

# **SUPPLY TERMS & CONDITIONS FOR OVERSEAS & NEW ZEALAND SUPPLIERS**

**FOR USE WHEN IMPORTING ITEMS DIRECTLY FROM AN  
OVERSEAS SUPPLIER  
& PURCHASING LOCALLY FROM A NEW ZEALAND  
SUPPLIER**

**Kmart Australia Limited**

**ABN 73 004 700 485**

**and**

**Kmart NZ Holdings Limited**

**NZCN 33 55 13 NZBN 9429 03963 7192**

**trading as Kmart**

**Name of Supplier:**

**GST Number:**

(Enter for New Zealand based Suppliers only)

**Execution Date:**

(Kmart to enter date after signing at execution)

**SAP No: .....**

**DSS No: .....**

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## SUPPLY AGREEMENT FOR OVERSEAS SUPPLIERS

The parties agree that this document sets out the terms and conditions on which Goods are to be supplied and that all Orders made by the Purchaser are subject to these Terms and Conditions.

**Supplier:**

**Address:** \_\_\_\_\_

### 1. ACKNOWLEDGEMENT

1.1 Each time the Supplier accepts an Order from the Purchaser (whether in writing or by delivery or pursuant to **clause 4.3**), the Supplier agrees to be bound by these Terms and Conditions, other documents referenced in these Terms and Conditions and the Confidential Trading Agreement.

[Explanatory note: These Terms and Conditions relate to the purchase of goods by Kmart from: (a) suppliers based in New Zealand; and (b) suppliers based overseas in countries other than New Zealand. If the supplier is a supplier based overseas in a country other than New Zealand, the supplier should ignore all references to New Zealand GST and also Confidential Trading Agreements as they do not apply]

1.2 The Supplier acknowledges and agrees that the Purchaser is under no obligation to place an Order or any number of Orders over a particular period.

1.3 The Supplier acknowledges that the commercial arrangements relating to Orders are set out in a separate trading terms agreement ("Confidential Trading Agreement") between the Purchaser and the Supplier.

### 2. AGREEMENT AND INCONSISTENCIES

2.1 These Terms and Conditions and all other documents referenced in these Terms and Conditions supersede any other existing agreements, documents or arrangements between the Supplier and the Purchaser in relation to the supply of Goods. Any other terms (for example appearing on invoices or acceptance of Orders) are not part of the agreement formed pursuant to **clause 1.1**.

2.2 In the event of any inconsistency between these Terms and Conditions, the Order and the Confidential Trading Agreement, the documents will be interpreted in the following priority:

- (a) these Terms and Conditions;
- (b) the Confidential Trading Agreement; and
- (c) the Order.

2.3 These Terms and Conditions may only be varied by a written agreement signed by an authorised representative of each party with a level of authority equivalent to or higher than the signatory of these Terms and Conditions.

### 3. EDI

3.1 Unless specified by the Purchaser, the Supplier must have electronic trading and EDI capability and commit to the following within an agreed timeframe:

- (a) Business to Business (“**B2B**”) EDI standards and electronic trading requirements as notified from time to time by the Purchaser;
  - (b) support emerging Purchaser EDI standards as communicated and implemented from time to time; and
  - (c) support industry standard product catalogues as adopted by Purchaser, for example EANnet.
- 3.2 The Supplier must participate and complete the Purchaser’s B2B accreditation process.
- 3.3 In the event that transmissions by EDI are delayed due to technical difficulties Orders may be given in writing at the Purchaser’s discretion.

#### **4. ORDERS**

- 4.1 Each Order is deemed to incorporate these Terms and Conditions and constitutes an offer by the Purchaser to purchase the Goods subject to these Terms and Conditions and the Confidential Trading Agreement.
- 4.2 Orders will be deemed to have been received by the Supplier at the time of successful electronic transmission.
- 4.3 All Orders are subject to acceptance by the Supplier. The Supplier will be deemed to have accepted the Order if the Order has not been accepted or refused within 3 Business Days of the Supplier receiving notification of the Order for Goods in accordance with **clause 4.2**.
- 4.4 A variation of an Order will only be binding on the Purchaser and the Supplier if the Order with the variation has been re-issued by the Purchaser and accepted by the Supplier.
- 4.5 The Supplier must not make substitutions in respect of the colours, sizes, trims or other details of the Goods specified in the Order or Specifications without the written approval of the Purchaser.

#### **5. DISTRIBUTION AND SALE OF THE GOODS**

- 5.1 The Purchaser may distribute the Goods to and sell the Goods through any of its stores in Australia and New Zealand.
- 5.2 The Purchaser may sell the Goods via its website.
- 5.3 The Purchaser may sell the Goods to any third party in any location (including for re-sale by the third party).

#### **6. SUPPLIER WARRANTIES**

- 6.1 The Supplier warrants and represents to the Purchaser on acceptance of each Order and at all material times that:
- (a) it has the capacity to enter into these Terms and Conditions and each Order on its own behalf and on behalf of its Related Bodies Corporate (as applicable under these Terms and Conditions) and has the right and authority to sell the Goods to the Purchaser;
  - (b) it has the right to sell the Goods free from all encumbrances, the Goods being sold are free from all encumbrances, and that the Purchaser will enjoy quiet possession of the Goods;

- (c) the Goods are safe, free from defects or faults, are of acceptable appearance, finish, durability and are of acceptable quality including where the Goods are software or the Goods contain software, the Goods are free from any malware, viruses, worms and other destructive codes;
- (d) the Goods are fit for sale (either retail or wholesale and by any channel (including on-line)) for their usual purpose;
- (e) the packaging and labelling of the Goods complies with any Artwork provided by the Purchaser to the Supplier or developed by the Supplier for the Purchaser in relation to the Goods;
- (f) the Goods comply with the Specifications, Policies and any technical performance standards or grades (including Quality Assurance Specifications) provided by the Purchaser;
- (g) all information which the Supplier has provided to the Purchaser (for example instructions, warranties, product descriptions) in relation to the Goods is true, clear and accurate;
- (h) where the Goods are supplied by reference to a sample, those Goods (including the way the Goods are labelled, marked, ticketed and packaged) correspond with the sample;
- (i) the Goods comply with all applicable laws and generally accepted industry standards in the country in which they were manufactured and in which they are to be located or sold, including all applicable laws and standards relating to care, safety, manufacture, storage, packaging, labelling (including statement of claims), ticketing, loading, transportation and country of origin;
- (j) the Goods comply with all agreed voluntary industry codes and any court or governmental order or declaration and are not the subject of a notice published in exercise of the *Competition and Consumer Act 2010*, or any similar powers in any other laws, including applicable laws in New Zealand (where the Goods are to be sold in New Zealand);
- (k) the importation, sale or promotion of the Goods by the Purchaser or the use of photos, graphics or text provided by the Supplier in relation to the Goods in advertising or marketing materials, will not infringe any person's Intellectual Property Rights or other rights, and that the Supplier has made all reasonable enquiries to ascertain this where the Goods (or any component or part of the Goods such as its packaging or instruction manuals) are imported from, or manufactured or produced by a third party;
- (l) where the Goods are supplied to the Purchaser for importation or retail sale in New Zealand, then the Goods will comply with the requirements set out in the *Consumer Guarantees Act 1993* and any other relevant laws in New Zealand;
- (m) to the best of its knowledge, there is no current, pending or threatened litigation, arbitration, investigation, inquiry or proceeding in which the Supplier is involved that will or may have a material adverse effect on the Supplier's reputation, the Purchaser's reputation or the performance of any of the Supplier's obligations under these Terms and Conditions; and
- (n) the goods being exported and supplied to the Purchaser in Australia and New Zealand do not contain asbestos.

6.2 Upon request, the Supplier must provide to the Purchaser independent test reports of all Goods that are subject to mandatory standards under the laws in the location in which the Goods are to be sold that confirm that the Goods meet such mandatory standards. All such testing is to be at the cost of the Supplier.

- 6.3 The Supplier will not be liable for breach of any warranty under **clause 6.1** to the extent that such breach is caused or contributed to by damage to the Goods following delivery to the Delivery Address or other acts or omissions of the Purchaser.
- 6.4 Except as set out in these Terms and Conditions, any condition, warranty, statement or undertaking as to the quality of the Goods or their fitness or suitability for any purpose howsoever or whenever expressed or which may be implied by statute or otherwise is hereby excluded, except to the extent that such exclusion is prevented by law.

## 7. PRICE

- 7.1 The price of the Goods is stated in the Order and unless otherwise specified by the Purchaser includes all costs including but not limited to the following:
- (a) all taxes (including, without limitation, GST for Orders placed with New Zealand suppliers), levies and duties that are applicable in the country of manufacture and export;
  - (b) all charges for labelling and packaging, packing, shipping, carriage, freight applicable to delivery of the Goods from the factory to the freight forwarder used to deliver the Goods, quarantine, commissions, assists, rebates, discounts (and any other consideration), testing and delivery to and off-loading of the Goods to the Delivery Address;
  - (c) all insurance costs applicable to cover the Goods during manufacture and while in transit from the factory to the Delivery Address; and
  - (d) all insurance costs incurred by the Supplier to comply with its obligations in **clause 17**.

## 8. PAYMENT AND INVOICING

- 8.1 Subject to **clause 1.1** the Supplier may only render an Invoice to the Purchaser prior to or on delivery of the Goods in accordance with these Terms and Conditions. Each Invoice must prominently display the number of the Order, the Purchaser recognised EAN or GTIN or the Purchaser's product keycode. The Supplier must otherwise comply with all requirements notified by the Purchaser regarding its invoicing requirements.
- 8.2 The Purchaser will pay the Invoice in accordance with the price specified on the Order and the quantity of the Goods shown on the Order, unless the Purchaser:
- (a) finds, upon inspecting the Goods pursuant to **clause 16.2**, that the quantity of the Goods received varies from the quantity shown on the Order; or
  - (b) exercises its rights under **clause 16**.
- in which case the Purchaser will only be required to pay for the Goods that are received and fully comply with these Terms and Conditions (including the Order). This **clause 8.2** does not limit any other rights or remedies available to the Purchaser.
- 8.3 The Supplier will provide upon delivery or as soon as possible afterwards all documents as reasonably required by the Purchaser and/or specified in Kmart's International Shipping Manual. Delivery will only be deemed effective on the day when all Goods and all required documents have been properly delivered, and the agreed time period for payment will not commence until all Goods and all required documents specified in Kmart's International Supplier Shipping Manual and any other documentation reasonably required by Kmart have been delivered as required.

- 8.4 The Purchaser will only make payment for an Order when **clause 8.3**, the Order and these Terms and Conditions have been complied with.
- 8.5 The Supplier must keep records of the Orders and the delivery of the Goods for at least 12 months from the date of delivery of the Goods in accordance with these Terms and Conditions or longer if otherwise required by law.
- 8.6 Invoices will be paid by the Purchaser on the settlement terms set out in the Confidential Trading Agreement, vendor registration form or such other written agreement between the parties and any rebates or discounts set out in any such document(s) will be deducted by the Purchaser from the remittance to the Supplier by set-off in accordance with **clause 40**.

## 9. NEW ZEALAND GST

- 9.1 Unless the context requires otherwise, this clause and **clause 7.1(a)** override all other provisions of this Agreement as regards the treatment of GST under the GST Act.
- 9.2 Unless the context requires otherwise, words and phrases used in this clause have the same meaning as those words and phrases have in the GST Act.
- 9.3 The Supplier and the Purchaser each acknowledge that at the time of entering this agreement that, to the extent required by the GST Act, they are registered for GST and will promptly notify the other party in writing if they cease to be registered for GST.
- 9.4 Subject to **clause 9.5**, for every taxable supply of Goods under this agreement, the Supplier will issue to the Purchaser a valid tax invoice. The Supplier acknowledges that payment for the Goods is conditional on the issue of a tax invoice.
- 9.5 The Supplier warrants that where applicable, any tax invoice it issues to the Purchaser in accordance with **clause 9.4** will comply with the GST Act, and if any invoice fails to comply with the GST Act, then the Supplier will indemnify the Purchaser against any Loss resulting from that failure.
- 9.6 If an event referred to in section 25(1) of the GST Act occurs in relation to a taxable supply made under or in connection with this agreement, the GST payable on that supply will be recalculated to reflect that adjustment, a debit note or credit note will be issued as required by the GST Act and an appropriate payment will be made between the parties.

## 10. DUTIES OF SUPPLIER

- 10.1 The Supplier undertakes and agrees with the Purchaser that it must at all times observe and perform these Terms and Conditions and in particular must:
- (a) promptly execute all Orders accepted by it under **clause 4.3**;
  - (b) arrange for advance production samples of the Goods to be forwarded to the Purchaser for approval prior to production of the ordered Goods if required by the Purchaser;
  - (c) allow the Purchaser, or its authorised representatives, to make, upon reasonable notice, such quality control and other checks and inspections of ordered Goods as specified in the Kmart Quality and Compliance Framework to ensure compliance with the Quality Assurance Specifications and other technical standards;
  - (d) ensure the Goods comply with all laws and generally accepted industry standards in the country in which they were manufactured and in which they are to be located or sold, including all laws and standards relating to care, safety, manufacture, storage, packaging, labelling (including claims), ticketing, loading, transportation and country of origin;

- (e) ensure the packaging and labelling of the Goods complies with the Artwork provided by the Purchaser to the Supplier or developed by the Supplier for the Purchaser in relation to the Goods;
- (f) ensure that the Supplier promptly prepares and forwards to the Purchaser's nominated representative or freight forwarder, at the Supplier's own cost, shipping documents including but not limited to, invoices, packing notes/lists and where required inspection certificates, at the time of booking of cargo with the Purchaser's freight forwarder and forward any remaining documents by the time of delivery. Any subsequent approved changes to documentation due to changes in quantity or price must be submitted to the Purchaser's nominated representative or freight forwarder immediately. The invoices must agree to the Order placed by the Purchaser. The Supplier will also review the shipping documentation to ensure that it meets the requirements of both the Purchaser or its nominated representative and the requirements of the customs and quarantine governmental departments in the final destination country of sale of the Goods;
- (g) promptly inform the Purchaser of any potential problems with quality or quantity arising from an inspection of the Goods or otherwise;
- (h) ensure that the Purchaser is fully and promptly informed as to any delays or anticipated delays in relation to the shipment of the Goods to the Delivery Address; and
- (i) ensure that the Supplier obtains any necessary licences or permissions necessary to be obtained for the exportation of the Goods from the country of origin and the importation of the Goods into the final destination country of sale of the Goods.

## **11. PACKING OF GOODS FOR DELIVERY**

- 11.1 The Supplier must ensure that the Goods for delivery and transport are packed, labelled, marked, ticketed and loaded according to the Order and the Purchaser's instructions and comply with all requirements of the carrier to assist in minimising damage to the Goods while in transit.
- 11.2 The Purchaser is not obliged to return to the Supplier any packaging or packing materials for the Goods, whether or not the Goods are accepted by the Purchaser.

## **12. FREIGHT**

- 12.1 The Purchaser is not responsible for freight except to the extent this is specified by the Purchaser in the delivery terms in the Order.
- 12.2 Where the Supplier organises freight on behalf of the Purchaser then the Supplier must:
  - (a) do so in accordance with any Policies provided by the Purchaser to the Supplier; and
  - (b) minimise all associated costs.

## **13. DELIVERY OF THE GOODS**

- 13.1 The Supplier must deliver the Goods to the Delivery Address:
  - (a) By the "DLV CONS DATE" (being the deliver to consolidator date) or in the case of Suppliers based in New Zealand by the "delivery not after" date specified in the Order (or such later date as the Purchaser may agree to in writing by issuing an



amended Order where an event outside the control of the Supplier causes a delay in the manufacture of the Goods such that the Supplier reasonably believes that it is unable to meet the original "DLV CONS DATE" or in the case of Suppliers based in New Zealand the "delivery not after" date specified in the Order);

- (b) marked according to the Order including a prominent consignment note quoting the Order number, ASN and all required invoices, packing notes and inspection certificates for that order all of which quote the Order number and Item Codes or EAN codes; and
- (c) according to all relevant procedures or other requirements otherwise specified by the Purchaser, in writing or otherwise.

13.2 The Supplier must promptly notify the Purchaser of the inability or failure to deliver Goods on time or in such volumes as stated in the Order.

13.3 If the Supplier does not deliver the Goods in accordance with **clause 13.1(a)**, or does not deliver the quantity of Goods ordered in an Order in accordance with **clause 13.1(a)**, the Purchaser is entitled to immediately cancel the Order or any part of it.

13.4 Where agreed between the parties, if Goods are to be delivered by instalments, the contract formed by acceptance of the relevant Order will be treated as a single contract and not severable.

13.5 Notwithstanding the terms of the Order, the Purchaser may, at its option, take or accept delivery of Goods at the Supplier's premises and the Supplier must ensure that the Goods are:

- (a) ready to be collected at the time and in the manner specified by the Purchaser such time and manner being pre-agreed by the Supplier;
- (b) marked according to the Order including a prominent consignment note quoting the Order number, ASN and all required invoices, packing notes and inspection certificates for that order all of which quote the Order number and Item Codes or EAN codes; and
- (c) ready to be collected according to all relevant procedures or other requirements specified by the Purchaser, in writing or otherwise to the extent the Purchaser has notified the Supplier of such procedures and requirements and the same are reasonable.

## **14. DELIVERY FOR A SPECIAL EVENT**

14.1 If the Purchaser requires Goods for a special event, such as a catalogue sale or other promotion and the Supplier has agreed to deliver the Goods ordered for the special event to the Delivery Address by the "DLV CONS DATE" specified in the Order or in the case of Suppliers based in New Zealand the Supplier has agreed to deliver the Goods to the Delivery Address between the "delivery not before" and "delivery not after" dates specified in the Order, then, if the Supplier believes that it may not be able to deliver the Goods on time and in such volumes as ordered, the Supplier must:

- (a) notify the Purchaser immediately;
- (b) provide the Purchaser with any information and assistance that is necessary or is reasonably requested by the Purchaser to lessen the damage the Purchaser is likely to suffer as a consequence, including damage to its reputation or damage arising from a breach of legislation (e.g. *Competition and Consumer Act 2010* or the *Fair Trading Act 1986 in New Zealand*); and

- (c) indemnify the Purchaser against all Loss in accordance with **clause 22.1** incurred by the Purchaser as a consequence of the late, inadequate or non-delivery of the Goods.

14.2 Subject to any other rights of the Purchaser under these Terms and Conditions, on receipt of the information referred to in **clause 14.1(b)**, the Purchaser will notify the Supplier in writing whether it will accept the Goods and, if so, on what terms.

## 15. PROPERTY AND RISK

15.1 Subject to **clauses 15.2, 15.3 and 15.4** and unless otherwise agreed:

- (a) property in the Goods passes to the Purchaser on delivery to the Delivery Address or collection by the Purchaser or its agent pursuant to **clause 13.5**; and
- (b) risk in the Goods passes to the Purchaser when the Purchaser or the Purchaser's agent takes physical Possession of the Goods at the Delivery Address or on collection of the Goods by the Purchaser or its agent pursuant to **clause 13.5**.

*[Explanatory note to clause 15.1(a) – Kmart must have title to the Goods to on-sell them, which may occur before we have paid your invoice.]*

15.2 Where Goods are to be delivered by the Supplier direct to a customer of the Purchaser:

- (a) property in the Goods passes to the Purchaser upon delivery to the Delivery Address; and
- (b) risk in the Goods passes to the Purchaser when the Purchaser or the customer takes physical Possession of the Goods.

This **clause 15.2** only applies where the Supplier is registered for New Zealand GST purposes under *New Zealand Goods and Services Act 1985* and the customer is located in New Zealand.

15.3 Where the Purchaser or its agent is to collect the Goods in accordance with **clause 13.5**:

- (a) all risks relating to transportation of the Goods will be borne by the Purchaser; and
- (b) under no circumstances will delivery be deemed to have occurred unless and until the Goods have been collected by the Purchaser or its agent.

15.4 Where the Purchaser or its agent receives the Goods at the Delivery Address from the Supplier's carrier or agent:

- (a) all risks relating to transportation of the Goods to the Delivery Address will be borne by the Supplier; and
- (b) under no circumstances will delivery be deemed to have occurred unless and until the Goods have been delivered to the Delivery Address.

15.5 Property in the Goods passing to the Purchaser in accordance with **clause 15** will not relieve the Purchaser of its obligation under these Terms and Conditions to pay for Goods delivered in accordance with these Terms and Conditions.

15.6 The Supplier must not claim or register any interest (including any security interest) in the Goods.

## 16. RETURNED GOODS

- 16.1 The Purchaser may, upon obtaining physical Possession of Goods or at any time after it has inspected the Goods pursuant to **clause 16.2**, return Goods if the Purchaser reasonably considers that:
- (a) where the Goods have a use-by date, the use by dates are insufficient for distribution and re-sale by the Purchaser in the normal course of the Purchaser's business;
  - (b) the Goods, components or ingredients thereof, safety, quality (including but not limited to being fit for their usual purpose, safe, free from defects or faults, being of acceptable appearance, finish, and durability), processes of manufacture, packaging, labelling, grade, storage or anything else done or agreed to be done in respect of the Goods do not comply with the Order, Policies, Specifications, Artwork (in the case of the packaging or labelling) provided by the Purchaser to the Supplier or developed by the Supplier for the Purchaser in relation to the Goods, or these Terms and Conditions; or
  - (c) the Goods have been damaged in any way prior to the Purchaser or its agent taking Possession; or
  - (d) **clauses 24.5(b) or 24.5(c)** (or both) apply; or
  - (e) **clauses 24.9(b) or 24.9(c)** (or both) apply.
- 16.2 The Purchaser will not be deemed to have accepted any Goods until the Purchaser has had a reasonable time to inspect them following delivery to the Delivery Address or within a reasonable time after any latent defect in the Goods has become apparent.
- 16.3 Where the Goods are to be returned, the Supplier will collect the returned Goods from the Purchaser at the Supplier's risk and cost, unless otherwise agreed. Where the Purchaser has paid for the Goods (the "**Paid Amount**"), the Purchaser will:
- (a) where the Paid Amount is less than the amount owing by the Purchaser to the Supplier, the Purchaser will set-off the Paid Amount in full against the next payment due to be made by the Purchaser to the Supplier;
  - (b) where the Paid Amount is greater than the amount owing by the Purchaser to the Supplier, the Purchaser will set-off that part of the Paid Amount that can be set-off against the next payment due to be made by the Purchaser to the Supplier and the Supplier will refund to the Purchaser the difference between the amount set-off and the Paid Amount within the agreed period from when the Purchaser notifies the Supplier of that difference; or
  - (c) where there is no amount owing by the Purchaser to the Supplier, the Supplier will refund to the Purchaser the Paid Amount in full within the time period stipulated by the Purchaser.
- 16.4 Where the Goods are required to be delivered by instalments, the Purchaser may return all or any of the Goods so delivered without affecting the validity of the contract formed by acceptance of the relevant Order and applying to any instalments accepted by the Purchaser.
- 16.5 Without prejudice to any other remedy, if any Goods are supplied in breach of any warranty or representation given by the Supplier or are otherwise not in accordance with an Order, the Purchaser may require the Supplier to despatch replacement Goods within the time agreed in writing between the parties.
- 16.6 The Purchaser will not be entitled to return Goods under **clause 16.1(b)** where the failure of the Goods to comply with the Order, Policies, Specifications, Artwork or these Terms and

Conditions is caused or contributed to by damage to the Goods (or their packaging or labelling) following delivery to the Delivery Address or other acts or omissions of the Purchaser.

## 17. INSURANCE

- 17.1 The Supplier will take out and maintain an annual, worldwide General and Products Liability Policy of insurance with a reputable insurer (including coverage for all warranties in respect of the Goods under these Terms and Conditions) in the name of the Supplier and fully indemnifying the Supplier, to the fullest extent permitted by law, against liability for property damage, personal injury or death arising directly or indirectly out of Goods manufactured, distributed or sold by it with an annual cover of not less than US\$2 million, or the foreign currency equivalent, for any single occurrence and in the aggregate.
- 17.2 Where the Supplier is not the manufacturer of the Goods, the Supplier must also ensure that the manufacturer of the Goods has the insurance cover set out in **clause 17.1**. Failure or delay by the Supplier in complying with **clause 17.2** will not relieve the Supplier of its obligations in **clause 17.1**.
- 17.3 The Supplier will ensure that all insurance policies taken out and maintained by the Supplier in accordance with this **clause 17** do not exclude liability which only arises as a result of the Supplier entering into a contract, arrangement or other legally binding agreement through which the Supplier incurs liability.
- 17.4 The Supplier must provide to the Purchaser, at the same time as it returns these signed Terms and Conditions, a certificate of currency in respect of the insurance referred to in **clause 17.1** confirming that the insurance is in force. In addition, the Supplier must immediately provide a new certificate of currency to the Purchaser upon the expiry of any previously provided certificate of currency. No Goods or Orders will be exempt from this requirement.
- 17.5 Where applicable, the Supplier must make any notification to its insurer required under the GST Law to ensure that GST is not payable on a payment that may be made by an insurer in respect of any claim on an insurance policy required under these Terms and Conditions.
- 17.6 The Supplier is responsible for insuring the Goods against theft, Loss or damage until property in them has passed to the Purchaser.

## 18. SAMPLES

- 18.1 If the Goods are supplied by reference to a sample, which has been approved by the Purchaser (either subject to conditions or otherwise), then the Supplier must ensure that the Goods supplied, including (where applicable) the way the Goods are labelled, marked, ticketed and packaged comply with the sample and the Artwork (in the case of packaging and labelling) provided by the Purchaser to the Supplier or developed by the Supplier for the Purchaser in relation to the Goods.

## 19. PRIVATE LABEL/ HOUSEBRAND

- 19.1 This **clause 19** only applies where the Supplier develops, manufactures or supplies private label or house brand Goods for the Purchaser. Private label or house brand Goods include those Goods provided by Purchaser approved suppliers, which are labelled either by the supplier or at store level with a brand owned by the Purchaser. It also includes Goods provided by the Supplier in bulk that are sold loose or unbranded in a display. This also includes branded products that are provided exclusively to the Purchaser.

- 19.2 The Purchaser may provide Specifications in relation to the private label or house brand Goods to the Supplier.
- 19.3 The Purchaser may request that the Supplier develop Specifications for Goods or the Supplier may suggest Specifications for Goods to the Purchaser. Any costs incurred by the Supplier or Purchaser in relation to such development will be as agreed between the parties in writing.
- 19.4 The Purchaser may provide digital Artwork in relation to the private label or house brand Goods to the Supplier. If the Supplier provides the Purchaser with the technical specifications that the Supplier's nominated printer prefers, the Purchaser will provide the Artwork to those specifications.
- 19.5 Unless agreed in writing to the contrary, the Supplier must pay for the costs associated with the development of the Artwork by the Purchaser as well as any printing and packaging costs. Prior to commencing any Artwork development, the Purchaser will advise the Supplier of the estimated Artwork development costs. Any costs incurred by the Purchaser in relation to the development of the Artwork may be invoiced to the Supplier after the digital Artwork referred to in **clause 19.4** has been provided to the Supplier's printer.
- 19.6 The Purchaser may request that the Supplier develop Artwork on behalf of the Purchaser. Any costs incurred by the Supplier or Purchaser in relation to such development will be borne by the Supplier.
- 19.7 All copyright, design rights and other Intellectual Property Rights in the Artwork or Specifications given to the Supplier by the Purchaser will remain at all times the property of the Purchaser.
- 19.8 The Supplier assigns to the Purchaser all copyright, design rights and other Intellectual Property Rights in any Artwork or Specifications developed for the Purchaser, effective immediately on the creation of such rights.
- 19.9 On request by the Purchaser, the Supplier must promptly return to the Purchaser, or permanently delete or destroy (at the Purchaser's election), all Specifications and all Artwork and any copies of the Specifications or Artwork in the Supplier's possession or control.
- 19.10 The Supplier must treat the Specifications and Artwork provided by the Purchaser to the Supplier or developed by the Supplier for the Purchaser in relation to the Goods in accordance with the confidentiality obligations set out in **clause 28**.
- 19.11 Subject to **subclause 19.12**, if the Goods are subject to the *Therapeutic Goods Act 1989* ("the **Act**") or, where the Goods are supplied to the Purchaser for importation or retail sale in New Zealand, a New Zealand equivalent law, the Supplier will be deemed to be the sponsor for the purposes of that Act and the Supplier must:
- (a) comply with its obligations under the Act or any New Zealand law (as applicable), including any costs associated with being the sponsor; and
  - (b) ensure that the Goods comply with the Act or any New Zealand law (as applicable).
- 19.12 If the Goods are:
- (a) subject to the *Therapeutic Goods (Medical Devices) Regulations 2002* ("the **Regulations**"); and
  - (b) sourced by the Purchaser directly from the Supplier; and
  - (c) the Supplier does not have a business address in Australia,
- the Purchaser will be deemed to be the sponsor and the Supplier will be deemed to be the manufacturer for the purposes of the Act and Regulations (as applicable), and the Supplier must:

- (d) comply with its obligations under the Act and Regulations; and
  - (e) ensure that the Goods comply with the Act and Regulations.
- 19.13 Unless agreed to the contrary, the Supplier must maintain a maximum of 12 weeks of private label packaging for the Goods but will maintain such lesser quantities as are necessary to provide for any sales forecasts advised by the Purchaser.
- 19.14 The Supplier acknowledges and agrees that it shall not, by virtue of these Terms and Conditions, obtain or claim any right, title or interest in or to the Purchaser's Intellectual Property Rights.

## 20. PURCHASER BRANDING

- 20.1 Goods bearing any Intellectual Property Rights that are owned by or licensed to the Purchaser ("**Purchaser Branding**") must only be sold to the Purchaser and must only be manufactured in quantities required by the Purchaser.
- 20.2 Supplier acknowledges and agrees that Purchaser Branding is and shall remain the exclusive property of Purchaser or the licensor (as the case requires), and that the Supplier does not acquire, and must not make any Claim to, any rights in the Purchaser Branding.
- 20.3 Without limiting **clause 28**, Supplier must keep all details of Purchaser Branding confidential and must not disclose it to, nor permit the disclosure of any such details to, any third party other than where that third party is involved in manufacturing the Goods for the Supplier.
- 20.4 Supplier must not use Purchaser Branding for any purpose other than to supply Goods to Purchaser.
- 20.5 The Goods will bear any copyright notices or ownership of Intellectual Property Rights notices stipulated by the Purchaser.
- 20.6 Where Goods bearing the Purchaser Branding have been returned or not taken up by the Purchaser, the Supplier must obtain the prior written consent of the Purchaser to sell such Goods to any third party. Consent may be given on any terms specified by the Purchaser. If such consent is given, then the Supplier must remove all Purchaser Branding and all references to the Purchaser's trademarks including swing tickets, tags, badges and all other labels from those Goods before they are offered for sale to a third party. Such Purchaser Branding and references must be removed to the satisfaction of the Purchaser and at the cost of the Supplier.

## 21. CANCELLATION OF ORDERS

- 21.1 The Purchaser may cancel an Order in respect of any Goods which have not been delivered if:
- (a) **clause 13.3** applies;
  - (b) the Supplier is in breach of any of the terms of these Terms and Conditions and has failed to remedy that breach within 5 Business Days of receipt of notice from the Purchaser requesting it to do so;
  - (c) the Goods are not supplied in accordance with the Order;
  - (d) an Insolvency Event occurs in relation to the Supplier or its assets; or
  - (e) **clause 31.2** (anti-bribery) applies.

For the purposes of sub-paragraph (a), an Order is deemed to have been cancelled once the "delivery not after" date or "DLV CONS DATE" has passed, unless otherwise agreed.

- 21.2 If an Order is cancelled under **clause 21.1** the Purchaser is not liable to pay anything in respect of any Goods that have not been delivered before the time of cancellation. Cancellation does not affect any rights the Purchaser may have in relation to anything done or not done by the Supplier.
- 21.3 The Purchaser is not responsible for any Loss or damage suffered by the Supplier as a consequence of such cancellation.
- 21.4 If the Supplier believes that at any time it may be unable to supply the Purchaser under the terms of these Terms and Conditions, the Supplier must:
- (a) notify the Purchaser immediately and confirm its position in writing; and
  - (b) provide the Purchaser with any help it may reasonably require to lessen any damage the Purchaser may suffer as a consequence.

## 22. SUPPLIER INDEMNITIES

- 22.1 The Supplier releases and forever indemnifies the Kmart Group, its officers, directors, employees, agents, successors and assignees against all Loss, incurred by the Purchaser arising out of or in connection with any:
- (a) breach of the Order or these Terms and Conditions (including the Specifications or the Supplier's warranties in **clause 6**);
  - (b) the late, inadequate or non-delivery of the Goods in the circumstances described in **clause 14.1**;
  - (c) defects or faults or alleged defects or faults in the Goods;
  - (d) any recall or withdrawal of Goods in accordance with **clause 25**;
  - (e) Claim of infringement of any Intellectual Property Rights by any person in respect of the Goods (including their packaging or labelling or instruction manuals) or the use of photos, graphics or text provided by the Supplier to the Purchaser for marketing, advertising or promotion of the Goods;
  - (f) failure by the Supplier to comply with its obligations under **clause 29.1** (Privacy) or **clause 28** (Confidentiality); and
  - (g) to the fullest extent permitted by law, Claim for Loss by a third party where the Loss suffered or incurred by the third party is as a result of a defect or fault in the Goods,
- except to the extent that the Loss is directly attributable to the negligence or wrongful act or omission by the Purchaser.
- 22.2 Any amount payable by the Supplier under **clause 22.1** will include any GST payable by the Purchaser (where applicable).
- 22.3 Where a Related Body Corporate or other associated entity of the Supplier is the immediate past supplier of the Goods ("**Previous Supplier**") to the Purchaser prior to the Supplier entering into these Terms and Conditions, the Supplier agrees that the indemnity set out under **clause 22.1** and **clause 14.1(c)** will extend to any Goods supplied by the Previous Supplier whether delivery of such Goods occurs prior to or after the date that the Supplier has entered into these Terms and Conditions. Without limiting the preceding paragraph, the Supplier agrees to honour all Claims made by the Purchaser that relate to Goods supplied by the Previous Supplier, including Claims relating to rebates, cost errors not previously claimed and Goods returned or rejected by the Purchaser.

## 23. SAFETY

- 23.1 The Supplier must ensure that it complies with the Kmart Occupational Health and Safety Obligations and other safety and security policies (as notified to the Supplier from time to time) whilst the Supplier and/or any of its employees or sub-contractors are on the Purchaser's premises or using the Purchaser's equipment or property.
- 23.2 The Kmart Occupational Health and Safety Obligations are located under Supplier Safety at <http://et.supplier.kmart.com.au>.

## 24. POLICES AND ETHICAL SOURCING

- 24.1 The Supplier acknowledges and agrees that it will at all times comply with the Policies. Any changes to the Policies or new policies that apply to the Supplier will be published by the Purchaser on the Purchaser's "supplier portal", or will be notified by the Purchaser to the Supplier, such notice to not be less than 7 days. The Supplier will register itself to use the "supplier portal".
- 24.2 The Supplier agrees that it will at all times comply with the Kmart Ethical Sourcing Code and located under Ethical Sourcing Code & Program at <http://et.supplier.kmart.com.au>.
- 24.3 The Supplier agrees to comply with all laws and regulations of the jurisdictions in which the factories at which the Goods the subject of any Order are manufactured. Where the Purchaser has agreed under **clause 39.3**, to the Supplier using third party factories to perform major or multiple operations (more than one function) in relation to the manufacture or supply of the Goods (the "**Permitted Subcontractor**"), the Supplier must ensure that such Permitted Subcontractors comply with all laws and regulations of the jurisdiction in which the factories are located (including those relating to labour, worker safety and protection of the environment).
- 24.4 The Supplier must have in place a compliance management system to ensure:
- (a) compliance with applicable laws and regulations;
  - (b) ensure conformance with the Kmart Group Ethical Sourcing Code;
  - (c) identification and mitigation of compliance risks related to the Ethical Sourcing Code; and
  - (d) continual improvement.
- 24.5 Upon request by the Purchaser, the Supplier must disclose factory information in the form requested by the Purchaser relating to the factories at which it or its Permitted Subcontractors manufacture the Goods supplied under any Order. The Supplier acknowledges that the Purchaser may as part of its commitment to ethical sourcing and transparency regarding the manufacture of its Goods, publish the name and location of such factories. If the Supplier fails to provide this information, or does not provide sufficient details as requested by the Purchaser, in each case within the time frames required by the Purchaser, the Purchaser may do any or all of the following:
- (a) cancel any or all Orders in respect of any Goods which have not then been delivered;
  - (b) reject any Goods that have been delivered but which have not yet been paid for;
  - (c) reject and return any Goods that have been delivered and paid for but not yet sold by the Purchaser in its normal course of business. The Supplier will provide a full refund for any such Goods returned; and/or



- (d) cease doing all business with the Supplier whether under these Terms and Conditions or some other arrangement.
- 24.6 The Supplier acknowledges and agrees that the Purchaser has developed the Kmart Ethical Sourcing Program to measure compliance by suppliers and subcontractors with the requirements of the Kmart Ethical Sourcing Code, and that the Purchaser may conduct audits in the manner set out in the Kmart Ethical Sourcing Program and inspect the factories at which the Goods are manufactured. The Supplier agrees to co-operate with any audits (which may be announced or unannounced) and/or verification of such audits and/or inspections of the factories at which Goods the subject of any Order are manufactured to assess compliance by the Supplier (or any Permitted Subcontractor) with the Kmart Ethical Sourcing Code. The Supplier must co-operate with any such audit (and ensure that any Permitted Subcontractor also co-operates). These audits may be conducted by the Purchaser or a third party appointed by the Purchaser.
- 24.7 The Supplier acknowledges and agrees that any reasonable costs associated with a third party audit which requires the Supplier to demonstrate compliance with the Kmart Ethical Sourcing Code will be met by the Supplier unless otherwise agreed to in writing.
- 24.8 Where the audit identifies deficiencies in the Supplier's (or Permitted Subcontractors) compliance with the Kmart Ethical Sourcing Code, the Supplier must take such corrective steps (or ensure that they are taken by the Permitted Subcontractor) as required by the Purchaser and within the time frames required by the Purchaser.
- 24.9 Where there are critical breaches of Kmart's Ethical Sourcing Code and/or if the Supplier fails to take the required corrective action or delays in implementing any corrective action, the Purchaser may do any or all of the following:
- (a) cancel any or all Orders in respect of any Goods which have not then been delivered;
  - (b) reject any Goods that have been delivered but which have not yet been paid for;
  - (c) reject and return any Goods that have been delivered and paid for but not yet sold by the Purchaser in its normal course of business. The Supplier will provide a full refund for any such Goods returned; and/or
  - (d) cease doing all business with the Supplier whether under these Terms and Conditions or some other arrangement.
- 24.10 All factories producing Goods, which the Purchaser, in its discretion, deems are National Brand Goods, will not be subject to **clauses 24.5** through to **24.9** above regarding factory disclosure and third-party audits. Instead, the Supplier must ensure that the factories at which it or its Permitted Subcontractors manufacture the National Brand Goods are subject to an adequate ethical sourcing program, which at a minimum consists of documented ethical sourcing standards (e.g. in the form of a code or policy that includes standards equivalent to those outlined in the Kmart Group Ethical Sourcing Code ) and adequate compliance procedures to ensure compliance with the ethical sourcing standards including, but not limited to. third party audit, training, worker hotline and reporting mechanisms.
- 24.11 Upon request by the Purchaser, the Supplier must disclose to the Purchaser information on the ethical sourcing program covering the operations of the factories at which it or its Permitted Subcontractors manufacture the National Brand Goods. In the event that the Purchaser determines, in its absolute discretion, that the ethical sourcing program is not adequate for the purposes of **clause 24.10**, it reserves the right to subject the Supplier to the requirements outlined in **clauses 24.5** through to **24.9**.
- 24.12 For the avoidance of doubt, should a Supplier supply to the Purchaser both National Brand Goods and Goods which the Purchaser, in its discretion agrees, are not National Brand Goods, then the requirements outlined in **clauses 24.5** through to **24.9** above will still apply

to the factories producing Goods which the Purchaser, in its discretion, agrees are not National Brand Goods.

## **25. PRODUCT WITHDRAWALS AND RECALLS**

25.1 If the Supplier or the Purchaser becomes aware of:

- (a) any defect, fault or other condition, actual, potential or threatened, in any Goods in which the Purchaser has taken Possession that ought not be offered for sale to the public because they pose an unsatisfactory health or safety risk; or
- (b) the Goods do not comply with relevant laws (including mandatory labelling requirements); or
- (c) the Goods infringe or are likely to infringe a third party's Intellectual Property Rights; or
- (d) the Goods being the subject of either a voluntary recall, or a mandatory recall ordered by a government regulator, because a defect, fault or other condition in the Goods means the Goods pose an unsatisfactory health or safety risk;

("Threat") having regard to the nature and extent of the Threat, then that party must immediately give notice to the other party of:

- (e) the Goods affected by reference to Order numbers, invoice numbers/ASNs, product descriptions, batch codes, best before/use by date codes, APNs, Item Code numbers, quantities supplied, date of Possession and where Goods have been distributed or any other unique identifier;
- (f) the nature of the Threat; and
- (g) the action the party has taken or proposes to take in relation to the Threat.

25.2 The notice referred to in **clause 25.1** must be given in writing by email to the other party's nominated representative.

25.3 The parties agree to co-operate to the fullest extent possible to diminish any risk to the public from the Threat which includes, but is not limited to, undertaking to do the following:

- (a) stopping distribution and/or ceasing production of the Goods that may be affected by the Threat;
- (b) withdrawing the Goods that may be affected by the Threat from offer for sale to the public;
- (c) complying with all laws, regulations and notice requirements in relation to product recalls;
- (d) complying with regulator requests during the recall process, including provision information and of progress reports;
- (e) complying with any stipulations and corrective action as required by the Purchaser in relation to the Threat;
- (f) recalling the Goods that may be affected by the Threat where they have been sold and facilitating the return of such Goods and disposing of the Goods in a safe manner in compliance with all relevant laws (if such disposal is requested by the Purchaser); and

- (g) taking corrective action where appropriate including disseminating information that in the Purchaser's sole opinion is necessary to limit any harm, Loss or damage that may be caused in any way in relation to the Threat which may include storing and disposing of recalled Goods safely.

## 26. ADVERTISING

In the course of advertising and promoting the Goods by any means, the Purchaser may use photos, graphics, text, trademarks and other items provided by the Supplier to the Purchaser for the purpose of advertising and promoting the Goods at no cost to the Purchaser, provided the same are not used in an untrue or defamatory manner.

## 27. PUBLIC STATEMENT

Other than in **clause 26**, each party must obtain the other party's prior written consent before it advertises or publishes anything in any format, authorises a press release or other public statement, or makes any representation to any third party (including the public generally) that refers to these Terms and Conditions, the other party or negotiations and dealings between the parties.

## 28. CONFIDENTIALITY

- 28.1 Each party agrees to keep confidential all the other party's financial, technological (including designs and specifications), strategic or business information (including customer details) concerning or arising from these Terms and Conditions, Kmart Data and Personal Information ("**Information**"). In particular, each party must ensure that all electronic communications are kept secure so as to prevent unauthorised access.
- 28.2 All Information remains the property of the disclosing party and may only be used by the receiving party in fulfilling its obligations under these Terms and Conditions. Otherwise, no Information may be disclosed by the receiving party to any third party without the disclosing party's written consent.
- 28.3 Each party otherwise agrees not to disclose any of the terms of these Terms and Conditions except to the extent that:
  - (a) disclosure is necessary to comply with these Terms and Conditions or any other agreement between the parties;
  - (b) the disclosure is required by law or rules of any stock exchange on which either party is listed; or
  - (c) the Information is in the public domain other than through a breach of these Terms and Conditions.
- 28.4 Where a party believes that it is required by law to disclose any of the terms of an Order or these Terms and Conditions or any other confidential Information of the other party, the party must immediately notify the other party in writing and provide assistance as reasonably required by the other party if the other party wishes to defend or resist that requirement.
- 28.5 Upon request, each party must destroy or return to the other party (in a format acceptable to the other party) any copies of the Information in the party's possession in whatever medium, but in the case of electronic files containing Information such return is only to the extent that such copies can be readily extracted from any IT system on which such files are stored.
- 28.6 Nothing in this **clause 28** will be construed to prevent the Purchaser from publishing the name and location of the Supplier's factories at which the Goods are manufactured, as set out in **clause 24.5**.

## 29. PRIVACY

- 29.1 In relation to any Personal Information disclosed to the Supplier by the Purchaser or otherwise accessed, collected or held by the Supplier in its performance of its obligations under these Terms and Conditions (“**Relevant Personal Information**”), the Supplier will comply with:
- (a) all Australian Privacy Laws (whether or not Supplier is bound by the Privacy Act);
  - (b) all New Zealand Privacy Laws (as applicable); and
  - (c) any applicable International Privacy Laws.
- 29.2 Without limiting its obligations under **clause 29.1**, the Supplier must:
- (a) use Relevant Personal Information only as necessary to fulfil its obligations under these Terms and Conditions;
  - (b) only collect, access, use, store, disclose or otherwise deal with Relevant Personal Information as directed by the Purchaser (other than where such direction would cause the Supplier to be in breach of an applicable Australian Law or New Zealand Law (as applicable));
  - (c) not disclose Relevant Personal Information except:
    - (i) to its Personnel to the extent necessary for fulfilling the Supplier’s obligations under these Terms and Conditions;
    - (ii) as required by Australian Law, New Zealand Law, or International Law, subject to the Supplier giving notice to the Purchaser promptly when it becomes aware that such a disclosure may be required; or
    - (iii) with the express prior written consent of the Purchaser;
  - (d) ensure that any person, including Personnel, to whom Relevant Personal Information is disclosed under these Terms and Conditions does not do or omit to do anything which, if done or omitted to be done by the Supplier, would constitute a breach of this **clause 29** (Privacy);
  - (e) obtain written agreement to comply with Privacy Laws and provisions having the same effect as this clause from all subcontractors to whom Relevant Personal Information is disclosed;
  - (f) not do any act, engage in any practice, or omit to do any act or engage in any practice that would cause the Purchaser to breach or be taken to breach a Privacy Law;
  - (g) take all reasonable steps to ensure that Relevant Personal Information is protected against misuse, interference and loss, and from unauthorised access, modification or disclosure, including undertaking any Personnel training as may be required;
  - (h) notify the Purchaser as soon as practicable, and disclose to the Purchaser all relevant information, if the Supplier becomes aware of any breach or alleged breach of the Supplier’s obligations under this clause or a Privacy Law, or there has been unauthorised access to or unauthorised disclosure of any Kmart Data, or if Kmart Data is lost or destroyed or becomes damaged, corrupted, or unusable. The Supplier must comply with any reasonable direction from the Purchaser with respect to remedying that breach, unauthorised access or destruction; and

- (i) take reasonable steps to ensure that Relevant Personal Information it uses or discloses to the Purchaser is up-to-date, complete and relevant.

## **30. PERSONNEL**

30.1 The Supplier will:

- (a) ensure its Personnel are aware of the Supplier's obligations under **clause 29** (Privacy);
- (b) comply, and ensure that its Personnel comply, with all reasonable directions of the Purchaser in relation to the Supplier's obligations under **clause 29** (Privacy); and
- (c) comply, and ensure that its Personnel comply, with all Policies.

## **31. ANTI-BRIBERY**

31.1 Each party must:

- (a) at all times comply with all applicable laws, statutes, regulations and codes relating to anti-bribery and improper payments including but not limited to the Criminal Code Act 1995 (Cth) (Australia), The Secret Commissions Act 1910 (New Zealand), the Foreign Corrupt Practices Act 1977 (United States), and the Bribery Act 2010 (United Kingdom) ('**Relevant Requirements**');
- (b) not give or offer or promise to give, receive, or agree to accept, any payment, gift or other benefit or advantage which violates a Relevant Requirement;
- (c) have and maintain in place throughout the term of these Terms and Conditions its own policies and procedures, including adequate procedures under the Relevant Requirements, to ensure compliance with the Relevant Requirements, and will enforce them where appropriate;
- (d) not prepare, approve or execute any contract or other document or make any record in connection with these Terms and Conditions that the party knows, or ought to reasonably know, is false, inaccurate or misleading;
- (e) promptly report to the other party any request or demand for any undue financial or other advantage of any kind received by the party in connection with the performance of these Terms and Conditions which will or may be in breach of the Relevant Requirements; and
- (f) in the case of the Supplier, procure, and shall be responsible for, the observance and performance of the Relevant Requirements by all persons performing services or providing goods in connection with these Terms and Conditions on behalf of the Supplier or under its supervision or control.

31.2 Without limiting any other rights of a party at law or under these Terms and Conditions, if a party determines that the other party is in breach of or has breached the other party's obligation under **clause 31.1**, the non-breaching party may immediately cancel any existing but not yet fulfilled Orders and also cease doing all business with the other party whether under these Terms and Conditions or some other arrangement.

## **32. MODERN SLAVERY**

32.1 The Supplier represents, warrants and undertakes:

- (a) that no form of Modern Slavery is used in the Supplier's business or by its directors, officers, employees, agents, representatives, contractors or subcontractors;
- (b) to comply with all applicable employment and work health and safety laws;
- (c) to comply with all applicable statutory requirements relating to Modern Slavery;
- (d) to comply with applicable Modern Slavery reporting requirements including but not limited to the *Modern Slavery Act 2018* (NSW), the *Modern Slavery Act 2015* (UK) and legislation passed as a result of, or substantially similar to, the *Modern Slavery Bill 2018* (Cth); and
- (e) to notify to the Purchaser promptly upon becoming aware of any incident, complaint or allegation that the Supplier, or any entity in its supply chain, has engaged in Modern Slavery.

32.2 The Supplier shall have and maintain its own policies and procedures that are intended to ensure compliance with the warranties contained in **clause 32.1**.

32.3 The Supplier must not engage in Modern Slavery.

32.4 The Supplier acknowledges that the Purchaser has corporate reporting requirements with regard to Modern Slavery and, at the reasonable request of the Purchaser, it will confirm in writing that it has complied with its undertakings under this **clause 32** and will provide any information reasonably requested by the Purchaser in support of such compliance.

32.5 Upon becoming aware of any actual, reasonably suspected or anticipated breach of **clause 32**, the Supplier must immediately provide written notice of the breach, giving full details of such breach, to the Purchaser.

### **33. RIGHT TO ENTER AND INSPECT PROPERTY**

The Purchaser may, at any time (both prior to and upon obtaining physical possession of Goods) during business hours and upon providing reasonable advance notice, inspect the Goods, components and ingredients thereof and the processes of manufacture and packing, labelling, storage or transportation thereof. For this purpose, the Purchaser or its representative will have the right to enter any premises or vehicle where the Goods may be found. The Supplier will provide the Purchaser or its representative with reasonable assistance and access in any and all such inspections.

### **34. PURCHASER'S OBLIGATIONS**

34.1 Where the Purchaser is the importer of the Goods into Australia or New Zealand, the Purchaser shall be responsible for obtaining any necessary import licences or permits necessary for the entry of the Goods into Australia or New Zealand.

### **35. AGENCY**

35.1 Supplier acknowledges and agrees that the Purchaser enters into these Terms and Conditions on its own behalf and as agent for each member of the Kmart Group that is nominated by the Purchaser who may enjoy the benefit of these Terms and Conditions from time to time and who may place orders with the Supplier from time to time for the Goods (each a "**Kmart Entity**").

- 35.2 The Purchaser acknowledges that it is authorised by each Kmart Entity to enter into these Terms and Conditions on their behalf.
- 35.3 For the purposes of these Terms and Conditions, any Loss suffered by a Kmart Entity will be considered to be Loss suffered by the Purchaser.

## **36. FORCE MAJEURE**

- 36.1 Any delay or failure of either party to perform its obligations shall be excused if the delay or failure is as a result of an event or occurrence beyond the reasonable control of the party and without its fault or negligence, including, but not limited to, acts of God, actions by any governmental authority (whether valid or invalid), fires, floods storms, windstorms, explosions, riots, labour problems (including strikes, lock outs and slowdowns), natural disasters, epidemic, war, sabotage, court injunction or order; provided that written notice of such delay including the anticipated length of delay is given by the affected party to the other party as soon as possible after the event or occurrence. During the period of delay, the parties will be excused from their performance obligations until such time as the event or occurrence has passed.
- 36.2 Nothing in this clause shall be interpreted to release the Supplier from its obligation to indemnify the Purchaser under these Terms and Conditions, nor to release the Purchaser from its obligation to pay the Supplier for Goods delivered to the Purchaser up to the date of the event of Force Majeure in accordance with these Terms and Conditions.

## **37. DISPUTE RESOLUTION**

- 37.1 If a dispute arises out of, under or in connection with an Order or these Terms and Conditions, the Purchaser and the Supplier will both use its reasonable endeavours to:
- (a) bring that issue to the other's attention as soon as possible, and no later than 24 months from when the issue first arises; and
  - (b) resolve the dispute through discussion in good faith, and to promptly elevate it through senior levels or management as appropriate given the nature of the dispute.
- 37.2 If a dispute cannot be resolved by discussions between the parties, the dispute shall be submitted to arbitration for final and exclusive settlement.
- 37.3 All disputes arising out of or in connection with the Terms and Conditions shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by a single arbitrator appointed in accordance with the said Rules. The arbitration proceedings shall be in the English language and shall take place in Melbourne, Victoria, Australia. The seat of the arbitration shall be Melbourne, Victoria, Australia.

## **38. GOVERNING LAW**

- 38.1 Except where **clause 38.2** applies, the laws of the State of Victoria and Commonwealth of Australia govern these Terms and Conditions.
- 38.2 For Goods sold in New Zealand, these Terms and Conditions are governed by the law of New Zealand and the parties submit to the non-exclusive jurisdiction of the courts of New Zealand.
- 38.3 The United Nations Convention on Contracts for the International Sale of Goods does not apply to these Terms and Conditions.
- 38.4 Despite anything else contained in this Agreement, the parties agree and acknowledge that the provisions of the Sale of Goods Act 1908 will not apply to this Agreement.

38.5 Subject to **clause 6.1(l)**, despite anything else contained in this Agreement, the parties agree and acknowledge that they are both in trade, and that the Goods being supplied by the Supplier and acquired by the Purchaser are supplied or acquired in trade, and the provisions of the Consumer Guarantees Act 1993 will not apply to this Agreement.

### **39. ASSIGNMENT AND SUBCONTRACTING**

39.1 Except where the assignment is by a party to its Related Body Corporate, neither party may assign or purport to transfer, assign, or novate any of its obligations under an Order or these Terms and Conditions in whole or in part without the prior written consent of the other party. Each party will not unreasonably withhold or delay consent.

39.2 In the event that there is an assignment or transfer referred to in **clause 39.1** other than an assignment by a party to its Related Body Corporate, without the consent of the Purchaser, the Supplier will continue to remain solely responsible for all acts and omissions of the new entity.

39.3 The Supplier must not subcontract the manufacture and/or supply of the Goods or use any factory to perform a major or multiple operations (more than one function) in relation to the manufacture/supply of the Goods without the prior written consent of the Purchaser. Consent to subcontract may only be given if the Supplier confirms in writing that it has a contract or arrangement in place with the subcontractor which includes the following requirements:

- (a) the subcontractor will comply with Kmart's Ethical Sourcing Code;
- (b) the subcontractor's standards of conduct are accepted as good industry practice; and
- (c) the subcontractor will comply with the Relevant Requirements.

39.4 The Supplier will remain responsible for any and all acts or omissions of the sub-contractor.

39.5 The Supplier acknowledges that a deemed assignment of these Terms and Conditions will occur, if:

- (a) the Supplier sells or agrees to sell the business through which it supplies the Goods; or
- (b) if the Supplier is a body corporate, a Change of Control occurs, or occurs in respect of the party that Controls the Supplier.

In the event that either paragraphs **(a)** or **(b)** above apply, the Supplier will continue to honour all Claims made by the Purchaser in relation to the Goods supplied by the Supplier prior to the events in paragraphs **(a)** or **(b)** occurring (including Claims relating to rebates, cost errors not previously claimed and Goods returned or rejected by the Purchaser)) and indemnify the Purchaser against all Loss, liability, damages, costs (including legal costs on a solicitor and own client basis) and all expenses incurred by the Purchaser in connection with such Claims or, if the Supplier has transferred its rights and obligations under these Terms and Conditions to a third party as a consequence of the events in paragraph **(a)** or **(b)**, the Supplier will ensure that such third party honours all such Claims and indemnifies the Purchaser. The Supplier further acknowledges and agrees that if such third party fails to honour and indemnify in accordance with this clause, the Supplier will honour such Claims and indemnify in accordance with this clause.



#### **40. SET OFF**

- 40.1 The Purchaser agrees that the account between the Purchaser and the Supplier is a running account.
- 40.2 For Claims relating to rebates, discounts or other amounts under the Confidential Trading Agreement, the Supplier acknowledges that by signing the Confidential Trading Agreement, the Supplier has consented to the Purchaser setting off such amounts against amounts the Purchaser owes to the Supplier without further notice to the Supplier.
- 40.3 For Claims under the Kmart standard form Supplier Returns Agreement, the Supplier acknowledges that by signing such agreement, the Supplier has consented to the Purchaser setting off such amounts against amounts the Purchaser owes the Supplier without further notice to the Supplier.
- 40.4 For Claims relating to short deliveries of Goods and discrepancies between the invoiced price and the Prices in the Order for the Goods, the Purchaser may set-off such amounts against amounts the Purchaser owes to the Supplier without further notice to the Supplier.
- 40.5 For any other Claim that does not fall within **clause 40.2** or **clause 40.3** or **clause 40.4**, the Purchaser may only conduct a set-off with the prior written consent of the Supplier
- 40.6 If the amount in the running account is insufficient to allow the Purchaser to conduct the set-off referred to in **clauses 40.2** or **40.3** or **40.4** or **40.5** in full, the Purchaser will set-off an amount equal to the funds available in the running account and the Supplier will, within 7 days or such other time as agreed by the Purchaser, refund to the Purchaser the difference between the amount set-off and the amount owed by the Supplier to the Purchaser.

#### **41. WAIVER**

- 41.1 If the Purchaser accepts any Goods or approves any sample, this does not extinguish any of the Purchaser's rights if the Goods do not comply with these Terms and Conditions or any other provision of an Order.
- 41.2 Failing to insist on strict performance of any condition is not a waiver of any later breach or default.
- 41.3 A waiver is not valid or binding on the party granting that waiver unless made in writing.

#### **42. SEVERABILITY**

If any part of these Terms and Conditions are found to be invalid or of no force or effect under any applicable laws, executive order, regulations of any government authority having jurisdiction, or by a court or competent authority these Terms and Conditions will be construed as though such part had not been inserted herein and the remainder of these Terms and Conditions will retain its full force and effect.

#### **43. SURVIVAL**

Any obligations in these Terms and Conditions which by their nature are of a continuing nature or which are not fully satisfied and discharged will not merge upon termination of an Order.

#### 44. GIVING OF NOTICES

- 44.1 Other than as explicitly provided for by these Terms and Conditions, a notice required by these Terms and Conditions must be in writing and must be either hand delivered or sent by prepaid post or facsimile to the address or facsimile number last notified by the addressee.
- 44.2 A notice takes effect from the time it is received unless a later time is specified in it.
- 44.3 Notices are taken to be received:
- (a) if delivered, at the time of delivery;
  - (b) in the case of a posted letter, on the fifth day after posting; and
  - (c) in the case of a facsimile, at the time indicated on the transmission report by the machine sending the facsimile indicating (in the absence of manifest error or tampering) that the facsimile in its entirety was sent to the facsimile number of the recipient.

#### 45. RELATIONSHIP BETWEEN PARTIES

The Supplier acknowledges that it is an independent contractor to the Purchaser for the supply of Goods. The Supplier is not the Purchaser's employee or agent. Neither party may make any representations on the other party's behalf, or enter into any commitment, agreement, contract, arrangement or understanding on the other party's behalf.

#### 46. DEFINITIONS

In these Terms and Conditions, the following terms have the corresponding meaning:

**"APN"** means Australian product number.

**"APPs"** means the Australian Privacy Principles and any new or replacement privacy principles included in the Privacy Act.

**"Artwork"** includes, without limitation, graphic or other design specifications and labelling or packaging specifications for the Goods.

**"ASN"** means Advance Ship Notice.

**"Australian Laws"** means all laws (including the common law and statutory laws), regulations, orders, subordinate legislation, ministerial directions or directions of regulators in force from time to time in Australia, whether made by a State, Territory, the Commonwealth or a local government.

**"Australian Privacy Laws"** means the *Privacy Act* (including the APPs), the *Spam Act 2003 (Cth)* and any other requirement under Australian Law or industry code relating to the handling of Personal Information.

**"Business Day"** means a day on which banks are open for business in the location where the Supplier manufactures or otherwise obtains Goods to fulfil Orders from the Purchaser, excluding Saturday, Sunday or public holidays in the location where the Supplier manufactures or otherwise obtains Goods to fulfil Orders from the Purchaser.

**"Business to Business EDI"** is the reference used by the Purchaser to describe the business process adopted by the supply chain to order, receive and pay for goods delivered into the distribution centres.

**"Change of Control"** means a change in the identity of a person who as at the date of these Terms and Conditions is able to Control an entity (including a corporation defined in the Corporations Act and where the Goods are supplied to the Purchaser for importation or retail sale in New Zealand a company as defined in the Companies Act in New Zealand).

**“Claim”** means any action, demand, claim or proceeding whether arising under contract, tort, equity, negligence or otherwise.

**"Companies Act"** means the *Companies Act 1993 New Zealand*.

**“Control”** of an entity includes the definition of “Control” in section 50AA of the *Corporations Act* (and where the Goods are supplied to the Purchaser for importation or retail sale in New Zealand the definition of Control in section 7 of the *Companies Act* in New Zealand) and in the case of a corporation includes the power (whether it is legally enforceable or not) to control, whether directly or indirectly, the composition of the board of directors of that corporation, the voting rights of the majority of the voting shares of the corporation or the management of the affairs of the corporation.

**“Corporations Act”** means the *Corporations Act 2001 (Cth of Australia)*.

**“Delivery Address”** means the Purchaser's nominated freight forwarders' address or other address notified (with reasonable notice) by the Purchaser in writing to the Supplier, including in an Order.

**“EAN” or “GTIN”** have the meanings given by EAN Australia.

**“EDI”** means electronic data interchange.

**“Goods”** means goods or services as described in an Order (or any part or instalment thereof) and includes samples, packaging and labelling and any accessories, instruction manuals, documentation or publication accompanying the Goods.

**“GST”** either has the meaning given by Section 195-1 of *the A New Tax System (Goods and Services Tax) Act 1999 (Cth)* and includes any similar tax imposed under a Commonwealth, State or Territory law in place of GST or (as the context requires) means goods and services tax levied under the GST Act, at the rate prevailing from time to time, including any tax levied in substitution for such tax, but excluding any penalties or interest payable in respect of such tax.

**"GST Act"** means the Goods and Services Tax Act 1985 (*New Zealand*).

**“GST Law”** means the *A New Tax System (Goods and Services Tax) Act 1999 (Cth)* as amended or replaced from time to time

**“Insolvency Event”** means a party:

- (a) being in liquidation or provisional liquidation or under administration;
- (b) having a Controller (as defined in the *Corporations Act* or analogous person appointed to it or any of its property);
- (c) being taken under section 459F(1) of the *Corporations Act* to have failed to comply with a statutory demand;
- (d) being unable to pay its debts as they fall due or where the other party believes on reasonable grounds to be insolvent;
- (e) taking any step that is reasonably likely to result in the person becoming insolvent under administration (as defined in section 9 of the *Corporations Act*);
- (f) proposing to enter or entering into a compromise or arrangement with, or assignment for the benefit of, any of its members or creditors; or
- (g) any analogous event under the laws of any jurisdiction,

unless this takes place as part of a solvent reconstruction, amalgamation, merger or consolidation that has been approved by the other party (which approval is not to be unreasonably withheld).

**“Intellectual Property Rights”** means trade mark, business name, patent, registered design, copyright, artistic work, design right, topography right, application to register any of the above rights,

trade secret, inventions, product or business concepts, unpatented know-how and right of confidence and any other intellectual or industrial property rights of any nature whatsoever in any part of the world and whether now or in the future existing and whether arising under statute, contract or otherwise.

**“International Laws”** means all applicable laws (including the common law and statutory laws), regulations, orders, subordinate legislation, ministerial directions or directions of regulators in force from time to time in any jurisdiction the Supplier operates.

**“International Privacy Laws”** means the laws concerning privacy or data protection applicable to the Supplier in any jurisdiction the Supplier operates.

**“Invoice”** means a Tax Invoice or an Advance Shipping Notice (ASN), as the case may be.

**“Item Code”** means the Purchaser’s identification code for the Goods.

**“Kmart Data”** means all data, information, text, drawings or other materials, embodied in any electronic or tangible medium that is disclosed, accessed or made available to Supplier, or in the case of Personal Information, that is collected by Supplier, or disclosed, accessed or made available to Supplier in the performance of its obligations under these Terms and Conditions.

**“Kmart Entity”** has the meaning given to that term in **clause 35.1**.

**“Kmart Ethical Sourcing Code”** means the minimum requirements and expectations that all Suppliers, including sub-contractors engaged by Suppliers, must meet in order to do business with the Purchaser (as amended from time to time) as set out at <http://et.supplier.kmart.com.au>.

**“Kmart Ethical Sourcing Program”** means the program developed by the Purchaser to measure compliance with the Ethical Sourcing Code by Suppliers (including sub-contractors engaged by Suppliers).

**“Kmart Group”** means the Purchaser and its Related Body Corporates.

**“Kmart Occupational Health and Safety Obligations”** means the safety obligations for contractors and demonstrators on Purchaser’s premises set out at <http://et.supplier.kmart.com.au>.

**“Loss”** means any cost, expense, loss, damage, injury or liability (including reasonable legal costs and disbursements on a full indemnity basis, store and distribution centre handling costs, freight, import or customs duty or landing charges in Australia or New Zealand, disposal of stock costs).

**“Modern Slavery”** means any activity, practice or conduct that would constitute an offence in relation to slavery, forced labour, involuntary servitude, debt bondage, human trafficking, and other slavery-like exploitation as prohibited or defined as a modern slavery offence under all applicable anti-slavery and human trafficking laws, statutes and codes from time to time in force including, but not limited to the *Criminal Code Act 1995* (Cth) (specifically Schedule 1 Divisions 270 and 271), the *Modern Slavery Act 2018* (NSW) (specifically section 5(1) and Schedule 2), the *Modern Slavery Act 2015* (UK) (specifically sections 1, 2 and 4), and legislation passed as a result of, or substantially similar to, the *Modern Slavery Bill 2018* (Cth). For the avoidance of doubt, Modern Slavery includes any conditions or practices similar to those prohibited under those laws, statutes, regulations and codes.

**“National Brand Goods”** are goods carrying a brand which is internationally or nationally known and which is not owned, exclusive to, or licensed by the Purchaser.

**“NZPPs”** means the New Zealand Privacy Principles and any new or replacement privacy principles included in the Privacy Act 1993.

**“New Zealand Laws”** means all laws (including the common law and statutory laws), regulations, orders, subordinate legislation, ministerial directions or directions of regulators in force from time to time in New Zealand.

**“New Zealand Privacy Laws”** means the Privacy Act 1993 (including the NZPPs and any Codes of Practice issued under the Privacy Act), the Unsolicited Electronic Messages Act 2007, and any other

requirement under New Zealand Law or industry code relating to the handling of Personal Information.

“**Order**” means any electronic or other order by the Purchaser to the Supplier to purchase Goods from the Supplier.

“**Personal Information**” has the same meaning as in the *Privacy Act* or the New Zealand Privacy Laws, as the case may be.

“**Personnel**” mean the employees, partners, agents, directors and officers of the Supplier, and of its subcontractors and Related Bodies Corporate.

“**Policies**” means the policies listed in Schedule 1 and any updates or changes to those policies or additional policies published by the Purchaser on the Purchaser’s “supplier portal”, or notified by the Purchaser to the Supplier, such notice to not be less than 7 days.

“**Possession**” means where the Purchaser takes physical possession at the Delivery Address following delivery by the Supplier or Purchaser’s agent.

“**Previous Supplier**” has the meaning given to that term in **clause 22.3**.

“**Privacy Act**” means the *Privacy Act 1988 (Cth)* (including the APPs).

“**Privacy Laws**” means Australian Privacy Laws and International Privacy Laws.

“**Purchaser**” means Kmart Australia Limited ABN 73 004 700 485 and Kmart NZ Holdings Ltd trading as Kmart, and any Kmart Entity.

“**Quality Assurance Specifications**” means any legal or other standards or requirements relating to the quality of the Goods specified by the Purchaser either in these Terms and Conditions or otherwise in writing.

“**Related Body Corporate**” has the meaning given to that term under section 50 of *Corporations Act* and, where the Goods are supplied to the Purchaser for importation or retail sale in New Zealand, has the meaning given to the term Related Company in the *Companies Act 1993* and Related Body Corporates or Related Companies (as the case may be) has a corresponding meaning.

“**Relevant Requirements**” has the meaning given to that term in **clause 31.1(a)**.

“**Supplier**” means the Supplier named on page 1 of these Terms and Conditions and includes its successors and permitted assigns. Any reference to Vendor in an Order, Policy or related documentation will be taken to be a reference to Supplier.

“**Specifications**” means any technical or other specifications or standards relating to the Goods as specified either in these Terms and Conditions or otherwise in writing.

“**Tax Invoice**” has the meaning given by Section 195-1 of the *A New Tax System (Goods and Services Tax) Act 1999 (Cth)* as amended.

“**Taxable Supply**” has the meaning given by Section 195-1 of the *A New Tax System (Goods and Services Tax) Act 1999 (Cth)* as amended.

“**Terms and Conditions**” means these Terms and Conditions (including the Schedules) and any variations agreed by the parties thereto.

## **47. INTERPRETATION**

47.1 In these Terms and Conditions (including any Order), unless the context otherwise requires, if a Related Body Corporate of the Supplier performs an obligation of the Supplier, that Related Body Corporate and the Supplier are deemed to be jointly and severally bound in respect of that Order, right or obligation, including any associated warranties or Claims.

47.2 Any reference in these Terms and Conditions to “writing” includes an electronic communication and “written” is to be interpreted accordingly.

- 47.3 A reference to "dollars" or "\$" is to an amount in New Zealand currency (unless otherwise specified).
- 47.4 "Includes", "including" and other similar expressions are not words of limitation.
- 47.5 A reference to law means common law, principles of equity, and laws made by parliament (and laws made by parliament include laws and regulations and other instruments under them, and consolidations, amendments, re-enactments or replacements of any of them).
- 47.6 Any reference to or to a provision of legislation includes a modification or re-enactment of it, a legislative provision substituted for it and a regulation or statutory instrument issued under it.
- 47.7 A reference to a Schedule is to a schedule attached to the body of these Terms and Conditions.
- 47.8 Where a document published on a website forms part of these Terms and Conditions, the Supplier is bound by the version published at the time the Supplier enters into these Terms and Conditions or commences trading with the Purchaser, and by any future changes made to that document from time to time as published on the website. If the Supplier objects to any changes, the Supplier will notify the Purchaser:
- (a) of the Supplier's objection and the Purchaser will consider it and may mutually agree (each acting reasonably) in writing to an amended version of the relevant document to apply as part of these Terms and Conditions; or
  - (b) that the Supplier does not wish to continue to supply Goods to the Purchaser under these Terms and Conditions.

## **SCHEDULE 1 – POLICIES**

The following Kmart policies, documents and other process documents are located on the Kmart Supplier website at <http://et.supplier.kmart.com.au>

- Kmart Ethical Sourcing Code and Program
- Supplier Safety – Contractor Online Induction
- Overseas Supplier Delivery Handbook
- eCommerce Delivery Requirements

**EXECUTED** as an agreement on the \_\_\_\_\_ day of \_\_\_\_\_

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**SIGNED** for and on behalf of Kmart Australia Limited by an authorised officer:

Signature: \_\_\_\_\_

Name \_\_\_\_\_

Position: Regional Merchandise Manager/Divisional Merchandise Manager  
/General Manager/Business Manager

Date: \_\_\_\_\_/\_\_\_\_\_/20\_\_\_\_

**SIGNED** for and on behalf of Kmart NZ Holdings Limited trading as Kmart by an authorised officer:

Signature: \_\_\_\_\_

Name \_\_\_\_\_

Position: Regional Merchandise Manager/Divisional Merchandise Manager  
/General Manager/Business Manager

Date: \_\_\_\_\_/\_\_\_\_\_/20\_\_\_\_

**SIGNED** for and on behalf of .....

("Supplier") by an authorised officer:

Signature: \_\_\_\_\_

Name \_\_\_\_\_

Position: \_\_\_\_\_

Date: \_\_\_\_\_/\_\_\_\_\_/20\_\_\_\_