



**Small Business
Development Corporation**

Your ref: AA1000529
Our ref: D20/7893

Ms Danielle Staltari
Director, Adjudication
Australian Competition and Consumer Commission
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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