



**Small Business
Development Corporation**

Your ref: 62637
Our ref: D17/4678

Mr Darrell Channing
Director, Adjudication Branch
Australian Competition and Consumer Commission
GPO Box 3131
CANBERRA ACT 2601

Dear Mr Channing

**SHOPPING CENTRE COUNCIL OF AUSTRALIA APPLICATION FOR
RE-AUTHORISATION A91591 & A91592 – CASUAL MALL LICENSING CODE OF
PRACTICE**

Thank you for your letter dated 4 August 2017 inviting comment on the application from the Shopping Centre Council of Australia (SCCA) for re-authorisation of the Casual Mall Licensing Code of Practice ('the Code').

The Small Business Development Corporation (SBDC) is an independent statutory authority of the Western Australian Government whose primary role is to encourage, promote, facilitate and assist the establishment, growth and development of small businesses in the State. This is achieved by providing free advice and guidance, as well as education and skill development programs, to Western Australian small business owners. This includes the provision of specialist information and guidance to small business landlords and tenants on the *Commercial Tenancy (Retail Shops) Agreements Act 1985* and all aspects of negotiating and leasing business premises.

Through the Small Business Commissioner, the SBDC also offers an alternative dispute resolution (ADR) service in relation to small business disputes, including a prescribed role in commercial tenancy disputes. The ADR service gives small businesses an opportunity to resolve disputes without the need to engage in a formal legal process. Early, effective ADR can have a positive effect on maintaining ongoing business relationships, which is particularly vital in a commercial tenancy sense given the long-term nature of retail shop leases.

The SBDC has previously made submissions in relation to this matter, initially prior to the introduction of the original Code in 2007 and again when it was re-authorised in 2012. These earlier submissions outlined our primary concerns regarding the potential impacts of the Code's provisions on long-term tenants at shopping centres.

While it should be noted that casual mall leasing is not a major issue raised with us by small business lessees in Western Australia, the SBDC remains of the view that:

- Casual mall licences should not be granted for longer than 30 days; enabling a lessor to grant a casual mall licence of up to 180 days is excessive and could impact negatively on an existing lessee's business (Clause 1).
- Any interference with sightlines to an existing lessee's shopfront should be prohibited rather than only if it "substantially interferes" (Clause 5.1).
- An external competitor that competes with an existing adjacent lessee should not be granted a licence (Clause 6.1).
- Special events should not be excluded from the Code provisions; however, if retained, the requirement for the lessor to give existing lessees only 24 hours notice is grossly insufficient (Clause 7).

The latest application for re-authorisation would extend the voluntary Code for a further five year period, from 1 January 2018 to 31 December 2022. It is understood that the application proposes that the Code largely be the same in intent and operation, subject to minor "machinery" amendments agreed to by the parties to the Code.

In line with these proposed machinery amendments, the SBDC notes with interest that the latest application for re-authorisation no longer has the Australian Retailers Association (ARA) as a Code signatory.

The SBDC is aware that the ARA – which claims to also be acting on behalf of two of the country's largest retail industry groups, the Pharmacy Guild of Australia and Franchise Council of Australia – has significant concerns with the current Code which have not been effectively addressed by the SCCA as the primary signatory. The ARA has advised the SBDC that it has withdrawn its support for the Code as it has ongoing issues in relation to product mix, location and the Code Administration Committee's efficacy.

Specifically, the ARA has written to the SBDC indicating that it has been seeking agreement from the SCCA to amend the Code Preamble to give more weight to the potential direct and unfair competitive threat posed by casual mall lessees to long-term shopping centre tenants, in line with the narrow definitions of "adjacent lessee" and "competitor".

Added competition from temporary stalls could be considered unfair and particularly damaging to existing lessees, especially when (even if not directly competing in terms of product mix) these businesses are competing for consumers' discretionary dollar or impulse purchase. This opportunity cost is especially critical given the tough economic conditions and shifting consumer preferences currently impacting the retail industry in Western Australia.

The SBDC understands that the ARA also wants further consideration given to rent reductions for incumbents, in line with the adjustments to non-specific outgoings set out under the Code. Casual mall licensing enables landlords to obtain additional revenue, with no benefit to the long-term tenants.

The SBDC believes the same logic should apply to rents as applies to outgoings; while the formula may need to be different (as the beneficiaries of any adjustment should be the affected tenants), the broad principles of fairness and equity should be the same.

In addition, the association wants greater obligations placed on shopping centre owners to consult with tenant representatives in relation to their casual mall licensing policy and is also seeking enhancements to the operation of the Code Administration Committee.

In principle, the SBDC supports measures that further protect the rights of existing tenants, especially in regards to improving fairness and access to dispute resolution. We would not be supportive of any arrangement that could change the current position in a manner that detrimentally affects the livelihoods of long-term tenants that were not evident at the commencement of the lease. In other words, the Code should not be drafted and used for the purpose of increasing the investment returns of shopping centre lessors at the expense of long-term small business lessees.

Generally speaking, the SBDC sees the benefits of casual mall leasing provided they add variety to the retail mix of a shopping centre and create events that increase the amount of foot traffic passing through. If the concerns raised in this submission can be addressed, the SBDC believes the Code has the potential to provide ongoing benefits to shopping centre landlords, existing small business tenants, casual mall lessees and consumers.

Striking the right balance between competing interests and healthy competition remains the key.

Yours sincerely



David Eaton
SMALL BUSINESS COMMISSIONER

28 August 2017