



Australian
Competition &
Consumer
Commission

Draft Determination

Application for authorisation

lodged by

Jewellers Association of Australia

in respect of

a proposed retail tenancy database

Date: 25 September 2014

Authorisation number: A91432

Commissioners: Sims
Rickard
Schaper
Cifuentes
Court
Featherston
Walker

Summary

The ACCC proposes to grant authorisation to the Jewellers Association of Australia (JAA) and its current and future members to establish a retail tenancy database. The Database will include de-identified information about the terms and conditions associated with commercial leases for retail tenancies entered into by members of the JAA.

The ACCC is proposing to grant authorisation for five years.

Next steps

The ACCC will seek submissions in relation to this draft determination before making its final decision. The applicants and interested parties may also request the ACCC to hold a pre-decision conference to allow oral submissions on the draft determination.

The application for authorisation

1. On 24 June 2014, the Jewellers Association of Australia (JAA) on behalf of itself and its members lodged application A91432 with the Australian Competition and Consumer Commission under subsection 88(1A) and 88(1) of the *Competition and Consumer Act 2010* (the CCA).
2. The JAA is seeking authorisation for five years for proposed conduct to establish a retail tenancy database (Database) for use by its members. The Database will be a secure website and will include de-identified information about the terms and conditions associated with leases for retail tenancies.¹ The Database will contain information reported by JAA members as to the details of their retail tenancies, including location, the rent paid and the total area leased. The information will not include the full address of the applicable premises or the name of the tenant.

Background

3. The JAA is a national not-for-profit organisation, membership is voluntary, and members include organisations from the manufacturing, wholesaling, distribution and retail sectors of the jewellery industry. The JAA estimates that its membership includes more than 75 per cent of the jewellery industry. JAA membership includes 646 jewellery retailers who collectively have more than 1,100 retail jewellery outlets nationally.
4. The JAA's main functions include implementing the JAA Jewellery Industry Code of Conduct, providing career, training and industry events, and assisting with complaints and enquiries through the JAA Information Hotline.

¹ JAA has noted that jewellers predominantly occupy retail premises in shopping centres and retail shopping strips (as opposed to factory outlet centres and homemaker centres).

Leasing advisory services

5. There currently exist a number of publicly available databases that contain information regarding retail tenancy leases, including RP Data and Leasing Information Services (LIS).
6. RP Data Commercial provides data on commercial property transactions across Australia. According to RP Data its Licensing Cityscope and Lease Expiry Diary Data (NSW and QLD only) helps retail tenants to compare transactions and determine rental rates for tenancies (initial and renewal agreements). RP Data's Property Information Monitor's database of sales and leasing transactions provides rental rates and market activity.²
7. LIS provides tenancy reports including information on existing retail leases throughout NSW. Information includes terms of lease, base rent, annual rent reviews, rate per metre squared, and rental rate estimate. LIS reports are generated using leases purchased directly from the land titles offices in each state.³

Productivity Commission Report

8. In 2008, the Productivity Commission (PC) conducted a public inquiry to examine and report on retail tenancy leases in Australia. The final report, *The Market for Retail Leases in Australia*, was released by the PC on 27 August 2008.⁴ The request by the Government to conduct the inquiry stemmed from difficulties small business were facing in entering into commercial leases over which they felt they had little or no control, and from differences in retail tenancy laws between States and Territories.
9. In its report the PC concluded that despite the presence of market-based information providers/advisors, and the mandatory disclosure requirements, information asymmetries exist in the market for retail tenancies. The PC found that information on rentals in shopping centres is scarce in many States — with the exception of New South Wales, Queensland and the Australian Capital Territory where lease registration is more common place.⁵
10. The PC considered that one of the most fruitful approaches to improving the operation of the retail tenancy market and reducing costs would be to further improve transparency, disclosure and dispute resolution, to reduce information imbalances and unwind constraints on efficient decision making. The PC considered that wider availability of key lease details would contribute to market information being widely used, and should be facilitated.⁶

² http://www.rpdata.com/services/information_knowledge.html

³ https://www.leaseinfo.com.au/about_faq.cfm

⁴ <http://www.pc.gov.au/projects/inquiry/retail-tenancies/report>

⁵ Productivity Commission Inquiry Report, *The Market for Retail Tenancy Leases in Australia* (2008), page 163.

⁶ Ibid, page xxx.

ACCC evaluation

11. The ACCC tests the claims made by the applicant in support of an application for authorisation through an open and transparent public consultation process. The ACCC sought submissions from 69 interested parties potentially affected by the application, including JAA members and non-members; leasing data providers; landlord, retail and consumer associations; and government bodies.
12. The ACCC received three submissions:
 - a. The Shopping Centre Council of Australia advises that it has no objection to the authorisation, as long as its members are not required to provide information for the Database, or verify information provided by JAA members.
 - b. The Small Business Development Corporation of Western Australia (SBDC) supports an industry association creating a voluntary lease register to increase access to rental information for its members. The SBDC considers that this could lead to lower cost leases being entered into and cost savings being passed on to consumers.
 - c. Leasing Information Services (LIS) considers that there is a problem of information asymmetry between landlords and retailers, especially in shopping centres. LIS supports the application as it considers that there is a need for greater transparency in retail leasing.
13. Copies of public submissions may be obtained from the ACCC's website: www.accc.gov.au/authorisationsregister.
14. The ACCC's evaluation of the proposed conduct is in accordance with the relevant net public benefit test⁷ contained in the CCA. Under the relevant test the ACCC shall not grant authorisation unless it is satisfied that the likely benefit to the public would outweigh the likely detriment to the public constituted by any lessening of competition.
15. In its evaluation of the application the ACCC has taken into account:
 - a. the application and submissions received from the applicant and interested parties
 - b. information available to the ACCC from consideration of previous matters
 - c. the likely future without the proposed conduct for which authorisation is sought. The ACCC considers that without the introduction of the Database, JAA members would have more limited access to specific and tailored information about tenancy arrangements for retail jewellery outlets and are likely to continue to negotiate retail leases with landlords based on currently available information
 - d. the relevant area of competition likely to be affected by the proposed conduct. The JAA submits that the relevant market is that for retail tenancy leases in

⁷ Subsections 90(5A) and 90(6). The relevant tests are set out in Attachment A.

Australia. The ACCC does not consider that it is necessary to precisely identify the market for the purpose of assessing this application, but notes that the area of competition most likely to be affected is for the supply and acquisition of retail tenancy leases in Australia, and

- e. the five year period for which authorisation has been sought.

Public benefit

16. Public benefit is not defined in the CCA. However, the Tribunal has stated that the term should be given its widest possible meaning. In particular, it includes:

...anything of value to the community generally, any contribution to the aims pursued by society including as one of its principal elements ... the achievement of the economic goals of efficiency and progress.⁸

17. The JAA submits that the proposed conduct will deliver public benefits, including:

- a. improving the availability of retail tenancy market data throughout Australia
- b. the retention of smaller jewellery retailers
- c. increased competition in retail tenancy terms
- d. efficiency in resolving disputes regarding rental amounts, and
- e. more competitive jewellery prices for consumers.

18. The ACCC considers that the proposed conduct is likely to result in some public benefits, including:

- a. **Improving access to information leading to better input into contracts:**

In its submission to the PC the Franchise Council of Australia (FCA) argued that information asymmetry provides the landlord with an unfair advantage in rent negotiations as they know the tenant's ability to pay and tenants find it hard to compare rent levels between shopping centres.⁹

The PC noted that many concerns were raised about information imbalances, particularly over the lack of available verifiable information on shopping centre rents (including incentives).¹⁰

The PC noted that rent information for similar locations, notwithstanding that each lease and location is unique, would allow tenants and potential tenants

⁸ *Re 7-Eleven Stores* (1994) ATPR 41-357 at 42,677. See also *Queensland Co-operative Milling Association Ltd* (1976) ATPR 40-012 at 17,242.

⁹ *Ibid.*

¹⁰ *Productivity Commission Inquiry Report, The Market for Retail Tenancy Leases in Australia* (2008), page 159.

to recognise ambit claims made by the landlord and to have greater confidence in their assessment of the market.¹¹

The ACCC considers that the Database is likely to improve the level of, and access to, information relating to retail jewellery tenancies for JAA members. The availability and use of specific and tailored information about jewellery tenancy arrangements by JAA members has the potential to facilitate greater input into contractual negotiations and enable leases to be negotiated that better reflect the commercial requirements of individual JAA members. The ACCC considers that this is likely to result in a public benefit from efficiency improvements.

b. Improved retail competition:

The JAA notes that its members operate in a competitive retail market, where any occupancy cost savings will be passed on to consumers through more competitive pricing of jewellery at the retail level.

As noted, the ACCC considers that the improved transparency of market information through the Database is likely to lead to more efficient leases for retail tenancies, this may, in turn, result in benefits to consumers.

c. More efficient dispute settlement:

The JAA submits that the incidence and duration of disputes between landlords and tenants could be reduced where the retailers have access to specific retail tenancy information which enables them to objectively assess their position.

In its report the PC noted that most disputes relate to occupancy costs, performance of a tenant or landlord under a tenancy contract and the trading amenity provided by the landlord.¹² It was the PC's view that increased access to rental data may aid valuers when they are requested to settle disputes over market rent reviews.¹³

The ACCC considers that the improved availability of lease information is likely to aid in the more efficient settlement of rental disputes between tenants and landlords.

Public detriment

19. Public detriment is also not defined in the CCA but the Tribunal has given the concept a wide ambit, including:

...any impairment to the community generally, any harm or damage to the aims pursued by the society including as one of its principal elements the achievement of the goal of economic efficiency.¹⁴

¹¹ Ibid.

¹² Ibid at page 193.

¹³ Ibid at page 163.

¹⁴ *Re 7-Eleven Stores* (1994) ATPR 41-357 at 42,683.

20. The JAA submits that the proposed conduct will not result in any significant public detriment and that any public detriment would be outweighed by the public benefits. The JAA notes that:
- a. Information regarding retail tenancy leases is already available through other providers of leasing information, or directly from the Land Titles Office in most states.
 - b. The Database will not place tenants in a position that they can act as a collective, or negotiate or co-ordinate their conduct as a group in relation to particular tenancies.
 - c. The information in the Database will not be determinative of the actual rent agreed between the landlord and tenant in each case.
21. The ACCC considers that the proposed conduct is likely to result in limited public detriment, for the following reasons:
- a. Participation in the Database by the JAA's members is voluntary. Furthermore, the information provided by the Database is for guidance only and JAA members will negotiate and enter into leases that best suit their individual circumstances.
 - b. The proposed conduct is unlikely to lessen competition for retail leases. In particular the proposed conduct does not affect the incentives of tenants to compete for retail leases, nor does it affect the incentives of landlords to compete for tenants. Furthermore the JAA members make up a small proportion of the total market for retail leases. The JAA has noted that their members have about 1100 retail outlets nationally, in its report the PC estimated that there are about 290,000 retail tenancy leases, with about 58,000 written each year.
 - c. The proposed conduct is unlikely to reduce the incentives for JAA members to compete with each other at the retail level, particularly given the level of competition that exists and is likely to continue to exist.

Balance of public benefit and detriment

22. In general, the ACCC may grant authorisation if it is satisfied that, in all the circumstances, the proposed conduct is likely to result in a public benefit, and that public benefit will outweigh any likely public detriment.
23. For the reasons outlined in this draft determination the ACCC is satisfied that the likely benefit to the public resulting from the proposed arrangements would outweigh the likely detriment to the public constituted by any lessening of competition that would be likely to result.
24. Accordingly, the ACCC is satisfied that the relevant net public benefit test is met.

Length of Authorisation

25. The JAA is seeking authorisation for five years. The JAA submits that the development of the Database (including collection of the information) is likely to take at least 12 months. Further, to obtain the benefit of the Database, JAA members will need to be at a point of negotiating a new or existing lease - most members will already be party to a retail tenancy lease, which are commonly for a term of five years.
26. The ACCC considers it is appropriate to propose to grant authorisation to the JAA for five years as requested.

Draft determination

The application

27. On 24 June 2014, the Jewellers Association of Australia (JAA) on behalf of itself and its current and future members lodged application A91432 with the Australian Competition and Consumer Commission using Form B Schedule 1 of the *Competition and Consumer Regulations 2010*. The application was made under subsection 88(1A) and 88(1) of the CCA.
28. The JAA is seeking authorisation to establish a retail tenancy database (Database) for use by its members. The Database will be a secure website and will include de-identified information about the terms and conditions associated with leases for retail tenancies.¹⁵ The Database will contain information reported by JAA members as to the details of their retail tenancies, including location, the rent paid and the total area leased.
29. Subsection 90A(1) requires that before determining an application for authorisation the ACCC shall prepare a draft determination.

The net public benefit test

30. For the reasons outlined in this draft determination, the ACCC considers that in all the circumstances the proposed conduct for which authorisation is sought is likely to result in a benefit to the public and that benefit would outweigh the likely detriment to the public constituted by any lessening of competition that would result.¹⁶

¹⁵ JAA has noted that jewellers predominantly occupy retail premises in shopping centres and retail shopping strips (as opposed to factory outlet centres and homemaker centres).

¹⁶ Subsections 90(5A) and 90(6) of the CCA.

Conduct for which the ACCC proposes to grant authorisation

31. The ACCC proposes to grant authorisation to the JAA and its current and future members to establish a retail tenancy database (the Database) for use by its members. The Database will include de-identified information about the terms and conditions associated with commercial leases for retail tenancies. The Database will be populated (at least in part) by information reported by JAA members as to the details of their own retail tenancies, including location, the rent paid and the total area leased. JAA members will continue to negotiate retail tenancy leases individually with landlords.
32. The ACCC proposes to grant authorisation for a period of five years.
33. This draft determination is made on 25 September 2014.

Further submissions

34. The ACCC will now seek further submissions. In addition, the applicant or any interested party may request that the ACCC hold a conference to discuss the draft determination, pursuant to section 90A of the CCA.

Attachment A - Summary of relevant statutory tests

Subsection 90(5A) provides that the ACCC shall not authorise a provision of a proposed contract, arrangement or understanding that is or may be a cartel provision, unless it is satisfied in all the circumstances that:

- the provision would result, or be likely to result, in a benefit to the public; and
- that benefit would outweigh the detriment to the public constituted by any lessening of competition that would result, or be likely to result, if the proposed contract or arrangement were made or given effect to.

Subsection 90(6) states that the ACCC shall not authorise a provision of a proposed contract, arrangement or understanding, other than an exclusionary provision, unless it is satisfied in all the circumstances that:

- the provision of the proposed contract, arrangement or understanding would result, or be likely to result, in a benefit to the public; and
- that benefit would outweigh the detriment to the public constituted by any lessening of competition that would result, or be likely to result, if the proposed contract or arrangement was made and the provision was given effect to.