



Draft Determination

Application for authorisation AA1000477

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: AA1000477

15 July 2020

Commissioners: Sims, Keogh, Rickard, Ridgeway

Summary

The ACCC proposes to grant authorisation to Coles, Woolworths, Metcash, ALDI and other grocery retailers to cooperate in response to the COVID-19 pandemic, to ensure the supply and fair and equitable distribution of Retail Products to Australian consumers. The cooperation may only occur at, in preparation for, or arise out of, an Authorised Meeting – which are specific meetings arranged by government departments and agencies for the purpose of responding to the pandemic.

The ACCC proposes to grant authorisation, subject to the condition that other grocery retailers seeking protection of the authorisation obtain approval from the ACCC.

The ACCC proposes to grant authorisation until 31 March 2021.

The interim authorisation granted by the ACCC on 9 June 2020 remains in place until the final determination comes into force or the interim authorisation is revoked.

The ACCC invites submissions in relation to this draft determination by 31 July 2020 before making its final decision.

1. The application for authorisation

- 1.1. On 20 March 2020, Coles Group Limited on behalf of itself and other participating supermarkets (Woolworths, ALDI and Metcash) lodged application for authorisation AA1000477 with the Australian Competition and Consumer Commission (the **ACCC**). The applicants are seeking authorisation for six months from the date of final determination by the ACCC. The application was made under subsection 88(1) of the *Competition and Consumer Act 2010* (Cth) (the **Act**).
- 1.2. The ACCC may grant authorisation, which provides businesses with legal protection for arrangements that may otherwise risk breaching competition laws but are not harmful to competition and/or are likely to result in overall public benefits.
- 1.3. Coles also requested interim authorisation to enable it and the other applicants to engage in conduct while the ACCC is considering the substantive application. The ACCC granted interim authorisation on 23 March 2020. On 26 March 2020, to clarify the process for other grocery retailers wishing to be covered by the interim authorisation, the ACCC revoked the interim authorisation of 23 March 2020 and replaced it with a conditional interim authorisation. On 9 June 2020, the ACCC revoked the interim authorisation of 26 March 2020 to narrow the scope of the interim authorisation and granted a new interim authorisation in replacement (collectively, all three interim authorisations are the **Interim Authorisations**).¹ The interim authorisation granted on 9 June 2020 remains in place until the date the ACCC's final determination comes into effect, or the interim authorisation is revoked.
- 1.4. Coles advised that it was necessary to seek authorisation for broad conduct in its initial application given the rapidly evolving circumstances in relation to the COVID-19 pandemic in Australia, and as such it was not possible to identify with certainty the kinds of cooperation between supermarkets that may be necessary to facilitate supply of Retail Products to consumers.² However, as the COVID-19 pandemic has progressed, Coles considered it was appropriate to limit the Proposed Conduct to

¹ ACCC decisions of 26 March 2020 and 9 June 2020 available on the ACCC's public register [here](#).

² Application available on the ACCC's public register [here](#).

matters that come out of or are associated with Authorised Meetings (see paragraph 1.11).

- 1.5. On 22 June 2020, Coles amended its application for authorisation to seek authorisation in the same (narrower) terms as the interim authorisation granted on 9 June.³
- 1.6. The ACCC recognises the significant challenges being faced by businesses and the economy more broadly as a result of the COVID-19 pandemic. The pandemic has caused a major disruption to society and the economy, with social distancing measures and travel bans affecting various sectors across the economy. In that context, the ACCC has received a large number of applications for authorisation, including requests for urgent interim authorisation aimed at facilitating the supply of goods and services.

The applicants

- 1.7. The application was lodged by Coles Group Limited (**Coles**) on behalf of itself and the following businesses:
 - 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**)

together, the **Participating Supermarkets**.

- 1.8. Coles also seeks authorisation on behalf of other grocery retailers that wish to gain the protection of the authorisation. Several other retailers have since applied for and been granted protection under the Interim Authorisations, listed at paragraph 1.14 below.

The Proposed Conduct

- 1.9. Authorisation is sought 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 Supermarkets or any other grocery retailer that is or previously has been approved by the ACCC (**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

³ The condition of the interim authorisation of 9 June 2020 with respect to Authorised Meetings (at paragraphs 14 and 26 of the ACCC's interim authorisation decision of 9 June) now forms part of Coles' revised application (paragraph 1.9(c) of this draft determination).

- 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); or
 - iv. facilitating access to Retail Products in remote or rural areas; and
- c. occurs at, in preparation for, or arises out of, an Authorised Meeting that occurs on or after the date that authorisation is granted.

1.10. In addition, authorisation is sought for the Participating Supermarkets and any Other Approved Supermarket to continue to give effect to any contract, arrangement or understanding previously entered into in reliance on an Interim Authorisation (together with paragraph 1.9 above, the **Proposed Conduct**).

1.11. An **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 time (as of 9 June 2020, the Safety of Staff and Customers Working Group and the Food Supply Working Group), or
- 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 similar forum convened by a Federal 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, at least two clear working days before the date of any meeting (or any shorter period of notice to which the ACCC agrees in writing), that the Participating Supermarket wishes meetings of the relevant taskforce or forum 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 forum, and the matters to be discussed at the meeting; and
 - 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 set out at paragraph 1.9(b) above.

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

1.13. The Proposed Conduct is not compulsory, and any Participating Supermarket or authorised party can opt out of any proposed collaboration under the authorisation.

Other Approved Supermarkets

1.14. The Other Approved Supermarkets which have previously been approved by the ACCC under an interim authorisation are:⁴

- a. Amazon Australia, 7-Eleven Australia, Harris Farm, Arnhem Land Progress Aboriginal Corporation, Outback Stores, and Community Enterprises Queensland,

⁴ A full list of these parties also appears on the public register at [https://www.accc.gov.au/system/files/public-registers/documents/Parties with protection of the interim authorisation - 03.04.20-PR- AA1000477 Coles 1.xlsx](https://www.accc.gov.au/system/files/public-registers/documents/Parties%20with%20protection%20of%20the%20interim%20authorisation%20-%2003.04.20-PR-AA1000477%20Coles%201.xlsx)

who each have protection of the interim authorisation on the same terms as the Participating Supermarkets.

- b. Specified current and future members of Retail Drinks Australia⁵, who have protection of the interim authorisation 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.
- c. Master Grocers Australia and the Australasian Association of Convenience Stores, who have protection of the interim authorisation limited to discussions held or arrangements made during a meeting of the Supermarkets 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.

1.15. Each of the parties set out in paragraph 1.14 is an Other Approved Supermarket for the purposes of this authorisation.

2. Rationale for authorisation application

2.1. Coles' initial application for authorisation dated 20 March 2020 submits the following rationale for the authorisation application:

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

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

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

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

2.2. On 8 May 2020, Coles requested a variation of the application for authorisation. Coles requested a narrowing of the scope of the interim authorisation and the substantive application for authorisation, because:

- demand had returned to relatively normal levels and community transmission of COVID-19 was under control at the time;
- discussions between Coles and Participating Supermarkets that had been outside of, or separate to, the Supermarket Taskforce and working groups had only been in

⁵ 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 Australia that are classed as 'Liquor Store Members' and 'Digital and Online Members'

respect of matters raised and discussed within the Supermarket Taskforce and related working groups;

- at the time of the request, the Supermarket Taskforce convened by the Department of Home Affairs had been suspended, with only two working groups remaining in operation (being the Safety of Staff and Customers Working Group and the Food Supply Working Group). Since this time, Coles had not engaged in any discussions with the Participating Supermarkets pursuant to the Interim Authorisation outside these working groups; and
- in those circumstances, Coles did not anticipate that it would engage in further discussions or enter into agreements with the Participating Supermarkets pursuant to the Interim Authorisation except as might be required through the Supermarket Taskforce and related working groups. Such action might be required in the event of, for example, cluster outbreaks or a 'second wave' of infection.

2.3. On 9 June 2020, after public consultation on Coles' requested variation (summarised below), the ACCC revoked the interim authorisation of 26 March 2020 and granted a new interim authorisation in replacement. On 22 June, Coles amended its application for authorisation to seek authorisation in the same terms as the interim authorisation granted on 9 June.

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 conducted two rounds of consultation - the first round followed the ACCC's initial decision to grant interim authorisation and the second round followed Coles' request to narrow the scope of the conduct covered by the interim authorisation.
- 3.3. 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.⁶
- 3.4. Public submissions by the applicants and interested parties are on the Public Register for this matter. The issues raised are summarised below.

Submissions following the ACCC's decision to grant interim authorisation

- 3.5. Following the interim authorisation decision, the ACCC invited submissions on the interim authorisation and the substantive application.
- 3.6. The main concerns raised by interested parties include:

Scope of conduct

- as the supply and demand side pressure on retailers eased, the ACCC should consider revoking or narrowing the scope of the interim authorisation granted in March, and reduce the risk that the cooperation and sharing of information will lessen competition. The risk is particularly high given the interim authorisation granted in March permitted cooperation without ACCC oversight;

⁶ A list of the parties consulted and the public submissions received is available from the ACCC's public register [here](#).

- cooperation should be limited to Retail Products that are in short supply, and the broad purposes for which cooperation is authorised in the interim authorisation should be narrowed;
- the Proposed Conduct should not authorise price fixing and exclusive arrangements with suppliers and logistics providers;

Supply to independent and regional retailers

- smaller, independent and regional/remote retailers and wholesalers find it difficult to secure supply of Retail Products. Some interested parties submit the coordination from larger supermarkets, combined with their existing market power, allows the major supermarkets to exert increased pressure on suppliers to prioritise supply to them, leaving smaller retailers and wholesalers unable to secure supply, and at risk of closure;
- any cooperation between the major supermarkets should not be to the detriment of smaller retailers;
- lack of supply to local independent retailers will effect older and vulnerable customers who rely on those retailers, particularly in regional and rural locations not serviced by the major supermarkets;
- there are additional difficulties in resupplying grocery stores in rural and remote communities. Many small independent retailers are the single source of Retail Products for customers in remote areas. Remote customers may also be disproportionately affected by product limits;

Reporting

- the Participating Supermarkets should be required to disclose what conduct they have engaged in in reliance on the interim authorisation. Any reporting framework should include consumer representative participation in the process.

3.7. Interested parties identified the following public benefits from the interim authorisation:

- measures by the Participating Supermarkets to control how many customers are in a store at any one time have been helpful in ensuring safety of customers and staff;
- product limits have assisted the equitable supply of products to customers (however some submissions note that there was a disproportionate negative effect from product limits on remote customers);
- the Participating Supermarkets have worked with suppliers and logistics providers to increase supply, and the implementation of online delivery; and
- some of the Participating Supermarkets have set aside stock to go to independent retailers in regional and remote areas.

Submissions following Coles' request to amend its application

3.8. The ACCC invited submissions on Coles' request to narrow the scope of the conduct.

3.9. Woolworths and Metcash submit that the interim authorisation and the Supermarket Taskforce have been effective, particularly in dealing with the safety of customers and staff and diverting essential supplies to remote communities.

3.10. Metcash submits that each of the Participating Supermarkets had addressed supply issues by dealing directly with their suppliers, and had not pursued collective

responses to date. Metcash submits that the interim authorisation was still serving a public purpose and should remain on foot, particularly in the case of cluster outbreaks or a 'second wave'. Metcash submitted that the permitted conduct should be narrowed to conduct arising from the Supermarket Taskforce, with continued ACCC oversight.

- 3.11. The Arnhem Land Progress Aboriginal Corporation (**ALPA**) submits that any narrowing of the authorised conduct should continue to enable ALPA and other retailers servicing remote and regional areas to cooperate in response to the COVID-19 pandemic.
- 3.12. Amazon Australia submits that authorised conduct should cover any government-sponsored or approved conduct relating to grocery supply and delivery issues. Amazon submits that this would avoid the risk of beneficial discussions or conduct being inadvertently excluded due to a change in the structure or responsibilities of a particular taskforce or working group. Alternatively, Amazon submitted the scope of the authorised conduct could cover the discussions or conduct arising from the Supermarket Taskforce and its working groups.

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
 - 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. In the future with the Proposed Conduct, the Participating Supermarkets and Other Approved Suppliers will be able to cooperate with each other if such cooperation arises from meetings of the Supermarket Taskforce and its working groups, the NIAA taskforces, or other taskforces approved by the ACCC. In addition, the conduct must have one of the relevant purposes set out at 1.9(b) related to ensuring the supply and fair and equitable distribution of Retail Products to consumers during the COVID-19 pandemic.

4.6. The ACCC considers that, without the Proposed Conduct, grocery retailers 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, implementing uniform measures such as those described at paragraph 4.12 below will 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.*⁷

4.8. Coles submits that the Proposed Conduct will result in significant public benefits. The ACCC considers that Coles' claimed public benefits can be broadly categorised as ensuring consumer access to Retail Products, reducing community concerns about stockpiling and grocery availability, and reducing strain on supply chains for Retail Products.

4.9. The ACCC's assessment of these claimed public benefits is informed by submissions from the Participating Supermarkets and interested parties and from its own observations of the co-ordination to date under the interim authorisation, particularly through ACCC representatives attending the Authorised Meetings listed in paragraph 1.11.⁸

4.10. Coles submits that the conduct that has occurred under the protection of the Interim Authorisations to date has been useful, primarily relating to cooperating on store hours, safety procedures and product limits.

Consumer access to Retail Products

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

4.12. The Interim Authorisations permit the Participating Supermarkets and Other Approved Supermarkets (together, authorised retailers) to co-operate in relation to a wide range of measures that are intended to improve consumers' access to Retail Products during the period of the COVID-19 pandemic. To date the ACCC has observed discussions at Authorised Meetings in relation to:

- co-ordinating store hours, including allocating dedicated shopping hours for elderly and disadvantaged members of the public during periods of high demand for Retail Products;

⁷ 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.

⁸ 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.

- implementing uniform safety measures, such as limiting the number of customers permitted in store at a time;
- developing uniform policies for online deliveries, particularly policies intended to assist vulnerable groups of consumers including those who are unwell or self-isolating;
- implementing uniform or similar purchase limits and related public messaging;
- measures to ensure continuity of supply to consumers in remote or regional areas, including securing special allocations of stock and joint requests to suppliers; and
- sharing information about anticipated disruptions in manufacturing and supermarket supply and logistics chains, enabling other authorised retailers to develop strategies to ensure the continued supply of Retail Products.

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

4.14. The ACCC considers that enabling the co-operation permitted by the Interim Authorisations has enabled authorised retailers to respond proactively to anticipated or expected impediments to the continued availability of Retail Products across Australia during the period of the COVID-19 pandemic. The ACCC considers this improved availability is likely to continue to be realised if the Proposed Conduct is authorised.

Reducing community concerns and stockpiling behaviour

4.15. 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.

4.16. The ACCC has observed discussions between authorised retailers monitoring availability of supply-constrained Retail Products, the implementation of uniform or similar purchase limits and related public messaging.

4.17. By enabling improved discussions and co-ordination between the authorised retailers, the ACCC considers that the Interim Authorisations have been effective in addressing consumer concerns about the need to stockpile essential household items. The ACCC considers this is likely to continue if the Proposed Conduct is authorised.

4.18. 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.

4.19. The Participating Supermarkets submit that they have also implemented a number of measures to ensure the safety of customers and staff, by reducing congestion in stores and store car parks (thereby assisting with beneficial social distancing) and alleviating customer stress regarding stock shortages.

4.20. The ACCC considers that enabling co-operation permitted by the Interim Authorisations has enabled authorised retailers to implement measures, both individually and collectively, to materially reduce community concerns about stockpiling behaviour.

Reducing strain on the Retail Products supply chain

- 4.21. 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.
- 4.22. Overall, the ACCC considers there are significant public benefits in enabling grocery retailers to prepare for, discuss and implement activities to safeguard the supply of groceries to consumers during the period of the COVID-19 pandemic. The ACCC considers the authorised retailers' handling of the recent peak of infections in Melbourne to be a salient demonstration of these benefits, as grocery supplies in Melbourne have been relatively stable and there has been relatively muted panic buying. Given the potential for further outbreaks of COVID-19, the ACCC considers the benefits are likely to continue to be realised in future if the Proposed Conduct is authorised.

Public detriments

- 4.23. 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.*⁹
- 4.24. The ACCC considers that the Proposed Conduct may result in some public detriments associated with a lessening of competition.
- 4.25. 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 and the authorisation is no longer in place competition between them must return.
- 4.26. Separately, there may be unidentifiable and potentially significant public detriments when presently unidentified third parties may also seek and gain protection of the authorisation.
- 4.27. With the proposed condition described below, the ACCC considers that the public detriments likely to result from the Proposed Conduct will be limited due to:

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

- the restriction of the authorisation to conduct arising from Authorised Meetings, being taskforces and other fora approved by the ACCC which has the purpose of responding to the COVID-19 pandemic. All Authorised Meetings are called and chaired by a government department or agency, further reducing the risk of competitively sensitive information being exchanged for purposes unrelated to responding to the pandemic;
- the presence of ACCC representatives at these Authorised Meetings. The ACCC is satisfied that information exchanged and arrangements made at Authorised Meetings to date focus on short-term responses to the pandemic, and is unlikely to have any longer-term impacts on competition. The presence of ACCC representatives at Authorised Meetings may encourage these discussions to remain focussed on the intended issues, and provides for suitable monitoring mechanisms to identify whether the authorisation is working as anticipated. If there were to be a material change in circumstances during a period of authorisation, the ACCC may initiate a review of an authorisation.
- the Proposed Conduct not extending to coordination in relation to price; and
- the Proposed Conduct being unlikely to materially change the Participating Supermarkets' incentive to compete during the period of authorisation, and being unlikely to change the incentives at all after the period of authorisation.

Proposed Condition

4.28. To minimise the likelihood of detriment described at paragraph 4.26 above, the ACCC proposes to impose a condition requiring other retailers that wish to obtain the protection of authorisation to seek the approval of the ACCC under the process in paragraph 5.16. This condition was also in the interim authorisations of 26 March and 9 June.

4.29. This is intended to provide the ACCC with sufficient certainty, oversight and transparency regarding the addition of new participating retailers and gives the ACCC the opportunity to be satisfied that each addition does not result in unintended public detriments.

Balance of public benefit and detriment

4.30. The ACCC is satisfied that the Proposed Conduct is likely to result in substantial public benefits. The ACCC has observed authorised retailers engaging in the Proposed Conduct under the Interim Authorisations since March 2020, and 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 of COVID-19 in Australia.

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

Length of authorisation

- 4.32. The Act allows the ACCC to grant authorisation for a limited period of time.¹⁰ 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.
- 4.33. In this instance, Coles seeks authorisation for six months from the date of final determination. Coles submits that due to the uncertainty arising from the COVID-19 pandemic and the potential for any localised flare ups or a 'second wave' of infections, six months is an appropriate period of time.
- 4.34. The ACCC proposes to grant authorisation until 31 March 2021. 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 condition). The recent peak of infections in Melbourne and the disruption it has caused to supply chains demonstrates the likely utility of authorisation for this period of authorisation.
- 4.35. The ACCC invites submissions on the appropriateness of this proposed time period.

5. Draft determination

The application

- 5.1. On 20 March 2020, Coles lodged application AA1000477 with the ACCC, seeking authorisation under subsection 88(1) of the Act.
- 5.2. On 22 June 2020, Coles amended its application to seek authorisation in the same terms as the interim authorisation granted by the ACCC on 9 June 2020.
- 5.3. Subsection 90A(1) of the Act requires that before determining an application for authorisation, the ACCC shall prepare a draft determination.

The authorisation test

- 5.4. 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 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 from the Proposed Conduct.
- 5.5. 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.
- 5.6. Accordingly, the ACCC proposes to grant authorisation.

¹⁰ Subsection 91(1)

Conduct which the ACCC proposes to authorise

- 5.7. The ACCC proposes to grant authorisation to enable the Participating Supermarkets and Other Approved Supermarkets 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 any other grocery retailer that is or previously has been approved by the ACCC (**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); or
 - iv. facilitating access to Retail Products in remote or rural areas; and
 - c. occurs at, in preparation for, or arises out of, an Authorised Meeting that occurs on or after the date that authorisation is granted.
- 5.8. In addition, the ACCC proposes to grant authorisation for the Participating Supermarkets 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 (together with paragraph 5.7 above, the **Proposed Conduct**).
- 5.9. An 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 time (as of 9 June 2020, the Safety of Staff and Customers Working Group and the Food Supply Working Group), or
 - 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 similar forum convened by a Federal 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, at least two clear working days before the date of any meeting (or any shorter period of notice to which the ACCC agrees in writing), that the Participating Supermarket wishes meetings of the relevant taskforce or forum 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 forum, and the matters to be discussed at the meeting; and
 - 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 set out at paragraph 5.7(b) above.

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

5.11. The Proposed Conduct is not compulsory, and any Participating Supermarket or authorised party can opt out of any proposed collaboration under the authorisation.

5.12. 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).

5.13. 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.

5.14. The ACCC proposes to grant authorisation, subject to the proposed condition, AA1000477 until 31 March 2021.

5.15. This draft determination is made on 15 July 2020.

Proposed Condition of Authorisation

5.16. The ACCC proposes to grant authorisation subject to the following proposed condition, which is not applicable to the Participating Supermarkets or any grocery retailer that previously has been approved by the ACCC (i.e. an Other Approved Supermarket):

- a. Parties that wish to engage in the Proposed Conduct must seek the approval of the ACCC by sending an email to adjudication@acc.gov.au with the subject 'AA1000477 – request to be covered by authorisation', identifying the entity(ies) that wish to be covered by this authorisation, detailing the type(s) of conduct covered by this authorisation 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 this 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 applicants) engaging in the Proposed Conduct, that party will not have the protection of this authorisation.

6. Next steps

- 6.1. The ACCC now invites submissions in response to this draft determination. 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.