



Draft Determination

Application for revocation of A91398 and the substitution of
authorisation AA1000434

lodged by

David Jones Pty Limited

in respect of

David Jones' invitation to Retail Brand Management Businesses
(concession stores) operating within its stores to participate in certain
promotions

Authorisation number: AA1000434

Date: 28 February 2019

Commissioners: Keogh
Rickard
Court
Featherston

Summary

The ACCC proposes to grant re-authorisation to enable David Jones to continue to invite concession stores, which are separate businesses operating within its retail stores, including the David Jones online store, to participate in certain promotions. This conduct has been authorised since 17 December 2003 and is not changed in the current application.

The ACCC proposes to grant authorisation for 10 years.

The ACCC invites submissions in relation to this draft determination before making its final decision.

1. The application for revocation and substitution

- 1.1. On 2 January 2019, David Jones Pty Limited (David Jones) lodged an application with the Australian Competition and Consumer Commission (the **ACCC**) to revoke authorisation A91398 and substitute authorisation AA1000434 for the one revoked (referred to as **re-authorisation**). This application for re-authorisation AA1000434 was made under subsection 91C(1) of the *Competition and Consumer Act 2010* (Cth) (the **Act**).
- 1.2. The ACCC has granted authorisation to David Jones for substantially the same conduct in three successive 5-year authorisations¹ and the current authorisation is due to expire on 17 April 2019.
- 1.3. The ACCC can grant authorisation, which provides businesses with legal protection for arrangements that may otherwise risk breaching the law but are not harmful to competition and/or are likely to result in overall public benefits.

The Applicant

- 1.4. David Jones operates 48 department stores throughout Australia, comprising 15 stores in NSW, 10 in Victoria, 2 in the Australian Capital Territory, 10 in Queensland, 3 in South Australia and 8 in Western Australia. Since November 2012, David Jones has also been operating as an online retailer through the David Jones Online Store.
- 1.5. Within each David Jones store there are concession stores which are effectively 'shops within a shop'. Concession stores maintain separate inventory from David Jones, set their own prices and generally use their own employees to staff their allocated area. Concession stores are often run by 'prestige' brands that want to accentuate their brand by using special displays and specialist staff. Some concession stores offer a specific service to David Jones customers, such as tailoring, beauty salons and restaurants.

The Conduct

- 1.6. David Jones is seeking re-authorisation to invite current and future suppliers which operate separate businesses physically within David Jones stores and/or conduct sales through David Jones' online retail store (**Retail Brand Management Businesses** or **concession stores**) to take part in, and (with David Jones itself) give effect to, David Jones promotions (the **Conduct**). David Jones submits that the

¹ See ACCC determinations granting previous authorisations were granted on 17 December 2003 (A30230), 18 February 2009 (A91113) and 26 March 2014 (A91398).

participation of Retail Brand Management Businesses in David Jones promotions would be voluntary and those businesses would otherwise be free to price and discount at their discretion.

- 1.7. David Jones seeks re-authorisation in respect of all concession stores, whether they operate under a Retail Brand Licence Agreement or similar agreements with David Jones.
- 1.8. David Jones advises that it does not require concession stores to contribute to the cost of David Jones promotions, as any costs will be met by David Jones. Sometimes, however, concession stores may specifically negotiate a more involved marketing program with David Jones under which the business's cost contribution will be determined on a case-by-case basis.
- 1.9. David Jones advises that other than the acquisition of David Jones by Woolworths Holdings Limited (and David Jones' concurrent delisting from the stock exchange) and minor changes in the number and identity of concession stores, there are no differences between the Conduct the subject of its application for re-authorisation and the conduct previously authorised by the ACCC.
- 1.10. David Jones seeks re-authorisation for 10 years.
- 1.11. As David Jones sells (or may sell) products which compete with the products and services sold by concession stores, they may be considered competitors for the purposes of the Act. Consequently, any agreement between David Jones and a concession store relating to a David Jones promotion risks contravening the Act.

2. Background

- 2.1. As at 21 December 2018, the number of concession stores operating within David Jones stores was 84 (see Attachment A to David Jones' application for re-authorisation). David Jones does not anticipate any major changes to the number and identity of these concession stores during the term for which authorisation is sought.
- 2.2. David Jones submits that the rationale for the Conduct is to increase efficiency, offer lower prices to customers and be more competitive in the retail market by: simplifying how promotions are communicated by reducing the need for exclusions, thereby making them more attractive; allowing customers to access products sold by concession stores at discounted prices, in addition to independent promotions run by concession stores; and enabling concession stores that participate in promotions to benefit from David Jones' promotional marketing.

Myer application

- 2.3. Myer Pty Ltd (**Myer**), the closest competitor to David Jones, also invites concession stores operating within its retail stores, including its online store, to participate in certain promotions. The ACCC has granted authorisation to Myer for these arrangements, most recently on 20 February 2014 (A91384). This authorisation expires on 14 March 2019.
- 2.4. On 12 February 2019, Myer lodged an application for re-authorisation of these arrangements. The ACCC expects to make a decision about interim authorisation for Myer's application for re-authorisation in March 2019 and issue a draft determination in March or April 2019.

3. Consultation

- 3.1. A public consultation process informs the ACCC's assessment of the likely public benefits and detriments from the Conduct.
- 3.2. The ACCC invited submissions from a range of potentially interested parties including major competitors, concession stores, relevant industry associations or peak bodies, consumer groups and relevant regulatory bodies.²
- 3.3. The ACCC did not receive any submissions from interested parties in relation to the application.

4. ACCC assessment

- 4.1. The ACCC's assessment of the Conduct is carried out in accordance with the relevant authorisation test contained in the Act.
- 4.2. David Jones has sought authorisation for Conduct that would or might constitute a cartel provision within the meaning of Division 1 of Part IV of the Act and may substantially lessen competition within the meaning of section 45 of the Act. Consistent with subsection 90(7) and 90(8) of the Act,³ the ACCC must not grant authorisation unless it is satisfied, in all the circumstances, that the conduct would result or be likely to result in a benefit to the public, and the benefit would outweigh the detriment to the public that would be likely to result (**authorisation test**).
- 4.3. In its assessment of the application the ACCC has taken into account:
 - the application and submission received from David Jones
 - other relevant information available to the ACCC, including information from considering previous matters
 - the likely future without the Conduct. In particular, the ACCC considers that, absent the Conduct, it is likely that concession stores would not participate in promotions run by David Jones, although they may individually and independently run their own promotions, and
 - the relevant areas of competition likely to be affected by the Conduct, particularly the retail supply of goods and services sold by department stores and/or relevant concession stores, including the supply by online retailers in particular circumstances including where there is a sufficient degree of substitutability.

Public benefits

- 4.4. The Act does not define what constitutes a public benefit. The ACCC adopts a broad approach. This is consistent with the Australian Competition Tribunal (the **Tribunal**) which has stated that the term should be given its widest possible meaning, and includes:

² A list of the parties consulted is available from the ACCC's public register www.accc.gov.au/authorisationsregister.

³ See subsection 91C(7).

*...anything of value to the community generally, any contribution to the aims pursued by society including as one of its principal elements ... the achievement of the economic goals of efficiency and progress.*⁴

4.5. David Jones submits that the Conduct is likely to result in public benefits in the form of:

- increased competition, as the ability to participate will encourage concession stores to make more attractive offers for consumers in terms of price and other benefits and will encourage other competitors to discount prices and make more innovative service offers, and
- convenience for consumers as a result of fewer exclusions from storewide and category-wide sales and a broader range of discounted products than would otherwise be the case. This may include benefits accruing from the simplification of promotions which will be more easily understood by consumers.

Increased competition

4.6. David Jones submits that the Conduct has:

- permitted David Jones to continue to attract customers and compete more effectively in difficult times, especially in terms of price
- delivered tangible increases in discounting activity by concession stores, and
- often resulted in David Jones promotions that spanned concession stores sparking a competitive response from David Jones' competitors.

4.7. David Jones also submits that because concessions stores often seek consistency between their various outlets (whether in David Jones, other retailers, standalone stores or online), consumers are likely to obtain the benefits of discounted products across all locations that the brand is offered for sale to consumers.

4.8. David Jones submits, however, that it is virtually impossible to ascertain the net impact of its promotions over the past 15 years as David Jones does not maintain any records or data regarding the number of promotions it runs, how many are implemented by concession stores or how much in savings are made by consumers through its promotions.

4.9. The ACCC considers that the Conduct is likely to promote competition through greater discounting by David Jones and concession stores than in the absence of coordination by David Jones. This discounting is in turn, likely to lead to a competitive response from David Jones' rivals and concession stores' rivals, benefiting customers through lower prices and more innovative service offerings.

4.10. Accordingly, while David Jones has not provided data to substantiate its submission regarding increases in discounting and inducing a competitive response, the ACCC considers that the Conduct is likely to promote competition.

Simplification of promotions

4.11. David Jones submits that the Conduct will reduce the need for exclusions in promotions which are advertised as 'storewide', 'department-wide' or 'category-wide'

⁴ Queensland Co-operative Milling Association Ltd (1976) ATPR 40-012 at 17,242; cited with approval in Re 7-Eleven Stores (1994) ATPR 41-357 at 42,677.

sales, thereby simplifying how promotions are communicated and ultimately making them more attractive to customers.

- 4.12. The ACCC considers that the risk of customer confusion may increase with the number of concession store exclusions. Therefore, the Conduct is likely to result in a public benefit through providing greater clarity for customers around these types of promotions.

Public detriments

- 4.13. The Act does not define what constitutes a public detriment. The ACCC adopts a broad approach. This is consistent with the Tribunal which has defined it as:

*...any impairment to the community generally, any harm or damage to the aims pursued by the society including as one of its principal elements the achievement of the goal of economic efficiency.*⁵

- 4.14. David Jones submits that the Conduct will not result in any public detriment or any anti-competitive outcome, noting that there was no evidence of public detriment during the preceding authorisations. David Jones also submits that the Conduct does not involve David Jones agreeing with any concession stores on the price for any good or service but only on a minimum discount or other benefit, and that concession stores are free to offer greater discounts and/or benefits on top of David Jones promotions.

Potential to reduce competition and discounting

- 4.15. The ACCC considers that the Conduct has the potential to result in public detriment as a result of reduced competition and discounting by concession stores. Without the Conduct, concessions stores would only run their own promotions throughout the year, rather than opting to meet the frequency and level of David Jones' promotions. Accordingly, some concession stores may not run their own promotions beyond joining David Jones' promotions. This may reduce the overall number and size of promotions.
- 4.16. The Conduct may also reduce the incentives for concession stores to differentiate their promotional offers, such as through offering different, including potentially higher, levels of discounts and/or other benefits than David Jones, both within David Jones stores, and, to the extent to which concession stores seek consistency between their various outlets, in their stand alone stores.
- 4.17. However, while the Conduct has the potential to reduce competition and discounting, the ACCC is not aware of any evidence that the Conduct has had this effect. Rather, the ACCC considers that the Conduct has promoted competition. In this respect, the ACCC considers that the potential for competitive detriment is limited by the fact that:
- the Conduct is voluntary and concession stores can elect whether to participate in any given promotion. Concession stores remain free to offer discounts or other promotions (including above those offered by David Jones) or to conduct their own promotions at a time of their choosing, and
 - concession stores currently compete, both in store and online, with each other, other independent retailers and department stores such as David Jones and Myer for sales. David Jones also competes with other department stores and specialty outlets. The incentive for David Jones and concession stores to compete is likely to remain, with or without the Conduct.

5 Re 7-Eleven Stores (1994) ATPR 41-357 at 42,683.

4.18. The ACCC therefore considers that public detriment in the form of potential reduction in competition, including discounting, is not likely.

Balance of public benefit and detriment

4.19. For the reasons outlined in this draft determination, the ACCC is satisfied that the Conduct is likely to result in a public benefit and that this public benefit would outweigh any likely detriment to the public from the Conduct.

Length of authorisation

4.20. The Act allows the ACCC to grant authorisation for a limited period of time.⁶ This enables the ACCC to be in a position to be satisfied that the likely public benefits will outweigh the detriment for the period of authorisation. It also enables the ACCC to review the authorisation, and the public benefits and detriments that have resulted, after an appropriate period.

4.21. In this instance, David Jones seeks re-authorisation for 10 years. David Jones submits that this is an appropriate period considering the Conduct is the same as conduct that has been previously authorised by the ACCC for the last 15 years, the likely public benefits from the Conduct will only be enhanced over time and there will be no public detriments.

4.22. The ACCC considers that the Conduct has resulted in a net public benefit over the period of the previous authorisations and that this is likely to continue. The ACCC also notes that no concerns have been raised about the Conduct over the 15 years the authorisations have been in place. Given the assessment of the public benefits and detriments likely to result from the Conduct the ACCC proposes to re-authorise the arrangements for 10 years.

5. Draft determination

The application

5.1. On 2 January 2019, David Jones lodged an application to revoke authorisation A91398 and substitute authorisation AA1000434 for the one revoked (referred to as re-authorisation). This application for re-authorisation AA1000434 was made under subsection 91C(1) of the Act.

5.2. David Jones seeks re-authorisation to invite current and future Retail Brand Management Businesses (or concession stores) operating separate businesses physically within David Jones stores and/or conducting sales through David Jones' online retail store to take part in and (with David Jones itself) give effect to David Jones promotions (the **Conduct**).

5.3. Subsection 90A(1) of the Act requires that before determining an application for authorisation, the ACCC shall prepare a draft determination.

The authorisation test

5.4. Under subsections 90(7) and 90(8) of the Act, the ACCC must not grant authorisation unless it is satisfied in all the circumstances that the Conduct is likely to result in a

⁶ Subsection 91(1)

benefit to the public and the benefit would outweigh the detriment to the public that would be likely to result from the Conduct.

- 5.5. For the reasons outlined in this draft determination, the ACCC is satisfied, in all the circumstances, that the Proposed Conduct would be likely to result in a benefit to the public and the benefit to the public would outweigh the detriment to the public that would result or be likely to result from the Proposed Conduct, including any lessening of competition.
- 5.6. Accordingly, the ACCC proposes to grant re-authorisation.

Conduct which the ACCC proposes to authorise

- 5.7. The ACCC proposes to revoke authorisation A91398 and grant authorisation AA1000434 in substitution to enable David Jones to invite Retail Brand Management Businesses operating within its stores to participate in certain promotions as described in paragraph 5.2.
- 5.8. The Conduct may involve a cartel provision within the meaning of Division 1 of Part IV of the Act or may have the purpose or effect of substantially lessening competition within the meaning of section 45 of the Act.
- 5.9. The ACCC proposes to grant authorisation AA1000434 for 10 years.
- 5.10. This draft determination is made on 28 February 2019.

6. Next steps

- 6.1. The ACCC now invites submissions in response to this draft determination. In addition, consistent with section 90A of the Act, David Jones or an interested party may request that the ACCC hold a conference to discuss the draft determination.