

Cairns Airport Pty Ltd

Submission on Authorisation Applicants' request to delay authorisation process ref: AA1000460

6 May 2020

1 Introduction and summary

- 1.1 The ACCC has invited further written submissions regarding the Applicants' request to 'extend the timeframe for the application for authorisation and whether, in the current circumstances, it is appropriate for interim authorisation to remain in place'.
- 1.2 In short, Cairns Airport submits that the ACCC has sufficient evidence to decline the authorisation application on the basis that, under the correct application of the law, no public benefits can arise from the authorisation.
- 1.3 Given this, it would be inappropriate for the ACCC to grant the Applicants' request to extend the authorisation process. The onus is on the Applicants to satisfy the ACCC that the test for authorisation is met. If the Applicants cannot do this, they should either withdraw the application or the ACCC should decline the authorisation.
- 1.4 Further, the Applicants propose to voluntarily refrain from engaging in the conduct permitted under the interim authorisation. Given this there is clearly no clear need for interim authorisation and the ACCC should revoke the interim authorisation regardless of its decision regarding the extension of the authorisation process.
- 1.5 Cairns Airport provides this submission in addition to DLA Piper's letter of 29 April 2020.
- 1.6 This submission also addresses the ACCC's request for Cairns Airport to provide further information on how it is having regard to the national cabinet code of conduct for commercial leases.

2 The Applicants' request

Process to date

- 2.1 In November 2019 a group of car rental operators (**Applicants**) sought authorisation to collectively bargain with Cairns Airport in relation to the acquisition of airport space associated with the provision of car rental services at Cairns Airport (**Authorisation**).

- 2.2 On 13 February 2020 the ACCC granted interim authorisation to enable the Applicants to engage in the initial stages of collective negotiations with Cairns Airport (**Interim Authorisation**).
- 2.3 Since then the ACCC has issued its draft determination on the application and Cairns Airport has requested a pre-decision conference. On 30 April 2020 the ACCC convened the pre-decision conference and after a short discussion adjourned it to a later date.

Applicants' request to delay authorisation process

- 2.4 On 29 April 2020, the day before the pre-decision conference, the Applicants requested that the ACCC extend the period for making a determination on the Application by six months:¹

Under section 90 (10) and (10A) of the Competition and Consumer Act 2010 (CCA), the ACCC may determine that the relevant period for the consideration of an authorisation be extended for a period of up to 6 months.

Our clients request that the ACCC exercises its power under s90(10A)(b) to determine in writing to extend the relevant period of the abovementioned Application for Authorisation by an additional 6 months.

- 2.5 The Applicants also requested that the ACCC adjourn the pre-decision conference, which was requested by Cairns Airport, until at least August 2020.²

As a part of this request for extension of the statutory timeframe, our clients also request the ACCC adjourn the Pre-Decision Conference (PDC) currently scheduled for 30 April 2020 to a date to be determined, and for the reasons set out below, not before early August 2020.

- 2.6 The stated basis for the proposed extensions is that the Applicants have been affected by the Covid-19 pandemic and, as a result, they are unable to adequately engage with the ACCC's process.³

- 2.7 The Applicants also suggest that they would refrain from engaging in the proposed collective bargaining conduct, which is currently permitted under the interim authorisation, during interim period – although Cairns Airport notes the Applicants would be under no legal obligation to refrain from engaging in this conduct:⁴

The Applicants also propose to voluntarily and on a temporary basis refrain from engaging in the Proposed Conduct in the interim period and will update the ACCC in the event that they propose to recommence engaging in the conduct (notwithstanding the fact that the Applicants otherwise can do so pursuant to the ACCC's Interim Authorisation and Draft Determination).

¹ Email from A Guirguis to ACCC Request to delay PDC and extend timeframe for Car Rental Operators / Cairns Airport authorisation matter AA10460-1, dated 29 April 2020.

² Email from A Guirguis to ACCC Request to delay PDC and extend timeframe for Car Rental Operators / Cairns Airport authorisation matter AA10460-1, dated 29 April 2020.

³ Email from A Guirguis to ACCC Request to delay PDC and extend timeframe for Car Rental Operators / Cairns Airport authorisation matter AA10460-1, dated 29 April 2020.

⁴ Email from A Guirguis to ACCC Request to delay PDC and extend timeframe for Car Rental Operators / Cairns Airport authorisation matter AA10460-1, dated 29 April 2020.

Request for submissions

- 2.8 On 30 April 2020 the ACCC invited further written submissions regarding the authorisation Applicants' request to extend the timeframe for the application for authorisation and whether, in the current circumstances, it is appropriate for the interim authorisation to remain in place.

3 Timing of final decision

- 3.1 Cairns Airport submits that the ACCC should proceed to finalise its decision as soon as practical, and that they Applicants have not put forward valid reasons for prolonging the process.
- 3.2 The onus is on the Applicants to satisfy the Commission that the test for authorisation is met. If they cannot do so then the Applicants should withdraw the application or the ACCC should decline the Authorisation Application.
- 3.3 The ACCC should not allow the Applicants to drag out the process for proceeding to a final authorisation decision. Cairns Airport has other urgent matters, arising from the COVID-19 pandemic, which require management attention. Cairns Airport has engaged in the ACCC process in good faith in the hope that the process can be expediently concluded, and the matter can be put to bed. The authorisation process has proven to be an inconvenient distraction for senior management and Cairns Airport is eager to have the matter settled so it can have certainty over its operating environment and focus on other issues at this critical time for the business.
- 3.4 Cairns Airport has put forward a clear case for why, under the correct application of the law, the authorisation application should be declined.⁵ Cairns Airport simply will not engage in collective negotiations – so there cannot be any public benefit arising from the proposed conduct.
- 3.5 Meanwhile, the authorisation process has already resulted in unnecessary costs. The Applicants' have engaged a third party to attempt to collectively negotiate with Cairns Airport, and both parties have expended significant costs to participate in the authorisation process. Deferring the ACCC's decision so late in the process would only add to this cost.
- 3.6 Further to this, the Applicants now propose that they will voluntarily refrain from engaging in the conduct which they are permitted to undertake under the interim authorisation. This demonstrates unequivocally that the benefits of the authorisation *do not* outweigh the costs, as even the Applicants cannot even justify the cost of engaging in the conduct in circumstances where they are permitted to undertake it.
- 3.7 Cairns Airport acknowledges that the Applicants have devoted time and resources into preparing the Application and engaging with the ACCC's process to date. However, the ACCC should not allow the prolongment of the authorisation process where there is clearly no good case for authorisation. It is now late in the authorisation process and Cairns Airport has

⁵ Cairns Airport's April 2020 submission explains the correct application of the law with reference to relevant precedent.

put a comprehensive case for why authorisation should not be allowed. No amount of time will enable the Applicants to rectify a deficient case.

- 3.8 If the Applicants are genuinely convinced of the merits of their case, then the appropriate course of action is to withdraw the application and resubmit it (along with the work that has been undertaken to date), at a later date when they are prepared to commit the resources to engaging with the ACCC's process.

4 Timing of pre-decision conference

- 4.1 Cairns Airport requests that the ACCC reconvene the pre-decision conference as soon as possible.
- 4.2 Section 90A(6) of the *Competition and Consumer Act 2010 (Act)* provides Cairns Airport a statutory right to request a pre-decision conference, which must be scheduled to be held within 30 days.
- 4.3 Cairns Airport acknowledges that in some circumstances it may be pragmatic to adjourn a conference where it is convenient for all parties involved, however this is different from circumstances where the party who requested the conference wants to proceed.
- 4.4 If the Applicants do not want to participate in the pre-decision conference, then that is their prerogative. However this should not interfere with Cairns Airport's explicit statutory right to be heard.
- 4.5 Cairns Airport has expended time and resources to prepare a presentation for the ACCC on the key authorisation issues, and given this submits that it is appropriate that the pre-decision conference be reconvened at the earliest convenience so that Cairns Airport can present its case to the ACCC.

5 Interim Authorisation

- 5.1 The Applicants have now advised that they propose to voluntarily refrain from engaging in the conduct which is subject to the interim authorisation.⁶ This clearly demonstrates that there is no valid case for the interim authorisation and the ACCC should revoke the Interim Authorisation immediately, regardless of its decision regarding the extension of the authorisation process.
- 5.2 In circumstances where the Applicants themselves do not see the value in engaging in the conduct, there can be no good reason for allowing the interim authorisation, especially given the potential significant detriments identified in Cairns Airport's earlier submissions.

⁶ Email from A Guirguis to ACCC *Request to delay PDC and extend timeframe for Car Rental Operators / Cairns Airport authorisation matter AA10460-1*, dated 29 April 2020.

- 5.3 Cairns Airport notes that the ACCC is always able to reinstate the interim authorisation in the unlikely scenario that it becomes appropriate. However, it should not be left to the discretion of the Applicants when it is and is not appropriate for the interim authorisation to have effect (which would be the case if the Applicants were to voluntarily refrain from engaging in the conduct without the revocation of the interim authorisation).

6 Cairns Airport rental concessions and ongoing individual negotiations

- 6.1 On 4 May 2019 the ACCC requested that, as part of this submission, Cairns Airport provide further information on how it is having regard to the National Cabinet Mandatory Code of Conduct - SME Commercial Leasing Principles During COVID-19 (**Code of Conduct**).⁷
- 6.2 The Code of Conduct imposes a set of good faith leasing principles that are designed to apply when negotiating amendments with small businesses in the wake of the COVID-19 pandemic:⁸

The purpose of this Code of Conduct (“the Code”) is to impose a set of good faith leasing principles for application to commercial tenancies (including retail, office and industrial) between owners/operators/other landlords and tenants, where the tenant is an eligible business for the purpose of the Commonwealth Government’s JobKeeper programme.

These principles will apply to negotiating amendments in good faith to existing leasing arrangements – to aid the management of cashflow for SME tenants and landlords on a proportionate basis – as a result of the impact and commercial disruption caused by the economic impacts of industry and government responses to the declared Coronavirus (“COVID-19”) pandemic

⁷ <https://www.pm.gov.au/sites/default/files/files/national-cabinet-mandatory-code-ofconduct-sme-commercial-leasing-principles.pdf>

⁸ See Code of Conduct, page 1.



