



# Determination

Application for revocation of A91384 and the substitution of  
authorisation AA1000436

lodged by

Myer Pty Limited

in respect of

Myer's invitation to licensees and brand partners (concession stores)  
operating within its stores to participate in certain promotions

Authorisation number: AA1000436

Date: 9 May 2019

Commissioners: Sims  
Keogh  
Court  
Featherston

## Summary

The ACCC has decided to grant re-authorisation to enable Myer to continue to invite concession stores, which are separate businesses operating within its retail stores, including the Myer online store, to participate in certain promotions. This conduct has been authorised since 4 June 2003 and is substantially unchanged in the current application.

The ACCC has decided to grant re-authorisation for 10 years until 31 May 2029.

## 1. The application for revocation and substitution

- 1.1. On 12 February 2019, Myer Pty Limited (Myer) lodged an application with the Australian Competition and Consumer Commission (the **ACCC**) to revoke authorisation A91384 and substitute authorisation AA1000436 for the one revoked (referred to as **re-authorisation**). This application for re-authorisation AA1000436 was made under subsection 91C(1) of the *Competition and Consumer Act 2010* (Cth) (the **Act**).
- 1.2. 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.
- 1.3. The ACCC has granted authorisation to Myer for substantially the same conduct in three successive 5-year authorisations,<sup>1</sup> the most recent of which was due to expire on 14 March 2019.
- 1.4. On 13 March 2019, to enable due consideration to be given to the application for re-authorisation, the ACCC suspended the operation of the previous authorisation that was due to expire on 14 March 2019 and granted interim authorisation under subsection 91(2) of the Act in substitution.<sup>2</sup> Interim authorisation will remain in place until the date the ACCC's final determination comes into effect or until interim authorisation is revoked.

## The Applicant

- 1.5. Myer operates 61 department stores throughout Australia, and retails a broad range of merchandise including women's, men's and children's clothing, footwear and accessories; cosmetics and fragrance; homewares; electrical; furniture and bedding; toys; books and stationery; food and confectionery; and travel goods. Myer has also been operating as an online retailer through the Myer website.
- 1.6. Within each Myer store there are concession stores which are effectively 'shops within a shop'. Concession stores maintain separate inventory from Myer, 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 Myer customers, such as tailoring, hair and beauty salons and restaurants.

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<sup>1</sup> See ACCC determinations granting previous authorisation on 4 June 2003 (A40082), 3 September 2008 (A91091) and 20 February 2014 (A91384).

<sup>2</sup> See ACCC decision of 13 March 2019 available at [www.accc.gov.au/authorisationsregister](http://www.accc.gov.au/authorisationsregister)

## The Conduct

- 1.7. Myer is seeking re-authorisation to invite current and future businesses including licensees and brand partners (or concession stores) operating separate businesses physically within Myer stores and/or conducting sales through online stores to participate in certain promotions (the **Conduct**). Myer submits that the participation of relevant businesses in Myer's promotions would be voluntary and those businesses would otherwise be free to price and discount at their discretion.
- 1.8. The conduct the subject of Myer's previous authorisations included Myer inviting concession stores to participate in promotions conducted through the Myer website. In the current application for re-authorisation Myer advises it will expand the description of online channels, to include any online channel owned, operated or managed by or on behalf of Myer.
- 1.9. Myer seeks re-authorisation for 15 years.
- 1.10. As Myer 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 Myer and a concession store relating to a Myer promotion risks contravening the Act.

## 2. Background

- 2.1. The current listing of concession stores operating within Myer stores, including cafés, restaurants and other services provided, is contained in Schedule 1 to Myer's application for re-authorisation.
- 2.2. Myer submits that the rationale for the Conduct is for customers to benefit from the simplification of promotions by reducing the need for exclusions, and allowing customers to access products sold by concession stores at discounted prices. Myer submits that the Conduct will promote competition.

### Similar application - David Jones

- 2.3. David Jones Pty Ltd (**David Jones**), the closest competitor to Myer, also invites concession stores operating within its retail stores, including its online store, to take part in and (with David Jones itself) give effect to, David Jones promotions.
- 2.4. On 2 January 2019, David Jones lodged an application for re-authorisation of these arrangements. On 21 March 2019, the ACCC issued a final determination granting re-authorisation to these arrangements for 10 years.

## 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.<sup>3</sup>

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<sup>3</sup> A list of parties consulted is available from the ACCC's public register [www.accc.gov.au/authorisationsregister](http://www.accc.gov.au/authorisationsregister).

- 3.3. On 28 March 2019, the ACCC issued a draft determination proposing to grant re-authorisation for 10 years. A pre-decision conference was not requested following the draft determination.
- 3.4. The ACCC did not receive any submissions from interested parties in relation to the application or the draft determination.

## 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. Myer 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 subsections 90(7) and 90(8) of the Act,<sup>4</sup> 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 Myer
  - 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 Myer, 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:

*...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.*<sup>5</sup>

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

- consumers having access to discounts and promotions over a broader range of brands than would otherwise be accessible,

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<sup>4</sup> See subsection 91C(7).

<sup>5</sup> 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.

- simplified promotions providing greater clarity to consumers, and
- enhanced competition by encouraging competitors to discount their products and services to compete more vigorously against Myer and concession stores.

## Increased competition

4.6. Myer submits that the Conduct has:

- encouraged concession stores to make more attractive offers to consumers in terms of price and other benefits which is in addition to the occasions on which concession stores independently decide to engage in similar promotions
- encouraged competitors to discount their products and services to compete more vigorously against Myer and concession stores, and
- permitted Myer to continue to attract customers in a competitive retail environment where consumers are provided with better products and services at possibly lower prices.

4.7. Myer also submits that consumers who shop at Myer have the benefit of accessing promotions offered by concession stores through shopping in one location than would otherwise be accessible to consumers.

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

## Simplification of promotions

4.9. Myer submits that the Conduct will reduce the need for exclusions in promotions, thereby simplifying how promotions are communicated and ultimately making them more attractive to customers.

4.10. 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

4.11. 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.<sup>6</sup>*

4.12. Myer submits that the Conduct will not result in any public detriment or any anti-competitive outcome, stating that negligible if any public detriment was realised during the period of the preceding authorisations and no significant changes have occurred which would alter the net public benefit of the Conduct. Myer also submits that

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<sup>6</sup> Re 7-Eleven Stores (1994) ATPR 41-357 at 42,683.

concession stores are free to offer any discounts (greater or less) in conjunction with or on top of Myer promotions to the benefit of consumers.

### **Potential to reduce competition and discounting**

- 4.13. The ACCC considered the possibility that the Conduct may result in public detriment as a result of reduced competition and discounting by concession stores. Without the Conduct, concession stores would decide independently whether, when and how to run their own promotions throughout the year, but would not participate in Myer's promotions. It is possible that, because they are participating in Myer's promotions, some concession stores may decide not to also run their own separate promotions, and that this may reduce the overall number and size of promotions.
- 4.14. 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 Myer. This may occur both within Myer stores, and, to the extent to which concession stores seek consistency between their various outlets, in their standalone stores.
- 4.15. 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 Myer) and to conduct their own promotions at a time of their choosing, and it appears that many do so, and
  - concession stores currently compete, both in store and online, with each other, other independent retailers and department stores such as Myer and David Jones for sales. Myer also competes with other department stores and specialty outlets. The incentive for Myer and concession stores to compete is likely to remain, with or without the Conduct.
- 4.16. 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**

- 4.17. For the reasons outlined in this 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**

- 4.18. The Act allows the ACCC to grant authorisation for a limited period of time.<sup>7</sup> 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.

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<sup>7</sup> Subsection 91(1).

- 4.19. In this instance, Myer seeks re-authorisation for 15 years, rather than the 5 years granted to it on three previous occasions. Myer 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, which Myer submits, has not resulted in any public detriment.
- 4.20. While the ACCC has at times granted very long authorisations, such as 15 years, this has typically been due to particular circumstances that warrant an authorisation of this duration, such as the need for long term contracts to facilitate significant capital investment. The ACCC considers that Myer's application for re-authorisation does not exhibit such characteristics.
- 4.21. 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, and accepts that a re-authorisation period longer than five years is appropriate. However, the ACCC also notes the ongoing evolution of competition for the retail supply of goods and services sold by Myer and its concession stores. Given the assessment of the public benefits and detriments likely to result from the Conduct, the ACCC has decided to re-authorise the arrangements for 10 years. This is consistent with the period for which the ACCC has recently granted re-authorisation to equivalent conduct for David Jones.

## 5. Determination

### The application

- 5.1. On 12 February 2019, Myer lodged an application to revoke authorisation A91384 and substitute authorisation AA1000436 for the one revoked (referred to as re-authorisation). This application for re-authorisation AA1000436 was made under subsection 91C(1) of the Act.
- 5.2. Myer seeks re-authorisation to invite current and future businesses including licensees and brand partners (or concession stores) operating separate businesses physically within Myer stores and/or conducting sales through online stores to participate in certain promotions (the **Conduct**).

### The authorisation test

- 5.3. 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 benefit to the public and the benefit would outweigh the detriment to the public that would be likely to result from the Conduct.
- 5.4. For the reasons outlined in this determination, the ACCC is satisfied, in all the circumstances that the 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 Conduct, including any lessening of competition.
- 5.5. Accordingly, the ACCC has decided to grant re-authorisation.

### Conduct which the ACCC has decided to authorise

- 5.6. The ACCC revokes authorisation A91384 and grants authorisation AA1000436 in substitution to enable Myer to invite licensees and brand partners operating within its stores to participate in certain promotions as described in paragraph 5.2.

5.7. 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.

5.8. The ACCC grants authorisation AA1000436 until 31 May 2029.

## 6. Date authorisation comes into effect

6.1. This determination is made on 9 May 2019. If no application for review of the determination is made to the Australian Competition Tribunal, it will come into force on 31 May 2019.