

COMPETITION AND CONSUMER LAW

Table of Contents

| | |
|---|-----------|
| WEEK 1 [INTRODUCTION] | 9 |
| Crown immunity | 11 |
| ACCC v Baxter Healthcare Pty Ltd (2007) 237 ALR 512..... | 11 |
| Section 5 of the CCA – Extraterritorial application of the ACL | 11 |
| ACCC v Chen [2003] FCA 897..... | 11 |
| Extended Application of the ACL | 12 |
| Jurisdiction of the Court | 12 |
| Application of the Criminal Code | 12 |
| ‘Consumer’ | 13 |
| Section 3 of the ACL..... | 13 |
| ‘Corporation’ and Related Body Corporates | 15 |
| Section 4 of the CCA 2010 (Cth)..... | 15 |
| Shahid v Australasian College of Dermatologists (2007) 72 IPR 555..... | 16 |
| E v Australian Red Cross Society (1991) 99 ALR 601..... | 16 |
| ‘Trade and Commerce’ | 17 |
| Concrete Constructions (NSW) Pty Ltd v Nelson (1990) 92 ALR 193..... | 17 |
| O’Brien v Smolonogov (1983) 53 ALR 107..... | 17 |
| Argy v Blunt & Lane Cove Real Estate Pty Ltd (1990) 94 ALR 719..... | 18 |
| Lubidineuse v Bevanere Pty Ltd (1984) 55 ALR 273..... | 18 |
| Public Statements, Debates and Education | 19 |
| Plimer v Roberts (Noah’s Ark Case) (1997) 150 ALR 235..... | 19 |
| Accessorial Liability | 19 |
| Yorke v Lucas (1985) 61 ALR 307..... | 19 |
| R v Tannos | 20 |
| WEEK 2 [CONSUMER GUARANTEES] | 21 |
| “Attempt to contravene” | 21 |
| Liability of corporate and non-corporate principals | 22 |

| | |
|--|-----------|
| Section 139B of the CCA | 22 |
| <i>Tesco Supermarkets Ltd v Natrass</i> [1972] AC 153. | 23 |
| Consumer Guarantees..... | 24 |
| Consumer guarantees in relation to goods | 25 |
| Section 51 – Guarantee as to title | 26 |
| Section 52 – Guarantee to undisturbed possession | 26 |
| Section 53 – Guarantee as to undisclosed securities etc. | 26 |
| Section 54 – Guarantee as to acceptable quality..... | 27 |
| Section 55 – Guarantee as to fitness for any disclosed purpose etc..... | 30 |
| Section 56 – Guarantee relating to the supply of the goods by description | 31 |
| Section 57 – Guarantees relating to the supply of goods by sample or demo | 32 |
| Section 58 – Guarantee as to repairs and spare parts..... | 32 |
| Section 59 – Guarantee as to express warranties | 33 |
| Consumer Guarantees in relation to supply of services..... | 34 |
| Section 61 – Guarantees as to fitness for a particular purpose etc..... | 34 |
| Section 62 – Guarantee as to reasonable time for supply..... | 35 |
| Section 63 - Services to which this Subdivision does not apply | 35 |
| Consumer Guarantee Remedy Regime | 35 |
| Action against the supplier of goods..... | 36 |
| WEEK 3 [MISLEADING AND DECEPTIVE CONDUCT] | 41 |
| Induces or is capable of inducing error | 41 |
| <i>Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd</i> (1982) 42 ALR 1..... | 42 |
| Mere confusion or wonderment..... | 42 |
| <i>McWilliam’s Wine Pty Ltd v McDonald’s System of Australia Pty Ltd</i> (1980) 33 ALR 394. | 42 |
| Doctrine of erroneous assumption..... | 43 |
| “Likely to mislead or deceive” | 43 |
| <i>Taco Co of Australia Inc v Taco Bell Pty Ltd</i> (1982) 42 ALR 177. | 43 |
| Who must be misled?..... | 44 |
| General Principles | 45 |
| Conduct must be viewed as a whole | 45 |
| Multiple meanings..... | 45 |
| Intention (and honesty)..... | 45 |
| Spoken Words..... | 45 |

| | |
|---|---------------|
| Literal truths..... | 46 |
| Half-truths | 46 |
| Silence | 46 |
| Future conduct (predictions, forecasts and opinions)..... | 47 |
| Failure to make proper inquiries | 47 |
| Failure to accommodate subsequent changes and the transitory effect..... | 48 |
| Passing on information..... | 48 |
| Disclaimers and exclusion clauses..... | 49 |
| Misleading and Deceptive Conduct and Advertising | 49 |
| Puffery..... | 50 |
| Small Print..... | 50 |
| Asterisk..... | 51 |
| Advertising and different communication mediums | 52 |
| Medical Benefits Fund of Australia Ltd v Cassidy (2003) 205 ALR 402..... | 52 |
| Advertising and Packaging..... | 52 |
| Red Bull Australia Pty Ltd v Sydneywide Distributors Pty Ltd [2001] FCA 1228..... | 52 |
| Advertising and Labelling..... | 53 |
| Character Advertising..... | 53 |
| Pacific Dunlop Ltd v Hogan (Crocodile Dundee Case) (1989) 87 ALR 14. | 53 |
| Comparative Advertising | 53 |
| Disparaging Advertising..... | 53 |
| Makita (Aust) Pty Ltd v Black & Decker (A/Asia) Pty Ltd (1990) 18 IPR 270..... | 53 |
| Parody Advertising | 54 |
| Surge Licensing Inc v Pearson | 54 |
| Trading names and business names | 54 |
| WEEK 4 [MISLEADING AND DECEPTIVE CONDUCT CONT. SPECIFIC FALSE OR MISLEADING REPRESENTATIONS] | 55 |
| Tort of Passing off..... | 55 |
| Twentieth Century Fox Film Corporation v South Australian Brewing Co Ltd (Duff Beer case) (1996) 66 FCR 451..... | 55 |
| Negligent misstatements under tort law | 56 |
| Section 29 – False or misleading representations about goods or services | 56 |

| | |
|---|-----------|
| s 29(1)(a) Particular standard, quality, value, grade, composition, style, model, history, or use of goods..... | 59 |
| s 29(1)(b) 'Particular standard, quality, value, grade' of services..... | 60 |
| s 29(1)(c) 'New' goods..... | 61 |
| s 29(1)(e) and (f) 'Testimonials'..... | 61 |
| s 29(1)(g) 'Sponsorship, approval, performance characteristics, etc' and (h) 'Sponsorship, approval or affiliation of persons'..... | 62 |
| s 29(1)(i) 'Price' of goods and services..... | 62 |
| s 29(1)(k) 'Place of origin'..... | 63 |
| S 29(1)(m) 'Exclusion' of any consumer guarantee, etc..... | 63 |
| Section 30 – False or misleading representations about sale etc of land | 64 |
| Section 31 – Misleading Conduct relating to employment..... | 65 |
| ACCC v Zanok Technologies Pty Ltd [2009] FCA 1124..... | 65 |
| Section 33 – Misleading Conduct as to the nature etc of goods..... | 66 |
| ACCC v Halkalia Pty Ltd (No 2) [2012] FCA 535..... | 67 |
| ACCC v Mailpost Australia [2010] FCA 369. | 67 |
| Misleading Conduct in the internet | 67 |
| ACCC v Jones (No 3) (2010) FCA 908. | 68 |
| 'In trade or commerce' on the internet..... | 69 |
| Online Auctions | 70 |
| Ariix LLC v Mahilall [2014] FCA 429..... | 70 |
| WEEK 5 [UNCONSCIONABLE CONDUCT AND UNFAIR CONTRACT TERMS]..... | 72 |
| Background to unconscionable conduct..... | 72 |
| Section 20 – Unconscionable conduct within the meaning of the unwritten law | 73 |
| ACCC v Samton Holdings Pty Ltd (2002) ALR 76. | 74 |
| Definition of unconscionable conduct in the unwritten law | 74 |
| Elements of unconscionable conduct in the unwritten law | 74 |
| Commercial Bank of Australia Ltd v Amadio (1983) 46 ALR 402. | 74 |
| First element - 'Special Disability'..... | 75 |
| Second element – 'Knowledge of special disability' | 78 |
| Third element – 'Taking advantage of the special disability' | 78 |
| Section 21 - Unconscionable conduct in connection with goods or services..... | 79 |
| Unconscionable conduct under section 21 | 80 |

| | |
|---|------------|
| Section 22 - Matters the court may have regard to for the purposes of section 21..... | 81 |
| Unconscionable conduct with consumers..... | 83 |
| ACCC v Lux Distributors Pty Ltd [2013] FCAFC 90..... | 83 |
| Unfair Contract terms..... | 84 |
| Section 23 - Unfair terms of consumer contracts and small business contracts | 84 |
| Section 24 – Meaning of unfair | 86 |
| Section 25 - Examples of unfair terms | 87 |
| Section 26 - Terms that define main subject matter of consumer contracts or small business contracts etc. are unaffected..... | 88 |
| Remedies | 88 |
| WEEK 6 [OTHER SHARP PRACTICES AND MANUFACTURER’S LIABILITY] | 89 |
| Section 32 Offering rebates, gifts, prizes, etc | 89 |
| TPC v Calderton Corp Pty Ltd (1994) ATPR 41-306..... | 90 |
| ACCC v Nationwide News Pty Ltd (1996) 36 IPR 75. | 90 |
| Section 35 - Bait advertising..... | 90 |
| Section 36 - Wrongly Accepting Payments..... | 91 |
| ACCC v EDirect Pty Ltd [2008] FCA 65. | 92 |
| Section 39 - Unsolicited credit and debit cards..... | 92 |
| Section 40 - Unsolicited Goods or Services | 93 |
| ACCC v Artorios Ink Co Pty Ltd (No 2) [2013] FCA 1292. | 94 |
| Section 44 - Pyramid selling..... | 98 |
| ACCC v Jutsen (No 3) (2011) 285 ALR 110. | 100 |
| Section 47 – Multiple Pricing | 100 |
| Section 48 - Component Pricing..... | 102 |
| ACCC v Gourmet Goody’s Family Restaurant Pty Ltd [2010] FCA 1216. | 103 |
| Section 49 - Referral Selling..... | 104 |
| ACCC v Giraffe World Australia Pty Ltd (No 2) (1999) 166 ALR 74..... | 104 |
| Section 50 - Harassment and Coercion..... | 104 |
| ACCC v Maritime Union of Australia (2001) 187 ALR 487..... | 105 |
| Remedies and enforcement powers..... | 105 |
| Background of Manufacturers’ Liability | 106 |
| Donoghue v Stevenson [1932] AC 562..... | 106 |
| ‘Safety defect’ | 108 |

| | |
|--|------------|
| Glendale Chemical Products Pty Ltd v ACCC (1998) 90 FCR 40 | 108 |
| Section 138 - Liability for loss or damage suffered by an injured individual | 109 |
| Section 139 - Liability for loss or damage suffered by a person other than the injured individual | 109 |
| Defences – Section 142..... | 109 |
| The safety defect at the time of supply | 110 |
| State of scientific and technical knowledge | 110 |
| Ancillary provisions..... | 111 |
| WEEK 7 [INTRODUCTION TO COMPETITION LAW – FUNDAMENTAL COMPETITION BASICS] | 112 |
| Background of Competition Law | 112 |
| Cartels..... | 114 |
| ‘Per se’ prohibition provisions | 115 |
| Part VII – Authorisations and Notifications | 117 |
| Key Concepts | 118 |
| ‘Market’ | 118 |
| Queensland Co-op Milling Assn. Ltd, Re (1976) 8 ALR 481..... | 118 |
| Dimension 1 - Product Market..... | 119 |
| Dimension 2 – Geographic market..... | 119 |
| Dimension 3 – Functional market..... | 120 |
| Dimension 4 – Time market | 120 |
| ‘Market Power’..... | 121 |
| ‘Market share’ | 121 |
| ‘Barriers to entry’ | 121 |
| ‘Substantial lessening of competition’ | 122 |
| WEEK 8 [COMPETITION REGULATION – SECTION 45]..... | 123 |
| “Contract arrangements or understanding” (CAU) | 125 |
| ‘Contract’ | 125 |
| ‘Arrangements’ | 125 |
| ‘Understandings’ | 126 |
| ‘Purpose or effect’ | 126 |
| “Effect or likely effect” | 127 |

| | |
|--|------------|
| “Provision” | 127 |
| ACCC v Safeway Stores Pty Ltd (no 2) [2001] FCA 1861. | 127 |
| Section 45(1)(a) | 128 |
| Concerted practices - Section 45(1)(c) | 128 |
| Section 45(3) | 131 |
| Section 45(5) and onwards | 131 |
| Section 45(6A) | 132 |
| Section 45(7) | 133 |
| Exceptions | 133 |
| Section 45(8A) | 133 |
| Section 45(8AA) | 133 |
| Section 45(9) | 134 |
| Meaning of ‘Competitors’ | 134 |
| Meaning of ‘CAU’ | 134 |
| Meaning of ‘substantial lessening of competition’ in a market | 135 |
| Secondary boycotts – ss 45D - 45ED | 135 |
| Penalties | 136 |
| WEEK 9 [COLLUSION AND CARTEL REGULATION] | 137 |
| Background | 137 |
| What are cartels? | 137 |
| Types of cartel conduct | 137 |
| Price fixing..... | 138 |
| Output restriction..... | 139 |
| Bid rigging | 139 |
| Market sharing | 140 |
| Civil provisions - s 45AJ, 45AK | 143 |
| Criminal provisions - s 45AF, 45AG | 144 |
| Section 45AH – Determining Guilt | 146 |
| Exemptions | 147 |
| Anti-overlap provisions | 148 |
| Section 45AU - Collective acquisition of goods or services..... | 148 |
| Immunity and Cooperation Policy | 148 |
| Case law | 149 |

| | |
|---|------------|
| <i>CDPP v Nippon Yusen Kabushiki Kaisha</i> [2017] FCA 876..... | 149 |
| <i>ACCC v Flight Centre</i> (2016) HCA 49..... | 149 |
| <i>ACCC v Australian Egg Corporation Ltd</i> [2017] FCAFC 152..... | 150 |
| WEEK 10 [MISUSE OF MARKET POWER] | 151 |
| The former s 46 | 151 |
| Section 46 | 152 |
| Criteria of s 46..... | 153 |
| Taking advantage of market power..... | 153 |
| Conduct that falls under section 46 | 154 |
| Refusal to supply | 154 |
| Refusal to acquire..... | 155 |
| Predatory pricing | 155 |
| Price discrimination..... | 156 |
| Land banking..... | 157 |
| Anti-competitive threats | 158 |
| Anti-competitive bundling of goods..... | 158 |
| Other elements in s 46 | 159 |
| WEEK 11 [EXCLUSIVE DEALING, RPM, AND MERGERS AND ACQUISITIONS] | 160 |
| Section 47 – Exclusive Dealing | 160 |
| Types of exclusive dealings | 165 |
| Solus agreements - s 47(2)(d) | 165 |
| Tying agreements – s 47(2)(d)..... | 167 |
| Minimum quantities condition – s 47(2)(d) | 167 |
| Customer Restrictions – s 47(2)(f)(i) | 167 |
| Third-line forcing – s 47(6) and (7) | 168 |
| Section 48 – Resale Price Maintenance | 169 |
| Definition of RPM – Part 8 | 169 |
| Section 50 – Mergers and Acquisitions..... | 170 |
| Authorisation and Notification Process..... | 173 |
| Authorisations | 173 |
| Notification..... | 174 |

WEEK 1 [INTRODUCTION]

Readings - Coorey Chapter 1 and Chapter 2

This week we will consider the history and design of the Competition and Consumer Act 2010 (Cth); constitutional impediments to legislation in this area and the role of application schemes. We will refresh skills of statutory interpretation.

Websites

<https://www.accc.gov.au/>

<http://www.australiancompetitionlaw.org/>

<http://consumerlaw.gov.au/>

Australian Consumer Law is like a national regime, coming into effect as of the 1 January 2011 and it replaced 17 different laws on consumer protection, in federal laws and state laws. Prior to that, the main piece was the Trade Practices Act 1974, consumer protection being under Part 5. The Act was RENAMED (not repealed). Prior to 1974 however, consumer protection was non-existent. The first piece of competition legislation came into effect in 1906, named the Australian Industries Preservations Act - protecting Australian primary producers against cartels from the US and tariff levies imposed. However, 3 years after the legislation came into effect, there was a case [*Huddart Parker & Co Pty Ltd v Moorehead* \[1909\] HCA 36; \(1909\) 8 CLR 330](#) where it was found that the Australian Industries Preservation Act exceeded its powers from the Australian Constitution and thus was ultra vires. As a result, the legislation was repealed. From then, competition law went into the “dark ages” where there were scattered pieces of legislation, such a. There then was a big push in the late 60’s and early 70’s for a new protection for competition and consumer law.

Chapter 1 - Introduction

Context of Australian market in 60’s and 70’s

- Only one type of beer, only one type of oil - no variety of products - the prices were high
- No regulation (e.g. product safety)

Our Comps and Consumer law is 40 years in the making - ACCC is in the top 5 government regulators in the world.

-
- all the states law was not harmonised because of the constitutional limits of the Trade Practices Act
 - grabbed it's powers from various areas of the Constitution
 - Corporations power
 - Trade and commerce power
 - Postal Service?
 - However what the commonwealth could not do is regulate individuals
 - E.g. Misleading or deceptive Conduct
 - Currently section 18 ACL
 - Use to be s 52 of the Trade Practices Act and mirrored in state acts (s 40 of the NSW Act)
 - Difference between s 40 and s 52?
 - 52 – regulated corporation
 - 40 – regulated people
 - myriad of provisions and regulation between states
 - IDEA = harmonising
 - States have as a result given up their powers to regulate individuals for ACL to the federal power

The ACL operates both as a law for the Commonwealth and as an 'applied law' of the states and territories. The provision in the ACL are drafted to reflect this and apply to 'persons' instead of 'corporations'.

NB – ASIC is also a regulator of consumer law. It regulates complaints in relation to financial issues and financial products. It still retains this position. Reason – this is a historical role since 1995.

What are the key change brought about by the ACL?

- harmonised definitions;
 - consumer
- what is an unfair contract?
- Amendments to general provisions
- New national consumer guarantees regime

-
- New national consumer unsolicited consumer agreement regime
 - New national product safety regime additional national information standards provisions for goods and services
 - Additional enforcement powers by the ACCC

Crown immunity

- a doctrine inherited from English law
- unless the legislation specifically states the Crown in the legislation, the legislation does not apply to the Crown/government
- the Crown IS specifically stated in the ACC in 2A (federal), 2B (state) and 2C (local)

ACCC v Baxter Healthcare Pty Ltd (2007) 237 ALR 512.

FACTS: Baxter provided sterile and PD fluids. Engaging in misuse of market power. Crown immunity was argued by Baxter – if the states are going to be immune, that should extend to companies who deal with the Crown (dealing with 2B).

HELD – HC held no this is not the case

Section 5 of the CCA – Extraterritorial application of the ACL

- appealed all the way up to the federal court in the case of *Valv* recently
- provides extraterritorial reach of the ACL, but you can only get that reach if 3 things are satisfied
 - incorporated in Australia/carrying on business in Australia
 - Australian citizen
 - Ordinary resident in Australia
- Deals with international trade

ACCC v Chen [2003] FCA 897.

FACTS – Mr Chen framed the Sydney Opera House website, copying it's exact layout and trying to pass it off as it's own imitating the website, he was selling fraudulent tickets for large amounts of money, targeting non-Australian residents. The Commission sought substituted service where you can't find the person – the case went on ex parte.

Sackville J was the judge and the court is hesitant to grant injunctions in these circumstances as they are likely to be ignored – they don't want their authority to be undermined. The ACCC argued that the ACL is of high importance in Australia, lots of tourists coming in and out. The ACCC had been in contact with the USA regulator the Fair Trading Commission in order to seek an enforcement of a foreign judgment. Also gave policy arguments.

HELD - Sackville J granted injunction. Judgment came down here at approximately 4:30 pm – in US time, his website came down 4 and a half hours later

Extended Application of the ACL

- **Section 6(3)**

- A specific power that allowed the ACCC to sue individuals when they engaged in conduct that was by way of use of postal services or telephonic/communication services, etc.
- The ACCC can sue the individual as well as the corporation
- Not used as much these days

Jurisdiction of the Court

- 138 of the ACL gives the jurisdiction to the Federal Court - MAIN
- there ARE cross-vesting powers but there should be a reason for this

Application of the Criminal Code

- ACL is linked to the criminal code
- Not utilised as much as we have a lot of civil remedies

‘Consumer’

Section 3 of the ACL

- not to be confused with ‘consumer goods’ defined in section 2 or ‘consumer contracts’ in section 23(3)

3 Acquiring goods as a consumer

(1) A person is taken to have acquired particular goods as a **consumer** if, and only if:

- (a) the amount paid or payable for the goods, as worked out under subsections (4) to (9), did not exceed:
 - (i) \$40,000; or
 - (ii) if a greater amount is prescribed for the purposes of this paragraph - that greater amount; or
- (b) the goods were of a kind ordinarily acquired for personal, domestic or household use or consumption; or
- (c) the goods consisted of a vehicle or trailer acquired for use principally in the transport of goods on public roads.

(2) However, subsection (1) does not apply if the person acquired the goods, or held himself or herself out as acquiring the goods:

- (a) for the purpose of re supply; or
- (b) for the purpose of using them up or transforming them, in trade or commerce:
 - (i) in the course of a process of production or manufacture; or
 - (ii) in the course of repairing or treating other goods or fixtures on land.

Acquiring services as a consumer

(3) A person is taken to have acquired particular services as a consumer if, and only if:

- (a) the amount paid or payable for the services, as worked out under subsections (4) to (9), did not exceed:
 - (i) \$40,000; or
 - (ii) if a greater amount is prescribed for the purposes of subsection (1)(a) - that greater amount; or
- (b) the services were of a kind ordinarily acquired for personal, domestic or household use or consumption.

Amounts paid or payable for purchases

(4) For the purposes of subsection (1) or (3), the amount paid or payable for goods or services purchased by a person is taken to be the price paid or payable by the person for the goods or services, unless subsection (5) applies.

(5) For the purposes of subsection (1) or (3), if a person purchased goods or services by a mixed supply and a specified price was not allocated to the goods or services in the contract under which they were purchased, the amount paid or payable for goods or services is taken to be:

- (a) if, at the time of the acquisition, the person could have purchased from the supplier the goods or services other than by a mixed supply - the price at which they could have been purchased from the supplier; or
- (b) if:
 - (i) paragraph (a) does not apply; but

- (ii) at the time of the acquisition, goods or services of the kind acquired could have been purchased from another supplier other than by a mixed supply; the lowest price at which the person could, at that time, reasonably have purchased goods or services of that kind from another supplier; or
- (c) if, at the time of the acquisition, goods or services of the kind acquired could not have been purchased from any supplier except by a mixed supply - the value of the goods or services at that time.

Amounts paid or payable for other acquisitions

(6) For the purposes of subsection (1) or (3), the amount paid or payable for goods or services acquired by a person other than by way of purchase is taken to be the price at which, at the time of the acquisition, the person could have purchased the goods or services from the supplier, unless subsection (7) or (8) applies.

(7) For the purposes of subsection (1) or (3), if:

- (a) goods or services acquired by a person other than by way of purchase could not, at the time of the acquisition, have been purchased from the supplier, or could have been purchased only by a mixed supply; but
- (b) at that time, goods or services of the kind acquired could have been purchased from another supplier other than by a mixed supply; the amount paid or payable for the goods or services is taken to be the lowest price at which the person could, at that time, reasonably have purchased goods or services of that kind from another supplier.

(8) For the purposes of subsection (1) or (3), if goods or services acquired by a person other than by way of purchase could not, at the time of the acquisition, have been purchased from any supplier other than by a mixed supply, the amount paid or payable for the goods or services is taken to be the value of the goods or services at that time.

Amounts paid or payable for obtaining credit

(9) If:

- (a) a person obtains credit in connection with the acquisition of goods or services by him or her; and
- (b) the amount paid or payable by him or her for the goods or services is increased because he or she so obtains credit; obtaining the credit is taken for the purposes of subsection (3) to be the acquisition of a service, and the amount paid or payable by him or her for the service of being provided with the credit is taken to include the amount of the increase.

Presumption that persons are consumers

(10) If it is alleged in any proceeding under this Schedule, or in any other proceeding in respect of a matter arising under this Schedule, that a person was a consumer in relation to particular goods or services, it is presumed, unless the contrary is established, that the person was a consumer in relation to those goods or services.

Mixed supplies

(11) A purchase or other acquisition of goods or services is made by a ***mixed supply*** if the goods or services are purchased or acquired together with other property or services, or together with both other property and other services.

Supplies to consumers

(12) In this Schedule, a reference to a supply of goods or services to a consumer is a reference to a supply of goods or services to a person who is taken to have acquired them as a consumer.

- There are 12 subsections with a different threshold test
- There are a further 2 definitions of consumer in the Fair Trading Act NSW and 2 more in every other state legislation – none identical
- And then 2 MORE in the sale of Goods Act 1993 and another 1 or 2 in every other state
- **Subsection 1** – the definition of consumer in relation to goods
 - There are 3 ways someone can be defined as a consumer in relation to goods -
 - 1. Threshold test of \$40, 000.00 or less
 - anyone, even a small business, will be protected by the consumer guarantee regime
 - what about when you buy multiple items? – are they separate goods or should they be considered together – case law would suggest they are usually considered to be separate
 - 2. The good that you acquired was for personal, domestic or household use or consumption
 - 3. A vehicle or trailer was required to transport the good on public roads
- Subsection 2 – the exceptions that apply to that definition
 - Purpose of re-supply or the purpose of transforming them in trade or commerce - e.g. a furniture company when buying the wood
- Subsection 3 – the definition of consumer in relation to services
 - Mirrors subsection 1
 - Note however they did not put the exceptions for subsection 3 as they did for subsection 1
 - You cannot re-supply a service – however later in the act there is talk of a remedy of re-supply of service – a clear inconsistency
- The rest deal with things such as amounts paid for mix supplies

‘Corporation’ and Related Body Corporates

- the definition of Corporation under the CCA mirrors though to the ACL

Section 4 of the CCA 2010 (Cth)

corporation means a body corporate that:

-
- (a) is a foreign corporation;
 - (b) is a trading corporation formed within the limits of Australia
 - (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).

- **foreign corporation** – if you have incorporated outside Australia in another jurisdiction, you are still captured by the ACL and the CCA
- trading corporation –
 - work out by a substantial current activities test – looking at how much commercial activity the company engages in – even if it is not the primary activity
 - look at the constitution, etc (use to ONLY look at the constitution but sometimes not always an accurate portrayal)

Shahid v Australasian College of Dermatologists (2007) 72 IPR 555.

FACTS: Training college, did not charge the Doctors for the actual training to join but had a once a year scientific conference which would make a lot of money for them), where they would get all their money to run the organisation.

HELD: Nicholas J – are they a trading corporation – yes because of this one week

E v Australian Red Cross Society (1991) 99 ALR 601.

FACTS: Red Cross NSW wasn't making any money because the government would wipe out any expenses – therefore generating a lot of money with little shops at the front of hospitals, etc – making roughly 2 mil

HELD – this was more than enough to be considered a trading corp

- Financial corporation –
 - Substantial activities test

-
- Section 2.90 – financial corporations therefore include a wide range financial companies, insurance companies, etc.

Definition of Related Body Corporates

- three things need to be satisfied
 - you own more than 50% shares of assets in the company;
 - you have control of more than 50% of the board of directors;
 - you control the voting power of the company.

‘Trade and Commerce’

- if a product has to be in trade or commerce for the provision to work, then it is limiting
 - What is in trade and commerce and what is in relation to it.

Concrete Constructions (NSW) Pty Ltd v Nelson (1990) 92 ALR 193.

FACTS: Mr Nelson was an employee of CC and fell three stories down a shaft in the course of business. Sued under a range of things. But what the courts had **issue** with was whether the communication given by his supervisor one that was given IN trade or commerce or in respect of or incidental to? The words in the legislation state that a person in such a corporation shall not, in trade or commerce, engage in conduct that is misleading.

HELD: Majority HELD that it was incidental to the construction of the building and the negotiations between the owner and constructors are communications IN trade or commerce. Here, instructions internally to an employer were not **commercial in character**. Nelson therefore not successful

- Private Sale and Business
 - One off private sale of land by a vendor is generally not considered to be in TOC
 - E.g. – sales private property – real estate agents and lawyers DANGER ZONE

O’Brien v Smolonogov (1983) 53 ALR 107.

FACTS: Obrien advertised that they had 2 portions of property in Jindabyne. Smolon wanted to buy the land with a friend – rang them up. O made the representations about the land that were NOT TRUE. S purchased the land with friend buy subsequently sued for misleading conduct.

HELD: FFC held there was NOT enough for it to be considered in TOC. This was because it was not regular basis and not commercial in character.

Argy v Blunt & Lane Cove Real Estate Pty Ltd (1990) 94 ALR 719.

FACTS: Raymone Cooks was a vendor and hired real estate agents for a particular property. Argy read the advertisements in the newspaper, which made some false representations. He went to the auction and was the highest bidder but the price was negotiated and ultimately got sale of the property. In this time period, he requested a full copy of the contract and it wasn't clear who's fault it was but the final page of the contract was missing which was a 149 certificate (important) – says there was an restraint on the land

HELD: The real estate agent was found liable – did not really matter who did it because the real estate agent was engaging in TOC

[Contrast this case with?]

Lubidineuse v Bevanere Pty Ltd (1984) 55 ALR 273.

FACTS: One off sale of a business and YES said to be in TOC even though it was a vendor. Bevanere was an owner of a company – Lubidineuse wanted to buy it but said she would not unless a particular employee stayed because she did not know the area very well. Sale went ahead and the employee resigned three days after the purchase.

HELD: Wilcox J said that this is different because they were representations made in a commercial character. Representation was made based on a person about good will – commerce. Therefore considered to be in TOC.

- Contrast this to personal property – chattels
 - When you sell things on the internet – selling one thing you'll be fine but selling lots of the one thing, you will be caught

Public Statements, Debates and Education

Plimer v Roberts (Noah's Ark Case) (1997) 150 ALR 235.

FACTS: Plimer was a professor in geology. Dr Roberts was going around all around Australia putting on education presentations and conferences talking about his time as a researcher, archaeologist, etc. In a presentation, he said that he stumbled across the remanent of Noah's Ark. Plimer was at this lecture and got hic nickers in a twist about this representation, sued under s 40 of the FTA – misleading conduct to the public.

HELD: FFC saw that Roberts was never paid for these presentations and held that what he was saying wasn't stuff in TOC – theological types of discussion. Nothing of commercial character. However there were people that recorded his lectures and made money from these recordings. If Roberts took money from these recordings, then he would be caught

- Also consider Orion Products

Accessorial Liability

- Sue individuals as secondary liable or accessories to the conduct
- S 75 of the CCA and s 2 you ACL
- ACCS usually sues a company as the primary contravener and then sues accessorial liabilities
 - This is because a company is make up of individual directors
 - ACTS AS A DETTERANT – have to hit them directly
- Two threshold test (*Yorke v Lucas*)
 - You need ACTUAL knowledge of the facts that support the elements of the contravention
 - You need to take some kind of PHYSICAL STEP in engaging in the conduct

Yorke v Lucas (1985) 61 ALR 307.

FACTS: Lucas was a managing director of this company and licenced another company called Treasureways. Yorke wanted to buy this company and during negotiations, a piece of paper was

given to York which said the average weekly turnover was \$3,500.00 – was not true, was less York sued for misleading conduct – but the evidence put forward to the court was that Lucas did not know that the company was not making this amount of money – he was the middle man – not ACTUAL knowledge

HELD: The first element was not satisfied.

R v Tannos

FACTS: Supports the element that you need some reasonable steps. A criminal case. DPP alleged that Tannous was smuggling drugs into the country and that father was involved. The father did not know the specifics

HELD: SC said that the father did not take any active steps – not enough.

- Continual forms of wilful blindness can be deemed to be actual knowledge