RESPONSE TO 'INTERESTED PARTY' SUBMISSIONS:
APPLICATION FOR REAUTHORISATION OF THE CASUAL MALL LICENSING CODE OF PRACTICE

OVERVIEW

The National Retail Association (NRA) and Shopping Centre Council of Australia (SCCA) are pleased to provide this submission to the Australian Competition and Consumer Commission (ACCC) in response to the 'interested party' representations received in response the joint-NRA/SCCA application for the reauthorisation of the *Casual Mall Licensing Code of Practice* (the Code).

The Code is something that the retail industry has worked on jointly and cooperatively over many years, and with great success. The NRA and SCCA wish this to remain the case.

It is pleasing that, during the consultation process, the National Online Retailers Association (NORA) has provided its support for the Code, noting in its submission that it was "*pleased to join with the NRA and the SCCA in their efforts to continue the existing, positive and balanced framework for the provision of short-term, 'pop-up' retail sites in Australia's shopping centres*" **(Attachment 1).**

We note that the submission received by the ACCC from the Australian Retailers Association (ARA), which is understood to also represent the views of the Pharmacy Guild of Australia (PGA) and the Franchise Council of Australia (FCA) is dated 8 September 2017. This submission was made available to the NRA and SCCA for response on 19 September 2017.

Despite having only five (5) working days to respond to the ARA's submission, the NRA and SCCA have provided this submission to the ACCC on 25 September, as requested. (In contrast, we note that the ARA had around five (5) weeks to prepare its response to the joint-NRA/SCCA application.) We understand that the ACCC made best efforts to ensure that the ARA's submission was provided to the SCCA and NRA in a timely manner but experienced delay in obtaining approval from the ARA to do so. We thank the ACCC for their efforts and courtesy in this regard.

SECTIONS OF THIS SUBMISSION

Across three sections, this submission:

1. Addresses the ACCC's public interest test, and responds to inaccurate claims made by the ARA regarding the actions of landlords;
2. Provides further context to the ACCC on the role, and modern practice, of casual mall licensing amidst the ongoing evolution of the retail and shopping centre sectors; and
3. 'Corrects the record' on a range of incorrect claims made about the activities of the NRA and SCCA, the history of the Code, and the operation of the Code.

ACTIVITIES SUBJECT TO REAUTHORISATION

Subject to the reauthorisation by the ACCC of the Code for a further five years (to December 2022), the NRA and SCCA would be pleased to engage further with other industry stakeholders and undertake a range of activities during the period of reauthorisation, specifically:

- The NORA, ARA, PGA and FCA will be invited to join the NRA and SCCA and become parties to the Code.
    - We note that it does not appear that the ARA disclosed to the Government stakeholders that, in June 2017, the NRA and SCCA agreed in-principle to 'new' stakeholders being involved in the Code. This correspondence was brought to the attention of the ACCC at the time (**Attachment 2**).
- The NORA, ARA, PGA and FCA will be offered representation (one representative each) on the Code Administration Committee (CAC).
    - This proposal is conditional on this increased retailer membership of the CAC being balanced by equivalent and equal representation from the SCCA. This will see a balance of five (5) retailer and five (5) landlord representatives (nominated by the SCCA) on the CAC. The CAC can take forward any necessary discussions about the Code during the period of reauthorisation.
- The SCCA will, with the engagement of the retailer parties to the Code, undertake an awareness and engagement drive to ensure continued high levels of ongoing compliance and awareness of the Code over the period of reauthorisation.

The NRA and SCCA believe that these proposed activities, which are balanced and appropriate, will address the concerns noted by stakeholders, and will provide an ongoing, and expanded, forum for parties impacted by the Code to engage in its administration and raise issues during the term of reauthorisation.

SUPPORT FOR REAUTHORISATION

It is pleasing that the majority of submissions received by the ACCC note strong support for the reauthorisation of the Code. This includes the support of a number of SCCA members - Scentre Group, Charter Hall, Vicinity Centres, DEXUS, Perron, QIC and Stockland.

The NRA has also provided an additional statement of support on behalf of its members.

As a reflection of the modern approach to casual mall licensing and the increasing interest in 'bridging the gap' between online and physical retail, it is pleasing that the joint-NRA/SCCA application also, now, has the support of NORA, Australia's newest, national retailer group, which represents the interests of 'New Retail' in Australia.

Critically, we note the key themes which form the basis of support for the Code, including achieving balance between lessor and lessee interests in the management of casual mall licensing, harmonisation of management across jurisdictions, facilitation of competition and choice for customers, provision of an innovation pathway for new retailers, provision of short-term opportunities for retailers, such as online retailers, to have a presence in 'bricks and mortar' environments, and the Code's role in the reduction of disputes regarding casual mall licensing.

ARA, PGA and FCA SUBMISSION

The ARA's submission, which is understood to also represents the views of the PGA and FCA (as they are referenced throughout the submission), and the related submission from the FCA, are very disappointing.

We do not consider the ARA's submission to be a faithful representation of its historical involvement with the Code, or of the issues which the ARA claims exist regarding the Code.

In our view, many of the issues raised by the ARA are 1) based on a mis-understanding of the Code's current drafting, 2) inconsistent with other claims it has made (both within its submission, and with earlier representations received from the ARA), or 3) are an inaccurate representation of the Code and other relevant legislation, including prevailing retail leasing legislation.

We are also concerned about the baseless and inflammatory, and extremely serious, allegations made against those organisations which use the Code, including claims of unconscionable conduct and the use of the Code in a 'coercive manner'. In our view, their allegations reveal more about the ARA's lack of understanding of competition policy and law and how the Code works, than they do about the behaviour of shopping centre landlords.

For the sake of completeness, we have had these allegations comprehensively reviewed by Australia's leading competition lawyers and, consequently, confidently refute the ARA's claims.

This is discussed further at section 1.02.

GOVERNMENT STAKEHOLDERS

We note the submissions received by the Australian Small Business and Family Enterprise Ombudsman (ASBFEO), the NSW Small Business Commissioner (NSW SBC), the Victorian Small Business Commissioner (VSBC), the WA Small Business Commissioner (WA SBC) and the Queensland Small Business Champion (QSBC)

We believe that Government stakeholders may have relied on certain inaccurate information or claims in formulating their submitted positions.

SECTION 1: COMPETITION FRAMEWORK

1.01 Public benefit v Public detriment

As a general comment on the representations received by the ARA, PGA and FCA, and NSW SBC, ASBFEO WA SBC and QSBC, these submitters have not engaged in the context or detail of the joint-NRA/SCCA application for reauthorisation of the Code, or with the role of the ACCC in assessing this application.

Section 88 of the *Competition and Consumer Act 2010* gives the Commission power to grant authorisations to corporations to:

> *"(a) to make a contract or arrangement, or arrive at an understanding, if a provision of the proposed contract, arrangement or understanding would be, or might be, a cartel provision; or*
>
> *(b) to give effect to a provision of a contract, arrangement or understanding if the provision is, or may be, a cartel provision,"*

and

> *"(a) to make a contract or arrangement, or arrive at an understanding, where a provision of the proposed contract, arrangement or understanding would be, or might be, an exclusionary provision or would have the purpose, or would have or might have the effect, of substantially lessening competition within the meaning of section 45; or*
>
> *(b) to give effect to a provision of a contract, arrangement or understanding where the provision is, or may be, an exclusionary provision or has the purpose, or has or may have the effect, of substantially lessening competition within the meaning of section 45;"*

Further, section 90 of the *Competition and Consumer Act 2010* provides that, in relation to determining an application for authorisation:

> *"(6) [the Commission is] …satisfied in all the circumstances that the provision of the proposed contract, arrangement or understanding, the proposed covenant, or the proposed conduct, as the case may be, would result, or be likely to* ***result, in a benefit to the public and that that benefit would outweigh the detriment to the public constituted by any lessening of competition that would result, or be likely to result****, if … (a) the proposed contract or arrangement were made, or the proposed understanding were arrived at, and the provision concerned were given effect to;"*

The purpose of the application for authorisation (or in this context, reauthorisation) is to seek "…*protection against legal action for certain conduct or arrangements that might otherwise breach the competition provisions of the Act*" (ACCC Authorisation Guidelines, 2013, page 2).

Further, "*the authorisation provisions recognise that, in certain circumstances, conduct or arrangements that may restrict competition can nonetheless be in the public interest*" (ACCC Authorisation Guidelines, 2013, page 2).

The role of the ACCC, in deciding whether or not to grant authorisation, is to assess whether "*a benefit to the public*" gained by conduct that might otherwise be considered anti-competitive (i.e. agreement among landlords to apply various 'barriers to entry' regarding casual mall licensing detailed in the Code) outweighs the public detriment of the lessening of competition.

This test has been applied to the Code on two prior occasions – in 2007 and 2012/13 - and, on each occasion, the ACCC has deemed that the public benefits of the Code, which are detailed in joint-NRA/SCCA application and generally noted in the ACCC's two prior Final Determinations (dated 29 August 2007 and 6 February 2013), outweigh the public detriment.

The Code has the same public benefits as it was previously perceived by the ACCC to have, and that have been detailed extensively in the current joint-NRA/SCCA application.

By way of summary, these include 1) the provision of certainty and transparency, 2) efficiency and harmonisation, 3) facilitation of retail competition, and 4) provision of a dispute resolution pathway.

To the extent the Code has an anti-competitive effect, that effect is no greater than it was in 2013, or in 2007.

As such, the public benefit of the Code continues to outweigh its public detriment.

1.02 Allegations of monopolisation, unconscionable conduct and acting in a 'coercive manner'

The NRA and SCCA cannot allow the ARA's claims regarding 1) the structure of the shopping centre sector, and 2) the behaviour of landlords with regard to the Code to be left uncorrected.

The ARA's commentary, in particular its accusation that landlords are acting unconscionably with regard to the Code's application, is inflammatory, ill-informed and unhelpful.

Shopping centres are not monopolies

Australian shopping centres are not monopolies.

The ARA is correct to state that "*Australian retailers establish their businesses in a variety of locations and premises across the country*" (page 1), the existence of Shopping Centres "*has allowed for retailers to flourish*" (page 1), the "*presence of shopping centres is advantageous to retailers seeking reliable premises from which to trade*" (page 3), and that "*shopping centres provide retailers with a range of services including secure and well-maintained premises, access to promotional activities, and a steady customer base*" (page 1).

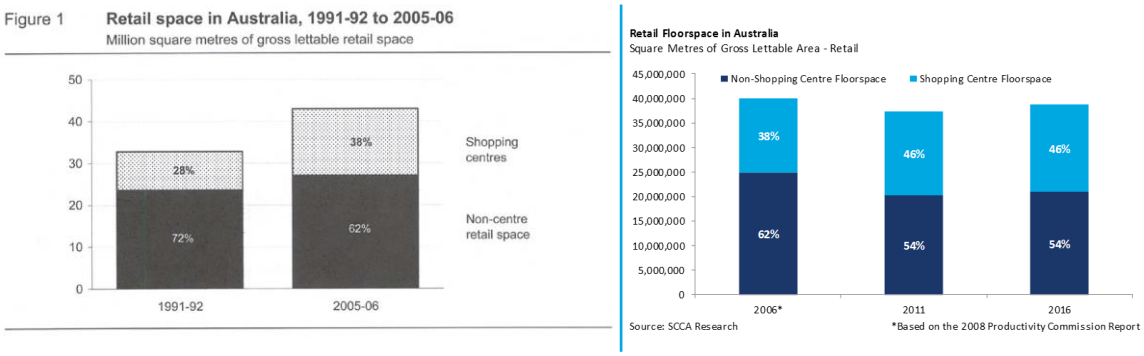
The ARA, however, is wrong to assert that "*perhaps the most widespread marketplace for retail trade is that of Shopping Centres*" (page 1). The ARA is further wrong to assert there exists shopping centre monopolies or that "*shopping centres in Australia operate in a closed market situation, which is disadvantageous to the bulk of retailers seeking a viable and competitive environment…*" (page 3), "*centres operate in isolation from one another*" (page 3), and "*in most cases outside of Inner-Metropolitan areas, multiple centres are not located within close geographic proximity to one another*" (page 3).

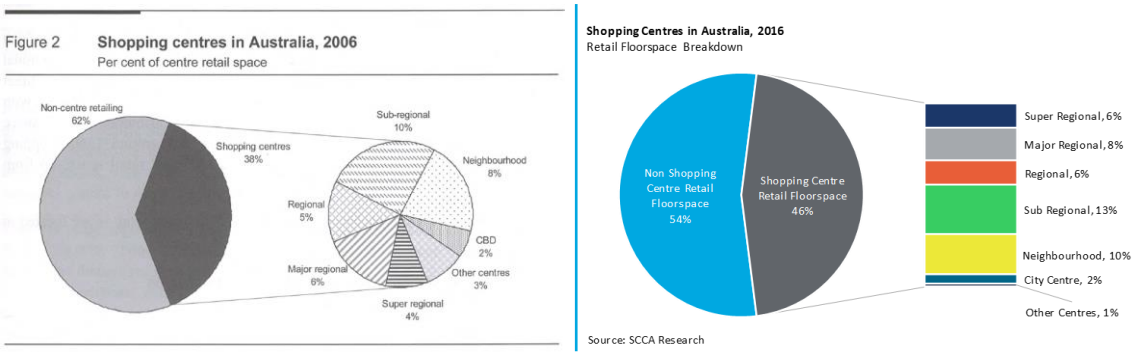
An initial point that needs to be made is how Australia's land-use planning schemes operate, which have been continually based on an 'activity centres' policy approach. In essence, these seek to consolidate major retail uses, and other uses and services (e.g. government, public transport), in order to ensure overall public benefit through issues such as labour agglomeration, infrastructure efficiency, sustainability, as well as competition. Indeed, the Federal Government's 'cities agenda' seeks to reiterate this approach.

This policy approach has remained in place over-time, and has also been critiqued via previous inquiries by the ACCC and Productivity Commission. More recently, the Harper Competition Policy Review recommended that "*…state and territory governments should subject restrictions on competition in planning and zoning rules to the public interest test, such that the rules should not restrict competition unless it can be demonstrated that the benefits of the restriction to the community as a whole outweigh the costs, and the objectives of the rules can only be achieved by restricting competition*" (Competition Policy Review Final Report, page 131). The SCCA is on record as supporting this recommendation.

There is, in fact, a great variety of space available to retailers from which to conduct their businesses both inside and outside shopping centres. These include free standing shops (some in traditional shopping strips alongside roadways, others separated by varying distances from other shops), shops grouped together under the one roof and connected wholly, partly, or not at all, by enclosed walkways, and shops in office complexes, industrial factories and residential areas. Shops exist individually, or in groups under the one roof, in all manner of physical combinations, construction standards and locations. Shoppers shop across the range of shops in the metropolitan area. All the types of retailers that trade from shopping centres also trade in significant numbers from shops located outside those centres.

The Productivity Commission undertook a comprehensive inquiry into "The market for Retail Tenancy Leases in Australia", with its final report released in March 2008. The Productivity Commission's final report contained the following figures (left), which are adjacent to updated analysis for 2016 (right):





In 2016, there remains a greater proportion of retail floorspace outside of shopping centres. (Caution should be taken when comparing figures between years as different assumptions may have been adopted; for example, bulky goods and market floorspace is excluded from the 2016 figures).

The fact is that within, and overlapping with, the main trade area of invariably any shopping centre in Australia there is alternative physical retail space available to lease or to buy both inside competing shopping centres and outside. As noted above, Australian shopping centres are not monopolies. Further, and in any event, it must be recognised that retailers themselves are not confined to leasing space and trading from space within a particular trade area. They are certainly not limited to establishing and leasing a shop, say, within a radius of 10km from their place of residence. Retailers, in fact, can and do establish stores thousands of kilometres from their registered place of business. For the vast majority of retailers the reality is, when considering leasing space at one location or another, that they are not limited to a single 10km radius area but can choose to establish a first, second or further store anywhere across a city or even the country. Shopping centre landlords compete with each other and other owners of retail space across this diverse range of locations to lease space to these retailers.

Since the Productivity Commission's report in March 2008, a significant shift and growth in the "*marketplace for retail trade*" has been online. In 2017, retailers can now make a significant portion of their sales online, need less and less to be located in physical stores, and are taking advantage of these opportunities in ever increasing numbers and quantities.

Shopping centre owners and other landlords of retail space are being challenged by this online competition as retailers now have the option of retailing via an online presence rather than having to have a physical store.

Having regard to the above, the ARA's suggestion that there exists in Australia shopping centre monopolies indicates either that the ARA does not understand what it means to have a monopoly or is prone to great exaggeration. The NRA and SCCA suspect it is a combination of the two.

The ARA's statement below concerning the "*dominance of shopping centres*" (page 4) is similarly misinformed and exaggerated:

> *"The dominance of shopping centres within their respective local areas diminishes the consumer market places within which they operate, allowing them to substantially control the market. Should a retailer wish to establish their business within a certain catchment, area, region or suburb, their access is severely limited due to the power of shopping centres within their locales, limiting the options for retailers to seek economically viable tenancies outside such centres."*

The Productivity Commission found in its inquiry in 2008 that (page XXV):

> *"Overall, the market is working reasonably well — hard bargaining and varying business fortunes should not be confused with market failure warranting government intervention to set lease terms and conditions. Generally,*
>
> - *there is no convincing evidence that systemic imbalance of bargaining position exists outside of shopping centres;*
> - *in larger shopping centres, there is stiff competition by tenants for high quality retail space and competition by landlords for the best tenants, reflected by relatively low vacancy rates and high rates of lease renewals; and*
> - *the more desirable tenants and shopping locations are able to negotiate more favourable lease terms and conditions."*

Particularly pertinent were the Commission's statements that 1) "*…the Commission considers that the shopping centre 'package' is a retail tenancy arrangement that tenants can either accept, negotiate around, or reject in favour of other tenancy options elsewhere*" (page 248), and 2) "*the Commission also accepts that a shopping centre might be the preferred venue for many retailing activities, with retail space in centres highly prized by prospective and existing tenants. However, the decision to bid for that space, in terms acceptable to the landlord, is a commercial one, and the consequences of this decision does not make the case for government intervention*" (page 248/249).

The ARA likes to portray retail landlords as the 'big guys' in any retail lease negotiations and retailers as the little guys but this itself ignores the facts, again as found by the Productivity Commission, that "*…many specialty retailers are part of a national chain or larger franchise arrangement. For example, Colonial First State Property Management states that in its portfolio of centres, approximately 80 per cent of leases involve tenants that are part of a national chain (submission no. 78, p. 6). Similarly, Stockland reports that almost 60 per cent of its retail tenants \ are multistore 'chain' retail tenants (submission no. 88, p. 4)*" (page 31).

Further, it is worth noting that, while retailers have the choice of leasing space inside or outside a particular shopping centre, whether at a competing shopping centre, retail precinct, free standing shop, or shop in an office complex etc, it is a commercial imperative for the landlord of that particular shopping centre to ensure its retail space on offer is fully occupied. Aside from the obvious holding costs and loss of rent occasioned by having available retail space left vacant, vacancies at a retail centre materially affect the overall ambience of the centre and its customer drawing power - hence affecting its overall appeal to retailers and the rentals that the landlord can achieve. Consequently, there is a real economic driver and necessity for landlords of shopping centres to fully let the retail space available at their shopping centres, with this driver and need giving retailers, including all types of specialty retailers (not just those referred above), significant countervailing negotiating power.

Landlord are not acting unconscionably or in a 'coersive manner'

In light of the countervailing power that retailers have by virtue of the above, their own size and options to locate elsewhere (or retail online), it is incorrect for the ARA (and contrary to actual practice) to say that "*…upon entering into a lease arrangement within a Centre, retailers are in effect subject to a sole arbitrator dictating the terms of their trade*" [or that] "*…many retailers are bound to accept the terms of the Code as a condition of their lease agreements*" (page 4).

Nothing in or concerning the Code prevents a tenant requesting and negotiating with landlords for greater protections than are provided for under the Code. The Code, in fact, assists retailers in those negotiations by giving them a high starting base upon which they can then negotiate for greater protections. Lease negotiations where retailers ask for, and are granted zones, of exclusivity around their store (including in respect of causal mall licenses) are relatively commonplace.

Even where shopping centre owners are not prepared to negotiate more generous (i.e. more protective, anti-competitive) terms than the Code in relation to an individual retailer to protect that tenant from casual mall competitors, it is an enormous stretch for the ARA to suggest that a shopping centre owner has thereby engaged in "*unconscionable conduct*" (page 5).

The fact is that there are good reasons why shopping centres might refuse granting additional protections and thereby maintain flexibility as to whom they lease retail space and as to the tenancy mix they might seek to achieve at their centre.

If a shopping centre doesn't maintain an appeal to all of its customers (i.e. have the right 'tenancy mix') it will lose customers and stagnate. That will be to the detriment of its tenants (as a whole) as much as the centre's owners. Changes to the tenancy mix of shopping centres, as well as fairly regular redevelopments, are therefore a very necessary fact of life. Management of the tenancy mix is a constant and evolving process designed to maximise the customer pulling power of the centre for the benefit of all retailers.

The evolution of retail, and recent trends in this regard, are discussed further at section 2.

In any event, the Code only sets minimum standards to which SCCA members have committed which are to the benefit of their permanent tenants. The Code is not "*a self-serving carte blanche for shopping centre landlords only*" (page 14) since it protects retailers and, in fact, impinges SCCA members. Without the Code, retail tenants are still left with, and may rely on, their substantial other legislative rights (under State based retail tenancy legislation) which are extensive – albeit not specifically direct to casual mall licensing.

The fact that "*when concerns are raised*" about the location of a casual trader, "*landlords will in some cases produce the Code to defend the location practices of Casual tenants*" (page 7) is unremarkable, and certainly not unconscionable, given that the Code would in that instance represent the standard of protection they have committed to the retailer to grant.

Similarly, the suggestion that the Code is then being "*used in a coercive manner against permanent tenants when concerns are raised*" (page 5) is nonsense.

As noted above, the Code sets minimum standards to which SCCA members have committed which are to the benefit of their permanent tenants. The Code does not place obligations on permanent tenants so we can't see how a permanent tenant could be 'coerced' with regard to the operation of the Code.

1.03 ARA's proposed amendments to the Code

The NRA and SCCA do not support the amendments to the Code proposed by the ARA.

The ARA does not reflect in any detail on the public interest versus public detriment test with regard to their proposed amendments to the Code. They also don't acknowledge that their proposed amendments would, in application, make the Code more anti-competitive by, for example, broadening the definition of 'adjacent lessee' to include a 'reasonable line of slight' test.

Although no specific amendments are proposed, we also note that the ARA seeks the review and amendment of the various clauses relevant to the definition of 'competitor'.

We note, however, that the ARA seems to, at some parts, be confused in its interpretation and explanation of the Code, including with regard to the definition of 'adjacent lessee' and the distinction between 'line of sight' and 'sightlines'.

For example, the ARA states that "*under the current definition within the Code, adjacent lessees may exist either in front of or to the immediate aside of a permanent tenant*" (page 8). An 'adjacent lessee' under the Code is a 'permanent tenant'. We do not understand the ARA's confusion in this regard.

With regard to the ARA's recommendation that a 'line of sight' test (so to speak) be added to the definition of 'adjacent lessee', it is the NRA and SCCA interpretation that this would have the effect of considerably broadening the existing, clear parameters which guide the locations a casual mall licensee, which is a competitor of any given 'adjacent lessee', can be established relative to that 'adjacent lessee' i.e. the definition would be broadened to, in effect, any lessee which can be 'seen' from the casual mall licence area.

Apart from being considerably more anti-competitive, it would also be near impossible to apply in practice in a large and, potentially, multi-level shopping centre (i.e. 'line of sight' could extend between levels). In a smaller shopping centre, 'line of sight' could extend to a considerable portion of a centre's retailers.

However, having made this recommendation, the ARA goes on to provide an example of a casual licensee being set up "*…immediately in front of or immediately to the left or right of…*" a pharmacy (page 8), explaining that "*this is not reasonable, as it impacts directly on the line of sight of the permanent tenant*" (page 8). In this context, they also state that "*…retailers lease shops in shopping centres for a number of reasons, not least for the convenience provided by clear sightlines…*" (page 8).

In its submission of support for the ARA's submission, the FCA also indicates a misunderstanding about the definition of 'adjacent lessee' and the premise of 'line of sight', by seeking "*improvements to the interpretation of adjacent lessee, to include the provision of reasonable line of sight so as to prevent a competitor from obstructing a permanent tenant's retail shop*" (page 2).

Sightlines are dealt with at clause 5 of the Code, which deals with obstructions to the sightlines of any lessee in a shopping centre, not just an 'adjacent lessee'. The proposal to include a more anti-competitive 'line of sight' test in the definition of 'adjacent lessee' is not relevant to 'sightlines' to a 'permanent tenant'.

In the context of the application of the Code, it seems as though the ARA, FCA and PGA are confusing the concepts of 'line of sight' and 'sightlines' and, in doing so, have proposed a considerably more anti-competitive outcome.

With regard to the ARA's proposal to, at clause 9 of the Code, introduce a 14-day timeframe within which a nominated person must respond to a complaint regarding an alleged breach of the Code, we are concerned that the ARA may not have read the joint-NRA/SCCA application to the ACCC which notes that the average length of a casual mall 'booking' was 12 days.

In light of the above, the current drafting at clause 9, which requires a response "*as soon as practicable*", remains of more utility to retailers than the ARA's proposed 14-days.

1.04 Retail leasing legislation does not protect from the introduction of competitors

The ARA has not faithfully represented to the ACCC the management of 'competitive mix' in shopping centres.

The ARA states that "*permanent tenants enter into their lease arrangements on a good-faith basis, with the understanding that competitive mix remains largely unchanged*" (page 6). They go on to state that "*tenants thereby enter lease agreements aware of who their permanent competitors will be*" (page 11).

These are not accurate statements.

Although retail tenancy legislation exists to provide an extensive range of protections for 'permanent' tenants, including disclosure requirements, processes in the event of relocation or demolition, and outgoings disclosure, recovery and reconciliation, it does not provide protection from competition from other retailers (although, as noted at section 1, noting prevents a retailer seeking to negotiate relevant terms).

Shopping centre landlords are required to make appropriate disclosures regarding 'exclusivity clauses' to retailers entering a shopping centre.

For example, Schedule 2 of the NSW *Retail Leases Act 1994* - the 'prescribed form' disclosure statement – contains the following:

8	**Does the lease provide the lessee with exclusivity in relation to the permitted use of the premises? (see item 2.2)**	□ **Yes** □ **No**

Further:

2.2	**Is the permitted use described in item 2.1 exclusive to the lessee?**	□ **Yes** □ **No**

We do not know why the ARA are making these incorrect claims about the introduction of new retailers in a shopping centre which may be competitors of existing retailers in that centre.

Read in context, we expect the ARA may be attempting to exaggerate the perceived impact and uncertainty of the introduction of competition via the practice of casual mall licensing.

1.05 Stable competition?

We respectfully urge the ACCC to disregard the ARA's claims that they "*…do not seek to reduce competition…*" (page 11) and that specific issues are "*…not raised with the intent of placing limitations on, or stifling competition…*" (page 8), and that their concerns are raised as result of the "*…introduction of unfair competition…*" (page 6).

In our view, the ARA reveal their intent by stating that "*…the introduction of a Casual Lessee into a shopping centre often poses a threat to stable competition by way of both direct and indirect competition…*" (page 6).

We do not know what 'stable competition' means. However, when read in context, we interpret this to mean that 'permanent' retailers do not want any change, and certainly no 'increase', in the competitive mix they face.

We also note that the ARA expresses dissatisfaction with the introduction of "*indirect competition, where a competitor may not retail similar products or services, yet competes for discretionary or impulse purchases by customers…*" (page 6). This statement, which suggests a retailer should be protected from the presence of a casual mall licensee which isn't even a competitor of that retailer and is, in our view, revealing of the ARA's genuine views.

As discussed further at section 2, retail is a sector which continually evolves to maintain relevance and appeal to the customer. The apparent desire of the ARA, FCA and PGA for retail to 'stand still' is a concern and, in our view, reflects a particularly 'backward looking' perspective on the retail sector.

1.06 ACCC does not arbitrate the practice of CML

It is our view that the ARA has misinterpreted the role of the ACCC in relation to the reauthorisation of the Code. Specifically, the ACCC's role is to determine the application on the basis of the 'net benefit' test detailed in section 1.01 above. We do not call upon the ACCC to arbitrate or approve the practice of casual mall licensing.

SECTION 2: RETAIL AND SHOPPING CENTRES EVOLVE

Considering some of the claims made against the practice of casual mall licensing in the interested party submissions, the NRA and SCCA believe it would be useful to outline the broader context of where casual mall licensing sits in the market, and to also outline the role, and modern practice, of casual mall licensing amidst the various challenges and the ongoing evolution of the retail and shopping centre sectors.

This includes a key issue of consumer trends, which NORA references in its submission to the ACCC, where it is noted that "*customers are increasingly demanding multi-touch points with their brands of choice*" (page 1).

This section aims to provide some structure around what are otherwise general claims made against casual mall licensing in the marketplace.

Various submissions overlook the evolving nature of retail, such as consumer trends, online retail and store consolidation, and do not acknowledge the other 'headwinds' which are impacting the sector.

In turn, these submissions present a static or 'backward looking' perspective of retail in Australia and, in doing so, seem to take out their grievances, in relation to consumer and competition issues, on the activities of shopping centre landlords and the practice of casual mall licensing.

More than ever, landlords need to innovate, adapt and work hard to drive customers to their centre, and provide a rich and diverse experiential offering. Casual mall licensing has a critical role to play in this regard, and its own evolution has seen the attraction of new businesses and the conversion of some 'online' retail players into 'bricks and mortar' stores.

2.01 Consumer trends

Retail is a consumer market. It is driven by continually evolving consumer preferences, and retailers and shopping centres need to stay ahead of the curve and innovate and adapt accordingly.

It is therefore a simple, yet accurate, statement that the retail sector is constantly changing.

It is therefore critical that there are balanced frameworks in place, such as the Code, to facilitate, rather than curtail, experimentation, innovation and consumer engagement opportunities.

Two basic examples of broad and structural consumer trends affecting Australian retail over recent years are 1) the rise of overseas online shopping (late 2000s) and 2) the mass penetration of smart-devices (e.g. iPhone) giving rise to consumers increasingly reviewing products and doing their shopping online, while mobile, and in real-time, and connecting to social-media (such as consumer reviews). This has also given rise to what is broadly known as 'click and collect' and the convergence between online and brick-and-mortar retail.

More specifically, this includes the rise of the 'Millennial' demographic group (18-34-year-olds), which will also likely be a key driver into the future.

Consumers also increasingly want personalisation, experiences and a sense of 'exclusivity'. These concepts are no secret and are frequently canvassed in national and trade media.

Smart Company noted such issues in an article last year headed '*Top five retail trends to watch in 2017*' as follows **(Attachment 3)**:

1. 'Retailtainment' will take off
2. Personalisation will become increasingly important
3. Smaller shops are in, larger shops are out
4. Speciality stores will be more popular than department stores
5. Retailers that promote product quality and sustainability will flourish

As outlined in section 2.07 below, modern casual mall licensing has played a critical role in adapting, and responding, to these trends.

2.02 Companies announce change all the time

To illustrate change in the retail landscape, it is worth noting that companies, including retailers, announce changes all the time to adapt to emerging consumer and competition issues. This is frequently covered in the national media.

In the period preparing this submission, this includes 1) Shoes of Prey, shoe maker and 'e-tailer', announcing a move to capture the 'athleisure dollar' by making sneakers, 2) 7/11 moving into fresh food, and 3) Myer closing a number of their 'anchor' department stores.

Shoes Of Prey chasing the 'athleisure' dollar

Myer store closures offer new space at malls

SHARE TWEET MORE

Department store chain Myer is to close a further three stores as it focuses on its strategy of less is more and smaller.

Myer has already reduced its space by 24,368 square metres, being the closure of the Wollongong, Brookside and Orange stores as well as space handback at Cairns and Dubbo and the hand back of 50 per cent at the Queensland DC and more than 30 per cent of support office floor space.

7-Eleven boosts fresh food offering

7-Eleven CEO Angus McKay and chairman Michael Smith. Picture: David Geraghty

The Australian 12:00AM September 12, 2017

This highlights that retailers are constantly changing, including where changes have impacts on shopping centres such as through the closure, of reduction of the size of, stores. Some of them, however, are also looking to casual mall licensing opportunities in order to promote their brand, product and find new and adaptive touch-points with consumers.

2.03 ABS data reflects evolution

Changes in the retail sector, such as those noted above, are ultimately reflected in publicly available ABS data, Changes in the retail sector, such as those noted above, are ultimately reflected in publicly available ABS data, which at July 2017 accounted for $309 billion of annual retail sales, and since March 2013 has included an experimental data series that identifies online sales as a separate measure.

This includes trend analysis of ABS retail categories over time, and across jurisdictions. The table below demonstrates the change overtime (year-on-year) of the highest growth retail categories.

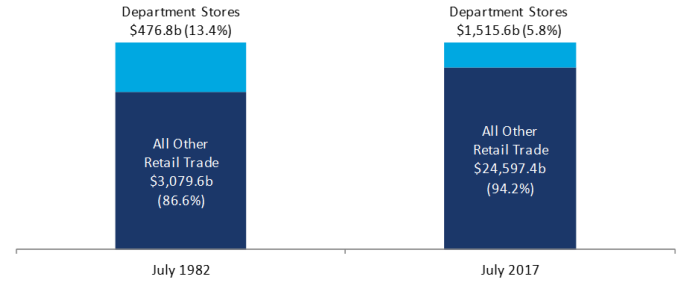
ABS Retail Turnover (Seasonally Adjusted) - July 2017

Highest Recorded Growth by Category (%) - Year-on-Year

	NSW	VIC	QLD	WA	AUS
Jul-07	Clothing, Footwear	Clothing, Footwear	Café & Rest.	Other	Food
Jul-08	Other	Clothing, Footwear	Other	Other	Other
Jul-09	Café & Rest.	Café & Rest.	Food	H'hold Goods	Café & Rest.
Jul-10	Café & Rest.	Café & Rest.	Café & Rest.	Café & Rest.	Café & Rest.
Jul-11	Other	Other	Food	Café & Rest.	Other
Jul-12	Café & Rest.	Clothing, Footwear	Other	Café & Rest.	Café & Rest.
Jul-13	Other	Food	Café & Rest.	Food	Food
Jul-14	Café & Rest.	Café & Rest.	Dept. Store	Food	Café & Rest.
Jul-15	Clothing, Footwear	H'hold Goods	Clothing, Footwear	Clothing, Footwear	H'hold Good
Jul-16	Clothing, Footwear	Café & Rest.	Clothing, Footwear	Other	Other
Jul-17	Food	Other	Other	Café & Rest.	Other

Source: ABS (Cat. No 8501.0) / SCCA Research

Further, other analysis of ABS data reveals that 'Department store' retailing, the traditional anchor for medium to large shopping centres, has gone from accounting for 13.4 per cent of total retail turnover in Australia in July 1982 to just 5.8 per cent by July 2017 – as illustrated in the chart below:



Source: ABS (Cat. No 8501.0) / SCCA Research

This echoes two earlier points in this submission; firstly that speciality stores will become 'more popular' than department stores (as noted in *Smart Company*), and secondly the recent announcement by Myer of closing several stores. Of course, such change also impacts the utilisation of shopping centre floorspace and tenancy mix overtime.

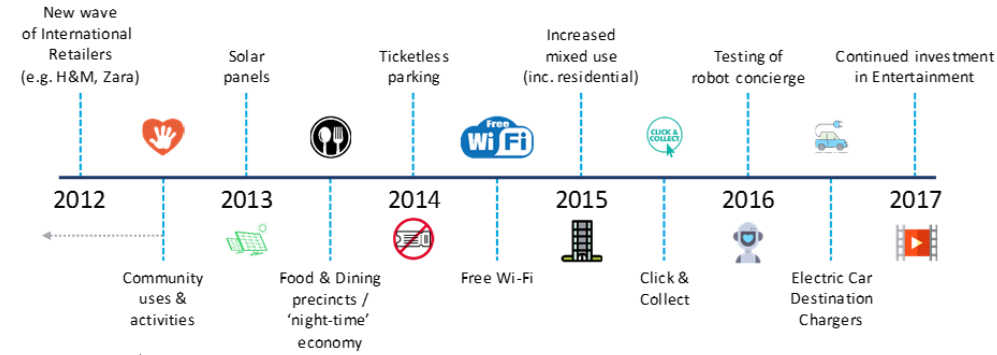
Over the same period (1982-2017), there has been a marked increase in the contribution to retail turnover by 'food' retailing a (up from 34.1 per cent to 40.3 per cent) and 'Cafes, restaurants and takeaway food services' retailing (up from 9.6 per cent to 14.2 per cent). This structural shift has manifested itself in the development of 'Food and Beverage' and 'Fresh Food' precincts in shopping centres throughout Australia and more competition in that customer offer.

2.04 Shopping centre evolution

There have also been significant leaps in the evolution of shopping centres in the last five-years alone, including with regard to tenancy-mix and engagement with customers to enable a more seamless experience.

This has been driven by the need to 1) maintain relevance to, and the engagement of consumers, 2) respond to the changing retail landscape, including the role of online retail and influx of international retailers, and 3) adapt to and implement technological advancement.

Some of the major changes in the last five-years are highlighted below:



Source: SCCA Research
Icon Source: flaticon.com

NOTE: Timeline is for illustrative purposes only.

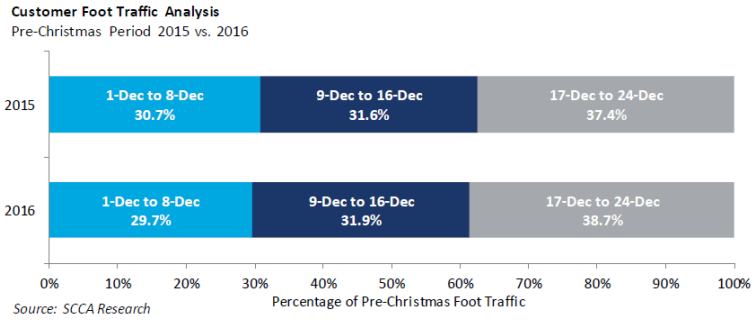
2.05 Seasonal impacts of online

The ASBFEO submission made a criticism against casual mall licensing, insofar that licensees can 'come and go', and in effect choose periods when customer foot traffic and sales volumes are likely to be higher than average (e.g. pre-Christmas).

In the absence of any critical analysis, this criticism is simplistic and overlooks the impact of, for instance, online shopping on shopping centres, and where casual mall licensing plays a critical role in helping to drive customers to shopping centres.

The SCCA's analysis of the 2015-2016 pre-Christmas trading period in NSW highlights some relevant issues in this regard - which have also been noted by independent retail analysts such as Citi.

A key issue, for example, is that customer foot traffic to shopping centres increased progressively across the three 'eight-day' periods up to, and including, 24 December (Christmas Eve). This is illustrated across 2015 and 2016 as follows:



Source: SCCA Research

Independently, Citi retail analyst Craig Woolford has noted a similar trend in independent research, in a post-(2016) Christmas briefing note titled*: "How Many Presents Were Under the Tree?: Australian Post-Christmas Retail Feedback for 2016".*

Citi noted as follows:

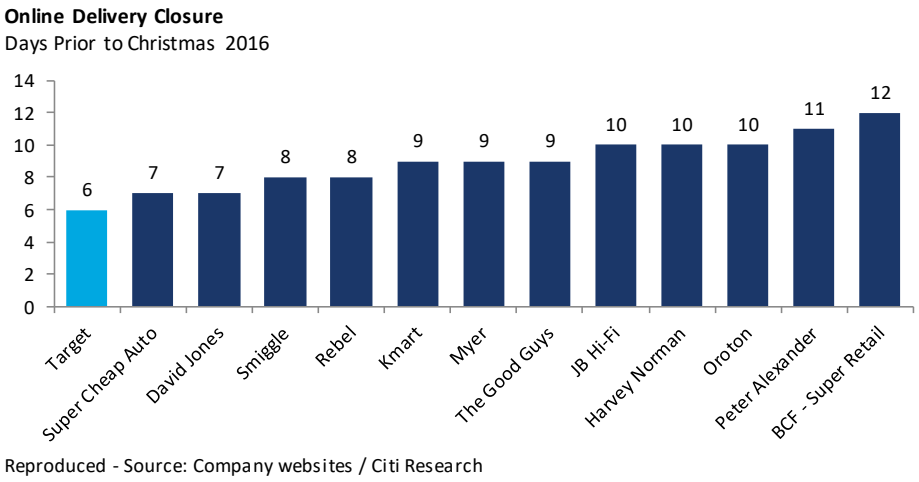
"Retail feedback for Christmas 2016 is a contract to the prior year with most retailers we spoke to reporting a weak start to December, a good two weeks leading into Christmas day and solid Boxing Day sales".

It is our view that this trend can be attributed to consumers shopping online in late November and early December to ensure that goods are delivered and received before Christmas Day and the commencement of the holiday period.

The above trend, across both the 2015 and 2016 periods, of relatively weaker consumer demand in early December compared with the demand closer to Christmas (including the most popular days being just prior to Christmas), also accords with other independent observations.

Citi has also noted a similar trend, in a report titled *"Online Retail Reshaping Christmas"* that the *"online peak is in late November and early December"*, and that the *"capacity to buy online is limited by the timeframe in which retailers can deliver before 25 December"*.

Citi illustrated this through the following chart, outlining the pre-Christmas deliver cut-offs for some national retailers:



Reproduced - Source: Company websites / Citi Research

In general terms, the above illustrates a key and detailed reason as to why landlords utilise casual mall licensing during seasonal periods, such as early December when customer foot traffic is relatively lower, as a mechanism to help drive customer foot traffic to their centres, and retailers, and maintain relevance to consumers.

2.06 The need to innovate will continue

Evolution and adaptability has never been more important, including with regard to the growth of online retailing

Similar to the issues noted throughout this section, it is critical that shopping centres are able to continue to innovate and adapt to best respond to the emerging challenges, such as the 'arrival' of Amazon in Australia, to drive customers to their centres and their retailers.

2.07 Modern casual mall licensing

In light of the range of issues noted above, the practice of casual mall licensing remains a critical tool in the context of facilitating the evolution of both the retail and shopping centre sectors. It creates dynamism and a regular sense of change.

It is synonymous with the hugely popular concept of 'pop-up' retailing and, increasingly, the concepts of 'retailtainment', exclusivity, experience and personalisation.

Landlords describe casual mall licensing in terms of opportunities for 'activation', and are placing a greater emphasis on working to develop and profile 'brand'. Casual mall licensing also continues to be leveraged to 'incubate' new retailers, including local 'providers' and small businesses.

Modern casual mall licensing has also led to the introduction of new service providers to the market which assists to bridge the gap between businesses looking for opportunities, and those businesses with available and appropriate space.

Examples of the modern, innovative and creative use of casual mall licensing opportunities include its use by (1) car retailers, such as Tesla and Jaguar, (2) Fast Moving Consumer Goods (FMCG), such as Allen's confectionary, Magnum and Cadbury, (3) residential property developers (i.e. to generate interest in new development and 'off-the-plan sales', and (4) consumer electronics, including Samsung. These come in addition to its use across a wide range of more traditional retail segments, including health and beauty, and fashion.

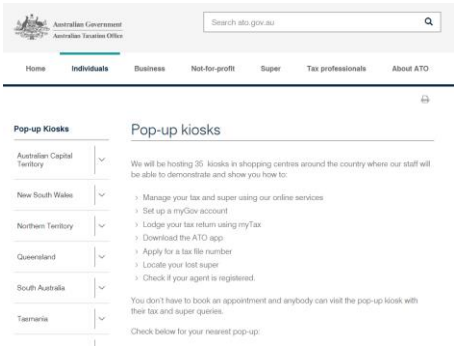


In their submission to the ACCC, NORA also notes that "*customers are increasingly demanding multi-touch points with their brands of choice*" (page 1). NORA goes on to note that 'pop-up' retailing offers this opportunity for online retailers looking to test a 'bricks and mortar' presence of an otherwise online retail platform.

Existing shopping centre retailers also utilise casual mall licencing to 'trade out' of their tenancies into the common mall. This provides short term opportunities for retailers to showcase their product, connect with customers, and grow their brand recognition and engagement. Examples of retailers which have utilised this opportunity include T2, Smiggle, Pandora, Aquila, EB Games, Cotton On Group, Body Shop, Priceline, Nespresso and Lush (not exhaustive).



Government agencies also utilise 'pop-up' opportunities. The ATO, for example, looks to uses the opportunity around 'tax-time' to provide shopping centre customers easy access to advice on tax matters.



Casual mall licensing also provides opportunities for Government agencies when widespread, but short term, customer engagement may be necessary. For example, during the roll-out of the Opal Card in NSW (tap and go on public transport in NSW), there were temporary Opal Card locations in a number of shopping centres.

SECTION 3: CORRECTING THE RECORD

3.01 No evidence of a systemic issue

We submit that there is no systemic issue with the application of the Code.

Critically, the ARA in its submission does not (as far as we can identify) disclose how many respondents there were to the survey they have undertaken to assist inform/detail their claims. As such, there is no way of understanding the scale of any potential issue in the context of the retail leasing market in Australia (tens of thousands of leases).

The ARA seeks to represent having "*issues with casual mall traders*" as, by default, having justifiable cause for complaint and, supposedly, the right to some sort of 'corrective' action.

A tenant declaring a 'self-determined' "*issue*" or a perceived lack of "*resolution*" with a casual mall licensee, or that a tenant has raised issues with their landlord, does not, in our view, definitively demonstrate that a landlord has 'breached' the Code in engaging with that tenant.

We also note that the ARA's commentary about the survey results are not necessarily a faithful representation of the findings.

For example, in our view the evidence provided by the ARA does not show that "*the increase in granting of Casual Mall Licenses has resulted in external competitors permitted to trade directly adjacent to a permanent lessee, and to sell identical or like products and services unreasonably*" (page 7).

The survey question of relevance to the above statement relates to whether "*issues*" experienced related to 'internal' or 'external' competitors, not whether external competitors have been "*permitted to trade directly adjacent to a permanent lessee, and to sell identical or like products and services unreasonably".* The ARA is drawing conclusions which, based on what has been provided in their submission, are not, in our view, supported by evidence.

3.02 Inconsistent claims about non-compliance

At various points of their submission, the ARA infers that there is systemic non-compliance with the Code, principally relating to the disclosure of information.

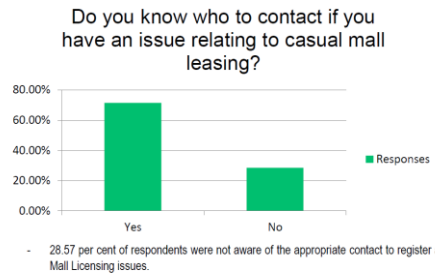
However, other statements in their submission contradict these claims.

For example, there is an obvious contradiction between the ARA's commentary and the survey results regarding information disclosure.

At two points, the ARA makes critical observations regarding the failure of landlords to make known to retailers who they should contact regarding a complaint with casual mall licensing, as per clause 3(1)(c) of the Code. At one point the ARA states that "*disclosure is non-existent in relation to subclause 3(c) of the Code which, provides for a nominated individual to deal with complaints around Casual Mall Licensing practices*" (page 5), and at another they state that "*…it is rare to receive a nomination, as prescribed in subclause 3(1)(c)…*" (page 3).

These statements are contradicted by the survey resulted presented (reproduced below from the ARA's submission), which reveals that over 70% of respondents knew "*who to contact*" if they had "*an issue relating to casual mall leasing*".

Table 5: Knowledge of contact for complaints regarding Casual Mall Licensing



- 28.57 per cent of respondents were not aware of the appropriate contact to register a complaint regarding Casual Mall Licensing issues.

The ARA also claims that there is systemic non-compliance with regard to the provision of a copy of the Code to 'permanent' tenants as per clause 3(1)(b). The ARA claims that "*…many lessees are either not aware of the existence of the Code, either through non-disclosure by the respective landlord, or with the Code hidden within the lease agreement…*" (page 5).

However, earlier in their submission, the ARA claims that "*…consultation conducted by the ARA, FCA and PGA found that many retailers are bound to accept the terms of the Code as a condition of their lease agreements*" (page 4). While we disagree with the premise of the ARA's statement (discussed further at section 1), it does make plain that the ARA received other feedback from retailers that they, in fact, were aware of the Code, down to the detail of its "*terms*", in the context of their lease.

In our view, the ARA is not being faithful, or consistent, in its representation of its issues regarding the Code to the ACCC. In this regard, the ARA has not provided any compelling evidence of systemic non-compliance with the Code.

3.03 Disputes under the Code

The ARA appears to misunderstand the current dispute resolution process under the Code.

The Code has a two-step dispute resolution process

If a complaint arises, the parties are expected to negotiate in good faith to attempt to resolve the complaint between themselves. This is detailed at clause 10 of the Code.

There is an explicit acknowledgement in the joint-NRA/SCCA application to the ACCC that issues may arise from time to time between a lessor and lessee regarding a casual mall licence, and that, as detailed in the Code, this complaint would be dealt with between the parties, likely at the centre management level (page 6 of application).

If a complaint cannot be resolved between the parties as per clause 10, either party to the complaint – a lessor or a lessee – can refer a complaint for mediation. This is detailed at clause 11 of the Code.

In the close to five years since the Code was last reauthorised by the ACCC, nothing has prevented an aggrieved retailer from elevating a complaint and seeking mediation. The simple reality is that no retailer has sought to formalise a dispute and take this course of action.

The dispute resolution steps in the Code are working as intended and claims made by various stakeholders, such as the NSW SBC's claim that the absence of formal disputes "*…does not support claims in relation to the effectiveness of the code in achieving its objectives…*" (page 2), are without foundation.

We also note that, as far as we understand, there have been no formal disputes under the mandatory, statutory Code under the South Australian *Retail and Commercial Leases Act*.

Pleasingly, the ARA seems to endorse the current 'internal' dispute resolution mechanism which exists under the Code, they then claim that "*…the absence of external mediation options has allowed a power imbalance to exist between landlords and tenants…*" (page 12).

However, the ARA then goes on to incorrectly reference and explain the external dispute resolution mechanism which currently exists under the Code.

Clause 12 of the current Code says: *"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)"*

The ARA has – inappropriately – truncated this clause at page 13 of their submission and, as a result, has inaccurately represented to the ACCC what was intended to be included in the 'Schedule' (nothing that the joint-NRA/SCCA application proposes to delete reference to the 'Schedule').

As is made plain in the drafting above, the schedule was to be of "*the relevant retail tenancy official in each State or Territory",* not of independent mediators.

As such, the ARA's claim that "*it is entirely regrettable, a decade after the Code was first introduced, that the schedule of independent mediators is 'still being finalised. This is entirely inadequate in protecting the interests of both lessees AND lessors, as it fails to provide for an independent safeguard of external mediation where internal dispute resolution has failed*" (page 13) is false.

The joint-NRA/SCCA application expressly deals with the 'Schedule', including providing feedback to the ACCC that the lack of relevant disputes under the Code means the exercise of maintaining a 'Schedule' of retail tenancy officials was not an effective use of resources.

3.04 Legislative protections continue

The protections in the Code for existing retailers do not 'extinguish' the protections which these retailers also benefit from via the application of retail leasing legislation, including the NSW *Retail Leases Act 1994* and the WA *Commercial Tenancy (Retail Shops) Agreements Act 1985*.

For example, and as noted in the ARA's submission, in both of these jurisdictions there are statutory protections which provide a tenant a right of compensation if a landlord "*takes any action that would substantially alter or inhibit the flow of customers to the retail shop*" (section 14(b) of the WA *Commercial Tenancy (Retail Shops) Agreements Act 1985),* or if a landlord "*unreasonably takes any action that causes significant disruption of, or has the effect on, trading of the lessee in the shop"* (section 34(1)(c) of the NSW *Retail Leases Act 1994*).

The Code's protections for existing tenants regarding the treatment of, for example, sightlines (see clause 5(1) of the Code) come in addition to the prevailing statutory protections provided by relevant legislation in each jurisdiction. The Code does not elevate, or provide a defence against, a breach of retail lease legislation or relevant compensation provisions.

3.05 Recent support for the Code and the CAC

The ARA, FCA and PGA, along with the SCCA and the NRA, signed a letter to the NSW Minister for Small Business (and now Deputy Premier), John Barilaro, in April 2016 noting the success of the Code and proposing that the CAC model be replicated in the context of another industry initiative (discussed further at section 3.14).

This letter (without its attachments, which are not relevant to the joint-NRA/SCCA application) is provided at **Attachment 4**, and the relevant excerpt is provided below:

…… …… ……

> The Code will be overseen by a Code Administration Committee similar to that which oversees the successful *Casual Mall Licensing Code of Practice* which is currently authorised by the ACCC.
>
> **Letter to The Hon John Barilaro MP, 16 April 2016**

On this basis, the NRA and SCCA held a reasonable working assumption at the start of 2017 (when correspondence from the ACCC was first received that the Code needed to be reauthorised) that the ARA, FCA and PGA continued to support the Code and the operation of the CAC.

3.06 Reinvention of history

The ARA's attempts to distance themselves from the Code are not a faithful representation of their long-term involvement with the Code and its related governance framework.

The ACA has been a member of the CAC since 2007. In our view, they have not provided an explanation as to why they have not utilised the open-ended opportunity - over close to 10 years - to raise issues with the SCCA and the NRA about the Code and the operation of the CAC.

For clarity, a plotted history of the Code, which has involved the intimate and direct involvement of the ARA, is provided at section 3.08.

The ARA claims that "*…efforts to amend the Code have failed to improve its effectiveness…*" (page 2). In this context, they draw reference to "*a significant submission"* which was made by the FCA to the ACCC in 2012 (which they attach to their submission) "*in order to address a multitude of issues surrounding the Code*" (page 2). They go on to state that "*this submission was ignored and the Code was reauthorised, leading to further increases in discontent among permanent lessees in relation to Casual Mall Licensing".*

The ARA were a party to the application to the ACCC in 2012 to have the Code reauthorised.

As such, they were party to the application and process which, in their own words, "*ignored*" the representations of the FCA.

This can't be stated any more plainly.

3.07 Earlier correspondence from the ARA, PGA and FCA

We note that, prior to the lodgement of the joint-NRA/SCCA application, the ARA, also acting on behalf of the PGA and FCA, sent a letter, dated 13 June 2017, to the SCCA. This correspondence is provided at **Attachment 5**. We understand that, at the time, the ARA copied this correspondence to the ACCC.

This letter detailed, in effect, the conditions that they required to be met in order for their support of the Code's reauthorisation to be granted. In fact, the ARA noted that "*if the changes to the Code are made and it is approved, the ARA supports the Casual Mall Leasing Code of Practice remaining in operation until 31 December 2020*" (page 6).

We note two issues with this earlier representation by the ARA.

Firstly, this representation is, essentially, 'copied and paste' from the FCA's submission to the ACCC during the 2012 reauthorisation round. We note that the ARA has attached the FCA's 2012 to its current submission, which is how this relationship between the two submissions became apparent.

In effect, the ARA was seeking to have the SCCA and NRA – and, presumably, the ACCC - engage on proposed Code amendments and changes to the practice of casual mall licensing that the ACCC had already considered, and placed to the side, in the context of the reauthorisation of the Code in 2013.

Secondly, we note that the proposed range of issues and amendments being sought by the ARA in their submission in response to the joint-NRA/SCCA application are different to those detailed in their letter of 13 June 2017.

For example, the ARA earlier correspondence expressed very clear support for the dispute resolution framework under the Code, while in their submission to the ACCC, they specifically recommend the "*redefinition and expansion of the dispute resolution process prescribed in Clauses 9-13 of the Code*" (page 16).

3.08 Not raised as an issue in retail leasing reviews

At no stage during the recent review of various pieces of retail leasing legislation across the country have issues regarding casual mall licensing been raised.

Since the ACCC last reauthorised the Code in 2013, three comprehensive reviews of retail leasing legislation have been completed – in NSW, Queensland and South Australia.

As far as we are aware, at no stage in any of these reviews did any retailer association, including the ARA, FCA or PGA, raise any concerns with the practice of casual mall licensing, or seek to have the Code made mandatory by inclusion in respective legislation (as per South Australia).

Similarly, with regard to South Australia, as far as we are aware, no stakeholder raised issues with the mandatory Code under the *Retail and Commercial Leases Act* in their representations to that review process.

3.09 History of the Code

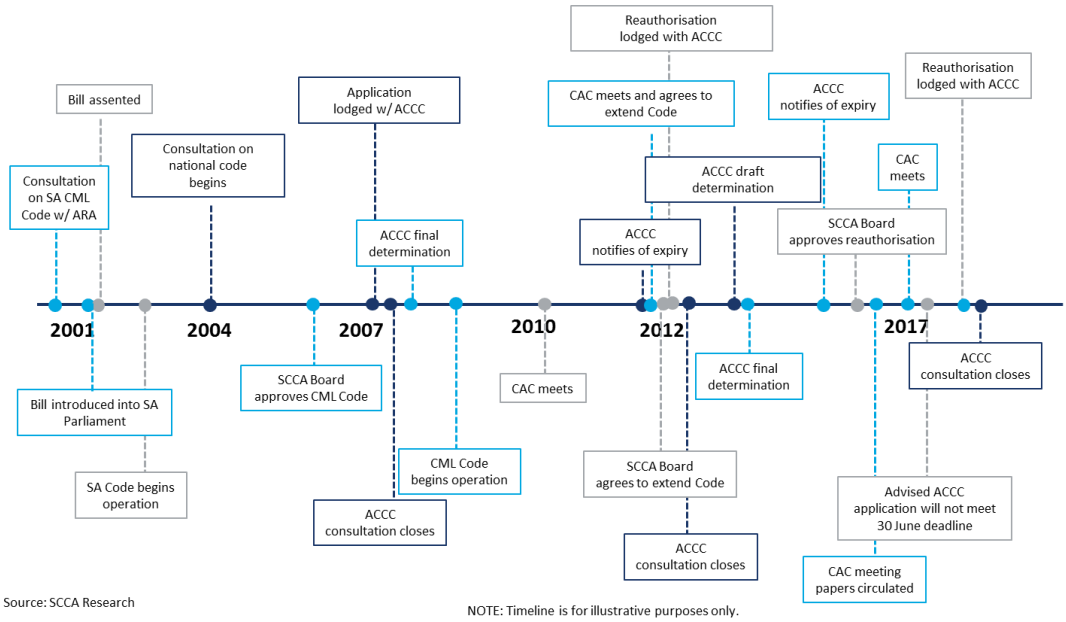
Throughout the various submissions in response to the joint-NRA/SCCA application there is an implied critique that the Code, and the CAC, are not actively reviewed or considered. In fact, the ARA states that "*…it is important that Code be reviewed more regularly than presently done so…*" (page 14).

The Code has been regularly scrutinised and reviewed - in 2007, 2012/13 and, now, in 2017.

In addition to the extensive consultation which was undertaken between stakeholders when the Code was first negotiated, including passing the scrutiny of the South Australian Parliament, the Code has passed the scrutiny of the ACCC's competition test twice – in 2007 and 2012/13. Each time an application has been made to the ACCC, there has been two rounds of consultation, firstly regarding the application for authorisation/reauthorisation, followed by public consultation on the ACCC's Draft Determination.

Just because there have been no material changes to the Code does not mean that it a static instrument. It has certainly not suffered from a lack of consideration or reflection on behalf of the parties to the Code, or the ACCC.

The following is an illustrative snap-shot of the extent to which the Code has been considered and reviewed overtime.



Source: SCCA Research

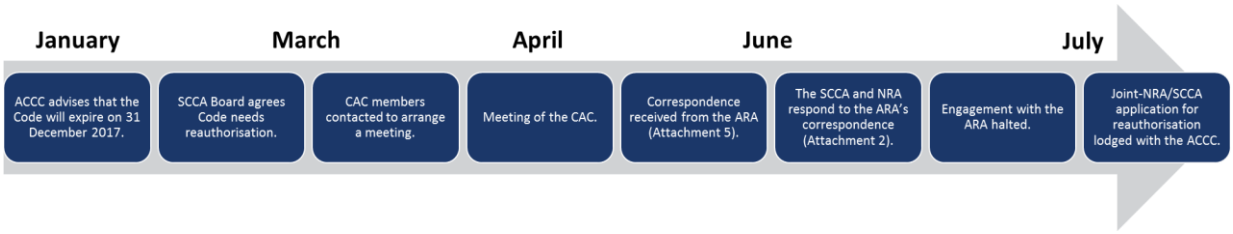
NOTE: Timeline is for illustrative purposes only.

The Code would have received considerably more scrutiny, including more public scrutiny, than many pieces of legislation active in every jurisdiction across Australia. It is also worth noting that the current five-year cycle of review and reauthorisation of the Code is more regular than the statutory review period for the NSW *Retail Leases Act 1994*, which is currently specified as 7 years.

3.10 2017 Application for reauthorisation

There has never been any attempt by the NRA and SCCA to exclude the ARA from the application process, in fact, numerous efforts were made to engage the ARA constructively and positively in the CAC process.

The following is a faithful timeline of the key activities leading up to the point of the lodgement of the joint-NRA/SCCA application for the reauthorisation:



We also note that the SCCA's correspondence to the ARA of 20 June 2017 **(Attachment 2)** proposed to the ARA that they convene a meeting of the CAC so parties "*…could seek to resolve and find common ground, and a pathway forward, on issues ahead of lodging an application with the ACCC at a later date…*" (page 2).

The ARA did not set up a meeting of the CAC, as proposed.

3.11 Voluntary Code v Mandatory Code

In its representations to the ACCC, the NSW SBC seeks to draw a distinction between the operation of the Code as a voluntary Code authorised by the ACCC and the operation of the mandatory Code under the South Australian *Retail and Commercial Leases Act 1995*. The NSW SBC infers that the voluntary Code is inferior to the mandatory Code.

In their submission to the ACCC, the NSW SBC states that "*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*" (page 2).

As far as we are aware, in South Australia there have similarly been no formal disputes regarding casual mall licensing (at the very least, none under the tenure of the current Small Business Commissioner; this assertion can be tested with the SA SBC as needed).

3.12 Small business constituencies

The critiques offered by the ASBFEO, NSW SBC, WA SBC and QSBC of the joint-NRA/SCCA application run the risk of them potentially overlooking the interests of their own small business constituencies to the extent that these stakeholders may support greater protection from competition for larger businesses from smaller businesses.

As noted in the joint-NRA/SCCA application, casual mall licensing provides "*relatively low cost and short term opportunities for prospective retailers to test products and models, gain experience and train staff*" (page 3). This would, of course, include small businesses seeking to test products or expand their product/service into a new market.

Given NORA supports the joint-NRA/SCCA application, the representations of some Government stakeholders also indicate that they may support changes that may curtail those online retailers which NORA represents from growing their presence and experience via casual mall licensing. As such, these Government stakeholders are, in our view, potentially overlooking a key emerging theme in retail relating to omni-channel retailing, personalisation and branding. This is discussed further at section 2.

3.13 Franchise Council and Pharmacy Guild

The FCA and the PGA are not currently parties to the Code and have never been parties to the Code.

However, we note that the NSW SBC, the WA SBC and the ASBFEO have made comments with regard to the concerns and role of the FCA and PGA.

In correspondence of 20 June 2017 to the ARA (copied to the respective CEOs of the FCA and PGA – **Attachment 2**), the SCCA expressly notes that there is no in-principle objection to the addition of the FCA and PGA as parties to the Code, on the basis that their remains a balance between landlord and lessee representation on the CAC.

It is possible this wasn't disclosed by the ARA to the various Government stakeholders to which they made representations.

3.14 Sales Reporting Code of Conduct

The NRA and SCCA does not consider the Sales Reporting Code of Conduct, as referenced by the NSW SBC, to be relevant to the joint-NRA/SCCA application. The NSW SBC had no involvement in the development of the Sales Reporting Code, and has no ongoing role in its future operation.

CONTACT

Angus Nardi
Executive Director
Shopping Centre Council of Australia
Phone: 02 9033 1930
Email: anardi@scca.org.au

Dominique Lamb
CEO
National Retail Association
Phone: 07 3240 0100
Email: d.lamb@nra.net.au

nora
THE NETWORK THAT CONNECTS

6TH September 2017

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

And by email: adjudication@accc.gov.au

Dear Mr Channing

Shopping Centre Council of Australia– application for re-authorisation A91591 & A91592 – interested party consultation

Thank you for the opportunity to provide comment on the joint-application made by the National Retail Association (NRA) and the Shopping Centre Council of Australia (SCCA) to the Australian Competition and Consumer Commission (ACCC) seeking reauthorisation of the *Casual Mall Licensing Code of Practice*.

The National Online Retailers Association (NORA) is a key retail industry stakeholder and provides a forward thinking, optimistic and balanced view of New Retail in Australia. NORA represents small to large pure-play and multi-channel retailers. The NORA Board includes members from a wide range of organisations, including Microsoft, Telstra, and Myer

NORA strongly supports the reauthorisation of the Code in the form submitted by the NRA and SCCA. No concerns have been raised with NORA about the current and, we understand, longstanding, operation of the Code.

We would urge caution against any moves which would make fewer, or make more challenging for a shopping centre owner to manage and deliver, opportunities for short term, 'pop-up' sites in Australia's shopping centres.

Customers are increasingly demanding multi-touch points with their brands of choice. As such, online retailers increasingly moving toward a 'phygital' connection with their customers. This can take a range of forms, key to which is short-term, 'pop-up' retailing.

Curbing the capacity for retailers to meet this customer demand would be counter to the interests of customers, counter to the concept of innovation and counter to healthy competition in the retail sector.

At NORA, we are of the view that change in the retail landscape is being driven by tech-savvy and informed shoppers. Retail should not stand still in the face of this change, but embrace new and different opportunities to reach their customers. Competition is healthy and the collective goal should be to 'grow the pie' in a positive, dynamic and increasingly interesting way.

NORA is pleased to join with the NRA and the SCCA in their effort to continue the existing, positive and balanced framework for the provision of short-term, 'pop-up' retail sites in Australia's shopping centres. The Code plays an important part of this framework and, appropriately, balances the treatment of longer-term tenants in shopping centres.

We are particularly pleased to partner with groups which recognise the importance of this 'pop-up' framework, which is underpinned by the Code, to New Retail brands in Australia. The NRA and SCCA understand the importance of providing opportunities, particularly relatively low cost and low commitment opportunities, for New Retail brands to test innovation and ideas, engage and delight their customers and, increasingly, grow their brand recognition.

The 'pop-up' framework is just as important for more established, high profile New Retail brands which utilise opportunities to drive sales, loyalty and enthusiasm by enticing their customers with exclusive 'bricks and mortar' opportunities.

New Retail does not stand still. It recognises and embraces the role that a deliberate and clever short term 'bricks and mortar' opportunity can play in its various business models. NORA seeks to ensure that these opportunities continue to be available in the future.

Subject to the reauthorisation of the Code at hand, we would be pleased to work with the SCCA and NRA, and any other interested parties, to discuss how New Retail thinks about and utilises 'pop-up' opportunities, how this may change into the future and how our organisations should collectively be preparing for, and welcoming, this change.

Please contact me on 0419 979 474 to discuss this letter as needed.

Yours sincerely

Paul Greenberg
Executive Director

SHOPPING CENTRE
COUNCIL OF AUSTRALIA

20 June 2017

Mr Russell Zimmerman
Executive Director
Australian Retailers Association
Level 1, 112 Wellington Parade
EAST MELBOURNE VICTORIA 3002

Via email: Russell.Zimmerman@retail.org.au

Dear Mr ~~Zimmerman~~ Russell

Casual Mall Licensing Code of Practice – Reauthorisation

I write in response to your letter, dated 13 June 2017, regarding the proposed reauthorisation of the *Casual Mall Licensing Code of Practice* (the Code).

The Code is something that the industry has worked on jointly and cooperatively over many years, and with great success. I sincerely wish this to remain the case.

In this regard, the issues detailed in your letter, and its tone, have come as a surprise to the Shopping Centre Council of Australia.

As you would be aware, the Australian Retailers Association (ARA) was involved in the drafting of the Code, has been a party to the Code for 10 years, did not raise these or similar issues during the previous reauthorisation round in 2012/13, and has not mentioned these issues in the approx. 4 ½ years since the ACCC's last determination authorising the Code.

With this history in mind, I'm sure you can understand why your letter – which requests significant changes to the Code and, more alarmingly, fundamental changes in the practice of casual mall licensing in Australia's shopping centres – came as a surprise.

Your letter does not provide any evidence to support some of your requests, including in the context of the authorisation process against competition principles. In this regard, I note that there have been no formal disputes raised under the Code (one of its key successes), which casts doubt on the necessity of a range of your claims for change. Our own analysis of the casual mall licensing market, based on a sample of our members' portfolios, also challenges some of your claims, as does the utilisation of casual mall licensing opportunities by retailers that may be members of the ARA.

In our view, some of the proposed changes to the Code and related practice – such as rent sharing, the right of veto for tenants, new policy development requirements and the significant broadening of the operative provisions of the Code, including the definitions of 'affected lessee' and 'competitor'– would create an imbalance and, in some instances, fall outside the scope of the purpose and public benefit principles, including restrictions on competition, of the authorisation process.

I also note that, upon review of the *Casual Mall Licensing Code* which is a schedule to the South Australian *Retail and Commercial Leases Act 1995*, on which the Code is based, your proposed changes would result in differences between each Code. This proposed diversion from what is, effectively, harmonisation in the management of casual mall licensing in Australia's shopping centres, is not a desirable outcome for either landlords or tenants.

Your letter also seeks to distance the ARA from the current and ongoing administration of the Code by questioning the make-up and activities of the Code Administrative Committee.

Level 1, 11 Barrack Street, SYDNEY NSW 2000
P +61 2 9033 1902 E scca@scca.org.au W www.scca.org.au @SCCA_Advocacy

It is unclear to us where the confusion regarding this matter has arisen. The ARA is currently listed as a member of the Code Administrate Committee and has been since the Code was first authorised in 2007. Further, the ARA was invited to the April 2017 Code Administration Committee meeting facilitated by the SCCA, arranged upon receipt of the Australian Competition and Consumer Commission's (ACCC's) advice to initiate the reauthorisation process, and, having noted the ARA's apologies for this meeting, were provided with all relevant meeting papers, including the meeting agenda and minutes.

We have provided a copy of your letter to the National Retail Association (NRA), the other current 'retailer' party to the Code. The NRA has formally responded that they do not support the changes proposed by the ARA. For transparency, I have attached to this letter a copy of the NRA's correspondence.

I am mindful that the ACCC recommended a timeframe for the lodgement of an application for reauthorisation, being six-months before the current authorisation expires on 31 December 2017 (i.e. by end-June 2017).

The nature of the issues raised, and the timing of your letter, means that we are unlikely to be able to lodge the application within this timeframe.

I have discussed this with the ACCC (to which I have copied this letter), which has expressed a willingness to extend (so to speak) the timeframe for lodgement of an application, and receive an application into July.

In this regard, we propose two alternative approaches.

The first is that we make an application for the reauthorisation of the Code by 30 June 2017, and the ARA provides a submission to the ACCC with a justification of its claims to substantially amend the Code. As noted, we do not support a number of these claims and the ARA's proposed amendments.

The second option is that the ARA convenes a Code Administration Committee meeting as a matter of urgency and provides further justification on the issues raised and proposals made. At this meeting, we could seek to resolve and find common ground, and a pathway forward, on issues ahead of lodging an application with the ACCC at a later date, as noted above. (We note, however, that the ARA should, ideally, have done this in the period since the last reauthorisation of the Code in 2013.)

I advise that we have no in-principle objection to the inclusion of new parties to the reauthorised Code, including the Franchise Council of Australia and the Pharmacy Guild of Australia, in addition to the ARA and NRA, on the basis there is a balance of landlord and tenant representatives.

I hope we can continue to work jointly and cooperatively with regard to the Code to achieve a balanced outcome.

I can be contacted on 0408 079 184 to discuss this letter. I look forward to discussing this issue with you further.

Yours sincerely

20.6.2017

Angus Nardi
Executive Director

CC:
Darrell Channing, Australian Competition and Consumer Commission
Dominique Lamb, CEO, National Retail Association
Damian Paull, CEO, Franchise Council of Australia
David Quilty, CEO, Pharmacy Guild of Australia

PO Box 1544
Coorparoo DC Q 4151
ABN 44 009 664 073
P 1800 RETAIL
F 07 3240 0130
www.nra.net.au

16 June 2017

Mr Angus Nardi
Executive Director
Shopping Centre Council of Australia
Level 1, 11 Barrack Street
SYDNEY NSW 2000

Via email: anardi@scca.org.au

Dear Mr Nardi

Casual Mall Licensing Code of Practice – Reauthorisation

Thank you for seeking the National Retail Association's (NRA) feedback on the proposals detailed in the letter you received from Mr Russell Zimmerman, the Executive Director of the Australian Retailers Association (ARA), regarding the proposed reauthorisation of the Casual Mall Licensing Code of Practice.

As a fellow member of the Code Administration Committee, I can confirm that the National Retail Association strongly supports the reauthorisation of the Code by the ACCC.

I can also confirm that the NRA does not consider necessary the amendments to the Code proposed by the ARA. We are also of the view that the ARA has raised issues which are beyond the scope of the Code and the framework of the proposed reauthorisation.

The Code has been around for close to 10 years. It has played an important role in balancing the interests of landlords and lessees in the practice of casual mall licensing in Australia's shopping centres.

Subject to reauthorisation by the ACCC later this year in its current form (subject to agreed minor, machinery changes), the NRA would be pleased for the Code Administration Committee to come together again to discuss the current practice of casual mall licensing and any relevant developments.

Please contact me on 07 3240 0100 to discuss this letter as needed.

Yours sincerely

Dominique Lamb
Chief Executive Officer

RETAIL

Top five retail trends to watch in 2017

VAUGHAN ROWSELL / Thursday, November 24, 2016

Aussie retailers saw a boost in sales in 2016, with the latest figures from the Australian Bureau of Statistics showing an increase of 2.8% on the previous year. With some measures of consumer confidence high in the lead up to Christmas, I expect a number of new trends to break ahead of the pack.

Next year will be the year where customer experience becomes a tangible reality, with a focus on in-store experiences and more personalisation. Here are five trends to watch for Aussie retailers.

1. "Retailtainment" will take off

Watch out for the newest aspect of the in-store experience trend to start gaining popularity in Australia in 2017 – "retailtainment". This is the fusion of retail and entertainment — making the in-store shopping experience enjoyable, entertaining, and encouraging shoppers to step away from online browsing at home and into the shops instead.

"Retailtainment" assumes that people are more likely to engage with retailers that incorporate lifestyle elements into their stores, such as boutique coffee shops or virtual reality experiences. We'll certainly see more "retailtainment" in bricks-and-mortar retail stores in 2017.

2. Personalisation will become increasingly important

According to an Accenture Interactive study, 56% of consumers are more likely to shop with a retailer that recognises them by name.

Personalisation in retail has been around for years but unfortunately, the tactics retailers once used to speak directly to customers (such as using first names in an email) have become outdated and transparent in the eyes of customers. At the same time consumers are searching for more personalised shopping experiences, so 2017 will see retailers testing new ways of doing this.

One Aussie retailer that continues to lead the pack with personalised experiences is Shoes of Prey, but others are starting to make it easier for consumers to personalise products too. For instance, EziBuy is now offering hundreds of products with personalised options as a regular feature on its site.

3. Smaller shops are in, larger shops are out

When it comes to store size, less will be more in 2017.

We've already seen a shift here, with retail giants such as Target, Kmart and Priceline investing in smaller-format stores to provide more curated selections. Consumers don't want to waste precious time wandering around enormous stores anymore. Instead, they want the ease and efficiency of smaller stores with specialised selections.

4. Specialty stores will be more popular than department stores

Specialty stores that focus on categories such as beauty products, like Mecca Cosmetics, will have an advantage in 2017 as consumers focus on curated selections.

Australia's department store sales have been consistently declining for many years in response to the rise of e-commerce and standalone specialty stores. We all know online shopping shows no signs of slowing down, but how will the bricks-and-mortar establishments — specialty and department — fare against each other?

Look for specialty stores to win in the coming year. These niche retailers tend to provide better in-store experiences for their customers, with more knowledgeable staff, better prices, and more personalised service.

5. Retailers that promote product quality and sustainability will flourish

Customers today want to know more about the goods they're purchasing – where they've come from and how they've been sourced and produced. The proliferation of transparent, sustainably conscious companies has initiated a radical shift in the retail industry — one we can expect to gain greater traction in 2017. Shoppers are gravitating toward retailers that reveal the inner workings of their operations.

Kathmandu, for example recently opened its new Galleria Store making it a pioneer in sustainable retail. The store features a range of sustainability features to meet the Green Star submission standards and enhance the indoor environmental quality for customers and staff. There's now a worldwide shift toward sustainability, and a consumer desire to be more ethically conscious and to support brands with a "strong sense of identity." Retailers need to be at the forefront of this shift in 2017.

Evolving customer preferences and how to satisfy changing needs has been talked about a lot in 2016. In the coming year, there are going to be many more opportunities for retailers to respond to these challenges and further shake-up the way they engage and attract shoppers, and grow their market share.

https://www.smartcompany.com.au/industries/retail/top-five-retail-trends-watch-2017/

Accessed 22 September 2017

15 April 2016

The Hon John Barilaro MP
Minister for Small Business
GPO Box 5341
SYDNEY NSW 2001

Dear Minister

Review of Retail Leases Act

The undersigned write to provide you with an agreed retail industry approach to bring the review of the *Retail Leases Act 1994* to conclusion.

We appreciate the good faith you have extended to our organisations in recent months, and the opportunity and time you have provided to allow key industry stakeholders to negotiate and present a unified position to the NSW Government.

Attached to this letter is an 'in-principle' industry position on the 80+ proposals regarding the amendment of the *Retail Leases Act 1994* that were presented to stakeholders by the Office of the Small Business Commissioner in September 2015. As noted in the attached, this industry position is conditional on satisfaction being reached on the detail of related legislative drafting. As such, the Australian Retailers Association (ARA), National Retail Association (NRA) and the Shopping Centre Council of Australia (SCCA) respectfully request the opportunity to review and provide comment on any resultant exposure draft amending Bill. We would be pleased to brief your staff on the detail of our 'in-principle' responses as needed.

Also **attached** to this letter is a final draft *Retail Industry Code of Practice – The Reporting of Sales and Occupancy Costs* (the Code). Agreement on the draft Code has been reached between the ARA, NRA, SCCA, the Franchise Council of Australia and the Pharmacy Guild of Australia. As noted in the Preamble, the purpose of this voluntary industry Code is to establish how landlords and retailers communicate sales data between themselves.

The Code acknowledges that sales information is important to landlords for a range of management reasons, including determining the overall financial performance of a shopping centre and informing decisions about redevelopments and tenancy mix. This reflects the Federal Government's response to the recent Senate inquiry into retail leasing. The Code also acknowledges that sales information is important to retailers to enable then to benchmark their performance and to highlight any need for corrective action.

The Code will be overseen by a Code Administration Committee similar to that which oversees the successful *Casual Mall Licensing Code of Practice* which is currently authorised by the ACCC.

It is intended that, over time, the Code will be adopted by industry stakeholders in other Australian jurisdictions.

As you have advised that you intend to present this draft Code to you Cabinet colleagues for noting, we will respect the convention of Cabinet in Confidence and not speak publically about this Code until we are advised otherwise. At the appropriate time, we would be pleased to discuss with you a coordinated approach to announcing the finalisation of the Code of Practice.

As this is an industry-led and administered Code that will not be referenced in any Act or Regulation, we respectfully advise that we will not be willing to make drafting amendments to the Code as a result of the cabinet process.

Minister, we are most grateful for the courtesy and professionalism you have extended to us, as well as that extended by your staff. Meryn Willetts, in particular, has played a key and constructive role in working with us to deliver this positive outcome.

We look forward to discussing the next steps with your office in the near future.

Yours sincerely,

Russell Zimmerman
Executive Director
Australian Retailers Association

Phillip Chapman
On behalf of the
Franchise Council of Australia,
Pharmacy Guild of Australia

Michael Lonie
NSW State Director
National Retail Association

Angus Nardi
Executive Director
Shopping Centre Council of Australia

Australian Retailers Association

Mr Angus Nardi
Executive Director
Shopping Centre Council of Australia
Level 1, 11 Barrack Street,
SYDNEY NSW 2000

Email: anardi@scca.org.au

Tuesday 13 June 2017

Proposed Casual Mall Leasing Code ACCC Renewal – Retailer Requirements

Dear Mr Nardi,

The Australian Retailers Association (ARA) broadly supports the Casual Mall Leasing Code of Practice in principle if a number of issues are addressed.

We acknowledge that the current Casual Mall Leasing Code of Practice is better than having no such code however its scope needs to be broadened, to that extent the ARA supports the re-authorisation by the ACCC of such a code in the event the code is improved in addressing retailer needs including the Code administration.

We consider that changes need to be made to the Casual Mall Leasing Code of Practice (the Code) and those changes should be made as part of the current re-authorisation process.

The ARA acknowledges the substantial contribution of major shopping centres. This relationship is synergistic, and largely the relationship between retailers and shopping centres is collaborative.

The ARA is strongly of the view that shopping centres have become economic markets of their own, and that information imbalances and other inequalities in those markets see retailers consistently at an economic disadvantage.

The ARA, our Tenancy Committee and the two other largest retail industry groups, the Pharmacy Guild of Australia (PGA) and Franchise Council of Australia (FCA), have concerns about the conduct of some shopping centres that have led the ARA to champion the development of a proposed Retail Leasing

Phone: 1300 368 041
Fax: (03) 8660 3399

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Address: Level 1, 112 Wellington Parade
East Melbourne VIC 3002

Code of Conduct. Although these matters are not directly relevant to the Code, they do provide important context for the need to improve centre practices and a collaborative retail industry approach.

The Code was originally developed to curb the practices of shopping centre owners, and protect the legitimate interests of the permanent tenants who had in good faith committed to long term leases.

There are a few protections for tenants in the shopping centre leases, notwithstanding there are a number of promises implicit in the bargain struck between landlord and tenant at the time of setting the rental and signing the lease. One of the implicit promises is that the competitive mix will remain largely unchanged, and tenants will be entitled to reasonable quiet enjoyment of their tenancy. In a normal market changes occur naturally. In a shopping centre changes can be made unilaterally by landlords which is why retailers want this Code strengthened.

The Casual Mall Leasing Code of Practice Preamble

The Casual Mall Leasing Code of Practice preamble notes that casual mall licensing is a feature of shopping centres in Australia, which is true. It is however a feature that was introduced unilaterally by landlords, and solely for the benefit of landlords.

These arrangements provide landlords with extra rental on top of the rental paid by permanent tenants. In a broad sense, money spent by customers with these tenants is not spent with the permanent tenants.

ARA members are sceptical as to whether casual mall licensing adds much variety to the retail offer of shopping centres or helps attract customers to shopping centres. For the most part, customers are attracted by the presence of the brands, the marketing and promotions undertaken by those brands and the general retail shopping environment. Most of the casual mall licensing arrangements do not feature existing tenants, but rather new casual tenants.

Casual mall licensing can be a direct and unfair competitive threat to a permanent tenant. This threat can be direct, in terms of casual mall licensing by a direct competitor, and indirect. Indirect competition can occur by the establishment of a business that may not be a direct competitor in terms of products or services, but competes for the discretionary dollar or impulse purchase from a customer. The financial impact on the permanent tenant is the same. The permanent tenant can also be prejudiced by disruption to traffic flow, impairment of store visibility and other indirect consequences.

The ARA members and other major retail industry groups believe the scope to which the Code has in fact been developed as part of the consensus process required for these forms of industry codes has not included the largest industry groups. The original version of the voluntary Code of Practice may

Phone: 1300 368 041
Fax: (03) 8660 3399

MELBOURNE OFFICE
Address: Level 1, 112 Wellington Parade
East Melbourne VIC 3002

have been agreed between the ARA, the Retail Traders Association of Western Australia (RTAWA), the Shopping Centre Council of Australia (SCCA) and the Property Council of Australia (PCA).

The ARA is the first to admit that these bodies are not totally representative of the retail sector, the current review process needs to be broad and that interests at the time did not enable the sectors views to be fully represented. With the PGA and FCA being the next largest retail industry groups they have no current representation on the Code administration committee or development.

The ARA broadly supports the concept of the Casual Mall Leasing Code of Practice, and agrees that it will help 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 ARA, PGA and FCA believes consideration should be given to the enactment of the Casual Mall Leasing Code of Practice as a mandatory industry code under section 51AE of the Competition and Consumer Act or using options through State based regulators to give the Code some rigger.

Operative Provisions

Our comments on the operative provisions appear below, with reference to the relevant provision of the Code.

1. Interpretation - Clause I

(1) The current definition of “adjacent lessee” is central to the Casual Mall Leasing Code of Practice, and is set out below:

"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;

There are many situations where a party is significantly affected by a casual licensing arrangement notwithstanding it is not “in front of or immediately adjacent” to the proposed location of that casual licence. The relevant test should be whether the person is an “affected lessee”, not and “adjacent lessee”.

A new definition of “affected lessee” should then be inserted as follows:

"affected 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

Phone: 1300 368 041
Fax: (03) 8660 3399

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Address: Level 1, 112 Wellington Parade
East Melbourne VIC 3002

area or is able to establish that the lessee is likely to be substantially affected by the casual mall licence;

The ARA considers such a definition is consistent with the intent of the Casual Mall Leasing Code of Practice, and indeed is consistent with the definition of "competitor" discussed below.

2. "Competitor" – Clause 1

The ARA has less concern with the definition of an internal competitor, as that is essentially an extension of the current competitive environment within the market and reasonably addressed by the Casual Mall Leasing Code of Practice. The current definition defines an external competitor as a competitor that is not a lessee of another shop in the same shopping centre. The definition of a 'competitor" by reference to specific product competition is as follows:

(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;

The ARA considers that this definition is far too narrow. The intent of the Code should be to protect permanent tenants paying a fixed rent from unfair competition. In an economic sense, a competitor is any business that competes for a particular aspect of the customer's expenditure. Many retailers rely on discretionary spending, or impulse purchases. That is often exactly the sort of business granted a casual mall licence. In this context it the ARA considers that the following definition of a "competitor" in clause 1(2)(b) relation to services is more appropriate:

(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.

There is no reason why there should be a different definition for goods compared to services.

3. Casual mall licence policy

The ARA supports the concept of preparation and disclosure in relation to the casual mall licensing policy. The current provisions contain no requirement for consultation in relation to the development of a casual mall licensing policy. This is left solely in the hands of the shopping centre owner. There should be some express obligation to consult with tenant representatives in the shopping centre in relation to the development of any such policy, and any variations.

Phone: 1300 368 041
Fax: (03) 8660 3399

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Address: Level 1, 112 Wellington Parade
East Melbourne VIC 3002

The ARA also considers that the current provisions do not go far enough, and should require the lessor to provide an assessment of any anticipated impact on tenant of any specific casual mall licence. This need not be a complex process, and could be as simple as grading the impact as "nil / not substantial / substantial". Such a process would require the lessor to consider the impact on the tenants of a specific activity. There should also be an explicit obligation to consult with the tenant in relation to any casual licensing proposed, and to consider in good faith any objections raised by the tenant to any proposed arrangement.

4. Reduction of rent

Clause 8 of the Casual Mall Leasing Code of Practice provides that where there is casual mall licensing there must be a reduction of non-specific outgoings paid by fixed tenants by a formula that the ARA agrees is a fair means of allocating the outgoings across all tenants including casual mall licensees.

The logic of an adjustment is obvious, and to fail to adjust would see the landlord secure contributions from tenants that exceed the amount of the outgoings. The same logic applies to rent. The landlord controls this market, and a certain number of customers with a certain amount of disposable income attend the shopping centre. In a global sense, all tenants compete with each other for the customer's attention and expenditure. Rents are set by reference to the anticipated revenue to be generated by a tenant in ordinary circumstances. The requirement for tenants to provide turnover details to landlords, and the capacity to easily share information, means that landlords have full access to information.

Casual licensing enables landlords to obtain additional revenue, with no benefit to the tenants. The same logic should apply to rents as applies to outgoings. The formula may need to be different, as the beneficiaries of any adjustment should be the affected tenants. But the broad principle should be the same - if a casual mall licence is granted the extra rental should be split with the affected tenants.

5. Dispute Resolution

The ARA supports the current dispute resolution arrangements in the Casual Mall Leasing Code of Practice.

6. Code Administration Council

The ARA considers that there needs to be greater visibility as to the operation of the Code Administration Council, and consideration given to increasing the number and nature of representative organisations participating on the Code Administration Council.

In that respect, has the Code Administration Council reported to the parties to the Code? Is a copy of that report available to the ARA and indeed other interested parties? Can the proponent be a significant

Phone: 1300 368 041
Fax: (03) 8660 3399

MELBOURNE OFFICE
Address: Level 1, 112 Wellington Parade
East Melbourne VIC 3002

financial supporter of a member or members of the Code Administration Council and not have that Code Administration Council member conflicted? Should Code Administration Council members or representatives be required to declare financial or other support by property and shopping centre related entities on an annual basis?

7. Period of Operation of the Code of Practice

If the changes to the Code are made and it is approved, the ARA supports the Casual Mall Leasing Code of Practice remaining in operation until 31 December 2020.

We would appreciate the assistance of the SCCA in addressing retailer concerns in this matter and will need to incorporate the other two major retail organisations, PGA and FCA in any re-authorisation moving forward.

Heath Michael has been put forward as the ARA Code representative and would be happy to discuss any matters with you.

Once again thank you for your efforts and diligence in this matter.

Kind regards,

Russell Zimmerman
Executive Director

Heath Michael
Director of Policy, Government and Corporate Relations

Phone: 1300 368 041
Fax: (03) 8660 3399

MELBOURNE OFFICE
Address: Level 1, 112 Wellington Parade
East Melbourne VIC 3002