



Trade Practices Act 1974
Undertaking to the Australian Competition & Consumer Commission
Given under section 87B
by Fonterra Co-operative Group Limited

Background

In November 2004 Fonterra lodged a submission in support of its request for an informal clearance by the Australian Competition & Consumer Commission (“**Commission**”) of its takeover offer for National Foods Limited (“**NFL**”).

In its submission to the Commission, Fonterra advised that it was prepared to enter into a divestiture undertaking to ensure that it did not contravene section 50 of the Act. In considering this submission, the Commission formed the view that the proposed acquisition would be likely to lead to a substantial lessening of competition in the market for pasteurised fresh milk in the State of Western Australia.

After further discussion with Fonterra, the Commission formed the view that if Fonterra were to give and implement the undertakings proffered by Fonterra in this section 87B undertaking, it would satisfy the Commission’s competition concerns in relation to the proposed takeover offer.

The Commission has advised Fonterra that subject to the provision and the implementation of the undertakings contained in this section 87B undertaking, the Commission has no objection to the proposed takeover. Accordingly, on the basis of that advice, Fonterra has agreed to provide the undertakings set out in this section 87B undertaking.

Definitions

“**Act**” means the *Trade Practices Act 1974 (Cth)*.

“**Appointment Date**” means the date on which the Approved Person is appointed under clause 3.1.

“**Approved Person**” means a person, independent of Fonterra, approved by the Commission in writing (which approval must not be unreasonably withheld), to effect the Divestiture Proposal under clause 3.1 if that clause becomes operative.

“**Approved Purchaser**” means a purchaser of the assets (and/or counterparty to the contracts) comprising the Divestiture Proposal who is approved by the Commission in advance in writing (which approval will not be unreasonably withheld and will be given in good faith) having regard to:

- (a) the adequacy of the purchaser’s financial resources to effect the purchase of the assets and/or enter into of the contracts comprising the Divestiture Proposal and to conduct a viable pasteurised fresh milk business in Western Australia; and
- (b) the likelihood of the purchaser being an effective competitor to Fonterra and its related bodies corporate in the market for pasteurised fresh milk in Western Australia,

which criteria will be considered having regard to whether the acquisition of NFL and the disposal of the assets and/or the entering into of the contracts comprising the Divestiture Proposal in accordance with this undertaking is likely to result in a contravention of section 50 of the Act in relation to the market for pasteurised fresh milk in the State of Western Australia.

“**Business Sale Deadline**” has the meaning given to it in clause 2.14.

“**Commission**” means the Australian Competition & Consumer Commission.

“**Divestiture Proposal**” has the meaning given to it in clause 2.2, having regard to the provisions of clause 2.1.

“**Fonterra**” means Fonterra Co-operative Group Limited or a wholly owned subsidiary (as the context requires).

“**Major Grocery Chain**” means Woolworths Limited, Coles Myer Limited or Foodland Associated Limited.

“**NFL**” means National Foods Limited (ABN 65 004 486 631) or a wholly owned subsidiary (as the context requires).

“**Offer**” means Fonterra’s takeover offer for all the issued ordinary shares in NFL announced on 28 October 2004 and as may be varied from time to time by Fonterra in accordance with the Corporations Act.

“**PB Foods**” means PB Foods Ltd (ABN 47 008 668 602).

“**Prospective Purchaser(s)**” means a prospective purchaser of all or any of the assets the subject of the Divestiture Proposal.

“**Trigger Date**” has the meaning given to it in clause 1.

Undertakings

1 Trigger Date

1.1 For the purposes of this section 87B undertaking, the Trigger Date is the first date on which Fonterra:

- (a) has control of, or the ability to control, the composition of the board of directors of NFL; or
- (b) has a relevant interest in more than 50% of the issued ordinary shares in NFL, and the Offer has become unconditional.

2 Undertaking

2.1 Fonterra shall, as soon as practicable after the occurrence of the Trigger Date, procure that the following arrangements are entered into with an Approved Purchaser:

- (a) **Access to retailer shelf space:**
- (i) The sale of Fonterra's 'Brownes' brand in Australia to the Approved Purchaser for use in Australia (by means of an assignment of the 'Brownes' trade mark and any copyright in the brands and distinctive packaging designs, to the extent assignable, of the relevant products to which the 'Brownes' trade mark is currently applied, except for any packaging designs that are confusingly similar to the packaging designs of existing Fonterra brands), including in relation to pasteurised fresh white milk, modified milks, flavoured milks and other dairy products. This sale includes the "Brownes" sub-brands set out in Annexure B such as "Chill" flavoured milk, but does not include the "Brownes" sub-brands "Heart Plus", "Calcium Plus", "Supashake", "YoGo" and "Connoisseur". The sale is subject to an exclusive licence to Fonterra to use the "Brownes" brand in respect of yoghurt, ice cream, cheese, cream, juice and extended shelf life milk manufactured in Australia for export. This licence back to Fonterra only applies to goods for export and only for a period of three years, to allow an orderly transition to other Fonterra brands; and
 - (ii) Fonterra using its best endeavours (without incurring any financial obligation) to novate to the Approved Purchaser a private label contract between PB Foods and the Major Grocery Chain nominated by Fonterra, subject to the consent of the relevant Major Grocery Chain; and
- (b) **Access to chilled distribution:** the sale to the Approved Purchaser of such elements of the distribution system in Western Australia owned or operated by Fonterra or alternatively NFL (if NFL is a wholly owned subsidiary of Fonterra) such as owned warehouses, depots and company owned trucks, as is required by the Approved Purchaser as necessary to service the sale of pasteurised fresh milk, modified milk and flavoured milk products under the "Brownes" brand (with the Approved Purchaser having the right to use such assets for other products), but excluding Fonterra's dual temperature delivery vehicles used for the transportation of ice cream to regional areas of Western Australia; and
- (c) **Access to manufacturing capacity or capability:**
- (i) a toll manufacturing contract on reasonable commercial terms with the Approved Purchaser for the manufacture for the Approved Purchaser of pasteurised fresh milk for sale in Western Australia for a period up to 7 years (with the contract being terminable by the Approved Purchaser on 12 months notice) for milk volumes up to a volume equal to the current fresh milk processed by the processing facilities operated by PB Foods at Balcatta, Western Australia as at the date of this undertaking. The Approved Purchaser is responsible for the supply of all materials under the toll manufacturing contract and Fonterra is to produce a finished packaged product to defined and agreed specifications and otherwise on commercial terms; or
 - (ii) the sale to the Approved Purchaser on reasonable commercial terms of either the fresh milk processing facilities operated by PB Foods at Balcatta, Western Australia or the fresh milk processing facilities operated by NFL at Bentley, Western Australia, as determined by Fonterra,

with the Approved Purchaser having the right to choose between (i) and (ii) or if it so desires, to choose neither (i) nor (ii). In the case of clause 2.1(c)(ii), the sale of the relevant fresh milk processing plant must include assets and arrangements necessary to operate the plant (including the transfer or licence of real property rights) and in the case of transfer of any employees at the plant, Fonterra must not do anything with the intention or likely effect of discouraging any of the employees from taking up employment with the Approved Purchaser if they receive acceptable offers; and

- (d) **Access to milk supply:** Fonterra using its best endeavours (without incurring any financial obligation) to novate to the Approved Purchaser existing contracts with Western Australian dairy farmers for fresh milk from PB Foods' or alternatively NFL's existing supply contracts (if NFL is a wholly owned subsidiary of Fonterra) in Western Australia as determined by Fonterra, to service the sale in Western Australia of dairy products currently sold under the "Brownes" brand up to a maximum volume equal to the volume currently required for those dairy products of approximately 90 million litres,

in accordance with the terms of this section 87B undertaking. For the avoidance of doubt, the undertakings in this clause 2.1 do not relate to Fonterra's extended shelf life technology, the 'Supashake', "YoGo" or "Connoisseur" sub-brands or the specialty milk sub-brands, Heart Plus and Calcium Plus.

- 2.2 Within six months of the Trigger Date, Fonterra will decide which of the alternatives under clause 2.1(c)(ii), together with the obligations under clauses 2.1(a), (b), (c)(i) and (d) (the "**Divestiture Proposal**") it elects to pursue in accordance with this undertaking and shall notify the Commission of that decision. If Fonterra, however, wishes to change that decision under clause 2.1(c)(ii), then without limiting its obligations under clauses 2.3 and 4.1, it shall be free to do so provided that it promptly notifies the Commission of its amended decision and the reasoning for that change having regard to the provisions of Part Three of Annexure A.
- 2.3 Unless the Commission agrees otherwise, the transaction the subject of the Divestiture Proposal shall be entered into with an Approved Purchaser.
- 2.4 To facilitate the Commission's approval of the Approved Purchaser(s), Fonterra must, within six months of the Trigger Date (or an earlier date if Fonterra considers it is in a reasonable position to do so):
- (a) provide the Commission on a confidential basis with an Information Memorandum relating to the Divestiture Proposal which must contain or annex:
- (i) an associated draft sale and purchase agreement for effecting the Divestiture Proposal in accordance with this undertaking, and any associated contracts referred to in clause 2.1 (such as the toll manufacturing contract), which comprise the Divestiture Proposal;
 - (ii) a copy of this undertaking (excluding the Annexures);
 - (iii) the postal address for the General Manager, Mergers and Asset Sales Branch, of the Commission;
 - (iv) a detailed description of all land, premises, plant, equipment, inventory and other assets that are subject to the Divestiture Proposal; and

- (v) a detailed description of the operations of the assets and access arrangements that comprise the Divestiture Proposal; and
 - (b) seek the Commission's written notice of no objection to the Information Memorandum prepared by Fonterra in accordance with clause 2.4(a).
- 2.5 The Commission will, within 2 weeks from the date of the receipt of the proposed Information Memorandum under clause 2.4(a), consider the proposed Information Memorandum and advise Fonterra in writing of any decision to object on the basis of inconsistency with this section 87B undertaking (in which case the Commission will provide Fonterra with its written reasons for its objection which must be reasonable) or not to object to the proposed Information Memorandum. If the Commission does not object or provide written reasons for any objection within 2 weeks of receipt of the Information Memorandum, it will be deemed to have given a written notice of no objection to the Information Memorandum.
- 2.6 The Commission will provide Fonterra with three weeks from the date of indicating its objection pursuant to clause 2.5, to amend the proposed Information Memorandum to address the Commission's competition concerns as stated in its reasons of objection.
- 2.7 Fonterra must, if the Commission so requests, at any time prior to the giving effect to the Divestiture Proposal:
 - (a) provide information to the Commission as to the attributes and extent of assets and arrangements for access comprising the Divestiture Proposal;
 - (b) discuss and negotiate with the Commission in good faith any difference of view in relation to the inclusion in, or exclusion from, the description of the businesses and assets for sale or the arrangements for access in the Information Memorandum.
- 2.8 Fonterra must, within 6 months of the Trigger Date, subject to clauses 2.9 and 2.12, seek expressions of interest for the Divestiture Proposal from a reasonable number of Prospective Purchasers with the objective of maximising the value from the Divestiture Proposal.
- 2.9 Fonterra:
 - (a) must not provide the Information Memorandum (or any part of it) to any Prospective Purchaser(s) unless the Commission's written notice of no objection to the Information Memorandum has been first obtained (or deemed to have been obtained) pursuant to clause 2.5;
 - (b) must provide the Information Memorandum to any Prospective Purchaser who has expressed a serious interest in the Divestiture Proposal (or part thereof) except to a Prospective Purchaser which Fonterra considers, after consulting with and gaining the approval of the Commission, does not represent a genuine Prospective Purchaser.
- 2.10 Subject to clause 2.12, Fonterra must provide the Commission on a confidential basis with a list of all Prospective Purchasers who have expressed a serious interest in the Divestiture Proposal (or part thereof).

- 2.11 The Commission will have three weeks from the provision of the document referred to in clause 2.10 to conduct and conclude market enquiries in relation to the transactions the subject of the Divestiture Proposal with the Prospective Purchasers listed by Fonterra and advise Fonterra in writing whether or not the Commission approves of any of those Prospective Purchasers as an Approved Purchaser and the reasons for its decision. The mechanism for reviewing the list of Prospective Purchasers and advising Fonterra is capable of more than one application subsequent to the initial process outlined above.
- 2.12 Fonterra may at its option provide the Commission with the name of only one Prospective Purchaser without having to first seek multiple expressions of interest, approval of which Prospective Purchaser must be sought and obtained in accordance with clause 2.11 and reserves the right to undertake the transaction the subject of the Divestiture Proposal with one Approved Purchaser.
- 2.13 Fonterra will provide the Commission, on a confidential basis, a final version of the sale and purchase agreement and any associated agreements giving effect to the Divestiture Proposal to allow the Commission to review those agreements to determine whether they are consistent with this section 87B undertaking and with the objective of the Approved Purchaser being an effective competitor in the market for pasteurised fresh milk in Western Australia. Fonterra may either give these agreements to the Commission in a form ready to execute, at least two weeks before execution, or may enter into the agreements conditional on the Commission having two weeks to review them under this clause 2.13.
- 2.14 If the Divestiture Proposal does not occur within the time period specified in Part One of Annexure A from the Trigger Date, or such longer time as the Commission may agree acting reasonably (“**Business Sale Deadline**”), then the provisions of clause 3 will apply. For the avoidance of doubt, nothing in this clause 2 requires Fonterra to sell any assets it currently holds (other than as expressly provided in clauses 2.1 and 2.2) and nothing in this clause 2 requires Fonterra to procure the disposal of any Fonterra assets or NFL assets (other than as expressly provided in clauses 2.1 and 2.2).

3 Failure to dispose of Business within Business Sale Deadline

- 3.1 Subject to clause 3.2, if at the Business Sale Deadline, the Divestiture Proposal has not been finalised in accordance with the terms of clause 2 above, Fonterra must appoint an Approved Person to cause the Divestiture Proposal (with 2.1(c)(ii) still being as determined by Fonterra) to be offered in the manner and on the terms directed by the Commission and such sale is to be effected within the time period set out in Part Two of Annexure A. Fonterra must appoint the Approved Person within three weeks of the expiration of the Business Sale Deadline. The Commission must advise Fonterra as soon as practicable whether or not it approves of any person proposed by Fonterra as an Approved Person. The provisions of Part Four of Annexure A are to apply.
- 3.2 If Fonterra is unable to comply with its obligations under clause 2 or 4 due solely to circumstances outside of its control, then Fonterra shall provide the Commission with details of the relevant circumstances outside of Fonterra’s control and Fonterra and the Commission shall review the undertakings contained in clauses 2 and 4 (as the case may be) and if appropriate negotiate an amendment of all or any of such undertakings in light of such circumstances.

4 Preservation of assets pending sale

- 4.1 Fonterra agrees that it will not during the term of this section 87B undertaking, except in accordance with this section 87B undertaking, transfer the control of the assets or access arrangements referred to in clause 2.1 without the prior written consent of the Commission and it will not remove or make any material adverse change to the assets, operations or businesses referred to in clause 2.1 (including, but not limited to, plant, equipment, staffing levels, level of management, premises and inventory). Pending the sale of such assets and/or the entering into of the contracts referred to in clause 2.1, Fonterra will take all reasonable steps to ensure that those assets are preserved (so far as within Fonterra's power) so that such sale, and/or contracting (as the case may be) takes place as expeditiously and effectively as practicable.

5 Notification

- 5.1 Fonterra shall promptly provide notice and information to the Commission (in confidence) of:
- (a) the Trigger Date and the occurrence of any event set out in clause 1.1;
 - (b) progress in the completion of the Divestiture Proposal; and
 - (c) all other material information reasonably requested by the Commission.

6 Confidentiality

- 6.1 Fonterra acknowledges that the Commission may from time to time publicly refer to this undertaking, subject to clause 6.2.
- 6.2 Annexure A to this undertaking will remain confidential until the completion of the Divestiture Proposal in accordance with this undertaking.

7 No derogation

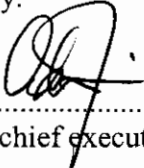
- 7.1 Nothing in this undertaking is intended to restrict the right of the Commission to take action under the Act in the event that divestiture of the assets and the arrangements the subject of the Divestiture Proposal are not implemented in accordance with this undertaking.
- 7.2 The undertaking does not prevent the Commission from taking enforcement action at any time whether during or after the period of the undertaking in respect of any breach by Fonterra of any of the undertaking.

8 Commencement and termination of undertaking

- 8.1 This undertaking comes into effect when all the following conditions are satisfied:
- (a) the undertaking is executed by Fonterra; and
 - (b) the Commission accepts in writing the undertaking so executed.

8.2 This section 87B undertaking shall cease to have effect if the Trigger Date does not occur within 12 months of the date that this section 87B undertaking comes into effect. Nothing in this clause 8 shall thereafter prevent the Commission from continuing to perform its regulatory role in relation to its functions under the Act.

FONTERRA CO-OPERATIVE GROUP)
LIMITED by:)

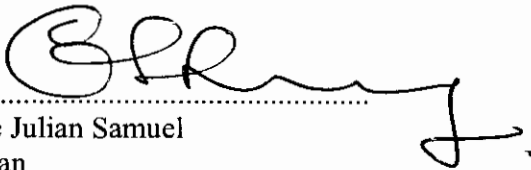


.....)
Signature of chief executive officer)

.....)
ANDREW FERRIER)

.....)
Name of chief executive officer (block letters))

ACCEPTED by the **AUSTRALIAN COMPETITION & CONSUMER COMMISSION**
pursuant to section 87B of the Trade Practices Act 1974



.....)
Graeme Julian Samuel
Chairman

.....)
18th January 2005
Dated

Confidential Annexure A

Annexure B

Included Brands and sub-brands

Fresh milks

Brownes Fresh Full Cream Milk
Brownes Hi-Lo Milk
Brownes Skim Milk
Brownes Low Fat Milk

Flavoured milks

Brownes IC Chill
Brownes Lite Coffee Chill
Brownes Double Choc Chill
Brownes Choc Chill
Brownes Mocha Chill
Brownes Berry Chill
Brownes Banana Chill
Brownes E-Nog Chill
Brownes Coffee Chill

Yoghurts

Brownes Dessert Style Yoghurt
Brownes Traditional Yoghurt
Brownes Light Yoghurt
Brownes Diet Yoghurt

Desserts and Creams

Brownes Creme Mango Passion
Brownes Apple Cream Pie
Brownes Creme Caramel
Brownes Custard
Brownes Whipping Cream
Brownes Thickened Cream
Brownes Sour Cream