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19 June 2020

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**By email**

Dear Kai

**Coles Group application for authorisation on behalf of itself and participating supermarkets**

We refer to your email of 1 June 2020 in relation to the application for authorisation by Coles Group Limited (**Coles**) lodged on 20 March 2020 (the **Application**) and updated on 8 May 2020 (the **Amended Application**).

We also refer to the interim authorisation granted by the ACCC to Coles, Woolworths, ALDI and Metcash on 23 March 2020, as substituted on 26 March 2020 (**Interim Authorisation**) and further substituted on 9 June 2020 (**Amended Interim Authorisation**).

The purpose of this letter is to provide Coles' views in relation to matters that have arisen since the Application and that may be relevant to the ACCC's draft final determination, and why it remains the case that the proposed conduct would, or would be likely to, result in a net public benefit.

**1 Observations on the Interim Authorisation**

As set out in the Amended Application, as of 8 May 2020, only a small number of agreements had been reached under the Interim Authorisation and most of the discussions between Participating Supermarkets had taken place in the context of the Government's Supermarket Taskforce.

Since the Amended Application, the scope of conduct engaged in by Coles under the Interim Authorisation and the Amended Interim Authorisation has been even narrower. In particular, Coles notes that in this period it has not entered into any additional agreements in reliance on the Interim Authorisation. Regular scheduled meetings of the Supermarket Taskforce and its working groups have recently been suspended, further limiting the scope of the proposed conduct going forward.

Coles remains of the view that the Interim Authorisation and Amended Interim Authorisation have been effective and greatly assisted efforts to facilitate fairer and greater access to retail products among the general public, those in need and those in remote or rural areas. The Interim Authorisation has been critical to the functioning of the Supermarket Taskforce and allowed participants to freely discuss the challenges they faced and contribute to a collaborative response.

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As previously stated, had the Participating Supermarkets not been able to engage with each other in a collaborative manner as facilitated by the Interim Authorisation, it is likely that the impacts of COVID-19 would have had a greater detrimental impact on Australian consumers.

## **2 Ongoing utility of the Amended Application**

The public health position in Australia has improved since the Amended Application and both consumer demand and supply chains have further stabilised. Particularly, while Coles' supply chain continues to be impacted by COVID-19, Coles has been able to remove all COVID-19 related transaction limits as of 26 May 2020.

Nonetheless, Coles is conscious of government and expert advice of the potential for a 'second wave' of community transmission, recent news reports regarding COVID-19 'spikes' in countries such as China and the United States, and the potential for such a second wave or spike to again disrupt the availability of retail products.

Should a second wave occur, whether on a local or broader scale, Coles anticipates that the collaborative approach adopted through the Government's Supermarkets Taskforce would likely be re-enlivened. Coles notes that while the Supermarkets Taskforce and related working groups have recently been suspended, the Government has retained the framework of the taskforce to be available in the event of a second wave and informed participants that additional meetings may be convened in the future.

Coles considers that the conduct within the scope of the Amended Interim Authorisation and Amended Application may be necessary to allow the Supermarket Taskforce and related processes to be re-enlivened on short notice. Accordingly, Coles submits that authorisation remains likely to result in substantial ongoing public benefit.

Coles remains of the view, as set out in section 7 of the Application, that there is very limited potential for detriment to arise from collaboration of the type proposed. Coles submits that the likelihood of public detriment is further reduced in light of its request for a narrowing of the scope of the proposed conduct.

## **3 Interested party submissions**

Coles notes that some submissions from interested parties have raised concerns, including that the interim authorisation may have contributed to shortages of supply to wholesalers and independent retailers and that the scope of authorisation sought in the original Application was too broad.

However, as noted above, the conduct engaged in by Coles and Participating Supermarkets pursuant to the Interim Authorisation and Amended Interim Authorisation has been limited and did not involve any joint procurement from or joint discussions with suppliers. Coles submits that interim authorisation could not therefore have contributed to any shortages of supply to other retailers and notes that Coles itself suffered substantial shortages of supply. Coles further notes that, in light of developments since the Application was lodged, it has requested the scope of the proposed conduct be narrowed such that, if authorised on a final basis, the proposed conduct would involve substantial oversight from government bodies including the ACCC.

## **4 Draft determination**

For the reasons set out above, Coles submits that it remains the case that the proposed conduct would, or would be likely to, result in a net public benefit and, therefore, that it would be appropriate for the ACCC to propose to grant authorisation in its draft determination. The timeframe for the COVID-19 pandemic remains fundamentally uncertain and, as a result, Coles considers that the timeframe for the authorisation remains similarly uncertain. For this reason, Coles submits that the period of authorisation sought in the original Application of 6 months from the date of the ACCC's

final determination remains appropriate. Coles notes that the ACCC could revoke the authorisation sooner if there is a material change in circumstances, for example where the effects of the pandemic subside at an earlier date.

Please do not hesitate to contact us to discuss anything in this letter. Otherwise, we look forward to receipt of the ACCC's draft determination in due course.

Kind regards

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Partner

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**James Somerville**

Senior Associate

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