

## **ADVISORY NOTE 1: CONSUMER'S RIGHTS REGARDING DEFECTIVE GOODS<sup>1</sup>**

**This note is provided by the office of the Consumer Goods and Services Ombudsman to guide suppliers and consumers as to their rights and obligations under the Consumer Protection Act with regard to sections 55 & 56 Consumer Protection Act (CPA) (Implied warranty of quality)**

### **Implied warranty**

Section 56 of CPA imposes a built-in or automatic warranty (commonly known as a guarantee) that all goods sold comply with the requirements listed in Section 55, namely:

- (a) They are reasonably suitable for the purposes for which they are generally intended;
- (b) They are of good quality, in good working order and free of any defects<sup>2</sup>;
- (c) They will be useable and durable (will last) for a reasonable period of time<sup>3</sup>;
- (d) They comply with the Standards Act/ other public regulations; and
- (e) They are reasonably suitable for the specific purpose that the consumer has informed the supplier that the consumer wants to use them for.

If the goods are not suitable for the purposes for which they are intended or otherwise fail to comply with the requirements listed in Section 55 (above), the consumer is entitled to return them, at the supplier's risk and expense and without penalty, and:

- (a) Have the item(s) repaired; or
- (a) Have the item(s) replaced; or
- (b) Get a full refund of the price paid.

### **IMPORTANT:**

**The choice is the consumer's:** the supplier cannot force a consumer to opt to have the goods repaired if the consumer prefers a refund or replacement unless the defect is insignificant or minor (see below). The consumer can insist on a cash refund instead of a store credit or vouchers, or on a replacement with something similar at no additional cost. The supplier may not force the consumer to purchase a more expensive model or brand. The supplier must bear the costs of repairing, collecting and/ or replacing the defective goods and may not charge for usage or wear and tear on the returned product.

<sup>1</sup> **Warning:** This information is not intended to constitute legal advice and should not be relied upon in lieu of consultation with appropriate legal advisors.

<sup>2</sup> 53. (1) (a) **"defect"** means—

(i) any material imperfection in the manufacture of the goods or components, or in performance of the services, that renders the goods or results of the service less acceptable than persons generally would be reasonably entitled to expect in the circumstances; or (ii) any characteristic of the goods or components that renders the goods or components less useful, practicable or safe than persons generally would be reasonably entitled to expect in the circumstances.

<sup>3</sup> Dealt with below.

## Return period

The consumer must return the goods within **six months** of being delivered, except where the goods were not reasonably suitable for the specific purpose that the consumer had informed the supplier of or are otherwise not what the customer ordered. The consumer has 10 days to return goods in these circumstances. (section 20(2)(b) and (d)). The six month limitation is considered further below.

## Exceptions

The above rules regarding refunds **do not apply** if:

- (a) The consumer was specifically told that the particular goods were offered in a specific condition (e.g. that they were in some way defective)(section 55 (6))<sup>4</sup>; or
- (b) The goods were altered contrary to the instructions, or after leaving the control, of the supplier (tampered with by the consumer)(section 56 (1)).

## Offered in a specific condition

It is not clear whether the supplier must describe each individual defect or whether it is sufficient that the goods be described with sufficient particularity to indicate that the goods may be defective e.g. second hand goods or goods that are sold at a lower price because of their lower quality (De Stadler in Naudé and Eiselen (eds): *Commentary on the Consumer Protection Act 55-26* at para 56.)

The latter approach is supported by the case of *Vousvoukis v Queen Ace CC t/a Ace Motors* (3878/2013) [2015] ZAECGHC 64 at para 119, in which Pickering J stated:

“In my view, a reasonable person in plaintiff’s shoes, being aware that he was purchasing a second hand motor vehicle, albeit an expensive one, for a price very considerably less than a new vehicle of that make would have been conscious of the fact that it might experience mechanical problems from time to time which were not to be expected in a brand new vehicle of that make. Compare: *Addison v Harris* 1945 NPD 444; *Lakier v Hager* 1958(4) SA 108 (T).”

De Stadler suggests that a warning that the goods may be defective should be accompanied by an instruction to the consumer to inspect the goods carefully.

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<sup>4</sup> According to Naudé, it is likely that South African courts will follow a via media interpretation of section 55(6), namely that the supplier may only escape liability if it described the particular less-than-ideal condition of the goods in specific, though generalized detail, without having to list each and every defect for which it seeks to escape liability: Tjatie Naudé “The Consumer’s Right to Safe, Good Quality Goods and the Implied Warranty of Quality under Sections 55 and 56 of the Consumer Protection Act 68 of 2008” (2011) 23 *SA Merc LJ* 336 at 342 to 343 (Hereafter “Naudé”).

**Altered contrary to the instructions, or after leaving the control, of the supplier (tampered with by the consumer)**

De Stadler (supra) at 56-3 para 4 says

"The supplier's liability is only excluded 'to the extent that' the alterations were done. This means that the supplier's liability is only excluded insofar as the breach of the implied warranty is attributable to the alterations. If the breach is still attributable to an unaltered characteristic or a defect unrelated to the alterations a supplier may not escape liability."

This approach is in line with the interpretation given to a similar provision in New Zealand's Consumer Guarantees Act by that country's Consumer Affairs department:

"Can the trader refuse to fix goods when I have altered them?"

"Yes, if the fault occurred because the goods had been changed or altered by you. But the trader may have to provide a remedy for a fault that is not related to your alteration."<sup>5</sup>

**Underwear is not an exception** if it is defective/ damaged- the consumer is entitled to a replacement or a refund (or even notionally a repair of something like a bustier). The supplier need not take back the original underwear if worn or it can accept it and dispose of it. It does not usually count as a defect that something does not fit, but it could be if the item has an incorrect size indicated on it (i.e. it is smaller or larger than items of that size usually are). It must be borne in mind that suppliers do not normally allow consumers to try on underwear at the store and that underwear is often contained in closed packages, preventing a visual inspection.

A supplier is, however, entitled to refuse to accept the return of underwear that has been opened and tried on if there is nothing wrong with the underwear and the consumer has changed their mind or merely chosen the wrong size (e.g. as a gift). Change-of-mind returns are subject to store policy, which must be brought to the attention of the customer before the conclusion of the sale. As the ultimate consumer may not be the person who bought the product, it is advisable for suppliers to place warning notices on the underwear items/ have open samples available for visual inspection. A recipient of goods is also a consumer (section 1: Definition (c) of Consumer).

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<sup>5</sup> <http://www.consumerprotection.govt.nz/pdf-library/publications/Your-Consumer-Rights--Goods.pdf>.

Where a consumer has not had the opportunity to examine and try on the underwear because of shop policy/ it was sent by mail order, the consumer has the right to a reasonable opportunity to examine it to ensure it complies with the agreement/ order or, in the case a special-order agreement, reasonably conform to the material specifications of the special order (section 19 (5)).

If the underwear does not meet the agreed requirements, the consumer is entitled to return it for a refund (section 20(2)(b), unless for reasons of public health or otherwise, a public regulation prohibits the return of those goods to a supplier once they have been supplied to a consumer (section 20(3)(a). Even if the return of such items is prohibited (we are unaware of any prohibition regarding the return of underwear), this does not mean to say that a consumer is not entitled to a refund if the item did not comply with the consumer's requirements.

### **Inspection of returned goods by supplier**

Whether a supplier is entitled to submit returned goods for technical inspection before making a call on whether to refund/ replace is not dealt with expressly in the CPA. Suppliers in some instances request such an inspection in order to establish whether the defect was caused by consumer abuse. An inspection might also reveal whether the fault is insignificant and accordingly that the supplier has the right to repair it instead of replacing it, if this cannot be determined readily in the store.

Conversely, the CPA also does not say that it will be presumed that any defect that manifests within 6 months was present in the goods at the time of sale<sup>6</sup>. So if suppliers simply denied liability, consumers would have to prove the defect was pre-existing and they would be forced to go through the CPA dispute resolution process. In most instances it would be necessary for the entity dealing with the complaint (ombudsman, Commission or Tribunal) to call for the item to be submitted for inspection, in order to make a call.

The present practice of suppliers of sending goods for inspection seems a reasonable practical solution to the problem, subject to the provisos that:

- it be resorted to only in appropriate cases, where there is a genuine reason for believing that the supplier may not be liable;
- the inspection is conducted and the item be returned to the consumer speedily (a maximum of 7-10 days if the item needs to be sent away);
- the supplier informs the consumer before doing any repair;

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<sup>6</sup> Unlike Louisiana law, which presumes that if a defect is noticed within three days of purchase, it existed at the time of sale: <http://en.wikipedia.org/wiki/Redhibition>

- the letter and spirit of the CPA and good customer relations guide any such dealings.
- the inspection and time taken thereon do not have the effect of depriving consumers of their rights under CPA. To do so would contravene the CPA.<sup>7</sup>

### **Defects that are insignificant/ not material**

Not every defect entitles a consumer to return goods for a refund or a replacement: The defect must be a “material imperfection” (see definition in footnote 1 above). Another word for material is significant. The defect may also be an imperfection or a characteristic that renders the goods less useful. This is similar to the common law test.

In *Holmdene Brickworks (Pty) Ltd v Roberts Construction Co. Ltd* 1977 (3) SA 670 (AD) Corbett JA (as he then was), dealing with a latent defect, stated as follows at 683H – 684A:

“Broadly speaking in this context a defect may be described as an abnormal quality or attribute which destroys or substantially impairs the utility or effectiveness of the res vendita, for the purpose for which it has been sold or for which it is commonly used.”

In *Odendaal v Ferraris* 2009 (4) SA 313 (SCA) at 322A – B paragraph 25, Cachalia JA stated with reference to Kerr: *The Law of Sale and Lease* 3rd Edition, that “[I]t is now settled that any material imperfection preventing or hindering the ordinary or common use of the res vendita is an aedilitian defect.”

The English headnote of *De Vries v Wholesale Cars en ‘n Ander* 1986 (2) SA 22 (OPA) reads as follows:

“The question which has to be answered in considering the issue whether the latent defect in the merx is serious enough for a successful reliance on the actio redhibitoria, is whether the defect(s) is or are so serious that a purchaser would not have bought had he been aware thereof on conclusion of the contract. In determining the question whether the purchaser would have bought or not, an objective test should be applied. The ipse dixit of the purchaser is not decisive.”

Combrinck J (as he then was) stated as follows in *Du Plessis v West* [1998] JOL 202 (N) at para 5:

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<sup>7</sup> Section 51(1)(b)(i) and section 4(5): In any dealings with a consumer in the ordinary course of business, a person must not—

(a) engage in any conduct contrary to, or calculated to frustrate or **defeat the purposes and policy** of, this Act;

(b) engage in any conduct that is unconscionable, misleading or deceptive, or that is reasonably likely to mislead or deceive;

“Where the purchaser chooses to pursue redress by way of the *actio redhibitoria* he will, in addition, have to show that, had he known about the defect in the *res vendita*, he would not have entered into the sale and also that he is willing and able to effect restitution of the *res*, or is excused therefrom. Whilst there is a subjective element to the buyer’s assertion that he would not have entered into the sale if he had been aware of the defect that must notwithstanding be objectively sustainable. At the end of the day the court must be satisfied on all the evidence that a reasonable man in the buyer’s shoes would have held a similar view.”

De Stadler in Naudé and Eiselen (eds): Commentary on the Consumer Protection Act 55-6 para 11 says that the South African case law may be of assistance in giving further content to section 55(2)(a). She cites case examples including:

- cows that do not give milk;
- a mare that could not race because she was pregnant;
- a welded crankshaft in a car;
- mouldy monkey nuts;
- cracked wall in a building; and
- susceptibility of carpet to water stains, impairing its decorative purpose.

It is permissible under the CPA to look to foreign law for guidance.

## USA

According to 15 USCS § 6602 (4), [Title 15. Commerce and Trade; Chapter 92. Year 2000] the term material defect means “a defect in any item, whether tangible or intangible, or in the provision of a service, that substantially prevents the item or service from operating or functioning as designed or according to its specifications. The term "material defect" does not include a defect that--

- (A) has an insignificant or *de minimis*<sup>8</sup> effect on the operation or functioning of an item or computer program;
- (B) affects only a component of an item or program that, as a whole, substantially operates or functions as designed; or
- (C) has an insignificant or *de minimis* effect on the efficacy of the service provided.”<sup>9</sup>

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<sup>8</sup> Thefreedictionary.com: ***de minimis***: Latin for "of minimum importance" or "trifling." Essentially it refers to something or a difference that is so little, small, minuscule, or tiny that the law does not refer to it and will not consider it. In a million dollar deal, a \$10 mistake is *de minimis*.

<sup>9</sup> See: <http://definitions.uslegal.com/m/material-defect/>

## European Union<sup>10</sup>:

### Article 3(6)

The consumer is not entitled to have the contract rescinded if the lack of conformity is minor.

### Article 4:

Any repair or replacement shall be completed within a reasonable time and without any significant inconvenience to the consumer, taking account of the nature of the goods and the purpose for which the consumer required the goods.

## Australia

A purchased item has a *major* problem when it:

- has a problem that would have stopped someone from buying the item if they had known about it
- is unsafe
- is significantly different from the sample or description
- doesn't do what you said it would, or what the consumer asked for and can't easily be fixed.<sup>11</sup>

It follows that if the fault is something that could be easily remedied or repaired, it would not give rise to a right to cancel the agreement and obtain a refund. An example is a drawer that squeaks or something that needs minor adjusting. If, however, the goods would need to be sent off for repairs, it is less likely that the defect is one that is insignificant. The same is true where the problem reoccurs after an apparently insignificant defect has been repaired. At that point, the consumer would be entitled to demand a replacement or refund.

## Components

The definition in section 53(1)(a)(i) of "defect" includes any material imperfection in the manufacture of the components of goods. In practice, it is sometimes necessary to decide whether the failure of a component justifies the replacement of the entire goods. The question has been considered by both the Tribunal and the courts.

In the Tribunal case of *Hyundai Automotive SA (Pty) Ltd v t/a Kia Motors Roodepoort*,<sup>12</sup> the facts were that the Complainant purchased a motor vehicle from the Applicant but returned

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<sup>10</sup> 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. Hereafter referred to as "EU Directive 44".

<sup>11</sup> See: <http://www.accc.gov.au/business/treating-customers-fairly/consumers-rights-obligations>

<sup>12</sup> NCT/4734/2012/60(3)&101(1))

it to the Applicant and pointed out a paint bubble on an interior plastic panel of one of the doors. The Applicant immediately replaced the panel with another panel from a demonstration vehicle and at the same time ordered a new replacement panel. When the new panel arrived, the Complainant refused to return the vehicle or collect the number plates and registration documents for the vehicle. The complainant alleged the fuel gauge was not working.

Without deciding on the issue, the Tribunal expressed the view that although the paint bubble could be seen as a defect from a cosmetic perspective, it would be hard-pressed to find that this rendered the entire vehicle as unsuitable, of bad quality and unusable and therefore not compliant with the requirements set out in Section 55(2)(a) to (c): It would have been reasonable for the Applicant to simply replace the defective part with a new part, which is what it offered to do.<sup>13</sup>

In the case of *Vousvoukis v Queen Ace CC t/a Ace Motors* (3878/2013) [2015] ZAECGHC 64, the facts were that the consumer purchased a used motor vehicle from the supplier. When the vehicle's engine was destroyed through no fault of the consumer, the supplier replaced the destroyed engine with a second engine its own cost. The second engine also experienced mechanical problems. The consumer relied in the alternative on CPA section 55(2)(b) and (c).

It emerged that the cause of the vehicle's mechanical problems was in fact damage to the oil pump's drive gear. The court ruled that the claim based on the CPA was out of time and then considered the claim under the *actio redhibitoria*. This too was rejected on the grounds that the damage to the oil pump, once diagnosed, was easily remedied for an amount of approximately R15 000,00, an amount which, whilst seen in isolation, is not inconsiderable, is however, relatively inconsequential when viewed against the purchase price of R470 000.<sup>14</sup>

The consumer argued that the replacement of the first engine with the second engine did not constitute a repair of the BMW motor vehicle as a whole but that the provision of the second engine was in fact a "new supply" of goods to plaintiff. He submitted that because the defect in the second engine manifested itself within six months of its installation in the BMW, the provisions of s 56(2) were applicable and that plaintiff was accordingly entitled in terms thereof to return the BMW to defendant and to claim a refund of the purchase of the BMW.

The court did not accept this reasoning because, although the engine in itself was a separate component of the motor vehicle which could be removed, repaired and replaced, it was nevertheless an integral part thereof without which the motor vehicle was a mere shell and accordingly defective.

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<sup>13</sup> At para 32.

<sup>14</sup> *Ibid* at para 120.

The court quoted Loubser and Reid: 'Liability for Products in the Consumer Protection Bill 2006': A Comparative Critique, *Stellenbosch Law Review* vol 17, 2006, page 412 at 438 – 9:

“[I]t would seem uncontentious that a complex product is defective even where its defectiveness is attributable only to a fault in one of its components: for example a car is defective even when only its brakes fail.”

On this basis the court held that the replacement of the first engine by the second engine of the BMW was clearly a repair to the BMW.

The court cited dicta from *De Vries v Wholesale Cars en 'n Ander*:<sup>15</sup>

“So 'n defek sal egter gou en teen geringe koste herstel kan word en sal gevolglik nie kansellasië van 'n ooreenkoms regverdig nie.”

(My translation: Such a defect (broken petrol pipe) can be repaired quickly and at low cost and will therefore not warrant cancellation of an agreement.)

### **Durable for a reasonable period of time**

Section 55(2)(c) is further quite radical as the requirement that goods must be useable and durable for a reasonable period of time embodies a new right not recognized under the common law. For the first time in South African law, the consumer has an *ex lege* right to continued good quality.<sup>16</sup> This operates in tandem with the implied warranty of quality in section 56 of the CPA.<sup>17</sup>

It is uncertain whether the six month limitation in section 56 has reference to the life span of the implied warranty or execution of the remedies (in which scenario the implied warranty will exist indefinitely and the normal prescription rules regarding the institution of a claim will prevail).<sup>18</sup> Barnard prefers the latter approach as being more acceptable and more in line with the purposes of the CPA.

According to Professor Naudé, certain goods can be reasonably expected to be useable and durable for more than 6 months. The anomaly that section 56 provides no remedy for infringement of the consumer's right to useable and durable goods can be resolved by means of section 4(2)(b)(ii)(bb), which gives courts and the tribunal the power to make any innovative order that better protects consumers' rights, not just orders specifically

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<sup>15</sup> 1986 (2) SA 22 (OPA).

<sup>16</sup> CM Van Heerden “The impact of the Consumer Protection Act 68 of 2008 on Product Liability in South Africa” unpublished paper at 14.

<sup>17</sup> Ibid at 15.

<sup>18</sup> J Barnard “The influence of the Consumer Protection Act 68 of 2008 on the warranty against latent defects, voetstoots clauses and liability for damages 2012 *De Jure* (45) 445 at 467-8.

mentioned in the CPA. Naudé argues that courts or the tribunal should have the power to enforce the right that goods remain durable through an innovative order.<sup>19</sup>

This reasoning was rejected out of hand by Pickering J in *Vousvoukis v Queen Ace CC t/a Ace Motors* (3878/2013) [2015] ZAECGHC 64 (19 June 2015) at 110:

‘The Legislature, for whatever reason, has expressly decreed a limitation period of six months for the return of any goods in s 56(2). There is no question of s 56(2) being ambiguous in any way. In my view, it is not open to a court, under the guise of making an “innovative order”, to extend this period.’

## Foreign law

### European Union

EU Directive 44: Article 5.

The seller shall be held liable under Article 3 where the lack of conformity becomes apparent within two years as from delivery of the goods. If, under national legislation, the rights laid down in Article 3(2) are subject to a limitation period, that period shall not expire within a period of two years from the time of delivery.

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### England

A spokeswoman for the DTI says: "... UK law in practice provides better protection for consumers than the two-year minimum required by the EU - consumers are able to pursue relevant claims for up to six years (five in Scotland)."<sup>20</sup>

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The law doesn't say exactly how long goods should last. The general rule is that goods should last for a reasonable time and in reasonable condition. For example, a new car should last for several years in a reasonable condition but you may need to replace some of its parts over time.<sup>21</sup>

In particular, the Sale of Goods Act 1979 provides that goods should be of satisfactory quality, be fit for purpose and be as described. The requirement to be of satisfactory quality might include the item working or lasting for a reasonable length of time. What this means depends on the item but having spent perhaps a few thousand on a TV it would be reasonable to expect it to last a considerable length of

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<sup>19</sup> Naudé op cit at 339. Examples of innovative orders can be found in Annexure A hereto.

<sup>20</sup> [www.Guardian.co.uk](http://www.Guardian.co.uk).

<sup>21</sup> See:

[http://www.adviceguide.org.uk/england/consumer\\_e/consumer\\_common\\_problems\\_with\\_products\\_e/faulty\\_goods\\_e/what\\_is\\_meant\\_by\\_not\\_of\\_satisfactory\\_quality.htm](http://www.adviceguide.org.uk/england/consumer_e/consumer_common_problems_with_products_e/faulty_goods_e/what_is_meant_by_not_of_satisfactory_quality.htm)

time. The same may not be said for a 50p plastic torch. If the goods do not meet these requirements, consumers may be able to get a repair, replacement or refund from the seller.<sup>22</sup>

### **Québec, Canada**

Chapter P-40.1 CONSUMER PROTECTION ACT<sup>38</sup>. Goods forming the object of a contract must be durable in normal use for a reasonable length of time, having regard to their price, the terms of the contract and the conditions of their use.

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### **Victoria, Australia**

If a product turns out to be defective, you may be entitled to a repair, replacement or refund (depending on whether the problem is major or cannot be fixed).

This applies regardless of whether the product is still under warranty.

Example:

Danny buys a plasma TV for \$6000. It stops working after two years.

The store says they will not provide a repair or replacement as the TV only had a 12-month manufacturer's warranty. They tell Danny he should have bought an extended warranty, which would have given five years' cover.

However, it is reasonable for Danny to expect more than two years' use from a \$6000 TV. He is entitled to a repair, replacement or refund from the store.<sup>23</sup>

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### **New Zealand<sup>24</sup>**

#### 7. Meaning of acceptable quality

(1) For the purposes of section 6, goods are of acceptable quality if they are as—

- (a) fit for all the purposes for which goods of the type in question are commonly supplied; and
- (b) acceptable in appearance and finish; and
- (c) free from minor 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, would regard as acceptable, having regard to—

- (f) the nature of the goods:
- (g) the price (where relevant):

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<sup>22</sup> See: <http://www.offt.gov.uk/news-and-updates/ofthinks/aug-13/#.UmUrmPmHOoM>

<sup>23</sup> See: <http://www.consumer.vic.gov.au/shopping/warranties/warranty-has-expired>

<sup>24</sup> Consumer Guarantees Act 1993.

(h) any statements made about the goods on any packaging or label on the goods:

(i) any representation made about the goods by the supplier or the manufacturer:

(j) all other relevant circumstances of the supply of the goods.

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[T]he longest available period for an extended warranty - five years ... - is shorter than the reasonable life of most whiteware.<sup>25</sup>

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From the above survey, it is clear that there is overseas legal precedent and local academic support for the reasonable period of time that goods are required to be durable for in terms of section 55(2)(c) to extend beyond the period of 6 months mentioned in section 56 (2). With respect to Pickering J in *Vousvoukis v Queen Ace CC t/a Ace Motors* (3878/2013) [2015] ZAECHC 64 (19 June 2015), section 56 (2) is arguably ambiguous as it can be read to mean either (as the learned judge held):

- the goods must be returned within 6 months in order to qualify for the remedies of refund, or repair or replacement of the goods **at the direction of the consumer** (emphasis added); or
- if the goods were not durable for a reasonable period of time as contemplated by 55(2)(c) and they were returned after 6 months, it would be the prerogative of the supplier and not the consumer to elect the appropriate remedy. The requirement that the return of the goods is without penalty and at the supplier's risk and expense would also fall away at the end of the 6 month period.

The former interpretation has the unintended consequence of undermining or rendering nugatory the right to goods that are durable for a reasonable period of time. This is particularly so in respect of so-called durable goods ( defined as a category of consumer products that do not need to be purchased frequently because they are made to last for a long time (usually lasting for three years or more)).<sup>26</sup> Examples would be motor vehicles, furniture, televisions, washing machines and refrigerators.

Hopefully this issue will be clarified by the legislature when the CPA is ultimately revised.

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<sup>25</sup> See: <http://www.stuff.co.nz/business/money/6816866/An-end-to-extended-warranties> and Annexure A.

<sup>26</sup> [www.investinganswers.com/financial-dictionary/.../durable-goods-2323](http://www.investinganswers.com/financial-dictionary/.../durable-goods-2323)

## **Store refund policy**

The above rules regarding refunds apply irrespective of the store's refund policy or the terms of the manufacturer's guarantee/ warranty.

In other words, the store's refund policy or the terms of the manufacturer's guarantee/ warranty cannot override the CPA requirements, but they can go further than or offer more rights to the customer than the Act does. For example, a store may accept for a refund goods returned within a specific period and with their original packaging even if there is nothing wrong with them and the customer has merely changed their mind, although the Act only requires a supplier to accept a return if there was something wrong with the goods, as explained above.

The manufacturer's warranty may extend beyond the 6 months provided by the CPA warranty but its terms and conditions must be fair (s. 48 CPA) or be brought to the attention of the consumer if they are of an unusual or onerous nature (s. 49 CPA).

## **Original Packaging**

Section 56 does not require that a consumer returns the goods in their original packaging if the goods are defective. This is in line with the practice in New South Wales, Australia<sup>27</sup>: "You do not have to return products in the original packaging in order to get a refund."

The supplier may, however, insist upon the return of the goods in the original packaging if the goods are returned because the consumer has merely changed their mind and there is nothing wrong with the goods and the consumer is permitted to return the goods by the store's returns policy. The supplier should, however, at the time of purchase, warn the consumer of the need to keep the packaging.

Whether or not goods are returned with their packaging is relevant in determining the applicable charge where goods are returned in terms of section 20 because:

- A direct marketing agreement was rescinded during the cooling off period
- the consumer did not have an opportunity to examine before delivery, and the consumer has rejected them
- the consumer has refused delivery of a mixture of goods
- The goods are unsuitable for a particular purpose communicated to the supplier:

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<sup>27</sup> See:

[http://www.fairtrading.nsw.gov.au/ftw/Consumers/Consumer\\_guarantees\\_warranties\\_and\\_refunds/Repairs\\_refunds\\_replacements.page?](http://www.fairtrading.nsw.gov.au/ftw/Consumers/Consumer_guarantees_warranties_and_refunds/Repairs_refunds_replacements.page?)

20 (6) In determining the right of a supplier to impose a charge contemplated in subsection (5), if any goods returned to the supplier in terms of this section are—

- a) in the original unopened packaging, the supplier may not charge the consumer any amount in respect of the goods;
- b) in their original condition and repackaged in their original packaging, the supplier may charge the consumer a reasonable amount for...

### **Till Slip**

While the Consumer Protection Act makes no specific reference to till slips, the high levels of crime in South Africa and the fact that the CPA implied warranty is only for 6 months are reasons justifying the requirement of the production of a till slip when exchanging an item. I am aware that the National Consumer Commission usually requires the production of a till slip, but that it also looks to suppliers to assist by keeping proper records. While I do not believe it is desirable to lay down an inflexible industry standard as this is an issue of competitive service, it is useful to look at prevailing practice in South Africa. From the survey conducted by credible journalist, Wendy Knowler, it appears that some shops do not require till slips while others will not give a cash refund without one.<sup>28</sup>

In both this article and the one reproduced below as Annexure C, it is evident that the CPA has ushered in a spirit of consumercentricity.

### **Comparative survey**

#### **Southern Australia<sup>29</sup>**

- a receipt
- credit card slip
- statement
- lay-by agreement
- confirmation
- receipt number from a phone or online purchase
- copy of a paid cheque or even acknowledgement by a store staff member that they sold the item to you.

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<sup>28</sup> See: <http://www.iol.co.za/the-star/returning-unwanted-christmas-presents-1.1196333?ot=inmsa.ArticlePrintPageLayout.ot> and Annexure B.

<sup>29</sup> See: <http://www.sa.gov.au/subject/citizens+and+your+rights/Shopper+protection/Refunds+and+returns>

## **Western Australia**

Businesses are understandably concerned to ensure that claims made to them about goods and services are genuine.

The best proof of purchase is a tax invoice or receipt.

A number of other forms of evidence are also usually acceptable, including:

- a lay-by agreement;
- a confirmation or receipt number provided for a telephone or internet transaction;
- a credit card or debit card statement;
- a warranty card showing the supplier's or manufacturer's details and the date or amount of the purchase; and
- a serial or production number linked with the purchase on the supplier's or manufacturer's database.

Sometimes, a consumer may need to provide more than one of these to support their claim - for example, when a receipt does not clearly itemise the faulty goods or service.

If a consumer cannot show that they bought the goods or services, you may still choose to accept the consumer's claim.

## **New Zealand<sup>30</sup>**

Does the customer have to produce proof of purchase?

You are entitled to ask for proof of purchase. Proof of purchase may be a receipt, a credit card slip, a bank statement or a witness. It may be unreasonable to expect the customer to have a receipt if the fault has occurred after some time has elapsed.

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I suggest that each case be treated on its merits (I appreciate the dangers of giving low level staff unfettered discretion and of accusations of discrimination arising). Relevant considerations are: is the item a brand sold by the store; is it a brand that is widely available at competitor's outlets, does its condition suggest it is a recent purchase and the defect was not caused by the customer; is the item of the sort that someone is likely to have shoplifted and damaged in order to get the cash value of and have there been other similar returns.

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<sup>30</sup> <http://www.consumeraffairs.govt.nz/for-business/compliance/consumer-guarantees-act-1/providing-remedies-for-goods>

Please direct any requests for clarification to [info@cgso.org.za](mailto:info@cgso.org.za)

**Advocate N J Melville**  
**Consumer Goods and Services Ombudsman**  
**5 May 2016**

## Disputes Tribunal cases New Zealand<sup>31</sup>

### **The Fridge**

Product: A double door fridge and freezer purchased in January 2002 for just under \$5,000.

Problem: Stopped working in November 2007. Buyer was charged \$842.50 towards repair. Broke again in November 2008 and proved uneconomic to repair.

Warranty: Five years.

Decision: Two major failures within seven years was not good enough. It did not matter that the failures were outside the warranty or that a brochure explained that repair costs were to be shared between the buyer and seller.

Result: Buyer entitled to a new fridge or his money back. But no reimbursement for repair costs because the replacement fridge was better than the original.

### **The Laptop**

Product: Laptop purchased in March 2007.

Problem: Developed a fault in February 2010 and was taken back to the store where it was repaired after about four and a half weeks.

Warranty: Buyer purchased a three-year extended warranty for \$300.

Decision: The repair time bordered on unreasonable given that the problem was caused by a known fault with that model of laptop. Retailer had complied with the law but after buying an extended warranty the buyer could have expected better service.

Result: Extended warranty cancelled and the buyer's \$300 refunded.

### **The Chairs**

Product: Two recliner chairs purchased in September 2007 for just under \$1200.

Problem: By March 2009 the cushioning on both chairs was crooked or indented, one chair had been repaired with replacement foam.

Warranty: Seller argued the warranty for the foam expired after 12 months, and that the buyer caused a problem by always leaning to one side of the chair.

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<sup>31</sup> See: <http://www.stuff.co.nz/business/money/6816866/An-end-to-extended-warranties>

Decision: Lopsided cushioning was unacceptable after eighteen months given the price. Leaning to one side of an armchair was not abnormal or unreasonable.

Result: Buyers entitled to a refund.

## **The Fridge 2**

Product: Fridge freezer purchased in June 2002.

Problem: In August 2009 the fridge stopped working properly. The retailer was out of business.

Warranty: The manufacturer's call centre told the buyer they could not help as the fridge was outside the 12 month manufacturer's warranty. A repair company (charging \$125) advised repairs would cost \$900 so the buyer got rid of the fridge and bought a new one.

Decision: Seven years was not a reasonable time for a fridge to last before a major component failed.

Result: Buyer awarded \$435 compensation for the three years remaining on the reasonable life of fridge plus \$125 for the repair quote.

## Returning unwanted Christmas presents (Extract)

December 12 2011 at 09:00am

By Wendy Knowler

So, in the countdown to Christmas, I phoned nine major retailer groups – some of them representing many brands – and asked them to spell out their returns policies, specifically for non-defective gifts purchases.

All take back unwanted gifts, but the terms vary.

Remember: query a store's returns policies with regard to change-of-heart purchases before you pay.

### **WOOLWORTHS**

Woolworths will take back goods bought from any Woolworths store in the country for a refund or an exchange, where similar goods are sold, within 60 days of purchase. So don't try to return an unwanted top at a food-only Woolies.

If you can't produce a till slip as proof of purchase, a gift voucher will be issued instead of cash, and you will have to accept the amount currently in the system. If the item has since gone on sale, you'll be issued a voucher to the value of the sale price.

If you exchange an unwanted gift without a till slip, and you are due change, that change will be issued in the form of a gift voucher.

! Sale or clearance goods have different returns terms and conditions, printed on till slips.

### **MAKRO**

Makro will issue refunds or exchanges for goods within 14 days of purchase, provided they are in their original condition and packaging and have not been used in any way.

If you have a Makro card, you don't need to produce a till slip.

**Exclusions:** Underwear, toothbrushes, software and CDs.

### **EDCON GROUP**

(Edgars, Jet, Boardmans, Legit, Red Square, CNA and Prato)

Goods can be returned in their original packaging within 30 days of purchase. Proof of purchase – a till slip or gift receipt – is required.

**Exceptions:** Swimwear, underwear bottoms, evening wear, hosiery, hair accessories, cosmetic accessories, earrings, body piercing products, infant's bottles, feeders, breast pumps, dummies, baby consumables, personal care products and all supplements.

Gift cards will not be exchanged for cash and no change will be given, but the balance will remain on the gift card.

### **THE FOSCHINI GROUP**

(Foschini, Totalsports, Exact!, @Home, Markham, Due South, American Swiss, Sterns, Fashion Express, Donna-Claire etc)

You have 30 days to return non-defective items in original packaging, excluding underwear, swimwear, cosmetics and earrings for pierced ears.

Goods must be in original packaging, unopened and unused, and proof of purchase must be produced. Refunds are issued for cash purchases, and account purchases will be credited on the customers' account.

"Our return policy is a guideline for the stores. We encourage a customer-centric approach and stores deal with each query individually, keeping the interest of the customer in mind," said a spokesman.

### **INCREDIBLE CONNECTION**

You have 14 days to return non-defective, unwanted items for an exchange or refund, even if the item has been opened and used, as long as the item is in its original condition and has the original packaging.

No handling fee will be charged, unless the items are missing parts such as start-up disks, cables, instruction manuals and internal protective packaging.

If you can't produce a till slip, the company can track the purchase from any branch through serial numbers.

The 14-day limit will be extended to cater for public holidays.

Incredible Connection will also exchange or refund – in the form of gift vouchers – "any item that we sell for the same value as long as the item is unopened and the packaging is 100 percent intact".

### **SHOPRITE CHECKERS**

"Shoprite Checkers has always tried to accommodate customers who return unwanted gifts after the holidays. If it is a product we sell and it is fit for resale (in its original packaging and not abused), we will exchange it for another product to the same value.

"Without a till slip customers will not get a refund. We hardly ever see festive season gifts returned long after the school term has started, so we have not set a time limit.

"Managers use discretion if requests in this regard are made long after January."

### **CLICKS**

Clicks allows customers 60 days in which to return a product for a full refund, replacement or exchange, if they have the till slip and the item is in its original unopened packaging. "If customers don't have their till slip anymore we will be happy to exchange this at the current system price."

**Exclusions:** Cosmetics, personal grooming items, jewellery for pierced ears and navels and medicine.

### **GAME & DIONWIRED**

The principle is: they'll swop it if they stock it. If a customer has bought an item, or has been given an item, that they do not want, they can return it to Game for an exchange. No till slip is required.

Provided they stock the item, Game will issue a gift voucher for the advertised value of the item.

So even if the item was not bought at Game, it can still be exchanged at Game for an item you prefer.

There is no time limit on this offer.

**PICK N PAY**

“Most goods will be refunded or exchanged if they are returned within 10 business days of purchase. Customers are required to present proof of payment and the goods must be in their original packaging and condition.”

DVDs, games, CDs, software, books and newspapers will only be refunded if they are in their original packaging and unused.

Customers may return perishable goods should they not be satisfied with their quality, within the product’s sell-by date, if it is in its original packaging. The exception is goods which present a possible health risk.

### **Returned goods market grows as CPA gets stronger**

The number of consumers returning their unwanted goods is growing, as they benefit from the Consumer Protection Act (CPA). According to Paul Greenberg, chairman of Going.co.za, this could amount to tens of millions of Rands of stock during the festive season.

The stores are taking such returns often without question. "A whole new market is emerging, where small businesses that are looking for cheap products to resell will take these returned goods and sell them to buyers who cannot afford to pay full retail prices," he says.

"There are a number of sections in the CPA that allow consumers to return goods to suppliers and there are many reasons why consumers are returning goods." Many of the larger retailers will take products back and pay refunds whatever the reason and usually the right to a refund depends on the customer's reason for returning the product. "Some shops will take back gifts without question, particularly if it is their own brand of product, without asking to see a receipt or other proof of purchase."

Furthermore, the growth of online retail in South Africa is also growing the returned goods market because of the CPS cooling off period and a customer-centric culture, where retailers accept that people change their mind when they physically see the product they bought online. Returns are often a good thing for a retailer looking to grow customer loyalty and cross-sell to other purchases...

[19 Aug 2013 16:14] [www.bizcommunity.com](http://www.bizcommunity.com)