

**NOTICE OF LODGMENT**  
**AUSTRALIAN COMPETITION TRIBUNAL**

This document was lodged electronically in the AUSTRALIAN COMPETITION TRIBUNAL on 31/5/2018 at 3:44pm AEST and has been accepted for lodgment under the Practice Direction dated 23 September 2016. Filing details follow and important additional information about these are set out below.

**Lodgment and Details**

Document Lodged: Application to Tribunal for Review

File Number: ACT 1 of 2018

File Title: Re 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

Registry: VICTORIA – AUSTRALIAN COMPETITION TRIBUNAL



Dated: 31/5/2018 3:44pm AEST

Registrar

**Important Information**

This Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Tribunal and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.

The date and time of lodgment also shown above are the date and time that the document was received by the Tribunal. Under the Tribunal's Practice Direction the date of filing of the document is the day it was lodged (if that is a business day for the Registry which accepts it and the document was received by 4:30 pm local time at that Registry) or otherwise the next working day for that Registry.



## FORM I

(subregulation 20(1))

### APPLICATION TO TRIBUNAL FOR REVIEW

**Re 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**

1. Port of Brisbane Pty Ltd ACN 143 384 749 (**PBPL**) hereby applies to the Australian Competition Tribunal pursuant to section 101 of the *Competition and Consumer Act 2010 (Cth)* (**CCA**) for review of the determination of the Australian Competition and Consumer Commission (**ACCC**) dated the 10<sup>th</sup> day of May 2018 (Commission file no. AA1000399) (**Determination**).
2. PBPL was an applicant for the authorisation to which the Determination relates, together with Carnival plc ARBN 107 998 443 (**Carnival**).
3. PBPL is dissatisfied with the Determination in the following respects:
  - (a) the imposition of the second condition pursuant to paragraph 161(2) of the Determination (**Weekend Condition**); and
  - (b) the following findings made by the ACCC in the Determination, which are not supported by the evidence before the ACCC:
    - (i) That the development of the new cruise terminal could proceed with a different form of take or pay contract between PBPL and Carnival. (Determination, [48])
    - (ii) That a new cruise terminal may be developed in Brisbane by a party other than PBPL. (Determination, [48] [49])
    - (iii) 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. (Determination, [49])



- (iv) That it is likely that Portside would continue to operate as a cruise terminal absent the new cruise terminal being built. (Determination, [58])
- (v) That, under the proposed arrangements, it is likely that fewer berthing days will be available to cruise ships in Brisbane than are currently available. (Determination, [59])
- (vi) That many of the public benefits may also arise without the proposed arrangements. (Determination, [70])
- (vii) That potential entrant cruise operators will be discouraged from offering cruises out of Brisbane if they are unable to be confident that they can compile a season of cruise itineraries a reasonable proportion of which depart or return on a weekend. (Determination, [101])
- (viii) That the proposed arrangements are likely to result in detriments by lessening competition in the supply of cruise services originating from or stopping in Brisbane. (Determination, [129])
- (ix) That Carnival's preferential rights over the new cruise terminal will make it unattractive or uneconomic for other cruise operators to seek to operate cruises out of Brisbane. (Determination, [129])
- (x) That Carnival's ability to use its preferential berthing rights over the three days of each weekend is likely to block competitors from being able to build commercial itineraries over the summer cruising season. (Determination, [130])
- (xi) That it is possible that Carnival's use of its Foundation Berthing Days up to four per week may result in a 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. (Determination, [131])
- (xii) That any of the public benefits are contingent on other cruise operators being able to gain sufficient access to berthing days at the new cruise terminal. (Determination, [140])



- (xiii) That Carnival's preferential rights over the new cruise 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. (Determination, [141])
  - (xiv) That the Weekend Condition will not impose too onerous a burden on Carnival and should not significantly affect the commercial value of its agreement with PBPL. (Determination, [145])
  - (xv) That Carnival's ability to seek to vary the authorisation should provide Carnival with comfort in relation to its need for flexibility to be able to respond to changes in demand over time. (Determination, [146])
4. PBPL is not dissatisfied with the imposition of the first condition pursuant to paragraph 161(1) of the Determination (**Second Berth Condition**). The Weekend Condition and Second Berth Condition are described in the attachment to this Form.
5. The determination that PBPL is seeking from the Tribunal is as follows:
- (a) that the Determination be varied to:
    - (i) remove the Weekend Condition; and
    - (ii) remove the factual findings identified in 3(b) above, and replace such findings as the Tribunal deems necessary and appropriate to support its determination; and
  - (c) that the Determination otherwise be affirmed (including the imposition of the Second Berth Condition).
6. Particulars of the facts and contentions upon which PBPL intends to rely in support of the application for review, and a statement of the issues as PBPL sees them, are attached.

7. PBPL's address for service for the purpose of regulation 21 of the *Competition and Consumer Regulations 2010* is:

**Port of Brisbane Pty Ltd**

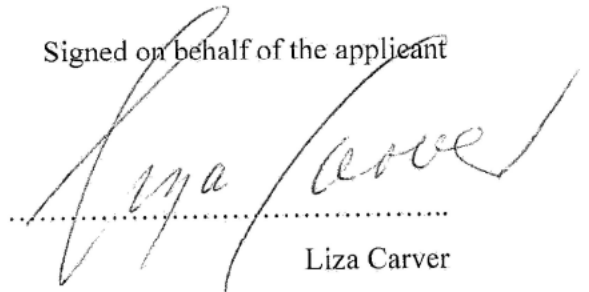
c/o Liza Carver  
Herbert Smith Freehills  
[liza.carver@hsf.com](mailto:liza.carver@hsf.com)

DX 361 Sydney

Level 34, ANZ Tower  
161 Castlereagh Street  
Sydney NSW 2000

Dated this 31 day of May 2018.

Signed on behalf of the applicant



Liza Carver

Partner, Herbert Smith Freehills

Solicitor for the applicant



## Attachment – Background, facts, contentions and issues for Tribunal to consider

---

### 1. The Applicant

1. PBPL is an Australian proprietary company.
2. PBPL is owned by the APH Consortium, which comprises four global infrastructure investors:
  - (1) Caisse de dépôt et placement du Québec (**CDPQ**);
  - (2) IFM Investors Pty Ltd (**IFM**);
  - (3) QIC Global Infrastructure on behalf of its managed funds (**QIC**); and
  - (4) Tawreed Investments Limited, a wholly-owned subsidiary of the Abu Dhabi Investment Authority (**ADIA**).
3. PBPL is the manager of the Port of Brisbane.

### 2. Applicant status

4. PBPL was a joint applicant for authorisation pursuant to CCA section 88 dated 11 October 2017. The other applicant was Carnival.
5. Carnival is a global leisure travel company with headquarters in Miami and London. Carnival has 10 international cruise line brands and over 100 cruise ships, and carries more than 11.5 million passengers per year.
6. Eight (8) of Carnival's cruise line brands operate in Australia: P&O Cruises Australia, Carnival Cruise Lines, Princess Cruises, Holland America Line, Seabourn, Cunard, P&O Cruises (UK), and Costa Cruises.

### 3. Cruise Facility Services and capacity for mega cruise ships in Brisbane

7. There is demand in Brisbane for purpose built facilities that provide cruise operators with:
  - (1) a wharf capable of berthing cruise ships;
  - (2) facilities for embarking and disembarking passengers (including check in, luggage handling and customs clearance);
  - (3) associated passenger logistical facilities (such as car parking, taxi ranks, bus parking and passenger drop-off zones); and
  - (4) provisioning and maintenance services for cruise ships,(Cruise Facility Services).
8. There is a global trend towards larger cruise ships, in terms of length and passenger capacity. There is increasing demand in Brisbane for Cruise Facility Services for:
  - (1) cruise ships in general – cruise ship calls are forecast to increase from 159 in 2015/16 to around 270 in 2035/36; and

- (2) cruise ships above 270 metres in length (**mega cruise ships**) – mega cruise ship calls are forecast to increase from 17 in 2015/16 to around 80 in 2035/36.
9. Typically, a wharf can berth (and provide Cruise Facility Services, if relevant, to) only one cruise ship per day, regardless of the ship's length, passenger numbers or the wharf's location. As a result, a wharf's capacity to berth cruise ships (and to provide Cruise Facility Services) is commonly expressed in "**Berthing Days**".
10. Cruise ships may make 3 types of visit to a port:
  - (1) **Homeport visit:** where (i) the majority of passengers disembark and new passengers embark and (ii) the cruise ship is based in that port permanently or seasonally.
  - (2) **Turnaround visit:** where (i) the majority of passengers disembark and new passengers embark and (ii) the cruise ship is not based in that port permanently or seasonally.
  - (3) **Transit visit:** where (i) a significant number of passengers disembark to visit that port and then re-embark to continue their cruise and (ii) the cruise ship is not based in that port permanently or seasonally.
11. In Brisbane, there is currently limited capacity to provide Cruise Facility Services to cruise ships, particularly mega cruise ships.
  - (1) The wharf located near the Brisbane CBD (**Portside**) can only receive ships up to 270m in length due to the Brisbane River's geography. It therefore cannot accommodate mega cruise ships. Portside is owned and operated by Brookfield Residential Properties, a subsidiary of Brookfield Asset Management Inc, and is subject to an obligation under its lease with the Queensland Government to berth cruise ships, but this obligation ends in 2021.
  - (2) The wharf on Moreton Island (**Moreton Island**) cannot accommodate mega cruise ships.
  - (3) PBPL's multi-user terminal at Fisherman Island (**MUT**) can berth mega cruise ships. However:
    - (A) PBPL is required by its sublease to provide 22 Berthing Days to cruise ships at the Port of Brisbane each year, and currently uses the MUT to fulfil this obligation (**Sublease Obligation**).
    - (B) The MUT is a cargo precinct. Its primary function is to berth ships carrying freight. Berthing cruise ships at the MUT reduces the capacity available for agricultural exports. Consequently PBPL currently only makes the MUT available to berth cruise ships on up to 30 Berthing Days per year.
    - (C) Cruise ships cannot homeport at the MUT. The MUT provides a low standard of convenience and amenity for tourists, and is not well suited to passenger transport for safety reasons.
  - (4) There are no other wharfs that provide Cruise Facility Services in Brisbane.
12. Between July 2014 and May 2018 in Brisbane:
  - (1) only 2 cruise operators acquired Cruise Facility Services: Carnival and Royal Caribbean International (**RCI**);

- (2) Carnival was the principal acquirer of Cruise Facility Services; and
  - (3) RCI only acquired Cruise Facility Services during summer, and only during December 2015 – April 2016 and November 2016 – February 2017 (and not in 2014 or summer 2017/18).
13. Carnival is the only cruise operator to operate ex-Brisbane cruises (and acquire Cruise Facility Services) year-round, and the only cruise operator to homeport in Brisbane.

#### 4. PBPL's Brisbane International Cruise Terminal Project

14. PBPL proposes to build a new terminal for cruise ships, the Brisbane International Cruise Terminal (**BICT**). The BICT will be a dedicated facility to provide Cruise Facility Services, including for mega cruise ships. In particular, PBPL proposes to:
- (1) obtain a leasehold interest in approximately 22.762 hectares (dry and wet) of State owned land at Luggage Point; and
  - (2) develop the BICT with completion occurring in 2020, and thereafter operate the BICT,
- (BICT Project)**
15. PBPL will operate the BICT as a common user terminal and all users will execute a non-exclusive licence for use of the BICT.
16. PBPL will allocate users Berthing Days in accordance with the "**Berthing Rules**" – in particular:
- (1) Booking requests to use the BICT on a particular Berthing Day must be made 25 months prior to the start of a cruise season. PBPL then allocates those requests 24 months prior to the start of a cruise season. Cruise ships have priority over all other vessels.
  - (2) PBPL grants users rights to make booking requests. There are three types of rights to make booking requests:
    - (A) Berthing Days which are allocated first (**Foundation Berthing Days**, or **FBDs**);
    - (B) Berthing Days which are allocated second (**Priority Berthing Days**); and
    - (C) Berthing Days which are not an FBD or a Priority Berthing Day, and are allocated third (**Ad Hoc Berthing Days**).
  - (3) PBPL must allocate booking requests made for an FBD first, and in priority to any other booking requests. PBPL will then allocate Priority Berthing Days second and Ad Hoc Berthing Days third.
  - (4) PBPL must not allocate a user more than 4 Berthing Days in any one week or 18 Berthing Days in any one calendar month, until after the initial booking requests of all other users have been allocated (the **4/18 Rule**).
  - (5) PBPL may refuse to allocate a particular Berthing Day (being any of an FBD, Priority Berthing Day or Ad Hoc Berthing Day) to a user if:
    - (A) the corresponding day of the corresponding week in the immediately preceding cruise season was allocated to a second user;



- (B) that second user has requested that Berthing Day in a booking request; and
  - (C) PBPL is reasonably of the view that the first user's request is prohibited under applicable competition laws,  
(the **Anticompetitive Booking Rule**)
- 17. The BICT Project involves material financial and commercial risks to PBPL, including:
  - (1) risks associated with the financial performance of the BICT Project, in particular that demand for Cruise Facility Services will be materially lower than forecast;
  - (2) financial risks associated with the development of the wharf, terminal and land and risk of damage to existing utility services;
  - (3) commercial risks, including that a change in strategy results in cancellation or delay of PBPL funding;
  - (4) risks associated with project design and scope, causing project timeline delays and increased costs; and
  - (5) risks associated with land acquisitions, regulatory approvals, utilities and local Government.
- 18. Passenger forecasts are the primary driver of the financial model developed by PBPL for the purposes of assessing whether or not to proceed with the BICT Project.
- 19. In order to manage the BICT Project risks and for the BICT Project to be commercially viable, PBPL required a material degree of underwriting by BICT users, in the form of Take or Pay commitments for rights to use the BICT on nominated Berthing Days (**TOP Commitments**).
- 20. PBPL engaged with several cruise operators seeking to secure TOP Commitments. PBPL:
  - (1) briefed the following cruise operators on the BICT's characteristics, design and timings: Carnival, Royal Caribbean International (**RCI**), Norwegian Cruise Line, Viking Cruises and MSC Cruises;
  - (2) or around April 2016, offered Carnival a TOP Commitment; and
  - (3) or around April 2016, offered RCI a TOP Commitment on substantially similar terms to those offered to Carnival.
- 21. Apart from Carnival, all other potential users advised PBPL that they would not enter into TOP Commitments.
- 22. PBPL and Carnival conducted arms-length negotiations as to whether Carnival would provide a TOP commitment in respect of the BICT Project.
- 23. On 5 October 2017, PBPL entered into a conditional Agreement for Licence and Licence in respect of the BICT Project with Carnival (**Carnival BICT Licence**). The key commercial terms of the Carnival BICT Licence are:
  - (1) **Licence:** PBPL grants a non-exclusive licence in favour of Carnival to berth cruise ships and use the BICT (i.e. to receive Cruise Facility Services at the BICT).
  - (2) **Term:** The License is for a 15 year term, with options to renew for further terms.

- (3) **TOP Commitment:** Carnival is obliged to pay PBPL the minimum annual access charges equal to 100 Berthing Days at 2,400 passengers per annum, regardless of whether Carnival uses the BICT on those Berthing Days (**Carnival TOP Commitment**).
  - (4) **Allocation to Carnival of FBDs:** Carnival receives 100 FBDs per year. Carnival will be allocated its 100 FBDs in priority to other bookings, subject to the 4/18 Rule and the Anticompetitive Booking Rule.
  - (5) **Second Wharf:** If PBPL constructs a second wharf at the BICT, Carnival has a first right of refusal over TOP Commitments in respect of that second wharf.
  - (6) **Other terms:** Carnival may purchase additional Priority Berthing Days subject to certain minimum thresholds. Carnival's use of the BICT will be subject to the Berthing Rules.
24. On 13 September 2017, the PBPL Board decided to proceed with BICT Project on the basis that:
- (1) Carnival had provided the Carnival TOP Commitment, representing approximately \$9.79 million in annual revenue the first year and escalating annually over the 15 year term;
  - (2) the effect of the Carnival TOP Commitment was to underwrite approximately 70.4% of the capital expenditure risk associated with the BICT Project;
  - (3) PBPL would charge users per cruise ship and per passenger, with increasing discounts applying for every 40 Berthing Days as shown below (**Pricing Model**); and

Pricing model – cruise operators pay		
Calls	Price per Call \$	Price per Passenger \$
1st 40 per year	74,683	21.24
2nd 40 per year	52,278	14.85
3rd 40 per year	41,076	11.68
121 and above	29,873	8.49
Transit calls	67,704	Nil

- (4) the combined effect of the Pricing Model and the terms of the Carnival TOP Commitment mean that the BICT Project's internal rate of return (**IRR**) and net present value (**NPV**) increases when Berthing Days booked by non-Carnival users increase.
25. On 13 September 2017 the PBPL Board approved PBPL proceeding with the BICT Project.
26. Without the Carnival TOP Commitment, the PBPL Board would not have approved PBPL proceeded with the BICT Project.

## 5. Queensland Government Market-Led Proposals process

27. The Queensland Government has a policy framework under which it engages with the private sector for the delivery of services and infrastructure to address the needs of the community (**Market-Led Proposals (or MLP) process**).
28. Market-Led Proposals are assessed by the Queensland Government under guidelines issued by it (**MLP Guidelines**). The MLP Guidelines contain the following assessment criteria:

- (A) Government policy, priority and community need;
  - (B) justification for direct negotiation;
  - (C) value for money;
  - (D) capacity and capability of the proponent (financial and technical);
  - (E) risk and cost allocation (between the proponent and the government); and
  - (F) feasibility of the proposal (technically, commercially and practically feasible).
29. As part of the MLP process the Queensland Government determined that the proposed site of the BICT was the only suitable feasible site and no other developer could replicate the project within the timeframe necessary to take advantage of the forecast increase in demand for the mega cruise ship market.
30. On 25 October 2017, the Queensland Premier announced that construction would commence on PBPL's \$158 million BICT Project.

## 6. Basis for Carnival's decision to enter into the TOP Commitment

31. Carnival made the Carnival TOP Commitment on the basis that the BICT would provide it with long-term certainty (at least 15 years) and flexibility in itinerary planning in Brisbane across Carnival's multiple brands.
32. The effect of the Carnival TOP Commitment is that Carnival:
- (1) is making a long term (minimum 15 year) and year round commitment to deploying cruise ships in Brisbane;
  - (2) will likely commit its Carnival Cruise Line, P&O Cruises Australia and Princess Cruises to homeporting in Brisbane; and
  - (3) is thereby forfeiting its ability to exit Brisbane and deploy its cruise ships elsewhere, in the event of market volatility (unlike its competitors).
33. A key factor in Carnival's decision whether to proceed with the Carnival BICT Licence (and the Carnival TOP Commitment) was whether the potential for competitor free riding on Carnival's investment was of an acceptable level, particularly in circumstances where Carnival is the only cruise operator making a TOP Commitment.

## 7. Conditions imposed in the ACCC's Determination

34. On 11 October 2017, PBPL and Carnival lodged an application with the ACCC seeking authorisation pursuant to CCA section 88 to make and give effect to the Carnival BICT Licence executed on 5 October 2017.
35. On 10 May 2018, the ACCC issued its final "**Determination**", which authorised the Carnival BICT Licence until 31 May 2036 subject to two conditions:<sup>1</sup>
- (1) *The Applicants do not give effect to any provision of their proposed arrangements [i.e. the Carnival BICT Licence] that provides Carnival*

---

<sup>1</sup> Determination, [161] – [162].

with a first right of refusal in respect of a take or pay obligation in relation to a second berth [wharf] at Brisbane.

**(Second Berth Condition)**

- (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.

The definitions below apply to the second condition:

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

**(Weekend Condition)**

36. In the Determination, the ACCC explained the objectives of the Weekend Condition as follows:<sup>2</sup>

*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.*

*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.*

*If no other user has nominated any of those third weekend days 24 months out, [sic: then] Carnival can nominate and be allocated these days.*

37. The Applicants do not oppose the Second Berth Condition.
38. In this application, consistent with the Determination, "**Weekend Day**" means Friday, Saturday or Sunday.

---

<sup>2</sup> Determination, [163].

## 8. The factual and the counterfactual

39. PBPL will proceed with the BICT Project subject to having the benefit of the Carnival TOP Commitment.
40. If the BICT Project proceeds (the **factual**), then the following will likely occur:
- (1) PBPL will develop the BICT (with completion occurring in 2020), and thereafter use it to supply Cruise Facility Services;
  - (2) PBPL will no longer use the MUT to supply Cruise Facility Services (including mega cruise ships);
  - (3) Portside will possibly no longer berth cruise ships from 2021;
  - (4) the cumulative effect of (1) to (3) above is that the availability of Cruise Facility Services for mega cruise ships in Brisbane will increase (from 22 Berthing Days at the MUT under the counterfactual, to 365 Berthing Days at the BICT);
  - (5) the BICT will also be available to supply Cruise Facility Services to smaller cruise ships;
  - (6) Carnival will be able to nominate 100 of the 365 Berthing Days at the BICT prior to any bookings by other operators, subject to the 4/18 Rule and the Anticompetitive Booking Rule;
  - (7) PBPL will have the financial incentive to maximise use of the BICT by non-Carnival users; and
  - (8) if BICT capacity is sufficiently utilised (55%), non-Carnival cruise operators will be able to enter into negotiations with PBPL to underwrite the development of a second wharf at the BICT. A second wharf would likely be constructed at a materially lower capital expenditure than the BICT.
41. If the BICT Project does not proceed (the **counterfactual**), then the following will likely occur:
- (1) PBPL will not build the BICT;
  - (2) no third party is likely to build the BICT (or a similar alternative);
  - (3) PBPL will satisfy its Lease Obligation by allowing cruise ships to berth at the MUT for 22 Berthing Days;
  - (4) Portside will possibly no longer berth cruise ships from 2021;
  - (5) the cumulative effect of (1) to (4) above is that the supply of Cruise Facility Services for mega cruise ships (and for cruise ships in general) in Brisbane will decrease; and
  - (6) all cruise operators (including Carnival) will have a materially reduced ability to berth cruise ships in Brisbane (as compared to the factual).

## 9. Conditions for competition in the factual and counterfactual

42. There are limited to no anti-competitive detriments associated with the factual as compared to the counterfactual.
43. In both the factual and the counterfactual, Portside will possibly no longer berth cruise ships from 2021.

44. In the factual, the conditions for competition in the supply of leisure cruise services to passengers (**Leisure Cruise Services**) by cruise operators in Brisbane will likely be improved, due to:
  - (1) the significantly increased supply of Cruise Facility Services for mega cruise ships in Brisbane; and
  - (2) the ability of the BICT to also supply Cruise Facility Services to smaller cruise ships.
45. In the factual, once the BICT Project is complete:
  - (1) Carnival will be able to nominate 100 of the 365 Berthing Days at the BICT prior to any bookings by other operators, subject to the 4/18 Rule and the Anticompetitive Booking Rule; and
  - (2) all cruise operators (including Carnival) will be able to acquire Cruise Facility Services at the BICT for the remaining 265 Berthing Days.
46. In the counterfactual, the conditions for competition in the supply of Leisure Cruise Services by cruise operators in Brisbane will likely be substantially reduced, because:
  - (1) the supply of Cruise Facility Services for mega cruise ships (and for cruise ships in general) in Brisbane will reduce – likely limited to 22 Berthing Days at the MUT;
  - (2) the MUT provides a lower quality of Cruise Facility Services (and hence cruise operators will provide a lower quality of Leisure Cruise Services) because the MUT:
    - (A) provides a low standard of convenience and amenity for tourists;
    - (B) is not well suited to passenger transport for safety reasons; and
    - (C) cannot be used for homeporting; and
  - (3) as a result, all cruise operators (including Carnival) will have a reduced ability and incentive to supply Leisure Cruise Services (and acquire Cruise Facility Services) in Brisbane.

## 10. Public benefits in the factual

47. In the factual, the following public benefits will accrue as a result of the BICT Project proceeding.
48. Increased capacity, more cruise terminal competition and superior facilities will stimulate demand for cruises that port in Brisbane, with resulting increases in cruise ship and passenger numbers. Increased passenger numbers will, in turn, increase demand for local tourism infrastructure and businesses, such as restaurants, attractions, retail outlets, and taxis. This will directly benefit tourism in Australia, with further direct economic benefits for the wider economy.
  - (1) The BICT has been estimated to deliver a minimum economic uplift of \$3.75 billion over a 15 year term.
  - (2) The economic uplift from Carnival's passenger and crew spend in Brisbane and other Queensland ports alone has been estimated to be \$250 million in the first year of the BICT's operation.
  - (3) PBPL estimates that the BICT has the potential to triple the size of Brisbane's cruise industry over the next 20 years, safeguarding the

current 3,750 cruise industry jobs, bringing approximately 766,260 international and domestic cruise visitors to Queensland and contributing approximately \$1 billion in gross output annually to Queensland's economy.

- (4) The facilities available at the BICT will increase options for cruise operators to homeport cruise ships in Brisbane, leading to increased economic benefits. Homeport cruise ships require maintenance, using heavy equipment (such as aerial work platforms and cranes), which will be able to be accommodated at the BICT.
- 49. The BICT is likely to generate significant operational efficiencies for cruise operators. In particular:
  - (1) The location of the BICT at the mouth of the Brisbane River creates significant operational efficiencies for cruise operators, reducing navigation time by up to two hours (as compared to Portside, located up the Brisbane River) and accommodating the turning circle of large vessels. This reduces fuel costs, and allows transit visit passengers to disembark for longer periods.
  - (2) The wharf area available at the BICT will allow multiple concurrent work streams during a vessel's turnaround period, increasing the efficiency of provisioning and maintenance services.
- 50. The BICT will provide better land side facilities:
  - (1) The BICT Project will improve experience for passengers who travel on mega cruise ships. Unlike the MUT, the BICT is close to land transport and has the benefit of easy passenger access. The BICT is within a two hour drive of 75% of Queensland's population, with ideal road connectivity to Brisbane's motorway network and airport.
- 51. Capacity available for agricultural exports at the MUT will increase by 22 Berthing Days, as compared to the counterfactual.

## **11. Public detriments in the counterfactual**

- 52. In the counterfactual, none of the public benefits associated with the factual (section 11 above) will accrue.
- 53. In addition, the counterfactual will likely result in the following public detriments:
  - (1) capacity available for agricultural exports at the MUT will reduce by 22 Berthing Days per year, as compared to the factual;
  - (2) the cruise industry in Brisbane and Queensland will materially reduce and potentially cease; and
  - (3) this will have a negative economic impact on Queensland, in circumstances where tourism is an important contributor to the Queensland economy.

## **12. The BICT Project is not likely to proceed if the Weekend Condition is imposed**

- 54. Carnival is not likely to proceed with the Carnival BICT Licence (or Carnival TOP Commitment) if it is subject to the Weekend Condition.
  - (1) The Weekend Condition undermines Carnival's ability to optimise cruise itineraries.

- (2) The effect of the Weekend Condition is to give Carnival's competitors a preference (and free option) over Carnival for one Weekend Day in each weekend (i.e. 33% of Weekend Days and 14% of Berthing Days per year), despite those cruise operators making no financial commitment to the BICT Project.
- 55. PBPL is not likely to proceed with the BICT Project without the Carnival TOP Commitment.
- 56. The Weekend Condition creates a lack of certainty for Carnival with respect to its ability to book three Weekend Days in any particular week, creating a real chance that Carnival will plan and schedule its cruise itineraries on the basis of two Weekend Days. This increases the risk that PBPL will not receive a booking request for the third Weekend Day.

### **13. Particular issues with the ACCC's approach**

- 57. Although the ACCC appeared to accept that any other operators offering cruise services in Brisbane would have ships of 270m or above,<sup>3</sup> the ACCC did not analyse or conclude (and it is not the case) that the MUT (with only 22 Berthing Days) could support viable competitive services from rival operators. On any view, a facility with 365 Berthing Days (including up to 265 Berthing Days for rival operators) would be more likely to foster competition than a facility with only 22 Berthing Days.
- 58. Therefore, the ACCC's decision appears to depend upon a view that either:
  - (1) the BICT would be built anyway, even with the Weekend Condition; or
  - (2) another facility would be built anyway if the BICT was not built.
 The evidence did not support either of those conclusions.
- 59. The ACCC also did not consider the conditions separately. The ACCC did not consider whether the Second Berth Condition, if imposed, would be likely to foster competition through the use of the second berth, or a combination of the second berth and the first berth, and therefore whether the Carnival BICT Licence (subject to the Second Berth Condition) would be likely to have the effect of substantially lessening competition, or whether relevant benefits to the public would outweigh any detriment to the public.

### **14. Issues for Tribunal to consider**

- 60. The Applicants submit that the Tribunal should consider two issues:
  - (1) whether the Carnival BICT Licence (subject to the Second Berth Condition) should be authorised pursuant to CCA section 88; and
  - (2) if so, whether that authorisation should be subject to the Weekend Condition pursuant to CCA section 91(3)?
- 61. The Applicants submit that the Tribunal should answer "yes" to the first issue, on the basis that:
  - (1) the Carnival BICT Licence will not have the effect, or be likely to have the effect, of substantially lessening competition;

---

<sup>3</sup> At Determination, [53].



- (2) the benefits to the public that would result, or are likely to result, from the Carnival BICT Licence will outweigh any detriments to the public for the reasons outlined in sections 9 to 11 above, such that the statutory test in CCA section 90(7) is satisfied and the Tribunal may grant authorisation; and
  - (3) having regard to all the circumstances, the Tribunal should exercise its discretion to grant authorisation.
62. The Applicants submit that the Tribunal should answer "no" to the second issue.
63. The Tribunal should not exercise its discretion under CCA section 91(3) to impose the Weekend Condition as a condition of authorisation, for the following reasons.
- (1) The Carnival BICT Licence will promote competition by providing significant additional Berthing Days than would be the case in the absence of the BICT. That includes the likely benefit of the Second Berth Condition.
  - (2) There is unlikely to be any comparable alternative source of Berthing Days to the BICT.
  - (3) For the reasons in section 12 above, if the Weekend Condition is imposed then it is likely that PBPL:
    - (A) will not have the benefit of the Carnival TOP Commitment;
    - (B) will not proceed with the BICT Project; and
    - (C) will not build the BICT.
  - (4) This would:
    - (A) prevent the enhancement of competition that would be brought about by the BICT; and
    - (B) prevent the realisation of the public benefits referred to in section 10 above, and lead to the public detriments referred to in section 11 above.
  - (5) Further, and in any event, the ACCC imposed the Weekend Condition to address a purported foreclosure concern.
  - (6) Without the Weekend Condition, Carnival's competitors will be able to acquire Cruise Facility Services at the BICT on:
    - (A) 265 Berthing Days per year (given Carnival's 100 FBDs);
    - (B) a minimum of 10 or 11 Berthing Days each February and 12 or 13 Berthing Days in all other months (given the 4/18 Rule);<sup>4</sup> and
    - (C) a minimum of 3 Berthing Days in every week (given the 4/18 Rule).
  - (7) Accordingly, non-Carnival cruise operators will have sufficient available Berthing Days to determine viable and competitive cruise schedules to supply Leisure Cruise Services.

---

<sup>4</sup> The minimum number of available Berthing Days depends on the number of days in the relevant month.

- (8) There is no basis to conclude that access to Berthing Days on Weekend Days is necessary to supply Leisure Cruise Services on a viable and competitive basis in Brisbane.
  - (A) Cruise operators offer cruise itineraries which have scheduled arrival and departure days throughout the week.
  - (B) Cruise operators offer cruise itineraries of various durations: typically 3 days, 4 days and 7-10+ days.
  - (C) A material (estimated 27% in 2018) and increasing (estimated 50% in 2036) proportion of passengers at Brisbane are interstate and international, and are likely to be insensitive to whether or not a cruise has a Weekend Day arrival and/or departure day.
  - (D) If there was stronger demand from cruise operators to nominate Weekend Days as Berthing Days, then suppliers of Cruise Facility Services (such as PBPL) would be expected to offer differential pricing on that basis. PBPL's Pricing Model does not provide for differential pricing on that basis.
- (9) Without the Weekend Condition, Carnival will have no ability to exclude non-Carnival cruise operators from Weekend Days in Brisbane in any event, given that:
  - (A) Carnival's 100 FBDs are only sufficient to book each Weekend Day for 33 of 52 weeks per year; and
  - (B) at least 56 Weekend Days would remain.
- (10) It would not be economically rational for Carnival to pursue such a strategy, as:
  - (A) this would undermine Carnival's flexibility in itinerary planning, which is necessary for scheduling and network planning across multiple brands (as described in section 6 above);
  - (B) this would undermine Carnival's ability to offer a mix of itinerary durations, types and destinations, and respond to changes in demand; and
  - (C) Carnival would conclude that such a strategy would not be effective, and hence provide no benefit to Carnival.
- (11) Further, and in any event, in the absence of the Weekend Condition, the benefits to the public from the Carnival BICT Licence, or the Carnival BICT Licence with the Second Berth Condition, will, or are likely to, outweigh any detriments to the public.