



**Australian Retailers Association –
Application for authorisation AA1000501
Interim authorisation decision
22 April 2020**

Decision

1. The Australian Competition and Consumer Commission (the **ACCC**) has granted interim authorisation in respect of the application for authorisation AA1000501, lodged by the Australian Retailers Association (**ARA**) on 17 April 2020.
2. The ARA has applied for authorisation on behalf of itself and its current and future members to collectively negotiate with landlords regarding the support to be provided to retail tenants who are adversely impacted by COVID-19, including in relation to the appropriate information to be exchanged with landlords for that purpose.
3. The ACCC has granted interim authorisation to the ARA to enable it and its members who have been adversely financially impacted by the COVID-19 pandemic to discuss and exchange information and collectively negotiate the terms of support with landlords, including sharing of information for the purpose of the collective negotiations (see paragraph 6).
4. Interim authorisation commences immediately and remains in place until it is revoked or the date the ACCC's final determination comes into effect.

The application for authorisation

5. As Australia's largest retail association, the ARA represents the interests of the Australian retail sector and provides advice, education and advocacy for its approximately 7500 members.
6. The ARA is seeking authorisation on behalf of itself and its current and future members who have been adversely financially impacted by the COVID-19 pandemic to enable them to discuss, exchange information and collectively negotiate with landlords regarding the support to be provided to retail tenants, including the appropriate information to be exchanged with landlords for that purpose (the **Proposed Conduct**).
7. The ARA submits that the collective negotiations will have regard to the mandatory Code of Conduct announced by the Prime Minister on 7 April 2020, which prescribes the good faith leasing principles applicable to negotiations between landlords and SME tenants (**Code**). The Code applies to tenancies with an annual turnover of up to \$50 million, but states that its principles should apply in spirit to all leasing arrangements for affected businesses, having fair regard to the size and financial structure of those businesses.¹
8. The ARA submits the Proposed Conduct will enable retail tenants, having regard to the principles of the Code, to jointly negotiate with landlords, and to make and give effect to contracts, arrangements or understandings as to the terms of support to be provided to them, either generally or in respect of a particular group of tenants. Those terms will likely address such matters as:

¹ See [National Cabinet Mandatory Code of Code](#), page 1.

- a) The appropriate information to be exchanged between landlords and tenants – for example:
 - i. In relation to landlords, information about savings or concessions obtained by the landlord through insurance coverage, reduced costs and taxes, reduced services being provided (i.e. due to the reduced use of facilities), as well as information about shopping centre trading conditions, customer numbers and the landlord’s financial position and capacity to grant rent reductions.
 - ii. In relation to tenants, the nature and extent of information such as revenue / turnover figures to be provided to landlords, and the confidentiality and other restrictions applicable to use of that information by landlords.
 - b) 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;
 - c) The assistance landlords and tenants should provide to each other in their respective dealings with third parties such as banks;
 - d) The size and form of rent reductions, including waivers and deferrals;
 - e) The size and form of reductions in statutory (e.g. land tax, council rates), insurance or other charges payable by a tenant;
 - f) Landlords’ passing through of savings or concessions obtained to tenants, such as benefits received from their banks or insurers;
 - g) Landlords’ ability to increase tenants’ rent or other obligations;
 - h) The efficacy of landlords’ initiatives to combat the impact of COVID-19, including as part of any recovery phase;
 - i) Whether steps taken by landlords comply with the requirements and spirit of the Code; and
 - j) Dispute resolution processes to be adopted in the event landlords and tenants are unable to reach agreement.
9. To inform the collective negotiations, the ARA intends that the authorisation will enable retail tenants to discuss and exchange information about:
- a) how they are approaching the current COVID-19 crisis and dealing with its impacts upon them
 - b) the shopping centres in which they operate, including how vacancies, falling customer counts and deteriorating trading conditions caused by COVID-19 have impacted the value of those centres
 - c) the questions being asked, and requests for information being made, by landlords of tenants in the context of considering and/or negotiating the support (if any) they will provide to tenants in the context of COVID-19
 - d) the appropriateness of actions landlords have requested tenants to take in the context of such negotiations, for example, signing non-disclosure agreements, and
 - e) the positions landlords are adopting in respect of such negotiations, including how they have (or have not) applied and interpreted the principles of the Code.
10. The information sharing and collective negotiations will occur at multiple levels and involve varying groups of tenants. The ARA advises that this is because some issues will be relevant to tenants generally, while others may only involve a particular tenant or be specific to circumstances and trading conditions within a particular shopping centre. As such, the ARA intends the Proposed Conduct to cover discussions:
- regarding matters that impact landlords and tenants generally

- involving particular landlords across their shopping centre portfolio
 - between tenants of a particular shopping centre, and
 - regarding particular groups of tenants, for example, within a certain category of usage.
11. The ARA advises that the Proposed 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 Rent Information**). The ACCC notes that Interim Authorisation provides protection from legal action for arrangements that may otherwise breach the competition law. Interim Authorisation cannot override existing contractual terms, including those that limit information disclosure (see second dot point in paragraph 22 for more information).
 12. Participation in the Proposed Conduct is not compulsory and individual ARA members may elect not to participate, or opt out, of any proposed collaboration.
 13. The ARA is seeking authorisation for 12 months from the ACCC's grant of final authorisation. The ARA submits that this period is consistent with the 12-month authorisation sought by the Scentre Group and the Shopping Centre Council of Australia on 2 April 2020. The application by the Scentre Group and Shopping Centre Council of Australia broadly enables shopping centre landlords to take urgent industry-wide action to assist small and medium enterprise tenants adversely financially impacted by the outbreak of COVID-19. The ARA also submits that this period is consistent with Code's principles which are expressed to have regard to the impact of the COVID-19 pandemic plus a reasonable recovery period.
 14. The ARA submits that the Proposed Conduct will result in the following public benefits:
 - contributing to the survival of the Australian retail industry and prevent unemployment
 - increasing competition between retailers to supply products once the economy emerges from the COVID-19 pandemic by ensuring retailers are in a financial position to compete vigorously
 - achieving transaction cost savings and efficiencies by tenants working together to develop consistency in responses and approaches
 - advancing the Australian Government's objectives as stated in mandatory commercial tenancy Code of Conduct announced by the Prime Minister on 7 April 2020, and
 - improving relationships and communication by providing a collective voice to tenants through which landlords can better understand the position of tenants.

The authorisation process

15. 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

16. 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.

17. The ARA requests urgent interim authorisation to enable its member retail tenants to collectively negotiate with landlords regarding the terms of support to be provided during the COVID-19 pandemic. The ARA submits that landlords are making urgent demands of tenants in respect of their negotiations for rental relief. The ARA seeks urgent interim authorisation for the Proposed Conduct to enable the negotiations to be conducted, and arrangements regarding the terms of support to be provided to tenants, as a matter of urgency.

Consultation

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

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

Reasons for decision to grant Interim Authorisation

20. The ACCC has granted Interim Authorisation to the Proposed Conduct described at paragraph 6 of this Interim Authorisation decision document. The Interim Authorisation does not extend to ARA and its members sharing information on actual rental amounts for existing leases.

21. In granting interim authorisation, the ACCC recognises the urgency of the request for interim authorisation in light of the significant challenges that retail tenants are facing due to the COVID-19 pandemic.

22. The ACCC considers that it is unlikely that the Proposed Conduct will significantly impact competition in the long term, due to the following factors:

- The collective bargaining and information sharing by the ARA and its members is temporary and is linked to rental support measures.
- The Proposed Conduct does not extend to individual tenants discussing or exchanging 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 the actual rent payable under existing leases in order for them to discuss and collectively negotiate rent relief measures with landlords. In this regard, the ACCC notes that the ARA does not consider it necessary or appropriate for tenants to discuss or exchange Sensitive Rent Information in undertaking the joint negotiations about rent relief. The ARA also notes that many leases may prohibit tenants from doing so in any event. Rather, the ARA submits that tenant discussions must be undertaken, and arrangements must be expressed, to avoid disclosure of Sensitive Rent Information. For example, the Proposed Conduct would permit a group of clothing retailers to collectively negotiate with their landlord a percentage reduction in rent for a particular period. However, it would not permit those retailers to disclose to each other actual rental amounts or the specific monetary impact of the negotiated rental reduction on their tenancy / business.
- The breadth of the collective bargaining groups formed by retail tenants is likely to be limited to tenants who share common traits (such as particular landlords, shopping centres, or classes of tenants) or rental distress issues.
- Authorisation does not compel landlords to negotiate with the bargaining groups of retail tenants. Landlords may decide to deal tenants on an individual basis.
- Participation in the Proposed Conduct is also voluntary for tenants. The ARA submits that all tenants will be free to negotiate their own individual arrangements

with landlords and to not participate in any proposed collaboration under the authorisation.

23. The ACCC further considers that there are likely to be significant public benefits in the current unprecedented circumstances, including:

- improving the quality and amount of information accessible to tenants, enabling them to become more informed and engaged in negotiations with landlords and have better input into support 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 outcomes. In this regard, the ARA submits that landlords generally have access to detailed information (including financial records) of all tenants within their shopping centre which gives them stronger bargaining power (particularly in relation to smaller retailers)
- transaction cost savings for both tenants and landlords, due to substantially reducing the time and burden that would otherwise be taken in individual dealings, including the time to negotiate and obtain legal, technical or other advice. The ARA does however expect that individual dealings on some issues will remain necessary, given leases have certain features that differ (such as structures, tenure periods and mechanisms for determining rent)
- to the extent that tenants are able to negotiate more beneficial terms as a group than on their own, this will increase the likelihood that retailers remain viable and continue to employ their workers; and once the recovery period is in place it will enable retailers to be in a better 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 during a reasonable recovery period.

Reconsideration of interim authorisation

24. 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.