

December 2010

Warranties to Consumers & the new Competition and Consumer Act

Katarina Klaric *

Principal, Stephens Lawyers & Consultants

Overview

It is common industry practice for manufacturers and suppliers to provide express warranties to consumers, in respect of supplied goods or services. From a marketing perspective, providing an express warranty to consumers, sends positive messages to the public about the quality, value and reliability of your business' goods or services and promotes customer loyalty and assurance.

Express manufacturers' warranties operate in addition to the rights consumers have under statute. Previously, under the *Trade Practices Act*, the State Fair Trade Acts and Goods Acts, warranties and conditions, including warranties as to title, fitness for purpose and merchantable quality, were implied into consumer contracts. The implied statutory warranties and conditions regime has now been replaced by a comprehensive new framework of statutory guarantees under the *Competition and Consumer Act*, as of **1 January 2011**.

These new laws have important implications in the franchise industry. Any franchisors involved in the supply of goods and services to consumers, that is goods and services having a value of less than \$40,000 or goods or services used for personal, domestic or household use (irrespective of value) will have to abide by the statutory guarantees when dealing with product defects or consumer complaints about products or services.

The new statutory guarantees in relation to consumer goods include the following:

- Guarantee as to title; [\[1\]](#)
- Guarantee as to undisturbed possession (provided there are no limitations on the title disclosed to the consumer); [\[2\]](#)
- Guarantee as to undisclosed securities, charges or encumbrances; [\[3\]](#)
- Guarantee that goods are of an acceptable quality; [\[4\]](#)
- Guarantee that goods are reasonably fit for any disclosed purpose; [\[5\]](#)
- Guarantee that goods match their description; [\[6\]](#)
- Guarantee that goods match a sample or demonstration model; [\[7\]](#) and
- Guarantee that spare parts and repair facilities are reasonably available for a reasonable period after goods are supplied. [\[8\]](#) An exemption applies where manufacturers give reasonable notice, in writing, to a consumer that repair facilities or parts would not be available for a specified period. [\[9\]](#)

Further, if a manufacturer or supplier provides an express warranty to consumers when supplying goods, the *Competition and Consumer Act* imposes on the manufacturer or supplier, a statutory guarantee that they will comply with the express warranty provided in respect of their products or services.

The *Competition and Consumer Act*, imposes statutory guarantees in relation to the supply of **services**, as to the following:

- Guarantee as to due care and skill; [\[10\]](#)
- Guarantee that services are reasonably fit for a particular purpose; [\[11\]](#)
- Guarantee that services will achieve the desired result; [\[12\]](#) and
- Guarantee as to reasonable time of supply. [\[13\]](#)

The guarantees for the supply of services do not apply to contracts for the transportation or storage of goods, or insurance contracts. [\[14\]](#)

Further, the *Competition and Consumer Act* also provides that the statutory guarantees cannot be excluded, restricted or modified by contract. A contractual term excluding, restricting or modifying a guarantee will be void. [\[15\]](#) However, manufacturers or suppliers can limit their liability for failure to comply with statutory guarantees (other than guarantees as to title, undisturbed possession and undisclosed securities, charges and encumbrances), in limited circumstances.

Examples: Conduct your franchise business should avoid

Requiring consumers to pay for rights entitled under statute

It is unlawful to require consumers to pay for rights that they are already entitled to under statutory guarantees. [\[16\]](#) This may be particularly relevant in the case of manufacturers' extended warranties. For example, if a product is sold with a free 12-month manufacturer's warranty, and the consumer is told that they must purchase an extended warranty, or they will have no right to a remedy after 12 months, the supplying business is likely to have breached the *Competition and Consumer Act*. This type of conduct attracts substantial penalties of up to \$1.1 million for companies and \$220,000 for individuals.

Displaying a "no refund" sign/policy

If a business displays a sign which states "no refund" or "no refund on sale items", they imply that a consumer cannot get a refund under any circumstances. This conduct is unlawful, as the *Competition and Consumer Act* specifically provides that refunds are available where there is a failure to comply with a statutory guarantee. [\[17\]](#) However, businesses can limit the circumstances in which refunds are offered, such as refusing to offer refunds for "change of mind".

Selling goods which do not match a sample/demonstration model

Where a business advertises products using a sample or demonstration model, all goods must match the demonstration shown prior to a consumer's purchase. [\[18\]](#) This issue commonly arises in the context of cars or motorbikes: if a consumer test drives a car and the dealer informs the consumer that their purchased is the same as the demonstration vehicle, the dealer will be in breach of their statutory guarantees if the car delivered to the consumer does not match the demonstration model (ie has a lesser capacity engine, has less safety features etc).

Failing to achieve the consumer's desired result

Businesses who supply consumers with services, have statutory obligations to ensure that their services must achieve the result that the consumer has made known to them prior to agreeing to the services. [19] This consumer guarantee is particularly relevant to many service-orientated franchise businesses, including those operating in the gardening, fitness, beauty, cosmetic laser treatments, hairdressing, hair-replacement, cleaning or repairs areas. An example would be if a consumer visits a laser hair-removal clinic, and the consumer is told and expects to get "lasting results" by using the laser technique, and in fact, this does not occur and has hair regrowth, then the services provided by the clinic would not meet the statutory guarantee.

Refusing to offer spare parts or repair facilities

Manufacturers and suppliers must make repair facilities and access to spare parts, reasonably available to consumers, for a reasonable period of time after goods are purchased. [20] However, the manufacturer is entitled to make clear to a consumer, that repair facilities and/or spare parts will not be available after a specified period. For example, a consumer purchases an expensive European bike, and is told by the supplier that spare parts will be available for a period of 5 years after purchase; one year after purchase of the bike, if the consumer is unable to have the bike repaired as spare parts are not available, the supplier has failed to comply with the statutory obligation relating to spare parts and repair facilities under the *Competition and Consumer Act*.

Further from **1 July 2011**, repair notices relating to consumer goods will need to comply with various new requirements under the *Competition and Consumer Regulations*, such as the need to include the following statement in notices where the repairer offers refurbished goods or uses refurbished parts: "*Goods presented for repair may be replaced by refurbished goods of the same type rather than being repaired. Refurbished parts may be used to repair the goods*". [21]

Implications for Franchise Businesses

Franchise businesses who offer warranties to consumer for the goods or services they provide, must consider whether they are compliant with the new consumer guarantees under the *Competition and Consumer Act*. Significantly, where a business offers an extended warranty, it is necessary to ensure that the extended warranty provides more protection to consumers than the rights they are entitled to under the statutory guarantees.

For more information on consumer guarantees and the new *Competition and Consumer Act*, please see Stephens Lawyers' [December 2010 Trade Practices Update: New Consumer Laws commencing 1 January 2011](#).

*** Katarina acknowledges the assistance of Colette Downie (Paralegal) in the preparation of this article.**

Stephens Lawyers & Consultants can advise on all aspects of Australian Consumer Law compliance and the *Competition and Consumer Act*.

Our lawyers represent leading companies in both litigious and commercial matters.

For further information contact:

Katarina Klaric

Principal

Stephens Lawyers & Consultants

*Level 34, 360 Collins Street
Melbourne VIC 3000
Phone: (03) 8636 9100
Fax: (03) 8636 9199
Email: stephens@stephens.com.au
Website: www.stephens.com.au
All Correspondence to:
PO Box 16010
Collins Street West
Melbourne VIC 8007*

To register for newsletter updates and to send your comments and feedback, please email stephens@stephens.com.au

Disclaimer: This newsletter is not intended to be a substitute for obtaining legal advice.

© Stephens Lawyers & Consultants. March 2011. Researched and written by Katarina Klaric and Colette Downie.

[\[1\]](#) *Competition and Consumer Act 2010* section 51.

[\[2\]](#) *Competition and Consumer Act 2010* section 52.

[\[3\]](#) *Competition and Consumer Act 2010* section 53.

[\[4\]](#) *Competition and Consumer Act 2010* section 54.

[\[5\]](#) *Competition and Consumer Act 2010* section 55.

[\[6\]](#) *Competition and Consumer Act 2010* section 56.

[\[7\]](#) *Competition and Consumer Act 2010* section 57.

[\[8\]](#) *Competition and Consumer Act 2010* section 58(1).

[\[9\]](#) *Competition and Consumer Act 2010* section 58(2).

[\[10\]](#) *Competition and Consumer Act 2010* section 60.

[\[11\]](#) *Competition and Consumer Act 2010* section 61(1).

[\[12\]](#) *Competition and Consumer Act 2010* section 61(2).

[\[13\]](#) *Competition and Consumer Act 2010* section 62.

[\[14\]](#) *Competition and Consumer Act 2010* section 63.

[\[15\]](#) *Competition and Consumer Act 2010* section 64.

[\[16\]](#) *Competition and Consumer Act 2010* section 29(1)(n).

[\[17\]](#) *Competition and Consumer Act 2010* section 261.

[\[18\]](#) *Competition and Consumer Act 2010* section 57.

[\[19\]](#) *Competition and Consumer Act 2010* section 61(2).

[\[20\]](#) *Competition and Consumer Act 2010* section 58.

[\[21\]](#) *Competition and Consumer Regulations 2010*, Explanatory Statement, Schedule 2, Item 1. Available at: <http://www.comlaw.gov.au/comlaw/Legislation/LegislativeInstrument1.nsf/all/whatsnew/733DF6FC5026BB02CA2577DB0079E483?OpenDocument&VIEWCAT=attachment&COUNT=999&START=1> .