

NOTICE OF LODGMENT
AUSTRALIAN COMPETITION TRIBUNAL

This document was lodged electronically in the AUSTRALIAN COMPETITION TRIBUNAL and has been accepted for lodgment pursuant to the Practice Direction dated 13 July 2026. Filing details follow and important additional information about these are set out below.

Lodgment and Details

Document Lodged:	Submissions
File Number:	ACT 1 of 2026
File Title:	APPLICATION BY COLES SUPERMARKETS AUSTRALIA PTY LTD
Registry:	VICTORIA – AUSTRALIAN COMPETITION TRIBUNAL



REGISTRAR

Dated: 4/09/2026 5:04 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.

Commonwealth of Australia
Competition and Consumer Act 2010 (Cth)

In the Australian Competition Tribunal

File No. ACT 1 of 2026

Re: Application for review of a determination made by the Australian Competition and Consumer Commission under subsection 51ABZE of the *Competition and Consumer Act 2010 (Cth)*

O'CONNOR FRESH IGA

SUBMISSIONS ON APPLICATION FOR FURTHER DIRECTION

A. Introduction

1. These submissions are in support of O'Connor Fresh IGA's application dated 4 September 2026 (**Application**) seeking a direction from the Tribunal pursuant to r 22(1)(a) of the Competition and Consumer Regulations 2010 (Cth) and s 100S(2) of the *Competition and Consumer Act 2010 (Cth)* (**CCA**) permitting it to file and serve the Affidavit of Reece Neville Grant affirmed 4 September 2026 (**Grant Affidavit**).
2. The Grant Affidavit deposes that on 20 July 2026, O'Connor Fresh IGA began offering a home delivery service to consumers in Kalgoorlie through the "Uber Eats" platform (**Delivery Service**). The Grant Affidavit also deposes to the operation and growth of the Delivery Service since that time.
3. The facts and matters deposed to in the Grant Affidavit concerning the Delivery Service were not in existence when the Determination was made on 30 June 2026. Those facts and matters bear on issues Coles and O'Connor Fresh IGA have raised before the Tribunal in their respective concise statements, and the ACCC's consideration in its Statement of Reasons (**Reasons**). Accordingly, they are relevant to the Tribunal's consideration on review.

B. The statutory test

4. Section 100S(2) provides:

100S Information gathering etc.

- (1) For the purposes of a review under this Division, the Tribunal:
 - (a) may consult, in such a manner as it sees fit, any consumer associations or consumer interest groups; and
 - (b) may have regard to any information furnished, documents produced or evidence given to the Tribunal in connection with such consultation.
- (2) For the purposes of a review under this Division in relation to an acquisition determination in respect of a notification of an acquisition, the Tribunal may allow a person to provide new information, documents or evidence if:
 - (a) the Tribunal is satisfied that the information, document or evidence was not in existence at the time the Commission made the determination; or
 - (b) the person is the notifying party of the notification, and the Tribunal is satisfied that:
 - (i) the information, documents or evidence are relevant to the grounds on which the Commission made the determination; and
 - (ii) the person was not given a reasonable opportunity to make submissions to the Commission in relation to those grounds, or the evidence or other material on which those grounds were based, before the Commission made the determination (including because the person was not informed of the grounds, evidence or other material).

- 5. Section 100S(2)(a) permits the Tribunal, on a review of an acquisition determination, to allow a person to provide new information, documents or evidence if the Tribunal is satisfied that the information, document or evidence was not in existence at the time the Commission made the determination.
- 6. Section 100S(2)(a) came into effect on 1 July 2025. The purpose of s 100S(2)(a) was explained in the Explanatory Memorandum to the *Treasury Laws Amendment (Mergers and Acquisitions Reform) Bill 2024* (at [6.29]), which introduced the provision:

6.29 The Tribunal may allow a person to provide new information, documents or evidence that the Tribunal is satisfied was not in existence at the time the Commission made the determination to which the review relates. This will allow the Tribunal to take account of a change in circumstances that has occurred since the Commission's determination. For example, if there is new entry to the relevant market after the Commission's determination is made, the Tribunal may allow a person to provide new information about the entrant so this change in circumstances can be taken into account in the Tribunal's review.

- 7. In *Applications by Telstra Corporation Limited and TPG Telecom Limited* [2023] ACompT 1, the Tribunal considered substantially the same statutory language in s 102(9) of the CCA, which at the time provided:

(9) For the purposes of the review, the Tribunal may allow a person to provide new information, documents or evidence that the Tribunal is satisfied was not in existence at the time the Commission made the determination.

- 8. The Tribunal observed of s 102(9) (at [82]):

It can be accepted that there is a degree of ambiguity in the descriptor "in existence at the time the Commission made the determination" when used to qualify the phrase "information, documents or evidence". Taken literally, the descriptor could refer to an affidavit or expert report that is only brought into existence after the ACCC made its determination, but which contains information or evidence about facts and matters that existed before the ACCC made its

determination. Read in context and in light of the statutory purpose as revealed by the extrinsic materials, however, it is clear that the descriptor is intended to confine the Tribunal's discretion so as to permit the provision of new material concerning facts and matters that did not exist at the time the ACCC made its determination.

9. The statutory test is satisfied here. The Grant Affidavit deposes to the following facts and matters, none of which existed at the time the ACCC made its Determination:
 - (a) the Delivery Service commenced on 20 July 2026, 20 days after the Determination (Grant Affidavit [5]);
 - (b) the manner in which orders are received, picked and fulfilled in store (Grant Affidavit [7]);
 - (c) data relating to the volume and value of sales through the Uber Eats platform in the six weeks after the Delivery Service commenced (Grant Affidavit [8]); and
 - (d) the intention to make deli and in-store kitchen products available through the platform by the end of the 2026 calendar year (Grant Affidavit [9]).
10. Although the Uber Agreement annexed as Confidential Annexure "RNG-1" was signed on 21 May 2026, its provisions only came into operation on 20 July 2026 with the commencement of the Delivery Service. The Uber Agreement clarifies the contractual basis on which the Delivery Service is, and has been since 20 July 2026, provided.

C. Exercise of discretion

11. The following discretionary factors weigh in favour of O'Connor Fresh IGA being permitted to file and serve the Grant Affidavit.
12. *First*, the changed circumstances to which Mr Grant deposes in the Grant Affidavit are relevant to the Tribunal's assessment of contentions raised by Coles in its concise statement. Coles contends:
 - (a) of the Metcash-supplied independents, "only Foodworks offers online click and collect and delivery" (Coles Concise Statement (**CCS**) [14]);
 - (b) "The Proposed Supermarket will substantially increase home delivery and click and collect capacity in Kalgoorlie" (CCS [30(a)]);
 - (c) "Coles and Woolworths also compete at a local level, including in Kalgoorlie, to offer store amenity...and customer service (including staff numbers, checkout experience, and delivery and click and collect service)" (CCS [9], emphasis added); and

(d) [REDACTED]
[REDACTED] (CCS [10]).

13. *Second*, the changed circumstances to which Mr Grant deposes in the Grant Affidavit are relevant to the Tribunal's assessment of matters raised by O'Connor Fresh IGA in its concise statement. For example, O'Connor Fresh IGA contends that it is an effective and materially differentiated competitor (O'Connor Fresh IGA Concise Statement (**IGA CS**) [15]-[26]). The new facts and matters evidenced in the Grant Affidavit support and supplement that contention. They also have a bearing on the adverse effect on consumers in a future with the Proposed Acquisition in which O'Connor Fresh IGA exits the Kalgoorlie market (see IGA CS [50]).
14. *Third*, the changed circumstances to which Mr Grant deposes in the Grant Affidavit are relevant to the Tribunal's consideration of the ACCC's Reasons, including the ACCC's assessment of the purported pro-competitive benefits of the Proposed Supermarket. For example, in finding that the Proposed Supermarket would offer improved amenity for Kalgoorlie consumers, the ACCC appeared to accept evidence from Coles that [REDACTED]
[REDACTED]
[REDACTED] (Reasons [7.2]-[7.5]).
15. *Fourth*, the evidence is confined and documentary. Permitting it to be filed and served at an early stage of the proceedings will have no impact on the timetable.
16. *Fifth*, there is no prejudice to Coles, which is yet to make submissions in the proceeding, or to the ACCC, which is yet to file its concise statement or make submissions.
17. *Sixth*, admission of the evidence will ensure that the Tribunal assesses the issues before it on an accurate factual foundation.

D. Direction sought

18. The Tribunal ought to be satisfied that the statutory test in s 100S(2)(a) has been satisfied and that it ought to exercise its discretion in favour of permitting O'Connor Fresh IGA to file and serve the Grant Affidavit by making the direction sought in the Application.

4 September 2026

Michael Hodge KC

Shipra Chordia

Counsel for O'Connor Fresh IGA