



Australian
Competition &
Consumer
Commission

Draft Determination

Application for revocation and substitution
of authorisation

lodged by

David Jones Limited

in respect of

David Jones' invitations to Retail Brand
Management Businesses (concession
stores) operating within its stores to
participate in certain promotions

Date: 27 February 2014

Authorisation number: A91398

Commissioners:

Sims
Rickard
Schaper
Cifuentes
Court

Summary

The ACCC proposes to grant re-authorisation to David Jones for another five years to enable David Jones to continue to invite Retail Brand Management Businesses (concession stores) operating within its stores to participate in certain promotions.

The ACCC considers that the proposed conduct is likely to satisfy the relevant public benefit tests. In reaching this conclusion, the ACCC notes that David Jones and its concession stores appear to be constrained by competition, including competition from suppliers who are independent of David Jones. The ACCC also notes that concession stores are not under any obligation to participate in promotions run by David Jones and that the ACCC has not seen any evidence to suggest that the previous authorisations have reduced the level of discounting by David Jones or concession stores.

Next steps

The ACCC will seek submissions in relation to this draft determination before making its final decision. The applicants and interested parties may also request the ACCC to hold a pre-decision conference to allow oral submissions on the draft determination.

The application for authorisation

1. On 27 November 2013 David Jones Limited (David Jones) lodged an application with the Australian Competition and Consumer Commission (the ACCC) under section 91C(1) of the *Competition and Consumer Act 2010* (the Act) for the revocation of authorisation A91113 and the substitution of authorisation A91398 for the one revoked (re-authorisation).¹
2. David Jones has previously been granted successive authorisations by the ACCC on 17 December 2003 (A30230) and 18 February 2009 (A91113).
3. David Jones also requested interim authorisation to apply from the expiry of authorisation A91113 on 12 March 2014, to enable David Jones to engage in the proposed conduct while the ACCC is considering the substantive application. Interim authorisation is granted as part of this draft determination and will remain in place until the date the ACCC's final determination comes into effect or until the ACCC decides to revoke interim authorisation.

The conduct

4. David Jones has sought authorisation under subsections 88(1) and 88(1A) for conduct which is substantially the same as that which concerned the previous authorisations. That is, David Jones seeks re-authorisation to invite retail brand management businesses (concession stores) operating within its stores to participate in certain promotions (proposed conduct). In addition, while

¹ Detailed information about the authorisation process is contained in the ACCC's Guide to Authorisation available on the ACCC's website www.accc.gov.au.

concession stores do not currently conduct sales through David Jones' online store, David Jones has defined the proposed conduct to include any such sales in the future. Authorisation has also been sought to apply to current and future concession stores as the identity and number of businesses changes from time to time.

5. David Jones submits that participation by concession stores in the proposed conduct would be voluntary and decided by each business on a promotion by promotion basis and businesses will otherwise be able to price and discount at their discretion.² Further detail and examples of promotions is set out in section 3.1 of David Jones' submission which is available on the ACCC's website.
6. David Jones sells or may sell products which compete with the products sold by concession stores, David Jones and concession stores may be considered competitors for the purpose of the Act. On this basis, any agreement or understanding between David Jones and a concession store in relation to a promotion including the level of discount or bonus offers may contravene:
 - Sections 45(2)(a)(ii) and (b)(ii), if the agreement or understanding has the purpose or would have or be likely to have the effect of substantially lessening competition; and
 - Sections 44ZZRF, 44ZZRG, 44ZZRJ and 44ZZRK, if the agreement or understanding is a cartel provision as defined in section 44ZZRD.
7. David Jones requests re-authorisation for a period of five years.

The applicant

8. David Jones operates 38 department stores in Australia comprising 15 stores in New South Wales, 7 in Victoria, 7 in Queensland, 4 in Western Australia, 3 in South Australia and 2 in the Australian Capital Territory. In addition to these stores, David Jones has a clearance outlet in New South Wales and in Queensland. David Jones' online store commenced operations in late 2012.
9. David Jones is a full line retailer meaning that it sells a wide variety of products including women's, men's and children's clothing, accessories, homewares, furniture, food, electrical appliances, and other general merchandise. David Jones also provides services including hair and beauty salons, restaurants, tailors and home decoration.³

Retail brand management businesses

10. David Jones has agreements with various suppliers of merchandise and services to enable them to operate businesses located within its stores. Such businesses are often referred to as 'concession stores' or 'stores within a store'. These agreements are either retail brand management agreements or licences.

² David Jones Limited application for revocation and substitution, submission, 25 November 2013, p.7.

³ David Jones Limited application for revocation and substitution, submission, 25 November 2013, p.8.

Authorisation has been sought in respect of all concession stores, whether they operate under a retail brand management agreement or a licence agreement.

11. David Jones submits that concession stores maintain separate inventory from David Jones, employ their own staff and set their own prices. They are often run by prestige brands that want to accentuate their brand by using special displays and specialist staff. Other examples of concession stores include those that offer services to David Jones' customers such as hair and beauty salons, restaurants, tailors and home decoration.⁴
12. The number of concession stores operating within David Jones' stores increased from 82 in 2009 to 101 in 2013. David Jones provided a list of participating concession stores at Attachment B to its application for authorisation. David Jones stated that it does not currently expect there to be any material change to the number of concession stores operating within its stores during the proposed period of authorisation.⁵

Submissions received by the ACCC

13. The ACCC tests the claims made by the applicant in support of an application for authorisation through an open and transparent public consultation process.
14. The ACCC invited submissions from around 30 interested parties potentially affected by this application, including consumer groups, retailer associations, small business representatives and government agencies. No submissions were received, other than from the applicant.
15. Broadly, David Jones submits that the proposed conduct will not result in any public detriment but will enhance competition in the relevant markets by encouraging concession stores to make more attractive offers to consumers in terms of price and other benefits. David Jones also submits that consumers will have the convenience of shopping at David Jones during a promotion and having a broader range of discounted products available than would otherwise be the case.
16. The views of David Jones are considered in the evaluation chapter of this draft determination. David Jones' application and public submissions may be obtained from the ACCC's website www.accc.gov.au/authorisationsregister.

ACCC evaluation

17. The ACCC's evaluation of the proposed conduct is in accordance with the relevant net public benefit tests⁶ contained in the Act. In broad terms, the ACCC may grant authorisation if it is satisfied that the likely benefit to the public would outweigh the detriment to the public including by any lessening of competition that would be likely to result.

⁴ David Jones Limited application for revocation and substitution, submission, 25 November 2013, p.8.

⁵ David Jones response to ACCC questions, 28 January 2014, p.2.

⁶ Subsections 90(6), 90(7), 90(5A) and 90(5B). The relevant tests are set out in Attachment A.

18. In order to assess the effect of the proposed arrangements and the public benefits and detriments likely to result the ACCC identifies the relevant areas of competition and the likely future with and without the conduct the subject of the authorisation.

The relevant area of competition

19. As a full line retailer David Jones' relevant area of competition encompasses the supply of a wide range of products and services. David Jones submits that it faces strong competition from outlets operating in a number of different formats including:⁷

- other department stores including discount department stores such as Big W, Kmart, Harris Scarfe, Best & Less and Target
- 'category killers', being retailers who specialise in a particular category such as Toys R Us, Barbeques Galore, Captain Snooze and Officeworks
- large format, high volume retailers including Harvey Normal and JB Hi-Fi
- specialist and boutique stores offering ranges of products such as women's or men's fashion, homewares, books, gifts and sporting goods.

20. David Jones further submits that the Australian retail market has undergone dramatic changes since the ACCC granted authorisation A91113 in 2009 including the appearance of international brands such as Zara and TopShop opening 'bricks and mortar' stores in Australia. In addition, David Jones notes that most of its competitors now operate an online retail channel which it submits, heightens the competitive dynamics. Similarly, David Jones submits that there has been a significant increase in the number of domestic and international online retailers offering goods and services to Australian consumers.⁸

21. David Jones submits that a broad market definition is appropriate in the circumstances including a geographic dimension that potentially extends beyond Australian borders given the rise of online retailing.⁹

22. Consistent with its previous assessment, the ACCC considers that the relevant area of competition is likely to be the retail supply of goods and services sold by department stores and/or relevant concession stores. The ACCC also considers that retail supply may include supply by online retailers in particular circumstances including where there is a sufficient degree of substitutability.

23. However, the ACCC does not consider that it is necessary to precisely identify the relevant areas of competition to assess David Jones' application for re-authorisation.

⁷ David Jones Limited application for revocation and substitution, submission, 25 November 2013, p.11.

⁸ David Jones Limited application for revocation and substitution, submission, 25 November 2013, p.11.

⁹ David Jones Limited application for revocation and substitution, submission, 25 November 2013, p.11.

The future with and without

24. To assist the assessment of the proposed conduct against the authorisation tests the ACCC compares the likely future with the conduct that is the subject of the authorisation to the likely future without the conduct that is the subject of the authorisation.¹⁰ The ACCC compares the public benefits and detriments likely to arise in the future where the proposed conduct is in place against the future in which it is not.
25. As noted previously, concession stores may be considered to be competitors of David Jones for the purposes of the Act. As a result, any agreement between David Jones and a concession relating to a David Jones promotion may breach the Act. Therefore, David Jones submits that the authorisation will reduce the need for exclusions from promotions which will simplify promotions and the communication of promotions to customers and ultimately make the promotions more attractive to consumers.¹¹
26. David Jones notes that with or without the proposed conduct, concession stores will be free to retain their current prices, reduce their prices (whether or not by the same amount as David Jones) or increase their prices. David Jones submits that previous authorisations have delivered tangible increases in discounting activity by concession stores.¹²
27. The ACCC considers that in the likely future without authorisation, concession stores would be excluded from participating in discount promotions run by David Jones, although they may individually and independently run their own promotions. The impact of excluding licensees from David Jones' promotions is considered further in the following sections concerning the likely public benefits and detriments of the proposed arrangements.

Public benefit

28. Public benefit is not defined in the Act. However, the Tribunal has stated that the term should be given its widest possible meaning. In particular, it includes:
- ...anything of value to the community generally, any contribution to the aims pursued by society including as one of its principle elements ... the achievement of the economic goals of efficiency and progress.¹³
29. David Jones submits the proposed conduct will deliver public benefits, including:
- Increased or enhanced competition leading to greater more attractive offers to consumers in terms of price and other benefits

¹⁰ See *Re Medicines Australia Inc* [2007] ACompT 4 at [120].

¹¹ David Jones Limited application for revocation and substitution, submission, 25 November 2013, p.9.

¹² David Jones Limited application for revocation and substitution, submission, 25 November 2013, p.12.

¹³ *Re 7-Eleven Stores* (1994) ATPR 41-357 at 42,677. See also *Queensland Co-operative Milling Association Ltd* (1976) ATPR 40-012 at 17,242.

- Convenience for consumers as a result of fewer exclusions from David Jones' storewide and category wide sales and a broader range of discounted products than would otherwise be the case. This may include benefits accruing from the simplification of promotions which will be more easily understood by consumers and reduce the risk of confusion.

30. The ACCC's assessment of the likely public benefits from the proposed conduct follows.

Enhanced competition

31. The ACCC considers that the proposed conduct may result in the promotion of competition for the retail supply of goods and services sold by department stores and/or relevant concession stores. This would occur if the conduct is expected to result in greater discounting by David Jones and the concession stores than would be undertaken in the absence of coordination by David Jones, and this discounting in turn leads to a competitive response from David Jones' rivals and from concession stores' rivals.

32. If such a competitive process results from the proposed conduct, the ACCC agrees that customers may benefit through lower prices and/or product offerings. In this regard, the ACCC notes David Jones' submission that during the previous periods of authorisation, David Jones has been able to attract more customers and compete more effectively, particularly with respect to price, and further that there has been a tangible increase in discounting activity by concession stores which has often resulted in competitive response from David Jones' competitors.¹⁴

33. While David Jones has not substantiated its submission regarding tangible increases in discounting and inducing competitive response, the ACCC considers that David Jones and concession stores are likely to be constrained by competition from suppliers that are independent of David Jones.¹⁵ As a result of this competition, the ACCC considers that the proposed conduct is unlikely to reduce the number and size of promotions offered, and accepts David Jones' submission that the conduct in previous periods of authorisation is likely to have increased the competitiveness of David Jones and concession stores.

34. Therefore, consistent with its previous assessments, the ACCC considers that the proposed conduct is likely to continue to result in public benefits from enhanced competition, including through lower prices for consumers.

Simplification of promotions and other consumer benefits

35. David Jones submits that the proposed conduct will reduce the need for exclusions in promotions which are advertised as 'storewide', department wide,

¹⁴ David Jones Limited application for revocation and substitution, submission, 25 November 2013, p.12.

¹⁵ The relevant competitive constraints are discussed further under the heading 'Public detriment'.

or 'category wide', thereby simplifying how promotions are communicated and ultimately making them more attractive to customers.¹⁶

36. Broadly, the ACCC accepts that the risk of customer confusion may increase with the number of exclusions. On this basis, the proposed arrangements are likely to result in public benefit in the form of providing greater clarity for customers around storewide and category wide promotions.
37. At present, concession stores do not conduct sales through the David Jones online store. However, should they do so in the future, David Jones has sought authorisation to enable concession stores to participate in David Jones promotions through its online store. The ACCC considers that the benefits relevant to 'bricks and mortar' stores are also likely to result where sales take place online.

Public detriment

38. Public detriment is also not defined in the Act but the Tribunal has given the concept a wide ambit, including:

...any impairment to the community generally, any harm or damage to the aims pursued by the society including as one of its principal elements the achievement of the goal of economic efficiency.¹⁷

39. David Jones submits that there was no public detriment during the preceding periods of authorisation. David Jones also submits that there is no anti-competitive detriment flowing from the proposed conduct because the proposed conduct does not involve David Jones agreeing with concession stores on the price for any good or service, but only on a level of discount or other benefit.
40. The ACCC's assessment of the likely public detriments from the proposed conduct follows.

Potential to reduce competition and discounting

41. The proposed conduct has the potential to result in public detriments as a result of reduced competition and discounting by concession stores.
42. In the absence of the proposed conduct, individual concession stores would be entirely responsible for their own program of sales and promotions throughout the year, rather than simply deciding to join with David Jones' promotions. It is possible that some concession stores may not run their own or as many independent promotions outside of joining David Jones' promotions, which may reduce the overall number and size of promotions.
43. Many of the concession stores that operate within David Jones' stores also have separate standalone stores outside of David Jones and/or operations within other department stores. As such, if the proposed arrangements were to result

¹⁶ David Jones Limited application for revocation and substitution, submission, 25 November 2013, p.9.

¹⁷ *Re 7-Eleven Stores* (1994) ATPR 41-357 at 42,683.

in a reduction in competition and discounting by concession stores within David Jones, that potential detriment may also extend beyond David Jones' stores.

44. The ACCC enquired whether David Jones requires concession stores to match discounts offered at other locations, such as standalone boutiques or other department stores, at their David Jones stores. David Jones advised that no link is created and that there is also no requirement for David Jones to match the discounts offered by concession stores at other locations. David Jones further advised that the agreements '...merely provide that David Jones may invite the Retail Brand Management Businesses to participate in a David Jones driven promotion.'¹⁸
45. While there is no contractual obligation for concession stores to offer the same discounts and promotions between store locations, such as between a concession stand within David Jones and its standalone boutique, the ACCC notes that it is common practice among retailers to price match between their store locations. Whether the discount or promotion originates within David Jones or at another location, the ACCC understands that it is generally in the retailer's commercial interest to match the offer.
46. David Jones submits that the retail industry is in a constant state of flux with impacts in recent years as a result of:¹⁹
- changing consumer confidence and buying power
 - local and global economic conditions and exchange rates
 - significant growth in online retailing and the resultant entry of local and overseas retailers
 - general changes in customer preferences.
47. As a result of these factors, David Jones submits that:²⁰
- '...it is difficult to pinpoint, with accuracy, the net impact of David Jones Promotions over the past 10 years. However, David Jones can say with confidence that it has:
1. permitted David Jones to continue to attract customers and compete more effectively in difficult times, especially in terms of price;
 2. delivered tangible increases in discounting activity by retail brand management businesses
 3. often resulted in David Jones promotions that spanned retail brand management businesses sparking a competitive response from David Jones' competitors.'
48. While David Jones has not substantiated its submission that there has been a tangible increase in discounting activity by concession stores coinciding with the previous periods of authorisation, the ACCC is not aware of any evidence to

¹⁸ David Jones response to ACCC questions, 28 January 2014, p.3.

¹⁹ David Jones Limited application for revocation and substitution, submission, 25 November 2013, p.12.

²⁰ David Jones Limited application for revocation and substitution, submission, 25 November 2013, p.12.

contradict David Jones' submission. Similarly, the ACCC has not observed any evidence to suggest that there has been a reduction in independent promotions undertaken by concession stores.

49. Concession stores are under no obligation to participate in promotions run by David Jones and where they elect not to participate, they remain free to offer any price discount or other promotional activity they consider appropriate, including discounts that exceed the discount offered by David Jones. Further, concession stores are free to conduct their own promotions at a time of their choosing.
50. The ACCC considers that the voluntary nature of the conduct (preserving the ability of concession stores to elect whether to participate on a case by case basis) is likely to limit the potential competitive detriment from the proposed conduct. Further, the ACCC considers that the incentive for David Jones and concession stores to compete is likely to remain, with or without the proposed conduct.
51. The ACCC notes that many of the concession stores compete with other independent retailers, as well as each other and David Jones for sales. For example, in the fashion category, the ACCC notes that David Jones and concession stores compete with a range of independent suppliers and stores that are not represented in David Jones. In general, David Jones must also compete with other department stores, such as Myer, and specialty outlets.
52. The ACCC considers that the incentive to compete is likely to remain, despite the ability to agree to participate in storewide or category wide discounts and promotions that are coordinated by David Jones.
53. On balance, the ACCC does not consider that the previous arrangements have resulted in any significant detriment to competition and similarly, considers that the proposed arrangements are unlikely to result in anti-competitive detriment.

Balance of public benefit and detriment

54. In general, the ACCC may grant authorisation if it is satisfied that, in all the circumstances, the proposed arrangements are likely to result in a public benefit, and that public benefit will outweigh any likely public detriment, including any lessening of competition.
55. In the context of applying the net public benefit test in subsection 90(8)²¹ of the Act, the Tribunal commented that:

... something more than a negligible benefit is required before the power to grant authorisation can be exercised.²²
56. For the reasons outlined in this draft determination the ACCC is satisfied that the likely benefit to the public would outweigh the detriment to the public including

²¹ The test at subsection 90(8) of the Act is in essence that conduct is likely to result in such a benefit to the public that it should be allowed to take place.

²² *Re Application by Michael Jools, President of the NSW Taxi Drivers Association* [2006] ACompT 5 at paragraph 22.

the detriment constituted by any lessening of competition that would be likely to result.

57. Accordingly, the ACCC is satisfied that the relevant net public benefit tests are met.

Length of authorisation

58. The Act allows the ACCC to grant authorisation for a limited period of time.²³ This allows the ACCC to be in a position to be satisfied that the likely public benefits will continue to outweigh the detriment for the period of authorisation. It also enables the ACCC to review the authorisation, and the public benefits and detriments that have resulted, after an appropriate period.

59. In this instance, David Jones seeks authorisation for a period of five years on the basis that the net benefits of the proposed conduct can be readily anticipated given the previous authorisations.²⁴

60. The ACCC considers an authorisation period of five years, as requested by David Jones, is appropriate in the circumstances.

Draft determination

The application

61. On 27 November 2013 David Jones lodged an application under section 91C(1) of the Competition and Consumer Act 2010 (the Act) for the revocation of authorisation A91113 and substitution of authorisation A91398 for the one revoked.

62. Application A91398 was made using Form FC, Schedule 1, of the Competition and Consumer Regulations 2010 to enable David Jones to invite retail brand management businesses (concession stores) operating within its stores to participate in certain promotions.

63. Similar conduct was initially authorised under section 88(1) of the Act in 2003. The current application for re-authorisation has been assessed as if it were a new application for authorisation under section 88(1) and 88(1A)²⁵ of the Act.²⁶

64. Subsection 90A(1) requires that before determining an application for authorisation the ACCC shall prepare a draft determination.

²³ Subsection 91(1).

²⁴ David Jones Limited application for revocation and substitution, submission, 25 November 2013, p.10.

²⁵ The initial authorisation (A91091) was made under subsection 88(1) of the *Trade Practices Act 1974* (Cth) (now the Act). With the introduction of the cartel provisions into the Act, transitional provisions were introduced to cover authorisations of agreements that may contain cartel provisions. (See Division 1 of Part XIII of the Act).

²⁶ See section 91C(7) of the Act.

The net public benefit test

65. For the reasons outlined in this draft determination, the ACCC is satisfied pursuant to sections 90(5A), 90(5B), 90(6), and 90(7) of the Act²⁷ that in all the circumstances the proposed conduct for which authorisation is sought is likely to result in a public benefit that would outweigh the detriment to the public constituted by any lessening of competition arising from the arrangements.
66. The ACCC therefore **proposes to grant** the substitute authorisation A91398 for a period of five years.

Conduct for which the ACCC proposes to grant authorisation

67. The ACCC proposes to revoke authorisation A91113 and substitute authorisation A91398 to David Jones, for a period of five years, to enable David Jones to invite retail brand management businesses (concession stores) operating within its stores to participate in certain promotions. This includes David Jones promotions that apply to the David Jones Online Store as well as to both current and future concession stores.
68. This draft determination is made on 27 February 2014.

Interim authorisation

69. At the time of lodging the application, David Jones requested interim authorisation to apply from the expiry of authorisation A91113 on 12 March 2014 to enable it to engage in the proposed conduct while the ACCC is considering the substantive application.
70. For the reasons outlined in this draft determination the ACCC has decided to grant interim authorisation under subsection 91(2) of the Act.
71. Interim authorisation will remain in place until the date the ACCC's final determination comes into effect or until the ACCC decides to revoke interim authorisation.

Further submissions

72. The ACCC will now seek further submissions from interested parties. In addition, the applicant or any interested party may request that the ACCC hold a conference to discuss the draft determination, pursuant to section 90A of the Act.

²⁷ See attachment A

Attachment A - Summary of relevant statutory tests

Subsections 90(5A) and 90(5B) provide that the ACCC shall not authorise a provision of a proposed contract, arrangement or understanding that is or may be a cartel provision, unless it is satisfied in all the circumstances that:

- the provision, in the case of subsection 90(5A) would result, or be likely to result, or in the case of subsection 90(5B) has resulted or is likely to result, in a benefit to the public; and
- that benefit, in the case of subsection 90(5A) would outweigh the detriment to the public constituted by any lessening of competition that would result, or be likely to result, if the proposed contract or arrangement were made or given effect to, or in the case of subsection 90(5B) outweighs or would outweigh the detriment to the public constituted by any lessening of competition that has resulted or is likely to result from giving effect to the provision.

Subsections 90(6) and 90(7) state that the ACCC shall not authorise a provision of a proposed contract, arrangement or understanding, other than an exclusionary provision, unless it is satisfied in all the circumstances that:

- the provision of the proposed contract, arrangement or understanding in the case of subsection 90(6) would result, or be likely to result, or in the case of subsection 90(7) has resulted or is likely to result, in a benefit to the public; and
- that benefit, in the case of subsection 90(6) would outweigh the detriment to the public constituted by any lessening of competition that would result, or be likely to result, if the proposed contract or arrangement was made and the provision was given effect to, or in the case of subsection 90(7) has resulted or is likely to result from giving effect to the provision.