



# Draft Determination and Interim Authorisation

Application for authorisation AA1000457

lodged by

Co-Operative Supermarkets Australia Limited

in respect of

collective bargaining with suppliers of goods and services to the Australian grocery industry

Authorisation number: AA1000457

13 March 2020

Commissioners:

Rickard

Keogh

Court

Ridgeway

## Summary

The ACCC proposes to authorise collective bargaining arrangements involving current and future members of Co-Operative Supermarkets Australia Limited (CSA). The proposed authorisation would allow CSA to represent members in collective negotiations with a range of suppliers of goods and services.

The ACCC proposes to grant authorisation for five years.

On 19 December 2019, the ACCC granted interim authorisation to enable CSA to share information and negotiate with suppliers, but not to enter into contracts or impose an 'active member test'. In response to a request by CSA, the ACCC has decided to revoke the December interim authorisation and grant interim authorisation to allow CSA to share information, negotiate with suppliers and enter into contracts with suppliers of goods and services to the Australian grocery industry, conditional upon the final authorisation being granted. The new interim authorisation does not extend to the Applicants imposing and enforcing a proposed 'active member test'.

The ACCC invites submissions in relation to this draft determination by 27 March 2020, before making its final decision. In addition, CSA or an interested party may request that the ACCC hold a conference to discuss the draft determination.

### 1. The application for authorisation

- 1.1. On 5 November 2019, Co-Operative Supermarkets Australia Limited (**CSA**) lodged an application for authorisation AA1000457 with the Australian Competition and Consumer Commission (the **ACCC**) under subsection 88(1) of the *Competition and Consumer Act 2010* (Cth) (the **Act**). CSA is seeking authorisation for a period of five years.
- 1.2. Authorisation provides businesses with legal protection for arrangements that may otherwise risk breaching the law but are not harmful to competition and/or are likely to result in overall public benefits.
- 1.3. On 19 December 2019, the ACCC granted interim authorisation under subsection 91(2) of the Act to enable CSA to commence negotiations with suppliers and allow information sharing between members regarding terms of supply to support these negotiations, but not to enter into contracts or enforce its proposed 'active member test' (discussed at 2.8 and 2.9). On 25 February 2020, CSA sought to vary the terms of the interim authorisation to allow CSA and its members to make and enter into contracts. This is discussed further in section 6, below.

## The Proposed Conduct

1.4. CSA is seeking authorisation to:

- collectively bargain on behalf of current and future CSA members with suppliers on the terms of supply of goods and services<sup>1</sup> to CSA member businesses, where these goods and service are consumed by CSA member businesses (e.g. electricity) or offered for sale through CSA member businesses (e.g. food and grocery products), and
- impose and enforce an 'active member test' (see paragraph 2.9).

(the **Proposed Conduct**)

1.5. CSA proposes to represent members to collectively bargain with suppliers of goods and services of all kinds to supermarkets and grocery stores, including:

- food and grocery products (which will initially be products acquired from suppliers via 'direct/directs' and 'direct delivery/charge through' channels, rather than through a wholesaler, see paragraph 2.7). These include beverages, bakery products, dry and packaged foods, cleaning supplies, dairy products, delicatessen items, flowers, frozen foods, toiletry and health care products, meat and seafood, pet care, fresh fruit and vegetables, and tobacco.
- equipment, such as shopfitting and displays
- refrigeration
- packaging and wrapping
- waste services
- insurance
- payroll software services
- point of sale systems
- electricity
- EFTPOS
- telecommunications
- logistics

1.6. CSA is not seeking authorisation for collective boycott activity. It submits that collective bargaining will be voluntary for all suppliers and that suppliers can opt to deal directly with CSA's members.

### **Rationale**

1.7. CSA submits that the Proposed Conduct would allow CSA member businesses to share information among them; and to collectively bargain through CSA with suppliers to acquire goods and services at prices which would allow CSA member businesses to compete effectively with dominant retail competitors; and to arrest the declining market share of the independent retail supermarket sector.

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<sup>1</sup> The terms of supply negotiated with suppliers may include: price, volumes, promotional conditions, rebates and benefits earned from a supplier, terms of credit, delivery, picking and packing fees, logistic charges, insurance, rights to refund or credit from spoilage, and ullage.

## 2. Background

### The competitive landscape for independent retail supermarkets

- 2.1. Retail grocery businesses in Australia operate in many forms, ranging from national retailers with fully vertically integrated wholesaling and retailing functions (e.g. Woolworths, Coles and Aldi), through to independent retailers supplied by independent wholesalers.
- 2.2. According to an IBISWorld report,<sup>2</sup> the top grocery supermarkets in Australia<sup>3</sup> (namely, Woolworths and Coles) account for approximately 66.5% of the market share by sales revenue; Aldi accounts for 9.3%; while independent retailers supplied by wholesaler, Metcash Trading Limited (**Metcash**) (namely, IGA, Supa IGA, IGA X-press, IGA Fresh, Foodland and Friendly Grocer) account for approximately 6.6%. The remaining 17.5% of market share is attributed to Costco, FoodWorks and other independent retailers.
- 2.3. At the wholesale level, Woolworths, Coles and Aldi have their own wholesaling operations. Metcash operates a major wholesale distribution business, supplying food and grocery products to independent retailers across Australia.<sup>4</sup> Metcash owns the IGA and Foodland brands; however, the majority of the 1,600 stores operating under these brand names are independently owned. Other wholesalers in the market include Bidfood Australia Limited and PFD Food Services Pty Ltd and.

### CSA structure and membership

- 2.4. Members of CSA<sup>5</sup> comprise the managers of 'Independent Retail Grocery Stores'<sup>6</sup> located across metropolitan areas and larger rural centres in Victoria, New South Wales, Queensland, Tasmania and the Australian Capital Territory. There are no geographic limitations that prevent members in other States from joining CSA, but CSA does not presently plan to operate elsewhere in Australia.
- 2.5. There are currently 121 member stores within CSA, including Ritchies supermarket stores,<sup>7</sup> IGA-branded stores, and other independent supermarkets.<sup>8</sup> These stores are currently supplied by Metcash and other wholesalers. CSA aims to grow its membership to cover 20%-25% of independent retailer stores in the eastern States and future members are not restricted to any particular banner groups.
- 2.6. Under the rules of CSA, members are entitled to, amongst other things:
  - actively participate in policies and decision making
  - contribute to, and democratically control, the capital of their co-operative

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<sup>2</sup> IBISWorld Industry Report G4111, *Supermarkets and Grocery Stores in Australia*, September 2019.

<sup>3</sup> The report notes that convenience stores, specialist food retailers, and cafes, restaurants and takeaway food services also compete with supermarkets and grocery stores. However, these retailers are excluded from industry definition adopted in the report.

<sup>4</sup> Metcash also operates wholesale distribution of liquor and hardware products; and provides merchandising, operational and market support to independent retailers.

<sup>5</sup> CSA is incorporated as a "distributing co-operative" under Victoria legislation, which adopts the *Co-Operatives (Adoption of National Law) Act 2012 (NSW)* and the Co-Operative National Law.

<sup>6</sup> CSA defines an Independent Retail Grocery Store as a retail grocery store, which is not majority owned/controlled by a wholesaler, and is not owned/controlled by a major national or international retailer. See CSA's rules, clause 2.1(g).

<sup>7</sup> Ritchies stores trade under the 'Ritchies Supa IGA' name, and are located in New South Wales, Victoria and Queensland. Metcash owns 26% stake in the Ritches Group.

<sup>8</sup> CSA estimates that the current member stores account for approximately 10% of the IGA Network by number of stores, and 15% of Metcash's IGA sales volumes in Victoria, New South Wales and Queensland.

- share information with each other and with CSA, including information about suppliers and terms of supply agreements (subject to any confidentiality obligations).
- cast votes at CSA meetings, with voting entitlements being in proportion to the number of stores controlled by the member business (but limited to 20% of the total available votes).<sup>9</sup>

## Retail grocery supply chain

2.7. CSA submits that the food and grocery products sourced by independent retailers broadly fall into the following categories:

- (a) 'Direct/direct' purchases – i.e. product lines developed by a retailer with a supplier, and are delivered directly to the retailer's store and paid for outside the primary wholesaler's system.<sup>10</sup>
- (b) 'Direct delivery, charge through' purchases – i.e. product lines typically developed by a retailer with a supplier, and are delivered directly to the retailer's store. However, these products are invoiced through the retailer's wholesaler system and the wholesaler takes a margin on the products.
- (c) Warehouse-sourced purchases – i.e. products ordered through and delivered by the primary wholesaler.<sup>11</sup>

## CSA operation and active member test

- 2.8. CSA proposes to negotiate with suppliers on supply terms in respect of 'direct/directs' and 'direct delivery/charge through' (i.e. **direct to store**) consumer products, and other goods and services (e.g. electricity). If successful, the deals would be made available as a standing offer through the CSA system to all members.<sup>12</sup>
- 2.9. CSA also seeks authorisation to impose an 'active member test' which requires CSA's member businesses to acquire goods or services through the CSA system to a minimum value or volume (to be determined) once in each rolling two-month period.<sup>13</sup> CSA submits that the rationale for the active member test (as mentioned in paragraph 1.4) is to ensure that businesses that join CSA are doing so for the purpose of genuinely participating in collective bargaining arrangements, rather than for the purpose of accessing confidential supply terms (and using the information outside CSA).

## 3. Consultation

- 3.1. A public consultation process informs the ACCC's assessment of the likely public benefits and detriments from the Proposed Conduct.
- 3.2. The ACCC invited submissions from a range of potentially interested parties including retail competitors, wholesalers, suppliers, relevant industry associations and government organisations.

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<sup>9</sup> Disclosure Statement, page X.

<sup>10</sup> CSA states that the award winning IGA stores in recent years have sourced not less than 40% of their offering through 'direct to store' goods.

<sup>11</sup> For a typical independent retailer, these are the core consumer products and the majority of stock by value.

<sup>12</sup> However, many deals may be 'regionally based', given possible logistics and supply-side limitations.

<sup>13</sup> CSA states that members would not be required to purchase prescribed items or a specified basket or range of goods.

- 3.3. The ACCC received one submission in relation to the application.
- 3.4. The Australian Small Business and Family Ombudsman (**the Ombudsman**) provided a submission supporting the application for authorisation. The Ombudsman noted that there is significant concentration in the supermarket industry; and that competition from new entrants will ensure the major retailers continue to drop their prices, making it increasingly difficult for small supermarkets to compete. The Ombudsman considers that granting authorisation would allow small supermarkets to remain competitive and viable, and contribute to supply chain diversification through opening new markets for small to medium suppliers and promote their sustainability and growth, particularly in rural areas. The Ombudsman also considers that CSA should become a signatory to the *Food and Grocery Code of Conduct* (the **Code**) to further enhance protections for small businesses with whom it engages.
- 3.5. Public submissions by CSA and interested parties are available on the Public Register for this matter.<sup>14</sup>

## 4. ACCC assessment

- 4.1. The ACCC's assessment of the Proposed Conduct is carried out in accordance with the relevant authorisation test contained in the Act.
- 4.2. CSA has sought authorisation for Proposed Conduct that would or might constitute a cartel provision within the meaning of Division 1 of Part IV of the Act and may substantially lessen competition within the meaning of section 45 of the Act. Consistent with subsection 90(7) and 90(8) of the Act, the ACCC must not grant authorisation unless it is satisfied, in all the circumstances, that the conduct would result or be likely to result in a benefit to the public, and the benefit would outweigh the detriment to the public that would be likely to result (**authorisation test**).

### Relevant areas of competition

- 4.3. To assess the likely effect of the Proposed Conduct, the ACCC will identify the relevant areas of competition likely to be impacted.
- 4.4. CSA notes that its member businesses operate in the retail supermarket industry but the Proposed Conduct relates to the supply chain to the retailers in the industry. The collective bargaining group is intended to compete with wholesalers who supply retail supermarkets. However, the Proposed Conduct could be applied to goods and services of all kinds that are either consumed by CSA's member businesses, or offered for sale through CSA's member businesses.
- 4.5. The ACCC considers that the following areas of competition are relevant to its assessment of the Proposed Conduct:
  - the wholesale acquisition of goods and services by supermarkets,
  - the retail supply of food and grocery products by supermarkets, and
  - the wholesale supply of food and grocery products by suppliersin the eastern states of Australia.

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<sup>14</sup> <https://www.accc.gov.au/public-registers/authorisations-and-notifications-registers/authorisations-register/co-operative-supermarkets-australia-limited>

## Future with and without the Proposed Conduct

- 4.6. In applying the authorisation test, the ACCC compares the likely future with the Proposed Conduct that is the subject of the authorisation to the likely future in which the Proposed Conduct does not occur.

### Future with the Proposed Conduct

- 4.7. In the future with the Proposed Conduct, the ACCC considers CSA's members will have an additional option for obtaining goods and services for their stores; sourcing 'direct/direct' and 'direct delivery, charge through' purchases through CSA if they choose. CSA would provide an ordering platform through which its members could order directly from the suppliers on terms agreed with CSA. CSA members would continue with their current supply arrangements to obtain warehouse-sourced purchases.

### Future without the Proposed Conduct

- 4.8. The ACCC considers that, without the Proposed Conduct, the status quo is likely to continue. CSA's member businesses would continue to individually negotiate with suppliers for the supply of 'direct to store' products and other goods and services, and continue to purchase their core range of 'warehouse-supplied' products through wholesalers.
- 4.9. CSA submits that the independent retail supermarkets, acting individually, have limited purchasing power to leverage in negotiating supply prices compared to the major integrated retailers. CSA considers that the independent retail supermarket sector is in decline and is at serious risk of failure without the Proposed Conduct. In support of this proposition CSA points to research suggesting that the market share of Metcash-supplied independent retail supermarket stores has been lost to Woolworths, Coles and Aldi over the last decade<sup>15</sup> and the sector faces rising costs coupled with stagnant (or falling) sales revenues that will continue into the future.<sup>16</sup> CSA also notes the declining revenue of Metcash and submits that this has significant consequences for the independent retailers.<sup>17</sup>
- 4.10. The ACCC notes CSA's submissions on this issue but considers that these submissions do not currently provide sufficient evidence for the ACCC to assess the future without the Proposed Conduct as one in which independent retail stores are no longer viable.

## Public benefits

- 4.11. The Act does not define what constitutes a public benefit. The ACCC adopts a broad approach. This is consistent with the Australian Competition Tribunal (the **Tribunal**) which has stated that the term should be given its widest possible meaning, and includes:

*...anything of value to the community generally, any contribution to the aims pursued by society including as one of its principal elements ... the achievement of the economic goals of efficiency and progress.*<sup>18</sup>

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<sup>15</sup> Application for Authorisation, Annexure A page 3

<sup>16</sup> Application for Authorisation, Annexure A pages 1-4.

<sup>17</sup> Application for Authorisation, Annexure A page 10.

<sup>18</sup> Queensland Co-operative Milling Association Ltd (1976) ATPR 40-012 at 17,242; cited with approval in Re 7-Eleven Stores (1994) ATPR 41-357 at 42,677.

4.12. CSA submit that the Proposed Conduct is likely to result in public benefits including:

- Improved negotiating power for retailers resulting in more favourable terms of supply for goods and services from suppliers, reducing the cost base for these retailers;
- Improved viability of independent retail supermarket stores and enhanced capacity to compete with major retailers, supporting the viability of the wholesaler(s), and preserving diversity of retail offering and consumer choice (i.e. more stores offering different products for sale)<sup>19</sup>;
- Additional pathways for suppliers to supply their goods and services to a large range of retailers, leading to greater diversity of retail product lines (between independent retailers, and between independent retailers and major retailers);<sup>20</sup>
- Efficiencies from:
  - centralised ordering (emulating large volume order to reduce risk to suppliers and inconsistency in order volumes)
  - having a centralised point for the supplier to address compliance with promotional arrangements, reducing risk to the supplier of uncertainty in product placement
  - reducing time and resources devoted to negotiation on price and other terms and conditions
  - having control of and transparency of price fluctuations, with the ability to directly alert CSA's members to changes in price and conditions
  - sharing skills and experience
  - utilising a central invoicing system to reduce operating costs for retailers and suppliers.

4.13. The Ombudsman agreed there would be public benefits, including from small supermarkets being better able to compete with major retail supermarkets, preservation of consumer choice in retail offering and enabling small to medium supplies to grow their businesses (see paragraph 3.4).

4.14. The ACCC considers the following public benefits are likely to result from the Proposed Conduct.

### **Reduced transaction costs**

4.15. The ACCC accepts that collective bargaining through CSA is likely to result in public benefits from transaction cost savings relative to the situation where individual negotiations take place between each of CSA's members and each supplier of the relevant goods and services. CSA's member businesses can share the costs of negotiation with many suppliers through CSA. Similarly, the costs to suppliers will be reduced by negotiating supply terms and promotional arrangements with a single representative body. The ACCC accepts that a single negotiation process covering a large number of supply arrangements, resulting in bulk purchases of goods or services

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<sup>19</sup> Application for Authorisation, Annexure A pages 10 and 11.

<sup>20</sup> Application for Authorisation, Annexure A page 11.



through CSA's centralised ordering system, is likely to deliver considerable transaction cost savings for both CSA's member businesses and suppliers.

- 4.16. The co-ordination on distribution of goods by multiple suppliers through CSA<sup>21</sup> is likely to prevent duplication of deliveries, increase efficiency in delivery arrangements and materially lower distribution charges. The reduction in distribution charges would likely flow to both retailers and suppliers.

### **Better input into contracts**

- 4.17. The Proposed Conduct provides for CSA's members to discuss their desired outcomes from collective negotiations and to identify common issues they wish to be addressed through contractual arrangements with suppliers. This is likely to result in more complete and efficient contracts that better reflect the needs of individual members of the bargaining group.

### **Increased retail competition between supermarkets**

- 4.18. With the Proposed Conduct, it is likely that CSAs members will achieve transaction and logistic costs savings. These businesses will also be more likely to have more bargaining power with their aggregated, higher purchasing volumes, and may therefore be able to negotiate more favourable terms and conditions of supply with the suppliers, i.e. lower prices or better non-price terms (e.g. quality and service). If so, this is likely to allow the independent supermarkets to improve their offerings to consumers (including through lower retail prices), and enable them to compete with their retail competitors more effectively.
- 4.19. Due to the ease of accessing 'direct to store' suppliers, the Proposed Conduct is likely to lead to independent supermarkets within CSA increasing their purchase of existing lines of products or sourcing new products within the 'direct to store' categories. In turn, this is likely to allow the independent supermarkets to provide a more diverse and differentiated product and service offerings to consumers, and better compete with major retailers.

### **Increased competition between food and grocery suppliers**

- 4.20. With respect to food and grocery product suppliers, the Proposed Conduct is likely to provide them with an increased access to a wider range of independent supermarkets.<sup>22</sup> The aggregated demand from the CSA group is likely to lead to larger and more consistent order volumes, and greater demand certainty for suppliers. This may attract the interest of new suppliers, and lead to greater competition between existing suppliers and new suppliers to supply CSA. Moreover, as mentioned in ASMFEO's submission, it is likely that small to medium suppliers (particularly in regional Australia) may decide to increase production in order to supply CSA. To the extent this occurs, this may also promote competition in the supply of food and grocery products to third parties (e.g. supermarkets outside the CSA group).

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<sup>21</sup> That is, aligning delivery/aggregating distribution of bulk orders to CSA's member businesses on a run-to-run basis by designing routes to take account of which suppliers are sending products and which CSA members will be receiving them, enables more efficient delivery routes.

<sup>22</sup> This is because CSA's members would be sharing information with each other, and with CSA, about suppliers of 'direct to store' products.

## Increased competition in the wholesale acquisition of food and grocery products

4.21. The Proposed Conduct effectively allows CSA to act as a new wholesale level competitor. With CSA proposing to establish a centralised wholesale ordering system (albeit initially only limited to 'direct to store' products), suppliers would have a new outlet through which they could supply products at the wholesale level. That is, suppliers in the 'direct/directs' category (discussed in paragraph 2.7(a)) would now have the choice to sell through CSA (in addition to the limited pool of existing wholesalers), in addition to selling to their existing customers (i.e. selling directly to retailers<sup>23</sup> and other customers). Suppliers currently in the 'direct delivery/charge through' category (discussed in paragraph 2.7(b)) would now have the choice of selling products through CSA, or through the existing wholesaler's system interface.<sup>24</sup> For any new suppliers coming onto the market, they would also be able to access customers through CSA's new system for product ordering and distribution, as well as through more traditional means. The opening up of this new supply channel through the proposed entry of CSA is likely to introduce new competitive pressure on existing acquirers of goods and grocery products, and increase competition in the wholesale acquisition for these products.<sup>25</sup>

## Public detriments

4.22. The Act does not define what constitutes a public detriment. The ACCC adopts a broad approach. This is consistent with the Tribunal which has defined it as:

*...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.*<sup>26</sup>

4.23. CSA considers that its member businesses compete with each other in their retail offering to consumers, and in the acquisition of products from suppliers (particularly in the 'direct to store' segment). However, it submits that the public detriments resulting from the Proposed Conduct would be minimal (if any) due to the following factors:

- participation in collective bargaining, or becoming a member of CSA, is voluntary for all parties and no collective boycott is proposed;
- increased access for suppliers to customers
- appropriate governance measures and information sharing protocols of CSA
- the longer term reversal of declining sales to consumers, protecting both the independent retailers and the independent wholesale sector.

4.24. CSA submits that the reduction in competition between CSA's member businesses for supply terms will not have a material adverse impact on competition because the

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<sup>23</sup> This include retailers who are not CSA's member businesses; as well as retailers who are CSA's members businesses, but have decided not to acquire specific food and grocery products through CSA, and are instead continuing to acquire these products directly from suppliers.

<sup>24</sup> The existing wholesaler (Metcash) is an intermediary in respect of the 'direct delivery/charge through' products. It provides the linkage between the independent retailers and the suppliers. The products are ordered and invoiced through the wholesaler's systems, however, the wholesaler does not stock the products in its warehouse or deliver it to the retailer. The products are delivered directly to the retailers' stores.

<sup>25</sup> Competition for the wholesale acquisition for good and grocery products may be further enhanced in the future, if CSA decided to expand the scope of the Proposed Conduct to include 'warehouse-sourced products' (mentioned in paragraph 2.7(c)). However, CSA indicates that it has no intention to do so.

<sup>26</sup> Re 7-Eleven Stores (1994) ATPR 41-357 at 42,683.

authorisation brings back into balance what the ACCC has recognised as a concentrated industry.<sup>27</sup>

- 4.25. CSA also submits that while competition between retailers for supply terms will be reduced, that is not harming any aspect of the market that is genuinely 'pro-consumer'.<sup>28</sup>
- 4.26. The ACCC considers that the public detriment resulting from the Proposed Conduct is likely to be limited.

### **Competition between CSA's member businesses for wholesale acquisition of goods and services**

- 4.27. CSA's member businesses may be considered to be each other's competitors for the wholesale acquisition of goods and services. To the extent that CSA's member businesses participate in the Proposed Conduct, they are agreeing to no longer compete. The Proposed Conduct therefore will lessen competition in the acquisition of goods and services.
- 4.28. However, the ACCC considers the effect of any such reduction in competition is likely to be limited.
- 4.29. The bargaining group comprises a small proportion of the total wholesale purchasers in respect of food and grocery products, and business-related goods and services commonly required for retail store operation (e.g. shop equipment, point of sale systems, electricity and other utilities). If authorisation is granted, there will continue to be competition from a broad range of participants outside the bargaining group. It is expected that wholesalers, major supermarkets, independent supermarkets not within the bargaining group, speciality retailers, convenience stores and food establishment will compete with the CSA to acquire food and grocery products; and these, and many other retail businesses (not limited to the retail grocery sector) will compete with CSA to acquire business-related goods and services from suppliers.

### **Competition in the retail supply of food and grocery products**

- 4.30. Deals organised by CSA in respect of 'direct to store' products would be made available as a standing offer to all members. To the extent that members decide to take up those offers, this may lead to homogeneity in the supply of products at the retail level and lessen product and service differentiation. However, this is unlikely to be of concern for the following reasons:
- Participation is voluntary for CSA's member businesses. Subject to the active member test, members will remain free to independently decide whether, and what, products to purchase through the group or source directly from suppliers, based on what they consider to be of value to their customers. CSA has indicated that it has no intention to cause any members to purchase prescribed items or a specified basket or range of products. It claims that the active member test will be a minimum purchase threshold based on value or volume, designed to ensure members are bona fide and genuinely committed to the business of CSA.
  - 'Direct to store' products are not the core range of products stocked by independent supermarkets; rather, they are products that characterise the

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<sup>27</sup> Application for Authorisation, Annexure A page 8.

<sup>28</sup> Application for Authorisation, Annexure A page 8.

stores' appeal, providing them with a point of difference compared to their major competitors. Enabling independent supermarkets to more easily access 'direct to store' products through CSA would likely lead to an increase in the range of products stocked at these supermarkets, which will provide more consumer choice and may invoke a competitive response from non-member retailers. As between CSA's member businesses, competitive tension will exist irrespective of the Proposed Conduct. Retail competition generally occur in local areas, and independent supermarkets are typically geographically dispersed. But, even if a similar range of 'direct to store' products are purchased by CSA's member businesses, those products will only make up a small proportion of all products stocked by members. Further, given the competitive nature of retail competition, strong incentives should remain for members to compete with each other at the retail level.

### **Effect of the active member test on CSA Members**

- 4.31. In some cases, the active member test may result in members purchasing products through CSA on less favourable terms than if they had purchased the products directly from suppliers. This may occur if overall benefits of membership (e.g. higher overall cost savings and sales/profits derived from other products purchased through CSA) are such that members are prepared to accept a particular deal from CSA that is less profitable for them in order to retain access to other deals that they desire. The ACCC considers these situations would be uncommon, as bulk purchasing generally give rise to better supply terms (e.g. prices) for the purchasers. Further, participation in collective bargaining and in any resulting joint buying arrangements for any specific products are voluntary; and members are free to choose the products they wish to acquire through CSA, and exercise judgement to take up deals that best serve their commercial interests.
- 4.32. However, depending on the level at which the minimum purchase threshold is set, it may still interfere with member businesses' decisions regarding what products they purchase through CSA. Based on the information currently available, the ACCC considers the risk of this outcome is low but invites further submissions from the Applicant and interested parties on this issue.

### **ACCC conclusion on public detriment**

- 4.33. Overall, the ACCC considers that the Proposed Conduct is likely to result in limited public detriment.

### **Balance of public benefit and detriment**

- 4.34. The ACCC considers that the collective bargaining by independent supermarket retailers is likely to result in some public benefits through transaction cost savings, more efficient contractual outcomes by improving the input of retailers into their negotiations with suppliers, and improved competition in the retail market. Balanced against this, the ACCC considers that the Proposed Conduct is likely to result in limited public detriment, particularly as the arrangements are voluntary and a collective agreement will only be reached where it is in the interests of both sides of the negotiation.
- 4.35. Therefore, for the reasons outlined in this draft determination, the ACCC considers that the Proposed Conduct is likely to result in a public benefit and that this public benefit would outweigh any likely detriment to the public from the Proposed Conduct.

## Length of authorisation

- 4.36. The Act allows the ACCC to grant authorisation for a limited period of time.<sup>29</sup> This enables the ACCC to be in a position to be satisfied that the likely public benefits will 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.
- 4.37. In this instance, CSA seeks authorisation for five years. CSA considers that the major supermarket retailers are likely to continue to operate very competitively over that period, and the factors that have contributed to the decline of the independent supermarkets will continue, unless sufficient time is given under a grant of authorisation to allow the Proposed Conduct to occur.
- 4.38. The ACCC considers that a five year authorisation period would be sufficient to allow potential benefits to be realised, but is not long enough for possible detriments to significantly impact market dynamics. In light of its assessment of the public benefits and detriments likely to result from the Proposed Conduct, the ACCC proposes to grant authorisation for five years.

## 5. Draft determination

### The application

- 5.1. On 5 November 2020 CSA lodged an application AA1000457 with the ACCC, seeking authorisation under subsection 88(1) of the Act. CSA seeks authorisation for the Proposed Conduct as defined in paragraph 1.4.
- 5.2. Subsection 90A(1) of the Act requires that before determining an application for authorisation, the ACCC shall prepare a draft determination.

### The authorisation test

- 5.3. Under subsections 90(7) and 90(8) of the Act, the ACCC must not grant authorisation unless it is satisfied in all the circumstances that the Proposed Conduct is likely to result in a benefit to the public and the benefit would outweigh the detriment to the public that would be likely to result from the Proposed Conduct.
- 5.4. For the reasons outlined in this draft determination, the ACCC is satisfied, in all the circumstances, that the Proposed Conduct would be likely to result in a benefit to the public and the benefit to the public would outweigh the detriment to the public that would result or be likely to result from the Proposed Conduct, including any lessening of competition.
- 5.5. Accordingly, the ACCC proposes to grant authorisation.

### Conduct which the ACCC proposes to authorise

- 5.6. The ACCC proposes to grant authorisation AA1000457 to enable CSA to and its current and future members<sup>30</sup> to collectively bargain with suppliers of goods or

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<sup>29</sup> Subsection 91(1)

<sup>30</sup> Section 88(2) of the Act.

services, and impose and enforce an 'active member test, as described in paragraph 1.4 and defined as the Proposed Conduct.

- 5.7. The Proposed Conduct may involve a cartel provision within the meaning of Division 1 of Part IV of the Act or may substantially lessen competition within the meaning of section 45 of the Act.
- 5.8. The conduct for which the ACCC proposes to authorise does not extend to any contracts, arrangements or understandings between CSA member businesses in relation to their retail supply of products to consumers.
- 5.9. The ACCC proposes to grant authorisation AA1000457 for five years.
- 5.10. This draft determination is made on **13 March 2020**.

## 6. Interim authorisation

- 6.1. Section 91 of the Act allows the ACCC, where it considers it appropriate, to grant interim authorisation. This allows the parties to engage in the Proposed Conduct while the ACCC is considering the substantive application.

### Initial interim authorisation

- 6.2. On 19 December 2019, the ACCC granted interim authorisation (the **December IA**) to enable CSA to collectively bargain on behalf of its members with suppliers of goods and services to the Australian grocery industry. The December IA did not extend to:
  - CSA and its members entering into any contracts or understandings with suppliers for the supply of goods or services; and
  - CSA imposing and enforcing a proposed 'active member test', as described in paragraph 2.9.

### Request to vary interim authorisation

- 6.3. On 25 February 2020, CSA requested interim authorisation allow CSA and its members to make and document deals with suppliers of goods and services to retail supermarket owners, contingent on final authorisation being granted.
- 6.4. CSA requested this change on the basis that the financial pressures on independent retailers has continued to accelerate, and that securing lower costs to run the retailers' operations has become an urgent matter for its members.<sup>31</sup>

### ACCC's decision on interim authorisation

- 6.5. The ACCC has decided to revoke the December IA and grant an interim authorisation to allow CSA to collectively bargain on behalf of its members with suppliers of goods and services to the Australian grocery industry; and enter into agreements with those suppliers in respect of those goods and services, provided that those agreements do not come into effect unless final authorisation is granted (the **March IA**).
- 6.6. The March IA does not extend to the Applicants imposing and enforcing a proposed 'active member test' that would require members to actively trade in goods and services offered through CSA's system during each rolling two month period.

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<sup>31</sup> CSA did not request varying the December IA to allow it to impose and enforce the proposed 'active member test'.

- 6.7. The March IA commences immediately and will remain in place until the date the ACCC's final determination comes into effect or until the March IA is revoked.
- 6.8. Given the decision to grant the March IA, the ACCC considers it appropriate to revoke the December IA pursuant to Section 91(2AB) of the Act.
- 6.9. The reasons for the ACCC's decision to revoke the December IA and grant new interim authorisation are as follows:
- It is unlikely that the competitive dynamics in any market will be materially impacted by allowing CSA to collectively bargain with suppliers, and entering into conditional supply agreements with suppliers. Such agreements (if made by the relevant parties) can be prevented from coming into effect in the event the final authorisation is not granted, and the relevant markets will be able to return to substantially their current state. CSA Members may gain access to information about the supply terms obtained by other CSA members and use it in subsequent negotiations with their suppliers. We do not consider that CSA members' access to this information is likely to materially impact such one-on-one negotiations except to the extent that they may seek better terms from their suppliers.
  - For the reasons set out in this draft determination, the ACCC considers the Proposed Conduct is likely to result in public benefits, which would outweigh any likely public detriments.
  - There is unlikely to be any harm to any interested parties as a result of broadening the scope of the December IA to allow CSA to enter into conditional supply agreements with suppliers, due to the voluntary nature of the collective bargaining arrangements. On the other hand, CSA perceives that its member businesses are facing urgent financial pressures, and the ability to secure and enter into agreements (even if conditional) is likely to assist its member businesses.

## 7. Next steps

- 7.1. The ACCC now invites submissions in response to this draft determination by **27 March 2020**. In addition, consistent with section 90A of the Act, CSA or an interested party may request that the ACCC hold a conference to discuss the draft determination.