

**Application for interim and final
authorisation under s88(1) of the
*Competition and Consumer Act 2010 (Cth)***

Lodged by:

Coles Group Limited

on behalf of itself and other operators of supermarket chains
in Australia

Public version

20 March 2020

Contents

1	Summary	3
	1.1 Background	3
	1.2 Application for urgent interim authorisation	3
2	Parties to the Proposed Conduct	4
	2.1 Applicant	4
	2.2 Email address for service of documents in Australia	4
	2.3 Other Persons who propose to engage in the Proposed Conduct	4
3	The Proposed Conduct	5
	3.1 Overview	5
	3.2 Application for interim authorisation	6
	3.3 Rationale	7
	3.4 Provisions of the CCA which might apply to the Proposed Conduct	7
	3.5 Term of authorisation sought	8
4	Persons who may be directly impacted by the Proposed Conduct	8
5	Counterfactual	8
6	Public benefit	8
7	Public detriment	8
8	Contact details of relevant market participants	8
9	Declaration by applicant	9

1 Summary

1.1 Background

This application is made to the Australian Competition and Consumer Commission (**ACCC**) by Coles Group Limited (**Coles**), on behalf of:

- (a) itself and its related bodies corporate (**Coles Group**);
- (b) Woolworths Group Limited and its related bodies corporate (**Woolworths**);
- (c) ALDI Stores (A Limited Partnership) (**ALDI**);
- (d) Metcash Limited, its related bodies corporate and the class of persons comprising each of the owners and/or operators of supermarkets or liquor stores trading under a brand owned or licensed by Metcash Limited or its related bodies corporate (**Metcash**); and
- (e) any other grocery retailer who in future wishes to engage in the conduct the subject of the application providing the ACCC is notified

(the **Participating Supermarkets**).

Supermarkets play a vital role in Australian communities, and will continue to play a critical role during the COVID-19 (coronavirus) pandemic. The Participating Supermarkets seek urgent interim and final authorisation under section 88(1) of the *Competition and Consumer Act 2010* (Cth) (**CCA**) to engage in the conduct described in section 3 of this application.

With growing community concerns about the global COVID-19 pandemic, there has been an unprecedented and growing degree of stockpiling of essential everyday goods by consumers. This has resulted in shortages of certain stock on shelves (especially toilet paper and non-perishable items) and constraints in the supply chain due to the unprecedented demand for those items.

Alongside these issues, there is significantly higher demand for online delivery of groceries as many Australians (particularly older and immune-suppressed consumers) seek to self-isolate given growing concerns around community transmission. The need for online deliveries is also likely to increase as some consumers fall ill with COVID-19.

Unless the Participating Supermarkets can undertake the type of measures identified in the application, including to address current demand patterns, the issues may worsen across supply chains.

The Proposed Conduct is intended to assist the Participating Supermarkets to work together to quickly address these issues, with a view to ensuring the supply and fair and equitable distribution of fresh food, groceries, household products and liquor (the **Retail Products**) to consumers while the pandemic persists.

1.2 Application for urgent interim authorisation

The Participating Supermarkets consider that immediate steps are required to address community concerns about access to essential every day goods. To ensure steps can be taken as quickly as possible, and as discussed in section 3.2 below, the Participating Supermarkets request that the ACCC grant interim authorisation urgently.

2 Parties to the Proposed Conduct

2.1 Applicant

Name, address (registered office), telephone number and ACN	Contact person’s name, position, telephone number and email address	Description of business activities
Coles Group Limited (ACN 004 089 936) and its related bodies corporate 800 Toorak Road Hawthorn East, VIC 3123 (03) 9829 5111	David Brewster Chief Legal & Safety Officer Coles Group Limited [REDACTED] 800 Toorak Road Hawthorn East, VIC 3123 (03) 9829 5111	Acquisition and retail supply of Retail Products through supermarkets, liquor and convenience outlets and online

2.2 Email address for service of documents in Australia

Rosannah Healy
 Partner
 Allens

[REDACTED]

[REDACTED]

2.3 Other Persons who propose to engage in the Proposed Conduct

Each of the Participating Supermarkets operate retail outlets, including supermarkets, liquor and convenience outlets, through which consumer goods are supplied to the public.

Name, address (registered office), telephone number and ACN	Contact person’s name, position, organisation, telephone number and email address	Description of business activities
Woolworths Group Limited (ACN 000 014 675) and its related bodies corporate 1 Woolworths Way Bella Vista, NSW 2153 (02) 8885 0000	Bill Reid Chief Legal Officer Woolworths Group Limited (02) 8885 0000 [REDACTED]	Acquisition and retail supply of Retail Products through supermarkets, liquor and convenience outlets and online
ALDI Stores (A Limited Partnership) (ABN 90 196 565 019) Locked Bag 56 St Marys Delivery Centre, NSW 2760 13 25 34	Bronwyn Gallacher Managing Director CCL Consultants Pty Ltd [REDACTED] [REDACTED]	Acquisition and retail supply of Retail Products through supermarkets outlets

<p>Metcash Limited (ACN 112 073 480) and its related bodies corporate and each of the owners and/or operators of supermarkets or liquor stores trading under a brand owned or licensed by Metcash Limited or its related bodies corporate</p> <p>1 Thomas Holt Drive Macquarie Park NSW 2113 (02) 9741 3000</p>	<p>Julie Hutton General Manager Legal & Company Secretary Metcash Limited [REDACTED] [REDACTED]</p>	<p>Wholesale and retail supply of Retail Products through distribution centres, warehouses, supermarkets, liquor and convenience outlets and online</p>
--	---	---

3 The Proposed Conduct

3.1 Overview

Supermarkets play a vital role in Australian communities, and will continue to play a critical role during the COVID-19 pandemic. The conduct the subject of this application relates to discussions and arrangements between retailers and wholesalers, and other conduct, which is intended to facilitate consumer access to Retail Products.

On 11 March 2020, the World Health Organisation announced that it had characterised the COVID-19 outbreak as a pandemic. The Australian Government is taking all appropriate steps to control the spread of COVID-19 within Australia, and the number of confirmed cases in Australia is still limited, however the Participating Supermarkets have observed an unprecedented surge in demand for certain products (including through online delivery) as consumers seek to stockpile goods.

Participating Supermarkets have unilaterally introduced limits on the maximum number of certain products that consumers can purchase in a single transaction (including online).¹ However, despite these efforts, stockpiling behaviour has continued. Ongoing stockpiling is likely to lead to issues in the supply chain for certain manufacturers, transport and logistics providers. For example, it could result in suppliers running out of packaging or inputs for certain products, and being more constrained in their ability to meet consumer demand.

To the extent that Participating Supermarkets already have an online offering, they have also encountered difficulties fulfilling and delivering online orders to consumers given the unprecedented surge in demand.

The Participating Supermarkets propose to engage in a number of coordinated activities with a view to ensuring the supply and fair and equitable distribution of Retail Products to Australian consumers during the COVID-19 pandemic. Specifically, the Participating Supermarkets seek authorisation to:

discuss, enter into or give effect to any arrangement between them (including with manufacturers, suppliers, transport and logistics providers), or engage in any conduct, which has the purpose of:

¹ Coles, Woolworths, ALDI and IGA retailers have each independently applied purchase limits on the number of toilet roll packs that can be purchased by a customer in a single transaction, as well as further purchase limits in respect of a range of other products (including pasta, flour, dried rice, paper towels, paper tissues and hand sanitiser amongst other products). See Coles media releases [here](#) and [here](#), Woolworths media release [here](#) and updates [here](#), ALDI updates [here](#) and IGA updates [here](#).

- (i) facilitating or ensuring the acquisition and/or supply of Retail Products in Australia (especially of those Retail Products in short supply);
- (ii) ensuring fairer access to Retail Products among the general public;
- (iii) providing greater access to Retail Products to those in most need (including the elderly and disadvantaged members of the public, such as consumers who may be too unwell to travel to the supermarket); or
- (iv) facilitating access to Retail Products in remote or rural areas.

Conduct which has the purpose of any of (i) to (iv) above includes discussing, entering into or giving effect to any arrangement, or engaging in any conduct, which has been recommended by the Supermarket Taskforce convened by the Department of Home Affairs, or the main working sub-committee of that Taskforce (both of which include a representative from the ACCC), and approved by the Minister for Home Affairs.

(the **Proposed Conduct**)²

Importantly:

- the Proposed Conduct is intended to secure the supply and fair and equitable distribution of Retail Products to consumers and does not involve collective decisions as to the retail price of Retail Products;
- the Proposed Conduct is not compulsory, and any Participating Supermarket can opt out of any proposed collaboration the subject of this application; and
- the Proposed Conduct is a temporary measure to deal with the immediate difficulties that the Participating Supermarkets and their suppliers have been facing in light of the coronavirus COVID-19 pandemic.

3.2 Application for interim authorisation

The Participating Supermarkets seek interim authorisation on an urgent basis.

As outlined in various media reports, and as has been observed by the Participating Supermarkets, the extent of stockpiling of certain grocery and household items (including through online orders) is unprecedented and has been growing, causing supply chain constraints. Recent unilateral measures adopted by each Participating Supermarket have not sufficiently curbed this customer behaviour. Accordingly, discussions and agreements to enable limited coordination among the Participating Supermarkets ought to commence as soon as possible. The Participating Supermarkets submit that urgent interim authorisation is justified, for example, to:

- (a) curb recent stockpiling behaviour and encourage consumers to return to normal shopping patterns;
- (b) by curbing stockpiling behaviour:
 - (i) ameliorate current community concerns about availability of essential grocery and other household items;
 - (ii) ensure that all consumers will continue to have fair and reasonable access to Retail Products. This includes elderly and disadvantaged members of the public, including consumers who may be unwell as a result of COVID-19, as well as consumers in remote or regional areas;

² The authorisation is intended to cover arrangements involving Metcash-affiliated retailers (ie each of the owners and/or operators of supermarkets or liquor stores trading under a brand owned or licensed by Metcash), in circumstances where those arrangements are facilitated through discussions as between Metcash Limited and the other Participating Supermarkets.

- (iii) ensure the safety of customers and staff, by reducing congestion in stores and store car parks and alleviating customer stress regarding recent stock shortages;
 - (iv) avoid unnecessary strain on Retail Product supply chains, including in manufacturing plants, distribution centres and in primary and secondary haulage; and
 - (v) smooth upstream production which will help avoid stock outages;
- (c) assist relevant manufacturers and the Participating Supermarkets to quickly understand any impediments to increasing production to meet higher demand and agree on solutions to address those issues;
- (d) by assisting manufacturers and Participating Supermarkets to solve any supply chain issues which may prevent higher production volumes, ameliorate supply issues for the period that customer demand is higher than normal and enable the Participating Supermarkets to urgently restock their shelves. This in turn will further contribute to the benefits listed at (b)(i) to (iii) above; and
- (e) assist Participating Supermarkets to meet the unprecedented increase in demand for online deliveries, thereby assisting in particular consumers who are unwell or self-isolating (including elderly consumers and consumers who are immune suppressed).

If, while interim authorisation is in place, the ACCC is concerned about the effectiveness of the Proposed Conduct, it will be open to the ACCC to revoke that authorisation at any time.

3.3 Rationale

As noted above, authorisation is sought to manage the difficulties that the Participating Supermarkets and their suppliers have been facing due to the unprecedented demand for certain grocery and household items in light of the coronavirus COVID-19 pandemic (including through online orders).

The Proposed Conduct is intended to ensure that consumers, including elderly and disadvantaged members of the public, will continue to have fair and equitable access to everyday items that they need. This includes consumers who may be unwell as a result of COVID-19.

3.4 Provisions of the CCA which might apply to the Proposed Conduct

The Participating Supermarkets compete in relation to the acquisition of grocery and household items, transport and logistics services as well as the supply of groceries and other consumer products to consumers through their retail supermarket and liquor store outlets and/or wholesaling functions. Accordingly, in the absence of authorisation, the Proposed Conduct risks giving rise to contraventions of the CCA, including by provisions of the CCA relating to:

- (a) cartel conduct (Division 1 of Part IV), in that it may involve contracts, arrangements or understandings containing provisions which have the purpose or effect of fixing, controlling or maintaining, or providing for the fixing, controlling or maintaining of, the price or a discount, allowance, rebate or credit in relation to goods or services acquired or likely to be acquired by the parties, or have the purpose of preventing, restricting or limiting the acquisition or supply or likely acquisition or supply of goods or services by the parties (ss45AD(2), 45AD(3), 45AF, 45AG, 45AJ, and 45AK of the CCA); or
- (b) contracts, arrangements or understandings, concerted practices, exclusive dealing and other conduct that have the purpose, effect or likely effect of substantially lessening competition (ss 45(1), 46(1) and 47(1) of the CCA).

3.5 Term of authorisation sought

The Participating Supermarkets propose to engage in a limited number of coordinated activities on a temporary basis in order to ensure the supply and fair and equitable distribution of Retail Products to consumers throughout the duration of the pandemic. The Participating Supermarkets seek authorisation to engage in the Proposed Conduct for a period of 6 months from the date of a final determination by the ACCC, noting that the ACCC could under section 91B of the CCA revoke the authorisation should there be a material change in circumstances (e.g. the effects of the pandemic subside).

4 Persons who may be directly impacted by the Proposed Conduct

The persons who would be directly impacted by the Proposed Conduct include customers, suppliers and staff of the Participating Supermarkets.

5 Counterfactual

In the absence of the Proposed Conduct, there may be restrictions on the ability of the Participating Supermarkets to address the concerns discussed in section 3.1 above, such as customer stockpiling, supply chain disruption and/or inability to fulfil online orders. Participating Supermarkets would likely seek to address these issues unilaterally, but in a substantially less effective and timely manner than if they are permitted to engage in certain limited coordination. This means that the current customer cycle of stockpiling and supply chain issues is likely to continue for a longer period in the absence of the Proposed Conduct.

6 Public benefit

The Participating Supermarkets consider that the Proposed Conduct will result in significant public benefits, as outlined in section 3.2 above.

7 Public detriment

The Participating Supermarkets submit that the Proposed Conduct will result in a significant net public benefit because:

- in the current circumstances, and without the Proposed Conduct, Participating Supermarkets are facing difficulties maintaining stock to meet consumer demand. In this way, the Proposed Conduct will facilitate, rather than limit, supply;
- the Proposed Conduct does not extend to any agreement on the retail price of Retail Products. Each Participating Supermarket will continue to compete in relation to factors such as price and service in relation to affected products;
- the Proposed Conduct is not compulsory, and any Participating Supermarket can opt out of any proposed collaboration the subject of this application; and
- the period of authorisation is for a limited period of 6 months only (from the date of the ACCC's final determination) and can be discontinued in the event that the effects of the pandemic subside at an earlier date. This is no more than is reasonably necessary to address the supply challenges caused by the COVID-19 pandemic.

8 Contact details of relevant market participants

See section 2.3 above.

9 Declaration by applicant

The undersigned declare that, to the best of their knowledge and belief, the information given in response to questions in this form is true, correct and complete, that complete copies of documents required by this form have been supplied, that all estimates are identified as such and are their best estimates of the underlying facts, and that all the opinions expressed are sincere.

The undersigned undertake(s) to advise the ACCC immediately of any material change in circumstances relating to the application.

The undersigned are aware that giving false or misleading information is a serious offence and are aware of the provisions of sections 137.1 and 149.1 of the Criminal Code (Cth).



David Brewster

Chief Legal & Safety Officer, Coles Group Limited

This 20th day of March 2020