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Lodgment and Details

Document Lodged:	Concise Statement of Contentions
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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

Coles Supermarkets Australia Pty Limited Application for Review of Australian Competition and Consumer Commission Merger Authorisation Determination (MN-01068)

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 Commissioner under subsection 51ABZE(1) of the *Competition and Consumer Act 2010*
Applicants:	Coles Supermarkets Australia Pty Limited

ACCC'S CONCISE STATEMENT OF CONTENTIONS[1]

This document contains confidential information which is indicated as follows:

[redacted]

[1] In this document, capitalised terms have the meaning identified in the Concise Statement filed by the Applicant on 14 August 2026 (**Coles' CS**), unless noted otherwise.

PART I INTRODUCTION

SUBSTANTIAL LESSENING OF COMPETITION

1. The Tribunal is presented with two starkly different approaches to determine whether Coles' acquisition of a lease for a new supermarket in Kalgoorlie is likely to have the effect of substantially lessening competition (**SLC**) in the retail supply of groceries by supermarkets in the Kalgoorlie-Boulder area.

2. Coles contends for a narrow approach to the evaluation of SLC within the meaning of s 51ABZE of the *Competition and Consumer Act 2010* (Cth) (**Act**), contending that if an acquisition is a greenfield expansion, it is presumed to be pro-competitive unless the acquisition is "predatory" in the sense that the investor sacrifices profit in the short run and has sufficient market power that it can recoup foregone profits later. Coles distinguishes between such a "predatory" investment and an acquisition that is commercially rational without assuming exit, and contends that the latter "likely reflects the normal competitive process".[2]

3. The ACCC adopted a broader approach to the statutory test in s 51ABZE of the Act, finding that it was satisfied that the Proposed Acquisition was likely to have the effect of SLC in circumstances where it would likely lead to the exit of an effective independent rival, increasing concentration and market power, and leaving consumers worse off.[3]

4. The ACCC's SLC analysis was broadly as follows. The ACCC considered the nature of competition in grocery retailing in Kalgoorlie, including the structure of the market (e.g. concentration, customers, barriers to entry, product differentiation), the conduct of firms in the market (e.g. investment in stores, promotional and pricing policies, customer service) and the market's performance (price, product quality, profits, efficiencies).[4] In doing so, it considered the competitive constraint imposed and faced by the supermarkets in Kalgoorlie, including O'Connor Fresh IGA.[5] The ACCC considered how, if implemented, the Proposed Acquisition would alter the market structure (e.g. increased concentration, increased market power),[6] conduct of the remaining supermarkets and performance of the market.[7]

5. The ACCC concluded that if the Proposed Acquisition, and therefore Coles' proposed new supermarket, went ahead, it was likely that the O'Connor Fresh IGA supermarket would cease to operate and not be replaced by another firm in the market, with the result that concentration would increase, a competitive constraint on Coles and other supermarkets would be lost, and Coles would increase its market power.[8] It further

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2 Coles' CS at [24]; see also [28], [46], [56(b)(i)] and [56(c)].

3 ACCC's Phase 2 Determination Statement of Reasons (**SOR**) at [1.8] and [8.1]-[8.11].

4 SOR at [6.6]-[6.252] and [7.1]-[7.55].

5 SOR at [6.36]-[6.46], [7.13]-[7.18] and [7.23]-[7.55].

6 SOR at [7.19]-[7.22] and [8.7].

7 SOR at [7.35]-[7.55].

8 SOR at [8.6]-[8.8].

concluded that consumers would be harmed over time by the likely reduction in competitive rivalry and the likely loss of a differentiated local offering.[9]

6. The two approaches presented to the Tribunal invite attention to fundamental principles underpinning Australian competition law, in this the first case under the new merger review regime, as further addressed in paragraphs 9 to 22 below.

FACTUAL MATTERS

7. In reaching the conclusion that it was satisfied that the Proposed Acquisition would be likely to have the effect of SLC in the relevant market, the ACCC made material findings of fact concerning the matters in the preceding paragraphs. Those findings are set out in Part III of this document and are largely contested by Coles in its concise statement.

8. Part IV of this document identifies information furnished, documents produced or evidence given to the ACCC in connection with the making of its determination which are not referred to in the SOR but which the ACCC considers may assist the Tribunal in considering the material findings of fact, economics or law that are in dispute.

PART II THE SLC TEST

Issue raised by Coles' CS

9. Coles raises a key legal issue: how the SLC test is to be applied when an acquisition by way of greenfield expansion is likely to cause the exit of a competitively effective rival, and offsetting new entry is unlikely. Coles proposes that, absent predation, any such exit and its competitive consequences should be treated simply as the outworking of a competitive process unharmed by the Proposed Acquisition. The ACCC found a likely SLC, informed but not dictated by consideration of the interests of consumers and without needing to find predation.

The statutory context

10. The Act is to be interpreted having regard to economic principles. The economic principles relevant to the interpretation and application of the SLC test are well-established. Chief among them are that "competition" is a very rich concept, that evaluation of competition is not reducible to formulae, and that the existence of market power (regardless of whether it is used) is the antithesis of competition.[10] This is critical context in which Coles' contentions fall to be considered.

11. Further, the Act specifies how those principles are to be applied to an acquisition. Whether an acquisition is likely to have the effect of SLC is to be considered "in all the circumstances" (s 51ABZE(2)(c)). Regard must be had to the Act's object of enhancing the welfare of Australians through the promotion of competition (s 51ABZE(3)(a) and s 2). Regard must also be had to all relevant matters, including the interests of

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9 SOR at [6.208] and [8.9].

10 *Re Queensland Co-operative Milling Association Ltd* (1976) 25 FLR 169 (***QCMA***) at 187-189.

consumers (s 51ABZE(3)(b)). Finally, an acquisition may be likely to have the effect of SLC if it would be likely to have the effect of creating, strengthening or entrenching a substantial degree of market power (s 51ABZH(4)).

The ACCC's approach

12. The ACCC considered the likely effect of the Proposed Acquisition having regard to the rich and multi-faceted nature of the competitive process, and the many factors that bear on it (see paragraphs 4 and 5 above). It is well accepted as a matter of economics that the matters that may bear on an analysis of the competitive process can be conveniently described by reference to the concepts of structure (factors that determine the competitiveness of the market), conduct (the behaviour of firms in a market) and performance (the success of an industry in producing benefits for consumers or, put another way, the efficiency of the outcomes produced by a market). The Tribunal has itself recognised the relevance of a market's structure, conduct and performance to the concept of competition under the Act.[11] Viewed in this context, the ACCC's analysis was principled and conventional.

13. The ACCC did not adopt any "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".[12] Clearly, any theory of harm that postulated that an SLC could occur "without harm to the competitive process" would be anathema to the established principles governing application of the SLC test. Rather, its analysis involved consideration of the nature of the competitive process, and the impact on that process of the increased concentration, decreased competitive constraint and increased market power occasioned by O'Connor Fresh IGA's exit (see paragraphs 4 and 5 above).

14. Nor was the ACCC's analysis "based on" the reports of Professor Patrick Rey,[13] or any "framework" therein.[14] Professor Rey's reports describe principles which, as a matter of economics, are relevant to considering whether the competitive consequences of a rival's exit (without offsetting new entry) following an acquisition entailing a greenfield expansion constitute an effect of SLC brought about by that acquisition, or simply the outworking of a competitive process unharmed by the acquisition.[15] He also set out a formal, stylised analysis to illustrate how those principles might be applied.[16] Professor Rey did not propose, or purport to propose, any "framework" for use by the ACCC (or, here, the Tribunal) in the application of s 51ABZE(2)(c).[17] Professor Rey confined his consideration of likely effect to the likely effect on net consumer welfare,[18] but that does

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11 *Application by Chime Communications Pty Ltd (No 2)* [2009] A CompT 2; 257 ALR 765 at [48] (Finkelstein J, R Davey and Professor D Round).

12 Cf Coles' CS at [29] and [54].

13 Cf Coles' CS at [54].

14 Cf Coles' CS at [55].

15 Report of Professor Patrick Rey dated 14 May 2026, 01068.022.006.0198 (**First Rey Report**), .0198 to .0200; Report of Professor Patrick Rey dated 25 June 2026, .01068.022.017.0074 (**Second Rey Report**), for example at .0074, .0077, .0078, .0079.

16 First Rey Report at .0201 - .0205, and the accompanying Technical Appendix.

17 Cf Coles' CS at [55].

18 First Rey Report at .0202, and the accompanying Technical Appendix.

not mean that the ACCC did so. Professor Rey was not asked to, and did not, apply the principles described in his report to the particular circumstances of Kalgoorlie supermarket retailing, nor did he express a view on whether the Proposed Acquisition would, in all the circumstances, be likely to have an SLC effect.[19]

15. In considering the application of the SLC test to the Proposed Acquisition, the ACCC had regard to the principles Professor Rey described, including as to the relevance of consumer welfare to considering whether the consequences of a rival's exit might constitute an SLC effect of the acquisition, rather than an outworking of a competitive process unharmed by that acquisition,[20] and as to the possibility that consumer behaviour in the short term might still be consistent with longer term lessening of competition.[21] While the ACCC had regard to the interests of consumers, it did not, as Professor Rey had done, confine its consideration to the effects of the acquisition on net consumer welfare (see paragraphs 4 and 5 above).

16. Given the matters addressed in paragraphs 12 to 15 above, and that no Participant suggests the Tribunal should adopt Professor Rey's particular Cournot modelling framework when applying the SLC test in the present proceeding, many of Coles' criticisms of Professor Rey are either peripheral to the issues before the Tribunal, or else fall away completely.[22] They do not prevent Professor Rey's reports from assisting the Tribunal's evaluation of whether there is likely to be an SLC in this case, either in general or in the particular way entailed by the ACCC's approach (see paragraph 15 above).

17. Importantly, it is not the case that concepts of consumer welfare and the competitive process are discrete and oppositional, or that Professor Rey approached them in that way.[23] The Act proceeds on the assumption that the interests of consumers are relevant to the application of the SLC test (s 51ABZE(3)(b)), consistent with the structure-conduct-performance framework from the field of economics, which considers consumer welfare as a key aspect of a market's performance (see paragraph 12 above). Likewise, Professor Rey considered consumers and consumer welfare relevant to considering the performance of the competitive process.[24] It is not the case that Professor Rey's analysis, or the ACCC's approach, depended "on consumer welfare ***rather than*** the process of competition"[25] (emphasis added), or concluded that

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19 First Rey Report at .0198 (as to Professor Rey's instructions) and, for example, at .0204 - .0205; Second Rey Report at .0074, .0077.

20 SOR at [6.196]-[6.201] and [7.35].

21 SOR at [6.190].

22 Coles' CS at [56] and [57(a)]-[57(c)]. For example, given Professor Rey's instructions were to address matters of economic principle, and not to opine on the application of the statutory SLC test in this case, Coles' criticisms of Professor Rey for not undertaking the forward looking analysis required by that test (Coles' CS, [56(a)]), and for not addressing the statutory concept of substantiality (Coles' CS, [56(c)]), are immaterial.

23 Cf Coles' CS at [56(b)].

24 For example, First Rey Report at .0200.

25 Cf Coles' CS at [56(b)].

"mere exit" is sufficient to establish an SLC effect.[26] Likewise, it is simply not the case that Professor Rey "does not account for consumer choice".[27]

Coles' approach

18. Coles' narrow approach based on predation should not be accepted, for the following reasons.

19. First, it would impermissibly limit the broad evaluative inquiry required by the SLC test, and risk excluding matters material to a rigorous evaluation of the competition effects of an acquisition. For example, so far as it would preclude *any* consideration of an acquisition's net impact on consumer welfare,[28] Coles' approach is irreconcilable with, at least, the object of the Act (s 51ABZE((3)(a)) and s 2), and the statutory requirement to consider the interests of consumers (s 51ABZE(3)(b)).

20. Second, it is inconsistent with principle and authority, particularly in relation to the application of the SLC test in the merger assessment context. As to principle, the focus of the merger regime must be on preserving the conditions for competition that exist in a market,[29] so there will be an SLC if, as a result of a merger (horizontal or vertical), a firm gains sufficient market power in that market, whether or not it exercises that power. As to authority, in *QCMA* the Tribunal accepted that to prevent a merger it is not necessary to show that a firm with market power would, or would likely, use that power (at 188): it is the *existence* of market power that is antithetical to competition, and it is no answer that a particular firm chooses, for the time being, not to *exercise* that power in a particular way. However, Coles' proposed approach would focus the application of the SLC test on whether the acquirer sacrifices profit in the short term and can, on account of its market power, recoup foregone profits following a rival's exit.[30] Coles' answer as to why the Proposed Acquisition is not predatory in that sense depends heavily on its stance that Coles does not have market power in Kalgoorlie, including on account of its choice to set prices on a national or State basis, rather than locally in Kalgoorlie.[31] That choice is best characterised as a decision not to *use* market power in its pricing in Kalgoorlie rather than denying or negativing the *existence* of any such local market power. .

21. Third, it would result in application of a different approach to the SLC test for greenfield acquisitions compared to other acquisitions. There is no support for that approach in the Act or the cases decided under it. Rather, the Act requires that all "acquisitions" requiring notification be evaluated by reference to a single, common standard: the SLC test (s 51ABZE(2)(c))..

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26 Cf Coles' CS at [56(b)(i)].

27 For example, First Rey Report at .0204, .0205.

28 Coles' CS at [22].

29 Jill Walker, "An Economic Perspective on Part IV" in Michael Gvozdenovic and Stephen Puttick, *Current Issues in Competition Law: Volume 1 – Context and Interpretation* (Federation Press, 2021) at 101-102.

30 Coles' CS at [24].

31 See eg Coles' CS at [8], [31] and [33].

22. Fourth, confining the evaluation to an analysis of whether a greenfield expansion is predatory would give prominence to an acquirer's subjective intentions or expectations to an extent that is unwarranted and inconsistent with the statutory requirement that acquisitions be evaluated, only, by reference to their effect and likely effect (s 51ABZE(2)(c)).

PART III MATERIAL FINDINGS OF FACT MADE BY THE ACCC

23. This Part outlines the material findings of fact made by the ACCC which, in light of Coles' CS, are relevant to the Tribunal's review of the ACCC's determination. The ACCC made the following findings in concluding that it was satisfied that the Proposed Acquisition would be likely to have the effect of SLC in accordance with the principles discussed above. A summary of the bases for that conclusion is set out in paragraphs 4 and 5 above.

RELEVANT MARKET, MARKET PARTICIPANTS AND MARKET CONDITIONS

The nature of supermarket competition in Kalgoorlie

24. The ACCC found that the relevant market is the market for the supply of retail groceries by supermarkets in the city of Kalgoorlie-Boulder.[32] There are currently six participants in that market: Coles, Woolworths Group Ltd (**Woolworths**), Spudshed, O'Connor Fresh IGA, Hannans Marketplace by FoodWorks (**FoodWorks**) and IGA Lionel St.[33] Each of Coles and O'Connor Fresh IGA (collectively, the **Participants**) largely agree on those matters, with Coles contending that the geographic market may be broader.

25. The Participants and the ACCC also broadly agree that competition in the relevant market is driven by demand for groceries, which are supplied by supermarket operators.[34] Operating a supermarket involves substantial fixed costs such as lease commitments and fit-out costs with supermarket operators providing an overall value proposition based on matters including the following dimensions to attract consumers to their supermarkets instead of rival supermarkets: [35]

    25.1. *location*: supermarket operators will seek to locate a proposed supermarket development in a place that is attractive to customers who value proximity to where they shop. It is beneficial for proposed supermarket developments to have a mixture of co-located tenants such as Chemist Warehouse as that gives consumers reasons to visit and shop at the location;[36]

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32 SOR at [5.6].

33 SOR at [2.31].

34 SOR at [6.6].

35 SOR at [6.6] and [6.9].

36 SOR at [6.8].

25.2. *design and fit-out:* supermarket operators choose buildings and design fit-outs for their supermarkets including shelving, fridges, and automated and manned checkouts which they believe are attractive to consumers;[37]

25.3. *price and product range:* supermarket operators choose product ranges and prices at which to sell those products which are dynamic and important levers for supermarket operators to attract consumers to shop at their supermarket. Product range decisions may include providing on-site butchered meat or fresh meals; and

25.4. *customer service levels:* supermarket operators compete on the basis of their customer service offering which is an important factor in attracting customers. This involves hiring staff or contractors for a range of jobs including operating checkouts, stocking shelves and assisting customers as well as ensuring cleanliness of the supermarket.[38]

26. The ACCC found that competition in the relevant market is influenced by the offerings of the local supermarket participants, competition at the national level and the degree of concentration both at the local and national levels.[39] Grocery retailing across Australia at a national level is concentrated with the estimated market shares based on the revenue of each of Coles and Woolworths being 29% and 38% respectively.[40] The combined median share of stores and Gross Lettable Area (**GLA**) of greater than 1,000 sqm in areas representing 10 minute drive times round each Coles store nationally is 81%.[41]

27. Coles and Woolworths are both national, chain supermarkets that procure groceries directly from suppliers, manage their own distribution and logistics networks and operate retail stores under their own banners. They are full-line supermarkets in that they supply a large range of groceries including fresh produce, meat, dairy, bakery, frozen and general merchandise items and provide a 'one-stop shop' experience for customers.[42] They both operate relatively new supermarkets in Kalgoorlie which stock between approximately [redacted] and [redacted] stock keeping units (**SKUs**).[43]

28. O'Connor Fresh IGA is an independent supermarket which is supplied groceries by the wholesale distributor Metcash Limited (**Metcash**). Metcash is predominantly a grocery wholesaler to independent supermarkets operating at a national level but also owns and operates some supermarkets.[44] O'Connor Fresh IGA is the geographically closest supermarket to the location of the Proposed Supermarket.[45] The ACCC found that

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37 SOR at [6.8].

38 SOR at [6.8].

39 SOR at [2.19].

40 SOR at [2.19]-[2.21] and Table 1.

41 SOR at [2.22]-[2.25] and Table 2.

42 SOR at [2.32].

43 SOR at [6.13] and Table 3

44 SOR at [2.14].

45 SOR at [6.63].

O'Connor Fresh IGA is an independent full-line supermarket, in the sense described in the preceding paragraph, as it offers a significant range of groceries for customers, stocking approximately [redacted], though it has a smaller floor space than Coles and Woolworths.[46] Coles instead characterises O'Connor Fresh IGA as typically attracting consumers seeking a convenience or 'top-up' shop.[47]

29. Spudshed is an independent supermarket operator which has a network of 19 supermarkets and is vertically integrated with farms throughout Western Australia. It opened its Kalgoorlie store in November 2025 in an established shopping centre location, with other small retailers, including a chemist. That site was previously occupied by FoodWorks and Coles respectively.[48] Spudshed focusses on fresh foods and bulk-purchases and is generally perceived to be a discounter. The ACCC found that Spudshed in Kalgoorlie is a full-line supermarket, though its range of approximately [redacted].[49]

30. IGA Lionel St is an independent supermarket with a sale floor area of approximately 500-1,000 sqm.[50] Foodworks is an independent small-format supermarket with a sale floor area of approximately 5,000-1,000 sqm.[51] The ACCC found that IGA Lionel St and Foodworks are not full-line supermarkets and are more aligned with a convenience or top-up shop offering for consumers.[52]

31. The ACCC found that Coles and Woolworths are one another's closest competitors in Kalgoorlie.[53] Both set prices on a national or state-wide basis, subject to limited exceptions.[54] Coles and Woolworths [redacted] ALDI Stores (A Limited Partnership) (**ALDI**), a vertically integrated and low-cost supermarket operator that offers groceries at a relatively low price, [redacted][5] Coles aims for its prices [redacted][56]

32. Coles and Woolworths [redacted] Woolworths and Coles each compete on the quality of their stores and customer service and [redacted].[58]

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[46] SOR at [6.35]-[6.36].

[47] Coles' CS at [15].

[48] SOR at [6.40].

[49] SOR at [6.41] and Table 3.

[50] SOR at Table 3.

[51] SOR at Table 3.

[52] SOR at [2.33], [6.49] and Table 3.

[53] SOR at [6.12].

[54] SOR at [6.16] and [6.29].

[55] SOR at [2.12], [6.17] and [6.31].

[56] SOR at [6.32].

[57] SOR at [6.25] and [6.27].

[58] SOR at [6.20]-[6.21] and [6.24].

33. The ACCC found that O'Connor Fresh IGA and Spudshed provide a material competitive constraint on Coles and Woolworths in Kalgoorlie.[59] The ACCC's findings about the competitive constraint and offering provided by O'Connor Fresh IGA are set out in more detail below.

34. The ACCC found that Spudshed, as an independent supermarket operator, is able to retain control over pricing and ranging decisions and retain control of supply to its stores.[60] It sets prices [redacted] Spudshed competes [redacted][62] Spudshed's opening [redacted].[63]

35. Further, Spudshed materially competes on other non-price factors, [redacted] and hours of operation,[64] and in doing so provides a differentiated offering that is valued by customers in Kalgoorlie.[65]

36. The ACCC found that while Foodworks and IGA Lionel St provide a form of competitive constraint in Kalgoorlie, because of their smaller ranges and more convenience-based offering, they only constitute second-order constraints on the full-line supermarkets.[66]

37. The ACCC found that specialist retailers, such as Chemist Warehouse and Bunnings Warehouse, are not strong constraints on supermarkets having regard to matters including their narrow product ranges.[67] This finding is disputed by Coles.[68]

O'Connor Fresh IGA provides a differentiated offering

38. The ACCC concluded that O'Connor Fresh IGA provides an offering valued by consumers which is differentiated both from the supermarket chains in Kalgoorlie and from the other independent full-line supermarket, Spudshed.[69] This finding is disputed by Coles.[70]

39. O'Connor Fresh IGA is proximate and convenient to consumers, including because it is located near schools, a recreation centre and the Kalgoorlie airport.[71] It was refurbished in 2023 and is co-located with a Chemist Warehouse, a liquor store and a car wash. Its product range, quality and customer service attract a [redacted]

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59 SOR at [6.35].

60 SOR at [2.13] and [6.40].

61 SOR at [6.41].

62 SOR at [6.42].

63 SOR at [6.44].

64 SOR at [2.35]-[2.36] and [6.35].

65 SOR at [6.35].

66 SOR at [2.33] and [6.49].

67 SOR at [5.13].

68 Coles' CS at [3].

69 SOR at [6.12].

70 Coles' CS at [17]-[20].

71 SOR at [6.36].

[redacted] indicating that it competes effectively with Coles and Woolworths.[72] The ACCC found that it is a source of substantial competitive tension in Kalgoorlie.[73]

40. O'Connor Fresh IGA focusses on higher-value local products and a high standard of customer service.[74] [redacted][75] It also has materially longer trading hours than Coles, as it is not subject to restricted trading hours that apply to Coles and Woolworths under Western Australian legislation.[76]

41. O'Connor Fresh IGA is more flexible in its price and product range decisions than Coles and Woolworths, and tailors its offering to more closely meet local demand in Kalgoorlie.[77] For example, [redacted][78] [redacted][79] [redacted][80] [redacted].[81]

There is not excess supermarket demand in Kalgoorlie

42. The ACCC found that there is not excess demand for retail supply of groceries from supermarkets in Kalgoorlie that is not being met by current supermarket capacity, and that the Kalgoorlie market is already well-serviced by supermarket capacity.[82] Coles disputes this finding.[83] In making its finding, the ACCC had regard to the current and forecast population of Kalgoorlie, and projected sales modelling from Coles.

Population and sales growth is likely to remain low

43. The ACCC concluded that future supermarket sales growth in Kalgoorlie is likely to remain low.[84] The ACCC based its findings on Coles' business case for the new proposed Kalgoorlie store (**Business Case**), [redacted].[85] The ACCC accepted that population growth in

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72 SOR at [6.12], [6.14], [6.35], [6.39], [6.252], [7.35], [7.49] and [8.9].

73 SOR at [7.33] and [7.36].

74 SOR at [6.13].

75 SOR at [7.26].

76 SOR at [7.26].

77 SOR at [6.14] and [7.23].

78 SOR at [6.37].

79 SOR at [6.37], [6.38] and [7.28].

80 SOR at [7.28]-[7.29].

81 SOR at [7.24].

82 SOR at [6.216].

83 Coles' CS at [6]-[7].

84 SOR at [6.169].

85 [redacted].

Kalgoorlie will remain modest at [redacted]
The Business Case also demonstrates that [redacted]

44. These findings are disputed by Coles, which contends that there is strong and increasing demand for retail supply of groceries in Kalgoorlie[86], and disagrees with the ACCC's finding that there is insufficient evidence to assume higher revenue growth in the relevant market than that Coles modelled in its own Business Case.[87]

45. Fly-in-fly-out (**FIFO**) workers, and other visitors to Kalgoorlie do not and will not in the future, create additional demand for supermarket sales to such a degree that different assumptions from those outlined in the Business Case should be made about sales growth. [redacted][88]

FUTURE MARKET CONDITIONS WITH AND WITHOUT THE PROPOSED ACQUISITION

46. The ACCC considered that, in the future without the Proposed Acquisition, the counterfactual will be the status quo and supermarkets in Kalgoorlie will continue to be constrained by competition including that provided by O'Connor Fresh IGA.[89] The ACCC further gave some consideration to information provided [redacted] While the ACCC ultimately did not conclude that [redacted], entry by a further independent could be more likely in the future without the Proposed Acquisition.[90]

Likely exit in the future with the Proposed Acquisition

47. In determining that O'Connor Fresh IGA is likely to exit in the future with the Proposed Acquisition, the ACCC considered various impact scenarios following the opening of the Proposed Supermarket. The ACCC had regard to an independent sensitivity analysis conducted by FTI, which modelled the impact on O'Connor Fresh IGA based on a range of revenue impact scenarios from 10% to 30%. The ACCC gave significant weight to evidence from Coles, [redacted][91] Coles disputes that its Business Case provides an appropriate benchmark for modelling the impact on O'Connor Fresh IGA.[92] However, the ACCC had regard to other evidence and did not only rely on [redacted]. Rather, it considered a range of possible outcomes and further considered that there was a real prospect that [redacted] may underestimate the

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86 Coles' CS at [6].

87 Coles' CS at [32(d)].

88 [redacted]. See SOR at [5.14].

89 SOR at [6.184].

90 SOR at [6.243].

91 SOR at [6.64].

92 Coles' CS at [40].

impact on O'Connor Fresh IGA.[93] These findings and the following findings are broadly disputed by Coles.[94]

48. The table below illustrates the estimated sales revenue, earnings before interest and tax (**EBIT**), earnings before interest, tax, depreciation and amortisation (**EBITDA**) and free cash flow of O'Connor Fresh IGA for [redacted] in circumstances where there is no reduction in revenue and an [redacted] reduction in revenue respectively, which were each considered by FTI, among many other scenarios. The latter scenario assumes employee and store cost items can be reduced by O'Connor Fresh IGA to offset that revenue reduction – specifically, it assumes that [redacted] of employee expenses and [redacted] of store expenses are variable in circumstances where certain variations to those figures were identified by Coles' experts but which the ACCC did not consider were likely to materially affect the results of the FTI analysis:[95]

O'Connor Fresh IGA Sales Revenue with 0 and [redacted] scenario impacts ($AUD '000s)							
% revenue impact	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
0%	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
O'Connor Fresh IGA EBITDA with 0 and [redacted] scenario impacts ($AUD '000s)							
0%	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
O'Connor Fresh IGA EBIT with 0 and [redacted] scenario impacts ($AUD '000s)							
0%	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
O'Connor Fresh IGA Free Cash Flow with 0 and [redacted] scenario impacts ($AUD '000s)							
0%	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]

49. The ACCC concluded there is a real and material risk that, in the future with the Proposed Acquisition, O'Connor Fresh IGA and its assets will exit the relevant market.[96] While the ACCC acknowledged that there is uncertainty as to the precise revenue impact on O'Connor Fresh IGA in the future with the Proposed Acquisition, the ACCC considered that there was a real prospect that O'Connor Fresh IGA would lose a substantial amount of sales to the Proposed Supermarket, which would result in O'Connor Fresh IGA being financially unviable under its current ownership.[97]

93 SOR at [6.64]-[6.66], [6.69] and [6.76].

94 Coles' CS at [34]-[45].

95 SOR at [6.100]-[6.105] and FTI at 11-12 and 52-53.

96 SOR at [6.59].

97 SOR at [6.66].

50. Further, the ACCC concluded that where the impact on O'Connor Fresh IGA's revenue is a reduction of [redacted], there is a material risk that its assets could not be sold as a going concern.[98] Based on the analysis prepared by FTI, the ACCC found that:

50.1. Following the opening of the Proposed Supermarket, O'Connor Fresh IGA is likely to incur a substantial loss of sales to the Proposed Supermarket. Those losses are likely to be immediate and may increase over time,[99] such that there is a material prospect that O'Connor Fresh IGA's current operations will not be viable.[100]

50.2. O'Connor Fresh IGA can be expected to respond to that loss of sales by seeking to reduce its variable costs, but these reductions [redacted][101]

50.3. While O'Connor Fresh IGA [redacted][102]

50.4. It is then likely that a process of receivership would be triggered, where options would include the sale of the business, either outside of insolvency or in a liquidation scenario, or sale of the business assets.[103] The business case for any new independent operator to acquire the business does not appear to be commercially viable assuming a reduction in sales revenue of [redacted] or more, meaning that [redacted][104]

51. The ACCC's findings were made taking into account the enterprise value of O'Connor Fresh IGA's assets, which allows for a potential purchaser of those assets to have any debt structure.[105]

Pro-competitive effects in the future with the Proposed Acquisition, including the competitive response to the Proposed Acquisition

52. The ACCC found that the Proposed Acquisition is likely to have some pro-competitive effects but those would be short-term in duration.[106] It may also enable Coles to reduce

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98 SOR at [6.160].

99 SOR at [6.53].

100 SOR at [6.55].

101 SOR at [6.94] and [6.99].

102 SOR at [6.138].

103 SOR at [6.150].

104 SOR at [6.152] and [6.160].

105 SOR at [6.141], [6.153]-[6.154] and [6.157]-[6.159].

106 SOR at [8.4]-[8.5].

the cost of providing an improved home delivery service.[107] Further, there will be some competitive response from incumbent supermarkets on price.[108]

53. The Proposed Supermarket will bring benefits to some consumers in the form of improved amenity from improved carparks and a location which will see incremental time and travel costs savings for some consumers.[109] Those benefits are confined to those consumers who would prefer the Proposed Supermarket to supermarkets at which they currently shop.[110]

New entry is unlikely in the future with the Proposed Acquisition and following the exit of O'Connor Fresh IGA

54. The ACCC concluded that there is little prospect of new entry in the market for retail supply of groceries by supermarkets in Kalgoorlie, and that existing competitors of Coles are not likely to develop new stores in Kalgoorlie.[111] New entry would therefore not be a credible constraint on Coles in the future with the Proposed Acquisition. Those findings are disputed by Coles.[112]

55. The ACCC's conclusion was based on its assessment that barriers to entry are substantial, its analysis that new entry is unlikely to be profitable and specific considerations relevant to particular operators.

Barriers to entry are substantial

56. While the ACCC identified that there are multiple potentially suitable sites available in Kalgoorlie and such sites are not scarce,[113] the ACCC found that the time and cost associated with establishing a new supermarket are substantial and therefore represent a substantial barrier to timely and sufficient new entry that would act as a competitive constraint in the future with the Proposed Acquisition.[114]

No credible threat of entry or expansion in the future with the Proposed Acquisition

57. The ACCC concluded that it is unlikely that new entry in the retail market for supermarket groceries in Kalgoorlie would be profitable. The incentive to enter the Kalgoorlie market would likely be reduced given current supermarket capacity, low anticipated population growth and the exit of an existing independent, all of which suggests that new entry would not be profitable.[115]

58. Further, the ACCC considered whether specific operators would be likely to enter the market or expand their existing offering. The ACCC considered that:

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107 SOR at [7.12].

108 SOR at [8.2].

109 SOR at [7.6]-[7.7].

110 SOR at [7.8] and [8.5].

111 SOR at [6.214] and [6.251].

112 Coles' CS at [53]-[54].

113 SOR at [6.218]. See also Coles' CS at [32(a)].

114 SOR at [6.218].

115 SOR at [6.233].

58.1. Woolworths is unlikely to open a second store in Kalgoorlie;[116]

58.2. [redacted];[117]

58.3. [redacted]; and[118]

58.4. ALDI is unlikely to reconsider entering Kalgoorlie, either in the same development as the Proposed Acquisition or at another site in Kalgoorlie.[119]

59. Coles contends at [5(c)] of Coles' CS that each of [redacted][120] The ACCC is not aware of the factual basis for this contention.

Competitive constraints on Coles in the future with the Proposed Acquisition

60. In circumstances where the ACCC concluded that O'Connor Fresh IGA is likely to exit and that there is no credible threat of new entry in the future with the Proposed Acquisition, the ACCC considered that Coles and Woolworths would continue to be each other's closest competitors, but with the removal of a material competitive constraint that currently exists and would otherwise continue to exist in the future without the Proposed Acquisition. Coles, among other things, disputes that a material competitive constraint would be removed in the future with the Proposed Acquisition.[121]

61. The result of the Proposed Acquisition would therefore be to increase concentration with the removal of an important competitive constraint,[122] such that there would be less incentive for the remaining supermarkets to compete on non-price factors, including investment in customer service, tailored or differentiated product ranges and quality, and store investment.[123] It is estimated that Coles' market share in Kalgoorlie would increase from [redacted] in FY24-25 based on revenue to [redacted] with the Proposed Acquisition and [redacted] if O'Connor Fresh IGA were to exit the market.[124]

62. As to price factors, there would be less incentive for [redacted][125] While Coles' pricing is not responsive to local market conditions in Kalgoorlie, the ACCC identified that Coles' state-wide or national pricing may not reflect competitive pricing levels due to high levels of market concentration, the high profits earned by Coles across its supermarkets in Western Australia and nationally which is reflected

116 SOR at [6.234].

117 [redacted]

118 SOR at [6.245]; [redacted]

119 SOR at [6.235]-[6.239].

120 Coles' CS at [5(c)].

121 Coles' CS at [31].

122 SOR at [8.8].

123 SOR at [7.33], [7.36], [7.45], [7.50] and [7.55].

124 SOR at Table 8.

125 SOR at [7.42].

by, for example, a [redacted] return on capital across its supermarkets in Australia and Western Australia, its limited incentive to compete effectively on price with Woolworths and the lack of constraint on price by other competitors.[126]

63. Instead of the current market structure, which consists of two full-line chain supermarkets operated by two different supermarket operators and two full-line independent supermarkets, in the future with the Proposed Acquisition, Coles would operate two of the four full-line supermarkets in Kalgoorlie. Its share of SFA and revenue would increase materially, and the combined Coles and Woolworths share of GLA used for larger supermarkets would increase from its already high level of 62%.[127]

PART IV INFORMATION, DOCUMENTS OR EVIDENCE NOT REFERRED TO IN THE SOR

64. This Part identifies any information furnished, documents produced or evidence given to the ACCC in connection with the making of its determination which are not referred to in the SOR but which the ACCC considers may assist the Tribunal in considering the material findings of fact, economics or law that are in dispute.

65. The ACCC has identified the following information, documents and evidence not referred to in the SOR that may assist the Tribunal:

    65.1. with respect to whether Spudshed and O'Connor Fresh IGA are differentiated from each other, as well as from Coles and Woolworths as raised by paragraphs of Coles' CS including [8(d)], [12], [16]-[19] and [31], the ACCC has identified document 01068.022.036.0003, being an email containing a note of an oral submission from Spudshed.

    65.2. as to whether consumers typically shop at O'Connor Fresh IGA for convenience or top-up shops, as raised by [15] of the Coles CS, the ACCC has identified document 01068.001.020.0159, page 96 of which describes Coles' National Location Planning Manager's perspectives on the offerings of O'Connor Fresh IGA, as well as IGA Lionel St and FoodWorks;

    65.3. as to the issue of population growth in Kalgoorlie, in particular:

        65.3.1. whether it is constrained only by a lack of housing as raised by [32(d)(i)] of Coles' CS, the ACCC has identified the following documents: Coles internal email, COL.0028.0001.5055; O'Connor Fresh / Geotech, Kalgoorlie Local Area Assessment, 11 June 2026, 01068.022.013.0822;

        65.3.2. whether population growth will be higher than the estimate in Coles' Business Case, as also raised by [32(d)(i)] of Coles' CS, the ACCC has identified the following documents: [redacted], Sales Forecast Kalgoorlie, WA, 24 February 2024, 01068.022.013.0353; ALDI's Trade

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[126] SOR at [2.5], [2.39], [7.41] and Attachment B.

[127] SOR at [1.14]

Area and Sales Projection, 01068.001.017.0166; and City of Kalgoorlie-Boulder, Response to RFI, 12 May 2026, 01068.001.030.0002; and

65.3.3. whether transient and FIFO workers are included in population growth figures as raised by [32(d)(ii)] of Coles' CS, the ACCC has identified the following documents concerning the grocery shopping habits of FIFO workers: File note of call with the City of Kalgoorlie-Boulder, 01068.022.036.0001; Jillian Bardos, 2024, The Housing and Rental Crisis in Kalgoorlie – exploration of housing issues in a regional Australian town, Parliamentary Research Program 2024, 01068.022.022.0721;

65.4. as to the issue of the likelihood of new entry and whether there are high barriers to entry as raised by [32] of Coles' CS, the ACCC has identified:

65.4.1. the following documents concerning capital investment and lead times for taking over an existing supermarket site: File note of call with M Group, 8 December 2025, 01068.001.006.0043; File note of call with Lester Group, 2 June 2026, 01068.022.003.0039; File note of call with Spudshed – 24 February 2026, 01068.001.005.0397; Spudshed, ACCC VB Spudshed Kalgoorlie Schedule 1, 1 May 2025, 01068.001.018.0002; Coles, Kalgoorlie timeline – 24 February 2026, 01068.001.015.0240;

65.4.2. the following documents concerning [redacted]

65.5. as to the impact of a reduction in forecast revenue on the calculated NPV of the Proposed Supermarket as raised by [52] of Coles' CS, the ACCC has identified [redacted] and

65.6. as to whether Coles' methodology for its Business Case [redacted], as raised by [50] of Coles' CS, the ACCC notes [redacted]