

Ms Danielle Staltari
Director, Adjudication
Australian Competition and Consumer Commission

By email: adjudication@acc.gov.au

Dear Ms Staltari

Shopping Centre Council of Australia: Casual Mall Licensing Code of Practice: Application for Re-Authorisation – AA100529

This is a submission in support of the Shopping Centre Council of Australia (SCCA) in relation to its application for re-authorisation by the ACCC of its exemption in relation to the conduct of casual leasing in shopping centres. The submission addresses each of the matters invited for comment by the ACCC.

I have prepared this submission in my capacity as the Independent Chairman of the Casual Mall Licensing Code Administration Committee (the Committee) and have also informed my views by reference to my experience previously as the Australian Small Business Commissioner and the Victorian Small Business Commissioner.

A. Effectiveness of the Code and the Committee

The effectiveness of the Code and of the Committee has been refreshingly pleasing. Putting to one side the impact on business of the coronavirus, the effectiveness of the Code can be considered in the first place against key policy principles supporting government intervention in the business sector generally.

In my view these considerations can be stated as follows:

1. Government regulation of business should focus on addressing information balance and fair competition.
2. While an objective of government intervention may be to protect small and medium size businesses, the net outcome should be an enhanced competitive and fair operating environment for all business.
3. Government involvement in small business matters should aim at ensuring that both prospective and ongoing small businesses have sufficient knowledge to make informed business decisions.
4. While any business has a fundamental right of control over positioning and maximising its business opportunities, this right does not extend to engaging in unfair business practices.
5. Business should be able to access a low-cost informal dispute resolution forum prior to any grievances proceeding to formal litigation.

Note: These policy principles expressed in a small business context are set out in a paper which I prepared when the then Victorian Small Business Commissioner, entitled, *An Innovative Government Intervention*, presented to the International Council for Small Business World Conference in Melbourne 2006. For a discussion of the application of these policy principles in the context of retail leases regulation, refer to Victorian Government publication "Retail Leases Legislation Discussion Paper, October 2001 pp 21-23.

These Policy principles are reflected prominently in the development of the Code and in the practice of the Committee. Sound underpinning principles of this nature serve to enhance the effectiveness of the Code and provide reassurance for the appropriateness of the exemption for which reauthorisation is sought.

In practical terms, a significant initiative undertaken by the Committee was the recent production of a Fact Sheet outlining important information about the Code and its administration. The production of the Fact Sheet reinforces the importance of information. In particular, information likely to enhance decision-making by small businesses, whether a sitting tenant in a shopping centre or an innovative pop-up retailer seeking a shorter-term opportunity to conduct business at a shopping centre.

The importance of information to small business cannot be underestimated. In my experience as a small business commissioner, I was frequently asked about the main challenges faced by small business. Whilst acknowledging that there are many challenges to be faced, I identified two challenges that, to my mind, are a tier above all others. The first of these, all small businesses would agree with me, is cash flow problems. The second, to which small businesses are not immediately responsive in recognising, is management skills. In relation to management skills, there is considerable scope generally for improvement by small businesses. Most small businesses have a good product or good service, but frequently they lack all of the management skills that might assist in maximising the productivity of the business. In this regard, not all small businesses are in the one package skilled in accounting, marketing, IT, law, or business analysis.

Accordingly, to supplement deficiencies in skills, information to enhance decision-making is vital. In the context of the Code, the Fact Sheet serves this purpose.

B. Representation on the Committee

In relation to representation on the committee, at the suggestion of the ACCC, retailer representation was increased, and an Independent Chairman was appointed. Recently, the Franchise Council of Australia withdrew from the Committee and the Restaurant and Catering Industry Association of Australia have been added.

By way of curious observation, if it is accepted that the main protagonists to which the Code applies are landlords, Centre management, tenants and pop-up retailers, it might have been expected that each of these protagonists may have representation on the Committee. In other words, it might be considered curious that there is no representation of pop-up retailers on the Committee. The primary reason for this is that pop-up retailers are typically unaffiliated in the sense that there is no representative association dedicated to their activity. To the extent that there is justification for the interests of pop-up retailers to be represented on the Committee, in my view this can be accommodated within the role expected of the independent chairman.

C. Public Benefits of the Code

The policy principles referred to above form a basis of consideration of the public benefits of the Code. In this regard, the principles relating to achieving equitable balance of the interests of relevant parties are fundamental. The challenge of the Code is to facilitate an appropriate balance between rights and business efficacy, whilst stimulating innovation.

To expand on this, the rights of sitting tenants should be safeguarded through mechanisms such as leases, legislation and codes, whilst the interests of business efficacy for landlords and shopping centre management should similarly be guaranteed. Further, in the interests of the economy and business community generally, the stimulation of innovation in business is paramount and it is in this context that the encouragement of pop-up retailers has its primary emphasis.

The Code is an ameliorating intervention that is contributing importantly to the public benefits of maintaining rights, facilitating business efficacy, and stimulating innovation.

D. Public Detriments of the Code

The public detriments of the code are usually identified by reference to a perceived unfairness impacting on sitting tenants by the introduction of pop-up retailers. However, any such detriments are significantly diluted by the establishment of appropriate alternative dispute resolution processes.

The dispute resolution processes of the Code are a commendable feature.

E. Whether 10 Years is an Appropriate Reauthorisation

When the matter of reauthorisation was discussed by the Committee, it was suggested that having regard to experience so far of the operation of the Code over a period of some 13 years, it was no longer appropriate to have to seek reauthorisation on a basis as frequent as has occurred. It was considered that the performance of the Code, with the oversight, in effect, of the Committee justified an alternative to frequent application for reauthorisation.

At first instance, it was felt that approval should be sought for an enduring authorisation coupled with a right by an interested party, such as a Committee representative, to apply to the ACCC at any time seeking an examination of the continuing appropriateness of the exemption. Following discussion with Deputy Chairman of the ACCC, Mr Mick Keogh, it was considered that rather than an enduring exemption, an extended period of 10 years was appropriate for the re-authorisation.

Whilst not specifically related to the Code, the experiences of legislative intervention in casual mall leasing in South Australia and Victoria are instructive as to how settled this area of activity has become.

South Australia has had a legislative scheme for casual mall licensing, which has operated a Code effectively and without controversy (see *Retail and Commercial Leases Act 1995*). Victoria has had legislative capacity to specifically regulate casual leasing by means of a regulation making power, first inserted in the *Retail Leases Act 2003*. In 17 years, there has not been a need in Victoria to invoke this regulatory power (see s.99 (1)(b) of the Act).

The experiences of South Australia and Victoria tend to strengthen the notion that the environment for casual mall leasing is acceptably settled and a longer-term extension of the Authorisation by the ACCC is unlikely to disturb this environment.

F. Experience with Dispute Resolution under the Code

It is apparent that the dispute resolution processes of the code are operating successfully. To the extent that disputes arise, these can be characterised as being in the nature of irritations rather than substantial disputes. Accordingly, these matters have been resolved locally within the shopping centre concerned.

There have been few matters which have been brought to the attention of the Committee. These have been resolved outside of the Committee by the SCCA and the relevant industry Association. It is a positive reflection of the Committee that matters are dealt with collegiately in a spirit of good faith. This is evident from the absence of any need to establish formal procedures within the Committee for the handling of disputes or Code issues.

G. Other

I have a peripheral observation. To my mind, the replacement of the existing re-authorisation period with a period of 10 years is a significant measure in terms of reducing red tape.

Periodically, government agencies are required to identify actions that have resulted in a reduction of red tape for business. It is often difficult to articulate such measures. In my experience, I found it helpful to suggest to the business community to articulate red tape concerns by reference to the frequency with which compliances might require contact with government agencies. Under the existing authorisation process, there is a requirement for the SCCA and interested parties to commit significant resources to an application process recurring at its current frequency. An extension to 10 years of the authorisation will be a significant compliance relief for these business organisations and a justifiable claim open to the ACCC to make as a contribution to the reduction of red tape.

As a closing observation, in my view, the establishment of the Committee has had a beneficial incidental impact in providing a forum for representatives of landlords, tenants and retailers to meet and discuss matters of broader interest to their sector. The formation of the Committee and the appointment of an independent chairman was a constructive suggestion of the ACCC, of which it is entitled to feel well pleased.

Thank you for the opportunity to make this submission. I commend the application of the SCCA to the ACCC. I am available to discuss this application in the context of this process. Also, at any time during the course of the operation of the reauthorisation, I am available to be consulted by the ACCC.



Mark Brennan
Independent Chairman
Casual Mall Licensing Code Administration Committee

6 November 2020