



# Consumer Protection Act: Grain 14 March 2012

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## **Consumer Protection Act**

- ▶ Intention of the Act is to **protect all consumers, focussing on the previously disadvantaged, the poor, the illiterate**, the uninformed and all small business from **exploitation and commercial abuse**
- ▶ Consumer ≠ purchaser – even if got for free or purchase on sale at a retailer, even SMME < R 2 mil
- ▶ Applicable to most transactions **in South Africa** except where state is consumer and some others BUT state is not exempted from CPA.



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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**



## CPA – 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



# Interpretation

## Simple Rules:

1. When in doubt, interpret in favour of the consumer
2. If CPA conflicts with another law, CPA trumps
  - Act 36?



## REDRESS MECHANISM

- Simplified redress mechanism for consumers
  - No or very little cost to consumer to pursue claims!
- Industry code and Ombud – in process at the moment
- Consumer Commission – investigative and prosecutorial
- Consumer Court – as already exists in Gauteng and WC
- Consumer Tribunal – same one as from NCA
- Investigators with powers of search and seizure
- Dawn raids by Commission – similar to Competition Act



# Consumer Rights

- **Information in Plain and Understandable Language**
  - Plain language is required on packaging, ads etc
  - Don't replace prescribed info like R 146 etc
  - Ordinary person of the class of intended consumer with
    - **average literacy skills,**
    - **but no special skills as a consumer,**
    - **must understand its significance and importance**
    - **Images, text, syntax, etc etc**
  - What about best Before, Sell By, Use By – c.f. R146 defn's



## CPA – GM Labelling

24(6) 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** in accordance with applicable regulations.





## Sections 25(2) and (3) of CPA

- (2) A person must not-
  - (a) 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;
- (3) A **retailer** of goods must-
  - (a) **not offer to supply, display or supply** any particular goods if the retailer knows, reasonably could determine or **has reason to suspect** that-
    - (i) a **trade description** applied to those goods is likely to **mislead the consumer**



## Reg 7 – 7(2)

- Reg 7 - “prescribed goods”

7(2) - This regulation applies to goods approved for commercialisation by the Executive Council for Genetically Modified Organisms

“Executive Council” – has approved certain maize, soy, cotton and canola seeds for commercialization

**These are the “goods”**



7(3) - regulation applies to all **goods** referred to in sub-regulation (2) which contain at least 5 percent of genetically modified organisms

7(7) – less than 5% requires no labelling - voluntary labelling.

Irrespective where manufactured and applies to marketing material

Is this the **“mode of manufacture”** in **“trade description”**? Yes

Is **testing** required? Not prescribed but - **retailer** may not sell a product it suspects to have a false trade description – incorrect labelling here will lead to liability.

How will you know if you are above or below 5% in a compound product?



Reg 7

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7(4) - Any good or ingredient or component to which sub- regulation (3) applies may not be **produced, supplied, imported, or packaged** unless a **notice** in plain language is applied to such good or marketing material in a **conspicuous and easily legible manner** and **size** stating without change, that the good or ingredient or component

***"contains Genetically Modified Organisms"*** – is this true?

Section 24(6) CLEARLY refers only to **"ingredients or components** of those goods"

Question: Is a food product which is not a single commodity product ever able to be "goods"?

"goods" as defined may be ingredients or components of a food product BUT in 24(6) relates to **"ingredients of the 'goods'"**.



## Reg 7 – “produced by...”

7(5) - If goods listed or contemplated in sub - regulation (2) are intentionally and directly produced using genetic modification processes, the goods or **marketing material**, must be labelled in plain language, without change, as "Produced using genetic modification".

This therefore ONLY applies to the seed companies and maybe the farmers



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## Reg 7 – “GM Free”

A notice must not state that a good or ingredient or component does **not contain** genetically modified organisms **unless** such good or ingredient or component **contains less than one percent** genetically modified organisms.

Requirement for testing because if you get it wrong you are guilty of a prohibited conduct – big fines

Remember – **retailer** may not sell a product it suspects to have a false trade description such as this!



Reg 7(8) provides an **exception** to the need for **testing** for GM content – this implies that in **all other cases** testing is required **otherwise why the exception?**

“**scientifically** (impractical or not feasible) to test **goods**” for genetically modified organisms or ingredients .....  
conspicuous and easily legible manner and size, stating “**May contain genetically modified ingredients**”.

BUT this is **not an easy way out** as you need to show why it is **scientifically** impractical or not feasible...

**Retailer** has the obligation not to sell goods it suspects have a misleading trade description – this could be such a case!



# Fair and responsible marketing

1. Marketing may not be false, misleading or deceptive (whether directly or indirectly), including exaggeration, innuendo and ambiguity.
2. One may not falsely claim goods are available (when they are not) and that goods can be delivered or services can be performed within a certain period (knowing it cannot).
3. One cannot claim a price advantage you don't have!
4. One cannot claim product quality, characteristics, properties, uses, benefits, advantages that product does not have.
  - GM free or "May contain GM" or "contains GM"





## 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.



## Quality of Goods

- *R146 -‘Use by’ (Best Consumed Before, Recommended Last Consumption Date, Expiry Date) means the date which signifies **the end of the estimated period** under the stated storage conditions, after which the product probably will **not have the quality** attributes normally expected by the consumers and after which date the food should **not be regarded as marketable**;*
- **none** of the R146 definitions state that after such a date, **whether Best Before, Sell By, or Use By**, the food is **unsafe to consume**. Its all about “marketable”!



## Quality of Goods

- ▶ **Implied warranty of quality “6 month money back”**
  - the producer or importer, the distributor and the retailer **each** warrant the goods
  - Within six months after the delivery return the goods to the supplier, without penalty and at the supplier’s risk and expense, for refund or replacement (consumer has this choice!) – **“Use by date”** critical
    - **If sold before Sell By date then consumer cannot return thereafter IF IT WAS CLEARLY MARKED**



## Warnings and Instructions

- Labeling - ensuring correct info – **change over packaging or recipe**
- must have warnings of hazards and clear instructions
  - allergens
  - preservatives, pesticide residues etc
  - any additives which are known or believed to be a risk
  - “heavy, bend knees when lifting



## Product 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 – FSI code or GS1 recall code eventually**
- 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



# Food Safety and Product Liability

- Impact on food safety - need to prove *due diligence*, → no zero risk, but must do everything possible to prevent food safety incident and reduce fines;
- Food-borne incident / outbreak of foodborne illness:
  - Mild to severe illness
  - Worst case scenario = death
  - Take into consideration, high % immuno-compromised population in SA = very vulnerable
- NB: Implement food safety management system accurately with appropriate documentation;

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## **Product liability**

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.**



## Exclusions / defences

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;
- (c) defect arose solely due to a supplier complying with the instructions from the person who supplied that supplier with the goods;
- (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 e.g. **NEVER unreasonable to use common sense**; or
- (e) the plaintiff's claim expired because it was brought 3 years after the events





# Food Fraud

- **Mislabelling**
  - Product line changeover
  - Packaging change over
  - Missing ingredient e.g. an allergen
- **Adulteration**
  - Economic
  - Sabotage
  - Innocent



## 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!



## FRAUD BY CONSUMERS

- No protection for business in the CPA
  - Other countries have criminal sanctions in their Consumer laws to discourage abuse of these powerful laws
- Common law still exists and charges of fraud can and should be laid at the police station
  - Prosecution may take long or never happen but it will build up a history of such activities which may come in handy in the future
  - Private prosecution is possible if police refuse/fail to prosecute



## **Does RSA need the CPA?**

**USA Situation – about 3 to 5 recalls a day!**

**RSA Situation – about 3 to 5 recalls a **year!****

- Are our products 365 times safer than in the USA;
- Are our consumers 365 times tougher than in the USA; or
- **Does our industry care 365 times less about consumers than in the USA? ..... YOU DECIDE!**



Questions?

Thank You

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