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26 April 2023

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Australian Competition and Consumer ACCC
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By Email

Dear Ms Camilleri and Ms Menon

ACCC Draft Decisions and Proposed Amendment to Application for Authorisation by Coles Group Limited

We refer to the application for authorisation by Coles Group Limited (**Coles**) lodged on behalf of itself and its related bodies corporate, Woolworths Group Limited and its related bodies corporate (**Woolworths**) and ALDI Stores (a Limited Partnership) (**ALDI**) (together, the **Participants**) on 16 November 2022 (the **Application**). We also refer to the draft determination published by the ACCC on 30 March 2023 (the **Draft Determination**) and to our recent discussions.

In summary, the Participants do not object in principle to the ACCC's proposal to define the authorised conduct by reference to the Soft Plastics Taskforce Roadmap to Restart dated 7 March 2023 (the **Roadmap**). However, the Participants note that the Roadmap was not originally drafted with a view to defining the conduct to be authorised. While it contains important contextual information about the views of the Taskforce and the steps taken to date, the Participants consider that much of this descriptive material is less well suited to defining the conduct to be exempt from relevant competition laws and could potentially introduce uncertainty as to what conduct is and is not permitted. Accordingly, the Participants consider that a narrower approach could be taken whereby the authorised conduct would be limited to the Instore Collection Recommencement Steps contained in section 9 of the Roadmap, with some minor updates to reflect the Participants' most recent planning and to ensure the steps are sufficiently clear and precise.

Coles and the other Participants seek a variation to the Application to reflect this approach, which reflects a narrowing of the approach proposed to be adopted by the ACCC in its Draft Determination.

Further detail is set out below.

1 Preliminary observations

The Participants do not object in principle to the ACCC's proposal to define the authorised conduct by reference to the Roadmap. The Roadmap accurately records the Participants' activities to date in evaluating interim solutions for soft plastics recycling as well as their detailed planning (as at 7 March 2023) for the management of existing stockpiles and the recommencement of an in-store soft plastics recovery program.

However, the Participants note that the Roadmap was not originally drafted with a view to defining the conduct to be authorised. Much of the Roadmap is descriptive in nature, focusing on the history of the REDcycle program, the Participants' views about why the REDcycle program was ultimately unsuccessful

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and the 'lessons learned that should inform the design of the Participants' proposed new in-store soft plastics collections program. While this is important contextual information, the Participants consider that such descriptive material is less well suited to defining the conduct to be exempt from relevant competition laws and are concerned that such an approach could potentially introduce uncertainty as to the conduct that is and is not permitted under the authorisation.

To address this concern, the Participants propose that a narrower approach could be taken whereby the authorised conduct would be limited to the Instore Collection Recommencement Steps contained in section 9 of the Roadmap, with minor updates for clarity and to reflect the Participants' most current planning. Such an approach would limit authorisation to the specific conduct contemplated by the Participants (such as remediating existing stockpiles and engaging recycling processors and logistics providers in order to launch a new in-store collections program). This would result in a definition of authorised conduct that is more confined and precise, providing greater certainty and clarity to the Participants, the ACCC as well as other interested stakeholders regarding the types of conduct that would be permitted under the authorisation.

The Participants note the ACCC's view that limiting the authorised conduct to conduct that is consistent with the Roadmap is likely to result in significant public benefits that would outweigh any likely detriment. The Participants consider that their proposed amendments, reflecting a narrowing of the ACCC's proposed approach, would support an even clearer finding of a net public benefit.

2 Variation of application

Coles and the Participants remain of the view that the original Application for authorisation is likely to give rise to significant public benefits and is unlikely to give rise to any public detriments. This is due to

- the confined scope of the Application (ie, the focus on *in-store* collection of *post-consumer* soft plastics only and the period of authorisation being only 12 months);
- the fact that it would not detract from any longer term solutions being explored such as the AFGC's proposed National Plastics Recycling Scheme;
- the high level of supervision and oversight including that the proposed conduct is restricted to conduct occurring at, in preparation for or arising out of a meeting of the Soft Plastics Taskforce attended by representatives of the Department of Climate Change, Energy, the Environment and Water;
- that the proposed conduct is voluntary and no Participant is prevented from exploring or developing their own soft plastics recycling capacity; and
- that the proposed conduct does not change the Participants' incentives to compete during or after the period of authorisation.

Notwithstanding this view, the Participants do not object to the ACCC's proposal to define the authorised conduct by reference to the Roadmap and accordingly seek a variation to the Application as set out in **Annexure A**. For the reasons set out in section 1 above, the Participants propose that the authorised conduct be limited to the Instore Collection Recommencement Steps contained in section 9 of the Roadmap, with minor updates for clarity and to reflect the Participants' most current planning. The Parties note the following in relation to Annexure A:

- the updated Instore Collection Recommencement Steps in Annexure A predominately reflect the Instore Collection Recommencement Steps already outlined in section 9 of the Roadmap, with only minor changes either for clarity or to reflect the Participants' most current planning. In particular, the updated Instore Collection Recommencement Steps make clear that:
 - the Participants propose to engage with logistics providers as well as processors;
 - given limited domestic processing capacity currently, the Participants may seek to engage offshore processors and logistics providers as well as domestic processors and logistics providers;

- the initial pilot would likely be limited to certain geographic areas;
- development of business models to support cost sharing for a new in-store soft plastics recovery program would also involve agreeing on membership fees and terms and conditions both for the Participants and for Program Partners; and
- while the Participants remain committed to avoiding landfill wherever possible, it is possible that management of existing stockpiles may require some materials to be disposed of, for example, where the material is contaminated and unable to be processed from a technical point of view or where the Participants are directed by an environmental regulator to dispose of materials to avoid a health and safety risk. This has been reflected in the Instore Collection Recommencement Steps which would permit disposal of any stockpiled material *only* where landfill cannot reasonably be avoided.

The Participants note that many of these points were already discussed in other parts of the Roadmap but through the updates in Annexure A, would now be expressly incorporated into the Instore Collection Recommencement Steps.

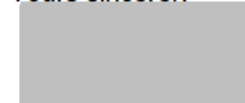
- The Participants have not incorporated estimated timeframes into the Instore Collection Recommencement Steps. This is on the basis that the proposed conduct would only be authorised for 12 months in any event and so specific time frames for individual steps is both unnecessary and likely to lead to unnecessary complexity. It could also have the unintended consequence that legitimate conduct could potentially fall outside the authorisation on the basis that it was undertaken one or two months later than anticipated, even though it was still undertaken within the period of authorisation.
- In respect of communications to customers or to the public, the Participants have also proposed that communications be limited to communications regarding the Instore Collection Recommencement Steps but propose to make clear that this would extend to providing recycling directions to the public in connection with the launch of any new in-store soft plastics collections program. This amendment is intended to make clear that communications need not only update the public about the *Participants'* progress in implementing the Instore Collection Recommencement Steps but also the steps *consumers* can take to take advantage of any new in-store soft plastics collections program.

Coles has consulted with the other Original Participants, who have indicated that they are supportive of the proposed variation to the Application.

Finally, although the commentary above could be considered by the ACCC purely as a submission to the Draft Determination (ie, without any variation to the Application), Coles considers it preferable that the Application be varied as proposed in Annexure A and seeks the ACCC's consent for this variation. By more closely aligning the Application with the ACCC's proposed approach, this would avoid complexity in the final determination and any further consultation that the ACCC may wish to undertake in considering the Application.

Please do not hesitate to contact us to discuss.

Yours sincerely



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Annexure A – Proposed Amendments to the definition of Proposed Conduct

The Participants seek authorisation for the Participants and any Program Partners to propose, discuss, enter into or give effect to any contract, arrangement or understanding between [two or more](#) them, or engage in any conduct that:

1. both:
 1. occurs at, in preparation for, or arises out of, a meeting of the Soft Plastics Taskforce; and
 2. has the purpose of considering, developing or implementing solutions that are consistent with [any of the Instore Collection Recommencement Steps in section 9 of the Soft Plastic Taskforce's Roadmap to Restart dated 7 March 2023, as updated below](#); or

 2. constitutes planning or agreeing on communications to customers or to the public in respect of [any of the Instore Collection Recommencement Steps in section 9 of the Soft Plastic Taskforce's Roadmap to Restart dated 7 March 2023, as updated below, including providing recycling directions for soft plastics packaging in respect of any new in-store soft plastics collections program](#)
- (collectively, the **Proposed Conduct**).

The Participants update the [Instore Collection Recommencement Steps](#) in section 9 of the Soft Plastics Taskforce's Roadmap to Restart dated 7 March 2023 as follows:

#	Instore collection Recommencement Steps
1.	Engagement (including site visits) with third-party recycling and logistics providers (including domestic or overseas providers).
2.	Ongoing development of a stockpile remediation action plan which will include undertaking safety risk assessments and identifying safe storage, processing and transport options for stockpiled materials. The stockpile remediation action plan may also include disposal options for certain stockpiled materials but only where landfill cannot reasonably be avoided.
3.	Implementation of stockpile remediation action plan developed under point 2 above.
4.	Completion of domestic and offshore processing capacity assessment and preparation of a preferred solution shortlist including capacities by geography and expected timeframes.
5.	Negotiation, development and establishment of contract terms with third-party recycling and logistics providers, including establishment of service level agreements and formalised audit process.
6.	Ongoing development of launch strategy for instore soft plastics collections program based on geographic/volume metrics. Finalising of collection logistics and end to end management approach in readiness for pilot.
7.	Exploration and development of business models to support cost sharing, including with brands and other retailers for the purposes of implementing a new in-store soft plastics collections program.

8.	Development and launch of pilot for recommencement of soft plastic collection and processing in specific geographic areas to serve as test for ongoing viability of program.
9.	Development and launch of expanded program from original pilot area to additional geographical area/s (subject to sufficient progress in managing stockpiles and available processing capacity).
10.	Development of membership Terms and Conditions and membership fees for the Participants and Program Partners.