

**DRAFT MODEL AMENDMENT TO SECTION 51AC OF THE *TRADE PRACTICES ACT*
1974 (CTH)**

EXPLANATORY NOTE

Purpose

- 1 Section 51AC of the *Trade Practices Act 1974* (Cth) (“**the Act**”) prohibits unconscionable conduct by a corporation or person, 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).
- 2 It is proposed to amend s 51AC to clarify its scope and operation in relation to the renewal of contracts so as to overcome any possible application of the reasoning in *ACCC v CG Berbatis Holdings Pty Ltd* (2003) 214 CLR 51 to that section.

Notes on individual clauses

The Key Provision – Proposed Subsection 51AC(11A)

- 3 The key provision is proposed new subsection 51(11A). This subsection recognises that a decision to renew a contract may involve a series of steps:
 - (a) Paragraph 51AC (11A)(a) relates to conduct both preliminary to, and constituted by, the decision whether or not to renew the relevant contract. At this stage of the process a party may decide not to renew an agreement for an improper purpose or to threaten non-renewal in order to extract some benefit from the other party.
 - (b) Paragraph 51AC(11A)(b), concerns conduct subsequent to or giving effect to a decision by a party to renew the contract and indicates the means by which any threat of non-renewal may be implemented. This conduct may result in:
 - (i) the inclusion of terms and conditions in the renewed contract that differ from the terms and conditions of the original contract (sub-para (i)); or

- (ii) the entry into a collateral contract, arrangement or understanding that would not otherwise have been entered into by the renewing party (subpara (ii)).

Clause 51AC(3)(l) and (m) and Clause 51AC(4)(1) and (m)

4 Proposed new paragraphs 51AC(3)(l) and (m) and (4)(1) and (m) are enabling provisions, to ensure the concurrent application of s 51AC(2) and (11A). Consistently with the scheme of section 51AC, these paragraphs will permit consideration by the court of additional factors that would be relevant in a renewal context, such as:

- (a) the pre-existing relationship between the parties generally (paragraphs 51AC (3)(l) and (4)(1); and
- (b) a comparison between the terms of the existing and the new arrangements between the parties in relation to:
 - (i) the inclusion of terms and conditions in the new contract which differ from the terms and conditions of the prior contract and could not reasonably have been required if there had been no prior contract between the parties (subparagraphs (l)(i) and (m)(i));
 - (ii) entry into any other contract, arrangement or understanding that the other party would not have otherwise entered into (subparagraphs (l)(ii) and (m)(ii));

5 Again, these amendments will clarify the scope of s 51AC and overcome any effect of the decision in *Berbatis* consistently with the existing scheme of the section.