



**Coles Group Limited –
Application for authorisation AA1000546
Interim authorisation decision
25 March 2021**

Decision

1. The Australian Competition and Consumer Commission (the **ACCC**) has granted conditional interim authorisation in respect of the application for authorisation AA1000546 lodged on 12 March 2021 by 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 ACCC (**Other Approved Supermarkets**).
2. Interim authorisation is granted to enable the Participating 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 at paragraph 8 of this Interim Authorisation Decision and defined as the **Proposed Conduct**. Interim authorisation is granted subject to the conditions set out in **Annexure A**.
3. The Participating Supermarkets have an existing authorisation AA1000477 for substantively similar conduct which is due to expire on 31 March 2021 (the **Existing Authorisation**).
4. The ACCC grants interim authorisation in relation to Division 1 of Part IV of the Act and sections 45(1), 46(1) and 47(1) of the *Competition and Consumer Act 2010* (Cth) (the **Act**).
5. 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remains in place until the date the ACCC's final determination comes into effect, the application for authorisation is withdrawn, or until the ACCC decides to revoke interim authorisation.

The application for authorisation

6. Coles has lodged the application for authorisation on behalf of:
 - (a) itself and its related bodies corporate (**Coles Group**)
 - (b) Woolworths Group Limited and its related bodies corporate (**Woolworths**)
 - (c) ALDI Stores (A Limited Partnership) (**ALDI**), and
 - (d) Metcash Limited, its related bodies corporate and the class of persons comprising each of the owners and/or operators of supermarkets or liquor stores trading under a brand owned or licensed by Metcash Limited or its related bodies corporate (**Metcash**).
7. The Participating Supermarkets propose that the authorisation would also apply to:
 - (a) any other grocery retailer who has approval from the ACCC to engage in the conduct the subject of the application pursuant to the Existing Authorisation (or any related interim authorisation), and

- (b) 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 **Annexure A** to this Interim Authorisation Decision
- (together, **Other Approved Supermarkets**).

The Proposed Conduct

8. The Participating Supermarkets seek authorisation for the following (with the underlined text indicating the additions to the conduct authorised under the Existing 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 (**Existing Arrangement**).

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

(the **Proposed Conduct**).

9. Authorisation is sought until 31 March 2022.
10. The Proposed Conduct is not compulsory, and any Participating Supermarket can decline to participate in, or opt out of, any proposed discussion or collaboration under the authorisation, if granted.

The Existing Authorisation

11. 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.
12. 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 (until 31 March 2021).
13. Coles submits that the Existing 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.
14. Coles submits that while only a small number of agreements have been reached in reliance on the Existing 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.
15. Coles submits that the COVID-19 outbreaks which have occurred since the Existing 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

16. 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.
17. 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.
18. The application for authorisation the subject of this Interim Authorisation Decision is intended to allow the currently authorised collaboration to continue, with some changes, after 31 March 2021.

19. Coles submits that authorisation is sought on substantially the same terms as in the Existing Authorisation but with some modifications to reflect the evolution of the pandemic and the current operating rhythms of key government agencies.

Proposed changes to the existing authorisation

20. Under the Existing Authorisation, the supermarkets are 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 must 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.
21. Coles is proposing the following additions to the scope of the authorised conduct:
- (a) clarifying, as detailed in paragraph 8, that for the avoidance of doubt, that the purposes for which coordination is authorised includes the supermarkets ensuring a safe operating environment for employees and customers. 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)
 - (b) expanding the definition of an Authorised Meeting, as detailed at **Annexure A**, to include:
 - (i) 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
 - (ii) 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
 - (iii) 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 8, 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.

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

The authorisation process

23. 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.

Request for interim authorisation

24. 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.
25. Because Coles' new application for authorisation was not lodged until shortly before the Existing Authorisation expires, the ACCC will not be able to make a final decision about the new application by 31 March 2021. Therefore, Coles requests urgent interim authorisation to ensure that an exemption for the specified types of collaborative action remains available should issues arise during the period that the substantive application is being considered by the ACCC.

Consultation

26. The ACCC sought the views of current participants in the Supermarket Taskforce and State Government agencies about the request for interim authorisations. No concerns about the interim authorisation request were raised.
27. The ACCC has not conducted a broader public consultation process in respect of the request for interim authorisation due to the imminent expiry of the Existing Authorisation and the need for the Participating Supermarkets to have continuous protection should they need to quickly take steps to ensure supply of Retail Products to consumers, as well as the compelling nature of the public benefits likely to result from the conduct the subject of the request for interim authorisation.
28. 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](#).

Reasons for decision

29. The ACCC grants interim authorisation subject to the conditions outlined at **Annexure A** to this Interim Authorisation Decision.
30. The ACCC notes that there is urgency about the request for interim authorisation as the Existing Authorisation expires on 31 March 2021.
31. In considering the application for interim authorisation, the ACCC has considered whether there is a continuing need for coordinated activities between the supermarkets in the current circumstances. 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 outbreaks and lockdowns in various states in late 2020 and early 2021. This

ongoing uncertainty, and the possibility of restrictions being introduced at short notice, has particular impacts on the operations of supermarkets in supplying customers.

32. Given this, the ACCC considers that there appears to be an ongoing need for the Participating Supermarkets to be able, in limited circumstances, to engage in coordinated activities to respond to the COVID-19 pandemic, at least in the short term. The ACCC considers that such coordination is, in the short term, likely to continue to result in the public benefits previously identified by the ACCC. In particular:
- 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.
 - Enabling retailers to implement measures, both individually and collectively, to materially reduce community concerns and stockpiling behaviour.
 - Reducing strain on the Retail Products supply chain, by assisting manufacturers and authorised retailers to quickly understand and address impediments to increasing production to meet higher demand and to address difficulties within their internal supply chains.
 - Promoting a safe operating environment for consumers, employees and contractors and other third parties.
33. The ACCC's preliminary view is that the expansions to the Proposed Conduct (detailed in paragraph 21 above) are likely to provide for more effective and efficient cooperation between the supermarkets, particularly in circumstances where there is a need to implement arrangements at short notice and/or at a local level.
34. Informed by observations about how the Existing Authorisation has been operating since March 2020, including attendance at all Supermarket Taskforce meetings to date, the ACCC considers that interim authorisation will not materially alter the competitive dynamics in any market, and markets will be able to return to substantially their pre-authorisation state once authorisation is no longer in place. In particular:
- The interim authorisation is restricted to conduct arising from Authorised Meetings or Urgent Measures, 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, further reducing the risk of competitively sensitive information being exchanged for purposes unrelated to responding to the pandemic. 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 **Annexure A**, the ACCC has notice in advance that they are being held and there is oversight over the outcomes, which must be tabled at the next Authorised Meeting.
 - 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.
 - It is not compulsory for supermarkets to participate in the Proposed Conduct. Similarly, the interim 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, and interim authorisation, is a temporary measure. The ACCC may also review its decision to grant interim authorisation at any time. If manufacturers, suppliers, transport and logistic providers have concerns with the way supermarkets are dealing with them during the period of interim authorisation, they are encouraged to advise the ACCC.
35. The ACCC has decided to grant authorisation subject to the conditions at **Annexure A** of this Interim Authorisation Decision. Except for the condition relating to Urgent Measures, these are the same conditions as imposed in the Existing Authorisation with some modifications and changes. The underlined text at **Annexure A** indicates additions to the conditions imposed in the Existing Authorisation. Except for the condition relating to Urgent Measures, each of these additions were requested by Coles, as summarised at paragraphs 20 to 22.
 36. 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.
 37. 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 new authorised retailers wishing to engage in the Proposed Conduct. This gives the ACCC the opportunity to be satisfied that any coordination agreed and/or retailers added does not result in unintended public detriments.
 38. The ACCC also notes that 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.
 39. In this respect, the interim authorisation is a temporary measure. The ACCC will consider the appropriate duration, if any, of any substantive authorisation as part of its ongoing assessment of the application.

Reconsideration of interim authorisation

40. The ACCC may review a decision on interim authorisation at any time, including in response to feedback raised following interim authorisation.
41. The ACCC's decision in relation to the interim authorisation should not be taken to be indicative of whether or not the final authorisation will be granted.

Annexure A – Conditions of authorisation

Condition 1: Authorised Meetings

1. 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 time¹
 - (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

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

¹ As of 9 June 2020, this included the Safety of Staff and Customers Working Group and the Food Supply Working Group.

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

3. 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@acc.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.
4. 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.