



Draft Determination

Application for authorisation

lodged by

Car rental operators at Cairns Airport

in respect of

collective bargaining arrangements with Cairns Airport in relation to the acquisition of space association with the provision of car rental services

Authorisation number: AA1000460

Date: 26 March 2020

Commissioners: Sims
Keogh
Rickard
Cifuentes
Court
Ridgeway

Summary

The ACCC proposes to grant authorisation to enable a group of car rental operators to collectively bargain with Cairns Airport in relation to the acquisition of space associated with the provision of car rental services at Cairns Airport. The ACCC also proposes to grant authorisation to any other car rental entity which commences operating at Cairns Airport.

The ACCC proposes to grant authorisation for 5 years.

The ACCC notes that Cairns Airport is unlikely to negotiate with the Applicants. However, the ACCC does not have to predict the likely outcome of the collective negotiations. In this instance, the ACCC has assessed whether the public benefits are likely to arise assuming that the Applicants were successful in negotiating with Cairns Airport, and weighed any public benefits against the public detriments likely to arise.

The ACCC considers, based on the information before it, that the collective bargaining conduct is likely to result in some small public benefit and that this public benefit would outweigh any likely detriment to the public from the conduct.

The ACCC invites submissions in relation to this draft determination by 9 April 2020, before making its final decision.

1. The application for authorisation

1.1. On 28 November 2019, a group of car rental operators lodged application for authorisation AA1000460 with the Australian Competition and Consumer Commission (the **ACCC**). The Applicants are:

- WTH Pty Ltd trading as Avis Australia
- Budget Rent a Car Australia Pty Ltd
- Hertz Australia Pty Limited
- CLA Trading Pty Ltd trading as Europcar
- Redspot Head Office Pty Ltd trading as Enterprise, Alamon, National and Redspot
- Kingmill Pty Ltd trading as Thrifty Car Rental and Dollar Car Rental

(the **Applicants**).

1.2. The Applicants are seeking authorisation to collectively bargain with Cairns Airport Pty Ltd (**Cairns Airport**) in relation to the acquisition of space associated with the provision of car rental services at Cairns Airport (for example counter space, car parking bays and shared facilities), including the terms and conditions of the Licence Agreement and Lease Agreements (the **Proposed Conduct**). The Applicants are also seeking authorisation on behalf of future car rental companies that commence operating at Cairns Airport during the term of the authorisation. This application for authorisation was made under subsection 88(1) of the *Competition and Consumer Act 2010* (Cth) (the **Act**).

- 1.3. The Applicants seek authorisation to collectively negotiate all terms and conditions (both price and non-price) related to the acquisition of airport space and services associated with the provision of car rental services from Cairns Airport. In particular, they wish to collectively negotiate:
- the amount and annual increases for key payment terms in Licence and Lease Agreements, such as the Minimum Guaranteed Payment, the Turnover Percentage Payment, Car Parking Fees and rent
 - terms relating to the operation of the above key payment terms and other payments such as a security bond or bank guarantees, and
 - the breadth and scope of definitions such as ‘operator’s turnover’ for the purposes of calculating various concession payments.
- 1.4. The Applicants seek authorisation for 10 years.
- 1.5. The Applicants propose:
- the Proposed Conduct will be voluntary (members of the bargaining group can withdraw from the group at any time and negotiate individually)
 - the collective bargaining group will be open to any car rental companies operating at Cairns Airport through the course of the authorisation
 - there will be no collective boycott activity
 - an independent third party will negotiate with Cairns Airport on behalf of the Applicants
 - at the conclusion of negotiations, the Applicants will enter into separate agreements with Cairns Airport.
- 1.6. The ACCC may grant authorisation which provides businesses with legal protection for arrangements that may otherwise risk breaching the law but are not harmful to competition and/or are likely to result in overall public benefits.
- 1.7. The Applicants also requested interim authorisation so they could begin the initial stages of the negotiation process, while the ACCC is considering the substantive application. The ACCC granted interim authorisation on 13 February 2020 to allow the Applicants to prepare for negotiations and negotiate with Cairns Airport, including in relation to the continuation of existing agreements on the basis of existing terms. Interim authorisation will remain in place until the date the ACCC’s final determination comes into effect or until interim authorisation is revoked.

2. Background

- 2.1. Each of the Applicants provide car rental services for passenger vehicles both on and off airport location throughout Australia, including at Cairns Airport. The six Applicants are currently the only providers of on airport car rental services at Cairns Airport.
- 2.2. Cairns Airport is located 7 kilometres from Cairns CBD. Over 5 million passengers pass through Cairns Airport each year, on both domestic and international flights. It is Australia’s seventh busiest international airport. Cairns Airport Pty Ltd owns and

manages Cairns Airport and is part of the North Queensland Airports Pty Ltd.¹ The entity which owns and manages Mackay Airport is part of the same group. Twelve airlines currently operate out of the airport including Qantas, Virgin, Jetstar, Tigerair, Singapore Airlines and Air New Zealand. Cairns Airport is the only one to service the Cairns area.

Car rental services

- 2.3. Car rental services provided to consumers at airports (**on airport car rentals**) comprise a significant portion of the revenue of car rental operators in Australia.² The ACCC understands that many customers who wish to hire a car after flying into an airport are likely to wish to rent a car directly after arriving at the airport and/or to return a car directly before departing.
- 2.4. Generally, car rental charges to customers are made up of a 'base rate' which is charged on a time or kilometre basis. This fee can vary according to demand and other market forces. Other fees and charges are applied on top of this base rate. The types of fees charged and how these are calculated differ between rental companies, and can include fees related to administration, vehicle registration, insurance, tolls, refuelling, excess kilometres, additional or young drivers, and relocation. Car rentals in locations such as airports generally include a Location Fee to cover the costs to car rental companies of doing business at these locations.

Costs at Cairns Airport

- 2.5. Unlike off airport car rental companies, those offering on airport car rental services must enter into licencing and leasing arrangements with airport operators in order to acquire space at the airport for their operations. Access charges generally cover retail counter space inside the terminal, access to car parking bays for the collection of and return of vehicles outside of the terminal, and access to other supporting facilities such as those for car cleaning and servicing. On airport car rental operators also pay a concession fee, which is charged as a percentage of revenue earned, and are subject to minimum annual concession payment guarantees.³
- 2.6. The Applicants submit that, on a domestic level, Cairns Airport has the second highest charges to car rental operators of all Australian airports (behind Sydney Airport), despite being only the seventh busiest airport in Australia in terms of passenger volume. They submit that the average costs per transaction incurred by car rental operators at Cairns Airport is almost three times higher than costs incurred at downtown off airport locations in Cairns, and that the difference in average costs per transaction incurred by car rental operators at airport locations compared to off airport locations is greater in Cairns than in Sydney, Brisbane, Darwin, Canberra, Perth, Melbourne, Newcastle, Adelaide or Townsville, as shown in the figure below.⁴

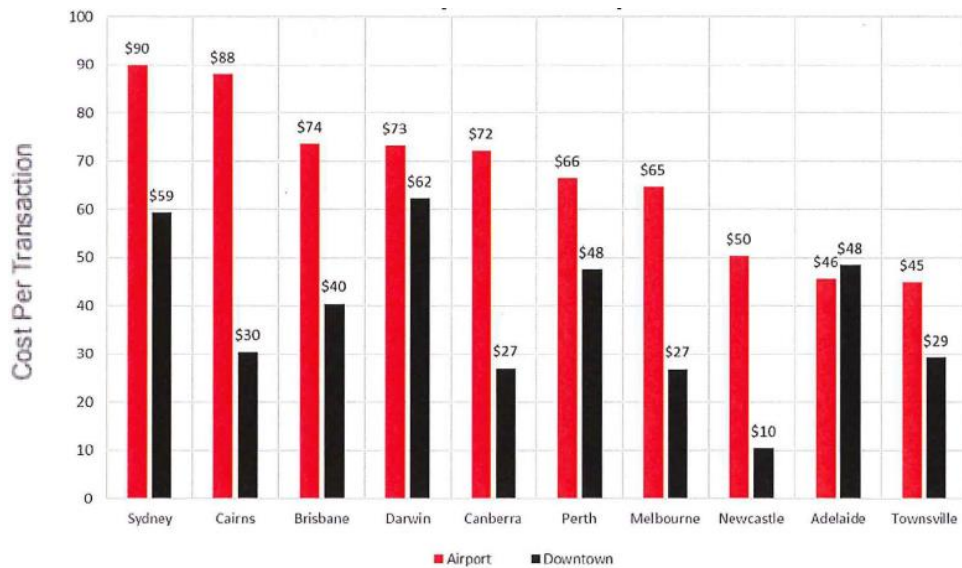
¹ North Queensland Airports Pty Ltd is a consortium comprised of IIF Cairns Mackay Investment Ltd (an entity advised by JP Morgan Asset Management), The Infrastructure Fund (TIF) and Perron Investments.

² Australian Finance Industry Association figures indicate approximately 50 per cent of revenue.

³ Productivity Commission, *Economic Regulation of Airports*, Report no. 92, 2019, p211.

⁴ Compiled by AFIA based on five of the six Applicants average cost per transaction in the 2018 calendar year, across 10 Australian airport and off airport locations

Figure 1: Applicants' comparison of costs per transaction charged to rental companies at on and off airport locations



2.7. Cairns Airport submits the methodology used by the Applicants in compiling the above figure is misleading as it ignores the value of the services provided by Cairns Airport, and the relatively higher revenue that car rental operators achieve in operations at Cairns Airport.

2.8. In response, the Applicants submit that Cairns Airport remains a high cost operator even when costs per revenue are compared across Australian airports.⁵

Previous negotiations between the parties

2.9. Previously, each of the Applicants has negotiated with Cairns Airport on an individual basis. The Applicants advise that the majority of the current agreements expired in early 2020.

2.10. The Applicants submit that Cairns Airport has been willing to engage in negotiations to a limited degree with each Applicant during previous renegotiations of the Licence and Lease Agreements. Some of the Applicants report that negotiations can often involve short deadlines with minimal time to consider proposals in detail.

2.11. In response, Cairns Airport submits that prior to providing proposed pricing to car rental operators regarding the current round of renegotiations, it undertook extensive consultation and sought feedback. Cairns Airport submits all rental operators have refused to engage with Cairns Airport on an appropriate price, except to say that the prices proposed are too high.

Tender process

2.12. On 20 December 2019, Cairns Airport advised it would conduct a competitive Request for Tender (**RFT**) process in relation to the allocation of airport space to car rental operators. Cairns Airport advised that, on 24 January 2020, it invited car rental operators to submit expressions of interest (**EOI**) for car rental facilities at the airport, with EOIs due on 11 February. Those operators which Cairns Airport identified as suitable through the EOI process were issued an RFT, calling for the operators to

⁵ Applicants submission made 5 February 2020, p. 3.

identify their preferred services, airport locations, and the price they were prepared to pay. Cairns Airport advised the RFT process would be an open process allowing for any rental operator to tender including those who currently do not have on airport offerings at Cairns Airport.

- 2.13. As of 10 March 2020, car rental operators had been shortlisted based on the EOI process and Cairns Airport was in advanced negotiations, intending to have the RFT process completed by the end of April 2020.
- 2.14. Cairns Airport submits the RFT process has been designed to efficiently allocate the use of limited ground and terminal space between car rental operators and other uses (such as car parks and taxi stands), and to efficiently allocate the limited available facilities (given different locations and features are likely to have different values for different operators).
- 2.15. As part of the RFT, Cairns Airport has provided the proposed Lease and License agreements to the tenderers. Cairns Airport states that it is open to negotiating alternative terms with car rental operators. The RFT provides that tenderers can propose alternative terms in the proposed License and Lease agreements when they submit their bid.

3. Consultation

- 3.1. A public consultation process informs the ACCC's assessment of the likely public benefits and detriments from the Proposed Conduct.
- 3.2. The ACCC invited submissions from a range of potentially interested parties including Cairns Airport, other car rental companies operating in Cairns, industry associations and government agencies.⁶
- 3.3. The ACCC received four interested part submissions in relation to the application, all from Cairns Airport; as well as four further submissions from the Applicants. Cairns Airport states that it has no intention of negotiating with the Applicants as a group and as such any public benefits claimed are non-existent. Cairns Airport submits the proposed collective bargaining would risk causing significant harm to competition in upstream and downstream markets, as well as reduce the economic efficiency of Cairns Airport. The issues raised by Cairns Airport are considered in the ACCC's analysis below.
- 3.4. Public submissions by the Applicants and interested parties are on the Public Register for this matter.

4. ACCC assessment

- 4.1. The ACCC's assessment of the Proposed Conduct is carried out in accordance with the relevant authorisation test contained in the Act.
- 4.2. The Applicants have sought authorisation for Proposed Conduct that would or might constitute a cartel provision within the meaning of Division 1 of Part IV of the Act and may substantially lessen competition and be a concerted practice within the meaning of section 45 of the Act. Consistent with subsection 90(7) and 90(8) of the Act, the ACCC must not grant authorisation unless it is satisfied, in all the circumstances, that

⁶ A list of the parties consulted and the public submissions received is available from the ACCC's public register www.accc.gov.au/authorisationsregister.

the conduct would result or be likely to result in a benefit to the public, and the benefit would outweigh the detriment to the public that would be likely to result (authorisation test).

Relevant areas of competition

- 4.3. To assess the likely effect of the Proposed Conduct, the ACCC will identify the relevant areas of competition likely to be affected.
- 4.4. The Applicants submit that the relevant markets for the purposes of this authorisation are those for the supply of airport space (including counter space, car parking bays and supporting facilities) at Cairns Airport to car rental companies, and the supply of car rental services to customers at Cairns Airport.
- 4.5. While Cairns Airport did not make a comment in relation to the relevant areas of competition, its submission refers to 'the market for on-airport car rentals'.
- 4.6. The Proposed Conduct relates to collective negotiations with Cairns Airport for on airport space.
- 4.7. The ACCC understands that off airport car rentals are considered by customers travelling through airports to be at best partial substitutes for on airport car rentals, because of the convenience of picking up and dropping off a rental car at the airport itself. For this reason, the ACCC considers that off airport car rentals are not a close substitute for on airport car rentals.
- 4.8. Therefore, based on the information currently before it, the ACCC considers that the relevant areas of competition are likely to be the supply of airport space at Cairns Airport to car rental companies (including counter space, car parking bays and supporting facilities), and the provision of car rental services to customers at Cairns Airport.

Future with and without the Proposed Conduct

- 4.9. In applying the authorisation test, the ACCC compares the likely future with the Proposed Conduct that is the subject of the authorisation to the likely future in which the Proposed Conduct does not occur.
- 4.10. If the Proposed Conduct occurs, the Applicants would engage in a range of steps for the purposes of collective negotiation with Cairns Airport, seek to engage in collective negotiation, and then each Applicant will enter into separate agreements with Cairns Airport for the acquisition of space at the airport for providing car rental services.
- 4.11. Since the authorisation was lodged, Cairns Airport has advised that it is conducting a competitive RFT process in relation to the allocation of airport space for car rental services. The ACCC considers that without the Proposed Conduct it is likely that each car rental company party to the proposed arrangements would negotiate individually with Cairns Airport in relation to the acquisition of space for car rental facilities, either by submitting a bid to the RFT process or by individual negotiation with Cairns Airport.
- 4.12. The ACCC recognises that the outcome of the proposed collective bargaining is uncertain. However, in considering the likely future with the Proposed Conduct, the ACCC does not have to predict the likely outcome of the collective negotiations on the relevant issues. In this instance, the ACCC has assessed whether the public benefits are likely to arise assuming that the Applicants were successful in negotiating with

Cairns Airport, and weighed any public benefits against the public detriments likely to arise.

Public benefits

4.13. The Act does not define what constitutes a public benefit. The ACCC adopts a broad approach. This is consistent with the Australian Competition Tribunal (the **Tribunal**) which has stated that the term should be given its widest possible meaning, and includes:

*...anything of value to the community generally, any contribution to the aims pursued by society including as one of its principal elements ... the achievement of the economic goals of efficiency and progress.*⁷

4.14. The Applicants submit the Proposed Conduct will result in public benefits in the form of:

- redressing an imbalance of bargaining power between Cairns Airport and the Applicants
- providing the opportunity for greater input into Licence and Lease Agreements for the car rental companies
- cost savings for car rental customers at Cairns Airport, and
- transaction cost savings.

4.15. Cairns Airport submits that it has no intention of negotiating collectively with the Applicants. As a consequence, Cairns Airport submits there is no public benefit likely to result from the Proposed Conduct. In this regard, the ACCC notes that an authorisation granted by the ACCC, when it does not include a collective boycott, does not compel the target to deal with the group. Rather, the authorisation removes the competition risk that the bargaining group faces from dealing with the target collectively.

4.16. The ACCC accepts that there can be benefits from allowing the collective bargaining group to form and attempt to collectively bargain even when the target advises that it will not deal with the group.

4.17. Further, the ACCC takes the position that it may also consider whether public benefits or detriments are likely to arise assuming that the collective bargaining group is successful in negotiating with the target. This approach is reflected in the ACCC's final determination in respect of the applications by banks for authorisation to collectively bargain on the terms surrounding the introduction of ApplePay. In this matter, Apple submitted that even if the ACCC granted authorisation, Apple would not permit access and therefore the proposed conduct could not lead to any of the claimed public benefits.⁸ However in making its determination, the ACCC took into account likely benefits and detriments if the banks were successful in negotiating with ApplePay.⁹

4.18. In assessing this application for authorisation, the ACCC has assessed the likely public benefits and potential public detriments assuming that the Applicants were successful

⁷ Queensland Co-operative Milling Association Ltd (1976) ATPR 40-012 at 17,242; cited with approval in Re 7-Eleven Stores (1994) ATPR 41-357 at 42,677.

⁸ Apple submission received 26 August 2016, pp. 3-4; Apple submission received 26 October 2016, p. 1; Apple submission received 31 January 2017, p. 3.

⁹ ACCC Final determination 31 March 2017, para 233.

in negotiating with Cairns Airport, including from any public detriments resulting from lessening of competition.

Redressing imbalance of bargaining power

Applicants' view

4.19. The Applicants submit that collective negotiation will enable the Applicants to redress (to a degree) the current imbalance in bargaining power that exists between Cairns Airport and the Applicants. As evidence of an imbalance, the Applicants submit that:

- Cairns Airport is a natural monopolist
- the fees Cairns Airport charges car rental operators are excessive in comparison to other Australian airports (including busier airports than Cairns)
- Cairns Airport has historically engaged in negotiations regarding the agreements to only a limited degree, and has imposed short deadlines for the Applicants to consider proposals
- in previous agreements, the risks of fluctuating passenger demand have been borne mostly by the Applicants.

Cairns Airport's view

4.20. In response, Cairns Airports argues that the fees it charges car rental operators are reasonable and not materially higher than other comparable airports, but that the Applicants have inappropriately used a cost-per-transaction methodology to support their claim that fees are excessive. Cairns Airport submits that costs per transaction may be higher at Cairns Airport for a number of reasons, including that car rental operators receive higher revenue than operators at other airports, the longer average rental period for hire cars in Cairns, and the more extensive services provided by Cairns Airport to car rental operators (such as larger than usual back-of-house and car storage facilities).

4.21. Cairns Airport also submits that the examples provided by the Applicants of previous negotiations between Cairns Airport and the Applicants individually do not demonstrate an imbalance in bargaining power, because:

- the Applicants have successfully “pushed back” on proposals made by Cairns Airport in negotiations
- it is not possible to assess whether a particular price increase is reasonable without further context
- the timeframe given for response was reasonable and consistent with normal commercial practice, and
- based on historical fluctuation in passenger numbers, there is minimal risk to the Applicants, and the existing approach to risk management is appropriate as it allows flexibility for car rental operators in the case of underperformance while also providing an incentive to innovate, grow the market, and compete for customer market share.

ACCC view

- 4.22. The ACCC accepts that, where there is a significant imbalance of bargaining power between two parties to a negotiation, there may be little or no opportunity for the weaker party to negotiate variations that could result in a more efficient and effective contract overall. One way that parties can seek to redress their disadvantages is to bargain collectively.
- 4.23. The ACCC does not consider that redressing an imbalance of bargaining power constitutes a public benefit in itself. Public benefits arise from redressing an imbalance of bargaining power if this also leads to efficiencies. These are discussed below.

Greater input into agreements and reduced information asymmetry

- 4.24. Information asymmetry occurs when one party to a negotiation has access to relevant information that the other party does not. Where there is information asymmetry, the party lacking information may accept or contemplate different terms than it would if more information were available to it. Under these circumstances, the outcomes of the negotiation may not capture many of the available efficiencies. Information asymmetry can often be addressed by improving the transparency of market information. If collective bargaining improves the availability and use of information, it has the potential to enable more complete and efficient contracts to be negotiated that better reflect the needs of members of the bargaining group.

Applicants' view

- 4.25. The Applicants submit that, as a result of improving the balance of bargaining power between the Applicants and Cairns Airport, the Applicants will have greater input into the terms and conditions of Licence and Lease Agreements and will be able to negotiate more favourable and commercially reasonable terms.
- 4.26. The Applicants also submit the Proposed Conduct is capable of generating significant efficiencies through redressing the significant information asymmetry resulting from the imbalance in bargaining power between Cairns Airport and the Applicants which allows Cairns Airport to blunt price signals, leading to price distortions and economic detriments to customers.
- 4.27. In particular, the Applicants expect collective negotiation to enable them to more effectively 'push back' on significant and unsubstantiated fee increases, on terms that are one-sided or unfair, and on access terms and conditions for shared facilities. The Applicants submit that, for example, the Proposed Conduct may result in a more balanced allocation of demand risk between Cairns Airport and the Applicants, as currently this risk is skewed such that the Applicants take most of the risk if the number of customers using Cairns Airport is significantly lower than expected (due to disease outbreak, natural disasters, etc).
- 4.28. The Applicants submit that the Proposed Conduct is more likely to result in outcomes closer to those expected in competitive markets, and therefore innovation and efficiencies through joint discussions are possible including in relation to the efficient uses of scarce ground and terminal space. The Applicants submit this will allow Cairns Airport to maximise the allocative efficiency of its limited space.
- 4.29. The Applicants submit that they have previously been unable to negotiate with Cairns Airport regarding terminology and the scope of terms, and suggest that they may feel compelled to include in their individual proposals to Cairns bids for facilities of which they have no need, in order to avoid the risk of lodging non-conforming proposals and

having Cairns Airport refuse to consider their proposal. The Applicants suggest the potential inefficiencies of this arrangement may be addressed through the collective process they propose.

Cairns Airport's view

4.30. As outlined, Cairns Airport submits that the Applicants have:

- been extensively consulted by Cairns Airport about their future requirements, prior to the commencement of negotiations regarding the currently round of renegotiations, and
- previously successfully 'pushed back' in the course of previous negotiations.

4.31. Further, Cairns Airport submits that the terms identified as 'unfair' over which the rental operators wish to bargain are standard practice employed by most airports in Australia.

4.32. Cairns Airport submits that the RFT process ensures that scarce airport space is put to its highest value use, by transparently allowing rental operators to indicate the value they place on having an airport presence and on particular locations within the airport, through their bids for given spaces and an operator nominated percentage of turnover.

ACCC view

4.33. The ACCC considers that the Proposed Conduct is likely to result in some public benefit through addressing, in part, an asymmetry of information between each of the Applicants and Cairns Airport, and in so doing may facilitate more efficient outcomes from negotiations.

4.34. The ACCC considers that there is likely to be information asymmetry between Cairns Airport and each of the Applicants, because Cairns Airport has information about all of the Applicants through its negotiations and arrangements with each of them whereas each of the Applicants only has information about Cairns Airport through its own negotiations and agreement with Cairns Airport and has very limited information about the other Applicants and therefore the options available to it in negotiations. If the Applicants are permitted to share information relevant to negotiations, the ACCC considers that this information asymmetry may be addressed in part.

4.35. The ACCC accepts that the Proposed Conduct will also allow the Applicants to jointly identify, strategise and propose solutions in relation to standard contract terms they may wish to negotiate. The ACCC considers that the Proposed Conduct has the potential to result in a public benefit where the increased input of the Applicants into the agreements results in efficiencies which are mutually beneficial to both the Applicants and Cairns Airport.

4.36. The ACCC notes the Applicants' submission that the Proposed Conduct is likely to result in increased efficiency of the allocation of space at Cairns airport. They submit that there are certain facilities they do not, or may not, wish to acquire from Cairns Airport, but that they expect Cairns Airport may require them to include these facilities within their individual proposals (despite the fact that an alternative use for these facilities would – in the view of the Applicants – deliver better outcomes for Cairns Airport as well). The Applicants have provided examples of this to the ACCC on a confidential basis. The Applicants consider the Proposed Conduct will assist them in exploring options with Cairns Airport.

4.37. On the basis of the information currently before it, the ACCC does not consider the Proposed Conduct is likely to result in an increase in the efficiency of space allocation

at Cairns Airport. The ACCC notes that there are likely to be many factors relevant to a decision by Cairns Airport in terms of space allocation. However, the ACCC also notes that this is likely to be one of the issues that the Applicants will seek to negotiate with Cairns Airport.

Transaction cost savings

- 4.38. Collective bargaining enables members of a bargaining group to share some or all of the transaction costs of preparing to negotiate, negotiating, and preparing tenders, and thus can reduce the total costs shared by the group. Lower transaction costs mean that negotiations can go further than they would do if transaction costs were higher, which can result in more efficient outcomes. This can potentially make the bargaining group and the target better off (or at least no worse off).
- 4.39. The Applicants submit that the Proposed Conduct will result in transaction cost savings through allowing the Applicants to share the considerable costs of preparing for and negotiating with Cairns Airport, and reducing the costs to Cairns Airport by enabling it to negotiate with a single independent negotiator representing the Applicants. The Applicants submit that transaction cost savings will include enabling the parties to identify common contractual problems in a streamlined manner and (in the case of the Applicants) sharing the cost of obtaining professional advice.
- 4.40. Cairns Airport submits that negotiation with the bargaining group is unlikely to materially reduce transaction costs, and is in fact likely to result in higher transaction costs than individual negotiations, because:
- its proposed RFT process will have similar transactions costs to a scenario where Cairns Airport negotiates with a bargaining group
 - each rental operator will still incur costs from considering its position
 - the proposed arrangements will result in additional costs as a result of coordinating and attaining agreement from the bargaining group,
 - arguments for reduced transaction costs are typically relevant where the members of the proposed bargaining group are small, poorly resourced negotiating parties; however each of the Applicants belong to large national networks who have significant experience in negotiating with airports, and
 - it does not expect engaging in negotiations with a single negotiator would materially reduce its transaction costs.
- 4.41. The ACCC considers that the Proposed Conduct is likely to result in transaction cost savings through:
- allowing the Applicants to share (and therefore reduce) the costs of preparing for, and engaging in, negotiations and/or an individual tender process, through identifying and discussing common contractual problems, and sharing the costs of engaging expert advice and/or administrative services
 - reducing the costs to Cairns Airport should it choose to negotiate with the Applicants. Cairns Airport has advised that it is willing to negotiate with the car rental operators who submit a tender on the terms and conditions which are included in the proposed Licence and Lease Agreements. There are likely to be transaction cost savings for Cairns Airport should it choose to negotiate with the Applicants as a group on the terms and conditions in the proposed Licence

and Lease Agreements, compared to the situation where Cairns Airport is negotiating with each Applicant individually.

Cost savings for car rental customers

- 4.42. While the ACCC considers it is not necessary for cost savings resulting from efficiencies arising from the Proposed Conduct to be passed through to consumers in order to constitute public benefits, the ACCC will give more weight to benefits which flow through to consumers.
- 4.43. The Applicants submit that cost savings obtained through the Proposed Conduct will be passed on to consumers in the form of lower Locations Fees, given the strong competitive pressures that exist at a retail level between the Applicants at Cairns Airport and the fact that price is the primary factor on which the Applicants compete. The Applicants submit that they also compete with each other for customers through marketing strategies, and commercial partnerships with airlines and other organisations.
- 4.44. Cairns Airport submits that, should the Proposed Conduct result in reduced costs to rental operators, there is no evidence that any cost savings would be passed on to consumers. Instead, the Applicants would, to the extent possible, seek to reduce their input costs without passing these cost reductions onto consumers and thereby increasing their profits. Rental operators are enabled to charge what the market can bear because car rental supply is restricted by limited airport space and the limited number of participants in the car rental market, and because customer demand is inelastic.
- 4.45. The ACCC considers that any cost savings resulting from the Proposed Conduct will only be passed through to consumers in the form of lower prices or better services for car rental services at Cairns Airport, to the extent there is competitive pressure on car rental companies to do so. The ACCC does not have sufficient information on the competition pressure at Cairns Airport to conclude that this will occur.

Summary of public benefits

- 4.46. The ACCC considers that the Proposed Conduct is likely to result in some public benefit by providing an opportunity for greater input into agreements with Cairns Airport and result in some transaction cost savings.

Public detriments

- 4.47. The Act does not define what constitutes a public detriment. The ACCC adopts a broad approach. This is consistent with the Tribunal which has defined it as:

...any impairment to the community generally, any harm or damage to the aims pursued by the society including as one of its principal elements the achievement of the goal of economic efficiency.¹⁰

- 4.48. The ACCC considers that public detriment may arise as a result of collective bargaining arrangements such as these in circumstances where competition is reduced between members of the group as a result of acting collectively, the ability of businesses outside of the bargaining group to compete against the group is affected, and/or by increasing the potential for collective activity beyond the Proposed Conduct which is sought to be authorised.

¹⁰ Re 7-Eleven Stores (1994) ATPR 41-357 at 42,683.

4.49. The Applicants submit that the Proposed Conduct is likely to result in minimal (if any) public detriment because: it is voluntary for all parties; the bargaining group will be open to any other car rental company, and includes all those currently operating at the airport; there is no collective boycott activity; and the current level of meaningful negotiation between each of the Applicants and Cairns Airport is low.

4.50. Cairns Airport submits that there are clear detriments that will arise if the proposed collective bargaining arrangements are authorised, including by allocating airport space less efficiently than would be the case should the Applicants each engage independently with the RFT process, by resulting in standardisation of the retail services offered by rental operators, and by increasing the likelihood of collaboration between the Applicants in downstream markets.

4.51. These issues are discussed below.

Reduction in competition for the acquisition of airport space by car rental operators

4.52. Cairns Airport submits that, if the proposed arrangement were to have any effect, it would blunt price signals for airport space resulting in distorted pricing and inefficient use of space, because it does not allow for independent bidding, or for different contracts based on differentiated levels of service.

4.53. The Applicants submit that the Proposed Conduct will result in minimal public detriment given the voluntary nature of the conduct, that each Applicant may choose to engage individual negotiations with Cairns and that the collective bargaining group is open to other car rental companies.

4.54. The ACCC considers that, while there is some potential for collective negotiation to reduce competition between the Applicants in acquiring airport space from Cairns Airport, the ACCC considers that the potential for reduction in competition is limited because:

- the Proposed Conduct is voluntary with each Applicant being able to enter into individual negotiations and agreements with Cairns Airport
- the Applicants propose for all sensitive commercial information to be exchanged through an independent negotiator, and distributed only in aggregated and de-identified form
- while there are divergent views, it appears that the level of negotiations between the parties has been relatively low to date
- the Applicants have stated that they do not consider the Proposed Conduct extends to coordinating a joint proposal to the RFT process and advise that they will make independent, confidential commercial decisions regarding how they may wish to engage with Cairns Airport through the RFT¹¹ and
- Cairns Airport advises that there are more car rental companies interested in facilities at Cairns Airport than there are facilities.

4.55. The ACCC therefore considers there is likely to be little, if any, detriment as a result of the proposed conduct in relation to a reduction of competition between car rental operators for the acquisition of airport space.

¹¹ Applicants submission received March, para. 7.1.

Increased potential for collective activity beyond that authorised

4.56. Generally, the ACCC considers that information sharing in collective bargaining arrangements is of concern if it allows the parties to coordinate their conduct beyond that for which authorisation is granted, for example if it facilitates collusion or provides a focal point for competitors to align their behaviour in related markets such as the downstream supply of services to consumers.

Applicants' view

4.57. The Applicants submit that a robust level of retail competition and the Applicants' different business models prevents the Applicants from colluding in the downstream market, and that the information protocols and confidentiality barriers they have in place provide sufficient legal restraint to prevent the Applicants from sharing any competitively sensitive information with each other.

4.58. The Applicants advise they have, and will continue to have, in place information sharing protocols to ensure that information is shared only to the extent it is reasonably necessary for, and related to, legitimate purposes. The Applicants have provided copies of these protocols to the ACCC on a confidential basis.

4.59. Under the protocols, an independent third party is to negotiate on the Applicants' behalf, and each Applicant will provide sensitive commercial information only to this third party. The information is then to be processed either through aggregation or anonymization before it is shared amongst Applicants, or redacted so that no Applicant can access confidential information specific to another Applicant. The Applicants advise that current pricing information, such as relating to the leasing of space at the airport or the price of car rentals, would be treated as sensitive commercial information in the manner described.

4.60. The Applicants advise that any group meetings between the Applicants and the collective negotiator will have an agenda intended to appropriately circumscribe discussion boundaries, and a competition lawyer will act as a probity officer supervising all group meetings to enforce the relevant information sharing protocols.

Cairns Airport's view

4.61. Cairns Airport submits that the proposed arrangements will increase the risk of collusion between the Applicants in downstream markets, noting that the market for on airport car rentals in Cairns is already concentrated, that off airport providers of car rental services are less prevalent in Cairns than they are at other Australian airports and there are high barriers to entry due the scarcity of airport space for other operators.

4.62. Cairns Airport submits that authorisation of collective bargaining would allow commercially sensitive information to be shared, either intentionally or unintentionally, and would create a collaborative environment that will increase the likelihood of collusion in decisions not to pass on cost savings to consumers, not to compete on service offering, or arrangements to control prices.

4.63. It also submits that the proposed conduct would make it possible for the Applicants to coordinate on non-price aspects of competition in the downstream market under the premise that it relates to upstream negotiations with Cairns Airport, such as capacity sharing agreements or the level of service that should be sought from Cairns Airport.

4.64. Cairns Airport considers the information sharing protocols proposed by the Applicants to reduce the risk of collaborative conduct beyond that authorised are inadequate to

address the risk as they are vague and are proposed to apply only to discussions unrelated to negotiations with Cairns Airport.

ACCC view

- 4.65. The ACCC notes that the Applicants compete in a downstream market in which there are a small number of competitors, all of whom are proposed to be engaged in information sharing under the collective bargaining arrangement. The ACCC considers these factors, when present in a collective bargaining arrangement, increase the risk that information exchange may facilitate collusion.
- 4.66. In relation to pricing of car rental services, the ACCC considers that there are a number of factors which lower the risk of collusion in relation to retail pricing of car rental services, as a result of the proposed collective bargaining, specifically:
- pricing of car rental services is calculated using a number of different components (see paragraph 2.4 above), with rental companies each including different components within their pricing, and calculating these components differently.
 - the high level of price fluctuation of car rental services depending on demand
 - without the Proposed Conduct there is already a degree of transparency of pricing of car rental services.
- 4.67. In addition, the ACCC notes the information sharing protocols the Applicants have put in place as described above.
- 4.68. The ACCC considers that the Proposed Conduct does not increase the risk of collusion by the Applicants in relation to pricing regarding the provision of car rental services to consumers and is unlikely to result in a detriment.

Standardisation of car rental services to consumers

- 4.69. Cairns Airport submits that the proposed conduct would be highly likely to result in the standardisation of the services that could be offered to rental operators by Cairns Airport, and in turn to customers in the downstream market, because the very nature of collective bargaining is inconsistent with the provision of differentiated services, as separate individual negotiations are needed to provide tailored services.
- 4.70. The Applicants submit that collective negotiations will enhance competition between the Applicants in the supply of car rental services at Cairns Airport, rather than resulting in standardisation of services or reducing the incentive to innovate, by ensuring that an Applicant's ability to compete is not hindered by comparatively disadvantageous terms or unfair treatment, and by allowing the Applicants to pass on cost reductions to customers.
- 4.71. The ACCC notes that participation in the collective bargaining is voluntary for all parties, and that the parties remain free to negotiate on an individual basis in relation to any issues.

Summary of public detriment

- 4.72. The ACCC considers that the Proposed Conduct is likely to result in little detriment in relation to competition in the acquisition of airport space by car rental operators and is unlikely to increase the risk of collusion by the Applicants in relation to pricing regarding the provision of car rental services to consumers, particularly given that

there will be no collective boycott activity, the Proposed Conduct is voluntary and the fact that information sharing protocols will be in place for the duration.

Balance of public benefit and detriment

4.73. For the reasons outlined in this draft determination, based on the information currently before it, the ACCC is satisfied that the Proposed Conduct is likely to result in a small public benefit and that this public benefit would outweigh any likely detriment to the public from the Proposed Conduct.

Length of authorisation

4.74. The Act allows the ACCC to grant authorisation for a limited period of time. 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.

4.75. In this instance, the Applicants seek authorisation for a period of 10 years. The Applicants submit that a 10 year period would allow them to collectively negotiate two sets of agreements with Cairns Airport (each with five year terms).

4.76. Cairns Airport submits that there is no basis for the ACCC to grant authorisation for 10 years and the Applicants have not provided sufficient reasons for the proposed length. Cairns Airport submits that if the ACCC grants authorisation it should be for a shorter period of one year. Cairns Airport submits this would allow the parties to attempt to collectively renegotiate their current agreements, and would enable the ACCC to reassess the authorisation for future re-negotiations, without allowing the Applicant's to collaborate or share sensitive information during the terms of their agreements.

4.77. The ACCC considers that an authorisation term of five years is appropriate as this will allow shorter period of time to re-assess the public benefits which have arisen from the Proposed Conduct should the Applicants seek to have the conduct authorised again and therefore proposes to grant authorisation for this period.

5. Draft determination

The application

5.1. On 28 November 2019, the Applicants lodged application AA1000460 with the ACCC, seeking authorisation under subsection 88(1) of the Act.

5.2. The Applicants seek authorisation to collectively bargain with Cairns Airport in relation to the acquisition of space associated with the provision of car rental services at Cairns Airport. Subsection 90A(1) of the Act requires that before determining an application for authorisation, the ACCC shall prepare a draft determination.

The authorisation test

5.3. Under subsections 90(7) and 90(8) of the Act, the ACCC must not grant authorisation unless it is satisfied in all the circumstances that the Proposed Conduct is likely to result in a benefit to the public and the benefit would outweigh the detriment to the public that would be likely to result from the Proposed Conduct.

- 5.4. For the reasons outlined in this draft determination, the ACCC is satisfied, in all the circumstances, that the Proposed Conduct would be likely to result in a benefit to the public and the benefit to the public would outweigh the detriment to the public that would result or be likely to result from the Proposed Conduct, including any lessening of competition.
- 5.5. Accordingly, the ACCC proposes to grant authorisation.

Conduct which the ACCC proposes to authorise

- 5.6. The ACCC proposes to grant authorisation AA1000460 to enable the Applicants, and any other car rental entity which commences operating at Cairns Airport during the term of the authorisation,¹² to collectively bargain with Cairns Airport as described in paragraph 1.2-1.3 and defined as the Proposed Conduct.
- 5.7. The Proposed Conduct may involve a cartel provision within the meaning of Division 1 of Part IV of the Act or may have the purpose or effect of substantially lessening competition or be a concerted practice within the meaning of section 45 of the Act.
- 5.8. The ACCC proposes to grant authorisation AA1000460 for 5 years.
- 5.9. This draft determination is made on 26 March 2020.

Conduct which the ACCC proposes not to authorise

- 5.10. The proposed authorisation does not extend to permit the Applicants to engage in:
- jointly discussing, preparing or submitting tenders, or
 - the formation of agreements, arrangements or understanding not to acquire particular services or facilities from Cairns Airport.

6. Next steps

- 6.1. The ACCC now invites submissions in response to this draft determination by 9 April 2020. In addition, consistent with section 90A of the Act, the Applicants or an interested party may request that the ACCC hold a conference to discuss the draft determination.

¹² s 88(2) of the Act.