

Looking into the crystal ball: product labelling and pre-sales warnings in terms of the new Consumer Protection Act, 2008

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

The way that manufacturers label their products, particularly when providing warnings and instructions to consumers, will need to change dramatically to comply with the provisions of the new Consumer Protection Act, 2008 (CPA), which is due to become operational on 1 April 2011.

Section 24 of the CPA makes it clear that manufacturers will have to reassess the manner in which product labels and trade descriptions are drafted and how such labels describe the attributes, use and benefits applicable to its products when described by such manufacturer on the particular good in question or in inserted documentation which is included in the product.

The CPA also sets out the way that manufacturers can limit their liability in respect of the assumption of risk when introducing a particular product to the market. Section 49 states that any notice to consumers that:

- ▶ purports to limit in any way the risk or liability of the supplier;
- ▶ constitutes an assumption of risk or liability by the consumer;
- ▶ imposes an obligation on the consumer to

indemnify the supplier or any other person for any cause;

- ▶ constitutes an acknowledgment of any fact by the consumer;

must be brought to the attention of the consumer in a manner and format that satisfies the formal requirements as set out in the CPA.

The manufacturer is expected to set out very clearly on the product label or on any inserted notice, any activity or facility that is subject to any risk of an unusual character or nature. Other criteria in assessing whether or not a risk should be highlighted include the fact that:

- ▶ the consumer could not reasonably be expected to be aware of or notice the risk; or
- ▶ an ordinarily aware consumer could not reasonably be expected to notice or contemplate the risk in the circumstances; or
- ▶ the risk could result in serious injury or death.

Manufacturers will have to specifically draw the fact, nature and potential effects of these risks to the attention of consumers in a way that satisfies the requirements of the CPA.

In addition, the consumer must have assented to that provision or notice by signing or initialling the provision or acting in a manner consistent with acknowledgement of the notice, awareness of the risk and acceptance of the provision.

How manufacturers will be able to comply with this provision will be a challenge. It might result in a manufacturer needing to prove to a court of law, on some basis, that a particular consumer when buying a product knew specifically of the manner in which he or she had accepted the assumption of risk when using it.

Plain language and notification of risk

Any notice whether it be on the product itself or within an inserted notification, must be written in plain language as set out in Section 22 of the CPA. Section 22 states clearly that such notification must be provided to the consumer in a form which constitutes "plain language". This will be assessed by the courts by establishing whether an ordinary consumer of the class of persons for whom the notice is intended, with average literacy skills and minimal experience, could be expected to understand the content, significance and import of the notice without undue effort. The following aspects will be considered:

- ▶ context, comprehensiveness and consistency;
- ▶ document or visual representation;
- ▶ organisation, form and style;
- ▶ vocabulary usage and sentence structure; and
- ▶ use of any illustrations, examples, headings or other aids to reading and understanding.

The National Consumer Commission is expected to publish guidelines (hopefully in the regulations still to be published) for assessing whether notifications satisfy the requirements of Section 22.

Section 49(4) states that the fact, nature and effect of the notification of risk must be brought to the consumer's attention conspicuously (i.e. in a way that is likely to attract the attention of an ordinarily alert consumer, having regard to the circumstances at the time when the consumer enters into the transaction or when payment is made).

Lastly, in terms of Section 49(5) the consumer must be given an adequate opportunity in the circumstances to receive and comprehend the provision or notice provided by the manufacturer.

Manufacturers who produce products that are potentially dangerous to human life, are hazardous, or potentially unsafe, will have to

comply with Section 58 of the CPA. Section 58 states that any producer of any product that is subject to any risk:

- ▶ of an unusual character or nature; and
 - ▶ of which a consumer could not reasonably be expected to be aware, or which an ordinarily aware consumer could not reasonably be expected to contemplate, in the circumstances; or
 - ▶ that could result in serious injury or death;
- must specifically draw the fact, nature and potential effect of that risk to the attention of the consumer in a form and manner that meets the standards set out in Section 49 of the CPA.

Coupled with the new strict liability (Section 61) provisions, manufacturers and suppliers (including foreign suppliers) will have to look very carefully at their product labels and, if necessary, redraft them to ensure that they comply with the provisions of the CPA. In particular, the language used, and the manner in which the benefits of a product to a consumer are described, will have to be carefully explained and in a way that clearly makes it easy for consumers to understand what they are taking on when purchasing a product.

These issues will be considered, in due course, when these matters are tested in our courts. Aspects that will be explored include whether or not the manufacturer in question could have anticipated risks when designing products and when providing warnings and instructions to consumers.

Pre and post sale warnings?

Kenneth Ross, a well known American writer on this topic, suggests that manufacturers might be expected to predict "future conduct by users" and consider what conduct constitutes reasonable use or "foreseeable misuse" – i.e. the pre sale warning!

The question, as posed by Mr Ross, will be how far will the manufacturer have to go to anticipate unintended, but foreseeable misuses of a product? For example is it enough if a manufacturer's warning label covers what damage could occur if the product is misused? Or should the manufacturer foresee that users might ignore such warnings?

American jurisprudence indicates that manufacturers cannot make product users read and follow warnings. Nevertheless, it has been argued there, that it was reasonably foreseeable that a user would ignore a warning because, for example, it was too hard to comply with, too detailed or that it was not understandable. The question of "post sale" duties has been debated in US courts. It is possible for a manufacturer to be held

not liable for selling a defective product, but yet liable for violating some post sale duty which could have been foreseeable when the manufacturer introduced the product to the market. The upshot of what Mr Ross suggests, is that the manufacturer needs to employ preventive techniques through risk assessment, either before or after product sale, to identify conduct that is misuse and could be considered reasonably foreseeable.

As Mr Ross states, risk assessment has been described as "a tool for manufacturers to identify possible hazards and provide a basis for considering alternative designs to mitigate the manufacturer's control risks". Risk assessment offers an opportunity to identify hazards associated with intended uses and reasonably foreseeable misuses, and to take steps to eliminate or control them before an injury occurs. This process can be a key factor in successfully reducing risk to an acceptable level by manufacturers.

Risk assessment

Risk assessments by manufacturers attempting to comply with the new provisions of the CPA in South Africa, will become critical once the CPA is implemented. The way that manufacturers screen potential hazards and assess the probability of harm in respect of the use of their products will no doubt be tested by our courts. When a manufacturer is sued in a court of law, the success of defences against product liability actions will turn on the manner in which these practices have been taken on board by the manufacturer. Unfortunately, these assessment processes cannot be exact and the results are not definitive. Manufacturers will have to, on some basis, predict future behaviour of consumers which, by its very nature is inaccurate, sometimes unknown and in certain instances impossible to understand. The use of scientific processes and experienced people, and subsequent implementation of appropriate risk reduction measures, will be key.

Costs

Product manufacturing in South Africa might become more expensive when one considers the potential liability on the part of manufacturers in terms of the CPA. Insurance costs combined with the costs of researching, preparing, drafting and attaching labels to products, might very well translate into increased production costs. What is hoped is that the introduction of the CPA does not result in a situation where increased product prices start impacting consumers' pockets, when ultimately the CPA is an attempt to protect consumers' rights.

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