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Annex A

This Annex cites and briefly describes the confidentiality laws and procedures that would protect the confidentiality of antitrust evidence that may be provided under this Agreement. Also included are laws and procedures that provide sanctions for breaches of the confidentiality provisions described herein.

I. UNITED STATES OF AMERICA

A. Confidentiality Laws and Procedures

15 U.S.C. §§ 6201-6212, INTERNATIONAL ANTITRUST ENFORCEMENT ASSISTANCE ACT

This statute authorizes the Department of Justice (DOJ) and the Federal Trade Commission (FTC or, as used in this Part I, Commission) to enter into bilateral agreements with other countries permitting mutual assistance in the enforcement of the antitrust laws. Specifically, it permits DOJ and FTC to exchange certain otherwise confidential investigative information with foreign antitrust authorities, where this will be in the public interest of the United States and where it satisfies the important confidentiality and other safeguards outlined in the statute.

Section 6207(b) of the statute prohibits DOJ and FTC from disclosing, in violation of an antitrust mutual assistance agreement, any antitrust evidence received under such agreement, except to the extent such disclosure is required by law to be made to a defendant or respondent in an action brought by DOJ or FTC. Such antitrust evidence is exempt from other provisions of law that might otherwise be construed to require disclosure, including the Freedom of Information Act, 5 U.S.C. § 552, described below.

This statute does not provide specific enforcement mechanisms for the confidentiality provision, or penalties for its breach. Other laws and regulations, however, prohibit the improper use of non-public information. See discussion in Part B, *infra*.

15 U.S.C. §§ 1311-1314, ANTITRUST CIVIL PROCESS ACT (APPLIES ONLY TO DOJ)

This statute authorizes the DOJ Antitrust Division to issue compulsory process for documents or testimony in furtherance of civil investigations. Section 1313(c) of this statute provides that, other than for use in oral depositions in furtherance of such investigations, no documents or transcripts produced pursuant to such compulsory process shall be made publicly available without the consent of the party that produced the materials. Such materials may, however, be used when necessary before any court, grand jury or federal administrative or regulatory agency in any case or proceeding, including an investigation or proceeding conducted by the FTC. Such materials may also be disclosed to Congress or to any authorized committee or subcommittee thereof.

Section 1313(e) also provides for the return, at the completion of an investigation, of original materials produced pursuant to this statute during the course of the investigation. Any requests for the return of such materials must be in writing. The Division is permitted, however, in certain circumstances, to keep copies of materials produced.

Section 1314(g) exempts documents and testimony submitted in response to compulsory process authorized by this statute from disclosure under FOIA.

This statute does not provide specific enforcement mechanisms for the confidentiality provision, or penalties for its breach. Other laws and regulations, however, prohibit the improper use of non-public information. See discussion in part B, *infra*.

15 U.S.C. §§ 41-68, THE FEDERAL TRADE COMMISSION ACT (APPLIES ONLY TO FTC)

Section 6(f) [15 U.S.C. § 46(f)] states that the Commission shall not have any authority to make public any trade secret or any commercial or financial information which is obtained from any person and which is privileged or confidential, except that the Commission may disclose such information to officers and employees of appropriate Federal law enforcement agencies or to any officer or employee of any State law enforcement agency upon the prior certification of an officer of any such Federal or State law enforcement agency that such information will be maintained in confidence and will be used only for official law enforcement purposes.

Section 21(b) [15 U.S.C. § 57b-2(b)] provides that any document, tangible thing, or transcript of oral testimony received by the Commission pursuant to compulsory process in an investigation, a purpose of which is to determine whether any person may have violated any provision of the laws administered by the Commission, may not be made available for examination by any individual other than a duly authorized officer or employee of the Commission (including contractors and consultants) without the consent of the person who produced the document, thing, or transcript. Such materials may be used in Commission proceedings and in judicial proceedings in which the Commission is a party. Such materials may also be made available to other Federal and State law enforcement agencies upon the certification of an officer of such an agency that such information will be maintained in confidence and will be used only for official law enforcement purposes. This section does not prevent disclosure to Congress, but the Commission is required to notify immediately the owner or provider of any such information of a request from Congress for information designated as confidential by the owner or provider.

Section 21(c) [15 U.S.C. § 57b-2(c)] provides that all information reported to or otherwise obtained by the Commission which is not subject to the requirements of Section 21(b) shall be considered confidential when so marked by the person supplying the information. If the FTC determines that information may be disclosed because it is not protected by Section 6(f), it must notify the submitter of the information that the Commission intends to disclose the information (*i.e.*, place it on the public record, pursuant to Commission Rule 4.9) not less than 10 days after receipt of the notification. Upon receipt of such notification, the submitter may bring an action in United States District Court seeking to restrain disclosure, including an application for a stay of disclosure. The Commission shall not disclose the information until the court has ruled on the application for a stay.

Section 21(d) [15 U.S.C. § 57b-2(d)] provides that the provisions of 21(c) shall not be construed to prohibit disclosures: (A) to Congress (with notice to the owner or provider of the information); (B) of the results of investigations or studies (without identifying information or disclosing trade secrets or any commercial or financial information obtained from any person which is privileged or confidential); (C) of relevant and material information in FTC adjudicative proceedings or judicial proceedings in which the FTC is a party, according to the FTC's rules for adjudicative proceedings or by court rules or orders; (D) to Federal agencies of disaggregated information for economic, statistical, or policymaking purposes only.

Section 21(f) [15 U.S.C. § 57b-2(f)] provides that any document, tangible thing, written report or answers to questions, or transcript of oral testimony received by the Commission in any investigation, a purpose of which is to determine whether any person may have violated any provision of the laws administered by the Commission, and which is provided pursuant to any compulsory process or which is provided voluntarily in place of such compulsory process, shall be exempt from disclosure under FOIA.

Section 10 of the FTC Act [15 U.S.C. § 50] provides for criminal penalties for the unauthorized disclosure of information obtained by the Commission; *see* the discussion in part B, *infra*.

16 C.F.R. § 3.1, *ET SEQ.*, FTC RULES OF PRACTICE FOR ADJUDICATIVE PROCEEDINGS (*APPLIES ONLY TO FTC*)

Adjudicative proceedings are formal proceedings conducted under the statutes administered by the Commission which are required by statute to be determined on the record after an opportunity for an agency hearing. An adjudicative proceeding is commenced when an affirmative vote is taken by the Commission to issue a complaint. The rules provide for the respondent to answer the complaint within a specified time, for discovery, and for a hearing held before an Administrative Law Judge (ALJ) for the purpose of receiving evidence relevant and material to the Commission's complaint and the respondent's answer. The hearings are open to the public, except to the extent that an *in camera* order is entered by the ALJ or the Commission. *See* Rule 3.41(a).

Rule 3.45 [16 C.F.R. § 3.45] provides for *in camera* treatment of documents and testimony which keeps such documents and testimony confidential and not part of the public record of the hearing. Rule 3.45(b) provides that the ALJ may order documents, testimony, or portions thereof offered into evidence, whether admitted or rejected, to be placed *in camera* upon a finding that

their *in camera* treatment; only respondents, their counsel, authorized Commission personnel, and court personnel concerned with judicial review shall have access thereto. The order shall provide the date on which *in camera* treatment will expire.

16 C.F.R. § 4.10(G), ET SEQ., FTC RULES OF PRACTICE FOR ADJUDICATIVE PROCEEDINGS (APPLIES ONLY TO FTC)

Rule 4.10(g) provides that the following categories of materials obtained by the FTC may be disclosed in FTC administrative or court proceedings subject to FTC or court protective or *in camera* orders as appropriate: (1) material obtained through compulsory process or voluntarily in lieu thereof, and protected by sections 21(b) and (f) of the FTC Act; (2) material designated by the submitter as confidential, and protected by section 21(c) of the FTC Act; or, (3) material that is confidential commercial or financial information protected by section 6(f) of the FTC Act. Prior to disclosure of such material in a proceeding, the submitter will be afforded an opportunity to seek a protective or *in camera* order. All other material obtained by the FTC may be disclosed in FTC administrative or court proceedings at the FTC's discretion except where prohibited by law.

RULE 26(C) OF THE FEDERAL RULES OF CIVIL PROCEDURE

This rule provides that a court may grant, in civil litigation in federal court, a protective order concerning discovery, including, *inter alia*, that certain matters not be inquired into, or that the scope of discovery be limited to certain matters; and that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a certain way.

A court may impose sanctions for violations of protective orders entered pursuant to this rule.

RULE 6 OF THE FEDERAL RULES OF CRIMINAL PROCEDURE

This rule governs the conduct of grand jury proceedings. Subsection (e) of this rule prohibits, without the permission of a court, public disclosure of matters occurring before the grand jury by any person having knowledge of such proceedings, except witnesses, who are free to disclose their testimony.

Knowing violations of this rule are punishable as a contempt of court.

5 U.S.C. § 552, FREEDOM OF INFORMATION ACT

FOIA is a statute that provides that any person has a right of access to federal agency records, except to the extent that FOIA authorizes the agencies to withhold certain records from disclosure. Of the categories of records which may be withheld under FOIA, those of primary relevance to the antitrust enforcement agencies are:

trade secrets and commercial or financial information, obtained from a person, that is privileged or confidential (subsection 552 (b)(4));

records or information compiled for law enforcement purposes to the extent that disclosure thereof could reasonably be expected, *inter alia*, to interfere with enforcement proceedings or to disclose the identity of a confidential source (subsection 552(b)(7)(A) and (D));

intra-agency and inter-agency memoranda or letters that would be routinely privileged in civil discovery, e.g., attorney work-product or attorney-client information (subsection 552(b)(5));

national defense or foreign policy information that is properly classified (subsection 552(b)(1));

information that may be withheld on the basis of other specific statutory authority (subsection 552(b)(3)).

FOIA does not authorize withholding information from Congress.

28 C.F.R. § 16.7, PROCEDURE FOR PROCESSING REQUESTS FOR DISCLOSURE OF INFORMATION SUBJECT TO THE BUSINESS INFORMATION EXEMPTION TO FOIA (APPLIES ONLY TO DOJ)

This regulation specifies the procedures DOJ must follow before it can disclose, in response to a request under FOIA, any materials that may qualify for exemption from disclosure as confidential business information. The section requires that before any such disclosure can be made, DOJ provide notice to submitters of information that either: (i) has been designated as confidential business information by the submitter; or (ii) DOJ has reason to believe may constitute confidential business information. This notice is intended to enable the submitter to object to the planned disclosure and, if the submitter chooses, seek a protective order. DOJ is not required to provide notice to any submitter whose information DOJ has determined not to disclose.

This regulation does not provide specific enforcement mechanisms for the confidentiality provision, or penalties for its breach. Other laws and regulations, however, prohibit the improper use of non-public information. See discussion in part B, *infra*.

The Privacy Act permits federal agencies to maintain "systems of records," *i.e.*, records that are retrievable by the name, social security number or other personal identifier of an individual U.S. citizen (or permanent resident alien), subject to requirements that the agencies disclose the existence of such records systems and that individuals have access to records concerning themselves. The Privacy Act, however, sets forth several exceptions to this general restriction, including one that permits, under specified circumstances, agencies to exempt investigatory material compiled for law enforcement purposes from such "systems of records" and, thereby, to deny access to such material.

B. Laws and Procedures Providing Sanctions for Breaches of the Confidentiality Laws and Procedures

18 U.S.C. § 1905, TRADE SECRETS ACT

This statute provides criminal penalties for unauthorized disclosure of trade secrets or confidential business information by any government employee or agent of DOJ within the meaning of the Antitrust Civil Process Act, who comes into possession or gains knowledge of such information during the course of his or her employment or official duties. Said penalties include a fine of not more than \$1,000, one year's imprisonment or both, and removal from employment.

18 U.S.C. § 641, THEFT OF GOVERNMENT PROPERTY, RECORDS

This statute provides criminal penalties for the theft, embezzlement, knowing conversion, or unauthorized conveyance of any record, voucher, money, or "thing of value" (which, according to judicial interpretation, includes information) possessed by the United States Government. Said penalties include a fine or imprisonment of not more than 10 years, or both.

18 U.S.C. § 1831 *ET SEQ.*, ECONOMIC ESPIONAGE ACT

This statute provides criminal penalties for theft of trade secrets, as that act is defined in the statute. It also provides criminal penalties for economic espionage, which the statute, in essence, defines as the theft of trade secrets to benefit a foreign power. The penalty for individuals convicted of theft of trade secrets under the statute includes a fine of not more than \$500,000, or imprisonment of not more than ten years, or both, and for an organization includes a fine of not more than \$5 million. The penalty for individuals convicted of economic espionage under the statute includes a fine of not more than \$500,000, or imprisonment of not more than 15 years, or both, and for organizations includes a fine of not more than \$10 million. Penalties also include forfeiture of property used in or derived from trade secret theft or economic espionage.

The statute specifically does not prohibit any otherwise lawful activity conducted by a governmental entity of the United States, a state, or a political subdivision of a state, nor shall it be construed to affect the otherwise lawful disclosure of information by any government employee under FOIA. The statute also preserves the confidentiality of trade secrets in court proceedings brought thereunder.

5 C.F.R. § 2635.703, OFFICE OF GOVERNMENT ETHICS - STANDARDS OF ETHICAL CONDUCT FOR EMPLOYEES OF THE EXECUTIVE BRANCH

This section prohibits the improper use of non-public information by an Executive Branch employee to further his or her own private interest or that of another person. Non-public information is information that the employee gains by reason of federal employment and that he or she knows or reasonably should know has not been made available to the general public. Section 2635.106 provides that any violation may be cause for appropriate corrective or disciplinary action pursuant to Government wide regulations or agency procedures, which action may be in addition to any action or penalty prescribed by law. These sections have been incorporated by reference in the FTC's Rules. See 16 C.F.R. § 5.1 *et seq.*

15 U.S.C. § 50 (FEDERAL TRADE COMMISSION ACT) AND 16 C.F.R. § 4.10(C) (*APPLIES ONLY TO FTC*)

This section of the FTC Act (and the above-referenced Rule) provides that any officer or employee of the Commission who shall make public any information obtained by the Commission without its authority, unless directed by a court, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be punished by a fine not exceeding \$5,000, or by imprisonment not exceeding one year, or by fine and imprisonment, in the discretion of the court.

II. AUSTRALIA

A. Confidentiality Laws and Procedures

THE TRADE PRACTICES ACT 1974

Section 89 outlines the procedure for seeking an authorisation from the Australian Competition and Consumer Commission (as used in this Part II, Commission) in relation to certain anti-competitive conduct, and in doing so it outlines the circumstances in which confidentiality may be claimed in relation to information so placed before the Commission and thus excluded from the

then it will be excluded from the public register. Further, if the information relates to anything else the Commission in its discretion considers to be confidential, it may exclude the information from the public register.

Where the Commission refuses a request to exclude such information from the public register on the basis of its confidential nature, the person who submitted the information may withdraw it, in which case that submission will not form part of the application for authorisation.

Section 95 requires that the Commission keep a public register of notifications, particularly in relation to conduct which amounts to exclusive dealing. (Once notification is lodged, the corporation is permitted to engage in such conduct until otherwise notified by the Commission.) The section outlines the circumstances in which confidentiality may be claimed in relation to information so placed before the Commission and thus excluded from the public register of notification. If the information contains particulars of a secret formula or process, cash consideration offered for shares or assets, or the current costs of manufacturing, producing or marketing goods or services, then it will be excluded from the public register. Further, if the information relates to anything else the Commission in its discretion considers to be confidential, it may exclude the information from the public register.

Where the Commission refuses a request to exclude such information from the public register on the basis of its confidential nature, the person who submitted the information may withdraw it, in which case that submission will not form part of the notification.

The procedures for requesting that a document be excluded from the public register on the basis of its confidential nature under sections 89(5) and 95(2) can be found in regulation 24(1) of the *Trade Practices Regulations*.

Section 106 of the *Trade Practices Act 1974* grants the Australian Competition Tribunal, where it is satisfied that it is desirable to do so by reason of the confidential nature of any evidence or matter or for any other reason, the power to prohibit or restrict the publication of evidence given before it, whether in public or private, or of matters contained in documents filed or lodged with the Registrar, received in evidence by the Tribunal or placed in the records of the Tribunal.

Section 155AA of the Act provides that Commission officials must not disclose any protected Part IV information to any person except as part of the official's functions as a Commission official or when he/she is required by law to disclose the information. "Protected Part IV information" is defined as information relating to a matter under Part IV and which has been obtained by the Commission under section 155. Section 155 enables the Commission to require a person to answer questions, provide information or produce documents, if the Commission, the Chairperson or Deputy Chairperson has reason to believe that a person is capable of furnishing information relating to a matter that may constitute a contravention of the *Trade Practices Act*.

Section 157 of the Act, amongst other things, provides that: (a) where a corporation makes an application for authorization; or (b) where the Commission has instituted proceedings or made an application for an order against a corporation or other person, the Commission shall provide, at the request of the corporation or other person, a copy of every document furnished to or obtained by the Commission in connexion with the matter that tends to establish the case of the corporation or other person, other than documents obtained from the corporation or other person or prepared by an officer or professional adviser of the Commission. However, subsections (2) and (3) provide that, when the Commission declines to comply with such a request, a Court that is asked to order the Commission to comply may refuse to do so "if the Court considers it inappropriate to make the order by reason that the disclosure of the contents of the document or part of the document would prejudice any person or for any other reason."

THE FREEDOM OF INFORMATION ACT OF 1982

The *Freedom of Information Act 1982* gives members of the public rights of access to official documents of Commonwealth Government Ministers and agencies, limited only by exceptions and exemptions necessary for the protection of the essential public interests and the private and business affairs of persons in respect of whom information is collected and held by agencies. Of the categories of documents that are exempt from disclosure under FOI, those of relevance to antitrust authorities are:

Section 33(1) operates to exempt documents, the disclosure of which would or could be reasonably expected to cause damage to the security, defence or international relations of the Commonwealth or would divulge any information or matter communicated in confidence by or on behalf of a foreign government, an authority of a foreign government or an international organisation.

Section 36 operates to exempt documents where disclosure would disclose opinion, advice or recommendation, or consultation or deliberation relating to the deliberative processes involved in the functions of the Commission, and such

Section 37 exempts documents if disclosure would, or could reasonably be expected to, prejudice the conduct of an investigation, or the enforcement or proper administration of the law. Documents are also exempt if their disclosure under this Act would, or could reasonably be expected to, endanger the life or physical safety of any person.

Section 40(1)(d) exempts documents where disclosure would, or could reasonably be expected to, have a substantial adverse effect on the proper and efficient conduct of the operations of the Commission.

Section 43(1)(a) exempts documents containing trade secrets.

Section 43(1)(b) exempts documents containing information having a commercial value that would, or could reasonably be expected to, be destroyed or diminished if the information were disclosed.

Section 43(1)(c)(i) exempts documents where disclosure could be reasonably expected to unreasonably adversely affect a company in respect of its business affairs.

Section 43(1)(c)(ii) exempts documents where there is a reasonable expectation that disclosure would prejudice future supply of information to the Commission.

Section 45 exempts documents the disclosure of which would constitute a breach of confidence. This exemption relates to information communicated to the Commission in a relationship of confidence as indicated on its face or in circumstances imparting an obligation of confidentiality.

THE FEDERAL COURT ACT AND THE FEDERAL COURT RULES

Pursuant to Section 23 of the *Federal Court Act* and Order 15 of the *Federal Court Rules*, courts may, in proceedings before them, issue orders that information may not be disclosed or may be disclosed only in a certain way. In addition, Order 15 of the *Federal Court Rules* empowers persons seeking to avoid the production of documents subject to discovery, to rely on the claim that they are privileged from production, e.g. the documents are subject to legal professional privilege, or to Crown privilege. (Order 15(17) preserves the right of parties to rely on any rule of law which authorises or requires the withholding of any document on the grounds that its disclosure would be harmful to the public interest.)

THE PRIVACY ACT 1988

The *Privacy Act 1988* establishes a scheme to govern the collection, storage, security, access, use and disclosure of personal information by Commonwealth agencies through a set of rules called Information Privacy Principles. This scheme is subject to prescribed exceptions which limit an agency's use or disclosure of personal information (Information Privacy Principles 10 and 11).

THE ADMINISTRATIVE APPEALS TRIBUNAL ACT 1975

Section 36 of the *Administrative Appeals Tribunal Act 1975* provides that, in proceedings before it, the Attorney General may certify that disclosure of a document would be contrary to the public interest, and the Tribunal must do everything to ensure that the information in the document is not disclosed other than to a member of the Tribunal.

THE ADMINISTRATIVE DECISIONS (JUDICIAL REVIEW) ACT 1977

Under section 13 of the *Administrative Decisions (Judicial Review) Act 1977* an application may be made to the Commission for a statement in respect of a decision setting forth, *inter alia*, the reasons for the decision, the findings on material questions of fact, and a reference to the evidence on which the findings were based. Section 13A sets out information not required to be disclosed in response to such an application, including, information as to a person's business affairs which is supplied in confidence, or if published, would reveal a trade secret.

Under section 14, the Attorney General can certify that the disclosure of information would be contrary to the public interest.

THE PUBLIC SERVICE REGULATIONS

Regulation 35 of the *Public Service Regulations* prohibits an officer from disclosing information obtained in the course of official duties unless authorised to do so.

THE EVIDENCE ACT 1995

Section 130 of the *Evidence Act 1995* provides that a court (whether or not on the application of a person) may direct that a document relating to matters of state not be adduced as evidence on the grounds of public interest in preserving secrecy or confidentiality. Information will be taken to relate to matters of state if adducing it as evidence would, *inter alia*, prejudice the prevention, investigation or prosecution of an offence; prejudice the prevention or investigation of, or the conduct of proceedings

confidential source of information relating to the enforcement or administration of the law.

Section 131 provides (subject to certain exceptions) that evidence is not to be adduced of communications made or documents prepared in the context of attempts to negotiate the settlement of a dispute.

THE MUTUAL ASSISTANCE IN CRIMINAL MATTERS ACT 1987

Section 43B of the *Mutual Assistance in Criminal Matters Act 1987* outlines restrictions on use of information sent to Australia in response to a request made by the Attorney General under the Act in relation to a criminal matter. It provides that such material is not used or disclosed intentionally for any purpose other than that for which it was requested unless the Attorney General has approved otherwise.

The restriction on unauthorised use of the material is extended to inadmissibility in evidence in any proceedings other than those for which it was obtained without the Attorney General's approval. In addition, any information, document, article or thing which has itself been obtained directly or indirectly from a person as a result of unapproved use of the material received from the other country is also inadmissible in evidence in any proceedings other than those for which it was requested (or used for the purposes of any other investigation) without the Attorney General's approval.

Section 43B(4) provides a penalty of two years imprisonment for contravention of subsection (1).

Section 43C provides a penalty of two years imprisonment for intentional disclosure of the contents of a request for assistance, of the fact that a request has been made or of the fact that assistance has been granted or refused where the person has such knowledge as a result of his or her employment, unless such disclosure is necessary in the performance of his or her duties or the Attorney General has authorised such disclosure.

B. Laws and Procedures Providing Sanctions for Breaches of the Confidentiality Laws and Procedures

THE CRIMES ACT 1914

Section 70 of the *Crimes Act 1914* provides a penalty of two years imprisonment for unauthorised disclosure by a Commonwealth officer of information which the officer has a duty not to disclose.

The Privacy Act 1988

Under section 93 of the *Privacy Act 1988*, a confider may recover damages from a confidant in respect of a breach of confidence with respect to personal information.

THE FREEDOM OF INFORMATION ACT 1982

Section 59 of the *Freedom of Information Act 1982* provides that where an agency makes a decision that documents relating to the business, commercial or financial affairs of a company are not exempt documents under section 43, the company may apply to the Administrative Appeals Tribunal for a review of that decision.

Section 57 of the *Freedom of Information Act 1982* provides that a person may complain to the Ombudsman concerning any action taken by an agency in the exercise of its powers and the performance of its functions under the Act. The Ombudsman cannot overturn the decision of an agency, although recommendations can be made to that agency or the responsible minister.

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