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Mr John Hawkins
Committee Secretary
Senate Economics Committee
The Australian Parliament
Canberra

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Dear Mr Hawkins

Submission to Senate Inquiry into Trade Practices (Creeping Acquisitions) Amendment Bill 2007

Metcash welcomes the appointment of a dedicated Minister for Competition Policy and the Australian Government's recognition that the current Trade Practices Act ("the Act") is in need of reforms to effectively deal with creeping acquisitions.

Metcash plays a key role in the independent sector of the grocery industry, and is therefore very supportive of the Government's intentions to more effectively contain creeping acquisitions. This is an important issue for the grocery industry, as a series of acquisitions of independent retailers by major chains over the past decade has resulted in a highly concentrated retail market.

The ACCC Chairman has noted that "the Trade Practices Act…does not permit us to stop parties that are engaging in acquisitions of assets by small increments". In the past, the ACCC has not been able to prevent the vast majority of acquisitions of independent supermarkets by the major chains. In their public submission to the ACCC on creeping acquisitions, Woolworths recognises the fact that the ACCC has cleared the acquisition of 21 Action stores and 6 independent supermarkets since 2005. A number of supermarket acquisitions have also proceeded without notification to the ACCC. Despite the denial of a creeping acquisitions "strategy", the combined market share of the major chains (Coles and Woolworths) in the packaged groceries market is now approximately 78%.

The ACCC recently elected to block the purchase of the Karabar Supabarn supermarket by Woolworths because the acquisition would "substantially lessen competition in the local retail supermarket market surrounding the area".[1] However the current Act would not be able to block acquisitions in situations where the major chains are seeking to acquire an independent retailer in an area where they do not already have a presence.

[1] ACCC, Media Release #MR 178/08, 208

Such acquisitions reduce the competitiveness of the independent sector of the grocery industry, as they result in:

- a loss of sales volumes (and associated scale economies) for the independent sector as a whole; and
- increases the bargaining power of the major chains against suppliers (including both grocery product suppliers and landlords).

In a 2002 OECD Competition Committee Policy Roundtable, many OECD regulators have recognised the difficulties in using the "substantial lessening of competition" test to practically prevent a series of small mergers if each merger is analysed in isolation.[2] We fully agree with the government's conclusion that reform to the Act is essential and a priority for legislative change.

While there are no specific mentions of how to evaluate creeping acquisitions in the Merger Guidelines 2008 (draft) published by the ACCC in February 2008, these guidelines do provide a greater focus on market dynamics. It would be useful to have more information on how the amendments would apply in practice. It is important that the ACCC provide specific guidelines on how creeping acquisitions will be assessed in practice.

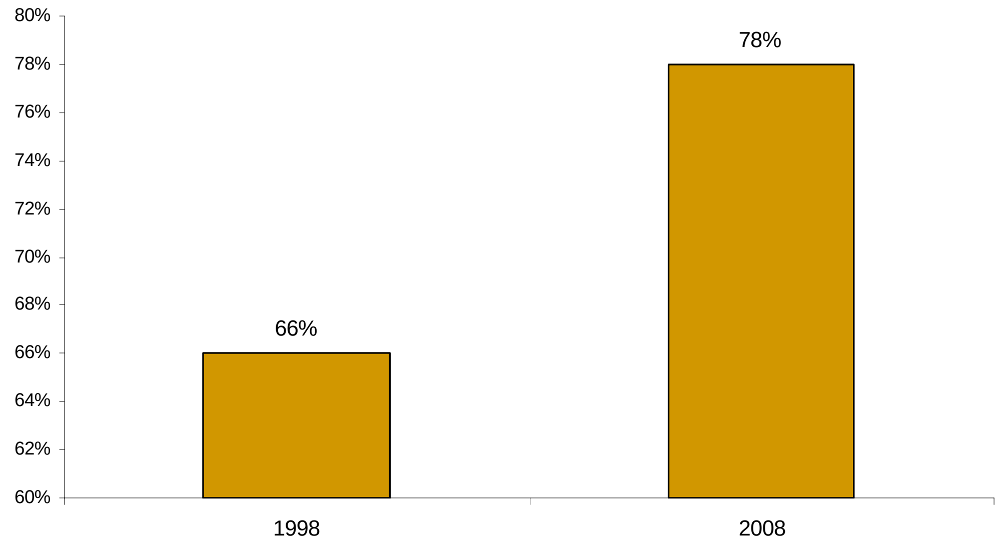
The proposed amendments in the Trade Practices (Creeping Acquisitions) Amendment Bill 2007 ("the Bill"), which primarily change the Act to enable the ACCC to examine other acquisitions of the acquirer over the 6 years in conjunction with a proposed acquisition, offers a relatively simple approach but may not provide sufficient protection against creeping acquisitions. In the absence of specific guidelines on how the proposed amendments will be interpreted and applied by the ACCC, we suggest the following issues be considered by the Committee:

- **Consideration of existing market concentrations**

  The amendments proposed in the Bill would not provide adequate protection against creeping acquisitions in the grocery retail industry, as a wave of consolidation over the past decade has already resulted in very high market concentrations.

[2] OECD, Substantive Criteria used for Merger Assessment, Policy Roundtables 2002

Combined packaged groceries market share of Coles & Woolworths



Sources: ACNielsen, Parliament of Australia Joint Select Committee on the Retailing Sector, 1998

Significantly, Coles purchased 16 Charlie Carters supermarkets in 1998 while Woolworths purchased / converted 71 Franklins stores in 2000-01. These acquisitions occurred more than 6 years ago but their impact on the level of market concentration (and competition) in the industry remains significant.

Over 20 independent supermarkets, representing $89m in annual warehouse sales, were acquired by the major chains in the period 2001 to 2003. The existing level of (abnormally high) concentration in this market must be considered in any assessment of further acquisitions, not just acquisitions over the past 6 years.

- **Consideration of all market players**

The acquisition of an independent retailer by a major chain impacts negatively on the ability of the independent sector to effectively compete in the retail market, regardless of which major chain is the acquirer. The Bill focuses only on the acquisitions of one particular acquirer and fails to consider the actions of duopolies in many sectors of the Australian market.

For example, Coles has not been very active as an acquirer in the retail grocery market (compared to Woolworths) over the recent past. The following table shows a list of supermarket acquisitions by Coles / Woolworths since 2005.

Table: Acquisitions by Coles / Woolworths since 2005

Acquisitions by Coles Group	Acquisitions by Woolworths
IGA Wyong	Supa IGA, Coonabarabran
Action Supermarket, Busselton	Eli FoodWorks, Hervey Bay
Hallam Supermarket	Nardi's FoodWorks Bannockburn
	Roger and Dale's IGA, Thurgoona
	Supa IGA, Capalaba
	IGA, Jindabyne
	Mallam's Spar Supermarket
	Ritchie's Super IGA, Kelvin Grove
	21 Action Stores and development sites

Source: ACCC Grocery Inquiry, Issues Paper & Public Submissions

The Bill may not be able to adequately prevent acquisitions of independent retailers by Coles (compared to if the acquirer was Woolworths), although such acquisitions would result in the same level of negative impact on competition in the grocery industry.

- **Definition of the relevant market**

The market for retail groceries is a local one, as consumers are constrained by travel time in their selection of supermarkets. The UK Competition Commission outlined specific travel times in their recent report on the grocery industry and similar guidelines by the ACCC may improve clarity on the geographic market definition used in merger assessments. Metcash is supportive of the ACCC's definition of the local retail supermarket in its assessment of Woolworth's proposed acquisition of the Karabar Supabarn supermarket.

However, the market for grocery wholesaling activities takes place on a national level (i.e. Metcash pools the volumes of all retailers it supplies in its negotiations with suppliers). The acquisition of an independent retailer by a major chain presents a reduction of choice for consumers on a local level but also affects the ability of independent retailers to obtain competitive costs of supply on a national level. This complication in market definition should be considered in amendments to the Act.

- **Strengthening the competition test for creeping acquisitions**

The proposed amendments do not specifically consider the impact of creeping acquisitions and how they can be addressed as part of the competition test. It is unclear how the amended Act would be able to prevent an acquisition which contributes to the gradual erosion of economies of scale for the independent sector, yet does not in itself represent a very significant change in the Herfindahl-Hirschman Index (HHI, used by the ACCC to measure market concentration) or would allow a small but significant non-transitory increase in price (SSNIP) by the merged firm (used by the ACCC to measure market power). The government should provide clear guidelines on strengthening the “substantial lessening of competition” test for creeping acquisitions.

For example, the current HHI of the packaged groceries market is already substantially higher than 2,000 on a national basis (indicating a highly concentrated market) but may not change significantly on a local basis for certain proposed acquisitions. It is unclear how the proposed amendments would allow the ACCC to successfully stop the acquisition of supermarkets by Woolworths or Coles in small increments, particularly in those areas where they do not already have a significant presence.

The “significant impediment of effective competition” test, adopted by the European Commission, has been considered by some as more flexible than the “substantial lessening of competition” test. This is because “strengthening” could be interpreted as putting more weight on preserving existing levels of market power or other harmful effects that cannot easily be modelled in market power terms. Each individual merger may not in itself lessen competition substantially yet the cumulative anti-competitive impact may be large.[3]

As a general comment we also suggest that the Committee simplify the wording of the amendments.

Please contact either the writer, or Metcash’s General Counsel, Greg Watson on 02 9741 3063 or via email at greg.watson@metcash.com, if you would like to discuss any aspect of this submission.

Yours sincerely

Andrew Reitzer

[3] Roller, Lars-Hendrik and De La Mano, Miguel, The Impact of the New Substantive Test in European Merger Control, European Competition Journal, April 2006