

Mr Darrell Channing
Director
Competition Exemptions
ACCC

8 April 2022

Via: exemptions@accg.gov.au

Dear Mr Channing,

Re: Coles Group Limited – Application for re-authorisation AA1000606 – Interim authorisation decision and interested party consultation

The Australian Food and Grocery Council (AFGC) welcomes the opportunity to comment on the application for re-authorisation - AA1000606 submitted by Coles Group Limited on behalf of itself, Woolworths Group Limited, ALDI Stores and Metcash and Other Approved Supermarkets who have obtained ACCC approval.

The initial and existing authorisation (AA1000546) has been instrumental in mitigating the worst of critical shortages and supply chain constraints during the height of the COVID-19 pandemic. The AFGC has broadly supported the ACCC's previous determination for Participating Supermarkets to be able to, in limited circumstances, engage in coordinated activities to respond to the COVID-19 pandemic, to allow:

- The opportunity for Australian consumers, particularly the most vulnerable in the community, and those in regional and remote areas to continue to have fair and reasonable access to essential everyday food and grocery products
- reducing community concerns and stockpiling behaviour
- reducing strain on the retail products supply chain by assisting manufacturers and retailers to understand and address impediments to increasing production and to meet difficulties within their internal supply chains, and
- promoting a safe operating environment for consumers, employees, contractors and other third parties

The disparities of State regulations to limit the spread of COVID-19 (and subsequent variants) has been a key driver of confusion and uncertainty across the industry. It is essential that communication between and amongst food, beverage and grocery retailers, suppliers, transport operators and government continue when and if subsequent variants of COVID-19 lead to further public health orders that may impact the demand or supply of food, beverage, and grocery items along the supply chain.

Whilst it is difficult to ascertain whether future variants of COVID-19 will lead to further major public health emergencies, it is probable that future variants will lead to public health orders that may restrict the mobility and proximity of people 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 everyday 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. We support the ACCC's current view that the proposed conduct should not extend to coordination in relation to price

and should not act to compel or bind manufacturers, suppliers and third-party transport and logistics operators to the proposals made by the participating supermarkets.

Length of re-authorisation

We note that the length of re-authorisation requested by the applicants is longer than previously sought. However, the AFGC 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 the ACCC's power to revoke the authorisation if the unusual circumstances created by the COVID-19 pandemic are no longer present. As noted in previous submissions to the ACCC, 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.¹

Suggested amendments to the purpose of the proposed conduct

The AFGC urges caution on the recommendation(s) made by the ACCC and Coles to amend the wording of the Authorisation's proposed conduct under s 5.2(1)(b) of Coles' application to read as follows:

Proposed

(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...

Instead of,

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...

The newly proposed text may shift discussions away from acutely temporal aspects focused on 'immediate and critical issues' to potentially incorporate a much broader set of issues. Proposed conduct to allow for discussions on '*issues arising from [or exacerbated by] the COVID-19 pandemic*' removes the short-term reactionary purpose of the meetings to potentially incorporate discussions on medium to longer-term strategic matters impacting the supermarket business model. Discussions on these matters should not be a feature of the authorisation.

Whilst the AFGC agrees that the current text of the proposed conduct is too general and unclear, it recommends the addition of '*short-term or immediate*' before the term '*issues*' with the intent of establishing temporal parameters that allow for a focus on resolving and mitigating '*immediate and present issues.*' Further, the term '*issues*' in this context to be limited to '*issues arising from public health orders and regulations imposed in response to managing the public health risks of COVID-19*', such as COVID-19 pandemic orders that limit the mobility and proximity of individuals and workers in the community and the workplace. This may include under exceptional circumstances, public health orders of import markets. The AFGC recommends the text of the proposed conduct be amended to read as follows:

(b) has the purpose of ensuring the supply and fair and equitable distribution of Retail Products to Australian consumers while responding to short-term or immediate issues arising from the COVID-19 pandemic public health response by...

There are many issues arising from the COVID-19 pandemic that are impacting or exacerbating supermarket business models that should not be a feature of discussions

¹ Grattan Institute 2017, AFGC and EQ Economics

between participating supermarkets as this is not in keeping with the nature and intent of the initial authorisation. The focus of meetings had between supermarkets should be focused on abrogating immediate issues impacting the fair and equitable access of essential products to Australians' particularly those most vulnerable in our community. These discussions should be allowed under exceptional circumstances, as suggested, such as when state governments impose pandemic health orders that limit mobility and access in the community and workplace.

In relation to other proposed amendments, the AFGC supports the following underlined amendments to the text of the Proposed conduct (suggested by Coles) as it adds a layer of specificity and accuracy to the parameters of discussions had:

(2) for themselves and any Other Approved Supermarket to continue to give effect to any contract, arrangement or understanding previously entered 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

We support the continued participation of appropriate ACCC authorities at meetings between two or more 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 the coordination in relation to price should be strictly prohibited.

Appropriate safeguards implemented by the ACCC during and following meetings including sufficient time to review agenda papers particularly under urgent notice of a meeting is emphasised. As is the need for reasonable notice granted to the ACCC to include non-business days such as weekends and public holidays.

We welcome further discussion and consideration of our submission if necessary. Please contact [REDACTED] to arrange a meeting.

Yours Sincerely,



Samantha Blake

Director, Competitiveness and Growth

Australian Food and Grocery Council