Consumer Protection Act No. 68 of 2008

Set out below are answers to questions companies should be asking themselves in light of the provisions of the Consumer Protection Act No. 68 of 2008 (CPA), which are currently enforced.

**Question 1 – What is the expected impact of the CPA?**
The CPA is expected to significantly change the manner in which goods and services are marketed to consumers, as well as the relationships, transactions and agreements between consumers and producers, suppliers, distributors, importers, retailers, service providers and intermediaries of and in relation to goods and services. The CPA will essentially apply to every transaction for the supply, in the ordinary course of business, of goods or services to consumers in exchange for consideration, and the promotion of any goods, services and of suppliers thereof, within South Africa, as well as to the goods or services that are supplied or performed, themselves.

**Question 2 – Is my company a consumer?**
The definition of “a consumer” is broad but does contain a number of provisions that may exclude certain persons from its application. Being excluded from the definition of “consumer” may restrict the application of the CPA to your company’s business activities.

**Question 3 – Does my company engage in transactions contemplated in the CPA?**
A careful analysis of the definition of “transaction” must be undertaken in order to determine whether or not your company’s business falls within this definition. Should the definition not include the transactions dealt with by your company, the CPA may not apply to certain, if not all, of your company’s transactions.

**Question 4 – What are the thresholds for exemption?**
The CPA applies only in certain circumstances, which are determined by thresholds published in the Government Gazette. The thresholds are designed to exclude certain persons from the application of the CPA. As at October 2010, thresholds are published in draft and are not finalised.

**Question 5 – What are the exemptions?**
The CPA contemplates a number of exemption transactions. One must understand whether or not a transaction in any particular circumstance falls into the exemptions in section 5(2). If an exemption is applicable, the CPA does not apply to the transaction itself, but the product liability and product recall provisions of the CPA will be applicable to goods supplied in terms of exempt transactions.

**Question 6 – What is the early effective date?**
The early effective date is the date on which certain provisions, more particularly, those relating to product liability, came into effect. The early effective date is considered to be 29 April 2010.

**Question 7 – What is the general effective date?**
The general effective date is the date on which the balance of the provisions of the CPA will come into effect. This date has been postponed by the Department of Trade and Industry to 1 April 2011.

**Question 8 – What are consumer rights?**
The CPA identifies certain entitlements, which are obligations imposed upon suppliers, to ensure that the interests of consumers are protected when suppliers are transacting with consumers. In order to determine the application of “consumer rights” or entitlements to any supplier, regard must be had to the applicable thresholds and exemptions to which we have referred.

**Question 9 – Will the CPA increase the risk of producers, importers, distributors and retailers in relation to product liability?**
The provisions of the CPA, in terms of which no-fault product liability for producers, importers, distributors and retailers has been introduced in relation to any goods that were first supplied to a consumer on or after the early effective date, are already in effect. Before this, a degree of fault or negligence causing harm would have been required by our common law, before liability could attach. In addition, the CPA ensures that consumers can elect to take action against any member of a supply chain, and not only the manufacturer or direct supplier of the goods in question.

**Question 10 – How will the CPA affect terms and conditions of supply to consumers?**
The CPA is expected to widely impact our law of contract, by regulating the content of consumer agreements and the manner in which notices or documents are provided or displayed to consumers.
In particular, provisions where suppliers seek to limit their exposure in relation to quality claims in relation to products supplied will be curtailed, with our Courts being given wide powers to declare that a transaction or agreement was, in whole or in part, unconscionable, unjust, unreasonable or unfair and to compensate the consumer for losses or expenses relating to the transaction or agreement, amongst other things.

Question 11 – What if I am complying with the existing legislation particular to my products?
The Consumer Protection Act states that it will apply to every transaction subject to any exemption or threshold determination. However, if the Consumer Protection Act provides better protection to a consumer than any other piece of legislation, then that legislation will not apply. Therefore, where an existing piece of legislation already protects the consumer adequately or better than the Consumer Protection Act, then that piece of legislation will take precedence.

Question 12 – How will a consumer enforce his or her or its rights?
The consumer has a number of avenues available to him or her including referring complaints to alternative dispute resolution fora, referring a complaint to a particular ombudsman identified in the CPA or referring a matter to the National Consumer Commission. The National Consumer Commission may also investigate matters relating to consumer complaints or any contravention of the CPA – in much the same way as the Competition Commission enjoys similar powers in respect of competition matters.

Question 13 – What about the codes of conduct to which my company already adheres?
The codes of conduct that already exist are recognised in chapter 4 of the CPA. Industry codes of conduct are dealt with expressly in section 82 of the CPA. The CPA recognises the role of industry codes provided the industry code is consistent with the purposes and policies of the CPA.

Question 14 – What is a compliance notice?
A compliance notice is issued by the National Consumer Commission and sets out a contravention or alleged contravention of the CPA by a supplier. The compliance notice is the first step in an investigation by the National Consumer Commission into an apparent contravention of the CPA. It is an important document and policies would have to be implemented so as to ensure that companies are able to identify and deal with compliance notices promptly in order to avoid prosecution in terms of the CPA.

Question 15 – Are there fines under the CPA and if so, how much are they?
Fines may be imposed in terms of section 112 of the CPA and may not exceed the greater of 10% of the supplier’s annual turnover during the preceding financial year or a R1 000 000. In this regard, the CPA makes express provisions for vicarious liability, which allows any employer to be held liable jointly and severally with its employee for a contravention of the CPA.

Question 16 – What steps should I be taking now?
As indicated above, careful analysis of the definitions in the CPA must be undertaken in order to determine whether or not your company’s business falls within the scope of the CPA. If the CPA is applicable to its transactions, a review of your business’ terms and conditions of supply, marketing material and practices and agreements with suppliers, will be required. Even if goods are supplied to your business in terms of exempt transactions, but will be on-supplied to consumers in terms of non-exempt transactions, you may need to ensure that you have remedies against your supplier in the event that a consumer exercises his/her rights under the CPA against your business. A risk assessment procedure for each business in light of the increased product liability risk (which should include a review of the adequacy of instructions given to consumers, as well as of risk-mitigating measures such as insurance), is also recommended.

For more information on the Consumer Protection Act No. 68 of 2008, please visit our website on www.werksmans.com or contact any of our directors as listed below:

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