



Franchise Council of Australia

Submission in relation to the authorisation of the Casual Mall Licensing Code of Practice

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Franchise Council of Australia

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Background

As the peak industry body representing franchisors, franchisees, service providers and suppliers involved in franchising the Franchise Council of Australia welcomes the opportunity to provide input to this Inquiry.

There are approximately 1,100 franchise systems and 70,000 franchised outlets in Australia. Around 30% of franchise systems are involved in retail, with many franchisors and franchisees occupying tenancies in major shopping centres. Indeed the FCA probably has a broader representation of retail tenants than most of the retail industry bodies.

The FCA is strongly supportive of the concept of a Casual Mall Licensing Code of Practice. We acknowledge that the current Casual Mall Leasing Code of Practice is better than having no such code, so to that extent the FCA supports the authorisation by the ACCC of such a code. However we consider that changes need to be made to the Casual Mall Leasing Code of Practice and ideally those changes should be made as part of the current authorisation process.

The FCA acknowledges the substantial contribution major shopping centres have made to Australian retail. Australian customers enjoy world class shopping environments featuring a diverse array of retail concepts. Similarly Australian shopping centres have benefitted from the presence of the many franchise and retail brands that draw customers to shopping centres. This relationship is synergistic, and largely the relationship between retailers and shopping centres is collaborative. However it has to be said that the economic returns enjoyed by shopping centres point to market imperfections that need to be addressed. The FCA is strongly of the view that shopping centres have become economic markets of their own, and that information imbalances and other inequalities in those markets see retailers consistently at an economic disadvantage. The FCA also has concerns about the conduct of shopping centres that have led the FCA to champion the development of a proposed Retail Leasing Code of Conduct.

Although these matters are not directly relevant to the Casual Mall Licensing Code of Practice, they do provide important context. The Casual Mall Leasing Code of Practice was originally developed to curb the practices of shopping centre owners, and protect the legitimate interests of the permanent tenants who had in good faith committed to long term leases. There are few if any genuine contractual protections for tenants in the shopping centre leases, notwithstanding that there are a number of promises implicit in the bargain struck between landlord and tenant at the time of setting the rental and signing the lease. One of the implicit promises is that the competitive mix will remain largely unchanged, and tenants will be entitled to reasonable quiet enjoyment of their tenancy.

In a normal market changes occur naturally. In a shopping centre most changes are made unilaterally by landlords. To some extent major shopping centres compete with other centres and with other retail locations, but the sheer size of these centres and the restrictions on competition resulting from zoning and town planning restrictions means that they are largely markets unto themselves. Measured on the basis of retail turnover, customer purchasing and staff employed the largest shopping centres would have a greater market size than most regional cities or metropolitan suburbs. They are in essence markets in themselves, and those markets are essentially controlled by the landlords.

The Casual Mall Leasing Code of Practice Preamble

The Casual Mall Leasing Code of Practice preamble notes that casual mall licensing is a feature of shopping centres in Australia, which is true. It is however a feature that was introduced unilaterally by landlords, and solely for the benefit of landlords. Put simply, these arrangements provide landlords with extra rental on top of the rental paid by permanent

tenants. And in a broad sense, money spent by customers with these tenants is not spent with the permanent tenants.

The FCA is sceptical as to whether casual mall licensing actually adds much variety to the retail offer of shopping centres or helps attract customers to shopping centres. For the most part customers are attracted by the presence of the brands, the marketing and promotions undertaken by those brands and the general retail shopping environment. Most of the casual mall licensing arrangements do not feature existing tenants, but rather new casual tenants.

The FCA has no objections to casual mall licensing arrangements for existing tenants. The FCA agrees that it enables existing retailers to augment their normal sales, particularly when shopping centres are typically highly restrictive in terms of the retail activities tenants are able to undertake. For example most landlords will insist that retailers not undertake sampling or promotions outside the boundaries of their store.

The FCA certainly agrees that where casual mall licensing is applied insensitively it can be a source of dissatisfaction to existing retailers. Indeed we would go much further. Casual mall licensing can be a direct and unfair competitive threat to a permanent tenant. This threat can be direct, in terms of casual mall licensing by a direct competitor, and indirect. Indirect competition can occur by the establishment of a business that may not be a direct competitor in terms of products or services, but competes for the discretionary dollar or impulse purchase from a customer. The financial impact on the permanent tenant is the same. The permanent tenant can also be prejudiced by disruption to traffic flow, impairment of store visibility and other indirect consequences.

The FCA is also sceptical about the extent to which the Code has in fact been developed as part of the consensus process required for these forms of industry codes. The original version of the voluntary Code of Practice may well have 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. However these bodies are not totally representative of the retail sector, and the current review process needs to be broader. Further, the FCA, the Australian Retailers Association and others have endeavoured to engage the Shopping Centre Council of Australia and the Property Council of Australia in the development of a Retail Leasing Code of Conduct without success. This seems at least culturally at odds with a genuine desire to engage in proper consultation.

That said, the FCA strongly supports industry codes of practice developed through a genuine consultative process. The FCA also broadly supports the concept of the Casual Mall Leasing Code of Practice, and agrees that it will help 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. Indeed the FCA believes consideration should be given to the enactment of the Casual Mall Leasing Code of Practice as a mandatory industry code under section 51AE of the Competition and Consumer Act.

Operative Provisions

Our comments on the operative provisions appear below, with reference to the relevant provision of the Code.

1. Interpretation - Clause I(1)

The current definition of "adjacent lessee" is central to the Casual Mall Leasing Code of Practice, and is set out below:-

"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;

There are many situations where a party is significantly affected by a casual licensing arrangement notwithstanding it is not "in front of or immediately adjacent" to the proposed location of that casual licence. The relevant test should be whether the person is an "affected lessee", not and "adjacent lessee". A new definition of "affected lessee" should then be inserted as follows:-

"affected 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 or is able to establish that the lessee is likely to be substantially affected by the casual mall licence;

The FCA considers such a definition is consistent with the intent of the Casual Mall Leasing Code of Practice, and indeed is consistent with the definition of "competitor" discussed below.

2. "Competitor" – Clause 1(2)

The FCA has less concern with the definition of an internal competitor, as that is essentially an extension of the current competitive environment within the market and reasonably addressed by the Casual Mall Leasing Code of Practice. However the current definition defines an external competitor as a competitor that is not a lessee of another shop in the same shopping centre. The definition of a 'competitor' by reference to specific product competition is as follows:-

(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;

The FCA considers that this definition is far too narrow. The intent of the Code should be to protect permanent tenants paying a fixed rent from unfair competition. In an economic sense a competitor is any business that competes for a particular aspect of the customer's expenditure. Many retailers rely on discretionary spending, or impulse purchases. That is often exactly the sort of business granted a casual mall licence. In this context it the FCA considers that the following definition of a "competitor" in clause 1(2)(b)relation to services is more appropriate:-

(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.

There is no reason why there should be a different definition for goods compared to services.

3. Casual mall licence policy

The FCA supports the concept of preparation and disclosure in relation to the casual mall licensing policy. However the current provisions contain no requirement for consultation in relation to the development of a casual mall licensing policy. This is left solely in the hands of the shopping centre owner. There should be some express obligation to consult with tenant representatives in the shopping centre in relation to the development of any such policy, and any variations.

The FCA also considers that the current provisions do not go far enough, and should require the lessor to provide an assessment of any anticipated impact on tenant of any specific casual mall licence. This need not be a complex process, and could be as simple as grading the impact as “nil / not substantial / substantial”. However such a process would require the lessor to consider the impact on the tenants of a specific activity. There should also be an explicit obligation to consult with the tenant in relation to any casual licensing proposed, and to consider in good faith any objections raised by the tenant to any proposed arrangement.

4. Reduction of rent

Clause 8 of the Casual Mall Leasing Code of Practice provides that where there is casual mall licensing there must be a reduction of non-specific outgoings paid by fixed tenants by a formula that the FCA agrees is a fair means of allocating the outgoings across all tenants including casual mall licensees. The logic of such an adjustment is obvious, and to fail to adjust would see the landlord secure contributions from tenants that exceed the amount of the outgoings.

The same logic applies to rent. The landlord controls this market, and a certain number of customers with a certain amount of disposable income attend the shopping centre. In a global sense all tenants compete with each other for the customer’s attention and expenditure. Rents are set by reference to the anticipated revenue to be generated by a tenant in ordinary circumstances. The requirement for tenants to provide turnover details to landlords, and the capacity to easily share information, means that landlords have full access to information.

Casual licensing enables landlords to obtain additional revenue, with no benefit to the tenants. The same logic should apply to rents as applies to outgoings. The formula may need to be different, as the beneficiaries of any adjustment should be the affected tenants¹. But the broad principle should be the same - if a casual mall licence is granted the extra rental should be split with the affected tenants.

5. Dispute Resolution

The FCA supports the current dispute resolution arrangements in the Casual Mall Leasing Code of Practice.

6. Code Administration Council

The FCA considers that there needs to be greater visibility as to the operation of the Code Administration Council, and consideration given to increasing the number and nature of representative organisations participating on the Code Administration Council.

In that respect, has the Code Administration Council reported to the parties to the Code? Is a copy of that Report available to the FCA and indeed other interested parties?

7. Period of Operation of the Code of Practice

Once approved, the FCA supports the Casual Mall Leasing Code of Practice remaining in operation until 31 December 2017.

¹ As we have amended that definition. See Paragraph 1 of this submission.

Franchise Council of Australia
Request for Comments – FCA Submission on Casual Mall Licensing Code of Practice

The Shopping Centre Council has applied to the Australian Competition and Consumer Commission for authorisation of the Casual Mall Leasing Code of Practice.

In essence this application is for the continuation of the existing authorisation, which expires December 31, 2012. The FCA has been invited to comment to the ACCC on whether the authorisation ought to be granted. Strictly speaking, the ACCC is seeking to understand whether the FCA considers that the public benefits of the Casual Mall Leasing Code of Practice outweigh any public detriment. However the process also enables the FCA to raise broader issues with the content of the Casual Mall Leasing Code of Practice, and the process for administration and oversight of the Casual Mall Leasing Code of Practice.

Essentially an authorisation is granted by the ACCC in circumstances where conduct might otherwise breach the Competition and Consumer Act. In the present case the Casual Mall Leasing Code of Practice could contain an exclusionary provision in breach of s4D of the Competition and Consumer Act or result in a substantial lessening of competition in the relevant markets in breach of s45 of the Act. The Casual Mall Leasing Code of Practice is a code of practice involving the owners of major shopping centres and retailers through their respective industry bodies. Some of these parties are likely to be considered competitors for the purposes of the Act. One of the consequences of the Casual Mall Leasing Code of Practice is that parties may be prevented from securing space at shopping centres via casual licensing arrangements.

Attached to this Briefing Paper are:-

- 1 The FCA's submission to the ACCC in relation to the authorisation; and
- 2 An Executive Summary of the Casual Mall Licensing Code of Practice

Your urgent comments are requested in relation to the Casual Mall Licensing Code of Practice, and the content of the FCA's submission.

The FCA's position is that the public benefit of having a code of practice such as the Casual Mall Leasing Code of Practice outweighs any public detriment. So in that sense we are supportive of the Casual Mall Leasing Code of Practice, and of the application for authorisation. However more broadly the FCA considers that the Code of Practice could be substantially improved to give greater protection to fixed term tenants, and changes should be made to the process for administration of the Code of Practice. The FCA also believes that consideration should be given to making the current voluntary code a mandatory industry code for the purposes of s51AE of the Competition and Consumer Act, which is the section under which the Franchising Code of Conduct was introduced.

Comments are to be sent to Steve Wright at the Franchise Council of Australia, and are requested by Friday October 26, 2012.

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Franchise Council of Australia
Member Briefing Paper - Casual Mall Licensing Code of Practice

Background

The Casual Mall Leasing Code of Practice was created 5 years ago to address complaints by tenants of shop centres that they were unfairly impacted by casual licensing arrangements implemented by the owners of major shopping centres. Tenants felt such arrangements were unfair and unreasonable given they were committed to fixed term and fixed rental arrangements negotiated in good faith based on competitive circumstances at the time of signing their lease.

The Casual Mall Leasing Code of Practice is a voluntary code of practice between shopping centres and retailers introduced via their various representative industry bodies. The parties to the Casual Mall Leasing Code of Practice are:-

- The Shopping Centre Council of Australia Ltd;
- The Property Council of Australia;
- The Australian Retailers Association;
- The National Retail Association; and
- The Retail Traders Association of WA

These associations strongly recommend to their members that they comply with the code of practice, but compliance is not mandatory.

ACCC authorisation is required, as the Casual Mall Leasing Code of Practice might otherwise breach the Competition and Consumer Act. The Casual Mall Leasing Code of Practice contains exclusionary provisions in breach of s4D of the Competition and Consumer Act, and provisions excluding or limiting entry to major shopping centres that could result in a substantial lessening of competition in the relevant markets in breach of s45 of the Act. The owners of major shopping centres and retailers that are parties to the Casual Mall Leasing Code of Practice through their respective industry bodies are likely to be considered competitors for the purposes of the Act.

Operative Provisions

A casual mall licensing arrangement refers to an arrangement where a party is granted the right to occupy part of the common area of a shop centre for a period of less than 180 days.

The essential provisions of the Code are as follows:-

- Clause 2, which requires a lessor to prepare and provide a casual mall licence policy that sets out the lessor's policy in respect of granting casual mall licences for the relevant centre, including a floor plan setting out the location and size of areas in the mall where casual mall licences may be granted;
- Clause 3, which requires a lessor to give certain information including the casual mall licence policy to all lessees before granting a casual mall licence to any person;
- Clause 4, which requires a lessor to comply with its casual mall licensing policy;
- Clause 5, which requires lessors to ensure that the business conducted by any casual mall licensee does not substantially interfere with the sightlines of a lessee's shopfront in the shopping centre except with consent of the lessee;

- Clause 6(1), which provides that a lessor must not grant a casual mall licence that results in the unreasonable introduction of an external competitor of an adjacent lessee.
- Clause 6(2), which provides that a lessor must not grant a casual mall licence that results in the unreasonable introduction of an internal competitor of an adjacent lessee unless:-
 - the internal competitor is a lessee of a retail shop in the same retail precinct in the shopping centre;
 - the casual mall licence area is the closest available to the internal competitor's retail shop;
 - the casual mall licence term is within a designated sales period in respect of the shopping centre; or
 - the casual mall licence is within the centre court of the shopping centre.
- Clause 6(4), which provides that the introduction of a competitor is unreasonable if it has a significant adverse effect on trading of the adjacent lessee. (Note: Clause 6(5) provides that the wording of clause 6(4) does not limit the circumstances where introduction of a competitor could be unreasonable, so it is in theory possible to show it is unreasonable even if there is no significant effect on trading.)
- Clause 7, which excludes special events from clauses 4, 5 and 6.
- Clause 8, which provides for a reduction in the non-specific outgoings to be paid by all tenants to factor in contributions from casual leasing based on lettable area occupied by casual mall licensees and the applicable time periods of their occupation.
- Clauses 9-13, which provide for mediation based dispute resolution;
- Clauses 14 – 18, which set out the process for administration and operation of the Casual Mall Leasing Code of Practice.

Key definitions

In the context of the operative provisions, the following definitions are important:-

"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;

The key words are underlined. In other words there is a requirement for very close proximity between the 2 premises.

In relation to competition:-

(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 supply of services – a person is a competitor of another person if the person competes with the other person to a substantial extent.

This is quite a limited definition, and it relies on floor area.

A "special event" is defined to be:-

“a community, cultural, arts, entertainment, sporting, promotional or other similar event that is to be held on the retail shopping centre over a limited period of time.”