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Dear Mr Channing

**Shopping Centre Council of Australia Ltd – Application for re-authorisation of the Casual Mall Licensing Code of Practice (A91591 and A91592)**

Thank you for the opportunity to make a submission to the Australian Competition and Consumer Commission (ACCC) in relation to the Shopping Centre Council of Australia's (SCCA) application for re-authorisation dated 4 August 2017.

As the NSW Small Business Commissioner, I have been appointed to support small businesses in NSW by:

- providing dispute resolution services
- delivering quality business advice through Small Biz Connect, and
- speaking up for small business within government.

The Dispute Resolution Unit of the Office of the NSW Small Business Commissioner also incorporates the functions of Registrar of the Retail Tenancy Unit and responsibility for the administration and review of the *Retail Leases Act 1994* (NSW). One of the roles of the Unit is to provide:

- information and assistance on retail leasing matters to retail landlords and tenants, and
- mediation services when retail lease disputes arise to facilitate their prompt resolution.

I support the development of voluntary industry codes of conduct to ensure industry cooperation to address contentious issues. The *Casual Mall Licensing Code of Practice* has the potential to provide an appropriate and reasonable balance between the interests of permanent retail tenants and casual mall licensees within a shopping centre.

I support industry-led solutions to issues and have worked with key stakeholders in the motor industry to make amendments to the *Motor Vehicle Insurance and Repair Industry Code of Conduct* in order to address industry issues.

I have reviewed the application of the SCCA and do not support the re-authorisation of the Casual Mall Licensing Code of Practice (the code) without further consultation and potentially

a number of amendments. In the absence of any evidence to support the SCCA's claims that the Code is operating successfully and achieving its objectives, the reverse could equally be deduced and has been represented to me that the operation for tenants is far from satisfactory.

Contrary to the claims of the SCCA, the absence of formal complaints does not necessarily indicate that there is widespread compliance with the code among shopping centre landlords. It furthermore does not support claims in relation to the effectiveness of the code in achieving its objectives of providing protections to retail tenants in retail shopping centres from the unreasonable introduction of external competitors.

In my experience assisting small businesses in industries characterised by significant imbalances of power (for example, the motor and retail leasing industries), small businesses are often reluctant to exercise their rights and bring formal complaints out of fear of retaliatory action by the dominant party in the commercial relationship.

#### *Lack of transparent administration*

The ACCC's *Guidelines for developing voluntary industry codes of conduct* note that codes of conduct are more effective in regulating market behaviour where there are transparent mechanisms for administration and the appointment of Code Administration Committee (CAC) members, regular external reviews, annual reporting and an external dispute resolution mechanism. The absence of these mechanisms from the *Casual Mall Licensing Code of Practice* (the Code) advances a lack of transparency with the administration of the Code.

#### *Lack of industry representation on the CAC*

While I supported the authorisation of the Code in 2013, the withdrawal of a key stakeholder, the Australian Retailers Association (ARA), represents a lack of balanced industry representation on the CAC. The SCCA's application states that its members own and manage around 500 shopping centres in Australia accounting for almost three quarters of all shopping centre *floor space*. The SCCA website states that its 25 members co-own 480 centres in Australia and quotes an Urbis figure of a total of approximately 1753 shopping centres in Australia. It is estimated that the SCCA represents approximately 27 percent of *shopping centres* in Australia. The ARA claims 5000 members Australia-wide. Australian Bureau of Statistics data calculates that there are over 170,000 retail businesses in Australia. It is estimated therefore that the ARA may represent approximately 3% of retailers in Australia (**Attachment A**).

The primary objective of the Code is to regulate the conduct of Shopping Centre landlords to moderate the impact of casual mall licences on their retail tenants. The withdrawal of the ARA signifies the withdrawal of an important check on the balance of power within the CAC and administration of the Code. The absence of the Franchising Council of Australia and the Pharmacy Guild as signatories is also of concern.

Compliance with the Code is voluntary for the shopping centre members of the SCCA. In a random sampling of retail Lessor's Disclosure Statements conducted by the OSBC, all Shopping Centre landlords had ticked "no" to clause 26: "*Do you adhere to the Shopping Centre Council of Australia's Casual Mall Licensing Code of Practice?*"

In the absence of any reporting, there is little evidence of compliance with the Code. I cannot support maintaining a perfunctory Code that is largely unknown to the shopping retailers it provides protections to.

#### *Code of Conduct regulate the collection and reporting of retail tenants' turnover data*

One of the outcomes of the recent review of the *Retail Leases Act 1994* (the Act) was a commitment to NSW Government by a number of key retail industry stakeholders that an industry-led voluntary code of conduct to manage the collection and reporting of tenants' turnover data would be developed as an alternative to the proposal for a mandatory code prescribed by the Act.

This Code is intended to put arrangements in place to allow turnover figures (which are disclosed by tenants to landlords) and operating costs (held closely by landlords) to be shared across the industry. The industry associations have been delighted by the negotiation of this code and anticipation of it coming into force. The associations were to nominate two members each for the Code Administration Committee and sign the agreement by the end of June 2017.

The Shopping Centre Council of Australia (SCCA) has not provided their nominees and the Code remains unsigned.

Industry associations representing retailers are disappointed with the outcome. The objective of the code was to address one of the most contentious issues of the review. Industry associations representing retailers agreed to forgo a number of protections that were proposed by amendments to the Act in favour of the voluntary industry code. This raises doubt as to whether industry is able to collaborate on effective self-regulation to manage issues in the retail market.

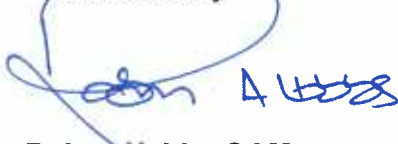
For this reason, I only support the re-authorisation of the Code subject to a number of amendments:

#### **Recommendations for amendments**

1. The introduction of transparent mechanisms for the appointment of members to the CAC with minimum and maximum terms, regularity of meetings, voting quorums, and publication of meeting minutes;
2. A maximum period of time (48 hours) for shopping centre management to respond to a complaint;
3. A requirement to have greater industry representation of retail tenants on the CAC;
4. A requirement to publish on the SCCA's external website an annual report noting expenditure on marketing the code and shopping centre members who apply the Code and comply its obligations;
5. An external review undertaken prior to re-authorisation;
6. The Code is renewed for a further three (3) years; and
7. The inclusion of a Schedule to the Code of state Small Business Commissioners for the provision of independent external dispute resolution.
8. A commitment by the SCCA that their members will comply with the Code.

I support the extension of the current code for a limited period of time while consultation on the above amendments occurs broadly within the retail leasing industry. If you wish to discuss any of the issues raised in this submission further please contact Nicola Gorton, Senior Mediation Officer on (02) 8222 4882 or email [nicola.gorton@smallbusiness.nsw.gov.au](mailto:nicola.gorton@smallbusiness.nsw.gov.au).

Yours sincerely



**Robyn Hobbs OAM**

NSW Small Business Commissioner

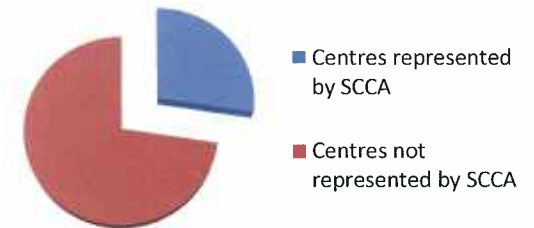
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## ATTACHMENT A: Retail industry representation by industry association

### Shopping centres represented by the Shopping Centre Council of Australia

The SCCA website states that its 25 members co-own 480 centres in Australia. The website also quotes Urbis figure of approximately 1753 shopping centres in Australia<sup>1</sup>. It is estimated therefore that the SCCA represents approximately 27% of shopping centres in Australia.

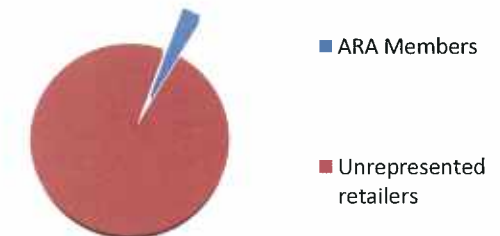
- **27% of shopping centres are owned by SCCA members**
- **73% of shopping centres are NOT owned by SCCA members**



### Retailer businesses represented by the Australian Retailers Association

The ARA claims 5000 members Australia-wide.<sup>2</sup> ABS data reveals that there are over 170,000 retail businesses in Australia. It is estimated therefore that the ARA may represent approximately 3% of retailers in Australia.

- **3% of retail businesses in Australia are estimated to be members of the ARA**
- **97% of retail businesses are estimated NOT to be members of the ARA**



### Number of retail premises held by members of the National Retail Association

The NRA claims to represent members who possess 19,000 stores or retail outlets in Australia.<sup>3</sup> In 2008 the Productivity commission estimated that there were approximately 290,000 retail leases in Australia. It is estimated therefore that the NRA's member represent approximately 6% of the retail premises in Australia.

- **6% of retail premises in Australia are estimated to be held by NRA members**
- **94% of retail premises are estimated NOT to be held by NRA members**



<sup>1</sup> Shopping Centre Council of Australia website [accessed on 27 April 2016] at: <http://www.scca.org.au/industry-information/key-facts/> and <http://www.scca.org.au/about-us/>

<sup>2</sup> "ARA Retail Institute" website. [accessed on 27 April 2016] at: <http://retailinstitute.org.au/about-us/>

<sup>3</sup> "Improving efficiency and competitiveness for Australian retailers" NRA Submission to Productivity Commission (May 2014); "2013 Review of the New South Wales Retail Shop Leases Act 1994" NRA Submission (January 2014)

**ATTACHMENT B: Application for re-authorisation A91591 & A91592**

	<b>OSBC Comments</b>
<b>1. Summary</b>	<p>The SCCA's application states that the Code is the "same in intent and operation" as the mandatory code prescribed by the South Australian <i>Retail and Commercial Leases Act 1995</i> (the South Australian Code) subject to further minor, 'machinery' amendments at section 9.</p> <ul style="list-style-type: none"> <li>• The operation of the voluntary code is significantly different in its scope and operation to the mandatory code prescribed by the South Australian <i>Retail and Commercial Leases Act 1995</i> which is administered by the South Australian Small Business Commissioner, is mandatory in its application to all shopping centres, and has an impartial dispute resolution mechanism and enforcement mechanism.</li> </ul>
<b>2. Parties to the Code</b>	<p>The proposed parties are the Shopping Centre Council of Australia (SCCA) and the National Retail Association (NRA). The Australian Retailers Association (ARA) has withdrawn from the Code.</p> <ul style="list-style-type: none"> <li>• The SCCA represents Australia's major owners, managers and developers of shopping centres. The SCCA has 25 members (<a href="http://www.scca.org.au/about-us/members/">http://www.scca.org.au/about-us/members/</a>) representing 27% of shopping centres in Australia.</li> <li>• The NRA represents approximately 6% of retail businesses in Australia.</li> <li>• Retail tenants are not sufficiently represented on the CAC.</li> </ul>
<b>3. Casual Mall licensing</b>	<p>The SCCA undertook a survey of a representative sample of members: "Across the 'sites' identified in the survey, the average length of a 'booking, was around 12 days."</p> <ul style="list-style-type: none"> <li>• The claims in relation to satisfaction with the operation and effectiveness of the Code are not supported with data. The survey referred to has not been provided.</li> <li>• The survey does not show the minimum and maximum length of booking, reportedly some of which are half a day and others extend for weeks.</li> </ul>
<b>4. Market Definition</b>	<ul style="list-style-type: none"> <li>• No comment.</li> </ul>
<b>5. Public benefits</b>	<p>The application states that the Code is substantially similar to the South Australian Code and differs in substance only by the addition of a dispute resolution procedure (clauses 9 to 11), and code administration committee (clauses 14 to 16) and in the period of operation (clause 17 to 18). The SCCA claims that the Code has the same virtues as the South Australian Code which were described in the Second Reading speeches in the South Australian Parliament.</p> <ul style="list-style-type: none"> <li>• The operation of the prescribed mandatory South Australian Code is substantially different to the voluntary Code.</li> </ul>

## ATTACHMENT B: Application for re-authorisation A91591 & A91592

	<ul style="list-style-type: none"><li>• Extracts from the South Australian second reading speech do not give support to the claim that the voluntary code has the “same virtues” and is not a substitute for any meaningful evidence or data demonstrating the effectiveness of the voluntary Code.</li></ul>
<b>Reporting on obligations</b>	<ul style="list-style-type: none"><li>• The Code does not impose mandatory obligations on lessors and there is no requirement for the CAC to report against the Code’s obligations.</li><li>• Section 62A of the <i>Retail and Commercial Leases (Casual Mall Licences) Amendment Act 2001</i> (SA) makes it mandatory for shopping centre landlords to comply with the provisions of the Casual Mall Licensing Code.</li><li>• There is only a “strong recommendation” that the members of the SCCA apply the Code of Practice to shopping centres in all states and territories (therefore, it is optional).</li><li>• There is no enforcement mechanism and no independent dispute resolution mechanism.</li><li>• There is no reporting in relation to application and compliance with the obligations of the Code. There are no reporting obligations for the CAC members and the ‘parties to the Code’ / signatories are not provided. There is no voluntary agreement for members of the associations to be bound by the Code.</li></ul>