4 December 2012

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

Dear Dr Chadwick,

Queries concerning Casual Mall Licensing Code of Practice

I refer to the email of 28 November from Ms Marie Dalins, Director Adjudication, forwarding queries by Commissioners in relation to the 'Application for Revocation of a Non-Merger Authorisation and Substitution of a New Authorisation' of the Casual Mall Licensing Code of Practice. We lodged this application on 21 August 2012 on behalf of all parties to the Code.

It might be useful, before responding to the specific queries, to explain how this Code came into operation.

This Code began a decade ago as a code of practice negotiated in South Australia by members of the statutory-appointed Retail Shop Leases Advisory Committee. This body comprised, among others, representatives of shopping centre landlords (Shopping Centre Council, Property Council and representatives of shopping centre tenants (Australian Retailers Association, South Australian Retailers Association, Newsagents Association of South Australia). The series of meetings to negotiate the SA Code were chaired by the SA Commissioner for Consumer and Business Affairs. (The ACCC was also present, as an observer, at these meetings). The SA Code, which is still in existence, was eventually agreed by all parties. No party disagreed with any of the final provisions of the Code. The only area of disagreement was whether the code would be a voluntary code or mandatory code. The final decision on this was taken by the (then) Attorney-General, who decided it would be a mandatory code. Hence the SA Code was implemented by *Retail and Commercial Leases (Casual Mall Leasing) Amendment Act*. I stress that all provisions of the SA Code, including the two provisions now queried by the Commissioners, were agreed by three representative organisations of shopping centre tenants.

All provisions of the SA Code were examined and reviewed when the National Code was negotiated in 2007. The two provisions queried by the Commissioners were again agreed by three representative organisations of shopping centre tenants, including two additional organisations – the National Retail Association and the Retail Traders Association of WA. These provisions have therefore been agreed by four separate retailer associations, all of whom represent shopping centre tenants. In the light of this it is puzzling that these provisions are now being queried by the ACCC.

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I should also stress, as noted in the Preamble to the National Code, the Code is meant to "provide *balanced* guidelines" to ensure that casual mall licensing "operates in a way that is fair to shopping centre owners and managers and shopping centre retailers". Individual provisions of the Code must therefore be considered in the context of 'balance' and 'fairness' to *both retailers and owners.* The ACCC has highlighted two provisions that may appear to operate to the advantage of shopping centre owners while ignoring the very significant property rights which the owners have surrendered in agreeing to this Code (including the right to deal with their own property as they see fit), as well as the additional workload (in terms of disclosure, preparation of casual mall licensing plans etc.), which lessors have taken on.

Finally, as stated in earlier submissions, not only have these provisions been agreed by four different retailer associations, none of these provisions (including the two highlighted by the Commissioners) have led to any disputes between owners and tenants over the last five years (and over an even longer time in SA). This suggests that not only have these provisions been accepted by retailer associations, they have also been accepted by individual retailers.

I now address the two specific queries which the Commissioners have raised about provisions of the Code – the definition of 'special events' and the definition of 'adjacent lessee'.

The Commissioners have requested examples of 'special events' which are defined in Clause 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."*

These special events are events which are designed to promote the retailers in the shopping centre or to promote particular categories of retailers and, in doing so, increase retail sales. These events can range from visits to the centre by popular entertainers, film and television stars, fashion gurus and sporting identities; special marketing programs for children during school holidays; special programs based around calendar events, such as Christmas and Easter; and community events in the centre court. The only limit to the type of special event is the initiative and inventiveness of the marketing teams in the centres, and in the shopping centre company, in devising events which will attract customers and potential customers. The marketing teams work closely with the retailers of the centre in designing and organising these events.

All of these 'special events' have in common a desire to increase the sales of the retailers in the centre and increase the market share of the centre within its customer trade area. At a time when retail is facing particular challenges, including increasing competition from on-line retailing, it is vital that shopping centres keep reinforcing their relevance to their particular community and 'special events' are an important way of doing this.

Because these events cannot be foreseen at the time a casual mall licensing policy is drawn up – often being inspired by a topical event, such as the popularity of a television cooking show – it is important that the Code of Practice can accommodate such special events. The SA Retail Shop Leases Advisory Committee, when it drew up the provisions of the SA Code, recognised this and considered that the restrictions imposed by clauses 4, 5 and 6 should effectively be 'suspended' when such 'special events' were taking place.

As the definition of 'special events' in the Code makes clear, these events occur over a "limited period of time". For this reason, retailers are prepared to suspend, for a limited period, rights that might otherwise accrue to them under the Code, because they recognise that the purpose of these special events is to increase their own retail sales.

Once again, it must be stressed that over the last five years (and even longer in South Australia), there have been no disputes between shopping centre owners and shopping centre tenants over the definition of 'special events' or over the operation of clause 7 of the Code (to which the definition relates).

Only one submission (of the two received by the ACCC) raised the issue of 'special events'. This was the WA Small Business Commissioner who argued that *"special events should not be excluded from the Code provisions."* Without such an exclusion, however, the shopping centre would run the risk of being unable to undertake special promotions and marketing events designed to increase retail sales. Over time this would be to the disadvantage of all retailers in the centre. The fact that there have been no disputes over the operation of this provision demonstrates that shopping centre retailers obviously have a far better appreciation of what is in their best interests than does the WA SBC.

The second query made by the Commissioners related to whether the definition of 'adjacent lessee' should be amended to 'affected lessee'.

Both submissions received by the ACCC raised the issue of 'adjacent lessee'. The WA Small Business Commissioner (WA SBC) argued that *"an external competitor who competes with an existing adjacent lessee should not be granted a [casual mall] license".*

Presumably the ACCC, as the competition regulator, does not agree with a proposition which will lead to less retail competition in respect of further authorisation of a code on competition grounds. In 2007 the ACCC, in weighing the public interest against the public detriment of the Code, noted that its impact on competition between retailers was "very limited", as was the *"potential for the arrangements to act as a barrier to new entrants entering relevant markets".*

The Franchise Council of Australia (FCA) also raised the definition and argued that the definition of 'adjacent lessee' should be changed to 'affected lessee' which would include the existing definition of 'adjacent lessee' plus the additional words *"or is able to establish that the lessee is likely to be substantially affected by the casual mall license."*

Neither the WA SBC, nor the FCA, gave any reasons why the definition should be changed other than a desire to shield shopping centre retailers from further competition. Since the existing definition has given no cause for concern to existing retailers, as evidenced by the fact that there have been no disputes under the Code, there is no obvious reason why the definition needs to be changed.

We are puzzled that the ACCC would appear to be giving some support to the proposition to further shield shopping centre retailers from competition. In 2007, when we first sought ACCC authorisation of the Code, we considered clause 6(1), which operates as an exclusionary provision relating to competitors to an 'adjacent lessee', to be one of the provisions of the Code that could be considered to be in contravention of the provisions of the *Competition and Consumer Act* and to which the ACCC would take exception. This clause was one of the reasons why we sought authorisation of the Code in 2007 before it could begin operation. Broadening the definition in the way suggested by the FCA would, of course, make the operation of this clause even less competitive.

Indeed, in its original authorisation of 29 August 2007, the ACCC noted that the introduction of short-term competitors to the long-term lessees of a shopping centre was not, of itself, problematic since *"encouraging competition is generally likely to lead to more efficient outcomes for businesses and consumers, resulting in greater choice in price, quality and service."*

However the ACCC, in its consideration of the operation of clause 6, concluded:

> *"6.67 The ACCC considers that the public detriment generated by the Code is minimal. In particular, while the Code places some restriction on the introduction of casual mall tenants in competition with existing lessees in shopping centres, the restrictions apply only in respect of the granting of a casual mall license that introduces a competitor directly adjacent to or in front of an existing lessee and only in limited circumstances. Further, the restrictions do not apply in respect of retail shopping areas other than shopping centres, for example, retail space located in freestanding shops, 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.*
>
> *6.68 In the limited circumstances where the restrictions do apply, casual mall licensees potentially affected by the arrangements have a range of alternatives, including locating in a different area of the shopping centre, locating in another shopping centre or in a retail precinct other than a shopping centre.*
>
> *6.69 As a result, the capacity for the Code to impact on competition between retailers is very limited, as is the potential for the arrangements to act as a barrier to new entrants entering relevant markets."*

As noted earlier, mending the definition of 'adjacent lessee' in the manner suggested by the FCA would, in our opinion, alter the assessment above that the public detriment generated by the Code was "minimal" and also alter the 2007 assessment that the *"capacity for the Code to impact on competition between retailers is very limited", as is the potential for the arrangements to act as a barrier to new entrants entering relevant markets".*

It should be pointed out that the existing provisions of the Code, to the extent that they protect long-term retailers from competition from short-term retailers, exceed the provisions of retail tenancy legislation. Although retail tenancy legislation exists to provide protections for retailers, including retailers in shopping centres, it does not provide protection from competition from other retailers. Provisions such as section 34 of the NSW *Retail Leases Act* (and similar provisions in other States and Territories), for example, provide for the payment of compensation in the event of the landlord taking certain actions. These actions do not include the introduction of a competitor. Indeed often long-term retailers that are direct competitors are placed side-by-side in a shopping centre because retailers understand the customer benefits that can accrue from the creations of 'precincts' within the shopping centre, particularly in the fashion and food areas.

In agreeing to the provisions of the Code, SCCA members have agreed to impose on themselves a restriction from introducing short-term (casual) retailers in certain areas and in certain circumstances because they believe such restrictions are in the public interest. Amending the definition in the manner suggested by the FCA would result in the odd outcome that long-term retailers would have even greater protection from competition from short-term retailers than they have from other long-term retailers.

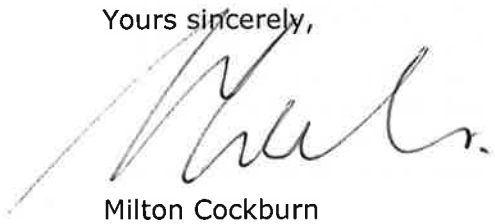
The definition suggested by the FCA would also introduce a vagueness which would make it difficult for shopping centre staff to interpret. The present definition is objective and precise in its application. How is a shopping centre manager, or casual leasing executive, expected to decide which other retailers in the entire shopping centre could be "substantially affected". Is the *Tie Rack* retailer on, say, the ground floor of the shopping centre likely to be substantially affected by a decision to grant a casual license to sell ties on the first floor of the shopping centre? It is only necessary to pose such a question to realise the impractical nature of the FCA proposal.

Finally, the Commissioners have asked whether the SCCA (and, presumably, the other parties) have any proposals to review the Code in the future. I assume this query is in the context of our overriding desire to ensure consistency between the SA Code and the National Code. In this respect we are very much in the hands of the SA Government. We understand there may be a review of the SA *Retail and Commercial Leases Act* next year. If a review does occur it is our intention to seek to persuade the SA Government to repeal its Code which would allow us to extend the operation of the National Code to South Australia. If that was agreed by the SA Government the issue of future reviews of the National Code would then be solely in the hands of the parties to the National Code. If the SA Government does not agree to this it is unlikely that the National Code will be separately reviewed because of our desire (and the desire of the other parties) to ensure there is uniformity of regulation of casual mall licensing around Australia – just as the ACCC, on many occasions, has urged the uniform regulation of franchising around Australia.

Having stated that future reviews of the Code are largely in the hands of the SA Government, I should point out that the National Code was reviewed by the Code Administration Committee (CAC) in July 2012 when making the decision to renew the Code for another five years. This was not just a 'tick and flick' exercise by the CAC. The fact that none of the substantive provisions (as distinct from machinery provisions) of the Code were altered by the CAC also reflects the fact that none of the parties to the Code saw any need to alter any of these provisions. The major reason for coming to this conclusion was that none of the provisions of the Code have led to any disputes between landlords and tenants.

I hope this answers the queries raised by the Commissioners.

Yours sincerely,



Milton Cockburn
Executive Director