

Relevance of the Consumer Protection Act of 2008 to the Dairy Industry

This note on the Consumer Protection Act and its implications for the dairy industry has been written by Janusz Luterek, Pr.Eng, an engineer with experience in the food and dairy industry, having been involved in various dairy projects as an engineer at APV, and who is now an attorney and a patent attorney specialising in the Consumer Protection Act (from the supplier's perspective), product liability, and other aspects of technology related law. Janusz is a partner at Hahn & Hahn attorneys of Pretoria and may be contacted on janusz@hahnlaw.co.za or 012 342 0563 for further specific advice on this topic.

1. This is a short memorandum on the effects of the Consumer Protection Act as signed into law on 24 April 2009, portions of which have come into effect on 24 April 2010 and the remainder of which is expected to come into effect on 24 October 2010, on the various parties in the dairy supply chain including farmers, processors, wholesalers, and retailers. In particular I have focused on the applicability of the Act, the anti-discrimination provisions, the rights of consumers to inspect goods and to expect timeous and correct delivery of goods, the use of plain language in all documents, the requirements for trade descriptions, the provisions against misrepresentation, deception, and exploitation of vulnerable consumers, the right of consumers to contractual provisions which are just, fair, and reasonable, the right of consumers to prices which are just, fair and reasonable, the liability for damage caused by goods, and warranties and product returns.

Applicability

2. The Act applies to any transaction in which goods or services are supplied or offered to be supplied, or where a person is exposed to any goods or services regardless whether any supply actually took place, as long as the consumer is a natural person or a juristic person having a turnover or nett asset value below the threshold which the Minister will determine in due course, but is expected to be around R 1 million to R 2 million. Thus, a person who is exposed to marketing only is still considered a consumer in terms of this Act as is a person who received a product or service for free.

It is possible for the same person to be a supplier in one transaction and a consumer in another transaction, for example, where a small business or farmer purchases feed or packaging material and then packages and sells milk. There need not be a direct relationship between the manufacturer or producer and the end user for application of the Act as between the end user and the manufacturer.

Discriminatory Marketing

3. The Act prohibits discriminatory marketing between consumers on any grounds set out in the bill of rights of the Constitution of South Africa, such as race, gender, sexual orientation, religion, and the like. However, specific provision is made for favourable treatment of pensioners over 60 and minors under age 18. In addition, discrimination based on purely commercial reasons, such as a milk distribution area which is economically viable, is also permitted.

Inspection and Delivery of Goods

4. Every consumer has the right to inspect goods before accepting delivery and this is especially important when deliveries of perishable products such as milk and other dairy products are made to consumers (which includes small retailers!). If the consumer is not permitted to inspect the products before accepting delivery, the consumer may reject the delivery and demand a full refund. It is also important when delivering milk and other dairy products that the delivery be made at the agreed time and place, that the agreed quantities be delivered (no over or under supply), and that any freight charges be specifically agreed beforehand as well as when the risk will pass from the supplier to the consumer on any specific consignment. Where deliveries are not made on time or at the right address, or the goods delivered do not correspond to those ordered, the consumer does not have to accept the delivery and can reject it in part or in whole. Further, where goods are delivered to the wrong address, or the incorrect goods are delivered, the Act provides that the delivery can become the property of the person to whom it was delivered, free of charge, if not collected in the prescribed time and in the prescribed manner.

Labelling and Marketing

5. The Act has extensive provisions regarding labelling and marketing, including strict regulation of direct marketing, promotional competitions, the use of language, the content of labels, and prohibitions against misrepresentations to and deception of consumers, especially the most vulnerable who are challenged either by literacy, language, age, or health.

6. Where any direct marketing to consumers is undertaken, this has to be limited to the times and days permitted under the Act, and the consumer must be given the option to either pre-emptively opt out from all or certain direct marketing, or to opt out from a specific supplier's marketing by either registering on a pre-emptive block register which will be established and which all marketers will have to consult before conducting any direct marketing or by contacting a supplier directly in order to inform them not to be contacted again. No charge may be made to a consumer either for opting out or for responding to direct marketing with a request not be contacted again.

7. Where promotional competitions are held, whether by manufacturers, packers, or retailers, the rules of the promotion must be strictly in accordance with the Act and there must be enough prizes or awards to satisfy the demand which results therefrom. Of great importance is the prohibition on charges of any kind for the entering of promotional competitions, whether in the form of a premium SMS or any other form, and only the actual cost of communication may be charged to an entrant, for example, a postage stamp to enter by mail or a standard SMS charge for entering by SMS.

8. The use of specific languages in documents, forms, and notices is not prescribed and where specific forms, notices and documents are prescribed by the Act or by any other public regulation then such should be used. In all other cases, such as contracts, portions of labels for which no prescribed format exists, marketing materials, and the like, plain language must be used such that it is reasonable to conclude that an ordinary consumer of the class of persons for whom the notice, document or visual representation is intended, with average literacy skills and minimal experience as a consumer of the relevant goods or services, could be expected to understand the content, significance and import of the notice, document or visual representation without undue effort. Thus the choice of language is upto the individual producer, but the above requirements must be met. The Commission will publish guidelines on when the plain language requirement has been met. In the context of dairy products it is believed that where any statements as to the benefits of the product or special characteristics of the product are advertised or appear on labelling, great care must be taken to ensure that consumers will understand the content, significance and import thereof.

9. Further to what has been stated about the plain language requirements, the Act also makes provision for specific goods, such as dairy products, to be the subject of regulation under this Act in so far as trade descriptions are concerned, so that the country of origin, the ingredients used, the manufacturing processes employed, the name and address of producers of imported products, and the presence of GM ingredients in the goods to be disclosed on the label thereof. However, this provision will only apply to goods once they have been called up by the Minister and only to the extent of the call up.

10. Finally, in so far as labelling, marketing, and advertising are concerned, there is a prohibition of any and all misrepresentations to consumers, whether direct or indirect, and where a supplier is aware that a consumer has a misapprehension as to any fact then it is considered deception not to put the consumer right and correct the misapprehension. Numerous examples of situations where misrepresentation is taking place are listed in the Act and these include claiming product is available when it is not, has a certain characteristic when it does not, and has a price advantage over other products when this is not the case. In addition, advantage may not be taken of consumers who are unable to look after their own interests due to illiteracy, blindness, deafness, inability to understand a language, age, and the like.

Just, Fair and Reasonable

11. The Act has a prohibition against any unconscionable conduct by a supplier against a consumer, including one sided contracts and the use of duress or unfair tactics to conclude a transaction. Further, the act has a prohibition against contract

terms which are unfair, unreasonable or unjust and, most importantly, prices which are unreasonable, unfair or unjust. These provisions should be considered very carefully as they could be used together with the Competition Act to take action against manufacturers, packers, distributors, etc who are found guilty of price fixing or collusion which results in prices which are unfair, unjust, or unreasonable or supply terms which are similarly unfair, unjust and unreasonable. Thus, a party found guilty under the Competition Act and fined 10% of their turnover, could face a class action claim from consumers for damages under the Consumer Protection Act as well as a further fine of 10% of turnover from the Consumer Tribunal.

Right to Goods which are Safe and of Good Quality

12. The Act provides, amongst others, for a warranty of quality, the right to safe, good quality goods, warnings concerning the fact and nature of risks associated with goods, safety monitoring and recall of products, and liability for damage caused by goods. Of these, it seems likely that the liability for damage caused by goods will have the most far reaching effects on your business, however, in time the other consumer rights in this chapter will increase the burden on your business.

Liability to a Consumer

13. ***This section of the Act came into effect on 24 April 2010 and potential claims by consumers are already accumulating as you read this.*** From the outset, it must be borne in mind that the liability for such damages is not only in terms of the Consumer Protection Act and both existing common law liability and criminal law liability will continue to exist so that a company could find itself both liable civilly under this Act but also under common law and criminal law.

14. Furthermore, the sword of the Consumer Tribunal will hang over the heads of repeat, intentional, or grossly negligent transgressors where a fine of upto 10 % of turnover of a company may be levied. In terms of other provisions there are criminal sanctions against individuals which carry prison terms of upto 10 years.

15. The Act will also put in place a product recall regime in terms of which product recalls may be ordered and which may require accurate record keeping of the sales of designated products and returns thereof for product failure monitoring and for reporting of such figures in order to permit recalls of out of specification products to be ordered before they cause damage or harm.

16. As regards the liability for harm or injury caused by goods, the major difference between the legal position in terms of the Act and the common law position prior to the coming into effect of Act on the liability of a manufacturer, producer, wholesaler, or supplier to a consumer is that whereas the common law requires that the manufacturer or packer be negligent or that there be breach of an explicit or implied contractual term, the Act imposes a no fault liability on **any producer or importer, distributor or retailer of any goods** for damage caused wholly or partly as a consequence of supplying any unsafe goods, a product failure, defect or hazard in any goods, or inadequate instructions or warnings provided to the consumer pertaining to any hazard arising from or associated with the use of any goods, irrespective whether the harm resulted from any negligence on the part of the producer, importer, distributor or retailer, as the case

may be. Thus, the consumer may hold at their whim any or all elements in the supply chain liable for damages, the one paying the others to be absolved. Some of the causes from which such claims could arise include allergic reactions to ingredients in dairy products of which the consumer has not adequately been warned, foreign objects in food products, food poisoning and other food safety related situations. It is quite likely that some consumers or consumer groups will attempt to rely on these provisions against producers who use hormones (r-BST), antibiotics, and other production aids without adequately disclosing this information or, in some cases, claiming they are absent when they are not, for example, “r-BST free” labelling.

17. Prior to the Act, it would have been a defence to a claim by a consumer against a producer or importer, distributor and possibly a retailer for damages due to defective products or product failure for the seller, or anyone else in the supply chain, to show that there was no negligence on its part and/or that liability was excluded or limited in terms of a contractual term such as a warrantee. This is a typical situation where food poisoning or the effects of additives or chemicals used in production cause harm or injury to a consumer where the producer or importer, distributor or retailer would merely claim ignorance and show that they acted reasonably in the manufacture or supply of the dairy product.

18. Since 24 April 2010, however, the question of negligence will not arise and the only defences open to a person in the supply chain will be those set out in the Act which are:

- (a) the unsafe product characteristic, failure, defect or hazard that results in harm is wholly attributable to compliance with any public regulation;
- (b) the alleged unsafe product characteristic, failure, defect or hazard—
 - (i) did not exist in the goods at the time it was supplied by that person to another person alleged to be liable; or
 - (ii) was wholly attributable to compliance by that person with instructions provided by the person who supplied the goods to that person, in which case, subparagraph (i) does not apply;
- (c) it is unreasonable to expect the distributor or retailer to have discovered the unsafe product characteristic, failure, defect or hazard, having regard to that person’s role in marketing the goods to consumers; or
- (d) the claim for damages has prescribed in terms of Section 61(5).

19. A further element of liability which is introduced by the Act is that of no fault vicarious liability in terms of which if an employee or agent of a person is liable in terms of this Act for anything done or omitted in the course of that person’s employment or activities on behalf of their principal, the employer or principal is jointly and severally liable with that person. Whereas presently under common law this is available to a consumer the present section makes this easier to enforce as the element of negligence is no longer a requirement for liability for the actions of an employee or agent.

20. A major consequence of the coming into effect of the Act, and especially the no fault liability, will be the need for distributors and retailers to have systems, both administrative and laboratory, to test products and keep accurate records in order to be able to sustain the defence that it is unreasonable to expect the distributor or retailer to have discovered the unsafe product characteristic, failure, defect or hazard, having regard to that person’s role in marketing the goods to consumers. There will off-course

be much debate as to what the effect of the role as a wholesaler or retailer has on the liability of the wholesaler or retailer in terms of the defence that they merely sell on what has been sold to them without reviewing or testing the safety or suitability thereof, however, in the writers opinion, the bigger the wholesaler or retailer, the less likely this defence is to succeed.

21. The good news is that what has not changed is the determination of the extent of any damages claimed. Thus, there are no punitive damages as is the case in the US and a court will —

- (a) assess whether any harm has been proven, and adequately mitigated;
- (b) determine the extent and monetary value of any damages, including economic loss; or
- (c) apportion liability among persons who are found to be jointly and severally liable.

22. Thus, the extent of provable damages has not been changed by the Act, however, the consumer will no longer have to prove negligence on the part of anyone in the supply chain in order to open the door to a damages claim, which is the case under the present common law, and thus there may be many spurious or minimal claims against supply chains where the damages are either incalculably small or very minor in extent, such as the replacement of a carton of milk or a block of cheese, but which require proper responses to the Retail Ombud, the Consumer Commission, and even the Consumer Tribunal, from legally qualified personnel rather than the current customer care line type of approach. Failure to deal fully with all the issues at an early stage may result in claims escalating.

23. Further, the inclusion of economic loss in the list of damages calculable by the Court makes it possible that claims may be instituted not only for directly foreseeable losses and direct losses, but also consequential losses, however unforeseeable these may have been. Thus, in an absurd example, the producer of a block of cheese with a nail in it, could be liable for the loss of income of a business owner who at the nail, all his employees, as well as of the business as such.

Warranty and Right to Return Goods

24. Every consumer has a right to receive goods that are reasonably suitable for the purposes for which they are generally intended for, are of good quality, in good working order and free of any defects, will be 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 comply with any applicable standards set under the Standards Act, 1993 (Act No. 29 of 1993) or any other public regulation. In addition to the right set out above, if a consumer has specifically informed the supplier of the particular purpose for which the consumer wishes to acquire any goods, or the use to which the consumer intends to apply those goods, and the supplier ordinarily offers to supply such goods or acts in a manner consistent with being knowledgeable about the use of those goods, the consumer has a right to expect that the goods are reasonably suitable for the specific purpose that the consumer has indicated.

25. In determining whether any particular goods satisfied the above requirements, all of the circumstances of the supply of those goods must be considered, including but not limited to the manner in which, and the purposes for which, the goods were marketed, packaged and displayed, the use of any trade description or mark, any instructions for, or warnings with respect to the use of the goods, the range of things that might reasonably be anticipated to be done with or in relation to the goods, and the time when the goods were produced and supplied. It is irrelevant whether a product failure or defect was latent or patent, or whether it could have been detected by a consumer before taking delivery of the goods unless the consumer has been expressly informed that particular goods were offered in a specific condition, and has expressly agreed to accept the goods in that condition.

26. Thus, in the context of dairy products, the consumer is entitled to dairy products which have the product characteristic as indicated on the packaging and in marketing, which will have a reasonable shelf life depending on the type of product, for example, fresh pasteurised, UHT, and the like. The dairy products should be safe and not contain any foreign objects nor be produced using any undesirable additives nor packed in material which would detract from the safety or suitability thereof. The products should always comply with all Agricultural Products Standards, Food labelling requirements, and compulsory specifications. Furthermore, where a small manufacturer, who would be considered a consumer, states his requirements for a particular dairy product, perhaps because he intends to use it as an ingredient, the product must satisfy the requirement or else the consumer (small manufacturer) would have to be refunded or the product replaced, in addition to any claim for damages which they may have.

27. It is very important to note that the producer or importer, the distributor and the retailer **each** warrant that the goods comply with the requirements and standards contemplated above and the retailer, for example, cannot merely refer the consumer back to its supplier when a situation arises.

28. Within six months after the delivery of any goods to a consumer, the consumer may return the goods to the supplier, without penalty and at the supplier's risk and expense, if the goods fail to satisfy the abovementioned requirements and standards, and the supplier must either **replace** the failed, unsafe or defective goods, or **refund** to the consumer the price paid by the consumer for the goods, **at the direction of the consumer**.

29. The above is by no means an exhaustive thesis on this topic and is merely intended to alert and inform on the possible issues which may arise in terms of the Consumer Protection Act.