



**Coles Group Limited –
Application for authorisation AA1000606
Interim authorisation decision
25 March 2022**

Decision

1. The Australian Competition and Consumer Commission (the **ACCC**) has decided to suspend the operation of authorisation AA1000546 and grant interim authorisation, with conditions, in substitution for the suspended authorisation. The conditional interim authorisation is in respect of application AA1000606 lodged by Coles Group Limited (**Coles**) on 9 March 2022.
2. Coles has applied for re-authorisation on behalf of itself and Woolworths Group Limited, ALDI Stores (A Limited Partnership), Metcash Limited (the **Participating Supermarkets**) and any other grocery retailers approved by the ACCC (**Other Approved Supermarkets**).
3. Interim authorisation is granted to enable the Participating Supermarkets and Other Approved Supermarkets to continue to engage in coordinated activities with the broad purpose of ensuring the supply and fair and equitable distribution of Retail Products to consumers, and the health and safety of customers and staff, during the COVID-19 pandemic as described at paragraph 11 of this interim authorisation decision and defined as the **Proposed Conduct**. Interim authorisation is granted subject to the conditions set out in **Annexure A**.
4. The ACCC grants conditional interim authorisation in relation to Division 1 of Part IV of the Act and sections 45(1), 46(1) and 47(1) of the *Competition and Consumer Act 2010* (Cth) (the **Act**).
5. Interim authorisation commences immediately and remains in place until the date the ACCC's final determination comes into effect, the application for authorisation is withdrawn, or until the ACCC decides to revoke interim authorisation.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 application for re-authorisation

6. On 9 March 2022, Coles lodged an application for the revocation of authorisation AA1000546 (the **Existing Authorisation**) and the substitution of authorisation AA1000606 in its place (**re-authorisation**).
7. The Existing Authorisation was granted on 25 August 2021 and is due to expire on 31 March 2022.
8. 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**).

9. 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 the application and is approved by the ACCC subject to the approval process described in the Proposed Conduct below or any other conditions imposed by the ACCC
- (together, **Other Approved Supermarkets**).

The Proposed Conduct

10. Coles submits that re-authorisation is sought on substantially the same terms as the Existing Authorisation. The underlined text in paragraph 11 indicates the minor amendments to the conduct authorised under the Existing Authorisation that Coles has requested.
11. The Participating Supermarkets seek 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) an Authorised Meeting that occurs on or after the date that authorisation is granted (**Authorised Meeting**), or
 - (ii) 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 Meeting¹ that is held (**Urgent Measures**). 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:
- (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).

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

(the **Proposed Conduct**).

- 12. Re-authorisation is sought until 31 December 2023.
- 13. Coles seeks re-authorisation in relation to Division 1 of Part IV of the Act and sections 45(1), 46(1) and 47(1) of the Act.
- 14. The Proposed Conduct is not compulsory, and any Participating Supermarket or Other Approved Supermarket can decline to participate in, or opt out of, any proposed discussion or collaboration under the authorisation, if granted.

The Initial and Existing Authorisations

- 15. The Participating Supermarkets and Other Approved Supermarkets have been authorised to engage in broadly similar conduct to the present application since March 2020 under Initial Authorisation AA1000477 (from 23 March 2020 until 31 March 2021) and Existing Authorisation AA1000546 (from 25 March 2021 until 31 March 2022).
- 16. 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.
- 17. 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 maintaining sufficient numbers of staff in stores and distribution centres. It submits that while only a small number of agreements have been reached under the Initial and Existing Authorisations, they have enabled open, frank and timely discussions between Participating Supermarkets and government, without which stock shortages and supply chain constraints would likely have continued for considerably longer. Authorisation has also enabled them to share best practice information, and provide consistent public messaging, about safety measures for both staff and

¹ This wording differs from the wording at 5.2(c)(ii) of Coles' original application for re-authorisation, lodged on 9 March 2022, which read 'the next Authorised Meeting'. Coles subsequently clarified that the original application for re-authorisation ought to have read 'the next relevant Authorised Meeting': see [Amended application and clarification of Proposed Conduct \(24 March 2022\)](#).

customers. More recently, the Existing Authorisation has enabled the Participating Supermarkets and Other Approved Supermarkets to work closely with Government to:

- develop a prioritisation process for staff to access vaccinations
- develop updated safety protocols in relation to 'close contacts' to facilitate their ability to maintain continuity of supply, and
- address shortages of Retail Products contributed to by panic buying, staff shortages, and supply chain constraints.

The application for re-authorisation

18. 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.
19. It submits that the emergence of the Omicron strain of COVID-19 demonstrates the potential for the pandemic to evolve and the importance of continued authorisation to enable targeted collaboration between the Participating Supermarkets as new issues emerge. For example, it notes that vaccines will not be 100% effective at preventing infection; variant-specific vaccines may be required to respond to future waves; and the emergence of further COVID-19 waves in Australia is very likely, especially during the winter months.

The authorisation process

20. Authorisation provides protection from legal action for conduct that may otherwise breach the competition provisions of the Act. Broadly, the ACCC may grant authorisation if it is satisfied that the benefit to the public from the conduct outweighs any public detriment, including from a lessening of competition. The ACCC conducts a public consultation process to assist it to determine whether a proposed arrangement results in a net public benefit.
21. The power conferred upon the ACCC to authorise conduct is discretionary. In exercising that discretion, the ACCC may have regard to considerations relevant to the objectives of the Act.
22. The ACCC may specify conditions in an authorisation. The legal protection provided by an authorisation does not apply if any conditions are not complied with.

Request for interim authorisation

23. Section 91 of the Act allows the ACCC, where it considers it appropriate, to grant interim authorisation prior to the ACCC's final determination. This allows the parties to engage in the proposed conduct while the ACCC is considering the substantive application.
24. Because Coles' new application for authorisation was not lodged until shortly before the Existing Authorisation expires, the ACCC will not be able to make a final decision about the new application by 31 March 2022. Therefore, Coles requests interim authorisation to ensure that an exemption for the specified types of collaborative action remains available should issues arise during the period that the substantive application is being considered by the ACCC.

Consultation

25. The ACCC has not conducted a public consultation process in respect of the request for interim authorisation. This is due to the imminent expiry of the Existing

Authorisation and the need for the Participating Supermarkets to have continuous protection should they need to quickly take steps to ensure supply of Retail Products to consumers. In addition, the ACCC is familiar with how the arrangements are working in practice given that they have been operating (in largely the same form) since March 2020 and no concerns have been raised.

26. The ACCC will conduct a public consultation process on the substantive application for re-authorisation and will further examine the public benefits and detriments likely to result from the Proposed Conduct during that process. Details regarding how to make a submission will be available on the [ACCC's authorisations public register](#).

Reasons for decision

27. The ACCC grants interim authorisation with the conditions outlined at **Annexure A** to this interim authorisation decision.
28. The ACCC notes that there is urgency about the request for interim authorisation as the Existing Authorisation expires on 31 March 2022.
29. In considering the request for interim authorisation, the ACCC has considered whether there is a continuing need for coordinated activities between the supermarkets in the current circumstances. In this respect, the ACCC notes that while there has been a transition away from lockdowns, the situation in relation to the COVID-19 pandemic remains uncertain as COVID-19 outbreaks continue. This ongoing uncertainty has particular impacts on the operations of supermarkets in supplying customers.
30. Given this, the ACCC considers that there appears to be an ongoing need for the Participating Supermarkets to be able, in limited circumstances, to engage in coordinated activities to respond to the COVID-19 pandemic, at least in the short term. The ACCC considers that such coordination is, in the short term, likely to continue to result in the public benefits previously identified by the ACCC. In particular:
 - 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.
 - Reducing community concerns and stockpiling behaviour, including by enabling retailers to implement measures such as uniform or similar purchase limits and consistent public messaging.
 - Reducing strain on the Retail Products supply chain resulting from the COVID-19 pandemic, including by assisting manufacturers and authorised retailers to quickly understand and address impediments to increasing production to meet higher demand and to address difficulties within their internal supply chains.
 - Promoting a safe operating environment for consumers, employees and contractors and other third parties.
31. Informed by observations about how the Initial and Existing Authorisations have been operating since March 2020, particularly through ACCC representatives attending Authorised Meetings, the ACCC considers that it is unlikely interim authorisation will have an ongoing anti-competitive impact. In particular:
 - The interim authorisation is restricted to conduct arising from Authorised Meetings or Urgent Measures, both of which must have the purpose of responding to the COVID-19 pandemic. Authorised Meetings include Federally-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, under the condition imposed at **Annexure A**, 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.

- The Proposed Conduct is a temporary measure in response to the COVID-19 pandemic.
 - 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 and Other Approved Supermarkets to participate in the Proposed Conduct. Similarly, the interim authorisation does not compel the manufacturers, suppliers, transport and logistic providers to agree to the proposals by the Participating Supermarkets and Other Approved Supermarkets, nor does it prevent them from negotiating alternative outcomes with the Participating Supermarkets.
 - The ACCC may review its decision to grant interim authorisation at any time, including in response to feedback as the Proposed Conduct is rolled out. If any persons, including relevant Government and regulatory bodies, have concerns with the way the Participating Supermarkets or Other Approved Supermarkets are dealing with them during the period of interim authorisation, they are encouraged to advise the ACCC.
32. The ACCC has decided to grant interim authorisation with the conditions at **Annexure A** of this Interim Authorisation Decision. These are the same conditions that applied in the Existing Authorisation, subject to changes (underlined) reflecting Coles' minor amendments to its proposed definition of 'Authorised Meetings'.
33. These conditions are intended to provide the ACCC, and relevant Federal, State and Territory Governments, with sufficient certainty, oversight and transparency regarding any coordination agreed between the Participating Supermarkets and new authorised retailers wishing to engage in the Proposed Conduct. This gives the ACCC the opportunity to be satisfied that any coordination agreed and/or retailers added does not result in unintended public detriments.
34. The ACCC also notes that the Participating Supermarkets are, in most cases, each other's closest competitors and the ACCC considers it vital that once the present unusual circumstances created by the COVID-19 pandemic are no longer present, cooperation between them in relation to these matters should cease.

Reconsideration of interim authorisation

35. The ACCC may review a decision on interim authorisation at any time, including in response to feedback raised following interim authorisation.
36. The ACCC's decision in relation to the interim authorisation should not be taken to be indicative of whether or not the final authorisation will be granted.

Annexure A – Conditions of authorisation

Condition 1: Authorised Meetings

1. For the purposes of paragraph 11(c)(i) above, Authorised Meeting means any of the following types of meetings:
 - (a) 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 time²
 - (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 to 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
 - (ii) more than one Participating Supermarket, or one or more Participating Supermarkets and one or more Other Approved Supermarket, has been invited to the forum, 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 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.

Condition 2: Urgent Measures

2. For the purposes of paragraph 11(c)(ii) above, 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, 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

² As of 9 June 2020, this included the Safety of Staff and Customers Working Group and the Food Supply Working Group.

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.

Condition 3: Other parties wishing to engage in Proposed Conduct

3. 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 exemptions@acc.gov.au with the subject 'Authorisation AA1000606 – 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.

4. The ACCC may authorise the ACCC Competition Exemptions Committee, a member of the ACCC or a member of the ACCC staff, to exercise a decision-making function under these conditions on its behalf and that authorisation may be subject to any conditions which the ACCC may impose.