

RESPONSE TO DRAFT DETERMINATION: APPLICATION FOR REAUTHORISATION OF THE CASUAL MALL LICENSING CODE OF PRACTICE

OVERVIEW

The National Retail Association (NRA) and Shopping Centre Council of Australia (SCCA) are pleased to provide this submission to the Australian Competition and Consumer Commission (ACCC) in response to the Draft Determination for substitution authorisations A91591 and A91592 regarding the *Casual Mall Licensing Code of Practice* (the Code).

It is pleasing that the ACCC has reached a preliminary view which reflects its earlier determinations regarding the Code (2007: A91049 and A91050, and 2013: A91329 and A91330), specifically that the proposed conduct detailed in the Code is likely to result in public benefits which are "*likely to outweigh the minimal public detriment resulting from the Code*" (page 1). It is also pleasing that the ACCC has in the Draft Determination and associated media release, which included commentary from ACCC Deputy Chair Dr Michael Schaper, acknowledged the relationship between casual mall licensing and 'pop-up' retailing.

In its Draft Determination, the ACCC notes the proposals which were detailed in the joint-NRA/SCCA submission with regard to engagement with other industry parties, including the Australian Retailers Association (ARA).

We note the ACCC "*strongly encourages*" the NRA and SCCA to broaden the Code's governance arrangements and to undertake an awareness and engagement drive to ensure continued high levels of ongoing compliance and awareness of the Code.

The NRA and SCCA are pleased to reiterate to the ACCC our willingness to undertake these activities upon reauthorisation of the Code.

PARTIES TO THE CODE

The NRA and SCCA will issue invitations to the ARA, the Franchise Council of Australia (FCA), the Pharmacy Guild of Australia (PGA) and the National Online Retailers Association (NORA) to become parties to the Code. The ACCC may consider it appropriate that this be reflected in the Final Determination to ensure that all interested parties understand the agreed future directions regarding the governance of the Code.

CODE ADMINISTRATION COMMITTEE

In the context of issuing invitations to become parties to the Code, the NRA and SCCA will propose to the ARA, PGA, FCA and NORA that they become members of the Code Administration Committee (CAC).

As per above, the ACCC may consider it appropriate that this be reflected in the Final Determination.

As was detailed in the joint-NRA/SCCA submission, increased retailer representation on the CAC will be balanced by equivalent and equal representation from the SCCA. This is noted by the ACCC in the Draft Determination (page 9). Assuming each proposed new party accepts its invitation to join the CAC, this will see a balance of five (5) retailer and five (5) landlord representatives (nominated by the SCCA) on the CAC.

As soon as practicable after the ACCC's Final Determination is issued, a meeting of the CAC will be convened to discuss the modern practice of casual mall licensing and any relevant developments, including to address and resolve concerns, and address any misconception, raised by various industry parties during the current reauthorisation round.

INDEPENDENT CHAIR

The NRA and SCCA note the ACCC's proposal that an Independent Chair be appointed to the CAC, including its view that an Independent Chair would improve the "*effectiveness*" of the CAC.

In-principle, the NRA and SCCA accept this proposal. Again, it may be appropriate that this be reflected in the Final Determination.

We note that the CAC and, in more general terms, the Code has historically been premised on achieving consensus between the parties. It is the SCCA and NRA's intent that the premise of consensus remains the guiding principle of the Code's administration.

As such, an Independent Chair would play a guiding, administrative role on the CAC, and would not be conferred with 'voting' or 'decision making' rights (so to speak).

The SCCA will prepare a shortlist of possible Independent Chairs for the consideration of an expanded CAC. As necessary, the SCCA will also accept responsibility for any costs associated with the appointment of an Independent Chair.

AWARENESS AND ENGAGEMENT DRIVE

The NRA and SCCA will undertake an awareness and engagement drive, along with other future retailer parties to the Code.

The SCCA will consider further promoting the Code among its membership, including in industry publications, and also consider the placement of information regarding the Code on the SCCA website to ensure it is prominent and easily accessible for landlords, tenants and prospective casual mall licensees.

Relevant collateral could also be prepared for the retailer parties to the Code to place on their own websites and in their member communications.

It is also anticipated that a reconvened, expanded CAC will discuss other appropriate awareness and engagement activities that may be undertaken.

TERM OF REAUTHORISATION

We note that the ACCC proposes in the Draft Determination that reauthorisation of the Code be for three years (to end-December 2020), as opposed to the five-year timeframe sought by the NRA and SCCA in its application (to end-December 2022).

If the ACCC determines that a three-year reauthorisation period is preferable, the NRA and SCCA will gratefully accept this outcome and work constructively and productively with industry stakeholders over this period.

However, the SCCA and NRA remain of the view that the commitments offered with regard to the governance of the Code and awareness raising should give the ACCC confidence that the parties will “engage productively” with regard to the Code over a future period of authorisation.

(In this regard, we also note that the SCCA and NRA have always sought to engage constructively with other interested parties. For example, our repeated efforts and offers to engage with the ARA when preparing the application for reauthorisation are outlined in detail in the joint-NRA/SCCA submission.)

As such, we reiterate our request that the Code be reauthorised for a further five years, to end-December 2022.

In this regard, we are also conscious of the additional resources that will be required to be applied by the parties to the Code in preparing an application for reauthorisation within three years, and the ACCC with regard to assessing a future application. Considering the timeframe over which the Code has already benefitted from authorisation of the ACCC (since 2007), and the commitments detailed in this submission, authorising the Code for five years may deliver a more efficient outcome for the parties to the Code and the ACCC.

MINOR POINTS OF CLARIFICATION

While the Draft Determination provides a detailed overview of the various representations received by the ACCC with regard to the Code, the NRA and SCCA refers to our earlier submission in response to interested party representations with regard to the range of claims made by the various parties, including with regard to proposed amendments to the Code, competition, application of the Code and dispute resolution.

Despite the above, there are a number of points of clarification which we consider important to the ACCC’s understanding of the Code, and of the earlier representations from the NRA and SCCA:

1. Dispute resolution

As was detailed in the joint-NRA/SCCA submission, the Code has a two-step dispute resolution process. If a complaint arises, the parties are expected to negotiate in good faith to attempt to resolve the complaint between themselves. It is only if a complaint cannot be resolved that a ‘formal dispute’ would be progressed.

In the joint-NRA/SCCA application for reauthorisation, at page 6 of the ‘Supplementary Information’, it was noted that any issues which may have arisen over the course of the current authorisation period would have been effectively dealt with between the parties. It was transparently acknowledged that ‘good faith’ resolution may occur from time to time between parties (and we are aware this is the case).

It would be beneficial for the ACCC to acknowledge the two-stage process to dispute resolution, and the acknowledgements made by the NRA and SCCA in its various representations. This may assist to assure other stakeholders that dispute resolution mechanisms under the Code are being utilised, despite the fact that no disputes have been ‘formalised’ and progressed to mediation.

Further, we note that the ACCC notes in the Draft Determination that the CAC is strongly encouraged “to consider measures which may enhance the dispute resolution provisions of the Code” (page 13). The SCCA and NRA are of the view that highlighting, and promoting, the existing two-stage dispute resolution process under the Code via a future engagement and awareness drive will effectively and efficiently address any concerns regarding the existing dispute resolution process under the Code.

2. Schedule of independent mediators

At page 4 of the Draft Determination, it is summarised that “the SCCA no longer intends to include a list of nominated mediators within the Code”.

For absolute clarity, at no stage has it ever been proposed that the Code would contain a list of independent mediators. Rather, the Code was intended to include a schedule of ‘relevant retail tenancy official(s) in each state or territory’. However, as was detailed in the joint-NRA/SCCA application for reauthorisation, at pages 8 and 9 of the ‘Supplementary Information’ document, the inclusion of a schedule of officials, and the subsequent requirement to continually brief new/incoming Commissioners and their staff on a role under the Code was considered a poor allocation of resources. It was also agreed that, if required, the Office of the Small Business Commissioner (or equivalent) in each jurisdiction would be approached in the first instance for advice on the appointment of an independent mediator.

3. South Australia

At page 5 of the Draft Determination, it is noted that “South Australia has also progressed a review of its approach to regulating casual mall licensing under its retail tenancy legislation”. For clarity, the South Australian Government undertook a comprehensive review of the *Retail and Commercial Leases Act 1995*, of which the Casual Mall Licensing Code is a schedule. As far as we are aware, no issues regarding casual mall licensing were raised during this review, including by the ARA. Indeed, the final review report prepared by retired South Australian District Court Judge, Mr Alan Moss, did not contain any specific commentary regarding casual mall licensing.

4. Casual Mall licensees can be small businesses

The Draft Determination overviews the representations of the various small business representatives, including the Australian Small Business and Family Enterprise Ombudsman (ASBFEO) and the NSW Small Business Commissioner (NSW SBC). It would be appropriate if these representations were contextualised with regard to the commentary provided in the joint-NRA/SCA submission, at page 18, that casual mall licensees can be small businesses.

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