

CLAYTON UTZ

Undertaking to the Australian Competition and Consumer Commission

Given under section 87B of the Trade Practices Act by:

Symbion Health Limited
ACN 004 073 410

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1. Background

- (a) Healthscope and Symbion each operate pathology businesses in markets for the provision of community pathology services and a market or markets for the provision of pathology services to public hospitals in Australia. In the Commission's view, there are state markets for the provision of community pathology services with geographical segments within those markets. The Commission considers it unnecessary to form a concluded view in relation to whether there is a national market for the provision of pathology services to public hospitals in Australia or whether there are state markets for those services.
- (b) Healthscope proposes to acquire Symbion's pathology, medical centre and imaging businesses in Australia ("**Diagnosics Business**"). Relevantly, Symbion's pathology businesses compete with Healthscope in markets for the provision of community pathology services.
- (c) Healthscope and Symbion initially proposed that Healthscope's acquisition of the **Diagnosics Business** would be implemented by way of a scheme of arrangement under which all of the shares in Symbion were to be acquired by Healthscope Investments, a wholly owned subsidiary of Healthscope ("**Scheme**") ("**Initial Proposed Acquisition**"). The Scheme was announced by Healthscope and Symbion to the ASX on 29 May 2007. Immediately after implementation of the Scheme, it was proposed that agreements would be entered into between Symbion and companies ultimately jointly owned by funds managed and advised by Ironbridge Capital and Archer Capital ("**IAC Consortium**") for the sale of Symbion's consumer products group and Symbion's pharmacy services and distribution group ("**C&P Business**"). The only businesses previously operated by Symbion that were proposed to remain in the control of Healthscope were the **Diagnosics Business**.
- (d) The Initial Proposed Acquisition raised competition concerns for the Commission in markets for the provision of community pathology services. The Commission was concerned that a participant's ability to compete in markets for the provision of community pathology services in regional areas may be affected by its ability to compete to provide pathology services to public hospitals in the same regional area.
- (e) Specifically, concerns arose in relation to the Victorian market for community pathology services and in particular, regions within the Victorian market, namely north-eastern Victoria and Gippsland. The Commission was concerned that following the Initial Proposed Acquisition Healthscope would be the sole or dominant provider of community pathology services in those regions and that competitors would have little or no opportunity to compete for the provision of pathology services to public hospitals in the relevant regions making entry or expansion in the market for the provision of community pathology services difficult.
- (f) The Commission conducted market inquiries in relation to its concerns. Following those market inquiries, the Commission was satisfied that the Initial Proposed Acquisition would make it unlikely that a competitor to Healthscope could either enter or expand into the relevant market with sufficient scale to constrain Healthscope. Consequently the Commission was concerned that the Proposed Acquisition was likely to have the effect of substantially lessening competition in the relevant market.

- (g) Healthscope did not agree that the Initial Proposed Acquisition would be likely to substantially lessen competition, but provided an enforceable undertaking pursuant to section 87B of the Act on 15 August 2007 in order to address the Commission's concerns ("**Initial Undertaking**"). The Initial Undertaking provided for the divestment by Healthscope of sufficient assets to enable a purchaser of those assets to compete effectively in the relevant market.
- (h) Pursuant to the Initial Undertaking, Healthscope agreed to sell the Divestiture Business, comprising the Gippsland Business, Benalla Business and Albury Business operated by Symbion and the Wangaratta Business operated by Healthscope. Healthscope agreed to use its best endeavours to enter into an arrangement with a purchaser for the Divestiture Business prior to the Scheme's implementation date, with the sale to occur the day after the implementation of the Scheme to a purchaser approved of by the Commission. If this did not occur, then Healthscope agreed to have the Divestiture Business independently managed until it was sold in accordance with the Initial Undertaking. In addition, Healthscope agreed to sell the Divestiture Business within a confidential timeframe to a purchaser approved of by the Commission. However, in the event that Healthscope did not sell the Divestiture Business within the specified timeframe, Healthscope agreed to provide a power of attorney to a divestiture agent to ensure the Divestiture Business was sold within a further limited timeframe. Healthscope accepted that such a sale was to occur on terms necessary, including as to price, to ensure a sale was effected within that further limited period.
- (i) To address the Commission's concern in relation to the relationship between the provision of pathology services to public hospitals and community pathology services in the same geographic regions, Healthscope agreed that it would tender for the provision of pathology services to public hospitals in the relevant regions on terms approved of by the independent manager of the Divestiture Business and would give the purchaser of the Divestiture Business the option to acquire from Healthscope any contract for the provision of pathology services to public hospitals in the relevant regions.
- (j) The Commission was satisfied that the Initial Undertaking, the primary purpose of which was to divest an independent, viable business in competition with the merged entity, addressed its competition concerns.
- (k) On 15 August 2007 the Commission accepted the Initial Undertaking proposed by Healthscope and announced that it would not oppose the Initial Proposed Acquisition.
- (l) Symbion shareholders voted on the Scheme on 11 September 2007. The Scheme did not receive sufficient votes to proceed.
- (m) On 8 October 2007, Healthscope and Symbion announced to the ASX that they had agreed on a revised proposal for Healthscope to acquire the Diagnostics Business. Under the revised proposal, Symbion will sell its Diagnostics Business to Healthscope pursuant to a share sale agreement ("**Diagnostics Sale and Purchase Agreement**") ("**Proposed Acquisition**") in return for new Healthscope shares ("**Consideration Shares**") (with the number of Consideration Shares to be issued calculated using the same formula as that used under the Scheme). Symbion will then (virtually immediately) distribute the Consideration Shares to Symbion shareholders *in specie*, by way of a capital reduction and dividend.

- (n) Subject to Symbion shareholder approval by the requisite majorities, the IAC Consortium will then acquire all of the shares in Symbion pursuant to a scheme of arrangement which is scheduled to complete shortly after the acquisition by Healthscope of the Diagnostics Business.
- (o) The implementation of the Proposed Acquisition will essentially replicate the outcome of the Initial Proposed Acquisition through an alternative structure whereby Healthscope will own the Diagnostics Business and the IAC Consortium will own the C&P Business.
- (p) Healthscope has submitted to the Commission that while various amendments are necessary to the Initial Undertaking to accommodate the new transaction structure, no new competition issues arise that were not considered under the previous Scheme proposal.
- (q) In order to address the Commission's competition concerns, Healthscope has offered an undertaking to the Commission, in a substantially similar form to the Initial Undertaking, in replacement of the Initial Undertaking ("**Healthscope Undertaking**"). Healthscope has also sought the Commission's consent to withdraw the Initial Undertaking.
- (r) While the Commission is of the view that the Proposed Acquisition would raise the same competition concerns as those that it identified (and which are described in clauses 1(d) – (f) above) in respect of the Initial Proposed Acquisition, the Commission is concerned to ensure that Healthscope's ability to comply with the Healthscope Undertaking is not affected by the new transaction structure.
- (s) Symbion has offered this undertaking in order to address the Commission's concern described in clause 1(r) above ("**Undertaking**"). The primary purpose of this Undertaking is to ensure that Symbion, during any period in which it may control or otherwise be in a position to influence the affairs of Healthscope, will not in any way hinder or prevent Healthscope's compliance with the Healthscope Undertaking.

2. Definitions and interpretation

2.1 Definitions

The meanings of the terms used in this document are as follows:

"**Act**" means the *Trade Practices Act 1974* (Cth).

"**Albury Business**" means Symbion's pathology business conducted at Albury, New South Wales, as set out in item 4 of Schedule 2 of the Healthscope Undertaking.

"**ASX**" means Australian Stock Exchange.

"**Benalla Business**" means Symbion's pathology business conducted at Benalla, Victoria, as set out in item 2 of Schedule 2 of the Healthscope Undertaking.

"**Business Day**" means a day on which all banks are generally open in Melbourne, but does not include a Saturday, Sunday or public holiday.

"**C&P Business**" means Symbion's consumer products, pharmacy services and pharmacy distribution business.

"C&P Scheme Implementation Deed" means the deed between Symbion and Lantern dated on or about the date of the TID pursuant to which Symbion proposes to implement a scheme of arrangement under Part 5.1 of the Corporations Act pursuant to which Lantern would acquire all of the shares in Symbion.

"Capital Reduction" means an equal reduction of capital by Symbion in relation to its ordinary shares under section 256C of the Corporations Act and distribution *in specie* by Symbion of all of the Consideration Shares (or, to the extent that certain of the Consideration Shares are distributed to Participating Shareholders by way of the Share Distribution Dividend, all of the Consideration Shares which are not so distributed by way of the Share Distribution Dividend) to Participating Shareholders (or, in the case of Ineligible Overseas Shareholders, to a nominee in accordance with clause 5.8 of the TID).

"Commencement Date" means the date determined in accordance with clause 3.1 of this Undertaking.

"Commission" means Australian Competition and Consumer Commission.

"Consideration Shares" means the Healthscope Shares as determined, allotted and issued to Symbion in accordance with clause 8 of the TID and as provided for in the Diagnostics Sale and Purchase Agreement.

"Diagnostics Business" means Symbion's pathology, medical centre and imaging businesses in Australia.

"Diagnostics Sale and Purchase Agreement" means the Share Sale and Purchase Deed between Symbion, Symbion CP Holdings Pty Ltd, Symbion Pharmacy Services Pty Ltd and Healthscope, pursuant to which Healthscope will acquire all of the shares in the capital of Symbion Healthcare Holdings, being the owner of the Diagnostics Business.

"Diagnostics Shares" has the meaning given to the term "Sale Shares" in the Diagnostics Sale and Purchase Agreement.

"Diagnostics Transaction" means the proposed transaction pursuant to which:

- (a) Symbion will sell the Diagnostics Shares to Healthscope in accordance with the terms of the TID and the Diagnostics Sale and Purchase Agreement following completion of the Restructure Agreement; and
- (b) Symbion will distribute to the Participating Shareholders (or the nominee contemplated by clause 5.8 of the TID) the Consideration Shares it receives pursuant to the Diagnostics Sale and Purchase Agreement by way of a Capital Reduction and the Share Distribution Dividend, in accordance with the terms of the TID.

"Divestiture Business" means the businesses identified in Schedule 2 of the Healthscope Undertaking.

"Gippsland Business" means Symbion's pathology business conducted at Gippsland, Victoria, as set out in item 1 of Schedule 2 of the Healthscope Undertaking.

"Healthscope" means Healthscope Limited ACN 004 405 152. Unless the context otherwise indicates, a reference in this Undertaking to Healthscope includes a reference to any of its related bodies corporate.

"Healthscope Undertaking" means the undertaking offered to the Commission by Healthscope in replacement of the Initial Undertaking, in the form accepted by the Commission.

"IAC Consortium" has the meaning given to it in clause 1(c).

"Initial Proposed Acquisition" has the meaning given to it in clause 1(c).

"Initial Undertaking" means the undertaking given by Healthscope pursuant to section 87B of the Act in relation to the Initial Proposed Acquisition and accepted by the Commission on 15 August 2007.

"Lantern" means Lantern Bidco Pty Limited ACN 127 183 886.

"Participating Shareholder" means each person registered in the Symbion Health Share Register as the holder of Symbion Health Shares as at the Record Date.

"Pre-registration Period" means the period from the time of issue of the Consideration Shares until the Consideration Shares are distributed to (and all of the Consideration shares have actually been registered in the names of) Participating Shareholders and the nominee contemplated by clause 5.8 of the TID.

"Proposed Acquisition" means the proposed acquisition, announced to the ASX on 8 October 2007, of the Diagnostics Business by Healthscope pursuant to the Diagnostics Sale and Purchase Agreement.

"Record Date" means 7:00 pm on the date which is 5 Business Days after the Symbion Health Meeting Date or such other date as agreed between the parties.

"Related Body Corporate" has the meaning given to that phrase by section 4A of the Act.

"Restructure Agreement" means the document entitled "Restructure Agreement" initialled by Symbion Health, Lantern and Healthscope for the purposes of identification (or such other substitute or replacement document agreed between Symbion, Lantern and Healthscope in writing).

"Scheme" has the meaning given to it in clause 1(c).

"Share Distribution Dividend" means the payment of a special dividend by Symbion Health by the distribution *in specie* by Symbion Health to Participating Shareholders (or in the case of Ineligible Overseas Shareholders, to a nominee in accordance with clause 5.8 of the TID) of that number of Consideration Shares the directors of Symbion Health resolve to distribute.

"Symbion" means Symbion Health Limited ACN 004 073 410 of Level 7, 5 Queens Road, Melbourne, VIC 3004. Unless the context otherwise indicates, a reference in this Undertaking to Symbion includes a reference to any of its related bodies corporate.

"Symbion Health Meeting Date" means the date that the meeting convened by Symbion in accordance with clause 7.2 of the TID for the purposes of Symbion Health Shareholders approving the Symbion Health Resolutions is held (or if the meeting is opened and then adjourned, the date on which the voting on the Symbion Health Resolutions takes place (or is concluded, if later)).

"Symbion Health Shareholders" means a person who is registered in the Symbion Health Share Register as a holder of Symbion Health Shares.

"Symbion Health Shares" means fully paid ordinary shares in the capital of Symbion.

"Symbion Health Share Register" means the register of members of Symbion maintained on behalf of Symbion in accordance with section 168(1) of the *Corporations Act 2001* (Cth)

"Symbion Health Resolutions" means:

- (a) (Capital Reduction) an:
 - (i) ordinary resolution of Symbion Health Shareholders approving the Capital Reduction for the purposes of section 256C(1) of the Corporations Act, in the form set out in section 1 of Schedule 3 of the TID (or in such other form as Symbion and Healthscope may agree in writing); and
 - (ii) ordinary resolution of Symbion Health Shareholders approving the resolution set out in section 2 of Schedule 3 of the TID (or in such other form as Symbion and Healthscope may agree in writing); and
- (b) any other approvals required by law, the Listing Rules, ASIC or ASX of Symbion Health Shareholders reasonably considered by Symbion as necessary in order to implement the Diagnostics Transaction.

"Symbion Healthcare Holdings" means Symbion Healthcare Holdings Pty Limited ACN 078 954 631.

"TID" means the Transaction Implementation Deed dated 8 October 2007 between Symbion and Healthscope (as amended).

"Undertaking" is a reference to all of the provisions of this document.

"Wangaratta Business" means Healthscope's pathology business conducted at Wangaratta, Victoria, as set out in item 3 of Schedule 2 of the Healthscope Undertaking.

2.2 Interpretation

The following rules of interpretation apply unless the context requires otherwise:

- (a) The following rules of interpretation apply:
 - (i) the singular includes the plural, and vice versa;
 - (ii) a gender includes all genders;
 - (iii) referring to anything after the words include, includes or including does not limit what else might be included;
 - (iv) a reference to "this Undertaking" is a reference to all the provisions of this document;
 - (v) a reference to dollars and \$ is to Australian currency; and
 - (vi) all references to time are to time in Melbourne, Australia.
- (b) In the interpretation of a clause of this Undertaking, a construction that would promote the purpose or object underlying this Undertaking (whether that purpose or object is expressly stated in this Undertaking or not) shall be preferred to a construction that would not promote the purpose or object.

- (c) In the interpretation of this Undertaking, material not forming part of this Undertaking may be considered if that material is capable of assisting in the ascertainment of the meaning or context of a clause of this Undertaking in order to:
- (i) confirm that the meaning of a clause is the ordinary meaning conveyed by the text of the clause taking into account its context in this Undertaking and the competition concerns intended to be addressed by this Undertaking and the clause in question; or
 - (ii) determine the meaning of a clause when the ordinary meaning conveyed by the text of the clause taking into account its context in this Undertaking and the purpose or object underlying this Undertaking leads to a result that does not promote the purpose or object underlying this Undertaking.
- (d) In determining whether consideration should be given to any material in accordance with clause 2.2(c), or in considering any weight to be given to any such material, regard shall be had, in addition to any other relevant matters, to:
- (i) the effect that reliance on the ordinary meaning conveyed by the text of the clause would have (taking into account its context in this Undertaking and whether that meaning promotes the purpose or object of this Undertaking); and
 - (ii) the need to ensure that the result of this Undertaking is to address the Commission's competition concerns.
- (e) The Commission may authorise the Mergers Review Committee, a member of the Commission or a member of the Commission staff, to exercise a decision making function under this Undertaking on its behalf and that authorisation may be subject to any conditions which the Commission may impose.
- (f) This Undertaking does not prevent the Commission from taking enforcement action at any time during or after the period of this Undertaking in respect of any breach by Symbion of any term of this Undertaking.

3. Commencement of Undertaking and Termination

3.1 Commencement

This Undertaking comes into effect when:

- (a) it has been executed by Symbion; and
- (b) it has been accepted by the Commission,

(Commencement Date).

4. Obligation not to hinder or prevent compliance with Healthscope Undertaking

During the Pre-registration Period Symbion will not in any way hinder or prevent compliance by Healthscope, or by any of Healthscope's Related Bodies Corporate, with the Healthscope Undertaking.

5. Restrictions on voting on Consideration Shares

5.1 Voting Restrictions on Consideration Shares

Subject to clause 5.2 of this Undertaking, Symbion will not exercise any right to vote (or appoint any proxy to exercise any right to vote), or any other right (including any right to distribute, trade or sell the Consideration Shares, but excluding the right to distribute the Consideration Shares to Participating Shareholders and the nominee contemplated by clause 5.8 of the TID), in respect of any of the Consideration Shares during the period from the time of issue of the Consideration Shares until the Consideration Shares are distributed to (and all of the Consideration Shares have actually been registered in the names of) Participating Shareholders and the nominee contemplated by clause 5.8 of the TID.

5.2 Exception of Voting Restrictions on Consideration Shares

Notwithstanding clause 5.1 of this Undertaking, and subject to clause 4, Symbion may exercise a right to vote on the Consideration Shares:

- (a) while a dividend (or part of a dividend) in respect of any of the Consideration Shares is unpaid;
- (b) on a proposal to reduce Healthscope's share capital;
- (c) on a resolution to approve the terms of a buy-back agreement;
- (d) on a proposal that affects the rights attached to any of the Consideration Shares;
- (e) on a proposal to wind Healthscope up;
- (f) on a proposal for the disposal of the whole of Healthscope's property, business and undertaking; or
- (g) during Healthscope's winding up,

in which case Symbion may exercise its right to vote at its discretion (or appoint a proxy to do so).

6. Notices

6.1 General

- (a) Any notice, demand, consent or other communication given or made under this Undertaking to the Commission should be sent to:

Australian Competition & Consumer Commission
Attention: General Manager, Mergers and Asset Sales
Address: GPO Box 3131, Canberra ACT 2601
Fax No: +61 2 6243 1212

or to any other address which the Commission subsequently notifies to Symbion.

- (b) Any notice, demand, consent or other communication given or made under this Undertaking to Symbion should be sent to the address or fax number below or the address or fax number last notified by the intended recipient to the sender:

Symbion Health Limited
Attention: The Company Secretary

Address: Level 7, 5 Queens Road, Melbourne, VIC, 3004, Australia
Fax No: + 61 3 9918 2867

Copied to: Clayton Utz, Level 19, 1 O'Connell Street, Sydney, NSW
2000, Australia
Fax number: +61 2 8220 6700
For the attention of: Linda Evans/Kirsten Webb

or to any other address which Symbion subsequently notifies to the Commission.

6.2 Notification of expiry of Pre-registration Period

Symbion will notify the Commission of the expiry of the Pre-registration Period within 5 Business Days of that expiry.

7. Disclosure

Symbion acknowledges that:

- (a) the Commission will make this Undertaking available for public inspection; and
- (b) from time to time publicly refer to this Undertaking.

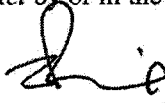
8. Compliance and Further Information

- (a) At the Commission's direction, Symbion will, and will procure that its directors, employees, agents or contractors identified by the Commission will:
 - (i) furnish information to the Commission;
 - (ii) produce documents to the Commission within Healthscope's custody, control or power; and/or
 - (iii) attend the Commission at a time and place appointed by the Commission to answer any questions the Commission, its Commissioners, staff or agents may have;as directed by the Commission in relation to this Undertaking.
- (b) Nothing in clause 8(a) requires the provision of information in respect of which Symbion has a claim of legal professional privilege.

9. Costs

All costs incurred by Symbion in providing information to the Commission, in responding to Commission inquiries as required by this Undertaking and in complying with this Undertaking are to be paid by Symbion.

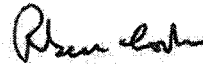
Executed by **Symbion Health Limited ACN**
004 073 410 in accordance with section 127 of the
Corporations Act by or in the presence of:



Signature of Secretary/~~other Director~~

Timothy Angus Paine

Name of Secretary/~~other Director~~ in full



Signature of Director ~~or Sole Director and~~
~~Secretary~~

Robert John Cooke

Name of Director ~~or Sole Director and~~
~~Secretary~~ in full

Accepted by the **Australian Competition and Consumer Commission** pursuant to Section 87B
of the *Trade Practices Act 1974*.



Graeme Julian Samuel
Chairman

25 October 2007

Date