



Draft Determination

Application for authorisation AA1000546

lodged by

Coles Group Limited on behalf of itself and participating supermarkets

in respect of

engaging in coordinated activities to ensure the supply of Retail

Products to consumers during the COVID-19 pandemic

Authorisation number: AA1000546

7 July 2021

Commissioners:

Keogh

Rickard

Brakey

Ridgeway

Summary

The ACCC proposes to grant authorisation to Coles, Woolworths, Metcash, ALDI and other grocery retailers to continue to cooperate in response to the COVID-19 pandemic, to ensure the supply and fair and equitable distribution of Retail Products to Australian consumers, and the health and safety of customers and staff.

The ACCC proposes to grant authorisation in accordance with conditions providing that:

- the cooperation may only occur at, in preparation for, or arise out of either:
 - an **Authorised Meeting** (specific meetings involving government departments and agencies), or
 - **Urgent Measures discussions or agreements** (held within 24 hours of a government announcement), and
- other grocery retailers seeking the protection of the authorisation must, if they have not previously done so, obtain approval from the ACCC.

These conditions are similar to the conditions that applied to a previous authorisation granted to grocery retailers to cooperate in response to the COVID-19 pandemic. This authorisation, which had been in effect since 23 March 2020, expired on 31 March 2021.

This draft determination follows on from the interim authorisation granted by the ACCC on 25 March 2021 to enable the cooperation between the grocery retailers to continue while the ACCC considers the substantive application.

The ACCC proposes to grant authorisation until 31 March 2022.

The ACCC invites submissions in relation to this draft determination by 28 July 2021 before making its final decision.

1. The application for authorisation

- 1.1. On 12 March 2021, Coles Group Limited (**Coles**) on behalf of itself and Woolworths Group Limited, ALDI Stores (A Limited Partnership), Metcash Limited (the **Participating Supermarkets**) and any other grocery retailers approved by the Australian Competition and Consumer Commission (the **ACCC**) (**Other Approved Supermarkets**) lodged application for authorisation AA1000546 with the Australian Competition and Consumer Commission ACCC.
- 1.2. Coles is seeking authorisation for the Participating Supermarkets and Other Approved Supermarkets to continue to engage in coordinated activities with the broad purpose of ensuring the supply and fair and equitable supply of retail products to consumers, and the health and safety of customers and staff, during the COVID-19 pandemic as described at paragraph 1.9 of this draft determination (the **Proposed Conduct**). Authorisation is sought until 31 March 2022.
- 1.3. This application for authorisation AA1000546 was made under subsection 88(1) of the *Competition and Consumer Act 2010* (Cth) (the **Act**).

- 1.4. The ACCC may grant authorisation, which provides businesses with protection from legal action under the competition provisions in Part IV of the Act for arrangements that may otherwise risk breaching those provisions in the Act, but are not harmful to competition and/or are likely to result in overall public benefits.
- 1.5. A previous authorisation for the Participating Supermarkets and Other Approved Supermarkets to cooperate in response to the COVID-19 pandemic expired on 31 March 2021 (the **previous authorisation**).
- 1.6. Because the previous authorisation was due to expire shortly after the current application was lodged, Coles also requested interim authorisation to enable the Participating Supermarkets and Other Approved Supermarkets to continue to engage in the Proposed Conduct while the ACCC is considering the substantive application. On 25 March 2021, the ACCC granted interim authorisation in accordance with subsection 91(2) of the Act¹ (the **Interim Authorisation**).

The applicants

- 1.7. Coles has lodged the application for authorisation on behalf of:
 - itself and its related bodies corporate (**Coles**)
 - Woolworths Group Limited (**Woolworths**)
 - ALDI Stores (**ALDI**), and
 - Metcash Limited, including 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**).
- 1.8. The Participating Supermarkets propose that the authorisation would also apply to:
 - any other grocery retailer who has approval from the ACCC to engage in the conduct the subject of the application pursuant to the previous authorisation (or any related interim authorisation) (as listed at paragraph 2.11), and
 - any other grocery retailer who in future wishes to engage in the conduct the subject of the application and is approved to do so by the ACCC under the approval process stipulated in the conditions of authorisation at paragraphs 5.15 to 5.16 of this draft determination.

¹ See ACCC decision of 25 March 2021 available [here](#).

The Proposed Conduct

1.9. The Participating Supermarkets seek authorisation for the following conduct (with the underlined text indicating the additions to the conduct authorised under the previous authorisation):

- (1) to propose, discuss, enter into or give effect to any contract, arrangement or understanding (including contracts, arrangements or understandings involving manufacturers, suppliers, transport and logistic providers), or engage in any conduct, where the contract, arrangement or understanding, or conduct:
 - (a) involves two or more of any Participating Supermarket or Other Approved Supermarkets; and
 - (b) has the purpose of ensuring the supply and fair and equitable distribution of Retail Products to Australian consumers during the COVID-19 pandemic by:
 - (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 most in need (including the elderly and disadvantaged members of the public, such as consumers who may be too unwell to travel to the supermarket)
 - (iv) facilitating access to Retail Products in remote or rural areas, or
 - (v) ensuring supermarkets provide a safe operating environment for staff, including contractors and third parties, and consumers, including vulnerable consumers, and
 - (c) either occurs at, in preparation for, or arises out of:
 - (i) **(Authorised Meeting)** an Authorised Meeting that occurs on or after the date that authorisation is granted, or
 - (ii) **(Urgent Measures)** discussions within 24 hours of a government COVID-19 direction or response (such as a government response to an outbreak) concerning urgent measures to ensure a safe operating environment, which measures are subsequently tabled at an Authorised Meeting. The ACCC must be provided with as much notice of the relevant discussion or meeting as is reasonably practicable in the circumstances, or
- (2) for themselves and any Other Approved Supermarket to continue to give effect to any contract, arrangement or understanding previously entered into in reliance on the Interim Authorisations dated 23 and 26 March 2020 and 9 June 2020 and the Final Authorisation dated 3 September 2020.

Retail Products are fresh food, groceries, household products and liquor.

(the **Proposed Conduct**).

- 1.10. Authorisation is sought until March 2022.
- 1.11. The Proposed Conduct is not compulsory, and any Participating Supermarket or Other Approved Supermarket can decline to participate in, or opt out of, any proposed discussion or collaboration under the authorisation.

2. Background

- 2.1. On 20 March 2020, Coles applied for authorisation, and requested urgent interim authorisation, for the Participating Supermarkets to engage in coordinated activities to ensure the supply and fair and equitable distribution of Retail Products to consumers during the COVID-19 pandemic.
- 2.2. The ACCC granted interim authorisation on 23 March 2020 and granted replacement interim authorisations due to some changes to the arrangements on 26 March 2020 and 9 June 2020. The ACCC granted substantive authorisation on 3 September 2020, which expired on 31 March 2021.
- 2.3. Coles submits that the previous authorisation has been effective in achieving its aims, including curbing stockpiling behaviour and, consequently, ameliorating community concerns about availability of Retail Products, ensuring fair and reasonable access to Retail Products for all customers (including the elderly and disadvantaged) and ensuring the safety of customers and staff.
- 2.4. Coles submits that while only a small number of agreements have been reached in reliance on the previous authorisation, it has enabled open, frank and timely discussions and collaboration between Participating Supermarkets and the government on a number of topics, without which stock shortages and associated supply chain constraints would likely have continued for a considerably longer period. Additionally, discussions about safety matters (such as customer numbers in store and cleaning and hygiene measures) have enabled the Participating Supermarkets to share ideas and best practice information on, and provide similar or consistent public messaging about, safety measures.
- 2.5. Coles submits that the COVID-19 outbreaks which have occurred since the previous authorisation was granted – in Adelaide (November 2020), Sydney (December 2020), Brisbane (January 2021), south-west Western Australia (February 2021) and Melbourne (February 2021) – demonstrate how the authorisation enables potential limited collaboration between the Participating Supermarkets as issues emerge.

The new (current) application for authorisation

- 2.6. Coles submits that authorisation is sought on substantially the same terms as in the previous authorisation but with some modifications to reflect the evolution of the pandemic and the current operating rhythms of key government agencies. These modifications are set out at paragraph 1.9 and described in paragraph 2.10.
- 2.7. Coles wishes to ensure that a framework remains in place for Participating Supermarkets and Other Approved Supermarkets to coordinate their activities to manage risks associated with the COVID-19 pandemic that may arise in the event of further coronavirus clusters and lockdowns, including measures to address any anomalies in consumer demand (i.e. panic buying) and disruptions to supply chains or to ensure the safety of customers, employees and contractors.
- 2.8. Coles submits that at least until the Australian vaccination schedule is completed, and the efficacy of the vaccines and other COVIDsafe practices are known with greater

certainty, there is an ongoing risk that collaborative action may be required to respond to COVID-19 outbreaks.

Proposed changes to the existing authorisation

- 2.9. Under the previous authorisation, the supermarkets were authorised for coordinated activities with the broad purpose of ensuring the supply and fair and equitable distribution of Retail Products to consumers during the COVID-19 pandemic. Discussions and agreements between the supermarkets had to occur at, in preparation for, or arise out of an Authorised Meeting, being meetings of the Supermarket Taskforce and any of its working groups, the COVID-19 Food Security Working Group and the Coordinated Corporate Taskforce, or meetings of a taskforce, working group or similar forum convened by a Federal Government Department and notified to the ACCC.
- 2.10. Coles proposed, and on 23 March 2021 interim authorisation was granted for, the conduct previously authorised with the following additions to the scope of the authorised conduct:
- (a) clarifying, as detailed in paragraph 1.9, that for the avoidance of doubt, the purposes for which coordination is authorised include the supermarkets ensuring a safe operating environment for employees and customers. The Participating Supermarkets consider an express permitted purpose relating to safety is desirable as Australia moves to the next phase of the pandemic. Coles submits that this includes agreeing on measures such as common approaches to implementing regulatory requirements relating to COVID-19 safety (for example, QR codes). It submits that such discussions would only be covered by the Existing Authorisation to the extent they were necessary for the purposes of ensuring ongoing supply of Retail Products
 - (b) expanding the definition of an Authorised Meeting, as detailed at paragraph 1.9, to include:
 - (iii) meetings involving State or Territory Government representatives, rather than only the Federal Government. Coles submits that recent case outbreaks in Adelaide, Sydney, Brisbane, Perth and Melbourne provide pertinent examples of circumstances where swift action may be required at a more localised level without necessarily involving coordination at the Federal level
 - (iv) meetings attended by Federal, State or Territory representatives rather than only meetings convened by Government (i.e. the meeting could be convened by the industry provided Government representatives attended). Coles submits that this would provide additional flexibility to respond to urgent issues whilst still ensuring government oversight, and
 - (v) meetings held by Governments with individual supermarkets. Coles submits that certain Governments have chosen to hold discussions with individual supermarkets, rather than convene a meeting where all Participating Supermarkets are present at the same time. Coles seeks to have such meetings included within the definition of an Authorised Meeting so that the protection of the authorisation applies in circumstances where an agreement is facilitated in circumstances where the relevant supermarkets may not meet or speak directly, and

(c) adding, as detailed in paragraph 1.9, a new class of discussions and agreements, Urgent Measures, to the conduct protected by the authorisation. Coles submits that while it is appropriate that the conduct should generally occur at or in connection with an Authorised Meeting, there would be a public benefit in ensuring that in limited urgent cases, supermarkets can also discuss and act swiftly outside of an Authorised Meeting to agree on critical safety measures. For example, in the event of any future outbreak and/or lockdown in a particular State, the supermarkets may within hours wish to agree on urgent measures to ensure a safe operating environment to deal with a sudden change in consumer demand (i.e. panic buying). Coles proposes that discussions and agreements arising out of Urgent Measures have legal protection under the authorisation provided that measures agreed are subsequently tabled at an Authorised Meeting and the ACCC is provided with as much notice as reasonably practical of the relevant discussion or meeting.

2.11. Coles provided the ACCC with examples, on a confidential basis, of instances where these proposed amendments to the previous authorisation may have allowed for a more effective and efficient response to the various localised outbreaks in late 2020 and early 2021.

Other Approved Supermarkets

2.12. As noted, Coles also proposes that the authorisation apply to any other grocery retailers that have been approved by the ACCC under the process provided for through the conditions of the previous authorisation, or are approved by the ACCC in the future under the new authorisation. The following retailers have already applied for and been granted protection under the previous authorisation:²

- Amazon Australia, 7-Eleven Australia, Harris Farm, Arnhem Land Progress Aboriginal Corporation, Outback Stores, and Community Enterprises Queensland – who each have protection on the same terms as the Participating Supermarkets
- specified current and future members of Retail Drinks Australia³ – who each have protection limited to implementing recommendations of the Supermarket Taskforce, or the main working sub-committee of the Supermarket Taskforce, that have been approved by the Minister for Home Affairs, and
- Master Grocers Australia and the Australasian Association of Convenience Stores – who each have protection limited to discussions held or arrangements made during a meeting of the Supermarket Taskforce, the Food Supply working group or one of the Taskforce's other working groups, or in any directly related side-meetings to continue discussions.

3. Consultation

3.1. A public consultation process informs the ACCC's assessment of the likely public benefits and detriments from the Proposed Conduct.

² A full list of these parties also appears on the public register [here](#).

³ Hotel & Tourism Management Pty Ltd, Top Cellars Group, Beer Cartel, Liquor Marketing Group, Wine Depot, Diageo Australia, Red Bottle Group, Vantage Group, Liquor Stax, and all current and future members of Retail Drinks that are classed as 'Liquor Store Members' and 'Digital and Online Members'.

- 3.2. The ACCC invited submissions from a range of potentially interested parties including retailers, industry associations, and bodies that are responsible for food supply in rural and remote communities.⁴
- 3.3. The ACCC received four submissions from interested parties in support of Coles' application for authorisation.
- 3.4. Public submissions by Coles and interested parties are on the Public Register for this matter. The submissions received are summarised below.
- 3.5. The **Supermarket Taskforce**, led by the Department of Home Affairs and established to respond to challenges facing supermarkets arising from the COVID-19 pandemic, submitted that the positive outcomes achieved to date to ensure the continuity of food supply would not have been possible without the previous authorisation. It noted that the Supermarket Taskforce continues to meet as required to respond to food security challenges, and that as the pandemic situation remains uncertain, it is important the Taskforce continue to facilitate industry cooperation.
- 3.6. The **Australian Food and Grocery Council (AFGC)** submits that it supports authorisation to facilitate the supply of retail products during the COVID-19 pandemic, but notes that any benefit gained should be limited to this environment and function only. The AFGC considers that accountability could be strengthened through the establishment of a register to record the occurrence and contents of all Authorised Meetings and Urgent Measures, which would be available to interested parties upon request. The AFGC considers this to be an appropriate governance measure to monitor and record the utilisation of the authorisation.
- 3.7. **Community Enterprise Queensland (CEQ)**, a supplier of retailer services to remote Indigenous communities in Queensland, supports continuation of authorisation. CEQ views the previous authorisation as having allowed for a collaborative approach between the parties to better service communities in need and a more equitable distribution of retail product. CEQ supports the proposed expansions to the conduct previously authorised.
- 3.8. CEQ also submits that any minutes of meetings should be distributed to Participating Supermarkets, Other Approved Supermarkets, and all levels of Government including the ACCC.
- 3.9. The **Arnhem Land Progress Aboriginal Corporation (ALPA)**, an operator of commercial stores in 22 remote Australian communities, supports authorisation because it considers the pandemic is not over and there is risk of further outbreaks, which can instigate panic buying causing stock outages again. ALPA notes that the previous authorisation has allowed ALPA, Outback Stores and CEQ to coordinate approaches to wholesalers and manufacturers to ensure their remote stores did not run out of key essentials and there was no panic buying. It submits that it continues to meet regularly with the COVID-19 Remote Food Security Working Group convened by the National Indigenous Australians Agency (**NIAA**) and also the Northern Territory Government COVID-19 taskforce.
- 3.10. In **response to submissions** from interested parties, Coles submits that the outbreaks and lockdowns that have occurred since the application was lodged demonstrate the ongoing threat of supply disruptions and the ongoing benefits of the Participating Supermarkets being able to engage in the Proposed Conduct. Coles also

⁴ A list of the parties consulted and the public submissions received is available from the ACCC's public register www.accc.gov.au/authorisationsregister.

submits that these examples highlight the potential of the additional elements of the Proposed Conduct – for example, Urgent Measures processes could prove necessary in similar circumstances which involve sudden and significant lockdown restrictions implemented with no advance notice.

3.11. Coles also submits that it does not agree with the AFGC's and CEQ's proposals that details of Authorised Meetings or Urgent Measures be recorded and published on a public register or recorded in minutes and distributed to all authorised parties and levels of government, including the ACCC. Coles submits that this is for three reasons:

- The Proposed Conduct already provides for appropriate regulatory oversight, accountability to, and involvement of the ACCC and other government departments and agencies.
- The subjects discussed in Authorised Meetings are often confidential both to government and the meeting participants. 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 effect on participation in – and hence efficacy of – the Authorised Meetings in the future.
- 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. To require Coles or other Participating Supermarkets 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.

3.12. This issue is discussed further in the ACCC's assessment at paragraph 4.35 below.

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. Authorisation is sought 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. Authorisation also is sought for Proposed Conduct relating to contracts, arrangements or understandings, concerted practices, exclusive dealing and other conduct that has the purpose, effect or likely effect of substantially lessening competition. 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 result or be likely to result (authorisation test).

Relevant areas of Competition

- 4.3. While the ACCC does not consider it necessary to precisely define the relevant areas of competition, the ACCC considers the relevant areas of competition are likely to include the:
 - retail supply of Retail Products by supermarkets, and

- wholesale acquisition of Retail Products by supermarkets.

Future with and without the Proposed Conduct

- 4.4. 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.
- 4.5. The ACCC considers that in the future with the Proposed Conduct, the Participating Supermarkets and Other Approved Supermarkets will be able to cooperate with each other if such cooperation arises from Authorised Meetings or Urgent Measures discussions. In addition, the conduct must have one of the relevant purposes set out at paragraph 1.9 related to ensuring the supply and fair and equitable distribution of Retail Products to consumers, and the health and safety of customers and staff, during the COVID-19 pandemic.
- 4.6. Without the Proposed Conduct, the ACCC considers that the Participating Supermarkets and Other Approved Supermarkets would not be able to cooperate in response to the COVID-19 pandemic where cooperation would breach the Act. Further, some of the measures which do not require authorisation may take longer to implement than they would in the future with authorisation. Accordingly, discussing and implementing uniform measures (such as those described at paragraph 4.9 and 4.12 to 4.16 below) would be more difficult or impossible.

Public benefits

- 4.7. 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.*⁵
- 4.8. Coles submits that the previous authorisation has been effective in achieving its aims, and it wishes to ensure a framework remains in place for Participating Supermarkets and Other Approved Supermarkets to coordinate their activities to manage risks associated with the COVID-19 pandemic that may arise in the event of further coronavirus clusters and lockdowns.
- 4.9. Coles notes that in practice only a small number of agreements have been reached in reliance on the Existing Authorisation. These have included introducing temporary limits on retail liquor, adjusting trading hours (including to facilitate restocking, prevent crowding during public holiday periods and improve access to vulnerable persons) and introducing customer number limits in-store for social distancing reasons to protect team member and customer safety. However, Coles submits the Existing Authorisation has enabled open, frank and timely discussions and collaboration between Participating Supermarkets and the government on a number of topics such as:
- the safety aspects of trading during the pandemic
 - availability of key product lines for customers

⁵ 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.

- trading hours
- customs clearance and border closures
- use of hand sanitiser and masks
- customer numbers and security in supermarkets and shopping centres
- supply to vulnerable customers, including through online channels
- access to grocery supplies by remote and indigenous communities, and
- cleaning and hygiene measures undertaken to protect team members and customers.

4.10. In considering this application, the ACCC has considered whether there is a continuing need for the coordinated activities between the supermarkets. In this respect, the ACCC notes that the situation in relation to the COVID-19 pandemic remains uncertain in the short term as evidenced by ongoing outbreaks and lockdowns in various states. This ongoing uncertainty, and the possibility of restrictions being imposed at short notice, has particular impacts on the operations of supermarkets in supplying customers.

4.11. The ACCC's assessment of public benefits is informed by submissions from Coles and interested parties, and from its own observations of the coordination to under the previous authorisation and current interim authorisation, particularly through ACCC representatives attending the Authorised Meetings.⁶ With respect to the current application, since the interim authorisation was granted in March 2021, the ACCC has observed a number of discussions between the Participating Supermarkets on various issues. These discussions have often been held in response to outbreaks and lockdowns.

Consumer access to Retail Products

4.12. The ACCC considers that the Proposed Conduct is likely to result in public benefits by maximising the likelihood of consumers across Australia, including in regional and remote areas, continuing to have fair and reasonable access to Retail Products at times of unexpected shortages resulting from the COVID-19 pandemic.

4.13. The ACCC recognises that not all of the measures discussed at Authorised Meetings and Urgent Measures discussions require authorisation. However, where these measures have been implemented, either collectively or unilaterally, the ACCC considers the coordination permitted by the authorisation has enabled measures to be implemented more rapidly than they would otherwise have been.

4.14. The ACCC considers that allowing the cooperation permitted by the previous authorisation and the current interim authorisation has enabled authorised retailers to respond proactively to anticipated or expected impediments to the continued availability of Retail Products across Australia during the COVID-19 pandemic. For example, ALPA submits that the previous authorisation allowed ALPA, Outback Stores and CEQ to coordinate approaches to wholesalers and manufacturers to ensure their remote stores did not run out of key essentials and there was no panic buying. The

⁶ ACCC representatives attend the Supermarkets Taskforce and the main working group established by the Department of Home Affairs to coordinate the supermarkets' response to the COVID-19 pandemic, and the main NIAA taskforce dealing with retail supply in rural and remote communities.

ACCC considers this type of coordination is likely to continue if the Proposed Conduct continues to be authorised.

- 4.15. The ACCC also notes Coles' submission that a number of response measures developed by supermarkets (such as product limits) are time-sensitive, and to be effective, must be discussed and implemented immediately following a lockdown announcement or regulatory change. Coles submits that expanding the previously authorised conduct to including Urgent Measures discussions and agreements arising out of such discussions would allow the Participating Supermarkets and/or Other Approved Supermarkets to hold urgent discussions (outside of an Authorised Meeting) within 24 hours of a government COVID-19 direction, about introducing and implementing measures such as product limits to ensure a safe operating environment.
- 4.16. Coles considers expanding the authorised conduct in this way is necessary because the previously authorised conduct required Authorised Meetings to be convened or attended by a representative of a State or Territory government. Coles submits that in the event of an urgent outbreak and/or localised lockdown, it is possible that the relevant State or Territory government may not be available to meet within a very short time frame (such as 1 to 2 hours) given the range of matters being addressed by government at that time to implement the lockdown.
- 4.17. The ACCC considers that the expansions to the previously authorised conduct to allow for Urgent Measures discussions and agreements will enhance the ability of grocery retailers to implement measures to maximise the likelihood of consumers continuing to have fair and reasonable access to Retail Products at times of unexpected shortages resulting from the COVID-19 pandemic.

Reducing community concerns and stockpiling behaviour

- 4.18. The ACCC considers that the Proposed Conduct is likely to result in public benefits by reducing community concerns about availability of Retail Products during the period of the COVID-19 pandemic.
- 4.19. By enabling improved discussions and coordination between the authorised retailers, the ACCC considers that the Proposed Conduct has been effective to date in reducing consumer concerns about the need to stockpile essential household items. The ACCC considers this is likely to continue if the Proposed Conduct is authorised.
- 4.20. Providing consumers with greater certainty about the availability of Retail Products and promoting retailers' ability to respond effectively to periods of high (and at times unpredictable) demand, has resulted in public benefits associated with encouraging consumers to return to normal shopping patterns in many areas.
- 4.21. The ACCC also considers that the expansions to the previously authorised conduct to allow for Urgent Measures discussions and agreements will enhance the ability of grocery retailers to implement measures to maximise the likelihood of consumers continuing to have fair and reasonable access to Retail Products at times of unexpected shortages resulting from the COVID-19 pandemic. This is particularly as community concerns about availability of Retail Products often arise at short notice, for example, immediately after the announcement of a lockdown.

Reducing strain on the Retail Products supply chain

- 4.22. The ACCC considers that the Proposed Conduct has been effective to date in reducing strain on Retail Product supply chains resulting from the COVID-19

pandemic. The Proposed Conduct facilitates discussions intended to address supply chain strains, including:

- assisting manufacturers and authorised retailers to quickly understand impediments to increasing production to meet higher (and at times unpredictable) demand and agree on solutions to address those issues
- assisting manufacturers and authorised retailers 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 applicants to urgently restock their shelves. This will further contribute to the safety of customers and access to groceries, and
- assisting Participating Supermarkets to address difficulties within their internal supply chains.

Promoting a safe operating environment for consumers, employees and contractors and other third parties

4.23. Coles submits that as Australia moves to the next phase in the pandemic, the Participating Supermarkets expect that coordinated activities to ensure a safe working environment for staff and customers may be a particular focus. Coles submits that without authorisation, each authorised retailer would continue to unilaterally implement safety measures which ensure the safety and wellbeing of customers and staff. However, the Proposed Conduct will enable authorised retailers to share and agree on best practice measures during the next phase of the pandemic, including similar or consistent public messaging and store safety requirements such as customer numbers in stores, cleaning and hygiene measures and requirements in relation to QR codes, likely resulting in enhanced safety outcomes across industry.

4.24. The ACCC considers that allowing the cooperation permitted by the previous authorisation and the current interim authorisation has enabled the Participating Supermarkets and Other Approved Supermarkets to implement measures to ensure the safety of customers and staff. Under the previous authorisation, for example, the Participating Supermarkets were able to discuss various safety-related matters and reach agreements on measures such as adjusting trading hours (including to facilitate restocking, prevent crowding during public holiday periods and improve access to vulnerable persons) and introducing customer number limits in-store to maintain social distancing and team member and customer safety.

4.25. The ACCC considers that the change to the previously authorised conduct to explicitly list ensuring supermarkets provide a safe operating environment for staff and consumers as a purpose for which coordination can occur provides certainty about this.

4.26. The ACCC also considers that the expansions to the previously authorised conduct to allow for Urgent Measures discussions and agreements will enhance the Participating Supermarkets' and Other Approved Supermarkets ability to discuss and implement safety measures in a timely manner.

Public detriments

4.27. 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.⁷

- 4.28. The ACCC considers that the Proposed Conduct may result in some public detriments associated with a lessening of competition.
- 4.29. The ACCC notes that arrangements involving competitors in relation to the goods and services they provide are likely to lessen competition relative to a situation where each business makes its own decisions. The Participating Supermarkets are in most cases each other's closest competitors and the ACCC considers it is vital that once the unusual circumstances created by the COVID-19 pandemic are no longer present cooperation between them in relation to these matters should cease.
- 4.30. Separately, there may be unidentifiable and potentially significant public detriments when presently unidentified third parties may also seek and gain protection of the authorisation.
- 4.31. With the proposed conditions described at paragraphs 5.13 to 5.16 below (which are the same as the conditions imposed in the interim authorisation granted on 25 March 2021 and similar to those imposed in the previous authorisation⁸), the ACCC considers that the public detriments likely to result from the Proposed Conduct will be limited due to the following factors.
- 4.32. Authorisation is restricted to conduct arising from Authorised Meetings or Urgent Measures discussions, both of which must have the purpose of responding to the COVID-19 pandemic. Authorised Meetings include federally-convened meetings of the Supermarket Taskforce, COVID-19 Food Security Working Group and Coordinated Corporate Taskforce, as well as taskforces and other fora that are notified to the ACCC and are convened or attended by a Federal or State Government department or agency. This further reduces the risk of competitively sensitive information being exchanged for purposes unrelated to responding to the pandemic.
- 4.33. Urgent Measures are narrow in scope (as they can only be used in limited circumstances to ensure a safe operating environment); are restricted to a limited timeframe (within 24 hours of a government announcement); and, under the condition imposed at 5.14 below, the ACCC has advance notice that they are being held and there is oversight over the outcomes, which must be tabled at the next Authorised Meeting.
- 4.34. The ACCC is satisfied that information exchanged and arrangements made at Authorised Meetings and Urgent Measures discussions to date (that is, since 23 March 2020) focus on short-term responses to the pandemic and are unlikely to have longer-term impacts on competition.
- 4.35. The ACCC further considers that the public detriment likely to result from the Proposed Conduct will be limited because:
- The Proposed Conduct does not extend to coordination in relation to price.
 - The Proposed Conduct is unlikely to materially change the Participating Supermarkets' incentives to compete during the period of authorisation, and unlikely to change the incentives after the period of authorisation.

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

8 The difference being the addition of an Urgent Measures condition reflecting that Urgent Measures discussions are a new addition to the previously authorised conduct.

- It is not compulsory for supermarkets to participate in the Proposed Conduct. Similarly, authorisation does not compel the manufacturers, suppliers, transport and logistic providers to agree to the proposals by the Participating Supermarkets and Other Approved Supermarkets, nor does it prevent them from negotiating alternate outcomes with the Participating Supermarkets.
- The Proposed Conduct is a temporary measure. The ACCC may also review its decision to grant authorisation at any time.

4.36. The ACCC does not propose to require that details of Authorised Meetings or Urgent Measures discussions be made publicly available or distributed to grocery retailers that did not participate in the discussion. The ACCC considers that the arrangements discussed above for government and ACCC attendance at these meetings provides an appropriate level of oversight. The ACCC also considers that broad disclosure of details of matters discussed could make some participants more reluctant to discuss, and as necessary agree on measures, undermining the utility of the arrangements.

Proposed Conditions

4.37. To mitigate the potential public detriment described at paragraphs 4.28-4.29 above, the ACCC proposes to impose the same conditions as it imposed in granting interim authorisation on 25 March 2021. These conditions relate to limiting the definition of Authorised Meetings; the conducting of Urgent Measures meetings or discussions; and requiring ACCC approval of other Parties wishing to engage in the Proposed Conduct.

4.38. Except for the condition relating to Urgent Measures, these are the same conditions as imposed in the previous authorisation on 3 September 2020, with some modifications and changes. The underlined text at paragraphs 5.13 to 5.14 below indicates additions to the conditions imposed in the previous authorisation. Except for the condition relating to Urgent Measures, each of these additions were requested by Coles, as summarised at paragraph 2.10 above.

4.39. The Urgent Measures condition is a new condition reflecting that Urgent Measures discussions are a new addition to the previously authorised conduct. The Urgent Measures condition requires that any Urgent Measures must be tabled at the next relevant Authorised Meeting that is held, rather than an Authorised Meeting as requested by Coles.

4.40. These conditions are intended to provide the ACCC, and relevant Federal, State and Territory Governments, with sufficient certainty, oversight and transparency regarding any coordination agreed between the Participating Supermarkets and Other Approved Supermarkets wishing to engage in the Proposed Conduct. This gives the ACCC the opportunity to be satisfied that any coordination agreed to and/or retailers added does not result in unintended public detriments.

Balance of public benefit and detriment

4.41. The ACCC considers there are significant public benefits in enabling the Participating Supermarkets and Other Approved Supermarkets to prepare for, discuss and implement activities to safeguard the supply of Retail Products to consumers during the period of the COVID-19 pandemic.

4.42. The ACCC has observed the Participating Supermarkets engaging in the Proposed Conduct under the previous authorisation since March 2020, and under the current interim authorisation since March 2021. The ACCC considers that each of the public benefits outlined above has been realised and is likely to continue to be realised if the

Proposed Conduct is authorised, particularly if there are further outbreaks and/or lockdowns.

- 4.43. The ACCC considers the likely public detriment arising from the Proposed Conduct (with the proposed conditions) to be limited, and is unlikely to have any long-term impacts extending beyond the period of authorisation.
- 4.44. Accordingly, the ACCC is satisfied that the public benefits arising from the Proposed Conduct outweighs the public detriments.

Length of authorisation

- 4.45. The Act allows the ACCC to grant authorisation for a limited period of time.⁹ 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.
- 4.46. In this instance, Coles seeks authorisation until 31 March 2022 (being 12 months from the date the previous authorisation expired).
- 4.47. As discussed above, the ACCC considers that the Participating Supermarkets are in most cases each other's closest competitors. The ACCC considers it is vital that once the unusual circumstances created by the COVID-19 pandemic are no longer present cooperation between them in relation to these matters should cease.
- 4.48. However, the ACCC considers that the number of recent outbreaks and/or lockdowns around Australia, and uncertainty surrounding the vaccination schedule, demonstrate the likely continued utility of authorisation for the period requested by Coles.
- 4.49. Therefore, the ACCC proposes to grant authorisation until 31 March 2022. The ACCC considers that this is appropriate given the significant public benefits and minimal public detriments likely to result from the Proposed Conduct (with the proposed conditions).

5. Draft determination

The application

- 5.1. On 12 March 2021, Coles lodged application AA1000546 with the ACCC, seeking authorisation under subsection 88(1) of the Act.
- 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.

⁹ Subsection 91(1).

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 AA1000546 to enable the Participating Supermarkets and Other Approved Supermarkets to engage in coordinated activities with the broad purpose of ensuring the supply and fair and equitable distribution of Retail Products to consumers, and the health and safety of customers and staff, during the COVID-19 pandemic, as described in paragraph 1.9 and defined as the Proposed Conduct.

5.7. The Proposed Conduct is not compulsory, and any Participating Supermarket or Other Approved Supermarket can opt out of any proposed collaboration under the authorisation.

5.8. The provisions of the Act in respect of which the ACCC proposes to grant authorisation are as follows:

- 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 Act), and
- 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 Act).

5.9. The proposed authorisation does not extend to any agreement in relation to the retail price for Retail Products. Each of the Participating Supermarkets and Other Approved Supermarkets will continue to compete in relation to factors such as price and service in relation to Retail Products.

5.10. The ACCC proposes to grant authorisation AA1000546 until 31 March 2022.

5.11. This draft determination is made on 7 July 2021.

Proposed Conditions of Authorisation

5.12. The ACCC proposes to grant authorisation with the following conditions (with additions to the conditions imposed in the previous authorisation underlined):

Condition 1: Authorised meetings

5.13. For the purposes of paragraph 8(c)(i) above, Authorised Meeting means any of the following types of meetings:

- (a) meetings of the Supermarket Taskforce and any of its working groups, as convened by the Department of Home Affairs from time to time¹⁰
- (b) meetings of the COVID-19 Food Security Working Group and the Coordinated Corporate Taskforce as convened by the National Indigenous Australians Agency, or
- (c) meetings of a taskforce, working group or forum convened or attended by a representative of a Federal, State or Territory Government department or agency with the objective of responding to the COVID-19 pandemic where:
 - (i) the ACCC is notified by a Participating Supermarket in writing to exemptions@acc.gov.au, at least two clear working days before the date of any meeting (or, if a shorter period of notice is given, the ACCC advises in writing that it accepts the shorter period of notice provided), that the Participating Supermarket wishes meetings of the relevant group to be covered by this authorisation, and sets out the time and date of the first meeting, proposed attendees, the purpose of the meeting and the group, and the matters to be discussed at the meeting
 - (ii) more than one Participating Supermarket, or one or more Participating Supermarkets and one or more Other Approved Supermarket, has been invited to the forum, and
 - (iii) the ACCC does not notify the relevant Participating Supermarket at least one business day in advance in writing that it is not satisfied that the meeting has been convened to further one or more of the purposes at (1)(b) above.

For the avoidance of doubt, a forum includes a coordination mechanism convened by a Federal, State or Territory Government department or agency where Government liaises and/or coordinates with more than one Participating Supermarket, or one or more Participating Supermarkets and one or more Other Approved Supermarkets, even though the relevant supermarkets may not meet or speak directly, provided that the relevant Federal, State or Territory Government department or agency specifies to each relevant Participating Supermarket and or Other Approved Supermarket that it is a forum for the purposes of this Authorisation.

Condition 2: Urgent Measures

5.14. For the purposes of paragraph 8(c)(ii) above, Urgent Measures must only be engaged in if:

¹⁰ As of 9 June 2020, this included the Safety of Staff and Customers Working Group and the Food Supply Working Group.

- (a) the ACCC has been provided with as much notice as is reasonably practicable in the circumstances of any Urgent Measures discussions or meetings taking place. Notice must be provided in writing to exemptions@accc.gov.au, and
- (b) any Urgent Measure is tabled at the next relevant Authorised Meeting that is held. A relevant Authorised Meeting for this purpose includes:
 - (i) in relation to Urgent Measures adopted at a State or Territory or local level, either an Authorised Meeting attended by representatives of a State or Territory Government department or agency in the State or Territory in which the Urgent Measures are adopted, or an Authorised Meeting attended by representatives of a Federal Government department or agency, and
 - (ii) in relation to Urgent Measures adopted across more than one State or Territory, an Authorised Meeting attended by representatives of a Federal Government department or agency.

Condition 3: Other parties wishing to engage in Proposed Conduct

5.15. In addition to the Participating Supermarkets and current Other Approved Supermarkets:

- (a) Parties that wish to engage in the Proposed Conduct must seek the approval of the ACCC by sending an email to exemptions@accc.gov.au with the subject 'Authorisation AA10000546 – request to be covered by authorisation', identifying the entity(ies) that wish to be covered by any authorisation granted pursuant to this application, detailing the type(s) of conduct covered by this application that those entities propose to engage in and the reasons it wishes to do so.
- (b) If the ACCC approves a party to engage in some or all of the conduct for which authorisation is granted, that party will have the protection of authorisation subject to any condition specified by the ACCC, from the time it is notified of the ACCC's decision.
- (c) When considering the participation of any party, the ACCC may refuse to approve the party engaging in any or all of the Proposed Conduct or impose conditions which restrict the type or extent of the Proposed Conduct in which that party may engage.
- (d) Unless the ACCC approves a party (other than the Participating Supermarkets and current Other Approved Supermarkets) engaging in the Proposed Conduct, that party will not have the protection of authorisation granted pursuant this application.

5.16. The ACCC may authorise the ACCC Competition Exemptions Committee, a member of the ACCC or a member of the ACCC staff, to exercise a decision making function under these conditions on its behalf and that authorisation may be subject to any conditions which the ACCC may impose.

6. Next steps

6.1. The ACCC now invites submissions in response to this draft determination by 28 July 2021. In addition, consistent with section 90A of the Act, the applicant or an interested party may request that the ACCC hold a conference to discuss the draft determination.