TEMPLATE – LAST UPDATED 22 AUGUST 2023

UNDERTAKING

relating to

the divestment of the "**Divestment Assets**[1]" as defined in clause 1.1(e)

Given by the Applicant in favour of the New Zealand Commerce Commission

in connection with [Applicant]'s application for clearance/authorisation of its proposed acquisition of [Target] under section 66/67 of the Commerce Act 1986 (Commerce Act).

Date [date]

[1] ["Divestment Assets" is used in this template for illustrative purposes. Please amend as appropriate.]

This **Undertaking** is given on [date of signing by Applicant] and is given by [the Applicant], a company incorporated in [country] and having its registered office at [address] in favour of the **Commerce Commission** (the **Commission**).

Under section 69A(1) of the Commerce Act the Commission may accept a written undertaking from an applicant in granting a clearance/authorisation under section 66/67 of the Commerce Act.

If the Commission accepts the Undertaking by granting clearance to the Proposed Transaction, the Undertaking will form part of the Commission's clearance to the Proposed Transaction under section 66(3)(a) of the Commerce Act.

A breach of the Undertaking (accepted under section 69A(1)) will render the clearance to which the Undertaking relates void and of no effect from the date it was granted pursuant to section 69AB(1) of the Commerce Act.

Introduction

A. The Applicant has applied to the Commission for clearance of the Proposed Transaction pursuant to section 66 of the Commerce Act.

B. [Background to / detail of the parties to the Proposed Transaction.]

C. As at the date of this Undertaking, the Commission is not satisfied that the Proposed Transaction will not be likely to substantially lessen competition in a New Zealand market and has not given clearance to the Proposed Transaction.

D. In order to obtain clearance from the Commission the Applicant undertakes to carry out the Divestment of the Divestment Assets.

1. DEFINITIONS AND RELATED MATTERS

1.1. In this Undertaking:

(a) **Adverse Event** means an issue, event or circumstance which arises in relation to the Divestment Assets that is sufficiently material and adverse that the Applicant's ability to achieve the outcomes in relation to the Divestment Assets envisaged by and in accordance with clause 5.1 is or may be compromised (after, for the avoidance of doubt, the Applicant has considered and used best endeavours for such period as is reasonable in the circumstances to meet the requirements of clause 5.1).

(b) **Applicant** means [the legal entity that is applying for clearance].

(c) **Approved Purchaser** means a purchaser of Divestment Assets approved by the Commission pursuant to clause 4.

(d) **Divestment** means the divestment of the Divestment Assets during the Divestment Period or Second Divestment Period, in accordance with this Undertaking.

(e) **Divestment Agent** has the meaning given in clause 2 of Schedule B.

(f) **Divestment Assets** means [describe – in the case where a company or group of companies is to be divested: "[all] the shares in the Divestment Entity and, where the context permits, also includes the Divestment Entity itself and the Divestment Group"][2]

(g) **Divestment Entity** means [name of company], a company that [insert description].

(h) **Divestment Group** means the Divestment Entity and all its subsidiaries.

(i) **Divestment Period** means the period commencing at 12.01am on the date of the completion of the Proposed Transaction and ending at 11.59pm on the date which is [x months] after the date on which completion of the Proposed Transaction occurs.[3]

(j) **Divestment Undertakings** means the undertakings in clause 3.1 of this Undertaking.

(k) **Hold Separate Manager** means a person approved by the Commission and appointed pursuant to clause 6.1 or 6.2D(b) of this Undertaking.

(l) **Independent Monitor** means a natural or legal person who:

(i) is approved by the Commission and is appointed pursuant to clause 9.1, 9.2 or 9.3 of this Undertaking;

(ii) is independent of the Applicant and its Related Entities; and

(iii) possesses the necessary qualifications to carry out its obligations.

(m) **Interconnected Body Corporate** has the meaning set out in section 2(7) of the Commerce Act.

(n) **Key Personnel** means employees and independent contractors of [relevant entity or entities] as at the date of the Proposed Transaction who are necessary to maintain the viability of the Divestment Assets, including the Hold Separate Manager;

(o) **Material Issue** means an issue, event or circumstance following the commencement of the Divestment Period:

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[2] [In cases where multiple assets are being divested, it may be appropriate to include a schedule listing these assets. Where a company or legal person is being divested, it may be appropriate to use the term "Divestment Business" or similar.]

[3] [For both the Divestment Period and Second Divestment Period, the Commission will not accept a time period that it considers is longer than reasonably necessary to complete the divestment of the Divestment Assets. Applicants should provide full reasons, with supporting evidence, for why they consider the specified period is appropriate.]

(i) which the Hold Separate Manager or, if no Hold Separate Manager is in place, the Applicant, is, or should have been, aware may impact the profitability of the Divestment Assets by more than 5% from forecast;

(ii) which the Hold Separate Manager or, if no Hold Separate Manager is in place, the Applicant, acting reasonably, believes may materially impact the market value or remaining useful life of any Divestment Assets; or

(iii) where the Hold Separate Manager or Independent Monitor concludes, acting reasonably, that the Applicant is failing to materially comply with this Undertaking.

(p) **Potential Breach** means a matter that the Applicant is, or should have been, aware warrants an internal investigation to determine whether an actual breach of this Undertaking has occurred, irrespective of whether an actual breach is ultimately identified.

(q) **Proposed Transaction** means [describe the transaction for which clearance has been sought].

(r) **Related Company** has the meaning given to it in section 2(3) of the **Companies** Act 1993, provided that, for this purpose, references to company in that section will extend to any body corporate wherever incorporated or registered.

(s) **Related Entity** means an Interconnected Body Corporate and/or a Related Company and/or an "associated person" as defined in section 47(3) of the Commerce Act.

(t) **Ring-fenced Information** means commercially sensitive information relating to **the** Divestment Assets (including that information which is contained in confidential documents), including but not limited to:[4]

(i) product strategy and development;

(ii) pricing data that is not publicly available, including current, historic and future pricing, pricing changes, margin, strategies, revenues and/or payment terms;

(iii) customer contracts and data;

(iv) supply agreements; and

(v) all other commercially sensitive information relating to the Divestment Assets.

[4] [This section should be tailored to the Divestment Assets. The list below is the minimum that is likely to be required.]

(u) **Second Divestment Period** means the period commencing at the end of the Divestment Period and ending at midnight on the date which is [y months] from the end of the Divestment Period[5]

(v) **Working Day** has the meaning set out in section 2(1) of the Commerce Act.

1.2. References to dates and time in this Undertaking are references to New Zealand Standard Time or Daylight Savings Time as applicable.

1.3. This Undertaking will be governed by, and construed in accordance with, the laws of New Zealand and the Applicant accepts the exclusive jurisdiction of the New Zealand Courts in respect of all disputes arising under, or in connection with the interpretation or performance of, this Undertaking.

1.4. Any disputes under Part 6 of the Commerce Act in relation to this Undertaking may be referred to the High Court Commercial Panel and the Applicant undertakes that it will cooperate with the Commission to ensure any such proceedings are dealt with expeditiously.

1.5. Any notice or communication that is given or served under or in connection with this Undertaking must be given in writing in the following manner:

(a) if addressed to the Commission, by hand delivery or email to the following address:

Commerce Commission
Level 9, 44 The Terrace, Wellington 6011
Attention: Head of Mergers (mergers@comcom.govt.nz)

(b) if addressed to the Applicant, by hand delivery or email to the following address:

C/- [contact law firm]

[Law firm address]

Attention: [contact name and email]

2. COMMENCEMENT AND TERM

2.1. This Undertaking comes into effect when it is signed by the Applicant and accepted by the Commission under section 69A(1) of the Commerce Act, save for clauses 5 (Preservation Obligations)[6] and 7 (Ring-fencing) to 9 (Independent Monitor), which come into effect at the beginning of the Divestment Period.

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[5] [For both the Divestment Period and Second Divestment Period, the Commission will not accept a time period that it considers is longer than reasonably necessary to complete the divestment of the Divestment Assets. Applicants should provide full reasons, with supporting evidence, for why they consider the specified period is appropriate.]

[6] [In certain circumstances, for example where there may be a significant time period between the Commission accepting the Undertaking and commencement of the Divestment Period, the Commission may require some or all of these provisions to take effect from the date the Undertaking is accepted.]

2.2. Except for the obligations set out in clause 7 (Ring-fencing), which continue to apply for so long as the Applicant has Ring-fenced Information in its control, the Applicant's obligations under this Undertaking are discharged when:

(a) the sale of the Divestment Assets to an Approved Purchaser has completed and the Commission has provided written confirmation to the Applicant that the Applicant's obligations have been discharged; or

(b) where the Commission has provided written confirmation that the Applicant is released from its obligations on the basis that the Proposed Transaction will no longer proceed to completion.

3. DIVESTMENT

3.1. The Applicant undertakes to the Commission that it will, upon completion of the Proposed Transaction:

(a) within two Working Days inform the Commission in writing that the Proposed Transaction has completed;

(b) procure the Divestment of the Divestment Assets[7] to an Approved Purchaser within the Divestment Period in accordance with the terms of this Undertaking (or, if applicable, within the Second Divestment Period, in accordance with the terms of Schedule B of this Undertaking); and

(c) use best endeavours to procure, obtain or assist an Approved Purchaser to obtain any consents required to assign the rights and contracts described in Schedule A of this Undertaking to the Approved Purchaser.[8]

3.2. The Applicant acknowledges that the Divestment Undertakings:

(a) form part of any clearance given by the Commission for the Proposed Transaction under section 66(3)(a) of the Commerce Act;

(b) impose legal obligations on it;

(c) may be enforced by the Commission under sections 84, 85A and 85B of the Commerce Act; and

(d) may only be varied by application under section 69AC of the Commerce Act.

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[7] [Where the composition of the Divestment Assets is subject to change during the course of the Undertaking eg inventory, the following text should be inserted at the point of this footnote reference: "it owns or controls as at 11:59pm on the date the Proposed Transaction completes".]

[8] [This clause should be included if there are third party consents required to assign ownership of the Divestment Assets (or part of them) to an Approved Purchaser. For example, contracts or licences with 'change of control' provisions. Where relevant, the Applicant should provide details of all third party consents required in a Schedule to this Undertaking. The Applicant should also provide to the Commission, either in this Undertaking or in a separate submission, details of whose consent is needed, any bases for withholding consent, how these consents would be obtained and the likely timing for obtaining these consents.]

4. PURCHASER APPROVAL

4.1. As soon as practicable and no later than 20 Working Days before the anticipated date of completion of the Divestment, the Applicant or the Divestment Agent will notify the Commission in writing:

(a) of the identity of the proposed purchaser (or where negotiations are ongoing with more than one potential purchaser, the potential proposed purchasers) of the Divestment Assets; and

(b) that the Applicant is formally seeking purchaser approval for that proposed purchaser (or those potential proposed purchasers).

4.2. The Applicant will ensure that the transaction documentation relating to the Divestment provides that completion of the Divestment is conditional on obtaining the Commission's approval of the proposed purchaser based on the criteria set out in clauses 4.3 and 4.5.

4.3. The Applicant must satisfy the Commission that the Divestment will be carried out in a manner consistent with the Undertaking and that any proposed purchaser of the Divestment Assets:

(a) will operate the Divestment Assets in a way that restores the competitive constraint that would have been lost with the Proposed Transaction;

(b) is not associated with, or an Interconnected Body Corporate of, the Applicant or any of its Related Entities (including, for the avoidance of doubt, any entity which transfers to the Applicant as part of the Proposed Transaction);

(c) has the financial resources, proven business expertise and incentive to viably operate and develop the Divestment Assets in competition with the Applicant in the relevant market(s);

(d) is not likely to breach section 47(1) of the Commerce Act if it acquires the Divestment Assets;

(e) is not likely to give rise to a risk that the implementation of the Divestment will be unduly delayed; and

(f) can be reasonably expected to obtain all necessary approvals from relevant regulatory authorities for the acquisition of the Divestment Assets.

4.4. At the same time as providing the written notification as required at clause 4.1, the Applicant will provide the Commission with a submission in writing to assist the Commission's assessment of the requirements in clauses 4.3(a)- 4.3(f).

4.5. The Commission's approval of any purchaser proposed by the Applicant or the Divestment Agent shall also be contingent on:

(a) the Applicant or the Divestment Agent, as appropriate, providing all draft transaction documentation (including any sale and purchase, transitional services, supply and other ancillary agreements) to the Commission at least 20 Working Days before the anticipated signing date of these documents; and

(b) the Commission's approval in writing of all transaction documentation.

4.6. Neither the Applicant nor the Divestment Agent can proceed with the Divestment until such time as:

(a) a written request for approval under clause 4.1 has been made to the Commission; and

(b) the Applicant or the Divestment Agent and/or the proposed purchaser, has provided the information contemplated by this Undertaking or as requested by the Commission; and

(c) the Commission advises in writing that it has, at its discretion, approved the proposed purchaser and the form of all transaction documents.

4.7. The Applicant acknowledges that:

(a) an approval of a potential purchaser by the Commission under this clause 4 is, once given, an approval for the relevant purchaser to acquire the Divestment Assets pursuant to the Divestment during the Divestment Period in accordance with the transaction documents approved by the Commission, but not during the Second Divestment Period; and

(b) if the Divestment does not occur during the Divestment Period, and, accordingly, Schedule B applies, any proposed purchaser intending to purchase the Divestment Assets during the Second Divestment Period must be approved for such purchase by the Commission (even if such purchaser had been approved by the Commission as a purchaser under this clause 4 for a Divestment during the Divestment Period).

4.8. Should the Divestment not proceed to a purchaser approved by the Commission pursuant to clause 4.6(c) for any reason, the Applicant may notify the Commission of the identity of an alternative purchaser (or potential purchasers). The terms of clauses 4.2 to 4.6 will equally apply to such alternative purchaser(s).

5. PRESERVATION OBLIGATIONS[9]

5.1. During the Divestment Period and, if applicable, the Second Divestment Period, the Applicant will (either directly or via its Related Entities, or via the Hold Separate Manager or the Divestment Agent, as appropriate), in relation to the Divestment Assets, use best endeavours[10] to:

(a) preserve the reputation and goodwill of the Divestment Assets;

[9] [In certain circumstances, the Commission may insist on more stringent preservation obligations than this template provides for.]

[10] [In certain circumstances, the Commission may consider that a higher standard, eg "all practicable steps", is appropriate.]

(b) preserve the economic viability, marketability and competitiveness of the Divestment Assets; and

(c) maintain the provision of goods and services by means of the Divestment Assets in a manner consistent with the provision of goods and services as at the date of this Undertaking.

5.2. If a Material Issue or Adverse Event arises, the Applicant shall, as soon as practicable after it becomes aware of the Material Issue or Adverse Event:

(a) use best endeavours[11] to:

(i) mitigate the adverse effects on the Divestment Assets of the Material Issue or Adverse Event; and

(ii) restore (as relevant) the reputation, goodwill, economic viability, marketability and competitiveness of the Divestment Assets to a level that is materially similar to, and consistent with, the operation of the Divestment Assets immediately prior to the Divestment Period;

(b) report in writing to either the Commission or the Independent Monitor (where an Independent Monitor has been appointed under clause 9) on:

(i) the nature of the Material Issue or Adverse Event and when and how it arose;

(ii) why the Material Issue or Adverse Event has compromised or may compromise the Applicant's ability to achieve the outcomes as envisaged by and in accordance with clause 5.1;

(iii) what steps have been taken, or are planned to be taken, by the Applicant in compliance with clause 5.2(a); and

(iv) any other material information relevant to the Adverse Event, Material Issue or the performance of the Applicant's obligations under clause 5.2(a).

5.3. During the Divestment Period and, if applicable, the Second Divestment Period, neither the Applicant nor its Related Entities will:

(a) carry out any act upon its own authority that might have a significant adverse impact on the value or competitiveness of the Divestment Assets or that might alter the nature and scope of activity, or the industrial or commercial strategy in relation to Divestment Assets;

[11] [In certain circumstances, the Commission may consider that a higher standard, eg "all practicable steps", is appropriate.]

(b) sell or transfer any of the Divestment Assets or contractual rights to use assets which are required to continue to operate the Divestment Assets in the ordinary course and in a manner that is materially similar to, and consistent with, the operation of the Divestment Assets as at the date of this Undertaking to any person other than an Approved Purchaser in accordance with this Undertaking; or

(c) solicit Key Personnel other than where that person responds to a bona fide public advertisement for a vacant position (provided that the advertisement is not targeted specifically at the person concerned).

6. HOLD SEPARATE OBLIGATIONS

6.1. The Applicant will appoint a Hold Separate Manager[12] who will, during the Divestment Period (and, if applicable, the Second Divestment Period), manage the Divestment Assets in a manner that is consistent with the Applicant's obligations as set out in clause 5.

6.2. The Applicant will provide, for approval by the Commission, the name of the proposed Hold Separate Manager and the terms of engagement between the Applicant and the Hold Separate Manager at least 20 Working Days prior to the commencement of the Divestment Period.

(a) If the Commission is satisfied with the proposed Hold Separate Manager, the Commission will approve the appointment of the Hold Separate Manager in writing.

(b) If the Commission has not approved the name or terms of engagement of the proposed Hold Separate Manager 10 Working Days prior to the commencement of the Divestment Period, the Commission may nominate or arrange directly for the appointment of a Hold Separate Manager and the Applicant will accept any terms, timelines or other steps imposed or agreed by the Commission (including as to payment of the Hold Separate Manager's costs) for this to take effect.

6.3. The Applicant will procure that the Hold Separate Manager uses all reasonable endeavours to operate the Divestment Assets, during the Divestment Period and, if applicable, the Second Divestment Period, as they were operated at the date of this Undertaking and as a going concern separate from the businesses operated by the Applicant and its other Related Entities, including procuring that:

(a) the day-to-day management of the Divestment Assets is the responsibility of the relevant Hold Separate Manager;

(b) the Hold Separate Manager's terms of engagement provide that it is required to operate the Divestment Assets in such a way that preserves their economic

[12] [In certain circumstances it may be necessary to appoint more than one Hold Separate Manager eg where the Divestment Assets comprise assets that are managed separately, or where they reside in different countries.]

viability, marketability, competitiveness and goodwill and maximises the value of the Divestment Assets as at the date immediately prior to the Divestment Period;

(c) the Hold Separate Manager's terms of engagement provide that the Hold Separate Manager will provide sufficient information to [name and position of Applicant's nominee][13] (or a suitably qualified replacement as nominated by the Applicant to the Hold Separate Manager) to the extent required for the Applicant or its Related Entities to comply with their legal, reporting and regulatory obligations (including obligations relating to taxation, accounting, financial reporting or stock exchange disclosure requirements) or their contractual obligations or to progress, conduct or resolve any legal dispute. For the avoidance of doubt, no more information than is strictly required to meet the relevant obligation or purpose may be provided under this clause;

(d) the Hold Separate Manager's terms of engagement provide that in the event of a Material Issue or Adverse Event arising, the Hold Separate Manager passes on all relevant information to the Applicant via [person nominated under 6.3(c)] (or a suitably qualified replacement as nominated by the Applicant to the Hold Separate Manager) and to the Independent Monitor within three Working Days; and

(e) the Hold Separate Manager's acknowledges that the Commission has the ability to enforce the Hold Separate Manager's terms of appointment if, in the view of the Commission, the Hold Separate Manager has been, or is, unable to meet its obligations to the Applicant in relation to the Divestment Assets.

6.4. If the Applicant or any of its Related Entities receives any Ring-fenced Information through the reporting process in clause 6.3(c) to 6.3(d) above, the Ring-fenced Information will be subject to clause 7 (Ring-fencing) below.

7. RING FENCING

7.1. The Applicant shall implement all reasonable measures to ensure that, from the commencement of the Divestment Period, neither it nor its Related Entities, or their respective employees, directors, officers, contractors, agents and advisers, obtain or use any Ring-fenced Information other than where strictly necessary for one or more of the purposes of:[14]

(a) maintaining the viability of the Divestment Assets;

(b) progressing the Divestment;

[13] [This person should ideally not be involved in the day-to-day management of the Applicant's business that competes or interacts with the Divestment Assets.]

[14] [Where the Applicant and Divestment Assets have or will have an on-going relationship eg by virtue of a transitional services agreement or supply agreement, disclosures as necessary to maintain/establish these relationships are likely to be acceptable to the Commission, and Applicants should suggest drafting to this effect.]

(c) reporting to the Commission or, if applicable, to the Independent Monitor, pursuant to clause 8.1;

(d) responding to a Material Issue or Adverse Event notified to the Applicant, or reporting to the Commission or the Independent Monitor, if one has been appointed under clause 9.1; and/or

(e) complying with legal, reporting and regulatory obligations (including obligations relating to taxation, accounting, financial reporting or stock exchange disclosure requirements) or to progress any legal dispute,

provided such information:

(f) is obtained and used only by those officers, employees, contractors, agents or advisers who have signed a confidentiality undertaking containing the obligations set out in clause 7.3 and need to know the information in order to carry out the purposes listed at clause 7.1(a) – 7.1(e), above.

7.2. The Applicant shall take reasonable steps to ensure that the Ring-fenced Information is stored securely and protected against access, disclosure and use of the information:

(a) by persons; and

(b) for purposes,

not permitted under this Undertaking.

7.3. The Applicant shall ensure that any employees, directors, officers, contractors, agents and advisers with access to systems containing Ring-fenced Information are subject to a binding confidentiality undertaking, in a form approved by the Commission, that:

(a) is for the benefit of the Divestment Assets;

(b) is enforceable by the Commission [and the Divestment Entity]; and

(c) prohibits the disclosure or use of Ring-fenced Information, except where strictly necessary for the purposes set out in clauses 7.1(a) – 7.1(e) above.

7.4. If, after the date this Undertaking comes into effect, any employee, director, officer, contractor, agent or adviser of the Applicant (or of any of its Related Entities) receives Ring-fenced Information and such person is not already subject to the confidentiality undertaking described in clause 7.3, the Applicant will ensure that such person enters into the confidentiality undertaking described in clause 7.3.

7.5. The Applicant shall take all reasonable steps to ensure that any Ring-fenced Information that remains in its control at the end of the Divestment Period (or Second Divestment Period, if applicable) is provided to the Approved Purchaser of the Divestment Assets and, to the extent any information remains in the possession or control of the Applicant or any of its Related Entities, the Applicant shall use reasonable endeavours to destroy the Ring-fenced Information within 20 Working Days of the end of the Divestment Period (or Second Divestment Period, as applicable).

7.6. Nothing in this clause prevents the Applicant from retaining Ring-fenced Information where strictly necessary for the purposes set out at 7.1(e) provided that:

(a) the provisions of this clause 7 shall continue to apply to such information for as long as it is held; and

(b) the information is provided to the Approved Purchaser of the Divestment Assets and destroyed (to the extent the Applicant is reasonably able to destroy the information) within 20 Working Days of the need to retain that information ceasing.

7.7. For the purposes of this clause 7, references to the Applicant's employees, directors, officers, contractors, agents or advisers excludes those employed or engaged by the Divestment Group immediately prior to the Divestment Period and who continue to be employed or engaged by the Divestment Group during and following the Divestment Period.

8. MONITORING COMPLIANCE WITH THIS UNDERTAKING

8.1. During the Divestment Period (and, if applicable, the Second Divestment Period) the Applicant will provide reports to the Commission or, if applicable, to the Independent Monitor, at the times specified below (or at such times as notified by the Commission) detailing:

(a) on a monthly basis, the Applicant's compliance with its obligations under this Undertaking;

(b) on a monthly basis, the Applicant's progress towards carrying out the Divestment;

(c) on a monthly basis, detailed information about the financial performance of the Divestment Group,[15] including but not limited to revenues, profits, volumes, significant contracts won and lost, and significant personnel changes;[16]

(d) any actual breach or Potential Breach of this Undertaking within two Working Days of the Applicant becoming aware of the actual breach or Potential Breach; and

(e) promptly at the Commission's request, any other information and documents reasonably required:

(i) about the Applicant's progress towards carrying out the Divestment; and

(ii) that demonstrate that the Applicant's conduct complies with the Divestment Undertakings.

[15] [Replace reference to "Divestment Group" in this clause 8.1 with "Divestment Assets" where what is being divested is assets rather than the shares in a company.]

[16] [The exact information that the Commission will wish to see will differ from case to case, depending on the nature of the Divestment Assets and the competition issues that the divestment addresses. This clause should be tailored to meet the needs of each case.]

8.2. If requested, the Applicant will attend a meeting with the Commission at a time and place appointed by the Commission to answer any questions the Commission may have (including by telephone or video conference if more convenient for the Commission).

8.3. Without limiting clause 8.1, the Applicant will provide to the Commission:

(a) a copy of any information memorandum provided to potential purchasers relating to [the Divestment Assets/the Divestment Entity/the Divestment Group]; and

(b) notification of the completion of the Divestment, within two Working Days of its completion.

8.4. Nothing in this Undertaking requires the Applicant to provide legally privileged information or documents to the Commission or any other party.

9. INDEPENDENT MONITORING

9.1. If requested by the Commission in writing, the Applicant will appoint an Independent Monitor, approved by the Commission, to audit and report to the Commission (with a copy to the Applicant) on the Applicant's compliance with this Undertaking (and, where relevant, obligations of the Applicant relating to its Related Entities).

(a) The Applicant will provide, for approval by the Commission, the name of the proposed Independent Monitor, and the terms of engagement between the Applicant and the Independent Monitor within 10 Working Days of receipt of the Commission's written request.

(b) The terms of engagement between the Applicant and the Independent Monitor will include requirements that:

(i) in the event of a Material Issue under clause 1.1(o)(iii) arising, the Independent Monitor passes on all relevant information to the Applicant and the Commission via [person nominated under clause 6.3(c)] (or a suitably qualified replacement as nominated by the Applicant to the Hold Separate Manager) within three Working Days; and

(ii) the Independent Monitor acknowledges that the Commission has the ability to enforce the Independent Monitor's terms of appointment if, in the view of the Commission, the Independent Monitor has been, or is, unable to meet its obligations to the Applicant.

(c) If the Commission is satisfied with the proposed Independent Monitor, the Commission will approve the appointment of the Independent Monitor in writing.

(d) If the Applicant has failed to comply with clause 9.1(a), the Commission may nominate or arrange directly for the appointment of an Independent Monitor and the Applicant will accept any terms, timelines or other steps imposed or agreed by the Commission (including as to payment of the Independent Monitor's costs) for this to take effect.

9.2. Once the Commission has notified the Applicant that it has either approved the name and terms of engagement of the Independent Monitor nominated under clause 9.1(a), or has nominated another Independent Monitor and terms of engagement under clause 9.1(d):

(a) the Applicant will appoint the Independent Monitor approved or nominated by the Commission within two Working Days of that notification; and

(b) the Applicant will provide the Commission a copy of the executed terms of engagement within two Working Days of the appointment agreement being executed.

9.3. To avoid doubt, if the Applicant fails to appoint the Independent Monitor approved or nominated by the Commission in accordance with clause 9.1(d) or 9.2(a), the Commission may directly appoint an Independent Monitor and the Applicant will accept any terms, timelines or other steps imposed or agreed by the Commission (including as to payment of the Independent Monitor's costs) for this to take effect.

9.4. Where an Independent Monitor has been appointed before a Hold Separate Manager has been appointed, the Independent Monitor is required to inform the business holding the Divestment Assets of the Independent Monitor's appointment and contact details.

9.5. The Applicant will procure that the Independent Monitor will submit a written report to the Commission:

(a) on a monthly basis regarding the following:

(i) the Applicant's compliance with:

A. clause 5 (preservation obligations);

B. clause 6 (hold separate obligations) including the performance of the Hold Separate Manager's obligations; and

C. clause 7 (ring-fencing obligations);

(ii) the Applicant's compliance with any other obligations under this Undertaking;

(iii) the Applicant's progress on the Divestment; and

(iv) any other information about the [Divestment Assets/the Divestment Entity/the Divestment Group] or the Applicant's compliance with this Undertaking reasonably requested by the Commission; and

(b) as soon as practicable following the receipt by the Independent Monitor of any other reports or notifications that the Applicant is required to make to it under this Undertaking, other than the monthly reports required under clauses 8.1(a) to 8.1(c).

9.6. Where an Independent Monitor is appointed under this clause 9, the Applicant will (and will procure that the Hold Separate Manager will) report on matters identified in this

Undertaking to that Independent Monitor and otherwise comply with any reasonable request for information or assistance to enable the performance of the Independent Monitor's obligations as set out in this clause 9.

9.7. In the event that:

(a) the Applicant receives notice that the Independent Monitor's term will end before its obligations in this Undertaking have expired in accordance with clause 2.2; or

(b) the Independent Monitor's term otherwise expires or terminates before its obligations under this Undertaking have expired in accordance with clause 2.2,

then this clause 9 shall apply to the appointment of a replacement Independent Monitor as though the Commission had issued a written request for appointment of a replacement Independent Monitor on the date that the Applicant received, or ought to have received, that notice.

EXECUTION

Executed as an Undertaking

[Applicant full company name] by

Signature

Signatory name

Position

Name

Date

Witness signature

Witness name

Occupation

Date

SCHEDULE A – DESCRIPTION OF DIVESTMENT ASSETS[17]

[17] [If required.]

SCHEDULE B – PROCEDURE IF DIVESTMENT DOES NOT OCCUR DURING DIVESTMENT PERIOD

1. SALE OF UNSOLD ASSETS

1.1. In the event that the sale of the Divestment Assets is not completed by 11:59pm on the last Working Day of the Divestment Period, in each case the relevant unsold Divestment Assets become Unsold Assets.

2. DIVESTMENT AGENT

2.1. If, 20 Working Days prior to the relevant Divestment Assets becoming Unsold Assets (Notification Date), the Divestment has not completed, the Applicant will provide to the Commission, for its approval, the name and proposed terms of engagement of an agent (Divestment Agent) to effect the sale of the Unsold Assets within the Second Divestment Period in accordance with this Schedule B. If the Applicant considers the Divestment may not occur during the Divestment Period, it may engage with the Commission earlier than the timing contemplated in this clause.

2.2. If the Commission has not approved the name or terms of appointment of the Divestment Agent 10 Working Days prior to the end of the Divestment Period, or the Applicant fails to comply with clause 2.1 of this Schedule B on or before the Notification Date, the Commission may, in accordance with clause 4 of this Schedule B nominate or arrange directly for the appointment of a Divestment Agent, and the Applicant will accept any terms, timelines or other steps agreed by the Commission and the Divestment Agent (including as to payment of the Divestment Agent's costs) for this to take effect.

3. INDEPENDENCE

3.1. The person proposed to be appointed as the Divestment Agent (the **Proposed Divestment Agent**) will be a person with the qualifications and/or experience necessary to effect the sale of Unsold Assets and will be independent from the Applicant. The criteria by which the independence of the Proposed Divestment Agent will be determined include whether the person is:

(a) a current employee or officer of the Applicant or any of its Related Entities;

(b) a person who has been an employee or officer of the Applicant or any of its Related Entities in the past three years;

(c) a person who, in the opinion of the Commission, holds a material interest in the Applicant;

(d) a professional adviser of the Applicant or any of its Related Entities, whether currently or in the past three years;

(e) a person who has a contractual relationship, or is an employee or contractor of a firm or company that has a contractual relationship, with the Applicant or any of its Related Entities, but for the terms of any Divestment Agent agreement with the Applicant;

(f) a material supplier, or a person who is an employee or contractor of a firm or company that is a material supplier, of the Applicant or any of its Related Entities; or

(g) a material customer of, or a person who is an employee or contractor of a firm or company that has a material contractual relationship with, the Applicant or any of its Related Entities.

4. APPOINTMENT OF PROPOSED DIVESTMENT AGENT

4.1. Where the Commission has, within 10 Working Days of receipt by the Commission of the written notice referred to in clause 2.1 of this Schedule B, informed the Applicant that it:

(a) approves the appointment of the Proposed Divestment Agent, the Applicant will:

(i) appoint the Proposed Divestment Agent as the Divestment Agent on terms approved by the Commission within two Working Days; and

(ii) provide the Commission with a copy of the executed terms of appointment within two Working Days of the appointment agreement being executed; or

(b) does not approve the appointment of the Proposed Divestment Agent and nominated (in its absolute discretion) another person (who is appropriate, having regard to clause 3 of this Schedule B) to be the Divestment Agent, the Applicant will:

(i) appoint such person as the Divestment Agent within two Working Days, on terms agreed by the Commission under clause 2.1 of this Schedule B; and

(ii) provide the Commission with a copy of the executed terms of appointment within two Working Days of the appointment agreement being executed.

4.2. Where the Commission has, pursuant to clause 2.2 of this Schedule B, nominated in its absolute discretion and having regard to clause 3 of this Schedule a person to be the Divestment Agent, the Applicant will:

(a) appoint such person as the Divestment Agent within two Working Days, on terms agreed by the Commission under clause 2.1 of this Schedule B; and

(b) provide the Commission with a copy of the executed terms of appointment within two Working Days of the appointment agreement being executed.

5. OBLIGATIONS RELATING TO EACH OF THE UNSOLD ASSETS

5.1. The Applicant must procure that the terms of appointment of the Divestment Agent include obligations to the effect that the Divestment Agent:

(a) must continue to satisfy the independence criteria in clause 3 of this Schedule B for the period of their appointment;

(b) is empowered by the Applicant and required to effect the Divestment of the Unsold Assets, only to an Approved Purchaser, including at no minimum price and as soon as reasonably practical after each of the Divestment Assets become Unsold Assets and within the Second Divestment Period;

(c) must promptly inform the Commission and the Applicant of all offers for each of the Unsold Assets;

(d) must promptly accept any offer for each of the Unsold Assets from an Approved Purchaser upon written instruction from the Applicant given in accordance with clause 5 of this Schedule B;

(e) may charge such fees as are agreed between the Divestment Agent and the Applicant (but not fees contingent on the price to be obtained from the sale of Unsold Assets), and to be paid by the Applicant;

(f) is the only person who may effect the Divestment of the Unsold Assets after the Divestment Agent's appointment;

(g) may retain any lawyer or other adviser or agent reasonably required to effect the sale of each of the Unsold Assets, and the reasonable fees of that lawyer, adviser or agent must be paid by the Applicant;

(h) must use his or her best endeavours to enter into a binding agreement for the sale of each of the Unsold Assets as quickly as possible;

(i) must account to the Applicant for any monies derived from the Divestment of each of the Unsold Assets after deduction of:

  (i) all disbursements, fees and charges incurred by the Divestment Agent in undertaking his or her duties; and

  (ii) all agreed fees of the Divestment Agent (including the fees of any adviser appointed under clause 5.1(g) of this Schedule B);

(j) must provide a written report to the Commission and the Applicant on the first Working Day of each month until the Divestment occurs, and promptly answer any reasonable inquiries of either the Commission or the Applicant, concerning:

  (i) the efforts made to sell each of the Unsold Assets;

  (ii) costs and fees incurred;

  (iii) the identity of any advisers engaged;

  (iv) the identity of any persons expressing interest in purchasing the Unsold Assets;

  (v) the terms of sale offered by any prospective purchaser and their position on any material unresolved points of negotiation; and/or

  (vi) any other information reasonably required by the Commission or the Applicant;

(k) must use best endeavours to ensure that the Applicant complies with its obligations as set out in this clause and all other obligations imposed on the Applicant under this Undertaking where relevant to the carrying out of the Divestment, and to promptly notify the Commission and the Independent Monitor of any material failure by the Applicant to do so;

(l) must effect the divestment of each of the Unsold Assets to an Approved Purchaser, approved by the Commission in accordance with clause 4 of this Undertaking, with the Divestment Agent acting in place of the Applicant; and

(m) must follow any reasonable direction given to him or her by the Commission in relation to the performance of his or her functions as Divestment Agent under this Undertaking.

6. COMMISSION'S DIRECTION

6.1. The Commission may direct the Applicant to instruct the Divestment Agent to accept any offer for Unsold Assets notified to it under clause 5.1(c) of this Schedule B.

6.2. The Applicant must comply with such a direction within two Working Days. Where there is more than one offer for Unsold Assets from an Approved Purchaser, the Applicant may stipulate which Approved Purchaser the Divestment Agent must sell to, provided that the Commission has approved the sale to the Approved Purchaser stipulated by the Applicant.

7. THE APPLICANT'S OBLIGATIONS

7.1. Without limiting the obligations in this Undertaking, the Applicant must:

(a) comply with and enforce the terms upon which the Divestment Agent is appointed in this Schedule B and elsewhere in this Undertaking;

(b) indemnify the Divestment Agent for any expenses, loss, claim or damage arising directly or indirectly from the performance by the Divestment Agent of his or her functions as the Divestment Agent except where such expenses, loss, claim or damage arise out of the gross negligence, fraud, or wilful misconduct by the Divestment Agent;

(c) not interfere with, or otherwise hinder, the Divestment Agent's ability to carry out his or her functions as Divestment Agent;

(d) ensure that the Divestment Agent will promptly provide information or documents requested by the Commission directly to the Commission and Independent Monitor;

(e) ensure that the Divestment Agent undertakes to promptly report and respond to the Commission, or otherwise informs the Commission, directly of any issues that arise in the performance of his or her functions as Divestment Agent or in relation to any matter that may arise in connection with this Undertaking;

(f) provide reasonable assistance to the Divestment Agent, as well as any information or documents requested by the Divestment Agent that he or she considers reasonably necessary to effect the sale of Unsold Assets, or for reporting to or otherwise advising the Commission;

(g) assist the Divestment Agent to effect the sale of each of the Unsold Assets as quickly as possible and within the Second Divestment Period;

(h) not direct the Divestment Agent to sell Unsold Assets to a purchaser other than an Approved Purchaser; and

(i) not contract to sell Unsold Assets on terms which would be inconsistent with the Divestment Agent's role, the granting of authority to the Divestment Agent under this clause 7 of this Schedule, or any other obligation in this Undertaking.

8. POWERS OF THE DIVESTMENT AGENT

8.1. The Applicant must grant the Divestment Agent an irrevocable power of attorney conferring all necessary power and authority to effect the Divestment of Unsold Assets on terms considered by the Divestment Agent in his or her sole discretion (acting reasonably) to be consistent with this Undertaking. Any such irrevocable power of attorney granted will be revoked upon termination of the Divestment Agent in accordance with clause 9 of this Schedule B and completion of the Divestment.

9. RESIGNATION OR TERMINATION OF DIVESTMENT AGENT

9.1. The Applicant will include terms in the Divestment Agent's engagement that mitigate the risk of disruption and delay to the Divestment, should the Divestment Agent's engagement end for whatever reason (including incorporating appropriate notice provisions in the event of resignation or termination). To be prepared for any such resignation, during the Divestment Period (and prior to any question of termination of the Divestment Agent's engagement actually arising), the Applicant will also provide the Commission with the name of an appropriate substitute Divestment Agent at the time of providing the notice under clause 2.1 of this Schedule B.

9.2. The Applicant will immediately notify the Commission in the event that a Divestment Agent resigns or otherwise stops acting as a Divestment Agent.

9.3. The Commission may approve any proposal by, or alternatively may direct, the Applicant to terminate a Divestment Agent's authority to divest the Divestment Assets during the Second Divestment Period if in the Commission's view the Divestment Agent acts inconsistently with the provisions of this Undertaking.

9.4. If either clause 9.2 or 9.3 of this Schedule B applies, the Commission may nominate an alternative Divestment Agent, having regard to the qualifications and other criteria for a Divestment Agent under clause 3.1 of this Schedule B.

9.5. The Applicant must, within two Working Days of the Commission nominating an alternative Divestment Agent (exclusive of the date of nomination):

(a) appoint a Divestment Agent nominated by the Commission on terms approved by the Commission and consistent with the performance by the Divestment Agent of his or her functions under this Undertaking; and

(b) advise the Commission of the appointment of that Divestment Agent by providing the Commission a copy of the executed terms of appointment within two Working Days of that appointment agreement being executed (exclusive of the date of execution).

9.6. If the Applicant fails to comply with clause 9.5, the Commission may arrange directly for the appointment of a Divestment Agent, and the Applicant will accept any terms, timelines or other steps agreed by the Commission and the Divestment Agent (including as to payment of the Divestment Agent's costs) for this to take effect.