

Submission

1 Overview

Metcash Limited (**Metcash**) is an ASX Top 100 Company. Headquartered in Sydney, its diverse business operations range from servicing its customers in supermarket and convenience businesses through to hardware and automotive aftermarket parts and services.

Metcash welcomes this opportunity to comment on the Issues Paper published by the Competition Policy Review.

In this submission, Metcash comments on three specific issues:

- The merger control provision in section 50 of the *Competition and Consumer Act 2010* (Cth) (the **Act**), and in particular, whether or not it is sufficiently well adapted for addressing the problem of creeping acquisitions;
- The third line forcing prohibitions in section 47 of the Act, and in particular, whether the *per se* prohibition should be removed; and
- The existing unfair and unconscionable conduct provisions in the *Australian Consumer Law*, and in particular, whether those provisions are adequate to protect the interests of small business.

This submission is structured as follows:

- Section 2 provides a brief description of Metcash's business;
- Section 3 sets out Metcash's submission regarding creeping acquisitions;
- Section 4 sets out Metcash's submission regarding the existing third line forcing prohibitions; and
- Section 5 sets out Metcash's submission regarding the existing unfair and unconscionable conduct provisions, and whether further protection should be extended to small business.

2 Metcash's business

Metcash is the wholesaler to a wide variety of independent retailers. Its customers are, predominantly, independently owned grocery and liquor stores, but also include hardware and automotive aftermarket part and service stores, which operate under Metcash's portfolio of brands including: IGA, Mitre 10, Cellarbrations and Autobarn.

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

Metcash has 3 internal divisions, often referred to as business pillars, each operating in a distinct wholesaling industry segment:

- Food & Grocery
- Liquor
- Hardware & Automotive

2.1 Metcash Food & Grocery

Metcash Food and Grocery (**MF&G**) is the wholesale dry grocery and fresh foods pillar of the business. It supplies product for independent grocery stores along with support for ranging, retail operations, merchandising and marketing. It supplies approximately 2,400 independent stores across Australia including 1,365 IGA branded stores.

The Convenience division of MF&G has two wholesale distribution arms which service businesses around Australia. These are:

- Campbells Wholesale, which is Australia's leading distributor in Fast Moving Consumer Goods, with a National network of over 18 branches servicing in excess of 60,000 small businesses and ABN holders across all states & territories; and
- C-Store Distribution, which aims to provide a one stop shop and total supply solution to the convenience and route trade channel.

2.2 Australian Liquor Marketers

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 over 12,000 hotels, liquor stores, restaurants and other licensed premises throughout Australia. The division has a wholly owned subsidiary, Tasman Liquor Company, which operates in a similar market in New Zealand.
- IBA creates strong national brands (Cellarbrations, IGA Liquor (formerly IGA Plus Liquor), Bottle-O and Bottle-O Neighbourhood), and a suitable framework for independent liquor retailers to compete equally 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.

2.3 Mitre 10 (Hardware)

The Metcash Hardware pillar bears the name of its well-recognised brand: Mitre 10 – the independent hardware wholesaler committed to supporting retailers providing the best brands at great prices.

Mitre 10 is Australia's only independent home improvement and hardware wholesaler to the industry. It has an iconic independent and local retail network of over 430 Mitre 10 and True Value Hardware stores.

2.4 Metcash Automotive

On 2 July 2012, Metcash entered into an agreement to acquire a 75.1% stake in Automotive Brands Group (**ABG**) for \$53.8m and gained the independent network of Autobarn and Autopro stores. On 16 May 2013, Metcash acquired Australian Truck and Auto Parts; which comprises a number of retail and distributor banners. This increased

Metcash's ownership in the automotive aftermarket division of ABG to 83.1%. The division managing these businesses is now referred to as Metcash Automotive.

3 Creeping acquisitions

The term 'creeping acquisitions' refers to a series of acquisitions where, when each acquisition is considered individually, none of them substantially lessen competition, but when they are considered together, they do, in aggregate, substantially lessen competition. The issue is whether or not section 50 of the Act appropriately addresses the likely competitive harm that could arise from such acquisitions.

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

The issue of creeping acquisitions is not new. For example, in only the past seven years:

- In September 2007, Senator Steve Fielding introduced into Federal Parliament a Bill to regulate creeping acquisitions under the Act. 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 agrees that the current provisions of section 50 of the *Trade Practices Act* are insufficient to address the problem adequately'.¹
- 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**).²
- 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**).³
- 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'.⁴ The Explanatory Memorandum explained that these amendments 'could assist to address creeping acquisitions concerns'.⁵

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

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

³ http://archive.treasury.gov.au/documents/1530/PDF/Discussion_paper_Creeping_Acquisitions.pdf.

⁴ *Competition and Consumer Legislation Amendment Act 2011* (No. 184).

⁵ *Explanatory Memorandum to the Competition and Consumer Legislation Amendment Bill 2010* at [1.5].

Metcash provided submissions to the consultations conducted by Treasury concerning creeping acquisitions in 2008 and 2009.⁶ In both of those submissions, Metcash reiterated and explained in detail its view that creeping acquisitions are a serious threat to effective competition in the Australian supermarket sector. Metcash remains of that view.

Further, 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 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 that together would allow the corporation to accrue substantial market power, or that would have the effect of substantially lessening competition. The issue of creeping acquisitions therefore remains unaddressed by section 50.

An amendment to the Act that regulates or prohibits creeping acquisitions would be akin to closing a 'loophole', or providing an anti-circumvention measure, in the sense that it would stop a series of acquisitions that collectively would substantially lessen competition before those acquisitions could do so. This is not a novel concept, and nor would it be an unfamiliar concept in the Act. For example:

- Section 45(4) of the Act 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 Act 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.

Metcash considers that the Review Panel should reconsider the issue of creeping acquisitions. Further, Metcash considers that the Review Panel should propose an amendment to section 50 of the Act to ensure that Australian marketplaces are properly protected from such acquisitions.

4 Third line forcing

4.1 Context

The phrase 'third line forcing' refers to the situation where a firm supplies goods or services to a customer on condition that the customer will acquire goods or services from another firm. The Act prohibits this conduct on a *per se* basis – that is, without requiring any substantive anti-competitive purpose or effect. Specifically:

- Section 47(6) prohibits supply, or offers to supply, goods or services on condition that the person to whom they are supplied will acquire goods or services of a particular kind or description directly or indirectly from another person.
- Section 47(7) prohibits refusing to supply goods or services to a person for the reason that the person has not acquired or has not agreed to acquire goods or services of a particular kind or description directly or indirectly from another person.

⁶ See <http://archive.treasury.gov.au/documents/1422/PDF/Metcash.pdf>;
http://archive.treasury.gov.au/documents/1583/PDF/Metcash_Limited.pdf.

There are similar *per se* prohibitions in sections 47(8)(c) and 47(9)(c) that apply in the context of leases or licences over real property.

The Act also provides a 'notification' process under which a corporation can obtain immunity for third line forcing conduct 14 days from lodging the notification, so long as the ACCC does not give the corporation a notice stating that it is satisfied that the likely public benefit of the conduct will not outweigh the likely public detriment of the conduct.⁷ The filing fee for a third line forcing notification is \$100.⁸

Notwithstanding that notification provides a relatively streamlined process through which a corporation can obtain the ability to engage in third line forcing conduct without contravening the Act, Metcash considers that the prohibition on third line forcing conduct should apply only if there is a purpose or effect of substantially lessening competition. It should not be prohibited on a *per se* basis.

There are at least four reasons that support amending section 47 of the Act to remove the *per se* prohibition on third line forcing (and instead subjecting it to the competition test in section 47(10)):

- It is contrary to the object of the Act to prohibit, in an absolute way, conduct that is often pro-competitive.
- It is inefficient to require corporations to submit to a formal notification process in order to engage in pro-competitive or publically beneficial conduct.
- The *per se* prohibition on third line forcing creates competitive disadvantage as between firms that are vertically integrated or conglomerated, and firms that are not.
- Previous reviews of the Australia's competition laws, the literature, and judicial decisions broadly support removing the *per se* prohibition on third line forcing.

4.2 The object of the Act supports an amendment

The express object of the Act is to 'enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection'.⁹ That means the Act should not absolutely prohibit conduct that is often pro-competitive. Instead, the Act should only prohibit that kind of conduct where there is a demonstrable anti-competitive purpose or effect.

Metcash considers that third line forcing is a kind of conduct that is often pro-competitive. For example:

- Third line forcing may be necessary to ensure product quality standards. It may enhance the competitiveness of franchisees if a franchisor requires its franchisee to use certain inputs.¹⁰
- Third line forcing may be efficiency enhancing where the cost of producing and selling products together is less than the cost of doing so separately.¹¹
- Third line forcing may involve bundled discounts that are beneficial to consumers.¹²

⁷ See sections 47(10A) and 93 of the Act.

⁸ See Reg 28(5) and Sch.1B, item 9 of the *Competition and Consumer Regulations 2010*.

⁹ See section 2 of the Act.

¹⁰ McEwin, R.I., 'Third line forcing in Australia' (1994) 22 *Australian Business Law Review* 114 at 121.

¹¹ McEwin, R.I., 'Third line forcing in Australia' (1994) 22 *Australian Business Law Review* 114 at 121.

¹² Healey, D., 'Third line forcing: has the problem gone away?' (2009) 32 *UNSW Law Journal* 249 at 251.

This is especially so in retail industries such as grocery, petrol and liquor. Competitors in these industries regularly offer bundled discounts across different categories of products in order to enhance the competitiveness of their offering. Shopper docket discounts on fuel where a certain volume of groceries is purchased is one such example. These discounts can constitute a significant benefit to consumers.

As a consequence, Metcash considers that it is counterproductive to achieving the object of the Act for the Act to prohibit this kind of conduct absolutely when in many cases it is pro-competitive.

4.3 An amendment is supported on efficiency grounds

Although the notification process permits pro-competitive or publically beneficial third line forcing conduct to occur, it does so at a cost.

For corporations that wish to engage in third line forcing conduct, the amount that corporations would usually incur in legal costs (both for advice and preparation of the notification) in addition to the filing fee would be a significant sum. Given that the ACCC receives hundreds of third line forcing notifications each year, this represents a substantial, and unnecessary compliance cost for businesses that wish to engage in pro-competitive or publically beneficial conduct.

Further, many corporations will regularly incur legal advice costs in relation to conduct that ultimately turns out not to be third line forcing. This too is an unnecessary compliance cost for businesses that could be avoided if the *per se* prohibition on third line forcing conduct was removed.

4.4 An amendment is needed to remove competitive disadvantage

Where a firm gives bundled discounts on goods or services that it supplies, or that members of its corporate group supply, this conduct is not subject to a *per se* prohibition under the Act. At most, the conduct may contravene the Act if it has a purpose or effect of substantially lessening competition, either because it constitutes exclusive dealing or an anti-competitive contract, or if the firm has taken advantage of substantial market power for an anti-competitive purpose.

For example, in the grocery industry, the major supermarket chains (Coles and Woolworths) are conglomerated across the grocery, petrol, liquor and hardware industries. That means that when Coles or Woolworths offer discounts on fuel or liquor at their stores where a person purchases a certain volume of groceries, this conduct is not automatically prohibited by the Act, and does not usually need to be notified to the ACCC. Instead, when bundled discounts of this kind raise substantive competition concerns – as they sometimes do – the ACCC reviews the conduct, and in some cases, takes action to restrain it.¹³

By contrast, independent grocery retailers, such as the IGA retailers, are not conglomerated across other industries. That means that when independent grocery retailers wish to provide bundled offers whereby consumers receive discounts when purchasing groceries in combination with fuel or liquor at unrelated businesses, those retailers (or the unrelated business, as the case may be) need to lodge a third line forcing notification with the ACCC.

¹³ For example, in December 2013, the ACCC accepted s87B undertakings from Coles and Woolworths obliging them not to offer fuel discounts that are greater than 4 cents per litre, or not wholly funded by their fuel divisions. The ACCC subsequently commenced proceedings to enforce those undertakings. See *Australian Competition and Consumer Commission v Woolworths Limited* [2014] FCA 364 and *Australian Competition and Consumer Commission v Coles Group Limited* [2014] FCA 363.

Similarly, the vertically integrated major supermarket chains are able to direct their stores to acquire services from third party providers for quality control and consistency without facing any competition law prohibition. By contrast, if Metcash wanted to encourage IGA retailers to use third party services to boost quality and competitiveness, for example by offering a rebate on groceries for using a third party service, Metcash would need to lodge a third line forcing notification.

Because the independent sector in the grocery industry incurs a compliance cost in instances like these that the major supermarket chains do not incur (due to their conglomeration or vertical integration), this creates an unnecessary competitive disadvantage for the independent sector. Indeed, the Dawson Review in 2003 recognised that '[t]he current provision prohibiting third line forcing discriminates on the basis of corporate structure'.¹⁴

Accordingly, if the *per se* prohibition on third line forcing conduct were to be removed, the potential for such competitive disadvantages in industries like the grocery industry would be removed. Metcash considers that such an amendment would better promote the express purpose of the Act.

4.5 There is broad support for an amendment

There has been broad support over many years for removing the *per se* prohibition on third line forcing conduct. Specifically:

- In 1993, the Hilmer Report recommended removing the *per se* prohibition on third line forcing. It stated '[t]he Committee does not believe that third-line forcing is so significantly anti-competitive as to warrant treatment which differs from other forms of tying and recommends that third-line forcing be subject to a competition test and notification'.¹⁵
- In 2003, the Dawson Review recommended removing the *per se* prohibition on third line forcing and instead making third line forcing subject to a substantial lessening of competition test.¹⁶
- In 2009, Justice Gordon stated in *Australian Competition and Consumer Commission v Bill Express Ltd* (2009) 180 FCR 105 that the fact that third line forcing conduct continues to be subject to a *per se* prohibition is 'unsatisfactory'.¹⁷
- In the academic literature, there are a number of articles that argue the *per se* prohibition is unwarranted, given that in many situations, third line forcing is not anti-competitive.¹⁸
- In *Heydon's Competition and Consumer Law*, Dyson Heydon notes that it is anomalous to subject third line forcing to *per se* prohibition, when other kinds of exclusive dealing and full line forcing are subject to a substantial lessening of competition test.¹⁹

¹⁴ *Review of the Competition Provisions of the Trade Practices Act* (January 2003) at p130.

¹⁵ Report of the Competition Policy Review (1993) (the **Hilmer Report**) at p54.

¹⁶ *Review of the Competition Provisions of the Trade Practices Act* (January 2003) at p131.

¹⁷ *Australian Competition and Consumer Commission v Bill Express Ltd* (2009) 180 FCR 105 at 118.

¹⁸ McEwin, R.I., 'Third line forcing in Australia' (1994) 22 *Australian Business Law Review* 114; Healey, D., 'Third line forcing: has the problem gone away?' (2009) 32 *UNSW Law Journal* 249; Hortle, E., 'Third-line forcing and the notification process: Yet another reason to abolish the per se prohibition' (2010) 18 *Competition & Consumer Law Journal* 39.

¹⁹ Heydon D, *Competition and Consumer Law* at [70.340].

Metcash considers the Review Panel should endorse the widespread support for removing the *per se* prohibition on third line forcing conduct, and recommend strongly that such an amendment be made.

5 No further changes are warranted to protect small business

The Issues Paper notes that Australian Governments are currently considering whether or not the unfair contract terms provisions of the *Australian Consumer Law* ought to be extended to protect small business as well as consumers.²⁰ The unfair contract terms provisions provide that unfair terms in standard form consumer contracts are void.²¹

Metcash supports the existing protections for small business that the Act and the *Australian Consumer Law* already provide. The success of small business, which includes many independent retailers that Metcash serves, is critical to Metcash's success. In the grocery industry especially, Metcash considers it is important that the Act and the *Australian Consumer Law* contain protections for small business that are sufficient to promote the efficiency of independent retailers, and to attract quality operators of independent stores.

However, Metcash also considers the Review Panel should reject calls to extend the unfair contract terms regime to small business. There are at least two broad reasons for this:

- The current protections for small business in the Act (for example, the prohibitions against unconscionable conduct and contravening certain industry codes) are sufficient; and
- Maintaining the status quo would avoid imposing substantial costs on businesses that transact with 'small business'.

5.1 Extending unfair contract terms to small business is unnecessary

The Act already contains a number of protections for small businesses in their interactions with larger businesses. Two key examples of these protections are the prohibition on unconscionable conduct in connection with goods or services²² and the prohibition against contravening applicable industry codes.²³

Section 21 of the *Australian Consumer Law* prohibits conduct in connection with the supply or acquisition of goods or services that is, in all the circumstances, unconscionable. Further, section 21(4) provides that, in considering whether or not conduct is unconscionable, the court may consider the terms of the contract, and the manner in which, and extent to which, the contract is carried out. That is, if the terms of a contract between a small business and a larger business are capable of being regarded as being contrary to good conscience according to the norms of society²⁴, those terms, or enforcing those terms, may involve unconscionable conduct.

This means that small businesses already have an important potential remedy against seriously unreasonable or unfair contract terms. In addition, it is likely that larger businesses would be deterred from entering into such contracts with small businesses in

²⁰ Competition Policy Review, Issues Paper (April 2014) at [5.14].

²¹ Section 23 of the *Australian Consumer Law*.

²² See section 21 of the *Australian Consumer Law*.

²³ See section 51AD of the Act.

²⁴ *Australian Competition and Consumer Commission v Lux Distributors Pty Ltd* [2013] FCAFC 90 at [41].

any event, given that doing so may expose them to potentially substantial pecuniary penalties if they were found to have contravened the prohibition on unconscionable conduct.²⁵

Section 51AD of the Act prohibits a corporation from contravening an applicable industry code. An applicable industry code is one that has been prescribed by regulations.²⁶ If a corporation contravenes an applicable industry code, it is potentially exposed to actions for damages, injunctions and other remedial orders under sections 80, 82 and 87 of the Act.

Industry codes have the potential to provide significant protections for small business. For example, the Franchising Code of Conduct is a prescribed mandatory industry code for the purposes of the Act.²⁷ This code provides a number of protections for franchisees, which are often small businesses, in their interactions with franchisors, including disclosure requirements and cooling off periods.

Further, small business customers often have more experience with commercial contracts, and better access to advice and support (for example, from industry associations) than consumers.

As a consequence, Metcash considers that the current protections for small business in the Act and the *Australian Consumer Law* are sufficient. It is unnecessary to provide small business with further protections in the form of unfair contract terms legislation.

5.2 Extending unfair contract terms to small business would be costly

Extending the unfair contract terms provisions of the *Australian Consumer Law* would involve substantial one-off and ongoing costs for firms that transact with small businesses. Those increased costs would ultimately be passed on to consumers, to the detriment of Australian economic welfare overall.

Specifically, Metcash considers that, if the current protections for consumers under the unfair contract terms provisions were extended to small business, there would be at least the following costs for Australian businesses:

- All firms that interact with small business by using standard form contracts would need to review their standard form contracts for compliance with the new laws (or otherwise risk certain terms of their standard form contracts being declared void). That would likely involve substantial one-off compliance and legal advisory costs.
- All firms that interact with small business by using standard form contracts would face increased contractual uncertainty due to the risk of certain terms being declared void. That is a significant problem when the purpose of contracts is to allocate risks between the parties. By introducing additional contractual uncertainty for firms that transact with small business, those firms will need to mitigate risks in other ways. That would be likely to involve ongoing increased costs. For example, increased legal advisory costs (to ensure that contract terms are not unfair), allocating risks through increased pricing (where the firm supplies a small business) or reduced pricing (where the firm purchases from a small business) or bearing additional risk (which would ultimately be passed on to consumers in end product prices).

²⁵ Under section 224(1)(a)(i) of the *Australian Consumer Law*, corporations are liable to a maximum pecuniary penalty of \$1.1 million, and individuals are liable to a maximum pecuniary penalty of \$220,000.

²⁶ See sections 51ACA and 51AE of the Act.

²⁷ See Reg 3 of the *Trade Practices (Industry Codes – Franchising) Regulations 1998*.

- To the extent that firms that interact with small business would be deterred from using standard form contracts as often, opting instead for negotiated contracts, this would increase costs for those firms and small business, due to increased time spent negotiating contracts.

Accordingly, Metcash considers that it would not benefit the welfare of Australians as a whole to subject standard form contracts with small business to the unfair contract terms legislation. The Review Panel should recommend against such an extension.