



**Australian
Competition &
Consumer
Commission**

Determination

Application for Authorisation

lodged by

Hugo Boss Australia Pty Ltd

in respect of

**Agreement between Hugo Boss Australia Pty Ltd
and David Jones Limited.**

Date: 20 June 2002

Application: A90809

File: C2001/ 1605

Commissioners:

**Fels
Bhojani
Jones**

Summary

On 12 November 2001, application A90809 was lodged with the Australian Competition and Consumer Commission ("the Commission") by Hugo Boss Australia Pty Ltd ("Hugo Boss") for authorisation of an agreement with David Jones Limited ("David Jones") under section 88(1) of the *Trade Practices Act 1974* ("the Act"). Application A90809 is made for the making and giving effect to a contract or arrangement, or arriving at an understanding, where a provision of the proposed contract, arrangement or understanding is, or may be, an exclusionary provision within the meaning of section 45 of the Act.

The application relates to an agreement between Hugo Boss and David Jones to grant David Jones limited exclusive rights to stock certain products within the Hugo Boss range. In consideration for these limited exclusive rights, David Jones undertakes to construct and fit out "shop in shop" Hugo Boss outlets within David Jones Stores to Hugo Boss' fitout specifications and employ specialist staff to sell Hugo Boss products.

On 27 March 2002, the Commission issued a draft determination proposing to grant authorisation to the proposed agreement for a period of five years and distributed it to interested parties, including department stores, specialist retailers and competitors of Hugo Boss, inviting their comment. The Commission received one submission, which supported the draft determination.

On 27 February 2002 Hugo Boss AG announced its intention to acquire all remaining shares in Hugo Boss. Following the announcement, Hugo Boss requested that the Commission defer its final determination to enable Hugo Boss to consider its position. On 7 June 2002, Hugo Boss AG confirmed its intention to seek authorisation of the agreement and that it intends to continue operating the Preston factory outlet.

The proposed agreement is primarily a vertical arrangement between a supplier and a retailer. However, the proposed agreement may also constitute an agreement between competitors because Hugo Boss is owner of a factory outlet in Preston which sells Hugo Boss goods potentially in competition with David Jones. For this reason, the proposal may constitute an exclusionary provision in breach of the Act.

The Commission considered that the proposed agreement will have only a negligible effect on competition in the relevant market, as all retailers maintain access to the product lines to which they are accustomed, competition between David Jones and the Preston factory outlet is minimal, and Hugo Boss is only one of a large number of suppliers of premium mens and womens apparel and accessories. The proposed agreement may to a limited extent promote competition between brands and between retailers.

The Commission therefore concluded that the public benefits likely to result from the proposed agreement would outweigh any anti-competitive detriment that may arise and the proposed arrangement should be allowed to be made. Accordingly, the Commission grants authorisation for a period of five years.

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1. Introduction

1.1 On 12 November 2001, application A90809 was lodged with the Australian Competition and Consumer Commission ("the Commission") by Hugo Boss Australia Pty Ltd ("Hugo Boss") for authorisation of an agreement with David Jones Limited ("David Jones") under section 88(1) of the *Trade Practices Act 1974* ("the Act"). Application A90809 is made for the making and giving effect to a contract or arrangement, or arriving at an understanding, where a provision of the proposed contract, arrangement or understanding is, or may be, an exclusionary provision within the meaning of section 45 of the Act.

1.2 Generally speaking, exclusionary provisions are provisions of a contract, arrangement or understanding between two or more competitors which give rise to a boycott of some other person or class of persons. Exclusionary provisions are per se breaches of the Act. That is to say, they breach the Act irrespective of their actual effect on competition.

1.3 The application relates to an agreement between Hugo Boss and David Jones to grant David Jones limited exclusive rights to stock certain identified products within the Hugo Boss range. In consideration for these limited exclusive rights, David Jones undertakes to construct and fit out "shop in shop" Hugo Boss outlets within David Jones stores to Hugo Boss' fitout specifications. Further, David Jones will commit to a purchase plan and employ specialist staff to sell Hugo Boss products from the Hugo Boss "shop in shop" outlets.

1.4 The proposed agreement would have an initial term of five years plus options thereafter.

1.5 Hugo Boss also sells some of its merchandise from a factory outlet situated at its Preston showroom and run by Flair Menswear Pty Ltd ("Flair"). This factory outlet sells Hugo Boss and Flair merchandise, is staffed by Flair, selling Hugo Boss products on consignment. Hugo Boss pays Flair a portion of the running costs of the factory outlet. The Preston outlet sells to Hugo Boss and Flair staff, to VIP customers who include executives and their clients and other persons with whom they deal on a regular basis. Members of the public who are aware of the existence of the factory outlet may also be customers.

1.6 The Preston outlet does not carry a full range of Hugo Boss merchandise. Rather, its product range includes samples, garments previously worn by models at fashion shows or as part of photographic shoots, and returned and out of season stock.

1.7 The proposed agreement is primarily a vertical arrangement between a supplier and a retailer. However, the proposed agreement may also constitute an agreement between competitors because Hugo Boss is owner of the Preston factory outlet which sells Hugo Boss goods potentially in competition with David Jones.

1.8 For this reason the applicant is concerned that the existence of sales by Hugo Boss from the factory outlet may result in the proposed agreement between David Jones and Hugo Boss constituting an exclusionary provision in breach of the Act.

1.9 Hugo Boss AG has exercised an option to purchase the Flair Group shareholding of Hugo Boss. Whilst, as a result of the purchase, Hugo Boss has become a wholly owned subsidiary of Hugo Boss AG, Hugo Boss AG advise that they intend to continue with the proposed arrangement with David Jones and continue operating the Preston factory outlet. As such, the purchase does not affect the relationship between the proposed arrangement and the competition provisions of the Act.

1.10 Hugo Boss requested confidentiality for some aspects of its application on the grounds of commercial sensitivity. The Commission granted this request on 27 November 2001 with regard to market share and sales percentage figures.

2. The applicant

2.1 Hugo Boss Australia is a wholly owned subsidiary of Hugo Boss AG.

2.2 Hugo Boss is principally engaged in the supply of menswear and presently a small range of womenswear in the premium end of the clothing market. This takes the form of the manufacture and importation of tailored clothing. Hugo Boss wholesales its products in Australia to Boss shops stocking exclusively Hugo Boss merchandise (such shops being owned and operated by third parties unrelated to Hugo Boss), department stores and menswear stores Australia wide. Hugo Boss does not supply its stock to discount department stores or menswear outlets stocking merchandise for the cheaper end of the market.

2.3 The Hugo Boss range is broken up into a number of categories of merchandise. These categories are listed at **attachment A** and include Hugo Boss Black, Orange and Red label products.

3. The agreement

3.1 The agreement relates to a proposal that Hugo Boss supply certain products to David Jones exclusively, and not to Myer Grace Bros, Harris Scarfe or other discount department stores. The items the subject of this proposal comprise items in the Black Label, Orange Label, Red Label and Boss Women, and are detailed in **attachment B**. In return for this exclusivity, David Jones undertakes to construct and staff "shop in shop" Hugo Boss outlets.

3.2 Hugo Boss submits that the items which it proposes to supply to David Jones to the exclusion of other department stores all represent items which Myer Grace Bros has chosen not to order for either its winter 2001 or summer 2002 seasons. Hugo Boss advises that Harris Scarfe and the other discount department stores have never ordered any of these items.

3.3 Hugo Boss advises that all items which Myer Grace Bros has ordered for the winter 2001 and summer 2002 seasons are excluded from the proposed agreement. The greatest percentage of Hugo Boss merchandise presently sold are Black Label suits, trousers and jackets. Myer Grace Bros presently orders these items and nothing in the

proposed agreement will preclude the ability of Myer Grace Bros or other Hugo Boss customers from continuing to order these items.

3.4 Hugo Boss also advises that Myer Grace Bros has not ordered Hugo Boss footwear for approximately five years. They have also not ordered Hugo Boss bodywear for approximately two years. Similarly, they have not ordered Hugo Boss Orange Label products for one year.

3.5 Hugo Boss further advises that neither Harris Scarfe nor any other discount department store have ever purchased Hugo Boss merchandise from Hugo Boss. Hugo Boss submits that due to the clientele these stores target and the expensive fit-out and display requirements required to gain approval to sell Hugo Boss merchandise, it is unlikely that these stores would be interested in Hugo Boss merchandise.

Shop in Shop concept

3.6 The “shop in shop” concept involves department stores setting aside space for the display of particular product brands in particular areas specifically designed and constructed to display those particular brands of merchandise. It is regularly used for the display of clothing in large department stores. This form of display is used to highlight the quality and impact of presentation of particular brands. Hugo Boss submits that the agreement with David Jones will similarly highlight the quality and impact of the Hugo Boss label. Currently other premium menswear brands such as Armani are displayed in “shop in shop” outlets at David Jones and Jag Menswear is displayed in this way at Myer Grace Bros stores.

4. The statutory test

4.1 Application A90809 was made under subsection 88(1) of the Act concerning an arrangement that may be an exclusionary provision. The Act provides that the Commission shall only grant authorisation if the applicant satisfies the relevant test in subsection 90(8) of the Act.

4.2 Subsection 90(8) provides that the Commission may only grant authorisation if it is satisfied in all the circumstances that the proposed provision would result, or be likely to result, in such a benefit to the public that the proposed contract or arrangement should be allowed to be made.

4.3 In practice, as required by the statutory test, it is necessary for the Commission to assess the likely public benefit and detriment, including the effects on competition, resulting from the proposed agreement, to determine which is the greater.

4.4 Should the public benefits or expected public benefits outweigh the anti-competitive detriment, the Commission may grant authorisation or grant authorisation subject to conditions.

5. Applicant's submission

5.1 In its submission Hugo Boss noted that the proposed agreement with David Jones might technically constitute an exclusionary provision in breach of the Act but only because of the small volume of sales of Hugo Boss merchandise through the Preston factory outlet and, so far as it may be construed as a boycott, is a boycott in form only rather than substance.

Competitive effects and public benefit

5.2 Hugo Boss is of the view that to the extent that there is competition between the Preston outlet and David Jones nationally it is minimal and, as such, the agreement will not have a significant detrimental effect on the competitive structure of the relevant clothing markets.

5.3 Hugo Boss submits that the increased exposure of its brand in David Jones stores enabled through the agreement will enhance competition between Hugo Boss and other manufacturers of premium menswear, particularly those who utilise the "shop in shop" marketing strategy such as David Jones and Myer Grace Bros. In the future, this would also extend to womenswear.

5.4 Hugo Boss further submits that the proposal will enhance intra-brand competition between David Jones and specialist retail outlets selling Hugo Boss menswear and womenswear. These specialist retail outlets will continue to be able to stock the full range of Hugo Boss merchandise.

5.5 Further, the differentiation in presentation of Hugo Boss merchandise between David Jones and Myer Grace Bros is submitted by Hugo Boss to promote competition between these two department stores.

5.6 Hugo Boss is also of the view that the proposed agreement provides benefits to David Jones and Hugo Boss. Hugo Boss gains a substantial investment in the presentation of its brand and in increased David Jones purchase commitments. In turn, David Jones achieves some limited exclusivity in respect of part of the Hugo Boss range as against Myer Grace Bros. However, Hugo Boss notes that this exclusivity is in relation to products Myer Grace Bros presently does not purchase.

5.7 Hugo Boss also submits that a public benefit will flow from the pro-competitive benefits identified above. Hugo Boss is of the view that the proposed agreement will assist its move to enter the womenswear market as a significant supplier, and thus increase competition in that market in a way that would not otherwise be possible.

Relevant Markets

5.8 Hugo Boss initially submitted that the relevant markets are the markets for the retail supply of premium menswear and womenswear.

5.9 The major competitors in the premium menswear market include: Zegna; Armani; Gant; Polo; Country Road; Versace; Valentino; Feraud; Durban; Corneliani and Cerruti.

5.10 No information was provided as to competitors in the premium womenswear market.

5.11 Hugo Boss also initially submitted that the premium menswear and womenswear markets have extremely low barriers to entry. There are a large range of outlets stocking both mens and womens clothing and accessories. Retail outlets stocking such products include large department stores such as Myer Grace Bros, David Jones and Daimaru.

5.12 In its letter of 7 June 2002 Hugo Boss AG advised that it is of the view that the relevant market for consideration is the broader clothing market in Australia.

6. Interested parties

6.1 On 4 December 2001 the Commission sought comments from 16 interested parties regarding the Hugo Boss application for authorisation. The interested parties contacted included department stores, competitors of Hugo Boss, and menswear retail stores. Responses were received from Coles Myer Limited and Daimaru.

6.2 Neither Coles Myer nor Daimaru raised concerns with the proposed agreement. However, in its submission Coles Myer put the view that should the arrangement extend to Black Label merchandise other than that specifically mentioned in the application it, and particularly its Myer Grace Bros business, would be extremely concerned about the effect on competition as Myer Grace Bros stocks Black Label merchandise.

7. Draft Determination

7.1 On 27 March 2002 the Commission issued a draft determination proposing to grant authorisation to the agreement between Hugo Boss and David Jones for a period of five years. The draft determination was distributed to interested parties, including department stores, specialist retailers and competitors of Hugo Boss, inviting their comment.

7.2 In response to the draft determination the Commission received one submission. In that submission, Coles Myer noted that the Commission had considered their concern about the effect on competition should the exclusive arrangement extend to Black Label merchandise other than that specifically mentioned in the application. On that basis they did not propose to make any further submissions regarding the application.

7.3 No submissions were received from other interested parties regarding the draft determination.

7.4 On 27 February 2002 Hugo Boss AG announced its intention to acquire all remaining shares in Hugo Boss. Following the announcement, Hugo Boss requested that the Commission defer its final determination to enable Hugo Boss to consider its position. On 7 June 2002, Hugo Boss AG confirmed its intention to seek authorisation of the agreement and that it intends to continue operating the Preston factory outlet. Further, Hugo Boss AG also submitted that Hugo Boss operates in a wider market, being the market in Australia for clothing.

8. Commission evaluation

8.1 The Commission's consideration of the application is made in accordance with the statutory test outlined in section 4 of this determination.

8.2 As required by the statutory test, it is necessary for the Commission to assess the likely public benefit and detriment, including the effects on competition, resulting from the proposed agreement.

8.3 The proposed agreement is primarily a vertical arrangement between a supplier and a retailer. It should be noted that, in general, the Commission accepts that businesses may decide for themselves with whom they wish to deal subject, of course, to the competition provisions of the Act.

8.4 However, the proposed agreement may also constitute an agreement between competitors because Hugo Boss is owner of a factory outlet in Preston which sells Hugo Boss goods potentially in competition with David Jones. For this reason the proposal may constitute an exclusionary provision in breach of the Act.

8.5 The Commission notes that the basis upon which authorisation has been sought by Hugo Boss has not changed with the buy-out of Hugo Boss Australia by Hugo Boss AG as Hugo Boss intends to continue operating the Preston factory outlet.

8.6 The Commission is required to assess the anti-competitive detriment in the context of the relevant markets. The applicant initially suggested that the relevant markets were those for premium menswear and womenswear in Australia, subsequently advising that the relevant market for consideration should rather be the broader clothing market in Australia. As described below, the Commission does not need to decide definitively the boundaries of the relevant market for consideration given that the anti-competitive detriment is negligible in either a broad or narrow view of the market.

Anti-competitive Detriments

8.7 The Commission considers that the proposed agreement between Hugo Boss and David Jones for limited product exclusivity may have some small effect on competition by removing the ability of Myer Grace Bros and others to have access to those items for resale.

8.8 The Commission, however, is of the view that this effect on competition is likely to be negligible. This is because Myer Grace Bros maintains the ability to stock all of the product lines they have sourced previously, and premium menswear outlets will maintain access to the full range of Hugo Boss merchandise. In addition, Hugo Boss is only one of a large number of suppliers of premium mens and womens apparel and accessories. As such the agreement will have a negligible effect on the structure of competition.

8.9 The Commission also notes that as the Preston outlet offers for sale a very limited selection of Hugo Boss merchandise, the resulting competition between the Preston outlet and David Jones is therefore insubstantial.

8.10 The Commission further notes that Hugo Boss AG suggests a wider market, being the market for clothing in Australia. Given that a net public benefit is evident in the premium menswear and womenswear markets, this net public benefit will also be realised in a wider clothing market in Australia. It is therefore not necessary for the purposes of this determination to decide in which of the submitted markets Hugo Boss operates.

Public Benefits

8.11 The Commission considers that the proposed agreement may enhance competition to a limited extent. For example, the Commission considers that the proposed agreement may promote intra-brand competition by enabling David Jones to compete more effectively both with other department stores and specialist retailers on the service and presentation of Hugo Boss products. That is, competition in the sale of Hugo Boss products between different retailers may be increased.

8.12 Further, the Commission is also of the view that the proposed agreement may promote inter-brand competition. The increased exposure of the Hugo Boss brand through the agreement is likely to enhance competition between Hugo Boss and other manufacturers of premium menswear.

8.13 The Commission is of the view that some of the benefits claimed by the Applicant to be derived from the proposed agreement are not public benefits within the test outlined in section 4 of this determination. The claimed benefit Hugo Boss receives from increased purchase commitments from David Jones and the claimed benefit David Jones receives from limited exclusive rights to stock the Hugo Boss product range, particularly as against Myer Grace Bros, appear to be benefits derived only by the parties to the proposed agreement.

Conclusion

8.14 On balance, after considering the submission made by Hugo Boss, the Commission considers that the proposed arrangements are likely to result in such a benefit to the public that the proposed arrangement should be allowed to be made.

Term of Authorisation

8.15 The Commission grants authorisation for a period of five years. This will allow the proposed agreement to be made and run for its initial course.

8.16 Following this time, should Hugo Boss or David Jones wish to retain the benefits of authorisation in respect of the agreement, a fresh application for authorisation would need to be considered by the Commission. Should the parties wish to amend or vary the agreement before this time, and maintain the benefits of authorisation, they may have recourse to revocation and substitution or minor variation of the authorisation in accordance with sections 91A and 91C of the Act.

9. Determination

9.1 For the reasons set out in section 8 of this determination, the Commission is satisfied that the proposed conduct for which authorisation is sought is likely to result in such a benefit to the public that the arrangement should be allowed to be made and entered into.

9.2 The Commission therefore grants authorisation to the proposed agreement by Hugo Boss in application A90809.

9.3 The authorisation the Commission proposes to grant will be for a period of five years.

9.4 This authorisation extends only to provide immunity from the exclusionary provisions of the Act for the conduct for which authorisation is sought. The immunity gained from this authorisation does not extend to the application of the other competition provisions of the Act, particularly the exclusive dealing provisions.

9.5 This determination is made on 20 June 2002. If no application for a review is made to the Australian Competition Tribunal, it will come into effect on 12 July 2002. If an application for review is made to the Tribunal, the determination will come into effect:

- where the application is not withdrawn – on the day on which the Tribunal makes a determination on the review;
- where the application is withdrawn – on the day on which the application is withdrawn.

ATTACHMENT A

Hugo Boss range

Black Label Menswear	<p>this category comprises a broad range of products, in particular:</p> <ul style="list-style-type: none">- suits- jackets- trousers- shirts- ties- knits- leather items- jeans- dressing gowns- underwear- nightwear- socks- footwear- accessories- swimwear
Orange Label	<p>This category comprises similar items to those in the Black Label range but caters for a younger and more sporty look.</p>
Red Label	<p>This category comprises the labels 'Hugo Man' and 'Hugo Woman'. The items are similar to those in the Black Label range but also include a range of womenswear and accessories. These cater to a younger and more fashion conscious segment of the market.</p>
Baldessarini	<p>This is a complete collection comprising all categories of the most expensive clothing supplied by Hugo Boss.</p>
Golf Clothing	<p>This category is primarily golf shirts and trousers, also including other golfing clothing, shoes and golfing accessories.</p>
Boss Women	<p>This category is due to be released for the Winter 2003 season (commencing November/ December 2002) and comprises a complete collection of womenswear and accessories.</p>

ATTACHMENT B

Products subject to the agreement

- | | |
|------------------|---|
| (a) Black Label | (i) dressing gowns;
(ii) underwear
(iii) nightware;
(iv) socks;
(v) footwear;
(vi) accessories; and
(vii) swimwear. |
| (b) Orange Label | all items. |
| (c) Red Label | all items. |
| (d) Boss Women | all items. |