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Lodgment and Details

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Important information

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**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' WRITTEN SUBMISSIONS

Confidentiality Key:

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 a Confidentiality Claimant]
3. [Highly 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]

PART A: OVERVIEW

1 The case against Coles rests on a central factual premise: that the Proposed Supermarket will cause the exit of O'Connor IGA and its assets. Assuming the correctness of that premise (which Coles disputes), the ACCC's conclusion that the Proposed Acquisition will substantially lessen competition is wrong. In the future *without* the Proposed Supermarket, if O'Connor IGA continues in business (as to which see **Part D(1)**), the market will be characterised by rivalry between six supermarkets, with Coles and Woolworths constrained by each other, by Spudshed, and by the threat of expansion or new entry — to which barriers are not high (as the history of the market and recent moves to enter make clear). In the factual, and assuming exit of O'Connor IGA (as to which see **Part D(2)**), the structure of the market will not materially change. The threat of expansion or entry will not be diminished and indeed may be enhanced. Concentration may be increased, but absent heightened barriers to entry, that will not create or increase market power for Coles — which will continue to be disciplined by the same supermarkets, and the threat of entry or expansion. The exit of O'Connor IGA will not result in the loss of a materially differentiated competitor.

2 In any event, the Tribunal cannot be satisfied of the ACCC's factual premise, for the reasons given in **Part E**. Information before the Tribunal contains no reliable basis to conclude that O'Connor IGA is likely to exit as a result of the Proposed Acquisition. [REDACTED]

[REDACTED] Further, exit of the operator could only have a relevant competitive effect if the asset currently owned by that operator also exited. But the asset ([REDACTED]) has economic value, with or without the Proposed Acquisition, and is not likely to exit in either scenario, even if its operator does.

3 Further, the ACCC's conclusion (even if otherwise available) requires that exit of a differentiated competitor, to the notional detriment of consumer welfare, can (as a matter of law and economics, and absent any assertion or finding of predation and recoupment, profit sacrifice or strategic overcapacity) support a finding that there has been harm to competition. That is legally incorrect, and economically unsound (see **Part F**).

4 Before turning to each of those matters, these submissions outline the framework for the Tribunal's review (**Part B**) and the relevant market (**Part C**). These submissions do not address the question of predation given no party contends that Coles' business case was predicated on profit sacrifice and subsequent recoupment by exercise of market power.

PART B: FRAMEWORK AND PRINCIPLES FOR THE TRIBUNAL'S REVIEW

5 The *Competition and Consumer Act 2010* (CCA) pursues an object of enhancing the welfare of Australians (both consumers and producers) "through the promotion of competition": s 2. "Competition" describes "a process rather than a situation".¹ It is a mechanism for firms to discover the

¹ *Queensland Co-operative Milling Association* (1976) 25 FLR 169 (QCA) at 189.

kinds of goods and services the community wants and the manner in which these may be supplied in the cheapest possible way.² “Prices and profits are the signals which register the play of these forces of demand and supply”.³ Firms disregard these signals at their peril, since there are other firms which “would be only too willing to encroach upon their market share and ultimately supplant them.”⁴ Competition is thus “a dynamic process ... generated by market pressure from alternative sources of supply and the desire to keep ahead”: this process expresses itself as “rivalrous market behaviour”.⁵

6 Competitors engage in rivalrous market behaviour because “the basic aim of competition is to win sales” and the “key mechanism of competition” is substitution — to supply products to customers in place of another’s supply.⁶ “Competitors strive to replace each other in the supply of products (whether goods or services) sought by customers”.⁷ It follows that “[c]ompetition damages competitors. If the damage is sufficiently serious, competition may eliminate a competitor.”⁸ As Mason CJ and Wilson J said in the context of s 46 of the CCA (and which would equally apply to the new merger regime):⁹

Competition by its very nature is deliberate and ruthless. Competitors jockey for sales, the more effective competitors injuring the less effective by taking sales away. Competitors almost always try to ‘injure’ each other in this way. This competition has never been a tort and these injuries are the inevitable consequence of the competition s 46 is designed to foster.

7 Further, McHugh J similarly explained:¹⁰

... the object of s 46 — the protection of consumer interests — is to be achieved through the promotion of competition, even though competition by its nature is deliberate and ruthless and competitors injure each other by seeking to take sales from one another. A rational business seeks to maximise profit and to increase its share of the market. However, the very nature of such conduct is detrimental to other competitors in the market and may cause some of those competitors to leave the market.

8 In this way, the protection of consumer interests is achieved by fostering vigorous competition, with harm to consumers necessarily anchored in the assessment of any harm to the competitive process — including any reduction of incentives to reduce costs or improve efficiency and innovation.¹¹

9 The Tribunal’s task on review is to “make its own findings of fact and reach its own decision”¹² with respect to the application of the test in s 51ABZE of the CCA. The Tribunal’s function is not to consider the correctness of the ACCC’s determination.¹³

10 Section 51ABZE was fundamentally misapplied by the ACCC, when it purported to make a “single evaluative judgment” having regard to matters including “the interests of consumers”: SOR [1.17]

² QCMA at 187; ACCC v *Pacific National* (2020) 277 FCR 49 at [100].

³ QCMA at 188.

⁴ QCMA at 188; *Stirling Harbour Services v Bunbury Port Authority* (2000) ATPR 41-783 at [32].

⁵ QCMA at 188.

⁶ ACCC v *BlueScope Steel* (No 5) [2022] FCA 1475 at [125]–[126].

⁷ *BlueScope Steel* at [125].

⁸ *Boral Besser Masonry v ACCC* (2003) 215 CLR 374 at [87], [122].

⁹ *Queensland WireIndustries v Broken Hill Proprietary* (1989) 167 CLR 177 at 191.

¹⁰ *Boral Besser* at [260]. See also *NT Power Generation v Power and Water Authority* (2004) 219 CLR 90 at [138]

¹¹ *Applications by Telstra Corporation and TPG Telecom (No 2)* [2023] ACompT 2 (*Telstra/TPG*) at [114]. See also *Epic Games v Apple* [2025] FCA 900 at [3756]–[3759] and *BlueScope Steel* at [124]–[127].

¹² *Applications by Australia and New Zealand Banking Group and Suncorp Group* (2024) 386 FLR 372 at [54] quoting *Application by Medicines Australia Inc* (2007) ATPR 42-164 at [135].

¹³ *Medicines Australia* at [138]; *Application by Flexigroup (No 2)* [2020] ACompT 2 at [135].

and [8.2].¹⁴ Section 51ABZE(1) confers a power and binary duty to determine whether an acquisition “may be” or “must not be” put into effect. That power cannot be exercised to determine that an acquisition “must not be” put into effect unless the precondition in subsection (2) is met, in particular, satisfaction that the acquisition if put into effect, would, in all the circumstances have the effect, or be likely to have the effect, of SLC. As explained below, that is an established test that does not involve direct assessment of the interests of consumers.¹⁵ Subsection (3) separately mandates that regard be had to the object of the CCA and the interests of consumers. But that subsection is expressed to apply in the task of “considering whether to determine that the acquisition may be put into effect or must not be put into effect”: that is, it applies to the exercise of power in subsection (1), not to the distinct satisfaction that is made a prerequisite to the exercise of the power by subsection (2)(c). The precondition in subsection (2) is an anterior and independent step. Section 51ABZE, on its proper construction, does not make the interests of consumers a mandatory relevant consideration to the question whether an acquisition would SLC.

11 The principles for assessing whether conduct is likely to have the effect of SLC are well-established.¹⁶ The assessment begins with the identification of markets, and requires a comparison between the nature and extent of competition in the future with and without the proposed conduct.¹⁷ The word “likely” does not mean more probable than not, but requires an assessment of what could reasonably be expected to be the consequences of the proposed conduct; it encompasses real commercial likelihoods, but not mere possibilities.¹⁸ It is insufficient to prevent an acquisition or expansion from being put into effect if there is some lessening¹⁹ of competition; the ACCC (and the Tribunal) must be satisfied that the degree to which competition is lessened, or likely to be lessened, is “substantial” — that is “real or of substance” and thereby meaningful and relevant to the competitive process.²⁰ As Dr Walker observes, this approach makes sense from an economic perspective: *“[c]onduct which restricts the actions of individual competitors in order to promote broader competition in the market should not be unlawful as this will promote the welfare of Australians: it would not be ‘meaningful or relevant to the competitive process’”*²¹. An acquisition may SLC if it has the effect of creating, strengthening or entrenching a substantial degree of market power: s 51ABZH(4).

PART C: RELEVANT MARKETS

12 It is common ground that the relevant market for assessing the competitive effects of the Proposed Supermarket is the market for the supply of groceries by supermarkets to retail consumers in the city of Kalgoorlie (the **relevant market**).²² That does not gainsay the significance to competition in that relevant market of national and state dimensions of competition between supermarkets

¹⁴ Statement of Reasons (SOR) [8.2]; ACCC Concise Statement of Contentions (ACCC CS), [19].

¹⁵ Explanatory Memorandum to the *Treasury Laws Amendment (Mergers and Acquisition Reform) Bill 2024* (Cth) at [4.21].

¹⁶ *Pacific National* at [98]–[105], [161], [243]–[246].

¹⁷ *Pacific National* at [103] and the authorities there cited.

¹⁸ *Pacific National* at [245]–[246].

¹⁹ Including “preventing or hindering” competition: *Competition and Consumer Act 2010* (Cth) (CCA) s 4G.

²⁰ *Pacific National* at [104], [219]; *Epic Games* at [3773] and *Suncorp* at [71]–[73].

²¹ Dr Jill Walker, ‘An Economic Perspective on Part IV’, in *Current Issues in Competition Law* (The Federation Press, 2021, vol 1) (Dr Walker Article) at 72.

²² Coles’ Concise Statement of Contentions (Coles CS), [3]; O’Connor Fresh IGA Concise Statement of Contentions (IGA CS), [6]; ACCC CS, [24]; Agreed Facts [5.1], [5.17].

(particularly between Coles, Woolworths and ALDI at a national level, and with state-based chains such as Spudshed at a state level); nor the competitive constraint imposed on supermarkets [REDACTED].²³ Price and product competition in Kalgoorlie cannot be assessed in isolation from those dynamics. Nor can competition be assessed in isolation from the constraint [REDACTED] imposed by specialist retailers who supply products substitutable for those in the relevant market.²⁴

PART D: MARKET STRUCTURE AND COMPETITION ASSESSMENT

13 A proper comparison of competition in the future with and without the Proposed Supermarket requires consideration of the extent to which competition is likely to increase and decrease in the dimensions on which supermarkets compete: [14]; the likely competitive incentives and constraints on each supermarket: [15]-[25] and [36]-[39]; and the commercially meaningful prospect of new entry: [30]-[31] and [40]-[43]. That assessment is *forward-looking* and *dynamic*,²⁵ but is nevertheless informed by the history of competition in the market to date. Kalgoorlie, like “[m]ost markets” has “a history from which an assessment of substitution possibilities, concentration, barriers to entry and other commercial behaviours and conditions can be undertaken and reliable predictions about the future can be made”.²⁶ Having regard to the history of competition in Kalgoorlie, there is no basis for the contention that in the future with the Proposed Supermarket there will be any reduction in non-price (or price) competition, compared with the future without the Proposed Supermarket.

(1) Future without the Proposed Supermarket

14 In the future without the Proposed Supermarket, [REDACTED], there will be six supermarkets: Coles; Woolworths, Spudshed, and three Metcash-supplied supermarkets. [REDACTED]: [43]. New supermarkets may also enter the market. Each of those supermarkets compete more or less closely based on a range of dimensions, including location, size and product range, prices, store amenity and customer service, and “shopping mission”.²⁷ For this reason, in considering the market structure (and competition) in Kalgoorlie, the Tribunal should avoid any binary categorisation of competitors into “full line” and “small format” supermarkets: cf ACCC SOR [2.31]; IGA CS [7]-[8], [46]. This ignores or minimises competition from the two smaller supermarkets in Kalgoorlie and artificially inflates the degree of differentiation and competitive constraint imposed by O'Connor IGA. It does not reflect the reality of supermarket competition in Kalgoorlie.

²³ [REDACTED]; Agreed Facts [2.19], [REDACTED]; SOR [REDACTED], [6.11], [REDACTED]; ACCC, *Supermarkets Inquiry Final Report*, February 2026 (SIFR), 3.5.5.

²⁴ SIFR, 3.5.5.

²⁵ *Epic Games* at [3787]-[3788]. See also *Pacific National* at [246], affirming *ACCC v Pacific National Pty Ltd (No 2)* [2019] FCA 669 at [1276]-[1279] (*Pacific National (First Instance)*). See also QCMA at 188.

²⁶ *Pacific National* at [218] (Middleton and O'Bryan JJ).

²⁷ Agreed Facts [2.9], [6.8]; [REDACTED]; SIFR [3.2.8].

a) **By location:** Convenience is a key factor affecting consumer choice, and location is a key factor influencing convenience.²⁸ Stores that are geographically closer — other things equal — compete more aggressively.²⁹ Coles and Woolworths are located within one block of each other in the city-centre. Spudshed and Foodworks are located most closely to each other in the north-east suburbs of Hannans and Piccadilly respectively. Lionel St IGA is in the south-east suburb of South Kalgoorlie; and O'Connor IGA is furthest from all existing competitors in the south-west suburb of Somerville.³⁰

b) **By size:** There is no “bright line” between large and small supermarkets in Kalgoorlie. The independent supermarkets increase incrementally in size, and [REDACTED] Coles and Woolworths — which are similar in size.³¹ Coles and Woolworths classify their Kalgoorlie stores as “large format” supermarkets; [REDACTED]

[REDACTED]³²

c) **By product range:** The size of each competitor’s product range is not closely correlated with its store size: [REDACTED]

[REDACTED]³³ [REDACTED]³⁴ and the Tribunal can readily infer that there is also a material degree of overlap [REDACTED]

[REDACTED]³⁵ There is also variation in product ranges: [REDACTED]³⁶ and O'Connor IGA (along with Foodworks and Lionel St IGA) also supplies [REDACTED]

d) **By price:** Coles and Woolworths price according to national and State-based pricing models and [REDACTED]³⁸ Spudshed is “a discounter”, and [REDACTED]³⁹ O'Connor IGA,

²⁸ SOR, [5.17] referring to SIFR, pp. 81-82; [REDACTED]

²⁹ [REDACTED]; SIFR, [2.3.7].

³⁰ SOR, Figure 3.

³¹ SOR, [REDACTED]

³² Agreed Facts [2.2], [2.8], [6.20] [REDACTED]

³³ Agreed Facts [REDACTED], [REDACTED], but c.f. [REDACTED]

³⁴ Agreed Facts [REDACTED]; SOR [REDACTED]

³⁵ [REDACTED] Agreed Facts [REDACTED]

³⁶ Agreed Facts [REDACTED]

³⁷ Agreed Facts, [REDACTED]; SOR [REDACTED]

³⁸ Agreed Facts [2.11], [6.16], [6.29], [REDACTED]; SIFR, p. 89.

³⁹ Agreed Facts [REDACTED]; SOR, [6.13]; [REDACTED]

Foodworks and Lionel St IGA each [REDACTED]

e) **By store amenity and customer service:** Store amenity and customer service comprise a range of different attributes. Information about these attributes was not obtained consistently, or in some cases at all, by the ACCC, rendering comparison of competition between supermarkets on this dimension difficult. Relevant aspects of competition may include the matters highlighted below: **SOR [6.8]**. Each of Coles, Woolworths and O'Connor IGA offer high levels of **store amenity**: Coles opened in 2021, [REDACTED].⁴¹

[REDACTED]⁴² **Co-location** is a relevant factor.⁴³ Amongst other stores, Coles is co-located with a Kmart, a butcher and a pharmacy;⁴⁴ Woolworths is co-located with a BWS.⁴⁵ Spudshed is co-located with small retailers including a chemist.⁴⁶ O'Connor IGA is co-located with a Chemist Warehouse, liquor store, and a car wash;⁴⁷ Foodworks is co-located with a liquor store; Lionel St IGA is co-located with a liquor store and butcher.⁴⁸ **Carparking** — particularly wide and shaded car parking — is an important competitive advantage to attracting customers, given vehicle size and conditions in Kalgoorlie.⁴⁹ Each of Coles and Woolworths offers large (300) shaded car park bays, with Coles offering wider bays.⁵⁰ Each of Spudshed and O'Connor IGA offer a large (200 and 100) unshaded car park with wide bays.⁵¹ Foodworks and IGA Lionel St offer more limited and unshaded carparking.⁵² Each of Coles and Woolworths offers substantial **click-and-collect and home delivery services**,⁵³ [REDACTED]

[REDACTED]⁵⁴ Spudshed offers click-and-collect and delivery through its website (with a third-party provider).⁵⁵

[REDACTED]⁵⁶ There is no evidence before the Tribunal as to whether IGA Lionel St has or will implement a home delivery service. The number of **checkouts** offered by each

⁴⁰ Agreed Facts [REDACTED]; SOR [REDACTED]; [REDACTED]

⁴¹ Agreed Facts [6.13], [6.20], [REDACTED]; SOR, [6.36]; [REDACTED]
p.15 [01068.001.002.0106].

⁴² [REDACTED]; ACCC site visit notes [01068.022.015.0351]; images [01068.022.015.0325]; [01068.022.015.0026]; [01068.022.015.0001].

⁴³ Agreed Facts [6.8].

⁴⁴ ACCC site visit notes [01068.022.015.0351]; [REDACTED]

⁴⁵ [REDACTED]
⁴⁶ Agreed Facts [6.40].

⁴⁷ Agreed Facts [6.36].

⁴⁸ ACCC site visit notes, pp.3, 5 [01068.022.015.0351].

⁴⁹ [REDACTED]; [REDACTED].

⁵⁰ ACCC site visit notes [01068.022.015.0351]; and site visit images [01068.022.015.0001]; [01068.022.015.0363].

⁵¹ ACCC site visit notes [01068.022.015.0351]; and site visit images [01068.022.015.0073]; [01068.022.015.0032].

⁵² ACCC site visit notes [01068.022.015.0351]; and site visit images [01068.022.015.0325]; [01068.022.015.0026].

⁵³ ACCC site visit notes, p.12 [01068.022.015.0351]; [REDACTED]

⁵⁴ Agreed Facts [2.3], [7.10]; site visit images [01068.022.015.0363]; [REDACTED]

[REDACTED]; ACCC site visit notes [01068.022.015.0351].

⁵⁵ [REDACTED]
⁵⁶ Agreed Facts, [6.48]; [REDACTED]

supermarket broadly correlates with their size: Woolworths maintains [REDACTED], with Coles Kalgoorlie having [REDACTED].⁵⁷ Spudshed has [REDACTED].⁵⁸ O'Connor IGA has [REDACTED], whereas Foodworks have [REDACTED] and Lionel St IGA has [REDACTED] (in materially smaller stores).⁵⁹ As **staffing levels** depend on a range of factors, including supermarket size, range and revenue, it is difficult to compare meaningfully across supermarkets. [REDACTED]

[REDACTED]⁶¹ Provision of **in-store specialist service** is another factor. Each of Coles, Woolworths, and O'Connor IGA have an in-store bakery.⁶² O'Connor IGA has an in-store butcher.⁶³ Each of the Metcash-supplied independents, but not Spudshed, supply [REDACTED] hot food prepared on-site.⁶⁴ Coles and Woolworths each supply a range of hot snacks from their delis.⁶⁵ There is otherwise insufficient evidence before the Tribunal to compare the specialised services of each supermarket: [21]. 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. This protects independent supermarkets from competition typically before 7am and after 7pm (and before 8am or after 3pm on Sundays), forcing customers who may otherwise to prefer to shop at Coles or Woolworths during those times to shop at the independents.⁶⁶ Spudshed trades 24 hours a day seven days a week; each of the Metcash-supplied independents trade an additional 22 hours per week in the mornings and up to 25 hours per week in the evenings.⁶⁷ Which **shopping mission** supermarkets best serve also matters. Consumers tend to shop a [REDACTED] or [REDACTED] at Coles [REDACTED]⁶⁸, Woolworths ([REDACTED])⁶⁹, and Spudshed [REDACTED],⁷⁰ and a [REDACTED] at O'Connor IGA ([REDACTED])⁷¹, Lionel St ([REDACTED]),⁷² and Foodworks [REDACTED]⁷³ — consistent with a [REDACTED] or [REDACTED] or [REDACTED].⁷⁴ Consistent with a [REDACTED] Coles' top selling items by revenue are [REDACTED]; Woolworths are [REDACTED], and

⁵⁷ [REDACTED]
⁵⁸ [REDACTED]
⁵⁹ ACCC site visit notes, p.3 [01068.022.015.0351]; [REDACTED]

⁶⁰ [REDACTED]
⁶¹ SOR, [REDACTED]
⁶² ACCC site visit notes [01068.022.015.0351]; [REDACTED]

⁶³ ACCC site visit notes [01068.022.015.0351]; [REDACTED]
⁶⁴ [REDACTED]; ACCC site visit notes [01068.022.015.0351]; [REDACTED]
⁶⁵ [REDACTED]

⁶⁶ [REDACTED]
⁶⁷ [REDACTED]

⁶⁸ SOR, Table 4.

⁶⁹ [REDACTED] see also [REDACTED].

⁷⁰ [REDACTED].

⁷¹ [REDACTED]
⁷² [REDACTED]
⁷³ [REDACTED]
⁷⁴ [REDACTED]

Spudshed's are

⁷⁵ By contrast, O'Connor IGA's are

15 Competitive incentives and constraints: The different dimensions on which supermarkets compete reflect the extent to which supermarkets are substitutes for each other, and the degree of constraint imposed by or on them: the less differentiated competitors are on these dimensions, the closer they compete.⁷⁸ The reality is not, as asserted by the ACCC and IGA, that Foodworks and Lionel St are "only partial substitutes" to the remaining supermarkets in Kalgoorlie: c.f. SOR [5.10].

16 On all dimensions, each of Coles and Woolworths are each other's closest competitors, and are meaningfully constrained by the other, and by national and State dimensions of competition, which in turn indirectly constrains other competitors.⁷⁹

17 On price, the overwhelming (and accepted) evidence is that

18 As to non-price dimensions of competition, ⁸⁶ By contrast, ⁸⁷ Coles and Woolworths also compete most closely to offer store **customer service**

⁷⁵ ⁷⁶ ⁷⁷ ⁷⁸ ⁷⁹ ⁸⁰ Agreed Facts [6.16]. ⁸¹ Agreed Facts [6.16], [6.29], ⁸² Agreed Facts ⁸³ ⁸⁴ ⁸⁵ ⁸⁶ ⁸⁷

[REDACTED]

[REDACTED].⁸⁹ Spudshed exerts meaningful competitive constraint on both Coles' and Woolworths' customer service offering (as was accepted by the ACCC [REDACTED]).⁹⁰ Each of Coles and Woolworths presently have an incentive to **invest in existing stores or new stores to increase store amenity** and their ability to compete and attract customers: that is reflected in their history of competitive store upgrades, both nationally and in Kalgoorlie, and indeed in the Proposed Supermarket.⁹¹ [REDACTED]

[REDACTED]

[REDACTED] (c.f. SOR [6.43] which incorrectly attributed to O'Connor IGA the impact Coles' experienced from the opening of Hannan's IGA);⁹³ and [REDACTED]

[REDACTED]

[REDACTED].⁹⁴ Further, [REDACTED]

[REDACTED]: [50].

19 That is reflected in supermarkets' own assessments of the extent to which they compete with, and are constrained by, each other. **Coles and Woolworths** each consider each other to be their closest competitor in Kalgoorlie.⁹⁵ [REDACTED]

(c.f. SOR [REDACTED])

[REDACTED]⁹⁶ [REDACTED]

[REDACTED]

[REDACTED]⁹⁷ [REDACTED]

[REDACTED]

⁸⁸ Agreed Facts [6.24]; [REDACTED]

⁸⁹ [REDACTED]

⁹⁰ SOR [6.14], [6.35]; [REDACTED]

⁹¹ SOR [6.20]-[6.21]; [REDACTED]

⁹² [REDACTED]

⁹³ [REDACTED] Cf SOR [6.43].

⁹⁴ [REDACTED]

⁹⁵ [REDACTED]

⁹⁶ [REDACTED]; see also [REDACTED]

⁹⁷ [REDACTED]

⁹⁸ Cf IGA CS [9], [46].

⁹⁹ [REDACTED]

¹⁰⁰ [REDACTED]

20 That is also reflected in the way in which competitors experienced the impact of Spudshed's entry in late 2025. [REDACTED]

21 **O'Connor IGA's differentiation is not indicative of effective competition** The contention that O'Connor IGA's offering is materially differentiated,¹⁰⁵ and thus indicative of effective competition with Coles and Woolworths, does not withstand scrutiny. The ACCC's conclusion to the contrary rests on flawed reasoning: it excluded other Metcash-supplied independents from the analysis without obtaining information or making any assessment of whether they do or could supply the products or services said to "differentiate" O'Connor IGA; it did not properly compare the attributes said to "differentiate" O'Connor with attributes at Coles, Woolworths, and Spudshed; and it assumed that consumers choose O'Connor IGA over other supermarkets because of that differentiation.¹⁰⁶

22 [REDACTED]

[REDACTED] Even if those supermarkets do not presently supply the relevant products, the Tribunal should infer that if

¹⁰¹ SOR [REDACTED]

¹⁰² [REDACTED]

¹⁰³ [REDACTED]

¹⁰⁴ [REDACTED]

¹⁰⁵ See for example SOR, [6.35]; ACCC CS, [38]; IGA CS, section D.

¹⁰⁶ See for example IGA CS, [38]-[41].

¹⁰⁷ [REDACTED]

¹⁰⁸ [REDACTED]

¹⁰⁹ Agreed Facts [7.24]; [REDACTED]

¹¹⁰ [REDACTED]

O'Connor IGA exited the market, it would be commercially rational for Foodworks and Lionel St to meet any unmet demand, and for local producers to seek an alternative supplier for their products.

23 As to Coles and Woolworths, [REDACTED]

[REDACTED]

[REDACTED].¹¹³ In fact, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]¹¹⁵ It is otherwise difficult to determine with any precision the total extent to which O'Connor IGA offers products that are not supplied by Coles or Woolworths: comparison and matching of SKU (including as attempted by the ACCC) is unreliable because it requires subjective judgment as to how to "match" generic products, different pack sizes, and different-branded products.

24 [REDACTED]

[REDACTED]¹¹⁶ As can be seen in [14], compared with Coles, O'Connor IGA offers an older store, less (and less shaded) carparking, no direct click and collect or online delivery option, fewer checkouts, fewer staff, and an equivalent bakery offering. As compared with Woolworths, O'Connor IGA also offers less carparking, online options, and checkouts, and an equivalent bakery. As compared with Spudshed, O'Connor IGA offers a smaller carpark, materially shorter trading hours, fewer online shopping options, and materially fewer checkouts; and their co-located stores are equivalent. There is no evidence that O'Connor IGA is meaningfully differentiated from Foodworks and Lionel St IGA on price, delivery, checkouts, trading hours, or shopping mission. [REDACTED]

[REDACTED]: [50].

25 The ACCC reasons that the extent of the differentiation between O'Connor IGA and other supermarkets described above indicates that it competes effectively with Coles and Woolworths for

¹¹¹ SOR, [REDACTED]; ACCC CS, [REDACTED].

¹¹² [REDACTED]

¹¹³ [REDACTED]

¹¹⁴ [REDACTED]

¹¹⁵ [REDACTED]

¹¹⁶ Cf SOR [REDACTED], [REDACTED], [REDACTED], [7.49]; [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

consumer demand for groceries.¹¹⁷ That inference is not established on the evidence. O'Connor IGA is the most geographically isolated from competition of all supermarkets in Kalgoorlie (a feature which apparently attracted its owners to the asset in 2024: [51]). The Tribunal can infer that a material portion of consumers convenient to O'Connor IGA choose to shop there, simply because it is convenient (particularly during the almost 50 hours a week when Coles and Woolworths are prevented from competing with it). O'Connor IGA [REDACTED]

[REDACTED]: [14]. This "differentiates" O'Connor IGA precisely because these products are not core "groceries" — demand for which the parties agree is what drives competition in the market: SOR [5.1]; [5.2]. Other products that are said to differentiate O'Connor IGA are products where it acts as a third-party supplier for non-supermarket retailers: Hannan St and Kalgoorlie Bakeries; and local Thai and Indian and Japanese restaurants.¹¹⁹ To the extent O'Connor IGA supplies hot meals and ready-to-eat food, it largely does not compete directly with Coles, Woolworths, or Spudshed, but with takeaway stores, cafes, and restaurants (and other Metcash independents to some extent). [REDACTED]

[REDACTED]. In any event, many such products are also supplied or likely to be supplied by other supermarkets, suggesting that they are not a source of competitive differentiation: [22]-[23]. Other popular products ([REDACTED]) are commonly supplied by non-supermarket retailers.

26 Current barriers to entry are not high: There is no current scarcity of supermarket sites in Kalgoorlie.¹²¹ [REDACTED]

27 The time and cost associated with establishing a new supermarket is also not a substantial barrier to either entry or expansion.¹²³ The matters relied upon by the ACCC are the same investments required of all existing and prospective supermarket operators establishing a new supermarket in Kalgoorlie or any other market.¹²⁴ Those matters have not been sufficient to deter new entry by independent supermarkets across Australia, or by each of the four existing independent supermarkets

¹¹⁷ SOR, [6.35].

¹¹⁸ [REDACTED].

¹¹⁹ IGA CS, [21(c)]; [REDACTED].

¹²⁰ [REDACTED].

¹²¹ SOR, [6.218].

¹²² [REDACTED]; [REDACTED].

¹²³ Cf ACCC CS [56] and IGA CS [43(a)].

¹²⁴ See *Pacific National (First Instance)* at [138]-[141].

who have entered Kalgoorlie since 2006, only one of which (Spudshed) has entered by acquiring an existing unoccupied supermarket building.¹²⁵ [REDACTED]

¹²⁶ those investments have not been sufficient to deter [REDACTED] taking material steps to enter,¹²⁷ nor the development by Coles of its existing and Proposed Supermarket sites in Kalgoorlie. Nor, where four Metcash-supplied independent supermarkets — and seven independent supermarket operators — have chosen to enter since 2006,¹²⁸ could the Tribunal accept the argument advanced by O'Connor IGA (CS [43]) that high freight costs and logistics are a sufficient barrier to new independent entry. Further, development costs can be avoided by acquiring an existing supermarket building (or other large format store) – as did Spudshed, which entered by acquiring a site previously occupied by Hannan's IGA, and Coles before that.¹²⁹

28 It is put against Coles that new entry is unlikely, because there is insufficient demand to support it: ACCC CS [57]. That is not consistent with the evidence, [REDACTED]

[REDACTED].¹³⁰ There is no real dispute that official population statistics indicate limited population growth. But that is not the measure of demand. The relationship between supermarket demand and population growth in Kalgoorlie is not linear: between 2023 and 2025, when population growth was 0.4% per annum, sales grew [REDACTED] at Coles [REDACTED]

[REDACTED].¹³² Supermarket capacity (by SFA) has increased by approximately [REDACTED] over the same period that population increased by only 3%.¹³³ [REDACTED]

[REDACTED]¹³⁴ [REDACTED]
[REDACTED]
[REDACTED].¹³⁵ Those matters alone are sufficient for the Tribunal to conclude that population growth is not determinative of local demand.

29 In any event, population growth understates demand growth because Kalgoorlie's remoteness and significant transient and FIFO workforce increase demand both directly and indirectly —

[REDACTED]

¹²⁵ SOR [6.222], [6.228], [6.40].

¹²⁶ [REDACTED]

¹²⁷ [REDACTED]; [REDACTED]

¹²⁸ SOR [6.228]; [REDACTED]

[REDACTED]

¹²⁹ SOR [6.40], [6.222], [6.228].

¹³⁰ [REDACTED]

¹³¹ SOR [6.231]; [REDACTED].

¹³² [REDACTED].

¹³³ SOR [REDACTED]

¹³⁴ [REDACTED]

¹³⁵ [REDACTED]

[REDACTED]

[REDACTED].

[REDACTED].¹³⁶ Further, the Tribunal could reasonably infer that population growth is likely to increase, [REDACTED]

[REDACTED]¹³⁷ Demand in Kalgoorlie also depends on the availability of supermarkets in surrounding areas: [REDACTED]

30 [REDACTED]
[REDACTED]
[REDACTED].¹³⁹ The Tribunal should place significant weight on those assessments. The developer of the Proposed Supermarket site stated: [REDACTED]

[REDACTED]¹⁴⁰
[REDACTED]

31 In circumstances where there is sufficient demand for new entry, the market structure is not likely to act as a deterrent.¹⁴² Four Metcash-supplied independent supermarkets (and seven operators) have entered since 2006. Many comparable towns have a similar mix of Coles, Woolworths and independent supermarkets, most with at least two Coles or Woolworths: [14]. This history, combined with the forecasted future in Kalgoorlie, demonstrates that barriers to entry are not high. Indeed, the gravamen of O'Connor IGA's complaint in this case is that barriers are not high enough: [51].

(2) Future with the Proposed Supermarket

32 Having regard to the history of competition in Kalgoorlie, there is no basis to contend that there will be any reduction in non-price (or price) competition in the factual.

33 **Competitors and market shares:** In the future with the Proposed Supermarket, the number of supermarkets in Kalgoorlie will increase from six to seven, two of which will be operated by Coles (competing with Woolworths, Spudshed, and three Metcash-supplied supermarkets). If O'Connor IGA exits, the number of supermarkets will be the same as in the future without the Proposed Supermarket, and Coles would continue to compete with Woolworths, Spudshed, and two Metcash-supplied supermarkets. That structure is consistent with comparably sized regional towns around Australia: of

¹³⁶ [REDACTED]

[REDACTED]

[REDACTED]

¹³⁷ [REDACTED]

¹³⁸ [REDACTED]

¹³⁹ [REDACTED]

¹⁴⁰ [REDACTED]

¹⁴¹ [REDACTED]

¹⁴² Cf IGA CS [43].

the 10 regional towns closest in size to Kalgoorlie, all have more supermarkets than Kalgoorlie, and nine of those towns have at least two Woolworths or two Coles.¹⁴³ As in the counterfactual, [REDACTED]: [43].

34 The Proposed Supermarket will be located in Somerville, closest to O'Connor IGA. It will be a new, high amenity store, of similar size to Coles. [REDACTED]

35 The Proposed Supermarket will (once operational and if successful in attracting customers) increase Coles' share of the market, whether that assessment is based on supermarket count, SFA or revenue. If O'Connor IGA were to exit the market it follows logically that there will have been an increase in the Proposed Supermarket's market share that is significantly at the expense of O'Connor IGA. The Tribunal has the estimate of market shares in the future with the Proposed Supermarket: SOR Tables 7 and 8. Limited weight should be given to that estimate in the competition assessment in the market:

a) *First*, market share by SFA measures *capacity* to meet demand, but not the extent to which a competitor *captures* demand. On the ACCC's estimates, [REDACTED]

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b) *Second*, the ACCC's assessment of market share by revenue is incomplete and unreliable in a number of respects: [REDACTED]

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c) *Third*, it is difficult to predict with any certainty the likely market shares in the future with the Proposed Supermarket. That is because Coles is not acquiring a competitor, but building one from the ground up: the Proposed Supermarket's share of revenue will be 0% until it is operational, and any gain in that share will depend upon whether it is successful in attracting customers, and the competitive responses of other supermarkets¹⁵¹ (including potential expansions, enhancements in service offerings

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148 SOR, [7.2];

149 SOR,

150 SOR, p. 71.

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[REDACTED]¹⁵² and any change in the competitive landscape through new entry). Coles has made certain predictions of those shares for the different purpose of preparing its business case, the limitations of which are explained in [58].

d) *Fourth*, while market shares and concentration are relevant to the Tribunal's assessment, neither is determinative and must be interpreted alongside evidence on entry, expansion and competitive conduct.¹⁵³ That is particularly so here because expansion of market share through investment is fundamentally different from a merger: economic theory does not treat concentration arising from successful competition as harmful, but rather (absent exclusionary or deliberately deterrent conduct) recognises expansion as the natural outcome of competition on the merits.¹⁵⁴

36 Competitive incentives and constraints: In the future with the Proposed Supermarket, supermarkets in Kalgoorlie will continue to constrain each other in respect of both price and non-price dimensions of competition in materially the same ways as they currently do. The Proposed Supermarket is likely to intensify — rather than diminish — those rivals’ existing incentives to invest in dimensions of competition.¹⁵⁵ The competitive constraint that has incentivised O’Connor IGA’s alleged differentiation will not change in the factual. To the contrary, the commercial likelihood is that it will increase, as O’Connor IGA seeks to compete to avoid exit. The conclusion that the exit of O’Connor IGA will materially reduce constraints or change the incentives of the remaining supermarkets requires the Tribunal to accept the premise that O’Connor IGA will act as such a constraint in the factual. For the reasons explained in [REDACTED], the Tribunal could not be satisfied that it will. That O’Connor IGA has sought to differentiate itself is not indicative of any competitive constraint it imposes on Coles or Woolworths,

37 Non-price incentives and constraints: The loss of O'Connor IGA would not reduce “pressure on remaining supermarkets to maintain or improve their product, service and store quality offering”: Cf. SOR [8.9]. Even assuming its exit, 3 large supermarkets remain in the market (with Woolworths constraining Coles); [REDACTED]. Other supermarkets have responded to entry or expansion in Kalgoorlie by enhancing the service and quality of their stores: [38]. There is also the threat of new entry or other expansion: [40]-[43].

38 That is so both generally and with respect to the specific attributes on which the ACCC and O'Connor IGA rely. [REDACTED]

_____ In circumstances where Coles competes most closely with Woolworths to offer store **customer service**, and _____, it is fanciful that O'Connor IGA's exit will lead to any worsening of Coles' customer service offering in the factual. Rather, Coles will be competing to win customers from

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all supermarkets in Kalgoorlie with a superior store, [REDACTED]
[REDACTED] [34]. That is in turn likely to incentivise at least Woolworths, if not other competitors, to invest in their own customer service. The Proposed Supermarket (which itself reflects Coles' incentive to invest in store amenity to compete and attract customers) will increase Woolworths' incentive to **invest in existing or new stores to increase store amenity**. But whether or not O'Connor IGA exits will have no material effect on those incentives for either Coles or Woolworths, [REDACTED]
[REDACTED]: [18]. Meanwhile, the exit of O'Connor IGA would have no impact on the **trading hours** of Coles, Woolworths or Spudshed, because each already trades their maximum permitted hours, incentivised by each other to do so: [14e].

39 Pricing incentives and constraints: The Tribunal could not conclude that there will be any material change in pricing constraints on Coles or Woolworths in the factual, even if O'Connor IGA exits. Indeed, there would be no reduction in price competition, and consumers who prefer to shop in south-western Kalgoorlie will have the benefit of lower prices: [REDACTED]. O'Connor IGA's contention (IGA CS

[REDACTED] that [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED],¹⁵⁸ who will continue to exert materially the same competitive constraint on Coles in the
factual. [REDACTED]
[REDACTED] c.f. SOR [REDACTED] ACCC CS [REDACTED] IGA CS [REDACTED]. [REDACTED]

40 Low barriers and credible threat of new entry will remain: In the future with the Proposed Supermarket, Coles and other supermarkets will continue to be constrained by the threat of new entry. Existing barriers to new entry are not high, for all the reasons set out above. The Tribunal need not identify any particular new entrant that it is satisfied *will* enter. What is relevant is whether a potential new entrant *could* credibly and profitably enter in the future with the Proposed Supermarket, if Coles charged more or gave less, or (on the ACCC's case theory) if there was sufficient demand for a differentiated offering valued by consumers. In circumstances where [REDACTED]

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¹⁵⁹ the Tribunal can be satisfied that is the case.

41 In any event,

¹⁶¹ The location of the Proposed Supermarket is not necessarily a deterrent to further entry in Somerville: ¹⁶² Nor is it likely to preclude new entry in the city development: **[41]**. If or another supermarket, chose to enter or expand at either of the two alternative sites, the Tribunal could reasonably infer that development would proceed at a similar or even faster pace than the Proposed Supermarket

42 Exit of O'Connor IGA would incentivise entry by more effective rival: If O'Connor IGA exits, by reason of its inability ¹⁶⁶ to prevent its customers from switching to Coles in numbers sufficient to preserve its viability, O'Connor IGA's exit will incentivise entry by a more effective rival. Thus, one matter which the ACCC says constitutes a barrier to entry will be *lowered*: that is, the availability of suitable and suitably improved sites: SOR [6.219]; ACCC CS [56]. with a large supermarket-sized site,¹⁶⁷ and every incentive to install another supermarket on that site to preserve the presence of the Chemist Warehouse and Liquorland, will be looking for a tenant. That suggests that entry by a new independent could be more likely in the future *with* the Proposed Supermarket if O'Connor IGA exits the market: c.f. SOR . A future in which an effective new competitor enters to replace O'Connor IGA if it fails to withstand competition from Coles would be one in which not one but *two* effective competitor supermarkets enter in place of an ineffective incumbent. That on any view is an enhancement of competition. It is equally relevant to consider entry by a new supermarket *operator* who purchases a supermarket, or its assets, that would otherwise exit

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¹⁶⁰ Cf SOR .

¹⁶¹ Cf SOR .

¹⁶² . SIFR, [3.4.2]

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the market: [REDACTED] .¹⁶⁸

43 Expansion of competitors: In the factual, one or more existing competitors may invest in an *alternative* supermarket site. [REDACTED]

[REDACTED] .¹⁶⁹

[REDACTED] .¹⁷⁰

[REDACTED] .¹⁷³ If a competitor were to re-locate to an alternative site, their existing site would also become available.

44 Conclusions on market power: The ACCC contends that in the factual, if O'Connor IGA exits, Coles' market power will increase.¹⁷⁴ As Beach J explained in *Epic Games*, "[m]arket power is the ability of a firm to act without constraint from the conduct of competitors or customers, for example by setting prices above the competitive level for a sustained period".¹⁷⁵ Having regard to the matters above, Coles does not have such market power, 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 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.

45 Market share alone is generally not determinative of market power.¹⁷⁶ An increase in market share may be solely because of lower prices, better products or a superior consumer offering made available by the acquisition or expansion; as such, if market share is won because of a superior offering, that outcome is a product of effective competition rather than any SLC.¹⁷⁷ There is no dispute that in the factual, whether or not O'Connor IGA exits, Coles' market share will increase: **[14]**. However, the extent to which it does, and whether or not it results in the exit of O'Connor IGA, will depend upon whether consumers prefer Coles over O'Connor IGA (and other supermarkets). Exit of O'Connor IGA would not be imposed upon consumers (as might be the case in a merger), but would be the direct

¹⁶⁸ [REDACTED].

¹⁶⁹ [REDACTED].

¹⁷⁰ [REDACTED].

¹⁷¹ [REDACTED].

¹⁷² [REDACTED].

¹⁷³ [REDACTED].

¹⁷⁴ ACCC CS [13].

¹⁷⁵ *Epic Games* at [3857] (in respect of s 46 of the CCA).

¹⁷⁶ *Epic Games* at [3861].

¹⁷⁷ Fisher, 'Diagnosing Monopoly' (1979) 27(2) *Journal of Reprints for Antitrust Law and Economics* 669 at 682; Zvtiev, *Corones Competition Law in Australia* (8th ed) at [2.360].

outcome of consumer choice. If Coles were to succeed in attracting sales away from O'Connor IGA to the point of precipitating its exit from the market, that outcome will be an outcome and manifestation of competition in action, than as a result of any market power.

46 The primary consideration in determining market power is the extent to which it is rational or possible for new entry in the relevant market.¹⁷⁸ Barriers to entry and expansion is relevant to the assessment of market power as this determines the extent to which the relevant firm is sufficiently constrained by market pressures.¹⁷⁹ As noted in *Queensland Wire*, “a large market share may be evidence of market power... but the ease with which competitors would be able to enter the market **must** also be considered. It is **only** when for some reason it is not rational or possible for new entrants to participate in the market that a firm can have market power”.¹⁸⁰ As such, competition will not be substantially lessened in every case where barriers are raised by an acquisition or expansion. It will only do so if new entry “is impossible or ... close to impossible.”¹⁸¹ Hence of all the elements of market structure, the most important is the height of any barriers to entry: “is the ease with which firms may enter which establishes the possibilities of market concentration over time; and it is the threat of entry of a new firm or a new plant into a market which operates as the ultimate regulator of competitive conduct”.¹⁸² The market in Kalgoorlie is not characterised by high barriers to entry: **[40]**.

47 There is no reason to think that Coles, with a larger market share, after the Proposed Supermarket, could assume a position to give less and charge more without losing customers. That is the case *even if* it attracts sales away from O'Connor IGA in volumes sufficient to result in the exit of O'Connor IGA. Any attempt by Coles to reduce its service or raise prices would be defeated by a sufficient degree of substitution to Woolworths or Spudshed, and the credible threat of new entry.

PART E: LIKELY POSITION OF O'CONNOR IGA WITH AND WITHOUT PROPOSED SUPERMARKET

48 **No basis for concluding that *with* the Proposed Supermarket, operator of O'Connor IGA will exit.** The information before the Tribunal concerning O'Connor IGA, most of which was provided by O'Connor IGA, does not provide a sufficient basis for any conclusion concerning the likely future of O'Connor IGA, [REDACTED]

¹⁷⁸ *Epic Games* at [3861].

¹⁷⁹ *QCMA* at 185-186, 189.

¹⁸⁰ *Queensland Wire* at 189 (emphasis added).

¹⁸¹ *Pacific National* at [197]. See also *QCMA* at 188, as quoted in *Epic Games* at [3750].

¹⁸² *QCMA* at 189. See also Dr Walker Article at 63-64.

¹⁸³ [REDACTED]

¹⁸⁴ [REDACTED]

¹⁸⁵ [REDACTED]

¹⁸⁶ [REDACTED]

[REDACTED]

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[REDACTED]

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[REDACTED]

51 This indication is reinforced by

[REDACTED]

[REDACTED]

[REDACTED]

²⁰¹ This makes no commercial sense —

[REDACTED]

[REDACTED]

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[REDACTED]

[REDACTED]

[REDACTED]²⁰³ O'Connor IGA's materials make clear that [REDACTED]

[REDACTED]

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[REDACTED]

53 **Asset likely to remain** [REDACTED] The Tribunal should not be satisfied that the Proposed Supermarket would cause the relevant capital asset of O'Connor IGA to exit, [REDACTED]

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[REDACTED]

54 The competitive effects of the Proposed Supermarket on the relevant capital asset should be assessed on the basis of *economic* costs and profits, not *accounting* costs and profits. The financial performance of the asset of O'Connor IGA should be analysed by reference to the replacement cost of the asset (that is, the forward-looking, long-run cost of buying a capital asset of comparable quality and use), rather than on the historical or book cost of that asset in the hands of the current operator of O'Connor IGA. [REDACTED]

55 To approximate a forecast of the future financial performance of the asset of O'Connor IGA, on an economic rather than an accounting basis (and noting that the Tribunal does not have direct evidence concerning the long-run cost of buying a capital asset of comparable quality and use before it) [REDACTED]

56 With the clear and compelling independent evidence establishing the positive equity value of the O'Connor IGA asset at all impacts up to and including [REDACTED] of O'Connor IGA's sales, any finding that O'Connor IGA is likely to exit in the factual [REDACTED] requires the Tribunal to make a finding about any value or increment of sales which it anticipates the Proposed Supermarket will win from O'Connor IGA. Characterisations of that sales diversion or loss of revenue as "substantial" will not suffice: c.f. ACCC CS [50.1], [REDACTED]

²¹⁸ But in "assess[ing] what may occur

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²¹⁸ *ACCC v Metcash Trading* (2011) 198 FCR 297 at [228]; *Pacific National (First Instance)* at [1277].

in the relevant market in the future, taking into account the likelihood as a matter of possibility as well as probability, and weigh[ing] such predictions in the overall assessment of whether the” proposed expansion is likely to have a proscribed effect on the balance of probabilities, the Tribunal cannot sidestep the empirical analysis which presents the likely outcomes in specified diversion and revenue loss scenarios by characterising such diversions and losses as “substantial”.

57 There is no real chance that diversion of sales from O'Connor IGA to the Proposed Supermarket will be [REDACTED] or anything approaching that: The ACCC relies on aspects of Coles' business case to estimate diversions of sales from O'Connor IGA to the Proposed Supermarket in the event that proceeds.²¹⁹ That reliance is misplaced. The Tribunal should not place any comparable reliance on Coles' estimate of a [REDACTED] impact of the Proposed Supermarket on O'Connor IGA. The ACCC misuses an individual estimated input [REDACTED]. [REDACTED] The ACCC then artificially inflates that input for flawed reasons. In fact, when that input is properly understood and considered in light of the evidence as a whole, the Tribunal should be satisfied that any impact on O'Connor IGA will be less than [REDACTED].

58 Coles' business case cannot reliably be used to determine the likely impact on O'Connor

IGA: The component of Coles' business case from which the ACCC extracted this [REDACTED] figure is Coles' estimate of what value of its existing competitors' sales Coles can attract upon entry.²²⁰ By using Coles' estimate of where its sales will be sourced from (Coles' **Source of Sales Analysis**) as a forecast, the ACCC is adapting that aspect of Coles' business case for a use to which it is not suitable. [REDACTED]

59 Coles' primary sales forecast represents the total grocery expenditure available within a defined catchment. In accordance with Coles' usual processes, it was generated [REDACTED]
[REDACTED]
[REDACTED].²²⁷ After generating the primary sales forecast,²²⁸ by a subsequent exercise [REDACTED],²²⁹ Coles

²¹⁹ SOR [6.67]-[6.81]·ACCC.CS [47]

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performed a secondary analysis to identify where (from among existing supermarkets, or from latent sources) the sales forecast in its market assessment could be sourced from.

60 As to this secondary Source of Sales Analysis,

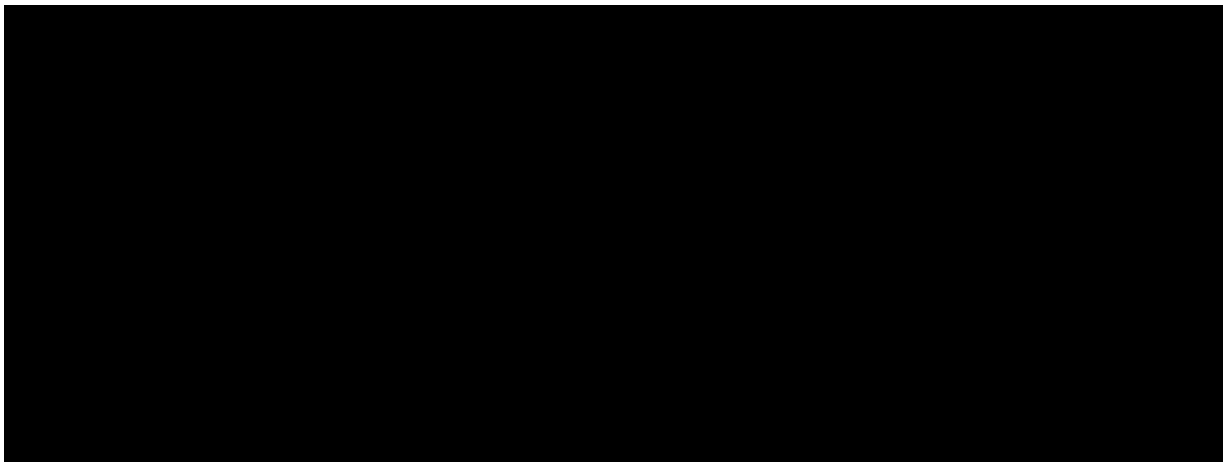
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62 Having regard to the manner in which Coles' business case is prepared, and to the function of the Source of Sales Analysis within it, the [REDACTED] figure identified as the proportion of the sales forecast for the new Coles to be "sourced" from O'Connor IGA should not be used to support any conclusion about what volume of sales O'Connor IGA will lose in the factual, relative to the counterfactual.

63 Coles' business case unlikely to underestimate sales diversion: If, contrary to [58] to [62], 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 (contrary to SOR [REDACTED], [6.79] and ACCC CS [REDACTED]) that the [REDACTED] figure is *unlikely* to *under-estimate* the true position.

64 Contrary to SOR [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) 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 [REDACTED]. The use of ramp rates reflects Coles' experience that [REDACTED]

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and in the absence of any contrary evidence, the Tribunal could not be satisfied that such an approach is appropriate or reliable.

65 Nor is there is any basis, contrary to SOR [REDACTED], to revise Coles' [REDACTED] figure upwards by distributing the "latent" sales figure of [REDACTED] across the existing competitor supermarkets. The allowance of "latent" sales (meaning sales which Coles anticipates that it will generate, but does not ascribe to diversions from any competitor),²³⁸ in Coles' Source of Sales analysis reflects Coles consistent experience [REDACTED]

[REDACTED]

[REDACTED]²⁴⁰ Indeed, the whole purpose of the Source of Sales Analysis is to generate this "latent" figure — that is, to identify [REDACTED]

[REDACTED]

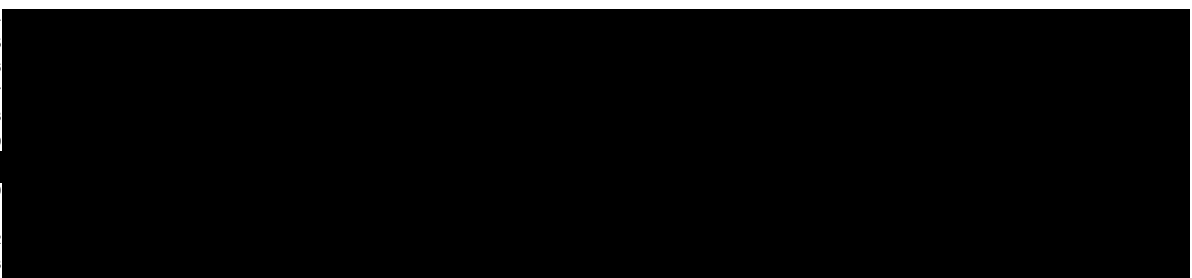
[REDACTED].²⁴¹ The purpose and function of this latent figure in Coles' business case is [REDACTED]

[REDACTED],²⁴² and [REDACTED]

[REDACTED]. To allocate those sales across existing supermarkets would be antithetical to and unsupported by Coles' forecasting approach.

66 **Coles' business case likely overestimates diversion of O'Connor IGA sales:** If, contrary to [58] to [62], the [REDACTED] figure taken from Coles' Source of Sales analysis *is* to be used to estimate O'Connor IGA's revenues, the Tribunal should be satisfied that that [REDACTED] figure likely *overestimates* the true position. Coles estimates that it could attract sales worth [REDACTED] from O'Connor IGA, [REDACTED].²⁴³

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[REDACTED]

[REDACTED]²⁴⁸ Even if (contrary to Coles' submissions), "latent" sales were distributed across existing supermarkets, and Coles' ramp rates applied to inflate the impact on O'Connor IGA in Year 1 into an impact at Year 3, the estimated impact would then be [REDACTED] — well short of the impact which, [REDACTED] [REDACTED] would make the asset of O'Connor IGA NPV negative.

67 Estimate of likely effect on O'Connor IGA must be static, not dynamic: To the extent, that any conclusion concerning the future financial performance of O'Connor IGA can be supported by the Coles business case, that conclusion must necessarily be a static, point-in-time quantification of an impact upon O'Connor IGA of entry by Coles at the commencement of trading by Coles. By its nature, that quantification cannot take account of competitive responses which the operator of O'Connor IGA acting rationally would take in response to entry by Coles. The effect of that competitive response would necessarily be to limit or mitigate the effect of Coles' entry in attracting sales away from existing competitors — including O'Connor IGA. [REDACTED]

[REDACTED]

68 Other materials do not support any conclusion as to diversion of sales: Nothing else in the material before the Tribunal supports any finding concerning the likely diversion of sales from O'Connor IGA to the Proposed Supermarket in the factual. O'Connor IGA put forward an "indicative" assessment by a third party, Geotech, based on overnight locations of mobile phones recorded visiting O'Connor IGA, of what proportion of O'Connor IGA customers the Proposed Supermarket will attract.²⁵⁰ That heavily-caveated assessment at first anticipated a [REDACTED] diversion in traffic, from O'Connor to the Proposed Supermarket, in the factual.²⁵¹ This was based on an assumption that [REDACTED]

[REDACTED] and that [REDACTED]

[REDACTED]²⁵²

Metcash then commissioned updated modelling on the assumption [REDACTED]

[REDACTED]

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██████████²⁵³ Geotech's assumption ██████████ is unrealistic. These assumptions may be contrasted with the assumptions in Coles' business case ██████████: in a comparable catchment²⁵⁴ Coles estimates that it will win between ██████████ and ██████████ market share of consumers living in Geotech's identified catchment.²⁵⁵ Geotech also nowhere explains how it has assessed ██████████.²⁵⁶ If anything, the Geotech evidence supports Coles' position. If ██████████ of O'Connor IGA's customers in any substantial part of Geotech's identified catchment were to prefer the Proposed Supermarket, this would speak to a ██████████ consumer preference for Coles over O'Connor IGA. Any consequences of those preferences for O'Connor IGA up to and including exit of the operator (or even, contrary to Coles' submission, the asset) plainly could not support any finding of SLC. Any harm to O'Connor IGA including its exit, effected on these assumptions, could only rationally be seen as the consequence of competition in action.

PART F: To conclude that exit of O'Connor IGA constitutes a SLC is novel, unsound and contrary to established competition law and the objectives of the CCA

69 Central to the ACCC's determination that the Proposed Supermarket would have the likely effect of a SLC was a conclusion that (i) there is a "material risk" of an "effective, independent competitor" exiting the Kalgoorlie market (SOR, [8.6]); and (ii) consumers would likely be worse off over time by losing a differentiated local offer (SOR, [8.9]). These conclusions did not depend on Coles' expansion involving short-term profit sacrifice with a view to longer-term recoupment: SOR [6.207], [6.209]. This approach is flawed, and contrary to the objectives of the CCA and authority (as the Tribunal recognised, it would be a "novel thesis in Australian competition law merger jurisprudence"²⁵⁷).

70 *First*, such an approach confuses competition on the merits with harm to the competitive process. That is clear from the very words of the ACCC's conclusion at SOR [8.6] that the exit of a competitor will SLC "because the Proposed Supermarket is expected to win significant sales from the existing Kalgoorlie supermarkets and there is a material risk that the loss of those sales will place sufficient financial pressure on an independent competitor that it will exit". Winning customers away from rivals is the essence of competition, and injury to rivals is the natural consequence of the switching which competition prompts: [6]-[7]. As such, the exit of a competitor as a result of Coles winning sales through consumers preferring Coles offer to that of O'Connor IGA cannot of itself constitute a SLC. To find otherwise would be to protect a competitor, not to promote competition.

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257 Application by Coles Supermarkets Australia [2026] ACompT 1 at [97].

71 *Second*, assessing SLC by reference to net consumer welfare is contrary to the objectives of the CCA and binding authority. As the Tribunal explained in *Re Qantas*, in stating the object of the CCA — to enhance the welfare “of Australians, through the promotion of competition”²⁵⁸ — parliament eschewed any framing of competition law so as to “confer special benefits on a particular sector of the community, whether that be consumers or a particular class of competitors, such as small business”.²⁵⁹ To the extent that the CCA embraces assessments of welfare as being relevant to whether conduct affecting competition should be allowed, it does so through public benefit exceptions in the merger authorisation and notification provisions. The relevant standard in that regard is total welfare, not consumer welfare.²⁶⁰ Section 51ABZE(3) does not indicate otherwise. Section 51ABZE(3) says nothing about the SLC enquiry that is to be conducted, pursuant to s 51ABZE(2)(c), consistently with Pt IV jurisprudence. That jurisprudence focuses on the competitive process, not on any welfare measure — let alone a measure of consumer welfare alone. If the negative condition in s 51ABZE(2)(c) is satisfied, enlivening the power to enjoin a notified acquisition, then the Commission is directed to consider, alongside “the object of [the] Act”, “all relevant matters, including the interests of consumers”. That might permit the ACCC to allow an acquisition having a likely effect of lessening competition — consistently with the recognition in this Tribunal and elsewhere that conduct which lessens competition “may have value to society”, and that “[w]e cannot rely on the functioning of competitive markets to deliver ‘everything of value to the community generally’”.²⁶¹ That is different to treating an anticipated effect on consumer *welfare* as equivalent or relevant to the assessment of effects or likely effects upon *competition*, in the s 51ABZE(2)(c) enquiry.

72 *Third*, if a net consumer welfare test were appropriate for assessing any effect of SLC, the Tribunal would not be assisted by the two reports of Prof Rey.²⁶² No basis for the *application* of Prof Rey’s theories *to the facts* of the present matter is identified. No party contends otherwise before the Tribunal.²⁶³ Prof Rey’s Cournot framework is designed for homogenous product markets where firms primarily compete on output or capacity.²⁶⁴ As is apparent from Part D, the differentiated, price-competitive rivalry typical of supermarket competition is typically assessed using a Bertrand model, premised on competition by differentiation, and on customer substitution in response to changes. On a Bertrand model, there could be no competitive harm from the Proposed Supermarket without close differentiated competition between the Proposed Supermarket and O’Connor IGA.²⁶⁵ The Tribunal could not be reasonably satisfied of that in this case.

73 *Fourth*, having regard to competition being a dynamic process, with the assessment of any effect of SLC being a forward-looking evaluative judgment,²⁶⁶ the Tribunal would not adopt Prof Rey’s approach because it would depend upon comparison of static states of consumer welfare before and

²⁵⁸ CCA s 2 (emphasis added); *Re Qantas Airways* (2005) ATPR 42-065 at [178].

²⁵⁹ *Re Qantas* at [177].

²⁶⁰ *Re Qantas* at [185].

²⁶¹ *Re Qantas* at [180]; *Re 7-Eleven Stores Pty Ltd* (1994) ATPR 41-357 at 42,677.

²⁶² Cf ACCC CS, [15].

²⁶³ CCS [56], [57]; ACCC CS [14]–[16].

²⁶⁴ [REDACTED]

²⁶⁵ [REDACTED]

²⁶⁶ *Epic Games* at [3788]; *Pacific National* at [246], affirming *Pacific National (First Instance)* at [1276]–[1279]; QCMA at 188.

after the acquisition rather than dynamic future states with and without the acquisition. That approach would ignore critical matters relevant to the assessment of a likely SLC, including the breadth of the matters identified in Part D above and especially the likelihood of competitive responses.

74 *Fifth*, even if measures of net consumer welfare could be relevant to the SLC question, in isolation, a finding of a likely net diminution in consumer welfare is not sufficient to conclude that any corresponding effect upon competition was (as the authorities require) “real or of substance”.²⁶⁷ The ACCC finds that consumers would “likely be worse off” in the factual vs the counterfactual (SOR [1.15]), but does not measure or assess the magnitude of that diminution in consumer welfare or how it contributes to the overall lessening of competition. Accordingly, the Tribunal does not have any information from which it could evaluate whether any such effect is “substantial”.

75 *Sixth*, the conclusion that consumers would be “worse off” by the exit of a competitor (SOR [8.9]) fails to recognise consumer choice as an aspect of the interests of consumers. That O’Connor IGA is likely to exit upon Coles’ expansion is inconsistent with the proposition that its differentiated offer is truly valued by consumers. Prof Rey asserts that “[i]ntuitively, consumers would benefit from preventing exit” and characterises their preference for the Proposed Supermarket as a failure to recognise their own best interests.²⁶⁸ But it is the very exercise of consumers choosing Coles over O’Connor IGA which would result in the loss of sales to O’Connor IGA (and its exit). Competition regulation based on a direct assessment of which differentiated offering maximises consumer welfare would substitute the regulator’s judgement of consumers’ interests for that of consumers themselves, expressed in switching behaviour. That is antithetical to the CCA, which treats competition as a process where consumers reveal preferences through purchasing decisions.²⁶⁹

76 *Seventh*, the ACCC’s approach is akin to an “efficiency offence” theory of harm.²⁷⁰ The adoption of such a theory in determining the effect of the Proposed Supermarket on competition would be a significant departure from the SLC assessment under existing law. Specifically, it does not facilitate an interpretation of the SLC test which is consistent with the economic rationale that underpins the CCA²⁷¹ — which should centrally focus on protecting and promoting markets by *preserving the conditions for competition*.²⁷² Further, the efficiency offence theory has been widely criticised for its potential to stifle investment and innovation by penalising firms for enhancing their consumer offering. As Dr Jill Walker puts it “[p]rocess and product innovation are constant features of a well-functioning market.”²⁷³ Finding an SLC in an “efficiency offence” will run the risk of chilling investment and competition and cannot be reconciled with the economic rationale and statutory objectives of the CCA.

²⁶⁷ *Pacific National* at [104], [219] (Middleton and O’Byrne JJ); *Epic Games* at [3773]; *Suncorp* at [71].

²⁶⁸ [REDACTED].

²⁶⁹ See *QCMA* and *Pacific National* at paragraph 4. above.

²⁷⁰ Motta, M and Vasconcelos, H, “*Efficiency Gains and Myopic Antitrust Authority in a Dynamic Merger Game*” European University Institute, Department of Economics, EUI Working Paper ECO No 2003/23 (22 September 2003).

²⁷¹ Dr Walker Article at 59.

²⁷² Dr Walker Article at 92-93.

²⁷³ Dr Walker Article at 62.

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