

**CONSUMER PROTECTION  
AND LIABILITY LAW  
SUMMARY**

**2010**



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# 1. Application and Concepts

## 1.1. CORPORATIONS

- The *Trade Practices Act 1974* (Cth) (**TPA**) is primarily directed towards the conduct of corporations.
- **Section 4(1)** defines a corporation as meaning 'a body corporate that is a foreign, trading or financial corporation or a holding company thereof'.

### 1.1.1. Trading Corporation

- A trading corporation is a corporation where a **sufficiently significant (and not merely peripheral) proportion of their current activities are trading**. That is, the acquiring or supplying of goods and services in a commercial or business context: *E v Australian Red Cross Society* (1991).
- The test is one of the **current activities** of the corporation: **Adamson**. However, this is not the sole criterion for determining.
- Thus, **where the corporation has not yet commenced** activities, its character and purpose may be found in the corporation's constitution, to determine whether it is a trading corporation: *Fencott v Muller*.
- A corporation can be trading corporation even though the corporation is a **non-profit organisation**, and even though the income from the trading activities constitute a relatively small proportion of the total income of the corporation: *E v Australian Red Cross Society* (1991).

E.g. In *E v ARCS*, the **predominant activity** was the **provision of a public service** rather than a trading activity. Nevertheless, the operation by ARCS of **selling goods at its gift shops** for fund-raising, and its **fees received** from private patients, (1/6<sup>th</sup> total income), amounted to **'substantial' trading activities**.

Corporations that have been held to be trading corporations:

- WACA – a substantial proportion of the WACA's **income was constituted by gate takings and social and recreational facilities** provided to members:  
*Hughes v WA Cricket Association*

- Professional football organisation - a substantial proportion of the club's activities was constituted by **membership fees and the provision on restaurant activities**: *R v Federal Court of Australia*.
- NSW Government Insurance Office - a statutory corporation that **engaged in commercial activities**, in particular insurance: *State Government Insurance v GIO (1991)*.
- Taxi Business - An incorporated association that ran a taxi business: *TPC v Legion Cabs (1978)*.

Corporations that have been held not to be trading corporations:

- An amateur cricket club: *Hughes v WACA*
- An amateur horse riding association: *McCarthy v Australian Rough Riders Association*
- Qld Commissioner for Railways: *Bradken Consolidated v BHP*
- These were held not to be trading corporations, despite the fact that **part of their activities involved the provision of social and recreational facilities** to members. These activities were said to **be inconsequential compared with the clubs' activities** in organising sporting matches or other club activities.

### 1.1.2. Financial Corporation

- A financial corporation is a body corporate that carries on its sole or principal business, the business of **banking or insurance**.
- The essence of a financial corporation is that it deals in finance to an appreciable degree; that is, whose **subject matter is finance** (i.e. borrowing, lending money), not merely involvement in the use of money.

### 1.1.3. Foreign Corporation

- A financial corporation is one incorporated outside continental Australia; that is, in another country or in an external territory.

## 1.2. NATURAL PERSONS

- **Section 5** extends certain parts of the TPA (including Pt V) to **conduct outside of Australia** by Australian corporations or by Australian citizens or persons ordinarily resident within Australia.
- **Section 6(3)** extends the TPA to persons engaging in conduct to the extent to which the **conduct involves the use of postal, telegraphic, or telephonic services** or takes place in a **radio or television broadcast**.
- This has been said to include:
  - **Internet sites:** *ACCC v Chen*.
  - Representations made over the **telephone:** *O'Brien v Smolomogou*.
  - **Email messages:** *Dataflow Computer Services v Goodman*.
- **Section 6(4)** extends operation of the TPA to natural persons who engage in conduct in trade or commerce, occurring:
  - Overseas, where the person involved was an Australian citizen or resident
  - In overseas or interstate trade or commerce (i.e. b/w states or countries)
  - Within a Territory or b/w a State and Territory
  - In the course of supplying goods or services to the Cth or a Cth instrumentality



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