



## Compliant goods: been there done that?

By Neil Kirby, Director

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Don't be left in the dark when the new Consumer Protection Act comes into full effect.

Do you remember those claims about hot coffee being spilt and burning a consumer or the burning and blister-inducing deodorant claims and the rash-causing body wash? Take heed for the nature of such claims in our jurisdiction will be based on the provisions of the Consumer Protection Act No. 68 of 2008 (the CPA).

But let's start at the beginning:

"It might be useful right about now to pause and look at the science of shopping from the perspective not of the scientist but of the practitioner – that is, the retailer. He or she is certainly part of the equation we're studying, the provider of shopping experiences, as it were. The retailer is also the one who's expected to absorb all our lessons and then apply the principles of what we've learned. And since it's his or her own store we study, it's fair to ask: How much doesn't the retailer already know?"

The advent of the CPA, or at least those parts of it that require retailers, as suppliers of goods and services, to think about what they don't know about their own goods, poses a few questions for contemplation:

- ▶ The first question: how dangerous are the goods you supply? If you sell knives or chlorine or headache tablets, how dangerous are each of these items in the hands of the average consumer?
- ▶ The second question: if such goods are dangerous, what are the dangers that they represent both possibly and in reality?
- ▶ The third question: have you taken sufficient steps to ensure that any potential danger that is presented by such goods is dealt with in material supplied to consumers advising them of such dangers and helping you to avoid liability in circumstances where those dangers result in harm to the consumer?

Fundamentally, the CPA requires suppliers of certain goods to think about the extent of the liability of suppliers for goods supplied by them where those goods may be inherently dangerous.

We have previously addressed the provisions of Section 61 of the CPA. You will recall that Section 61 of the CPA imposes strict liability on suppliers where goods result in harm to the consumer. The imposition of strict liability by Section 61 of the CPA is a paradigm shift in South African consumer law. This paradigm

shift requires suppliers to ensure that the goods that they supply are adequately described: either to highlight the potential dangers with which a consumer may be faced, should he or she use the goods; and or supply enough information for the consumer to avoid harm when using the goods concerned.

However, a number of suppliers are labouring under the belief that their goods are not necessarily subject to the CPA because their goods are already subject to existing legislation – so the CPA is more red-herring and less shark. Not so?

The design of the CPA is to promote and realise the entitlements of consumers. One of these entitlements is that consumers are entitled to goods that are safe and are of good quality. Whilst the CPA contains a number of exemptions that are contemplated for suppliers and goods and services, respectively, the one aspect about which the CPA is clear is that the goods and the importer or producer, distributor and retailer of those goods, respectively, are subject to the provisions of Section 61 of the CPA. In this regard, Section 5(5) of the CPA is express in so far as its application of product liability provisions is concerned. Conceivably, therefore the CPA requires that no one will escape the consequences of supplying goods to consumers in South Africa.

There may very well be an objection to the application of the CPA by the apparent conflict that arises between Section 5(5) and the provisions of Section 2(9) of the CPA. Section 2(9) is that section that endeavours to reconcile the provisions of the CPA with existing legislation to avoid conflicts in the legislation. The precise wording of Section 2(9) is as follows:

“If there is an inconsistency between any provision of this Act and a provision of any Act not contemplated in subsection (8) -

- (a) the provisions of both Acts apply concurrently, to the extent that it is possible to apply and comply with one of the inconsistent provisions without contravening a second; and
- (b) to the extent that paragraph (a) cannot apply, the provision that extends the greater protection to a consumer prevails over the alternative provision,

provided that in the case of hazardous chemical products only the provisions of the Act relating to the consumer redress will apply.”

Other than for hazardous chemical products, which require special attention, all other goods will need to be evaluated in light of both the legislative provisions that may already

regulate those goods and the provisions of the CPA. Such an evaluation is required in order to determine whether or not the provisions of the CPA will indeed apply to those goods and if so, the measures that must be implemented by the importer, distributor or retailer of those goods to avoid the pitfalls of the provisions of Section 61 of the CPA.

Therefore goods that may be controlled in terms of:

- ▶ the Medicines & Related Substances Act No. 101 of 1965, which controls the registration and labelling of medicines and makes provision for the Registrar of Medicines to deal with adverse effects of medicines;
- ▶ the Fertilizers, Farm Feeds, Agricultural Remedies and Stock Remedies Act No. 36 of 1947, as amended, which makes provision for the registration and control of the range of substances referred to in the title of the Act, which includes insecticides for domestic use; and
- ▶ the Foodstuffs, Cosmetics and Disinfectants Act No. 54 of 1972, which makes provision for the information that is placed onto labels and the creates legal consequences for labelling that is incorrect or fraudulent,

would all need to be considered very carefully in relation to whether or not those pieces of legislation require enough of the suppliers of the goods regulated by that legislation to avoid the provisions of the CPA.

In light of the novelty of the provisions of the CPA, in relation particularly to the protection that they afford to consumers, it is probably doubtful that anyone would be able to rely on the provisions of existing legislation to fend off a consumer's claim that he or she was harmed by a product, and is therefore entitled to redress in terms of the CPA, or that the CPA is nice but not required of them.

The fourth question therefore that arises as a result of the analysis set out above, is how legally dangerous are your goods? The danger in question should be evaluated in relation to the risk that is presented by the goods, which is an aspect that is dealt with by Section 58 of the CPA concerning the warnings relating to the facts and the nature of the risk of the goods.

Related sections of the CPA pertaining to the consumer's right to safe and good quality goods are:

- ▶ Section 55 read together with “Warranties on Goods in Relation to Quality” in Section 56; and
- ▶ the “Safety Monitoring and Recall of Goods” in Section 60.

These sections are all the more important in relation to the wide ranging powers afforded to the National Consumer Commission to:

- ▶ require the recall of goods;
- ▶ require the publication of industry-wide codes of practice that provide for consumers to complain about failures, defects or hazards in goods;
- ▶ monitor the sources of such information; and
- ▶ institute investigations into the nature, causes, extent and degree of the risk to the consumer of such goods.

Do not assume that because your goods are already regulated by a particular statute, albeit that such a statute requires you daily to jump through all sorts of hoops and into and over all sorts of obstacles in order to ensure that you are compliant with the law, that you are able to avoid the liability imposed by the CPA.

Risks, warnings, guarantees, warranties and danger should be assessed carefully as part of the consumer environment for any goods especially those that present inherently and perhaps obviously a danger to the average consumer.

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