



**Small Business
Development Corporation**

Your ref: AA1000529
Our ref: D21/49

Ms Danielle Staltari
Director, Competition Exemptions
Australian Competition and Consumer Commission
GPO Box 3131
CANBERRA ACT 2601

Email: exemptions@accc.gov.au

Dear Ms Staltari

**SHOPPING CENTRE COUNCIL OF AUSTRALIA LIMITED APPLICATION FOR
RE-AUTHORISATION OF THE CASUAL MALL LICENSING CODE OF PRACTICE
AA1000529 – DRAFT DETERMINATION AND INTERIM AUTHORISATION**

Thank you for your letter dated 3 December 2020 inviting submissions in response to the Australian Competition and Consumer Commission's (ACCC) draft determination in respect of the application for re-authorisation of the Casual Mall Licensing Code of Practice ('the Code') lodged by the Shopping Centre Council of Australia Limited (SCCA).

Given our interest in the Code and its potential impacts on long-term retail tenants of shopping centres in Western Australia, the Small Business Development Corporation (SBDC) has previously provided submissions in relation to the introduction of the original Code in 2007 as well as its re-authorisations in 2012 and 2017.

Most recently, the SBDC provided our views on the latest application for the Code's re-authorisation (our ref: D20/7893). A copy of our submission dated 14 October 2020 is attached.

As expressed in our previous submissions, the SBDC has raised concerns on the operation of the Code in Western Australia over many years. In particular, the SBDC is alarmed at the ACCC's draft determination to grant re-authorisation to extend the Code for a further 10 years, in line with the SCCA's request.

The SBDC maintains our position that in the context of Australia's fast evolving retailing sector, the length of the re-authorisation is excessive and should be limited to five years. We are concerned that over the coming decade there will be significant upheaval in the retail sector brought about by a rapidly changing shopping centre landscape, as fast-tracked by the impacts on consumers of the COVID-19 pandemic.

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 Casual Mall Licensing 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.

Yours sincerely



David Eaton
SMALL BUSINESS COMMISSIONER

7 January 2021

Attached: D20/7893 – SBDC submission to AA100529 dated 14 October 2020



**Small Business
Development Corporation**

Your ref: AA1000529
Our ref: D20/7893

Ms Danielle Staltari
Director, Adjudication
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CANBERRA ACT 2601

Email: adjudication@accc.gov.au

Dear Ms Staltari

**SHOPPING CENTRE COUNCIL OF AUSTRALIA APPLICATION FOR
RE-AUTHORISATION OF THE CASUAL MALL LICENSING CODE OF
PRACTICE (AA1000529)**

Thank you for your letter dated 23 September 2020 inviting comment on the application from the Shopping Centre Council of Australia (SCCA) for re-authorisation of the Casual Mall Licensing Code of Practice ('the Code').

The Small Business Development Corporation (SBDC) is an independent statutory authority of the Western Australian Government whose primary role is to encourage, promote, facilitate and assist the establishment, growth and development of small businesses in the State.

The SBDC provides free advice and guidance, as well as education and skill development programs, to Western Australian small business operators. This includes the provision of specialist information and guidance to small business landlords and tenants on the *Commercial Tenancy (Retail Shops) Agreements Act 1985 (WA)* and all aspects of negotiating and leasing business premises.

Through the Small Business Commissioner, the SBDC also offers a dispute resolution service (DRS) in relation to small business disputes, including a prescribed role in commercial tenancy disputes. The DRS gives small businesses an opportunity to resolve disputes without the need to engage in a costly, formal legal process. Early, effective dispute resolution can have a positive effect on maintaining ongoing business relationships, which is especially important in a commercial tenancy sense given the long-term nature of most retail shop leases.

Given this role, the SBDC has a particular interest in the Code and its potential impacts on long-term retail tenants of shopping centres in Western Australia. In this regard, the SBDC has previously provided submissions in relation to the introduction of the original Code in 2007 as well as its re-authorisations in 2012 and 2017.

While it should be noted that casual mall leasing is still not a major issue raised with us by small business lessees in Western Australia, the SBDC remains of the view that:

- Casual mall licences should not be granted for longer than 30 days; 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).
- Any interference with sightlines to an existing lessee's shopfront should be prohibited rather than only if it "substantially interferes" (Clause 5.1). Maintaining this provision potentially harms incumbents and puts them at a competitive disadvantage to passing foot traffic.
- 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).
- 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).

In the SBDC's opinion, added competition from temporary stalls could be considered unfair and particularly damaging to existing lessees, especially when (even if not directly competing in terms of product mix) these businesses are competing for consumers' discretionary dollar or impulse purchase. This opportunity cost is especially critical given the tough economic conditions and shifting consumer preferences currently impacting the retail industry in Western Australia as a result of the COVID-19 pandemic.

The SBDC notes that the latest application for re-authorisation seeks to extend the Code for a further 10-year period up to 31 December 2030. It is the SBDC's view that such a length is grossly excessive given how fast the retailing sector changes in Australia (i.e. due to changing consumer preferences, growing online competition, economic factors, etc.) and as such, any re-authorisation should be for a period of no more than five years.

The SCCA submits that the current application does not include material changes to the Code, noting some operational amendments to reflect changes to the Code Administration Committee (CAC), as recommended by the ACCC in its 2017 Determination.

In our previous submission following the draft determination in 2017, the SBDC supported the ACCC's strong encouragement that the SCCA implement its proposal to increase retailer representation on the CAC by inviting the Australian Retailers Association (ARA), Franchise Council of

Australia (FCA), Pharmacy Guild of Australia (PGA) and National Online Retailers Association (NORA) to become parties to the Code and appoint representatives to the committee.

The SBDC is pleased to note that the SCCA followed through with this request and that the National Retail Association, ARA, PGA, NORA, as well as the Restaurant and Catering Industry Association of Australia, are now members of the CAC, along with five SCCA representatives. The SBDC understands that the FCA, despite originally accepting the invitation to join the CAC, has since withdrawn its participation.

The broadening of signatories to the Code and representation on the CAC should have helped address some of the concerns previously raised with the SBDC by industry representatives regarding the effective operation of the Code, especially access to dispute resolution.

In our previous submission following the draft determination in 2017, the SBDC also supported the ACCC's view that the effectiveness of the CAC could be improved by the appointment of an independent chair. The SBDC notes that an independent chair was appointed in July 2018.

In relation to resolving disputes, it is noted that the Code provides a process for dispute resolution and that in the event that the landlord and lessee are unable to resolve a complaint, that it can be referred to the relevant State or Territory retail leasing body, with an independent mediator then appointed at equal cost of the parties.

The SBDC strongly supports the inclusion of a schedule in the Code that details the timely, low-cost dispute resolution services available from Small Business Commissioners in Western Australia, South Australia, New South Wales and Victoria.

While it is noted that this information is provided in the Casual Mall Licensing Code of Practice Fact Sheet ('the Fact Sheet') which has been prepared for sitting tenants and licensees, the SBDC believes it would be useful to also have this included in the Code itself.

Following the release of the Fact Sheet, the SBDC wrote to the independent chair of the CAC in December 2019 raising several concerns. The SBDC argued that the Fact Sheet should 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 before committing to any lease.

This remains an issue, which the SBDC is keen to see addressed in the Fact Sheet to ensure both tenants and landlords are able to have full disclosure and clarity before entering into a retail shop lease.

Subject to the above, the SBDC does not object to the request by the SCCA for the granting of an interim authorisation that maintains the current status

quo, to ensure the Code can remain in force until the ACCC decides on the current application.

Yours sincerely



David Eaton
SMALL BUSINESS COMMISSIONER

14 October 2020



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Our ref: AA1000529
Contact officer: Alex Reed, 02 6243 1364
Simon Bell, 02 6243 1232

3/12/2020

Dear Interested Party

Shopping Centre Council of Australia Limited application for re-authorisation of the Casual Mall Licensing Code of Practice AA1000529 – draft determination & interim authorisation

The Australian Competition and Consumer Commission (the **ACCC**) has issued a draft determination in respect of the application for re-authorisation lodged by the Shopping Centre Council of Australia Limited (**SCCA**) on 11 September 2020.

For the reasons set out in its draft determination, the ACCC proposes to grant authorisation for 10 years to enable the SCCA to give effect to the Casual Mall Licensing Code of Practice (the **Code**). The ACCC has previously authorised the Code several times beginning in 2007.

The Code is voluntary and aims to regulate the practice of casual mall licensing in shopping centres (also known as 'pop-up' retailing). The Code's purpose is to ensure that casual mall licensing practices are fair to shopping centre owners and managers, shopping centre retailers and casual mall licensees. The Code prohibits provision of casual mall licences in certain circumstances where they might harm permanent shopping centre tenants.

The ACCC has also decided to grant interim authorisation to allow for continuity of the existing Code's operation while the ACCC considers the substantive application for re-authorisation.

A copy of the ACCC's draft determination and summary of its reasons is attached and available on the [ACCC Public Register](#).

Next steps

Once the ACCC issues a draft determination, the applicant or any interested party may make a written submission and/or request that the ACCC convene a 'pre-decision conference'.

Making a submission

If you wish to make a submission in response to the ACCC's draft determination, please lodge your submission by close of business **8 January 2021**. You should email submissions to exemptions@accc.gov.au with the subject '*Shopping Centre Council of Australia – AA1000529 – Submission*'.

The ACCC will consider any submissions it receives, including any oral submissions made should a pre-decision conference be called (see below), and will then release a final determination in relation to this application.

The ACCC will place any submissions, including a record of oral submissions, on the [ACCC Public Register](#) subject to any request for exclusion (see the [ACCC guidelines](#) for more information).

Optional pre-decision conference

In some cases, the applicant or an interested party requests that the ACCC convene a pre-decision conference in relation to the draft determination. If a conference is called in this matter, it will be open to the applicant and interested parties to attend and make oral submissions in relation to the draft determination. Conferences are conducted informally and while legal or professional advisers are able to attend, they are not entitled to participate in the discussion.

If you wish for the ACCC to hold a pre-decision conference in relation to the draft determination you must notify the ACCC in writing by **8 January 2021**. Any request for a conference should be emailed to exemptions@accg.gov.au.

We prefer to hold a conference in a way that enables attendees to attend in person. In the current circumstances, with the spread of COVID-19 and the need to significantly limit social contact, a face-to-face conference may not be possible. There may be options for the ACCC to hold a conference via webinar or teleconference. If you are considering requesting the ACCC hold a conference please contact us as early as possible to discuss the options for holding a conference before requesting one.

Timetable

The ACCC will progress its assessment of the application in a timely manner. An indicative timetable is set out below for your information. The ACCC will post an up to date version (including any changes) on the public register.

Indicative date	Stage in assessment process
11 September 2020	Lodgement of application and supporting submission.
23 September 2020	Public consultation process begins.
3 December 2020	Draft determination and decision regarding interim authorisation.
December / January 2021	Public consultation on draft determination including any conference if called.
February/March 2021	Final Determination

You may forward this letter to any other party who may wish to make a submission to the ACCC regarding the application. The ACCC will place this letter on the [ACCC Public Register](#).

If you wish to discuss any aspect of this matter please do not hesitate to contact Alex Reed on 02 6243 1364.

Yours sincerely

D.C.

Danielle Staltari
Director
Competition Exemptions