

COMMONWEALTH GOVERNMENT COVID-19 RESPONSE INQUIRY

The [Shopping Centre Council of Australia](#) (SCCA) represents Australia's major shopping centre companies, with interests across all jurisdictions.

We put on record that we are incredibly disappointed at the limited scope of the Response Inquiry, particularly excluding any actions taken by State and Territory Governments.

As shopping centres remained open as an 'essential activity' and assisted Governments (e.g. COVID-19 testing in our car parks) throughout the pandemic – including during the initial 'hibernation' period, ongoing 'lockdowns', and COVID-Safe 'opening' periods – the limited scope severely limits the learning and preparedness for future events. In our view, this includes institutional learning, for instance at the National Cabinet-level. The limited scope also diminishes the valid experience and inputs of groups like ours, that bore a substantial burden from various Government decisions.

Even so, we provide this submission in good faith and would welcome any future opportunities to engage with the Taskforce in an objective assessment of Government's response, recognising that there were of course many positives.

The SCCA led the shopping centre sectors engagement with the Commonwealth and State and Territory Governments.

We worked closely with our members – including through a dedicated established COVID-19 capability and under SCCA Board delegations – to ensure that our industry was well coordinated across all jurisdictions and operated safely throughout the pandemic. This involved countless discussions with Governments, state/territory public health authorities and Chief Health Officers, Police, retailers, safe work agencies, and other stakeholder groups to ensure effective operations along with compliance with Public Health Orders.

We also developed industry-specific COVID-Safe plans/protocols on general operations, the wearing of face masks, food courts (which are listed on Safe Work Australia's website), children's rides and Santa Photos. We also adjusted our trading practices (e.g. extended hours, enabled click and pick-up facilities) to reduce crowd congestion and queuing and to help ensure social distancing.

KEY ISSUES

Noting the limited scope and page-limit of submissions, we provide this submission to identify, at a high-level, one key issue that the Taskforce may seek to engage with us on in the new year, noting that there is considerably more to discuss in terms of our sectors experience that would not be done justice through in this short submission.

1. SME Code of Conduct

The *National Code of Conduct for Commercial Tenancies – Leasing Principles* (known as the SME Code of Conduct) – formally announced on 7 April 2020 as a 'hibernation' measure – stands as a poor decision and legacy made by the Commonwealth Government.

The SME Code of Conduct was conceived by us (including a related interim ACCC authorisation) and developed with industry; yet the Commonwealth Government in essence 'commandeered' it, made some problematic changes, and then handed it over to State and Territory Governments (and groups like us) to deal and live with.

To be clear, there was no policy or market failure that the Government needed to address.

To be clear, no other sector was required by law, like ours, to waive or defer income (e.g. banks, suppliers).

Anyone that suggests that the SME Code of Conduct was good policy by the Commonwealth Government comes, in our view and experience, from two opportunistic perspectives:

- Firstly, Governments that 'claimed credit' for the rent relief and business support provided to small businesses that was entirely funded by the private sector. Regretfully, the SME Code of Conduct became an easy way for Governments to amass political goodwill on someone else's burden and dollar (ironically, in response to the detrimental effects of Government-imposed restrictions).
- Secondly, retailers and retailer groups that simply benefited from gaming the SME Code of Conduct for risk-transfer and financial benefit at landlords' expense.

Our key recommendation is that the Response Inquiry recommends that an SME Code of Conduct should not be recognised as a policy mechanism or re-enlivened in any future event.

Particularly as the pandemic rolled on (i.e. beyond March/April/May 2020), this poor Commonwealth Government intervention could not continue to be explained as, or now reduced to, something akin to: '*these were exceptional circumstances...*', or '*Government acted as it saw fit/to ensure the survival of small businesses...*'.

Nationally, SCCA members provided \$3 billion in rent relief during the course of the COVID-19 pandemic – the equivalent of \$4.2 million per day. The largest proportion of SME support went to those businesses affected by Public Health Orders (i.e. we subsidised the ongoing closure/partial closure/limited operations of such businesses).

Many thousands of retailers would not have survived or performed as well as they did without landlord support, and countless business closures were avoided due to landlord support.

The following provides a general outline of our experience with the Commonwealth Government intervening in the SME Code of Conduct:

- The SCCA conceived the SME Code of Conduct based on the principle of support for SME tenants, as part of ongoing discussions with Governments and other stakeholders. At the time, there was a desire to move quickly, and ensure a nationally consistent approach.
- The SCCA had already agreed to not terminate any leases for the non-payment of rent.
- The SCCA, with key retailer groups such as the National Retail Association and Pharmacy Guild of Australia, developed the SME Code of Conduct. The development of the SME Code of Conduct was collegiate and measured, and done in good faith.
- The basis for the SME Code of Conduct was the SCCA's existing *Casual Mall Licensing Code of Practice*, which is authorised by the ACCC.
- The SCCA sought and received interim ACCC authorisation to enable SCCA members to discuss rent and rent relief issues. The ACCC were a fantastic agency to work with as part of this process.
- During the development of the SME Code of Conduct, the Commonwealth Government, in essence, requisitioned it and made changes which appeared in the 'National Cabinet Mandatory Code of Conduct' when announced on 7 April 2020 that, to this day, remains problematic in terms of ongoing legacies.
- After the SME Code of Conduct was announced, the Commonwealth Government then vacated the space and it was left to State and Territory Government to implement. This created a regulatory quagmire, including where initial rent relief was stalled given that some Government's took some time to adopt the SME Code of Conduct and provide clarity on relevant statutory provisions.
- Nationally, the SME Code of Conduct was regulated and re-regulated 27 times. It applied for a collective 2,472 days versus 555 days of lockdown.
- In the end, the SME Code of Conduct was simply being used by Governments to claim credit for business support that they did not fund themselves, all the while they continued to make and enforce challenging operating rules for retailers and SMEs.
- **Attachment 1** highlights how an initial 6-page, 11-provision document resulted in (in the worst case, Victoria) 60+ pages of regulation and overly complicated provisions, and an application that went well beyond the initial purpose of it being a 'hibernation' policy.
- Nationally, rules relating to shopping centres and their tenants, under Public Health Orders and other guidance material, changed on average every few days.
- The SME Code of Conduct seriously eroded and suspended property and legal rights, including the inability to:
 - enforce core trading hours (which is ultimately to the detriment of all other tenants),
 - terminate leases due to non-payment of rent (including well after Government-imposed lockdowns and markedly improved trading conditions), and
 - increase outgoings (at a time when cleaning costs were rising considerably).
- To this day, the SME Code of Conduct continues to have a negative legacy including an entitlement mentality with many retailers, and an over-reliance on Government mediation processes, which is now clogging up certain retail leasing arrangements.

RECOMMENDATIONS

The SCCA submits that the Taskforce should recommend that the Commonwealth Government:

1. Thank the shopping centre industry for providing and under-writing substantial business support for the retail sector, including predominantly for retailers most affected by Public Health Orders.
2. Acknowledge that the SME Code of Conduct was indiscriminately applied and now presents as an inadequate model for measured business support in similar circumstances.
3. Determine that the former government failed – noting its developed as a 'hibernation' measure – to ensure appropriate execution and oversight of the SME Code of Conduct by state-territory governments; it continued to apply well beyond its initial intent.
4. Engage with State and Territory Governments and stakeholder groups to develop consistent definitions and agreed actions (in relation to movement and business restrictions, and public health responses).

CONTACT

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EVOLUTION OF SME CODE: RETAIL LEASING RISK

	Pages			Sections			Words			Jurisdiction	First			Last			Change			Number of Days								
	Icon	Count	Count	Count	Count	Count	Count	Count	Count		Count	Count	Count	Count	Count	Count	Count	Count	Count	Code	Lockdown	Ratio						
SCCA CML Code		6	18	2,581		1		2		3		NSW		13		13	3,906		9		16	2,308	-31%	23%	-41%	561	110	5:1
SCCA/Retail Industry Code		6	11	2,624		1		2		3		VIC		24		25	4,229		67		65	13,580	179%	160%	221%	577	282	2:1
ACCC Authorisation		5	23	1,887		1		2		3		QLD		34		49	8,831		34		49	8,831	-	-	-	266	51	5:1
												SA		10		10	3,264		12		11	4,206	20%	10%	29%	232	11	21:1
												WA		18		13	3,350		27		13	5,910	50%	-	76%	348	12	29:1
												TAS		43		33	6,851		43		33	6,851	-	-	-	213	17	13:1
												NT		24		18	5,223		24		18	5,223	-	-	-	259	9	29:1
National Cabinet SME Code		6	14	5,249		1		2		3		ACT		11		8	3,325		12		12	3,931	9%	50%	18%	286	63	5:1
7 April 2020											TOTAL		177		169	38,979		228		217	50,840	29%	28%	30%	2,742	555	5:1	