

## **Part IVA—Unconscionable conduct**

### **51AAB Part does not apply to financial services**

- (1) Section 51AA does not apply to conduct engaged in in relation to financial services.
- (2) Section 51AB does not apply to the supply, or possible supply, of services that are financial services.

### **51AA Unconscionable conduct within the meaning of the unwritten law of the States and Territories**

- (1) A corporation must not, in trade or commerce, engage in conduct that is unconscionable within the meaning of the unwritten law, from time to time, of the States and Territories.
- (2) This section does not apply to conduct that is prohibited by section 51AB or 51AC.

### **51AB Unconscionable conduct**

- (1) A corporation shall not, in trade or commerce, in connection with the supply or possible supply of goods or services to a person, engage in conduct that is, in all the circumstances, unconscionable.
- (2) Without in any way limiting the matters to which the Court may have regard for the purpose of determining whether a corporation has contravened subsection (1) in connection with the supply or possible supply of goods or services to a person (in this subsection referred to as the *consumer*), the Court may have regard to:
  - (a) the relative strengths of the bargaining positions of the corporation and the consumer;
  - (b) whether, as a result of conduct engaged in by the corporation, the consumer was required to comply with conditions that were not reasonably necessary for the protection of the legitimate interests of the corporation;
  - (c) whether the consumer was able to understand any documents relating to the supply or possible supply of the goods or services;
  - (d) whether any undue influence or pressure was exerted on, or any unfair tactics were used against, the consumer or a person acting on behalf of the consumer by the corporation or a person acting on behalf of the corporation 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 consumer could have acquired identical or equivalent goods or services from a person other than the corporation.
- (3) A corporation shall not be taken for the purposes of this section to engage in unconscionable conduct in connection with the supply or possible supply of goods or services to a person by reason only that the corporation institutes legal proceedings in relation to that supply or possible supply or refers a dispute or claim in relation to that supply or possible supply to arbitration.
- (4) For the purpose of determining whether a corporation has contravened subsection (1) in connection with the supply or possible supply of goods or services to a person:
  - (a) the Court shall 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 conduct engaged in, or circumstances existing, before the commencement of this section.
- (5) A reference in this section to goods or services is a reference to goods or services of a kind ordinarily acquired for personal, domestic or household use or consumption.

- (6) A reference in this section to the supply or possible supply of goods does not include a reference to the supply or possible supply of goods for the purpose of re-supply or for the purpose of using them up or transforming them in trade or commerce.
- (7) 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.

### **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
  - (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 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
  - (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 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 \$3,000,000, 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 \$3,000,000, 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.
- (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*.

# Part V—Consumer protection

## Division 1—Unfair Practices

### 51AF Part does not apply to financial services

- (1) This Part does not apply to the supply, or possible supply, of services that are financial services.
- (2) Without limiting subsection (1):
  - (a) sections 52 and 55A do not apply to conduct engaged in in relation to financial services; and
  - (b) if a security (within the meaning of the *Corporations Act 2001*) consists of or includes an interest in land, section 53A does not apply to that interest; and
  - (c) section 63A does not apply to a debit card that allows access to an account that is a financial product.
- (3) In subsection (2):

*debit card* has the same meaning as in section 63A.

### 51A Interpretation

- (1) For the purposes of this Division, where a corporation makes a representation with respect to any future matter (including the doing of, or the refusing to do, any act) and the corporation does not have reasonable grounds for making the representation, the representation shall be taken to be misleading.
- (2) For the purposes of the application of subsection (1) in relation to a proceeding concerning a representation made by a corporation with respect to any future matter, the corporation shall, unless it adduces evidence to the contrary, be deemed not to have had reasonable grounds for making the representation.
- (3) Subsection (1) shall be deemed not to limit by implication the meaning of a reference in this Division 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.

### 52 Misleading or deceptive conduct

- (1) A corporation shall not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.
- (2) Nothing in the succeeding provisions of this Division shall be taken as limiting by implication the generality of subsection (1).