

## 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, the Retail Traders Association of Western Australia, the Shopping Centre Council of Australia and the Property 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 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 five years until 31 December 2012.

### 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) nominated in the schedule attached to this Code. (*Schedule still being finalised*)
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 produce an annual report to the parties to the Code on the operation and effectiveness of the Code.
16. The CAC will comprise six representatives as follows:
  - Two representatives nominated by the Australian Retailers Association;
  - One representative nominated by agreement between the National Retail Association and the Retail Traders Association of Western Australia;
  - Two representatives nominated by the Shopping Centre Council of Australia;
  - One representative nominated by the Property Council of Australia.

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

- 17.** This Code of Practice will remain in operation for a period of five years from 1 January 2008 or for the period of authorisation of the Code by the Australian Competition and Consumer Commission (ACCC) if the period of authorisation is for a period of less than five years.
- 18.** One year prior to the date of expiry of the Code according to Clause 17 the CAC will, following the annual review of the operation of the Code, 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.