

# Submission to Competition Taskforce re merger reform

## 1 Overview

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Metcash Limited (**Metcash**) welcomes the opportunity to comment on the Merger Reform Consultation Paper (**Consultation Paper**) published by the Treasury Competition Taskforce (**Competition Taskforce**). Metcash agrees with the Competition Taskforce that competition is an important driver of dynamism and productivity and that effective competition generates benefits across the economy. It is important that Australia has an effective merger clearance regime that can appropriately consider transactions which raise material risks of anti-competitive outcomes, while not placing additional costs and regulatory burdens in respect of most transactions, which will not raise competition concerns.

Metcash's business purpose is "Championing Successful Independents". Across our food, liquor and hardware pillars we work with our customers to make Metcash supplied stores the 'best store in town' and for independent retailers to consider us as their business partner of choice. Independent retailers occupy an important competitive position in Australia. In addition to providing a pricing constraint to the large dominant vertically integrated retailers, they provide real differences in product offerings and opportunities for local suppliers which benefit both consumers and suppliers. In the context of its review in December 2022, of the potential acquisition of SUPA IGA Karabar, the ACCC noted that SUPA IGA Karabar "offers a different shopping experience to Woolworths, Coles and Aldi. This differentiated shopping experience generates competitive tension in the local area...".

Metcash considers that the current review provides an opportunity to consider how changes to the *Competition and Consumer Act 2010* (Cth) (**CCA**) and, in particular, the merger review provisions might contribute to the continued vibrancy of independent retailers to the benefit of consumers and the overall competitive process. In this respect, Metcash has had long standing concerns regarding "creeping acquisitions" and the ability of the current legal framework to address the broader impacts of a series of local retail transactions.

Metcash notes the broad decline of independent retailers as a percentage of the overall market across each of the grocery, hardware and retail markets over the last 20 years. Metcash considers that the relative decline of the independent sector does not reflect a superior outcome for consumers or suppliers but, rather, evidences a decline in consumer choice and competitive outcomes.

## 2 Metcash's business

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Metcash is a wholesaler to a wide variety of independent retailers. Its customers are, predominantly, independently owned grocery, hardware and liquor stores, which operate under Metcash's portfolio of brands including IGA, Mitre 10, Home Hardware, Total Tools and Cellarbrations.

Metcash champions the interests of the independent grocery, hardware and liquor retailers through its core competencies of buying, merchandising, marketing, brand building, distribution logistics and warehousing.

Metcash has three internal divisions, often referred to as business pillars, each operating in a distinct wholesaling industry segment. These pillars are:

- Food
- Hardware
- Liquor

## 2.1 Food

Metcash Food and Grocery (**MF&G**) is the wholesale dry grocery and fresh foods pillar of the business. It supplies products to independent grocery stores along with support for ranging, retail operations, merchandising and marketing. It supplies and supports a network of over 1,600 stores in Australia which includes stores trading under the IGA and Foodland banners.

In addition, through its Campbells and Convenience business, MF&G's services convenience stores, institutions and other small businesses with grocery products.

## 2.2 Hardware

The Metcash Hardware pillar comprises the Independent Hardware Group (**IHG**) and Total Tools Holdings.

IHG is Australia's largest home improvement wholesaler. It supplies more than 1,500 customers, including independent, joint venture and company owned hardware stores across Australia operating under the Mitre 10 and Home Hardware brands, and hundreds of non-branded retailers. Its branded customers operate a range of store formats of differing sizes and combinations of hardware trade and do it yourself retail offers.

Total Tools is the supplier and franchisor to a professional tool retail network which operates throughout Australia. The network includes a mix of independent and joint venture stores.

## 2.3 Liquor

Australian Liquor Marketers (**ALM**) is Metcash's Liquor pillar. It has two divisions, ALM and Independent Brands Australia (**IBA**).

ALM serves as a broad range liquor wholesaler supplying hotels, liquor stores, restaurants and other licensed premises throughout Australia.

IBA manages and provides retail services to national brands (Cellarbrations, IGA Liquor, Bottle-O, Porters Liquor and Thirsty Camel), and through the provision of these brands and other services, provides a framework for independent liquor retailers to compete with the chains and secure long-term sustainability. It provides strong marketing support and a wide variety of retail services to its independent retailer network to ensure high standards of execution and access to joint buying power.

# 3 Creeping acquisitions

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The term 'creeping acquisitions' refers to a series of acquisitions where, when each acquisition is considered individually, may not be found to substantially lessen competition in individual local markets, but when they are considered together, they may, in aggregate, lessen competition both in individual local markets but also more broadly.

Metcash considers that section 50 of the CCA does not appropriately address the likely competitive harm that could arise from such acquisitions.

The industries that may be prone to this issue over time include industries where retail stores are critical to competing in the marketplace – for example, grocery stores, hardware stores, liquor stores, petrol stations and childcare centres.

The markets that are subject to creeping acquisition concerns are, in large measure, the markets where Metcash seeks to supply and support independent competitors.

#### ***ACCC consideration of supermarket mergers***

To take the example of supermarket acquisitions in the period 2010 to 2023, the ACCC publicly reviewed 29 proposed acquisitions of individual supermarket stores or sites or of shopping centres by the two largest vertically integrated supermarket operators. Metcash understands that there have been a number of other acquisitions of retail grocery stores which were not subject to public review. The ACCC only opposed two of these transactions, with another transaction not being opposed subject to undertakings. Metcash considers that each of the approved transactions entrenched the market power of the two largest supermarkets at a regional or national level.

#### ***Broader impact of local market acquisitions***

In circumstances where an acquisition involves the removal of an independent retailer (whether in grocery, liquor or hardware), the local market loses the product and service variety offered by that independent competitor, as well as the pricing constraint provided by it. The loss of an independent retailer, and its replacement by a large vertically integrated chain, not only entrenches the position of that vertically integrated chain but also reduces the overall efficiency and effectiveness of the Metcash network. Metcash has, and continues to make, significant investments in its distribution centre capabilities and its distribution systems across Australia. Both the cost of logistical services and pricing offered to retailers through negotiations with suppliers are, to a material degree, dependent on volumes. A creeping acquisition strategy by its very nature removes independents from the market. This has an immediate impact on the local retail markets, but also reduces scale efficiencies available to Metcash thereby entrenching the market position of vertically integrated chains in relation to the independent sector.

The competition impacts of a series of transactions may be more apparent than when a single transaction is considered. The effects of creeping acquisitions on Metcash may include:

- Reductions in scale and expected profitability, which will impact new investment. Over time this may result in higher costs, slower deliveries and reductions in product range which in turn, will have impacts on the future prospects on profitability and investment both at the wholesale and retail level.
- Reductions in scale may also lead to a loss of volume which may result in less favourable terms with suppliers, thereby increasing retailers' COGs across the network.

Scale economies are important to Metcash especially in circumstances where the vertically integrated retail grocery chains are substantially larger than Metcash and where there is significant variation in the amount of stock purchased by Metcash customers.

It is emphasised that a loss in volume resulting from a creeping acquisition strategy does not have a linear effect on Metcash's business in terms of its overall efficiency and scale. Further the potential consequences are broader than the impact of volume losses in discussions with suppliers or increases in relative logistics costs. There are any number of fixed costs that cannot be easily reduced where independents exit the market including:

- Advertising – eg the costs of television advertising does not decrease by reason of the number of retailers; and
- Facilities costs, system costs (such as development of warehouse automation or loyalty programs) and staffing costs – the overall competitiveness of the network and the ability to continue to make investments to support local independent retailers is impacted where these costs are borne by a smaller network.

### ***Prior consideration of creeping acquisitions***

As acknowledged by the Consultation Paper, concerns regarding creeping acquisitions are not new. However, proposals to address these long-standing concerns have not been implemented and the minor change to the law introduced in 2011 has not been effective.

- In September 2007, Senator Steve Fielding introduced into Federal Parliament a Bill to regulate creeping acquisitions under the *Trade Practices Act 1974* (Cth). That Bill proposed prohibiting an acquisition where, when taken together with other acquisitions completed by the corporation in the past 6 years, there would be likely to be an effect of substantially lessening competition (the **aggregation model**).
- In August 2008, the Senate Standing Committee on Economics released a report concerning the Trade Practices (Creeping Acquisitions) Amendment Bill 2007. The Committee concluded that 'concerns about the impact of 'creeping acquisitions' on competition are valid'. It agreed that the provisions of section 50 of the *Trade Practices Act 1974* (Cth) were insufficient to address the problem adequately<sup>1</sup>.
- In September 2008, the Federal Treasury released a discussion paper concerning creeping acquisitions. It canvassed both the aggregation model, and an alternative model that would prohibit acquisitions that lessen competition where the acquiring corporation has substantial market power (the **market power model**)<sup>2</sup>.
- In June 2009, the Federal Treasury released a further discussion paper concerning creeping acquisitions. It canvassed two alternative versions of the market power model. One would prohibit acquisitions that enhance the market power of a firm that already has substantial market power (the **market power enhancement model**). The other would prohibit acquisitions that do so only in declared industries or by declared corporations (the **declaration model**)<sup>3</sup>.
- In 2011, the Federal Government amended section 50 to remove the requirement for the acquisition to have a relevant effect on a 'substantial' market, and to substitute 'any market' for 'a market'<sup>4</sup>. The Explanatory Memorandum explained that these amendments 'could assist to address creeping acquisitions concerns'<sup>5</sup>.
- In 2015, the Harper Competition Policy Review discussed but ultimately did not advance any changes to the CCA in respect of creeping acquisitions<sup>6</sup>.

Metcash considers that the Federal Government's amendments to section 50 in 2011, which were ostensibly directed at the problem of creeping acquisitions, have not dealt

<sup>1</sup> Report of the Senate Standing Committee on Economics on Trade Practices (Creeping Acquisitions) Amendment Bill 2007 (August 2008) at [3.1].

<sup>2</sup> <http://archive.treasury.gov.au/documents/1409/PDF/Discussion%20Paper%20-%20Creeping%20Acquisitions.pdf>.

<sup>3</sup> [http://archive.treasury.gov.au/documents/1530/PDF/Discussion\\_paper\\_Creeping\\_Acquisitions.pdf](http://archive.treasury.gov.au/documents/1530/PDF/Discussion_paper_Creeping_Acquisitions.pdf).

<sup>4</sup> Competition and Consumer Legislation Amendment Act 2011 (No. 184).

<sup>5</sup> Explanatory Memorandum to the Competition and Consumer Legislation Amendment Bill 2010 at [1.5].

<sup>6</sup> I Harper, P Anderson, S McCluskey, M O'Bryan AC, *Competition Policy Review – Final Report*, 2015, pp 320-323

with the problem. Specifically, by extending section 50 to include non-substantial markets and by ensuring that ‘any’ market can be considered, the amendments have done nothing to prevent a corporation from completing a series of minor acquisitions in one particular market which have a broader anti-competitive effect. The issue of creeping acquisitions therefore remains unaddressed by section 50.

Metcash considers that the Competition Taskforce should reconsider the issue of creeping acquisitions. In particular, Metcash considers that the Competition Taskforce should propose an amendment to section 50 of the CCA to ensure that Australian marketplaces are properly protected from such acquisitions.

## 4 Proposed changes to the CCA

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Against the background above, Metcash makes the following submissions in respect of certain issues raised and proposed reforms noted in the Consultation Paper.

### 4.1 Compulsory notifications and “satisfaction test”

Metcash understands that the ACCC is advocating for a mandatory suspensory formal clearance regime where mergers above notification thresholds would fall within the formal regime and be prohibited from completing unless approved by the ACCC or Australian Competition Tribunal (**Tribunal**) on review. In addition, the ACCC has advocated a “satisfaction test” whereby in order to clear a transaction the ACCC would need to be satisfied that the transaction is not likely to substantially lessen competition.

This would result in a significant change to the Australian competition law regime. It is understood that, if any changes are made, there will be an attraction in having a single regime which would apply to all transactions. However, in Metcash’s view a one size fits all approach would not be appropriate. There are certain segments of the economy where market structure and the position of certain market participants may support a mandatory notification regime and/or the adoption of the “satisfaction test”. Those concerns may support placing additional burdens and completion risk on merging parties in limited instances. Metcash considers that this proposal may be an appropriate response (along with other changes noted below) to address concerns regarding creeping acquisitions.

Metcash does not consider that a broader case for these changes has been made out (i.e., that a compulsory suspensory regime should apply to all transactions over a certain size). Metcash considers that, generally the informal merger clearance process is appropriate and has delivered benefits to the business community and Australian consumers. Whilst Metcash cannot comment on the full range of matters that have been considered by the ACCC, its understanding is that most significant transactions are notified to the ACCC. The number of transactions that are abandoned following a decision by the ACCC not to grant clearance and/or the offering of undertakings to address competition law concerns suggest that, overall, the current voluntary regime is effective.

As such, Metcash’s position is that any mandatory regime and “satisfaction test” should apply to those limited sectors of the economy and market participants to address creeping acquisition concerns. It is not in favour of broader changes.

If the Competition Taskforce ultimately advanced the ACCC’s position, Metcash considers that it would need to carefully consider the review rights available to merging parties. It would not be in favour of proposals that would limit the scope of materials to be considered by either the Tribunal or the Federal Court. In this respect, it is not in favour of a system that seeks to limit the capacity of any entity (be that the Federal Court or the Tribunal) to review a decision by the ACCC.

## 4.2 Change to merger factors in section 50(3)

The Consultation Paper considers potential changes to the merger factors in section 50(3) of the CCA. The proposed changes include changes directed towards whether the acquisition is part of a series of acquisitions, on the basis that this may in part, assist with the concerns regarding creeping acquisitions. Metcash considers that there may be some benefit in referring to creeping acquisitions within section 50(3). However, Metcash considers that a change in the primary contravention in section 50(1) such that a substantial lessening of competition is specifically considered by reference to the cumulative effect of multiple acquisitions (for example, all acquisitions in a particular time period) would be preferable.

In this respect, the Competition Taskforce should consider including, within section 50(1) itself, language which would clearly require, in assessing the potential lessening of competition, the cumulative effect of multiple acquisitions within a relevant period be assessed. It is less certain, in our view, that an addition to the merger factors in section 50(3) would have the same effect.

It is noted that the acquisition of an independent retailer by a major vertically integrated chain will negatively impact the competitiveness of the independent sector notwithstanding which major vertically integrated chain is the acquirer. In this regard we would encourage the Competition Taskforce to consider amendments which would require a consideration of the cumulative effect of potentially multiple acquisitions by multiple parties in assessing any substantial lessening of competition.

A consideration of multiple transactions is not a novel concept. It would not be an unfamiliar concept in the CCA. For example:

- Section 45(4) of the CCA already allows multiple contracts, arrangements or understandings to be aggregated. It deems a provision of a contract, arrangement or understanding to have, or be likely to have, the effect of substantially lessening competition if that provision together with provisions of other contracts, arrangements or understandings have that effect.
- Section 47(10)(b) of the CCA similarly already allows multiple instances of exclusive dealing conduct to be aggregated. It prohibits exclusive dealing conduct where the conduct, together with other conduct of the same or similar kind, has, or is likely to have, the effect of substantially lessening competition.

## 4.3 Changes to merger control test

The Consultation Paper, in addition to considering potential changes to the section 50(3) factors also contemplates a change to the substantial lessening of competition test in section 50. It considers that mergers that would “entrench, materially increase or materially extend a position of substantial market power” would amount to a substantial lessening of competition.

Again, acknowledging potential concerns regarding differing tests being applied to different segments of the economy, Metcash considers that any such change should be specifically directed towards industries where it has been determined that there is a creeping acquisition concern (e.g., from Metcash’s perspective, retail, grocery and liquor markets).

The ACCC, in support of this proposal, considers that it would allow for a greater focus “on the effect of mergers on the structural conditions for competition” and that such a test would mirror that of the European Commission where mergers are prohibited if they

significantly impede competition “in particular as a result of the creation or strengthening of a dominant position”<sup>7</sup>.

The ACCC, in advocating this position, appears to have concerns regarding digital platforms in mind. Metcash takes no position in respect of digital platform markets. However, it is arguable that the term “strengthening”, would allow for a consideration of the impact of a transaction beyond the scope of the immediate local market and could, in combination with the other matters discussed above, provide some greater ability to address ongoing concerns with creeping acquisitions.

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<sup>7</sup> *Outline to Treasury ACCC's proposals for merger reform* - March 2023 at p 10