



Australian
Competition &
Consumer
Commission

Draft Determination

Application for revocation and substitution of
authorisations A91049 and A91050

lodged by

Shopping Centre Council of Australia Ltd

in respect of

the Casual Mall Licensing Code of Practice

Date: 13 December 2012

Authorisation numbers: A91329 and
A91330

Commissioners: Sims
Rickard
Schaper
Court
Dimasi
Walker
Willett

Summary

The Australian Competition and Consumer Commission (ACCC) proposes to revoke authorisations A91049 and A91050, previously granted to the Shopping Centre Council of Australia Ltd for its Casual Mall Licensing Code of Practice, and grant authorisations A91329 and A91330 in substitution. The substitute authorisations are proposed to be granted for a further five years.

Next steps

The ACCC will seek further submissions in relation to this draft determination before making its final decision. The applicants and interested parties may also request the ACCC to hold a pre-decision conference to allow oral submissions on the draft determination.

The applications for authorisation

1. On 21 August 2012, the Shopping Centre Council of Australia Limited ('the SCCA') lodged an application for the revocation of authorisations A91049 and A91050 and their substitution with authorisations A91329 and A91330. Authorisations A91049 and A91050 were granted by the ACCC on 29 August 2007 (the 2007 Authorisations) and relate to the Casual Mall Licensing Code of Practice ('the Code'). The 2007 Authorisations are due to expire on 31 December 2012. The SCCA seeks interim authorisation in the event that the ACCC's final determination for the substitute authorisations is not made prior to the expiration date.
2. The ACCC may 'authorise' businesses to engage in anti-competitive conduct where it is satisfied that the public benefit from the conduct outweighs any public detriment.¹ The holder of an authorisation may apply to the ACCC to revoke an existing authorisation and grant another authorisation in substitution for the one revoked (re-authorisation). In order for the ACCC to re-authorise conduct, the ACCC must consider the application for re-authorisation in the same manner as it would consider an application for initial authorisation under section 88 of the *Competition and Consumer Act 2010* (the Act).
3. The Code (see Attachment A) is a voluntary code that is designed for shopping centre owners and managers Australia wide (other than in South Australia).²
4. The Code relates to casual mall licensing, which involves the granting of a right to occupy part of the common area of a shopping centre for a short period of time (up to 180 days but normally less than one month) – usually for product launches and demonstrations, stock clearance sales and brand awareness campaigns.
5. The Code is aimed at providing balanced guidelines to ensure that the practice of casual mall licensing delivers benefits in a manner that is fair to shopping

¹ Detailed information about the authorisation process is contained in the ACCC's Guide to Authorisation available on the ACCC's website www.accc.gov.au.

² The SCCA Code is based on a Casual Mall Licensing Code enacted by the South Australian Government in 2002 as a schedule to the *Retail and Commercial Leases Act 1995* (SA).

centre owners and managers (lessors), and to shopping centre retailers (lessees).

6. The SCCA advise 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. In addition, the SCCA note that as the Code is endorsed by most retailer associations in Australia, that in excess of 90 per cent of shopping centre owners are covered by the Code.³

7. The key provisions of the Code cover the following areas:

- the provision of information to lessees regarding casual mall licensing in the vicinity of their shopfront
- the obligations of a lessor relating to casual mall licence policies
- sightlines to shopfronts – a lessor must ensure that the business conducted by the holder of a casual mall licence does not substantially interfere with the sightlines to a lessee's shopfront in the shopping centre (clause 5)
- placement of competitors in shopping centres – the Code restricts a lessor from granting a casual mall licence that results in the unreasonable introduction of an *external* competitor⁴ of an adjacent lessee. The Code also restricts a lessor from granting a casual mall licence that results in the unreasonable introduction of an *internal* competitor⁵ of an adjacent lessee, except:
 - if both competitors are situated in the same precinct; or, if they aren't in the same precinct, in the vicinity of the casual mall licensing area (Clause 6(2)(a)).if the casual mall licence area is the closest to the internal competitor' retail shop (Clause 6(2)(b))
 - if the term of the licence is in a defined sales period (Clause 6(2)(c)), and
 - or if the casual mall licence area is within the centre court of the shopping centre (Clause 6(2)(d)).
- special events⁶ – provided that a lessor has reserved the right in their policy to grant exemptions in the case of special events then the clauses regarding sightlines and competitors do not apply to these events (clause 7)

³ The SCCA state that the Code is endorsed by the Australian Retailers Association, the National Retail Association and the Retail Traders Association of Western Australia but not the Australian National Retailers Association whose members include Coles and Woolworths who are generally not covered by retail tenancy legislation.

⁴ An external competitor is defined as a competitor who does not currently have a lease on a retail shop in the shopping centre.

⁵ An internal competitor is defined as a competitor of the permanent lessee who also has a current lease on a retail shop in the shopping centre.

⁶ Clause 1(1) defines a special event 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.

- adjustment of non-specific outgoings for permanent lessees – lessors must reduce the non-specific outgoings to be paid by permanent lessees in accordance with the number of casual mall licences granted (clause 8), and
 - a dispute resolution process for handling breaches of the Code.
8. In the case of the sale of goods, clause 1(2)(a) of the Code states that 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 the display basis) of the goods displayed for sale by the other person.
9. In the case of the supply of services, clause 1(2)(b) of the Code states a person is a competitor of another person if the person competes with the other person to a substantial extent.
10. In its application, the SCCA note that the Code Administration Committee (CAC)⁷ which includes all parties to the Code has agreed to “a number of minor amendments to the existing Code but these are machinery changes only”. The two changes include:
- No longer requiring CAC to report annually to the parties to the Code on the operation and effectiveness of the Code but to “report regularly” (amendments to clauses 15 and 18)
 - Seeking extension of the Code for another 5 years until 31 December 2017 (clause 17).
11. The SCCA seeks authorisation until 31 December 2017.

The SCCA

12. The SCCA was formed in May 1998 to give a stronger and clearer voice to the shopping centre industry. It has an advocacy and information role and represents investors in, and managers of, shopping centres.
13. The SCCA comprises 24 members, including 21 shopping centre owners, two independent shopping centre managers and the Property Council of Australia. The current members are listed at Attachment C.
14. The SCCA’s mission is ‘to be an effective advocate for these investors and managers and to promote a better understanding of the significant contribution that shopping centres make to economic growth – through employment, retail sales, investment returns and as a platform for small and medium-sized businesses’.⁸

⁷ The CAC comprises of six representatives: One each from the Australian Retailers Association, National Retail Association, Retailer Traders Association of Western Australia and Property Council of Australia and two representatives from the SCCA.

⁸ www.scca.org.au, viewed 19 September 2012.

Background - 2007 Authorisation

15. The Casual Mall Licensing Code of Practice was authorised by the ACCC in a determination issued 29 August 2007 (A91049 – A91050) (the 2007 Authorisation).
16. In its consideration of the 2007 Authorisation, the ACCC considered that the Code balanced the reasonable and consistent treatment of permanent retail tenants with the introduction of casual mall licensees within a shopping centre. The ACCC considered that the provision of certainty to retail tenants and the extension of general disclosure obligations to casual mall licensees were particularly of public benefit.
17. The ACCC also accepted that the Code was likely to generate minimal public detriment due to the limited restrictions on competition imposed by the Code.

Consultation and issues raised

18. The ACCC tests the claims made by the applicant in support of an application for authorisation through an open and transparent public consultation process.

Applicant's submissions

19. The SCCA submits that the Code has led to the following public benefits:
 - clarifying the entitlements and expectations of affected parties
 - ensuring that lessees have access to greater information about casual mall licensing
 - promoting fair competition between permanent tenants and casual mall licensees
 - encouraging competition and creating economic efficiency for shopping centres around Australia by encouraging planning, equitable dealings, a level playing field, commercial certainty and industry harmony, and
 - reducing complaints regarding inappropriate issuing of casual mall licences.
20. The SCCA submits that the Code has no significant public detriments. In relation to its potential effect on competition, the SCCA submits:
 - The Code will have no impact on barriers to entry. The only barrier will be for a casual mall operator that wishes to establish a store adjacent to a similar competitor.
 - The Code only applies to retail space inside shopping centres, which is significantly less than the amount of retail space outside shopping centres.

Interested party submissions

21. The ACCC sought submissions from approximately 50 interested parties potentially affected by this the application, including the SCCA's members, retail trade associations, small business associations and relevant state and Australian government bodies. The ACCC received submissions from the Small Business Development Corporation (SBDC), and Franchising Council of Australia (FCA).
22. Although both the SBDC and FCA stated that they generally supported industry codes for casual mall licensing, both parties submitted that the Code in particular could be improved. These comments are noted where relevant in the following assessment.
23. Copies of public submissions can be obtained from the ACCC's website www.accc.gov.au/authorisationsregister.

ACCC evaluation

24. The ACCC's evaluation of the proposed conduct is in accordance with the relevant net public benefit tests⁹ contained in the Act. In broad terms, under the relevant tests the ACCC shall not grant authorisation unless it is satisfied that the likely benefit to the public would outweigh the detriment to the public, including the detriment constituted by any lessening of competition that would be likely to result.

Relevant Area of Competition

25. The ACCC notes that the Code directly impacts the:
 - supply of retail space by shopping centre owners and managers
 - supply of goods and services by shopping centre tenants.
26. These areas of competition were considered relevant in the 2007 Authorisation and are supported by the Applicant.¹⁰

Future with and without

27. The ACCC considers a likely 'future with-and-without' to identify and weigh the public benefit and public detriment generated by conduct for which authorisation has been sought.¹¹
28. The ACCC compares the public benefit and anti-competitive detriment generated by arrangements in the future if the authorisation is granted with those generated if the authorisation is not granted.

⁹ Subsections 90(5A), 90(5B), 90(6), 90(7) and 91C(7) of the Act). The relevant tests are set out in Attachment A.

¹⁰ These areas of competition were adopted by the ACCC in the 2007 Authorisation A91049-50.

¹¹ *Australian Performing Rights Association* (1999) ATPR 41-701 at 42,936. See also for example: *Australian Association of Pathology Practices Incorporated* (2004) ATPR 41-985 at 48,556; *Re Media Council of Australia* (No.2) (1987) ATPR 40-774 at 48,419.

29. The likely future should authorisation not be granted, would be that the SCCA and its members would be unlikely to enforce the Code.
30. The SCCA and its members would offer casual mall licences on the individual terms and conditions that they consider to be appropriate.

ACCC assessment of public benefits and detriments

Public Benefit

31. The problem that the Code is seeking to address is the imperfect information faced by retail shopping centre lessees relative to shopping centre owners regarding a long term lease as tenants invest significant money into the business and face uncertainty as to whether the shopping centre will issue a licence to a competitor close by. The Code aims to reduce the uncertainty and risk faced by retail lessees from the introduction of casual mall licensees during the term of their lease.
32. The costs of entering into a long term lease at a shopping centre are likely to be significant and, as recognised by the Code, casual mall licensing can unfairly disadvantage existing permanent stores with higher set-up and operation costs.
33. The ACCC considers that the Code is likely to continue to result in public benefit through providing certainty for permanent lessees as to the circumstances and terms on which casual mall licences would be granted to businesses that set up in competition with them. This in turn allows lessees to make better informed business decisions and provides certainty over the life of agreements entered into.
34. The ACCC notes that the Code's transparency requirements, where lessees are provided with a copy of the lessor's casual mall licensing policy before entering into a lease, is important to providing this commercial certainty for lessees. These disclosure requirements are broadly consistent with those that apply to landlords under state and territory retail tenancy legislation.
35. The Code also provides casual mall licensees with information regarding the terms on which they are able to be granted licences by shopping centres. The ACCC considers that while it would be expected that individual shopping centre owners and managers would provide such information absent the proposed arrangements, the Code provides greater certainty in this respect.
36. The ACCC notes that the Code also includes provisions that relate to dispute resolution. These provisions enhance the public benefits of the Code by providing a mechanism for resolving disputes in relation to breaches of the Code.¹²

¹² Clauses 9-13 of the Code set out the dispute resolution provisions which include the appointment of an independent mediator by the relevant retail tenancy official of each State or Territory to mediate any dispute that may arise.

37. The ACCC notes the SCCA's amendment to the frequency of the reporting obligations on the operation and effectiveness of the Code from an annual basis when authorised in 2007 to "report regularly" (clause 15).¹³
38. The SCCA note the change was "in recognition that the Code is working effectively and because no problems had arisen [the CAC] believed it was not necessary for the CAC to meet every year and to produce an annual report to the parties".
39. The ACCC would welcome additional information on the circumstances in which "report[ing] regularly" would be undertaken. The ACCC notes that regular monitoring and reporting of any Code, including the Casual Mall Licensing Code of Practice provides a formal mechanism to ensure accountability and monitor compliance. Indeed the ACCC's publication "*Guidelines for developing effective voluntary industry codes of conduct*" recommends annual reports on the operation of codes.

Public Detriments

40. The ACCC notes that although the Code (clause 6) limits the circumstances in which competitors to existing lessees can set up within a mall on a temporary basis, the ACCC considers that the public detriment likely to result from the Code is minimal.
41. The restrictions apply only in respect of the granting of a casual mall licence that introduces a competitor directly **adjacent to or in front of** an existing lessee and then, only if the placing of that direct competitor would be **unreasonable** (see paragraph 7 and clause 6).
42. Further, the Code only applies to retail shopping centres. It does not apply to retail space located in freestanding shops, shops that are grouped together under one roof but do not constitute a shopping centre, shops in office complexes and other configurations of shops.
43. In addition, there are many shopping centres and a casual mall licensee which may be restricted at one shopping centre may not be restricted at another as there is likely to be a different composition and positioning of tenants.
44. The ACCC notes that the FCA and SBDC generally support the Code, although they suggest a number of amendments including:
- that the impact on lessees should be broadened under the Code such that the relevant test is "an affected lessee" rather than an "adjacent lessee"
 - that the Code does not provide adequate protection to permanent retailers and provides for the introduction of unfair competitive threats.
 - that "special events" (see paragraph 7) should not be excluded from the Code's provisions. SBDC states that clause 7 (special events) should also be subject to provisions that protect existing tenants from competition that unfairly affects their small business.

¹³ And also a consequential amendment to clause 18.

- casual mall licences should not be granted for longer than 30 days, not up to 180 days as presently permitted under the Code.
- Clause 8 of the Code (which provides where there is casual mall licensing, it should be accompanied by a reduction in non-specific outgoings charges to existing lessees) should be amended to make provision for a similar adjustment for rent, so that if a casual mall licence is granted, the extra rental should be split with the affected tenants.
- the Code should be made mandatory under section 51AE of the Act.

45. In response the SCCA submits that the current provisions are working effectively as there have not been any disputes under the Code. In particular:

- broadening the definition to an affected lessee as suggested by the FCA and SBDC would make the operation of this clause even less competitive.
- the lessee's disclosure statement in Queensland, NSW and Victoria also advises the tenant whether or not the tenant has exclusivity in relation to the use of the premises and specifically whether the landlord assures the tenant that the current tenant mix will not be altered by the introduction of a competitor. The SCCA also submits that unless a tenant has negotiated a strict usage clause in its lease, or has negotiated exclusivity, then it must accept that it will face competition and also that the tenancy mix of the centre will change over time.
- the purpose of special events is to promote the retailers in the shopping centre or to promote particular categories of retailers and in doing so, increase retail sales. Examples of special events include visits by popular entertainers, special marketing programs for children during school holidays and calendar events such as Easter and Christmas. As "special events" occur for a limited period of time, the SCCA submits that "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".
- if the parties to the current Code agreed to any of the suggestions or amendments proposed by the SBDC or the FCA, this would mean dual regulation of casual mall leasing around Australia as the Code provisions would differ from those in South Australia (and that the benefits of uniformity and consistency in arrangements would be lost).
- the voluntary Code has been effective, and no disputes have been lodged since the Code took effect.

46. The ACCC acknowledges that the Code is aimed at providing balanced guidelines to ensure that the practice of casual mall licensing delivers benefits in a manner that is fair to shopping centre owners and managers (lessors), and to shopping centre retailers (lessees).

47. The ACCC has assessed the Code as it is currently drafted and considers that the Code is likely to result in minimal detriment due to the limited restrictions on competition imposed by the Code (see paragraph 41 and 42).
48. Further the ACCC notes that mandating the Code falls outside the scope of assessing the authorisation. In any event, responsibility for prescribing an industry code lies with the Minister with responsibility for Part IVB of the Act.

Balance of public benefit and detriment

49. Broadly, the ACCC considers that the Code strikes a balance between providing certainty and transparency for permanent retail tenants and also providing shopping centres with flexibility to introduce casual mall licensees within a shopping centre. Although there have been no disputes under the existing Code, the ACCC encourages the SCCA to regularly review the Code and to consider feedback from tenants and their representatives.
50. For the reasons outlined in this draft determination the ACCC is satisfied that the likely benefit to the public would outweigh the detriment to the public including the detriment constituted by any lessening of competition that would be likely to result.
51. Accordingly, the ACCC is satisfied that the relevant net public benefit tests are met.

Length of authorisation

52. The ACCC considers it appropriate to grant authorisation for the period requested, being five years.

Draft determination

The application

53. On 21 August 2012 Shopping Centre Council of Australia Ltd lodged applications for the revocation of A91049 - A91050 and substitution of authorisations A91329 and A91330.
54. Applications A91329 and A91330 were made under subsection 91C (1) of the Act. The initial authorisations were made under subsection 88(1) and 88(1A) of the Act.¹⁴
55. In particular, the SCCA seeks authorisation to give effect to the Casual Mall Licensing Code of Practice (as at Attachment B).
56. The SCCA seeks authorisation for a period of 5 years.

¹⁴ On 24 July 2009, amendments to the Act, contained in the Trade Practices Amendment (Cartel Conduct and Other Measures) Act 2009, commenced operation. All authorisations in effect on that date, including the 2007 Authorisations, were deemed to provide statutory protection from legal action under the cartel provisions (s.88(1A)) of the Act.

The net public benefit test

57. For the reasons outlined in this draft determination, the ACCC is satisfied that the tests in sections 90(5B), 90(7), 90(8) and 91(C)(7) of the Act are met.¹⁵ Accordingly, the ACCC considers that in all the circumstances the Casual Mall Licensing Code of Practice for which authorisation is sought is likely to result in a public benefit that would outweigh the detriment to the public constituted by any lessening of competition arising from the conduct.
58. Further, the ACCC is satisfied that the proposed Casual Mall Licensing Code of Practice is likely to result in such a benefit to the public that the conduct should be allowed to take place.
59. The ACCC therefore **proposes to revoke authorisations** A91049 and A91050 **and grant** authorisations A91329 - A91330 in substitution.

Conduct for which the ACCC proposes to grant authorisation

60. The ACCC proposes to grant authorisation to Shopping Centre Council of Australia Ltd to the Casual Mall Licensing Code of Practice for five years.
61. Further, the proposed authorisation is in respect of the Casual Mall Licensing Code of Practice as it stands at the time authorisation is granted (as at Attachment B). Any changes to the Casual Mall Licensing Code of Practice during the term of the proposed authorisation would not be covered by the proposed authorisation.
62. This draft determination is made on 13 December 2012.

Interim authorisation

63. The SCCA requests interim authorisation for the Casual Mall Licensing Code of Practice. For the reasons in this draft determination the ACCC suspends the operation of A91049 and A91050 which are about to expire and grants interim authorisation in substitution for the authorisations suspended.
64. When considering interim authorisation, the ACCC considers a range of factors, including harm to the applicant and other parties if interim is or is not granted, possible benefit and detriment to the public, the urgency of the matter and whether the market would be able to return to substantially its pre-interim state if the ACCC should later deny authorisation.
65. The ACCC grants interim authorisation noting that:
- it will enable the Code to remain in effect and therefore maintain the status quo
 - the conduct will likely result in public benefits that outweigh the minimal detriment.

¹⁵ See Attachment A.

66. Interim authorisation will remain in place until the date the ACCC's final determination comes into effect or until the ACCC decides to revoke interim authorisation.

Further submissions

67. The ACCC will now seek further submissions from interested parties. In addition, the applicant or any interested party may request that the ACCC hold a conference to discuss the draft determination, pursuant to section 90A of the Act.

Attachment A - Summary of relevant statutory tests

Sections 90(5A) and 90(5B) provide that the ACCC shall not authorise a provision of a proposed contract, arrangement or understanding that is or may be a cartel provision, unless it is satisfied in all the circumstances that:

- the provision, in the case of section 90(5A) would result, or be likely to result, or in the case of section 90(5B) has resulted or is likely to result, in a benefit to the public; and
- that benefit, in the case of section 90(5A) would outweigh the detriment to the public constituted by any lessening of competition that would result, or be likely to result, if the proposed contract or arrangement were made or given effect to, or in the case of section 90(5B) outweighs or would outweigh the detriment to the public constituted by any lessening of competition that has resulted or is likely to result from giving effect to the provision.

Subsections 90(6) and 90(7) state that the ACCC shall not authorise a provision of a proposed contract, arrangement or understanding, other than an exclusionary provision, unless it is satisfied in all the circumstances that:

- the provision of the proposed contract, arrangement or understanding in the case of subsection 90(6) would result, or be likely to result, or in the case of subsection 90(7) has resulted or is likely to result, in a benefit to the public; and
- that benefit, in the case of subsection 90(6) would outweigh the detriment to the public constituted by any lessening of competition that would result, or be likely to result, if the proposed contract or arrangement was made and the provision was given effect to, or in the case of subsection 90(7) has resulted or is likely to result from giving effect to the provision.

Section 90(8) states that the ACCC shall not:

- make a determination granting:
 - i. an authorization under subsection 88(1) in respect of a provision of a proposed contract, arrangement or understanding that is or may be an exclusionary provision; or
 - ii. an authorization under subsection 88(7) or (7A) in respect of proposed conduct; or
 - iii. an authorization under subsection 88(8) in respect of proposed conduct to which subsection 47(6) or (7) applies; or
 - iv. an authorisation under subsection 88(8A) for proposed conduct to which section 48 applies;

unless it is satisfied in all the circumstances that the proposed provision or the proposed conduct would result, or be likely to result, in such a benefit to the public that the proposed contract or arrangement should be allowed to be made, the proposed understanding should be allowed to be arrived at, or

the proposed conduct should be allowed to take place, as the case may be;
or

- make a determination granting an authorization under subsection 88(1) in respect of a provision of a contract, arrangement or understanding that is or may be an exclusionary provision unless it is satisfied in all the circumstances that the provision has resulted, or is likely to result, in such a benefit to the public that the contract, arrangement or understanding should be allowed to be given effect to.

Section 91C(7) requires the Commission, in making a determination to revoke an authorisation and substitute another authorisation, to apply the tests in section 90(5A), (5B), (6), (7) (8), (8A), (8B), or (9) (as applicable) as if the authorisation were a new authorisation sought under section 88.

Attachment B

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;

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"**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.

Attachment C – Members of the Shopping Centre Council of Australia

Property Council of Australia

Westfield Group

Retail First

Jones Lang LaSalle

Jen Retail Properties

The GPT Group

Centro Properties Group

McConaghy Group

McConaghy Properties

Perron Group

Brookfield Australia

Charter Hall Australia

Mirvac

Dexus Property Group

Eureka Funds Management

Precision Group

QIC

IPOH

Savills

ISPT Super Property

Colonial First State Retail Property Trust

Stockland

AMP Capital

Lend Lease