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Consumer Protection Act Series #1

Make sure you don't get it wrong on consumer rights

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In this issue:

- We provide an overview of the Consumer Protection Act (CPA), its application and the arrangement of the Act
- We discuss the date when the CPA will apply to business
- We highlight matters that will be more fully discussed in future publications of the PwC Consumer Protection Act Series
- We discuss how the CPA currently applies to business prior to 31 March 2011
- We provide business with an overview of matters to consider in preparation of implementation of the CPA
- We summarise the penalties for non-compliance with the CPA

Overview of the CPA

South Africa's Consumer Protection Act, No. 68 of 2008 (CPA) is fully effective from 31 March 2011.

Background to the CPA

The CPA is the result of a long process of reform and development in the field of consumer protection in South Africa. The CPA affects the relationships between consumers and businesses, covering a wide range of matters in this relationship including:

- A comprehensive revision of the law of sale;
- A control framework to ensure the fairness of contracts;
- A modified liability regime where a product causes death or injury and specific requirements relating to product safety;
- New protective mechanisms for consumers to exit from contractual obligations; and
- Provisions relating to marketing and marketing practices.

Arrangement of the Act

In addition to the usual chapters on interpretation, purpose, application, enforcement and general provisions, the CPA consists of:

- Chapter 2 : Fundamental Consumer Rights;
- Chapter 3 : The Protection of Consumer Rights and the Consumer's voice;
- Chapter 4 : Business Names and Industry Codes of Conduct; and
- Chapter 5: Protection Institutions.

Regulations to the CPA are currently being drafted and are expected to be released for comment shortly. The regulations contain details about how to perform certain functions and actions prescribed by the CPA. Business should be on the lookout for the release of these regulations, as compliance will be imperative. The regulations will, amongst other aspects, contain thresholds for determining whether you are dealing with a consumer. This will affect whether the CPA applies to a transaction or not.

Scope and application of the CPA

The CPA impacts most industries and governs suppliers and consumers in relation to

- Transactions for the supply of goods and services in South Africa entered into in the ordinary course of business for consideration;
- The promotion of goods and services and the promotion of the supply thereof in South Africa;
- Goods or services;
- Goods that are the subject of an exempted transaction, if the goods are supplied in South Africa; and
- Franchise arrangements.

When will the CPA be fully effective?

Provisions relating to the creation of national consumer institutions, the repeal of certain laws and the provisions authorising the Minister of Trade and Industry to make regulations became effective on 24 April 2010. All other provisions are effective from 31 March 2011.

The CPA applies with limited retrospective effect. Certain provisions are already effective, as is more fully discussed below. In general, the CPA does not apply to

- The marketing of any goods or services before 31 March 2011;
- Any transaction concluded, or agreement entered into, before 31 March 2011; or
- Any goods supplied, or services provided before 31 March 2011.

Do any exemptions apply?

The CPA does not apply to:*

- Supply of goods or services to the State;
- Any transaction where the consumer is a juristic person whose asset value or annual turnover at the time of the transaction equals or exceeds the threshold value determined by the Minister;
- Transactions within an exemption granted by the Minister ***;
- Services regulated by the Financial Advisory and Intermediary Services Act, 2002;
- Services regulated by the Long and Short Term Insurance Acts,1998**;
- A credit agreement under the National Credit Act, 2005 but the goods or services that are the subject of the credit agreement are not excluded from the CPA;
- Services supplied under an employment contract; and
- A transaction giving effect to a collective bargaining agreement or collective agreement .

* The provisions in the Act regarding safety monitoring and recall (section 60), and liability for damages caused by goods (section 61) apply to all transactions, even transactions exempted from the application of the Act.

** The CPA prescribes that the Acts must be aligned with the consumer protection measures in the CPA within 18 months from the commencement. If this is not done, the provisions of the CPA will apply to all services rendered in terms of the Long and Short Term Insurance Acts, 1998.

*** A regulatory authority may apply to the Minister for an industry-wide exemption from one or more provisions of the CPA on the grounds that the provisions overlap or duplicate a regulatory scheme administered by that regulatory authority in terms of national legislation; or any treaty, international law convention or protocol.

CPA matters of significance that PwC will discuss in future publications and that business should be aware of:

Franchising

In the past the franchising industry in South Africa was not specifically regulated. The Code of Ethics administered by the Franchising Association of South Africa and secondary legislation also applicable to other industries applied up to now. Except for certain exclusions, the CPA applies to franchise agreements and inter alia affects restraint of trade clauses in franchise agreements where such clauses are unfair or unreasonable. This series will provide you with insight on how the CPA applies solely to franchise agreements and when it applies generally to both franchise agreements and consumer transactions.

Implied warranty of quality

The CPA says that every consumer has the right to safe and good quality products. This means that every consumer has a right to receive goods that are reasonably suitable for their purpose and free of any defects. If the goods fail to satisfy the requirements, the consumer may at the supplier's risk and expense return the goods within six months after delivery. If this happens, suppliers have certain obligations and organisations should take note of these obligations. Suppliers should also know what this warranty means, when it applies and when it is not enforceable.

Marketing practices

A wide spectrum of marketing practices as methods or channels to supply goods or services is being used by business every day. The CPA impacts many of these practices significantly, including direct and other marketing practices. Amongst other things the CPA introduces very specific requirements relating to:

- Catalogue marketing;
- Bait marketing
- Negative option marketing; and
- Discriminatory marketing

CPA requirements are also very specific with regard to:

- Promotional competitions;
- Auctions; and
- Trade coupons.

In general, marketing may not be conducted in a manner that is likely to imply a false or misleading representation or in a manner that is misleading, fraudulent or deceptive. This prohibition also applies to the nature and price of the goods or services, the manner and conditions of supply and the sponsoring of events.

Rights of the consumer

In addition to other CPA rights, the consumer may cancel a transaction originating from direct marketing without incurring any penalty, within five days after delivery of goods or the conclusion of an agreement. This is also referred to as the "cooling-off period" or the "cooling-off" right of the consumer. More detailed information will be provided to retailers on the rights of consumers such as:

- The right to choose;
- The right to terminate a fixed-term contract;
- Pre-authorisation of repair or maintenance services:
- The right to select suppliers;
- The right to cancel advance reservations, bookings or orders;
- The right to choose or examine goods;
- The right to return goods; and
- Equality.

‘Trading as’ business names

The CPA will cease the trading by companies or close corporations under names other than their registered names. Persons will be prohibited from carrying on business except under their full names as recorded in an identity document or with the Registrar of Companies.

Disclosure of information about goods and services

The CPA is specific about the information that should be disclosed to consumers. It determines, amongst others, that the consumer has the right to receive information in an understandable language that the ordinary consumer with average literacy skills and minimal experience of the relevant goods or services can be expected to understand without undue effort. Product labelling and packaging will also be subject to certain requirements.

Price display

The CPA says that suppliers must clearly display prices of products in ZAR. The adequacy of price display is determined by the CPA. This does not apply to transactions where estimates for the performance of certain services are given or to transactions where a supplier offers goods or services for sale electronically. The information contained on the website of a supplier must, however, comply with the requirements of the Electronic Communications and Transactions Act. Suppliers must indicate certain information on their websites such as the full price of the goods or services, including transport costs, taxes and any other fees or costs.

If the CPA has limited retrospective effect and is not in full operation yet, how does it apply before 30 March 2011?

Pre-existing fixed-term agreements

The CPA applies to certain fixed-term agreements concluded before 31 March 2011 and that will expire after 31 March 2013. The extent to which the CPA applies to these fixed term pre-existing agreements is set out in Chapter 7 of the Act.

The liability provision for damage

The liability provision applies to damage caused by all goods that were first supplied to the consumer from 24 April 2010 and thereafter. A producer or importer, distributor or retailer of any goods is liable for any harm, such as death, injury, illness, physical damage and the economic loss that results as a consequence of the supplying of any unsafe goods or from a product failure, defect or hazard in any goods, or inadequate instructions or warnings on products. It is not required that the harm resulted from any negligence on the part of the producer, importer, distributor or retailer, as the case may be.

A supplier of services, who, in conjunction with the performance of those services, applies, supplies, installs or provides access to any goods, must be regarded as a supplier of those goods to the consumer, for the purposes of this provision. If, in a particular case, more than one person is liable, the liability is joint and several with other businesses in the supply chain.

Pre-existing loyalty programmes

The provisions relating to customer loyalty programmes apply to any pre-existing loyalty programme that had participating consumers immediately before 31 March 2011 in respect of:

- An offer to participate in that programme on or after 31 March 2011;
- A tender by a consumer, on or after 31 March 2011, of any loyalty credit or award in that programme as consideration for any supply of goods or services; and
- Any supply of goods or services if, on or after 31 March 2011, the consumer tendered any loyalty credit or award in the programme as consideration for those goods or services.

Business impact assessment

Does the CPA apply to your organisation?

Retail and consumer companies should be aware of the detail of the CPA in order to determine the impact on their operations. The definition section of the CPA is very relevant during this exercise.

If your business performs the principal commercial activities of 'transactions' and 'marketing' in relation to goods or services, then you should consider the application of the CPA to your operations. A transaction is an agreement between a person acting in the ordinary course of business and one or more persons for the supply or potential supply of any goods or services in exchange for consideration. To market means to promote or supply any goods or services.

What is your position in the supply chain?

Your organisation may operate in the supply chain as producer, importer, distributor and retailer of goods or as service provider and the extent of the application of the CPA to such activities should be considered. The implications of the product liability provisions of the CPA should also be considered.

As the provisions already apply to goods that were first supplied to the consumer from 24 April 2010, you should consider taking preventative measures in the interim to minimise the risk of being held liable under the liability provisions.

This could include ensuring that labels on products and product instructions adequately warn and instruct the consumer on how to use and maintain goods and to consider that appropriate insurance cover is in place.

Are you a supplier?

Consider that a supplier is a person who markets goods or services. The following may also be regarded as suppliers:

- *Foreign suppliers;*
- *Non-profit organisations;*
- *Organs of state;*
- *Clubs;*
- *Trade unions; and*
- *A franchisor.*

Are the receivers and actual users of your goods or services consumers?

Natural persons	Yes
Juristic person (company, close corporation, body corporate, partnership, association, trust) with an asset value or annual turnover within the prescribed thresholds at the time of the transaction. The thresholds will be prescribed by regulation by the Minister in terms of section 6	Yes
Franchisees under franchise agreements	Yes

What if the CPA applies?

If the CPA applies to your organisation you need to consider matters such as:

- Standard business terms and conditions should be scrutinised to ensure that it does not contain unfair contract or prohibited terms. Disclaimers and limitation of liability clauses must be correctly positioned in agreements to ensure that the consumer's attention is drawn to such clauses at initiation of the transaction. Where an agreement is in writing, ensure that it complies with the requirements of understandable language and that it contains an itemised breakdown of the consumer's financial obligations.

- Appropriate insurance cover to minimise the risk of being held liable under the product liability provisions.

- A review of product instructions and labelling to minimise the risks associated with liability for damage caused by products.

- A review of marketing practices to ensure that your advertising is not misleading and deceptive or even fraudulent.

- Appropriate training of client-facing staff to ensure that their interaction with consumers complies with the CPA and that they are aware of the requirements.

- Drafting of a CPA risk management plan to document controls and to identify those requirements where controls are not yet in place.

- If your industry is regulated, the regulatory authority may apply to the Minister for an industry-wide exemption from one or more provisions of the CPA. Such an exemption is possible if the CPA provisions overlap or duplicate a regulatory scheme administered by your regulatory authority in terms of national legislation or any treaty, international law, convention or protocol.

What are the penalties for non-compliance with the CPA?

- *A CPA offence attracts a possible fine or imprisonment for a period not exceeding 12 months or both a fine and imprisonment.*
- *In the case where a person is convicted of a breach of confidence the penalty is a fine or imprisonment for a period not exceeding 10 years or both a fine and imprisonment. A breach of confidence occurs when a person discloses any personal or confidential information concerning the affairs of any person, obtained in carrying out any function in terms of the CPA.*
- *The Tribunal may impose administrative fines for prohibited or required conduct. An administrative fine imposed in terms of the CPA may not exceed the greater of:*
  - *Ten percent of the respondent's annual turnover during the preceding financial year; or*
  - *R1 000 000.*

Meeting the requirements of the CPA

Important considerations

We recognise the challenges posed to business by the CPA both before and after the effective date of 31 March 2011. The CPA may significantly impact the marketing practices of many companies doing business in South Africa. The risk of non-compliance could be costly; not only with regards to financial penalties, but also in relation to the potential damage that non-compliance poses to a company's brand and image in the market place. Those companies that have not initiated steps towards compliance, should without any delay assess the potential impact of the CPA on their business and ensure that adequate measures are introduced to minimise the risk of non-compliance in an effective and cost-efficient manner.

How we can help you

PwC has significant experience in assisting clients with regulatory compliance. Our specialists take a structured approach to enable clients to achieve and sustain compliance in a relatively short space of time. Our solution encompasses helping companies to assess the impact of the CPA on their business and designing and implementing the changes required to ensure ongoing compliance.

Our understanding of the specific requirements of the CPA, together with our blend of regulatory compliance, risk management, information technology, process consulting and industry-specific expertise allow us to provide a complete CPA compliance solution.

We follow a proven and structured regulatory compliance approach for CPA compliance at each of the following key stages:

- **Assess**
  An assessment of impact of the CPA on the business.
- **Design**
  Detailed design of the transformation requirements – for example, the development of a CPA compliance framework, changes to existing business processes and/or practices, training and awareness; and new IT systems.
- **Construct**
  Build new ways of working and plan roll-out.
- **Implement**
  Roll-out new ways of working and ensure benefits are realised.
- **Operate**
  Operate new processes and systems and implement continuous improvement.

Our approach is top-down and risk based. It spans the domains of strategy, structure, process, people and technology. Typical outcomes include an increased awareness of the CPA and its implications and risks to the business, a CPA compliance framework, new and/or revised structures and processes relating to aspects such as customer complaints or care lines, internal consultation, upstream and downstream supply chain, marketing and promotion, packaging and labelling, product guarantees, supplier contracts and pre-payments.

Contacts

Johannesburg

Diederik Fouché
Director & Industry Leader: Consumer, Industrial Products & Services
Tel: +27 (11) 797 4291
email: diederik.fouche@za.pwc.com

Maadian Botha
Associate Director: Risk Advisory Services
Regulatory Compliance
Johannesburg
Tel: +27(11)797 4058
email:maadian.botha@za.pwc.com

Cape Town

John Wilkinson
Director : Retail and Consumer
Tel: +27(21)529 2086
email:john.wilkinson@za.pwc.com

Corrin Holgate
Associate Director: Risk Advisory Services
Regulatory Compliance
Tel:+27(21)529 2063
email:corrin.holgate@za.pwc.com

Durban

Trevor White
Director: Risk Advisory Services
Regulatory Compliance
Tel:+27(31)271 2020
email:trevor.white@za.pwc.com

Technical advisor

Carla Budricks
Associate Director: Legal Compliance

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