

CRITIQUE AND COMMENT

THE NEW CONSUMER GUARANTEE LAW AND THE REASONS FOR REPLACING THE REGIME OF STATUTORY IMPLIED TERMS IN CONSUMER TRANSACTIONS

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[The new Australian Consumer Law ('ACL') contained in sch 2 of the Competition and Consumer Act 2010 (Cth) contains many of the consumer protection provisions from the renamed Trade Practices Act 1974 (Cth) ('TPA'). One new development is the consumer guarantee law ('CGL'), which replaces the terms implied into contracts for the supply of goods and services to consumers under pt V div 2 of the TPA with a regime of consumer guarantees that apply as statutory rights. The CGL was enacted with the aim of harmonising and clarifying the law providing mandatory standards of quality in the supply of goods and services to consumers. This piece considers the extent to which this important new legislation succeeds in this aim.]

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I INTRODUCTION

The Commonwealth Parliament recently enacted ‘far-reaching ... reforms’¹ to consumer protection law in Australia in the form of the *Australian Consumer Law* (‘*ACL*’) contained in sch 2 of the *Competition and Consumer Act 2010* (Cth) (‘*CCA*’), which is the new name for the *Trade Practices Act 1974* (Cth) (‘*TPA*’).² The *ACL* is comprehensive consumer protection legislation that applies across Australia.³ It re-enacts the consumer protection provisions of the *TPA* and introduces new provisions aimed at promoting fairer and more efficient markets.⁴ One significant new development in the *ACL* is the consumer guarantee law (‘*CGL*’).⁵ The *TPA* implied a range of mandatory terms providing minimum quality standards into contracts for the supply of goods and services to consumers.⁶ The *CGL* replaces these implied terms with ‘consumer guarantees’ that operate as statutory rights, apply independently of the parties’ contract, and are accompanied by their own remedial regime.⁷

The decision to replace the implied terms regime under the *TPA* with consumer guarantees under the *CGL* was prompted not by a rejection of the policy behind the implied terms regime, but by more practical concerns relating to the ease with which the regime could be understood and applied by consumers and traders. A number of reports had found that undue complexity and uncertainty in the law providing mandatory quality standards in the supply of goods and services to consumers was created by differences between the implied terms regimes implemented by Commonwealth, state and territory legislation⁸ and by

¹ Commonwealth, *Parliamentary Debates*, House of Representatives, 17 March 2010, 2719 (Craig Emerson, Minister for Competition Policy and Consumer Affairs).

² *Trade Practices Amendment (Australian Consumer Law) Act (No 2) 2010* (Cth) sch 5 items 1–2.

³ See, eg, Council of Australian Governments, *Intergovernmental Agreement for the Australian Consumer Law* (2009) cl 3.2 <http://www.coag.gov.au/coag_meeting_outcomes/2009-07-02/docs/IGA_australian_consumer_law.pdf>, where the states and territories have undertaken to enact legislation applying the *ACL* as laws of their jurisdictions. See also Department of Treasury (Cth), *Implementing the Australian Consumer Law: Information Note* (2010) 5–6 <http://www.consumerlaw.gov.au/content/the_acl/downloads/Implementing_ACL_Information_Note.pdf>.

⁴ See generally Explanatory Memorandum, Trade Practices Amendment (Australian Consumer Law) Bill (No 2) 2010 (Cth); Department of Treasury (Cth), *The Australian Consumer Law: An Introduction* (2010) <http://www.consumerlaw.gov.au/content/the_acl/downloads/ACL_an_introduction_november_2010.pdf>.

⁵ *ACL* pt 3-2 div 1, pt 5-4.

⁶ *TPA* pt V div 2.

⁷ *ACL* pt 3-2 div 1, pt 5-4.

⁸ Productivity Commission, *Review of Australia’s Consumer Policy Framework*, Inquiry Report No 45 (2008) vol 2, 48–63 [4.1]–[4.2]; Commonwealth Consumer Affairs Advisory Council, Department of Treasury, *Consumer Rights: Reforming Statutory Implied Conditions and Warranties — Final Report* (2009) 50 [5.1] (‘*CCAAC Final Report*’). See also J W Carter, ‘The

the technical form and language of the regimes.⁹ The Regulatory Impact Statement ('RIS') for the CGL argued that by harmonising and clarifying the law, the new regime would assist traders and consumers in understanding and enforcing their rights and obligations.¹⁰ The RIS also stated that the CGL would not involve a change in the substantive rights and obligations of traders or consumers.¹¹

This piece argues that the CGL does not succeed entirely in achieving its stated aims. The goal of harmonisation did not require the enactment of an entirely new regime. The clarity of the regime has arguably been improved in some respects, particularly with the introduction of a new standard of 'acceptable quality', replacing that of 'merchantable quality', and by requiring traders at least to alert consumers to the possible overlap between statutory consumer guarantees and the 'extended warranties' sometimes purchased by consumers in conjunction with goods. On the other hand, the CGL introduces new terminology and distinctions governing the remedies available for failing to comply with the consumer guarantees, which may confuse its application.

This piece also argues that, contrary to what was represented in the RIS, the CGL introduces a number of significant substantive changes to this area of the law, with uneven benefits to consumers and traders.¹² The CGL introduces new provisions regulating 'express warranties', which increase the opportunities for consumers to enforce pre-contractual representations by traders about the quality or characteristics of goods and services. Conversely, the new scheme of remedies provided under the CGL may restrict the rights of consumers, particularly in claiming damages where goods or services fail to comply with the consumer guarantees.

Part II of the piece begins with a brief overview of the new CGL and provides the background to its introduction. The piece then assesses the extent to which the CGL meets its stated objectives of harmonising and clarifying the law providing mandatory quality standards in the supply of goods and services to consumers. Part III considers the extent to which the CGL represents a successful harmonisation of the relevant law. Part IV considers whether the CGL improves clarity in the law by replacing the implied terms regime with one based on statutory guarantees and by replacing the standard of 'merchantable quality' with 'acceptable quality'. Part V considers the steps taken under the CGL to clarify the relationship between statutory guarantees and extended warranties. Part VI considers the new provisions regulating 'express warranties'. Part VII assesses the new remedial regime.

Commercial Side of Australian Consumer Protection Law' (2010) 26 *Journal of Contract Law* 221, 223.

⁹ Consumer Affairs Victoria, 'Warranties and Refunds in the Electronic Goods, White Goods and Mobile Telephone Industries' (Research Paper No 17, May 2009) 2–3; *CCAAC Final Report*, above n 8, 127–8; Carter, 'The Commercial Side of Australian Consumer Protection Law', above n 8, 226.

¹⁰ Explanatory Memorandum, Trade Practices Amendment (Australian Consumer Law) Bill (No 2) 2010 (Cth) 608 [25.49]–[25.50].

¹¹ *Ibid* 595 [25.8].

¹² See Carter, 'The Commercial Side of Australian Consumer Protection Law', above n 8, 243–6.

II THE CONSUMER GUARANTEE LAW

Prior to the enactment of the *ACL*, pt V div 2 of the *TPA* implied into contracts for the supply of goods and services to consumers a range of terms providing minimum quality standards.¹³ Of particular importance were implied conditions that goods would be of merchantable quality¹⁴ and fit for any purpose that the consumer made known to the supplier,¹⁵ and an implied warranty that services would be provided with due care and skill.¹⁶ These terms were based on terms implied by state and territory sale of goods legislation.¹⁷ However, unlike the terms implied under sale of goods legislation,¹⁸ the terms implied in consumer contracts under the *TPA* were mandatory. A term attempting to exclude or limit a trader's liability for breach of the implied warranties and conditions would be void.¹⁹ Under the *TPA*, the rights of consumers to reject goods and terminate the contract for breach of an implied term depended on whether the term breached was a condition or warranty, not on the extent or seriousness of the breach.²⁰ Contract law determined the remedies available to consumers for breach of the statutory implied terms.²¹ The *TPA* also provided consumers with a statutory basis for seeking remedies against a manufacturer where goods failed to comply with the standards specified in the legislation.²²

A *The Main Changes*

The statutory standards in the CGL are similar to the terms implied under the *TPA*. For example, the CGL requires goods supplied to consumers to be fit for any disclosed purpose.²³ Further, in the case of sale of goods by description, those goods must match their description.²⁴ Services supplied to a consumer must, as under the *TPA*, be rendered with due care and skill,²⁵ and any product resulting from the services must be fit for a purpose that the consumer made

¹³ Similar provisions were found in state and territory fair trading legislation. See further the table of legislation in Explanatory Memorandum, Trade Practices Amendment (Australian Consumer Law) Bill (No 2) 2010 (Cth) 629–30 app A.

¹⁴ *TPA* s 71(1).

¹⁵ *Ibid* s 71(2).

¹⁶ *Ibid* s 74(1).

¹⁷ See, eg, *Goods Act* 1958 (Vic) s 19.

¹⁸ See, eg, *ibid* s 19(d).

¹⁹ *TPA* ss 68–68A.

²⁰ *Ibid* s 75A(1). See also D W Greig, 'Condition — Or Warranty?' (1973) 89 *Law Quarterly Review* 93.

²¹ *E v Australian Red Cross Society* (1991) 27 FCR 310, 352 (Wilcox J). See also *Austral Pacific Group Ltd (in liq) v Airservices Australia* (2000) 203 CLR 136, 141 (Gleeson CJ, Gummow and Hayne JJ).

²² *TPA* pt V div 2A. Consumers who bought the goods from a retailer could not enforce statutory implied terms against that manufacturer because there is no privity of contract between these parties.

²³ *ACL* s 55.

²⁴ *Ibid* s 56.

²⁵ *Ibid* s 60.

known to the supplier.²⁶ As with the implied terms under the *TPA*, the consumer guarantees are mandatory and cannot be excluded, restricted or modified by contract.²⁷ Like the *TPA*, the CGL also imposes mandatory standards of quality on manufacturers of goods.²⁸

The primary change introduced by the CGL is in providing consumers with statutory rather than contractual standards of quality in the supply of goods and services.²⁹ Under the CGL, the specified mandatory standards of quality (that is, the ‘consumer guarantees’) apply to the supply of goods and services by force of statute, not contract law, and the remedies available to consumers in the event that the goods or services fail to comply with a consumer guarantee are found in the legislation itself.³⁰

In addition, the CGL differs from the implied terms regime under the *TPA* by introducing a new consumer guarantee of ‘acceptable quality’,³¹ which replaces the requirement of ‘merchantable quality’ implied under the *TPA*.³² The CGL also contains new provisions, not found in the *TPA*, dealing with express warranties³³ and with the relationship between the statutory guarantees and extended warranties.³⁴ Unlike the *TPA*, the CGL provides for representative actions to be taken by a regulator to enforce the statutory rights specified in the CGL.³⁵

B Reasons for Introducing the CGL

Mandatory quality standards applying to the supply of goods and services to consumers may not appear consistent with the market-based principle of freedom of contract. However, such standards are now a reasonably uncontroversial feature of consumer protection regimes.³⁶ Mandatory quality standards in consumer transactions are usually justified on grounds of the inevitable information asymmetry between consumers and traders.³⁷ Consumers typically have less

²⁶ Ibid s 61(1).

²⁷ Ibid s 64.

²⁸ Ibid pt 5-4 div 2.

²⁹ See also ibid s 2 (definition of ‘sale by auction’) which, unlike the *TPA*, clarifies that the consumer guarantee regime applies to online auctions. This includes those conducted by eBay.com, where the operator of the site is merely providing a venue for sale rather than acting as an agent of the seller. Cf *Smythe v Thomas* (2007) 71 NSWLR 537, 546 [34]–[35], where Rein AJ held that a sale through eBay.com was in any case deemed to be a sale by auction under sale of goods legislation. Ibid s 266 also provides gift recipients (of goods) with rights and remedies against suppliers in respect to the consumer guarantees.

³⁰ *ACL* pt 5-4 div 1.

³¹ Ibid s 54.

³² *TPA* s 74D.

³³ *ACL* s 59.

³⁴ Ibid s 102; *Trade Practices (Australian Consumer Law) Amendment Regulations 2010 (No 1)* (Cth) sch 3, inserting *Competition and Consumer Regulations 2010* (Cth) reg 90(1)(h), which comes into force on 1 January 2012.

³⁵ *ACL* s 277.

³⁶ See, eg, *Sale of Goods Act 1979* (UK) c 54, ss 14–15.

³⁷ Explanatory Memorandum, *Trade Practices Amendment (Australian Consumer Law) Bill (No 2) 2010* (Cth) 607 [25.45]; Gillian K Hadfield, Robert Howse and Michael J Trebilcock, ‘Information-Based Principles for Rethinking Consumer Protection Policy’ (1998) 21 *Journal of*

knowledge and experience with the goods and services that they purchase than traders do. Consumers may not be aware of the defects likely to occur in the goods and hence may not be in a position to bargain for the optimal combinations of terms dealing with these risks. Mandatory standards of quality address this information asymmetry by giving consumers a right of redress in the event that the goods or services they have purchased prove to be faulty or defective.³⁸

This rationale presumes that the rights in question are sufficiently clear and accessible to be easily enforced by consumers, preferably without recourse to the courts.³⁹ Reform of the implied terms regime under the *TPA* was promoted by a series of reports in Australia expressing concern that the regime was not proving effective in this manner.⁴⁰ These reports argued that the effectiveness of the regime was being impeded by some very practical issues, including uncertainty caused by differences between the regimes applying across Australia, a lack of awareness by consumers of their statutory rights, and the complexity and technicality of the regime in general.⁴¹

One of the first calls for reform of the implied terms regime in the *TPA* was the 1995 Federal Bureau of Consumer Affairs discussion paper *Getting What You Pay For*, which recommended replacing implied terms with a scheme of statutory guarantees covering consumer goods and services.⁴² In 2008, the Productivity Commission's *Review of Australia's Consumer Policy Framework* noted that there were numerous minor differences between the implied terms regimes applying across Australia, including with respect to the definitions of 'consumer' and the extent to which the statutory implied terms could be excluded.⁴³ The Commission expressed concern that these differences could create costs for business and confusion for consumers.⁴⁴ The Commission recommended that '[t]he adequacy of existing legislation related to implied warranties and conditions should be examined as part of the development of the new national generic consumer law.'⁴⁵ In response to this recommendation, the Commonwealth Consumer Affairs Advisory Council ('CCAAC') conducted an

Consumer Policy 131, 141; Geraint Howells and Stephen Weatherill, *Consumer Protection Law* (Ashgate, 2nd ed, 2005) 146.

³⁸ Howells and Weatherill, above n 37, 145–7.

³⁹ Explanatory Memorandum, Trade Practices Amendment (Australian Consumer Law) Bill (No 2) 2010 (Cth) 605 [25.39]; John Carter, Freehills, Submission to the Commonwealth Consumer Affairs Advisory Council, *Review of Statutory Implied Conditions and Warranties*, 24 August 2009, 11 <<http://www.treasury.gov.au/contentitem.asp?ContentID=1614&NavID=>>.

⁴⁰ See, eg, above n 8.

⁴¹ See, eg, Federal Bureau of Consumer Affairs, *Getting What You Pay For: New Rights and Remedies for Consumers of Goods and Services under the Trade Practices Act 1974* (1995) 2–3; Productivity Commission, above n 8, 24–5 [2.4]; *CCAAC Final Report*, above n 8, 4–7.

⁴² Federal Bureau of Consumer Affairs, above n 41, 6–12.

⁴³ Productivity Commission, above n 8, 58–9 [4.2]. See also Explanatory Memorandum, Trade Practices Amendment (Australian Consumer Law) Bill (No 2) 2010 (Cth) 598–601 [25.18]–[25.29].

⁴⁴ Productivity Commission, above n 8, 49–50.

⁴⁵ *Ibid* 177 (recommendation 8.1).

inquiry.⁴⁶ At the same time, the National Education and Information Advisory Taskforce commissioned a survey to collect data from consumers and traders in relation to statutory warranties ('*NEIAT Study*').⁴⁷

The *NEIAT Study* found a number of barriers to effective enforcement of the implied terms regime under the *TPA* and equivalent state and territory legislation. The study found that the primary barrier to the exercise of consumer rights was a lack of awareness of the statutory rights on the part of both consumers and traders.⁴⁸ The *NEIAT Study* found that 57 per cent of retailers and 47 per cent of manufacturers/importers were unaware that under the *TPA*, consumers were entitled to remedies for breaches of statutory implied terms.⁴⁹ It found that consumer awareness of statutory warranties was very low, with 71 per cent of consumers being unaware that they had any statutory rights implied into their sale contracts with retailers.⁵⁰ Nearly half of the surveyed consumers believed they only had rights if the manufacturer provided an express warranty.⁵¹ The *NEIAT Study* recommended that consumers be provided with clear and concise information about the availability of their statutory rights through a number of channels, including at the point of sale.⁵²

The CCAAC released its report, *Consumer Rights: Reforming Statutory Implied Conditions and Warranties*,⁵³ to the Australian Government in October 2009. This report found that

[t]he current range and lack of uniformity of Australian laws on implied conditions and warranties leads to confusion and uncertainty for consumers about their rights. It also leads to confusion and unnecessary costs for businesses in complying with the law.⁵⁴

The CCAAC recommended that 'current laws on implied conditions and warranties should be amended to increase consumer and business understanding and to harmonise differences between existing national, state and territory laws.'⁵⁵ The implied terms regime should be replaced with one of statutory

⁴⁶ Chris Bowen, Assistant Treasurer and Minister for Competition Policy and Consumer Affairs, 'Review of Statutory Warranties and Conditions' (Media Release, No 14, 12 March 2009) <<http://www.treasurer.gov.au/Listdocs.aspx?doctype=0&min=ceb&PageID=003>>.

⁴⁷ National Education and Information Advisory Taskforce, *National Baseline Study on Warranties and Refunds*, Research Paper No 2 (2009) 11 [1.1]–[1.2].

⁴⁸ *Ibid* 9. See also Australian Competition and Consumer Commission, *Warranties and Refunds* (2004) 1.

⁴⁹ *NEIAT Study*, above n 47, 53.

⁵⁰ *Ibid* 51–2.

⁵¹ *Ibid* 50.

⁵² *Ibid* 72–3.

⁵³ *CCAAC Final Report*, above n 8. For a general overview of the *CCAAC Final Report*, see Stephen Corones, 'Consumer Guarantees in Australia: Putting an End to the Blame Game' (2009) 9 *Queensland University of Technology Law and Justice Journal* 137.

⁵⁴ *CCAAC Final Report*, above n 8, 50 [5.1]. See also Australian Law Reform Commission, *Compliance with the Trade Practices Act 1974*, Report No 68 (1994); Consumer Affairs, Department of Industry, Science and Tourism (Cth), *Audit of Consumer Protection Laws: Second Report Identifying Inconsistencies, Gaps and Overlaps in Australian Consumer Protection Legislation* (1997); Consumer Affairs Victoria, above n 9, 2–3.

⁵⁵ *CCAAC Final Report*, above n 8, 50 [5.2].

guarantees expressed in 'simple and clear' language.⁵⁶ The CCAAC recommended that Australia replace the existing regime of statutory implied terms with a regime of consumer guarantees that could be enforced by consumers against the retailer or the manufacturer to obtain a remedy specified in legislation.⁵⁷ The CCAAC also recommended that retailers be strongly encouraged to display a clear notice informing consumers about statutory consumer guarantees at the point of sale.⁵⁸

The Commonwealth responded to these various reports and recommendations by enacting the CGL as part of the package of reforms included in the *ACL*. The RIS to the CGL endorses the findings of the preceding reports that differences in the regimes applying across Australia 'add to complexity, uncertainty and compliance costs.'⁵⁹ The RIS also endorses the concerns expressed in those reports that the terminology used in the implied terms regime was confusing to consumers and that its structure was unduly complex.⁶⁰ The RIS expresses the view that '[h]armonising and clarifying the law [relating to mandatory quality standards] can help raise consumer and business awareness [and] understanding of the law and encourage enforcement of consumer rights.'⁶¹

III HARMONISATION?

There are a number of ways in which the CGL might have attempted to harmonise the various legislative regimes providing mandatory quality standards in the supply of goods and services. It is suggested that the CGL has not been entirely successful in achieving any of these possible outcomes.

The CGL is based on the New Zealand *Consumer Guarantees Act 1993* (NZ)⁶² which is in turn based on the Canadian *Consumer Protection Act*,⁶³ and the English *Sale of Goods Act 1979* (UK) c54.⁶⁴ The CGL also contains elements consistent with the European *Directive 1999/44/EC*.⁶⁵ The CGL model, however, was not adopted on the basis of harmonisation with overseas models.⁶⁶ The key

⁵⁶ Ibid 51 [5.3].

⁵⁷ Ibid 51–3 [5.3].

⁵⁸ Ibid 61 [6.2], [6.4].

⁵⁹ Explanatory Memorandum, Trade Practices Amendment (Australian Consumer Law) Bill (No 2) 2010 (Cth) 601 [25.29].

⁶⁰ Ibid 600–1 [25.27]–[25.29].

⁶¹ Ibid 608 [25.50].

⁶² On this Act, see generally Cynthia Hawes, 'Consumer Law Reform: The Consumer Guarantees Bill' (1992) 5 *Canterbury Law Review* 17; Bill Bevan, Bob Dugan and Virginia Grainer, *Consumer Law* (LexisNexis, 2009) ch 4.

⁶³ SS 1996, c C-30.1, pt III. See especially ss 48(d) (acceptable quality), 55 (no privity of contract required), 57 (remedies where breach is of a substantial character).

⁶⁴ See ss 10–15. See especially ss 14 (satisfactory quality), 48B (repair or replacement remedies). See also Bevan, Dugan and Grainer, above n 62, 51–2 [4.2].

⁶⁵ *Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on Certain Aspects of the Sale of Consumer Goods and Associated Guarantees* [1999] OJ L 171/12.

⁶⁶ But see *CCAAC Final Report*, above n 8, 128, where it was noted that adopting the provisions of the *Consumer Guarantees Act 1993* (NZ) would advance one of the objectives of the *Australia New Zealand Closer Economic Relations Trade Agreement*, signed 28 March 1983, [1983] ATS 2 (entered into force 1 January 1983).

consideration appears to have been the view that the *Consumer Guarantees Act 1993* (NZ) is more accessible to consumers than were the relevant provisions in the *TPA*, a view arising from the fact that the awareness of New Zealand consumers of their statutory rights in respect to goods and services is significantly higher than that of Australian consumers.⁶⁷

The CGL does not fully harmonise the regimes within Australia that provide mandatory standards of quality in the supply of goods and services. The CGL is limited to consumer transactions.⁶⁸ Business transactions will continue to be regulated by state and territory sale of goods legislation.⁶⁹ The differences in these regimes will create significant complexity for traders engaged in both consumer and business sales.

In order to harmonise the consumer protection regimes providing mandatory standards of quality in the supply of goods and services within Australia, it was not necessary to replace the implied terms regime under the *TPA* with the statutory guarantee regime in the CGL. The *ACL* applies as uniform consumer protection legislation across all Australian jurisdictions and hence an implied terms regime, had it been included, would also have had national, uniform application.

At any rate, the CGL does not result in complete harmonisation of the mandatory standards of quality applying to consumer transactions within Australia. The *ACL*, which contains the CGL, does not apply 'to the supply, or possible supply, of services that are financial services, or of financial products.'⁷⁰ These contracts are regulated under the *Australian Securities and Investments Commission Act 2001* (Cth) ('*ASIC Act*').⁷¹ While the *ASIC Act* has been amended to incorporate some aspects of the regime introduced by the *ACL*,⁷² the *ASIC Act* has not been amended to apply the provisions of the CGL. There are no consumer guarantees applying to the supply of financial services or financial products. Instead, the *ASIC Act* continues to imply, into contracts for the supply of financial services, warranties based on those previously contained in the *TPA*. These include that the services will be rendered with due care and skill and that any materials supplied in connection with those services will be reasonably fit for the purpose for which they are supplied.⁷³ These warranties apply as implied terms for which contractual remedies are available in the event of breach.⁷⁴ There is no equivalent to the remedial regime that applies to the consumer guarantees under the

⁶⁷ Explanatory Memorandum, Trade Practices Amendment (Australian Consumer Law) Bill (No 2) 2010 (Cth) 619–20 [25.98].

⁶⁸ *ACL* pt 3-2.

⁶⁹ See, eg, *Goods Act 1958* (Vic).

⁷⁰ *CCA* s 131A(1). Services supplied under a contract of insurance are also excluded: *ACL* s 63.

⁷¹ Interestingly, some state legislation adopting the *ACL* does not exclude the application of that law to contracts for financial services: see, eg, *Fair Trading Amendment (Australian Consumer Law) Act 2010* (NSW); *Fair Trading Amendment (Australian Consumer Law) Act 2010* (Vic).

⁷² See especially the unfair contract terms law found in pt 2-3 of the *ACL* and pt 2 div 2 sub-div BA of the *ASIC Act*.

⁷³ *ASIC Act* s 12ED(1).

⁷⁴ Damages are not available under the *ASIC Act* for a breach of an implied warranty: s 12GF.

CGL. There are no implied terms or consumer guarantees applying to financial products (that is, requirements of acceptable quality or fitness for purpose).

The CGL does go some way towards harmonising the regimes of mandatory standards of quality applying to suppliers and manufacturers in consumer transactions. Under the *TPA*, suppliers and manufacturers were subject to different regimes. Part V div 2 of the *TPA* implied terms into contracts between suppliers and consumers, while pt V div 2A of the *TPA* provided consumers with statutory rights against manufacturers. The CGL applies similar statutory regimes of rights and remedies to both suppliers and manufacturers.⁷⁵ This change should make it more straightforward for consumers to assert their rights to quality goods and services.⁷⁶ The harmonisation goal is, however, undermined by the fact that there is no right of action against a manufacturer where goods fail to comply with the guarantee of fitness for purpose.⁷⁷

IV CLARIFICATION: CONSUMER GUARANTEES AND ACCEPTABLE QUALITY

The goal of clarifying the regime of mandatory quality standards in the supply of goods and services was premised on the view that, by making the language of the law more accessible, consumers would be better able to enforce their rights and traders would be better able to understand their obligations.⁷⁸ The new terminology used in the CGL may assist both consumers and traders in this manner. However, it is also important to recognise that clarifying the language used to describe consumers' rights will have little impact unless consumers and traders are also made aware of the existence of those rights. If consumers are informed about their rights, then the terminology used to describe those rights probably assumes a less significant role. Interestingly, although the CGL provides the Minister with the option of requiring retailers to display notices informing consumers about their rights under the CGL,⁷⁹ this power has not as yet been exercised.

A From Implied Terms to Consumer Guarantees

The implied terms regime under the *TPA* adopted much of the terminology used in the *Sale of Goods Act 1893* (UK).⁸⁰ The influence of this earlier law was particularly apparent in the implied term requiring goods to be of 'merchantable quality'⁸¹ and in the classification of the terms implied as either 'conditions' or

⁷⁵ *ACL* pt 5-4 divs 1-2.

⁷⁶ Corones, above n 53, 146-7, 154.

⁷⁷ *ACL* pt 5-4 div 2.

⁷⁸ Explanatory Memorandum, Trade Practices Amendment (Australian Consumer Law) Bill (No 2) 2010 (Cth) 617-19 [25.85], [25.91], [25.94], [25.97].

⁷⁹ *ACL* s 66(1).

⁸⁰ 56 & 57 Vict, c 71, ss 10-14. See generally P S Atiyah, John N Adams and Hector MacQueen, *The Sale of Goods* (Longman, 10th ed, 2001).

⁸¹ *TPA* s 71(1).

'warranties'.⁸² As noted above, concerns had been raised that, although the meaning of these concepts was well established in law, they were likely to mean little to the average consumer who did not have the benefit of legal advice.⁸³ The Explanatory Memorandum for the new *ACL* states that the CGL will clarify the law for the benefit of traders and consumers 'by removing difficult concepts like "conditions", "warranties" and "merchantable quality"'.⁸⁴

The CGL describes the standards of quality provided by the regime as 'consumer guarantees'.⁸⁵ Consumers may more easily understand that minimum quality standards in the supply of goods and services are ensured by a 'guarantee', rather than by an 'implied condition' or 'warranty'. There is, however, a risk that consumers, and indeed traders, may be confused about the relationship between the guarantees provided by the CGL and any express guarantees provided by suppliers or manufacturers. Consumers may not understand that 'consumer guarantees' prevail over suppliers' or manufacturers' 'express guarantees'. It might have been useful for the rights provided under the CGL to have been described as 'statutory guarantees' or even 'statutory rights', so as to better distinguish them from the guarantees sometimes provided by manufacturers or suppliers.

B *From Merchantable Quality to Acceptable Quality*

One of the most significant terms implied under the *TPA* into contracts for the supply of goods to consumers was a requirement for the goods to be of 'merchantable quality'.⁸⁶ Courts had recognised that the standard of merchantable quality in consumer protection legislation, such as in the *TPA*, would not have the same meaning as when the concept was used in assessing the quality of goods bought by a trader for the purposes of resale in a particular market.⁸⁷ Nonetheless, commentators had frequently argued that the terminology of 'merchantable quality' was inappropriate for use in consumer transactions. Thus, Professor Carter criticised the concept of merchantable quality as having no immediately apparent meaning outside legal circles.⁸⁸ Professor Willett noted that

[m]oving away from the term "merchantable quality" has long been regarded as important if only because "merchantable" smacks of a standard more appropri-

⁸² Ibid pt V div 2.

⁸³ See above Part II(B).

⁸⁴ Explanatory Memorandum, Trade Practices Amendment (Australian Consumer Law) Bill (No 2) 2010 (Cth) 608 [25.50].

⁸⁵ *ACL* pt 3-2 div 1.

⁸⁶ *TPA* s 74D.

⁸⁷ See, eg, *Rasell v Cavalier Marketing (Australia) Pty Ltd* [1991] 2 Qd R 323, 348 (Cooper J).

⁸⁸ John Carter, Freehills, Submission No 44 to Senate Standing Committee on Economics, Parliament of Australia, *Inquiry into the Trade Practices Amendment (Australian Consumer Law) Bill 2009*, 31 July 2009, 5 [3.2].

ate to commercial transactions between two dealers than to a transaction between a dealer and a consumer.⁸⁹

The CGL replaces the standard of merchantable quality with one of 'acceptable quality'.⁹⁰ The terminology of 'acceptable quality' may assist consumers and traders by clearly directing attention to whether the goods are of a standard acceptable to a reasonable consumer. Importantly, the CGL provides a more detailed explanation of the meaning of 'acceptable quality' than was provided for 'merchantable quality' under the *TPA*.⁹¹ Under the *TPA*:

Goods of any kind are of merchantable quality within the meaning of this Division if they are as fit for the purpose or purposes for which goods of that kind are commonly bought as it is reasonable to expect having regard to any description applied to them, the price (if relevant) and all the other relevant circumstances.⁹²

Under the CGL, goods will be of acceptable quality if they are as:

- (a) fit for all the purposes for which goods of that kind are commonly supplied; and
- (b) acceptable in appearance and finish; and
- (c) free from defects; and
- (d) safe; and
- (e) durable;

as a reasonable consumer fully acquainted with the state and condition of the goods (including any hidden defects of the goods), would regard as acceptable having regard to the matters in subsection (3).⁹³

The matters that may be taken into account are:

- (a) the nature of the goods; and
- (b) the price of the goods (if relevant); and
- (c) any statements made about the goods on any packaging or label on the goods; and
- (d) any representation made about the goods by the supplier or manufacturer of the goods; and
- (e) any other relevant circumstances relating to the supply of the goods.⁹⁴

⁸⁹ Chris Willett, 'The Quality of Goods and the Rights of Consumers' (1993) 44 *Northern Ireland Law Quarterly* 218, 220.

⁹⁰ *ACL* s 54.

⁹¹ Bevan, Dugan and Grainer, above n 62, 65 [4.27].

⁹² *TPA* s 66(2).

⁹³ *ACL* s 54(2). The second part of the test of acceptable quality is reminiscent of the test of merchantable quality laid down by Dixon J in *Australian Knitting Mills Ltd v Grant* (1933) 50 CLR 387, 418.

⁹⁴ *ACL* s 54(3). As with 'merchantable quality', there are limitations on the circumstances in which goods will not be of acceptable quality. These limitations include defects specifically drawn to the consumer's attention (s 54(4)); defects caused by abnormal use (s 54(6)(b)); and defects of which the consumer should reasonably have become aware in cases where the consumer examined sample or demonstration goods before buying them (s 54(7)).

The test for acceptable quality under the CGL is based on ss 6–7 of the *Consumer Guarantees Act 1993* (NZ), which also imposes a standard of acceptable quality. The CGL test is also very similar to the test for the standard of ‘satisfactory quality’ implied under the *Sale of Goods Act 1979* (UK).⁹⁵ It has been said that the factors identified in the test for satisfactory quality in the United Kingdom ‘make explicit what was probably implicit within the old law’.⁹⁶ The same can also be said of the test of acceptable quality under the CGL. While the test probably does not extend substantive protection for consumers beyond that provided under the ‘merchantable quality’ standard of the *TPA*, it performs an important role in clarifying for traders and consumers the content of the relevant standard. This point can be illustrated by considering some of the newly specified relevant considerations.

1 *Fit for All Normal Purposes*⁹⁷

The CGL makes explicit the approach taken in case law under the *TPA* and in equivalent consumer protection legislation. In order to be of merchantable quality, goods are required to be fit for all, not merely some, of the purposes for which goods of that kind are commonly supplied.⁹⁸ The high standard of quality required by demanding the goods be fit for *all* purposes is qualified to some degree by the need for the goods only to be fit for the purposes for which goods of that *kind* are *commonly* supplied.⁹⁹ In other words, the standard is based on the common uses of the category of goods in question, not the actual uses of the specific goods.¹⁰⁰

2 *Acceptable in Appearance and Finish*¹⁰¹

The CGL confirms the view expressed in case law under the *TPA* that matters of appearance and finish are relevant in assessing the quality of goods.¹⁰²

3 *Free from Defects*¹⁰³

Under the *TPA*, it was uncertain whether defects that detracted from the quality of the goods without preventing them from being used would preclude those

⁹⁵ *Sale of Goods Act 1979* (UK) c 54, s 14(2B), as amended by *Sale and Supply of Goods Act 1994* (UK) c 35, s 1(1).

⁹⁶ Howells and Weatherill, above n 37, 174.

⁹⁷ *ACL* s 54(2)(a).

⁹⁸ *Rasell v Cavalier Marketing (Australia) Pty Ltd* [1991] 2 Qd R 323, 349 (Cooper J). Cf the approach taken to merchantable quality under the *Sale of Goods Act 1979* (UK) c 54 by the England and Wales Court of Appeal in *Aswan Engineering v Lupdine Ltd* [1987] 1 All ER 135.

⁹⁹ F M B Reynolds, ‘Terms as to Description and Quality Implied by the *Sale of Goods Act*’ in Michael G Bridge (ed), *Benjamin’s Sale of Goods* (Sweet & Maxwell, 8th ed, 2010) 531 [11-001], 556–7 [11-038].

¹⁰⁰ Cf *ACL* s 23(3), where a ‘consumer contract’, for the purposes of the unfair contract terms law, is defined as a contract for (a) a supply of goods or services, or (b) a sale or grant of an interest in land to an individual whose acquisition of the goods, services or interest is wholly or predominantly for personal, domestic or household use or consumption.

¹⁰¹ *Ibid* s 54(2)(b).

¹⁰² *Rogers v Parish (Scarborough) Ltd* [1987] 1 QB 933, 944 (Mustill LJ); *Rasell v Cavalier Marketing (Australia) Pty Ltd* [1991] 2 Qd R 323, 350 (Cooper J).

¹⁰³ *ACL* s 54(2)(c).

goods from being of merchantable quality.¹⁰⁴ Under the CGL, whether goods or services are ‘free from defects’ is specifically identified as a relevant matter in assessing whether goods are of acceptable quality. However, unlike the legislation in the United Kingdom, the CGL does not clarify that even ‘minor’ defects may detract from the required standard.¹⁰⁵

4 Safety¹⁰⁶

The CGL specifically mentions ‘safety’ as a relevant factor to consider in assessing whether goods are of acceptable quality. Unsafe products have traditionally been regulated through product safety laws.¹⁰⁷ It may be that the reference to safety in the CGL will apply to products that are not so unsafe as to warrant being banned under product safety regimes but which require instructions on correct usage in order to be used safely.¹⁰⁸ Reynolds explains that

there can presumably be goods, not dangerous, which are unusable, or not efficiently usable, without adequate instructions or warnings (for example, as to compatibility with other equipment), and so not up to the present requirement of satisfactory quality, unless such instructions are supplied or available.¹⁰⁹

5 Durability¹¹⁰

The role of durability in assessing whether goods were of merchantable quality under legislation such as the *TPA* was not entirely clear.¹¹¹ Probably the most commonly expressed view was that, while merchantable quality should be assessed at the time of supply, durability was relevant to that assessment.¹¹² In other words, in order to be merchantable, goods needed to be of such quality that they would remain of satisfactory quality for a reasonable length of time.¹¹³ A similar approach may well be taken under the CGL.¹¹⁴ The express reference to the goods being ‘durable’ in assessing acceptable quality will, nonetheless, benefit consumers and traders. The *NEIAT Study* found considerable lack of understanding of the role of durability among traders and consumers:

¹⁰⁴ See, eg, *Jones v West Star Motors Pty Ltd* (1995) ATPR 41-447; Ewan McKendrick (ed), *Goode on Commercial Law* (Penguin Books, 4th ed, 2010) 335.

¹⁰⁵ *Sale of Goods Act 1979* (UK) c 54, s 14(2B)(c).

¹⁰⁶ *ACL* s 54(2)(d).

¹⁰⁷ See, eg, *TPA* pt V div 1A; *ibid* pt 3-3.

¹⁰⁸ *Cf Henry Kendall & Sons v William Lillico & Sons Ltd* [1969] 2 AC 31, 119 (Lord Pearce).

¹⁰⁹ Reynolds, above n 99, 557 [11-039]. See also McKendrick, above n 104, 335. *Cf Peterson v Merck Sharpe & Dohme (Aust) Pty Ltd* (2010) 184 FCR 1, 360 [982], where Jessup J considered that the fact that a product might be the subject of a hazard alert or product recall notice would not alone be sufficient to render it unmerchantable.

¹¹⁰ *ACL* s 54(2)(e).

¹¹¹ See, eg, *Medtel Pty Ltd v Courtney* (2003) 130 FCR 182, 198 [39] (Moore J).

¹¹² Stephen Kapnoullas and Bruce Clarke, ‘Countdown to Zero: The Duration of Statutory Rights for Unfit and Unmerchantable Goods’ (1999) 14 *Journal of Contract Law* 154, 155.

¹¹³ *Ibid* 155, 158–9. See also Reynolds, above n 99, 558–9 [11-040]; McKendrick, above n 104, 336–7; Kenneth Sutton, *Sales and Consumer Law* (LBC Information Services, 4th ed, 1995) 310–11 [10.48]; *Jones v West Star Motors Pty Ltd* (1995) ATPR 41-447.

¹¹⁴ McKendrick, above n 104, 337.

Most traders considered consumers were entitled to a refund or replacement product no more than two weeks after purchase.

Both consumers and traders considered that traders should pay for repairs up to about 12 months after purchase, aligning with the typical duration of manufacturer's warranties.¹¹⁵

Contrary to these expressed views, there are many types of goods that, as a matter of law, might reasonably be expected to operate for a number of years without the need for repairs.¹¹⁶

6 *Price, Packaging and Pre-Contractual Statements*¹¹⁷

The CGL makes clear that in assessing whether goods comply with the guarantee of acceptable quality, the price, the nature of the goods, any statements on packaging and any representations by the retailer or manufacturer may be taken into account. This was the position under the previous regime but it is once again a desirable clarification. Consumers are often strongly influenced in their purchasing decisions by advertising and other statements by traders.

V CLARIFICATION: THE RELATIONSHIP BETWEEN CONSUMER GUARANTEES AND EXTENDED WARRANTIES

The *ACL* implements a number of measures that will impact on the sale of extended warranties. These measures are likely to have considerable practical importance in promoting greater awareness of consumers' rights.

An extended warranty is a contract entered into in conjunction with the purchase of goods, under which the provider of the warranty undertakes to repair or replace the goods should they prove defective or faulty within a specified period of time.¹¹⁸ Extended warranties are widely offered in some industries. The *NEIAT Study* found that 38 per cent of surveyed consumers had purchased extended warranties, typically for white goods and large electrical items.¹¹⁹ The *NEIAT Study* found that traders 'defend extended warranties as "the consumer's choice", and a choice that can save the consumer costs in the longer term.'¹²⁰ In addition, it also found that consumers purchase extended warranties to provide themselves with peace of mind in respect of any repairs to the goods over the warranty period.¹²¹ It appears that the 'peace of mind' offered by extended warranties is particularly attractive to vulnerable consumers who may have difficulties enforcing their statutory rights. For instance, the CCAAC reported

¹¹⁵ *NEIAT Study*, above n 47, 9.

¹¹⁶ See also *CCAAC Final Report*, above n 8, 42, where the CCAAC recommended against a provision specifying a period within which it would be presumed goods were not of merchantable quality. This was due to the fact that it might wrongly be interpreted by consumers and traders to express the maximum period of time within which complaints might be brought about defects in the goods.

¹¹⁷ *ACL* s 54(3).

¹¹⁸ See further *CCAAC Final Report*, above n 8, 79.

¹¹⁹ *NEIAT Study*, above n 47, 47 [7.1]–[7.2].

¹²⁰ *Ibid* 8.

¹²¹ *Ibid* 47 [7.2], 63 [10.2].

that ‘consumers from culturally and linguistically diverse communities and those over the age of 65 have a higher uptake of extended warranties than other groups.’¹²²

Reports preceding the introduction of the *ACL* had identified a number of concerns relating to the sale of extended warranties to consumers.¹²³ It appears that some traders have been pressuring consumers into buying extended warranties.¹²⁴ In addition, the opportunity to purchase an extended warranty is commonly only presented to consumers at the point of final sale for the product in question, when consumers are unlikely to give sufficient attention to the terms and conditions of the warranty contract.¹²⁵ It has further been reported that the terms of extended warranties are often less than transparent, with reports of a ‘lack of clarity about who offers the cover’,¹²⁶ hidden limitations on the scope of the cover,¹²⁷ insufficient explanation of the basis on which the warranties have been priced (that is, whether the price is commensurate with the likely cost of repairs)¹²⁸ and a lack of disclosure of the commissions that are sometimes payable to traders for the sale of an extended warranty.¹²⁹

It also appears that many consumers, and indeed traders, do not understand the relationship between extended warranties and the implied terms or consumer guarantees provided under statute.¹³⁰ If consumers are not aware of or do not understand their rights under statute, it is unlikely that they will be able to assess accurately the benefits provided by an extended warranty.¹³¹ The existence of extended warranties may wrongly suggest to consumers that extended warranties are the only source of protection against defective or faulty goods. For example, the mere opportunity to purchase an extended warranty may induce consumers wrongly to believe that there are no (free) statutory rights. Consumers may also wrongly consider that the time period specified in an extended warranty defines the temporal limits of their rights to a remedy for defective goods.¹³² In fact, extended warranties supplement rather than replace statutory implied terms or consumer guarantees¹³³ and, in the event of conflict, it is the statutory rights that

¹²² *CCAAC Final Report*, above n 8, 83, citing *NEIAT Study*, above n 47, 47 [7.1].

¹²³ See generally Christian Twigg-Flesner, ‘Dissatisfaction Guaranteed? The Legal Issues of Extended Warranties Explored’ [2002] (4) *Web Journal of Current Legal Issues* <<http://webjcli.ncl.ac.uk/2002/issue4/twigg-flesner4.html>>.

¹²⁴ *Ibid* 12. See further NSW Fair Trading, Department of Finance and Services, *Extended Warranties Research 2008* (17 November 2008) <http://www.fairtrading.nsw.gov.au/Aboutus/Reviews_and_reports/Consumer_and_trader_research_and_issues/Extended_warranties_research_2008.html>.

¹²⁵ *CCAAC Final Report*, above n 8, 82–3. See also Choice, Submission to the Commonwealth Consumer Affairs Advisory Council, *Review of Statutory Implied Conditions and Warranties*, July 2009, 5 <<http://www.treasury.gov.au/contentitem.asp?ContentID=1614&NavID=>>>.

¹²⁶ *NEIAT Study*, above n 47, 8.

¹²⁷ *Ibid*.

¹²⁸ Twigg-Flesner, above n 123, 10.

¹²⁹ *NEIAT Study*, above n 47, 8.

¹³⁰ Consumer Affairs Victoria, above n 9, 14–16; Choice, above n 125, 2; *NEIAT Study*, above n 47, 50.

¹³¹ Consumer Affairs Victoria, above n 9, 2, 5, 15–16; Choice, above n 125, 3.

¹³² Consumer Affairs Victoria, above n 9, 35–6.

¹³³ *Rogers v Parish (Scarborough) Ltd* [1987] 1 QB 933, 945 (Mustill LJ).

prevail. Extended warranties may give consumers more extensive protection than that provided under the consumer guarantees.¹³⁴ However, without knowledge of their statutory rights, consumers will be in no position to make this assessment. Certainly, the *NEIAT Study* found that '[w]hen consumers are more informed of their statutory rights, their view of extended warranties changes; they feel that they are being asked to pay for something that they already have the right to expect.'¹³⁵

As a practical matter, the longer the period of time between the purchase of goods and the appearance of a defect or fault, the more difficult it may be for a consumer to establish that the defect was caused by a lack of acceptable quality in the goods, rather than by fair wear and tear or improper use. One advantage of extended warranties may be that for the warranty period, consumers can bypass this evidentiary difficulty. For example, consumers who seek a remedy for defective or faulty goods covered by an extended warranty do not have to establish that the goods became defective within the reasonable time that those goods should have been expected to last for the purposes of the consumer guarantees. The consumer can simply demand a remedy according to the terms of the extended warranty. It is possible that some such consumers may, nonetheless, have to confront an argument from the retailer that the defect is due to their inappropriate use of the goods. As a result, this practical benefit of the extended warranty may not always be significant.

The CGL does not itself directly regulate extended warranties.¹³⁶ However, s 102 of the *ACL* provides that the regulations may 'prescribe requirements relating to the form and content of warranties against defects.' Such 'warranties against defects' have been sufficiently broadly defined by the regulations to cover extended warranties. Thus, a warranty against a defect is

a representation communicated to a consumer in connection with the supply of goods or services, at or about the time of supply, to the effect that a person will (unconditionally or on specified conditions):

- (a) repair or replace the goods or part of them; or
- (b) provide again or rectify the services or part of them; or
- (c) wholly or partly recompense the consumer;

if the goods or services or part of them are defective, and includes any document by which such a representation is evidenced.¹³⁷

From 2012, the regulations will require a warranty against defects to be in writing and to include certain information for the better protection of consumers, including information about the duration, scope and enforcement of the war-

¹³⁴ It might even be argued that if an extended warranty does not extend the protection available to consumers beyond that provided under the CGL, the extended warranty will be in breach of the implied guarantee of fitness for purpose under *ACL* s 61: *S v W & N Ltd* [2010] NZ Disp T 33 (30 May 2010).

¹³⁵ *NEIAT Study*, above n 47, 8.

¹³⁶ Cf *The Supply of Extended Warranties on Domestic Electrical Goods Order 2005* (UK) SI 2005/37.

¹³⁷ *ACL* s 102(3).

ranty.¹³⁸ In addition, the regulations expressly require the written document providing a warranty against defects to alert consumers to the existence of the consumer guarantees under the *ACL*. Thus, an extended warranty that is also a 'warranty against defects' for the purposes of the CGL must include the following statement:

Our goods come with guarantees that cannot be excluded under the *Australian Consumer Law*. You are entitled to a replacement or refund for a major failure and for compensation for any other reasonably foreseeable loss or damage. You are also entitled to have the goods repaired or replaced if the goods fail to be of acceptable quality and the failure does not amount to a major failure.¹³⁹

This provision will at least alert consumers to the possible overlap between their statutory rights under the CGL and the supplementary rights provided by an extended warranty. However, there is no requirement in the regulations for timely disclosure of the specified information. Extended warranties are typically purchased at the time consumers purchase the goods to which the warranty attaches. Disclosure about the details and scope of extended warranties, and their relationship with consumer guarantees, might therefore only be provided at the time the consumer has committed to the purchase. This may be too late for consumers genuinely to have an opportunity to consider the implications of that information. The *ACL* does, however, provide some incentive for traders to take care in the way in which extended warranties are marketed to consumers. Section 29(1) provides that:

A person must not, in trade or commerce, in connection with the supply or possible supply of goods or services or in connection with the promotion by any means of the supply or use of goods or services: ...

- (n) make a false or misleading representation concerning a requirement to pay for a contractual right that:
 - (i) is wholly or partly equivalent to any condition, warranty, guarantee, right or remedy (including a guarantee under Division 1 of Part 3-2); and
 - (ii) a person has under a law of the Commonwealth, a State or a Territory (other than an unwritten law).¹⁴⁰

A trader who expressly claims that purchasing an extended warranty is the only way to obtain rights equivalent to those provided under the CGL will clearly contravene s 29(1)(n). It is unclear whether the mere offer of an extended warranty would also contravene the section. In such circumstances, the trader is not expressly representing that the consumer can only obtain the rights in question by purchasing an extended warranty. The assessment of the worth of the extended warranty is made by the consumer. It might nonetheless be argued that

¹³⁸ *Trade Practices (Australian Consumer Law) Amendment Regulations 2010 (No 1)* (Cth) sch 3, inserting *Competition and Consumer Regulations 2010* (Cth) reg 90.

¹³⁹ *Trade Practices (Australian Consumer Law) Amendment Regulations 2010 (No 1)* (Cth) sch 3, inserting *Competition and Consumer Regulations 2010* (Cth) reg 90(2).

¹⁴⁰ Cf *ASIC Act* s 12DB(1)(j); *TPA* s 53(g). In *CCAAC Final Report*, above n 8, 75 [7.7], it was noted that *TPA* s 53(g) had been of limited application.

a ‘false or misleading representation’ is implicit in the offer of an extended warranty. By offering consumers the opportunity to purchase an extended warranty, a trader is implicitly representing that the consumer will receive rights of some value additional to the rights otherwise available to the consumer under statute. If, in fact, the extended warranty in question does not extend beyond the rights available to the consumer under the CGL, it might be concluded that there has been a contravention of s 29(1)(n).

There appears to be an important limitation on the scope of the new provisions regulating the sale of extended warranties, which may result in the regime having a highly uneven application. The CCAAC reports that there are two types of extended warranties:

The first type of extended warranty is sold by a retailer at the same time that the goods are acquired. In this case, the warranty provider is the manufacturer or retailer of the product. This is not a contract of insurance but is likely to be a facility for managing financial risk. It is likely to fall within the ‘incidental product’ exemption in section 763E of the *Corporations Act 2001*.

The second type of extended warranty is either sold by: the retailer/dealer as an agent or intermediary on behalf of an insurer; or a third party warranty provider who is not involved in the supply of the product covered by the warranty. This type of extended warranty is a financial service since they are either contracts of insurance or contracts for managing financial risk. Accordingly, these extended warranties are subject to the consumer protection provisions of Part 2, Division 2 of the *ASIC Act*, rather than Part V of the *TPA*.¹⁴¹

The *ACL* expressly states that it does not apply to contracts for financial services.¹⁴² There are no equivalent provisions regulating the sale of extended warranties in the *ASIC Act*. Accordingly, the requirements for information to be provided to consumers about extended warranties and the specific prohibition on misleading conduct will only apply to the first type of extended warranty described by the CCAAC — that is, express warranties that are actually provided by the retailer, not those provided by third parties.

VI SUBSTANTIVE CHANGES: THE REGULATION OF EXPRESS WARRANTIES

The CGL introduces further substantive changes to the regime of mandatory quality standards in the supply of goods and services to consumers through a number of provisions regulating ‘express warranties’. Consumers may often be influenced in their decision to purchase goods or services by statements made by the supplier or the manufacturer about the quality or characteristics of that product. These statements may be made in the course of either advertising or negotiations. In many cases, these pre-contractual statements, although influential, may not be included in the formal written contract between the parties. Leaving aside the CGL, the liability of a trader for pre-contractual statements in

¹⁴¹ CCAAC Final Report, above n 8, 80.

¹⁴² CCA s 131A.

the course of negotiations depends on whether such statements form terms of the contract, sometimes referred to as a 'warranty', or are mere representations.¹⁴³ If a statement that takes effect as a term of the contract proves false, the consumer may seek a remedy for breach of contract. If the statement is not a term of the contract, but a mere representation, and proves false, a contractual remedy for breach will not be available. The claim will instead be for misleading and deceptive conduct.¹⁴⁴

The CGL strengthens the rights available to consumers in holding suppliers and manufacturers to pre-contractual statements. First, as already noted, in deciding whether goods are of 'acceptable quality', a court may consider 'any representation made about the goods by the supplier or manufacturer of the goods'.¹⁴⁵ Secondly, the guarantee that goods be 'fit for a purpose' disclosed by a consumer to the supplier¹⁴⁶ is complemented by a guarantee that goods will be fit for any purpose 'for which the supplier represents that they are reasonably fit'.¹⁴⁷ Thirdly, and potentially most significantly, the CGL provides statutory force to the provision of an 'express warranty' given by manufacturers or suppliers of goods.¹⁴⁸ A failure to comply with an 'express warranty' will allow the consumer to seek a remedy under the CGL. The prohibition in s 64 of the CGL on excluding or restricting liability for a failure to comply with a consumer guarantee also applies to an 'express warranty'.¹⁴⁹

Section 59(2) of the CGL provides that if

- (a) a person supplies, in trade or commerce, goods to a consumer; and
- (b) the supply does not occur by way of sale by auction;

there is a guarantee that the supplier will comply with any express warranty given or made by the supplier in relation to the goods.¹⁵⁰

An 'express warranty' is broadly defined under s 2 of the *ACL* to include an 'undertaking, assertion or representation' that relates to the 'quality, state, condition, performance or characteristics of the goods ... the natural tendency of which is to induce persons to acquire the goods.'

The definition is broad enough to apply to oral statements made by suppliers or manufacturers in pre-contractual negotiations, as well as to advertising. The inclusion of express warranties as consumer guarantees in the CGL complements the prohibition on misleading and deceptive conduct under pt 2-1 of the *ACL* with statutory rights directly aimed at pre-contractual representations that induce

¹⁴³ See generally Jeannie Paterson, Andrew Robertson and Arlen Duke, *Principles of Contract Law* (Lawbook, 3rd ed, 2009) ch 12.

¹⁴⁴ *ACL* s 18.

¹⁴⁵ *Ibid* s 54(3)(d).

¹⁴⁶ *Ibid* s 55.

¹⁴⁷ *Ibid* s 55(1).

¹⁴⁸ *Ibid* s 59. Under s 74G of the *TPA*, only manufacturers' warranties were binding in this way.

¹⁴⁹ Carter, 'The Commercial Side of Australian Consumer Protection Law', above n 8, 244-5.

¹⁵⁰ The CGL is also broader than the *Consumer Guarantees Act 1993* (NZ) ss 2 (definition of 'express guarantee'), 14, which gives statutory force only to express guarantees made by a manufacturer in a written document.

entry into a contract for the supply of goods and services. It may also reduce the practical significance of contract doctrines aimed at determining whether oral representations are incorporated as terms of a contract. Under common law, a pre-contractual representation may form part of a contract if, assuming any issues in regard to the parol evidence rule are overcome,¹⁵¹ it was intended by the parties, objectively assessed, to be a promise and to form part of the written contract.¹⁵² These issues will be determined by reference to the circumstances of the case in question, taking into account factors such as the relative expertise of the parties and the words used. Under the CGL, to give a pre-contractual statement legally binding status as a consumer guarantee, consumers merely need to satisfy the more straightforward test of showing that the term was an 'express warranty' with a 'natural tendency ... to induce persons' to enter into a contract.¹⁵³

The extension of the CGL to cover an express warranty might be justified on the basis that consumers place considerable reliance on the pre-contractual representations of suppliers and manufacturers, and not merely on the written terms of a contract. The new regime imposes no undue burden upon suppliers and manufacturers who may, after all, refrain from making such statements. Indeed, the CGL may provide a further incentive to suppliers and manufacturers to ensure that consumers are given accurate information about the goods they are proposing to purchase.¹⁵⁴

VII SUBSTANTIVE CHANGES: THE REMEDIAL REGIME

In replacing the implied terms regime under the *TPA* with one based on statutory consumer guarantees, the CGL cannot rely on the law of contract to provide a remedy in the event of a failure to comply with the guarantees. Accordingly, the CGL itself sets out the remedies available to consumers against suppliers and manufacturers in response to the failure of goods¹⁵⁵ and services¹⁵⁶ to comply with the consumer guarantees. This change is central to the CGL's objective of increasing clarity in the law. As already noted, earlier studies had found that consumers and traders appeared to be unaware of the rights and remedies flowing from a breach of the implied terms regime under the *TPA*.¹⁵⁷

The merits of this new regime are, however, difficult to assess. While consumers and traders may benefit from having their remedial rights and obligations set out in the legislation, these rights and remedies are substantively different from those under the *TPA*. It is possible that the new distinctions introduced by the

¹⁵¹ On these issues, see Paterson, Robertson and Duke, above n 143, ch 14.

¹⁵² *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41, 61–2 (Gibbs CJ). See also *Oscar Chess Ltd v Williams* [1957] 1 All ER 325, 328 (Denning LJ).

¹⁵³ *ACL* s 2 (definition of 'express warranty' para (c)).

¹⁵⁴ Cf M J Trebilcock, 'The Doctrine of Inequality of Bargaining Power: Post-Benthamite Economics in the House of Lords' (1976) 26 *University of Toronto Law Journal* 359, 371.

¹⁵⁵ *ACL* pt 5-4 div 1 sub-div A, pt 5-4 div 2.

¹⁵⁶ *Ibid* pt 5-4 div 1 sub-div B.

¹⁵⁷ See above Part II(B).

regime may themselves contribute to uncertainty. The substantive rights given to consumers under the CGL may, in some instances, prove narrower than those available under the *TPA*.

A The Right to Reject Goods

As discussed above, under the *TPA* the right of a consumer to reject the goods and terminate the contract depended on whether the implied term breached by the supplier was a condition or a warranty.¹⁵⁸ Only a breach of a condition entitled a consumer to terminate the contract.¹⁵⁹ This regime did not take into account the severity of the breach in determining whether a consumer had a right to terminate the contract. Nor did it provide options for a consumer to seek repair or replacement of the goods. On the other hand, it is significant that the implied terms of merchantable quality¹⁶⁰ and fitness for purpose¹⁶¹ had the status of conditions. This classification meant that, in many cases, consumers with faulty or defective goods obtained a right to reject the goods and, assuming they were informed of their legal position, could use this right to bargain for other more flexible remedies. By contrast, the remedies relating to guarantees in the CGL depend on a distinction between major and non-major failures to comply with the consumer guarantees. Only major failures give rise to a right for the consumer to reject the goods.

A major failure to comply with a consumer guarantee applying to goods¹⁶² occurs if:

- the goods would not have been acquired by a reasonable consumer fully acquainted with the nature and extent of the failure;¹⁶³ or
- the goods depart significantly from their description or a sample or demonstration model that was used when selling the goods;¹⁶⁴ or
- the goods cannot easily be remedied to make them fit for purpose within a reasonable time;¹⁶⁵ or
- the goods are not of acceptable quality because they are unsafe.¹⁶⁶

If a supplier's failure to comply with a statutory guarantee is capable of being remedied and is not a major failure, the 'consumer may require the supplier to remedy the failure within a reasonable time'.¹⁶⁷ In remedying a failure to comply with the consumer guarantees applying to the supply of goods, a supplier may

¹⁵⁸ See text accompanying above n 20.

¹⁵⁹ *TPA* s 75A.

¹⁶⁰ *Ibid* s 71(1).

¹⁶¹ *Ibid* s 71(2).

¹⁶² For services, see *ACL* s 268.

¹⁶³ *Ibid* s 260(a).

¹⁶⁴ *Ibid* s 260(b).

¹⁶⁵ *Ibid* ss 260(c)–(d).

¹⁶⁶ *Ibid* s 260(e).

¹⁶⁷ *Ibid* ss 259(2)(a), 267(2)(a).

choose between providing a refund, a replacement or a repair.¹⁶⁸ If the supplier refuses or fails to comply with a request to remedy a failure, the consumer may recover the reasonable costs of having the failure rectified,¹⁶⁹ notify the supplier that the consumer rejects the goods,¹⁷⁰ or terminate the contract for the supply of services.¹⁷¹

If a supplier's failure to comply with the statutory guarantees cannot be remedied or is a major failure, the consumer may reject the goods,¹⁷² terminate the contract for the supply of services,¹⁷³ or recover compensation for the reduction in the value of the goods or services below the price paid or payable by the consumer.¹⁷⁴ Consumers may also 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.'¹⁷⁵

The distinction drawn in the CGL between major and non-major failures to comply with a consumer guarantee has some precursor in the common law approach to intermediate breach, under which the right to terminate depends on the severity of the breach.¹⁷⁶ The CGL departs from the common law in prioritising performance-based remedies, such as the right to have goods repaired, over damages as a response to breach of contract. The approach in the CGL assumes that the 'original interest of both parties to have the contract performed as agreed is paramount.'¹⁷⁷ Certainly, the *NEIAT Study* found that the preference of most consumers where goods or services failed or had faults was for a replacement or repair rather than a refund of the purchase price following return of the goods.¹⁷⁸

Although the CGL gives consumers a right to have a failure to comply with a consumer guarantee remedied, it is the supplier who has the discretion to determine how that is done by choosing between refund, replacement and repair.¹⁷⁹ Professor Carter has expressed concern that this approach may act to the detriment of consumers by allowing suppliers to choose to repair rather than replace goods.¹⁸⁰ An alternative solution would have been to list the possible remedies available in the event of a failure to comply with the consumer guaran-

¹⁶⁸ *Ibid* s 261.

¹⁶⁹ *Ibid* s 259(2)(b)(i).

¹⁷⁰ *Ibid* s 259(2)(b)(ii).

¹⁷¹ *Ibid* s 267(2).

¹⁷² *Ibid* s 259(3)(a). For restrictions on the right to reject goods, see s 262.

¹⁷³ *Ibid* s 267(3)(a).

¹⁷⁴ *Ibid* ss 259(3)(b), 267(3)(b).

¹⁷⁵ *Ibid* s 259(4). See also s 267(4).

¹⁷⁶ Bevan, Dugan and Grainer, above n 62, 80 [4.58]; Carter, 'The Commercial Side of Australian Consumer Protection Law', above n 8, 233–4.

¹⁷⁷ Ulrich Magnus, 'Consumer Sales and Associated Guarantees' in Christian Twigg-Flesner (ed), *The Cambridge Companion to European Union Private Law* (Cambridge University Press, 2010) 243, 252.

¹⁷⁸ *NEIAT Study*, above n 47, 8.

¹⁷⁹ *ACL* s 261.

¹⁸⁰ Carter, 'The Commercial Side of Australian Consumer Protection Law', above n 8, 234.

tees, and to grant consumers discretion to choose between these remedies.¹⁸¹ The EC *Directive 1999/44/EC* also prioritises the role of performance-based remedies, but contemplates consumers having a choice between repair and replacement of the goods, unless this is impossible or disproportionate.¹⁸²

B Compensation and Damages

Under the implied terms regime in the *TPA*, a breach of a statutory implied term was a breach of contract that entitled a consumer to an award of damages under the law of contract. The breach was not a contravention of the *TPA* that entitled consumers to access the remedies in that Act.¹⁸³ The *TPA* provided consumers with a statutory right to recover from manufacturers compensation for ‘loss or damage’ suffered where goods did not comply with specified quality standards.¹⁸⁴ By contrast, the CGL itself sets out the measures of compensation and damages available to consumers against both suppliers and manufacturers where there is a failure to comply with a consumer guarantee. The measure of the damages available under the CGL, as compared to those awarded in contract law for a breach of a term implied under the *TPA*, is not entirely clear. It appears, however, that the measure of compensation and damages available to consumers under the CGL may not match the damages that would have been recovered under the law of contract.

1 Compensation Based on Reduction of the Value of the Goods or Services

Under the CGL, if a failure to comply with the statutory guarantees cannot be remedied or is a major failure, the consumer may choose to reject the goods¹⁸⁵ or to recover compensation.¹⁸⁶ The compensation will be based on any reduction in the value of the goods or services below the price paid or payable.¹⁸⁷ Thus, in respect to compensation for goods that fail to comply with the consumer guarantee, s 259(3) provides that

[i]f the failure to comply with the guarantee cannot be remedied or is a major failure, the consumer may: ...

- (b) by action against the supplier, recover compensation for any reduction in the value of the goods below the price paid or payable by the consumer for the goods.

Compensation may be claimed from a manufacturer on a similar basis.¹⁸⁸

¹⁸¹ Carter, Submission No 44 to Senate Standing Committee on Economics, above n 88, 25 [7.3].

¹⁸² *Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on Certain Aspects of the Sale of Consumer Goods and Associated Guarantees* [1999] OJ L 171/12, art 3. See also *Sale of Goods Act 1979* (UK) c 54, pt 5A.

¹⁸³ *E v Australian Red Cross Society* (1991) 27 FCR 310, 353 (Wilcox J); *Zalai v Col Crawford (Retail) Pty Ltd* [1980] 2 NSWLR 438, 441 (Rogers J).

¹⁸⁴ *TPA* pt V div 2A.

¹⁸⁵ *ACL* s 259(3)(a). In the case of services, the consumer may choose to terminate the contract for the supply of the services: at s 267(3)(a).

¹⁸⁶ *Ibid* ss 259(3)(b), 267(3)(b).

¹⁸⁷ *Ibid*.

¹⁸⁸ *Ibid* s 272(1)(a).

The measure of compensation available under the CGL resembles the damages that might be recovered in an action based in tort rather than in contract. As such, it provides a more restrictive measure of compensation than would have been available to a consumer under the implied terms regime in the *TPA*.¹⁸⁹ In tort, damages are awarded with the object of placing the plaintiff in the position in which he or she would have been had the tort not been committed.¹⁹⁰ For example, '[i]n deceit the measure of damages is the difference at the time of purchase between the real value of the goods, and the price paid' for those goods.¹⁹¹ By contrast, contract damages aim to put the plaintiff in the position he or she would have been in had the contract been performed.¹⁹² Thus, for example, damages in contract for defective goods are, subject to the rules of causation, remoteness and mitigation, typically based on the difference between the value of the goods delivered and the value of the goods had they complied with the contract.¹⁹³

2 Reasonably Foreseeable Losses

Where goods or services fail to comply with a consumer guarantee, consumers may recover damages from the supplier for any loss or damage that was reasonably foreseeable.¹⁹⁴ A similar claim may be available against a manufacturer.¹⁹⁵ In respect of goods, s 259(4) provides:

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.

The CGL damages provisions will allow a consumer to claim foreseeable losses consequential to the failure of goods to comply with a consumer guarantee.¹⁹⁶ For example, a consumer might recover water damage to a carpet caused by a faulty washing machine, or the costs of alternative transport where a bicycle bought to ride to work proved to be defective.

It is uncertain whether a consumer might claim as 'foreseeable' damages akin to those available for breach of contract, which put the consumer in the position

¹⁸⁹ In the report that preceded the *Consumer Guarantees Act 1993* (NZ), Professor David Vernon advocated for a tort-based remedy for failure to comply with the consumer guarantees: David H Vernon, *An Outline for Post-Sale Consumer Legislation in New Zealand: A Report to the Minister of Justice* (1987) 27–30. For criticism of this approach, see David J Harland, 'Post-Sale Consumer Legislation for New Zealand — A Discussion of the Report to the Minister of Justice by Professor David H Vernon' (1988) 3 *Canterbury Law Review* 410, 434–8.

¹⁹⁰ *Livingstone v Rawyards Coal Co* (1880) 5 App Cas 25, 39 (Lord Blackburn).

¹⁹¹ *Gates v The City Mutual Life Assurance Society Ltd* (1986) 160 CLR 1, 12 (Mason, Wilson and Dawson JJ).

¹⁹² *Robinson v Harman* (1848) 1 Ex 850, 855; 154 ER 363, 365 (Parke B).

¹⁹³ This basic measure of contract damages is enshrined in the *Sale of Goods Act 1979* (UK) c 54, ss 50–1, 53; *Goods Act 1958* (Vic) s 56. See also *Lowe v Mack Trucks Australia Pty Ltd* [2008] FCA 439 (4 April 2008) [268] (Kenny J).

¹⁹⁴ *ACL* ss 259(4), 267(4).

¹⁹⁵ *Ibid* s 272(1)(b).

¹⁹⁶ According to Bevan, Dugan and Grainer, above n 62, 117 [4.132], this is also the interpretation given to s 18(4) of the *Consumer Guarantees Act 1993* (NZ).

he or she would have been in had goods complied with the consumer guarantee. Three examples can be used to illustrate the issue.

(a) *Example 1*

A consumer purchases an expensive designer chair for \$3250. Such chairs normally retail for \$4000. The chair proves, however, to have minor damage, which means its value is only \$3000. The defect cannot be remedied but the consumer elects to keep the chair. If the consumer was able to sue for breach of contract, the consumer could claim \$1000, being the difference between the value of the chair provided and the value the chair would have had if it complied with the contract. Under *ACL* s 259(3)(b), the consumer could claim the difference between the actual value of the chair and the amount paid for it, which is \$250. Could it be argued that under *ACL* s 259(4), the foreseeable loss is \$1000?

(b) *Example 2*

A consumer enters into a contract for a parquet floor. The floor that is installed is not of acceptable quality because the surface is stained, uneven and generally not of an aesthetically pleasing quality. For the consumer to obtain a floor of the agreed standard, the parquet that has been laid would have to be removed and replaced. This would be an expensive process. If the consumer sued for breach of contract, the consumer would probably be able to claim rectification damages for the cost of replacing the defective floor with one that complied with the contract.¹⁹⁷ Under the CGL, if the failure of the floor to comply with the consumer guarantee of acceptable quality could be remedied and was not a major failure, the consumer could request the supplier to remedy the failure.¹⁹⁸ The supplier could elect to do this merely by refunding any money paid by the consumer.¹⁹⁹ If the defect was a major failure or could not be remedied, the consumer could elect to reject the goods and recover the purchase price or to claim the difference between the price paid for the floor and the value of the defective floor actually laid.²⁰⁰ It is unclear, however, whether the consumer could claim rectification damages under *ACL* s 259(4) for the cost of replacing the defective floor with one that complied with the contract. The issue would be whether the 'foreseeable loss' referred to in s 259(4) extends to the cost of rectifying the defects so as to enable the consumer to obtain a floor of the quality for which he or she contracted.

(c) *Example 3*

A consumer purchases a grey water tank. The consumer is induced to enter into the contract for the tank by a statement by the supplier that the tank is so efficient that it will save the consumer \$20 a month in water bills. In fact, the tank does not work well enough for the consumer to make that saving. The consumer elects to keep the tank. There is no evidence the tank is worth less than

¹⁹⁷ See *Tabcorp Holdings Ltd v Bowen Investments Pty Ltd* (2009) 236 CLR 272.

¹⁹⁸ *ACL* s 259(2).

¹⁹⁹ *Ibid* s 261(d).

²⁰⁰ *Ibid* s 259(3).

the consumer paid for it, so there is no claim for compensation available under s 259(3)(b). If the consumer sued for breach of contract, the consumer would need to show that the statement about the cost savings was made as a promise and intended to be a term of the contract. If the consumer could pass this hurdle, the consumer could claim damages compensating him or her for the lost water bill savings he or she expected to obtain had the tank complied with the statement. If the consumer sued for misleading and deceptive conduct, the case law is currently uncertain as to whether the consumer could recover this measure of damages, based on his or her expectation loss.²⁰¹ Assuming the statement constituted an 'express warranty' under the CGL,²⁰² it is unclear whether the consumer could claim the lost savings as foreseeable losses under s 259(4).²⁰³

The requirement that the damages be 'reasonably foreseeable' is reminiscent of the principle of remoteness applying to the tort of negligence. In negligence, the rule of remoteness states that a loss is too remote if it is not reasonably foreseeable.²⁰⁴ In contract law, the remoteness rule in *Hadley v Baxendale*²⁰⁵ refers to losses that were 'reasonably contemplated' by both parties.²⁰⁶ It might be argued that, given the provisions providing for compensation and damages under the CGL both invoke concepts used in the law of torts, a tort-based measure of damages should define the limit of the award. On this approach, the award of damages under s 259(4) in the above examples would not extend beyond what is provided under s 259(3) (a tort-based measure).

Alternatively, it might be argued that if the wrong giving rise to damages under the CGL is considered, that wrong is failing to comply with the mandatory standard of quality found in a consumer guarantee. This might suggest a measure akin to contract damages, which put the consumer in the position that he or she would have been in had the goods complied with the guarantee.²⁰⁷ It might be argued that this approach is also supported by the words of the legislation.²⁰⁸ In each of the scenarios above, the consumer is not in the position he or she

²⁰¹ See the different approaches to this issue in *Marks v GIO Australia Holdings Ltd* (1998) 196 CLR 494 and *Murphy v Overton Investments Pty Ltd* (2004) 216 CLR 388. See also the analysis of this issue in Craig Colvin, 'Tales of the Unexpected: Damages for Lost Expectations' (1997) 5 *Trade Practices Law Journal* 17.

²⁰² See above Part VI.

²⁰³ Cf *Murphy v Overton Investments Pty Ltd* (2004) 216 CLR 388.

²⁰⁴ *Overseas Tankship (UK) Ltd v Morts Dock & Engineering Co Ltd* [1961] AC 388, 426 (Viscount Simonds for Viscount Simonds, Lords Reid, Radcliffe, Tucker and Morris) ('*Wagon Mound [No 1]*').

²⁰⁵ (1854) 9 Ex 341, 355; 156 ER 145, 151 (Alderson B).

²⁰⁶ Some courts have suggested that the remoteness rule in tort is wider than in contract. See, eg, *Koufos v C Zarnikow Ltd* [1969] 1 AC 350, 385–6 (Lord Reid), 411 (Lord Hodson), 413–14 (Lord Pearce), 422 (Lord Upjohn); *Alexander v Cambridge Credit Corporation Ltd* (1987) 9 NSWLR 310, 365 (McHugh JA). Cf *Victoria Laundry (Windsor) Ltd v Newman Industries Ltd* [1949] 2 KB 528, 539 (Asquith LJ for Asquith, Tucker, and Singleton LJJ); *H Parsons (Livestock) Ltd v Uttley Ingham & Co Ltd* [1978] QB 791, 801–2 (Lord Denning MR).

²⁰⁷ See also G Q Taperell, R B Vermeesch and D J Harland, *Trade Practices and Consumer Protection: A Commentary on the Trade Practices Act 1974* (Butterworths, 3rd ed, 1983) 902–3 [1831], where it is argued that in respect of a manufacturer's liability under pt V div 2A of the *TPA* an analogy with contract, rather than tort, is appropriate.

²⁰⁸ See *Marks v GIO Australia Holdings Ltd* (1998) 196 CLR 494, 510 (McHugh, Hayne and Callinan JJ).

expected to be in had the goods complied with the guarantee. The associated 'expectation losses' that flow from the failure of the goods to comply with the guarantee may hence be classed as 'foreseeable'.

If such arguments are adopted, then the damages awarded under s 259(4) will be able to supplement the amounts prescribed as compensation under s 259(3). Interestingly, on this basis, it might also be argued that, under the CGL, damages might be claimed for disappointment and distress arising from a failure to comply with the consumer guarantees.²⁰⁹ Such damages are not generally available for breach of contract, but may be a 'reasonably foreseeable' consequence of at least some failures of goods or services to comply with the consumer guarantees. Whatever the conclusion on this point, it can be seen that the relationship between the measures of compensation and damages in the CGL will not be straightforward.

VIII CONCLUSION

The CGL was enacted with the aim of harmonising and clarifying the law providing mandatory standards of quality in contracts for the supply of goods and services to consumers in order to assist consumers and traders better to understand their statutory rights and obligations. This piece has argued that the extent to which the CGL meets these aims is uncertain. The CGL is not entirely successful in achieving its aim of harmonisation, particularly given the fact that different regimes continue to apply to business transactions and to consumer contracts for financial services and products. The CGL does clarify some aspects of the law, particularly with regard to the new standard of 'acceptable quality' that replaces the implied term of 'merchantable quality', and in respect of the relationship between extended warranties and consumer guarantees. However, new concepts governing the remedies available where there is a failure to comply with a consumer guarantee under the CGL may introduce considerable uncertainty into the regime.

Importantly, the CGL has made several substantive changes to the mandatory quality standards in the supply of goods and services to consumers imposed by law. The CGL extends statutory regulation to 'express warranties', including pre-contractual representations about the quality or characteristics of goods and services, with the consequence that in consumer contracts there is likely to be much less reliance on contractual doctrines governing the incorporation of terms. The CGL removes mandatory quality standards from the domain of contract law and introduces a remedial regime that is very different to that applying under the law of contract. Ultimately, the success of the CGL in protecting consumers will depend on increasing consumers' and traders' knowledge of their statutory rights and obligations. This is something that the legislation, at least currently, does not directly address.

²⁰⁹ The issue was raised but not resolved in *Pier v Imation Holdings Ltd* (Unreported, High Court of New Zealand, Hansen J, 5 December 2006) [19], [32]–[34].