

Undertaking to the Australian Competition and Consumer Commission

Given under section 87B of the *Competition and
Consumer Act 2010* (Cth) by **Metcash Limited**
ACN 112 073 480

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1. Person giving the Undertaking

- 1.1. This Undertaking is given to the Australian Competition and Consumer Commission (ACCC) by Metcash Limited ACN 112 073 480 on behalf of itself and its Subsidiaries (together referred to as **Metcash** in this Undertaking).

2. Background

The parties to the Proposed Acquisition

Metcash

- 2.1. Metcash operates a wholesale distribution and marketing company specialising in groceries, fresh produce, liquor and hardware.
- 2.2. Metcash's Mitre 10 division is a wholesale supplier of hardware and home improvement products to independent retailers, including those trading under its 'Mitre 10' and 'True Value Hardware' banners, as well as unbannered retailers.
- 2.3. Mitre 10 supplies products to about 325 Mitre 10 and True Value Hardware bannered independent stores. It also offers support services to these stores, such as central billing, branding and marketing, IT system support and assistance with store layouts.
- 2.4. In addition, Mitre 10 has interests in eight joint ventures with retailers which operate around 50 stores, and owns four retail stores itself.

Home Timber and Hardware Group

- 2.5. Home Timber and Hardware Group, comprising Danks Holdings Pty Ltd (ACN 004 295 532) (**Danks**) and its Subsidiaries (together, **HTHG**), is a wholesale supplier of hardware and home improvement products to independent retailers, including those operating under its banners 'Home Timber and Hardware' (**HTH**) and 'Thrifty-Link', as well as unbannered retailers.
- 2.6. HTHG states that it has a reach of over 400 sites, comprising a mix of company-owned and independent businesses. Specifically, HTHG owns and operates 43 corporate stores, supplies over 350 HTH and Thrifty-Link bannered independent stores and further supplies about 1000 non-branded independents.

The Proposed Acquisition

- 2.7. HTHG is owned by a joint venture between Woolworths Limited and Lowe's Companies Inc. The joint venture is planning to sell HTHG, as well as its Masters retail hardware and home improvement business.
- 2.8. Metcash is proposing to acquire HTHG by way of an acquisition of all the issued shares in the capital of Danks (**Proposed Acquisition**).

The ACCC's review

- 2.9. On 6 May 2016, the ACCC commenced its public review of the Proposed Acquisition.

- 2.10. The ACCC undertook market inquiries and considered information provided by the parties to the Proposed Acquisition, industry participants and others. The purpose of the ACCC's inquiries was to assess whether the Proposed Acquisition would have the effect, or be likely to have the effect, of substantially lessening competition in any market in Australia in contravention of section 50 of the Act.

The ACCC's competition concerns

- 2.11. The ACCC was concerned that, in the absence of the Undertaking, the Proposed Acquisition would have the effect, or be likely to have the effect, of substantially lessening competition in:
- (a) national or regional markets for the wholesale supply of hardware and home improvement products to independent (non-vertically integrated) retailers;
 - (b) local markets for the retail sale of hardware and home improvement products; and
 - (c) national or regional markets for the wholesale acquisition of hardware and home improvement products from manufacturers and suppliers.
- 2.12. The ACCC was concerned that HTHG is Metcash's closest competitor, due to the similarity in services that both parties provide. For a significant proportion of independent retailers the Proposed Acquisition would combine the only two independent wholesalers that offer a broad range of hardware and home improvement products. The ACCC understood that independent retailers can and do switch between Metcash and HTHG to secure better price and non-price terms. This would no longer be an option after the Proposed Acquisition.
- 2.13. The ACCC was concerned that the elimination of competition between Metcash and HTHG could lead to the following effects:
- (a) increased wholesale prices (including reduced rebates) or decreased services to independent retailers supplied by Metcash (both bannered and unbannered);
 - (b) increased incentive and ability for Metcash to discriminate against independently owned retailers where a Metcash joint venture or corporate-owned store competes against an independently owned store supplied by Metcash;
 - (c) muted retail competition between retailers who would otherwise be supplied by Metcash and HTHG in competition with each other – the proposed acquisition may impede retailers' ability to compete with each other by differentiating their offers, including by seeking other sources of wholesale supply; and
 - (d) the removal of HTHG as a significant distribution channel for manufacturers and suppliers of hardware and home improvement products.

The Undertaking remedy

- 2.14. Metcash does not consider that its acquisition of HTHG would be likely to substantially lessen competition in any market. However, to address the ACCC's competition concerns, Metcash has offered this Undertaking pursuant to section 87B of the Act.

2.15. The objective of this Undertaking is to address the ACCC's competition concerns as set out above that would otherwise arise as a consequence of the Proposed Acquisition. The Undertaking aims to achieve this objective by placing obligations on Metcash to:

- (a) not restrict the ability of a Member Store or Unbanned Retail Store to purchase goods from other suppliers, therefore lowering barriers to entry in hardware and home improvement wholesaling and encouraging greater choice of supply for retailers;
- (b) not discriminate against Member Stores or Unbanned Retail Stores that compete with a Metcash Corporate Store, in relation to Supply Terms;
- (c) provide information about Metcash's obligations under this Undertaking to Member Stores and Unbanned Retail Stores; and
- (d) provide for the effective oversight of Metcash's compliance with this Undertaking.

3. Commencement of this Undertaking

3.1. This Undertaking comes into effect when:

- (a) this Undertaking is executed by Metcash; and
- (b) this Undertaking so executed is accepted by the ACCC,
(the **Commencement Date**).

4. Cessation of Ongoing Obligations

Termination

4.1. This Undertaking terminates on the earlier of:

- (a) the date which is 10 years from the Commencement Date;
- (b) the date on which the Undertaking is withdrawn in accordance with clause 4.2; or
- (c) the date on which the Undertaking is revoked in accordance with clause 4.3.

Withdrawal

4.2. Metcash may request withdrawal of this Undertaking pursuant to section 87B of the Act at any time. This Undertaking is taken to be withdrawn on the date the ACCC consents in writing to that withdrawal.

Revocation

4.3. The ACCC may, at any time, revoke its acceptance of this Undertaking if the ACCC becomes aware that any information provided to it was incorrect, inaccurate or misleading.

Waiver

- 4.4. The ACCC may, at any time, expressly waive in writing any of the obligations contained in this Undertaking or extend the date by which any such obligation is to be satisfied.

5. Undertakings

- 5.1. Subject to clauses 5.3(b), 5.6(a) and 5.13, this clause 5 applies from the Control Date.

Non-discrimination

- 5.2. Metcash undertakes that, in relation to any Member Store which is within a 20km radius of a Corporate Store, the Supply Terms offered to the Member Store will be no less favourable than the Supply Terms to the Corporate Store.
- 5.3. Clause 5.2 applies:
- (a) from the Control Date, to Member Stores trading under the 'Mitre 10' and 'True Value Hardware' banners and to Existing Corporate Stores; and
 - (b) from the date which is six months after the Control Date (or such other date as agreed in writing with the ACCC), to Member Stores and Corporate Stores.
- 5.4. Metcash undertakes that, from the Control Date to the date that is six months after the Control Date (or such other date as agreed in writing with the ACCC), a Member Store which is within a 20km radius of a Corporate Store and is trading under an 'HTH' or 'Thrifty-Link' banner will be offered or allowed to continue to trade under Supply Terms that are the same as or no less favourable than that Member Store's Supply Terms at the Control Date.
- 5.5. For the purposes of clause 5.2, the Supply Terms offered to a Member Store will not be taken to be any less favourable than the Supply Terms to the relevant Corporate Store by reason only of the fact that:
- (a) they make reasonable allowance for differences in the cost or likely cost of providing goods or services resulting from differences in delivery or the volume or nature of the goods or services supplied;
 - (b) they reflect a reasonable assessment of commercial risk including, for example, credit-worthiness or compliance with contractual obligations;
 - (c) Metcash offers administrative support and training services including, for example, payroll services, to the Corporate Store;
 - (d) Metcash is considering introducing a new initiative or program, and trials that new initiative or program at the Corporate Store (and up to nine other Corporate Stores) for a reasonable period of time (having regard to the nature of the initiative or program being trialled); or
 - (e) Metcash provides funding to the Corporate Store including working capital or in respect of the refurbishment of the Corporate Store.

5.6. Metcash undertakes that:

- (a) from the date which is three months after the Control Date (or such other date as agreed in writing with the ACCC), in relation to any Unbannered Retail Store within a 20km radius of a Corporate Store, the Supply Terms offered to that store will be no less favourable than the Supply Terms offered to Equivalent Unbannered Retail Stores; and
- (b) from the Control Date to the date that is three months after the Control Date (or such other date as agreed in writing with the ACCC), an Unbannered Retail Store which is within a 20km radius of a Corporate Store will be offered or allowed to continue to trade under Supply Terms that are the same as or no less favourable than that Unbannered Retail Store's Supply Terms at the Control Date.

5.7. For the purposes of clause 5.6:

- (a) the Supply Terms will not be taken to be any less favourable by reason only of the fact that they make reasonable allowance for differences in the cost or likely cost of providing goods or services resulting from differences in delivery or the volume or nature of the goods or services supplied; and
- (b) in the event that a dispute arises in relation to whether a store is an Equivalent Unbannered Retail Store, the ACCC's determination of what constitutes an Equivalent Unbannered Retail Store will be binding.

No requirement to purchase through Metcash

5.8. Metcash undertakes that it will not:

- (a) give effect to, or threaten to give effect to, a provision contained in an Existing Membership Agreement or Existing Supply Agreement which:
 - (i) restricts the ability of a Member Store or Unbannered Retail Store to purchase goods other than through a warehouse maintained by Metcash or a chargeback facility maintained by Metcash; or
 - (ii) requires a Member Store or Unbannered Retail Store to purchase goods through a warehouse maintained by Metcash or a chargeback facility maintained by Metcash; or
- (b) include as a condition of entry into a new Membership Agreement or as a provision of a new supply agreement any of the provisions proscribed by clause 5.8(a).

5.9. It will not be a breach of this Undertaking:

- (a) to give effect to a provision in a Membership Agreement or other supply agreement, or to enter into a Membership Agreement or other supply agreement that contains a provision, that obliges a Member Store to have sufficient products to support advertised promotions, including products promoted through Metcash websites;
- (b) where Metcash:

- (i) makes a capital investment in or contribution to a Member Store or an Unbannered Retail Store that is equal to or greater than the Investment Threshold; and
- (ii) requires a commitment from the Member Store or Unbannered Retail Store that Metcash will receive a specified return on its investment or contribution; and
- (iii) realises the return on its investment through the Member Store or Unbannered Retail Store electing to:
 - (A) purchase a sufficient quantity of goods from Metcash within a defined period; and/or
 - (B) make one or several repayments; or

(c) to:

- (i) restrict the ability of a Majority Owned Corporate Store to purchase goods other than through a warehouse maintained by Metcash or a chargeback facility maintained by Metcash; or
- (ii) require a Majority Owned Corporate Store to purchase goods through a warehouse maintained by Metcash or a chargeback facility maintained by Metcash.

5.10. Metcash undertakes that it will not include in any new Manufacturer Agreement, or give effect to a provision contained in an Existing Manufacturer Agreement, or reach any other arrangement with a Manufacturer, which restricts the ability of a Manufacturer to supply goods to a Member Store or Unbannered Retail Store other than through a warehouse maintained by Metcash or a chargeback facility maintained by Metcash.

5.11. Clause 5.10 does not apply in relation to Private Label Products.

Volume rebates

5.12. For the avoidance of doubt, nothing in this clause 5 prevents Metcash from offering rebates to Corporate Stores, Member Stores or Unbannered Retail Stores calculated by reference to the volume of products purchased by the relevant store, so long as those offers are consistent with clauses 5.2, 5.4 and 5.6.

Information to staff, Member Stores and Unbannered Retail Stores

5.13. Metcash will ensure that the existence of this Undertaking and its obligations are brought to the attention of its staff concerned with the management and operation of Metcash's hardware and home improvement business division. This obligation commences one month from the Commencement Date or within such period as the ACCC otherwise agrees.

5.14. Metcash will at its own expense provide to all Member Stores and Unbannered Retail Stores, within one month of the Control Date:

- (a) a copy of this Undertaking; and
- (b) a plain English summary of the obligations contained within this Undertaking (which summary is to approved by the ACCC prior to distribution).

- 5.15. The obligation to provide both a copy of this Undertaking and the plain English summary extends to the provision of those documents to new Member Stores at the time of them becoming members, and to new Unbannered Retail Stores at the time of them entering into a supply agreement with Metcash.

6. Independent Audit

Obligation to appoint an Approved Independent Auditor

- 6.1. Metcash must appoint and maintain an Approved Independent Auditor to audit and report upon Metcash's compliance with this Undertaking.

Process for approving a Proposed Independent Auditor

- 6.2. By the Control Date, Metcash must provide the ACCC with a notice for a Proposed Independent Auditor in the form prescribed in Schedule 2 to this Undertaking (**Proposed Independent Auditor Notice**), including draft terms of appointment and a draft audit plan.
- 6.3. If clauses 6.16, 6.17 or 6.18 apply, Metcash must provide the ACCC with a Proposed Independent Auditor Notice within five Business Days after the relevant event occurs, otherwise clause 6.8 applies.
- 6.4. The ACCC shall have the discretion to approve or reject in writing the Proposed Independent Auditor identified in the Proposed Independent Auditor Notice.
- 6.5. Without limiting the ACCC's discretion, in deciding whether to approve a Proposed Independent Auditor, the factors to which the ACCC may have regard include whether the:
- (a) person named in the Proposed Independent Auditor Notice or identified by the ACCC has the qualifications and experience necessary to carry out the functions of the Approved Independent Auditor;
 - (b) person named in the Proposed Independent Auditor Notice or identified by the ACCC is sufficiently independent of Metcash;
 - (c) draft terms of appointment and the draft audit plan are consistent with this Undertaking; and
 - (d) draft terms of appointment and the draft audit plan are otherwise acceptable to the ACCC.

Appointment of the Approved Independent Auditor

- 6.6. After receiving a written notice from the ACCC of its approval of a Proposed Independent Auditor, the draft terms of appointment and draft audit plan, Metcash must within 10 Business Days:
- (a) appoint the person approved by the ACCC as the Approved Independent Auditor on the Approved Terms of Appointment; and
 - (b) forward to the ACCC a copy of the executed Approved Terms of Appointment.

Failure to appoint

6.7. If the Approved Independent Auditor has not been appointed:

- (a) by Metcash within 10 Business Days of receiving approval from the ACCC under clause 6.6; or
- (b) if the ACCC has not received a Proposed Independent Auditor Notice pursuant to clause 6.2 or 6.3;

then clause 6.8 applies.

6.8. If clause 6.7 applies, the ACCC at its absolute discretion may:

- (a) identify and approve a person as the Approved Independent Auditor, including approving the draft terms of appointment and draft audit plan; and/or
- (b) direct Metcash to appoint a person who the ACCC has deemed is an Approved Independent Auditor.

Obligations and powers of the Approved Independent Auditor

6.9. Metcash must procure that any proposed terms of appointment for the Approved Independent Auditor include obligations on the Approved Independent Auditor to:

- (a) maintain his or her independence from Metcash, apart from appointment to the role of Approved Independent Auditor, including not form any relationship of the types described in paragraph 2(c) of Schedule 2 to this Undertaking with Metcash for the period of his or her appointment;
- (b) conduct compliance auditing according to the Approved Audit Plan;
- (c) provide the following reports directly to the ACCC:
 - (i) a scheduled written Audit Report as described in clause 6.11; and
 - (ii) an immediate report of any issues that arise in relation to the performance of his or her functions as Approved Independent Auditor or in relation to compliance with this Undertaking by any person named in this Undertaking; and
- (d) follow any direction given to him or her by the ACCC in relation to the performance of his or her functions as Approved Independent Auditor under this Undertaking.

6.10. Metcash must procure that any proposed terms of appointment for the Approved Independent Auditor provide the Approved Independent Auditor with the authority to:

- (a) access the facilities, sites or operations of the Metcash business as required by the Approved Independent Auditor;
- (b) access any information or documents that the Approved Independent Auditor considers necessary for carrying out his or her functions as the Approved Independent Auditor or for reporting to or otherwise advising the ACCC; and

- (c) engage any external expertise, assistance or advice required by the Approved Independent Auditor to perform his or her functions as the Approved Independent Auditor.

Compliance Audit

- 6.11. The Approved Independent Auditor must conduct an audit and prepare a detailed report (**Audit Report**) that includes:
 - (a) the Approved Independent Auditor's procedures in conducting the audit, or any change to audit procedures and processes since the previous Audit Report;
 - (b) a full audit of Metcash's compliance with this Undertaking;
 - (c) identification of any areas of uncertainty or ambiguity in the Approved Independent Auditor's interpretation of any obligations contained in this Undertaking;
 - (d) all of the reasons for the conclusions reached in the Audit Report;
 - (e) any qualifications made by the Approved Independent Auditor in forming his or her views;
 - (f) any recommendations by the Approved Independent Auditor to improve:
 - (i) the Approved Audit Plan;
 - (ii) the integrity of the auditing process;
 - (iii) Metcash's processes or reporting systems in relation to compliance with this Undertaking; and
 - (iv) Metcash's compliance with this Undertaking; and
 - (g) the implementation and outcome of any prior recommendations by the Approved Independent Auditor.
- 6.12. The Approved Independent Auditor is to provide an Audit Report to the ACCC and Metcash at the following times:
 - (a) within six months after the Control Date or such other period agreed by the ACCC (**Establishment Audit**);
 - (b) every 12 months from the date of the Establishment Audit, until the ACCC confirms in writing to Metcash that it is satisfied that Metcash has fulfilled its obligations pursuant to this Undertaking;
 - (c) a final report due three months after the last report provided pursuant to clause 6.12(b); and
 - (d) otherwise at the request of the ACCC.
- 6.13. Metcash must implement any recommendations made by the Approved Independent Auditor in Audit Reports in relation to Metcash's compliance with this Undertaking, and notify the ACCC of the implementation of the recommendations, within 10 Business Days after receiving the Audit Report or such other period as agreed in writing with the ACCC.

- 6.14. Metcash must comply with any direction of the ACCC in relation to matters arising from the Audit Report in relation to Metcash's compliance with this Undertaking, within 10 Business Days after being so directed (or such other period as agreed in writing with the ACCC).

Metcash's obligations in relation to the Approved Independent Auditor

- 6.15. Without limiting its obligations in this Undertaking, Metcash must:

- (a) comply with and enforce the Approved Terms of Appointment for the Approved Independent Auditor;
- (b) maintain and fund the Approved Independent Auditor to carry out his or her functions including:
 - (i) indemnifying the Approved Independent Auditor for any expenses, loss, claim or damage arising directly or indirectly from the performance by the Approved Independent Auditor of his or her functions as the Approved Independent Auditor except where such expenses, loss, claim or damage arises out of the gross negligence, fraud, misconduct or breach of duty by the Approved Independent Auditor; and
 - (ii) providing and paying for any external expertise, assistance or advice required by the Approved Independent Auditor to perform his or her functions as the Approved Independent Auditor; and
- (c) not interfere with, or otherwise hinder, the Approved Independent Auditor's ability to carry out his or her functions as the Approved Independent Auditor, including:
 - (i) directing Metcash personnel, including directors, contractors, managers, officers, employees and agents, to act in accordance with this clause 6;
 - (ii) providing access to the facilities, sites or operations of the Metcash business as required by the Approved Independent Auditor;
 - (iii) providing to the Approved Independent Auditor any information or documents he or she considers necessary for carrying out his or her functions as the Approved Independent Auditor or for reporting to or otherwise advising the ACCC;
 - (iv) not requesting any information relating to the compliance audit from the Approved Independent Auditor without such a request having been approved by the ACCC; and
 - (v) not appointing the Approved Independent Auditor, or have any Agreements with the Approved Independent Auditor, to utilise the Approved Independent Auditor's services for anything other than compliance with this Undertaking until at least 12 months after the Approved Independent Auditor ceases to act in the role of the Approved Independent Auditor.

Resignation, revocation or termination of the Approved Independent Auditor

- 6.16. Metcash must immediately notify the ACCC in the event that the Approved Independent Auditor resigns or otherwise stops acting as the Approved Independent Auditor.
- 6.17. The ACCC may revoke an Approved Independent Auditor's status as the Approved Independent Auditor if the ACCC becomes aware that any information provided to it was incorrect, inaccurate or misleading.
- 6.18. The ACCC may approve any proposal by, or alternatively may direct, Metcash to terminate the appointment of the Approved Independent Auditor if in the ACCC's view the Approved Independent Auditor acts inconsistently with the provisions of this Undertaking or the Approved Terms of Appointment.

7. Notification of key dates and ACCC requests for information

- 7.1. Metcash must notify the ACCC in writing of:
 - (a) the anticipated date of the Control Date, at least five Business Days before that date; and
 - (b) the occurrence of the Control Date, within one Business Day of that date.
- 7.2. The ACCC may direct Metcash in respect of its compliance with this Undertaking to, and Metcash must:
 - (a) furnish information to the ACCC in the time and in the form requested by the ACCC;
 - (b) produce documents and materials to the ACCC within Metcash's custody, power or control in the time and in the form requested by the ACCC; and/or
 - (c) attend the ACCC at a time and place appointed by the ACCC to answer any questions the ACCC (its Commissioners, its staff or its agents) may have.
- 7.3. Any direction made by the ACCC under clause 7.2 will be notified to Metcash, in accordance with clause 13.2.
- 7.4. In respect of Metcash's compliance with this Undertaking or the Approved Independent Auditor's compliance with its Approved Terms of Appointment, the ACCC may request the Approved Independent Auditor to:
 - (a) furnish information to the ACCC in the time and in the form requested by the ACCC;
 - (b) produce documents and materials to the ACCC within the Approved Independent Auditor's custody, power or control in the time and in the form requested by the ACCC; and/or
 - (c) attend the ACCC at a time and place appointed by the ACCC to answer any questions the ACCC (its Commissioners, its staff or its agents) may have.
- 7.5. Metcash will use its best endeavours to ensure that the Approved Independent Auditor complies with any request from the ACCC in accordance with clause 7.4.

- 7.6. Information furnished, documents and material produced or information given in response to any request or direction from the ACCC under this clause 7 may be used by the ACCC for any purpose consistent with the exercise of its statutory duties.
- 7.7. The ACCC may in its discretion to be exercised in good faith:
- (a) advise the Approved Independent Auditor of any request made by it under this clause 7; and/or
 - (b) provide copies to the Approved Independent Auditor of any information furnished, documents and material produced or information given to it under this clause 7.
- 7.8. Nothing in this clause 7 requires the provision of information or documents in respect of which Metcash has a claim of legal professional or other privilege.

8. Disclosure of this Undertaking

- 8.1. Metcash and the ACCC agree that Confidential Schedule 3 is confidential.
- 8.2. Metcash acknowledges that the ACCC may provide the Approved Independent Auditor with a copy of this Undertaking which includes unredacted versions of Confidential Schedule 3.
- 8.3. Metcash acknowledges that the ACCC may, subject to clause 8.1:
- (a) make this Undertaking publicly available;
 - (b) publish this Undertaking on its Public Section 87B Undertakings Register and Public Mergers Register; and
 - (c) from time to time publicly refer to this Undertaking.
- 8.4. Nothing in clause 8.1 or the confidential parts of this Undertaking referred to in clause 8.1 prevents the ACCC from disclosing such information as is:
- (a) required by law;
 - (b) permitted by section 155AAA of the Act;
 - (c) necessary for the purpose of enforcement action under section 87B of the Act; or
 - (d) necessary for the purpose of making such market inquiries as the ACCC thinks fit to assess the impact on competition arising in connection with this Undertaking.
- 8.5. Nothing in clause 8.1 or the confidential parts of this Undertaking referred to in clause 8.1 prevents the ACCC from using the information contained in this Undertaking for any purpose consistent with its statutory functions and powers.

9. Obligation to procure

- 9.1. Where the performance of an obligation under this Undertaking requires a Related Body Corporate of Metcash to take or refrain from taking some action, Metcash will procure that Related Body Corporate to take or refrain from taking that action.

10. No Derogation

- 10.1. This Undertaking does not prevent the ACCC from taking enforcement action at any time whether during or after the period of this Undertaking in respect of any breach by Metcash of any term of this Undertaking.
- 10.1. Nothing in this Undertaking is intended to restrict the right of the ACCC to take action under the Act for penalties or other remedies in the event that Metcash does not fully implement and/or perform its obligations under this Undertaking or in any other event where the ACCC decides to take action under the Act for penalties or other remedies.

11. Change of Control

- 11.1. In the event that a Change of Control is reasonably expected to occur, Metcash must:
- (a) notify the ACCC of this expectation as soon as practicable; and
 - (b) only implement a Change of Control to another person or entity if that person or entity has given a section 87B undertaking to the ACCC that requires it to comply with the same obligations as are imposed on Metcash pursuant to this Undertaking, or on terms that are otherwise acceptable to the ACCC, unless the ACCC has notified Metcash in writing that a section 87B undertaking under this clause is not required.

12. Costs

- 12.1. Metcash must pay all of its own costs incurred in relation to this Undertaking.

13. Notices

Giving Notices

- 13.1. Any notice or communication to the ACCC pursuant to this Undertaking must be sent to:

Email address: mergers@accc.gov.au
Attention: Executive General Manager
Merger and Authorisation Review Division

With a copy sent to: mergersucu@accc.gov.au
Attention: Director, Undertakings Compliance Unit
Coordination and Strategy Branch
Merger and Authorisation Review Division

- 13.2. Any notice or communication to Metcash pursuant to this Undertaking must be sent to:

Name: The Company Secretary, Metcash Limited

Address: 1 Thomas Holt Drive, Macquarie Park NSW 2113

Email Address: secreco@metcash.com

Fax number: 02 9741 3027

With a copy sent to:

Name: Herbert Smith Freehills

Address: 161 Castlereagh Street, Sydney NSW 2000

Email Address: patrick.gay@hsf.com; tony.damian@hsf.com

Fax number: 02 9322 4000

Attention: Patrick Gay; Tony Damian

- 13.3. If sent by post, notices are taken to be received three Business Days after posting (or seven Business Days after posting if sent to or from a place outside Australia).
- 13.4. If sent by email, notices are taken to be received at the time shown in the email as the time the email was sent.

Change of contact details

- 13.5. Metcash must notify the ACCC of a change to its contact details within three Business Days.
- 13.6. Any notice or communication will be sent to the most recently advised contact details and subject to clauses 13.3 and 13.4, will be taken to be received.

14. Defined terms and interpretation

Definitions in the Dictionary

- 14.1. A term or expression starting with a capital letter:
- (a) which is defined in the Dictionary in Part 1 of Schedule 1 (**Dictionary**), has the meaning given to it in the Dictionary; or
 - (b) which is defined in the Corporations Act, but is not defined in the Dictionary, has the meaning given to it in the Corporations Act.

Interpretation

- 14.2. Part 2 of Schedule 1 sets out rules of interpretation for this Undertaking.

Executed as an Undertaking

Executed by Metcash Limited ACN 112 073 480 pursuant to section 127(1) of the Corporations Act 2001 by:



Signature of director



Signature of a director/company secretary

Name of director (print)

Patrick Allaway

Name of director/company secretary (print)

JULIE S. HUTTON

Date

18 July 2016

Date

18 July 2016

Accepted by the Australian Competition and Consumer Commission pursuant to section 87B of the Competition and Consumer Act 2010 on: 20 July 2016

And signed on behalf of the Commission:

Chairman



Date

20 July 2016

Schedule 1 – Dictionary and interpretation

1. Dictionary

ACCC means the Australian Competition and Consumer Commission.

Act means the *Competition and Consumer Act 2010* (Cth).

Agreements means any contract, arrangement or understanding, including any contract, arrangement or understanding to renew, amend, vary or extend any contract, arrangement or understanding.

Approved Audit Plan means the plan approved by the ACCC in accordance with the terms of this Undertaking, by which the Approved Independent Auditor will audit and report upon compliance with this Undertaking.

Approved Independent Auditor means the person approved by the ACCC and appointed under clause 6 of this Undertaking.

Approved Terms of Appointment means the terms of appointment for the Approved Independent Auditor as approved by the ACCC in accordance with the terms of this Undertaking.

Associated Entity has the meaning given by section 50AAA of the Corporations Act.

Audit Report has the meaning given to it in clause 6.11 of this Undertaking.

Business Day means a day other than a Saturday or Sunday on which banks are open for business generally in the Australian Capital Territory.

Change of Control means:

- the assignment or other transfer of the legal or beneficial ownership of some or all of the share capital of Metcash to any other person or entity that may impact compliance with this Undertaking in its entirety; or
- the sale or transfer of any assets necessary, or which may be necessary, to enable compliance with this Undertaking in its entirety.

Commencement Date means the date described in clause 3.1 of this Undertaking.

Control Date means the date on which the Proposed Acquisition is completed.

Corporate Store means a hardware retail store in respect of which Metcash has an ownership interest.

Corporations Act means the *Corporations Act 2001* (Cth).

Entities Connected has the meaning given to it by section 64B of the Corporations Act.

Equivalent Unbanned Retail Store means an independent hardware retail store that:

- is supplied with goods or services by Metcash's hardware and home improvement business division;
- is not a Corporate Store;
- is not a Member Store; and
- is equivalent to the Unbanned Retail Store in question, having regard to its trading volumes, product range, credit-worthiness or compliance with contractual

obligations, the region in which it is located, the size of the retail group to which it belongs (if any), and the non-Metcash banner under which it is operating (if any).

Establishment Audit has the meaning given to it in clause 6.12 of this Undertaking.

Existing Corporate Store means a Corporate Store immediately prior to the Control Date.

Existing Manufacturer Agreement means an agreement between Metcash, Mitre 10 or HTHG and a Manufacturer in force as at the Control Date.

Existing Membership Agreement means a Membership Agreement in force as at the Control Date.

Existing Supply Agreement means a supply agreement between Metcash, Mitre 10 or HTHG and an independent hardware retail store in force as at the Control Date.

HTHG has the meaning given to it in clause 2.5 of this Undertaking.

Investment Threshold has the meaning given to it in Confidential Schedule 3 of this Undertaking.

Majority Owned Corporate Store means a Corporate Store in which Metcash holds a majority shareholding.

Manufacturer means a manufacturer, importer or distributor of hardware or home improvement products.

Manufacturer Agreement means an agreement between Metcash, Mitre 10 or HTHG and a Manufacturer.

Membership Agreement means an agreement under which a party is granted the right to operate a Member Store.

Member Store means an independent hardware retail store trading under a banner owned by Metcash or Mitre 10 or HTHG.

Mitre 10 means Mitre 10 Australia Pty Ltd ACN 009 713 704 and its Subsidiaries.

Private Label Product means a product marketed under a brand that is owned or developed by or for Metcash, Mitre 10 or HTHG.

Proposed Acquisition has the meaning given to it in clause 2 of this Undertaking.

Proposed Independent Auditor means a person named in the Proposed Independent Auditor Notice.

Proposed Independent Auditor Notice has the meaning given to it in clause 6.2 of this Undertaking.

Public Mergers Register means the ACCC's public register of merger clearances, available at www.accc.gov.au.

Public Section 87B Undertakings Register means the ACCC's public register of section 87B undertakings, available at www.accc.gov.au.

Related Bodies Corporate has the meaning given to it by section 50 of the Corporations Act.

Related Entities has the meaning given to it by section 9 of the Corporations Act.

Related Parties has the meaning given to it by section 228 of the Corporations Act.

Subsidiary has the meaning given to it by section 9 of the Corporations Act.

Supply Terms means the terms and conditions of supply of goods and services by Metcash's hardware and home improvement business division (including terms and conditions relating to marketing support, discounts and rebates).

Unbanned Retail Store means an independent hardware retail store that is supplied with goods or services by Metcash's hardware and home improvement business division, or seeking to be supplied with goods or services by Metcash's hardware and home improvement business division, but is not:

- a Corporate Store;
- a Member Store;
- a vertically-integrated retailer; or
- a specialty retailer selling limited categories of hardware or home improvement products.

Undertaking is a reference to all provisions of this document, including its schedules and as varied from time to time under section 87B of the Act.

2. Interpretation

- 2.1 In the interpretation of this Undertaking, the following provisions apply unless the context otherwise requires:
- (a) a reference to this Undertaking includes all of the provisions of this document including its schedules;
 - (b) headings are inserted for convenience only and do not affect the interpretation of this Undertaking;
 - (c) if the day on which any act, matter or thing is to be done under this Undertaking is not a Business Day, the act, matter or thing must be done on the next Business Day;
 - (d) a reference in this Undertaking to any law, legislation or legislative provision includes any statutory modification, amendment or re-enactment, and any subordinate legislation or regulations issued under that legislation or legislative provision;
 - (e) a reference in this Undertaking to any company includes its Related Bodies Corporate;
 - (f) a reference in this Undertaking to any agreement or document is to that agreement or document as amended, novated, supplemented or replaced;
 - (g) a reference to a clause, part, schedule or attachment is a reference to a clause, part, schedule or attachment of or to this Undertaking;

- (h) an expression importing a natural person includes any company, trust, partnership, joint venture, association, body corporate or governmental agency;
- (i) where a word or phrase is given a defined meaning, another part of speech or other grammatical form in respect of that word or phrase has a corresponding meaning;
- (j) a word which denotes the singular also denotes the plural, a word which denotes the plural also denotes the singular, and a reference to any gender also denotes the other genders;
- (k) a reference to the words 'such as', 'including', 'particularly' and similar expressions is to be construed without limitation;
- (l) a construction that would promote the purpose - or object - underlying the Undertaking (whether expressly stated or not) will be preferred to a construction that would not promote that purpose or object;
- (m) material not forming part of this Undertaking may be considered to:
 - (i) confirm the meaning of a clause is the ordinary meaning conveyed by the text of the clause, taking into account its context in the Undertaking and the competition concerns intended to be addressed by the Undertaking and the clause in question; or
 - (ii) determine the meaning of the clause when the ordinary meaning conveyed by the text of the clause, taking into account its context in the Undertaking and the purpose or object underlying the Undertaking, leads to a result that does not promote the purpose or object underlying the Undertaking;
- (n) in determining whether consideration should be given to any material in accordance with paragraph (m), or in considering any weight to be given to any such material, regard must be had, in addition to any other relevant matters, to the:
 - (i) effect that reliance on the ordinary meaning conveyed by the text of the clause would have (taking into account its context in the Undertaking and whether that meaning promotes the purpose or object of the Undertaking); and
 - (ii) need to ensure that the result of the Undertaking is to completely address any ACCC competition concerns;
- (o) the ACCC may authorise the ACCC Mergers Review Committee, a member of the ACCC or a member of the ACCC staff, to exercise a decision making function under this Undertaking on its behalf and that authorisation may be subject to any conditions which the ACCC may impose;
- (p) in performing its obligations under this Undertaking, Metcash will do everything reasonably within its power to ensure that its performance of those obligations is done in a manner which is consistent with promoting the purpose and object of this Undertaking;
- (q) a reference to:
 - (i) a thing (including, but not limited to, a chose in action or other right) includes a part of that thing;

- (ii) a party includes its successors and permitted assigns; and
- (iii) a monetary amount is in Australian dollars.

Schedule 2 – Independent Auditor Appointment

This form sets out the information required by the ACCC in relation to the proposed appointment of the Approved Independent Auditor under the Undertaking.

Please note in relation to information given pursuant to this form, giving false or misleading information is a serious offence.

Method of Delivery to the ACCC

The completed Independent Auditor Appointment form, along with the additional requested information, is to be provided to the ACCC with the subject line '*Proposed Independent Auditor Form – section 87B Undertaking given to the ACCC by Metcash Limited ACN 112 073 480 dated July 2016*' to the below email addresses:

1) mergers@accc.gov.au

Attention: Executive General Manager
Merger and Authorisation Review Division

2) **With a copy sent to:**

mergersucu@accc.gov.au

Attention: Director
Undertakings Compliance Unit
Coordination and Strategy Branch
Merger and Authorisation Review Division

Information Required

The ACCC requires the following information in order to assess a Proposed Independent Auditor.

1) Proposed Independent Auditor Details:

- (a) the name of the Proposed Independent Auditor; and
- (b) the name of the Proposed Independent Auditor's employer and contact details including:
 - Address;
 - Contact name;
 - Telephone number;
 - Other contact details.

2) A submission containing the following information:

- (a) details of the Proposed Independent Auditor's qualifications and experience relevant to his or her proposed role pursuant to the Undertaking.
- (b) the names of the [owner/s and the directors (delete any that do not apply)] of the Proposed Independent Auditor's employer.

(c) details of any of the following types of relationships between Metcash and the Proposed Independent Auditor or the Proposed Independent Auditor's employer or confirmation that no such relationship exists whether within Australia or outside of Australia:

- (i) Metcash and the Proposed Independent Auditor's employer are Associated Entities.
- (ii) Metcash is an Entity Connected with the Proposed Independent Auditor's employer.
- (iii) The Proposed Independent Auditor's employer is an Entity Connected with Metcash.
- (iv) Metcash and the Proposed Independent Auditor's employer are Related Entities.
- (v) Metcash and the Proposed Independent Auditor's employer are Related Parties.
- (vi) any Related Party, Related Entity or Entity Connected with Metcash is a Related Party, Related Entity or Entity Connected with the Proposed Independent Auditor.
- (vii) Metcash and the Proposed Independent Auditor or the Proposed Independent Auditor's employer have a contractual relationship or had one within the past three years, other than those attached to this form.
- (viii) the Proposed Independent Auditor's employer is a supplier of Metcash or has been in the past three years.
- (ix) Metcash is a supplier of the Proposed Independent Auditor's employer or has been in the past three years.
- (x) any other relationship between Metcash and the Proposed Independent Auditor or the Proposed Independent Auditor's employer that allows one to affect the business decisions of the other.

3) A document outlining the terms of appointment for the Proposed Independent Auditor.

Specific Information required

1) The ACCC requires a finalised draft audit plan, drafted by the Proposed Independent Auditor and outlining (to the extent possible) the Proposed Independent Auditor's plans in regard to the Audit Report.

Confidential Schedule 3
