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NEWS RELEASE

ACCC APPEALS METCASH JUDGMENT

The ACCC today announced it is appealing against the Federal Court's judgment dismissing the ACCC's application to prevent Metcash from acquiring the Franklins supermarket business.

"We are appealing this case for two reasons," ACCC Chairman Rod Sims said today. "First, because of the adverse effect of the proposed acquisition on independent supermarket retailers, consumers and competition in the NSW and ACT grocery sector. Metcash, with this proposed acquisition, will have an ability to increase prices and/or reduce service to independent supermarket retailers.

"Second, the ACCC is appealing because, if left unchallenged, the Court's interpretation of some fundamental principles of merger analysis could have serious implications for the ACCC's ability to block anti-competitive mergers and so protect consumers in the future," Mr Sims said.

The ACCC has carefully considered the judgment and believes the Court made a number of significant legal and factual errors in dismissing the ACCC's application to stop the proposed acquisition.

The ACCC sought an injunction in the Federal Court in December last year to prevent the proposed acquisition proceeding.

The ACCC took this action because it considered that the proposed acquisition was likely to result in a substantial lessening of competition through the removal of Metcash's only real competitor for the wholesale supply of packaged groceries to independent retailers in NSW and the ACT.

"We remain concerned that the proposed acquisition would remove any future ability for those independent retailers to choose from whom they get their grocery supplies," Mr Sims said.

"We have had a number of submissions from independent retailers and others that competition to Metcash at the wholesale level is necessary for them to control the cost of their goods."

An alternative wholesale option provides a direct competitive constraint on Metcash. For example, in response to Franklins offering franchise agreements to independent retailers in NSW and the ACT, Metcash offered independent retailers in NSW and the ACT an additional rebate of up to 1.2 per cent on their wholesale purchases if they entered into a five year supply agreement with Metcash.

"To put that into perspective, rebates represent a significant proportion of an independent retailer's profit. The total rebate paid by a wholesaler to a retailer is typically only around 2 to 3 per cent; so the additional rebate of 1.2 per cent represented an increase in the order of 40-60 per cent to the rebates of those retailers. The increased rebate was a huge benefit to independent supermarket retailers who received it; and it would not have come about without wholesaling competition between Metcash and Franklins," Mr Sims said.

The ACCC has closely examined the grocery industry over the years, including the role of Coles and Woolworths, who are by far the largest players. The ACCC has consistently noted the competitive constraint these chains impose at the retail level, particularly on larger independent supermarket retailers located close to a Coles or Woolworths store. However, the most immediate competitive constraint on Metcash is direct competition at the wholesale level. The acquisition of Franklins would remove the only option for independent retailers who are unhappy with what Metcash offers them.

The ACCC's second concern is the Court's interpretation of some fundamental principles of merger analysis.

In relation to market definition, for example, the decision taken by the Court in the Metcash case is at odds with the Full Federal Court's decision in the 1994 Davids Holdings case. In that case the Court affirmed that there was a market for the wholesale supply of packaged groceries to independent retailers.

"The key question in relation to market definition is 'what product is supplied to independent retailers, and where could they turn for alternatives?' The answer is clear: the product is the wholesale supply of packaged groceries to independent retailers, and unhappy Metcash customers in NSW and the ACT can only turn to Franklins and in rare cases Spar for alternative supply," Mr Sims said.

"Another important issue in merger analysis is that the ACCC has an obligation to examine the competition effects of alternative outcomes. A fundamental question is how certain do these alternative outcomes need to be before being accepted as the relevant benchmark against which to measure any anti-competitive effects of the merger," Mr Sims said.

"The Court's approach, through its application of an onerous test, would make it an unrealistic task for the ACCC in future matters to establish what is likely to happen in the market if a merger doesn't proceed. For example, in applying the test to the circumstances of this case, where the ACCC contended that a consortium of independent retailers was likely to acquire all or a large part of Franklins if the Court stopped the Metcash acquisition, the Court appeared to expect that the consortium satisfy stringent and commercially unrealistic standards. Amongst other points, this included satisfying the Court that Franklins' owner Pick n Pay would likely accept the offer (when the ACCC believed it may have an incentive to ensure that the Court is not satisfied of this point) and to provide evidence as to who would buy or take a franchise of any unwanted stores should the consortium choose not to retain all 80 stores," Mr Sims said.

The Court also gave considerable weight to the stated preferences and intentions of the seller in determining the likely market outcome if the merger does not proceed. This raises the important general question of how the Court assesses a seller's reaction in such circumstances. Clearly a seller will realise they will receive a higher price from a close competitor, who expects competition to diminish, than from other buyers.

"If this judgment goes unchallenged it may entrench the principle that the intentions and preferences of the seller are critical to deciding how likely it is that alternative buyers will have a real chance of success," Mr Sims said.

Media inquiries

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General inquiries

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