

Undertakings to the Commerce Commission under s 46A of the Fair Trading Act 1986

Johnson & Johnson (New Zealand) Limited

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1 Person giving Undertakings

- 1.1 These Undertakings are given to the Commerce Commission (**Commission**) for the purposes of s 46A of the Fair Trading Act 1986 (**FTA**) by Johnson & Johnson (New Zealand) Limited (**JJNZ**), a company incorporated in New Zealand having its registered office at 507 Mt Wellington Highway, Mt Wellington, Auckland.
- 1.2 In these Undertakings, **Undertaking Party** means JJNZ.

2 Background

- 2.1 These Undertakings serve to resolve the investigation by the Commission of the Neutrogena Sensitive Skin SPF60+ Sunscreen product (**Sensitive Skin Product**) and the Neutrogena Pure & Free Baby SPF60+ Sunscreen product (**Baby Product**) (together referred to as the **Products**), marketed in New Zealand by JJNZ (the **investigation**).
- 2.2 The labels on the Products claim a Sun Protection Factor (**SPF**) of '60+'. The SPF value is a measure used to indicate to consumers how much longer they could expect to be exposed to UV radiation before burning relative to UV exposure without sunscreen, when the product is applied as directed. Products with high SPF values offer greater protection than products with low SPF values.
- 2.3 The Products have been formulated to provide sunscreen protection for consumers who perceive their skin as being sensitive. The Products use the active ingredients of 4.9% Titanium Dioxide (**TiO₂**) and 4.7% Zinc oxide (**ZnO**). These active ingredients are non-reactive and stay on the skin's surface without penetration, therefore minimising the risk of contact dermatitis and irritation.
- 2.4 In New Zealand sunscreens are currently classified as cosmetics and do not require pre-approval or consent before marketing but, to ensure SPF labelling is not false and misleading, all sunscreens must be tested and compliant with a globally recognised sunscreen standard. Many sunscreens in New Zealand comply with the 'AS/NZ 2604:2012 standard' (**AS/NZ standard**). However multiple standards are recognised and may be legally used for SPF determination. Some sunscreens, including the Products, comply with the American 'Federal Drug Administration final rule 2011 Standard' (**FDA standard**).
- 2.5 The investigation resulted from a complaint made by Consumer New Zealand (**CNZ**) who tested the Sensitive Skin Product as part of an investigation into the efficacy of various sunscreens in late 2014. The CNZ test results suggested that the Sensitive Skin Product had an SPF value of significantly less than the label claim using the AS/NZ standard
- 2.6 The Undertaking Party, JJNZ, disagreed and provided evidence to both CNZ and the Commission of independent testing results which showed the Sensitive Skin Product did have an SPF of greater than 60 when tested using the FDA standard. Furthermore, the Undertaking Party advised the Commission that ongoing monitoring of consumer complaints data did not reveal a pattern of sub-standard performance.

- 2.7 The Commission conducted several independent tests of the SPF level on the Sensitive Skin Product and the results were provided to and discussed with the Undertaking Party.
- 2.8 The Commission retained concerns that the Sensitive Skin Product had been represented as having an SPF of more than 60, when its testing could not replicate the result.
- 2.9 The Commission was of the opinion that the conduct may have been a breach of sections 10, 13(a) and 13(e) of the FTA, that is, it was:
- (a) liable to mislead the public as to the nature or characteristics of the Products;
 - (b) a false or misleading representation that goods are of a particular standard; and/or
 - (c) a false or misleading representation that goods have a particular performance characteristic.
- 2.10 The Undertaking Party considered that the SPF rating was justifiable and correct as testing had been conducted by a credible and recognised independent laboratory, and that variation between different testing laboratories and different testing standards explained the variation between the results.
- 2.11 On 8 September 2016 the Commission issued a stop now letter requesting that the Sensitive Skin Product not be supplied in the New Zealand market. Prior to receipt of the letter, JJNZ had, for independent commercial reasons, decided in April 2016 to discontinue the Products in New Zealand. Since 9 September 2016, JJNZ has ceased to supply the Sensitive Skin Product in New Zealand. JJNZ also independently chose to cease the supply of the Baby Product. On 27 September 2016, JJNZ voluntarily initiated a trade withdrawal of the Products in New Zealand.
- 2.12 To resolve the investigation, the Undertaking Party, without any admission to a breach of the FTA or otherwise, offered to provide enforceable undertakings to ensure that a consistent sunscreen standard was applied going forward, even though multiple standards are recognised in New Zealand and may be legally used for SPF determination.

3 Purpose of the Undertakings

- 3.1 These Undertakings are given by the Undertaking Party:
- (a) in order to improve consistency in the standard applied for SPF testing and rating of sunscreens sold in the New Zealand market;
 - (b) noting that the AS/NZ standard is a mandatory standard for all sunscreens sold on the Australian market;
 - (c) noting that many sunscreen suppliers in New Zealand test their sunscreens to the AS/NZ standard and that the undertaking will therefore improve consistency across sunscreens in New Zealand;
 - (d) noting that 'Johnson & Johnson Pacific' sunscreen products sold in Australia are tested to the AS/NZ standard and that the undertaking will therefore harmonise testing standards of sunscreens across the 'Johnson & Johnson Pacific' range in New Zealand and Australia;

- (e) to assist the Commission to ensure the Undertaking Party maintains this consistency in the future; and
- (f) acknowledging that multiple standards may be legally used for SPF determination in New Zealand.

3.2 The Commission considers New Zealand consumers will make better informed choices about sunscreen as a result of these Undertakings.

4 Undertakings

- 4.1 The Undertaking Party undertakes to the Commission that it will from 31 December 2017 only sell sunscreen products in New Zealand that are SPF tested and rated in accordance with the AS/NZ standard.
- 4.2 For the purposes of this undertaking, 'sunscreen products' refers to any good which makes an SPF representation.

5 Effect of the Undertakings

- 5.1 The Undertakings are:
 - (a) Court enforceable undertakings in terms of s 46A of the FTA; and
 - (b) made without any admission of liability by the Undertaking Party as to the conduct described in section 2 above or otherwise.

6 Commencement of Undertakings

- 6.1 The Undertakings come into effect when:
 - (a) executed by the Undertaking Party; and
 - (b) the Commission confirms its acceptance of the Undertakings.

7 Duration of the Undertakings

- 7.1 These Undertakings will continue to have effect until the earlier of:
 - (a) five years from the date of acceptance;
 - (b) the Commission agrees to discharge the Undertaking Party from the Undertakings; or
 - (c) a regulatory reform coming into force such that the AS/NZ standard, or some other standard, or otherwise, becomes mandatory in New Zealand.

8 Compliance with the Undertakings

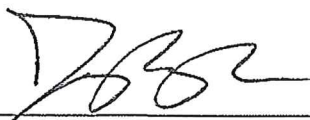
- 8.1 If the Undertaking Party becomes aware of a material breach of these Undertakings, whether advertent or inadvertent, it will notify the Commission within seven days of becoming aware, giving full particulars of the breach.
- 8.2 For the avoidance of doubt, nothing in paragraph 8.1 above prevents the Commission from directly seeking any information from the Undertaking Party to which it is entitled at any time during the course of any criminal and/or civil proceedings for the purpose of checking compliance with the Undertakings.

9 Miscellaneous

- 9.1 No amendment to the Undertakings will be effective unless it is in writing, executed by the Undertaking Party, and signed as accepted by the Commission.
- 9.2 These Undertakings are properly executed if JJNZ signs the same copy, or separate identical copies of the execution page. Where separate copies are signed on behalf of the Undertaking Party and the Commission, the signed copy can be the original document, or a faxed or emailed copy.
- 9.3 The Undertaking Party acknowledges that:
- (a) The Commission may make the Undertakings publicly available including by publishing them on the Commission's enforcement response register on its website.
 - (b) The Commission may make public reference to the Undertakings including in news media statements and in the Commission's publications.
 - (c) Nothing in the Undertakings is intended to restrict the right of the Commission, or the right of any other person, to take action under the FTA or under any other statute or law.

Execution

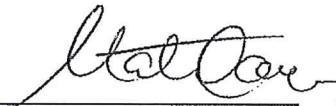
Signed by and on behalf of Johnson & Johnson
(New Zealand) Limited



Authorised signatory

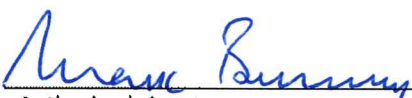
Doug Cunningham

Name

In the presence of: 
Witness Name: Mark Joseph McMillan
Witness Address: 45 Jones Street Ultimo NSW 2007
Witness Occupation: Customer Logistics Coordinator
Date: 22/12/2017

Acceptance


Accepted by the Commerce Commission by



Authorised signatory

MARK NEWMAN BERRY

Name

In the presence of: 
Witness Name: Belinda Kew
Witness Address: 2/69A Waipā Street, Birkenhead, Auckland
Witness Occupation: Executive Assistant
Date: 22.12.2017