



# Determination

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

22 April 2021

Commissioners: Brakey  
Court  
Ridgeway

## Summary

The ACCC has decided 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 in 2007, 2013, and 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 greater 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 is satisfied that the likely public benefits will outweigh the likely public detriments.

The ACCC has decided to grant re-authorisation for 10 years until 31 December 2030.

### 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**).
- 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% of total floorspace that is available for leasing in Australian shopping centres.
- 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.
- 1.5. The SCCA requested, and on 3 December the ACCC granted, interim authorisation under subsection 91(2) of the Act. Interim authorisation enables the SCCA to give

effect to the Code on the same terms as the previous authorisation<sup>1</sup>. Interim authorisation will remain in place until the date the ACCC's Determination comes into effect or until the interim authorisation is revoked.

## The Conduct

- 1.6. The SCCA is seeking re-authorisation to give effect to an amended version of the currently authorised Code for 10 years until 31 December 2030 (the **Conduct**). A copy of the amended Code is at **Annexure A**.
- 1.7. 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.

## 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).

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<sup>1</sup> [A91591 & A91592](#)

- 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% of the goods displayed for sale by the person are of the same general kind as more than 20% 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 5 landlord and 5 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 3 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.
- 2.5. Broadly, the SCCA has not substantially changed the Code regarding its requirements for casual mall licensing practices. However, the SCCA has made a number of

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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.

changes to how the Code Administration Committee operates. 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 5 public submissions from interested parties prior to issuing its draft determination; 4 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.
  - c. The Code Administration Committee independent Chair Mark Brennan supports re-authorisation of the Code for 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](#).

- 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 5-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 5 years.
- 3.4. On 3 December 2020 the ACCC issued a draft determination proposing to grant authorisation for 10 years. A pre-decision conference was not requested following the draft determination. The ACCC received 5 public submissions in response to its draft determination:
- a. The WA SBDC provided 2 submissions:
    - i. reiterating its concerns with re-authorisation and the proposed 10-year duration of re-authorisation, and
    - ii. responding to ACCC questions regarding potential changes to the shopping centre landscape and their effect.
  - b. The Australian Small Business and Family Enterprise Ombudsman (**ASBFEO**) supports re-authorisation of the Code, but suggests a 5-year authorisation, or periodic review within a longer period, would be appropriate.
  - c. The SCCA responded to the submissions from the WA SBDC and ASBFEO by providing further information in support of its application for re-authorisation of the Code for a period of 10 years.
  - d. Scentre Group supports re-authorisation of the Code for 10 years.
- 3.5. The ACCC considers these submissions in its assessment below.
- 3.6. 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).

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

## 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.

## 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. 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. As such, in the future without the Conduct, the ACCC considers that individual SCCA members would be likely to 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).
- 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 licensing 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.

### **Greater 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 uncertainty or risk to lessees and allows them to make informed decisions. While the Code is voluntary, SCCA strongly recommends its members apply it.
- 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 raised by the ARA, PGC and FCA in 2017 about inadequate disclosure requirements of past versions of the Code, the SCCA, NRA and other

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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.



retailer parties to the Code undertook an awareness and engagement drive. 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 the previously held concerns of the ARA, PGC and FCA, who now support re-authorisation of the Code for 10 years. In addition, the ARA and PGA are now directly represented on the Code Administration Committee and the ARA and PGA submit 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 are likely to be granted. This allows lessees to make better-informed decisions and the greater certainty may encourage greater retail investment. This is especially likely where retail leases incorporate the Code into their terms.
  - b. To licensees, by facilitating an environment where they are less likely to be placed in a mutually undesirable situation with permanent tenants, or subject to disputes arising from dissatisfied permanent tenants.
  - 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

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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.

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.
  - 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>

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

- 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).
  - 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 provide 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 5-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 5 to 7-year cycle and having the Code authorised for 5 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 5 years. The WA SBDC considers that the shopping centre landscape is highly likely to change, that these changes are likely to be significant within 10 years, and that the Code could become out of step with market

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

conditions, creating an environment for disputes. The WA SBDC submits that the shopping centre landscape is highly likely to change based on:

- a. emerging technological developments including online shopping, click and collect, frictionless retail and direct to consumer,
- b. expected changes in how shopping centre managers will continue to tailor their product to adjust to a changing economic environment, competition, the impact of the COVID-19 pandemic, consumer behaviour and societal needs, and
- c. shopping centre landlords better serving the community through more experiential and flexible spaces including more free and public spaces.

- 4.44. The WA SBDC submits that the Code could fail to meet landlord and tenant requirements going forward. For example, shopping centre tenants (including casual mall tenants) and their landlords could require different bricks and mortar configurations or other requirements for space to meet consumer expectations that the Code does not address.
- 4.45. The WA SBDC expressed concerns that some stakeholders, including small business tenants, could misinterpret a 10-year authorisation by the ACCC as being non-negotiable when the Code is voluntary. WA SBDC notes that the Casual Mall Licensing Code of Practice Fact Sheet should more clearly disclose the overall standing of the Code.
- 4.46. The ASBFEO submits that it may be prudent to either reduce the period of authorisation to a shorter time, or for the ACCC to include a 3 to 5 yearly review mechanism.
- 4.47. The SCCA's response to the WA SBDC's concerns claims that they are unsubstantiated and speculative in nature and that evidence and the views of key stakeholders support an argument that the Code has proven to be an enduring, robust and fit-for-purpose framework in the evolving retail and shopping centre landscape.
- 4.48. The SCCA considers that the Code will continue to prove adaptive and enduring into the future. SCCA notes that that the Code has continued to operate throughout the COVID-19 pandemic, which saw an increase in online trade as a proportion of total retail trade. SCCA notes that since the inception of the Code, and throughout the COVID-19 pandemic, retailers have leveraged new technologies and practices to suit their individual requirements to meet customer preferences and that these technologies will evolve and change over time. The SCCA agrees that shopping centres are evolving in terms of their usage and tenant mix, and notes that the Code has continued to apply and be malleable as shopping centres have provided COVID-19 testing sites to support the Victorian Government.
- 4.49. The SCCA rejects WA SBDC's claim that a 10-year authorisation has the potential to give rise to a misrepresentation of the Code not being voluntary in nature. The SCCA notes that the Code is voluntary and does not consider the Fact Sheet misrepresents the standing of the Code.
- 4.50. The ACCC previously had concerns about the effective administration of the Code and granted a shorter authorisation of 3 years in 2017. The ACCC notes that the SCCA has made a number of amendments to the Code's operation focusing on retailer representation and independent oversight to address these concerns and that the Code appears to be operating effectively.

- 4.51. 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 review, benefits will erode.
- 4.52. The ACCC considers the duration of an authorisation on a case-by-case basis, although they are often granted for up to 5-year periods. The ACCC is more likely to grant authorisation for longer periods where the conduct has been authorised previously and there is demonstrated evidence of net public benefits. 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.
- 4.53. Although there have been, and continue to be, changes to the market environment, the ACCC considers that based on the current information these changes are unlikely to impact the public benefits and public detriments arising from the Code which specifically relates to shopping mall retailing. Should market conditions affect the operation of the Code, the ACCC considers it likely that the SCCA would seek to amend the Code to address these issues. The ACCC notes that if the SCCA made amendments to the Code, the SCCA would need to seek re-authorisation.
- 4.54. 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. The ACCC will consider any new information provided by interested parties in deciding whether to initiate a review.
- 4.55. The ACCC has decided to grant re-authorisation for 10 years until 31 December 2030.

## 5. 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 until 31 December 2030.

### The authorisation test

- 5.3. 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.
- 5.4. For the reasons outlined in this determination, the ACCC is satisfied, in all the circumstances, that the Conduct is 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.
- 5.5. Accordingly, the ACCC has decided to grant re-authorisation.

## Conduct which the ACCC has decided to authorise

- 5.6. The ACCC has decided to revoke authorisations A91591 & A91592 and grant authorisation AA1000529 in substitution. Authorisation AA1000529 enables the SCCA and its members to give effect to the Code as described at 2.3 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.
- 5.7. The ACCC has decided to grant authorisation AA1000529 for 10 years until 31 December 2030.
- 5.8. 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.

## 6. Date authorisation comes into effect

- 6.1. This determination is made on 22 April 2021. If no application for review of the determination is made to the Australian Competition Tribunal, it will come into force on 14 May 2021.

# Casual Mall Licensing Code of Practice

## Preamble

Casual mall licensing is a standard feature of shopping centres in Australia. Where applied properly casual mall licensing adds variety to the retail offer of shopping centres, helps attract customers to shopping centres and enables existing retailers to augment their normal sales. Where it is applied insensitively it can be a source of dissatisfaction to existing retailers.

This voluntary Code of Practice has been agreed between the Australian Retailers Association, National Retail Association, National Online Retail Association and the Shopping Centre Council of Australia 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 Associations form the membership of the Code Administration Committee (refer to section 14 of this Code), along with the Restaurant Catering Industry Association of Australia.

The Associations strongly recommend to their members that this Code of Practice apply to shopping centres in all States and Territories in Australia (except South Australia) progressively from 1 January 2008, as circumstances permit. It is noted that the practice of casual mall licensing in shopping centres in South Australia is regulated by the *Retail and Commercial Leases (Casual Mall Licences) Amendment Act 2001*.

This Code of Practice does not apply to any lessee, any retail shop or other premises, or any lease to which the relevant retail tenancy legislation of the State or Territory in which the shopping centre is located does not apply.

This Code of Practice has been authorised by the Australian Competition and Consumer Commission for a period of ten years until 31 December 2030.

## Interpretation

1.(1) In this Code, unless the contrary intention appears—

**"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;

**"casual mall licence"** means an agreement under which a person grants, or agrees to grant, to another person other than a registered charity a right to occupy a designated part of a mall area for the purposes of the sale of goods or the supply of services to the public, where the total number of days the person is permitted to occupy the area does not exceed 180 days;



"**casual mall licence area**", in relation to a casual mall licence, means the part of the mall area in respect of which a person is granted a right of occupancy under the casual mall licence;

"**casual mall licence plan**"—see clause 2(2);

"**casual mall licence policy**"—see clause 2;

"**centre court**" means a part of a mall area designated as a centre court by the lessor in a casual mall licence policy in accordance with clause 2;

"**common area**" does not include parking areas, loading docks, plant rooms, customer service areas, stairways, escalators, travelators, lifts, lift wells, toilets, restrooms, seating areas, food courts, stage areas, entertainment areas, or lifestyle precincts;

"**competitor**"—see subclause (2);

"**external competitor**"—see subclause (3);

"**internal competitor**"—see subclause (4);

"**mall area**" means a part of the common area of a retail shopping centre accessible to the public that is bordered wholly or partly by the shopfronts of retail shops;

"**non-specific outgoings**" means outgoings not specifically referable to any particular shop in a retail shopping centre.

"**sales period**" means a period not exceeding four weeks fixed from time to time by the lessor as a period during which the lessor promotes a sales event in the retail shopping centre;

"**special event**" means 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) For the purposes of this Code—

(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;

(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.

(3) For the purposes of this Code, a person granted a casual mall licence is an **external competitor** of a lessee of a retail shop if the person is, in the business conducted in the casual mall licence area, a competitor of the lessee but is not a lessee of another retail shop in the same retail shopping centre.

(4) For the purposes of this Code, a person granted a casual mall licence is an **internal competitor** of a lessee of a retail shop if the person is, in the business conducted in the casual mall licence area, a competitor of the lessee and is a lessee of another retail shop in the same retail shopping centre.

## **Casual mall licence policy**

- 2.(1) A lessor must not grant a casual mall licence in respect of a retail shopping centre unless the lessor has prepared a document that sets out the lessor's policy in respect of the granting of casual mall licences for the shopping centre (a "**casual mall licence policy**").
- (2) The casual mall licence policy must include the following:
  - (a) a floor plan (a "**casual mall licence plan**") that clearly shows—
    - (i) the mall areas within the shopping centre in respect of which casual mall licences may be granted, and the size of those areas; and
    - (ii) the part of the mall area within the shopping centre designated as a centre court (if any), and the size of that area;
  - (b) the number of sales periods for the shopping centre in each accounting period;
  - (c) a statement whether the lessor reserves the right to grant casual mall licences otherwise than in accordance with clauses 4, 5 and 6 in respect of special events in the shopping centre.
- (3) The area designated as a centre court in a casual mall licence policy must not exceed 20 per cent of the total common area of the shopping centre.
- (4) If a lessor amends a casual mall licence policy, the lessor must—
  - (a) give written notice of the amendment to the lessees of the shopping centre and the place and times at which a copy of the amended policy may be inspected; and
  - (b) in the case of a lessee who may reasonably be considered to be affected by the amendment—provide a copy of the amended policy to the lessee; and
  - (c) otherwise provide a copy of the amended policy to a lessee on request.
- (5) An amendment to a casual mall licence policy does not take effect until 30 days after the lessees of the shopping centre have been notified in accordance with subclause (4)(a).

## **Provision of information**

- 3.(1) A lessor must not grant a casual mall licence in respect of a retail shopping centre unless the lessor has given each person who is a lessee of a retail shop in the shopping centre the following information:
  - (a) a copy of the casual mall licence policy in force in respect of the shopping centre; and
  - (b) a copy of this Code; and
  - (c) the person nominated by the lessor to deal with complaints about casual mall licences (whether described by name or the title of the person's position) and the person's contact details.
- (2) The information required under subclause (1) must have been given to a person—

(a) in the case of a person who has entered into a retail shop lease after the commencement of this Code at the time the disclosure statement for the lease was provided to the person; or

(b) in any other case—not less than 14 days before the first granting of a casual mall licence in respect of the shopping centre after the commencement of this Code.

### **Obligations of lessor relating to casual mall licence policy**

- 4.(1) A lessor must not grant a casual mall licence except in accordance with the casual mall licence policy as in force in respect of the retail shopping centre at the time the licence is granted.
- (2) A lessor must not grant a casual mall licence in respect of an area that is not included in a casual mall licence plan as in force in respect of the retail shopping centre at the time the licence is granted.
- (3) A lessor must not amend a casual mall licence policy except in accordance with this Code.

### **Sightlines to shopfront**

- 5.(1) A lessor must ensure that the business conducted by the holder of a casual mall licence in respect of a retail shopping centre does not substantially interfere with the sightlines to a lessee's shopfront in the shopping centre.
- (2) Subclause (1) does not apply in relation to a lessee if the lessor, before the grant of the casual mall licence, and after informing the lessee of the proposal to grant a licence that might result in interference of a kind referred to in subclause (1), obtained the written consent of the lessee to the grant of the licence.

### **Competitors**

- 6.(1) A lessor must not grant a casual mall licence that results in the unreasonable introduction of an external competitor of an adjacent lessee.
- (2) A lessor must not grant a casual mall licence that results in the unreasonable introduction of an internal competitor of an adjacent lessee unless—
  - (a) the internal competitor is a lessee of a retail shop situated in the same retail precinct as the casual mall licence area, or if the shopping centre is not divided into precincts, in the vicinity of the casual mall licence area; or
  - (b) the casual mall licence area is the area closest to the internal competitor's retail shop that is available for the casual mall licensing at the time the casual mall licence is granted; or
  - (c) the term for which the casual mall licence is granted falls within a sales period fixed by the lessor in respect of the shopping centre, there having been no more than five previous sales periods in the preceding period of twelve months; or
  - (d) the casual mall licence area is within the centre court of the shopping centre.

- (3) Subclause (2) does not apply in relation to an adjacent lessee if the lessor, before the grant of the casual mall licence, and after informing the lessee of the proposal to grant a licence that will result in the introduction of an internal competitor of the lessee, obtained the written consent of the lessee to the grant of the licence.
- (4) For the purposes of subclauses (1) and (2), the introduction of a competitor of an adjacent lessee is unreasonable if it has a significant adverse effect on the trading of the adjacent lessee in the adjacent lessee's retail shop.
- (5) Subclause (4) is not to be taken as limiting the circumstances in which the introduction of a competitor of an adjacent lessee might be regarded as being unreasonable.

### **Special events**

7. Clauses 4, 5, and 6 do not apply to casual mall licences granted in respect of a special event provided that the lessor—
  - (a) reserved the right in the casual mall licence policy to grant casual mall licences otherwise than in accordance with those clauses; and
  - (b) gave the lessees of the retail shopping centre not less than 24 hours written notice containing details of the special event and its duration.

### **Adjustment of outgoings**

8. The lessor must, before making an adjustment after the end of an accounting period in accordance with the provision of a retail shop lease, reduce the total amount of the non-specific outgoings to which lessees of retail shops in the retail shopping centre are liable to contribute in respect of the accounting period by an amount calculated in accordance with the following formula in relation to each casual mall licence granted by the lessor permitting trade in the casual mall licence area during the accounting period:

$$R = \frac{TO}{TLA \times TD} \times CMLD \times CMLA$$

where—

R=the amount of the reduction;

TO=the total amount of the non-specific outgoings to which lessees of retail shops in the shopping centre are liable to contribute in respect of the accounting period;

TLA=the total of the lettable areas of all the retail shops in the shopping centre in square metres;

TD=the total number of days in the accounting period;

CMLD=the number of days during which the person granted the casual mall licence was permitted to trade in the casual mall licence area during the accounting period;

CMLA=the casual mall licence area in square metres.

## **Dispute Resolution**

- 9.** A lessee who considers a breach of this Code has occurred must upon becoming aware of the breach notify, in writing, the person nominated by the lessor to deal with complaints under subclause 3 (1) (c). This person must, as soon as practicable, respond to the complaint that has been lodged.
- 10.** The parties to this Code expect, where a complaint is made alleging a breach of this Code has occurred, that the lessor and lessee will, in good faith, attempt to resolve any complaint by negotiation between themselves.
- 11.** In the event that the lessor and lessee are unable to resolve a complaint, after exhausting all internal avenues for resolution, the parties agree that the complaint can be referred by either the lessor or lessee for mediation.
- 12.** The independent mediator will be appointed by the relevant retail tenancy official in each State or Territory (except South Australia).
- 13.** The lessor and lessee will pay for the cost of a mediation in equal shares.

## **Code Administration Committee**

- 14.** The Code will be administered by a Code Administration Committee (CAC) whose members will be without remuneration, except for expenses.
- 15.** The role of the CAC will be to promote and publicise the Code throughout the industry; to monitor the operation of the Code; and to report regularly to the parties to the Code on the operation and effectiveness of the Code.
- 16.** The CAC will comprise ten representatives as follows, comprising five landlord and five retailer representatives:
  - One representative nominated by the National Retail Association;
  - One representative nominated by the National Online Retailers Association;
  - One representative nominated by the Australian Retailers Association;
  - One representative nominated by the National Retail Association;
  - One representative nominated by the Pharmacy Guild of Australia;
  - One representative nominated by the Restaurant Catering Industry Association of Australia;
  - Up to five representatives nominated by the Shopping Centre Council of Australia.

*Any changes to the composition of the CAC will be notified at [www.scca.org.au/industry-information/casual-mall-licensing-code/](http://www.scca.org.au/industry-information/casual-mall-licensing-code/)*

  - The CAC will be chaired by an independent person.

## **Period of Operation of the Code of Practice**

- 17.** This Code of Practice will remain in operation until 31 December 2030.
- 18.** Within one year prior to the date of expiry of the Code according to Clause 17 the CAC will report to the parties to the Code on whether the period of operation of the Code should be extended and, if a period of extension is agreed, will seek further authorisation of the Code from the ACCC.