



Australian
Retailers
Association

Australian Competition and Consumer Commission

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A91591 & A91592:

RETAILER RESPONSE TO ACCC DRAFT DETERMINATION IN RESPECT OF THE CASUAL MALL LICENSING CODE OF PRACTICE

Monday 20 November 2017

Introduction:

The Australian Retailers Association (ARA), Australian Sporting Goods Association (ASGA), Franchise Council of Australia (FCA) and Pharmacy Guild of Australia (PGA) appreciate the opportunity to respond to the ACCC Draft Determination in respect of the Casual Mall Licensing Code of Practice (the Code). We welcome the draft determination of the ACCC in relation to this matter, and thank the ACCC for its ongoing engagement.

Our respective organisations have reviewed the draft determination and wish to raise a number of points in response.

Balance of Public Benefit and Detriment:

We welcome the ACCC's public benefit concerns regarding the effective operation of the Code. The ARA, FCA and PGA also welcome the ACCC's suggestion to invite our respective organisations to become parties to the Code and appoint representatives to the Code Administration Committee (CAC).

The CAC has not been functioning as intended, with ineffective administration and maintenance of the Code leading to a number of issues. The CAC has met only once in the current five-year authorisation period - a meeting which was undertaken without the presence of the ARA - where the Code was approved for renewal. Non-representative practices of this kind cannot continue to govern the operation and administration of the Code going forward. In order to avoid a repeat of this in the future, we suggest that meetings should be set for twice-yearly, with an initial meeting to be held no later than 1 March 2018.

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An effective and representative CAC will increase the capacity for retailers' concerns around the operation of the Code to be addressed, especially where issues arise. This is especially important given the current CAC is weighted heavily towards landlord representatives. As noted by the Australian Small Business and Family Enterprise Ombudsman's (ASBFEO) submission, it is important that parties which are affected by any code should have ownership of it. Diverse representation is crucial to the success of the Code¹.

To facilitate appropriate representation to the CAC, an agreed process for the appointment of representatives should be implemented. This should be a process whereby the respective board of an organisation should appoint a representative to serve a specified term on the CAC. This will ensure consistency and remove the possibility of alternative representatives attending meetings. Additionally, the CAC will need to facilitate appropriate governance mechanisms, including notice of meetings and agreed conduct. We propose these arrangements will be dealt with at the first meeting of the CAC post-authorisation. Any resolutions to confirm these arrangements by the CAC should then be published in the interests of transparency, and made part of the Code.

Whilst the ARA, ASGA, FCA and PGA appreciate the recommended appointments to the CAC, we also question the amount of knowledge an organisation such as the National Online Retailers Association (NORA) might possess on retail-leasing issues, given its representation of retail businesses who do not generally occupy physical stores. However, the ARA does not have any objection to NORA being put forward as a landlord nominee, nor the National Retailers Association (NRA) as a landlord nominee, given its close relationship in representing the interests of the SCCA over retail.

Independent Chair:

The appointment of an independent chair is welcomed by the ARA, ASGA, FCA and PGA. An independent chair will assist in addressing ongoing issues with the Code's operation and application.

The ARA suggests the appointment of the ASBFEO as the independent chair, working in conjunction with State Business Commissioners, as appropriate. An independent chair will assist the CAC in engaging productively to address the Code's issues, and will assist in the Code realising the public benefits championed by the ACCC.

CAC Role Going Forward:

In our initial submission, the ARA, FCA and PGA raised a number of issues which will need to be addressed by an expanded CAC going forward:

¹ Australian Small Business and Family Enterprise Ombudsman Submission to ACCC, 29 August 2017 (D17+121272).



Dispute resolution process:

We maintain that an absence of reported disputes does not mean that the Code is functioning effectively. The current dispute resolution process is inadequate and does not encourage permanent tenants to come forward with complaints. The ARA, ASGA, FCA and PGA believe an expanded CAC should facilitate amendments to dispute resolution as a matter of priority. Changes should include clarification and refinement of the process to encourage all parties with complaints to come forward and resolve matters as soon as practicable.

We also suggest that the CAC should regularly engage with landlords and tenants who operate under the Code to seek information regarding disputes. Parties should register their disputes with their industry organisation and significant matters should be referred for the assessment of the CAC. Under these terms, the CAC should have the responsibility to: investigate and make determinations on any breaches of the Code; monitor any other aspects of the Code which are referred to it; provide dispute resolution support between landlords and tenants; refer any disputes which cannot be resolved to the Independent Chair.

The ARA, ASGA, FCA and PGA believe this to be a fair and reasonable process which would clearly outline grounds for complaint and steps to be taken in raising and resolving disputes in a timely and orderly fashion.

Competition and Adjacency:

The ARA, FCA and PGA raised the issues of competition and adjacency as key weak points of the Code in our previous submission. We suggest these matters should be discussed by an expanded CAC going forward. The definition of 'competitor' as stated in the code should be re-written in 'plain English' to give greater clarity and easier application. Clarification and expansion of the definition of 'competitor' in the Code will provide greater certainty for all parties. This will also assist in maintaining a more stable competitive mix in shopping centres. We also maintain that Casual Mall licences granted to internal competitors should be limited maintain a fair competitive mix and minimise any associated disputes.

Additionally, adjacency and line of sight issues require further clarification in the Code. Obstructions to permanent tenants by Casual tenants should be minimised, as this is disruptive to their trade and the quiet enjoyment of their leases. Casual tenants also should be restricted from establishing directly in front of existing tenants, and clearer parameters should be outlined in the Code.

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Promotion and disclosure:

The ARA, FCA and PGA noted in our initial submission that a majority of consulted retailers had no possession of, or had not received a copy of the Code². We support the ACCC's suggestion that the Code should be promoted and circulated more widely. It is important that permanent tenants are fully aware of the Code and where it operates, especially for circumstances where disputes may arise. If the Code is to be effective, disclosure will assist in providing certainty and transparency to landlords and retailers.

Additionally, we believe it is important to make all parties aware of the voluntary nature of the Code. Both landlords **and** retailers should be made aware that the Code is non-binding, and therefore cannot be tied to other leasing arrangements or contracts, or used as a coercive tool in any way. Specifically, we note the importance of disclosure by landlords to all permanent tenants who operate in centres who do apply the Code.

It is important to ensure that these issues are addressed within the proposed three-year authorisation period if the Code is to be supported for further renewal after this time.

Length of Authorisation:

The ARA, ASGA, FCA and PGA agree with the assessment of the ACCC in its draft determination limiting the renewal of the Code to three years. This shorter authorisation period will give impetus to an expanded CAC, with an independent chair, addressing the Code's issues. Numerous amendments will need to be made to the Code to ensure a fair and reasonable application; to maintain its public benefits; and to realise the potential of casual tenancy without affecting permanent tenants.

However, we note that we will not support the Code's reauthorisation at the end of the three-year period if the current issues with the Code are not addressed. Should this situation arise, we will be advocating for a regulatory approach in order to ensure fairness and independence in the matter of Casual Mall Licensing going forward.

Summary and Conclusion:

The ARA, ASGA, FCA and PGA, in respect for the draft determination of the ACCC, are committed to ensuring the success of the Code going forward. In response to suggestions by the ACCC, we seek the following provisions to be implemented to improve the Code:

- Increase the representation of the CAC and implement stricter governance and accountability;
- Appoint the ASBFEO as the Independent Chair to oversee the CAC;

² Australian Retailers Association, Franchise Council of Australia and Pharmacy Guild of Australia Submission, 8 August 2017, (D17+133550).



- Mandate the CAC to resolve ongoing issues with the Code and its operation within the proposed three-year authorisation period;
- Amend and expand the dispute resolution process by empowering the CAC to monitor and resolve complaints;
- Clarify terms in the Code relating to competition and adjacency to reduce issues with Casual tenants;
- Increase awareness of the Code where it operates, and more broadly.

The ARA, ASGA, FCA and PGA will not support re-authorisation of the Code in the future if current issues are not addressed and continue to proliferate. Should this be the case, we commit to seeking regulatory intervention by the ACCC.

We would like to take the opportunity to thank the ACCC for the opportunity to respond to the Draft Determination in Respect of the Casual Mall Licensing Code of Practice. For further information, please contact ARA Director of Policy, Government and Corporate Relations, Heath Michael, at heath.michael@retail.org.au.

Kind regards,

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