



LAWYERS

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## **TRADE PRACTICES ACT 1974**

### **Variation to undertaking given to the Australian Competition and Consumer Commission under section 87B**

By

Given under section 87B of the Trade Practices Act by Woolworths Limited ABN 81 004  
295 532 and Carboxy Pty Limited ACN 138 990 584

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## Recitals

- A. On 11 November 2009, the Australian Competition and Consumer Commission (ACCC) accepted an undertaking (the **Undertaking**) under section 87B of the *Trade Practices Act 1974 (Act)* from Woolworths Limited (**Woolworths**) and Carboxy Pty Limited (**Carboxy**) (together the Parties) in connection with the acquisition of Danks Holdings Limited by a joint venture between Woolworths and Lowe's Companies Inc.
- B. The Parties applied to the Commission to vary the Undertaking with the purpose of:
- (i) extending the operation of the Undertaking to hardware stores of any size;
  - (ii) varying the geographic scope of the obligations; and
  - (iii) making clear its application in respect of hardware stores acquired by the Home Improvement Joint Venture or any of the Parties.
- C. The Commission has agreed, pursuant to section 87B of the Act, to accept this variation of the Undertaking (**Variation**).
- D. A copy of the Undertaking (as varied) is annexed to this Variation at Schedule A.

## Agreed terms

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### 1. Commencement

This Variation comes into effect when:

- (a) this Variation is executed by the Parties; and
- (b) the Commission accepts this Variation so executed.

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### 2. Variation to clause 2 - Background

Clause 2 is varied by inserting a new paragraph (s) as follows:

On 2 June 2010 this Undertaking was varied with the ACCC's consent with the purpose of:

- (i) *extending the operation of the Undertaking to hardware stores of any size;*
- (ii) *varying the geographic scope of the obligations; and*
- (iii) *making clear its application in respect of hardware stores acquired by the Home Improvement Joint Venture or any of the Parties.*

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### 3. Variation to clause 4 – Commencement and termination

(a) The heading of clause 4.1 is varied by inserting the words "of Undertaking" after the word "Commencement".

(b) Clause 4.2(a) is amended by deleting the words "date on which this Undertaking is accepted" and inserting in their place the words "Commencement Date".

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#### 4. Variation to clause 5 – Undertakings

- (a) Clause 5.1(ii) is varied by deleting the word "which".
- (b) Clause 5.1(ii) is varied by replacing the number "5" with the number "10".
- (c) Clause 5.1(ii) is varied by inserting a comma after the words "Joint Venture Store".
- (d) Clause 5.1(c)(iii) is varied by inserting "-Link" after the word "Thrifty".
- (e) Clause 5.1(c)(iv) is varied by inserting "-Link" after the word "Thrifty".
- (f) Clause 5.1(c)(iv) is varied by replacing the second instance of the words "Danks trade buying" with the words "Home banner".
- (g) Clause 5.3(b) is varied by inserting after the phrase "Joint Venture Store" the following text: ", including by acquiring a store that will subsequently become a Joint Venture Store,".
- (h) Clause 5.3(b) is varied by replacing the number "5" with the number "10".

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#### 5. Variation to Schedule 1 – Defined terms and interpretation

- (a) In the definition of "Commencement Date", replace the words "a date determined in accordance with clause 4.1" with the words "11 November 2009".
- (b) In the definition of "Joint Venture Store", delete the second instance of "means a" and also delete the words, "with a trading area of not less than 7,000m<sup>2</sup>".
- (c) In the definition of "The Parties", add after the word "and" the following: "/or".
- (d) In the definition of "Undertaking", insert after the word "document" the words: "as at the Commencement Date, as varied by the Variation dated 2 June 2010".
- (e) Insert a new definition as follows: "*Variation means the variation to the Undertaking given to the ACCC under section 87B of the Act and accepted by the ACCC on 2 June 2010.*"

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#### 6. Acknowledgements

The Parties acknowledge that the Commission may:

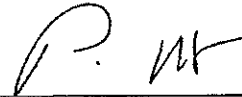
- (a) make this Variation available for public inspection; and
- (b) from time to time publicly refer to this Variation.

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#### 7. Definitions and Interpretation

- (a) Any term defined in the Undertaking and not defined in this Variation has the meaning given in the Undertaking, unless the contrary intention appears.
- (b) Variation means this variation to the Undertaking.

Executed by Woolworths Limited ABN 81 004 295 532 and in accordance with section 127 of the Corporations Act by or in the presence of:



Peter Horton, Group General Counsel and Company Secretary

1 June 2010

Date

Executed by Carboxy Pty Limited ACN 138 990 584 in accordance with section 127 of the Corporations Act by or in the presence of:

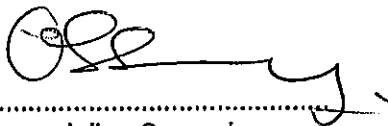


Peter Horton, Company Secretary

1 June 2010

Date

**ACCEPTED BY THE AUSTRALIAN COMPETITION & CONSUMER COMMISSION**



Graeme Julian Samuel  
Chairman, Australian Competition & Consumer Commission

Date: 2/6/10

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# Undertaking to the Australian Competition and Consumer Commission

Given under section 87B of the Trade Practices Act by Woolworths Limited ABN 81 004  
295 532 and Carboxy Pty Limited ACN 138 990 584

11 November 2009

Varied  June 2010

**Gilbert + Tobin**

2 Park Street  
Sydney NSW 2000  
Australia

GPO Box 3810  
Sydney NSW 2001

T +61 2 9263 4000  
F +61 2 9263 4111

DX 10348 SSE  
[www.gtlaw.com.au](http://www.gtlaw.com.au)

Clayton Utz  
Lawyers  
Levels 19-35 No 1 O'Connell Street Sydney NSW 2000 Australia  
PO Box H3 Australia Square Sydney NSW 1215  
T +61 2 9353 4000 F+61 2 8220 6700

[www.claytonutz.com](http://www.claytonutz.com)

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## 1 Persons giving undertaking

This undertaking is given to the ACCC by the Parties.

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## 2 Background

- (a) Woolworths is an Australian retailer. It has businesses in food, liquor, petrol, hotels, and general merchandise comprising discount department and consumer electronic stores.
- (b) On 25 August 2009 Woolworths announced the formation of a joint venture to create a home improvements business in Australia (the **Home Improvement Joint Venture**).
- (c) Carboxy is an incorporated joint venture bid vehicle.
- (d) Danks is a public company listed on the Australian Securities Exchange. Danks is the parent company of the Danks Group of companies. The principal business of the Danks Group is the distribution of hardware products with a related service offering to Danks banner stores and non-affiliated independent hardware stores.
- (e) Danks' members operate stores under the banners of "Home Timber and Hardware", "Thrifty-Link Hardware" and "Plants Plus Garden Centres". In addition to supplying stores with a wide range of products, Danks provides a related service offering including, but not limited to, marketing and promotional services, retail support services and financial benefits (e.g. rebates).
- (f) Woolworths has announced that it intends to develop a network of destination home improvement stores by:
  - (i) Carboxy acquiring 100% of the issued share capital in Danks (**Proposed Acquisition**);
  - (ii) establishing a network of destination home improvement stores; and
  - (iii) entering into the Home Improvement Joint Venture.
- (g) Woolworths has made submissions to the ACCC and expressed the view that the Proposed Acquisition will not have the effect of substantially lessening competition in any market.
- (h) On 3 September 2009, the ACCC commenced its review of the Proposed Acquisition.
- (i) The ACCC undertook market inquiries and considered information provided by the parties, industry participants and others. The ACCC's inquiries were aimed at assessing whether or not the Proposed Acquisition would have the effect or be likely to have the effect of substantially lessening competition in a market in contravention of section 50 of the Act.
- (j) The ACCC considered that, in the absence of this Undertaking, the Proposed Acquisition would be likely to result in a substantial lessening of competition in certain local markets for the supply of the hardware and home improvement products.

- (k) The ACCC considered that without the Proposed Acquisition, the Parties, either alone or jointly, would still be likely to enter the hardware and home improvement sector by establishing a network of home improvement retail stores, together with a wholesale network, to supply these stores. The ACCC considered it likely that Danks would continue in its present form without the Proposed Acquisition, operating mainly as a wholesale supplier to independent hardware retailers.
- (l) Compared to the situation without the Proposed Acquisition, the ACCC was concerned that the Proposed Acquisition would be likely to give Woolworths the ability and incentive to discriminate against some of its wholesale customers who are also its retail competitors. The ACCC was also concerned that this would limit the ability of those stores to compete as effectively in local markets for the retail sale of various categories of hardware and home improvement products as they would have without the acquisition (that is, if Danks remained independent of Woolworths).
- (m) The ACCC was also concerned that the Proposed Acquisition would be likely to result in a reduction in the level of retail competition between some retailers supplied by Danks and some Woolworths' 'big box' stores as compared to the position without the acquisition.
- (n) This concern arises because the ACCC considered that the Proposed Acquisition would reduce the number of participants at the wholesale level which in turn would affect competition at the retail level. The ACCC considered that Woolworths' dual role as wholesaler and retailer would be likely to provide incentives for a reduced level of competition at the retail level.
- (o) The ACCC was also concerned that Danks Members would be vulnerable to discrimination or foreclosure if they are unable to access alternative supply options without constraint.
- (p) Woolworths does not consider that the Proposed Acquisition would be likely to substantially lessen competition in any relevant markets. The Parties do not consider that the Proposed Acquisition will give the Parties the ability or incentive to, or that the Parties would, discriminate against Danks wholesale customers who are also its retail competitors. However, in order to address the ACCC's competition concerns arising from its review of the Proposed Acquisition, Woolworths, without admission, offered this Undertaking pursuant to section 87B of the Act.
- (q) The objective of this Undertaking is, and the ACCC accepted this Undertaking, to address the ACCC's competition concerns which would otherwise arise as a consequence of the Proposed Acquisition, including to remove certain barriers to Danks Members exiting a Danks Member banner group or to obtaining supply from other sources while remaining a Danks Member Store.
- (r) This Undertaking has been given to the ACCC in order to facilitate the acquisition by Carboxy of Danks on the basis of the undertakings set out below.
- (s) On 2 June 2010 this Undertaking was varied with the ACCC's consent with the purpose of:
  - (i) extending the operation of the Undertaking to hardware stores of any size;
  - (ii) varying the geographic scope of the obligations; and
  - (iii) making clear its application in respect of hardware stores acquired by the Home Improvement Joint Venture or any of the Parties.



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## **3 Dictionary and interpretation**

### **3.1 Definitions in the Dictionary**

A term or expression starting with a capital letter:

- (a) which is defined in the Dictionary in Schedule 1 (**Dictionary**), has the meaning given to it in the Dictionary; and
- (b) which is defined in the Corporations Act, but is not defined in the Dictionary, has the meaning given to it in the Corporations Act.

### **3.2 Interpretation**

The interpretation clause in Schedule 1 sets out rules of interpretation for this Undertaking.

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## **4 Commencement and termination**

### **4.1 Commencement of Undertaking**

This Undertaking comes into effect when:

- (a) the Undertaking is executed by the Parties; and
- (b) the Undertaking so executed is accepted by the ACCC.

### **4.2 Termination**

The Undertaking terminates on:

- (a) the date which is ten years from the Commencement Date; or
  - (b) the date on which the ACCC consents in writing to the withdrawal of this Undertaking in accordance with section 87B of the Act.
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## **5 Undertakings**

### **5.1 Non-discrimination Undertaking**

- (a) The Parties undertake that, in relation to any independent hardware store or Danks Member Store which:
  - (i) is supplied by the Parties; and
  - (ii) is within a 10km radius of a Joint Venture Store,

the terms and conditions of supply of goods or services (including marketing support or any Membership Agreement offered) provided by the Parties, will be no less favourable than the terms and conditions of supply of goods and services provided by the Parties to equivalent independent hardware stores or Danks Members Stores supplied by Danks.

However, the terms and conditions of supply will not be taken to be any less favourable by reason only of the fact that conditions of supply of goods or services

make reasonable allowance for differences in the cost or likely cost of providing goods or services resulting from differences in delivery or the volume or nature of the goods or services supplied.

- (b) In the event that a dispute arises in relation to what stores constitute equivalent hardware stores (which is a category which may consist of only one store) for the purposes of this clause, the ACCC's determination of what constitutes equivalent hardware stores will be binding.
- (c) In determining the category of equivalent hardware stores, the ACCC shall take into account, where relevant, matters including:
  - (i) the store's trading volumes, the region in which it is located and the banner group of which it is a member (if any);
  - (ii) that the terms and conditions of supply to a member of the Thrifty-Link banner group are different to the terms and conditions of supply to a member of the Home banner group or a member of a Danks trade buying group;
  - (iii) that the terms and conditions of supply to a member of the Home banner group are different to the terms and conditions of supply to a member of the Thrifty-Link banner group or a member of a Danks trade buying group;
  - (iv) that the terms and conditions of supply to a member of a Danks trade buying group are different to the terms and conditions of supply to a member of the Thrifty-Link banner group or a member of a Home banner group;
  - (v) that the terms and conditions of supply to non-affiliated independent hardware stores supplied by Danks are different to the terms and conditions of supply to a member of any Danks banner group or trade buying group; and
  - (vi) that the terms and conditions of supply to a Danks Member Store are materially the same as the terms and conditions of supply for that store at the Commencement Date.

## **5.2 Non-enforcement of requirements provisions**

The Parties undertake that they will not:

- (a) give effect to, or threaten to give effect to, a provision contained in an Existing Membership Agreement which requires a Danks Member to purchase products, including:
  - (i) house branded products;
  - (ii) a designated range of products, whether described as CORE STOCK or not, in all departments;
  - (iii) key supplier or preferred supplier products and ranges,or require a Danks Member to purchase products via a warehouse maintained by the Parties or use any chargeback facility maintained by the Parties; or
- (b) require as a standard condition of entry into a new Membership Agreement the inclusion of a clause proscribed by clause 5.2(a) above.

It will not be a breach of this undertaking to:

- (c) give effect to a provision in a Membership Agreement or to enter into a Membership Agreement that contains a provision that obliges a Danks Member to have available sufficient products to support advertised promotions;
- (d) offer to enter into a separate agreement with a Danks Member Store containing provisions referred to in clause 5.2(a) and to enter into such an agreement where the Danks Member Store elects to do so.

### 5.3 No restraint on Termination of Existing Membership Agreement

- (a) The Parties must not prevent or in anyway hinder an Existing Danks Member from terminating the Membership Agreement, including by relying on any contractual rights which create a disincentive for the Danks Member to cease membership.
- (b) Further, the Parties will not require an Existing Danks Member who wishes to terminate their Membership Agreement to reimburse the Parties the costs of:
  - (i) painting the Danks Member's premises;
  - (ii) removing signage or logos;
  - (iii) removing all building works originally installed as part of the external store identification of the store as a Danks Member Store,

if the Parties have announced an intention to open a Joint Venture Store, including by acquiring a store that will subsequently become a Joint Venture Store, within 10km from the Existing Danks Member's store.

### 5.4 Information to staff and Danks Members

- (a) The Parties will ensure that the existence of the Undertaking and its obligations are brought to the attention of their staff concerned with the management and operation of the Parties' hardware business and that training is provided to those staff. This obligation commences one month from the commencement of the Undertaking or within such period as the Commission otherwise agrees.
- (b) The Parties will at their own expense provide, within a month of commencement of the Undertaking:
  - (i) a copy of the Undertaking to all Danks Members and all acquirers of product from Danks; and
  - (ii) will provide a plain English summary of the obligations contained within the Undertaking (which summary is to be provided to the ACCC for approval prior to distribution).
- (c) The obligation to provide both a copy of the Undertaking and the plain English summary extends to the provision of those documents to new Danks Members within one month of them becoming members.

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## 6 Monitoring

### 6.1 Proposed Auditor

- (a) By no later than 1 February 2010, the Parties will identify the prospective independent auditor (**Proposed Auditor**) and provide the ACCC with written

notice of the identity of the Proposed Auditor, together with such information and documents as the ACCC requires to assess whether to object to the appointment of the Proposed Auditor, including a copy of the proposed terms of appointment.

- (b) The Proposed Auditor must be a person who has the qualifications and experience necessary to carry out the functions of the Approved Independent Auditor and is independent of the Parties. The criteria by which the independence of the Proposed Auditor will be determined include whether the person is:
  - (i) a current employee or officer of the Parties;
  - (ii) a person who has been an employee or officer of the Parties in the past 3 years;
  - (iii) a person who, in the opinion of the ACCC, holds a material interest in the Parties;
  - (iv) a professional adviser of the Parties, whether current or in the past 3 years;
  - (v) a person who has, but for the terms of any Approved Independent Auditor agreement with the Parties, a contractual relationship, or is an employee or contractor of a firm or company that has a contractual relationship with the Parties;
  - (vi) a supplier, or a person who is an employee or contractor of a firm or company that is a supplier of the Parties; or
  - (vii) a material customer of, or a person who is an employee or contractor of a firm or company that has a contractual relationship with, the Parties.

## **6.2 Appointment of Approved Independent Auditor**

If:

- (a) within 5 Business Days of receipt by the ACCC of the written notice referred to in clause 6.1(a); or
- (b) such further period as is required by the ACCC and notified to the Parties in writing prior to the expiration of the 5 Business Days period,

the ACCC informs the Parties that it:

- (c) does not object to the Proposed Auditor, the Parties will:
  - (i) appoint the Proposed Auditor as the Approved Independent Auditor as soon as practicable, on terms approved by the ACCC and consistent with the performance by the Approved Independent Manager of his or her functions under this Undertaking, and
  - (ii) forward to the ACCC a copy of the executed terms of appointment; or
- (d) does object to the Proposed Auditor, the Parties will:
  - (i) appoint a person identified by the ACCC at its absolute discretion as the Approved Independent Auditor on terms approved by the ACCC and consistent with the performance by the Approved Independent Auditor of his or her functions under this Undertaking; and

- (ii) forward to the ACCC a copy of the executed terms of appointment.

### **6.3 Obligations relating to the Approved Independent Auditor**

- (a) The Parties must procure that the terms of appointment of the Approved Independent Auditor include obligations on the Approved Independent Auditor to:
  - (i) continue to satisfy the independence criteria in clause 6.1(b) for the period of his or her appointment;
  - (ii) provide any information or documents requested by the ACCC about the Parties's compliance with this Undertaking directly to the ACCC;
  - (iii) report or otherwise inform the ACCC directly of any issues that arise in the performance of his or her functions as Approved Independent Auditor or in relation to any matter that may arise in connection with this Undertaking; and
  - (iv) follow any direction given to him or her by the ACCC in relation to the performance of his or her functions as Approved Independent Auditor under this Undertaking.
- (b) Without limiting the obligations in this Undertaking, the Parties must:
  - (i) provide a copy of the executed terms of appointment for the Approved Independent Auditor to the ACCC within 1 day of their execution;
  - (ii) comply with and enforce the terms of appointment for the Approved Independent Auditor;
  - (iii) maintain and fund the costs of the Approved Independent Auditor carrying out his or her functions;
  - (iv) indemnify the Approved Independent Auditor for any expenses, loss, claim or damage arising directly or indirectly from the performance by the Approved Independent Auditor of his or her functions as the Approved Independent Auditor except where such expenses, loss, claim or damage arises out of the gross negligence, fraud, misconduct or breach of duty by the Approved Independent Auditor;
  - (v) not interfere with, or otherwise hinder, the Approved Independent Auditor's ability to carry out his or her functions as the Approved Independent Auditor;
  - (vi) provide and pay for any external expertise, assistance or advice required by the Approved Independent Auditor to perform his or her functions as the Approved Independent Auditor;
  - (vii) provide to the Approved Independent Auditor any information or documents requested by the Approved Independent Auditor that he or she considers necessary for carrying his or her functions as the Approved Independent Auditor or for reporting to or otherwise advising the ACCC;
  - (viii) not request any information relating to the audit from the Approved Independent Auditor without such a request having been approved by the ACCC;
  - (ix) ensure that the Approved Independent Auditor will provide information or documents requested by the ACCC directly to the ACCC;

- (x) ensure that the Approved Independent Auditor reports or otherwise informs the ACCC directly of any issues that arise in the performance of his or her functions as Approved Independent Auditor or in relation to any matter that may arise in connection with this Undertaking;
- (xi) direct its personnel, including directors, contractors, managers, officers, employees and agents, to act in accordance with this clause;
- (xii) ensure that all relevant personnel are aware of the Approved Independent Auditor and the obligations in clause 6; and
- (xiii) not appoint the Approved Independent Auditor, or have any agreements, understandings or arrangements with the Approved Independent Auditor, to utilise the Approved Independent Auditor's services for anything other than compliance with this Undertaking.

#### 6.4 Compliance Audit

- (a) The Parties will procure that the Approved Independent Auditor prepares the Audit Report set out in clause 6.4(b) below. The Audit Report is to be provided,
  - (i) within 3 months of the Approved Independent Auditor's appointment or such other period agreed by the ACCC;
  - (ii) thereafter on each anniversary of the commencement date; and
  - (iii) otherwise at the request of the ACCC.
- (b) The Approved Independent Auditor is to prepare a detailed report (**Auditor's Report**) on:
  - (i) the Parties' compliance with this Undertaking;
  - (ii) full reasons for the conclusions reached in the audit;
  - (iii) any qualifications made by the Approved Independent Auditor in forming his or her views; and
  - (iv) any recommendations by the Approved Independent Auditor to improve the integrity of the auditing process and any reasonable recommendations to improve the Parties' processes or reporting systems in relation to compliance with this Undertaking.
- (c) The Parties must provide the ACCC with copies of the Auditor's Report within 2 Business Days of the Auditor's Report being received by the Parties.
- (d) The Parties must require the Approved Independent Auditor to provide to the ACCC details of any possible failure to comply by the Parties with the obligations in this Undertaking immediately upon such a possible failure to comply coming to the attention to the Approved Independent Auditor.
- (e) The Parties must implement any recommendations of the Approved Independent Auditor made pursuant to clause 6.4(b)(iv), and notify the ACCC of the implementation of the recommendations, within 10 Business Days of receiving the Approved Independent Auditor's Report or after a period agreed on with the ACCC.

- (f) The Parties will comply with any direction of the ACCC in relation to matters arising from the Auditor's report within 10 Business Days of being so directed (or such longer period as agreed with the ACCC).

#### **6.5 Provision of information to the ACCC by the Approved Independent Auditor**

- (a) The ACCC may request information from the Approved Independent Auditor directly at any time and the Approved Independent Auditor will provide the information so requested directly to the ACCC, or as otherwise required by the ACCC.
- (b) In addition, the Approved Independent Auditor may report or otherwise inform the ACCC directly and immediately of any issues that arise in the performance of his or her engagement and functions as Approved Independent Auditor or in relation to compliance by the Parties with this Undertaking.

#### **6.6 Resignation or termination of the Approved Independent Auditor**

- (a) The Parties must immediately notify the ACCC in the event that an Approved Independent Auditor resigns or otherwise stops acting as an Approved Independent Auditor before the termination of this Undertaking.
- (b) The ACCC may approve any proposal by, or alternatively may direct, the Parties to terminate an Approved Independent Auditor if in the ACCC's view the Approved Independent Auditor acts inconsistently with the provisions of this Undertaking or the terms of his or her appointment.
- (c) If either clauses 6.6(a) or 6.6(b) applies, the ACCC may nominate an alternative auditor to be the Approved Independent Auditor.
- (d) The Parties must, within 5 Business Days of the ACCC nominating an alternative Approved Independent Auditor:
  - (i) appoint the Approved Independent Auditor nominated by the ACCC on terms approved by the ACCC and consistent with the performance by the Approved Independent Auditor of his or her functions under this Undertaking; and
  - (ii) forward to the ACCC a copy of the executed terms of appointment.

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## **7 Information**

- (a) The Parties will respond in a timely manner to any queries or requests for information made by the ACCC (including a person authorised by the ACCC under Schedule 1 paragraph (o) of this Undertaking).
- (b) The ACCC can request information from the Independent Auditor directly at any time and the Independent Auditor will provide the information so requested directly to the ACCC, or as otherwise directed by the ACCC.
- (c) The ACCC may direct the Parties in respect of their compliance with this Undertaking to, and the Parties will:
  - (i) furnish information, documents and materials to the ACCC in the time and in the form requested by the ACCC;

- (ii) produce information, documents and materials to the ACCC within the Parties' custody, power or control in the time and in the form requested by the ACCC; and/or
    - (iii) attend the ACCC at a time and place appointed by the ACCC to answer any questions the ACCC (including its Commissioners, its staff or its agents) may have.
  - (d) In respect to the Parties' compliance with this Undertaking, the ACCC may request the Approved Independent Auditor to:
    - (i) furnish information, documents and materials to the ACCC in the time and in the form requested by the ACCC;
    - (ii) produce information, documents and materials to the ACCC within the Approved Independent Auditor's custody, power or control in the time and in the form requested by the ACCC; and/or
    - (iii) attend the ACCC at a time and place appointed by the ACCC to answer any questions the ACCC (including its Commissioners, its staff or its agents) may have.
  - (e) The Parties will use their best endeavours to ensure that the Approved Independent Auditor complies with any request from the ACCC in accordance with this clause.
  - (f) Information furnished, documents and material produced or information given in response to the ACCC's direction under this Undertaking may be used by the ACCC for any purpose consistent with the exercise of its statutory duties.
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## **8 General**

### **8.1 Obligation to procure**

Where the performance of an obligation under this Undertaking requires a Related Body Corporate of any of the parties to the Undertaking to take or refrain from taking some action, the Parties will procure that Related Body Corporate to take or refrain from taking that action as the case may be.

### **8.2 Five Year Review**

Within 5 years of the Commencement Date, having regard to the competition concerns expressed in the ACCC's Statement of Issues, the ACCC will, at the request of the Parties, review the terms of this Undertaking and determine whether or not this Undertaking continues to be required.

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## **9 No Derogation**

- (a) This Undertaking does not prevent the ACCC from taking enforcement action at any time whether during or after the period of this Undertaking in respect of any breach by the Parties of any term of the Undertaking.
- (b) Nothing in this Undertaking is intended to restrict the right of the ACCC to take action under the Act for penalties or other remedies in the event that the Parties do not fully implement and/or perform their obligations under this Undertaking or



in any other event where the ACCC decides to take action under the Act for penalties or other remedies.

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## 10 Costs

The Parties must pay all of its own costs incurred in relation to this Undertaking.

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## 11 Notices

### 11.1 Giving Notices

- (a) Any notice or communication to the ACCC pursuant to this Undertaking must be sent to:

Name: Australian Competition and Consumer Commission  
Address: 23 Marcus Clarke Street  
CANBERRA ACT 2601  
Fax number: (02) 6243 1212  
Attention: Executive General Manager – Mergers and Acquisitions Group

- (b) Any notice or communication to the Parties pursuant to this Undertaking must be sent to:

Name: General Counsel, Woolworths Limited  
Address: Norwest Business Park  
1 Woolworths Way  
Bella Vista, NSW 2153  
Fax number: (02) 8888 1029  
Attention: Mr Peter Horton

### 11.2 Change of address or fax number

If the Parties or the ACCC gives the other three Business Days' notice of a change to its address or fax number, any notice or communication is only given to the relevant entity if it is delivered, posted or faxed to the most recently advised address or fax number.

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Signed by **Woolworths Limited** by its  
authorised signatory:

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Peter Horton, Group General Counsel and  
Company Secretary

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Date

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Signed by **Carboxy Pty Limited** by its  
authorised signatory:

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Peter Horton, Company Secretary

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Date

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Accepted by **The Australian Competition  
and Consumer Commission** pursuant to  
section 87B of the Trade Practices Act 1974  
(Cth):

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Graeme Julian Samuel  
Chairman

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Date:

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## Schedule 1: Defined terms and interpretation

### Dictionary

**ACCC** means the Australian Competition and Consumer Commission.

**Act** means the *Trade Practices Act 1974* (Cth).

**Business Days** means a day other than a Saturday or Sunday on which banks are open for business generally in the Australian Capital Territory.

**Carboxy** means Carboxy Pty Limited ACN 138 990 584 and/or its Related Bodies Corporate.

**Commencement Date** means 11 November 2009.

**Corporations Act** means *Corporations Act 2001* (Cth).

**Danks** means Danks Holdings Limited ABN 81 004 295 532 and/or its Related Bodies Corporate.

**Danks Member** means an independent retailer who operates a Danks Member Store.

**Danks Member Store** means a hardware store trading under the banner "Home Timber and Hardware" and "Thrifty -Link Hardware".

**Existing Danks Member** means an independent retailer who operates a Danks Member Store as at the Commencement Date.

**Existing Membership Agreement** means a Membership Agreement in force as at the Commencement Date.

**Joint Venture Store** means a hardware store owned by the Home Improvement Joint Venture.

**Membership Agreement** means an agreement between Danks and a Danks Member under which the Danks Member is granted the right to operate a store under the banner "Home Timber and Hardware" or "Thrifty -Link Hardware".

**Related Body Corporate** has the meaning given to that term in the Corporations Act.

**The Parties** means Woolworths and/or Carboxy.

**Undertaking** is a reference to all the provisions of this document as at the Commencement Date, as varied by the Variation dated 2 June 2010.

**Variation** means the variation to the Undertaking given to the ACCC under section 87B of the Act and accepted by the ACCC on 2 June 2010.

**Woolworths** means Woolworths Limited ABN 81 004 295 532 and/or its Related Bodies Corporate.

### Interpretation

In the interpretation of this Undertaking, the following provisions apply unless the context otherwise requires:

- (a) a reference to 'this Undertaking' includes all of the provisions of this document including its schedules;
- (b) headings are inserted for convenience only and do not affect the interpretation of this Undertaking;
- (c) if the day on which any act, matter or thing is to be done under this Undertaking is not a Business Day, the act, matter or thing must be done on the next Business Day;
- (d) a reference in this Undertaking to any law, legislation or legislative provision includes any statutory modification, amendment or re-enactment, and any subordinate legislation or regulations issued under that legislation or legislative provision;
- (e) a reference in this Undertaking to any company includes its Related Bodies Corporate;
- (f) a reference in this Undertaking to any agreement or document is to that agreement or document as amended, novated, supplemented or replaced;
- (g) a reference to a clause, part, schedule or attachment is a reference to a clause, part, schedule or attachment of or to this Undertaking;
- (h) an expression importing a natural person includes any company, trust, partnership, joint venture, association, body corporate or governmental agency;
- (i) where a word or phrase is given a defined meaning, another part of speech or other grammatical form in respect of that word or phrase has a corresponding meaning;
- (j) a word which denotes the singular also denotes the plural, a word which denotes the plural also denotes the singular, and a reference to any gender also denotes the other genders;
- (k) a reference to the words 'such as', 'including', 'particularly' and similar expressions is to be construed without limitation;
- (l) a construction that would promote the purpose - or object - underlying the Undertaking (whether expressly stated or not) will be preferred to a construction that would not promote that purpose or object;
- (m) material not forming part of this Undertaking may be considered to:
  - (i) confirm the meaning of a clause is the ordinary meaning conveyed by the text of the clause, taking into account its context in the Undertaking and the competition concerns intended to be addressed by the Undertaking and the clause in question; or
  - (ii) determine the meaning of the clause when the ordinary meaning conveyed by the text of the clause, taking into account its context in the Undertaking and the purpose or object underlying the Undertaking, leads to a result that does not promote the purpose or object underlying the Undertaking;
- (n) in determining whether consideration should be given to any material in accordance with paragraph (m), or in considering any weight to be given to any such material, regard must be had, in addition to any other relevant matters, to:

- (i) the effect that reliance on the ordinary meaning conveyed by the text of the clause would have (taking into account its context in the Undertaking and whether that meaning promotes the purpose or object of the Undertaking); and
  - (ii) the need to ensure that the result of the Undertaking is to completely address any ACCC competition concerns;
- (o) the ACCC may authorise the Mergers Review Committee, a member of the ACCC or a member of the ACCC staff, to exercise a decision making function under this Undertaking on its behalf and that authorisation may be subject to any conditions which the ACCC may impose;
- (p) in performing its obligations under this Undertaking, the Parties will do everything reasonably within its power to ensure that its performance of those obligations is done in a manner which is consistent with promoting the purpose and object of this Undertaking.
- (q) a reference to:
- (i) a thing (including, but not limited to, a chose in action or other right) includes a part of that thing;
  - (ii) a party includes its successors and permitted assigns; and
  - (iii) a monetary amount is in Australian dollars.