

DRAFT MODEL AMENDMENTS:

SECTION 51AC OF THE *TRADE PRACTICES ACT 1974* (CTH)

[Changes are marked up by underlining]

(28.08.08)

51AC Unconscionable conduct in business transactions

- (1) A corporation must not, in trade or commerce, in connection with:
 - (a) the supply or possible supply of goods or services to a person (other than a listed public company); or
 - (b) the acquisition or possible acquisition of goods or services from a person (other than a listed public company);engage in conduct that is, in all the circumstances, unconscionable.
- (2) A person must not, in trade or commerce, in connection with:
 - (a) the supply or possible supply of goods or services to a corporation (other than a listed public company); or
 - (b) the acquisition or possible acquisition of goods or services from a corporation (other than a listed public company);engage in conduct that is, in all the circumstances, unconscionable.
- (3) Without in any way limiting the matters to which the Court may have regard for the purpose of determining whether a corporation or a person (the *supplier*) has contravened subsection (1) or (2) in connection with the supply or possible supply of goods or services to a person or a corporation (the *business consumer*), the Court may have regard to:
 - (a) the relative strengths of the bargaining positions of the supplier and the business consumer; and
 - (b) whether, as a result of conduct engaged in by the supplier, the business consumer was required to comply with conditions that were not reasonably necessary for the protection of the legitimate interests of the supplier; and
 - (c) whether the business consumer was able to understand any documents relating to the supply or possible supply of the goods or services; and
 - (d) whether any undue influence or pressure was exerted on, or any unfair tactics were used against, the business consumer or a person acting on behalf of the business consumer by the supplier or a person acting on behalf of the supplier in relation to the supply or possible supply of the goods or services; and
 - (e) the amount for which, and the circumstances under which, the business consumer could have acquired identical or equivalent goods or services from a person other than the supplier; and
 - (f) the extent to which the supplier's conduct towards the business consumer was consistent with the supplier's conduct in similar transactions between the supplier and other like business consumers; and
 - (g) the requirements of any applicable industry code; and

- (h) the requirements of any other industry code, if the business consumer acted on the reasonable belief that the supplier would comply with that code; and
 - (i) the extent to which the supplier unreasonably failed to disclose to the business consumer:
 - (i) any intended conduct of the supplier that might affect the interests of the business consumer; and
 - (ii) any risks to the business consumer arising from the supplier's intended conduct (being risks that the supplier should have foreseen would not be apparent to the business consumer); and
 - (j) the extent to which the supplier was willing to negotiate the terms and conditions of any contract for supply of the goods or services with the business consumer; and
 - (ja) whether the supplier has a contractual right to vary unilaterally a term or condition of a contract between the supplier and the business consumer for the supply of the goods or services;
 - (k) the extent to which the supplier and the business consumer acted in good faith;
 - (l) any pre-existing contract between the supplier and the business consumer;
 - (m) the extent to which the supplier required or sought to require, as a condition of a renewal of a contract:
 - (i) the inclusion of terms and conditions in the new contract which differ from the terms and conditions of the prior agreement and could not reasonably have been required if there had been no prior contract between the parties; or
 - (ii) entry into any other contract, arrangement or understanding that the business consumer would not have otherwise entered into.
- (4) Without in any way limiting the matters to which the Court may have regard for the purpose of determining whether a corporation or a person (the *acquirer*) has contravened subsection (1) or (2) in connection with the acquisition or possible acquisition of goods or services from a person or corporation (the *small business supplier*), the Court may have regard to:
- (a) the relative strengths of the bargaining positions of the acquirer and the small business supplier; and
 - (b) whether, as a result of conduct engaged in by the acquirer, the small business supplier was required to comply with conditions that were not reasonably necessary for the protection of the legitimate interests of the acquirer; and
 - (c) whether the small business supplier was able to understand any documents relating to the acquisition or possible acquisition of the goods or services; and
 - (d) whether any undue influence or pressure was exerted on, or any unfair tactics were used against, the small business supplier or a person acting on behalf of the small business supplier by the acquirer or a person acting on behalf of the acquirer in relation to the acquisition or possible acquisition of the goods or services; and

- (e) the amount for which, and the circumstances in which, the small business supplier could have supplied identical or equivalent goods or services to a person other than the acquirer; and
- (f) the extent to which the acquirer's conduct towards the small business supplier was consistent with the acquirer's conduct in similar transactions between the acquirer and other like small business suppliers; and
- (g) the requirements of any applicable industry code; and
- (h) the requirements of any other industry code, if the small business supplier acted on the reasonable belief that the acquirer would comply with that code; and
- (i) the extent to which the acquirer unreasonably failed to disclose to the small business supplier:
 - (i) any intended conduct of the acquirer that might affect the interests of the small business supplier; and
 - (ii) any risks to the small business supplier arising from the acquirer's intended conduct (being risks that the acquirer should have foreseen would not be apparent to the small business supplier); and
- (j) the extent to which the acquirer was willing to negotiate the terms and conditions of any contract for the acquisition of the goods and services with the small business supplier; and
- (ja) whether the acquirer has a contractual right to vary unilaterally a term or condition of a contract between the acquirer and the small business supplier for the acquisition of the goods or services;
- (k) the extent to which the acquirer and the small business supplier acted in good faith;
- (l) any pre-existing contract between the acquirer and the business supplier;
- (m) the extent to which the acquirer required or sought to require as a condition of a renewal of a contract:
 - (i) the inclusion of terms and conditions in the new contract which differ from the terms and conditions of the prior contract or lease and could not reasonably have been required if there had been no prior contract between the parties; or
 - (ii) entry into any other contract, arrangement or understanding that the business consumer would not have otherwise entered into.

(5) A person is not to be taken for the purposes of this section to engage in unconscionable conduct in connection with:

- (a) the supply or possible supply of goods or services to another person; or
- (b) the acquisition or possible acquisition of goods or services from another person;

by reason only that the first-mentioned person institutes legal proceedings in relation to that supply, possible supply, acquisition or possible acquisition or refers to arbitration a dispute or claim in relation to that supply, possible supply, acquisition or possible acquisition.

- (6) For the purpose of determining whether a corporation has contravened subsection (1) or whether a person has contravened subsection (2):

- (a) the Court must not have regard to any circumstances that were not reasonably foreseeable at the time of the alleged contravention; and
 - (b) the Court may have regard to circumstances existing before the commencement of this section but not to conduct engaged in before that commencement.
- (7) A reference in this section to the supply or possible supply of goods or services is a reference to the supply or possible supply of goods or services to a person whose acquisition or possible acquisition of the goods or services is or would be for the purpose of trade or commerce.
- (8) A reference in this section to the acquisition or possible acquisition of goods or services is a reference to the acquisition or possible acquisition of goods or services by a person whose acquisition or possible acquisition of the goods or services is or would be for the purpose of trade or commerce.
- (9) A reference in this section to the supply or possible supply of goods or services does not include a reference to the supply or possible supply of goods or services at a price in excess of \$10,000,000, or such higher amount as is prescribed.
- (10) A reference in this section to the acquisition or possible acquisition of goods or services does not include a reference to the acquisition or possible acquisition of goods or services at a price in excess of \$10,000,000, or such higher amount as is prescribed.
- (11) For the purposes of subsections (9) and (10):
 - (a) subject to paragraphs (b), (c), (d) and (e), the price for:
 - (i) the supply or possible supply of goods or services to a person; or
 - (ii) the acquisition or possible acquisition of goods or services by a person; is taken to be the amount paid or payable by the person for the goods or services; and
 - (b) paragraph 4B(2)(c) applies as if references in that paragraph to the purchase of goods or services by a person were references to:
 - (i) the supply of goods or services to a person pursuant to a purchase; or
 - (ii) the acquisition of goods or services by a person by way of purchase; as the case requires; and
 - (c) paragraph 4B(2)(d) applies as if:
 - (i) the reference in that paragraph to a person acquiring goods or services otherwise than by way of purchase included a reference to a person being supplied with goods or services otherwise than pursuant to a purchase; and
 - (ii) a reference in that paragraph to acquisition included a reference to supply; and
 - (d) paragraph 4B(2)(e) applies as if references in that paragraph to the acquisition of goods or services by a person, or to the acquisition of services by a person, included references to the supply of goods or services to a person, or the supply of services, to a person, as the case may be; and

- (e) the price for the supply or possible supply, or the acquisition or possible acquisition, of services comprising or including a loan or loan facility is taken to include the capital value of the loan or loan facility.

(11A) For the purposes of this section, conduct that is capable of being unconscionable includes, without limitation:

(a) conduct engaged in for the purpose of, or in connection with, a decision whether or not to renew any contract; or

(b) conduct by which the party engaging in the conduct requires, or seeks to require, as a condition of the renewal of a contract:

(i) the inclusion of terms and conditions that differ from the terms and conditions of the prior contract; or

(ii) entry into any other contract, arrangement or understanding that the would not have otherwise entered into.

- (12) Section 51A applies for the purposes of this section in the same way as it applies for the purposes of Division 1 of Part V.
- (13) Expressions used in this section that are defined for the purpose of Part IVB have the same meaning in this section as they do in Part IVB.
- (14) In this section, ***listed public company*** has the same meaning as it has in the *Income Tax Assessment Act 1997*.