

Recitals

- A On 24 July 2008, the Australian Competition and Consumer Commission (the **Commission**) accepted an undertaking from Kirin Holdings (Australia) Pty Ltd (**Kirin**) and National Foods Ltd (**National Foods**) in accordance with section 87B of the *Trade Practices Act 1974* (the **Act**) to address competition concerns raised by the proposed acquisition of Dairy Farmers.
- B The Undertaking requires National Foods to sell the Divestiture Businesses.
- C National Foods commenced a process in late 2008 to sell the Divestiture Businesses and has identified Parmalat Food Products Pty Ltd (**Parmalat**) as a possible purchaser.
- D National Foods has become aware that there were certain factual and typographic errors in the Undertaking. These factual and typographic errors related to the descriptions of relevant milk depots and to the address of the Dairy Farmers Lidcombe Facility.
- E National Foods and Parmalat have also executed a Sale and Purchase Agreement, which requires minor variations to the Undertaking. These minor variations provide:
- flexibility to the Approved Purchaser regarding employment arrangements;
 - in relation to the supply of bottles in NSW and SA, provisions to ensure supply security for the Approved Purchaser if bottle joint venture interests are unable to be transferred;
 - the ability for an Approved Purchaser to purchase the intellectual property associated with relevant flavoured milk brands;
 - in relation to fresh white milk in South Australia, the ability for an Approved Purchaser to obtain either a perpetual licence to use the relevant brands or a licence for a shorter period;
 - removal of the requirement to transfer the Enfield milk depot in NSW, which is not required for the effective operation of the NSW Divestiture Business; and
 - the ability for raw milk to be delivered in a manner requested by the Approved Purchaser.
- F Accordingly, Kirin and National Foods propose to vary the Undertaking to correct the factual and typographic errors and make the minor amendments outlined above.
- G The Commission has agreed, pursuant to section 87B of the Act, to accept this Second Variation.

Agreed terms

1 Commencement

This Second Variation comes into effect when:

- (a) this Second Variation is executed by Kirin and National Foods; and
- (b) the Commission accepts this Second Variation so executed.

2 Variation of Undertaking

Clause 3.2(b) of the Undertaking is varied as follows:

after the words "the timely transfer of employment to the Approved Purchaser of all employees", insert:

"who are required by the Approved Purchaser at its discretion and who are".

Clause 3.2(h)(3) of the Undertaking is varied as follows:

after the words "Third Party Consents", insert:

", as may be agreed with the Approved Purchaser".

Clause 15.1 of the Undertaking is varied as follows:

in the definition of "Dairy Farmers Lidcombe Facility" delete the word "Street" and replace that word with "Avenue".

Schedule 2 of the Undertaking is varied as follows:

- (a) in the section relating to bottle manufacturing interests, after the words "Transfer Dairy Farmers' interest in the bottle manufacturing joint venture associated with the Dairy Farmers Lidcombe Facility to the Approved Purchaser.", insert:

If the transfer is not achieved prior to Completion (due to a lack of consent from another joint venture participant), then the following 3 paragraphs apply:

- (i) *National Foods must, from Completion, and for a minimum period of 2 years or until the transfer is achieved (whichever occurs sooner), on-supply to the Approved Purchaser the bottles and other products required by the NSW Divestiture Business from the bottle manufacturing joint venture at cost and otherwise on the same terms as those bottles and other products were being supplied to National Foods at Completion.*
- (ii) *Notwithstanding paragraph (i), National Foods must use reasonable endeavours to establish a direct supply agreement between the bottle manufacturing joint venture and the Approved Purchaser for the supply of bottles and other relevant products required by the NSW Divestiture Business on the same terms as those bottles and other products were being supplied to National Foods at Completion, for a minimum period of 2 years from Completion or until the transfer is achieved (whichever occurs sooner).*
- (iii) *If the direct supply agreement referred to in paragraph (ii) is established, then paragraph (i) no longer applies.*

- (b) under the heading "Flavoured Milk", delete the word "grant" and replace that word with "Sell, or grant".

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- (c) under the heading "Depots", after the words "other than the depot at National Foods' milk production facility located in Penrith, NSW", insert:
"and the depot located at Enfield, NSW."
- (d) in the section relating to raw milk supply, after the words "Delivery: the agreed volume of raw milk to be delivered evenly over the year", insert:
"(or as otherwise requested by the Approved Purchaser)."

Schedule 3 of the Undertaking is varied as follows:

- (a) in the section relating to bottle manufacturing interests, after the words "interest exercised by another joint venture participant.", insert:
If the transfer is not achieved prior to Completion (due to a lack of consent from another joint venture participant), then the following 3 paragraphs apply:
- (i) *National Foods must, from Completion, and for a minimum period of 2 years or until the transfer is achieved (whichever occurs sooner), on-supply to the Approved Purchaser the bottles and other products required by the SA Divestiture Business from the bottle manufacturing joint venture at cost and otherwise on the same terms as those bottles and other products were being supplied to National Foods at Completion.*
 - (ii) *Notwithstanding paragraph (i), National Foods must use reasonable endeavours to establish a direct supply agreement between the bottle manufacturing joint venture and the Approved Purchaser for the supply of bottles and other relevant products required by the SA Divestiture Business on the same terms as those bottles and other products were being supplied to National Foods at Completion, for a minimum period of 2 years from Completion or until the transfer is achieved (whichever occurs sooner).*
 - (iii) *If the direct supply agreement referred to in paragraph (ii) is established, then paragraph (i) no longer applies.*
- (b) under the heading "Fresh White Milk", delete the words "Grant to the Approved Purchaser a perpetual licence", and replace them with:
"Grant to the Approved Purchaser either a perpetual licence or a licence for such shorter period as may be acceptable to the Approved Purchaser (with a minimum duration of 2 years)".
- (c) under the heading "Flavoured Milk", delete the word "Grant" and replace that word with "Sell, or grant".
- (d) in the section relating to raw milk supply, after the words "Delivery: the agreed volume of raw milk to be delivered evenly over the year", insert:
"(or as otherwise requested by the Approved Purchaser)".

Schedule 4 of the Undertaking is varied as follows:

- (a) delete Schedule 4;
- (b) replace Schedule 4 with the following:
"1 Existing National Foods Depots in NSW and the ACT

Suburb	Address	Owned or leased
<i>Broken Hill</i>	<i>2 Galena Street, Broken Hill</i>	<i>Leased</i>
<i>East Dubbo</i>	<i>1 Mt Batton Drive, East Dubbo</i>	<i>Third Party Operated</i>

Hume	24 Tralee Street, Hume	Third Party Operated
Katoomba	16 Mistral Street, Katoomba	Owned
Lidcombe	Birmie Avenue and Pippita Road, Lidcombe	Owned
Lithgow	74 and 76 Inch Street, Lithgow	Owned
Newcastle	Regional Markets Rural Drive, Sandgate, Newcastle	Third Party Operated
Springwood	3 Lawson Road, Springwood	Owned
Taree	10 Railway Parade East, Taree	Leased
Thornleigh	9 Pioneer Avenue Thornleigh	Third Party Operated
Wagga	16 Slay Street, Wagga	Third Party Operated
West Gosford	12 Jusfrute Drive, West Gosford	Leased
Wollongong	1 Tarrawanna Road, Corrimal, Wollongong	Leased

2 Existing National Foods Depots in SA

Suburb	Address	Owned or leased
Berri	Jellett Street, Berri	Third Party Operated
Cavan	3 Cardiff Court, Cavan	Owned
Clarence Gardens	Caulfield Avenue, Clarence Gardens	Owned
Kangaroo Island	8 Telegraph Road, Kingscote, Kangaroo Island;	Third Party Operated
Kingston	6 Gough Street, Kingston	Third Party Operated
Millicent	74 Mount Gambier Road, Millicent	Leased
Mt Gambier	390-396 Commercial Street, Mt Gambier	Owned
Murray Bridge	23 Rocky Gully Road, Murray Bridge	Third Party Operated
Naracoorte	12 Magarey Crescent, Naracoorte	Third Party Operated
Point Lincoln	28 Bayview Road, Point Lincoln	Third Party Operated
Port Pirie	7 George Street, Port Pirie	Third Party Operated
Renmark	Lot 1, Pyap Street, Renmark	Owned
Robe	Robe Street, Robe	Third Party Operated
Seaford	Lot 2, Railway Rd, Seaford	Third Party Operated
Whyalla.	40 Donaldson Terrace, Whyalla.	Third Party Operated
Yorke Peninsula	64 Main Coast Rd Pine Point, Yorke Peninsula;	Third Party Operated

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3 Acknowledgements

Kirin and National Foods acknowledge that the Commission may:

- (a) make this Second Variation available for public inspection; and
- (b) from time to time publicly refer to this Second Variation.

4 Definitions and interpretation

- (a) any term in this Second Variation that is defined in the Undertaking has the meaning given in the Undertaking, unless the contrary intention appears.
- (b) 'Completion' has the same meaning as appears in the executed Sale and Purchase Agreement between National Foods and the Approved Purchaser.
- (c) 'Second Variation' means this variation to the Undertaking.

EXECUTED by Kirin Holdings (Australia) Pty Ltd
in accordance with section 127(1) of the Corporations Act 2001
(Cwth) by authority of its directors

sign here ► Masaki Harada
Director

print name Masaki Harada

sign here ► Philip Thomas
Director/company secretary*

*delete whichever is not applicable

print name PHILIP THOMAS

EXECUTED by National Foods Ltd
in accordance with section 127(1) of the Corporations Act 2001
(Cwth) by authority of its directors

sign here ► David Lambert
Director

print name **DAVID LAMBERT**

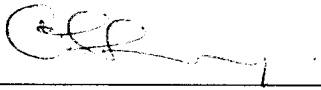
sign here ► Philip Thomas
Director/company secretary*

*delete whichever is not applicable

print name PHILIP THOMAS

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



Graeme Julian Samuel
Chairman
Australian Competition and Consumer Commission

Dated: 24 July 2009