

# Consumer guarantees under the ACL

By Jenny Stathis

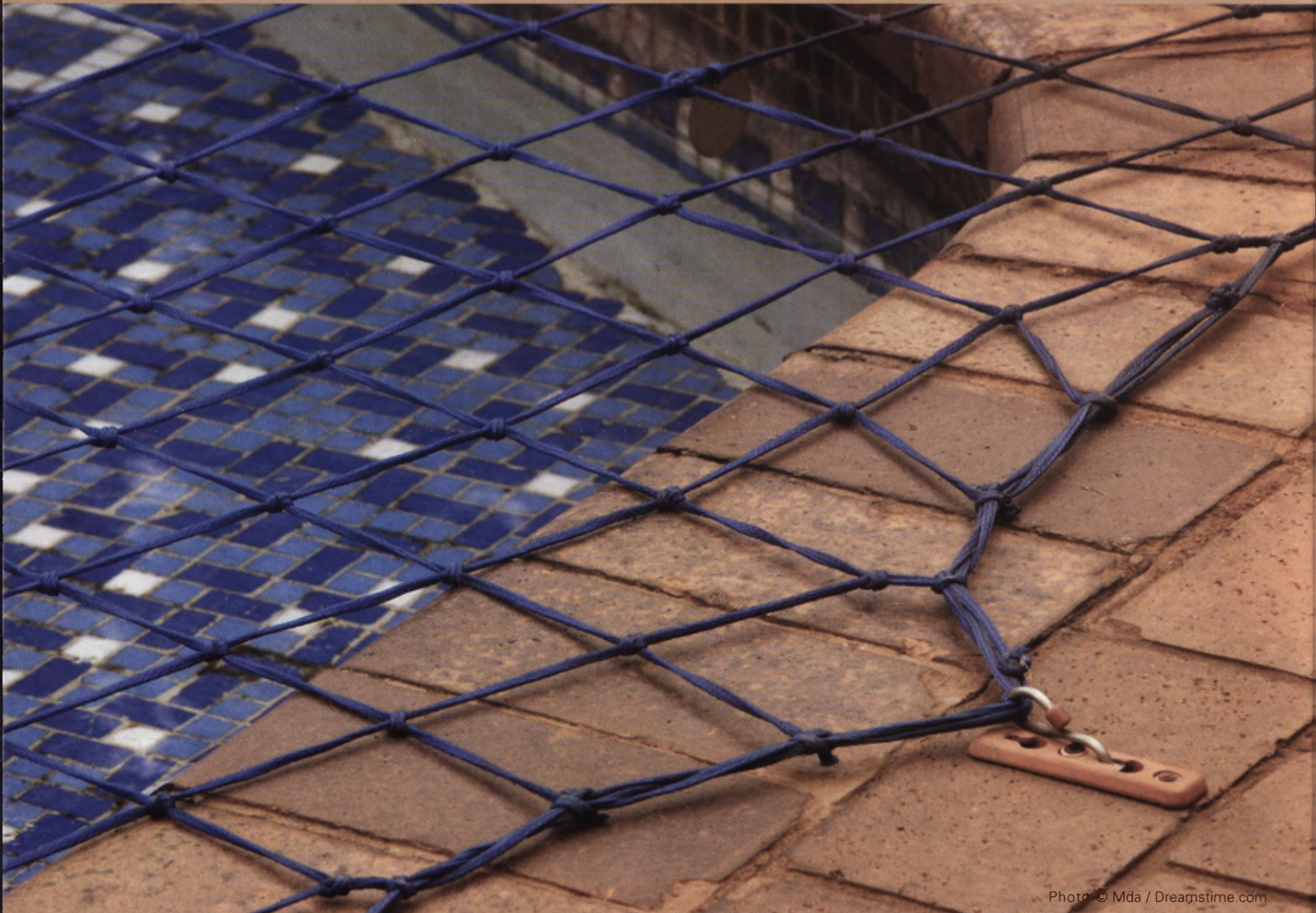


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On 1 January 2011, the *Trade Practices Act 1974 (Cth)* (TPA) was renamed the *Competition and Consumer Act 2010 (Cth)* (the CCA). This name change was part of a suite of changes that culminated in the Australian Consumer Law (the ACL).



**T**he ACL forms Schedule 2 to the CCA and includes a new consumer guarantees regime which replaced the implied conditions and warranties that were contained in the TPA and equivalent state and territory legislation. The new regime is based on similar provisions in the New Zealand *Consumer Guarantees Act 1993* (NZCGA) and is designed to clarify and simplify consumer rights where a consumer experiences a problem with goods or services they acquire.

**BACKGROUND TO REFORMS**

The introduction of the consumer guarantees regime has its origins in the recommendations made by the Productivity Commission in its 2008 report, *Review of Australia's Consumer Policy Framework*. The Productivity Commission recommended that consumer regulators should raise awareness among consumers and suppliers about the statutory rights and responsibilities conferred by the implied warranties and conditions in the generic consumer law and, where appropriate, take specific enforcement action against misleading marketing and sale of extended warranties. It also recommended the examination of the adequacy of the legislation relating to implied warranties and conditions as part of the development of the national generic consumer law.<sup>1</sup>

In 2009, the National Education and Information Advisory Taskforce conducted a national study on consumer and trader experiences in relation to statutory warranties and refunds (NEIAT Study). The study focused on three markets – whitegoods, electronic goods and mobile phones – where problems with warranties and refunds were found to be relatively high.

According to the NEIAT Study, less than 20 per cent of both consumers and traders were able to demonstrate actual knowledge and understanding of the basic principles of federal or state legislation.<sup>2</sup> Almost half of all consumers claimed to know of no protection beyond the manufacturer's warranty and only 13 per cent were aware (without prompting) of the right

57 per cent of retailers and 47 per cent of manufacturers and importers had no idea of any consumer protections beyond the manufacturer's warranty.

to return faulty goods and expect the trader to make good by way of repairs, a replacement product or a refund.<sup>3</sup>

As to traders, the NEIAT Study found that 57 per cent of retailers and 47 per cent of manufacturers/importers had no idea of any consumer protections beyond the manufacturer's warranty and one in five traders did not consider that they were subject to any legal obligation to give refunds on faulty goods when sought by consumers.<sup>4</sup> Manufacturers' warranties also seemed to dictate trader expectations of how long consumers should be entitled to repairs for faulty goods.

In 2009, the Commonwealth Consumer Affairs Advisory Council (CCAAC) conducted a review of the laws on implied conditions and warranties in the TPA and equivalent state and territory laws. The CCAAC found that the range and lack of uniformity of Australian laws on implied conditions and warranties had led to confusion and uncertainty for consumers and businesses.<sup>5</sup> It also found that the understanding by consumers and businesses about implied conditions and warranties was limited, which also led to confusion and uncertainty about the application of the law.<sup>6</sup> Relevantly, the CCAAC found that the ACL should include a single set of consistent statutory consumer guarantees that are simple and clear.<sup>7</sup> These consumer guarantees would be similar to those in the NZCGA.<sup>8</sup> They would be drafted in a way which abandons the contractual language of conditions and warranties<sup>9</sup> and provides for new statutory remedies for breach of these guarantees.<sup>10</sup>

The implementation of the

national consumer guarantees regime therefore presents an opportunity to raise awareness among consumers and suppliers of their rights and responsibilities in this area. The government will provide \$1.6 million in 2011-12 to the Australian Competition and Consumer Commission (ACCC) to educate consumers and suppliers about their rights and responsibilities in this area.<sup>11</sup> Another educative initiative is the government-endorsed point-of-sale sign, 'Refunds and returns',<sup>12</sup> which clearly sets out information about the rights of consumers to refunds, replacements and repairs.

**WHAT ARE THE CONSUMER GUARANTEES?**

The consumer guarantees are set out in Part 3-2, Division 1 of the ACL and provide minimum standards or performance guarantees that manufacturers and suppliers must meet when they supply goods or services to consumers.

In relation to the supply of goods, the guarantees are:

- the supplier has a right to sell the goods;
- the consumer has the right to undisturbed possession of goods;
- goods are free from any undisclosed security, charge or encumbrance;
- goods are of an acceptable quality;
- goods are reasonably fit for any disclosed purpose;
- goods correspond with their description;
- goods correspond with the sample or demonstration model in quality, state or condition;
- the manufacturer of goods will take reasonable action to ensure that facilities for the repair of the >>

While the test to be applied in determining whether goods are of an acceptable quality is an objective one, it is of necessity flexible so as to apply to a vast range of goods and to particular goods and circumstances.

goods, and spare parts are reasonably available for a reasonable period of time after the supply of the goods; and

- the manufacturer or supplier will comply with any express warranty given or made by the manufacturer.<sup>13</sup>

In relation to the supply of services, the guarantees are:

- services will be rendered with due care and skill;
- services and related products will be reasonably fit for their identified purpose; and
- services will be supplied within a reasonable time.<sup>14</sup>

The consumer guarantees cannot be excluded, restricted or modified by contract.<sup>15</sup> However, where the supply is for goods or services that are other than of a kind ordinarily acquired for personal, domestic or household use or consumption, the supplier or manufacturer may limit their liability for failure to comply with a guarantee, if it is fair or reasonable to do so.<sup>16</sup>

The consumer guarantees apply to the supply in trade or commerce (with the exception of the guarantees as to title, undisturbed possession and undisclosed securities) of goods and

services to a consumer. A consumer is defined in s3 of the ACL as someone who acquires:

- (a) goods or services of any kind not exceeding \$40,000;
- (b) goods or services costing in excess of \$40,000, but that are of a kind ordinarily acquired for personal, domestic or household use or consumption; or
- (c) a vehicle or trailer acquired for use principally in the transport of goods.

An acquirer of goods will not be considered a consumer if they acquire goods to on-sell or to manufacture or transform the goods into another product which is then sold. This means that in some circumstances businesses will be considered to be 'consumers' under this regime.

The NZ decision of *Nesbit v Porter* [2000] 2 NZLR 465 (Court of Appeal) provides guidance on the meaning of 'consumer' and, in particular, the meaning of 'goods ordinarily acquired for personal, domestic or household use or consumption'. In July 1995, the Nesbits purchased an 11-year-old Nissan Navara 4-wheel drive utility for \$10,990. While there had been some minor problems with the utility, the Nesbits first became aware of major issues in December 1995, namely a problem with rust and defective shock absorbers and bushes. In January 1996, the Nesbits discovered problems with the steering box and, soon after, the vehicle failed a warrant of fitness check because of rust. The checklist also mentioned the steering box.

The Court held that 'ordinarily' is used in the sense of 'as a matter of regular practice or occurrence' or 'in the ordinary or usual course of events or things'.<sup>17</sup> The Court found that the Nissan Navara was a good of a kind ordinarily acquired for personal, domestic or household use or consumption, even though the evidence showed that of the total sales of Nissan Navaras in New Zealand, 80 per cent were for commercial purposes and 20 per cent were exclusively for private use. This interpretation suggests that the scope is quite broad for goods to be considered of a kind ordinarily acquired for personal, domestic, or household

use or consumption and, accordingly, for persons acquiring those goods to be considered consumers.

### THE GUARANTEE OF 'ACCEPTABLE QUALITY'

One of the key changes is the introduction of a guarantee of 'acceptable quality' that has replaced the implied condition of 'merchantable quality'. Unlike the latter term, the term 'acceptable quality' is defined in s54 of the ACL:

- (2) Goods are 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).
- (3) The matters for the purposes of subsection (2) 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.'

The criteria set out in s54(2) are applied according to the expectations of a hypothetical reasonable consumer who is fully acquainted with the state and condition of the goods, including any hidden defects. In applying these criteria, consideration must be given to the matters set out in s54(3). While the test to be applied in determining whether goods are of an acceptable quality is an objective one, it is applied to the particular goods and circumstances at issue. It is of necessity a flexible test, so that it can be applied



to a vast range of goods. However, goods will not fail to be of acceptable quality if:

- the only reason(s) why the goods are not of acceptable quality was specifically drawn to the consumer's attention before the consumer agreed to the supply<sup>18</sup> – including by way of a written notice displayed with the goods;<sup>19</sup>
- the consumer causes the goods to become, or fails to take reasonable steps to prevent them from becoming, of unacceptable quality;<sup>20</sup> and
- the consumer examined the goods before agreeing to the supply and the examination ought reasonably to have revealed that the goods were not of acceptable quality.<sup>21</sup>

In the case of *Norton v Hervey Motors Ltd* [1996] DCR 427, the District Court in NZ took into account the existence of the manufacturer's warranty when considering whether a reasonable consumer would consider a vehicle with a defective paint job to be of acceptable quality. The court held that a reasonable consumer acquiring a new vehicle does so having regard to the existence of the warranty and, accordingly, repair under the warranty was the appropriate remedy in the circumstances.

There are three key differences between the implied condition of 'merchantable quality' and the guarantee of 'acceptable quality'. First, for goods to be of acceptable quality, they must be fit for *all* the purposes for which goods of that type are commonly supplied. Previously, goods were of merchantable quality if they were of use for *any* purpose for which those goods would normally be used. Justice Blanchard referred to the 'significant difference' between these requirements in *Nesbit v Porter*:

'Goods are of merchantable quality if of use for *any* purpose for which goods which complied with the description under which they were sold would normally be used; if for any such purpose they are regarded as saleable under that description... In contrast... goods are of acceptable quality only if fit for *all* purposes for which goods of the type in question

are commonly used *and* meet the other standards referred to in s7(1), including being free of minor defects, with all of these matters being tested against the opinion of a reasonable *and* fully acquainted consumer having regard to the matters in paras (f) to (j) of that subsection.'<sup>22</sup>

Second, goods must be free from defects in order to be of acceptable quality. A minor defect can arguably result in a failure to comply with the acceptable quality guarantee but may have satisfied the less stringent merchantability requirement. It is noteworthy that the equivalent NZCGA provision specifically refers to goods being 'free from minor defects' rather than 'free from defects'. Finally, goods will not be of acceptable quality if they are defective within a reasonable period after purchase. However, for goods to have failed the merchantability test, they must have been defective (including latent defects) at the time of supply.

### STATUTORY REMEDIES FOR BREACH OF CONSUMER GUARANTEES

Part 5-4 of the ACL sets out the remedies that are available when the consumer guarantees are not

complied with. This is different to the position under the TPA, where breach of an implied condition or warranty gave rise to a claim in contract and contractual remedies. The available remedy under the ACL depends on which guarantee has not been complied with and the nature of the failure to comply.

Regulators, including the ACCC, can also take action against suppliers and manufacturers, in respect of failures to comply with the guarantees, on behalf of one or more persons named in an application.<sup>23</sup> Such an action could be more efficient and effective in circumstances where there is repeated and systemic conduct that results in non-compliance.

Failures are classified into those that are major and those that are not major. Section 260 of the ACL defines a major failure in relation to the supply of goods to occur if:

- the goods would not have been acquired by a reasonable consumer if they were fully acquainted with the nature and extent of the failure;
- the goods depart in one or more significant respects from the supply description, or sample or demonstration model;
- the goods are substantially unfit for a purpose for which goods of the >>

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The ACL clarifies and simplifies the rights and obligations of consumers in the supply and acquisition of goods or services. While the regime is still new, the NZ experience is likely to inform the way the ACL is interpreted and applied by the courts and regulators in Australia.

same kind are commonly supplied and cannot be remedied easily and within a reasonable time;

- the goods are unfit for a disclosed purpose made known prior to acquisition and cannot be remedied easily and within a reasonable time; or
- the goods are unsafe.

In *Stephens v Chevron Motor Court Ltd* [1996] DCR 1, Justice Macdonald observed, that it is a matter of degree in any given case whether a fault is one of a 'substantial character' (major failure). The concept of 'degree' is illustrated in the following example:

'On a monetary level, being required to spend say \$1,000 on repairs in respect of a vehicle purchased for \$5,000 might indicate a failure of a 'substantial character' but that would not necessarily hold true for the same repairs on a vehicle of significantly greater value.'<sup>24</sup>

If a failure with respect to goods satisfies any one of the five criteria in s260, or if any failure to comply with a guarantee cannot be remedied, the consumer may reject the goods and choose between a refund and replacement. If a consumer decides to reject the goods, they must notify the supplier of that decision and of the grounds for the rejection, and the supplier must then provide the remedy the consumer has chosen.<sup>25</sup>

Alternatively, the consumer can seek to recover from the supplier compensation for any reduction in the value of the goods below the price paid for the goods.

On the other hand, where the failure to comply with the guarantee is not major and can be remedied, the consumer must first give the supplier the opportunity to remedy the failure (by way of repair, replacement or refund or if relevant curing the defect in title) within a reasonable time. In New Zealand, a failure to give the supplier the opportunity to remedy a non-major fault has been held to be fatal to the consumer's claim for repair costs.<sup>26</sup> If the supplier refuses or fails to remedy the failure, or fails to do so within a reasonable time, the consumer may:

- (a) have the failure remedied elsewhere and then seek to recover from the supplier all reasonable costs incurred in having the failure remedied; or
- (b) notify the supplier of their decision to reject the goods and of the grounds for the rejection.<sup>27</sup>

If a consumer rejects goods that fail to comply with a guarantee, and the supplier is required to provide a refund, the consumer may also terminate any contract of supply connected with the rejected goods. The consumer may also, by action against the supplier, recover damages for reasonably foreseeable loss or damage resulting from the breach, including consequential damages.

A consumer is not entitled to reject goods if:

- (a) the rejection period has ended. This is the period from the time of supply to the consumer within which it would be reasonable

to expect the relevant breach to become apparent having regard to the type of goods, the likely use of the goods, the length of time for which it is reasonable for them to be used and the amount of use to which it is reasonable for them to be put before such a failure becomes apparent;

- (b) the goods have been lost, destroyed or disposed of by the consumer;
- (c) the goods were damaged after delivery; or
- (d) the goods have been attached or incorporated into property and cannot be detached or remedied without damaging them.

In *Nesbit v Porter*, the Court of Appeal considered whether the Nesbits had exercised their right to reject the vehicle within a reasonable time, namely a period from the date of supply of the vehicle in which it would be reasonable to expect the defect to become apparent. The court determined that the meaning of 'reasonable time' had to be considered in relation to the particular defect or combination of defects causing the buyer to reject the goods. It found that, as a general rule, the older the goods, the reasonable time is likely to be shorter. The period may also be longer if the goods are likely to be used infrequently or only at a particular time of year.

The court ultimately held that the 'reasonable time' for rejection ran out prior to the date of actual rejection by the Nesbits. The Nesbits did not reject the vehicle until nine months had elapsed. The court found the reasonable period for rejection expired one month after the warrant of fitness check had detected the defects (about seven months after the date of purchase). In making this finding, the court considered the age of the vehicle at the time of purchase, the nature of the vehicle (a 4WD that is likely to have been driven in off-road conditions), the length of time for which it was reasonable for the vehicle to be used and the amount of use that was reasonable before the particular defects became apparent.



**Repair notices**

Since 1 July 2011, prior to accepting certain consumer goods for repair, repairers must provide notices to consumers that comply with the requirements prescribed by the regulations.<sup>28</sup> If the notice relates to the repair of goods that are capable of storing user-generated data, the notice must state that repair of the goods may result in loss of the data. User-generated data include files stored on a computer hard drive, telephone numbers stored on a mobile phone and songs stored on a portable media player.

If the practice of the repairer is to supply refurbished goods as an alternative to repairing a consumer's defective goods, or to use refurbished parts in the repair of a consumer's defective goods, then the notice must include certain prescribed text.

A repairer who fails to comply with the prescribed requirements as to repair notices contravenes the ACL and is liable to a maximum civil pecuniary penalty of \$50,000 for a body corporate and \$10,000 for an individual.<sup>29</sup> A failure to comply with these requirements can also amount to an offence and criminal penalties for the same amounts apply.<sup>30</sup> Other remedies for non-compliance include injunctions and damages.

**Manufacturers' warranties**

Where a supplier or manufacturer provides a warranty against defects in connection with the supply of goods or services to a consumer they must comply with the prescribed requirements.<sup>31</sup>

A warranty against defects is a representation communicated to a consumer at or about the time of supply, that the supplier or manufacturer 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.<sup>32</sup>

From 1 January 2012, a warranty against defects must:

- (a) be in a document that is transparent – expressed in plain language, legible and presented clearly;
- (b) prominently state the warrantor's contact details – name, business address, telephone number and email address (if any);
- (c) state the warranty period, procedure for claiming and identify who will bear the costs of claiming the warranty;
- (d) include a statement that the benefits to the consumer are additional to the rights and remedies under the consumer guarantees; and
- (e) include the following text:

'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.'

The remedies that are available against repairers who do not comply with the prescribed requirements are also available against manufacturers who provide warranties against defects.<sup>33</sup>

**Extended warranties**

The ACL has also introduced a specific provision regarding extended warranties. A person contravenes the ACL in circumstances where they make a false or misleading representation concerning a requirement to pay for a contractual right that is wholly or partly equivalent to any condition, warranty, guarantee, right or remedy that the person enjoys at law. This is in addition to the prohibitions against misleading or deceptive conduct and making false or misleading representations concerning the existence, exclusion or effect of any condition, warranty, guarantee, right or remedy. Such conduct can expose a

person to a pecuniary penalty of up to \$1.1 million for bodies corporate and \$220,000 for individuals.

**CONCLUSION**

The ACL clarifies and simplifies the rights and obligations of consumers and suppliers when there is a supply and acquisition of goods or services. While the regime is still in its infancy, the experience in New Zealand is likely to inform the interpretation and application of the equivalent ACL provisions by regulators and Australian courts. The success of the new regime, including education activities designed to raise awareness of the provisions, will be fundamental in reducing consumer detriment. The expectation is that consumers will be more willing and better able to enforce their rights and suppliers will more readily meet their obligations. ■

**Notes:** **1** Productivity Commission Inquiry Report, No. 45, *Review of Australia's Consumer Policy Framework*, April 2008, Volume 2 – Chapters and Appendixes, at xxi-xxii and 176-7. **2** National Education and Information Advisory Taskforce, *National Baseline Study on Warranties and Refunds*, October 2009 at 8. **3** *Ibid.*, 9. **4** *Ibid.* **5** Commonwealth Consumer Affairs Advisory Council, Final Report, *Consumer Rights – Reforming statutory implied conditions and warranties*, 30 October 2009, Finding 5.1, at ix. **6** *Ibid.*, Finding 6.1, at xii. **7** *Ibid.*, Finding 5.3, at ix. **8** *Ibid.*, 35. **9** *Ibid.*, 42. **10** *Ibid.*, 5, 63, 70 and 128. **11** Commonwealth Government, Budget Paper No. 2, *Budget Measures 2011-12*, 10 May 2011 at 316. **12** The Point-of-Sale sign was launched by the Hon David Bradbury MP at the Consumers 2011 Conference on 7 June 2011. **13** *ACL*, ss51-59. **14** *ACL*, ss60-62. **15** *ACL*, s64. **16** *ACL*, s64A. **17** *Nesbit v Porter* [2000] 2 NZLR 465 [29]. **18** *ACL*, s54(4). **19** *ACL*, s54(5). **20** *ACL*, s54(6). **21** *ACL*, s54(7). **22** *Nesbit v Porter*, above n17, [52]. **23** *ACL*, s277. **24** *Stephens v Chevron Motor Court Ltd* [1996] DCR 1 [16]. **25** *ACL*, ss259(3), 260, 263. **26** See *Acquired Holdings Ltd v Turvey* (2008) 8 NZBLC 102 at 107. **27** *ACL*, s259(2). **28** *ACL*, s103(2); *Competition and Consumer Regulations 2010*, reg 91. **29** *ACL*, s224. **30** *ACL*, s193. **31** *ACL*, s102(2); *Competition and Consumer Regulations 2010*, reg 90. **32** *ACL*, s102(3). **33** *ACL*, ss192, 224.

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