



Draft Determination and interim authorisation

Application for authorisation

lodged by

National Retail Association (NRA)

in respect of

collective bargaining of NRA tenant members with landlords, and
cooperation between NRA landlord members regarding rental relief

Authorisation number: AA1000512

2 July 2020

Commissioners: Sims, Keogh, Rickard, Court, Ridgeway

Summary

In light of the impact of the COVID-19 pandemic on retailers, 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 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' tenant members 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 to enable the Applicants' landlord members to exchange information and make and give effect to agreements as to the nature of the relief to be offered to small and medium-sized enterprise tenants.

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

On 19 May 2020, the ACCC granted interim authorisation enabling participating landlords and 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 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, **the Applicants**) lodged an application for authorisation AA1000512 with the Australian Competition and Consumer Commission (the **ACCC**). The Applicants are seeking authorisation on behalf of themselves and their current and future members who are a tenant, a landlord, or both. Broadly, the Applicants seek authorisation to enable:
 - (a) tenant members who have been adversely affected by the COVID-19 pandemic to discuss, share information and collectively negotiate with landlords regarding the support to be provided to tenants by landlords (the **Proposed Tenant Conduct**)
 - (b) landlord members to discuss and share information, and make and give effect to agreements as to the nature of the relief to be offered to small and medium-sized enterprise tenants or classes of such tenants, by landlords (the **Proposed Landlord Conduct**).
- 1.2. The ACCC may 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.
- 1.3. The Applicants requested urgent interim authorisation to enable them to engage in the Proposed Tenant Conduct and the Proposed Landlord Conduct while the ACCC is

considering the substantive application.¹ On 19 May 2020, the ACCC granted conditional interim authorisation, recognising the urgency of the request and significant challenges faced by retail tenants due to the COVID-19 pandemic. The condition requires Landlord Participants to notify the ACCC about the rental relief agreements offered and provides some transparency over the arrangements. Interim authorisation 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.

The Applicants

1.4. The Applicants are the:

- (a) NRA - an industry association representing over 6,000 employers in Australia's retail, fast food and quick service sectors.
- (b) Australian Hotels Association - an industry association representing over 5,000 employers in Australia's hospitality and liquor industry.
- (c) Franchise Council of Australia Limited - the peak industry association for the franchise business segment.
- (d) Pharmacy Guild of Australia - an industry association representing employers in the community pharmacy sector.
- (e) Australian Newsagents' Federation Limited - the peak industry body for newsagents and lottery licensees.
- (f) Australian Federation of Travel Agents Limited - the peak industry body for travel agency businesses in Australia representing approximately 96 per cent of the indirect travel distribution industry.

1.5. The majority of members of each of the Applicants are tenants, although some Applicants have members that are landlords and some have members that are both a tenant and a landlord.

1.6. Paragraph 2.2. of the application also seeks the following:

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.

1.7. The Applicants have subsequently confirmed they do not seek to press paragraph 2.2. of their application. Accordingly, the authorisation covers the Applicants and their members, but does not extend to the members of any membership based organisation or association that is a member of the Applicants.

Background

1.8. 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 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

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

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).

- 1.9. 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.
- 1.10. On 17 April 2020, the Australian Retailers Association lodged application for authorisation AA1000501 seeking authorisation for conduct similar to that sought by the Applicants.

The Proposed Tenant Conduct

- 1.11. The Applicants seek authorisation to enable current and future members who are tenants (**Tenant Participants**) 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**);
 - (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 Tenant Conduct**).
- 1.12. The Applicants advise that the terms of any contract, arrangement or understanding agreed under the Proposed Tenant Conduct will likely include matters such as:

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

- (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.

1.13. The Applicants advise that the Proposed Tenant 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.*

1.14. Sensitive Tenant Rent Information also includes any Sensitive Tenant Rent Information obtained by a Tenant Participant in their capacity as a landlord. The ability to share information and form bargaining groups by Tenant Participants is limited to members of the same Applicant association. For example, Tenant Participants who are members of the NRA may engage in the Proposed Tenant Conduct only with other Tenant Participants who are also members of the NRA. The Applicants also propose that a Tenant Participant who is a member of more than one Applicant association prior to 29 April 2020 may join bargaining groups and share information relevant to both Applicant associations.

The Proposed Landlord Conduct

1.15. The Applicants seek authorisation to enable current and future members who are landlords (**Landlord Participants**) to:

- (a) discuss and share information regarding:
 - (i) the financial difficulties their SME tenants are facing; and
 - (ii) which SME tenants, or classes of SME tenants, would benefit most from relief and the nature of relief that might be offered;
- (b) provisionally enter into agreements as to the nature of the relief that 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 that tenants might otherwise be obliged to pay; and
- (c) give effect to those agreements

(the **Proposed Landlord Conduct**).

1.16. The Applicants advise that the information to be shared amongst Landlord Participants:

- (a) may include:
 - (i) 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);
 - (ii) aggregated information as to the range and types of financial challenges that retail and other tenants (including broad classes of retailer) are facing by reason of the COVID-19 pandemic;

- (iii) 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
 - (iv) 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); but
- (b) may not include:
- (i) an individual tenant's trading, visitation or financial performance data whether at a single location or on a multiple location basis;
 - (ii) information about an individual tenant's financial position, arrangements or difficulties;
 - (iii) the support that an individual tenant may require or is otherwise receiving, or has already received;
 - (iv) any confidential information of an individual tenant; or
 - (v) any data or information from which any of the above in relation to an individual tenant may be reasonably ascertained

(Sensitive Landlord Information).

- 1.17. Sensitive Landlord Information also includes any information obtained by a Landlord Participant in their capacity as a tenant.
- 1.18. The ability to share information by Landlord Participants is limited to members of the same Applicant association. For example, Landlord Participants who are members of the NRA may engage in the Proposed Landlord Conduct only with other Landlord Participants who are also members of the NRA. The Applicants also propose that a Landlord Participant who is a member of more than one Applicant association prior to 29 April 2020 may share information relevant to both Applicant associations.
- 1.19. The Applicants propose that as soon as possible after agreeing the nature and extent of rent relief to be provided to SME tenants or a class of SME tenants, and no less than 24 hours before implementing the rent relief, the Landlord Participants who have agreed will notify the ACCC.
- 1.20. The Applicants seek 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 Tenant Conduct and the Proposed Landlord Conduct.
- 2.2. The ACCC invited submissions from a range of potentially interested parties including landlords, tenants and industry associations.³
- 2.3. The ACCC received two submissions before the draft determination.
- 2.4. The Australian Federation of Travel Agents Limited (**AFTA**), one of the Applicants, submits that the application for authorisation will support travel agent businesses that are struggling during the COVID-19 pandemic to seek rental relief. AFTA submits that

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

the authorisation will allow for better representation of members in such negotiations. The AFTA had concerns that landlords may wish to conduct all negotiations collectively and may force some unwilling tenants to negotiate collectively.

- 2.5. The second submission came from an NRA member. The member submitted that it was important to authorise the proposed conduct as their landlord was seeking to limit or deny collective negotiations with tenants through confidentiality clauses. It submitted that collective bargaining would help address the power imbalance between landlords and tenants.

3. ACCC assessment

- 3.1. The ACCC's assessment of the Proposed Tenant Conduct and the Proposed Landlord Conduct is carried out in accordance with the relevant authorisation test contained in the Act.
- 3.2. The Applicant has sought authorisation for Proposed Tenant Conduct and the Proposed Landlord 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 Tenant Conduct and the Proposed Landlord Conduct. Without the Proposed Tenant Conduct and the Proposed Landlord Conduct, retail tenants are likely to continue to negotiate with landlords for rental relief arising from COVID-19 on an individual basis, with reference to the Code where applicable.
 - (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 Tenant Conduct is likely to result public benefits as follows:

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.

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. Accordingly, the ACCC considers that the Proposed Tenant Conduct and Proposed Landlord Conduct are likely to result in public benefits in the form of lower transaction costs.

Improved input into rent relief negotiations

- 3.9. 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.
- 3.10. 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 Tenant Conduct may still offer some allocative efficiency benefits.
- 3.11. Accordingly, the ACCC considers that the Proposed Tenant Conduct is likely to result in some public benefits associated with improved input into rent relief negotiations, particularly for small business retail tenants where collective bargaining proceeds. Further, the ACCC considers the Proposed Landlord Conduct is likely to result in public benefits by providing landlords with better information to inform their negotiations with tenants.

Survival of retail businesses and employment benefits

- 3.12. The Applicants submit 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.
- 3.13. 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

3.14. 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

Public detriments of the Proposed Tenant Conduct

3.15. The ACCC has considered whether the Proposed Tenant Conduct is likely to result in public detriment by:

- (a) reducing competition for retail space, or
- (b) 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).

3.16. The ACCC considers the risk and magnitude of these forms of public detriment is likely to be limited because:

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

3.17. 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.

3.18. 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.

Public detriments of the Proposed Landlord Conduct

3.19. The ACCC has considered whether the Proposed Landlord Conduct may result in public detriment if landlords use shared information to reduce rent relief to a minimum level, in line with that provided by other landlords.

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

- 3.20. The ACCC considers the risk and magnitude of this public detriment is likely to be limited because:
- (a) Landlord Participants are only able to share aggregated information that does not identify their tenants, and are not permitted to share Sensitive Landlord Information,
 - (b) any agreements as to the nature and extent of rent relief to be provided will be notified to the ACCC by the Landlord Participants before being implemented.
 - (c) The relevant Applicant will publish any agreements made to its Tenant Participant members.

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 Tenant Conduct and Proposed Landlord 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 Tenant Conduct and the Proposed Landlord Conduct is likely to result in material public benefits that would outweigh any likely minimal detriment to the public from the Proposed Tenant Conduct and the Proposed Landlord 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 NRA seeks authorisation for 12 months from the date of the ACCC's final determination 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 NRA 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

⁶ Subsection 91(1)

Proposed Tenant Conduct and the Proposed Landlord 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 20 May 2020, the Applicants lodged application AA1000512 with the ACCC, seeking authorisation under subsection 88(1) of the Act.
- 4.2. The Applicants seek authorisation for the Proposed Tenant Conduct and the Proposed Landlord 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 Tenant Conduct and the Proposed Landlord Conduct is 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 from the Proposed Tenant Conduct and the Proposed Landlord Conduct.
- 4.4. For the reasons outlined in this draft determination, the ACCC is satisfied, in all the circumstances, that the Proposed Tenant Conduct and the Proposed Landlord 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 Tenant Conduct and the Proposed Landlord 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 AA1000512⁸ to enable the National Retail Association and its current and future members to engage in the Proposed Tenant Conduct (defined at paragraph 1.11) and the Proposed Landlord Conduct (defined at paragraph 1.15) in relation to rent relief negotiations between tenants and landlords as a result of the COVID-19 pandemic (**Proposed Conduct**).
- 4.7. The Proposed Tenant Conduct and the Proposed Landlord 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.

⁷ Subsection 91C(3)

⁸ Pursuant to subsection 88(2) 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 each collect from their members and maintain records of all material meetings or communications engaged in by its members in relation to Proposed Tenant Conduct or Proposed Landlord 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.
 - (c) Landlord Participants must notify the ACCC of any rental relief measure arising from the Proposed Landlord Conduct prior to the measure being implemented, or otherwise given effect to.
 - (d) The Landlord Participants who have agreed to implement any measure arising from the Proposed Landlord Conduct must provide notification to the ACCC (by sending an email to adjudication@acc.gov.au) as soon as practicable after any members who are Landlord Participants have reached agreement on the terms of the relief measure, but not less than 24 hours before the relief measure is implemented, or otherwise given effect to.
 - (e) The notification to the ACCC must include at a minimum:
 - (i) a description of the relief measure, including (if applicable) a description of the SME tenant group(s), or classes of SME tenants, intended to be offered the relief measure (if not all SME tenants)
 - (ii) the criteria to be applied in identifying those tenants, or classes of tenants, and the rationale for applying relief to some SME tenants and not others (if applicable)
 - (iii) the Landlord Participants who, at the time of the notification, have agreed to implement the relief measure, and
 - (iv) the location(s) at which, and when, the relief measure is intended to be implemented.

Conduct not proposed to be authorised

- 4.12. For the avoidance of doubt, the proposed authorisation does not:
- (a) extend to individual tenants discussing or exchanging Sensitive Tenant Rent Information as defined at paragraph 1.13, or landlords discussing or exchanging Sensitive Landlord Information as defined at paragraph 1.16
 - (b) enable the Tenant Participants to collectively refuse to pay rent, rent increases or outgoings

(c) 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 19 May 2020 and replace it with a replacement interim authorisation.
- 4.14. The replacement interim authorisation enables the Participating Tenants and Participating Landlords to engage in the Proposed Conduct described at paragraph 4.6 above, subject to the conditions at paragraph 4.11 and limitations at paragraph 4.12.
- 4.15. Sensitive Tenant Rent Information and Sensitive Landlord Information under the replacement interim authorisation has the same meaning as paragraphs 1.13 and 1.16 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.