

Freehills

AUST. COMPETITION &
CONSUMER COMMISSION
SYDNEY

1 8 DEC 2007

FILE No:

DOC:

MARS/PRISM:

Mr Scott Gregson
General Manager - Adjudication
Australian Competition & Consumer
Commission
Level 7, Angel Place
123 Pitt Street
Sydney NSW 2000
scott.gregson@accc.gov.au

18 December 2007
Matter 81284339

Dear Mr Gregson

Third Line Forcing Notification

We act for Metcash Trading Limited ACN 000 031 569 (**Metcash**).

Metcash proposes to implement a refurbishment program to encourage and assist the owners of selected IGA branded stores (**Retailers**) to conduct a major refurbishment of plant and equipment within their stores (**Refurbishment Program**).

We attach the following:

- a completed Form G Notification of Exclusive Dealing;
- a joint submission by ANZ and Metcash in support of Form G including confidential Annexures A, B and C;
- a cheque for \$100 payable to the ACCC (lodgement fee).

We understand that ANZ will also lodge a notification in respect of the Refurbishment Program at the ACCC's Melbourne office.

Metcash claims confidentiality over the documents attached to the parties' joint submission, on the basis that they disclose competitively significant and commercially confidential information.

Please contact Lisa Emanuel on (02) 9225 5415 or Michael Gray on (02) 9225 5286 if you require any further information.

Yours sincerely


Michael Gray
Partner
Freehills

+61 2 9225 5286
+61 414 642 068
michael.gray@freehills.com

Lisa Emanuel
Senior Associate
Freehills

+61 2 9225 5415
+61 403 857 528.
lisa.emanuel@freehills.com

Doc 2.005347513.1

Number	Description
1	Form G Notification of Exclusive Dealing
2	Joint submission by ANZ and Metcash in support of Form G
3	Confidential Annexure A – Restriction of publication claimed
4	Confidential Annexure B – Restriction of publication claimed

Form G

Commonwealth of Australia
Trade Practices Act 1974 — subsection 93 (1)
NOTIFICATION OF EXCLUSIVE DEALING

To the Australian Competition and Consumer Commission:

Notice is hereby given, in accordance with subsection 93 (1) of the *Trade Practices Act 1974*, of particulars of conduct or of proposed conduct of a kind referred to subsections 47 (2), (3), (4), (5), (6), (7), (8) or (9) of that Act in which the person giving notice engages or proposes to engage.

PLEASE FOLLOW DIRECTIONS ON BACK OF THIS FORM

1. Applicant

- (a) Name of person giving notice:
(Refer to direction 2)

N932 47

Metcash Trading Limited (ACN 000 031 569) (**Metcash**) and its wholly owned subsidiary companies IGA Distribution Pty Ltd (ACN 004 391 422), IGA Distribution (Vic) Pty Ltd (ACN 006 509 280), IGA Distribution (SA) Pty Ltd (ACN 008 193 155), IGA Distribution (WA) Pty Ltd (ACN 008 667 650) (together referred to as **IGA Distribution**).

- (b) Short description of business carried on by that person:
(Refer to direction 3)

Metcash, through its wholly owned subsidiary companies, IGA Distribution, carries on the business of:

- Wholesaling groceries, general merchandise, perishable products, frozen foods, tobacco and health care products to independent grocery retailers.
- Providing marketing and promotional support to independent grocery retailers.

- (c) Address in Australia for service of documents on that person:

Freehills
Attention: Lisa Emanuel and Michael Gray
MLC Centre
Martin Place
SYDNEY NSW 2000

2. Notified arrangement

- (a) Description of the goods or services in relation to the supply or acquisition of which this notice relates:

- Introduction of retailers to ANZ for the purpose of the retailers obtaining a credit finance facility.
- Assistance to retailers in the completion of an application for a credit finance facility from the Australia and New Zealand Banking Group Limited (ACN 005 357 522) (ANZ).
- Rebate on the interest payable under a credit finance facility.
- Supply and installation of plant and equipment.
- Finance by way of a credit finance facility.

For further particulars of goods and services, see attached submission.

(b) Description of the conduct or proposed conduct:

Metcash, through its wholly owned subsidiary companies, IGA Distribution, proposes to supply, or offer to supply, to owners of eligible IGA branded stores (**Retailers**):

- introduction and referral to ANZ;
- assistance in the completion and lodgement of an application for a credit finance facility offered to Retailers by ANZ;
- a rebate on the interest component of the amount payable by the Retailer to ANZ under a credit finance facility in the amounts of:
 - 100 per cent of the interest payable in the first year,
 - 80 per cent of the interest payable in the second year, and
 - 60 per cent of the interest payable in the third year;

on the condition that the Retailer acquires a specific credit finance facility from ANZ.

For further particulars of conduct, see attached submission.

(Refer to direction 4)

3. Persons, or classes of persons, affected or likely to be affected by the notified conduct

(a) Class or classes of persons to which the conduct relates:

(Refer to direction 5)

All SUPA IGA and mid-tier IGA stores in Australia.¹

See attached submission for further particulars.

(b) Number of those persons:

(i) At present time:

Zero.

¹ The conduct initially will be limited to Supa IGA and mid-tier IGA stores. However, stores branded 'IGA Everyday' will also be able to obtain finance from ANZ on the same or similar terms as Supa IGA and mid-tier IGA stores. An IGA Everyday store will only be eligible to receive the rebate from Metcash on interest payable to ANZ if their capital expenditure on the plant and equipment exceeds the minimum threshold applying to mid-tier stores (ie \$250,000).

(ii) Estimated within the next year:
(Refer to direction 6)

Up to 1,133.

(c) Where number of persons stated in item 3 (b) (i) is less than 50, their names and addresses:

Not applicable.

4. Public benefit claims

(a) Arguments in support of notification:
(Refer to direction 7)

See attached submission.

(b) Facts and evidence relied upon in support of these claims:

See attached submission.

5. Market definition

Provide a description of the market(s) in which the goods or services described at 2 (a) are supplied or acquired and other affected markets including: significant suppliers and acquirers; substitutes available for the relevant goods or services; any restriction on the supply or acquisition of the relevant goods or services (for example geographic or legal restrictions):

(Refer to direction 8)

- The market for the supply of credit finance facilities to SMEs in Australia. Significant substitute suppliers of credit finance facilities include all major banks and other financial institutions including:
 - Commonwealth Bank of Australia;
 - National Australia Bank Limited;
 - Westpac Banking Corporation;
 - St George Bank Limited;
 - Bank of Western Australia Limited (BankWest); and
 - Suncorp Metway Limited.
- The market for the supply and installation of plant and equipment to retailers. There are a large number of suppliers of retail plant and equipment throughout Australia.
- The market for the provision of 'banner group' services to independent grocery retailers, where 'banner group' services means business development and support services and discounts or the provision of rebates on groceries and other products

provided on a wholesale basis to independent grocery retailers. Substitute providers of 'banner group' services include:

- Foodworks;
 - SPAR (in Queensland and New South Wales);
 - Four Square (in Queensland and New South Wales); and
 - Franklins (in New South Wales).
- The market for the supply of retail groceries. Substitute providers of retail groceries services are varied and include:
 - Woolworths;
 - Coles;
 - ALDI (in Queensland, New South Wales, the Australian Capital Territory and Victoria);
 - Franklins (in New South Wales); and
 - a large number of independent retailers (including those belonging to the banner groups set out above).
 - The market for the supply of wholesale groceries to independent grocery stores. Substitute providers of wholesale groceries include:
 - Franklins (in New South Wales); and
 - SPAR (in Queensland and New South Wales).

Metcash has indicated above where it is aware that the activities of substitute suppliers are restricted to certain States. Metcash is not aware of any other relevant restrictions.

6. Public detriments

- (a) Detriments to the public resulting or likely to result from the notification, in particular the likely effect of the notified conduct on the prices of the goods or services described at 2 (a) above and the prices of goods or services in other affected markets:
(Refer to direction 9)

No known applicable detriments.

- (b) Facts and evidence relevant to these detriments:

Not applicable.

7. Further information

- (a) Name, postal address and contact telephone details of the person authorised to provide additional information in relation to this notification:

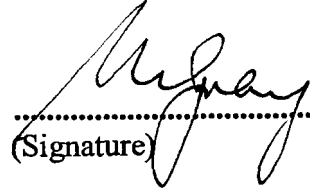
Freehills

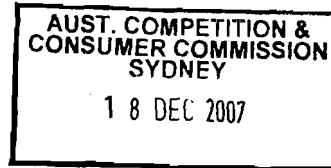
Attention: Lisa Emanuel and Michael Gray

MLC Centre
Martin Place
Sydney NSW 2000

Dated 18/12/07

Signed by/on behalf of the applicant


.....
(Signature)



Michael Gray
(Full Name)

Freehills
(Organisation)

Solicitor for the Applicant
(Position in Organisation)

DIRECTIONS

1. In lodging this form, applicants must include all information, including supporting evidence that they wish the Commission to take into account in assessing their notification.
2. Where there is insufficient space on this form to furnish the required information, the information is to be shown on separate sheets, numbered consecutively and signed by or on behalf of the applicant.
3. If the notice is given by or on behalf of a corporation, the name of the corporation is to be inserted in item 1 (a), not the name of the person signing the notice, and the notice is to be signed by a person authorised by the corporation to do so.
4. Describe that part of the business of the person giving the notice in the course of the which the conduct is engaged in.
5. If particulars of a condition or of a reason of the type referred to in section 47 of the *Trade Practices Act 1974* have been reduced in whole or in part to writing, a copy of the writing is to be provided with the notice.
6. Describe the business or consumers likely to be affected by the conduct.
7. State an estimate of the highest number of persons with whom the entity giving the notice is likely to deal in the course of engaging in the conduct at any time during the next year.
8. Provide details of those public benefits claimed to result or to be likely to result from the proposed conduct including quantification of those benefits where possible.
9. Provide details of the market(s) likely to be affected by the notified conduct, in particular having regard to goods or services that may be substitutes for the good or service that is the subject matter of the notification.
10. Provide details of the detriments to the public which may result from the proposed conduct

including quantification of those detriments
where possible.

1 Introduction

This submission accompanies the Notifications of Exclusive Dealing lodged by Metcash Trading Limited (ACN 112 073 480) (**Metcash**) and Australia and New Zealand Banking Group Limited (ACN 005 357 522) (**ANZ**) on 18 December 2007. It sets out:

- background information in relation to the notified conduct;
- the rationale for the conduct;
- the public benefits arising from the conduct; and
- the absence of competitive detriment resulting from the conduct.

2 Background to the notified conduct

2.1 Metcash Refurbishment Program

Metcash proposes to implement a refurbishment program to encourage and assist the owners of selected IGA branded stores (**Retailers**) to conduct a major refurbishment of plant and equipment within their stores (**Refurbishment Program**).

The Refurbishment Program will involve Metcash offering and supplying the following services to SUPA IGA and mid-tier IGA Retailers:

- introduction and referral to ANZ;
- assistance in the completion and lodgement of an application for a credit finance facility (Business Loan (ABL) and/or Commercial Bill facility) offered to Retailers by ANZ;
- a rebate on the interest component of the amount payable by the Retailer to ANZ under the credit finance facility in the amounts of:
 - 100 per cent of the interest payable in the first year;
 - 80 per cent of the interest payable in the second year; and
 - 60 per cent of the interest payable in the third year.

The rebate will be provided as an offset against the Retailer's wholesale grocery account with Metcash;

- supply and installation of plant and equipment requested by each Retailer.

Metcash will also indemnify ANZ for 50 per cent of the liability arising under each credit finance facility.

The supply of the rebate by Metcash to Retailers will be conditional on the Retailers acquiring a credit finance facility from ANZ, under which Retailers will receive credit

finance for the purchase of plant and equipment from Metcash (including its installation). A Retailer's participation in the Refurbishment Program will be entirely voluntary.

Metcash estimates that Retailers will undertake a combined total of over \$100 million worth of refurbishments under the Refurbishment Program.

Metcash will require each Retailer to enter into a 1in7 Rebate Deed¹, under which Metcash agrees to pay the rebates to the Retailer. The 1in7 Rebate deed is conditional on the Retailer signing the Facility Documents² and Metcash Collateral Documents (to the extent that the Retailers have not already done so). A copy of the 1in7 Rebate Deed is attached as confidential Annexure A.

The Metcash Collateral Documents are:

- Alliance Agreement – an agreement between the Retailer and the IGA Distribution company operating in the State where the Retailer's store is located. Under the terms of the Alliance Agreement, a Retailer must not be involved in any other supermarket business, other than an IGA business, or participate in any other buying or promotional network competitive with the IGA network (except for unbannered stores supplied by IGA). Each party is obliged by the terms of the Alliance Agreement to adopt certain systems and procedures in the operation of their business. The Alliance Agreement may be terminated by either party on 90 days notice.
- Supply Agreement – an agreement between the Retailer and Metcash. The Supply Agreement requires the Retailer to acquire all of its wholesale supplies from Metcash subject to certain exceptions.
- Rights Deed – under which the Retailer must, subject to certain exceptions, offer to sell its supermarket business to Metcash prior to transferring the business, or control of the business, to any third party.
- Scan Data Deed – under which, during the term of the agreement, the Retailer will provide scanned data to the relevant IGA distribution company or another party nominated by the IGA distribution company. Title to the transmitted data vests in the IGA distribution company.
- Fixed and Floating Charge – granted by the Retailer to Metcash in circumstances where Metcash has provided the Retailer with credit or other financial accommodation. The liabilities covered by the Fixed and Floating Charge would include the Retailer's liability to Metcash in respect of the indemnity provided by Metcash to ANZ for 50 per cent of the liability arising under each credit finance facility.

It is standard practice for Metcash to request all IGA branded retailers to enter into these arrangements and many Retailers would already be fully compliant. At a minimum, all IGA branded retailers will have already entered into the Alliance Agreement. These arrangements provide certainty to Metcash, and are linked to Metcash's ability to provide IGA branded retailers with a range of business development and support services, and rebates on groceries and other products. The Fixed and Floating Charge, in particular, is important to Metcash's granting of an indemnity to ANZ for 50 per cent of the liability arising under each credit finance facility.

2.2 Arrangements between Metcash and ANZ

Metcash and ANZ propose to enter into a Coordination Agreement, Master Indemnity, Deed of Acknowledgement and, in some cases, a Deed of Priority (which will also be

¹ '1in7' refers to the aim of the Refurbishment Program to refurbish stores once every seven years.

² The Facility Documents are the Loan Agreement (see part 2.3 of this submission); any security, guarantee or indemnity in favour of ANZ on account of the Retailer's obligations under the Loan Agreement; and any other document or category of document agreed by the Retailer and ANZ in writing or referred to in any of the documents already listed.

executed by the Retailer).³ A copy of the Coordination Agreement is attached as confidential Annexure B. The Master Indemnity and annexures (Deed of Acknowledgement and Deed of Priority) are attached as confidential Annexure C.

Under the Coordination Agreement:

- Metcash will use reasonable endeavours to promote the offer of credit finance by ANZ to Retailers. ANZ and Metcash will also cooperate to jointly promote the availability of the credit finance facility.
- Metcash will, where it deems it appropriate, collect from Retailers and provide to ANZ, completed applications for a credit finance facility.
- ANZ will make available a credit finance facility to Retailers that submit an application and satisfy ANZ's credit finance approval criteria. The Retailer must enter into the documentation including the Loan Agreement and any security, guarantee or indemnity in favour of ANZ on account of a Retailer's obligations under the Loan Agreement.
- The credit finance facility will be provided by ANZ on the basis that Metcash will indemnify ANZ for 50 per cent of the liability arising under each credit finance facility.
- The credit finance facility will be provided by ANZ on the basis that Metcash, ANZ and the Retailer will enter into the Deed of Priority as required.

Metcash will not receive a financial benefit from ANZ if Retailers enter into a credit finance agreement with ANZ.

The obligations of ANZ and Metcash under the Coordination Agreement are subject to, and conditional upon, the ACCC granting immunity from action in relation to any potential third line forcing conduct arising from the Coordination Agreement or the manner in which the credit finance facility and rebates will be promoted and made available.

Metcash will indemnify ANZ in relation to losses incurred under the Loan Agreement by executing the Master Indemnity and Deed of Acknowledgement.

2.3 Arrangements between ANZ and Retailers

ANZ will enter into a Loan Agreement (Business Loan (ABL) and/or Commercial Bill facility) with each Retailer introduced to it by Metcash whom the ANZ considers meet its lending criteria.

Under the terms of the Loan Agreement:

- ANZ will provide a credit finance facility to the Retailer of a specified amount;
- the Retailer will provide a trader's bill of sale or fixed charged to ANZ (with respect to equipment purchased for the refurbishment of the Retailer's premises) as security for the credit finance; and
- the Retailer will agree to pay the principal and interest owing under the credit finance facility.

ANZ retains complete discretion as to whether or not to enter into a Loan Agreement with any Retailer referred to it by Metcash.

The Retailer may also be required to execute a Deed of Priority, which is a tripartite agreement between the Retailer, ANZ and Metcash (see section 2.2 above).

³ The Deed of Priority will only be executed by ANZ, Metcash and the Retailer if the Retailer's main bank for general banking purposes is ANZ.

3 Background information

3.1 Metcash

Metcash Trading Limited (**Metcash**) is the holding company of the following IGA Distribution companies:

- IGA Distribution Pty Ltd;
- IGA Distribution (Vic) Pty Ltd;
- IGA Distribution (SA) Pty Ltd;
- IGA Distribution (WA) Pty Ltd (**IGA Distribution**).

IGA Distribution wholesales and distributes groceries, general merchandise, perishable products, frozen foods, tobacco and health care products to independent grocery retailers. IGA Distribution also provides marketing and support services including promotional and marketing support via advertising campaigns, merchandising of certain products, branding of stores, and store development.

The customers supplied by IGA Distribution range from large supermarkets to small convenience stores and are generally independently owned. The stores may be bannered or unbannered. 'Bannered' stores belong to a banner group which coordinates marketing for member retail stores. The marketing services may be supplied from a supplier such as IGA Distribution or performed by the banner group. Metcash controls the IGA banner group and licenses the trademark from IGA Inc of the USA.

3.2 Identification of Retailers

Participation in the Refurbishment Program will be offered to all SUPA IGA and mid-tier IGA stores that wish to undertake a 'major refurbishment'. A major refurbishment is defined as follows:

- for SUPA IGAs, a minimum spend of \$500,000.
- for mid-tier stores, a minimum spend of \$250,000;

There are currently 418 SUPA IGA stores and 715 mid-tier IGA stores. SUPA IGA stores range in size from 1,200m² to over 4,000m². Mid-tier IGA stores range in size from 225m² to 1,200m².⁴

3.3 Description of plant and equipment

It is intended that Metcash will source, supply and install all plant and equipment that may be required by Retailers to undertake a major refurbishment, including:

- refrigeration equipment – including cool rooms, various display cabinets, freezer motors, condensers, and compressors;
- shelving – including dense end displays and pallet racking;
- floor coverings;
- display bins and other point of sale materials;

⁴ The Refurbishment Program initially will be limited to Supa IGA and mid-tier IGA stores. However, stores branded 'IGA Everyday' will also be able to obtain finance from ANZ on the same or similar terms as Supa IGA and mid-tier IGA stores. An IGA Everyday store will only be eligible to receive the rebate from Metcash on interest payable to ANZ if their capital expenditure on the refurbishment exceeds the minimum threshold applying to mid-tier stores (ie \$250,000).

- shop fittings, such as checkouts;
- cash registers, back office computer equipment and software;
- security related equipment – including alarm panels, closed circuit television systems and cameras;
- air conditioning units;
- trolleys and shopping baskets.

The Retailer remains free to specify the particular plant and equipment he or she requires, including particular brands.

4 Rationale

The Refurbishment Program is designed to assist Retailers to update old and/or outdated plant and equipment in their stores. Metcash believes this will enable Retailers to provide an enhanced service offering to customers and thereby to compete more effectively at the retail level with the major supermarket chains. Further, by attracting more customers, the Retailers will have a higher stock turnover, which will increase the amount of stock those Retailers purchase from Metcash.

ANZ is able to pass on the benefit of the Metcash indemnity to each Retailer by offering a very competitive cost of funding and security structure. This may also provide ANZ with the opportunity to cross-sell additional banking and finance products to Retailers.

5 Public benefits

The proposed conduct will assist Retailers to update their stores. This will result in direct public benefits because participating Retailers will be able to provide a greatly enhanced service offering to consumers. Without the financial assistance Metcash is proposing to offer to Retailers (in the form of the proposed rebate and the provision of an indemnity to ANZ), many of these Retailers would not be in a position to conduct a major refurbishment. Further, Metcash has negotiated with ANZ credit finance terms that are favourable to Retailers, and which would not be available to Retailers from ANZ absent the provision of the rebate and indemnity from Metcash. These include:

- an agreed basis on which ANZ will process credit finance applications from Retailers. This is likely to improve the prospects of Retailers' credit finance applications being accepted by ANZ;
- a less onerous obligation on the Retailer in respect of the security required by the credit finance facility. Under the proposed terms of the ANZ credit finance facility, Retailers will be required to provide security in the form of a trader's bill of sale or fixed charge. Ordinarily, a finance provider would require a fixed and floating charge as a condition of providing a retailer with finance for the purchase of plant and equipment;
- an agreed competitive interest rate;⁵ and
- an agreed competitive approval fee.⁶

⁵ The interest rate margin may be varied by ANZ in relation to new credit finance facilities on 20 business days prior written notice to Metcash.

By assisting Retailers to update their stores, the proposed conduct will contribute to enhanced competition between retail suppliers of groceries at the local level. Metcash understands that the large supermarket chains update plant and equipment in all of their stores about every five years. The inability of many IGA retailers to undertake such regular refurbishments inhibits their ability to compete with the large supermarket chains. The proposed conduct seeks to redress this imbalance.

In addition, by enhancing the competitive position of Metcash's customer base, the conduct will reinforce Metcash's position as a strong third force in the wholesale grocery market.

6 Impact on competition

The proposed conduct will not result in competitive detriment in any market. This is because:

- participation in the Refurbishment Program by Retailers is completely voluntary;
- the Retailers remain free to specify the particular plant and equipment they require;
- IGA retailers remain free to enter into credit finance facilities with competitors of ANZ;
- IGA retailers remain free to purchase plant and equipment independently of Metcash; and
- while Metcash does not undertake to negotiate beneficial terms with financial institutions other than ANZ, it would consider the provision of financial and/or other assistance (potentially rebates on interest payable by the Retailers) in respect of credit finance facilities negotiated by Retailers with competitors of ANZ.

⁶ The approval fee may be varied by ANZ in relation to new credit finance facilities on 20 business days prior written notice to Metcash.

EXCLUDED FROM
PUBLIC REGISTER

Confidential - Annexure A

EXCLUDED FROM
PUBLIC REGISTER

Confidential - Annexure B

EXCLUDED FROM
PUBLIC REGISTER

Confidential - Annexure C