

**Application for interim and final
authorisation under s 88(1) of the
*Competition and Consumer Act 2010 (Cth)***

Lodged by:

Coles Group Limited

on behalf of itself and other operators of supermarket chains
in Australia

Public version

12 March 2021

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1 Summary

1.1 Background

This application seeks authorisation under section 88(1) of the *Competition and Consumer Act 2010* (Cth) (**CCA**) to engage in the conduct described in section 3 (**Proposed Conduct**). The Proposed Conduct is currently largely authorised by the existing ACCC authorisation AA1000477 dated 3 September 2020 (**Existing Authorisation**).

The application is made by Coles Group Limited (**Coles**), 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**)
(together, the **Participating Supermarkets**).

The critical role of supermarkets in Australian communities has been highlighted by the COVID-19 (coronavirus) pandemic. The Existing Authorisation, which is due to expire on 31 March 2021, has generated significant public benefits by enabling the Participating Supermarkets to work together to ensure the supply and fair and equitable distribution of fresh food, groceries, household products and liquor (**Retail Products**) during the pandemic. This collaboration has focused on critical matters such as the safety aspects of trading during the pandemic, availability of key product lines for customers, supply to vulnerable customers and cleaning and hygiene measures.

Although the public health position in Australia has improved since the initial outbreak of COVID-19 in 2020, the situation remains uncertain and fragile, as demonstrated by recent outbreaks and lockdowns in numerous States.¹ In addition, with the roll out of vaccines globally and locally, Australia enters a new phase of managing COVID-19, one which may raise different issues and challenges to those faced to date. Accordingly, Coles, on behalf of the Participating Supermarkets, seeks authorisation for a further 12 months on a slightly modified basis to ensure that they can continue to work together to address supply and safety issues that could arise in future in relation to the COVID-19 pandemic.

The outcome of this application 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) (see full list in Annexure 1 below); 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
(together, **Other Approved Supermarkets**).

1.2 Application for interim authorisation

To ensure that the Participating Supermarkets can continue to take steps as needed to address any supply issues which may arise in relation to the COVID-19 pandemic, and for the reasons detailed in section 3.3, the Participating Supermarkets request that the ACCC grant interim authorisation prior to the expiration of the Existing Authorisation on 31 March 2021. This will ensure that the clear public

¹ As recently as mid-February this year.

benefits associated with the Existing Authorisation are maintained without disruption pending the ACCC's final determination of this application.

2 Parties to the Proposed Conduct

2.1 Applicant

Name, address (registered office), telephone number and ACN	Contact person's name, position, telephone number and email address	Description of business activities
<p>Coles Group Limited (ACN 004 089 936) and its related bodies corporate</p> <p>800 Toorak Road Hawthorn East, VIC 3123</p> <p>(03) 9829 5111</p>	<p>David Brewster</p> <p>Chief Legal & Safety Officer</p> <p>Coles Group Limited</p> <p>[REDACTED]</p> <p>800 Toorak Road Hawthorn East, VIC 3123</p> <p>[REDACTED]</p>	<p>Acquisition and retail supply of Retail Products through supermarkets, liquor and convenience outlets and online</p>

2.2 Email address for service of documents in Australia

Rosannah Healy
Partner
Allens

[REDACTED]
[REDACTED]

2.3 Others Persons who proposed to engage in the Proposed Conduct

Details of any other persons and/or classes of persons who, in addition to Coles Group, also propose to engage, or become engaged, in the Proposed Conduct and on whose behalf authorisation is sought are set out below.

Other Participating Supermarkets

Name, address (registered office), telephone number and ACN	Contact person's name, position, telephone number and email address	Description of business activities
<p>Woolworths Group Limited (ACN 000 014 675) and its related bodies corporate</p> <p>1 Woolworths Way</p> <p>Bella Vista, NSW 2153</p> <p>(02) 8885 000</p>	<p>Bill Reid</p> <p>Chief Legal Officer</p> <p>Woolworths Group Limited</p> <p>[REDACTED]</p> <p>[REDACTED]</p>	<p>Acquisition and retail supply of Retail Products through supermarkets, liquor and convenience outlets and online</p>
<p>ALDI Stores (A Limited Partnership) (ABN 90 196 565 019)</p> <p>Locked Bag 56 St Marys Delivery Centre, NSW 2760</p> <p>13 25 34</p>	<p>Bronwyn Gallacher</p> <p>Managing Director</p> <p>CCL Consultants Pty Ltd</p> <p>[REDACTED]</p> <p>[REDACTED]</p>	<p>Acquisition and retail supply of Retail Products through supermarkets outlets</p>
<p>Metcash Limited (ACN 112 073 480) and its related bodies corporate and each of</p>	<p>Julie Hutton</p> <p>General Manager Legal & Company Secretary</p>	<p>Wholesale and retail supply of Retail Products through distribution centres,</p>

<p>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</p> <p>1 Thomas Holt Drive Macquarie Park NSW 2113 (02) 9741 3000</p>	<p>Metcash Limited</p> <p>██████████</p> <p>████████████████████</p>	<p>warehouses, supermarkets, liquor and convenience outlets and online</p>
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Other Approved Supermarkets

Details of the Other Approved Supermarkets, that Coles is aware of as at the date of this application, based on the ACCC public register for Authorisation AA1000477, are outlined in Annexure 1.

The Participating Supermarkets propose that authorisation also apply to other retailers which are approved by the ACCC subject to the requirements in section 3.2 below, or any other conditions imposed by the ACCC.

3 The Proposed Conduct

3.1 Overview

The conduct the subject of this application relates to cooperation between the Participating Supermarkets and Other Approved Supermarkets in response to the COVID-19 pandemic to ensure the supply and fair and equitable distribution of Retail Products to Australian consumers.

The Participating Supermarkets applied for the Existing Authorisation early in the pandemic in March 2020 following an unprecedented surge in demand for certain Retail Products as consumers sought to stockpile goods. Among other things, the Participating Supermarkets sought authorisation to engage in limited coordinated activities in order to curb stockpiling behaviour and encourage consumers to return to normal shopping patterns. By curbing stockpiling behaviour, the Participating Supermarkets sought to ameliorate community concerns about availability of Retail Products, ensure fair and reasonable access to Retail Products for all customers (including elderly and disadvantaged members of the public) and ensure the safety of customers and staff.

Coles considers that the Existing Authorisation was effective in achieving these aims and has continued to give rise to significant public benefits. While in practice only a small number of agreements have been reached in reliance on the Existing Authorisation,² it enabled open, frank and timely discussions between Participating Supermarkets and the government during the pandemic on topics such as:

- (a) The safety aspects of trading during the pandemic;
- (b) Availability of key product lines for customers;
- (c) Trading hours;
- (d) Customs clearance and border closures;
- (e) Use of hand sanitiser and masks;
- (f) Customer numbers and security in supermarkets and shopping centres;
- (g) Supply to vulnerable customers, including through online channels;

² For example, agreements were reached to introduce temporary limits on retail liquor, adjust trading hours (including to facilitate restocking, prevent crowding during public holiday periods and improve access to vulnerable persons) and introduce customer number limits in-store for social distancing reasons to protect team member and customer safety.

- (h) Access to grocery supplies by remote and indigenous communities; and
- (i) Cleaning and hygiene measures undertaken to protect team members and customers.

Had Coles been unable to collaborate with the other Participating Supermarkets and the government in this manner, it is likely that stock shortages on shelves and associated supply chain constraints would have continued for a considerably longer period, to the detriment of Australian consumers. In addition, open and collaborative discussions among Participating Supermarkets about safety matters such as customer numbers in store and cleaning and hygiene measures enabled the Participating Supermarkets to share ideas and best practice information, providing all Participating Supermarkets with a high degree of confidence about the safety measures being implemented to protect consumers and staff, including similar or consistent public messaging about those safety measures.

The COVID-19 outbreaks which have occurred since the date of the Existing Authorisation in Adelaide (November 2020), Sydney (December 2020), Brisbane (January 2021), south-west Western Australia (February 2021) and Melbourne (February 2021) have demonstrated how the authorisation enables potential limited collaboration between the Participating Supermarkets as issues emerge.

To ensure the Participating Supermarkets can continue to work together to address supply issues that arise in future in relation to the COVID-19 pandemic, Coles, on behalf of the Participating Supermarkets, seeks authorisation on substantially the same terms as in the Existing Authorisation for a further 12 months. The Proposed Conduct contains some minor modifications (underlined in section 3.2 below) to reflect the evolution of the pandemic and the current operating rhythms of key government agencies. In summary, the changes proposed are:

- (a) **Safe operating environment.** The Participating Supermarkets propose that the description of the Proposed Conduct include an express reference to a permitted purpose of *ensuring a safe operating environment*. As Australia moves to the next phase in the pandemic, the Participating Supermarkets expect that co-ordinated activities to ensure a safe working environment for staff and customers may be a particular focus. While other permitted purposes are broad enough to cover safety matters (for example, agreements to ensure the ongoing supply of Retail Products would cover agreements to ensure supply in a safe environment), the Participating Supermarkets consider an express permitted purpose relating to safety is desirable in the next phase of the pandemic.
- (b) **Urgent measures prior to an Authorised Meeting.** The Participating Supermarkets consider it appropriate that conduct should generally occur at or in connection with an Authorised Meeting attended by government (such as the Supermarkets Taskforce). However, the Participating Supermarkets submit that there would be a public benefit in ensuring that, in limited urgent cases, the Participating 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 Participating 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 (ie, panic buying). While the Existing Authorisation permits discussions and agreements 'in preparation for an Authorised Meeting', the Participating Supermarkets consider that an express ability to discuss or agree on safety measures outside of an Authorised Meeting is desirable provided that those measures are subsequently tabled at an Authorised Meeting.

In circumstances where such conduct may occur within hours of a government direction or response, the Participating Supermarkets consider that prescribed time frames for provision of notice to the ACCC are not practicable. Instead, the Participating Supermarkets propose that the ACCC be provided with as much notice of the relevant discussion or meeting as is

reasonably practicable in the circumstances. Coles emphasises that urgent measures would only be necessitated in exceptional circumstances.³

- (c) **State and Territory governments.** Except in the limited circumstances discussed in (b) above, the Participating Supermarkets propose that authorisation continue to be subject to a requirement that the conduct occur at, in preparation for, or arise out of an Authorised Meeting. However, the Participating Supermarkets propose that the scope of Authorised Meetings be expanded to encompass meetings involving Federal, *State or Territory* Government representatives (rather than only the Federal Government). Recent positive cases and 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.

In addition, Federal, State or Territory Government representatives would not need to convene the meeting (eg, it could be convened by industry) provided Government representatives are in attendance. The parties submit that this modification would provide the Participating Supermarkets with additional flexibility to respond to urgent issues whilst still ensuring that there is strong government oversight.

- (d) **Government convened coordination mechanism.** From time to time, certain Governments have chosen to hold discussions with individual Participating Supermarkets, rather than convene a meeting where all Participating Supermarkets are present at the same time. To ensure any contracts, arrangements or understandings facilitated by Government in these circumstances receive the protection of authorisation, the Participating Supermarkets propose that an 'Authorised Meeting' includes a coordination mechanism facilitated by a Federal, State or Territory department or agency even where the relevant supermarkets may not meet or speak directly.

Coles has provided below examples of conduct which would be permitted under these proposed modifications but which may not clearly be permitted under the Existing Authorisation. Coles submits that there is a public benefit in putting beyond doubt that such conduct would be authorised.

Example industry measure	Analysis
Scenario 1: Discussing and agreeing on implementation of COVID—19 regulatory requirements relating to safety	The inclusion of an express permitted purpose relating to a safe operating environment ((a) above) would put beyond doubt that the Participating Supermarkets can discuss and agree on measures such as common approaches to implementing regulatory requirements relating to COVID-19 safety (eg, QR codes). These discussions would only be covered by the Existing Authorisation to the extent they were necessary for the purposes of ensuring ongoing supply of Retail Products.
Scenario 2: Discussing and agreeing on new store limits in the event of changes to local COVID-19 restrictions	The modification at (c) above would ensure that the Participating Supermarkets could convene an Authorised Meeting with representatives from <i>State</i> Government in order to agree on new limits on customers in store in the event of modifications to that State's COVID-19 restrictions. This conduct would only be covered under the Existing Authorisation to the extent there was a subsequent meeting

³ For example, some States have opted for lockdown actions with little or no forewarning, following a very small number of reported cases, necessitating unanticipated swift action. These lockdowns can take customers and retailers by surprise triggering panic buying and a lack of clarity in situational management which can increase risk to store teams and customers.

	<p>convened by the Federal Government and the limits were agreed as interim measures in preparation for and in anticipation of the Authorised Meeting with Federal Government.</p>
<p>Scenario 3: Urgent product limits in the event of a localised state lock down to ensure a safe operating environment</p>	<p>In the event of a future COVID outbreak and/or localised lockdown, the modification suggested at (b) above would enable the Participating Supermarkets to hold an urgent discussion (outside of an Authorised Meeting) within 24 hours of a government COVID-19 direction about introducing and implementing measures such as product limits to ensure a safe operating environment. Those discussions (and the implementation of any measures) would receive the protection of the Authorisation, provided that the ACCC was notified of the discussion and the measures were subsequently tabled at an Authorised Meeting involving either State, Territory or Federal government.</p> <p>A number of response measures developed by supermarkets (eg, product limits) are time-sensitive and must be discussed and implemented immediately following announcement of a lockdown or regulatory change in order to be effective. In Coles' view, the modification proposed at (c) above (that an Authorised Meeting need only be convened or attended by a representative of a <i>State or Territory</i> government) may not be sufficient to ensure that these urgent and time-sensitive discussions can occur. This is because, in the event of an urgent outbreak and/or localised lockdown, it is possible that the relevant State or Territory government may not be available to meet within a very short time frame (eg, 1 – 2 hours) given the range of matters being addressed by government at that time to implement the lockdown.</p> <p>Under the Existing Authorisation, such urgent measures are only covered to the extent they amount to conduct undertaken 'in preparation for' an Authorised Meeting.</p>

3.2 The Proposed Conduct

Coles, on behalf of the Participating Supermarkets, seeks 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**).

Authorised Meetings

For the purposes of paragraph 1(c) above, each of the following is an **Authorised Meeting**:

- (a) meetings of the Supermarket Taskforce and any of its working groups, as convened by the Department of Home Affairs from time to time (as of 9 June 2020, this included 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 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, 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; 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 relevant group; 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 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.

Other parties wishing to engage in Proposed Conduct

The Participating Supermarkets propose that, 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 adjudication@acc.gov.au with the subject '[Authorisation application number] – 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.

3.3 Application for interim authorisation

Coles, on behalf of the Participating Supermarkets, seeks interim authorisation to ensure that collaborative action is available should issues arise during the period that the application is pending. As the ACCC concluded in its final determination in relation to the Existing Authorisation, and discussed in section 5 below, the conduct engaged in pursuant to the Existing Authorisation and its associated interim authorisations has generated significant public benefits and the Proposed Conduct is likely to continue to do so while there is a need to manage supply issues related to COVID-19.

If, while interim authorisation is in place, the ACCC is concerned about the continued effectiveness of the Proposed Conduct, it will be open to the ACCC to revoke that authorisation at any time.

3.4 Rationale

Authorisation is sought to ensure that a framework remains in place for Participating and Other Approved Supermarkets to manage risks associated with the COVID-19 pandemic. This includes measures to address any anomalies in consumer demand (ie, panic buying) and disruptions to supply chains that may arise, as well as measures to ensure the safety of customers, employees and contractors.

As previously submitted in relation to the Existing Authorisation:

- the Proposed Conduct is intended to secure the supply and fair and equitable distribution of Retail Products to consumers, and the health and safety of customers, staff and other visitors, and does not involve collective decisions as to the retail price of Retail Products;
- the Proposed Conduct is not compulsory, and any Participating Supermarket can opt out of any proposed collaboration the subject of this application; and
- the Proposed Conduct is a temporary measure to deal with the supply difficulties that the authorised retailers have been facing and are likely to continue to face in light of the COVID-19 pandemic.

3.5 Provisions of the CCA which might apply to the Proposed Conduct

The Participating Supermarkets (and Other Approved Supermarkets) compete in relation to the acquisition of grocery and household items, transport and logistics services as well as the supply of groceries and other consumer products to consumers through their retail supermarkets, liquor store outlets and/or wholesaling functions, as well as other inputs to their business operations.

Accordingly, in the absence of authorisation, the Proposed Conduct risks giving rise to contraventions of the CCA, including by provisions of the CCA relating to:

- (a) cartel conduct (Division 1 of Part IV), in that it may involve contracts, arrangements or understandings containing provisions which have the purpose or effect of fixing, controlling or maintaining, or providing for the fixing, controlling or maintaining of, the price or a discount, allowance, rebate or credit in relation to goods or services acquired or likely to be acquired by the parties, or have the purpose of preventing, restricting or limiting the acquisition or supply or likely acquisition or supply of goods or services by the parties (ss45AD(2), 45AD(3), 45AF, 45AG, 45AJ, and 45AK of the CCA); or
- (b) contracts, arrangements or understandings, concerted practices, exclusive dealing and other conduct that have the purpose, effect or likely effect of substantially lessening competition (ss 45(1), 46(1) and 47(1) of the CCA).

3.6 Term of authorisation sought

The Participating Supermarkets propose to engage in a limited number of coordinated activities on a temporary basis, as required, in order to manage risks that may arise throughout the duration of the pandemic.

Coles, on behalf of the Participating Supermarkets, seeks authorisation to engage in the Proposed Conduct for a period of 12 months from the date of the Existing Authorisation's lapse, that is, until 31 March 2022.

This term has been proposed having regard to the COVID-19 vaccination schedule in Australia. The Australian government has indicated that they expect all Australians to be offered a vaccine by sometime towards the end of 2021, with Minister for Health Greg Hunt indicating a vaccination timeline ending in October 2021.⁴ Even then, Prime Minister Scott Morrison has emphasised on numerous occasions that the vaccine 'is not a silver bullet' and that COVIDSafe practices will continue 'over the course of 2021'.⁵ This is consistent with World Health Organisation advice that

⁴ See 'Doorstop interview on 28 December 2020', *Department of Health: The Hon Greg Hunt MP* (4 January 2021) <<https://www.health.gov.au/ministers/the-hon-greg-hunt-mp/media/doorstop-interview-on-28-december-2020>>; 'Interview with Mark Levy on 2GB about COVID-19 vaccine, vaccination rollout timeline and international travel', *Department of Health: The Hon Greg Hunt MP* (6 January 2021), <<https://www.health.gov.au/ministers/the-hon-greg-hunt-mp/media/interview-with-mark-levy-on-2gb-about-covid-19-vaccine-vaccination-rollout-timeline-and-international-travel>>.

⁵ 7 January 2021 Press Conference Transcript, *Australian Parliament House – Prime Minister* (7 January 2021) <<https://www.pm.gov.au/media/press-conference-australian-parliament-house-12>>. The Prime Minister has since repeated this position: 25 January 2021 Press Conference Transcript, *Australian Parliament House – Prime Minister* (25 January 2021) <<https://www.pm.gov.au/media/press-conference-australian-parliament-house-act-25-01-21>>.

COVID-19 vaccines are not anticipated to be 100% effective.⁶ The Participating Supermarkets consider 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 among Participating and Other Approved Supermarkets may be required to respond to COVID-19 outbreaks.

The Participating Supermarkets submit that 12 months is an appropriate term, for three key reasons.

- Although authorisation is only sought on a temporary basis, given the uncertainty around the vaccination rollout timing and efficacy of the vaccines generally, it is difficult to predict with certainty how long it may be necessary for Participating and/or Other Approved Supermarkets to collaborate in relation to issues arising from the COVID-19 pandemic.
- Except in the case of urgent measures within 24 hours of a government COVID-19 direction or response, the authorised conduct is confined to cooperation occurring at, in preparation for, or as a result of an Authorised Meeting. Even where urgent measures are discussed or agreed among Participating and/or Other Approved Supermarkets, those measures must be tabled at a subsequent Authorised Meeting. This means that there is a high degree of government oversight over any coordinated conduct. In the event that the effects of the pandemic have subsided and there is no need for discussion between the Participating Supermarkets and Other Approved Supermarkets, government would not agree to convene or attend an Authorised Meeting.
- Ultimately, the ACCC can, on the application of the Participating Supermarkets or on its own initiative, revoke the authorisation under section 91B of the CCA should there be a material change in circumstances (e.g. the vaccinations are complete, the effects of the pandemic have subsided, and no Authorised Meetings are expected to take in the foreseeable future).

3.7 Persons who may be directly impacted by the Proposed Conduct

The persons who would be directly impacted by the Proposed Conduct include customers, suppliers, and staff of the Participating Supermarkets and Other Approved Supermarkets.

4 Counterfactual

In the absence of the Proposed Conduct, there may be material limitations on the ability of the Participating Supermarkets to effectively address risks associated with the COVID-19 pandemic including risks to the health of consumers and employees, any anomalies in consumer demand, and disruptions to supply chains that may arise in the event of further coronavirus clusters and lockdowns.

Participating Supermarkets would likely seek to address these issues unilaterally, but in a substantially less effective and timely manner than if they were permitted to engage in certain limited coordination.

5 Public benefits

In its Final Determination concerning the Existing Authorisation,⁷ the ACCC accepted that coordination permitted by the Interim Authorisations had given rise to significant public benefits which were likely to continue if the Existing Authorisation was granted, namely:

⁶ Coronavirus disease (COVID-19): Vaccines, *World Health Organisation (updated 19 February 2021)*, [https://www.who.int/news-room/q-a-detail/coronavirus-disease-\(covid-19\)-vaccines?adgroupsurvey={adgroupsurvey}&gclid=Cj0KCQiAmL-ABhDFARisAKywwVac6VSvWljGD2HujpGsVWUS6zPw7X54BYoLEMoBH1zV8syei8j8jd-8aAstzEALw_wcB](https://www.who.int/news-room/q-a-detail/coronavirus-disease-(covid-19)-vaccines?adgroupsurvey={adgroupsurvey}&gclid=Cj0KCQiAmL-ABhDFARisAKywwVac6VSvWljGD2HujpGsVWUS6zPw7X54BYoLEMoBH1zV8syei8j8jd-8aAstzEALw_wcB)

⁷ Determination, Application for authorisation AA1000477, lodged by Coles Group Limited, 3 September 2020.

- (a) **Consumer access to Retail Products (paragraph 4.14):** The ACCC accepted that the co-operation permitted by the Interim Authorisations had enabled authorised retailers to respond proactively to anticipated or expected impediments to the continued availability of Retail Products across Australia during the period of the COVID-19 pandemic.
- (b) **Reducing community concerns and stockpiling behaviour (paragraphs 4.17 – 4.20):** The ACCC accepted that by enabling discussions and co-ordination between the authorised retailers (including uniform or similar purchase limits and public messaging), the Interim Authorisations had been effective in addressing consumer concerns about the need to stockpile essential household goods, resulting in public benefits associated with consumers returning to normal shopping patterns in many areas.
- (c) **Reducing strain on the Retail Products supply chain (paragraph 4.22):** The ACCC observed that the authorised retailers' handling of the second wave of infections in Melbourne was a salient demonstration of the significant public benefits in enabling grocery retailers to prepare for, discuss and implement activities to safeguard the supply of groceries to consumers during the pandemic. It observed that grocery supplies in Melbourne during the second wave were "relatively stable, with relatively muted panic buying".

The Participating Supermarkets submit that the significant public benefits identified by the ACCC in its final determination relating to the Existing Authorisation have continued since the Existing Authorisation was granted and will continue to be realised if the Proposed Conduct is authorised.

In addition, the Participating Supermarkets submit that coordination engaged in pursuant to the Interim Authorisations and Existing Authorisation has resulted in an additional public benefit which will continue to be realised, being the promotion of a safe operating environment for consumers, employees and contractors and other third parties. In the absence of authorisation, each authorised retailer would of course continue to implement measures unilaterally which ensure the safety and wellbeing of their customers and staff as their highest priority. However, if the Proposed Conduct is authorised, it will enable authorised retailers to share and agree on best practice measures during the next phase of the pandemic, including similar or consistent public messaging and store safety requirements, likely resulting in enhanced safety outcomes across industry.

6 Public detriment

The Participating Supermarkets submit that the Proposed Conduct is not likely to result in any public detriment, including from any lessening of competition, and will therefore result in a significant net public benefit. In particular:

- a) The Proposed Conduct will continue to facilitate consistent and more predictable levels of supply for consumers in the event of future outbreaks.
- b) The authorisation is subject to conditions which narrowly restrict its use to conduct occurring at, arising from, or in preparation for Authorised Meetings (or in the event of urgent measures, to conduct tabled at a subsequent Authorised Meeting).
- c) There is a high level of government oversight. Government representatives must be present at Authorised Meetings and the ACCC notified of Authorised Meetings (with the ACCC historically attending all Authorised Meetings).
- d) The Proposed Conduct does not extend to any agreement or coordination on the retail price of Retail Products.
- e) The Proposed Conduct does not change the Participating Supermarkets' and Other Approved Supermarkets' incentives to compete during or after the period of authorisation.

7 Contact details of relevant market participants

See section 2 above and Schedule 1.

8 Declaration by applicant

The undersigned declares that, to the best of their knowledge and belief, the information given in response to questions in this form is true, correct and complete, that complete copies of documents required by this form have been supplied, that all estimates are identified as such and are their best estimates of the underlying facts, and that all the opinions expressed are sincere.

The undersigned undertakes to advise the ACCC immediately of any material change in circumstances relating to the application.

The undersigned is aware that giving false or misleading information is a serious offence and is aware of the provisions of sections 137.1 and 149.1 of the *Criminal Code* (Cth).



David Brewster
Chief Legal & Safety Officer, Coles Group Limited
This 12th day of March 2021

Annexure 1: Other Approved Supermarkets

The Other Approved Supermarkets referred to on the ACCC public register for the Existing Authorisation and in the ACCC's final determination dated 3 September 2020 are:

- Amazon Australia, 7-Eleven Australia, Harris Farm, Arnhem Land Progress Aboriginal Corporation, Outback Stores, Liquor Stax, and Community Enterprises Queensland, who each have protection of the interim authorisation on the same terms as the Participating Supermarkets.
- Specified current and future members of Retail Drinks Australia, who have protection of the interim authorisation limited to implementing recommendations of the Supermarket Taskforce, or the main working sub-committee of the Supermarket Taskforce, that have been approved by the Minister for Home Affairs. This covers Hotel & Tourism Management Pty Ltd, Top Cellars Group, Beer Cartel, Liquor Marketing Group, Wine Depot, Diageo Australia, Red Bottle Group, Vantage Group) and all current and future members of Retail Drinks that are classed as 'Liquor Store Members' and 'Digital and Online Members'.
- Master Grocers Australia and the Australasian Association of Convenience Stores, who have protection of the interim authorisation limited to discussions held or arrangements made during a meeting of the Supermarkets Taskforce, the Food Supply working group or one of the Taskforce's other working groups, or in any directly related side-meetings to continue discussions.