

# Undertaking to the Australian Competition and Consumer Commission

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Given under section 87B of the *Competition and  
Consumer Act 2010* (Cth) by **Pfizer Australia  
Pty Ltd (ACN 008 422 348)**

## 1 Person giving the Undertaking

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This Undertaking is given to the Australian Competition and Consumer Commission (**ACCC**) by Pfizer Australia Pty Ltd (ACN 008 422 348) referred to as (**Pfizer Australia**) in this Undertaking.

## 2 Background

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### The Parties to the Proposed Acquisition

- 2.1 Pfizer Inc. (**Pfizer**) is a public company listed on the New York, London, Euronext and Swiss stock exchanges. Pfizer Nutrition is a business unit of Pfizer and supplies infant nutrition products and maternal and adult nutrition products globally.
- 2.2 In Australia, Pfizer Australia Pty Ltd (**Pfizer Australia**) markets, distributes and sells infant nutrition products under the S-26 and SMA brands.
- 2.3 Nestlé S.A. is a public company listed on the Swiss stock exchange and organised under Swiss law. Nestlé S.A. is a global manufacturer, primarily involved in the production, marketing and sale of a large variety of food and beverage products, including dairy products; coffee beverages; packaged water; cereals; health care nutrition products; culinary products including prepared food, condiments, sauces and dry pasta; chocolate and tea beverages; confectionary products including chocolate, sugar and snacks, and pet food. Nestlé S.A. is also engaged in some non-food related activities.
- 2.4 Nestlé Australia is the Australian subsidiary of Nestlé S.A. Nestlé Australia supplies a range of products including beverages, pet foods, cereals, confectionery, snack products, healthcare nutrition products, performance nutrition products and infant nutrition products.
- 2.5 In Australia, Nestlé Australia supplies infant nutrition products under the NAN, Lactogen and Alfare brands. In this Undertaking, Nestlé S.A. and its subsidiaries, including Nestlé Australia, are referred to as **Nestlé**.

### The Proposed Acquisition

- 2.6 Nestlé S.A. or its wholly owned subsidiary proposes to acquire the global infant nutrition business of Pfizer Nutrition (including certain prenatal and maternal vitamin products) (**Proposed Acquisition**). As a consequence of the Proposed Acquisition, the infant nutrition business of Pfizer Nutrition will be transferred to Nestlé.

### The ACCC's review

- 2.7 The ACCC commenced its public review of the Proposed Acquisition on 24 May 2012.
- 2.8 The ACCC has conducted extensive market inquiries and considered information provided by Nestlé, Pfizer and a range of industry participants and others. The purpose of the ACCC's inquiries was to assess whether or not the Proposed Acquisition would have the effect, or be likely to have the effect, of substantially lessening competition in any market in contravention of section 50 of the Act.

### The ACCC's competition concerns

- 2.9 The ACCC has concluded that, in the absence of the Nestlé Undertaking in conjunction with the Pfizer Undertaking, the Proposed Acquisition would have the effect, or be likely to have the effect, of substantially lessening competition in:
- (a) the market for the wholesale supply of infant and follow-on milk formulae (for infants that are newborn or up to 12 months of age) (**IFFO Milk**) in Australia; and
  - (b) the market for the wholesale supply of growing-up milk formulae (for children aged between 1 and 5 years) (**GUMs**) in Australia.
- 2.10 In the absence of the Nestlé Undertaking in conjunction with the Pfizer Undertaking, the ACCC was concerned that the Proposed Acquisition would result in a significant increase in concentration in already concentrated markets (in particular for IFFO Milk), where barriers to entry and expansion appear high. If the Proposed Acquisition proceeded, the number of major suppliers of IFFO Milk and GUMs in each of the distribution channels (hospital, pharmacy and grocery/retail) would be reduced from three to two, with the two major suppliers controlling approximately 90% of sales in the relevant markets.
- 2.11 The ACCC was concerned that, if the Proposed Acquisition were to proceed, this would result in muted competition in the relevant markets, following the removal of Pfizer Nutrition – one of Nestlé's closest competitors in the supply of IFFO Milk and GUMs. This may provide Nestlé with an increased incentive or ability to raise prices and/or reduce the levels of promotion/discounting of IFFO Milk and GUMs products that it currently offers to retailers.
- 2.12 The ACCC was also concerned that as the Proposed Acquisition would reduce the number of firms among which to coordinate, it may increase the likelihood of coordinated conduct between the major suppliers of IFFO Milk and GUMs.

### **The Nestlé Undertaking**

- 2.13 Without admission, Nestlé has offered an undertaking to the ACCC (**Nestlé Undertaking**) attached as Schedule 5 to this Undertaking, to address the ACCC's competition concerns with the Proposed Acquisition.
- 2.14 The Nestlé Undertaking includes an obligation to divest, or cause the divestiture of, the Divestiture Business to a prospective purchaser to be approved by the ACCC (the **Approved Purchaser**).
- 2.15 At the same time as the ACCC is considering the Nestlé Undertaking and this Undertaking the ACCC will consider Pfizer Australia as the proposed Independent Manager of the Divestiture Business, to manage the Divestiture Business from the Control Date until the Divestiture Date in accordance with the Nestlé Undertaking.
- 2.16 The Divestiture Business will be transferred to Nestlé subject to ring fencing provisions on the Control Date save that the Dedicated Personnel will remain employees of Pfizer Australia until the Divestiture Date.
- 2.17 In accordance with the Nestlé Undertaking, Nestlé has an obligation to procure the transfer of employees of the Divestiture Business to the Approved Purchaser from Pfizer through contractual arrangements between Nestlé and Pfizer. In addition, Nestlé has an obligation to ensure that transitional services are provided to the Approved Purchaser by Pfizer.

### **Objective of this Undertaking**

- 2.18 Pfizer Australia's obligation to transfer the Dedicated Personnel to the Approved Purchaser and to provide Transitional Services to the Approved Purchaser are separate and additional to Pfizer Australia's obligations as Approved Independent Manager of the Divestiture Business.
- 2.19 Pfizer Australia has proffered this Undertaking to the ACCC under Section 87B of the Act in respect of the transfer of personnel and the provision of transitional services to the Approved Purchaser (or its wholly-owned subsidiary that will own and operate the Divestiture Business after the Divestiture Date).
- 2.20 The objective of this Undertaking, in conjunction with the Nestlé Undertaking, is to ensure:
- (a) the maintenance of a viable, effective, stand-alone, independent and long term competitor in the market for the wholesale supply of IFFO Milk in Australia and the market for the wholesale supply of GUMs in Australia; and

- (b) that the Approved Purchaser has the necessary assets, rights and agreements to compete effectively in the market for the wholesale supply of IFFO Milk in Australia and the market for the wholesale supply of GUMs in Australia.

### **3 Commencement of this Undertaking**

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#### **Commencement**

- 3.1 This Undertaking comes into effect when:
- (a) this Undertaking is executed by Pfizer Australia; and
  - (b) this Undertaking so executed is accepted by the ACCC
- (the **Commencement Date**).

### **4 Cessation of Ongoing Obligations**

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#### **Withdrawal**

- 4.1 This Undertaking is taken to be withdrawn on the date the ACCC consents in writing to the withdrawal of this Undertaking in accordance with section 87B of the Act.

#### **Revocation**

- 4.2 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**

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

## Completion

- 4.4 Clauses 1, 2, 3, 4, 6, 7, 8, 9, 10, 11, 12 and 13 survive completion of the obligations in clause 5.

## 5 Obligations with respect to the Divestiture Business

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### Transferred Personnel

- 5.1 Pfizer Australia must use best endeavours to maintain the employment of the Dedicated Personnel from the Commencement Date to the Divestiture Date.
- 5.2 Pfizer Australia must implement the Retention Plan in respect of the Dedicated Personnel on the Control Date.
- 5.3 Pfizer Australia must, from the Control Date until the Divestiture Date:
- a) ensure that the Divestiture Business has access to and use of the Dedicated Personnel; and
  - b) not directly or indirectly procure, promote or encourage the redeployment of any Dedicated Personnel as at the Control Date to any other business operated by Pfizer.
- 5.4 At the option of the Approved Purchaser, Pfizer Australia must use best endeavours to ensure the transfer to the Approved Purchaser or one of its wholly-owned subsidiaries by the Divestiture Date of all Dedicated Personnel who consent to the transfer of their employment (**Transferred Personnel**).
- 5.5 Pfizer Australia must:
- (a) not directly or indirectly discourage any Dedicated Personnel from commencing, continuing or seeking employment with or providing services to, the Approved Purchaser;
  - (b) not redeploy any Dedicated Personnel to any other business operated by Pfizer prior to the Divestiture Date;
  - (c) effective on the Divestiture Date, release the Transferred Personnel from any obligations to provide services to Pfizer Australia;
  - (d) effective on the Divestiture Date, release the Transferred Personnel from any non-compete or similar restraint of trade obligation, to the extent that such an obligation would otherwise prevent the person from performing

his or her contemplated role in relation to the Divestiture Business or Unsold Business; and

- (e) not procure, promote or encourage the transfer of any of the Transferred Personnel from the Approved Purchaser to Pfizer or Pfizer Australia for a period of two years after the Divestiture Date.

5.6 As soon as practicable after the Commencement Date, Pfizer Australia must:

- (a) direct its personnel, including directors, contractors, managers, officers, employees and agents, not to do anything inconsistent with Pfizer Australia's obligations under this Undertaking;
- (b) ensure all Dedicated Personnel do not disclose any confidential information about the Divestiture Business other than in accordance with clause 8.6 of the Nestlé Undertaking.

### **Transitional Services**

5.7 Pfizer Australia must, from the Control Date to the Divestiture Date, provide continuous supply of the transitional services set out in Schedule 3 of this Undertaking (**Transitional Services**) to the Divestiture Business so that the Divestiture Business can continue to operate as a viable, competitive, going concern.

5.8 Pfizer Australia must, at the option of the Approved Purchaser, provide continuous supply of any or all of the Transitional Services to the Approved Purchaser from the Divestiture Date until the end of the period referred to in clause 5.9(a) of this Undertaking (**Transitional Services Agreement**).

5.9 Pfizer Australia must ensure that any Transitional Services Agreement supplied pursuant to clause 5.8:

- (a) lasts for a period of no longer than 12 months, which period is to be nominated by the Approved Purchaser, or such other period as agreed in writing between Pfizer Australia and the Approved Purchaser, and as agreed in writing by the ACCC;
- (b) provides for the supply of Transitional Services at cost price and on such terms other than price that are no less favourable than arm's length terms; and
- (c) is approved by the ACCC pursuant to clause 5.11(a).

### **Provision of a notice for a proposed Transitional Services Agreement**

- 5.10 Within three Business Days of the ACCC notifying Pfizer that it has received a Proposed Purchaser notice pursuant to clause 7.2 of the Nestlé Undertaking, Pfizer Australia must provide notice to the ACCC of any proposed Transitional Services Agreement pursuant to clause 5.9 of this Undertaking.
- 5.11 Within 10 Business Days after the ACCC has received the notice described in clause 5.10, the ACCC will provide written notice to Pfizer Australia of its decision to:
- (a) approve any proposed Transitional Services Agreement; or
  - (b) not approve any proposed Transitional Services Agreement.
- 5.12 Without limiting the ACCC's discretion, in making the decision described in clause 5.11, the factors to which the ACCC may have regard include whether :
- (a) the proposed Transitional Services Agreement is consistent with this Undertaking and the Nestlé Undertaking and is otherwise acceptable to the ACCC; and
  - (b) the ACCC has approved the Proposed Purchaser named in the notice described in clause 5.10 of this Undertaking pursuant to clause 7.3 of the Nestlé Undertaking.

## **6 Independent Audit**

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### **Obligation to appoint an Approved Independent Auditor**

- 6.1 Pfizer Australia must appoint and maintain an Approved Independent Auditor to audit and report upon Pfizer Australia's compliance with this Undertaking.
- 6.2 Without limiting its obligations in this Undertaking, Pfizer Australia 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:
    - A. 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;



- B. 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:
- A. directing Pfizer Australia personnel, including directors, contractors, managers, officers, employees and agents, to act in accordance with this clause 6;
  - B. providing access to the facilities, sites or operations of the Divestiture Business and Pfizer Australia's other businesses as required by the Approved Independent Auditor;
  - C. providing to the Approved Independent Auditor any information or documents requested by the Approved Independent Auditor that 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;
  - D. 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
- (d) not appoint 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.

#### **Approval of RSM Bird Cameron as the Approved Independent Auditor**

##### 6.3 Prior to the Commencement Date:

- (a) the ACCC approved RSM Bird Cameron as the Approved Independent Auditor, together with the Approved Terms of Appointment and Approved Audit Plan; and
- (b) Pfizer Australia appointed RSM Bird Cameron as the Approved Independent Auditor on the Approved Terms of Appointment, and forwarded to the ACCC a copy of the executed Approved Terms of Appointment.

### **Resignation, revocation or termination of the Approved Independent Auditor**

- 6.4 Pfizer Australia must immediately notify the ACCC in the event that the Approved Independent Auditor resigns or otherwise stops acting as the Approved Independent Auditor before the ACCC has provided the written confirmation pursuant to clause 4.1, 4.2 or clause 4.3.
- 6.5 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.
- 6.6 The ACCC may approve any proposal by, or alternatively may direct, Pfizer Australia 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 Independent Auditor's Approved Terms of Appointment.

### **Replacement of Approved Independent Auditor**

- 6.7 If the Approved Independent Auditor resigns, has his or her status revoked, or appointment terminated pursuant to clause 6.4, 6.5 or 6.6 before the ACCC has provided the written confirmation pursuant to clause 4.1, 4.2 or clause 4.3, Pfizer Australia must, within five Business Days after the relevant event occurs, provide the ACCC with a Proposed Independent Auditor Notice.
- 6.8 If the ACCC receives a Proposed Independent Auditor Notice, the ACCC must decide whether to:
  - (a) approve the appointment of the person named in the Proposed Independent Auditor Notice as the Approved Independent Auditor which includes approving the:
    - i. terms of appointment attached to the Proposed Independent Auditor Notice; and
    - ii. draft audit plan attached to the Proposed Independent Auditor Notice; or
  - (b) not approve the person named in the notice as the Proposed Independent Auditor.
  - (c) If clause 6.8(b) applies, the ACCC may, at its absolute discretion:
    - i. direct Pfizer Australia to submit a Proposed Independent Auditor Notice that:

- A. names a person identified by the ACCC as the Proposed Independent Auditor; and/or
  - B. includes attachments that:
    - I. relate to the person identified by the ACCC under clause 6.8(c)(i)(A)(if applicable); and/or
    - II. address any issues identified by the ACCC in relation to the terms of appointment and/or draft audit plan; or
  - ii. identify and approve a person as the Approved Independent Auditor together with the:
    - A. terms of appointment; and
    - B. draft audit plan.
- (d) As soon as practicable, and within two Business Days of any direction by the ACCC under clause 6.8(c)(i), Pfizer Australia must submit a Proposed Independent Auditor Notice in accordance with the direction.
- (e) Without limiting the ACCC's discretion, in making the decisions described in clause 6.8(a) 6.8(b) or 6.8(c), the factors to which the ACCC may have regard include whether the:
- i. 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;
  - ii. person named in the Proposed Independent Auditor Notice or identified by the ACCC is sufficiently independent of Pfizer Australia;
  - iii. terms of appointment and the draft audit plan are consistent with this Undertaking; and
  - iv. terms of appointment and the draft audit plan are otherwise acceptable to the ACCC.
- (f) Within 10 Business Days after receiving a Proposed Independent Auditor Notice, the ACCC must notify Pfizer Australia in writing of its decision made pursuant to clauses 6.8(a), 6.8(b) and, if applicable, any direction made pursuant to clause 6.8(c).

(g) The ACCC may extend the period within which it will provide notice of the decision or direction (if applicable) described in clause 6.8(f) by notifying Pfizer Australia in writing of the extension within 10 Business Days after receiving the Proposed Independent Auditor Notice.

(h) If the Approved Independent Auditor has not been appointed:

- i. by the Control Date,
- ii. within 17 Business Days after the Approved Independent Auditor resigns or otherwise ceases to act as the Approved Independent Auditor pursuant to clause 6.4, 6.5, or 6.6; or
- iii. if the ACCC has not received a Proposed Independent Auditor Notice pursuant to clause 6.8;

then the provisions of clause 6.8(i) apply.

(i) If clause 6.8(h) applies, the ACCC at its absolute discretion may:

- i. identify and approve a person as the Approved Independent Auditor;
- ii. approve the terms of appointment of the Approved Independent Auditor; and
- iii. approve the draft audit plan.

#### **Appointment of the Approved Independent Auditor**

6.9 After receiving notice from the ACCC of a decision pursuant to clause 6.8(a), (b), (c)ii or 6.8(i), Pfizer Australia must, within two 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 within one Business Day of execution.

## Obligations and powers of the Approved Independent Auditor

6.10 Pfizer Australia 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 Pfizer Australia 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 Pfizer Australia 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 6.12; 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.

6.11 Pfizer Australia 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 Divestiture Business and Pfizer Australia's other businesses 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

6.12 The Approved Independent Auditor must conduct an audit and prepare a detailed report (**Audit Report**) on:

- (a) Pfizer Australia's compliance with this Undertaking;
- (b) all of the reasons for the conclusions reached in the Audit Report;
- (c) any qualifications made by the Approved Independent Auditor in forming his or her views;
- (d) any recommendations by the Approved Independent Auditor to improve:
  - i. the Approved Audit Plan;
  - ii. the integrity of the auditing process;
  - iii. Pfizer Australia's processes or reporting systems in relation to compliance with this Undertaking; and
  - iv. Pfizer Australia's compliance with this Undertaking; and
  - v. the implementation and outcome of any prior recommendations by the Approved Independent Auditor.

6.13 The Approved Independent Auditor is to provide an Audit Report to the ACCC and Pfizer Australia at the following times:

- a. within 10 Business Days after the Control Date, at which time the Audit Report is to include the results of the initial audit and any recommended changes to the Approved Audit Plan (**Establishment Audit**);
- b. every month from the date of the Establishment Audit until the first month after the Divestiture Date;
- c. every three months after the date of provision of the last Audit Report pursuant to clause 6.13(b), until the ACCC confirms in writing to Pfizer Australia that it is satisfied that all Transferred Personnel have been transferred to the Approved Purchaser or its subsidiary pursuant to clause 5.4, all Transitional Services

have been supplied for the period identified in clause 5.9(a), and the obligation in clause 5.5(e) has been met; and

- d. a final report due three months after the last report provided pursuant to clause 6.13(c).
- e. Pfizer Australia must implement any recommendations of the Approved Independent Auditor made in the Audit Report, 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.
- f. Pfizer Australia must comply with any direction of the ACCC in relation to matters arising from the Audit Report within 10 Business Days after being so directed (or such other period as agreed in writing with the ACCC).

## **7 Information**

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7.1 The ACCC may direct Pfizer Australia in respect of its compliance with this Undertaking to, and Pfizer Australia 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 Pfizer Australia'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.

7.2 Any direction made by the ACCC under clause 7.1 will be notified to Pfizer Australia, in accordance with clause 12.2.

7.3 In respect of Pfizer Australia'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.
- 7.4 Pfizer Australia will use its best endeavours to ensure that the Approved Independent Auditor complies with any request from the ACCC in accordance with clause 7.3.
- 7.5. 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.
- 7.6 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.
- 7.7 Nothing in this clause 7 requires the provision of information or documents in respect of which Pfizer Australia has a claim of legal professional or other privilege.

## **8 Disclosure of this Undertaking**

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- 8.1 Pfizer Australia and the ACCC agree that Schedule 4 will remain confidential at all times.
- 8.2 Pfizer Australia acknowledges that the ACCC may provide each Undertaking Appointment with a copy of this Undertaking which includes unredacted versions of Schedule 4.
- 8.3 Pfizer Australia acknowledges that the ACCC may, subject to clause 8.1:
  - (a) make this Undertaking publicly available; and
  - (b) publish this Undertaking on its Public Section 87B Undertakings 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 s 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**

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Where the performance of an obligation under this Undertaking requires a Related Body Corporate of Pfizer Australia to take or refrain from taking some action, Pfizer Australia will procure that Related Body Corporate to take or refrain from taking that action, as the case may be.

## **10 No Derogation**

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- 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 Pfizer Australia of any term of this Undertaking.
- 10.2 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 Pfizer Australia 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 Costs**

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- 11.1 Pfizer Australia must pay all of its own costs incurred in relation to this Undertaking.

## **12 Notices**

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### **Giving Notices**

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

Email address: [mergers@acc.gov.au](mailto:mergers@acc.gov.au)  
Attention: Executive General Manager  
Mergers and Adjudication Group

**With a copy sent to:** [mergersucu@acc.gov.au](mailto:mergersucu@acc.gov.au)  
Director, Undertaking Compliance Unit  
Merger Coordination and Strategy Branch

- 12.2 Any notice or communication to Pfizer Australia pursuant to this Undertaking must be sent to:

Name: Pfizer Australia Pty Ltd

Address: 38-42 Wharf Road  
West Ryde NSW 2114

Email Address: [Genevieve.Small@Pfizer.com](mailto:Genevieve.Small@Pfizer.com)

Fax number: +61 2 9850 3776

Attention: Genevieve Small, Finance Director ANZ

**With a copy sent to:**

Name: Allens

Address: Deutsche Bank Place  
Corner Phillip and Hunter Streets  
Sydney NSW 2000

Email Address: [Fiona.Crosbie@allens.com.au](mailto:Fiona.Crosbie@allens.com.au)

Fax number: (02) 9230 5333

Attention: Fiona Crosbie

- 12.3 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).

- 12.4 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**

- 12.5 Pfizer Australia or the ACCC must notify the other party of a change to its contact details within three Business Days.

- 12.6 Any notice or communication will be sent to the most recently advised contact details and subject to clause 12.3 and 12.4, will be taken to be received.

## **13 Defined terms and interpretation**

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### **Definitions in the Dictionary**

13.1 A term or expression starting with a capital letter:

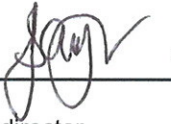
- (a) which is defined in the Dictionary in Part 1 of Schedule 1 (Dictionary), has the meaning given to it in the Dictionary; or
- (b) which is defined in the Corporations Act, but is not defined in the Dictionary, has the meaning given to it in the Corporations Act.

### **Interpretation**

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

## Executed as an Undertaking

Executed by Pfizer Australia Pty Ltd (ACN 008 422 348) pursuant to section 127(1) of the Corporations Act 2001 by:

  
\_\_\_\_\_

Signature of director

JENNIFER ALTOFT.

Name of director (print)

20/11/12

Date

  
\_\_\_\_\_

Signature of a ~~director~~/company secretary (please delete as applicable)

Tony George

Name of ~~director~~/company secretary (print)(please delete as applicable)

20/11/12

Date

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

  
\_\_\_\_\_

Date 22 November 2012

And signed on behalf of the Commission:

Chairman

Date

## Schedule 1

### 1. Dictionary

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1.1 In this document, words and phrases shall have the same meaning as in the Nestlé Undertaking unless expressly defined in this Undertaking.

1.2 Defined terms

**ACCC** means the Australian Competition and Consumer Commission.

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

**Approved Audit Plan** means the plan approved by the ACCC in accordance with the terms of this Undertaking, as amended from time to time by ACCC direction given under clause 6.10(d) by which the Approved Independent Auditor will audit and report upon compliance with this Undertaking.

**Approved Independent Auditor** means the person appointed under clause 6.3 or clause 6.9 of this Undertaking.

**Approved Independent Manager** has the meaning given in the Nestlé Undertaking.

**Approved Purchaser** has the meaning given in the Nestlé 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.

**Approved Transitional Services Agreement** means any agreement approved by the ACCC in accordance with clause 5.11(a) 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 6.12 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.

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

**Commencement Date** has the meaning given in clause 3.1 of this Undertaking.

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

**Dedicated Personnel** has the meaning given in the Nestlé Undertaking.

**Divestiture Business** has the meaning given in the Nestlé Undertaking.

**Divestiture Date** has the meaning given in the Nestlé Undertaking.

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

**Establishment Audit** has the meaning given to it in clause 6.13(a) of this Undertaking.

**Nestlé** means the entity referred to in clause 2 of this Undertaking.

**Nestlé Australia** means Nestlé Australia Ltd ACN 000 011 316.

**Nestlé Undertaking** means the court enforceable undertaking given by Nestlé to the ACCC pursuant to section 87B of the Act and accepted by the ACCC on the same date as this Undertaking, a copy of which is attached at Schedule 5 of this Undertaking.

**Pfizer** means the entity described in clause 2.1 of this Undertaking.

**Pfizer Australia** means the entity described in clause 1 of this Undertaking.

**Proposed Acquisition** is defined in clause 2.6 of this Undertaking.

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

**Proposed Independent Auditor Notice** means a completed notice in the form of Schedule 2 to this Undertaking provided to the ACCC with all required attachments in relation to the Proposed Independent Auditor.

**Proposed Purchaser** has the meaning given in the Nestlé Undertaking.

**Public Section 87B Undertakings Register** means the ACCC's public register of section 87B undertakings, available at [www.accc.gov.au](http://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.

**Retention Plan** has the meaning given to it in Confidential Schedule 4 to this Undertaking.

**Subsidiary** has the meaning given by section 4A of the Act.

**Transferred Personnel** has the meaning given to it in clause 5.4 of this Undertaking.

**Transitional Services** means those services outlined in Schedule 3 of this Undertaking.

**Transitional Services Agreement** has the meaning given to it in clause 5.8 of this Undertaking.

**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.

**Unsold Business** has the meaning given to it in the Nestlé Undertaking.

## 2. Interpretation

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- 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 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, Pfizer Australia 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 – Proposed Independent Auditor Form

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

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

### Method of Delivery to the ACCC

The completed Proposed Independent Auditor form, along with the additional requested information is to be provided to the ACCC with the subject line (*Proposed Independent Auditor Form – Pfizer Australia section 87B Undertaking to the below email addresses:*

1. [mergers@acc.gov.au](mailto:mergers@acc.gov.au)  
Attention: Executive General Manager  
Mergers and Adjudication Group
2. **With a copy sent to:**  
[mergersucu@acc.gov.au](mailto:mergersucu@acc.gov.au)  
Attention: Director  
Undertaking Compliance Unit  
Coordination and Strategy Branch

### 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 Pfizer 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) Pfizer and the Proposed Independent Auditor's employer are Associated Entities;
    - (ii) Pfizer is an Entity Connected with the Proposed Independent Auditor's employer;
    - (iii) The Proposed Independent Auditor's employer is an Entity Connected with Pfizer;
    - (iv) Pfizer and the Proposed Independent Auditor's employer are Related Entities;
    - (v) Pfizer and the Proposed Independent Auditor's employer are Related Parties;
    - (vi) any Related Party, Related Entity or Entity Connected with Pfizer is a Related Party, Related Entity or Entity Connected with the Proposed Independent Auditor;
    - (vii) Pfizer 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 Pfizer or has been in the past three years;
    - (ix) Pfizer is a supplier of the Proposed Independent Auditor's employer or has been in the past three years; and
    - (x) any other relationship between Pfizer 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.
  4. The 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 Establishment Audit and the Audit Report.

## Schedule 3

### 1. List of Services

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#### (a) Back office services

- (i) **Finance Services:** general accounting services, including general ledger support (e.g., posting of journal entries and sales reporting) and reporting assistance (e.g., support for monthly, quarterly and year-end reporting processes), accounting management of fixed assets, intercompany reconciliations, inventory services, provisions and accruals support, credit control (excluding credit risk and analysis services), procurement and payment services in relation to existing suppliers, cash management services, support for reimbursement of travel and other expenses and order processing (including invoicing, credit management and preparation of credit notes).
- (ii) **IT Services:** infrastructure support and business application support. Infrastructure support includes day-to-day support of printing facilities, work station desktop support, incident diagnostics, network connectivity and LAN/WAN support, as well as information security, disaster recovery services, e-mail hosting and technical operations and site services. Business application support includes maintenance of various IT applications in use by the business for financial, commercial, and other purposes.
- (iii) **Human Resources Services:** managing payroll processes.

#### (b) Transitional arrangements relating to real property and premises

- (i) **Real Estate and Facilities Management Services.** Transitional real estate arrangements whereby the Approved Purchaser may continue to utilise a portion of Pfizer Australia's premises at its West Ryde Headquarters in Sydney (which is a shared site with other Pfizer business units). These arrangements and accompanying services include access to and use of existing office space and parking facilities, standard facilities management services such as internal office services segregation, cleaning, building and electrical maintenance/repairs, waste management, telecommunications facilities (e.g., internet, phone/fax lines and IT infrastructure), mail management such as sorting, screening and delivery, and site services such as reception, cafeteria, document shredding and audio/visual equipment operations.

#### (c) Procurement and Supply Chain Services

- (i) Procurement category management support for identified indirect spend categories, which involves the provision of support in regard to sourcing and negotiations with existing suppliers and advisory support for sourcing

and negotiations with new suppliers (i.e., Pfizer Australia will not have direct involvement in negotiations with new suppliers but will provide advice in relation to developing strategies for contract negotiations, supplier selection and reviewing of competitive bids).

- (i) Management of current fleet vehicle leases.
- (ii) Customer support with respect to fulfilment of orders (including expediting orders, order tracking, inventory and sales reconciliation).
- (iii) Infant formula demand forecasting, logistics (including warehousing and distribution, repackaging and outbound freight) and supply planning in accordance with market demand.

**(d) Other miscellaneous services**

Pharmacovigilance: adverse event processing for the products of the Divestiture Business, which includes the collection of safety information, analysis of information, safety surveillance, quarterly and ad hoc risk assessment, dealing with queries from and in response to health authorities, inspection support, interfacing with quality and regulatory groups and reconciliation support for serious adverse events in clinical trials.

## Confidential Schedule 4 – Retention Plan

## **Schedule 5 –**

Nestlé Undertaking