

Natural persons bound by the CCA

- **NOTE:** this unit only analyses the application of the Commonwealth version of the ACL
- See ss 5 and 6 of the CCA
- Section 6(3): 'Extension' provision
 - Natural persons engaging in conduct involving the use of postal, telegraphic or telephonic services or taking place in a radio or TV broadcast
 - *O'Brien v Smolonogov* (phone)
 - *Dataflow Computer Services v Goodman* (email)
 - *ACCC v Kaye* (radio and internet)
- Section s(3A): applies to *contracts* for or relating to the use of postal, telegraphic or telephonic services, or radio or television broadcasts
 - T/F Act would apply to a natural person who engages in misleading conduct when promoting a mobile phone contract
- 'Accessorial' liability
- Individuals being 'involved in' a contravention
 - Topic 9

The Crown

- What is the Crown?
 - Government instrumentalities or agents acting in the course of their functions or duties
 - *Burgundy Royale Investments v Westpac Banking Corp* – **Issue** was whether the Northern Territory or the Northern Territory Development Corporation were bound by the TPA.
 - Northern Territory – not intended to be bound by the Act
 - NT Development Corporation – Corporation was intended to perform government functions and t/f should be treated as an agent or emanation of the Crown...the legislative framework in which the Corporation operates makes it clear that it was not intended to have significant degree of autonomy; its members are appointed by the government, it is subject to government control and it is publicly funded and T/F the Corporation is entitled to the immunities of the Crown and is not bound by the Act
- The Commonwealth and State Crowns are presumed not to be bound by the CCA except as otherwise provided
- Section 2A: binds the Commonwealth in so far as it 'carries on a business, either directly or by an authority of the Commonwealth' → t/f Commonwealth and its authorities are to be treated as if they were corporations
 - *JS McMillan Pty Ltd v Commonwealth* – Crown immunity only remains where the Crown's conduct occurred other than when it was engaged in business
 - *Corrections Corporation of Australia v Commonwealth* – Department of Immigration and Multicultural Affairs has centres for 'non-citizens'

entering Australia unlawfully, and the government decided to privatise the provision of these centres. T/F requested a number of applicants to tender for this work, which set out certain criteria and other requirements with which tenders has to comply. Applicant submitted a tender unsuccessfully, and alleged that DIMA had made a number of false representation to induce a submission, in contravention with s 52 of the TPA.

- The **issue** was whether the conduct occurred in trade or commerce
- Court **held** firstly that operating a detention centre is not a trading or commercial activity and secondly that requests for tenders and dealing with prospective tenders it not in itself attempting to trade in goods or provide services, and therefore not carrying on a business. Judge struck out applicants s 52 claim
- State and Territory governments bound by their respective legislation but not CCA
 - 2A impliedly excludes liability
 - *Bradken Consolidated Ltd v BHP*
 - *Also, see Murphy v State of Victoria (2014)*

JS McMillan Pty Ltd v Commonwealth (1997)

- 3 criteria to be met
 - 1) The Commonwealth must have engaged in a relevant course of conduct displaying 'system and regularity'. A single transaction is insufficient.
 - 2) The systematic activity must be of a 'business kind', not governmental or regulatory in nature, or an activity traditionally regarded as the core functions of government: such as law enforcement, the operation of detention centres, the operation of employment centres, the acquisition of property, disease control policies, and entering into joint ventures with the private sector to perform essentially government services. None of these is 'carrying on a business'.
 - 3) The Commonwealth is only bound *insofar as* it carries on a business. So, the impugned conduct must occur in the course of carrying on the business. This element was not satisfied in *McMillan*. Whilst the AGPS was carrying on a business, the Commonwealth's one-off decision to sell it off did not itself amount to carrying on a business.

'In trade or commerce'

- **NB: separate to 'trading corporation' requirement**
- See, e.g.
 - *E v Australian Red Cross Society*
 - *Orion Pet Products Pty Ltd v RSPCA (Vic)*
- 'Trade or commerce' defined in s 2 of the ACL as meaning:
 - a) trade or commerce within Australia, or
 - b) trade or commerce between Australia and places outside Australia

- and includes any business or professional activity (whether or not carried on for profit)
- 'In' – conduct must itself be trading or commercial in nature, it is not sufficient for it to be merely connected with or incidental to, the very conduct itself must be of that character

Concrete Constructions v Nelson

- **Facts:**
 - Nelson, an employee of Concrete Constructions Pty Ltd, was injured when he fell to the bottom of a shaft
 - He alleged that the accidents occurred as of a result of misleading assurance given to him by a foreman of the company that a grate at the entry of the shaft was secure
 - He took action under section 52 (now s 18 - ACL) of the *Trade Practices Act* 1974 in order to avoid the limitations under the relevant Workers Compensation legislation in NSW
 - He alleged, inter alia, that the foreman's conduct was misleading and deceptive
 - By consent, an order was made that it be decided before trial whether the facts gave rise to a cause of action under the TPA
- **Held:**
 - Construed the expression 'in trade or commerce' as referring only to conduct with the character of an aspect or element of trading or commercial activities or transactions
 - The conduct of the foreman was not 'in' trade or commerce.
 - Significant case for authorities for the element of 'in' trade or commerce for Section 18
 - In the context of the act, it is plain that section 52 was not meant to extend to all conduct – section is concerned with conduct towards persons, consumers or not, where transactions are of trading or commercial character

Plimer v Roberts

- **Facts:**
 - Professor Plimer, a member of the Australian Skeptics, claimed that the respondent, Dr Roberts, an ordained Christian Minister, contravened s 42(1) of the Fair Trading Act 1987 (NSW) (the NSW equivalent of s 52 of the TPA) by making misleading and deceptive statements in a course of lectures concerning the location of Noah's Ark.
 - The lectures were promoted and taped by the Noah's Ark Research Foundation (NARF) and copies were sold to members of the public
 - At first instance, Sackville J found that Dr Roberts had made three false representations. These included representations that he had used powerful metal detectors in his search for the Ark and that artifacts found at the alleged site of the Ark had been subjected to careful and objective scientific scrutiny.

- His Honour dismissed Professor Plimer's claim on the grounds that Dr Roberts' representations had not been made in trade or commerce.
- Professor Plimer appealed
- **Held:**
 - The conduct of Dr Roberts was not 'in' trade or commerce
 - Delivering of lectures are not in trade or commerce, even if charging or selling of institution is
 - The delivery of the lectures was not inherently a trading or commercial activity, and the misrepresentations, made in the course of giving them, were not in the nature of a promotion of NARF's selling of tickets or video tapes/audio
 - Emphasised that 'in' does not mean 'in relation to' or 'in connection to'

The conduct must be of a trading or commercial character

- **Concrete Constructions v Nelson**
 - It is not sufficient that the conduct merely occurred in the overall course of D's trading or commercial activities
 - The conduct must *of itself* be of a trading or commercial character; it must occur in, or as part of, a particular commercial dealing or transaction
 - Promotional activities in relation to, or for the purpose of, the supply of goods or services to actual or potential consumers are a clear example of activities having a 'trading or commercial character' – the fact that a promotional activity is not direct at consumers does not result in it not having a 'trading or commercial character'
- **Plimer v Roberts**
 - The misrepresentations were not *about* the services (lectures) or *about* the goods (audio or video tapes of the lectures) but were *part of the* lectures *themselves*
 - *Per Lindgren J*
- **Versace v Monte**
 - The Defendant wrote and promoted a book in which he alleged that the plaintiff had connections with the Mafia and was involved in criminal activities including blackmail and money laundering
 - Court held that the defendant's conduct in writing, disseminating and promoting the book were in trade or commerce "in the sense that the publishing of a book for sale is an activity of an author of a commercial character"
 - Note: Overlap with Section 18 and the law of defamation
- **Murphy v State of Victoria (2014)**
 - An action brought by a resident opposed to the East West Link who was claiming misleading or deceptive conduct by the Victorian Government
 - The claim was that the Government's figures for projected traffic volumes and the net economic benefit of the project were misleading as they were not based on standard methodology.
 - Was the conduct 'in' trade or commerce?