

Undertaking to the Australian Competition and Consumer Commission

Given under section 87B of the *Competition and
Consumer Act 2010* (Cth) by **Viva Energy Group
Limited ACN 626 661 032**

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1. Person giving the Undertaking

- 1.1. This Undertaking is given to the Australian Competition and Consumer Commission (**ACCC**) by Viva Energy Group Limited ACN 626 661 032 on behalf of itself and its related bodies corporate (**Viva Energy**).

2. Background

The parties to the Proposed Acquisition

- 2.1. Viva Energy is an energy company which, through its wholly-owned subsidiaries, conducts downstream fuel refining, importing, distribution and marketing in Australia and operates a nationwide fuel supply chain consisting of the Geelong refinery and an import, storage and distribution network. Through its subsidiaries, Viva Energy is the exclusive supplier of Shell-branded fuels and lubricants in Australia. It is also active as a primary wholesale fuel supplier and commercial fuel supplier (i.e., to commercial customers) in every Australian state and territory. As of 1 September 2023, Viva Energy's retail fuel network from which it supplies fuel products consists of 1307 sites across Australia, including 706 Shell/Coles Express co-branded sites at which Viva Energy controls the retail price of fuel, of which 44 are located in South Australia, with the balance being dealer sites at which Viva Energy does not control the retail price.
- 2.2. On the Run Pty Ltd (ACN 638 356 466) (**OTR**) and its related bodies is a privately owned operator of 153 retail fuel and convenience sites in South Australia, of which 115 are located in metropolitan Adelaide. OTR currently has an exclusive fuel supply contract with BP for all of its sites in South Australia. Sites supplied by BP have associated branding on the forecourt with "OTR" convenience stores on all sites except for S24 Kensington Gardens, S24 Tanunda, S24 Welland and Largs Bay OPT.

The Proposed Acquisition

- 2.3. On 5 April 2023, Viva Energy entered into a share sale deed with, among others, Viva Energy Australia Pty Ltd (ACN 004 610 459), Viva Energy Group Ltd (ACN 626 661 032), Yasser Shahin, Khalil Shahin and Samer Shahin (**Share Sale Deed**) under which Viva Energy agreed to:
- (a) acquire the entities which constitute:
- (i) the retail fuel and convenience business consisting of 184 retail fuel and convenience sites operated by OTR under the brand name "OTR". From these 184 retail fuel and convenience sites, On the Run operates "OTR" branded convenience stores and certain franchised restaurants (including Hungry Jack's, Oporto and Guzman Y Gomez restaurants);
 - (ii) a franchise business comprised of eight "Krispy Kreme" branded sites, two "Hungry Jack's" branded restaurants, two "Happy Wash" branded car wash sites, two "Guzman Y Gomez" branded restaurants, seven "Subway" branded restaurants and one supermarket (operated by OTR and its subsidiaries);
 - (iii) the duty-free tobacco sales business operated by DF Wholesalers Pty Ltd (ACN 604 041 241); and

- (iv) the wholesale fuel distribution business operated by Reliable Petroleum Pty Ltd (ACN 602 197 375) and Mogas Regional Pty Ltd (ACN 111 402 110); and
- (b) procure the entry into a business sale agreement under which a subsidiary of Viva Energy would agree to:
 - (i) acquire certain assets of SEPL Pty Ltd (ACN 008 150 543) as trustee for the SFT Trust (ABN 75 492 874 033) (**SFT Trust**) which relate to the retail and wholesale tobacco, gift and e-cigarette business operated under the "Smokemart", "Giftbox" and "Vape Square" banners (**SMGB Business**); and
 - (ii) acquire all of the issued share capital of Vape Square Online Pty Ltd (ACN 636 609 526), which operates the online "Vape Square" business (being one arm of the SMGB Business)

(Proposed Acquisition).

The ACCC's review

- 2.4. On 6 July 2023, the ACCC commenced its public review of the Proposed Acquisition.
- 2.5. At the time it sought informal merger clearance from the ACCC, Viva Energy offered to divest 23 retail fuel and convenience sites in Adelaide, South Australia to pre-emptively address potential competition concerns that the ACCC may raise with the Proposed Acquisition (**Initial Divestiture Offer**).
- 2.6. The ACCC undertook market inquiries and considered information provided by Viva Energy, Peregrine, industry participants and others. The purpose of the ACCC's inquiries was to assess:
 - (a) whether the Proposed Acquisition would have the effect, or be likely to have the effect, of substantially lessening competition in any market in Australia in contravention of section 50 of the Act; and
 - (b) whether the Initial Divestiture Offer would address the ACCC's potential competition concerns.
- 2.7. Following feedback from market participants and in response to further concerns from the ACCC, Viva Energy increased the number of sites to be divested to 25 retail fuel and convenience sites in South Australia (**Divestiture Business**).

The ACCC's competition concerns

- 2.8. The ACCC has concluded that, in the absence of the Undertaking, the Proposed Acquisition would have the effect, or be likely to have the effect, of substantially lessening competition in the supply of retail fuel in South Australia and in a number of local areas in South Australia.
- 2.9. The ACCC found that Viva Energy and OTR are competitors for the supply of retail fuel in South Australia. OTR has the largest network of retail fuel sites in South Australia, with Viva Energy also having a significant number of retail fuel sites in South Australia. The ACCC considered that the Proposed Acquisition would remove OTR as a competitor to Viva Energy for the supply of retail fuel South Australia. Additionally, the Proposed Acquisition would provide Viva Energy with a

substantial market share in the supply of retail fuel in South Australia well above remaining competitors through the addition of the significant OTR network to Viva Energy's existing network of fuel sites in South Australia.

- 2.10. The ACCC was also concerned that Viva Energy having a significant market presence in the retail supply of fuel in South Australia, in combination with Viva Energy also having a significant presence in the wholesale supply of fuel in South Australia, may have the effect of reducing competition for the supply of wholesale fuel in South Australia.
- 2.11. In addition to state wide supply concerns, the ACCC also found that Viva Energy and OTR are close competitors in several local areas within South Australia. The ACCC was concerned that the Proposed Acquisition would remove a competitor in a number of local areas in South Australia and that there would be few remaining competitors to effectively constrain Viva Energy from increasing prices (or implementing equivalent reduction in non-price aspects of its retail offerings) in these local areas.
- 2.12. Overall, the ACCC was concerned that, in the absence of the Undertaking, the Proposed Acquisition would substantially reduce competition in the supply of retail fuel in South Australia and the supply of retail fuel in a number of local areas in South Australia where Viva Energy and OTR sites overlap.

The Undertaking remedy

- 2.13. Viva Energy does not consider that the Proposed Acquisition would have the effect, or be likely to have the effect, of substantially lessening competition in any relevant market. However, to address the ACCC's competition concerns, Viva Energy has offered this Undertaking pursuant to section 87B of the Act. The objective of this Undertaking is to address the ACCC's competition concerns which would otherwise arise as a consequence of the Proposed Acquisition. This Undertaking aims to achieve this objective by placing obligations on Viva Energy to:
 - (a) ensure that the Divestiture Business is sold to an Approved Purchaser that will result in the creation or strengthening of a viable, effective, stand-alone, independent and long term competitor for the supply of retail fuel in South Australia and in a number of local areas in South Australia;
 - (b) ensure the purchaser of the Divestiture Business has all the necessary associated assets and rights to compete effectively with Viva Energy in the supply of retail fuel in South Australia and in a number of local areas in South Australia;
 - (c) maintain the economic viability, marketability, competitiveness and goodwill of the Divestiture Business prior to divestiture; and
 - (d) provide for the effective oversight of Viva Energy's compliance with this Undertaking.

3. Commencement of this Undertaking

- 3.1. This Undertaking comes into effect when:
 - (a) this Undertaking is executed by Viva Energy; and
 - (b) this Undertaking so executed is accepted by the ACCC

(the **Commencement Date**).

4. Cessation of Ongoing Obligations

Revocation

- 4.1. 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. Such a revocation must be express and in writing.

Waiver

- 4.2. The ACCC may, at any time, waive any of the obligations contained in this Undertaking. Such a waiver must be express and in writing.

Extension

- 4.3. The ACCC may, at any time, extend the date by which any of the obligations in this Undertaking is to be satisfied. Such an extension must be express and in writing.

Survival

- 4.4. Unless and until this Undertaking is withdrawn in accordance with section 87B(2) of the Act, clauses 1, 2, 3, 4, 9, 11, 12, 13, 14, 16, 17 and 18 survive completion of the obligations in clauses 5, 6, 7, 10 and Schedule 4, Confidential Schedule 5, Schedule 6, Confidential Schedule 7 and Schedule 8.

5. Divestiture of the Divestiture Business

Divestiture

- 5.1. Viva Energy must, in accordance with this Undertaking, divest, or cause the divestiture of, the Divestiture Business only to an Approved Purchaser.
- 5.2. In the event that clause 10 applies, Viva Energy must not authorise the Approved Divestiture Agent to divest the Unsold Business to a purchaser other than the Approved Purchaser.
- 5.3. Viva Energy must divest, or cause the divestiture of, all of the Divestiture Business by:
- (a) the sale, assignment, transfer and/or licence of all of the assets in Schedule 4 to the Approved Purchaser, pursuant to the Approved Sale and Purchase Agreement and within the Initial Sale Period, otherwise clause 10 applies;
 - (b) the transfer or grant to the Approved Purchaser of all Consents pursuant to clauses 5.4 to 5.5;
 - (c) the transfer of any Transferred Personnel required pursuant to clauses 5.7 to 5.8;
 - (d) compliance with any Approved Transitional Technical Assistance Agreement required pursuant to clauses 5.9 to 5.11; and
 - (e) compliance with any Approved Transitional Supply Agreement required pursuant to clauses 5.12 to 5.14.

Consents

5.4. Viva Energy must:

- (a) obtain or assist the Approved Purchaser to obtain as expeditiously as possible, all Consents as required before completion of the divestiture of each Divestiture Site;
- (b) comply with all requirements necessary to obtain any Consents, including by promptly providing all information necessary for the Consents to be given;
- (c) act in good faith in its negotiations with the Approved Purchaser in relation to obtaining any Consents;
- (d) promptly pay the costs and expenses of any third party reasonably incurred in providing the Consents; and
- (e) enter an agreement with the Approved Purchaser and approved by the ACCC, or vary any existing Approved Transitional Supply Agreement as required by the Approved Purchaser, in relation to any goods or services that are required for the operation of each Divestiture Site which may be affected by any failure to gain a Consent.

5.5. If, seven Business Days before completion of the divestiture of each Divestiture Site, the Approved Purchaser does not or is otherwise unable to obtain one or more Consents, then Viva Energy must:

- (a) immediately provide to the ACCC and the Approved Purchaser in writing details of the:
 - (i) Consents that have not been obtained;
 - (ii) reasons why the Consents have not been obtained; and
 - (iii) information or material required to obtain the Consents.
- (b) continue to do everything in its power to satisfy clause 5.4 as soon as possible after the completion of the divestiture of each Divestiture Site (and until such time as clause 5.4 is satisfied).

5.6. Even if Viva Energy has complied with clause 5.4 and 5.5, Viva Energy will be in breach of this Undertaking if Viva Energy is unable to effect the divestiture of a Divestiture Site by reason that one or more Consents are not obtained.

Transferred Personnel

5.7. At the option of the Approved Purchaser, Viva Energy must transfer to the Approved Purchaser:

- (a) all employees; and
- (b) all service providers under a contract for service;

who are, in the view of the Approved Purchaser, required for the Approved Purchaser to maintain, operate or conduct effectively the Divestiture Business and who consent to the transfer of their employment or contract for service to the Approved Purchaser (**Transferred Personnel**).

- 5.8. When fulfilling its obligations under clause 5.7, Viva Energy must:
- (a) encourage all Transferred Personnel to remain with the Divestiture Business, including offering incentives based on industry practice;
 - (b) not directly or indirectly discourage any Transferred Personnel from any obligations to provide services to the Divestiture Business;
 - (c) effective on the date of the divestiture of each Divestiture Site, release the relevant Transferred Personnel for that site from any obligations to provide services to Viva Energy;
 - (d) effective on the date of the divestiture of each Divestiture Site, release the relevant Transferred Personnel for that site 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 Viva Energy for a period of 12 months after the completion of the divestiture of each Divestiture Site.

Technical Assistance

- 5.9. At the option of the Approved Purchaser, Viva Energy must supply to the Approved Purchaser, under an Approved Transitional Technical Assistance Agreement, any Technical Assistance that is required by the Approved Purchaser in order to operate the Divestiture Business.
- 5.10. Viva Energy must ensure that any Approved Transitional Technical Assistance Agreement, and any renewal or extension of an Approved Transitional Technical Assistance Agreement, provides for the supply of Technical Assistance:
- (a) on a transitional basis for a period that is nominated by the Approved Purchaser and approved in writing by the ACCC; and
 - (b) at cost price and otherwise on arm's length terms.
- 5.11. To avoid doubt, Viva Energy must seek prior written approval from the ACCC of any renewal or extension of an Approved Transitional Technical Assistance Agreement. Without limiting the ACCC's discretion in making a decision on whether to approve a renewal or extension of an Approved Transitional Technical Assistance Agreement, the ACCC will have regard to the criteria set out in clauses 5.9 and 5.10.

Transitional Supply Agreements

- 5.12. At the option of the Approved Purchaser, Viva Energy must ensure the continued supply by Viva Energy to the Approved Purchaser, under an Approved Transitional Supply Agreement, of any goods or services that Viva Energy can reasonably supply and that are required by the Approved Purchaser in order for the Approved Purchaser to be established as a viable, effective, stand-alone, independent and long-term competitor in the supply of retail fuel in South Australia and in a number of local areas in South Australia.
- 5.13. Viva Energy must ensure that any Approved Transitional Supply Agreement and any renewal or extension of an Approved Transitional Supply Agreement:

- (a) is for a reasonable transitional period, to be nominated by the Approved Purchaser and approved in writing by the ACCC;
 - (b) provides for the supply of the included goods and services at cost price or as otherwise approved in writing by the ACCC; and
 - (c) is on such terms other than price which are no less favourable to the Approved Purchaser than arm's length terms.
- 5.14. To avoid doubt, Viva Energy must seek prior written approval from the ACCC of any renewal or extension of an Approved Transitional Supply Agreement. Without limiting the ACCC's discretion in making a decision on whether to approve a renewal or extension of an Approved Transitional Supply Agreement, the ACCC will have regard to the criteria set out in clauses 5.12 and 5.13.

6. Process for approving a proposed purchaser

Potential purchasers

- 6.1. Viva Energy must provide the ACCC and Approved Independent Auditor with:
- (a) the identity of any person who expresses an interest in acquiring the Divestiture Business;
 - (b) the status of negotiations with each person; and
 - (c) a copy of each person's offer to acquire the Divestiture Business, where relevant;
- at the following times:
- (d) as soon as possible following the Commencement Date for those persons who express interest before the Commencement Date;
 - (e) after the Commencement Date, within 10 Business Days of each person expressing the interest and/or providing an offer;
- regardless of whether the person subsequently withdraws or is declined.

Provision of a notice for a Proposed Purchaser

- 6.2. To seek ACCC approval for a Proposed Purchaser, Viva Energy or the Approved Divestiture Agent must provide the ACCC with a notice in the form prescribed in Schedule 2 to this Undertaking (**Proposed Purchaser Notice**), including a draft sale and purchase agreement, a draft transitional technical assistance agreement (where required by the Proposed Purchaser), and a draft transitional supply agreement (where required by the Proposed Purchaser).
- 6.3. The Proposed Purchaser Notice must be provided to the ACCC at least 20 Business Days prior to the end of the Initial Sale Period.

Purchaser approved at the time the Undertaking was accepted

- 6.4. At the time this Undertaking was accepted, the ACCC also considered information of the type required in a Proposed Purchaser Notice and approved the Proposed Purchaser identified in Schedule 6 as the Approved Purchaser of the Divestiture Business, subject to clause 6.8.

- 6.5. ACCC approval of the Proposed Purchaser identified in Schedule 6 as the Approved Purchaser of the Divestiture Business included approval of the draft Business Sale Agreement in the form of the attached Confidential Schedule 7 as the Approved Sale and Purchase Agreement.

Approval of a Proposed Purchaser after the Commencement Date

- 6.6. The ACCC may, in its discretion, approve or reject in writing the Proposed Purchaser identified in the Proposed Purchaser Notice. In exercising this discretion, the ACCC will consider, without limitation:
- (a) the draft sale and purchase agreement attached to the Proposed Purchaser Notice;
 - (b) any draft transitional technical assistance agreement attached to the Proposed Purchaser Notice, in accordance with the criteria in clauses 5.9 and 5.10; and
 - (c) any draft transitional supply agreement attached to the Proposed Purchaser Notice, in accordance with the criteria in clauses 5.12 and 5.13.
- 6.7. Without limiting the ACCC's discretion, in making the decision described in clause 6.6, the factors to which the ACCC may have regard include whether the:
- (a) draft sale and purchase agreement is consistent with this Undertaking and otherwise acceptable to the ACCC;
 - (b) Proposed Purchaser will complete the transaction as contemplated by the draft sale and purchase agreement;
 - (c) Proposed Purchaser is independent of, and has no direct or indirect interest in, Viva Energy;
 - (d) Proposed Purchaser is of good financial standing;
 - (e) Proposed Purchaser has an intention to maintain and operate the Divestiture Business as a going concern;
 - (f) Proposed Purchaser is able to conduct the Divestiture Business effectively; and
 - (g) divestiture of the Divestiture Business to the Proposed Purchaser will address any competition concerns of the ACCC, including in relation to the likely long-term viability and competitiveness of the Divestiture Business under the ownership of the Proposed Purchaser.
- 6.8. The ACCC may revoke the Approved Purchaser's status as an Approved Purchaser if the ACCC becomes aware that any material information provided to it by Viva Energy was incorrect, inaccurate or misleading.

7. Divestiture Business Protection

Protection of the Divestiture Business

- 7.1. From the Control Date, Viva Energy must not sell or transfer its interest, or any assets or resources comprising part of, or used in, the Divestiture Business (other than the sale of goods and services in the ordinary course of business) or make

any Material Change except in accordance with this Undertaking or (subject to other terms of this Undertaking) as necessary to allow completion of the Proposed Acquisition.

- 7.2. Notwithstanding clause 7.1 above, Viva Energy may temporarily cease trading activities being carried on each subject site for a reasonable duration (but in any event no longer than five Business Days) in order to effect signage changes and debranding required in order to comply with its obligations to Coles, Shell, Chevron or an Approved Purchaser.

Viva Energy's obligations in relation to the Divestiture Business prior to completion of divestiture

- 7.3. Without limiting this clause 7, Viva Energy must, from the Control Date until completion of the divestiture of each Divestiture Site, take all steps available to it to:
- (a) ensure that each Divestiture Site is managed and operated in the ordinary course of business as a fully operational, competitive going concern and in such a way that preserves the economic viability, marketability, competitiveness and goodwill of each Divestiture Site at the Control Date;
 - (b) continue to provide access to working capital and sources of credit for each Divestiture Site in a manner which is consistent with the financing of each Divestiture Site before the Control Date;
 - (c) continue to provide administrative and technical support for each Divestiture Site in a manner which is consistent with the operation of each Divestiture Site before the Control Date and in accordance with any plans established before the Control Date;
 - (d) continue existing Agreements relating to the Divestiture Business with customers, suppliers and / or other third parties that are in place at the Control Date;
 - (e) renew or replace upon expiry Material Contracts for the provision of goods or services to each Divestiture Site on commercial terms favourable to the Divestiture Business;
 - (f) maintain the supply of those goods and services that are part of each Divestiture Site to existing customers in a manner consistent with the supply of those goods and services as at the Control Date;
 - (g) maintain the standard of manufacture, distribution, promotion and sale of those products which form part of each Divestiture Site as at the Control Date;
 - (h) promote and market the products that form part of each Divestiture Site in accordance with any plans established before the Control Date; and
 - (i) carry out such other actions or plans that the Approved Independent Manager considers to be necessary or convenient to maintain each Divestiture Site as an effectively competitive going concern.

Personnel of Viva Energy

- 7.4. From the Control Date until completion of the divestiture of the Divestiture Business, Viva Energy must:

- (a) in consultation with the Approved Independent Manager, replace any
 - (i) Transferred Personnel; or
 - (ii) if the Transferred Personnel have not yet been identified, any personnel necessary for the operation of the Divestiture Business;
 - who leave or will leave the Divestiture Business before divestiture;
- (b) not terminate or vary the terms of employment or engagement (or agree to do any of those things) of any of the
 - (i) Transferred Personnel; or
 - (ii) if the Transferred Personnel have not yet been identified, any personnel necessary for the operation of the Divestiture Business; and
- (c) not directly or indirectly procure, promote or encourage the redeployment of personnel necessary for the operation of the Divestiture Business as at the Control Date to any other business operated by Viva Energy.

7.5. As soon as practicable after the Commencement Date, Viva Energy must direct all Relevant Personnel not to do anything inconsistent with Viva Energy's obligations under this Undertaking.

Ongoing obligations in relation to the Divestiture Business

7.6. To the extent Viva Energy has obligations in relation to the provision of transitional technical assistance or continued supply pursuant to clauses 5.9 to 5.14 of this Undertaking in relation to the Divestiture Business, Viva Energy must not sell, assign, transfer, and/or licence directly or indirectly any of the assets necessary to fulfil such obligations without the prior written consent of the ACCC.

Confidential Information

7.7. Subject to clause 7.8, Viva Energy must not, at any time from the Commencement Date, use or disclose any confidential information about the Divestiture Business gained through:

- (a) ownership and/or management of the Divestiture Business; or
- (b) fulfilling any obligations pursuant to this Undertaking.

7.8. Clause 7.7 does not apply to information that Viva Energy requires to:

- (a) comply with legal and regulatory obligations including obligations relating to taxation, accounting, financial reporting or stock exchange disclosure requirements; or
- (b) carry out its obligations pursuant to this Undertaking;

provided such information is only used for that purpose and is only disclosed to those officers, employees, contractors and advisers of Viva Energy who need to know the information to carry out the permitted purpose.

8. Independent Management of the Divestiture Business

Obligation to appoint an Approved Independent Manager

- 8.1. Viva Energy must appoint and maintain an Approved Independent Manager to manage the Divestiture Business, from the Control Date until the completion of the divestiture of the Divestiture Business in accordance with this Undertaking.

Process for approving a Proposed Independent Manager

- 8.2. At least 15 Business Days before the Control Date, Viva Energy must provide the ACCC with a notice for a Proposed Independent Manager in the form prescribed in Schedule 3 to this Undertaking (**Proposed Independent Manager Notice**), including a draft terms of appointment and a draft separation and management plan.
- 8.3. If clauses 8.12, 8.13 or 8.14 apply, Viva Energy must provide the ACCC with a Proposed Independent Manager Notice within five Business Days after the relevant event occurs.
- 8.4. The ACCC shall have the discretion to approve or reject in writing the Proposed Independent Manager identified in the Proposed Independent Manager Notice.
- 8.5. Without limiting the ACCC's discretion, in deciding whether to approve a Proposed Independent Manager, the factors to which the ACCC may have regard include whether the:
- (a) person named in the Proposed Independent Manager Notice or identified by the ACCC has the qualifications and experience necessary to manage the Divestiture Business;
 - (b) person named in the Proposed Independent Manager Notice or identified by the ACCC is sufficiently independent of Viva Energy;
 - (c) draft terms of appointment and the draft separation and management plan are consistent with this Undertaking; and
 - (d) draft terms of appointment and the draft separation and management plan are otherwise acceptable to the ACCC.

Appointment of the Approved Independent Manager

- 8.6. After receiving a written notice from the ACCC of its approval of the Proposed Independent Manager, the draft terms of appointment and draft separation and management plan, Viva Energy must by the Control Date:
- (a) appoint the person approved by the ACCC as the Approved Independent Manager on the Approved Terms of Appointment; and
 - (b) forward to the ACCC a copy of the executed Approved Terms of Appointment.

Failure to appoint

- 8.7. If:
- (a) the Approved Independent Manager has not been appointed by the Control Date;

- (b) the Approved Independent Manager has not been appointed within 15 Business Days after the Approved Independent Manager resigns or otherwise ceases to act as the Approved Independent Manager pursuant to clause 8.12, 8.13 or 8.14; or
- (c) the ACCC has not received a Proposed Independent Manager Notice pursuant to clause 8.2 or 8.3;

then clause 8.8 applies.

8.8. If clause 8.7 applies, the ACCC may, in its discretion:

- (a) identify and approve a person as the Approved Independent Manager, including approving the draft terms of appointment of the Approved Independent Manager and the draft separation and management plan; and/or
- (b) direct Viva Energy to appoint a person who the ACCC has deemed is an Approved Independent Manager.

Obligations and powers of the Approved Independent Manager

8.9. Viva Energy must procure that any proposed terms of appointment for the Approved Independent Manager include obligations on the Approved Independent Manager to:

- (a) maintain his or her independence from Viva Energy, apart from appointment to the role of Approved Independent Manager, including not forming any relationship of the types described in paragraph 2.2(c) of Schedule 3 to this Undertaking with Viva Energy for the period of his or her appointment;
- (b) act in the best interests of the Divestiture Business at all times including ensuring that the Divestiture Business is managed and operated in the ordinary course of business as a fully operational, competitive going concern and in such a way that preserves the economic viability, marketability, competitiveness and goodwill of the Divestiture Business at the Control Date;
- (c) not use any confidential information gained through the management of the Divestiture Business other than for performing his or her functions as Approved Independent Manager;
- (d) make only those Material Changes to the Divestiture Business which the ACCC does not object to;
- (e) operate and manage the Divestiture Business to the maximum extent practicable, in a manner which is financially and operationally separate from Viva Energy;
- (f) co-operate with the requests of any Approved Divestiture Agent or Approved Independent Auditor appointed pursuant to this Undertaking;
- (g) provide the following reports directly to the ACCC:
 - (i) a monthly written report regarding the implementation of and any suggested changes to the Approved Separation and Management Plan; and

- (ii) an immediate report of any issues that arise in relation to the implementation of the Approved Separation and Management Plan or Viva Energy's compliance with this Undertaking; and
 - (h) follow any direction given to him or her by the ACCC in relation to the performance of his or her functions as Approved Independent Manager pursuant to this Undertaking.
- 8.10. Viva Energy must procure that any proposed terms of appointment for the Approved Independent Manager provide the Approved Independent Manager with the sole authority to:
- (a) manage and operate the Divestiture Business according to the Approved Separation and Management Plan until the completion of the divestiture of the Divestiture Business;
 - (b) provide any information requested by Viva Energy pursuant to the protocol in the Approved Separation and Management Plan;
 - (c) decide whether or not to provide access and the manner of such access to competitively sensitive information relating to the Divestiture Business requested by Viva Energy which is not covered by the protocol in the Approved Separation and Management Plan;
 - (d) renew or replace upon expiry Material Contracts and enter into new contracts for the provision of goods or services to the Divestiture Business on commercial terms favourable to the Divestiture Business;
 - (e) engage, redeploy or make redundant personnel employed in the Divestiture Business as the Approved Independent Manager determines necessary; and
 - (f) engage any external expertise, assistance or advice required by the Approved Independent Manager to perform his or her functions as the Approved Independent Manager.

Viva Energy's obligations in relation to the Approved Independent Manager

- 8.11. Without limiting its obligations in this Undertaking, Viva Energy must:
- (a) comply with and enforce the Approved Terms of Appointment of the Approved Independent Manager;
 - (b) maintain and fund the Approved Independent Manager to carry out his or her functions, including:
 - (i) indemnifying the Approved Independent Manager for any expenses, loss, claim or damage arising directly or indirectly from the performance by the Approved Independent Manager of his or her functions as the Approved Independent Manager except where such expenses, loss, claim or damage arises out of the gross negligence, fraud, misconduct or breach of duty by the Approved Independent Manager;

- (ii) ensuring that the Approved Independent Manager is fully able to acquire and pay for sufficient and timely delivery of all goods and services (including from third parties) which the Approved Independent Manager considers are required by the Divestiture Business; and
 - (iii) providing and paying for any external expertise, assistance or advice required by the Approved Independent Manager to perform his or her functions as the Approved Independent Manager; and
- (c) not interfere with the authority of, or otherwise hinder, the Approved Independent Manager's ability to carry out his or her obligations as the Approved Independent Manager, including:
- (i) accepting (and directing its directors, contractors, managers, officers, employees and agents to accept) direction from the Approved Independent Manager as to the control, management, financing and operations of the Divestiture Business, and for the Divestiture Business to meet all legal, corporate, financial, accounting, taxation, audit and regulatory obligations;
 - (ii) providing access to the facilities, sites or operations of the Divestiture Business required by the Approved Independent Manager;
 - (iii) providing to the Approved Independent Manager any information or documents that they consider necessary for managing and operating the Divestiture Business or for reporting to or otherwise advising the ACCC;
 - (iv) not requesting information or reports regarding the Divestiture Business from the personnel of the Divestiture Business except through the Approved Independent Manager; and
 - (v) not appointing the Approved Independent Manager, or have any Agreements with the Approved Independent Manager, to utilise the Approved Independent Manager's services for anything other than compliance with this Undertaking until at least 12 months after the Approved Independent Manager ceases to act in the role of the Approved Independent Manager.

Resignation, revocation or termination of the Approved Independent Manager

- 8.12. Viva Energy must immediately notify the ACCC in the event that the Approved Independent Manager resigns or otherwise stops acting as the Approved Independent Manager before the completion of the divestiture of the Divestiture Business.
- 8.13. The ACCC may revoke an Approved Independent Manager's status as the Approved Independent Manager if the ACCC becomes aware that any information provided to it was incorrect, inaccurate or misleading.
- 8.14. The ACCC may approve any proposal by, or alternatively may direct Viva Energy to terminate the appointment of the Approved Independent Manager if in the ACCC's view the Approved Independent Manager acts inconsistently with the provisions of this Undertaking or the Approved Terms of Appointment.

9. Independent Audit

Obligation to appoint an Approved Independent Auditor

- 9.1. Viva Energy must appoint and maintain an Approved Independent Auditor to audit and report upon Viva Energy's compliance with this Undertaking.

Process for approving a Proposed Independent Auditor

- 9.2. At least 15 Business Days before the Control Date, Viva Energy must provide the ACCC with a notice for a Proposed Independent Auditor in the form prescribed in Schedule 3 to this Undertaking (**Proposed Independent Auditor Notice**), including draft terms of appointment and a draft audit plan.
- 9.3. The Approved Independent Auditor is to be appointed for a term of two years.
- 9.4. Within 15 Business Days of the end of the Approved Independent Auditor's term, Viva Energy must provide the ACCC with a new Proposed Independent Auditor Notice. A person who is, or who has been, the Independent Auditor is eligible for reappointment as the Independent Auditor.
- 9.5. If clauses 9.18, 9.19 or 9.20 apply, Viva Energy must provide the ACCC with a Proposed Independent Auditor Notice within five Business Days after the relevant event occurs.
- 9.6. The ACCC shall have the discretion to approve or reject in writing the Proposed Independent Auditor identified in the Proposed Independent Auditor Notice.
- 9.7. Without limiting the ACCC's discretion, in deciding whether to approve a Proposed Independent Auditor, the factors to which the ACCC may have regard include whether the:
- (a) 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;
 - (b) person named in the Proposed Independent Auditor Notice or identified by the ACCC is sufficiently independent of Viva Energy;
 - (c) draft terms of appointment and the draft audit plan are consistent with this Undertaking; and
 - (d) draft terms of appointment and the draft audit plan are otherwise acceptable to the ACCC.

Appointment of the Approved Independent Auditor

- 9.8. After receiving a written notice from the ACCC of its approval of a Proposed Independent Auditor, the draft terms of appointment and draft audit plan, Viva Energy must by the Control Date:
- (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.

Failure to appoint

9.9. If:

- (a) the Approved Independent Auditor has not been appointed by the Control Date;
- (b) the Approved Independent Auditor has not been appointed within 15 Business Days after the Approved Independent Auditor resigns or otherwise ceases to act as the Approved Independent Auditor pursuant to clause 9.18, 9.19, or 9.20; or
- (c) the ACCC has not received a Proposed Independent Auditor Notice pursuant to clause 9.2 and 9.4;

then clause 9.10 applies.

9.10. If clause 9.9 applies, the ACCC at its absolute discretion may:

- (a) identify and approve a person as the Approved Independent Auditor, including approving the draft terms of appointment and draft audit plan; and/or
- (b) direct Viva Energy to appoint a person who the ACCC has deemed is an Approved Independent Auditor.

Obligations and powers of the Approved Independent Auditor

9.11. Viva Energy 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 Viva Energy, apart from appointment to the role of Approved Independent Auditor, including not forming any relationship of the types described in paragraph 2.2(c) of Schedule 3 to this Undertaking with Viva Energy for the period of his or her appointment;
- (b) conduct compliance auditing according to the Approved Audit Plan;
- (c) where requested by the ACCC, assess the suitability of any Proposed Purchaser or potential purchaser of the Divestiture Business against the factors (as relevant) in clause 6.7;
- (d) provide the following reports directly to the ACCC:
 - (i) a scheduled written Audit Report as described in clause 9.13;
 - (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
 - (iii) where requested by the ACCC, a report on the suitability of any Proposed Purchaser or potential purchaser of the Divestiture Business following an assessment under clause 9.11(c); and

- (e) 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.
- 9.12. Viva Energy 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 Viva Energy'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

- 9.13. The Approved Independent Auditor must conduct an audit and prepare a detailed report (**Audit Report**) that includes:
- (a) the Approved Independent Auditor's procedures in conducting the audit, or any change to audit procedures and processes since the previous Audit Report;
 - (b) a full audit of Viva Energy's compliance with this Undertaking;
 - (c) identification of any areas of uncertainty or ambiguity in the Approved Independent Auditor's interpretation of any obligations contained in this Undertaking;
 - (d) all of the reasons for the conclusions reached in the Audit Report;
 - (e) any qualifications made by the Approved Independent Auditor in forming his or her views;
 - (f) any recommendations by the Approved Independent Auditor to improve:
 - (i) the Approved Audit Plan;
 - (ii) the integrity of the auditing process;
 - (iii) Viva Energy's processes or reporting systems in relation to compliance with this Undertaking; and
 - (iv) Viva Energy's compliance with this Undertaking; and
 - (g) the implementation and outcome of any prior recommendations by the Approved Independent Auditor.
- 9.14. The Approved Independent Auditor is to provide an Audit Report to the ACCC and Viva Energy at the following times:

- (a) within 20 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, including the Approved Independent Auditor's proposed procedures and processes for conducting the audit (**Establishment Audit**);
 - (b) every month from the date of the Establishment Audit until one month after the divestiture of the Divestiture Business is completed; and
 - (c) every three months after the date of provision of the last Audit Report pursuant to clause 9.14(b), until the ACCC confirms in writing to Viva Energy that it is satisfied that Viva Energy has fulfilled its obligations pursuant to this Undertaking.
- 9.15. Viva Energy must implement any recommendations made by the Approved Independent Auditor in Audit Reports, 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.
- 9.16. Viva Energy 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).

Viva Energy's obligations in relation to the Approved Independent Auditor

- 9.17. Without limiting its obligations in this Undertaking, Viva Energy 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:
 - (i) 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; and
 - (ii) 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:
 - (i) directing Viva Energy personnel, including directors, contractors, managers, officers, employees and agents, to act in accordance with this clause 9;
 - (ii) providing access to the facilities, sites or operations of the Divestiture Business and Viva Energy's other businesses as required by the Approved Independent Auditor;

- (iii) providing to the Approved Independent Auditor any information or documents that they consider necessary for carrying out his or her functions as the Approved Independent Auditor or for reporting to or otherwise advising the ACCC;
- (iv) 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
- (v) not appointing 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.

Resignation, revocation or termination of the Approved Independent Auditor

- 9.18. Viva Energy must immediately notify the ACCC in the event that the Approved Independent Auditor resigns or otherwise stops acting as the Approved Independent Auditor.
- 9.19. 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 in connection with the appointment of the Approved Independent Auditor was incorrect, inaccurate or misleading.
- 9.20. The ACCC may approve, pursuant to clause 9.6, any proposal by, or alternatively may direct, Viva Energy 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 and/or the Approved Terms of Appointment or the Approved Independent Auditor fails to perform their role to an adequate standard.

10. Failure to divest the Divestiture Business within Initial Sale Period

Divestiture of the Unsold Business

- 10.1. In the event that the divestiture of the Divestiture Business to an Approved Purchaser is not completed by the end of the Initial Sale Period, the Divestiture Business becomes an unsold business (**Unsold Business**), and the provisions of this clause 10 apply.

Obligation to appoint an Approved Divestiture Agent

- 10.2. From the end of the Initial Sale Period, Viva Energy must appoint and maintain an Approved Divestiture Agent to effect the divestiture of the Unsold Business.

Process for approving a Proposed Divestiture Agent

- 10.3. At least 15 Business Days prior to the end of the Initial Sale Period, if the divestiture of the Divestiture Business has not been completed, Viva Energy must provide the ACCC with a notice for a Proposed Divestiture Agent in the form of Schedule 3 to this Undertaking (**Proposed Divestiture Agent Notice**) including draft terms of appointment, a draft business sale agreement, and draft marketing and sale plan.

- 10.4. If clauses 10.14, 10.15, or 10.16 apply, Viva Energy must provide the ACCC with a Proposed Divestiture Agent Notice within five Business Days after the relevant event occurs.
- 10.5. The ACCC shall have the discretion to approve or reject in writing the Proposed Divestiture Agent.
- 10.6. Without limiting the ACCC's discretion, in deciding whether to approve a Proposed Divestiture Agent, the factors to which the ACCC may have regard include whether the:
- (a) person named in Proposed Divestiture Agent Notice or identified by the ACCC has the qualifications and experience necessary to carry out the functions of the Approved Divestiture Agent;
 - (b) person named in the Proposed Divestiture Agent Notice or identified by the ACCC is sufficiently independent of Viva Energy;
 - (c) draft terms of appointment, draft business sale agreement and draft marketing and sale plan are consistent with this Undertaking; and
 - (d) draft terms of appointment, draft business sale agreement and draft marketing and sale plan are otherwise acceptable to the ACCC.

Appointment of the Approved Divestiture Agent

- 10.7. After receiving written notice from the ACCC of its approval of the Proposed Divestiture Agent, the draft terms of appointment, draft business sale agreement and draft marketing and sale plan, Viva Energy must within two Business Days:
- (a) appoint the person approved by the ACCC as the Approved Divestiture Agent on the Approved Terms of Appointment; and
 - (b) forward to the ACCC a copy of the executed Approved Terms of Appointment.

Failure to appoint

- 10.8. If:
- (a) the Approved Divestiture Agent has not been appointed within 10 Business Days after the Divestiture Business becomes an Unsold Business;
 - (b) the Approved Divestiture Agent has not been appointed within 15 Business Days after the Approved Divestiture Agent resigns or otherwise ceases to act pursuant to clauses 10.14, 10.15 or 10.16; or
 - (c) the ACCC has not received a Proposed Divestiture Agent Notice pursuant to clause 10.3 and 10.4;
- then clause 10.9 applies.
- 10.9. If clause 10.8 applies, the ACCC may, at its absolute discretion:
- (a) identify and approve a person as the Approved Divestiture Agent, including approving the draft terms of appointment of the Approved Divestiture Agent, draft business sale agreement and draft marketing and sale plan; and/or

- (b) direct Viva Energy to appoint a person who the ACCC has deemed is an Approved Divestiture Agent.

Obligations and powers of the Approved Divestiture Agent

10.10. Viva Energy must procure that any proposed terms of appointment for the Approved Divestiture Agent include obligations on the Approved Divestiture Agent to:

- (a) divest the Unsold Business only to an Approved Purchaser, at no minimum price;
- (b) maintain his or her independence from Viva Energy, apart from appointment to the role of Approved Divestiture Agent, including not form any relationship of the types described in paragraph 2.2(c) of Schedule 3 to this Undertaking with Viva Energy for the period of his or her appointment;
- (c) not use any confidential information gained through the divestiture of the Unsold Business other than for performing his or her functions as Approved Divestiture Agent;
- (d) follow the Approved Marketing and Sale Plan;
- (e) use his or her best endeavours to enter into a binding agreement for the divestiture of the Unsold Business as quickly as possible using the Approved Business Sale Agreement;
- (f) cooperate with the requests of any Approved Independent Manager or Approved Independent Auditor appointed pursuant to this Undertaking;
- (g) every 30 Business Days following appointment of the Approved Divestiture Agent, provide written reports directly to the ACCC which include:
 - (i) information regarding the implementation of the Approved Business Sale Agreement and the Approved Marketing and Sale Plan including any previous changes approved by the ACCC;
 - (ii) information regarding any suggested changes to any Approved Marketing and Sale Plan including any previous changes approved by the ACCC;
 - (iii) an account and explanation of all disbursements, fees and charges incurred by the Approved Divestiture Agent in undertaking his or her duties by month and to the date of the report;
 - (iv) a schedule of agreed fees of the Approved Divestiture Agent (including the fees of any adviser appointed under clause 10.11(d));
 - (v) the efforts made to sell the Unsold Business;
 - (vi) the identity of any advisers engaged;
 - (vii) the identity of any persons expressing interest in the Unsold Business;and

- (viii) any other information required by the ACCC;
 - (h) within 30 Business Days after the completion of the divestiture of the Unsold Business, provide a written report directly to the ACCC which includes a final accounting of:
 - (i) any moneys derived from the divestiture of the Unsold Business;
 - (ii) all disbursements, fees and charges incurred by the Approved Divestiture Agent in fulfilling his or her duties; and
 - (iii) all agreed fees of the Approved Divestiture Agent (including the fees of any adviser appointed under clause 10.11(d));
 - (i) immediately inform the ACCC of:
 - (i) any issues that arise in relation to the implementation of the Approved Business Sale Agreement and any Approved Marketing and Sale Plan;
 - (ii) non-compliance with this Undertaking by any person named in this Undertaking; and
 - (iii) any offers for the Unsold Business;
 - (j) accept any offer for the Unsold Business upon instruction from Viva Energy given in accordance with clause 10.13(d); and
 - (k) follow any direction given to him or her by the ACCC in relation to the performance of his or her functions as Approved Divestiture Agent pursuant to this Undertaking.
- 10.11. Viva Energy must procure that any proposed terms of appointment for the Approved Divestiture Agent contain an irrevocable grant of power of attorney conferring all necessary power and authority on the Approved Divestiture Agent to:
- (a) negotiate with purchasers to divest the Unsold Business on terms considered by the Approved Divestiture Agent in his or her sole discretion to be consistent with this Undertaking and the Approved Marketing and Sale Plan;
 - (b) execute any agreements with the Approved Purchaser required pursuant to clause 6.6;
 - (c) upon instruction pursuant to clause 10.13(d), complete the divestiture of the Unsold Business to the Approved Purchaser in accordance with the Approved Business Sale Agreement; and
 - (d) engage any external expertise, assistance or advice required by the Approved Divestiture Agent to perform his or her functions as the Approved Divestiture Agent.
- 10.12. Any irrevocable power of attorney granted pursuant to clause 10.11 will end upon resignation or termination of the Approved Divestiture Agent in accordance with clauses 10.14, 10.15, or 10.16, or in the event that the Unsold Business is divested in accordance with this Undertaking.

Viva Energy's obligations in relation to the Approved Divestiture Agent

- 10.13. Without limiting its obligations in this Undertaking, Viva Energy must from the end of the Initial Sale Period:
- (a) comply with and enforce the Approved Terms of Appointment for the Approved Divestiture Agent;
 - (b) maintain and fund the Approved Divestiture Agent to carry out his or her functions; including:
 - (i) indemnifying the Approved Divestiture Agent for any expenses, loss, claim or damage arising directly or indirectly from the performance by the Approved Divestiture Agent of his or her functions as the Approved Divestiture Agent except where such expenses, loss, claim or damage arises out of the gross negligence, fraud, misconduct or breach of duty by the Approved Divestiture Agent;
 - (ii) providing and paying for any external expertise, assistance or advice required by the Approved Divestiture Agent to perform his or her functions as the Approved Divestiture Agent;
 - (iii) paying such fees as are agreed between the Approved Divestiture Agent and Viva Energy (but not fees contingent on the price to be obtained for the Unsold Business); and
 - (iv) if an agreement as to fees cannot be reached between the Approved Divestiture Agent and Viva Energy within 15 Business Days after the end of the Initial Sale Period, Viva Energy agrees to pay such fees as are directed by the ACCC;
 - (c) not interfere with, or otherwise hinder, the Approved Divestiture Agent's ability to carry out his or her functions as the Approved Divestiture Agent, including:
 - (i) directing all Relevant Personnel, to act in accordance with this clause 10;
 - (ii) providing access to the facilities, sites or operations of the Unsold Business as required by the Approved Divestiture Agent; and
 - (iii) providing to the Approved Divestiture Agent any information, documents or other assistance that they consider necessary for carrying out his or her functions as the Approved Divestiture Agent or for reporting to or otherwise advising the ACCC;
 - (d) within three Business Days after receiving notice from the ACCC pursuant to clause 6.6, Viva Energy must instruct the Approved Divestiture Agent to complete the divestiture of the Unsold Business to the Approved Purchaser in accordance with the documents approved by the ACCC pursuant to clause 6.6; and
 - (e) other than in accordance with clause 10.13(d) of this Undertaking, not instruct the Approved Divestiture Agent to divest the Unsold Business.

Resignation, revocation or termination of the Approved Divestiture Agent

- 10.14. Viva Energy must immediately notify the ACCC in the event that an Approved Divestiture Agent resigns or otherwise stops acting as an Approved Divestiture Agent before the completion of the divestiture of the Unsold Business.

- 10.15. The ACCC may revoke an Approved Divestiture Agent's status as the Approved Divestiture Agent if the ACCC becomes aware that any information provided to it was incorrect, inaccurate or misleading.
- 10.16. The ACCC may approve any proposal by, or alternatively may direct, Viva Energy to terminate an Approved Divestiture Agent if in the ACCC's view the Approved Divestiture Agent acts inconsistently with the provisions of this Undertaking or the Approved Terms of Appointment.

11. Notification of key dates and ACCC requests for information

- 11.1. Viva Energy must notify the ACCC and each Undertaking Appointment in writing of:
- (a) the anticipated date of the Control Date, at least five Business Days before that date;
 - (b) the anticipated date of the completion of the divestiture of the Divestiture Business or Unsold Business (as applicable), at least five Business Days before that date;
 - (c) the occurrence of the Control Date, within one Business Day of that date; and
 - (d) the occurrence of the completion of the divestiture of the Divestiture Business or Unsold Business (as applicable), within one Business Day of that date.
- 11.2. The ACCC may direct Viva Energy in respect of its compliance with this Undertaking to, and Viva Energy 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 Viva Energy'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.
- 11.3. Any direction made by the ACCC under clause 11.2 will be notified to Viva Energy, in accordance with clause 18.2.
- 11.4. In respect of Viva Energy's compliance with this Undertaking or an Undertaking Appointment's compliance with its Approved Terms of Appointment, the ACCC may request any Undertaking Appointment 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 Undertaking Appointment'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.

- 11.5. Viva Energy will use its best endeavours to ensure that an Undertaking Appointment complies with any request from the ACCC in accordance with clause 11.4.
- 11.6. Information furnished, documents and material produced or information given in response to any request or direction from the ACCC under this clause 11 may be used by the ACCC for any purpose consistent with the exercise of its statutory duties.
- 11.7. The ACCC may in its discretion:
- (a) advise any Undertaking Appointment of any request made by it under this clause 11; and/or
 - (b) provide copies to any Undertaking Appointment of any information furnished, documents and material produced or information given to it under this clause 11.
- 11.8. Nothing in this clause 11 requires the provision of information or documents in respect of which Viva Energy has a claim of legal professional or other privilege.

12. Disclosure of this Undertaking

- 12.1. Viva Energy and the ACCC agree that Confidential Schedule 5 will remain confidential until after the completion of the divestiture of the Divestiture Business or Unsold Business.
- 12.2. Viva Energy acknowledges that the ACCC may provide each Undertaking Appointment with a copy of this Undertaking which includes unredacted versions of Confidential Schedule 5 and Confidential Schedule 7.
- 12.3. Viva Energy acknowledges that the ACCC may, subject to clause 12.1:
- (a) make this Undertaking publicly available;
 - (b) publish this Undertaking on its Public Section 87B Undertakings Register and Public Mergers Register; and
 - (c) from time to time publicly refer to this Undertaking.
- 12.4. Nothing in clause 12.1 or the confidential parts of this Undertaking referred to in clause 12.1 prevents the ACCC from disclosing such information as is:
- (a) required by law;
 - (b) permitted by section 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.
- 12.5. Nothing in clause 12.1 or the confidential parts of this Undertaking referred to in clause 12.1 prevents the ACCC from using the information contained in this Undertaking for any purpose consistent with its statutory functions and powers.

13. Obligation to procure

- 13.1. Where the performance of an obligation under this Undertaking requires a Related Body Corporate of Viva Energy to take or refrain from taking some action, Viva Energy will procure that Related Body Corporate to take or refrain from taking that action.

14. No Derogation

- 14.1. 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 Viva Energy of any term of this Undertaking.
- 14.2. 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 Viva Energy 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.

15. Change of Control

- 15.1. In the event that a Change of Control is reasonably expected to occur, Viva Energy must:
- (a) notify the ACCC of this expectation as soon as practicable; and
 - (b) only implement a Change of Control to another person or entity if that person or entity has given a section 87B undertaking to the ACCC that requires it to comply with the same obligations as are imposed on Viva Energy pursuant to this Undertaking, or on terms that are otherwise acceptable to the ACCC, unless the ACCC has notified Viva Energy in writing that a section 87B undertaking under this clause is not required.

16. Costs

- 16.1. Viva Energy must pay all of its own costs incurred in relation to this Undertaking.

17. Resolving Inconsistencies

- 17.1. To the extent there are inconsistencies between this Undertaking and the Approved Sale and Purchase Agreement as regards to Viva Energy's obligations pursuant to this Undertaking, this Undertaking prevails.

18. Notices

Giving Notices

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

Email address: mergers@accc.gov.au
Attention: Executive General Manager
Merger, Exemptions & Digital Division

With a copy sent to: mergersru@accc.gov.au

Attention: Director, Remedies Unit
Policy, Coordination & Remedies Branch
Merger, Exemptions & Digital Division

- 18.2. Any notice or communication to Viva Energy pursuant to this Undertaking must be sent to:

Name: Legal Department, Viva Energy

Address: Level 16/720 Bourke Street, Docklands VIC 3008

Email Address: stuart.nicol@vivaenergy.com.au

Attention: Stuart Nicol, Head of Legal and Internal Audit

With a copy sent to:

Name: Clifford Chance

Address: Level 24, Brookfield Place, 10 Carrington Street, NSW 2000

Email Address: Mark.Grime@cliffordchance.com;
Elizabeth.Richmond@cliffordchance.com

Attention: Mark Grime / Elizabeth Richmond

- 18.3. 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).
- 18.4. 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

- 18.5. Viva Energy must notify the ACCC of a change to its contact details within three Business Days.
- 18.6. Any notice or communication will be sent to the most recently advised contact details and subject to clauses 18.3 and 18.4, will be taken to be received.

19. Defined terms and interpretation

Definitions in the Dictionary


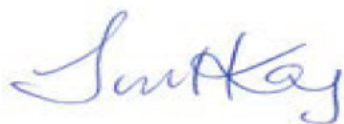
- 19.1. A term or expression starting with a capital letter:
- (a) which is defined in the Dictionary in Part 1 of Schedule 1 (*Dictionary*), has the meaning given to it in the Dictionary; or
 - (b) which is defined in the Corporations Act, but is not defined in the Dictionary, has the meaning given to it in the Corporations Act.

Interpretation

- 19.2. Part 2 of Schedule 1 (*Interpretation*) sets out rules of interpretation for this Undertaking.

Executed as an Undertaking

Executed by Viva Energy Group Limited ACN 626 661 032 pursuant to section 127(1) of the *Corporations Act 2001* by:

	
Signature of director	Signature of company secretary
Scott Andrew Wyatt	Julia Naumovna Kagan
Name of director (print)	Name of company secretary (print)
Date 7 December 2023	Date 7 December 2023

Doc No.
102/23

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

12 December 2023

Date

and signed on behalf of the Commission:



~~Chair~~ Acting Chair

12 December 2023

Date

Schedule 1 – Dictionary and interpretation

1. Dictionary

ACCC means the Australian Competition and Consumer Commission.

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

Agreements means any contract, arrangement or understanding, including any contract, arrangement or understanding to renew, amend, vary or extend any contract, arrangement or understanding.

Approved Audit Plan means the plan approved by the ACCC in accordance with the terms of this Undertaking, by which the Approved Independent Auditor will audit and report upon compliance with this Undertaking.

Approved Business Sale Agreement means the standard form contract for the divestiture of the Unsold Business which has been approved by the ACCC in accordance with the terms of this Undertaking.

Approved Divestiture Agent means the person approved by the ACCC and appointed under clause 10 of this Undertaking.

Approved Independent Auditor means the person approved by the ACCC and appointed under clause 9 of this Undertaking.

Approved Independent Manager means the person approved by the ACCC and appointed under clause 8 of this Undertaking.

Approved Marketing and Sale Plan means the plan approved by the ACCC in accordance with the terms of this Undertaking, by which the Approved Divestiture Agent will market and effect the divestiture of the Unsold Business.

Approved Purchaser means the person approved by the ACCC under clause 6 of this Undertaking.

Approved Sale and Purchase Agreement means the contract approved by the ACCC in accordance with the terms of this Undertaking, by which the Viva Energy will divest the Divestiture Business to the Approved Purchaser and Approved Purchaser will acquire the Divestiture Business from Viva Energy.

Approved Separation and Management Plan means the plan approved by the ACCC in accordance with the terms of this Undertaking, by which the Approved Independent Manager will:

- (a) separate the Divestiture Business from any business to be retained by Viva Energy; and
- (b) manage and operate the Divestiture Business independently of Viva Energy and any retained business.

Approved Transitional Supply Agreement means any agreement, for the supply of goods or services (other than Technical Assistance) by Viva Energy to the Approved Purchaser, approved by the ACCC in accordance with the terms of this Undertaking.

Approved Transitional Technical Assistance Agreement means any agreement, for the supply of Technical Assistance by Viva Energy to the Approved Purchaser, approved by the ACCC in accordance with the terms of this Undertaking.

Approved Terms of Appointment means the terms of appointment for the Approved Independent Manager, Approved Independent Auditor or Approved Divestiture Agent, as applicable, as approved by the ACCC in accordance with the terms 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 9.13 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.

Change of Control means:

- (a) the assignment or other transfer of the legal or beneficial ownership of some or all of the share capital of Viva Energy to any other person or entity that may impact compliance with this Undertaking in its entirety; or
- (b) the sale or transfer of any assets necessary, or which may be necessary, to enable Viva Energy to continue to comply with this Undertaking in its entirety.

Coles means Coles Group Limited ACN 004 089 936 of 800 Toorak Road, Hawthorn East VIC 3123.

Commencement Date means the date described in clause 3.1 of this Undertaking.

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

Consents means any Government Consents or Third Party Consents.

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

Divestiture Business has the meaning given to it in clause 2.7 and means the items described in Schedule 4 to this Undertaking.

Divestiture Site means each individual site listed in Schedule 4 to this Undertaking.

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

Establishment Audit has the meaning given to it in clause 9.14(a) of this Undertaking.

Government Consents means any consents from any government agency required for the assignment, novation, sale, sub-licensing or transfer of any assets, licences, permits, approval or contracts required for the operation of the Divestiture Business.

Holding Company has the meaning given by section 9 of the Corporations Act.

Initial Sale Period is defined in Confidential Schedule 5 to this Undertaking.

Material Change means any change to the structure, attributes, extent or operations of the Divestiture Business or product or service sold by a Divestiture Business that may affect, or impact on, the competitiveness of the Divestiture Business.

Material Contract means any Agreement that is elected by the Proposed Purchaser as being reasonably necessary for the operation of the Divestiture Business.

Proposed Acquisition is defined in clause 2 of this Undertaking.

Proposed Divestiture Agent means a person named in a Proposed Divestiture Notice.

Proposed Divestiture Agent Notice has the meaning given to it in clause 10.3 of this Undertaking.

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

Proposed Independent Auditor Notice has the meaning given to it in clause 9.2 of this Undertaking.

Proposed Independent Manager means a person named in a Proposed Independent Manager Notice.

Proposed Independent Manager Notice has the meaning given to it in clause 8.2 of this Undertaking.

Proposed Purchaser means a person named in a Proposed Purchaser Notice.

Proposed Purchaser Notice has the meaning given to it in clause 6.2 of this Undertaking.

Proposed Undertaking Appointment means a Proposed Independent Manager, Proposed Independent Auditor or Proposed Divestiture Agent.

Public Mergers Register means the ACCC's public register of merger clearances, available at www.accc.gov.au.

Public Section 87B Undertakings Register means the ACCC's public register of section 87B undertakings, available at 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.

Relevant Personnel means any director, contractor, manager, officer, employee or agent of Viva Energy who is involved in, or has the ability to influence decision making in respect of, the retail fuel business and/or operations at the respective sites that form part of the Divestiture Business, including persons occupying the positions (or occupying a position within a team) identified in Schedule 8.

Shell means Shell Brand International AG, a company incorporated in Switzerland (registered number CH-110.324.462) and having its registered office at Baarermatte, CH 6340 Baar, Switzerland.

Subsidiary has the meaning given by section 9 of the Corporations Act.

Technical Assistance includes advising on technical knowledge documentation, supporting the Approved Purchaser on acquiring specific assets necessary for the ongoing conduct of the Divestiture Business, providing staff with suitable experience and skills to

assist and/or advice on technical issues, assisting in training for the Approved Purchaser's staff, and providing guidance on regulatory and legal aspects relating to the transfer of or application for licences.

Third Party Consents means any Consent from any entity that is not a government agency required for the assignment, novation, sale, sub-licensing or transfer of any assets, leases, licences, permits, approval or contracts required for the operation of the Divestiture Business.

Transferred Personnel has the meaning given to it in clause 5.7 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.

Undertaking Appointment means the Approved Independent Manager, the Approved Independent Auditor or Approved Divestiture Agent, as applicable.

Undertaking Signatories has the meaning given to it in clause 1.1 of this Undertaking.

Unsold Business has the meaning given to it in clause 10.1 of this Undertaking.

2. Interpretation

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.
- (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 ACCC 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, Viva Energy 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 Purchaser Notice Form

This form sets out the information required by the ACCC in relation to a Proposed Purchaser.

Please note that it is an offence under s137.1 of the Criminal Code Act 1995 (Cth) to give information to a Commonwealth entity knowing that the information is false or misleading or omits any matter or thing without which the information is misleading.

1. Method of Delivery to the ACCC

The completed form with requested documents attached should be provided to the ACCC using the following method:

Email

Subject line: Proposed Purchaser Notice – Re: Undertaking given by Viva Energy Group Limited ACN 626 661 032

Address: mergers@acc.gov.au

Attention: Executive General Manager – Merger, Exemptions & Digital Division

With an email copy sent to:

Address: mergersru@acc.gov.au

Attention: Director, Remedies Unit - Policy, Coordination & Remedies Branch, Merger, Exemptions & Digital Division

2. Information Required

The ACCC requires the following information in order to assess a Proposed Purchaser.

2.1 Proposed Purchaser details:

- (a) Name of the Proposed Purchaser;
- (b) Address;
- (c) Contact name;
- (d) Telephone number; and
- (e) Other contact details.

2.2 A submission containing the following information:

- (a) a description of the business carried on by the Proposed Purchaser including the locations in which the Proposed Purchaser carries on its business;
- (b) details of the Proposed Purchaser's experience in the relevant market(s);
- (c) the names of the owner(s) and the director(s) of the Proposed Purchaser;

- (d) details of any of the following types of relationships between Viva Energy and the Proposed Purchaser or confirmation that no such relationship exists whether within Australia or outside of Australia:
- (i) Viva Energy and the Proposed Purchaser are Associated Entities;
 - (ii) Viva Energy is an Entity Connected with the Proposed Purchaser;
 - (iii) the Proposed Purchaser is an Entity Connected with Viva Energy;
 - (iv) Viva Energy and the Proposed Purchaser are Related Entities;
 - (v) Viva Energy and the Proposed Purchaser are Related Parties;
 - (vi) any Related Party, Related Entity or Entity Connected with Viva Energy is a Related Party, Related Entity or Entity Connected with the Proposed Purchaser;
 - (vii) Viva Energy and the Proposed Purchaser have a contractual relationship or had one within the past three years, other than those attached to this form;
 - (viii) the Proposed Purchaser is a supplier of Viva Energy or has been in the past three years;
 - (ix) Viva Energy is a supplier of the Proposed Purchaser or has been in the past three years; and
 - (x) any other relationship between Viva Energy and the Proposed Purchaser that allows one to affect the business decisions of the other; and
- (e) a section addressing the following factors, including any information adverse to the Proposed Purchaser, in the power, possession or control of Viva Energy:
- (i) whether the draft sale and purchase agreement is consistent with this Undertaking;
 - (ii) whether the Proposed Purchaser will complete the transaction as contemplated by the draft sale and purchase agreement;
 - (iii) whether the Proposed Purchaser is of good financial standing;
 - (iv) whether the Proposed Purchaser has an intention to maintain and operate the Divestiture Business as a going concern;
 - (v) whether the Proposed Purchaser is able to conduct the Divestiture Business effectively;
 - (vi) whether the divestiture of the Divestiture Business to the Proposed Purchaser will address any competition concerns of the ACCC, including any relationships (including but not limited to shareholding interests, other proprietary interests, contracts, arrangements or understandings) between the Proposed Purchaser and other entities in a relevant market, and the likely long-term viability and

competitiveness of the Divestiture Business under the ownership of the Proposed Purchaser; and

- (vii) any other matters that may affect the Proposed Purchaser's capacity or ability to acquire or operate the Divestiture Business, such as outstanding legal action or disputes.

2.3 Please also attach to this form:

- (a) the finalised draft of the sale and purchase agreement for approval by the ACCC in accordance with this Undertaking;
- (b) the finalised draft of any transitional technical assistance agreement for approval by the ACCC in accordance with this Undertaking;
- (c) the finalised draft of any transitional supply agreement for approval by the ACCC in accordance with this Undertaking; and
- (d) any documents required to support the information provided by Viva Energy pursuant to this form.

Schedule 3 – Proposed Undertaking Appointment Form

This form sets out the information required by the ACCC in relation to proposed appointment of the following positions under the Undertaking:

- Proposed Independent Manager;
- Proposed Independent Auditor; or
- Proposed Divestiture Agent.

(the **Undertaking Appointment**)

This form is to be used for each of the above Undertaking appointments.

Please note that it is an offence under s137.1 of the Criminal Code Act 1995 (Cth) to give information to a Commonwealth entity knowing that the information is false or misleading or omits any matter or thing without which the information is misleading.

1. Method of Delivery to the ACCC

The completed form with requested documents attached may be provided to the ACCC using the following method:

Email

Subject line: Proposed [only include relevant Undertaking Appointment i.e. Independent Manager / Independent Auditor / Divestiture Agent] Notice – [insert name of undertaking]

Address: mergers@accc.gov.au

Attention: Executive General Manager – Mergers, Exemptions & Digital Division

With an email copy sent to:

Address: mergersru@accc.gov.au

Attention: Director, Remedies Unit - Policy, Coordination & Remedies Branch, Mergers, Exemptions & Digital Division

2. Information Required

The ACCC requires the following information in order to assess a proposed Independent Manager, Independent Auditor or Divestiture Agent (i.e. the relevant Undertaking Appointment).

2.1 Proposed Undertaking Appointment details:

- (a) the name of the Proposed Undertaking Appointment; and
- (b) the name of the proposed Undertaking Appointment's employer and contact details including:
 - (i) address;
 - (ii) contact name;

- (iii) telephone number; and
- (iv) other contact details.

2.2 A submission containing the following information:

- (a) details of the Undertaking Appointment's qualifications and experience relevant to his or her proposed role pursuant to the Undertaking;
- (b) the names of the owner(s) and the director(s) of the Undertaking Appointment's employer; and
- (c) details of any of the following types of relationships between Viva Energy and the Undertaking Appointment or the Undertaking Appointment's employer or confirmation that no such relationship exists whether within Australia or outside of Australia:
 - (i) Viva Energy and the Undertaking Appointment's employer are Associated Entities;
 - (ii) Viva Energy is an Entity Connected with the Undertaking Appointment's employer;
 - (iii) The Undertaking Appointment's employer is an Entity Connected with Viva Energy;
 - (iv) Viva Energy and the Undertaking Appointment's employer are Related Entities;
 - (v) Viva Energy and the Undertaking Appointment's employer are Related Parties;
 - (vi) any Related Party, Related Entity or Entity Connected with Viva Energy is a Related Party, Related Entity or Entity Connected with the Undertaking Appointment;
 - (vii) Viva Energy and the Undertaking Appointment or the Undertaking Appointment's employer have a contractual relationship or had one within the past three years, other than those attached to this form;
 - (viii) the Undertaking Appointment's employer is a supplier of Viva Energy or has been in the past three years;
 - (ix) Viva Energy is a supplier of the Undertaking Appointment's employer or has been in the past three years;
 - (x) any other relationship between Viva Energy and the Undertaking Appointment or the Undertaking Appointment's employer that allows one to affect the business decisions of the other; and
 - (xi) Details of any existing or past contractual relationships between the Undertaking Appointment or the Undertaking Appointment's employer and the ACCC within the past three years.

2.3 A document outlining the terms of appointment for the proposed Undertaking Appointment. This should identify the basis on which fees will be paid, including disclosure of any proposed performance based fees.

3. Specific Information required for Proposed Undertaking Appointments

The ACCC requires the below information in relation to the relevant Undertaking Appointment.

Proposed Independent Auditor

- 3.1 A finalised draft audit plan for the Divestiture Business, in an editable format, drafted by the Proposed Independent Auditor and outlining (to the extent possible) the Proposed Independent Auditor's plans regarding the Establishment Audit and the Audit Report.

Proposed Divestiture Agent

- 3.2 The finalised draft business sale agreement drafted by the Proposed Divestiture Agent in consultation with Viva Energy, in an editable format. The draft business sale agreement is to provide for the divestiture of the Unsold Business.
- 3.3 The Proposed Divestiture Agent's draft marketing and sale plan for the Unsold Business, in an editable format.

Proposed Independent Manager

- 3.4 The finalised draft separation and management plan for the Divestiture Business, in an editable format, detailing the measures and timing to be implemented by Viva Energy and the Approved Independent Manager in order to fulfil Viva Energy's and the Approved Independent Manager's obligations pursuant to this Undertaking. This plan is to be drafted by the Proposed Independent Manager in consultation with Viva Energy to achieve the objectives of the Undertaking including:
- (a) the intended mode of operation of the Divestiture Business until completion of its divestiture;
 - (b) separation measures to ensure the Divestiture Business is operated in a manner which is financially and operationally separate from Viva Energy, including the:
 - (i) separation of the books and records of the Divestiture Business from those of Viva Energy;
 - (ii) severance of the Divestiture Business's participation in any private shared information technology networks, to the extent possible without compromising the viability of the Divestiture Business;
 - (iii) implementation of specific electronic, information and physical security measures to maintain the confidentiality of any competitively sensitive information of the Divestiture Business; and
 - (iv) severance of arrangements to share personnel and plant between the Divestiture Business and any businesses to be retained by Viva Energy, to the extent possible without compromising the viability of the Divestiture Business;

- (c) details of contracts for the provision of goods or services to the Divestiture Business which will expire after the completion of the divestiture of the Divestiture Business to the Approved Purchaser and the actions which will be taken to ensure they are replaced, renewed and/or renegotiated on commercial terms favourable to the Divestiture Business;
- (d) personnel planning to maintain appropriate personnel levels and ensure that the Divestiture Business has access to all personnel necessary to operate the Divestiture Business;
- (e) any Material Changes to the Divestiture Business required in order to fulfil Viva Energy's and the Approved Independent Manager's obligations pursuant to the Undertaking; and
- (f) the cooperation required from the Approved Independent Manager with Viva Energy in relation to the divestiture of the Divestiture Business, including:
 - (i) the activities to be conducted by the Approved Independent Manager that are necessary for the effective operation of the Divestiture Business, having regard to the nature of the Divestiture Business (including the extent to which the Divestiture Business already has a management structure in place prior to the proposed acquisition that will be retained during the hold separate period);
 - (ii) the method by which due diligence information, site visits and personnel interviews by and to prospective purchasers of the Divestiture Business will be managed;
 - (iii) the method by which the Approved Independent Manager and Viva Energy will preserve the confidentiality of the Divestiture Business's competitively sensitive information from Viva Energy and its advisers throughout this process; and
 - (iv) a protocol whereby the Approved Independent Manager can provide any information requested by Viva Energy without disclosing the details of the Divestiture Business's competitively sensitive information to Viva Energy.

Schedule 4 – Divestiture Business

1. Property interests to be transferred by Viva Energy to the Approved Purchaser

Viva Energy will assign the relevant leasehold interests in, and obtain the consent of the Lessor to the assignment of each lease for, each of the Divestiture Sites identified below.

No.	Site Name	Address	Suburb	State	Postcode
1.	COLES EXPRESS CEDUNA	30-32 MCKENZIE STREET	CEDUNA	SA	5690
2.	COLES EXPRESS GOLDEN GROVE	LOT 203 THE GROVE WAY & ATLANTIS DR	GOLDEN GROVE	SA	5125
3.	COLES EXPRESS DARLINGTON	1477-1479 MAIN SOUTH RD	DARLINGTON	SA	5047
4.	COLES EXPRESS REYNELLA	89 MAIN SOUTH RD	REYNELLA	SA	5161
5.	COLES EXPRESS PARK HOLME	606-610 MARION RD	PARK HOLME	SA	5043
6.	COLES EXPRESS WOODVILLE	827-837 PORT RD	WOODVILLE	SA	5011
7.	COLES EXPRESS ISLINGTON	392 CHURCHILL RD	KILBURN	SA	5084
8.	COLES EXPRESS EDWARDSTOWN	1112 SOUTH RD	EDWARDSTOWN	SA	5039
9.	COLES EXPRESS SALISBURY EAST	1461 MAIN NORTH RD	SALISBURY EAST	SA	5109
10.	COLES EXPRESS FINDON	245 FINDON RD & GRANGE RD	FINDON	SA	5023
11.	COLES EXPRESS QUEENSTOWN	77 PORT RD	QUEENSTOWN	SA	5014
12.	COLES EXPRESS WEST TERRACE	111 WEST TCE	ADELAIDE	SA	5000
13.	COLES EXPRESS THEBARTON	53-57 PORT RD	THEBARTON	SA	5031
14.	COLES EXPRESS BLACKWOOD	371 SHEPHERDS HILL RD	BLACKWOOD	SA	5051
15.	COLES EXPRESS HAWTHORN	150 BELAIR RD	HAWTHORN	SA	5062
16.	COLES EXPRESS GAWLER	12 MURRAY ST	GAWLER	SA	5118
17.	COLES EXPRESS PARAFIELD GARDENS	443 SALISBURY HIGHWAY	PARAFIELD GARDENS	SA	5107
18.	COLES EXPRESS SMITHFIELD EAST	LOT 182 MAIN NORTH RD	BLAKEVIEW	SA	5114
19.	COLES EXPRESS WINDSOR GARDENS	526 NORTH EAST RD (CNR SUDHOLZ CRT)	WINDSOR GARDENS	SA	5087
20.	COLES EXPRESS KLEMZIG	44 O.G. RD	KLEMZIG	SA	5087
21.	COLES EXPRESS MODBURY NORTH	432 MONTAGUE RD (CNR DEBORAH RD)	MODBURY NORTH	SA	5092
22.	COLES EXPRESS HECTORVILLE	150 MONTACUTE RD	HECTORVILLE	SA	5073
23.	COLES EXPRESS ROSE PARK	150 FULLARTON RD (CNR ALEXANDRA AVE)	ROSE PARK	SA	5067
24.	COLES EXPRESS NOARLUNGA	BEACH RD (CNR HANNAH RD)	NOARLUNGA CENTRE	SA	5168
25.	COLES EXPRESS HALLETT COVE	2 RAMROD AVE	HALLETT COVE	SA	5158

2. Wet and dry stock

Viva Energy will transfer all fuel and convenience shop stock (except gift cards, newsagency products, telecommunications products, and Coles/Coles Express/Shell branded products) for each Divestiture Site, that is located at a Divestiture Site as at completion.

3. Plant and equipment

Viva Energy will transfer all plant and equipment (including the interest in any fuel equipment owned by Viva Energy at the nominated sites) in working condition to allow the relevant business to operate from completion.

4. Employees

At the option of the Approved Purchaser, Viva Energy must transfer to the Approved Purchaser:

- (a) all employees; and
- (b) all service providers under a contract for service;

who are, in the view of the Approved Purchaser, required for the Approved Purchaser to maintain, operate or conduct effectively the Divestiture Business and who consent to the transfer of their employment or contract for service to the Approved Purchaser.

5. All cash in tills or otherwise on premises but excluding cash in third party-owned ATMs

All cash on site will be transferred, except for cash in third-party owned ATMs.

6. Licenses and permits

All business authorisations (to the extent transferrable) held by Viva Energy that relate exclusively to the nominated sites, including but not limited to tobacco, food, environmental and dangerous goods storage licences/permits.

7. All other assets and personnel reasonably necessary to operate such business

Deliverable records related to the property and business connected to each Divestiture Site as agreed between Viva Energy and the Proposed Purchaser.

Confidential Schedule 5

Schedule 6 – Approved Purchaser

The Approved Purchaser of the Divestiture Business at the date of this Undertaking is Chevron Australia Downstream Fuels Pty Limited (ACN 009 644 151) and Chevron Australia Downstream Stores Pty Ltd (ACN 116 713 476).

Confidential Schedule 7

Schedule 8 – Relevant Personnel

For the purposes of clauses 7.5 and 10.13(c) of this Undertaking, "Relevant Personnel" includes any employee holding the following positions at Viva Energy:

- (a) Executive Leadership Team (Group CEO and Executive General Managers);
- (b) Retail Leadership Team;
- (c) Retail GM Strategy and Business Development and the following direct reports:
 - (i) Head of Supply Chain;
 - (ii) Business & Strategy Performance Manager;
 - (iii) Procurement Manager; and
 - (iv) Project Managers;
- (d) Retail GM Network Development and the following direct reports:
 - (i) National Network Manager;
 - (ii) Retail Program Manager;
 - (iii) Head of Retail Design & Development; and
 - (iv) Head of Property Management;
- (e) Retail State Manager Region 4 (WA/SA/NT) and the following direct reports:
 - (i) Regional Operations Manager;
 - (ii) Retail Area Manager A1 (responsible for a portion of South Australia);
 - (iii) Retail Area Manager A2 (responsible for a portion of South Australia); and
 - (iv) Cluster Manager (responsible for a portion of South Australia);
- (f) Retail Digital & Transformation Lead;
- (g) Retail Head of Central Operations and the following direct reports:
 - (i) National Facilities Manager; and
 - (ii) Operations Project Lead;
- (h) Retail Head of Safety;
- (i) Retail Head of Security & Loss Prevention;
- (j) Retail Mobility Business Transformation Manager;
- (k) Retail Finance Manager – Consumer, Retail Finance Manager – Fuel, Retail Finance Manager – Commercial;
- (l) Retail Business Intelligence & Pricing Manager; and
- (m) Retail People & Culture Leads.