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21 April 2020

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

Dear Mr McCracken-Hewson

AUSTRALIAN RETAILERS ASSOCIATION'S APPLICATION FOR AUTHORISATION

We act on behalf of the Shopping Centre Council of Australia (SCCA).

The SCCA notes that on 16 April 2020 the Australian Retailers Association (ARA) made an urgent application for interim authorisation for ARA members:

- To discuss and exchange information; and
- 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.

The SCCA further notes that the ARA justifies its application for urgent authorisation on a number of bases including that:

- on 3 April 2020 the ACCC granted conditional interim authorisation to Scentre Group and the Shopping Centre Council of Australia (SCCA) to enable shopping centre landlords to discuss, share information and coordinate relief to be provided to small and medium enterprise (SME) tenants financially impacted by COVID-19; and
- shopping centre landlords are making urgent demands of tenants in respect of their negotiations for rental relief, including requiring tenants to "open their books".

The SCCA has a number of preliminary concerns about the ARA's application for authorisation which appears to the SCCA to represent an attempt by the ARA to put its substantial number of members in a position to maximise the rental relief those members might obtain in the current COVID_19 crisis - rather than for them "to share, in a proportionate, measured manner, the financial risk and cashflow impact during the COVID-19 period, whilst seeking to appropriately balance the interests of tenants and landlords" as envisaged by the Australian government. In particular, for the reasons discussed below, the SCCA is concerned that the ARA's application for authorisation is not limited to SME's, contains inadequate limits on the information that might be discussed and exchanged by ARA members, would allow for collective negotiation by ARA members, has the potential for necessitating landlords accepting a collective negotiation, is said to be justified by the unsurprising conduct of landlords and does not proffer sufficient protections.

Not limited to SMEs

There is nothing in the ARA's application which suggests that the application is made only in respect of, and to benefit, small and medium enterprises. Rather the authorisation is said to be requested on behalf of the ARA and its current and future members. By way of contrast, the "Proposed Conduct (and any Agreed Conduct)" in respect of the SCCA's application for authorisation was proposed to concern "*only tenants that represent SMEs as described by the Prime Minister in media announcements in March 2020. This represents tenants which have a group wide annual turnover of up to $50 million*".

As the ARA's application makes clear some of its current (and potential future members) are very large entities such as:

a) Accent Group –which according to the ARA has 522 Platypus, Hype and Athletes Foot stores

b) Lovisa – which according to the ARA has more than 155 stores.

c) Alceon – which according to the ARA has more than 1400 stores.

d) Premier Investments – which according to the ARA has more than 900 Smiggle, Dotti, Peter Alexander, Just Jeans, Jay Jays and Jacqui E stores.

In fact, according to the ARA's application, 50% of Australia's top 20 retailers are ARA members. Confidential Schedule A to the ARA's application is said to contain a list of the top 50 ARA members by number of tenancies. Behind annexure A to this letter are the details, derived by the SCCA from public sources, including from company websites where available and from calculations based on Urbis Shopping Centre Benchmarks, of a number of the larger retailers whom the SCCA understands are ARA members.

Certainly the "sum of the prices for the .. acquisition of" the services (leases) the subject of the collective negotiations envisaged as possible by the ARA in its application for authorisation well exceeds, by orders of magnitude, the $3million threshold in section 93AB of the *Competition and Consumer Act 2010 (***Act**)

Given that the ARA is seeking authorisation for its members to engage in conduct that might otherwise be in breach of the criminal cartel provisions of Division 1 of Part IV of the Act and section 45 – it is important that the authorisation, including any interim authorisation given, is only as extensive as is reasonably justified as being in the public interest.

Significantly, when drafting the Mandatory Code of Conduct, entitled "*SME Commercial Leasing Principles During COVID-19*", approved by the National Cabinet and announced by the Australian Government on 7 April 2020 (the **Code**), the Australian government did not see the need to include, under the cover of that code, larger enterprises – such as the larger

retailers identified above within the ARA's membership. This was no doubt because they were considered big enough to well look after their own interests absent a mandatory code.

The ARA's application for authorisation fails to identify why its larger members need say the ability to collectively negotiate with their landlords (many of whom, including some SCCA members, would own and manage less tenancies than those retailers occupy). This omission is particularly significant given the ARA's own admission that: "*Larger retailers are generally not as vulnerable as their smaller counterparts, particularly where they are able to negotiate multiple tenancies with the same landlord on a portfolio basis across numerous shopping centres*." It is the SCCA's and its members' experience that larger retailers have substantial countervailing market power and are already well able to look after their own interests (absent having any ability to collectively negotiate with their landlords).

Inadequate limits on information that might be discussed and exchanged

The ARA's application for authorisation also does not adequately limit the nature of the information that is to be discussed and exchanged by ARA members. It is, for instance, difficult to see the claimed benefits (in terms of minimising inefficiencies, in terms of costs savings and in assisting the ARA in providing appropriate support and advice to its members) arising from allowing those members to exchange information about and discuss: "*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."*

By contrast, the SCCA's application for authorisation only sought permission for the SCCA and its members to : "*discuss and share information 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 offere*d".

The limitation in the ARA's application that the "*proposed conduct does not extend to individual tenants discussing or exchanging information about the precise amount of rent payable under their existing or proposed leasing arrangements, or any rent incentives previously granted by the relevant landlord ("Sensitive Rent Information")*" is not broad enough and does afford landlords adequate protection. This limitation does not, for instance, mirror with respect to confidential information pertaining to any particular landlord the SCCA's statements made in relation to its application for authorisation, in response to concerns raised with the ACCC:

> *"that it is not proposed with the Proposed Conduct that its members will be seeking to share amongst 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"*.

Allows for Collective Negotiation

The ARA's application for authorisation is an application for the ARA and its members 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 including as to:

- The size and form of rent reductions, including waivers and deferrals;
- The size and form of reductions in statutory (e.g. land tax, council rates), insurance or other charges payable by a tenant; and

- Landlords' passing through of savings or concessions obtained to tenants, such as benefits received from their banks or insurers.

This is in contrast to SCCA's own application for authorisation which did not seek approval for SCCA members to collectively be at the negotiating table with their tenants. Rather the SCCA's application was for authorisation for its members to "enter into agreements as to the nature of the relief which might be offered to these tenants, or classes of tenants, by SCCA members".

As the SCCA's application for authorisation makes clear any SCCA member might opt in or out of any agreed relief and "*any rental relief measures agreed through the Proposed Conduct will operate as a guide, a benchmark, for all SCCA members who agree to them, providing SME tenants with some basis for discussions. SCCA members and their tenants will still remain able and open to negotiate greater rental relief on a case-by-case basis. The existing financial hardship policies (if any) of SCCA members will continue to operate." "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.*"

The benefits of such a co-ordinated response between SCCA members were stated to be that such a response "*was likely to achieve results of the nature desired by the Australian Government much faster and thereby give SME comfort and certainty much earlier than would be achieved by SME tenants negotiating on a case-by-case basis with individual SCCA members. This is because any rental relief measures once agreed upon by SCCA members (any Agreed Conduct) will, at a minimum, provide them with meaningful and defined short-term relief almost immediately*".

Similar benefits would likely accrue to the ARA and its members if there authorisation were similarly limited and stopped short of the right to collectively negotiate with landlords.

It is not apparent to the SCCA that there would be any additional public benefits gained, which justify the associated significant anticompetitive risks, by enabling multiple ARA members (and the collective market power they have) to go further and be at the one negotiating table with a given landlord. In this regard it is significant that the ARA acknowledges in its application that "*It is nevertheless expected that individual dealings on some issues will remain necessary, given leases have (for example) different structures, different periods of tenure and different mechanisms for determining rent*." With retail leases we are not dealing with widgets where a one size fits all approach is likely to work.

Potentially necessitates landlords accepting a collective negotiation

In its application the ARA states that it considers "*there will be utility in … collective negotiations occurring at multiple levels and group sizes of the landlord and tenant relationship, given some issues will be generally relevant, others to a particular landlord, and others to circumstances and trading conditions within a particular centre*". It consequently seeks authorisation to "jointly negotiate with landlords … either generally or in respect of a particular group of tenants".

The ARA, however, acknowledges in its application that its members "operate more than 60,000 retail shopfronts across Australia". Now 60,000 retail shops closely correlates with the "65,000 speciality shops" in total that according to Baker Consulting, as at 2018, were located in the 1,630 shopping centres in Australia, excluding Homemaker, Themed and Factory Outlet centres, which exceeded 1,000 square metres of GLA. That includes those centres owned and managed by the SCCA).

In the circumstances, given the coverage of and collective market power of the ARA's membership, if post authorisation ARA members insist that a particular landlord negotiate

with them "generally" or largely as a collective - there will potentially be limited scope, as a matter of commercial reality, for a particular landlord to refuse to enter into such collective negotiations. This represents both a reason for the ACCC not to grant the authorisation sought and for making it a condition of any authorisation granted that the ARA and it members not in any way seek to pressure landlords into negotiating with ARA members as a collective. Participation in any such negotiations would need to be entirely voluntary on the part of a landlord.

Reliance on landlords urgent demands for information

The ARA, in its application for authorisation, seems to seek to justify the need for urgent interim authorisation on the basis that the ARA "is aware that shopping centre landlords are making urgent demands of tenants in respect of their negotiations for rental relief, including requiring tenants to "open their books".

In relation to this statement it is important to appreciate that SCCA members are not making any such requests for information pursuant to and in reliance on the interim authorisation granted the SCCA and its members on 3 April 2020. Rather, when tenants come to landlords for relief from the rental they had contracted to pay to those landlords, at a very high and general level the SCCA understands that landlords 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). Such information is necessary for landlords 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 landlord might either be prepared or required to offer the tenant.

As stated in the ARA's application for authorisation, a requirement of Australian Government's Mandatory Code is that "Landlords must reduce rent in proportion to the reduction in the tenant's business". And yet to do so tenants need to "open their books" to landlords to enable landlords to determine the tenant's reduction in business and hence the proportional reduction in rent that needs to be made.

Insufficient Protections

As stated above, given that the ARA is seeking authorisation for its members to engage in conduct that might otherwise be in breach of the provisions of the *Competition and Consumer Act 2010* including the criminal cartel provisions of Division 1 of Part IV and section 45 – it is important that the authorisation, including any interim authorisation given, is only as extensive as is reasonably justified as being in the public interest. In addition conditions ought to be imposed on any authorisation granted so as to provide reasonable protection to persons and entities who might otherwise be adversely affected by the proposed conduct. Here, insufficient protections are provided for in the ARA's application for authorisation.

In the ARA's application, for instance, it is merely stated that "*It is intended that the collective negotiations will have regard to the mandatory Code of Conduct announced by the Prime Minister on 7 April 2020*". It is not, however, stated that the ARA and it members will not be using the substantial collective negotiating power they would potentially gain through the ACCC's authorisation to negotiate for relief greater than provided for in that Code – say for a rental reduction that is "out of" proportion to the reduction in a tenant's business.

In contrast, the SCCA correspondence submitted in support of its application makes clear "*that it is anticipated that any agreement, arrangement or understanding reached by the SCCA members by reason of the Proposed Conduct (if any) will <u>not</u> 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."

Further the ARA's application for authorisation proffers no advance notification to the ACCC mechanism, again in contrast with the SCCA's application for authorisation which states:

> *The SCCA undertakes, on behalf of its members, to notify the ACCC of any agreement provisionally arising from the Proposed Conduct ("Agreed Conduct") for the deferral or amelioration of rent, prior to the Agreed Conduct being given effect to.*
>
> *The notification to the ACCC will include at a minimum:*
>
> - *a description of the Agreed Conduct, including (if applicable) a description of the SME tenant group/s, or classes of SME tenants, intended to be impacted by the Agreed Conduct (if not all SME tenants);*
> - *the criterion 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 SCCA members which, at the time of the notification, have agreed to implement the Agreed Conduct; and*
> - *when the Agreed Conduct is intended to be implemented.*
>
> *When considering any Agreed Conduct, it is understood that the ACCC may in its absolute discretion, object to the Agreed Conduct or impose conditions which restrict the type or extent of the Agreed Conduct.*
>
> *It is proposed that the ACCC will publish on its authorisation register the details of any Agreed Conduct of which it is notified. Further it is expected that SCCA would be obliged by the ACCC, as a condition of this Authorisation, to publish widely and transparently the relief measures available by reason of the Agreed Conduct such that affected SME tenants become aware of and may take advantage of those measures*

As a minimum, a similar notification process ought to be imposed as condition on any authorisation granted to the ARA.

Further Responses

In this letter we have sought to set out on behalf of the SCCA the SCCA's preliminary response to the ARA's application for authorisation. The SCCA and its members reserve the right to provide more detailed and comprehensive responses once they have had the opportunity of considering that application in more detail over the coming weeks.

Regards

Peter Speed