

**Undertaking to the Australian Competition and  
Consumer Commission pursuant to section 87B of the  
Trade Practices Act 1974**

**By**

**Pfizer Inc**

## 1. Background

- (a) Pfizer Inc (*Pfizer*), a company incorporated in Delaware, United States of America, is a pharmaceutical company whose activities are divided into three business segments: consumer healthcare; pharmaceuticals; and animal health.
- (b) On 25 June 2006, Pfizer and J&J entered into a Stock and Asset Purchase Agreement to effect the sale of the Pfizer Consumer Healthcare Business to Johnson & Johnson (J&J) included in the assets of that business are the intellectual property and contractual rights in relation to the distribution of the Lomotil and Lofenoxal brands in Australia. The sale of the Pfizer Consumer Healthcare Business in Australia will be effected under a separate business transfer agreement in accordance with the terms of the Stock and Asset Purchase Agreement and shall be for the sale of assets of the business and not shares in a company.
- (c) In its Statement of Issues dated 28 November 2006, the Commission expressed the view that the Proposed Acquisition raises competition concerns under section 60 of the Act. Relevantly for the purposes of this undertaking (the *Pfizer Undertaking*), the Commission expressed concern that the acquisition by J&J of Pfizer brands Lomotil and Lofenoxal could lead to a lessening in competition in the market for medicines for the treatment of diarrhoea.
- (d) Without admission, J&J has offered an undertaking to the Commission with the intention that it will address the Commission's competition concerns including in relation to the market for medicines for the treatment of diarrhoea (the *J&J Undertaking*).
- (e) The J&J Undertaking includes an undertaking to complete the Divestiture Brand Sales within the Initial Sale Period to a prospective purchaser approved by the Commission (the *Approved Purchaser*). Relevantly for the purposes of the Pfizer Undertaking, this includes the sale of the Lofenoxal brand and the Lomotil brand which are described in the J&J Undertaking as the Lofenoxal Sale and the Lomotil Sale. In requiring the Lofenoxal Sale and the Lomotil Sale, the Commission is seeking to ensure that those brands are acquired by an Approved Purchaser capable of competing in the market for medicines for the treatment of diarrhoea, using those brands having secured a source of supply.
- (f) Lofenoxal and Lomotil are currently marketed in Australia by Pfizer Australia Pty Limited which is a wholly owned subsidiary of Pfizer.
- (g) Lofenoxal and Lomotil are manufactured for and supplied to Pfizer Manufacturing Services (a company incorporated in Ireland) by NPIL Pharmaceuticals (UK) Limited (*NPIL*) under a Manufacturing and Supply Agreement (the *NPIL Agreement*). Pfizer Australia Pty Limited obtains its requirements of Lofenoxal and Lomotil for sale in Australia through Pfizer inter-company arrangements.
- (h) The commercial arrangements which will be entered into following the Lomotil and Lofenoxal Sales are uncertain at this stage. It is possible that the NPIL Agreement insofar as it relates to Lomotil and Lofenoxal will be assigned to J&J or to an Approved Purchaser; new arrangements may be entered into between J&J and NPIL, or an Approved Purchaser and NPIL; or new arrangements may be entered into between an alternative supplier of

Lomofil and Lofenoxal and J&J, or an alternative supplier and Approved Purchaser. Should no one of these events occur, Pfizer undertakes, on the terms set out below, to ensure ongoing supply of Lomofil and Lofenoxal for sale in Australia to an Approved Purchaser, should this be required by an Approved Purchaser.

- (i) Pfizer has proffered the Pfizer Undertaking to the Commission pursuant to section 87B of the Act.

## **2. Interpretation**

---

### **Definitions**

- (a) In this document, words and phrases shall have the same meaning as in the J&J Undertaking unless expressly defined in the Pfizer Undertaking.

### **Construction**

- (b) In the interpretation of a clause of the Pfizer Undertaking, a construction that would promote the purpose or object underlying the Pfizer Undertaking (whether that purpose or object is expressly stated in the Pfizer Undertaking or not) shall be preferred to a construction that would not promote that purpose or object. In the interpretation of this Undertaking, material which does not form part of this Undertaking, including the Commission's Statement of Issues dated 28 November 2006, 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.
- (c) In determining whether consideration should be given to any material in accordance with clause (b) or in considering any weight to be given to any such material, regard shall 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) the need to ensure that the Undertaking promotes competition.
- (d) In performing its obligations under the Pfizer Undertaking, Pfizer 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 the Pfizer Undertaking.
- (e) Unless expressed to the contrary, in this document:
- (i) words in the singular include the plural and vice versa;

- (ii) If a word or phrase is defined its other grammatical forms have corresponding meanings; and
- (iii) "Includes" means includes without limitation.
- (f) Unless expressed to the contrary, in this document a reference to:
  - (i) a person includes a partnership, joint venture, unincorporated association, corporation and a government or statutory body or authority;
  - (ii) a person includes the person's legal personal representatives, successors, assigns and persons substituted by novation;
  - (iii) any legislation includes subordinate legislation under it and includes that legislation and subordinate legislation as modified or replaced; and
  - (iv) an obligation includes a warranty or representation and a reference to a failure to comply with an obligation includes a breach of warranty or representation.
- (g) Headings do not affect the interpretation of this document.

### **3 Commencement of Pfizer Undertaking**

The Pfizer Undertaking comes into effect when the Pfizer Undertaking is executed by Pfizer and accepted and executed by the Commission.

### **4 Ongoing supply undertakings**

- (a) Pfizer will, if requested to by J&J pursuant to its obligation under clause 24 of the J&J Undertaking, supply to the Approved Purchaser the Approved Purchaser's total requirements of Lofenoxal and Lomotti for sale by the Approved Purchaser in Australia.
- (b) Supply will commence within 30 days of J&J making the request unless otherwise agreed with the Approved Purchaser.
- (c) The cost of supply to the Approved Purchaser will be no greater than Pfizer's actual costs (which include the price paid to NPII and any reasonable costs of delivery, but does not include any of Pfizer's internal costs associated with arrangement of supply);
- (d) Pfizer will not, in any 12 month period, be required to supply an amount of Lofenoxal or Lomotti to the Approved Purchaser, if the amount sought by the Approved Purchaser is greater than 175 per cent of the total amount of either product acquired or sold by Pfizer Australia Pty Ltd (whichever is the greater) in the 2005 calendar year.
- (e) Pfizer's obligation to supply will cease 2 years from the date J&J first request supply.
- (f) Notwithstanding paragraph (e), Pfizer will continue to supply Lofenoxal and Lomotti-branded product to the Approved Purchaser on terms referred to in paragraphs (c) and (d) for a further 12 months after the expiry of the two year period if:
  - (i) the Approved Purchaser requests it 3 months prior to the expiry of the 2 year period; and

- (ii) the reason for the Approved Purchaser's request is that it is unable to commence retailing Lofenoxal and Lomotil-branded product sourced from an alternative source of supply as a result of delay in obtaining the necessary approvals from the Therapeutic Goods Administration which delay is not caused by an act or omission of the Approved Purchaser.
- (g) Pfizer will not be obliged to commence supply under this clause unless J&J has provided to Pfizer an indemnity in respect of any payment Pfizer may have to make to NPIL (other than payments for goods sold and delivered) solely in connection with the divestiture of Lomotil and Lofenoxal in Australia. The indemnity offered by J&J may be limited to payments to NPIL, the occurrence of which was notified to J&J a reasonable time before the payments were made.
- (h) The obligation accepted by Pfizer in clause 4(a) above:
  - (i) may involve Pfizer doing all things within its control, necessary to enforce its contractual rights under the NPIL Agreement; and
  - (ii) is subject to J&J doing all things within its control, necessary to ensure Pfizer is able to comply with the undertaking, including but not limited to ensuring access to rights to intellectual property that are required for Pfizer to comply with the supply obligation.

## **5. General**

### **Obligation to procure**

- (a) Where the performance of an obligation under the Pfizer Undertaking is imposed on Pfizer, if complete performance of the Pfizer Undertaking requires a Related Body Corporate of Pfizer to take some action or refrain from taking some action, Pfizer will procure that Related Body Corporate to take that action or refrain from taking that action.

### **Obligation to provide the Commission with information**

- (b) Pfizer will provide the Commission with all information and documents that the Commission reasonably requires for the purpose of monitoring compliance with the Pfizer Undertaking.
- (c) Pfizer will use its best endeavours to comply with any request for information from the Commission within 5 Business Days or such other period of time as may be agreed between Pfizer and the Commission.
- (d) Except as required by law, the Commission will keep confidential any information provided to it by Pfizer pursuant to this Part 5 which is identified by Pfizer as confidential and the Commission agrees is confidential and will not disclose the same to any party without the written consent of Pfizer.

### **Severability**

- (a) If for any reason a provision or provisions of the Pfizer Undertaking are found to be unlawful, invalid or unenforceable, to the extent permitted by law, the remaining terms of the Pfizer Undertaking remain in force.

### **Jurisdiction and Service of Process**

- (f) Pfizer submits to the jurisdiction of the Federal Court of Australia.
- (g) Unless and until notified in writing by Pfizer to the Commission of the appointment of another law firm as agent within Australia, Pfizer irrevocably appoints Allens Arthur Robinson, of Deutsche Bank Place, 126 Phillip Street, Sydney, NSW, 2000, Australia as their agent for the purposes of any service of process under the Pfizer Undertaking.

### **Notices**

- (h) Any notice or other communication given in relation to the Pfizer Undertaking should be sent to the address or fax number given below:

**Pfizer**                      Pfizer Australia Pty Limited  
                                 Attention: Mr John Young, Regional Director Australia/NZ  
                                 38-42 Wharf Road  
                                 West Ryde NSW 2114  
                                 Fax: (02) 9650 3646

With a copy to:  
Allens Arthur Robinson  
Attention: Ms Fiona Crosbie, Partner  
Deutsche Bank Place  
126 Phillip Street  
Sydney NSW 2000  
Fax: (02) 9230 5333

**Commission**            Attention: Mr Tim Grimwade, General Manager,  
                                 Mergers and Asset Sales  
                                 Level 7 Angel Place  
                                 123 Pitt Street  
                                 Sydney NSW 2000  
                                 Fax: (02) 9223 1082

### **Acknowledgments**

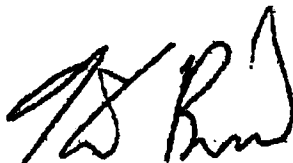
- (i) Pfizer acknowledges that the Pfizer Undertaking in no way affects the rights and remedies available to any other person arising from the subject matter of the Pfizer Undertaking.

- (i) Pfizer acknowledges that the Commission will make this Undertaking available for public inspection and that the Commission will, from time to time, publish and publicly refer to the Pfizer Undertaking.

SIGNED for PFIZER Inc



Signature of Witness



Officer

William C. LOUGA

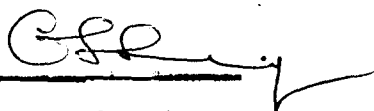
Name of Witness

Kat Bernal

Name of Officer

Date:

ACCEPTED by the AUSTRALIAN COMPETITION AND CONSUMER COMMISSION



Graeme Julian Samuel

Chairman

Australian Competition and Consumer Commission

Date: 21/12/06