

Template Leniency Agreement

Parties

Commerce Commission (Commission), a body corporate established under section 8 of the Commerce Act 1986 (the Commerce Act)

and

[Company name] (*abbreviated company name*), a [company incorporated under the Companies Act 1993/ registered Overseas ASIC Company/ Overseas Non-ASIC Company/ Company number x] and having its registered office at [registered office as listed in the Companies Office register]

(together, the **parties**)

Preamble

This agreement records the terms on which the Commission grants continuing Leniency to [Company] and any Eligible Person. Leniency will continue provided [Company] and any Eligible Person comply with their obligations under this agreement.

Interpretation

- 1 For the purposes of this agreement:
 - 1.1 Application means any application made for Immunity and/or Leniency in relation to the Conduct, including amended or multiple applications;
 - 1.2 Conduct means the activities described in clause 3;
 - 1.3 Eligible Company means a [wholly owned or controlled subsidiary of [Company]], any company listed in Schedule 1, and any company that the Commission and [Company] agree in writing is included;
 - 1.4 Eligible Individual means:
 - 1.4.1 any natural person who is a current or former director, officer, contractor, agent or employee of [Company] or an Eligible Company;
 - 1.4.2 any natural person listed in Schedule 1; and
 - 1.4.3 any natural person who the Commission and [Company] agree in writing is included;
 - 1.5 Eligible Person means any Eligible Individual or Eligible Company;
 - 1.6 Enforcement Proceedings means any Commission initiated criminal prosecution, civil proceedings or other enforcement action relating to the Conduct or arising out of the Investigation under Part 2 of the Commerce Act;
 - 1.7 Immunity means the grant of immunity from criminal prosecution in relation to the Conduct awarded by the Solicitor-General;
 - 1.8 Information includes documents as defined in section 2(1) of the Commerce Act, statements, and evidence of any kind whatsoever, including all oral, written, and electronic material;
 - 1.9 Investigation means the Commission's inquiry into the Conduct or any related activities, including any possible breaches of section 103 of the Commerce Act, or any related offences under the Crimes Act 1961;
 - 1.10 Leniency means the Commission's undertaking not to bring any civil Enforcement Proceedings in relation to the Conduct, subject to [Company] and any Eligible Person's compliance with their obligations under this agreement;
 - 1.11 Other Proceedings means any Commission initiated criminal prosecution or other enforcement action arising out of the Investigation, including criminal prosecution for breaches of section 103 of the Commerce Act, or any related offences under the Crimes Act 1961;

1.12 Person includes a local authority, and any association of persons whether incorporated or not; and

1.13 Working Day has the definition as set out in section 2(1) of the Commerce Act.

[Add any additional definitions that apply to this investigation]

- 2 For the purposes of the conditions specified in clauses 6 – 10 below (the Leniency agreement conditions), a reference to the Commission includes a reference to the Solicitor-General or any Person acting on behalf of the Solicitor-General, such as a panel prosecutor appointed under section 107 of the Commerce Act.

Admission of Conduct

- 3 [Company] admits *[briefly detail the contravening conduct/agreement and substance of the conduct/agreement and state the applicant's role, eg. [Company] entered into an agreement with [party/ies] from [date] until [date] concerning [xx] which may breach section 27 via 30,¹ section 30 or section 82B of the Commerce Act]*.
- 4 [Company] warrants and represents that it and all Eligible Persons:
 - 4.1 have ceased, or will immediately on the Commission confirming to [Company] that it should cease, any involvement in the Conduct;
 - 4.2 did not coerce any person to participate in the Conduct; and
 - 4.3 have reported to the Commission all potential breaches of section 27 via 30,² section 30 or section 82B of the Commerce Act related to the Conduct of which it is aware at the date of this agreement, and provided to the Commission all evidence within its possession or control relevant to the potential breaches.

Scope of Leniency

- 5 Subject to their continued compliance with their obligations under this agreement, the Commission grants Leniency to:
 - 5.1 [Company]; and
 - 5.2 any Eligible Persons.

Leniency conditions for [Company]

- 6 Unless the Commission advises [Company] in writing, [Company] will:
 - 6.1 maintain continuous, complete and expeditious cooperation with the Commission throughout the Investigation and any Enforcement Proceedings;
 - 6.2 provide the Commission promptly and voluntarily with all Information available to it regarding the Conduct (including its formation, scope, existence and operation);
 - 6.3 preserve, and assist the Commission to retrieve, all Information related to the Conduct or the Investigation;
 - 6.4 use its best endeavours to secure the complete and truthful cooperation of Eligible Persons, including by informing all Eligible Persons (as notified to and agreed by the Commission) of their respective obligations under clauses 7 or 9, and 21 of the agreement;
 - 6.5 inform the Commission within five Working Days of any employees involved in the Conduct that [Company] knows are intending to leave [Company] ;

1. Prior to 15 August 2017, any conduct in breach of s 30 was deemed to be a breach of s 27. After 15 August 2017, any conduct in breach of s 30 is a breach in its own right. An exception to this is conduct involving a contract, arrangement or understanding that was entered into prior to 15 August 2017 but given effect to between 15 August 2017 and 15 May 2018; conduct of this type that is in breach of s 30 is deemed to be a breach of s 27.

2. Prior to 15 August 2017, any conduct in breach of s 30 was deemed to be a breach of s 27. After 15 August 2017, any conduct in breach of s 30 is a breach in its own right. An exception to this is conduct involving a contract, arrangement or understanding that was entered into prior to 15 August 2017 but given effect to between 15 August 2017 and 15 May 2018; conduct of this type that is in breach of s 30 is deemed to be a breach of s 27.

- 6.6 encourage and facilitate all Eligible Persons to voluntarily provide the Commission with any Information requested, and to appear for interviews and to give evidence in Court as requested by the Commission, even if the Eligible Persons are outside New Zealand (the interviews will usually be conducted in person at the Commission's Wellington or Auckland offices unless otherwise agreed by the Commission and [Company]);
- 6.7 act as directed by the Commission in relation to the Conduct; and
- 6.8 meet its own expenses incurred in the course of complying with its obligations under this agreement, including any reasonable and necessary expenses incurred by any Eligible Persons, including in seeking independent legal advice in the course of the Investigation, provided the Eligible Persons comply with their obligations under this agreement.

Leniency conditions for Eligible Individuals

- 7 To gain, and maintain, the benefit of Leniency, an Eligible Individual must:
 - 7.1 admit their role in the Conduct (to the best of their knowledge);
 - 7.2 maintain continuous, complete and expeditious cooperation with the Commission throughout the Investigation and any Enforcement Proceedings;
 - 7.3 when requested, provide the Commission promptly and voluntarily with all Information available to them regarding the existence, activities and operation of the Conduct;
 - 7.4 preserve, and assist the Commission to retrieve, all Information relating to the Conduct;
 - 7.5 make available to the Commission any personal Information which is relevant, or which the Commission considers may assist the Investigation or the Enforcement Proceedings;
 - 7.6 make themselves available for interviews and respond fully and truthfully to all the Commission's inquiries in relation to the Investigation and promptly inform the Commission of any changes in their employment situation and/or contact details;
 - 7.7 comply with clause 21 of this agreement;
 - 7.8 appear as a witness in any Enforcement Proceedings and provide full, frank and truthful evidence as to all matters within their knowledge, if required to do so by the Commission;
 - 7.9 act as directed by the Commission in relation to the Conduct; and
 - 7.10 certify in writing that they have complied with the conditions outlined above.
- 8 The obligations in clause 7 are continuing obligations and only cease when the Commission releases the Eligible Individual from those obligations in writing.

Leniency conditions for Eligible Companies

- 9 To gain, and maintain, the benefit of Leniency, an Eligible Company must:
 - 9.1 admit its role in the Conduct;
 - 9.2 maintain continuous, complete and expeditious cooperation with the Commission throughout the Investigation and any Enforcement Proceedings;
 - 9.3 when requested, provide the Commission promptly and voluntarily with all Information available to it regarding the existence, activities and operation of the Conduct;
 - 9.4 preserve, and assist the Commission to retrieve, all Information relating to the Conduct;
 - 9.5 when requested, use its best endeavours to secure the complete and truthful cooperation of its Eligible Individuals;
 - 9.6 encourage and facilitate its Eligible Individuals to voluntarily provide the Commission with any Information requested, to appear for interviews, and to give evidence in court as requested by the Commission;

- 9.7 make available to the Commission any Information relating to the Conduct or the Investigation;
- 9.8 comply with clause 19 of this agreement;
- 9.9 act as directed by the Commission in relation to the Conduct; and
- 9.10 certify in writing that it has complied with the conditions outlined above.

- 10 The obligations in clause 9 are continuing obligations and only cease when the Commission releases the Eligible Company from those obligations in writing.

Revocation of Leniency

- 11 If the Commission forms a view on reasonable grounds that [Company] has:
 - 11.1 failed to meet any of the conditions of this agreement that apply to it;
 - 11.2 made false statements to the Commission in this agreement; or
 - 11.3 materially misled the Commission as to any matter relevant to the Investigation or Enforcement Proceedings;the Commission will:
 - 11.4 outline to [Company] in writing the issues which provide a basis for contemplating revocation of [Company]'s Leniency, and allow ten Working Days (or such longer period if agreed), for [Company] to respond satisfactorily to any issues the Commission identifies; and
 - 11.5 if [Company] does not satisfactorily respond to (and, if required by the Commission, rectify) the Commission's issues, set out the shortcomings in writing, and allow [Company] a further ten Working Days, or such longer period as the Commission may specify, to respond to (and, if required by the Commission, rectify) the Commission's issues satisfactorily.
- 12 If having regard to any responses made by [Company] under clause 11.5, the Commission remains of the view referred to in 11.1 - 11.3 above, then the Commission may give written notice to [Company] that its Leniency is revoked.
- 13 If the Commission has given notice under clause 12, the Commission may initiate Enforcement Proceedings and/or Other Proceedings against [Company], subject to any remaining limitations under the Leniency agreement and/or grant of Immunity.
- 14 For the avoidance of doubt, if the Commission has given notice under clause 12, the Commission may use any Information provided by [Company] under this agreement:
 - 14.1 for the purpose of conducting the Investigation;
 - 14.2 as evidence in any civil proceedings and/or criminal prosecutions against other parties to the Conduct; and/or
 - 14.3 as evidence in any civil proceedings and/or criminal prosecution referred to at clause 13 above.
- 15 In the event of the Commission commencing civil proceedings under clause 13, [Company] agrees to waive any right it may otherwise have to assert that any civil proceedings brought against it by the Commission arising out of or in connection with the Conduct are time-barred for the purposes of any applicable limitation period under the Commerce Act, for a period of three years from the date of revocation of the Leniency. For the avoidance of doubt, this waiver does not apply to any matter already time-barred at the date on which the marker was granted.
- 16 If the Commission forms a view on reasonable grounds that an Eligible Person has:
 - 16.1 failed to meet any of the conditions of this agreement that apply to it;
 - 16.2 made false statements to the Commission in this agreement; or
 - 16.3 materially misled the Commission as to any matter relevant to the Investigation or Enforcement Proceedings;

the Commission will:

- 16.4 outline to the Eligible Person in writing the issues which provide a basis for contemplating revocation of the Eligible Person's Leniency, and allow ten Working Days (or such longer period if agreed), for the Eligible Person to respond satisfactorily to any issues the Commission identifies; and
- 16.5 if the Eligible Person does not satisfactorily respond to (and, if required by the Commission, rectify) the Commission's issues, set out the shortcomings in writing, and allow the Eligible Person a further ten Working Days, or such longer period as the Commission may specify, to respond to (and, if required by the Commission, rectify) the Commission's issues satisfactorily.
- 17 If having regard to any responses made by the Eligible Person under clause 16.5, the Commission remains of the view referred to in 16.1 - 16.3 above, then the Commission may give written notice to the Eligible Person that its Leniency is revoked.
- 18 If the Commission has given notice under clause 17, the Commission may initiate Enforcement Proceedings and/or Other Proceedings against the Eligible Person, subject to any remaining limitations under the Leniency agreement and/or grant of Immunity.
- 19 For the avoidance of doubt, if the Commission has given notice under clause 17, the Commission may use any Information provided by the Eligible Person under this agreement:
 - 19.1 for the purpose of conducting the Investigation;
 - 19.2 as evidence in any civil proceedings and/or criminal prosecutions against other parties to the Conduct; and/or
 - 19.3 as evidence in any proceedings or prosecution referred to at clause 18 above.
- 20 In the event of the Commission commencing civil proceedings under clause 18, the Eligible Person agrees to waive any right it may otherwise have to assert that any civil proceedings brought against it by the Commission arising out of, or in connection with, the Conduct are time-barred for the purposes of any applicable limitation period under the Commerce Act, for a period of three years from the date of revocation of the Leniency. For the avoidance of doubt, this waiver does not apply to any matter already time-barred at the date on which the marker was granted.

Confidentiality

- 21 [Company] and all Eligible Persons will:
 - 21.1 not, without the consent of the Commission, disclose the fact of, or the content of the Application, the Investigation or Enforcement Proceedings, or any details regarding the Application, the Investigation or Enforcement Proceedings, except for the purposes of seeking legal advice, as required by law and/or the rules of its stock exchange; and
 - 21.2 inform the Commission at the earliest reasonable opportunity if it intends to make a disclosure as required by law and/or the rules of its stock exchange.
- 22 If the fact of, or the content of, the Application or the Commission's Investigation becomes public other than as a result of [Company] breaching its obligations under this agreement, [Company] will be entitled to:
 - 22.1 disclose that it was the Leniency applicant; and
 - 22.2 correct any incorrect or misleading statements or respond to media inquiries, providing it has first given the Commission not less than 24 hours' notice in writing (unless a shorter time is agreed with the Commission) of what it proposes to say and makes any changes to its proposed statement that the Commission reasonably requests.

Disclosure and use of Information by the Commission

- 23 The Commission may disclose any Information provided by [Company] or any Eligible Persons for the purpose of:
 - 23.1 conducting the Investigation;
 - 23.2 conducting any Enforcement Proceedings or Other Proceedings;
 - 23.3 obtaining legal and other expert advice in relation to the Investigation, Enforcement Proceedings or Other Proceedings;
 - 23.4 informing relevant Ministers and/or their advisers (subject to an obligation of confidence);
 - 23.5 carrying out the Commission's functions;
 - 23.6 complying with the law; or
 - 23.7 as the Commission otherwise considers necessary or desirable with [Company's] prior written consent.
- 24 If the Commission receives a third party request for disclosure of Information, whether pursuant to the Official Information Act 1982, the Privacy Act 2020, a request for discovery in any court, or otherwise, the Commission will to the extent reasonably possible, give [Company] an opportunity to:
 - 24.1 make submissions to the Commission regarding any proposed release of the Information; and
 - 24.2 take such action as [Company] considers necessary to resist the request.
- 25 Clauses 23 and 24 survive revocation, save for any obligations imposed on the Commission that [Company] releases the Commission from in writing.

Continuing obligations

- 26 [Company]'s obligations in clause 6 are continuing obligations and only cease when the Commission, by notice in writing, advises [Company] that the Investigation or Enforcement Proceedings have been concluded (whichever is the later) and releases [Company] from those obligations.
- 27 [Company]'s obligations in clauses 21 - 22 survive revocation unless the Commission releases [Company] from these obligations in writing.

General

- 28 This agreement, including any attachments, is the entire agreement between the parties and supersedes all prior agreements, arrangements, representations or understandings, whether oral or written, between the parties in relation to the Conduct.
- 29 No amendment to this agreement will be effective unless it is in writing and signed by the parties.
- 30 The failure of a party to enforce any provision of this agreement at any time shall not operate as a waiver of that provision in respect of the particular act or omission or any other act or omission.
- 31 The parties represent and warrant to each other that the signatories to this agreement have the necessary authority and capacity to bind them.
- 32 The parties agree that the New Zealand courts shall have jurisdiction to determine any proceedings arising out of or in connection with this agreement and the matters to which it relates.
- 33 The parties represent and agree that they are each voluntarily entering into this agreement after having received legal advice.
- 34 The parties may enter into this agreement by signing any number of counterparts, each of which will be treated as an original. All of the counterparts taken together will constitute a single document. A party's delivery of a signed facsimile or pdf counterpart of this agreement will have the same legal effect as that party's delivery of a signed original counterpart.

35 Any written notice or communication pursuant to this agreement shall be delivered as follows:

If to the Commerce Commission, to:

Commerce Commission
Level 9, 44 The Terrace
PO Box 2351
Wellington 6011
New Zealand

For the attention of [lead investigator] or by email to: [lead investigator's email address]

(or such other Person or address as the Commission may advise [Company])

If to [Company], to:

For the attention of []

(or to such other Person or address as [Company] may advise the Commission)

Execution

Signed by and on behalf of the Commerce Commission on

[Date]

Authorised signatory

Name

Signed by and on behalf of

[Company] on

[Date]

Authorised signatory

Name