

10<sup>th</sup> April 2020



## URGENT

Mr Rod Sims  
Chairman  
Australian Competition and Consumer Commission  
23 Marcus Clarke Street  
CANBERRA ACT 2601

Dear Mr Sims,

### Urgent Request to Revoke Interim Authorisation Scentre Group and Shopping Centre Council of Australia – AA1000489

1. I write to you on behalf of the Large Format Retail Association (**LFRA**) regarding the ACCC's conditional interim authorisation granted to Scentre Group and the Shopping Centre Council of Australia (**SCCA**) on 3 April 2020.
2. The ACCC's interim authorisation enables SCCA members – comprising primarily shopping centre landlords – to discuss, share information and coordinate the relief they will provide to small and medium enterprise (**SME**) tenants adversely financially impacted by COVID-19.
3. For the reasons set out below, the LFRA requests that the ACCC urgently revoke its interim authorisation.
4. The LFRA is the national peak industry association for Australia's Large Format Retail sector, which accounts for approximately 25% of all retail sales in Australia. Members of the LFRA include Large Format Retailers as well as owners, developers, investors and service suppliers of the sector. Further information about the LFRA and its members is **enclosed**.

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## Primary Issue – Interim Authorisation Contradicts Mandatory Code of Conduct

5. On 7 April 2020 the Prime Minister announced a mandatory Code of Conduct for commercial tenancies impacted by COVID-19 (**Code**).<sup>1</sup> The Code was developed in consultation between the National Cabinet and major retailer, landlord and tenant bodies.
6. The Code's stated purpose is to impose a set of good faith leasing principles. 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.
7. Relevantly, the Code includes the following principles:
  - (a) All premises are different, as are their commercial arrangements; it is therefore not possible to form a collective industry position. All parties recognise the intended application, legal constraints and spirit of the *Competition and Consumer Act 2010*.
  - (b) 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.
  - (c) 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". These factors should also be taken into account in formulating any temporary arrangements in line with this Code.
8. The LFRA considers the interim authorisation granted by the ACCC to SCCA members is contrary to these principles of the Code. In particular, a key public benefit cited by the ACCC in authorising the proposed conduct was that it would enable "a consistent and industry wide approach to rent relief".<sup>2</sup> However, this directly contradicts the Code's principles that it is not possible to form a collective industry position, and that all leases must be dealt with on a case by case-by-case basis.

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<sup>1</sup> <https://www.pm.gov.au/sites/default/files/files/national-cabinet-mandatory-code-ofconduct-sme-commercial-leasing-principles.pdf>

<sup>2</sup> ACCC Interim Authorisation, paragraph 22.

9. The Code also prescribes the leasing principles that “*should be applied as soon as practicable on a case-by-case basis*” to negotiations between shopping centre landlords and tenants. These include that:
- (a) Landlords must reduce rent in proportion to the reduction in the tenant’s business;
  - (b) At least 50% of the reduction must be a rent waiver with the balance being a deferral;
  - (c) To the extent deferred, tenants will be entitled to repay the deferred amounts over the balance of the term of the lease; and
  - (d) Landlords cannot terminate leases due to non-payment of rent or call on security such as bank guarantees.
10. Given the leasing principles prescribed by the Code, it is unnecessary for landlords to coordinate “*urgent industry-wide action*” between themselves about how to collectively deal with SME tenants – being a fundamental premise of their application for authorisation. Rather, individual landlords’ time would be far better spent speaking directly with affected tenants to provide solutions tailored to each tenant’s circumstances in accordance with the Code.

### Other Concerns with the ACCC’s Interim Authorisation

11. The LFRA considers the material inconsistencies between the interim authorisation and the Code alone make it incumbent upon the ACCC to revoke its interim authorisation. However, the LFRA also takes this opportunity to bring the following additional concerns about the interim authorisation to the ACCC’s attention.
12. First, the LFRA considers the “*significant public benefits*” cited in support of the interim authorisation are overstated and commercially unrealistic. In particular, the likely outcome of a “*consistent and industry wide approach to rent relief*”, as well as being contrary to the Code’s principles, would be that:
- (a) As a collective, shopping centre landlords will simply agree to take more and give less across the board;
  - (b) Competition between shopping centre landlords to provide tenants more favourable terms will be destroyed or undermined; and

- (c) As a result, tenants will be significantly worse off than if they were negotiating with individual landlords, which will in turn lead to consumers paying higher prices and having less choice.
13. Secondly, the authorisation of landlords to “*share information*” for the apparent purpose of assisting SMEs affected by COVID-19 is also highly concerning, and may have far-reaching anti-competitive consequences, particularly once the economy emerges from the social and financial impacts of COVID-19. In particular:
- (a) The authorisation does not provide specifics, or express any restrictions, as to the nature of the tenant information permitted to be shared between landlords, or any requirements to de-identify that information.
- (b) Many tenants are already required under their leases to provide confidential and commercially sensitive information, including in connection with the payment of turnover rent. Landlords will likely require tenants to “*open their books*” even further to demonstrate reduction in business turnover, and accordingly gain further information which will be valuable to them in any future negotiations with those tenants.
- (c) The exchange of this type of information by landlords pursuant to the interim authorisation would be highly inappropriate – as it would provide landlords with a commercial and competitive advantage far beyond what is required for them to achieve the stated objective of the authorisation.
- (d) The sharing of such information would also further increase the information-related power imbalance between shopping centre landlords and their tenants.
14. Thirdly, the ACCC acknowledges it has not conducted a public consultation process in relation to the application. Such a process is ordinarily a critical aspect of the ACCC’s assessment of conduct that may otherwise be anti-competitive. While the LFRA accepts the unprecedented COVID-19 situation warrants interim authorisation being given without that process in certain circumstances – for example, so supermarkets can cooperate to ensure the fair and equitable distribution of groceries to consumers – there is no compelling justification in this case for landlords to coordinate their conduct. To the contrary, the ACCC should instead direct landlords to comply with the principles of the Code, which includes dealing with tenants on a case-by-case basis.

15. Fourthly, there is no equivalent authorisation for tenants to share information and collectively negotiate with shopping centre landlords – meaning landlords are presently permitted to pool their considerable resources and information for their own purposes, and then “*divide and conquer*” individual retailers.
16. Ultimately, the fundamental purpose of the ACCC’s interim authorisation was to assist tenants adversely financially impacted by COVID-19. This purpose has now been addressed by the implementation of the Code, which prescribes the good faith leasing principles applicable to negotiations between shopping centre landlords and tenants on a case-by-case basis.
17. In light of the significant concerns outlined in this letter on behalf of the supposed beneficiaries of the authorised conduct, the LFRA requests the ACCC’s urgent confirmation that the interim authorisation has been revoked.
18. Please contact me on [REDACTED] or [REDACTED] if you would like to discuss any aspect of this letter.

Yours sincerely,



**Philippa Kelly**  
Chief Executive Officer



## The Large Format Retail Sector and the Large Format Retail Association

The Large Format Retail Association (LFRA) is Australia's peak industry body which supports and advocates for Australia's Large Format Retail market.

The LFRA's policy agenda strongly encourages investment and employment growth and opportunities. Issues such as urban planning, competition policy and energy underpin our agenda.

Demand assessment economists, Deep End Services, estimates the following national key industry metrics for the year ending 30<sup>th</sup> June 2019:

Key Industry Metrics	Quantification
Total retail sales	\$325 billion
Large Format Retail percentage of total retail sales	25.2%
Large Format Retail sales	\$81.8 billion
Number of direct employees in Large Format Retail	200,037
Number of indirect employees in Large Format Retail	248,446
Total number of employees both directly and indirectly in Large Format Retail	448,483
Large Format Retail floor space	19.8 million square metres

Further information about the LFRA can be found on our website [www.lfra.com.au](http://www.lfra.com.au) and our free to subscribe industry e-news website [www.unwraplfra.com.au](http://www.unwraplfra.com.au)

Uniquely, the LFRA's membership base includes not only Large Format Retailers, but also investors, owners, developers and services suppliers in the Large Format Retail sector.

Retail members of the LFRA include some of Australia's largest and most respected Large Format Retailers including the 60 individual business brands listed in the following table:



ABS Automotive Service Centres	Decathlon	Original Mattress Factory
Adairs	DeRucci	OZ Design Furniture
Adairs Kids	Domayne	Petbarn
Amart Furniture	Early Settler	PETstock
Anaconda	Fantastic Furniture	Pillow Talk
Animates	Freedom	Plush
Autopro	Harvey Norman	Provincial Home Living
Autobarn	House	Rebel
Baby Bunting	IKEA	RoadTech Marine
Barbeques Galore	James Lane	Robins Kitchen
Bay Leather Republic	Jaycar Electronics Group	RSEA
BCF	JB Hi-Fi	Sleepys
Beacon Lighting	JB Hi-Fi Home	Snooze
Beaumont Tiles	Joyce Mayne	SPACE
Bedshed	Kitchen Warehouse	Sprint
Bunnings	Lincraft	Spotlight
Bursons	Macpac	Supercheap Auto
Chemist Warehouse	Midas Auto Service Experts	The Good Guys
City Farmers	Mountain Designs	The Sleeping Giant
Costco	Officeworks	Urban Home Republic

The LFRA is supported by its Patron, PwC, and the following 76 Associate members that comprise of Large Format Retail developers, investors, owners and service suppliers:

ACTON Commercial	CV Media & Signage	Leffler Simes Architects
Acure Asset Management	Deep End Services	Mainbrace Constructions
ADCO Constructions	Deluca Constructions	Major Media
Aigle Royal Properties	DOME Property Group	Morgans Financial Limited
Aisleplus	Earlytrade	MPG Funds Management
Arise Developments	Edge Electrons	Moray & Agnew Lawyers
AsheMorgan	Edgewise Insurance Brokers	National Storage
Arkadia	ERM Power	Newmark Capital Limited
Aventus Group	Ethos Urban	Perth Airport
AXIMA Logistics	Eureka Home Maker Centre	Planning Solutions
AXIOM Properties Limited	Excel Development Group	Primewest
Bayleys	Gazcorp	Properties and Pathways
Blackmont	Gibb Group	QIC
Blueprint	Gibbens Group	Realmark Commercial
BNE Property	Geon Property	Savills
Buchan	Grosvenor Engineering Group	Sentinel Property Group
Burgess Rawson	HLC Constructions	Terrace Tower Group
BWP Trust	Home Consortium	TK Maxx
CBRE	Humich Group	Tomkins
Charter Hall	Investore Limited	Transact Capital
Cherry Energy Solutions	IRetail	Transcend Property
Citinova	Jape Group Australia	Troon Group
Colliers International	KHQ Lawyers	Upstream Energy
Complete Colour	Knapp Property Group	Vend Property
Cornwalls	Leedwell Property	VPG Property
Cushman and Wakefield		

