

## **Determination**

### **Thermo Fisher Scientific Inc. and Life Technologies Corporation [2013] NZCC 26**

- The Commission:** Anita Mazzoleni  
Elisabeth Welson  
Dr Jill Walker
- Summary of application:** Thermo Fisher Scientific Inc. seeks clearance for Polpis Merger Sub Co (a wholly owned subsidiary of Thermo Fisher Scientific Inc.), or nominee, to amalgamate with Life Technologies Corporation to form a merged entity that would be a wholly owned subsidiary of Thermo Fisher Scientific Inc.
- Determination:** Under section 66(3)(a) of the Commerce Act 1986, the Commerce Commission gives clearance for Thermo Fisher Scientific Inc. to acquire Life Technologies Corporation subject to the divestment undertaking dated 18 December 2013 provided by Thermo Fisher Scientific Inc. under section 69A of the Commerce Act 1986
- Date of determination:** 19 December 2013

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Confidential material in this report has been removed. Its location in the document is denoted by [ ].

## The proposal

1. On 7 November 2013 Thermo Fisher Scientific Inc. (Thermo Fisher) applied for clearance<sup>1</sup> for a nominated subsidiary of Thermo Fisher to amalgamate with Life Technologies Corporation (Life Technologies) (the proposed acquisition). The newly formed merged entity would be a wholly owned subsidiary of Thermo Fisher.
2. In New Zealand, the proposed acquisition would result in Thermo Fisher acquiring direct or indirect control of Life Technologies New Zealand Limited. By agreement with Thermo Fisher, a decision on the application was required by 20 December 2013.
3. The proposed acquisition is a global transaction that has also been examined by agencies in other jurisdictions. When Thermo Fisher applied for clearance in New Zealand, agencies in other jurisdictions had already identified competition concerns with the proposed acquisition and Thermo Fisher was in discussions with these agencies with respect to remedies.
4. Given this fact and the commercial timeframes within which Thermo Fisher sought a decision on its application, on 18 December 2013 Thermo Fisher<sup>2</sup> provided an undertaking to divest its New Zealand cell culture assets.
5. In these reasons we set out our assessment of the divestment proposal, including whether it is likely to remedy any competition concerns arising in New Zealand as a result of the proposed acquisition.

## Our framework

6. Our approach to analysing the competition effects of the proposed acquisition is based on the principles set out in our Mergers and Acquisitions Guidelines.<sup>3</sup>

## The substantial lessening of competition test

7. As required by the Commerce Act 1986, we assess mergers using the substantial lessening of competition test.
8. We determine whether a merger is likely to substantially lessen competition in a market by comparing the likely state of competition if the merger proceeds (the scenario with the merger, often referred to as the factual), with the likely state of competition if the merger does not proceed (the scenario without the merger, often referred to as the counterfactual).<sup>4</sup>
9. A lessening of competition is generally the same as an increase in market power. Market power is the ability to raise price above the price that would exist in a

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<sup>1</sup> Under s 66 of the Commerce Act 1986.

<sup>2</sup> Under s 69A of the Commerce Act 1986.

<sup>3</sup> Commerce Commission, *Mergers and Acquisitions Guidelines*, July 2013.

<sup>4</sup> *Commerce Commission v Woolworths Limited* (2008) 12 TCLR 194 (CA) at [63].

competitive market (the ‘competitive price’),<sup>5</sup> or reduce non-price factors such as quality or service below competitive levels.

10. Determining the scope of the relevant market or markets can be an important tool in determining whether a substantial lessening of competition is likely.
11. We define markets in the way that we consider best isolates the key competition issues that arise from the merger. In many cases this may not require us to precisely define the boundaries of a market. A relevant market is ultimately determined, in the words of the Act, as a matter of fact and commercial common sense.<sup>6</sup>

### **When a lessening of competition is substantial**

12. Only a lessening of competition that is substantial is prohibited. A lessening of competition will be substantial if it is real, of substance, or more than nominal.<sup>7</sup> Some courts have used the word ‘material’ to describe a lessening of competition that is substantial.<sup>8</sup>
13. Consequently, there is no bright line that separates a lessening of competition that is substantial from one that is not. What is substantial is a matter of judgement and depends on the facts of each case. Ultimately, we assess whether competition will be substantially lessened by asking whether consumers in the relevant market(s) are likely to be adversely affected in a material way.

### **When a substantial lessening of competition is likely**

14. A substantial lessening of competition is ‘likely’ if there is a real and substantial risk, or a real chance, that it will occur. This requires that a substantial lessening of competition is more than a possibility, but does not mean that the effect needs to be more likely than not to occur.<sup>9</sup>

### **The clearance test**

15. We must clear a merger if we are satisfied that the merger would not be likely to substantially lessen competition in any market.<sup>10</sup> If we are not satisfied – including if we are left in doubt – we must decline to clear the merger.<sup>11</sup>
16. We may accept undertakings to dispose of assets or shares.<sup>12</sup> If divestment undertakings are accepted by us, they are deemed to form part of the clearance.

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<sup>5</sup> Or below competitive levels in a merger between buyers.

<sup>6</sup> Section 3(1A). See also *Brambles v Commerce Commission* (2003) 10 TCLR 868 at [81].

<sup>7</sup> *Woolworths & Ors v Commerce Commission* (2008) 8 NZBLC 102,128 (HC) at [127].

<sup>8</sup> *Ibid* at [129].

<sup>9</sup> *Ibid* at [111].

<sup>10</sup> Commerce Act 1986, s 66(1) of the Commerce Act 1986.

<sup>11</sup> In *Commerce Commission v Woolworths Limited* (CA), above n 4 at [98], the Court held that “the existence of a ‘doubt’ corresponds to a failure to exclude a real chance of a substantial lessening of competition”. However, the Court also indicated at [97] that we should make factual assessments using the balance of probabilities.

17. As set out in our divestment guidelines,<sup>13</sup> upon receiving a divestment undertaking we will consider whether the proposed divestment is sufficient to remedy any substantial lessening of competition that would otherwise arise.

## Parties

### Thermo Fisher Scientific Inc. (Thermo Fisher)

18. Thermo Fisher is a diversified, global manufacturing company with headquarters in the United States of America. Thermo Fisher's principal activity is the production and sale of scientific and analytical instruments, consumables and other products for use in research, diagnostics and analysis.
19. Thermo Fisher's key business in New Zealand involves the supply of a range of scientific products, including life sciences products. For the year ended 31 December 2012, Thermo Fisher's New Zealand revenue was \$[ ]. Its New Zealand business includes cell culture sera processing facilities in Tauranga and Christchurch with a combined annual production capacity of [ ] litres and output of approximately [ ] litres.

### Life Technologies Corporation (Life Technologies)

20. Life Technologies is a global biotechnology company also headquartered in the United States of America. Life Technologies is active in the production and supply of technologies for a range of life science applications.
21. Life Technologies' business in New Zealand specialises in the manufacture, sale and distribution of life science and bio-medical products. For the year ended 31 December 2012, Life Technologies' New Zealand revenue was \$[ ]. Its New Zealand business includes cell culture sera processing facilities in Auckland and Christchurch with a combined annual production capacity of [ ] litres and output of approximately [ ] litres.

## Market definition

### Our approach to market definition

22. Market definition is a tool that provides a framework to help identify and assess the close competitive constraints the merged firm would likely face. Determining the relevant market requires us to judge whether, for example, two products are sufficiently close substitutes as a matter of fact and commercial common sense to fall within the same market.
23. To help us establish whether customers would switch sufficient purchases to alternative products, we use the hypothetical monopolist test as a conceptual tool. This test asks whether a hypothetical sole supplier of a set of products would profitably increase prices for at least one of the merging firms' products by at least a

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<sup>12</sup> Under s 69A(2) of the Commerce Act 1986 we are only able to accept structural undertakings. This means that we are unable to accept behavioural undertakings.

<sup>13</sup> Commerce Commission, *Mergers and Acquisitions Guidelines*, Attachment F, July 2013.

small, but significant, amount.<sup>14</sup> This small, but significant, amount is often referred to as a SSNIP – a small, but significant, non-transitory increase in price.

24. In general, the smallest set of products in which the SSNIP can be profitably sustained is defined as the relevant product market.

### Relevant overlapping product markets

25. Thermo Fisher submitted that the proposed acquisition would result in overlap in a number of product markets both globally and in New Zealand. These areas of overlap are outlined in table 1 below.

**Table 1: Areas of overlap**

Category of overlap	Products affected
Cell culture	Cell culture media and sera <sup>15</sup> , and standard process liquids.
Protein Biology	Cell lysis detergents, cell lysis reagents, cell lysis inhibitors, SDS-PAGE products (vertical gel boxes, horizontal gel boxes, power supplies, gel stains), western blotting products (membranes, chemiluminescent substrates), enzyme-linked immunosorbent assays, protein modification products (chemical modification reagents, proteases), primary antibodies, secondary antibodies, biotin reagents, streptavidin and avidin reagents, reactive dyes, and detection kits.
Molecular Biology	Cloning enzymes, restriction enzymes, modifying enzymes, magnetic bead instruments, horizontal gel boxes, thermal cyclers (for PCR applications), qPCR instruments, Taq polymerase, other thermostable DNA polymerase (excluding Taq polymerase), high fidelity polymerase, hot start polymerase, other speciality polymerase, PCR kits, RT PCR kits, dye-based qPCR kits, consumables, home-brew agarose, silica NA purification kits, standalone probes and assays, standard PCR reagents, and deoxynucleotide triphosphates.
Transplant Diagnostics	Human leukocyte antigen (HLA) typing kits.
'Other overlap areas'	SDS-PAGE pre-cast gels and nucleic acid standards.

Source: Thermo Fisher

<sup>14</sup> The test assumes that all other prices are held at current levels.

<sup>15</sup> Sera are used in cell cultures to stimulate cell reproduction. Foetal bovine serum is by far the most widely used sera. Other types of sera include calf serum, adult bovine serum, sera from other animal species, and engineered sera products.

*Protein biology, molecular biology and 'other overlap areas'*

26. Thermo Fisher submitted that the degree of aggregation between the parties is very minor and therefore no substantial lessening of competition was likely for protein biology, molecular biology and the SDS-PAGE pre-cast gels and nucleic acid standards.
27. During the course of our investigation, no concerns were raised in regard to these areas of minor overlap. Customers were satisfied that sufficient competitive alternatives would remain with the acquisition. Furthermore, the degree of aggregation is such that overlap in these areas would fall well within the Commission's concentration indicators.<sup>16</sup>
28. However, overseas agencies identified competition concerns with respect to two molecular biology products:
- 28.1 gene silencing effectors (eg, siRNA); and
- 28.2 magnetic beads.
29. While these products raised competition concerns in some overseas jurisdictions, we have not identified any competition concerns in New Zealand with respect to these products. Compared to other countries, there is limited overlap in respect of these products in New Zealand. [
- ]
30. We note that even if we are incorrect in our assessment of the impact of the proposed merger on the supply of siRNA and magnetic beads, any potential lessening of competition would be mitigated by Thermo Fisher's commitment to divestment undertakings for those products to remedy the concerns of overseas agencies.
31. On this basis we do not consider these areas of overlap any further in this decision.

*Transplant diagnostics*

32. With respect to HLA typing kits, Thermo Fisher and Life Technologies each currently supply a different type of HLA typing kit in New Zealand. We consider that the kits are not functional substitutes for each other.
33. Nevertheless, we considered the extent to which the parties are developing new HLA typing kits, such that they might compete with each other in this area in the future. In this regard, there appear to be a number of other competitors in the supply of

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<sup>16</sup> We further note that overseas agencies did not identify any concerns that the merged entity would be able to bundle any of these products with other products and foreclose competitors.

HLA typing kits, such that any removal of potential future competition is unlikely to be substantial.<sup>17</sup>

34. On this basis we do not consider transplant diagnostics any further in this decision.

*Cell culture – Foetal bovine serum (FBS)*

35. Thermo Fisher and Life Technologies are both active in the sale of foetal bovine serum (FBS) to customers in New Zealand under the brand names HyClone and Gibco respectively. Customers use FBS in research and/or bio-production applications.
36. FBS is produced from raw foetal bovine blood, a by-product of the meat processing industry extracted and collected at abattoirs. Thermo Fisher and Life Technologies procure this raw material from abattoirs [ ].
37. Thermo Fisher submitted that the relevant market for considering the competition implications of the proposed acquisition is one focused on the supply of New Zealand and Australian sourced FBS to New Zealand bio-production and research customers.
38. However, Thermo Fisher conceded that the relevant market may be narrower in scope because:
- 38.1 [ ], and therefore the market could be limited to the supply of New Zealand sourced FBS; and
- 38.2 Thermo Fisher does not supply FBS to New Zealand bio-production customers, [ ] and therefore the market of concern could be limited to sales to research customers.

*Our view of the relevant FBS market*

39. We consider that it is appropriate to assess the competition impacts of the proposed acquisition in the national market for the supply of New Zealand sourced FBS.
40. In general, sera-free products are not substitutes for sera. Although sera-free products can in some cases be substituted for sera, in practice customers do not consider these alternatives to be cost-effective or practical substitutes.
41. In regard to serum itself, sera are typically categorised by the animal from which the sera are extracted. Different sera appear to be preferred for different uses and substitution between the sera does not appear to occur. FBS is the most widely used and available bovine sera.

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<sup>17</sup> Overseas agencies similarly did not find any competition concerns with respect to HLA typing kits.



42. Customers have told us that they prefer New Zealand sourced FBS for its quality and traceability.<sup>18</sup> New Zealand sourced FBS is of high quality due to the low risk of bovine disease contamination.<sup>19</sup> Although overseas sourced FBS may be a functional substitute for New Zealand sourced FBS, the regulatory requirements for importation increases the cost and difficulty of supply. [ ]
43. The principal FBS customers are research institutions and pharmaceutical manufacturing companies (bio-production customers). Bio-production customers require larger volumes of FBS than research customers and therefore generally constitute the most important sales channel for suppliers.
44. We understand that FBS customer groups have different preferences regarding FBS supply. Bio-production customers are more concerned with traceability and quality of FBS because they have strict regulatory requirements regarding the inputs into their pharmaceutical products. Research customers prioritise pricing and consistency of supply.<sup>20</sup>
45. However, there do not appear to be any significant obstacles for a supplier to offer FBS to both customer types. Even if price discrimination occurs, markets are defined to identify the different competitive alternatives available to customers and so it is appropriate in this case to consider these customer types together.

## **With and without scenarios**

### **With the acquisition**

46. With the acquisition, Thermo Fisher would amalgamate with Life Technologies Corporation to form a merged entity that would be a wholly owned subsidiary of Thermo Fisher Scientific Inc. As a result, Thermo Fisher would obtain control of the Life Technology business.

### **Without the acquisition**

47. We consider that without the acquisition, the likely scenario is the status quo.

## **Assessment of the proposed divestment**

48. We consider that the proposed divestment is likely to remedy any competition concerns in the national market for the supply of New Zealand sourced FBS by

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<sup>18</sup> Traceability refers to the identification of the source of the serum. That is, the location of the animal from which the serum was extracted.

<sup>19</sup> This is because mad cow disease, foot and mouth disease, and other cattle diseases have not been known to occur in New Zealand in recent history. The same is true for Australia, such that Australian sourced FBS is also of high quality.

<sup>20</sup> There is currently no overlap between the parties with respect to the supply of FBS to bio-production customers in New Zealand as Thermo Fisher does not supply any FBS to bio-production customers in New Zealand. However, we do not exclude the possibility of Thermo Fisher supplying bio-production customers in New Zealand in the future as obstacles for a supplier to offer FBS to both customer types appear to be low.

providing sufficient constraint on the merged entity to remove any potential competitive harm.

49. We have found no significant risks associated with the divestment.

### **Potential competitive harm**

50. When Thermo Fisher submitted its application for clearance overseas, agencies had already identified competition concerns regarding the supply of FBS. Some concerns were also identified by New Zealand customers during our investigation.
51. Below we summarise the potential competitive harm from the acquisition, absent the proposed divestment, including the issues identified by overseas agencies and their findings.

#### *Existing competition*

52. Thermo Fisher submitted that the total value of the national market for the supply of New Zealand sourced FBS is \$[ ] per year. Most FBS produced in New Zealand is exported.
53. With the acquisition, Thermo Fisher submitted that its market share would increase from [ ]% to [ ]%. It also submitted that it would continue to face strong competition from existing market participants, including Sigma-Aldrich.<sup>21 22</sup>
54. We focused on interviewing research customers where both the merging parties are existing supply options. Customers we spoke to expressed concern regarding the proposed merger as it would result in the removal of Life Technologies as an independent competitor. Life Technologies is seen by some customers as providing a superior product as it has a longer shelf life and provides greater surety of supply.
55. Life Technologies is also seen by customers to be one of the three main companies who are selling New Zealand sourced FBS to research customers in New Zealand, with Thermo Fisher and Moregate Biotech being the others.<sup>23</sup> Some customers expressed concerns regarding Moregate's ability to source sufficient FBS as they see it as a small competitor.
56. Customers also considered that the proposed merger would lessen Thermo Fisher's incentives to sell to New Zealand based research customers in favour of larger, more lucrative sales to overseas based bio-production customers.

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<sup>21</sup> Interviews with customers have not confirmed the presence of Sigma-Aldrich as a strong competitor in the supply of New Zealand sourced FBS in New Zealand.

<sup>22</sup> [

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<sup>23</sup> According to its website, Moregate supplies "tens of thousands of litres" of FBS worldwide per annum. It has production facilities in Hamilton and Australia, and sells both Australian and New Zealand sourced FBS.

*Potential competition*

57. Thermo Fisher submitted that there are a number of credible paths to new entry into the national market for the supply of New Zealand sourced FBS, such that potential competition would provide a further constraint on the merged entity.
58. Overseas agencies did not consider that the merged entity would be constrained by potential competition. They found that there were a number of barriers to entry to supplying FBS, including brand reputation and access to raw foetal bovine blood. They also found that abattoirs were unlikely to possess the facilities and technical expertise necessary to themselves produce and supply FBS.
59. These same conditions of entry may apply to a firm seeking to supply New Zealand sourced FBS to New Zealand customers.
60. We note that prior to the proposed acquisition arising, at least one meat processing company in New Zealand was already involved in the production and supply of FBS.<sup>24</sup> However, there was no evidence before us that other meat companies planned to follow suit.<sup>25</sup>

**The proposed divestment undertaking**

61. We have assessed the composition, asset and purchaser risks associated with Thermo Fisher's divestment proposal in accordance with our guidelines.<sup>26</sup>
62. We consider that the divestment proposal submitted by Thermo Fisher does not present a significant level of composition or asset risk. There are sufficient safeguards in place to ensure that the assets will not deteriorate and the makeup of the divestiture business is such that the eventual purchaser will be able to offer the full suite of cell culture products currently offered by Thermo Fisher.
63. We consider that the divestment package proposed by Thermo Fisher presents some level of purchaser risk, given the lack of a confirmed upfront buyer. However, for the reasons set out below, we do not consider that this purchaser risk is materially different to any other divestment package where there is no upfront buyer.
64. We have assessed the potential purchasers of the divestiture business and we are satisfied that suitably experienced and independent purchasers exist for the divestiture business.

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<sup>24</sup> [ ]

<sup>25</sup> [ ]

<sup>26</sup> Commerce Commission, *Mergers and Acquisitions Guidelines*, Attachment F, July 2013.

*The divestment offer*

65. On 18 December 2013 we received an undertaking from Thermo Fisher (Attachment A), under s 69A of the Act that Thermo Fisher would divest its New Zealand cell culture business.
66. Thermo Fisher is proposing to divest:
- 66.1 the Hyclone sera and media facility located in Omokoroa, Tauranga, New Zealand;
  - 66.2 subject to the consent of the owner, use of the processing facility located in [ ], including all contracts, licences and rights to use the facility;
  - 66.3 all intellectual property, technology, and know-how, including research and development associated with the Tauranga and [ ] facilities and its New Zealand sera and media operations;
  - 66.4 at the option of the purchaser, all dedicated sera and media manufacturing employees associated with the facilities and its New Zealand sera and media operations;
  - 66.5 all relevant supply chain associated with the facilities and its New Zealand sera and media operations;
  - 66.6 all inventory associated with the facilities and its New Zealand sera and media operations;
  - 66.7 all customer and supplier contracts associated with the facilities and its New Zealand sera and media operations;
  - 66.8 all existing distributor and dealer arrangements associated with the facilities and its New Zealand sera and media operations; and
  - 66.9 all licences, permits and/or other regulatory approvals associated with the facilities and its New Zealand sera and media operations.

*Composition risks*

67. Composition risks are risks that a divestment proposal may be too limited in scope, or not appropriately configured, to attract either a suitable purchaser or to allow a successful business to be operated in competition with the merged entity.
68. We consider that given the makeup of the divestment business, the divestee would have the ability to supply the market with cell culture media and sera products.
69. We consider that the scope of the proposed divestment is sufficiently wide as it covers the entirety of Thermo Fisher's media and sera business in New Zealand. Key factors such as intellectual property rights and customer details are included and the

successful purchaser will take over all of Thermo Fisher's existing contracts and customers in New Zealand.

70. We consider that the scope of the divestment undertaking is sufficient to enable the purchaser to offer a competitive alternative to the merged entity in the national market for the supply of New Zealand sourced FBS.

*Asset risks*

71. Asset risks are risks that the competitive capability of a divestment business will deteriorate prior to completion of the divestment.
72. Under the divestment undertaking:
- 72.1 Thermo Fisher undertakes to preserve the economic viability of the divestment business and to hold it separate from the business it is retaining;
- 72.2 until closing, under the supervision of the monitoring trustee, a hold separate manager will manage the business independently to ensure its continued marketability and competitiveness; and
- 72.3 Thermo Fisher has undertaken to divest its business within [ ] of acquiring Life Technologies.
73. In order to monitor the progress of Thermo Fisher's compliance with the undertaking, we will receive a copy of each monitoring trustee report provided to the European Commission. We also have the ability to ask the monitoring trustee for further information and documents if required.
74. We consider that there is little risk of asset deterioration prior to divestment.

*Purchaser risks*

75. We consider the the main purchaser risks to be that:
- 75.1 a purchaser acceptable to us may not be available, and/or
- 75.2 the Applicant has an incentive to sell to a weak competitor for a low price rather than to a strong competitor.
76. In some cases there may be little or no interest from potential purchasers. This might indicate that the assets are unattractive to potential purchasers which may cast doubt on the effectiveness of the undertaking.
77. A buyer acceptable to us needs to have certain attributes that enable it to be an effective competitor in the relevant market. Examples of attributes that may make a buyer acceptable are set out below.
- 77.1 it is independent of the merged entity;

- 77.2 it possesses or has access to the necessary expertise, experience and resources to be an effective long term competitor in the market; and
- 77.3 the acquisition of the divested shares or assets by the proposed buyer does not raise competition concerns.
78. Thermo Fisher informed us that [ ] parties were currently being considered as potential purchasers of the divestment business: [ ].
79. We understand that potential purchasers of the divestment business are [ ].
80. All of the companies listed above are active in the life sciences industry and supply complementary products and services to the divestiture business.
81. In addition, all of the companies are large, well-resourced firms with strong track records in the life sciences industry. We are satisfied that all of them would have the experience, expertise and resources to be an effective long term competitor in the market. Similarly, we are satisfied that all the potential purchasers are independent of the merged entity.
82. As with any divestment proposal where there is no upfront purchaser, we consider that the package presented by Thermo Fisher carries some level of purchaser risk. However, the level of purchaser risk is not sufficient to outweigh our conclusion that the divestment proposal is likely to remedy any competition concerns in the national market for the supply of New Zealand sourced FBS.

### **Overall conclusion**

83. We are satisfied that the proposed acquisition with the divestment, will not have, or would not be likely to have, the effect of substantially lessening competition.

### **Determination on notice of clearance**

84. Pursuant to s 66(3)(a) of the Commerce Act 1986, the Commerce Commission determines to give clearance to Thermo Fisher Scientific Inc. to acquire Life Technologies Corporation subject to the divestment undertaking dated 18 December 2013 provided by Thermo Fisher Scientific Inc. under s 69A of the Commerce Act 1986.

Dated this 19<sup>th</sup> day of December 2013

Anita Mazzoleni  
Commissioner

## **Attachment A: Divestment undertaking**



DEED dated 18 December 2013

## PARTIES

**THERMO FISHER SCIENTIFIC INC.** ("Thermo Fisher")

**THE COMMERCE COMMISSION** ("Commission")

## INTRODUCTION

- A. On 7 November 2013, Thermo Fisher gave notice to the Commerce Commission ("**Commission**") pursuant to section 66(1) of the Commerce Act 1986 ("**Act**") seeking clearance (the "**Clearance Application**") for the proposed amalgamation of Polpis Merger Sub Co (a wholly owned subsidiary of Thermo Fisher), or nominee, and Life Technologies Corporation ("**Life Technologies**") (the "**Merger**").
- B. On 26 November 2013, the European Commission granted clearance for the Merger conditional on the divestment of certain businesses, including Thermo Fisher's HyClone cell culture business, as described in exhibit A to the EC Commitments.
- C. Thermo Fisher offers the Commission, as part of the Clearance Application, the divestment undertakings in the form of this deed, pursuant to section 69A of the Act.

## OPERATIVE PROVISIONS

1. **Definitions:** In this deed, unless the context otherwise requires:
  - (a) "**ACCC**" means the Australian Competition and Consumer Commission.
  - (b) "**Approved Purchaser**" means a person approved by the Commission in accordance with clause 4.
  - (c) "**Divestiture Date**" means the date [**CONFIDENTIAL**] after completion of the Merger.
  - (d) "**Divestiture Trustee**" means one or more natural or legal person(s), independent of Thermo Fisher and Life Technologies, who is approved by the EC and appointed by Thermo Fisher and who has received from Thermo Fisher the mandate to carry out the Global Divestiture at no minimum price.
  - (e) "**EC**" means the European Commission.

- (f) **"EC Commitments"** means Thermo Fisher's commitments to the EC dated 19 November 2013, a copy of which is **annexed** to this deed.
- (g) **"FTC"** means the Federal Trade Commission.
- (h) **"Global Divestiture"** means the divestiture to which Thermo Fisher has committed in accordance with exhibit A to the EC Commitments.
- (i) **"Material Change"** means any change to the structure, attributes, extent or operations of a business associated with the New Zealand Cell Culture Assets that may materially affect, or impact on, that business' competitiveness, independence from Thermo Fisher and viability.
- (j) **"Material Contract"** means any contract, arrangement or understanding necessary for the operation of a business associated with the New Zealand Cell Culture Assets, whether or not in writing.
- (k) **"Monitoring Trustee"** means the one or more natural or legal person(s), independent of Thermo Fisher and Life Technologies, who is approved by the EC and appointed by Thermo Fisher, and who has the duty to monitor Thermo Fisher's compliance with the conditions and obligations in the EC Commitments.
- (l) **"New Zealand Cell Culture Assets"** means the assets described in the schedule to this deed.
- (m) **"New Zealand Cell Culture Assets Divestiture Completion Date"** means the date on which completion of the divestiture of the New Zealand Cell Culture Assets by Thermo Fisher to the Approved Purchaser takes place.
- (n) **"Proposed Purchaser"** means a person that Thermo Fisher provides details of, pursuant to clause 4, to the Commission for the purposes of the Commission deciding whether to approve that person as an Approved Purchaser.
- (o) **"working day"** has the meaning given in section 29 of the Interpretation Act 1999.

2. **Divestment to the Approved Purchaser:** Before the Divestiture Date, Thermo Fisher will divest, or cause the divestiture of, the New Zealand Cell Culture Assets to the Approved Purchaser on terms which include:

- (a) the sale, assignment (to the extent assignable), transfer or licence, to the Approved Purchaser of all assets that comprise the New Zealand Cell Culture Assets, including any Material Contracts;
- (b) at the option of the Approved Purchaser, the transfer to the Approved Purchaser of:
  - (i) employees employed in the operation of the businesses associated with the New Zealand Cell Culture Assets at the time of the sale; and
  - (ii) any service provider under a service contractwho are, in each case necessary for the operation of the businesses associated with the New Zealand Cell Culture Assets and who agree to the transfer;
- (c) at the option of the Approved Purchaser, interim arrangements for the supply or toll manufacturing of media sold in SUT bags, in relation to which Thermo Fisher will ensure the reasonable and continuous supply of media sold in SUT bags for the term of the arrangements and that the supply or toll manufacturing is:
  - (i) for a reasonable period to enable the Approved Purchaser to be established as a competitive, viable and independent business, which period is to be nominated by the Approved Purchaser and approved by the Commission; and
  - (ii) provided at current transfer costs (which are above cost) or as otherwise agreed with Approved Purchaser; and
  - (iii) on such other terms which are no less favourable to the Approved Purchaser than arm's length terms; and
  - (iv) notified to the Commission.

3. **Divestment only to Approved Purchaser:** Thermo Fisher will only divest the New Zealand Cell Culture Assets pursuant to clause 2 to an Approved Purchaser, and will not authorise the Divestiture Trustee to divest the New Zealand Cell Culture Assets to a purchaser other than an Approved Purchaser.

4. **Process for approving Proposed Purchaser:** Thermo Fisher will seek to have the Proposed Purchaser(s) approved by the Commission by providing the Commission with a written notice containing:
- (a) the name, address, telephone number and any other available contact details of the Proposed Purchaser(s);
  - (b) a copy of the draft sale and purchase agreement that Thermo Fisher proposes to enter into with the Proposed Purchaser(s);
  - (c) a description of the business carried on by the Proposed Purchaser(s), including the locations at which the Proposed Purchaser(s) carries on business;
  - (d) details of the experience in the relevant market of the Proposed Purchaser(s);
  - (e) the names of the director(s) of the Proposed Purchaser(s) and information as to the ownership of the Proposed Purchaser(s).

Such notice will be provided to the Commission no later than **[CONFIDENTIAL]** working days prior to the Divestiture Date so that the Commission may advise Thermo Fisher, in writing and within **[CONFIDENTIAL]** working days of receipt of such notice, whether the Proposed Purchaser would be considered by the Commission to be an Approved Purchaser if it were to purchase the New Zealand Cell Culture Assets.

5. **Maintenance of the New Zealand Cell Culture Assets:**
- (a) From the completion of the Merger, Thermo Fisher will not sell or transfer its interest in the New Zealand Cell Culture Assets, or make any Material Change, except in accordance with this deed.
  - (b) Until the Divestiture Date, Thermo Fisher will take such actions as are necessary to maintain the economic viability, marketability and competitiveness of the New Zealand Cell Culture Assets.
6. **Confidential Information:**
- (a) Subject to subclauses 6(b) and 6(c), Thermo Fisher will not, at any time from the completion of the Merger, use or disclose any confidential information about the New Zealand Cell Culture Assets gained through:
    - (i) the ownership and/or management of the New Zealand Cell Culture Assets; or

- (ii) the provision of any services or technical assistance to the Approved Purchaser of the New Zealand Cell Culture Assets.
- (b) Clause 6(a) does not apply to information that Thermo Fisher must use or disclose in order to comply with legal and regulatory obligations, including obligations relating to:
  - (i) taxation;
  - (ii) accounting; and
  - (iii) the Companies Office, the Financial Markets Authority, or stock exchange disclosure obligations.
- (c) Clause 6(a) does not apply to information that Thermo Fisher must use or disclose in order to carry out its obligations under this deed, including its obligations to divest or cause the divestiture of the New Zealand Cell Culture Assets, or to maintain the economic viability, marketability and competitiveness of the New Zealand Cell Culture Assets, provided such information:
  - (i) is only made available to those officers, employees, contractors and advisers of Thermo Fisher who need to know the information for the purpose of ensuring compliance with this deed; and
  - (ii) is not used for any other purpose.

7. **Failure to divest the New Zealand Cell Culture Assets within the Divestiture Period:**

- (a) **Sale of unsold New Zealand Cell Culture Assets:** In the event that the sale of the New Zealand Cell Culture Assets (being a component of the Global Divestiture) to an Approved Purchaser is not completed by the end of the Divestiture Period, Thermo Fisher will appoint a Divestiture Trustee, consistent with the EC Commitments.
- (b) **Appointment of a Divestiture Trustee:** Thermo Fisher will procure that the terms of appointment of the Divestiture Trustee include obligations to the effect that the Divestiture Trustee will divest the New Zealand Cell Culture Assets to an Approved Purchaser.

8. **Monitoring Trustee's reports:** Thermo Fisher will procure that the Monitoring Trustee provide to the Commission a copy of each report (including any confidential version)

provided to the EC that indicates that the progress of Thermo Fisher's compliance with the EC Commitments within [CONFIDENTIAL] working days of providing such a report to the EC.

9. **Information:**

- (a) Subject to all necessary merger clearances being received in sufficient time for the notice period to apply, Thermo Fisher will notify the Commission in writing of the date which Thermo Fisher anticipates will be the New Zealand Cell Culture Assets Divestiture Completion Date at least [CONFIDENTIAL] working days before that date.
- (b) Thermo Fisher will notify the Commission in writing of the occurrence of:
  - (i) the completion of the Merger within [CONFIDENTIAL] days of the completion of the Merger; and
  - (ii) the divestiture of the New Zealand Cell Culture Assets within [CONFIDENTIAL] working days of the New Zealand Cell Culture Assets Divestiture Completion Date.
- (c) Thermo Fisher will provide the Commission with a copy of the executed sale and purchase agreement, and any other agreements between Thermo Fisher and an Approved Purchaser relating to the sale of the New Zealand Cell Culture Assets within [CONFIDENTIAL] working days of any such agreement being executed.
- (d) The Commission may direct Thermo Fisher in respect of its compliance with this deed to, and Thermo Fisher will:
  - (i) furnish information to the Commission in the time and in the form requested by the Commission;
  - (ii) produce information, documents and materials to the Commission within Thermo Fisher's custody, power or control in the time and in the form requested by the Commission; and/or
  - (iii) direct its personnel, including its directors, contractors, managers, officers, employees and agents, to attend the Commission at a time and place appointed by the Commission to answer any questions the Commission (including its commissioners, its staff or its agents) may have.

- (e) In respect of Thermo Fisher's compliance with this deed, the Commission may request the Divestiture Trustee or Monitoring Trustee to:
  - (i) furnish information to the Commission in the time and in the form requested by the Commission;
  - (ii) produce information, documents and materials to the Commission within the Monitoring Trustee or Divestiture Trustee's custody, power or control in the time and in the form requested by the Commission; and/or
  - (iii) attend the Commission at a time and place appointed by the Commission to answer any questions the Commission (including its Commissioners, its staff or its agents) may have.
- (f) Thermo Fisher will use its best endeavours to ensure that the Divestiture Trustee or Monitoring Trustee complies with any request from the Commission in accordance with clause 9(e).
- (g) Any direction made by the Commission under clause 9(d) will be notified to Thermo Fisher in accordance with clause 14(b).

10. **Disclosure of deed:**

- (a) Thermo Fisher and the Commission agree that the Commission will at all times treat as confidential all information in this deed (including the schedule) that is marked as confidential.
- (b) Nothing in the confidential parts of this deed prevents the Commission from disclosing such information as:
  - (i) is required by law;
  - (ii) is necessary for the purpose of enforcement action under section 85A and/or section 85B of the Act.
  - (iii) is necessary for the purpose of making such market inquiries as the Commission thinks fit to assess the impact on competition arising in connection with this deed.
- (c) Nothing in the confidential parts of this deed prevents the Commission from using the information contained in this deed for any purpose consistent with its statutory functions and powers.

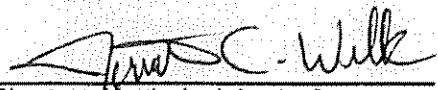
- (d) This clause 10 shall survive the termination of this deed.
11. **Obligation to procure:** Where the performance of an obligation under this deed requires a related body corporate of Thermo Fisher to take or refrain from taking some action, Thermo Fisher will procure that related body corporate to take or refrain from taking that action, as the case may be.
12. **Governing law:** This deed shall be governed by, and construed in accordance with, the laws of New Zealand and each party hereby irrevocably submits to the exclusive jurisdiction of the courts of New Zealand in respect of enforcement of this deed.
13. **Binding relations:** This deed is intended to create binding and enforceable legal obligations in relation to and for the benefit of the Commission. Thermo Fisher may, with the written consent of the Commission, vary this deed at any time.
14. **Notice:**
- (a) Any notice or communication to the Commission required pursuant to this deed will be given by Thermo Fisher sending it by email to [registrar@comcom.govt.nz](mailto:registrar@comcom.govt.nz). If receipt of any communication is disputed, Thermo Fisher may evidence that a communication has been received by the Commission if Thermo Fisher produces a printed copy of an email which evidences that the communication was sent to the email address specified above by Thermo Fisher or its legal counsel, with the time and date specified on the email being evidence of the timing of provision of the communication to the Commission
- (b) Any notice or communication to Thermo Fisher pursuant to this deed shall be sent to:
- Russell McVeagh  
PO Box 8  
AUCKLAND 1140
- Attention: Sarah Keene  
Telephone: 09 367 8133  
Fax: 09 367 8595  
Email: [sarah.keene@russellmcveagh.com](mailto:sarah.keene@russellmcveagh.com)

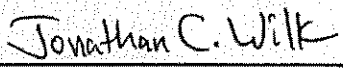


**CONFIDENTIAL VERSION**  
*Confidential information is highlighted in blue*

**SIGNED AS A DEED**

**THERMO FISHER SCIENTIFIC INC. by:**

  
\_\_\_\_\_  
Signature of [authorised signatory]

  
\_\_\_\_\_  
Name of [authorised signatory]

**SCHEDULE****NEW ZEALAND CELL CULTURE ASSETS**

The New Zealand Cell Culture Assets include:

- (a) **HyClone sera and media facility located in Omokoroa, Tauranga, New Zealand ("the Tauranga facility").**

The Tauranga facility is located at 433 Old Highway, Omokoroa, Tauranga, New Zealand. The facility is owned by Thermo Fisher Scientific Tauranga Limited, a wholly owned subsidiary of Thermo Fisher.

This cGMP<sup>1</sup> site is used to process and manufacture New Zealand foetal bovine serum ("FBS"), New Zealand calf sera and New Zealand adult bovine sera. It is composed of 17,000 square feet across multiple buildings that include manufacturing lines (filtration, freezers, incubators, pooling tank, filling equipment and packaging equipment) as well as supply chain and operations infrastructure (shipping and logistics, quality assurance and inventory control). The facility has an annual production capacity of [CONFIDENTIAL]. Its utilisation rate in 2012 was [CONFIDENTIAL] percent, and its output was [CONFIDENTIAL] litres of FBS, [CONFIDENTIAL] litres of calf sera and [CONFIDENTIAL] litres of adult bovine sera.

- (b) **Use of the processing facility located in [CONFIDENTIAL]**

Thermo Fisher will transfer to the Approved Purchaser all contracts, licences and rights to use the [CONFIDENTIAL] facility, subject to the consent of the owner of the facility, [CONFIDENTIAL], if required. Thermo Fisher will also transfer to the Approved Purchaser all sera and media equipment owned by Thermo Fisher and located at the [CONFIDENTIAL] facility.

- (c) **All intellectual property, technology, and know-how, including research and development associated with the Tauranga facility and the [CONFIDENTIAL] facility (together the "Facilities"), and Thermo Fisher's New Zealand sera and media operations.**

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<sup>1</sup> cGMP or Current Good Manufacturing Practices are regulations enforced by the US Food and Drug Administration. cGMP provide for systems that assure proper design, monitoring, and control of manufacturing processes and facilities. Adherence to the cGMP regulations assures the identity, strength, quality, and purity of drug products by requiring that manufacturers of medications adequately control manufacturing operations. This includes establishing strong quality management systems, obtaining appropriate quality raw materials, establishing robust operating procedures, detecting and investigating product quality deviations, and maintaining reliable testing laboratories.

Thermo Fisher will transfer to the Approved Purchaser any material proprietary information kept as trade secrets relating to the manufacturing of sera and media products. **[CONFIDENTIAL]**

The HyClone and HyQ brands will be divested subject to a limited licence back to Thermo Fisher for a period of two years:

- to use the HyClone/HyQ name for the single use technologies (SUT) business. **[CONFIDENTIAL]**; and
- to use "HyClone" or "HyQ" in any relevant pre-existing company or legal entity names. **[CONFIDENTIAL]**

- (d) **All dedicated sera and media manufacturing employees** associated with the Facilities and Thermo Fisher's New Zealand sera and media operations, at the option of the Approved Purchaser pursuant to clause 2(b)(i) of this deed.
- (e) **All relevant supply chain** associated with the Facilities and Thermo Fisher's sera and media operations. **[CONFIDENTIAL]** Thermo Fisher Scientific New Zealand Limited will, at the Approved Purchaser's request, provide transitional arrangements for distribution services to the HyClone cell culture business for a period of 12 months after divestment in order to ensure the viability and competitiveness of the HyClone cell culture business (as discussed in more detail in paragraph (h) below).
- (f) **All inventory** associated with the Facilities and Thermo Fisher's New Zealand sera and media operations.

The Tauranga facility currently has US\$ **[CONFIDENTIAL]** in inventory as at 2 December 2013.

- (g) **All customer and supplier contracts** associated with the Facilities and Thermo Fisher's New Zealand sera and media operations. Thermo Fisher notes that as at 4 December 2013 there are **[CONFIDENTIAL]** customer contracts associated with the Facilities and its sera and media operations, as follows:

- (i) **[CONFIDENTIAL]**;
- (ii) **[CONFIDENTIAL]**;
- (iii) **[CONFIDENTIAL]**

- (h) **All existing distributor/dealer arrangements** associated with the Facilities and Thermo Fisher's New Zealand sera and media operations. In particular, Thermo Fisher Scientific (New Zealand) will, at the Approved Purchaser's request, continue to provide the benefit of all current arrangements (on terms and conditions equivalent to those at present) pursuant to which it currently provides distribution services to the HyClone cell culture business for a transitional period of 12 months after divestment in order to ensure the viability and competitiveness of the HyClone cell culture business.  
**[CONFIDENTIAL]**
- (i) **All licences, permits and/or other regulatory approvals** associated with the Facilities and Thermo Fisher's New Zealand sera and media operations.

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