

Non-Confidential Version**Restriction of Publication Part Claimed****Application for Authorisation AA1000460-1: Further submission to the ACCC****1. Background**

- 1.1 The purpose of this submission is to provide the ACCC with additional information, following the adjourned Pre-Decision Conference (PDC) on 30 April 2020, to facilitate the ACCC's consideration of two issues, being:
- the Applicants' request to seek an extension of the statutory period for the ACCC's consideration of the application for Authorisation process; and
 - whether ACCC's Interim Authorisation should be withdrawn in the interim period if the above extension is granted.
- 1.2 COVID-19 is an unprecedented, unforeseeable and un-predictable situation. It also has had a devastating impact on the Applicants. Clearly, extraordinary times calls for pragmatic solutions.
- 1.3 In this challenging economic climate, the only viable solution for the Applicants is to pivot their focus to sustain their business continuity. An urgent extension to the application for Authorisation process is necessary to enable the Applicants to have a fair opportunity to properly prepare and consider their position in due course.
- 1.4 The Applicants consider that their voluntary offer to cease engaging in the Proposed Conduct in the interim period, and willingness to notify the ACCC prior to recommencement, should provide a sufficient level of comfort and oversight from the ACCC during the interim period without the ACCC needing to revoke its Interim Authorisation.
- 1.5 The Applicants summarise their observations below:
- But for the extraordinary circumstances of COVID-19, the Applicants would not have contemplated a request to extend the application for Authorisation process. Procedural fairness considerations warrants providing the Applicants with a real opportunity to sufficiently respond to Cairns Airport Pty Ltd (CAPL)'s most recent submissions and assertions, an extension for application for Authorisation process being the only feasible solution.
 - Due to the material change of circumstances since the lodgement of the application of the Authorisation, it is appropriate and necessary for the ACCC to exercise its statutory power under s90 (10A) of the *Competition and Consumer Act 2010* (Cth) (CCA) to grant an extension of the statutory period so that it may have before it, all of the relevant available information, prior to its Final Determination, including any re-assessment of the counterfactual.

- Importantly, if the ACCC were to grant a statutory extension to the application for Authorisation pursuant to the above considerations, it would have no material impact nor inflict undue prejudice on CAPL's ability to exercise its commercial discretion in choosing how it deals with the Applicants, including whether to collective negotiate with the Applicants or not.
- The Applicants also consider it is unnecessary and undesirable for the ACCC to revoke its Interim Authorisation should it grant the requested extension. Such a step is unnecessary as the ACCC will retain significant oversight over the Proposed Conduct under the Applicants' proposed model of voluntary non-engagement and notification of the ACCC before recommencement. It is also undesirable as it hampers the incentive and opportunity for the Applicants and CAPL to re-enter collective discussions if the appropriate circumstances arises to address the novel and rapidly changing business viability challenges resultant from COVID-19.

2. The Applicants' Request for extension of the application for Authorisation process

2.1 The Applicants consider that the ACCC should grant its request for extension of the application for Authorisation process, taking into account the exceptional circumstances precipitating the Applicants' request and the importance of providing the Applicants with due procedural fairness. Further, the extension would also provide the ACCC an appropriate opportunity to fully consider all relevant matters for its re-assessment without causing any undue prejudice to CAPL.

2.2 The Applicants set out their supporting observations below.

But for COVID-19, the Applicants' would not have contemplated requesting for an extension of the application for Authorisation process

2.1 Ordinarily, it would be in the Applicants' and CAPL's best interests to have the application for Authorisation resolved as expeditiously as possible, so that both parties can have commercial certainty about negotiation possibilities. In fact, the Applicants have been consistent proponents to expedite the application for Authorisation process so that they can have certainty regarding their future on-airport operations in Cairns.

2.2 However, the rapid escalation and implementation of COVID-19 travel restrictions announced by the Federal Government has effectively collapsed many of the Applicants' revenue streams.¹ The Applicants provide the ACCC with additional detail of the adverse commercial impacts resulting from COVID-19 on the Australian car rental industry in **Confidential Annexure A**, being confidential submissions the Applicants have made to the Victorian and Federal Government in seeking COVID-19 relief.

2.3 Further, we provide the ACCC with some illustrative statistics to demonstrate how COVID-19 has impacted on the Applicants actual operations so that the ACCC can better appreciate the enormity of business continuity needs that the Applicants need to attend to in the short term.

¹ Examples of the Federal Government's current COVID-19 travel restrictions can be found on <https://www.health.gov.au/news/health-alerts/novel-coronavirus-2019-ncov-health-alert/coronavirus-covid-19-advice-for-travellers>.

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- 2.5 Yet notwithstanding this critical industry-wide adversity, the Applicants still have had to make significant payments to Cairns Airport, and other landlords under their pre COVID-19 contractual arrangements. While the Applicants welcome Federal initiatives such as the recent introduction of a mandatory Code of Conduct (Code) to encourage good faith commercial leasing re-negotiations during COVID-19, the Applicants nevertheless need to devote a significant amount of resources and time to individually negotiate interim relief with each landlord. The Code is being separately legislated in each state and territory with varying timings, which will add an additional layer of unwelcome legal complexity to the Applicants' negotiations.
- 2.6 The Applicants' onerous task of re-negotiating with all of their respective landlords as well as with other stakeholders (such as franchisees, financiers, commercial and leisure customers) in Australia and elsewhere is compounded by the short timeframe in which the Applicants must attempt to settle interim COVID-19 arrangements, all the while preparing for an uncertain economic future for an undetermined duration.
- 2.7 In choosing to prioritise business continuity over pursuing the application for Authorisation process in the interim period, the Applicants are also seeking to ensure that any pro-competitive effects arising from the application for Authorisation can be realised post COVID-19 with a viable car rental industry.

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[REDACTED]

Procedural fairness considerations warrants giving the Applicants a fair opportunity to consider and respond to Cairns Airport's recent assertions

- 2.8 A key tenet of procedural fairness in the context of an application for Authorisation is to provide all parties with a reasonable opportunity to consider and respond to the relevant assertions. The Applicants consider procedural fairness is particularly important in this instance where there is a significant imbalance of bargaining power and information asymmetry between the Applicants and CAPL.
- 2.9 While the Applicants recognise that their belated request for the extension of the application for Authorisation process was less than ideal, equally the Applicants ought to have the opportunity to properly consider and respond to CAPL's extensive submissions that were provided to the Applicants less than a week prior to the PDC. The Draft Determination was largely positive for the Applicants and did not require any further material work to be undertaken in respect of the Authorisation process. The Applicants were only able to gain a full appreciation of the preparation required for the PDC (and the material matters which could affect their position) when they gained access to CAPL's submission on 23 April 2020.
- 2.10 Given the close interrelationship between CAPL's submission regarding the Draft Determination and the PDC which allows both parties to ventilate any relevant concerns arising from the Proposed Conduct, a deferral of the PDC and an extension of the overall application for Authorisation period is appropriate and proportionate to give the Applicants a reasonable chance to consider its position.
- 2.11 CAPL's submission in response to the Draft Determination was 27 pages in length and explored both jurisdictional and substantive issues in the Applicants' application for Authorisation. In contrast, the Applicants' submission dated 22 April 2020 was 3 pages in length and focussed on clarifying the scope of Proposed Conduct in the ACCC's Draft Determination rather than exploring any substantive issues. Therefore, the Applicants do not consider its task in responding to CAPL's submission to be comparable to that required by CAPL to respond to its submission (in fact, CAPL has already addressed the same issue separately in its submission).³

It is appropriate and necessary for the ACCC to extend the statutory period so that it can consider the relevant counterfactual more closely

- 2.12 Under s90 (10A) of the CCA, the ACCC has the power to grant an extension of up to 6 months in addition to the prescribed 6 months statutory period (7 months in this instance due to CAPL convening the Pre-Decision Conference). The Applicants consider that the relevant conditions prescribed under s90 (10A) of the CCA are enlivened, and request the ACCC to exercise its power under s90 (10A)(b) of the CCA to extend the relevant period for determining the application for Authorisation to not more than 6 months from the prescribed period.
- 2.13 Since the Applicants' lodgement of the application for Authorisation, there have been significant changes to the relevant counterfactual scenario. Both of the ACCC's Interim Authorisation and Draft Determination was made assuming the main counterfactual was that CAPL may be able to complete its Request for Tender (RFT) process and enter into bilateral agreements with each Applicant. However, due to COVID-19 impacts, CAPL has publicly indicated it has paused its RFT process until business normality resumes at an undetermined time in the future.

³ See sections 5.2- 5.4 of Cairns Airport submission dated 15 April 2020.

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2.15 In light of the abeyance of CAPL's RFT process for a significant period of time, the Applicants consider that the RFT is a remote possibility and is too speculative to be relevant as a counterfactual scenario. In the circumstances, given that the ACCC has already issued a Draft Determination within the base 6 month statutory period under s90 (10A)(a), it is appropriate for the ACCC to take more time to appropriately assess the relevant counterfactual (being bilateral negotiations between CAPL and each Applicant that was included in the application for Authorisation) and the benefits/detriments flowing on from the Proposed Conduct more closely. The ACCC can and should exercise its extension power in writing under s90 (10A)(b) of the CCA and the Applicants propose to agree to any proposed extension under s90 (10A)(c) of the CCA.

2.16 If the ACCC does accept the changed counterfactual, the Applicants consider it would be appropriate for the ACCC to give less or no weight to any arguments advanced by CAPL relating to the public benefits arising from the RFT process and correspondingly, greater weight to the public benefits/lack of detriments arguments advanced by the Applicants in all of their submissions to date, as against the bilateral negotiations with the Applicants, evidence of which was provided to the ACCC in the Applicants' earlier submissions

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The ACCC's grant of an extension of the application for Authorisation process period will not unduly prejudice CAPL's position

2.18 The Applicants consider that if the ACCC granted an extension of the relevant statutory period, it will not unduly prejudice CAPL's position in any event. CAPL remains free to exercise its commercial discretion in any way it chooses in respect of its dealings with the Applicants. Amongst the various options available to CAPL include the following (but not limited to):

- engage in bilateral negotiations with the Applicants to conclude long term agreements
- a continued refusal to collectively negotiate with the Applicants (as it has done to date); or

- to consider and pursue collective negotiations with the Applicants (once the Authorisation process is enlivened) in light of the material change in circumstances while its RFT process is on pause.
- 2.19 The Applicants have also indicated their willingness to temporarily suspend the Proposed Conduct during any deferral period (discussed in more detail in section 3). To the extent that CAPL has reached any COVID-19 interim arrangements with any of the Applicants, this will also provide CAPL with ample time and opportunity to consider its longer term commercial options. It is unlikely that the degree of CAPL's commercial latitude will change in any event, with or without the Proposed Conduct.
- 2.20 As a corollary point, the Applicants also note that CAPL has indicated it was fully prepared for the PDC. To the extent that the extension of the statutory period will also result in an adjournment of the PDC, a deferral will not materially affect CAPL's ability to advance its position (but rather will provide a more level playing field for the Applicants to properly consider and respond to CAPL's assertions). The Applicants are only seeking a reasonable accommodation under the exceptional circumstances. The Applicants consider that if the PDC was deferred to no earlier than August 2020, they would have sufficient time to clarify its position with respect to various landlords and stakeholders. Consequently, the Applicants will be able to devote their resources to continue with the application for Authorisation process (a process in which the Applicants have already made significant time and resource investments in).

3. The ACCC does not need to revoke Interim Authorisation if it grants an extension of the statutory period

- 3.1 The Applicants seek to respond to the ACCC's concerns of having the Interim Authorisation on foot in the event that it decides to grant an extension of the statutory period. The Applicants consider that their offer to refrain from engaging in the Proposed Conduct in the interim period and notifying the ACCC ahead of any recommencement of the Proposed Conduct should provide the ACCC with a sufficient level of comfort, such that a revocation of the Interim Authorisation is not necessary.

The Applicants' voluntary offer to refrain from engaging in the Proposed Conduct is sufficient and have the same practical effect of a revocation of Interim Authorisation with no loss of ACCC oversight

- 3.2 The Applicants reiterate their offer to not engage in the Proposed Conduct in the interim deferral period (despite having authority under ACCC's Interim Authorisation and Draft Determination to do so). In the event that they may need to seek to recommence the Proposed Conduct, they would notify the ACCC prior to engaging in the Proposed Conduct.
- 3.3 As a practical matter, given the urgent need for all of the Applicants to prioritise their respective business continuity during COVID-19 and relevantly, their immediate need to re-negotiate and finalise interim COVID-19 arrangements with CAPL, it is highly unlikely that the Applicants would want to or need to recommence the Proposed Conduct in the interim period without some degree of input from CAPL.

- 3.4 The Applicants have also maintained a strong degree of self-discipline and effective enforcement of information sharing protocols and confidentiality barriers as discussed in the Applicants' previous submissions to date. There is no evidence to suggest that the Applicants would not continue to follow this trajectory and stay within the bounds of the Proposed Conduct, including appropriately updating the ACCC if and before they re-engage in any Proposed Conduct.

The ACCC should not revoke its Interim Authorisation as it would hamper appropriate collaboration and innovation required to assist the Applicants and CAPL to address the business viability challenges at Cairns as a result of COVID-19

- 3.5 As discussed previously, the extraordinary circumstances of COVID-19 call for new and flexible approaches, both to preserve and promote competition appropriately. This is already reflected in the significant amount of COVID-19 induced industry collaborations contained in the many urgent interim applications for Authorisations (including allowing general landlord and tenant collective discussions) which the ACCC has already approved since the start of the pandemic.⁴ The ACCC has approved many of these applications for Authorisation (with appropriate oversight mechanisms such as the Applicants notifying the ACCC of any material changes to the Proposed Conduct or providing regular operational updates regarding such conduct) with an unprecedented speed.⁵
- 3.6 The Applicants consider that the same flexible philosophy is equally apt in this circumstance, where the Applicants' request for extension of the statutory period is also precipitated by COVID-19. The Applicants consider that given the ACCC has already approved of appropriate collective rental re-negotiations in much broader contexts, similarly, there remains a strong need for flexibility in this instance to enable the Applicants and CAPL to pursue appropriately collective discussions without the need for further formal applications before doing so. Revoking Interim Authorisation and requiring the Applicants to lodge a new application for Interim Authorisation before they seek to recommence the Proposed Conduct in the interim period is not conducive to facilitating pragmatic commercial solutions in these extraordinary times. In particular, where collective discussions may need to be initiated or pursued very promptly.
- 3.7 As a part of the Applicants' advocacy for a more flexible approach in unprecedented circumstances, the Applicants are happy to pursue and negotiate with the ACCC 'midway' options that could increase any safeguards already proposed by the Applicants provided they sufficiently take into account the Applicants' practical needs and priorities.

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⁴ See for example, Australian Retailers Association application for Authorisation AA1000501-1 (allowing ARA members to collectively negotiate with retail landlords), Scentre Group and Shopping Centre Council of Australia Limited (SCCA) application for Authorisation AA1000489-1 (allows SCCA members to discuss and give effect to COVID-19 re-negotiated contracts with SME tenants).

⁵ See for example, the Interim Authorisation conditions imposed by the ACCC in the application for Authorisation AA1000489-1.

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