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16 April 2020

Daniel McCracken-Hewson  
Australian Competition & Consumer Commission  
Level 17/2 Lonsdale Street  
Melbourne VIC 3000

**By email:** [adjudication@accc.gov.au](mailto:adjudication@accc.gov.au)

Dear Mr McCracken-Hewson

**Australian Retailers Association: urgent application for interim authorisation**

We act for the Australian Retailers Association (**ARA**).

The ARA is an industry association representing the interests of Australia's retail sector, which employs over 1.2 million people. The ARA works to ensure retail success by informing, protecting, educating, advocating and saving money for its independent and national retail members, who operate more than 60,000 retail shopfronts across Australia.

The COVID-19 pandemic is having an unprecedented impact on the retail sector. Health and safety concerns, along with government-imposed restrictions, have forced large scale retail closures, and substantially reduced customer traffic across retail precincts.

On 3 April 2020 the ACCC granted conditional interim authorisation to Scentre Group and the Shopping Centre Council of Australia (**SCCA**) to enable shopping centre landlords to discuss, share information and coordinate relief to be provided to small and medium enterprise (**SME**) tenants financially impacted by COVID-19. At this stage, tenants do not themselves have ACCC authorisation to discuss, share information and coordinate their negotiation with landlords.

The ARA is aware that shopping centre landlords are making urgent demands of tenants in respect of their negotiations for rental relief, including requiring tenants to "open their books" and sign non-disclosure agreements. However, landlords are not providing an equivalent level of information disclosure and transparency. The ARA considers such conduct further increases the imbalance of information and bargaining power that already exists in the relationship between landlords and tenants, given landlords are discussing, sharing information and coordinating the relief they will provide.

In this context, the ARA seeks ACCC authorisation on behalf of ARA members who have been adversely financially impacted by COVID-19 to enable them to discuss, exchange information and collectively negotiate with landlords regarding the support to be provided to them, including the appropriate information to be exchanged with landlords for that purpose. It is intended that the collective negotiations will have regard to the mandatory Code of Conduct announced by the Prime Minister on 7 April 2020, which prescribes the good faith leasing principles applicable to negotiations between landlords and SME tenants (**Code**). The Code states that these principles should apply in spirit to all leasing arrangements for affected businesses, having fair regard to the size and financial structure of those businesses. The Code has not yet been enacted by the states and territories and it may take some time for that to happen.

The Code's principles include that:

- Landlords must reduce rent in proportion to the reduction in the tenant's business;
- At least 50% of the reduction must be a rent waiver with the balance being a deferral;
- To the extent deferred, tenants will be entitled to repay the deferred amounts over the balance of the term of the lease;
- Landlords cannot terminate leases due to non-payment of rent or call on security such as bank guarantees; and
- Parties should assist each other in their respective dealings with other stakeholders, including governments, utility companies, and banks/other financial institutions in order to achieve outcomes consistent with the objectives of the Code.

To inform the collective negotiations, it is intended the authorisation will enable participants to discuss and share information about how they are approaching the current COVID-19 crisis and dealing with its impacts upon them, as well as about the shopping centres in which they operate, including how vacancies, falling customer counts and deteriorating trading conditions caused by COVID-19 have impacted the value of those centres. The proposed conduct does not extend to individual tenants discussing or exchanging information about the precise amount of rent payable under their existing or proposed leasing arrangements, or any rent incentives previously granted by the relevant landlord.

The ARA considers enabling tenants to work together in this way will have broad public benefits, including helping both SME and large retail tenants alike survive, recover and be ready to flourish as the economy emerges from COVID-19, which will in turn help maintain strong and competitive retail markets that drive lower prices and greater choice for consumers.

Allowing ARA members to work together to develop consistency in responses and approaches will also minimise inefficiencies at a time when urgent action is required and the resources available to take that action are limited. It will also assist the ARA in providing appropriate support and advice to its members, an obligation which would otherwise likely fall to government bodies or require significant outlay by individual members, further facilitating the government's objectives pursuant to the Code.

Given shopping centre landlords are urgently demanding tenants to take action that may significantly impact their legal rights, the ARA seeks urgent interim authorisation for the proposed conduct pending the ACCC's final authorisation decision.

Further details of the proposed conduct are set out in the **enclosed** schedule.

We will arrange payment of the filing fee as soon as practicable.

Please let us know if you have any questions or would like to discuss any aspect of the ARA's application.

Yours sincerely

**KHQ Lawyers**



**David Robbins**  
Principal Solicitor

**Email:** 

## Schedule 1 – Further information regarding authorisation application

### The Applicant and parties to the proposed conduct

1. The ARA is an industry association representing the interests of Australia’s retail sector, which employs over 1.2 million people. The ARA works to ensure retail success by informing, protecting, educating, advocating and saving money for its independent and national retail members, who operate more than 60,000 retail shopfronts across Australia.
2. Further information about the ARA, its members and operations is available on the ARA website <https://www.retail.org.au/> and the relevant contact details for this application are below:

Name	Australian Retail Association
Address	Level 1, 112 Wellington Parade, East Melbourne VIC 3002
Telephone	(03) 8660 3308
Contact person(s)	Russell Zimmerman   Executive Director Phone: [REDACTED] Email address: [REDACTED]
Email address for service	David Robbins, KHQ Lawyers, [REDACTED]

3. Authorisation is requested on behalf of the ARA and its current and future members. At the time of this application, the ARA has approximately 7500 members.

### Proposed conduct to be authorised

4. The COVID-19 pandemic is having an unprecedented impact on the retail sector. Health and safety concerns, along with government-imposed restrictions, have forced large scale retail closures, and substantially reduced customer traffic across retail precincts.
5. On 3 April 2020 the ACCC granted conditional interim authorisation to Scentre Group and the Shopping Centre Council of Australia (**SCCA**) to enable shopping centre landlords to discuss, share information and coordinate relief to be provided to small and medium enterprise (**SME**) tenants financially impacted by COVID-19 (**SCCA authorisation**). At this stage, tenants do not themselves have ACCC authorisation to discuss, share information and coordinate their negotiation with landlords.
6. The ARA is aware that shopping centre landlords are making urgent demands of tenants in respect of their negotiations for rental relief, including requiring tenants to “open their books” and sign non-disclosure agreements. However, landlords are not providing an equivalent level of information disclosure and transparency. The ARA considers such conduct further increases the imbalance of information and bargaining power that already exists in the relationship between landlords and tenants, given landlords are discussing, sharing information and coordinating the relief they will provide.
7. In this context, the ARA seeks ACCC authorisation under s 88(1) of the *Competition and Consumer Act 2010* (Cth) on behalf of ARA members who have been adversely financially impacted by COVID-19 to enable them to discuss, exchange information and collectively negotiate with landlords regarding the support to be provided to them, including the appropriate information to be exchanged with landlords for that purpose. It is intended that the collective negotiations will have regard to the mandatory Code of Conduct announced by the Prime Minister on 7 April 2020, which prescribes the good faith leasing principles applicable to negotiations between landlords and SME tenants (**Code**). The Code states that these principles should apply in spirit to all leasing arrangements for affected

businesses, having fair regard to the size and financial structure of those businesses. The Code has not yet been enacted by the states and territories and it may take some time for that to happen.

8. The Code's principles include that:
  - (a) Landlords must reduce rent in proportion to the reduction in the tenant's business;
  - (b) At least 50% of the reduction must be a rent waiver with the balance being a deferral;
  - (c) To the extent deferred, tenants will be entitled to repay the deferred amounts over the balance of the term of the lease;
  - (d) Landlords cannot terminate leases due to non-payment of rent or call on security such as bank guarantees; and
  - (e) Parties should assist each other in their respective dealings with other stakeholders, including governments, utility companies, and banks/other financial institutions in order to achieve outcomes consistent with the objectives of the Code.
  
9. To inform the collective negotiations, it is intended the authorisation will enable participants to discuss and exchange information about:
  - (a) How they are approaching the current COVID-19 crisis and dealing with its impacts upon them;
  - (b) The shopping centres in which they operate, including how vacancies, falling customer counts and deteriorating trading conditions caused by COVID-19 have impacted the value of those centres;
  - (c) The questions being asked, and requests for information being made, by landlords of tenants in the context of considering and/or negotiating the support (if any) they will provide to tenants in the context of COVID-19;
  - (d) The appropriateness of actions landlords have requested tenants to take in the context of such negotiations, for example, signing non-disclosure agreements; and
  - (e) The positions landlords are adopting in respect of such negotiations, including how they have (or have not) applied and interpreted the principles of the Code.
  
10. It is also intended the authorisation will enable participants, having regard to the above information and 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 in respect of a particular group of tenants. Those terms will likely address matters such as:
  - (a) The appropriate information to be exchanged between landlords and tenants – for example:
    - (i) In relation to landlords, information about savings or concessions obtained by the landlord through insurance coverage, reduced costs and taxes, reduced services being provided (i.e. due to the reduced use of facilities), as well as information about shopping centre trading conditions, customer numbers and the landlord's financial position and capacity to grant rent reductions.
    - (ii) In relation to tenants, the nature and extent of information such as revenue / turnover figures to be provided to landlords, and the confidentiality and other restrictions applicable to use of that information by landlords.
  - (b) 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;

- (c) The assistance landlords and tenants should provide to each other in their respective dealings with third parties such as banks;
  - (d) The size and form of rent reductions, including waivers and deferrals;
  - (e) The size and form of reductions in statutory (e.g. land tax, council rates), insurance or other charges payable by a tenant;
  - (f) Landlords' passing through of savings or concessions obtained to tenants, such as benefits received from their banks or insurers;
  - (g) Landlords' ability to increase tenants' rent or other obligations;
  - (h) The efficacy of landlords' initiatives to combat the impact of COVID-19, including as part of any recovery phase;
  - (i) Whether steps taken by landlords comply with the requirements and spirit of the Code; and
  - (j) Dispute resolution processes to be adopted in the event landlords and tenants are unable to reach agreement.
11. The ARA considers there will be utility in discussions and collective negotiations occurring at multiple levels and group sizes of the landlord and tenant relationship, given some issues will be generally relevant, others to a particular landlord, and others to circumstances and trading conditions within a particular centre. Accordingly, the authorisation is intended to facilitate discussions:
- (a) In relation to matters that impact landlords and tenants generally;
  - (b) With particular landlords across their shopping centre portfolio;
  - (c) Between tenants of a particular shopping centre and the landlord of that centre; and
  - (d) In respect of a particular group of tenants – for example within a certain category such as clothing retailers or takeaway food outlets.
12. The proposed conduct does not extend to individual tenants discussing or exchanging information about the precise amount of rent payable under their existing or proposed leasing arrangements, or any rent incentives previously granted by the relevant landlord ("**Sensitive Rent Information**").
13. The ARA does not consider it necessary or appropriate for tenants to discuss or exchange Sensitive Rent Information in undertaking the joint negotiations described above, noting that many leases may prohibit tenants from doing so in any event. Rather, tenant discussions must be undertaken, and arrangements must be expressed, to avoid disclosure of Sensitive Rent Information. As an illustrative example, the authorisation (if granted) would permit a group of clothing retailers to collectively negotiate with their landlord a percentage reduction in rent for a particular period. However, it would not permit those retailers to disclose to each other actual rental amounts or the specific monetary impact of the negotiated rental reduction on their tenancy / business.
14. The proposed conduct:
- (a) is to enable ARA members to work together to develop consistency in responses and approaches, and minimise inefficiencies at a time when urgent action is required and the resources available to take that action are limited.
  - (b) is a temporary measure aimed to deal with the difficulties that retail tenants have been facing as a result of COVID-19, to help them survive, recover and be ready to flourish as the economy emerges from COVID-19.

- (c) is not compulsory – any participant can elect not to participate, or opt out of any proposed collaboration under the authorisation.

### **Interim authorisation**

15. As noted above, the ARA is aware that shopping centre landlords are making urgent demands of tenants in respect of their negotiations for rental relief. Given these urgent demands have the potential to significantly impact the legal rights of tenants, the ARA seeks urgent interim authorisation for the proposed conduct to enable the negotiations to be conducted, and arrangements regarding the terms of support to be provided to tenants, as a matter of urgency.

### **Period of authorisation**

16. The applicant seeks authorisation for the proposed conduct for a period of 12 months. This is consistent with the period sought in the SCCA authorisation, and the Code's principles which are expressed to have regard to the impact of the COVID-19 pandemic plus a reasonable recovery period. At this stage it is difficult to predict the duration or extent of the COVID-19 pandemic and therefore the period in which authorisation for the proposed conduct may need to be extended.
17. The applicant notes the ACCC has the ability under section 91B of the CCA to revoke authorisation should there be a material change in circumstances, such as to the financial and economic impact caused by COVID-19.

### **Relevant provisions of the CCA**

18. The relevant provisions of the CCA which may apply to the proposed conduct include:
- (a) making and/or giving effect to a contract, arrangement or understanding that contains a cartel provision (Division 1 of Part IV);
  - (b) making and/or giving effect to a contract, arrangement or understanding that has the purpose, effect or likely effect of substantially lessening competition (section 45(1)(a) and (b));
  - (c) engaging in concerted practices that have the purpose, effect or likely effect of substantially lessening competition (section 45(1)(c)).

### **Persons who may be directly impacted by the proposed conduct**

19. The persons directly impacted are the landlords who own or manage the tenancies of the participants in the proposed conduct, and their owners and employees.

### **Market information**

20. According to ICSC Research, Australian shopping centres (including Homemaker, Themed and Factory Outlet centres) contain around 26.5 million square metres of gross lettable area (**GLA**), which accounts for approximately 46% of the total retail space in Australia.
21. According to Baker Consulting, as at 2018 there were 1,630 shopping centres in Australia which exceeded 1,000 square metres of GLA. These comprised:
- (a) 78 Regional shopping centres (i.e. those that include at least one department store);
  - (b) 291 Sub Regional centres (i.e. those that include at least one discount department store as the major anchor tenant);
  - (c) 1,120 Neighbourhood or supermarket-based shopping centres (i.e. those that include at least one supermarket as the major anchor tenant);



- (d) 96 CBD centres; and
  - (e) more than 65,000 speciality shops.
22. The data in paragraph 21 excludes Homemaker, Themed and Factory Outlet centres, and is contained in the SCCA authorisation application. Confidential Schedule C to that application provides details of the top 20 shopping centre owners and managers in Australia by GLA according to the Property Council of Australia, Shopping Centre Directory 2019. According to the application:
- (a) SCCA members own or co-own approximately 510 shopping centres in Australia;
  - (b) These centres contain approximately 13 million square metres of lettable floor space;
  - (c) The SCCA understands this represents about 68% of the total lettable floorspace of Australian shopping centres; and
  - (d) A number of SCCA members also have management agreements in respect of other shopping centres not owned by those SCCA members.
23. Confidential Schedule D to the SCCA application provides estimates of the number of centres SCCA members own and/or manage in Australia and of their tenants' shares of ABS retail sales. Although the ARA does not have access to the Confidential Schedules, the shopping centre landlords the subject of the SCCA authorisation are plainly substantial enterprises. For example, as at 15 April 2020 the market capitalisation (as obtained from the Australian Securities Exchange) for the below entities is as follows:
- (a) Scentre Group - \$10.74 billion.
  - (b) Mirvac Group - \$8.97 billion.
  - (c) GPT Group - \$8.03 billion.
  - (d) Lendlease Group - 6.62 billion.
  - (e) Jones Lang LaSalle Incorporated - \$5.568 billion.
24. The imbalance of information and bargaining power that exists between shopping centre landlords on the one hand, and tenants on the other, is well recognised. Landlords generally have access to detailed information (including financial records) of all tenants within their shopping centres, and can exploit that information and superior bargaining power to extract rent and other terms from tenants which they otherwise could not if the imbalance did not exist. Smaller retailers in particular often have little bargaining power and access to market information, which can result in them committing themselves to high rentals with relatively short lease terms and automatic annual rent increases. Smaller retailers can be especially vulnerable when it comes time to renew their lease, where if the landlord's rent offer is excessive, their only alternative may be to exit the centre and sacrifice significant costs spent developing the business during the term of their lease.
25. Larger retailers are generally not as vulnerable as their smaller counterparts, particularly where they are able to negotiate multiple tenancies with the same landlord on a portfolio basis across numerous shopping centres. However, larger retailers nevertheless suffer from an imbalance of information and bargaining power compared with landlords, given they do not have access to the same centre-wide information as landlords, generally have only a maximum of a few stores within any one centre, and can also be especially vulnerable at the time of lease renewals, given the substantial investment made during the term of their lease. Accordingly, their negotiating position vis-à-vis landlords is also comparatively weak.

26. Australia's retail sector is worth approximately \$325 billion and employs over 1.3 million people. 50% of Australia's top 20 retailers are ARA members.<sup>1</sup> Broadly speaking, retail tenants compete with one another for retail space in shopping centres and other forms of shops, such as free-standing shops and shops in office complexes and industrial and residential areas. Retail spending is a major driver of demand for retail property space, and leases often take into account retail sales growth. Over the past 5 years online stores have continued to capture an increasing share of sales from shopping centre retailers, which has reduced foot traffic in centres and resulted in changes to tenancy mixes.
27. The shopping centre retail industry can broadly be divided into segments based on the type of tenant, including:
- (a) Consumer goods retailers, who sell furniture, homeware, appliances, consumer electronics, computers, sporting goods, video games, toys, books, clothing, footwear, personal accessories and cosmetics;
  - (b) Supermarkets and fresh food stores, including butchers, bakeries, cake stores and fruit and vegetable retailers;
  - (c) Takeaway food outlets, cafes / coffee shops and restaurants; and
  - (d) Other entertainment and service providers including banks, travel agents, phone and tablet vendors, cinemas, and hair and beauty salons.<sup>2</sup>
28. **Confidential Schedule A** to this application contains a list of the top 50 ARA members by number of tenancies, including their staff numbers where available.

#### Public benefits

29. As noted above, health and safety concerns, along with government-imposed restrictions, have forced large scale retail closures, and substantially reduced customer traffic across retail precincts. Many discretionary retailers have experienced sales declines of well over 50% since the start of the COVID-19 crisis, making many businesses unviable. Kepler Analytics has reported that of the 3,000+ Australian stores it tracks, 55% have closed as at the end of March 2020.<sup>3</sup> This has substantially reduced footfall in shopping centres where those retailers are located, which has flow-on consequences for other retailers who have remained open.
30. Examples of major retailer closures include<sup>4</sup>:
- (a) Accent Group – which has closed all 522 Platypus, Hype and Athletes Foot stores and stood down about 4500 employees.
  - (b) Lovisa – which has closed 155 stores and stood down about 800 full and part-time employees.
  - (c) Alceon – which has closed almost 1400 stores and stood down almost 7000 employees.
  - (d) Premier Investments – which has closed some 900 Smiggle, Dotti, Peter Alexander, Just Jeans, Jay Jays and Jacqui E stores and stood down about 7000 employees.
31. In these unprecedented circumstances, enabling tenants adversely financially impacted by COVID-19 to work together, share information and collectively negotiate as described above will reduce the

<sup>1</sup> <https://www.retail.org.au/australian-retailers-association/>

<sup>2</sup> IBISWorld industry report OD5255, Shopping Centre Operators in Australia, August 2019, p 13.

<sup>3</sup> <https://www.mcgrathnicol.com/insight/in-retail-covid-19-special-edition-1/>

<sup>4</sup> <https://insideretail.com.au/news/mass-closures-as-premier-accent-lovisa-and-others-shut-stores-202003>;  
<https://www.afr.com/companies/retail/premier-lovisa-accent-close-stores-super-retail-cancels-dividend-20200326-p54e1h>



imbalance of information and bargaining power that exists between landlords and tenants, and result in tenants obtaining more beneficial terms than they would otherwise be able to achieve individually. This will have broad public benefits, including:

- (a) **Survival of the Australian retail industry and prevention of unemployment** – The very survival of many participants’ retail businesses is at stake. The extent to which they can successfully emerge from the COVID-19 crisis, and continue to remain significant employers of Australian workers is connected in large part to their ability to meet ongoing financial obligations to landlords under their lease arrangements. Accordingly, more beneficial terms for tenants will directly assist the Australian retail industry, retailers and retail jobs to survive.
- (b) **Increased competition between retailers to supply products** – Assisting retail businesses to survive, recover and be ready to flourish as the economy emerges from COVID-19 will help maintain strong and competitive retail markets that drive lower prices and greater choice for consumers. In particular, obtaining more favourable terms from landlords will enable retailers to compete more vigorously to supply products to consumers, for example by passing on cost reductions in the form of lower prices, improved product offerings and/or expanded product ranges. It will also assist the Australian retail industry more broadly to compete effectively against online overseas sellers, which (among other things) does not necessarily benefit the Australian economy, and who are at greater risk of non-compliance with Australian product quality and safety standards.
- (c) **Transaction cost savings and efficiencies** – The proposed conduct will reduce transaction costs incurred by both tenants and landlords alike, and enable a more efficient utilisation of resources. In particular, allowing tenants to share information and collectively negotiate with landlords will substantially reduce the time and bureaucratic burden that would otherwise be taken in individual dealings, including the time to negotiate and obtain legal, technical or other advice. It is nevertheless expected that individual dealings on some issues will remain necessary, given leases have (for example) different structures, different periods of tenure and different mechanisms for determining rent. As noted above, allowing ARA members to work together to develop consistency in responses and approaches will minimise inefficiencies at a time when urgent action is required and the resources available to take that action are limited. It will also assist the ARA in providing appropriate support and advice to its members, an obligation which would otherwise likely fall to government bodies or require significant outlay by individual members.
- (d) **Advancing the Australian Government’s objectives** - The stated objective of the Code implemented by Government is to share, in a proportionate, measured manner, the financial risk and cashflow impact during the COVID-19 period, whilst seeking to appropriately balance the interests of tenants and landlords. An overarching principle is that landlords and tenants share a common interest in working together, to ensure business continuity, and to facilitate the resumption of normal trading activities at the end of the COVID-19 pandemic during a reasonable recovery period. In this regard, the ARA considers a co-ordinated response by its members is likely to achieve outcomes consistent with these principles much faster and more effectively than if tenants had to individually negotiate every term of every lease.
- (e) **Improved relationships and communication** - The ARA considers that, in providing a collective voice to tenants, the proposed conduct will assist landlords in better understanding the position of tenants, the challenges they face and the impact of landlords’ decisions on them - given landlords are driven by different imperatives to tenants and may have unconscious biases arising from their distinct role and perspective.

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### Public detriment

32. A possible public detriment of ARA members discussing, sharing information and collectively negotiating with landlords is a reduction in competitive tension between tenants competing for retail space in shopping centres. However, the ARA considers the proposed conduct will assist in creating a more level negotiating field by reducing the imbalance of information and bargaining power with landlords described above – and on that basis is pro-competitive.
33. The risk of a reduction in competitive tension is also mitigated by the proposed conduct not extending to individual tenants discussing or exchanging Sensitive Rent Information about their existing or proposed leasing arrangements. Further, the proposed conduct is not compulsory – all participants are free to negotiate their own individual arrangements with landlords, and not participate in any proposed collaboration under the authorisation.

### Declaration by Applicant

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).



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Russell Zimmerman | Executive Director  
Australian Retailers Association  
This 16th day of April 2020.

**Confidential Schedule A - Top 50 ARA members by number of tenancies**

