# Retail Compass

## Summer edition 2019

# Welcome

**Welcome to the Summer 2019 edition of Retail Compass – our guide to key upcoming legal and policy changes affecting Retail and our thoughts on the need-to-know issues.**

Retail remains a key focus for RPC. We understand the issues retailers face and have a deep knowledge of what is happening and what is likely to matter the most to you and your business.

We started Retail Compass back in 2017 and continue to publish twice a year, addressing developments in six core areas: Commercial, Data Protection, Corporate, Employment, Real Estate and Tax. Our primary focus remains on the UK but we have also included some highlights for the USA, Australia and China, where many of our Retail clients and contacts operate.

Having listened to your feedback, we have added an Executive Summary so you can see at a glance what's covered and click through the links in the digital version to access further details for pieces that are most relevant to you.

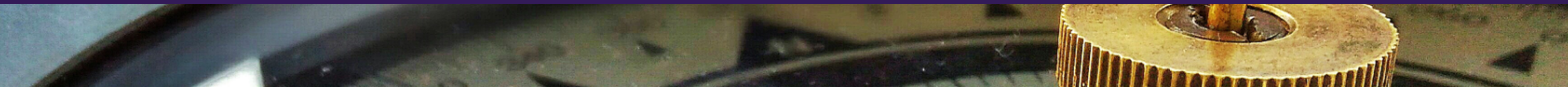
Because we see our role as lawyers as helping you avoid any surprises, horizon-scanning continues to make up a large part of Retail Compass. We've included various hot topic items of relevance to the sector, and previewed some key changes due in early 2020. As before, we've also included other features such as interesting statistics, a list of Government consultations/inquiries and a legislation tracker.

We hope this edition is helpful for your business. We would love to hear any feedback or comments so please feel free to contact us.

**RPC Retail Compass has been designed to help steer you through the key legal and policy changes affecting businesses operating in the fast-moving and competitive retail sector.**

**Karen Hendy**
**Partner**
**Joint Head of Retail**
+44 20 3060 6051
karen.hendy@rpc.co.uk

**Jeremy Drew**
**Partner**
**Joint Head of Retail**
+44 20 3060 6125
jeremy.drew@rpc.co.uk



# Executive summary

Below are the headline legal and policy developments on the immediate horizon. Please follow the links to see what action you should consider taking for each.

# Interesting statistics – UK

Source: British Retail Consortium

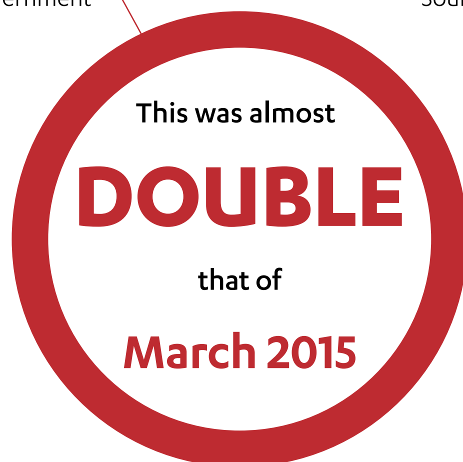
Source: UK Parliament

Source: British Retail Consortium

## Interesting statistics – International

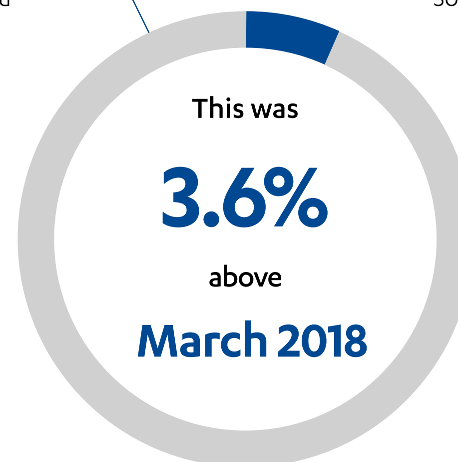
Australia

Source: Australian Government



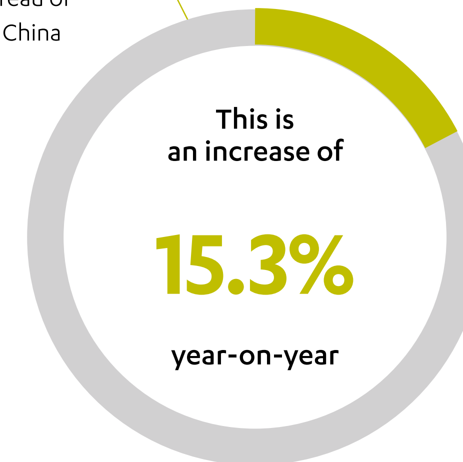

USA

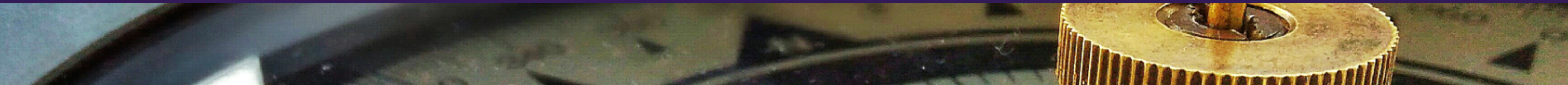
Source: US Census Bureau




China

Source: National Bureau of Statistics of China





# Horizon scanning

Please click on the boxes below to see further details.

2019

JUNE JULY AUGUST SEPTEMBER OCTOBER NOVEMBER DECEMBER

2020

10 June 2019

# Implementation of the Shareholder Rights Directive II

## What is happening?

The Shareholder Rights Directive II (SRD II) took effect in the UK from 10 June 2019. It amends the original Shareholder Rights Directive, which was implemented in the UK in 2009 with the aim of improving corporate governance in EU companies whose shares are traded on EU regulated markets.

## Why does it matter?

The amendments implemented by SRD II have the ultimate aim of encouraging long-term shareholder investment and engagement in listed companies – and ending the "short-termism" investment culture - by prescribing new obligations for companies, intermediaries, investors, asset managers and proxy advisers. The new regime sets out rules around transparency, accountability, investment strategies and remuneration structures (some of which will already be familiar to retailers with a premium listing). The key elements of these changes are as follows:

- **Related party transactions**: SRD II imposes new requirements around the disclosure and approval requirements for material related party transactions for listed companies. For premium-listed retailers, the rules are broadly equivalent to those set out in Listing Rule 11 (albeit with a slightly wider scope as SRD II employs a different definition of related party). However, the rules are entirely new for standard-listed retailers (to whom Listing Rule 11 does not currently apply),
- **Directors' remuneration**: listed companies must publish a remuneration policy which must be subject to a shareholders' vote. This is not a new requirement for UK-listed companies, which have been subject to a binding vote on remuneration for several years, but SRD II applies certain minor modifications to the existing rules and also extends the requirement to unquoted traded companies, and
- **Institutional investors and asset managers**: SRD II imposes additional obligations on asset managers and institutional investors to develop and publicly disclose a policy on shareholder engagement (or explain why they have chosen not to do so) and disclose how the main elements of their investment strategy contribute to the medium- to long-term performance of their assets. These regulatory obligations are supplemented by the voluntary provisions of the Stewardship Code which also seek to ensure responsibility and accountability for stewardship by investors and which is also being revised at present (see page 8).

## What action should you take?

1. Main market listed retailers will need to ensure they have procedures in place to identify material related party transactions and comply with the related approval/announcement obligations when they enter into certain types of transaction in financial years starting on or after 10 June 2019. For premium listed retailers, the impact of these changes should be relatively minor.

2. Listed retailers should ensure they are aware of the modified rules on directors' remuneration policies which (in general) will apply to policies adopted from 10 June 2019.

3. As with the proposed changes to the Stewardship Code, retailers may see greater engagement from institutional investors in the future on topics such as long term business strategy, board composition, sustainability, environmental issues and executive remuneration.

If you would like any assistance, please contact Karen Hendy or your usual RPC contact.

14 June 2019

# New rules banning harmful gender stereotyping in advertising

## What is happening?

Following a review by the Advertising Standards Agency (ASA), new rules from the Committee of Advertising Practice (CAP) now prohibit the use of gender stereotypes that are likely to cause harm.

The new CAP rules apply to all advertising from 14 June 2019 onwards.

## Why does it matter?

Any advertisements that include *"…gender stereotypes that are likely to cause harm, or serious or widespread offence"* are now prohibited.

These stereotypes potentially include:

- Gender-stereotypical roles and characteristics (eg a woman being solely responsible for cleaning the home while the man relaxes),
- Pressure to conform to an idealised gender-stereotypical body shape or physical features (eg attributing an idealised physique or body shape to success or happiness),
- Scenarios aimed at or featuring children (eg showing children of a specific gender being excluded from or dismissive of an activity),
- Scenarios aimed at or featuring potentially vulnerable groups (eg showing young people that an idealised physique or appearance equates to social or romantic success), and
- Scenarios featuring people who don't conform to a gender stereotype (eg mocking groups or individuals for not conforming to stereotypical expectations of their gender).

The ASA will consider an advertisement's likely impact when taken as a whole and in context after a complaint from the viewpoint of the group of individuals being stereotyped. Humour may be used as a mitigating factor but there is no guarantee this will lead to compliance.

The ASA will assess complaints on a case-by-case basis. Companies in breach will face sanctions levied by CAP or the ASA, including restrictions or prohibitions on future advertising.

It's more important than ever for retailers to be careful about how they portray gender. Any breach, or even perception of a breach, could result in significant damage to your brand. To learn more about this, please see this article on RPC's Retail Therapy blog.

## What action should you take?

1. Ensure that your advertising does not use gender stereotypes that are likely to cause harm, even if the intention is to be humorous.
2. If any advertisements might display potentially harmful gender stereotypes or you have concerns, have your legal advisers guide you to raise any potential risks and work with you to achieve compliance.

If you would like any assistance, please contact Oliver Bray or your usual RPC contact.

16 July 2019

# Proposed changes to the UK Stewardship Code

## What is happening?

The Financial Reporting Council (FRC) is planning to introduce a revised UK Stewardship Code (the Code) to take effect from 16 July 2019.

The Code is a aimed at institutional investors, and sets out principles of good practice for engaging with the companies in which they invest. The intention is that, by setting out effective standards of stewardship across the investor community, the Code will ultimately help to deliver sustainable value for investors, the economy and society as a whole.

## Why does it matter?

In a retail context, the Code is of direct relevance to publicly-listed retailers in connection with their ongoing engagement with investors. The Code aims to encourage active investor engagement in listed companies by requiring institutional investors to hold boards of directors to account and engage on matters such as strategy, performance, risk and corporate governance. The Code is designed to be a voluntary supplement to the "regulatory baseline" for stewardship implemented by the Shareholder Rights Directive II (which is discussed on page 6) and is intended to drive standards beyond that baseline.

The existing version of the Code had been heavily criticised for simply driving "boilerplate reporting". This led to the FRC publishing a consultation paper and a revised Code in January 2019 in which it proposed various structural and substantive changes. The change that is likely to have the most significance for retailers is the requirement that institutional investors take into account environmental, social and governance issues when fulfilling their stewardship responsibilities (indeed, stewardship itself is defined in the Code as the creation of "sustainable value"). This requirement is further strengthened by more stringent reporting requirements for institutional investors, including an obligation on investors to produce an annual activities and outcomes report, detailing the extent of their compliance with the Code.

Some respondents to the FRC's consultation paper (including Blackrock) have warned that implementing more onerous reporting obligations for investors could actively deter companies from listing in London on the grounds that it could potentially lead to sensitive discussions between investors and companies being disclosed publicly.

## What action should you take?

1. Prepare for institutional investors to increase engagement on environmental, social and governance issues after 16 July 2019, which may include sustainability, diversity, human rights, animal welfare issues, employee relations, remuneration and climate change (which is the only environmental issue specifically referred to in the revised Code).

2. In light of more stringent reporting obligations on institutional investors, approach sensitive matters with particular care until it becomes apparent how investors will comply with their obligations.

If you would like any assistance, please contact Peter Sugden or your usual RPC contact.

14 September 2019

# Two-factor authentication becomes mandatory for many online transactions

## What is happening?

From 14 September 2019, online retailers must have in place Strong Customer Authentication (SCA) methods for customer-initiated online payments in the EU above the value of €30 (however, if there are more than five consecutive payments under €30, or they total over €100, SCA will also apply). Recurring direct debits or fixed amount subscriptions will not require SCA, as these are merchant-initiated and identification is verified on set up.

This requirement has been brought in by the second Payment Services Directive (PSD2), which came into force in January 2018, as mentioned in the first edition of Retail Compass.

## Why does it matter?

If a payment does not have SCA, banks must decline it. Retailers will therefore have to ensure that adequate measures are in place to allow for online transactions to go through.

SCA allows for three different methods of verification, out of which at least two must be used for a transaction to proceed:

- something a customer knows (eg PIN or a password),
- something they have (eg a bank card or mobile phone), and
- something they are (eg a biometric, such as a fingerprint or facial recognition).

A common technology used to authenticate card payments online is 3D Secure (3DS). This prompts the customer with an additional window as the payment is being processed, further verifying their credentials. However, user experience of 3DS is poor and it still carries some fraud risk. Many banks are preparing for the launch of 3DS 2.0, which will allow for customer verification through biometric means and also improve the check-out experience for customers.

## What action should you take?

1. Put in place an adequate process of verification for qualifying transactions to ensure compliance. This includes the use of 3DS technologies.
2. Record and monitor the necessary payment information (eg details of payer and payee, time and date, and amount paid), and provide to the relevant authorities or customers when requested, including for disputes against specific payments.
3. Review your arrangements with third-party payment providers, and ensure they offer technologies that allow for easy and PSD2 compliant customer payments.

If you would like any assistance, please contact Jeremy Drew or your usual RPC contact.

1 October 2019

# Legislation on VAT reverse charge for construction services

## What is happening?

From 1 October 2019, a VAT reverse charge will take effect on certain building and construction services, along with materials which fall to be treated as part of a single supply of services.

The reverse charge is a mechanism to prevent the avoidance of VAT by suppliers who charge VAT from a recipient but do not account for that VAT to HMRC. The charge 'reverses' responsibility for the VAT from the supplier to the customer, meaning customers will be liable to account for the VAT to HMRC.

## Why does it matter?

Recipients of construction services in a business to business context, where the recipient is not the final consumer, must not account to HMRC for VAT on the supply. Determining such VAT is likely to be complex as a single transaction can often comprise multiple suppliers and multiple supplies involving different VAT rates.

This represents a potentially significant financial and administrative burden as businesses must adapt their accounting systems to process reverse charge supplies and to make ongoing checks to ensure supplies and purchases are correctly treated. HMRC have also noted that the charge may reduce the cash flow available to some business, as they will no longer be able to use the VAT collected from customers as working capital before it is paid to HMRC.

Further, as liability now falls to the recipient, any debt action pursued by HMRC will be enforced against the recipient instead of the supplier. Recipients who breach the new rules could be subject to various penalties, introducing an extra level of risk for suppliers.

## What action should you take?

1. Conduct a thorough overview of your current and future transactions to assess your exposure to the reverse charge.
2. Review and adapt your accounting procedures and systems to be able to process the reverse charge and keep track of supplies and purchases.
3. Stay aware of the potential risks and penalties associated with the reverse charge, and consider introducing appropriate training for staff.

If you would like any assistance, please contact Michelle Sloane or your usual RPC contact.

31 October 2019

# Brexit – current position and considerations

## What is happening?

The United Kingdom has delayed its exit from the European Union, with the "current" date of withdrawal set to be 31 October 2019, and a transitional period lasting until 31 December 2020.

The ultimate relationship between the UK and the EU is still being decided, and progress made in this regard will change the ultimate impact that retailers and businesses in general will face from Brexit.

In our previous edition of Retail Compass in early 2019 we highlighted Brexit's impact on retailers' supply chains in particular, along with customs considerations such as further requirements for paperwork for goods and additional tax implications. While these remain very relevant, here we flag other considerations that retailers need to be aware of ahead of the looming deadline.

## Why does it matter?

### Supply Chains

In the run up to leaving the EU and during any transitional period, retailers may consider stockpiling goods to prevent large scale disruption to consumers. However, any decision to do so will undoubtedly be impacted by the costs of stockpiling goods and for warehousing in general – the latter costs are set to escalate with the Government's proposal to raise business rates for warehouses in 2021 by up to 40%. Businesses could therefore see the costs for their warehousing space increases by up to 40%.

### Labour

In December 2018 the Government released detailed plans regarding the settlement of EU citizens after Brexit. Whether the UK reaches a deal with the EU or not, EU citizens will be able to stay in Britain provided they apply for pre-settled status, or settled status if they have lived in the UK continuously for 5 years or longer. The current deadline for applying for settled status is 30 June 2021. The Government's new skills points system, outlined in a white paper published in December 2018 could also make the recruitment of skilled, capable staff harder both from the EU and outside of it.

### Contracts

At the beginning of this year, the High Court ruled that Brexit did not frustrate a 25-year lease held by the European Medicines Agency and therefore did not allow for them to be discharged from their entire c. £500 million obligation under the agreement. This ruling suggests that parties will not be able to discharge an agreement due to Brexit, unless specifically provided for in an agreement. The matter has been appealed to the Court of Appeal, and we expect that decision in the next 12 months.

## What action should you take?

1. Consider lobbying the Government against the proposed business rates increases for warehousing prior to their introduction.
2. Continue to prepare strategies in relation to your customs procedures and adequately plan for additional costs incurred through taxes and/or other tariffs.
3. Ensure employees who are from the EU and are not UK citizens apply for (pre-)settled status ahead of 30 June 2021. Any hires from outside of the UK made after Brexit should be made in accordance with the new skills points system.
4. Review all existing contracts to identify potential risks, liabilities and complications that could arise from Brexit and draw up risk assessments based on the review. Ensure any new agreements entered into are "Brexit-proofed".

If you would like any assistance, please contact Ciara Cullen or your usual RPC contact.

October 2019

# “Making Tax Digital” initiative to begin

## What is happening?

In October 2019, the “Making Tax Digital” (MTD) initiative will be rolled out to all remaining entities.

The change requires all VAT-registered businesses to use the MTD service to keep records digitally and use software to submit their VAT returns.

## Why does it matter?

MTD was introduced on 1 April 2019 for most VAT-registered businesses, but it will be extended in October 2019 to the remaining categories of entities. This includes, amongst others, trusts, not for profits not set up as a company, public corporations and local authorities.

A digital system is said to address mistakes and a lack of care when submitting tax returns, therefore cutting the ‘tax gap’ between the tax which the Exchequer expected to be paid and what it was actually paid (estimated at £33bn for 2016-2017).

The change represents an administrative burden on businesses, with the need to purchase and integrate new software and systems capable of keeping digital records and submitting returns. Smaller companies and not-for-profits who may be less likely to already track invoices digitally may find the new system difficult to introduce.

The increased accuracy brought about by digital records may well increase businesses’ VAT liability in the short term, but theoretically the changes should lead to a decrease in HMRC action due to issues with VAT returns and therefore save companies money on tax disputes in the long run.

## What action should you take?

1. Start preparing for the introduction of MTD ahead of time.
2. Make sure that you keep track of your invoices digitally ahead of October 2019.
3. Invest in software which is compatible with MTD systems so that you are able to submit returns.
4. Consider investing in appropriate training for your staff to use the new systems and minimise teething problems upon the initiative’s introduction.

If you would like any assistance, please contact Robert Waterson or your usual RPC contact.

30 November 2019

# Drone registration and remote pilot competency requirements

## What is happening?

The Civil Aviation Authority (CAA) will be introducing drone registration and remote pilot competency requirements.

## Why does it matter?

For the purposes of this note, 'drone' refers to small unmanned aircrafts only and any with a mass of more than 20kg are not covered.

Presently in the UK, drones operated within the restrictions of the Air Navigation Order 2016 (ANO) for non-commercial or hobby purposes do not require any specific licence or authorisation. Drones for commercial operations do require the permission of the CAA and the ANO defines which drones are captured under this category.

From 30 November 2019, drone operators with a drone weighing more than 250 grams will be required to register online with the CAA – the registration applies to the drone operator, not the drone. Remote pilots will be required to complete an online safety test.

An annual charge to the drone operator of £16.50 has been proposed for the registration scheme and there is no charge for the competency requirements.

There will be EU Regulations that apply from 1 July 2020 and cover various rules for the operation of drones, including the requirement for operators to register in their member state.

An important aspect for retailers to note is that registration and obtaining permission from the CAA are separate matters – retailers must consider both accordingly when using drones for any purpose, be it promotional filming, site investigations or delivery of goods.

## What action should you take?

1. Drone operators should give consideration to the requirements and whether they will need to register – follow the developments of the registration process, which will be released by the CAA closer to the implementation deadline.
2. Ensure drone operators are trained and have completed the CAA online safety test.
3. If the drone use constitutes "commercial operations", consider whether permission from the CAA will be required.

If you would like any assistance, please contact Jon Bartley or your usual RPC contact.

9 December 2019

# Extension of Senior Managers and Certification Regime

## What is happening?

From 9 December 2019, retailers which offer or introduce finance or credit to their customers and are FCA authorised will need to comply with a new individual accountability and conduct regime known as the Senior Managers and Certification Regime (SMCR).

SMCR, which already applies to banks and insurers (amongst others), is set to be extended to all FCA authorised firms and will apply personal accountability and conduct obligations to almost all staff which work in regulated financial services, including the offer and provision of consumer credit.

## Why does it matter?

For affected retailers, the impact of SMCR on its governance and staff can be broken down into three core parts:

- **Senior Managers Regime**: This replaces the previous "approved persons" regime.
  - For most retailers which have the limited consumer credit permission, they will still only need one person to be approved by the FCA. This will now be known as a "senior manager function" – the current "approved person" will automatically convert in December 2019.
  - Senior managers will be under a new "duty of responsibility" and will need to have their roles and responsibilities set out in a "statement of responsibilities" which should be provided to the FCA.
  - The approval form and process for new senior managers will change considerably.
- **Certification Regime**: This will require affected retailers to certify, at least on an annual basis, that all staff (including Senior Managers) who have an impact on how customers obtain or take out credit/finance, are fit and proper to perform their roles.
- **Conduct Rules**: This will place conduct rules and obligations on staff carrying on consumer credit related activities at an affected retailer. Such retailers will need to train the relevant staff on the new rules and obligations.

## What action should you take?

1. Identify your current "approved persons" (soon to be "senior managers") and other employees caught by the Certification Regime and Conduct Rules.
2. Draft a statement of responsibilities for new senior managers and ensure that they understand the new "duty of responsibility".
3. Assess whether employees caught by the Certification Regime are fit and proper and set up a process (including who is responsible for oversight) to ensure this certification is done at least on a yearly basis.
4. Consider the training (and induction) needs of affected staff and your systems and controls to a) ensure that the new rules are complied with and b) notify the FCA of breaches of conduct.

If you would like any assistance, please contact Jonathan Charwat or your usual RPC contact.

31 December 2019

# Disclosure of cross-border tax planning arrangements under EU Directive

## What is happening?

European Member States are required to implement national legislation requiring the disclosure by intermediaries or, in certain circumstances, taxpayers, of certain cross-border tax planning arrangements by 31 December 2019.

The changes require intermediaries that design, promote or implement tax planning schemes to report potentially 'aggressive' tax planning arrangements that cross EU borders to national tax authorities.

## Why does it matter?

The new EU Directive captures a broad range of 'intermediaries' which in practice will encompass lawyers (both private practice and in-house), accountants, tax and financial advisors, banks and consultants. The new reporting obligations therefore represent an extra regulatory hurdle for these industries.

Although the reporting obligation lies with intermediaries in the majority of instances, it can shift to the taxpayer if: (a) the intermediary is not located in the EU; or (b) the intermediary is bound by professional privilege or secrecy rules.

The obligation to report begins on 1 July 2020, but it applies to all transactions implemented from 25 June 2018. Therefore, intermediaries and their clients will need to be aware of how the Directive applies to any transactions from this date.

Member States are also permitted to bring in penalties for non-compliance with the reporting requirements, which will also apply to clients, should (a) or (b) above be satisfied. Clients therefore need to be aware of the rules when considering entering any tax arrangements.

## What action should you take?

1. Evaluate all your tax arrangements entered into after 25 June 2018 for potential reporting liabilities under the Directive.
2. Ensure any reportable arrangements are reported after 1 July 2020.
3. Moving forward, make sure any potential obligations under the Directive are considered before entering into any new tax arrangements.
4. Work closely with your advisors to help avoid any penalties for non-compliance with the reporting requirements.

If you would like any assistance, please contact Adam Craggs or your usual RPC contact.

Late 2019

# New Catalogue of Encouraged Industries for Foreign Investment 2019 (China)

## What is happening?

The National Development and Reform Commission and the Ministry of Commerce in China have issued an exposure draft of the Catalogue of Encouraged Industries for Foreign Investment (Catalogue).

A new Catalogue is expected to be released in late 2019.

The Catalogue will seek to further improve the business environment, expand the scope of foreign investment and optimize industrial and regional foreign investment.

## Why does it matter?

The Catalogue consists of two parts:

1. The National Catalogue of Encouraged Industries for Foreign Investment which encourages investment in the Wholesale and Retail industries, including:
   - modern logistics such as joint distribution of general merchandise, cryogenic distribution of fresh produce and special drugs, and relevant technical services,
   - rural distribution chains, and
   - construction and operation of pallets and container unit sharing systems.
2. The Catalogue of Industries for Foreign Investment in Central and Western China which applies to foreign investment in the central and western regions, north-east China and Hainan Province including:
   - Heilongjiang Province
   - Henan Province
   - Hainan Province
   - Municipality of Chongqing
   - Sichuan Province
   - Xizang (Tibet) Autonomous Region
   - Shanxi Province, and
   - Xinjiang Autonomous Region.

Currently, the Negative List (Edition 2018) prohibits the investment in the wholesale and retail of tobacco leaf, cigarettes and other tobacco products. However, foreign investors can actively invest in the encouraged sectors or any sector that is not prohibited or restricted.

## What action should you take?

1. If you do business in or otherwise invest in China, be aware of the upcoming changes to the Catalogue.

If you would like any assistance, please contact Michael Liu from Hylands Law, or your usual RPC contact.

Late 2019

# Changes to casual employment laws (Australia)

## What is happening?

Casual employment has recently gained significant public attention following two recent developments:

- re-examination of what constitutes casual employment in the Federal Court, and
- the Fair Work Commission's (FWC) insertion of casual conversion clauses into 85 modern awards (ie documents which set out the minimum terms and conditions of employment, on top of the National Employment Standards).

The Fair Work Amendment (Right to Request Casual Conversion) Bill 2019 also proposes to extend the right to casual conversion to a wider range of employees, including those that are award-free or regulated by an enterprise agreement.

## Why does it matter?

Parliament and the courts are cracking down on employers that deem employees to be casual when the substantive arrangement suggests otherwise.

The Federal Court has previously held that casual employment must retain the "essence of casualness". This requires consideration of the substance of the employment relationship including factors such as irregular work patterns; uncertainty; discontinuity; intermittency of work and unpredictability.

The FWC's insertion of a casual conversion clause into 85 modern awards will enable casual employees to apply for their employment to be converted to full or part time. Subject to some limited exceptions on business grounds, in order to qualify for this, the employee must have worked on an ongoing basis for over 12 months with a pattern of hours which they could continue to perform post-conversion.

This is likely to have significant consequences for employers in the retail sector who engage employees on a casual basis as it could:

- increase liability for leave, notice and redundancy entitlements, and
- limit the control and flexibility an employer has over its workforce by creating a presumption that casuals will migrate to full or part time employment after 12 months.

## What action should you take?

1. Review your casual employment arrangements to determine if the substance of these is consistent with that classification.
2. Consider pro-actively offering casual conversion.
3. Have a plan when submitting enterprise agreements to the FWC, including arrangements for casual conversion and setting off.

If you would like any assistance, please contact Daniel Proietto of Lander & Rogers or your usual RPC contact.

Late 2019

# Law Commission to propose changes to enfranchisement

## What is happening?

On 7 January 2019 the Law Commission closed its consultation on its proposals for the reform of the tenant rights of leasehold enfranchisement. It intends to publish its final report and recommendations later this year.

Enfranchisement rights allow for tenants with long leaseholds in residential properties to extend their leases or acquire the freeholds to their houses, flats or buildings, either individually or as part of a group of tenants.

Currently this is a very costly and administratively burdensome process. The objective of the proposals is to make it cheaper for tenants to bring a claim and to make such claims quicker, easier and more likely to succeed.

## Why does it matter?

Making the enfranchisement process more accessible to tenants will have a significant impact on retailers and landlords in mixed use schemes.

Some of the proposed changes include:

- introducing a new, single enfranchisement regime to replace the two existing regimes for leasehold owners of flats and houses,
- introducing standard forms for making and responding to claims,
- broadening the rules around effective service of notices in order to prevent landlords from deeming them to have been improperly served,
- removing barriers to enfranchisement such as the "low rent" test and the requirement for at least two years of leasehold ownership, and
- creating rights for "estate enfranchisement" to allow leaseholders in a single block of flats that forms part of an estate to acquire the freehold of the entire estate.

Retailers in mixed use buildings will be wary of increasing attempts by inexperienced residential tenants to exercise their rights of enfranchisement, resulting in them acquiring the freehold interest in retailers' properties.

There may well also be a shift to more commercial use in mixed use schemes as a result of the extension of the existing limit on commercial use. The reform will extend the application of the limit of 25% to all claims brought by tenants rather than to collective claims by multiple tenants alone.

The Law Commission will issue its final report on these proposals later this year, following which the Government will decide whether or not to implement them into law. It is not certain as to exactly what changes will be made. It is likely that we will see a simplification of the law in this area in favour of residential tenants with an increasing number of them seeking to acquire the freehold interests in retailers' properties.

## What action should you take?

1. Take note and consider the growing risks posed by owning or occupying premises shared with residential tenants.

If you would like any assistance, please contact Elizabeth Alibhai or your usual RPC contact.

# Hot topics – UK

## Update on advertising of High Fat, Salt and Sugar (HFSS) products

As discussed in the previous edition of Retail Compass, the advertising of HFSS Food and Drink foods remains high on the agenda of the Advertising Standards Authority (ASA). The ASA concluded its review on its non-broadcast food advertising rules 12 months after they came into effect almost a year ago. We are still awaiting the results of that review.

The Government has also launched a new consultation about imposing further restrictions on the advertising of HFSS products. The consultation focuses on the inefficacy of existing restrictions on HFSS advertising, particularly on online platforms. Proposed additional restrictions include a watershed for HFSS advertising between 5.30am and 9pm on all forms of media. Also, the prohibition for advertising HFSS products for online audiences could be adjusted to include any program with an audience comprising of at least 10% children.

This follows an earlier consultation in April 2019 where the Government sought to restrict both volume-based price promotions of HFSS products, and the placement of HFSS food and drink at main selling locations in stores, such as checkouts, aisle ends and store entrances. The consultation has concluded and the Government is currently considering the evidence submitted.

## IR35 changes for the private sector (April 2020)

"IR35", the legislation designed to combat tax avoidance by workers supplying their services through an intermediary, is set to change in April 2020. IR35 has been around since 2000, but HMRC has long been dissatisfied with its application. "Off payroll" rules were implemented for contractors working for public sector organisations, switching the obligation to determine IR35 status from contractors to their clients. Where a contractor is deemed to be "inside" IR35, the client is responsible for deducting employees' National Insurance Contributions (NICs) and income tax from a contractor's pay, alongside employers' NICS.

As of April 2020, the "off payroll" rules will be extended to all private sector businesses except "small business" clients. This is a significant change which introduces a difficult burden on companies both to police the tax status of its contractors – many of whom will have their own view on their employment status – and the risk of significant tax liabilities if they are deemed to have come to the conclusion that someone is a self-employed contractor when they are not. These are complex questions which HMRC often get wrong (see the *Lorraine Kelly* decision), and companies with large numbers of contractors should take advice on how to implement the new rules.

## ASA five year strategy and its impact on Retail

The ASA launched its five year strategy in late 2018, showing a clear intent to more strictly regulate current and emerging forms of online advertising. The ASA is seeking to harness new technologies and build stronger relationships with online platforms to achieve this new strategy and better combat non-compliance. Sanctions for non-compliance will also potentially be made more severe.

The ASA's focus will remain on a few key topics, particularly child protection, influencer marketing, gender stereotyping and the Internet of Things. The strategy is clearly aimed at more effectively regulating new and emerging forms of online advertising through collaboration with online platforms and intelligent usage of new technologies.

# Hot topics – UK/contd...

## All termination payments above the £30,000 threshold to be liable to employer NICs (April 2020)

First proposed in 2006, the Government's plan to align the income tax and employer National Insurance Contributions (NICs) regimes in relation to termination payments is set to come in to force in April 2020. Currently, the first £30,000 of a termination payment to an employee is free of tax, and anything above £30,000 is subject to deductions for income tax, but not for NICs. The changes coming into force in April 2020 will mean that any termination payments above the £30,000 threshold will now also be subject to employer NICs, placing an extra financial burden on employers. The exemption for employee NICs, however, is to remain. It is expected the extra NICs will be collected in 'real-time' through employers' weekly or monthly payroll returns, representing an additional administrative burden for employers to calculate, record and account for such NICs throughout the year.

## Company Voluntary Arrangements: Retail tenants turn up the pressure

According to Deloitte, the number of large retailers launching CVAs increased seven-fold in 2018. The trend continues apace this year and high street stalwart Arcadia Group has just been added to the ranks.

The trend for CVAs is, of course, a sign of high street distress but does it also point to something more opportunistic? In a CVA voting power is determined by value of debt but unascertained debt (such as future rent) is only given nominal value, meaning landlords often have limited sway.

Used effectively, CVAs can allow tenants to rewrite lease liabilities. Tenants are also increasingly making pre-emptive approaches for rent reductions on the basis that landlords may otherwise end up with empty units. Monsoon-Accessorize and Ann Summers both threatened CVAs recently if rent cuts were not agreed. William Hill took things a step further in March by asking for reduced rents in mere anticipation of difficulties when fixed betting curbs are introduced. For new leases, "turnover rents", whereby rents are wholly or partially linked to turnover are also growing in popularity.

In this challenging market, landlords are increasingly taking a share of downside risk, whether they signed up to it or not.

## Government to introduce new legislation mandating full ingredients labelling on pre-packaged foods

The new legislation, to be known as "Natasha's Law" (named after the individual involved in the tragic Pret A Manger incident), will make full ingredients labelling mandatory for all pre-packaged foods. Under current legislation, food prepared on the premises in which it is sold is not required to display allergen information on its labelling.

The Government intends to draft the legislation by the end of summer 2019, with a view to it coming into force in 2021. After this all foods prepared and sold on the same premises will have to include details of ingredients and allergens.

Retailers should therefore review their packaging and labelling for all foods prepared and sold on their premises, to ensure compliance when the legislation comes into force.

# Hot topics – UK/contd...

## Modern slavery – latest

The Home Office has recently written to the CEOs of 17,000 UK companies telling them to open up about modern slavery in their supply chains, or risk being named as in breach of the law. Any companies found to be non-compliant with section 54 of the Modern Slavery Act 2015 (MSA) will be "named and shamed" in a list published after an audit of modern slavery statements. While the list has not been published yet, this still shows a clear intent by the Home Office to pursue stricter enforcement of the MSA.

The Home Office also published its final report on its review of the MSA on 22 May 2019. The report looks at the operational effectiveness of and potential improvements to certain provisions in the MSA. The report recommends a total of 80 changes, including:

- making the six areas of reporting mandatory, as opposed to only being recommendations, and not allowing companies to simply state they have taken no steps to address modern slavery in their supply chains,
- establishing of a central, Government operated central repository for statements, and the monitoring of transparency by the Anti-Slavery Commissioner,
- strengthening of sanctions for non-compliance and the establishment of an enforcement body, and
- extending of MSA section 54 requirements to the public sector and improving its public procurement processes, and a requirement for companies to have to refer to their modern slavery statement in their annual reports.

It will be up to the Government to decide whether to implement the report's recommended changes to further strengthen the provisions around modern slavery and bring non-compliant companies to the foreground.

## Retail consolidation - lessons from the failed Asda/Sainsbury's merger

In April 2019, the Competition and Markets Authority (CMA) blocked the proposed Asda/Sainsbury's merger after an in-depth investigation. The CMA found it would have left UK shoppers worse off with expected price rises, reductions in the quality and range of products available, and a poorer overall shopping experience.

The CMA has clearly tightened up its position in the retail market in terms of mergers. In its decision it assessed the "substantial lessening of competition" at a threshold of 2.75% for pricing pressure in local markets (i.e. how big of a projected increase there will be in prices after the merger), which was typically assessed at 5-10%. The change drastically increased the number of store disposals that Asda and Sainsbury's would had to have made than before. The tighter threshold could also mean that even smaller retail mergers would be blocked by the CMA.

# Hot topics – UK/contd...

## Government shows further concern over retail issues

The National Minimum Wage (NMW) increases each year, but the Government is still actively pursuing further improvements. A review of international research on the impact of minimum wages was started in March 2019. This is set to examine the implications of NMW policy in both the immediate and longer-term and will ultimately lead to a consultation.

Even in the light of the above, the Government has currently suspended their practice of "naming and shaming" companies for the underpayment of NMW.

## "Burn out" redefined and re-categorised by the World Health Organisation

The World Health Organisation (WHO) has recently decided to recognise "burn-out" as a form of work-induced stress.

While the WHO has clarified that burn-out isn't classified as a medical condition, it has included it in the updated International Classification of Disease as a reason to contact health services outside of illnesses or health conditions. Importantly, it has also, re-categorised burn-out as a problem specifically associated with employment.

WHO has defined burn-out as "a syndrome conceptualised as resulting from chronic workplace stress that has not been successfully managed". Burn-out is to be categorised with the following symptoms: feelings of energy depletion or exhaustion; increased mental distance from one's job or feelings of negativism or cynicism related to one's job; and reduced professional efficacy. It will be specific to feelings within the work environment.

## Court of Appeal decides that differences in pay levels for maternity and shared parental leave is not sex discrimination

The Court of Appeal has recently handed down a judgment about whether it amounts to sex discrimination for an employer to pay enhanced maternity pay but not pay the same in enhanced shared parental pay.

The Court of Appeal has rejected the sex discrimination arguments. As the law stands it is not discriminatory for an employer to enhance its maternity pay and not match its shared parental pay. This is due to the fact that the circumstances are different for the two, including because the main purpose of maternity leave is the health and wellbeing of the pregnant mother and other mother-specific matters such as developing the special relationship between mother and newborn and breastfeeding.

It remains to be seen whether the case will be appealed to the Supreme Court, but both parties have been given leave to do so.

# Hot topics – International

## New Foreign Investment law for China

In a further focus on foreign investment, the new Foreign Investment Law of the People's Republic of China, adopted by the National People's Congress in March 2019, is due to come into force in early 2020.

In this law, the State adopted the management system of pre-establishment national treatment and negative list of foreign investment. It also encourages and guides foreign investors to invest in specific industries, fields and regions.

The State also seeks to protect:

- foreign-funded enterprises' participation in Government procurement activities through fair competition,
- the intellectual property of foreign investors and foreign-funded enterprises, and
- the investment, earnings and other legitimate rights and interests within China of foreign investors and foreign-funded enterprises.

The new law also establishes a security review system for foreign investment affecting or likely to affect State security.

## Cuts on penalty rates for retail employees under the General Retail Industry Award 2010 to continue in Australia

How much should employees be compensated for working on a Sunday or a public holiday as opposed to during the week?

This is the question that the Fair Work Commission recently considered in deciding to cut penalty rates for retail employees paid under the General Retail Industry Award 2010. The decision reflects changing attitudes to weekends and public holidays from sacred to "just another day". Additionally, it reflects the trend in the Australian retail industry to trade consistently throughout these periods.

The changes are being incrementally introduced, with the first cuts implemented on 1 July 2018. The second and final rounds of cuts will take place on 1 July 2019 and 1 July 2020. Following the recent Federal election in Australia, there is no prospect that these cuts will be stopped or reversed.

## Employment law trends in the United States

The latest trend in employment law that is impacting retail employers is predictive scheduling. Several major cities in the U.S. currently have such laws and several state legislatures are proposing to implement them. These laws require employers to provide new employees with a "good faith" written estimate of the minimum number of scheduled shifts they must work. In addition, employees must receive their schedules at a certain time in advance, and the employer is restricted from changing the employees' schedules without adequate notice. Depending on the jurisdiction, employers may face penalty fees if they don't properly adhere to these rules.

Additionally, a recent case in California clarifies that employers must pay "reporting time pay" for call-in shifts where employees must call in two hours before a potential shift to learn whether the employee is needed. Previously, this was only required when employees physically came into work.

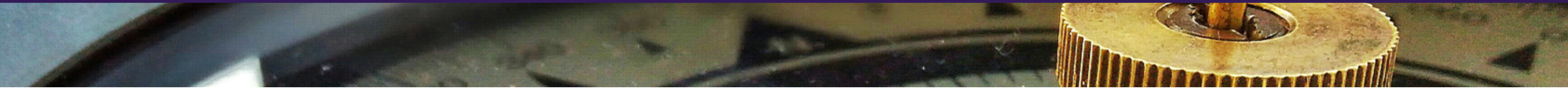
# Hot topics – International/contd..

## Website access claims increase in the United States

The number of website accessibility claims filed in the Federal Court under Title III of the Americans with Disabilities Act, jumped by 177% from 2017 to 2018. High numbers of such claims have been filed in several states, with California in the lead at 4,249 in 2018 alone. The increase is continuing in 2019.

There are no formal regulations that set the standard for website accessibility and none are anticipated in the near future. Law firms often send out demand letters that do not include the client's name or the client's disability, but instead state generically that the client is vision impaired and simply list "errors" found on a website. If a firm is known for sending out hundreds of these generic letters it may be best to ignore the letter; those who respond may end up paying settlements and while those who do not may be forgotten.

We suggest businesses develop a business-wide strategy in how to deal with such claims. It also makes sense to try to run them in-house, to avoid external legal costs and greater financial demands being made during settlement negotiations (because of a perception that there is a "fighting fund" in place).



# Key UK consultations and inquiries: a snapshot

**There are numerous ongoing Government consultations and inquiries affecting retailers. We keep an updated list of these on a separate webpage, so you have easy access to up-to-date information all in one place.**

You can find the webpage here.

# Legislative bills tracker

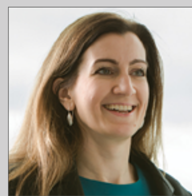
**We maintain on a separate webpage, a list of bills currently in the UK Parliament which have relevance to the retail sector. These bills are not yet in force as law, but they give a flavour of developments to come.**

You can find the webpage here.

# Contacts

## Key RPC contacts

**Jeremy Drew**
Joint Head of Retail
Commercial
+44 20 3060 6125
jeremy.drew@rpc.co.uk



**Karen Hendy**
Joint Head of Retail
Corporate
+44 20 3060 6051
karen.hendy@rpc.co.uk

**David Cran**
Commercial
(IP & Technology)
+44 20 3060 6149
david.cran@rpc.co.uk

**Ciara Cullen**
Commercial
(IP & Technology)
+44 20 3060 6244
ciara.cullen@rpc.co.uk

**Elizabeth Alibhai**
Real Estate
+44 20 3060 6756
elizabeth.alibhai@rpc.co.uk

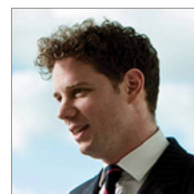
**Paul Joukador**
Commercial (Operations & Outsourcing)
+44 20 3060 6239
paul.joukador@rpc.co.uk

**Patrick Brodie**
Employment
+44 20 3060 6643
patrick.brodie@rpc.co.uk

**Simon Edwards**
Commercial
(IP & Technology)
+44 20 3060 6616
simon.edwards@rpc.co.uk

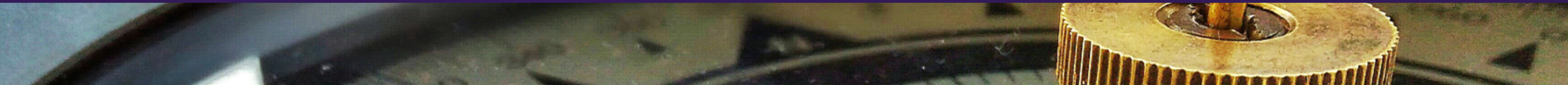
**Oliver Bray**
Commercial (Data Protection & Advertising)
+44 20 3060 6277
oliver.bray@rpc.co.uk

**Jon Bartley**
Commercial (Technology & Outsourcing)
+44 20 3060 6911
jon.bartley@rpc.co.uk



**Robert Waterson**
Tax
+44 20 3060 6918
robert.waterson@rpc.co.uk

**Tim Moynihan**
Insolvency & Restructuring
+44 20 3060 6198
tim.moynihan@rpc.co.uk



# An overview of RPC and TerraLex

## Full service firm

RPC is an innovative professional services firm, providing a full business law service to UK and international clients across a wide range of industry sectors. With over 300 lawyers in London, Bristol, Hong Kong and Singapore – and as a founder-member of global network TerraLex – RPC offers a seamless service in more than 100 jurisdictions across the world.

## Market leaders

RPC is a modern, progressive and commercially focused law firm. Our market-leading, multidisciplinary teams advise clients on a wide range of legal areas and are consistently ranked highly by both Legal 500 and Chambers & Partners.

## Standing out from the crowd

What makes us different is that, while we love the law, we take pride in our ability to translate our underlying technical expertise into concise, commercial advice. Our lawyers' excellent technical skills are a given; what makes them stand out from the crowd is that listening to clients is a genuine passion; and delivering client service is a must.

## One step ahead

We are big enough to handle the most complex matters, but small enough to adapt quickly to our clients' changing needs. We relish change because it means we can think outside of the box and create innovative and bespoke solutions for our clients.

## Connected through TerraLex

TerraLex is a network of select leading law firms that serve international clients and the international needs of their local clients. TerraLex member firms are leaders in their respective markets, have the expertise to handle matters beyond their borders, and understand the needs of international clients.

With access to over 19,000 lawyers at 150 leading firms worldwide, through TerraLex we can give our clients access to the best legal advice on the ground.

**Tower Bridge House**
**St Katharine's Way**
**London E1W 1AA**
T +44 20 3060 6000

**Temple Circus**
**Temple Way**
**Bristol BS1 6LW**
T +44 20 3060 6000

**38/F One Taikoo Place**
**979 King's Road**
**Quarry Bay**
**Hong Kong**
T +852 2216 7000

**12 Marina Boulevard**
**38/F MBFC Tower 3**
**Singapore 018982**
T +65 6422 3000

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