



# Determination

Application for revocation of A91329 & A91330  
and the substitution of authorisations A91591 &  
A91592

lodged by

Shopping Centre Council of Australia

in respect of

the Casual Mall Licensing  
Code of Practice

Date: 20 December 2017

Authorisations: A91591 & A91592

Commissioners:  
Rickard  
Schaper  
Court  
Featherston

## Summary

The ACCC grants re-authorisation to the Shopping Centre Council of Australia (SCCA) for the Casual Mall Licensing Code of Practice (the Code) until 31 December 2020.

The Code applies to shopping centre owners and managers (lessors) who have signed up to it. It regulates the terms on which those shopping centres offer casual mall licences to temporary retailers, such as 'pop-up' shops. It gives permanent tenants (lessees) certain rights if casual mall licences are not granted in accordance with the Code.

Participation in the Code is voluntary for shopping centre lessors. Those shopping centres which do not participate in the Code may still offer casual mall licences on terms which they consider appropriate.

The ACCC previously authorised a similar version of the Code in 2007 and 2013.

Authorisation provides protection from legal action for conduct that might otherwise breach the Competition and Consumer Act 2010. In this case, without authorisation the Code would be at risk of breaching the Act because it includes agreements between competitors (shopping centre owners and managers) about leasing arrangements.

The ACCC considers that the Code is likely to result in public benefits in the form of:

- greater certainty and transparency for lessees and licensees about the terms by which casual mall licences may be granted
- the provision of a dispute resolution pathway
- efficiency for those lessees that enter into leases in multiple shopping centres or in multiple jurisdictions by standardising the terms on which casual mall licences may be granted.

It is important that the Code operates effectively in order for these public benefits to be realised in practice.

The ACCC considers that these public benefits are likely to outweigh the minimal public detriment resulting from the Code, as constituted by a possible lessening of competition for the supply of casual mall licences by lessors or the supply of goods and services by retailers who are shopping centre tenants.

However, in reaching this view the ACCC has given careful consideration to submissions from some interested parties who consider that certain aspects of the Code are not serving retailers well.

In the draft determination, the ACCC strongly encouraged the SCCA to increase retailer representation on the Code Administration Committee (CAC).

The SCCA accepted this suggestion and has invited additional members to join the CAC including the Australian Retailers Association, the Franchise Council of Australia, the Pharmacy Guild of Australia and the National Online Retailers Association.

The ACCC also suggested that the effectiveness of the CAC would be improved by appointing an independent chair. The SCCA has accepted this proposal in principle and submits that it will work with the CAC towards appointing a suitable candidate.

To implement these proposals and to address a range of concerns raised by stakeholders about the Code, both the SCCA and ARA intend that the CAC should meet as soon as practicable after the final determination.

The ACCC has decided to grant authorisation for three years rather than the requested five years. This will encourage the SCCA and stakeholders to engage productively over the concerns raised about the Code and demonstrate that the Code is working prior to any application for reauthorisation in three years.

## The application for authorisation

1. On 26 July 2017, the Shopping Centre Council of Australia (**SCCA**), on behalf of itself and the National Retail Association (**NRA**), lodged applications for revocation of authorisations A91329 and A91330 and substitution with authorisations A91591 and A91592 to continue to give effect to the Casual Mall Licensing Code of Practice (the **Code**).
2. The SCCA is an industry body that represents Australia's major owners, managers and developers of shopping centres. It has 25 members, which own and manage more than 12.3 million square metres of shopping centre floor space in around 500 shopping centres in Australia. SCCA members' shopping centres encompass around 40,000 retail stores.
3. The NRA, a party to the Code, is an industry body that represents its member retailers. NRA members include operators of single stores and major national chains.
4. Authorisation is a transparent process where the ACCC may grant protection from legal action for conduct that might otherwise breach the Competition and Consumer Act 2010 (the Act). The ACCC may 'authorise' businesses to engage in anti-competitive conduct where it is satisfied that the public benefit from the conduct outweighs any public detriment.
5. On 31 October 2017, the ACCC issued a draft determination proposing to grant authorisation to the SCCA for the Code for three years. A conference was not requested to discuss the draft determination.

## The Casual Mall Licensing Code of Practice

6. The Code is a voluntary code of practice between shopping centre owners and managers and retailers in relation to casual mall licensing. The Code regulates the practice of casual mall licensing in shopping centres. It gives lessees certain rights if casual mall licensees are not granted in accordance with the Code. The Code defines a 'casual mall licence' as  

"an agreement under which a person grants or agrees to grant to another person other than a registered charity a right to occupy a designated part of a mall area for the purpose of the sale of goods or the supply of services to the public, where the total number of days the person is permitted to occupy the area does not exceed 180 days".
7. Shopping centre owners and managers Australia wide, except in South Australia where the practice of casual mall licensing is regulated under South Australia's retail tenancy legislation, are able to sign up to the Code. The Code is based on a Casual Mall Licensing Code enacted by the South Australian Government in 2002 as a schedule to the *Retail and Commercial Leases Act 1995 (SA)*.

8. The key provisions of the Code are summarised below:
- a. Lessors must maintain a casual mall licensing policy. This must include a floor plan, which states where casual mall licences may be offered in a shopping centre, and other policies under which a lessor may grant a casual mall licence.
  - b. Lessors must provide certain information to lessees and prospective lessees in a shopping centre before granting a casual mall licence in that shopping centre. Information that must be provided includes a copy of the relevant casual mall licensing policy, a copy of the Code, and contact details for the person nominated by the lessor to deal with complaints about casual mall licences.
  - c. Lessors must ensure that the business conducted by the holder of a casual mall licence does not substantially interfere with the sightlines to a lessee's shopfront in the shopping centre (clause 5).
  - d. The Code restricts a lessor from granting a casual mall licence that results in the unreasonable introduction of an 'external competitor' of an adjacent lessee. An external competitor is defined as a competitor who does not currently have a lease on a retail shop in the shopping centre.
  - e. The Code also restricts a lessor from granting a casual mall licence that results in the unreasonable introduction of an 'internal competitor'<sup>1</sup> of an adjacent lessee. There are some exceptions, which are set out in clause 6(2). These exceptions state that an internal competitor must not be introduced:
    - i. if both competitors are situated in the same precinct; or, if they aren't in the same precinct, an internal competitor must not be introduced in the vicinity of the casual mall licensing area
    - ii. if the casual mall licence area is the closest to the internal competitor's retail shop
    - iii. if the term of the licence is in a defined sales period, or
    - iv. if the casual mall licence area is within the centre court of the shopping centre.
  - f. The Code defines when a casual mall licensee is considered a competitor of another person. In relation to the sale of goods, this is where more than 50 per cent of the goods displayed for sale by the person are of the same general kind as more than 20 per cent of the goods displayed for sale by the other person.<sup>2</sup> For the supply of services, this is where the person competes with the other person to a 'substantial extent'.
  - g. A lessor may reserve the right in their policy to grant exemptions to the clauses regarding sightlines and competitors for special events<sup>3</sup> (clause 7)
  - h. Lessors must reduce the non-specific outgoings to be paid by permanent lessees in accordance with the number of casual mall licences granted (clause 8), and
  - i. A dispute resolution process for handling breaches of the Code.

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<sup>1</sup> An internal competitor is defined as a competitor of the permanent lessee who also has a current lease on a retail shop in the shopping centre.

<sup>2</sup> Percentages are calculated on a floor area occupied by display basis.

<sup>3</sup> A special event is defined in clause 1(1) as a community, cultural, arts, entertainment, recreational, sporting, promotional or other similar event that is to be held in the retail shopping centre over a limited period of time.

## Previous authorisations, changes to this version

9. The Code was first authorised by the ACCC in 2007 for five years (A91049 & A91050) and re-authorised in 2013 until 31 December 2017 (A91329 & A91330).
10. The SCCA submits that, since it was last authorised in 2013, there have been a number of changes to the Code:
  - a. *Parties to the Code*: the Property Council of Australia (**PCA**) and the Australian Retailers Association (**ARA**) are no longer parties to the Code. The SCCA submits that it will invite the ARA, Franchise Council of Australia (**FCA**), Pharmacy Guild of Australia (**PGA**) and National Online Retailers Association (**NORA**) to become parties to the Code and appoint representatives to the Code Administration Committee. The preamble and Clause 16 of the Code have been amended accordingly.
  - b. *List of nominated mediators*: the SCCA no longer intends to include a list of nominated mediators within the Code. Instead, the SCCA submits that in the event of a dispute it would seek advice from the relevant state or territory small business commissioner or the Australian Small Business and Family Enterprise Ombudsman (**ASBFEO**) about the appointment of an independent mediator. Alternatively, the parties could decide to appoint a mutually suitable mediator. Clause 12 of the Code has been amended to reflect this.
  - c. *Expiry date*: Subject to re-authorisation, the expiry date of the Code in Clause 17 will be updated.

## Applicants' submission

11. The SCCA submits that the Code has successfully realised a number of the public benefits since it was last authorised. It submits that the benefits previously accepted by the ACCC have continued. It submits that:
  - a. Under the Code, lessors have provided relevant information to shopping centre lessees as to the circumstances under which, and the terms on which, a casual mall licence may be granted within that shopping centre. In doing so, the Code made negligible any potential uncertainty or risk (in relation to casual mall leasing) that may otherwise have impacted shopping centre lessees.
  - b. The Code has also provided casual mall licensees with information about the terms and conditions under which they are granted a right to occupy part of the common area of a retail shopping centre.
  - c. The provision of information to lessees and licensees has facilitated better informed decision making, including with regard to future investment. The Code provides certainty of terms, conditions and process over the life of agreements entered into with a lessor.
  - d. The Code has also continued to deliver time and cost efficiencies for shopping centre owners and managers by providing for a national approach to casual mall licensing (excluding South Australia). South Australia has also progressed a review of its approach to regulating casual mall licensing under its retail tenancy legislation. The SCCA is not aware of any issues raised during the review process and there are no proposed changes to the South Australian code. The SCCA notes that all but four of

its members own and manage shopping centres in two or more Australian jurisdictions.

- e. The Code has been successful in preventing Australia's state and territory governments from allocating resources to the regulation of casual mall licensing. During the term of the current authorisation, New South Wales, Queensland and Victoria have all either initiated or completed full or partial reviews of relevant retail leasing regulation. No issues regarding casual mall licensing were raised in the context of these reviews.
  - f. During the term of the current authorisation, the Code has facilitated retail competition for the benefit of businesses and consumers, while guiding the consistent and certain management of casual mall licensing within shopping centres. This is evidenced, in part, by the large number of casual mall sites in Australia's shopping centres.
  - g. The code has provided a dedicated dispute resolution pathway and successfully eliminated formal disputes under the Code.
12. The SCCA submits that the Code has resulted in no significant public detriments. Since the re-authorisation was granted in 2013, the Code has not imposed a barrier to entry or led to a substantial lessening of competition. It submits that the parameters for the ACCC to assess public detriment remain the same as in 2013<sup>4</sup>.

## Interested party submissions

- 13. The ACCC tests the claims made by applicants in support of an application for authorisation through an open and transparent public consultation process.
- 14. Before and after the draft determination, the ACCC invited submissions from a range of potentially interested parties, including shopping centre owners and managers, industry groups and government agencies.
- 15. Copies of public submissions are available on the ACCC's website [www.accc.gov.au/authorisationsregister](http://www.accc.gov.au/authorisationsregister).

## Submissions before the draft determination

- 16. The ACCC received 16 submissions before the draft determination – seven from shopping centre owners and managers, four from industry associations, and five from government agencies representing small business.
- 17. A brief summary of these submissions is below with a more detailed summary in the draft determination.

## Submissions from shopping centre owners and managers

- 18. The ACCC received seven submissions from shopping centre owners and managers: Scentre Group, Charter Hall, QIC, Dexu Property Group, Stockland, Vicinity Centres and Perron Group. Each of these shopping centre owners and managers are SCCA members and offer casual mall licences in accordance with the Code. All of these submissions supported re-authorisation.
- 19. These shopping centre owners and managers submitted that casual mall licensing is an important part of their operations. The Code provides a long standing,

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<sup>4</sup> In that context, the ACCC notes for completeness that any lessening of competition (whether or not it rises to the level of a substantial lessening of competition) constitutes a public detriment.

consistent and simple framework to facilitate casual mall licensing and relationships with casual mall licensees.

## **Submissions from industry associations**

20. The ACCC received three submissions from industry associations representing retailers. The National Retail Association (NRA) supported re-authorisation. The Australian Retail Association (ARA), Franchise Council of Australia (FCA) and Pharmacy Guild of Australia (PGA) made a joint submission opposing authorisation. FCA also made a separate submission opposing authorisation, which reiterated some of the points raised in the joint submission.

### *The National Retail Association (NRA)*

21. NRA is a party to the Code and member of the Code Administrative Committee. NRA submitted that, before the Code was introduced in 2007, there were a growing number of disputes between shopping centre owners and managers and tenants about casual tenants taking up mall space and disrupting the business of the permanent tenants. Since the Code was introduced, disputes have been reduced substantially. The NRA is not aware of any issues arising in respect of the Code that have been referred for mediation in the past three years. It submits that the Code has worked well for all parties and enabled those issues that have arisen to be resolved quickly and efficiently without any cost to the permanent tenants.

### *The National Online Retailers Association (NORA)*

22. NORA submitted that the nature of retail and consumer preferences is changing. Casual mall licensing opportunities are increasingly important for 'New Retail' to drive sales, loyalty and enthusiasm. NORA submitted that it intends to seek involvement in administration of the Code should it be re-authorised.

### *The Australian Retailers Association (ARA), Franchise Council of Australia (FCA) and Pharmacy Guild of Australia (PGA) - joint submission*

23. The ARA, FCA and PGA's joint submission did not support re-authorisation of the Code unless the following issues were addressed:
- a. The definition of 'adjacent lessees' should be amended to include the provision of reasonable line of sight so as to prevent a competitor from obstructing the permanent tenant's retail shop.
  - b. Clause 3 of the Code in relation to the provision of information to permanent tenants is not functioning at present, and has led to inconsistencies and confusion around disclosure and information.
  - c. Clause 5 in relation to sightlines to shopfronts should be expanded and re-defined. The ARA submits that this is one of the main sources of disruption for permanent lessees and raises a range of issues for them.
  - d. Clauses 9-13 of the Code covering dispute resolution. The Code should include a schedule of independent mediators and ensure an effective and transparent process.
  - e. The composition of the Code Administration Committee. The ARA, FCA and PGA should be added alongside shopping centre representatives.
24. The ARA, FCA and PGA submitted that they were not seeking these changes in order to reduce competition, but to provide a clearer, better defined and more prescriptive Code. They submitted that the Code has failed to prevent the proliferation of casual mall licensing, which they consider has gone beyond the remit

of fair competition and is now used purely as a profit driving mechanism for shopping centres.

25. The FCA made a separate submission opposing authorisation. The FCA's submission reiterated the above views expressed in the joint submission.

## **Submissions from agencies representing small business**

26. The ACCC received five submissions from state and federal agencies responsible for representing the interests of small business. Submissions were received from the Australian Small Business and Family Enterprise Ombudsman (**ASBFEO**), New South Wales Small Business Commissioner (**NSW SBC**), Queensland Small Business Champion, Victorian Small Business Commission (**VSBC**) and WA Small Business Development Corporation (**WA SBDC**).
27. Agencies representing small business expressed various views about whether the Code should be re-authorised: ASBFEO and NSW SBC submitted that they do not support re-authorisation of the Code in its current form unless certain suggested improvements to the Code occur. The Queensland Small Business Champion and WA SBDC did not specifically support or oppose re-authorisation of Code, but made observations about particular provisions of the Code. The VSBC supported re-authorisation and amendments which would to strengthen the Code, provided there is need for and evidence to support the amendments.
28. Each of these agencies submitted that there is scope for some amendments to strengthen the Code. The suggestions focussed on the Code's operation in practice, dispute resolution provisions and effectiveness of the Code's governance arrangements.

## **Applicants' response to interested parties**

29. Before the draft determination, the SCCA provided a response to interested party submissions. It proposed to engage further with other industry stakeholders and undertake a range of activities over a period of re-authorisation. It proposed to invite NORA, ARA, PGA and FCA to each become parties to the Code and join the CAC. Increased retailer representation would be balanced (one for one) by an increase in the number of shopping centre members of the CAC. The SCCA also proposes to undertake an awareness and engagement drive along with the engagement of retailer parties to the Code. It submits this is intended to ensure continued high levels of ongoing compliance and awareness of the Code.
30. The SCCA submitted that retailers have countervailing power when negotiating with shopping centres which constrains lessors from acting unconscionably or in a coercive manner.
31. The SCCA submitted that the Code does not prevent retailers from requesting and negotiating with lessors for greater protections than are currently provided for under the Code. The Code sets minimum standards to which SCCA members have committed. It does not place obligations on permanent tenants. The SCCA submitted that those shopping centres which are not prepared to negotiate more generous protections for retailers are not engaging in unconscionable conduct.
32. The SCCA's submission did not support the amendments to the Code proposed in the ARA submission. It submitted that the proposed amendments do not go to the public benefit test and would make the code more anti-competitive:

- a. amending the definition of 'adjacent lessee' to include a line of sight test may be unreasonably broad and impractical. Line of sight is already protected under the Code.
  - b. the dispute resolution provisions of the Code, which require a response 'as soon as practicable', offer greater utility to retailers than the ARA's proposed changes.
  - c. the disclosure requirements of the Code are intended to ensure that lessees are aware of the potential for casual mall licensees to compete with lessees, rather than protect them from competition. This is in line with protections in retail tenancy legislation.
  - d. the concept of 'indirect competition' in the ARA submission is revealing; it suggests that a lessee should be protected from the presence of a casual mall licensee, which does not even retail similar products or services, but competes for discretionary or impulse purchase.
33. The SCCA submitted that retail is continually evolving and casual mall licensing is part of that trend. It submits that the ARA submission offers a backward looking perspective on the retail sector.

## **Submissions in response to the draft determination**

34. The ACCC received three submissions from interested parties in response to its draft determination: from the WA SBDC, NSW SBC and a joint submission from the ARA in cooperation with the FCA, PGA and Australian Sporting Goods Association (ASGA). All interested parties support the proposed measures in the draft determination, including proposals to: include new parties to the Code and members of the CAC; appoint an independent chair of the CAC; and engage with shopping centre tenants and other parties to raise awareness about the Code.
35. The WA SBDC and NSW SBC also suggest adding a schedule to the Code which identifies Alternative Dispute Resolution procedures available to parties.
36. The ARA, on behalf of the FCA, PGA and Australian Sporting Goods Association (ASGA), submit that the CAC should meet twice-yearly with the first meeting no later than 1 March 2018. It suggests that the ASBFEO may be an appropriate independent chair of the CAC. Agreed procedures for the appointment of representatives to the CAC should be developed. It supports the proposed three year period of re-authorisation, which it considers should give impetus to addressing issues it has identified with the Code. It will not support re-authorisation at the end of the three year period unless progress is made on these issues.
37. The SCCA and NRA made a joint submission re-iterating their support for these proposals. The submission details how they propose to implement these proposals through resolution of the expanded CAC. The SCCA and NRA submit that the Code has operated under a two-step dispute resolution process where 'good faith' dispute resolution has resolved most issues which have arisen. It was not proposed that the Code would contain a list of all independent mediators, but that referrals would be made as required.
38. The SCCA and NRA also noted that no concerns were identified during a recent review in South Australia of its regulations covering casual mall licensing; and that casual mall licensees can be small businesses.

## **ACCC assessment**

39. The ACCC's assessment of the Code is in accordance with the relevant net public benefit tests contained in the Act<sup>5</sup>. In broad terms, the ACCC may grant authorisation if it is satisfied that the conduct would be likely to result in a public benefit that outweighs the likely public detriment constituted by any lessening of competition.

### **Relevant areas of competition**

40. In its 2007 and 2013 determinations, the ACCC considered that the relevant areas of competition were:

- a. the supply of retail space by shopping centre owners and managers and
- b. the supply of goods and services by retailers who are shopping centre tenants.

41. The ACCC considers that these areas of competition remain relevant. The ACCC also notes the increasing significance of online retail since it last considered the Code. For some but not all consumers, and particularly for certain types of goods and services, online retailers may offer an acceptable (or even preferable) alternative supplier of goods and services supplied by retailers in shopping centres. That said, the ACCC's decision in this matter does not depend on the closeness or otherwise of competition from online retailers.

### **The future with and without the proposed conduct**

42. To assist in its assessment of the conduct against the authorisation tests, the ACCC compares the benefits and detriments likely to arise in the future with the conduct against those in the future without the conduct.

43. Some interested parties have made general comments about casual mall licensing, both positive and negative. However, there is no suggestion that SCCA members would cease offering casual mall licences in the future without authorisation. In this context, the ACCC is not required to assess the public benefits and detriments generated by casual mall licensing per se. Rather, the ACCC assesses the public benefits and detriments generated by the Code.

44. The Code relates to the terms on which casual mall licences are offered. In the future without authorisation, the ACCC considers that individual SCCA members would likely offer casual mall licences on the terms and conditions that they consider appropriate. The SCCA and its members would be unlikely to give effect to the Code.

45. In the absence of the Code, there may be a greater likelihood that some jurisdictions would introduce legislation to address issues of casual leasing and its effect on permanent tenants. Given the uncertainty about how much more likely this would be without the Code and what form any such legislation it would take, the ACCC has not taken this possibility into account when assessing the likely benefits and detriments of the proposed conduct.

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<sup>5</sup> Subsections 91C(4), 91C(7), 90(5A), 90(5B), 90(6) and 90(7).

## ACCC assessment of public benefits

46. Public benefit is not defined in the Act. However, the Tribunal has stated that the term should be given its widest possible meaning. In particular, it includes:

“...anything of value to the community generally, any contribution to the aims pursued by society including as one of its principal elements ... the achievement of the economic goals of efficiency and progress.”<sup>6</sup>

47. In previous authorisations of the Code, the ACCC concluded that the Code is likely to deliver public benefits associated with:

- a. greater certainty and transparency for prospective shopping centre lessees before entering into a lease
- b. providing a process for the resolution of disputes in relation to breaches of the Code
- c. efficiency, through the standardisation of terms between different shopping centres owned or managed by parties to the Code. Terms are also standardised across different states and territories where the Code applies.

48. In assessing this application for reauthorisation, the ACCC has taken into account information and submissions as to whether the Code has resulted in these public benefits.

## Certainty and transparency

49. The ARA, PGA and FCA submit that the disclosure requirements of the Code are not working in practice. They submit that even those shopping centre owners and operators who are signatories to the Code do not always provide information as required under clause 3, such as the contact details for a nominated person to handle complaints. They submit that this has led to inconsistencies and confusion around disclosure and provision of information.

50. In response, the SCCA submits that the survey data included in the ARA, PGA and FCA submission indicates that retailers are aware of the existence of the Code and the nominated person to handle complaints under the Code. The SCCA also submits that it proposes to undertake an awareness and engagement drive regarding the Code with the engagement of retailer parties to the Code (which may include ARA, PGA and FCA).

51. The ACCC accepts that the Code seeks to address the imperfect information faced by retail shopping centre lessees relative to shopping centre lessors regarding long term leases. The Code aims to reduce the uncertainty and risk faced by retail lessees from the introduction of casual mall licensees during the term of their lease. Specifically, the Code provides for lessees to be provided with a copy of the casual mall licensing policy, which explains where casual mall licensees can be placed, and for how long.

52. The ACCC acknowledges the concerns raised by interested parties about the disclosure requirements of the Code. The ACCC notes the SCCA's proposal to undertake an awareness and engagement drive along with the NRA and other retailer parties to the Code. The SCCA also submits that further awareness and engagement measures could be developed during a period of authorisation along with other retailer members of the expanded CAC.

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<sup>6</sup> *Re 7-Eleven Stores* (1994) ATPR 41-357 at 42,677. See also *Queensland Co-operative Milling Association Ltd* (1976) ATPR 40-012 at 17,242.

53. The ACCC considers these measures are likely to address concerns and scope for improvement noted above and increase the likelihood that public benefits of certainty and transparency will be more fully realised. The ACCC considers that the Code has resulted and is likely to continue to result in a public benefit by providing some degree of greater certainty and transparency:
- a. to lessees, which allows them to make better informed business decisions and is likely to continue to encourage greater retail investment
  - b. to licensees, by ensuring that they have information about the terms on which casual mall licences may be offered in a shopping centre and
  - c. in relation to the equitable distribution of non-tenant specific overhead costs incurred by shopping centres between lessees and licensees. Specifically, clause 8 of the Code provides for a reduction in non-specific outgoings charged to each existing lessee proportional with the area of the shopping centre over which a casual mall licence is granted and the duration of the licence.

## **Dispute resolution**

54. The Code contains provisions that relate to dispute resolution. The ACCC has previously considered that these provisions enhance the likely public benefits by providing a process for the resolution of disputes in relation to breaches of the Code.
55. Since it was last authorised in 2013, no formal disputes have been lodged under the Code. The SCCA and NRA submit that this shows that the Code has been effective in eliminating formal disputes under the Code and is working as intended. Some other interested parties suggest otherwise. They submit that small businesses are reluctant to raise complaints, are not always aware of the Code and do not think disputes will be resolved in time. Some interested parties suggest amendments to the Code to resolve dispute in a more-timely manner.
56. The ACCC notes the submissions from both the applicants and interested parties with differing interpretations of the fact that there have been no formal disputes under the Code to date. The ACCC considers that this number does not demonstrate in itself whether its dispute resolution procedures are working effectively or not.
57. The ACCC remains of the view that the dispute resolution provisions of the Code are likely to result in a public benefit by providing a mechanism for how formal disputes will be handled.
58. In the future without re-authorisation, where the SCCA and its members would be unlikely to give effect to the Code, the ACCC considers that the available avenues for resolving disputes about casual mall licensing may not exist at all and, if they do exist, are likely to vary across shopping centres and jurisdictions. The reasons given for why retailers may have been unwilling or unable to raise disputes under the Code would likely exist both with and without authorisation.
59. The ACCC acknowledges the suggestions by some interested parties and the SCCA's proposal to engage with industry participants during a period of re-authorisation. The ACCC notes the SCCA's proposal to highlight and promote the dispute resolution procedures currently available under the Code. The ACCC considers that awareness and engagement measures proposed by the SCCA and NRA may enhance the dispute resolution provisions of the Code. The ACCC strongly encourages the Code Administration Committee and parties to the Code to

consider measures which may further enhance the dispute resolution provisions of the Code.

## Standardisation of terms

60. While the Code is voluntary, SSCA members include many of the major retail landlords in Australia which means that it applies in a wide range of shopping centres in most states and territories in Australia. Each retail tenant and casual mall licensee entering into a shopping centre will incur transaction costs, such as the time taken to negotiate and other costs such as obtaining legal and technical advice. Shopping centres also incur transaction costs in negotiating with lessees individually.
61. Standardising the terms relating to casual mall licences between different shopping centres and across different states and territories in Australia is likely to reduce transaction costs for those retail tenants and casual mall licensees who enter into agreements across a number of shopping centres. The ACCC recognises this is a likely public benefit of the Code.

## ACCC assessment of public detriments

62. Public detriment is also not defined in the Act but the Tribunal has given the concept a wide ambit, including:

“...any impairment to the community generally, any harm or damage to the aims pursued by the society including as one of its principal elements the achievement of the goal of economic efficiency”.<sup>7</sup>

63. The Code limits the circumstances in which competitors to existing lessees can set up within a mall on a temporary basis. By doing so, the Code may reduce competition and innovation between competing shopping centre owners and managers in relation to the terms under which they supply retail space. It may also reduce competition in the supply of goods and services by retailers who are shopping centre tenants.
64. The ACCC notes that submissions from interested parties propose a number of amendments to the Code, including that:
- a. the impact on lessees should be broadened under the Code such that the relevant test is “an affected lessee” rather than an “adjacent lessee”.
  - b. the Code should protect any interference with sightlines of an existing lessee’s shopfront, rather than protecting against substantial interference
  - c. the Code should provide protection against the introduction of unfair competitive threats
  - d. casual mall licences should not be granted for longer than 30 days, not up to 180 days as presently permitted under the Code.
  - e. special events should not be excluded from the Code provisions. If the special event exclusion is retained, existing lessees should be given more notice as 24 hours notice is grossly insufficient.
  - f. dispute resolution procedures should be improved.

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<sup>7</sup> *Re 7-Eleven Stores* (1994) ATPR 41-357 at 42,683.

65. The ACCC has not sought to assess whether these changes would result in an optimal code. Rather, it has assessed the Code in the form put forward by the Applicant for authorisation.
66. The ACCC considers that the Code is likely to result in minimal detriment in the form of a lessening competition between retailers. This assessment is largely based on the limited restrictions on competition imposed by the Code. The ACCC considers that the following factors mitigate any public detriment likely to result from the Code.
- a. The restrictions apply only in respect of the granting of a casual mall licence that introduces a competitor directly adjacent to or in front of an existing lessee and then, only if the placing of that direct competitor would be unreasonable (see paragraph 8 above and clause 6 of the Code).
  - b. The Code only applies to retail shopping centres. It does not apply to retail space located in freestanding shops; shops that are grouped together under one roof but do not constitute a shopping centre; shops in office complexes; and other configurations of shops.
  - c. In addition, there are many shopping centres and therefore a casual mall licensee who may be restricted at one shopping centre may not be restricted at another as there is likely to be a different composition and positioning of tenants at each shopping centre.
  - d. The evolving nature of casual mall licensing since the ACCC last considered the Code. The ACCC notes submissions about how casual mall licensing is being used by businesses in ways which do not always compete with permanent tenants. Businesses are using casual mall licensing to profile their brand, short term customer engagement by government agencies and landlords seeking opportunities for 'activation' of a shopping centre.
67. The ACCC also notes the SCCA's submissions that:
- a. the Code is aimed at providing balanced guidelines to ensure that the practice of casual mall licensing delivers benefits in a manner that is fair to shopping centre owners and managers (lessors), and to shopping centre retailers (lessees)
  - b. it proposes to engage with industry participants throughout the period of any reauthorisation.
68. The ACCC strongly encourages the SCCA and other interested parties to engage in a constructive manner to ensure that the Code is enhanced for the benefit of all parties.

## **Balance of public benefit and detriment**

69. The ACCC may grant authorisation if it is satisfied that, in all the circumstances, the conduct is likely to result in a public benefit, and that public benefit will outweigh any likely public detriment constituted by any lessening of competition.
70. For the reasons outlined in this determination, the ACCC is satisfied that the likely benefit to the public would outweigh the likely detriment to the public including the detriment constituted by any lessening of competition.
71. Broadly, the ACCC considers that the Code strikes a balance between providing certainty and transparency for permanent retail tenants and casual mall licensees, and providing shopping centres with flexibility to introduce casual mall licensees within a shopping centre.

72. Although there have been no formal disputes under the existing Code, it is not clear whether this indicates success; the Code Administration Committee (CAC) and parties to the Code should consider measures which may enhance the dispute resolution provisions of the Code.
73. However, the ACCC notes the strong concerns of some interested parties that certain aspects of the Code are not serving retailers well. The effective operation of the Code affects the extent to which the public benefits described above can be realised in practice. The ACCC strongly encourages the SCCA to implement its proposal to invite the Australian Retailers Association, the Franchise Council of Australia, the Pharmacy Guild of Australia and the National Online Retailers Association to become parties to the Code and appoint representatives to the CAC. The ACCC also considers that the effectiveness of the CAC would be improved by appointing an independent chair.
74. The ACCC welcomes the SCCA's proposed awareness and engagement drive with the retailer parties to the Code, and encourages the SCCA and members of the CAC to regularly review the Code and consider feedback from tenants and their representatives which would enhance the Code.
75. Overall, the ACCC considers that the relevant net public benefit test is met. Taking into account the analysis above and submissions following the draft determination, the ACCC has decided not to impose conditions of authorisation. Rather, the ACCC considers it appropriate to reflect the concerns raised in the length of authorisation. This is discussed further below.

## Length of authorisation

76. The CCA allows the ACCC to grant authorisation for a limited period of time.<sup>8</sup> This enables the ACCC to be satisfied that the likely public benefits will outweigh the detriment for the period of authorisation. It also enables the ACCC to review the authorisation, and the public benefits and detriments that have resulted, after an appropriate period.
77. In this instance, the Applicants seek authorisation for five years.
78. In its draft determination the ACCC proposed to grant re-authorisation for three years rather than the five years sought. This will encourage the applicants and interested parties to engage productively over the concerns raised about the Code and demonstrate that it is working prior to any application for reauthorisation in three years.
79. The ACCC invited submissions from interested parties on this proposed period of re-authorisation. The ARA and SCCA each made submissions in this respect. The SCCA reiterated its preference for a five year period of re-authorisation while the ARA supported a three year period of re-authorisation, provided the issues it identified with the Code are addressed over this period.
80. On balance, the ACCC considers that three years is an appropriate period of authorisation and therefore, has decided to grant re-authorisation until 31 December 2020.

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<sup>8</sup> Subsection 91(1).

# Determination

## The application

81. On 26 July 2017, the SCCA lodged applications for revocation of A91329 & A91330 and the substitution of authorisations A91591 & A91592 (the applications for re-authorisation). The applications for re-authorisation were made using a Form FC, under subsection 91C(1) of the CCA.<sup>9</sup>

## The net public benefit test

82. For the reasons outlined in this determination, the ACCC is satisfied, pursuant to subsections 91C(4), 91C(7), 90(5A), 90(5B), 90(6) and 90(7) of the CCA, that in all the circumstances the conduct for which re-authorisation is sought is likely to result in a public benefit that would outweigh the likely detriment to the public constituted by any lessening of competition that is likely to result.

## Conduct which the ACCC authorises

83. The ACCC revokes authorisations A91329 & A91330 and grants authorisations A91591 & A91592 in substitution. The substitute authorisation allows the Shopping Centre Council of Australia Ltd to give effect to the Casual Mall Licensing Code of Practice until 31 December 2020.
84. Authorisation is granted as the Casual Mall Licensing Code of Conduct may contain a cartel provision or may have the purpose or effect of substantially lessening competition within the meaning of section 45 of the CCA.<sup>10</sup>
85. This determination is made on 20 December 2017. If no application for review of the determination is made to the Australian Competition Tribunal, it will come into effect on 11 January 2018.

## Interim authorisation

86. On 31 October 2017, the ACCC granted interim authorisation to the SCCA to continue to give effect to the Casual Mall Licensing Code of Practice as it stood on 6 February 2013.<sup>11</sup>
87. Interim authorisation remains in effect until it is revoked or the date on which the ACCC's final determination comes into effect.

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<sup>9</sup> On 6 November 2017, a number of amendments to the CCA came into effect, including changes to the authorisation provisions in Division 1 of Part VII of the CCA. Pursuant to section 182(3), these changes apply to applications for authorisation under consideration by the ACCC on or after 6 November 2017. Accordingly, the CCA as amended will apply to this application, notwithstanding that it was lodged with the ACCC prior to the amendments coming into effect. Applications for authorisation under subsections 88(1A) and (1) are treated as applications for authorisation under subsection 88(1) of the CCA as amended.

<sup>10</sup> As s 4D has been repealed pursuant to the amendments referenced above it has been excluded from the description of the proposed conduct. The reference to "within the meaning of section 45 of the CCA" includes the making and/or giving effect to a contract, arrangement or understanding or to engage in a concerted practice, any or all of which may have the purpose or effect of substantially lessening competition.

<sup>11</sup> The ACCC granted authorisations A91329 & A91330 on 6 February 2013. A copy of the Casual Mall Licensing Code of Practice is at Attachment B to the ACCC's determination A91329 & A91330 and can be found on the ACCC's public register: [www.accc.gov.au/AuthorisationsRegister](http://www.accc.gov.au/AuthorisationsRegister)