



**CONSUMERS'
FEDERATION
OF AUSTRALIA**

Developing and promoting
the consumer interest

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AA1000477 – Coles Group

Joint Consumer Group Submission to ACCC

Introduction and summary

1. This submission is made by the Consumer' Federation of Australia (CFA). CFA is the peak body for consumer organisations in Australia.
2. This submission is about the ACCC's interim authorisation decision in relation to Coles and others (the Participating Supermarkets) made on 26 March 2020 (the interim authorisation).
3. The ACCC has set out a 5-month process to consider whether a final authorisation should be granted to Participating Supermarkets. In the current environment, much can change in that time.
4. Current indications are that the demand side pressures on Participating Supermarkets have already largely eased. Accordingly, the benefits of the interim authorisation may no longer be sufficient to justify the disadvantages and risks the interim authorisation poses.
5. Our submission is that the ACCC should be testing with the Participating Supermarkets whether the authorisation continues to be necessary and, if it is, how it can be constrained to minimise the risks that it poses. In particular, now that Participating Supermarkets have had a month's experience of the interim authorisation, Participating Supermarkets should be disclosing what they have done in reliance on the interim authorisation and why any action in concert continues to be necessary and proportionate. This information should be made publicly available to permit interested parties to comment.
6. The balance of our submission sets out our comments about the information so far provided by Participating Supermarkets to justify an authorisation. It also sets out the risks that we think the interim authorisation poses.

Benefits and risks of the interim authorisation

7. The Participating Supermarkets' application states that the COVID-19 pandemic has led to unprecedented stockpiling by consumers of everyday goods. This has resulted in shortages.

Supermarkets have also been unable to meet demand for online deliveries. The aim is that the Participating Supermarkets work together to address these issues with a view to ensuring the supply and fair and equitable distribution of fresh food, groceries and household products and liquor while the pandemic persists.

8. We are, of course, highly supportive of the Participating Supermarkets' stated aim to ensure supply and fair and equitable distribution. We commend Participating Supermarkets' rationing measures that were first implemented before the date of the interim authorisation. These have since continued on an expanded basis, encompassing additional products as needed. Meanwhile it has been evident that Participating Supermarkets have worked with their suppliers and logistics providers to increase supply to supermarkets and so to minimise the need for rationing. Participating Supermarkets' capacity to provide on-line delivery has also been ramped up.
9. We are also highly supportive of measures to control the number of consumers in Participating Supermarkets at any one time, in the interests of the safety of consumers and Participating Supermarket staff.
10. We are, however, concerned that the Participating Supermarkets' application is extremely short on particulars as to what exactly they plan to do in concert and why concerted action is necessary to address the demand challenges they have faced. Their application might be read as suggesting that they could agree consistent rationing limits, they could share information about consumer demand for supermarket products to better inform manufacturers and they could arrange joint deliveries by suppliers. But we are speculating here because the Participating Supermarkets' application does not state how they will be better able to achieve their stated purpose by acting in concert. The application does not, for example, explain why Participating Supermarkets are not individually of a size to have excellent insight themselves into issues of consumer demand.
11. In any event, Participating Supermarkets now have one month's experience of working in concert in reliance on the interim authorisation. They should be required to publicly disclose via the ACCC Public Register what they have done in concert and what else they might do in the future. Without this, we think that the Participating Supermarkets do not establish a sound case for the very significant concessions that they want to continue for a lengthy period of time.
12. Furthermore, it would seem that the emergency situation has largely passed. Consumer communications from Coles and Woolworths suggest that demand is tapering, supply is improving and rationing is being phased out. It is to be hoped that the substantial decline in new COVID-19 cases in Australia will continue this trend.
13. In these circumstances, we question whether the current radical re-write of competition law for Participating Supermarkets continues to be justified.
 - i. In our view, the interim authorisation is radical because it is written in extremely broad terms that pose substantial risk and it is not subject to sufficient regulator monitoring – see later discussion as to both these matters.

- ii. It is also radical because it could alter competitive dynamics going forward if used by these very large supermarkets to exchange commercially sensitive information, for example, as to their margins and the details of their agreements with suppliers and service providers. This exchange of information could position Participating Supermarkets to drive harder bargains with their suppliers and service providers, thereby advantaging Participating Supermarkets to the detriment of long term competition. This is particularly the case given the extent of own-label products sold by the Participating Supermarkets.
14. At the very least, we submit that the interim authorisation should be amended to limit its scope and enhance reporting to facilitate ACCC monitoring of the way in which it is being implemented.

Breadth of the interim authorisation

15. The interim authorisation applies to Retail Products, defined as fresh food, groceries, household products and liquor. In our view, this is overly broad. We think that, to be consistent with the rationale in the Participating Supermarkets' application, it should be limited to products that are in short supply.
16. The ACCC authorises Participating Supermarkets "to discuss, enter into or give effect to, any arrangement between them (including with manufacturers, suppliers, transport and logistics providers), or engage in any conduct which has the purpose of:
- 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), or
 - iv. facilitating access to Retail Products in remote or rural areas."
17. This includes – but is not limited to – giving effect to Ministerially approved recommendations by the Supermarket Taskforce convened by the Department of Home Affairs or the main working sub-committee of that Taskforce.
18. We submit that the authorised conduct is too broadly cast in the following respects:
- i. Authorisation is provided for conduct with the permitted purpose. Unlike some other COVID-19 authorisations a "sole purpose" test has not been imposed. We submit that the conduct should not be permitted if there are ancillary purposes not within the bounds of the permitted purposes.
 - ii. One permitted purpose (paragraph 8i of the interim authorisation) is to facilitate the acquisition or supply of Retail Products – this is well beyond just ensuring supply chain security and equity. We submit that this is far too broad.

- iii. The broad language would appear to permit Participating Supermarkets, for example, to agree to service different remote or regional areas. If this led to the closure of some regional supermarkets, this could adversely affect price competition in the long run. The long-term prejudice of this would negate any short-term enhanced security of supply. This example demonstrates the importance of narrowing the scope of the interim authorisation.
- iv. The interim authorisation does not expressly exclude the fixing of retail prices.
- Price fixing is not carved out of the definition of Proposed Conduct in paragraph 8 of the interim authorisation.
 - Paragraph 1 of the interim authorisation states that the grant of the authorisation is “in respect of the application for authorisation AA1000477 made on 20 March 2020 by Coles ...”. This appears to imply that authorisation is granted for all that is sought by the Participating Supermarkets’ application. Yet paragraph 3.4(a) of their application asks for protection from section 45AD(2) (the provision dealing with fixing, controlling or maintaining the price for, or a discount, allowance, rebate or credit in relation to goods or services).
 - Although the interim authorisation’s statement of reasons (paragraph 23) states that the Proposed Conduct does not enable Participating Supermarkets to agree the retail prices of Retail Products, we are not sure that the explanation of reasons serves as an enforceable limitation on the grant of the authorisation.

We submit that the interim authorisation should be drafted in a way that clearly maintains the prohibition on retail price fixing.

This is of particular concern given consumers report that supermarket prices have increased since COVID-19 and there have been fewer promotions and loyalty offers.

It is, of course, extremely difficult to establish actionable price gouging (something the ACCC has acknowledged). That is why competition is so important as a break on this type of conduct.

By opening opportunities for the Supermarket Participants to strategise together, we submit that the interim authorisation creates an environment where retail prices could very easily be discussed and informal arrangements reached. To discourage this behaviour, it is vital that the ACCC’s authorisation is crystal clear that this is not permitted.

- v. The interim authorisation does not exclude arrangements or agreements in relation to wholesale pricing or logistics pricing. It would permit, Participating Supermarkets, for example, to require suppliers or logistics providers to enter into exclusive arrangements with Participating Supermarkets, to the detriment of smaller supermarkets and shops. The implications of this could continue beyond the pandemic with long term adverse consequences. We submit that the authorisation should be revised to address these risks.

Reporting

19. We are also concerned that the interim authorisation does not establish a regulatory reporting framework so that the ACCC can properly understand, monitor and control the implications of the interim authorisation. A reporting framework is needed, given that under the interim authorisation permitted understandings and agreements are not limited to those to emerge from the Supermarket Taskforce (which includes ACCC representation).
20. In comparison, the AEMO and NBN COVID-19 authorisations require an agreed reporting protocol with the ACCC whereby regular reporting is provided to the ACCC of all material agreements or decisions made by authorised companies.
21. We think that the lack of a reporting framework is a significant omission. Without a sound reporting arrangement, it will be extremely difficult for the ACCC to monitor whether the authorisation is promoting the public benefit or whether in fact it is operating in a way that has important long-term adverse implications for competition.
22. Moreover, in the case of supermarkets, we submit that the consumer importance is such that reporting should not just be behind closed doors to the regulator. Either reporting should be made public. Or alternatively reporting should be via a body (possibly the Supermarket Taskforce) that includes consumer representative participation. In our view, this is vital to ensure the consumer perspective is properly taken into account.

Response to ACCC questions

23. By way of conclusion we respond to the specific questions set out in the ACCC's letter of 3 April inviting comment.

1. *What impact has the supermarkets' coordinated conduct had on you? How have the Applicants' dealings with you changed as a result of the interim authorisation?*

Without public transparency as to the action that has been taken in reliance on the interim authorisation, it is impossible to respond properly to this question. Consumers report, however, that supermarket prices have increased since COVID-19 and there have been fewer promotions and loyalty offers.

2. *Is the interim authorisation achieving its purpose of ensuring continued and equitable supply of Retail Products?*

We question whether the interim authorisation is necessary to ensure continued and equitable supply of Retail Products. This is because the Participating Supermarkets are arguably large enough themselves to understand and respond

to the demand challenges. Moreover, those demand challenges are rapidly reducing and so the imperative for an authorisation is reducing.

3. *Have you identified any negative effects from coordinated conduct permitted by the interim authorisation?*

We think that the interim authorisation risks long term adverse consequences for competition. This is particularly the case given its broad terms and given that it is not subject to a robust monitoring framework.

4. *Is the coordinated conduct permitted by the interim authorisation likely to entrench anti-competitive behaviours that continue past the end of the COVID-19 pandemic?*

Yes, we think that the interim authorisation is likely to entrench the position of the largest supermarkets to the detriment of smaller supermarkets, suppliers and service providers – and so ultimately to the detriment of consumers.

5. *Should any changes be made to the interim authorisation?*

Yes, the interim authorisation should either be revoked or varied to restrict its scope and introduce a robust reporting framework.