RESPONSE TO ACCC DRAFT DETERMINATION

APPLICATION FOR RE-AUTHORISATION OF THE CASUAL MALL LICENSING CODE OF PRACTICE

OVERVIEW

The Shopping Centre Council of Australia (SCCA) is pleased to provide this submission to the Australian Competition and Consumer Commission (ACCC) – in response to submissions made to the ACCC's Draft Determination for the revocation of authorisations A91591 and A91592 with the substitution of the replacement authorisation AA1000529 – regarding the Casual Mall Licensing Code of Practice (the Code).

Noting the detail in the SCCA's original application and the ACCC's Draft Determination, this submission specifically addresses the several claims raised by the WA Small Business Development Corporation (WA SBDC) and to a lesser extent the issues raised by the Australian Small Business and Family Enterprise Ombudsman (ASBFEO).

From the outset, we note that we provide this response with respect and in good faith and have a positive relationship with the WA SBDC. However, as outlined in our submission, we submit that the WA SBDC has failed to substantiate any of its claims against reauthorising the Code for the proposed 10-year period. Many of the claims are 'loose' and speculative, and in parts misunderstand and misrepresent the role, purpose and effect of the Code.

The WA SBDC also makes a claim that the Code's reauthorisation should be limited to 5 years, as this would be 'in line' with the review process of WA retail lease legislation. Respectfully, the basis of this claim is factually incorrect. The WA retail lease legislation has not been comprehensively reviewed on a consistent 5-year basis, and has not been comprehensively reviewed for over a decade. The Code has been subject to more reviews and reauthorisations than the WA legislation has. The last comprehensive reviews of equivalent legislation across Australia occurred in QLD, NSW, and SA – along with a 'mini-review' in VIC.

In addition, we note and submit for the ACCC's consideration that no other State-based Small Business Commissioners or offices (collectively representing the remaining ~88.4 percent of the SCCA members' retail leasing market) involved in general retail lease legislation issues have opposed the re-authorisation of the Code.

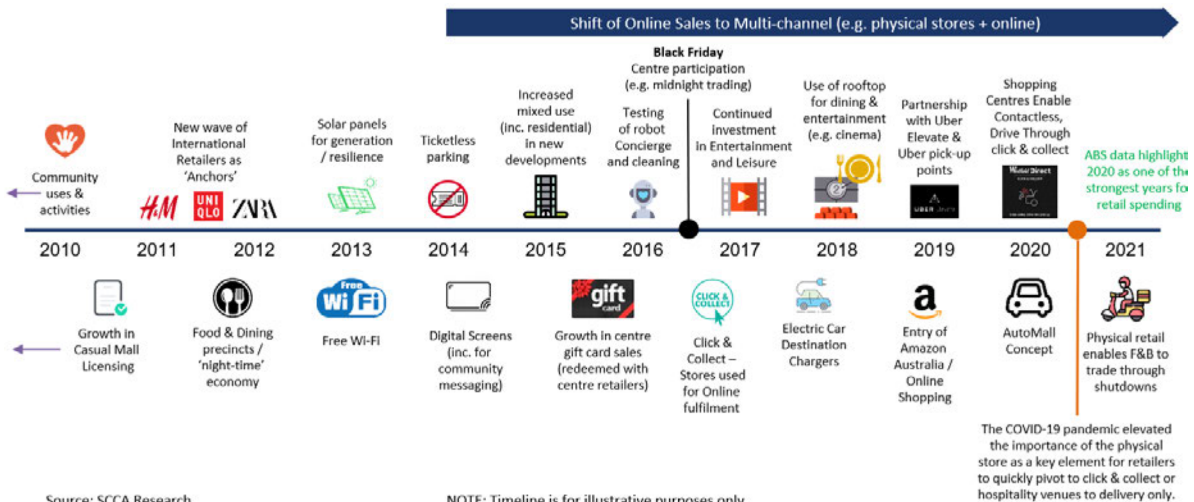
SCCA POSITION ON DRAFT DETERMINATION

The SCCA welcomes and supports the ACCC's Draft Determination and its principal proposal to authorise the Code for a 10-year period and grant interim authorisation to allow the SCCA to continue to give effect to the 'current' Code while continuing its assessment of the application for re-authorisation.

We are pleased the ACCC acknowledges that the Code has been strengthened and progressively matured since its inception in 2007. Indicative of this is the fact that Australia's key retail industry groups have unanimously supported the Code's proposed reauthorisation for a 10-year period (as per their support noted in our application and their separate letter dated 14 October 2020 on the ACCC's public register) and continue to work collaboratively on the Code's continual improvement, administration, and oversight as part of the Code Administration Committee (CAC). This position is also supported by the CAC's Independent Chairman, Mr Mark Brennan, who is a former Victorian and Australian Small Business Commissioner.

Evidence and the views of key stakeholders **support the fact that the Code has proven to be an enduring, robust and fit-for-purpose framework in the evolving retail and shopping centre landscape**, including during COVID-19. The Code has been successfully applied during times of evolving changes for the past 10-years, as illustrated below.

Figure 1 – Shopping Centre Innovation Timeline (2010-2021)



SCCA RESPONSE TO WA SBDC

As noted above, we are disappointed that the WA SBDC has not substantiated or provided any evidence to support its several claims and ultimate position that the Code should not be re-authorised for a 10-year period, per the ACCC's Draft Determination.

The so-called "alarm" conveyed by the WA SBDC about the ACCC's Draft Determination therefore has no firm basis or validity, and is in our view unnecessarily provocative. While we respond to each of the WA SBDC's six claims below, we specifically reject the WA SBDC's claims that:

- a "fast evolving retail sector" might contribute to the Code becoming "out of step" and "fail to meet landlord and tenant requirements going forward"; and
- subsequent concern that this will give rise to a misinterpretation of the Code as not voluntary, rather "non-negotiable".

While we will not revisit the key principles noted in our original application in detail, it is disappointing that the WA SBDC has failed to acknowledge the **public benefits of the Code**, which are outlined in our original application and have been acknowledged by the ACCC in its three previous Determinations for the Code and under the Draft Determination. Central to this is that the Code enables the consistent management of casual mall licensing (CML) within shopping centres, promotes fair competition, and ensures lessees have access to increased information (including on a similar basis to how the WA SBDC provides information to small businesses).

It is also disappointing that the WA SBDC has failed to acknowledge the **role of the Code** in enabling productive use of common mall areas, along with the benefits to retailers, including providing a low-cost nursery for retailers and potential retailers, providing a cheap and effective way to (for instance) clear excess stock or sell seasonable stock, and attracting customers to shopping centres by offering a wider variety of good and services. As noted in our application, there are:

- an average of 15 casual mall license sites per shopping centre;
- an average 'booking' (or license) of around 23 days which highlights the temporary, short-term or 'pop-up' nature of casual mall licensing; and
- an annual average of around 20 bookings per site.

This latter point alone substantially refutes the WA SBDC's claim that the Code would somehow be "out of step" and "fail to meet landlord and tenant requirements", as it points to both the productive use of a landlord's common mall area and the productive, responsive and adaptive use and turnover of each casual mall site.

While we accept that the WA SDBC is not a law-maker, we note that the WA retail lease legislation, which the WA SBDC makes reference to in its submission, requires an application to be made to the State Administrative Tribunal (SAT) on certain lease-term issues in relation to the legislated 'minimum' lease term of 5-years (which can often be rejected by SAT despite where there's agreement between the landlord/tenant). Unlike aspects of the WA legislation, the Code is in 'in-step' with the market and 'meeting' landlord and tenant requirements in an efficient manner and responsive to the ever-evolving retail and shopping centre sector.

Further, we **attach** to this submission an email from the CAC Independent Chair, Mark Brennan, dated 17 February 2021 to the CAC, which was also discussed at the CAC's 18 February 2021 meeting. The ACCC will note from this email that Mr Brennan provides his own view on the gaps in the WA SBDC's criticism of the Code. Mr Brennan has indicated to the SCCA that he is happy for his email to be attached to this submission and published on the ACCC's public register, and that he is happy to discuss with the ACCC.

The SCCA is firm in its view that the Code has proven to be and remains fit-for-purpose in a continually evolving retail and shopping centre environment. As noted above, this view is supported by Australia's key retailer groups: the National Retail Association (NRA), the National Online Retailers Association (NORA), the Australian Retailers Association (ARA), the Pharmacy Guild of Australia (PGA), and the Restaurant and Catering Industry Association of Australia (RCIA).

We now respond to what the SCCA has identified as six unsubstantiated claims made by the WA SBDC.

1) Emerging technological developments

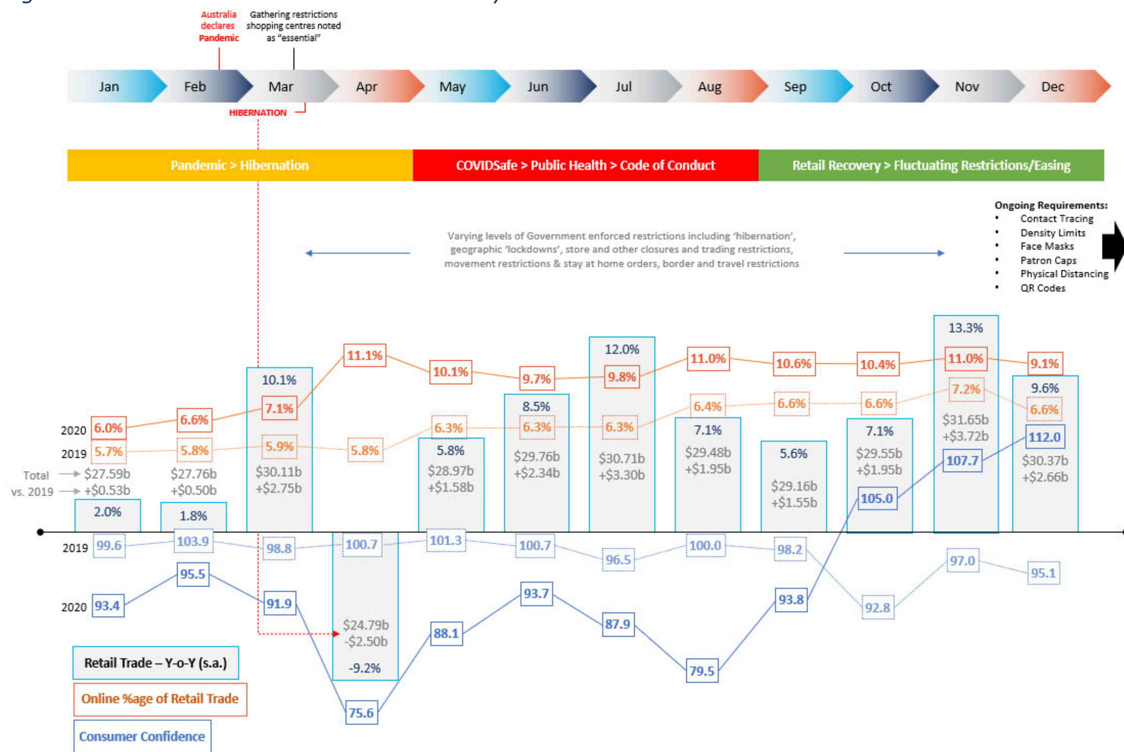
WA SBDC claim: The WA SBDC asserts that the impact of "emerging technological developments such as online shopping, click-&-collect, frictionless retail, and direct-to-consumer" typify the kind of changes that should be considered within the context and effect of a 10-year authorisation.

SCCA response: The SCCA considers that the WA SBDC has not substantiated its claim let alone its relevance to justify a recommendation that is contrary to the ACCC's Draft Determination. Figure 1 (above) highlights significant trends and developments over the past 10-year period (a period which specifically includes many of the changes that the WA SBDC refers to), during which the Code has proven to be an enduring, robust and fit-for-purpose framework in an evolving retail and shopping centre landscape.

In our and the major retail groups' view, the Code will continue to prove adaptive and enduring into the future.

Further, the Code has continued to operate throughout the COVID-19 pandemic, proving robust and adaptable to fast-tracked public health measures, which saw an increase in online trade as a proportion of total retail trade (peaking in April and declining in December) of which 65 percent was multi-channel, such as click-&-collect (refer to Figure 2 below). The operation of the Code during this time disproves the WA SBDC's claims that it may become "out of step" or "fail to meet landlord and tenant requirements going forward".

Figure 2 - COVID-19 Multi Criteria Retail Analysis 2020



Since the inception of the Code, and throughout the COVID-19 pandemic, retailers have leveraged new technologies and practices to suit their individual strategies and requirements to meet customer preferences and demands. It is expected that retail-specific technologies and practices will evolve and change over time, just as they have over the past decade.

The Code has proven it's applicability through several 'changes', as retail trade has continued to grow and benefit from the diversity of retail offerings and activities in shopping centres. "Emerging technological developments", in the unsubstantiated manner that the WA SBDC has raised it, does not present as a compelling rationale to revise the proposed 10-year re-authorisation.

2) Responding to consumer and economic trends

WA SBDC claim: The WA SBDC identifies "expected changes in how shopping centre managers will continue to tailor their product to adjust to a changing economic environment, competition, the impact of COVID-19, consumer behaviour and societal needs" as a change that should influence a 10-year authorisation. The example of "shifts in who is shopping, and how often, is changing how retailers and brands market, merchandise and promote" is provided.

SCCA response: As the applicant, the SCCA (as the industry group representing shopping centre owners and managers, including those with dedicated CML businesses) is confident in its view that CML will be a core part of the retail experience and offering for the foreseeable future. This is supported by key retailer groups as well. The advent and success of CML exemplifies how "retailers and brands market, merchandise and promote" and utilise "flexible" spaces. We also note that the Code applies across a range of our members centres in terms of size, location and to different demographics.

The SCCA submits that the WA SBDC's concern is misplaced. The WA SBDC has not substantiated its claim or its relevance to justify a recommendation contrary to the ACCC's Draft Determination. Accordingly, it should have no bearing on a prospective 10-year authorisation.

3) Experiential and flexible use of space

WA SBDC claim: The WA SBDC asserts that "shopping centre landlords better serving the community through more experiential and flexible spaces including more free and public spaces…shopping centres are and will not be just for retailing" presents as a change that should be considered within the context of and effect a 10-year authorisation.

SCCA response: The SCCA agrees the shopping centres are evolving in terms of their usage and tenant mix, however the WA SBDC misses the point that this has always been the case. For instance, the Code has continued to apply and be malleable as shopping centres have provided COVID-19 testing sites to support the Victorian Government, as a greater proportion of retail space has been operated by service providers, as car dealerships have occupied what was previously retail space etc.

The WA SBDC's observation does not, however, articulate how the Code has or might give rise to tensions or disagreement concerning other uses of space in shopping centres. The WA SBDC's claim is not relevant and does not justify a recommendation contrary to the ACCC's Draft Determination. Accordingly, it should have no bearing on a prospective 10-year authorisation.

4) The Code will become "out of step", may "fail to meet landlord and tenant requirements" and in turn "create an environment for disputes"

WA SBDC claim: Based on the claims outlined above, the WA SBDC contends that:

- "The potential significance of these changes is the real possibility that well within the 10 year authorisation period the fabric of shopping centres and the operations of shopping centre tenants and landlords will continue to change."
- "The Code's operation will be affected because it could become out of step with the prevailing market conditions. 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 as to space to meet consumer expectations that the Code does not address (such as click-&-collect)."
- "Consequently the Code as currently drafted could fail to address these changes and create an environment for disputes."

SCCA response: The SCCA rejects this assertion, which is underpinned by unsubstantiated and irrelevant claims as the basis of a highly speculative conclusion. The sector anticipates continued change in its tenant mix (i.e. rooftop gardens, shared office space, schools etc.), confident that the Code has remained highly relevant and not impacted other tenants or uses in the past 10 years (per Figure 1). This is not expected to change in the future.

Ultimately, the WA SBDC has sought to inference that the continued operation of the Code, in tandem with prospective and anticipated change, will give rise to an environment in which the Code is a source of significant concern and disputes. The WA SBDC has not sought to evidence or substantiate this narrative.

No evidence of any representations or disputes managed have informed the WA SBDC's opposition to the Code or concern about a potential rise in disputes. It should be expected that the WA SBDC would cite specific instances or describe common areas of complaint by retailers. Rather, successive WA SBDC submissions highlight:

- 2012: "casual mall leasing is not a major issue raised by lessees with the SBDC and does not currently appear to be a problem area."
- 2020: "casual mall leasing is still not a major issue raised with us by small business lessees in WA."

A representative survey of SCCA members with shopping centres in WA indicates that no cases have been discussed with the WA SBDC in past 12 months, again calling into question the rationale behind the WA SBDC's concern around future disputes and uncertainty, or that CML is an issue that the WA SBDC has any ongoing engagement in.

The WA SBDC's claims are substantiated and do not justify a recommendation contrary to the ACCC's Draft Determination. Accordingly, they should have no bearing on a prospective 10-year authorisation.

5) 5-year reviews

WA SBDC claim: The WA SBDC suggests "five years to be a more appropriate period of authorisation. Further five year reviews are in line with statutory reviews of WA commercial tenancy legislation."

SCCA response: The SCCA notes that the WA SBDC cites five year reviews to be "in line with statutory reviews of WA commercial tenancy legislation." The *Commercial Tenancy (Retail Shops) Agreements Act 1985* has not been reviewed in over a decade and so cannot be cited as a best practice example.

Regardless, the reference point for the length of an authorisation is the ACCC's past practices and capacity to grant authorisations for longer periods "where the conduct has been authorised previously and there is evidence of net public benefits", per the subsection 91C(1) of the *Competition and Consumer Act 2010*. Were casual mall licensing to be significantly disrupted then the CAC exists as the ideal forum to discuss and mitigate any adverse outcomes. This is acknowledged by the ASBFEO's submission:

- "The current voluntary arrangement appears to be delivering good outcomes, strengthened by the appointment of an independent and effective Chair to the Code Administration Committee, the broadening of the membership of retailer industry groups to the Committee, and with stakeholders typically acting in good faith. However circumstances do change and the voluntary nature of the Code may need to be reviewed should it cease to be effective."

The SCCA notes the ASBFEO's suggestion:

- "Even though the current environment works well, it may be prudent to either reduce the period of effect to a shorter time, say five years, and at the very least include 3-5 yearly reviews."

In this regard the SCCA notes that the ACCC maintains the ability to review the authorisation, and has indicated that it would do so "in the event of a material change of circumstances, which significantly affects the benefits to the public or detriments." A shorter authorisation period is therefore not necessary, noting the maturation of the Code over 13 years and that no concerns of note remain.

6) Misinterpretation of the Code as "non-negotiable"

WA SBDC claim: The WA SBDC claims that a 10-year authorisation has the potential to give rise to a misinterpretation of the Code as not being voluntary nature, rather "non-negotiable":

- "The SBDC is also concerned about the potential that some stakeholders, including small business tenants, could misinterpret the ACCC's substantial authorisation as being non-negotiable – as opposed to the Code being voluntary – to their detriment. This is highlighted by our previous argument that the CML Code of Practice Fact Sheet should more clearly disclose the overall standing of the Code and that prospective tenants should have clarity of their rights, responsibilities and capacity to negotiate before entering into a retail shop lease."

SCCA response: The SCCA rejects this contention as entirely speculative and highly unlikely. Our position is supported by the CAC's Independent Chairman in the **attached** email. The SCCA is in full agreement with the Independent Chairman's perspective, which can be summarised as follows:

- The WA SBDC's concerns about how prospective tenants might receive the Fact Sheet are speculative and not supported by case studies.
- There is no intention to represent the Fact Sheet as a legislative instrument that negates state-based legislation, and it is extremely unlikely to be considered as such.
- It is unconvincing to suggest that the provision of the Fact Sheet at the same time as giving statutory disclosure documents somehow creates confusion.

Further, the ACCC has indicated that measures to strengthen the operation and oversight of the Code have addressed concerns about transparency and understanding of the Code. Again, the WA SBDC does not expand on or provide evidence to the contrary.

The SCCA is concerned that the WA SBDC's responses to the Draft Determination misrepresent the purpose of the Code in this regard. The Code is a voluntary code of practice between shopping centre owners/managers and retailers and regulates the practice of casual mall licensing in shopping centres and applies in all jurisdictions except SA, where casual mall licensing is regulated seperately.

The Code regulates casual mall licensing in shopping centres, which refers to agreements under which a person grants another person a right to occupy part of the common area of a shopping centre for the purpose of the sale of goods or the supply of services to the public. It is difficult to see how a shorter authorisation period would have any bearing on this, particularly as the ACCC maintains the ability to review the authorisation, and has indicated that it would do so "in the event of a material change of circumstances, which significantly affects the benefits to the public or detriments."

The Code is a voluntary arrangement and its administration has matured to the satisfaction of retail and landlord industry groups that do not share the WA SBDC's concern, which is not substantiated. Further, it is highly speculative and unlikely that stakeholders would misinterpret the Code. The WA SBDC's recommendation is not justified and should have no bearing on the ACCC's views.

CONCLUSION

The SCCA respects the concerns raised by the WA SBDC concerning the operation of the Code in WA over successive re-authorisations. These have either informed amendments to the Code and its administration or, more recently, have not been accepted by the ACCC as likely to impact the benefits derived from the operation of the Code.

The SCCA submits that there is now no validity to the claim that the Code should not be authorised for a 10-year period, in accordance with the ACCC's Draft Determination. The Code has proven to be an enduring, robust and fit-for-purpose framework in the evolving retail and shopping centre landscape. The SCCA and major retail groups are confident that the Code will remain so into the future.

CONTACT

James Newton, Manager – Policy and Regulatory Affairs, SCCA, ,

James Newton

From: Mark Brennan
Sent: Wednesday, 17 February 2021 11:43 AM
To: Sheridan Joel; Dominique Lamb; Scott Harris; Phillip Chapman; Greg Chubb; Wes Lambert; Michael Mackley; Paul Zahra; ; Angus Nardi
Cc: James Newton; Victoria Stewart; Victoria Lockley; Kirby Rogers;
Subject: CML Code Reauthorisation

Dear Casual Mall Licensing Code Administration Committee Members,

I am writing to share my observations on the position taken by David Eaton, the Western Australian Small Business Commissioner (the "WA SBC"), on the re-Authorisation application by the SCCA to the ACCC.

In his response to the ACCC's Draft Determination, Commissioner Eaton refers to previous submissions which raised concerns about the operation of the Casual Mall Licensing Code of Practice in WA.

The thrust of Commissioner Eaton's concerns reflect separate correspondence he has sent to me. I think it is well accepted that Commissioner Eaton is held in high regard in his role as WA SBC. His opinions are weighty and well respected. However, on the matter of the re-Authorisation, it appears that the premises underpinning his views may be derived from a perception of the Code that is not compatible with the objectives of the Code.

In this regard, Commissioner Eaton expresses some apprehension that there will be detriment experienced by small business tenants who do not understand the voluntary nature of the Code. To avoid misinterpretations of this kind, the ACCC encourages promotion of the Code. In accordance with this encouragement, our Committee resolved to prepare the Casual Mall Licensing Code of Practice Fact Sheet.

It appears that Commissioner Eaton's concerns are speculative about how prospective tenants might receive the Fact Sheet and are not supported by any actual instances purportedly to have occurred in the already 13 year life of the Authorisation conferred by the ACCC. Despite previous contentions made by Commissioner Eaton, there is no intention to represent the Fact Sheet as a legislative instrument that somehow intrudes on State laws. Contrary to Commissioner Eaton's apparent understanding, the Code is underpinned by legislation with the Authorisation granted by the ACCC under s.90(1)(a) of the *Competition and Consumer Act 2010.* Although granted under a Commonwealth Act, the Authorisation does not disturb the operation of relevant State Retail Leases laws.

As a mechanism for promoting the Code, the Committee determined to bring the Fact Sheet to the attention of small business commissioners and

like bodies with responsibilities under retail leases laws or small business dispute resolution functions.

In the case of small business commissioners, the Committee considered there was a particular relevance as in the concept of small business commissioner, a flagship function is “to promote informed decision making by small business” (in context, see for example s.11 (2)(ha) of WA’s *Small Business Development Corporation Act 1983*).

In this context, it is important to understand that the Fact Sheet is not the Code. The Fact Sheet is responsive to the desire of tenant groups to assist tenants and licensees to become more aware of the Code. The Fact Sheet is an information aid, highlighting key issues, to assist informed decision making. In this sense, the Fact Sheet is comparable to the WA SBC’s information publications, such as “8 Steps to Starting” and its Commercial Leasing Guides. It is extremely unlikely that publications such as these would be considered to have status as legislative instruments.

Further, it is unconvincing to suggest, as Commissioner Eaton has previously done, that the provision of the Fact Sheet at the same time as giving statutory disclosure documents somehow creates confusion. Disclosure statements are a feature of State retail leases laws, but are a minimum standard of what must be disclosed rather than an exhaustive requirement and there is nothing to prevent the parties from disclosing or providing additional information.

I will talk at Thursday’s Committee meeting about my intention as Chairman to engage with the small business commissioners, as key stakeholders of the Code, including David Eaton, this year. One opportunity I will seek is to attend one of the regular catch-ups that the Commissioners have with each other.

I hope the above observations provide a useful perspective from which to view Commissioner Eaton’s concerns. In making these observations, I wish to stress that the contribution which Commissioner Eaton makes is valued and his commitment to continuing collaboration with the Committee is welcomed.

Yours sincerely

Mark Brennan

Independent Chairman

Casual Mall Licensing Code Administration Committee

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