



**Coles Group Limited –
Application for authorisation AA1000477
Interim authorisation decision
9 June 2020**

Decision

1. The Australian Competition and Consumer Commission (the **ACCC**) grants conditional interim authorisation in respect of the application for authorisation AA1000477 submitted on 20 March 2020 (the **Original Application**) by Coles Group Limited (**Coles**) on behalf of itself and Woolworths Group Limited, ALDI Stores, Metcash Limited (the **Participating Supermarkets**) and any other grocery retailer that may wish to join in the future.
2. On 8 May 2020, Coles requested a narrowing of the scope of the proposed conduct in its application and a corresponding narrowing of the conduct permitted under the conditional interim authorisation dated 26 March 2020 (the **Amended Application**). Following consultation with interested parties, the ACCC has revoked the conditional interim authorisation granted on 26 March, and substituted this conditional interim authorisation.
3. Grocery retailers will continue to be protected if they give effect to any contracts, arrangements, or understandings that were entered into within the scope of the revoked interim authorisation dated 23 March 2020, or the revoked conditional interim authorisation dated 26 March 2020.
4. The ACCC has granted interim authorisation to the Participating Supermarkets and the Other Approved Supermarkets (as defined in paragraph 12(a) of this authorisation), in relation to the conduct described in paragraph 14 of this authorisation. As a condition of authorisation, other parties that wish to engage in the conduct described in this interim authorisation are required to comply with the process set out in paragraph 27 of this authorisation.

Background

5. On 20 March 2020, Coles applied for authorisation, and requested urgent interim authorisation for the Participating Supermarkets and other grocery retailers to engage in 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; see section 3.1 of the Original Application.
6. On 23 March 2020, the ACCC granted interim authorisation for the Participating Supermarkets and other grocery retailers to engage in the conduct specified in the Original Application.
7. On 26 March 2020, the ACCC published a further Statement of Reasons revoking the ACCC's interim authorisation decision of 23 March 2020 and replacing it with an amended conditional interim authorisation. The 26 March 2020 Statement of Reasons clarified the application process for other parties who wished to be covered by the conditional interim authorisation.

Consultation

8. On 8 May 2020, Coles requested the scope of the proposed conduct in its application be narrowed to cover only conduct related to the Supermarket Taskforce convened by the Department of Home Affairs and its working groups.
9. The ACCC conducted a public consultation process with interested parties in respect of Coles' request to narrow the scope of the proposed conduct in its application. Following public consultation, the ACCC proposed, and the Participating Supermarkets did not object to, the conditional interim authorisation also covering conduct in relation to the fora described at paragraph 15.b. and 15.c. below.
10. The ACCC's public consultation letter is available on the [public register](#).

Interim authorisation

11. The ACCC may, where it considers it appropriate, grant interim authorisation, which allows parties to engage in proposed conduct while the ACCC is considering the substantive application.
12. The Participating Supermarkets seek interim authorisation for authorised parties 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)
 - i. ensuring fairer access to Retail Products among the general public
 - ii. 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
 - iii. facilitating access to Retail Products in remote or rural areas.
13. 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 the Interim Authorisations dated 20 and 26 March 2020.
14. The ACCC has granted interim authorisation for the Participating Supermarkets and Other Approved Supermarkets to engage in the conduct set out in paragraphs 12 and 13 subject to the condition that any arrangement or conduct described in paragraph 12 must occur at, in preparation for, or arise out of, an Authorised Meeting (as defined in paragraph 15 below) that occurs after this conditional interim authorisation has been granted.
15. For the purposes of the authorised conduct, 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 (currently, 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 interim 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 the forum; 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 12(b) above.

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

17. The Participating Supermarkets requested authorisation for six months from the date of the ACCC's final determination, and will withdraw the application in the event that the effects of the pandemic subside at an earlier date.

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

The authorisation process

19. Authorisation provides protection from legal action for conduct that may otherwise breach the competition provisions of the *Competition and Consumer Act 2010* (Cth) (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 proposed conduct results in a net public benefit.

20. 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 *Competition and Consumer Act 2010* (Cth) (the **Act**).

21. 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.

Reasons for decision

22. The ACCC's 26 March 2020 interim authorisation decision noted that:

"In granting conditional interim authorisation, the ACCC recognises the urgency of the request for interim authorisation in light of the difficulties that the Applicants and their suppliers have been facing due to the unprecedented demand for certain grocery and household items resulting from the COVID-19 pandemic."

23. On 8 May 2020, Coles submitted that it is appropriate to narrow the scope of the interim authorisation with appropriate mechanisms in place should the COVID-19 pandemic escalate in the future. Coles submits that:

- demand has returned to relatively normal levels and community transmission of COVID-19 is currently under control,
- discussions between Coles and other Participating Supermarkets that have been outside of, or separate to, the Supermarket Taskforce and working groups have

only been in respect of matters raised and discussed within the Taskforce and related working groups,

- the Supermarket Taskforce has recently 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 has not engaged in any discussions with other Participating Supermarkets pursuant to the Interim Authorisation outside these working groups,
- in these circumstances, Coles does not anticipate that it will engage in further discussions or enter into agreements with other Participating Supermarkets pursuant to the Interim Authorisation except as might be required in the future 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.

24. In considering Coles' request, the ACCC has assessed whether there is a continued need for interim authorisation in the current circumstances. The ACCC has decided to grant a new interim authorisation, noting that it remains unlikely that interim authorisation will materially alter the competitive dynamics in any market, and markets will likely be able to return to substantially their current state once the emergency circumstances subside. In particular:

- there is some oversight of the outcomes of the Proposed Conduct, particularly by the Supermarket Taskforce and associated sub-committees, convened by the Department of Home Affairs. Meetings of these groups are attended by representatives of the ACCC, government departments and relevant industry stakeholders. There is an opportunity to raise competition concerns as part of these meetings.
- the Proposed Conduct does not enable Participating Supermarkets to agree the retail prices of Retail Products. The Participating Supermarkets will continue to compete with respect to retail prices and service in relation to the Retail Products.
- the interim authorisation does not compel the manufacturers, suppliers, transport and logistic providers to agree to the proposals by the Participating Supermarkets. The ACCC anticipates that the manufacturers, suppliers, transport and logistic providers will be likely to willingly participate in discussions with the Participating Supermarkets but the interim authorisation does not force them to do so, nor does it prevent the organisations from negotiating alternate outcomes with the Participating Supermarkets.
- it is not compulsory for supermarkets to participate in the Proposed Conduct and it is possible for manufacturers, suppliers, transport and logistic providers to seek to address issues directly with individual supermarkets.
- 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 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.

Authorised parties

25. A list of authorised parties with the protection of the interim authorisation is available on the ACCC's [public register](#).

Condition of authorisation

26. The interim authorisation is subject to the condition set out in paragraph 14 of this authorisation, as well as the following condition which is not applicable to the

Participating Supermarkets or parties that previously have been authorised by the ACCC to engage in the Proposed Conduct.

27. The following process applies to parties that wish to obtain the protection of this interim authorisation:

- (a) Parties that wish to engage in the Proposed Conduct must seek the approval of the ACCC by sending an email to adjudication@accc.gov.au with the subject 'AA1000477 – request to be covered by interim authorisation', identifying the entity(ies) that wish to be covered by this interim 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 interim 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 in its absolute discretion, 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 interim authorisation.

Reconsideration of interim authorisation

28. The ACCC may review a decision on interim authorisation at any time, including in response to feedback raised following interim authorisation.

29. 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.