

Retail Shops and Fair Trading Legislation Amendment Bill 2005

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Western Australia

LEGISLATIVE ASSEMBLY

Retail Shops and Fair Trading Legislation Amendment Bill 2005

A Bill for

An Act to amend —

- the *Retail Trading Hours Act 1987*;
 - the *Commercial Tenancy (Retail Shops) Agreements Act 1985*; and
 - the *Fair Trading Act 1987*,
- and for related matters.**

The Parliament of Western Australia enacts as follows:

Part 1 — Preliminary

1. Short title

This is the *Retail Shops and Fair Trading Legislation Amendment Act 2005*.

5 **2. Commencement**

- (1) This Act comes into operation on a day fixed by proclamation.
- (2) Different days may be fixed under subsection (1) for different provisions.

Part 2 — Retail Trading Hours Act 1987

Division 1 — Amendments

3. The Act amended

5 The amendments in this Part are to the *Retail Trading Hours Act 1987**.

[* Reprinted as at 18 January 2002.

For subsequent amendments see *Western Australian Legislation Information Tables for 2004, Table 1, p. 386.*]

4. Section 3 amended

10 Section 3(1) is amended after the definition of “member” by inserting the following definitions —

“

“**motor vehicle**” has the meaning given to that term in the *Road Traffic Act 1974* section 5(1);

15 “**motor vehicle shop**” means a general retail shop or portion of a general retail shop, as the case may be —

- (a) in, on or from which motor vehicles are sold by way of retail sale; or
- 20 (b) in, on or from which spare parts for motor vehicles are sold by way of retail sale in conjunction with the sale of motor vehicles;

”.

5. Section 5 replaced

Section 5 is repealed and the following section is inserted instead —

“

5

5. Interpretation Act applies to orders

(1) An order made by the Minister under this Act is subsidiary legislation as defined in the *Interpretation Act 1984* section 5.

10

(2) The *Interpretation Act 1984* section 42 applies to an order made under section 10(3b) or 14B(4).

”.

6. Section 10 amended

(1) Section 10(3) is amended as follows:

15

(a) by deleting paragraph (a) and inserting the following paragraph instead —

“

20

(a) neither motor vehicles, nor goods or services prescribed for the purposes of this paragraph, are sold or provided at the retail shop;

”;

(b) in paragraph (b) by deleting “4” in both places where it occurs and inserting instead —

“ 6 ”;

25

(c) in paragraph (bc) by deleting “5 persons” and inserting instead —

“ 10 persons ”;

(d) after paragraph (bc) by deleting “and”;

(e) after paragraph (bd) by inserting —

“

- 5 (be) no owner of the retail shop is related, in the opinion of the chief executive officer, to an owner of another retail shop that is in such close proximity to the first-mentioned retail shop that, in the opinion of the chief executive officer, those retail shops are to be regarded as occupying the same location; and

”;

- 10 (f) in paragraph (c) after “subsection” by inserting —
“ , and that certificate has not been cancelled ”.

(2) Section 10(3a)(a) is amended as follows:

- (a) after subparagraph (i) by inserting —
“ and ”;
- 15 (b) by deleting subparagraph (ii) and inserting the following instead —

“

- (ii) does not own or operate, either alone or together with any other person, more than 3 retail shops except as a shareholder in a listed corporation as defined in the Commonwealth
- 20 *Corporations Act 2001* section 9;

”.

25 (3) Section 10(3a)(b) is amended as follows:

- (a) after subparagraph (ii) by deleting “and”;
- (b) by deleting subparagraph (iii) and inserting the following instead —

“

- 30 (iii) does not himself or herself own or operate a retail shop alone if 2 or more other persons in the group each own or operate a retail shop that is not owned or

operated together with the other persons
in the group; and

- (iv) does not himself or herself own or
operate a retail shop alone if another
person in the group owns or operates
2 or more retail shops that are not
owned or operated together with the
other persons in the group.

”.

(4) After section 10(3a) the following subsections are inserted —

“

(3aa) The matters that the chief executive officer may have
regard to when determining whether an owner of a
retail shop is related to an owner of another retail shop
for the purposes of subsection (3)(be) include —

(a) whether one owner is —

(i) the spouse or de facto partner of the
other owner;

(ii) a child of the other owner or of the
spouse or de facto partner of the other
owner;

(iii) a parent of the other owner or of the
spouse or de facto partner of the other
owner; or

(iv) a brother or sister of the other owner or
of the spouse or de facto partner of the
other owner;

(b) whether one owner is a related body corporate
in relation to the other owner;

(c) whether one owner is a corporation and the
other owner is —

(i) an officer of the corporation; or

- (ii) a majority shareholder in the corporation;
- (d) whether one owner is accustomed or under an obligation, whether formal or informal, to act in accordance with the directions, instructions or wishes of the other owner in relation to the operation of the first-mentioned owner's retail shop;
- (e) whether one owner is —
- (i) an employee or partner of the other owner; or
- (ii) an agent, banker, solicitor, accountant, auditor or other person acting in any capacity for or on behalf of the other owner;
- and
- (f) whether one owner is —
- (i) a trustee for the other owner; or
- (ii) a trustee of a trust of which the other owner is a discretionary or other beneficiary.
- (3ab) In subsection (3aa) —
- “corporation”** has the meaning given to that term in the Commonwealth *Corporations Act 2001* section 57A;
- “officer”** has the meaning given to that term in the Commonwealth *Corporations Act 2001* section 9;
- “related body corporate”** has the meaning given to that term in the Commonwealth *Corporations Act 2001* section 9.
- (3ac) A person who operates a small retail shop is required to notify the chief executive officer within 14 days after —

- 5
- (a) a person becomes or ceases to be an owner of the retail shop; and
 - (b) if the owner of the retail shop is a body corporate — a person becomes or ceases to be a shareholder of the body corporate.
- ”.

(5) Section 10(3c) is repealed.

7. Section 11 amended

Section 11(4)(a) is amended as follows:

- 10
- (a) by deleting subparagraph (i) and inserting the following subparagraph instead —
 - “
 - (i) that any motor vehicle is, or any goods or service prescribed for the purposes of
 - 15 section 10(3)(a) are, sold or provided at that retail shop;
 - ”;
 - (b) by deleting subparagraph (iii) and inserting the following subparagraph instead —
 - “
 - (iii) that notification has not been given as
 - 20 required by section 10(3ac);
 - ”.

8. Section 12 amended

- 25
- (1) Section 12(1) is amended after “this Act” by inserting —
 - “
 - and any order made under section 12E(1) that affects the trading hours of the general retail shop,
 - ”.

- (2) Section 12(1a), (1b) and (2) are repealed and the following subsection is inserted instead —

“

- (2) Subsection (1) does not apply to —

- 5 (a) a general retail shop in a tourism precinct or holiday resort, as defined in section 12A(4);
- (b) a general retail shop to which an order under section 12A applies by the operation of subsection (3) of that section; or
- 10 (c) a motor vehicle shop.

”.

9. Sections 12A to 12E inserted

After section 12 the following sections are inserted —

“

15 **12A. Trading hours for general retail shops in tourism precincts and holiday resorts**

- (1) The Minister may by order fix a time or times when general retail shops in a tourism precinct or holiday resort are required to be closed —
- 20 (a) on any or every day in each week; or
- (b) on any day or days specified in the order.
- (2) An order may apply to —
- (a) all general retail shops in the tourism precinct or holiday resort;
- 25 (b) general retail shops in the tourism precinct or holiday resort of a class specified in the order; or
- (c) general retail shops in the tourism precinct or holiday resort that are specified in the order.

- (3) An order that applies to general retail shops in a tourism precinct may also apply to general retail shops —

- (a) that are in the immediate vicinity of the tourism precinct; and
- (b) that are specified, or that are of a class specified, in the order.

- (4) In this section —

“Fremantle tourism precinct” means the area or areas prescribed for the purposes of this definition;

“holiday resort” means the Rockingham holiday resort, Rottnest Island holiday resort or Wanneroo holiday resort;

“Perth tourism precinct” means the area or areas prescribed for the purposes of this definition;

“Rockingham holiday resort” means the area or areas prescribed for the purposes of this definition;

“Rottnest Island holiday resort” means the area or areas prescribed for the purposes of this definition;

“tourism precinct” means the Perth tourism precinct or Fremantle tourism precinct;

“Wanneroo holiday resort” means the area or areas prescribed for the purposes of this definition.

12B. Trading hours for motor vehicle shops

Subject to this Act and any order made under section 12E(1) that affects the trading hours of the motor vehicle shop, a motor vehicle shop is required to be closed —

- (a) on Monday, Tuesday, Thursday and Friday in each week — until 8 a.m. and from and after 6 p.m.;

- (b) on Wednesday in each week — until 8 a.m. and from and after 9 p.m.;
- (c) on Saturday in each week — until 8 a.m. and from and after 1 p.m.;
- (d) on Sunday in each week; and
- (e) on each public holiday and public half-holiday.

12C. No restriction on trading hours for small retail shops

A small retail shop may be open at any time.

12D. Trading hours for special retail shops

Subject to this Act and any order made under section 12E(1) that affects the trading hours of the special retail shop, a special retail shop is required to be closed on every day of the year until 6 a.m. and from and after 11.30 p.m..

12E. Variation of trading hours

- (1) The Minister may by order vary the trading hours of retail shops by —
 - (a) requiring retail shops to be closed at a time or times when the shops would otherwise not be required to be closed under section 12(1), 12B or 12D; or
 - (b) authorising retail shops to be open at a time or times when the shops would otherwise be required to be closed under any of those provisions.
- (2) An order varying the trading hours of general retail shops in the metropolitan area (other than an order under section 12A) can have effect only in relation to a day or days within the period from 28 days before a

public holiday or public half-holiday to 28 days after the public holiday or public half-holiday.

- 5 (3) Subject to subsection (2), an order varying the trading hours of general retail shops may apply to —
- (a) all general retail shops;
 - (b) general retail shops of a specified class;
 - (c) general retail shops in a specified area; or
 - (d) a specified general retail shop.
- 10 (4) An order varying the trading hours of motor vehicle shops may apply to —
- (a) all motor vehicle shops;
 - (b) motor vehicle shops of a specified class;
 - (c) motor vehicle shops in a specified area; or
 - (d) a specified motor vehicle shop.
- 15 (5) An order varying the trading hours of special retail shops may apply to —
- (a) all special retail shops;
 - (b) special retail shops of a specified class;
 - (c) special retail shops in a specified area; or
 - 20 (d) a specified special retail shop.
- (6) An order varying the trading hours of retail shops may apply to —
- (a) all retail shops; or
 - (b) any specified portion of retail shops,
- 25 in which one or more classes of specified goods or services, or goods and services, are sold or provided.
- (7) An order varying the trading hours of retail shops may apply to —
- (a) any or every day in each week; or

(b) a specified day or specified days.

(8) In this section —

“**specified**”, in relation to an order, means specified in the order.

5

”.

10. Section 13 repealed

Section 13 is repealed.

11. Section 14 replaced by sections 14 to 14C

Section 14 is repealed and the following sections are inserted instead —

10

“

14. No restriction on trading hours for filling stations

A filling station may be open at any time.

14A. Sale of goods at filling stations

15

(1) A person who operates a filling station is not, at any time outside the trading hours referred to in section 12(1), to sell or allow to be sold at the filling station any thing that is not —

(a) fuel or an accessory;

20

(b) one of the goods prescribed for the purposes of this paragraph;

(c) in the case of a small filling station — fuel or an accessory or one of the goods prescribed for the purposes of paragraph (b) or this paragraph;

25

or

(d) in the case of a prescribed small filling station — fuel or an accessory or one of the goods prescribed for the purposes of paragraph (b) or (c) or this paragraph.

(2) In this section —

“accessory” means —

- (a) lubricant in any form, tyre, tube, battery, part or accessory; or
- 5 (b) any other thing, other than fuel, required to equip or operate a motor vehicle.

14B. Small filling stations

- (1) For the purposes of section 14A(1)(c), a filling station is to be regarded as a small filling station if —
 - 10 (a) the filling station is owned by —
 - (i) one eligible person;
 - (ii) not more than 6 eligible persons trading in partnership; or
 - 15 (iii) a body corporate with not more than 6 shareholders all of whom are eligible persons;
 - (b) the filling station is operated for the benefit of the eligible persons referred to in paragraph (a);
 - (c) the eligible persons referred to in paragraph (a) are personally and actively engaged in the filling station;
 - 20 (d) not more than 10 persons (including the eligible persons who own and operate the filling station) work in the filling station at any one and the same time;
 - 25 (e) the filling station is owned and operated in accordance with the directions given under subsection (4); and
 - 30 (f) the chief executive officer has issued a certificate in relation to the filling station certifying that it is a small filling station in

terms of this subsection, and that certificate has not been cancelled.

- (2) A person is not an eligible person for the purposes of subsection (1) unless —

5

- (a) in relation to a case where the person is the only person in question, the person —

(i) is a natural person; and

10

- (ii) does not own or operate, either alone or together with any other person, more than 3 filling stations except as a shareholder in a listed corporation as defined in the Commonwealth *Corporations Act 2001* section 9;

15

- (b) in relation to a case where the person in question is one of a group of persons, the person —

(i) is a person to whom the provisions of paragraph (a)(i) and (ii) apply;

20

- (ii) does not own or operate another filling station together with a person who is outside that group of persons;

25

- (iii) does not himself or herself own or operate a filling station alone if 2 or more other persons in the group each own or operate a filling station that is not owned or operated together with the other persons in the group; and

30

- (iv) does not himself or herself own or operate a filling station alone if another person in the group owns or operates 2 or more filling stations that are not owned or operated together with the other persons in the group.

- 5
- (3) A person who operates a small filling station is required to notify the chief executive officer within 14 days after —
- (a) a person becomes or ceases to be an owner of the filling station; and
- (b) if the owner of the filling station is a body corporate — a person becomes or ceases to be a shareholder of the body corporate.
- 10
- (4) The Minister may by order give directions for the purposes of subsection (1) and any such order may include directions with respect to —
- (a) the persons who are to be, and the persons who are not to be, regarded as owners for the purposes of subsection (1);
- 15
- (b) the extent to which any person other than a person who owns or operates a small filling station may benefit from the operation of the small filling station;
- 20
- (c) the extent to which the natural persons who operate the filling station are to be personally and actively engaged in the operations of the filling station;
- 25
- (d) such other matters (including a requirement that any statement made for the purposes of this section be verified by statutory declaration) as the Minister considers necessary,
- and effect is to be given to any such order.

14C. Issue and cancellation of certificates for small filling stations

- 30
- (1) A person who desires to operate a small filling station at any place is to apply to the chief executive officer for a certificate in relation to that place in accordance with the regulations.

- 5 (2) If the chief executive officer is satisfied in relation to an application under subsection (1) that there is no reason for the refusal of the application, the chief executive officer is to issue a certificate in terms of the application.
- (3) A person who is aggrieved by a decision of the chief executive officer refusing the issue of a certificate under subsection (2) may appeal to the Minister, whose decision is final.
- 10 (4) The chief executive officer may cancel a certificate certifying a filling station to be a small filling station if the chief executive officer is satisfied —
- (a) that any thing other than —
- 15 (i) fuel or an accessory (as defined in section 14A(2)); or
- (ii) goods prescribed for the purposes of section 14A(1)(b), (c) or (in the case of a prescribed small filling station) (d),
- 20 are sold at the filling station outside the trading hours referred to in section 12(1);
- (b) that the filling station is not owned or operated in accordance with section 14B(1) and (4); or
- (c) that notification has not been given as required by section 14B(3).
- 25 (5) The cancellation of a certificate under this section does not prevent a person from being prosecuted for an offence against this Act.

”.

12. Section 15 amended

- (1) Section 15(1) is repealed and the following subsection is inserted instead —

“

- 5 (1) Despite the provisions of this Part —
- (a) a person who operates a retail shop;
 - (b) a body consisting of, or representing, persons who operate a class of retail shops or retail shops in a part of the State; or
 - 10 (c) a local government, at the request of a person referred to in paragraph (a) or a body referred to in paragraph (b) in respect of a retail shop or retail shops, as the case requires, in the local government's district,
- 15 may apply to the chief executive officer for a permit —
- (d) to open the retail shop operated by the person or the retail shops operated by the persons who are members of, or represented by, the body, as the case requires, at times when the shop or
 - 20 shops would otherwise be required to be closed by section 12, 12B or 12D or by order under section 12A or 12E; or
 - (e) to sell goods, or to allow goods to be sold, or to provide services despite those goods or
 - 25 services —
 - (i) in the case of small retail shops — being goods referred to in, or goods or services prescribed for the purposes of, section 10(3)(a);
 - 30 (ii) in the case of special retail shops — not being goods or services prescribed for the purposes of section 10(4)(b); or

- (iii) in the case of filling stations — not being goods referred to in, or prescribed for the purposes of, a relevant paragraph of section 14A(1).

”.

(2) Section 15(2) is amended as follows:

- (a) by deleting “not goods or services, or both, prescribed for the purposes of section 10(3)(a) or 10(4)(b), as the case requires,” and inserting instead —

“ of the kind referred to in the application ”;

- (b) by deleting “classes of goods or provide such services or classes of” and inserting instead —

“ provide such ”.

(3) After section 15(2) the following subsection is inserted —

“

- (2a) The chief executive officer may issue a permit under subsection (2) to open a retail shop or retail shops only if satisfied that, by reason of the event or circumstances referred to in that subsection, it is not appropriate, or it is not practicable, for an order to be made under section 12A or 12E to vary the trading hours of that shop or those shops.

”.

13. Section 25 amended

Section 25(2) is repealed and the following subsection is inserted instead —

“

(2) A person who operates a retail shop —

- (a) that is certified to be a small retail shop under section 10(3)(c) and is not owned and operated in accordance with section 10(3)(a), (b), (ba), (bb), (bc), (bd) and (be); or

- (b) that is certified to be a small filling station under section 14B(1)(f) and is not owned and operated in accordance with section 14B(1)(a), (b), (c), (d) and (e),

5 commits an offence.

”.

14. Section 41 replaced

Section 41 is repealed and the following section is inserted instead —

10 “

41. Minister to review and report on Act

- (1) The Minister is to carry out a review of the operation and effectiveness of this Act as soon as is practicable after the expiry of 3 years from the commencement of the *Retail Shops and Fair Trading Legislation Amendment Act 2005* section 14.
- (2) The Minister is to prepare a report based on the review and, as soon as is practicable after the report is prepared, is to cause a copy of the report to be laid before each House of Parliament.

20

”.

15. Section 43 repealed

Section 43 is repealed.

16. Amendments relating to “authorised person”

- 25 (1) Section 28 is amended by deleting “other person authorised by the chief executive officer in writing, whether generally or in a specific case,” and inserting instead —

“ an authorised person ”.

(2) Section 29(1) is amended as follows:

(a) by deleting “any person authorised by the chief executive officer under section 27” and inserting instead —

5 “ authorised person ”;

(b) after “the inspector” by inserting —

“ or authorised person ”.

(3) Section 29(2) is amended by deleting “any person authorised by the chief executive officer under section 27” and inserting instead —

10

“ authorised person ”.

17. Amendments relating to penalties

Each provision mentioned in column 1 of the Table to this section is amended by deleting the corresponding amount in column 2 and inserting instead the corresponding amount in column 3.

15

Table

Column 1	Column 2	Column 3
s. 15(4)	\$2 000	\$5 000
s. 25(3)	\$2 000	\$5 000
s. 25(3)	\$3 000	\$6 000
s. 25(3)	\$5 000	\$8 000
s. 26(1)	\$2 000	\$5 000
s. 27(2)	\$2 000	\$5 000
s. 30	\$2 000	\$5 000
s. 32	\$2 000	\$5 000
s. 33(3)	\$2 000	\$5 000
s. 40(2)(e)	\$1 000	\$2 000
s. 40(2)(e)	\$300	\$500

Division 2 — Validation

18. Validation

5 An order made, or purporting to have been made, under the
Retail Trading Hours Act 1987 section 5, 10, 12, 13 or 14 that
had effect, or purported to have effect, immediately before the
commencement of this section —

- (a) is taken to have been validly made under that section of
that Act;
- 10 (b) continues, on and after that commencement, to have
effect and the force of law; and
- 15 (c) in relation to an order made under section 5, 12, 13 or 14
of that Act that continues to have effect and the force of
law under paragraph (b) — may be amended or revoked
as if it had been made under section 12E of that Act as
amended by this Act.

**Part 3 — Commercial Tenancy (Retail Shops)
Agreements Act 1985**

19. The Act amended

5 The amendments in this Part are to the *Commercial Tenancy (Retail Shops) Agreements Act 1985**.

[* Reprinted as at 21 July 2000.

For subsequent amendments see *Western Australian Legislation Information Tables for 2004, Table 1, p. 70.*]

20. Long title amended

10 The long title is amended after “shops,” by inserting —
“

**to prohibit unconscionable conduct by landlords or
tenants in relation to such agreements,**

”.

15 **21. Section 3 amended**

Section 3(1) is amended after the definition of “Tribunal” by deleting the full stop and inserting —

“

;

20 **“unconscionable conduct application”** means an application under section 15F(1).

”.

22. Section 12D inserted

After section 12C the following section is inserted —

25 “

12D. Tenants’ associations etc.

- (1) A provision in a retail shop lease is void to the extent that it has the effect of preventing or restricting the

s. 23

tenant from forming, joining or taking part in any activities of a tenants' association, chamber of commerce or similar body.

(2) If a tenant under a retail shop lease —

- (a) forms or joins; or
- (b) proposes to form or join,

a tenants' association, chamber of commerce or similar body, the landlord is not to treat or propose to treat the tenant less favourably than a tenant in similar circumstances who does not do or propose to do any of those things.

(3) A tenant under a retail shop lease may apply in writing to the Tribunal in respect of a failure by the landlord to comply with subsection (2) for one or both of the following orders —

- (a) an order that the landlord pay compensation to the tenant in respect of pecuniary loss suffered by the tenant as a result of the failure;
- (b) an order that the landlord do, or refrain from doing, anything specified in the application.

”.

23. Part IIA inserted

After section 15 the following Part is inserted —

“

Part IIA — Unconscionable conduct

15A. Terms used in this Part

In this Part —

“**applicable industry code**”, in relation to a person who is a participant in an industry, means the prescribed provisions of an industry code relating to the industry;

“commencement” means the commencement of section 23 of the *Retail Shops and Fair Trading Legislation Amendment Act 2005*;

5 **“fit out costs”** includes the costs of providing or installing finishes, fixtures, fittings, equipment and services;

10 **“industry code”** means a code regulating the conduct of participants in an industry towards other participants in the industry or towards consumers in the industry.

15B. Application of Part

15 (1) In addition to a retail shop lease to which or in relation to which this Part would otherwise apply, this Part also applies to or in relation to a retail shop lease that was entered into —

- (a) before the relevant day; or
- (b) pursuant to an option granted or agreement made before the relevant day,

20 if this Act would have applied to the lease had it been entered into on or after that day.

(2) This Part does not apply to conduct that occurred before the commencement.

(3) In subsection (1) —

25 **“relevant day”** has the meaning given to that term by section 4(3).

15C. Unconscionable conduct of landlords

(1) A landlord under a retail shop lease shall not, in connection with the lease, engage in conduct that is, in all the circumstances, unconscionable.

30 (2) Without in any way limiting the matters to which the Tribunal may have regard for the purpose of

s. 23

determining whether a landlord has contravened subsection (1), the Tribunal may have regard to —

- (a) the relative strengths of the bargaining positions of the landlord and tenant;
- 5 (b) whether, as a result of conduct engaged in by the landlord, the tenant was required to comply with conditions that were not reasonably necessary for the protection of the legitimate interests of the landlord;
- 10 (c) whether the tenant was able to understand any documents relating to the lease;
- (d) whether any undue influence or pressure was exerted on, or any unfair tactics were used against, the tenant (or a person acting on behalf
15 of the tenant) by the landlord or a person acting on behalf of the landlord in relation to the lease;
- (e) the amount for which, and the circumstances under which, the tenant could have acquired an identical or equivalent lease from a person
20 other than the landlord;
- (f) the extent to which the landlord's conduct towards the tenant was consistent with the landlord's conduct in similar transactions between the landlord and other similar tenants;
- 25 (g) the requirements of any applicable industry code;
- (h) the requirements of any other industry code, if the tenant acted on the reasonable belief that the landlord would comply with that code;
- 30 (i) the extent to which the landlord unreasonably failed to disclose to the tenant —
 - (i) any intended conduct of the landlord that might affect the interests of the tenant; or

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- (2) Without in any way limiting the matters to which the Tribunal may have regard for the purpose of determining whether a tenant has contravened subsection (1), the Tribunal may have regard to —
- 5 (a) the relative strengths of the bargaining positions of the landlord and tenant;
- 10 (b) whether, as a result of conduct engaged in by the tenant, the landlord was required to comply with conditions that were not reasonably necessary for the protection of the legitimate interests of the tenant;
- 15 (c) whether the landlord was able to understand any documents relating to the lease;
- (d) whether any undue influence or pressure was exerted on, or any unfair tactics were used against, the landlord (or a person acting on behalf of the landlord) by the tenant or a person acting on behalf of the tenant in relation to the lease;
- 20 (e) the amount for which, and the circumstances under which, the landlord could have granted an identical or equivalent lease to a person other than the tenant;
- 25 (f) the extent to which the tenant's conduct towards the landlord was consistent with the tenant's conduct in similar transactions between the tenant and other similar landlords;
- (g) the requirements of any applicable industry code;
- 30 (h) the requirements of any other industry code, if the landlord acted on the reasonable belief that the tenant would comply with that code;

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- (i) the extent to which the tenant unreasonably failed to disclose to the landlord —
- (i) any intended conduct of the tenant that might affect the interests of the landlord; or
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- (ii) any risks to the landlord arising from the tenant's intended conduct that are risks that the tenant should have foreseen would not be apparent to the landlord;
- (j) the extent to which the tenant was willing to negotiate the terms and conditions of any lease with the landlord;
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- (k) the extent to which the tenant acted in good faith;
- (l) the extent to which the tenant was not reasonably willing to negotiate the rent under the lease;
- 20
- (m) the extent to which the tenant unreasonably used information about the turnover of the tenant's or a previous tenant's business to negotiate the rent; and
- (n) the extent to which the tenant was willing to incur reasonable refurbishment or fit out costs.
- 25
- (3) In considering whether a tenant has contravened subsection (1), the Tribunal —
- (a) is not to have regard to any circumstances that were not reasonably foreseeable at the time of the alleged contravention; and
- 30
- (b) may have regard to circumstances existing before the commencement but not to conduct engaged in before the commencement.

15E. Certain conduct not unconscionable

A person is not to be taken for the purposes of section 15C or 15D to engage in unconscionable conduct in connection with a retail shop lease only because —

- (a) the person institutes legal proceedings in relation to the lease or refers a dispute or claim in relation to the lease to arbitration;
- (b) the person fails to renew the lease or enter into a new lease; or
- (c) the person does not agree to having an independent valuation of current market rent carried out.

15F. Powers of Tribunal relating to unconscionable conduct

- (1) A landlord or tenant, or former landlord or tenant, under a retail shop lease or former retail shop lease who suffers loss or damage because of unconscionable conduct of another person that contravenes section 15C or 15D may recover that loss or damage by applying in writing to the Tribunal.
- (2) An unconscionable conduct application is required to be lodged within 6 years after the alleged unconscionable conduct occurred.
- (3) Without limiting section 26, in proceedings in relation to an unconscionable conduct application, the Tribunal may make any one or more of the following orders that it considers appropriate —
 - (a) an order that a party to the proceedings pay money to a specified person, whether by way of debt, damages or restitution, or refund any money paid by a specified person;

- 5 (b) an order that a specified amount of money is
not due or owing by a party to the proceedings
to a specified person, or that a party to the
proceedings is not entitled to a refund of any
money paid to another party to the proceedings.
- (4) The Tribunal may make any ancillary orders that it
considers necessary for the purpose of enabling an
order under this section to have full effect.
- 10 (5) The Tribunal may impose any conditions that it
considers appropriate when making an order under this
section.
- (6) The Tribunal may make an interim order under this
section pending final determination of an
unconscionable conduct application, if the Tribunal
15 considers it appropriate to do so.
- (7) In this section —
“**specified**”, in relation to an order, means specified in
the order.

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20 **24. Section 27 amended**

After section 27(3) the following subsections are inserted —

“

- (4) Where —
- 25 (a) an unconscionable conduct application has been
made; and
- (b) at the time it was made no issue arising under
the application was the subject of civil
proceedings before a court,
- 30 a court has no jurisdiction to hear or determine such an
issue in civil proceedings unless subsection (5) applies.

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- 5 (5) This subsection applies if —
- (a) the unconscionable conduct application, or the part of that application to which the issue referred to in subsection (4) relates, is withdrawn or is dismissed for want of jurisdiction; or
 - (b) as a result of judicial review, a court quashes or declares invalid an order, direction or determination of the Tribunal made in respect of the application on the ground that the Tribunal had no jurisdiction to hear and determine that issue.
- 10
- (6) Where —
- (a) an unconscionable conduct application has been made; and
 - (b) at the time it was made an issue arising under the application was the subject of civil proceedings before a court,
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- the Tribunal, on becoming aware of those proceedings, ceases to have jurisdiction to hear or determine the issue unless subsection (7) applies.
- 20
- (7) This subsection applies if —
- (a) the proceedings referred to in subsection (6) are, or the part of those proceedings relating to the issue referred to in that subsection is, transferred to the Tribunal by the court concerned;
 - (b) those proceedings are, or that part of those proceedings is, withdrawn or dismissed by the court, or by another court on appeal in those proceedings, for want of jurisdiction or without deciding the issue on its merits; or
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- 30

- 5 (c) as a result of judicial review, a court quashes or declares invalid those proceedings or that part of those proceedings or any order, judgment or decision made in those proceedings in relation to the issue, on the ground that the court concerned had no jurisdiction to hear and determine the issue.

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25. Minor amendment

10 Section 16(1)(a) is amended by deleting “him” and inserting instead —

“ the Tribunal ”.

Part 4 — *Fair Trading Act 1987*

26. The Act amended

The amendments in this Part are to the *Fair Trading Act 1987**.

[* Reprint 2 as at 24 June 2005.]

5 **27. Section 11A inserted**

After section 11 the following section is inserted —

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**11A. Unconscionable conduct in business transactions
(TPA s. 51AC)**

10 (1) In this section —

“**applicable industry code**”, in relation to a person
who is a participant in an industry, means a code
of practice relating to the industry that has been
prescribed under section 43 and that is in force;

15 “**commencement**” means the commencement of
section 27 of the *Retail Shops and Fair Trading
Legislation Amendment Act 2005*;

20 “**industry code**” means a code regulating the conduct
of participants in an industry towards other
participants in the industry or 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.

25 (2) A person shall not, in trade or commerce, in connection
with —

- (a) the supply or possible supply of goods or
services to another person (other than a listed
public company); or

- (b) the acquisition or possible acquisition of goods or services from another person (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 a court may have regard for the purpose of determining whether a person (the “**supplier**”) has contravened subsection (2) in connection with the supply or possible supply of goods or services to a person (the “**business consumer**”), the court may have regard to —

- (a) the relative strengths of the bargaining positions of the supplier and the business consumer;
- (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;
- (c) whether the business 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 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;
- (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;

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- (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 similar business consumers;
- (g) the requirements of any applicable industry code;
- 10
- (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;
- (i) the extent to which the supplier unreasonably failed to disclose to the business consumer —
- 15
- (i) any intended conduct of the supplier that might affect the interests of the business consumer; or
- (ii) any risks to the business consumer arising from the supplier's intended conduct that are risks that the supplier should have foreseen would not be
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- apparent to the business consumer;
- (j) the extent to which the supplier was willing to negotiate the terms and conditions of any contract for the supply of the goods or services with the business consumer; and
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- (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 (the **"acquirer"**) has contravened subsection (2) in connection with the acquisition or possible acquisition of goods or services from a person (the **"small business supplier"**), the court may have regard to —
- 30

- (a) the relative strengths of the bargaining positions of the acquirer and the small business supplier;
- 5 (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;
- 10 (c) whether the small business supplier was able to understand any documents relating to the acquisition or possible acquisition of the goods or services;
- 15 (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;
- 20 (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;
- 25 (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 similar small business suppliers;
- 30 (g) the requirements of any applicable industry code;
- (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;

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- (i) the extent to which the acquirer unreasonably failed to disclose to the small business supplier —
- 5 (i) any intended conduct of the acquirer that might affect the interests of the small business supplier; or
- 10 (ii) any risks to the small business supplier arising from the acquirer's intended conduct that are risks that the acquirer should have foreseen would not be apparent to the small business supplier;
- 15 (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.
- 20 (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,
- 25 only because the first-mentioned person institutes legal proceedings in relation to that supply, possible supply, acquisition or possible acquisition or refers a dispute or claim in relation to that supply, possible supply, acquisition or possible acquisition to arbitration.
- 30 (6) For the purpose of determining whether a person has contravened subsection (2) —
- (a) a court is not to 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 but not to
conduct engaged in before the commencement.

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- (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.

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- (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.

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- (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.

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- (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.

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- (11) For the purposes of subsections (9) and (10) —

- (a) subject to paragraphs (b), (c), (d) and (e), the
price for —

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

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- (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;
- 5 (b) section 6(3)(c) applies as if references in that provision 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
- 10 (ii) the acquisition of goods or services by a person by way of purchase,
as the case requires;
- (c) section 6(3)(d) applies as if —
- (i) the reference in that provision 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;
- 15 and
- 20 (ii) a reference in that provision to acquisition included a reference to supply;
- (d) section 5(3) applies as if the reference in that provision to the acquisition of goods or services by a person, or to the acquisition of services by a person, included a reference to the supply of goods or services to a person, or to the supply of services to a person, as the case requires; and
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- 5 (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.

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28. Section 69 amended

Section 69(1) is amended by deleting “section 10 or 11,” and
inserting instead —

10 “ section 10, 11 or 11A, ”.

29. Section 75 amended

Section 75(2) is amended after “section 11” by inserting —

“ or 11A ”.

30. Section 77 amended

15 Section 77(4), (5) and (6) are each amended after “section 11”
by inserting —

“ or 11A ”.

31. Section 79 amended

20 Section 79(1) is amended by deleting “(section 11 excepted)”
and inserting instead —

“ (sections 11 and 11A excepted) ”.

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