



**SA Floods Matter –
Application for authorisation AA1000603
Interim authorisation decision
15 February 2022**

Decision

1. The Australian Competition and Consumer Commission (the **ACCC**) has granted interim authorisation with conditions in respect of the application for authorisation AA1000603 lodged on 14 February 2022 by Linfox Australia Pty Ltd and its related bodies corporate (**Linfox Group**).
2. Interim authorisation is granted with the conditions described in paragraphs 28 to 30 below to the Linfox Group and to the potential parties identified at paragraph 14 (the **Participants**), for the conduct described in paragraph 17 below and defined as the **Proposed Conduct**. In summary, this will enable collaboration between the Participants to identify and prioritise supply of critical retail products and shipping containers into Western Australia (**WA**) and the Northern Territory (**NT**) to ensure a sufficient supply of those products is available for consumption in WA and the NT; to identify and prioritise supply of critical export products out of WA and the NT to other states in Australia; and to optimise the use of available rail, road, sea and air freight into and out of WA and the NT.
3. Interim authorisation extends to any other party who may wish to participate in the Proposed Conduct in the future and has notified the ACCC by sending an email to exemptions@accc.gov.au with the subject '*Authorisation AA1000603– notification to engage in Proposed Conduct*', identifying the new entity(ies) that intend to be covered by this interim authorisation, the reasons that the entities wish to engage in the conduct, their contact details and details of the business (**Other Participants**). Once an entity has notified the ACCC, that entity will have the protection of the interim authorisation.
4. Interim authorisation does not extend to sharing information or any agreement on price of any goods or services between the Participants and Other Participants.
5. The ACCC grants interim authorisation in relation to Division 1 of Part IV of the *Competition and Consumer Act 2010* (Cth) (the **Act**) and sections 45, 46 and 47 of the Act.
6. Interim authorisation commences immediately and remains in place until the date the ACCC's final determination comes into effect, the application for authorisation is withdrawn, or until interim authorisation is revoked.

Background

7. The information in paragraphs 8 to 11 below was provided in the application.
8. Significant heavy rainfall in north and west South Australia (**SA**) damaged 300km of the rail track between Western Australia (**WA**), the Northern Territory (**NT**) and SA and cut the rail link between WA, NT, SA and the Eastern States of Australia (**the Trans-Australian Railway**).¹ Road links between WA, NT and SA were also damaged but have since been repaired. Repair works on the Trans-Australian Railway between WA, NT and SA are expected to be completed on 15 February 2022.
9. Approximately 80% of WA's land-based freight from the rest of Australia arrives by rail, while the NT's land-based freight from the rest of Australia arrives by road and rail. This includes the following categories of goods which are identified in the Department of Home Affairs' Draft Essential Goods and Planning Prioritisation – Interim Guidance (**the Interim Guidance**):
 - a. essential food, groceries and hygiene products and packaging materials including inputs into those products, such as yeast for baked goods, and goods for vulnerable cohorts, such as aged care facilities,
 - b. essential food stocks for animal welfare,
 - c. urgent medical supplies, such as Rapid Antigen Tests, Personal Protective Equipment and prescription and non-prescription pharmaceuticals,
 - d. goods that are critical to enabling, supporting or facilitating freight services that carry essential goods, such as spare parts for heavy vehicles,
 - e. supplies for the operation of critical infrastructure, such as telecommunications equipment,
 - f. dangerous goods shipping containers which are used to exports goods from WA and the NT, and
 - g. any other goods identified as a priority by a Commonwealth, WA and/or NT Government department or agency(together, the **Critical Products**).
10. The damage to the Trans-Australian Railway has led to shortages of the Critical Products in WA and the NT, and shortages in available transport and logistics capacity with those shortages expected to be particularly critical until the end of February 2022. It is currently expected that goods backlogs will continue for approximately 12 weeks from 15 February 2022 while the backlog is cleared. Until this occurs, there is a need to prioritise which of the Critical Products use transport and logistics services to prevent shortages of those products.
11. The damage to the Trans-Australian Railway has also led to shortages of products which are mined or manufactured in WA or the NT or transported from WA or the NT to SA and the Eastern States of Australia via the Trans-Australian Railway. These products include the following (which are identified in the Interim Guidance):
 - a. water and wastewater treatment supplies, such as aluminium sulphate which is used for municipal water purification and waste-water treatment for populations in SA,
 - b. empty shipping containers,

¹ Australian Rail Track Corporation says line closed between SA, WA and NT due to heavy rain in outback, [Australian Rail Track Corporation says line closed between SA, WA and NT due to heavy rain in outback - ABC News](#), 24 January 2022, accessed 9 February 2022.

- c. essential food stocks for animal welfare,
- d. goods that are critical to enabling, supporting or facilitating freight services that carry essential goods,
- e. supplies for the operation of critical infrastructure, and
- f. any other goods identified as a priority by a Commonwealth, State and/or Territory Government department or agency

(together, the **Critical Exports**).

12. The Commonwealth Government has facilitated a coordinated response to the supply issues through National Coordination Mechanism (**NCM**) meetings. The NCM has brought together relevant stakeholders for guidance and a coordinated response.
13. The Participants submit that the Proposed Conduct is intended to assist the Participants and Other Participants to work together to:
 - a. optimise the use of available freight space on the Trans-Australian railway, including by the use of other freight transport methods such as road, sea and air;
 - b. prioritise supply and transport of the Critical Products into WA and the NT to ensure sufficient supply of those products are available for consumption by the WA and NT communities; and
 - c. prioritise supply and transport of the Critical Exports out of WA and the NT to ensure sufficient supply of those products are available for use by the relevant industries primarily in SA but also the Eastern States of Australia (especially where there are shortages of the Critical Exports).

The application for authorisation

14. On 14 February 2021, Linfox Group lodged an application for authorisation on behalf of itself and its related bodies corporate. Linfox Group also identified the following potential parties proposing to engage in the conduct the subject of the application:
 - ALDI Stores (A Limited Partnership),
 - Coles Group Limited and its related bodies corporate,
 - Metcash Limited and its related bodies corporate and each of the owners and/or operators of supermarkets or liquor stores trading under a brand owner or licensed by Metcash Limited or its related bodies corporate,
 - One Rail Pty Ltd and its related bodies corporate,
 - Pacific National Pty Ltd and its related bodies corporate,
 - Toll Global Express Holdings Pty Ltd, and
 - Woolworths Group Limited and its related bodies corporate

(together with the Linfox Group, the **Participants**).
15. Authorisation is also sought to apply to any other parties that are notified to the ACCC. Such parties may include, for example, other suppliers of transport services or logistics services (such as freight forwarders), suppliers of Critical Products (including retailers, wholesalers or suppliers) and manufacturers or suppliers of Critical Exports.
16. The ACCC has set out in paragraph 3 of this interim authorisation the procedure that must be followed by such parties if they wish to participate in the Proposed Conduct

with the protection of the interim authorisation. Once an entity has notified the ACCC in accordance with that procedure, that entity will be considered an **Other Participant** and have the protection of the interim authorisation.

The Proposed Conduct

17. The Participants seek authorisation to propose, discuss, enter into or give effect to any provision in a contract, arrangement or understanding (including contracts, arrangements or understandings involving retailers, wholesalers and/or suppliers of Critical Products, manufacturers and/or suppliers of Critical Exports, freight forwarders and road, air and/or sea transport and logistics providers), or engage in any conduct, where the contract, arrangement, understanding or conduct:
- a. involves two or more of any Participants or Other Participants; and
 - b. has the purpose or likely effect of either ensuring the supply or transport of one or more of the Critical Products to the WA and/or NT communities or ensuring the supply or transport of one or more of the Critical Exports by:
 - i. identifying the specific Critical Products which are critically required in WA or the NT and/or identifying the specific Critical Exports, each in accordance with the Interim Guidance, which are critically required in States and Territories of Australia other than WA and the NT,
 - ii. prioritising the transport of the Critical Products and/or Critical Exports identified in subparagraph (i) and ensuring the optimal distribution of all available freight space,
 - iii. ensuring the supply and transport of the Critical Products and/or Critical Exports identified in subparagraph (i), including developing stockpiles of those products and prioritisation of those products to the places in which they are critically required,
 - iv. sharing non-price commercially sensitive information (for example, relating to schedules, freight or logistics capacity, stock levels, and access to air, rail, road or sea freight channels),
 - v. prioritising access to the Critical Products and/or Critical Exports according to need (for example, to particular geographical areas or consumers) as directed by the Commonwealth Government and/or State or Territory Governments pursuant to the Interim Guidance, and
 - c. either occurs at or directly arises out of an Approved Meeting (defined in paragraph 28 below) that occurs on or after the date that authorisation is granted.

(the **Proposed Conduct**).

18. The Proposed Conduct does not extend to sharing information or any agreements on the price of Critical Products, Critical Exports, transport services and/or logistics services.
19. Final authorisation is sought until 15 August 2022. The Trans-Australian Railway is expected be operational on 15 February 2022, but with significant backlogs of goods due to the major supply disruption caused by the SA floods which are not expected to be cleared until mid-April 2022 at the earliest. The term of authorisation sought provides for a buffer period given prospects of delays in clearing the backlog. Although Linfox Group notes that it is unclear when these difficulties (potentially compounded by existing supply issues and staff shortages associated with the COVID-19 pandemic) will ease, it

is also noted that the ACCC could revoke the authorisation should circumstances change.

The authorisation process

20. Authorisation provides protection from legal action for conduct that may otherwise breach the competition provisions of the Act. Broadly, the ACCC may grant authorisation if it is satisfied that the benefit to the public from the conduct outweighs any public detriment, including from a lessening of competition. The ACCC conducts a public consultation process to assist it to determine whether a proposed arrangement results in a net public benefit.
21. The power conferred upon the ACCC to authorise conduct is discretionary. In exercising that discretion, the ACCC may have regard to considerations relevant to the objectives of the Act.
22. The ACCC may specify conditions in an authorisation. The legal protection provided by an authorisation does not apply if any conditions are not complied with.

Request for interim authorisation

23. Section 91 of the Act allows the ACCC, where it considers it appropriate, to grant interim authorisation prior to the ACCC's final determination. This allows the parties to engage in the proposed conduct while the ACCC is considering the substantive application.
24. Linfox Group requests urgent interim authorisation due to imminent anticipated shortages of the Critical Products and Critical Exports, particularly in WA, the NT and SA but also in other States and Territories. Linfox Group submits that it is essential that the Participants can immediately commence engaging in the Proposed Conduct to address the effects on transport and logistics services subsequent when the Trans-Australian Railway reopens on 15 February 2022 and to avoid shortages of the Critical Products and Critical Exports.

Consultation

25. The ACCC has not conducted a public consultation process in respect of the request for urgent interim authorisation due to the need for the Participants to have protection should they need to quickly take steps to engage in the Proposed Conduct as well as the compelling nature of the public benefits likely to result from the conduct which is the subject of the request for interim authorisation.
26. The ACCC will conduct a public consultation process on the substantive application for authorisation shortly. Details regarding how to make a submission will be available on the ACCC's [Authorisations public register](#).

Conditions

27. Interim authorisation is granted for the Participants and Other Participants to engage in the Proposed Conduct (as defined at paragraph 17) with the following conditions:
28. **Condition 1 – Approved Meetings:** For the purposes of paragraph 17(c) above, any of the following types of meetings will be Approved Meetings:
 - a. a meeting of the National Coordination Mechanism, which is a coordination mechanism or task force, convened by the Commonwealth Government with the objective of preparing and/or finalising the Interim Guidance and/or ensuring the supply and/or transport of Critical Products to the WA and NT communities and the supply and/or transport of Critical Exports to the affected States and Territories, and to which the ACCC is invited to attend; or
 - b. meetings of a taskforce, working group or forum convened or attended by a representative of a Commonwealth Government department or agency, State or Territory Government department or agency, with the objective of supplementing

the Interim Guidance and/or ensuring the transport and/or supply of Critical Products to the WA and NT communities or ensuring the transport and/or supply of the Critical Exports, where:

- the ACCC is notified in advance by a Participant or government representative in writing that a Participant or government representative intends meetings of the relevant group to be covered by this authorisation, and invites the ACCC to attend the meeting of the relevant group, sets out the time and date of the meeting, proposed attendees, purpose of the meeting and the group and the matters to be discussed at the meeting;
 - more than one Participant and one or more Other Participant has been invited to the relevant group; and
 - the ACCC does not notify the Participant or government representative in writing in advance of the meeting that it is not satisfied that the meeting is covered by the authorisation.
29. For the avoidance of doubt, a forum includes a coordination mechanism convened by a Commonwealth, State or Territory Government department or agency where Government liaises and/or coordinates with more than one Participant or Other Participant, even though the relevant Participants/Other Participants may not meet or speak directly, provided that the relevant Commonwealth, State or Territory Government department or agency specifies to each relevant Participant or Other Participant that it is a forum for the purposes of this Authorisation.
30. **Condition 2 – Reporting:** The Participants and Other Participants must (either directly or via another nominated party), provide the ACCC with:
- a. the minutes of any Approved Meeting that is convened under the Proposed Conduct, within 14 days after the meeting (or such other time as the ACCC agrees to in writing); and
 - b. all information requested by the ACCC in relation to the Proposed Conduct, within a reasonable timeframe.
31. The ACCC may authorise a Committee or Division of the ACCC, a member of the ACCC or a member of the ACCC staff, to exercise a decision making function under the conditions of authorisation on its behalf.

Reasons for decision

32. In granting interim authorisation, the ACCC recognises the urgency of the request for interim authorisation to assist the supply and transport of Critical Products into WA and the NT and the supply and transport of the Critical Exports out of WA and the NT.
33. The ACCC considers that there are likely to be significant public benefits that result from the Proposed Conduct in the current circumstances, including enabling the Participants and Other Participants to:
- reduce the impact of disruptions to the supply chain and increase availability of the supply of shipping containers, Critical Products to WA and the NT and the Critical Exports out of WA and the NT.
 - ensure that consumers in the impacted areas have continued access to Critical Products such as food, personal hygiene products and pharmaceuticals.
 - ensure that SA and the Eastern States receive Critical Exports, including products which are used for municipal water purification and waste-water treatment.
34. If the Participants are unable to engage in the Proposed Conduct, there is a real risk that critical shortages of the Critical Products will occur in WA and the NT over a sustained period which will leave those communities unable to access Critical

Products, or access a necessary amount of these products. There would also be shortages of the Critical Exports which, among other things, will affect the supply of safe drinking water and waste-water treatment.

35. The ACCC considers that the Proposed Conduct has the potential to result in some public detriment through lessening competition between the Participants and Other Participants. These parties compete in several areas:
- transport and logistics companies compete in relation to the supply of freight forwarding services, and the acquisition, and supply of, rail, road, sea and air freight services, including container handling services,
 - supermarkets and Critical Product retailers compete in relation to the acquisition of Critical Products, transport and logistics services, as well in the supply of Critical Products to consumers,
 - manufacturers and suppliers of Critical Products compete in the supply of those products, as well in the acquisition of transport and logistics services, and
 - manufacturers and suppliers of the Critical Exports compete in relation to the supply of the Critical Exports, as well in the acquisition of transport and logistics services.
36. For competitors, sharing information and coordinating the supply and transport of Critical Products and/or Critical Exports may reduce competition relative to a situation where each business makes its own decisions.
37. The Participants and Other Participants are in most cases each other's closest competitors and may have a commercial interest in excluding or foreclosing their competitors from the supply of the relevant products. Arrangements between firms that involve prioritising the supply of products in times of shortages create the risk that some suppliers or acquirers will receive preferential treatment over their competitors. This risk is more likely where large suppliers or acquirers have undue influence of what is transported, when it is transported and to whom.
38. There is also a risk that the Proposed Conduct could lead to the exchange of commercially sensitive information between the Participants or Other Participants and learning behaviours that could result in anti-competitive coordination after the conduct ceases.
39. However, the ACCC considers that it is unlikely that the Participants and Other Participants engaging in the Proposed Conduct under interim authorisation will have an anti-competitive impact. In particular:
- There will be transparency around the Proposed Conduct as a result of the involvement of Government agencies and the reporting and information provision conditions that the ACCC has decided to impose. The Proposed Conduct is restricted to conduct that occurs at or arises out of an Approved Meeting, each of which must be either convened or attended by Commonwealth Government representatives. The ACCC also has advance notice of any Approved Meeting being held, is able to attend meetings and, under the condition imposed at paragraph 28 above, has oversight over the outcomes of meetings.
 - The Proposed Conduct is a temporary measure to ensure sufficient supply of Retail Goods and Critical Exports.
 - The Proposed Conduct only enables the Participants and Other Participants to prioritise access to the Critical Products and/or Critical Exports according to need as directed by the Commonwealth Government and/or State or Territory Governments.

- The Proposed Conduct, and interim authorisation, only apply to arrangements and conduct engaged in for specified purposes, namely ensuring the supply of Critical Products to WA and the NT or ensuring the supply of Critical Exports to the other jurisdictions.
- The Proposed Conduct is not compulsory and any participant can opt out of any information sharing arrangements or other authorised conduct.
- The Proposed Conduct and interim authorisation does not extend to sharing commercially sensitive price information or any coordination in relation to price.
- The ACCC may review its decision to grant interim authorisation at any time, including in response to feedback as the Proposed Conduct is rolled out. If anyone, including relevant Government and regulatory bodies, has concerns with the way the Participants or Other Participants are dealing with them during the period of interim authorisation, they are encouraged to advise the ACCC.

40. Nevertheless, the ACCC considers it vital that, once the backlog of disrupted supply is resolved, cooperation between the Participants and Other Participants in relation to these matters should cease.

Reconsideration of interim authorisation

41. The ACCC may review the interim authorisation at any time, including in response to feedback raised following this grant of interim authorisation. Any parties that have concerns with the way the Applicants are dealing with them during the period of interim authorisation are encouraged to advise the ACCC.
42. The ACCC's decision in relation to the interim authorisation should not be taken to be indicative of whether or not authorisation will ultimately be granted.