

Walking the talk

Consumer Protection Act Series #3

*Product quality and
implied warranty of quality*

June 2011

In this issue:

- We investigate the consumer's right to good quality and safe products and the duties of the supplier in response to this right
- We explain what the implied warranty of quality means
- We provide an overview of the warranty on repaired goods
- We discuss how the product liability provisions increase the risk to producers, importers, distributors and retailers

Introduction

One of the most controversial and far-reaching implications of the Consumer Protection Act (CPA) for suppliers, importers, distributors and retailers is the imposition of strict or no-fault liability for damage caused by goods. Section 61 provides for liability for any harm caused wholly or partly as a result of supplying any unsafe goods; product failure, defect or hazard in any goods; or inadequate instructions or warnings provided to a consumer pertaining to any hazard arising from or associated with the use of any goods.

Business should consider the impact of the sections contained in Part H of Chapter 2 of the CPA:

Section 53	Definitions
Section 55	Consumer's rights to safe, good quality goods
Section 56	Implied warranty of quality
Section 57	Warranty on repaired goods
Section 58	Warning concerning fact and nature of risks
Section 59	Recovery and safe disposal of designated products or components
Section 60	Safety monitoring and recall
Section 61	Liability for damage caused by goods

The Regulations to the CPA were promulgated on 1 April 2011. Provisions relating to trade descriptions and product labelling contained in these should be considered in conjunction with the above sections of the CPA. Specific regulations have been introduced for trade descriptions of textiles, leather goods, shoes, clothing, grey market goods and genetically modified organisms. The CPA further refers to applicable standards set for goods under the Standards Act, No. 8 of 2008.

What are the rights of the consumer?

The general rule is that every consumer has the right to safe and good quality products. The exceptions to this general rule are:

- Goods bought at an auction. Auctions are comprehensively governed by separate provisions in the CPA and the regulations of 1 April 2011;
- If the consumer is expressly informed that goods are offered in a specific condition and the consumer agrees to accept the goods in this condition.

What does safe and good quality products mean?

Every consumer has a right to receive goods that:

- Are reasonably suitable for their intended purpose;
- Are of good quality, in good working order and free of any defects;
- Will be useable and durable for a reasonable period of time; and
- Comply with any applicable standards set under the Standards Act, No. 8 of 2008.

Important definitions: Section 53

Defect	<ul style="list-style-type: none"> • 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 • 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.
Failure	<ul style="list-style-type: none"> • The inability of the goods to perform in the intended manner or to the intended effect.
Hazard	<p>A characteristic that:</p> <ul style="list-style-type: none"> • Has been identified as, or declared to be, a hazard in terms of any other law; or • Presents a significant risk of personal injury to any person, or damage to property, when the goods are utilised.
Unsafe	<ul style="list-style-type: none"> • Due to a characteristic, failure, defect or hazard, particular goods present an extreme risk of personal injury or property damage to the consumer or to other persons.

Definition: ‘Trade description’

Trade description means any description, statement or other direct or indirect indication, other than a trademark, as to the number, quantity, measure, weight or gauge of any goods; the name of the producer or producers of any goods; the ingredients of which any goods consist, or material of which any goods are made; the place or country of origin of any goods; the mode of manufacturing or producing any goods; or any goods being the subject of any patent, privilege or copyright; or any figure, work or mark, other than a trademark, that, according to the custom of the trade, is commonly understood to be an indication of any matter contemplated in paragraph (a) of the definition.

Promises about product suitability

Suppliers should be careful not to over promise in their sales efforts. If a consumer informs the supplier of the particular purpose for which he intends buying the goods and the supplier offers to supply the goods or acts knowledgeable about the use of the goods, the consumer has a right to expect that the goods are reasonably suitable for the indicated purpose.

Delivering on product promises

To determine if particular goods satisfied the requirements, all of the circumstances of the supply of those goods are considered. This includes the manner in which, and the purposes for which, the goods were marketed, packaged and displayed, the use of any trade description or mark, any instructions for, or warnings with respect to the use of the goods, the range of things that may reasonably be anticipated to be done with the goods and the time of production and supply.

Are your product labels and trade descriptions Section 24-friendly?

A trade description may not mislead the consumer or be altered, defaced, covered, removed or obscured to mislead consumers. Retailers may not offer to supply, display or supply goods if the retailer knows, reasonably could determine or has reason to suspect that a trade description applied to those goods is likely to mislead consumers. For goods in the control of retailers, reasonable steps should be taken to prevent misleading information being communicated to consumers in trade descriptions.

It is an offence for any person to alter, obscure, falsify, remove or omit a displayed price, labelling or trade description without authority.

Disclosure of reconditioned or grey market goods

A conspicuous notice to grey market or reconditioned goods must clearly state that they have been reconditioned, rebuilt or remade, as the case may be. A person who markets any goods that bear a trademark, but have been imported without the approval or licence of the registered owner of that trademark, must apply a conspicuous notice to those goods in the prescribed manner and form.

Implied warranty

What does the implied warranty of quality mean?

If the goods do not meet the requirements, the consumer may within six months after delivery of the goods, without penalty and at the supplier's risk and expense, return the goods to the supplier. The implied warranty and right to return goods are in addition to any other implied warranty or condition imposed by law, or stipulated by the producer, importer, distributor or retailer.

What are the duties of the supplier under the implied warranty of quality?

The supplier must at the direction of the consumer, either repair or replace the defective goods or refund to the consumer the paid price. If a supplier repairs the goods or any component thereof and the defect is not remedied within three months after the repair, or a further defect is discovered, the supplier must replace the goods or refund to the consumer the paid price.

What about repaired goods?

The CPA provides for a separate warranty on repaired goods. The warranty applies to new or reconditioned parts installed during any repair or maintenance work and the labour required to install such parts.

For how long is the warranty on repaired goods operative?

The warranty is operative for a period of three months after the date of installation of the parts, or such longer period as the supplier may specify in writing. The warranty is also concurrent with any other deemed, implied or express warranty. The warranty is void if the consumer has subjected the part, or the goods or property in which it was installed, to misuse or abuse. The warranty does also not apply to ordinary wear and tear, having regard to the circumstances.

How does Section 61 affect producers, importers, distributors and retailers?

Section 61 applies to goods that were first supplied to a consumer on or after the early effective date of 24 April 2010 and also to exempt transactions. Prior to this date, the common law required a degree of fault or negligence in causing harm before liability could attach. The CPA only requires a causal link between the harm caused and the defective goods. A consumer can furthermore elect to take action against any member in the product supply chain, and not only against the manufacturer or direct supplier. Business should consider the following to minimise the risk of potential liability:

- Improved product quality control procedures;
- A review of sales and marketing procedures;
- Training of sales personnel; and
- Compliant product labels, trade descriptions and instructions.

In addition, business should consider its position in the supply chain and ensure that sufficient insurance cover is in place.

Meeting the requirements of the CPA

Important considerations

We recognise the challenges posed to business by the CPA and the impact it will have on 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

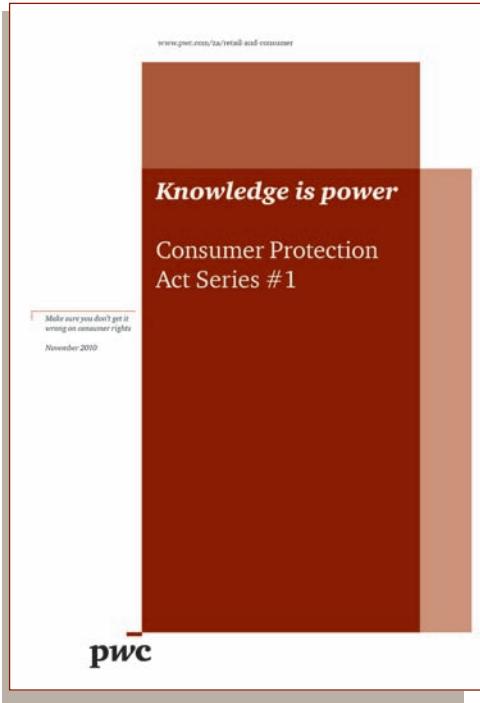
Trevor White
Director: Risk Advisory Services
Regulatory Compliance
Tel: +27 (31) 271 2020
email: trevor.white@za.pwc.com

Technical advisor

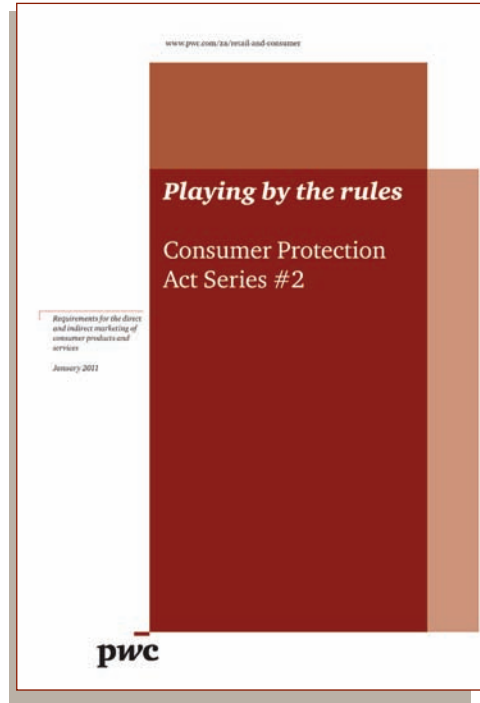
Carla Budricks
Associate Director: Legal Compliance

Previous issues

November 2010



January 2011



The information contained in discussion papers published by PricewaterhouseCoopers(PwC) is provided for discussion purposes only and is intended to provide the reader or his/her entity with general information of interest. The information is supplied on an 'as is' basis and has not been compiled to meet the reader's or his/her entity's individual requirements. It is the reader's responsibility to satisfy him or her that the content meets the individual or his/ her entity's requirements. The information should not be regarded as professional or legal advice or the official opinion of PwC. No action should be taken on the strength of the information without obtaining professional advice. Although PwC take all reasonable steps to ensure the quality and accuracy of the information, accuracy is not guaranteed. PwC shall not be liable for any damage, loss or liability of any nature incurred directly or indirectly by whomever and resulting from any cause in connection with the information contained herein.

© 2011 PricewaterhouseCoopers ('PwC'), a South African firm, PwC is part of the PricewaterhouseCoopers International Limited ('PwCIL') network that consists of separate and independent legal entities that do not act as agents of PwCIL or any other member firm, nor is PwCIL or the separate firms responsible or liable for the acts or omissions of each other in any way. No portion of this document may be reproduced by any process without the written permission of PwC. (11-09129)

