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AUSTRALIAN COMPETITION TRIBUNAL

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Lodgment and Details

Document Lodged:	Concise Statement of Contentions
File Number:	ACT 1 of 2026
File Title:	APPLICATION BY COLES SUPERMARKETS AUSTRALIA PTY LTD
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Dated: 20/08/2026 4:23 PM

Important information

This Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Tribunal and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.

APPLICATION BY COLES SUPERMARKETS AUSTRALIA PTY LTD

Commonwealth of Australia

Competition and Consumer Act 2010

In the Australian Competition Tribunal

File No. ACT 1 of 2026

Re Application by Coles Supermarkets Australia Pty Ltd

This document contains confidential information which is indicated as follows:

1. [Confidential and governed by the Confidentiality Regime made by Justice O'Bryan on 21 July 2026]
2. [Highly Confidential and governed by the directions of Justice O'Bryan dated 10 August 2026, where ALDI Stores (A Limited Partnership) is not the Confidentiality Claimant.]
3. [High Confidential and governed by the directions of Justice O'Bryan dated 10 August 2026 and where ALDI Stores (A Limited Partnership) is the Confidentiality Claimant.]

Concise Statement

1 Pursuant to s 100C of the *Competition and Consumer Act 2010* (Cth) (**Act**), Coles Supermarkets Australia Pty Ltd (**Coles**) seeks review of a determination of the Australian Competition and Consumer Commission (**ACCC**), under s 51ABZE(1) of the Act, that Coles' proposed acquisition of a leasehold interest in Lots 95-106 Great Eastern Highway, Somerville, for the purposes of developing a supermarket (**Proposed Acquisition**) not be put into effect (**Determination**). Coles contends that the Tribunal should not be satisfied that the Proposed Acquisition, if put into effect, would, in all the circumstances, have the effect, or be likely to have the effect, of substantially lessening competition (**SLC**) in any market. Accordingly, the ACCC's Determination should be set aside under s 100N(1)(a) of the Act, and the Tribunal should instead determine under s 51ABZE(1) and s 100N(1)(b) of the Act that the Proposed Acquisition may be put into effect.

2 **Proposed Acquisition:** Coles proposes to acquire a leasehold interest as an anchor tenant in an as-yet-undeveloped greenfields site on the main traffic intersection entering Kalgoorlie and Boulder, on the Great Eastern Highway in Somerville, a suburb in south-western Kalgoorlie-Boulder, Western Australia (**Kalgoorlie**). The proposed development will comprise a new, large-format Coles supermarket (the **Proposed Supermarket**) and a co-located Liquorland operated by Coles, [redacted]. The Proposed Supermarket site will offer consumers over [redacted] and [redacted] both the Proposed Supermarket and Liquorland. The development will be [redacted].

The relevant market and market participants

3 **Relevant market:** The relevant market for assessing the competitive effects of the Proposed Acquisition is the market for the supply of groceries by supermarkets to retail consumers in the city of Kalgoorlie (the **relevant market**). Competition in that market is affected by competition in state and national dimensions between supermarkets (particularly Coles, Woolworths and ALDI) and competitive constraint imposed on supermarkets by non-supermarket grocery retailers, including Amazon, Costco, Chemist Warehouse, and Bunnings.

4 **Current market participants:** There are presently six supermarkets in Kalgoorlie: two major supermarkets — Coles (which opened its existing store in 2021) and Woolworths (opened in 1969); three Metcash-supplied supermarkets — IGA Lionel Street (**IGA Lionel St**) (opened in 2006), O'Connor Fresh IGA (**O'Connor IGA**) (opened in 2008 [redacted]); and Hannan's Marketplace by FoodWorks (**Foodworks**) (opened in 2019 [redacted]); and Spudshed, a Western Australian supermarket chain. Spudshed opened in Kalgoorlie in November 2025, on a site where Coles operated

a supermarket until 2021 and a fourth Metcash-supplied IGA (Hannans IGA) operated from 2021-2025. Between 1986 and 2021, there were two Coles supermarkets at different sites in Kalgoorlie.

5 **Likely market participants in the future with and without the Proposed Acquisition:** In the future, both with and without the Proposed Supermarket, there is likely to be at least one new entrant, and new store openings by existing market participants (contrary to the ACCC's Phase 2 Determination Statement of Reasons [6.214], [6.233], [6.243], [6.251] and [8.7]).

a) [redacted]. [redacted]; [redacted], and subsequently purchased and divested by ALDI.

b) [redacted]. [redacted], [redacted]).

c) [redacted]. ALDI has previously taken steps to enter the market in Kalgoorlie at 101 Brookman St, and may reconsider doing so at that or another of the development sites.

Supermarket demand in Kalgoorlie

6 **Demand in Kalgoorlie:** There is strong and increasing demand for retail groceries in Kalgoorlie which is not met by current supermarket capacity.

a) In 2025, [redacted]. Sales at [redacted]. This is comparable with [redacted]. Over that same period, [redacted]. Prior to entry, [redacted], [redacted].

b) [redacted].

c) [redacted]; [redacted].

d) [redacted].

7 Coles' growth and capacity constraints: [redacted]. [redacted], [redacted]. [redacted]. [redacted].

Supermarket competition in Kalgoorlie

8 Coles and Woolworths: Coles' closest competitor in Kalgoorlie is Woolworths. Coles and Woolworths compete at national, State and local levels. Each [redacted]). Coles and Woolworths also [redacted]. Coles and Woolworths [redacted]. Those national and State dimensions of competition constrain Coles' and Woolworths' product ranging and pricing in Kalgoorlie (contrary to ACCC [7.50]).

9 Coles and Woolworths also compete at a local level, including in Kalgoorlie, to offer store amenity (including location, customer access, parking, store layout and cleanliness) and customer service (including staff numbers, checkout experience, and delivery and click and collect service). In Kalgoorlie, Coles and Woolworths are located in the city centre within one block of each other; each offers a new (Coles) or recently refurbished (Woolworths) large-format store and a high level of customer service, including home delivery and click and collect. Each [redacted]. Coles [redacted]. Woolworths imposes a strong and meaningful competitive constraint on Coles' store amenity and customer service offering in Kalgoorlie (contrary to ACCC [7.36] and [7.45]).

10 Spudshed: Spudshed is a significant competitor of Coles (and Woolworths), both statewide and locally in Kalgoorlie. In Kalgoorlie, Spudshed is located in the north-east suburb of Hannans.

Spudshed offers a smaller product range than Coles and Woolworths, [redacted] "[redacted]. [redacted]. [redacted], but operates 24 hours a day seven days a week [redacted]. Spudshed imposes a meaningful competitive constraint on Coles' store amenity and customer service offering in Kalgoorlie: Coles [redacted]. In response, Coles [redacted]. Woolworths [redacted]. IGA Lionel St and Foodworks each experienced [redacted]. O'Connor IGA [redacted]).

11 **Metcash-supplied independents:** The three remaining supermarkets in Kalgoorlie are Metcash-supplied independent supermarkets: O'Connor IGA, located in the southern suburb of Somerville; Foodworks, located in the suburb of Piccadilly (immediately northeast of the city centre, approximately 1.6km from Spudshed, and adjacent to the hospital); and IGA Lionel St, located in the suburb of South Kalgoorlie.

12 Coles and Woolworths [redacted]. Coles [redacted], [redacted].

13 In Kalgoorlie, O'Connor IGA is the [redacted]. Its reported revenue is approximately [redacted]. However, it [redacted]. O'Connor IGA is also [redacted]. The stated sizes of the Metcash-supplied independents' [redacted], [redacted], [redacted].

14 Each of the three Metcash-supplied supermarkets are [redacted]. There is also a [redacted]. Differentiation arises to a large degree in [redacted]. Each of the Metcash-supplied supermarkets are similarly likely to be most [redacted]. O'Connor IGA typically prices on average [redacted]. Of the Metcash-supplied independents, each of IGA Lionel St and O'Connor IGA have co-located liquor stores, and only s Foodworks offers online click and collect and delivery.

15 Consumers typically shop at O'Connor IGA — and the other Metcash-supplied independents — for convenience, or for a "top up shop", or [redacted] (contrary to ACCC [2.32]) [redacted]. O'Connor IGA's [redacted] (contrary to ACCC [7.25]). Compared with Coles and Woolworths, [redacted].

16 Coles [redacted]. Coles [redacted]. Spudshed [redacted]. O'Connor IGA [redacted]. IGA Lionel St [redacted]; [redacted]. Foodworks [redacted]. Each of the independents [redacted]

[redacted].

No significant differentiated offering or constraint imposed by O'Connor IGA

17 O'Connor IGA is not a significant differentiated offering in the relevant market (contrary to ACCC [6.252], [7.36]).

18 **Product range and quality:** O'Connor IGA's product offering is not significantly differentiated from Coles or other supermarkets supplying the relevant market.

a) ***Metcash supplies the independents***: Metcash-supplied independents source between [redacted] of their range from [redacted]. [redacted]. [redacted].

b) ***Local products not exclusive to O'Connor IGA***: O'Connor IGA offers a [redacted], which are not exclusive to O'Connor IGA and which are, or are likely to be, available to consumers from the local retailers supplying them (including from local bakeries and restaurants) and from other independent supermarkets given the incentive of local suppliers to supply their products to other independent supermarkets in Kalgoorlie (for example, Foodworks [redacted]; and (ii) [redacted]. [redacted] and [redacted]. The incentive of other independents to offer this dimension of differentiation arises from the constraint imposed on them by Coles, Woolworths and Spudshed.

c) ***Coles and Woolworths do not respond to*** [redacted]: Coles (and Woolworths) [redacted]. Neither Coles (nor Woolworths) make ranging decisions in response to the [redacted]. Coles' "[redacted] would not provide it with any more ability or incentive to match O'Connor IGA's product range (in any factual or counterfactual) (contrary to ACCC [7.48]).

d) ***Coles does respond to local demand***: Although Coles' overall product range is centrally determined, [redacted], as with all Coles' stores, is responsive to local demand [redacted]. How much, if any, space Coles allocates to a particular product from the overall range is determined by [redacted]. Woolworths similarly has regard to the [redacted].

19 **Customer service differentiation and constraints:** O'Connor IGA is not meaningfully differentiated by "higher touch" customer service, and does not offer a level of customer service that meaningfully constrains other supermarkets (contrary to ACCC [1.14], [7.43], [7.44], [8.8]).

a) ***Coles invests in customer service at its Kalgoorlie store***: [redacted]. This is in circumstances where Coles has [redacted] (as it has with other competitors in the market). Foodworks has an equivalent number of [redacted] and IGA Lionel St has [redacted].

b) ***Specialised staff***: Coles also employs a baker at its existing supermarket (and bakes fresh bread and other products on-site), and if the Proposed Acquisition proceeds, [redacted]. Woolworths also has an in-store bakery. Foodworks also supplies hot food and ready made meals on site, and [redacted]. Despite undertaking a site visit to each of the supermarkets in Kalgoorlie, the ACCC did not identify or compare whether each supermarket had an on-site butchery or bakery, or employed a butcher, baker or chef.

c) ***Inventory management and stock replenishment***: There is no basis to conclude that O'Connor IGA has a meaningfully differentiated advantage in this regard (contrary to ACCC [7.26]). [redacted]. Spudshed similarly states that it competes on [redacted].

d) ***Trading hours***: The ability to offer extended trading hours in Kalgoorlie is determined by State and local regulatory settings, which restrict the permitted trading hours for Coles and Woolworths, and permit each of the independent supermarkets to trade for extended hours. O'Connor IGA is one of four supermarkets in Kalgoorlie with extended trading hours, including one (Spudshed) that trades 24 hours a day seven days a week, and two others that operate slightly shorter trading hours than O'Connor IGA.

20 **Pricing differentiation and constraints:** O'Connor IGA is not materially differentiated by "locally responsive" pricing and any such "locally responsive" pricing does not in any event meaningfully constrain Coles' pricing or that of other supermarkets in Kalgoorlie (contrary to ACCC [1.15], [8.9]).

COMPETITION ANALYSIS

Applicable legal and economic principles

21 Under s 51ABZE(2)(c), the Tribunal must allow the Proposed Acquisition to be put into effect unless it is satisfied that the Proposed Acquisition would, in all the circumstances, have the effect, or be likely to have the effect, of SLC in a market.

22 Whether there is likely to be an SLC focuses on harm to the dynamic process of competition, which is distinct from the effects of an acquisition on any individual competitor, or an assessment of total consumer welfare. The Act pursues an object of enhancing the welfare of Australians (both consumers and producers) "through the promotion of competition". In the context of notifiable acquisitions under Part IVA of the Act, net consumer welfare is a potential counterpoint to an SLC, by reason of a public benefit application able to be made only in the circumstances specified in s 51ABZP(1), but it is not part of the inquiry into the question whether there is, or is likely to be, an SLC.

23 A greenfield expansion in a market (by contrast with a merger) is presumed to be pro-competitive and welfare-enhancing, because it expands consumer choice and intensifies rivalry. Even where expansion might result in exit by a competitor, that is (without more) the outcome of consumer choice through the outworking of the competitive process and not a competitive harm.

24 This presumption might be displaced if an investment in expansion is predatory, in the sense that the investor sacrifices profit in the short run in order to induce the exit of rivals (or the deterrence of credible entry) and can recoup those forgone profits later because the investor has such market power, by reason of barriers to entry or expansion, that it will have the ability in the future to charge more or give less by reason of lack of competitive constraint. By contrast, an acquisition that is commercially rational without assuming exit likely reflects the normal competitive process.

Application of legal and economic principles to the Proposed Acquisition

25 Here, the Proposed Acquisition is a greenfields expansion that will expand consumer choice and intensify rivalry between competitors in Kalgoorlie. If consumers choose to shop at the Proposed Supermarket, it will be because they value Coles' offering. By contrast with a merger, any exit by O'Connor IGA (as postulated by the ACCC) would not be imposed on consumers but would be the direct outcome of consumer choice: **paragraph 30 below.**

26 Further, even if it were the case that the Proposed Acquisition would lead to the exit of O'Connor IGA (as postulated by the ACCC) Coles does not have such market power, by reason of barriers to entry or expansion, that it will have the ability or incentive in the future to charge more or give less by reason of lack of competitive constraint. To the contrary, the existing competitive constraints on Coles do not change in the factual; in particular Coles (and other supermarkets) remain constrained by the threat of new entry and expansion in Kalgoorlie: **paragraphs 31 to 33 to below.**

27 There is, however, no reliable basis on which the Tribunal could conclude that O'Connor IGA is likely to exit in the factual or, alternatively, to conclude that, if the operator of the IGA exited it would be other than as a result of its [redacted] that would cause its exit in either the factual or counterfactual: **paragraphs 34 to 35 below.** If the operator were to exit for that reason, its assets would likely remain in the market in the factual and counterfactual; in any event, its exit would likely incentivise entry by a more effective rival: **paragraphs 36 to 45 below.**

28 It is not the case that the Proposed Acquisition is predatory, nor did the ACCC ultimately determine that it was: **paragraphs 46 to 53 below.**

29 The ACCC's alternative theory of harm — that an SLC occurs where a net consumer detriment arises from Coles' expansion and the exit of a competitor, without harm to the competitive process — is not legally open under the Act; nor is the predicate of net consumer detriment factually open to the Tribunal: **paragraphs 54 to 57 below.**

Greenfields investment is pro-competitive

30 **Pro-competitive effects:** The Proposed Acquisition will likely have pro-competitive effects, of benefit to all consumers in the Kalgoorlie market, both directly and indirectly, and not only in the short term (contrary to ACCC [7.2], [7.7]-[7.8], [8.5]).

a) ***Direct and long-term benefits for consumers who choose to shop there***: The Proposed Supermarket is an amenity-enhancing proposed greenfields development, the construction of which is dependent upon the inclusion of a major supermarket. The Proposed Supermarket will substantially increase home delivery and click and collect capacity in Kalgoorlie, offer large shaded carparking bays, and be the only major supermarket with a co-located liquor store — each of which are matters of substantial value to consumers in Kalgoorlie. [redacted]). The Proposed Supermarket will offer a more convenient "full basket" shop to consumers in the south-west of Kalgoorlie, particularly in the suburbs of West Kalgoorlie, Broadwood and Somerville, who must presently travel to the city centre to shop at a major supermarket. Consumers will not, by the Proposed Acquisition, be denied the opportunity to shop at O'Connor IGA but may choose to shop either at O'Connor IGA or the Proposed Supermarket (or another supermarket of their choice). The very fact that [redacted] is concerned that customers who presently shop [redacted].

b) ***Competitive response by other supermarkets***: Each of Coles and Woolworths presently have an incentive to invest in upgrading existing stores or investing in new stores to increase store amenity: that is reflected in their history of competitive store upgrades, both nationally and in Kalgoorlie, and indeed in the Proposed Acquisition. The Proposed Acquisition would increase that incentive (contrary to ACCC [7.54] - [7.55]). Existing competitors would likely respond to the Proposed Acquisition by investing in existing or new stores as well as in other dimensions of competition including customer service. Woolworths is likely to invest in refurbishing its new store [redacted]); Woolworths may alternatively [redacted]. IGA Lionel St is also currently planning to [redacted]. [redacted].

31 **Existing competitive constraints on Coles and other supermarkets do not change even if O'Connor IGA exits:** In the future with the Proposed Acquisition, Coles and other supermarkets will continue to constrain each other in materially the same ways as in the future without the Proposed Acquisition (contrary to ACCC [1.8], [1.14], [7.33], [7.36], [7.45], [7.50], [7.55], [8.8]). Coles will remain constrained by Woolworths, ALDI and other competitors at a national and State level, which in turn indirectly constrains other local competitors. Spudshed, which has imposed a meaningful constraint on Coles' customer service offering, will continue to exert the same degree of competitive pressure on Coles. Coles is not meaningfully constrained by O'Connor IGA (or the other Metcash-supplied independents) in the factual or counterfactual as explained in paragraphs 17 to 20 above. Other Metcash-supplied independents will continue to offer the dimension of differentiation that arises from the constraint imposed on them by Coles and Woolworths, and local suppliers will continue to be incentivised to supply their products to those independent supermarkets. Exit of O'Connor IGA would have no impact on the trading hours of Coles, Woolworths or Spudshed, and may equally likely incentivise the remaining independents to offer even longer trading hours.

32 **Coles and other supermarkets remain constrained by threat of new entry and expansion:** Barriers to timely and sufficient entry or expansion by supermarkets in Kalgoorlie are not high (contrary to ACCC [6.224], [8.7]).

a) ***There is no scarcity of suitable sites for the development of a supermarket***. The time and costs relied upon by ACCC as barriers largely relate to site development; acquisition of an existing leasehold or freehold building (which may but need not be a former supermarket site, contrary to ACCC [6.222]) avoids the time and cost of development and (if a former supermarket site) upfront capital costs of fitting out a new supermarket. Even if O'Connor IGA exits [redacted], its supermarket site will be available for purchase or lease by an existing or new supermarket operator in Kalgoorlie without substantial renovation, and the owner of the site will have a strong incentive to secure a supermarket tenant. Other existing supermarkets (including Spudshed and Woolworths) may relocate to new premises, leaving their existing stores available for new freehold or leasehold entry (again, without the associated costs on which the ACCC relied). Leasehold options do not present a barrier for new entry into an *unoccupied* building (contrary to ACCC [6.223]).

b) ***Since 2006, six new supermarkets, five supermarket fascias, and at least seven new supermarket operators, have entered Kalgoorlie***: The most recent new entrant, Spudshed, entered by acquiring the site previously occupied by Hannans IGA, and Coles before that. Spudshed [redacted]. ALDI has previously obtained and divested a supermarket site in Kalgoorlie (at the site of Coles' original store in the city centre), and [redacted].

c) ***Developers, new entrants, and existing competitors are considering new supermarket entry, and new or replacement stores, in the future with and without the Proposed Acquisition***: see paragraph 5 above. The likely new entrant has continued to pursue opportunities to enter the Kalgoorlie market, even after the Proposed Acquisition was announced, [redacted].

d) ***There is sufficient demand to support new entry***. Coles disagrees with the ACCC's finding (ACCC [6.173]) that there is insufficient evidence to assume higher revenue growth in the relevant market than that [redacted]):

i) [redacted]. [redacted]. [redacted]. [redacted].

ii) Demand is not limited to the local population, and population growth underestimates demand growth (contrary to ACCC [6.174], [6.229] - [6.231]). Kalgoorlie has a significant transient and FIFO workforce and short-stay visitors — neither reflected in the population growth figure — which, in a remote location like Kalgoorlie, increase supermarket demand both directly and indirectly (through hospitality and wholesale customers). [redacted]

[redacted]; [redacted]. Demand in Kalgoorlie also depends on the availability of supermarkets in surrounding regional areas: [redacted].

iii) Supermarket capacity (measured by SFA) in Kalgoorlie has increased by [redacted]. During that time, supermarket sales increased considerably, and potential new entrants consider demand sufficient to support new entry (contrary to ACCC [6.216], [6.233], [6.244] - [6.247]): see **paragraphs 5 and 6** above.

iv) The ratio of supermarket SFA to population, both with and without the Proposed Acquisition, [redacted].

33 **No substantial degree of market power:** Coles does not have substantial market power in Kalgoorlie and the Proposed Acquisition would not likely create, strengthen or entrench substantial market power (contrary to ACCC [8.7]). Existing competitive constraints on Coles (and other supermarkets) will remain unchanged with the Proposed Acquisition, including both from national and state dimensions of supermarket competition (both with respect to price, and non-price, aspects of competition), existing competitors in the market, and the threat of new entry or expansion.

Likely position of O'Connor IGA with and without the Proposed Acquisition

34 ***Insufficient evidence of future financial position of O'Connor IGA.*** The information before the Tribunal is too incomplete and uncertain to support *any* reliable conclusion as to the likely future of O'Connor IGA, with or without the acquisition

35 [redacted]. [redacted]. [redacted]. In particular:

a) [redacted].

b) [redacted].

c) [redacted].

d) [redacted].

36 ***Supermarket asset likely to remain in both factual and counterfactual***: The Tribunal should not be satisfied that the Proposed Acquisition would cause the relevant capital asset of the O'Connor IGA to exit [redacted].

37 The competitive effects of the Proposed Acquisition on the relevant capital asset should be assessed on the basis of economic costs and profits, not accounting costs and profits. In particular:

a) The financial performance of the O'Connor IGA asset should be analysed by reference to the replacement cost of the asset (being the forward-looking, long-run cost of buying a capital asset of comparable quality and use), rather than on the book or historical cost of that asset in the hands of the current operator of O'Connor IGA.

b) To forecast the future financial performance of the asset, it is therefore necessary to substitute for the operator's actual debt level an optimal debt level.

c) An optimal debt level for the owner of the asset is around 10% of the NPV of forecast free cash flow to firm (**FCFF**) (being EBIT adjusted for tax, depreciation and capital expenditure).

d) To forecast the future financial performance of the asset on an economic rather than an accounting basis, it is also necessary to make an assumption as to future capital expenditure. The best benchmark for this purpose that is available to the Tribunal is the capex incurred by Coles at its existing Kalgoorlie store, [redacted].

38 With an optimal debt structure [redacted], and benchmarked capex assumption [redacted], O'Connor IGA asset has an equity value [redacted].

39 In the future with the Proposed Supermarket, <u>with the adjustments to debt structure and capex indicated in paragraph 38 above</u>, the O'Connor IGA asset retains a positive equity value in all scenarios up to and including a [redacted]. There is no real chance of that scenario eventuating by reason of any diversion of sales from O'Connor IGA to the Proposed Supermarket.

40 *Insufficient evidence of likely diversion.* The Tribunal should not be satisfied that the revenue of O'Connor IGA would be lower by any *specific* increment, in the factual compared with the counterfactual. In particular:

a) Contrary to ACCC [6.68], Coles' investment case cannot be used for the different purpose of discerning an estimate "that the Proposed Supermarket is likely to reduce O'Connor IGA's revenue by [redacted] in its first trading year";

b) The estimates of future diversions of trade from O'Connor IGA to the Proposed Supermarket provided to the ACCC by O'Connor IGA do not provide any robust or reliable basis for forecasting revenues of O'Connor IGA in the factual compared with the counterfactual;

c) All estimates of future diversions of trade from existing supermarkets to the Proposed Supermarket, in the factual compared with the counterfactual, are static estimates of initial diversions at the point of entry of the Proposed Supermarket, and take no account of expected competitive responses or normalization of trading after entry (see above at [10] in relation to effect of entry by Spudshed on Coles).

41 *Coles business case unlikely to underestimate diversion of O'Connor IGA sales*: If, contrary to paragraph [40a)] above, the [redacted] figure taken from Coles' Source of Sales analysis is to be used to estimate O'Connor IGA's revenues (assuming ALDI were entering), in the factual compared with the counterfactual, the Tribunal should be satisfied (contrary to ACCC [6.76], [6.79] [C5]) that the [redacted] figure is *unlikely* to *under-estimate* the true position. In particular:

a) Contrary to ACCC [6.77] and [C.5], there is no basis for escalating the [redacted] figure (which is Coles' estimate of the sales that it could source from O'Connor IGA in the year of entry of the Proposed Supermarket) in step with the ramp rates (of [redacted] year 1 to 2, and [redacted] year 2 to 3) which Coles applies to its own sales forecasts to reach maturity.

i) [redacted];

ii) [redacted];

iii) Given that Coles' internal assessments do not [redacted], and in the absence of any contrary evidence, the Tribunal could not be satisfied that such an approach (as proposed by the ACCC, using Coles analyses) is appropriate or reliable.

b) Contrary to ACCC [6.74], no escalation of the [redacted] by way of apportioning the "latent" component of Coles' Source of Sales analysis across identified competitors is appropriate.

i) The presence of "latent" sales (being sales upon entry, correctly forecast by prediction from population and per capita spending data, but unable to be traced or sourced to any incumbent) is a phenomenon which Coles has observed consistently over [redacted].

ii) Historical data and experience of latent sales enables Coles [redacted].

iii) Given that Coles calculates a "latent" sales figure on the basis that it represents sales which Coles does not expect to attract away from any incumbent, [redacted], the Tribunal should not be satisfied that it is appropriate [redacted] to attribute that "latent" sales figure to diversions from incumbents.

42 *<u>Coles business case likely to overestimate diversion of O'Connor IGA sales</u>*: If, contrary to paragraph [40a)] above, the [redacted] figure taken from Coles' Source of Sales analysis is to be used to estimate O'Connor IGA's revenues, in the factual compared with the counterfactual, the Tribunal should be satisfied (further contradicting ACCC [6.76] and [6.79]) that the [redacted] figure <u>is likely to *overestimate*</u> the true position. In particular:

a) Coles' estimate of [redacted] is derived using Coles' estimate of the [redacted];

b) Using actual historical financial information of O'Connor IGA, to which Coles is not privy, FTI (the ACCC-retained experts) estimated that O'Connor IGA's annual sales at the likely commencement of the Proposed Supermarket will be [redacted];

c) The value of sales which Coles estimates it will attract away from O'Connor IGA should be expressed as a proportion of FTI's estimate of O'Connor IGA's annual sales, at the commencement of the Proposed Supermarket;

d) On that basis, the value of sales which Coles estimates that it will attract away from O'Connor IGA in Year 1 of the Proposed Supermarket is [redacted].

e) Even if the Tribunal were to accept in principle the ACCC's adjustments referred to in **paragraph 41a) and 41b) above**, applying those to a figure of [redacted] instead of [redacted] would result in an estimate of [redacted] still well short of the [redacted] to impact the viability of the assets.

43 _Competitive response by O'Connor IGA would mitigate diversions_: To the extent, if any, that the Tribunal can be satisfied on the basis of Coles' business case that the Proposed Supermarket will cause a diversion in sales from O'Connor IGA of any specific increment (whether that be [redacted], [redacted], [redacted] or even [redacted]), that is a static figure at the commencement of trading of the Proposed Supermarket, which would likely be mitigated by competitive response by O'Connor IGA.

44 Contrary to ACCC [6.79], it is therefore not "unlikely that it can be the case that the Proposed Supermarket makes economic sense for Coles and that it also makes economic sense for O'Connor IGA's assets to remain in the market". The Tribunal should be satisfied, on the information before the Tribunal, that both the Proposed Supermarket and the asset owned by the current operator of O'Connor IGA will remain in the market in the factual.

45 ***Alternatively, exit of O'Connor IGA would incentivise entry by more effective rival.*** Further, and alternatively, if O'Connor IGA were to exit in the factual but not in the counterfactual, removal of O'Connor IGA's commercial offering would (to the extent that consumers value that offering) strengthen incentives for entry by a more effective rival, offering a similar mix of quality, range and service.

Coles' investment case not predicated on exit

46 Even if the exit of O'Connor IGA is an effect or likely effect of the Proposed Acquisition, that would be the outworking of competition unless Coles' business case was predicated upon exit of O'Connor IGA or predatory or exclusionary conduct.

47 Contrary to ACCC [C.1]-[C.2], Coles prepared one business case for the Proposed Acquisition.

48 Contrary to the ACCC's preliminary view (expressed in the Phase 2 Review Notification and the Notice of Competition Concerns), Coles' business case was not predicated on exit of O'Connor IGA.

a) The ACCC's preliminary view was based upon an internal ACCC analysis of Coles' business case (**ACCC Profitability Analysis**).

b) Independent expert analysis by the Coles-retained expert Sapere establishes that the ACCC Profitability Analysis is oversimplified and erroneous (including because it failed to account for responsiveness of costs to revenues, and mistook ramp rates for growth rates) and cannot support any finding that Coles' investment case is predicated on exit of O'Connor IGA.

c) The ACCC did not brief FTI with the Sapere analysis.

d) As the ACCC appears now to accept (ACCC [C.6], C.11]), the analysis of Coles' business case contained in the ACCC Profitability Analysis provides no basis upon which the Tribunal could be satisfied that the Proposed Acquisition is predicated, premised (or, contrary to ACCC [6.54], relevantly dependent) on the exit of any competitor.

49 Coles' business case for the Proposed Acquisition was prepared in accordance with its usual methodology. This involves [redacted]. [redacted].

50 Coles' methodology is [redacted], generally and as applied to the Proposed Acquisition, in that:

a) Coles' sales and revenue forecasts are [redacted];

b) Coles' business case adopts a specific risk premium (**SRP**) and thus a weighted average cost of capital (**WACC**) [redacted];

c) Coles' business case for the Proposed Acquisition assumes a [redacted];

d) Coles' business case for the Proposed Acquisition assumed [redacted].

e) Coles' internal investment benchmarks are [redacted].

51 Using this [redacted] methodology, Coles' business case [redacted]. The forecast EBIT % was [redacted] (where forecasts of less than [redacted] are [redacted] by Coles' benchmarks), but the independent expert's assessment was (as is the case) that it is [redacted].

52 ACCC [6.80] asserts that "if the Proposed Supermarket's revenue in [redacted] were [redacted], which is [redacted] less than Coles' forecast, then Coles' incremental NPV for the Acquisition would be negative". This proposition apparently relies on Annexure C to the ACCC Reasons. The ACCC further asserts (in footnote 176, to ACCC [6.80]) that "If calculation issues in Coles' business case that the ACCC has identified in Annexure A [sic] are fixed, the Acquisition would have a negative NPV with a much smaller reduction or could have a negative NPV in any case". Coles was not provided with the worksheets by which the ACCC (at [C.10]) "addressed" the "calculation issues" it identified, and (at [C.12]) calculated Coles' incremental NPV for the Acquisition based on a [redacted] shortfall in revenue to forecast, until 12 August 2026. Coles reserves its position in response to ACCC [6.67]-[6.81] (including footnote 176) and Annexure C pending analysis of those worksheets.

53 In any event, and subject to the reservation made at [42] above, the Tribunal should not be satisfied that there is any real chance of the revenue of the Proposed Supermarket being [redacted] less than forecast. In particular:

a) The internal benchmarks which Coles sets [redacted]; in that context, it would be inappropriate for the Tribunal to apply a wider margin of error to Coles' forecasts.

b) Further, and in any event, the weight of evidence and information before the Tribunal makes clear that the forecasts arrived at by Coles' usual process (which was applied here) [redacted].

ACCC's theory of harm is not legally or factually open

54 The ACCC's quite different theory of harm based on reports of Professor Patrick Rey—that an SLC occurs where a net consumer detriment arises from Coles' expansion and the exit of a competitor, without harm to the competitive process (for example, ACCC [6.208], [6.201], [7.35] and [8.3] to [8.8])—is not legally open under the Act.

55 Professor Rey's framework (**Rey Framework**) would assess the Proposed Acquisition by comparing consumer surplus in the "expansion and exit scenario" (i.e., assuming exit of O'Connor IGA in the future with the Proposed Acquisition) with consumer surplus generated from the contributions made by O'Connor IGA to the quality, cost and exertion of competitive pressure on the existing retailers in Kalgoorlie. On stated assumptions, Professor Rey reasoned that, if there is an overall net reduction in consumer welfare with Coles' expansion as compared to without (and without the exit of O'Connor IGA), then this net reduction in overall consumer welfare constitutes "an inefficient outcome of the competitive process, or a lessening of competition among supermarkets": First Rey Report. Professor Rey did not, however, measure the impact of the Proposed Acquisition on total welfare.

56 The Tribunal would err if it adopted the Rey Framework, which does not assist the legally required analysis of effects on the process of competition, because:

a) it depends on comparison of static states of net consumer welfare before and after the acquisition rather than dynamic future states with and without the acquisition including:

i) the potential for other developments and new entry in the Kalgoorlie market (even with Coles' expansion and O'Connor IGA's exit), and the potential for new entry by purchase of O'Connor IGA's assets;

ii) the nature and degree of competitive responses to Coles' expansion from existing rivals, including the extent to which these responses would limit harm to competition assuming O'Connor IGA did exit;

iii) State and national competitive dynamics (particularly pricing constraints at a national and statewide basis by Woolworths, ALDI and other retailers); or

iv) the possibility for O'Connor IGA to relocate to another area of the city.

b) it depends on consumer welfare rather than the process of competition:

i) Mere exit of a differentiated competitor is not sufficient to constitute an SLC, without more (i.e., predation). Concluding that mere exit is sufficient would, in effect, adopt an "efficiency offence" theory of harm, which is not properly applicable to the market conditions here, where incumbents are constrained by real threats of new entry and expansion, and which in any event has been criticised in principle, for reasons including its potential to stifle investment and innovation by penalising firms for enhancing their consumer offering and requiring competition authorities and firms to predict uncertain future events (including the exit of a rival), which makes the overall competition assessment susceptible to material errors of forecasting. Rather, the correct and orthodox approach is to view the exit of less successful rivals as a normal incident of vigorous competition, reflective of consumer choice and the effective outworking of competition on the merits. The Rey Framework does not address this.

ii) The Rey Framework does not account for consumer choice, including the expansion of choice in the range, quality and pricing of groceries and quality of the overall services offered to consumers and is committed to a condescending treatment of consumer choice in which the Tribunal would have to weigh incommensurable consumer benefits and detriments which are properly left to the market to decide.

c) It does not address the "substantiality" requirement in the SLC test. By focusing on whether the Proposed Acquisition provides a net benefit to consumers, the Rey Framework provides no mechanism for the mandatory evaluation of whether the reduction in competition (on application of his framework, the reduction in consumer welfare) is real or of substance. It therefore amplifies the risk of "false positives" that underpins the orthodox assumption that greenfields expansion, without predation or exclusionary conduct, is pro-competitive.

57 Even if a consumer welfare test were appropriate, Professor Rey's reports do not assist to determine that issue:

a) Professor Rey's model is theoretical in nature, avowedly "*designed for illustrative purposes, and abstract indeed from many real-word features that would need to be taken into consideration for an empirical investigation of the particular case at hand*": Second Rey Report.

b) Professor Rey employs a Cournot framework in assessing consumer welfare, which assumes that firms compete on quantity and capacity and that products in the market are homogeneous. That is inappropriate for assessing supermarket competition which is characterised by differentiated, price-competitive rivalry. By contrast, the standard (and more suitable) framework for analysis of supermarket competition is a Bertrand differentiated products model, which assesses competition based on price and product quality. Under a Bertrand framework, whether there is competitive harm from Coles' expansion would depend on whether there was evidence of close competition between the new Coles store and O'Connor IGA, including through an analysis of diversion ratios and substitution patterns.

c) Professor Rey assumes both a symmetric level of competition between supermarkets and that O'Connor IGA is meaningfully differentiated (which are entirely inconsistent propositions). In any case, the evidence suggests that O'Connor IGA is not meaningfully differentiated considering the Kalgoorlie market as a whole.

d) The Tribunal could not in any event be satisfied of any net consumer detriment in all the circumstances identified above, including having regard to what may be lost (O'Connor IGA who is not materially differentiated, whose exit would not materially change the competitive constraints on Coles or other supermarkets in the Kalgoorlie market, and who is as likely to exit the market without, as with, the Proposed Acquisition) and what is gained (a new large format supermarket, enhancing consumer amenity and encouraging pro-competitive responses from the existing competitors). If consumers choose to shop at Coles rather than O'Connor IGA, it will be because they value Coles' offering more than O'Connor IGA's. As such, any exit by O'Connor IGA would not be imposed on consumers. Rather, it would be a direct outcome of consumer choice such that there is no material loss of consumer welfare.

Determination sought by Coles

58 Having regard to all the matters above, Coles seeks a determination that the ACCC's Determination be set aside, pursuant to s 100N(1)(a) of the Act and the Proposed Acquisition may be put into effect, pursuant to ss 51ABZE(1) and 100N(1)(b) of the Act.