

# Determination

## Application for Authorisation

lodged by

**David Jones Limited**

in respect of

**its proposal to invite retail brand  
management businesses operating  
within its stores to participate in  
promotions**

**Date: 17 December 2003**

**Authorisation no:** A30230

**Commissioners:** Samuel  
Sylvan  
Martin  
McNeill  
Willett

**Public Register Number:** C2003/1140

# **Executive Summary**

## **The authorisation process**

A key objective of the *Trade Practices Act 1974* (the TPA) is to prevent anti-competitive arrangements or conduct, thereby encouraging competition and efficiency in business, resulting in greater choice for consumers in price, quality and service.

However, the TPA allows the Commission to grant immunity from the TPA for anti-competitive conduct in certain circumstances.

One way in which parties may obtain immunity is to apply for what is known as an 'authorisation' from the Commission. Broadly, the Commission may 'authorise' parties to engage in anti-competitive conduct where it is satisfied that the public benefit from the conduct outweighs any public detriment.

The Commission conducts a comprehensive public consultation process before making a draft decision and ultimately a final decision to grant or deny authorisation.

## **The application**

On 19 August 2003, David Jones Limited lodged application A30230 with the Commission. The application was made under subsection 88(1) of the TPA 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.

Specifically, the application seeks authorisation for retail brand management businesses (commonly known as concession businesses) operating within David Jones stores to participate in promotions such as storewide or department-wide discounts at the invitation of David Jones.

The application was expressed as applying to all current and future David Jones concession businesses, pursuant to section 88 (10) of the TPA. The application was also expressed as being in relation to other agreements in similar terms pursuant to section 88 (13) of the TPA.

## **Draft decision**

On 19 November 2003, the Commission issued a draft decision proposing to grant authorisation to the application for a period of five years.

The Commission informed interested parties that they could request a pre-decision conference to discuss the operation and effect of the draft decision. No such conference was requested.

The Commission also invited interested parties to make further submissions on the draft decision. No such submissions were received.

## **Assessment of public benefit and public detriment**

The Commission has considered the public benefits and public detriment that are likely to flow from the arrangements for which authorisation is sought.

The Commission considers that any agreement between David Jones and its concession businesses on the promotional benefits offered to customers (be it a percentage discount on price or other promotional activity) has the potential to result in some lessening of competition. However, the Commission considers that the proposed arrangements will not, in practice, result in any significant public detriment. In particular, 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;
- concession businesses are not forced to participate, but will be able to choose to accept David Jones' invitation on a promotion-by-promotion basis;
- concession businesses remain free to run their own promotions, including discounts, independently of David Jones.

Further, the Commission considers that the proposed arrangements are likely to increase competition with regard to promotional benefits between David Jones and its competitors.

With regard to public benefits, the Commission considers that the proposed arrangements are likely to provide consumers with a broader range of discounts and other benefits across Australia. The Commission considers that this constitutes a benefit to the public. Further, the Commission considers that to the extent that the proposed arrangements reduce the number of exclusions that attach to David Jones promotions, an additional small public benefit is generated.

On balance, the Commission considers that the public benefits flowing from the proposed arrangements are likely to outweigh any public detriment flowing from the proposed arrangements.

### **Determination**

The Commission **grants** authorisation to application A30230.

The Commission extends the interim authorisation previously granted until the Commission's final decision comes into effect.

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# 1. Introduction

- 1.1. The Australian Competition and Consumer Commission (the Commission) is the Commonwealth agency responsible for administering the *Trade Practices Act 1974* (the TPA). A key objective of the TPA is to prevent anti-competitive conduct, thereby encouraging competition and efficiency in business. This results in a greater choice for consumers with regard to price, quality and service.
- 1.2. The TPA, however, allows the Commission to grant immunity from legal action for anti-competitive conduct in certain circumstances. One way in which parties may obtain immunity is to apply to the Commission for what is known as an ‘authorisation’.
- 1.3. Broadly, the Commission may ‘authorise’ parties to engage in anti-competitive conduct where it is satisfied that the public benefit flowing from the conduct outweighs any public detriment.

## Authorisation process

- 1.4. 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.
- 1.5. 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.
- 1.6. 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.
- 1.7. 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.

## The application

- 1.8. On 19 August 2003, David Jones Limited lodged application A30230 with the Commission. The application was made under subsection 88(1) of the TPA 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 retail brand management businesses (commonly known as concession businesses) operating within

David Jones stores to participate in promotions such as storewide or department-wide discounts at the invitation of David Jones.

- 1.10. The application was expressed as applying to all current and future David Jones concession businesses, pursuant to section 88 (10) of the TPA. The application was also expressed as applying to other agreements in similar terms pursuant to section 88 (13) of the TPA.

### **Statutory test**

- 1.11. Under 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.
- 1.12. 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.

### **Interim authorisation**

- 1.13. At the time of lodging the application, the applicant requested interim authorisation for the proposed arrangements. On 24 September 2003, the Commission granted the applicant's request for interim authorisation.

### **Draft decision**

- 1.14. On 19 November 2003, the Commission issued a draft decision proposing to grant authorisation to the application for a period of five years.
- 1.15. The Commission then informed interested parties that they could request a pre-decision conference. No such conference was requested.
- 1.16. The Commission also invited interested parties to make submissions on the draft decision. No such submissions were received.

### **Chronology of the Commission's assessment of the application**

1.17. A chronology of the Commission's assessment of the application is contained in Table 1, below.

**Table 1 Chronology of the Commission's assessment**

<b>Date</b>	<b>Action</b>
19 August 2003	Application A30230 is lodged with the Commission. A request for interim authorisation is also made on this date.
5 September 2003	The Commission invites interested parties to make submissions on the request for interim authorisation and on the application for authorisation.
19 September 2003	The date by which the Commission requested that interested parties lodge submissions in relation to the request for interim authorisation. No such submissions were made.
24 September 2003	The Commission grants interim authorisation.
3 October 2003	The date by which the Commission had requested that interested parties lodge submissions in relation to the application.
21 October 2003	The Applicant responds to the submission received from an interested party.
19 November 2003	The Commission issues a draft decision.
5 December 2003	The date by which interested parties were required to request a pre-decision conference, and by which interested parties were requested to lodge any submissions they wished to make on the draft decision. No conference was requested and no submissions were received.
17 December 2003	The Commission issues a final decision.

## 2. Background to the application

### Background to the industry

- 2.1 The Australian Bureau of Statistics (ABS) defines the 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.<sup>1</sup>
- 2.2 According to the Australian Retailers' Association, there are 34 department store chains in Australia employing some 103 000 people and accounting for 8.8% of total retail sales.
- 2.3 Of the 34 department store chains, ten employ 200 or more staff and account for 99.6% of all department store sales.<sup>2</sup>
- 2.4 Large businesses that dominate the department stores sector of the retail industry include Myer/Grace Bros, David Jones, Harris Scarfe, K Mart, Target, Big W and Best and Less.<sup>3</sup>
- 2.5 Department stores such as David Jones also compete with other industry groups involved in retail trade such as clothing and soft good retailers, furniture, homeware and appliance retailers, recreational good retailers and other personal and household good retailers. These sectors of the retail trade industry are less highly concentrated.

### The applicant

- 2.6 David Jones operates 36 department stores throughout Australia. 16 stores are located in New South Wales; four in Victoria; two in the ACT; six in Queensland; three in South Australia; and five in Western Australia. David Jones also maintains two clearance outlets.
- 2.7 David Jones describes itself as a “full line” retailer, meaning that it sells a wide variety of goods including clothing, accessories, homewares, furniture, food, and electrical appliances. David Jones also provides services such as hair and beauty services, restaurants and tailoring services.

### Concession businesses

- 2.8 Retail brand management businesses are commonly called ‘concessions’. Concession businesses operate pursuant to a license granted by David Jones to use floor space in certain David Jones stores in return for a percentage of sales.

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<sup>1</sup> [www.abs.gov.au](http://www.abs.gov.au)

<sup>2</sup> Australian Retailers' Association, *Retail Industry Profile 2001*, downloaded from [www.ara.com.au](http://www.ara.com.au) on Tuesday 4 November 2003.

<sup>3</sup> Myer/Grace Bros, K Mart and Target are all owned and operated by the Coles Myer group.

- 2.9 Concession businesses maintain a separate inventory from David Jones, employ their own staff, and set their own prices. David Jones is currently in the process of renegotiating its agreements with concession businesses.
- 2.10 According to David Jones, concession businesses are often run by ‘prestige’ brands that wish to accentuate their brand by using special displays.

### **3. The Application**

#### **The application**

- 3.1 David Jones is seeking authorisation to invite concession businesses operating within its stores to participate in certain promotions. David Jones is seeking authorisation for five years.
- 3.2 The application was expressed as applying to all current and future David Jones concession businesses, pursuant to section 88 (10) of the TPA. The application was also expressed as applying to other agreements in similar terms pursuant to section 88 (13) of the TPA.
- 3.3 A list of concession businesses currently operating in David Jones stores is at Appendix A. David Jones proposes to notify the Commission of any changes to the list of concession businesses operating within its stores at the end of each twelve-month period from the date of authorisation, if granted.
- 3.4 The types of promotions in which concession businesses will be invited to participate include:
  - sales during which a certain percentage discount is offered off a particular type of merchandise, or across a particular department or a whole store;
  - interest free purchase offers;
  - free gift offered with purchase;
  - free voucher offered with purchase;
  - promotions offering incentives to purchase more than one item (eg the offer of a 20% discount if two or more items of a particular type are purchased); and
  - promotions in which customers are offered additional Instant Rewards offers under the David Jones loyalty program for holders of its store cards.
- 3.5 Concession businesses will not be required to participate in any promotions, and will decide on their participation on a promotion-by-promotion basis. Concession businesses will also be able to run their own promotions, including promotions offering a different discount or benefit.

## 4. Submissions

### Submission from David Jones

- 4.1 David Jones provided a submission in support of its application. This submission is outlined below and discussed in more detail, where relevant, in section 5 of this determination.

#### *Relevant market*

- 4.2 Although David Jones did not suggest the relevant market in which the application should be considered, it contended that it is subject to strong competition from:
- other department stores (such as Myer/Grace Bros or Target);
  - large retailers that specialise in a particular category of goods (such as Toys R Us);
  - large format, high volume retailers (such as Harvey Norman);
  - other general merchandise retailers; and
  - specialist and boutique stores offering products such as fashion, homewares, books, gifts and sporting goods.

#### *Public benefits*

- 4.3 David Jones submitted that the conduct for which authorisation is sought is likely to:
- increase competition, encouraging concession businesses to make more attractive offers to consumers in terms of price and other benefits;
  - reduce the need for exclusions in relation to promotions advertised as storewide or department-wide, thereby simplifying promotions and making them more attractive to consumers;
  - encourage competitors to discount in order to compete more vigorously against David Jones and its concession businesses; and
  - provide consumers with access to lower prices from concession businesses, and to a broader range of discounted products than would otherwise be the case.

#### *Public detriment*

- 4.4 David Jones submitted that the conduct for which authorisation is sought would not result in any detriment to the public, as it:
- would not involve an agreement between David Jones and any concession business as to the price of a product, merely as to the level of discount or other benefit; and

- would enhance competition as outlined above.

### **Submissions from interested parties**

- 4.5 The Commission sought submissions from a wide range of interested parties (including the concession businesses that would be invited to participate in the conduct, if authorised) in relation to the application for authorisation and the public benefit and public detriment claims made by David Jones.
- 4.6 The Commission received one submission from a party that wished to remain anonymous. The text of this submission, with the identifying details removed, has been placed on the Commission's Public Register. No other submissions were received.
- 4.7 This submission did not oppose the application. However, it contended that a possible result of the conduct for which authorisation is sought may be that customers are misled as to the extent of discounts or other promotions (if, for example, some businesses did not choose to participate but the promotions were advertised as being 'storewide' or 'department-wide').

### **David Jones' response**

- 4.8 David Jones responded to the submission on 21 October 2003.
- 4.9 David Jones contended that if it were able to invite concession businesses to participate in promotions, the need for exclusions in relation to promotions advertised as storewide or department-wide would be reduced, not removed. Further, David Jones stated that it would be very careful not to advertise promotions as being 'department-wide' or 'storewide' if such descriptions would be misleading in all the circumstances.

### **Following the draft decision**

- 4.10 Following the release of its draft decision, the Commission informed interested parties that they could request a pre-decision conference. No such conference was requested. The Commission also invited interested parties to make submissions on the draft decision. No such submissions were received.

## 5. Commission evaluation

5.1 The Commission's evaluation of the application is in accordance with the statutory test 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 public detriment generated by the proposed arrangements, the Commission applies the 'future with-and-without test' that was first established by the Australian Competition Tribunal.<sup>4</sup> 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, the conduct for which authorisation is sought could breach the TPA. As a result, the Commission considers that concession businesses would be likely to be excluded from discount promotions run by David Jones were authorisation not granted.

### The relevant market

5.4 The Commission uses market analysis to identify and measure the public benefits and public 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 Although David Jones did not make a submission identifying the relevant market in which the proposed conduct should be considered, it submitted that it was subject to strong competition from a range of retailers.

5.7 The Commission notes that while some consumers may prefer to shop in department stores rather than other retail outlets for reasons of convenience, 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.

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<sup>4</sup> 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.
- 5.9 In this instance, the Commission does not consider it necessary to define the relevant market(s) comprehensively, as it considers that a net public benefit will arise from the proposed conduct regardless of the definition.
- 5.10 The Commission has not received any evidence to suggest that these markets are not currently subject to competitive forces.

### **Effect on competition**

- 5.11 Authorisation is sought for David Jones to invite concession businesses operating within its stores to participate in promotions such as storewide or department-wide discounts. David Jones and its concession businesses could be termed as competitors.
- 5.12 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 caused by such agreements will depend on the circumstances of each case.

### *Commission evaluation*

- 5.13 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;
  - concession businesses are not forced to participate, but will be able to choose to accept David Jones' invitation on a promotion-by-promotion basis;
  - concession businesses remain free to run their own promotions, including discounts, independently of David Jones.
- 5.14 The Commission considers that the public detriment likely to flow from the proposed arrangements is limited by the fact that there is no provision for agreements on price or other terms and conditions between David Jones and concession businesses. The proposed arrangements are limited to an agreement on the benefit offered to consumers.

- 5.15 The Commission considers that the public detriment of the proposed arrangements is further limited by the fact that participation in any promotion is voluntary, and concession businesses will be able to choose whether or not to participate as each promotion arises.
- 5.16 In addition, concession businesses will still be able to run their own promotions (including promotions that offer greater benefits than those offered through the David Jones promotion), either concurrently with David Jones promotions or at other times.
- 5.17 It could be argued that the invitation to participate in David Jones promotions may discourage competition on promotional benefits between David Jones and its concession businesses. However, the Commission considers that those concession business currently offering benefits lower than those offered by David Jones promotions may consider joining David Jones promotions and so the level of benefits they offer is likely to increase.
- 5.18 Further, the Commission considers that those concession businesses that currently, or in the future choose to, match or exceed the level of benefits offered by David Jones, are unlikely to become reliant on David Jones promotions as the primary or sole means of promoting their brand. The Commission therefore considers that those businesses are likely to continue to offer benefits greater than those offered by David Jones in its promotions.
- 5.19 Accordingly, the Commission concludes that competition on promotional benefits between David Jones and its concession businesses is unlikely to be significantly affected, and that consumers are not likely to be offered lesser benefits and may, in fact, be offered greater benefits.
- 5.20 Finally, if it appeared to the Commission that the promotional benefits offered by David Jones in conjunction with its concession businesses were less significant than they are now, the Commission would consider this to be a material change of circumstances which may trigger revocation of the authorisation pursuant to section 91B of the TPA.
- 5.21 The Commission also considers that the proposed arrangements will make David Jones stores' promotions more competitive with other those of other stores. While the Commission has received no information to suggest that David Jones, its concession businesses, or the retail markets in which they operate, are not already highly competitive, extending David Jones's current promotions to include its concession businesses could be expected to further promote price competition within these markets, and in particular between David Jones and other department stores.

### *Conclusion*

- 5.22 The Commission considers that any agreement between David Jones and its concession businesses on the promotional benefits offered to customers (be it a percentage discount 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 public detriment.

- 5.23 The Commission does not consider that the arrangements will unduly inhibit competition (on price or other terms) between David Jones and its concession businesses.
- 5.24 The Commission also accepts that the proposed arrangements are likely to increase price competition between David Jones and its competitors, in particular other department stores.

## **Public benefits**

### *Commission evaluation*

- 5.25 The Commission has examined the public benefit claims made by David Jones, as outlined below.

#### Increased competition

- 5.26 David Jones submitted that the proposed arrangements would increase competition by encouraging concession businesses to make more attractive offers to consumers.
- 5.27 The Commission considers that promotions organised by David Jones may involve more attractive benefits (such as larger discounts), and notes that concession businesses would also be able to offer their own discounts over and above the level suggested by David Jones if they so wished. The Commission considers that the outcome of the proposed arrangements is likely to be that concession businesses compete with David Jones and other competitors by offering more attractive benefits to consumers, and that this constitutes a public benefit.

#### Discounts to consumers

- 5.28 David Jones submitted that the proposed arrangements would be likely to provide a broader range of discounts to consumers, and that its competitors would also be likely to offer discounts to consumers in order to compete more vigorously with David Jones and its concession businesses.
- 5.29 The Commission considers that concession businesses are likely to benefit from participation in the proposed arrangements through increased exposure of their brands (including through inclusion in sale catalogues and other advertising, and through an increased ability to offer non price-promotions such as the offer of David Jones Instant Rewards).
- 5.30 Concession businesses are likely to wish to avail themselves of these benefits. In this respect the Commission also notes that no concession business has indicated to the Commission that it opposes the proposed arrangements.
- 5.31 On this basis, the Commission considers that a significant number of concession businesses are likely to participate in the proposed arrangements. Given the

large number of David Jones 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 David Jones promotions.

- 5.32 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.
- 5.33 David Jones also submitted that the proposed arrangements are likely to encourage David Jones' competitors to offer discounts to consumers. The Commission considers that the proposed arrangements are likely to increase price competition between David Jones and its competitors, in particular other department stores, which would also result in reduced prices to consumers.
- 5.34 To the extent that the proposed arrangements will result in reduced prices or other benefits to consumers, the Commission considers this to be a public benefit.

#### Reducing the need for exclusions

- 5.35 David Jones submitted that the proposed conduct would reduce the need for exclusions in relation to promotions that are advertised as storewide or department-wide, thereby simplifying promotions and making them more attractive to consumers.
- 5.36 One interested party raised a concern that a possible result of the conduct for which authorisation is sought may be that customers are misled as to the extent of discounts or other promotions (if, for example, some businesses did not choose to participate but the promotions were advertised as being 'storewide' or 'department-wide').
- 5.37 The Commission notes that the immunity provided by authorisation, if granted, does not extend to Part V of the TPA (which includes provisions prohibiting misleading or deceptive conduct). Advertisements that infringe Part V of the TPA (for example, by misleading consumers as to the existence of exclusions in relation to promotions) will still be actionable by the Commission or third parties.
- 5.38 Accordingly, the Commission considers that this concern is addressed by the operation of the law, and expects that David Jones will take care to ensure that its advertisements do not contravene the TPA in this or any other respect.
- 5.39 The Commission considers that, to the extent that the proposed arrangements reduce the number of exclusions that attach to David Jones promotions, a public benefit is generated. However, the Commission considers this public benefit to be small.

## *Conclusion*

5.40 For the reasons outlined above, 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 a broader range of discounts and other benefits being made available to consumers across Australia.

### **Balance of public benefit and public detriment**

5.41 The Commission considers the public detriment of the arrangements is limited. The Commission does not consider that the arrangements will unduly inhibit competition (on price or other terms) between David Jones and its concession businesses.

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

5.43 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 a broader range of discounts being made available to consumers across Australia.

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

5.45 The Commission concludes that the public benefits likely to result from the arrangements will outweigh the public detriment. Accordingly, the Commission **grants** authorisation subject to a five-year time limit.

5.46 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 to the market environment as it develops.

5.47 In addition, the Commission may review the authorisation, prior to the expiry of the authorisation, if, for example, there has been a material change of circumstances since the authorisation was granted.

5.48 The interim authorisation that was granted by the Commission on 24 September 2003 will continue until the Commission's final decision takes effect.

## 6. Determination

### The Application

- 6.1 On 19 August 2003, David Jones Limited (David Jones) lodged application for authorisation No A30230 with the Australian Competition and Consumer Commission (the Commission).
- 6.2 The application was made under section 88(1) of the *Trade Practices Act 1974* (the TPA) for authorisation to make and give effect to a contract or arrangement, or arrive at an 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 (Form B, Trade Practices Regulations 1974).
- 6.3 David Jones sought authorisation to invite retail brand management businesses operating within its stores to participate in certain promotions.
- 6.4 The application was expressed as applying to all current and future David Jones concession businesses, pursuant to section 88 (10) of the TPA. The application was also expressed as being in relation to other agreements in similar terms pursuant to section 88 (13) of the TPA.

### Statutory test

- 6.5 For the reasons outlined in this determination, the Commission is satisfied that in all the circumstances the making of and 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.

### Determination

- 6.6 The Commission **grants** authorisation to application A30230. Authorisation is granted for a period of 5 years.

### *Conduct that is authorised*

- 6.7 David Jones is authorised to invite its concession businesses to participate in David Jones promotions and to include its concession businesses in those promotions in which the concession businesses elect to participate. These promotions may include the offer of discounts or other benefits to consumers.
- 6.8 David Jones is authorised to extend the invitation to participate in promotions to concession business on an individual basis, in relation to individual promotions.

*Conduct that is not authorised*

- 6.9 This authorisation is in relation to the level of discount, benefit or promotion offered to consumers, and does not extend to any agreement between David Jones and its concession businesses as to other pricing issues.
- 6.10 David Jones is not authorised to require its concession businesses to participate in promotions, or to prevent or restrict its concession businesses from running their own promotions instead of or in addition to David Jones promotions.

*Conclusion*

- 6.11 The interim authorisation granted by the Commission on 24 September 2003 will continue until this determination takes effect.
- 6.12 This determination is made on 17 December 2003. If no application for review of the determination is made to the Australian Competition Tribunal, it will come into force on 8 January 2004. 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.

## **Appendix A - Concession businesses currently operating in David Jones stores**

David Jones provided the following list of concession businesses currently operating within its stores.

Barossa Fine Foods  
Bills Bakery & Patisserie  
Bonbons at the Glen  
Bottom of the Harbour  
Bouchier's Meats  
Browns Bakery  
Casey's Fruit & Veg  
Castle Towers Restaurant  
Cellarmasters  
Cookie Man  
Costi at David Jones  
Eurest  
Feeling Fruity  
Jarmer's Restaurant  
Mondo Di Carne  
Prime Quality Meats  
Quality Cut Meats  
Santos Tea & Coffee  
Sealanes  
Tavale  
Top Fruit  
Anthea Crawford  
Sportscraft  
Carla Zampatti  
Covers Designs  
Colette Dinnigan  
David Lawrence  
Esprit  
George Gross and Harry Who  
Maria Finlay  
Max Mara  
Marcs  
Perri Cutten  
Simona  
Table Eight  
Trent Nathan  
Anthony Squires  
Marcs  
Polo Ralph Lauren  
One Stop School Shop  
Moray Hats  
Mecca  
Nail Spa  
Alessi  
Australian Craft Galleries  
Bang & Olufsen  
Florist-Gleedon  
Florist – YS  
Hali  
Ordai Australia

Royal Doulton Shops  
Royal Scandinavia  
Sheridan Australia  
Special Light Fittings  
Stuart Waterford Wedgwood  
Villeroy & Boch  
Whitehill Silver & Plate Co  
Men's Hairdressing Salon  
Di Fabio Brothers  
Maurice Mead Hairdressers  
Milma