



Draft 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: 1 March 2018

Authorisation number: AA1000399

Commissioners: Rickard
Schaper
Cifuentes
Court
Featherston
Keogh

Summary

The ACCC proposes to grant conditional authorisation to Port of Brisbane (PBPL) and Carnival for proposed arrangements between them whereby 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 will receive preferential berthing rights at the new terminal. The ACCC proposes to grant authorisation for 18 years, subject to a condition that prohibits the parties from giving effect to the provisions in the proposed arrangements that provide Carnival with a right of first refusal in respect of a take or pay obligation in relation to a second berth.

The ACCC seeks submissions in relation to this draft determination before making its final decision.

Port of Brisbane (**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. These nominations will have absolute priority over any other parties seeking access to berth cruise ships at the new terminal.

Agreements of this form may breach competition laws, depending on their effect on competition. For legal certainty, parties can apply to the ACCC, which can authorise such conduct, either on the basis that it is satisfied that the conduct is not likely to substantially 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.

The proposed arrangements provide PBPL with greater certainty about long term baseline volume and revenue, and the ACCC accepts that the terminal – estimated to cost \$158 million – may not be built without such an arrangement.

The ACCC considers the construction of the new terminal is likely to be of benefit to the public. 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, competition benefits will only be achieved to the extent that other cruise operators are able to gain sufficient access to berthing days at the new terminal. While

it is in PBPL's interests to ensure other cruise operators may access berthing days at the terminal, some parties have raised concerns that the proposed arrangements may create barriers to this 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 exceed the likely public detriments.

If the proposed arrangements between PBPL and Carnival relating to preferential rights over the terminal allow Carnival to deter or potentially prevent the entry of other cruise operators to Brisbane, this may substantially lessen competition and would result in a significant public detriment. This may occur through Carnival's right of first refusal in respect of a take or pay obligation in relation to a possible future second berth at the terminal, and therefore the ACCC proposes to impose a condition that the Applicants not give effect to the clauses of their Licence that relate to this right.

Some interested parties have expressed concern that Carnival may use its 100 priority Foundation Berthing Days per year to book out its allowable 4 days per week on the most attractive days over the summer cruising season, preventing competing cruise operators from offering an attractive commercial cruise itinerary, at least on a regular basis. It has been suggested that the ACCC should require a reduction in the allowable booking days per week from 4 to 3.

The ACCC is concerned that Carnival's right to nominate 100 Foundation Berthing Days up to a maximum of 4 per week may prevent or discourage competing cruise operators from providing cruises out of Brisbane by limiting their ability to access berthing services on key days (such as Friday-Sunday) or from being able to establish regular itineraries. However, on the information before it, the ACCC is not currently satisfied that any potential detriment from this source is sufficiently likely to warrant such a condition. The ACCC invites further information and evidence from interested parties and the Applicants on this point.

Some interested parties have expressed concern that Carnival may also block or deter, or at least restrict, entry by other cruise operators through the acquisition of additional Priority Berthing Days (which are available for purchase by any user – subject to certain restrictions – and allocated after Foundation Berthing Days). Based on the information currently before it, the ACCC considers that this is unlikely, because Carnival can cover the summer cruising season using its 100 Foundation Berthing Day rights, and it would only be necessary for Carnival to make use of Priority Berthing Days through the winter months which are currently uncontested by other cruise operators. Other cruise operators run cruises in the northern hemisphere summer season and only bring ships to Australia in the northern winter season.

While 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, it is satisfied, subject to a condition, 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.

Accordingly, the ACCC proposes to grant authorisation, for 18 years, subject to a condition that prohibits the parties from giving effect to the provisions in the proposed arrangements that provide Carnival with a right of first refusal in respect of a take or pay obligation in relation to a second berth.

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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 ACCC¹.
2. The Applicants are seeking authorisation for an agreement² 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 right of first 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 is sought for a period of 18 years to match the underlying agreement, and is 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 Berthing Rules whereby:
 - booking requests must be made 25 months prior to the start of a cruise season and allocated 24 months out by PBPL
 - cruise vessels have priority over all other vessels
 - 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
 - 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

¹ 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.

² Agreement for Licence and a Licence executed on 5 October 2017.

allocated to another user, that user has made another request, or PBPL is reasonably of the view that the request is prohibited under applicable competition laws

- 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 seek 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.

Interim authorisation

9. 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.
10. 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.³

The Applicants

11. 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

³ 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>.

proprietary company owned by the APH consortium,⁴ whose principal business is the management and development of the Port of Brisbane.

12. 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

13. 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%).⁵ Carnival accounts for more than 70 per cent of the total number of Australian and New Zealand cruise passengers.⁶
14. Australia accounted for 5.2% of global cruise passengers in 2016, the fifth largest country in the world.⁷ 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.
15. Australian ocean cruise passenger numbers have increased by an annual average of 19.4% since 2007.⁸ The industry continues to predict strong growth.⁹ 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 limits the potential growth of the industry.¹⁰ The industry predicts that using ships of greater capacity provides the possibility of growth given growing port congestion.¹¹
16. 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

⁴ 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.

⁵ Cruise Market Watch, *2018 Worldwide Cruise Line Market Share*, <http://www.cruisemarketwatch.com/market-share/>, viewed 22 December 2017.

⁶ Cruise Market Watch, *2018 Worldwide Cruise Line Market Share*, <http://www.cruisemarketwatch.com/market-share/>, viewed 22 December 2017; www.carnivalaustralia.com.

⁷ Cruise Lines International Association Australasia, *Cruise Industry Source Market Report: Ocean Cruise Passengers Australia 2016*.

⁸ Cruise Lines International Association Australasia, *Cruise Industry Source Market Report: Ocean Cruise Passengers Australia 2016*.

⁹ Australian Cruise Association, *Annual Report 2065-2017*, p8.

¹⁰ IBISWorld, *Water Passenger Transport in Australia*, March 2017.

¹¹ Australian Cruise Association, *Annual Report 2015-2016*, p8.

ships. The majority of contracts to build new cruise ships worldwide are for vessels over 100,000 gross tonnes¹², with many considerably larger.¹³

17. 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.¹⁴

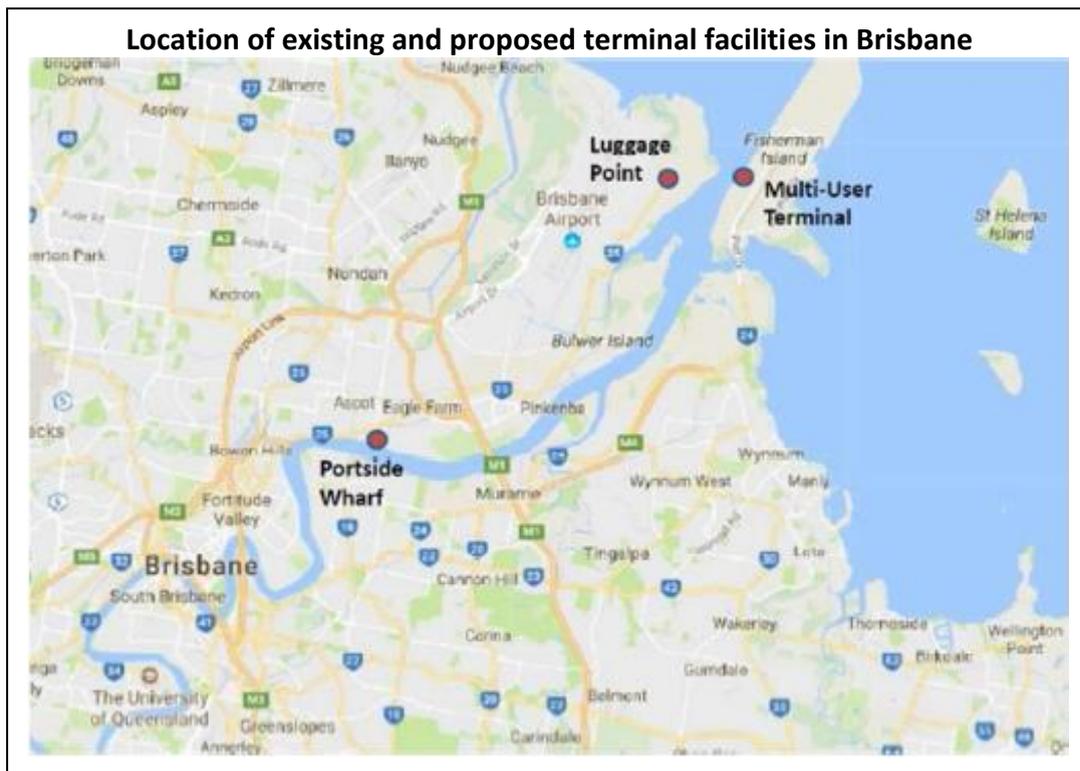
Brisbane ports

18. 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. The ACCC understands that Carnival is the only cruise operator using Portside at the current time, due to this constraint.
19. 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.
20. 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 the MUT will not continue to allow berthing by cruise ships after the new cruise facility is opened.
21. 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.

¹² The ACCC understands that ships of 100,000 gross tonnes or greater are generally at least 270m in length.

¹³ Australian Cruise Association, *Annual Report 2015-2016*, p8.

¹⁴ Cruise Lines International Association Australasia, *Cruise Industry Source Market Report: Ocean Cruise Passengers Australia 2016*.



22. 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.
23. 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.
24. 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.¹⁵
25. 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 the 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

26. About 40% of Australian cruise passengers depart from New South Wales, and almost 24% from Queensland.¹⁶

¹⁵ Port of Brisbane, media release, "Brisbane's international cruise terminal set to launch", 25 October 2017.

¹⁶ Cruise Lines International Association Australasia, *Cruise Industry Source Market Report: Ocean Cruise Passengers Australia 2016*.

27. In financial year 2016-17, 344 cruise ships berthed in Sydney. Newcastle, Wollongong and Eden also host a small number of cruise ships.
28. In the financial year 2016-2017, 391 cruise ships called at Queensland ports.¹⁷ 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).
29. 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

30. The ACCC tests the claims made by an applicant in support of its application for authorisation through an open and transparent public consultation process.
31. 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.¹⁸
32. 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.
33. Submissions by the Applicants and interested parties are considered as part of the ACCC's assessment of the application for authorisation.

ACCC assessment

34. 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:
 - a. that the conduct would not have the effect, or would not be likely to have the effect, of substantially lessening competition; or
 - b. that:
 - i. the proposed conduct would result, or be likely to result, in a benefit to the public, and
 - ii. that benefit would outweigh the detriment to the public that would result, or be likely to result, from the proposed conduct.

¹⁷ Australian Cruise Association, *Annual Report 2016-2017*.

¹⁸ A list of the parties consulted and the public submissions received is available from the ACCC's public register www.accc.gov.au/authorisationsregister.

Relevant areas of competition

35. The Applicants submit that the proposed arrangements will impact on the following markets:

- the provision of wharf and terminal facilities to passenger cruise liners, and
- the market for the supply of pleasure cruises which include an Australian itinerary.

36. The ACCC considers that the relevant areas of competition are likely to be those for:

- the provision of wharf and terminal facilities to passenger cruise liners in and near Brisbane, and
- the market for the supply of pleasure cruises that originate from or stop in Brisbane.

Future with and without

37. 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.

38. 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.

39. 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.

40. 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. 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.

41. On this basis, the ACCC considers that it is likely that the new cruise terminal would not be built without some form of a long term take or pay commitment, and that cruise ships in Brisbane would continue to berth at Portside and the MUT.

Assessment of public benefits

42. 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.
43. The ACCC's assessment of the likely public benefits from the proposed arrangements follows.

Increased competition in the supply of terminal facilities

44. The Applicants submit that the addition of the new cruise facility will provide significant new competition for existing terminal facilities, and more choice for cruise operator customers. 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.
45. An 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.
46. The ACCC understands that Carnival is the only cruise operator to use the Portside cruise terminal currently, because only it has ships under 270m which are able to dock there. A second 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 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.
47. Carnival advises that it intends to use the new cruise facility for the majority of its Brisbane berthing requirements, including any home porting requirements in Brisbane, although it may continue to use other cruise terminals within Brisbane from time to time.
48. 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.

49. 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.
50. 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 will have fewer berthing days in the total pool than is currently available.
51. 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.

Increased capacity and improved services for cruise operators

52. The Applicants submit that the addition of berthing capacity will provide a benefit by:
- enabling current and future demand for services to be met
 - stimulate further demand
 - prevent capacity constraints and associated inefficiencies within Brisbane, and
 - provide an alternative facility for cruise operators who cannot access other ports, particularly Sydney, at times of capacity constraint.
53. 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.
54. 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 home port vessels in Brisbane.
55. 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.

56. 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.
57. 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.

Regional economic benefits and increased demand for tourist services

58. 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).
59. 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.
60. 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.

ACCC conclusion on public benefits

61. The ACCC accepts that the proposed arrangements are likely to result in public benefits in the form of:
- short term increase in competition for the provision of cruise terminal services in or near Brisbane
 - 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, and
 - 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
 - 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 spending is not diverted from other parts of the Australian economy.

Assessment of public detriments including competition effects

62. 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.
63. In many cases the only identifiable detriments will be those constituted by a lessening of competition.
64. The proposed arrangements have the potential to result in public detriment constituted by a lessening of competition in the supply of cruise services that originate from or stop in Brisbane, and the supply of wharf and terminal facilities to passenger cruise liners in and near Brisbane. Competitive detriment would arise if the proposed arrangements had the effect of discouraging or preventing other cruise operators from operating out of Brisbane. The arrangements may also lead to the existing cruise terminal in Brisbane closing down.
65. Competition in the supply of cruise services may be reduced if 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.
66. The Applicants submit the proposed arrangements will not result in any lessening of competition because:
- the new terminal will create a new purpose-built cruise terminal in Brisbane, with the ability to berth ships over 270m, increasing competition in the market for cruise terminals, and
 - it will facilitate the new 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.
67. 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.
68. An interested party submits that:
- the extent of the commitment in the proposed arrangements means that Carnival will not have capacity to choose 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, and
- the ACCC should impose a condition limiting Carnival's commitment to the new terminal to ships which cannot dock at Portside.

69. 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 cruise operator is likely to begin using the new facility. This will have a major restrictive impact on the growth of cruising in Brisbane.
- the access of mega ships 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, and
- competition offered by other terminals is misrepresented in the application.

Reduction of competition in the provision of wharf and terminal facilities

70. 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).

71. 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.

72. The ACCC notes that the proposed arrangements do not impose any requirement on Carnival to send ships to the new facility. Although it seems likely 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), Portside remains free to compete for any excess requirements Carnival may have, 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.

73. 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 entry of new cruise operators

74. 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, and on Carnival's use of its Foundation Berthing Days, are that no user can book more than 4 days in any week, or more than 18 days in any calendar month.

75. An interested party submits that cruise operators other than Carnival are likely to be effectively blocked from bringing large cruise ships to Brisbane 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 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 game 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 turnaround days, 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 Berth Days be limited to a maximum of three per week.

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

- add additional cruise terminal capacity so that more cruise operators can be accommodated,
- deliver better facilities and services for cruise ships over 270m,
- introduce more competition in terminals, with anticipated downward pressure on prices and improvements in services,
- stimulate demand for cruising in Brisbane, prompting further investment and competition in downstream cruise market,
- will not have the effect of 'locking away' capacity or enabling Carnival to stockpile capacity,
- allow PBPL to refuse to allocate a berthing day to a cruise operator if to do so would have an anti-competitive effect, and
- 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.

Priority Berthing Days

77. Under the Priority Rules for the allocation of berthing days for the new terminal, it is proposed that Foundation Berthing Days will be allocated first (of which Carnival has 100 per year), 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.

78. 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.

79. 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.

80. 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.

81. 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.

Maximum weekly bookings

82. As discussed above, Carnival can have priority over all other users for allocation of all of its berthing days over the summer season, and doesn't need to secure berthing days for the other six months using its Foundation Berthing Day rights because there are no other cruise operators running cruises out of Brisbane in those months.
83. An interested party has recently submitted a concern that the ability for Carnival, under the proposed arrangements with PBPL and the Priority Rules, to use its 100 Foundation Berthing Days at a rate of 4 per week over the key summer months when berth contestability is the most important for any potential new entrant, means that the arrangements can be gamed to ensure that any other berthing opportunities were, at best, sub-optimal.
84. This interested party has proposed that any agreement between Carnival and PBPL should limit the use of Foundation Berth Days to a maximum of three per week. Other available berthing days could be made available to all industry participants subject to the Priority Rules. Under this proposal, after the final berthing allocation day – no more than 18 months before the proposed berthing day – Carnival would be free to use its Foundation Berthing Days to access more than 3 days per week if no other user has chosen to book those days.
85. The ACCC considers that, should Carnival use all of its Foundation Berthing Days during the summer season by securing preferential allocation of key berthing days best suited to building 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, this would limit the options open to competing cruise operators from entering the market.
86. However, at this stage the ACCC has insufficient information on this issue to be satisfied that Carnival's 100 Foundation Berthing Days and its ability to have preferential access to up to 4 berthing days per week is likely to result in such significant detriment to competition that it would justify imposing a condition, for

example to reduce the number of Foundation Berthing Days or limit Carnival's ability to nominate them to a maximum of 3 days per week. The ACCC intends to revisit this issue in its final determination, and invites interested parties and the Applicants to provide further information on this point, including evidence of the effect that this provision is likely to have on the ability of competitors to operate.

Carnival's rights over second berth may discourage entry

87. 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 right of first refusal to enter into a take or pay obligation to underwrite the construction of the second berth. Carnival submits that it requires a right of first 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 submits 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).
88. An interested party submits that the right of first 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.
89. In response, the Applicants submit 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.
90. 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 terms of the proposed arrangements between the parties, even without the right of first refusal.
91. 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. The ACCC therefore considers that Carnival having a right of first refusal to contract for priority berthing rights from a second berth if it were constructed has the potential to substantially lessen competition and result in significant detriment by discouraging the entry of other cruise operators to offer cruises out of Brisbane.

Extent of constraint offered by competition from other cruise terminals

92. The Applicants submit that the proposed development will not detrimentally affect competition for cruise terminal services within Brisbane, or on a state or national basis, because the proposed development will increase dedicated cruise capacity within Brisbane. The Applicants submit the new 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.

93. 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.

94. 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.¹⁹

95. 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 days and for ships smaller than 270m), it appears unlikely Portside will remain open if the proposed arrangements go ahead (see paragraphs 46-48 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, and
- plans for other new developments are at a very early stage and highly uncertain.

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

¹⁹ See for example <https://www.governmentnews.com.au/2017/10/park-cruise-ships-garden-island-government-told/>

ACCC conclusion on public detriments including competition effects

97. The ACCC notes the proposed arrangements have the potential to result in detriments by lessening competition in the supply of cruise services originating from or stopping in Brisbane. Competitive detriment would arise if the proposed arrangements had the effect of discouraging or preventing other cruise operators from operating out of Brisbane. This may occur if 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. This may occur in a number of different ways.
98. The ACCC considers that entry of competing cruise operators may be prevented or discouraged through granting Carnival a right of first refusal with respect to a take or pay obligation in relation to a second berth which may have the effect of locking out or discouraging the entry of smaller cruise operators. The ACCC considers that Carnival's legitimate commercial interests can be protected through other means.
99. The ACCC considers that Carnival may have the ability to use its Foundation Berthing Day allocations to effectively block smaller competitors from being able to build commercial itineraries over summer. The ACCC considers it currently has insufficient information to be satisfied it should place weight on this detriment, and invites further information on this issue from interested parties and the Applicants.
100. 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 currently 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.
101. 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 that it appears unlikely that the new development will be significantly constrained by competition provided by alternative cruise terminals, and therefore that this constraint would provide any mitigation against any anti-competitive detriment arising from the proposed arrangements.

Application of the authorisation legal test

102. As the Applicants have sought authorisation for proposed arrangements that would or might contravene section 45 of the CCA, the ACCC may grant authorisation if it is satisfied in all the circumstances:
- that the conduct would not be likely to have the effect of substantially lessening competition, or
 - the likely public benefit from the conduct would outweigh the likely public detriment²⁰.

²⁰ Section 90(7). Section 90(8) does not apply because there is not a cartel provision.

Substantial lessening of competition

103. 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. In particular, the ACCC considers that entry of competing cruise operators may be prevented or discouraged through Carnival's right of first refusal with respect to a take or pay obligation in relation to a second berth. Further, the ACCC is concerned that Carnival's right to nominate 100 Foundation Berthing Days up to a maximum of 4 per week may prevent or discourage competing cruise operators from providing cruises out of Brisbane by limiting their ability to access berthing services on key days (such as Friday-Sunday) or from being able to establish regular itineraries. As noted above, the ACCC seeks further information and evidence on this issue.

Net public benefit

104. The ACCC considers the construction of the new terminal is likely to result in the following public benefits:

- 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), on a short term basis in the provision
- a short term increase in competition for the provision of cruise terminal services in or near Brisbane, and
- 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
- regional economic benefits from increased tourist spending on cruises, to the extent this spending is not diverted from other parts of the Australian economy.

105. The ACCC considers that the proposed arrangements between PBPL and Carnival relating to preferential rights over the terminal would be likely to result in public detriment by preventing or deterring the entry of, or competition from, other cruise operators to Brisbane, through:

- Carnival's right of first refusal with respect to a take or pay obligation in relation to a possible future second berth at the terminal
- Carnival using its Foundation Berthing Days during the summer season to prevent other cruise operators from being able to build a commercial cruise itinerary, and
- the acquisition and use of Priority Berthing Days by Carnival during the winter season (although the ACCC considers this seems unlikely at the current time).

106. 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.

107. The ACCC proposes to address its concern relating to Carnival's right of first 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.
108. For the reasons outlined in this draft determination, the ACCC is satisfied, subject to the proposed condition of authorisation, that the proposed arrangements are likely to result in a public benefit that would outweigh the likely public detriments from that conduct, and are unlikely to result in a substantial lessening of competition.
109. Accordingly, subject to the proposed condition, the ACCC proposes to grant authorisation.

Length of authorisation

110. The CCA allows the ACCC to grant authorisation for a limited period of time.²¹ This enables the ACCC to be in a position to be satisfied that the likely public 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.
111. 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.
112. 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.
113. 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.
114. 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 proposes to grant authorisation for 18 years, to allow for the three year construction period.

Draft determination

The application

115. 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

²¹ Subsection 91(1).

purpose or effect of substantially lessening competition within the meaning of section 45 of the CCA.

116. 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 182(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.

117. Subsection 90A(1) of the CCA requires that before determining an application for authorisation the ACCC shall prepare a draft determination.

The statutory test

118. 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:

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

119. For the reasons outlined in this draft determination:

- 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;
- the ACCC is satisfied, subject to the proposed condition 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 proposes to conditionally authorise

120. The ACCC proposes to grant conditional authorisation AA1000399 to Port of Brisbane Pty Ltd and Carnival to give effect to the proposed arrangements between Port of Brisbane Pty Ltd (PBPL) and Carnival – specifically, an Agreement for Licence and a Licence – which provide Carnival with take-or-pay obligations and certain preferential berthing rights over a new cruise terminal to be constructed by PBPL.

121. The ACCC proposes to grant authorisation on condition the Applicants do not give effect to clauses of their proposed arrangements which provide Carnival with the right of first refusal in respect of a take or pay obligation in relation to a second berth, or any other special rights in relation to the second berth (specifically, Clause 23 of the Licence).
122. Further, the proposed 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.
123. The proposed 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.
124. The ACCC proposes to grant authorisation for 18 years.
125. This draft determination is made on 1 March 2018.

Next steps

126. The ACCC now seeks submissions in response to this draft determination. In addition, consistent with section 90A of the CCA, the applicant or an interested party may request that the ACCC hold a conference to discuss the draft determination.