

CONSUMER GUARANTEES AND THE SUPPLY OF EDUCATIONAL SERVICES BY HIGHER EDUCATION PROVIDERS

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I INTRODUCTION

The higher education sector is undergoing a number of significant changes, the implications of which have yet to emerge. One such change is the increasing reliance by higher education providers on the revenue generated by full fee paying international students to fund their operating expenses. The report by the Victorian Ombudsman, *Investigation into how Universities Deal with International Students* ('*Victorian Ombudsman's Report*')¹ tabled in the Victorian Parliament on 27 October 2011, provides evidence that Australian higher education providers may be failing to meet their legal obligations to international students. The *Victorian Ombudsman's Report* is the result of an investigation into four Victorian universities teaching international students with a focus on accounting and nursing schools.² The report contains evidence that the universities were admitting students with scores below, or at the lower end of, the International English Language Testing System ('IELTS') score considered acceptable. Alternatively, they were relying upon their own language testing admission standards and not on an independent test like the IELTS test. While the universities provided English language support services for their international students after they had been admitted, the Ombudsman was concerned that the universities 'have not dedicated sufficient resources ... to meet the level of need amongst international students'.³

Another significant change is the deregulation of university admissions. Previously, the government limited the number of funded places at universities.

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1 J R Taylor, *Victorian Ombudsman Investigation into how Universities Deal with International Students*, (October 2011) <http://www.ombudsman.vic.gov.au/resources/documents/Investigation_into_how_universities_deal_with_international_students.pdf>.

2 The four universities selected were Deakin University ('Deakin'), RMIT University ('RMIT'), Swinburne University of Technology ('Swinburne') and the University of Ballarat.

3 *Victorian Ombudsman's Report*, above n 1, 35–8 [167]–[186].

From 2012, universities will receive funding under the Commonwealth Grants Scheme for as many students as they admit. This has resulted in universities increasing enrolments by admitting a large quota of high school-leavers with ‘very low’ Australian Tertiary Admission Ranks (‘ATARs’). In a Policy Note, the Group of Eight⁴ universities observe:

This has obvious implications for an expanding system which is admitting greater numbers of less academically prepared students. These students will need more support, and more intensive teaching, which in turn requires more resources. Without increased resources and attention to learning needs, attrition will increase or the quality of student learning outcomes will fall.⁵

Higher education providers were subject to the misleading conduct provisions of the former *Trade Practices Act 1974* (Cth) (‘TPA’), now section 18 of the Australian Consumer Law (‘ACL’) in schedule 2 of the *Competition and Consumer Act 2010* (Cth) (‘CCA’).⁶ University compliance programs generally take account of their potential liability in this regard, especially in relation to their promotional and marketing activities. What is less well understood is that from 1 January 2011, the consumer guarantees regime which forms part of the ACL in schedule 2 of the CCA applies to the supply of educational services by higher education providers. This new law could potentially have a significant effect on the university–student relationship and the student of today as ‘consumer’.⁷

The ACL operates as a national application legislation scheme, with the Commonwealth as lead legislator. Section 131(1) of the CCA provides that the ACL applies as a law of the Commonwealth to the conduct of corporations. The states and territories have enacted application legislation which applies the ACL as a law of their respective jurisdictions to the conduct of persons, including corporations.⁸ Thus, there are now nine ACLs in force in Australia: the

4 The Group of Eight is made up of the University of Sydney, the University of Melbourne, Monash University, the University of New South Wales, the University of Queensland, the University of Adelaide, the University of Western Australia and the Australian National University.

5 Group of Eight, ‘University Admissions’ (Policy Note No 3, Group of Eight, February 2012) 5 (‘*Group of Eight Policy Note*’) <http://go8.edu.au/_documents/go8-policy-analysis/2012/go8policynote3_universityadmissions.pdf>.

6 Philip H Clarke, ‘Applying the *Trade Practices Act* to Universities’ Marketing and Promotional Activities’ (2003) 8 *Deakin Law Review* 304–17.

7 For academic commentary on the possibility of student litigation, see Patty Kamvounias and Sally Varnham, ‘Legal Challenges to University Decisions Affecting Students in Australian Courts and Tribunals’ (2010) 34 *University of Melbourne Law Review* 140; Lynden Griggs, ‘Knowing the Destination Before the Journey Starts – Legal Education and Fitness for Purpose’ (2007) 14(1) *eLaw Journal: Murdoch University Electronic Journal of Law* 315 <https://elaw.murdoch.edu.au/archives/issues/2007/1/eLaw_knowing_destination.pdf>; Patty Kamvounias and Sally Varnham, ‘Getting What They Paid For: Consumer Rights of Students in Higher Education’ (2006) 15 *Griffith Law Review* 306; Sally Varnham, ‘Guarantees for Degrees?’ (2001) *New Zealand Law Journal* 418; Francine Rochford, ‘Suing the Alma Mater: What Loss Has Been Suffered?’ (2001) 13 *Education and the Law* 319.

8 The principal state and territory Acts are: *Fair Trading Act 1987* (NSW) ss 27–8; *Fair Trading Act 1999* (Vic) ss 8–9; *Fair Trading Act 1989* (Qld) ss 15–16; *Fair Trading Act 2010* (WA) ss 18–19; *Fair Trading Act 1987* (SA) ss 13–14; *Australian Consumer Law (Tasmania) Act 2010* (Tas) ss 5–6; *Consumer Affairs and Fair Trading Act* (NT) ss 26–7; and *Fair Trading Act 1992* (ACT) ss 6–7.

Commonwealth *ACL* ('*ACL* (Cth)'), which applies principally to corporations, and six state and two territory application Acts (*ACL* Application Acts) that apply to persons generally. The nine pieces of legislation are jointly enforced by the Australian Competition and Consumer Commission ('ACCC') and state and territory regulators.

The consumer guarantees provisions are contained in part 3-2 division 1 of the *ACL*. The term 'guarantee' is not defined but is used in the sense of a promise by the supplier or manufacturer to meet certain minimum performance standards, rather than in the sense of a promise to answer for the debt of another. The consumer guarantees provisions are modelled on the *Consumer Guarantees Act 1993* ('*NZ CGA*'), and it seems that New Zealand case law may assist in the interpretation of part 3-2 division 1 of the *ACL*.⁹

Some higher education providers have produced compliance fact sheets for their staff in relation to their obligations under the consumer guarantees regime, but little is known about the effectiveness of their compliance training in this area.¹⁰ One of the purposes of this article is to examine some of the concerns identified in the *Victorian Ombudsman's Report* and to consider whether the conduct identified gives rise to breaches of the consumer guarantees relating to services in the *ACL*.

The higher education environment is in a state of constant flux. There are a number of recent and proposed changes that may influence the quality of the educational services being provided by higher education providers, for better or for worse. These changes, in no particular order, include:

- the reliance by higher education providers on the revenue generated by full fee paying international students to fund their operating expenses;
- the deregulation of admissions to universities, the widening participation environment and the 20/40 targets set by the Government in *Transforming Australia's Higher Education System*,¹¹ which will require institutions to provide a higher level of support to meet the needs of students from disadvantaged backgrounds;
- the new accountability standards through the new Tertiary Education Quality and Standards Agency ('TEQSA') that will evaluate the

9 The Explanatory Memorandum to the Trade Practices Amendment (Australian Consumer Law) Bill 2009 (Cth) 179 [7.9] states: 'The provisions set out in Part 3-2, Division 1 of the [*ACL*] are couched in terms broadly similar to those in the New Zealand *Consumer Guarantees Act 1993* and the jurisprudence applicable to that Act is of relevance to those provisions'. There are, however, some significant differences between the *ACL* and the *Consumer Guarantees Act 1993* (NZ). See, eg, the definition of 'consumer' for the purposes of the consumer guarantees regime in *Consumer Guarantees Act 1993* (NZ) s 2(1) and *ACL* s (3).

10 See, eg, University of New South Wales, *Competition and Consumer Law* (17 January 2012) UNSW Legal and Compliance <<http://www.legal.unsw.edu.au/factsheets/marketinglaw.html>>.

11 Commonwealth of Australia, 'Transforming Australia's Higher Education System' (Report, Department of Education, Employment and Workplace Relations, 2009) ('*Transforming Australia's Higher Education System*') <<http://www.deewr.gov.au/HigherEducation/Documents/TransformingAusHigherED.pdf>>.

performance of higher education providers against a new Higher Education Standards Framework;

- the high and increasing student-to-teaching-staff ratio in some courses;
- the generational change that is occurring in the higher education sector as the so-called ‘baby boomer’ generation of academics reaches retirement age and is replaced by more junior staff; and
- the growing trend to appoint academics on the basis of fixed term or casual work contracts, rather than tenured appointments.

The article falls broadly into three parts. Part II examines the common elements that must be satisfied before the consumer guarantees relating to services apply. Part III discusses how the consumer guarantees can apply to different types of educational services. Part IV considers the causes of action that may be brought against higher education providers for failure to comply with their obligations. The theme or thesis of the article is that the statutory causes of actions under the *ACL* for a failure to comply with the consumer guarantees strengthen the hand of students as consumers of educational services. While it can be difficult for students to prove that any loss they have suffered is not their own fault, it is now possible for a student admitted into university with a low ATAR or less academic preparation to argue that the university was obligated to provide additional support to compensate, and that the lack of such support is a breach of the consumer guarantees. Higher education providers need to manage student expectations and to put in place risk management programs to limit their potential liability.

II ELEMENTS OF THE CONSUMER GUARANTEES

The consumer guarantees have a number of common elements. The guarantees only apply where ‘services’ are supplied to a ‘consumer’, ‘in trade or commerce’ by a ‘trading corporation’. These common elements are defined in the *ACL* (Cth) and will be considered in turn.

A Services

The term ‘services’ is widely defined in section 2 of the *ACL* (Cth) to include ‘any rights (including rights in relation to, and interests in, real or personal property), benefits, privileges or facilities that are, or are to be, provided, granted or conferred in trade or commerce’.

It is first necessary to identify the precise nature of the services that are being acquired. Students acquire a package of educational services when they enrol in a course of study. Most obviously, these include ‘teaching services’ in relation to undergraduate and postgraduate courses. These services include curriculum design and delivery, and may be provided to a large group simultaneously either face-to-face in a lecture theatre or, increasingly, online. Other services provided by higher education providers include ‘research supervision services’ in relation to research degrees which are provided on a one-to-one basis.

As a part of the package of services supplied by higher education providers, students may also acquire ‘food and accommodation services’, ‘medical and health services’, ‘sporting and recreational services’ and ‘parking services’.

Higher education providers supply services other than educational services, such as ‘consultancy services’ to the public and private sector organisations, which are not considered here. The *ACL* (Cth) guarantees only apply if these services are supplied to consumers in trade or commerce.

B Consumer

Students are consumers for the purposes of the *ACL* (Cth) guarantees.¹² The definition of ‘consumer’ in section 3(3) of the *ACL* (Cth) provides:

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 ... 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.

The first ground upon which a student may be taken to have acquired services as a consumer is where the ‘amount paid or payable’ for the educational services acquired did not exceed the prescribed amount, which is currently \$40 000. Where the amount paid or payable does not exceed this amount, a student will be a consumer and it is not necessary to inquire into the nature of the services.

Where the price paid by a student for educational services exceeds the prescribed limit of \$40 000, the second ground in section 3(3) of the *ACL* (Cth) focuses on the use to which the services are ‘ordinarily’ acquired, not the use to be made of them by the particular student. In *Bunnings Group Limited v Laminex Group Limited*,¹³ Young J held that the word ‘ordinarily’ means ‘commonly’ or ‘regularly’, not ‘principally’, ‘exclusively’ or ‘predominantly’. The test is an objective one based on the essential character of the services supplied.

The essential character of educational services is that they are ordinarily acquired for the student’s own personal use. This is so even where the educational services are vocational and enable the student to earn a higher income than would otherwise be the case without the qualification acquired on graduation. Thus, it is likely that full fee and part fee paying students will be considered to be ‘consumers’ for the purposes of the *ACL* (Cth).

12 See the discussion in Kamvounias and Varnham, ‘Getting What They Paid For: Consumer Rights of Students in Higher Education’, above n 7, 322–32.

13 (2006) 153 FCR 479, 496–7 [81].

C In Trade or Commerce

Educational services must be supplied ‘in trade or commerce’ before the *ACL* (Cth) applies. The term ‘trade or commerce’ is defined in section 2 of the *ACL* (Cth) to mean:

- (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).

The *ACL* (Cth) applies to conduct engaged in outside Australia, provided that at least some aspect of the trading relationship between two or more parties has taken place in Australia. The phrase ‘trade or commerce’ is expressly defined to include ‘any business or professional activity’. The effect of this is to expose professional academics and professional admission authorities to liability under the *ACL* (Cth).¹⁴ The definition of ‘trade or commerce’ expressly includes non-profit activities. This part of the definition differs from that found in the repealed *TPA*. For example, it would apply to educational and training services provided on a pro bono basis or free of charge.

Conduct must occur ‘in’ trade or commerce. In *Concrete Constructions (NSW) Pty Ltd v Nelson*,¹⁵ the High Court held that the conduct at issue must itself be of a trading or commercial nature and that it is not sufficient for it to be merely connected with, or incidental, to trade or commerce. In other words, the trade or commerce requirement is not satisfied merely because the conduct occurred as part of some overall commercial or trading activity.

Prior to 1 January 2005, educational services were not provided by universities ‘in trade or commerce’ but pursuant to a statutory obligation under the *Higher Education Funding Act 1988* (Cth). On 1 January 2005, universities started operating under the *Higher Education Support Act 2003* (Cth). One aspect of those reforms was the Commonwealth Grants Scheme, under which educational institutions enter into a funding agreement with the Commonwealth specifying the number of places and the discipline mix that the Commonwealth will support. This revised form of funding is intended to allow universities to specialise in the areas of strength and to be more responsive to student demand. Universities determine their own student contribution fees, which may be up to 30 per cent more than the HECS fees set by the Commonwealth. This is, in effect, a discretionary tuition fee rather than a statutory charge.

As a result, since 1 January 2005, universities provide services to HECS-paying students ‘in trade or commerce’. The position is even clearer in relation to international students who pay full fees for their courses which are also discretionary and subject only to a minimum set by the Commonwealth. The *Victorian Ombudsman’s Report* found that the fees charged to international students for their courses varied. For example, a Bachelor of Commerce student

14 See *Shahid v Australasian College of Dermatologists* (2008) 168 FCR 46.

15 (1990) 169 CLR 594, 602–5 (Mason CJ, Deane, Dawson and Gaudron JJ). See also *Plimer v Roberts* (1997) 80 FCR 303, 326–9 (Lindgren J).

could expect to pay an annual fee in 2011 of \$14 600 at the University of Ballarat and \$31 766 at the University of Melbourne.¹⁶

Universities now compete for students on the basis of price (tuition fees and other costs of attendance) and service (courses offered, teaching quality, the standard of facilities and research opportunities). This is recognised in some of the internal documentation of the universities under investigation by the Victorian Ombudsman. For example, a memorandum on International and National Recruitment submitted to Swinburne's Research Higher Degrees Committee Review of its IELTS and Teaching of English as a Foreign Language ('TOEFL') requirements stated:

The recruitment of international and domestic students is undertaken in an intensively competitive and increasingly market/demand driven environment, including students seeking to undertake research. A critical function of our role is to ensure that Swinburne is competitive in this environment.

In order for Swinburne to compete, course requirements need to be comparable and competitive.

There is no doubt that educational services supplied to full fee and part fee students are supplied in trade or commerce.

D Trading Corporation

Section 130 of the *CCA* provides that the word 'corporation' for the purposes of the *ACL* (Cth) has the same meaning as in section 4(1) of the *CCA*.

Section 4(1) of the *CCA* provides:

Corporation means 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).

A trading corporation is one which engages in trading (which in this context means the activity of acquiring, or supplying, goods or services in a commercial or business context) as a substantial and not merely a peripheral activity. The 'substantial current activities test' was summarised in *Hughes v Western Australian Cricket Association (Inc)* by Toohey J:

16 Victorian Ombudsman's Report, above n 1, 29 [144].

Views as to the necessary extent of trading activity have varied. It must be a substantial corporate activity (Barwick CJ in *Adamson* [R v Federal Court of Australia; Ex parte WA National Football League (1979) 143 CLR 190] at 208); the trading activities must form a sufficiently significant proportion of the corporation's overall activities (Mason J in *Adamson* at 233, with Jacobs J concurring at 237); the trading activities should not be insubstantial (Murphy J in *Adamson* at 239); the corporation must carry on trading activities on a significant scale (Mason, Murphy and Deane JJ in *State Superannuation Board* [*State Superannuation Board v Trade Practices Commission* (1982) 150 CLR 282] at 304; 43,976,-43,977; Deane J in *Commonwealth v Tasmania* (1983) 57 ALJR 450 at 559-560).¹⁷

There is Federal Court authority that universities are trading corporations, but the High Court of Australia has not yet considered the issue. In *Quickenden v O'Connor, Commissioner of Australian Industrial Relations Commission*,¹⁸ the University of Western Australia was held to be a trading corporation because it engaged in trading activities such as selling publications, parking services, student accommodation services and making investments, all of which constituted a significant proportion of its total operating revenue. It may be that the High Court will re-cast the test and require that a majority of a university's activities be of a trading nature before it can be held to be a trading corporation.

The *Victorian Ombudsman's Report* found that universities now rely on international student fees for a significant proportion of their revenue. The number of international students enrolled in onshore higher education courses at Victorian universities tripled between 2000 and 2009 to almost 67 000 students. In 2009 the income from fee-paying international students to Victorian universities amounted to \$1.16 billion, which represented 20 per cent of their total revenue.¹⁹

However, even if universities are held not to be trading corporations by the High Court and therefore not subject to the *ACL* (Cth), they will still remain subject to the *ACL* (Application Acts) which apply to persons generally.

III GUARANTEES APPLICABLE TO EDUCATIONAL SERVICES

Two areas of concern were identified in the *Victorian Ombudsman's Report* that may potentially breach the consumer guarantees applicable to educational services. The first related to the universities' practice of admitting international students who do not have the language skills they need to study successfully. There was evidence that the universities were admitting students with scores below or at the lower end of the IELTS score considered acceptable. Alternatively, they were relying upon their own language testing admission

17 *Hughes v Western Australian Cricket Association (Inc)* (1986) 19 FCR 10, 20.

18 (2001) 109 FCR 243.

19 *Victorian Ombudsman's Report*, above n 1, 4 [3].

standards and not on an independent test like the IELTS test.²⁰ Most of the international students admitted were from Asian countries where English is not the first language. Broadly, the Ombudsman was concerned that the universities were failing to ensure that these students had the requisite English language skills needed to study successfully in Australia.²¹ Secondly, while the universities provided English language support services for their international students after they had been admitted, the Ombudsman was concerned that the universities ‘have not dedicated sufficient resources to meet the level of need amongst international students’.²² Are universities that do not pay enough attention to English standards and support at risk of breaching the consumer guarantees in the *ACL* (Cth)?

Consumer guarantees are a guarantee of performance. Part 3–2 division 1 subdivision B imposes four guarantees in relation to the supply of consumer services:

- section 60 – a guarantee that services will be rendered with due care and skill;
- section 61(1) – a guarantee that services will be fit for a particular purpose made known to the supplier;
- section 61(2) – a guarantee that services will achieve a result made known to the supplier or a person by whom any prior negotiations in relation to the acquisition of the services was conducted; and
- section 63 – a guarantee that the services will be completed in a reasonable time.

A Guarantee of Due Care and Skill

Section 60 of the *ACL* (Cth) provides:

If a person supplies, in trade or commerce, services to a consumer, there is a guarantee that services will be rendered with due care and skill.

There is no definition of ‘due care and skill’ in the *ACL* (Cth).

According to the Explanatory Memorandum to the Trade Practices Amendment (Australian Consumer Law) Bill (No 2) 2010 (Cth), two requirements must be met:

- first, the provider of the service must have ‘an acceptable level of skill’ in the area of activity covered by the service; and
- secondly, the provider must exercise due care in supplying the service.²³

Under the first limb the consumer would be entitled to cancel the contract even before any work is performed if the consumer discovers that the supplier is

20 Ibid 22–9 [109]–[142].

21 Ibid 6 [13].

22 Ibid 8 [25].

23 Explanatory Memorandum, Trade Practices Amendment (Australian Consumer Law) Bill (No 2) 2010 (Cth) 192 [7.59].

not properly qualified. Thus, if a university fails to ensure that a staff member has the relevant professional qualifications or skills to undertake his or her duties, it would breach the first limb of this guarantee.

It seems that an acceptable level of skill is the level of skill necessary to complete the contract in an acceptable way. It will be necessary to have regard to the nature of the services, the cost of the services (if relevant), any statements made about the services, any representations made about the services by the provider and other relevant circumstances. If a supplier holds himself or herself out as having specialist skills and expertise, what is an acceptable level of skill would be higher than in normal circumstances.

As regards the second limb, no guidance is provided as to what the standard – ‘due care’ – means. The *Macquarie Dictionary* (4th ed) defines ‘due’ in this context to mean ‘rightful, proper, or adequate’. Thus, it does not impose strict liability. Under strict liability, suppliers of services would be responsible for any loss or damage arising from the provision of services whether it was caused by a failure to exercise proper or adequate care or not.

If the words ‘due care’ do not impose strict liability, what level of care is required to meet the standard? One possibility is that they impose a duty to exercise ‘reasonable care’ and to avoid negligence. This would make the guarantee somewhat similar to that imposed under the *NZ CGA*. However, if Parliament had intended to adopt this standard and to codify the common law position it would have adopted the common law standard of ‘reasonable care’.

The term ‘due care’ was used in the implied warranty provision in section 74(1) of the repealed *TPA*. In relation to the scope of consumer guarantees themselves, it was only intended to repeat and clarify the previous law relating part V division 2 and division 2A of the *TPA*; it was not intended to expand those provisions.²⁴ In that context it was construed to mean that the services be carried out in a workmanlike manner and that the warranty would be breached if work was carried out in a careless and unskilful manner. The standard is lower than ‘best practice’.

The Explanatory Memorandum to the Trade Practices Amendment (Australian Consumer Law) Bill (No 2) 2010 (Cth) provides two fact scenarios as examples of the application of the guarantee of due care and skill.²⁵ The first fact scenario is where a supplier installs a burglar alarm that is easily bypassed by burglars. This is taken from *Mayne Nickless Ltd v Crawford*,²⁶ where the appellant installed an intruder alarm system in the respondent’s shop. The alarm

24 Ministerial Council on Consumer Affairs, *Joint Communiqué: Ministerial Council on Consumer Affairs Meeting* (4 December 2009) Australian Consumer Law <http://www.consumerlaw.gov.au/content/Content.aspx?doc=mcca/mcca_meetings/Meeting_22_4_Dec_2009.htm>:

MCCA agreed, as part of the development of the Australian Consumer Law, to improve the legal framework for consumer rights that apply to the acquisition of goods and services. This will be a single national law guaranteeing consumer rights in relation to their acquisition of goods and services. They will be based on existing implied conditions and warranties, which will be simplified and streamlined.

25 Explanatory Memorandum, Trade Practices Amendment (Australian Consumer Law) Bill (No 2) 2010 (Cth) 192 [7.59].

26 (1992) 59 SASR 490.

system failed to work during a burglary because the wiring between the system's control box and the Telecom cord was severed. A large quantity of the respondent's stock was stolen. The respondent sued the appellant for breach of warranty implied by section 74 of the *TPA*.

The second fact scenario provided by the Explanatory Memorandum to the Trade Practices Amendment (Australian Consumer Law) Bill (No 2) 2010 (Cth) is where loss or damage of personal luggage occurs in the course of transportation of passengers by an airline or cruise ship. This is taken from *Dillon v Baltic Shipping Co*,²⁷ which involved a contract for the carriage of a passenger's personal luggage. The respondent's conduct was so serious that the court readily concluded that it fell short of the standard of due care.

The Explanatory Memorandum states: 'Whilst the cases cited here were heard under the comparable implied warranty provision of the *TPA*, the intention is that the guarantee applies to such services in a similar way'.²⁸

In *Read v Nerey Nominees Pty Ltd*,²⁹ a case involving a contract for repairs to a motor vehicle which had been extensively damaged in a road accident, it was alleged that there was a warranty that the repairs would be rendered with due care and skill, and that this warranty was implied by section 74(1) of the *TPA*. Marks J held that section 74 of the *TPA* applied to the repair contract.³⁰ His Honour found that a breach of that implied warranty under section 74 of the *TPA* might be constituted by a failure to diagnose correctly the fault in the safety system, or because of careless and unskilful work, namely incorrect wiring. The guarantee of due care and skill requires the supplier of the services to be 'careful, skilful and workmanlike'. The test is an objective one but there is no guarantee that a particular result will be achieved unless that result would be achieved if the services were performed in a 'careful, skilful and workmanlike' manner.

In relation to section 28 of the *NZ CGA*, it has been suggested that the courts are likely to adopt the common law approach of measuring the duty in relation to the standard appropriate to the profession, and that 'it would be helpful to use as a measure standards used by other institutes teaching similar courses'.³¹

However, as the *Victorian Ombudsman's Report* noted, the university sector is characterised by a lack of clear standards that leave considerable discretion to universities.³²

B Due Care and Skill: Curriculum Design and Delivery

What might be determined to be due skill and care in the delivery of educational services would arguably include curriculum design, delivery and

27 (1989) 21 NSWLR 614 (Carruthers J). On appeal, *Baltic Shipping Co v Dillon (The Mikhail Lermontov)* (1991) 22 NSWLR 1.

28 Explanatory Memorandum, Trade Practices Amendment (Australian Consumer Law) Bill (No 2) 2010 (Cth) 192 [7.59].

29 [1979] VR 47.

30 *Read v Nerey Nominees Pty Ltd* [1979] VR 47, 48.

31 Varnham, 'Guarantees for Degrees?', above n 7, 419.

32 *Victorian Ombudsman's Report*, above n 1, 40–1 [187]–[195], 62–8 [314]–[351].

support that provides students with appropriate learning environments. The new TEQSA will 'register and evaluate' the performance of higher education providers against a new Higher Education Standards Framework.³³ The Framework will ultimately consist of five domains in total, most still in the process of being settled,³⁴ but include the 'Qualification Standards', which are deemed to be minimum or 'Threshold Standards'. These new standards may help to fill the void as to what constitutes due care and skill in curriculum design and delivery.

Importantly, the Qualifications Standards will be determined by the finalised Australian Qualifications Framework ('AQF') which will define the relative levels of achievement that graduates are required to demonstrate over 10 levels ranging from Certificate 1 to Doctoral Degree.³⁵ For example, level 7 Bachelor Degree qualifications 'must be designed and accredited to enable graduates to demonstrate the learning outcomes expressed as knowledge, skills and the application of knowledge and skills specified in the level 7 criteria and the Bachelor Degree descriptor'.³⁶

The relevant level 7 criteria in this regard are stated to be: '[g]raduates at this level will have well-developed cognitive, technical and communication skills to select and apply methods and technologies to: ...',³⁷ while the more detailed Bachelor Degree descriptor states that '[g]raduates of a Bachelor Degree will have: ... communication skills to present a clear, coherent and independent exposition of knowledge and ideas'.³⁸

A failure to meet these threshold standards may be evidence that educational services have not been supplied in compliance with the guarantee. If students are unable to demonstrate achievement of the relevant AQF level criteria and descriptors, this may be evidence that a university has failed to comply with the standard of due care and skill in the design and delivery of the curriculum.

Apart from the Qualification Standards that TEQSA will monitor, there may be other widely accepted benchmarks that could be used to demonstrate that specific aspects of the delivery of a course have not been rendered with due care and skill. For example, there is an obligation on universities to provide international students and some disadvantaged domestic students with the resources they need to develop their English language proficiency.

33 TEQSA's powers are set out in the *Tertiary Education Quality and Standards Agency Act 2011* (Cth).

34 For example, the Commonwealth Government has recently issued a discussion paper on teaching and learning standards: Department of Education, Employment, and Workplace Relations, 'Developing a Framework for Teaching and Learning Standards in Australian Higher Education and the Role of TEQSA' (Discussion Paper, Department of Education, Employment and Workplace Relations, June 2011) <http://www.deewr.gov.au/HigherEducation/Policy/teqsa/Documents/Teaching_Learning_Discussion_Paper.pdf>.

35 Australian Qualifications Framework Council, 'Australian Qualifications Framework' (Australian Qualifications Framework Council, July 2011) <http://www.aqf.edu.au/Portals/0/Documents/Handbook/AustQuals%20FrmwrkFirstEditionJuly2011_FINAL.pdf>.

36 Ibid 45.

37 Ibid.

38 Ibid 46.

In 2009, the Australian Universities Quality Agency, which was responsible for auditing the quality of universities in Australia, released the *Good Practice Principles for English Language Proficiency for International Students in Australian Universities* ('*Good Practice Principles*').³⁹ Failure to comply with these principles may be used as evidence of a breach of the consumer guarantee to provide services with due care and skill. The *Good Practice Principles* provide:

1. Universities are responsible for ensuring that their students are sufficiently competent in the English language to participate effectively in their university studies.⁴⁰
2. Resourcing for English language development is adequate to meet students' needs throughout their studies.
3. Students have responsibilities for further developing their English language proficiency during their study at university and are advised of these responsibilities prior to enrolment.
4. Universities ensure that the English language entry pathways they approve for the admission of students enable these students to participate effectively in their studies.
5. English language proficiency and communication skills are important graduate attributes for all students.
6. Development of English language proficiency is integrated with curriculum design, assessment practices and course delivery through a variety of methods.
7. Students' English language development needs are diagnosed early in their studies and addressed, with ongoing opportunities for self-assessment.
8. International students are supported from the outset to adapt to their academic, socio-cultural and linguistic environments.
9. International students are encouraged and supported to enhance their English language development through effective social interaction on and off campus.
10. Universities use evidence from a variety of sources to monitor and improve their English language development activities.⁴¹

There may be other aspects of curriculum design and delivery that could give rise to a breach of the guarantee of due care and skill. For example, courses that involve vocational training may have a substantive content requirement established by an admitting authority which prescribes what practitioners need to

39 Australian Universities Quality Agency, 'Good Practice Principles for English Language Proficiency for International Students in Australian Universities' (Final Report, Australian Universities Quality Agency, March 2009) <http://www.deewr.gov.au/HigherEducation/Publications/Documents/Final_Report-Good_Practice_Principles.pdf>. New draft standards based on the *Good Practice Principles* were submitted to the Government in July 2010.

40 As noted in the *Good Practice Principles* 3 n 1: 'for international students studying in Australia, it is a requirement of the National Code's standard 2 under the *Education Services for Overseas Students Act 2000* that "registered providers ensure students' qualifications, experience and English language proficiency are appropriate for the course for which enrolment is sought". This requirement is also relevant to Principle 4.'

41 Ibid 3.

know.⁴² There may also be discipline-specific standards about the capabilities and skills that students will require to practise their chosen profession effectively.⁴³ A student could claim a breach of the duty of care and skill if a higher education provider failed to embed these capabilities and skills into its curriculum.⁴⁴

In terms of curriculum delivery, a failure to provide students with a complete set of examinable course materials could give rise to a breach of the duty of care and skill.⁴⁵

C Due Care and Skill: Setting Admission Standards

A part of the package of services that a higher education provider supplies is advice to prospective students concerning their suitability to undertake a particular course of study. In setting entry standards, higher education providers are representing to prospective students that if they meet the entry criteria and engage actively in their learning, they have reasonable prospects of successfully completing their courses. As well as constituting a breach of the consumer guarantee of setting admission standards with due care and skill, this may also constitute a breach of section 18 of the *ACL* (Cth) which prohibits conduct that is misleading or likely to mislead.

International students pose special challenges for higher education providers in relation to complying with the guarantee of due care and skill in setting admission standards. Universities as suppliers of educational services must manage international students' expectations and, when admitting students, must take care to ensure that they have reasonable prospects of success. The following extract from the *Victorian Ombudsman's Report* suggests conduct that may be in breach of the guarantee of due care and skill in relation to setting admission standards:

42 For example, in the discipline of Law, the admitting authorities insist that students undertaking the Bachelor of Laws program must study the so-called 'Priestly 11' subjects.

43 See Sally Kift, Mark Israel and Rachael Field, 'Bachelor of Laws Learning and Teaching Academic Standards Statement' (Australian Learning and Teaching Council, December 2010) <http://www.olt.gov.au/system/files/resources/altc_standards.LAW_110211_rv2.pdf>.

44 See Griggs, above n 7, 321–27 <https://elaw.murdoch.edu.au/archives/issues/2007/1/eLaw_knowing_destination.pdf>.

45 See *T v ABE Ltd* [2009] NZDispT 78 (19 October 2009). The respondent was a national tertiary education provider which conducted courses, including workshops and examinations, leading to admission as a member of the New Zealand Institute of Chartered Accountants. To be admitted as a member of the New Zealand Institute of Chartered Accountants it was necessary to complete two years of courses with the respondent. The applicant successfully completed the first year of courses and enrolled in the second year course which consisted of six workshops. The applicant was given permission to attend her brother's funeral and as a result missed workshop 2. At the next workshop she asked the facilitator for copies of the materials for workshop 2 and was told to obtain them from one of the other students who had attended workshop 2. In the final examination the second question, which was compulsory, was based on the material covered in workshop 2. The applicant failed the examination. It was held that by failing to provide the applicant with a complete set of all the examinable materials provided to the other students, the respondent failed to provide its services with reasonable skill and care in breach of *NZ CGA* s 31.

English language proficiency is not the only requirement for academic success, but witnesses expressed concern that students with very low levels of English were being 'set up to fail'. A lecturer from RMIT said:

... for the ones that haven't got the English, they do fail. And quite often you can see a pattern. They will have failed two or three subjects in [semester] one, two or three out of the four. And then they'll fail some more in the second semester ...

While the universities' published data show that international students have similar pass rates to local students, other data obtained from two universities suggest that international students are over-represented amongst their worst-performing students.⁴⁶

The correlation between IELTS admission scores and pass rates was demonstrated by a 2008 study commissioned by Swinburne which found that

students with an IELTS score of 7 had an 85.7 per cent mean progress rate. Students with an IELTS score of 6 had a lower 74.7 per cent mean rate, while students with an IELTS score of 5.5 had a 70.3 per cent mean rate. This compared with an 81 per cent mean rate for local students.⁴⁷

The challenge in setting appropriate admission standards also arises in relation to domestic students.

The deregulation of admissions has resulted in universities increasing enrolments by admitting a large quota of high school leavers with 'very low' ATARs. In addition to admitting students with lower ATARs, universities are admitting students into courses without the appropriate academic requirements, such as engineering and biological sciences without mathematics skills. In a Policy Note, the Group of Eight universities observe:

While the evidence on links between ATAR and university performance is mixed, and the relationship appears to be non-linear, there is clear evidence that the probability of completing is closely linked to ATAR scores. Marks (2007) found that expected completion rates rose by about seven percentage points for each ATAR decile, from around 66 per cent for ATARs between 50 and 59, to 94 per cent for the top decile. A difference of 20 ATAR points doubled completion rates, once all other factors were held constant.⁴⁸

Students with low ATARs are more likely to have higher attrition rates, but once the universities accept these students into their courses their obligations under the consumer guarantees regime of the *ACL* (Cth) crystallise. In order to comply with these obligations universities will be required to commit the necessary resources and provide the necessary teaching support to see them through their courses.

Another government policy which could give rise to potential liabilities under the consumer guarantees regime is the commitment to increase students from disadvantaged backgrounds. In *Transforming Australia's Higher Education System*, the Australian Government announced its intention to increase the participation by low socio-economic status ('SES') students to 20 per cent by

46 *Victorian Ombudsman's Report*, above n 1, 17–18 [84], [86].

47 *Ibid* 24 [113].

48 *Group of Eight Policy Note*, above n 5, 5.

2020.⁴⁹ It also announced its intention to increase the number of those holding a bachelor degree to 40 per cent of all 25- to 34-year-olds, which poses challenges for universities.⁵⁰ The Australian Government does not foresee any difficulties in the widening participation environment and the 20/40 targets. According to the Government:

Once students from disadvantaged backgrounds have entered university the likelihood of them completing their course of study is broadly similar to that of the general higher education population. Often, however, they require higher levels of support to succeed, including financial assistance and greater academic support, mentoring and counselling services.⁵¹

In widening the participation environment and meeting the 20/40 targets set by the Government, universities will need to provide the 'higher level of support' that is recognised as being required to ensure the success of students from disadvantaged backgrounds.

Universities are being required to absorb large numbers of additional students without sacrificing the quality of the educational services they provide. This kind of policy-driven expansion of university places and consequent lowering of entrance scores for courses such as arts and science has been criticised on the basis that it leads to 'a steady erosion in the quality of course content'.⁵² The Government refutes the claim that a quantitative exercise to increase student numbers will come at the cost of quality. In reply to the criticism, the Minister for Tertiary Education stated:

To shore up our quality commitment we have acted on one of the key recommendations of the Bradley review and established a single national regulatory and assurance agency. The Tertiary Education Quality and Standards Agency will ensure that all students receive a high-quality education at any Australian university.⁵³

Whether a student bringing an action for breach of the consumer guarantees under the *ACL* (Cth) will be able to obtain access to TEQSA information about individual providers is unclear. TEQSA has released its *Regulatory Risk Framework*,⁵⁴ which identifies categories of overarching risk, one of which is

49 *Transforming Australia's Higher Education System*, above n 11, 13: 'To address Australia's historically poor record in increasing participation by low SES students, the Government has announced its ambition that by 2020, 20 per cent of higher education enrolments at the undergraduate level will be of people from a low SES background.'

50 Ibid 12: 'The Government has therefore announced its ambition for growth in higher education attainment, so that by 2025, 40 per cent of all 25 to 34 year olds will hold a qualification at bachelor level or above. The achievement of this ambition will produce around 217,000 additional graduates by 2025.'

51 Ibid 14.

52 Frank Furedi, 'More Students and More Degrees Do Not a Smarter Country Make', *The Weekend Australian* (Sydney), 4 February 2012, 22.

53 Chris Evans, 'We're Flinging Open the Door for Aspiring Students', *The Australian* (Sydney), 7 February 2012, 14. For the Opposition's response, see Brett Mason, 'Quality Must Not Be Sacrificed to Quantity', *The Australian* (Sydney), 22 February 2012, 32.

54 Tertiary Education Quality and Standards Agency, *Regulatory Risk Framework* (Tertiary Education Quality and Standards Agency, February 2012) <<http://www.teqsa.gov.au/sites/default/files/TEQSA%20Regulatory%20Risk%20Framework%20Feb%202012.pdf>>.

risk to students (including international students).⁵⁵ There are 46 risk indicators. The following academic risks are identified in relation to providers' responsibilities to students:

- declining academic admission standard/lack of academic requirements in admissions policy;
- very high or rapidly increasing student attrition rates;
- very low/very high or rapidly changing student progress rates;
- very low or rapidly declining unit satisfaction levels; and
- very low or rapidly declining graduate course satisfaction.⁵⁶

Risk Assessments or Risk Profiles will focus on risk at the institutional level and will not constitute performance profiles of individual providers. Furthermore, Risk Profiles relating to individual providers will not be published by TEQSA. However, TEQSA is an agency to which the *Freedom of Information Act 1982* (Cth) applies, so it may be possible to obtain the Risk Profile for a particular institution by means of a freedom of information request.

Other avenues, such as the MyUniversity website which became operational on 3 April 2012, provide consumers with some fit-for-purpose performance information on higher education providers.⁵⁷ The MyUniversity website is intended to overcome market failure arising from information asymmetry and a lack of transparency. By forcing universities to disclose information about matters such as fees, student–staff ratios, results of student satisfaction surveys, measures of graduate skills and the quality of teaching and learning outcomes, it will improve transparency and promote informed consumer decision-making.

D Due Care and Skill: Research Supervision

Just as there are a range of views about what constitutes 'good' teaching, there are a range of views about what constitutes 'good' research supervision.⁵⁸ The contemporary model for research supervision adopted at most Australian universities involves co-supervision with a principal and an associate supervisor being appointed for each doctoral candidate. There is a three-way interaction between the candidate, the principal supervisor and the associate supervisor. Generally, the principal supervisor is a more experienced, senior academic and the associate supervisor is a junior academic who, as well as supervising the candidate, is also being mentored in the practice of research supervision by the principal supervisor.⁵⁹

55 Ibid 9.

56 Ibid 15.

57 Ibid 4.

58 See Angela Brew and Tai Peseta, 'Changing Postgraduate Supervision Practice: a Programme to Encourage Learning Through Reflection and Feedback' (2004) 41 *Innovations in Education and Teaching International* 5.

59 See Tom Bourner and Mark Hughes, 'Joint Supervision of Research Degrees: Second Thoughts' (1991) 24 *Higher Education* 21.

The appointment of supervisors can give rise to a breach of the guarantee of due care and skill. The university sector is currently undergoing a generational change as the so-called ‘baby boomer’ generation of academics reaches retirement age and is being replaced by more junior staff. This generational change is creating a gap in the supply of experienced research supervisors. Most universities are having to ‘fast-track’ junior academics to fill the gap. Appointing inexperienced junior staff to research supervision roles may give rise to allegations that the standard of due care and skill has not been met.

The process of supervision can give rise to a breach of the guarantee of due care and skill. There are certain doctoral skills that may be taught, such as how to research, how to prepare a literature review, what constitutes effective writing and how to construct a clear and concise argument. However, other skills which go the heart of thesis writing, such as how to acquire a scholarly attitude or approach students must develop for themselves.

In addition to the *Good Practice Guidelines* referred to above, the following conduct involving the delivery of research supervisory services could constitute a breach of the consumer guarantee of due care and skill:

- appointing an inexperienced supervisor, or a supervisor without the appropriate level of discipline knowledge and expertise;
- admitting students to research degrees in disciplines in which they have insufficient undergraduate experience or admitting students who do not have proficiency in English;
- failing to manage the process of supervision by establishing clear goals for the student to ensure a timely and successful completion;
- failing to hold regular and productive meetings with the student and to provide support and guidance in their research;
- failing to provide supportive and challenging feedback at all, or to provide it promptly;
- failing to keep appropriate, contemporaneous written records of meetings between supervisors and candidates summarising what was discussed and what actions were required of the candidate to progress the thesis; and
- failing to appoint examiners who are fair and objective from the candidate’s point of view.⁶⁰

Failure to ensure continuity of supervision may constitute a breach of the consumer guarantee of due care and skill.⁶¹ The move away from appointing tenured academic staff to employing academic staff on fixed term contracts may create continuity problems for research supervision. For example, to appoint an

60 For a consideration of what constitutes ‘good’ supervision, see Brew and Peseta, above n 58, 5.

61 In *Ogawa v University of Melbourne (No 3)* [2004] FMCA 536 (3 September 2004), an international student relied on representations in the University of Melbourne’s *Handbook for the Degree of Doctor of Philosophy* and unsuccessfully claimed that the university had engaged in misleading conduct by not providing continuity of supervision.

academic staff member on a two-year contract as a principal supervisor, when a PhD normally takes three years of full-time study, could give rise to a breach of the consumer guarantee of due care and skill if the university was unable to find a suitable replacement.

E Guarantee of Fitness for a Particular Purpose or Desired Result

The second and third guarantees that apply to educational services supplied by universities to students are contained in section 61 of the *ACL* (Cth). Section 61(1) provides:

If:

- (a) a person (the supplier) supplies, in trade or commerce, services to a consumer; and
- (b) the consumer, expressly or by implication, makes known to the supplier any particular purpose for which the services are being acquired by the consumer;

there is a guarantee that the services, and any product resulting from the services, will be reasonably fit for that purpose.

Some higher education courses may seek to achieve more than one purpose. For example, while undergraduate law courses were originally designed with admission to the practising profession in mind, now only one half of graduates enter the profession. While undergraduate law courses may serve multiple purposes, Griggs observes that ‘the purpose of undertaking legal studies is to have at least the option of professional legal admission’.⁶² Failure to provide a curriculum that will make graduates eligible for admission to practise law may breach the guarantee of fitness for a particular purpose made known by implication. This is another area where there is potential for a breach of section 18 of the *ACL* (Cth) which prohibits conduct that is misleading or likely to mislead.⁶³

Section 61(2) of the *ACL* (Cth) provides:

If:

- (a) person (the supplier) supplies, in trade or commerce, services to a consumer; and
- (b) the consumer makes known, expressly or by implication, to
 - (i) the supplier; or
 - (ii) a person by whom any prior negotiations or arrangements in relation to the acquisition of the services were conducted or made;
 - (iii) the result that the consumer wishes the services to achieve;

62 Griggs, above n 7, 322. See also Jeremy Webber, ‘Legal Research, the Law Schools and the Profession’ (2004) 26 *Sydney Law Review* 565, 570–1.

63 It is reported in ‘US law grads sue over worthless degrees’, *Lawyers Weekly* (Sydney), 17 February 2012, 4 that Brooklyn Law School is being sued in the Brooklyn Supreme Court by a law graduate who paid nearly \$150 000 in tuition fees. It is claimed that Brooklyn Law School represented that its graduates had employment rates from 88 per cent to 98 per cent within nine months of graduation. However, it is claimed that those employment rates included part-time and temporary positions and employment not related to law.

there is a guarantee that the services, and any product resulting from the services, will be of such a nature, and quality, state or condition, that they might reasonably be expected to achieve that result.

Whether the services might reasonably be expected to achieve that result is a question of fact.⁶⁴ The guarantees in sections 61(1) and (2) are not expressed in absolute terms. The courts are likely to apply a common sense approach in determining what was the particular purpose made known or the result the consumer desires the service to achieve. Furthermore, sections 61(1) and (2) only require the services to be reasonably fit for that purpose or of such a nature and quality that they might reasonably be expected to achieve that result.

Section 61(3) provides that the guarantees in sections 61(1) and (2) do not apply 'if the circumstances show that the consumer did not rely on, or that it was unreasonable for the consumer to rely on, the skill or judgment of the supplier'.

In relation to the equivalent guarantee, section 28 of the *NZ CGA*, Tokeley expresses the view that:

A teacher does not have to ensure that a student will get an A grade in order to have performed his or her job with reasonable skill and care. Nevertheless, suppliers of services must be careful not to promise a particular result when they ought to know that such a result is unlikely.⁶⁵

The issue of fitness for purpose is one that higher education providers need to consider in setting academic admission standards and academic requirements in their admissions policies. This issue was considered above in relation to the guarantee of due care and skill; it is also relevant to the guarantee of fitness for purpose. If universities admit high school leavers into courses and they do not have the ability or the academic requirements to complete, then the courses were not fit for the high school leavers' purpose or for achieving the desired result.

The following conduct may constitute a breach of the guarantee to provide educational services that are fit for purpose or will achieve a desired result:

- enrolling a student in a vocational or professional course, such as nursing or accounting, when the course is not accredited with the relevant professional body or does not contain the required subjects that will enable the student on graduation to be admitted to that profession;
- admitting international students without first ensuring that appropriate English language admission standards have been met and that they have a reasonable chance of academic success;
- failing to provide English language support services to international students after they enrol;
- failing to provide students with adequate library and computing resources; and
- failing to provide students with a safe environment that complies with, or exceeds, the relevant workplace health and safety legislation.

64 See *Warnock v Australia & New Zealand Banking Group Ltd* [1989] ATPR 40-928.

65 Kate Tokeley, *Consumer Law in New Zealand* (Butterworths, 2000) [3.2.4].

Consider the allegation in relation to the Writing and Cultural Studies degree at the University of Technology, Sydney.⁶⁶ Some 45 communication students alleged that the 2009 Universities Admissions Centre guide provided an overview of the Writing and Cultural Studies degree. It indicated that they would gain skills in screenwriting, which would make them more versatile for a multimedia workplace. However, these skills were removed from the course without their knowledge. While the matter was settled, the allegations, if proven, would have constituted a breach of the guarantees in section 61 of the *ACL*.

In *Kwan v University of Sydney Foundation Program Pty Ltd*,⁶⁷ the applicant, an international student, sought damages for alleged misleading conduct in breach of section 42 of the *Fair Trading Act 1987* (NSW). The applicant enrolled in a foundation program aimed at introducing students to undergraduate study at Australian universities. The cost of the course was \$11 174. The applicant claimed that the program document implied that students in the foundation program would have access to all university facilities and the standard of teaching would be akin to that of a university course. He claimed he was denied full access to the university library and had external borrowing rights only. He also claimed that there were only 10 computers available to, on average, 160 students between October 1999 and March 2000 and that the access hours were restricted to a couple of hours a day and were not available on weekends. He also alleged that the teaching accommodation provided was noisy and dusty due to renovation work and that during the absence of his mathematics teacher, a relief teacher was engaged with poor English skills. There was no finding of misleading conduct largely because the applicant did well enough in the foundation course to be offered a place to study for a Bachelor of Economics.

The case predates the consumer guarantees provision of the *ACL* (Cth). If the conduct occurred after 1 January 2011, would it have constituted a breach of the guarantees in sections 60 and/or 61 of the *ACL* (Cth)? In relation to the guarantee of due care and skill, the standard is not equivalent to ‘best practice’ and it seems that the services were performed in a ‘careful, skilful and workmanlike’ manner. In relation to the guarantee of fitness for purpose and achieving a desired result made known to the supplier, the student was offered a university place which was the student’s purpose in enrolling in the foundation course. It seems that there would have been no breach of the consumer guarantees. However, if the student failed to obtain a university place after completing the foundation course, it would be necessary to look more closely at the causes for that failure.

F Guarantee of Supply within a Reasonable Time

The fourth guarantee that must be met in relation to the supply of educational services by universities concerns the time for completion. Contracts for the

66 Yuko Narushima, ‘Call for Compensation Over Axed University Courses’, *Sydney Morning Herald* (Sydney), 23 May 2011, 5.

67 [2002] NSWCTTT 83 (8 May 2002). See also *Yee Tak On v Dr Linda Hort (ANU College)* [2012] FMCA 391 (11 May 2012).

supply of services generally stipulate the time for providing the service. If the contract is silent, the services must be supplied within a reasonable time.

Section 62 of the *ACL* (Cth) provides:

If:

- (a) a person (the supplier) supplies, in trade or commerce, services to a consumer; and
- (b) the time within which the services are to be supplied:
 - (i) is not fixed by the contract for the supply of the services; or
 - (ii) is not to be determined in a manner agreed to by the consumer and supplier;

there is a guarantee that the services will be supplied within a reasonable time.

The Explanatory Memorandum to the Trade Practices Amendment (Australian Consumer Law) Bill (No 2) 2010 (Cth) states:

The time period that is reasonable will vary significantly depending on the nature of the services to be provided. The reasonable time to build a house will obviously be much longer than what is reasonable for providing a tree-logging service. Accordingly, it is not possible to set out in the *ACL* what is reasonable and the courts and tribunals will need to consider all of the circumstances that apply to a particular case to determine the time period that is reasonable.⁶⁸

This can also be an issue in relation to research supervisions, where agreement about deadlines and timely feedback and guidance as to the candidate's progress are important aspects of good research supervision practice.

IV CAUSES OF ACTION FOR FAILURE TO COMPLY WITH CONSUMER GUARANTEES

A Jurisdiction

While jurisdictional issues may arise where students seek to challenge decisions about the internal processes of Australian universities,⁶⁹ it is clear that the courts have jurisdiction to hear student disputes arising from the failure to comply with consumer guarantees under the *ACL* (Cth) and the *ACL* (Application Acts).

Section 138 of the *CCA* confers jurisdiction on the Federal Court of Australia over any civil matter in relation to the *ACL* (Cth). The jurisdiction is exclusive, except that jurisdiction is also conferred by section 138A on the Federal Magistrates Court in relation to civil matters where the loss or damage does not exceed \$750 000 or an amount specified in the regulations, and on the courts of the states and territories under section 138B. The *CCA* and a state or territory's application Act specifies that the *ACL* is a law of the relevant jurisdiction.⁷⁰

68 Explanatory Memorandum, Trade Practices Amendment (Australian Consumer Law) Bill (No 2) 2010 (Cth) 193 [7.64].

69 For a recent study of this topic, see Kamvounias and Varnham, 'Legal Challenges to University Decisions Affecting Students in Australian Courts and Tribunals', above n 7, 140.

70 See, eg, *Fair Trading Amendment (Australian Consumer Law) Act 2010* (Vic) s 13.

The *CCA* and the *ACL* (Application Acts):

- govern the way in which consumers can access national, state and territory courts and tribunals; and
- make provision for enforcement, administrative and judicial review procedures in respect of the actions of regulators under the *ACL*.⁷¹

The state and territory Fair Trading Acts provide that proceedings under their respective ACLs must be referred to a court of competent jurisdiction.

For example, under the *ACL* (Qld), jurisdiction to hear and determine proceedings under that law is conferred on:

- the Supreme Court;
- the District Court;
- the Magistrates Court; and
- the Queensland Civil and Administrative Tribunal.⁷²

The tribunal or court having jurisdiction for the proceeding must have regard to:

- for the tribunal – whether the subject of the proceeding would be a minor civil dispute within the meaning of the *Queensland Civil and Administrative Tribunal Act 2009* (Qld); or
- for a court – any civil jurisdictional limit, including any monetary limit, applying to the court.

In relation to the grant of an injunction under section 232 of the *ACL*, section 51 of the *Fair Trading Act 1989* (Qld) provides that if the injunction is sought in connection with, or in the course of another proceeding under the *ACL* (Qld), whether for an offence or otherwise, the matter is to be heard before the District Court, and the District Court has jurisdiction; otherwise the Supreme Court has jurisdiction.

Other states and territories make similar provision for the conferral of jurisdiction on their tribunals and courts to hear and determine matters arising under their respective *ACLs*.⁷³

B Causes of Action: Major Failure

Section 267 of the *ACL* (Cth) provides:

- (1) A consumer may take action under this section if:
- (a) a person (the *supplier*) supplies, in trade or commerce, services to the consumer; and
 - (b) a guarantee that applies to the supply under Subdivision B of Division 1 of Part 3-2 is not complied with; and

⁷¹ See *Fair Trading Amendment (Australian Consumer Law) Act 2010* (Vic) div 5; *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 73(2A)(b).

⁷² *Fair Trading Act 1989* (Qld) ss 50, 51.

⁷³ See *Fair Trading Act 1999* (Vic) s 160E.

- (c) unless the guarantee is the guarantee under section 60—the failure to comply with the guarantee did not occur only because of:
 - (i) an act, default or omission of, or a representation made by, any person other than the supplier, or an agent or employee of the supplier; or
 - (ii) a cause independent of human control that occurred after the services were supplied.
- (2) If the failure to comply with the guarantee can be remedied and is not a major failure:
 - (a) the consumer may require the supplier to remedy the failure within a reasonable time; or
 - (b) if such a requirement is made of the supplier but the supplier refuses or fails to comply with the requirement, or fails to comply with the requirement within a reasonable time—the consumer may:
 - (i) otherwise have the failure remedied and, by action against the supplier, recover all reasonable costs incurred by the consumer in having the failure so remedied; or
 - (ii) terminate the contract for the supply of the services.
- (3) If the failure to comply with the guarantee cannot be remedied or is a major failure, the consumer may:
 - (a) terminate the contract for the supply of the services; or
 - (b) by action against the supplier, recover compensation for any reduction in the value of the services below the price paid or payable by the consumer for the services.
- (4) The consumer may, by action against the supplier, recover damages for any loss or damage suffered by the consumer because of the failure to comply with the guarantee if it was reasonably foreseeable that the consumer would suffer such loss or damage as a result of such a failure.
- (5) To avoid doubt, subsection (4) applies in addition to subsections (2) and (3).

The *ACL* (Cth) classifies failures into those that are major and those that are not major. Section 267(3) provides that if the failure is major or cannot be remedied, the consumer (not the supplier) has a choice. The consumer may:

- terminate the contract for the supply of services; or
- recover compensation from the supplier to make up any reduction in value of the services caused by the failure.

Section 268 of the *ACL* (Cth) sets out a number of alternative tests that need to be satisfied in determining whether a failure is major and cannot be remedied within a reasonable time.

In relation to section 268(a), a failure is major if ‘the services would not have been acquired by a reasonable consumer fully acquainted with the nature and extent of the failure’. The test is an objective one. The matters that a ‘reasonable’ consumer would take into account include:

- the price of the services: the more expensive the services, the less acceptable is any fault;
- any representations made about the services by the supplier either orally or in the advertising; and

- any other faults with the services: a number of small faults may not be serious, but their cumulative effect may be major.

Thus, if a student elects to terminate a contract for a breach of the consumer guarantee imposed by section 60 of the *ACL* (Cth) to exercise due care and skill, the contract with the university is discharged and the consumer is discharged from further performance. If the consumer has already paid the higher education provider, the student will be able to recover compensation. The amount of the compensation will depend on whether some of the service was satisfactory. The consumer may also be able claim damages for consequential loss, considered below.

The difficulty for students in establishing and quantifying their losses has been identified as limiting the utility of the consumer protection laws for students.⁷⁴ As Rochford observes:

If, say, a student's failure to learn is claimed to be the result of poor teaching, but in defence it is said that it is due to the student's lack of ability, or lack of application, or inability to concentrate due to illness of personal difficulties, how are the relative weights of these factors to be assessed?⁷⁵

It is likely to be more difficult to prove a failure to comply with the guarantee of due care and skill in relation to 'teaching services' provided to a large group ('mass education') than services provided on a one-to-one basis such as research supervision services. Where it is alleged that there has been a failure to comply with the guarantee of due care and skill in relation to 'teaching services', it will not be a complete answer for a university lecturer to say: 'I taught them, but they didn't learn'.⁷⁶ Educational theory makes clear that students must be active in, and take responsibility for, their own learning. A failure by a student to contribute to their own learning may, nevertheless, result in breach of the guarantee of due care and skill on the part of the university providing the educational services. There are a range of views about what constitutes 'good' teaching.⁷⁷ However, it is widely accepted that teaching and learning are closely linked.⁷⁸ Expert teaching requires the mastery of a variety of teaching techniques. If students are not learning, the teaching techniques adopted need to change to facilitate the learning process. There is an obligation on universities to create the educational conditions that enable success.

In relation to allegations about poor research supervision, the answers to the following questions should elicit evidence about how the supervisory process evolved over time, whether the candidate was left to his or her own devices or whether the candidate was actively supervised but failed to take advice:

74 Kamvounias and Varnham, 'Getting What They Paid For: Consumer Rights of Students in Higher Education', above n 7, 326–7.

75 Rochford, above n 7, 328.

76 John Biggs and Catherine Tang, *Teaching for Quality Learning at Universities: What the Student Does* (Open University Press, 3rd ed, 2007) 18.

77 Ibid 16–19; John Biggs, 'What the Student Does: Teaching for Enhanced Learning' (1999) 18 *Higher Education Research and Development* 57.

78 Paul Ramsden, *Learning to Teach in Higher Education* (Routledge Falmer, 2nd ed, 2004).

- Did the candidate have the requisite discipline knowledge and English proficiency skills prior to admission into the doctoral programme?
- Did the supervisor appointed have the necessary disciplinary knowledge on the thesis topic so that they could provide constructive feedback?
- Did the supervisor have adequate research supervisory experience to perform at an appropriate level?
- How many research students was the supervisor responsible for? Depending on the discipline, supervisors who are responsible for 15–20 research supervisions may have difficulty demonstrating that they had sufficient time to supervise each student effectively.
- How many times throughout the year did the supervisor and the candidate meet? What was discussed at the meetings?
- How often did the student submit written work for assessment? What feedback was received from the supervisor? Was it constructive?

In relation to a breach of the duty of care in setting admission standards, there is evidence that high English language proficiency scores are predictors of academic success. A higher education provider that sets low IELTS scores to attract international students may find it difficult to deny a claim for a refund by an international student who should not have been admitted to the course.

In some cases it may be necessary to apportion liability. For example, in the New Zealand case of *T v ABE Ltd*,⁷⁹ the applicant sought compensation of NZ\$48 499 for breach of the guarantee of reasonable care and skill. Section 32 of the *NZ CGA* is in similar terms to section 267(3) of the *ACL*. It provides that where there has been a breach of a relevant guarantee that cannot be remedied by the supplier, the consumer may obtain from the supplier damages in compensation for any ‘reduction in value’ of a service below the charge paid or payable by the consumer of the service.

The New Zealand Disputes Tribunal held that calculation of the ‘reduction in value’ was problematic. It was not proven that the respondent’s failure to comply with the guarantee was the sole cause of the applicant’s failure to pass the examination. The applicant was under a duty to mitigate her loss, but declined the opportunity to sit for a special examination which was offered by the respondent. The Tribunal found that the appropriate compensation was one third of the amount claimed, that is NZ\$2833.24.

C Causes of Action: Not a Major Failure

If the failure to comply with a guarantee can be remedied and is not a major failure, section 267(2) of the *ACL* (Cth) provides that the consumer may require the supplier to remedy the failure within a reasonable time. The consumer must give the supplier who provided the service the opportunity to fix the problem at no cost to the consumer. In the context of educational services, it may be possible

79 [2009] NZDispT 78 (19 October 2009).

to remedy the failure by providing extra tuition or by arranging for students to sit for a special examination.

D Damages for Consequential Loss

Section 267(4) of the *ACL* (Cth) provides that the consumer may bring an action against the supplier to recover damages for any loss or damage suffered by the consumer because of the failure to comply with the guarantee, including losses that were ‘reasonably foreseeable’ as a result of the failure. The court’s power is discretionary and carries with it the power to award less than the full loss, taking into account the consumer’s contribution to the loss.

Consequential losses may include loss of opportunity to undertake another course and loss of employment opportunities during the period of study.⁸⁰ Where the breach of the guarantee of due care and skill relates to a major failure to provide research supervision services, and the student has been enrolled for three years, the damages payable for loss of employment opportunities may be considerable. The calculation of consequential loss is likely to give rise to issues of causation, remoteness and contributory negligence.

E Advantages of Consumer Guarantees

The adequacy of the repealed *TPA* consumer protection provisions to protect students enrolled in public universities was the subject of an article that predates the *ACL* reforms.⁸¹ The imbalance in financial power as between university and student was identified in that article as one reason why students were not able to access their rights. The *ACL* deals with this deficiency by providing that the ACCC now has the power to bring civil proceedings to secure compensation on behalf of students where a university fails to honour its guarantees.⁸²

The consumer guarantees arise independently of contract. The implied terms regime in part V division 2 of the repealed *TPA* did not provide for statutory causes of action. A breach of one of those implied term gave rise to a cause of action under the common law for breach of contract. The new consumer guarantees regime in the *ACL* (Cth) stands independently of the law of contract. The statutory causes of action are contained in section 267 of the *ACL* (Cth) which is considered above. They obviate the problem that has arisen in some previous cases in which higher education providers have sought to deny liability on the basis that admission into a course of study was not evidence of a legally binding contract between the provider and the student.⁸³

80 *Grant v Victoria University of Wellington* [2003] NZAR 185 (Ellis J).

81 Kamvounias and Varnham, ‘Getting What They Paid For: Consumer Rights of Students in Higher Education’, above n 7, 324–6.

82 *ACL* (Cth), s 277.

83 See, eg, *Griffith University v Tang* (2005) 221 CLR 99; *Fennell v Australian National University* [1999] FCA 989 (22 July 1999); *Mathews v University of Queensland* [2002] FCA 414 (8 April 2002); *Dudzinski v Kellow* [1999] 47 IPR 333 (Drummond J). Cf *Grant v Victoria University of Wellington* [2003] NZAR 185 (Ellis J). See Kamvounias and Varnham, ‘Getting What They Paid For: Consumer Rights of Students in Higher Education’, above n 7, 312–14; Griggs, above n 7, 318–321.

These guarantees overcome other perceived failures of the common law to provide adequate protection for consumers of services. First, under the law of tort it is necessary to prove fault on the part of the supplier which can be a difficult evidentiary matter for the consumer. The liability of a supplier of services under the consumer guarantee provisions of the *ACL* (Cth) arises as a consequence of the supply arrangement, rather than as the result of the assumption of a duty of care.

Secondly, it is not possible for universities to avoid liability for breach of the consumer guarantees by inserting a term to that effect in their handbooks or other course materials. Section 64(1) of the *ACL* (Cth) provides:

A term of a contract (including a term that is not set out in the contract but is incorporated in the contract by another term of the contract) is void to the extent that the term purports to exclude, restrict or modify, or has the effect of excluding, restricting or modifying:

- (a) the application of all or any of the [consumer guarantee] provisions of this Division; or
- (b) the exercise of a right conferred by such a provision; or
- (c) any liability of a person for a failure to comply with a guarantee that applies under this Division to a supply of goods or services.

Examples of terms that will be prohibited by section 64 of the *ACL* (Cth) include ‘all care but no responsibility’ and ‘no liability for negligence’ terms. However, section 64 will also render void terms which purport to restrict the remedies available to consumers following a breach of a consumer guarantee. Where the *ACL* (Cth) applies, it will not be possible for a university to exclude liability for claims made after a certain period, claims in excess of a certain amount or claims for consequential damages.

False or misleading representations in trade or commerce concerning the existence, exclusion or effect of a guarantee, right or remedy are prohibited by section 29(1)(m) of the *ACL* (Cth), breach of which can give rise to civil pecuniary penalties of up to \$1.1 million or a body corporate and \$220 000 for other persons. Section 151 of the *ACL* (Cth) creates a criminal offence that replicates section 29 of the *ACL* (Cth). The offence in section 151 is one of strict liability so that it is not necessary to consider the intent of the person committing the offence.

F Higher Education Providers and Risk Management

Most higher education providers have risk management mechanisms in place to promote compliance with their legal obligations; however, the effectiveness of these compliance programs was called into question by the *Victorian Ombudsman’s Report*.⁸⁴ Universities need to be aware of their legal obligations under the *ACL* (Cth), especially in relation to misleading conduct in their marketing practices and in meeting their obligations to comply with the

84 *Victorian Ombudsman’s Report*, above n 1, 68–9 [351]–[356].

consumer guarantees that apply to services. More effective compliance strategies need to be put in place.

An effective compliance programme would require as a minimum:

- the appointment of a legal compliance manager with a knowledge of the *ACL*;
- an *ACL* risk assessment exercise;
- an *ACL* complaints handling procedure; and
- *ACL* compliance training for new academic staff as part of the staff induction training and assessment.

While all four universities examined by the Victorian Ombudsman had policies and processes for dealing with student complaints, the *Victorian Ombudsman's Report* identified poor complaint handling within faculties and schools.⁸⁵

V CONCLUSION

Higher education providers have entered a new era of transparency and accountability: accountability to the government through TEQSA that will evaluate their performance against a new Higher Education Standards Framework and accountability to their students through the new consumer guarantees regime in the *ACL* (Cth).

The *Victorian Ombudsman's Report* provides evidence that some Australian universities may be failing to meet their legal obligations to international students under the consumer guarantees regime in the *ACL* (Cth). Universities need to exercise due care and skill not just in the delivery of their courses to international students but also in the admissions process. Students with low tertiary entrance scores, or who lack the required English proficiency skills, may later complain that they were being set up to fail. The *Victorian Ombudsman's Report* contained evidence of the correlation between IELTS admission scores and pass rates, and that high English language proficiency scores were predictors of academic success.

While most universities provide English language support services to assist international students after they have been admitted, the Victorian Ombudsman found evidence that some universities may not have dedicated sufficient resources to meet the level of need amongst their international students. The provision of research supervision services to international students is another area where universities are at risk of failing to meet the required performance standard.

The advent of the new quality and regulatory agency, TEQSA, with its brief to monitor compliance with the strengthened AQF, and the new consumer guarantees under the *ACL* (Cth) provide urgent incentives to higher education

85 Ibid 53–61 [262]–[309].

providers to ensure that reasonable standards of program delivery are maintained. In meeting the 20/40 targets set by the Government, universities will also need to provide the 'higher level of support' that is recognised as being necessary to meet the need of students from disadvantaged backgrounds.

The consumer guarantees strengthen the hand of international and domestic students as consumers of educational services. Higher education providers need to confront their legal obligations under these new laws and to put in place quality assurance and compliance programs that will limit their exposure to liability.