



# Draft Determination and Interim Authorisation

Application for revocation of authorisations A91591 & A91592 and the  
substitution of authorisation AA1000529

lodged by

the Shopping Centre Council of Australia Limited

in respect of

the Casual Mall Licensing Code of Practice

Authorisation number: AA1000529

3 December 2020

Commissioners: Keogh  
Rickard  
Ridgeway

## Summary

The ACCC proposes to grant authorisation to enable the Shopping Centre Council of Australia Limited (SCCA) to give effect to the Casual Mall Licensing Code of Practice (the Code). The Code is voluntary and aims to regulate the practice of casual mall licensing in shopping centres by giving lessees certain rights if casual mall licensing practices contravene the Code.

The ACCC has authorised the Code twice since 2007, most recently in 2017. The amended version of the Code submitted for re-authorisation formalises improvements to the Code's operation that have taken place since 2017, including increased retailer representation on the Code Administration Committee and the appointment of an independent Chair.

The ACCC is satisfied that the Code is likely to result in public benefits by providing transparency and certainty to lessees on how casual mall licensing will be offered in shopping centres, as well as some transaction cost savings. The ACCC considers that by providing a dispute resolution mechanism for shopping centre landlords and lessees the likelihood that the public benefits will be realised increases. The ACCC considers the Code is likely to result in minimal public detriment.

The ACCC proposes to grant re-authorisation for 10 years.

The ACCC grants interim authorisation to allow for continuity of the existing Code's operation while the ACCC considers the substantive application for re-authorisation. Interim authorisation is necessary because authorisation in respect of the existing Code expires on 31 December 2020, which will occur before the ACCC makes its final determination in respect of re-authorisation.

The ACCC invites submissions in relation to this draft determination by 8 January 2021 before making its final decision.

### 1. The application for authorisation revocation and substitution and interim authorisation

- 1.1. On 11 September 2020, the Shopping Centre Council of Australia Limited (**SCCA**) lodged an application to revoke authorisations A91591 & A91592 and substitute authorisation AA1000529 for the ones revoked (referred to as re-authorisation) with the Australian Competition and Consumer Commission (the **ACCC**). The SCCA seeks re-authorisation of an amended version of the Casual Mall Licensing Code of Practice (the **Code**).<sup>1</sup> The ACCC has previously authorised versions of the Code in 2007, 2013 and 2017.
- 1.2. The application for re-authorisation AA1000529 was made under subsection 91C(1) of the *Competition and Consumer Act 2010* (Cth) (the **Act**).
- 1.3. The SCCA is a national industry group for shopping centre owners, managers, and developers. SCCA members own or co-own approximately 510 shopping centres in Australia, encompassing around 40,000 retail stores and 70 per cent of total floorspace that is available for leasing in Australian shopping centres.

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<sup>1</sup> Provided with the SCCA's application for re-authorisation on 11 September 2020.

- 1.4. The ACCC may grant authorisation, which provides businesses with legal protection for arrangements that may otherwise risk breaching the competition law but are not harmful to competition and/or are likely to result in overall public benefits. In this instance, the SCCA seeks authorisation because agreeing to and giving effect to the Code may otherwise breach competition laws, since signatories to the Code are in competition with each other in relation to certain products and services.

## The Conduct

- 1.5. The SCCA is seeking re-authorisation to give effect to an amended version of the currently authorised Code for 10 years (the **Conduct**).
- 1.6. The SCCA has sought authorisation for the Conduct, which would or might contain a cartel provision within the meaning of Division 1 of Part IV of the Act and may substantially lessen competition within the meaning of section 45 of the Act.
- 1.7. The SCCA also requested interim authorisation to ensure continuity of the existing Code while the ACCC considers the substantive application for re-authorisation. The ACCC has decided to grant interim authorisation, considered further at Section 6 of this Draft Determination.

## 2. The Casual Mall Licensing Code of Practice

- 2.1. Casual mall licensing refers to agreements under which a person, (usually a retail shopping centre operator) grants another person, (usually a retailer or service provider) a right to occupy part of the common area of a retail shopping centre for a short-term period (no more than 180 days) for the purpose of the sale of goods or the supply of services to the public (also known as 'pop-up' retailing).

The Code's stated purpose is to provide balanced guidelines to ensure that the practice of casual mall licensing is conducted in a way that is fair to shopping centre owners and managers, shopping centre retailers who lease premises and casual mall licensees. The Code aims to regulate the practice of casual mall licensing in shopping centres by giving lessees certain rights if casual mall licensing practices contravene the Code.

- 2.2. The Code is voluntary, and shopping centre owners/managers in all Australian jurisdictions excluding South Australia (the only state/territory where retail tenancy legislation regulates casual mall licensing), are able to sign up to the Code.

### Key provisions of the Code

- 2.3. The Code includes provisions that prohibit provision of casual mall licences in certain circumstances. In summary:
  - a. Lessors must maintain a casual mall licensing policy. This must include a floor plan, which states where casual mall licences may be offered in a shopping centre, and other policies under which a lessor may grant a casual mall licence (clause 2).
  - b. Lessors must provide certain information to lessees and prospective lessees in a shopping centre before granting a casual mall licence in that shopping centre. Information that must be provided includes a copy of the relevant casual mall licensing policy, a copy of the Code, and contact details for the person nominated by the lessor to deal with complaints about casual mall licences (clause 3).

- c. Lessors must ensure that the business conducted by the holder of a casual mall licence does not substantially interfere with the sightlines to a lessee's shopfront in the shopping centre (clause 5).
- d. Lessors must not grant a casual mall licence that results in the unreasonable introduction of an 'external competitor' of an adjacent lessee. An external competitor is defined as a competitor who does not currently have a lease on a retail shop in the shopping centre (clause 6(1)).
- e. Lessors must not grant a casual mall licence that results in the unreasonable introduction of an 'internal competitor'<sup>2</sup> of an adjacent lessee unless (clause 6(2)):
  - i. both competitors are situated in the same precinct or (if the mall is not divided into precincts) the same vicinity,
  - ii. the casual mall licence area is the closest to the internal competitor's retail shop,
  - iii. the term of the licence is in a defined sales period, or
  - iv. the casual mall licence area is within the centre court of the shopping centre.
- f. The Code defines when a casual mall licensee is considered a competitor of another person. In relation to the sale of goods, this is where more than 50 per cent of the goods displayed for sale by the person are of the same general kind as more than 20 per cent of the goods displayed for sale by the other person.<sup>3</sup> For the supply of services, this is where the person competes with the other person to a 'substantial extent' (clause 1(2)).
- g. A lessor may reserve the right in their policy to grant licences for special events without applying the clauses regarding sightlines and competitors<sup>4</sup> (clause 7).
- h. Lessors must reduce the non-specific outgoings (expenses incurred by landlords) to be paid by permanent lessees in accordance with the number of casual mall licences granted (clause 8).
- i. The Code includes dispute resolution processes for handling breaches of the Code (clauses 9 to 13).
- j. The Code sets out its administration by a Code Administration Committee comprising five landlord and five retailer representatives and chaired by an independent person (clauses 15 to 16).

## Changes from previous authorisation

2.4. In 2017, the ACCC granted authorisation for three years. At the time, the ACCC noted concerns from interested parties that certain aspects of the Code were not serving retailers well (this is discussed further in section 4). The ACCC encouraged the SCCA and signatories to the Code to work to improve its operation and demonstrate that the Code is working ahead of any application for re-authorisation.

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<sup>2</sup> An internal competitor is defined as a competitor of the permanent lessee who also has a current lease on a retail shop in the shopping centre.

<sup>3</sup> Percentages are calculated on a floor area occupied by display basis.

<sup>4</sup> A special event is defined in clause 1(1) as a community, cultural, arts, entertainment, recreational, sporting, promotional or other similar event that is to be held in the retail shopping centre over a limited period of time.

- 2.5. Broadly, the SCCA has not substantially changed the Code regarding requirements for casual mall licensing. However, the SCCA has made a number of changes to how the Code and the Code Administration Committee operate. These changes are formalised in the version of the Code submitted for re-authorisation, and comprise:
- a. Appointment of an independent Chair, currently former Victorian and Australian Small Business Commissioner Mark Brennan.
  - b. Expansion of Code Administration Committee retailer organisation participation, previously solely provided by the National Retail Association (**NRA**), to also include representation from:
    - i. the Australian Retailers Association (**ARA**),
    - ii. the Pharmacy Guild of Australia (**PGA**),
    - iii. the National Online Retail Association (**NORA**), and
    - iv. the Restaurant and Catering Industry Association of Australia (**RCA**).
- 2.6. The SCCA advised that the Code Administration Committee has met more frequently than previously, at least twice each year, though this change is not formalised in the Code.
- 2.7. The SCCA and Code Administration Committee have developed and distributed a [Code Fact Sheet](#)<sup>5</sup>, which provides prospective and sitting shopping centre tenants and casual mall licensees with an overview of the Code, and its key provisions in relation to competitors, sightlines, outgoings, and dispute resolution.

### 3. Consultation

- 3.1. A public consultation process informs the ACCC's assessment of the likely public benefits and detriments from the Conduct.
- 3.2. The ACCC invited submissions from a range of potentially interested parties<sup>6</sup> including:
- a. Shopping centre owners and managers.
  - b. Retailer, small business, consumer, and commerce associations.
  - c. Federal and state/territory government authorities.
- 3.3. The ACCC received five public submissions from interested parties; four in support of re-authorisation, and one that did not object to interim authorisation to maintain the status quo, but proposed some further amendments to the Code under re-authorisation:
- a. The NRA, ARA, PGA, and RCA lodged a joint submission in support of the Code and the SCCA's application for re-authorisation for a period of 10 years.
  - b. The Tasmanian Government Consumer, Building and Occupational Services made a submission advising no objection in relation to the application for re-authorisation, including for the requested period of 10 years.

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<sup>5</sup> Also attached to the SCCA's application as accessible on the ACCC's [public register](#).

<sup>6</sup> A list of the parties consulted is available under 'Consultations' on the ACCC's [public register](#).

- c. The Code Administration Committee independent Chair Mark Brennan supports re-authorisation of the Code for 10 years.
- d. The Code Administration Committee Observer Phillip Chapman supports re-authorisation of the Code. Mr Chapman submits that a 10-year authorisation period is unlikely to result in any issues. However, a shorter five-year period may be more appropriate.
- e. The Western Australian Government Small Business Development Corporation (**WA SBDC**) lodged a submission that proposed a number of amendments to the Code (discussed in section 4), while noting casual mall leasing is not a major issue raised by small business lessees in Western Australia. It considered that the ACCC should not grant re-authorisation for a period longer than five years.

3.4. The ACCC considers these submissions in its assessment below.

3.5. Public submissions by the SCCA and interested parties are on the [Public Register](#) for this matter.

## 4. ACCC assessment

- 4.1. The SCCA has sought authorisation for the Conduct, which would or might contain a cartel provision within the meaning of Division 1 of Part IV of the Act and may substantially lessen competition within the meaning of section 45 of the Act.
- 4.2. The ACCC's assessment of the Conduct is conducted in accordance with the relevant authorisation test contained in the Act.
- 4.3. Consistent with subsection 90(7) and 90(8) of the Act<sup>7</sup>, the ACCC must not grant authorisation unless it is satisfied, in all the circumstances, that the conduct is likely to result in a benefit to the public, and the benefit would outweigh the detriment to the public that would be likely to result (authorisation test).

### Relevant areas of Competition

- 4.4. In its 2007, 2013, and 2017 determinations, the ACCC considered that the relevant areas of competition likely to be impacted by the Conduct were:
  - a. the supply of retail space by shopping centre owners and managers, and
  - b. the supply of goods and services by retailers who are shopping centre tenants.
- 4.5. The ACCC considers that these areas of competition remain relevant. The ACCC also notes the continued increase in significance of online retail compared to its previous considerations of the Code. For some but not all consumers, and particularly for certain types of goods and services, online retailers may offer an acceptable (or even preferable) alternative supply of goods and services supplied by retailers in shopping centres. However, the ACCC's decision in this matter does not depend on the closeness or otherwise of competition from online retailers.

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<sup>7</sup> See subsection 91C(7).

## Future with and without the Conduct

- 4.6. In applying the authorisation test, the ACCC compares the likely future with the Conduct that is the subject of the authorisation to the likely future in which the Conduct does not occur.
- 4.7. The ACCC considers that it is unlikely that SCCA members would cease offering casual mall licences in the future without the Code. In this context, the ACCC is not required to assess the public benefits and detriments generated by casual mall licensing per se. Rather, the ACCC assesses the public benefits and detriments generated by the Code.
- 4.8. The Code relates to the terms on which casual mall licences are offered. In the future without the Conduct, the ACCC considers that individual SCCA members would likely offer casual mall licences on terms and conditions as they consider appropriate and in accordance with relevant laws and regulations (for example, the Retail Leases Act in NSW). The SCCA and its members would be unlikely to give effect to the Code without authorisation as signatories are in competition with each other and giving effect to the Code may breach competition laws.
- 4.9. In the absence of the Code, there may be a greater likelihood that some jurisdictions would introduce legislation to address issues of casual leasing and its effect on permanent tenants. Given the uncertainty about how much more likely this would be without the Code and what form any such legislation would take, the ACCC has not taken this possibility into account when assessing the likely benefits and detriments of the proposed conduct.

## Public benefits

- 4.10. The Act does not define what constitutes a public benefit. The ACCC adopts a broad approach. This is consistent with the Australian Competition Tribunal (the **Tribunal**) which has stated that the term should be given its widest possible meaning, and includes:

*...anything of value to the community generally, any contribution to the aims pursued by society including as one of its principal elements ... the achievement of the economic goals of efficiency and progress.*<sup>8</sup>

- 4.11. The SCCA submits that the Code will result in the following public benefits:
  - a. certainty and transparency,
  - b. efficiency and harmonisation,
  - c. facilitation of retail competition, and
  - d. provision of a dispute resolution pathway.
- 4.12. In assessing this application for re-authorisation, the ACCC has taken into account, amongst other things, information and submissions as to whether the Code has resulted in these public benefits under the current and previous authorisations and whether public benefits are likely to continue.

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<sup>8</sup> Queensland Co-operative Milling Association Ltd (1976) ATPR 40-012 at 17,242; cited with approval in Re 7-Eleven Stores (1994) ATPR 41-357 at 42,677.

## Certainty and transparency

- 4.13. The Code seeks to address the imperfect information faced by retail shopping centre lessees relative to shopping centre lessors regarding long-term leases. The Code aims to reduce the uncertainty and risk faced by retail lessees from the introduction of casual mall licensees during the term of their lease. The Code provides for lessees to be provided with a copy of the casual mall licensing policy, which explains where casual mall licensees can be placed, and for how long. It also provides for a reduction in non-specific outgoings charged to each existing lessee proportional with the area of the shopping centre over which a casual mall licence is granted and the duration of the licence.
- 4.14. The SCCA submits that the Code has provided shopping centre lessees with the relevant information as to the circumstances under which, and the terms on which, a casual mall licence may be granted within a shopping centre. In doing so, the SCCA submits the Code minimises any uncertainty or risk to lessees and allows them to make informed business decisions.
- 4.15. The SCCA further submits that the Code Administration Committee has continued to work on ensuring that this transparency is accessible to shopping centre lessees, through the development and distribution of the Fact Sheet. The Fact Sheet provides an overview of the Code and its key provisions including in relation to competitors, sightlines, outgoings and dispute resolution. It also contains specific information relating to potential concerns, and that if a complaint cannot be resolved by negotiation, the Code provides that it can be referred to relevant State and Territory retail leasing dispute resolution bodies.
- 4.16. The WA SBDC submits that the Fact Sheet could more clearly disclose the overall position including the Code's standing, the relevant rights and obligations applicable under retail tenancy legislation, the tenant's capacity to negotiate, and that legal advice should be obtained by potential lessees before committing to any lease.
- 4.17. In response to concerns about inadequate disclosure requirements of the Code that were raised by the ARA, PGC and FCA as part of the 2017 authorisation process, the SCCA undertook an awareness and engagement drive along with the NRA and other retailer parties to the Code. The SCCA also considered ways to implement further awareness and engagement measures with other retailer members of the expanded Code Administration Committee.
- 4.18. The ACCC considers that the measures undertaken by the SCCA and the expanded Code Administration Committee address these previous concerns. In addition, the ARA and PGA are now represented on the Code Administration Committee and a joint submission including the ARA and PGA advises that the Code Administration Committee has proven to be a productive forum.
- 4.19. The ACCC considers that the Code has resulted, and is likely to continue to result in, a public benefit by providing greater certainty and transparency:
- a. to lessees, by setting out to permanent lessees the circumstances and terms on which casual mall licences will be granted. This allows lessees to make better-informed business decisions and encourages greater retail investment by providing certainty to lessees over the life of the agreements they have entered into.
  - b. to licensees, ensuring that they have information about the terms on which casual mall licences may be offered in a shopping centre, so that they can also make



better informed decisions, and facilitating casual mall licensees who may also be or become prospective lessees to test product and business models, and

- c. in relation to the equitable distribution of non-tenant specific overhead costs incurred by shopping centres between lessees and licensees.

### **Transaction cost savings**

- 4.20. The SCCA submits that the Code has continued to deliver time and cost efficiencies for shopping centre landlords by providing for a consistent national approach<sup>9</sup> to the management of casual mall licensing.
- 4.21. The ACCC considers that by setting out the parameters on which casual mall licensing will be offered under the Code, there may be some transaction cost savings for landlords who have a number of shopping centres across multiple jurisdictions. There may also be some transaction cost savings for casual mall licensees and existing tenants as they are not required to inquire with each landlord how casual mall licensing will be offered in each shopping centre.

### **Dispute resolution**

- 4.22. The Code contains provisions that relate to dispute resolution. The ACCC has previously considered that these provisions increase the likelihood that the public benefits are realised by providing a process for the resolution of disputes in relation to breaches of the Code.
- 4.23. The SCCA submits that during the term of the current authorisation, the Code has provided an effective dispute resolution pathway, serving to reduce complaints regarding the issuing of casual mall licences contrary to the provisions of the Code. The SCCA submits that the Code Administration Committee, with its increased retailer participation and awareness, has become a productive forum to identify and discuss relevant issues under the Code, including the development of the Fact Sheet to help raise awareness of the Code, casual mall licensing and key provisions under the Code.
- 4.24. In a response to an ACCC request for information, the SCCA provided specific examples, on a confidential basis, of the kinds of dispute that are resolved informally using the dispute resolution pathway set out in the Code. Based on the information provided, the Code appears to be facilitating parties to resolve disputes.
- 4.25. Further, submissions from Code Administration Committee independent Chair Mr Mark Brennan and Observer Mr Phillip Chapman support the Code's effective operation in facilitating dispute resolution without the need for formal escalation, and the beneficial effects of operational changes to the Code's administration.
  - a. Mr Mark Brennan considers the dispute resolution processes of the Code are operating successfully, with disputes having been resolved locally within the relevant shopping centre. Mr Brennan submits that the few matters brought to the Code Administration Committee's attention since 2016 were resolved outside the Committee and in good faith, without the need for formal procedures.

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<sup>9</sup> While South Australian retail tenancy legislation regulates casual mall licensing, The ACCC considers that the SCCA's Casual Mall Licensing Code of Practice is consistent with South Australia's Casual Mall Licensing Code as set out in the Retail and Commercial Leases Act 1995.

- b. Mr Phillip Chapman noted that a number of issues existed with the Code prior to the ACCC's 2017 re-authorisation, including poor dispute resolution, which have since improved. Mr Chapman submits that the Code resolves issues in a timely manner, and the expanded Code Administration Committee serves as a productive forum to make practice changes and prevent issues arising.
- 4.26. The WA SBDC submits that the Code should include a schedule detailing the timely, low-cost dispute resolution services available from Small Business Commissioners in Western Australia, South Australia, New South Wales and Victoria (while noting that the Fact Sheet provides this information).
- 4.27. Without the Code, the ACCC considers that the available avenues for resolving disputes about casual mall licensing would depend on applicable legislation and the terms of leasing contracts between lessors and retailers, which may vary between shopping centres and may not contain provisions relating to casual mall licensing.
- 4.28. The ACCC considers that the dispute resolution provisions of the Code increase the likelihood that the public benefits of the Code are realised by providing mechanisms to ensure the Code is operating in the interests of all parties. The ACCC does not consider it necessary to require further amendments to the Code to include detail about the low cost dispute resolution services available from Small Business Commissioners and notes that this information is set out in the Fact Sheet provided by the SCCA.

## Public detriments

- 4.29. The Act does not define what constitutes a public detriment. The ACCC adopts a broad approach. This is consistent with the Tribunal which has defined it as:
- ...any impairment to the community generally, any harm or damage to the aims pursued by the society including as one of its principal elements the achievement of the goal of economic efficiency.<sup>10</sup>*
- 4.30. The Code limits the circumstances in which competitors to existing lessees can set up within a mall on a temporary basis. By doing so, the Code may reduce competition and innovation between competing shopping centre owners and managers in relation to the terms under which they supply retail space. It may also reduce competition in the supply of goods and services by retailers who are shopping centre tenants.
- 4.31. The SCCA submits that during the current authorisation period, there has been no evidence or incident provided to the SCCA or the Code Administration Committee to suggest that the Code has caused public detriment.
- 4.32. The ACCC considers that the Code is likely to result in minimal detriment in the form of a lessening of competition between retailers. The ACCC bases this assessment on the limited restrictions on competition imposed by the Code. The ACCC considers that the following factors mitigate any public detriment likely to result from the Code:
- a. The restrictions apply only in respect of the granting of a casual mall licence that introduces a competitor directly adjacent to or in front of an existing lessee and then, only if the placing of that direct competitor would be unreasonable (see paragraph 2.4 (d) and (e) above and clause 6 of the Code).

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<sup>10</sup> Re 7-Eleven Stores (1994) ATPR 41-357 at 42,683.

- b. The Code only applies to retail shopping centres. It does not apply to retail space located in freestanding shops; shops that are grouped together under one roof but do not constitute a shopping centre; shops in office complexes; and other configurations of shops.
- c. In addition, there are many shopping centres and therefore a casual mall licensee who may be restricted at one shopping centre may not be restricted at another as there is likely to be a different composition and positioning of tenants at each shopping centre.

4.33. The ACCC notes that the WA SBDC proposed a number of amendments to the Code, including that:

- a. Casual mall licences should not be granted for longer than 30 days as enabling a lessor to grant a casual mall licence of up to 180 days is excessive and could detrimentally impact on existing lessees' businesses (Clause 1).
- b. Any interference with sightlines to an existing lessee's shopfront should be prohibited rather than only if it "substantially interferes" (Clause 5(1)) as maintaining this provision potentially harms incumbents and puts them at a competitive disadvantage to passing foot traffic.
- c. A lessor should not be able to grant a casual mall licence that results in the introduction of an external competitor of an adjacent lease, not just the "unreasonable introduction" of that competitor (Clause 6(1)).
- d. Special events should not be excluded from the Code provisions; however, if retained, the requirement for the lessor to give existing lessees only 24 hours' notice is grossly insufficient (Clause 7).

4.34. It is not clear that the suggested changes would materially increase the public benefits or reduce the public detriments from the Code, or that they are necessary in order for the likely public benefits of the Code to outweigh the likely public detriments. However, industry codes that are regularly reviewed, and improved in response to feedback, are likely to be more effective. The ACCC encourages the SCCA to continue to take into account feedback about the effectiveness of the Code and if necessary, seek re-authorisation of the Code to reflect any proposed amendments.

## Balance of public benefit and detriment

4.35. The ACCC considers that the Code is likely to deliver public benefits resulting from:

- a. greater certainty and transparency for shopping centre lessees and casual mall licensees on the circumstances in which casual mall leasing will be offered in a shopping centre, and
- b. transaction cost savings for landlords, shopping centre lessees and casual mall licensees by setting out the parameters on which casual mall licensing will be offered in shopping centres owned or managed by parties to the Code.

4.36. The ACCC also considers that by providing a process for the resolution of disputes in relation to breaches of the Code, this increases the likelihood that the public benefits will be realised.

4.37. The ACCC is satisfied that the Code is likely to result in minimal public detriment arising from any lessening of competition between retailers.

4.38. Overall, the ACCC is satisfied that the Code is likely to result in a public benefit and that this public benefit would outweigh any likely detriment to the public from the Code.

### Length of authorisation

- 4.39. The Act allows the ACCC to grant authorisation for a limited period of time.<sup>11</sup> This enables the ACCC to be in a position to be satisfied that the likely public benefits will outweigh the detriment for the period of authorisation. It also enables the ACCC to review the authorisation, and the public benefits and detriments that have resulted, after an appropriate period.
- 4.40. The SCCA seeks re-authorisation for 10 years, submitting that the Code has now been in operation for over a decade and is well established. The SCCA submits that improvements to the Code Administration Committee, provides for a productive forum to engage on, and resolve, issues as they arise.
- 4.41. This view is supported by the Code Administration Committee independent Chair Mr Mark Brennan, who submits that the Code has been in operation for 13 years and it is no longer appropriate to have to seek re-authorisation as frequently as has occurred in the past. The performance of the Code and the oversight of the Code Administration Committee justifies a longer period of authorisation
- 4.42. Mr Phillip Chapman, the independent Observer on the Code Administration Committee, submits that granting authorisation for 10 years is unlikely to be an issue, although a five-year authorisation might be a better outcome to provide accountability and transparency over the operation of the Code. Mr Chapman noted that states and territories typically review retail legislation on a five to seven-year cycle and having the Code authorised for five years would align with this review period.
- 4.43. The WA SBDC submits that a 10-year authorisation would be excessive given how fast the retail sector changes in Australia and that the ACCC should grant re-authorisation for no more than five years.
- 4.44. The ACCC previously had concerns about the effective administration of the Code and granted a shorter authorisation of 3 years. The ACCC notes that the SCCA has made a number of amendments to the Code and its operation to address these concerns and the Code appears to be operating effectively.
- 4.45. The ACCC typically grants authorisations for period of up to five years, although the ACCC has granted authorisation for longer periods including where the conduct has been authorised previously and there is evidence of net public benefits. The ACCC proposes to grant authorisation for a period of 10 years, as requested by the SCCA.
- 4.46. The ACCC considers that the SCCA has significantly improved the Code's operation, and the improvements are largely formalised in the Code itself. This formalisation reduces the likelihood that, in the absence of regular ACCC review, benefits will erode.
- 4.47. The ACCC notes that the substantive elements of the Code, which set out how landlords may and may not grant casual mall licences, have remained unchanged since the ACCC's first authorisation of the Code in 2007 and reflect South Australia's statutory Casual Mall Licensing Code.

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<sup>11</sup> Subsection 91(1)

- 4.48. In the event of a material change of circumstances, which significantly affects the benefits to the public or detriments, the ACCC may initiate a review of an authorisation.
- 4.49. The ACCC proposes to grant re-authorisation for 10 years. The ACCC invites interested parties to make submissions on the proposed length of authorisation.

## 5. Draft determination

### The application

- 5.1. On 11 September 2020 the SCCA lodged an application to revoke authorisations A91591 & A91592 and substitute authorisation AA1000529 for the ones revoked (referred to as re-authorisation). This application for re-authorisation AA1000529 was made under subsection 91C(1) of the Act.
- 5.2. The SCCA seeks re-authorisation for the Code for 10 years.
- 5.3. Subsection 90A(1) of the Act requires that before determining an application for authorisation, the ACCC shall prepare a draft determination.

### The authorisation test

- 5.4. Under subsections 90(7) and 90(8) of the Act, the ACCC must not grant authorisation unless it is satisfied in all the circumstances that the Conduct is likely to result in a benefit to the public and the benefit would outweigh the detriment to the public that would be likely to result from the Conduct.
- 5.5. For the reasons outlined in this draft determination, the ACCC is satisfied, in all the circumstances, that the Conduct would be likely to result in a benefit to the public. The ACCC is satisfied that the benefit to the public would outweigh the detriment to the public that would result or be likely to result from the Conduct, including any lessening of competition.
- 5.6. Accordingly, the ACCC proposes to grant re-authorisation.

### Conduct which the ACCC proposes to authorise

- 5.7. The ACCC proposes to revoke authorisations A91591 & A91592 and grant authorisation AA1000529 in substitution to enable the Applicant to give effect to the Code as described at 2.4 and defined as the Conduct. The Code may involve a cartel provision within the meaning of Division 1 of Part IV of the Act or may have the purpose or effect of substantially lessening competition within the meaning of section 45 of the Act.
- 5.8. The ACCC proposes to grant authorisation AA1000529 for 10 years.
- 5.9. The proposed authorisation is in respect of the Code as it stands at the time authorisation is granted. Any changes to the arrangement during the term of the proposed authorisation would not be covered by the proposed authorisation.
- 5.10. This draft determination is made on 3 December 2020.

## 6. Interim authorisation

- 6.1. At the time of lodging the application for re-authorisation, the SCCA also requested interim authorisation to ensure continuity of the existing Code while the ACCC considers the substantive application for re-authorisation.
- 6.2. Section 91(2) of the Act allows the ACCC to suspend the operation of an authorisation that is sought to be revoked and grant interim authorisation in substitution for the suspended authorisation while the ACCC is considering the substantive application for re-authorisation.
- 6.3. In granting interim authorisation, the ACCC has taken into account:
  - a. that there is a need for interim authorisation to enable the SCCA to continue to use the Code for casual mall licensing,
  - b. granting interim authorisation maintains the status quo and therefore maintains the likely net benefits previously identified by the ACCC while the ACCC assesses the application for re-authorisation, and
  - c. granting interim authorisation is unlikely to result in harm if the application for re-authorisation is granted or denied.
- 6.4. Accordingly, the ACCC has decided to suspend the operation of authorisations A91591 & A91592 and grant interim authorisation to allow the Code to continue to operate on the same terms as authorised by A91591 & A91592, while the ACCC considers the SCCA's substantive application for re-authorisation.
- 6.5. Interim authorisation will remain in place until the date the ACCC's final determination comes into effect or until the ACCC decides to revoke interim authorisation.

## 7. Next steps

- 7.1. The ACCC now invites submissions in response to this draft determination. Submissions are requested by 8 January 2021. In addition, consistent with section 90A of the Act, the SCCA or an interested party may request that the ACCC hold a conference to discuss the draft determination.