

# Cairns Airport Pty Ltd

Submission on ACCC authorisation draft determination  
ref: AA1000460

15 April 2020

## 1 Introduction and summary

The ACCC's draft determination

- 1.1 On 26 March 2020 the ACCC released its draft determination which proposed to grant authorisation to a group of car rental operators (**Applicants**) to collectively bargain with Cairns Airport in relation to the acquisition of space associated with the provision of car rental services at Cairns Airport for a period of five years (**ACCC Draft Determination**).
- 1.2 The ACCC noted that Cairns Airport is unlikely to negotiate with the Applicants. However, the ACCC considered that it did 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.
- 1.3 The ACCC considered, 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 the little detriment to the public resulting from the conduct.
- 1.4 The conclusions of the ACCC are superficial, irrational and contrary to law.

The ACCC's draft determination makes a fundamental error of law

- 1.5 The ACCC's stated approach of undertaking its analysis on the *assumption* that collective negotiations would be successful, without a proper analysis of whether this *would likely* occur in practice, is contrary to the well-established legal precedent regarding the ACCC's statutory task.
- 1.6 The ACCC must be satisfied that there is a real chance of the purported benefits arising from proposed conduct, as a matter of commercial reality. The ACCC cannot take into account benefits which are speculative or a mere possibility, let alone benefits which are based on unfounded assumptions
- 1.7 The clear evidence before the ACCC is that Cairns Airport will not, and has not to date, engaged in collective negotiations. As such, the benefits identified by the ACCC are purely speculative and are inconsistent with the commercial reality.

- 1.8 This means that the authorisation cannot result in public benefits and the ACCC cannot allow the authorisation.

ACCC conclusion does not follow from its analysis of likely public benefits

- 1.9 Even if the ACCC proceeds to undertake its assessment of the public benefits on the erroneous assumption that negotiations would be successful, Cairns Airport submits that ACCC's conclusion that there is some 'small benefit'<sup>1</sup> is inconsistent with its own reasoning.

- 1.10 At paragraph 4.46 the ACCC concludes:

*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.*

- 1.11 However the ACCC previously concluded that there are no benefits arising from greater input into agreements:

1.11.1 At paragraph 4.35 of the Draft Determination the ACCC states: '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'.

1.11.2 The only efficiency identified by the Applicants arising from greater input into agreements is 'increased efficiency of the allocation of space at Cairns Airport'.<sup>2</sup>

1.11.3 However, at paragraph 4.37 the ACCC concludes: '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.'

1.11.4 Accordingly the ACCC conclusion at paragraph 4.46 is without foundation and inconsistent with the ACCC own analysis and conclusions.

- 1.12 Furthermore, the ACCC's conclusion that there will be 'some transaction cost savings' does not hold as a matter of logic.

1.12.1 As the ACCC acknowledges Cairns Airport commenced in late December a RFT process to allocate the car rental facilities at Cairns Airport upon the expiry of the existing leases. By 13 March 2020 all existing car rental operators at Cairns Airport (being the Applicants) had lodged substantive responses to the RFT.

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<sup>1</sup> ACCC Draft Determination, page 1.

<sup>2</sup> ACCC Draft Determination, para 4.36.

- 1.12.2 Accordingly, the Applicants have already incurred costs in participating in the existing RFT process. The Applicants did so prima facie on an individual basis and without any collusion. Therefore it is irrational to conclude that the Proposed Conduct will save costs, as the relevant costs to be saved have already been incurred and continue to be incurred.
- 1.12.3 The correct conclusion is that authorisation is likely to *increase* the Applicants and Cairns Airports transaction costs as it would create an additional collective negotiation process with additional costs.

Even if speculative benefits are taken into account, there are no clear benefits arising from the authorisation

- 1.13 Even if the ACCC proceeds to undertake its assessment of the public benefits on the erroneous assumption that negotiations would be successful, Cairns Airport submits that even the 'small benefit' identified in the ACCC's draft determination is overstated.

- 1.14 This is because:

- 1.14.1 there is no significant imbalance of bargaining power to be remedied (the Applicants' primary rationale for the authorisation), [REDACTED]

- 1.14.2 [REDACTED]

- 1.14.3 the Applicants have not identified any bonafide efficiencies that would occur if information asymmetry is reduced; and

- 1.14.4 the Applicants have not established that the authorisation would result in a reduction in transaction costs. Rather, it is likely that collective negotiations will increase transaction costs, given the additional steps involved in undertaking a separate collective negotiation process.

- 1.15 Further, it is highly unlikely that any costs savings would be passed onto consumers. As such, the ACCC should give very little weight, if any, to purported cost savings in assessing the public benefits arising from the authorisation.

The authorisation would result in significant detriments which outweigh any benefits

- 1.16 Even if the ACCC maintains its conclusion that there is 'some small benefit' attributable to the authorisation, Cairns Airport submits that this is outweighed by the significant public detriments that arise from the authorisation.

- 1.17 The Draft Determination materially understates the public detriments that would arise as a result of the authorisation.

1.18 Authorisation could materially prejudice the competitive RFT process underway which is designed to facilitate greater competition between the Applicants at Cairns Airport. The RFT process is designed to create competition for and competition in the market for the benefit of consumers. These benefits could be materially reduced, if not lost, as a result of the authorised collective negotiations. That is the ACCC is proposing to sanction cartel conduct, without any benefits, at the cost of a competitive tender process. This outcome is an unequivocal detriment which the ACCC has failed to have any regard in the Draft Determination.

1.19 [REDACTED]

1.20 [REDACTED]

1.21 [REDACTED]

1.22 [REDACTED]

1.23 [REDACTED]

1.24 [REDACTED]

1.25 When all of the information available is assessed, it is clear that there are significant public detriments, which outweigh the small public benefits identified by the ACCC. As such the ACCC must reject the authorisation application.

#### Cairns Airport requests a conference

1.26 The Draft Determination document also invited interested parties to request that the ACCC hold a conference to discuss the Draft Determination, consistent with section 90A of the Act. As set out in the email correspondence from DLA Piper of 9 April 2020, Cairns Airport requests a conference in accordance with those provisions.



## Structure of this submission

1.27 This submission is split into six sections:

- 1.27.1 Section 2 explains why the ACCC's approach to analysing the potential benefits of the transaction constitutes an error of law, and why, when analysed properly there are no public benefits;
- 1.27.2 Section 3 explains why, even if it were appropriate for the ACCC to assume that collective negotiations would be successful, the benefits identified by the ACCC are overstated.
- 1.27.3 Section 4 explains why the ACCC has not had sufficient regard to the detriments that would occur as a result of authorisation.
- 1.27.4 Section 5 lays out Cairns Airport's submissions in relation to the authorisation period and the scope of the authorisation.
- 1.27.5 Section 6 provides an update regarding the COVID-19 pandemic and how it impacts on Cairns Airport's operations, and the ACCC's analysis.

## 2 The ACCC must not weigh speculative benefits

- 2.1 This section explains why the ACCC's approach to analysing the potential benefits of the transaction constitutes an error of law, and why, when analysed properly there are no public benefits that will occur as a result of the authorisation.

### ACCC draft determination

- 2.2 The ACCC's draft determination concludes that it is not required to identify the likely outcome of collective negotiations and that it is able to simply assume that collective negotiations would be successful in its assessment of the public benefits arising from the Authorisation:<sup>3</sup>

*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.*

- 2.3 The basis for the ACCC's conclusion that it can make its assessment of public benefits on the assumption that the Applicants would be successful in negotiating with Cairns Airport, is unclear, and is inconsistent with the well-established case law which requires the ACCC to be satisfied that there is a real chance, and not a mere possibility, that a benefit or detriment would eventuate.<sup>4</sup> The Australian Competition Tribunal has made it clear that it is not satisfactory for a benefit or detriment to be speculative or a theoretical possibility.<sup>5</sup>
- 2.4 Indeed, even the Applicants accept that 'it is well established that the ACCC should not take into account merely speculative benefits, being benefits which are unlikely to arise based on commercial reality'.<sup>6</sup>
- 2.5 The ACCC has failed to undertake an assessment of whether these benefits would arise as a matter of the commercial reality. This is erroneous, and inconsistent with its statutory task before the ACCC.
- 2.6 While Cairns Airport has previously set out the relevant precedent on this issue the ACCC has not engaged with the relevant jurisprudence. The next section briefly lays out the relevant precedent again.

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<sup>3</sup> ACCC Draft Determination, page 7, para 12.

<sup>4</sup> *Qantas Airways Limited* (2005), ACompT 9, page 156.

<sup>5</sup> *Qantas Airways Limited* (2005), ACompT 9 page 156.

<sup>6</sup> Applicants March 2020 Submission, para 3.1.

## Australian Competition Tribunal precedent

- 2.7 In identifying and weighing the public benefits and detriment associated with authorised conduct the ACCC must compare the 'future with' the authorised conduct (the factual), and the 'future without' the authorised conduct (the counterfactual). This test was explained by the Tribunal in *Re QIW Ltd* and quoted with approval in *Qantas Airways Limited* (2005), ACompT 9 (*Qantas*):<sup>7</sup>

*The test is not to compare the present situation with the future situation, were the acquisition to take place: a 'before and after' test. Rather the test is to appraise the future, were the acquisition to take place, in light of the alternative outcome, were the acquisition not to take place: the 'future with-and-without' test.*

*That does not mean that we prophesy the future. As QCMA expressed the point ... :*

*'We are to be concerned with probable effects rather than with possible or speculative effects. Yet we accept the view that the probabilities with which we are concerned are commercial or economic likelihoods which may not be susceptible of formal proof. We are required to look into the future, but we can be concerned only with the foreseeable future as it appears on the basis of evidence and argument relating to the particular application.'*

- 2.8 Clearly this requires the ACCC to assess the probable effects of the authorisation, and does not permit the ACCC to simply *assume* that collective negotiations will be successful. Rather, the ACCC must assess the probable effects of the authorisation based on the commercial likelihood that collective negotiations will be successful.
- 2.9 In *Qantas*, following an assessment of the relevant authority, the Australian Competition Tribunal articulated the circumstances in which a benefit or detriment can be taken into account in assessing an authorisation:<sup>8</sup>

*Thus, 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 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*

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<sup>7</sup> *Re QIW Ltd* (1995) 132 ALR 225 at 276, quoted with approval in *Qantas Airways Limited* (2005), ACompT 9, para 156.

<sup>8</sup> *Qantas Airways Limited* (2005), ACompT 9 at para 156, discussed at paras 152-165.

*(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.*

- 2.10 The ACCC's position that it can assume that collective negotiations would be successful directly contradicts this established principle. While Cairns Airport's initial submission clearly laid out this jurisprudence, the ACCC has offered no explanation for why it has deviated from this established precedent.
- 2.11 The ACCC must undertake an assessment as to whether, as a matter of commercial reality, it is satisfied that the purported benefits are sufficiently capable of exposition. Naturally, this requires an assessment of whether collective negotiations are likely to be effective.
- 2.12 It is irrational to assume that collective negotiations will occur when the evidence before the ACCC is unequivocally to the contrary.

#### ACCC precedent

- 2.13 While the clearly established position of the Tribunal has precedence over the ACCC's previous decisions, Cairns Airport submits that the Draft Determination is also inconsistent with the ACCC's previous decisions.

#### ApplePay Authorisation

- 2.14 The ACCC cited its previous decision regarding the Applepay Authorisation,<sup>9</sup> in support of its position that it could assess the likely public benefits assuming that the Applicants would be successful in collective negotiations.<sup>10</sup>

*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. However in making its determination, the ACCC took into account likely benefits and detriments if the banks were successful in negotiating with ApplePay.*

- 2.15 While in some circumstances it may be appropriate to consider whether the benefits, if they did arise, would be outweighed by the detriments, the ACCC is not permitted to simply assume that they would occur as the basis for making an authorisation.

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<sup>9</sup> ACCC Bendigo and Adelaide Bank & Ors - Authorisation - A91546 & A91547 – Final Determination 31 March 2017 (ApplePay Determination).

<sup>10</sup> ACCC Draft Determination, para 4.17.



2.16 In ApplePay the ACCC was of the view that *even if* the collective negotiations were to be successful, the detriments that would result from the conduct would outweigh those benefits.<sup>11</sup> In this sense, whether or not the public benefits claimed would arise was a moot point, as it was inconsequential to the outcome of the authorisation determination. In that case it may have been appropriate for the ACCC to proceed on the basis that the benefits would occur in order to simplify its analysis, as a prediction of whether collective negotiations would be successful would not have altered the outcome of the authorisation determination.

2.17 This is in direct contrast to the ACCC's Draft Determination in this matter. In this case the ACCC has concluded that if the benefits would arise as a result of collective negotiations, they *would not* be outweighed by the detriments. This distinction is critical. It means that whether or not the benefits arise is critical to the outcome of the authorisation determination. As such, the ACCC must undertake a proper analysis of whether, as a matter of commercial reality, the benefits are likely to arise – that is, will collective negotiations be successful – consistent with the well-established case law.

2.18 Indeed in ApplePay the ACCC expressly accepts that in assessing applications for authorisation it may be appropriate to assess the likely outcomes of collective negotiations in order to determine whether a public benefit is likely to result:<sup>12</sup>

*In assessing the applications for authorisation, in order to determine whether the claimed public benefits and detriments are likely to result, it is open to the ACCC to consider the likely outcome of the collective negotiations.*

2.19 However, in ApplePay this was not necessary as the detriments would outweigh the benefits in any event. The ACCC continued:<sup>13</sup>

*However, in this instance, rather than attempting to predict the likely outcomes from the collective negotiations, the ACCC has assessed whether the claimed public benefits are likely to arise assuming that the Applicants were successful in negotiating NFC access and App Store access, and weighed these against the likely public detriment including from any resulting lessening of competition. For the reasons outlined, on balance the ACCC is not satisfied that there would be a net public benefit likely to arise from the proposed conduct.*

### *Perth Airport*

2.20 The ACCC is required to take into account submissions made in relation to the application. Despite referring to the ApplePay decision, the ACCC's draft determination does not have had regard to its own highly analogous decision in relation to Perth Airport, which was explained in detail in Cairns Airport's initial submission.<sup>14</sup>

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<sup>11</sup> ACCC ApplePay Determination, page 75.

<sup>12</sup> ACCC Applepay Determination, page V.

<sup>13</sup> ACCC Applepay Determination, page V.

<sup>14</sup> Cairns Airport December 2019 Submission, section 3 and section 5, paras 5.6-5.8.

- 2.21 The circumstances in the Perth Airport Decision are almost identical to the facts in this matter, as previously submitted by Cairns Airport.
- 2.22 The ACCC's draft determination has not explained why the same reasoning does not apply to Cairns Airport and the current authorisation. In particular the ACCC's previous conclusions that:
- 2.22.1 the airport would not engage in negotiations unless it had something to gain;
  - 2.22.2 even if the airport did collectively negotiate, the rental operators would be unlikely to secure a better deal; and
  - 2.22.3 allowing the applicants to collectively bargain, would result in the sharing of commercially sensitive information (either intentionally or unintentionally), causing a harm to competition.
- 2.23 The ACCC has failed to have regard to a very relevant matter and is acting inconsistently with its own prior decisions, without explanation.

Will benefits arise from collective negotiations?

- 2.24 In circumstances where the ACCC concludes that the detriments do not outweigh the purported benefits, the ACCC must be satisfied that there is a real chance that the benefits purported by the Applicants would arise. To establish the purported benefits in this case, the ACCC must be satisfied that Cairns Airport would engage in collective negotiations and that those negotiations would be successful for the Applicants.
- 2.25 This conclusion is clearly not supported by the evidence.
- 2.26 This has been clearly demonstrated by Cairns Airport's consistent and unequivocal communications with the rental operators that it will not engage in collective negotiations<sup>15</sup> as well as Cairns Airport's conduct to date which constitutes the most probative evidence as to its future behaviour.<sup>16</sup>
- 2.27 The Applicants' submission explains that they are 'hopeful' that Cairns Airport will engage in collective negotiations, and that 'it is possible' that Cairns Airport 'may' engage in collective negotiations:<sup>17</sup>

*It is possible that if the RFT process does not produce the optimal commercial outcome that CAPL had hoped, CAPL may choose to extend the timeline of its RFT process or engage with collective negotiations so that it can consider the potential outcomes of the collective negotiations and adopt a course of action /which is favourable to its commercial interest.*

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<sup>15</sup> See, for example, Cairns Airport's 10 March 2020 submission, Attachment A – Letter to AFIA dated 18 February 2020.

<sup>16</sup> That is, Cairns Airport has not engaged in collective negotiations to date.

<sup>17</sup> Applicants 6 March 2020 submission, paras 7.6 and 7.7.

*The Applicants remains [sic] hopeful that CAPL will engage with the Applicants in the collective negotiation process as it presents a valuable commercial opportunity to propel CAPL's growth in a sustainable manner.*

- 2.28 'Hopefulness' and 'possibility' are clearly not a satisfactory bases for the ACCC to find that public benefits would likely eventuate in light of clear evidence from Cairns Airport that it will not engage in collectively negotiations. The benefits purported by the Applicants are speculative at best and do not constitute a real chance.
- 2.29 The ACCC needs to be satisfied that the claimed benefits are *likely* to flow from the proposed conduct. However the ACCC concludes that 'Cairns Airport is *unlikely* to negotiate with the Applicants'.<sup>18</sup> Accordingly it is irrational for the ACCC to conclude that benefits are likely to arise from collective negotiations that are unlikely to occur.

## Conclusion

- 2.30 There is no basis for the ACCC to conclude there is a commercial likelihood or real chance the purported benefits of authorisation will arise. Cairns Airport will not engage in collective negotiations and as such, the ACCC cannot be satisfied that there is a net public benefit, even if the significant detriments are not taken into account, and, consistent with its decision regarding Perth Airport, the ACCC must deny the authorisation.

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<sup>18</sup> ACCC Draft Determination, page 1.



### 3 Public benefits

- 3.1 Even if the ACCC proceeds to undertake its assessment of the benefits on the assumption that negotiations would be successful (an approach which Cairns Airport considers would constitute an error of law), Cairns Airport submits that the 'small benefit'<sup>19</sup> identified in the ACCC's draft determination is overstated.
- 3.2 Cairns Airport submits even these small benefits are unlikely to arise as:
- 3.2.1 there is no significant imbalance of bargaining power to be remedied (the Applicants' primary rationale for the authorisation), as demonstrated by the successful individual negotiations with one of the Applicants;
  - 3.2.2 the authorisation does not improve, but rather harms, allocative efficiency at Cairns Airport, as demonstrated by Applicants' attempts to collectively reduce service to consumers inside both terminals and at the international terminal altogether, despite evidence that the rental operators value the ability to offer those services;
  - 3.2.3 the Applicants have not identified any bonafide efficiencies that would occur if information asymmetry is reduced; and
  - 3.2.4 the Applicants have not established that the authorisation would result in a reduction in transaction costs. Rather, it is likely that collective negotiations will increase transaction costs, given the additional steps involved in undertaking a separate collective negotiation process.
- 3.3 Further, it is highly unlikely that any costs savings would not be passed onto consumers in any event. As such, the ACCC should give very little weight to any cost savings in assessing the public benefits arising from the authorisation.
- 3.4 If the ACCC maintains its conclusion that there is 'some small benefit' attributable to the authorisation, Cairns Airport submits that this benefit is so immaterial that it is undoubtedly outweighed by the detriments that arise from the authorisation.

#### Addressing an imbalance in bargaining power

- 3.5 The Applicants primary rationale for the authorisation is that it would result in public benefits because it would address an imbalance in bargaining power between the Applicants and Cairns Airport.
- 3.6 Cairns Airport agrees with the ACCC's view that redressing an imbalance of bargaining does not constitute a public benefit in itself, and that public benefits will only arise where this leads to efficiencies.<sup>20</sup>

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<sup>19</sup> ACCC Draft Determination, page 1.

<sup>20</sup> ACCC Draft Determination, para 4.23.



3.7 However, Cairns Airport does not consider that there is a significant imbalance in bargaining power between Cairns Airport and the rental operators to begin with.

3.8 As previously submitted the Applicants are large, sophisticated corporates, some of which have higher revenues than Cairns Airport. The publicly available annual revenue figures for the car rental operators is as follows:

3.8.1 Thrifty \$731m;<sup>21</sup>

3.8.2 Europcar \$236m;<sup>22</sup>

3.8.3 Hertz \$419m;<sup>23</sup> and

3.8.4 Avis Budget Group \$451m.<sup>24</sup>

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

3.12 As discussed further in Section 6, the current COVID-19 pandemic further decreases Cairns Airport's bargaining power, as it is in a unique position where it is reliant on rental operators (along with other airport users) to recover its fixed costs, and those airport users have a credible threat of shutting down operations at Cairns Airport. This is demonstrated in Cairns Airport's agreement to provide concessions under the existing contractual arrangements with rental operators.

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<sup>21</sup> [https://www.dnb.com/business-directory/company-profiles.kingmill\\_pty\\_ltd.ede3994cd7601677dc6408b67a00378c.html](https://www.dnb.com/business-directory/company-profiles.kingmill_pty_ltd.ede3994cd7601677dc6408b67a00378c.html)

<sup>22</sup> [https://www.dnb.com/business-directory/company-profiles.cla\\_trading\\_pty\\_ltd.5ffa1c212432c61ea2bac8577512a080.html](https://www.dnb.com/business-directory/company-profiles.cla_trading_pty_ltd.5ffa1c212432c61ea2bac8577512a080.html)

<sup>23</sup> [https://www.dnb.com/business-directory/company-profiles.hertz\\_australia\\_pty\\_limited.62e4e3b35e8ca30d2bdbcab7d99b3c3.html](https://www.dnb.com/business-directory/company-profiles.hertz_australia_pty_limited.62e4e3b35e8ca30d2bdbcab7d99b3c3.html)

<sup>24</sup> [https://www.dnb.com/business-directory/company-profiles.w\\_t\\_h\\_pty\\_ltd.477e74a69d71c8a669eab1242cf957ad.html](https://www.dnb.com/business-directory/company-profiles.w_t_h_pty_ltd.477e74a69d71c8a669eab1242cf957ad.html)

## Greater input into agreements and reduced information asymmetry

### *Removal of information asymmetry does not lead to efficiencies*

- 3.13 The ACCC seems to conclude that addressing information asymmetry in itself can constitute a public benefit.<sup>25</sup>

*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*

- 3.14 Reducing information asymmetry is not, in itself, a public benefit. Rather, a public benefit will arise when it results in efficiencies, such as more efficient outcomes from negotiations. However, the ACCC has not identified the more efficient outcomes that would be facilitated through reducing information asymmetry, noting only that they 'may' be facilitated.

- 3.15 Rather, the ACCC goes on to conclude that the authorisation is not likely to result in an increase in the efficiency of space allocation at Cairns Airport:<sup>26</sup>

*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.*

- 3.16 Cairns Airport agrees with the ACCC's analysis that the authorisation, including the removal of information asymmetries, will not lead to increased allocative efficiency at Cairns Airport, and therefore does not constitute a public benefit. Rather, Cairns Airport submits that the authorisation will harm allocative efficiency at the airport, as discussed in more detail in Section 4.

### *Greater input into agreements*

- 3.17 The ACCC concludes that the authorisation is likely to result in some public benefit by providing an opportunity for greater input into agreements.<sup>27</sup>

- 3.18 The ACCC reasons that if the authorised conduct results in increased input of the Applicants into the agreements and this results in mutually beneficial efficiencies, it will constitute a public benefit.

*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*

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<sup>25</sup> ACCC Draft Determination, para 4.33.<sup>26</sup> ACCC Draft Determination, para 4.3

<sup>26</sup> ACCC Draft Determination, para 4.3

<sup>27</sup> ACCC Draft Determination, para 4.46.

*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.*

3.19 The ACCC only identifies the increased efficiency of the allocation of space at Cairns Airport as a result of increased input into the agreements.<sup>28</sup>

3.20 However the ACCC concludes that such efficiencies are unlikely to arise:

*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.*<sup>29</sup>

3.21 Therefore, there is no basis for the ACCC to find that efficiencies arise from increased input into agreements *as a result* of the proposed authorisation.

Transaction cost savings have not been established

3.22 The ACCC considers that the authorisation is likely to result in transaction cost savings by allowing the Applicants to share in costs of preparing for negotiations or individual tenders through identifying common contractual problems and sharing the costs of engaging expert advice and administrative services; as well as reducing the costs to Cairns Airport if it chooses to engage in collective negotiations.<sup>30</sup>

3.23 The evidentiary basis for the ACCC's conclusion that there would be savings in transaction costs under the authorisation is not clear. There is no material before the ACCC to establish that the costs savings are of substance and durable.<sup>31</sup>

3.24 For example it is not clear what expert or administrative services are required to negotiated individually with Cairns Airport.

3.25 The Applicants claim that 'the key source of transaction cost savings will be based on enabling the Applicants and [Cairns Airport] to identify common contractual problems'.<sup>32</sup> However, the identified contractual terms which the rental operators wish to negotiate with Cairns Airport are well-known and have been discussed with Cairns Airport previously. Negotiations regarding these terms are a purely commercial matter and are a matter of risk allocation versus price trade-offs. It is unclear what legal or other expert advice is required to prepare for the negotiation of these terms.

3.26 With regard to legal costs, Cairns Airport considers it highly unlikely that the individual operators will not seek their own legal advice on contractual issues, either in-house or

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<sup>28</sup> ACCC Draft Determination, para 4.36

<sup>29</sup> ACCC Draft Determination, para 4.37.

<sup>30</sup> ACCC Draft Determination, para 4.41.

<sup>31</sup> *Qantas* at para 205: *Re Rural Traders Cooperative (WA) Ltd* (1979) 37 FLR 244 at 262.

<sup>32</sup> Applicants' 5 February 2020 submission, para 3.10.



externally. As such, the costs of further expert legal advice is likely to arise solely from the attempted collective negotiations and should be considered as a detriment.

- 3.27 In any event, as previously submitted, the costs identified by the Applicants to date are so immaterial that they cannot be considered to be material to the assessment of public benefits.<sup>33</sup>

*No transaction costs savings*

- 3.28 As acknowledged by the ACCC, Cairns Airport commenced a competitive tender for the award to car rental facilities at Cairns Airport in late December 2019. By 13 March 2020 each Applicant had submitted a detailed tender response including detailed pricing proposals and, importantly, detailed proposed amendments to the draft lease and license documentation.
- 3.29 Accordingly, the Applicants have already incurred the transaction costs which the Applicants claim could be saved through authorisation (including the 'key source of transaction cost savings' being the identification of contractual problems).
- 3.30 Accordingly there can no longer be any transaction cost savings likely to result from authorisation. To conclude otherwise is illogical.

*Transaction costs are likely higher with authorisation*

- 3.31 The Applicants have gone to great length to point out that the collective negotiation process is in addition to and separate from the RFT process.<sup>34</sup> This suggests that the additional collective negotiation process is highly likely to result in additional costs. These additional costs will produce no benefit as Cairns Airport will not engage in collective negotiations.
- 3.32 As previously submitted these additional costs are likely to be substantial. Collective negotiations require the appointment of an independent negotiator to act as a middleman and attempt to coordinate not two, but seven parties to the collective negotiations. Each rental operator will still have to consider its own position, what services it desires, its preferred contractual terms, how much it is prepared to pay, and what trade-offs it is prepared to make, in addition to having the terms of the agreement reviewed and approved by its own legal representatives. The parties will then have to incur cost further cost in engaging in the back-and-forth required to decide on a common negotiating position, while paying the additional costs of the negotiator. Further back-and-forth would then be required to seek the Applicants' views on Cairns Airport's engagement, and to ultimately settle on an agreement.
- 3.33 The ACCC does not appear to have considered the likelihood that these additional costs are greater than any transaction cost savings.

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<sup>33</sup> Cairns Airport 10 March 2020 Submission, paras 4.38-4.43.

<sup>34</sup> Applicants March 2020 Submission, section 7.



### *Cairns Airport's costs will not be reduced*

- 3.34 With regards to the ACCC's contention that the costs to Cairns Airport may be reduced, as discussed above, there is no basis for the ACCC to conclude that Cairns Airport will engage in collective negotiations, and as such this purported benefit should not be taken into account.

### *Conclusion on transaction costs*

- 3.35 Cairns Airport submits that due to the fact that the Applicants have already incurred transaction costs from their voluntary participation in the existing competitive tender process there can be no transaction cost savings from collective negotiations. Further, the additional processes involved in collective negotiations will likely result in increased transactional costs if the authorisation is allowed.

### *Cost savings for car rental customers*

- 3.36 The ACCC does not consider it necessary for cost savings resulting from the authorisation to be passed through in order to constitute a public benefit.<sup>35</sup>

*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.*

- 3.37 In determining whether cost savings constitute a public benefit the ACCC must apply a form of total welfare standard. Cairns Airport agrees that any transaction costs savings could potentially constitute a benefit, even if these savings are not passed through to consumers *where the ACCC can identify another benefit arising from the cost saving* – though they should be given very little weight, especially given the cost savings are likely to be minimal or non-existent.
- 3.38 However, with regards to any cost savings to rental operators arising from the Applicants achieving better terms with Cairns Airport, these will not result in any public benefit as it would only result in a transfer of rents from Cairns Airport to rental operators, and no increase in total welfare.
- 3.39 The ACCC concludes that it does not have sufficient information regarding the competitive pressures in the market for car rental services at Cairns Airport to conclude that cost savings will be passed through to consumer.<sup>36</sup>
- 3.40 In the absence of sufficient information to draw a conclusion the ACCC must find that there is no public benefit. To find a benefit without sufficient information would be purely speculative.
- 3.41 However, Cairns Airport submits that there could be sufficient information for the ACCC to conclude that cost savings will not be passed onto consumers. The pricing information provided in the appendices to Cairns Airport's initial submission clearly shows that the rental

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<sup>35</sup> ACCC Draft Determination, para 4.42.

<sup>36</sup> ACCC Draft Determination, para 4.55.

operators price at what the car rental services market will bear, not based on their underlying costs, indicating that any costs savings will likely not be passed on to consumers.

- 3.42 This holds even if the pricing mechanism of some rental operators provides for the direct pass-through of cost reductions. What matters to end consumers is the overall price, and Cairns Airport has shown that the rental operators' price at what the market will bear.

## 4 Public Detriments

- 4.1 The ACCC draft determination is that the authorisation 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.<sup>37</sup> The ACCC considers that this 'little' detriment is outweighed by the 'small' benefit that would arise as a result of the authorisation.
- 4.2 Cairns Airport submits that the detriments as assessed by the ACCC are significantly understated.
- 4.3 This section explains why the authorisation, if it is to have any effect, will result in significant detriments that outweigh the 'small harm' identified by the ACCC. In particular:
  - 4.3.1 If the authorisation is to have any effect it is likely to prejudice Cairns Airport's competitive RFT process;
  - 4.3.2 The Applicants intended outcome of collective negotiations will result in a significant reduction in service to downstream consumers;
  - 4.3.3 The authorisation will reduce allocative efficiency and could result in a standardisation of services at Cairns Airport.

### Authorisation is prejudicial to competitive tender process

- 4.4 Authorisation will materially prejudice the competitive tender process underway which is designed to facilitate greater competition between the Applicants at Cairns Airport. The tender process is designed to create competition for and competition in the market for the benefit of consumers. These benefits will be materially reduced if not lost as a result of authorisation of collective negotiations. That is the ACCC is proposing to sanction cartel conduct, without any benefits, at the cost of a competitive tender process. This outcome is an unequivocal detriment which the ACCC has failed to have any regard in the Draft Determination.

[REDACTED]

[REDACTED]

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<sup>37</sup> ACCC Draft Determination, para 4.72.

[REDACTED]

Changes proposed by the third party negotiator will result in detriments

4.7 As discussed above, Cairns Airport has recently received correspondence from the negotiator for the Applicants' appointed for the purposes of collective negotiations.

4.8 [REDACTED]

- [REDACTED]

- [REDACTED]

- [REDACTED]

4.9 [REDACTED]

4.10 [REDACTED]

- [REDACTED]
- [REDACTED]
- [REDACTED]

4.11 [REDACTED]



[REDACTED]

4.12

[REDACTED]

4.13

[REDACTED]

4.14

[REDACTED]

*Reduction in allocative efficiency and standardisation of services*

[REDACTED]

[REDACTED]

[REDACTED]

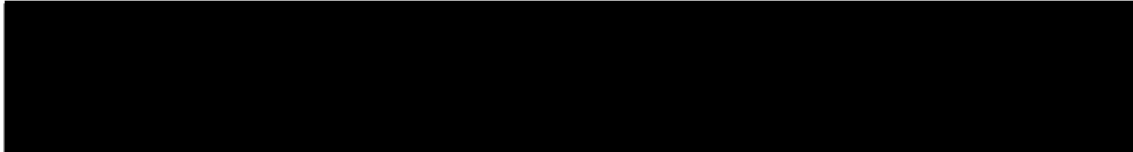
4.18 This is clearly an allocatively efficient outcome – as the Tribunal articulated it in *Qantas*:<sup>38</sup>

*In brief, allocative efficiency occurs when the optimal level of resources is employed in a market at a given point in time (it is a static concept), as a result of the efficient operation of the independent market forces of supply and demand. When allocative efficiency is achieved, as a result of the responses of firms to market signals, the socially optimal level of output will be produced, at the minimum achievable long-run cost. No alternative allocation of resources could improve the market's outcome. In the reverse situation, allocative inefficiency is caused by socially non-optimal prices or output decisions.*

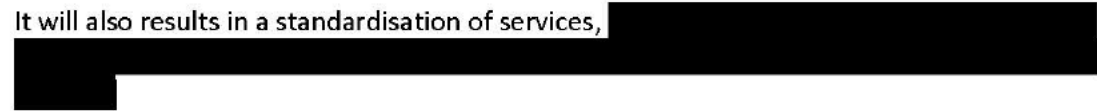
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<sup>38</sup> *Qantas Airways Limited* (2005), ACompT 9, para 158.

4.19



4.20 It will also results in a standardisation of services,



*Indicative of types of harm that could occur with authorisation*

4.21 This example establishes that it is a commercial reality that the authorisation will enable the Applicants to collaborate to reduce competition for service offerings (both in acquiring the service from Cairns Airport in the upstream market, and in providing those services to end consumers in the downstream market).

However, it also establishes that it is highly likely that similar collaboration to reduce service quality would occur over the course of negotiations. It is concerning that this conduct was proposed during the ACCC's assessment process and Cairns Airport is concerned that further conduct could be sought, or collectively agreed to, if authorisation is allowed.

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

4.22 The ACCC's draft determination acknowledges that there is some potential for collective negotiations to reduce competition between Applicants for the acquisition of airport space.<sup>39</sup> However it considers that this is limited by a number of factors namely:<sup>40</sup>

- *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 RFT and*
- *Cairns Airport advises that there are more car rental companies interested in facilities at Cairns Airport than there are facilities.*

*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*

4.23

[REDACTED]

4.24 The fact that the authorisation is voluntary is irrelevant. All rental operators presumably have an incentive to enter into an agreement which minimises competition for airport space. The fact that they are not compelled to does not affect the Applicants' incentives to do so. The proposed authorisation expressly enables the Applicants to enter into agreements that removes competition for airport space [REDACTED]

4.25 While it is not clear how a lack of negotiations to date is relevant to the ACCC's analysis, the basis for this conclusion is unclear. [REDACTED]

Increased potential for collective activity beyond that authorised

*Reduction in competition in downstream car rental services market*

4.27 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.<sup>41</sup>

4.28 However, the upstream market for airport space and the downstream market for car rental services are inextricably linked. Allowing the rental operators to collaborate in their negotiation of access for airport space has clear flow on impacts for downstream consumers.

4.29 As discussed above, this is clearly demonstrated with the Applicants' proposal to collectively withdraw from operating at the international terminal and inside both terminals. This results in clear harm to consumers in the downstream market, and shows how coordination in the upstream market (ie, an agreement not to purchase airport space at the international

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<sup>39</sup> ACCC Draft Determination, paras 4.54 and 4.55.

<sup>40</sup> ACCC Draft Determination, paras 4.54 and 4.55.

<sup>41</sup> ACCC Draft Determination, para 4.68.

terminal or inside terminals), can flow through to competition in the downstream market (ie, agreeing not to compete for customers at the international terminal, or inside the terminals).

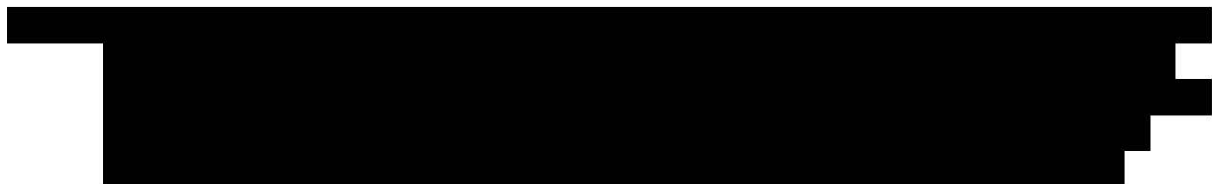
- 4.30 This is simply real life example of the type of behaviour in the downstream market which could be facilitated by the Authorisation. The authorisation creates a real risk that other such anti-competitive behaviour will occur under the guise of legitimacy provided by the authorisation and constitutes a significant detriment resulting from the proposed authorisation.

*Reduction in competition in other airport space markets*

- 4.31 The rental operators currently operating at Cairns Airport also operate at most other airports throughout Australia.
- 4.32 The authorisation would also increase the likelihood that the rental operators will collaborate to lessen competition, either explicitly or tacitly, at other airports. This is inappropriate, in circumstances where the ACCC has not assessed the benefits and detriments of collaborative behaviour at other airports.

*Standardisation of car rental services to consumers*

- 4.33 The ACCC does not appear to make any conclusion whether a standardisation of car rental services for consumers would constitute a detriment for the purposes of its assessment, simply noting that participation in the collective bargaining is voluntary for all parties. However, based on the ultimate conclusion of the ACCC it would appear that the ACCC does not consider this to be a detriment.
- 4.34 This is clearly not the case. As demonstrated by the Applicants proposal to remove in-terminal kiosks and services at the international terminal, the authorisation (if it is to have any effect), allows the Applicants to pursue a standardisation of services which would not otherwise occur.
- 4.35 The fact that the collective bargaining is voluntary is irrelevant. The authorisation allows the Applicants to pursue a standardised reduced service, which requires consumers to access services outside at the domestic terminal and requires customers at the international terminal to make use of a shuttle service to gain access to car rental services.





## 5 Other issues

### Period of authorisation

- 5.1 Cairns Airport agrees with the ACCC's decision and reasoning in its draft determination that, if the authorisation is to be allowed, it should be allowed for a period of five years. If appropriate the Applicants can then reapply for authorisation.

### Conduct which the ACCC proposes not to authorise

- 5.2 In its reasoning for its draft determination the ACCC appears to have relied on the Applicants' statements that they do not consider the proposed conduct extends to coordinating a joint proposal to the RFT process and have advised that they will make independent, confidential commercial decision regarding how they engage with Cairns Airport through the RFT.<sup>42</sup> The ACCC's draft determination sets out that:

*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.*

- 5.3 For the avoidance of doubt, Cairns Airport submits that the ACCC should clarify that the authorised conduct does not extend to agreeing to prices that will:

- 5.3.1 be included in any tenders or
- 5.3.2 that will otherwise be agreed with Cairns Airport.

- 5.4 Cairns Airport notes that it considers that this conduct would not be included in the authorised conduct as specified by the ACCC in any event, but requests the ACCC include it for the avoidance of doubt.

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<sup>42</sup> ACCC Draft Determination, para 5.54, bullet point 4.

## 6 Impacts of COVID 19

- 6.1 It will be clear to the ACCC that the country, and indeed the world, is facing an unprecedented time in relation to the COVID-19 pandemic.
- 6.2 The aviation industry has been hit particularly hard with domestic and international flights almost grinding to a halt, resulting in significant financial pressures for the industry. Cairns Airport is no exception.

## What this means for the RFT process

- 6.3 Management at Cairns Airport is currently focussed on navigating the crisis, and as a result Cairns Airport intends to pause the RFT process. Cairns Airport will look to resume the RFT process when the effects of the pandemic on the aviation industry have started to subside.

### What this means for the ACCC's analysis

- 6.4 The suspension of the RFT process has no effect on the ACCC's analysis. The proposed authorisation would continue to apply for a five year period, and as such will cover the period when Cairns Airport resumes the RFT process and allocates new contracts to rental operators.

## What this means for Cairns Airport's bargaining position

- 6.5 The Covid-19 pandemic presents an existential threat to Cairns Airport's business, and has significantly weakened its bargaining position with rental operators.
- 6.6 This is perhaps best demonstrated by the concessions made by Cairns Airport to the rental operators, under their existing holdover agreements, that provide for rent relief.

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[REDACTED]

\_\_\_\_\_

\_\_\_\_\_

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

6.8 These concessions show that Cairns Airport is reliant on the rental operators to recover its fixed costs of providing its services (or at least some of these fixed costs), and that it does not enjoy an unduly favourable bargaining position.

6.9 It is important to emphasise that the concessions offered by Cairns Airport are not a result of collective negotiation process. Rather, the concessions reflect the individual rental operators countervailing market power, and are consistent with the approaches of other airports in Australia which have offered such concessions in circumstances where there is no interim authorisation in place.