

Form FC

Commonwealth of Australia

Competition and Consumer Act 2010 — subsection 91C (1)

APPLICATION FOR REVOCATION OF A NON-MERGER AUTHORISATION AND SUBSTITUTION OF A NEW AUTHORISATION

To the Australian Competition and Consumer Commission:

Application is hereby made under subsection 91C (1) of the *Competition and Consumer Act 2010* for the revocation of an authorisation and the substitution of a new authorisation for the one revoked.

PLEASE FOLLOW DIRECTIONS ON BACK OF THIS FORM

1. Applicant

(a) Name of applicant:

(Refer to direction 2)

SHOPPING CENTRE COUNCIL OF
AUSTRALIA LTD.

(b) Description of business carried on by applicant:

(Refer to direction 3)

Policy advocates and research
on behalf of shopping centre owners
and managers

(c) Address in Australia for service of documents on the applicant:

Level 1, 11 BARRACK ST, SYDNEY
NSW 2000

2. Revocation of authorisation

(a) Description of the authorisation, for which revocation is sought, including but not limited to the registration number assigned to that authorisation:

Casual Mall Licensing Code of Practice
A91049 and A91050

(b) Provide details of the basis upon which revocation is sought:

Existing authorisation expires on
31 December 2012. All parties to
the Code of Practice seek
to extend the authorisation for
another five years.

A91329

A91330

3. Substitution of authorisation

- (a) Provide a description of the contract, arrangement, understanding or conduct whether proposed or actual, for which substitution of authorisation is sought:

(Refer to direction 4)

Revised Code of Practice on
Caravel Mall Licensing, with
amendments approved by the
Code Administrative Committee

- (b) Description of the goods or services to which the contract, arrangement, understanding or conduct (whether proposed or actual) relate:

Regulation of the Practice of Caravel
mall licensing (agreements to occupy or
designated area of the common area of a
shopping centre for the purpose of the sale of
goods and services to the public)

- (c) The term for which substitute authorisation of the contract, arrangement or understanding (whether proposed or actual), or conduct, is being sought and grounds supporting this period of authorisation:

Five years, concluding on 31 December
2017 (see attached statement)
correct letter)

4. Parties to the contract, arrangement or understanding (whether proposed or actual), or relevant conduct, for which substitution of authorisation is sought

- (a) Names, addresses and description of business carried on by those other parties to the contract, arrangement or understanding (whether proposed or actual), or the relevant conduct:

See attached page.

- (b) Names, addresses and descriptions of business carried on by parties and other persons on whose behalf this application is made:

(Refer to direction 5)

As Above

- (c) Where those parties on whose behalf the application is made are not known - description of the class of business carried on by those possible parties to the contract or proposed contract, arrangement or understanding:

Not appl. cable

5. Public benefit claims

- (a) Arguments in support of application for substitution of authorisation:

See covering letter and attachment

(See Direction 6 of this Form)

- (b) Facts and evidence relied upon in support of these claims:

See covering letter and attachment

6. Market definition

Provide a description of the market(s) in which the goods or services described at 3 (b) are supplied or acquired and other affected markets including: significant suppliers and acquirers; substitutes available for the relevant goods or services; any restriction on the supply or acquisition of the relevant goods or services (for example geographic or legal restrictions):

*The supply of retail shopping centre space
The geographical dimensions of a particular market cannot be
(See Direction 7 of this Form) unreasonably defined.*

7. Public detriments

- (a) Detriments to the public resulting or likely to result from the substitute authorisation, in particular the likely effect of the conduct on the prices of the goods or services described at 3 (b) above and the prices of goods or services in other affected markets:

*A.55 lessening of competition to
existing retailers (licensees) of shopping centre
(See Direction 8 of this Form) as a result of matters
contained in the Code*

- (b) Facts and evidence relevant to these detriments:

*Code only applies to retail space inside
shopping centres which is significantly
less than the supply of retail space
in other areas (main streets, strip centres,
bulk goods centres, arcades, convenience
centres etc.)*

*Code only applies to "unreasonable"
competition. It does not
substantially restrict competition from
casual licensees.*

8. Contracts, arrangements or understandings in similar terms

This application for substitute authorisation may also be expressed to be made in relation to other contracts, arrangements or understandings (whether proposed or actual) that are, or will be, in similar terms to the abovementioned contract, arrangement or understanding

- (a) Is this application to be so expressed?

..... *No*

- (b) If so, the following information is to be furnished:

- (i) description of any variations between the contract, arrangement or understanding for which substitute authorisation has been sought and those contracts, arrangements or understandings that are stated to be in similar terms:

.....
.....
(See Direction 9 of this Form)

- (ii) Where the parties to the similar term contract, arrangement or understanding(s) are known - names, addresses and description of business carried on by those other parties:

.....
.....
(See Direction 5 of this Form)

- (iii) Where the parties to the similar term contract, arrangement or understanding(s) are not known — description of the class of business carried on by those possible parties:

.....
.....

9. Joint Ventures

- (a) Does this application deal with a matter relating to a joint venture (See section 4J of the *Competition and Consumer Act 2010*)?

..... *No*

- (b) If so, are any other applications being made simultaneously with this application in relation to that joint venture?

.....
.....

- (c) If so, by whom or on whose behalf are those other applications being made?

.....
.....

10. Further information

- (a) Name, postal address and telephone contact details of the person authorised by the parties seeking revocation of authorisation and substitution of a replacement authorisation to provide additional information in relation to this application:

MILTON COCKBURN, EXECUTIVE
DIRECTOR, SHOPPING CENTRE
COUNCIL OF AUSTRALIA

Dated..... 29 August 2012

Signed by/on behalf of the applicant

(Signature)

MILTON COCKBURN

(Full Name)

SHOPPING CENTRE COUNCIL OF
AUSTRALIA

(Organisation)

EXECUTIVE DIRECTOR

(Position in Organisation)

AND COMPANY SECRETARY



DIRECTIONS

1. Where there is insufficient space on this form to furnish the required information, the information is to be shown on separate sheets, numbered consecutively and signed by or on behalf of the applicant.
2. Where the application is made by or on behalf of a corporation, the name of the corporation is to be inserted in item 1 (a), not the name of the person signing the application and the application is to be signed by a person authorised by the corporation to do so.
3. In item 1 (b), describe that part of the applicant's business relating to the subject matter of the contract, arrangement or understanding, or the relevant conduct, in respect of which substitute authorisation is sought.
4. In completing this form, provide details of the contract, arrangement or understanding (whether proposed or actual), or the relevant conduct, in respect of which substitute authorisation is sought.
 - (a) to the extent that the contract, arrangement or understanding, or the relevant conduct, has been reduced to writing — provide a true copy of the writing; and
 - (b) to the extent that the contract, arrangement or understanding, or the relevant conduct, has not been reduced to writing — provide a full and correct description of the particulars that have not been reduced to writing; and
 - (c) If substitute authorisation is sought for a contract, arrangement or understanding (whether proposed or actual) which may contain an exclusionary provision — provide details of that provision.
5. Where substitute authorisation is sought on behalf of other parties provide details of each of those parties including names, addresses, descriptions of the business activities engaged in relating to the subject matter of the authorisation, and evidence of the party's consent to authorisation being sought on their behalf.
6. Provide details of those public benefits claimed to result or to be likely to result from the contract, arrangement or understanding (whether proposed or actual), or the relevant conduct, including quantification of those benefits where possible.
7. Provide details of the market(s) likely to be affected by the contract, arrangement or understanding (whether proposed or actual), in particular having regard to goods or services that may be substitutes for the good or service that is the subject matter of the application for substitute authorisation.
8. Provide details of the detriments to the public, including those resulting from the lessening of competition, which may result from the contract, arrangement or understanding (whether proposed or actual). Provide quantification of those detriments where possible.
9. Where the application is made also in respect of other contracts, arrangements or understandings, which are or will be in similar terms to the contract, arrangement or understanding referred to in item 2, furnish with the application details of the manner in which those contracts, arrangements or understandings vary in their terms from the contract, arrangements or understanding referred to in item 2.

Re: Question 4

Contact List:

2012

Association name	Address	Description of business
ARA – Australian Retailers Association	Level 10 136 Exhibition Street Melbourne VIC 3000	Industry association on behalf of retailers.
NRA – National Retail Association	6 Overend Street East Brisbane QLD 4169	Industry association on behalf of retailers.
RTA – Retail Traders' Association of WA	180 Hay Street East Perth WA 6004	Industry association on behalf of retailers.
PCA – Property Council of Australia	Level 1 11 Barrack Street Sydney NSW 2000	Industry association on behalf of property owners and managers.
SCCA – Shopping Centre Council of Australia	Level 1 11 Barrack Street Sydney NSW 2000	Industry association on behalf of shopping centre owners and managers.

SHOPPING CENTRE

COUNCIL OF AUSTRALIA

20 August 2012

Mr Richard Chadwick
General Manager
Adjudication Branch
Australian Competition and Consumer Commission
GPO Box 3131
CANBERRA ACT 2601

FILE No:

DOC:

MARS/PRISM:

Dear Mr Chadwick,

Authorisation Numbers A91049 and A91050 – Revocation and Substitution of a New Authorisation

Summary

On 29 August 2007, the Australian Competition and Consumer Commission issued a determination (A91049 and A91050) in respect of applications lodged by the Shopping Centre Council of Australia (SCCA) in relation to a (then) draft 'Casual Mall Licensing Code of Practice' ("the Code"). The authorisation was for a period of five years from 29 August 2007.

Subsequently the SCCA lodged with the ACCC an 'Application for Minor Variation of Authorisation A91049 and A91050'. The purpose of this application was to align the period of authorisation by the ACCC with the period of operation of the Code (for five years from 1 January 2008). On 30 January 2008, the ACCC issued a determination in respect of the minor variation (your reference C2007/2252) to extend the period of authorisation of the Code to 31 December 2012. This determination came into force on 21 February 2008.

The ACCC authorisation of the Code expires on 31 December 2012. At a meeting of the Code Administration Committee on 9 July 2012 all of the parties to the Code agreed to extend the operation of the Code for a further period of five years. As a consequence, the SCCA (on behalf of all the parties to the Code) is lodging an 'Application for Revocation of a Non-Merger Authorisation and Substitution of a New Authorisation'. (This process could not be set in train until this was formally approved by the Board of Directors of the SCCA at its next meeting on 10 August 2012. Hence it was not possible to meet the timetable of at least six months prior to expiry suggested by the ACCC.)

The ACCC issued its initial determination because it concluded that the public benefits arising from the Code were likely to outweigh any public detriments that may arise. This has been the case. Indeed there are now two additional public benefits from the Code. First, it has eliminated disputes over casual mall licensing. Second, it has prevented disparate state-by-state regulation of casual mall licensing. Both of these issues are addressed below.

The parties to the Code believe that the additional public benefits derived from the Code and the minimal public detriments caused by the Code justify the ACCC revoking the initial authorisation and substituting a new authorisation which would expire on 31 December 2017.

Leaders in Shopping Centre Advocacy

ABN 41 116 804 310

Shopping Centre Council of Australia Limited
Level 1 11 Barrack Street Sydney NSW 2000

Telephone: 02 9033 1902 – Facsimile: 02 9033 1976 – www.scca.org.au

AUST. COMPETITION &
CONSUMER COMMISSION
CANBERRA

21 AUG 2012

Original Authorisation

The SCCA lodged the **attached** submission in relation to its original application. This submission is still relevant.

The ACCC comprehensively investigated the original application for authorisation and this included sending the application and the Code to relevant parties and issuing a draft determination inviting further comment.

In reaching its determination, the ACCC concluded, in relation to its consideration of any public detriment caused by the Code:

- 6.36 *Consequently, the ACCC considers that the restrictions on the granting of casual mall licensing contained within the Code are minimal and do not significantly impact competition between existing traders or the capacity for new traders to enter relevant markets.*
- 6.37 *Similarly, the limited nature of the restrictions means that their capacity to impact on shopping centres ability to compete to attract casual mall licensees is also minimal.*

The ACCC, in relation to its consideration of the public benefit of the Code, stated:

- 6.55 *The ACCC considers that the provisions contained in the Code are likely to provide a public benefit by ensuring, through limiting the circumstances in which a direct competitor of an existing license is introduced in a directly adjacent area, balance and consistency in the treatment of permanent retail tenants when casual mall licensees are introduced to a shopping centre.*
- 6.56 *This is not to suggest that the introduction of such competitors in itself is problematic. Indeed, encouraging competition is generally likely to lead to more efficient outcomes for businesses and consumers, resulting in greater choice in price, quality and service.*
- 6.57 *However, the cost of entering into a long term lease at a shopping mall for most retailers is significant, involving not just a commitment to abide by the contractual obligations under the terms of the lease agreement but also other, often sunk, costs involved in establishing a retail business.*
- 6.58 *The Code provides certainty to lessees as to the circumstances, and terms on which, casual mall licenses could be granted to businesses in competition with them. This in turn allows them to make better informed business decisions and provides certainty over the life of agreements entered into. Such certainty, in itself, is likely to encourage investment in retail businesses.*

The ACCC can only grant authorisation if it is satisfied that, in all the circumstances, the proposed conduct is likely to result in a public benefit that will outweigh any public detriment. The ACCC came to the conclusion that "the arrangements for which authorisation is sought are likely to result in such a benefit to the public that the arrangements should be allowed to take place".

The ACCC also granted the SCCA's request that the period of authorisation be for five years. The ACCC accepted the SCCA's argument that this was consistent with the minimum term for retail leases stipulated in retail tenancy legislation in all states (except Queensland, where there is no minimum term).

Operation of the Code

The Code began operation on 1 January 2008. By the time the Code commenced, the National Retail Association had also endorsed the Code. This means, on behalf of retailers, the Code is now endorsed by the Australian Retailers Association, the National Retail Association and the Retail Traders Association of Western Australia. These are the most representative retailer associations in Australia and, between them, cover the vast majority of shopping centre retailers. The only major retailer association which is not a party to the Code is the Australian National Retailers Association, whose members (such as Coles and Woolworths) are generally not covered by retail tenancy legislation and whose bargaining power is often far superior to the landlords with whom they negotiate. Such retailers therefore do not need the assistance of a code of practice in their dealings with landlords. (It should be noted that the Code "does not apply to any lessee, retail shop or other premises, or any lease, to which the relevant retail tenancy legislation of the State or Territory in which the shopping centre is located does not apply.")

On behalf of landlords, the Code is endorsed by the Property Council of Australia and the Shopping Centre Council of Australia. We estimate, given the combined membership of these two organisations, in excess of 90% of shopping centre owners in Australia are covered by the Code.

Following authorisation by the ACCC in 2007, all parties sought to extensively publicise the existence of the Code among their members and more widely. Articles explaining the Code were published in *Shopping Centre News* (in September 2007) and *Property Australia* (November 2007) both of which circulate widely within the property industry. Similarly client notices outlining the obligations of the Code were published by many law firms which handle retail tenancy issues.

Disputes under the Code

Since 1 January 2008 not one dispute has required to be resolved under the formal dispute resolution provisions outlined in Clauses 9 to 13. We understand that in South Australia, where the practice of casual mall licensing is regulated by the *Retail and Commercial Leases (Casual Mall Licences) Amendment Act 2001*, no disputes relating to casual mall licensing have been notified to the relevant authority (which is now the Small Business Commissioner.) While, as noted below, one of the retailer associations has reported "some areas of concern", it further noted that these have been resolved once they have been raised with the Centre Manager. Similarly, all parties have acknowledged that casual mall leasing is now more sophisticated and professional and "this had helped change behaviour". The Code has contributed to a cultural change and has led to a reduction in disputes and any disputes which do occur appear to be being resolved at the centre management level, as envisaged by the Code. The reduction in disputes over this issue is therefore a considerable public benefit of the Code.

Since the Code came into operation, two States (NSW and Western Australia) have now joined Victoria in appointing Small Business Commissioners. (South Australia has also appointed a Small Business Commissioner but the Code does not apply in SA). Even though it is unlikely there will be many or any disputes under the Code, it is our intention to write to these officials and see if they will agree to be the "relevant retail tenancy official" referred to in Clause 12 of the Code. The position of the other States (Queensland and Tasmania) and the Territories will be reviewed once the Federal Small Business Commissioner has been appointed.

Views of the Parties to the Code

At a meeting on 9 July 2012 of the Code Administration Committee (CAC), which includes all parties to the Code, it was noted:

"All parties agreed that the Code has worked effectively and has contributed to a culture change within the shopping centre industry concerning the use of casual mall licensing."

"It was further noted that the practice of casual mall licensing is now more sophisticated and professional, often with dedicated casual mall leasing executives, and this had helped change behaviour."

"The RTA of WA had reported "some areas of concern regarding casual mall licensing, however, once raised with Centre Managers they have been dealt with effectively".

"It was noted that casual mall leasing is occasionally still a problem in some smaller shopping centres, those not owned by SCCA members, where the existence of the Code may still not be known."

The CAC agreed that the Code be extended for a further period of five years (from 1 January 2013) and that the SCCA, on behalf of all parties, apply to the ACCC for a revocation of the existing authorisation and substitution with a new authorisation.

Machinery Changes to the Code

The CAC also agreed to a number of amendments to the existing Code but these are machinery changes only and are not relevant to the ACCC's deliberations.

First, it was agreed to amend Clause 15 of the Code to read: *"The role of the CAC will be to promote and publicise the Code throughout the industry; to monitor the operation of the Code; and to report regularly to the parties to the Code on the operation and effectiveness of the Code."* Clause 15 currently reads: *"The role of the CAC will be to promote and publicise the Code throughout the industry; to monitor the operation of the Code; and to produce an annual report to the parties to the Code on the operation and effectiveness of the Code."*

Second, it was agreed to amend Clause 18 of the Code to read: *"Within one year prior the date of expiry of the Code according to Clause 17 the CAC will report to the parties to the Code on whether the period of operation of the Code should be extended and, if a period of extension is agreed, will seek further authorisation of the Code from the ACCC."* Clause 18 currently reads: *"One year prior to the date of expiry of the Code according to Clause 17 the CAC will, following the annual review of the operation of the Code, report to the parties to the Code on whether the period of operation of the Code should be extended and, if a period of extension is agreed, will seek further authorisation of the Code from the ACCC."*

The CAC, in recognition of the fact that the Code is working effectively and because no problems had arisen, believed it was not necessary for the CAC to meet every year and to produce an annual report to the parties. Thus Clause 15 was amended to require the CAC to "report regularly", rather than annually. This also required a consequential amendment to Clause 18.

In addition, because the parties seek the extension of the Code for another five years, Clause 17 has been amended to read: *"This Code of Practice will remain in operation until 31 December 2017."*

A copy of the Code of Practice, with these amendments, is **attached**.

Harmonisation of Regulation

One of the reasons why the SCCA and the retailer associations decided to pursue this voluntary code in 2007 was because South Australia had already regulated a similar code and we were concerned that other states would follow with their own versions of such a code. This would have led to a lack of harmony around Australia, such as has occurred with retail tenancy legislation. This objective has been achieved. Since the adoption of the Code, no jurisdiction has sought to introduce regulation in this area. Indeed the existence of the national code has been recognised in the 'harmonised' disclosure statement which has been adopted by NSW, Queensland and Victoria. This is an additional public benefit of the Code.

Public Detriments

In reaching its original determination the ACCC considered a number of possible public detriments resulting from the Code, in particular from any lessening of competition (paragraphs 6.29 to 6.44). The ACCC considered the extent to which the Code limits the capacity for competitors of existing lessees to compete to provide goods and services to potential customers. The ACCC concluded that the "restrictions on the granting of casual mall licences contained in the Code are unlikely to significantly impact on competition in any relevant market." It is the view of the parties, after nearly five years of operation of the Code, that the ACCC's assessment was correct.

Conclusion

In the opinion of all of the parties to the Code, both representatives of retailers and landlords, the Code results in a public benefit that outweighs any detriment to the public as a result of any lessening of competition arising from the arrangements. We respectfully seek the ACCC to grant the request to revoke the original authorisation and to substitute a new authorisation to expire on 31 December 2017.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Milton Cockburn', written over a horizontal line.

Milton Cockburn
Executive Director

SUBMISSION TO AUSTRALIAN COMPETITION AND CONSUMER COMMISSION ACCOMPANYING APPLICATION FOR AUTHORISATION OF CASUAL MALL LICENSING CODE OF PRACTICE

1. INTRODUCTION

This submission accompanies an Application for Authorisation of the Casual Mall Licensing Code of Practice ("Code") and, in particular, clause 6 of the Code. The Code was drafted by the Shopping Centre Council of Australia ("SCCA") and the Australian Retail Association ("ARA"). Invitations have also been extended to the National Retail Association ("NRA") and the Retail Traders Association of Western Australia ("RTAWA"), and to the Property Council of Australia ("PCA"), to also be signatories to the Code. The PCA and the RTAWA have accepted the invitation and the NRA is still considering it. This application, however, is made on behalf of the SCCA and the ARA, only.

The Code is substantially similar to a Casual Mall Licensing Code which was enacted by the South Australian Government in 2002 ("SA Code"). The SA Code is a schedule to the *Retail and Commercial Leases Act 1995* (SA) and was enacted after considerable public inquiry and debate among relevant parties and was subsequently approved by the SA Parliament. On 11 April 2003 ACCC Commissioner John Martin, in a presentation to the ARA in Victoria, congratulated the SCCA and the ARA for co-operating in drafting the South Australian Code.

The SCCA and the ARA submit that there are substantial public benefits arising from the Code which outweigh any anti-competitive effects. Accordingly the SCCA and the ARA seek authorisation pursuant to section 88(1) of the Trade Practices Act for the shopping centre industry to nationally apply the Code (except to South Australia).

2. BACKGROUND

2.1 Casual Mall Licensing

Casual mall licensing (or leasing) refers to agreements under which a person grants another person a right to occupy a designated part of the common area of a retail shopping centre 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.

The vast majority of casual licences are only for one or two weeks duration and are rarely for more than four weeks.

Since the 1990s the use of casual mall licensing by landlords at shopping centres has increased and has now largely matured. Casual mall licensing has become a common feature in most, if not all, major shopping centres in Australia. There is no evidence to suggest that casual mall licensing will reduce in numbers in the near future.

2.2 The Benefits of Casual Mall Licensing

Casual mall licensing is beneficial to *shopping centre owners* for the following reasons:

- It increases the total rental income for landlords without the cost of having to build a new shopping centre or redevelop an existing centre; and
- It increases asset value and returns to investors.

Casual mall licensing is beneficial to *retailers and prospective retailers* for the following reasons:

- It provides a low cost nursery for retailers and potential retailers to gain experience and train staff on how to operate a retail store;
- It provides a cheap and effective way for existing retailers to obtain space to clear excess stock and/or sell special lines or seasonal stock; and
- It attracts consumers to the shopping centre by introducing seasonal bargains and by offering a wider variety of goods and services to consumers.

Casual mall licensing is beneficial to the *public* for the following reasons:

- It creates healthy competition in the retail industry which, in turn, provides cheaper prices and a wider variety of goods and services to consumers.

2.3 Issues

Casual mall licensing has occasionally been criticised by some commentators who argue that it can:

- Obstruct pedestrian walkways in peak shopping times;
- Inhibit lines of sight to existing/permanent stores;
- Downgrade the appearance and standard of shopping centres; and
- Permit unfair and unreasonable competition to existing permanent stores which generally have higher set-up and operational costs.

Casual mall licensing is not regulated by State or Territory retail tenancy legislation (except in South Australia.)

2.4 The Code

The Code, being a voluntary industry code of practice, stipulates a national approach to a substantial number of the issues listed above and, when adopted by shopping centre owners, will create greater fairness, harmony, certainty and consistency for landlords and tenants across Australia. It will ensure that the regulation of casual mall licensing will be consistent throughout Australia (with

only minor variation in South Australia) rather than varying from State to State as is the case with other aspects of retail tenancy legislation.

The Code is considered by both the SCCA and the ARA to represent a reasonable compromise. Neither the SCCA nor the ARA, representing different interests, suggest that the Code represents what they would individually describe to be "best practice". Neither the SCCA nor the ARA are seeking the ACCC's endorsement of the Code; simply its authorisation.

3. PUBLIC BENEFITS OF THE CODE

The Code is substantially similar to the SA Code and differs in substance only by the addition of a dispute resolution procedure (clauses 9 to 11), a code administration committee (clauses 14 to 16) and in the period of operation (clause 17 to 18).

The Code, consequently, has the same virtues as the SA Code which were described in the Second Reading speeches in the South Australian Parliament as follows:

- The Code *"clarifies the entitlements and expectations of those affected parties, as well as ensuring that lessees have access to greater information about casual mall licensing in retail shopping centres"*.
- The Code *"focuses on trying to see that, to the greatest extent possible, competition between tenants and casual mall licensees is fair, and that is the reason why the code addresses such things as the placement of licensees and the obstruction of sight lines and attempts to give some definition to the concept of competition in a way that can be applied by tenants and landlords in a practical context."*

The Code, being substantially based on the SA Code, can fairly be said to be the result of extensive consultation and debate among representatives of shopping centre owners and representatives of shopping centre retailers. The ACCC was also present at all meetings associated with the drafting of the SA Code and did not raise any arguments of concern with respect to anti-competitive conduct.

The Code will encourage competition and create economic efficiency for shopping centres around Australia. It will do this by encouraging planning, equitable dealings, a level playing field, commercial certainty, industry harmony and the flow of commercially significant information (as detailed in the specific provisions of the Code.) It will also set a framework of business practices that inspires confidence and trust.

There is evidence that the SA Code has assisted in changing behaviour in the industry in South Australia. The SA Code was the result of complaints by retailer associations alleging inappropriate issuing of casual mall licences (such as locating a casual licensee adjacent to a centre retailer selling similar goods.) In the more than four years since the SA Code has been in operation there have been no complaints lodged under the Code.

4. POSSIBLE EXCLUSIONARY CONDUCT

With the adoption of the Code by the members of the SCCA and the ARA it may be arguable the Code represents an arrangement or understanding between members of those associations. It may then be arguable that one or more of the clauses of the Code are exclusionary provisions.

It might, for instance, be said that Clause 6 has the purpose of *limiting, restricting or preventing* particular types of casual mall operators from establishing their business inside particular shopping centres.

Note: It is highly questionable that the Code does contain any provisions that **are directed** to particular persons or classes of persons (as required by section 4D). In any event, given the substantial benefits of the code, the issue whether the clauses of the Code are exclusionary does not need to be determined.

5. POSSIBLE SUBSTANTIAL LESSENING OF COMPETITION

Whilst it may be arguable that one or more of the clauses of the Code may constitute section 4D exclusionary provisions in contravention of section 45 of the Act, only clause 6 might be said to potentially substantially lessen competition in the relevant markets.

A proper review of Clause 6 of the Code, however, shows that it will not lead to substantial lessening of competition.

Clause 6(1) of the Code provides that the lessor must not grant a casual mall licence that results in the unreasonable introduction of an external competitor (which is defined under clause 1(3)) of an adjacent lessee. In addition, clause 6(2) requires that a lessor must not grant a casual mall licence that results in the unreasonable introduction of an internal competitor (which is also defined in clause 1(3) i.e. an existing tenant in the centre) of an adjacent lessee unless certain preconditions are met.

Clause 6(4) provides that, for the purposes of subclauses (1) and (2), the introduction of a competitor of an adjacent lessee is unreasonable if it has a significant adverse effect on the trading of the adjacent lessee in the adjacent lessee's retail shop.

Clause 6 has the following public benefits:

- It restricts "unreasonable" competition at shopping centres. "Unreasonable competitors" have the potential to unfairly compete with and damage the businesses of permanent retail tenants as their commitment is only short-term and they have less expenses and negligible barriers to entry and exit. This is not in the long term interests of the public who may consequently lose the benefit of a long term trader or may not get the benefit of that trader providing the range of services he or she might otherwise offer (were he or she not damaged by unreasonable competition or faced with the prospect of unreasonable competition.)
- The exclusion of unreasonable competition promotes *fair, equitable and reasonable competition* by making space available to reasonable competitors (at the expense of unreasonable competitors.) It therefore likely to lead to an increase in the range of goods and services offered to consumers at a particular shopping centre (or with respect to a larger

shopping centre, the range of goods or services offered in particular parts of that centre.) This is of benefit to consumers who typically wish to acquire multiple different types of goods and services at any one time.

5.1 Market Definitions

The product and functional dimensions of the relevant markets are: "the supply of retail space."

The geographic dimensions of the markets vary across Australia. For retail space in cities, such as Sydney, the geographic dimension of the market is the metropolitan area of Sydney. For larger isolated towns, such as Bathurst, the market is likely to be the metropolitan area of Bathurst.

The geographic dimensions of a particular market in Australia in which a particular shopping centre is located cannot be universally defined.

5.2 Effects on the Number of Competitors and Constraints on Competition

The Code only applies to retail space in shopping centres which is significantly less than the amount of retail space outside shopping centres. It does not apply to the great bulk of retail space that is located in freestanding shops (some in traditional shopping strips along a road), shops grouped together under the one roof but which do not constitute a shopping centre, shops in office complexes, shops in markets and in other locations.

Further Clause 6 of the Code only applies to restrict "*unreasonable*" competition. Whether a person represents an "unreasonable competitor" at a particular shopping centre depends on facts and circumstances peculiar to that shopping centre (or the relevant part of that shopping centre) – i.e. the composition and positioning of the particular shopping centre's tenancy mix.

An "unreasonable competitor" at one shopping centre may or may not represent an unreasonable competitor at a nearby shopping centre or another part of the same shopping centre. A retailer restricted by clause 6 at one shopping centre is very likely *not* so restricted at another shopping centre (as it is likely to have a different composition and positioning of tenants). Typically there are large numbers of shopping centres and shops generally in a given market in Australia. Consequently clause 6 is very unlikely to prevent a person from competing in a particular market and is only likely to slightly limit (if at all) the range of locations within that market from which that person might compete.

5.3 Effects on Restrictions to Entry

The Code will have a negligible effect, if any, on barriers to entry. The Code will only create a barrier to entry for a casual mall operator if the operator wishes to establish a store adjacent to a similar competitor. The Code regulates rather than restricts competition.

As stated above, the Code does not apply to the great bulk of retail space available in Australia. If a casual mall operator is restricted from entering a particular shopping centre then he or she may nevertheless set up at another alternative location that is not covered by the scope of the Code.

In larger shopping centres a casual mall operator is likely to find available at that centre a common area floor space that is not adjacent to a competitor. This is because shopping centres typically have a wide tenancy mix and casual mall licences are short term ensuring a constant turnaround of space.

6. PUBLIC DETRIMENTS

The Code has no significant public detriments.

The Code does not constrain competition; rather it regulates that competition. The Code provides a balanced regulatory framework that represents fair leasing practice. It ensures that retail tenants and casual mall tenants are informed of a standard set of rules which apply to maintain the high standard already set by shopping centres throughout Australia.

The Code, when it begins operation, will also extend the general disclosure obligations of landlords under State and Territory retail tenancy legislation to casual mall licensing.

7. TIME PERIOD FOR AUTHORISATION

The SCCA and the ARA recommends that ACCC authorisation be for a period of 5 years. This is appropriate having regard to the fact that the vast majority of retail leases have a five-year term and five years is usually the period between period reviews of retail tenancy legislation in States and Territories.

8. VOLUNTARY CODE

The Code is a voluntary code of practice since neither the SCCA nor the ARA has the power to enforce compliance among its members. Nevertheless the Code has been approved by the SCCA Board of Directors and the ARA National Council and will be widely publicised among our members. Both associations have traditionally had a very large degree of compliance by members with decisions taken by these respective bodies. The SCCA has a very broad 'reach' within the shopping centre industry and its members own and manage around two-thirds of the gross lettable area of the total industry (and nearly 100% of regional shopping centres where the practice of casual mall leasing is most common.) The Australian Retailers Association is the largest and most representative retailer association in Australia and represent retailers throughout Australia, and particularly in NSW, Victoria and Tasmania (and, although it is not relevant for this Code, in South Australia.).

9. OTHER INTERESTED PARTIES

We noted above that the Code has also been discussed with the Property Council of Australia and the PCA Board of Directors has agreed to endorse the Code and to recommend it to its members once the Code is authorised. Between them the SCCA and the PCA would represent more than 90% of all shopping centre owners in Australia.

The Code has also been discussed with the National Retail Association which also represents retailers throughout Australia, and particularly in Queensland, and it is presently considering whether it will endorse the Code. The Retail Traders Association of Western Australia, the largest and most representative retailer association in Western Australia, has agreed to endorse the Code.

10. ORAL SUBMISSIONS

The SCCA and the ARA would like the opportunity to make oral submissions to the ACCC in addition to the submissions made in this paper.

11. CONCLUSION

It is clear that the public benefits of the Code, such as those detailed above, clearly outweigh its negligible public detriments and anti-competitive effects. It therefore is appropriate to grant authorisation of the Code under section 88(1) of the Act.

SHOPPING CENTRE COUNCIL OF AUSTRALIA

Casual Mall Licensing Code of Practice

Preamble

Casual mall licensing is a standard feature of shopping centres in Australia. Where applied properly casual mall licensing adds variety to the retail offer of shopping centres, helps attract customers to shopping centres and enables existing retailers to augment their normal sales. Where it is applied insensitively it can be a source of dissatisfaction to existing retailers.

This voluntary Code of Practice has been agreed between the Australian Retailers Association, the Retail Traders Association of Western Australia, the National Retail Association, the Shopping Centre Council of Australia and the Property Council of Australia to provide balanced guidelines to ensure that the practice of casual mall licensing delivers the benefits outlined above in a way that is fair to shopping centre owners and managers and to shopping centre retailers.

The Associations strongly recommend to their members that this Code of Practice apply to shopping centres in all States and Territories in Australia (except South Australia) progressively from 1 January 2008, as circumstances permit. It is noted that the practice of casual mall licensing in shopping centres in South Australia is regulated by the Retail and Commercial Leases (Casual Mall Licences) Amendment Act 2001.

This Code of Practice does not apply to any lessee, any retail shop or other premises, or any lease to which the relevant retail tenancy legislation of the State or Territory in which the shopping centre is located does not apply.

This Code of Practice has been authorised by the Australian Competition and Consumer Commission for a period of five years until 31 December 2012.

Interpretation

1. (1) In this Code, unless the contrary intention appears—

"adjacent lessee", in relation to a casual mall licence area, means a lessee of a retail shop that is in the same retail shopping centre and is situated in front of or immediately adjacent to the casual mall licence area;

"casual mall licence" means 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 purposes 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;

"**casual mall licence area**", in relation to a casual mall licence, means the part of the mall area in respect of which a person is granted a right of occupancy under the casual mall licence;

"**casual mall licence plan**"—see clause 2(2);

"**casual mall licence policy**"—see clause 2;

"**centre court**" means a part of a mall area designated as a centre court by the lessor in a casual mall licence policy in accordance with clause 2;

"**common area**" does not include parking areas, loading docks, plant rooms, customer service areas, stairways, escalators, travelators, lifts, lift wells, toilets, restrooms, seating areas, food courts, stage areas, entertainment areas, or lifestyle precincts;

"**competitor**"—see subclause (2);

"**external competitor**"—see subclause (3);

"**internal competitor**"—see subclause (4);

"**mall area**" means a part of the common area of a retail shopping centre accessible to the public that is bordered wholly or partly by the shopfronts of retail shops;

"**non-specific outgoings**" means outgoings not specifically referable to any particular shop in a retail shopping centre.

"**sales period**" means a period not exceeding four weeks fixed from time to time by the lessor as a period during which the lessor promotes a sales event in the retail shopping centre;

"**special event**" means 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.

(2) For the purposes of this Code -

(a) in the case of the sale of goods—a person is a **competitor** of another person if more than 50 per cent (on a floor area occupied by display basis) of the goods displayed for sale by the person are of the same general kind as more than 20 per cent (on a floor area occupied by display basis) of the goods displayed for sale by the other person;

(b) in the case of the supply of services—a person is a **competitor** of another person if the person competes with the other person to a substantial extent.

(3) For the purposes of this Code, a person granted a casual mall licence is an **external competitor** of a lessee of a retail shop if the person is, in the business conducted in the casual mall licence area, a competitor of the lessee but is not a lessee of another retail shop in the same retail shopping centre.

(4) For the purposes of this Code, a person granted a casual mall licence is an **internal competitor** of a lessee of a retail shop if the person is, in the business conducted in the casual mall licence area, a competitor of the lessee and is a lessee of another retail shop in the same retail shopping centre.

Casual mall licence policy

- 2.(1) A lessor must not grant a casual mall licence in respect of a retail shopping centre unless the lessor has prepared a document that sets out the lessor's policy in respect of the granting of casual mall licences for the shopping centre (a "**casual mall licence policy**").
- (2) The casual mall licence policy must include the following:
- (a) a floor plan (a "**casual mall licence plan**") that clearly shows—
 - (i) the mall areas within the shopping centre in respect of which casual mall licences may be granted, and the size of those areas; and
 - (ii) the part of the mall area within the shopping centre designated as a centre court (if any), and the size of that area;
 - (b) the number of sales periods for the shopping centre in each accounting period;
 - (c) a statement whether the lessor reserves the right to grant casual mall licences otherwise than in accordance with clauses 4, 5 and 6 in respect of special events in the shopping centre.
- (3) The area designated as a centre court in a casual mall licence policy must not exceed 20 per cent of the total common area of the shopping centre.
- (4) If a lessor amends a casual mall licence policy, the lessor must—
- (a) give written notice of the amendment to the lessees of the shopping centre and the place and times at which a copy of the amended policy may be inspected; and
 - (b) in the case of a lessee who may reasonably be considered to be affected by the amendment—provide a copy of the amended policy to the lessee; and
 - (c) otherwise provide a copy of the amended policy to a lessee on request.
- (5) An amendment to a casual mall licence policy does not take effect until 30 days after the lessees of the shopping centre have been notified in accordance with subclause (4)(a).

Provision of information

- 3.(1) A lessor must not grant a casual mall licence in respect of a retail shopping centre unless the lessor has given each person who is a lessee of a retail shop in the shopping centre the following information:
- (a) a copy of the casual mall licence policy in force in respect of the shopping centre; and
 - (b) a copy of this Code; and
 - (c) the person nominated by the lessor to deal with complaints about casual mall licences (whether described by name or the title of the person's position) and the person's contact details.

- (2) The information required under subclause (1) must have been given to a person—

(a) in the case of a person who has entered into a retail shop lease after the commencement of this Code at the time the disclosure statement for the lease was provided to the person; or

(b) in any other case—not less than 14 days before the first granting of a casual mall licence in respect of the shopping centre after the commencement of this Code.

Obligations of lessor relating to casual mall licence policy

- 4.(1) A lessor must not grant a casual mall licence except in accordance with the casual mall licence policy as in force in respect of the retail shopping centre at the time the licence is granted.
- (2) A lessor must not grant a casual mall licence in respect of an area that is not included in a casual mall licence plan as in force in respect of the retail shopping centre at the time the licence is granted.
- (3) A lessor must not amend a casual mall licence policy except in accordance with this Code.

Sightlines to shopfront

- 5.(1) A lessor must ensure that the business conducted by the holder of a casual mall licence in respect of a retail shopping centre does not substantially interfere with the sightlines to a lessee's shopfront in the shopping centre.
- (2) Subclause (1) does not apply in relation to a lessee if the lessor, before the grant of the casual mall licence, and after informing the lessee of the proposal to grant a licence that might result in interference of a kind referred to in subclause (1), obtained the written consent of the lessee to the grant of the licence.

Competitors

- 6.(1) A lessor must not grant a casual mall licence that results in the unreasonable introduction of an external competitor of an adjacent lessee.
- (2) A lessor must not grant a casual mall licence that results in the unreasonable introduction of an internal competitor of an adjacent lessee unless—
- (a) the internal competitor is a lessee of a retail shop situated in the same retail precinct as the casual mall licence area, or if the shopping centre is not divided into precincts, in the vicinity of the casual mall licence area; or
- (b) the casual mall licence area is the area closest to the internal competitor's retail shop that is available for the casual mall licensing at the time the casual mall licence is granted; or

(c) the term for which the casual mall licence is granted falls within a sales period fixed by the lessor in respect of the shopping centre, there having been no more than five previous sales periods in the preceding period of twelve months; or

(d) the casual mall licence area is within the centre court of the shopping centre.

- (3) Subclause (2) does not apply in relation to an adjacent lessee if the lessor, before the grant of the casual mall licence, and after informing the lessee of the proposal to grant a licence that will result in the introduction of an internal competitor of the lessee, obtained the written consent of the lessee to the grant of the licence.
- (4) For the purposes of subclauses (1) and (2), the introduction of a competitor of an adjacent lessee is unreasonable if it has a significant adverse effect on the trading of the adjacent lessee in the adjacent lessee's retail shop.
- (5) Subclause (4) is not to be taken as limiting the circumstances in which the introduction of a competitor of an adjacent lessee might be regarded as being unreasonable.

Special events

7. Clauses 4, 5, and 6 do not apply to casual mall licences granted in respect of a special event provided that the lessor—

(a) reserved the right in the casual mall licence policy to grant casual mall licences otherwise than in accordance with those clauses; and

(b) gave the lessees of the retail shopping centre not less than 24 hours written notice containing details of the special event and its duration.

Adjustment of outgoings

8. The lessor must, before making an adjustment after the end of an accounting period in accordance with the provision of a retail shop lease, reduce the total amount of the non-specific outgoings to which lessees of retail shops in the retail shopping centre are liable to contribute in respect of the accounting period by an amount calculated in accordance with the following formula in relation to each casual mall licence granted by the lessor permitting trade in the casual mall licence area during the accounting period:

$$R = \frac{TO}{TLA \times TD} \times CMLD \times CMLA$$

where—

R=the amount of the reduction;

TO=the total amount of the non-specific outgoings to which lessees of retail shops in the shopping centre are liable to contribute in respect of the accounting period;

TLA=the total of the lettable areas of all the retail shops in the shopping centre in square metres;

TD=the total number of days in the accounting period;

CMLD=the number of days during which the person granted the casual mall licence was permitted to trade in the casual mall licence area during the accounting period;

CMLA=the casual mall licence area in square metres.

Dispute Resolution

9. A lessee who considers a breach of this Code has occurred must upon becoming aware of the breach notify, in writing, the person nominated by the lessor to deal with complaints under subclause 3 (1) (c). This person must, as soon as practicable, respond to the complaint that has been lodged.
10. The parties to this Code expect, where a complaint is made alleging a breach of this Code has occurred, that the lessor and lessee will, in good faith, attempt to resolve any complaint by negotiation between themselves.
11. In the event that the lessor and lessee are unable to resolve a complaint, after exhausting all internal avenues for resolution, the parties agree that the complaint can be referred by either the lessor or lessee for mediation.
12. The independent mediator will be appointed by the relevant retail tenancy official in each State or Territory (except South Australia) nominated in the schedule attached to this Code. (*Schedule still being finalised*)
13. The lessor and lessee will pay for the cost of a mediation in equal shares.

Code Administration Committee

14. The Code will be administered by a Code Administration Committee (CAC) whose members will be without remuneration, except for expenses.
15. The role of the CAC will be to promote and publicise the Code throughout the industry; to monitor the operation of the Code; and to report regularly to the parties to the Code on the operation and effectiveness of the Code.
16. The CAC will comprise six representatives as follows:
 - One representative nominated by the Australian Retailers Association;
 - One representative nominated by the National Retail Association;
 - One representative nominated by the Retail Traders Association of Western Australia;
 - Two representatives nominated by the Shopping Centre Council of Australia;
 - One representative nominated by the Property Council of Australia.

Period of Operation of the Code of Practice

- 17.** This Code of Practice will remain in operation until 31 December 2017.
- 18.** Within one year prior to the date of expiry of the Code according to Clause 17 the CAC will report to the parties to the Code on whether the period of operation of the Code should be extended and, if a period of extension is agreed, will seek further authorisation of the Code from the ACCC.

