

**Coles Myer Ltd.**

ABN 11 004 080 936

Legal Services Group

Telephone: 61 3 982 96603

Facsimile: 61 3 982 95906

Richard.Dammerly@colesmyer.com.au

29 September 2006

The General Manager
Adjudication Branch
The Australian Competition and Consumer Commission
PO Box 1199
DICKSON ACT 2602

Attention: Ms Joanne Palisi

By facsimile: (02) 6243 1211

Dear Ms Palisi

Review of Authorisation A6058 lodged by the South Australian Mixed Business Association Inc (SAMBA).

Thank you for your letter of 7 September 2006 inviting comment on a decision by the Australian Competition and Consumer Commission (ACCC) to review authorisation A6058 granted to the South Australian Mixed Business Association (SAMBA) by the Trade Practices Commission (TPC) on 9 April 1979.

Upon review of your letter dated 7 September and Authorisation A6058, Coles Myer Ltd (CML) is of the view Authorisation A6058 should be revoked. At the outset we would like to note that (CML) are responding on the basis of the information provided by the ACCC only, as we have been unable to obtain a great deal of information in relation to the members of State Retailers Associates of SA Inc (the Association) and its predecessor SAMBA, the content of the price guide, and its effective presence in the market. Our reasons for submitting that Authorisation A6058 should be revoked are set out below:

1. Authorisation A6058 – Material Change

CML agrees with the material changes of circumstances identified by the ACCC listed in the Notice pursuant to section 91B(3) being:

- Increased access to information as a result of advances in technology;

800 Toorak Road Tooronga Victoria 3146 Australia. PO Box 2000 Glen Iris Victoria 3146

Telephone (03) 9829 3111 Facsimile (03) 9829 6787

Internet www.colesmyer.com.au

- changes to the composition of small business and membership of the Association; and
- changes to the regulatory environment, including changes to retail trading hours and the Trade Practices Act (TPA).

In conjunction with these above listed material changes, CML also believe the following are important supplementary considerations to support our submission that a "material change in circumstances" has occurred in the 27 years since Authorisation A6058 was granted:

(i) **Increase in accessible data**

Technological advances have meant that collating information (including publicly available prices of competitors) is significantly easier than that which existed in 1979. Indeed companies such as AC Nielsen are centred on the collation and redistribution of data to businesses to assist in this process. Publications such as Retail World and Convenience World provide trends, key categories and products.

Given that all suppliers regularly distribute a Recommended Retail Price (RRP) list to their retailers, it would appear all businesses are now well equipped with the necessary information to compete in the marketplace without the circulation of a price guide.

(ii) **Increased distortion of prices in the marketplace**

CML spend significant sums of money monitoring prices to remain competitive in the relevant markets. This has significant public benefit in ensuring our customers can obtain competitively priced goods and services in all areas of Australia.

The circulation of the price guide to members not only affords a competitive advantage to the Association in the marketplace, but has the disadvantage of distorting prices for the public. In a perfectly competitive marketplace with a large number of suppliers (such as the retail and convenience sectors) prices should be set according to demand and supply. Given the large (and increasing) membership of the Association this distorts prices which would require other retailers and convenience store owners to align their prices with those already in existence in the marketplace to remain competitive.

(iii) **Composition of membership of the Association**

The composition of the Association has clearly changed since 1979 and with amendments such as removal of 20 employee limit, it would appear the Association is now servicing different needs, and businesses, to that which Authorisation A6058 was originally designed to assist.

At the time the Authorisation was granted by the TPC, the public detriment was minimal when compared to the public benefit of assisting mainly family operated businesses. As the Association has evolved, the drivers of the Association has changed and the focus of the assistance they now provide. The Authorisation was granted on the basis of the drivers and rules of the Association at the time. As these have evolved and changed the public detriment has increased at the expense of the public benefit.

No longer would it be in the public benefit to allow such a price guide to be circulated which would otherwise amount to a clear contravention of the TPA. The public benefit has decreased in direct correlation with the increase in size of the businesses and the significant change in the nature and composition of the Association's membership.

We believe the three changes listed by the ACCC, and the above supplementary considerations, are of a kind and of such magnitude as to warrant revocation of Authorisation A6058.

2. Public Benefit v Public Detriment.

For a change to be considered material in order to revoke an authorisation, the change in circumstances listed above must constitute a *material* detrimental change in the balance of public benefits against detriments caused by any lessening of competition.

CML submit that the price guide significantly lessens competition in relation to the pricing of goods and services. This is primarily because the initial determination by the TPC on 6 March 1979 states that the Association "compete more by way of convenience, service and after hours trading than on price" and hence why significant public benefit can be gained from the Authorisation.

However, with the introduction of increased retail hours across Australia, the increase in number of convenience stores and enhanced focus on customer service at all levels of retail, price is indeed the basis on which the majority of retailers compete. Therefore whilst the Authorisation has resulted in further detriment caused by the lessening of competition and membership increases, this has seen no incremental increase in public benefit. Rather it would appear that the Authorisation is no longer serving the needs, or the public benefit for which this was granted.

Whilst we understand that when assessing whether to revoke an authorisation currently in place, it is not the legal test to consider whether the same Authorisation would be granted if applied for in 2006, we nonetheless consider it significant that an authorisation of this nature would be unlikely to be granted or considered to be in the public interest if currently assessed.

In summary if the Authorisation were allowed to stand, it is highly likely that the Association's membership, size and nature of the businesses would also increase. This would result in a further lessening of competition and public detriment as less organisations would be competing on the basis of price.

CML are of the view the anti-competitive detriment resulting from circulation of the price guide clearly outweighs the public benefit.

3. Substitute Authorisation.

In the event the ACCC were to consider revoking Authorisation A6058, CML is of the view a new authorisation should not be granted which allows a price guide to be circulated in any form. CML also submits that no variations or conditions can be made to the conduct in question which would still result in the public benefit outweighing the public detriment.

Even if the price guide were permitted by the ACCC to only be circulated to small business (for example with staff levels below 20 people) the increase in technology and amendments to the TPA capturing individuals and non-incorporated entities would mean the detriment would still outweigh the public benefit.

Thank you for allowing us this opportunity to provide our submission in relation to this review. Please contact me at any time if you would like to discuss this matter further.

Yours faithfully



Richard Dammary
General Counsel – Coles Myer Ltd

Direct Line: 03 982 96603
E-mail: Richard.Dammary@colesmyer.com.au