

**Restriction of Publication of Part Claimed****Response to Cairns Airport Pty Ltd (CAPL)'s submission on Application for Interim Authorisation (Application for Authorisation AA1000460)****1. Background**

- 1.1 The Applicants propose to respond to CAPL's submission that was published by the ACCC on 2 January 2020, in two parts, focusing on CAPL's response on Interim Authorisation (being this submission) and the substantive application for Authorisation (in a separate submission).
- 1.2 This submission is made for the purposes of providing the ACCC with additional information as part of the ACCC's consideration of the application for Interim Authorisation.
- 1.3 The Applicants submit that the ACCC should grant Interim Authorisation for the Proposed Conduct for the following reasons (the last two points will be explored in more detail in the Applicants' substantive submission):
  - Interim Authorisation will not result in "irreversible harm" done through sharing of commercially sensitive information between the Applicants, in light of the restricted scope of the Proposed Conduct and the information sharing protocols in place.
  - Interim Authorisation, if granted, will provide the Applicants and customers with commercial certainty of access to on-airport car rental operations between the expiration of the Applicants' existing arrangements with CAPL and ACCC's Final Determination.
  - There are significant benefits to the public that will result from the conduct sought to be authorised, including transaction cost savings and the more efficient use of ground and terminal space, such efficiencies will mutually benefit CAPL and the Applicants with the resultant pro-competitive effects directly benefiting customers - if the Proposed Conduct is authorised.

**2. The Applicants' Response on Interim Authorisation****Information sharing between the Applicants**

- 2.1 In sections 7.2 - 7.5 of CAPL's submission, CAPL argues that Interim Authorisation should not be allowed as irreparable and irreversible harm would be done through the Applicants sharing commercially sensitive information so that even if ACCC objects subsequently to the Proposed Conduct:
  - the harm caused by the information sharing cannot be reversed; and
  - the Applicants can collude using the information shared previously and form a pre-existing cartel without the ACCC's Authorisation.

- 2.2 The Applicants strongly reject CAPL's submission. CAPL has conflated possibility with likelihood in speculating that the Applicants can collude using the information shared.
- 2.3 As a practical matter, the degree of information sharing between the Applicants to date has been limited to enabling the preparation for the application for Authorisation of the Proposed Conduct. Going forward, the Applicants will share information so as to undertake the Proposed Conduct (if authorised).
- 2.4 If Interim Authorisation is granted, the Applicants propose to engage, through their negotiation agent, with CAPL, about a number of the key issues referred to in the application for Authorisation. Importantly, however:
- there are appropriate information sharing protocols and confidentiality barriers in place that prevent the Applicants from sharing any competitively sensitive information directly with each other. Instead, such information is shared only with the negotiation agent, AFIA and the Applicants' lawyers (please refer to section 8.3 of the application for Authorisation for more details about existing arrangements);
  - the Applicants do not propose commencing to engage in any form of collective bargaining conduct with CAPL before receiving the ACCC's determination on Interim Authorisation, and do not propose to enter into any complete agreement with CAPL until the ACCC has made its Final Determination.
  - Even in the event that the ACCC allowed the Proposed Conduct in its Final Determination, each Applicant proposes to enter into separate agreements with CAPL, ultimately based on their independent positions and the scope of any ongoing information sharing is as set out above.

In the event that the ACCC does not ultimately authorise the Proposed Conduct, CAPL will then negotiate bilaterally with each Applicant, including exercising its commercial discretion, as it has indicated in its submission, to negotiate with the Applicants individually. In doing so, the Applicants expect CAPL to use its bargaining power to pursue commercially favourable terms.

### **Continuity and certainty of Cairns Airport's on-airport car rental operations**

- 2.5 Interim Authorisation, if granted, will provide continuity and certainty of Cairns Airport's on-airport car rental operations for the collective benefit of CAPL, the Applicants and prospective customers having regard to the upcoming expiration of the Applicants' agreements with CAPL. This is particularly important to buffer customers against the possibility of delays in:
- CAPL and each of the parties, either individually or collectively, arriving at mutually acceptable commercial arrangements/potential 'hold over' arrangements pending the ACCC's Final Determination; and/or
  - CAPL's recently proposed Request for Proposal (**RFP**) process to be completed.

2.6



[REDACTED]

[REDACTED]

[REDACTED]

2.7 [REDACTED]

2.8 [REDACTED]

### **Significant efficiencies generated from the Proposed Conduct**

- 2.9 The Applicants submit that Interim Authorisation should be granted as it will facilitate, and is likely to result in, the realisation of significant efficiencies. The commencement of the collective negotiations, at an earlier stage in the event that Interim Authorisation is granted, will in the view of the Applicants, assist in arriving at a more expeditious resolution of negotiations - in the event 'final' authorisation is granted. These efficiencies will be to the mutual benefit of the Applicants and CAPL and ultimately, the public. The Applicants will elaborate on the benefits in more detail in its substantive submission, but will provide an overview below.
- 2.10 In addition to timeliness, significant transaction cost savings can be generated for the Applicants and CAPL if the Proposed Conduct were allowed, including enabling the Applicants (and CAPL) to identify common contractual problems in a streamlined manner and in the case of the Applicants, sharing the cost of obtaining professional advice. As the Proposed Conduct still has latitude for the Applicants to individually negotiate aspects of their agreement with CAPL, tailored consideration of the Applicants' commercial needs can occur without compromising efficiency gains.
- 2.11 Additionally, collective consideration of possible efficient uses of scarce ground and terminal space as raised by CAPL in section 2 of its submission is possible due to collective negotiations being more likely to result in outcomes closer to those expected in competitive markets. This can lead to innovation and efficiencies created through the joint discussions regarding solutions to respond to those scarcities - which are unlikely

to be achieved under either a RFP process or through relying on individual negotiations alone. This can generate benefits for all stakeholders as follows:

- CAPL can maximise the allocative efficiency of its limited space, improving land value and CAPL's revenue;
- customers receive economic benefits from the pro-competitive market environment and have access to innovative and efficient service delivery solutions; and
- the Applicants receive more commercially fair terms for access to appropriate facilities which cater to their commercial needs, which better positions them to more vigorously respond to customer demands and compete at the retail level.

**Confidential Attachment A**







