



Our ref: D12/4439

Dr Richard Chadwick
General Manager
Adjudication Branch

Email: Shane.Chisholm@accc.gov.au

Dear Dr Chadwick

**SHOPPING CENTRE COUNCIL OF AUSTRALIA LTD APPLICATION FOR
REVOCATION OF AUTHORISATIONS A91049 AND A91050 AND
SUBSTITUTION OF NEW AUTHORISATIONS A91329 AND A91330 –
INTERESTED PARTY CONSULTATION**

CASUAL MALL LICENSING CODE OF PRACTICE

Thank you for providing the opportunity to make a submission regarding the reauthorisation for the Shopping Centre Council of Australia's (SCCA) Casual Mall Licensing Code of Practice (Code).

The Small Business Development Commission (SBDC) made a submission on the original Code in 2007 outlining concerns in relation to possible impacts on long-term tenants at shopping centres. Please find a copy of the submission attached.

It is acknowledged that casual mall leasing is not a major issue raised by small business lessees with the SBDC, however, the SBDC considers that the concerns raised in the 2007 submission are relevant today.

Specifically, the SBDC remains of the view that:

- casual mall licences should not be granted for longer than 30 days. Enabling a lessor to grant a licence of up to 180 days is excessive and could impact negatively on an existing lessee's business (Clause 1);
- any interference with sightlines to a lessee's shopfront should be prohibited rather than only if it 'substantially interferes' (Clause 5.1);
- an external competitor that competes with an existing adjacent lessee should not be granted a licence (Clause 6.1); and
- special events should not be excluded from the Code provisions (Clause 7).

Clearly, the ACCC primarily concerns itself with whether the Code restricts competition, however, I consider that competition that could lead to the closure of existing lessees is not of public benefit.

Yours sincerely

A handwritten signature in black ink, appearing to read 'D. Eaton', written over a horizontal dashed line.

David Eaton
SMALL BUSINESS COMMISSIONER

21 September 2012

Att

Halse, Kirsten

From: Gianna Cammarano [Gianna.Cammarano@sbdc.com.au]
Sent: Friday, 15 June 2007 4:57 PM
To: Adjudication
Cc: Jenni Collins; Jim Mouzalidis
Subject: SHOPPING CENTRE COUNCIL OF AUSTRALIA APPLICATIONS
FORAUTHORISATION A91094 and A91095
Attachments: Casual Mall Licensing Code of Practice Submission.pdf; Gianna Cammarano.vcf

Dear Louise,

Please find attached a copy of the SBDC's submission in relation to the Casual Mall Licensing Code of Practice. The original copy of the submission has been forwarded to you by post.

Kind regards,

Gianna Cammarano
Principal Policy and Planning Officer
Policy, Planning and External Relations

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The General Manager
Adjudication Branch
Australian Competition and Consumer Commission
PO Box 1199
DICKSON ACT 2602

**SHOPPING CENTRE COUNCIL OF AUSTRALIA APPLICATIONS FOR
AUTHORISATION – A91049 AND A91050**

Thank you for the opportunity to make a submission on the Shopping Centre Council of Australia (SCCA) applications for authorisation A91049 and A91050 in relation to the *Casual Mall Licensing Code of Practice (Code)*.

The Small Business Development Corporation (SBDC) is a Western Australian statutory authority incorporated under the *Small Business Development Corporation Act 1983*. The SBDC provides advice and assistance to new and existing small businesses in Western Australia. The SBDC also monitors and comments on policies and legislation that impact on the growth and development of the small business sector in this State.

The SBDC's Small Business Services Division provides information and guidance to small business landlords and tenants on all aspects of the leasing of business premises, including leasing business premises in shopping centres.

In Western Australia, casual mall leasing is not a major issue raised by small business lessees with the SBDC and does not currently appear to be a problem area. In general terms the SBDC opposes any arrangement that detrimentally affects the viability of a business in a manner that was not foreseeable at the time the business entered into the lease.

The SBDC from time to time receives inquiries from small business shopping centre tenants distressed as to competition being introduced into shopping centres that was non-existent when the business lease was entered into with the lessor and which materially affects the ongoing viability of the business. These inquiries normally relate to competitors being granted long term tenancies.

The SBDC is supportive of casual mall leasing that adds variety to the retail mix of a shopping centre and creates events that increase traffic flow to the shopping centre. Having said that, the SBDC considers it is imperative that casual mall leasing should provide existing tenants with the opportunity to increase profits and generally be of benefit to existing tenants and their customers. The Code should not be drafted and used for the purpose of increasing the investment returns of shopping centre lessors at the expense of small business operators. The SBDC considers that the Code requires re-drafting to achieve a fair approach for lessors and lessees.

Specific concerns in relation to the proposed Code are outlined below:

- the definition of “casual mall licence” in clause 1 enables a lessor to grant a licence for up to 180 days. This period of 180 days is considered excessive and could detrimentally affect an existing lessee’s business. Instead the SBDC supports a maximum period of one month;
- subclause 5(1) places an obligation on the lessor not to substantially interfere with the sightlines to a lessee’s shopfront. It is considered that this subclause should be amended to prohibit any interference to the sightlines. Further, any Code should contain specific provisions that create a positive obligation on the lessor not to interfere in any way with the existing lessee’s business;
- subclause 6(4) provides for the introduction of a competitor as being unreasonable and therefore unallowable under the Code “if it has a significant adverse effect on the trading of the adjacent lessee”. It is considered that this subclause should be amended to provide that any adverse effect is considered unreasonable;
- Clause 7 permits special events to be excluded from the Code provisions that give some protection to lessees. It is considered clause 7 should also be subject to provisions that protect existing tenants from competition that unfairly affects their small business;
- Clause 12 refers to an independent mediator being appointed by the relevant retail tenancy official in each State or Territory. In Western Australia the State Administrative Tribunal hears and determines disputes, and it is considered that this agency should be the mediator utilised under any proposed Code in order to keep mediation costs to a minimum.

Further, the SBDC is concerned that the introduction of the Code as it stands could increase disputes between shopping centre lessors and lessees by introducing the unclear concepts of “unreasonableness” and “significant adverse effect”.

The above concerns reflect the SBDC’s position that an existing lessee’s business should not be damaged or otherwise negatively affected by any proposed Code. The SBDC considers the introduction of competition into a shopping centre is not of public benefit and does not promote competition if the competition directly causes business losses and closure of long term tenants.

The SBDC appreciates the opportunity to comment on the SCCA applications for authorisation A91049 and A91050 in relation to the Code. Should you wish to discuss any aspect of this submission, please do not hesitate to contact Mr Jim Mouzalidis on 9220 0223.

Stephen Moir
MANAGING DIRECTOR

15 June 2007