

29 August 2017

Darrell Channing
Director
Adjudication Branch
Australian Competition and Consumer Commission
GPO Box 3131
Canberra ACT 2601

By email: adjudication@accc.gov.au


Dear Mr Channing,

**RE: A91591 & A91592 SHOPPING CENTRE COUNCIL OF AUSTRALIA -
SUBMISSION**

Thank you for the opportunity to submit comments on the application for re-authorisation of the Casual Mall Licensing Code of Practice ('the Code').

We have received representations from a number of small business industry associations in relation to the re-authorisation of the Code. These stakeholders have raised issues concerning the operation of the existing Code which we believe should be addressed. Accordingly, we do not support the application of the Shopping Centre Council of Australia (SCAA) that the Code not be re-authorised as proposed by SCAA when it expires. We would support the continuation of the present code as an interim measure until a new code, which addresses stakeholder concerns, is agreed.

We would seek to raise concerns regarding three aspects of the proposed renewal application regarding operation of the code, dispute resolution and code administration.

The Code is a mechanism to justify Landlord actions

The Code was renewed in 2007 because the Australian Competition and Consumer Commission (ACCC) concluded the public benefits would outweigh the public detriments. The SCCA in its supplementary information to the current application outlines the public benefits in terms of certainty and transparency, efficiency and harmonisation, competition and dispute resolution. The concerns raised with our office challenge some of these assertions.

We agree with the principle that the Code provides certainty and transparency in theory. In practice, we understand that the Code is being used as a mechanism to justify a landlord's decision on a casual mall lease when confronted with a complaint by an existing tenant. Concerns raised with our office indicate landlords use the Code as justification to tenants by indicating that the Code is a part of their retail

lease terms, and as such, the Landlord can proceed largely as they like. Small business tenants often will hesitate when confronted with this scenario due to the asymmetry of power in the relationship, the complexity and legal aspects of such justification. While the Code, in its current form, does provide theoretical certainty and transparency, its application is, in some cases, to the detriment of small business tenants.

The Code is a source of dissatisfaction for some existing retailers

The Code itself notes “where it is applied insensitively, it [casual mall licensing] can be a source of dissatisfaction to existing retailers.” This reflects the role of the code in managing the competition between casual tenants and long-term tenants. In representations made to ASBFEO, stakeholders have outlined circumstances that the Code has been applied insensitively by landlords with regards to product mix of casual tenants and adjacency of casual tenants to long term tenants. Stakeholders contend that the Code has been breached by allowing the unreasonable introduction of a competitor, usually an external competitor, selling the same general kind of product. This includes instances where the holder of a casual mall licence, selling the same or similar product, has been located in front of an adjacent lessee. Examples provided to us include:

- a casual lease tenants selling baked goods in-front of a bakery;
- a casual imported book reseller adjacent to a bookstore;
- a casual perfume or make-up retailer in-front of a pharmacy; and
- a casual calendar and gift card stall in-front of a newsagency.

The selection of the location for a casual mall licence can have a significant negative impact on the sales volume of retail lessees, their long-term viability and ultimately lead to a reduction in choice for consumers, particularly during sales period. Retail lessees generally make a reasonably long-term commitment to a business in a shopping mall. Depending on the product sold, sales volume can be cyclical and profits seasonal. By contrast, those holding a casual mall license “can come and go” and choose periods throughout the year when sales volume is more likely to be higher than average (e.g. pre-Christmas, Boxing Day sales etc.) They can cherry pick the time of year to operate without any long-term commitment to the shopping mall. The fact that the average length of a ‘booking’ was around 12 days¹ confirms this to some extent. The ‘competition’ is only for a short period but can affect the long-term viability of the retail lessee. Stakeholders we spoke with were not opposed to casual tenants selling similar goods operating in the same centre, however, placing a competitor directly adjacent to a long term tenant selling similar goods is insensitive and demonstrates bad faith by a landlord in valuing that long term tenants relationship.

¹ SCCA, Supplementary Information on the Code provided to ACCC, page 3.

A harmonised national code must evolve to address stakeholder concerns

The national application of the code is a benefit to both landlords and tenants. This however is not sufficient a reason to justify the code being a static document. A code as a framework for guiding interaction between landlords and long-term tenants regarding casual mall leases is only effective if it evolves to address the issues and concerns of all parties. We suggest that the SCCA application does not consider the issues raised by stakeholders with them, including an existing Code Administrative Committee member, the Australian Retail Association. As such we suggest that the Code itself must be reviewed objectively and independently considering all the issues brought forward by interested stakeholders. This application should not be granted until an independent review of the effectiveness of the Code is undertaken. This is something our Office would be happy to undertake in conjunction with State Small Business Commissioners and other State and Territory government representatives.

A lack of disputes may indicate the existing mechanism isn't working

We acknowledge there are dispute resolution mechanisms in the Code. We are concerned that there have been no formal disputes under the Code since re-authorisation in 2013. Retail tenancy disputes are a common issue for regulators yet there has been nothing progressed formally under the existing Code. This could indicate the existing mechanism isn't working effectively. Similarly, the suggestion by the SCAA that the lack of formal complaints² implies there are no issues with the operation of the Code is misleading.

Stakeholders have indicated to us that there are complaints about casual tenants. These are usually raised with the landlord in the first instance and then often with the small business tenants industry group. Stakeholders have also advised us that following the process in the Code often does not result in resolution or prevent future occurrences. This relates to the fact that by the time a complaint is registered, the source of the complaint (i.e. casual tenant), has often moved on. In addition, as raised earlier in our submission, we note reports of how the promotion of the Code as justification of a landlord's decision.

The obligations in Section 3 of the Code require a lessor to provide information to the lessee including:

- the casual mall licence policy,
- a copy of the Code and
- the name of the person to deal with in the event of a complaint.

Stakeholders have noted that this information, particularly in relation to dispute resolution, is sometimes not provided to a long-term tenant.

² SCAA Supplementary Information, Disputes under the Code, page 6

We note the proposed amendment to the Code by the SCAA is to approach the Small Business Commissioners for a mediator to any dispute. We suggest that the amendment should include our office (the Office of the Australian Small Business and Family Enterprise Ombudsman) as a source for advice on mediators in jurisdictions without a Small Business Commissioner. In addition, we believe our office and the State Small Business Commissioners should be identified in the Code as an alternative dispute resolution options.

The Code Administration Committee membership should be expanded

We noted with interest SCAA's supplementary information suggested altering the composition of the Code Administration Committee (CAC). This highlights the exclusion of the Australian Retailers Association (ARA) from the CAC. We also note the comment that this fact is conveyed to the ACCC for information only and not relevant to its deliberations. We disagree. It is important that in any Code, parties that are directly affected by it should have ownership of it. ARA has been a long-standing member of the Committee and we are advised that they wish to continue in this role.

Similarly, we would note that the CAC, in its current form, has not been functioning as intended to undertake its role and has not met on a regular basis. Stakeholders informed us that the CAC has only met once (in April 2017) since the Code was renewed. The ARA informed us that they were unable to attend that meeting, at which the decision to renew the code was agreed. Furthermore, other industry stakeholders have expressed interest in joining the Committee, including the Franchise Council of Australia. A diverse and representative CAC is integral to the success of the Code.

We hope these comments assist your deliberations. Please feel free to contact either myself or Mr James Strachan, by telephone 02 62631537 or email james.strachan@asbfeo.gov.au if you have any questions relating to this submission.

Yours sincerely,



Kate Carnell AO

Australian Small Business and Family Enterprise Ombudsman