



9 December 2019

By email: Hayley.Munro-Smith@accc.gov.au

Our Reference
181762

Ms Hayley Munro-Smith
Analyst | Adjudication | Merger and Authorisation Review
Australian Competition & Consumer Commission
Level 17 Casselden
2 Lonsdale Street
MELBOURNE 3000

Dear Madam

**ACCC Authorisation Information Request AA1000457
Co-Operative Supermarkets Australia Limited**

Thank you for your email of 4 December 2019.

You seek clarification as follows:

1. information regarding the operation and parameters of the active member test. More specifically, you seek information about how the Applicants envision the active member test will work.
 - a. How will the minimum value or volume requirement be set?
 - i. What types of considerations will the Board have regard to in setting the minimum value or volume requirement?
 - ii. What consultation will occur with members in setting this requirement?
 - iii. What capacity, if any, will there be for members to seek to vary the requirement as it applies to them?
 - b. Will the minimum value or volume requirement be set for each member at an aggregate level (that is, across their entire spend through the CSA system) or will it be applied to particular categories or classes of products or services (that is, separate requirements in respect of different categories of goods and services)?
 - c. Will the minimum value or volume requirement be expressed as a monetary value or a percentage of the members' purchases?
 - d. Will the minimum value or volume requirement be applied uniformly across all members, regardless of characteristics such as size, sales turnover or location? Or will the value or volumes required to be purchased through the CSA system vary depending on the member business?
2. whether it will be a requirement for membership that the member shares such information, including information about range, costs, terms and conditions.

We acknowledge that your request and this reply will be published on the ACCC's public register and confirm that there is no aspect of this response which CSA would wish to exclude from that publication.

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Active Member Test

The “active member test” is a foundation requirement for all registered cooperatives. Members must commit, through the Rules of the Co-op, to support the primary activity of the Co-op. Here the “member” is, essentially, the manager of a Supermarket. But the Supermarket concerned, through its Associated Controller, must acquire goods or services through the services offered by CSA at least:

- (a) once in each rolling two (2) month period; and
- (b) to the minimum value or volume, if any, set by the Board from time to time over that rolling period.

Presently no minimum volume is set, yet the Directors reserve the right to set a value (as the Foundation Disclosure Statement states under paragraph 3.1).

Going to your specific questions:

1. *How will the minimum value or volume requirement be set?*

That volume or value is a matter for the Board. The Board are presently “Retailers”, each of whom understand the benefit of establishing a membership which will create a sufficient presence to create the weight necessary to achieve the volumetric negotiating strength, which can deliver the benefits hoped for. The Board has a broad spectrum of representation, from persons engaged in a “chain” of many stores through to single and rural store owners.

a. *What types of considerations will the Board have regard to in setting the minimum value or volume requirement?*

The foremost concern for setting minimum values or volumes is “straw membership”, that being membership for the sake of accessing the pricing, terms and other information to be made available amongst the CSA Members, with the fear that such (confidential) information will be taken and used by competitors or persons whose interests are antagonistic to the aspirations of CSA. CSA wants genuine participants committed to the path outlined in the Disclosure Statement; it may be that the setting of sales floors using the system proves prudent or necessary in that respect.

The second aspect is one that concerns the culture of CSA and its intention to conduct its business by delivering value to its members through the Co-operative Principles, set out at s.10 of the Co-operatives National Law (“CNL”). Application of those principles operates on a number of levels, yet as the Disclosure Statement alludes, CSA hopes to operate with a view to developing a “collective work” regime, by which members are actively engaged in advancing the business of CSA; the business of CSA is intended to become an important aspect of the conduct of member retail management, with the objective of delivering benefits to members directly. In this, it remains true that CSA will want members who deliver benefit to CSA through their membership, acquiring goods and services through the CSA systems; in this respect, the symbiotic engagement of CSA with its membership is typical of a co-operative and driven by the Co-operative Principles; it may be that the setting of sales floors using the system proves prudent or necessary in that respect.

In considering this, CSA is not a Corporations Act Company designed to accumulate profit from its members; it is designed to deploy the profits it earns back to its members and to do so in the form of delivering benefits through improving the services to retailer members, the price of freight, packaging and the goods available to be sold. A Member who is not using the trade mechanisms made available through CSA either derives no benefit from the CSA’s offering, or is not able to do so (perhaps from financial reasons) or is perhaps contractually unable, thus being engaged in a preferred but restrictive supply chain). All indications to CSA presently is that the logistics and price of direct to store supplies will have a price advantage over a wide range of existing supplies for all but the largest Member groups. Thus, being unable or unwilling to the acquire through the CSA

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systems falls short of the intended application of the participation hoped for; this is a matter that might become regulated through volume or value mechanisms.

There is no intention for a Member to be anything other than a willing purchaser using the trade mechanisms made available through CSA; the terms through CSA will either be beneficial or not; there is no intention for any member to have a minimum stated basket or range of goods.

b. What consultation will occur with members in setting this requirement?

CSA is made by the Retailers, for the Retailers to deliver what meets the Retailers needs. The Board must have a majority of Members on it and presently has no "non-members". The second principle of the Co-operative Principles set out at s.10 of the CNL, urges "democratic member control", yet CSA intends to go further with direct member engagement in the actual development and implementation of CSA plans. Apart from a core executive administration, "staff" will include membership. Once established, regional fora are intended to draw and guide the development of initiatives, going beyond mere policy input by members.

Members will have their statutory rights to call meetings, remove directors and the like, but the present intention is for active member engagement on regional basis. This aspect is not likely to manifest until CSA re-opens its membership drive after the Sunset Date, as the Disclosure Statement describes. Here, the initial membership who understand and are wedded to the Co-operative Principles will use the period in that time to establish the operational norms and take those back out to prospective members; it is in that space the membership engagements will be shaped.

As the background material supplied outlines, CSA is built for the members and as co-operatives are designed, will succeed through member engagement.

c. What capacity, if any, will there be for members to seek to vary the requirement as it applies to them?

The "legal" avenues are:

- Membership of CSA is voluntary, and they can leave.
- Rule 12 of the Co-operative Rules sets out a grievance procedure, with rights of natural justice.
- Members comprising 20% of the total number of votes able to be cast at a meeting of the Co-operative (noting votes are restricted to one vote per member) may call a Special General Meeting.

As discussed above, the intention remains one of having active member engagement.

However, on a more pragmatic level, CSA seeks members to support its volumetric stance and the membership is desirably spread through regions to render delivery and back loading (freight) options attractive.

It is true that the initial membership take-up is aimed specifically at "better" retailers and specifically those commercially able to see the advantage of delivering the benefit of the model described in the Disclosure Statement.

But ultimately the issue of volumetric or value thresholds is "political" in the sense that if (and I emphasise "if") such thresholds are set, the threshold will be set at such a level that delivers a common benefit across the membership and then on sufferance of the Board being removed by a disgruntled membership, as the CNL and the Rules permit.

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2. *Will the minimum value or volume requirement be set for each member at an aggregate level (that is, across their entire spend through the CSA system) or will it be applied to particular categories or classes of products or services (that is, separate requirements in respect of different categories of goods and services)?*

There is no present intention to set any threshold.

If a threshold were to be set, then it is envisaged that it will be an easily measured baseline value that demonstrates a bona fide broad-based engagement in taking advantage of the trading terms benefits offered by CSA, as opposed to a person holding membership for the purpose of deriving information for ulterior purposes.

It remains far more likely that the "collective work" regime once established will prove to be a far more likely discriminator than value or volume thresholds. There is no intention to use this value or volume threshold mechanism to cause any member to acquire a minimum basket or range of goods.

3. *Will the minimum value or volume requirement be expressed as a monetary value or a percentage of the members' purchases?*

If a threshold were to be set, then it is envisaged that it will be an easily measured baseline value unrelated to total stock or costs of operation of a member business; the test is about participation with CSA; CSA is not intending to be a "Supermarket Banner", but rather a source of goods and information.

4. *Will the minimum value or volume requirement be applied uniformly across all members, regardless of characteristics such as size, sales turnover or location? Or will the value or volumes required to be purchased through the CSA system vary depending on the member business?*

As to uniform application: Yes. In practice it may eliminate "small stores" as the system is intended to assist "supermarkets". And nor is CSA intended to be a wholesale competitor to say "Metcash Trading Limited", but rather to complement offerings through those stores to enhance foot traffic to support both the retail and supply side.

As to the active member test threshold varying according to character or features of a member business: No; if a threshold is to be set, it will be of uniform application geared towards participation.

Information Sharing

You ask whether it will be a requirement for membership that the member shares such information, including information about range, costs, terms and conditions. The short answer is : "No, but it will be encouraged".

Critical to the success of CSA will be the engagement of members in assisting their fellow members identify opportunities, not only to engage with suppliers, but to improve theirs and each other's performance; that is a characteristic of this co-operative. Whilst there is no enshrined Rule that demands information, the system and benefits are delivered through "sharing". Yet on a practical level, one member engaged with 80 stores is far more likely to provide "beneficial" information far in excess of any single store owner and hence the burden of "compulsion" is unlikely to be an operative aspect here. That beneficial information is going to address "terms and conditions" as will methods of seeking market information such a "tender".

Also consider, information concerning 'range' is not confidential, as that can be gained from merely walking into a store.

It is expected that a member who has access to a supplier of interest to the CSA network will share knowledge of that supplier; terms of confidentiality will be respected. A retailer who holds the benefit of a

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"special deal" will remain entitled to retain that deal, yet practically, why a supplier will not replicate that deal across a greater supply chain tends not to make good commercial sense, yet there may be "reasons". But here, we emphasise that the benefit here is to develop the suppliers to achieve better penetration where that suits their plans and capabilities.

Development of the CSA offering will drive towards benefits essentially on a category basis, looking at costs side supplies also, such as freight, packaging, waste, utilities and the like. Much may well be regionally based. Categories of (direct to store) supply will be targeted, offer terms tested or benchmarked amongst the membership to see whether benefits are in fact being derived; here is an example of expected membership engagement. If terms are established, then the offer is published to the membership. Some aspects may be regionally limited owing perhaps to logistics or perhaps supply-side limitations; here again, working groups of members can work with a supplier to sure up broader and better supply where suitable.

The success of stores within more than one of the European Co-operatives has structures where each store has a number of "mentors" to assist in identifying opportunities and weaknesses. The system works to improve the particular store and also to improve the "manager's skill".

If CSA got to a point of seeking point of sale information, such information would be treated equivalently as "personal information" according to the Privacy Principles, ensuring confidentiality.

Closing

Please, should you have any questions regarding this response, do not hesitate to contact the writer.

Yours sincerely
BRADLEY ALLEN LOVE



Mark Love
Legal Director

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Season's Greetings

The Directors and Staff wish you a safe and happy Christmas and New Year.
Please note that our office will close from 1pm on Tuesday, 24 December 2019
and will re-open on Thursday, 2 January 2020