

NRALEGAL

Application for authorisation under section 88(1) of the *Competition and Consumer Act 2010* (Cth)

Application for urgent interim authorisation under section 91(2)(d) of the *Competition and Consumer Act 2010* (Cth)

1. Applicants

- 1.1. The relevant details of the Applicants as prescribed by the ACCC in accordance with section 89(1) of the *Competition and Consumer Act 2010* (Cth) (**the Act**) are set out in Schedule 1 to this application.
- 1.2. For the purposes of this application, each entity named in Schedule 1 is an **Applicant**. Where the term **Applicants** is used in this application, it refers to those entities named in Schedule 1 jointly and severally.
- 1.3. In this application:
 - (a) the retail trade industry as falling within Division G of the Australian and New Zealand Standard Industrial Classification (**ANZSIC**) is represented by:
 - (i) the National Retail Association Limited (**NRA**);
 - (ii) the Franchise Council of Australia (**FCA**);
 - (iii) the Pharmacy Guild of Australia (**PGA**);
 - (iv) the Australian Newsagents' Federation Limited t/a the Australian Lotteries and Newsagents Association (**ALNA**);
 - (b) the accommodation and food services industry as falling within Division H, Group 722 (Travel Agency and Tour Arrangement Services) of the ANZSIC is represented by the Australian Hotels Association (**AHA**); and
 - (c) the administrative and support services industry as falling within Division N of the ANZSIC is represented by the Australian Federation of Travel Agents Limited (**AFTA**).

2. Other parties to the proposed conduct

- 2.1. Authorisation is requested by the Applicants on behalf of their current and future members.
- 2.2. To the extent that any member of any Applicant is also a membership-based organisation or association, authorisation is also requested on behalf of that member's current and future members and is also a member of the relevant Applicant for the purposes of this application.
- 2.3. The parties described at paragraphs 2.1 and 2.2 may include parties who are tenants, landlords, or both. As such, in this application:
 - (a) the term **Participants** means all parties described in paragraphs 2.1 and 2.2;
 - (b) the term **Tenant Participants** means all parties described in paragraphs 2.1 and 2.2 in their capacity as a tenant (if any); and
 - (c) the term **Landlord Participants** means all parties described in paragraphs 2.1 and 2.2 in their capacity as a landlord (if any).

3. The conduct proposed to be authorised – Tenant Participants

3.1. The Applicants seek authorisation on behalf of Tenant Participants who have been adversely affected by the COVID-19 pandemic to discuss and share information about:

- (a) the nature and extent of the impact of the COVID-19 pandemic and the measures being implemented or considered to mitigate this impact;
- (b) the retail precincts in which they operate, including the impact on the value of those precincts by increased vacancies, declining customer counts or visitation and deteriorating trading conditions caused by the COVID-19 pandemic;
- (c) the information requested, and questions being asked, of tenants by landlords in the context of considering and/or negotiating what support (if any) they will provide to tenants in the context of the COVID-19 pandemic;
- (d) the actions requested of tenants by landlords in the context of such negotiations (for example, signing non-disclosure agreements) and the appropriateness of those actions; and
- (e) the positions adopted by landlords in respect of such negotiations, including the interpretation and application (or non-application) of the principles of the *National Cabinet Mandatory Code of Conduct: SME Commercial Leasing Principles During COVID-19 (the Code)*;

and to collectively negotiate with landlords regarding the support to be provided to them, including the appropriate information to be exchanged with landlords for that purpose.

3.2. It is also intended that the authorisation will enable Tenant Participants, having regard for the above information and the principles of the Code, to jointly negotiate with landlords and to make and give effect to contracts, arrangements or understandings as to the terms of support to be provided to them either generally or with respect to a particular class of tenants.

3.3. The terms of any contract, arrangement or understanding will likely include such matters as:

- (a) the appropriate information to be exchanged between landlords and tenants, including but not limited to:
 - (i) in relation to landlords – information about:
 - (A) savings or concessions obtained by the landlord through insurance coverage;
 - (B) reduced costs and taxes (including, for example, any benefit derived from alterations to the treatment of land tax);
 - (C) reduced service costs (i.e. due to reduced use of facilities);
 - (D) shopping precinct trading conditions and customer/visitation numbers; and
 - (E) the landlord's financial position and capacity to grant rent reductions or other forms of financial relief, whether on a permanent, temporary or deferred basis;
 - (ii) in relation to tenants – information about:
 - (A) the nature and extent of information, such as revenue/turnover and customer/visitation figures including on a comparable basis, to be provided to landlords; and

- (B) the confidentiality and other restrictions applicable to the use of that information by landlords;
 - (b) the landlords' and tenants' views, interpretations or available information to determine 'proportionality' under the Code;
 - (c) the appropriate action to be taken by landlords and tenants in relation to the negotiations, including the execution of documents such as non-disclosure agreements;
 - (d) the assistance landlords and tenants should provide to each other in their respective dealings with third parties including (but not limited to) financial institutions;
 - (e) the size and form of rent reductions, including waivers and deferrals;
 - (f) the size and form of statutory, insurance or other charges payable by the tenant or chargeable by the landlord as an outgoing;
 - (g) the passing through of savings or concessions obtained by landlords to tenants, including benefits received from financial institutions, insurers, or statutory concessions;
 - (h) the ability of landlords to increase rent or other obligations;
 - (i) the efficacy of initiatives implemented by landlords to combat the impact of the COVID-19 pandemic, including as part of any recovery phase;
 - (j) whether steps taken by landlords comply with the requirements and spirit of the Code; and
 - (k) dispute resolution processes to be adopted in the event that landlords and tenants are unable to reach agreement.
- 3.4. The proposed conduct does **not** extend to individual tenants discussing or exchanging information about the actual amount of rent payable under their existing or proposed leasing arrangements, or any rent incentives previously granted by the relevant landlord (**Sensitive Tenant Rent Information**).
- 3.5. For the avoidance of doubt, the prohibition on the sharing of Sensitive Tenant Rent Information referred to in paragraph 3.4 includes any Sensitive Tenant Rent Information to which a Tenant Participant may be privy in their capacity as a landlord.
- 3.6. For the avoidance of doubt, it is intended that the conduct be authorised only between Tenant Participants of the same Applicant; that is to say that Tenant Participants:
- (a) who are members of the NRA may only engage in the conduct with other Tenant Participants who are members of the NRA;
 - (b) who are members of the FCA may only engage in the conduct with other Tenant Participants who are members of the FCA;
 - (c) who are members of the PGA may only engage in the conduct with other Tenant Participants who are members of the PGA;
 - (d) who are members of the ALNA may only engage in the conduct with other Tenant Participants who are members of the ALNA;
 - (e) who are members of the AHA may only engage in the conduct with other Tenant Participants who are members of the AHA;

- (f) who are members of the AFTA may only engage in the conduct with other Tenant Participants who are members of the AFTA; and
- (g) may not engage in the conduct with Tenant Participants who are members of any other Applicant unless the Tenant Participant was also a member of the relevant other Applicant immediately prior to 29 April 2020.

4. The conduct proposed to be authorised – Landlord Participants

4.1. The Applicants also seek authorisation on their behalf and on behalf of the Landlord Participants to work together during the period of the authorisation to:

- (a) discuss and share information regarding:
 - (i) the financial difficulties their SME tenants are facing;
 - (ii) which SME tenants, or classes of SME tenants, would benefit most from relief and the nature of relief that might be offered;
 - (iii) provisionally enter into agreements as to the nature of the relief which might be offered to these SME tenants, or classes of SME tenants, by Landlord Participants, including through the deferment or amelioration of the payment of rents or other payments which tenants might otherwise be obliged to pay; and
 - (iv) to give effect to those agreements.

4.2. The information to be shared among Landlord Participants may include:

- (a) information as to the trading conditions and trends being experienced by retail and other tenants as a result of the COVID-19 pandemic (aggregated across tenants or classes of tenants);
- (b) aggregated information as to the range and types of financial challenges that retail and other tenants (including broad classes of retailers) are facing by reason of the COVID-19 pandemic;
- (c) aggregated information as to the alternative relief already available to tenants, the reach and coverage of that relief and any gaps in such relief; and
- (d) aggregated information as to the range and types of rental relief that are likely to benefit retailers and other tenants of retail precincts (including which types of retailer/tenant meet which criterion).

4.3. Any information shared among Landlord Participants must, prior to being shared, be treated in such a fashion as to prevent any particular tenant from being identified or allow any particular tenant to be reasonably identifiable.

4.4. The information to be shared among Landlord Participants may **not** include:

- (a) an individual tenant's trading, visitation or financial performance data whether at a single location or multiple location basis;
- (b) information about an individual tenant's financial position, arrangements or difficulties;
- (c) the support that an individual tenant may require or is otherwise receiving, or has already received;
- (d) any confidential information of an individual tenant;

- (e) any data or information from which any of the above in relation to an individual tenant may be reasonably ascertained.

(Sensitive Landlord Information).

- 4.5. For the avoidance of doubt, the prohibition on the sharing of Sensitive Landlord Information referred to in paragraph 4.3 includes any such information to which a Landlord Participant may be privy in their capacity as a tenant.
- 4.6. A contract, agreement or understanding entered into by Landlord Participants pursuant to the authorisation (**Agreed Conduct**) may include such terms as:
 - (a) the nature and extent of rent relief to be provided to SME tenants;
 - (b) if applicable, a description of the SME tenant groups, or classes of SME tenants, to whom the relief is to be extended;
 - (c) the criterion for identifying the SME tenant groups, or classes of SME tenants, to whom the relief is to be extended; and
 - (d) the time at which the Agreed Conduct is to commence implementation, and the location/s at which the Agreed Conduct shall be implemented.
- 4.7. For the avoidance of doubt:
 - (a) there may be multiple forms of Agreed Conduct entered into by different groups or classes of Landlord Participants; and
 - (b) an individual Landlord Participant may be a party to multiple forms of Agreed Conduct having regard for the groups or classes of SME tenant to which the Agreed Conduct applies.
- 4.8. For the avoidance of doubt, it is intended that the conduct be authorised only between Landlord Participants of the same Applicant; that is to say that Landlord Participants:
 - (a) who are members of the NRA may only engage in the conduct with other Landlord Participants who are members of the NRA;
 - (b) who are members of the FCA may only engage in the conduct with other Landlord Participants who are members of the FCA;
 - (c) who are members of the PGA may only engage in the conduct with other Landlord Participants who are members of the PGA;
 - (d) who are members of the ALNA may only engage in the conduct with other Landlord Participants who are members of the ALNA;
 - (e) who are members of the AHA may only engage in the conduct with other Landlord Participants who are members of the AHA;
 - (f) who are members of the AFTA may only engage in the conduct with other Landlord Participants who are members of the AFTA; and
 - (g) may not engage in the conduct with Landlord Participants who are members of any other Applicant unless the Landlord Participant was also a member of the relevant other Applicant immediately prior to 29 April 2020.

- 4.9. As soon as practicable after agreeing to implement Agreed Conduct and no less than 24 hours prior to implementing such Agreed Conduct, the Landlord Participants who have agreed to implement the relevant Agreed Conduct or a person appointed to act on their behalf must notify the ACCC and the Applicants.
- 4.10. The notification provided to the ACCC in accordance with paragraph 4.8 must include, at a minimum, the details specified at paragraph 4.5 and identify the Landlord Participants who have agreed to be a party to the relevant Agreed Conduct.
- 4.11. Any Agreed Conduct shall be implemented by Landlord Participants if, and only if, following notification in accordance with paragraph 4.8 the ACCC does not object to the implementation of the Agreed Conduct within the period of notice given.
- 4.12. It is understood that the ACCC may, at its absolute discretion, object to any Agreed Conduct or impose conditions upon any Agreed Conduct.
- 4.13. It is further contemplated that:
- (a) the details of any Agreed Conduct implemented shall be published by the ACCC in its Authorisation Register; and
 - (b) the Applicants shall publish the details of any Agreed Conduct to their members.
- 4.14. In this part:
- (a) **SME** means small and medium enterprise, these being businesses with a group turnover of less than \$50 million per annum. In circumstances where a lease is held by a franchisor and a franchisee holds a franchise licence or sublease in a tenancy owned or managed by a Landlord Participant, and the franchisee is liable under the terms of the franchise licence or sublease to reimburse the franchisor in respect of some or all of the rental payable under the lease, then any Agreed Conduct is also proposed to concern and cover that franchisee in circumstances where the franchisee is or represents an SME.

5. Additional terms of the proposed conduct – all Participants

- 5.1. It is intended that any conduct authorised as a result of this application will have regard for the Code adopted by the National Cabinet and announced by the Prime Minister on 7 April 2020.
- 5.2. The Code states that the principles outlined therein should apply in spirit to all leasing arrangements for businesses affected by the COVID-19 pandemic, having fair regard for the size and financial structure of the businesses concerned.
- 5.3. The principles of the Code include, but are not limited to, requiring that:
- (a) landlords must neither terminate leases nor draw on the tenant's security for non-payment of rent;
 - (b) landlords must offer tenants reductions in rent payable, proportionate to the reduction in the tenant's trade during the COVID-19 pandemic and for a subsequent reasonable recovery period, in the form of waivers and deferrals;
 - (c) where there is a reduction in rent, waivers must constitute at least 50% of the total reduction, and should constitute a greater proportion of the total reduction in cases where failure to do so would compromise the tenant's capacity to fulfil their ongoing obligations under the lease agreement;

- (d) payment of rental deferrals must be amortised over no less than the greater of the balance of the lease period or 24 months, unless otherwise agreed;
- (e) any reduction in statutory charges or insurance will be passed on to the tenant in the appropriate proportion applicable under the terms of the lease; and
- (f) tenants must remain committed to the terms of their lease, subject to any negotiated amendments to the rental agreement.

6. Relevant provisions of the Act which might apply to the conduct proposed to be authorised

6.1. In absence of authorisation, the conduct for which authorisation is sought risks giving rise to contraventions of the provisions of Part IV, Division I (particularly Subdivision B) and/or section 45 of the Act.

7. Rationale for the conduct proposed to be authorised

- 7.1. This application seeks authorisation for the proposed conduct in response to the COVID-19 pandemic.
- 7.2. The impact of the COVID-19 pandemic on the retail sector is unprecedented, with health and safety concerns together with government-imposed restrictions forcing large-scale closures and significant reductions in customer traffic.
- 7.3. As a result, 24% of retail businesses had ceased to trade by the week commencing 30 March 2020.¹
- 7.4. On 2 April 2020, Scentre Group and the Shopping Centre Council of Australia (**SCCA**) lodged an application for authorisation to enable shopping centre landlords to discuss, share information and co-ordinate relief to be provided to SME tenants financially affected by the COVID-19 pandemic (**the SCCA Application**).
- 7.5. On 3 April 2020 the ACCC granted a conditional interim authorisation of the conduct sought in the SCCA Application (**the SCCA Authorisation**).
- 7.6. On 17 April 2020 the Australian Retailers Association (**ARA**) lodged an application for authorisation to enable current and future members of the ARA to discuss, share information and collectively bargain with landlords (**the ARA Application**).
- 7.7. On 22 April 2020 the ACCC granted an interim authorisation of the conduct sought in the ARA Application (**the ARA Authorisation**).
- 7.8. This application is brought as both the SCCA Application (and the SCCA Authorisation) and the ARA Application (and the ARA Authorisation) capture only a very limited number of landlords and tenants respectively.
- 7.9. Indeed, as the retail industry in Australia comprises some 132,835 businesses,² the 7,500 membership of the ARA as referred to in the ARA Application encompasses only 5.6% of all retail businesses in Australia.

¹ Australian Bureau of Statistics (2020) *Business Indicators, Business Impacts of COVID-19, Week Commencing 30 March 2020*, cat. no. 5676.0.55.003, viewed 24 April 2020, <https://www.abs.gov.au/AUSSTATS/abs@.nsf/Latestproducts/5676.0.55.003Main%20Features%20Week%20Commencing%2030%20March%202020?opendocument&tabname=Summary&prodno=5676.0.55.003&issue=Week%20Commencing%2030%20March%202020&num=&view=>

² Australian Bureau of Statistics (2019) *Counts of Australian Businesses, including Entries and Exits, June 2015 to June 2019*, 'Table 1: Businesses by Industry Division by Statistical Area Level 2 by Turnover Size Ranges, June 2019 (a) (b)' data cube 9: Excel spreadsheet, cat. no. 8165.0, viewed 24 April 2020, <https://www.abs.gov.au/AUSSTATS/abs@.nsf/DetailsPage/8165.0June%202015%20to%20June%202019?OpenDocument>

- 7.10. According to ICSC research (referred to in the SCCA Application), Australian shopping centres as represented by the SCCA account for approximately 46% of the total retail space in Australia.³
- 7.11. Consequently, the SCCA Authorisation and the ARA Authorisation may have granted an otherwise unlawful competitive advantage to a minority of the relevant markets.
- 7.12. This application seeks to:
- (a) allow Tenant Participants to work together to develop consistency in approaches and responses, and to minimise inefficiencies at a time when urgent action is needed and the resources required to undertake such action are scarce;
 - (b) allow Landlord Participants to work together to develop consistency in approaches and responses, and to minimise inefficiencies at a time when urgent action is needed and the resources required to undertake such action are scarce; and
 - (c) minimise as best as possible any public detriment which may arise as a result of the limited scope of the SCCA Authorisation and the ARA Authorisation.

8. Term of authorisation

- 8.1. Authorisation of the proposed conduct is sought for a period of 12 months from the date of the ACCC's final determination. It is noted that should a further period of authorisation be required, the appropriate processes for obtaining this shall be discussed between the Applicants and the ACCC.
- 8.2. This is consistent with the period of authorisation sought in the SCCA Application and the ARA Application, and the principles of the Code which encompass both the COVID-19 pandemic period and a subsequent reasonable recovery period.
- 8.3. As the economic impact of the COVID-19 pandemic, and the duration of any recovery period, is not capable of ready measurement, the period for which authorisation is sought may need to be extended.
- 8.4. The Applicants acknowledge and understand that, pursuant to s 91B of the Act, the ACCC may revoke any authorisation in the event of a material change in circumstances, including but not limited to the financial and/or economic impact of the COVID-19 pandemic.

9. Interim authorisation

- 9.1. The Applicants are aware that landlords are making increasingly urgent demands of their tenants in respect of their negotiations for rental relief.
- 9.2. The Applicants are also aware that tenants have, in some circumstances, engaged in unilateral conduct to the detriment of landlords, such as declining to pay rent or other amounts owing under the terms of the lease.
- 9.3. Given that:
- (a) the demands of landlords have the potential to significantly affect the legal rights of tenants; and
 - (b) unilateral action by tenants has the potential to adversely affect the viability of landlords' financial positions;

³ Shopping Centre Council of Australia (2019) *Industry Information - Key Facts*, accessed 1 May 2020, <https://www.scca.org.au/industry-information/key-facts/>

the Applicants seek urgent interim authorisation for the proposed conduct to enable the negotiations to be conducted and entry into arrangements pertaining to the support to be provided to tenants.

10. Persons who may be directly affected by the proposed conduct

10.1. The persons directly affected by the conduct for which authorisation is sought are:

- (a) landlords who own and/or manage the tenancies of Tenant Participants, and their owners and employees; and
- (b) retail and other tenants of premises in Australia owned and/or manager by the Landlord Participants, and their owners and employees.

11. Market information and concentration

- 11.1. As mentioned above at paragraph 7.9, the retail industry in Australia encompasses 132,835 individual businesses nation-wide. Of these businesses, only 3.29% have a turnover in excess of \$10 million, with the majority (59.11%) having a turnover of less than \$500,000. In February 2020, the total turnover of the Australian retail sector was \$25,428,400,000.⁴
- 11.2. Separately, the accommodation and food services industry (**hotel businesses**) encompasses some 95,301 businesses across Australia. Of these, a mere 1.39% have a turnover in excess of \$10 million, with the majority (63.89%) having a turnover of less than \$500,000.⁵
- 11.3. Further, the travel agency and tour arrangement services sub-industry (**travel agents**) includes 8,018 individual businesses nationwide, with 2.87% having turnovers in excess of \$10 million and the majority (57.61%) having turnovers of \$200,000 or less and 88.33% having turnovers of less than \$2 million.⁶
- 11.4. In contrast, the entities captured by the SCCA application are far more substantial enterprises, with the market capitalisation of some of those entities as at 1 May 2020 (obtained from the Australian Securities Exchange) being as follows:
- (a) Scentre Group \$12.09 billion
 - (b) Mirvac Group \$8.81 billion
 - (c) GPT Group \$8.24 billion
 - (d) Lendlease Group \$6.98 billion
 - (e) Charter Hall Group \$3.56 billion
- 11.5. The tenants of the entities listed in paragraph 11.4 include businesses who may elect to be Tenant Participants to the conduct proposed to be authorised by this application. Of those, the overwhelming majority are SME businesses, being either proprietary companies, trusts, partnerships or sole traders.
- 11.6. The disparity in bargaining power as between tenants on the one hand and large landlords such as those covered by the SCCA Application is well recognised, and is evident in the disparity between the

⁴ Australian Bureau of Statistics (2020) *Retail Trade, Australia, Feb 2020*, 'Table 3: Retail Turnover, By State', time series spreadsheet, cat. No. 8501.0, viewed 1 May 2020, <https://www.abs.gov.au/AUSSTATS/abs@.nsf/DetailsPage/8501.0Feb%202020?OpenDocument>

⁵ *Supra*, note 2

⁶ Australian Bureau of Statistics (2019) *Counts of Australian Businesses, including Entries and Exits, June 2015 to June 2019*, 'Table 1: Businesses by Main State by Industry Class by Turnover Size Ranges, June 2019', data cube 3: Excel spreadsheet, cat. no. 8165.0, viewed 8 May 2020, <https://www.abs.gov.au/AUSSTATS/abs@.nsf/DetailsPage/8165.0June%202015%20to%20June%202019?OpenDocument>

turnover of the majority of retail and hotel businesses and the market capitalisation of those large landlords.

- 11.7. Landlords generally have access to detailed information (including financial records) of all tenants within their portfolio, and are able to exploit that information and superior bargaining power to obtain lease terms that would otherwise not be agreed to if the imbalance in bargaining power had not existed.
- 11.8. Smaller businesses are particularly vulnerable to this imbalance of bargaining power, potentially committing themselves to terms which are adverse to their short- and long-term viability including, but not limited to, higher rents, shorter lease terms or lease terms without options to renew, and automatic rent increases.
- 11.9. This vulnerability is particularly acute towards the end of the lease period, at which point a smaller business may be compelled to relocate if they are unable to accommodate the terms offered by the landlord, often involving the sacrifice of significant costs to re-start their business elsewhere, or otherwise ceasing to trade entirely.
- 11.10. Australia's retail sector employs approximately 1.27 million individuals,⁷ and is worth approximately \$329 billion.⁸ In general terms, retail businesses compete for retail floor space in shopping centres, shopping precincts, and other areas of high foot traffic such as free-standing shops in residential, commercial and industrial areas. A significant driver of demand for retail property space is retail spending, and sales growth is often accounted for in leases. The growth of online retail (reaching 10% of all retail spending by 2018)⁹ has resulted in reduced foot traffic and changes to tenancy mixes in retail precincts.
- 11.11. The industries that occupy these precincts can broadly be broken down into four categories:
- (a) consumer goods retailers (furniture, homeware, appliances, consumer electronics, sporting goods, toys, books, clothing, personal accessories);
 - (b) supermarkets and fresh food stores;
 - (c) takeaway food outlets, cafes, coffee shops and restaurants (indeed some shopping precincts have recently made, or are making, significant investments in specific areas for these businesses);
 - (d) other entertainment and service providers (banks, travel agents, cinemas, and hair and beauty salons).
- 11.12. Separately, as mentioned at paragraph 7.10 above, major landlords such as those represented by the SCCA constitute only 46% of retail space in Australia. The natural inference from this is that the remaining 56% of retail floor space is held by smaller operators, and in some cases individuals. Ownership of retail floor space is more likely to be in the hands of individuals in outlying suburban and regional areas.

⁷ Australian Bureau of Statistics (2020) *Labour Force, Australia, Detailed, Quarterly*, 'Table 04: Employed persons by Industry division of main job (ANZSIC) – Trend, Seasonally Adjusted and Original', time series spreadsheet, cat. no. 6291.0.55.003, viewed 24 April 2020, <https://www.abs.gov.au/AUSSTATS/abs@.nsf/DetailsPage/6291.0.55.003Feb%202020?OpenDocument>

⁸ Total of monthly turnover for the year January to December 2019, Australian Bureau of Statistics (2020) *Retail Trade, Australia, Feb 2020*, 'Table 3: Retail Turnover, By State', time series spreadsheet, cat. No. 8501.0, viewed 1 May 2020, <https://www.abs.gov.au/AUSSTATS/abs@.nsf/DetailsPage/8501.0Feb%202020?OpenDocument>

⁹ Yip R and Jones E (2019) *Inside Australian Online Shopping: 2019 eCommerce Industry Report*, Australia Post, viewed 2 May 2020, https://auspost.com.au/content/dam/auspost_corp/media/documents/inside-australian-online-shopping-ecommerce-report.pdf

11.13. Of the businesses that may be Landlord Participants to the conduct proposed to be authorised by this application, a very small minority of these are publicly listed on the Australian Securities Exchange.

11.14. The overwhelming majority of potential Landlord Participants are SMEs themselves, being proprietary companies, family trusts, or “mum and dad” investors. In general, the portfolios of these Landlord Participants will be limited to a small number of tenancies within a particular geographic locale.

12. Public benefits

12.1. As discussed above at paragraphs 7.2 and 7.3, the COVID-19 pandemic has had a significant adverse effect on retail businesses, with many businesses being forced to close their doors either temporarily or permanently.

12.2. Examples of recent retail closures include:

- (a) Accent Group – 522 stores closed and approximately 4,500 employees stood down;
- (b) Lovisa – 155 stores closed and approximately 800 employees stood down;
- (c) Alceon – 1,400 stores closed and approximately 7,000 employees stood down;
- (d) Premier Investments – approximately 900 stores closed and 7,000 employees stood down.

12.3. Businesses in the accommodation and food services industry have also been significantly affected, with government directions forcing many restaurants to cease their usual operations and restructure to support a much-reduced takeaway-only model, if indeed they continued to operate at all.

12.4. While accommodation services remain able to operate, restrictions on travel both interstate and internationally have resulted in significant declines in business.

12.5. The cessation of operations by tenants not only indicates the impact of the COVID-19 pandemic on those businesses, but also has a consequential effect on their ability to satisfy their obligations under their lease, thereby adversely affecting the viability of their landlord’s business particularly if such action was taken without prior notice or consultation.

12.6. In these unprecedented circumstances, enabling tenants adversely affected by the COVID-19 pandemic to work together, share information and collectively negotiate as described above will reduce the imbalance of information and bargaining power that typically exists between landlords and tenants, allowing tenants to obtain more beneficial terms than they otherwise would have.

12.7. Conversely, allowing landlords, particularly smaller landlords, to share information and agree to particular courses of action with respect to rental relief would allow those landlords to more effectively contribute to an industry-wide response to the COVID-19 pandemic, and also assist those landlords in effectively accommodating urgent changes to the nature of any response as the national situation evolves.

12.8. The broad public benefits would include the following:

- (a) **Survival of the Australian retail industry and the prevention of unemployment**
 - (i) In many cases, particularly in the case of SMEs, the very survival of their business is at stake.

- (ii) Already some members of the Applicants have been forced to close their businesses forever as a result of the COVID-19 pandemic, in some cases as the result of landlord action.
 - (iii) The ability of these businesses to survive the COVID-19 pandemic and continue to remain a contributor to Australian employment is intrinsically linked with their ability to satisfy their ongoing obligations to their landlords.
 - (iv) Consequently, more beneficial terms for tenants will directly assist the survival of those businesses and the jobs which they support.
- (b) **Increased competition between retailers to supply products**
- (i) It ought to be trite to say that the more businesses survive the COVID-19 pandemic, the more competitive the Australian economy will be both during and after the current crisis has passed.
 - (ii) By obtaining more beneficial lease terms businesses will be in a position to compete more vigorously, for example by passing on cost savings to consumers.
 - (iii) This will also allow Australian businesses to compete more effectively against online sellers abroad, who *inter alia* are at greater risk of non-compliance with Australian product safety standards.
- (c) **Transaction cost savings and efficiencies**
- (i) The proposed conduct will reduce the transaction costs incurred by both tenants and landlords, and enable scarce resources (including time) to be utilised more efficiently.
 - (ii) In particular, allowing action on a collective rather than an individual basis will substantially reduce the time and bureaucratic burden that would otherwise arise in individual transactions.
 - (iii) However, it is expected that some issues will remain the subject of individual dealings having regard for the particular circumstances of each case.
- (d) **Advancing the objectives of the Commonwealth**
- (i) The fundamental objective of the Code, as adopted by the National Cabinet, is to share in a proportionate, measured manner, the financial risk and impact of the COVID-19 pandemic whilst balancing the interests of tenants and landlords.
 - (ii) The Code expressly acknowledges the common interest of tenants and landlords in working together to ensure business continuity and the facilitation of the resumption of normal trading activities when such is permitted.
 - (iii) In this respect, the Applicants consider that a coordinated response among Tenant Participants and Landlord Participants is likely achieve outcomes consistent with the principles of the Code much faster and more effectively than individual efforts.
- (e) **Improved relationships and communication**
- (i) The Applicants consider that the proposed conduct, in providing a collective voice to tenants, will assist landlords in better understanding the position of the tenants, the challenges they face and the impact of any decisions of the landlord on them.

- (ii) Conversely, the Applicants consider that the proposed conduct, in allowing landlords to agree to particular courses of action in relation to classes of groups of tenants, will allow tenants more certainty as to how their concerns will be addressed across the industry more generally.
- (iii) It is also considered beneficial that the prospect of tenants and landlords entering into negotiations, collective to collective, will allow for a more consistent relationship between landlords and tenants more generally, with the collective curtailing the excesses of any individual tenant or landlord.

13. Public detriment

13.1. A possible result of the proposed conduct is a reduction in the competitive tension between tenants competing for tenancy space. However, the Applicant's consider that the proposed conduct will assist in creating a more even negotiating field by reducing the imbalance of bargaining power between landlords and tenants.

13.2. A further possible detriment is the potential reduced opportunity for SMEs to negotiate the terms of their lease on a wholly bespoke, individual basis, noting that such individual negotiations may result in outcomes more beneficial for the individual tenant than an outcome which is more beneficial to the body of Tenant Participants as a whole.

13.3. The potential public detriment is mitigated by:

- (a) the restrictions on the information that can be shared between Tenant Participants and Landlord Participants; and
- (b) the proposed conduct not being compulsory, as if authorisation is granted there is no compulsion on any member of the Applicants to engage in the conduct; and
- (c) the relatively short period of time for which the conduct is proposed to be authorised.

NRALEGAL

Declaration by Applicant(s)

The undersigned declare that, to the best of their knowledge and belief, the information given in response to questions in this form is true, correct and complete, that complete copies of documents required by this form have been supplied, that all estimates are identified as such and are their best estimates of the underlying facts, and that all the opinions expressed are sincere.

The undersigned undertake(s) to advise the ACCC immediately of any material change in circumstances relating to the application.

The undersigned are aware that giving false or misleading information is a serious offence and are aware of the provisions of sections 137.1 and 149.1 of the Criminal Code (Cth).



Signature of authorised person

Chief Executive Officer, National Retail Association Limited

Office held

Dominique Lamb

(Print) Name of authorised person

This 17 day of May, 2020

Declaration by Applicant(s)

The undersigned declare that, to the best of their knowledge and belief, the information given in response to questions in this form is true, correct and complete, that complete copies of documents required by this form have been supplied, that all estimates are identified as such and are their best estimates of the underlying facts, and that all the opinions expressed are sincere.

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Signature of authorised person

Chief Executive Officer, Australian Hotels Association

Office held

Stephen Ferguson

(Print) Name of authorised person

This 11th day of May, 2020

Declaration by Applicant(s)

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Signature of authorised person

Chief Executive Officer, Franchise Council of Australia Ltd

Office held

Mary Aldred

(Print) Name of authorised person

This 11 day of May , 2020

NRALEGAL

Declaration by Applicant(s)

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Signature of authorised person

Chief Executive Officer, The Pharmacy Guild of Australia

Office held

SUZANNE GREENWOOD

(Print) Name of authorised person

This 11th day of May, 2020

NRALEGAL

Declaration by Applicant(s)

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Signature of authorised person

Chief Executive Officer, Australian Newsagents Federation Ltd

Office held

BENJAMIN KEARNEY

(Print) Name of authorised person

This 11th day of May, 2020


NRALEGAL

Declaration by Applicant(s)

The undersigned declare that, to the best of their knowledge and belief, the information given in response to questions in this form is true, correct and complete, that complete copies of documents required by this form have been supplied, that all estimates are identified as such and are their best estimates of the underlying facts, and that all the opinions expressed are sincere.

The undersigned undertake(s) to advise the ACCC immediately of any material change in circumstances relating to the application.

The undersigned are aware that giving false or misleading information is a serious offence and are aware of the provisions of sections 137.1 and 149.1 of the Criminal Code (Cth).



Signature of authorised person

Chief Executive Officer, Australian Federation of Travel Agents Ltd

Office held

JAMSON Westbury

(Print) Name of authorised person

This 11 day of MAY, 2020

Schedule 1 – Details of the Applicants

Name	National Retail Association Limited
ACN	009 664 073
Registered office	Level 3, 67 St Pauls Terrace, Spring Hill QLD 4000
Telephone	(07) 3240 0100
Contact person	Ms Dominique Lamb Chief Executive Officer Phone: (07) 3240 0100 Email: [REDACTED]
Email address for service	[REDACTED]
Description of business activities	Industry association registered under the <i>Fair Work (Registered Organisations) Act 2009</i> (Cth) representing the interests of over 6,000 employers in Australia's retail, fast food and quick service sectors and their affiliates. The NRA exists to support, inform, protect and represent the interests of its members in these industries.
Name	Australian Hotels Association
ACN	N/A
Registered office	Level 1, 27 Murray Crescent, Griffith ACT 2603
Telephone	(02) 6273 4007
Contact person	Stephen Ferguson Chief Executive Officer
Email address for service	[REDACTED]
Description of business activities	Industry association registered under the <i>Fair Work (Registered Organisations) Act 2009</i> (Cth) representing the interests of over 5,000 employers in Australia's hospitality and liquor industry.
Name	Franchise Council of Australia Limited
ACN	002 789 988
Registered office	Level 19, 567 Collins Street, Melbourne VIC 3000
Telephone	(03) 9508 0888
Contact person	Mary Aldred Chief Executive Officer
Email address for service	[REDACTED]
Description of business activities	Peak industry association body for the \$184 billion franchise business segment, which includes 1,344 networks, with 98,000+ individual franchised outlets, employing more than 598,000 people.
Name	The Pharmacy Guild of Australia
ABN	84 519 669 143
Registered office	Level 2, 15 National Circuit, Barton ACT 2600
Telephone	(02) 6270 1888
Contact person	Suzanne Greenwood Executive Director
Email address for service	[REDACTED]
Description of business activities	Industry association registered under the <i>Fair Work (Registered Organisations) Act 2009</i> (Cth) representing the interests of employers in the community pharmacy sector. representing community pharmacy. It seeks to serve the interests of its members and to support community pharmacy in its role delivering quality health outcomes for all Australians.

NRALEGAL

Name	Australian Newsagents' Federation Limited
ACN	008 295 038
Registered office	Suite 1.9, 56 Delhi Road, North Ryde NSW 2113
Telephone	0417 144 994
Contact person	Ben Kearney Chief Executive Officer
Email address for service	[REDACTED]
Description of business activities	Peak industry body for newsagents and lottery licencees, providing advocacy and support for the largest non-franchised sector in Australia.
Name	Australian Federation of Travel Agents Limited
ACN	001 444 274
Registered office	Level 31, 31 Market Street, Sydney NSW 2000
Telephone	(02) 9287 9900
Contact person	Jayson Westbury Chief Executive Officer
Email address for service	[REDACTED]
Description of business activities	Peak industry body for travel agency businesses in Australia representing approximately 96% of turnover of the indirect travel distribution industry, some 1400 entities in over 2800 locations nationally. AFTA operates the ATAS accreditation scheme which provides consumers with a clear differentiation of those travel agencies who have been accredited under the industry scheme - there is no government regulation for travel agents.