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# Consumer Protection Act, 68 of 2008

## Quality implications on the new Consumer Protection Act

Presented at SASQ Conference

by

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## CONSUMER PROTECTION ACT



**I KNOW MY  
RIGHTS.  
DO YOU KNOW  
YOURS?**

You have rights as a consumer.  
Understand them.  
Enforce them.



**the dti**

Department:  
Trade and Industry  
REPUBLIC OF SOUTH AFRICA



## Application of the Act

- QUALITY is key to survival!
- Every transaction in South Africa with a consumer (≠ client or purchaser!)
- Manufacturer, Importer, Distributor, and Retailer – anyone in supply chain
- Consumer can be person or SME
- The ONLY exemptions are:
  - State is the consumer
  - Consumer is an entity with a turnover or asset value at time of transaction above R **2 million**
  - **Small municipalities**



## Consumer Rights – Supplier Obligations

- Right to Safe, Good Quality Goods
  - No more “Its cheap, what did you expect”
- Safety Monitoring and Recall
  - NCC published Recall Guidelines
- Liability for Harm and Damage caused by goods
  - Entire supply chain exposed
  - Negligence is not a requirement
  - Very few defences – actually blame shifting
  - QMS and product testing essential for shifting blame



## Right to Choose

- Right to Return Goods for Refund
  - In addition to any right to return faulty, defective goods (discussed in detail later!)
  - No opportunity to examine before or at delivery
  - Incorrectly delivered goods
  - Goods not the same type or quality as in brochure or as per sample
  - Goods not suitable for purpose for which they were sold
    - This does not mean they are defective in any way
    - Purpose communicated to the supplier and not met
    - Full refund but in some cases a re-stocking fee may be charged

**ALL ARE QUALITY RELATED ISSUES!**



## Quality of Documentation

Understandable?

- The intended consumer must be able to understand documentation
- The significance and importance of what is being said must be made understandable, not just the fact

Choice of Language?

- Responsibility on supplier to select relevant language which is understandable!

**Instruction manuals, warning notices etc!!!** - Beware of translations of instructions from foreign languages by unqualified persons – Chinglish, Spanglish!

- Quality of documents, warnings etc just as critical as quality of goods!



## Product labelling and trade descriptions

1. Trade descriptions on or in relation to goods (e.g. in brochures, on labels, etc) must not be misleading.
2. **Retailer** may not sell goods which it has reason to suspect, to contain a trade description which is likely to mislead the consumer as to any matter implied or expressed in that trade description.
3. **Manufacturer, Importer** must not knowingly apply to any goods a trade description that is likely to mislead the consumer as to any matter implied or expressed in that trade description or alter, deface, cover, remove or obscure a trade description or TM applied to any goods in a manner calculated to mislead consumers.
4. Any person who produces, supplies, imports or packages any prescribed goods must display on, or in association with the packaging of those goods, a notice in the prescribed manner and form that discloses the **presence of any genetically modified ingredients or components of those goods – 5% is threshold for mandatory labelling**.
5. Quality control over labelling and trade descriptions is required!



## Honest Labelling

1. Labelling may not be false, misleading or deceptive (whether directly or indirectly), including exaggeration, innuendo and ambiguity.
2. The supplier must correct any misapprehension of a consumer which (if not corrected) would lead to aforementioned.
3. Prohibitions in labelling (not limited to these!):
  - (a) the supplier of any goods or services has any approval that they do not have, for example, SABS and the like;
  - (b) any goods
    - have ingredients, performance characteristics, benefits, uses, qualities, etc that they do not have;
    - are of a **particular standard, quality, grade**, style or model if they are not;
    - **recently issues with grades of potatoes – bags all labelled “first grade”!**
4. Non-compliance, besides court action by consumer, could lead to administrative fines (upto 10% of turnover).



## Right to Good Quality Service

- Consumer is entitled to the following i.r.o **services**:
  - (a) timely completion and timely notice of unavoidable delays;
  - (b) **quality levels which people are generally entitled to expect**;
    - what is this quality level?
  - (c) if goods are required for performance of the services, their use, delivery or installation must be free of defects and be of a quality that people are generally entitled to expect; and
  - (d) if the supplier uses goods of the consumer to perform the service, it must be returned in a condition not worse than when it was given to the supplier.

If the supplier fails to adhere to the above requirements, the consumer may elect to either:

- (a) compel the supplier to remedy the non-compliance or
- (b) demand the refund of a “reasonable portion” of the price paid (having regard to the extent of the failure).



## Right to Safe, Good Quality Goods

- Goods must be -
  - (a) **reasonably suitable** for the **purposes** for which they are **generally intended**;
  - (b) of **good quality, in good working order and free of defects**;
  - (c) **useable and durable** for a **reasonable period of time** having regard to the use to which they would normally be put and to all the surrounding circumstances of their supply; and
  - (d) compliant with applicable standards of the Standards Act and all other public laws.
- “reasonably suitable” and reasonably durable? - what would consumer expect in terms of performance, durability etc when considering marketing, packaging, discussion with sales staff etc
  - **Beware:** “everything you say can and will be held against you” – marketing messages will be held to be specification



## Right to Safe, Good Quality Goods

- “good quality, in good working order and free of defects”
  - Cheap does not mean poor quality!
  - Quality means the ability to perform the task safely and reliably
  - Do not confuse luxury and quality – luxury goods can be poor quality!
  - **Quality systems and product testing very important!**
- “useable and durable for a reasonable period of time”
  - what would consumer expect in terms of how the goods were advertised
  - School shoes shown running through water and kicking stones
  - Power tools sold as “industrial grade” should last 6 months or longer on a building site BUT sold as “occasional use” would not be expected to last 6 months on a building site – **see Boardmans notices in store!**
  - Packaging, marketing etc VERY important in determining durability
  - Statistics on expected life of appliances, power tools, etc - **testing!**



## Right to Safe, Good Quality Goods

- Implied Warranty on ALL goods by **each** element of supply chain!
- If goods are defective or fail or are in any way not in compliance with the right to safe, good quality goods, the consumer may return the goods **WITHIN 6 MONTHS** for a **FULL REFUND**
- Consumer **may agree** to goods being replaced or repaired in place of the refund BUT this is at the **consumers SOLE discretion**
- If repaired and second failure **WITHIN 3 MONTHS**, supplier **MUST REFUND** – no second bite at the cherry!
- The return of defective goods is at the SUPPLIERS risk and expense i.e. Must go collect the defective goods if so required by consumer
- No “Voetstoots” – consumer agrees to buy with specific faults pointed out then those faults not covered by the warranty – everything else is!



## Right to Safe, Good Quality Goods

- Return of goods within 6 months for a refund
  - **NO exceptions**, except auction or specific defects pointed out / accepted by consumer
  - “He should/could have seen the defect” – not a defence!
  - “It was cheap, what did he expect” – not a defence!
  - “reasonable wear and tear” – not a defence!
  - Cell phones, DVD’s, clothes, food – NOT exempted
  - **Reduce risk through proper quality management**



## Right to Safe, Good Quality Goods

- **Call centres for complaint handling**
  - A possible source of liability
  - Speedy responses and follow up required from call centre complaints or else consumers won't wait – they don't have to!
  - Avoid referring consumers from pillar to post and lame excuses - “ ...is not here, they are on leave and only they know what to do...”
- **Warranty on Repaired Goods (out of warranty repairs)**
  - Repaired goods or components of goods guaranteed for 3 months including labour
  - Unlike warranty on new goods , the warranty is void if the goods or component is abused by the consumer
  - Reasonable wear and tear is exempted from the warranty



## Warnings on Goods

- A person who packages any hazardous or unsafe goods for supply to consumers must display on or within that packaging a in plain language providing the consumer with adequate instructions for the safe handling and use of those goods
- A person who installs any hazardous or unsafe goods for a consumer, or supplies any such goods to a consumer in conjunction with the performance of any services, must give the consumer the original copy any warnings or notices and adequate and safe instructions for handling and use thereof
- **THIS IS ESPECIALLY IMPORTANT** to the section on liability of manufacturers, importers, distributors and retailers for any damage or harm caused by goods!



## Safety Monitoring and Recall

- Records of product failures by manufacturer or importer
- Records of failures which cause harm or damage to property
- Reporting to Consumer Commission of such failures which cause harm or injury
- If supplier does not initiate a recall and take corrective steps then Commission will order a mandatory recall as well as what steps to be taken regarding such recall
- VERY advantageous to be pro-active and not wait for mandatory recalls which cause damage to reputation and can have very high costs
- Industry Code may regulate recalls
- Voluntary recalls by suppliers require adequate systems to identify problems quickly and make decisions to avoid liability!
  - Consider outsourced recall processes and automated recall processes



## Product Liability - No Fault Regime!

- Producers, importers, distributors and Retailers are collectively and individually liable (even if they did not act negligently) for any harm (including economic loss) caused by -
  - (a) supplying any **unsafe goods**;
  - (b) a **product failure, defect** or **hazard** in any goods; or
  - (c) **inadequate instructions or warnings** of hazards that may result from the use of goods.



## Product Liability - No Fault Regime!

- (a) **supplying any unsafe goods**
- (b) a **product failure, defect or hazard** in any goods;

How will you know the goods are unsafe unless :

- There are proper and definitive product specifications which are reviewed for product safety issues
  - proper QMS are in place with certification and auditing
  - Product testing is conducted
  - regular reviews are conducted
  - independent inspectors are used to verify that product specifications are being complied with?
- Proper implementation of Quality systems will reduce risk and thus liability issues



## Product Liability - No Fault Regime!

Liability in terms of this section will be excluded if -

- (a) defect arose as a result of the product having to comply with a law;
- (b) defect was not present in the product at the time it was sold by that party e.g. Bottle damage at retailer;
- (c) defect arose solely due to a supplier complying with the instructions from the person who supplied that supplier with the goods – incorrect storage or dispensing – hygiene and draft beer etc;
- (d) it is unreasonable for distributor or retailer to have discovered the hazard, having regard to that person's role in marketing the goods to consumers; or
- (e) the plaintiff's claim expired because it was brought 3 years after the events



## Defective Product

### *Wagener v Pharmacare*

#### *BEFORE CPA* – Consumer can't prove liability

- Medical patient became paralysed in the right arm as a result of the administration of a local anesthetic manufactured by Pharmacare. Wagener could not prove negligence on the part of the manufacturer and there was no contractual link between the parties, Wagener's claim against the manufacturer failed.
- Lawyers: extremely difficult to prove fault as a consumer has no knowledge of or access to the manufacturing process.

#### *NOW! CPA POSITION* – Consumer could have proven liability

- Negligence is no longer required to be proven NOR a contractual link between the consumer and the manufacturer and thus the case would have been decided in favour of the consumer!



## Penalties and Administrative fines

- Consumer Commission may issue “compliance notice” and set deadline for compliance
- Non-compliance can be referred to Tribunal
- Fine greater of R 1,000,000 or 10% of total turnover
- Offences in terms of the Act
  - Disclosure of confidential information by inspector, complainant, or any party to proceedings can lead to a 10 year prison sentence
  - Any other offence can lead to a 12 month prison sentence e.g. ignore compliance notice



## Questions?

The above presentation is but an introduction to the topic and specific problems need consideration and unique solutions – do not apply general principles to unique problems!

Thus, the above presentation does not constitute legal advice and use of any of the information presented today is at your sole risk.



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