



Draft Determination and interim authorisation

Application for authorisation AA1000501
lodged by
Australian Retailers Association (ARA)
in respect of
collective bargaining of ARA members with landlords
Authorisation number: AA1000501

2 July 2020

Commissioners: Sims, Keogh, Rickard, Court, Ridgeway

Summary

In light of the impact of the COVID-19 pandemic on retailers, the Australian Retailers Association applied for authorisation to enable collective bargaining and information sharing in relation to rent relief measures.

The ACCC proposes to grant authorisation to enable the Applicants to exchange information and collectively bargain with landlords regarding rent relief as a result of the impact of COVID-19.

The ACCC proposes to grant authorisation subject to record keeping and reporting conditions until 1 September 2021.

On 22 April 2020, the ACCC granted interim authorisation enabling participating tenants to engage in the conduct while the ACCC is considering the substantive application. The ACCC has decided to revoke this interim authorisation and grant a replacement interim authorisation to ensure consistency with the conduct which the ACCC proposes to authorise.

The ACCC invites submissions in relation to this draft determination before making its final decision.

1. The application for authorisation

- 1.1. On 17 April 2020, the Australian Retailers Association (**ARA**) lodged an application for authorisation AA1000501 with the Australian Competition and Consumer Commission (the **ACCC**). The ARA is an industry association representing approximately 7,500 members who operate more than 60,000 retail shopfronts across Australia, most as tenants in leased stores within retail precincts.
- 1.2. The ARA seeks authorisation, on behalf of itself, and its current and future members (the **Applicants**), to collectively bargain and share information in relation to rent relief negotiations with landlords as a result of the COVID-19 pandemic.
- 1.3. The ACCC can grant authorisation, which provides businesses with legal protection for arrangements that may otherwise risk breaching competition laws but are not harmful to competition and/or are likely to result in overall public benefits.
- 1.4. The ARA also requested interim authorisation to engage in the Proposed Conduct while the ACCC is considering the substantive application.¹ On 22 April 2020, the ACCC granted interim authorisation, recognising the urgency of the request and significant challenges faced by retail tenants due to the COVID-19 pandemic. Interim authorisation will remain in place until the date the ACCC's final determination comes into effect or until the ACCC decides to revoke interim authorisation.

Background

- 1.5. The ACCC recognises the significant challenges being faced by small businesses and the economy more broadly as a result of the COVID-19 pandemic. The pandemic has caused a major disruption to society and the economy, with social distancing measures and travel bans affecting various sectors across the economy. Many small businesses around Australia have temporarily closed or are suffering from sharp

¹ The request for interim authorisation was made under subsection 91(2) of the *Competition and Consumer Act 2010* (Cth) (the Act)

declines in revenue while continuing to service their existing financial obligations. This has given rise to the need for relief packages from both government and industry. In that context, the ACCC has received a large number of applications for authorisation, including interim authorisation, aimed at providing financial relief to businesses and individuals, and facilitating the supply of goods and services (including medical products and services).

- 1.6. On 7 April 2020, the National Cabinet announced the Mandatory Code of Conduct regarding retail rental relief during the COVID-19 pandemic (the **Mandatory Code**). The Mandatory Code sets out good faith leasing principles between landlords and tenants who are small to medium sized businesses,² and was subsequently enacted by State and Territory governments. The Applicants are seeking authorisation for conduct beyond the scope of the Mandatory Code, including collective bargaining and information sharing, to further facilitate obtaining rent relief for their members.
- 1.7. On 12 May 2020, the National Retail Association, the Australian Hotels Association, the Franchise Council of Australia Limited, the Pharmacy Guild of Australia, the Australian Newsagents' Federation Limited and the Australian Federation of Travel Agents Limited collectively lodged application for authorisation AA1000512 seeking authorisation for conduct similar to that sought by the Applicants.

The Proposed Conduct

- 1.8. The ARA seeks authorisation for itself and its current and future members to discuss, exchange information, collectively negotiate with landlords, and to make and give effect to contracts, arrangements or understandings regarding the terms of support, including rent relief, to be provided to them, either generally or in respect of a particular group of tenants.
- 1.9. Specifically, the Applicants seek authorisation to enable current and future members who have been adversely affected by the COVID-19 pandemic to:
 - (a) discuss and share information about the:
 - (i) nature and extent of the impact of the COVID-19 pandemic and the measures being implemented or considered to mitigate this impact;
 - (ii) retail precincts in which Tenant Participants 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;
 - (iii) information requested, and questions being asked, of tenants by landlords in the context of considering and/or negotiating what support (if any) landlords will provide to tenants in the context of the COVID-19 pandemic;
 - (iv) 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
 - (v) positions adopted by landlords in respect of such negotiations, including the interpretation and (non-)application of the principles of the *National Cabinet Mandatory Code of Conduct: SME Commercial Leasing Principles During COVID-19* (the **Code**);

² National Cabinet Mandatory Code of Conduct – SME Commercial Leasing Principles.

- (b) collectively negotiate with landlords regarding the support to be provided to tenants, including the appropriate information to be exchanged with landlords for that purpose; and
- (c) make and give effect to contracts, arrangements or understandings as to the terms of support to be provided to tenants either generally or with respect to a particular class of tenants

(the **Proposed Conduct**).

1.10. The Applicants advise that the terms of any contract, arrangement or understanding agreed under the Proposed Conduct will likely include matters such as:

- (a) the appropriate information to be exchanged between landlords and tenants:
 - (i) in relation to landlords—information about:
 - savings or concessions obtained by the landlord through insurance coverage;
 - reduced costs and taxes (including, for example, any benefit derived from alterations to the treatment of land tax);
 - reduced service costs (i.e. due to reduced use of facilities);
 - shopping precinct trading conditions and customer/visitation numbers; and
 - 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; and
 - (ii) in relation to tenants—information about 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
 - 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 any reduction in statutory, insurance or other charges payable by the tenant or chargeable by the landlord as an outgoing;
- (g) the passing through to tenants of savings or concessions obtained by landlords, including benefits received from financial institutions, insurers and 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.

1.11. The Applicants advise that the Proposed Conduct does not extend to individual tenants discussing or exchanging:

- (a) the actual amount (*expressed or ascertainable as a dollar value*) of rent payable under their existing or proposed leasing arrangements, or
- (b) the amount (*expressed or ascertainable as a dollar value*) of any rent incentives previously granted by the relevant landlord before engaging in conduct under this authorisation;
- (c) the actual amount (*expressed or ascertainable as a dollar value*) of outgoings paid or to be paid under a lease; or
- (d) the actual amount (*expressed or ascertainable as a dollar value*) of any other moneys paid or to be paid under a lease by either the landlord or the tenant.

(Sensitive Tenant Rent Information) *For the avoidance of doubt, the amounts referred to above may be discussed or exchanged where these amounts are expressed as a percentage, provided that doing so does not result in the actual amount (as a dollar value) being ascertainable.*

1.12. The ARA submits that ARA Participation in the Proposed Conduct is not compulsory and individual ARA members may elect not to participate, or opt out, of any proposed collaboration.

1.13. The ARA seeks authorisation for 12 months.

2. Consultation

2.1. A public consultation process informs the ACCC's assessment of the likely public benefits and detriments from the Proposed Conduct.

2.2. The ACCC invited submissions from a range of potentially interested parties including landlords, tenants and industry associations.³ The Shopping Centre Council of Australia (**SCCA**) and several ARA retailer members made public submissions. These are available on the ACCC's Public Register.

2.3. ARA retailer members support the application for authorisation. They submit that COVID-19 has significantly impacted their businesses, and that they have subsequently encountered difficulty in individually negotiating any meaningful rent relief with their landlords.

2.4. The SCCA's submission raises a number of issues regarding the purpose and scope of the application. The SCCA submits that the application is an attempt to put its substantial number of members in a position to maximise the rental relief those members might obtain, rather than for landlords and tenants to share the impact of COVID-19.

2.5. Public submissions are considered in further detail below.

³ A list of the parties consulted and the public submissions received is available from the ACCC's public register [ACCC's public register](#).

3. ACCC assessment

- 3.1. The ACCC's assessment of the Proposed Conduct is carried out in accordance with the relevant authorisation test contained in the Act.
- 3.2. The Applicant has sought authorisation for Proposed Conduct that would or might constitute a cartel provision within the meaning of Division 1 of Part IV of the Act and may substantially lessen competition within the meaning of section 45 of the Act. Consistent with subsection 90(7) and 90(8) of the Act, the ACCC must not grant authorisation unless it is satisfied, in all the circumstances, that the conduct would result or be likely to result in a benefit to the public, and the benefit would outweigh the detriment to the public that would be likely to result (authorisation test).
- 3.3. In applying the authorisation test, the ACCC has taken into account:
 - a) The likely future with and without the Proposed Conduct. Without the proposed conduct, retail tenants are likely to continue to individually negotiate with landlords for rental relief arising from COVID-19 on an individual basis.
 - b) the relevant area of competition likely to be affected by the application for authorisation, primarily the competition for the leasing of retail space within shopping precincts.

Public benefits

- 3.4. The Act does not define what constitutes a public benefit. The ACCC adopts a broad approach. This is consistent with the Australian Competition Tribunal (the **Tribunal**) which has stated that the term should be given its widest possible meaning, and 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.*⁴

- 3.5. The ACCC considers that the proposed conduct is likely to result public benefits as follows:

Reduced Transaction Costs

- 3.6. An individual shopping centre tenant negotiating with a landlord will incur transaction costs (such as administrative costs, the costs of obtaining legal and expert advice, and the cost of the time taken to negotiate). The landlord also incurs transaction costs in negotiating with individual tenants.
- 3.7. Collective bargaining removes the need for individual negotiations between each tenant and landlord. Even if the authorisation results in limited collective bargaining, there are likely to be cost savings from landlords and tenants settling standard form documentation relating to the negotiation and documentation of rent relief that could be used in bilateral negotiations, such as lease variations, confidentiality agreements, forms.
- 3.8. The ACCC considers this is likely to result in public benefits from substantial transaction cost savings, including by enabling tenants to share the negotiation and other transaction costs.

⁴ Queensland Co-operative Milling Association Ltd (1976) ATPR 40-012 at 17,242; cited with approval in Re 7-Eleven Stores (1994) ATPR 41-357 at 42,677.

Improved input into rent relief negotiations for retail tenants

- 3.9. The ACCC considers that small businesses can be at a disadvantage when negotiating with larger businesses. Small businesses may have fewer resources or less experience available when negotiating in complex commercial environments. Collective bargaining is one way in which a small business can seek to redress such disadvantage.
- 3.10. The ACCC considers that enabling businesses to share information about rent relief negotiations is likely to provide them with greater awareness of the range of possible rent relief options and trade-offs. This greater awareness and improved input into negotiations may enable tenants as well as landlords to reach more mutually beneficial outcomes than would otherwise be the case. The additional value created through such outcomes would constitute an allocative efficiency benefit.
- 3.11. The SCCA notes that the proposed conduct is not limited to small and medium enterprises. The SCCA submits that the application also includes large, well-resourced ARA members, including 50% of Australia's top 20 retailers.
- 3.12. However, participation in collective negotiation is voluntary for both tenants and landlords. The ACCC has received reports that several shopping centre landlords have indicated that they will not participate in negotiations with groups of tenants. To the extent landlords do not participate in collective negotiations, this could reduce the potential benefits from greater tenant awareness of options and input to negotiations. However, even if negotiations over rent relief remain bilateral, the Proposed Conduct may still offer some allocative efficiency benefits.

Survival of retail businesses and employment benefits

- 3.13. The ARA's submits that the proposed conduct is likely to result in public benefits by assisting retailers to emerge successfully from the COVID-19 crisis, and continue to remain significant employers of Australian workers.
- 3.14. To the extent that these claimed public benefits are a likely outcome of collective negotiation, the ACCC considers that they are likely to be a consequence of other identified public benefits, such as better input into contracts and more efficient negotiation, rather than distinct categories of public benefit.

Public detriments

- 3.15. The Act does not define what constitutes a public detriment. The ACCC adopts a broad approach. This is consistent with the Tribunal which has defined it as:

...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.⁵

- 3.16. The ARA submits that any possible reduction in competition for retail space in shopping centres is mitigated because:
- the proposed conduct will result in a more level playing field between landlords and tenants

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

- the proposed conduct does not extend to individual tenants discussing or exchanging Sensitive Rent Information about their existing or proposed leasing arrangements
- 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

3.17. The ACCC has considered whether the proposed conduct may result in public detriment by:

- reducing competition for retail space, or
- increasing the risk of co-ordinated conduct beyond a period of authorisation (if competing retailers who enter into collective bargaining with landlords share information or develop close relationships that may facilitate future coordination).

3.18. The ACCC considers that public detriment is unlikely because:

- the permitted conduct is restricted solely to negotiating rent relief due to the economic impact of the COVID-19 pandemic,
- tenants are not permitted to share any information relating to the dollar value of their rents or rent relief,
- authorisation is sought for a limited period (12 months), and
- participation by landlords and retail tenants is voluntary.

3.19. The ACCC continues to consider whether collective bargaining may disincentivise landlords to offer greater relief to individual tenants. Under normal circumstances, landlords deal with tenants on an individual basis. This enables landlords to engage in a degree of price discrimination in order to increase their profits. Landlords may be willing in these circumstances to grant larger rent relief to individual tenants where landlords believe that greater relief may be necessary to prevent the tenant going out of business.

3.20. However, where the landlord is bargaining with multiple tenants and believes tenants will share information about the degree of rent relief granted, the landlord may be less inclined to offer greater relief to particular tenants out of a concern that this will create pressure to offer the equivalent (higher) relief to all its tenants. Instead, the landlord may be incentivised to grant the same percentage rent relief to all tenants where this percentage reduction minimises the landlord's overall loss of rent. This means that while landlords are likely to offer a greater average and total level of relief under collective bargaining, some tenants may receive less of a reduction than they would otherwise.

Condition of authorisation

3.21. The ACCC proposes to grant authorisation subject to the reporting condition described at paragraph 4.11 below. The condition imposes a record keeping obligation on the Applicants and, as in the interim authorisation, requires Participating Landlords to notify the ACCC as they agree to, and give effect to, rent relief measures under the authorisation. The proposed reporting condition is intended to minimise the likelihood that the Proposed Conduct will result in public detriment by enabling the ACCC to monitor rent relief negotiations during the period of authorisation.

Balance of public benefit and detriment

3.22. For the reasons outlined in this draft determination, the ACCC is satisfied that the Proposed Conduct is likely to result in a public benefit and that this public benefit would outweigh any likely detriment to the public from the Proposed Conduct. The ACCC proposes to impose a condition of authorisation to minimise the likelihood that the public detriments identified above will result.

Length of authorisation

- 3.23. The Act allows the ACCC to grant authorisation for a limited period of time.⁶ This enables the ACCC to be in a position to be satisfied that the likely public benefits will outweigh the detriment for the period of authorisation. It also enables the ACCC to review the authorisation, and the public benefits and detriments that have resulted, after an appropriate period.
- 3.24. The ARA seeks authorisation for 12 months which it submits is consistent with the Mandatory Code's principles which are expressed to have regard to the impact of the COVID-19 pandemic plus a reasonable recovery period.
- 3.25. The ARA acknowledges that 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.
- 3.26. In light of the current uncertainty around the lasting impacts of COVID-19 on the retail industry, the ACCC proposes to grant authorisation until 1 September 2021. The ACCC considers that this proposed period of authorisation is appropriate given the significant public benefits and minimal public detriments likely to result from the Proposed Conduct. The ACCC invites submissions on the appropriateness of this proposed time period.
- 3.27. If it appears to the ACCC that there has been a material change of circumstances during the period of authorisation, the ACCC may initiate a review of an authorisation, including the period of authorisation granted.⁷

4. Draft determination

The application

- 4.1. On 17 April 2020, the Applicants lodged application AA1000501 with the ACCC, seeking authorisation under subsection 88(1) of the Act.
- 4.2. The Applicants seek authorisation for the Proposed Conduct. Subsection 90A(1) of the Act requires that before determining an application for authorisation, the ACCC shall prepare a draft determination.

The authorisation test

- 4.3. Under subsections 90(7) and 90(8) of the Act, the ACCC must not grant authorisation unless it is satisfied in all the circumstances that the Proposed Conduct is likely to

⁶ Subsection 91(1)

⁷ Subsection 91C(3)

result in a benefit to the public and the benefit would outweigh the detriment to the public that would be likely to result from the Proposed Conduct.

- 4.4. For the reasons outlined in this draft determination, the ACCC is satisfied, in all the circumstances, that the Proposed Conduct would be likely to result in a benefit to the public and the benefit to the public would outweigh the detriment to the public that would result or be likely to result from the Proposed Conduct, including any lessening of competition. The ACCC proposes to impose the conditions of authorisation described below to minimise the likelihood that the public detriments identified above will result.
- 4.5. Accordingly, the ACCC proposes to grant authorisation.

Conduct which the ACCC proposes to authorise

- 4.6. Subject to the proposed condition, the ACCC proposes to grant authorisation AA1000501⁸ to enable the Australian Retailers Association and its current and future members to engage in the Proposed Conduct defined at paragraphs 1.8 to 1.9 in relation to rent relief negotiations between tenants and landlords as a result of the COVID-19 pandemic.
- 4.7. The Proposed Conduct may involve a cartel provision within the meaning of Division 1 of Part IV of the Act, or may have the purpose or effect of substantially lessening competition within the meaning of section 45 of the Act.
- 4.8. The ACCC proposes to grant authorisation only in so far as it is for the sole purpose of negotiating rent relief and support to SME tenants adversely affected by the COVID-19 pandemic.
- 4.9. The ACCC proposes to grant authorisation AA1000512 until 1 September 2021.
- 4.10. This draft determination is made on 2 July 2020.

Proposed Condition

- 4.11. The ACCC proposes to grant authorisation on condition that:
 - (a) the Applicants must collect from its members and maintain records of all material meetings or communications engaged in by its members in relation to Proposed Conduct, including the participants in the meeting or communication, the topics discussed, any written information or data exchanged, and material decisions made, and
 - (b) The Applicants provide to the ACCC, within a reasonable period following a request, the records maintained under paragraph (a) above, and any other information and documents related to the authorisation that is reasonably requested by the ACCC.

Conduct not proposed to be authorised

- 4.12. For the avoidance of doubt, the proposed authorisation does not:
 - (c) extend to individual tenants discussing or exchanging Sensitive Tenant Rent Information as defined at paragraph 1.11,

⁸ Pursuant to subsection 88(2) of the Act.

- (d) enable the Tenant Participants to collectively refuse to pay rent, rent increases or outgoings, or
- (e) override any existing contractual obligations in leasing arrangements.

Interim authorisation

- 4.13. The ACCC has decided to revoke the interim authorisation granted by the ACCC on 22 April 2020 and replace it with a replacement interim authorisation.
- 4.14. The replacement interim authorisation enables the Applicants to engage in the Proposed Conduct described at paragraphs 1.8 to 1.9 above, subject to the conditions at paragraph 4.11 and limitations at paragraph 4.12.
- 4.15. Sensitive Tenant Rent Information under the replacement interim authorisation has the same meaning as paragraph 1.11 of this draft determination.
- 4.16. The replacement interim authorisation will define conduct not authorised in the same terms as paragraph 4.12 above.
- 4.17. Interim authorisation commences immediately and will remain in place until the date the ACCC's final determination comes into effect, or until interim authorisation is revoked, or the application for authorisation is withdrawn.

5. Next steps

- 5.1. The ACCC now invites submissions in response to this draft determination. In addition, consistent with section 90A of the Act, the applicant or an interested party may request that the ACCC hold a conference to discuss the draft determination.