing Days, for ships under 270m. The ACCC notes that Carnival has the ability to make commercial choices based on Carnival's preference and the offerings of the two facilities.
82. It is also possible that either or both of Portside or the MUT may no longer offer berths to cruise ships beyond the short term even if the construction of the new terminal does not proceed (see paragraphs 53-58 above).
83. The ACCC does not consider that the proposed arrangements are likely to result in detriment in the form of reduced competition for the provision of wharf and terminal facilities in and near Brisbane, even though it appears likely that Portside will have insufficient business to continue to operate after the new facility opens, due to Carnival's commercial choices and the trend towards mega cruise ships. The ACCC therefore does not consider that a condition limiting the operation of the proposed arrangements to ships over 270m to be necessary or desirable.

### **Discouraging or limiting the entry of new cruise operators**

84. Under the proposed arrangements, Carnival is entitled to priority allocation for 100 Foundation Berthing Days. Under the Priority Rules, any user is entitled to purchase 20 or more Priority Berthing Days (if it agrees to commit to purchase these for seven years), which are given priority allocation over ad hoc booking requests. The limitations on the use of these Priority Berthing Days, and on Carnival's use of its Foundation Berthing Days, include that no user can book more than 4 days in any week, or more than 18 days in any calendar month.
85. An interested party submits that cruise operators other than Carnival are likely to be effectively blocked from offering cruises out of Brisbane using large cruise ships by the proposed arrangements, because Carnival will be able to choose the best days in the calendar as well as the majority of the available days through the summer cruising season. It submits that this means that:
- no other cruise operator will be able to build viable deployments over the summer, because there will be insufficient available berthing days (as Carnival has preferential access to 4 days/week) which will also be irregular from week to week and as such difficult to build regular itineraries around
  - Carnival can dominate the more commercially valuable weekend days, and days around the weekends
  - Carnival can strategically select its future bookings in such a way as to make the remaining berthing dates unattractive to competitors

- Carnival can prevent any competitor being able to 'home base' ships in Brisbane, by restricting the availability of days for a vessel to turnaround, limiting the ability of any competitor to offer sufficiently attractive itineraries
- the preferential berthing rights granted under the proposed arrangements are out of proportion to what would be required to protect the current operations of Carnival. The preferential rights are unjustified and the detriment far outweighs any public benefit
- they propose that Carnival's use of Foundation Berthing Days be limited to a maximum of three per week and that one regular weekend day be left available each week for bookings by other operators.

86. The Applicants submit that the proposed arrangements will have no negative effects on competition within the downstream international and domestic cruise markets because:

- the arrangements add additional cruise terminal capacity so that more cruise operators can be accommodated
- the arrangements deliver better facilities and services for cruise ships over 270m
- the arrangements introduce more competition in terminals, with anticipated downward pressure on prices and improvements in services
- the arrangements stimulate demand for cruising in Brisbane, prompting further investment and competition in downstream cruise markets
- the arrangements will not have the effect of 'locking away' capacity or enabling Carnival to stockpile capacity
- the arrangements allow PBPL to refuse to allocate a berthing day to a cruise operator if to do so would have an anti-competitive effect
- the construction and operation of a second berth, irrespective of any preferential access granted to Carnival, would result in a net increase in the number of berthing slots available, resulting in an increase in competition
- it is possible for a competing cruise operator to construct viable itineraries using only weekday departures and arrivals
- it is possible for competing cruise operators to construct viable patterns of deployment around Carnival's intended timetable
- Carnival does not have the ability or incentive to game its bookings to block the entry of a competitor.

87. Carnival submits that it has no ability or incentive to game its use of Foundation Berthing Days in order to prevent access to the new facility by other operators. It submits that other operators have equal access to the 265 days beyond Foundation Berthing Days and that at least three days per week will be contestable by any operator, including in the peak summer season. Carnival says if it wanted to exclude

potential competition, the best course of action would have been not to invest in the new facility.

88. The ACCC notes that other brands have not been able to operate out of Portside due to the limitations on the size of ships it is able to accommodate, and therefore Carnival's access to the Portside facility – and the Brisbane cruise market – has been largely uncontested. However, the ACCC notes that Carnival advises that leading up to entering this arrangement with PBPL it had not been able to come to a commercial agreement with Portside to ensure certainty of future access, that Carnival was concerned that Portside may no longer offer berths to cruise ships past its obligation to do so which ceases in 2021, and Carnival's own commercial requirements include a move to larger cruise ships which cannot be accommodated at Portside.
89. The ACCC therefore considers Carnival's decision to support the development of the new terminal is not evidence that it does not have an anti-competitive purpose. While the new terminal may risk Carnival's existing market position in Brisbane, the decision to enter into the proposed arrangements appears to have been driven largely by its own need for certainty of future access to a suitable facility, despite concerns of opening the Brisbane market to competition.
90. The sections that follow discuss whether various aspects of the arrangements may have the effect of lessening competition, including Carnival's use of Foundation Berthing Days over weekends and/or at a rate of four per week, Carnival's potential use of Priority Berthing Days, and its rights over a possible future second berth at the new terminal.

### **Foundation Berthing Days**

91. Under the Priority Rules for the allocation of berthing days for the new terminal, it is proposed that Foundation Berthing Days (of which Carnival has 100 per year) will be allocated first, followed by Priority Berthing Days. For example, Carnival could choose to use its 100 Foundation Berthing days to nominate its permitted 4 days per week for 25 of the 26 weeks of the contested summer season. The winter cruise season is currently uncontested as Carnival is the only operator deploying ships year round in Brisbane, and therefore Carnival currently has no need to use its preferential berthing rights during the winter season.

### **Interested party concerns**

92. In its draft determination, the ACCC noted concerns which had been recently raised by an interested party, submitting that Carnival's ability to use its 100 Foundation Berthing Days at a rate of four per week over the key summer months, when berth contestability is the most important for any potential new entrant, meant that the arrangements could be gamed to ensure that any remaining berthing opportunities were insufficiently attractive for a competing cruise operator to justify deploying a ship to Brisbane for a season. In its draft determination, the ACCC noted it had insufficient information on this issue and invited interested parties and the Applicants to provide further information on this point, including evidence of the effect of Carnival's ability to use four Foundation Berthing Days per week on the ability of competitors to operate.
93. In response, the same interested party made a further submission that, in order to ensure a commercially effective deployment of cruise ships, a cruise operator required:

- the ability to operate 15-20 cruises over a full summer season (to justify expenditure on advertising and selling)
- the ability to deliver cruises of between 8 and 11 nights' duration, because these durations deliver the highest combination of ticket revenue and on-board revenue per passenger
- the ability to operate cruises departing or returning on a weekend, because these offer the greatest guest convenience and therefore higher yields for the cruise operator, and
- the ability to offer separate Christmas and New Year cruises, as these generate significant profits.

94. The interested party expressed concern that Carnival's ability to use its Foundation Berthing Days at a rate of four per week, including over any or all of the three weekend days (being Friday, Saturday and Sunday) will create insurmountable barriers to any cruise operator seeking to enter. This is because Carnival can book weekends as the most commercially advantageous days, and use their remaining Foundation Berthing Days on a variable basis from week to week, thereby impacting the ability of a competitor to establish a consistent and reliable pattern of departures. The resulting possible deployment pattern would be suboptimal and irregular, and the lower consumer demand and lower profits would likely result in any cruise operator deciding to deploy its ships at a port elsewhere which was more commercially attractive.

95. The interested party requested that the ACCC impose a condition of authorisation to restrict Carnival's use of its Foundation Berthing Days to:

- a maximum three days per week (with the ability to compete with other operators for a fourth day according to the Priority Berthing Rules), and
- a maximum of two days per weekend, with one day each weekend left open to competition (including to Carnival) through the Priority Berthing Rules. The interested party submitted this should be the same day each weekend as this would enable a competitor to operate in the 7 night cruise market or a combination of cruises less than 21 days, which is the common pattern of cruise itineraries in the industry.

### **Applicants' response**

96. The Applicants submit that:

- Carnival's preferential berthing rights are commensurate with its commitment, and necessary to provide it with certainty and flexibility for current and future operations, given the long-term nature of its commitment
- Carnival has no ability or incentive to game its Foundation Berthing Days entitlement in order to keep potential operators from accessing particular days, given the proposed arrangements grant Carnival fewer Foundation Berthing Days than it currently needs to operate services
- while Carnival may not use its 4 berthing days every week, there are a number of weeks in which Carnival requires 4 days to give effect to its schedules across a range of weekends and weekdays

- a limit of four Foundation Berthing Days per week is an appropriate balance to provide other potential users with guaranteed access
- the 4 day per week limit on the use of preferential berthing rights prevents Carnival from having the ability to block access to the new facility, and the regularity and consistency of Carnival's deployment patterns leaves room for other operators.
- patterns of deployment in Brisbane and Sydney have shown cruise operators successfully operate itineraries with departures on various days of the week and with differing durations. This demonstrates that it is possible to build viable deployments on different departure days
- any reduction in the number of Foundation Berthing Days or restrictions on the permitted use of Foundation Berthing Days would change the commercial value of the agreements for Carnival and necessitate a reduction in the quantum of its take or pay commitment to PBPL, and a reconsideration of Carnival's commitment to Brisbane
- if Carnival was required to accept a reduction in its access entitlements (in terms of Foundation Berthing Days or its usage of these), and if the Applicants were then to renegotiate acceptable commercial terms to allow the development to proceed, it would increase access charges for the new terminal and raise operating costs for Carnival and other users of the new facility
- PBPL will not proceed with the development at a lower level of take-or-pay commitment.

## **ACCC view**

### **Importance of weekends**

97. The ACCC notes that Carnival is currently the only cruise operator running regular cruises out of Brisbane, largely due to the physical constraints on the size of ships which are able to berth at Portside. The construction of the new facility – suitable for larger ships – creates the possibility of competition, and it is likely that if suitable berthing days are available, one or more other cruise operators would seek to enter the Brisbane market in competition with Carnival, in particular over the summer cruising season.
98. The ACCC understands that decisions by cruise operators as to whether to deploy ships to particular ports in any given season are made on the basis of having confidence that they will be able to obtain access to the port such that they are able to construct commercially viable cruise itineraries. If a cruise operator does not have confidence of being able to construct a suitably attractive itinerary over a season, they are likely to choose to deploy the ship to another cruise port where they have greater certainty of this.
99. The ACCC understands, based on confidential information provided by interested parties and confidential internal documents from the Applicants, that cruises which either begin or end on a weekend day (being Friday, Saturday or Sunday) are more attractive to many customers for reasons of convenience (minimising the amount of leave it is necessary to take from work, for example) and therefore cruise operators make a larger profit from these cruises (both from higher priced tickets and from

greater on board spending per day by passengers).<sup>22</sup> As a result of this, and Brisbane's geographic position which allows attractive 7 night itineraries to be constructed (described at paragraph 20 above), week long cruises departing and returning on weekends have been very popular in Brisbane. Carnival's cruise offerings out of Brisbane currently predominantly depart or return on a weekend (or both) regardless of the length of the cruise.

100. A strong preference for weekend days also appears to be true of cruises run out of Sydney, despite cruise operators there not having the flexibility of timetabling (due to congestion) that Carnival currently has in Brisbane. More than 40% of cruises out of Sydney appear to depart on a weekend. Because the arrival date of one cruise is the departure date of the next, this indicates that close to 90% of cruises out of Sydney either return or depart on a weekend day.<sup>23</sup>
101. The ACCC considers it is likely that potential entrant cruise operators will be discouraged from offering cruises out of Brisbane if they are unable to be confident they can compile a season of cruise itineraries a reasonable proportion of which depart or return on a weekend.
102. The proposed arrangements would give Carnival the ability to nominate Fridays, Saturdays and Sundays for the entire summer cruising season. This is likely to discourage potential entrants from offering cruises out of Brisbane in competition with Carnival.
103. The ACCC notes that it appears to be possible to run some viable cruise itineraries mid-week to mid-week. However, the ACCC considers that to enter, a competitor would need to have access to enough weekend days to be able to build a season of sufficiently profitable itineraries to justify the deployment of a ship to Brisbane.
104. As a result, the ACCC is concerned that the proposed arrangements are likely to have the effect of substantially lessening competition and result in significant detriments because they permit Carnival to occupy all three days of each weekend during the contested summer season. This is likely to discourage or prevent other cruise operators from offering cruises out of Brisbane in competition with Carnival, thereby reducing competition and consumer choice.

#### **Use of four Foundation Berthing Days per week**

105. In addition to issues arising around weekend bookings, the ACCC is concerned that Carnival's use of four Foundation Berthing Days may occur on a variable basis from week to week, thereby impacting the ability of a competitor to establish a consistent and reliable pattern of departures. Given Carnival's tendency to run short 3 and 4 day cruises departing or returning on weekends, it seems possible that an irregular selection of weekdays may be available to other operators in any given week.
106. This variability in available days may occur as result of gaming by Carnival in order to block entry, or simply as a result of varying deployment patterns in order to ensure an attractive offering to consumers. The remaining available berthing days may only permit a smaller competitor to build suboptimal length cruises, decreasing

---

<sup>22</sup> The ACCC understands that the exception to this is the school holiday period of January, during which all cruises tend to attract higher ticket prices regardless of day of departure.

<sup>23</sup> This is based on the ACCC's understanding that very few seven night cruises are run out of Sydney.

the attractiveness of their offering to consumers and therefore undermining the profitability of deploying a ship in Brisbane for the season compared to other ports.

107. Carnival submits that it requires use of the terminal on more than the 100 days over which it has preferential access using its Foundation Berthing Days, and therefore that it does not have incentive to game its bookings to prevent other operators from entering.

108. The ACCC considers it is possible that Carnival's use of preferential berthing rights up to four days per week may – through gaming by Carnival or simply as a result of its variable scheduling - result in detriment to competition by restricting or preventing the entry of competing cruise operators because they may be unable to build a sufficiently viable schedule of cruises around the remaining available days.

109. However, the ACCC notes that Carnival submits that:

- it has no ability or incentive to game its use of Foundation Berthing Days
- Carnival will likely not require 4 days per week over every week of the summer cruise season
- the 4 day per week limit on the use of Foundation Berthing Days prevents Carnival from being able to block the entry of competitors
- the regularity and consistency of Carnival's deployment pattern leaves room for other operators to enter.

110. Additionally, the ACCC notes submissions from the Port of Brisbane that it intends to operate the facility as a common user terminal and ensure reasonable access to all users.

### **Priority Berthing Days**

111. Under PBPL's Priority Berthing Rules, Foundation Berthing Days are allocated first, followed by Priority Berthing Days. A user who has a greater number of Priority Berthing Days (User A) has priority over a user with fewer Priority Berthing Days (User B), to the extent that the number of User A's Priority Berthing Days exceeds the number of User B's Priority Berthing Days. Ad hoc berthing days are allocated after Priority Berthing Days.

112. The ACCC understands that, under the rules, it is possible for a cruise operator to purchase a large number of Priority Berthing Days (with an effective cap of just over 200 Priority and Foundation days imposed by the restriction that no user shall have more than 4 berthing days a week or 18 berthing days per calendar month allocated to it) and thereby effectively secure preferential access to berthing days over any smaller operator who has purchased a smaller number.

113. It is therefore also possible for a large operator to purchase as many Priority Berthing Days as necessary to effectively lock out a smaller competitor, by securing preferential allocation of key berthing days needed to build competitive cruise itineraries (such as weekends and the days around them), and/or booking strategically chosen days at other times of the week to prevent other operators from developing regular schedules.

114. The ACCC notes that, even without purchasing any Priority Berthing Days, Carnival is able to use its 100 Foundation Berthing days to nominate its permitted 4 days per week for 25 of the 26 weeks of the contested summer season. This means that the purchase of Priority Berthing Days will likely only become an issue if and when a competing cruise operator considers homeporting a ship in Brisbane – i.e. operating cruises in Brisbane year round. The ACCC understands that Carnival is currently the only cruise operator in Australia which does this. However, should a competitor wish to homeport in Brisbane, the ACCC is concerned that the Priority Rules provide scope for Carnival to purchase Priority Berthing Days in order to block or deter the entry of a competitor over the winter months.
115. Given the Priority Rules allow for any user to purchase more than 200 Priority and Foundation Berthing Days, the ACCC is concerned that there are circumstances in which it may be in a user's commercial interest to purchase a large number of Priority Berthing Days in order to effectively prevent access to the terminal by a smaller operator. However, based on the information before it, the ACCC does not consider it likely in the near future that Carnival would seek to acquire a large number of Priority Berthing Days to seek to deter or prevent a potential competitor from homeporting out of Brisbane. If this were to happen, the ACCC would be likely to consider this to be a material change in circumstances, such that it could review the authorisation at that time. Further, the ACCC notes that item 10(c) of the Priority Rules requires that when resolving a conflict between two nominations to book a particular berthing day by competing users, PBPL consider whether the nomination may have the intention or effect of restricting entry by another user or lessening competition between users.

### **Carnival's rights over second berth may discourage entry**

116. It is proposed that the new cruise facility will initially comprise a single berth. The proposed arrangements between Carnival and PBPL provide that, if that berth reaches or exceeds 55% utilisation, PBPL may decide to construct a second berth at the new facility, and that Carnival has a first right of refusal to enter into a take or pay obligation to underwrite the construction of the second berth. In its application, Carnival submitted that it required a first right of refusal on the take or pay obligation in relation to a second berth in order to protect its significant initial commitment to the development of the first berth of the new terminal. Carnival submitted that, absent this right, other cruise operators could take undue advantage of Carnival's significant commitment by seeking to enter into an agreement with PBPL to underwrite the construction of a second berth (taking advantage of the lower construction costs of that second berth).
117. Prior to the draft determination, an interested party submitted that the first right of refusal on priority access rights on a second berth cannot be justified as it would accentuate Carnival's dominance by erecting a further significant barrier to entry to the new facility.
118. In response, the Applicants submitted that the extent of the take or pay obligation required to underwrite the construction of the second berth is likely to be less than the extent of the take or pay obligation required to underwrite the first berth, and therefore it is likely there will be a smaller number of Foundation Berthing Days (or equivalent) granted to the cruise operator who accepts a take or pay commitment on a second berth. This would mean that a greater number of berthing days would be available to non-foundation cruise operators at a second berth.

119. The ACCC recognises that Carnival could be exposed if a competitor contracted for berthing days on a second berth on terms which were more favourable than those under which Carnival was bound by in using the first berth. However, this concern is unlikely to arise due to the inclusion of a Most Favoured Nation clause in the agreement between the parties, even without the first right of refusal.
120. The ACCC considers that the second berth may in the future provide an important opportunity for a competing cruise operator to begin or expand offering cruises from Brisbane, should they be unable to gain sufficient access to the first berth due to Carnival's preferential access to it (particularly in circumstances where weekend days are more attractive and the majority of these are likely to be booked by Carnival under its preferential access rights). The ACCC therefore considers that Carnival having a first right of refusal to contract for priority berthing rights over a second berth if it were constructed is likely to discourage potential entrants from contracting to access capacity from a second berth, or even from exploring such a proposal.
121. The ACCC therefore considers the proposed arrangements, in relation to Carnival's first right of refusal to contract for priority berthing rights over a second berth, are likely to substantially lessen competition and result in significant detriment by discouraging the entry of other cruise operators to offer cruises out of Brisbane.
122. In its draft determination, the ACCC proposed addressing this concern by imposing a condition that the Applicants not give effect to the relevant clauses of their proposed arrangements granting Carnival a first right of refusal over a take or pay commitment relating to a possible future second berth.
123. The Applicants subsequently confirmed that they accepted this condition, and have proposed to extend the most favoured nation clause set out in their agreement to the second berth, in order to prevent free-riding on Carnival's investment. The Applicants are not seeking authorisation to give effect to this proposed new provision in the proposed arrangements.

### **Extent of constraint offered by competition from other cruise terminals**

124. The Applicants submit that none of the possible detriments are likely to arise because the proposed development will be subject to significant constraint from actual and potential competition from a range of alternative cruise terminal facilities in Brisbane and elsewhere in Australia, particularly Portside, a proposed Gold Coast cruise terminal, Sydney, and other smaller terminals in Queensland.
125. Two interested parties submitted that the competition provided by any alternative facilities is significantly overstated by the Applicants because:
- Portside is likely to close if the proposed arrangements go ahead
  - there is considerable uncertainty as to whether the proposed Gold Coast development will proceed; all proposals for developments to date have failed to get beyond concept stage
  - terminals such as Moreton Island, Yorkey's Knob and the Whitsundays are ports of call only

- Townsville and Cairns cannot be accessed by mega liners due to physical constraints
- Cairns is some distance from Brisbane and has limited infrastructure and therefore is not generally considered large enough for baseporting
- plans for an additional cruise terminal in Sydney are at a very early stage.

126. The ACCC notes the Applicants' submissions that Sydney cruise terminals are subject to capacity constraints, but that planned new developments and capacity expansions would ease this. The ACCC understands that plans to add additional capacity to Sydney's mega cruise capacity are at a very early stage but that Garden Island and Botany Bay are being considered.<sup>24</sup>

127. The ACCC notes that, although Portside remains free to compete to provide cruise terminal services to Carnival (at least for any ships beyond its 100 Foundation Berthing Days and for ships smaller than 270m), it appears unlikely Portside will remain open if the proposed arrangements go ahead (see paragraphs 53-58 above). Further, on the basis of the information before it, the ACCC considers that many cruise operators – in particular those operating mega cruise ships – are unlikely to consider other Queensland terminals to be strong substitutes for the new facility given their locations and constraints in capacity and facilities, because:

- most cannot be accessed by mega liners
- most are suitable only for transit calls
- plans for other new developments are at a very early stage and highly uncertain.

128. The ACCC considers that it appears unlikely that the proposed new terminal will be constrained by competition provided by alternative cruise terminals in the medium to long term.

### **ACCC conclusion on public detriments including competition effects**

129. The ACCC notes the proposed arrangements are likely to result in detriments by lessening competition in the supply of cruise services originating from or stopping in Brisbane. The proposed arrangements are likely to have the effect of discouraging or preventing other cruise operators from operating out of Brisbane, because the arrangements provide Carnival with preferential rights to access the new terminal that make it unattractive or uneconomic for other operators to seek to also operate cruises out of Brisbane. The ACCC considers this is likely to occur in a number of different ways.

130. The ACCC considers that Carnival's ability to use its preferential berthing rights including its Foundation Berthing Day allocations, over the three days of each weekend is likely to effectively block competitors from being able to build commercial itineraries over the summer cruising season, in particular through preventing access, or not permitting sufficient access, to weekend days in order to allow competitors to build sufficiently profitable itineraries to justify the deployment

<sup>24</sup> See for example <https://www.governmentnews.com.au/2017/10/park-cruise-ships-garden-island-government-told/>

of a ship to Brisbane, and that this is likely to substantially lessen competition and result in significant detriment.

131. The ACCC also considers it is possible that Carnival's use of its Foundation Berthing Days up to four per week may – through gaming by Carnival or simply as a result of its variable scheduling - result in detriment to competition by restricting or preventing the entry of competing cruise operators because they may be unable to build a viable schedule of cruises around the remaining available days.
132. The ACCC considers that entry of competing cruise operators are likely to be prevented or discouraged through granting Carnival a first right of refusal with respect to a take or pay obligation in relation to a second berth, which is likely to result in a substantial lessening of competition and significant public detriment. The ACCC considers that Carnival's legitimate commercial interests can be protected through other means, such as a most favoured nation clause.
133. The ACCC considers that it is also possible for Carnival to use Priority Berthing Days to block or deter the entry of a cruise operator wishing to enter over the winter months. The ACCC considers, on the basis of the information before it, that this is unlikely to occur in the near future, and notes that PBPL has an obligation under the Priority Rules, in relation to resolving conflicting nominations for a particular berthing day, to consider anticompetitive intent or effect.
134. The ACCC does not accept the argument that the proposed arrangements will not affect competition because the development will increase dedicated cruise capacity within Brisbane and be subject to significant constraint from actual and potential competition from a range of alternative cruise terminal facilities. The ACCC considers it is unlikely that the new development would be constrained by competition provided by alternative cruise terminals, and therefore they would not provide any mitigation against anti-competitive detriment arising from the proposed arrangements.

## **Application of the authorisation legal test**

135. As the Applicants have sought authorisation for proposed arrangements that would or might contravene section 45 of the CCA, the ACCC must not grant authorisation unless it is satisfied in all the circumstances:
- that the conduct would not have the effect or be likely to have the effect of substantially lessening competition, or
  - the likely public benefit from the conduct would outweigh the likely public detriment<sup>25</sup>.

---

<sup>25</sup> Section 90(7). Section 90(8) does not apply because there is not a cartel provision.

## **Substantial lessening of competition**

136. The ACCC is not satisfied in all the circumstances that the proposed arrangements would not be likely to have the effect of substantially lessening competition.
137. Rather the ACCC considers the proposed arrangements absent the conditions are likely to result in a substantial lessening of competition.
138. In particular, the ACCC considers that entry of competing cruise operators would likely be prevented or discouraged through Carnival's first right of refusal with respect to a take or pay obligation in relation to a second berth.
139. Further, the ACCC is concerned that Carnival's right to nominate 100 Foundation Berthing Days up to a maximum of 4 per week would likely prevent or discourage competing cruise operators from providing cruises out of Brisbane because they permit Carnival to occupy all three days of almost every weekend during the contested summer cruising season.

## **Net public benefit**

140. The ACCC considers the construction of the new terminal is likely to result in the following public benefits:
1. increased competition in the provision of pleasure cruise services (to the extent other cruise operators are able to gain sufficient access to berthing days at the new terminal),
  2. a short term increase in competition for the provision of cruise terminal services in or near Brisbane,
  3. avoiding inefficiencies in current arrangements for berthing mega cruise ships and allowing for a significant increase in the number of mega cruise ships that can berth in Brisbane, and
  4. significant regional economic benefits from increased tourist spending on cruises, to the extent this spending is not diverted from other parts of the Australian economy.
141. The ACCC considers that the proposed arrangements between PBPL and Carnival relating to preferential rights over the terminal would be likely to result in significant public detriment by preventing or deterring the entry of, or competition from, other cruise operators to Brisbane, through:
1. Carnival's first right of refusal with respect to a take or pay obligation in relation to a possible future second berth at the terminal
  2. Carnival using its preferential berthing rights during the summer cruising season to prevent other cruise operators from being able to build a commercial cruise itinerary, particularly in relation to securing berths on weekend days of Friday, Saturday and Sunday.

## Conditions

142. The CCA allows the ACCC to grant authorisation subject to conditions. Generally, the ACCC may impose conditions to ensure that the relevant statutory test is met or continues to be met over the proposed period of authorisation.
143. The ACCC has decided to address its concern relating to Carnival's first right of refusal with respect to a take or pay obligation in relation to a second berth by imposing a condition that the Applicants not give effect to the relevant clauses of their proposed arrangements. The ACCC notes that the Applicants have indicated they will accept this condition.
144. The ACCC has also decided to impose a condition prohibiting Carnival from nominating or being allocated more than two days over any given weekend (being Friday, Saturday or Sunday) until other users have had the opportunity to nominate and be allocated the third weekend day. This is not limited to nominated Foundation Berthing Days, but also Priority Berthing Days and ad hoc berthing days.
145. The ACCC notes that, if, as Carnival submits, it is the case that it is possible for operators to build viable deployments on different departure days and that access to weekend days is not necessary, such a condition should not impose too onerous a burden on Carnival and should not significantly affect the commercial value of its agreement with PBPL.
146. The ACCC also notes that, should market conditions change significantly during the course of the authorisation, it is open to the Applicants to seek to vary the terms of the authorisation. This should provide Carnival with a degree of comfort in relation to its need for flexibility in order to be able to respond to changes in demand over time.
147. On the basis of Carnival's assurances and the requirement on PBPL to assess nominations for anti-competitive purpose and effect, the ACCC does not consider it is necessary to impose a condition requiring Carnival not to make bookings with the purpose or effect of discouraging or frustrating competitors, or limiting Carnival to using its Foundation Berthing Days at a rate of three per week.
148. For the reasons outlined in this determination, the ACCC is satisfied, subject to the conditions of authorisation, that the proposed arrangements are likely to result in a public benefit that would outweigh the likely public detriment from that conduct.
149. The ACCC is not satisfied in all the circumstances that the proposed arrangements would not be likely to have the effect of substantially lessening competition. However, as long as the net public benefit test is met (in this case, subject to conditions), the ACCC may make a determination granting authorisation under s88.
150. Accordingly, subject to the conditions, the ACCC has decided to grant authorisation.

## Length of authorisation

151. The CCA allows the ACCC to grant authorisation for a limited period of time.<sup>26</sup> This enables the ACCC to be in a position to be satisfied that the likely public

---

<sup>26</sup> Subsection 91(1).

benefits will outweigh the detriment for the period of authorisation. It also enables the ACCC to review the authorisation, and the public benefits and detriments that have resulted, after an appropriate period.

152. At the time of lodging their application, the Applicants requested the ACCC grant authorisation for a period of 18 years, which they submitted was appropriate given the substantial commitment being made by the Applicants as part of the proposed arrangements. The Applicants submitted it also reflected the minimum term of 15 years for the operation of the proposed arrangements, taking into account the anticipated 2-3 years required for the development of the new cruise facility to be completed.
153. In their submission of 20 December 2017, the Applicants requested that the term of 18 years' authorisation commence at the time the new cruise facility was completed as authorisation to give effect to the proposed arrangements is not required at this stage.
154. An interested party submits that the Applicants have not justified their request for seeking authorisation for 18 years, and submit the authorisation should be limited to a maximum of five years.
155. The ACCC accepts that a long term commitment may be required to support the development of infrastructure projects such as the new cruise terminal. The ACCC considers it appropriate that the 15 year agreement between the parties that underpins construction of the new terminal is authorised. So the ACCC has decided to grant authorisation until 31 May 2036, to allow for the three year construction period.

## **Determination**

### **The application**

156. Application AA1000399 was made using a Form B, under subsection 88(1) of the CCA. Authorisation is sought as the proposed arrangements may have the purpose or effect of substantially lessening competition within the meaning of section 45 of the CCA.
157. On 6 November 2017, a number of amendments to the CCA came into effect, including changes to the authorisation provisions in Division 1 of Part VII of the CCA. Pursuant to section 183(2), these changes apply to applications for authorisation under consideration by the ACCC on or after 6 November 2017. Accordingly, the CCA as amended will apply to this application, notwithstanding that it was lodged with the ACCC prior to the amendments coming into effect. Applications for authorisation under subsections 88 (1) lodged prior to the amendments are treated as applications for authorisation under subsection 88(1) of the CCA as amended.

### **The statutory test**

158. Pursuant to subsection 90(7) of the CCA, the ACCC must not make a determination granting authorisation in relation to conduct unless it is satisfied in all the circumstances:

1. that the conduct would not have the effect, or would not be likely to have the effect, of substantially lessening competition; or
2. that:
  - a. the proposed conduct would result, or be likely to result, in a benefit to the public, and
  - b. that benefit would outweigh the detriment to the public that would result, or be likely to result, from the proposed conduct.

159. For the reasons outlined in this determination:

1. the ACCC is not satisfied in all the circumstances that the proposed arrangements would not be likely to have the effect of substantially lessening competition;
2. the ACCC is satisfied, subject to the conditions below, that in all the circumstances the proposed arrangements for which authorisation is sought are likely to result in a benefit to the public that would outweigh any detriment to the public likely to result from the proposed arrangements.

## **Conduct which the ACCC has decided to conditionally authorise**

160. The ACCC has decided to grant conditional authorisation AA1000399 to Port of Brisbane Pty Ltd (PBPL) and Carnival to give effect to the proposed arrangements between PBPL and Carnival – specifically, an Agreement for Licence and a Licence (other than the conduct described in paragraph 167 below) – which provide Carnival with take-or-pay obligations and certain preferential berthing rights over a new cruise terminal to be constructed by PBPL.

## **Conditions of authorisation**

161. The ACCC has decided to grant authorisation on that the following conditions:

1. The Applicants do not give effect to any provision of their proposed arrangements that provides Carnival with a first right of refusal in respect of a take or pay obligation in relation to a second berth at Brisbane; and
2. Carnival does not nominate to PBPL and PBPL does not grant Carnival the right to more than two days over any weekend, being Friday, Saturday, or Sunday, as Foundation Berthing Days, Priority Berthing Days, or Ad Hoc Berthing Days in any Cruise Season until after:
  - a. PBPL has published the days nominated by Carnival as Foundation Berthing Days; and
  - b. Users have had an opportunity to consider available days (i.e. days that have not been nominated as Foundation Berthing Days); and
  - c. Users have submitted their initial booking requests to PBPL nominating Priority Berthing Days and/or Ad Hoc Berthing Days; and

d. PBPL has made allocations in relation to those requests.

162. The definitions below apply to the second condition:

- **Cruise Season** means each period from 1 October to 30 September, inclusive.
- **Users** means an operator of vessels that uses, or seeks access to use, the cruise facility and wharf (other than Carnival).

163. Objectives of the second condition:

1. The ACCC considers access to at least one weekend day is important to potential entrants being able to construct sufficiently profitable cruise itineraries to consider offering regular cruises out of Brisbane.
2. The ACCC is imposing a condition that Carnival cannot use its Foundation Berthing Days or any other preferential berthing rights or priority category under the Priority Berthing Rules to be allocated more than two of the three weekend days in any weekend (being Friday, Saturday or Sunday) *before* other users have had the opportunity to nominate and be allocated the third weekend day.
3. If no other user has nominated any of those third weekend days 24 months out, Carnival can nominate and be allocated these days.

164. The authorisation applies to these proposed arrangements in so far as they contain provisions that may have the purpose or effect of substantially lessening competition within the meaning of section 45 of the CCA.

165. The ACCC has decided to grant authorisation until 31 May 2036.

## **Conduct which the ACCC proposes not to authorise**

166. The authorisation is in respect of the Agreement for Licence and Licence as it was provided to the ACCC at the time of lodging the application. Any changes to the Agreement for Licence and Licence during the term of the proposed authorisation would not be covered by the proposed authorisation.

167. In response to concerns raised in the draft determination, the Applicants proposed to amend their arrangements to prevent free riding by agreeing a provision whereby Carnival would share the benefit of any lower costs for a second berth through an extension of the existing most favoured nation clause in the proposed agreement for licence. The Applicants are not seeking authorisation for this provision as they consider it is not required. Therefore this provision is excluded from the authorisation.

## **Date authorisation comes into effect**

168. This determination is made on 10 May 2018. If no application for review of the determination is made to the Australian Competition Tribunal it will come into force on 1 June 2018.