



# Draft Determination

Application for revocation of AA1000546 and the substitution of authorisation AA1000606

lodged by

Coles Group Limited on behalf of itself and participating supermarkets in respect of

engaging in coordinated activities in response to the COVID-19 pandemic to ensure the supply of Retail Products to consumers

Authorisation number: AA1000606

9 August 2022

Commissioners: Keogh  
Rickard  
Brakey

## Summary

The ACCC proposes to grant authorisation to Coles, Woolworths, Metcash, ALDI and other grocery retailers to enable them to continue to engage in coordinated activities in response to the COVID-19 pandemic which broadly have the purpose of ensuring the supply and fair and equitable distribution of Retail Products to consumers, and protecting the health and safety of customers and staff.

The ACCC first authorised conduct of this type in March 2020. The most recent authorisation (AA1000546) was granted on 25 August 2021 on substantially the same terms, and with substantially the same conditions, as the present application (AA1000606). The ACCC granted these authorisations with limited timeframes so that businesses would be able to return to competing on their merits as normal as early as practical, for the benefit of the economy and the community.

Authorisation AA1000546 was due to expire on 31 March 2022. The ACCC granted interim authorisation in respect of AA1000606 on 25 March 2022 to enable the cooperation between the grocery retailers to continue while the ACCC considers the substantive application.

The ACCC recognises there are still ongoing impacts from COVID-19 and it is unclear how long these will continue for. The ACCC proposes to grant authorisation on the terms set out in Annexure A, which includes minimal changes from the Proposed Conduct as sought by Coles. The ACCC proposes to grant authorisation until 31 March 2023, with the 2 conditions proposed by Coles (and as set out in Annexure B) which provide that:

- a meeting between retailers will only constitute an Authorised Meeting if, in advance of the meeting, the ACCC is notified in writing of the meeting, and does not tell the retailers that it is not satisfied the meeting is covered by the authorisation, and
- other grocery retailers seeking the protection of the authorisation must, if they have not previously done so, obtain approval from the ACCC.

The ACCC invites submissions in relation to this draft determination by 12 August 2022 before making its final decision.

### 1. The application for authorisation revocation and substitution

- 1.1. On 9 March 2022, Coles Group Limited (**Coles**) on behalf of itself and certain other grocery retailers lodged an application with the Australian Competition and Consumer Commission (the **ACCC**) to revoke authorisation AA1000546 and substitute authorisation AA1000606 for the one revoked (referred to as **re-authorisation**).
- 1.2. In summary, Coles is seeking re-authorisation until 31 December 2023 to be able to continue to engage in coordinated activities in response to the COVID-19 pandemic with the purpose of ensuring the supply and fair and equitable distribution of Retail Products to consumers, and ensuring the health and safety of customers and staff.
- 1.3. This application for re-authorisation AA1000606 was made under subsection 91C(1) of the *Competition and Consumer Act 2010* (Cth) (the **Act**). The ACCC may grant authorisation, which provides businesses with protection from legal action under the competition provisions in Part IV of the Act for arrangements that may otherwise risk breaching those provisions in the Act, but are not harmful to competition and/or are likely to result in overall public benefits.

- 1.4. Coles and other grocery retailers were first granted authorisation to cooperate in response to the COVID-19 pandemic in March 2020, under authorisation AA1000477 (the **Initial Authorisation**) and its associated interim authorisations. A subsequent authorisation, authorisation AA1000546, was granted in March 2021 and was due to expire on 31 March 2022 (the **Existing Authorisation**).
- 1.5. Because the Existing Authorisation was due to expire shortly after the current application was lodged, Coles also requested interim authorisation to enable collaboration of the same kind as under the Existing Authorisation to continue, while the ACCC considers the substantive application. On 25 March 2022, the ACCC granted interim authorisation in accordance with subsection 91(2) of the Act<sup>1</sup> (the **Interim Authorisation**).
- 1.6. The Interim Authorisation remains in place until the date the ACCC's final determination comes into effect, the application for authorisation is withdrawn, or until the ACCC decides to revoke interim authorisation.

## The applicants

- 1.7. Coles has lodged the application for re-authorisation 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**).
- 1.8. The Participating Supermarkets propose that the authorisation 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 Initial or Existing Authorisation (or any related interim authorisation), and
  - (b) any other grocery retailer who in future wishes to engage in the conduct the subject of this application and is approved to do so by the ACCC(together, **Other Approved Supermarkets**).
- 1.9. The Participating Supermarkets and the Other Approved Supermarkets are together referred to as the **Parties**.

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<sup>1</sup> See ACCC [Interim Authorisation Decision, 25 March 2022](#).

## The Proposed Conduct

1.10. The Participating Supermarkets seek authorisation for the following conduct (with the underlined or ~~struck-through~~ text indicating the changes from the conduct authorised under the Existing Authorisation<sup>2</sup>):

- (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<sup>3</sup> to Australian consumers while responding to issues arising from or exacerbated by ~~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 the next relevant Authorised Meeting that is held. ~~The ACCC must be provided with as much notice of the relevant discussion or meeting as is reasonably practicable in the circumstances, and~~
- (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:

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<sup>2</sup> The underlined text indicates additions to the conduct that is currently authorised under the Existing Authorisation, which were proposed by Coles both before and after the Interim Authorisation was granted. The amendments made by Coles after Interim Authorisation was granted sought primarily to refine the description of the Proposed Conduct and propose conditions, including by removing unnecessary duplication in the application and Interim Authorisation decision: see [Applicants' response to requests for further information and interested party submissions](#), 2 May 2022.

<sup>3</sup> 'Retail Products' are fresh food, groceries, household products, and liquor.

- (a) the Interim Authorisations dated 23 and 26 March 2020 and 9 June 2020 and the Initial Authorisation dated 3 September 2020
- (b) the Interim Authorisation dated 25 March 2021 and the Existing Authorisation dated 25 August 2021
- (c) any Interim Authorisation granted in relation to this application

**(Existing Arrangement).**

1.11. For the purposes of paragraph 1.10(c)(i) above, each of the following is an **Authorised Meeting**:

- (1) meetings of the Supermarket Taskforce (convened directly or through the National Co-ordination Mechanism) and any of its working groups, as convened by the Department of Home Affairs from time to time<sup>4</sup>
- (2) meetings of the COVID-19 Food Security Working Group and the Coordinated Corporate Taskforce as convened by the National Indigenous Australians Agency, or
- (3) 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 more than one Participating Supermarket, or one or more Participating Supermarkets and one or more Other Approved Supermarkets, has been invited to the forum and the proposed Condition 1 below is satisfied. [subparagraphs (i) – (iii) removed]

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.

1.12. For the purposes of paragraph 1.10(c)(ii) above, the Participating Supermarkets propose that **Urgent Measures** must only be engaged in if:

- (a) the ACCC has been provided with as much notice as is reasonably practicable in the circumstances of any Urgent Measures discussions or meetings taking place. Notice must be provided in writing to [exemptions@acc.gov.au](mailto:exemptions@acc.gov.au), and
- (b) any Urgent Measure is tabled at the next relevant Authorised Meeting that is held. A relevant Authorised Meeting for this purpose includes:
  - (i) in relation to Urgent Measures adopted at a State or Territory or local level, either an Authorised Meeting attended by representatives of a State or Territory Government department or agency in the State or Territory in which the Urgent Measures are adopted, or an Authorised Meeting attended by representatives of a Federal Government department or agency, and
  - (ii) in relation to Urgent Measures adopted across more than one State or Territory, an Authorised Meeting attended by representatives of a Federal Government department or agency.

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<sup>4</sup> As of 9 June 2020, this included the Safety of Staff and Customers Working Group and the Food Supply Working Group.

1.13. Paragraphs 1.10 to 1.12, inclusive, will be referred to as the **Proposed Conduct**.

1.14. The Proposed Conduct is not compulsory, and any Participating Supermarket or Other Approved Supermarket can opt out of any proposed discussion or collaboration under the authorisation.

### **List of Other Approved Supermarkets**

1.15. As noted, Coles also proposes that the authorisation apply to any other grocery retailers that have been approved by the ACCC under the process provided for through the conditions of the Existing Authorisation, or are approved by the ACCC in the future under the new authorisation. The following entities have already applied for and been granted protection under the Initial Authorisation or Existing Authorisation:<sup>5</sup>

- Amazon Australia, 7-Eleven Australia, Harris Farm, Arnhem Land Progress Aboriginal Corporation, Outback Stores, Community Enterprises Queensland, Endeavour Group Limited and Loscam Australia Pty Ltd – who each have protection on the same terms as the Participating Supermarkets
- specified current and future members of Retail Drinks Australia<sup>6</sup> – who each have protection 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, and
- Master Grocers Australia and the Australasian Association of Convenience Stores – who each have protection limited to discussions held or arrangements made during a meeting of the Supermarket 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.

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<sup>5</sup> A full list of these parties also appears on the public register [here](#).

<sup>6</sup> Hotel & Tourism Management Pty Ltd, Top Cellars Group, Beer Cartel, Liquor Marketing Group, Wine Depot, Diageo Australia, Red Bottle Group, Vantage Group, Liquor Stax, and all current and future members of Retail Drinks that are classed as 'Liquor Store Members' and 'Digital and Online Members'.

## 2. Background

### The Initial and Existing Authorisations

- 2.1. The Parties have been authorised to engage in broadly similar conduct to the present application under Initial Authorisation AA1000477 and associated interim authorisations (from 23 March 2020 until 31 March 2021) and Existing Authorisation AA1000546 and associated interim authorisation (from 25 March 2021 until 31 March 2022).
- 2.2. Coles submits that the **Initial Authorisation** enabled, among other things, the Participating Supermarkets to coordinate to curb stockpiling behaviour and, consequently, ameliorate community concerns about the availability of Retail Products, ensure fair and reasonable access to Retail Products for all customers (including the elderly and disadvantaged) and ensure the safety of customers and staff. Specifically, the Initial Authorisation facilitated discussions between Participating Supermarkets and government on topics such as:
  - the safety aspects of trading during the pandemic, trading hours, and customer numbers and security in supermarkets and shopping centres
  - availability of key product lines for customers
  - customs clearance and border closures
  - 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, including use of hand sanitiser and masks.
- 2.3. These discussions led to the Participating Supermarkets entering into a limited number of agreements to:
  - temporarily impose retail liquor limits
  - temporarily adjust trading hours, including to facilitate restocking, prevent crowding during public holiday periods, and improve access by vulnerable persons, and
  - limit customer numbers in store for social distancing reasons to protect customer and team safety.
- 2.4. Coles submits that as further COVID-19 outbreaks occurred and lockdowns and restrictions were implemented by Governments on a more localised basis, the **Existing Authorisation** enabled Participating Supermarkets and Government to continue to co-operate on critical issues to facilitate access to groceries, including in relation to safety of workers, access to supermarkets by vulnerable customers, and further strategies to prevent panic buying and ensure fair and equitable access to grocery supply.
- 2.5. Coles submits that as restrictions were eased and case numbers increased, including due to the emergence of the Omicron variant, the Existing Authorisation enabled the Participating Supermarkets to consult and cooperate on a number of matters, including

in relation to vaccinations and maintaining sufficient numbers of staff in stores and distribution centres (for example, due to the impacts of isolation requirements).

2.6. More recently, Coles submits that the Existing Authorisation has enabled the Parties to work closely with Government regarding the following (discussed further in paragraphs 4.10 to 4.34 below):

- developing a prioritisation process for distribution centre and store staff to access **vaccinations**, which facilitated the provision of a safe operating environment for staff and customers, and enhanced the ability of Participating Supermarkets to maintain ongoing supply by reducing staff absences
- developing updated **safety protocols in relation to 'close contacts'** to address staffing shortages and maintain continuity of supply (particularly during periods of high absenteeism) and to ensure a safe working environment in light of proposed changes to Government requirements, and
- addressing shortages of Retail Products resulting from **supply chain strains** in Western Australian in early 2022, which arose due to COVID-19 related panic buying and staff shortages, as well as supply chain interruptions due to flooding.

### **The current application for re-authorisation**

2.7. Coles submits that the conduct engaged in pursuant to the Initial and Existing Authorisations and their 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 and health and safety issues that arise in future in relation to the COVID-19 pandemic.

2.8. Coles submits that the Proposed Conduct is intended to ensure a framework remains in place to manage risks associated with the COVID-19 pandemic that may arise, including panic buying and disruptions to supply chains, and ensuring safety of customers, employees and contractors.

2.9. Coles submits it is difficult to predict how long the pandemic is likely to continue and what issues may arise having regard to the ongoing nature of the vaccination roll out, that vaccines will not be 100% effective at preventing infection and the emergence of further COVID-19 waves in Australia is very likely, especially during winter. Coles submits, however, that the evolution of the virus, together with changes in how the pandemic is managed in the community, mean that there are likely to be further challenges for the Participating Supermarkets to manage together with Government.

2.10. Coles submits that while the pandemic is now at a different stage to when it first sought authorisation in March 2020, there is still considerable uncertainty regarding the emergence of new variants and potentially also the effectiveness of existing vaccines to those variants. It submits that the emergence of the Omicron strain of COVID-19 demonstrates the potential for the pandemic to evolve; noting that the World Health Organisation was (at the time of its submission in May 2022) monitoring 2 new COVID-19 variants, Omicron BA.4 and BA.5. These issues are discussed further in paragraphs 4.68 to 4.73 below (length of authorisation). Coles therefore submits that this means there is still a continued need for authorisation to enable targeted collaboration between the Participating Supermarkets as new issues emerge.



## ***Transition from Supermarket Taskforce to the Food and Grocery Sector Group***

- 2.11. In March/April 2022, the Department of Home Affairs, Cyber and Infrastructure Security Centre (the **DHA**) notified members of the Supermarket Taskforce that it was intending to transition Supermarket Taskforce members over to the Food and Grocery Sector Group (**FGSG**) platform (part of the critical infrastructure Trusted Information Sharing Network (**TISN**)), during April 2022.
- 2.12. In its subsequent submission to the ACCC, the DHA stated that industry and Government are now transitioning to COVID-19 being a business-as-usual activity. Part of this transition process includes the reinvigoration of the FGSG (which the ACCC understands had paused its activity in light of the COVID-19 pandemic to enable the Supermarket Taskforce to do its work). The DHA submitted that the FGSG is a cross-sectoral collaboration mechanism operated by the DHA, within which supermarkets and a wider membership of the Australian food and grocery sector can collaborate to build their resilience to respond to any crisis.
- 2.13. The ACCC asked Coles to clarify how the proposed transition would affect the application for re-authorisation; in particular, whether Coles still considered that it requires an ongoing re-authorisation.
- 2.14. In response, Coles submitted that:
- The proposed transition from the Supermarket Taskforce back to the FGSG does not have any impact on the application for authorisation nor the ongoing need for re-authorisation. Coles understands that the proposal relates to a Government-led mechanism for engagement between critical infrastructure providers, food and grocery industry participants and all levels of Government including potentially in relation to COVID-19 related issues.
  - It anticipates that collaboration under any authorisation between the Parties will still occur primarily through the Supermarket Taskforce, which can be re-enlivened as required. Coles notes that interim authorisation was granted in June 2020 on a similar basis, where at that stage the Supermarket Taskforce was suspended but it could be re-enlivened to deal with any issues as they arose. Nevertheless, it is possible that relevant collaboration may also occur through the Government-led FGSG, subject to satisfaction of relevant notification and approval requirements under the interim authorisation (and any final re-authorisation).
  - There is still significant uncertainty with respect to new COVID-19 variants and further waves of infection, particularly with winter. Authorising the Proposed Conduct will ensure that the Participating Supermarkets and Government can continue to quickly respond to supply issues as they emerge. Whether the forum for that collaboration is the Supermarket Taskforce or another Government forum does not alter this conclusion.
- 2.15. The ACCC notes that for any collaboration that occurs under the FGSG to have the protection of the (current) Interim Authorisation, it would need to be an Authorised Meeting with the objective of responding to the COVID-19 pandemic (per Condition 1(c) of the Interim Authorisation) or an Urgent Measure (per Condition 2 of the Interim Authorisation) and be notified to the ACCC according to the relevant process.

### 3. Consultation

- 3.1. A public consultation process informs the ACCC's assessment of the likely public benefits and detriments from the Proposed Conduct.
- 3.2. After the ACCC granted the Interim Authorisation, it invited submissions from a range of potentially interested parties including retailers, industry associations, and bodies that are responsible for food supply in rural and remote communities.<sup>7</sup>
- 3.3. The ACCC received 4 submissions from interested parties in relation to the application, which are summarised below.
- 3.4. The **Master Grocers Association** submitted that it is happy for the authorisation to continue.<sup>8</sup>
- 3.5. The **Department of Infrastructure, Transport, Regional Development and Communications (DITRDC)** submitted that:<sup>9</sup>
  - The DITRDC's experience working with the sector through disruptions caused by COVID and its response, coupled with disruptions caused by major natural disaster/extreme weather events, has shown the importance and utility of having coordination mechanisms across the sector and between sector and Government that can be activated in times of disruption. While the DITRDC supports having such arrangements available, it understands this must be balanced against other considerations.
  - Early in the pandemic, the Freight Movement Code and Protocol for Domestic Border Controls enabled the free movement of transport workers across borders. In January 2022, National Cabinet adjusted the treatment of close contacts in the transport, freight and logistics sector, which saw a stabilisation of absenteeism among truck and train drivers. The DITRDC noted that the current trends (in April 2022) indicated a moderation in the level of disruption to freight from the COVID-19 pandemic.
  - There are examples of other disruptions beyond COVID-19 that have, and continue to, impact supply chains, including shortages of Diesel Exhaust Fluid (late 2021-early 2022) and severe weather events across multiple states. DITRDC submits that the ability of Government, primarily through Emergency Management Australia, to bring key parties together to share information and coordinate responses to these disruption events has been critical to coordinating mitigation and response activities. Participation of the food and grocery sector in National Coordination Mechanism meetings has been an essential part of this response.
  - In circumstances where there have been compounding impacts from the multiple and concurrent supply chain shocks on the food and grocery sector, which are likely to extend the period for the sector to recover and restock affected warehouses and stores, it would appear appropriate for the authorisation to operate in 'response to issues arising from or exacerbated by' the COVID-19 pandemic (as proposed by Coles).

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<sup>7</sup> A list of the parties consulted and the public submissions received is available from the ACCC's public register [www.accc.gov.au/authorisationsregister](http://www.accc.gov.au/authorisationsregister).

<sup>8</sup> [Master Grocers Association submission](#), 28 March 2022.

<sup>9</sup> [Department of Infrastructure, Transport, Regional Development and Communications submission](#), 8 April 2022.

- With respect to the length of authorisation, Australia has largely transitioned to Phase D of the National Plan and the Biosecurity Determination relating to COVID-19 was not being renewed (discussed further in paragraph 4.71 below).

3.6. The Australian Food and Grocery Council (**AFGC**) submitted that:<sup>10</sup>

- The previous authorisations have been instrumental in mitigating the worst of critical shortages and supply chain constraints during the height of COVID-19. Disparities in state regulations have been a key driver of confusion and uncertainty across the industry. It is essential that communication between food, beverage and grocery retailers, suppliers, transport operators and Government continue if subsequent COVID-19 variants lead to further public health orders that may impact the demand or supply in the food and grocery supply chain. It is probable that future variants will lead to public health orders that may restrict people's mobility and proximity in the community and the workplace.
- Given the possibility of further disruptions in response to future COVID-19 outbreaks, the authorisation's central intent of providing fair, reasonable, and equitable access of essential products to the most vulnerable in our community, particularly those in regional and remote areas, in the immediate to short-term must be emphasised.
- With respect to the length of authorisation, the AFGC does not take issue with the extended timeframe, given that the parameters of the proposed conduct are restricted to immediate COVID-19 related issues and the ACCC's power to revoke the authorisation if the unusual circumstances created by the COVID-19 pandemic are no longer present.
- With respect to the wording relating to the 'purpose' of the Proposed Conduct, the AFGC suggests amending it to read: *'while responding to short-term or immediate issues arising from the COVID-19 pandemic public health response by...'*. It submits that this establishes temporal parameters that focus on resolving and mitigating immediate and present issues; and seeks to limit discussions to exceptional circumstances, such as when State Governments impose COVID-19 orders that limit people's mobility and proximity.
- It supports the ACCC's continued participation at meetings between Participating Supermarkets. If anti-competitive issues are discussed or likely to be discussed the ACCC should immediately terminate the meeting and tabulate the issues, followed with appropriate actions and penalties. Any conduct that extends to coordination in relation to price should be strictly prohibited. The AFGC emphasises appropriate safeguards implemented by the ACCC during and following meetings, including sufficient time to review agenda papers (particularly under urgent notice of a meeting) and that 'reasonable notice' to the ACCC should include non-business days.

3.7. The DHA, in addition to its submission summarised at paragraph 2.12 above, submitted that:<sup>11</sup>

- The DHA established the Supermarket Taskforce to respond to the challenges facing supermarkets arising from the COVID-19 pandemic and coordinate supermarket responses across Australia.

<sup>10</sup> [Australian Food and Grocery Council submission](#), 8 April 2022.

<sup>11</sup> [Cyber and Infrastructure Security Centre \(Department of Home Affairs\) submission](#), 10 May 2022.

- DHA provided submissions in support of Coles' previous applications for authorisation of similar conduct, in May 2020 and April 2021. The authorisations have enabled the necessary collaboration to maintain Australia's essential food supply chains throughout the COVID-19 pandemic.
  - In the event of future disruptive events, the Department would continue to support authorisations that enable industry and Government to unite and collaboratively respond to support food security.
- 3.8. In response, **Coles submits** that the submissions from interested parties support re-authorisation of the Proposed Conduct. It notes that the DITRC's submission refers to the importance of having ongoing cooperation mechanisms that can be activated in times of disruption, which supports Coles' position that the Proposed Conduct would be likely to result in ongoing public benefits and that there is a strong ongoing need for re-authorisation.
- 3.9. Coles submits that it does not agree with the AFGC's proposed amendments to the purpose element of the Proposed Conduct. This issue is discussed further at paragraphs 4.40 to 4.49 below.
- 3.10. Public submissions are available on the [Public Register](#) for this matter.

## 4. ACCC assessment

- 4.1. Coles seeks re-authorisation for Proposed Conduct that would or might constitute a cartel provision within the meaning of Division 1 of Part IV of the Act, or may substantially lessen competition and fall within the terms of sections 45, 46 or 47 of the Act.
- 4.2. Consistent with subsections 90(7) and 90(8) of the Act,<sup>12</sup> the ACCC must not grant authorisation unless it is satisfied, in all the circumstances, that the conduct would result or be likely to result in a benefit to the public, and the benefit would outweigh the detriment to the public that would be likely to result (**authorisation test**).
- 4.3. The ACCC's assessment of this application is made in the context of the ongoing impacts of COVID-19. Consistent with the purpose of the Act which is to enhance the welfare of Australians by promoting fair trading and competition, when considering applications for authorisation in response to issues arising from COVID-19, the ACCC is seeking to ensure that any changes to the competitive landscape are, wherever possible, temporary.

### Relevant areas of competition

- 4.4. To assess the likely effect of the Proposed Conduct, the ACCC identifies the relevant areas of competition likely to be impacted.
- 4.5. While the ACCC does not consider it necessary to precisely define the relevant areas of competition, the ACCC considers the relevant areas of competition are likely to include the:
- retail supply of Retail Products by supermarkets, and
  - wholesale acquisition of Retail Products by supermarkets.

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<sup>12</sup> See subsection 91C(7).

## Future with and without the Proposed Conduct

- 4.6. In applying the authorisation test, the ACCC compares the likely future with the Proposed Conduct that is the subject of the authorisation to the likely future in which the Proposed Conduct does not occur.
- 4.7. Coles submits that 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.
- 4.8. The ACCC considers that in the future with the Proposed Conduct, the Parties will be able to cooperate with each other if such cooperation arises from Authorised Meetings or Urgent Measures discussions, and has one of the relevant purposes set out at paragraph 1.10 related to ensuring the supply and fair and equitable distribution of Retail Products to consumers, and the health and safety of customers and staff.
- 4.9. Without the Proposed Conduct, the ACCC considers that the Parties would not be able to cooperate in response to the COVID-19 pandemic where cooperation would breach the Act. Further, some of the measures which do not require authorisation may take longer to implement than they would in the future with authorisation. Accordingly, discussing and implementing any uniform measures would be more difficult or impossible.

## Public benefits

- 4.10. The Act does not define what constitutes a public benefit. The ACCC adopts a broad approach. This is consistent with the Australian Competition Tribunal (the **Tribunal**) which has stated that in considering public benefits:

*... we would not wish to rule out of consideration any argument coming within the widest possible conception of public benefit. This we see as anything of value to the community generally, any contribution to the aims pursued by society including as one of its principal elements ... the achievement of the economic goals of efficiency and progress.<sup>13</sup>*

- 4.11. Coles submits 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. Specifically, that the Proposed Conduct will result in public benefits in the form of:
- Consumer access to Retail Products
  - Reducing community concerns and stockpiling behaviour
  - Reducing strain on the Retail Products supply chain, and
  - Promoting a safe operating environment for consumers, employees and contractors and other third parties.

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<sup>13</sup> Queensland Co-operative Milling Association Ltd (1976) ATPR 40-012 at 17,242; cited with approval in Re 7-Eleven Stores (1994) ATPR 41-357 at 42,677.

- 4.12. In addition, Coles submits that the Initial and Existing Authorisations have resulted in public benefits in the form of enhanced and more efficient Government administration and crisis management related to ongoing grocery supply during the COVID-19 pandemic.
- 4.13. The ACCC's assessment of public benefits is informed by submissions from Coles and interested parties, and from its own observations of the coordination under the Initial Authorisation, Existing Authorisation and current Interim Authorisation, particularly through ACCC representatives attending the Authorised Meetings.<sup>14</sup> With respect to the current application, since the Interim Authorisation was granted in March 2022, the ACCC has observed a number of discussions between the Parties on various issues. These discussions have often been held in relation to addressing absenteeism in the food and grocery sector due to COVID-19 (for example, by updating 'close contacts' protocols), and more recently, addressing supply chain strains in Western Australia in early 2022 which arose due to a combination of major flooding and COVID-19 related panic buying and staffing shortages
- 4.14. The ACCC considers that the COVID-19 situation has evolved since the Initial Authorisation and the COVID-19 response has become business-as-usual for industry and Government. While the impacts of COVID-19 are continuing, the ACCC expects that businesses have had considerable time to adapt their practices and develop supply-chain resilience strategies, such that collaboration does not need to be the default response in most situations. The ACCC notes that, as submitted by the DITRDC, Australia appears to have largely transitioned to Phase D of the National Plan, which the ACCC understands may include measures to minimise cases in the community without ongoing restrictions or lockdowns.<sup>15</sup> More recently, however, on 16 July 2022 National Cabinet recognised that Australia is beginning to see a new wave of COVID-19 infections which will increase the pressure on our health system, and announced a number of measures in light of this.<sup>16</sup>
- 4.15. As such, the ACCC acknowledges that (at least in the short term) COVID-19 continues to circulate in the community and absenteeism rates are above-average. Further, based on the experience of the past 2 years, collaboration in response to COVID-19 may need to occur between the Parties in future, and likely at short notice. It is unlikely to be practical for the Parties to seek an urgent interim authorisation each time that need arises. In this context, the ACCC considers that the Proposed Conduct has the potential to result in a number of public benefits.

### **Consumer access to Retail Products**

- 4.16. The ACCC considers that the Proposed Conduct is likely to result in public benefits by maximising the likelihood of consumers across Australia, including in regional and remote areas, continuing to have fair and reasonable access to Retail Products at times of unexpected shortages resulting from the COVID-19 pandemic.
- 4.17. The ACCC considers that allowing the cooperation permitted by the Existing Authorisation and Interim Authorisation has enabled authorised retailers to respond proactively to anticipated or expected impediments to the continued availability of Retail Products across Australia during the COVID-19 pandemic. For example, Coles submits that the Existing Authorisation enabled the Parties to work with the

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<sup>14</sup> ACCC representatives have regularly attended the Supermarket Taskforce and the main working group established by the Department of Home Affairs to coordinate the supermarkets' response to the COVID-19 pandemic, and the main NIAA taskforce dealing with retail supply in rural and remote communities.

<sup>15</sup> Australian Government, [National Plan to transition Australia's National COVID-19 Response](#).

<sup>16</sup> Australian Government Department of Health and Aged Care, [National Cabinet Statement](#), 16 July 2022.

Government to develop updated safety protocols in relation to 'close contacts' to address staffing shortages and maintain continuity of supply – such as during the peak of the Omicron outbreak in January 2022, when the food and grocery sector reported up to 40% absenteeism. Coles anticipates further consultation between Government and the Participating Supermarkets as COVID-19 restrictions and 'close contacts' protocols continue to evolve.

- 4.18. The ACCC considers that to the extent that, in future, unexpected shortages of Retail Products arise, and the Proposed Conduct enables the Parties to coordinate to maximise access to Retail Products, this is likely to continue to result in a public benefit of this nature.

### **Reducing community concerns and stockpiling behaviour**

- 4.19. The ACCC considers that by enabling discussions and coordination between the Parties, the Initial and Existing Authorisations, in particular, have been effective in addressing consumer concerns about the need to stockpile essential Retail Products.
- 4.20. The ACCC also considers that providing consumers with greater certainty about the availability of Retail Products and promoting retailers' ability to respond effectively to periods of high (and at times unpredictable) demand, has resulted in public benefits associated with encouraging consumers to return to normal shopping patterns.
- 4.21. The ACCC notes that while Australia seems to have largely transitioned away from the kinds of snap lockdowns that induced panic buying in 2020 and 2021, it is possible that further outbreaks, new variants or Government policies could lead to consumers having increased concerns about the availability of, and/or stockpiling, Retail Products. It therefore considers that to the extent such concerns arise in future, coordination under the Proposed Conduct is likely to continue to result in a public benefit of reducing community concerns about availability of Retail Products and stockpiling behaviour.
- 4.22. The ACCC considers that to the extent that, in future, community concerns about availability of Retail Products and stockpiling behaviour arises, and the Proposed Conduct enables the Parties to coordinate to address these concerns, this is likely to continue to result in a public benefit of this nature.

### **Reducing strain on the Retail Products supply chain**

- 4.23. The ACCC considers that the Proposed Conduct has been effective in reducing strain on Retail Product supply chains that have resulted from the COVID-19 pandemic, by facilitating discussions intended to address supply chain strains, including:
- assisting manufacturers and retailers to quickly understand impediments to increasing production to meet higher (and at times unpredictable) demand and agree on solutions to address those issues
  - assisting manufacturers and retailers 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 applicants to urgently restock their shelves, and
  - assisting the Parties to address difficulties within their internal supply chains.
- 4.24. Coles notes that recent collaboration between the Parties and Government since the Existing Authorisation was granted has related to addressing supply chain strains due to logistical issues. For example, the Parties were able to engage in frank and open discussions about potential options for collaboration to resolve the supply chain strains

in Western Australia in early 2022 which arose due to COVID-19 related panic buying and staff shortages, as well as supply chain interruptions due to flooding.<sup>17</sup> After flooding impacted the East-West rail link, they worked collaboratively to facilitate the delivery of Retail Products to Western Australia by sea (including obtaining an exemption to cabotage laws that otherwise prevent domestic transportation of stock on foreign vessels); and also collaborated with Government and the National Heavy Vehicle Regulator to obtain approval for additional road transportation capacity and alternative routes.

- 4.25. The ACCC considers that to the extent that, in future, strains on Retail Product supply chains occur due to issues arising from or significantly impacted by COVID-19 (as discussed further in paragraphs 4.40 to 4.57 below), and the Proposed Conduct enables the Parties to coordinate to address these concerns, this is likely to continue to result in a public benefit of this nature.

### **Promoting a safe operating environment for consumers, employees and contractors, and other third parties**

- 4.26. The ACCC considers that the Proposed Conduct has enabled the Parties to implement measures to ensure the safety of customers and staff.
- 4.27. Most recently, for example, Coles notes that the Parties have worked closely with Government to develop a prioritisation process for distribution centre and store staff to access vaccinations. Coles submits that this program facilitated the provision of a safe operating environment for staff and customers by minimising the risk of staff becoming infected or spreading the virus, and enhanced the ability of Participating Supermarkets to maintain ongoing supply of Retail Products by reducing staff absences that would otherwise have occurred without vaccination. It submits that the effective implementation of this program was supported by the Participating Supermarkets' ability to share information. For example, they shared information on the numbers of distribution centre and store staff in particular areas to enable their collective needs to be communicated to Government, and for vaccination slots to be allocated according to each party's need.
- 4.28. Coles also submits that arising out of meetings of the Supermarket Taskforce, it has been able to discuss proposed industry changes to 'close contacts' protocols to ensure a safe working environment in light of proposed changes to Government requirements.
- 4.29. The ACCC considers that to the extent that, in future, there arises a need to implement coordinated measures to ensure customer and staff safety, and the Proposed Conduct enables the Parties to do so, this is likely to continue to result in a public benefit of this nature.

### **Enhanced and more efficient Government administration and crisis management**

- 4.30. Coles submits that the Initial and Existing Authorisations have facilitated the successful functioning of the Supermarket Taskforce and other Government working groups by creating efficiencies and ensuring that the Participating Supermarkets and Government could communicate openly, effectively and in a timely manner to address pandemic-related grocery supply issues. Coles submits that while in practice only a

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<sup>17</sup> The ACCC notes that the Parties' collaborative response may have, to some degree, been undertaken in reliance on the Existing Authorisation. However, the ACCC also notes that interim authorisation was sought and granted to certain parties, including the Participating Supermarkets, in a separate application specifically directed at responding to the Western Australian supply chain strains as a result of the South Australian flooding: see [Application for authorisation AA1000603, Interim Authorisation, 15 February 2022](#).



small number of agreements have been reached in reliance on the previous authorisations, they have enabled open, frank and timely discussions between Participating Supermarkets and the Government on topics affecting the supply and fair and equitable distribution of Retail Products during the pandemic. This has been critical to the functioning of the Supermarket Taskforce and other working groups established for the purposes of responding to the COVID-19 pandemic. It submits that had the Participating Supermarkets not been able to engage with each other and with Government in an open and collaborative manner, it is likely that stock shortages on shelves, associated supply chain constraints and restricted store trading hours would have continued for considerably longer, to the detriment of Australian consumers. Authorisation has also enabled them to share best practice information, and provide consistent public messaging, about safety measures for both staff and customers.

- 4.31. Coles submits that the Initial and Existing Authorisations have therefore resulted in public benefits in the form of enhanced and more efficient Government administration and crisis management related to ongoing grocery supply during the COVID-19 pandemic. It submits that these benefits will continue to be realised if the Proposed Conduct is authorised – whether the relevant forum for collaboration among Participating Supermarkets remains the Supermarket Taskforce or there is a transition to an alternative Government forum, such as the FGSG.
- 4.32. The ACCC recognises that the Initial and Existing Authorisations have facilitated the efficient functioning of the Supermarket Taskforce and other Government working groups. However, the ACCC considers that the public benefits resulting from this enhanced Government administration have already been identified (see paragraph 4.11) and taken into account above.
- 4.33. Accordingly, the ACCC does not accept that enhanced and more efficient Government administration and crisis management is an additional public benefit that is likely to result from the Proposed Conduct. In reaching this view, the ACCC also notes that many of the measures discussed at Authorised Meetings and Urgent Measures discussions do not appear to involve conduct that is likely to require authorisation.

### **ACCC conclusion on public benefit**

- 4.34. The ACCC considers that the Proposed Conduct is likely to continue to result in public benefits in the form of facilitating customer access to Retail Products, reducing community concerns about the availability of Retail Products and stockpiling behaviour, reducing strain on the Retail Products supply chain, and promoting a safe operating environment for customers and staff.

### **Public detriments**

- 4.35. The Act does not define what constitutes a public detriment. The ACCC adopts a broad approach. This is consistent with the Tribunal which has defined it as:

*...any impairment to the community generally, any harm or damage to the aims pursued by the society including as one of its principal elements the achievement of the goal of economic efficiency.<sup>18</sup>*

- 4.36. Coles submits 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:

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<sup>18</sup> Re 7-Eleven Stores (1994) ATPR 41-357 at 42,683.

- The Proposed Conduct will continue to facilitate consistent and more predictable levels of supply for consumers in the event of future outbreaks.
- 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).
- There is a high level of Government oversight. Government representatives must be present at, and the ACCC notified of, Authorised Meetings (with the ACCC consistently attending Authorised Meetings).
- The Proposed Conduct does not extend to any agreement or coordination on the retail price of Retail Products.
- The Proposed Conduct does not change the Participating Supermarkets' and Other Approved Supermarkets' incentives to compete during or after the period of authorisation.

4.37. The ACCC notes that arrangements involving competitors in relation to the goods and services they provide are likely to lessen competition relative to a situation where each business makes its own decisions. Agreements between competitors can also give rise to competition concerns if they make coordination (rather than competition) between businesses beyond the terms of the authorised agreement, or across the market more generally, more likely. The Participating Supermarkets are in most cases each other's closest competitors and the ACCC considers it is vital that once the unusual circumstances created by the COVID-19 pandemic are no longer present cooperation between them in relation to these matters should cease.

4.38. Separately, there is a risk that unidentified and potentially significant public detriments might arise if presently unidentified third parties also seek and gain protection of the authorisation.

4.39. As discussed below, with some changes to the 'purpose' for which the Proposed Conduct can be engaged in, and the conditions described at paragraphs 4.61 to 4.63 below,<sup>19</sup> the ACCC considers that the public detriments likely to result from the Proposed Conduct will be limited.

### **Purpose for which the Proposed Conduct can be engaged in**

4.40. Under the Interim Authorisation, the Proposed Conduct can only be engaged in for '*the purpose of ensuring the supply and fair and equitable distribution of Retail Products to Australian consumers during the COVID-19 pandemic*'. To reflect the fact that the COVID-19 situation has evolved since the exceptional circumstances which arose in 2020 and 2021 (as discussed in paragraph 4.14 above), and to limit the potential for public detriments to arise in the form of reduced competition between competitors, the ACCC proposes to change the parameters within which coordination is authorised.

4.41. Specifically, the ACCC considers it appropriate to more explicitly state that the conduct being authorised in the future should have the purpose of addressing the effects of the COVID-19 pandemic, rather than referring to the duration of the pandemic. Collaboration between the Parties under the previous authorisations has predominantly focused on COVID-19 specific issues, in circumstances where it was clear that was the primary cause behind many food and grocery supply issues. More

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<sup>19</sup> These conditions, when combined with the re-drafted Proposed Conduct, are in effect substantially the same as the conditions imposed in the Existing Authorisation and Interim Authorisation.

recently – as the impacts of COVID-19 have become more diverse, and COVID-19 has become one of many factors causing or exacerbating food and grocery supply issues – a range of other issues have also become key topics discussed by the Parties (such as the supply chain strains across the country due to flooding in early 2022). In these changing circumstances, the ACCC considers that the ‘purpose’ for which the Proposed Conduct is to be engaged in should directly refer to responses to the issues arising from COVID-19.

- 4.42. In light of the above, the ACCC informed Coles and interested parties that it was considering whether the ‘purpose’ for which the Proposed Conduct can be engaged in should be changed in any further authorisation to read as follows:

*(b) has the purpose of ensuring the supply and fair and equitable distribution of Retail Products to Australian consumers ~~during the COVID19 pandemic by while responding to issues arising from the COVID19 pandemic by...~~*

- 4.43. In response, Coles stated that additional wording should be included to avoid doubt that conduct would be covered where it seeks to address an issue arising from COVID-19 impacts, but there may be an additional contributing factor. Specifically, it amended the description of the Proposed Conduct to include the following:

*(b) has the purpose of ensuring the supply and fair and equitable distribution of Retail Products to Australian consumers while responding to issues arising from or exacerbated by the COVID-19 pandemic by....*

- 4.44. The ACCC also sought interested parties’ feedback on how the ‘purpose’ for which the Proposed Conduct must be engaged in should be described in any further authorisation.

- 4.45. The DITRDC submitted that in circumstances where there have been compounding impacts from the multiple and concurrent supply chain shocks on the food and grocery sector, which are likely to extend the period for the sector to recover and restock affected warehouses and stores, it would appear appropriate for the authorisation to operate ‘*in response to issues arising from or exacerbated by the COVID-19 pandemic*’ (as proposed by Coles).

- 4.46. In its submission, the Australian Food and Grocery Council (**AFGC**) stated that:

- It agrees that the current ‘purpose’ wording (under the Existing Authorisation and Interim Authorisation) is too general and unclear. However, the newly proposed text may shift discussions away from acutely temporal aspects focused on ‘immediate and critical issues’ and remove the short-term reactionary purpose of meetings – to potentially incorporate a much broader set of issues or discussions on medium/longer-term strategic matters impacting the supermarket business model.
- There are many issues arising from the COVID-19 pandemic that are impacting or exacerbating supermarket business models that should not be discussed between Participating Supermarkets, as this is not in keeping with the nature and intent of the initial authorisation. Rather, the focus of meetings should be on abrogating immediate issues impacting the fair and equitable access of essential products to Australians.
- It instead recommends the wording: ‘... *while responding to short-term or immediate issues arising from the COVID-19 pandemic public health response by...*’. This would: (a) establish temporal parameters that focus on resolving and mitigating immediate and present issues; and (b) seek to limit discussions to

exceptional circumstances, such as when State Governments impose COVID-19 orders that limit people's mobility and proximity (including under exceptional circumstances, public health orders of import markets).

4.47. The ACCC raised preliminary concerns with the wording of Coles' amendment and requested further information about what limitations Coles proposed to address the breadth that the amended words might introduce. In response, Coles submitted that its proposed wording is appropriately framed and does not require additional limitations, for the following reasons:<sup>20</sup>

- The wording is not intended to increase the breadth of conduct to be protected under the authorisation, but to ensure that coordination to ensure ongoing grocery supply would not lose protection under the authorisation simply because other non-COVID-19 related factors were also contributing to supply issues. Coles cites the DITRDC submission, noted above. Coles submits that provided COVID-19 issues are a substantial driving factor of the supply issue, it is appropriate that coordination be permitted under the authorisation (for example, the supply chain strains in Western Australia in early 2022 arose due to COVID-19 related panic buying, COVID-19 related shortages of freight industry staff, and supply chain interruptions due to flooding).
- There is an important overriding restriction on any conduct engaged in under the authorisation, because it is restricted to conduct arising from Authorised Meetings or Urgent Measures discussions, both of which must have the purpose of responding to the COVID-19 pandemic. New working groups and taskforces can only be brought under the auspices of the authorisation if their objective is to respond to the COVID-19 pandemic and they are notified to the ACCC. This reduces the risk of competitively sensitive information being exchanged for purposes unrelated to responding to the pandemic.
- There is a high level of Government oversight. Government representatives must be present at Authorised Meetings. The ACCC must be notified of Authorised Meetings and in practice, ACCC representatives have attended Authorised Meetings held since March 2020 and not raised any concerns in relation to the nature of any discussions it has observed.
- The Participating Supermarkets have engaged in limited collaboration for the purposes of responding to the COVID-19 pandemic for over 2 years. The public benefits of that collaboration have been demonstrated and there has been no evidence of any detriment. This suggests that the Proposed Conduct is appropriately framed and not too broad (even without the proposed wording above).

4.48. Nevertheless, Coles submits that if the ACCC is not minded to adopt Coles' amended wording ('arising from or exacerbated by the COVID-19 pandemic'), the following alternative formulation would address the ACCC's concerns:

*...while responding to issues arising from **or significantly impacted by the COVID-19 pandemic.***

4.49. Coles further submits that the wording proposed by the AFGC should not be accepted because:

- Including 'short term or immediate issues' is unnecessary, as measures directed at addressing issues caused or exacerbated by COVID-19 are inherently short-term

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<sup>20</sup> [Applicants' response to requests for further information and interested party submissions](#), 2 May 2022.

in nature. This additional wording would only increase the potential for confusion as to whether a legitimate proposed measure would meet the criteria for protection under any authorisation.

- Limiting authorisation to issues arising from public health responses is unduly narrow and would significantly curtail legitimate collaboration. Public health orders, such as those which limit the mobility and proximity of individuals and workers, may be one cause of supply issues related to the COVID-19 pandemic. However, issues related to the pandemic have and may arise independently of any public health orders or at least in circumstances where a causal connection may be unclear. For example, staff absences may arise due to COVID-19 positive cases irrespective of whether there is a Government mandate that such individuals self-isolate.

### ACCC view

- 4.50. The ACCC is seeking to strike an appropriate balance between only authorising collaboration in a narrow set of circumstances, so as to minimise any potential public detriments arising from reduced competition between competitors; and maintaining enough flexibility to encompass future (potentially unforeseen) supply issues that may benefit from a collaborative response from the Parties. It also considers that the parameters should be as clearly defined as possible, so as to not cause confusion regarding whether a measure would be covered or not.
- 4.51. The ACCC considers Coles' amendment to the purpose for which the Proposed Conduct can be engaged in, '*responding to...issues...exacerbated by the COVID-19 pandemic*', to be too broad. COVID-19 has, and will likely continue to, impact the supply chain for Retail Products in so many ways, that the breadth of supply issues that have been 'exacerbated by' COVID-19 is already very wide-ranging, and will only grow and become less predictable the longer the authorisation is on foot. This degree of uncertainty would make it more difficult for the ACCC to be satisfied that the likely public benefits resulting from the Proposed Conduct would outweigh the likely public detriments in the future.
- 4.52. The ACCC agrees with Coles' submission that coordination should only be permitted under the authorisation where COVID-19 is the 'primary driving factor of the supply issue'. The ACCC also notes Coles' submission that the Parties should not lose protection under the authorisation simply because other non-COVID-19 related factors were also contributing to supply issues. In this respect, Coles' revised wording – 'significantly impacted by' – appears to reflect this causal connection. The ACCC therefore proposes to adopt the formulation: ...while responding to issues arising from or significantly impacted by the COVID-19 pandemic.
- 4.53. If parties consider they need to collaborate in respect of other supply issues where COVID-19 is not the primary driving factor (such as in response to severe weather events), and they consider such collaboration would require authorisation, they should seek a separate authorisation if needed. This will require the parties to outline what specific collaboration is proposed in those particular circumstances, and why the ACCC should be satisfied that the likely public benefit outweighs the likely public detriment from the proposed conduct in that context. Where applicable, in particular where a national emergency declaration is in force, the parties could also submit that authorisation should be granted on the basis of the alternative authorisation test in subsection 90(7)(c) of the Act. However, authorisation would only need to be sought if parties wished to engage in conduct to which the competition provisions in Part IV of the Act would or might apply.
- 4.54. The ACCC agrees with Coles' submission that the AFGC's suggestion to limit authorisation to 'short term or immediate issues' is unnecessary, and it considers that

this phrase is difficult to define objectively. It also considers that limiting authorisation to 'issues arising from the COVID-19 pandemic public health response' is too narrow. In addition to Coles' submission that issues related to the pandemic may arise independently of, or lack a clear causal connection to, public health orders, it is not clear what the definition of 'pandemic public health response' would include (for example, whether it would be limited to Government-imposed restrictions, or not). Overall, it considers that the AFGC's proposal could introduce confusion as to whether a meeting or measure would be protected by the authorisation and make effective and timely collaboration difficult.

- 4.55. The ACCC acknowledges that the absence of a temporal element could create a risk that, as noted by the AFGC, the Parties could engage in discussions on medium/longer-term strategic matters. However, it is conceivable that supply issues may arise from COVID-19 that may have medium/longer-term effects, and therefore require collaboration over a longer period to address them. As such, the ACCC considers that proposing to grant authorisation for a shorter period than requested (i.e. until the 31 March 2023, rather than 31 December 2023 as requested), in combination with narrowing the 'purpose' wording, strikes an appropriate balance between mitigating against the risk to competition, and ensuring the terms of the authorisation remain workable (i.e. provide sufficient clarity as to what measures are covered).
- 4.56. The ACCC welcomes views from the Parties and interested parties on this proposal.
- 4.57. The ACCC notes, however, that its proposed formulation should not be taken to suggest that whenever a supply issue 'arises from or is significantly impacted by' COVID-19 arises, the Parties necessarily require authorisation for conduct undertaken in response to it. For example, authorisation may not be needed for the Parties to request assistance from Government at an Authorised Meeting.

### **Other mitigating factors**

- 4.58. Authorisation is restricted to conduct arising from Authorised Meetings or Urgent Measures discussions, and must have the purpose of ensuring the supply and fair and equitable distribution of Retail Products to Australian consumers in response to issues arising from or significantly impacted by the COVID-19 pandemic. Authorised Meetings include Government-convened meetings of the Supermarket Taskforce, COVID-19 Food Security Working Group and Coordinated Corporate Taskforce, as well as taskforces and other fora that are notified to the ACCC and are convened or attended by a Federal or State Government department or agency. This further reduces the risk of competitively sensitive information being exchanged for purposes unrelated to responding to the pandemic. Urgent Measures are narrow in scope (as they can only be used in limited circumstances to ensure a safe operating environment); are restricted to a limited timeframe (within 24 hours of a Government announcement); and, the ACCC has advance notice that they are being held and there is oversight over the outcomes, which must be tabled at the next relevant Authorised Meeting.
- 4.59. The ACCC is satisfied that information exchanged and arrangements made at Authorised Meetings to date (that is, since 23 March 2020) focus on short-term responses to the pandemic and are unlikely to have longer-term impacts on competition.
- 4.60. The ACCC further considers that the public detriment likely to result from the Proposed Conduct will be limited because:
- The Proposed Conduct does not extend to coordination in relation to price.

- The Proposed Conduct is unlikely to materially change the Participating Supermarkets' incentives to compete during the period of authorisation, and unlikely to change the incentives after the period of authorisation.
- It is not compulsory for Participating Supermarkets to participate in the Proposed Conduct. Similarly, authorisation does not compel the manufacturers, suppliers, transport and logistic providers to agree to the proposals by the Parties, nor does it prevent them from negotiating alternative outcomes with the Participating Supermarkets.
- The Proposed Conduct is a temporary measure. The ACCC may also review its decision to grant authorisation if there is a material change of circumstances.

## Conditions

- 4.61. To further mitigate the potential public detriment described at paragraphs 4.37 to 4.38 above, the ACCC is proposing to impose 2 conditions which are substantially the same conditions as Condition 1 (Authorised Meetings) and Condition 3 (Other parties wishing to engage in Proposed Conduct) which it imposed in granting Interim Authorisation on 25 March 2022. What was previously Condition 2 (Urgent Measures) under the Interim Authorisation has now been incorporated into Coles' definition of the Proposed Conduct and is therefore not needed as a condition.
- 4.62. The above restructure reflects Coles' re-drafted version of the Proposed Conduct, which it proposed after the Interim Authorisation was granted. Overall, apart from the changes to the 'purpose' discussed above, the ACCC considers that the scope of the Proposed Conduct that can be engaged in under the terms of the authorisation, and the notification procedures that must be followed, do not materially change as a result of this re-drafting.
- 4.63. The ACCC considers that taken together, the updated form of the Proposed Conduct and proposed conditions provide the ACCC, and relevant Federal, State and Territory Governments, with an important degree of certainty, oversight and transparency regarding any coordination agreed between the Participating Supermarkets and new authorised retailers wishing to engage in the conduct. This gives the ACCC the opportunity to be satisfied that any such coordination is unlikely to result in unintended public detriments.

## Balance of public benefit and detriment

- 4.64. The ACCC considers there are significant public benefits in enabling the Parties to prepare for, discuss and implement activities to safeguard the supply of Retail Products to consumers in response to the COVID-19 pandemic.
- 4.65. The ACCC has observed the Participating Supermarkets engaging in the Proposed Conduct under the previous authorisations since March 2020. The ACCC considers that each of the public benefits outlined above have been realised and to the extent the need for such coordination arises in future, are likely to continue to be realised if the Proposed Conduct is authorised.
- 4.66. The ACCC considers that with the change to the 'purpose' for which the Proposed Conduct can be engaged in, a shorter timeframe for authorisation, and the proposed conditions of authorisation, the likely public detriment arising from the Proposed Conduct is limited and is unlikely to have any long-term impacts extending beyond the period of authorisation. An updated form of the Proposed Conduct, which incorporates

that change to the wording relating to 'purpose', is set out in **Annexure A** and is referred to as the Authorised Conduct.

4.67. The ACCC is satisfied that in these circumstances, the likely public benefits arising from the Authorised Conduct would outweigh the likely public detriments.

### Length of authorisation

4.68. The Act allows the ACCC to grant authorisation for a limited period of time.<sup>21</sup> This enables the ACCC to be in a position to be satisfied that the likely public benefits will outweigh the detriment for the period of authorisation. It also enables the ACCC to review the authorisation, and the public benefits and detriments that have resulted, after an appropriate period.

4.69. In this instance, Coles seeks re-authorisation until 31 December 2023.

4.70. Coles submits that 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. It submits that the proposed term is appropriate for the following reasons:

- It is difficult to predict with certainty how long it may continue to be necessary for the Parties to collaborate in relation to issues arising from the COVID-19 pandemic.
- The World Health Organisation's advice remains that vaccines will not be 100% effective at preventing infection. Variant-specific COVID-19 vaccines may also be required to respond to future waves.
- The emergence of further COVID-19 waves in Australia is very likely, especially during the winter months. Accordingly, the pandemic will continue to impact the Australian workforce and the supply and demand levels of Retail Products during 2022 and likely extend into 2023. Given probable COVID-19 waves during the winters of 2022 and likely 2023, authorisation for the proposed term would enable the Parties to cooperate through these winter periods and a short period while the effects of any such winter COVID-19 waves dissipate in 2023.
- A version of the conduct has been authorised for approximately 2 years and has generated significant public benefits through 2 authorisation processes. In circumstances where the Proposed Conduct and its benefits are well understood, and the need for cooperation is likely to continue into at least 2023, it is appropriate for authorisation to be granted until the end of 2023.
- Ultimately, the ACCC can revoke the authorisation under section 91B of the CCA should there be a material change in circumstances (e.g. the vaccination schedule is completed, the effects of the pandemic have subsided such that no Authorised Meetings are expected to be required or to take place in the foreseeable future).

4.71. In its submission, the DITRDC stated that on 11 March 2022, National Cabinet noted Australia has largely transitioned to Phase D of the National Plan, with States and Territories removing remaining restrictions in coming months, subject to public health advice. It also stated that the Australian Government announced the Biosecurity Determination relating to COVID-19 would not be renewed when it expired on 17 April 2022. More recently, however, the ACCC notes that on 16 July 2022 National Cabinet

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<sup>21</sup> Subsection 91(1)



recognised that Australia's new wave of COVID-19 infections will increase the pressure on the health system and announced a number of measures in light of this.<sup>22</sup>

4.72. The AFGC submitted that it does not take issue with the extended timeframe, granted that the parameters of the proposed conduct are restricted to immediate COVID-19 related issues, and noting the ACCC's power to revoke the authorisation if the unusual circumstances created by the COVID-19 pandemic are no longer present. It notes that Australia's supermarket retail landscape is one of the most heavily concentrated in the world and any change in circumstances of the COVID-19 pandemic should lead to the immediate termination of the authorisation.

4.73. The ACCC proposes to grant authorisation until 31 March 2023. This would mean that authorisation would be granted for approximately 1 year (inclusive of the period of the Interim Authorisation). The ACCC does not consider it appropriate to grant for the longer period requested by Coles. As noted above, there is now less clarity over the kinds of supply issues that may continue to arise as a result of the COVID-19 pandemic, and therefore the kinds of coordination that the Parties could seek to engage in in response. This makes it more difficult for the ACCC to be satisfied that the authorisation test would continue to be met over that longer period. The ACCC also notes that the proposed length is consistent with the length for which the Initial and Existing Authorisations were granted. This has enabled the ACCC to review the public benefits and detriments that have resulted after a suitable period.

## 5. Draft determination

### The application

- 5.1. On 9 March 2022, Coles Group Limited (**Coles**) lodged an application to revoke authorisation AA1000546 and substitute authorisation AA1000606 for the one revoked (referred to as re-authorisation) on behalf of:
- itself and its related bodies corporate; Woolworths Group Limited and its related bodies corporate; ALDI Stores (a Limited Partnership); and 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 (together, the **Participating Supermarkets**), and
  - any other grocery retailer who has approval from the ACCC to engage in the conduct the subject of the application pursuant to the Initial or Existing Authorisation (or any related interim authorisation); and any other grocery retailer who in the 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**).
- 5.2. This application for re-authorisation AA1000606 was made under subsection 91C(1) of the Act.
- 5.3. Coles seeks authorisation for the Proposed Conduct. Subsections 90A(1) and 91C(5) of the Act require that before determining an application for re-authorisation, the ACCC shall prepare a draft determination.

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<sup>22</sup> Australian Government Department of Health and Aged Care, [National Cabinet Statement](#), 16 July 2022.

## The authorisation test

- 5.4. Under subsections 90(7) and 90(8) of the Act, the ACCC must not grant authorisation unless it is satisfied in all the circumstances that the Proposed Conduct is likely to result in a benefit to the public and the benefit would outweigh the detriment to the public that would be likely to result from the Proposed Conduct.
- 5.5. For the reasons outlined in this draft determination, the ACCC is satisfied, in all the circumstances, that with the conditions specified in **Annexure B**, the Authorised Conduct specified in **Annexure A** would be likely to result in a benefit to the public and the benefit to the public would outweigh the detriment to the public that would result or be likely to result from the Proposed Conduct, including any lessening of competition.
- 5.6. Accordingly, the ACCC proposes to grant re-authorisation.

## Conduct which the ACCC proposes to authorise

- 5.7. The ACCC proposes to revoke authorisation AA1000546 and grant authorisation AA1000606 in substitution. Authorisation AA1000606 would enable the Participating Supermarkets and Other Approved Supermarkets to engage in the conduct specified in **Annexure A** and defined as the Authorised Conduct. Authorisation is proposed to be granted with the conditions specified in **Annexure B**.
- 5.8. The ACCC proposes to grant authorisation in relation to the provisions of Division 1 of Part IV, and sections 45, 46 or 47 of the Act.
- 5.9. The ACCC proposes to grant authorisation AA1000606 until 31 March 2023.
- 5.10. This draft determination is made on 9 August 2022.

## 6. Next steps

- 6.1. The ACCC now invites submissions in response to this draft determination. In addition, consistent with section 90A of the Act, the applicant or an interested party may request that the ACCC hold a conference to discuss the draft determination.

## Annexure A – The Authorised Conduct

The **Authorised Conduct** is the conduct specified in this Annexure A.

A.1 The Participating Supermarkets and Other Approved Supermarkets are authorised:

- (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 while responding to issues arising from or significantly impacted by 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, and
- (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:
  - (a) the Interim Authorisations dated 23 and 26 March 2020 and 9 June 2020 and the Initial Authorisation dated 3 September 2020
  - (b) the Interim Authorisation dated 25 March 2021 and the Existing Authorisation dated 25 August 2021
  - (c) any Interim Authorisation granted in relation to this application.

A.2 For the purposes of paragraph A.1(1)(c)(i) above, each of the following is an **Authorised Meeting**:

- (1) meetings of the Supermarket Taskforce (convened directly or through the National Co-ordination Mechanism) and any of its working groups, as convened by the Department of Home Affairs from time to time<sup>23</sup>
- (2) meetings of the COVID-19 Food Security Working Group and the Coordinated Corporate Taskforce as convened by the National Indigenous Australians Agency, or
- (3) 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 more than one Participating Supermarket, or one or more Participating Supermarkets and one or more Other Approved Supermarkets, has been invited to the forum and Condition 1 below is satisfied.

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.

A.3 For the purposes of paragraph A.1(1)(c)(ii) above, **Urgent Measures** must only be engaged in if:

- (1) the ACCC has been provided with as much notice as is reasonably practicable in the circumstances of any Urgent Measures discussions or meetings taking place. Notice must be provided in writing to [exemptions@accc.gov.au](mailto:exemptions@accc.gov.au), and
- (2) any Urgent Measure is tabled at the next relevant Authorised Meeting that is held. A relevant Authorised Meeting for this purpose includes:
  - (a) in relation to Urgent Measures adopted at a State or Territory or local level, either an Authorised Meeting attended by representatives of a State or Territory Government department or agency in the State or Territory in which the Urgent Measures are adopted, or an Authorised Meeting attended by representatives of a Federal Government department or agency, and
  - (b) in relation to Urgent Measures adopted across more than one State or Territory, an Authorised Meeting attended by representatives of a Federal Government department or agency.

A.4 **Retail Products** are defined for the purposes of the Authorised Conduct as fresh food, groceries, household products, and liquor.

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<sup>23</sup> As of 9 June 2020, this included the Safety of Staff and Customers Working Group and the Food Supply Working Group.

## **Annexure B – Conditions of authorisation**

### **Condition 1: Authorised Meetings**

For the purposes of paragraph A.1(1)(c)(i) above, any 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 will only constitute an Authorised Meeting where:

- (a) the ACCC is notified by a Participating Supermarket in writing to [exemptions@acc.gov.au](mailto:exemptions@acc.gov.au), 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
- (b) 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 A.1(1)(b) above.

### **Condition 2: Other parties wishing to engage in Proposed Conduct**

In addition to the Participating Supermarkets and current Other Approved Supermarkets:

- (a) Parties that wish to engage in the Authorised Conduct must seek the approval of the ACCC by sending an email to [exemptions@acc.gov.au](mailto:exemptions@acc.gov.au) with the subject 'Authorisation AA10000598 – 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 Authorised Conduct or impose conditions which restrict the type or extent of the Authorised 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 Authorised Conduct, that party will not have the protection of authorisation granted pursuant to this application.