

NOTICE OF LODGMENT
AUSTRALIAN COMPETITION TRIBUNAL

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Lodgment and Details

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



REGISTRAR

Dated: 6/08/2026 5:46 PM

Important information

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

Commonwealth of Australia
Competition and Consumer Act 2010

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* (Cth) (**Act**)

Applicant Coles Supermarkets Pty Ltd

Submissions of Aldi Stores (A Limited Partnership) concerning confidentiality

A INTRODUCTION

- 1 These submissions are made by **Aldi** Stores (A Limited Partnership) in support of its application dated 3 August 2026 for orders pursuant to s 106(2)(b) of the Act that certain documents (listed and highlighted in the schedule to Aldi's application) (**Yellow Documents**) be kept confidential and not be accessible to other participants' external or internal lawyers. If the Yellow Documents are to be referred to in any hearing of the Tribunal, Aldi seeks a direction pursuant to s 106(2)(a) of the Act that the hearing take place in private and only the Commission and Aldi be present.

B BACKGROUND

- 2 The proceeding is an application by **Coles** Supermarkets Pty Ltd for a review of a decision by the Commission under s 51ABZE concerning a proposed acquisition by Coles of the lease of a supermarket in Somerville (a suburb of Kalgoorlie), WA.
- 3 In response to various requests issued by the Commission, Aldi provided certain information and documents to it, including the Yellow Documents.
- 4 On 21 July 2026, the Tribunal made directions including that the Commission file and serve a single documentary index identifying, *inter alia*, any other information furnished and documents produced in connection with the making of the Commission's determination. The Yellow Documents are included in the index.

5 Absent further orders, pursuant to the existing confidentiality regime, the Yellow Documents will be accessible to each participant's external and internal lawyers. The participants include Aldi's direct competitors: Coles and Metcash.

6 Further, absent further orders, at the hearing of Coles' application, the Yellow Documents may be referred to and form part of the evidence given in open hearing.

C APPLICABLE LAW

7 Section 106(2) of the Act permits the Tribunal, where it is satisfied that it is desirable to do so by reason of the confidential nature of any evidence or matter or for any other reason, to give directions, *inter alia*:

- (a) that a hearing or part of a hearing shall take place in private and give directions as to the persons who may be present; and/or
- (b) prohibiting or restricting the publication of matters contained in documents filed or lodged with the Registrar, received in evidence by the Tribunal or placed in the records of the Tribunal.

8 Justice Nimmo observed as early as 1977 that Tribunal proceedings were inherently likely to involve confidential information of trade competitors.¹ In those circumstances, his Honour regarded the predecessor to s 106 as having given the former Trade Practices Tribunal "*very wide powers*".²

9 Section 106(2)(b) has been applied by the Tribunal to limit access to confidential documents voluntarily supplied by participants.³ The exception to the principles of open justice for confidential information in proceedings involving trade rivals is well-established.⁴

D CONSIDERATION

10 Aldi relies upon an affidavit of Mr Radu Popescu affirmed 3 August 2026.

¹ *The Queen v. Trade Practices Tribunal; Ex Parte Tooheys Ltd.* (1977) 31 FLR 1, 5-6.

² *Ibid*, 6.

³ See, eg, *Application by Port of Newcastle Operations Pty Ltd* [2021] ACompT 1.

⁴ *Mobil Oil Australia Ltd v Guina Developments Pty Ltd* [1996] 2 VR 34, 38-41.

- 11 Mr Popescu gives evidence that Aldi operates 607 stores in Australia.⁵ It competes with Coles, Woolworths and Metcash.⁶ Mr Popescu deposes as to his concern that the protection of the existing confidentiality regime may not be sufficient. His concern is that, if for example Coles' external and internal lawyers were to see the information in the Yellow Documents, the information is of the sort that, once read, is not easily forgotten. He apprehends that they might be the same external and internal lawyers who advise Coles in relation to leasing more generally.⁷ Having seen the information in the Yellow Documents, they might inevitably be put in an unfair position of ascendancy in leasing or other negotiations involving Aldi by reason of what they saw in the Yellow Documents and simply could not erase from their minds, even inadvertently or unknowingly.⁸ It is for that reason that Aldi contends that the implied undertaking, which applies to Tribunal proceedings,⁹ is or may be insufficient.
- 12 In paragraphs 15 to 22 of his affidavit, Mr Popescu explains (in a general sense, so as not to disclose the content of the documents) why each of the Yellow Documents contains confidential information, the disclosure of which to Aldi's competitors would cause Aldi harm. It is beyond the scope of these brief submissions to traverse those matters in detail.
- 13 Aldi submits that, balancing the interests of other participants who may wish to receive the Yellow Documents and make submissions about them, and the interests of the Tribunal more broadly in open justice, against the prejudice and harm that Aldi may suffer by reason of the disclosure of the Yellow Documents, the Tribunal can comfortably be satisfied that it is desirable to direct that:
- (a) the Yellow Documents be kept confidential by the Commission and not be accessible to other participants' external or internal lawyers; and
 - (b) if the Yellow Documents are to be referred to in any hearing of the Tribunal, the hearing take place in private and only the Commission and Aldi be present.
- 14 If the Yellow Documents or their contents are referred to in the Tribunal's reasons for decision, Aldi will seek to be heard further before publication of those reasons.

⁵ Popescu [8].

⁶ Popescu [9].

⁷ Popescu [13]-[14].

⁸ *Mobil Oil Australia Ltd v Guina Developments Pty Ltd* [1996] 2 VR 34, 38.

⁹ *Application by Port of Newcastle Operations Pty Ltd* [2021] ACompT 1, [11].

Dated 6 August 2026

A L OUNAPUU

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