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8 May 2020

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By Email

Dear Mr McCracken-Hewson

Variation to Application for Authorisation by Coles Group Limited and Replacement of Interim Authorisation

We refer to your letter of 5 May 2020 in relation to the application for authorisation by Coles Group Limited (**Coles**) lodged on 20 March 2020 (the **Application**). We also refer to the interim authorisation granted by the ACCC to Coles, Woolworths, ALDI and Metcash (the **Original Participants**) on 23 March 2020, as substituted on 26 March 2020 (**Interim Authorisation**).

The purpose of this letter is to:

- (a) provide Coles' responses in relation to the topics outlined in your letter of 5 May 2020; and
- (b) seek a variation of the Application. Now that demand has returned to relatively normal levels and community transmission of COVID-19 is currently under control, Coles wishes to narrow the scope of conduct the subject of interim and final authorisation.

1 Effectiveness of Interim Authorisation to date and proposed future cooperation

Coles provides the following comments in relation to the issues identified in your letter of 5 May 2020.

- Whether, and if so, how effectively, your organisation and (to the extent you are able to comment) the other Participating Supermarkets has been able to achieve each of the four primary purposes of the conditional interim authorisation
- The extent to which your organisation has engaged in conduct in reliance on the conditional interim authorisation that has been outside of, or separate to, the Supermarket Taskforce and its subcommittees and working groups

While only a small number of agreements on very specific matters have been reached between the Participating Supermarkets under the Interim Authorisation (as set out below), Coles considers that the Interim Authorisation has enabled open and frank discussions between the participants and government. These discussions have been very effective in achieving the four primary purposes of the Interim Authorisation, in particular, to resolve issues relating to stock shortages on shelves and associated supply chain constraints. By enabling the Participating Supermarkets to resolve those

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issues, the Interim Authorisation has assisted the Participating Supermarkets' endeavours to facilitate fairer and greater access to retail products among the general public, those in need and those in remote or rural areas.

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. Coles notes that an ACCC representative has attended the Supermarket Taskforce and associated working group meetings. Discussions in the Supermarket Taskforce and related working groups have focused on matters such as:

- the safety aspects of trading during the pandemic;
- availability of key product lines for customers;
- trading hours, including public holiday opening hours;
- customs clearance and border closures;
- use of hand sanitiser and masks;
- customer numbers and security in supermarkets and shopping centres;
- supply to vulnerable customers, including through online channels;
- access to grocery supplies by remote and indigenous communities; and
- cleaning and hygiene measures undertaken to protect team members and customers.

Arising from these discussions, agreement was reached between the Original Participants in relation to the following specific areas:

- temporarily imposing retail liquor limits (lifted on 28 April 2020);
- temporarily adjusting trading hours, including to facilitate restocking, prevent crowding during public holiday periods, and improve access by vulnerable persons; and
- limitations on customer numbers in store for social distancing reasons to protect customer and team safety.

While in practice the matters discussed and agreed upon between supermarkets and government have been relatively limited, Coles considers that the Interim Authorisation has been extremely valuable. Had Coles not been able to engage with the other Participating Supermarkets, the government and the ACCC in this collaborative manner, it is likely that the stock shortages on shelves and associated supply chain constraints would have continued for a considerably longer period, to the detriment of Australian consumers.

- A detailed list of the written information or data that has been shared (if any) by or with your organisation as part of conduct in reliance on the conditional interim authorisation

As discussed above, the activities that Coles has engaged in pursuant to the Interim Authorisation has been relatively limited, and has included the sharing of the information and data that is listed in Annexure A.

Coles notes that it provided certain data and information to the Department of Home Affairs, which was requested during meetings of the Supermarket Taskforce and associated working groups. However, this information was provided on the basis that it would not be shared outside of relevant government agencies, and therefore would not be shared with Coles' competitors.

- Details of any plans for future cooperation in reliance on the conditional interim authorisation, in light of the gradual return of consumer demand to normal levels and the improving public health situation

As the ACCC is aware, the Government's 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.

The scope of the Interim Authorisation has also expanded through the addition of a variety of other parties approved by the ACCC, although Coles has not had any involvement with those parties (outside of meetings facilitated by the Department of Home Affairs).

Coles also notes that the number of new COVID-19 cases in Australia (including through community transmission) appears to be stabilising, although the situation remains fragile.

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. Coles may, for a period, continue to implement measures previously agreed pursuant to the Interim Authorisation (for example, in relation to limitations on customer numbers in store for social distancing reasons).

- Any changes to the conditional interim authorisation you consider may be desirable

Coles considers that it would be desirable for the scope of the Interim Authorisation to be narrowed, as discussed in more detail below.

2 Request to amend the Application and proposed replacement of the Interim Authorisation

In light of the matters discussed above, Coles considers that it is appropriate for the scope of conduct the subject of the Application and the Interim Authorisation to be narrowed, with appropriate mechanisms in place to ensure that Participating Supermarkets are able to respond quickly should the COVID-19 pandemic escalate in future.

Accordingly, Coles requests that the ACCC accept an amendment to the Application which provides that the Participating Supermarkets could continue to give effect to any contract, arrangement or understanding previously entered into under the Interim Authorisation but that the Proposed Conduct the subject of Application be narrowed such that Participating Supermarkets may only engage in future conduct that relates to, or is agreed to in, any future meetings of the Supermarket Taskforce or its associated working groups. If the ACCC accepts Coles' request to amend its Application, Coles submits that it would be appropriate for the scope of the Interim Authorisation to be narrowed to a corresponding extent.

The precise terms of Coles' proposed amendment to the Application are set out in Annexure B.

While the community transmission has been brought under control for the time being, it is clear from public statements by governments and health advisors that the situation is fragile and could escalate quickly. In those circumstances, Coles submits that there are strong public benefits associated with enabling Participating Supermarkets to continue to work together to address any issues that could arise in the future in relation to the COVID-19 pandemic. By narrowing the scope of the Proposed Conduct to conduct that relates to, or is agreed to in, any future meetings of the Supermarket

Taskforce or its associated working groups, there is limited room for detriment to arise. Coles also notes the ability of grocery retailers that are not currently authorised under the Interim Authorisation, to engage with the ACCC to obtain protection if they wish to participate in any such meetings.

Coles has consulted with Woolworths and Aldi in relation to the proposed wording in Annexure B and both parties are supportive of narrowing the application in this manner. Coles has also shared Annexure B with Metcash but has not yet received Metcash's response. In relation to other supermarkets, Coles considers that limited, if any, consultation is required. If other supermarkets wish to obtain broader immunity from competition laws than is proposed in Annexure B, it would be open to those retailers to make their own application for authorisation under the *Competition and Consumer Act 2010*.

Please do not hesitate to contact us to discuss.

Yours sincerely


Rosannah Healy

Partner
Allens


T **James Somerville**

Senior Associate
Allens


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Annexure A

List of the written information or data that has been shared by or with Coles as part of conduct in reliance on the conditional interim authorisation

Limited written information or data in the areas set out below has been shared by or with Coles in reliance on the conditional interim authorisation. This information has been in preparation for, or arising from discussions in, the Supermarket Taskforce and its associated working groups:

- a. Feedback on a list of products that would potentially be 'under pressure' drafted by the Department of Home Affairs was provided by Coles and received from a number of the Original Participants
- b. Health and safety documents including plans for additional safety measures to be adopted in response to COVID-19 were shared by Coles and Woolworths and with participants of the Supermarkets Taskforce
- c. Plans for adjusting trading hours and introducing community hours to improve access by vulnerable persons were shared by Coles and Woolworths
- d. Plans for limiting the number of customers in stores including information regarding proposed customer numbers, measures for communicating limitations and lists of stores likely to be substantially impacted by the imposition of customer limits were shared by Coles and with participants of the Supermarkets Taskforce and received from a number of the Original Participants
- e. Information and draft advertisements were shared for joint marketing with a number of the Original Participants regarding social distancing and support for the NDIS
- f. Information regarding the implementation and removal of retail industry liquor limitations were shared between Coles and Woolworths

Other data and written information was shared by Coles with the Supermarket Taskforce on the basis that it would not be provided to or shared with competitors and so is not relevant to the authorisation.

Annexure B

Proposed variation to Authorisation

Coles proposes that the Proposed Conduct (as defined in the Application) be varied as below.

[T]he Participating Supermarkets seek 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.*

The Proposed Conduct is subject to the following additional limitation:

- (a) As of [##] May 2020, the Proposed Conduct is limited to conduct that relates to, or is agreed upon in, any future meeting of the Supermarket Taskforce, the Safety of Staff and Customers Working Group or the Food Supply Working Group, as convened by the Department of Home Affairs; or*
- (b) Notwithstanding (a) above, the Participating Supermarkets may continue to implement any contract, arrangement or understanding previously entered into in reliance on the Interim Authorisations dated 20 and 26 March 2020.*

*(the **Proposed Conduct**)*