

**CONSUMER
PROTECTION AND
LIABILITY LAW
SUMMARY**



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Topic 1. Application and Concepts

1.1. INTRODUCTION

- On 1 January 2011, a **new national consumer protection and product liability regime** was introduced. Prior to this, consumer protection law in Australia was regulated by a number of different Commonwealth, State and Territory legislation and regulations.
- At the Federal level, the most significant piece of legislation was the *Trade Practices Act 1974 (Cth)* (**TPA**). This legislation was significantly mirrored at the State and Territory level in fair trading legislation.
- In 2010, the *Trade Practices Amendment (Australian Consumer Law) Act (No 1) 2010 (Cth)* and the *Trade Practices Amendment (Australian Consumer Law) Act (No 2) 2010 (Cth)* were passed by the Federal Parliament, renaming the TPA as the *Competition and Consumer Act 2010 (Cth)* (**CCA**) and created the *Australian Consumer Law (ACL)* as an 'applied law' regime.
- The 'applied law' regime applies to both the Commonwealth (CCA Part XI) and the State and Territories (CCA Part XIAA). The ACL is located in Schedule 2 of the CCA. Reference may be made to both these Acts throughout the summary.
- Note that the CCA and ACL only apply to matters that arise after 1 January 2011. Before this, then you need to apply the *Trade Practices Act 1974 (Cth)*.
- The CCA and ACT protect consumers via two mechanisms:
 1. Directly through the consumer protections in the ACL:
 - Consumer guarantees (ss 51-62 ACL);
 - Misleading and deceptive conduct (s 18 ACL);
 - False or misleading representations (ss 28-37 ACL);
 - Manufacturer's liability for defective goods (ss 138-141 ACL);
 - Product safety standards (ss 104-131 ACL);
 - Unconscionable conduct (ss 20-22 ACL); and
 - Unfair contract terms (s 23 ACL).
 2. Indirectly by prohibiting restrictive trade practices in the CCA:
 - Prohibition of cartels (Pt IV Div 1; s 45 CCA);
 - Misuse of market power (s 46 CCA);
 - Exclusive dealing (s 47 CCA); and
 - Resale Price Maintenance (s 48 CCA).

1.2. CORPORATIONS

- The TPA was directed predominantly towards the conduct of corporations, as the Federal Parliament lacked the constitutional power to legislate for consumer protection. The CCA continues to regulate corporations, although its **scope now extends to persons**.
- Section 130 of the ACL defines a corporation to have the same meaning as in subsection 4(1).
- Section 4(1) of the CCA defines corporation to mean a body corporate that:
 - (a) is a foreign corporation;
 - (b) is a trading corporation formed within the limits of Australia or is a financial corporation so formed;
 - (c) is incorporated in a Territory; or
 - (d) is the holding company of a body corporate of a kind referred to in paragraph (a), (b) or (c),

1.2.1. 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: *R v Federal Court of Australia* (1979). However, this is not the sole criterion for determination.
- 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* (1983).
- A corporation can be trading corporation even though the corporation is a **non-profit organisation**, and even though the income from the trading activities constitutes 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, (1/6th 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* (1986).
 - 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* (1979).
 - 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* (1986).
- An amateur horse riding association: *McCarthy v Australian Rough Riders Association* (1988).
- Qld Commissioner for Railways: *Bradken Consolidated v BHP* (1979).
- 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.

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