



**Coles Group Limited –
Application for authorisation AA1000477
Interim authorisation decision
26 March 2020**

Decision

1. The Australian Competition and Consumer Commission (the **ACCC**) grants conditional interim authorisation in respect of the application for authorisation AA1000477 made on 20 March 2020 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. In order to clarify the process for other grocery retailers to be covered by this interim authorisation to engage in the Proposed Conduct which is the subject of the application, the ACCC has revoked the interim authorisation granted on 23 March, and substituted this conditional interim authorisation.
3. This step has been taken to clarify the process by which grocery retailers that wish to engage in the Proposed Conduct can obtain the protection from legal action provided by this interim authorisation.
4. The ACCC has granted interim authorisation with immediate effect to Coles, Woolworths, Aldi Stores and Metcash. As a condition of authorisation, other grocery retailers that wish to engage in the Proposed Conduct described in the application are required to comply with the process set out in paragraph 25 of this authorisation.

Background

5. 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 Application.
6. The ACCC granted interim authorisation on 23 March 2020 for the Participating Supermarkets and other grocery retailers to engage in the conduct specified in the application.

The application for authorisation

7. The Participating Supermarkets submit that:
 - Growing community concerns has led to stockpiling of essential everyday goods by consumers, which has resulted in a shortage of certain stocks on shelves (especially toilet paper and some other non-perishable items), and constraints in supply due to the increased demand for these items.
 - A significantly higher demand for online orders of groceries, which has resulted in difficulties fulfilling and delivering online orders, given the surge in demand.

8. Therefore, the Participating Supermarkets sought authorisation:

To discuss, enter into or give effect to, any arrangement between them (including with manufacturers, suppliers, transport and logistic providers), or engage in any conduct, which has the purpose of:

- 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.

Conduct which has the purpose of any of (i) to (iv) above includes discussing, entering into or giving effect to any arrangement, or engaging in any conduct, which has been recommended by the Supermarket Taskforce convened by the Department of Home Affairs, or the main working sub-committee of that Taskforce (both of which include a representative from the ACCC), and approved by the Minister for Home Affairs.

(the **Proposed Conduct**)

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

10. 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.

11. The application for authorisation is lodged on behalf of:

- Coles Group Limited and its related bodies corporate;
- Woolworths Group limited and its related bodies corporate;
- ALDI Stores;
- Metcash Limited, its related bodies corporate and the class of persons comprising each 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; and
- any other grocery retailer who in future wishes to engage in the conduct subject of the application, providing the ACCC is notified.

12. The Proposed Conduct is not compulsory, and any Participating Supermarket or grocery retailer can opt out of any proposed collaboration under the authorisation.

13. The Participating Supermarkets submit that the Proposed Conduct is intended to enable them to work together during the COVID-19 pandemic to ensure the fair and equitable distribution of Retail Products to consumers, including elderly and disadvantaged members of the public and individuals who may be unwell as a result of COVID-19.

The authorisation process

14. 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.

15. 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**).
16. 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.

Interim authorisation

17. 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.
18. The Participating Supermarkets request urgent interim authorisation due to the need for Participating Supermarkets to urgently take steps to address community concerns about access to everyday goods because of the global COVID-19 pandemic.
19. The Participating Supermarkets submit that unilateral measures taken to date have not sufficiently curbed customer behaviour and, as such, discussions and agreements to enable limited coordination among the Participating Supermarkets is required as soon as possible. For example to:
 - curb recent stockpiling behaviour and encourage consumers to return to normal shopping patterns;
 - by curbing stockpiling behaviour:
 - ameliorate current community concerns about availability of essential grocery and other household items;
 - ensure that all consumers will continue to have fair and reasonable access to Retail Products. This includes elderly and disadvantaged members of the public, including consumers who may be unwell as a result of COVID-19, as well as consumers in remote or regional areas;
 - ensure the safety of customers and staff, by reducing congestion in stores and store car parks and alleviating customer stress regarding recent stock shortages;
 - avoid unnecessary strain on Retail Product supply chains, including in manufacturing plants, distribution centres and in primary and secondary haulage; and
 - smooth upstream production which will help avoid stock outages;
 - assist relevant manufacturers and the Participating Supermarkets to quickly understand any impediments to increasing production to meet higher demand and agree on solutions to address those issues;
 - by assisting manufacturers and Participating Supermarkets 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 Participating Supermarkets to urgently restock their shelves; and
 - assist Participating Supermarkets to meet the unprecedented increase in demand for online deliveries, thereby assisting in particular consumers who are unwell or self-isolating (including elderly consumers and consumers who are immune suppressed).

Consultation

20. The ACCC has not conducted a public consultation process in respect of the request for interim authorisation due to the urgent need for the Participating Supermarkets to quickly take steps to ensure supply of Retail Products to consumers during the COVID-

19 epidemic and the compelling nature of the public benefits likely to result from the request for interim authorisation.

21. The ACCC will conduct a public consultation process on the substantive application for authorisation in the coming days, and details regarding how to make a submission will be available on the [ACCC's authorisations public register](#).

Reasons for decision

22. In granting conditional interim authorisation, the ACCC recognises the urgency of the request for interim authorisation in light of the difficulties that the Participating Supermarkets and their suppliers have been facing due to the unprecedented demand for certain grocery and household items (including through online orders) resulting from the COVID-19 pandemic.

23. In addition, the ACCC considers that:

- It is unlikely that interim authorisation will materially alter the competitive dynamics in any market, and markets will be able to return to substantially their current state once the emergency circumstances subside. In particular:
 - The Proposed Conduct, and interim authorisation, is a temporary measure. Authorisation is only sought for six months from the date of the ACCC's final determination and the Proposed Conduct can be discontinued in the event that the effects of the pandemic subside at an earlier date.
 - The Proposed Conduct, and interim authorisation, only apply to arrangements and conduct for the purposes set out in 3.1 of the application for authorisation, which are broadly to ensure the supply and the fair and equitable distribution of Retail Products to consumers during the COVID-19 pandemic.
 - 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.

- There are likely to be significant public benefits given the current unprecedented circumstances, including:
 - Assisting manufacturers, suppliers and the Participating Supermarkets to quickly understand any impediments to increasing production to meet higher demand and agree on solutions to address those issues. Coordination amongst the supermarkets about possible solutions to supply and demand issues caused by the COVID-19 pandemic is likely to enable manufacturers and suppliers to more efficiently address and implement responses, compared to a scenario where supermarkets are separately developing solutions with suppliers.
 - Assisting manufacturers, suppliers and Participating Supermarkets to understand and address issues which may prevent higher production volumes for the period that customer demand is higher than normal and enable the Participating Supermarkets to urgently restock their shelves.
 - Enabling the Participating Supermarkets to take steps to facilitate fairer access to Retail Products among the general public.
 - Enabling the Participating Supermarkets and logistics providers to make arrangements to facilitate greater access to Retail Products for those in most need, including consumers who rely, or will rely, on home deliveries of Retail Products.
 - Enabling the Participating Supermarkets and transport and logistic providers to facilitate greater access to Retail Products by consumers located in rural and remote areas.
 - Facilitating a consistent approach to dealing with supply and delivery issues by Participating Supermarkets may assist in providing consumers with a greater understanding about solutions being taken to address such issues.

Condition of authorisation

24. The interim authorisation is subject to the following condition, which is not applicable to the Participating Supermarkets.
25. The following process applies to any grocery retailer (other than the Participating Supermarkets) that wishes to obtain the protection of this interim authorisation:
 - (a) Grocery retailers 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 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 grocery retailer to engage in some or all of the conduct for which authorisation is granted, that retailer 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 grocery retailer, the ACCC may in its absolute discretion, refuse to approve the grocery retailer 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 grocery retailer may engage.
 - (d) Unless the ACCC approves a grocery retailer (other than the Participating Supermarkets) engaging in the Proposed Conduct, that retailer will not have the protection of this interim authorisation.

Reconsideration of interim authorisation

26. The ACCC may review a decision on interim authorisation at any time, including in response to feedback raised following interim authorisation.
27. 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.