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

COMMONWEALTH OF AUSTRALIA
AUSTRALIA
AUSTRALIAN COMPETITION TRIBUNAL

REGISTRAR

Dated: 4/09/2026 5:23 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.

This document contains confidential information which is indicated as follows:
1. [Confidential and governed by confidentiality Regime made by Justice O'Bryan on 21 July 2026]

PUBLIC VERSION

COLES SUPERMARKETS AUSTRALIA PTY LIMITED APPLICATION FOR REVIEW OF AUSTRALIAN COMPETITION AND CONSUMER COMMISSION MERGER AUTHORISATION DETERMINATION (MN-01068)

Commonwealth of Australia

Competition and Consumer Act 2010

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(1) of the *Competition and Consumer Act 2010*

COLES' SUBMISSIONS IN SUPPORT OF APPLICATION UNDER SECTION 100S(2)(b)

1 Prior to the Determination under review dated 30 June 2026 (**Determination**), Coles was not notified of the theory of harm against which the Australian Competition and Consumer Commission (**ACCC**) ultimately assessed the Proposed Acquisition.

2 The ACCC notified a theory of harm from overcapacity relative to demand and predation by Coles. In fact, the Determination is based on a theory that Coles' expansion of capacity and O'Connor Fresh IGA's exit will reduce net consumer welfare and thus lessen competition, despite no predation. Coles was not provided with material evidence relied on for that theory of harm, including the second of two reports of Prof Patrick Rey and evidence going to the question of differentiation of O'Connor Fresh IGA. Nor was Coles given sufficient time or notice to respond to the way in which the first report of Prof Patrick Rey, and product range information, was ultimately applied by the ACCC. Coles was therefore not given a reasonable opportunity to make submissions to the ACCC in relation to the grounds on which the ACCC made the Determination, or the material on which those grounds were based.

3 Under s 100S(2)(b) of the *Competition and Consumer Act 2010* (**CCA**) Coles applies to be allowed to provide new evidence addressing the operative theory of harm and likely to assist the Tribunal's review, in the form of a further report of Dr. Mike Walker responding to that theory and its application in the circumstances of the Proposed Acquisition.

4 In addition, the ACCC made findings apparently relevant to its original predation theory of harm, but in any event deployed to support the finding of likely exit by O'Connor Fresh IGA. Those findings were based on amendments to Coles' Capital Approval Request (**CAR**) Model (underlying the business case for the Proposed Acquisition) without notice to or input from Coles. Coles seeks to provide the Tribunal with evidence from a Coles employee correcting material errors and potentially misleading aspects of the ACCC's calculations.

5 These two categories of new evidence are addressed in turn in this submission. In support of the Application, Coles relies on affidavits of: Liza Windel Carver sworn 27 August 2026 (**Carver**); Linda Catherine Evans sworn 4 September 2026 (**Evans**); and Andrew Eastwood sworn 4 September 2026 (**Eastwood**).

NEW EVIDENCE ADDRESSING NEW THEORY OF HARM AND REY REPORTS

6 **Requirement to notify theory of harm**: Section 100S(2)(b) of the CCA empowers the Tribunal to allow Coles, as the notifying party, to provide new information, documents or evidence for the purposes of the review if the Tribunal is satisfied that the new evidence is "*relevant to the grounds on which the Commission made the determination*" and that Coles 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*".

7 The opportunity that a notifying party has to make submissions to the Commission is shaped by the statutory requirement that the party be informed of the grounds on which the ACCC proposes to make a Determination, including the theory of harm which the ACCC proposes to apply in assessing the acquisition. When referring a notified acquisition to Phase 2 review, the Commission is required to give the notifying party written notice specifying the nature of the theory of harm that is the basis for the Commission's satisfaction that the acquisition could, in all the circumstances, have a proscribed substantial lessening of competition effect, and the matters the Commission intends to investigate before making its Determination: s 51ABZJ(2),(3)(b). The Commission must also give a notice of competition concerns which s 51ABZK requires to set out the grounds of the Commission's preliminary assessment and refer to the evidence on which those grounds are based. The notifying party's right to make submissions is expressed to be "in relation to the matters set out in the notice of competition concerns": s 51ABZL(1)(a).

8 **Theory of harm notified, and theory of harm relied on**: The ACCC indicated to Coles that the theory of harm against which it was assessing the Proposed Acquisition was one of oversupply and predation or profit sacrifice. The Phase 2 Notification referred to the "*likely economic rationale of the Acquisition*" and potential "*over-supply of supermarket capacity relative to consumer demand*" (Carver [14]; Phase 2 Notification [3.16]). The NoCC similarly recorded the ACCC's concerns about "*an over-supply of supermarket capacity in Kalgoorlie, leading to the exit of an effective independent supermarket competitor*" and that the Proposed Acquisition "[redacted]" (Carver [24]; NoCC [4.14], [4.23]). Documents provided by the ACCC to Coles (Carver [28]-[31]), questions put to witnesses in examinations under s 155(1)(c) of the CCA

(Carver [37]-[39]), and responses made to enquiries made by Coles seeking to clarify the applicable theory of oversupply and predation, were to equivalent effect.

9 According to this theory of harm, acquisitions that have the effect of increasing capacity may raise competition concerns when they involve a strategic investment in excess capacity relative to demand, leading to recoupment on the exit of a competitor (Carver [21]). That is an appropriate frame of reference on the facts of this matter, given that Coles is not proposing to acquire a competitor but rather, is seeking to establish new capacity and an additional source of supply for consumers, which expands consumer choice (Carver [21]).

10 At no stage was Coles informed that the ACCC was investigating or assessing the Proposed Acquisition against an alternative theory of harm whereby exit, even though occurring as a consequence of consumer choice, is said to be a substantial lessening of competition because of a judgement made by the regulator about net consumer welfare.

11 On 18 May 2026, Coles received a report prepared for the ACCC by Prof Patrick Rey (**Rey Report**) (Carver [40]). At the time of providing the Rey Report, the ACCC did not indicate to Coles how the ACCC would apply the Rey Report (Carver [41]).

12 On 1 June 2026, Herbert Smith Freehills Kramer (**HSFK**) received a spreadsheet comparing revenue for Coles Kalgoorlie's top 100 SKUs with revenue for “matching” SKUs offered by Woolworths, Spudshed and O'Connor Fresh IGA (**SKU Analysis)** (Evans [9] –[10]). The SKU Analysis did not include any data for Lionel St IGA and Hannans Marketplace by Foodworks (**Foodworks**) (Evans [13]). At the time of providing the SKU Analysis, the ACCC did not indicate to Coles how the ACCC would apply the analysis (Evans [14]).

13 On 3 June 2026, HSFK wrote to the ACCC, noting that “*[t]here is nothing in the NoCC that suggests that the framework set out in the Rey Report would be applied to the Acquisition. The ACCC has not otherwise provided any indication as to how it proposes to use or apply this framework”,* and that “*procedural fairness in connection with the ACCC’s determination requires that Coles have an opportunity to comment, not only on the Rey Report, but on the potential application(s) of the Rey Report to the Acquisition that the ACCC may be considering.”* (Carver [45]).

14 In the same letter, HSFK asked whether the SKU Analysis was “*being applied to the Rey Report*” and said that “*procedural fairness requires that Coles has an opportunity to respond to the … SKU Analysis, in particular in circumstances where the ACCC may be applying these datasets to the framework set out in the Rey Report*.” HSFK specifically asked if, or how, the ACCC proposed to or might use the SKU Analysis, and at a minimum, confirmation of the propositions or issues to which the SKU Analysis was relevant (Evans [15]).

15 The ACCC's response dated 5 June 2026 provided no substantive answer to Coles' question in respect of the Rey Report, instead asserting that it was "*for the Commission to decide whether and how the principles expounded by Professor Rey may inform the ultimate decision the ACCC is to make*", that the ACCC was "*considering how the principles articulated in the Rey Report may assist the ACCC to identify whether the new investment represented by the Acquisition would be pro-competitive or anti-competitive*", and inviting submissions on that question (Carver [46]). In respect of the SKU Analysis, the ACCC stated that "*the SKU Analysis is relevant to its assessment of the substitutability and closeness of competition between supermarkets in Kalgoorlie*" and stated that "*substitutability may be relevant to the application of the principles in the Rey Report (If they are applied)"* but that the SKU Analysis was "*not directly related to the Rey Report*" (Evans [16]).

16 On 5 June 2026, Coles instructed Dr. Mike Walker of Frontier Economics UK (**Frontier UK)** to provide a report on (among other matters) "*the extent to which the Rey Report is useful and informative for decisionmakers in relation to analysis of the Proposed Acquisition*" (Carver [47]). On 9 June 2026, Coles received a report from Frontier UK addressing those matters (**First Walker Report**), and provided that report to the ACCC on the same day (Carver [51]).

17 On 25 May 2026, Coles instructed Warwick Davis of Frontier AU to respond to the Rey Report insofar as it touched on an earlier report prepared by Mr Davis (Evans [18(b)]). On 10 June 2026, Coles provided further instructions to Mr Davis to also provide his observations on the SKU Analysis (Evans [17]). On 11 June 2026, Coles provided a report from Frontier AU a to the ACCC (Evans [18]). Coles also provided a statement from Coles' Head of Range, Space and Systems outlining Coles' [redacted], range decision-making processes (Evans [18]).

18 On 11 June 2026, Coles met with the ACCC, and stated that "*[t]he ACCC has not disclosed the material facts and propositions that would enable Coles to understand the issues likely to be relevant to the ACCC's decision"* (Carver [52]). On 17 June 2026, HSFK wrote to the ACCC regarding procedural fairness, emphasising the need for the Applicant to be in a position to understand and comment on the ACCC's potential application of the Rey Report to the Proposed Acquisition (Carver [53]). Coles has received no response to that letter (Carver [54]).

19 In its Determination, the ACCC concluded that there was a material risk that the Proposed Acquisition would lead to the exit of O'Connor Fresh IGA, and that consumers would be worse off over time by losing a differentiated local offer (through the exit of O'Connor Fresh IGA), thus reducing "non-price competitive rivalry" (SOR [8.6], [8.9]).

20 While the ACCC considered materials relevant to the "*profit sacrifice test*" (being the predation theory of harm identified at paragraph 8 above), the SOR made clear that the ACCC's assessment of the Proposed Acquisition did "*not turn on whether the Acquisition is profitable or not*" (SOR [6.207], [6.209]).

21 The ACCC's conclusion that the Proposed Acquisition would be likely to substantially lessen competition, even in the absence of predation, were informed by the Rey Report, and by a further report of Prof Rey received by the ACCC dated 25 June 2026 (**Second Rey Report**) (SOR [4.7], [6.185]-[6.209]). Coles and its legal representatives became aware that the ACCC had obtained the Second Rey Report only upon reviewing the SOR (Carver [57]). The Second Rey Report asserted that a substantial lessening of competition may occur in circumstances where there is reduction in net consumer welfare, resulting from an investment in new capacity and the exit of an independent and differentiated competitor, irrespective of any evidence of predation (Section II.1 (page 2) and Section IV (page 14). No equivalent assertion was made in the Rey Report, which observed that "the expansion & exit scenario outlined by the ACCC, in which the new store replaces O'Connor Fresh IGA, need not exhibit the dynamic pattern of predatory behaviour" (section C.I.2, p. 9), but did not make the further, critical point that the expansion & exit scenario could result in reduced net consumer welfare irrespective of predation.

22 Coles was not provided with the Second Rey Report until 3 July 2026 – that is, after the ACCC reached its Determination and published the SOR (Carver [58]).

23 The ACCC's conclusion that consumers would be worse off by losing a differentiated offer (O'Connor Fresh IGA) was informed by the SKU Analysis (Evans [22]; SOR [4.9], [6.45], [6.46] (Figure 4) and [7.24]), and the data on which it was based, being Woolworths, O'Connor Fresh IGA and Spudshed's top 2,000 SKUs by revenue (**SKU data**) (Evans [11]). Coles' legal advisors were not permitted to share the SKU Analysis with Coles (Evans [16]). Neither Coles nor its legal advisors were provided with the SKU data until between 30 July and 11 August 2026 — again, after the ACCC reached its Determination (Evans [24], [25], [27]).

24 The ACCC's conclusion was also informed by other information and evidence pertaining to supermarket SKUs, product ranges, sources of supply and differentiation in Kalgoorlie provided to the ACCC by O'Connor Fresh IGA, Metcash, Woolworths, Lionel St IGA and Foodworks (**Additional Information**) (Evans [23]; SOR [2.43] (Table 3), [6.37], [7.24], [6.37], [6.41], [6.50] and [7.25]). Neither Coles nor its legal advisors were provided with the Additional Information until between 13 July and 11 August 2026 — again, after the ACCC reached its Determination (Evans [24]-[27]).

25 **Coles not given reasonable opportunity to make submissions**: Coles was not informed, prior to the Determination, of the theory of harm which the ACCC was investigating, and which became the ground upon which the ACCC concluded that the Proposed Acquisition had a likely effect of substantially lessening competition. Coles was not advised in writing, prior to the Determination, that the ACCC was no longer assessing the Proposed Acquisition against the notified predation theory, or that the ACCC proposed to assess the matter on the basis of a "net consumer welfare" analysis supported by the Second Rey Report in particular.

26 Coles was not given reasonable opportunity to make submissions in relation to the grounds on which the Commission made the Determination, or to the evidence or other material on which those grounds were based, before the Commission made the Determination.

27 Coles' ability to respond to the Rey Reports (on which the ACCC's theory of harm was based) was unreasonably constrained:

a) *first,* by the time Coles was given to respond to the first Rey Report (being, in substance, a mere three weeks, in the context of requirements that Coles simultaneously respond to other later disclosed material) (Carver [65]).

b) *secondly*, by the ACCC's failure (even when asked) to inform Coles that the ACCC was considering applying Prof Rey's framework to support a conclusion that exit of O'Connor Fresh IGA would have an effect of substantially lessening competition even in the absence of a finding of predation by Coles (Carver [66]).

c) *thirdly,* by Coles not receiving the Second Rey Report prior to the Determination—especially in circumstances where the Second Rey Report asserted in terms that an "expansion & exit scenario" may support a finding of substantial lessening of competition even absent a finding of predation, where the Rey Report had contained no such assertion (see above at [21]) (Carver [67]). The non-disclosure of the Second Rey Report was additionally unfair because its assertion that Dr Walker "*does not question the validity*" of the economic principles outlined in the Rey Report formed the basis for the finding in the SOR that Dr Walker "*appears also to support an approach that assesses the net effect on consumer welfare, albeit using a different economic model [to that used by Professor Rey]*" (SOR [6.202]): this is not in fact Dr Walker's position, and the ACCC did not ask Dr Walker if it was (Carver [60]).

28 Further, Coles' ability to respond specifically to the SKU Analysis and the Additional Information (on which the ACCC's theory of harm was based) was unreasonably constrained:

a) *first,* by the time Coles was given to respond to the SKU Analysis (being only 10 days) (Evans [31(a)]), and by Coles not receiving the SKU data, and Additional Information prior to the Determination;

b) *secondly,* by reason of Coles' legal advisors not being permitted to share the SKU Analysis with Coles prior to the Determination and thereby permit it to interrogate the analysis and in particular the ACCC's assessment of "matching" SKUs (Evans [14], [31(b)]);

c) *thirdly,* by the ACCC's failure (even when asked) properly to inform Coles that the SKU Analysis was relevant to more than its "*assessment of the substitutability and closeness of competition between supermarkets in Kalgoorlie*" and that it was directly relevant to the application of Prof Rey's framework by the ACCC (Evans [16], [31(c)]).

29 If Coles had been aware that the ACCC proposed to use the Rey framework to reach a conclusion that expansion by Coles, resulting in exit of O'Connor Fresh IGA as a differentiated competitor, had an effect or likely effect of substantially lessening competition because of a reduction in long-term net consumer welfare even absent predation, Coles would have had an opportunity to put further or different instructions and questions to Dr Walker, including whether, in the circumstances, that theory of harm is an appropriate basis for a competitive assessment of the Proposed Acquisition (Carver [48]).

30 **Proposed further evidence**: Coles seeks to provide the Tribunal with a second expert report from Dr Mike Walker of Frontier UK (**Second Walker Report**) to respond to the Second Rey Report. This would respond to the new theory of harm (Carver [66]). It would address whether the theory of harm presented in the Second Rey Report and economic principles outlined is an appropriate basis in the circumstances for a competitive assessment of the Proposed Acquisition. It would also address the wrong assertion that Dr Walker supports an approach that assesses the net effect on consumer welfare. These were matters Coles did not have an opportunity to instruct Dr Walker to consider, or to make submissions on by reference to Dr Walker's opinions, prior to the ACCC reaching its Determination.

NEW EVIDENCE ADDRESSING ACCC MODIFICATIONS TO BUSINESS CASE

31 **Relevant grounds and evidence**: The Determination states that "*[t]here is a dependency between Coles' business case for the Proposed Supermarket and the extent of sales lost by [O'Connor Fresh IGA]*" (SOR [6.54]), and that "*it is unlikely that it can be the case that the Proposed Supermarket makes economic sense for Coles and that it also makes* *economic sense for the Relevant Independent's assets to remain in the market*" (SOR [6.79]). In apparent support of these findings, the ACCC performed analyses on Coles' business case (and in particular, to the CAR Model which formed part of that business case), in Attachment C to the SOR (SOR [6.54]). Attachment C purports to show that "*if the Proposed Supermarket attracted* [redacted] *revenue than forecast*", the Proposed Acquisition "*would be unprofitable using Coles' benchmarks*" (SOR [C12]). It also purports to show that if "*adjustments*" are made to "*address*" asserted "*calculation issues*" with Coles' business case, "*a central case of the model is that the acquisition would be* [redacted]" (SOR [C10]).

32 Well after making the Determination, and following initial resistance to production, the ACCC produced to Coles worksheets (**ACCC Spreadsheets**), each of which appears to Coles to be a modified and amended version of the CAR Model (Eastwood [30]-[32]).

33 **Coles not given opportunity to make submissions**: Coles was not provided with the ACCC's "NPV tipping point" analysis of the point at which shortfalls from revenue forecasts would cause the Proposed Acquisition to be unprofitable, nor was it given an opportunity to comment on the "calculation issues" asserted in Attachment C (Eastwood, [31]). This was despite the fact that the ACCC's earlier analysis of Coles' business case was presented to Coles for comment and was shown to contain a number of fundamental errors — and was then abandoned by the ACCC (Eastwood, [19]-[26]).

34 The ACCC's analyses and modifications of Coles' business case in the spreadsheets contain material errors and are liable to mislead the Tribunal if relied upon (Eastwood [35]-[36]). The errors are not simply in the nature of disagreement about appropriate inputs, but errors of logic that produce misleading outputs or wrong interpretations of the CAR Model. The lack of any opportunity to make submissions about the modifications was unreasonable.

35 **Proposed further evidence**: Coles seeks to correct the material errors in the ACCC's analysis of the CAR Model by adducing evidence from a Coles employee (Eastwood [54]).

36 **Oral hearing:** In the event this application is contested, or the Tribunal is not minded to accede to the application on the papers, Coles requests an oral hearing on an estimate of half a day.

Brendan Lim, Anna Lord, Tim Rogan and Jacqueline Ibrahim
Counsel for the Applicant, Coles
4 September 2026