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13 May 2021

Gavin Jones
Director, Competition Exemptions Branch
Australian Competition and Consumer Commission
Level 17
2 Lonsdale Street
Melbourne VIC 3000

By email

Dear Mr Jones

Application for Authorisation by Coles Group Limited – Application for Final Authorisation

We refer to your email of 30 April 2021 in relation to the application for authorisation by Coles Group Limited (**Coles**) lodged on 12 March 2021 (the **Application**) and the interim authorisation granted by the Australian Competition and Consumer Commission (**ACCC**) on 25 March 2021 (the **Interim Authorisation**).

The purpose of this letter is to provide Coles' views in relation to matters relevant to the ACCC's draft determination that have arisen since the Application was lodged, and to respond to interested party submissions.

1 Events since the Application

A number of events have occurred since the Application was lodged which reinforce the ongoing utility of the conduct the subject of the Application (the **Proposed Conduct**) and which was enabled by the Interim Authorisation.

Since the Application, outbreaks and/or lockdowns have occurred in Queensland, Western Australia and New South Wales. Each have involved the imposition of increased restrictions on supermarkets, and have also to an extent led to panic buying amongst consumers. To date, Coles has not itself engaged in, or become aware of, any conduct under the Interim Authorisation as a result of these outbreaks. However, Coles considers that the ongoing risk of outbreaks which have the potential to expand in scope and impact demonstrate the threat of supply disruptions that COVID-19 continues to pose for Australian consumers, as well as the ongoing benefits associated with supermarkets being able to engage in the Proposed Conduct.

Further, Coles considers that these recent events highlight the potential benefits of the additional elements of the Proposed Conduct which were not expressly permitted under the prior authorisation granted on 3 September 2020. For example, the recent Western Australian outbreak involved sudden and significant lockdown restrictions which were implemented with no advance notice or consultation. The urgent measures processes in the Proposed Conduct could prove necessary in similar circumstances in future, especially if any outbreak is more widespread.

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Your Ref AA1000546-1

2 Interested Party submissions

Coles notes that each of the four publicised submissions were generally supportive of the Interim and Final Authorisations.

Coles agrees with the submission of the Department of Home Affairs that authorisation by the ACCC has allowed for, and will continue to facilitate, critical industry co-ordination amongst supermarkets through the Supermarkets Taskforce. While Coles has not been directly involved in much of the rural and regional co-ordination under the Interim Authorisation referred to in the other parties' submissions, Coles considers that this activity, supported by a range of government bodies, demonstrates how the benefits of the Proposed Conduct are likely to extend beyond the Participating Supermarkets.

Coles does not agree with the proposals made in two submissions that details of Authorised Meetings or Interim Measures be recorded and published on a public register or recorded in minutes and distributed to all authorised parties and all levels of government including the ACCC. This is for three reasons.

- (a) First, the Proposed Conduct already provides for appropriate regulatory oversight, accountability to, and involvement of the ACCC and other government departments and agencies.
- (b) Second, the subjects discussed in Authorised Meetings are often confidential, both to government and the meeting participants. In the context of those Authorised Meetings, and subject to explicit arrangements as to confidentiality, participating supermarkets have shared sensitive information about their operations in order to facilitate swift action to prevent detriment to consumers and staff in the face of COVID-19 outbreaks. The risk that details of these discussions could be shared with supermarkets not involved in the Authorised Meeting or publicised on a register would undermine this confidentiality, and have an inevitable chilling effect on participation in – and hence efficacy of – the Authorised Meetings in the future.
- (c) Third, the maintenance and distribution of minutes or records of Authorised Meetings impose an undue burden on Coles and would be impracticable in most circumstances. Authorised Meetings will generally be conducted in immediate response to a COVID-19 outbreak. They may be arranged on short notice, involve a range of participants beyond supermarkets, and include a number of topics of discussion. To impose upon Coles or other Participating Supermarkets the need to finalise a detailed record, obtain the consent of all involved parties to the wording of the record, and then distribute or publicise these details would place substantial financial and time burdens on the responsible party. It would also risk delaying the implementation of agreed action items.

Accordingly, Coles does not consider that any change is required to the regulatory oversight or recording of the Proposed Conduct.

For the reasons set out above and in the Application, Coles submits that it remains the case that the Proposed Conduct would, or would be likely to, result in a net public benefit and that it is appropriate for the ACCC's draft determination to propose to grant authorisation as sought in the Application.

Coles has consulted with the other Participating Supermarkets, and each of these parties agree with the above submissions.

Please do not hesitate to contact us to discuss anything in this letter. Otherwise, we look forward to receipt of the ACCC's draft determination in due course.

Yours sincerely,



Rosannah Healy
Partner
Allens



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James Somerville
Senior Associate
Allens



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