

25 July 2017

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

Dear Mr Jones,

**Reauthorisation of Casual Mall Licensing Code of Practice**

**Attached** to this letter is an application to the Australian Competition and Consumer Commission (ACCC) from the Shopping Centre Council of Australia (SCCA) seeking reauthorisation of the Casual Mall Licensing Code of Practice (the Code).

This application is also made on behalf of the National Retail Association (NRA), an industry association representing the interests of retailers from single store operations to major national chains.

In its entirety, this application includes a completed Form FC – *Application for revocation of a non-merger authorisation and substitution of a new authorisation*, a supporting document of supplementary information, and a copy of the Code for which reauthorisation is sought.

Despite the SCCA's sincere efforts to lodge this application, as recommended, at least six months prior to expiry of the Code (which occurs on 31 December 2017), pre-lodgement engagement with various stakeholders, including retailer stakeholders, prevented this from being achieved. Your staff are aware of the recent and relevant activities in this regard.

It is understood that the formal processes for evaluation by the ACCC of this application may not be concluded by the date of the Code's expiry. If this is the case, the SCCA will apply for an interim authorisation to ensure the Code can remain in force until the ACCC gives its decision on this application.

I can be reached on [anardi@scca.org.au](mailto:anardi@scca.org.au) or on 0408 079 184 to discuss this application.

Yours sincerely,



Angus Nardi  
**Executive Director**

**CC:** Mr Darrell Channing  
Director  
Adjudication Branch  
Via email: [darrell.channing@accc.gov.au](mailto:darrell.channing@accc.gov.au)

**Form FC**

Commonwealth of Australia

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

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

To the Australian Competition and Consumer Commission:

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

PLEASE FOLLOW DIRECTIONS ON BACK OF THIS FORM

**1. Applicant**

- (a) Name of applicant:**  
**(Refer to direction 2)**

A91591 & A91592 Shopping Centre Council of Australia Limited (SCCA).

- (b) Description of business carried on by applicant:**  
**(Refer to direction 3)**

Industry group representing the interests of Australia's major shopping centre owners, managers and developers.

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

Level 1, 11 Barrack Street, Sydney NSW 2000

**2. Revocation of authorisation**

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

Authorisations A91329 & A91330 - Casual Mall Licensing Code of Practice

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

Authorisations A91329 and A91330 (the Authorisations) will expire on 31 December 2017.

The initial applications for the Authorisations were made under s88(1) of the Competition and Consumer Act 2010 (the Act). By virtue of the operation of s177 of the Act, the Authorisations granted in February 2013 were deemed to also be made under s88(1A) of the Act (so as to provide statutory protection from legal action under the cartel provisions). It is noted that paragraph [56] of the Determination dated 6 February 2013 granting the Authorisations stated that the initial authorisations were made under s88(1) and 88(1A).

Revocation is sought to allow for substitution of new authorisations to ensure continuity of the authorisation of the Casual Mall Licensing Code of Practice for parties to the Code under both s88(1) and 88(1A) of the Act.

**3. Substitution of authorisation**

- (a) Provide a description of the contract, arrangement, understanding or conduct whether proposed or actual, for which substitution of authorisation is sought:**  
**(Refer to direction 4)**

The Casual Mall Licensing Code of Practice regulates the practice of casual mall licensing in shopping centres.

The Code was first authorised by the Australian Competition and Consumer Commission (ACCC) in August 2007 (A91049 and A91050, with approval of a minor variation in 2008 with regard to the timeframe for expiration) and, subsequently, in 2013 (A91329 and A91330) for the five years to 31 December 2017.

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

Casual mall licensing refers to agreements under which a person grants another person a right to occupy part of the common area of a retail shopping centre for the purpose of the sale of goods or the supply of services to the public, where the total number of days the person is permitted to occupy the area does not exceed 180 days.

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

Five (5) years from 1 January 2018 to 31 December 2022. This period reflects the two prior authorisation periods of the Code by the ACCC. This proposed period has been agreed by the parties to the Code.

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

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

National Retail Association Inc (NRA)  
6 Overend Street, East Brisbane QLD 4169  
PO Box 1544, Coorparoo DC QLD 4151

Industry association representing the interests of retailers from single store operations to major national chains.

- (b) **Names, addresses and descriptions of business carried on by parties and other persons on whose behalf this application is made:  
(Refer to direction 5)**

As above.

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

Not applicable.

**5. Public benefit claims**

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

See attached supplementary information.

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

See attached supplementary information.

**6. Market definition**

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

**(See Direction 7 of this Form)**

See attached supplementary information.

**7. Public detriments**

- (a) Detriments to the public resulting or likely to result from the substitute authorisation, in particular the likely effect of the conduct on the prices of the goods or services described at 3 (b) above and the prices of goods or services in other affected markets:**  
**(See Direction 8 of this Form)**

See attached supplementary information.

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

See attached supplementary information.

**8. Contracts, arrangements or understandings in similar terms**

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

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

No.

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

- (i) description of any variations between the contract, arrangement or understanding for which substitute authorisation has been sought and those contracts, arrangements or understandings that are stated to be in similar terms:**  
**(See Direction 9 of this Form)**

Not applicable.

- (ii) Where the parties to the similar term contract, arrangement or understanding(s) are known - names, addresses and description of business carried on by those other parties:**  
**(See Direction 5 of this Form)**

Not applicable.

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

Not applicable.

**9. Joint Ventures**

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

No.

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

Not applicable.

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

Not applicable.

**10. Further information**

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

Mr Angus Nardi  
Executive Director  
Shopping Centre Council of Australia  
[anardi@scca.org.au](mailto:anardi@scca.org.au)  
02 9033 1902

Dated..... 25. 7. 20. 7 .....

Signed by/on behalf of the applicant

.....  
(Signature)

.....  
(Full Name)

.....  
(Organisation)

.....  
(Position in Organisation)

## **DIRECTIONS**

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

**Shopping Centre Council of Australia**  
**Application for revocation of a non-merger authorisation and substitution of a**  
**new authorisation**  
**Authorisations A91329 & A91330 – Casual Mall Licensing Code of Practice**

**Supplementary information**

**1. Summary**

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

In its 2007 determination, the ACCC summarised:

*"Overall, the ACCC considers that in all the circumstances, the public benefits likely to result from the proposed arrangements are likely to outweigh the anti-competitive detriment." (page ii)*

A minor variation application was lodged by the SCCA with the ACCC in November 2007 seeking to align the period of authorisation with the period of operation of the Code. In response, the ACCC issued a determination in February 2008 extending the period of authorisation of the Code until 31 December 2012 (Public Register no. C2007/2253).

On 6 February 2013, the ACCC issued a determination reauthorising the Code (A913229 and A91330) to 31 December 2017 having received an application from the SCCA for 'revocation of a non-merger authorisation and substitution of a new authorisation'.

The reauthorised Code, which had been subject to a number of minor 'machinery' amendments, was the same in intent and operation as the Code which was first authorised by the ACCC in 2007.

In its 2013 determination, the ACCC concluded:

*"For the reasons outlined in this 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." (clause 52, page 9)*

In January 2017, the SCCA received a letter from the ACCC (Ref: C2007/1896) advising that the authorisations A91329 and A91330 are due to expire on 31 December 2017.

It has been resolved to apply to the ACCC to revoke the existing authorisations relevant to the Code and seek the substitution of new authorisations for a further five years from expiration (to 31 December 2022).

This application proposes that the Code be the same in intent and operation (subject to further minor, 'machinery' amendments agreed between the parties to the Code – discussed at section 9) as those versions of the Code authorised by the ACCC in 2007 and 2013.

The Code does not apply in South Australia. A substantially similar Code – the *Casual Mall Licensing Code* – was included as a schedule to South Australia's *Retail and Commercial Leases Act 1995* in 2002. The commencement of the South Australian Code was the catalyst for relevant parties to agree on an otherwise voluntary and industry-led approach to the practice of casual mall licensing in Australia. This was to ensure there was a consistent approach adopted across other jurisdictions and, therefore, prevent the proliferation of new and different regulation on a jurisdiction by jurisdiction basis.

## **2. Parties to the Code**

The SCCA represents Australia's major owners, managers and developers of shopping centres. The SCCA has 25 members (<http://www.scca.org.au/about-us/members/>).

In March 2017, the SCCA's Board of Directors approved the SCCA seeking re-authorisation of the Code.

The SCCA is responsible for all shopping centre policy, advocacy and industry matters, including any matters regarding competition policy and law, and related engagement with the ACCC. The SCCA's members own and manage more than 12.3 million square metres of shopping centre floorspace across around 500 shopping centres in Australia. This accounts for almost three quarters of all shopping centre floor space in Australia (and over 90% of 'regional' shopping centre floorspace). These shopping centres encompass around 40,000 retail stores.

Two of Australia's major retailer associations have, historically, been parties to the Code; the Australian Retailers Association (ARA) and the National Retail Association (NRA).

This application for reauthorisation is made on behalf of the NRA only. The NRA represents the interests of retailers from single store operations to major national chains (<https://www.nra.net.au/>).

Since the Code was last considered by the ACCC in 2012/13, the Retail Traders Association of Western Australia, has ceased operation and the Property Council of Australia has delegated its role as a party to the Code to the SCCA.

The Code is publicly available on the SCCA's website for access by all interested parties, including owners and managers of shopping centres which are not members of the SCCA ([http://www.scca.org.au/wp-content/uploads/2015/06/CasualMallLicencingCode\\_January-2013.pdf](http://www.scca.org.au/wp-content/uploads/2015/06/CasualMallLicencingCode_January-2013.pdf)).

## **3. Casual Mall licensing**

As has been made known to the ACCC in previous applications for authorisation, casual mall licensing refers to agreements under which a person grants another person a right to occupy part of the common area of a retail shopping centre for the purpose of the sale of goods or the supply of services to the public, where the total number of days the person is permitted to occupy the area does not exceed 180 days.



Casual mall licensing is a common way for shopping centre landlords to appropriately utilise their common mall area to: 1) increase total rental income, asset values and returns for investors without the need to commit to a shopping centre development/redevelopment, 2) provide relatively low cost and short term opportunities for prospective retailers to test products and models, gain experience and train staff, 3) create a dynamic and interesting environment for customers by offering a wider, and changing, variety of goods and services within the shopping centre, 4) provide existing retailers with flexible and low cost opportunities to clear stock and/or promote special/sale product lines, and 5) foster healthy competition in the retail sector to drive improved consumer outcomes.

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

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

The SCCA undertook a survey of a representative sample of our members regarding the practice of casual mall licensing in Australian shopping centres. This was done to assist the ACCC understand the current scale and frequency of casual mall licensing in Australia (which will also assist to contextualise the absence of formal disputes under the Code – discussed further at section 7).

The floorspace owned and managed by SCCA members subject to this survey accounts for around 50% of that owned and managed by SCCA members.

*NB: The following figures are relevant to the 2016 calendar year.*

- There were 3,295 casual mall 'sites' (on this basis, it is estimated that, across all SCCA owned and managed centres in Australia, there would over 6,000 casual mall 'sites').
- Across the 'sites' identified in the survey, the average length of a 'booking' was around 12 days.

Casual mall licensing in Australia's shopping centres has continued to grow and add competition to the market over the last ten years. As evidenced by the number of casual mall 'sites' and frequency of 'bookings', the practice of casual mall licensing is a ubiquitous and popular component of the shopping centre experience and shopping centre management in Australia.

#### **4. Market definition**

As has been detailed by the SCCA in its earlier applications to the ACCC regarding the Code, relevant markets are the supply of retail space.

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

## **5. Public benefits**

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

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

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

A range of public benefits have been detailed to, and subsequently accepted by, the ACCC in the context of previous authorisation applications regarding the Code.

As required, the public benefits of the Code have been tested to determine whether they were realised during the term of the current authorisation.

### *Provision of certainty and transparency*

During the term of the current authorisation, the Code has provided for the provision of relevant information to shopping centre lessees as to the circumstances under which, and the terms on which, a casual mall license may be granted within that shopping centre. In doing so, the Code made negligible any potential uncertainty or risk that may otherwise have impacted shopping centre lessees.

As the ACCC said in its 2007 determination:

- "6.55    *The ACCC considers that the provisions contained in the Code are likely to provide a public benefit by ensuring, through limiting the circumstances in which a direct competitor of an existing license is introduced in a directly adjacent area, balance and consistency in the treatment of permanent retail tenants when casual mall licensees are introduced to a shopping centre.*

...

- 6.57 *...the cost of entering into a long term lease at a shopping mall for most retailers is significant, involving not just a commitment to abide by the contractual obligations under the terms of the lease agreement but also other, often sunk, costs involved in establishing a retail business.*
- 6.58 *The Code provides certainty to lessees as to the circumstances, and terms on which, casual mall licenses could be granted to businesses in competition with them. This in turn allows them to make better informed business decisions and provides certainty over the life of agreements entered into. Such certainty, in itself, is likely to encourage investment in retail businesses."*

The Code has also provided casual mall licensees with information about the terms and conditions of being granted a right to occupy part of the common area of a retail shopping centre.

With regard to both shopping centre lessees and casual mall licensees, the Code continues to facilitate the flow of relevant commercial information to relevant parties to allow for better informed decision making, including with regard to future investment. The Code provides certainty of terms, conditions and process over the life of agreements entered into with a lessor.

#### *Efficiency and harmonisation*

During the term of the current authorisation, the Code has continued to deliver time and cost efficiencies for shopping centre landlords by providing for a national approach (ex. South Australia) to the management of casual mall licensing. In this regard, the Code has provided for a 'harmonised' approach to the management of casual mall licensing. This is an important benefit as (with the exception of four members) SCCA members own and manage shopping centres in two or more Australian jurisdictions.

The Code has also been successful in preventing Australia's state and territory governments allocating resources to the regulation of casual mall licensing. During the term of the current authorisation, three jurisdictions have either initiated or completed full or partial reviews of relevant retail leasing regulation – New South Wales, Queensland and Victoria. No issues regarding casual mall licensing were/have been raised in the context of these reviews, allowing for government resources to be appropriately allocated elsewhere.

(South Australia, where casual mall licensing is regulated via a schedule to the *Retail and Commercial Leases Act 1995*, has also progressed a review of this Act over recent years. Amending legislation, the *Retail and Commercial Leases (Miscellaneous) Amendment Bill 2017*, was tabled in the South Australian Parliament on 5 July 2017. As far as is known, no issues regarding casual mall licensing were raised during the review process and there are no proposed changes to the South Australian Code in the amendment Bill.)

#### *Competition*

During the term of the current authorisation, the Code has facilitated retail competition for the benefit of businesses and consumers, while guiding the consistent and certain management of casual mall licensing within shopping centres. This is evidenced, in part, by the large number of casual mall 'sites' in Australia's shopping centres (discussed at section 3).

### *Dispute resolution*

During the term of the current authorisation, the Code has continued to provide for a dedicated dispute resolution pathway, the inclusion of which the ACCC has previously noted "*enhances the public benefits of the Code*" (2007, clause 6.63, page 20, and 2013, clause 37, pages 6 and 7).

The public benefit of the Code further extends to the elimination of formal disputes under the Code (discussed at section 7).

## **6. Public detriments**

During the term of the current authorisation, there has been no evidence or incident to suggest that the Code has caused public detriment, such as imposing a barrier to entry or leading to a substantial lessening of competition.

In its 2013 determination, the ACCC made the following statement:

*"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" (clause 49, page 9)*

In this regard, the ACCC's conclusion regarding public detriment remain valid, particularly as the drafting of the Code, specifically with regard to clause 6, is not proposed to change (therefore the parameters of any potential public detriment would remain the same between the current period of authorisation, and any future period).

## **7. Disputes under the Code**

As intended under clauses 9 and 10 of the Code, any issues which may have arisen over the course of the current authorisation period have been effectively dealt with between the parties, likely at the 'centre management' level. While there is no formal record or list of issues which required resolution in this manner (which would be impractical to establish and administer with any accuracy), the parties to the Code do not discount that resolution in this manner may occur from time to time.

Critically, however, since the reauthorisation of the Code by the ACCC in February 2013, no formal disputes have required action under the dispute resolution mechanism detailed at clauses 11 to 13 of the Code.

The lack of formal disputes under the Code, particularly when considered in the context of the large number of casual mall 'sites' in Australia's shopping centres (discussed at section 3), demonstrates the strength of compliance with the Code by shopping centre lessors and the effectiveness of the Code in driving professionalism of the management of casual mall licensing.

The Code is working as intended and, consequently, disputes regarding the practice of casual mall licensing have effectively ceased in Australia's shopping centres.

The presence of a dispute resolution mechanism has been noted previously by the ACCC as *"enhancing the public benefits of the Code"* (2013, clause 37, page 6). The absence of disputes under the Code is also a considerable public benefit.

In light of the success of the Code in reducing formal disputes, a number of 'machinery' changes to the Code are proposed with regard to the defined dispute resolution process (discussed further at section 9).

## **8. Code Administration Committee**

The Code currently specifies, at clause 18, that *"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"*.

Upon receipt of the ACCC's letter dated 5 January 2017 (ref: C2007/1896) to the SCCA advising that the Code's current authorisations are due to expire on 31 December 2017, the SCCA sought approval from its Board of Directors to seek reauthorisation of the Code.

This approval was forthcoming at the meeting of the SCCA Board of Directors on 2 March 2017.

A meeting of the Code Administration Committee (CAC) was then held on 7 April 2017. This meeting was attended by representatives of the NRA and the SCCA. Representatives of the ARA were invited, but did not attend the meeting. The ARA was provided with relevant meeting papers, including the meeting minutes.

At this meeting, it was agreed by the CAC that: 1) the Code has been working very well, 2) there had not been any formal issues raised in relation to the Code, 3) the professional management of casual mall licensing had been assisted by many landlords having staff dedicated to managing casual mall licensing across their shopping centre portfolios, 4) a number of minor 'machinery' changes to the Code should be made (discussed further at section 9), and 5) to seek reauthorisation of the Code for a further five years (discussed further at section 10) with the SCCA to lead the application process.

The CAC considered whether a longer period of authorisation should be sought (e.g. 10 years), but it was decided that five years remains an appropriate period to ensure reasonable regularity with regard to the review of the Code's operation and effectiveness, as per clause 15 of the Code.

The ARA provided written advice (dated 13 June 2017) to the SCCA regarding the proposed reauthorisation of the Code. This correspondence also referenced the views of the Franchise Council of Australia and the Pharmacy Guild of Australia (groups which are not / have never been parties to the Code). It is understood that this correspondence was provided to the ACCC.

In turn, the SCCA responded to the ARA's correspondence (dated 20 June 2017), which was also copied to the ACCC.

The ARA is not a party to this application for reauthorisation.

## 9. Machinery changes to the Code

A number of machinery changes to the Code have been agreed between parties to the Code. These are detailed as follows, and are incorporated into the Code which is **attached** to this application. These are administrative changes only and are detailed for information only. They are not relevant to the ACCC's deliberations.

### Preamble

It was agreed to amend the dates in the Preamble (subject to reauthorisation):

#### **From:**

*"This voluntary Code of Practice has been agreed between the Australian Retailers Association, 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."*

#### **To:**

*"This voluntary Code of Practice has been agreed between the ~~Australian Retailers Association, the National Retail Association and~~ 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."*

#### **From:**

*"This Code of Practice has been authorised by the Australian Competition and Consumer Commission for a period of five years until 31 December 2017."*

#### **To:**

*"This Code of Practice has been authorised by the Australian Competition and Consumer Commission for a period of five years until 31 December 2022~~17~~."*

### Clause 12

It is agreed that the current reference at clause 12 to a 'schedule' of 'relevant retail tenancy official(s) in each state and territory (except South Australia)' would not be finalised or included in the Code.

In the event an independent mediator was needed (which, based on the absence of relevant disputes over the former and current authorisation period, is unlikely), it was agreed that the relevant Office of the Small Business Commissioner would be approached in the first instance for advice on the appointment of an independent mediator (there are currently Small Business Commissioners in New South Wales, Victoria, South Australia and Western Australia). If there is no Commissioner, agreement would be reached between the parties on the appointment of an independent mediator.

The inclusion of a schedule was considered unnecessary as agreement was reached between the parties on how the independent mediator would be appointed. The lack of relevant disputes under the Code also makes the exercise of maintaining a current schedule and of continually briefing new/incoming Commissioners and their staff on their role under the Code is considered a poor allocation of resources.

The following amendments were agreed:

**From:**

*"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)"*

**To:**

*"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)."*

**Clause 16**

Since the 2013 authorisation of Code, and during the preparation of this application for reauthorisation, there have been a number of minor changes to the constitution of the CAC:

**From:**

*"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."

**To:**

*"The CAC will comprise ~~six~~ four representatives as follows:"*

- ~~One representative nominated by the Australian Retailers Association;~~
- ~~One~~ Two representatives 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;~~

Should another retail association become a party to the Code in the future, the composition of the CAC will be revisited to ensure equal representation from retail and landlord representatives.

#### **Clause 17**

As per the amendment to the Preamble, it was agreed to update the date of expiration (subject to reauthorisation):

**From:**

*"This Code of Practice will remain in operation until 31 December 2017."*

**To:**

*"This Code of Practice will remain in operation until 31 December ~~2022~~<sup>17</sup>."*

#### **10. Proposed length of authorisation**

Reauthorisation of the Code by the ACCC is sought for a further five years from expiration of the current authorisation – 31 December 2022.

This period is consistent with the two prior periods of authorisation provided for by the ACCC.

The CAC considered whether a longer period of authorisation should be sought (e.g. 10 years), but it was decided that five years remains an appropriate period to ensure reasonable regularity with regard to the review of the Code's operation and effectiveness, as per clause 15 of the Code.

Also, five years (with some exceptions) reflects the minimum regulated lease terms under various pieces of retail leasing legislation. As such, there is an industry familiarity and awareness of this period of time.



## **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 National Retail Association and the Shopping Centre 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 2022.

### **Interpretation**

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

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

**"casual mall licence"** means an agreement under which a person grants, or agrees to grant, to another person other than a registered charity a right to occupy a designated part of a mall area for the purposes of the sale of goods or the supply of services to the public, where the total number of days the person is permitted to occupy the area does not exceed 180 days;

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

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

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

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

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

**"competitor"**—see subclause (2);

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

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

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

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

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

**"special event"** means a community, cultural, arts, entertainment, recreational, sporting, promotional or other similar event that is to be held in the retail shopping centre over a limited period of time.

(2) For the purposes of this Code—

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

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

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

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

### **Casual mall licence policy**

2.(1) A lessor must not grant a casual mall licence in respect of a retail shopping centre unless the lessor has prepared a document that sets out the lessor's policy in respect of the granting of casual mall licences for the shopping centre (a **"casual mall licence policy"**).

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

### **Provision of information**

- 3.(1) A lessor must not grant a casual mall licence in respect of a retail shopping centre unless the lessor has given each person who is a lessee of a retail shop in the shopping centre the following information:
- (a) a copy of the casual mall licence policy in force in respect of the shopping centre; and
  - (b) a copy of this Code; and
  - (c) the person nominated by the lessor to deal with complaints about casual mall licences (whether described by name or the title of the person's position) and the person's contact details.
- (2) The information required under subclause (1) must have been given to a person—
- (a) in the case of a person who has entered into a retail shop lease after the commencement of this Code at the time the disclosure statement for the lease was provided to the person; or

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

### **Obligations of lessor relating to casual mall licence policy**

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

### **Sightlines to shopfront**

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

### **Competitors**

- 6.(1) A lessor must not grant a casual mall licence that results in the unreasonable introduction of an external competitor of an adjacent lessee.
- (2) A lessor must not grant a casual mall licence that results in the unreasonable introduction of an internal competitor of an adjacent lessee unless—
  - (a) the internal competitor is a lessee of a retail shop situated in the same retail precinct as the casual mall licence area, or if the shopping centre is not divided into precincts, in the vicinity of the casual mall licence area; or
  - (b) the casual mall licence area is the area closest to the internal competitor's retail shop that is available for the casual mall licensing at the time the casual mall licence is granted; or
  - (c) the term for which the casual mall licence is granted falls within a sales period fixed by the lessor in respect of the shopping centre, there having been no more than five previous sales periods in the preceding period of twelve months; or
  - (d) the casual mall licence area is within the centre court of the shopping centre.
- (3) Subclause (2) does not apply in relation to an adjacent lessee if the lessor, before the grant of the casual mall licence, and after informing the lessee of the proposal to grant a licence that will result in the introduction of an internal competitor of the lessee, obtained the written consent of the lessee to the grant of the licence.

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

(5) Subclause (4) is not to be taken as limiting the circumstances in which the introduction of a competitor of an adjacent lessee might be regarded as being unreasonable.

### **Special events**

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

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

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

### **Adjustment of outgoings**

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

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

where—

R=the amount of the reduction;

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

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

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

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

CMLA=the casual mall licence area in square metres.

### **Dispute Resolution**

9. A lessee who considers a breach of this Code has occurred must upon becoming aware of the breach notify, in writing, the person nominated by the lessor to deal with complaints under subclause 3 (1) (c). This person must, as soon as practicable, respond to the complaint that has been lodged.

10. The parties to this Code expect, where a complaint is made alleging a breach of this Code has occurred, that the lessor and lessee will, in good faith, attempt to resolve any complaint by negotiation between themselves.
11. In the event that the lessor and lessee are unable to resolve a complaint, after exhausting all internal avenues for resolution, the parties agree that the complaint can be referred by either the lessor or lessee for mediation.
12. The independent mediator will be appointed by the relevant retail tenancy official in each State or Territory (except South Australia).
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 four representatives as follows:
  - Two representatives nominated by the National Retail Association;
  - Two representatives nominated by the Shopping Centre Council of Australia.

#### **Period of Operation of the Code of Practice**

17. This Code of Practice will remain in operation until 31 December 2022.
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.