

RESPONSE TO INTERESTED PARTY SUBMISSIONS - 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) thank the Australian Competition and Consumer Commission (ACCC) for the opportunity to provide a submission in response to the 'interested party' representations which were lodged in response to the ACCC's Draft Determination regarding the *Casual Mall Licensing Code of Practice* (the Code).

At all times we have endeavoured to be transparent and constructive in our dealings with various stakeholders, including the Australian Retailers Association (ARA), the Pharmacy Guild of Australia (PGA) and the Franchise Council of Australia (FCA). This included proposing, in June 2017 (i.e. prior to the application for reauthorisation being lodged with the ACCC), that the ARA convene a meeting of the Code Administration Committee (CAC) to raise and discuss their concerns. Unfortunately, this proposal was not progressed.

The NRA and SCCA have also provided detail to the ACCC with regard to the historical development of the Code, its drafting and administration.

We remain keen to engage with the ARA, FCA and PGA, and others, constructively and collaboratively moving forward. However, such engagement must include a two-way commitment to reasonable and achievable outcomes.

We note that some 'conditions' which have been put forward are unwarrantable and, in our view, inappropriate. This includes the proposal that the Australian Small Business and Family Enterprise Ombudsman (ASBFEO) be appointed as the Independent Chair of the CAC, and that the CAC perform a dispute resolution function. These issues are discussed further at sections 2 and 4 of this submission respectively.

We also note the submission lodged by the Western Australian Small Business Commissioner, and the Commissioner's statements of support for the key proposals in the ACCC's draft determination, including an expanded CAC and the appointment of an Independent Chair. With regard to the Commissioner's reference to a schedule in the Code regarding dispute resolution services, this was addressed in the joint-NRA/SCCA submission in response to the Draft Determination (page 3).

The NRA and SCCA remain committed to working on the CAC collaboratively and positively to continue to deliver great outcomes for shopping centre landlords, permanent retailers, casual licensees and, critically, customers. Any directions or guidance the ACCC can offer via its Final Determination to urge all parties to the table to work constructively would be strongly welcomed by the SCCA and NRA.

RESPONSE TO ARA, FCA, PGA PROPOSALS

The following responds to each of the ARA's proposals (also representing the FCA and PGA) which are detailed on page five of their submission:

1. *Increase the representation of the CAC and implement stricter governance and accountability*

Since June 2017, the NRA and SCCA has made known to the ARA (and the ACCC) our in-principle agreement to 'new' stakeholders being involved in the Code. This was reiterated in the joint NRA/SCCA submission in response to interested party submissions (page 1, and which is publicly available on the ACCC's authorisations register) and, again, in our joint submission to the Draft Determination.

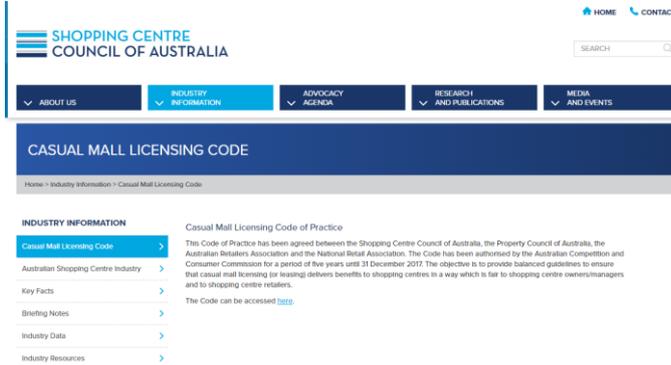
We reiterate the parameters of this in-principle agreement, specifically that increased retailer representation on the CAC will be balanced by equivalent and equal representation from the SCCA. This is noted by the ACCC in the Draft Determination (page 9).

Assuming each proposed new retailer party accepts its invitation to join the CAC, this will see a balance of five (5) retailer (NRA, NORA, ARA, PGA and FCA) and five (5) landlord representatives (nominated by the SCCA) on the CAC.

For completeness, we unequivocally refute the ARA's suggestion in their submission, at page two, that the NRA and NORA be considered 'landlord' nominees to the CAC.

As noted above, any directions or guidance the ACCC can offer via its Final Determination to urge all parties to the table to work constructively would be strongly welcomed.

Since the release of the Draft Determination, the SCCA has proactively made changes to its website to ensure that all material regarding the Code will be centrally located and readily accessible to all stakeholders. This has included the creation of a dedicated *Casual Mall Licensing Code* page on the SCCA website – see screenshot below:



Consideration will be given to further utilising this website with regard to the already agreed awareness and engagement drive, and as a transparency mechanism with regard to, in the ARA's words, 'governance and accountability', including with regard to CAC membership and meetings.

2. Appoint the ASBFEO as the Independent Chair to oversee the CAC

Both the NRA and SCCA work constructively and engage regularly with the ASBFEO on a range of matters, and sincerely wish for this to continue. However, with all sincere and due respect to the office of the ASBFEO, it would be inappropriate for that office holder to function as the Independent Chair of the CAC.

Under relevant legislation (*the Australian Small Business and Family Enterprise Ombudsman Act 2015*), the ASBFEO has two functions, 1) advocacy on behalf of small business (section 13(a)), and 2) providing assistance to small business (section 13(b)). There is also no requirement for the ASBFEO to have any particular awareness or understanding of retail market dynamics and trends, retail leasing, or shopping centre management, which would be highly beneficial in the appointment of an Independent Chair.

It is our strong view that the CAC cannot be chaired by an 'advocate' which, almost by definition given the Ombudsman's legislative parameters, may not be in a position to perform the role of an Independent Chair in a disinterested way.

We also note that the ASBFEO has previously submitted as an 'interested party' to the ACCC. The SCCA and NRA would also be concerned about the ASBFEO being unable to 'distance' themselves from earlier stakeholder representations to the ACCC regarding the Code (which we understand, were made on the basis of joint representations from the ARA, FCA and PGA) to step into an 'independent' position.

As is noted in the joint-NRA/SCCA submission in response to the Draft Determination, 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). This is necessary to ensure that consensus decisions are reached by the CAC via negotiation and compromise (where appropriate and necessary), and in the interest of achieving a balanced outcome for all parties with regard to casual mall licensing.

It is our view that it would be intolerable to all parties to the Code that an Independent Chair is given a 'determination' function.

Upon authorisation of the Code, the SCCA will prepare a shortlist of possible Independent Chairs for the collective consideration of an expanded CAC. The general knowledge/skill sets noted above as being desirable in an Independent Chair, including knowledge of retail trends and shopping centre management, would be the basis of the preparation of this shortlist.

3. Mandate the CAC to resolve ongoing issues with the Code and its operation within the proposed three-year authorisation period

As was detailed in the joint-NRA/SCCA submission in response to the Draft Determination, a CAC meeting will be convened as soon as practicable after the ACCC's Final Determination is released to discuss the modern practice of casual mall licensing and any relevant developments, including to address and resolve concerns, and to address any misconceptions, raised by various industry parties during the current reauthorisation round.

The NRA and SCCA reiterate, however, that we disagree with the need for many of the changes to the Code that are sought by the ARA, including with regard to, for example, the definition and scope of a 'competitor'. Our comments on many of the ARA's proposals are detailed in the joint-NRA/SCCA submission in response to the interested party submissions (see sections 1.02, 1.03, 1.04 and 1.05 under the heading *Section 1 – Competition Framework* of this earlier submission).

We remain concerned that the ARA's proposals would make the Code inherently more anti-competitive, and that they are, in many instances, based on a misunderstanding of the current drafting and operation of the Code and the application of, for example, prevailing retail leasing legislation.

We also note the effort to protect permanent tenants from competition (in the form of casual mall licensees), as opposed to ensuring that there is a fair and balanced framework for the practice of casual mall licensing. This is most clearly revealed on page three of the ARA's submission where they seek the maintenance of a "stable competitive mix" and, more concerningly, propose that "casual tenants also should be restricted from establishing directly in front of existing tenants...".

(By definition, casual mall 'tenants' must establish in designated parts of the mall area, where the mall area is bordered wholly or partly by shopfronts of retail shops.)

We are also concerned that the proposed amendments to the Code may, potentially, erode the public benefits that the ACCC considers are likely to result from the Code, including "efficiency for those lessees that enter into leases in multiple shopping centres or in multiple jurisdictions by standardising the terms on which casual mall licences may be granted" (page 1 of the Draft Determination).

We suggest that it may be beneficial for the ACCC to include in its Final Determination a statement to give the SCCA and NRA comfort that the ACCC will/could not 'intervene' with regard to these proposals if they are resubmitted to the ACCC in the context of a future consultation round. We make this suggestion with particular reference to the ARA's comment, on page 5 of its submission, that if "current issues are not addressed and continue to proliferate...we commit to seeking regulatory intervention by the ACCC".

4. Amend and expand the dispute resolution process by empowering the CAC to monitor and resolve complaints

The CAC has never had a dispute resolution role. The CAC has also never had a role in 'determining' breaches of the Code.

It would be inappropriate for the CAC to be conferred with dispute resolution powers, or with powers to 'determine' breaches of the Code. A large and diverse group of industry association representatives (up to 10) should not 'stand in judgment' of their respective members.

The SCCA and NRA cannot accept this proposal.

In more practical terms, the SCCA's constitution does not extend to the SCCA performing a dispute resolution, or compliance, role with regard to the activities of its members, such as that proposed with regard to the CAC.

We would expect that most of the organisations proposed to be on the CAC would be in an equivalent situation.

We also note the particular challenges and cost of resourcing the CAC to perform a dispute resolution role, including the extensive training in dispute resolution that would be required for CAC members, and the logistical challenge of arranging for the CAC to meet as-needed to resolve disputes.

It would be helpful if the ACCC noted the inappropriateness of this proposal in the Final Determination.

As noted in the joint-NRA/SCCA submission in response to the Draft Determination, it would also be beneficial for the ACCC to acknowledge in its Final Determination the current two-stage process to dispute resolution in the Code, and the acknowledgement made by the NRA and SCCA that 'good faith' dispute resolution (as currently required under the Code) may occur from time to time between parties.

This may assist to assure stakeholders, including the ARA, PGA and FCA, that the existing dispute resolution mechanisms under the Code are being utilised, despite the fact that no disputes have been formalised and progressed to mediation.

The SCCA and NRA remain of the view that highlighting, and promoting, the existing two-stage dispute resolution process under the Code via a future engagement and awareness drive (which has already been agreed) will effectively and efficiently address any concerns regarding the existing dispute resolution process under the Code.

5. Clarify terms in the Code relating to competition and adjacency to reduce issues with Casual tenants

As noted under point 3, the NRA and SCCA have already provided detailed responses to the ARA's areas of proposed amendments to the Code in the joint-NRA/SCCA submission in response to interested party submissions.

Many of their proposals are based on what we consider to be a misunderstanding of the current drafting and application of the Code, and appear to be motivated by a desire to limit competition.

While these issues can be discussed by a reconvened CAC, all parties will need to ensure that they are familiar with the operation and terms of the Code to ensure that they have a clear understanding of its role and scope.

6. Increase awareness of the Code where it operates, and more broadly

The NRA and SCCA have already committed to undertaking an awareness and engagement drive regarding the Code to ensure continued high levels of ongoing compliance and awareness of the Code over the period of reauthorisation.

As noted under point one, steps have already been taken by the SCCA to increase visibility on its website of information regarding the Code.

We note that the ARA has implied, at page four of its submission, the Code may be used as a 'coercive tool' by landlords. As was detailed in the joint-NRA/SCCA submission in response to interested party submissions, the Code sets minimum standards to which SCCA members have committed which are to the benefit of their permanent tenants. The Code does not place obligations on permanent tenants so we can't see how a permanent tenant could be 'coerced' with regard to the operation of the Code.

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