

8 May 2020

Kai Fu
Director
Adjudication Branch
Australian Competition & Consumer Commission
23 Marcus Clarke Street
CANBERRA ACT 2601

Dear Mr Fu

**SCENTRE GROUP & SHOPPING CENTRE COUNCIL OF AUSTRALIA
APPLICATION AUTHORISATION AA1000489**

We refer to the ACCC's letter of 1 May 2020 as well as to the ACCC's letters of 7 April and 16 April 2020, and to our responses on behalf of the SCCA on 8 and 17 April 2020.

We note that in its most recent letter the ACCC seeks an update as to:

- the conduct that the SCCA and its members have engaged in under the interim authorisation;
- the conduct that the applicants are likely to engage in under the interim authorisation over the next month; and
- when SCCA is likely to announce a relief package pursuant to the interim authorisation.

We also note that the ACCC seeks a response to the third party submissions received so far.

Update

The SCCA confirms that at the time its application for authorisation was drafted and lodged, on 2 April 2020, there was not the Mandatory Code of Conduct, entitled "*SME Commercial Leasing Principles During COVID-19*", that was approved by the National Cabinet and announced by the Australian Government on 7 April 2020 (the **Code**). Nor was there any certainty that such a mandatory code (rather than a voluntary agreed industry position then being pressed for by the government) would be introduced.

By virtue of the Code being introduced within days of the SCCA's application and the Code addressing broadly similar issues to the Proposed Conduct the subject of that application, since the grant of Interim Authorisation the SCCA and its members have primarily been focusing on the Code, what it means, what it requires, and in discussions with State governments as how it might be best implemented. This has and is taking some time as the Code was drafted at a high conceptual level, and is principle based rather than detailed or particularly prescriptive. As set out in our letter dated 17 April 2020 it has not been possible for the SCCA and its members to sensibly discuss how, and if, the Code can be supplemented and complemented by any agreement between them the subject of the authorisation application until the coverage of and gaps in the Code (and the State based legislation supporting that Code) are better understood.

Specifically since 7 April 2020 the State governments have been announcing details of and introducing their legislation implementing the Code as illustrated in the schedule to this letter. Significantly the legislation being introduced in each State varies quite significantly from State to State; as different legislatures adopt different interpretations of what was intended by the Code and adopt different wording. The form of the legislation is quite different and varies significantly depending upon the legislative framework that already exists in a given state – such as say whether the State already has bodies established to facilitate the mediations provided for in the Code. In assisting the State governments with their drafting of workable legislation the SCCA has been in regular contact and lengthy discussions with State and Territory governments referred to in the schedule below.

In addition to trying to better understand what the Code (and the State based legislation supporting that Code) mean for their portfolios, since the interim authorisation was granted, the members of the SCCA have themselves individually and independently of the SCCA been in constant and continuing dialogue with the tenants of their centres as to how the Code is to be implemented in respect of, and how rental relief more generally is to be afforded to, those tenants on a case-by-case basis. This has included individual members obtaining certain financial information from those tenants to enable them to provide that case-by-case assistance – which they are in the process of providing.

From the focus and conduct described above, the SCCA is yet to identify substantial gaps in the Code which require urgent attention and that are either:

- not already the subject of the above discussions with the State legislators and have not been covered by or might not, in due course be adequately covered by State legislation; or
- not better addressed by individual case-by-case dealings and negotiations by individual SCCA members with their tenants rather than by an SCCA co-ordinated response to SME rent relief.

As a consequence, to date the SCCA and its members have been focussed on the Code and not been discussing under the interim authorisation a co-ordinated response for providing any particular SME rent relief to their tenants; beyond that already afforded by the Code.

Since the introduction of the Code significant questions of interpretation, however, have arisen as to how the Code (and the State based legislation supporting that Code) is to be properly given effect to – including say, as to how an SCCA member is to identify and satisfy itself that a particular tenant is an SME and qualifies for relief under the Code. In this context the SCCA has sought to assist its members in gaining a better understanding, and quickly, of the new laws and what obligations they impose upon on SCCA members.

Going forward, there is a SCCA Board meeting scheduled for Thursday next week at which it is expected that SCCA members will give feedback, from their own understandings and

experience, as to coverage of the Code and as to whether they have now identified any gaps in the Code which require attention and are indeed best addressed by a SCCA co-ordinated response to SME rent relief (of the nature proposed to be the subject of the SCCA's authorisation) – rather than by individual case-by-case dealings and negotiations.

In all of the above circumstances, pending Thursday's meeting, it is not presently known what conduct, if any, post that meeting the SCCA and its members are likely to engage in under the interim authorisation over the next month and when (if at all) the SCCA is likely to announce a relief package pursuant to the interim authorisation.

Response to concerns raised

In terms of the concerns raised with the ACCC about "*the breadth of information requested by landlords and potentially shared under the interim authorisation*" the SCCA confirms, as stated in more detail in our letter dated 8 April 2020, that it was not proposed with the Proposed Conduct that its members would be sharing across the SCCA membership any confidential information pertaining to any particular tenant. So far as SCCA is aware, no sharing of such information between its members has taken place.

As stated in our letter dated 8 April 2020, the SCCA is aware that individual SCCA members have themselves, independently of the SCCA, been collecting from their tenants such information as they individually require to determine what rental relief (if any) they may offer their tenants and what relief those tenants might in any event be entitled (say pursuant to Code). Such information has not been sought (nor shared otherwise than on the basis and at the generic levels described in our letter dated 8 April 2020) in reliance on the Interim Authorisation.

In terms of the concerns raised with the ACCC about "*the extent to which the conduct permitted by the interim authorisation has been effective to date in delivering rent relief to shopping centre tenants*", we confirm (as explained above) that the conduct permitted by the interim authorisation is yet to deliver rent relief to shopping centre tenants beyond that provided for by the Code.

In terms of the concerns raised with the ACCC about "*the continued need for interim authorisation, following the National Cabinet's announcement of the Code*" we confirm that the Code addresses broadly similar issues as the conduct which was proposed in the SCCA's application for authorisation and the Interim Authorisation and that as yet the SCCA has not identified (nor had identified to it by its members) any substantial gaps in the Code which might best be addressed by an SCCA co-ordinated response to SME rent relief (rather than by the current or proposed legislation or by individual case-by-case dealings and negotiations).

Beyond continuing to enable the SCCA and its members to discuss the need for and the possible form of any SCCA co-ordinated response to SME rent relief (above and beyond the Code), the SCCA cannot itself yet positively state that there will ultimately be a need for authorisation. Interim authorisation is, however, sought to be maintained until a concluded view has been able to be reached in this regard and at least until after next Thursday's Board Meeting of SCCA members.

In terms of the concerns raised with the ACCC about "*whether an industry approach as contemplated under the interim authorisation is compatible with the principles of the Code*", we confirm - as was made clear in our letter dated 8 April 2020 - that any agreement, arrangement or understanding reached by the SCCA members by reason of the Proposed Conduct (if any) will not supersede or diminish from the

code. It is instead expected that any agreement, arrangement or understanding reached, if any, would supplement and complement that code.

Turning then to the submissions made with the ACCC and placed on the ACCC's authorisations register, we note that the Large Format Retail Association (LFRA), highlights the following principles that are included in the Code:

- All premises are different, as are their commercial arrangements;
- All leases must be dealt with on a case-by-case basis, considering factors such as whether the SME tenant has suffered financial hardship due to the COVID-19 pandemic, whether the tenant's lease has expired or is soon to expire, and whether the tenant is in administration or receivership; and
- Leases have different structures, different periods of tenure, and different mechanisms for determining rent. Leases may already be in arrears. Leases may already have expired and be in "hold-over".

The SCCA agrees with each of these principles. It is in part for these reasons that, beyond accepting the high conceptual level principles set down by the Code, the SCCA is yet to identify substantial gaps in the Code which are best addressed by a SCCA co-ordinated response to SME rent relief (of the nature foreshadowed in the SCCA's application for authorisation) – rather than by individual case-by-case dealings and negotiations. In the interim the members of the SCCA have been "*speaking directly with affected tenants to provide solutions tailored to each tenant's circumstances in accordance with the Code*" and are continuing to do so.

In terms of the submissions made by the LFRA, which body is said to support and advocate for Australia's large format retailers, the SCCA understands that only two of its members are SMEs impacted by the Interim Authorisation - with the remainder more substantial retailers to whom the Proposed Conduct (and the Code) do not apply.

In terms of the submissions made by the Australian Lottery and Newsagents Association we note the suggestion made that "*landlords seem to be sharing a lot of information and they are appearing to often take a similar approach to each other when communicating with tenants seeking rent relief. Language is similar, as are some of the ... requests for information from tenants before they will look at rent relief.*" As indicated above, the SCCA is not aware of the sharing of confidential tenant information between its members. In terms of landlords generally taking a similar approach - this is not surprising given the common difficulties landlords and their tenants are facing and the common requirements embedded in the Code; such as that the Code applies to tenants with an annual turnover up to \$50 million who are eligible for the Commonwealth Government's JobKeeper programme, which includes having an estimated likely fall in annual turnover by 30% or more. It is not the understanding of the SCCA that the requests generally being made by its members are "*unrealistic or unnecessary*" or not "*consistent with the code or the transparency requirements of the current authorisation*".

Regards

Peter Speed

Schedule

Illustration of the variation of implementation of the Code

1. Announcements to commit to implementing the Code

- NT – 8 April
- QLD – 9 April
- NSW – 13 April
- WA – 14 April
- VIC – 15 April

2. Enabling legislation to enable enactment of Code

- NSW – made under existing Retail Leases Act
- QLD – COVID-19 Emergency Response Act 2020 – tabled and passed on 22/4/2020
- WA – Commercial Tenancies (COVID-19 Response) Act 2020 – tabled 16/4/2020 and passed on 22/4/2020
- VIC – COVID-19 Omnibus (Emergency Measures) Act 2020 – tabled 23/4/2020 and passed on 23/4/2020.
- TAS – COVID-19 Disease Emergency (Commercial Leases) Act – tabled 6/4/2020 and passed on 7/5/2020.
- SA – Bill due to be tabled in Parliament in the week commencing 11/5/2020.

3. Code enacted for commencement

- NSW – Regulation gazetted / commenced on 24/4/2020.
- VIC – Regulation gazetted 1/5/2020 / commenced on 29/3/2020.
- WA – consultation ongoing
- QLD – consultation ongoing