

Final Determination

Application for Authorisation

lodged by

Myer Stores Limited

in respect of

**Concession businesses operating within
Myer stores, at the invitation of Myer,
participating in storewide and category
wide discount promotions and other
promotional activities.**

Date: 4 June 2003

Authorisation no: A40082

Commissioners: Fels
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Public Register Number: C2002/1407

Executive Summary

On 17 September 2002, Myer Stores Limited (Myer) lodged application A40082 with the Australian Competition and Consumer Commission (the Commission).

Broadly, authorisation was sought to permit concession businesses operating within Myer and Grace Bros department stores and Megamart stores to, at the invitation of Myer, participate in storewide and category wide discount promotions, bonus fly buys points offers, Coles Myer card promotions and other agreed bonuses (for example, buy one item, get a second for half price).

The Commission has considered the public benefits and anti-competitive detriment that are likely to flow from the proposed scheme. The Commission considers the anti-competitive detriment of the arrangements is limited. The Commission does not consider that the arrangements will unduly inhibit competition (on price or other terms) between Myer and its concession businesses. Where concession businesses do participate in Myer promotions, the Commission considers that in doing so, they are likely to offer larger discounts to their customers than would be the case through their own independently run promotions.

The Commission also considers that the proposed arrangements are likely to increase price competition between Myer and its competitors, in particular other department stores.

The Commission considers that there are public benefits arising from the arrangements. In particular, the Commission considers that the arrangements provide a public benefit through increased discounts (both price and non price) being offered to consumers across a range of products being offered by concession businesses through Myer promotions.

Additionally, the Commission considers that the proposed arrangements will generate some, small, public benefit through the simplification of Myer promotions by the inclusion of concession businesses in these promotions.

The Commission therefore concludes that the public benefits likely to result from the arrangements would outweigh any anti-competitive detriment that may arise. Accordingly, the Commission grants authorisation in relation to application A40082. Authorisation is granted for 5 years.

On 9 October 2002, the Commission granted interim authorisation to the proposed arrangements. Interim authorisation will continue to protect the proposed arrangements from action under the *Trade Practices Act 1974* (the TPA) until the date that the Commission's final determination comes into effect or until the Commission decides to revoke interim authorisation.

Table of contents

EXECUTIVE SUMMARY	I
1. THE APPLICATION	1
<i>Introduction</i>	<i>1</i>
<i>Authorisation process</i>	<i>1</i>
<i>Statutory test</i>	<i>1</i>
<i>The application</i>	<i>2</i>
<i>Draft Determination</i>	<i>2</i>
<i>Interim Authorisation.....</i>	<i>3</i>
2. BACKGROUND TO THE APPLICATION	4
<i>Background to the industry.....</i>	<i>4</i>
<i>The applicant</i>	<i>4</i>
<i>Concession businesses</i>	<i>4</i>
<i>The licence agreements.....</i>	<i>5</i>
<i>Current promotions run by Myer.....</i>	<i>5</i>
3. THE APPLICATION AND SUPPORTING SUBMISSION.....	7
<i>The application</i>	<i>7</i>
<i>The applicant's supporting submission.....</i>	<i>7</i>
4. SUBMISSIONS BY INTERESTED PARTIES.....	10
5. COMMISSION EVALUATION	12
<i>Future with and without test</i>	<i>12</i>
<i>The relevant market</i>	<i>12</i>
Effect on competition	13
<i>Conclusion</i>	<i>15</i>
Public benefits	16
<i>Conclusion</i>	<i>18</i>
Balance of public benefit and public detriment.....	18
6. DETERMINATION	20
<i>The Application.....</i>	<i>20</i>
<i>Statutory test</i>	<i>20</i>
<i>Determination</i>	<i>21</i>
APPENDIX A: CONCESSION BUSINESSES OPERATING IN MYER STORES AS AT APRIL 2003.....	22
APPENDIX B: SUBMISSIONS RECEIVED AND CONCESSION BUSINESSES WHICH PROVIDED LETTERS OF SUPPORT FOR THE APPLICATION.....	25

1. The application

Introduction

- 1.1 Organisations that engage, or propose to engage, in certain anti-competitive business arrangements or conduct that could breach the TPA, may apply to the Commission for authorisation of such arrangements or conduct. If granted, authorisation provides immunity from legal action under the TPA in respect of the arrangements or conduct.

Authorisation process

- 1.2 Upon receiving an application for authorisation, the Commission invites interested parties to lodge submissions outlining whether they support the application or not, and their reasons for this.
- 1.3 The Commission then issues a draft determination in writing, proposing either to grant the application (in whole, in part, or subject to conditions) or deny the application. In preparing a draft determination, the Commission will take into account any submissions received from interested parties.
- 1.4 Once a draft determination is released, the applicant or any interested party may request that the Commission hold a conference to discuss its operation and effect. The Commission will also usually invite interested parties to lodge written submissions on the draft.
- 1.5 The Commission then reconsiders the application, taking into account the comments made at the conference (if one is requested) and any further submissions received, and issues a written final determination.

Statutory test

- 1.6 Under sub-section 90 (6) of the TPA, the Commission may grant authorisation to a proposed contract, arrangement or understanding if it is satisfied that:
 - the contract, arrangement or understanding would be likely to result in a benefit to the public; and
 - this benefit would outweigh the detriment to the public constituted by any lessening of competition that would be likely to result from the contract, arrangement or understanding.
- 1.7 The Commission must assess the public detriment flowing from the anti-competitive aspects of the arrangements and the public benefits arising from the arrangements. The two must then be weighed to determine which is the greater. If the public benefit outweighs the public detriment, the Commission may grant authorisation. If not, authorisation will be denied. However, in some cases, it may still be possible to grant authorisation where conditions can be imposed which sufficiently increase the public benefit or reduce the public detriment.

The application

- 1.8 On 17 September 2002, Myer lodged application A40082 with the Commission. The application was made under subsection 88(1) of the TPA¹ for authorisation to make and give effect to a contract, arrangement or understanding, a provision of which would have the purpose, or would or might have the effect, of substantially lessening competition within the meaning of Section 45 of the TPA.
- 1.9 Specifically, the application seeks authorisation for concession businesses operating within Myer and Grace Bros department stores and Megamart stores to, at the invitation of Myer, participate in storewide and category wide discount promotions, bonus fly buys points offers, Coles Myer card promotions and other agreed bonuses (for example, buy one item, get a second for half price).

Draft Determination

- 1.10 On 17 April 2003, the Commission released a draft determination proposing to authorise the proposed arrangements. The Commission considered any anti-competitive detriment of the arrangements to be limited. In particular, the Commission did not consider that the arrangements would unduly inhibit competition (on price or other terms) between Myer and its concession businesses. Where concession businesses do participate in Myer promotions, the Commission considered that in doing so, they would be likely to offer larger discounts to their customers than would be the case through their own independently run promotions.
- 1.11 The Commission considered that there were public benefits arising from the arrangements. In particular, the Commission considered that the arrangements provide a public benefit through increased discounts (both price and non price) being offered to consumers across a range of products being offered by concession businesses through Myer promotions.
- 1.12 Additionally, the Commission considered that the proposed arrangements would generate some, small, public benefit through the simplification of Myer promotions by the inclusion of concession businesses in those promotions.
- 1.13 The Commission concluded that the public benefits likely to result from the proposed arrangements were sufficient to outweigh any anti-competitive detriment that may arise. Accordingly, the Commission proposed, subject to any request for a pre-decision conference, to grant authorisation in relation to the application for a period of 5 years.
- 1.14 No interested party requested that the Commission hold a pre-decision conference in relation to the draft determination, or provided the Commission with a written submission in response to the draft determination.

¹ The application has also been considered as an application under the *Competition Codes* of each of the participating Australian jurisdictions, namely, New South Wales, Victoria, Queensland, Western Australia, South Australia, Tasmania, the Northern Territory and the Australian Capital Territory.

Interim Authorisation

- 1.15 At the time of lodging the application, the applicant requested interim authorisation for the proposed arrangements. On 9 October 2002, the Commission granted the applicant's request for interim authorisation.

2. Background to the application

Background to the industry

- 2.1 The Australian Bureau of Statistics (ABS) defines retail trade industry as businesses mainly engaged in the resale of new or used goods to final consumers for personal or household consumption, or in selected repair activities such as repair of household equipment and motor vehicles.
- 2.2 A number of large businesses including Myer/Grace Bros, David Jones, Harris Scarfe, K Mart, Target, Big W and Best and Less dominate the department stores sector of retail trade.²
- 2.3 Department stores such as Myer also compete with other industry groups involved in retail trade such as clothing and soft good retailers, furniture, houseware and appliance retailers, recreational good retailers and other personal and household good retailers (see paragraphs 5.7 – 5.8). These sectors of the retail trade industry are less highly concentrated. (While accurate figures from the ABS are only available for 1998/99, it is not expected that market shares are dramatically different now from them. Large businesses contributed 47% of total income for the clothing and soft good retailing industry in 1998/99 while small businesses contributed over 50% of total income in recreational goods retailing and 57% of income in furniture, housewares and appliance retailing.)³

The applicant

- 2.4 Myer operates 68 department stores in Australia under the Myer and Grace Bros names and 6 Megamart stores. A wide variety of products (including men's, women's and children's apparel, homewares and electrical goods) and services (including cleaning, beauty, photography and repair services) are sold by Myer Stores.
- 2.5 Myer contended that it operates in a highly competitive retail environment and competes with other department stores and discount stores as well as specialty chains and shops, direct mail businesses and internet retailers.

Concession businesses

- 2.6 Myer enters into licence agreements with various wholesalers, distributors and importers of clothing and other products and providers of services to permit the operation of concession businesses within Myer stores. Concession businesses license or rent floor space from Myer. These businesses operate as a 'store within a store', retaining ownership of stock and usually employing their own staff to work in this area. A list of concession businesses operating in Myer stores as at April 2003 is at Appendix A of this determination.

² Myer/Grace Bros, K Mart and Target are all owned and operated by the Coles Myer group.

³ Australian Bureau of Statistics, *Retail Industry, Australia, 1998/99 (8622.0)*

- 2.7 Concession businesses are bound by the terms of the licence agreement which covers all aspects of the operational relationship with Myer. These ‘stores within stores’ display and sell only the brand of product, promoted and sold by the relevant concession business and are operated independently of Myer. Prices are set by the concession businesses independently of Myer.
- 2.8 Myer contended that this ‘store within a store’ concept has become a popular way for suppliers to promote their products to a larger number of customers, and is particularly used for branded men’s, women’s and children’s clothing. Myer contended that it enables suppliers to highlight their brand name and promote their latest products in specially fitted out concept areas, benefiting from the large number of customers who shop at Myer stores.
- 2.9 Myer contended that although the concession businesses are independently operated, they appear to consumers to be part of the Myer store and not a separate business. Coles Myer Cards are accepted as a form of payment at concession businesses, and in some cases points are awarded under the Fly Buys loyalty program for purchases, as is the case for purchases of Myer merchandise.

The licence agreements

- 2.10 The licence agreements between Myer and the concession businesses license the concession businesses to use an area within a Myer store, for a fixed term, usually 2 – 3 years. A licence fee is payable to Myer and is usually calculated by reference to the concession business’s gross sales. The concession business may use the licensed area only for the agreed “Permitted Use” – the retail sale of specific branded merchandise. Myer is not prevented by the standard licence agreement from granting licences to other areas of Myer stores to other concession businesses which will compete with the concession business nor from competing itself with the concession business.

Current promotions run by Myer

- 2.11 Myer’s current practice has been to exclude concession businesses from all promotions run by it. This is because any agreement between Myer and the concession businesses may constitute an agreement between competitors (on among other things, price) for the purposes of the TPA.
- 2.12 Consequently, concession businesses are expressly excluded from Myer promotions under which consumers are offered fixed percentage discounts or benefits storewide or on categories of products or services that include those offered by concession businesses. This means that many Myer storewide or departmental promotions are subject to numerous exclusions, which Myer argued, detracts from the attractiveness and clarity of the offer and risks confusing consumers. It also means that consumers do not obtain access to the products sold by concession businesses at these discount prices, unless the concession business independently decides to engage in a similar promotion.

- 2.13 Where Myer operates a promotion which excludes a concession business, that concession business may either retain its current prices, reduce prices (whether or not by the same amount as Myer) or increase prices.
- 2.14 Myer contended that often, concession businesses have independently decided to promote a discount or sale price at the same time as a Myer promotion, although the percentage discount offered to consumers has usually been less than the discount offered by Myer.

3. The application and supporting submission

The application

- 3.1 To simplify its promotions, Myer seeks authorisation to invite concession businesses to participate in Myer promotions which offer consumers:
- an agreed percentage discount on all products sold in Myer stores;
 - an agreed percentage discount on a category of products which include some or all of the products offered by concession businesses;
 - ‘bonus’ Fly Buy points upon the purchase of products which include some or all of the products offered by concession businesses;
 - Coles Myer card promotions; or
 - other agreed bonuses (for example, buy one item, get a second for half price).
- 3.2 Under the proposed arrangements Myer would not require or force concession businesses to participate in such promotions. This would remain at the discretion of the concession business each of which would independently elect whether to participate or not on a promotion by promotion basis.
- 3.3 Where a concession business elected not to participate in a promotion, the concession business would be excluded from the promotion in accordance with Myer’s current practice. The concession business would remain at liberty to run alternative promotions as considered appropriate by the concession business.
- 3.4 The identity and number of concession businesses operating in Myer stores varies from time to time as licence agreements expire and new licence agreements are entered into. Consequently, Myer has requested authorisation for itself and current and future concession businesses operating in its stores. Myer has indicated that it intends to regularly notify the Commission of changes to the concession businesses operating in its stores.
- 3.5 Myer noted that its licence agreements with concession businesses have varying terms and termination dates and so it is not possible for the period of authorisation to be tied to the term of these agreements. Myer seeks authorisation of the proposed conduct for an initial period of at least 5 years.

The applicant’s supporting submission

The relevant market

- 3.6 The applicant submitted that a wide range of products and services are offered by concession businesses in Myer stores. The applicant noted that these concession businesses compete in a range of product markets, such as the market for retail men’s, women’s and children’s clothing. The applicant

contended that it competes in a market which at its narrowest is the market for retailing products through department stores and, at its broadest, a market for retailing products to consumers.

- 3.7 The applicant submitted that it is subject to strong competition from department stores offering a similar range of products to those offered in Myer stores (in particular David Jones and discount department stores such as Harris Scarfe) as well as from specialty chains and individual stores which sell products which compete with part of the product range sold by Myer.

Public benefits

- 3.8 The applicant submitted that the proposed arrangements will enable a wide range of discount promotions to be offered to consumers which is likely to result in reduced prices to consumers.
- 3.9 The applicant submitted that concession businesses will be encouraged to join with Myer in storewide or category discount promotions at increased discount levels or offering additional benefits or bonuses to customers for products which are often perceived by consumers as being “prestige” brands (particularly clothing brands). The applicant submitted that at present, when it runs storewide or category wide promotions excluding concession businesses, concession businesses often independently decide to promote a discount or sale price at the same time as a Myer promotion. However, the applicant contended that when this does occur, the percentage discount offered to consumers by the concession business is usually less than the discount offered by Myer.
- 3.10 The applicant also submitted that consumers will benefit from the simplification of Myer promotions, by the inclusion of concession businesses in these promotions, as general percentage discount offers will be able to be made on a storewide or category basis, with only those concession businesses which choose to opt out excluded from the promotion. The applicant contended that since many consumers do not distinguish between Myer and concession businesses, there is a risk of confusion resulting from the exclusion of a large number of concession businesses from any overall promotion.

Effect on competition

- 3.11 The applicant noted that because Myer sells or may sell products which compete with the products sold by concession businesses, Myer and the concession businesses are competitors and any agreement between them on the level of discount or on bonus offers may contravene the price fixing provisions of the TPA.
- 3.12 However, in this instance, the applicant contended that the proposed conduct will enhance competition in the relevant markets as general storewide or category wide promotions by Myer Stores at agreed discount levels will encourage price competition by other retailers.
- 3.13 In particular, the applicant stated that the agreement on storewide or category percentage discounts or other offers is intended to make Myer stores and the concession businesses operating therein more competitive in the relevant

markets by encouraging concession businesses to offer larger discounts or additional benefits to consumers. The applicant argued that this can only promote competition between Myer stores and its competitors, because Myer stores' promotions will be more competitive with other stores, with limited exclusions and inclusion of the big brand names which are looked for by consumers.

- 3.14 The applicant contended that the only competitive detriment which could possibly flow from the proposed conduct is that it might be seen as having the effect of limiting discounts by concession businesses. However, the applicant argued that this would not be the case. The applicant contended that the proposed conduct will not lead to a reduction in the percentage discounts or bonuses offered by concession businesses as concession businesses have almost universally offered a smaller percentage discount in independent promotions than the discounts offered by Myer as part of a Myer storewide or category wide promotion. Further, the applicant noted, concession businesses will still be able to elect not to participate in a Myer promotion if they either do not wish to conduct a promotion or wish to conduct their own promotion, including offering consumers a larger discount or alternative offer.
- 3.15 The applicant argued that participation in Myer promotions by concession businesses will assist concession businesses to develop their exposure and increase sales, by accessing Myer advertising campaigns. The applicant stated that those concession businesses with whom the proposed conduct has been discussed have expressed considerable enthusiasm about the prospect of being able to participate in Myer promotions.
- 3.16 The applicant provided the Commission with information regarding the level of participation by concession businesses in its December/January - 2002/2003 stocktaking sale⁴. Of the 21 concession businesses Myer approached to participate in this promotion, 19 agreed.
- 3.17 This promotion included offers of 30% - 50% off a range of men's, women's and children's clothing, homewears, accessories and other items. The applicant argued that the level of participation of concession businesses in the stocktaking sale and the success of the promotion in offering significant discounts to consumers reinforces that the proposed arrangements will make Myer stores and the concession businesses operating therein more competitive in the relevant markets by encouraging concession businesses to offer larger discounts or additional benefits to consumers.

⁴ This promotion took place after the Commission granted interim authorisation to the proposed arrangements.

4. Submissions by interested parties

- 4.1 The Commission sought submissions from a wide range of interested parties in relation to the application for authorisation and the public benefit and public detriment claims made by the Myer. All submissions received by the Commission supported the proposed arrangements. Copies of submissions received by the Commission are on the public register.
- 4.2 The applicant also wrote to most of its concession businesses seeking expressions of support for its application. The applicant provided the Commission with copies of the responses it received. Copies of these responses are also on the public register.
- 4.3 A list of parties who provided submissions to the Commission and concession businesses who provided responses to the applicants request for expressions of support for the application is at Appendix B.
- 4.4 Set out below are the main arguments raised in submissions received by the Commission from interested parties and in letters provided by the applicant from concession businesses.
- Restrictions on joint promotions severely hamper concession businesses' ability to operate effectively within the Myer retail environment. Not being a part of Myer advertising and promotions places concession businesses at a competitive disadvantage within the Myer retail environment.
 - Joint promotions would give concession businesses the ability to strongly communicate offers to the public and to further develop their brands in Myer Stores. Current policy (where concession businesses are excluded from storewide promotional activities) disadvantages concession businesses' sales volume during these times.
 - The proposed arrangements will benefit consumers as there will be less confusion in relation to store wide and category wide promotional activity within Myer, and will provide greater choice of product and more competitive pricing to consumers.
 - Concession businesses will be afforded the opportunity to participate in a greater number of promotions which in turn will allow concession businesses to offer increased incentives to their customers.
 - Discounts offered by concession businesses participating in the proposed arrangements are likely to be greater than those which they would offer through individual promotions. Several concession businesses stated that they would be likely to offer increased discounts and deals in the course of their participation in the proposed arrangements.

- Myer stores will be able to make stronger offers in the market place, which will in turn add to competition in an already highly competitive market, which will ultimately benefit consumers.
- Competition between all participants in the programs within each Myer store will be substantially increased, which will provide increased services, greater convenience and lower prices to the buying public.

4.5 All submissions and letters from concession businesses commenting of the application supported the proposed arrangements. No interested party identified any anti competitive detriment they considered may flow from the proposed arrangements.

5. Commission evaluation

5.1 The Commission's evaluation of the application is in accordance with the statutory tests outlined in Section 1 of this determination. Accordingly, the Commission is required to assess the likely public benefits and detriment arising from the proposed arrangements. The two must then be weighed to determine which is the greater. If the public benefit outweighs the public detriment, the Commission may grant authorisation. If not, authorisation will be denied. However, in some cases, it may still be possible to grant authorisation where conditions can be imposed which sufficiently increase the public benefit or reduce the public detriment.

Future with and without test

5.2 In order to identify and measure the public benefits and anti-competitive detriment generated by the proposed arrangements, the Commission applies the 'future with-and-without test' that was first established by the Australian Competition Tribunal.⁵ This requires a comparison of the public benefit and public detriment that the proposed arrangements would generate in the future if the authorisation is granted with the position if the authorisation is not granted. The scenario in which authorisation is assumed not to have been granted is termed the counterfactual.

5.3 The counterfactual employed by the Commission in assessing this application is that, in the absence of authorisation, concession businesses will be excluded from discount promotions run by Myer.

The relevant market

5.4 The Commission uses market analysis to identify and measure the public benefits and anti-competitive detriment likely to result from arrangements for which authorisation is sought.

5.5 The Commission will generally only define a market to the extent necessary to undertake the required analysis.

5.6 The applicant submitted that it competes in a market which at its narrowest is the market for retailing products through department stores and, at its broadest, a market for retailing products to consumers.

5.7 The Commission notes that while some consumers may prefer to shop in department stores, as opposed to other retail outlets, due to the convenience that shopping in a larger department store may offer, there is a high degree of substitutability between retail products sold through department stores, and those sold through other retailers. Indeed, in many cases department stores and other retailers stock identical products.

⁵ See, for example, *Re Australasian Performing Rights Association* (1999) ATPR ¶41-701.

- 5.8 Broadly, the Commission considers that the relevant market(s) for the purposes of considering the current application are likely to be the market(s) for the retail supply of products sold by department stores and/or their concession businesses. In this instance, the Commission does not consider it necessary to comprehensively define the relevant market(s), as it considers a net public benefit will arise from the proposed conduct regardless of this definition.
- 5.9 The Commission notes the applicants' contention that these markets are highly competitive. The Commission has not received any evidence that suggests that these markets are not currently subject to competitive forces.

Effect on competition

- 5.10 Authorisation is sought for Myer to invite concession businesses operating within Myer and Grace Bros department stores and Megamart stores to participate in storewide and category wide discount promotions, bonus fly buys points offers, Coles Myer card promotions and other agreed bonuses (for example, buy one item, get a second for half price).
- 5.11 In general terms, agreements between competitors to provide a good or service on common terms, including where those terms relate to the quantum of any discount offered (be it a percentage discounted on price or other promotional offer), are likely to lessen competition relative to a situation where each party individually determines its own price or other terms. However the extent of the detriment and the impact on competition will depend on the specific circumstances involved.
- 5.12 The applicant has submitted that the proposed conduct will not lead to a reduction in the percentage discounts or bonuses offered by concession businesses as concession businesses have almost universally offered a smaller percentage discount in independent promotions than the discounts offered by Myer as part of its storewide or category wide promotions.
- 5.13 The applicant also noted that concession businesses will be able to elect not to participate in a Myer promotion if they either do not wish to conduct a promotion or wish to conduct their own promotion, including offering consumers a larger discount or alternative offer.
- 5.14 The applicant has also contended that the proposed conduct will enhance competition as general storewide or category wide promotions by Myer Stores at agreed discount levels will encourage price competition by other retailers.
- 5.15 In particular, the applicant submitted that the arrangements are intended to make Myer stores and the concession businesses operating therein more competitive by encouraging concession businesses to offer larger discounts or additional benefits to consumers which will promote competition between Myer and its competitors.

Commission evaluation

- 5.16 Whilst agreements between competitors in relation to price or other terms and conditions are generally likely to lessen competition relative to a situation where each competitor individually determines its own price and other terms and conditions, with respect to the proposed arrangements the Commission notes that:
- it is only the amount of any discount (price or otherwise) to be offered that is the subject of any proposed agreement. The arrangements do not allow for any agreement on price or other terms and conditions more generally;
 - the arrangements do not allow for any agreement between Myer and its concession businesses (collectively or individually) to agree on the level of any discount or terms of other promotional offers. Myer offers each concession business individually, on a promotion by promotion basis, the opportunity to participate in promotions, the terms and conditions of which it has already determined; and
 - the arrangements do not allow for any agreement to increase prices.
- 5.17 The Commission would be concerned the proposed arrangement had the effect of limiting discounts by concession businesses. The applicant has argued that under the proposed arrangements concession businesses will in fact offer increased percentage discounts or bonuses offers. Several concession businesses stated that they would be likely to offer increased discounts and deals in the course of their participation in the proposed arrangements.
- 5.18 Based on the information provided by the applicant, concession businesses, and the Commission's own assessment, the Commission accepts that it appears that the level of discounts offered by Myer, and consequently by concession businesses participating in Myer promotions, is likely to be greater than that which most concession businesses currently offer through their individual, independently run, promotions.
- 5.19 In particular, the Commission notes that of the 21 concession businesses approached by Myer to participate in its December/January, 2002/2003 stocktake sale, 19 agreed to participate. This sale provided consumers with discounts of between 30% and 50% on a range of products far in excess of those items to which Myer has applied discounts in previous years, when these arrangements have not been in place.
- 5.20 In some instances individual concession businesses do/may wish to offer discounts in excess of those Myer propose to offer through its joint promotions. Importantly, concession businesses are under no obligation to participate in promotions run by Myer, and where they elect not to participate, remain free to offer any price discount or run any other promotional activity they consider appropriate.
- 5.21 In submissions to the Commission, and letters provided by Myer, most concession businesses, while supportive of the proposed arrangements, noted

that they reserved the right not to participate in the proposed arrangements and would make such decision on a promotion by promotion basis.

- 5.22 Additionally, where concession businesses do participate in Myer promotions this does not preclude them from running their own independent promotions either concurrently with that being run by Myer or at other times.
- 5.23 While it can be expected that over time some concession businesses are likely to become reliant on Myer run promotions as their primary means of promoting their products through their concession outlets, as noted above, the discounts offered through these promotions are likely to be greater than those the concession business would offer independently.
- 5.24 Those concession businesses that do currently, or in the future chose to, match or exceed the level of discounts offered by Myer, are less likely to become reliant on Myer run promotions as their primary or sole means of promoting their brand through their concession outlets.
- 5.25 Consequently, to the extent that the opportunity to participate in Myer run promotions does discourage competition on promotional discounts between Myer and its concession businesses, this is more likely to be the case with respect to those concession businesses likely to offer promotional discounts on terms less favourable than will be the case if they chose to participate in the proposed arrangements, than it will be with respect to those concession businesses likely to offer promotional discounts on more favourable terms than Myer.
- 5.26 However, the Commission would be concerned if, having authorised these arrangements, the immunity from legal proceedings under the TPA for Myer to invite concession businesses to participate in its promotional activities which authorisation would provide, had the effect of limiting discounts by concession businesses. That is to say, if the promotional discounts offered by Myer in the future in conjunction with its concession businesses, were less than are currently offered by concession businesses acting independently.
- 5.27 If this were to occur the Commission would consider this a material change of circumstances which may form the basis for a revocation of the authorisation under s.91B of the TPA.
- 5.28 The Commission also accepts that the proposed arrangements will make Myer stores' promotions more competitive with other stores. While the Commission has received no information to suggest that Myer, its concession businesses, or the retail markets in which they operate, are not already highly competitive, extending Myer's current discount promotions to include its concession businesses could be expect to further promote price competition within these markets, and in particular between Myer and other department stores.

Conclusion

- 5.29 The Commission considers that any agreement between Myer and its concession businesses on the quantum of any discount offered to customers (be it a

percentage discounted on price or other promotional activity), has the potential to result in some lessening of competition. However, for the reasons outlined above, the Commission considers that the proposed arrangements will not, in practice, result in any significant anti-competitive detriment.

- 5.30 The Commission does not consider that the arrangements will unduly inhibit competition (on price or other terms) between Myer and its concession businesses. Where concession businesses do participate in Myer promotions, the Commission accepts that in doing so they are likely to offer larger discounts to their customers than would be the case through their own independently run promotions.
- 5.31 The Commission also accepts that the proposed arrangements are likely to increase price competition between Myer and its competitors, in particular other department stores.

Public benefits

- 5.32 The applicant claimed that a number of public benefits result from the arrangements for which authorisation is sought. The applicant has submitted that:
- the proposed arrangements will enable a wide range of discount promotions to be offered to consumers which is likely to result in reduced prices to consumers; and
 - consumers will benefit from the simplification of Myer promotions by the inclusion of concession businesses in these promotions.

Commission evaluation

- 5.33 In examining the effect on competition of the proposed arrangements the Commission concluded that that level of discounts offered by Myer, and consequently by concession businesses participating in Myer promotions under the proposed arrangements, is likely to be greater than that which most concession businesses currently offer through their individual, independently run, promotions (see paragraphs 5.18 – 5.20).
- 5.34 However, the extent to which reduced prices will be available to consumers will depend on the extent of participation by concession businesses in the proposed arrangements. In this respect the Commission notes that:
- the vast majority of concession businesses have indicated their support for the proposed arrangements. No concession business has indicated to the Commission that it opposes the proposed arrangements;
 - concession businesses are likely to benefit from participation in the proposed arrangements through increased exposure of their brands through inclusion in Myer promotions, including inclusion in sale catalogues and other advertising, and through an increased ability to offer non price

promotional discounts, such as through participation in Coles Myer card promotions and buy one, get another one half price, discount offers, in conjunction with other brand names also operating in Myer stores; and

- as noted above, (paragraph 5.19) when offered the opportunity to participate in the Myer 2002/2003 stocktake sale, 19 of 21 concession businesses approached chose to participate.

- 5.35 On this basis, the Commission considers that most concession businesses are likely to participate in the proposed arrangements. Given the large number of Myer stores operating throughout Australia, the number of concession businesses operating within those stores and the range of products offered by these concession businesses, this is likely to result in significant discounts across a range of retail goods being offered to consumers across Australia, in addition to those offered through existing Myer promotions.
- 5.36 Concession businesses have argued that not being a part of Myer advertising and promotions places concession businesses at a competitive disadvantage within the Myer retail environment.
- 5.37 While nothing currently precludes concession businesses from matching price discounts and other promotional activities offered by Myer, concession businesses are also likely to benefit from the cost savings and convenience associated with being included in Myer run promotions as opposed to having the coordinate and finance individual promotions.
- 5.38 This further increases concession businesses' incentives to participate in the proposed arrangements and through their participation the likelihood of reduced prices being passed on to consumers.
- 5.39 The Commission also considers that the proposed arrangements are likely to increase price competition between Myer and its competitors, in particular other department stores (see paragraph 5.27) which would also result in reduced prices to consumers.
- 5.40 To the extent that the proposed arrangements will result in reduced prices to consumers, the Commission considers this to be a public benefit.
- 5.41 The Commission also accepts that consumers will benefit from the simplification of Myer promotions by the inclusion of concession businesses in these promotions. Currently, Myer storewide and category wide promotions are subject to numerous exclusions. The applicant has contended that many consumers do not distinguish between Myer and concession businesses, and consequently that there is a risk of confusion resulting from the exclusion of concession businesses from promotions.
- 5.42 While the Commission accepts that the proposed arrangements will (in the case of those concession business participating in the proposed arrangements) alleviate this confusion, the Commission has received no evidence to suggest that this is a major problem or concern for consumers.

- 5.43 Additionally, as concession businesses will choose whether to participate in Myer promotions on a promotion by promotion basis, where a concession business chooses to participate in some promotions but not others, this is likely to add to any existing confusion among customers.
- 5.44 Consequently, while the Commission accepts that consumers will benefit from the simplification of Myer promotions by the inclusion of concession businesses, the Commission considers this public benefit to be small.

Conclusion

- 5.45 For the reasons outlined, the Commission considers that there are public benefits arising from the proposed arrangements. In particular, the Commission considers that the arrangements provide a public benefit through increased discounts being offered to consumers across the range of retail products being offered by concession businesses through Myer promotions across Australia.
- 5.46 Additionally, the Commission considers that the proposed arrangements will generate some, small, public benefit through the simplification of Myer promotions by the inclusion of concession businesses in these promotions.

Balance of public benefit and public detriment

- 5.47 The Commission considers the anti-competitive detriment of the arrangements is limited. The Commission does not consider that the arrangements will unduly inhibit competition (on price or other terms) between Myer and its concession businesses. Where concession businesses do participate in Myer promotions, the Commission accepts that in doing so they are likely to offer larger discounts to their customers than would be the case through their own independently run promotions.
- 5.48 The Commission also considers that the proposed arrangements are likely to increase price competition between Myer and its competitors, in particular other department stores.
- 5.49 The Commission accepts that there are public benefits arising from the arrangements. In particular, the Commission considers that the arrangements provide a public benefit through increased discounts being offered to consumers across the range of retail products being offered by concession businesses through Myer promotions across Australia.
- 5.50 Additionally, the Commission considers that the proposed arrangements will generate some, small, public benefit through the simplification of Myer promotions by the inclusion of concession businesses in these promotions.
- 5.51 Consequently, following consideration of the arguments advanced by the applicant and interested parties, the Commission concludes that the public benefits likely to result from the arrangements will outweigh the anti-competitive detriment.

- 5.52 The Commission proposes to grant authorisation subject to a five-year time limit.
- 5.53 In general, authorising arrangements for a limited time period allows the Commission, at the end of the period of authorisation, to evaluate whether the public benefits upon which its decision is made actually eventuate in practice and the appropriateness of the authorisation in the current market environment.
- 5.54 In addition, the Commission may review the authorisation, prior to the expiry of the authorisation, if there has been a material change of circumstances since the authorisation was granted.
- 5.55 This authorisation does not in any way allow any agreement between Myer and its concession businesses to collectively agree on the level of discount offered or to raise prices.

6. Determination

The Application

- 6.1 On 17 September 2002, Myer Stores Limited lodged an application for authorisation (No. A40082) with the Commission.
- 6.2 The application was made under section 88(1) of the TPA for an authorisation under that subsection:
- to make a contract or arrangement, or arrive at an understanding, where a provision of the proposed contract, arrangement or understanding would be, or might be, an exclusionary provisions within the meaning of section 45 of the TPA and to give effect to those provisions;
 - to make a contract or arrangement, or arrive at an understanding, a provision of which would have the purpose, or would have or might have the effect, of substantially lessening competition within the meaning of section 45 of the TPA and to give effect to those provisions.
- 6.3 The application sought authorisation for current and future concession businesses operating within Myer and Grace Bros department stores and Megamart stores to, at the invitation of Myer, participate in storewide and category wide discount promotions, bonus fly buys points offers, Coles Myer card promotions and other agreed bonuses (for example, buy one item, get a second for half price).
- 6.4 This authorisation does not in any way allow any agreement between Myer and its concession businesses to collectively agree on the level of discount offered or to raise prices.

Statutory test

- 6.5 For the reasons outlined in this determination, the Commission is satisfied that in all the circumstances the making of the contracts and the giving effect to the provisions of the arrangements for which authorisation is sought under subsection 88 (1) of the TPA:
- would be likely to result in a benefit to the public; and
 - that benefit would outweigh the detriment to the public constituted by any lessening of competition that would be likely to result from the arrangements.
- 6.6 The Commission is also satisfied that, in all the circumstances, the proposed arrangements for which authorisation is sought under subsection 88 (1) of the TPA in respect of provisions which may be exclusionary provisions would be likely to result in such a benefit to the public that it should be allowed to be made and given effect to.

Determination

- 6.7 The Commission therefore grants authorisation to application A40082. Authorisation is granted for a period of 5 years from the date on which the authorisation comes into force.
- 6.8 This decision is subject to any application to the Australian Competition Tribunal for its review.
- 6.9 This determination is made on 4 June 2003. If no application for review of the determination is made to the Australian Competition Tribunal, it will come into force on 26 June 2003. If an application is made to the Tribunal, the determination will come into force:
- where the application is not withdrawn – on the day on which the Tribunal makes a determination on the review; or
 - where the application is withdrawn – on the day on which the application is withdrawn.

Interim authorisation

- 6.10 On 9 October 2002, the Commission granted interim authorisation to the proposed arrangements. Interim authorisation will continue to protect the proposed arrangements from action under the TPA:
- where no application is made to the Tribunal for review of the Commission's determination, until the date that the Commission's final determination comes into effect;
 - where an application is made to the Tribunal for review of the Commission's determination, until the day on which the Tribunal makes a determination on the review; or
 - until the Commission, or the Tribunal in the event of an application for review of the Commission's determination, decides to revoke interim authorisation.

Appendix A: Concession businesses operating in Myer Stores as at April 2003

The following is a list of concession businesses operating in Myer Stores as at April 2003. The list was compiled by Myer.

Womenswear

- Anthea Crawford
- Betty Barclay
- Calvin Klein
- Carla Zampatti
- Charlie Brown
- Covers
- Cue
- David Lawrence
- Edward Kazas
- Feathers
- Jane Lamerton
- Marcs Womens
- Perri Cutten
- Review
- Room 42
- Sportscraft Womens
- Taking Shape
- Trent Nathan

Miss Shop / Kids

- Endless Spirit
- Esprit Womens

- Esprit Kids

Menswear

- Anthony Squires
- Esprit Mens
- Marcs Menswear
- Nautica
- Sportscraft Mens
- Calvin Klein Mens
- Belgravia/Lords Formal Hire
- Politix

Tabel Top / home

- Villeroy & Boch
- Swarovski
- Waterford Wedgwood
- Royal Doulton
- Complete Floor Fashions

Accessories

- Baku Jewellery

Cosmetics

- Lancome Beauty Room
- The Nail Bar Generation

Hair & Beauty Salons

- Hair & Beauty Salons
- L G Hair and Beauty
- Mens Hairdressing

Photography

- Christi Photography

- Portrait & Wedding Photography
- Portrait Place

Dry Cleaning

- Littles Dry Cleaning
- Brown Gouge Dry Cleaners

Optical

- Merringtons Optometrist
- Optical Superstore
- Robert Hamilton Optician

Ticketing

- Ticketek
- Ticketmaster

Services – miscellaneous

- Cavallo Nero
- CBD Lotto
- Cojen Clothing Alterations
- Stamps & Coins
- Instant Print Services
- Liverpool Travel & Tours
- Travelworld
- Seivers Watch Repairs
- Luxaflex
- Myer Cleaning Services
- The Nail Corner

Appendix B: Submissions received and concession businesses which provided letters of support for the application

The following is a list of submission received by the Commission and letters of support for the application provided by Myer from concession businesses.

Submissions received

Politix

Endless Spirit

Villeroy & Boch Australia

K Mart

Target

Concession businesses which provided letters of support for the application

Anthony Squires

Baku International

Belgravia Formalwear

Calvin Klein Jeans

Carla Zampatti

Covers Designs

Cue Design

Endless Spirit

Feathers Boutique

Jane Lamerton

Politix

Room 42 Maternity Wear

The Royal Doulton Company

Swarovski

Taking Shape

Trent Nathan

Villery & Boch

Waterford Wedgwood Australia