

TASMANIA

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**FAIR TRADING AMENDMENT  
(UNCONSCIONABLE CONDUCT) BILL 2002**

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# **FAIR TRADING AMENDMENT (UNCONSCIONABLE CONDUCT) BILL 2002**

*(Brought in by the Minister for Justice and Industrial  
Relations, the Honourable Judith Louise Jackson)*

## **A BILL FOR**

### **An Act to amend the *Fair Trading Act 1990***

Be it enacted by His Excellency the Governor of Tasmania,  
by and with the advice and consent of the Legislative  
Council and House of Assembly, in Parliament assembled,  
as follows:

#### **Short title**

- 1.** This Act may be cited as the *Fair Trading Amendment (Unconscionable Conduct) Act 2002*.

#### **Commencement**

- 2.** This Act commences on the day on which this Act receives the Royal Assent.

#### **Principal Act**

- 3.** In this Act, the *Fair Trading Act 1990*\* is referred to as the Principal Act.

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\*No. 29 of 1990

**Section 3 amended (Interpretation)****4.** Section 3 of the Principal Act is amended as follows:

- (a) by inserting the following definition after the definition of “acquire” in subsection (1):

**“applicable industry code”**, in respect of a supplier that is a participant in an industry, means –

- (a) the prescribed provisions of any mandatory industry code relating to the industry; and
- (b) the prescribed provisions of any voluntary industry code that binds the supplier;
- (b) by inserting the following definition after the definition of “commencement day” in subsection (1):

**“consumer”**, in respect of an industry, means a person to whom goods or services are, or may be, supplied by participants in the industry;

- (c) by inserting the following definitions after the definition of “goods” in subsection (1):

**“industry code”** means a code regulating the conduct of participants in the industry or their conduct towards consumers in the industry;

**“listed public company”** has the same meaning as it has in the *Income*

*Tax Assessment Act 1997* of the  
Commonwealth;

- (d) by omitting “premises.” from paragraph (b) of the definition of “trader” in subsection (1) and substituting “premises;”;
- (e) by inserting the following definition after the definition of “trader” in subsection (1):

**“voluntary industry code”** means an industry code that is declared to be voluntary.

- (f) by inserting the following subsection after subsection (1):

**(1A)** To avoid doubt, it is declared that –

- (a) franchising is an industry for the purposes of this Act; and
  - (b) franchisors and franchisees are participants in the industry of franchising, whether or not they are also participants in another industry.
- (g) by inserting the following subsections after subsection (6):

**(7)** For the purposes of this Act, where a person makes a representation with respect to any future matter, including the doing of, or the refusing to do, any act, and that person does not have reasonable grounds for making the representation, the representation is taken to be misleading.

**(8)** For the purposes of the application of subsection (7) to a proceeding concerning a

representation made by a person with respect to any future matter, that person is, unless he or she adduces evidence to the contrary, taken not to have had reasonable grounds for making the representation.

**(9)** Subsection (7) does not limit the meaning of a reference in this Act to a misleading representation, a representation that is misleading in a material particular or conduct that is misleading or is likely or liable to mislead.

**(10)** Without limiting the meaning of “services” in subsection (1), the obtaining of credit by a person in connection with the acquisition of goods or services by that person is taken to be the acquisition by that person of a service, and any amount by which the amount paid or payable by that person for the goods or services is increased by reason of so obtaining credit is taken to be paid or payable by that person for that service.

**(11)** Where a person acquired goods or services otherwise than by way of purchase, the price of the goods or services is taken to have been –

- (a) the price at which, at the time of the acquisition, that person could have purchased the goods or services from the supplier; or
- (b) if, at the time of the acquisition –
  - (i) the goods or services were not available for purchase from the supplier; or

- (ii) were so available only together with other property or services –

but, at that time, goods or services of the kind acquired were available for purchase from another supplier without any requirement to purchase other property or services, the lowest price at which that person could, at that time, reasonably have purchased goods or services of that kind from the other supplier; or

- (c) if goods or services of the kind acquired were not available, at the time of the acquisition, for purchase from any supplier or were not so available except together with other property or services, the value of the goods or services at that time.

### **Section 15A inserted**

5. After section 15 of the Principal Act, the following section is inserted in Part 2:

#### **Unconscionable conduct in business transactions**

**15A. (1)** This section applies to –

- (a) 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; and

- (b) 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 –

unless –

- (c) the supply or possible supply of the goods or services is at a price in excess of \$3 000 000, or such higher amount as is prescribed; or
- (d) the acquisition or possible acquisition of the goods or services is at a price in excess of \$3 000 000, or such higher amount as is prescribed.

**(2)** A person 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) –

where the supply or possible supply, or acquisition or possible acquisition, of the goods or services is, or would be, for the purpose of trade or commerce, engage in conduct that is, in all the circumstances, unconscionable.

**(3)** Without in any way limiting the matters to which a court may have regard for the purpose of determining whether a person (in this section referred to as the “supplier”) has contravened subsection (2) in connection with the supply or possible supply of goods or services to a person (in



this section referred to as 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
- (k) the extent to which the supplier and the business consumer acted in good faith.

**(4)** Without in any way limiting the matters to which a court may have regard for the purpose of determining whether a person (in this section referred to as the “acquirer”) has contravened subsection (2) or (3) in connection with the acquisition or possible acquisition of goods or services from a person or corporation (in this section

referred to as 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 or services with the small business supplier; and
- (k) the extent to which the acquirer and the small business supplier acted in good faith.

**(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 person has contravened subsection (2) –

- (a) a court must not have regard to any circumstances that were not reasonably foreseeable at the time of the alleged contravention; and
- (b) a court may have regard to circumstances existing before the commencement of this section but not to conduct engaged in before that commencement.

**(7)** For the purposes of subsection (1) –

- (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) subsection (10) of section 3 applies as if references in that subsection to the acquisition of goods or services by a person were references to –

- (i) the supply of goods or services to a person following a purchase; or

- (ii) the acquisition of goods or services by a person by way of purchase –

as the case requires; and

- (c) subsection (11) of section 3 applies as if –

- (i) the reference in that subsection 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 following a purchase; and

- (ii) a reference in that subsection to acquisition included a reference to supply; and

- (d) subsection (10) of section 3 applies as if references in that subsection 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 to 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.