

**Application for Authorisation AA1000460-1:  
Submission in response to Draft Determination dated 26 March  
2020 - Scope of the Conduct to be Authorised**

### Overview of Submission

- In section 5.10 of the ACCC's Draft Determination, the ACCC explicitly restricted the scope of the authorised conduct so as to not extend to *'jointly discussing, preparing or submitting tenders'*.
- However, the Applicants' view are that to the extent any delineation was made by the Applicants between collective negotiations and other bilateral processes which could also benefit from collective negotiations such as Request for Proposal (**RFT**) processes, this was only in respect of the CAPL's **current** RFT process rather than any further RFT processes (or other similar processes) which it may initiate.
- Accordingly, the Applicants' submit that the ACCC's Final Determination, if it does authorise the Proposed Conduct, should expressly enable the Applicants to *'jointly discuss any future tenders or other similar processes initiated by CAPL'* and only exclude from the Proposed Conduct any collective negotiations of CAPL's **current** RFT process.

### Submission in more detail

- The Applicants set out the basis for its submission below.

#### **1) Scope of the Proposed Conduct was broadly defined in the application for Authorisation - no contrary submission to narrow the scope generally**

- In section 5.6 of the ACCC's Draft Determination, the ACCC stated that it proposes to grant Authorisation for the Applicants to collective bargain with Cairns Airport as described in paragraphs 1.2-1.3 of the Draft Determination and as defined in the Proposed Conduct.
- In section 3.1 of the application for Authorisation, the Proposed Conduct was defined broadly and in a "process agnostic" manner to encompass all forms of collective bargaining with CAPL in relation to all terms and conditions regarding the acquisition of space associated with the provision of on-airport car rental services at Cairns Airport. Paragraphs 1.2 - 1.3 of the ACCC's Draft Determination also details the Proposed Conduct with the same phrasing and scope as in section 3.1 of the application for Authorisation.
  - At the time of lodgement of the application for Authorisation, the Applicants did not specifically refer to the RFT given that CAPL has not previously initiated any RFT process and did not indicate its inclination to initiate any such process until almost a month after the application for Authorisation was lodged.
  - It is precisely because of the inherent difficulty due to the information asymmetry between the Applicants and CAPL to predict and encompass all the commercial

strategies that CAPL may engage in with the Applicants,<sup>1</sup> that the scope of the Proposed Conduct was deliberately framed in a non-prescriptive manner.

- The Applicants first became aware of CAPL's RFT process in late December 2019, and over the forthcoming months gradually gained greater clarity regarding the terms and conditions associated with participation in this process. In particular, the Applicants were mindful of the following circumstances:
  - both CAPL and the ACCC were coming to terms with the extensive nature of the information sharing protocols in place;
  - the Applicants had to temporarily re-focus their priority in providing certainty and continuity of on-airport car rental services for Cairns Airport customers in the interim period, including in seeking to negotiate with CAPL urgent hold-over arrangements; and
  - the short notice and time frame CAPL imposed for its RFT process meant that it was difficult, if not commercially impractical, for any off-airport operators to join the collective bargaining group.
- In light of the above circumstances and to minimise the acrimony between CAPL and the Applicants to date, the Applicants decided to delineate between the ongoing collective negotiations and CAPL's ongoing RFT process while reserving their rights generally to negotiate collectively in respect of any future negotiation processes initiated by CAPL. The Applicants' are strongly of the view that no submissions that they have lodged with the ACCC to date has the intention or effect of narrowing the scope of the Proposed Conduct generally so that collective negotiations are delineated from all other negotiation forums, such as an RFT process.

## **2) Any contrary references should be appropriately contextualised in interpretation**

- In section 7.1 of the Applicants' submission dated 6 March 2020, the Applicants stated that:

*"As a starting point, the Proposed Conduct is a separate process from CAPL's RFT process. The Applicants are cognisant that neither the scope of the Proposed Conduct nor the Interim Authorisation permits the Applicants to discuss the RFT as a part of the collective negotiation process. As discussed in section 6 of this submission, there are strict information protocols and enforcement processes in place to ensure that this demarcation is maintained in any collective discussions between the Applicants."*

- As stated above, the Applicants assert that the exclusion of the Proposed Conduct or the interpretation of the scope of the Interim Authorisation was specifically in relation to the exclusion of the ongoing CAPL RFT process, rather than to the exclusion of any future RFT process (or similar) initiated by CAPL, as indicated through the use of singular 'CAPL's RFT process' and 'the RFT'. This accurately reflect the Applicants' intention and should be adopted for not just the entirety of the Applicants' submission of 6 March 2020, but also with regard to all of the Applicants' other submissions to date.
- Similarly, section 4.54 of the ACCC's Draft Determination which references the section 7.1 extract above and its understanding of the scope of the Proposed Conduct should be

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<sup>1</sup> This information asymmetry between CAPL and the Applicants were discussed in both the application for Authorisation and in the Applicants' subsequent submissions, and accepted by the ACCC in section 4.33 - 4.34 of its Draft Determination (26 March 2020).

interpreted to have a restricted scope only in relation to the current RFT process (*emphasis added*).

*"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"*

### **3) No change to public benefits and lack of public detriments arguments if the ACCC adopt clarification of the Proposed Conduct**

- The Applicants do not consider that there is any material change to either the public benefits or lack of public detriments arguments it has advanced to date over a number of submissions if the ACCC accepts this submission about the scope of the Proposed Conduct.
- The Applicants do not propose to reiterate the arguments that they have advanced to date, except to highlight the following:
  - The collective bargaining group remains open and voluntary - any future car rental operator who will operate in Cairns Airport are free to join the collective bargaining group at any time and any Applicants can also 'opt out' should they choose to;
  - The ACCC explicitly accepted the information imbalance between CAPL and the Applicants in its Draft Determination (see footnote 1) and the Applicants have already addressed the potential broad latitude for CAPL to utilise the Applicants' RFT responses to advance its strategic interests as stated in section 3.3 of its 5 February 2020 submission. If a restrictive interpretation of the Proposed Conduct were adopted, it would incentivise CAPL to introduce RFT processes in the future to evade collective negotiations, which will also aggravate the effects of any information asymmetry and restricting the Applicants' input into any resultant contractual terms.
  - The Applicants also submit that it would be counterintuitive for the ACCC to adopt a restrictive interpretation of the Proposed Conduct to differentiate between different negotiation processes which could benefit from collective negotiations (i.e. RFTs) in light of the recognised information asymmetry between CAPL and the Applicants, both as a legal and practical matter:
    - Legally, the Applicants consider the scope of the Proposed Conduct is broad enough to encompass other negotiation forums, such as future RFT processes (already discussed above). Further the ACCC also acknowledged explicitly in section 4.38 of its Draft Determination that collective bargaining can encompass other negotiation forums such as RFT scenarios (*emphasis added*):

*"Collective bargaining enables members of a bargaining group to share some or all of the transaction costs of preparing to negotiate, **negotiating, and preparing tenders**, and thus can reduce the total costs shared by the group.*

- Practically, the extensive information sharing protocols in place will prevent the sharing of any commercially sensitive information between the Applicants, whether it be in a RFT or other collective negotiations contexts, with all such information being appropriately processed before dissemination to the Applicants. Ultimately, the Applicants will need to execute any new agreements with CAPL individually (and CAPL remains free to act in a way that advances its commercial interests).