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DAIRY STANDARDS AGENCY

Legal Landscape

Dairy

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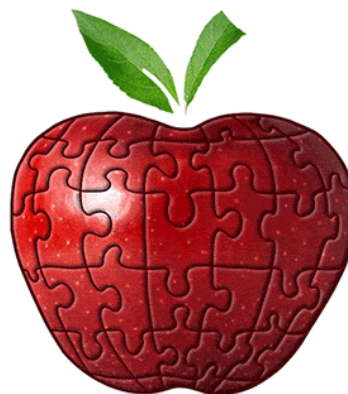
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Outline

- Food Public Health issues – Department of Health (DoH)
e.g. permissible ingredients, allergens, labeling
 - FCD Act and Regulations e.g. R146, R1555
 - Infant Food Regulations R 991
- Agricultural Products quality and composition –
Department of Agriculture (DALLRD)
 - APS Act and Regulations (Dairy R1510, Juice R286)



Outline

- GMO's – CPA and Regulations
 - Corn starch in a product
- General deception of consumers - CPA and Regulations
 - In addition to R146 and R1510
- Marketing – Advertising Regulatory Board (ARB)
- Product Recall – CPA (NCC) and FCD Act (R638) and INFOSAN



Outline

- **No single regulatory authority**
- Product jurisdiction fragmentation
- FCD Act enforcement – EHP’s at municipal level
- Department of Agriculture (DAFF) – Inspectorate & Assignees (now mainly **Assignees!**)
- DTI – includes CPA (NCC/NCT) and NRCS
- Self Regulation – CGSO and ARB



Current Issues

- Non-compliant imports – Port Health stopping at border – **NOT ALLOWING** relabelling locally
 - Turned away at harbour if no English on label
 - Turned away if non-compliant to R1510 e.g. %fat
 - E-mark and other NRCS non-compliances
- Pre-approval of labels
- CBD and Cannabis in foodstuffs and supplements
 - Haven't seen such a dairy product.....yet?



Current Issues

- Dairy products sold as Health and Nutritional Supplements (not registered under MRS Act)
- Enforcement, or lack thereof – Assignees? EHP's?
 - **BIG CHANGE HAS OCCURRED!**
- Recall and Product Liability under CPA
- Liability of person “in charge” of the premises
 - Also in case of a recall or non-compliant labelling



Enforcement Issues

- 1. ADVERTISING REGULATORY BOARD (ARB)**
- 2. HOW ARE LABELLING REGULATIONS ENFORCED IN VARIOUS DEPARTMENTS**
- 3. HOW DOES ONE HANDLE AN OFFENCE BY A COMPETITOR**
- 4. COPYRIGHT AND TRADEMARKS ON LABELS AND CLAIMS**



1. Where does the Advertising Regulatory Board of South Africa (ARB) fit in?

**NOTE: ASASA went bust! ARB was
established in its place!**



ARB

- Established by the marketing and communication industry
- Self-regulating system
- Independent body
- Advertising Code of Practice: general principals + specific regulations in appendixes (e.g. Appendix J Food and Beverage Code)
- **PRE-APPROVAL OF MARKETING PRIOR TO LAUNCH**



Opportunities and limits of the procedure

- Free to a consumer
- Much simpler procedure than a Court procedure
- BUT can only consider matters provided for in the ARB code and **cannot rule on legal non-compliance**
- No Jurisdiction in technical matters
- Only binding on its own members



2. How are labelling regulations enforced in various departments?



DoH Food control

- Shared between several authorities
- Different levels: national, provincial and local
- Common difficulties:
 - Lack of staff
 - Lack of training / understanding of complex scientific and legal issues



DOH

principle: enforcement at local level

- **DOH:**
 - Coordinating activities such as food product recalls
- **Districts/Local authorities (Municipalities):**
 - food control in their areas of jurisdiction
 - hygiene control
- **Provincial Department of Health:**
 - food control at provincial level
 - specialised services (e.g. import control, which is done on behalf of DOH)



DOH Approval of Labels

- DoH does NOT check or approve labels
- DoH does not enforce the labelling regulations and there is no provision in either FCD Act or R146 for the pre-approval of labels by DoH
- SAHPRA approves medicine labels and inserts, and this applies to CAMS (Supplements) as well
- Duty on you to ensure Labels are compliant - **get advice if unsure**



DALLRD

principle: enforcement at national level

- **Directorate Food Safety and Quality Assurance** enforces, e.g.
 - Agricultural Product Standards Act (Act 119 of 1990)
 - R 1510
- carries out its own inspections, but has appointed **assignees** e.g.
 - Nehjamogul for dairy



Assignee

- Fees may be charged in respect of the powers exercised and duties performed by the executive officer or the assignee, as the case may be, to ensure compliance
- In the case of powers exercised and duties performed by -
 - (ii) **the assignee, the fee determined by such assignee shall be payable.**



Inspection by Assignee

- the assignee may, during business hours of the industry in question in the case of compliance to regulations
- enter any place,any product, is
.....produced, processed, treated, prepared, classified, graded, packed, marked, labelled, kept, removed, transported, exhibited or sold
- inspect or test or cause to be tested any quantity of a product



Inspection by Assignee

- take samples as he ... deems necessary or as per the Regulations;
- as soon as possible after it has been taken,.....laboratory which is competent to test, inspect or analyse that sample.
- require the ownerto produce for inspection, or copy or extract, any book, label or other document or paper



Scope of Powers of Assignee

- Particular product e.g. dairy
- Regulations define scope of inspections – must inspect for compliance with a regulation – not arbitrary quality characteristics
- Sampling in accordance with regulations
- the owner of the product in question shall pay the amount determined by the assignee
- **DON'T PRE-APPROVE LABELS!!!**
- **ONUS ON MANUFACTURER/RETAILER/IMPORTER**



Warrants and Searches

- **CANNOT** issue a dispensation, only Executive Officer can do that
- Assignee can enter premises with a warrant issued by the Court and seize any product, material, substance or other article or any book or document
- may use force reasonably necessary to overcome resistance to such entry or search.



Seizure of Products

- seize some or all product, material, substance or other article, or any book or document
 - may afford evidence of the commission or suspected commission of any offence
 - is intended to be used in the commission of any such offence.
- RETURN if no prosecution or if cause of complaint removed



DUTY OF SECRECY!

- Keep secret all information which relates to the business affairs of any person – **in line of duty**
- **EXCEPT**
 - in the interest of the public or for the protection of the consumer
 - any legal proceedings or ordered by Court
 - Authorised in writing by Minister



APPEALS

- Appeals process which applies to inspectors also applies to Assignees
- Lodge appeal in prescribed period and pay the prescribed Appeal fee
- Assignee is bound by decision of Appeal Board
- decision of an appeal board together with the reasons therefore shall be in writing



OFFENCES AND PENALTIES

- Criminal offence not to pay Assignee for inspection service and laboratory services in terms of Section 3A of the APS Act
- Obstructing an Assignee in doing their job
- Falsely claim to be an Assignee of work for one!
- Falsifying any certificate, report etc, or altering a (genuine) report
- Imprisonment or a fine! 6 mo, 12 mo, 24 mo



What if DALLRD or Assignee Approval is wrong!

- Several times already label approved by one inspector or Assignee later rejected by another inspector
 - **They don't approve labels anymore!**
- The law is the law - **it is still NON-COMPLIANT!**
- Solution? Get advice/pre-approval on labels!
- Ask for dispensation to sell out non-compliant product which was approved while label is changing
- DALLRD sometimes **not sympathetic** to this



Dispensation at DALLRD

- **Formal procedure**
 - Dispensation form
 - letter to competent division explaining the circumstances
- **Practical hints**
 - a prior meeting can be opportune
 - a dispensation can help in transitional periods, e.g. until the use of new labels
 - **IT'S AN ADMISSION OF GUILT !!! CANNOT UNDO**



Enforcement under APS Act

- Directive to comply – deadline set
 - Can resolve with a dispensation
 - Can resolve by fixing the problem e.g. over label
- Seizure notice – far more severe
 - NO dispensation possible
 - Stop sale immediately
 - ONLY REMEDY is to rectify problem or discard product
- Prosecution – fines and/or imprisonment possible



No possibility of dispensation

- at DOH & DTI
- Medicines and Related Substances
- NRCS

Unless specific regulations

- e.g. R 638 (Regulation 14)



LIMITATION OF LIABILITY

No person, including the State, shall be liable in respect of anything done or omitted in good faith in the exercise of a power or the performance of a duty under or by virtue of this Act, or in respect of anything that may result therefrom.



DTI

principle: enforcement by specific institutions

- **National Consumer Commission (NCC):** enforces Consumer Protection Act
- **National Regulator for Compulsory Specifications (NRCS):** enforces compliance with compulsory specifications
- **International Trade Administration Commission (ITAC):** import & export control
- **Provincial Consumer Protectors** enforce the CPA at provincial level



The National Regulator for Compulsory Standards (NRCS)

- SASN 289 -
- Letter sizes
- Indication of quantity:
 - Where
 - How
 - Sizes

Slack Fill

- SANS 1841
 - e-mark

Don't use unless registered



3. Possible procedures - Competitor

- **a claim is false**
 - > ARB
- **R 146**
 - > municipality in which the factory is located
- **legislation under DAFF**
 - > DALLRD or Assignee directly
- **CPA:**
 - > competent Provincial Consumer Affairs office
 - > NCC or CGSO
- **other legislation under DTI** (Weights, e-mark):
 - > NRCS
- **Court** – unlawful competition



4. IP law: Trademarks on Labels and in Claims on products



IP Law

FCD Act – no general saving provisions for trademarks - key date is 1 Jan 1973

R146 prohibits use of deceptive or misrepresenting names – no trademark saving provision

- A trademark that is deceptive in the message it conveys **CANNOT** be used



IP Law

APS Act - has saving provision for trademarks in several regulations

WARNING : Trademark had to be **registered** before the regulation was promulgated, or the first time the claim, name, etc was prohibited

e.g. Reg 32(2) of R1510 – **In use prior to Nov 1987!**



IP Law

CPA :

No exception for a misleading or deceptive name or image contained in a registered trademark

Blanket prohibition on deceptive practices



5. What are the penalties for a labelling offence?



Under the FCD Act:

- **First offence:** fine \leq R50K or \leq 6 months imprisonment or both
- **Second offence:** fine \leq R100K or \leq 12 months imprisonment or both
- **Third offence:** fine \leq R200K or \leq 24 months imprisonment or both

Under the APS Act:

Penalties according to the type of offence. False or misleading description – e.g. Section 6 of APS:

- **First offence:** fine or imprisonment \leq 2 years
- **Second offence and subsequent:** fine or imprisonment \leq 4 years



Under the CPA

- Fine or ≤ 12 month imprisonment or both
- Scale for fines:
not exceeding 10 % of the
annual turnover
or R 1 000 000

Under MRS Act

Upto 10 years in prison!

Unclear how will be
interpreted!



Possible consequences for the products:

- Forfeiture
- Re-labelling
- Destruction



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Questions?

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