



**National Retail Association –
Application for authorisation AA1000512
Interim authorisation decision
19 May 2020**

Decision

1. The Australian Competition and Consumer Commission (the **ACCC**) has granted conditional interim authorisation in respect of the application for authorisation AA1000512, lodged by the National Retail Association Limited (**NRA**) on behalf of itself and participating industry organisations on 12 May 2020.
2. The NRA, Australian Hotels Association, Franchise Council of Australia Limited, the Pharmacy Guild of Australia, Australian Newsagents' Federation Limited and Australian Federation of Travel Agents Limited (collectively, the **Applicants**) have applied for authorisation on behalf of their current and future members, who are tenants, landlords, or both.
3. The Applicants seek authorisation to enable:
 - tenants 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 (see application for authorisation section 3); and
 - landlords 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 (**SME**) tenants or classes of SME tenants by landlords (see application for authorisation section 4).
4. The ACCC has granted conditional interim authorisation to the conduct set out in paragraphs 8 and 12 of this decision document, solely for the purpose of making available rent relief and support to tenants adversely affected by the COVID-19 pandemic, and subject to the condition set out in paragraph 23.
5. Interim authorisation commences immediately and remains in place until it is revoked, or the date on which the application for authorisation is withdrawn, or the date the ACCC's final determination comes into effect.

The application for authorisation

The Applicants

6. The Applicants are the:
 - NRA - an industry association representing over 6 000 employers in Australia's retail, fast food and quick service sectors.
 - Australian Hotels Association - an industry association representing over 5 000 employers in Australia's hospitality and liquor industry.
 - Franchise Council of Australia Limited - the peak industry association for the franchise business segment.
 - Pharmacy Guild of Australia - an industry association representing employers in the community pharmacy sector.

- Australian Newsagents' Federation Limited - the peak industry body for newsagents and lottery licensees.
 - 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.
7. 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.

The Proposed Tenant Conduct

8. 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**).
9. The Applicants advise that the terms of any contract, arrangement or understanding agreed under the Proposed Tenant Conduct will likely include matters such as:
- (a) the appropriate information to be exchanged between landlords and tenants, including but not limited to:
 - (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 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.
10. The Applicants advise that the Proposed Tenant Conduct does not extend to individual tenants discussing or exchanging the actual amount of rent payable under their existing or proposed leasing arrangements, or the amount of any rent incentives previously granted by the relevant landlord (**Sensitive Tenant Rent Information**). This includes any Sensitive Tenant Rent Information obtained by a Tenant Participant in their capacity as a landlord.
11. 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

12. 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**).

13. 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**).

14. Sensitive Landlord Information also includes any information obtained by a Landlord Participant in their capacity as a tenant.

15. 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.

16. 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. The notification will be published on the ACCC's public register and by the relevant Applicant to its members.

Timing

17. The Applicants seek authorisation for 12 months from the date of the ACCC's grant of final authorisation. The Applicants submit that this is consistent with the 12-month authorisations sought by the Scentre Group and the Shopping Centre Council of Australia on 2 April 2020 and the Australian Retailers Association on 17 April 2020. The Applicants also submit that this period is consistent with the principles of the Code, which encompass both the COVID-19 pandemic period and a subsequent reasonable recovery period.

The authorisation process

18. Authorisation provides protection from legal action for conduct that may otherwise breach the competition provisions of the *Competition and Consumer Act 2010* (Cth) (the **Act**). Broadly, the ACCC may grant authorisation if it is satisfied that the benefit to the public from the conduct outweighs any public detriment, including from a lessening of competition. The ACCC conducts a public consultation process to assist it to determine whether proposed conduct results in a net public benefit.

Interim authorisation

19. The ACCC may, where it considers it appropriate, grant an interim authorisation which allows parties to engage in proposed conduct while the ACCC is considering the substantive application.

20. The NRA requests urgent interim authorisation as landlords are making increasingly urgent demands of their tenants in respect of negotiations for rental relief. It is also aware that, in some circumstances, tenants have engaged in unilateral conduct, such as declining to pay rent owed under their leases, to the financial detriment of their landlords. Enabling the Tenant Participants and the Landlord Participants to commence the conduct under interim authorisation will assist both sides of the negotiations to have better input into rent relief outcomes.

Consultation

21. The ACCC has not conducted a public consultation process in respect of the request for interim authorisation.

22. The ACCC will conduct a public consultation process on the substantive application for authorisation, and how the arrangements are operating under the Interim Authorisation. Details about how to make a submission will be available on the [ACCC's authorisations public register](#).

Condition of interim authorisation

23. The ACCC grants interim authorisation to the Proposed Tenant Conduct described at paragraph 8 and the Proposed Landlord Conduct described at paragraph 12 of this decision document. The interim authorisation is subject to the following condition which provides transparency over the rental relief agreements offered.

Notification condition

- 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.
- 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.

- The notification to the ACCC must include at a minimum:
 - 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)
 - 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)
 - the Landlord Participants who, at the time of the notification, have agreed to implement the relief measure, and
 - the location(s) at which, and when, the relief measure is intended to be implemented.
- Within 2 days of the date of this interim authorisation, each Applicant must inform its landlord members, in writing, of the existence and requirements of this notification condition.

24. The ACCC will place any notification from Landlord Participants on the public register relevant to this application for authorisation.

Reasons for decision

25. In granting conditional interim authorisation, the ACCC recognises the urgency of the request for interim authorisation in light of the urgent need for tenants and landlords to get together to discuss and implement agreements to provide support to tenants by landlords as a result of the COVID-19 pandemic.

26. The ACCC considers that it is unlikely that the Proposed Tenant Conduct and Proposed Landlord Conduct will significantly impact competition in the long term due to the following factors:

- The measures are temporary and will only remain in effect for as long as it is necessary for the sole purpose of making available rent relief and support to tenants adversely affected by the COVID-19 pandemic.
- Individual Tenant Participants are not able to discuss or exchange information about the actual rental amounts under existing or proposed leasing arrangements. Interim authorisation does not override contractual obligations, including any confidentiality clauses regarding information disclosure. The ACCC does not consider it necessary for tenants to share information about actual rent payable under existing leases in order for them to discuss and collectively negotiate rent relief measures with landlords.
- Landlord Participants are only able to share aggregated, non-confidential tenant information, and the Proposed Landlord Conduct does not extend to Sensitive Landlord Information.
- The ability of Tenant Participants to share information and form bargaining groups is limited to members of the same Applicant association. Similarly, the ability of Landlord Participants to share information and agree on rental relief measures is limited to members of the same Applicant association. The breadth of any collective bargaining group formed by Tenant Participants is also likely to be limited to tenants who share common traits (such as particular landlords, locations or classes of tenants) or rental distress issues.
- Participation is voluntary for both tenants and landlords.
- Authorisation does not compel landlords to negotiate with the bargaining groups of Tenant Participants. Landlords may decide to deal with their tenants on an individual basis.
- The condition regarding notification of relief measures provides transparency and some ACCC oversight of the conduct being engaged in under the interim

authorisation. If major concerns are identified, the ACCC is able to revoke the interim authorisation (including substituting a new interim authorisation with narrower authorised conduct or imposing different conditions) or seek changes to the measures being implemented.

27. The ACCC also considers that the arrangements are likely to have significant public benefits, including:

- improving the quality and amount of information accessible to tenants and landlords, enabling them to become better informed and more engaged in negotiations and have better input into rent relief measures. Improving the communication between landlords and tenants, and assisting landlords to better understand the position of tenants, the challenges they face and the impact of landlords' decisions on them, may result in negotiated terms that better reflect the circumstances of a group of tenants and their landlord, leading to more efficient and positive outcomes for all involved;
- transaction cost savings for both tenants and landlords, due to reductions in the time and burden that would otherwise be required for negotiations between individual tenants and landlords, including the time to negotiate and obtain legal, technical or other advice;
- to the extent that tenants are able to negotiate more beneficial terms as a group than on their own, and landlords are able to negotiate more efficiently, the arrangements will increase the likelihood that tenants and landlords remain viable and continue to employ their workers, and once the recovery period is in place it will enable tenants to be in a better financial position compete; and
- advancing the objectives of the Code, an overarching principle of which 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 over a reasonable recovery period.

Reconsideration of conditional interim authorisation

28. The ACCC may review a decision on interim authorisation at any time, including in response to feedback raised following interim authorisation. The ACCC's decision in relation to the interim authorisation should not be taken to be indicative of whether or not the final authorisation will be granted.