



MINISTRY OF BUSINESS,
INNOVATION & EMPLOYMENT
HĪKINA WHAKATUTUKI

Memorandum of Understanding-Building Product Assurance

between

the Commerce Commission

and

**the Ministry of Business, Innovation
and Employment**



This memorandum of understanding (MoU)

Between the Commerce Commission (the Commission)

And the Ministry of Business, Innovation and Employment (MBIE)

each a “Party” and together, the “Parties”

PURPOSE OF THIS MEMORANDUM

1. The purpose of this MoU is to provide a framework for a formal relationship of cooperation and information sharing between the Commission and MBIE’s Building System Delivery and Assurance (BSDA) to enable effective and efficient performance of each agency’s regulatory functions, particularly in respect of matters where the Parties have a joint interest.
2. This MoU sets out the framework for cooperation and information sharing. Schedules that accompany this MoU set out the protocols relating to each Party’s particular regulatory functions, powers and information sharing activities.
3. Recent changes to the Building Act 2004 (“Building Act”) by the Building (Building Products and Methods, Modular Components, and Other Matters) Amendment Act 2021 (“Building Amendment Act”) introduced a new offence under section 362VC relating to false, misleading and unsubstantiated claims about building products. New Regulations impose minimum information requirements for building product manufacturers and suppliers. MBIE now also has additional regulatory powers and a greater level of responsibility for building product assurance, including for the CodeMark and BuiltReady schemes. These new powers are likely to intersect with some of the Commission’s functions and powers. Accordingly, the MoU is also intended to better define, formalise and demarcate the various regulatory functions of each Party.
4. Given these are new statutory requirements MBIE will focus on engagement with regulated parties and other stakeholders, providing education to the sector about what is required for them to achieve regulatory compliance, enabling regulated parties by providing information about best practices and regulatory requirements, and taking appropriate enforcement action where non-compliance is identified.

BACKGROUND AND LEGISLATIVE CONTEXT

5. The Commission is an independent Crown entity established under section 8 of the Commerce Act 1986 with statutory functions under that and other statutes including the Fair Trading Act 1986 (“Fair Trading Act”).
6. The Commission administers and enforces laws relating to competition, fair trading, consumer credit and economic regulation. Through the enforcement of the Fair Trading Act, the Commission helps to ensure that the interests of consumers are protected, accurate and clear information is provided to them, and businesses

compete effectively. The Fair Trading Act prohibits certain unfair conduct and practices in relation to trade, provides for the disclosure of consumer information in relation to the supply of goods and services and promotes safety in respect to goods and services.

7. The Fair Trading Act prohibits misleading and deceptive conduct, false or unsubstantiated representations, unfair contract terms, unfair practices and non-compliance with product safety and consumer information standards by people in trade. The amended Building Act now also prohibits misleading, false and unsubstantiated representations about building products. There are additional consumer protections under the common law of tort (negligence).
8. Under the Fair Trading Act, the Consumer Services Product Safety team at MBIE may arrange a compulsory recall for building products with identified safety or quality issues. A recall may also involve issuing advice for consumers of the need to have their product upgraded or repaired, or the supplier sending out additional components or instructions to customers.
9. MBIE is New Zealand's building regulator and administers the building regulatory system by way of the Building Act, Regulations (including the New Zealand Building Code) and Rules. The 'building regulatory system' is all the laws, rules, obligations, relationships, interventions, and activities that work together to ensure safe, durable and sustainable building in Aotearoa New Zealand.
10. The Building Act was recently amended by the Building (Building Products and Methods, Modular Components, and Other Matters) Amendment Act 2021. The amendments impacted the regulation of building products through strengthening the product certification scheme (CodeMark New Zealand), introducing the Modular Component Manufacturer certification scheme (BuiltReady), introducing a new offence of false, misleading and unsubstantiated claims about building products, providing new powers to compel information and documents and information sharing, and introducing new minimum Building Product Information Requirements ("BPIRs").
11. The Building (Building Product Information Requirements) Regulations 2022 were made by Order in Council on 7 June 2022 and commenced on 11 December 2023. The new requirements are intended to improve the quality and consistency of the information provided with designated building products, including how they contribute to compliance with the Building Code, and how they should be used, installed and maintained.
12. These legislative changes have resulted in MBIE having a greater degree of oversight and responsibility in relation to building product assurance. The changes also impact those who manufacture and supply building products to market in so far as their role, obligations and responsibilities are more clearly recognised and defined.

13. The new and existing powers, penalties and offences in the Building Act 2004 and relevant regulations are set out in **Schedule 1** of the MOU. In summary, the new suite of powers allows MBIE to:
 - 13.1 issue a notice to take corrective action, which requires a person to take actions to remedy the non-compliance, or ensure that the non-compliance is not continued or repeated;
 - 13.2 issue an infringement notice;
 - 13.3 carry out an investigation and prosecution.
14. The applicable powers, penalties and offences in the Fair Trading Act potentially relevant for conduct relating to building products and services are set out in **Schedule 1** of the MOU.
15. Across MBIE, a number of teams deliver and support the regulation of building products. The Building System Delivery and Assurance (BSDA), part of Te Whakatairanga Service Delivery branch at MBIE, monitor the building products market, assess complaints about building products, product information and claims made about building products, and investigate and carry out education, monitoring, compliance and enforcement actions where deemed necessary.
16. BSDA's *Product Assurance Compliance Strategy* sets out MBIE's approach for regulating building products under the Building Act. The Strategy provides an overview of the BPIRs and discusses the opportunities which shape the future of building product regulation. It also recognises that MBIE's role in regulating building products includes overlaps and intersections with other central agencies, such as the Commerce Commission and WorkSafe New Zealand.

COOPERATION PRINCIPLES

17. Where, and to the extent, appropriate, practicable and permitted by law the Parties will:
 - 17.1 Refer complaints to the other agency where appropriate;
 - 17.2 Raise issues promptly and respond promptly to requests by or other contact from the other;
 - 17.3 Work together, so far as is practicable, to improve the effectiveness and efficiency of our investigations and enforcement in areas of shared jurisdiction, particularly where there is a possibility that MBIE and the Commission may undertake joint investigations;
 - 17.4 Communicate in an open, honest and timely manner;
 - 17.5 In areas of shared jurisdiction, discuss complaints and/or issues in an open and timely manner to jointly decide whether MBIE and/or the Commission

will take the lead to undertake investigations relating to a building product or method that is not already covered by paragraph 20.

- 17.6 Share information about matters such as investigative processes and timing of matters in which the Parties both have an interest;
 - 17.7 Provide information and advice where it will assist the other party in the performance of its statutory functions, powers or obligations, and as contemplated by this MoU and section 207BA of the Building Act, including but not limited to as described in **Schedule 2**;
 - 17.8 Where applicable, share staff training and development opportunities and provide mutual operational support;
 - 17.9 Work together to avoid duplication of expenditure of taxpayer-funded resources;
 - 17.10 Advise each other in advance of actions to be taken, or proposed to be taken, of which the other might reasonably expect to be advised;
 - 17.11 Where either party identifies a risk or potential risk falling within the jurisdiction of the other, pass relevant information to the other party in a timely manner;
 - 17.12 Advise each other's Relationship Manager of any operational or policy concerns;
 - 17.13 Implement policies, procedures and systems as appropriate to support the operation of this MoU;
 - 17.14 Consult with the other, where and to the extent practicable, before publishing information or comment regarding transactions described in **Schedule 2**.
18. Our relationship recognises the Kia Tutahi Relationship Accord (The Relationship Accord between the Communities of Aotearoa New Zealand and the Government of New Zealand). To this end, when engaging with the sector, members of the wider community and Iwi the Parties will:
- 18.1 act honestly and in good faith;
 - 18.2 practise open and timely communication;
 - 18.3 work collaboratively and constructively;
 - 18.4 recognise our collective responsibilities;
 - 18.5 seek to understand each other's responsibilities;
 - 18.6 seek to build trust and mutual respect and be inclusive; and

- 18.7 encourage quality and innovation to achieve positive outcomes.
19. Where, and to the extent, appropriate, practicable and permitted by law, having regard to regulatory policy and legislative development, the Parties will:
- 19.1 Advise the other of any material proposed changes in legislation, regulatory policy, consultation, guidance, or decisions on regulation that may materially impact on the objectives and/or functions of the other.
- 19.2 Notify the other if the implementation of legislation, regulatory policy, guidance, or decisions on regulation by one party may impact on the objectives and/or functions of the other.
20. Where appropriate, practicable and permitted by law, MBIE will take the lead on building product or building method investigations that are technically complex in nature, which may serve to inform future amendments to the Building Code and/or potentially give rise to a warning or ban of a building product or building method, as outlined in **Schedule 1**. This includes complaints about false, misleading or unsubstantiated claims about building products (section 362VC); and complaints about misrepresentations about CodeMark (sections 272G and 272H) and BuiltReady (sections 272ZI and 272ZJ).

SHARED OR JOINT JURISDICTION

21. Both parties recognise that, in particular, co-operation between them is desirable to assist in their roles and responsibilities where there is potential for intersecting jurisdiction.
22. When dealing with any matters that involve intersecting jurisdiction, MBIE and the Commission will adhere to the cooperation principles set out above.

INFORMATION SHARING PRINCIPLES

23. Both Parties gather a wide range of information in order to give effect to the responsibilities they have, including to protect people, buildings and to ensure regulatory compliance of building products, building methods and building work, and in the case of the Commission and MBIE, to detect misrepresentation and criminal offending.
24. The Parties will work together including where they are considering matters in which they both have an interest. In particular, both Parties may consider the actions, conduct and behaviour of persons who have responsibilities or obligations in respect of building products under either of the respective regulatory regimes.
25. The Parties wish to record the operational protocols and statutory powers regarding cooperation and information sharing.
26. The Parties understand that how they collect and share information is fundamental to fostering trust and confidence in the public service. Each Party's policy on the collection, use and sharing of information is in accordance with the "Information

Gathering and Public Trust” Model Standards issued by the Public Service Commission on 18 December 2018 (as may be updated from time to time).

27. This Memorandum of Understanding (MOU) is to be publicly accessible and is to be published on each Party’s websites.

PROCESS AND PROTOCOLS FOR SHARING INFORMATION

28. The Parties acknowledge the importance of sharing information where practicable and to the extent permitted by law. However, the Parties will also be mindful of their obligations under the Privacy Act 2020, including principle 11(1)(e) of that Act, and other relevant legislation and published guidelines, when seeking to share information.
29. Under section 207BA of the Building Act, MBIE’s Chief Executive may provide relevant evidence to a regulatory body if the Chief Executive reasonably considers that the evidence is reasonably required by the regulatory body in the exercise of its powers or performance of its functions. Section 207BA(5) defines a regulatory body which includes the Commerce Commission to the extent it is exercising powers or performing functions in relation to building products, building methods, building designs, or building work.
30. Under section 99AA of the Commerce Act 1986, the Commission may provide a public service agency, such as MBIE, with information or a copy of any document it holds in relation to the exercise of the Commission’s statutory functions, powers, or duties, if it is satisfied that certain requirements have been met. Section 99AB sets out the conditions the Commission may impose when providing information or documents.
31. Requests for information from the other party should be made in writing to the Relationship Manager. Oral requests must be followed up by a written request as soon as practicable, or as agreed at the time of the request.
32. A Party may request information from the other for the purpose of facilitating the effective and efficient performance of that Party’s powers and regulatory functions. Requests for information will specify:
 - 32.1 the information requested (identifying the type of documents or information sought) and, where applicable, the statutory authority for requesting that information;
 - 32.2 the purpose for which the information is sought, including any background information necessary to understand and respond to the request;
 - 32.3 the timeframe in which the information is needed, and the reasons for any urgency requested;

- 32.4 any risks identified as part of any risk assessment, and any risk mitigation measures to be adopted;
 - 32.5 the names and contact details of the relevant individuals or case team of the requesting Party; and
 - 32.6 any other relevant matters.
- 33. The Parties will respond to requests for information as soon as is practicable or within the timeframe requested. In the case of an urgent request, the Parties will endeavour to consult to ensure a response to the request is expedited if possible.
 - 34. Where a Party holds the information requested but declines to provide it to the other Party, it will (to the extent it is able to do so) inform the other Party of the reason for declining the request.
 - 35. Before requesting information, a Party should consider whether the information is already in the public domain and can be obtained without the need for a formal request.
 - 36. The Parties may share confidential information where permissible by law and in accordance with the providing Party's policies.
 - 37. Obligations regarding the use, storage and retention of any information shared between the Parties are set out in **Schedule 2** to this MoU. The Parties may add further schedules to the MoU from time to time as they develop further specific procedures or matters of joint interest.

MAINTAINING CONFIDENTIALITY

- 38. Without prejudice to or limitation of any applicable legal principles, each Party will observe the strictest confidence in relation to information supplied under this MOU, or derived from or based on any such information, and any personal information (**Protected Information**). Neither Party will use or disclose Protected Information unless the use or disclosure is required by law, authorised by the other, or is otherwise required to fulfil that Party's statutory functions.
- 39. In particular, for the avoidance of doubt, disclosure by one Party to the other of any personal information under this MOU will be managed consistently with the Privacy Act 2020.

REPRESENTATIVES AND REVIEWS

40. Each Party will appoint a “Senior Representative” and a “Relationship Manager” to assist with the implementation of this MoU and the continuing relationship between the Parties. The Senior Representative and Relationship Manager for each party are:

Commerce Commission	MBIE
<p>Senior Representative General Manager, Fair Trading 44 The Terrace Wellington Telephone: (04) 924 3720</p>	<p>Senior Representative Head of Building System Delivery and Assurance Products@mbie.govt.nz Telephone: (04) 901 1499 Level 4, 15 Stout Street, PO Box 1473, Wellington 6140</p>
<p>Relationship Manager: Investigations and Compliance Manager, Fair Trading 44 The Terrace Wellington Telephone: (04) 924 3720</p>	<p>Relationship Manager: National Manager, Building Regulatory Delivery Products@mbie.govt.nz Telephone: (04) 901 1499 Level 4, 15 Stout Street, PO Box 1473, Wellington 6140</p>

41. Relationship Managers will:
- 41.1 be the first point of contact between the Parties with respect to the day-to-day implementation of this MoU;
 - 41.2 meet at least every six months, unless otherwise agreed, to discuss the progress of activities undertaken pursuant to this MoU, activity that could constitute current or future matters of joint interest, and any other matters relevant to the relationship between the Parties;
 - 41.3 develop or amend protocols relating to specific procedures and activities, as required; and
 - 41.4 notify each other of any changes to their representatives under this MoU.
42. The Parties’ Senior Representatives will meet at least every two years, or as otherwise agreed by the Parties, to review this MoU and schedules.

ISSUE OR DISPUTE RESOLUTION

43. All issues, disputes and differences between the Parties about the interpretation or performance of this MoU will be resolved at the earliest opportunity between the Relationship Managers themselves, wherever possible.
44. Only when matters remain unresolved or require further adjudication should they be referred to the Parties' Senior Representatives.
45. Each Party will raise any operational or policy concerns through appropriate internal channels at the other party.

COSTS

46. Unless the Parties mutually determine otherwise, the cost of meeting the commitments of this MoU shall be met by the Party incurring the cost.

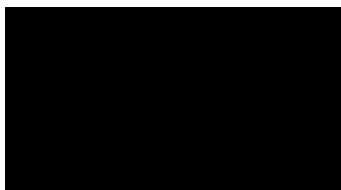
LEGAL

47. This MoU is non-binding and nothing in this MoU shall make either party liable for the actions of the other or constitute any legal relationship between the Parties.
48. The provisions in this MoU are to be read subject to any Chief Executive, Public Service Commission or Cabinet directives, and any enactment, regulations, rules or applicable case-law. For the avoidance of doubt, nothing in this MoU should be interpreted or applied inconsistently with either Party's statutory functions, powers or obligations.
49. Where there are changes to Government policy or legislation which affect the purpose and functions of this MoU, each Party agrees to inform the other of those changes at the earliest possible time thereafter and both Parties agree to meet to re-negotiate, if necessary, any aspects of the MoU.

COMMENCEMENT, AMENDMENT AND TERMINATION

50. This MoU will come into effect when signed by both Parties and will remain in effect until terminated by either Party (by giving 90 days' written notice) or by mutual consent.
51. All confidentiality commitments between the Parties will remain in effect despite any termination of the MOU.
52. The MOU may be amended by mutual written consent of the authorised representatives of the Parties.

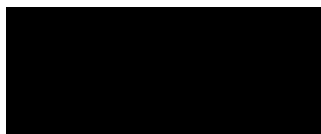
Signed by the Commerce Commission



Vanessa Horne
Acting Chief Executive
Commerce Commission

Date: 7th March 2024

Signed by MBIE



Simon Thomas
Head of Building System Delivery and Assurance
Ministry of Business, Innovation and Employment

Date: 18 December 2023

SCHEDULE 1

Regulatory tools relevant to building product compliance under the Building Act.

Regulatory Tool	Description	Section/s
General monitoring powers	The Act provides for MBIE to have access to all relevant information that is in the possession or control of any territorial authority, BCA, regional authority, registered product certification body or registered modular component manufacturer certification body.	(s) 204
Product certification scheme - CodeMark	MBIE may appoint a product certification accreditation body to accredit providers to issue product certificates (branded CodeMark), which must be accepted by BCAs as proof of compliance with the New Zealand Building Code. Product certification bodies and certificates must be registered by MBIE.	(s) 261-272F
	MBIE may take disciplinary action against a registered product certification body.	(s) 201, 203C
	Offence to misrepresent status as product certification body	(s) 272G
	Offence to misrepresent product certificate	(s) 272H
Modular Component Manufacturer scheme - BuiltReady	MBIE may appoint a modular component manufacturer accreditation body to accredit MCM certification bodies. MCM certification bodies and certified manufacturers must be registered by MBIE.	(s) 272I-272ZH
	MBIE may take disciplinary action against a registered MCM certification body.	(s) 201, 203C
	Offence to misrepresent status	(s) 272ZI
	Offence to misrepresent modular component as manufactured by registered MCM	(s) 272ZJ
Guidance Information	MBIE may publish guidance information for the purpose of assisting regulated parties and building owners in complying with the Act.	(s) 175
Determinations	MBIE can make decisions binding on the parties which confirm, reverse, or modify BCA decisions on certain issues relevant to building work or determine the matter to which it relates.	(s) 176-190
Warnings and bans	MBIE may issue a warning about, or ban the use of, building methods or products which have resulted, or are likely to result, in a building or building work failing to comply with the Building Code.	(s) 26-29
Powers, offences and penalties	MBIE can prosecute an offence where there are unsubstantiated or false or misleading representations made about building products.	(s) 362VC
	For the purposes of taking enforcement action, MBIE may also require a person to provide information or produce documents.	(s) 207A
	It is an offence to fail to provide information and documents as requested	(s) 207B
	MBIE can share information with other regulators	(s) 207BA
	Power of entry and inspection for investigative purposes	(s) 207BB
Building failure	MBIE can prosecute a number of offences related to carrying out a building failure investigation	(s) 207Q-207S

Prosecution offence for Failing to Comply with Building Product Information Requirements	A person who fails to comply is liable on conviction to a fine of up to \$10,000 for an individual, and \$30,000 for a body corporate.	(s) 362VB
Notice to Take Corrective Action	MBIE may issue a notice to take corrective action to a person if satisfied that the person has failed to comply with a building product information requirement. A person who fails to comply is liable on conviction to a fine of up to \$10,000 for an individual, and \$30,000 for a body corporate.	(s) 362VE-362VF
Defences	Defences for offences against sections 362VB and 362VC	(s) 362VD
Infringement offences for failing to comply with Building Product Information Requirements	Supplying, offering to supply or advertising the supply of building products without complying with the building product information requirements. \$1,000 offence Importing building products into New Zealand for the purposes of supply without complying with the building product information requirements. \$1,000 offence	Building (Infringement Offences, Fees, and Forms) Regulations 2007, Sch 1

Regulatory tools relevant to building product and service compliance under the Fair Trading Act

Regulatory Tool	Description	Section/s
Breaches of the Fair Trading Act	Unconscionable Conduct	S 7
	Misleading and deceptive conduct	ss 10, 11
	Unsubstantiated representations	s 12A
	False or misleading representations	s 13, 14(1) or 16.
	Unfair Practices , - Offering gifts, prizes or free items with the intention of not providing them or as offered. -Bait advertising – advertising goods or services not intended to offer for supply. -Referral selling - inducing another person to buy by offering some benefit (for example, a rebate or commission) in return for help in getting more customers. - Demanding or accepting payment without intending to supply as ordered. - Prohibition on asserting right to payment in respect of unsolicited goods or unsolicited services. - Misleading representations about the risk, profitability, or any other material particular of certain business activities. -Prohibition on Importation of goods bearing false trade description.	Ss 17,19,20,21, 21C,22 and 26

	Product Safety – The prohibitions under the Product Safety Part of the Fair Trading Act (Part 3) could potentially apply, but currently there is no Product Safety Standard or Unsafe Goods Notice issued in relation to a Building Product. Should a recall of a Building Product be required, the relevant sections may find application.	ss 30,31,32,33 and 33D
	The Rules applicable to the following Consumer Transactions (Part 4A) may apply in relation to Building Products: <ul style="list-style-type: none"> - Layby sale agreements, - Uninvited direct sale agreements, - Extended warranty agreements, and - Auctions. 	Ss 36C, 36D, 36L, 36U, 36ZB and 36ZD.
Enforcement and remedies	Powers- <ul style="list-style-type: none"> - If considered necessary or desirable for the purposes of carrying out its functions and exercising its powers under this Act, the Commission may, by notice in writing served on any person, require that person to provide information, supply documents or appear before the Commission and give evidence. - It is an offence to fail to provide information and documents or give evidence as requested. -The Commerce Commission may search premises to establish whether a person has been, or is currently, engaging in conduct which contravenes the Fair Trading Act or to gather evidence of conduct which does or may constitute a breach of the Fair Trading Act 	S 47, s 47G, s 47J,
	Penalties – <ul style="list-style-type: none"> - Contravention of certain provisions of Parts 1, 3 or 4 of the Fair trading Act is an offence and on conviction an individual is liable to a fine not exceeding \$200,000 and a body corporate to a fine not exceeding \$600,000. - Contravention of a provision of Parts 2 or 4A of the Fair trading Act is an offence and on conviction an individual is liable to a fine not exceeding \$10,000 and a body corporate to a fine not exceeding \$30,000. 	s 40
	Injunctive relief – <ul style="list-style-type: none"> - The Commission can apply to the Court for an injunction to restrain a person from engaging in conduct that constitutes or would constitute a contravention of any of the provisions of Parts 1 to 4 of the Fair Trading Act. 	S 41
	Corrective Advertising <ul style="list-style-type: none"> -The Commission can apply to the Court for an order requiring any person involved in a contravention to publish a corrective statement or advertisement. 	S 42
	Remedial orders. <ul style="list-style-type: none"> -The Court may make remedial orders on the application of any person or of its own volition if it finds that any person has suffered, or is likely to suffer, loss or damage because of another’s conduct that was in breach of Parts 1 -4A of the Fair Trading Act. 	S43
Defences	Available defences to a prosecution for an offence under s 40 of the Fair Trading Act is set out in s 44.	S 44

Schedule 2

Use, storage and retention of information

1. Any information shared between the Parties will:
 - 1.1 be used and kept by the receiving Party for legitimate purposes and in line with the law and that Party's policies, processes and systems,
 - 1.2 be held in accordance with any stated sensitivity, terms or restrictions requested in writing by the sharing Party at the time that the information is shared;
 - 1.3 be stored with appropriate security measures, whether the information is in electronic form, hard copy or otherwise.
2. Each party will upon request by the other party provide the first party with the other parties internal guidelines and policies relating to the use, storage and retention of information, together with any other information required to verify that the other party is meeting its obligation in paragraph 1 above.
3. Under section 207BA of the Building Act, MBIE's Chief Executive may provide relevant evidence to a regulatory body if the Chief Executive reasonably considers that the evidence is reasonably required by the regulatory body in the exercise of its powers or performance of its functions. Section 207BA(5) of the Building Act defines a regulatory body which includes the Commission to the extent it is exercising powers or performing functions in relation to building products, building methods, building designs, or building work.
4. Under section 99AA of the Commerce Act 1986, the Commission may provide a public service agency, such as MBIE, with information or a copy of any document it holds in relation to the exercise of the Commission's statutory functions, powers, or duties, if it is satisfied that certain requirements have been met. Section 99AB sets out the conditions the Commission may impose on the provision of the information or documents.
5. The Parties will retain any information shared in accordance with this MOU as required by the Public Records Act 2005.
6. The Parties agree that shared information may be disclosed by the receiving Party to a third-party only where the receiving Party has first obtained the consent of the other party, or where the receiving Party is legally required to disclose that information and has informed the other party of this requirement prior to disclosing the information.

7. The Parties acknowledge that:

7.1 If any criminal proceedings are initiated, the Criminal Disclosure Act 2008 will apply in relation to all relevant information held by the prosecuting party.

7.2 If any civil proceedings are initiated, the High Court Rules 2016 will apply in relation to all relevant information held by either party.