ASIC

Australian Securities & Investments Commission

Australian Securities and Investments Commission

Voluntary Confidential Legal Professional Privilege Disclosure Agreement

Australian Securities and Investments Commission (**ASIC**)
[*insert name of Disclosing Party]* (**Disclosing Party**)

Contract Information

Parties

Name	Australian Securities and Investments Commission
ABN	86 768 265 615
Short form name	**ASIC**
ASIC Representative	*[insert name and position of person to receive notices]* *[insert postal address]* *[insert physical address]* *[insert phone number]* *[insert facsimile number]* *[insert email address]*

Name	*[insert name of Disclosing Party]*
ABN	*[insert ABN]*
Short form name	**Disclosing Party**
Disclosing Party Representative	*[insert name and position of person to receive notices]* *[insert postal address]* *[insert physical address]* *[insert phone number]* *[insert facsimile number]* *[insert email address]*

Recitals

A. ASIC issued a notice under section [*insert section number*] of the [*insert details of legislation*] to the Disclosing Party dated [*insert date*] (the **Notice**) in connection with an investigation related to [*describe subject matter of investigation*] (the **Investigation**).

B. On [*insert date*] ASIC received notification from the Disclosing Party that it held, or had within its control documents (the **Disclosed Information**), which it claims are subject to legal professional privilege (**Privilege**).

C. The Disclosing Party has sought to provide the Disclosed Information to ASIC under this Agreement in a manner which is consistent with the maintenance of any Privilege. ASIC has agreed to receive the Disclosed Information subject to the terms of this Agreement.

D. The Disclosing Party has entered into this Agreement to facilitate the provision of the Disclosed Information to ASIC, to assist in the conduct of the Investigation, without waiving any Privilege in the Disclosed Information.

E. Neither the entry by ASIC into this Agreement, nor its receipt of the Disclosed Information subject to the terms of this Agreement, indicates that ASIC accepts that the Disclosed Information is subject to Privilege.

1. ASIC acknowledgments and undertakings

1.1 ASIC acknowledges that:

(a) the Disclosing Party does not lose the right to make a claim that the Disclosed Information is subject to Privilege by having provided the Disclosed Information to ASIC in accordance with this Agreement;

(b) the Disclosed Information has been provided to ASIC in confidence by the Disclosing Party;

(c) the provision of the Disclosed Information to ASIC by the Disclosing Party is not a waiver of any Privilege existing at the time of disclosure and is consistent with the maintenance of any Privilege;

(d) subject to clause 3.1, it will not seek to present the Disclosed Information as evidence in proceedings against the Disclosing Party, or any third parties.

1.2 ASIC undertakes that it will not contend in any proceeding, that by reason of the Disclosing Party having disclosed the Disclosed Information to ASIC under this Agreement, that the Disclosing Party has lost its right to make a claim that the Disclosed Information is subject to Privilege.

1.3 Subject to clause 1.2, ASIC reserves its rights to contend in any proceeding that the Disclosed Information disclosed to ASIC by the Disclosing Party is not subject to Privilege (including, without limitation, by reason of the Disclosed Information lacking the necessary quality of confidentiality).

2. Provision of the Disclosed Information to ASIC

2.1 The Disclosing Party must:

(a) within [*insert number of days*] days of the date of this Agreement provide the Disclosed Information to ASIC electronically on a CD-DVD disc or a USB stick or in hard copy;

(b) within [*insert number of days*] days of the date of this Agreement provide ASIC with a schedule in the form of the Privilege Claims Schedule as set out in Schedule A completed in respect of each document that comprises the Disclosed Information (the **Schedule**).

2.2 If the Schedule (completed in respect of each document that comprises the Disclosed Information) is not provided to ASIC in accordance with the timeframe set out in clause 2.1:

(a) the Disclosed Information ceases to be Disclosed Information for the purposes of this Agreement;

(b) the Disclosing Party is taken to have waived any Privilege in the Disclosed Information; and

(c) ASIC is not obliged to treat the Disclosed Information as privileged or, for the purposes of its obligations under this Agreement, as confidential.

2.3 ASIC will retain and store the Disclosed Information in accordance with its evidence management processes.

2.4 ASIC will return the Disclosed Information to the Disclosing Party at the:

(a) conclusion of the Investigation, if ASIC does not commence proceedings; or

(b) conclusion (including any appeals) of any proceedings commenced by ASIC as a result of the Investigation.

3. Use of the Disclosed Information by ASIC

3.1 ASIC will not seek to present the Disclosed Information as evidence in any proceeding other than:

(a) where the Disclosing Party has consented to its admission as evidence in the proceeding;

(b) subject to clause 1.2, to challenge the validity of the Privilege claim (including, without limitation, by asserting that the Disclosed Information lacks the necessary quality of confidentiality);

(c) where Privilege in respect of the Disclosed Information has otherwise been waived or it has been determined that the Disclosed Information is not privileged;

(d) in a criminal proceeding in respect to the falsity of a statement made by a person who has a claim of privilege in respect of the Disclosed Information.

3.2 Subject to clause 3.1, ASIC may use the Disclosed Information for the purposes of the Investigation and any proceedings commenced by ASIC as a result of the Investigation, including any appeals in respect of those proceedings.

3.3 Without limiting clause 3.2, ASIC is permitted to obtain, and to present as evidence in proceedings against the Disclosing Party or third parties, material and information obtained as a result of the Disclosing Party having provided the Disclosed Information to ASIC.

4. Disclosure of the Disclosed Information by ASIC

4.1 ASIC will treat the Disclosed Information as confidential, and will not disclose the Disclosed Information, other than in accordance with the procedures set out in this clause 4.

4.2 ASIC is permitted to disclose the Disclosed Information to:

(a) ASIC's external advisers or experts, on a confidential basis, in performance of their duties, who will provide an acknowledgement to ASIC that the Disclosed Information is received by them on that basis; and

(b) any Commonwealth Minister or any committee established by the Parliament of the Commonwealth of Australia, or to any advisor to such Minister or committee, in response to any questions or requests to which ASIC may be expected to respond, whether by reason of compulsion or not. If Disclosed Information is to be disclosed pursuant to this clause 4.2(b), ASIC will request that the recipient of the Disclosed Information maintain the confidentiality of the Disclosed Information.

4.3 If ASIC is compelled by law (other than under the *Freedom of Information Act 1982* (Cth) **(FOI Act)**) to release the Disclosed Information, prior to making the disclosure, ASIC will endeavour to:

(a) notify the Disclosing Party in writing of the legal requirement as soon as reasonably practicable;

(b) identify the information that falls within the terms of the legal requirement (the **Responsive Information**), and advise the Disclosing Party that the Responsive Information is available for inspection by the Disclosing Party, prior to ASIC producing the Responsive Information in response to the legal requirement, to enable the Disclosing Party to determine if a claim of Privilege or some other claim will be asserted by it in response to the legal requirement.

4.4 If ASIC receives a request to release the Disclosed Information under the FOI Act, ASIC will:

(a) notify the Disclosing Party of the request as soon as reasonably practicable;

(b) assert Privilege as an exemption, if ASIC accepts that a valid claim of Privilege arises in relation to Disclosed Information that falls within the scope of the request **(Responsive Information**).

If there is a dispute between ASIC and the Disclosing Party as to whether there is a valid claim of Privilege in relation to Responsive Information, ASIC will consult with the Disclosing Party in accordance with the business affairs and/or personal information FOI Act exemption provisions. If after consulting with the Disclosing Party, ASIC does not claim a business affairs and/or personal information exemption over the Responsive Information, ASIC will not release the Responsive Information until the Disclosing Party has exercised its appeal and review rights under the FOI Act.

4.5 The Disclosing Party acknowledges that it is the responsibility of the Disclosing Party to assert a claim of Privilege before a Court in relation to the Disclosed Information should it wish to maintain any Privilege in that information.

4.6 Nothing in this clause 4 derogates from any obligation which either party may have under the *Privacy Act 1988* (Cth) as amended from time to time in relation to the protection of personal information.

4.7 Notwithstanding any other provision of this Agreement, ASIC may disclose the provisions of this Agreement.

5. Privilege Claim Disputes

5.1 In the event that there is a dispute between ASIC and the Disclosing Party as to whether there is a valid claim of Privilege in relation to the Disclosed Information and that dispute does not arise in the circumstances contemplated by clause 4.4, the parties acknowledge that the procedure to resolve that dispute is:

(a) if it has not already done so, for the Disclosing Party to provide ASIC with the Schedule (completed in respect of each document that comprises the Disclosed Information);

(b) for ASIC to inform the Disclosing Party in writing whether the claim of Privilege is accepted;

(c) if the Privilege claim is not accepted by ASIC, by application by either the Disclosing Party or ASIC for a declaration as to whether the Disclosed Information is privileged.

6. Consequences of Disclosed Information not being privileged

6.1 If a document that forms part of the Disclosed Information is determined not to be privileged or ceases to be privileged (including, without limitation, by reason of the Disclosed Information lacking the necessary quality of confidentiality):

(a) the document shall cease to be Disclosed Information for the purposes of this Agreement;

(b) ASIC shall not be obliged to treat the document as privileged or, for the purposes of its obligations under this Agreement, as confidential; and

(c) for the avoidance of doubt, any restriction arising under this Agreement on the way in which ASIC may use, disclose or release the document shall cease to apply.

7. Dispute Resolution

7.1 The parties will endeavour to resolve any dispute under this Agreement, excluding disputes which arise under clauses 4.4 and 5.1, by non-binding mediation before they commence legal

proceedings (except proceedings for interlocutory relief). The parties are to agree to the appointment of a mediator within a period of 30 days from the day that the dispute arises, and if such agreement is not reached, a mediator may be appointed by the President for the time being of [*insert name of agreed society or institution*] upon the application of either party. If the mediation has not already concluded, either party may terminate the mediation [*insert number of days*] days after the date of appointment of the mediator.

7.2 Each party is to pay their own costs in relation to the preparation for, and conduct of the meditation. The costs and fees of the mediator are to be borne equally by the parties.

8. Variation

No agreement or understanding varying or extending this Agreement is legally binding upon either party unless the agreement or understanding is in writing and signed by both parties.

9. Assignment

A party may only assign its rights under this Agreement with the prior written consent of the other party.

10. Counterparts

This Agreement may be executed in counterparts. All executed counterparts constitute one document.

11. Entire Agreement

This Agreement constitutes the entire agreement between the parties in connection with its subject matter and supersedes all previous agreements or understandings between the parties in connection with its subject matter.

12. Governing law and jurisdiction

This Agreement is governed by the law of [*insert jurisdiction*] and each party submits to the non-exclusive jurisdiction of the courts of [*insert jurisdiction*].

Schedule A – Privilege Claims Schedule

No.	Description of document	Date of document	State if the document is an original or copy and its form (e.g. electronic, hard copy)	State category of privileged claimed and the grounds of privilege (e.g. advice or litigation privilege)	State where privilege is claimed over the whole or part of the document	Identify the privilege holder and any joint privilege holders
1	*[Describe each document for which privilege is claimed, including the type of document (e.g. email, letter) and listing all authors and recipients.]*					
2						
3						
4						

List of Authors & Recipients

Name	Business Title	Employer (or state if self-employed)

Signing page

EXECUTED as an agreement.

Signed for and on behalf of the **Australian Securities and Investments Commission** by its duly authorised representative in the presence of

←	←
Signature of witness	Signature of representative
Name of witness (print)	Name of representative (print)
	Position of representative (print)
	Date

[Select one of the following execution clauses.]

[Where the Disclosing Party is a company, select the execution block below.]

Executed by *[insert name of company]* in accordance with section 127 of the *Corporations Act 2001*

←	←
Signature of director	Signature of director/company secretary/sole director and sole company secretary (Please delete as applicable)
Name of director (print)	Name of director/company secretary/ sole director and sole company secretary (print)
	Date

[Where the Disclosing Party is an individual, select the execution block below.]

Signed by ***[insert Disclosing Party name]***
in the presence of

←

Signature of witness	Signature of Disclosing Party
Name of witness (print)	Date

[Where the Disclosing Party is a partnership, select the execution block below.]

Signed for and on behalf of *[insert name of Partnership]* by *[print name of Partner]* who warrants that he/she is duly authorised to bind the partnership in the presence of

←

Signature of witness	Signature of partner
Name of witness (print)	Date