

# SUBMISSION ON THE MARKET FOR RETAIL TENANCY LEASES IN AUSTRALIA TO THE PRODUCTIVITY COMMISSION

## Background on Author

Bruce York has a Commerce degree in Accounting is a CPA and FCIS and has extensive experience in Finance and Administration management positions in several business industries and lastly recently retired as National Lease Administration Manager in the Property Division of Woolworths Limited.

Other relevant highlights in his career include:

- In about 1974 making a successful submission to the then Commonwealth Department of Supply on behalf of the Removals Industry Association for establishing a system of costing Removals Storage which increased the income for the Industry by approximately \$1m per annum.
- In the employment of Seatainer Terminals Ltd being involved in both submissions to the then Prices Justification Tribunal to firstly establish a system for reviewing of price increases in the Industry under PJT guidelines and then on the second hearing being part of the negotiating team which successfully convinced the PJT that competition existed in the Industry so that regulation was no longer required. This occurred in the late 1970's and early 1980's.
- Employed by Woolworths in 1994 as Manager – Property & Services in the Big W Division which involved negotiating retail leases for Big W, making Board Submissions and administering the leases. Woolworths then decided to centralise the Lease Administration functions of the Company and in December 2002 he was transferred to the Corporate Property Section and established the National Lease Administration Department as its first manager, a position which he occupied until his retirement on 2<sup>nd</sup> July 2007. This involved administering retail property leases for all Divisions of Woolworths Australia except the Dick Smith Division.
- While employed with Woolworths and following the Fair Trade Review in the mid 90's in which the major tenants were criticised by the Inquiry for lack of involvement in the retail association he was appointed in about 1996 as the Woolworths representative on the Australian Retailers Association's Tenancy Committee which continued up until about 2004 when Woolworths left the Association.
- While a member of the ARA Tenancy Committee he was asked the Chair a subcommittee to review the committee's concerns on Shopping Centre Management Fees. This committee consisted of representatives from Coles Myer Ltd and David Jones Ltd resulting in the drafting of the Outgoings Code of Conduct approved by the ARA Council a copy of which is attached in Appendix A. Subsequently under the request of the Chairman of the ARA Tenancy Committee and in a similar form to the Outgoings Code he drafted a Code on Casual Mall Leasing which is attached as Appendix B. See also comments in the text below on these matters.

## SUMMARY OF CONCERNS ON THE RETAIL TENANCY MARKET IN AUSTRALIA

- The lack of reasonable competition to determine fair market rents caused by the imbalance of knowledge with landlord's having all knowledge and retailers and their advisers having very limited knowledge.
- The lack of transparency and accountability in claims for costs for shopping centre landlords on tenants most notably in outgoings, extended trading charges and promotional levies.
- State inconsistency regarding land tax as a recoverable outgoing.
- The complete lack of a fair system for compensation of tenants during shopping centre expansions and/or refurbishments.
- The general solidarity of the landlord organisation compared to the divisiveness of several tenant organisations results in lack of an effective power balance in tenants speaking from a position of strength and solidarity.

Note: There will be many other concerns expressed by those making submissions to which I would possibly concur but these concerns are expressed from my perspective alone and out of a general concern on what I perceive to be major injustices and inequities in the current retail tenancy market.

## DETAILS OF CONCERNS ON THE RETAIL TENANCY MARKET IN AUSTRALIA

1. Lack of Reasonable Competition – A major factor in the retail market which I believe we need to acknowledge is that planning authorities in Australia have decided that among other property assets retail space is to be regulated and controlled in quantitative and location terms so that it is reasonable to believe that approval to develop a shopping centre, especially a large regional centre, is to a fair extent a licence to “print money”. When shopping centres develop they defend their market share from intervention from competition of similar ventures, let alone the ever pressing demands of the bulky goods side of the industry who seek developments on cheaper rental land. This acknowledgement requires authorities to further consider intervention to ensure the monopolistic tendency of such positions does not prejudice fair market rents. If a chain wants to establish a shop in a given location it usually has little choice but to negotiate with the one landlord who controls the market in this location. The only choice is not to establish in that market and some make this choice to the loss of facility to the customer in that market. Retailers who ignore this choice do themselves and the retail industry great harm in accepting rents at uneconomic levels. The only solution I can see to this issue is to allow State Retail Tribunals to be empowered to accept appeals from tenants where landlords demand unreasonable rent reviews or ask for initial unreasonable rent. The existence of this mechanism should be significantly sobering to minimise appeals to these tribunals.

Some comments on a reasonable rent are required. I am especially conscious of major tenants with my Woolworths experience in mind but am also aware of specialties concerns due to my ARA Tenancy Committee involvement. A major tenant would have a choice of establishing say a supermarket in a shopping centre or in a standalone situation (if land was so authorised) and so when they consider a fair market rent, given the options are available, they would only be prepared to

pay a fair market rent knowing the cost of the alternative and therefore when specialty retailers complain that the majors are given a benefit of a lower rent they need to appreciate that the landlord needs to consider before he even constructs his shopping centre whether he can have a major commit. The other factor in determining rent of course is the competitive position with one major to another. So the exact fair market rent would depend on not only the major's options for a location but also the competitive position of other major retailers. These facts apply also to specialty retailers so some extent although they would normally come into a shopping centre lease once the landlord has tied up a major tenant or tenants and the shopping centre design. It is widely accepted wisdom that rents are charged on specialty tenancies on their ability to pay not on what it really costs the landlord. A successful landlord therefore looks for a balance of tenants not only to supply the necessary variety to the centre but to ensure the overall rent return meet the economic objectives. I think it would be a reasonable comment to say that if an authority adopted a position of one rate per square metre for rent then many of the retail tenants would be unable to locate in such centres causing shopping centres to be uneconomic entities. Thus when Retail Tenancy Tribunals consider a fair market rent this factor of varying rents for various tenancy types would need to be accepted wisdom. Note: On the question of disclosure of turnover, much despised by specialty tenants, I believe these concerns would be overcome should such a Tribunal exist as part of its knowledge would need to include knowledge of all rents being paid, knowledge which at present is very limited on the tenants side.

While percentage or turnover rent is agreed mostly with major tenants with the tenant objective of lowering the percentage of rent costs as turnover increases I believe this is a fair way of preventing unacceptable rent reviews and should be more pursued and encouraged with specialty tenancies to avoid base rent being the only source of gain to the landlord. On the other hand it is only fair and reasonable that if a landlord runs a successful centre he should share in the tenant's gains.

2. Lack of Transparency and Accountability of Landlords – There is no doubt in my mind that the best sort of retail leases in Australia are what is known as a gross lease ie the tenant simply pays a base rent with either CPI type escalations or percentage rent escalations with fixed term rent reviews ie percentage rent loaded into base rent but overall rent remains the same because once you introduce an unpredictable rental factor notably outgoings you are asking for trouble. This area of outgoings, extended trading charges and promotional levies are a minefield of trouble and in my opinion a cause of great concern to tenants and I believe an area fairly ignored in fundamental ways by regulators in Australia. One of the important factors in this is that for most specialty tenants the cost is only a relatively small of their occupancy cost eg say a base rent of \$800/m<sup>2</sup> outgoings would represent about another \$100/m<sup>2</sup>. Interestingly for major tenants the proportions are quite different and in a net lease could be 50% base rent and 50% outgoings so the issue is relatively more important for major tenants than specialty tenants both in proportional significance and in dollar terms because of their larger store areas. The problem is that generally landlords are reluctant to negotiate gross leases as this means they have to bare the risks of these operational costs and while there has been some movement towards these types of leases for specialty short term leases there is a substantial under use of these types of leases for medium and longer term leases.

Therefore there is still a substantial amount of semi gross (increase in outgoings over a base year) and net leases (full GLA share of outgoings) being negotiated and it looks, without some form of regulation in this area, being the long term position for retail leases in Australia. The issue then becomes a concern for retailers to devise effective measures of control over these costs which at present are well and truly determined by landlords but mostly funded by retailers. Note: Landlords will argue that it is in their interests to control these costs because of the volume of gross rents in their shopping centre but still the lack of transparency and accountability in current regulations is of concern to retailers. In fact it may well mean landlords will construct outgoings recoveries to ensure more than a fair share is recovered from those paying. This lack of transparency is also evident in the areas of referable outgoings and I have never seen an outgoings statement from a landlord advising his assumptions in this area. Specialty retailers have reported to me that landlords simply do not respond to their questioning on the details of outgoings but landlords are more responsive to the major tenants but even the majors have their difficulties. I am aware that one major is currently undertaking legal action to enforce more disclosure.

As mentioned in the background notes above the ARA Council through its Tenancy Committee approved a Shopping Centre Code of Conduct on Outgoings dated August 2002 (see Appendix A) which was sent to the Shopping Centre Council of Australia but out rightly rejected at a meeting about August 2003 with the Tenancy Subcommittee as unacceptable due to the already high level of regulation in the Industry generally. Shortly after Woolworths left the ARA and the matter has remained on the table. This Code has been presented to most State Retail Lease Review Authorities and a copy given to the ACCC and represents the wisdom of the three major retailers in Australia let alone the approval of the ARA Council, so should be taken as a credible document, but it has had little impact on recent legislative changes perhaps the most significant being in the last review of the NSW Act enabling tenants to question the auditor.

If there was one change to be made to outgoings regulations in Australia it would be to insert into legislation the ability of tenants to conduct an audit of outgoings as per clause 12.1 of the Outgoings Code.

The second major concern is regarding Management Charges and Fees. While some attempt has been made in Victoria to cap these costs and they have been banned in WA little attempt has been made in other jurisdictions. The proposal in the Code under clause 11 sought to address these concerns accepting that they are a real cost but they are out of control in some sections of the Industry. Reasonable Management Charges and Fees in my opinion are in the \$15 to \$25/m<sup>2</sup> range but many centres are well above these limits up to \$60/m<sup>2</sup> and beyond. Landlords perceive that it is reasonable for them to be able to make a “profit” out of inhouse management comparing the security or cleaning contractor who seeks to do so, but these fees are not being set at arms length and therefore prone to being set by unwritten mutual understandings between major landlords, saying this is the “market rate”. It is interesting to note that on my last review every Regional Shopping Centre (as defined by the Property Council of Australia) is owned and managed by one of the major landlords as generally represented on the Shopping Centre Council of Australia and it is these centres which have the very high rates of management charges and fees. At the other end of the market in subregional

and below shopping centres, except those owned by a couple of the major landlords, operate in the externally managed environment with rates in the \$15 to \$25/m<sup>2</sup> areas and below.

Woolworths use external managers in their company owned shopping centres, so I was very aware of these costs in smaller shopping centres. Major landlords claim the additional expense is justified by the extra management effort they put in regional shopping centres and while this argument is difficult to reject without knowledge of the facts, one would expect an element of cost savings due to economies of scale but this is not evident. The Codes answer was therefore to accept costs but to ask the auditor to verify only true costs were being fairly and reasonably apportioned ie no profit margin. These costs have been growing exponentially since the mid 90's, and while say the \$25/m<sup>2</sup> "overcharged" is a small amount relatively, there would be millions of dollars of "profit" when all the retail areas are accumulated while also appreciating that the competitive end of the management market must also be making their profit.

There are many other possible wrougts in outgoings and many are addressed in the Outgoings Code where landlords are able to construct outgoings costs to maximise or over recover and these could be best discussed in the open discussion sessions. There is one major concern in one of Sydney's leading shopping centres which is worthy of a fuller review. This would need to be subject, at least initially, to a confidential verbal submission. It especially begs the question at what lengths a landlord might go to maximise his outgoings recovery.

I believe the simple ability or threat of tenants being able to institute an audit would have a sobering impact on the performance of landlords and thus minimise the need for tenant audits. It is interesting to note that outgoings to my knowledge are not a big issue in the USA because the audit provision is substantial in most retail legislation and imbued in the culture of landlord/tenant relations and leases.

Extended Trading issues are addressed in the Outgoings Code, and while also subject to possible abuse, have not surfaced as such a major issue in my experience. They still need to be managed and benchmarked carefully by tenants.

The main concern tenants have with promotional levies is that landlords have the full control of the expense and most often use it to promote their names more than the retailers in a given centre. The Industry would simply be better off if these levies were completely banned.

3. Land Tax as a Recoverable Outgoing – The inability of landlords to recover land tax has occurred across the board in Queensland so all major and specialty tenants are included but in Victoria and South Australia where it has also been banned this only covers those covered by the state retail legislation. The best argued position for the deletion of land tax occurred in a paper I read when the Western Australian legislation was last reviewed. This argument was along the lines that the value of land was directly related to its location and to the infrastructure built around the land. This infrastructure was generally provided by the government and improved the value of the land to the benefit of the owner/landlord. It was therefore considered reasonable that this resulting increase in the value of the land was truly of major benefit to the owner, being reflected in the increased value should the land be sold, so it was only reasonable that the land tax so levied was seen as a cost to the owner who benefited financially in a much more direct way than a tenant.

4. System for Compensating Tenants – Landlords generally do not accept when they refurbish or extend a shopping centre that the impact on existing tenants businesses should be considered as part of the cost of these works. While some state regulations makes reference to compensating tenants there is no agreed formula for so doing. My observation has shown that for reasonably significant landlord works the tenants businesses will be impacted up to 5%, assuming a well managed change, but some landlords do not properly control their building contractors and a loss of business up to 25% and beyond can be expected.

Thus the compensation provision acts as a control on the landlord for him to ensure that any works are done under strict control and with minimal interference on the shopping centre's normal business.

The simple concept, which needs to be enshrined in regulation, is that a tenant's business is supported, firstly for chain stores, by using a basket of stores in unimpacted locations and comparing their growth this year on last year to the same situation for the impacted store and any shortfall in sales over last year is compensated by multiplying sales so lost by the gross margin for the impacted store and compensation paid accordingly on monthly rests or as otherwise agreed. Secondly the situation is different for one store retailers as basket stores would be unavailable but instead compensation is based on previous years growth and any other reasonable indicators including CPI growth would be used to determine expected sales growth in the current year and the same formula applied to determine the loss of profit.

These same formula can be used in any other types of compensation claims for loss of profits eg when a centre/store is forced to close due to some negligent action by the landlord or his agent.

5. Landlord/Tenant Imbalance in Negotiating Strength – While there is a limited measure of competition between shopping centres and therefore landlords because of the abovementioned property zoning/development limits set by statutory authorities there is a reasonable case to be made that landlords generally once they have established their centres have far less worries about competition than retailers who are in a fiercely competitive environment. This fierce competition evidences itself, among other ways, in the difficulties of trust between specialty retailers and also towards major retailers and this is further evidenced perhaps best in the ARA which has now ceased to be the power it once was without the funding of the major retailers who have now formed their own association (National Retailers Association – NRA).

This split has caused the ARA to lose its teeth but it also competes with a separate body in Queensland and divisive bodies in Victoria. This is not completely unusual in trade associations but is especially bad for the retailers of Australia who cannot speak with one voice or have powerful lobbyists like the SCCA. Thus this position has seriously changed since the last Federal review of retail legislation to the detriment of retailers.

Besides the lapsing of the Outgoings Code mentioned above another important impact for retailers in Australia has lapsed. Some years ago, I think about 1999, the current SCCA Executive Director Milton Cockburn announced at an ARA

Tenancy Forum in Canberra that the SCCA was prepared to accept the South Australian legislation on Casual Mall Leasing as a code throughout Australia. This agreement was never properly taken up by the ARA although it did occupy some of the Tenancy Committees attention. I tried to bring the matter to a head in agreement with the then Tenancy Committee Chairman Chris Barrie of The Just Jeans Group and as shown in Appendix B drafted the South Australian wording into a Code but as this was done shortly before Woolworths left the ARA, I believe it has now lapsed and so an important agreed position for the benefit of retailers throughout Australia lies languishing and one would reasonably think that retailers simply don't care but the truth is that the ARA lack the resources and ability to negotiate the details of an agreement with the SCCA.

## RECOMMENDATIONS FOR REFORMS IN THE RETAIL TENANCY MARKET IN AUSTRALIA

Uniform Retail Legislation in Australia as for the Companies Code including the following reforms but not limited to:

- Fair Rental Tribunals for arbitrating rent review disputes and establishing a database of fair market rentals recognising the market forces of supply and demand and the ability of tenants to sustain various levels of rent by tenancy types.
- Improving the transparency and accountability of landlords by the adoption of the Outgoings Code in legislation or as a minimum the audit right for tenants.
- The deletion of land tax across the board as a recoverable outgoing.
- The banning of promotional levies.
- Enshrine in legislation a system for compensation of tenants when landlord works in an existing centre impact a tenant's turnover.
- Including the South Australian Casual Mall Leasing Code as part of the legislation.
- The need for a statutory based body to represent retailers.

Bruce York  
21<sup>st</sup> July 2007

### ENCLOSURES:

APPENDIX A – Shopping Centre Code of Conduct on Outgoings August 2002

APPENDIX B – Shopping Centre Code of Conduct on Casual Mall Licensing September 2003

APPENDIX A

SHOPPING CENTRE  
CODE OF CONDUCT  
ON OUTGOINGS.

AUGUST 2002





ISBN

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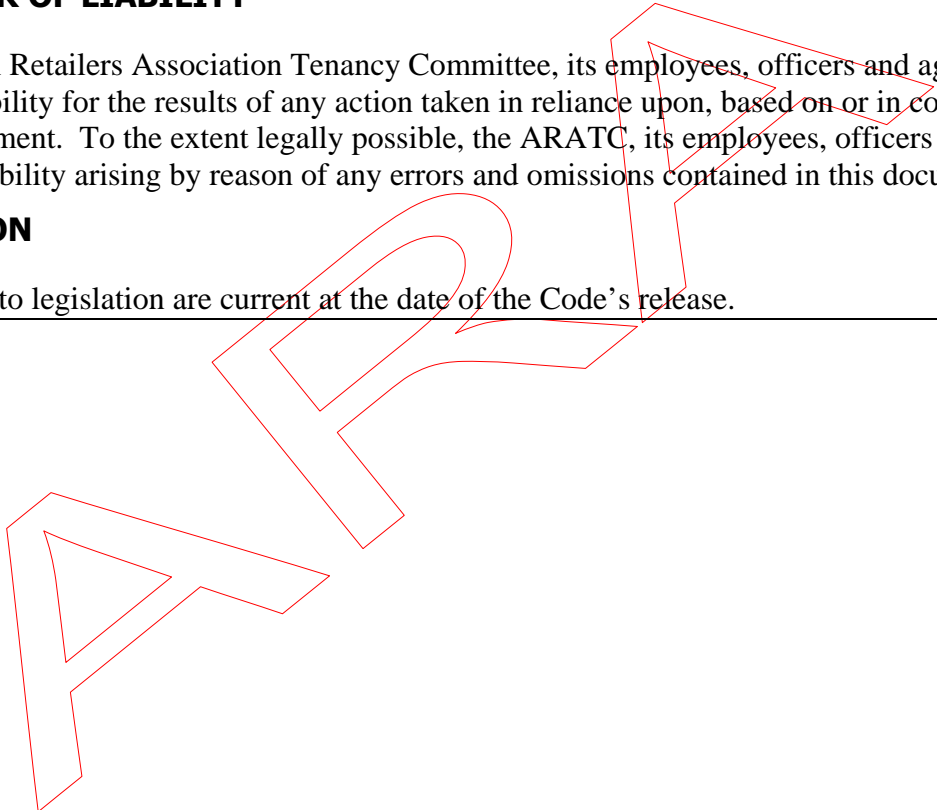
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**LEGISLATION**

All references to legislation are current at the date of the Code's release.



# FOREWORD

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1. Fundamentally, the recovery of Outgoings is a cost recovery procedure which subject to legislation should essentially be fairly and reasonably apportioned among the tenants.

The concept initially arose because Landlords were concerned that their return on investment base would be eroded by unforeseen cost increases, especially in areas of Rates and Taxes and Insurance Premiums, but this could easily extend to other areas including government regulations eg fire regulations or areas of security eg due to increasing incidents of misdemeanours or criminal activity in Shopping Centres.

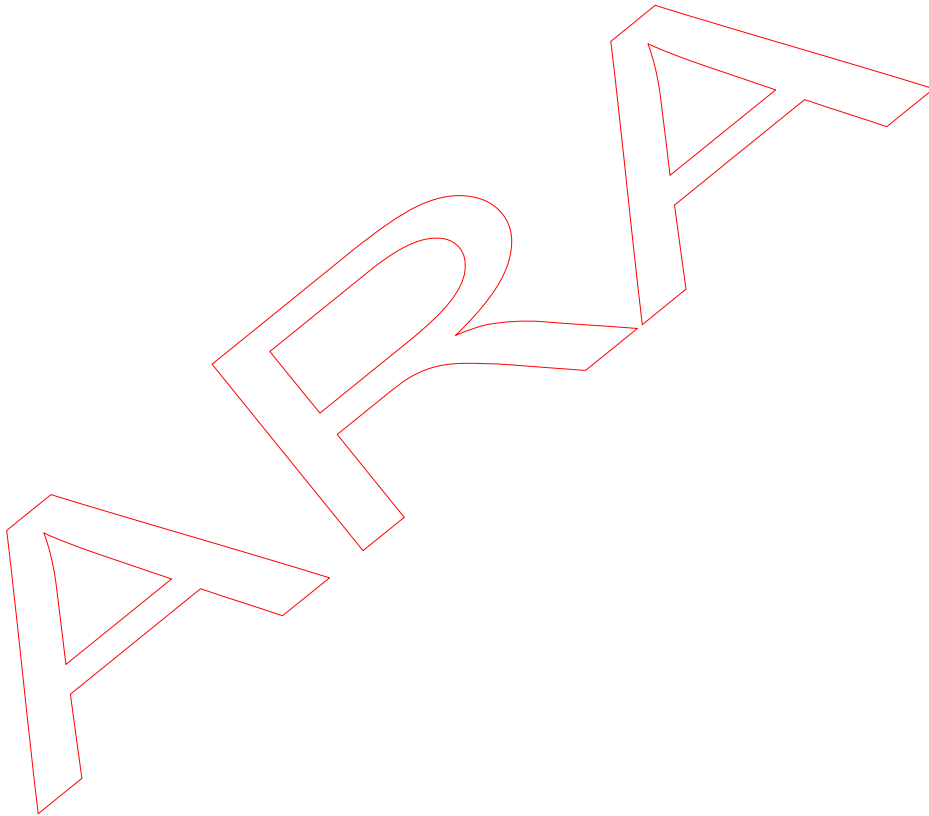
2. In more recent times, due to improved communications and computer systems, much of the work in managing Shopping Centres has been centralised thus complicating the cost apportionment to individual Centres.
3. These complications, together with significant ongoing changes in legislation, cost recovery methodologies and shopping habits now necessitate a consistent and transparent standard be adopted in measuring, apportioning, charging and reporting outgoings charges, management and administration charges and utilities in Australian Shopping Centres.
4. It is not intended to unduly restrict owners in developing high standards of Shopping Centre presentation but to assure tenants that the outgoings, management and administration charges are properly and prudently incurred and meet the requirements of this Code.
5. Landlords and Tenants of Shopping Centres have a vested interest in effective and efficient cost control as modern technology, especially the Internet, develops alternative means of distributing goods and services, not only within Australia but also on a global basis.
6. This Code will also assist the Industry to identify areas of costs beyond the control of Landlords and Tenants and provide a neutral and equitable means to assist those in control of the way in which outgoings are incurred treat the Industry on a fair and reasonable basis compared to other Industries and the community generally.

# INDUSTRY ENDORSEMENT

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The following organisations and businesses proudly endorse the Shopping Centre Industry Code of Conduct on Outgoings and commit to promoting their internal dispute resolution procedures:  
(Drafting Note: These endorsements and others yet to be achieved)

- Australian Retailers Association; (ARA)
- Shopping Centre Council of Australia; (SCCA)
- Other endorsements from retailers and landlords may be added if considered of value.

A large, stylized outline of the letters 'ARA' in red, positioned diagonally across the page. The letters are bold and have a double-line outline effect.

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# PART 1 – PRELIMINARY

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## 1. Background

- 1.1 This Code has been developed for the Shopping Centre Industry by the Australian Retailers Association Tenancy Committee.
- 1.2 This Code is a voluntary code of conduct for the Shopping Centre Industry.
- 1.3 This Code is intended to compliment the various Australian State and Territory retail tenancy legislation,

## 2. Objects

- 2.1 The objects of this Code are to:
  - promote equitable and transparent cost recovery practises
  - provide a simple, accessible and non-legalistic dispute resolution mechanism for Industry participants in the event of a dispute.
  - establish a uniform reporting standard for Outgoings

## 3. Scope

- 3.1 This Code applies to Industry participants.
- 3.2 This Code is intended to inform the conduct of Industry participants but does not constitute a contract between them.
- 3.3 This Code is not intended to cover consumers.
- 3.4 This Code is not intended to be declared as either a prescribed voluntary or mandatory code under Part IVB of the *Trade Practices Act 1974*.
- 3.5 The provisions of this Code are subject to all Commonwealth, State and Territory legislation and all rights and obligations arising under common law.

## 4. Definitions

- 4.1 In this Code, unless the contrary intention appears:

“Applicant” means a person, corporation or other body corporate who raises or causes to be raised a dispute for resolution in accordance with Part 3 – Dispute Resolution;

“Code” means the Shopping Centre Industry Code of Conduct on Outgoings;

“Code Administration Committee” means the industry committee established to oversee the operation of this Code in accordance with Part 4 - Administration;

“Food Courts” means the area in a shopping centre where more than one tenant serves food in an area which includes tables and seating facilities outside of their leased area and maintained in common with other adjacent tenants whose permitted use relates to the preparation and sale of retail food products.

“Gross Lettable Area” means as defined in the publication of the Property Council of Australia document titled “Method of Measurement for Lettable Area” dated March 1997 but clarified to include the total area in square metres of those parts of the Centre leased or licensed or capable of being leased or licensed including without limitation kiosks, storage areas, free standing tenants, cinemas, entertainment tenancies, and offices.

“Industry” means those businesses involved in the Shopping Centre Industry as defined below.

“Internal Mall Costs” means mall airconditioning, internal lighting, internal cleaning, internal security and rubbish removal and the like which exclusively serves those tenants physically connected to the mall areas.

“Internal Procedures” means the internal dispute resolution procedures of Industry participants;

“Management and Administration Charges” means costs directly involved in the proper and efficient administration of the Shopping Centre, including centre manager, administration and clerical staff, accounting staff, receptionists, directly involved in the operational management and maintenance functions either on or offsite.

“Outgoings” means a lessor’s outgoings on account of any of the following:

- (a) the expenses (excluding structural developments repairs or capital works renovations and leasing or hire purchase or replacement of capital equipment) directly attributable to the operation, maintenance or repair of the Shopping Centre in which the shop is located or of any building in the Shopping Centre or any areas used in association with any such building,
- (b) rates, taxes levies, premiums or charges payable by the lessor because the lessor is the owner or occupier of any such building or the land on which it is erected. (Based on NSW Retail Leases Act) and calculated on a single holding basis.

“Lease” means any agreement under which a person grants or agrees to grant to another person for value right of occupation of premises for the purpose of the use of the premises as a shop:

- (a) whether or not the right is a right of exclusive occupation, and
- (b) whether the agreement is express or implied, and
- (c) whether the agreement is oral or in writing, or partly oral and partly in writing. (NSW Retail Leases Act)

“Respondent” means a person, corporation or other body corporate against whom a dispute is raised by an Applicant for resolution in accordance with Part 3 – Dispute Resolution;

“Shopping Centre” means a group of premises;

- (a) at least 5 of which are retail premises; and
- (b) which have, or if leased would have, a common property owner; and
- (c) which are located in one building or adjoining buildings; and
- (d) which are generally regarded as a shopping centre;

“State Retail Tenancy Tribunal” means the respective State/Territory Authority which administers disputes under the respective Retail Tenancy Legislation/Code, whose addresses are listed under Part 5 Key Contacts.

“Support Person” means a person or persons nominated by the Applicant or the Respondent to provide moral and personal support during mediation in accordance with Part 3 – Dispute Resolution;

# PART 2—GUIDELINES

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## 5. Standards and specifications

**Principle:** All Industry participants support an efficient and competitive Shopping Centre Industry which accords equal respect to:

- the obligation of tenants to pay their correct contribution to Outgoings properly incurred in accordance with their Lease; and
- the entitlement of landlords to recover in full from tenants their correct, properly incurred expenditure of their costs in the running expenses of their shopping centre in accordance with their leases.

- 5.1 All applicable standards and specifications (where available) will be disclosed to tenants before entering into a Lease.
- 5.2 Audit certificates will be issued and attached to all actual outgoings advices to tenants in accordance with the relevant accounting standards in Australia which will include a certification that they conform to this Code.
- 5.3 A tenant may apply to the Respective State Retail Tenancy Tribunal should the tenant have reasonable grounds to believe that the tenant is not being charged outgoings in accordance with the standards and specifications of this Code.

## 6. Leases

**Principle:** All industry participants support the right of landlords and tenants to freely negotiate the terms and conditions of any Lease, including the right to determine whether or not that Lease is evidenced in writing.

- 6.1 Landlords and tenants will use their best endeavours to negotiate the terms and conditions of their Lease (including the terms of payment) in clear, meaningful and accurate terms.
- 6.2 In a genuine effort to resolve disputes in an effective manner, landlords and tenants should include an appropriate dispute resolution term in all written Leases.
- 6.3 Landlords and tenants will encourage the use of written contracts (where appropriate) to evidence the terms and conditions of the Lease.
- 6.4 Existing Leases should remain. If there is a conflict between the existing Lease and this Code then the conditions of the Lease will apply.

## 7. Shopping Centre Presentation and Management

**Principle:** All Industry participants accept the right of landlords to determine their standards of presentation and management of shopping centres, subject to the standards imposed or promoted by the relevant regulating authorities or industry associations, including any voluntary codes of conduct or practice.

- 7.1 Landlords are entitled to properly and reasonably determine cost expenditure in their shopping centres and must include only those costs in outgoings in accordance with the standards set out in the Property Council Recommended Chart of Accounts For Commercial, Industrial, Residential and Retail Properties dated 2000 as per the Primary and Secondary Accounts as currently shown or as mutually agreed between the ARA and SCCA from time to time. The format for Outgoings Budget and Actual Reports is to be in accordance with Schedule 1 as limited by state retail legislation or the specific retail Lease.
- 7.2 Landlords will pay all such costs promptly and ensure the continuity of services to the Shopping Centre.
- 7.3 Tenants will use their reasonable endeavours to deal fairly with landlords on outgoings matters and ensure prompt reimbursement of the charges in accordance with their Leases.
- 7.4 Where an end of year adjustment is to occur, landlords will adopt an open book approach to enable Tenants to satisfy themselves as to the correctness of the adjustment calculation.
- 7.5 Where an adjustment is to be paid by the landlord or by the tenant each party will pay the adjustment promptly.

## **8. Gross Lettable Area of a Shopping Centre**

**Principle:** All Industry participants acknowledge that a basic fair and reasonable basis for the allocation of outgoings is the Gross Lettable Area.

- 8.1 During shopping centre redevelopments landlords must maintain a constant GLA for the base of the division of outgoings that existed immediately prior to the commencement of works and then apply the adjusted GLA on the conclusion of works or if done in stages on the conclusion of each stage.
- 8.2 Pad site areas are to be included in the GLA for the calculation and apportioning of statutory charges, insurances, management and administration charges and all external categories including the GLA on an area proportion basis only excluding Internal Mall Costs.



## 9. Outgoings

**Principle:** All outgoings, to be recoverable, must be disclosed, and transparent in detail. If an item of expense is not known or specifically identified, it must not be recoverable from the tenants. There must be a clear distinction between costs attributable to Tenants and costs attributable to Landlords as owners of the asset for which they are compensated by rent. The principles of this Code also apply to Merchant Association or Promotional Levy charges which are simply a specific charge for the recovery of outgoings associated with promotion of a shopping centre. Costs shown are to be net of any settlement discounts.

- 9.1 There must be a strict separation between capital works renovations, finance costs, depreciation costs, equipment leasing costs and maintenance items, with capital renovation and equipment leasing costs items not being recoverable from tenants.
- 9.2 Landlords and Shopping Centre Managers are to use their best endeavours to ensure all costs incurred in outgoings are competitively based and referred to an open market tender basis at least once every three years. Within three years of commencement of this Code the open market basis is to be carried out in relation to all non-statutory outgoings in excess of 5% of total outgoings costs.
- 9.3 Where there is a relationship, as defined in the Companies Code, between the Landlord and/or Manager and any supplier of goods or services which will form part of outgoings then this relationship must be disclosed in the Centre Outgoings Audit statement and the onus placed on the landlord to prove that pricing is competitive.
- 9.4 Where Food Courts or the like are in shopping centres and specific outgoings apply to or are incurred in those areas the outgoings charges are to be considered as tenant related or licensed areas and not general outgoings for all tenants but recoverable from only those tenants as part of their tenancy costs.
- 9.5 Landlords should ensure transparency in mall trading by allocating part of the common area as GLA in accordance with the Shopping Centre Code of Conduct on Casual Mall Licensing.
- 9.6 The Landlord is not entitled to recover from tenants any costs associated with land surplus to the current use of the Centre. Costs are to be shown as a deduction.
- 9.7 Where the Landlord charges items of outgoings directly to the tenant eg electricity, it must not supply it at any greater rate than the Landlord pays. In the same context a Landlord may not recover any management and administration charge or the like component from a tenant for the supply of any goods or services. It is recognised that some costs eg rubbish removal and airconditioning and the like are to be recovered under an allocation basis as they are clearly not costs to all tenants but reasonably directly related to identifiable tenants. Full costs are to be shown and the calculation for the reduced rate.

- 9.8 On the application in writing of three tenants or more to the Landlord, the Landlord must allow, at the tenant's expense, for an independent auditor to review the accounts for the year requested and should the result of the audit show that outgoings have been overcharged by 3% or more of the total then the Landlord must bear the cost of the audit, which amount cannot be recovered from the tenants in future outgoings charges. Regardless of the amount identified as overcharged, the Landlord must refund all the tenants of the shopping centre in question their due proportion of the amount so ascertained as overcharged.
- 9.9 Outgoings Statement must ensure full disclosure of all proper costs associated with the shopping centre. Costs attributable to landlords eg items of capital expenditure, capital repairs or normal outgoings costs attributable to the development work, costs associated with extended trading and other outgoings recovered from specific tenants are to be excluded from outgoings. Income received from mall trading (the portion attributable to outgoings) or carparking (if applicable) is to be offset against the relevant Outgoing Account. The Property Council Chart of Accounts 2000 is to become the standard for all outgoings budget and actual reports.
- 9.10 Insurance Premiums for the Loss of Profits or the like are a landlord's cost and not recoverable from tenants.
- 9.11 All actual outgoings statement must be audited by a registered auditor in accordance with Australian Accounting Standards including a statement of compliance with this Code. The audit certificate should also include certification of the Shopping Centre GLA or GLA's used as a basis for the apportionment of outgoings and be cross referenced to the accompanying actual outgoings statement
- 9.12 Outgoings must exclude any amount of GST and any Credits to which the Landlord is entitled to avoid any over recovery of costs.
- 9.13 Sinking Funds, when agreed, must form part of the audited accounts each year and show the detailed movement in the provision accounts including the opening balance, the income received and the expenditures showing reasonable details including the various projects (by description for any amount over 10% of the opening provision balance) and the closing balance and be certified by the auditors as fair and reasonable in accordance with the provisions of the Code.

## 10. Extended Trading Costs

**Principal:** Outgoings attributable to trading outside core trading hours are to be recovered from tenants who trade outside of normal centre trading hours in accordance with their GLA and trading hours proportion and such recovery is specifically provided for in the Lease.

- 10.1 Extended trading costs should only include those costs which are directly attributed to trading outside core trading hours. All such costs must be recorded separately to ensure they do not become confused with core trading hours outgoings.
- 10.2 The landlord is to apportion extended trading hours costs between those tenants trading in accordance with their GLA proportionate share of all tenants trading on a time basis.
- 10.3 Extended trading costs and recoveries must be transparent in the centre financial reports. These reports must include any costs not recoverable from tenants and should be shown as a landlord cost.

10.4 It is acknowledged that the above charges and recoveries are subject to varying Lease terms.

## 11. Management and Administration Charges

**Principle:** That Management and Administration Charges not be based on any percentage of Gross Rent Turnover or the like but on a fair and reasonable cost recovery basis without any profit or management fee that might be agreed with the Landlord to compensate or provide a profit component to the Manager except where the charge is determined by a competitive market basis. Where the Landlord and the Manager are related entities in accordance with the Companies Code, Management and Administration Charges may only be established and charged on a cost recovery basis otherwise the competitive market basis to apply. The first market review, where such an arrangement exists, must occur within three years of the commencement of this Code.

11.1 It is recognised that management and administration charges can be significantly different from one shopping centre to another because of the difference between the quality and quantity of on site and off site management services and landlords should be free to determine this structure without interference from tenants, while being conscious of their responsibility to manage efficiently and on a competitive basis with appropriate standards.

11.2 Landlords, as relevant, must submit the management and administration charge component of their shopping centre to open public tender (3 yearly as for outgoing) in accordance with normal tender standards, including, if applicable, a full detailed specification of the services required beyond those provided by the onsite staff.

11.3 All costs associated with collection of rent or commissions or fees associated with the leasing of premises, advertising, development costs, feasibility costs and additional management and administration costs related to the development are to be excluded from management and administration charges as they are costs of running the landlords business.

11.4 Management and Administration Charges without limiting the generality must exclude costs relating to staff training, tenant training, management insurance, staff uniforms, staff amenities, consultants fees, staff travel, entertainment, rent relief, rental assistance, fitout contributions, promotional allowances and rent free periods.

11.5 The Auditor in determining whether a fair and reasonable cost basis is being used for the recovery of management and administration charges, especially involving offsite charges from a landlord/manager with multi sites, is to consider the total costs apportioned among all shopping centres being owned/managed to ensure these costs in total are not being over recovered.

## 12.1 Audit Powers and Annual Report, Code of Administration Committee

**Principle:** Transparency in what should be regarded as a simple cost recovery charge is essential and to enable the Industry to make comparisons and draw to all participants attention significant variations and trends which need addressing the Committee is to issue an annual report on costs by items and on a cost per square metre of GLA basis backed by the authority to conduct audit reviews to ensure conformity to the Code and the accuracy of information provided in annual accounts.

- 12.1 The Landlord of every Shopping Centre is to submit within 120 days of each financial year for their shopping centre a full set of audited outgoing accounts including the audit certificate and GLA used for the general outgoing calculation to the Code Administration Committee. These accounts are to be submitted to the ARA Secretariat for filing and any other use as the Code Administration Committee directs.
- 12.2 The Code Administration Committee is able to conduct its own audit at its own expense on providing 1 calendar month notice to the Landlord of a Shopping Centre after receipt of the annual audited outgoing accounts under Clause 11.1 and the Landlord will make available for the qualified auditor all the relevant records.
- 12.3 The Code Administration Committee will by 31<sup>st</sup> December each year produce an annual report on the working of the Code and provide summaries for each Shopping Centre of the latest outgoing statistics including GLA's and report on any significant items or trends for Industry review and information.

## **PART 3 — DISPUTE RESOLUTION**

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### **13. Dispute resolution scheme**

**Principle:** All Industry participants support a dispute resolution scheme which:

- considers all outgoing disputes arising between Industry participants;
- gives all Industry participants an opportunity to resolve disputes, in the first instance, under Internal Procedures;
- encourages unresolved disputes to be referred to the respective State Retail Tenancy Tribunal Systems as an alternative to litigation;
- considers all disputes fairly and impartially;
- will not jeopardise the underlying commercial relationship;
- respects the confidentiality of Applicants and Respondents; and
- encourages an equitable and timely resolution of disputes.

13.1 This Code promotes a two-stage dispute resolution scheme:

- Stage 1 encourages Applicants to raise disputes with the Respondent; and
- Stage 2 encourages unresolved disputes to be raised with the respective State Retail Tenancy Tribunal in which the Shopping Centre is located.

### **14. Dispute resolution procedure**

**Principle:** All industry participants support a dispute resolution procedure in which:

- tenants will promote the existence of any applicable Internal Procedures in a genuine effort to resolve disputes;
- tenants and landlords will participate in the mediation process in a spirit of goodwill and good faith; and

- matters discussed and documents produced in the course of mediation will be treated as confidential and without prejudice.

14.1 Where a dispute arises, the following procedures will apply:

**Stage 1 — Internal Procedures**

- 14.1.1 Applicants will raise the matter in dispute with the Respondent in writing, in accordance with the Respondent's Internal Procedures.
- 14.1.2 Applicants and Respondents will use their best efforts to meet within a 60 day period to resolve the matter in good faith and in accordance with the Internal Procedures (if any) in a climate giving respect to the ongoing commercial relationship and conducted on a confidential and without prejudice basis.
- 14.1.3 Applicants and Respondents will endeavour to exhaust all internal appeal procedures prior to recourse to any external dispute resolution.

**Stage 2 – State Retail Tenancy Tribunals**

- 14.1.4 Stage 1 disputes may be referred to the respective State Retail Tenancy Tribunals by either the Applicant or the Respondent where:
- the Respondent has failed to respond to the matter in dispute within a reasonable period or within that period stipulated in the Internal Procedures;
    - the Applicant and Respondent are unable to resolve the matter under the Internal Procedures;
    - the Applicant or Respondent is dissatisfied with the outcome of the Internal Procedures; or
    - the Applicant is dissatisfied with the Respondent's internal processes or procedures in considering the matter or in reaching its decision.
- 14.2 Disputes may be directly referred to the State Retail Tenancy Tribunals by either the Applicant or the Respondent (without having first attempted Stage 1 procedures) where:
- there are no Internal Procedures; or
  - the Applicant or the Respondent applies to the State Retail Tenancy Tribunals for a direct referral of their dispute and the State Retail Tenancy Tribunals determines that the circumstances warrant direct referral.
- 14.3 Once the State Retail Tenancy Tribunals establishes his or her jurisdiction to mediate a directly-referred dispute under Clause 14.2, the State Retail Tenancy Tribunals will contact the Respondent and advise that a referral has been received.
- 14.4 Advising the Respondent that a referral has been received under Clause 14.2 will not involve the release of the Applicant's name, unless the Applicant consents.
- 14.5 A Stage 2 dispute must be referred to the State Retail Tenancy Tribunals by application.
- 14.6 Application may be made to the State Retail Tenancy Tribunals by telephone, fax, letter, email or personal attendance (see Part 5 – Key Contacts).
- 14.9 An application fee of \$500 is payable.
- 14.8 Following receipt of both the application and the application fee (where payable), the State Retail Tenancy Tribunals will contact the Applicant and the Respondent to discuss the application and agree on a time, date and venue for the mediation conference.

- 14.9 The State Retail Tenancy Tribunal has jurisdiction to mediate any dispute arising between industry participants in their vertical relationships with one another provided that the dispute:
- occurs on or after the date of public release of the Code; and
  - is less than 12 months old.
- 14.10 In mediating a dispute under Clause 14.9, the State Retail Tenancy Tribunal may have regard to circumstances arising before the date of public release of the Code.
- 14.11 The exclusion of a legal representative in Clause 14.11 does not preclude the attendance of a Support Person but must include a person authorised to settle a dispute.
- 14.12 The State Retail Tenancy Tribunal may, in his or her absolute discretion, summarily dispose of any application on the grounds that the dispute is:
- frivolous;
  - vexatious;
  - repetitive;
  - lacking in substantive merit; or
  - a dispute which has been substantially previously dealt with.
- 14.13 The State Retail Tenancy Tribunal will assist the applicant and the Respondent, explore options for and, if possible, achieve the timely resolution of the dispute by agreement.
- 14.14 In exploring options for the timely resolution of the dispute, the State Retail Tenancy Tribunal will not:
- be bound by any resolution that might be achieved by negotiation or a contested trial; or
  - impose a solution on the Applicant or the Respondent.
- 14.13 If mediation does not result in an outcome acceptable to both the Applicant and the Respondent or the dispute proves incapable of resolution by mediation, the State Retail Tenancy Tribunal will issue a certificate to the Applicant and the Respondent setting out:
- the parties to the dispute;
  - an outline of the dispute; and
  - a list of the unresolved issues.
- 14.18 Any certificate issued under Clause 14.17 (including any information contained in the certificate) must remain confidential between the Applicant, the Respondent, the State Retail Tenancy Tribunal and any attending Support Person/s.
- 14.19 Disclosure of any certificate issued under Clause 14.17 (including any information contained in the certificate) to a third party requires the express consent of both the Applicant and the Respondent, except where the disclosure is required under law.
- 14.20 The Applicant and the Respondent must pay their own costs of attending mediation.
- 14.21 Failure of the mediation process above will result in the issue/s outlined in the certificate issued under clause 14.15 being referred to the full Tribunal whose determination will be final and binding on all parties.

# PART 4 — ADMINISTRATION

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## 15 Code Administration Committee

15.1 This Code will be administered by the Code Administration Committee (CAC) whose members will be without remuneration except for expenses

15.2 The CAC will initially comprise nine representatives:

3 x Australian Retailers Association (ARA);

3 x Shopping Centre Council of Australia;

1 x Qualified Accountant experienced in Shopping Centre accounting appointed by the Institute

of Chartered Accountants in Australia or failing them the Australian Society of Certified

Practicing Accountants;

1 x Member of The Australian Property Institute specializing in Land Economy and

experienced in Shopping Centre property matters appointed by that body; and

1 x Qualified Solicitor experienced in Shopping Centre Leases appointed by the Law Institute of Australia.

15.3 Committee members appointed by the Accounting, Property and Legal bodies must be ratified by both the ARA and SCCA Councils prior to their appointment.

15.4 An independent voting chairman will be appointed by the Committee.

15.5 The CAC will be funded jointly by the ARA and SCCA.

15.6 All decisions of the CAC must be made by way of a resolution passed by a simple majority of all CAC members entitled to vote, except for resolutions to amend the Code, which require a unanimous decision of all CAC members entitled to vote.

## 16. Role of the Code Administration Committee

16.1 The role of the CAC will be to:

- publicise and promote the Code and its dispute resolution procedures;
- monitor the operation of the Code;
- consult with industry participants (where appropriate) on proposed amendments to the Code;
- determine necessary amendments to the Code;
- provide for the adequate financing of Code administration expenses;
- produce an annual report on the Code and its administration;
- report to the Industry on the operation and effectiveness of the Code.
- Report on costs within the Industry.
- Conduct audits of Outgoings accounts of Shopping Centres.

## 17. State Retail Tenancy Tribunal

17.1 The role of the State Retail Tenancy Tribunal (in addition to mediating disputes in accordance with Part 3 – Dispute Resolution) will be to:

- produce an annual report to the Code Administration Committee on the operation and effectiveness of the Code;
- Make recommendations to the Code Administration Committee from time to time on matters of concern as regards the Code.

## **PART 5 — KEY CONTACTS**

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### **Code Administration Committee**

Telephone: 02

Facsimile: 02

Email:

Internet:

#### **Australian Competition and Consumer Commission**

470 Northborne Avenue

DICKSON ACT 2602

Telephone: 02 6243 1111

Facsimile: 02 6243 1199

Internet: [www.accc.gov.au](http://www.accc.gov.au)

### **State Retail Tenancy Tribunals**

Qld Govt Retail Shop Leases Registry

Floor 21

111 George Street

Brisbane QLD 4000

Ph: 07 3234 0389

Fax: 07 3234 1417

NSW Retail Tenancy

Unit Level 8, St James Centre

111 Elizabeth Street

SYDNEY NSW 2000



Ph: 02 9223 0466

ACT – to be advised

Victorian Retail Tenancy List

Victorian Civil & Administrative Tribunal

55 King Street

MELBOURNE VIC 3000

Ph: 03 9628 9960

Fax: 03 9628 9896

Tas – to be advised

Office of Consumer Business Affairs

Level 1, Chesser House

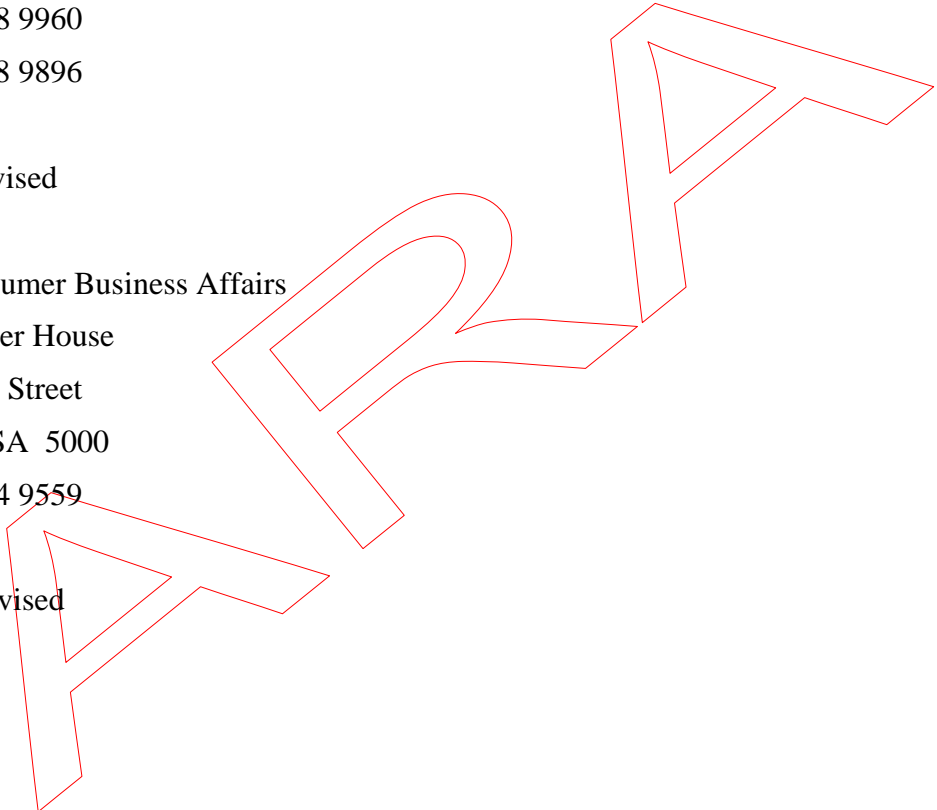
91-97 Grenfell Street

ADELAIDE SA 5000

Ph: 08 8204 9559

WA – to be advised

NT – n/a



**SCHEDULE 1**  
**CHART OF ACCOUNTS FOR USE IN OUTGOINGS STATEMENTS**

| <u>Account Number</u> | <u>Account Item</u>                 | <u>Account Number</u> | <u>Account Item</u>                         |
|-----------------------|-------------------------------------|-----------------------|---|
| Primary/Secondary     | Primary/Secondary                   | Primary/Secondary     | Primary/Secondary                           |
| <u>300000</u>         | <u>FIXED EXPENSES</u>               |                       |   |
| <u>301000</u>         | <u>Statutory Outgoings</u>          | <u>406000</u>         | <u>Repairs &amp; Maintenance-Electrical</u> |
|                       | 301100Municipal Rates               | <u>407000</u>         | <u>Repairs &amp; Maintenance-Structure</u>  |
|                       | 301110Water & Sewerage Rates        | <u>408000</u>         | <u>Repairs &amp; Maintenance-General</u>    |
|                       | 301120Land Tax                      |                       | 408110General                               |
| <u>302000</u>         | <u>Insurance</u>                    |                       | 408120Locks, Keys & Card Keys               |
|                       | 302100Industrial Special Risks/Fire |                       | 408130Painting                              |
|                       | 302110Public Liability              |                       | 408140Plumbing                              |
|                       | 302120Machinery Breakdown           |                       | 408150Carpet                                |
|                       | 302130Boiler Explosion              |                       | 408160Consultancy Fees                      |
|                       | 302140Workers Compensation          |                       | 408230Other                                 |
|                       | 302150Building                      | <u>409000</u>         | <u>Building Intelligence Systems</u>        |
|                       | 302160Claims                        |                       | 409100Contract Fee                          |
|                       | 302170Consequential Loss            |                       | 409110Materials                             |
|                       | 302180Excess of Claims              |                       | 409120Repairs & Maintenance                 |
|                       | 302190Loss of Rent/Profits          |                       | 409130General                               |
|                       | 302200Plate Glass                   |                       | 409140Consultants Fees                      |
| <u>304000</u>         | <u>Air Conditioning/Ventilation</u> |                       | 409150Other                                 |
|                       | 304100Contract Fee                  | <u>410000</u>         | <u>Energy Management Systems</u>            |
|                       | 304110Wages                         |                       | 410100Contract Fee                          |
|                       | 304120Materials                     |                       | 410110Materials                             |
|                       | 304130Insurance                     |                       | 410120Repairs & Maintenance                 |
|                       | 304140Electricity                   |                       | 410130General                               |
|                       | 304150Oil/Gas                       |                       | 410140Consultants Fees                      |
|                       | 304160Filter Maintenance            |                       | 410150Other                                 |
|                       | 304170Water Treatment               | <u>411000</u>         | <u>Security</u>                             |
|                       | 304180Licence Fees                  |                       | 411100Contract Fees                         |
|                       | 304190Repairs & Maintenance         |                       | 411110Wages & Overheads of Staff            |
|                       | 304200General                       |                       | 411120Materials                             |
| <u>305000</u>         | <u>Cleaning</u>                     |                       | 411130Repairs & Maintenance of Equipm       |
|                       | 305100Contract Fee                  |                       | 411140Equipment Monitoring Fees             |
|                       | 305110Wages                         |                       | 411150Telephone Line Rentals                |
|                       | 305120Window Cleaning               |                       | 411160Security Callout Charges              |
|                       | 305130Materials                     |                       | 411170Equipoment Lease Charges              |
|                       | 305140Toilet Requisites             |                       | 411180General                               |
|                       | 305150Rubbish Removal               |                       | 412000Sewerage Disposal & Sullage           |
|                       | 305160Equipment Repairs             |                       | 412100Sullage Removal Treatment Pump        |
|                       | 305170Equipment Lease Charges       |                       | 412110Plant Repairs & Maintenance           |
|                       | 305180Car Park                      |                       | 412120General                               |
|                       | 305190Child Minding                 | <u>413000</u>         | <u>Miscellaneous</u>                        |
|                       | 305200Common Areas                  |                       | 413100Auditors Fees for Outgoings           |
|                       | 305210Food Court                    |                       | 413110Licence Fees                          |
|                       | 305220General                       |                       | 413120Bank Charges                          |
|                       | 305230Grease Traps                  |                       | 413190Professional Fees                     |
|                       | 305240Management Area               | <u>415000</u>         | <u>Public Address/Background Music</u>      |
|                       | 305250Plant Room                    |                       | 415100Public Address                        |
|                       | 305260Sanitary Services             |                       | 415110Music Line Rentals                    |
|                       | 305270Tenant Area                   |                       | 415120Equipment Repairs & Maintenance       |
| <u>306000</u>         | <u>Car Parking</u>                  |                       | 415130Performing Rights Licence Fees        |
|                       | 306100Signs, Materials              | <u>416000</u>         | <u>Signs &amp; Notice Boards</u>            |

|               |                                       |               |  |
|---------------|---------------------------------------|---------------|--|
|               | 306110Wages                           |               | 416100Lease/Maintenance Charges          |
|               | 306120Repairs & Maintenance           |               | 416110Cleaning & Repairs                 |
|               | 306130Sweeping Contract/Cleaning      |               | 416120Electricity                        |
|               | 306140Equipment Leasing Charges       |               | 416130Licence Fees                       |
|               | 306150Equipment Repairs & Maintenance |               | 416140Directory Boards                   |
| <u>401000</u> | <u>Electricity</u>                    |               | 416150General                            |
|               | 401100Car Park                        | <u>417000</u> | <u>Landscaping</u>                       |
|               | 401110Child Minding                   |               | 417100Wages & Overheads of Staff         |
|               | 401120Common Area                     |               | 417110Gardening Contractors Charges      |
|               | 401130Conference Facilities           |               | 417120Materials                          |
|               | 401140Food Court                      |               | 417130Reticulation Repairs & Maintenance |
|               | 401180Lifts & Escalators              |               | 417140Plant Hire                         |
| <u>402000</u> | <u>Fire Protection</u>                |               | 417150Equipment Lease/Hire               |
|               | 402100Sprinkler Systems               |               | 417160General                            |
|               | 402110Thermal Alarms                  | <u>418000</u> | <u>Management &amp; Administration</u>   |
|               | 402120Equipment Inspection            |               | 418100Management Fee                     |
|               | 402130Extinguisher Service            |               | 418110Stationery & Printing              |
|               | 402140Fire Brigade Monitor Fee        |               | 418120Postage                            |
|               | 402150Fire Alarm Rental               |               | 418130Equipment Lease Charges            |
|               | 402160Pump Maintenance                |               | 418140Repairs & Maintenance              |
|               | 402210General                         |               | 418150Office Sundries                    |
|               | 402220Repairs & Maintenance           |               | 418160Motor Vehicle Expenses             |
| <u>403000</u> | <u>Gas &amp; Oil</u>                  |               | 418190Bank Charges                       |
| <u>404000</u> | <u>Lifts &amp; Escalators</u>         |               | 418200Building Supervision               |
|               | 404100Contract Fee                    |               | 418210Computer Facilities                |
|               | 404100Wages                           |               | 418220Entertainment                      |
|               | 404120Materials                       |               | 418240Staff Amenities                    |
|               | 404130Repairs & Maintenance           |               | 418250Telephones                         |
|               | 404160Other Charges                   |               | 418260Travel Expenses                    |
| <u>405000</u> | <u>Pest Control</u>                   |               | 418270Uniforms                           |
|               | 405100Pest Control Charges            |               | 418280Wages & Salaries                   |
|               | 405110Contract                        |               | 418290General                            |
|               | 405120General                         | <u>419000</u> | <u>Sinking Fund</u>                      |
|               | 405130Materials/Supplies              |               |  |

**TRADE PRACTICES ACT 1974**

The *Trade Practices Act 1974* (the Act) makes certain conduct illegal. Illegal conduct includes:

- misleading and deceptive conduct

Businesses are required to tell the truth or refrain from giving an untruthful impression. Failure to disclose material information may in some circumstances be a breach of the Act.

- unconscionable conduct

Businesses must not engage in conduct that would be regarded as unacceptable by taking advantage of a person's special disability or vulnerability or to the extent that it offends the conscience of a reasonable person.

- third line forcing

This conduct involves the supply of goods or services on condition that a purchaser acquires goods or services from a third party or a refusal to supply because the purchaser will not agree to that condition.

- resale price maintenance

Suppliers, manufacturers and wholesalers are prohibited from specifying a minimum price below which goods or services may not be resold or advertised for resale.

- exclusive dealing

Agreements involving the supply or acquisition of goods subject to conditions restricting the freedom of the supplier or the acquirer to deal with other suppliers or acquirers (as the case may be) are prohibited if they have the purpose or likely effect of substantially lessening competition.

- misuse of market power

A business that has a substantial degree of market power is prohibited from taking advantage of that power for the purpose of eliminating or substantially damaging a competitor; preventing the entry of a person into any market; or deterring or preventing a person from engaging in competitive conduct in any market.

- collusive contracts that substantially lessen competition

Agreements between competitors to share markets, restrict the supply or acquisition of goods are prohibited.

- price fixing

Agreements between competitors to fix the price of goods or services are prohibited.

- mergers and certain acquisitions

Mergers and acquisitions which substantially lessen competition in a market are prohibited.

Disclosing illegal conduct under this Code will not prevent that conduct being a breach of the Act. Disclosing illegal conduct cannot be used as a defence against such a breach.

The purpose of this appendix is to provide a general summary of certain provisions of the *Trade Practices Act 1974*. It should be treated as general information only and is not a substitute for legal advice from a qualified legal practitioner. Some of the provisions referred to above contain exceptions or important qualifications.

**For further information contact the ACCC (see Part 5 – Key Contacts)**

APPRA

APPENDIX B

DRAFT NO: 3

SHOPPING CENTRE  
CODE OF CONDUCT  
ON CASUAL MALL LICENSING.

SEPTEMBER 2003

ISBN

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**LEGISLATION**

All references to legislation are current at the date of the Code's release.

APPENDIX

# FOREWORD

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1. Casual mall leasing is a standard feature of shopping centres in Australia. Where applied properly casual mall leasing 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.
2. This voluntary Code of Practice has been negotiated between the Australian Retailers Association and the Shopping Centre Council of Australia to provide balanced guidelines to ensure that the practice of casual mall leasing delivers the benefits outlined above in a way that is fair to shopping centre owners and managers and to shopping centre retailers.
3. The Associations strongly recommend to their members that this Code of Practice apply to shopping centres in all States and Territories in Australia progressively from 1 July 2003, as circumstances permit. It is noted that the practice of casual mall leasing in shopping centres in South Australia is regulated by the Retail and Commercial Leases (Casual Mall Licences) Amendment Act 2001, and covers those tenants who are regulated by this Act and to that extent only does not apply to these tenants in South Australia.

# INDUSTRY ENDORSEMENT

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The following organisations and businesses proudly endorse the Shopping Centre Industry Code of Conduct on Outgoings and commit to promoting their internal dispute resolution procedures:  
(Drafting Note: These endorsements and others yet to be achieved)

- Australian Retailers Association; (ARA)
- Shopping Centre Council of Australia; (SCCA)
- Other endorsements from retailers and landlords may be added if considered of value.



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# PART 1 – PRELIMINARY

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## 2. Background

- 1.1 This Code has been developed for the Shopping Centre Industry by the Australian Retailers Association Tenancy Committee.
- 1.2 This Code is a voluntary code of conduct for the Shopping Centre industry.
- 1.3 This Code is intended to compliment the various Australian State and Territory retail tenancy legislation.

## 3. Objects

The objects of this Code are to:

- promote equitable and transparent practises
- support prompt, accessible and inexpensive dispute resolution for Industry participants concerning this Code.
- establish an agreed standard for conducting casual mall licensing

## 4. Scope

- 3.1 This Code applies to Industry participants.
- 3.2 This Code is not intended to cover consumers.
- 3.3 The provisions of this Code are subject to all Commonwealth, State and Territory legislation and all rights and obligations arising under common law.

## 5. Definitions

- 4.1 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;

“Applicant” means a person, corporation or other body corporate who raises or causes to be raised a dispute for resolution in accordance with Part 3 – Dispute Resolution;

“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 5(2);

“casual mall licence policy”—*see* clause 5;

“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 5;

“Code” means this Shopping Centre Industry Code of Conduct on Casual Mall Licensing;

“Code Administration Committee” means the industry committee established to oversee the operation of this Code in accordance with Part 4 – Administration;

“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 (4.2.2);

“external competitor”—*see* subclause (4.2.4);

“internal competitor”—*see* subclause (4.2.5);

“Internal Procedures” means the internal dispute resolution procedures of Industry participants;

“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.

“Respondent” means a person, corporation or other body corporate against whom a dispute is raised by an Applicant for resolution in accordance with Part 3 – Dispute Resolution;

“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;

“Shopping Centre” means a group of premises;

- (e) at least 5 of which are retail premises; and
- (f) which have, or if leased would have, a common property owner; and
- (g) which are located in one building or adjoining buildings; and
- (h) which are generally regarded as a 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.

“State Retail Tenancy Tribunal” where applicable under Part 3 means the respective State/Territory Authority, which administers disputes under the respective Retail Tenancy Legislation/Code, whose addresses are listed under Part 5 Key Contacts.

“Support Person” means a person or persons nominated by the Applicant or the Respondent to provide moral and personal support during mediation in accordance with Part 3 – Dispute Resolution;

-21. For the purposes of this Code –

1. 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;
2. 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.

## **PART 2—CASUAL MALL LICENCE POLICY**

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### **5. Standards and Specifications**

- 5.1 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**”).
- 5.2 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* **[the]** 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.

5.3 The following provisions apply to the designation of an area as a centre court in a casual mall licence policy:

- (a) only one part of the mall area of the shopping centre may be designated as a centre court at any one time;
- (b) the area designated as a centre court in a casual mall licence policy must not exceed 20 percent of the total common area of the shopping centre.

5.4 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.

5.5 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 5.4(a).

## **6. Provision of information**

6.1 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.

6.2 The information required under subclause 6.1 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.

## **7. Obligations of lessor relating to casual mall licence policy**

- 7.1 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.
- 7.2 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.
- 7.3 A lessor must not amend a casual mall licence policy except in accordance with this Code.

## **8. Sightlines to shopfront**

- 8.1 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.
- 8.2 Subclause (8.1) 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.

## **9. Competitors**

- 9.1 A lessor must not grant a casual mall licence that results in the unreasonable introduction of an external competitor of an adjacent lessee.
- 9.2 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.
- 9.3 Subclause 9.2 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.
- 9.4 For the purposes of subclauses 9.1 and 9.2, the introduction of a competitor of an adjacent lessee is unreasonable if it has significant adverse effect on the trading of the adjacent lessee in the adjacent lessee's retail shop.
- 9.5 Subclause (9) 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.

## 10. Special events

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.

## 11. Adjustment of outgoings

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.

## **PART 3 — DISPUTE RESOLUTION**

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**Applicability of this Part:** Where the Applicant's lease is one that the law stipulates the forum or procedure for resolving disputes between the tenant and landlord any dispute concerning this Code is to be resolved by that stipulated forum or procedure. However, where the law or the lease does not stipulate the forum or procedure for dispute resolution between the tenant and landlord the following provisions of this Part 3 of the Code shall apply.

### **12. Dispute resolution scheme**

**Principle:** All Industry participants support a dispute resolution scheme which:

- considers all casual mall licensing disputes arising between Industry participants;
- gives all Industry participants an opportunity to resolve disputes, in the first instance, under Internal Procedures;
- encourages unresolved disputes to be referred to the respective State Retail Tenancy Tribunal Systems as an alternative to litigation;
- considers all disputes fairly and impartially;
- will not jeopardise the underlying commercial relationship;
- respects the confidentiality of Applicants and Respondents; and
- encourages an equitable and timely resolution of disputes.

12.1 This Code promotes a two-stage dispute resolution scheme:

- Stage 1 encourages Applicants to raise disputes with the Respondent; and
- Stage 2 encourages unresolved disputes to be raised with the respective State Retail Tenancy Tribunal in which the Shopping Centre is located.

### **13. Dispute resolution procedure**

**Principle:** All industry participants support a dispute resolution procedure in which:



- tenants will promote the existence of any applicable Internal Procedures in a genuine effort to resolve disputes;
- tenants and landlords will participate in the mediation process in a spirit of goodwill and good faith; and
- matters discussed and documents produced in the course of mediation will be treated as confidential and without prejudice.

13.1 Where a dispute arises, the following procedures will apply:

**Stage 1 — Internal Procedures**

- 13.1.1 Applicants will raise the matter in dispute with the Respondent in writing, in accordance with the Respondent's Internal Procedures.
- 13.1.2 Applicants and Respondents will use their best efforts to meet within a 24 hour period to resolve the matter in good faith and in accordance with the Internal Procedures (if any) in a climate giving respect to the ongoing commercial relationship and conducted on a confidential and without prejudice basis.
- 13.1.3 Applicants and Respondents will endeavour to exhaust all internal appeal procedures prior to recourse to any external dispute resolution.

**Stage 2 – State Retail Tenancy Tribunals**

- 13.1.4 Stage 1 disputes may be referred to the respective State Retail Tenancy Tribunals by either the Applicant or the Respondent where:
- The Respondent has failed to respond to the matter in dispute within a reasonable period or within that period stipulated in the Internal Procedures;
  - The Applicant or Respondent is dissatisfied with the outcome of the Internal Procedures; or
  - The Applicant is dissatisfied with the Respondent's internal processes or procedures in considering the matter or in reaching its decision.

13.2 Disputes may be directly referred to the State Retail Tenancy Tribunals by either the Applicant or the Respondent (without having first attempted Stage 1 procedures) where:

- there are no Internal Procedures; or
- the Applicant or the Respondent applies to the State Retail Tenancy Tribunals for a direct referral of their dispute and the State Retail Tenancy Tribunals determines that the circumstances warrant direct referral.

13.3 Once the State Retail Tenancy Tribunals establishes his or her jurisdiction to mediate a directly-referred dispute under Clause 13.2, the State Retail Tenancy Tribunals will contact the Respondent and advise that a referral has been received.

13.4 Advising the Respondent that a referral has been received under Clause 13.2 will not involve the release of the Applicant's name, unless the Applicant consents.

13.5 A Stage 2 dispute must be referred to the State Retail Tenancy Tribunals by application.

13.6 Application may be made to the State Retail Tenancy Tribunals by telephone, fax, letter, e-mail or personal attendance (see Part 5 – Key Contacts).

13.7 An application fee of \$100 is payable.

- 13.8 Following receipt of both the application and the application fee (where payable), the State Retail Tenancy Tribunals will contact the Applicant and the Respondent to discuss the application and agree on a time, date and venue for the mediation conference.
- 13.9 The State Retail Tenancy Tribunals has jurisdiction to mediate any dispute arising between industry participants in their vertical relationships with one another provided that the dispute:
- occurs on or after the date of public release of the Code; and
  - is less than 12 months old.
- 13.10 In mediating a dispute under Clause 13.9, the State Retail Tenancy Tribunal may have regard to circumstances arising before the date of public release of the Code.
- 13.11 The exclusion of a legal representative in Clause 13.11 does not preclude the attendance of a Support Person but must include a person authorised to settle a dispute.
- 13.12 The State Retail Tenancy Tribunal may, in his or her absolute discretion, summarily dispose of any application on the grounds that the dispute is:
- frivolous
  - vexatious;
  - repetitive;
  - lacking in substantive merit; or
  - a dispute which has been substantially previously dealt with.
- 13.13 The State Retail Tenancy Tribunal will assist the applicant and the Respondent, explore options for and, if possible, achieve the timely resolution of the dispute by agreement.
- 13.14 In exploring options for the timely resolution of the dispute, the State Retail Tenancy Tribunal will not:
- be bound by any resolution that might be achieved by negotiation or a contested trial; or
  - impose a solution on the Applicant or the Respondent.
- 13.15 If mediation does not result in an outcome acceptable to both the Applicant and the Respondent or the dispute proves incapable of resolution by mediation, the State Retail Tenancy Tribunal will issue a certificate to the Applicant and the Respondent setting out:
- the parties to the dispute;
  - an outline of the dispute; and
  - a list of the unresolved issues.
- 13.16 Any certificate issued under Clause 13.15 (including any information contained in the certificate) must remain confidential between the Applicant, the Respondent, the State Retail Tenancy Tribunal and any attending Support Person/s.

- 13.17 Disclosure of any certificate issued under Clause 13.16 (including any information contained in the certificate) to a third party requires the express consent of both the Applicant and the Respondent, except where the disclosure is required under law.
- 13.18 The Applicant and the Respondent must pay their own costs of attending mediation.
- 13.19 Failure of the mediation process above will result in the issue/s outlined in the certificate issued under clause 13.15 being referred to the full Tribunal whose determination will be final and binding on all parties.

## **PART 4 — ADMINISTRATION**

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### **14. Code Administration Committee**

- 14.1 This Code will be administered by the Code Administration Committee (CAC) whose members will be without remuneration except for expenses.
- 14.2 The CAC will initially comprise nine representatives:  
3 x Australian Retailers Association (ARA);  
3 x Shopping Centre Council of Australia;  
1 x Qualified Accountant experienced in Shopping Centre accounting appointed by the Institute of Chartered Accountants in Australia or failing them the Australian Society of Certified Practising Accountants;  
1 x Member of The Australian Property Institute specialising in Land Economy and experienced in Shopping Centre property matters appointed by that body; and  
1 x Qualified Solicitor experienced in Shopping Centre Leases appointed by the Law Institute of Australia.
- <sup>14.3</sup> Committee members appointed by the Accounting, Property and Legal bodies must be ratified by both the ARA and SCCA Councils prior to their appointment.
- 14.4 An independent voting chairman will be appointed by the Committee.
- 14.5 The CAC will be funded jointly by the ARA and SCCA.
- 14.6 All decisions of the CAC must be made by way of a resolution passed by a simple majority of all CAC members entitled to vote, except for resolutions to amend the Code, which require a unanimous decision of all CAC members entitled to vote.

### **15. Role of the Code Administration Committee**

- 15.1 The role of the CAC will be to:
- publicise and promote the Code and its dispute resolution procedures;
  - monitor the operation of the Code;
  - consult with industry participants (where appropriate) on proposed amendments to the Code;
  - provide for the adequate financing of Code administration expenses;

- produce an annual report on the Code and its administration;
- report to the Industry on the operation and effectiveness of the Code.

## **16. State Retail Tenancy Tribunal**

16.1 The role of the State Retail Tenancy Tribunal (in addition to mediating disputes in accordance with Part 3 – Dispute Resolution) will be to:

- produce an annual report to the Code Administration Committee on the operation and effectiveness of the Code;
- Make recommendations to the Code Administration Committee from time to time on matters of concern as regards the Code.

# **PART 5 — KEY CONTACTS**

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## **Code Administration Committee**

Telephone: 02

Facsimile: 02

E-mail:

Internet:

## **Australian Competition and Consumer Commission**

470 Northborne Avenue

DICKSON ACT 2602

Telephone: 02 6243 1111

Facsimile: 02 6243 1199

Internet: [www.accc.gov.au](http://www.accc.gov.au)

## **State Retail Tenancy Tribunals**

Qld Govt Retail Shop Leases Registry

Floor 21

111 George Street

Brisbane QLD 4000

Ph: 07 3234 0389

Fax: 07 3234 1417

NSW Retail Tenancy

Unit Level 8, St James Centre

111 Elizabeth Street

SYDNEY NSW 2000

Ph: 02 9223 0466

ACT – to be advised

Victorian Retail Tenancy List

Victorian Civil & Administrative Tribunal

55 King Street

MELBOURNE VIC 3000

Ph: 03 9628 9960

Fax: 03 9628 9896

Tas – to be advised

Office of Consumer Business Affairs

Level 1, Chesser House

91-97 Grenfell Street

ADELAIDE SA 5000

Ph: 08 8204 9559

WA – to be advised

**NT – n/a**



**TRADE PRACTICES ACT 1974**

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The *Trade Practices Act 1974* (the Act) makes certain conduct illegal. Illegal conduct includes:

- misleading and deceptive conduct

Businesses are required to tell the truth or refrain from giving an untruthful impression. Failure to disclose material information may in some circumstances be a breach of the Act.

- unconscionable conduct

Businesses must not engage in conduct that would be regarded as unacceptable by taking advantage of a person's special disability or vulnerability or to the extent that it offends the conscience of a reasonable person.

- third line forcing

This conduct involves the supply of goods or services on condition that a purchaser acquires goods or services from a third party or a refusal to supply because the purchaser will not agree to that condition.

- resale price maintenance

Suppliers, manufacturers and wholesalers are prohibited from specifying a minimum price below which goods or services may not be resold or advertised for resale.

- exclusive dealing

Agreements involving the supply or acquisition of goods subject to conditions restricting the freedom of the supplier or the acquirer to deal with other suppliers or acquirers (as the case may be) are prohibited if they have the purpose or likely effect of substantially lessening competition.

- misuse of market power

A business that has a substantial degree of market power is prohibited from taking advantage of that power for the purpose of eliminating or substantially damaging a competitor; preventing the entry of a person into any market; or deterring or preventing a person from engaging in competitive conduct in any market.

- collusive contracts that substantially lessen competition

Agreements between competitors to share markets, restrict the supply or acquisition of goods are prohibited.

- price fixing

Agreements between competitors to fix the price of goods or services are prohibited.

- mergers and certain acquisitions

Mergers and acquisitions which substantially lessen competition in a market are prohibited.

Disclosing illegal conduct under this Code will not prevent that conduct being a breach of the Act. Disclosing illegal conduct cannot be used as a defence against such a breach.

|                         |
|-------------------------|
| <b>Important Notice</b> |
|-------------------------|

The purpose of this appendix is to provide a general summary of certain provisions of the *Trade Practices Act 1974*. It should be treated as general information only and is not a substitute for legal advice from a qualified legal practitioner. Some of the provisions referred to above contain exceptions or important qualifications.

**For further information contact the ACCC (see Part 5 – Key Contacts)**

APPRA