

8 April 2020

Daniel McCracken-Hewson
Ag General Manager
Adjudication
Australian Competition & Consumer Commission
23 Marcus Clarke Street
CANBERRA ACT 2601

Dear Mr McCracken-Hewson

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

We refer to the Australian Competition and Consumer Commission's (**ACCC**) decision on 3 April 2020 to grant conditional urgent interim authorisation to Scentre Group, the Shopping Centre Council of Australia (**SCCA**), and its members (**Interim Authorisation**) and to your letter dated 7 April 2020.

We confirm that the Interim Authorisation allows SCCA members to discuss, share information, and agree and give effect to contracts, arrangements or understandings to facilitate providing rent relief to their small and medium enterprise (**SME**) tenants adversely affected by the COVID-19 crisis ("**Proposed Conduct**").

Concerns Raised

We note from your letter dated 7 April 2020 that since the grant of Interim Authorisation concerns have been raised with the ACCC about:

- SCCA members requiring SME tenants to provide information regarding their financial circumstances that SCCA members would not ordinarily have access to; and
- SCCA members sharing tenants' confidential information with other SCCA members.

In response to these concerns the SCCA wishes to make clear from the outset **that it is not proposed with the Proposed Conduct that its members will be seeking to share across the SCCA membership any confidential information pertaining to any particular tenant - including in terms of an individual tenant's trading data, an individual tenant's financial position, arrangements or difficulties etc or data from which it is feasible to ascertain the same** (as explained in more detail below)

The SCCA also wishes to make clear at the outset that it is anticipated 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 Mandatory Code of Conduct entitled "SME Commercial Leasing Principles During COVID-19" approved by the National Cabinet and announced the Australian government on 7 April 2020 ("**Mandatory Code of Conduct**"). It is instead expected that any agreement, arrangement or understanding reached, if any, would supplement and complement that code.

ACCC Request for Information

We note that in response to the concerns raised with the ACCC, the ACCC has requested that the SCCA:

1. Provide the ACCC with details of the information that SCCA members have requested, or expect or are likely to request, from SME tenants as part of developing and providing rent relief to SME tenants, and explain why this information is required.
2. Identify the information, or types of information, including confidential information, that SCCA members have shared, or expect or are likely to share, with other SCCA members under the interim authorisation, and explain why it is necessary to share this information.

In responding to these two questions, the SCCA considers it important to first distinguish between:

- the information that individual SCCA members, independent of the SCCA, themselves collect in relation to tenants of shopping centres in which they have an interest for the purposes of determining what rental relief (if any) they might individually offer their tenants (on their own initiative or pursuant to any arrangement or understanding with other SCCA members) or are obliged to provide pursuant to the Mandatory Code of Conduct; and
- the information that, once collected by individual SCCA members, is then shared with other SCCA members (beyond any joint owners of those same centres) *"regarding the financial difficulties their tenants are facing and which tenants or classes of tenants would benefit most from relief and the nature of the relief that might be offered"* with a view to potentially agreeing between themselves contracts, arrangements or understandings, *"to benefit their SME tenants, which have the purpose of deferring, or in certain circumstances, ameliorating the rent and other payments which those tenants otherwise might be obliged to pay to SCCA Members"*.

This distinction is important because the SCCA has not co-ordinated and does not intend to co-ordinate (and is not aware of) any arrangement or understanding between its members (nor any proposed arrangement or understanding) for the collection of information from tenants. This is including pursuant to the Interim Authorisation. Rather it is expected that individual SCCA members will themselves, independently of the SCCA and without reliance on the Interim Authorisation, be collecting from their tenants such information as they may individually require so as 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 the Australian Government's recently introduced Mandatory Code of Conduct). The application for Authorisation in this regard notes that the *"Proposed Conduct is not proposed to be mandatory for all SCCA members but rather is proposed to be an opt-in arrangement. Some individual SCCA members may elect not to participate and all members may choose, on a case-by-case basis, to offer more generous or otherwise tailored relief to SME tenants"*.

In the circumstances the SCCA can only offer at a very high and general level a response to first question - based on its general understanding of what information its members are

and may into the future be requesting. In the time allowed for this response the SCCA has not sought to canvas, collate and bring together each individual member's responses to the question.

When tenants come to an SCCA member for rental relief, at a very high and general level the SCCA understands that one or more of its members are seeking, and might be expected to continue to seek, information that enables them to gain a reliable appreciation of the financial challenges their individual tenants are currently facing and their immediate and longer term needs for rental relief (including for one form of relief as opposed to another). This may include information as to the tenant's recent and current sales data (perhaps not limited to their store/s with that SCCA member but also including say any increased online sales data), the tenant's eligibility to federal government support schemes, their arrangements with financiers, their arrangements with other creditors such as their suppliers, their fixed overheads and other expenses, insurance cover etc etc. Tenants, for instance, who have satisfied the governments requirements to access say the JobKeeper payments, might be asked to confirm this fact by an SCCA member so as to automatically be considered by that SCCA member to be in financial distress and entitled to relief. It is anticipated that the information being requested, and to be requested by individual SCCA members, likely includes information that those SCCA members "would not ordinarily have access to". It is, however, information which the SCCA understands those individual SCCA members consider reasonably necessary for them to reliably understand a tenant's needs in light of the unprecedented COVID-19 crisis and that tenant's eligibility for any rental relief that SCCA member might either be prepared or required to offer the tenant.

In due course, if a contract, arrangement or understanding is reached pursuant to the Interim Authorisation, then the information requested by SCCA members who opt-in to that "Agreed Conduct", is likely to include information that is "reasonably necessary to understand a tenant's eligibility for" any relief package the subject of the Agreed Conduct. Until, however, such a contract, arrangement or understanding is reached, the information requested by individual SCCA will not be, and cannot be limited to the information that is "reasonably necessary to understand a tenant's eligibility for" that as yet undefined and yet to be agreed relief package. Even if a contract, arrangement or understanding is reached pursuant to the Interim Authorisation, an individual SCCA member's requests for information may not be so limited (particularly if they offer, on a case-by-case basis as envisaged by the Interim Authorisation, "*more generous or otherwise tailored relief to SME tenant*").

In terms then of the information, once collected by individual SCCA members from their tenants, that the SCCA expects may be shared by those SCCA members with other SCCA members (beyond joint owners and joint venture partners) in reliance on the Interim Authorisation – that information may include:

- information (aggregated across tenants or classes of tenants) as to the trading conditions and trends being experienced by retail and other tenants in the midst of COVID-19;
- aggregated information as to the range and types of financial challenges that retail and other tenants (including broad classes of retailers) are facing by reason of COVID-19;
- aggregated information as to the alternative relief already available to tenants, the reach and coverage of that relief and as to any gaps in the relief; and
- aggregated information as to the range and types of rental relief that are likely to benefit retailers and other tenants of shopping centres (including which types of retailers/tenant who meet which criterion).

This is aggregated information of a type that may reasonably need to be shared by SCCA members so as to enable the SCCA and its members to tailor and reach agreement/s as to

the “relief packages” that might as a collective be offered to the tenants of those members (and the criterion required to be met to qualify for one or more of those “relief packages”).


It is not, and was not, intended or expected by the SCCA that its members, pursuant to the Interim Authorisation, will be sharing details of:

- An individual tenant’s trading data;
- An individual tenant’s financial position, arrangements or difficulties;
- The support an individual tenant may require or is otherwise getting;
- Otherwise an individual’s tenant’s confidential information; or
- Data from which it is feasible to ascertain any of the above concerning an individual tenant/retailer.

This the SCCA will shortly make clear to its members (including by providing to it members a copy of this letter). Further the SCCA will be encouraging its members to distribute this letter to any of their tenants who raise concerns about the information being requested of them by an SCCA member and about with whom that information might be shared.

The SCCA is content for this letter to be placed on the ACCC’s public register.

Regards


/ Peter Speed
