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Proposed development of New
Brisbane Cruise Terminal
Submission by Port of Brisbane and
Carnival Australia in response to ACCC's
request for additional information

31 January 2018

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1 Overview

On 21 December 2017, the ACCC requested additional information from the Applicants. The Applicants make this submission in response to the request by the ACCC.

2 Extent of commitment required to support the Proposed Development and the New Cruise Facility

As part of the Proposed Development, QPH Property Co Pty Limited, as trustee for QPH Property Trust, a related group entity of PBPL, has forecast that the development of the New Cruise Facility will cost approximately [Confidential: restriction of publication claimed]. As stated in the Applicants' Submission, PBPL will not make the investment in building the New Cruise Facility unless it can guarantee a base level of custom and revenue, in order to support its business case and the viability of the investment.

To ensure that it has long term access to appropriate terminal facilities within Brisbane, Carnival is prepared to make a substantial financial commitment, via its take or pay obligations, of access charges not less than [Confidential: restriction of publication claimed] per cruise season.

2.1 Quantum of take or pay necessary to reduce the risk of the Proposed Development

The long term commitment by the first customer of the New Cruise Facility provides the level of revenue certainty required by PBPL to invest in the Proposed Development.

Carnival's take or pay obligations do not eliminate the risks for PBPL associated with the Proposed Development and the operation of the New Cruise Facility, but represent approximately [Confidential: restriction of publication claimed]% of the project risk. Given the volatility of the tourism sector and the fact that it is often the sector that suffers first and is hardest hit in economic down turns, this is the minimum level of commitment that is required for PBPL to assume the remainder of the project risk and proceed with the Proposed Development and operation of the New Cruise Facility.

The New Cruise Facility was required to satisfy the Queensland Government's criteria for the assessment of a Market-led Proposal, including that the proposal satisfies a community need, aligns with government policy and priorities, and is commercially feasible. The take or pay arrangements between Carnival and PBPL are considered necessary in order to reassure the State Government that the facility is commercially feasible and will be utilised by cruise operators as per the previous letters of support for the New Cruise Facility that were received during the Market-led Proposal process.

Carnival's minimum access charge is the equivalent of the charges associated with having 100 cruise vessel calls at the New Cruise Facility per annum, with 2,400 passengers per cruise vessel, at the proposed access charge for the New Cruise Facility. In return for its substantial financial commitment, Carnival receives not more than 100 Foundation Berthing Days per annum, which are limited to a maximum of 4 days in any week and a maximum of 18 days in any one month. Carnival would not have the incentive to guarantee a level of financial commitment to the Proposed Development without receiving this number of Foundation Berthing Days.

The total minimum access charge payable by Carnival is the minimum that PBPL requires to de-risk the Proposed Development and operate the New Cruise Facility. As Carnival is the only operator to have made a financial commitment to the facility, Carnival is the only operator on whom PBPL can rely to recover these costs. To reduce the number of Foundation Berthing Days received in return for this commitment would result in Carnival, and all other users of the New Cruise Facility, paying higher access charges per vessel berthed.

Carnival would not agree to pay a higher access charge or accept fewer berthing days for its financial commitment. To do so would materially change the commercial value of the Agreements and the long

term efficiency of the New Cruise Facility, and would raise the cost of operating cruises from the facility. This would ultimately make cruise costs associated with the New Cruise Facility uncompetitive and limiting the opportunity for tourism-related economic uplift in the South East Queensland economy.

2.2 No 'locking away' of capacity

As outlined in previous submissions, the 100 Foundation Berthing Days equate to less than Carnival's current and forecast berthing days in Brisbane. In 2017, Carnival berthed vessels 149 times in Brisbane. Subject to changes in demand, Carnival projects that it will call in Brisbane approximately [Confidential: restriction of publication claimed] As such, the take or pay commitments do not have the effect of 'locking away' capacity, or enabling Carnival to stockpile capacity that it does not intend to utilise. Rather, Carnival has priority access on fewer days than it commercially requires, leaving it to compete for additional berthing days with other operators, should other operators choose to commence cruise operations in Brisbane.

3 The Priority Rules

3.1 Operation of the Priority Rules

The Priority Rules (a copy of which are annexed to the Applicants' Submission) apply to all cruise operators at the New Cruise Facility and provide a mechanism for the allocation of specific Berthing Days to cruise operators.

Under the Priority Rules, PBPL may, by agreement, grant rights to other cruise operators to berth vessels at the New Cruise Facility for a certain number of Berthing Days each year. Any user can secure Priority Berthing Days with an associated take or pay commitment commensurate to 20 Berthing Days per year with a commitment for a for a period of seven years. Cruise operators can also secure Ad Hoc Berthing Days without making a financial commitment to the New Cruise Facility. There is no specified upper limit on the number of Priority Berthing Days or Ad Hoc Berthing Days that a cruise operator may access. However, the limit on the number of berthing days an individual operator may utilise in any individual week under the Priority Rules does act to limit the number of Foundation Berthing Days and Priority Berthing Days that an operator can secure.

Booking Requests must be made by cruise operators by nominating specific Berthing Days at least 25 months before, and are allocated by PBPL 24 months prior to, the start of a cruise season. In the allocation of Berthing Days to cruise operators:¹

- Foundation Berthing Days have priority over Priority Berthing Days and Ad Hoc Berthing Days;
- a cruise operator with a greater number of Priority Berthing Days has priority over a user with fewer Priority Berthing Days to the extent of that greater number, with the remaining unallocated Priority Berthing Days ranking equally between both users; and
- Ad Hoc Berthing Days are allocated prioritising homeported vessels, turnaround vessels, transit vessels and other vessels.

This priority is commensurate with the level of commitment a particular cruise operator makes to berthing at the New Cruise Facility through a take or pay agreement or otherwise. The priority structure is required by PBPL in order to incentivise cruise operators to commit to berthing at the New Cruise Facility in order to guarantee a base level of custom and revenue.

¹ Priority Rule 6

Notwithstanding the priority structure for allocation of Berthing Days, no cruise operator will be allocated more than four Berthing Days in any one week or more than 18 Berthing Days in any one month.² This ensures that, irrespective of a user's Foundation Berthing Days or greater number of Priority Berthing Days, a minimum of three Berthing Days in each week and 12 in each month are open to equal competition among all cruise operators.

The Priority Rules also provide that PBPL may refuse to allocate a Berthing Day to a cruise operator if to do so would have an anti-competitive effect.³ Further, if two cruise operators nominate the same Berthing Day in their Booking Request, PBPL will resolve the conflict in accordance with the above mentioned priorities, but also by considering (among other factors) whether a cruise operator has nominated that day for the purposes of, or the nomination would have the effect or likely effect of, restricting entry by another User or lessening competition between cruise operators.⁴ In the event that PBPL is otherwise unable to resolve conflicting booking requests, it will allocate Berthing Days in a manner that it considers, acting reasonably and in good faith, will be fair and reasonable in the circumstances, and taking into account any matters which PBPL reasonably and in good faith considers are appropriate in the circumstances.⁵

Therefore, it is not possible for a large cruise operator to effectively "lock out" a smaller customer or potential customer of the New Cruise Facility. At a minimum, regardless of the number of Priority Berthing Days that Carnival could theoretically commit to acquire, at least 3 days of each week would be fully contestable by other operators, should they decide to commence Brisbane services.

The Applicants' submissions of 20 December 2017 provide further information regarding the availability of berthing days at the New Cruise Facility.

3.2 Purpose of Priority Rules

The priority structure for the allocation of Berthing Days at the New Cruise Facility is necessary to underwrite the significant investment being made by PBPL in, and the annual commitment being made by Carnival to, the Proposed Development. Further, as set out in the Applicants' Submissions, the development and operation of the New Cruise Facility results in a net increase in the total number of berthing slots available for cruise vessels in Brisbane (compared with the current market and the counterfactual) resulting in an increase in competition.

3.3 Carnival's intended use of Priority Berthing Days

The ACCC has requested that the parties provide an indication of the number of Priority Berthing Days Carnival is likely to purchase in addition to its Foundation Berthing Days [Confidential: restriction of publication claimed]

4 Potential second berth at the New Cruise Facility

The New Cruise Facility will initially operate one berth. If there is sufficient utilisation of that berth (minimum of 55% utilisation), PBPL may decide to construct a second berth at the New Cruise Facility. The Agreements provide Carnival with a right of first refusal to enter into a take or pay obligation to underwrite the construction of that second berth. Any decision by PBPL to construct a second berth at the New Cruise Facility would be based on market demand.

² Priority Rule 7, subject to further allocation of Berthing Days after all initial Booking Requests have been allocated as per Priority Rule 8

³ Priority Rule 9

⁴ Priority Rule 10(c)

⁵ Priority Rule 10(g)

PBPL's preliminary estimate of the costs of constructing a second berth is \$50 million, plus an additional \$20 million for additional passenger processing facilities. No detailed design or costing work has been undertaken by PBPL with respect to the construction of a second berth and terminal and this estimate should not be relied upon.

The extent of the take or pay commitment required by PBPL with respect to the second berth in order to sufficiently de-risk its construction would likely be different from the extent of the take or pay commitment required by PBPL with respect to the initial Proposed Development and would depend on its assessment of market risk at the time the construction of the second berth is proposed.

PBPL would likely adopt the same approach as in the Agreements with Carnival to any Foundation Berthing Days (or equivalent) associated with a take or pay obligation by a cruise operator in relation to the second berth. That is, the extent of the take or pay obligation would be referable to a certain number of Foundation Berthing Days (or equivalent) based on the access charge for the New Cruise Facility that is applicable to all cruise operators. Because 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 current Proposed Development, the number of associated Foundation Berthing Days (or equivalent) secured by the cruise operator would be less than the number secured by Carnival under the Agreements. This would mean that a greater number of berthing days would be available to non-foundation cruise operators at any second berth (in addition to the total number of berthing days at the New Cruise Facility being increased by reason of the operation of a second berth).

Carnival requires a right of first refusal with respect to a take or pay obligation in relation to the second berth in order to protect its significant initial commitment to the development of the New Cruise Facility. In the absence of a right of first refusal with respect to the second berth, 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 reduced construction costs of that second berth).

However, the Agreements merely provide Carnival with a right of first refusal with respect to entering into a take or pay commitment in relation to any second berth. Should Carnival not exercise this right, PBPL would seek to agree a take or pay commitment with other cruise operators, with associated Foundation Berthing Days (or equivalent), for any second berth.

The construction and operation of a second berth at the New Cruise Facility, irrespective of any Foundation Berthing Days (or equivalent) granted to a cruise operator, would result in a net increase in the number of berthing slots available for cruise vessels in Brisbane, resulting in an increase in competition (as will the construction and operation of the New Cruise Facility).

5 The Proposed Development is inherently pro-competitive

As set out in the Applicants' previous submissions, the Proposed Development, which is made possible by the Agreements, will significantly increase cruise terminal capacity in Brisbane. That capacity will be able to be used by large cruise ships which are not able to berth at the existing facilities at Portside. In addition, the location of the facility at the mouth of the Brisbane river and the purpose built amenities which are close to the airport and further from residential areas mean that there will be significant efficiencies for both cruise and terminal operations. These are all highly competitive outcomes. In turn, these will result in public benefits related to the efficiency of operations, the increased ability for cruise ships to home port at Brisbane (noting that Carnival is the only operator that currently does so), with significant benefits for tourism and the broader economy, and valued improvements in the passenger experience.

Carnival's rights to Foundation Berthing Days under the Agreements are proportionate to the significant commitment that it has made to enable the New Cruise Facility to be constructed and do not change the pro-competitive nature of the Proposed Development. They are designed to protect its

commitment and are reflective of the actual berthing requirements of Carnival. They are also relative to the level of certainty required by PBPL in order to underwrite the construction of the Proposed Development and operation of the New Cruise Facility.

Carnival has entered into the Agreements in order to give it certainty of access to appropriate terminal facilities so that it can continue to operate year round services ex-Brisbane on larger ships which can cater to the demand of its passengers. Carnival has not entered into the Agreements with the intention of locking out potential competitors, who were themselves given the opportunity to commit to the Proposed Development but elected not to. PBPL has entered into the Agreements to give it certainty as to a minimum utilisation level of the New Cruise Facility.

Further, the Priority Rules mean that Carnival will not have the ability lock out potential competitors, because a minimum number of berthing days each week will be available for other operators. Carnival has no intention of acting irrationally and undermining the commercial success of its operations by gaming the use of Priority Berthing Days.

Finally, many competitors of Carnival have ships too large to call at the Portside terminal. By making this investment in the New Cruise Facility, Carnival is actually enabling its cruise competitors to have access to the Brisbane passenger market on their larger ships and furthermore is securing certainty of access to Brisbane for all cruise lines into the future, on cruise ships big and small.

For these reasons, the priority rights of Carnival under the Agreements do not lessen the pro-competitive effects of the Proposed Development. Rather, they make the Proposed Development possible and, with it, will provide significant public benefits and an increase in competition.