

Cairns Airport Pty Ltd

Supplementary submission on authorisation application by car rental operators (ref: AA1000460)

5 March 2020

1 Introduction

- 1.1 The purpose of this supplementary submission is to provide a brief response to the Applicant's February Submission to help inform the ACCC's draft decision, request that the ACCC revokes interim authorisation, and to respond to the summary of confidential information from the Applicants' authorisation application which was subsequently provided to Cairns Airport (Confidential Information).
- 1.2 This body of this submission is divided into three sections.
 - 1.2.1 Section 2 addresses some of the key issues with the public version of the Applicants' February Submission. Cairns Airport appreciates that the ACCC's draft decision is imminent, with the ACCC intending to make a draft decision by March 2020. Accordingly Cairns Airport has not sought to provide a full response to the Applicant's February Submission. Rather, Cairns Airport has sought to identify some of the most pertinent issues with the submission so that the ACCC is best placed to make its draft decision in March. Cairns Airport intends to respond more fully to the Applicants' February Submission in due course.
 - 1.2.2 Section 3 sets out Cairns Airport's concerns with the ACCC's decision to grant interim authorisation and requests that the ACCC revokes the Interim Authorisation.
 - 1.2.3 Section 4 sets out Cairns Airport's response to the Confidential Information.

2 Initial response to February 2020 submission

Overview

- 2.1 This section lays out some of the key problems with the Applicants' February Submission and explains why it does not establish that the ACCC should allow the authorisation.

Cairns Airport will not negotiate collectively with the car rental operators

- 2.2 An RFT process is underway for car rental facilities at Cairns Airport and should be completed within months. Any collective negotiation would undermine the intended outcomes of the RFT process to the detriment of consumers. Therefore Cairns Airport has no intention of entering into collective negotiations with the Applicants. This means that the authorisation is incapable of delivering any public benefit.
- 2.3 Accordingly, the ACCC must decline to grant authorisation on the basis of the authority of the ACCC Objection Notice in respect of a collective bargaining notification lodge by Hertz Australia Pty Limited dated 16 July 2010.
- 2.4 Despite Cairns Airport's clear position and authority, the Applicants' February Submission maintains that Cairns Airport 'may' be willing to collectively negotiate, arguing that there are a number of incentives for Cairns Airport to engage collective negotiations.¹
- 2.5 As explained in detail in Cairns Airport's initial submission, and supported by case law, it is not sufficient for the Applicants to establish a mere possibility that a benefit will eventuate.² Rather, the ACCC must be satisfied that there is a commercial likelihood that the benefit will arise as a result of the authorisation.³

Process developments

- 2.6 The Applicants' argument that Cairns Airport 'may' collectively negotiate with the Applicants simply does not accord with the commercial reality. Cairns Airport has been clear that it intends to pursue a competitive RFT process to allocate new licenses and leases to car rental operators. This is also supported by real, tangible evidence – not mere assertion. Specifically:
- 2.6.1 Following an expression of interest process ■ rental operators have been shortlisted and have until 13 March 2020 to submit a proposal in response to the RFT.
- 2.6.2 Cairns Airport is intending to have the RFT process completed by the end of April 2020.

¹ Applicants' February 2020 submission, at section 5.

² Cairns Airport initial submission 19 December 2019 [5.1]-[5.5].

³ *Qantas Airways Limited* (2005), ACompT 9 at 1456www

- 2.6.3 Cairns Airport is in advanced negotiations with [REDACTED].
- 2.6.4 Cairns Airport has made it clear, in response to the car rental operators' requests to engage in collective negotiation under the Interim Authorisation that it does not intend to engage with the rental operators on a collective basis and that individual rental operators are invited to participate individually in the RFT process. A copy of this correspondence is provided at **Attachment A**.

Cairns Airport will not negotiate collectively with the car rental operators

- 2.7 The Applicants argue that despite Cairns Airport's clear position that it will not collectively negotiate, it has 'strong commercial incentives to engage in collective bargaining with the Applicants'.⁴
- 2.8 Even without examination of these purported incentives, this argument does not hold as a matter of basic logic. Cairns Airport is best placed to determine its own commercial incentives. If there were strong commercial incentives to engage in collective negotiations with the Applicants, Cairns Airport would not oppose the Authorisation. Evidently, this is not the case.
- 2.9 The only basis upon which the ACCC can proceed to assess this application is on the basis that Cairns Airport will not collectively negotiate and will continue to retender car rental facilities pursuant to the existing RFT process which is well underway.
- 2.10 The purported incentives put by the Applicants do not survive scrutiny either. For example:
- 2.10.1 The Applicants argue that the fact that it is desirable for Cairns Airport to have at least some Applicants on-airport, means that Cairns Airport will engage in collective negotiations. This does not follow. Cairns Airport can negotiate individually, or request individual tenders from rental operators to ensure that some operators continue to provide services on airport. Cairns Airport has also opened the RFT process to non-incumbent car rental operators. As such, as a matter of commercial reality, it is not viable that all Applicants would withdraw operations at Cairns Airport. It is also worth noting that the while the authorisation would immunise the Applicants from engaging in cartel conduct, the authorisation would not allow the Applicants to engage in a collective boycott of Cairns Airport.

⁴ Applicants' February 2020 submission, at section 5.

- 2.10.2 The Applicants argue that Cairns Airport is incentivised to negotiate collectively with the Applicants to effectively facilitate Cairns Airport's expansion plans. However, collective negotiations are not needed to facilitate the expansion – which delivers significant improvements to the car rental facilities that were requested by the incumbent rental operators. Cairns Airport does not consider that collective negotiations will deliver a better planned expansion. It has already undertaken significant consultation with rental operators as well as other airport users to determine the most efficient use of limited airport space. As such, Cairns Airport considers that it is best placed to determine the optimum allocation of airport space, having regard to all stakeholders. For example, while the rental operators may disagree with the construction of a café, Cairns Airport customer surveys have clearly shown that this is a facility that airport customers would highly value. As such, Cairns Airport does not consider that the facilitation of an expansion provides any incentive to engage in collective negotiations.
- 2.10.3 The Applicants' argument that collective negotiation would improve allocative efficiency at the airport are counter-intuitive.
- 2.10.3.1 Cairns Airport's RFT process transparently allows applicants 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. This process ensures that scarce airport space is put to its highest value use, and allows rental operators with a lower cost base to outbid rival rental operators.
- 2.10.3.2 On the other hand the authorisation would allow the Applicants' to divide the market as they see fit and agree to not seek improved facilities that would enable them to improve their offering to end consumers – harming allocative efficiency.
- 2.10.4 Cairns Airport does not consider that engaging in negotiations with a single negotiator will materially reduce its transaction costs and does not consider this to be an incentive to engage in collective negotiations. In fact, given likely impracticalities of negotiating a one-size-fits-all agreement, Cairns Airport considers that negotiating collectively could increase transaction costs when compared to direct, bilateral negotiations.

Rental operators are able to effectively negotiate with Cairns Airport individually

- 2.11 The Applicants' February Submission reiterated its assertion that the contractual terms offered by Cairns Airport are unfair and a reflection of imbalance in bargaining power.
- 2.12 As demonstrated in the Confidential Information which is discussed in section 4 of this submission below, the Applicants have shown that in the past they have been able to successfully negotiate with Cairns Airport on an individual basis, and to push back against terms that they consider unfavourable. This is completely understandable and expected given that the Applicants are large, experienced and sophisticated commercial businesses. As with any commercial negotiation, the car rental operators have been

successful in negotiating their preferred terms on some occasions, and the airport on others.

- 2.13 The 'unfair' terms identified by the rental operators are nothing of the sort. Rather the terms identified are standard practice employed by most airports in Australia, a fact which is known by the Applicants.
- 2.14 Cairns Airport will continue to deal with issues raised by rental operators on a case-by-case basis. This approach is more effective given that the parties can negotiate bespoke terms that are suited to their individual circumstances and priorities. Individual negotiations will allow Cairns Airport to engage with the individual rental operator's unique commercial objectives, pricing model, and preferred risk allocation.

Collective negotiations will result in worse outcomes for consumers

- 2.15 Cairns Airport's RFT process has been designed with the express purpose of efficiently allocating scarce airport spaces, as well as improving rental operators' offerings to Cairns Airport customers.⁵
- 2.16 The RFT process will deliver the best outcomes to consumers by providing for a process that will enable Cairns Airport to select the car rental operators for the airport which will provide the best offering for consumers. For example The RFT expressly requires tenderers to:

...provide information that demonstrates how they can meet Cairns Airport's car rental service requirements and provide a competitive service offering which benefits the end customer, by submitting a capability statement.

- 2.17 Specifically, tenderers are required to:

- Demonstrate how your organisation will offer competitive pricing that will provide Cairns Airport customers with value for money with a range of vehicle choices for the duration of the lease;*
- Provide details of how your organisation will measure and report on its price competitiveness and deliver value for money for car rental customers at Cairns Airport;*
- Provide data on customer satisfaction surveys over the preceding 12-24 months.*

- 2.18 The RFT also requires tenderers to demonstrate how the car rental operators will measure and report on their competitiveness and value for money, in order to hold them accountable.

⁵ A copy of the RFT was provided to the ACCC in response to its request for information on 2 March 2020.

- 2.19 If Cairns Airport were to instead engage in collective negotiations, the consumer benefits arising from the RFT process will be lost.
- 2.20 Instead rental operators would be able to allocate the rental market at Cairns Airport as they see fit, protecting their incumbent market shares, standardising their offering, and agreeing not to pay for premium services which Cairns Airport has offered to enable car rental operators to broaden their offerings to end consumers.
- 2.21 The authorisation (including the Interim Authorisation) allows the rental operators to agree to commit to delivering consumers the bare minimum. This will likely have impacts in downstream markets, whether there is an express agreement between the operators not to compete downstream or not.
- 2.22 A key purpose of the RFT process is to promote significantly greater competition between car rental companies operating at Cairns Airport than has previously existed to improve levels of service and value for money received by consumers. Unfortunately the ACCC Interim Authorisation decision to allow cartel conduct in an already highly concentrated market has the potential to significantly impact the ability to the RFT to provide better outcomes in terms of price and quality of service for consumers. That is the ACCC's interim decision is to the detriment of consumers.
- 2.23 The RFT process is designed to create:
 - 2.23.1 Competition between car rental companies for the limited facilities currently available at Cairns Airport (competition for the market). Currently there are more car rental companies interested in facilities at Cairns Airport than there are facilities. Accordingly, it is likely that one or more car rental companies may not receive access to car rental facilities at Cairns Airport thus creating competition for the market: and
 - 2.23.2 A framework to promote competition in the market between successful tenders. The RFT requests that tenders demonstrate how they propose to increase competition, provide value for money to consumers, provide innovative products and services.
- 2.24 Allowing car rental companies to engage in price fixing, bid rigging and market allocation will limit the ability of Cairns Airport to promote competition for the market and competition in the market to the detriment of consumers. Notwithstanding the Interim Authorisation Cairns Airport does not propose to collectively negotiate with car rental companies so as to ensure as much competition as possible between car rental companies for the benefit of consumers.

No Pass through of savings to consumers

- 2.25 Even if Cairns Airport engaged in collective negotiations with the Applicants and this resulted in cost-savings for rental operators, the Applicants have provided no probative evidence to establish that cost savings will be passed onto consumers. Accordingly there is no basis upon which the ACCC can give any weight to the assertion of pass through of savings to consumers.

- 2.26 Without establishing that pass-through to consumers, any reduction in airport charges would simply be a transfer of rents, with no public benefit.
- 2.27 This can be clearly evident in the Applicants' choice of language. The Applicant's February Submission repeatedly refers to how cost savings 'may' pass-through to consumers,⁶ and the Applicants managing of expectations acknowledging that 'any Applicant's pricing model may not be designed to directly pass on cost savings to customers'.
- 2.28 Any pass through is asserted to arise from the Applicants' own pricing models. The pricing models have not been produced by the Applicants'. Accordingly the ACCC cannot give any weight to any such assertion of pass through based upon such models.
- 2.29 Furthermore clearly the Applicants are able to change such models at any time they choose to so as to eliminate any pass through. Accordingly, there is no certainty of the enduring nature of any pass through of cost savings.
- 2.30 Even if *current* pricing models allow for automatic pass-through of cost savings, what matters to end consumers is overall price. Cairns Airport's previous analysis has shown that the car rental operators price their services at what the market will bear,⁷ and a reduction in location fees may allow for a rental operator to increase its other costs.
- 2.31 The ACCC has not to date rigorously assessed claims of pass through and therefore Cairns Airport assumes the ACCC has given little or no weight to such claims.
- 2.32 The *possibility* of reduced charges being passed through to consumers is not an adequate evidential basis for the ACCC to find that the authorisation of the cartel conduct would deliver net public benefits. If the Applicants cannot establish the commercial likelihood that any cost savings would be passed onto consumers (assuming cost savings can be established), or provide an undertaking that they will pass on the cost savings to end consumers, then collective negotiations will not result in a public benefit, merely a transfer in rents and the loss of allocative efficiency at Cairns Airport.
- 2.33 Cairn's Airport submission, unlike that of the Applicants, is supported by authority. The Australian Competition Tribunal in Qantas Airways Limited, articulated that it is not enough that the claimed public benefit is a theoretical possibility. The Applicants must be able to establish a causal nexus between the proposed authorised conduct and the public benefits being achieved:⁸

...for a benefit or detriment to be taken into account, we must be satisfied that there is a real chance, and not a mere possibility, of the benefit or detriment eventuating. It is not enough that the benefit or detriment is speculative or a theoretical possibility. There must be a commercial likelihood that the applicants will, following the implementation of the relevant agreements, act in a manner that delivers or brings about the public benefit or the lessening of competition giving rise to the public detriment. We must be satisfied that the benefit or

⁶ Applicants' February 2020 submission, at [4.4], heading above [4.5],

⁷ Cairns Airport initial submission 19 December 2019 Attachments A and B.

detriment is such that it will, in a tangible and commercially practical way, be a consequence of the relevant agreements if carried into effect and must be sufficiently capable of exposition (but not necessarily quantitatively so) rather than "ephemeral or illusory", to use the words of the Tribunal in Re Rural Traders Co-operative (WA) Ltd (supra) at 263.

Cairns Airport is not a high cost airport

- 2.34 Section 2 of the Applicants February Submission examines the car rental airport costs at Cairns Airport. It is intended to support the assertion that Cairns airport is a higher cost airport, but in fact supports Cairns Airport's previous submission that airport charges for rental operators at Cairns Airport are reasonable and not materially higher than other comparable airports.

Transaction cost benchmark

- 2.35 The Applicants point to the fact that the use of a cost-per-transaction is an established and widely used methodology in the industry.
- 2.36 While cost-per-transaction may be used as a cost benchmark for some purposes, the Applicants have not provided any information about the suitability of cost-per-transaction as a benchmark for assessing the reasonableness of the costs at Cairns Airport when compared with other airports on a like-for-like basis.
- 2.37 The fact that a transaction cost benchmark is used by operators for some purposes does not mean that it is appropriate for assessing the reasonableness of the costs.
- 2.38 As previously explained in Cairns Airport's initial submission, a cost/revenue benchmark is much more appropriate and shows that Cairns Airport's charges are reasonable in the circumstances.⁹

Cost as a percentage of revenue shows that Cairns Airport is not high cost

- 2.39 Using the more appropriate cost as a percentage of revenue benchmark shows that Cairns Airport falls from the second most expensive to the fifth most expensive (with several airports very close behind), while being the seventh busiest airport in the country.
- 2.40 The Applicants set out in Figure 1 of the Applicants' February Submission the cost as a percentage of revenue at national airport locations. The data shows that Cairns Airport's costs are very much 'middle of the road', situated in the middle group of six airports all with costs within 2% of each other.

⁸ *Qantas Airways Limited* (2005), ACompT 9 at 1456

⁹ Cairns Airport initial submission 19 December 2019, [2.19]-[2.28].

- 2.41 Cairns Airport also queries why the Applicants have provided historical cost and revenue information, when presumably they have access to more recent data, and queries whether 2017 data has been cherry-picked to show Cairns Airport as more costly than more recent data suggests.

Facilities offered at Cairns Airport

- 2.42 It is even more clearly apparent that costs at Cairns Airport are reasonable when the facilities offered at Cairns Airport are taken into account.
- 2.43 As explained in Cairns Airport's initial submission a cost/transaction or cost/revenue benchmark does not take into account the level of facilities provided at Cairns Airport. The Applicants argue that there is no 'perceivable' difference between the facilities offered at Cairns Airport and those of other airports, however, this is clearly not the case.
- 2.44 For example, at Newcastle Airport (which the Applicants data show is the seventh most expensive airport) the majority of back of house car storage is done off-airport (compared to on-airport in Cairns Airport). This can and does have a material impact on the cost benchmarks and individual airport rankings, and if this service was accounted for Cairns Airport would compare more favourably on this benchmark.

3 Interim authorisation

Purpose of this section

- 3.1 This section responds to the ACCC's letter of 13 February 2020 and accompanying decision granting the car rental operators at Cairns Airport Interim Authorisation to undertake cartel conduct in their negotiations with Cairns Airport. It sets out Cairns Airport's concerns with the ACCC's reasoning for granting the authorisation and requests that the ACCC revoke the Interim Authorization.

Concerns with the ACCC's decision to grant authorisation

- 3.2 The ACCC's stated reasoning for allowing the interim authorisation is that it considers:
- 3.2.1 There is some urgency to the request for interim authorisation given the expected timing of the Request for Proposal process being conducted by Cairns Airport and noting that the majority of the Applicants' existing agreements with Cairns Airport are due to expire in early 2020; and
- 3.2.2 It is unlikely that interim authorisation will materially alter the competitive dynamics in any market. The Applicants will implement an information sharing protocol to address concerns about the sharing of commercially sensitive information. Further the interim authorisation extends to potentially agreeing to 'holdover' existing agreements but does not extend to the Applicants entering into any new agreements with Cairns Airport. Therefore if the ACCC does not ultimately grant authorisation the relevant markets are able to return to substantially their current state.

Purported urgency of the interim authorisation

- 3.3 The Applicants concerns regarding the urgency of the interim authorisation are unfounded. Cairns Airport's agreements with the car rental operators expired at the end of February. As explained in Cairns Airport's letter of 12 February 2020, at the time the ACCC made its decision on interim authorisation Cairns Airport had already agreed to hold over the agreements on their original terms until the conclusion of the RFT process.¹⁰ Cairns Airport agreed to this without the need for collective negotiations with the rental operators. As such, the urgency of the interim authorisation does not present a valid reason for granting the interim authorisation.
- 3.4 Cairns Airport notes that the Applicants did not submit the authorisation application until 28 November 2019, shortly before the expiration of their agreements. Given that Cairns Airport has already allowed for a hold-over of the existing agreements, it is not appropriate to allow the interim authorisation to interfere with Cairns Airport's commercial operations – specifically the competitive tender process, which is designed to settle negotiations with rental operators prior to the completion of Cairns Airport's terminal expansion, and deliver better outcomes for end consumers.

¹⁰ Letters to rental operators dated 20 December 2019.

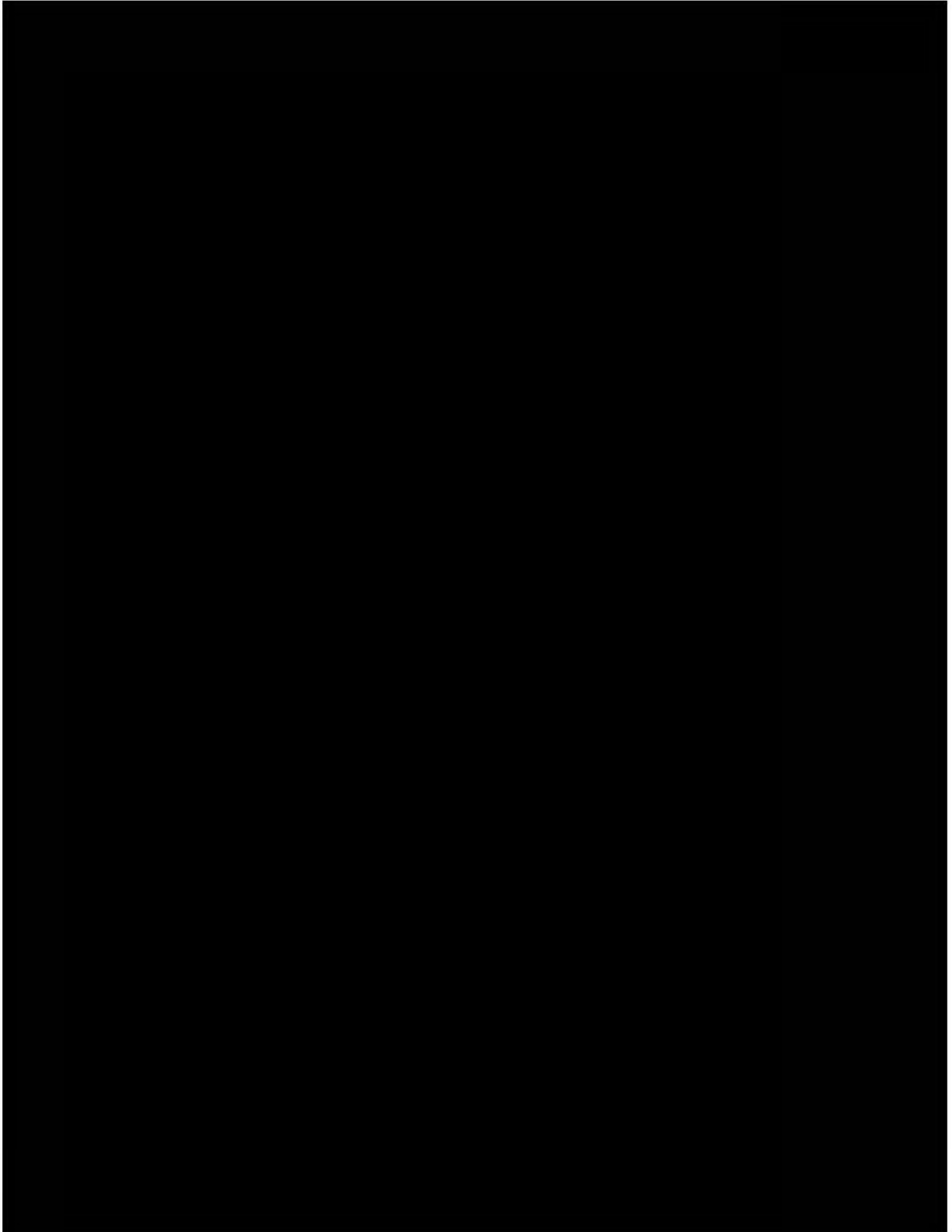
Impact on competitive dynamics

- 3.5 While the Interim Authorisation does not allow for the Applicants to enter into final agreements with Cairns Airport, it does expressly allow the Applicants to enter into price fixing agreements for the acquisition of car rental space from Cairns Airport, as well as information sharing regarding potential negotiation strategies, what premium services they will demand from Cairns Airport, the allocation of the market (ie, which rental operators will bid for what space and the amount that each operator will be bid), amongst others.
- 3.6 Even if the authorisation is subsequently not granted, and these agreements become prohibited, the information shared and strategy agreed has potential to continue to impact on the approach the Applicants take to individuals negotiations with Cairns Airport, as the Applicants will likely to continue to adopt the collaboratively agreed strategy, individually, in the knowledge that this approach will also likely be adopted by the other Applicants.
- 3.7 This could directly impact on the service offerings to end consumers of car rental services, and has the potential to substantially lessen competition in the downstream market. It will also interfere with Cairn Airport's ability to allocate airport space efficiently and effectively.
- 3.8 By way of example, on 26 February 2020 Cairns Airport received a letter from Property Beyond, the organisation appointed to act as negotiator for the rental companies in respect of any collective negotiations. A copy of the letter has been provided in **Attachment B** of this letter.
- 3.9 The letter sets out a number of high level proposals which the rental operators propose to collectively discuss with Cairns Airport.
- 3.10 [REDACTED]
- 3.10.1 [REDACTED]
- 3.10.2 [REDACTED]
- 3.11 [REDACTED]

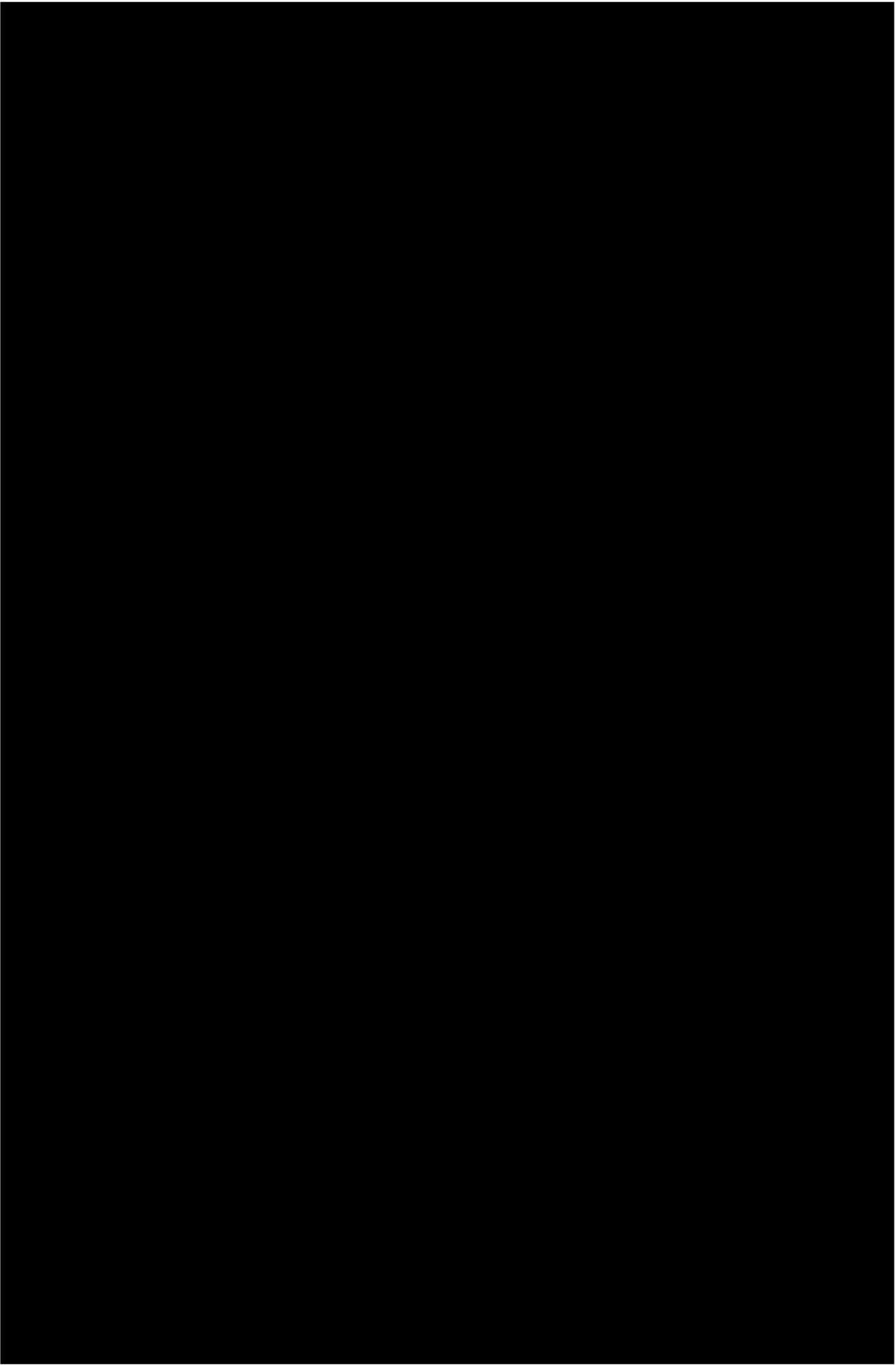
Request for revocation

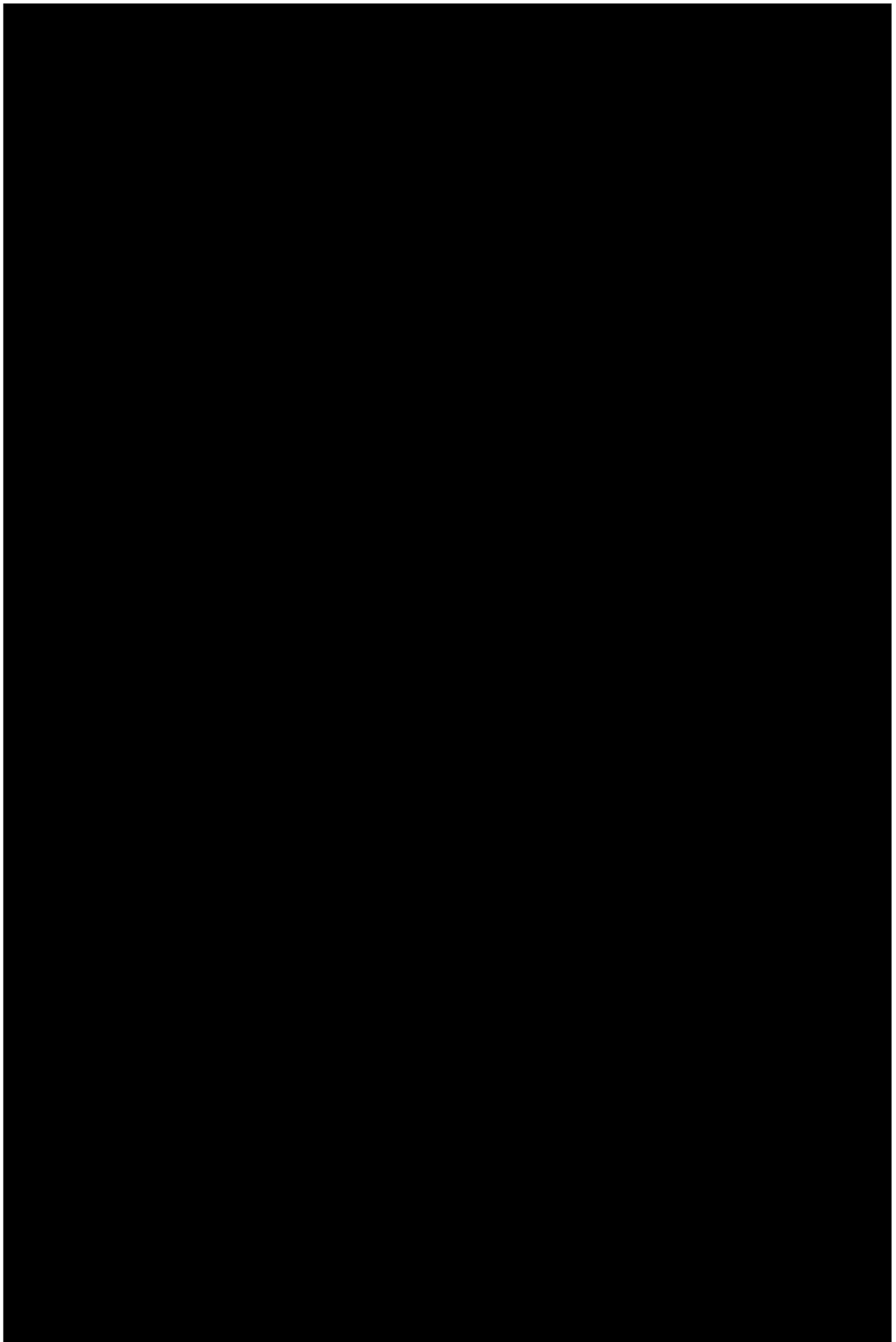
- 3.12 For the reasons set out in this section, Cairns Airport requests that the ACCC revoke the Interim Authorisation with immediate effect. There is no pressing urgency for authorisation, and the ongoing Interim Authorisation presents an irreversible risk to competition in the market for car rental space at Cairns Airport, which will impact competition in the downstream market for car rental services.

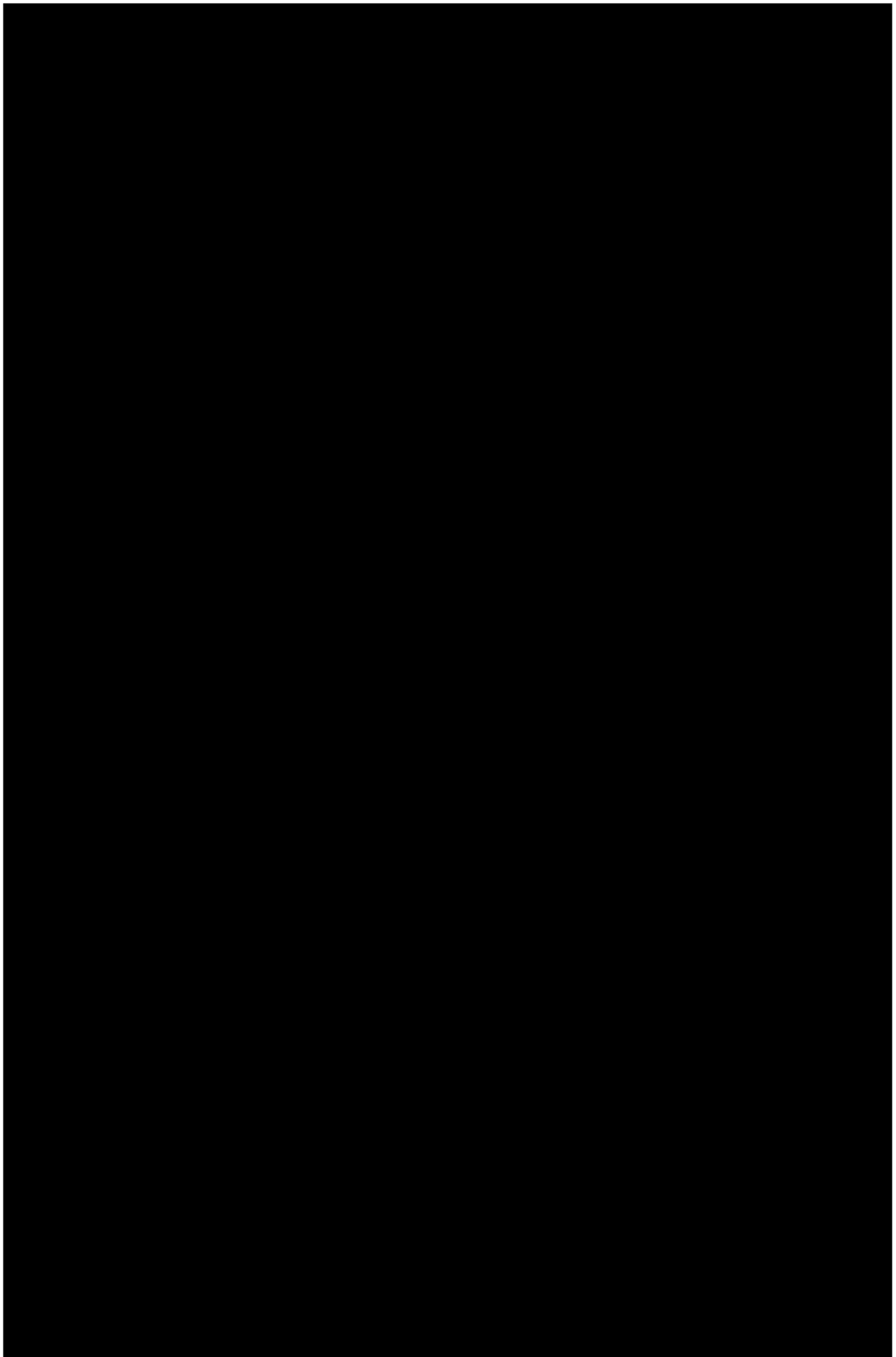
4 Response to confidential information in authorisation application

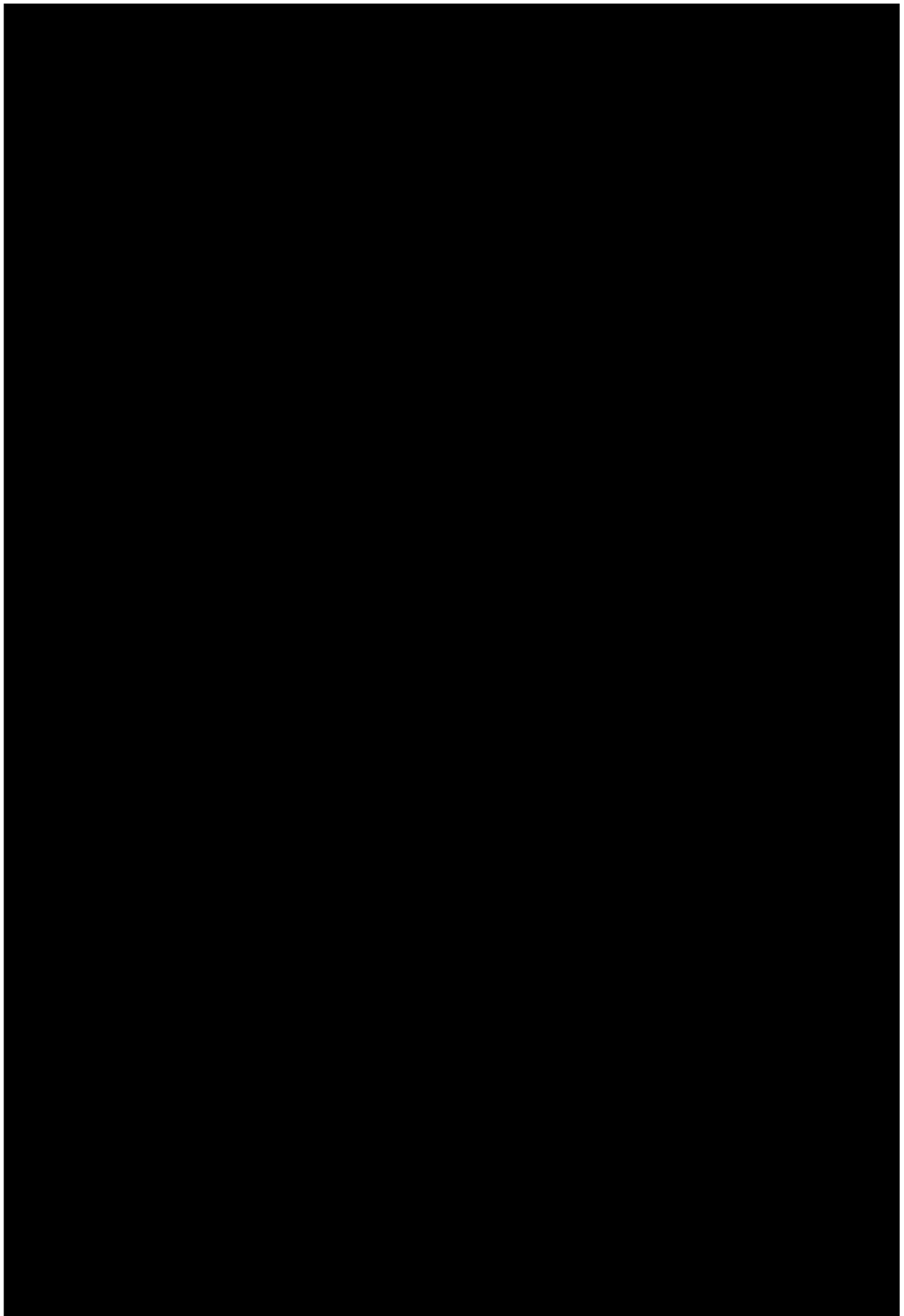


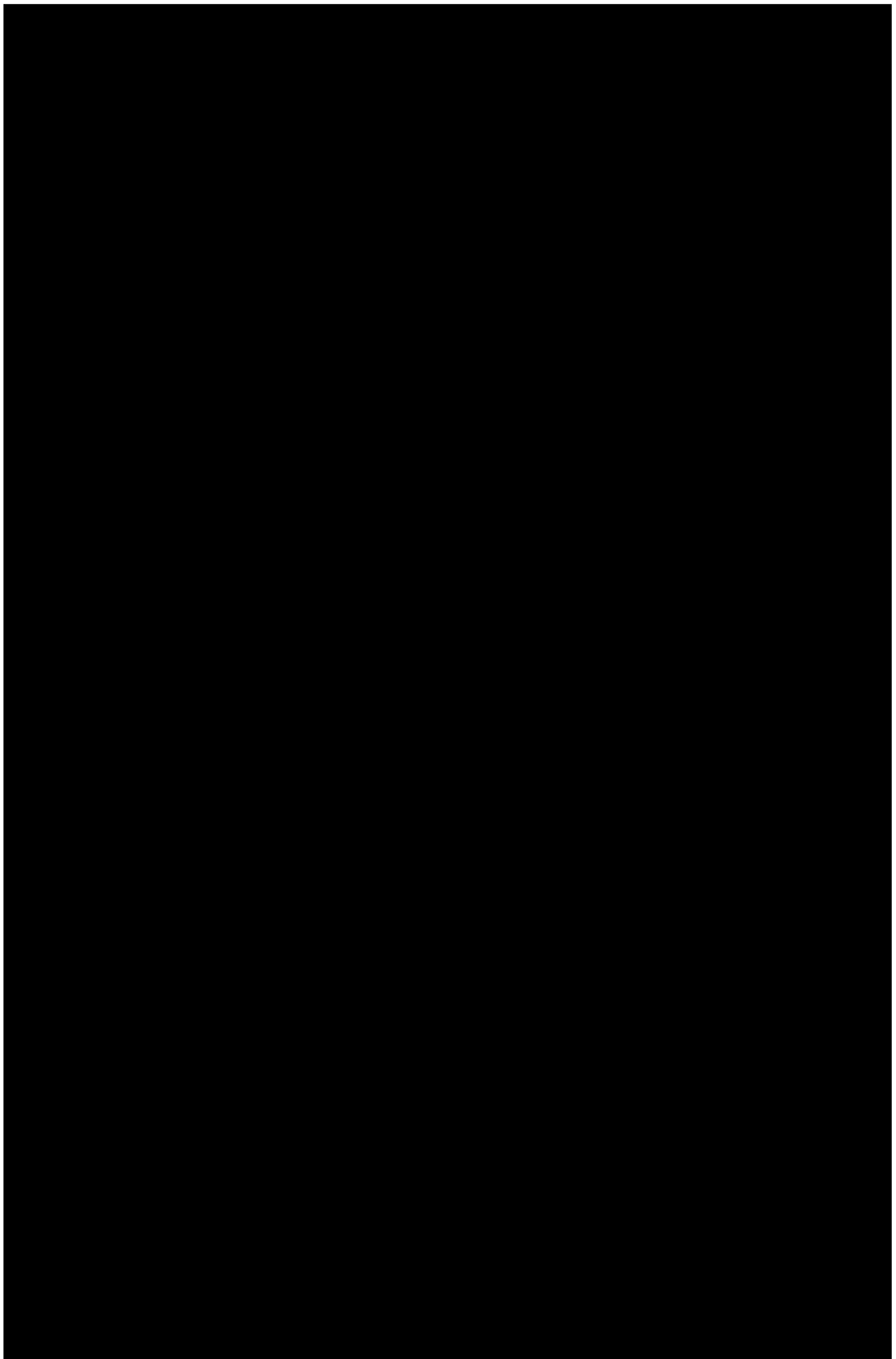


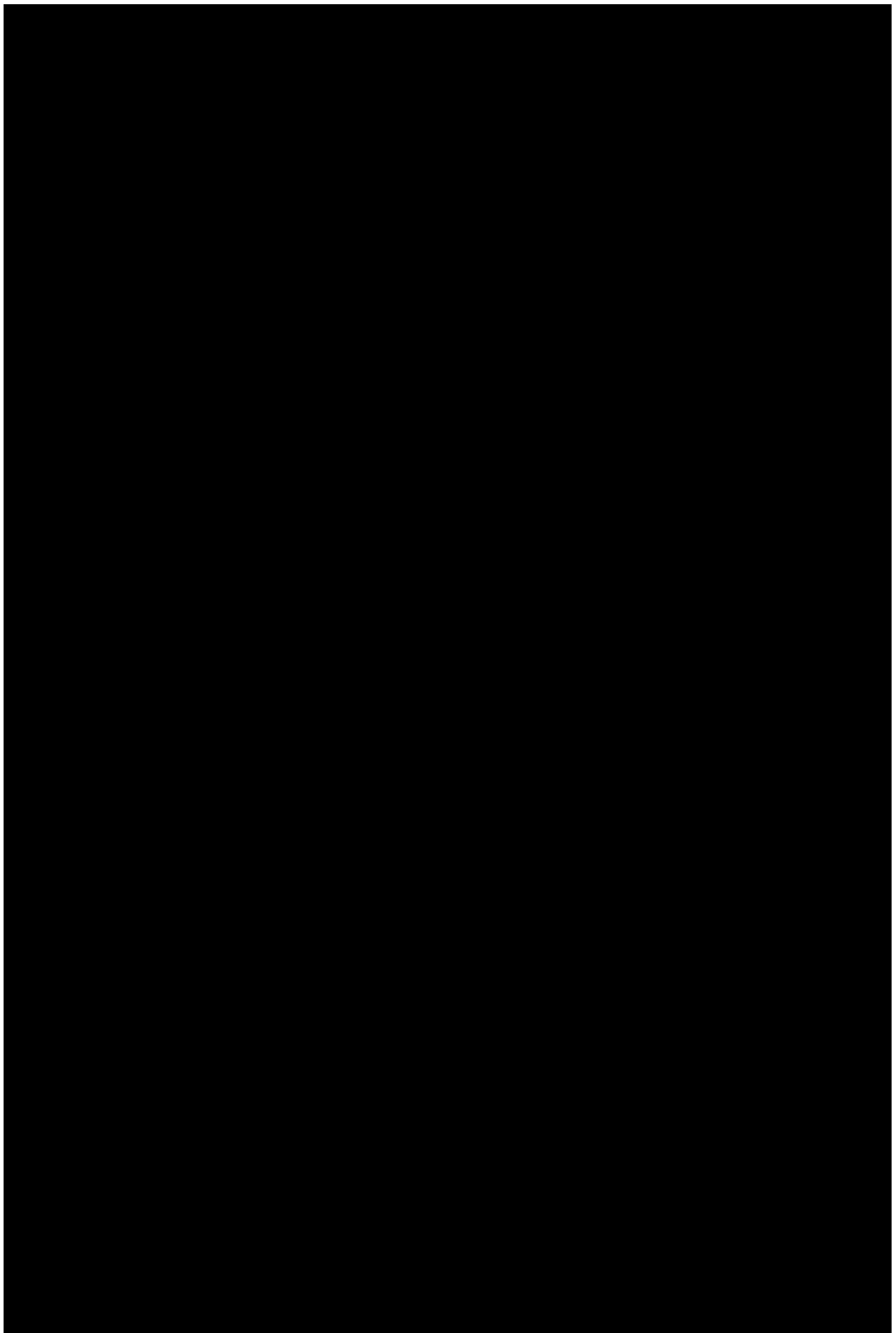












Treatment of remaining confidential information in Application

- 4.49 As previously explained, Cairns Airport is concerned that it has not been provided the full version of the confidential information provided in the Application. Rather, a summary of this information collated by the Applicants' lawyers has been provided. In these circumstances Cairns Airport submits that the ACCC should not place weight on any confidential information that has not been detailed in the Confidential Information summary letter.

18 February 2020



Australian Finance Industry Association



Car rental operators proposal to collectively negotiate with Cairns Airport

We refer to your email of 18 February 2020, in relation to the interim authorisation that your car rental members have been granted by the Australian Competition and Consumer Commission to collectively bargain with Cairns Airport.

Your email explained that the car rental operators had appointed a representative to commence collective negotiations with Cairns Airport and asked who the best person would be for this representative to get in contact with.

As we have previously advised your members, Cairns Airport is running a competitive Request for Tender (RFT) process in order to allocate new contracts for car rental space at Cairns Airport. This process is designed to:

- efficiently allocate the use of limited ground and terminal space between car rental operators and other airport users;
- efficiently allocate the limited front of house, parking booths and bays, and back-of-house facilities between car rental operators (given different locations and features are likely to have different values for different operators); and
- ensure that all successful car rental operators will deliver competitive, value for money, offerings to Cairns Airport's end customers.

Collective negotiations would undermine any competitive tension between car rental operators resulting in less efficient outcomes and poorer car rental offerings for Cairns Airport's end customers.

As such, Cairns Airport has no intention to collectively negotiate with your members. We consider that the RFT process will ensure that the negotiation of new agreements can be completed efficiently and expediently, with tenders due 13 March 2020 and completion date of 30 April 2020. We note that we have already agreed to hold over your clients' existing agreements until this date.

As explained in the RFT documentation, Cairns Airport is happy to meet individually with car rental operators following the receipt of a tender. Cairns Airport is also happy to meet individually with car rental operators to answer any questions regarding the RFT process.

Yours sincerely



26 February 2020

Reference: T003-200226-AFA0749

[REDACTED]
Cairns Airport Pty Ltd
Airport Avenue, Cairns Airport
Cairns
QLD 4870

[REDACTED]
Authorisation AA1000460-1: Car rental operators' proposal to collectively negotiate with Cairns Airport

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