

Variation to an Undertaking to the Australian Competition and Consumer Commission

Given under section 87B of the *Competition and Consumer Act 2010* (Cth) by Nestlé S.A., Nestlé Australia Ltd and Duke Holdco Pty Ltd

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1 Person giving this Variation

This Variation is given to the Australian Competition and Consumer Commission (ACCC) by Nestlé S.A. on behalf of itself and its subsidiaries, Nestlé Australia Ltd (ACN 000 011 316) (Nestlé Australia), and Duke Holdco Pty Ltd (ACN 160 607 509) (together referred to as Nestlé in this Variation).

2 Background

2.1 The Parties to the Proposed Acquisition

- (a) On 22 November 2012 the ACCC accepted an undertaking pursuant to section 87B of the *Competition and Consumer Act 2010* (Cth) from Nestlé in connection with Nestlé's Proposed Acquisition of the global infant nutrition business of Pfizer Nutrition.
- (b) Nestlé has applied to the ACCC to vary the Undertaking to
 - (i) require Nestlé to take all steps to ensure that any licence agreement entered into with the Approved Purchaser pursuant to clause 5.1(b)(i) of the Undertaking does not terminate as a result of a breach of that licence agreement by Nestlé and to include a procedure for approval by the ACCC of termination of any such licence agreement by Nestlé;
 - (ii) incorporate ring fencing measures in relation to information obtained by Nestlé relating to the Divestiture Products Trademark Licence.

3 Commencement of this Variation

3.1 Commencement

This Variation comes into effect when:

- (a) this Variation is executed by Nestlé; and
- (b) the Variation so executed is accepted by the ACCC.

4 Variation – Divestiture

4.1 Divestiture Licence

The Undertaking is varied by inserting the following new clause 5.1(c) after existing clause 5.1(b):

“Nestlé must take all steps to ensure that any licence agreement entered into with the Approved Purchaser pursuant to clause 5.1(b)(i) (Divestiture Licence) does not terminate as a result of a breach of that Divestiture Licence by Nestlé.”

4.2 Approval for termination of Divestiture Licence

The Undertaking is varied by inserting the following new clause 5.1A after existing clause 5.1:

“5.1A Approval for termination of Divestiture Licence

- (a) *Nestlé must not terminate any Divestiture Licence without obtaining the prior written approval of the ACCC.*
- (b) *To seek approval for termination of a Divestiture Licence in accordance with clause 5.1A(a), Nestlé must notify the ACCC of its intention to terminate giving the reasons for termination (**Termination Notice**).*
- (c) *After receiving a Termination Notice, the ACCC must decide whether to:*
 - (i) *approve the termination; or*
 - (ii) *not approve the termination.*
- (d) *Within 20 Business Days of receiving a Termination Notice under clause 5.1A(b), the ACCC must notify Nestlé in writing of its decision made pursuant to clause 5.1A(c).*
- (e) *The ACCC may extend the period within which it will provide the notice described in clause 5.1A(d) by notifying Nestlé in writing of the extension within 20 Business Days of receiving the Termination Notice.*

5 Variation – Confidential Trademark Licence Information

The Undertaking is varied by inserting the following new clause 8.7A after existing clause 8.7 of the Undertaking:

"8.7A Confidential Trademark Licence Information

- (a) *Any information obtained by Nestlé from the Approved Purchaser pursuant to the Divestiture Products Trademark Licence will be Confidential Trademark Licence Information (**Confidential Trademark Licence Information**).*
- (b) *Subject to this Undertaking, Nestlé must, from the Control Date and until the expiration of the term of the of the Divestiture Products Trademarks Licence, do everything within its power to prevent any Confidential Trademark Licence Information being communicated, disclosed to, used or accessed by any officer or employee of Nestlé Australia.*
- (c) *Nestlé must procure that each person to whom Confidential Trademark Licence Information is communicated or disclosed observes the restrictions on the communication, disclosure, use and access of Confidential Trademark Licence Information in this Undertaking as if those restrictions were obligations of that person.*
- (d) *Nestlé must use its best endeavours to:*
 - (i) *prevent any breach of the obligation of confidentiality in relation to Confidential Trademark Licence Information by such a person;*

- (ii) *enforce the obligation of confidentiality in relation to the Confidential Trademark Licence Information by such a person; and*
- (iii) *prevent any further breaches of confidentiality in relation to the Confidential Trademark Licence Information by such a person.*
- (e) *Nestlé must maintain Confidential Trademark Licence Information on files and on systems that are separate from those used by personnel of Nestlé who are not entitled to use the Confidential Trademark Licence Information.*
- (f) *Nestlé must advise the ACCC of any breach of the obligations of confidentiality in relation to Confidential Trademark Licence Information as soon as Nestlé becomes aware of the breach and, in any event, within two Business Days of Nestlé becoming aware of the breach.”*

6 Variation - Definitions

Schedule 1 of the Undertaking is varied by the insertion of the following definitions to be included in the list of definitions in Schedule 1 in alphabetical order:

“Confidential Trademark Licence Information has the meaning given to it in clause 8.7A in this Undertaking.”

“Divestiture Licence has the meaning given to it in clause 5.1(c) of this Undertaking.”

“Termination Notice has the meaning given to it in clause 5.1A of this Undertaking.”

7 Defined terms and interpretation

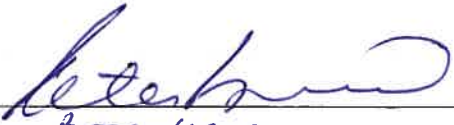
- (a) Any term defined in the Undertaking and not defined in this Variation has the meaning given in the Undertaking, unless the contrary intention appears.
- (b) Variation means this variation to the Undertaking.

8 Counterparts

This Variation may be executed in any number of counterparts.


Executed as an Undertaking

Executed by Nestlé S.A.:

By: 
Name: PETER LLOYD
Title: ATTORNEY


11 APRIL 2013
Date

Executed by Nestlé Australia Ltd:

By: 
Name: PETER LLOYD
Title: GENERAL COUNSEL + COMPANY SECRETARY

11 APRIL 2013
Date

Executed by Duke Holdco Pty Ltd:


By: 
Name: PETER LLOYD
Title: ATTORNEY

11 APRIL 2013
Date

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

Date 17/4/13

And signed on behalf of the Commission:


Chairman

Date 17/4/13

