

# **DRAFT Wholesale Agreement - XXXXXXXX and NZGW**

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**Date** XXX

**Parties** XXX (Customer)

and

**Woolworths New Zealand Limited, through its NZ Grocery Wholesalers division, of 80 Favona Road, Favona, Auckland (Supplier)**

## **Background**

This agreement sets out the terms on which:

- (a) the Supplier agrees to supply Products to the Customer; and
- (b) the Customer agrees to purchase Products from the Supplier.

## **Operative provisions**

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### **1. Definitions and interpretation**

#### **1.1 Definitions**

In this agreement, capitalised terms have the meaning set out below.

**Acceptable Quality** has the meaning given to the term "acceptable quality" in section 7 of the *Consumer Guarantees Act 1993*.

**Additional Costs** have the meaning set out in clause 8.2.

**Affected Party** means the party described in clause 16.

**Back Order** means any Product within an Order that was unavailable at the time of the planned Order Delivery Schedule that will be delivered when next available.

**Bill Rate** means, in respect of any rate of interest to be calculated pursuant to this Agreement, the Reserve Bank of New Zealand 90 day B2 Wholesale interest rate stated on the following page (or any successor page) <http://www.rbnz.govt.nz/statistics/b2> at or about 3.00pm on the first Business Day of the period in respect of which such rate of interest is to be calculated, and thereafter at intervals of 90 days from that Business Day.

**Brand** means any trade mark, name, design, brand or logo, and in relation to any Product, means a Product bearing such trade mark, name, design, brand or logo.

**Business Day** means a day which is not a Saturday, Sunday or bank or public holiday in Auckland, Palmerston North or Christchurch.

**Carton** means any physical package that the Products will be delivered inside, whether that is otherwise known as a case, unit of issue, issue quantity, outer, inner, or similar.

**Cash Before Delivery** means the Supplier will issue an invoice which is required to be paid in full, with cleared funds showing in the relevant Woolworths account before the delivery of an Order.

**Claim** means any claim, demand, action or proceeding made by a party or any of its Related Companies against any other party or any of its Related Companies under or in connection with this agreement.

**Commencement Date** means the date of the final signature to this letter agreement.

**Confidential Information** means in relation to a party (whether in material form or not), all information and data relating to that party (or any of its Related Companies) and its suppliers, retail network members, staff, business dealings, contracts, customers, computer operations and marketing, sales, purchases and business activities, financial and sensitive corporate and commercial information provided to the other party or which the other party (or any of its Related Companies) otherwise acquires in connection with any dealings pursuant or in relation to this agreement and which:

- (a) is designated by the relevant party as confidential;
- (b) this agreement provides is confidential to that party; or
- (c) should reasonably be regarded in all circumstances as confidential to the relevant party.

**Consequential Loss** means any:

- (a) loss or damage which does not naturally or directly result in the ordinary course of events from the breach, action or inaction in question;
- (b) indirect loss, being loss which may reasonably be supposed to have been in the contemplation of the parties at the time they made this agreement, as the probable result of the breach; or
- (c) special loss or damage, loss of profit or anticipated profit, economic loss, loss of revenue, loss of opportunity, loss of anticipated savings or loss of goodwill,

whether present or future, fixed or unascertained, actual or contingent.

**Customer Representative** means the person specified in clause 20(a) or such other person notified in writing by the Customer to the Supplier from time to time.

**Default Rate** means the Bill Rate plus 2.5% per annum.

**Delivery Location** (and alternatively **Sold-To Location**) has the meaning given in clause 7.1.

**Dispute** has the meaning given in clause 18.2(a).

**Expiry Date** means the end of the Term.

**Force Majeure Event** means for any party as an Affected Party, any act, event or cause which is beyond the reasonable control of the Affected Party, including:

- (a) an act of God, accident of navigation, war, sabotage, riot, insurrection, civil commotion, national emergency (whether in fact or Law), martial Law, fire, lightning, flood, cyclone, earthquake, landslide, explosion, power shortage, transportation embargo or failure or delay in transportation, manufacturing plant interruption, epidemic, pandemic, quarantine, radiation or radioactive contamination;
- (b) action or inaction of a government (not being contractual in nature) or other competent authority (including a court of competent jurisdiction), including

expropriation, restraint, prohibition, intervention, requisition, requirement, direction or embargo by legislation, regulation, decree or other legally enforceable order; and/or

- (c) a strike or other serious industrial action.

**Forecast** has the meaning given in clause 5(d).

**Grocery Act** means the *Grocery Industry Competition Act 2023*.

**GST Law** means the *Goods and Services Tax Act 1985*.

**Initiating Party** means the party described in clause 18.3(a).

**Insolvency Event** means:

- (a) a receiver, manager, receiver and manager, trustee, administrator, or similar officer is appointed in respect of a person or any asset of a person (and that appointment is not withdrawn or dismissed within 7 days);
- (b) a liquidator or provisional liquidator is appointed in respect of a corporation (and that appointment is not withdrawn or dismissed within 7 days);
- (c) any application (not being an application withdrawn or dismissed within 7 days) is made to a court for an order, or an order is made, or a meeting is convened, or a resolution is passed, for the purpose of:
  - (i) appointing a person referred to in paragraphs (a) or (b) above;
  - (ii) winding up a corporation; or
  - (iii) proposing or implementing a creditors' scheme of arrangement;
- (d) a moratorium of any debts of a person, or an official assignment, or a composition, or an arrangement (formal or informal) with a persons' creditors, or any similar proceeding or arrangement by which the assets of a person are subjected conditionally or unconditionally to the control of that person's creditors or a trustee, is ordered, declared, or agreed to, or is applied for and the application is not withdrawn or dismissed within 7 days; or
- (e) a person becomes, or admits in writing that it is, is declared to be, or is deemed under any Law to be, insolvent or unable to pay its debts.

**Intellectual Property Rights** means all intellectual property rights including current and future registered and unregistered rights in respect of copyright, designs, circuit layouts, trade marks, trade secrets, know how, confidential information, patents, invention and discoveries and all other intellectual property as defined in article 2 of the convention establishing the *World Intellectual Property Organisation 1967*.

**Law** means all applicable laws, statutes, regulations, ordinance, codes, standards, authorisations, licences, registrations, accreditations, approvals, permits, exemptions and rulings of any government, governmental or semi-governmental body.

**Loadlist** (otherwise known as packing slip, picking slip, delivery note or waybill) is the document that will be issued by the Supplier to the Customer upon completion of the Order being picked at the WWNZ distribution centre to confirm which Products will be supplied and which Products may be unsupplied.

**NZGW Pricebook** is a spreadsheet based format and has the meaning given to that term in clause 3.2(c).

**NZGW Portal** is an online ordering portal format and has the meaning given to that term in clause 3.2(c).

**Order** has the meaning given to that term in clause 6(a).

**Order Roster Schedule** has the meaning given to that term in clause 6.1(a).

**Order Delivery Schedule** has the meaning given to that term in clause 7.3.

**Personal Information** has the same meaning as in the *Privacy Act 2020*.

**Personnel** means a party's directors, officers, employees, agents, contractors and subcontractors who are performing functions in connection with this agreement from time to time. For clarity, upstream suppliers of Products to the Supplier are not "Personnel" of the Supplier.

**Pricing Principles** means those principles in relation to pricing published by the Supplier (being a 'regulated grocery retailer') in accordance with section 38(1) of the Grocery Act (including as part of the publication of any general principles for wholesale supply), as amended from time to time by the Supplier.

**Privacy Law** means any Law which relates to the privacy, confidentiality or use of any information about individuals including the *Privacy Act 2020*.

**Products** means each of the SKU's within the Range and "**Product**" means any one of them (as applicable). Also known as Article(s)

**Product Purchase Price** has the meaning given in clause 8.2(a).

**Quarter** means a three month period commencing on 1 January, 1 April, 1 July and 1 October, with the first Quarter (which may be shorter than 3 months) for the purposes of this agreement, commencing on the Commencement Date.

**Range** means the range of Products that are available for the Customer to purchase from the Supplier under this agreement.

**Receivable Record** has the meaning given in clause 7.5(b), otherwise known as a proof of delivery ("POD") document.

**Recipient Party** means the party described in clause 18.3(a).

**Rejected Order** has the meaning given in clause 7.6.

**Rejected Product** has the meaning given in clause 7.6.

**Related Company** has the same meaning as in the *Companies Act 1993*.

**Relevant Obligation** has the meaning given in clause 16.

**Representative** means:

- (a) in relation to the Supplier, the Supplier Representative; and
- (b) in relation to the Customer, the Customer Representative.

**Requested Product** has the meaning given in clause 3.2(e).

**Supplier Group** means the Supplier and each of its Related Companies.

**Supplier Representative** means the person specified in clause 20 or such other person notified by the Supplier to the Customer from time to time.

**Term** has the meaning given in clause 2.

**Ullage** is an allowance built into the Product Price by the Supplier to negate the need for the Customer to make a Claim for minor damage to Products upon Delivery, or for minor shortages in Products Delivered, as specified in clause 7.7.

## 1.2 Interpretation

Headings are for convenience only and do not affect interpretation. The following rules apply unless the context requires otherwise:

- (a) the singular includes the plural and conversely; and if a word or phrase is defined, its other grammatical forms have a corresponding meaning;
- (b) a reference to includes or including should be construed without limitation;
- (c) a reference to a party to this agreement or another agreement or document includes the party's successors, permitted substitutes and assigns (and, where applicable, the party's legal personal representatives);
- (d) a reference to legislation 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; and
- (e) a reference to a year or to a month is to a calendar year or a calendar month respectively; and a reference to dollars and \$ is to New Zealand currency.

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## 2. Term and Non-exclusivity

### 2.1 Initial Term

This agreement commences on the Commencement Date and ends after **24 months** (**Term**), unless terminated or extended in accordance with the terms of this agreement.

### 2.2 Extension

If the Customer wishes to extend the Term, the Customer must give the Supplier notice in writing at least 12 weeks before the Expiry Date, or as otherwise agreed mutually in writing. If the Supplier provides such notice of extension, then the Supplier and Customer may agree to extend the Term, on terms to be mutually agreed, provided however that any extended or additional period of supply granted would be undertaken using the latest version of the NZGW Wholesale Supply Agreement that was available.

### 2.3 Non-exclusive agreement

Subject to the Customer's obligation to use reasonable endeavours to purchase to Forecast as set out in clause 5(e), the Supplier acknowledges that the Customer's entry into this agreement is for the Customer's sole convenience and the Customer may:

- (a) obtain products that are the same or similar to the Products from another source at the Customer's sole discretion; and
- (b) enter into agreements with other suppliers for the supply of products that are the same or similar to the Products that are subject to this agreement.

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### **3. Products**

#### **3.1 Supply and purchase**

The Supplier agrees to supply the Products to the Customer, and the Customer agrees to purchase the Products from the Supplier, on the terms of this agreement for the Term.

#### **3.2 Product Range**

- (a) The Supplier will provide the Customer with the Range available to the Supplier and as otherwise set out in this Agreement.
- (b) The **NZGW Portal** and/or **NZGW Pricebook** will detail the Range and the Products available for supply.
- (c) The Supplier may add and remove Products from the Range from time to time, provided that any removal of Products from the Range complies with clause 3.3.
- (d) The Customer may request in writing to the Supplier to include a product in the Range. The Supplier will advise the Customer in writing of the outcome of the request and may be dependant on clause 5(h).

#### **3.3 Removal of Products and discontinued Products**

- (a) The Supplier may remove any Product from the Range for any reason. It will endeavour to provide the Customer with as much notice as possible of any such removal.
- (b) If the Supplier's own supermarket retail business unit decides to discontinue stocking a Product such that the Supplier will no longer have the Product available in the WWNZ Distribution Centre, then the Supplier will notify the Customer that it will no longer be resupplying that Product and:
  - (i) the Supplier may delete the Product from the Range in accordance with clause 3.3(a); or
  - (ii) the Supplier may agree to continue supplying the Product to the Customer in accordance with clause 3.2(e), in which event clause 5(h) below will apply.

#### **3.4 Stock shortages**

- (a) The Supplier must use reasonable endeavours to maintain adequate stock levels of Products to satisfy the Customer's demand based on the Forecast.
- (b) If the Supplier is not able to fully satisfy an Order within the Order Roster Schedule in clause 7.1, the Supplier must use reasonable endeavours to advise the Customer and to implement a solution to rectify the Product shortfall as soon as possible.
- (c) If:
  - (i) the Supplier is unable to fully satisfy an Order for a Product due to inadequate stock levels of the Product; and
  - (ii) the volume of the relevant Product under the Order is within the Forecast for that Product (on a week-by-week basis),

then the Supplier must give the Customer's Order the same priority (when allocating the Supplier's available stock of the relevant Product) that it applies to its other

wholesale customers and any New Zealand supermarket stores operated by any member of the Supplier Group.

- (d) Any Product that is not available for the Customer Order will be notified on the Loadlist and will not be supplied. In this situation, the Product will not be supplied as a Back Order.

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## 4. Products - Title, Risk and Resale

### 4.1 Title

Title in all Products supplied by the Supplier under this agreement will pass from the Supplier to the Customer upon receipt by the Supplier of full payment for the Products from the Customer. Until title passes to the Customer, the Supplier retains ownership of the Products, even though risk in the Products may have already passed to the Customer under clause 4.2.

### 4.2 Risk

Risk in all Products supplied by the Supplier under this agreement will pass from the Supplier to the Customer upon delivery to the relevant Delivery Location.

### 4.3 Products not for resale

The Products supplied under this agreement are expressly intended for resale by the Customer within New Zealand, at the retail premises directly associated with the Customer. The Customer will require the written consent of the Supplier to onsell the Products to any other entity. The parties can discuss the terms and conditions that would apply to such an arrangement, however the Supplier retains the absolute discretion whether to consent to such an arrangement, or not.

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## 5. Forecasting

- (a) The Customer will prepare for the Supplier a forecast of the Customer's anticipated purchase volumes of Products (itemised by Delivery Location, week and Product) for the relevant period ahead.
- (b) For Products supplied locally in New Zealand a forecast 6 **weeks** in advance is required and for indent (imported) Products a forecast of **20 weeks** in advance is required. These requirements should be included in the "Forecast" provided to the Supplier.
- (c) Following receipt of a proposed forecast from the Customer in accordance with clause 5(a), the Supplier must promptly accept or reject the proposed forecast. If the Supplier rejects the proposed forecast, then the parties will engage in good faith to agree the forecast.
- (d) Any forecast that is accepted by the Supplier or otherwise agreed between the parties in accordance with clause 5(b) will be the "**Forecast**" for the relevant period of time.
- (e) The Supplier will order sufficient volumes of Products to enable it to fulfill the Customer's Forecast and in return the Customer agrees to use all reasonable endeavours to purchase the volumes set out in the Forecast from the Supplier during that period.
- (f) The Customer will notify the Supplier as soon as it reasonably becomes aware of any anticipated material change (either increase or decrease) required to the Forecast. The parties will work together in good faith to make any adjustments required to the Forecast, acknowledging that NZ produced products will be easier to re-forecast than

overseas produced products. Once agreed, the revised forecast will become the "Forecast" as set out in clause 5(d).

- (g) If a Forecast is not received by the Supplier, the Customer accepts that Products Ordered may not be supplied.
- (h) If a requested Product (under 3.2(e)) is agreed to be maintained in a WWNZ distribution centre solely for wholesale supply then the Customer must provide a Forecast without exception.

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## 6. Ordering

### 6.1 Order and Order Roster Schedule

- (a) The Customer will order Products from the Supplier using an ordering system made available by the Supplier. Each such order placed by the Customer will be an "**Order**" for the purposes of this agreement, except to the extent that any such order is validly cancelled by the Customer or rejected by the Supplier in accordance with each party's respective rights under this agreement.
- (b) All Products supplied to the Customer in an Order will be in Cartons, with no facility for single unit pick available from any WWNZ Distribution Centre or third party suppliers that NZGW may use from time to time.
- (c) The Supplier will offer the Customer an "**Order Roster Schedule**" for set days and time for an Order to be received by the Supplier, which will have a corresponding delivery day and time. Any Orders placed prior to and up until 24 hours before the Order Roster Schedule cut-off, are able to be amended by written communication from the Customer to the Supplier.
- (d) Subject to clause 6.1(c) and clause 6.2, each Order is binding on the Customer upon receipt by the Supplier and cannot be withdrawn or varied without the Supplier's written consent.
- (e) Subject to clause 3.4(c), the Supplier reserves the right not to process any Order (or part thereof) if the Supplier is unable to fulfil the Order due to a stock shortage that reduces the total Cartons Ordered below the minimum order quantity detailed in clause 6.2 .

### 6.2 Minimum orders

In respect of all Orders, the Customer acknowledges that:

- (a) the minimum Order from each of the Supplier's ambient distribution centres is 60 Cartons of Products for each Delivery Location;
- (b) the minimum Order from each of the Supplier's perishables distribution centres is 50 Cartons of Products for each Delivery Location;
- (c) Any Order received under the required minimum order quantity will be rejected and the Customer contacted and advised to place another Order of the required quantity, subject to clause 6.1(c);
- (d) the minimum Order from each of the Supplier's distribution centres can be adjusted by the Supplier with 6 weeks' written notice to the Customer; and
- (e) the Supplier may impose a surcharge or additional fee, as specified in clause 8.3 (Additional Costs), if the Order volume is below a minimum order quantity and agreement has been reached between the Supplier and Customer to continue to supply despite not meeting the minimum Order quantity in clause 6.2(a) and 6.2(b).



### 6.3 Special Orders

- (a) If the Customer places an Order that involves any special or unusual logistics requirements outside the scope of the standard logistics requirements under this agreement (each such Order being a **"Special Order"**), the Supplier must promptly notify the Customer of any additional fees or charges that will be payable by the Customer in connection with the Special Order, as specified in clause 8.3 (Additional Costs).
- (b) Unless the Customer cancels a Special Order in accordance with clause 6.1(c) after being notified by the Supplier of any additional fees or charges payable by the Customer in connection with a Special Order, the Customer will be deemed to have accepted the additional fees and/or charges for the Special Order.

### 6.4 Product Shelf Life

- (a) The ambient and frozen packaged Products supplied will have a minimum life on receipt of at least 30 days before the printed "Best Before" or "Use By" date on the Product; and
- (b) The chilled perishable Products supplied will have a minimum life on receipt of at least 14 days before the printed "Best Before" or "Use By" date on the Product.

### 6.5 Credit Limit

At the sole discretion of the Supplier, a credit limit may be applied per Order and/or across a cumulative total of all Orders. Any Orders received that cause the credit limit(s) to be exceeded may not be processed. This will be communicated with the Customer in writing when the Customer's account is opened.

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## 7. Delivery

### 7.1 Delivery Location

The Customer must nominate the location within the Customer's premises for the delivery of Orders (each being a **"Delivery Location"**). The Delivery Location will be subject to approval from the Supplier and/or its freight carriers to ensure that there is a safe environment to enable the delivery of the Order.

### 7.2 Delivery schedules and specifications

In relation to deliveries:

- (a) the Supplier must deliver an Order to the nominated Delivery Location for that Order;
- (b) Products must be delivered to the Delivery Location in accordance with the Order Roster Schedule;
- (c) the Supplier will deliver up to a maximum height of 1.8m measured from floor to the bottom of the top case and a maximum weight for each pallet of Products of 650kg for tail lift truck delivery and 1,000kg for hoist unload truck delivery; and
- (d) Cartons of Products will be stacked and wrapped on a pallet for all deliveries to the Customer's Delivery Location and the Supplier's freight carrier will set down the palletised Order in conjunction with the initial inspection on delivery outlined in clause 7.5(b).

### 7.3 Delivery lead times

The Supplier must dispatch and deliver the Order to the relevant Delivery Location in accordance with the Order Delivery Schedule agreed from time to time between the parties. This will provide an appropriate delivery lead time to align with the Order Roster Schedule.

### 7.4 Cold chain requirements

- (a) Upon delivery to a Delivery Location, an initial check using an infrared laser thermometer should be used by the Customer to confirm that:

- (i) chilled Products must be at a temperature no higher than 5°C; and
- (ii) frozen Products must be at a temperature no higher than -15°C with no visible signs of thawing,

unless then-applicable food safety regulation specifies other requirements, in which case the Supplier must comply with such requirements.

- (b) If any Product exceeds the temperature allowance in clause 7.4(a), then an additional check should be made by the Customer using a probe thermometer to ensure accuracy that the Product and not the packaging is not compliant.
- (c) If any Product exceeds the temperature allowance in clause 7.4(b), then all Products on the Order should be checked by the Customer so that only those that are not compliant with the cold chain requirements will be considered Rejected Products.

### 7.5 Inspection on delivery

- (a) At the time of delivery to a Delivery Location, the Customer's Personnel must conduct a visual check to:
- (i) identify and report to the Supplier any discrepancies or damage on the outside of the packaging;
  - (ii) count the number of pallets delivered by the Supplier and reconcile against the Receivable Record provided by the Supplier;
  - (iii) check the temperature for any chilled or frozen Products to confirm compliance with clause 7.4.
- (b) Prior to the Supplier's delivery driver departing the Delivery Location after delivering any Products, the delivery driver and a member of the Customer's Personnel must each sign the Receivable Record (provided by the Supplier) to confirm the number of pallets delivered by the Supplier and any other discrepancies (such as missing or excess pallets delivered), damage or other issues identified by the Customer Personnel during any inspection conducted in accordance with clause 7.5(a) (each such record being a "**Receivable Record**"). Where a delivery driver does not provide a physical copy of a Receivable Record, the Customer's Personnel should maintain their own records of this information.
- (c) In respect of each delivery of Products, the parties acknowledge and agree that the signed Receivable Record for that delivery is evidence of:
- (i) the visually observable condition of the Products delivered (including the temperature on delivery of any chilled or frozen Product) as at the time of delivery; and
  - (ii) the number of pallets delivered, which will be processed as a pallet transfer outlined in clause 7.10.

- (d) The Customer must inspect all Products and notify the Supplier in writing within 2 days after delivery to a Delivery Location if any Product:
  - (i) is damaged, defective or otherwise does not comply with the standards and requirements of this agreement as outlined in clause 6.4 and clause 11;
  - (ii) has been incorrectly delivered by the Supplier without an Order; or
  - (iii) is missing from the Order.
- (e) If claims are not made within 3 days after delivery to a Delivery Location, the Supplier has no obligation to accept the claim as valid.
- (f) The Customer must provide all evidence reasonably requested by the Supplier to substantiate any notice issued by the Customer in accordance with 7.5(d), including samples of the relevant Products and photographic or videographic evidence.

## 7.6 Rejected Products/Order

- (a) If the Customer gives notice to the Supplier in accordance with clauses 7.4(a), 7.5(d)(i) or 7.5(d)(ii) (each validly rejected Product being a “**Rejected Product**”, otherwise all validly rejected Products on an Order being a “**Rejected Order**”), the Rejected Products/Order will be taken to be rejected by the Supplier, subject to the provisions of clauses 7.5(e), 7.5(f) and 7.7; and
- (b) Subject to clause 7.6(c):
  - (i) the Supplier will initially endeavour to replace the Rejected Products/Order within one week of the notification from the Customer. If the Supplier is unable to do so it will advise the Customer and a credit note will be issued for the Product Purchase Price (or any part thereof) for any Rejected Product/Order;
  - (ii) the Customer must return Rejected Products/Orders to the Supplier unless:
    - A. the Customer reasonably determines it necessary or appropriate (including for public health reasons) to destroy the Rejected Products/Order; or
    - B. the Supplier requests the Customer to destroy or dispose of the Rejected Products/Order; and
  - (iii) the Supplier will be responsible for all reasonable costs incurred by the Customer in connection with returning or destroying the Rejected Products/Order, provided that the Customer:
    - A. takes all reasonable steps to mitigate such costs; and
    - B. obtains the Supplier’s written consent prior to incurring any costs.
- (c) If any Rejected Product/Order is suitable and safe for resale to the public, the Customer and the Supplier may negotiate in good faith a discounted Product Purchase Price for the Rejected Product/Order. If the parties agree on a discounted Product Purchase Price for a Rejected Product/Order, then:

- (i) that Product will be deemed to have been accepted by the Customer (and will cease to be a Rejected Product/Order);
- (ii) the Product Purchase Price payable by the Customer for that Product will be the discounted Product Purchase Price agreed between the parties in accordance with this clause; and
- (iii) the difference in value established in 7.6(c)(ii) will be processed by the Supplier as a refund or credit note to the Customer.

## **7.7 Ullage**

The Customer acknowledges and agrees that an Ullage allowance has been built into the Product Purchase Price and as such, claims for Ullage under the value of \$50 per Order will not be accepted and the Supplier will not be liable for such claims.

## **7.8 Additional Product**

If the Customer gives notice to the Supplier in accordance with clause 7.5(d)(ii), then the Supplier will request the Customer retain the additional Product, then subject to:

- (a) If the Customer agrees;
  - (i) the Supplier will adjust the invoice for the Order to include the Product Purchase Price of the additional Product
- (b) If the Customer does not agree;
  - (i) the Customer must return the additional Product to the Supplier
  - (ii) the Supplier will be responsible for all reasonable costs incurred by the Customer in connection with returning additional Product

## **7.9 Missing Products**

If the Customer gives notice to the Supplier in accordance with clause 7.5(d)(iii), then subject to:

- (a) the provisions of clauses 7.5(e), 7.5(f) and 7.6; and
- (b) the Customer being able to demonstrate to the reasonable satisfaction of the Supplier that the missing Products were not delivered to the Delivery Location,

the Supplier will initially endeavour to deliver the missing Products within one week of the notification from the Customer. If the Supplier is unable to do so it will advise the Customer and a credit note will be issued to the Customer for the full Product Purchase Price of the missing Products.

## **7.10 Pallet transfer**

- (a) The Customer must have a CHEP and/or LOSCAM account (depending on the Customer's Delivery Location and type of Product being delivered) and provide the details to the Supplier to facilitate the transfer of pallets between Supplier and Customer.
- (b) The Supplier may utilise subcontractors for delivery of Products as per clause 20.2, in which case the facilitation of pallet transfers under clause 7.10 (a) shifts to the subcontractor, rather than the Supplier.

- (c) Any dispute regarding the quantity of pallets transferred to the Customer by the Supplier must be notified within thirty days of delivery.
- (d) The Customer is solely responsible for the de-hire of pallets. The Supplier will use its reasonable endeavours to assist the Customer with this process if requested to do so, but is not liable for any resulting expenses or losses claimed by CHEP or LOSCAM against the Customer.

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## 8. Pricing

### 8.1 Product Purchase Price

- (a) The purchase price payable by the Customer for each Product (such price in respect of any given Product being the “**Product Purchase Price**”) will be determined by the Supplier and set out in the NZGW Pricebook and/or NZGW Portal, with the effective date being the day that the Order is made ready for delivery and an invoice generated. Subject to clause 8.1(c), the Supplier reserves the right to change any Product Purchase Price at its sole discretion, provided that any such change must comply with the Supplier's then-current Pricing Principles.
- (b) If the Customer requests a delivery date more than one week beyond the date the Order is placed, the Customer accepts the responsibility to review the NZGW Pricebook and/or NZGW Portal for the Product Purchase Price that will apply and as per clause 6.1(c), can advise the Supplier of any request to change the quantity ordered
- (c) The Supplier must give the Customer:
  - (i) in respect of produce, meat, seafood or other Products with frequent price variation (as reasonably determined by the Supplier), not less than 7 days' notice of any proposed changes in the Product Purchase Price for any of those Products; and
  - (ii) in respect of all other Products, not less than 2 weeks' notice of any proposed changes in the Product Purchase Price for any of those Products, although the Supplier will endeavour to provide more notice than this where it is reasonably able to do so.
- (d) The NZGW Pricebook and/or NZGW Portal will be represented exclusive of GST and the Product Purchase Price on the invoice will record the applicable GST amount.

### 8.2 Additional Costs

- (a) If the Supplier identifies any costs or services not covered by this agreement (whether foreseeable or not, and including for example only, work required to fulfil an Order during a public holiday, enhanced reporting, rerouting transport due to natural disaster, re-delivery, hand unstacking of deliveries etc), then the Supplier will communicate those costs and/or services to the Customer and the additional charges that the Supplier may pass on to the Customer (**Additional Costs**).
- (b) If the Additional Cost has not been incurred by the Supplier at the time of communication to the Customer, such as a Special Order, and the Customer responds in writing that they do not agree in a time that allows, the Supplier will not proceed with the additional service.

### **8.3 Promotional Discount**

- (a) To the extent that the Supplier is successfully able to secure any promotional funding with the Supplier's own supplier base for its wholesale customers, including the Customer, the Supplier will pass on or make available that promotional discount to the Customer (whether through its Product Purchase Price, rebate or otherwise).
- (b) The Customer may have its own promotional agreements with other suppliers or distributors.

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## **9. Invoicing and payment**

### **9.1 Invoicing and payment terms**

- (a) In respect of each Order, the Supplier will invoice the Customer the Product Purchase Price payable by the Customer for all Products under the Order. and this will be issued by email upon dispatch of the Order to the Delivery Location.
- (b) An Invoice may also be issued for any Additional Costs or fees payable in accordance with clauses 6.2 (Minimum Orders), 6.3 (Special Orders) and 8.5 (Additional Costs).
- (c) All invoices will be due for payment 14 days after the invoice date, payable via weekly direct debit.
- (d) A Statement will be issued weekly which will summarise all payments due on each Customer account and the date of the week that the payment will be processed.
- (e) The due now balance on the weekly Statements, including GST, must be paid via direct debit on the following Monday.

### **9.2 Dishonoured direct debit**

- (a) If the Customer fails to pay any amount owing before the applicable due date for payment, then the Supplier may suspend the supply of Products until such time that the outstanding balance is paid.
- (b) If there are two or more instances of late payment within any 12 month period, the Supplier may, at its sole discretion, change payment terms to Cash Before Delivery.
- (c) At the discretion of the Supplier, the Customer may be charged default interest on the amount outstanding at the Default Rate, calculated on a daily basis from and including the due date for payment until the date payment is made in full.

### **9.3 Payments by the Supplier and credit notes**

If the Supplier owes any amount to the Customer under this agreement:

- (a) the Customer may issue a tax invoice to the Supplier for such amounts if the Customer has made a taxable supply; or
- (b) the Supplier will promptly issue an adjustment note if an adjustment event has occurred for a taxable supply that the Supplier has made,

and the Supplier must promptly pay such amounts owing by way of a credit applied against future invoices issued by the Supplier to the Customer under this agreement.

## 9.4 GST

- (a) In this clause 9.4, words or expressions which are defined in the GST Law, have the same meaning as in the GST Law; and
- (b) Subject to any other express statement in this agreement, and subject to the provisions set out below, if any supply made under or in connection with this agreement by one party (**Party A**) to the other party (**Party B**) is subject to GST, the consideration otherwise payable by the Party B for that supply will be increased by an amount equal to the GST payable by the Party A.
- (c) If an adjustment event occurs in respect of a supply under or in connection with this agreement such that the GST liability of Party A is different to the amount used to calculate a payment under clause 9.4(b), then the consideration for the supply will be adjusted by:
  - (i) in the case of an increasing adjustment for Party A, Party B paying an amount in money to Party A equal to the amount of the increasing adjustment; or
  - (ii) in the case of a decreasing adjustment for Party A, Party B paying an amount in money to Party A equal to the amount of the decreasing adjustment.
- (d) The amount payable under clause 9.4(c) is due within seven days of Party A or Party B (as applicable) issuing an adjustment note in respect of the adjustment.
- (e) If a payment made by one party to the other party is a reimbursement or indemnification of a cost, expense, loss or liability incurred by that other party, the payment shall be reduced by an amount for which that party, or the representative member of its GST group, is entitled to an input tax credit.

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## 10. Intellectual Property Rights

- (a) Subject to clause 10(b), neither party transfers to the other party any right, title or interest in any of the Intellectual Property Rights of the respective party.
- (b) In respect of Intellectual Property Rights of a party developed by that party under or pursuant to this agreement, or which are pre-existing Intellectual Property Rights of a party provided to the other party for the purposes of this agreement, the party that is the owner of such Intellectual Property Rights grants to the other a royalty-free, limited, non-exclusive, non-transferable right (with no right to sub-licence) to use those Intellectual Property Rights for the Term only, and for the sole purpose of exercising its rights and performing its obligations under this agreement.

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## 11. Product standards and requirements

- (a) Subject to clause 11(b), the Supplier warrants to the Customer that, in respect of all Products supplied under this agreement:
  - (i) the Products are manufactured, grown, extracted, produced, packaged, labelled, presented, supplied and described in compliance with this agreement and all applicable New Zealand laws and industry codes;
  - (ii) the Products are of Acceptable Quality, fit for any usual or customary purpose and fit for sale by the Customer to the public; and

- (iii) the Supplier has the title and the right to sell the Products in accordance with this agreement, free of all encumbrances, and the Customer will enjoy quiet possession of the Products.
- (b) If a warranty provided by the Supplier under clause 11(a) above is untrue, then to the extent that:
  - (i) the fact, matter or circumstance causing that warranty being untrue was caused or contributed to by any person (including any supplier of Supplier) other than the Supplier; and
  - (ii) the Supplier could not reasonably have avoided the breach caused by that other person,

the Supplier's liability to the Customer for breach of that warranty is limited to any amount that the Supplier recovers from each of its suppliers and the person referred to in sub-clause (b)(i) that is attributable to the Products supplied to the Customer under this agreement in respect of which the relevant warranty is untrue. Subject to clause 13.3, the Supplier must use reasonable endeavours to maximise recovery for the Customer.

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## 12. Product recalls

- (a) If the Customer receives from the Supplier notice of a recall or withdrawal event, then the Customer must promptly identify and withdraw or recall (as applicable) all affected Products.
- (b) If a Product is withdrawn or recalled by the Customer due to any act or omission of the Supplier or its Personnel, then the Supplier's liability to the Customer in connection with that withdrawal or recall is limited to all direct, reasonable and substantiated losses suffered or incurred by the Customer in connection with the withdrawal or recall, including the cost of replacing the withdrawn or recalled Products and reasonable administration fees.
- (c) If the Customer recalls or withdraws any Products in circumstances where the Supplier has not issued a notice in accordance with clause 12(a), the Customer must immediately notify the Supplier of the recall or withdrawal and promptly provide all information reasonably requested by the Supplier in connection with the recall or withdrawal (as applicable).
- (d) The Supplier's liability to the Customer in connection with any withdrawal or recall will be proportionately reduced to the extent the withdrawal or recall is caused, or contributed to, by any wrongful act or omission or negligence of the Customer or its Personnel.

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## 13. Liability

### 13.1 Limitations

To the extent permitted by Law and under this clause 13:

- (a) no party will be liable in respect of a Claim unless the party making the Claim gives the other party written notice of the Claim as soon as practicable and in any event within 90 days after becoming aware of the facts, matters or circumstances on which the Claim is based;
- (b) the maximum aggregate liability of the Supplier and its Related Bodies Corporate in respect of all Claims made by the Customer is limited to \$1 million; and



- (c) neither party is liable to the other party for any Consequential Loss in respect of any Claim.

## **13.2 Pass-through claims**

Where the Supplier is required to use reasonable endeavours to maximise recovery for the Customer under each of clauses 11(b) and 12(b), and the Supplier does not make a claim against the supplier or such other person referred to in the relevant clause in respect of products other than the Products supplied to the Customer, then:

- (a) the Supplier may request that the Customer pay the costs of making the claim in respect of those Products supplied to the Customer;
- (b) if the Customer agrees for the Supplier to proceed with the claim, the Customer will pay the reasonable costs of making the claim only in respect of such Products and subject to:
  - (i) the Supplier keeping the Customer informed of all material matters relating to the claim and following the Customer's reasonable instructions in relation to the conduct of the claim;
  - (ii) the Customer approving costs prior to such costs being incurred; and
  - (iii) the Customer being entitled to discontinue the claim at any time by notice to the Supplier; and
- (c) subject to clause 13.2(b), the Supplier must proceed with the claim.

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## **14. Insurance**

### **14.1 Procurement of insurance**

The Customer must procure at its cost at any time during the Term the following insurances effected by an insurer authorised to carry on insurance in New Zealand:

- (a) public and product liability insurance of **not less than \$100,000** per occurrence; and
- (b) all such other insurances required by law.

### **14.2 Certificate of currency**

The Customer must upon reasonable request by the Supplier provide to the Supplier a certificate or other evidence of the currency and provisions of any insurance to be procured by the Customer under this provision.

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## **15. Confidentiality and privacy**

### **15.1 Confidentiality restrictions**

- (a) Subject to clause 15.1(b), each party must:
  - (i) keep the terms of this agreement, information that relates to the transactions contemplated by the agreement and information of which it has become aware in connection with the agreement, confidential;
  - (ii) not disclose to a third party any Confidential Information of the other party; and

- (iii) not use any Confidential Information other than to perform its obligations and exercise its rights under this agreement.
- (b) The parties agree that either party may disclose information referred to in clause 15.1(a):
  - (i) if disclosure is required to be made by Law or the rules of a recognised stock or securities exchange;
  - (ii) to any professional adviser, financial adviser, banker, financier or auditor where that person is obliged to keep the information confidential;
  - (iii) in response to a request from a regulatory authority, in circumstances where a failure to provide information voluntarily is reasonably considered likely to result in a legal notice to provide information;
  - (iv) to any of its Personnel or Related Bodies Corporate to whom it is necessary to disclose the information for the purpose of performing its obligations under the agreement;
  - (v) to enforce its rights or to defend any claim or action under this agreement; or
  - (vi) where the information has come into the public domain through no fault of that party.

## 15.2 Privacy

- (a) Each party warrants to the other that when it collects, uses, discloses, transfers or otherwise handles Personal Information in the course of performing its obligations under the agreement that it will at all times comply with Privacy Laws.
- (b) Each party indemnifies and holds harmless the other party in respect of any liability, loss, damage or expense incurred by the other party to the extent that such liability, loss, damage or expense was caused by a breach of Privacy Laws by the first party, including, but not limited to a breach of Privacy Laws by the first party in a manner which places the other party in breach of Privacy Laws.

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## 16. Force majeure

If a party (**Affected Party**) becomes wholly or partly unable, by reason of a Force Majeure Event, to perform any obligation (other than an obligation to pay money) placed on it under this agreement (**Relevant Obligation**), then:

- (a) the Affected Party must give to the other party prompt written notice of:
  - (i) reasonable particulars of the nature of the Force Majeure Event and the manner in which the event has resulted in the Affected Party being unable to carry out the Relevant Obligation;
  - (ii) the Relevant Obligation that the Affected Party is unable to carry out; and
  - (iii) so far as is known, the probable extent to which the Affected Party will be unable to perform or be delayed in performing its Relevant Obligation;
- (b) subject to clause 16(c), the Relevant Obligation (and any other dependent obligations of either party) will be suspended until the Force Majeure Event has passed and the Affected Party is reasonably able to resume its Relevant Obligations; and

- (c) the Affected Party must use its reasonable endeavours to overcome or remove the Force Majeure Event as quickly as possible.

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## **17. Termination**

### **17.1 Termination for convenience**

Either party may terminate this agreement for convenience at any time by giving the other party a minimum notice period of 6 months.

### **17.2 Termination for cause**

In addition to any express right to terminate this agreement specified herein, either party may immediately terminate this agreement:

- (a) by written notice to the other party, if the other party has materially breached the terms of this agreement, where such breach is not remedied within 14 days of written notice of such breach or such breach is incapable of remediation;
- (b) by written notice to the other party, if a party's obligations have been suspended by a Force Majeure Event in accordance with clause 16 for not less than a period of 40 Business Days;
- (c) if a party assigns all or part of its rights or obligations under this agreement, or undergoes a Change of Control, without the consent of the other party pursuant to clause 20.4; or
- (d) if an Insolvency Event occurs in respect of the other party.

### **17.3 Consequences of termination**

Termination of this agreement does not affect any accrued rights or remedies of either party pursuant to this agreement.

### **17.4 Survival**

Clauses 1, 4, 9, 10, 11, 13, 15, 16, 18 and 19 and any other clause intended to survive termination or expiry of this agreement will continue to have effect after the termination or expiry of this agreement.

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## **18. Dispute resolution**

### **18.1 Dispute resolution under the Grocery Act**

If a dispute arises between the parties within the scope of section 153 of the Grocery Act (a **Grocery Act Dispute**), then the Customer may refer that Grocery Act Dispute to the dispute resolution scheme established under the Grocery Act by following the procedure for referral set out in the rules of that dispute resolution scheme. Clause 18.3 does not apply to a Grocery Act Dispute referred to the dispute resolution scheme established under the Grocery Act.

### **18.2 Disputes**

- (a) In the event of any dispute arising out of or in connection with this agreement (**Dispute**), then, subject to (and without limiting the Customer's rights under) clause 18.1 in respect of any Grocery Act Disputes, each party must follow the procedures in clause 18.3 before starting court proceedings (subject to clause 18.2(b)).
- (b) Nothing in this clause 18 prevents a party seeking urgent injunctive or similar interim relief from a court.

- (c) The parties must use reasonable endeavours and act in good faith in complying with their obligations under this clause 18.
- (d) Despite the existence of a Dispute, the parties must continue to perform their other obligations under this agreement that are not affected by the Dispute.

### **18.3 Procedure to resolve a Dispute**

- (a) Any party (**Initiating Party**) claiming that a Dispute has arisen must give the other party (**Recipient Party**) a notice setting out details of the Dispute (**Dispute Notice**).
- (b) If a Dispute Notice is issued by an Initiating Party, each party's Representative must promptly meet in good faith to discuss and attempt to resolve the Dispute.
- (c) If the Representatives are unable to resolve a Dispute within 20 Business Days of the Initiating Party issuing a Dispute Notice in relation to the Dispute, then the Initiating Party may refer the dispute to mediation in accordance with clause 18.3(d).
- (d) If a dispute is referred to mediation in accordance with clause 18.3(c), that mediation will be administered by the Arbitrators' and Mediators' Institute of New Zealand Inc (AMINZ) and will be conducted in accordance with the AMINZ Protocols for Mediation which set out the procedures to be adopted, the process of selection of the mediator and the costs involved and the terms of that Protocols document are incorporated into this document.

### **18.4 Confidentiality**

Any communication made for the purposes of this clause 18 must be kept confidential and must not be used except to attempt to resolve the Dispute.

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## **19. Personal Property Securities Act 1999 ("PPSA")**

- (a) This agreement constitutes a security interest in favour of the Supplier in all the Products and all proceeds of the Products (jointly, Collateral) to secure the Supplier's rights interest and title to the Products pursuant to this agreement, until full payment for the Products has been received by the Supplier.
- (b) The Customer agrees to promptly execute and deliver to the Supplier all assignments, transfers and other agreements and documents and do anything else which the Supplier may deem appropriate to perfect its security interest over the Collateral, or obtain the priority required by the Supplier or register (and/or renew registration of) a financing statement for a security interest in favour of the Supplier.
- (c) To the extent that Part 9 of the PPSA applies, the Customer agrees that the provisions of sections 114(1)(a), 120(1), 122, 133 and 134 of the PPSA which are for the Supplier's benefit, or place any obligations on the Supplier in the Customer's favour, shall not apply; and where the Supplier has rights in addition to those in Part 9 of the PPSA, those rights shall continue to apply.
- (d) To the extent that Part 9 of the PPSA applies, without limiting anything in the previous paragraph, the Customer hereby waives its rights under sections 116, 120(2), 121, 125, 126, 127, 129 and 131 of the PPSA, and its rights to receive a copy of a verification statement under section 148 of the PPSA in respect of any financing statement or financing change statement registered by the Supplier.

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## 20. General

### 20.1 Notices

- (a) The following address details for the purposes of giving notice are nominated by each party and may be updated by either party providing written notice to the other party from time to time with at least 5 Business Days' notice:

#### **Customer Representative**

Address XXXX

Attention XXXX

Email XXXX

#### **Supplier Representative**

Address 80 Favona Road, Favona, Auckland 2024

Attention Head of Commercial - NZGW Wholesale

Email tim.bastin@woolworthsnz.co.nz

- (b) A notice or other communication required or permitted to be given by one party to another must be in writing and is taken to have been given when (unless otherwise proved):
- (i) delivered personally by hand, at the time it is delivered to the party;
  - (ii) sent by pre-paid mail to the address of the addressee specified in clause 20.1(a) as updated from time to time;
    - A. from NZ to an address within NZ, on the fourth Business Day after posting; or
    - B. from NZ to an address outside NZ or from outside NZ to an address within NZ, on the tenth Business Day (at the address to which it is mailed) after posting; and
  - (iii) sent by email to the address of the addressee specified in clause 20.1(a) (as updated from time to time), 24 hours after receipt by the sender of a "delivery receipt" message from the recipient.
- (c) The parties agree that each Representative will be the initial and central point of contact between the parties in respect of this agreement.

### 20.2 Subcontracting

- (a) The Supplier may (without the prior written consent of the Customer) subcontract to a third party the performance of the Supplier's obligations under this agreement that relate to freight, delivery and shipping.
- (b) Where the Supplier subcontracts its obligations under the clause above, the Supplier will remain fully liable to the Customer for the due performance of those obligations and for any act or omission of the subcontractor, as if the subcontractor were the Supplier, notwithstanding such delegation or subcontracting.

### **20.3 Entire understanding**

To the extent permitted by Law, in relation to its subject matter, this agreement:

- (a) embodies the entire agreement understanding of the parties, and constitutes the entire terms agreed by the parties; and
- (b) supersedes any prior proposal or written or other agreement of the parties.

### **20.4 Permitted assignment**

- (a) Either party may assign or novate in whole or in part any right or obligation under this agreement to a Related Company without the prior consent of the other.
- (b) Either party may assign or novate in whole or in part any right or obligation under this agreement to any other party, with the written consent of the other, such consent not to be unreasonably withheld.

### **20.5 Nature of relationship**

Nothing in this agreement creates a relationship of partnership, employment, joint venture or agency between the parties.

### **20.6 Waiver**

- (a) A failure to exercise or enforce, or a delay in exercising or enforcing, or the partial exercise or enforcement of, a right, power or remedy provided by Law or under this agreement by a party does not preclude, or operate as a waiver of, the exercise or enforcement, or further exercise or enforcement, of that or any other right, power or remedy provided by Law or under this agreement.
- (b) A waiver or consent given by a party under this agreement is only effective and binding on that party if it is given or confirmed in writing by that party.
- (c) No waiver of a breach of a term of this agreement operates as a waiver of another breach of that term or of a breach of any other term of this agreement.

### **20.7 Governing Law**

This agreement is governed by and must be construed according to the Law applying in New Zealand.

### **20.8 Jurisdiction**

Each party irrevocably:

- (a) submits to the exclusive jurisdiction of the courts of New Zealand and the courts competent to determine appeals from those courts, with respect to any proceedings that may be brought at any time relating to this agreement; and
- (b) waives any objection it may now or in the future have to the venue of any proceedings, and any claim it may now or in the future have that any proceedings have been brought in an inconvenient forum, if that venue falls within clause 20.8(a).

### **20.9 Amendments**

This agreement may only be varied by agreement executed by or on behalf of each party in writing.

## 20.10 Counterparts

This agreement may be executed in any number of counterparts and by the parties on separate counterparts. Each counterpart constitutes the agreement of each party who has executed and delivered that counterpart.

## 20.11 No representation or reliance

- (a) Each party acknowledges that no party (nor any person acting on a party's behalf) has made any representation or other inducement to it to enter into this agreement, except for representations or inducements expressly set out in this agreement.
- (b) Each party acknowledges and confirms that it does not enter into this agreement in reliance on any representation or other inducement by or on behalf of any other party, except for representations or inducements expressly set out in this agreement.

## 20.12 Further assurances

Each party must do all things reasonably necessary to give effect to this agreement and the transactions contemplated by it.

Signed as an **agreement**:

<b>Executed by Woolworths New Zealand Limited (NZGW Division) , by its authorised representative:</b>
Signature of authorised representative
Full name of authorised representative
Date signed
<b>Signed for and on behalf of XXXXXXXX by its authorised representative:</b>
Signature of authorised representative
Full name of authorised representative
Date Signed