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Commercial law

Course Code: BTC1110 • Module 3 Notes

Module 3: Australian Consumer Law (ACL), Law of Torts & Professional Negligence

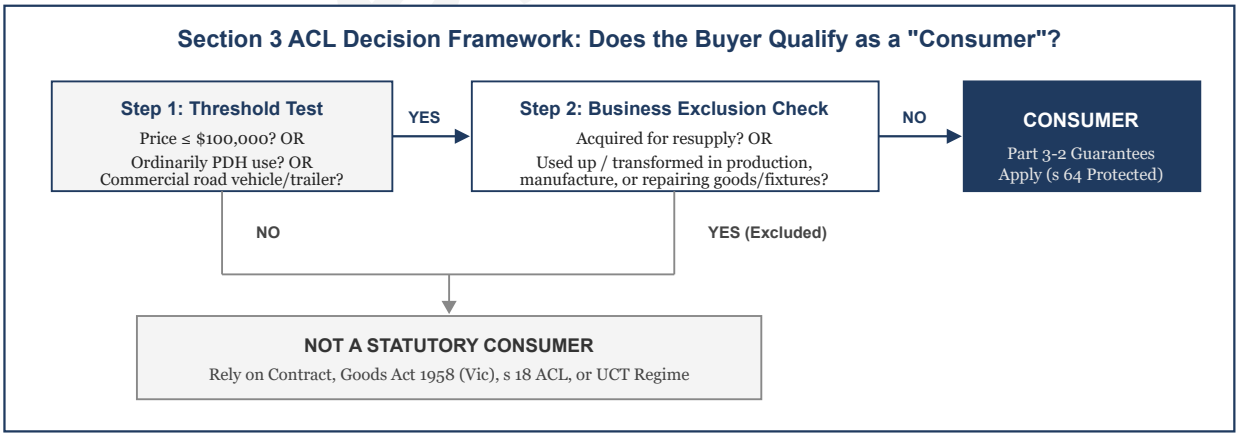
3.1 Statutory Architecture of the Australian Consumer Law (ACL)

Traditional common law contract rules—rooted in *caveat emptor* ("let the buyer beware") and privity—frequently left consumers and small businesses vulnerable to information asymmetry, standard-form exclusions, and misleading marketing. To establish a single, uniform national consumer protection regime across Australia's federal structure, the Commonwealth, States, and Territories enacted the **Australian Consumer Law (ACL)**, housed in **Schedule 2 to the *Competition and Consumer Act 2010* (Cth)** (CCA). At the Commonwealth level, the ACL applies primarily to the conduct of corporations (relying on s 51(xx) of the Constitution). Each State and Territory simultaneously adopted the identical ACL text as State/Territory law—in Victoria, via the *Australian Consumer Law and Fair Trading Act 2012* (Vic)—extending ACL coverage to sole traders, partnerships, and unincorporated businesses operating within Victoria.

Regulatory enforcement is shared under a "one-law, multi-regulator" cooperative model between the **Australian Competition and Consumer Commission (ACCC)** at the national level and State/Territory agencies such as **Consumer Affairs Victoria (CAV)** (with financial products and services governed by parallel provisions in the *Australian Securities and Investments Commission Act 2001* (Cth) enforced by ASIC).

Who Is a "Consumer" Under Section 3 of the ACL?

While general prohibitions such as s 18 (misleading or deceptive conduct) protect *all* persons—including rival corporations—the statutory **consumer guarantees** (Part 3-2) apply only where goods or services are acquired by a **"consumer"** as defined in **s 3 of the ACL**. Following legislative reforms effective 1 July 2021, the monetary threshold increased from $40,000 to **$100,000**. Notably, business buyers—not merely private households—frequently qualify as statutory "consumers" under s 3.



Thus, if a Melbourne accounting firm purchases an office espresso machine for $6,500 or an accounting software licence for $45,000 (not for resupply or manufacturing transformation), the firm is a "consumer" under s 3 because the price does not exceed $100,000. Conversely, a bakery buying

$15,000 of flour to bake into bread for sale is *not* a consumer because the flour is transformed in production for resupply, though the bakery buying a $95,000 commercial delivery van *is* a consumer both under the monetary cap and under the commercial road vehicle limb.

3.2 Misleading or Deceptive Conduct (Section 18 ACL) and Specific Unfair Practices

Section 18(1) of the ACL provides: "A person must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive." Originally enacted as s 52 of the *Trade Practices Act 1974* (Cth), s 18 is one of the most heavily litigated provisions in Australian commercial law because liability is **strict** (no proof of fraud, intent, or negligence is required) and cannot be excluded by contractual disclaimers.

Key Elements of Section 18

1. **"A Person":** Captures corporations (under the CCA) and natural persons, partnerships, and sole traders (under State ACL Application Acts).
2. **"In Trade or Commerce":** The conduct must bear a trading or commercial character as an integral aspect of business activity, rather than being purely private (such as selling one's private residence—*O'Brien v Smolonogov* (1983) 53 ALR 107) or an internal workplace communication not directed at commercial dealings (*Concrete Constructions (NSW) Pty Ltd v Nelson* (1990) 169 CLR 594).
3. **"Engage in Conduct":** Covers active statements, advertisements, product packaging, visual imagery, and **silence** where the circumstances give rise to a reasonable expectation of disclosure—such as selling a restaurant while concealing that its licensed seating capacity was unlawfully overstated (*Henjo Investments Pty Ltd v Collins Marrickville Pty Ltd* (1988) 39 FCR 546; *Demagogue Pty Ltd v Ramensky* (1992) 39 FCR 31). Merely acting as an innocent conduit passing on third-party advertising without adopting or endorsing it does not breach s 18 (*Google Inc v ACCC* (2013) 249 CLR 435; *Yorke v Lucas* (1985) 158 CLR 661).
4. **"Misleading or Deceptive or Likely to Mislead or Deceive":** Conduct is assessed objectively against the relevant target audience (*Campomar Sociedad, Limitada v Nike International Ltd* (2000) 202 CLR 45—asking how an ordinary and reasonable member of the targeted class would react, disregarding extreme or fanciful misunderstandings). Mere **sales puffery** (obvious hyperbole no reasonable consumer takes literally) does not breach s 18, whereas specific factual or comparative claims do. Under **s 4 of the ACL**, a representation regarding a **future matter** (such as projected franchise profits) is deemed misleading unless the maker adduces evidence of **reasonable grounds** for making it at the time.

Crucially, parties cannot contract out of s 18 through exclusion or "entire agreement" clauses (*Byers v Dorotea Pty Ltd* (1986) 69 ALR 715), though a clear, contemporaneous disclaimer may prevent conduct from being misleading in fact if it dispels the false impression before the plaintiff relies on it (*Butcher v Lachlan Elder Realty Pty Ltd* (2004) 218 CLR 592). Breach of s 18 does not itself attract criminal fines or civil pecuniary penalties, but triggers potent civil remedies: injunctions (s 232), damages (s 236), and broad remedial orders including rescission, contract variation, or corrective advertising (ss 237, 243, 246).

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Statutory Unconscionable Conduct and Specific Prohibitions

Beyond s 18, Part 2-2 and Chapter 3 of the ACL impose strict standards backed by heavy civil pecuniary penalties:

- **Unconscionable Conduct (ss 20–22 ACL):** Section 20 incorporates the unwritten equitable doctrine (such as *Amadio*), while **s 21** prohibits unconscionable conduct in connection with the supply or acquisition of goods or services in trade or commerce, guided by non-exhaustive statutory factors in **s 22** (relative bargaining strength, compliance with industry codes, unfair tactics, lack of good faith). In *ACCC v Kobelt* (2019) 267 CLR 1, the High Court clarified that statutory unconscionability requires conduct departing significantly from accepted societal and commercial norms of conscience—not mere hard bargaining.
- **False or Misleading Representations (s 29):** Prohibits specific false claims regarding quality, grade, origin ("Made in Australia"), sponsorship, price reductions, or the existence/effect of consumer guarantees.
- **Other Unfair Practices:** Bait advertising without reasonable stock for a reasonable period (s 35), wrongly accepting payment without intending or being able to supply (s 36), referral selling (s 49), pyramid schemes (s 44), and unsolicited consumer agreements with mandatory cooling-off rights (ss 69–95).

3.3 Consumer Guarantees, Remedies, and Civil Pecuniary Penalties

Part 3-2 Division 1 of the ACL replaces old implied contractual terms with non-excludable statutory **consumer guarantees** enforceable directly by consumers against suppliers and, in specific respects, manufacturers.

ACL Section	Consumer Guarantee	Substantive Scope & Commercial Requirements
ss 51–53	Title, Undisturbed Possession, No Undisclosed Securities	Supplier guarantees right to sell goods, buyer's undisturbed possession, and freedom from undisclosed security interests (e.g., PPSR encumbrances).
s 54	Acceptable Quality (Goods)	Goods must be fit for all ordinary purposes, acceptable in appearance and finish, free from defects, safe, and durable, judged by a reasonable consumer considering price and description.
s 55	Fitness for Disclosed Purpose (Goods)	Goods must be reasonably fit for any specific purpose expressly or impliedly made known to the supplier by the consumer, provided the consumer reasonably relied on the supplier's skill or judgment.
s 56–59	Description, Sample, Repairs/Spare Parts, Express Warranties	Goods must match description (s 56) and sample (s 57); manufacturers must take reasonable action to ensure repair facilities and spare parts are available for a reasonable period (s 58); express warranties must be honoured (s 59).
ss 60–62	Services: Due Care & Skill, Fitness for Purpose, Reasonable Time	Services must be rendered with due care and skill (s 60), be reasonably fit for any disclosed purpose or expected result (s 61), and be supplied within a reasonable time if no timeframe is fixed (s 62).

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Under **s 64**, any contractual term purporting to exclude, restrict, or modify these consumer guarantees is **void** (and misrepresenting that consumers have "no refunds" breaches s 29(1)(m)). A narrow exception exists under **s 64A**: for goods or services *not* ordinarily acquired for personal, domestic, or household use (e.g., commercial B2B purchases under $100,000), a supplier may contractually limit its liability—fairly and reasonably—to repairing, replacing, or resupplying the goods/services or paying the cost thereof.

Major vs Minor Failures, Manufacturer Liability, and Product Safety (Parts 3-3, 3-5 & 5-4 ACL)

Remedies depend on the severity of non-compliance. For goods, a **major failure** (s 260) occurs where the goods would not have been acquired by a reasonable consumer fully aware of the defect, depart significantly from description, are substantially unfit for purpose and cannot easily be remedied within a reasonable time, or are unsafe—or where multiple minor failures accumulate. For a **major failure**, the consumer chooses: reject the goods for a full refund or replacement, or retain them and claim compensation for drop in value plus foreseeable consequential loss. For a **minor failure**, the supplier chooses how to remedy within a reasonable time (repair, replace, or refund); if the supplier refuses or delays unreasonably, the consumer may reject the goods or have them repaired elsewhere and recover costs. Parallel rules govern services (ss 267–268). Furthermore, under **s 271**, a consumer may recover damages directly from a **manufacturer** (including an importer where the overseas manufacturer has no Australian place of business) for breaches of acceptable quality (s 54), description (s 56), spare parts (s 58), or express warranties (s 59).

Separately, **Part 3-5 of the ACL** imposes strict statutory liability on manufacturers where goods supplied in trade or commerce have a **safety defect**—meaning their safety is not such as persons generally are entitled to expect having regard to marketing, warnings, packaging, and foreseeable use (s 9)—and that defect causes personal injury, death, or damage to other personal/household property (*Carey-Hazell v Getz Bros & Co (Aust) Pty Ltd* [2004] FCA 853; *Merck Sharp & Dohme (Australia) Pty Ltd v Peterson* (2011) 196 FCR 145). Defences under s 142 include that the defect did not exist when supplied, compliance with a mandatory standard caused the defect, or the state of scientific or technical knowledge at supply could not have enabled discovery of the defect (the "development risks" defence). Under **Part 3-3**, the Commonwealth Minister may prescribe mandatory safety standards, impose interim or permanent product bans, and order compulsory recalls; suppliers conducting a voluntary safety recall must notify the ACCC within two days (s 128), and suppliers aware that consumer goods have caused death, serious injury, or illness must submit a mandatory report within two days (s 131).

Accessorial Liability ("Involved in a Contravention", Section 2 ACL)

Regulatory liability under the ACL is not confined to the primary corporate entity. Under **s 2(1)** and remedial provisions such as s 224 and s 236, civil pecuniary penalties and damages extend to any natural person—such as a company director, marketing manager, or external consultant—who is **"involved in a contravention"** by aiding, abetting, counselling, procuring, or being knowingly concerned in the contravention. In *Yorke v Lucas* (1985) 158 CLR 661, the High Court established that accessorial liability requires *actual knowledge* of the essential facts constituting the contravention (not merely constructive knowledge or negligence), though wilful blindness may satisfy actual knowledge. Where proven, individual officers face personal civil pecuniary penalties up to $2,500,000 per contravention under s 224(3) and disqualification from corporate management.

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Quantitative Example: Civil Pecuniary Penalties (Section 224 ACL)

To deter systemic corporate misconduct under Part 2-2 (unconscionable conduct), Chapter 3 (false representations, unfair practices, product safety), and the Unfair Contract Terms regime, the *Treasury Laws Amendment (More Competition, Better Prices) Act 2022* (Cth) enacted a five-fold increase in maximum civil pecuniary penalties under **s 224(3A) of the ACL**. For a body corporate, the maximum penalty per contravention is the *greatest* of three statutory limbs:

$$P_{\text{corp, max}} = \max\left(\text{AUD } 50{,}000{,}000,\ \ 3 \times B,\ \ 0.30 \times T_{\text{adj}}\right)$$

Where:

- $P_{\text{corp, max}}$ = maximum statutory civil pecuniary penalty per contravention for a body corporate (AUD).
- $\text{AUD } 50{,}000{,}000$ = fixed baseline statutory corporate cap ($50,000,000).
- B = total value of the benefit obtained directly or indirectly by the body corporate (and related bodies corporate) reasonably attributable to the contravention (AUD).
- T_{adj} = adjusted turnover of the body corporate during the breach turnover period (minimum 12 months preceding the end of the contravention) (AUD).

Worked Numerical Example: Suppose an Australian national electronics retailer makes systematic false representations under s 29(1)(m) of the ACL over an 18-month period claiming extended warranties are mandatory. The Federal Court determines that the net commercial benefit reasonably attributable to the unlawful sales was $B = \$22{,}000{,}000$, and the retailer's adjusted turnover during the 18-month breach turnover period was $T_{\text{adj}} = \$420{,}000{,}000$.

1. **Step 1 (Fixed Baseline Limb):** $50,000,000.
2. **Step 2 (Three-Times Benefit Limb):** Compute $3 \times B = 3 \times \$22{,}000{,}000 = \$66{,}000{,}000$.
3. **Step 3 (30% Adjusted Turnover Limb):** Compute $0.30 \times T_{\text{adj}} = 0.30 \times \$420{,}000{,}000 = \$126{,}000{,}000$.
4. **Step 4 (Maximum Exposure):** Taking the maximum of the three limbs yields $P_{\text{corp, max}} = \$126{,}000{,}000$ per contravention (the largest of $50,000,000, $66,000,000, and $126,000,000), compared with $2,500,000 maximum for an individual under s 224(3). Courts then apply the *French factors* (deterrence, deliberateness, seniority of management, compliance culture, and cooperation) to set the actual penalty within that ceiling.

3.4 Unfair Contract Terms (UCT) Regime (Sections 23–28 ACL)

Standard-form "take-it-or-leave-it" contracts create acute risks of one-sided risk allocation. Under **Part 2-3 (ss 23–28) of the ACL**, an unfair term in a standard-form **consumer contract** or **small business contract** is void, while the remainder of the contract continues if capable of operating without the unfair term. Crucially, under reforms taking effect in **November 2023**, proposing, applying, or relying on an unfair term in a standard-form contract is no longer merely void—it is an actionable contravention attracting the s 224 civil pecuniary penalties calculated above.

- **Expanded Small Business Scope (Nov 2023):** Applies where at least one party is a business employing **fewer than 100 persons** OR having an annual turnover of **less than $10,000,000** for the last income year (with the previous upfront price threshold cap abolished).
- **Standard Form Contract (s 27):** Presumed standard-form unless the proponent proves genuine negotiation; courts consider inequality of bargaining power, whether the contract was prepared prior to discussion, and "take-it-or-leave-it" presentation.
- **Three-Limb Test of Unfairness (s 24(1)):** A term is unfair if: (1) it would cause a **significant imbalance** in the parties' rights and obligations; (2) it is **not reasonably necessary** to protect the legitimate interests of the advantaged party (presumed unnecessary unless proved otherwise); and (3) it would cause **detriment** (financial or otherwise) if applied or relied on. Courts also evaluate **transparency** (plain language, legibility, prominence) and the contract as a whole (s 24(2)–(3)).
- **Grey List (s 25) & Exclusions (s 26):** Indicative unfair terms include unilateral termination, unilateral variation of price or terms, automatic renewal traps, and one-sided indemnity or limitation clauses. Terms defining the **main subject matter** or setting the **upfront price** payable are excluded from UCT review (s 26).

3.5 The Law of Torts and the Tort of Negligence

A **tort** is a civil wrong (other than a breach of contract) arising from infringement of an interest protected by general law, entitling the injured victim to compensation or injunctive relief. Unlike contractual duties, tortious obligations are imposed by law independently of any prior agreement between the parties. While business operators must guard against intentional torts—including trespass to land or goods, conversion, deceit, passing off, defamation, and inducing breach of contract—the dominant tort in commercial risk management is the **tort of negligence**.

Modern negligence law originated in *Donoghue v Stevenson* [1932] AC 562 (where Lord Atkin formulated the "neighbour principle": one must take reasonable care to avoid acts or omissions reasonably foreseeable as likely to injure persons so closely and directly affected by one's conduct), applied swiftly in Australia in *Grant v Australian Knitting Mills Ltd* [1936] AC 85. In Victoria, common law negligence principles are substantially codified and modified by **Part X of the *Wrongs Act 1958* (Vic)**. To succeed in negligence, the plaintiff must prove three cumulative elements on the balance of probabilities—**Duty of Care**, **Breach of Duty**, and **Causation and Remoteness of Damage**—subject to affirmative defences.

Element 1: Duty of Care

For physical injury or property damage within **established categories**—manufacturer to ultimate consumer, occupier to lawful entrant (*Australian Safeway Stores Pty Ltd v Zaluzna* (1987) 162 CLR 479), employer to employee, road user to road user, and professional to client—a duty of care is well settled. Where the claim arises in a **novel category** (especially claims for pure economic loss or psychiatric harm), Australian courts reject rigid proximity formulas and apply the High Court's **salient features (multi-factorial) approach** (*Sullivan v Moody* (2001) 207 CLR 562; *Perre v Apand Pty Ltd* (1999) 198 CLR 180). Relevant salient features include: reasonable foreseeability of harm, the

plaintiff's **vulnerability** (inability to protect themselves via contract or insurance), the defendant's control over the risk, assumption of responsibility, and whether imposing a duty would create indeterminate liability or undermine coherent statutory or commercial autonomy.

3.6 Breach of Duty, Causation, Remoteness, and Defences

Element 2: Breach of Duty (Section 48 *Wrongs Act 1958* (Vic))

Once a duty is established, the court asks whether the defendant fell below the objective standard of care expected of a reasonable person in the defendant's position (applying higher skill standards to specialists, *Rogers v Whitaker* (1992) 175 CLR 479, without discounting for learner inexperience, *Imbree v McNeilly* (2008) 236 CLR 510). Under **s 48(1) of the *Wrongs Act 1958* (Vic)**, a person is not negligent in failing to take precautions against a risk of harm unless: (a) the risk was **foreseeable** (knew or ought to have known); (b) the risk was **not insignificant** (a stricter threshold than "not far-fetched or fanciful" under *Wyong Shire Council v Shirt* (1980) 146 CLR 40); and (c) in the circumstances, a reasonable person would have taken those precautions.

In determining (c), **s 48(2)** requires weighing the four-factor **calculus of negligence**:

1. **Probability** that harm would occur if care were not taken (*Bolton v Stone* [1951] AC 850).
2. **Likely seriousness (gravity)** of the harm (*Paris v Stepney Borough Council* [1951] AC 367—higher care owed to a one-eyed worker).
3. **Burden of taking precautions** to avoid the risk, including cost, time, and operational disruption (*Romeo v Conservation Commission (NT)* (1998) 192 CLR 431; *Woods v Multi-Sport Holdings Pty Ltd* (2002) 208 CLR 460).
4. **Social utility** of the activity creating the risk (*Watt v Hertfordshire County Council* [1954] 1 WLR 835—emergency rescue vehicles).

Element 3: Causation and Scope of Liability (Section 51 *Wrongs Act 1958* (Vic))

Under **s 51(1) of the *Wrongs Act 1958* (Vic)**, causation comprises two distinct inquiries:

- **Factual Causation (s 51(1)(a)):** Whether the negligence was a *necessary condition* of the occurrence of the harm—essentially the statutory **"but for" test** (*Barnett v Chelsea & Kensington Hospital Management Committee* [1969] 1 QB 428; *Strong v Woolworths Ltd* (2012) 246 CLR 182, holding that failure to operate an inspection system caused a customer's slip on a hot chip). Where multiple causes interact, common-sense causal responsibility applies (*March v E & MH Stramare Pty Ltd* (1991) 171 CLR 506), unless a voluntary, extraordinary independent event breaks the chain of causation (*novus actus interveniens*).
- **Scope of Liability / Remoteness (s 51(1)(b)):** Whether it is appropriate for the scope of the negligent person's liability to extend to the harm so caused. At common law, damage is too remote unless the *kind or type* of injury was reasonably foreseeable (*Overseas Tankship (UK) Ltd v Morts Dock & Engineering Co Ltd (The Wagon Mound (No 1))* [1961] AC 388; *The Wagon Mound (No 2)* [1967] 1 AC 617). However, under the **eggshell skull rule**, once the kind of injury is foreseeable, the defendant takes the victim as found and is liable for its unexpectedly severe extent (*Smith v Leech Brain & Co Ltd* [1962] 2 QB 405).

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Defences and Vicarious Liability

Defence / Doctrine	Legal Principles & Statutory Basis	Commercial Impact & Cases
Contributory Negligence	Plaintiff failed to take reasonable care for own safety, contributing to injury (s 26 & s 62 *Wrongs Act 1958* (Vic)).	Partial defence: damages apportioned and reduced by court according to plaintiff's share of responsibility (*Liftronic Pty Ltd v Unver* (2001) 179 ALR 321).
Voluntary Assumption of Risk (*Volenti*)	Plaintiff had full knowledge of the precise risk and voluntarily consented to accept physical and legal risk.	Complete defence, though narrowly applied (*Rootes v Shelton* (1967) 116 CLR 383); aided by s 54 obvious risk presumptions.
Obvious & Inherent Risks	No duty to warn of an obvious risk unless requested or professional advice (ss 53–56 *Wrongs Act*).	Protects recreational, hospitality, and sport service providers against obvious-hazard claims.
Vicarious Liability	Employer is strictly liable for torts committed by an **employee** acting within the course and scope of employment (not independent contractors).	Multi-factor "totality of relationship" test (control, equipment, integration, contract terms): *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21; *ZG Operations Australia Pty Ltd v Jamsek* (2022) 275 CLR 254.

3.7 Professional Negligence, Negligent Misstatement, and Proportionate Liability

Accountants, auditors, financial planners, valuers, lawyers, and engineers frequently cause **pure economic loss**—financial harm unaccompanied by physical injury or property damage—through careless advice or certification.

Negligent Misstatement: From *Hedley Byrne* to *Esanda Finance*

In *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465, the House of Lords first recognised that negligent words causing pure economic loss can ground a duty of care where a "special relationship" of reliance exists (though an effective disclaimer negated liability there). The High Court developed Australian principles across three foundational decisions:

- ***Mutual Life & Citizens' Assurance Co Ltd v Evatt* (1968) 122 CLR 556 / *Shaddock & Associates Pty Ltd v Parramatta City Council (No 1)* (1981) 150 CLR 225:** A speaker owes a duty of care whenever giving information or advice in a serious business matter where the speaker knows or ought to know the recipient intends to rely on it, and it is reasonable for the recipient to rely on the speaker's care and competence (whether or not the speaker claims formal professional qualifications).
- ***San Sebastian Pty Ltd v Minister Administering the Environmental Planning and Assessment Act 1979* (1986) 162 CLR 340:** Liability for statements circulated generally

requires proof that the speaker intended to induce the plaintiff (or a class including the plaintiff) to act in a particular way.

- ***Esanda Finance Corporation Ltd v Peat Marwick Hungerfords* (1997) 188 CLR 241:** Addressing third-party claims against statutory auditors, the High Court held that an auditor does *not* owe a duty of care to every investor or lender who merely foresees relying on audited financial statements. To prevent indeterminate liability, a third-party claimant must prove that the auditor knew or ought reasonably to have known that the report would be communicated to the plaintiff (or specific class) for a purpose likely to enter a specific transaction, and intended or knew the plaintiff would rely on it without independent inquiry.

Where a professional is sued for breach of duty, **s 59 of the *Wrongs Act 1958* (Vic)** provides a statutory **peer professional opinion defence**: a professional is not negligent if they acted in a manner widely accepted in Australia by peer professional opinion as competent professional practice, unless the court determines that opinion is unreasonable.

Proportionate Liability (Part IVAA *Wrongs Act 1958* & Part VIA CCA)

Historically, under joint and several liability, a plaintiff suffering $1,000,000 in economic loss caused 10% by a wealthy audit firm and 90% by an insolvent property developer could recover 100% of the loss from the "deep-pocket" auditor. To address escalating professional indemnity insurance premiums, Victorian and Commonwealth Parliaments enacted **proportionate liability** regimes—**Part IVAA of the *Wrongs Act 1958* (Vic)** (for negligence and contractual breaches of care causing economic loss or property damage) and **Part VIA of the *Competition and Consumer Act 2010* (Cth)** (for s 18 ACL misleading conduct claims). Under proportionate liability, liability for an "apportionable claim" is divided strictly among all **concurrent wrongdoers** according to each wrongdoer's share of responsibility—meaning the plaintiff bears the insolvency risk of any bankrupt wrongdoer (unless a wrongdoer acted intentionally or fraudulently).

$$L_i = D_{\text{apportionable}} \times \left(\frac{w_i}{\sum_{k=1}^{n} w_k}\right)$$

Where:

- L_i = maximum damages payable by concurrent wrongdoer i under proportionate liability (AUD).
- $D_{\text{apportionable}}$ = total assessed economic loss or property damage recoverable in the apportionable claim (after any deduction for plaintiff's own contributory negligence) (AUD).
- w_i = percentage or fractional share of responsibility attributed by the court to concurrent wrongdoer i ($\sum w_k = 100\%$).
- n = total number of concurrent wrongdoers (whether or not all are joined or solvent).

Worked Numerical Example: A Melbourne commercial lender advances funds in reliance on both a negligent financial statement audit by Firm A and an inflated property valuation by Valuer B, alongside fraudulent cash-flow projections by Developer C (now in liquidation). The lender suffers total proven

economic loss of $2,400,000, reduced by 10% for the lender's own contributory negligence in failing to verify bank statements. The court apportions responsibility among the three concurrent wrongdoers as follows: Firm A (25%), Valuer B (35%), and insolvent Developer C (40%).

1. **Step 1 (Deduct Contributory Negligence):** Compute net apportionable damages $D_{\text{apportionable}} = \$2{,}400{,}000 \times (1 - 0.10) = \$2{,}160{,}000$.
2. **Step 2 (Firm A's Proportionate Liability):** Compute $L_A = \$2{,}160{,}000 \times 0.25 = \$540{,}000$.
3. **Step 3 (Valuer B's Proportionate Liability):** Compute $L_B = \$2{,}160{,}000 \times 0.35 = \$756{,}000$.
4. **Step 4 (Developer C's Share & Unrecovered Shortfall):** Developer C's share is $L_C = \$2{,}160{,}000 \times 0.40 = \$864{,}000$. Because Part IVAA / Part VIA replaces joint and several liability with several proportionate liability, the lender can recover at most $540,000 + $756,000 = $1,296,000 from the two solvent professionals and must absorb the $864,000 insolvency shortfall attributable to Developer C.

Non-Delegable Duties and Pure Economic Loss in Construction & Supply Chains

While vicarious liability generally excludes liability for independent contractors, a business may still owe a personal **non-delegable duty** to ensure that reasonable care is taken by contractors in specific high-control relationships—including employer to employee (*Kondis v State Transport Authority* (1984) 154 CLR 672), hospital to patient, school to pupil, and occupiers introducing ultra-hazardous substances onto commercial premises (*Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520, involving welding sparks igniting insulating foam stored in a cold-store). Separately, in pure economic loss cases outside negligent misstatement—such as negligent damage to third-party infrastructure (*Caltex Oil (Australia) Pty Ltd v The Dredge 'Willemstad'* (1976) 136 CLR 529) or latent building defects (*Woolcock Street Investments Pty Ltd v CDG Pty Ltd* (2004) 216 CLR 515; *Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288* (2014) 254 CLR 185)—Australian courts scrutinise whether the commercial purchaser had contractual bargaining power to negotiate warranties or defects-liability clauses; where sophisticated commercial parties could have protected themselves by contract, courts deny a tortious duty for lack of vulnerability.

3.8 Strategic Comparison: Contract vs Negligence vs Section 18 ACL

In commercial litigation, a single defective product, faulty audit, or misleading sales pitch frequently triggers overlapping claims in contract, tort, and statute. Understanding their strategic distinctions is vital for commercial risk management:

Dimension	Breach of Contract	Tort of Negligence	Section 18 ACL (Misleading Conduct)
Source of Obligation	Voluntarily assumed promises between contracting parties (privity required).	General law + *Wrongs Act 1958* (Vic) duty owed to foreseeable neighbours (no privity needed).	Mandatory statutory prohibition on conduct "in trade or commerce" (no privity needed).

Dimension	Breach of Contract	Tort of Negligence	Section 18 ACL (Misleading Conduct)
Standard of Liability	Strict liability (proof of breach suffices; fault irrelevant unless due-care term).	Fault-based: requires failure to take reasonable care (s 48 calculus).	Strict liability: intention, good faith, and reasonable care are no defence (except s 4 reasonable grounds).
Exclusion Clauses	Enforceable if properly incorporated and clearly drafted (subject to ACL s 64 & UCT).	May disclaim duty or limit liability if clearly worded and brought to notice.	Cannot be excluded by contract (*Byers v Dorotea*); clear disclaimer may negate misleading effect in fact.
Measure of Damages	**Expectation loss** (place plaintiff in position as if contract performed).	**Restoration** (place plaintiff in position as if tort had not occurred).	**Reliance / actual loss** under s 236 (analogous to tort; rarely expectation loss).
Limitation Period (Vic)	6 years from date of breach (s 5 *Limitation of Actions Act 1958* (Vic)).	6 years from date damage suffered (3 years for personal injury).	6 years from date cause of action accrued (s 236(2) ACL).
Proportionate Liability	Applies to economic loss/property damage claims for breach of contractual duty of care (Pt IVAA *Wrongs Act*).	Applies to economic loss/property damage claims (Pt IVAA *Wrongs Act*).	Applies to s 18 economic loss/property damage claims (Pt VIA CCA), unless intentional/fraudulent.

Worked Legal Problem Analysis (IRAC): Consumer Guarantees, s 18 ACL, and Negligent Misstatement

Fact Scenario: Yarra Valley Robotics Pty Ltd sells an automated commercial packaging machine for $78,000 to Harvest Fresh Orchards Pty Ltd after Harvest Fresh's operations director specifically states in an email that the machine must handle wet cold-room condensation at 2°C. Yarra Valley's sales brochure states unconditionally that the machine "operates reliably in all cold-chain environments," and its sales contract contains a clause stating: "All implied warranties and liability for consequential loss are excluded." Within three weeks, condensation shorts the machine's control board, destroying $18,000 of packaged fruit and halting packing for ten days.

Issue 1 (Consumer Guarantees under ACL): Is Harvest Fresh a "consumer" under s 3 ACL, and has Yarra Valley breached ss 54 and 55 despite its exclusion clause?

Rule 1 & Application 1: Under s 3(1)(a) ACL, a business acquiring goods priced at $100,000 or less is a statutory "consumer" unless the goods are acquired for resupply or to be used up/transformed in manufacturing or repairing goods. Because the packaging machine costs $78,000 (≤ $100,000) and is capital equipment rather than an input consumed in manufacturing, Harvest Fresh is a statutory consumer. Consequently, the machine carries non-excludable guarantees of acceptable quality (s 54) and fitness for the disclosed 2°C wet cold-room purpose (s 55). Under s 64, Yarra Valley's blanket exclusion clause is void (and misstating consumer rights risks s 29(1)(m) liability). Because a reasonable consumer would not have bought a $78,000 cold-chain machine that fails within three weeks of normal

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cold-room operation, the failure is a **major failure** under s 260, entitling Harvest Fresh to reject the machine for a full $78,000 refund and claim foreseeable consequential loss ($18,000 spoiled fruit) under s 259(4).

Issue 2 (Section 18 ACL & Negligent Misstatement): Does the brochure statement breach s 18 ACL and constitute negligent misstatement?

Rule 2 & Application 2: Under s 18 ACL, the brochure representation ("operates reliably in all cold-chain environments") was made in trade or commerce, was factual rather than mere puffery, and misled Harvest Fresh into purchasing. The exclusion clause cannot oust s 18 (*Byers v Dorotea*), entitling Harvest Fresh to damages under s 236 for actual reliance loss. In parallel, under *Shaddock* and *Esanda*, Yarra Valley owed a tortious duty of care when giving specific pre-contractual technical assurances knowing Harvest Fresh would rely on them without independent engineering testing; failing to verify moisture-sealing specs breached that duty, rendering Yarra Valley liable in negligence subject to any proved contributory negligence.

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