



The advertising and labelling of unhealthy foodstuffs:
towards a balance between government regulation
and industry self-regulation

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ABSTRACT

Non-communicable diseases (“NCDs”) are the leading cause of illness, death and disability in South Africa. In addition to the severe threat to public health, NCDs have dire implications for socio-economic development, which impedes sustainable development. Unhealthy diet is a risk factor contributing to the prevailing NCD burden. Consumers currently live in an obesogenic food environment where food manufacturers aggressively market unhealthy foodstuffs. The government has, therefore, committed to implementing measures that restrict the advertising and simplify the labelling of unhealthy foodstuffs. These measures aim to reduce consumers’ exposure to unhealthy foodstuffs whilst empowering them to make healthier food choices. It has been acknowledged that a multi-sectoral approach is required to achieve this result.

Whilst statutory reform is ongoing, a legislative gap exists in regulating unhealthy foodstuffs labelling and advertising. It is on this basis that this study considers the role that self-regulation within the advertising industry, through the operations of the Advertising Regulatory Board, can play in assisting with the regulation of unhealthy foodstuffs advertising and labelling in South Africa.

The study finds that industry self-regulation complements government regulation where it may be outdated, where legislative reform is pending, or where there are challenges in providing effective redress to consumers. Government regulation, on the other hand, provides a crucial backdrop for self-regulation in the instance of a rogue trader, or where the ARB does not have the mandate to consider an advertising complaint. In this way, government regulation and self-regulation mutually reinforce and complement each other, each having its own strengths and challenges. In the broader context, the complementary nature of government regulation and self-regulation in the advertising industry ultimately furthers consumer protection regarding unhealthy foodstuffs labelling and advertising. Several recommendations are made here to strengthen coordination and cooperation between government and industry towards achieving a balance between government regulation and self-regulation in

addressing diet-related NCDs through unhealthy foodstuffs advertising and labelling restrictions.

Keywords: unhealthy foodstuffs; advertising; labelling; self-regulation; non-communicable diseases; Advertising Regulatory Board; Advertising Standards Authority of South Africa; food law; food environment; foodstuffs; government-regulation; co-regulation.

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TABLE OF CONTENTS

ACKNOWLEDGEMENTS.....	i
ABSTRACT	iii
ACCREDITED PUBLICATIONS AND CONFERENCE PRESENTATIONS.....	v
TABLE OF CONTENTS	vi
LIST OF FIGURES	xix
LIST OF TABLES	xxii
LIST OF ABBREVIATIONS	xxiii
Chapter 1: Introduction	1
1.1 Background.....	1
1.1.1 <i>The burden of non-communicable diseases on public health and socio-economic development.....</i>	<i>1</i>
1.1.2 <i>Risk factors that cause NCDs.....</i>	<i>4</i>
1.2 Problem statement.....	5
1.2.1 <i>The global obesity health crisis</i>	<i>5</i>
1.2.2 <i>Obesity concerns in South Africa</i>	<i>6</i>
1.2.3 <i>Commitments to promoting consumer health and well-being.....</i>	<i>7</i>
1.2.4 <i>Government regulation through the implementation of legislative measures aimed at restricting unhealthy foodstuffs advertising and labelling.....</i>	<i>10</i>
1.2.5 <i>Considering industry self-regulation as part of the multifaceted approach to addressing NCDs.....</i>	<i>13</i>
1.3 Research question	17
1.4 Aim and objectives of the study	17
1.5 Hypothesis.....	18
1.6 The scope and limitations of this study.....	18

<i>1.7</i>	<i>Research method, design and framework</i>	<i>23</i>
<i>1.8</i>	<i>Important definitions</i>	<i>26</i>
<i>1.8.1</i>	<i>Foodstuffs.....</i>	<i>26</i>
<i>1.8.2</i>	<i>Unhealthy foodstuffs</i>	<i>27</i>
<i>1.8.3</i>	<i>Label/labelling</i>	<i>34</i>
<i>1.8.4</i>	<i>Advertise/advertising</i>	<i>36</i>
<i>1.8.5</i>	<i>The meaning of "consumer" in the context of foodstuffs labelling and advertising</i>	<i>40</i>
<i>1.8.6</i>	<i>Considering the meaning of "food law" in South Africa.....</i>	<i>41</i>
	Chapter 2: An overview of the current legal framework relevant to the advertising and labelling of foodstuffs in South Africa.....	50
<i>2.1</i>	<i>Introduction.....</i>	<i>50</i>
<i>2.2</i>	<i>Brief comments on the international framework within which the South African food law system operates</i>	<i>52</i>
<i>2.3</i>	<i>An overview of the national government departments that administer and enforce food laws in South Africa.....</i>	<i>54</i>
<i>2.3.1</i>	<i>The Department of Health.....</i>	<i>55</i>
<i>2.3.2</i>	<i>The Department of Agriculture, Land Reform and Rural Development.....</i>	<i>55</i>
<i>2.3.3</i>	<i>The Department of Trade, Industry and Competition.....</i>	<i>56</i>
<i>2.4</i>	<i>Labelling requirements for foodstuffs under R146</i>	<i>59</i>
<i>2.4.1</i>	<i>The general rule.....</i>	<i>59</i>
<i>2.4.2</i>	<i>Foodstuffs exempt from labelling requirements under R146</i>	<i>61</i>
<i>2.4.3</i>	<i>Horizontal labelling requirements.....</i>	<i>63</i>
<i>2.4.4</i>	<i>Vertical labelling requirements.....</i>	<i>66</i>
<i>2.4.4.1</i>	<i>Class designations under the APSA</i>	<i>66</i>

2.4.4.2 Fortified foodstuffs	67
2.4.4.3 Disclosing genetically modified organisms in foodstuffs	69
<i>2.4.5 The use of nutrition claims.....</i>	<i>71</i>
2.4.5.1 Nutrient content claims.....	71
2.4.5.2 Comparative claims.....	73
<i>2.4.6 Nutritional information on product labels.....</i>	<i>75</i>
<i>2.4.7 Criteria for the use of the terms "fresh", "pure" and "natural".....</i>	<i>79</i>
<i>2.4.8 Prohibited claims.....</i>	<i>82</i>
2.4.8.1 Prohibited medicinal claims	82
2.4.8.2 Restrictions on the use of health and nutrition claims	83
2.4.8.3 Prohibited false or misleading claims.....	83
<i>2.5 Other relevant legislation, common law aspects and standards.....</i>	<i>86</i>
<i>2.5.1 APSA</i>	<i>87</i>
<i>2.5.2 Trade mark rights.....</i>	<i>92</i>
2.5.2.1 Registered trade mark rights.....	93
2.5.2.2 Unregistered trade mark rights under the common law.....	103
<i>2.5.3 CPA.....</i>	<i>105</i>
<i>2.5.4 SANS issued by the SABS.....</i>	<i>108</i>
2.5.4.1 The prescribed units of measure.....	109
2.5.4.2 The prescribed quantities for certain prepackaged foodstuffs	110
<i>2.6 R991</i>	<i>112</i>
<i>2.6.1 Introduction.....</i>	<i>112</i>
<i>2.6.2 The relevant designated products.....</i>	<i>113</i>
<i>2.6.3 Labelling and advertising restrictions under R991</i>	<i>117</i>
2.6.3.1 The ban on advertising and promotion.....	118

2.6.3.2 Prescribed health messages	120
2.6.3.3 Restrictions on the use of certain graphic representations.....	122
2.6.3.4 Vertical labelling requirements.....	123
2.6.3.5 Prohibited claims	124
<i>2.6.4 Concluding remarks on R991.....</i>	<i>125</i>
2.7 Conclusion	126
Chapter 3: SDG 3, social determinants of health and related constitutional and consumer rights.....	129
3.1 Introduction.....	129
3.2 Public health and related rights	132
<i>3.2.1 The right to health as a fundamental human right in international law.....</i>	<i>133</i>
<i>3.2.2 Relevant constitutional and consumer rights that inform the right to health in South Africa</i>	<i>137</i>
3.2.2.1 The right to an environment that is not harmful to health or well-being.....	138
3.2.2.2 The right of access to information	141
3.3 Relevant social determinants of health	143
<i>3.3.1 Considering the pockets of the purchasing public: unemployment, global food supply chain disruptions and food inflation.....</i>	<i>145</i>
<i>3.3.2 The literacy levels of consumers in South Africa</i>	<i>149</i>
<i>3.3.3 The challenges within the South African health care system.....</i>	<i>150</i>
3.4 South African consumers' food environment and purchasing behaviour	156
<i>3.4.1 Brief comments on how South Africa's political history and changes in trade policy have impacted local consumer diet.....</i>	<i>157</i>
<i>3.4.2 The current consumer food environment and consumer behaviour.....</i>	<i>160</i>
3.4.2.1 Globalisation and industrialisation.....	160

3.4.2.2	Urbanisation.....	161
3.4.2.3	Digitalisation	162
3.4.2.4	Consumption patterns of South African consumers	165
3.5	<i>Commercial determinants of health.....</i>	168
3.5.1	<i>CDHs by the foodstuffs industry which positively impact on consumer health</i>	<i>170</i>
3.5.2	<i>The advertising and labelling of unhealthy foodstuffs as a CDH which negatively impacts on consumer health.....</i>	<i>173</i>
3.6	<i>A public health imperative: towards a food environment that enables and promotes consumer health and well-being.....</i>	178
3.6.1	<i>Obligations on states in respect of the right to health and access to information relevant to realising the right to health</i>	<i>182</i>
3.6.2	<i>The responsibility of the foodstuffs industry to respect consumers' right to health</i>	<i>185</i>
3.7	<i>Conclusion</i>	188
Chapter 4: Government regulation of unhealthy foodstuffs labelling and advertising: considering the proposed restrictions in R3337.....		
4.1	<i>Introduction.....</i>	192
4.2	<i>Background on the DOH efforts to regulate the advertising and labelling of unhealthy foodstuffs in South Africa</i>	196
4.3	<i>General comments on R3337.....</i>	200
4.4	<i>The proposal to introduce mandatory FOP warning labels in relation to unhealthy foodstuffs</i>	203
4.4.1	<i>The meaning of FOP and FOP labelling</i>	<i>203</i>
4.4.2	<i>Nutrient profiling models that underpin FOP labelling systems.....</i>	<i>204</i>
4.4.3	<i>The purpose of FOP labelling.....</i>	<i>206</i>

4.4.4	<i>Types of FOP labelling adopted around the world.....</i>	209
4.4.4.1	FOP labelling based on Guideline Daily Amounts	209
4.4.4.2	The multiple traffic light system.....	212
4.4.4.3	The nutri-score system	214
4.4.4.4	The health star rating system.....	215
4.4.4.5	Mandatory FOP warning labels	218
4.4.5	<i>When will FOP warning labelling be required in terms of R3337?.....</i>	223
4.4.5.1	Compulsory FOP warning labels.....	223
4.4.5.2	Possible interpretations of draft regulation 51(1)	224
4.4.5.3	Proposed nutrient cut-off values.....	226
4.4.6	<i>Considering the need to disclose the presence of artificial sweeteners by way of FOP warning labels.....</i>	228
4.4.7	<i>Foodstuffs that will not require FOP warning labelling under R3337.....</i>	233
4.4.8	<i>Considering the scientific basis for the FOP warning label design and format proposed by R3337.....</i>	236
4.4.9	<i>How should the FOP warning labelling appear on the product label of qualifying products in terms of R3337?</i>	239
4.4.10	<i>Considering the advantages of implementing mandatory FOP warning labels in South Africa</i>	245
4.4.11	<i>Potential challenges posed by the implementation of FOP warning labels.....</i>	251
4.5	<i>The proposed ban on unhealthy foodstuffs advertising to children.</i>	255
4.5.1	<i>Suggestions regarding the incorporation of definitions for "infants" and "young children" in R3337.....</i>	256
4.5.2	<i>Concerns and suggestions regarding the proposed definition of "children" in R3337.....</i>	256

4.5.3	<i>Contemplating the proposed age restriction for unhealthy foodstuffs advertising to children.....</i>	<i>257</i>
4.5.4	<i>Typographical challenges and interpretation discrepancies with draft regulation 52(2)(b).....</i>	<i>259</i>
4.5.5	<i>Exclusion of specifics on unhealthy foodstuffs advertising restrictions in R3337</i>	<i>261</i>
4.6	<i>The proposed inclusion of a health warning message in unhealthy foodstuffs advertising not directed at children</i>	<i>263</i>
4.7	<i>Considering the limitation of the right to free commercial speech of the food industry.....</i>	<i>266</i>
4.7.1	<i>Considering the factors in sub-sections 36(a)-(e) of the Constitution</i>	<i>268</i>
4.7.1.1	<i>The nature of the right</i>	<i>268</i>
4.7.1.2	<i>The importance of the limitation.....</i>	<i>268</i>
4.7.1.3	<i>The nature and extent of the limitation.....</i>	<i>269</i>
4.7.1.4	<i>The relation between the limitation and its purpose.....</i>	<i>269</i>
4.7.1.5	<i>Are there less restrictive means to achieve the purpose?.....</i>	<i>270</i>
4.7.2	<i>Additional factors and comments in the limitation of rights enquiry.....</i>	<i>274</i>
4.8	<i>The proposed measures that will require trade mark proprietors to remove graphic elements from unhealthy foodstuffs labelling and advertising</i>	<i>277</i>
4.8.1	<i>Trade marks constitute property in terms of section 25 of the Constitution ..</i>	<i>281</i>
4.8.2	<i>R3337 will be promulgated in terms of a law of general application.....</i>	<i>282</i>
4.8.3	<i>Restrictions on trade mark use amount to deprivation of property.....</i>	<i>283</i>
4.8.4	<i>The deprivation of trade mark rights in relation to unhealthy foodstuffs is not arbitrary.....</i>	<i>283</i>
4.9	<i>Anticipated challenges in implementing the proposed measures in R3337</i>	<i>285</i>

4.9.1	<i>Delays in legislative reform</i>	286
4.9.2	<i>Anticipated resistance by the food industry</i>	287
4.9.2.1	Infringement of the right to freedom of commercial speech.....	287
4.9.2.2	Potential international trade law concerns.....	288
4.9.2.3	The current absence of unequivocal science supporting the proposed measures	289
4.9.2.4	Potential impact on employment in the foodstuffs sector.....	291
4.9.2.5	Possible impact on innovation in the food sector.....	292
4.9.3	<i>The anticipated financial impact on the consumer pocket and a suggested phased-in approach.....</i>	293
4.9.4	<i>Effective monitoring and enforcement mechanisms will be required following the implementation of unhealthy foodstuffs labelling and advertising restrictions</i>	298
4.10	<i>Conclusion</i>	301
Chapter 5: Monitoring and enforcement of food laws in South Africa.....		306
5.1	<i>Introduction.....</i>	306
5.2	<i>Monitoring and enforcement of food laws within relevant government departments.....</i>	308
5.2.1	<i>Inspectors authorised by the DOH to monitor and enforce the FCDA</i>	308
5.2.2	<i>Assignees designated under the APSA by the DOA.....</i>	316
5.2.3	<i>The NRCS falling within the DTIC</i>	320
5.2.4	<i>Investigations by the NCC under the CPA within the DTIC.....</i>	324
5.2.5	<i>The National Consumer Tribunal.....</i>	322
5.3	<i>Monitoring and enforcement of food laws by private actors in the food sector.....</i>	331
5.3.1	<i>Case law relating to the FCDA.....</i>	332

5.3.2	<i>Case law relating to the APSA.....</i>	333
5.3.3	<i>Court proceedings in terms of the CPA.....</i>	340
5.3.4	<i>Case law relating to trade mark rights.....</i>	342
5.3.4.1	Trade mark opposition matters.....	343
5.3.4.2	Trade mark infringement matters	350
5.3.4.3	Passing-off proceedings	353
5.3.4.4	Concluding remarks on trade mark law disputes.....	361
5.4	<i>Monitoring and enforcement of food laws by consumers.....</i>	362
5.4.1	<i>The challenges faced by consumers in approaching the civil courts.....</i>	362
5.4.2	<i>ADR mechanisms under the CPA</i>	369
5.4.2.1	Provincial consumer protection authorities and provincial consumer courts...	369
5.4.2.2	The CGSO as an accredited ombud under the CPA.....	374
5.5	<i>Conclusion</i>	385
Chapter 6: Advertising self-regulation and the role of the ARB relating to unhealthy foodstuffs labelling and advertising.....		389
6.1	<i>Introduction.....</i>	389
6.2	<i>Background to advertising self-regulation</i>	393
6.2.1	<i>The meaning of advertising self-regulation.....</i>	393
6.2.2	<i>Distinguishing between voluntary self-regulation and co-regulation</i>	396
6.2.3	<i>Distinguishing between self-regulation and self-discipline.....</i>	397
6.2.4	<i>Brief comments on advertising self-regulation in the global context</i>	398
6.2.4.1	The WHO and the UN.....	399
6.2.4.2	The International Chamber of Commerce.....	400
6.2.4.3	The International Council for Advertising Self-Regulation and the European Advertising Standards Alliance.....	401

6.2.4.4	The International Food and Beverage Alliance.....	403
6.2.4.5	Other international bodies and organisations that support self-regulation.....	405
6.3	<i>The ARB.....</i>	405
6.3.1	<i>Background.....</i>	405
6.3.2	<i>Code of Advertising Practice.....</i>	408
6.3.3	<i>Membership.....</i>	412
6.3.4	<i>The mandate of the ARB.....</i>	415
6.3.5	<i>The jurisdiction of the ARB over advertising content of non-members.....</i>	423
6.3.6	<i>The ARB complaints resolution process.....</i>	429
6.3.6.1	Distinguishing between consumer complaints and competitor complaints.....	430
6.3.6.2	Complaints handling by the ARB Directorate and sanctions	432
6.3.6.3	Appeals.....	436
6.3.6.4	Review applications before the High Courts.....	442
6.3.7	<i>Funding of the ARB.....</i>	444
6.4	<i>ARB rulings relating to foodstuffs labelling and advertising.....</i>	446
6.5	<i>Comments on ICC guidelines on foods and beverage advertising.....</i>	455
6.5.1	<i>Responsible foodstuffs advertising.....</i>	455
6.5.2	<i>The definition of "children" adopted by the ICC.....</i>	457
6.6	<i>Appendix J: The Food and Beverage Code.....</i>	459
6.6.1	<i>General comments.....</i>	462
6.6.2	<i>Considering the use of the phrase "food and beverage products that do not represent healthy dietary choices and a healthy lifestyle"</i>	463
6.6.3	<i>Responsible foodstuffs advertising.....</i>	464
6.6.4	<i>Limitations on the use of graphic representations in relation to foodstuffs advertising.....</i>	468

6.6.5	<i>Limitations on the use of nutrition and health claims.....</i>	<i>475</i>
6.6.6	<i>Social values</i>	<i>478</i>
6.6.7	<i>Restrictions on unhealthy foodstuff advertising and promotion at pre-schools and primary schools.....</i>	<i>480</i>
6.7	<i>Considering the benefits of advertising self-regulation</i>	<i>483</i>
6.7.1	<i>Consumer benefits.....</i>	<i>483</i>
6.7.2	<i>Benefits to the advertising industry.....</i>	<i>486</i>
6.7.3	<i>The benefits of advertising self-regulation for the government.....</i>	<i>488</i>
6.7.3.1	<i>Alleviating the burden on the court system.....</i>	<i>488</i>
6.7.3.2	<i>Cost-saving.....</i>	<i>489</i>
6.7.3.3	<i>Flexibility in adapting to changes in the advertising landscape</i>	<i>489</i>
6.7.3.4	<i>Filling legislative gaps or complementing existing legislative requirements ...</i>	<i>491</i>
6.7.3.5	<i>Bringing specialist knowledge and resources to the table</i>	<i>494</i>
6.8	<i>Considering the criticisms, challenges and limitations of advertising self-regulation</i>	<i>495</i>
6.8.1	<i>Enforcement limitations.....</i>	<i>495</i>
6.8.2	<i>Limitations on the sanctions which may be imposed.....</i>	<i>497</i>
6.8.3	<i>The potential risks associated with voluntary funding.....</i>	<i>499</i>
6.8.4	<i>Human capacity constraints.....</i>	<i>501</i>
6.8.5	<i>Perceived bias or impartiality within a self-regulatory system</i>	<i>4501</i>
6.9	<i>Conclusion</i>	<i>502</i>
	Chapter 7: Summary, conclusion and recommendations	<i>507</i>
7.1	<i>Chapter summary and findings.....</i>	<i>507</i>
7.2	<i>Conclusion: considering the complementary relationship between government regulation and industry self-regulation</i>	<i>513</i>

7.3	<i>Recommendations: towards a balance between government regulation and industry self-regulation</i>	<i>517</i>
7.3.1	<i>Adopting a broad definition of “food law” in South Africa</i>	<i>517</i>
7.3.2	<i>Suggested amendments and comments to R3337.....</i>	<i>518</i>
7.3.3	<i>Suggested amendments to Appendix J.....</i>	<i>522</i>
7.3.4	<i>Expanding statutory recognition of the ARB Code</i>	<i>523</i>
7.3.5	<i>Putting a memorandum of understanding in place between the ARB, DOH and CGSO.....</i>	<i>526</i>
7.3.6	<i>Implementing a feedback loop to the DOH on ARB activities relating to foodstuffs labelling and advertising</i>	<i>529</i>
7.3.7	<i>Consumer education initiatives.....</i>	<i>531</i>
7.3.8	<i>Considering the implementation of compulsory pre-clearance services by the ARB in respect of unhealthy foodstuffs advertising.....</i>	<i>533</i>
7.3.8.1	<i>Copy advice</i>	<i>534</i>
7.3.8.2	<i>Mandatory pre-clearance.....</i>	<i>535</i>
7.4	<i>Final concluding remarks.....</i>	<i>538</i>
ADDENDUM A: Table 1 of regulation 52 of R146 which sets out the conditions for nutrient content claims		<i>539</i>
ADDENDUM B: Nutritional information table prescribed in point 1 in Annexure 2 to R146.....		<i>542</i>
ADDENDUM C: Annexure A to R991		<i>543</i>
ADDENDUM D: List of ARB rulings relating to foodstuffs advertising and labelling.....		<i>545</i>
ADDENDUM E: The South African Marketing to Children Pledge (2009).....		<i>547</i>
ADDENDUM F: Proposed amendments to Appendix J of the ARB Code		<i>560</i>

BIBLIOGRAPHY	565

LIST OF FIGURES

Figure 2-1: Nutritional composition and allergens of Wimpy Double Up breakfast meal	62
Figure 2-2: Fortification logo	68
Figure 2-3: White Star Super Maize Meal	69
Figure 2-4: Albany Everyday White Bread	69
Figure 2-5: Original Steri Stumpie.....	75
Figure 2-6: Lite Steri Stumpie.....	75
Figure 2-7: McCain frozen baby peas and accompanying nutritional information table	76
Figure 2-8: Kellogg's Coco Pops Chocolate Flavoured Multigrain Cereal.....	100
Figure 2-9: Heart mark certification mark.....	101
Figure 2-10: Example of collective mark.....	102
Figure 2-11: Woolworths Food double cream strawberry yoghurt	108
Figure 2-12: Nestlé NAN OptiPro Starter Infant Formula	114
Figure 2-13: Nestlé NAN OptiPro Follow-up Formula	115
Figure 2-14: Purity sweet potato product.....	116
Figure 2-15: Purity baby cereal	116
Figure 2-16: Nestlé Nido powdered drink	116
Figure 2-17: Gerber Sooth 'n' Chew	123
Figure 2-18: Earths Best Organic Sunny Day snack bars	123
Figure 3-1: Checkers SIMPLE TRUTH product range	172
Figure 3-2: Pick 'n Pay LIVE WELL website landing page.....	173
Figure 4-1: GDA label for KELLOGG'S ALL BRAN Flakes.....	209
Figure 4-2:GDA information for ALL GOLD ripe fig jam.....	210

Figure 4-3: Example of traffic light FOP nutrient label.....	212
Figure 4-4: Example of Nutri-Score FOP label.....	214
Figure 4-5: Example of health star rating FOP labelling.....	215
Figure 4-6: Mandatory FOP warning labels in Chile	218
Figure 4-7: Warning device proposed in R3337	240
Figure 4-8: Example of FOP warning label in Draft Annexure 10.....	243
Figure 4-9: Illustration of a FOP warning label which complies with the logo order in draft regulation 52(2)(e)(vi)	243
Figure 4-10: Example of a vertical FOP label	244
Figure 4-11: Example of a clustered configuration FOP warning label	244
Figure 4-12: Health warning message proposed in R3337	263
Figure 4-13: Kellogg’s COCO POPS breakfast cereal.....	279
Figure 4-14: ZOOM apple flavoured drink.....	279
Figure 4-15: SIMBA potato crisps	279
Figure 4-16: M&M’s chocolate candy.....	279
Figure 4-17: Examples of tobacco plain packaging in Australia	289
Figure 5-1: Side panel of STORK Butter Spread.....	334
Figure 5-2: Pepsico’s PEPSI TWIST device trade mark application	344
Figure 5-3: Opposed PEPPMATES trade mark application filed by Dinnermates (Tvl) CC	347
Figure 5-4: Prior PEPPADEW logo trade mark registration owned by Piquante Brands International (Pty) Limited	347
Figure 5-5: I&J’s OVEN CRUNCH packaging	354
Figure 5-6: Sea Harvest’s OVEN CRISP packaging	354
Figure 5-7: Bothaville Millings’ STAR super maize meal and Pioneer Foods’ WHITE STAR super maize meal	356

Figure 5-8: Checker’s FORAGE AND FEAST product range.....	359
Figure 5-9: Pick `n Pay’s CRAFTED COLLECTION product range.....	360
Figure 6-1: Depiction of SROs located globally	395
Figure 6-2: Responsible ARB Advertiser, Agency and Media logos.....	415
Figure 6-3: Images depicting the use of the claim “TAMPER PROOF SEAL” in relation to ALBANY bread.....	452
Figure 6-4:Images illustrating the use of the claim “TAMPER EVIDENT SEAL” in relation to ALBANY bread.....	454
Figure 6-5:Barbie-branded Fair Cape Dairies sweetened full cream chocolate flavoured milk.....	470

LIST OF TABLES

Table 1: Summary of the acceptable use of nutrient content claims.....	73
Table 2: Variants of Bokomo pre-packaged rusks.....	111
Table 3: Nutrient cut-off values proposed in R3337.....	226
Table 4: Cut-off values for unhealthy nutrients implemented in Chile over phases 1, 2 and 3.....	296
Table 5: Competitor complaint filing fees and appeal fees for contributors and non-contributors of the ARB.....	432

LIST OF ABBREVIATIONS

AAC	Advertising Appeals Committee of the Advertising Regulatory Board
ACA	Association for Communication and Advertising
ADR	Alternative Dispute Resolution
African Children's Charter	African Charter on the Rights and Welfare of the Child (1990)
African Commission	African Commission on Human and Peoples' Rights
AIDS	Acquired Immune Deficiency Syndrome
Appendix A	Appendix A: Alcohol Industry Communication Code of Conduct to the ARB Code
Appendix J	Appendix J: The Food and Beverage Code to the ARB Code
Appendix K	Appendix K: Social Media Code to the ARB Code
Appendix L	Appendix L: Vapour Products to the ARB Code
APSA	Agricultural Product Standards Act 119 of 1990
ARB	The Advertising Regulatory Board NPC incorporated under the laws of the Republic

	of South Africa, with company registration number 2018/5288775/08
ARB Code	Code of Advertising Practice of the ARB
ARB MOI	Memorandum of Incorporation of The Advertising Regulatory Board NPC
ASA	Advertising Standards Authority of South Africa (1995/000784/08)
AU	African Union
BMI	Body Mass Index
BMJ	British Medical Journal
CAC	Codex Alimentarius Commission
CAC Guidelines on Nutrition Labelling	CAC Guidelines on Nutrition Labelling CXG 2-1985 (1985, as amended)
CDHs	Commercial Determinants of Health
CEO	Chief Executive Officer
CGCSA	Consumer Goods and Services Council of South Africa
CGSO	Consumer Goods and Services Ombud
CIPC	Companies and Intellectual Property Commission
Companies Act	Companies Act 71 of 2008

Constitution	Constitution of the Republic of South Africa, 1996
COVID-19	Coronavirus Disease of 2019
CPA	Consumer Protection Act 68 of 2008
CPA Regulations	Consumer Protection Act Regulations, GN R293 in GG 34180 of 1 April 2011
DAFF	Department of Agriculture, Forestry and Fisheries
Dairy Products Regulations	Regulations Relating to the Classification, Packing and Marking of Dairy Products and Imitation Dairy Products Intended for Sale in the Republic of South Africa, GN R1510 in GG 42850 of 22 November 2019
DOA	Department of Agriculture, Land Reform and Rural Development, Republic of South Africa
DOA Dispensation	Dispensation: Relaxation of the Restriction on Letter Size for Trade Marks or Trade Names Still in the Process of Registration – Dairy and Imitation Dairy Products issued by the DOH Directorate Food Safety Quality Assurance dated 17 September 2015
DOA Meat Analogues Communication	DOA Illicit Use of the Product Names in Respect of Names Exclusively Prescribed for Processed Meat Products (2022)

DOH	Department of Health, Republic of South Africa
DOH NCD National Strategic Plan	DOH National Strategic Plan for the Prevention and Control of Non-Communicable Diseases 2022-2027 (2022)
DOH Obesity Strategy	DOH Strategy for the Prevention and Management of Obesity in South Africa 2023-2028 (2023)
DTIC	Department of Trade, Industry and Competition, Republic of South Africa
EASA	European Advertising Standards Alliance
EHP	Environmental Health Practitioner
FAC	Final Appeals Committee of the ARB
FAO	Food and Agriculture Organization of the United Nations
FCDA	Foodstuffs, Cosmetics and Disinfectants Act 54 of 1972
FMCG	Fast-moving consumer goods
FOP	Front-of-pack
FOPL	Front-of-pack label
Fortification Regulations	Regulations Relating to the Fortification of Certain Foodstuffs, GN R504 in GG 24715 of 7 April 2003

GATT	General Agreement on Tariffs and Trade, 1947
GDA	Guideline Daily Amounts
GDP	Gross domestic product
GG	Government Gazette
GM	Genetically modified
GM Regulations	Labelling of Foodstuffs Obtained Through Certain Techniques of Genetic Modification Regulations, GN R25 in GG 25908 of 16 January 2004
GMO	Genetically Modified Organism
GMO Act	Genetically Modified Organisms Act 15 of 1997
GN	General Notice
Guideline 7	Guideline 7 to R146: Criteria for the use of the term fresh, pure, natural, etc. in food labelling
HIV	Human Immunodeficiency Virus
ICAS	International Council for Ad Self-regulation
ICC	International Chamber of Commerce
ICC Advertising Code	ICC Advertising and Marketing Communications Code (2018)

ICC Food and Beverage Framework	ICC Framework for Responsible Food and Beverage Marketing Communications (2019)
ICESCR	International Covenant on Economic, Social and Cultural Rights (1966)
IFBA	International Food and Beverage Alliance
IP	Intellectual property
IPR(s)	Intellectual property right(s)
ISO	International Organisation for Standardisation
kJ	kilojoule
Liquor Products Act	Liquor Product Act 60 of 1989
LMICs	Low and middle-income countries
MEC	Member of Executive Council
Medicines Act	Medicines and Related Substances Act 101 of 1965
Merchandise Marks Act	Merchandise Marks Act 17 of 1941
Minister of Trade	Minister of Trade, Industry and Competition
National Development Plan	The National Planning Commission, Department: The Presidency, Republic of South Africa National Development Plan 2030: Our Future - Make it Work (2012)

National Food and Nutrition Security Plan	Government of the Republic of South Africa National Food and Nutrition Security Plan for South Africa 2018-2023 (2017)
NCC	National Consumer Commission
NCDs	Non-communicable diseases
NCT	National Consumer Tribunal
NHA	National Health Act 61 of 2003
Nice classification	Classification of goods and services in accordance with the Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of Registration of Marks (1979)
NRCS	National Regulator for Compulsory Specifications
NRCS Act	National Regulator for Compulsory Specifications Act 5 of 2008
OECD	Organisation of Economic Cooperation and Development
PAIA	Promotion of Access to Information Act 2 of 2000
PAJA	Promotion of Access to Justice Act 3 of 2000
PER	Potchefstroom Electronic Law Journal
para	paragraph

Previous Dairy Products Regulations	Regulations relating to the Classification, Packing and Marking of Dairy Products and Imitation Dairy Products Intended for Sale in the Republic of South Africa, GN R260 in GG 38615 of 27 March 2015
R	South African Rands
R146	Labelling and Advertising of Foodstuffs Regulations, GN R146 in GG 32975 of 1 March 2010
R3337	Draft Regulations Relating to the Labelling and Advertising of Foodstuffs, GN R3337 in GG 48460 of 21 April 2023
R429	Draft Regulations Relating to the Labelling and Advertising of Foods: Amendment, GN R429 in GG 37695 of 29 May 2014
R991	Regulations Relating to Foodstuffs for Infants and Young Children, GN R991 in GG 35941 of 6 December 2012
Reg	Regulation
RSA	Republic of South Africa
SABC	South African Broadcasting Corporation
SABS	South African Bureau of Standards
SAFLII	South African Legal Information Institute
SALJ	South African Law Journal

SAMJ	South African Medical Journal
SA Merc LJ	SA Mercantile Law Journal
SANS	South African National Standard
SANS 289	SANS 289: 2022 Labelling requirements for prepackaged products (pre-packages) and general requirements for the sale of goods subject to legal metrology control
SCA	Supreme Court of Appeal
SDHs	Social Determinants of Health
SDG	Sustainable Development Goal
SI units	Système International units of measure
SPS Agreement	Agreement on the Application of Sanitary and Phytosanitary Measures (1994)
SRO	Self-regulatory organisation
SSBs	Sugar-sweetened beverages
Stell LR	Stellenbosch Law Review
TB	Tuberculosis
TBT Agreement	Agreement on Trade-related Aspects of Intellectual Property Rights (1994)
THRHR	Journal of Contemporary Roman-Dutch Law
TM Act	Trade Marks Act 194 of 1993
TPCA	Tobacco Products Control Act 83 of 1993

TRIPS Agreement	Agreement on Trade-related Aspects of Intellectual Property Rights (1994)
UK	United Kingdom
UKFSA	Food Standards Agency of the United Kingdom
UN	United Nations
UNICEF	United Nations Children’s Fund
US\$	United States Dollar
USA / US	United States of America
WHA	World Health Assembly of the World Health Organization
WHO	World Health Organization
WHO Recommendations on the Marketing of Foods	WHO Set of Recommendations on the Marketing of Foods and Non-Alcoholic Beverages to Children (2010)
WTO	World Trade Organization
WTO Agreement	Agreement Establishing the World Trade Organization (1994)

Chapter 1: Introduction

1.1 Background

1.1.1 The burden of non-communicable diseases on public health and socio-economic development

In the current century non-communicable diseases (hereafter “NCDs”) are the leading global cause of death.¹ According to the World Health Organization (hereafter “WHO”),² approximately 74% of all human deaths worldwide can be attributed to NCDs annually.³ NCDs are also known as chronic diseases.⁴ In contrast to communicable diseases,⁵ NCDs are non-infectious, and cannot be passed from one person to another. Instead, factors such as a person’s genetics, environment and behaviour impact their susceptibility to developing NCDs.⁶ The major categories of NCDs are diabetes, cancer, cardiovascular

¹ WHO *Global Action Plan for the Prevention and Control of Non-Communicable Diseases 2013-2020* (2013) (hereafter “*WHO Global Action Plan for NCDs*”) 1, 5. The *WHO Global Action Plan for NCDs* was endorsed at the Sixty-sixth World Health Assembly (hereafter “WHA”) in May 2013. Also see WHO *Saving Lives Spending Less* 5.

² The primary objective of the WHO is the attainment of the highest possible level of health by all people around the world. To achieve this objective, the functions of the WHO include to promote and conduct research regarding health. The WHO is also the international body responsible for developing, establishing and promoting international standards relating to pharmaceutical products, foods and similar products. The WHA, which is composed of delegates representing each member state country, is the decision-making body of the WHO, which determines, amongst other things, the policies of the WHO. See articles 1, 2(u), 11, 18(a) and 18(m) of the *Constitution of the World Health Organization*, 1946 as amended.

³ WHO *Saving Lives Spending Less* 5. Also see WHO 2023 <https://www.who.int/news-room/fact-sheets/detail/noncommunicable-diseases>. Concerns have been raised that the NCD burden will worsen if urgent action is not taken. See Willet *et al* 2019 *Lancet* 448.

⁴ Willet *et al* 2019 *Lancet* 448. Also see WHO *Global Strategy on Diet, Physical Activity and Health* (2004) para 9; WHO *Global Action Plan for NCDs* 41; DOH *National Strategic Plan for the Prevention and Control of Non-Communicable Diseases 2022-2027* (2022) (hereafter “*DOH NCD National Strategic Plan*”) 14.

⁵ Communicable diseases are also known as infectious diseases, as they can spread between people. Examples of communicable diseases include malaria, tuberculosis (hereafter “TB”), human immunodeficiency virus (hereafter “HIV”), acquired immune deficiency syndrome (hereafter “AIDS”), viral hepatitis and Coronavirus disease of 2019 (hereafter COVID-19). See WHO date unknown <https://www.afro.who.int/health-topics/communicable-diseases>. For additional reading, see WHO *Global Progress Report on HIV, Viral Hepatitis and Sexually Transmitted Infections, 2021* (2021).

⁶ DOH *Strategy for the Prevention and Management of Obesity in South Africa 2023-2028* (2023) (hereafter “*DOH Obesity Strategy*”) 10; Willet *et al* 2019 *Lancet* 450. Also see WHO date unknown https://www.who.int/health-topics/noncommunicable-diseases#tab=tab_1.

diseases (including stroke and heart attacks), and chronic respiratory diseases (such as asthma).⁷

In 2021 the WHO reported that more than 85% of premature deaths resulting from NCDs worldwide occur in low- and middle-income countries (hereafter “LMICs”).⁸ Moreover, WHO research has affirmed that populations in LMICs, which include South Africa,⁹ are disproportionately affected by NCDs.¹⁰ In 2023 the Department of Statistics South Africa reported that deaths in South Africa resulting from the four main categories of NCDs mentioned above increased by nearly 60% from 1997 to 2018.¹¹

Historically, communicable diseases, notably HIV/AIDS and TB, were the most significant causes of death and health concerns in South Africa.¹² However, since 2009 there has been a notable change in the mortality pattern of natural deaths.¹³ Today deaths due to NCDs have surpassed deaths resulting from communicable diseases in this country, and are currently the leading cause of illness, death and disability¹⁴ in South Africa.¹⁵

⁷ Mental health issues have also been identified as a priority in this disease category. Related health complications include liver and kidney disease, sleep disorders and poor pregnancy outcomes. See Chandiwana *et al* 2024 *South African Medical Journal* (hereafter “SAMJ”) 1; DOH *NCD National Strategic Plan* 8, 14.

⁸ WHO *Saving Lives Spending Less* 6.

⁹ See the discussion in part 3.3.1 below.

¹⁰ WHO *Global Action Plan for NCDs* 1; UN *Resolution on the Political Declaration of the High-level Meeting of the General Assembly on the Prevention and Control of Non-communicable Diseases* GA Res 66/2, UN Doc A66/2 (2012) (hereafter “UN *Resolution on the Prevention and Control of NCDs*”) para 23; WHO *Global Status Report on Noncommunicable Diseases 2014* (2014) (“hereafter WHO *Global Status Report on NCDs*”) xv-xvi.

¹¹ Within the NCD category, cardiovascular diseases are the top cause of death, followed by cancer, diabetes and chronic respiratory diseases. See Department of Statistics South Africa *Non-communicable Diseases in South Africa: Findings from Death Notifications 2008-2018*iv. Also see DOH *Strategic Plan 2020/21-2024/25* 20; DOH *NCD National Strategic Plan* 4-6.

¹² Brady *et al* 2023 *World Medical and Health Policy* 436; Chandiwana *et al* 2024 *SAMJ* 1; Karim *et al* 2009 *Lancet* 921. Deaths resulting from TB and HIV have reduced significantly, whilst deaths resulting from NCDs have increased considerably. See DOH *Strategic Plan 2020/21-2024/25* 15; WHO date unknown <https://www.afro.who.int/health-topics/communicable-diseases>.

¹³ The DOH has reported a continued decline in deaths resulting from HIV/AIDS since 2009. TB-related deaths have also reduced since 2014. See DOH *NCD National Strategic Plan* 18-20.

¹⁴ The word “disability” refers to the loss of opportunity to take part in community life in a manner that restricts a person’s activity and participation in society. Disability can result from several impairments, including physical, developmental, neurological, sensory, psychological, or learning, and may be permanent, temporary or episodic in nature. See DOH *NCD National Strategic Plan* x.

¹⁵ DOH *NCD National Strategic Plan* 1. The DOH reported that in 2016 more than 57% of all deaths in South Africa in 2016 resulted from NCDs, and that 6 out of 10 of those deaths were of people below the age of 70 years. See DOH *Obesity Strategy* 17.

To make matters worse, members of the public with pre-existing NCDs are at higher risk of contracting communicable diseases.¹⁶ During the COVID-19 pandemic NCDs were identified as co-morbidities.¹⁷ Persons living with NCDs were and remain more likely to contract COVID-19 and, subsequently, are vulnerable to severe illness or premature death as a result thereof.¹⁸ In this regard, the WHO¹⁹ has pointed out that:

[s]ince the beginning of 2020, much of the world's attention has been focused on COVID-19 and the immense health and economic damage done by this new disease. But COVID-19 is not the only health crisis facing the world today – far from it. Long before the pandemic began, NCDs were already responsible for the majority of global deaths. They continue to be leading threats to health in all countries and have also contributed substantially to deaths and serious illness from COVID-19.

In addition to the threat to human life and health, NCDs also have a severe economic impact. In South Africa alone it has been estimated that the accumulated loss to the national gross domestic product (hereafter "GDP") resulting directly from members of the workforce being affected by diabetes, stroke or other cardiovascular diseases was 26 billion South African Rands (hereafter "R") during the period 2006-2015.²⁰ The global financial impact of NCDs from 2010 to 2030 is estimated to be in the region of 47 trillion United States Dollars (hereafter "US\$").²¹

The United Nations (hereafter "UN")²² has pointed out that the long-term effects of NCDs contribute to poverty, which hinders sustainable development. Factors such as medical treatment and related healthcare costs, in combination with loss in breadwinner

¹⁶ For example, persons with diabetes have a higher risk of contracting TB. See WHO *Global Action Plan for NCDs* 58; DOH *NCD National Strategic Plan* 7; Bopape *et al* 2022 *Appetite* 1.

¹⁷ Co-morbidities refer to the occurrence where one person has two or more health conditions or diseases simultaneously. See Klykylo "Comorbidity" 472. For additional reading, see Jassat *et al* 2022 *SAMJ* 747-748; Kushitor *et al* 2021 *SAMJ* 149.

¹⁸ DOH *NCD National Strategic Plan* i, iii, 7; DOH *Obesity Strategy* 19; WHO *Saving Lives Spending Less* 6. According to the WHO, obese individuals have a four times higher risk of developing severe COVID-19. See WHA75 - *Annex 7 Acceleration Plan to Support Member States in Implementing the Recommendations for the Prevention and Management of Obesity over the Life Course* (hereafter "WHO Acceleration Plan to Stop Obesity") 2.

¹⁹ WHO *Saving Lives Spending Less* 5.

²⁰ DOH *NCD National Strategic Plan* 33.

²¹ WHO *Saving Lives Spending Less* 4.

²² UN *Resolution on the Prevention and Control of NCDs* para 31.

productivity, threaten individual household incomes and burden the healthcare systems and economies of countries.²³

NCDs thus severely threaten public health and have dire implications for socio-economic development. This, in turn, impedes sustainable development.²⁴ It is imperative, therefore, that all governments take steps to address the rising burden of NCDs in their respective countries.²⁵

1.1.2 Risk factors that cause NCDs

The term “risk factors”, which can be either modifiable or non-modifiable, refers to characteristics that increase a person’s prospects of developing a disease.²⁶ Biological attributes such as age, gender, race and possible genetic predisposition cannot be controlled by intervention. Hence, they are termed non-modifiable risk factors.²⁷

On the other hand, modifiable risk factors contribute to disease and can be controlled or reduced through proper intervention.²⁸ In this regard the WHO²⁹ has identified five modifiable behavioural risk factors that predominantly contribute towards the occurrence of NCDs, namely (i) unhealthy diet, (ii) tobacco use, (iii) harmful use of alcohol, (iv) physical inactivity and (v) air pollution. Three of these modifiable risk factors relate to consumer products, namely unhealthy foodstuffs, tobacco products and alcoholic beverages, which have been described collectively as “unhealthy commodities”.³⁰

²³ UN *Resolution on the Prevention and Control of NCDs* paras 22, 31; WHO *Global Status Report on NCDs* 2014 xv-xvi; WHO *Global Action Plan for NCDs* 59.

²⁴ UN *Resolution on the Prevention and Control of NCDs* para 22; WHO *Global Action Plan for NCDs* 7.

²⁵ WHO *Global Status Report on NCDs* 2014 ix; WHO *Noncommunicable Diseases Progress Monitor 2020* v. In addition to a moral obligation and economic responsibility towards their citizens, countries also have a legal responsibility to respect, protect and fulfil the right to health within their nation. See further the discussion in part 3.6.1 below.

²⁶ DOH *NCD National Strategic Plan* xii.

²⁷ DOH *NCD National Strategic Plan* xi.

²⁸ DOH *NCD National Strategic Plan* xi.

²⁹ UN *Resolution on the Prevention and Control of NCDs* para 20. In respect of air pollution, which was identified as a modifiable risk factor more recently, see WHO *Global Action Plan for NCDs* 58; WHO *Follow-Up to the High-level Meetings of the United Nations General Assembly on Health-Related Issues: Prevention and Control of NCDs*, WHO Doc A72/19 (2019) para 4(c), Annex 1.

³⁰ Mialon 2020 *Globalization and Health* 2. Other examples of unhealthy commodities industries include those in the fossil fuels, mining, automobile and gambling sectors. See Gilmore *et al* 2023 *Lancet* 1197.

Unhealthy foodstuffs³¹ are the primary focus of this study, as this is the unhealthy commodity which underpin an unhealthy diet. Willet *et al*³² point out that:

[u]nhealthy diets are the largest global burden of disease and pose a greater risk to morbidity and mortality than does unsafe sex, alcohol, drugs, and tobacco use combined.

This statement illustrates the severity of the threat that unhealthy diet poses to public health.

1.2 Problem statement

1.2.1 The global obesity health crisis

Between 2000 and 2016 adult obesity³³ nearly doubled globally.³⁴ The increased prevalence of obesity amongst consumers, which often goes hand-in-hand with an unhealthy diet,³⁵ is closely linked with the four main NCDs of concern.³⁶ Reference to “diet-related NCDs” in this study therefore includes diabetes, cancer, cardiovascular diseases and respiratory diseases.³⁷

In considering the younger generation, it is estimated that worldwide 37 million children under the age of five are obese.³⁸ Whilst deaths resulting from NCDs mainly occur in adulthood, exposure to risk factors begins in childhood and builds up throughout a

³¹ As explained in part 1.8.1 below, for the purposes of this study the word “foodstuffs” includes both food and non-alcoholic beverages. The meaning of the term “unhealthy foodstuffs” is discussed in part 1.8.2.

³² Willet *et al* 2019 *Lancet* 447.

³³ Obesity refers to “an abnormal or excessive accumulation of fat in the body that presents a risk to health”, which is widely determined based on a person’s body mass index (“BMI”). A BMI of between 18.5 and 24.9 is deemed to be within the normal weight range. A person who has a BMI between 25 and 30 is overweight. As soon as the BMI of a person exceeds 30, that person is classified as obese. See DOH Obesity Strategy 16; WHO Acceleration Plan to Stop Obesity 4. Overweight and obesity are forms of malnutrition. See WHO *Policies to Protect Children From the Harmful Impact of Food Marketing: WHO Guideline* (hereafter “WHO Policies to Protect Children From the Harmful Impact of Food Marketing”) ix.

³⁴ FAO *et al* *The State of Food Security and Nutrition in the World 2022* 18.

³⁵ Physical inactivity is also often a contributory factor to obesity but falls outside the scope of this study.

³⁶ UN *Resolution on the Prevention and Control of NCDs* para 24. Also see Todd *et al* 2022 *Nutrients* 1; Willet *et al* 2019 *Lancet* 449; Frank *et al* 2024 *Public Health Nutrition* 1-2; Bopape *et al* 2022 *Appetite* 1-2.

³⁷ See part 1.1.1 above.

³⁸ FAO *et al* *The State of Food Security and Nutrition in the World 2023* vii.

person's life.³⁹ In a 2023 publication⁴⁰ prepared by several international organisations including the WHO, the Food and Agricultural Organization of the United Nations (hereafter "FAO") and the United Nations Children's Fund (hereafter "UNICEF"), it was pointed out that:

[c]hildren who are overweight or obese face both immediate and potentially long-term health impacts. Immediate impacts include respiratory difficulties, increased risk of fractures, hypertension, early markers of cardiovascular disease, insulin resistance and psychological effects. Affected individuals also have a higher risk of NCDs later in life. Child overweight has been on the rise in many countries, hastened by increasingly inadequate levels of physical activity and increased access to highly processed foods, which tend to be high in energy, fats, free sugars and/or salt.⁴¹

Therefore, the food and drinks people consume regularly directly impact on their health and well-being.⁴²

1.2.2 Obesity concerns in South Africa

When considering obesity rates in South Africa, 68% of adult women, 31% of adult men and 13% of children aged five and over were classified as either overweight or obese in 2016.⁴³ Based on current trends, South Africa could be among the top ten countries with the highest childhood obesity rates by 2030.⁴⁴ In 2023 the former South African Deputy-Minister of Health, Dr Sibongiseni Maxwell Dhlomo,⁴⁵ noted that:

obesity has increased dramatically in adults over a period of 20 years. In addition, the prevalence [of] obesity in children 6-14 years of age is higher [than] the global average in school children. The causes leading to the high rates of overweight and obesity in the country are multifactorial. The nutrition transition from minimally processed and locally [sic] food to readily available and cheap ultra-processed food and drinks that are high in sugar, salt and/or fat are among the key factors that have contributed to the problem.⁴⁶

³⁹ WHO *Global Action Plan for NCDs* 29.

⁴⁰ FAO *et al The State of Food Security and Nutrition in the World 2023* 34.

⁴¹ For a discussion on processed food, see part 1.8.2 below.

⁴² The meaning of "health" and "well-being" is discussed in parts 3.2.1 and 3.2.2.1 below, respectively.

⁴³ DOH *Obesity Strategy* 18.

⁴⁴ Frank *et al 2021 Nutrients* 5-6.

⁴⁵ DOH *Obesity Strategy* 6.

⁴⁶ Also see WHA *Resolution on the Prevention and Control of NCDs* para 39, confirming that a multisectoral approach should be adopted to address NCDs. See the discussion in part 1.8.2 below on food processing.

From an economic impact point of view, obesity-related costs such as loss of productivity, medical expenses and employee absenteeism are estimated to have a negative financial impact of around R 701 billion annually.⁴⁷ In the circumstances the Department of Health (hereafter “DOH”)⁴⁸ deems the prevailing high obesity rates amongst the South African public as “an urgent health crisis”.

1.2.3 Commitments to promoting consumer health and well-being

All WHO member states, including South Africa,⁴⁹ have committed to putting national measures in place to give effect to the UN and WHO goals⁵⁰ that are aimed at the prevention and control of NCDs. Policy documents issued by the South African government which are aimed at reducing NCDs to improve consumer health and well-being in this country include:

- the National Planning Commission, Department: The Presidency, Republic of South Africa *National Development Plan 2030: Our Future - Make It Work* (2012) (hereafter “*National Development Plan*”);
- the DOH *National Strategic Plan for the Prevention and Control of NCDs 2022-2027* (2022) (hereafter “*DOH National NCD Strategic Plan*”);⁵¹
- the DOH *Strategy for the Prevention and Management of Obesity in South Africa 2023-2028* (2023) (hereafter “*DOH Obesity Strategy*”); and⁵²
- the Government of the Republic of South Africa *National Food and Nutrition Security Plan for South Africa 2018-2023* (2017) (hereafter “*National Food and Nutrition Security Plan*”).

⁴⁷ DOH *Obesity Strategy* 12.

⁴⁸ DOH *Obesity Strategy* 18. Also see Bopape *et al* 2022 *Appetite* 1.

⁴⁹ DOH *Strategic Plan on NCDs* 7.

⁵⁰ See the discussion that follows.

⁵¹ The DOH *National NCD Strategic Plan* is the successor of the DOH *Strategic Plan for the Prevention and Control of Non-Communicable Diseases 2013-2017* (2013).

⁵² The DOH *Obesity Strategy* was issued following the DOH *Strategy for the Prevention and Control of Obesity in South Africa 2015-2020* (2015).

Starting with the UN's *2030 Agenda for Sustainable Development*,⁵³ sustainable development goal (hereafter "SDG") 3, namely to "[e]nsure healthy lives and promote well-being for all at all ages", is of specific relevance to this study.⁵⁴ Within SDG 3 target 3.4 aims to reduce the number of premature deaths resulting from NCDs by one-third (i.e., just over 33%) by the year 2030.⁵⁵ The DOH *National NCD Strategic Plan* aims to align with SDG 3.4.⁵⁶ Whilst the *National Development Plan* predates the SDGs,⁵⁷ it nevertheless seeks to promote consumer health and well-being in South Africa.⁵⁸ In this regard it should be noted that the *Constitution of the Republic of South Africa*, 1996 (hereafter "*Constitution*") affords all people the right to an environment that is not harmful to their health and well-being.⁵⁹ This right, as well as other constitutional and consumer rights that inform the right to health in South Africa, are considered as part of this study.⁶⁰

Turning to the WHO, the *Global Action Plan for NCDs* includes, as a global target, a relative reduction of premature deaths resulting from NCDs by 25% by the year 2025.⁶¹ The DOH *National Strategic Plan* strives to achieve that target, and has the vision of "[a] long and healthy life for all through equitable access to prevention and control of

⁵³ UN *Resolution on Transforming Our World: the 2030 Agenda for Sustainable Development* GA Res, UN Doc A/70/1 (2015) (hereafter "*UN Agenda for Sustainable Development*"). The 17 SDGs follow, expand and replace the previous 8 UN Millennium Development Goals. See UN date unknown [https://www.un.org/millenniumgoals/#:~:text=The%20eight%20Millennium%20Development%20Goals,the%20world's%20leading%20development%20institutions](https://www.un.org/millenniumgoals/#:~:text=The%20eight%20Millennium%20Development%20Goals,the%20world's%20leading%20development%20institutions;); Gostin *et al* 2019 *Lancet* 1871. For a further discussion on the Millennium Development Goals and sustainable development before the SDGs, see Scheyvens, Banks and Hughes 2016 *Sustainable Development* 371-375.

⁵⁴ UN *Agenda for Sustainable Development* 14. Whilst SDG 3 and target 3.4 thereunder form the focus of this study, it should be noted that NCDs are also linked with other SDGs, including SDG 1: end poverty; SDG 2: improve nutrition (including, *inter alia*, to ensure that, by 2023, all people have access to safe, nutritious and sufficient food all year round as target 2.1); SDG 8: promote economic growth; and SDG 10: reduce inequality. See DOH *National NCD Strategic Plan* 3; FAO *et al The State of Food Security and Nutrition in the World 2023* xix.

⁵⁵ UN *Agenda for Sustainable Development* 16.

⁵⁶ DOH *National NCD Strategic Plan* 1, 24.

⁵⁷ The *National Development Plan* was adopted in 2012, whilst the UN SDGs came into force only on 1 January 2016. See Chigova 2021 *Journal of Public Administration* 1069; UN date unknown <https://www.un.org/sustainabledevelopment/development-agenda-retired/>.

⁵⁸ *National Development Plan* 34, 330-335.

⁵⁹ Section 24(a) of the *Constitution*.

⁶⁰ See part 3.2.2 below.

⁶¹ Nine global targets have been set, which also include halting the increase in the prevalence of diabetes and obesity and a 30% reduction in salt intake. See WHO *Global Action Plan for NCDs* 5, 31.

NCDs+”.⁶² The term “non-communicable diseases plus”, abbreviated in this policy document as “NCDs+”, refers to the entire group of NCD conditions, including risk factors and disabilities.⁶³ NCDs+ is therefore a broader concept than the actual NCDs themselves. Whilst the term includes all NCDs, it goes further to include the modifiable and non-modifiable risk factors that contribute towards these diseases (which include an unhealthy diet) and the disabilities that may result from such diseases.

More specific to unhealthy diets, the UN⁶⁴ has stressed that governments should implement measures to reduce consumers’ exposure to foodstuffs associated with an unhealthy diet, and that this should be done “in line with the right-to-health framework”.⁶⁵ At the same time, measures should also be implemented to strengthen consumers’ capacity to make healthier food choices and follow lifestyles that promote overall good health. The *National Development Plan*⁶⁶ affirms that behaviour and lifestyle can contribute to ill-health. As one of the measures aimed at mitigating the prevalence of NCDs and promoting overall health and well-being in South Africa,⁶⁷ it stresses that consumers must be encouraged to buy and eat healthy foods. It is also highlighted that people require information to change behaviour and lifestyle *vis-à-vis* food, and that “[t]o become a healthy nation, South Africans need to make informed decisions about what they eat”.⁶⁸ This also links with the government’s strategic objective in the *National Food and Nutrition Security Plan* to “[i]nfluence people across the life cycle to make informed food and nutrition decisions”.⁶⁹ The DOH *National NCD Strategic Plan*⁷⁰ also affirms that the reduction of NCD risk factors (including unhealthy diet):

requires a life-course approach and strengthening of the capacity of individuals and populations to adopt healthier behaviours and lifestyles that foster health and well-being.

⁶² DOH *National NCD Strategic Plan* 23-24.

⁶³ DOH *National NCD Strategic Plan* xi.

⁶⁴ UN *Resolution on the Prevention and Control of NCDs* para 35.

⁶⁵ UN 2020 <https://www.ohchr.org/en/statements/2020/07/statement-un-special-rapporteur-right-health-adoption-front-package-warning>.

⁶⁶ *National Development Plan* 330.

⁶⁷ Health goal 4 is to reduce the prevalence of NCDs significantly. See *National Development Plan* 333.

⁶⁸ *National Development Plan* 330.

⁶⁹ *National Food and Nutrition Security Plan* 95.

⁷⁰ DOH *National NCD Strategic Plan* 29.

Therefore, the government supports an approach where members of the public are actively involved in tackling the NCD burden. This approach is also in line with the WHO *Global Action Plan for NCDs*,⁷¹ which confirms that consumers should be empowered and involved in activities aimed at the prevention and control of NCDs.

1.2.4 Government regulation through the implementation of legislative measures aimed at restricting unhealthy foodstuffs advertising and labelling

In May 2010 WHO member states, including South Africa, endorsed the *Set of Recommendations on the Marketing of Foods and Non-Alcoholic Beverages to Children* (2010) (hereafter the “WHO *Recommendations on Marketing of Foods*”).⁷² The WHO *Recommendations on Marketing of Foods* set out a series of policy suggestions for governments to reduce the effects of the “marketing of foods that are high in saturated fats, trans-fatty acids, free sugars, or salt” to children.⁷³ By endorsing the WHO *Recommendations on Marketing of Foods*, WHO member states have undertaken to take these policy considerations aboard when expanding on current national policies or implementing legislation that addresses marketing communications aimed at children.⁷⁴ In focusing on the entire consumer base, all WHO member states have committed to creating and promoting “an enabling environment to facilitate healthy lifestyles and choices”⁷⁵ in their territories. Moreover, WHO member states have agreed to:

[p]romote the development and initiate the implementation ... of cost-effective interventions to reduce salt, sugar and saturated fats and eliminate industrially produced trans-fats in foods, including through discouraging the production and marketing of foods that contribute to unhealthy diet, while taking into account existing legislation and policies.⁷⁶

Policy measures that promote positive shifts in consumer behaviour towards healthy diets are supported by several organisations, including the WHO, FAO, and UNICEF,⁷⁷ as well

⁷¹ WHO *Global Action Plan for NCDs* 13.

⁷² See WHA WHA63.14 *Marketing of Food and Non-Alcoholic Beverages to Children*, WHA Doc A63/VR/8 (2010), read with the WHO *Recommendations on the Marketing of Foods*.

⁷³ WHO *Recommendations on Marketing of Foods* 7.

⁷⁴ WHO *Recommendations on Marketing of Foods* 4.

⁷⁵ WHO *Global Action Plan for NCDs* 85.

⁷⁶ UN *Resolution on the Prevention and Control of NCDs* para 43(g).

⁷⁷ See, for example, WHO *Global Action Plan for NCDs* 30; FAO *et al The State of Food Security and Nutrition in the World 2022* 10, 32; UNICEF *Engaging with the Food and Beverage Industry* 5, 12.

as various scholars.⁷⁸ Recommended policy measures include enacting legislation on food marketing and implementing nutrition labelling policies.⁷⁹

The *DOH Obesity Strategy* includes the vision that “[a]ll South Africans lead a healthy lifestyle and maintain a healthy weight”.⁸⁰ In the light of that vision, the *DOH Obesity Strategy* aims to reduce the prevalence of obesity and diet-related NCDs in South Africa. The strategic objectives to achieve this aim include legislation supporting a healthy food environment.⁸¹ In this regard the DOH has identified that food advertising regulation and food labelling, respectively, are the second and third most cost-effective measures to reduce the consumption of unhealthy foodstuffs.⁸²

The *Foodstuffs, Cosmetics and Disinfectants Act* 54 of 1972 (hereafter “*FCDA*”) is the primary legislation that controls the sale, manufacturing, advertising and labelling of foodstuffs in South Africa, among other things. The DOH administers the *FCDA*. Two sets of current regulations published in terms of the *FCDA* warrant mention. Firstly, the *Labelling and Advertising of Foodstuffs Regulations*⁸³ (hereafter “R146”) sets out the requirements for the general labelling and advertising of foodstuffs. Secondly, the *Regulations Relating to Foodstuffs for Infants and Young Children*⁸⁴ (hereafter “R991”) contains additional advertising and labelling provisions that apply to foodstuffs for infants and young children.⁸⁵

In line with the policy objective of addressing diet-related NCDs in South Africa, the DOH has published draft amendment regulations to R146 which incorporate provisions that aim to place specific restrictions and limitations on the advertising and labelling of

⁷⁸ See, for example, Willet *et al* 2019 *Lancet* 447-448; Bopape *et al* 2022 *Appetite* 1; Frank *et al* 2024 *Public Health Nutrition* 11.

⁷⁹ FAO *et al* *The State of Food Security and Nutrition in the World 2022* 10, 32.

⁸⁰ *DOH Obesity Strategy* 13.

⁸¹ *DOH Obesity Strategy* 13.

⁸² The only measure that appears more cost-effective is the implementation of fiscal measures in the form of taxes. Fiscal measures would include the health promotion levy that was implemented with respect to sugar-sweetened beverages. The focus of this study is the regulation of unhealthy foodstuffs advertising and labelling, which are non-fiscal measures. See *DOH Strategy for the Prevention and Control of Obesity in South Africa 2015-2020* 19; *DOH Obesity Strategy* 21.

⁸³ GN R146 in GG 32975 of 1 March 2010.

⁸⁴ GN R991 in GG 35941 of 6 December 2012.

⁸⁵ The labelling and advertising of foodstuffs for infants and young children are required to comply with both R991 and R146. See regs 2(1)(b) and 2(19) of R991.

unhealthy foodstuffs. Most recently, the *Draft Regulations Relating to the Labelling and Advertising of Foodstuffs* (hereafter “R3337”)⁸⁶ were published for public comment in April 2023.⁸⁷ R3337 incorporates provisions that if enacted will:

- i. introduce mandatory front-of-pack nutrition warning labels in relation to unhealthy foodstuffs;
- ii. effectively place a ban on the advertising of unhealthy foodstuffs to children;
- iii. require the inclusion of a health warning message in the advertising of unhealthy foodstuffs that is not directed at children; and
- iv. necessitate the removal of graphic elements that are visually appealing to children from unhealthy foodstuffs labelling and advertising. For the purposes of this study, it is assumed that trade mark rights vest in those graphic elements.

Draft proposals (i)-(iv) above are referred to collectively as “the proposed measures”.

The proposed measures will undoubtedly place restrictions on various rights of foodstuffs manufacturers, including freedom of expression (which includes advertising as a form of commercial speech) and the property rights of trade mark holders affected by proposal (iv) above.⁸⁸ In order to establish if the proposed measures would pass constitutional muster, so to speak, they are considered in this study against the backdrop of the universal right to health, and relevant constitutional and consumer rights in South Africa.⁸⁹ The study further evaluates the challenges that would hinder the implementation of the proposed measures and monitoring and enforcement limitations, should they be enacted

⁸⁶ GN 3337 in GG 48460 of 21 April 2023.

⁸⁷ If R3337 comes into operation in due course, it will repeal and replace R146. See draft reg 76 of R3337. For a discussion on the various draft regulations published before R3337, see part 4.2.

⁸⁸ Trade mark law forms an integral part of this study. The distinctive brand name of a food product will generally qualify as a trade mark, as it serves to distinguish that product from the same type of product of others in the trade. In addition, the packaging (or get-up) of foodstuffs may qualify for trade mark protection if distinctive in the minds of the public with the manufacturer’s business or goods. Trade mark case law has been particularly useful in this study to explain or define various concepts such as “advertise”, “consumer” and “food law”. See parts 1.8.4-1.8.6, 2.4.3, 2.4.8.3, 2.5.1 and 2.5.2. The relevance of trade mark law to R3337 is discussed in part 4.8 below. Also see part 5.3.4 for a discussion on trade mark law cases relating to foodstuffs, and part 6.3.5 for the relevance of trade mark law to disputes before the ARB.

⁸⁹ See part 3.2 below.

in due course.⁹⁰

1.2.5 Considering industry self-regulation as part of the multi-sectoral approach to addressing NCDs

The UN⁹¹ and WHO⁹² have pointed out that, to be effective, a national response to addressing NCDs must be led by the government in each country whilst including multistakeholder engagement.⁹³ In the circumstances, UN member states have committed to:

[p]romote multisectoral and multi-stakeholder engagement in order to reverse, stop and decrease the rising trends of obesity in child, youth and adult populations, respectively.⁹⁴

In addition to the government and inter-governmental agencies, relevant role players who should support national efforts to address NCDs include private actors such as consumers, the media and voluntary organisations.⁹⁵

Following the above, it has been pointed out in the DOH *National NCD Strategic Plan* that the reduction of NCD risk factors:

requires the engagement of non-health sectors and non-state actors to address the social and commercial determinants of health and behaviour change.⁹⁶

This quote affirms that the government deems consumers and other private actors outside the health sector to be relevant stakeholders that have a role to play in addressing the burden of diet-related NCDs in South Africa.

The WHO has acknowledged that various approaches may be adopted to implement, monitor and evaluate the measures established to address the adverse effects of advertising unhealthy foodstuffs to children. In terms of the WHO *Recommendations on*

⁹⁰ See parts 4.9, 4.10 and 5.5 below.

⁹¹ UN *Resolution on the Prevention and Control of NCDs* para 33, 36-37, 54.

⁹² WHO *Global Action Plan for NCDs* 4, 8, 22-23.

⁹³ Also see Willet *et al* 2019 *Lancet* 448.

⁹⁴ UN *Resolution on the Prevention and Control of NCDs* para 45(f).

⁹⁵ Civil society groups would also be relevant role players. Whilst civil society efforts are not the main aim of this study, which deals with government regulation and self-regulation, comments on civil society efforts are made where relevant. See parts 3.5 and 6.6.

⁹⁶ DOH *National NCD Strategic Plan* xi, 29. For a discussion on relevant social determinants of health and commercial determinants of health, and the meaning of these terms, see parts 3.1, 3.3 and 3.5 below.

Marketing of Foods,⁹⁷ suitable approaches may include (i) statutory regulation, (ii) industry-led self-regulation or (iii) co-regulation. The last mentioned is essentially industry-led self-regulation which has a statutory backdrop, i.e., a combination of options (i) and (ii). In 2023 the WHO published the *Policies to Protect Children From the Harmful Impact of Food Marketing: WHO Guideline*, which builds the WHO *Recommendations on Marketing of Foods*. All three of these regulation models are also recognised in the WHO *Policies to Protect Children From the Harmful Impact of Food Marketing*, which defines the word “policies” in the context of protecting children from the harmful impact of food marketing as:

[a]ll measures to regulate marketing to which children are exposed, whether through legal instruments mandating compliance (such as legislation and regulations), government-led measures with which compliance is voluntary (such as codes of conduct and standards), or measures by which industry actors voluntarily undertake to restrict marketing (such as pledges and codes).⁹⁸

Against this background, measures to address concerns about marketing unhealthy foodstuffs to consumers may stretch beyond the confines of strict government regulation. Moreover, the potential role of industry self-regulation is acknowledged.⁹⁹

When considering the meaning of “self-regulation” in the context of advertising, the International Council for Advertising Self-Regulation (hereafter “ICAS”)¹⁰⁰ explains that:

Self-Regulation is a system whereby the industry actively regulates itself. In the advertising sector, it means that market players join forces to promote truthful and responsible advertising, with respect to the principles of fair competition. Market players typically include the three parts of the industry: advertisers, agencies, and the media. After developing common standards, they set up a system to ensure that advertisements that fail to meet those standards are quickly corrected or removed.¹⁰¹

⁹⁷ See WHO *Recommendations on Marketing of Foods* para 22.

⁹⁸ Action plans, initiatives, programmes or strategies are, however, excluded from the meaning of “policies”. See WHO *Policies to Protect Children From the Harmful Impact of Food Marketing* vii.

⁹⁹ Of course, government strategies that foster healthy diets of a population should be free from the “undue influence of commercial or other vested interests”. See WHO *Global Action Plan for NCDs* 34, 86.

¹⁰⁰ ICAS *International Guide on Developing a Self-Regulatory Organization* 5-6.

¹⁰¹ South Africa’s self-regulatory organisation, the Advertising Regulatory Board, is a member of ICAS. As such, this definition and other principles of ICAS discussed in this study are relevant. Also see part 6.2.1 for additional comments on the meaning of advertising self-regulation.

Self-regulation in the South African advertising industry has existed for over 50 years.¹⁰² The Advertising Regulatory Board (hereafter “ARB”) is the current¹⁰³ self-regulatory organisation (hereafter “SRO”) that administers and enforces the *Code of Advertising Practice* (hereafter “the *ARB Code*”). Through its operations the ARB aims to promote consumer protection through responsible advertising. The *ARB Code* consists of various parts. Section II sets out 19 general principles of acceptable advertising,¹⁰⁴ whilst the *Procedural Guide* contains the procedural aspects and sanctions that are relevant to advertising complaints filed by consumers or trade competitors through the ARB’s complaints resolution process.

The *ARB Code* also contains several appendices that set out a range of additional advertising rules in specific industries, and which form an integral part of the *ARB Code*.¹⁰⁵ Of particular relevance to this study is *Appendix J: The Food and Beverage Code* (hereafter “*Appendix J*”). *Appendix J* currently imposes certain advertising restrictions on foodstuffs advertising. It emphasises that foodstuffs advertising and promotion should not encourage poor nutritional habits or an unhealthy lifestyle in children. It highlights that children of 12 years old and younger are particularly impressionable.¹⁰⁶ As such, *Appendix J* stipulates that the advertising of foodstuffs that do not represent healthy dietary choices and a healthy lifestyle should not directly appeal to children in that age category in a manner that would persuade their parents or others to purchase the advertised foodstuff for them.¹⁰⁷ Furthermore, including such foodstuffs is also prohibited in television advertisements primarily aimed at children in that age category.¹⁰⁸ *Appendix J* also places advertising restrictions, albeit of limited scope, on the use of licensed third-

¹⁰² Part 6.3 sets out a discussion on the history of the ARB, the ARB’s *Code of Advertising Practice*, membership of the ARB, and the mandate of the ARB to consider advertising complaints. In addition, comments on the jurisdiction of the ARB to consider advertising complaints against advertisers who are not members of the ARB, the ARB’s complaints resolution process (including appeals and reviews), and the funding model of the ARB are also explained in part 6.3.

¹⁰³ The predecessor of the ARB was the Advertising Standards Authority of South Africa (hereafter “ASA”). See further the discussion in part 6.3.1.

¹⁰⁴ Those general principles cover aspects such as offensive advertising, discrimination, truthful presentation, substantiation of claims and comparative advertising. See clauses 1, 3.4, 4 and 7 of Section II of the *ARB Code*, respectively, for these listed advertising aspects.

¹⁰⁵ Clause 4.9 of Section I of the *ARB Code*.

¹⁰⁶ Clause 7.1 of *Appendix J*.

¹⁰⁷ Clause 8.1 of *Appendix J*.

¹⁰⁸ Clause 13.1 of *Appendix J*.

party characters (such as characters from animation films or cartoons) in relation to foodstuffs that do not represent healthy dietary choices and a healthy lifestyle. It provides that the use of licensed third-party characters is prohibited in television advertisements that are aimed at children aged 12 years and younger.¹⁰⁹ An immediate limitation of this provision is that it applies to television advertisements only, and would only extend to the use of licensed characters on product packaging if that packaging appears in a television advertisement. In addition, company-owned characters are expressly excluded from the scope of this restriction.

Following the above, it is apparent that certain of the advertising restrictions proposed in R3337 are already encompassed, at least partially, in the *ARB Code*. As such, this study considers to what extent the industry already supports the proposed measures in R3337 through self-regulation. Moreover, the extent to which the *ARB Code* should include or expand advertising and labelling restrictions explicitly aimed at unhealthy foodstuffs is considered.¹¹⁰ Related aspects that warrant specific consideration include the degree of industry commitment to the *ARB Code*, adherence to rulings issued by the ARB, the jurisdiction of the ARB to consider advertising complaints, consumers' access to the ARB, and the relative ease with which the *ARB Code* can be amended to keep abreast of developments and consumer habits in the advertising sector.¹¹¹ This is done to establish if the restrictions in *Appendix J* are effective in the current food environment and aligned with the consumers' constitutional rights in South Africa. This would include considering if the age delineation of children of 12 years and younger is appropriate. Moreover, this study considers if specific provisions in *Appendix J* should be expanded to cover all consumers irrespective of age and all forms of advertising (including labelling) against the overarching goal of improving public health by contributing towards preventing and controlling NCDs.¹¹² This is done to establish to what extent the provisions in *Appendix J*

¹⁰⁹ See clauses 8.1–8.3 and 9.1 of *Appendix J*.

¹¹⁰ See part 6.6 below.

¹¹¹ Part 6.7 below discusses the benefits of advertising self-regulation. In part 6.8, the criticisms, challenges and limitations of advertising self-regulation are considered.

¹¹² See parts 6.6 and 6.9 below.

may support or supplement the proposed measures in R3337 that aim to restrict advertising and simplify the labelling of unhealthy foodstuffs.

1.3 Research question

With reference to the South African government's commitment to reducing the occurrence of diet-related NCDs amongst consumers by means of advertising and labelling restrictions in relation to unhealthy foodstuffs, and specifically with due analysis of the current and proposed statutory and self-regulation provisions, how can a balance be achieved between legislative regulation by the government, and self-regulation by the advertising industry?

1.4 Aim and objectives of the study

The primary aim of the study is to consider and make recommendations on how a balance can be drawn between government regulation and self-regulation by the industry regarding the advertising and labelling of unhealthy foodstuffs, to advance the South African government's commitment to reducing the occurrence of NCDs.

The objectives (or secondary aims) of the study, consideration of which will serve to achieve the primary aim, are set out below:

- to consider the meaning of "unhealthy foodstuffs" in South Africa;
- to postulate who the "consumer" is for the purposes of foodstuffs advertising and labelling in South Africa;
- to consider the meaning of "food law" in South Africa;
- to provide an overview of the current government-regulated legal framework relevant to the advertising and labelling of foodstuffs in South Africa;
- to set out the determinants of health that are relevant to consumer food purchase behaviour and dietary patterns in the current food environment within a right-to-health framework;

- to discuss and analyse the proposed measures in R3337 which the government intends to implement in order to regulate the labelling and advertising of unhealthy foodstuffs;
- to discuss the monitoring and enforcement of food laws in South Africa within relevant government departments, as well as by private commercial actors and consumers; and
- to evaluate the role of advertising self-regulation by the ARB in relation to the regulation of foodstuffs labelling and advertising in South Africa, including restrictions on unhealthy foodstuffs advertising and labelling.

1.5 Hypothesis

This study hypothesises that self-regulation within the advertising industry complements government regulation aimed at restricting unhealthy foodstuffs labelling and advertising in South Africa, ultimately advancing the government's commitment to reducing the occurrence of diet-related NCDs in this country.

1.6 The scope and limitations of this study

Following the above, this study considers existing and proposed restrictions on the advertising and labelling of unhealthy foodstuffs in terms of both government regulation and industry self-regulation, to postulate an appropriate balance between those regulatory systems that would ultimately assist government efforts to reduce the prevalence of NCDs in South Africa. This study includes and reflects on the law up to and including 31 August 2024.

It should be noted that the general advertising and labelling requirements for foodstuffs in terms of the *FCDA* and relevant regulations under that Act cannot be considered in isolation. Due to the fragmented nature of the food law system, various other relevant laws are pertinent to the advertising and labelling of foodstuffs in South Africa. Other relevant legislation that forms part of this study includes the *Agricultural Product Standards Act* 119 of 1990 (hereafter "*APSA*"), the *Trade Marks Act* 194 of 1993

(hereafter "*TM Act*"), and the *Consumer Protection Act* 68 of 2008 (hereafter "*CPA*").¹¹³ Under the *CPA*, the study will focus on the provisions relating specifically to foodstuffs, and advertising provisions relating to false and misleading trade descriptions. Other marketing activities that are regulated under the *CPA*¹¹⁴ fall outside the scope of the study.

In the context of proposed legislative measures, the study focuses on the measures aimed explicitly at restricting unhealthy foodstuffs labelling and advertising proposed in R3337 under the *FCDA*, namely:

- i. introducing mandatory front-of-pack nutrition warning labels in relation to unhealthy foodstuffs;
- ii. placing a ban on the advertising of unhealthy foodstuffs to children;
- iii. requiring the inclusion of a health warning message in the advertising of unhealthy foodstuffs that are not directed at children; and
- iv. necessitating the removal of certain graphic elements that are visually appealing to children from unhealthy foodstuffs labelling and advertising. As previously mentioned, it is assumed that trade mark rights vest in those graphic elements for the purposes of this study.

It should be noted that neither the current food law framework¹¹⁵ nor the relevant provisions under R3337 propose restricting the autonomy¹¹⁶ of consumers to purchase or consume unhealthy foodstuffs.¹¹⁷ What has essentially been proposed by measures (i)-(iv) above is to make unhealthy foodstuffs labelling and advertising less eye-catching and more informative and understandable to the consumer.¹¹⁸ This has been proposed to

¹¹³ Whilst the *Electronic Communications and Transactions Act* 25 of 2002 may apply to certain forms of online advertising, that act falls outside the scope of this study. For a discussion on this topic, see Mupangavanhu and Kerchhoff 2023 *De Jure* 93-97.

¹¹⁴ The *CPA* regulates various marketing activities, including direct marketing, promotional competitions, bait marketing, negative option marketing and customer loyalty programmes. For a discussion on the meaning of these and related marketing aspects, see Van Heerden "The Regulation of Marketing Under the CPA" paras 8-22.

¹¹⁵ As discussed in Chapter 2.

¹¹⁶ In this context, "autonomy" refers to the freedom to choose whether or not to enter into a transaction as to the purchase of a specific food product, or to choose whether or not to eat it.

¹¹⁷ Provided of course that the foodstuffs are safe for consumption and comply with relevant legal requirements relating to, amongst other things, production, composition and storage.

¹¹⁸ See discussion in Chapter 4.

assist consumers, which includes children and persons with limited literacy, in making decisions whether or not to purchase and/or eat foodstuffs which are not necessarily good for health.¹¹⁹ As consumer autonomy and consumer's freedom of choice will not be affected by the proposed measures, comments on this aspect are left at that.¹²⁰

Nutrient profiling¹²¹ is a way in which food can be classified according to healthiness.¹²² Nutrient profile models¹²³ are used by a government to make evidence-based decisions that impact on the public health of that country's citizens, ultimately resulting in the formulation of policies that promote public health.¹²⁴ Of relevance to this study, and as discussed in Chapter 4, a nutrient profiling model serves as the instrument that governments use to determine which foodstuffs are subject to advertising and labelling restrictions or limitations.¹²⁵ As the models that underlie nutrient profiling fall primarily in the field of nutrition, an in-depth discussion on this aspect falls outside the scope of this legal study. Moreover, an assumption of this study is that the nutrient profiling model that the DOH has selected for South Africa¹²⁶ is based on scientific evidence for the local consumer market.¹²⁷

Consumers of foodstuffs include children, who are often exposed to foodstuffs labels and advertising. Because of their age and credulity, children are generally considered to be vulnerable members of society.¹²⁸ As such, an assumption of this study is that children

¹¹⁹ As discussed in parts 3.4.2-3.6 below.

¹²⁰ For additional reading on autonomy and freedom of choice, see Eggert 2004 *Chapman Law Review* 1-2, 6-7.

¹²¹ The term "nutrient profiling" refers to the science of classifying or ranking foods according to their nutritional composition for reasons related to preventing disease and promoting health. See WHO *Use of Nutrient Profile Models for Nutrition and Health Policies* v; Wicks, Wright and Wentzel-Viljoen 2017 *British Journal of Nutrition* 2151.

¹²² Wicks, Wright and Wentzel-Viljoen 2017 *British Journal of Nutrition* 2150; UNICEF *Guidance Framework to Support Healthy Food Retail Environments* 17.

¹²³ See the discussion in part 4.4.2 below.

¹²⁴ WHO *Use of Nutrient Profile Models for Nutrition and Health Policies* v.

¹²⁵ This is in line with WHO recommendations. See WHO *Policies to Protect Children From the Harmful Impact of Food Marketing* vii.

¹²⁶ Details of the nutrient profiling model calculator and software programme are available on the DOH's official website. See DOH 2024 <https://www.health.gov.za/food-control/>.

¹²⁷ See the discussion in part 4.4.2 below.

¹²⁸ Pettigrew *et al* 2017 *Appetite* 116; Reddy 2020 *TSAR* 446. Children depend on parents or caregivers for food especially in their younger years, and may also be more susceptible to advertising and marketing related to food products. For additional reading, see UN *Special Rapporteur Report on the*

are in fact a vulnerable segment of society and that restrictions on the advertising of unhealthy foodstuffs are justified *vis-à-vis* children. This study does not comprehensively analyse all the national and international laws relating specifically to children's rights in the context of unhealthy foodstuffs, as this forms part of a prior independent study published by Mills¹²⁹ in 2016.

Advertising self-regulation in South Africa is discussed with reference to the operations and functions of the ARB. Where relevant, mention is also made of the ARB's predecessor, the ASA. In addition to case law, relevant rulings issued by the ARB since its incorporation in 2018 up to and including 31 August 2024 have been considered.¹³⁰ Addendum D provides a table of ARB rulings relating to foodstuffs that were issued during that period. Those rulings were considered as part of the discussion on the advertising self-regulatory system in South Africa in Chapter 6.

It should be noted that unhealthy foodstuffs labelling and advertising fall within a broader framework of non-fiscal measures aimed at preventing and controlling NCDs. This topic is also linked with several challenges, including the affordability of a healthy diet,¹³¹ and fiscal measures such as taxes on sugar-sweetened beverages (hereafter "SSBs").¹³² Whilst comments on these challenges will be mentioned where relevant, the focus of the study

Right to Health paras 16-17, 34-38, 42-46; Mills *Considering the Best Interests of the Child When Marketing Food to Children: An Analysis of the South African Regulatory Framework* 81-82.

¹²⁹ For a comprehensive discussion on the best interests of the child in general and in the context of foodstuffs marketing specifically, see Mills *Considering the Best Interests of the Child When Marketing Food to Children: An Analysis of the South African Regulatory Framework* 40-99.

¹³⁰ Rulings of the ARB are readily accessible from the ARB's website, www.arb.org.za. The right to publish the rulings of the ASA vest in LexisNexis South Africa. Rulings of the ASA for the period 2013 leading up to the liquidation of the ASA in 2018 are not currently publicly available. As such, this study is limited to rulings of the ARB since its inception up to and including 31 August 2024.

¹³¹ The right to have access to sufficient food and the implications of poverty on food security are mentioned in parts 3.1 and 3.2 for the purposes of contextualisation and in the context of discussing social determinants of health. It should, however, be noted that a comprehensive analysis of those aspects falls outside the scope of this study.

¹³² The health-promotion levy was introduced in April 2018 as an excise duty levied on all sugary beverages manufactured in or imported into South Africa. See s 15 of the *Rates and Monetary Amounts and Amendment of Revenue Laws Act* 14 of 2007; chapter VB of the *Customs and Excise Act* 91 of 1964. For additional reading, see South African Revenue Services 2021 <https://www.sars.gov.za/customs-and-excise/excise/health-promotion-levy-on-sugary-beverages/>; Stacey *et al* 2019 *Social Science & Medicine* 1-8.

is predominantly on the regulation of foodstuffs labelling and advertising *vis-a-vis* the purchasing consumer.¹³³

Where relevant, and for contextualisation or illustration, discussions also refer to the advertising and labelling restrictions on the two other unhealthy commodities, notably alcoholic beverages¹³⁴ and tobacco products.¹³⁵ As discussed above, unhealthy foodstuffs, tobacco products and alcohol have been identified as modifiable risk factors that contribute towards the occurrence of and rise in NCDs. It has also been emphasised, both on an international and national level, that increased advertising and labelling restrictions are required with respect to each unhealthy commodity category.¹³⁶ The two other modifiable risk factors mentioned earlier, namely physical inactivity and air pollution, fall outside the scope of this study.

This study deals with the laws relevant to the labelling and advertising of foodstuffs sold or offered for sale in South Africa. Foodstuffs manufactured in South Africa but intended for sale outside this country fall outside the scope of this study. It should also be noted that this study considers the food environment in South Africa, where consumers live and function. Whilst other environmental considerations such as climate change, freshwater use, and biodiversity considerations are also relevant in the food system¹³⁷ when viewed as a whole, those aspects are not considered in this study.¹³⁸

¹³³ Advertising restrictions aimed at persons other than members of the public such as health care professionals are not considered in this study. Prohibited promotional practices included in R991 relating to health establishments and health care personnel, specifically in the context of infant and young child foodstuffs, also fall outside the scope of the study.

¹³⁴ See parts 4.5.3, 4.6, 6.6.4 and 6.7.3.4.

¹³⁵ See parts 4.5.3, 4.6, 4.7.2 and 4.9.2.2.

¹³⁶ See, for example, WHO *Global Action Plan for NCDs* 29; WHO *Saving Lives Spending Less* 8. DOH *Strategic Plan for the Prevention and Control of Non-Communicable Diseases 2013-2017* 36. In the context of restrictions on tobacco advertising, promotion and sponsorship, see art 13 of the WHO *Framework Convention on Tobacco Control* (2003) and s 3(1)(a) of the *Tobacco Products Control Act* 83 of 1993. For a further discussion, see Visagie "The Mandate of the Advertising Regulatory Board to Rule on Tobacco Products Advertising Complaints in South Africa" 332-338. For a discussion on the marketing of alcoholic beverages, see WHO *Global Strategy to Reduce the Harmful Use of Alcohol* (2010) paras 29-31.

¹³⁷ See part 1.8.6 below for the meaning of "food system".

¹³⁸ For a discussion of environmental considerations that are relevant to achieving and maintaining sustainable food production globally, see Willet *et al* 2019 *Lancet* 460-470.

1.7 Research method, design and framework

The research method used in this study includes a literature review of relevant international and national policy documents that aim to address the burden of NCDs, obesity resulting from unhealthy diet and, more specifically, the advertising and labelling of unhealthy foodstuffs. Furthermore, national legislation, draft regulations published under the applicable legislation (notably R3337), the *ARB Code*, rulings issued by the ARB, case law, journal articles, textbooks and electronic sources (local, foreign and international) have been consulted, interpreted and analysed to address the aim and objectives of the study and, ultimately, to answer the research question. A functional approach has been adopted, whereby relevant legislative and self-regulatory provisions relevant to other unhealthy commodities (notably tobacco products and alcoholic beverages)¹³⁹ and advertising regulation in foreign jurisdictions¹⁴⁰ and in international instruments¹⁴¹ have been considered and discussed where appropriate.

As a point of departure following the background and problem statement set out above, Chapter 2 provides an overview of the current legal framework relevant to the advertising and labelling of foodstuffs in South Africa. This chapter sets out the law, as regulated by the government, as it currently stands. The discussion of the *FCDA* (including R146 and R991) is accompanied by provisions of the *APSA* and *CPA* that specifically apply to the regulation of foodstuffs labelling and advertising. As trade marks form part of foodstuffs advertising and labelling and is relevant to this study,¹⁴² the chapter also includes a discussion on relevant trade mark law provisions, both under the *TM Act* as well as those relevant to passing off under the common law. As food law is the primary focus of this study, the relevant food law framework is set out in Chapter 2 before turning to the complementary linkages with public health in Chapter 3.

Against the backdrop of the universal right to health and SDG 3, Chapter 3 considers the relevant constitutional and consumer rights that are related to public health and well-being in South Africa. This is contextualised with reference to relevant social determinants

¹³⁹ See parts 3.6.1, 4.4.11, 4.5.3, 4.6, 4.7.2, 4.9.2.1, 4.9.2.2, 6.6.4 and 6.7.3.4.

¹⁴⁰ See parts 4.4.4 and 4.4.11.

¹⁴¹ See parts 2.2, 3.2.1 and 6.2.4.

¹⁴² See part 1.2.4 above.

of health such as income, literacy, urbanisation, industrialisation, globalisation of food supply and digitalisation that have shaped the current food environment in which consumers live in South Africa. This chapter also analyses the role and responsibility of private commercial actors in the food sector resulting from widespread unhealthy foodstuffs advertising and labelling practices that impact on consumer food purchase behaviour and dietary patterns in this country.

After brief comments on past government efforts to regulate the advertising and labelling of unhealthy foodstuffs, Chapter 4 unpacks the most recently proposed measures contained in R3337. Measures (i)-(iv) listed in part 1.6 above form the main focus of this chapter. As part of the functional approach adopted in this study, similar unhealthy foodstuffs labelling and advertising restrictions implemented in other countries and regions are also considered. Limitations on the rights of foodstuffs manufacturers, including the right to freedom of commercial speech through advertising and property rights of trade mark rights holders, are also analysed to ultimately consider whether the proposed measures are likely to pass constitutional muster. Comments on technical aspects in the formulation of certain provisions in R3337 are made, and anticipated challenges in implementing those measures in the near future are also considered.

If enacted in due course, the proposed measures restricting unhealthy foodstuffs advertising and labelling will have to be monitored and enforced to be effective. As such, Chapter 5 is dedicated to considering monitoring and enforcing the relevant food laws in South Africa. A crucial component in this study's design is to consider the authority and capacity of officials and agencies within the DOH, Department of Agriculture, Land Reform and Rural Development (hereafter "DOA") and Department of Trade, Industry and Competition (hereafter "DTIC"), respectively, to monitor and enforce food laws in this country. This is because the existing procedures within these three government departments are relevant, albeit to differing degrees, to the current and future regulation of foodstuffs labelling and advertising. Whilst the *FCDA* is administered and enforced by the DOH, the *APSA* is administered and enforced by the DOA. Both the *TM Act* and the *CPA* are administered and enforced by the DTIC. The discussion on the nature and capacity of these three government departments also highlights certain challenges or

restrictions within the government regulation mechanism in the context of the monitoring and enforcement of food labelling and advertising restrictions. In considering multi-stakeholder participation in food law regulation, the role of private actors, notably trade competitors and consumers, is considered. This includes a discussion on food law litigation between trade competitors before the South African courts, as well as possible challenges that consumers may face in obtaining effective redress in terms of the statutory food law framework.

Chapter 6 is dedicated to advertising self-regulation. This chapter sets out brief comments on self-regulation in the global context and an overview of the history of advertising self-regulation in South Africa. This is followed by a discussion on the operations and functions of the ARB as a consumer watchdog in the advertising industry, and its complaints resolution process. As far as possible, this chapter is contextualised with reference to relevant ARB rulings relating to foodstuffs labelling and advertising. Restrictions on unhealthy foodstuffs advertising that currently appear in *Appendix J* are considered, and suggested amendments to certain existing provisions are made with a view to widening their scope and relevance. Criticisms, challenges and limitations of advertising self-regulation are also discussed, as well as the benefits of advertising self-regulation by the ARB and its members to the government, commercial actors in the food industry¹⁴³ and consumers.¹⁴⁴

Chapter 7 sets out the findings of this study in order to answer the research question, namely, with reference to the South African government's commitment to reducing the occurrence of diet-related NCDs amongst consumers by means of advertising and labelling restrictions in relation to unhealthy foodstuffs, and specifically with due analysis of the current and proposed statutory and self-regulation provisions, how can a balance

¹⁴³ The term "food industry" is a wide concept and includes an array of persons and businesses in the food supply chain. In addition to farmers of agricultural products and livestock, other persons and businesses that have a role during planting and harvesting, through production and manufacture, food transport and distribution and ultimate retail to the consumer, would form part of the food industry. See Monteiro *et al* 2017 *Public Health Nutrition* 4.

¹⁴⁴ See part 1.8.5 below for a discussion of the meaning of "consumer" in the context of food labelling and advertising.

be achieved between legislative regulation by the government and self-regulation by the advertising industry? Recommendations and concluding remarks are also made.

1.8 Important definitions

The discussion that follows sets out the meaning of the following words or phrases: “foodstuffs”, “unhealthy foodstuffs”, “advertise/advertising” and “label/labelling”.¹⁴⁵ It also introduces comments on the relevant consumer as far as it relates to foodstuffs advertising and labelling. Lastly, a working definition of the term “food law” in South Africa is also put forward.

1.8.1 Foodstuffs

A “foodstuff” is defined in the *FCDA* as any article or substance, except a medicine as defined in the *Medicines and Related Substances Act* 101 of 1965 (hereafter “*Medicines Act*”), which is ordinarily eaten or drunk by a person or persons, purporting to be suitable, or manufactured or sold, for human consumption.¹⁴⁶ A product generally consumed when a person is hungry or to quench thirst would qualify as a foodstuff.¹⁴⁷ In this study reference to “foodstuffs” or “foods”, terms which will be used interchangeably, should be understood to cover both food products and non-alcoholic beverages.¹⁴⁸ Foodstuffs for all age groups, including foodstuffs for infants and young children, fall within the ambit of the *FCDA*. Other legislation applicable to the advertising and labelling of foodstuffs includes the *APSA*, the *TM Act* and the *CPA*.

¹⁴⁵ Unless specified otherwise these definitions of words relating to foodstuffs will be adopted for the purposes of this study.

¹⁴⁶ Section 1 of the *FCDA*.

¹⁴⁷ The inclusion of both food and drinks within the definition of a “foodstuffs” is also in line with the approach adopted in the EU and by the FAO. See Van der Meulen and Wernaart “Food Law and Regulatory Affairs” 29.

¹⁴⁸ For the purposes of this study, alcoholic beverages are not deemed to fall within the definition of “foodstuffs”. Such an approach is also in line with the definition of “food” adopted by the WHO. See WHO *Policies to Protect Children From the Harmful Impact of Food Marketing* vii. Subject to the disclosure of health warning messages under the *FCDA*, alcoholic beverages that are referred to in the *Liquor Products Act* 60 of 1989 (hereafter “*Liquor Products Act*”) are generally excluded from the labelling requirements under the *FCDA*. This would include wine, spirits, spirit-based beverages and liqueurs, and alcoholic fruit beverages. See s reg 54(3)(e) of R146; s 1 of the *Liquor Products Act*. For a discussion of the health warning messages that must appear on the labels and advertisements of alcoholic beverages, see part 4.6.

Foodstuffs can be seen as grab-and-go products for many consumers. In this regard Koen, Blaauw and Wentzel-Viljoen¹⁴⁹ point out that:

[i]n general, food purchases are regarded as routine purchase decisions which require little involvement and [sic] an external search for information. But, contrary to other types of purchases, consumers often have to choose several items within a very short period during food purchasing.¹⁵⁰

Following the above, it is apparent that foodstuffs fall within the fast-moving consumer goods (hereafter “FMCG”) industry.¹⁵¹ Foodstuffs and other goods in the FMCG industry¹⁵² are usually non-durable (i.e., need to be replaced) and have a short lifespan, hence the inclusion of the word “fast-moving” in this consumer product category.¹⁵³ In addition, such goods are usually perceived as relatively inexpensive necessities¹⁵⁴ that consumers purchase regularly.¹⁵⁵

1.8.2 *Unhealthy foodstuffs*

Neither the *FCDA* nor any other relevant national legislation currently in force sets out a definition of “unhealthy foods” or “unhealthy foodstuffs”.¹⁵⁶ That being said, a broad understanding of the meaning attached to this term can be identified in terms of WHO instruments South Africa endorses, government policy documents and draft legislation, which are discussed below.

As a starting point, and before contemplating the meaning of “unhealthy foodstuffs”, the concept of what is “healthy food” should be considered. No universal or fixed definition is available for defining what constitutes healthy foodstuffs or a healthy diet. An apparent

¹⁴⁹ Koen, Blaauw and Wentzel-Viljoen 2016 *S Afr J Clin Nutr* 16.

¹⁵⁰ Also see *Pepsico Inc v Atlantic Industries* para 30, in which the High Court noted that soft drinks are often purchased on a whim without careful scrutiny of the product container.

¹⁵¹ *Shoprite Checkers (Pty) Ltd v Pick 'n Pay Retailers (Pty) Ltd* (12098/22) [2023] ZAWCHC 285 (17 November 2023) para 1; *Pioneer Foods* case para 14.

¹⁵² The FMCG sector also includes personal care products (such as soap, toothpaste and shampoo) and home care products (such as washing powder, dishwashing liquid and surface cleaning products). See *KPMG Sector Report Fast-Moving Consumer Goods in Africa* 1, 4, 8.

¹⁵³ *KPMG Fast-Moving Consumer Goods Sector Report* 1.

¹⁵⁴ Compared to luxury items or non-perishable goods such as vehicles or immovable property.

¹⁵⁵ Foodstuffs categories are often very similar (such as pre-sliced bread or milk sold in grocery stores), and may have competitive prices. See *KPMG Sector Report Fast-Moving Consumer Goods in Africa* 1.

¹⁵⁶ For the purposes of this study, the terms “unhealthy foodstuffs” and “unhealthy foods” will be used interchangeably, and should be interpreted in line with the definition of “foodstuffs” as set out in the *FCDA*, as including both food products and non-alcoholic beverages.

reason for this is that one person's nutritional needs may not necessarily be the same as another's.¹⁵⁷ Factors such as a person's age, gender, health status and level of physical activity have an impact on what would be considered a healthy diet for a specific individual.¹⁵⁸ In addition, aspects such as cultural, religious or ethical convictions,¹⁵⁹ environmental considerations¹⁶⁰ or weight-loss objectives may also be relevant to a consumer's ultimate diet choice.¹⁶¹

Based on scientific evidence, the WHO¹⁶² and certain scholars¹⁶³ have advanced that a healthy diet comprises a combination of the different food groups.¹⁶⁴ This includes fruits and vegetables, legumes (lentils and beans), staples (such as potatoes, rice or maize), and foods derived from animal sources (i.e., eggs, milk, meat and fish).¹⁶⁵ It is also recommended that certain food groups be consumed in larger quantities than others. In this regard, Willet *et al*¹⁶⁶ observe that healthy diets:

have an appropriate caloric intake and consist of a diversity of plant-based foods, low amounts of animal source foods, unsaturated rather than saturated fats, and small amounts of refined grains, highly processed foods, and added sugars.

At this stage, it is important to note that foodstuffs can be consumed in an unprocessed (or natural) state, or a processed form. Unprocessed foods include single-ingredient whole foods such as edible parts of plants (such as raw nuts, fresh fruits and fresh vegetables), or edible parts derived from animals (such as eggs, milk, meat, fresh fish or

¹⁵⁷ WHO *Guiding Principles for FOP Labelling* 32; Willet *et al* 2019 *Lancet* 453.

¹⁵⁸ Willet *et al* 2019 *Lancet* 453.

¹⁵⁹ Hutt 2005 *Journal of Food Law & Policy* 2.

¹⁶⁰ Red meat production, for example, has been found to have a negative impact on the environment. See UNICEF *Guidance Framework to Support Healthy Food Retail Environments* 17.

¹⁶¹ Visagie 2024 *THRHR* 156-157; Swinburn *et al* 2013 *Obesity Reviews* 3.

¹⁶² WHO date unknown <https://www.who.int/initiatives/behealthy/healthy-diet>.

¹⁶³ See Monteiro *et al* *Ultra-processed Foods, Diet Quality, and Healthy Using the NOVA Classification System* 7; Willet *et al* 2019 *Lancet* 447, 453.

¹⁶⁴ The food groups are (i) fruits and vegetables, (ii) proteins, which can be sourced from plants or animals, (iii) fats where unsaturated fats such as those derived from nuts or fish are recommended above saturated fats that are often found in meat, (iv) dairy products, and (v) carbohydrates such as grains. See Willet *et al* 2019 *Lancet* 459.

¹⁶⁵ Certain scholars argue that a diet which excludes or only has a low consumption of red meat is healthier, as red meat has been linked with an increased risk of developing heart disease, cancer and other diseases. See Willet *et al* 2019 *Lancet* 445, 455.

¹⁶⁶ Willet *et al* 2019 *Lancet* 448.

marine products), and water.¹⁶⁷ Based on scientific evidence, these unprocessed foods are generally deemed to be healthier food options.¹⁶⁸

As soon as a foodstuff is subject to one or more processes which alter its original state, it is classified as a processed food product.¹⁶⁹ Common examples of food processing include freezing, fermentation, maturing, heat treating or tenderising.¹⁷⁰ Furthermore, the addition of nutrients¹⁷¹ such as fats, sugar, salt, or additives¹⁷² such as artificial sweeteners, flavourings and colourants¹⁷³ during food production are also deemed to be food processing.¹⁷⁴ In 2019 the FAO issued a publication prepared by Monteiro *et al*¹⁷⁵ which sets out four classifications of food groups according to the NOVA¹⁷⁶ food classification system.¹⁷⁷ The NOVA system essentially classifies foodstuffs into one of four groups according to the level of processing that the end product has undergone. These four food group classifications are:

1. unprocessed and minimally processed foods. Minimally processed foods are natural foods that have undergone slight processing to preserve the product and

¹⁶⁷ Monteiro *et al* *Ultra-processed Foods, Diet Quality, and Healthy Using the NOVA Classification System* 6, 11.

¹⁶⁸ WHO *Global Action Plan for NCDs* 32. Also see WHO date unknown <https://www.who.int/initiatives/behealthy/healthy-diet>.

¹⁶⁹ Food processing has been around for centuries. See Hutt 2005 *Journal of Food Law & Policy* 1.

¹⁷⁰ See reg 1 of R146.

¹⁷¹ For a discussion on the meaning of “nutrients”, see part 2.4.5.

¹⁷² A “food additive” is defined as “any substance, regardless of its nutritive value, that is not normally consumed as a foodstuff by itself and not normally used as a typical ingredient of the foodstuff, which is added intentionally to a foodstuff for a technological (including organoleptic) purpose in the manufacture, processing, preparation, treatment, packing, packaging, transport or storage of the foodstuff, and results, or may reasonably be expected to result (directly or indirectly) in such a substance, or its by-products, becoming a component of, or otherwise affecting the characteristics of, such foodstuffs and excludes any substance added to foodstuffs for maintaining or improving nutritional qualities or any contaminants and sodium chloride”. See reg 1 of R146.

¹⁷³ Other examples of additives include acids, anti-foaming agents, clouding agents, chemically modified starches, emulsifiers, herbs and spices, stabilisers, and thickeners. See Annexure 1 of R146.

¹⁷⁴ See reg 1 of R146.

¹⁷⁵ Monteiro *et al* *Ultra-processed Foods, Diet Quality, and Healthy Using the NOVA Classification System*.

¹⁷⁶ NOVA is the name of this food classification system. It is not an acronym. See Monteiro *et al* 2016 *World Nutrition* 28.

¹⁷⁷ The 2019 FAO publication is based on prior research conducted by Monteiro. For additional reading on the NOVA classification system and its developmental history, see Monteiro *et al* 2016 *World Nutrition* 28-38. In addition to the FOA, the UN and Pan-American Health Organisations recognise that the NOVA classification is a beneficial tool in public health and nutrition. See Monteiro *et al* 2016 *World Nutrition* 28. The NOVA classification system is used and supported by various scholars. See, for example, Lane *et al* 2024 *British Medical Journal* (hereafter “*BMJ*”) 1; Gearhardt *et al* 2023 *BMJ* 2.

enable more extended storage periods, to ensure that the product is edible, or to facilitate easier preparation;¹⁷⁸

2. processed culinary ingredients such as oil, butter, sugar, honey and salt. It is important to note that these ingredients are usually used in relatively small quantities when preparing, seasoning and cooking meals. Whilst over-use should be avoided, small amounts of these culinary ingredients can assist in creating tasty and nutritionally balanced meals;¹⁷⁹
3. processed foods, which are essentially foods prepared by combining foods in groups 1 and 2 above. Examples include fruit preserved in syrup; canned vegetables in brine; processed animal products such as ham, bacon and smoked fish; freshly baked bread; salted or candied nuts; and cheese which contains added salt. Whilst the over-consumption of processed foods should be avoided, the occasional consumption of such products in limited quantities may form part of a balanced diet;¹⁸⁰ and
4. ultra-processed foods, which are defined as “formulations of ingredients, mostly of exclusive industrial use, typically created by a series of industrial techniques and processes”.¹⁸¹ Ultra-processed foods do not contain whole, natural foods,¹⁸² and mostly include various additives such as flavourants, artificial sweeteners and colourants.¹⁸³ Examples of ultra-processed foods that are widely available include SSBs; confectionery; biscuits, pastries, mass-produced pre-packaged breads;

¹⁷⁸ Examples of minimally processed foods include pasteurised fresh milk; dried or frozen fruits and vegetables; crushed or ground wheat or maize; tea and coffee. See Monteiro *et al* *Ultra-processed Foods, Diet Quality, and Healthy Using the NOVA Classification System* 11.

¹⁷⁹ Monteiro *et al* *Ultra-processed Foods, Diet Quality, and Healthy Using the NOVA Classification System* 7, 11.

¹⁸⁰ Monteiro *et al* *Ultra-processed Foods, Diet Quality, and Healthy Using the NOVA Classification System* 8, 12.

¹⁸¹ Monteiro *et al* *Ultra-processed Foods, Diet Quality, and Healthy Using the NOVA Classification System* 8.

¹⁸² The processing of whole foods leads to reduced nutrients and fibre. As such, ultra-processed foods are often described as nutrient-poor. See Willet *et al* 2019 *Lancet* 457; Todd *et al* 2022 *Nutrients* 11.

¹⁸³ Also see Monteiro *et al* 2017 *Public Health Nutrition* 3.

sweetened breakfast cereals; chicken nuggets, fish fingers or sticks; instant noodles; and infant formula.¹⁸⁴

This fourth food category is the main culprit contributing to NCDs. UNICEF¹⁸⁵ has recently pointed out that:

[w]hile processing has benefited human diets for millennia, the food supply has recently become 'ultra-processed' (e.g., extracting minimally processed ingredients and inserting additives such as artificial colours or preservatives). These products are usually made in factories by food manufacturers and contain many ingredients – most of which cannot be found in everyday kitchens. There is increasing evidence of serious health risks associated with high levels of consumption of ultra-processed foods, including obesity, type 2 diabetes, depression and heart disease.¹⁸⁶

Monteiro *et al*¹⁸⁷ summarise the current problem with ultra-processed foodstuffs by observing that:

[p]rocesses and ingredients used to manufacture ultra-processed foods are designed to create highly profitable products (low-cost ingredients, long shelf-life, powerfully branded). Their convenience (imperishable, ready-to-consume), hyper-palatability, and ownership by transnational corporations using pervasive advertising and promotion, give ultra-processed foods enormous market advantages. They are, therefore, liable to displace all other NOVA food groups and to replace freshly made regular meals and dishes with snacking any time, anywhere.¹⁸⁸

The WHO¹⁸⁹ has identified (i) sugar;¹⁹⁰ (ii) saturated and trans-fatty acids; and (iii) sodium/salt, as “key negative nutrients of concern”, because they are linked directly with diet-related NCDs. In this study these three nutrients are collectively called “unhealthy nutrients”.

¹⁸⁴ Monteiro *et al* *Ultra-processed Foods, Diet Quality, and Healthy Using the NOVA Classification System* 8, 12.

¹⁸⁵ UNICEF *Guidance Framework to Support Healthy Food Retail Environments* 17.

¹⁸⁶ Also see the study by Lane *et al* 2024 *BMJ* 1-12, which reveals severe health outcomes (including an increased risk of death, cardiovascular diseases, type 2 diabetes, overweight and obesity) from the consumption of ultra-processed foods as classified in terms of the NOVA classification system.

¹⁸⁷ Monteiro *et al* *Ultra-processed Foods, Diet Quality, and Healthy Using the NOVA Classification System* 9. Also see Monteiro *et al* 2017 *Public Health Nutrition* 1.

¹⁸⁸ This global issue is also prevalent in South Africa. See Frank *et al* 2024 *Public Health Nutrition* 1-2.

¹⁸⁹ WHO *Guiding Principles for FOP Labelling* 28.

¹⁹⁰ This can be free sugars, added sugars or total sugars in the relevant foodstuff. See WHO *Guiding Principles for FOP Labelling* 28.

Knipe, Omoruyi and Durojaye¹⁹¹ point out that unhealthy diets are characterised by the excessive consumption¹⁹² of processed and ultra-processed foods that contain a high level of one or more of the unhealthy nutrients, and which are also energy-dense and micronutrient-poor.¹⁹³ Foodstuffs that are high in fat, sugar or salt are often referred to by the abbreviated term “HFSS foods”.¹⁹⁴ The WHO¹⁹⁵ points out that various terms may be used to describe HFSS foods, including “junk food”, “ultra-processed food”, “energy-dense nutrient-poor food” and “unhealthy food”.

The WHO *Recommendations on Marketing of Foods*¹⁹⁶ and the more recent WHO *Policies to Protect Children From the Harmful Impact of Food Marketing*¹⁹⁷ emphasise that children of all ages should be protected against the marketing of foodstuffs high in one or more of these unhealthy nutrients. The reference to the three unhealthy nutrients, in combination with the assertion that these categories of products pose challenges to eating healthily and maintaining a healthy weight, provides a basis for what types of foods and non-alcoholic beverages may, broadly speaking, be unhealthy.

Turning to South Africa, the DOH *Obesity Strategy*¹⁹⁸ and the DOH *National NCD Strategic Plan*¹⁹⁹ identify that the modern-day availability of ultra-processed food and drink products²⁰⁰ that are high in fat, sugar and/or salt is a key factor which has contributed to the prevalence of overweight and obesity amongst consumers in South Africa.²⁰¹ Frank *et*

¹⁹¹ Knipe, Omoruyi and Durojaye 2022 *ESR Review* 29.

¹⁹² The occasional consumption of small quantities of unhealthy foods within a diet consisting predominantly of healthier food options is not necessarily harmful to health. The health concern arises when unhealthy food becomes a diet replacement for healthier alternatives. See UN *Special Rapporteur Report on the Right to Health* para 3; Bopape, Taillie and Swart 2022 *Front in Public Health* 9.

¹⁹³ Also see WHO *Global Action Plan for NCDs* 32.

¹⁹⁴ HFSS is the abbreviation for high in fat, sugar or salt. WHO *Policies to Protect Children From the Harmful Impact of Food Marketing* vi.

¹⁹⁵ WHO *Policies to Protect Children From the Harmful Impact of Food Marketing* ix, 4,13.

¹⁹⁶ See para 9 of the WHO *Recommendations on Marketing of Foods* 7.

¹⁹⁷ WHO *Policies to Protect Children From the Harmful Impact of Food Marketing* 22.

¹⁹⁸ DOH *Obesity Strategy* 6.

¹⁹⁹ DOH *National NCD Strategic Plan* xi, 11.

²⁰⁰ The term “ultra-processed foods and drink products” is defined as “[r]eady-to-eat foods or drink formulations based on refined substances with a combination of sugar, salt, and fat, plus several additives. These include SSBs, snacks and ‘fast foods’”. See DOH *Obesity Strategy* 11. Also see Frank *et al* 2024 *Public Health Nutrition* 1.

²⁰¹ Also see Frank *et al* 2024 *Public Health Nutrition* 1-2.

*al*²⁰² point out that the current food environment in this country is characterised by packaged foodstuffs that are high in these unhealthy nutrients.²⁰³ In line with the views of the WHO and various scholars discussed above, HFSS foods are, therefore, also deemed to be unhealthy foodstuffs in South Africa.

Turning to draft legislation, R3337 references the terms “unhealthy foodstuffs” and “unhealthy food”. Neither of those terms is, however, explicitly defined. Draft regulation 52 provides that the package or label or advertisement of foods carrying a front-of-pack label shall not depict or contain a reference to a competition or a token, gift, or collectable items which appeals to children in order to encourage the use of such unhealthy foodstuffs.²⁰⁴ It also stipulates that the package or the label or an advertisement of foods carrying a front-of-pack label shall not “be misleading about the potential benefits from consumption of the unhealthy food”.²⁰⁵ From those provisions, it is clear that the concept of what would amount to “unhealthy foodstuffs” or “unhealthy food” in R3337 is directly related to the foodstuffs that would be required to contain a front-of-pack warning label. Whilst this aspect is discussed comprehensively in Chapter 4, at this stage it is relevant to mention that R3337 proposed the introduction of front-of-pack warning labels on pre-packaged foodstuffs that are high in saturated fats, high in sugar, or high in salt (i.e., HFSS foodstuffs). This also supports the contention that HFFS foods fall within the definition of “unhealthy foodstuffs” in South Africa.

Further to the above, R3337 also proposes the introduction of front-of-pack warning labels in relation to foodstuffs that contain artificial sweeteners.²⁰⁶ As discussed later in this study, concerns regarding the potential long-term health implications of the regular intake of non-sugar sweeteners (which include artificial sweeteners) have been raised by

²⁰² Frank *et al* 2024 *Public Health Nutrition* 1.

²⁰³ Foodstuffs labelling and advertising form part of the consumers’ food environment. For a discussion on the meaning of the term “food environment”, see part 3.2.2.1 below.

²⁰⁴ Draft reg 52(1)(b)(i)(bb) of R3337.

²⁰⁵ Draft reg 52(1)(h) of R3337.

²⁰⁶ See the discussion in part 4.4.6 below.

the WHO²⁰⁷ and a number of scholars²⁰⁸ in recent years. As such, the WHO²⁰⁹ has recommended that non-sugar sweeteners should not be used to reduce the risk of NCDs.

Against this background, for the purposes of this study, the term “unhealthy foodstuffs” refers to foodstuffs that are high in one or more of the following unhealthy nutrients: fat, sugar or salt (i.e., HFSS foods), as well as foodstuffs that contain artificial sweeteners in any amount.

1.8.3 Label/labelling

In terms of the *FCDA*, a “label”, in relation to foodstuffs, is defined as:

any brand or mark or any written, pictorial or other descriptive matter appearing on or attached to or packed with any foodstuff ... or its package, and referring to such foodstuff ...; and, when used as a verb, means to brand or mark or to attach or to provide in any other manner with, any written, pictorial or other descriptive matter.

In the abovementioned definition, the reference to “any written, pictorial or other descriptive matter” is important. That phrase confirms that images and wording on or affixed to a food conveying information about a product's nature, composition and quality forms part of food labelling.

Food labels form part of the overall product packaging (or get-up),²¹⁰ and serve as a means of communication between the foodstuffs’ manufacturer and the purchasing public.²¹¹ The elements appearing on food labels influence consumers at the point of sale and subsequently when they consume the relevant product.²¹² As such, food labels are a powerful marketing tool which assists with the sale of the relevant food product.²¹³

²⁰⁷ See WHO *Use of Non-Sugar Sweeteners: WHO Guideline* and Rios-Leyvraz and Montez 2022 *Health Effects of the Use of Non-Sugar Sweeteners* 48.

²⁰⁸ See, for example, Aguayo-Guerrero *et al* 2024 *Life* 9; Zhang, Tang and Li 2024 *PLoS ONE* 10; Swithers 2015 *Appetite* 86-87; Debras *et al* 2022 *BMJ* 1-2; Grimm “Information-Domination in the European Food Industry” 18-22.

²⁰⁹ WHO *Use of Non-Sugar Sweeteners: WHO Guideline* viii.

²¹⁰ The term “get-up” is generally used to describe the appearance of a product label in trade mark law. See the discussion in parts 2.5.2 and 5.3.4.3.

²¹¹ Bosman *et al* 2014 *British Food Journal* 31.

²¹² Khan, Frank and Swart 2023 *Public Health Nutrition* 2140.

²¹³ FAO *Handbook on Food Labelling to Protect Consumers* 2; Khan, Frank and Swart 2023 *Public Health Nutrition* 2140. Also see Van Heerden “The Regulation of Marketing Under the CPA” paras 1-2.

Considering the ever-expanding range of food options, consumers require certain information to enable them to make informed choices during food selection.²¹⁴ At a minimum, the required information usually includes the product type, brand name, net quantity and price. Food labels assist consumers in ascertaining information about the product, including its nature, composition, nutritional quality and preparation instructions.²¹⁵ The information on a food label therefore assists consumers in making an informed food selection decision.²¹⁶ Food selection in turn impacts on consumer health.²¹⁷ On this basis the FAO²¹⁸ has pointed out that food labels are vehicles that serve to advise consumers on the relationship between a specific foodstuff and health.

Certain consumers pay more attention to details on a food label than others.²¹⁹ In addition, the information required will also vary from one person to another, and may be based on a number of individual personal criteria such as food allergies, dietary requirements or food preferences.²²⁰ In applying the relevant labelling laws, foodstuffs manufacturers often tend to be “economical” with the truth. Short and punchy product descriptions are frequently used to describe processed or ultra-processed foods in terms that are familiar to the consumer, often placing less prominence on aspects such as the ingredients and production method.²²¹ As discussed later in this study, the fact that the nutritional quality of such foodstuffs is not apparent and immediately clear during food selection affects the consumer’s ability to make an informed choice regarding their diet which, in turn, impacts on their health. In this regard Khan, Frank and Swart²²² point out that:

[a]part from regulated nutritional information, marketers control most of the information on food packages and [front-of-pack] features and have the potential to influence a large proportion of consumers’ food choices and therefore affect the health of a population.

²¹⁴ FAO 2022 <https://www.fao.org/fao-who-codexalimentarius/thematic-areas/nutrition-labelling/pt/>.

²¹⁵ FAO *Handbook on Food Labelling to Protect Consumers* vii; Koen, Blaauw and Wentzel-Viljoen 2016 *S Afr J Clin Nutr* 13; Todd *et al* 2022 *Nutrients* 2.

²¹⁶ Koen, Blaauw and Wentzel-Viljoen 2016 *S Afr J Clin Nutr* 13.

²¹⁷ Bosman *et al* 2014 *British Food Journal* 31. Also see Todd *et al* 2022 *Nutrients* 2.

²¹⁸ FAO *Handbook on Food Labelling to Protect Consumers* vii.

²¹⁹ Koen, Blaauw and Wentzel-Viljoen 2016 *S Afr J Clin Nutr* 16.

²²⁰ Food Standards Agency of the United Kingdom (hereafter “UK”) *Review of the Use of the Terms Fresh, Pure, Natural, etc in Food Labelling* 4.

²²¹ Food Standards Agency of the UK *Review of the Use of the Terms Fresh, Pure, Natural, etc in Food Labelling* 11.

²²² Khan, Frank and Swart 2023 *Public Health Nutrition* 2140.

When the foodstuffs producer holds back on disclosing key information regarding the nutritional qualities of its food product this is known as information asymmetry. The increase and prevalence of diet-related NCDs necessitates that this asymmetry be corrected to assist consumers to make informed decisions about their diet and ultimately their health.²²³

1.8.4 Advertise / advertising

The terms “advertisement” or “advertise”, in relation to foodstuffs, is defined in the *FCDA* as:

...any written, pictorial, visual or other descriptive matter or verbal statement, communication, representation or reference-

- (a) appearing in a newspaper or other publication; or
- (b) distributed to members of the public; or
- (c) brought to the notice of members of the public in any manner,

and which is intended to promote the sale or encourage the use of such foodstuff.²²⁴

A food label usually consists of a combination of written, pictorial or visual elements, and is brought to the attention of consumers at the point of sale. By virtue of the fact that the label contains information on the product, such as the product type, brand name and price, the label is inevitably intended, at least indirectly, to promote the sale or encourage the use of the relevant product to which it is applied. In this context a product's label would therefore also fall within the definition of an advertisement. In this study and unless indicated otherwise a food label will be deemed part of foodstuffs advertising.

A food product is presented to the consumer via labelling and advertising. Foodstuffs labelling and advertising therefore form part of food manufacturers' commercial activities. Foodstuffs labelling and advertising significantly impacts on consumer choice and purchase decisions, as well as brand loyalty, amongst members of the public.²²⁵ Those

²²³ *FAO Handbook on Food Labelling to Protect Consumers* 1.

²²⁴ Section 1 of the *FCDA*.

²²⁵ Mupangavanhu and Kerchhoff 2021 *SA Merc LJ* 261; Pereira-Kotze, Doherty and Swart 2020 *BMJ Global Health* 2. Also see *FAO Handbook on Food Labelling to Protect Consumers* 1.

marketing activities are essential to attracting and retaining customers to a specific food product brand.²²⁶

Following the above, advertising and labelling fall within the broader concept of marketing.²²⁷ Mupangavanhu and Kerchhoff²²⁸ point out that the word “marketing” generally refers to the activities of a company that are associated with the buying and selling of goods or services, or the process of creating awareness of a business’s goods or services amongst consumers. Marketing is therefore a wide concept which includes the advertising, selling and delivery of goods or services to members of the public. In the context of foodstuffs marketing, the word “marketing” is defined by the WHO²²⁹ as:

[a]ny form of commercial communication, message or action that acts to advertise or otherwise promote a product or service, or its related brand, and is designed to increase, or has the effect of increasing, the recognition, appeal and/or consumption of products or services.

Advertising and labelling would also amount to the promotion of foodstuffs. Although the word “promote” is not defined in the *FCDA* or *APSA*, guidance can be found in the *CPA*. Subject to certain exceptions,²³⁰ the *CPA* applies to the promotion of any goods and services in South Africa.²³¹ The word “promote” is defined broadly in the *CPA*,²³² and includes virtually all activities aimed at inducing a consumer to purchase a specific product (or use a specific service), including the advertising of the product or business.²³³ It

²²⁶ Other tools that also serve to retain consumers in the foodstuffs industry include offering goods in smaller quantities to make them affordable to those who have less to spend; enhancing overall shopping experiences in foodstuffs retail outlets; and offering loyalty programmes. See KPMG *Sector Report Fast-Moving Consumer Goods in Africa* 5.

²²⁷ WHO *Policies to Protect Children From the Harmful Impact of Food Marketing* 1-2; Under the *CPA*, advertising (which includes product labelling) would also fall within the broad concept of marketing. See Van Heerden “The Regulation of Marketing Under the *CPA*” paras 1-2.

²²⁸ Mupangavanhu and Kerchhoff 2021 *SA Merc LJ* 264.

²²⁹ WHO *Policies to Protect Children From the Harmful Impact of Food Marketing* vii.

²³⁰ See the discussion in part 2.5.3 below.

²³¹ In addition, and subject to permitted exclusions, the *CPA* also applies to every transaction occurring within the borders of South Africa. See s 5(1)(a) and (b) of the *CPA*.

²³² In terms of s 1 of the *CPA*, the word “promote” means “to (a) advertise, display or offer to supply any goods or services in the ordinary course of business, to all or part of the public for consideration; (b) make any representation in the ordinary course of business that could reasonably be inferred as expressing a willingness to supply any goods or services for consideration; or (c) engage in any other conduct in the ordinary course of business that may reasonably be construed to be an inducement or attempted inducement to a person to engage in a transaction”.

²³³ Mupangavanhu and Kerchhoff 2021 *SA Merc LJ* 264.

follows therefore that the advertising²³⁴ of foodstuffs in the ordinary course of trade in South Africa would qualify as promoting those goods in terms of the *CPA*. As discussed in Chapter 2,²³⁵ the *CPA* also contains provisions, albeit of limited scope, relating to the labelling and advertising of foodstuffs.

The advertising of foodstuffs in South Africa is widespread.²³⁶ Advertising forms part of everyday life in various settings, including homes, schools, shopping malls and retail outlets, in cinemas, and at sporting events.²³⁷ Foodstuffs advertising also spans across various platforms, including print, television, radio, outdoor advertising and online media.²³⁸ Consumers are “constantly bombarded” with advertising, particularly in the current digital age.²³⁹ Whilst the traditional forms of advertising remain relevant in the foodstuffs sector,²⁴⁰ there has been an increase in digital advertising.²⁴¹ This occurrence was exacerbated by the COVID-19 pandemic, which necessitated many businesses to move the sale of goods to online platforms.²⁴² Most businesses have an online presence, and more than half of global advertising spend is on digital and online platforms.²⁴³ In addition, advertising through social media platforms like Meta (previously Facebook), TikTok, Instagram and even YouTube has also become a common means of engaging with consumers.²⁴⁴

²³⁴ The term “advertisement” is defined very broadly in the *CPA*, and “means any direct or indirect visual or oral communication transmitted by any medium, or any representation or reference written, inscribed, recorded, encoded upon or embedded within any medium, by means of which a person seeks to (a) bring to the attention of all or part of the public the existence or identity of a supplier; or the existence, nature, availability, properties, advantages or uses of any goods or services that are available for supply, or the conditions on, or prices at, which any goods or services are available for supply; (b) promote the supply of any goods or services; or (c) promote any cause”. See s 1 of the *CPA*.

²³⁵ See parts 2.4.4.3 and 2.5.3 below.

²³⁶ Igumbor *et al* 2012 *PLoS Med* 5.

²³⁷ Schmitt, Wagner and Kirch 2007 *Journal of Public Health* 58; Reddy *TSAR* 445.

²³⁸ Reddy *TSAR* 445.

²³⁹ Mupangavanhu and Kerchhoff 2021 *SA Merc LJ* 261.

²⁴⁰ For examples of food advertising in various media, see the discussion on foodstuffs advertising complaints filed with the ARB in Chapter 6.

²⁴¹ Pereira-Kotze, Doherty and Swart 2020 *BMJ Global Health* 1.

²⁴² Mupangavanhu and Kerchhoff 2023 *De Jure* 87, 89.

²⁴³ ICAS *Global Factbook* 23.

²⁴⁴ Mupangavanhu and Kerchhoff 2023 *De Jure* 86-87. Based on current trends, it is estimated that by 2029 nearly half of the advertising spend will be directed towards digital advertising. See Statista 2024 <https://www.statista.com/outlook/amo/advertising/south-africa>.

Foodstuffs manufacturers and retailers spend large amounts on advertising. It has been reported²⁴⁵ that during the period from January to June 2023 more than R5 billion was spent in the retail category. The top five South African advertisers during that period, namely Shoprite Checkers, KFC, Food Lover's Market, Spar and Debonairs, all operate in the food industry. In *Pioneer Foods (Pty) Limited v Bothaville Milling (Pty) Limited*²⁴⁶ (hereafter "*Pioneer Foods* case") the following advice on sales and advertising was noted by the court regarding the appellant's WHITE STAR maize meal:

by that date [2001] Pioneer's sales of WHITE STAR [maize meal] were well on track towards an annual tonnage of nearly 200 000 tons. Its marketing expenditure was nearly R7 million, with over R10 million having been spent on marketing from the time of its launch. Advertising on the radio, a major means of communication with the Black community for whom maize meal is part of their staple diet, was extensive, totalling 37 advertising spots a week on five different channels.²⁴⁷

More recently, in *Shoprite Checkers (Pty) Ltd v Pick 'n Pay Retailers (Pty) Ltd*²⁴⁸ (hereafter "*Checkers v P'nP*"), the applicant submitted that close to R60 million had been invested in advertising expenditure for its FORAGE AND FEAST food product range extending to 34 food product categories.²⁴⁹ In an advertising dispute with a trade competitor in 2022, Nando's, a popular dining chain specialising in flame-grilled chicken, submitted the following to substantiate its brand's reputation and goodwill²⁵⁰ in South Africa:

the Nando's brand was established in 1987, and has since been reinforced through, inter alia, extensive advertising spend and a unique advertising style, typically exploiting topical events when promoting its products. It provided a brief breakdown of the extent of its brand activities, noting, inter alia, that between 2005 and 2022, more than R1 billion had been spent on advertising, and more than R25 Billion in sales have been achieved.²⁵¹

²⁴⁵ See MarksLive.com 2023 <https://www.marklives.com/article/42882-adtracker-h1-2023-sas-top-advertising-spenders-retail-deep-dive>. The report reveals that the information was obtained from Nielsen and that the digital advertising spend is not included (due to difficulties tracking that information).

²⁴⁶ *Pioneer Foods (Pty) Limited v Bothaville Milling (Pty) Limited* 2014 JDR 0477 (SCA).

²⁴⁷ *Pioneer Foods* case para 9.

²⁴⁸ *Shoprite Checkers (Pty) Ltd v Pick 'n Pay Retailers (Pty) Ltd* 2023 JOL 62027 (WCC).

²⁴⁹ *Checkers v P'nP* paras 3, 4.

²⁵⁰ See the discussion in part 2.5.2.2 for the meaning of "reputation" and "goodwill", which are trade mark law terms.

²⁵¹ *Pedros / Nando's / 2307* (ARB Directorate ruling of 8 November 2022) 2.

Foodstuffs advertising is, therefore, undoubtedly part of the overall business operations of businesses in the food sector and, consequently, impacts on revenue.

1.8.5 The meaning of "consumer" in the context of foodstuffs labelling and advertising

When considering who the consumer is in the context of foodstuffs advertising and labelling in general, the *CPA* serves as a logical starting point.²⁵² In terms of the *CPA*, a "consumer" includes "a person to whom those particular goods or services are marketed in the ordinary course of the supplier's business".²⁵³ The definition of "goods" includes anything marketed for human consumption,²⁵⁴ which would extend to consumable goods such as foodstuffs. Members of the public to whom foodstuffs are marketed. i.e., at whom foodstuffs labelling and advertising is directed in-store, online or otherwise, would accordingly qualify as consumers in terms of the *CPA*.

When considering the target market in the context of foodstuffs advertising and labelling, it is relevant to remember that food is a basic necessity consumed by all members of society. In these circumstances, people of almost all ages assist in food selection and are exposed to foodstuffs advertising and labelling.²⁵⁵ Children also play an active role in food choices within a family, and also purchase food independently during their school-going years.²⁵⁶ In *RCL Group Services v Maspark Sales and Marketing (Pty) Ltd*,²⁵⁷ (hereafter "*RCL v Maspark*") the High Court noted that, when considering the relevant sector of the public in relation to biscuits and chocolates, these foodstuffs are consumed by a large cross-section of consumers, including children.²⁵⁸ In *Kraft Foods Inc v All Joy Foods (Pty)*

²⁵² Neither the *FCDA*, the *APSA* nor the *TM Act* contains a definition of "consumer".

²⁵³ The definition of a "consumer" also includes (i) a person who has entered into a transaction with a supplier in the ordinary course of that supplier's business, unless such transaction is exempt from the *CPA*; (ii) where relevant, a user of particular goods or a recipient or beneficiary of particular services, irrespective of whether that user, recipient or beneficiary was a party to a transaction concerning the supply of those particular goods or services; and (iii) a franchisee in terms of a franchise agreement, to the extent applicable. See s 1 of the *CPA*.

²⁵⁴ See s 1 of the *CPA*.

²⁵⁵ Newborn babies would obviously be the exception.

²⁵⁶ Children may have good knowledge of food brands and will often be able to identify advertised products in supermarkets or other food retail outlets. See WHO *Food Marketing Exposure* 13.

²⁵⁷ 2022 JDR 2381 (GJ).

²⁵⁸ *RCL v Maspark* paras 32, 35.

*Ltd*²⁵⁹ the High Court also observed that salad cream was a product used “by all sections of the South African community”.²⁶⁰ In *Pepsico Inc v Atlantic Industries*²⁶¹ the SCA noted:

one must remember that the universe of consumers for carbonated soft drinks is large: it includes persons of all ages, the rich and the poor; the sophisticated and unsophisticated.²⁶²

In commenting on who would qualify as the average consumer of maize meal in South Africa, as well as the duration of the purchase decisions relating to that staple food product, the SCA noted in the *Pioneer Foods* case that:

[t]he average customer is to be taken as someone of average intelligence, eyesight, observation and recollection...

In the case of a product such as this, falling in the category of fast moving consumer goods, the matter is largely one of first impression rather than lengthy examination, as customers buying such staple items will ordinarily be looking for their 'usual' brand as part of routine domestic shopping.²⁶³

Against this background, it is clear that the spectrum is very broad when considering the consumer in relation to foodstuffs advertising and labelling. It spans virtually all ages, and extends from the illiterate, possibly unsophisticated and poor individual on the one hand to the most educated, affluent and sophisticated individuals on the other.

1.8.6 Considering the meaning of “food law” in South Africa

Food law has developed over time²⁶⁴ and is currently deemed to be a relatively new, independent field of law.²⁶⁵ Because food is a consumer product that provides

²⁵⁹ *Kraft Foods Inc v All Joy Foods (Pty) Ltd* 1999 BIP 122 (T) (hereafter “*MAGIC WHIP* case”)

²⁶⁰ *MAGIC WHIP* case para 132.

²⁶¹ *Pepsico Inc v Atlantic Industries* [2017] JOL 38846 (SCA). See case discussion in part 5.3.4.1.

²⁶² *Pepsico Inc v Atlantic Industries* para 30. See further *Pioneer Foods* case para 24.

²⁶³ *Pioneer Foods* case para 14. Also see *Sea Harvest Corporation (Pty) Limited v Irvin & Johnson Limited* [2019] HIPR 93 (WCC) (hereafter “*Sea Harvest v I&J*”) paras 41-42, which relates to prepackaged frozen fish. The High Court noted that a consumer will spend a short period of time considering specific elements on the packaging of that generally available foodstuffs commodity.

²⁶⁴ For a discussion of the history of food law which dates back at least to as far as Ancient Greece and Roman times, and during the Middle Ages, see Hutt 2005 *Journal of Food Law & Policy* 1, 3-4, 8-10; Grimm “Information-Domination in the European Food Industry” 7-9.

²⁶⁵ Ofodile “Food Law and Policy in Africa” 1002; Van der Meulen and Wernaart “Food Law and Regulatory Affairs” 28. Various universities and tertiary institutions worldwide offer courses or post-graduate degrees in food law. The University of South Africa offers a post-graduate short course in the Agricultural and Food Law of South Africa. See University of South Africa date unknown

sustenance,²⁶⁶ the overreaching purpose of food law is to protect consumers from harm that may result from food consumption.²⁶⁷ Given that the overreaching aim of food law is to protect consumers, food law can be seen as a sub-category of consumer protection law.²⁶⁸ As an extension of protecting consumer lives and health, food law also aims to promote the right of consumers to make informed food choices. In this regard provisions prohibiting false or misleading food information,²⁶⁹ which would include details of the nutritional value or quality²⁷⁰ of a food product, are integral to food law.²⁷¹

According to the FAO,²⁷² a narrow or broad understanding of the term “food law” can potentially be adopted. In the narrow sense, food law would include only national laws²⁷³ that directly apply to food in general or specific types of food in the context of food control,²⁷⁴ food safety²⁷⁵ and the trade in food. South African laws that would be relevant

https://w2.unisa.ac.za/CW/SITES/CORPORAT/DEFAULT/APPLY_FO/SHORT_LE/PROGRAMM/ALL_PROG/COURS-20.HTM.

²⁶⁶ Hutt 2005 *Journal of Food Law & Policy* 2.

²⁶⁷ Van der Meulen and Wernaart “Food Law and Regulatory Affairs” 29, 31; See FAO and WHO *Assuring Food Safety and Quality* 3, 6. Also see Grimm “Information-Domination in the European Food Industry” 3-7.

²⁶⁸ Grimm “Information-Domination in the European Food Industry” 4.

²⁶⁹ By selling a food product bearing a misleading claim, the manufacturer is deceiving members of the public and, depending on the nature of the misleading claim, may potentially be endangering public health and safety. In addition, such a manufacturer is competing unlawfully with trade competitors. See FAO *Handbook on Food Labelling to Protect Consumers* 1. Also see part 2.4.8.3 on the relevant provisions under the *FCD*, *APSA*, and *CPA* that deal with misleading claims. Part 6.3.4 sets out a discussion of the misleading provisions of the *ARB Code* and a discussion of ARB rulings relating to misleading claims in foodstuffs advertising and labelling.

²⁷⁰ In the context of food, the word “quality” (or “food quality”) refers to the attributes that impact or influence the value that a consumer attaches to a specific food product. Attributes can be either positive (such as colour, texture, taste, origin or mode of production) or negative (such as spoilage, contamination, discolouration or bad odour). Attributes may also be internal (such as the nutritional value or safety of a product) or external (such as the size, colour and aspects of the product’s appearance). See FAO and WHO *Assuring Food Safety and Quality* 3; FAO *Strengthening Sector Policies for Better Food Security and Nutrition Results* 14.

²⁷¹ Van der Meulen and Wernaart “Food Law and Regulatory Affairs” 29-30. Also see the discussion in part 3.2.2.2.

²⁷² FAO *Perspectives and Guidelines on Food Legislation* 13.

²⁷³ Based on the narrow interpretation, international laws would be relevant only to the extent that they apply to food imports and exports. See FAO *Perspectives and Guidelines on Food Legislation* 13.

²⁷⁴ Food control refers to “a mandatory regulatory activity of enforcement” by government authorities to provide consumer protection and ensure that all foods in a country are (i) safe, wholesome and fit for human consumption, (ii) conform to safety and quality requirements; and (iii) are honestly and accurately labelled in accordance with the law. Food control measures are adopted throughout the entire food-supply chain running from production, handling, storage, processing, and ultimate distribution to the end-consumer. See FAO and WHO *Assuring Food Safety and Quality* 3.

²⁷⁵ In essence, food safety refers to all hazards that may make food injurious to public health. See FAO and WHO *Assuring Food Safety and Quality* 3. Although an in-depth discussion of food safety and

in this regard include the *FCDA*,²⁷⁶ the *APSA*²⁷⁷ and the *CPA*.²⁷⁸ As trade marks serve to distinguish different food brands from one another in the course of trade, the *TM Act* and the provisions under the common law that are relevant to unregistered trade marks would potentially also fall within this narrow interpretation.²⁷⁹

Turning to a broader interpretation of “food law”, this would include the abovementioned laws and regulations, as well as all additional areas of the law that complement or support the entire food chain, from production throughout processing to purchase and consumption by the end consumer (the so-called farm-to-table principle).²⁸⁰ In line with the broader meaning of the concept, the FAO²⁸¹ takes the view that:

‘food law’ applies to *legislation* which regulates the production, trade and handling of food and hence covers the regulation of food control, food safety, quality and relevant aspects of food trade across the entire food chain, from the provision for animal feed to the consumer.²⁸²

food-borne diseases falls outside the scope of this study, part 5.2.4 sets out brief comments on the listeriosis outbreak in South Africa that occurred in 2018. For additional reading, see FAO *Strengthening Sector Policies for Better Food Security and Nutrition Results* 1-15.

²⁷⁶ The Preamble of the *FCDA* affirms that this Act controls the sale and manufacture, as well as imports and exports of foodstuffs and matters that are connected to those activities, in South Africa.

²⁷⁷ The Preamble of the *APSA* affirms that this Act provides “for control over the sale and export of certain agricultural products, control over the sale of certain imported agricultural products; and control over other related products; and for matters connected therewith”. As discussed in part 2.5.1, foodstuffs which have a vegetable or animal origin qualify as agricultural products in terms of the *APSA*.

²⁷⁸ In South Africa food product recalls are issued in terms of the *CPA*. The National Consumer Commission conducts investigations to monitor food safety, as well as excessive food price increases. For a further discussion, see part 5.2.4.

²⁷⁹ See the discussion in part 2.5.2. Laws that regulate labelling and advertising also ensure fair competition between competitors in the trade. See FAO *Handbook on Food Labelling to Protect Consumers* 1.

²⁸⁰ The term “farm-to-table” includes all of the steps that are involved in the food production of any supply chain, from the manufacture to the storage, handling, preparation and eventually the distribution of foodstuffs. See FAO and WHO *Assuring Food Safety and Quality Guidelines for Strengthening National Food Control Systems* 20.

²⁸¹ FAO date unknown <https://www.fao.org/food-safety/food-control-systems/policy-and-legal-frameworks/food-laws-and-regulations/en/#:~:text=The%20term%20%E2%80%9Cfood%20law%E2%80%9D%20applies,animal%20feed%20to%20the%20consumer.>

²⁸² Own emphasis added. The broad interpretation of “food law” is also recognised in the EU. In the EU “food law” refers to “the laws, regulations and administrative provisions governing food in general, and food safety in particular, whether at [European] Community or national level; it covers any stage of the production, processing and distribution of food, and also of feed produced for, or fed to, food-producing animals”. See Art 3(1) of *EC Regulation No 178/2002 of the European Parliament and of the Council of 28 January 2002 Laying Down the General Principles and Requirements of Food Law, Establishing the European Food Safety Authority and Laying Down Procedures in Matters of Food Safety*.

A broader interpretation of food law takes cognisance of various areas or fields of law that should be regulated to ensure that food production, handling and trade are done in a safe manner. In essence, all aspects or elements of law that form part of the entire food system would then fall within the concept of food law. Willet *et al*²⁸³ define the term “food system” as “[a]ll elements and activities that relate to production, processing, distribution, preparation, and consumption of food”. This term has a wide scope and would include all people, the environment, processes, inputs, infrastructures and institutions that are involved in the food system in one way or another.²⁸⁴

In the South African context the adoption of a broad definition of “food law” is supported, particularly as the laws that inform food law do not all fall within the authority and mandate of a single national department of government.²⁸⁵ That being said, the abovementioned definition adopted by the FOA requires certain adjustments to align it with the South African legal system. As an immediate observation, the FAO definition refers to “legislation” only. This is rather restrictive in itself. In this regard Hutt²⁸⁶ points out:

[m]any erroneously assume that food law is limited to the governmental laws and regulations governing the marketing of food within a particular jurisdiction... A true understanding of food law and policy, however, extends far beyond these narrow confines. It includes, for example, issues relating to the ownership of agricultural property, the water rights needed to sustain agriculture, tax incentives to preserve family farms, agricultural research and education, governmental economic programs to prevent agricultural surplus and to stabilize [sic] agricultural prices, food distribution, programs for school children and the poor, programs designed to provide nutrition education and now to prevent obesity, and a host of other policies that impinge on food and agriculture.

In addition to legislation, other forms of law that are recognised in South Africa include the common law²⁸⁷ and customary law,²⁸⁸ which contain provisions and principles that are

²⁸³ Willet *et al* 2019 *Lancet* 450.

²⁸⁴ Willet *et al* 2019 *Lancet* 452.

²⁸⁵ Relevant government departments include the DOH, the DOA and the DTIC. See discussion in part 2.3 below.

²⁸⁶ Hutt 2005 *Journal of Food Law & Policy* 2-3.

²⁸⁷ Of specific relevance to this study is the common law protection afforded to the proprietors of unregistered trade marks. See the discussion in part 2.5.2. Unlike legislation, common law is an uncodified part of the law which is developed by the courts. For additional reading, see Mupangavanhu 2015 *De Jure* 118.

²⁸⁸ Section 39(3) of the Constitution acknowledges that, in addition to legislation, rights and freedoms may also be recognised or conferred by common law and customary law to the extent that those laws

relevant to food. In addition, the ARB's operations, including its advertising complaints resolution mechanism, are predominantly underpinned by a contractual commitment by businesses with the advertising industry.²⁸⁹ The discussion in Chapter 6 demonstrates to what extent advertising self-regulation also forms a piece of the South African food law puzzle, specifically in the context of restricting the labelling and advertising of unhealthy foodstuffs.²⁹⁰

The FAO²⁹¹ highlights that, where a broad definition of food law is adopted, branches of the law that would be relevant include (but are not limited to):

- food safety laws, which would include the *FCDA*, *APSA* and *CPA*.²⁹² Food labelling (which is a form of advertising)²⁹³ provides critical information on the product to which it is applied, attached or otherwise used. This would include details such as the

are consistent with the Bill of Rights (the constitutional rights contained in chapter 2 of the *Constitution* are known as the Bill of Rights). The customary law branch of South African law is historically unwritten and transmitted orally. However, certain aspects of customary law or indigenous knowledge have in recent years been recorded in legislation, textbooks and case law. For example, the Preamble of the *Intellectual Property Laws Amendment Act 28 of 2013* (which is yet to be proclaimed into effect) recognises that certain forms of indigenous knowledge may form the basis of intellectual property rights that warrant protection. For additional reading on customary law in South Africa, see Rautenbach 2019 *PER* 1-11. In the context of food law, indigenous knowledge norms and principles carried over in African culture may be relevant to agricultural production, harvesting or cultural aspects surrounding foodstuffs preparation or consumption. Those customary law provisions would, at least conceivably, fall within the broader food law framework. See Ofodile "Food Law and Policy in Africa" 1004-1005, 1037-1045. The South African restaurant chain Chesanyama warrants mention as an example of how customary aspects and culture are relevant to the commercial food trade. Chesanyama (which is also spelled shisha nyama) means "burnt meat" in the Zulu language. This restaurant chain prides itself on being traditionally South African. Its official website explains that the aim of establishing this restaurant was "to fuse the idea of a traditional South African braai with the township shisha nyama, which is a gathering of friends and family to braai meat at nearby shopping centres [sic]". It goes on to explain that South Africans may all agree that braaiing [a braai is similar to a barbeque] is "an affordable and satisfying cultural phenomenon" to consumers in this country. See Chesanyama date unknown <https://www.chesanyama.co.za/about-us/>.

²⁸⁹ See part 6.2.2. The law of contract in South Africa also has a common law basis. See Mupangavanhu 2015 *De Jure* 117-119.

²⁹⁰ *Appendix J* of the *ARB Code* sets out restrictions on the advertising of food and beverage products that do not represent healthy dietary choices and a healthy lifestyle. See discussion in part 6.6.1. The discussion throughout Chapter 6 also demonstrates that many consumer complaints and competitor complaints relating specifically to foodstuffs advertising or labelling are filed with the ARB.

²⁹¹ FAO *Perspectives and Guidelines on Food Legislation* 13. Also see Hutt 2005 *Journal of Food Law & Policy* 3.

²⁹² The *National Health Act* 61 of 2003 would also be relevant. See parts 3.2 and 5.2.1 below.

²⁹³ See the discussion in part 1.8.4 above.

ingredients, possible allergens and the product's shelf-life. As such, food advertising and labelling provisions are relevant in the context of food safety laws;

- consumer protection laws, notably the *CPA* in South Africa;
- fraud deterrence laws, which would include the provisions under the *FCDA*, *APSA* and *CPA* that prohibit false and misleading trade descriptions or claims in relation to foodstuffs. Related legislation would include the *Counterfeit Goods Act* 37 of 1997, which sets out both civil and criminal sanctions for dealing in counterfeit goods that are the subject of counterfeiting;²⁹⁴
- laws on weights and measures. In South Africa this would include the *Legal Metrology Act* 9 of 2014, the *Measurement Units and Measurement Standards Act* 18 of 2006, and the *Standards Act* 8 of 2008. These Acts are discussed briefly in Chapter 2.²⁹⁵ In addition, relevant standards issued by the South African Bureau of Standards would also apply;²⁹⁶
- customs laws, and import and export rules, including the *Customs and Excise Act* 91 of 1964 and the *Rates and Monetary Amounts and Amendment of Revenue Laws Act* 14 of 2007;²⁹⁷
- meat inspection laws, such as the *Meat Safety Act* 40 of 2000;
- fish products inspection rules, where the *National Regulator for Compulsory Specifications Act* 5 of 2005 would be relevant;²⁹⁸ and

²⁹⁴ See ss 2(2), 7(2), 9(2) and 10 of the *Counterfeit Goods Act* 37 of 1997. Counterfeit goods fall outside the scope of this study. For additional reading on this topic, see Webster, Morley and Joubert *SA Law of Trade Marks* paras 17.1-17.20.

²⁹⁵ See parts 2.3.3 and 2.5.4.

²⁹⁶ See part 2.5.4.

²⁹⁷ See, for example, the reference to the health promotion levy on SSBs in part 1.6 above.

²⁹⁸ See the discussion in part 5.2.3.

- laws controlling fertilizers and animal feeds, and laws on pesticide and veterinary drug residues such as the *Fertilizers, Farm Feeds, Agricultural Remedies and Stock Remedies Act* 36 of 1947.²⁹⁹

In the South African context, at least two immediate additions to the abovementioned areas of law would be relevant. Firstly, various constitutional provisions are relevant to the food law framework in South Africa.³⁰⁰ This would include the right to have access to sufficient food and water³⁰¹ and children's right to basic nutrition.³⁰² Constitutional rights that are specifically relevant to this study that focus on unhealthy foodstuffs advertising and labelling include the right to an environment (specifically a food environment)³⁰³ which is not harmful to health or well-being;³⁰⁴ the right of access to information (specifically nutritional information);³⁰⁵ the right to freedom of expression, which includes advertising as a form of commercial speech;³⁰⁶ and the property rights of trade mark rights holders.³⁰⁷

Secondly, advertising standards included in the *ARB Code* also form part of the food law framework. Van der Meulen³⁰⁸ notes that food law involves various branches of law (including public law, private law, administrative law and criminal law), and observes this

²⁹⁹ The *Medicines Act* may also be relevant, as it applies to veterinary medicines. See s 1 of the *Medicines Act*.

³⁰⁰ This is supported by Ofidile, who points out that human rights and governance form an integral part of "food law" on the African continent. Related aspects include rights to traditional knowledge, access to land and freedom from eviction, and the right not to be discriminated against. See Ofidile "Food Law and Policy in Africa" 1013.

³⁰¹ See s 27(1)(b) of the *Constitution*. For additional reading on the right to access to sufficient food, see Gildenhuys "Food Law in South Africa: Towards a South African Food Security Framework Act" 1203-1237.

³⁰² See s 28(1)(c) of the *Constitution*. Also s 35(2)(e) of the *Constitution*, which affords everyone who is detained, including every sentenced prisoner, the right to conditions of detention that are consistent with human dignity, including, *inter alia*, nutrition. Comments on food security and food nutrition are included in this study where relevant. However, a comprehensive analysis of these aspects falls outside the scope of this study. See part 3.1.

³⁰³ See part 3.2.2.1 below for a discussion of the meaning of a "food environment".

³⁰⁴ See s 24(a) of the *Constitution*. See part 3.2.2.1.

³⁰⁵ See s 32 of the *Constitution*. See part 3.2.2.2.

³⁰⁶ In terms of s 16(1)(b) of the *Constitution*, everyone has the right to freedom of expression, which includes the freedom to receive and impart information. See parts 3.2.2.2 and 4.7.

³⁰⁷ In terms of s 25(1) of the *Constitution*, no one may be deprived of property except in terms of law of general application, and no law may permit the arbitrary deprivation of property. See part 4.8.

³⁰⁸ Van der Meulen "Food Law" 186. Also see Van der Meulen and Wernaart "Food Law and Regulatory Affairs" 28.

branch of the law “encompasses all rules, regulations, case law and soft law” that is relevant to food.³⁰⁹ This supports the abovementioned submission that food law, at least in the South African context, is wider than government regulation in the form of legislation only, and includes standards and norms that have been put in place by the advertising industry through advertising self-regulation. In addition Van der Meulen³¹⁰ points out that, besides the obvious national dimension to food law in a country, there is also a regional and/or international dimension.³¹¹ As food forms part of the global supply chain³¹² and often travels through various countries or regions,³¹³ this area of law undoubtedly encompasses regional and international components.³¹⁴

As a possible third addition to a broad understanding of “food law”, environmental considerations such as food waste³¹⁵ and the recycling of food packaging³¹⁶ would also conceivably form part of this law field. These environmental aspects are merely mentioned as they fall outside the scope of this study.

Following the above, the working definition of “food law” supplied below is proposed for South Africa:

the legal framework (including but not limited to legislation, regulations, rules, case law, common law, customary law, standards, industry codes and soft law) which regulates or

³⁰⁹ Self-regulation by peers within an industry is seen as a form of soft law. See Boddewyn 1989 *Journal of Advertising* 24. The self-regulatory mechanism of the ARB would, therefore, be seen as soft law.

³¹⁰ Van der Meulen “Food Law” 186.

³¹¹ Ofodile “Food Law and Policy in Africa” 1013. For a discussion on relevant African regional instruments relevant to food trade on this continent, see Ofodile “Food Law and Policy in Africa” 1002-1009.

³¹² FAO *Perspectives and Guidelines on Food Legislation* 4.

³¹³ See the discussion in part 3.4.2.1 on globalisation and food trade.

³¹⁴ See part 2.2 of Chapter 2 for a discussion on the Codex Alimentarius Commission. As discussed in part 6.2.4, the South African *ARB Code*, like most SRO codes worldwide, is based on the International Chamber of Commerce *ICC Advertising and Marketing Communications Code* (2018). This alignment provides an international dimension to advertising self-regulation, and fosters a degree of harmonisation in SRO advertising rules and standards globally.

³¹⁵ The FAO explains that “food waste” refers to food that is appropriate for human consumption, but which has been discarded. While food waste often occurs due to food spoilage; other reasons for this occurrence may include an oversupply of a particular food product due to market conditions or the shopping and eating habits of individual consumers. See FAO *Food Wastage Footprint* 9. For additional reading on food waste habits of consumers in South Africa, see Pal, Naicker and Grobbelaar 2023 *Current Research in Nutrition and Food Science* 1229-1242.

³¹⁶ For additional reading on this topic, see FAO *Appropriate Food Packaging Solutions for Developing Countries* 16, 20, 24. See further Dianelli “Recycling of Food Packaging Materials: An Overview” 294-325.

is related to the production, trade and handling of foodstuffs, or any activities relevant to the food supply chain.

The above definition is wide and intentionally left open-ended to provide for a flexible interpretation.³¹⁷ The definition is worded in a manner that would include the regulation of food control, food safety (which includes foodstuffs labelling and advertising regulation, both in terms of government regulation and industry self-regulation),³¹⁸ food quality and food trade across the entire food chain along the lines of the farm-to-table approach. It also expands beyond the actual point of food consumption to include environmental considerations that may plausibly be relevant to food. The reference to “legal framework” would allow the recognition of regional and international laws or rules that may be relevant in a particular case or circumstance, in addition to national laws. It would also cover both the import and the export of products. In addition, and to align with the *FCDA*, the definition refers to “foodstuffs” instead of “food”.

Following the above, the next chapter sets out the current legal framework, as regulated by the government, that is relevant to the advertising and labelling of foodstuffs in South Africa. It should be highlighted that Chapters 2 to 5 are dedicated to government regulation. Chapter 6, which is dedicated to self-regulation, includes a discussion on the role of the ARB, relevant provisions of the *ARB Code*, and rulings of the ARB that relate to foodstuffs labelling and advertising. Whilst self-regulation forms part of the broader food law framework in South Africa, that aspect is dealt with in a separate chapter in order to ultimately juxtapose and consider the roles of government regulation and self-regulation regarding the advertising and labelling of unhealthy foodstuffs in South Africa.

³¹⁷ Courts, tribunals or other suitable forums would be able to determine the relevance and weight to be attached to any legislation, regulations, rules, case law, common law, standards, industry codes, soft law or the like on an ad hoc basis. In addition, an open-ended definition would reduce the risk of the definition’s becoming outdated with regard to developments in food technology, agricultural production or consumer behaviour, habits and preferences.

³¹⁸ See the discussion earlier in this part.

Chapter 2: An overview of the current legal framework relevant to the advertising and labelling of foodstuffs in South Africa

2.1 Introduction

This chapter sets out an overview of the current legal framework relevant to foodstuffs in South Africa as regulated by government, focusing predominantly on the provisions that are relevant to the labelling and advertising of foodstuffs. The chapter effectively sets out the law as it currently stands, and does not include relevant draft legislation, notably R3337. Chapter 4 discusses and analyses the proposed measures restricting unhealthy foodstuffs advertising and labelling published for public comment in R3337.

At the outset, it should be noted that the legal landscape regulating foodstuffs advertising and labelling is fragmented. In most instances it will consist of a combination of various legislative provisions,³¹⁹ common law provisions³²⁰ and standards³²¹ which are discussed in this chapter.³²² In addition, self-regulation also plays a role.³²³ Relevant provisions of the *ARB Code* are discussed separately in Chapter 6, which is dedicated to self-regulation. It should further be noted that in certain instances these legal aspects can be inter-related³²⁴ or may even overlap.³²⁵

It has been noted that the *FCDA* is the primary legislation that regulates the sale, manufacture, advertising and labelling *inter alia* of foodstuffs in South Africa.³²⁶ As the

³¹⁹ Including the *FCDA*, *APSA*, *TM Act* and *CPA*.

³²⁰ See the discussion on common law user rights in a trade mark or product get-up in part 2.5.2.1 below.

³²¹ For example, South African National Standards developed by the SABS. See the discussion in parts 3.3.3 and 3.5.4 below.

³²² Chapter 5 is dedicated to the monitoring and enforcement of these legislative provisions.

³²³ Chapter 6 includes a discussion on *Appendix J* and other relevant provisions of the *ARB Code*, as well as various ARB rulings relating to foodstuffs advertising and labelling.

³²⁴ For example, certain written or visual elements on a foodstuffs label or in foodstuffs advertising qualify as trade mark matter. As discussed further in this chapter, aspects of trade mark law are, therefore, relevant to the *FCDA*, *APSA* and *CPA*.

³²⁵ As an example, in terms of relevant legislation, making false and misleading claims is prohibited in terms of the *FCDA*, the *APSA* and the *CPA* as discussed further in this chapter. When considering the broader food law framework, the ARB Code also contains provisions that prohibit the making of false and misleading claims in advertising. See part 6.4 below.

³²⁶ The *FCDA* came into operation on 1 January 1973. The *FCDA* repealed the *Food, Drugs and Disinfectants Act* 13 of 1929 (hereafter "the repealed Act"), and regulations issued in terms of the repealed Act were deemed to be issued in terms of the *FCDA*, unless inconsistent with the *FCDA*. See ss 29(1) and 29(2) of the *FCDA*.

name of the Act suggests, in addition to foodstuffs it applies to two other product categories, notably cosmetics³²⁷ and disinfectants.³²⁸ This study focuses on foodstuffs only and, more specifically, foodstuffs that are either locally manufactured for sale in this country or imported for sale in South Africa.³²⁹

This chapter sets out the labelling and advertising requirements for foodstuffs in terms of two current sets of regulations issued under the *FCDA*, notably R146 (dealing with foodstuffs in general) and R991 (dealing with foodstuffs for infants and young children).³³⁰ These regulations cannot, however, be considered in complete isolation. From the discussion in this chapter it will become apparent that the *FCDA* is inter-related with other relevant legal provisions forming part of the food law framework as a whole. Whilst this chapter commences with a discussion of the relevant provisions under the *FCDA* (notably R991 and R146) as the primary legislation applicable to the labelling and advertising of foodstuffs, other relevant regulations under the *FCDA*³³¹ and other legislation, including the *APSA*, the *CPA* and the *TM Act* are also included.

Following the above, part 2.2 below sets out brief comments on the international trade framework within which the South African food law system operates. Part 2.3 introduces the main national government departments and entities that are responsible for food law

³²⁷ In terms of s 1 of the *FCDA*, a “cosmetic” refers to “any article, preparation or substance (except a medicine as defined in the *Medicines Act*) which is intended to be rubbed, poured, sprinkled or sprayed on or otherwise applied to the human body (including the epidermis, hair, teeth, mucous membranes of the oral cavity, lips and external genital organs), for the purposes of cleansing, perfuming, correcting body odours, conditioning, beautifying, protecting, promoting attractiveness or improving or altering the appearance”, in addition to products that would usually be termed make-up such as lipstick, eye shadow and mascara, products such as non-medicated toothpaste, body wash, soap, perfume and hair care products would also qualify as cosmetics in terms of the *FCDA*. See part 1.8.1 for the definition of a “medicine”.

³²⁸ A “disinfectant” is defined in s 1 of the *FCDA* as “any article or substance which is used or applied or intended to be used or applied as a germicide, preservative or antiseptic, or as a deodorant or cleansing material which is not a cosmetic”. Familiar products that fall in this category would include Dettol antiseptic disinfectant and Milton sterilising fluid.

³²⁹ Both domestically produced and imported foodstuffs that are intended for sale in South Africa must comply with the same standards and requirements as far as advertising and labelling is concerned. See DOA 2022 <https://www.dalrrd.gov.za/Branches/Agricultural-Production-Health-Food-Safety/Food-Safety-Quality-Assurance>.

³³⁰ In addition R3337, which has been published as draft regulations under the *FCDA*, is also of particular relevance. Chapter 4 is dedicated to R3337.

³³¹ Such as those relating to the genetic modification of foodstuffs or the fortification of foodstuffs. See parts 2.4.4.2-2.4.4.3 below.

implementation and enforcement in South Africa. This is followed by a discussion on the labelling and advertising requirements under R146 in part 2.4. Part 2.5 demonstrates how certain legal provisions in other legislation tie in or are related to R146, including those under the *APSA*, *CPA* and *TM Act*. Part 2.6 is dedicated specifically to the labelling requirements and advertising restrictions relevant to foodstuffs for infants and young children under R991, given that foods falling under R991 are currently the most strictly regulated in terms of labelling and advertising. Part 2.7 sets out concluding remarks.

2.2 Brief comments on the international framework within which the South African food law system operates

As food forms part of global trade, food is both imported into and exported from this country.³³² In order for South Africa to access and maintain foreign markets with its goods, compliance with international standards and regulations is crucial.³³³ As such, and in line with most countries worldwide,³³⁴ South Africa is a member of the World Trade Organisation (hereafter “WTO”).³³⁵ On this basis, South Africa has agreed to align its national laws with certain minimum requirements that are set out in various international trade agreements.³³⁶ Of relevance to this chapter is the fact that labelling and advertising

³³² See the discussion in part 3.4.

³³³ See NRCS *Annual Report 2008/2009* 8.

³³⁴ The WTO currently has 166 member countries. See WTO 2024 https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm.

³³⁵ South Africa is a signatory to the *Agreement Establishing the World Trade Organization* (1994) (hereafter “*WTO Agreement*”) and has been a WTO member since the establishment of this organisation on 1 January 1995. See World Population Review 2022 <https://worldpopulationreview.com/country-rankings/wto-countries>; Webster, Morley and Joubert *SA Law of Trade Marks* para 1.5. For additional reading, see Blumberg “South African Trade Policy and Regulation in the 1990s” 37-43.

³³⁶ More specifically, the annexures to the *WTO Agreement* that comprise the multilateral trade agreement which all WTO member states, including South Africa, have agreed to abide by. See art XIV:2 of the *WTO Agreement*. Two agreements that are referred to later in this study are the *Agreement on Technical Barriers to Trade* (1994) (hereafter “*TBT Agreement*”) and the *Agreement on Trade-related Aspects of Intellectual Property Rights* (1994) (hereafter “*TRIPS Agreement*”). See part 4.9.2.2. The *TBT Agreement* is one of the multilateral agreements on trade in goods that is listed in Annex 1A to the *WTO Agreement*. The *TRIPS Agreement* forms Annex 1C of the *WTO Agreement*. Also see FAO *Handbook on Food Labelling to Protect Consumers* 6-7.

norms in national foodstuffs legislation are harmonised with international standards as far as possible, whilst also catering for the specific needs of the local market.³³⁷

South Africa is also a member of the UN³³⁸ and its specialised agency, the WHO.³³⁹ The main objective of the WHO is “the attainment by all peoples of the highest possible level of health”.³⁴⁰ In the WHO *Global Action Plan for NCDs*, countries are encouraged to:

[p]romote nutrition labelling, according to but not limited to, international standards, in particular the Codex Alimentarius, for all pre-packaged foods including those for which nutrition or health claims are made.³⁴¹

The Food and Agriculture Organization (hereafter “FAO”) is also an agency within the UN that functions within the area of health³⁴² and, more specifically, health in the context of food and agricultural products, as well as food security.³⁴³ Public health and well-being are discussed further in Chapter 3.

Following the above, both R146³⁴⁴ and R991³⁴⁵ refer to the standards issued by the Codex Alimentarius Commission (hereafter “CAC”), an organisation jointly established by the

³³⁷ See DOA 2022 <https://www.dalrrd.gov.za/Branches/Agricultural-Production-Health-Food-Safety/Food-Safety-Quality-Assurance>. Specific requirements may include aspects such as language requirements. Because factors such as varying language requirements, cultural and religious beliefs and consumer habits differ from country to country, countries have different approaches to food labelling. See Hutt 2005 *Journal of Food Law & Policy* 2,4. See part 2.4.3 below for the official languages in South Africa.

³³⁸ The promotion of health and human rights falls within the operations of the UN and its agencies. See Gostin *et al* 2019 *Lancet* 1869.

³³⁹ The WHO was established in 1948 and was the first agency established by the UN. See Gostin *et al* 2019 *Lancet* 1869.

³⁴⁰ See art 1 of the *Constitution of the World Health Organization* (1948).

³⁴¹ WHO *Global Action Plan for NCDs* 33.

³⁴² Gostin *et al* 2019 *Lancet* 1869.

³⁴³ See FAO 2024 <https://www.fao.org/partnerships/fao-un-system/en/>. A recent example of an FAO publication relating *inter alia* to public health and diet is *FAO et al The State of Food Security and Nutrition in the World 2023*.

³⁴⁴ For example, R146 requires that certain food additives be labelled in accordance with the latest adopted revision of the relevant Codex principles in the *General Codex Standard for the Labelling of Pre-packaged Foods CODEX STAN 1-1985*. For a discussion on the meaning of “food additives”, see part 1.8.2 above.

³⁴⁵ R991 is closely aligned with the Codex standards, and reference to these standards appears throughout the regulations. Under R991 the relevant Codex standards are prescribed for aspects such as the testing and sampling methods for nutrient information analysis; permitted additives, hormone residue, antibiotics, pathogenic micro-organisms and the like; good manufacturing practices and hygiene requirements. See regs 2(6)-2(10) of R991. Some country-specific requirements are, however, also included in R991. For example, provision is made for the official languages of South Africa as listed in reg 3(6)(a).

WHO and the FAO.³⁴⁶ The CAC has been described as “the world government of food”.³⁴⁷ It plays a crucial role in setting international food standards, making recommendations and issuing guidelines. On an international level the CAC has published widely-adopted international food standards, guidelines and recommendations,³⁴⁸ which are collectively known as the *Codex Alimentarius* or Codex standards (hereafter Codex standards).³⁴⁹ The Codex standards relate to various aspects within the food supply chain, including the labelling and presentation of food.³⁵⁰ The Codex standards aim to harmonise food definitions and requirements for the trade in food throughout the world.³⁵¹ Through these efforts the Codex standards range aims to protect the health of consumers worldwide,³⁵² and to ensure that the common practices in international food trade are fair.³⁵³

2.3 An overview of the national government departments that administer and enforce food laws in South Africa

Due to the fragmented nature of the food law framework, various government departments play a role in developing, administering, monitoring and enforcing the food laws in this country. The three most relevant governmental departments are discussed below.

³⁴⁶ The CAC was established in 1963. See CAC 2022 <https://www.fao.org/fao-who-codexalimentarius/about-codex/en>. For additional reading, see Grimm “Information-Domination in the European Food Industry” 22-23.

³⁴⁷ Grimm “Information-Domination in the European Food Industry” 22.

³⁴⁸ See para 3(a) of Annex A to the *Agreement on the Application of Sanitary and Phytosanitary Measures* (1994) (hereafter “*SPS Agreement*”).

³⁴⁹ The term Codex standards is defined as the latest adopted version of the relevant Codex standards as issued by the CAC of the Joint FAO/WHO Food Standards Programme in reg 1 of R991. The same definition is provided for the word “Codex” in reg 1 of R146.

³⁵⁰ Other aspects include food additives, veterinary drug and pesticide residues, contaminants, methods of analysis and sampling, and codes and guidelines of hygienic practice. See para 3(a) of Annex A to the *SPS Agreement*; CAC 2022 <https://www.fao.org/fao-who-codexalimentarius/about-codex/en/>. Also see Van der Meulen “Food Law” 186-187.

³⁵¹ FAO *Perspectives and Guidelines on Food Legislation* 5-7.

³⁵² See CAC 2022 <https://www.fao.org/fao-who-codexalimentarius/about-codex/en/>.

³⁵³ Also see FAO *Handbook on Food Labelling to Protect Consumers* 5-6.

2.3.1 *The Department of Health*

First and foremost, the DOH administers, monitors and enforces compliance with the *FCDA*. More specifically, the Food Control section within the DOH is responsible for developing and administering regulations on food labelling, food safety³⁵⁴ and related aspects.³⁵⁵ The DOH is the primary department within the South African government that is responsible for public health and well-being in South Africa.³⁵⁶ As such, it has been the most active in implementing or proposing measures aimed specifically at addressing the prevalence of NCDs in South Africa and, more specifically to the food industry, the rise in overweight and obesity amongst South African consumers.³⁵⁷

2.3.2 *The Department of Agriculture, Land Reform and Rural Development*

The Department of Agriculture, Land Reform and Rural Development (hereafter DOA) administers and enforces the *APSA*, which contains labelling and advertising provisions in respect of products that are regulated under this Act. As discussed further in this chapter,³⁵⁸ the *APSA* supplements the *FCDA* in respect of these foodstuffs and sets out additional requirements relating *inter alia* to the labelling and advertising of certain agricultural products.³⁵⁹

The DOA sub-directorate Agricultural Product Quality Assurance establishes relevant criteria and norms for agricultural products, including aspects dealing with product labelling and marketing in South Africa.³⁶⁰ The sub-directorate Agricultural Product Quality

³⁵⁴ It is an offence to sell, manufacture or import for sale any foodstuff which is contaminated, impure or decayed, or which is in fact, or deemed to be, harmful or injurious to human health, or which contains or has been treated with a substance not usually present in any such foodstuff when it is in a normal, pure and sound condition. See s 2(1)(b) and further s 2(1)(c) of the *FCDA*.

³⁵⁵ For more information on the Food Control section within the DOH, see DOH 2024 <https://www.health.gov.za/food-control/>.

³⁵⁶ See the discussion in part 3.2 below.

³⁵⁷ See parts 1.2.3 and 1.2.4 above.

³⁵⁸ See parts 2.4.8.3 and 2.5.1 below.

³⁵⁹ For example, under the *APSA* regulations there are requirement that the appropriate class designation of the relevant agricultural food product appear on the product label. See discussion on part 2.4.4.1 below.

³⁶⁰ Other aspects falling within the functions of this sub-directorate include regulating the chemical composition of agricultural products, setting out the packaging requirements of agricultural products, and regulating the microbiological contaminants of agricultural products in the foodstuffs industry. See

Assurance aims, through administering the relevant regulations under the *APSA*, to provide to the consumer products that have a consistent quality, and to ensure that the product has sufficient information at the point of sale to assist consumers to make an informed choice.³⁶¹

2.3.3 *The Department of Trade, Industry and Competition*

The *TM Act*, the *CPA* and certain other legislation mentioned in the discussion below³⁶² fall under the responsibility of the DTIC. Within the DTIC more than a dozen specialised regulatory agencies referred to as council of trade in industry institutions³⁶³ have been set up to support this government department's overall objectives and functioning.³⁶⁴ All of these agencies report to the Minister of Trade, Industry and Competition (hereafter "Minister of Trade").³⁶⁵ The three agencies within the DTIC that are of specific relevance to this study are (i) the Companies and Intellectual Property Commission (hereafter "CIPC"),³⁶⁶ (ii) the National Consumer Commission (hereafter "NCC"),³⁶⁷ and (iii) the National Consumer Tribunal (hereafter "NCT").³⁶⁸

As its name suggests, the operations of the CIPC extend to both company law³⁶⁹ and intellectual property (hereafter "IP") law. From an IP perspective, the objectives of the CIPC include attending to the efficient and effective registration and enforcement of intellectual property rights (hereafter "IPRs") in terms of any relevant legislation, which

DOA 2022 <https://www.dalrrd.gov.za/Branches/Agricultural-Production-Health-Food-Safety/Food-Safety-Quality-Assurance>.

³⁶¹ Visagie 2024 *THRHR* 159; DOA 2022 <https://www.dalrrd.gov.za/Branches/Agricultural-Production-Health-Food-Safety/Food-Safety-Quality-Assurance>.

³⁶² Notably the *Legal Metrology Act* 9 of 2014 (hereafter "*Legal Metrology Act*"); *Measurement Units and Measurement Standards Act* 18 of 2006; *National Regulator for Compulsory Specifications Act* 5 of 2005; and the *Standards Act* 8 of 2008. See The DTIC *Annual Report 2021/2022* 24-27.

³⁶³ The DTIC date unknown <http://www.thedtic.gov.za/agencies/>.

³⁶⁴ For a complete list of these agencies, see DTIC *Annual Report 2021/2022* 29-33.

³⁶⁵ DTIC *Annual Report 2021/2022* 29.

³⁶⁶ The CIPC was established in terms of s 185 of the *Companies Act* 71 of 2008 (hereafter "*Companies Act*") as a juristic person functioning as an organ of state within the public administration.

³⁶⁷ The NCC was established as an organ of state within the public administration in terms of s 85(1) of the *CPA*. The NCC reports to the Minister of Trade, the Public Entity Oversight Unit and the Consumer and Corporate Regulation Branch within the DTIC. See NCC *Annual Performance Plan 2022/2023* 9.

³⁶⁸ The NCT was established as a juristic person and tribunal of record in terms of s 26(1) of the *National Credit Act* 34 of 2005.

³⁶⁹ Company law falls outside the scope of this study.

includes the granting and enforcement of trade mark rights under the *TM Act*.³⁷⁰ The office of the Registrar of Trade Marks falls within the CIPC.³⁷¹ The CIPC provides an online system for filing trade mark applications and maintaining existing trade mark registrations. Details of trade marks that have been filed or registered in terms of the *TM Act* are also accessible to members of the public on the CIPC's website.³⁷²

The NCC is authorised to investigate alleged contravention of the *CPA* and is responsible for enforcing the *CPA*.³⁷³ The NCT is authorised to adjudicate disputes referred to it by the NCC that relate to the *CPA*.³⁷⁴ Relevant disputes before the NCC and NCT are discussed in Chapter 5.

Two other agencies within the DTIC also warrant mention, namely the South African Bureau of Standards (hereafter "SABS") and the National Regulator for Compulsory Specifications (hereafter "NRCS"). The SABS is the national standardisation institution.³⁷⁵ It is currently responsible for the development, maintenance and promotion of South African National Standards (hereafter "SANS")³⁷⁶ in accordance with the *Standards Act* 8

³⁷⁰ See s 186(1)(a)(iii) and s 186(1)(e) read with schedule 4 of the *Companies Act*.

³⁷¹ The Registrar of Trade Marks exercises the main control of the trade marks office, subject to the directions of the Minister of Trade. See s 6(1) of the *TM Act*.

³⁷² A user is required to register and log into the CIPC website and can then conduct a free trade mark search at CIPC 2024 <https://iponline.cipc.co.za/Trademarks/Search/FreeTMSearch.aspx>. The CIPC is required to maintain the register of trade marks and to make information in that register available to the public, and to other organs of state. See ss 167(4)(a)(ii) and 167(4)(c) of the *Companies Act*. A register of trade marks, which is open for public inspection, is also kept at the trade marks office. See ss 22(1) and 22(4) of the *TM Act*.

³⁷³ See ss 86(b)(i) and s 99 of the *CPA*. The NCC is the primary regulatory for business interactions in South Africa. See NCC *Annual Performance Plan 2022/2023* 14. In addition to the NCC, provincial consumer protection authorities have been established in South Africa. See discussion in part 5.4.2.1 below.

³⁷⁴ In addition, the NCT may adjudicate disputes relating to the *National Credit Act* 24 of 2005. This study will focus on the function of the NCT within the context of the *CPA* only. See s 27(1) of the *National Credit Act* 34 of 2005; s 73(1)(c)(iii) read with s 73(2) of the *CPA*.

³⁷⁵ The SABS was initially established in terms of 2 of the *Standards Act* 24 of 1945. The 1945 Act was subsequently repealed by the *Standards Act* 29 of 1993. Notwithstanding the repeal of the 1993 Act, the SABS continues to exist as a public entity in terms of s 3(1) of the current *Standards Act*. The establishment of the SABS in 1945 coincided with the end of the Second World War, following the need to standardise certain aspects of products, to foster international trade and set minimum safety and performance requirements in respect of certain goods.³⁷⁵ As a founding member of the International Organisation for Standardisation ("ISO"), the SABS has been a prominent role player in international standardisation for over 75 years. See SABS date unknown <https://www.sabs.co.za/About-SABS/index.asp>.

³⁷⁶ A standard is a document that sets out rules, guidelines or characteristics for common and repeated use relating to (i) products,³⁷⁶ (ii) services, or (iii) processes and production methods. Aspects that are

of 2008 (hereafter *Standards Act*).³⁷⁷ Historically the SABS was also responsible for regulating SANS. However, these functions shifted to the NRCS³⁷⁸ when it was established in September 2008.³⁷⁹

The NRCS is a public, juristic entity which was established in terms of the *National Regulator for Compulsory Specifications Act* 5 of 2008 (hereafter "*NRCS Act*").³⁸⁰ It functions on behalf of the DTIC by administering, monitoring, and enforcing compliance with compulsory specifications and technical regulations that have been issued for various products, including foodstuffs.³⁸¹ The NRCS functions as a separate entity from the SABS.³⁸² The NRCS represents South Africa at conferences and gatherings by the CAC,³⁸³ and aims to ensure that the compulsory specifications relevant to the foodstuffs industry

generally included in a standard include rules, guidelines or requisite characteristics setting out prescribed terminology, symbols, packaging, marking or labelling requirements as they apply to a product, service, process or production method, as the case may be. A standard which has been approved by the SABS in terms of the *Standards Act* is a SANS. SANS are issued and amended by notice in the government gazette. See s 24(1)(a) and 24(4) of the *Standards Act*.

³⁷⁷ Through its business operations the SABS promotes quality in connection with commodities, products and services in South Africa. See ss 3(2), 4(1)(a)-(c) of the *Standards Act*.

³⁷⁸ In accordance with international best practice, the Department of Trade and Industry, as it was known at the time, adopted the view that it was not desirable for a single body (i.e., the SABS) to set standards, test and certify SANS, whilst also regulating SANS at the same time. On this basis, and as part of the government's efforts to increase South Africa's international competitiveness and protect its citizens, a decision was taken by the Department to separate the regulatory arm of the SABS from the rest of its business operations. This led to the adoption of the *NRCS Act* and the resulting establishment of the NRCS as an independent regulator for compulsory specifications in South Africa. See *NRCS Annual Report 2008/2009* 7, 10; SABS date unknown <https://www.sabs.co.za/Sectors-and-Services/Services/NRCS/index.asp>.

³⁷⁹ All assets, liabilities, obligations of the regulatory department of the SABS were transferred to the NRCS on the date that the NRCS was established, namely 1 September 2008. See *NRCS Annual Report 2008/2009* 10; Proc 34 in GG 31391 of 1 September 2008.

³⁸⁰ See s 3(1) and 3(2) of the *NRCS Act*; preamble of the *Legal Metrology Act*. Also see NRCS 2022 <https://www.nrcs.org.za/about-us/overview>.

³⁸¹ See the discussion in part 2.5.4 below. Other product categories include goods in the automotive industry; goods in the chemical industry; electrical products and related products; lighting and heating equipment; construction materials; plastic carrier bags; personal protective equipment; respirators and firearms. Compulsory specifications can be viewed on the website of the NRCS. See NRCS 2024 <https://www.nrcs.org.za/compulsory-specifications/compulsory-specifications>.

³⁸² The NRCS also makes recommendations to the Minister of Trade regarding compulsory specifications and technical regulations, respectively. Through its business operations the NRCS aims to protect human health and safety and the environment, and to foster fair trade. See s 5(1) of the *NRCS Act* and s 4(1) of the *Legal Metrology Act*; *NRCS Annual Report 2018/2019* 8.

³⁸³ *NRCS Annual Report 2018/2019* 37; 41. Also see the discussion on the CAC in part 2.2 above.

that have been implemented are and remain harmonised with international requirements.³⁸⁴

2.4 Labelling requirements for foodstuffs under R146 and related legislation

Before considering the labelling and advertising restrictions that have been proposed under R3337,³⁸⁵ it is important to understand the law governing foodstuffs labelling and advertising as it currently stands. On this basis, the discussion in part 2.4 sets out the foodstuffs labelling and advertising requirements that are currently prescribed under the *FCDA* (notably R146) as well as related food law legislation. The discussion starts off with the general rule for foodstuffs labelling and advertising compliance with the requirements prescribed in R146 in part 2.4.1, followed by select exclusions in part 2.4.2. Horizontal food labelling requirements for all foodstuffs sold in South Africa across the board are discussed in part 2.4.3, followed by product-specific vertical labelling requirements in part 2.4.4. As the nutritional composition of a food product forms the basis of considering how healthy it is,³⁸⁶ the requirements for acceptable nutrient claims and disclosing nutritional information on foodstuffs labels are set out in parts 2.4.5 and 2.4.6, respectively. Certain words, such as “fresh”, “pure” and “natural” on foodstuffs labelling, may allude to the healthiness of the product. This aspect and the use of such words is considered in part 2.4.7, followed by a discussion on prohibited claims on foodstuffs labels and in food advertising in part 2.4.8.

2.4.1 The general rule

R146 came into operation on 1 March 2012.³⁸⁷ It sets out the general labelling requirements for prepackaged foodstuffs and, subject to certain exclusions or limitations, non-prepackaged foodstuffs. The word “prepackaged” refers to the packaging of a

³⁸⁴ See *NRCS Annual Report 2018/2019* 47.

³⁸⁵ Chapter 4 is dedicated to government regulation of unhealthful foodstuffs labelling and advertising, and comprehensively considers the restrictions that have been proposed in R3337.

³⁸⁶ For a discussion on nutrient profiling, see parts 1.6 and 4.4.2.

³⁸⁷ Two sets of regulations precede R146 under the *FCDA*, namely GN R908 in GG 5565 of 27 May 1977, which was subsequently replaced by GN R2034 in GG 15226 of 29 October 1993 with effect from 1 May 1995. With effect from 1 March 2012, when R146 came into effect, both prior sets of regulations were repealed as far as they relate to foodstuffs. See reg 55 of R146.

foodstuff in packaging material ready for sale to the consumer or to a catering establishment³⁸⁸ in such a way that the relevant foodstuff cannot be altered without opening or changing the packaging.³⁸⁹ When considering supermarket stores or other foodstuffs retail outlets, most foodstuffs would be prepackaged foodstuffs. Examples would include canned or bottled non-alcoholic beverages; dairy products such as cheese, butter and milk; staple foods such as bread, rice and pasta; and confectionery products (i.e., sweets).³⁹⁰

Examples of non-prepackaged foodstuffs would include items that are sold either freshly picked or freshly baked without packaging, which can be selected in grocery stores. The purchase of a single watermelon comes to mind. Another example would be so-called naked bread, which is often found in the bakery section of supermarkets, such as bread, bread rolls and bread buns that are displayed for sale as-is, in no packaging prior to its selection by a customer.³⁹¹

Generally, the packaging (i.e., the container)³⁹² and bulk stock³⁹³ of all prepackaged foodstuffs that are manufactured, imported into, sold or offered for sale in South Africa must be labelled in terms of R146.³⁹⁴ As non-prepackaged foodstuffs displayed for sale

³⁸⁸ A "catering establishment" is defined as any establishment, including a vehicle or a fixed or mobile stall, where in the course of business ready-to-eat foodstuffs are prepared for direct sale to the consumer for consumption. See reg 1 of R146.

³⁸⁹ See reg 1 of R146.

³⁹⁰ However, individually wrapped one-bite sugar confectionery or chocolate confectionery, which is not enclosed in any further packaging, does not qualify as a prepackaged foodstuff. See reg 1 of R146.

³⁹¹ See reg 1 of R146.

³⁹² A "container" refers to any packaging of foodstuffs for sale at retail level or for catering purposes, for delivery as a single item or for free sample handout purposes. A container may either completely or partially enclose the foodstuff. Wrappers for individual and multiple-unit-packs of foodstuffs are also considered to be containers. On this basis, if one considers a 5-unit multi-pack of noodles, for example, the outer packaging of the unit pack and each individual unit package must comply with the labelling and advertising provisions as set out in R146.

³⁹³ The term "bulk stock" means either (i) a container that is used to display several individual units suitable for sale by itself (such as a 5-unit multi-pack of noodles), or (ii) several units, which are pre-packed or wrapped for the purpose of bulk sales or foodstuffs, which are offered for sale to consumers in quantities of their own choice from a large-scale container. See reg 1 of R146.

³⁹⁴ In terms of reg 2, no person shall manufacture, import, sell or offer any pre-packaged foodstuff for sale, unless the foodstuff container or the bulk stock from which it is taken is labelled in accordance with R146.

would not be sold in a container or in packaging, the prescribed labelling should appear on display in immediate proximity to such products.

Turning to the advertising of foodstuffs, Regulation 3 of R146 provides that no person shall advertise a foodstuff in any manner which contains any information, claim, reference or declaration that is not permitted on the foodstuffs label in accordance with R146.³⁹⁵ It follows, therefore, that only information, claims, references or declarations that are expressly permitted in terms of R146 may appear in the advertising of prepackaged or non-pre-packaged foodstuffs in South Africa.

2.4.2 Foodstuffs exempt from the labelling requirements under R146

Certain foodstuffs are either completely exempt from the labelling requirements in R146 or only require certain labelling particulars.³⁹⁶ Fresh, unprocessed³⁹⁷ fruits or vegetables such as those that can be hand-selected and weighed in retail outlets generally require no labelling particulars.³⁹⁸ R146 also contains limited labelling requirements in relation to agricultural products such as hens' eggs, unprocessed fish, marine products, meat and birds.³⁹⁹ However, comprehensive labelling requirements for these agricultural food products are to be found in the *APSA*, which is discussed further in this chapter.⁴⁰⁰

Ready-to-eat foodstuffs⁴⁰¹ that are prepared by and sold on the premises of a catering establishment such as a restaurant, fast-food take-away business or food truck for consumption need not be labelled. However, information about the list of ingredients, including allergens,⁴⁰² of such ready-to-eat foodstuffs, which would include take-away

³⁹⁵ Also see reg 51(1) of R146.

³⁹⁶ For a complete list, see reg 54(3) of R146.

³⁹⁷ For a discussion on unprocessed and processed products see part 1.8.2 above.

³⁹⁸ However, if a nutrition claim is made in relation to such goods the general labelling requirements in R146 would apply. See reg 54(3)(b)-(c) of R146.

³⁹⁹ See Reg 54(3)(a), (f) and (g) of R146. See the discussion in part 2.5.3 below regarding trade description particulars in respect of processed and packaged meat products, and dried and packaged meat products under the *CPA*.

⁴⁰⁰ See part 2.5.1.

⁴⁰¹ Ready-to-eat-food includes any food or beverages which are normally consumed in their raw or natural state (such as bananas, for example) or any food which is handled, processed, mixed, cooked or otherwise prepared into a form in which it is normally consumed without further processing (such as meals purchased at restaurants, from fast food take-away outlets or from food stalls or vehicles). See Reg 1 of R146.

⁴⁰² See part 2.4.3 below for a discussion on allergens.

meals or meals ordered in restaurants, must be made available at the point of sale upon request by a purchaser or potential purchaser of those goods.⁴⁰³ A number of restaurant food-chains have information on the nutritional composition and allergens of menu items on their websites. These are such as Wimpy (see the example of a Double Up breakfast meal shown in Figure 2-1 below), McDonalds,⁴⁰⁴ Steers,⁴⁰⁵ Burger King,⁴⁰⁶ Nando's⁴⁰⁷ and Mugg & Bean.⁴⁰⁸ The availability of nutritional information and information on allergens in food on an online platform serves to ensure accessibility to this information, particularly considering the increase in the volume of online purchases of foodstuffs.⁴⁰⁹



DOUBLE UP BREAKFAST	QUANTITY	PROTEIN (g)	CARB* (g)	TOTAL FAT (g)	SAT FAT (g)	DIETARY FIBRE (g)	TOTAL SODIUM (mg)	TOTAL ENERGY (KJ)
DOUBLE UP BREAKFAST	1	37.2	29.3	67.35	20.39	3.15	1567.5	3655.91

ALLERGEN INFORMATION : Gluten, Wheat, Soya, Cows Milk, Egg, Sulphites
***Carbohydrates by difference :** Source, includes: South African Medical Research Council(MRC) Food Composition Tables

Figure 2-1: Nutritional composition and allergens of Wimpy Double Up breakfast meal⁴¹⁰

⁴⁰³ See reg 54(3)(h) of R146. The same applies to naked bread, and flour confectionary (such as doughnuts and similar bakes) that are intended to be consumed within 24 hours of manufacture. The only labelling requirement for ice is that the name and address of the product manufacturer appear on the product packaging. See reg 54(3)(d) and 54(3)(k) of R146.

⁴⁰⁴ See, for example, McDonalds 2022 <https://www.mcdonalds.co.za/menu/sausage-mcmuffin-1>.

⁴⁰⁵ See Steers 2022 <https://steers.co.za/nutritional-guide>.

⁴⁰⁶ See Burger King 2022 <https://www.burgerking.co.za/nutrition-explorer>.

⁴⁰⁷ See, for example, Nando's 2022 <https://www.nandos.co.za/eat/product/hot-peri-peri-sauce>.

⁴⁰⁸ See Mugg & Bean date unknown <https://muggandbean.co.za/downloads/pdf/sit-down-nutritional-guide.pdf>.

⁴⁰⁹ See the discussion in part 3.4.2.3 below.

⁴¹⁰ See Wimpy 2022 <https://wimpy.co.za/nutritional-info/#/current/1>.

2.4.3 Horizontal labelling requirements

Certain labelling requirements have a horizontal application as they apply to all foodstuffs.⁴¹¹ In considering horizontal labelling requirements, the label of any pre-packaged foodstuff must contain the following particulars:

- i. the name of the product on the main panel.⁴¹² The name is essentially the word(s) giving a true description of the nature of the relevant product (i.e., the product's name).⁴¹³ In addition to the product's name, a brand name or trade name (i.e., the trade mark under which the product is sold)⁴¹⁴ usually also features on the main panel of the product;
- ii. the name and physical local address⁴¹⁵ of the manufacturer,⁴¹⁶ importer⁴¹⁷ or seller,⁴¹⁸ as the case may be;⁴¹⁹
- iii. instructions for use when it is required to make appropriate use of such foodstuff;⁴²⁰
- iv. a list of ingredients under the heading "Ingredients".⁴²¹ In the case of blended, compounded or mixed foodstuffs (i.e., foodstuffs which are not single ingredient

⁴¹¹ Mahy and Conte-Salinas "European Food Labelling Law" 505.

⁴¹² The main panel is the part of the food label that bears the brand/trade name and product name in the greatest prominence, or any other part of the label that bears the brand/trade name in equal prominence. See reg 1 of R146.

⁴¹³ The product's name must be sufficiently precise to avoid misleading or confusing the consumer regarding the true nature, physical condition, type of packing medium, style, condition and type of treatment the product has undergone. See reg 1 and Reg 9(a) of R146.

⁴¹⁴ For a discussion of trade marks see part 2.5.2 below.

⁴¹⁵ The definition of address in reg 1 of R146 requires that the address be a complete physical address. The street name, number and suburb must be disclosed.

⁴¹⁶ The term "manufacturer" is not defined in the *FCDA* or R146. In terms of s 1 of the *FCDA*, the word "manufacture" includes the production, or preparation, processing, preservation or other manufacturing process. The manufacturer would therefore seem to be the person or entity responsible for the manufacture, as defined, of the foodstuff.

⁴¹⁷ In terms of s 1 of the *FCDA*, the word "importer" includes any person who is in possession of or in any way entitled to the custody or control of any foodstuff imported into South Africa.

⁴¹⁸ The word "sell," in relation to a foodstuff, includes to offer, advertise, keep, display, transmit, consign, convey or deliver for sale, or to exchange, or to dispose of to any person in any manner whether for a consideration or otherwise. See s 1 of the *FCDA*. The seller would therefore be the person who conducts one or more of these activities in respect of a particular foodstuff.

⁴¹⁹ See reg 9(1)(b) of R146.

⁴²⁰ See reg 9(1)(c) of R146.

⁴²¹ See regs 9(1)(d) and 17 of R146.

- products), all the ingredients⁴²² are required to be listed on the label in descending order of mass as present in the end product;⁴²³
- v. an indication of common allergens,⁴²⁴ if relevant. Common allergens listed in R146 are egg, cow's milk, any significant cereals,⁴²⁵ crustaceans and molluscs, fish, peanuts, soybeans, and tree nuts.⁴²⁶ The allergens list usually appears adjacent to or near the list of ingredients;⁴²⁷
 - vi. instructions regarding special storage conditions, where applicable.⁴²⁸ The nature of the particular foodstuff would be relevant in this determination.⁴²⁹ Dairy products, for example, are usually required to be stored in a refrigerator under a specific temperature;
 - vii. the quantity or net contents of the container in the appropriate measuring unit system. The discussion in part 2.5.4 below elaborates on this aspect;⁴³⁰

⁴²² There are, however, limited exceptions in respect of added water. In terms of reg 18 read with reg 28, where water added to a foodstuff does not exceed 5% of the finished product (other than raw-processed meats), water need not be listed in the ingredients list if either (i) it was used during the manufacture of the foodstuff solely for the purpose of wetting a dry additive or ingredient, or (ii) it is part of brine or syrup and is declared as brine or syrup in the list of ingredients.

⁴²³ See reg 17 of R146. Herbs or spices not exceeding 2% by mass (either single or in combination), vitamins and minerals may be listed in any order at the end of the list of ingredients. See reg 21 of R146. Ingredients should be listed by the name used for such ingredients when independently sold as foodstuffs. Certain categories of additives may, however, simply be identified by their category name in the list of ingredients, such as acids, emulsifiers, raising agents, flavourings and thickeners. See reg 23 and 36(2) read with Annexure 8 of R146. In terms of reg 8(d), the items in the ingredients list should appear in a uniform size, colour, font and prominence throughout.

⁴²⁴ An allergen is any substance that causes an allergic or other adverse immune response. See reg 1 of R146. A food allergy is a condition in which a consumer's immune system has an abnormal response to a certain food product or food ingredients. Allergen information is therefore required to alert the consumer to the presence of such a food substance or ingredient in the product. See *FAO Handbook on Food Labelling to Protect Consumers* 23.

⁴²⁵ The following cereals are classified as significant cereals: (i) wheat including wheat varieties, (ii) rye, (iii) barley, (iv) oats, and (v) crossbred hybrids of wheat, rye or barley (e.g., triticale, which is a cross between wheat and rye). See reg 1 of R146.

⁴²⁶ A distinction is made between common allergens and uncommon allergens. An uncommon allergen refers to any food or non-food allergen which is not classified as a common allergen in terms of R146. See reg 1 of R146.

⁴²⁷ See reg 43 of R146.

⁴²⁸ See reg 9(1)(e) of R46. Regulation 32(1) sets out the letter size requirements.

⁴²⁹ It is the responsibility of the product manufacturer to determine if there are appropriate storage instructions required to be displayed on the pack. See reg 32(2) of R146.

⁴³⁰ In terms of reg 9(f) of R146, the net contents of the container should be displayed in *Système International* units (hereafter SI units) in accordance with the requirements of the *Trade Metrology Act 77 of 1973*. The *Trade Metrology Act 77 of 1973* was, however, repealed by the *Legal Metrology Act* on 1 August 2014. See further the discussion in part 2.5.4 below.

- viii. an appropriate country of origin indication. The origin of the ingredient(s) in the end-product and the country in which the product was manufactured will be relevant in establishing the appropriate wording of the country of origin indication.⁴³¹ The indication "Product of South Africa" should be used where all of the main ingredients in the product, the processing of the product and the labour used to make that product are located in this country.⁴³² If, however, one or more ingredient is imported from abroad and processed in South Africa to the extent that the nature of the product(s) is changed (for example where wheat is imported and processed into wheat flour for consumer sale), an appropriate country of origin indication would be "Produced in South Africa", "Processed in South Africa", "Manufactured in South Africa", "Made in South Africa" or a similar phrase.⁴³³
- ix. a batch identification number, which should appear on the container in such a manner that allows for the easy identifiability and traceability of a specific batch.⁴³⁴
- x. a date marking,⁴³⁵ which is preceded by an appropriate date of minimum durability such as "best before" (or the abbreviation BB), "use by", and/or "sell by".⁴³⁶ The nature of the product will be taken into consideration when establishing the most appropriate term.⁴³⁷

⁴³¹ See reg 10 of R146 for a complete list of the possible country of origin indications. These indications should be used unless regulations published in terms of the *APSA* or the *NRCS Act* provide otherwise.

⁴³² See reg 10(a) of R146.

⁴³³ See reg 10(b) of R146.

⁴³⁴ See reg 11 of R146. This provision is subject to any additional or alternative requirements that may be set out either in the *APSA* or the *NRCS Act*. A batch refers to a definite quantity of a particular product which was produced essentially under the same conditions within a period of 24 hours or less. See reg 1 of R146.

⁴³⁵ The date marking should usually be indicated in the order "Day-Month-Year" when only numbers are used. In the case of imported products which contain a different order, for example where the day follows the month, the month should be written out in letters and the year should be indicated in full. See reg 12(5) of R146. This requirement would avoid the risk of possible consumer confusion regarding the date of the minimum durability of the product.

⁴³⁶ The date marking informs the resellers of a food product (such as importers, distributors, or retailers) what the self-life of the product is. See *FAO Handbook on Food Labelling to Protect Consumers* 24. It should be noted that certain foodstuffs and ingredients are exempt from requiring a date of minimum durability on the container label, such as alcoholic beverages, chewing gum, vinegar, and fresh fruits and vegetables which have not been peeled or cut. For a complete list of the excluded products, see Annexure 4 of R146.

⁴³⁷ See reg 12(1) of R146. The date of minimum durability is applied to the label to indicate the end of the period under any stated storage conditions during which the foodstuff will remain fully marketable and will retain any specific qualities for which tacit or express claims have been made on the container

Certain minimum letter size requirements for the respective labelling elements on the pack are prescribed.⁴³⁸ The information which is required to appear on the label of a foodstuff should be presented in the English language as a minimum and, where possible, in at least one other official language of South Africa.⁴³⁹ The information on the label should also be displayed in a manner that is clearly visible, easily legible and indelible without being obstructed by any pictorial or any other matter. This aspect should be considered in combination with the requirements of the *CPA* as far as they relate to a consumer's right to information in a plain and understandable language.⁴⁴⁰

2.4.4 Vertical labelling requirements

In addition to the horizontal labelling requirements that apply in terms of R146, extra labelling requirements apply to certain types or categories of foodstuffs. Such extra requirements are referred to as vertical labelling requirements.⁴⁴¹ Of specific relevance to this study are the vertical labelling requirements set out in terms of R991 in respect of foodstuffs for infants and young children. Part 2.6 below is dedicated to R991. Other examples of vertical labelling requirements are discussed briefly below.

2.4.4.1 Class designations under the APSA

The labels of foodstuffs that qualify as agricultural food products, such as dairy products or fruit juices and drinks under the *APSA*, are required to include the class designations given in the prescribed manner.⁴⁴² In terms of the *Regulations Relating to the Classification, Packing and Marking of Dairy Products and Imitation Dairy Products*

or label. However, it is possible that the food may still be perfectly satisfactory (i.e., suitable for consumption) after the stipulated date. See reg 1 of R146.

⁴³⁸ See reg 8 of R146. These letter size requirements are, however, subject to alternative requirements under the *APSA* or the *NRCS Act*.

⁴³⁹ See reg 7(1)(a) of R146. In addition to English, the official languages of the Republic of South Africa are Sepedi, Sesotho, Setswana, siSwati, Tshivenda, Xitsonga, Afrikaans, isiNdebele, isiXhosa and isiZulu. See s 6(1) of the *Constitution*. Para 1.2.1 of SANS 289 requires that the prescribed marking particulars of prepackaged products that are sold in South Africa appear in at least one official language.

⁴⁴⁰ See the discussion in part 3.6.1 below.

⁴⁴¹ Mahy and Conte-Salinas "European Food Labelling Law" 505.

⁴⁴² The class designation refers to the class designation, alternate class designation or the type of dairy product or imitation dairy product as specified by the Dairy Products Regulations. The Dairy Products Regulations contain 21 tables setting out the specific class designations or alternative class designations of dairy products in South Africa. See reg 1 and 3(1) of the *Dairy Products Regulations*.

*Intended for Sale in the Republic of South Africa*⁴⁴³ (hereafter "*Dairy Products Regulations*"), the milk fat content percentage will determine if the product is classified as high fat, full fat, medium fat, low fat or fat free.⁴⁴⁴ For example, milk which has a milk fat content which is higher than 3.3% up to 4.5%, is classified as "full fat milk". Alternative class designations for full fat milk include "full cream milk" and "whole milk".⁴⁴⁵

For fruit juice and drinks, the percentage of the specific fruit juice in the end product will be a determining factor in the classification of the product as a drink, nectar, squash or juice, as the case may be.⁴⁴⁶ In taking apple juice and drink as an example, the class designation for a beverage consisting of 100% pure apple juice will be "apple juice".⁴⁴⁷ An "apple nectar" product requires at least 50% apple juice, whilst an "apple squash" must contain at least 24% apple juice in undiluted form. Drinks bearing the class designation of "apple drink" require an apple content of at least 6% in ready-to-drink form.⁴⁴⁸

2.4.4.2 Fortified foodstuffs

Certain foodstuffs have been identified by the DOH as so-called "food vehicles" and are required to be fortified in accordance with the provisions of the *Regulations Relating to the Fortification of Certain Foodstuffs*⁴⁴⁹ (hereafter "*Fortification Regulations*") prior to manufacture, importation and sale in South Africa.⁴⁵⁰ This means that one or more micronutrients (such as Vitamin A, Iron, Folic Acid and Zinc)⁴⁵¹ are required to be added

⁴⁴³ Published under GN R1510 of GG 42850 of 22 November 2019.

⁴⁴⁴ See further the discussion in part 2.5.1 below.

⁴⁴⁵ See table 1 in reg 5 of the *Dairy Products Regulations*.

⁴⁴⁶ See the *Regulations Relating to the Classification, Packing and Marking of Fruit Juice and Drink Intended for Sale in the Republic of South Africa* published under GN R286 in GG 7290 of 7 November 1980, as amended (hereafter "*Fruit Juice Regulations*").

⁴⁴⁷ The other requirements in reg 5(3) of the *Fruit Juice Regulations* must also be met.

⁴⁴⁸ See reg 5(4) of the *Fruit Juice Regulations*.

⁴⁴⁹ Published under GN R504 in GG 24715 of 7 April 2003, as amended by GN R1206 in GG 31584 of 14 November 2008.

⁴⁵⁰ Non-compliance with these regulations is a criminal offence. See reg 2 of the *Fortification Regulations*. The purpose of fortification is to prevent or correct a demonstrated deficiency of one or more nutrients in the general population or specific population group of South Africa, as determined by the DOH. See reg 1 of the *Fortification Regulations* for the definition of fortification.

⁴⁵¹ See Table 3 of the *Fortification Regulations*. A "micronutrient" is defined as a natural or synthesised vitamin, mineral, or trace element that is essential for normal growth, development and maintenance

to food vehicles in accordance with the *Fortification Regulations*. Three main categories of foodstuffs have been identified as food vehicles, namely dry and uncooked wheat flour, dry and uncooked maize meal, and bread prepared with and containing at least 90% fortified wheat flour, excluding water.⁴⁵²

From a labelling perspective, the *Fortification Regulations* set out additional requirements to those that are set out in R146. The main panel⁴⁵³ of the product label or advertising of food vehicles that have been fortified in accordance with the *Fortification Regulations* may contain the claim “Fortified for better health” and a suitable official fortification logo, such as the one depicted in Figure 2-2 below or as set out in Annexure VII of the *Fortification Regulations*.⁴⁵⁴



Figure 2-2: Fortification logo

In addition, where a foodstuff other than a food vehicle such as white or brown bread is prepared with fortified wheat flour and contains 90% or more of that food vehicle as an ingredient, excluding water, the claim “Manufactured with fortified wheat flour for better health” in combination with the fortification logo may be used on the main panel of the product label and advertising material for that product. This is similarly the case in respect of foodstuff prepared with fortified maize meal.⁴⁵⁵ The images in Figures 2-3 and 2-4

of life and of which a deficit will cause characteristic biochemical or physiological changes. See reg 1 of the *Fortification Regulations*.

⁴⁵² Annexures V and VI of the *Fortification Regulations* set out the micronutrient requirements for the fortification of food vehicles and the micronutrient requirements for fortified foodstuffs, respectively.

⁴⁵³ See the discussion in part 2.4.3 above for the definition of main panel.

⁴⁵⁴ It is a criminal offence to use the official fortification logo referred to on labels or in advertising material for foodstuffs in a manner that does not comply with the *Fortification Regulations*. See regs 12(b)-(c) of the *Fortification Regulations*.

⁴⁵⁵ See reg 12(d) read with Annexure VIII of the *Fortification Regulations*. Colour variants of the official fortification logos are also options in Annexures VII and VIII respectively. Such logos may be used only in the format set out in Annexures VII or VIII. In addition, the selected suitable logo must be printed in a prominent position on the main panel of the foodstuff in bold print against a contrasting

below serve as examples of products in South Africa that have been fortified and which contain the fortification logo:



*Figure 2-3: White Star Super Maize Meal*⁴⁵⁶



*Figure 2-4: Albany Everyday White Bread*⁴⁵⁷

2.4.4.3 Disclosing genetically modified organisms in foodstuffs

Of further relevance to the foodstuffs sector are the provisions relating to the disclosure of genetically modified ingredients or components, given the prevalence of genetically

or clear background. Minimum height requirements are also prescribed. See reg 12(h) and 12(i) of the *Fortification Regulations*.

⁴⁵⁶ Image sourced from White Star 2020 <https://whitestar.africa/>.

⁴⁵⁷ Image sourced from Albany 2020 <https://www.albany.co.za/Products/everyday-bread/Everyday-White-Bread>.

modified organisms (hereafter GMOs) in foodstuffs such as maize meal,⁴⁵⁸ which is a staple food for many South Africans.⁴⁵⁹ The *Genetically Modified Organisms Act* 15 of 1997 (hereafter the *GMO Act*) defines a “genetically modified organism” or the term “genetic modification” as:

an organism the genes or genetic material of which has been modified in a way that does not occur naturally through mating or natural recombination or both.⁴⁶⁰

The labelling requirements for foodstuffs that contain GMOs are set out under the *CPA*. Any person who produces, supplies, imports or packages any goods containing GMOs⁴⁶¹ must display on or in association with the packaging of those goods a notice⁴⁶² that discloses the presence of any GM ingredients or components of those goods in accordance with regulation 7 of the *Consumer Protection Act Regulations*⁴⁶³ (hereafter the *CPA Regulations*).⁴⁶⁴ In terms of regulation 7(4) any locally-produced or imported goods that contain at least 5% of GMOs must contain a notice stating that the relevant product “contains Genetically Modified Organisms” both on the packaging and all marketing material for those goods.⁴⁶⁵

⁴⁵⁸ The three main GM crops in South Africa are maize, soybean and cotton. See Biosafety South Africa 2021 <http://biosafety.org.za/information/know-the-basics/regulation-of-gmos/gm-permits-issues-in-sa>.

⁴⁵⁹ Ala-Kokko *et al* 2021 *Global Food Security* 1. South Africa ranks among the top ten producers of GM crops in the world, and is the top producer of GM crops on the African continent. See International Service for the Acquisition of Agri-biotech Applications 2019 <https://www.isaaa.org/resources/publications/pocketk/16/>; Blair and Regenstein *Genetic Modification and Food Quality A Down to Earth Analysis* 12. Potential advantages of genetic modification of food include perceived health benefits following the addition of vitamins and nutrients to foodstuffs, and optimising crop yields due to reduced crop losses because of unwanted pests and diseases. See FAO *Perspectives and Guidelines on Food Legislation* 8.

⁴⁶⁰ See s 1 of the *GMO Act*; reg 7(1) of the *CPA Regulations*.

⁴⁶¹ Section 24(6) refers to “prescribed goods” and would appear to refer to the goods that are covered by Reg 7 of the *CPA Regulations*, which deals with product labelling and trade descriptions of goods containing GMOs.

⁴⁶² The notice must be in the prescribed manner and form and must meet the requirements of s 22 of the *CPA*. See s 26(4) of the *CPA* and Reg 7(4) of the *CPA Regulations*. See part 3.6.1 below for a discussion on s 22 of the *CPA*.

⁴⁶³ See GN R293 in GG 34180 of 1 April 2011.

⁴⁶⁴ See s 24(6) of the *CPA*.

⁴⁶⁵ The use of the word “must” in s 24(6) of the *CPA* means that the requirements of Reg 7(4) are compulsory in respect of any goods that contain 5% or more of GMOs. Such goods may not be produced, supplied, imported or packaged unless the prescribed notice appears on the packaging (or on the marketing material) of those goods. See further regs 7(6)-7(8) of the *CPA Regulations*.

2.4.5 The use of nutrition claims

It is not uncommon for consumers to encounter nutrient content claims such as “high in protein”, “source of calcium” or “low in sodium”, or comparative claims such as “reduced fat”, on foodstuffs labels. Claims such as these provide information on the nutritional properties of the relevant product and can assist the consumer in making a selection based on food and dietary preferences. R146 sets out specific requirements for the use of such claims. Before proceeding with the discussion, a few terms should be explained, notably the meaning of the words “nutrient”, “nutrition claim”, “nutrient content claim” and “comparative claim”.

A “nutrient” is defined as:

any natural or synthetic substance consumed as a constituent of a foodstuff, which provides energy or which is needed for growth, development and maintenance of life and health or of which a deficit will cause characteristic biochemical or physiological changes to occur.⁴⁶⁶

All vitamins and minerals that are present in foodstuffs are regarded as nutrients.⁴⁶⁷ In addition fats, saturated fats and substances that provide energy, such as sugar, also qualify as nutrients.

Following the above, “nutrition claim” means any representation that refers to a specific nutrient or food constituent⁴⁶⁸ content of a particular foodstuff. A nutrition claim on a foodstuffs label or advertisement can take the form of either a nutritional content claim or a comparative claim. Such nutrition claims are discussed under separate headings below.

2.4.5.1 Nutrient content claims

A “nutrient content claim” is a claim that describes the level of a nutrient or energy contained in a foodstuff, for example “high in protein”, “source of calcium” or “low in

⁴⁶⁶ See reg 1 of R146.

⁴⁶⁷ Annexure 3 of R146 lists several vitamins and minerals as nutrients, such as protein, Vitamin A, Calcium, Iron and Zinc.

⁴⁶⁸ A “food constituent” refers to any biologically active substance other than a nutrient, which is naturally present in certain foodstuffs such as water, for example.

sodium”, as mentioned above. Any nutrient content claim which is made on a label or in an advertisement must comply with the conditions that are set out in Table 1 of Regulation 52.⁴⁶⁹ Table 1 sets out the conditions for the use of any nutrient content claim, and the permitted wording of nutrient content claims, and is included as Addendum A in this thesis.⁴⁷⁰

Only the words “free”, “virtually free”, “low”, “source”, “high” or “very high” may be used to describe the relevant nutrient, depending on the percentage of that nutrient present in the end-product. Table 1 is based on the nutrient reference value (hereafter “NRV”) for individuals older than four years.⁴⁷¹

Where a specific vitamin or mineral is present in less than 15% of the NRV, no nutrient content claim may be made.⁴⁷² As such, nutrient content claims may be used only if the relevant vitamin or mineral is present in at least 15% of the NRV in the foodstuff concerned.⁴⁷³ In those circumstances the following guidelines apply:

- where the vitamin or mineral is present in a quantity of between 15% and less than 30% of the NRV, the nutrient content claim “source of (list relevant nutrient(s))” may be used;
- if the nutrient is present in quantities between 30% and up to 60%, the claim “high in (list relevant nutrient(s)) may be used”; and
- for nutrients that are present in quantities of 60% or more of the particular foodstuff, the claim “very high in (list relevant nutrient(s))” is permitted.⁴⁷⁴

⁴⁶⁹ See reg 52(1) of R146.

⁴⁷⁰ See reg 52(2) of R146.

⁴⁷¹ In terms of reg 1 of R146, NRV, for food labelling purposes, refers to the nutrient reference value for the general population aged four years and above. Individuals below the age of four qualify as infants and young children. See the discussion on R991 in part 2.6 below.

⁴⁷² See reg 52(7) of R146. Where the vitamin or mineral is present in less than 5%, it should not be listed in the nutritional information table. If, however, the nutrient is present in a quantity of between five and less than 15%, it may be listed in the nutritional information table, although no nutrient content claim may be made in relation to that nutrient.

⁴⁷³ While permitted nutrient content claims are acceptable in relation to foodstuffs in general, there are certain foodstuffs which may not contain any nutrient content claim or the container label or product advertising, such as packaged water and complementary foodstuffs for young children. See reg 51(3) of R146.

⁴⁷⁴ See reg 52(7) of R146.

For ease of reference, the summary is set out in Table 1 below:

NRV for vitamins and minerals	May a claim be made?	May it be listed in the nutritional information table?
0 - < 5%	No	No
5% - < 15%	No	Yes
15% - < 30%	Yes - 'source of'	Yes
30% or more	Yes - 'high in'	Yes
60% or more	Yes - 'very high in'	Yes

Table 1: Summary of the acceptable use of nutrient content claims⁴⁷⁵

Turning to claims regarding the energy in a foodstuff, Table 1 sets out which claims are acceptable based on the end product's kilojoule (hereafter kJ) count. Essentially, where a product qualifies for the use of a nutrient content claim in relation to energy, the manufacturer or advertiser can claim that the product is “free” (alternatively “virtually free”), “low in”, a “source of”, or “high in” energy, as the case may be. If we consider liquid foodstuffs as an example, the claim “free from energy”, alternatively “virtually free from energy”, is permitted where the product contains no more than 17 kJ per 100 ml. The claim “low in energy” is permitted where the product contains no more than 80 kJ per 100 ml in the end product.⁴⁷⁶ A liquid foodstuff will be considered to be a “source of energy” where it contains between 80 kJ and 250 kJ per 100 ml, and “high in energy” is permitted if it contains 250 kJ or more in the end product.⁴⁷⁷

Addendum A can be referenced for the requirements for using nutrient content claims regarding fat, saturated fat and sodium levels.

2.4.5.2 Comparative claims

A comparative claim is a claim that compares the nutrient level(s), energy value or alcohol content of two or more similar foodstuffs. Words or phrases which are indicative of a comparative claim include “reduced”, “less than”, “fewer”, “light” and “lite”, and refer to

⁴⁷⁵ Table sourced from reg 52(7) of R146.

⁴⁷⁶ The claim “low in energy” is permitted for solids where the end-product contains no more than 170 kJ per 100 g. See Table 1 of reg 52 of R146.

⁴⁷⁷ The claim “high in energy” is permitted for solids where the end-product contains at least 950 kJ per 100 g. See Table 1 of reg 52 of R146.

one or more of the following nutrients: total fat, saturated fat, cholesterol, sugar, sodium or salt or energy value.

Regulation 53 of R146 sets out the requirements for the use of comparative claims.⁴⁷⁸ As a first requirement, the foodstuffs that are being compared must be different versions of the same or similar foodstuffs.⁴⁷⁹ R146 does not, however, provide a definition for the term "same or similar foodstuffs". The word "same" in this context would likely refer to the identical type or category of foodstuff, for example the original Steri Stumpi strawberry low fat flavoured milk product versus the "lite" version as illustrated in Figures 2-5 and 2-6 below. The term "similar" is less clear. An example of similar foodstuffs set out in Regulation 53 would be wholegrain Provitas and whole wheat bread.⁴⁸⁰

Secondly, the comparison must be on a relative difference of at least 25% in the energy value or nutrient content, as the case may be, of an equivalent mass or volume.⁴⁸¹ The label of the foodstuff which contains the comparative claim must also include a statement which reflects the amount of difference in the energy value or relevant nutrient, as the case may be, expressed as a percentage.⁴⁸² The side panel of the Steri Stumpi Lite strawberry low fat flavoured milk product contains the claim "27% fewer kilojoules", which complies with these requirements relative to the difference in energy value between this product and the original Steri Stumpi strawberry low fat flavoured milk product.

⁴⁷⁸ It should be noted that, whilst R146 allows for the permitted use of comparative claims in relation to foodstuffs in general, there are restrictions to the use of comparative claims. Notably, where compositional standards exist for a foodstuff under either the *APSA* or *NRCS Act*, comparative claims will be permitted only if provision is made for comparative claims in terms of such standards. See reg 53(2) of R146. In addition, comparative claims such as "more than," "increased" or other similar words or phrases may not be used in relation to vitamins, minerals or physiologically beneficial nutrients. See reg 53(4) of R146.

⁴⁷⁹ See reg 53(1)(a) of R146. The label of the foodstuff which contains the comparative claim must include the identity of the foodstuff(s) to which it is being compared, which should appear near the relevant comparative claim. See reg 53(1)(b)(ii) of R146.

⁴⁸⁰ See reg 53(1)(e)(ii) of R146.

⁴⁸¹ See reg 53(1)(c) of R146. Guideline 4 of R146 sets out examples of how percentage differences can be calculated.

⁴⁸² See reg 53(1)(b)(i) of R146.



Figure 2-5: Original Steri Stumpie⁴⁸³



Figure 2-6: Lite Steri Stumpie⁴⁸⁴

It is a further requirement that the label of the foodstuff containing the comparative claim must contain a nutritional information table in the prescribed manner.⁴⁸⁵ The discussion that follows deals with this aspect.

2.4.6 Nutritional information on product labels

It is not uncommon to see a table setting out nutritional information, such as the energy, fat and protein content of the relevant product, on the container label of foodstuffs. This nutritional information is known as a “nutritional declaration”, which essentially consists of a table (referred to below as a nutritional information table) including a standardised listing of the nutrient content of a particular foodstuff.⁴⁸⁶ The nutritional information table often appears either on the back of the label or on the side panel.⁴⁸⁷ In addition, certain foodstuffs manufacturers also share the nutritional information of the foodstuffs, amongst other details, on their websites. The McCain brand of prepacked vegetables serves as a good example. Figure 2-7 below sets out an image of McCain frozen baby peas and the

⁴⁸³ Image sourced from Lactalis 2022 <https://lactalis.co.za/our-brands/steri-stumpie>.

⁴⁸⁴ Image sourced from Lactalis 2022 <https://lactalis.co.za/our-brands/steri-stumpie>.

⁴⁸⁵ See reg 53(1)(d) of R146.

⁴⁸⁶ CAC *Guidelines on Nutrition Labelling CXG 2-1985* (1985, as amended) (hereafter “CAC *Guidelines on Nutrition Labelling*”); WHO *Guiding Principles for FOP Labelling* 9.

⁴⁸⁷ WHO *Guiding Principles for FOP Labelling* 9.

accompanying nutritional information table appearing both on the back of the product packaging and on its local website:



TYPICAL NUTRITIONAL INFORMATION (as packed)

SERVING PER CONTAINER 8

SINGLE SERVING 80g

	Per 100g	Per Single Serving	% NRV's* per single serving
Energy (kJ)	363	290	-
Protein (g)	5.0	4.0	7
Glycaemic Carbohydrate (g)	5	4	-
of which total sugar (g)	1.5	1.2	-
Total Fat (g) (g)	0.8	0.6	-
of which Saturated Fat (g)	<0.1	<0.1	-
Dietary Fibre* (g)	9.4	7.5	-
Total Sodium (mg)	8	6	-
Niacin (mg)	2.0	1.6	10
Vitamin B6 (mg)	0.1	0.1	5
Vitamin C (mg)	15.0	12.0	12
Zinc (mg)	1.1	0.9	8

*NRVs = Nutrient reference values for individuals 4 years and older.

#Prosky (AOAC, 1990). Information applies to product as packed.

Nutritional information is based on South African Medical Research Council Food Composition Tables.

**An Additive and preservative free food as is the case with all frozen vegetables.

Ingredients:

Green Peas.

Figure 2-7: McCain frozen baby peas and accompanying nutritional information table⁴⁸⁸

Currently in terms of R146 it is not always mandatory to supply a nutritional information table on the product label. However, a nutritional information table must appear on the label where:

- a nutrition claim appears on the label;⁴⁸⁹
- a fortification claim is made in relation to a food vehicle;⁴⁹⁰ or
- a comparative claim is made on the label.⁴⁹¹

⁴⁸⁸ Image sourced from McCain date unknown <https://mccain.co.za/retail/products/baby-peas/>.

⁴⁸⁹ See discussion 2.4.5 above.

⁴⁹⁰ See regs 50(12) and 51(2) of R146. Part 2.4.4.2 above sets out a discussion on the fortification of food vehicles.

⁴⁹¹ See reg 53(1)(d) of R146. See discussion 2.4.5.2 above.

In instances where it is not mandatory for a product label to include a nutritional information table, certain foodstuffs manufacturers may nevertheless voluntarily decide to do so. Under R3337 it is proposed that nutrient declarations become mandatory for all prepackaged foodstuffs in South Africa. This aspect is discussed in Chapter 4.⁴⁹²

Returning to R146, where nutritional information is required or voluntarily applied to a foodstuffs label the minimum mandatory nutritional information must be displayed on the label in the prescribed tabular format (hereafter referred to as the nutritional information table),⁴⁹³ as set out in Annexure 2 of R146, which may be found in Addendum B to this thesis. The nutritional information table should contain the heading "Typical nutritional information", which would be the typical nutritional information of the product in ready-to-eat form or as packed. The table should also indicate the mass or volume of a single serving of the relevant foodstuffs.⁴⁹⁴ Furthermore, the amount of the minimum prescribed nutrients present in the relevant foodstuff, including energy, protein, total fat, saturated fat, dietary fibre⁴⁹⁵ and total sodium, must be reflected in the nutritional information table in the appropriate unit of measurement.⁴⁹⁶ Each nutrient must be expressed per single serving,⁴⁹⁷ as well as per 100 g (for solid foodstuffs) or 100 ml (for liquid foodstuffs), as

⁴⁹² See discussion in part 4.3.

⁴⁹³ See reg 50(1) and 50(2) of R146.

⁴⁹⁴ See part 2.5.4.1 below for a discussion of the prescribed units of measure.

⁴⁹⁵ The term "dietary fibre" (or "fibre") refers to edible carbohydrate polymers with ten or more monomeric units, which are not hydrolysed by the endogenous enzymes in the small intestine of humans and which either occur naturally, or which have been obtained by physical, enzymatic, or chemical means, in fruits, vegetables and cereals that are consumed ordinarily as food and measured as non-starch polysaccharides. Novel fibres are excluded from this definition, however. See reg 1 of R146. The nutritional information table must disclose the method of analysis that was used to determine the dietary fibre content of the product. See reg 50(4)(c) of R146. The example in Figure 2-7 above indicates that the Prosky (AOAC, 1990) method was used.

⁴⁹⁶ The energy content of the foodstuff must be declared in kilojoules (or the abbreviated term kJ). Furthermore, the amount of each nutrient disclosed in the nutritional information table should be declared in mass in the prescribed units of measure as set out in Annexures 2 and 3 of R146. In terms of Annexure 2, sodium should be indicated in milligrams (mg), whilst protein, total sugar, total fat, saturated fat and dietary fibre should be reflected in grams (g). See reg 50(3)(a), (c) and 50(3)(d) read with Annexure 2 of R146. See further part 2.5.4.1 below.

⁴⁹⁷ This requirement is applicable to all foodstuffs except for dry uncooked wheat flour and dry uncooked maize meal, where the daily single serving is regarded as 100 g. See reg 51(2) of R146. An appropriate serving size must be determined by the manufacturer based on scientific, evidence-based testing that justifies the selected serving size of the relevant foodstuff. A single serving size which does not encourage the consumption of so-called supersize servings should be selected. Supersize servings are food servings which might result in an undesirable increase of a person's total energy intake in such a manner that could contribute to unhealthy weight gain. See reg 50(8)(a)-(b) of R146.

the case may be.⁴⁹⁸ The nutritional information table for the McCain frozen baby peas complies with these requirements, and also contains an additional column on the right side which sets out the percentage NRV of certain nutrients per single serving, which is permitted.⁴⁹⁹

A current shortcoming within R146 is that the nutritional information which usually appears on the back of a product container or label is difficult for the average customer to understand. This issue, which is even more prevalent among consumers with low income and literacy levels, has also been identified in other parts of the world.⁵⁰⁰ Aspects such as the wording used, difficulties in interpreting the numerical values of the nutrient values provided, and an overall feeling that the information is too complicated have been pointed out.⁵⁰¹ The issue is particularly problematic with respect to unhealthy foodstuffs, as the consumer may not be able to identify that a specific product is less healthy when the nutritional information is not displayed in a user-friendly manner, which may ultimately impact consumer health over time. In this regard the WHO⁵⁰² has noted:

[n]utrient declarations provide essential information about the nutrient content of foods, but the complexity of the quantitative information on the back of the pack means that it is not readily accessible and is often poorly understood. FOPL can complement nutrient declarations by providing convenient, relevant and readily understood information on the front of packs. Codex does not define or outline specific principles for FOPL systems.

The proposal in R3337 to introduce FOP warning labelling which discloses the presence of unhealthy nutrients and artificial sweeteners in a plain and understandable manner to address this concern is discussed in Chapter 4.

⁴⁹⁸ However, except for packaged water and food vehicles the nutritional information table should not list the vitamins and minerals that are present in the relevant foodstuff in quantities of less than 5% of the NRV for individuals of four years and older. The nutritional information table may, however, include the vitamins and/or minerals present in the foodstuff in amounts between 5-15%, although a nutrition claim is permitted in relation to those vitamins and/or minerals. See reg 52(7) of R146.

⁴⁹⁹ See reg 50(6) of R146.

⁵⁰⁰ Including the USA, Mexico and Europe. See Nieto *et al* 2019 *International Journal of Behavioural Nutrition and Physical Activity* 2; Schmitt, Wagner and Kirch 2007 *Journal of Public Health* 57.

⁵⁰¹ Bopape *et al* 2021 *PLoS ONE* 3.

⁵⁰² WHO *Guiding Principles for FOP Labelling* 9.

2.4.7 Criteria for the use of the terms "fresh", "pure" and "natural"

In addition to nutrient content and comparative claims, it has become an increasing trend to describe foodstuffs in ways that allude, at least indirectly, to the quality, composition or characteristics of the product. Examples of such words include "fresh", "pure" and "natural". Requirements for the use of such claims are set out in regulation 47 of R146.

Regulation 47(2) provides that, in the case of foodstuffs that are not regulated in terms of the *APSA* or *NRCS Act*, statements to the effect of their being "fresh", "natural", "pure", "nature's", "traditional", "original", "authentic", "real", "genuine", "home made", "farmhouse", "hand-made", "selected", "premium", "finest", "quality", or "best", or any other any words, statements, phrases, logos or pictorial representations which convey or imply similar concepts will be permitted if the use of such statements complies with the relevant criteria stipulated in Guideline 7 to R146.⁵⁰³ The discussion below is limited to three of these words, namely "fresh", "pure" and "natural" for the sake of conciseness and for illustrative purposes.

Guideline 7 is a document titled *Criteria for the use of the term fresh, pure, natural, etc. in food labelling* (hereafter "Guideline 7"). This document was issued by the UK Food Standards Agency (hereafter the UKFSA)⁵⁰⁴ in 2002 and revised in 2008,⁵⁰⁵ following investigations into consumers' perception of the use of these terms in relation to foodstuffs labelling and advertising.⁵⁰⁶ The UKFSA issued Guideline 7 with a view to

⁵⁰³ In terms of reg 47(1), the use of these words or terms would also be acceptable if they are linked to specific protocols which are registered with the DOA or acceptable in terms of regulations in terms of the *APSA* or *NRCS Act*. For example, the word "prime" is acceptable in relation to the meat cut classified as prime rib in terms of meat regulations that have been issued under the *APSA*. That being said, other quality indications, including words such as "super", "prima", and "quality" or any other word or expression which directly or by implication create or may create the impression that meat or a carcass is of a special or particular quality may not appear on the container label of such products. See reg 23(2) of the *Regulations Regarding the Classification and Marking of Meat Intended for Sale in the Republic of South Africa*, GN R55 in GG 38431 of 30 January 2015.

⁵⁰⁴ The UKFSA has been operating as an independent government department in England, Wales and Northern Ireland since 2000. Its activities centre around aspects relating to food safety, such as the prevention of food-borne illnesses. It also aims to ensure that information relating to food is accurate and assists consumers in making informed decisions when selecting food. See UKFSA 2022 <https://www.food.gov.uk/about-us/who-we-are>.

⁵⁰⁵ The first version of this guideline was issued by the UKFSA in 2002. It was revised in July 2008, which is the version adopted as Guideline 7 to R146. See para 10 of Guideline 7.

⁵⁰⁶ See UKFSA *FAC Review of The Use of the Terms Fresh, Pure, Natural, etc in Food Labelling* (2001).

mitigating or avoiding the use of certain marketing terms in a misleading or ambiguous manner, specifically to assist the consumer in making informed decisions during food selection in the UK.⁵⁰⁷

Following the above, a few comments should be made regarding the adoption of Guideline 7 into R146. Firstly, the document was issued by the UKFSA to provide “informal, non-binding advice”⁵⁰⁸ on the relevant legal requirements in the UK for the use of terms such as “pure”, “natural” and “fresh” in relation to food labelling in that country, and to set out voluntary best practice advice on the use of such terms in the UK. Paragraph 1 of Guideline 7 states, specifically, that “there is no legal obligation to follow the recommended criteria” as set out in the document. It is peculiar, therefore, that the South African government simply adopted a non-binding guideline which was issued by a foreign food agency for foodstuffs intended for sale in a foreign jurisdiction as part of our domestic food legislation. Given the non-binding intention of the drafters of the document, it is also peculiar that compliance with this document is mandatory⁵⁰⁹ in South Africa in terms of R146 without any adaptation in order to ensure that the document conforms with the local foodstuffs labelling legislation.

In terms of Guideline 7, the word “fresh” is usually understood by consumers in one of two ways. Firstly, it could refer to the fact that the foodstuff is sold within a short period of time after manufacture or harvesting.⁵¹⁰ In this context, claims such as “freshly baked”, “freshly cooked” or “freshly picked” would be acceptable in relation to foodstuffs that are offered for sale shortly after baking, cooking or picking, as the case may be.⁵¹¹ Secondly, the term “fresh” may be used to assist consumers in identifying products which have not

⁵⁰⁷ See paras 4-5 of Guideline 7. The aims of the criteria document are to (i) assist manufacturers, producers, retailers and caterers in ascertaining in which circumstances the use of these descriptions would be appropriate; (ii) assist enforcement authorities to provide consistent advice about labelling; and (iii) benefit consumers by encouraging the adoption of consistent and transparent labelling practices. See the cover page of Guideline 7.

⁵⁰⁸ See para 2 of Guideline 7.

⁵⁰⁹ Regulation 47(2) provides that “... statements to the effect of being 'fresh', 'natural', 'nature's'", etc “shall be permitted if compliant with the criteria stipulated in Guideline 7”. The use of the phrase “shall be permitted if compliant” with Guideline 7 indicates that compliance with the relevant criteria set out in Guideline 7 is mandatory for the use of terms that are covered by this document.

⁵¹⁰ See para 26 of Guideline 7.

⁵¹¹ See para 31 of Guideline 7. The use of such terms should not have any connotation other than the immediacy of the action being described in the term used.

been processed⁵¹² and to differentiate between similar products. Describing a product as fresh fruit salad would, for example, assist consumers in understanding that such a product contains fresh fruit only, as opposed to fruit salad which may contain dried or preserved fruits.⁵¹³ Similarly, the term “fresh” will assist consumers in distinguishing between fresh pasta and dried pasta.⁵¹⁴

Turning to the use of the word “pure”, Guideline 7 states that this word would usually be understood to describe a single-ingredient foodstuff to which nothing has been added and which is not subject to contamination with similar foods which are not pure.⁵¹⁵ As a general rule, the word “pure” should not be used in relation to compound foodstuffs.⁵¹⁶ If, however, each of the individual ingredients in the compound foodstuff qualifies as being pure, the use of the phrase “made with pure ingredients” would be acceptable.⁵¹⁷ Alternatively, the word “pure” could be used to highlight the quality of ingredients of a specific foodstuff, for example “pure butter shortbread” to indicate that the butter has not been mixed with other edible oils or fats.⁵¹⁸

In considering the use of the term “natural”, Guideline 7 stipulates that this word essentially means that the product consists of natural ingredients, e.g., ingredients produced by nature, and not ingredients that are the work of man or have been interfered

⁵¹² For a discussion on food processing, see part 1.8.2 above. As freezing is a form of processing a foodstuff, it would be misleading to describe frozen meat or fish as “fresh” meat or fish. The term “fresh” may, however, be used in relation to fish that has been kept chilled on ice after being caught, or raw chilled meat, because meat carcasses are usually chilled after slaughter as a hygienic measure. See paras 36-38 of Guideline 7. When the particular foodstuff was fresh (i.e., recently harvested or manufactured) prior to being frozen, use of the term “frozen from fresh” would be acceptable. See para 47 of Guideline 7.

⁵¹³ See paras 27 and 31 of Guideline 7.

⁵¹⁴ See para 45 of Guideline 7.

⁵¹⁵ See para 63 and 65(a) of Guideline 7.

⁵¹⁶ Guideline 7 mentions two exceptions to this general rule. Firstly, in addition to the acceptable use of the word “pure” in relation to non-sweetened 100% fruit juice (as this is a single ingredient product), it may also be used in relation to juice that has been reconstituted with water, provided that such reconstituted juice does not contain any added sugar, lemon juice or ascorbic acid. In addition, although jams and marmalades are not single-ingredient products, the term “pure fruit” may be used in relation to the labelling and advertising of such goods when the fruit added as an ingredient has not been preserved prior to being added as an ingredient during the manufacture process. See para 65(b) of Guideline 7.

⁵¹⁷ See para 65(b) of Guideline 7.

⁵¹⁸ See para 63 of Guideline 7.

with by man (i.e., that the product has not been processed).⁵¹⁹ In the circumstances, the word “natural” may be used in relation to single-ingredient foodstuff to which nothing has been added, such as fruits and nuts that are sold in their original harvested state.⁵²⁰ The use of “natural” would also be acceptable in relation to single-ingredient foodstuffs which have been subjected to only minimal processing methods (without any added chemicals) to make them suitable for human consumption, such as smoking, baking or roasting.⁵²¹

2.4.8 Prohibited claims

Now that we have looked at what particulars are required or acceptable on foodstuffs labels and advertisements, the discussion to follow sets out the prohibited claims that are not acceptable.

2.4.8.1 Prohibited medicinal claims

Regulation 13 of R146 deals with statements which are prohibited from appearing on the label or an advertisement of foodstuffs. As a starting point, the use of any word, description or pictorial representation which creates the impression that a foodstuff is supported or endorsed by, complies with or has been manufactured in accordance with recommendations by a health practitioner,⁵²² is strictly prohibited.⁵²³ In addition, the use

⁵¹⁹ See para 51 of Guideline 7. For a discussion of the processing of foods, see part 1.8.2 above.

⁵²⁰ See para 55(a) read with the table on p 19 of Guideline 7. Conversely, it would be misleading to use the term “natural” to describe foodstuffs (or ingredients in foodstuffs) that either contain or consist of chemicals to change their composition, such as chemicals used to tenderise meat, or GMOs. Any product which contains additives or flavourings produced in a chemical manner, or any other non-natural ingredients, cannot be described as “natural”. See para 51 read with the table on p 19 of Guideline 7.

⁵²¹ See para 55(a) read with the table on p 19 of Guideline 7. A compound foodstuff may not be described as “natural”. However, where all the ingredients in a compounded foodstuff are natural (i.e., originate from a plant) and the product has not been subject to any chemical processes or production methods, that product may be described as “Made from natural ingredients”. See para 56 read with the table on p 19 of Guideline 7.

⁵²² A health practitioner is defined as any health professional referred to in the *Health Professions Act* 56 of 1974, the *Allied Health Professions Act* 63 of 1982, the *Pharmacy Act* 53 of 1974, the *Nursing Act* 33 of 2005 or the *Dental Technicians Act* 19 of 1979. See reg 1 of R146.

⁵²³ See reg 13(a)(i) of R146. Reg 13(a)(ii) prohibits the use of any claim which creates an impression that a foodstuff is supported or endorsed by, complies with or has been manufactured in accordance with recommendations by a specific organisation, association, foundation and other entity, when this is not the case. Claiming, for example, that a product is “Certified Halaal” when such certification has not been properly obtained for the product would be prohibited in terms of that provision.

of the word “cure” or any other medicinal claim⁵²⁴ in relation to a foodstuff is prohibited.⁵²⁵ This prohibition assists consumers in distinguishing products that are ordinarily eaten or drunk, i.e., foodstuffs, on the one hand, from edible or drinkable products that qualify as medicines⁵²⁶ on the other hand. Medicines are specifically excluded from the definition of foodstuffs.⁵²⁷ As such, a single product cannot be classified as both a medicine and a foodstuff, as these categories of consumer goods are mutually exclusive.⁵²⁸ An apparent reason for this distinction is to avoid a consumer mistakenly eating or drinking something under the impression that it is a foodstuff whilst it is a medicine, or *vice versa*. This distinction, therefore, aids in consumer safety.

2.4.8.2 Restrictions on the use of health and nutrition claims

As a general rule, the use of the words “health” or “healthy” in relation to foodstuffs labelling and advertising is prohibited in South Africa.⁵²⁹ Similarly, any other words or symbols that imply that a foodstuff or a substance in the foodstuff has health-giving properties in any manner is not permitted.⁵³⁰ The use of words such as “wholesome”, “nutritious” or any other words with a similar meaning, or a claim that a foodstuff provides complete or balanced nutrition is also prohibited.⁵³¹

2.4.8.3 Prohibited false or misleading claims

It has been noted earlier that the food law framework is fragmented. As such, it is no surprise that certain foodstuffs advertising or labelling provisions are duplicated or

⁵²⁴ R146 does not provide a definition of “medicinal claims” but does clarify that prophylactic and therapeutic claims would fall in this category. See reg 13(g) of R146. Any claim that implies a curative, medicinal or therapeutic property or quality in a foodstuff would not be permissible.

⁵²⁵ See reg 13(g) of R146. This prohibition is subject to the provisions of the *Medicines Act*.

⁵²⁶ See part 1.8.1 for the definition of a “medicine”.

⁵²⁷ See s 1 of the *FCDA*.

⁵²⁸ See *Treatment Action Campaign v Rath* (C) (unreported) case number 12156/05 of 13 June 2008 (hereafter “*TAC v Rath*”) paras 57; 96. In this case, the High Court confirmed that a substance that qualifies as a medicine in terms of the *Medicines Act* cannot be classified as a foodstuff under the *FCDA*, and is not governed by the *FCDA*.

⁵²⁹ One notable exception to the above is fortified foodstuffs. As discussed in part 2.4.4.2 above, the official fortification logo contains the word “health” in the statements that accompany the relevant pictorial representation. On this basis, the fortification logo is an exception to the rule that the word “health” or “healthy” may not appear on a foodstuffs label or in foodstuffs advertising.

⁵³⁰ See reg 13(d) of R146.

⁵³¹ See reg 13(e) and (f) of R146.

overlap across different legislative instruments.⁵³² Provisions that prohibit the use of false or misleading claims on a foodstuffs label or advertisement serve as an illustrative example. The word “claim” is defined in R146 as:

any written, pictorial, visual, descriptive or verbal statement, communication, representation or reference brought to the attention of the public in any manner including a trade name or brand name and referring to the characteristics of a product, in particular to its nature, identity, nutritional properties, composition, quality, durability, origin or method of manufacture or production.⁵³³

In essence, therefore, all matter which appears on a foodstuffs label or in foodstuffs advertising that refers to any characteristic of that product would qualify as claims.

As a starting point, the *FCDA* and regulations under this Act⁵³⁴ contain provisions prohibiting the use of false or misleading claims in the advertising or labelling of any foodstuff. Section 5(1) of the *FCDA* provides:

- ... any person shall be guilty of an offence if he-
- (a) publishes a false or misleading advertisement of any foodstuff ...; or
 - (b) for purposes of sale, describes any foodstuff ... in a manner which is false or misleading as regards its origin, nature, substance, composition, quality, strength, nutritive value or other properties or the time, mode or place of its manufacture; or
 - (c) sells, or imports for sale, any foodstuff ... described in the manner aforesaid.⁵³⁵

⁵³² In addition to government regulation, the ARB Code also contains provisions that prohibit false and misleading advertising. See part 6.4 below.

⁵³³ See reg 1 of R146. The term “claim” is not defined in the *FCDA*.

⁵³⁴ Under R146, for example, reg 34 provides that a pictorial representation on a foodstuffs label or advertisement of a foodstuff may not be presented in a manner that is false, misleading or deceptive. Pictorial representations may also not be presented in a manner which is likely to create an erroneous impression regarding the contents of the foodstuffs container or its character, origin, composition, quality, nutritive value, nature or other properties of the product.

⁵³⁵ Section 5(2) qualifies this provision by providing that s 5(1) is not deemed to prohibit the description, sale or importation of any foodstuff under a geographical name which is generally accepted as a generic term for a particular type or variety of that particular product, provided the foodstuff is, in fact, of the type or variety indicated by that name. An example of a foodstuff that would likely fall in this category is the confectionary variant commonly referred to as Turkish delight. Furthermore, s 6(c) sets out a special defence to s 5(1). In terms of this provision, a person that has been charged with publishing a false or misleading advertisement of a foodstuff will not be convicted of an offence if that person proves that it is not selling the foodstuff to which the relevant advertisement relates, and that such a person did not know, and could not reasonably be expected to have known, that the advertisement was false or misleading.

Similarly, the *APSA* prohibits the use of false or misleading descriptions in relation to products regulated in terms of this Act,⁵³⁶ which includes a variety of agricultural foodstuffs. Section 6 provides:

[n]o person shall use any name, word, expression, reference, particulars or indication in any manner, either by itself or in conjunction with any other verbal, written, printed, illustrated or visual material, in connection with the sale of a product in a manner that conveys or creates or is likely to convey or create a false or misleading impression as to the nature, substance, quality or other properties, or the class or grade, origin, identity, or manner or place of production, of that product.

As is the case under the *FCDA*, contravention of section 6 of the *APSA* also constitutes a criminal offence.⁵³⁷ Non-compliance with this legislation or regulations promulgated in terms thereof can also form the basis of a civil claim based on unlawful competition.⁵³⁸

In addition to the *FCDA* and *APSA*, the *CPA* prohibits the use of false, misleading or deceptive representations in relation to the marketing of goods and services.⁵³⁹ In terms of section 29 read with section 41, goods and services may not be marketed in a manner that is misleading, false, fraudulent or deceptive in any way, or in a manner that is reasonably likely to imply a false or misleading representation concerning those goods or services. Section 41(3) lists various forms of conduct which would constitute false, misleading or deceptive representations. Examples would include falsely stating or implying that goods have ingredients, benefits, qualities, grade, or approval that they do not have. Claiming, for example, that a foodstuff contains no sugar or is certified “organic” in instances where this is not the case would be contrary to section 29 read with section

⁵³⁶ See part 2.5.1 below for a discussion of food products that fall within the *APSA*.

⁵³⁷ See s 11(1)(a) of the *APSA*. See the discussion on inspectors under the *FCDA*, assignees under the *APSA* and the National Regulatory for Compulsory Specifications in parts 5.2.1-5.2.3 below. There do not appear to be any reported criminal cases under this legislation, although the NRCS refuses to allow non-conforming imported food consignments to enter the South African ports. An absence of reported cases may indicate that there is general compliance with requests from enforcement authorities where a manufacturer is alerted to a food labelling non-compliance issue under relevant legislation, i.e. that a matter is resolved before there is a need for government enforcement authorities to institute formal court proceedings.

⁵³⁸ *Clover v Sigalo a quo* para 1. See parts 2.5.1 and 5.3.2 for this case discussion. For a general discussion of unlawful competition in advertising, as a delict under the common law in South Africa, see Jager and Smith *Advertising and Law* 55-58. This study focuses on passing-off, which is a form of unlawful competition in trade mark law. See parts 2.5.2.2 and 5.3.4.3 below.

⁵³⁹ This includes the marketing of foodstuffs as ordinary consumer products. See part 2.5.3 below.

41. In addition, such conduct would also be contrary to section 24(2), which prohibits the use of misleading trade descriptions.⁵⁴⁰

Although trade mark rights are discussed later in this chapter,⁵⁴¹ it should be noted at this stage that the *TM Act* contains provisions that prevent the use of false or misleading trade marks. In terms of section 10(12) of the *TM Act*, where a mark is either inherently deceptive or the use of that mark would be likely to deceive or cause confusion,⁵⁴² that mark shall not be registered as a trade mark in terms of the *TM Act*.⁵⁴³

2.5 Other relevant legislation, common law aspects and standards

While the *FCDA* is the primary legislation that sets out the labelling and advertising requirements relating to foodstuffs in South Africa, it cannot be considered in isolation. It is apparent from the discussion above that there are various other laws that are interrelated or which complement the *FCDA* within the overall food law framework. The most relevant legislative provisions, common law aspects and standards specifically relevant to foodstuffs advertising and labelling are discussed below.

At this stage it is also noteworthy to mention that when considering disputes before the South African courts relating to foodstuffs labelling and advertising, there are no reported cases where a contravention of the *FCDA* was claimed in relation to foodstuffs.⁵⁴⁴ Although a handful of cases have pertained to the *APSA*,⁵⁴⁵ the majority of the court disputes have been in terms of trade mark law. Chapter 5 is dedicated to the monitoring and enforcement of food laws that are regulated by the government. The role of self-

⁵⁴⁰ Provided that such conduct is intentional. Section 24(2)(a) of the *CPA* provides that "[a] person must not 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". In highlighting the word "knowingly" in this section the NCT has held that, where there was no intention on the part of a supplier to deliberately and purposely apply a non-compliant trade description to goods, such a supplier cannot be held to contravene s 24(2). See *Soulever Well CC t/a BellaBaci and National Consumer Commission* case no NCT/159598/2020/101(1) dated 30 May 2021 paras 41 and 42. See the discussion of trade descriptions in part 2.5.3.

⁵⁴¹ See part 2.5.2 below.

⁵⁴² See part 5.3.4 for a discussion of trade mark case law relevant to foodstuffs.

⁵⁴³ If such a mark has been registered as a trade mark, it is liable to be removed from the trade marks register. See s 10(12) of the *TM Act*.

⁵⁴⁴ There has, however, been case law relating to the advertising of toothpaste under the *FCDA*. See part 5.3.1 below.

⁵⁴⁵ See part 5.3.2 below.

regulation through the operations of the ARB, which includes the ARB's complaints resolution system, and a discussion of foodstuffs advertising disputes before the ARB are set out in Chapter 6.

2.5.1 APSA

In addition to the horizontal labelling requirements that are set out in R146, product-specific classification, grading or marking requirements are prescribed for foodstuffs which also qualify as products in terms of the *APSA*. A "product" under the *APSA* is defined as:

- (a) any commodity of vegetable or animal origin, or produced from a substance of vegetable or animal origin, and which consists wholly or partially of such substance; and
- (b) any other commodity which in general appearance, presentation and intended use corresponds to a commodity referred to in paragraph (a).⁵⁴⁶

When considering the above definition, all foodstuffs that originate from vegetable or animal origin, or which have been made therefrom, qualify as products in terms of the *APSA*. Although the above definition refers only to "any commodity of vegetable origin or animal", fruits, grains and other plant-based products are also regulated in terms of the *APSA*.⁵⁴⁷ Regulations have been issued in respect of a wide array of foodstuffs that are offered for sale in South Africa,⁵⁴⁸ including products such as processed meat;⁵⁴⁹ poultry

⁵⁴⁶ See s 1 of the *APSA*.

⁵⁴⁷ Visagie 2024 *THRHR* 158, 169.

⁵⁴⁸ Various regulations have also been issued in respect of the control of certain products for the export market. However, goods manufactured in South Africa which are intended for sale outside South Africa fall outside the scope of this study.

⁵⁴⁹ *Regulations Regarding the Classification, Packing and Marking of Processed Meat Products Intended for Sale in the Republic of South Africa*, published in GN R1283 in GG 42740 of 4 October 2019.

meat;⁵⁵⁰ fresh and canned fruits;⁵⁵¹ fresh and canned vegetables;⁵⁵² eggs;⁵⁵³ groundnuts;⁵⁵⁴ wheat products;⁵⁵⁵ bread wheat;⁵⁵⁶ rice kernels;⁵⁵⁷ maize and maize products;⁵⁵⁸ fat spreads;⁵⁵⁹ fruit juice and drinks;⁵⁶⁰ tea;⁵⁶¹ and coffee.⁵⁶²

Under the *APSA*, the *Dairy Products Regulations* set out specific marking requirements for dairy and imitation dairy products. In terms of these regulations, the main panel of a dairy product container label must also include the appropriate class designation such as “full cream milk” or “low fat yoghurt”.⁵⁶³ A noteworthy labelling restriction under the *Dairy Products Regulations* (which is not included in R146) relates to limitations on the

⁵⁵⁰ *Regulations Regarding Control Over the Sale of Poultry Meat*, published in GN R946 in GG 13876 of 27 March 1992 and as amended by GN R471 in GG 39944 of 22 October 2016.

⁵⁵¹ See, for example, the *Regulations Relating to the Grading, Packing and Marking of Fresh Fruits Intended for Sale in the Republic of South Africa*, published in GN R631 in GG 41723 of 22 June 2018; *Regulations relating to the Grading, Packing and Marking of Canned Fruit Intended for Sale in the Republic of South Africa*, published in GN R123 in GG 27280 of 18 February 2005.

⁵⁵² See, for example, *Regulations Relating to the Grading, Packing and Marking of Fresh Vegetables Intended for Sale in the Republic of South Africa*, published in GN R364 in GG 36480 of 24 May 2013; *Regulations Relating to the Grading, Packing and Marking of Canned Vegetables Intended for Sale in the Republic of South Africa*, published in GN R1532 in GG 25605 of 24 October 2003.

⁵⁵³ *Regulations Regarding the Grading, Packing and Marking of Eggs Intended for Sale in the Republic of South Africa*, published in GN R345 in GG 43108 of 20 March 2020.

⁵⁵⁴ *Regulations Relating to the Grading, Packing and Marking of Groundnuts Intended for Sale in the Republic of South Africa*, published in GN R966 in GG 28084 of 7 October 2005.

⁵⁵⁵ *Regulations Relating to the Grading, Packing and Marking of Wheat Products Intended for Sale in the Republic of South Africa*, published in GN R405 in GG 40828 of 5 May 2017.

⁵⁵⁶ *Regulations Relating to the Grading, Packing and Marking of Bread Wheat Intended for Sale in the Republic of South Africa*, published in GN R1547 in GG 42862 of 29 November 2019.

⁵⁵⁷ *Regulations Relating to the Grading, Packing and Marking of Rice Kernels Intended for Sale in the Republic of South Africa*, published in GN R44 in GG 42968 of 24 January 2020.

⁵⁵⁸ *Regulations Relating to the Grading, Packing and Marking of Maize Intended for Sale in the Republic of South Africa*, published in GN R473 in GG 32190 of 8 May 2009; *Regulations Relating to the Grading, Packing and Marking of Maize Products Intended for Sale in the Republic of South Africa*, published in Proc 3 in GG 39613 of 22 January 2016 and R63 in GG 39627 of 29 January 2016.

⁵⁵⁹ *Regulations Relating to the Classification, Packing and Marking of Fat Spreads Intended for Sale in the Republic of South Africa*, published in GN R194 in GG 35109 of 9 March 2012.

⁵⁶⁰ *Regulations Relating to the Classification, Packing and Marking of Fruit Juice and Drink Intended for Sale in the Republic of South Africa*, published in GG 7290 of 7 November 1980 and as amended over time, including most recently by R411 in GG 36544 of 14 June 2013.

⁵⁶¹ *Regulations Relating to Tea and Related Products Intended for Sale in the Republic of South Africa*, published in GN R1153 in GG 43856 of 30 October 2020.

⁵⁶² *Regulations Relating to Coffee, Chicory and Related Products Intended for Sale in the Republic of South Africa*, published in GN R1154 in GG 43856 of 30 October 2020.

⁵⁶³ Also see the discussion in part 2.4.4.1 above.

permitted letter size of the particulars that may appear on the main panel in proportion to the letter size of the relevant class designation.⁵⁶⁴ In terms of regulation 26(7)(a):

[n]o word or expression may be bigger than the class designation unless it is a registered trade mark or trade name.

This provision was relevant in *Clover SA (Pty) Ltd v Sigalo Foods (Pty) Ltd*⁵⁶⁵ (hereafter "*Clover v Sigalo a quo*"). In this matter Clover SA (Pty) Ltd ("Clover") launched motion proceedings in the Pretoria High Court against the producer of a product labelled as Stork BUTTER SPREAD, Sigalo Foods (Pty) Ltd (hereafter "Sigalo"). Clover claimed that the labelling of Sigalo's product was contrary to the *APSA*⁵⁶⁶ and the *Dairy Products Regulations*⁵⁶⁷ and that, by trading in that product, the respondent was competing unlawfully.⁵⁶⁸ One of the grounds raised by Clover was that Sigalo's use of the phrase "Stork BUTTER SPREAD" on the container label of its product contravened regulation 26(7)(a), as that phrase was displayed on the label in a letter size larger than that of the class designation (i.e., modified butter) although the phrase "Stork BUTTER SPREAD" was not a registered trade mark.⁵⁶⁹

In opposing the matter Sigalo argued that on a reading of regulation 26(7)(a) there were two distinct instances where displaying elements in a letter size larger than the class designation on the label would be permissible. The first instance was where a specific word or expression was a registered trade mark. The second instance, so it was argued, was where the relevant word or expression qualified as a trade name.⁵⁷⁰ In this regard Sigalo pointed out that neither the *APSA* nor the *Dairy Products Regulations* provide a definition for "trade name". As such, it submitted that the ordinary dictionary definition

⁵⁶⁴ See regs 26(7)(b)-(f) of the *Dairy Products Regulations*. Elements which may appear in a letter size larger than the class designation include (i) the nett quantity of the product, (ii) words and phrases which inform the consumer that the product is new or is on promotion, such as "try me, I'm new" or "on sale", and (iii) geographical indications such as "Protected Designation of Origin". Certain particulars on cheese labels may also appear in a larger font than the class designation on the pack.

⁵⁶⁵ *Clover SA (Pty) Ltd v Sigalo Foods (Pty) Ltd* (GP) (unreported) case number 12130/2021 of 12 November 2021.

⁵⁶⁶ Specifically, ss 3 and 6 of *APSA*.

⁵⁶⁷ Specifically, regs 26(7)(a), 32(3)(a) and 32(4) of the *Dairy Products Regulations*.

⁵⁶⁸ *Clover v Sigalo a quo* paras 1-2; *Sigalo Foods (Pty) Ltd v Clover SA (Pty) Ltd* 2023 JDR 1842 (SCA) (hereafter "*Sigalo v Clover* (SCA)") paras 5-6, 36.

⁵⁶⁹ *Clover v Sigalo a quo* paras 4.3; 6.2 and 7.

⁵⁷⁰ *Clover v Sigalo a quo* para 20.

should be afforded to this term,⁵⁷¹ namely “a name given to distinguish the respondent’s product from its competitors”.⁵⁷² On this basis Sigalo argued that the phrase “Stork BUTTER SPREAD” fell within the second instance in that it was utilised as the trade name of the product and could be displayed on the label in a letter size larger than the class designation without contravening regulation 26(7)(a).⁵⁷³ In rejecting this argument the High Court noted:

[e]ven if one was to attach the dictionary meaning to the word ‘trade name’ as propagated by the respondent, in my view, that definition, when viewed corporately within the affected sections of the Act and the Regulations, would still come short to meet the regulatory muster in that it offends, *inter alia*, Regulation 26(7)(a).⁵⁷⁴

The matter was subsequently taken on appeal,⁵⁷⁵ where it was also held that Sigalo had contravened regulation 26(7)(a).⁵⁷⁶ However, the SCA’s reasoning differed from that of the court *a quo*. On considering the documentary evidence Ponnann JA noted that Sigalo had referred to the phrase “Stork BUTTER SPREAD” as a trade mark in its response to the letter of demand and correspondence to an assignee of the DOH.⁵⁷⁷ In addition, it had applied to register that phrase as a trade mark in terms of the *TM Act*.⁵⁷⁸ The SCA held that, on its own admission, Sigalo deemed the phrase “Stork BUTTER SPREAD” to be a trade mark, and that it could not retrospectively claim that the phrase was not a trade mark but rather a trade name. As the phrase was not registered in terms of the *TM Act* at the relevant time, the use of that phrase in a letter size larger than the class designation on the product label was, therefore, contrary to regulation 26(7)(a) of the *Dairy Products Regulations*.⁵⁷⁹

When considering the background to the marking restriction set out in regulation 26(7)(a), this requirement was first introduced in the regulations that preceded the

⁵⁷¹ *Clover v Sigalo a quo* 20. See para 18 of the case for the respective dictionary definitions set out by the respondent.

⁵⁷² *Clover v Sigalo a quo* para 19.

⁵⁷³ *Clover v Sigalo a quo* para 17.

⁵⁷⁴ *Clover v Sigalo a quo* para 62.

⁵⁷⁵ *Sigalo Foods (Pty) Ltd v Clover SA (Pty) Ltd* 2023 JDR 1842 (SCA) (“*Sigalo v Clover* (SCA)”).

⁵⁷⁶ *Sigalo v Clover* (SCA) para 17.

⁵⁷⁷ *Sigalo v Clover* (SCA) para 15.

⁵⁷⁸ At the time of instituting the motion proceedings, the trade mark application was pending. As such it was not a registered trade mark. See *Sigalo v Clover* (SCA) paras 14-15.

⁵⁷⁹ *Sigalo v Clover* (SCA) para 17.

current *Dairy Products Regulations*, namely the *Regulations Relating to the Classification, Packing and Marking of Dairy Products and Imitation Dairy Products Intended for Sale in the Republic of South Africa*⁵⁸⁰ (hereafter “the previous *Dairy Products Regulations*”). Regulation 26(7)(a) of the current *Dairy Products Regulations* is identical in wording to regulation 25(7)(a) of the previous *Dairy Products Regulations*.⁵⁸¹ A few months before the previous *Dairy Products Regulations* came into operation,⁵⁸² a dispensation⁵⁸³ was issued by the DOA’s Directorate of Food Safety and Quality Assurance, which allowed the use of certain elements on the label in a letter size larger than the class designation.⁵⁸⁴ The relevant part of the dispensation provided:

[i]n terms of regulation 25(7)(a) of the newly published regulations on dairy and imitation dairy products (R260. Dated 27 March 2015), the only word that will be allowed to be bigger than the class designation when these regulations come into force, is a registered trade mark or registered trade name.⁵⁸⁵

Although the dispensation expired with the repeal of the previous *Dairy Products Regulations*⁵⁸⁶ it is submitted that this official document remains relevant to demonstrate how the DOA interpreted regulation 25(7)(a) of the previous *Dairy Products Regulations*, which has been retained as-is in regulation 26(7)(a) of the current *Dairy Products Regulations*. Moreover, the passage from the dispensation quoted above confirms that only elements registered in terms of the *TM Act* may appear on the label of a product in a letter size larger than the class designation. On this basis, and as the mark “Stork BUTTER SPREAD” was not registered in terms of the *TM Act*, the finding of the court *a*

⁵⁸⁰ Published in GN R260 of 27 March 2015. The previous *Dairy Products Regulations* were repealed when the current *Dairy Products Regulations* came into operation.

⁵⁸¹ Reg 25(7)(a) of the previous *Dairy Products Regulations* provided that “no word or expression may be bigger than the class designation unless it is a registered trade mark or trade name”.

⁵⁸² The previous *Dairy Products Regulations* came into operation on 27 March 2016, which was 12 months following its publication in the GG.

⁵⁸³ DOH Directorate Foods Safety and Quality Assurance *Dispensation: Relaxation of the Restriction on Letter Size for Trade Marks or Trade Names Still in the Process of Registration – Dairy and Imitation Dairy Products* issued dated 17 September 2015 (hereafter “DOA Dispensation”).

⁵⁸⁴ The DOA Dispensation was issued in terms of s 3(1)(a) of *APSA*. Essentially, the dispensation permitted a deviation from the letter size limitation where an application to register that element in terms of the *TM Act* had been filed with the Registrar of Trade Marks on or before a specific date. For dairy and imitation dairy products placed in the market after 28 March 2016, proof of filing an application to register the relevant elements in terms of the *TM Act* prior to launch was required. See DOA Dispensation part 2(b).

⁵⁸⁵ Underlined in quote from the original text. See DOA Dispensation part 1.

⁵⁸⁶ DOA Dispensation part 2(c).

quo and subsequently the SCA that the use of this phrase contravened regulation 26(7)(a) of the current *Dairy Products Regulations* seems to accord with the intention of the legislature.

As an additional observation, the class designation of the product informs the consumer what type of product it is, i.e. a modified butter as opposed to pure butter in the instance of the Stock BUTTER SPREAD product. The outcome of the case also accords with the provisions under various legislation discussed above that claims on product labels should not mislead or deceive the consumer as to the nature of the product.⁵⁸⁷ If a court were to interpret the phrase “trade name” in such a way as to suggest that a trade name does not require registration in terms of the *TM Act*, it would open the gates to potentially being able to display certain elements on the product label in a manner that might mislead consumers, the prevention of which was exactly the purpose of introducing this letter size limitation in the previous *Dairy Products Regulations* and retaining it in the current *Dairy Products Regulations*. The misleading nature of the Stock BUTTER SPREAD product name was one of the additional aspects considered by the court in *Clover v Sigalo*, which is discussed in Chapter 5.⁵⁸⁸

2.5.2 Trade mark rights

The case discussion above demonstrates how trade mark law is relevant to foodstuffs labelling. Written and/or graphic elements on a foodstuffs label and advertising that are distinctive (or capable of distinguishing) will qualify for trade mark protection in South Africa provided that the necessary requirements are met. As such, trade marks form an integral part of foodstuffs labels and advertising. In fact, our courts have observed that it is the trade mark that sells the goods.⁵⁸⁹

Following the above, one of the aspects that will be considered in this study relates to restrictions on the use of certain graphic elements that constitute trade mark matter on

⁵⁸⁷ See the discussion in part 2.4.8.3 above.

⁵⁸⁸ See part 5.3.2 below.

⁵⁸⁹ *Laugh It Off Promotions CC v South African Breweries International (Finance) BV t/a Sabmark International* 2005 2 SA 46 (SCA) (hereafter “*Laugh It Off* (SCA)”) para 13; *Laugh It Off Promotions CC v SAB International (Finance) BV ta/ Sabmark International (Freedom of Expression Institute As Amicus Curiae)* 2006 1 SA 144 (CC) (hereafter “*Laugh It Off* (CC)”) para 40.

product labels of unhealthy foodstuffs. On this basis, a discussion on trade mark rights in South Africa that are relevant to foodstuffs labelling and advertising is warranted. It should be noted that from an IP perspective this study will focus on trade mark law only.⁵⁹⁰

As elaborated later in this study,⁵⁹¹ trade marks are regarded as property which is capable of protection and enforcement within the bounds of the *Constitution*.⁵⁹² The SCA has held that a trade mark proprietor's right to property and right to freedom of trade, occupation and profession may not unduly restrict other constitutional rights of third parties. Where trade mark rights potentially restrict other rights afforded in the Bill of Rights, our courts will consider how the receptive rights of the parties should be balanced in the light of the spirit and purpose of the *Constitution*.⁵⁹³ This important aspect will be considered further in part 4.8 as part of the discussion on restrictions on the use of certain graphic elements that constitute trade mark matter on the product labels of unhealthy foodstuffs.

There is a dual system for trade mark protection in South Africa.⁵⁹⁴ Trade mark rights can be acquired in terms of statute or independently under the common law,⁵⁹⁵ as discussed under separate headings below. It is also possible that both registered trade mark rights and unregistered trade mark rights can vest in the same mark.

2.5.2.1 Registered trade mark rights

Under statute the proprietor of a trade mark can obtain registered trade mark protection for its mark in terms of the *TM Act*.⁵⁹⁶ Registered trade mark rights afford the proprietor

⁵⁹⁰ While it is possible that graphic elements that are incorporated in a product label may, in certain instances, constitute artistic works in terms of the *Copyright Act* 98 of 1978, copyright falls outside the scope of this study. See s 1(1), read with s 2(1) and 2(2) of the *Copyright Act* 98 of 1978.

⁵⁹¹ See the discussion in part 4.8.

⁵⁹² *Laugh It Off* (SCA) paras 10; 21; *Laugh It Off* (CC) paras 43-44.

⁵⁹³ *Laugh It Off* (SCA) paras 10; 21. Also see Van der Merwe *et al Law of Intellectual Property in South Africa* 108-109.

⁵⁹⁴ Van der Merwe *et al Law of Intellectual Property in South Africa* 107.

⁵⁹⁵ Webster, Morley and Joubert *SA Law of Trade Marks* para 1.1.

⁵⁹⁶ Barring the exceptions in s 70 of the *TM Act*, the *TM Act* applies to all trade marks that were registered or deemed to be registered in terms of the now-repealed *Trade Marks Act* 62 of 1963. See s 3(1) of the *TM Act*.

the right to use its trade mark⁵⁹⁷ in relation to the goods or services to which the trade mark registration extends, to the exclusion of others (i.e. granting a monopoly in that trade mark).⁵⁹⁸ The proprietor may also take steps to stop the unauthorised use of its mark,⁵⁹⁹ or a confusingly similar mark,⁶⁰⁰ in relation to the same or similar goods or services for which it is registered.⁶⁰¹ If a registered trade mark is infringed, the proprietor may institute trade mark infringement proceedings in terms of the *TM Act* to enforce and protect its trade mark rights.⁶⁰²

Under the *TM Act* there are essentially three types of trade marks, notably (i) an ordinary trade mark; (ii) a certification trade mark and (iii) a collective trade mark.⁶⁰³

An ordinary trade mark is defined as:

a mark used or proposed to be used by a person in relation to goods or services for the purpose of distinguishing the goods or services in relation to which the mark is

⁵⁹⁷ Or the licenced use of its trade mark. Section 38 of the *TM Act* deals with the permitted use of a registered trade mark.

⁵⁹⁸ Van der Merwe *et al Law of Intellectual Property in South Africa* 103.

⁵⁹⁹ In terms of s 34(1)(a) of the *TM Act*, "the rights acquired by the registration of a trade mark shall be infringed by the unauthorised use in the course of trade in relation to goods or services in respect of which the trade mark is registered, of an identical mark or of a mark so nearly resembling it as to be likely to deceive or cause confusion". This type of infringement is known as primary trade mark infringement, where the same or confusingly similar mark is used by an unauthorised third party in relation to goods (or services) that are included in the specification of the goods (or services) of the proprietor's trade mark registration. See Van der Merwe *et al Law of Intellectual Property in South Africa* 161-163. See part 5.3.4 below for cases dealing with confusing similarity between marks.

⁶⁰⁰ In terms of s 34(1)(b) of the *TM Act*, the rights acquired by the registration of a trade mark "shall be infringed by the unauthorised use of a mark which is identical or similar to the trade mark registered, in the course of trade in relation to goods or services which are so similar to the goods or services in respect of which the trade mark is registered, that in such use there exists the likelihood of deception or confusion". This type of infringement is known as extended trade mark infringement, where the same or a confusingly similar mark is used by an unauthorised third party in relation to goods (or services) that are similar to the goods (or services) to which the trade mark registration extends. See Van der Merwe *et al Law of Intellectual Property in South Africa* 163-165. For a discussion on the similarity between goods or services, see Webster, Morley and Joubert *SA Law of Trade Marks* para 12.23.

⁶⁰¹ The proprietor of a well-known trade mark may also institute infringement proceedings in terms of s 34(1)(c), in the case of a registered well-known mark, or s 35(3) in the case of an unregistered well-known mark of a foreign trade mark proprietor.

⁶⁰² In terms of s 34 of the *TM Act*. Examples of trade mark infringement matters are discussed in part 5.3.4.2 below.

⁶⁰³ A trade mark based on honest concurrent use may also be granted in special circumstances. See s 14(1) of the *TM Act* read with reg 17 of the *Trade Mark Regulations* published in GN R578 in GG 16373 of 21 April 1995.

used or proposed to be used from the same kind of goods or services connected in the course of trade with any other person.⁶⁰⁴

The phrase “for the purpose of distinguishing” in the definition above is of particular relevance when considering the functions of a trade mark. This distinguishing element of a trade mark is a basic requirement for a mark to be registrable in terms of the *TM Act*.⁶⁰⁵ Section 9(1) provides:

[i]n order to be registrable, a trade mark shall be capable of distinguishing the goods or services of a person in respect of which it is registered or proposed to be registered from the goods or services of another person either generally or, where the trade mark is registered or proposed to be registered subject to limitations, in relation to use within those limitations.⁶⁰⁶

Van der Merwe *et al*⁶⁰⁷ identify four functions of a trade mark. Firstly, and in line with section 9 of the *TM Act*, a trade mark has a distinguishing function in that it distinguishes the product to which it is applied from the same or similar products of other traders in commerce. By virtue of this distinguishing function, trade marks assist consumers in selecting desired products.⁶⁰⁸ When referring to a product, consumers may use (either verbally or in writing in the context of a shopping list) the trade mark as opposed to the generic product name. For example, consumers wanting to purchase their preferred margarine brand may refer to the product as “Rama” or “Flora.”

Secondly, a trade mark serves as a badge of origin in that it denotes that all goods bearing that mark emanate from the same commercial source. Webster, Morley and Joubert⁶⁰⁹ observe that the origin and distinguishing functions of a trade mark are closely linked.

⁶⁰⁴ The word “mark” is defined as “any sign capable of being represented graphically, including a device, name, signature, word, letter, numeral, shape, configuration, pattern, ornamentation, colour or container for goods or any combination of the aforementioned”. See s 1 of the *TM Act*.

⁶⁰⁵ *Cadbury (Pty) Ltd v Beacon Sweets & Chocolates (Pty) Ltd* 2000 2 SA 771 (SCA) 777H; Webster, Morley and Joubert *SA Law of Trade Marks* para 3.16.

⁶⁰⁶ A mark is capable of distinguishing within the meaning of s 9(1) if, on the date on which the application for the registration of the relevant marks is filed, that mark is either (i) inherently capable of so distinguishing (such as a made-up mark for example), or (ii) it is capable of distinguishing by reason of prior use. See s 9(2) of the *TM Act*. Section 10 sets out several grounds on which a mark will be deemed to be unregistrable under the *TM Act*, which includes grounds such as the mark’s not being capable of distinguishing or being likely to cause deception or confusion based on prior rights of third parties. See further part 5.3.4 for case law discussions.

⁶⁰⁷ Van der Merwe *et al Law of Intellectual Property in South Africa* 115-117.

⁶⁰⁸ Blakeney “Intellectual Property and Food Labelling: Trademarks and Geographical Indications” 103.

⁶⁰⁹ Webster, Morley and Joubert *SA Law of Trade Marks* para 3.16.

This observation is in line with the SCA's views in *Pepkor Retail (Proprietary) Limited v Truworths Limited*,⁶¹⁰ where it was noted:

[t]he purpose of a trade mark is to indicate the origin of goods or services in connection with which it is used, that is, to serve as a 'badge of origin'... The fundamental function of a trade mark is thus to distinguish the goods or services of one person from the goods or services of another.⁶¹¹

Thirdly, a trade mark can have a guarantee function in the sense that consumers may have an expectation of the quality of a product based on the trade mark(s) that are applied to it. Consumers who know and like a product sold under a specific trade mark and the quality associated with that product are likely to purchase the product again. In the interests of keeping and growing the consumer purchase base, therefore, the use of trade marks serves to encourage proprietors to maintain consistent quality standards for the goods to which their trade marks are applied.⁶¹² It should be noted, however, that a trade mark does not serve to guarantee quality *per se*. In *AM Moola v The Gap Inc*,⁶¹³ the SCA noted:

although in the ordinary course of events a trade mark owner would wish to ensure the consistency of the quality of the goods or services marketed under its mark, nothing prevents the owner from providing under one mark goods or services of differing, inconsistent or poor quality. The customer has, in the event of the purchase of a substandard product or the provision of substandard services, no redress based on trade mark principles. Market forces may eventually exact their toll. All a trade mark does ... is to identify the enterprise that is responsible for the quality of the goods or services.⁶¹⁴

The three functions above relating to distinguishing capacity, origin identification and guarantee are inter-related. The distinguishing capacity of a trade mark allows the consumer to realise that the product comes of a single commercial source, i.e., the origin, which also serves as a guarantee.⁶¹⁵ When considering that a trade mark forms part of a product label or other advertising content, an additional function is that it also serves

⁶¹⁰ *Pepkor Retail (Proprietary) Limited v Truworths Limited* 2016 JDR 2209 (SCA) (hereafter "*Pepkor case*").

⁶¹¹ *Pepkor case* para 10.

⁶¹² Blakeney "Intellectual Property and Food Labelling: Trademarks and Geographical Indications" 103.

⁶¹³ *AM Moola v The Gap Inc* 2005 6 SA 568 (SCA).

⁶¹⁴ *AM Moola v The Gap Inc* 2005 6 SA 568 (SCA) para 39.

⁶¹⁵ See *Laugh It Off* (SCA) para 12.

to assist in selling the product in relation to which it is used,⁶¹⁶ particularly when used prominently, for instance as the name of a foodstuff. Blakeney⁶¹⁷ points out that trade marks serve to:

facilitate advertising and product promotion through their ability to distinguish and identify goods and services. This is particularly important in markets where there is a proliferation of homogenous goods, as it allows purchasers to identify the goods of a particular trader... In the market for packaged foods, branding plays a very important role in product differentiation. A trademark is a concise way in which to refer to a product. Given the expense of advertising, trademarks serve a particularly important function in advertising and product promotion.

On this basis, where the proprietor of a registered trade mark has used its mark to such an extent that it has acquired a reputation and goodwill in that mark in relation to the goods to which the mark is used, that trade mark serves an advertising function which is protectable.⁶¹⁸ The brand of a product, which includes the trade mark matter on labels and in advertising, is a valuable business asset.⁶¹⁹ In this regard, section 34(1)(c) of the *TM Act*, which is known as the anti-dilution provision, is relevant. It provides:

(1) The rights acquired by registration of a trade mark shall be infringed by-

...
the unauthorized use in the course of trade in relation to any goods or services of a mark which is identical or similar to a trade mark registered, if such trade mark is well known in the Republic and the use of the said mark would be likely to take unfair advantage of, or be detrimental to, the distinctive character or the repute of the registered trade mark, notwithstanding the absence of confusion or deception.⁶²⁰

Our courts have confirmed that this provision aims to protect the economic or commercial value that attaches to a trade mark⁶²¹ as opposed to the origin or distinguishing function of a trade mark.⁶²² In particular, section 34(1)(c) protects the “advertising value or selling power” of a trade mark.⁶²³ It should be noted that the anti-dilution provision does not

⁶¹⁶ Van der Merwe *et al Law of Intellectual Property in South Africa* 117; *Laugh It Off* (SCA) para 13.

⁶¹⁷ Blakeney “Intellectual Property and Food Labelling: Trademarks and Geographical Indications” 103. Also see discussion in part 1.8.4 above.

⁶¹⁸ See the discussion below of unregistered trade mark rights below regarding the concepts reputation and goodwill.

⁶¹⁹ Dean *Deprivation of Trade Marks Through State Interference in Their Usage* 10.

⁶²⁰ From a trade mark opposition point of view, s 10(17) of the *TM Act* essentially mirrors s 34(1)(c).

⁶²¹ *National Brands Ltd v Blue Lion Manufacturing (Pty) Ltd* 2001 3 SA 563 (SCA) para 11; *Laugh It Off* (SCA) para 13.

⁶²² *Laugh It Off* (CC) para 40.

⁶²³ *Laugh It Off* (SCA) para 13 as confirmed by the Constitutional Court in *Laugh It Off* (CC) para 37.

protect the trade mark *per se*. Rather, this provision protects the “advertising value or selling power” of the trade mark, which usually accrues following extensive advertising efforts regarding the product in relation to which the relevant trade mark is used.⁶²⁴ In *Laugh It Off* (CC), the Constitutional Court noted:

[t]he proprietor of the trade mark usually expends vast sums of money through advertising in order to build up the reputation and selling power or advertising value of his trade mark. The growth of his business is dependent upon the growth of the meaning and importance of his trade mark. It is therefore only fair that he should be entitled to protect this valuable asset against misappropriation.⁶²⁵

Following the above, the Constitutional Court further held:

[c]learly, in our case too s 34(1)(c) serves a vital purpose in preserving trade and commercial interests of owners of trademarks which have a reputation. This it does by prohibiting use which, although it may not confuse or deceive, materially undermines the repute of well renowned trademarks ordinarily harnessed to sell goods and services. The protection must be seen to extend beyond the traditional and primary function of a trademark, which is to signify the origin of goods and services on offer. Rather, the section aims at more than safeguarding a product's 'badge of origin' or its 'source-denoting function'. The section strives to protect the unique identity and reputation of a registered trademark. Both of these attributes underpin the economic value that resides in the mark's advertising prowess or selling power.⁶²⁶

Turning to the issue of classification, trade marks fall into various goods and services classes in accordance with an international classification system as set out in terms of the *Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of Registration of Marks*, 1979 as amended (hereafter the *Nice classification*).⁶²⁷ In the context of foodstuffs, the goods in classes 29-32 are relevant. The class headings for the respective classes are listed below:⁶²⁸

⁶²⁴ *Laugh It Off* (CC) para 37. Also see discussion in part 1.8.4 above.

⁶²⁵ *Laugh It Off* (CC) para 37.

⁶²⁶ *Laugh It Off* (CC) para 40. Also see Dean *Deprivation of Trade Marks Through State Interference in Their Usage* 10.

⁶²⁷ See s 11(1) of the *TM Act*; reg 4(3) of the of the *Trade Mark Regulations* published in GN R578 in GG 16373 of 21 April 1995. Schedule 3 of the *TM Act* has been amended over time to keep up to date with the latest editions of the *Nice classification* published by WIPO. As of 1 January 2024, South Africa has been following the 12th edition of the *Nice classification*. See *Practice Note 2 of 2023: Notice in terms of Regulation 4(3) of the Trade Marks Act* issued by the CIPC Commissioner on 6 December 2023.

⁶²⁸ See CIPC *Nice Classification 12th edition, Version 2024*; World Intellectual Property Organization 2024 <https://www.wipo.int/classifications/nice/en/>.

- Class 29:
Meat, fish, poultry and game; meat extracts; preserved, frozen, dried and cooked fruits and vegetables; jellies, jams, compotes; eggs; milk, cheese, butter, yogurt and other milk products; oils and fats for food.
- Class 30:
Coffee, tea, cocoa and substitutes therefor; rice, pasta and noodles; tapioca and sago; flour and preparations made from cereals; bread, pastries and confectionery; chocolate; ice cream, sorbets and other edible ices; sugar, honey, treacle; yeast, baking-powder; salt, seasonings, spices, preserved herbs; vinegar, sauces and other condiments; ice (frozen water).
- Class 31:
Raw and unprocessed agricultural, aquacultural, horticultural and forestry products; raw and unprocessed grains and seeds; fresh fruits and vegetables, fresh herbs; natural plants and flowers; bulbs, seedlings and seeds for planting; live animals; foodstuffs and beverages for animals; malt.
- Class 32:
Beers; non-alcoholic beverages; mineral and aerated waters; fruit beverages and fruit juices; syrups and other preparations for making non-alcoholic beverages.

Foods that are ordinarily eaten fall in classes 29, 30 and 31.⁶²⁹ Non-alcoholic beverages fall in class 32.⁶³⁰ As an illustrative example, Figure 2-8 below is an image of Kellogg's Coco Pops Chocolate Flavoured Multigrain Cereal, which is commonly available in most foodstuffs retail outlets in South Africa. Cereals fall in class 30 of the *Nice classification*.

⁶²⁹ Class 31 deals with unprocessed food products which would, broadly speaking, fall in the category of agricultural products. Certain class 29 goods such as dairy products would also qualify as agricultural products whilst others, and goods in class 30, would generally be processed foodstuffs.

⁶³⁰ Non-alcoholic beverages and beer fall in class 32. All other alcoholic beverages fall in class 33, but are not deemed to be foodstuffs for the purposes of this study.



Figure 2-8: Kellogg's Coco Pops Chocolate Flavoured Multigrain Cereal ⁶³¹

A search of the CIPC online records reveals that Kellogg Company, a Delaware company of Michigan in the USA, is the proprietor of trade mark registrations:

- 1936/00273/2  in class 30 for "cereal foods included in this class", dated 29 February 1936;⁶³²
- 1983/09347 KELLOGG'S in class 30 for "Coffee, tea, cocoa, sugar, rice, tapioca, sago, coffee substitutes; flour, and preparations made from cereals, bread, biscuits, cakes, pastry and confectionery, ices; honey, treacle; yeast, bakingpowder [sic]; salt, mustard; pepper, vinegar, sauces, spices; ice", dated 20 December 1983; and
- 1962/01820 COCO POPS in class 30 for "Cereal foods consisting of or incorporating cocoa, or being flavoured with cocoa", dated 5 June 1962.⁶³³

⁶³¹ See Checkers 2020 <https://www.checkers.co.za/All-Departments/Food/Food-Cupboard/Breakfast-Cereals%2C-Porridge-and-Pap/Family-Cereals/Kellogg%27s-Coco-Pops-Chocolate-Flavoured-Multigrain-Cereal-350g/p/10393402EA>.

⁶³² If a trade mark is registered without any colour limitation, i.e., in black and white only, it shall be deemed to be registered for all colours. On this basis the black KELLOGG'S logo as registered affords the proprietor the right to use that colour in all colours, including the colour white against a red background as depicted in Figure 2-8. See s 32(2) of the *TM Act*.

⁶³³ Information based on an online trade mark search conducted on 27 September 2024 via the website CIPC IP Online 2024 <https://iponline.cipc.co.za/Trademarks/Search/FreeTMSearch.aspx>.

Kellogg Company's registered trade mark rights in the marks KELLOGG'S and COCO POPS in South Africa date back to 1936 and 1962 respectively. A notable difference between registered trade mark rights and other forms of IP that have a limited duration such as patent rights⁶³⁴ and copyright,⁶³⁵ is that registered trade mark rights can be owned indefinitely.⁶³⁶ Under the *TM Act*, a trade mark registration is initially valid for ten years,⁶³⁷ but can be renewed in perpetuity for continuous ten-year periods.⁶³⁸

A certification mark is defined as:

[a] mark capable of distinguishing, in the course of trade, goods or services certified by any person in respect of kind, quality, quantity, intended purpose, value, geographical origin or other characteristics of the goods or services, or the mode or time of production of the goods or of rendering of the services, as the case may be, from goods or services not so certified.⁶³⁹

The use of certification trade marks is not uncommon in relation to foodstuffs labels, and can also be implemented as a means of assisting consumers to make a choice regarding healthier food options. For example, the Heart and Stroke Foundation South Africa⁶⁴⁰ is the proprietor of the so-called "heart mark" certification mark shown in Figure 2-9 below:



Figure 2-9: Heart mark certification mark⁶⁴¹

⁶³⁴ Patent rights are valid for a period of 20 years calculated from the date of filing the patent application. See s 46(1) of the *Patents Act* 57 of 1978.

⁶³⁵ Whilst the duration of copyright differs somewhat for various copyright works, in general the copyright in a work will subsist for the duration of the author's life plus 50 years thereafter. See s 3 of the *Copyright Act* 98 of 1978.

⁶³⁶ Van der Merwe *et al Law of Intellectual Property in South Africa* 104.

⁶³⁷ See s 37(1) of the *TM Act*.

⁶³⁸ See s 37(2) of the *TM Act*.

⁶³⁹ See s 42(1) of the *TM Act*. One of the requirements for registrability of a certification mark is that the mark may not be registered in the name of a person who carries on business in the goods or services to which the relevant trade mark registration extends.

⁶⁴⁰ The Heart and Stroke Foundation South Africa was established as a non-profit organisation with the primary aim of reducing heart disease and stroke. It is a non-governmental organisation, but its business operations are approved by the DOH. See Heart and Stroke Foundation South Africa 2023 <https://www.heartfoundation.co.za/about/>.

⁶⁴¹ Images sourced from Heart and Stroke Foundation South Africa 2023 <https://www.heartfoundation.co.za/endorsements/>. A search of the online records of the CIPC reveals

A study conducted by Todd *et al*⁶⁴² highlights that the abovementioned logo, which includes a simplified icon, is a useful tool that conveys information in a simple and understandable way, in a manner that is quickly and easily identified by the consumer.

Turning to the meaning of a collective mark, this refers to:

a mark capable of distinguishing, in the course of trade, goods or services of persons who are members of any association from goods or services of persons who are not members thereof.⁶⁴³

The logo of the Citrus Growers' Association of Southern Africa⁶⁴⁴ shown in Figure 2-10 below would qualify as a collective mark.⁶⁴⁵



Figure 2-10: Example of collective mark⁶⁴⁶

Numerous cases have been instituted under the *TM Act* related to trade marks in the foodstuffs classes. Relevant case law examples are discussed in Chapter 5.

that the Heart and Stroke Foundation South Africa has registered the heart mark in classes 29-32 of the Nice classification. See CIPC IP Online 2024 <https://iponline.cipc.co.za/Trademarks/Search/FreeTMSearch.aspx>. Trade mark register pages can be made available by the student on request.

⁶⁴² Todd *et al* 2022 *Nutrients* 11.

⁶⁴³ See s 43(1) of the *TM Act*.

⁶⁴⁴ The Citrus Growers' Association of Southern Africa is an association that represents the interests of more than 1 400 citrus exporters in the Southern African region. See Citrus Growers' Association of Southern Africa 2022 <https://www.cga.co.za/page.aspx?ID=3242>.

⁶⁴⁵ Van der Merwe *et al* *Law of Intellectual Property in South Africa* 114.

⁶⁴⁶ Image sources from the website of the Citrus Growers' Association of South Africa 2022 <https://www.cga.co.za/page.aspx?ID=3242>.

2.5.2.2 Unregistered trade mark rights under the common law

Separate from the *TM Act*, where a person uses a mark (which could be a word, mark, logo,⁶⁴⁷ container shape⁶⁴⁸ or even an entire label)⁶⁴⁹ to the extent that members of the public associate that mark exclusively with that person or its goods and rely on that mark to distinguish that person's business or its goods from others in the course of trade,⁶⁵⁰ such a person can claim to own unregistered trade mark rights in that mark in terms of the common law.⁶⁵¹ Under the common law a trade mark protects the commercial reputation⁶⁵² of the relevant proprietor or its products to which the mark is applied.⁶⁵³

To enforce such unregistered trade mark rights, the proprietor may proceed in terms of the common law action of passing-off as a sub-category of unlawful competition.⁶⁵⁴ Passing-off damages the reputation of a business, which is a component of the broader goodwill⁶⁵⁵ that the business possesses.⁶⁵⁶ Passing-off occurs when a person (A)

⁶⁴⁷ In *Safari Surf Shop CC v Heavywater* [1996] 4 All SA 316 (D) 320; 321; 328, the proprietor of the word mark "spider" which was used in relation to surfboards succeeded in proving a *prima facie* case of passing-off by the respondent, who was using a stylised drawing of a spider in relation to surfboards.

⁶⁴⁸ The case of *Weber-Stephen Products Company v Alrite Engineering (Pty) Ltd* (A) (unreported) case number 201/91 of 24 February 1992 centred on the alleged passing-off of the shape and configuration of the Webber kettle grill.

⁶⁴⁹ See, for example, *Pioneer Foods (Pty) Limited v Bothaville Milling (Pty) Limited* 2014 JDR 0477 (SCA) (hereafter *Pioneer Foods* case) which related to the alleged passing-off of the get-up (i.e. entire packaging) of maize meal.

⁶⁵⁰ The person has, therefore, acquired a reputation in its unregistered mark in relation to the business or goods for which it is used.

⁶⁵¹ Such an unregistered trade mark forms part of the goodwill of the business in relation to which it is used. See Webster, Morley and Joubert *SA Law of Trade Marks* para 11.20. Also see De Jager and Smith *Advertising and the Law* 84.

⁶⁵² The word "reputation" refers to the opinion of the section of the public held in relation to a business or its products. If a business or specific product has a favourable or positive reputation, this encourages potential customers to support the business or purchase its goods. If there is an unfavourable or negative reputation attached to a business or its goods, on the other hand, this would discourage consumers from supporting that business or purchasing its goods. See *Premier Trading Co (Pty) Ltd v Sporttopia (Pty) Ltd* 2000 3 SA 259 (SCA) 266J-267A.

⁶⁵³ Blakeney "Intellectual Property and Food Labelling: Trademarks and Geographical Indications" 103.

⁶⁵⁴ See *Capital Estate and General Agencies (Pty) Ltd v Holiday Inns Inc* 1977 2 SA 916 (A) 929C; *Pioneer Foods* case para 7; Webster, Morley and Joubert *SA Law of Trade Marks* para 15.5.

⁶⁵⁵ The "goodwill" of a business refers to "the attractive force which brings in custom". The goodwill of a business may consist of various elements (such as the actual products or services offered); under a claim of passing-off, it is the reputation element of a business's goodwill that is damaged. See Webster, Morley and Joubert *SA Law of Trade Marks* para 15.7; De Jager and Smith *Advertising and the Law* 59-60.

⁶⁵⁶ *Caterham Car Sales & Coachworks Ltd v Birkin Cars (Pty) Ltd* 1998 3 SA 938 (SCA) (hereafter *Caterham v Birkin*) para 16; *Pioneer Foods* case para 7.

misrepresents to members of the public that its goods or business are those of another (B), or that it is associated with B. The test for establishing if passing-off has occurred is to determine whether or not there is a reasonable likelihood that customers of the relevant goods or business may be confused or deceived into believing incorrectly that A is B, or that A is connected with B, when this is not the case.⁶⁵⁷

To succeed in a passing-off action, the proprietor of the trade mark is required to prove the so-called “classical trinity”, namely (i) reputation, (ii) misrepresentation and (iii) damage (or the likelihood of damage).⁶⁵⁸ When considering the first requirement, the proprietor must prove that at the relevant time⁶⁵⁹ it had acquired a reputation in its trade mark in relation to the goods to which the mark is applied. A reputation is proven if the proprietor can show that its trade mark is distinctive in the sense that the mark is associated in the minds of a substantial portion of members of the public⁶⁶⁰ with the proprietor’s business or its goods.⁶⁶¹ Turning to misrepresentation, this occurs where the representation by the respondent or defendant, as the case may be, “is likely to deceive or confuse a substantial number of members of the public as to the source or origin of his product”⁶⁶² *vis a vis* the product or business of the trade mark proprietor. The third requirement, namely a likelihood of damage, is usually present if a likelihood of deception or confusion (i.e., misrepresentation) is shown.⁶⁶³

In the foodstuffs sector, passing-off proceedings have been instituted before our courts in relation to a variety of products. These cases are discussed in part 5.3.4.3 below.

⁶⁵⁷ *Pioneer Foods* case para 7.

⁶⁵⁸ *Caterham v Birkin* para 13. Also see Jager and Smith *Advertising and the Law* 59-65.

⁶⁵⁹ The trade mark proprietor must show that the reputation existed at the time of the alleged misrepresentation by the respondent. See *Caterham v Birkin* para 22.

⁶⁶⁰ Webster, Morley and Joubert submit that the term “a substantial number” in the context of the relevant members of public refers to sufficient persons to equate appreciable commercial value to the reputation in the relevant trade mark. The type of product concerned will have an impact on what may be a substantial number of members of the public. In the context of FMCG such as foodstuffs that are consumed and purchased by ordinary members of the public, the number may be higher than that in a specialised market such as luxury sports vehicles for example. See Webster, Morley and Joubert *SA Law of Trade Marks* para 15.10.

⁶⁶¹ Webster, Morley and Joubert *SA Law of Trade Marks* para 15.10.

⁶⁶² *Premier Trading Co (Pty) Ltd v Sporttopia (Pty) Ltd* 2000 3 SA 259 (SCA) 266I.

⁶⁶³ *Pioneer Foods* case para 7.

2.5.3 CPA

The *CPA*⁶⁶⁴ sets out certain provisions relating to the marketing,⁶⁶⁵ promotion and advertisement⁶⁶⁶ of goods and services in South Africa.⁶⁶⁷ The definition of “goods” includes anything marketed for human consumption,⁶⁶⁸ which would cover consumable goods such as foodstuffs. While the *CPA* can be termed as an “umbrella law”⁶⁶⁹ for the marketing of goods and services in South Africa,⁶⁷⁰ it does contain some provisions, albeit of a limited nature, relating specifically to foodstuffs advertising and labelling.

From a labelling perspective the provisions in the *CPA* relating to GMOs in foodstuffs have already been discussed in part 2.4.4.3 above. In terms of section 24(4) of the *CPA*, the Minister of Trade has prescribed that processed and packaged meat products as well as dried and packaged meat products are required to contain a trade description containing

⁶⁶⁴ The general effective date of the *CPA* was 31 March 2011. See Schedule 2 of the *CPA* and GN 917 in GG 33581 of 23 September 2010.

⁶⁶⁵ The word market, when used as a verb, means to promote or supply any goods or services. See s 1 of the *CPA*.

⁶⁶⁶ The words “market”, “promote” and “advertisement” are set out in s 1 of the *CPA*. For a discussion on the meaning of “advertisement” and its link with marketing and promotion, see the discussion in part 1.8.4 above.

⁶⁶⁷ See s 5(1)(b) of the *CPA*. Although the *CPA* generally extends to all goods and services in South Africa, there are certain exceptions. The *CPA* applies to the promotion of any goods or services within the Republic unless those goods or services could not reasonably be the subject of a transaction to which the *CPA* applies in terms of s 5(1)(a) as read with s 5(2), or the promotion of those goods or services has been exempted in terms of ss 5(3) and 5(4). In terms of s 5(2), the *CPA* will not apply to (i) transactions in terms of which goods or services are promoted or supplied to the State; (ii) transactions where a consumer is a juristic person whose asset value or annual turnover equals or exceeds R2 000 000 at the time of the transaction (see GN 294 in GG 34181 of 1 April 2011); (iii) transactions that constitute credit agreements under the *National Credit Act* 34 of 2005; and (iv) certain transactions that fall within the ambit of labour law. In addition, the Minister of Trade is authorised, in terms of 5(4) read with s 5(3), to grant an industry-wide exemption from certain provisions of the *CPA*. Examples of such exemptions granted by the Minister relate to the banking industry and the securities services industry. See GN 532 in GG 34399 of 27 June 2011; GN 533 in GG 34400 of 27 June 2011.

⁶⁶⁸ See s 1 of the *CPA*.

⁶⁶⁹ This comprehensive statute essentially covers almost all business activities in South Africa. See Woker 2019 *Stell LR* 100. There are, however, certain exceptions as discussed in a preceding footnote.

⁶⁷⁰ Van Heerden “The Regulation of Marketing Under the CPA” para 3. In addition to the general advertising provisions discussed in this Chapter, the *CPA* also deals with specific advertising and marketing practices, including direct marketing, negative option marketing, catalogue marketing, referral selling and bait marketing. These aspects fall outside the scope of this study. For further reading, however, see Van Heerden “The Regulation of Marketing under the CPA” paras 8-22.

certain particulars. The prescribed particulars are (i) an indication of the net quantity,⁶⁷¹ (ii) the name of the producer, (iii) an ingredients list,⁶⁷² (iv) details of the mode of manufacturing of the relevant product,⁶⁷³ and (v) a country of origin indication.⁶⁷⁴ Those requirements under the *CPA* would apply to packaged meat products and local delicacies like biltong and *droëwors* ordinarily purchased from butcher shops or foodstuffs retail outlets. Except for item (iv), namely the mode of manufacture, all of these requirements are essentially a duplication of horizontal requirements prescribed in terms of R146.⁶⁷⁵

The Minister of Trade has also issued a notice setting out the prescribed country of origin indication in respect of imported foods and beverages⁶⁷⁶ that originate from Jerusalem, Gaza or West Bank, respectively, to avoid such goods being wrongly labelled as "Made in Israel."⁶⁷⁷

The *CPA* prohibits a person⁶⁷⁸ from knowingly applying to any goods a trade description that is likely to mislead the consumer as to any matter implied or expressed in that trade description.⁶⁷⁹ A trade description⁶⁸⁰ would essentially include all written and graphic

⁶⁷¹ The net quantity would include an indication of the number, quantity, measure, weight or gauge of the goods, as the case may be. For meat products in general, a net quantity in kilograms (kg) is usually indicated on the pack.

⁶⁷² The ingredients list must include a description in plain language of the animal from which any particles, portions or constituents of meat were derived. See GN 825 in GG 36968 of 25 October 2013.

⁶⁷³ For a complete list of the information that should appear in the trade description, see GN 825 in GG 36968 of 25 October 2013.

⁶⁷⁴ See ss 24(a), 24(c) and 25(5) of the *CPA*. To assist consumers in making informed decisions or choices, the application of a trade description has also been prescribed in respect of textiles, clothing, shoes and leather goods that are sold in or imported into South Africa. See reg 6(1) read with Annexure D of the *CPA Regulations*, published under GN R293 in GG 34180 of 1 April 2011.

⁶⁷⁵ See part 2.4.3 above.

⁶⁷⁶ In addition to foods and beverages, these provisions are also applicable to cosmetics, technology, textiles and household goods. See GN 380 in GG 36364 of 12 April 2013.

⁶⁷⁷ See items 4-6 in GN 380 in GG 36364 of 12 April 2013. The country of origin indication "Made in Israel" may be applied only to goods that originate from within Israel's borders as they were during the period 1948-1967 before the country's borders were unilaterally changed by Israel in 1967 during the so-called Six-Day War. The country of origin indication for goods originating from East Jerusalem, Gaza or West Bank are required to be labelled as "East Jerusalem: Israeli Goods", "Gaza: Israeli Goods" or "West Bank: Israeli Goods", as the case may be.

⁶⁷⁸ Including a juridic person. See s 1 of the *CPA*.

⁶⁷⁹ An obligation is also placed on retailers not to offer to supply, display or supply any particular goods if that retailer knows or ought to have known that a trade description on a product label is likely to mislead the consumer. See s 24(3)(a)(i) of the *CPA*.

⁶⁸⁰ A "trade description" refers to any description, statement, indication, figure or mark (other than a trade mark as defined in s 1 of the *CPA*) relating to (i) the number, quantity, measure, weight or gauge of any goods; (ii) the name of the producer or producer of any goods; (iii) the ingredients of

elements that are annexed or affixed or otherwise applied⁶⁸¹ to goods (usually appearing on the product label or container) other than a trade mark.⁶⁸² For example, if we consider the front of the Woolworths Food double cream strawberry yoghurt container label pictured in Figure 2-11 below, the trade description would include the product classification, "DOUBLE CREAM STRAWBERRY YOGHURT", the net quantity, "1 kg", and the descriptors "thick & creamy", "WITH LIVE BIFIDOBACTERIUM CULTURES" and "SWEETENED". In addition, the image of the cow and the image depicting the strawberries and yoghurt at the base of the container would also form part of the trade description.⁶⁸³ If any of these elements on the label are false or misleading, this would contravene section 24 of the *CPA*,⁶⁸⁴ in addition to the relevant provisions under the *FCDA* and *APSA* that have been discussed earlier in this chapter.⁶⁸⁵

which any goods consist, or material of which any goods are made; (iv) the place or country of origin of any goods; (v) the mode of manufacturing or producing any goods; or (vi) any goods being the subject of any patent, privilege or copyright". See s 1 of the *CPA*.

⁶⁸¹ The word "apply", when used in relation to a trade description, means to emboss, impress, engrave, etch, print or weave into, work into or onto, annex or affix to, or incorporate within. See s 1 of the *CPA*.

⁶⁸² See the definition of a trade mark in s 1 of the *CPA*.

⁶⁸³ Elements commonly appearing on the back of a foodstuffs product container or label, such as the ingredients list, manufacturer details and nutrient information table, would also fall within the definition of a trade description.

⁶⁸⁴ Woolworths (Pty) Ltd is the proprietor of trade mark registration nos. 2011/12693 WOOLWORTHS FOOD W device and 1998/04798 AYRSHIRE logo, both in class 29. See CIPC 2024 <https://iponline.cipc.co.za/Trademarks/Search/FreeTMSearch.aspx>. As the mark WOOLWORTHS FOOD and the AYRSHIRE logo respectively form part of a registered trade mark, those elements would not qualify as trade descriptions for this product in terms of the *CPA*.

⁶⁸⁵ See part 2.4.8.3 above. In addition, false or misleading claims on foodstuffs labels or advertising would also be contrary to the *ARB Code*. See part 6.4 below.



Figure 2-11: Woolworths Food double cream strawberry yoghurt⁶⁸⁶

2.5.4 SANS issued by the SABS

The SABS operates in various sectors including the food and beverage industry.⁶⁸⁷ Of specific relevance to this study is *SANS 289: 2022 Labelling requirements for prepackaged products (prepackages) and general requirements for the sale of goods subject to legal metrology control* (hereafter “*SANS 289*”).⁶⁸⁸ Compliance with *SANS 289* is mandatory. All prepackaged products,⁶⁸⁹ including prepackaged foodstuffs that are made up prior to

⁶⁸⁶ Image downloaded from Woolworths 2021 https://www.woolworths.co.za/prod/Food/Milk-Dairy-Eggs/Yoghurt/Double-Cream-Yoghurt/Double-Cream-Ayrshire-Strawberry-Yoghurt-1-kg/_/A-6009184605463.

⁶⁸⁷ Its services include conducting chemical, microbiological and physical tests on crops, grain, dairy products, water and various processed food products. See SABS date unknown <https://www.sabs.co.za/Sectors-and-Services/index.asp> for a list of the sectors in which the SABS operates.

⁶⁸⁸ *SANS 289* was approved by the SABS in compliance with annexure 3 of the *TBT Agreement*. *SANS 289* has been amended several times, most recently in March 2024 with the publication of edition 2. Most SANS are copyright protected and must be purchased from the website of the SABS. See SABS 2024 <https://store.sabs.co.za/sans-289-ed-2-00.html>.

⁶⁸⁹ Para 3.1 of *SANS 289* defines a “prepackaged product” or “prepackage” as any commodity that is made up as a unit or entity and for which its quantity has been determined and indicated on its label before being offered for sale, irrespective of whether such a unit or entity is enclosed in a container, wrapped in any manner, or unenclosed. It should, however, be noted that *SANS 289* applies to prepackaged products in general, whilst R146 applies to foodstuffs specifically. In terms of s 1 of R146, the word “prepackaged” in relation to foodstuffs refers to the packaging of a foodstuff in packaging material ready for sale to the consumer or to a catering establishment in such a way that the relevant foodstuff cannot be altered without opening or changing the packaging. This definition differs from

being offered for sale, must comply with all applicable requirements of this national standard.⁶⁹⁰ The labelling requirements set out in *SANS 289* relate to (i) the identity of the product; (ii) the name and place of business of the manufacturer, packer, distributor, importer or retailer; (iii) the net quantity of the product; (iv) prescribed sizes in which certain products are packaged; and (v) certain general requirements for the sale of goods in South Africa.⁶⁹¹ Labelling requirements (i)-(iii) overlap with the horizontal requirements under R146⁶⁹² and will not be discussed further. There are, however, two aspects in *SANS 289* that warrant some discussion, notably the required units of measure for foodstuffs and the prescribed quantities or package sizes for certain foodstuffs.

2.5.4.1 The prescribed units of measure

SANS 289 sets out the units of measure and corresponding symbols for measurements of prepackaged goods in South Africa. For foodstuffs, liquids should be sold by volume (in millilitres or litres), whilst solids should be sold by mass (gram or kilogram).⁶⁹³ Certain products fall in a grey area, where they can take either a solid or fluid form depending on the temperature. *SANS 289* stipulates that butter and margarine are sold by mass⁶⁹⁴ (i.e., treated as solid foods). Edible oils like sunflower oil, on the other hand, should be packaged and sold in volume.⁶⁹⁵ Yoghurt (be it a drinking yoghurt or an eating yoghurt) and sour milk may be sold either by mass or by volume.⁶⁹⁶

the definition of “prepackaged” in *SANS 289*. The definition in R146 focuses on foodstuffs sold to the consumer in an outer container or packaging. On the other hand, the definition in *SANS 289* focuses on the quantity of the product being determined before sale, irrespective of whether or not the product is sold in a container or packaging.

⁶⁹⁰ See reg 20 of the *Legal Metrology Regulations*; para 9.6.2 of *SANS 289*.

⁶⁹¹ See paras 1.1-1.2 of *SANS 289*.

⁶⁹² See part 2.4.3 above.

⁶⁹³ The symbols ml or mL may be used for millilitres, while L or l may denote litres. The symbol kg should be used to denote kilogram, whilst the letter g is the common abbreviation for grams. See Table A.1-Units of Measurement and Table A.2-Choice of Units to *SANS 289*. Due to SABS copyright and licencing restrictions, these tables in *SANS 289* have not been included in this study.

⁶⁹⁴ Item 8 of Table E.1 to *SANS 289*.

⁶⁹⁵ Item 21 of Table E.1 to *SANS 289*.

⁶⁹⁶ Item 19 of Table E.1 to *SANS 289*.

2.5.4.2 The prescribed quantities for certain prepacked foodstuffs

SANS 289 sets out prescribed quantities or package sizes for certain foodstuffs when contained in a consumer package (i.e., when prepackaged).⁶⁹⁷ In the case of coffee and chicory, for example, these products can be packaged and sold in any quantity up to and including 100 g. Over the 100 g mark the product must be packaged and sold in one of the following quantities 125 g, 150 g, and thereafter minimum multiples of 50 g (i.e., 200 g, 250 g, 300 g, *etcetera*) up to 1 kg. Above 1 kg these products should be sold in integral quantities of 0.25 kg (i.e., 1, 25 kg, 1.5 kg, 1.75 kg, 2 kg, 2.25 kg, *etcetera*).⁶⁹⁸ Quantities or package sizes are also prescribed for tea,⁶⁹⁹ bread,⁷⁰⁰ milk and other dairy products,⁷⁰¹ sugar,⁷⁰² wheaten flour,⁷⁰³ sorghum meal,⁷⁰⁴ pasta products,⁷⁰⁵ dried beans,⁷⁰⁶ edible oil,⁷⁰⁷ maize,⁷⁰⁸ rice,⁷⁰⁹ salt,⁷¹⁰ spices and herbs.⁷¹¹ The reason for these quantity prescriptions and other requirements in *SANS 289* is to foster the harmonisation of the technical regulations between countries in the Southern African Development Community ("SADC")⁷¹² with the goal of eliminating unnecessary technical barriers to trade between countries in this region.⁷¹³

Furthermore *SANS 289* prohibits misleading practices relating specifically to the net quantity or identity of a product. Product packages or containers may not be filled in such

⁶⁹⁷ See para 6.7 read with Annexure E of *SANS 289*. A "consumer package" is defined as a prepackage that is customarily produced or distributed for sale to final purchasers through retail sales agencies or other means. See para 3.6 of *SANS 289*.

⁶⁹⁸ Item 14 of Table E.1 to *SANS 289*.

⁶⁹⁹ Item 50 of Table E.1 to *SANS 289*.

⁷⁰⁰ Item 6 of Table E.1 to *SANS 289*.

⁷⁰¹ Item 19 of Table E.1 to *SANS 289*. See item 8 for butter, margarine and other vegetable oils.

⁷⁰² Item 48 of Table E.1 to *SANS 289*.

⁷⁰³ Item 54 of Table E.1 to *SANS 289*.

⁷⁰⁴ Item 45 of Table E.1 to *SANS 289*.

⁷⁰⁵ Item 30 of Table E.1 to *SANS 289*.

⁷⁰⁶ Item 20 of Table E.1 to *SANS 289*.

⁷⁰⁷ Item 21 of Table E.1 to *SANS 289*.

⁷⁰⁸ Item 31 of Table E.1 to *SANS 289*.

⁷⁰⁹ Item 39 of Table E.1 to *SANS 289*.

⁷¹⁰ Item 42 of Table E.1 to *SANS 289*.

⁷¹¹ Item 46 of Table E.1 to *SANS 289*.

⁷¹² South Africa became a member of the SADC in 1994. Other SADC countries include Angola, Botswana, Lesotho, Malawi, Mauritius, Mozambique, Namibia, Swaziland, the Democratic Republic of Congo, Seychelles, Tanzania, Zambia, and Zimbabwe. For additional reading see Blumberg "South African Trade Policy and Regulation in the 1990s" 53-54.

⁷¹³ See *SANS 289* Introduction.

a way that a consumer might reasonably be misled with respect to the quantity of the product in the package, taking into consideration any recognised and accepted production practices that might be necessary for the manufacturer or packer.⁷¹⁴ For example, in the case of prepackaged rusks it is industry practice to have the same package size across different variants in a range. For shopping convenience it is also common practice to keep the price of the respective variants the same. Due to price differences in ingredients, the result is that it is not always possible to sell each variant or flavour in the same quantity.⁷¹⁵ The table set out in Table 2 below sets out examples of three different variants of prepackaged rusks which have the same package size and price, but are sold in different quantities:

Flavour	Buttermilk	Buttermilk and bran	Multigrain and raising
Quantity	500g	450 g	400 g
Image of the main panel			

Table 2: Variants of Bokomo prepackaged rusks

⁷¹⁴ See paras 7.1-7.2 of *SANS 289*.

⁷¹⁵ See *Bokomo Rusks-Paul Noppe* (ARB Directorate ruling of 5 July 2019) 2; 4. Also see the discussion in part 6.4 below.

2.6 R991

2.6.1 Introduction

Under the *FCDA*, R991 sets out provisions relating to foodstuffs and other designated products that are manufactured specifically for persons under three years, notably infants and young children. Infants refer to persons that are 12 months of age or younger, whilst a young child is a child between the ages of one and three years.⁷¹⁶ Government policies are aligned with WHO recommendations on exclusive breastfeeding for infants up to the age of six months, and continued breastfeeding up to the age of two years supplemented by safe, adequate and appropriate complementary foods.⁷¹⁷ The purpose of R991 is essentially to promote breastfeeding in South Africa.⁷¹⁸ The labelling and advertising restrictions that are discussed below should be considered in the light of these recommendations and policy objectives.

Certain labelling requirements set out in R991 overlap with the horizontal labelling requirements under R146. In addition R991 sets out additional, vertical labelling requirements and advertising restrictions applicable only to the designated products under R991. Where there is a conflict or discrepancy between R991 and R146, the provisions of R991 will prevail.⁷¹⁹ Relevant designated products must be manufactured, labelled and packed in accordance with R991, the relevant Codex standards⁷²⁰ and, where applicable, other applicable regulations published under the *FCDA*, including R146.⁷²¹

The *International Code of Marketing of Breast-milk Substitutes* has been entrenched in national legislation in South Africa, notably by the promulgation of R991⁷²² in 2012.⁷²³

⁷¹⁶ See reg 1 of R991.

⁷¹⁷ Weideman 2013 *Without Prejudice* 31; Willet *et al* 2019 *Lancet* 459. For additional reading on the importance of breastfeeding and the associated challenges in modern times, see Pérez-Escamilla *et al* 2023 *Lancet* 472-485.

⁷¹⁸ See Mills *Considering the Best Interests of the Child When Marketing Food to Children: An Analysis of the South African Regulatory Framework* 120; Weideman 2013 *Without Prejudice* 31.

⁷¹⁹ See reg 2(19) of R991.

⁷²⁰ Unless they conflict with R991, in which event the relevant provisions of R991 will prevail. See reg 2(1)(b) of R991.

⁷²¹ See reg 2(1)(b) of R991.

⁷²² Pereira-Kotze, Doherty and Swart 2020 *BMJ Global Health* 1.

⁷²³ See reg 1 of R991. R991 was first published as GN R991 in GG 35941 of 6 December 2012. Whilst reg 17 of R991 initially included an 18-month phase-in period, the compliance and phase-in periods

R991 is closely aligned with the Codex standards,⁷²⁴ and reference to these standards appears throughout the regulations.⁷²⁵ Relevant designated products must be manufactured, labelled and packed in accordance with R991, the relevant Codex standards and where relevant other applicable regulations published under the *FCDA*, including R146.⁷²⁶ Where there is a conflict or discrepancy between R991 and a Codex standard, the provisions of R991 will prevail.⁷²⁷ This is also the case where there are conflicting provisions between R991 and R146.

It should be noted that the advertising restrictions in R991 are aimed at consumers of all ages. The fact that parents or caregivers are usually those that make the selection of preferred foodstuffs for their infants and young children would seem an obvious reason for adopting this approach. As the study focuses on current and proposed advertising and labelling restrictions which are aimed at consumers, restrictions aimed at health care personnel⁷²⁸ included in R991 fall outside the scope of the study. In addition, prohibited promotional practices relating to health care personnel and health establishments such as hospitals⁷²⁹ and the funding of research by breast milk substitute (hereafter “BMS”) manufacturers⁷³⁰ also fall outside the scope of the study.

2.6.2 The relevant designated products

Various categories of so-called “designated products” fall under R991. The discussion below focuses on the most common types of infant and young child foodstuffs, notably:

-
- relating to various parts of R991 were subsequently extended in accordance with the periods set out in GN R434 in GG 36579 of 18 June 2013. The extended phase-in deadline was 6 December 2015.
- ⁷²⁴ Some country-specific requirements are also included in R991. For example, provision is made for the official languages of South Africa as listed in reg 3(6)(a).
- ⁷²⁵ The relevant Codex standards are prescribed for aspects such as the testing and sampling methods for nutrient information analysis; permitted additives, hormone residue, antibiotics, pathogenic micro-organisms and the like; good manufacturing practices and hygiene requirements. See regs 2(6)-2(10) of R991.
- ⁷²⁶ See reg 2(1)(b) of R991. Other relevant regulations include the *Fortification Regulations*. See reg 2(4)(c) of R991. Also see the discussion on the permitted use of the fortification logo in part 2.4.4.2 above.
- ⁷²⁷ See reg 2(1)(b) of R991.
- ⁷²⁸ Health care personnel include both health care providers such as doctors, nurses, dentists or pharmacists, and health workers such as social workers. See reg 1 of R991.
- ⁷²⁹ See reg 1 of R991 for the comprehensive definition of a “health establishment”.
- ⁷³⁰ For a discussion on this topic, see Lake *et al* 2019 *SAMJ* 902-906.

- i. infant formula, which is also known as a BMS;⁷³¹
- ii. follow-up formula;
- iii. complementary foods; and
- iv. liquid milks, powdered milks, modified powdered milks, and powdered drinks that are marketed or otherwise represented as suitable for infants or young children (referred to below as “infant and young child milks and drinks”).⁷³²

These products are referred to collectively as “the relevant designated products.”

An infant formula is a formulated product that has been specially manufactured⁷³³ *mero motu* to satisfy the nutritional requirements of infants during the first months of life up to the introduction of appropriate complementary feeding.⁷³⁴ Figure 2-12 below provides an example, namely Nestlé NAN OptiPro Starter Infant Formula, which is suitable for infants from birth to six months of age:



Figure 2-12: Nestlé NAN OptiPro Starter Infant Formula⁷³⁵

⁷³¹ Pereira-Kotze, Doherty and Swart 2020 *BMJ Global Health* 1.

⁷³² See reg 1of R991. Other designated products in R991 include feeding bottles, teats and feeding cups with spouts, straws or teats. As these products do not qualify as foodstuffs, the labelling and advertising requirements of these goods fall outside the scope of this study. Other designated products which will also not be canvassed in detail are products suitable for children that have health problems; notably infant or follow-up formula for special dietary management for infants with specific medical conditions.

⁷³³ Infant formula must be manufactured in accordance with the applicable Codex standard, namely CAC *Standard for Infant Formula and Formulas for Special Medical Purposes Intended for Infants* CXS 72-1981 (1981, as amended).

⁷³⁴ See reg 1 of R991.

⁷³⁵ See Clicks 2022 https://clicks.co.za/nestle_nan-stage-1-optipro-starter-infant-formula-1-8kg/p/103181?gclid=CjwKCAjwvsqZBhAlEiwAqAHElayufvgigrdqVHwxJ__ibMtCp-4Boi42G8Ax_g20LBCmhRqSCCRoARoC6g4QAvD_BwE.

A follow-up formula is a product that is marketed or otherwise represented as suitable for persons aged between six months and three years, which has been formulated in accordance with the composition requirements as set out in the relevant Codex standards.⁷³⁶ Figure 2-13 below provides an example, namely Nestlé NAN OptiPro Follow-up Formula, which is suitable for infants from six to twelve months:



Figure 2-13: Nestlé NAN OptiPro Follow-up Formula⁷³⁷

Complementary foods are foodstuffs that can be given to an infant aged six months and older as part of the transitional process during which the infant learns to eat food that is appropriate for its developmental stage whilst continuing to breastfeed or be fed with an appropriate follow-up formula. Complementary foods can have a liquid, solid or semi-solid formulation.⁷³⁸ Examples of complementary foods are illustrated in Figures 2-14 and 2-15 below:

⁷³⁶ See reg 1 of R991; CAC *Standard for Infant Formula and Formulas for Special Medical Purposes Intended for Infants CXS 72-1981* (1981, as amended); CAC *Standard for Follow-Up Formula CXS 156-1987* (1987, as amended).

⁷³⁷ See Clicks 2022 https://clicks.co.za/nestle_nan-stage-2-optipro-follow-up-infant-formula-1-8kg/p/103091.

⁷³⁸ See reg 1 of R991.



Figure 2-14: Purity sweet potato product⁷³⁹



Figure 2-15: Purity baby cereal⁷⁴⁰

Turning to the last category mentioned above, apart from powdered drinks,⁷⁴¹ R991 does not provide separate definitions for liquid milks, powdered milks, or modified powdered milks that are marketed or otherwise represented as suitable for infants or young children. An examples of this designated product category is the Nestlé Nido Powdered Drink for Growing Children depicted in Figure 2-16 below:



Figure 2-16: Nestlé Nido powdered drink⁷⁴²

⁷³⁹ See Clicks 2022 https://clicks.co.za/purity_second-foods-sweet-potato-125ml/p/181201.

⁷⁴⁰ See Clicks 2022 https://clicks.co.za/purity_first-foods-babys-first-cereal-rice-200g/p/95536. These Purity baby cereal products also qualify as processed cereal-based foodstuffs for infants and young children. See reg 1 of R991.

⁷⁴¹ A powdered drink refers to a substance that is intended to be added to liquid milk, powdered milk, modified powdered milk, water, or other beverages. See reg 1 of R991.

⁷⁴² See Clicks 2022 https://clicks.co.za/nestle_nido-stage-1+-powdered-drink-for-growing-children-1-8g/p/70022.

2.6.3 Labelling and advertising restrictions under R991

As discussed in Chapter 4, this study considers four restrictions that have been proposed in R3337 relating specifically to the advertising and labelling of unhealthy foodstuffs, notably:

- i. the introduction of mandatory front-of-pack nutrition warning labels in relation to unhealthy foodstuffs;
- ii. a ban on the advertising of unhealthy foodstuffs to children;
- iii. the inclusion of a health warning message in the advertising of unhealthy foodstuffs that is not directed at children; and
- iv. the removal of graphic elements that are visually appealing to children from unhealthy foodstuffs labelling and advertising.

Following the above, the discussion below will demonstrate that R991 contains provisions which currently:

1. ban the advertising and promotion of certain relevant designated products to consumers;
2. prescribe the use of certain nutrient warning descriptors on the label of relevant designated products; and
3. place restrictions on the use of certain graphic representations on the product labels of relevant designated products.

Aspects 1-3 are discussed under separate sub-headings below, followed by a discussion of vertical labelling requirements and prohibited claims under R991. Three of the four advertising and labelling restrictions proposed in R3337 for unhealthy foodstuffs in general are already included in R991. This illustrates that foodstuffs for infants and young children are the most strictly regulated in terms of labelling and advertising requirements. As discussed in part 4.4.7, based on the current draft of R3337 infant formula up to the

age of six months will be exempt from the FOP labelling requirements.⁷⁴³ This means that FOP warning labels will be required for follow-up formulas and other products designated under R991 that would qualify as unhealthy foodstuffs under R3337. This would essentially include foods high in sugar, fats or salt, or which contain artificial sweeteners in any amount.⁷⁴⁴

2.6.3.1 The ban on advertising and promotion

As with R146, R991 does not provide a definition for the term “advertise” or “advertisement”. As such, the meaning of this word as set out in the *FCDA* is to be followed.⁷⁴⁵ Turning to the meaning of the word “promote,” it is defined in R991 as:

to employ any method scheme or design, of encouraging or enticing a person or group of persons, in whatever form, to purchase or use a designated product, and includes but is not limited to advertising, point-of-sale advertising, the giving of samples, special sales, free supplies, donations, sponsorships, gifts, whether related or unrelated to purchases of designated products, free utensils or other articles, prizes, carrier bags with pack-shots or product logos, prizes or special displays at retail outlets, discount coupons, premiums, loss-leaders, tie-in sales, rebates and other give-aways.⁷⁴⁶

It is clear from this definition that the word “promote” includes advertising activities but is much more comprehensive. Certain promotional activities mentioned in the definition above, such as incentives to purchase relevant products or donations by product manufacturers, would usually fall outside the scope of advertising *per se*.⁷⁴⁷

Regulation 7(1) prohibits the use of any promotional practice or device advertising in relation to (i) infant formula, (ii) follow-up formula and (iii) infants and young child milks and drinks. It is noteworthy that the promotional restrictions appear to apply to all relevant designated products apart from complementary foods. Regulation 7(2) sets out what activities form part of promotional practices and device advertising that are prohibited in relation to the products (i)-(iii). Of specific relevance in the advertising context is the prohibition on any advertisements relating to a product in written

⁷⁴³ Draft reg 51(4) of R3337.

⁷⁴⁴ See the discussion in parts 1.8.2 and 4.4.5.

⁷⁴⁵ See part 1.8.4 above.

⁷⁴⁶ See reg 1 of R991.

⁷⁴⁷ See part 1.8.4 above.

publications, television, radio, film, electronic media, email, video, telephone displays, exhibitions and outdoor advertisements such as billboards, posters, signs and electronic signs.⁷⁴⁸ This prohibition includes advertisements about the availability of the product at a specific retail outlet and/or the price of the product.⁷⁴⁹

In addition, the display of the brand name (i.e., trade mark) of a product referred to in regulation 7(1) at any event for the general public is prohibited.⁷⁵⁰ In this regard, so-called baby expos, which have become common in recent years, come to mind. No special displays (in-store or otherwise) to promote the sale of any such product are permitted,⁷⁵¹ and no gifts⁷⁵² or any promotional items⁷⁵³ may be sold with any of these products.⁷⁵⁴ Direct or indirect contact⁷⁵⁵ between a company's personnel and consumers regarding the promotion of that company or its products is also not acceptable.⁷⁵⁶

R991 also bans the distribution of educational information and material to the general public. Regulation 7(5) provides:

[n]o manufacturer, distributor, retailer, importer or person on behalf of the aforementioned shall produce, distribute or present educational information relating to infant and young child nutrition.⁷⁵⁷

⁷⁴⁸ See reg 7(2)(f) of R991.

⁷⁴⁹ Any pecuniary advantage such as offering a product at a discounted rate is also prohibited. Other incentives such as gifts and promotional competitions are also prohibited, and there are restrictions on the distribution of free or low-cost designated products or product samples. See regs 7(2)(a) and 9 of R991.

⁷⁵⁰ See reg 7(2)(e) of R991.

⁷⁵¹ See reg 7(2)(a) of R991.

⁷⁵² The word "gift" refers to something that is given free of charge. In the context of R991 it includes but is not limited to free samples of designated products; meals and refreshments; stationary such as diaries, calendars, prescription pads; cot tags; stickers; growth charts; and tongue depressors used by health care personnel. See reg 1 of R991.

⁷⁵³ This would include promotional clothing, stationary or household utensils. See reg 7(2)(d) of R991.

⁷⁵⁴ See reg 7(2)(a) and 7(2)(d) of R991.

⁷⁵⁵ Direct contact would include instances where a consumer is contacted directly on behalf of the company via telephone calls, or promotional pamphlets are distributed by company representatives to members of the public. Contact by indirect means would include activities such as the hosting of internet sites by an entity which is registered in South Africa or which conducts business in this country, or organising so-called "mother and baby clubs". See reg 7(2)(b) of R991.

⁷⁵⁶ It is, however, permissible for consumers to contact the product manufacturer if there are queries or complaints regarding the quality of a product or any adverse reaction experiences. See reg 7(2)(b) of R991.

⁷⁵⁷ Also see reg 7(2)(c). Educational information refers to any written or audio-visual material or information which is disseminated by a person that seeks to impart knowledge, such as presentations, brochures or articles. Educational material refers to any written or audio-visual material that is intended for members of the public that purports to give guidance on the appropriate use of products

It is not apparent from a reading of regulation 7(5) if that provision applies only to the designated products that are listed in regulation 7(1) or if it applies to all designated products including complementary foods. When considering their position in the trade, manufacturers of complementary foods often have a product range that also includes other relevant designated products such as infant or follow-up formula. On a practical level, therefore, regulation 7(5) would apply to all complementary foodstuffs manufacturers who also manufacture one or more other designated product categories.

2.6.3.2 Prescribed health messages

In terms of regulation 3(7), at least one of the below health messages must appear prominently on the container and label of infant formula:

- “Infant formula increases an infant's risk of allergy;”
- “Infant formula increases an infant's risk of ear infections;”
- “Infant formula increases an infant's risk of acute respiratory disease;” or
- “Infant formula increases an infant's risk of gastrointestinal infections.”⁷⁵⁸

While the positioning or placement of the prescribed health messages is not prescribed, it is required that the health messages appear in a visible, legible, clear and conspicuous position on the label and container.⁷⁵⁹

A label or container of an infant formula or follow-up formula may not include a claim or expression suggesting a strong similarity between breast milk and the relevant product.⁷⁶⁰

To assist the consumer in understanding this, R991 requires that the top part of the front main panel of infant formula and follow-up formula must contain the messages “Does not contain breast milk” and “Breast milk is the best food for babies”.⁷⁶¹ These two messages

for infants and young children such as flyers, brochures, books, newspaper articles, video tapes and online information. See reg 1 of R991.

⁷⁵⁸ See Annexure D of R991.

⁷⁵⁹ See reg 3(7) of R991.

⁷⁶⁰ Words such as “breast milk substitute”, “maternalised”, “humanised” or words or phrases similar in meaning are also prohibited. See reg 3(4) and 4(3)(a) of R991.

⁷⁶¹ These messages must be clear, conspicuous and easily readable, and should be displayed in bold letters that are at least 3mm in height. See reg 3(1)(a)(ii) of R991.

should also be repeated in at least five other official languages⁷⁶² either on the package insert of the product or by the use of a self-adhesive label somewhere else on the container or label.⁷⁶³ In addition to the above, the bottom part of the front main panel should contain two additional messages, namely “This product shall only be used on the advice of a health professional” and “This product is not always sterile and may contain harmful microorganisms. It must be prepared and used appropriately.” These messages must appear in a minimum prescribed letter size,⁷⁶⁴ and must be displayed in a manner that is clear, conspicuous and easily readable.⁷⁶⁵

Turning to complementary foods and infant and young child milks and drinks, health messages on the container label have also been prescribed for these designated products, namely:

- i. “This food is not intended for infants under 6 months of age and early introduction is not recommended”;⁷⁶⁶
- ii. “From 6 months of age, together with breast milk, infants should be fed a variety of foods. Ask a health worker or health professional for advice;”⁷⁶⁷
- iii. “Do not add salt and/or sugar.”

These messages should appear near the instructions for preparing the product,⁷⁶⁸ they must be displayed in bold letters, and they must be in a clear, conspicuous and easily readable language.⁷⁶⁹ In addition, the words “Important notice” followed by a warning which sets out the potential health hazards that may result from the inappropriate or

⁷⁶² There are additional requirements regarding the language selection. In terms of reg 3(6), one of the languages selected should be from the Nguni language group (i.e., Zulu, Xhosa, Ndebele, or siSwati), one of the languages selected should be from the Sotho language group (i.e. (Sesotho, Setswana, or Sepedi), and the other three languages should be Afrikaans, Xitsonga and Tshivenda.

⁷⁶³ See reg 3(1)(a)(ii) of R991.

⁷⁶⁴ At least 3 mm in height for the messages that appear on the top part of the front main panel, and at least 2 mm in height for the messages that appear on the bottom part of the front main panel. See reg 3(1)(a)(ii) and 3(1)(b)(iii) of R991.

⁷⁶⁵ See reg 3(1)(a)(ii) and 3(1)(b)(iii) of R991.

⁷⁶⁶ See reg 4(1)(e) of R991.

⁷⁶⁷ See reg 4(1)(f) of R991.

⁷⁶⁸ See reg 4(1)(g) of R991.

⁷⁶⁹ See reg 4(1) of R991.

unsafe preparation, use and storage, as the case may be, of the product should appear prominently on the label and/or container.⁷⁷⁰

2.6.3.3 Restrictions on the use of certain graphic representations

In terms of Regulation 2(2), the container and/or label of a relevant designated product may depict only graphic representations that are necessary to demonstrate to the consumer the correct method of preparing and utilising the relevant product. Acceptable graphic representations include the illustration of the method for the safe preparation of a product, or illustrations depicting the sterilisation of equipment and utensils in the case of an infant formula and follow-up formula.⁷⁷¹ No other graphic representations, as defined in R991, are permitted. The term “graphic representations” includes:

illustrations, photographs, drawings or pictures of infants, young children, child characters, cartoons or any other forms that resemble them, human or not, such as humanised fruits, vegetables, animals and/or flowers, among others.⁷⁷²

The use of trade marks incorporating any of the abovementioned elements is therefore prohibited. For illustrative purposes, the use of the baby image or the famous Cookie-monster as depicted in Figures 2-17 and 2-18 below, respectively, would therefore be prohibited in South Africa in terms of R991.⁷⁷³

⁷⁷⁰ See reg 4(1)(d) of R991.

⁷⁷¹ See reg 2(2)(a)(i)-(ii) of R991.

⁷⁷² See reg 1 of R991.

⁷⁷³ The products pictured in Figures 2-17 and 2-18 are available for sale in the USA.



Figure 2-17: Gerber Sooth 'n' Chew⁷⁷⁴



Figure 2-18: Earths Best Organic Sunny Day snack bars⁷⁷⁵

2.6.3.4 Vertical labelling requirements

In addition to the horizontal labelling requirements under R146, the container label of all relevant designated products must also contain:

- i. the age range of the infants or young children for which the product is suitable;⁷⁷⁶
- ii. the appropriate health message(s) discussed above;
- iii. instructions for appropriate preparation, as prescribed;⁷⁷⁷ and

⁷⁷⁴ Image sources from Target 2022 <https://www.target.com/p/gerber-baby-chew-strawberry-apple-3-2oz/-/A-85239702#lnk=sametab>.

⁷⁷⁵ Image sources from Target 2022 <https://www.target.com/p/earth-39-s-best-sesame-street-organic-sunny-days-strawberry-snack-bars-7ct-0-67oz-each/-/A-16313206#lnk=sametab>.

⁷⁷⁶ See reg 3(1)(a)(i) and reg 4(1)(a) of R991.

⁷⁷⁷ See reg 3(3) and 4(1)(b) of R991. For infant and follow-up formulae, manufacturers must follow the WHO and FAO *Safe Preparation, Storage and Handling of Powdered Infant Formula Guidelines* (2007). The instructions should indicate, amongst other things, that (i) only safe drinkable, previously boiled water should be used; (ii) only the enclosed scoop should be used; (iii) instructions for discarding left-over formula are to be included; (iv) proper storage instructions are to be included, and (v) it must be made clear that infants must be in an upright position whilst feeding. See reg 3(3)(a)-(h) of R991.

- iv. instructions for the proper sterilisation of equipment and utensils, where required.⁷⁷⁸

The above information should appear in English on the container label, and in at least five other official languages⁷⁷⁹ either in a packaging insert or a self-adhesive label.⁷⁸⁰

It is also mandatory that the prescribed nutritional information table appear on the label of all relevant designated products.⁷⁸¹ The minimum mandatory nutritional information for infant formula and follow-up formula, which is set out in Annexure A to R991, differs from the nutritional information table prescribed in R146. For ease of reference, Addendum C to this thesis sets out the nutritional information table prescribed in R991 for designated foodstuffs for infants and young children.

2.6.3.5 Prohibited claims

R991 sets out various prohibited claims in addition to those that are set out in R146. When dealing with foodstuffs for infants and young children, therefore, these restrictions should be adhered to in addition to those that are set out in R146.

As a starting point, the container and/or label of a relevant designated product may not contain any reference or claim regarding the nutritional content or other properties of human milk,⁷⁸² or claim to be suitable for all infants.⁷⁸³ In addition, the claim that a product is “gluten free” is prohibited, even if it does not contain any gluten.⁷⁸⁴

In terms of regulation 2(1)(a), only infant formula may be sold, imported or offered for sale and represented as being suitable for infants that are younger than six months. It follows, therefore, that the other relevant designated products may not be advertised or

⁷⁷⁸ See reg 3(3) of R991.

⁷⁷⁹ For the language specifications under R991, see part 2.6.3.2 above.

⁷⁸⁰ See reg 3(3)(h)-(i) and 3(6) of R991.

⁷⁸¹ See reg 2(2)(d) and 2(4)(c) of R991. Annexure B of R991 sets out the table format and minimum mandatory nutritional information that should appear on the label of complementary foods and infant and young child milks and drinks.

⁷⁸² See reg 2(2)(b) of R991.

⁷⁸³ See reg 2(2)(c) of R991. This is because only infant formula may be sold as being suitable for infants younger than the age of six months.

⁷⁸⁴ See reg 3(11) of R991.

labelled as being suitable for persons under the age of six months.⁷⁸⁵ The use of phrases such as “first food”, “first growth”, “from the start”, “best start in life” or any phrases with similar meanings is prohibited and they may not be used on the labelling or advertising of any complementary foods or infant and young child milks and drinks.⁷⁸⁶

As with R146, no medicinal or health claims may be made in relation to the relevant designated products under R991.⁷⁸⁷ That being said, while nutrition claims⁷⁸⁸ are generally permitted on the label of foodstuffs under R146, R991 prohibits the use of nutrition claims (both nutrient content claims and comparative claims) in relation to any relevant designated product.⁷⁸⁹

In addition, the label of a designated product may not advertise, promote or otherwise refer to another designated product.⁷⁹⁰ The label may also not contain any claim that incentivises consumers to contact the product manufacturer where such a claim may lead to the sale or promotion of the product;⁷⁹¹ or which conveys a message to the consumer that the manufacturer is an expert in infant and young child nutrition.⁷⁹²

2.6.4 Concluding remarks on R991

The discussion above demonstrates that under R991 there is essentially a ban on the advertising and promotion of relevant designated products for infants and young children. In addition, only limited graphic representations are allowed on container labels, and various health messages are required to appear on the container label of relevant

⁷⁸⁵ Other foodstuffs that are not suitable for infant feeding include sweetened condensed milk, imitation dairy products and goat’s cheese. The container labels of these products must contain a message that the product is “Not for infant feeding”. See reg 5(1) of R991.

⁷⁸⁶ See reg 4(3)(b) of R991.

⁷⁸⁷ See reg 2(4)(a) of R991.

⁷⁸⁸ Nutrition claims can be either nutrient content claims or comparative claims. See discussion in part 2.4.5 above. Also see reg 1 of R991.

⁷⁸⁹ See reg 2(4)(a) of R991. The following particulars do not constitute nutrient claims on a product label: (i) the naming of substances in the list of ingredients; (ii) referring to a specific nutrient where required as part of prescribed nutrient labelling requirements; and (iii) a quantitative or qualitative declaration of specific ingredients or nutrients when required by legislation. See reg 1 of R991.

⁷⁹⁰ While the addition of measuring spoons and scoops with the relevant designated products is permissible, no toys, other gifts or tokens may be referred to on the product label or sold with any relevant designated product. See reg 2(12) and 2(13) of R991.

⁷⁹¹ See reg 2(14) of R991.

⁷⁹² See reg 2(18) of R991.

designated products. There is currently no requirement regarding FOP warning labels in relation to any foodstuffs, including those for infants and young children. Due to the prevalence of high-sugar foodstuffs for infants and young children that are widely available, there is support for introducing FOP labelling specifically in relation to such products.⁷⁹³ The DOH seems to have given heed thereto. R3337, which was published for public comment in April 2023, currently proposes that FOP warning labels be introduced for designated products under R991 that would essentially qualify as unhealthy foodstuffs except for infant formula, which would be exempt.

As a final remark, in the past few years several instances of non-compliance with the labelling and advertising requirements that are prescribed in R991 have been documented. The monitoring and enforcement of this legislation remains challenging, particularly in the online marketing environment.⁷⁹⁴ This aspect is considered in Chapter 5.

2.7 Conclusion

There is undoubtedly a comprehensive foodstuff labelling and advertising framework in South Africa, stretching from product-specific legislation such as R146 and R991 under the *FCDA* to broader legislation such as the *CPA* and the *TM Act*, which apply to a wider range of goods and services. In terms of government regulation this broad legal framework consists of a combination of various legislative provisions, common law provisions and standards.⁷⁹⁵ It has also been demonstrated that the rules and requirements are inter-related and complementary, and that they overlap in certain instances. The administration and enforcement of the relevant legal landscape stretches across different departments of government, notably the DOH, DOA and DTIC, which causes fragmentation.⁷⁹⁶

⁷⁹³ Marais *et al*/2019 *SAMJ* 328, 331.

⁷⁹⁴ Pereira-Kotze, Doherty and Swart 2020 *BMJ Global Health* 1-6.

⁷⁹⁵ As discussed in part 1.8.6 and elaborated throughout Chapter 6, the *ARB Code*, which is primarily based on industry self-regulation, is also a crucial component in the food law framework as far as advertising regulation is concerned.

⁷⁹⁶ See further part 5.2 below.

While the current food law framework as regulated by the government does not deal with or restrict the labelling and advertising of unhealthy foodstuffs *per se*, claims relating to or alluding to health or well-being and medicinal claims are strictly prohibited. In addition, R146 sets out strict requirements for the use of nutrient claims such as “low in fat” or “lite”, and words such as “pure”, “fresh” and “natural”. It is submitted that terms such as these are perceived, at least by some consumers, as alluding to the health properties of the relevant foodstuffs in relation to which those claims are used. Therefore regulating such claims is a step in the right direction. That being said, R146 has been in effect for more than 12 years.⁷⁹⁷ During that period the number of diet-related NCDs has continued to rise in South Africa.⁷⁹⁸ At a minimum, this indicates that the current food law framework requires adjustments.

In regard to vertical labelling requirements relevant to certain foodstuffs for infants and young children, R991 sets out strict requirements regarding the labelling and advertising of relevant designated products, amongst other things. Notably, and except for complementary foods, R991 essentially bans the advertising and promotion of relevant designated products. In addition, various health messages must appear on the container label of relevant designated products, and only limited graphic representations are permitted. These three aspects (i.e., banning the advertising of foodstuffs; limiting graphic elements that may appear on foodstuffs labels; and requiring health messages on foodstuffs labels) have essentially been proposed in R3337 in relation to unhealthy foodstuffs in general. As discussed in Chapter 4,⁷⁹⁹ it is also proposed in R3337 that FOP warning labels be required for products designated under R991 that would qualify as unhealthy foodstuffs under those regulations, other than infant formula for infants up to the age of six months.

A common challenge amongst consumers, especially those in the vulnerable sectors of South African society, including persons of all ages who are either illiterate or who have limited literacy skills, is that the information appearing on foodstuffs labels is often not

⁷⁹⁷ See part 2.4.1 above.

⁷⁹⁸ See part 1.1.1 above.

⁷⁹⁹ See part 4.4.7 below.

comprehensible.⁸⁰⁰ With this in mind, and before analysing R3337, Chapter 3 considers the current food environment in which South African consumers live, against the backdrop of public health, the determinants of health, and the NCD burden in this country.

⁸⁰⁰ Kanter, Vanderlee and Vandevijvere 2018 *Public Health Nutrition* 1405; Van Kleef and Dagevos 2015 *Critical Reviews in Food Science and Nutrition* 291.

Chapter 3: SDG 3, social determinants of health and related constitutional and consumer rights

3.1 Introduction

From a sustainable development point of view this study focuses on SDG 3, which is to “[e]nsure healthy lives and promote well-being for all at all ages”.⁸⁰¹ More specifically, target 3.4 within SDG 3⁸⁰² is aimed at reducing the number of premature deaths resulting from NCDs by one-third by the year 2030.⁸⁰³ As discussed in part 1.2.3 above, both the DOH *National NCD Strategic Plan* and DOH *Obesity Strategy* are aligned with SDG 3.4.

SDG 3 goes well beyond health care services alone, but rather encompasses the multiple conditions that are needed for the overall health and safety of all people throughout their respective lifespans.⁸⁰⁴ As such, and in addition to human biology and possible genetic predispositions, various non-medical factors and complexities impact on a person’s daily life and overall health.⁸⁰⁵ Moreover, many consumers’ adoption of unhealthy dietary patterns results from “a complex web of environmental and systematic drivers”.⁸⁰⁶ In this regard, Ghebreyesus⁸⁰⁷ (the current Director-General of the WHO), has pointed out that:

⁸⁰¹ UN *Resolution on Transforming Our World: the 2030 Agenda for Sustainable Development* GA Res, UN Doc A/70/1 (2015) (hereafter “UN *Agenda for Sustainable Development*”) 14. Whilst SDG 3 and target 3.4 thereunder form the focus of this study, it should be noted that NCDs are also linked with other SDGs, including SDG 1: end poverty; SDG 2: improve nutrition (including, *inter alia*, to ensure that, by 2023, all people have access to safe, nutritious and sufficient food all year round as target 2.1); SDG 8: promote economic growth; and SDG 10: reduce inequality. See DOH *National NCD Strategic Plan* 3; FAO *et al The State of Food Security and Nutrition in the World* 2023 xix.

⁸⁰² The AU *Agenda 2063* goal 3, namely “a high standard of living, and quality of life, sound health and well-being” also links with SDG 3. That goal falls within the aspiration of a prosperous African continent which is based on inclusive growth and sustainable development. See African Union Commission *Agenda 2063 The Africa We Want* (2015) paras 8-10; African Union date unknown <https://au.int/agenda2063/sdgs>.

⁸⁰³ UN *Agenda for Sustainable Development* 16.

⁸⁰⁴ Gostin *et al* 2019 *Lancet* 1871.

⁸⁰⁵ Including economic policies and systems, environmental factors, cultural considerations, social policies, political systems and development agendas. See DOH *Obesity Strategy* 17; WHO *Operational Framework for Monitoring Social Determinants of Health Equity* (hereafter WHO *Operational Framework for SDHs*) 2; Gilmore *et al* 2023 *Lancet* 1205; Ataguba, Day and McIntyre 2015 *Global Health Action* 1.

⁸⁰⁶ Knipe, Omoruyi and Durojaye 2022 *ESR Review* 29, 33.

⁸⁰⁷ Ghebreyesus 2023 *Lancet* 1137. Also see WHO 2022 <https://www.who.int/news/item/24-05-2022-world-health-assembly-re-elects-dr-tedros-adhanom-ghebreyesus-to-second-term-as-who-director-general#:~:text=22%20May%202022.-,World%20Health%20Assembly%20re%20elects%20Dr%20Tedros%20Adhanom%20Ghebreyesus>

[h]ealth does not begin in clinics or hospitals any more than justice begins in law courts or peace starts on the battlefield. Rather, health starts with the conditions in which we are born and raised, and in schools, streets, workplaces, homes, markets, water sources, kitchens, and in the very air we breathe.⁸⁰⁸

The significant reduction of NCDs as a goal within the South African *National Development Plan*⁸⁰⁹ is informed by the priority of addressing the social determinants of health (hereafter “SDHs”) that affect health and disease.⁸¹⁰ The term SDHs is defined as “the conditions in which people are born, grow, work, live, and age, and people’s access to power, money are resources”.⁸¹¹

Against this background this chapter considers several SDHs impacting on consumers’ health and susceptibility to diet-related NCDs.⁸¹² It should be noted that there is a relationship between SDHs, human rights and the economic system of the country where people live.⁸¹³ Kenyon, Forman and Brolan⁸¹⁴ point out that SDHs and human rights are complementary, indivisible and overlapping measures of human well-being.⁸¹⁵ The *Rio Political Declaration on Social Determinants of Health* (2011) (hereafter *Rio Declaration*)⁸¹⁶ also affirms that:

%20to,term%20as%20WHO%20Director%2DGeneral&text=WHO%20Member%20States%20today%20re,world's%20leading%20public%20health%20agency.

⁸⁰⁸ Also see WHO *Operational Framework for SDHs*2; Brady *et al* 2023 *World Medical and Health Policy* 436; Moyo *et al* *Socio-Economic Rights: Progressive Realisation?* 431-432.

⁸⁰⁹ National Planning Commission, Department: The Presidency, Republic of South Africa *National Development Plan 2030: Our Future - Make it Work* (hereafter “*National Development Plan*”).

⁸¹⁰ See health goal 4 read with priority 1 of the *National Development Plan* 329, 333, 335.

⁸¹¹ WHO *Operational Framework for SDHs* 1.

⁸¹² Gostin *et al* 2019 *Lancet* 1886. The fundamental right to health is related to and dependent upon the realisation of various other human rights, including the right to life, dignity, food, education, equality and access to information. See UN *General Comment No. 14: The Right to the Highest Attainable Standard of Health (Article 12 of the International Covenant on Economic, Social and Cultural Rights)*, 2000 E/C.12/2000 (2000) para 3.

⁸¹³ Kenyon, Forman and Brolan 2018 *Health and Human Rights Journal* 1, 4-5. Also see Ataguba, Day and McIntyre 2015 *Global Health Action* 1; Currie and De Waal *The Bill of Rights Handbook* 564.

⁸¹⁴ Kenyon, Forman and Brolan 2018 *Health and Human Rights Journal* 1, 2.

⁸¹⁵ The prevention and control of diet-related NCDs is also deemed to be a challenge from both a public health and a human rights perspective. See Knipe, Omoruyi and Durojaye 2022 *ESR Review* 30.

⁸¹⁶ The *Rio Political Declaration on Social Determinants of Health* (2011) was adopted during the World Conference on Social Determinants of Health on 21 October 2011, and endorsed during the Sixty-fifth WHA in May 2012. See WHO 2011 <https://www.who.int/publications/m/item/rio-political-declaration-on-social-determinants-of-health>; WHO Sixty-fifth World Health Assembly Resolutions and Decisions Annexes Geneva, 2012 (WHA65/2012/REC/1) available at https://apps.who.int/gb/DGNP/pdf_files/A65_REC1-en.pdf.

[p]ositioning human health and well-being as one of the key features of what constitutes a successful, inclusive, and fair society in the 21st century is consistent with our commitment to human rights at national and international levels.

The South African government's commitment to addressing the relevant SDHs to promote healthy diets and reduce the prevalence of NCDs⁸¹⁷ should be considered against the backdrop of the universal right to health as well as relevant South African constitutional rights and consumer rights.⁸¹⁸ Various rights in the Bill of Rights⁸¹⁹ influence the prevention of, and care of people living with, NCDs.⁸²⁰ More specifically, and in the context of unhealthy foodstuffs labelling and advertising, relevant rights include the right to an environment that is not harmful to one's health and well-being and consumers' right of access to information.⁸²¹ These rights cannot, however, be considered in isolation. Other relevant consumer rights,⁸²² as well as obligations⁸²³ of both the state and private commercial actors in the food industry, will be included in the discussion.

Following the above, part 3.2 below sets out a discussion on public health and related rights. This is followed by a discussion on the SDHs which are relevant to the current food environment of consumers in South Africa in part 3.3. Part 3.4 sets out brief comments on the historical developments that have impacted on consumers' diets, followed by a discussion of South African consumers' modern-day food environment and consumption patterns. Turning to the products and practices of the food manufacturers, part 3.5 discusses relevant commercial determinants of health. Part 3.6 discusses the pressing public health imperative of creating a food environment that enables and promotes consumer health and well-being, followed by concluding remarks in part 3.7.

⁸¹⁷ *National Development Plan* 329, 333, 335.

⁸¹⁸ The DOH *NCD National Strategic Plan* is based on a number of guiding principles, which include a human rights-based approach. See DOH *NCD National Strategic Plan* 25. This approach is also supported by the African Commission. See *Principles and Guidelines on the Implementation of the African Charter* para 67(n).

⁸¹⁹ Contained in chapter 2 of the *Constitution*.

⁸²⁰ These constitutional rights include equality (s 9), dignity (s 10), life (s 11), access to health care and food (s 27), rights of children (s 28), environment (s 24), access to information (s 32) and just administrative action (s 33). See DOH *NCD National Strategic Plan* 25.

⁸²¹ See respectively ss 24 and 32 of the *Constitution* as well as parts 3.2.2 and 3.6 below.

⁸²² Including the right to information in plain and understandable language as set out in s 22 of the *CPA*. See part 3.6.1 below.

⁸²³ Flowing from international law instruments, the *Constitution*, legislation as well as guiding principles of the UN. See parts 3.2, 3.6.1 and 3.6.2.

Relevant consumer rights, obligations on the state and private actors in the food industry, and SDHs impacting on consumer diet and the food environment in South Africa serve to contextualise the proposed advertising and labelling restrictions set out in R3337, which will be discussed in Chapter 4.

It should be noted that the right to have access to food⁸²⁴ in the context of food security,⁸²⁵ is also linked with the right to health.⁸²⁶ While comments on these aspects are included in this chapter and other parts of the study where relevant, a comprehensive analysis of food nutrition and food security warrants a separate independent study and falls outside the scope of this study.

3.2 *Public health and related rights*

The South African government has both the authority and the duty to protect public health in this country.⁸²⁷ The *National Health Act* 61 of 2003 (hereafter “*NHA*”) primarily regulates the South African health system in line with the constitutional obligations imposed on the state.⁸²⁸ The objectives of the *NHA* include *inter alia* protecting, respecting, promoting and fulfilling the right of the people of South Africa to an

⁸²⁴ S 27(1)(b) of the *Constitution* affords everyone the right to have access to sufficient food.

⁸²⁵ Whilst the definition of “food security” is flexible and has changed over time, it is currently accepted that food security is present “when all people, at all times, have physical, social and economic access to sufficient, safe and nutritious food which meets their dietary needs and food preferences for an active and healthy life”. See FAO *The State of Food Insecurity in the World 2001* 49; Peng and Berry “The Concept of Food Security” 1. For a further discussion on the development of this concept, see FAO *Trade Reforms and Food Security* para 2.1. Art 11.1 of the *ICESCR* recognises that everyone has the right to adequate food. This right is interpreted broadly, and is realised “when every man, woman and child, alone or in community with others, have physical and economic access at all times to adequate food or means for its procurement”. The right to adequate food incorporates both an availability component (i.e., food of sufficient qualities and of acceptable quantity) as well as an accessibility component (i.e., access to food in a sustainable manner without interfering with the enjoyment of other human rights). See UN *General Comment No 12: The Right to Adequate Food (Article 11 of the International Covenant on Economic, Social and Cultural Rights)*, E/C.12/1999/5 (1999) paras 6, 8.

⁸²⁶ Knipe, Omoruyi and Durojaye 2022 *ESR Review* 33; UN *General Assembly Report by the Special Rapporteur Anand Grover*, UN Doc A/HRC/26/31 (2014) (hereafter “UN *Special Rapporteur Report on the Right to Health*”) para 1.

⁸²⁷ The same can be said for virtually all state governments throughout the world. See Gostin *et al* 2019 *Lancet* 1862-1863. See further part 3.6.1 below.

⁸²⁸ See s 2 of the *NHA*; Moyo *et al* *Socio-Economic Rights: Progressive Realisation?* 376, 391.

environment that is not harmful to their health or well-being.⁸²⁹ Moreover, section 2(c) of the *NHA* provides:

The objects of this Act are to regulate national health and to provide uniformity in respect of health services across the nation by-

...

- (c) protecting, respecting, promoting and fulfilling the rights of-
 - (i) the people of South Africa to the progressive realisation of the constitutional right of access to health care services, including reproductive health care;
 - (ii) the people of South Africa to an environment that is not harmful to their health or well-being;
 - (iii) children to basic nutrition and basic health care services contemplated in section 28 (1)(c) of the Constitution; and
 - (iv) vulnerable groups such as women, children, older persons and persons with disabilities.

In addition to the *NHA*, various other statutes are administered by the DOH as part of the broader public health legislative framework,⁸³⁰ which includes the *FCDA*.⁸³¹ The relevant constitutional and consumer rights that inform the right to health in South Africa are discussed in part 3.2.2. Before that discussion, the right to health as a fundamental human right in international law is discussed in part 3.2.1, which follows immediately.

3.2.1 *The right to health as a fundamental human right in international law*

The WHO defines "health" as "a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity".⁸³²

The right to health is deemed to be a fundamental human right in international law.⁸³³ In terms of article 25(1) of the *Universal Declaration of Human Rights* (1948) "[e]veryone

⁸²⁹ See s 2(c)(ii) of the *NHA*. This is also in line with ss 7(2) and 24(a) of the *Constitution*.

⁸³⁰ Aspects governed by the public health framework include medicines and medical devices (in terms of the Medicines Act; training and conduct of health practitioners (in terms of the *Health Professions Act* 56 of 1974, *Allied Health Professions Act* 63 of 1982, *Pharmacy Act* 53 of 1974, *Nursing Act* 33 of 2005 and *Dental Technicians Act* 19 of 1979); tobacco products (in terms of the *TPCA*); as well as handling, storage and disposal of hazardous substances (in terms of the *Hazardous Substances Act* 15 of 1973).

⁸³¹ Carstens and Pearmain *Foundation Principles of South African Medical Law* 291-292.

⁸³² *Constitution of the World Health Organization* (1946) as amended by resolutions WHA26.37, WHA29.38, WHA39.6 and WHA51.23. Also see *Declaration of Alma-Ata* (1978) para I; Gilmore *et al* 2023 *Lancet* 1196; Kenyon, Forman and Brolan 2018 *Health and Human Rights Journal* 2. The word "health" is not defined in the *Constitution* or the *NHA*. As such, the WHO definition is adopted in this study.

⁸³³ WHO *Global Action Plan for NCDs* 12; UN *Resolution on the Political Declaration of the High-level Meeting of the General Assembly on the Prevention and Control of Non-communicable Diseases* GA

has the right to a standard of living adequate for the health and well-being of himself and of his family". Furthermore, article 12 of the *International Covenant on Economic, Social and Cultural Rights* (1966) (hereafter "*ICESCR*")⁸³⁴ sets out the most comprehensive foundation of the universal right to health in international human rights law.⁸³⁵ State parties to the *ICESCR*, including South Africa,⁸³⁶ recognise "the right of everyone to the enjoyment of the highest attainable standard of physical and mental health".⁸³⁷ Moreover, *General Comment No 14* (as adopted by the UN Committee on Economic, Social and Cultural Rights⁸³⁸ in elaboration of article 12 of the *ICESCR*)⁸³⁹ provides:

[h]ealth is a fundamental human right indispensable for the exercise of other human rights. Every human being is entitled to the enjoyment of the highest attainable standard of health conducive to living a life in dignity.⁸⁴⁰

On a regional level, article 16(1) of the *African Charter on Human and Peoples' Rights* (1981) (hereafter *African Charter*) provides that "[e]very individual shall have the right to enjoy the best attainable state of physical and mental health". State parties to the *African Charter*, including South Africa, have undertaken to take measures necessary to protect the health of their people.⁸⁴¹ In considering article 16(1) of the *African Charter*, the African Commission on Human and Peoples' Rights (hereafter "African Commission")

Res 66/2, UN Doc A66/2 (2012) (hereafter "*UN Resolution on the Prevention and Control of NCDs*") para 5.

⁸³⁴ The *ICESCR* is deemed to be the most important international instrument on socio-economic rights. See Currie and De Waal *The Bill of Rights Handbook* 570.

⁸³⁵ Gostin *et al* 2019 *Lancet* 1863. Other international human rights instruments that recognise the right to health include art 24 of the *Convention on the Rights of the Child* (1989); art 11.1(f) and 12 of the *Convention on the Elimination of All Forms of Discrimination Against Women* (1979) and art 5(e)(iv) of the *International Convention on the Elimination of All Forms of Racial Discrimination* (1965). See UN *General Comment No 14: The Right to the Highest Attainable Standard of Health (Article 12 of the International Covenant on Economic, Social and Cultural Rights)*, 2000 E/C.12/2000 (2000) para 2.

⁸³⁶ South Africa signed the *ICESCR* on 3 October 1994 and ratified this instrument on 12 January 2015. See UN Human Rights Treaty Bodies date unknown https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=162&Lang=en.
⁸³⁷ Art 12(1) of the *ICESCR*.

⁸³⁸ The independent expert body supervising the implementation of the *ICESCR*.

⁸³⁹ UN *General Comment No 14: The Right to the Highest Attainable Standard of Health (Article 12 of the International Covenant on Economic, Social and Cultural Rights)*, 2000 E/C.12/2000 (2000) (hereafter *General Comment No 14*). Currie and De Waal *The Bill of Rights Handbook* 571 point out that the socio-economic rights in the Constitution have been modelled on the overlapping rights contained in the *ICESCR*. Although the general comments are not legally binding per se, they are deemed to be primary authority when interpreting international socio-economic rights and, on a national level, have been valuable sources to South African courts in interpreting socio-economic rights.

⁸⁴⁰ *General Comment No 14* para 1.

⁸⁴¹ Art 16(2) of the *African Charter*; AU date unknown https://au.int/en/member_states/countryprofiles2.

has confirmed that the enjoyment of the right to health is both “widely known” and vital to all aspects of a person's life and well-being.⁸⁴² As such, the right to health “is crucial to the realisation of all the other fundamental human rights and freedoms”.⁸⁴³ The African Commission *Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples’ Rights* (2011) (hereafter “*Principles and Guidelines on the Implementation of the African Charter*”) provides that:

[t]he obligation to protect requires the State to take positive measures to ensure that non-state actors such as multi-national corporations, local companies, private persons ... do not violate economic, social and cultural rights. This includes regulating and monitoring the commercial and other activities of non-state actors that affect people's access to and equal enjoyment of economic, social and cultural rights and ensuring the effective implementation of relevant legislation and programmes and to provide remedies for such violations.⁸⁴⁴

In addition, article 14(1) of the *African Charter on the Rights and Welfare of the Child* (1990) (hereafter “*African Children’s Charter*”) provides that every child shall have the right to enjoy the best attainable state of physical, mental and spiritual health.⁸⁴⁵ In pursuance of the realisation of that right, South Africa as a state party to this regional instrument⁸⁴⁶ has undertaken to take measures that combat disease and malnutrition,⁸⁴⁷ which would include NCDs and obesity.⁸⁴⁸ In addition measures should be implemented to ensure that all sectors of society, including parents and children, are informed and supported in using basic knowledge of child health and nutrition.⁸⁴⁹

The right to health encompasses health care which, in turn, includes the promotion of proper nutrition.⁸⁵⁰ Furthermore, the right to health is broader than health care only; it

⁸⁴² *Purohit and Moote v The Gambia* (2003) AHRLR 96 (ACHPR 2003) para 80.

⁸⁴³ *Purohit and Moote v The Gambia* (2003) AHRLR 96 (ACHPR 2003) para 80.

⁸⁴⁴ Also see Pieterse 2007 *South African Journal of Human Rights* 161.

⁸⁴⁵ For a discussion of additional regional instruments dealing with the right to health, see Moyo *et al* *Socio-Economic Rights: Progressive Realisation?* 382-387.

⁸⁴⁶ South Africa signed the *African Children’s Charter* in 1997 and ratified it in 2000. See African Union date unknown <https://au.int/en/treaties/african-charter-rights-and-welfare-child>.

⁸⁴⁷ See art 14(2)(d) of the *African Children’s Charter*.

⁸⁴⁸ State parties have also agreed to implement measures for adequate child nutrition. See art 14(2)(c) of the *African Children’s Charter*. For a discussion on NCDs and obesity, see parts 1.1 and 1.2 above.

⁸⁴⁹ See art 14(2)(h) of the *African Children’s Charter*.

⁸⁵⁰ *General Comment No 14* paras 4, 11; para VII(3) of the *Declaration of Alma-Ata* (1978). Although this declaration is non-binding, it nevertheless represents a commitment by states to respect the right to health. See *National Development Plan* 330-332; Moyo *et al* *Socio-Economic Rights: Progressive Realisation?* 383.

also “embraces a wide range of socio-economic factors that promote conditions in which people can lead a healthy life.”⁸⁵¹ As such, the right to health is directly connected with the underlying determinants of health such as access to health care, poverty, education, food and nutrition, healthy environmental conditions and access to health-related information.⁸⁵²

The right to health should not, however, be equated to a perceived right to be healthy, given the freedom to control one’s health and body that is afforded to people.⁸⁵³ *General Comment No 14*⁸⁵⁴ clarifies that:

good health cannot be ensured by a State, nor can States provide protection against every possible cause of human ill health. Thus, genetic factors, individual susceptibility to ill health and the adoption of unhealthy or risky lifestyles may play an important role with respect to an individual’s health. Consequently, the right to health must be understood as a right to the enjoyment of a variety of facilities, goods, services and conditions necessary for the realization of the highest attainable standard of health.

To achieve the full realisation of the right to health, steps to be taken by state parties include those necessary to prevent, treat and control diseases, including NCDs.⁸⁵⁵ The related preventative steps, which are required to be deliberate, concrete, and targeted,⁸⁵⁶ include the promotion of determinants of good health.⁸⁵⁷ In this regard a country’s population should be able to participate in decisions regarding its health.⁸⁵⁸ *General Comment No 14* clarifies that information accessibility forms a component of the right to

⁸⁵¹ *General Comment No 14* paras 4, 11; African Commission Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples’ Rights (2011) (hereafter “*Principles and Guidelines on the Implementation of the African Charter*”) para 61.

⁸⁵² Other determinants include housing, safe working conditions, access to safe water, and adequate sanitation. See *General Comment No 14* paras 4, 11. Also see *Declaration of Alma-Ata* (1978) para VII(4); Cheadle and Davis *South African Constitutional Law* para 22.3.1.

⁸⁵³ *General Comment No 14* para 8; *Principles and Guidelines on the Implementation of the African Charter* para 61.

⁸⁵⁴ *General Comment No 14* para 8.

⁸⁵⁵ Art 12(2)(c) of the ICESCR. Other measures include provisions for the child’s healthy development, and creating conditions which would assure that everyone has medical services and medical attention in the event of sickness. See art 12(2)(a) and (d) of the ICESCR.

⁸⁵⁶ *General Comment No 14* para 30.

⁸⁵⁷ *General Comment No 14* para 16.

⁸⁵⁸ *General Comment No 14* para 11.

health.⁸⁵⁹ Accessibility to information affecting health applies to both adult members of society as well as adolescents - young people between the ages of 10 and 19 years.⁸⁶⁰ On this basis states are required to ensure that adolescents have the opportunity to participate in decisions affecting their health, for which purpose they need to have access to information about preventative and health-promoting behaviour.⁸⁶¹

3.2.2 *Relevant constitutional and consumer rights that inform the right to health in South Africa*

The *Constitution* contains several references to “health” but does not afford persons the right to health *per se*. That being said, Carstens and Pearmain⁸⁶² argue that despite the lack of a direct reference to “the right to health”, the Bill of Rights contains “a suite of rights which, when viewed collectively, could be said to constitute a right to health”.⁸⁶³ Constitutional rights falling within that suite and relevant to this study include section 24(a), which affords everyone the right to an environment that is not harmful to their health or well-being,⁸⁶⁴ and section 27(1)(a), which affords everyone the right to have access to health care services.⁸⁶⁵ The right of access to information as set out in section 32(1) of the *Constitution* is also closely related to the realisation of the right to health.⁸⁶⁶

⁸⁵⁹ Information accessibility includes the right to seek, receive and impart information and ideas regarding health issues. See *General Comment No 14* para 12(b). Also see Moyo *et al* *Socio-Economic Rights: Progressive Realisation?* 389.

⁸⁶⁰ *General Comment No 14* paras 22, 23; WHO and UNICEF *Improving the Health and Wellbeing of Children and Adolescents* 14; WHO 2024 https://www.who.int/health-topics/adolescent-health#tab=tab_1.

⁸⁶¹ *General Comment No 14* paras 22, 23. Also see Cheadle and Davis *South African Constitutional Law* para 22.3.1.

⁸⁶² Carstens and Pearmain *Foundation Principles of South African Medical Law* 25-26, 35-37.

⁸⁶³ Also see Cheadle and Davis *South African Constitutional Law* para 19.5.1.

⁸⁶⁴ Other relevant constitutional rights include the rights to life, dignity, privacy, bodily and physical integrity as well as the rights to sufficient food, water and social security. See ss 10, 11, 12(2)(b), 14, 27(1)(b) and (c) of the *Constitution*; Carstens and Pearmain *Foundation Principles of South African Medical Law* 26. The authors point out that this collection of fundamental rights cumulatively also falls within the WHO definition of health.

⁸⁶⁵ Furthermore, in terms of s 27(3), no one may be refused emergency medical treatment. In addition to s 27, two other constitutional provisions relate to the right to have access to health care services. Firstly, in terms of s 28(1)(c), every child has the right to basic health care services. Secondly, s 35(2)(e) affords sentenced prisoners and everyone else who is detained the right to conditions of detention that are consistent with human dignity, including the provision of adequate nutrition at state expense.

⁸⁶⁶ *General Comment No 14* para 3.

The discussion that follows elaborates on sections 32(a) and 32(1) of the *Constitution*. Section 27(1)(a) is discussed further in part 3.3.3 below.

3.2.2.1 The right to an environment that is not harmful to health or well-being

Linking with SDG 3, the constitutional right to an environment that is not harmful to one's health or well-being is generally deemed to extend to the public as opposed to an individual.⁸⁶⁷ Currie and De Waal⁸⁶⁸ point out that section 24(a) of the *Constitution* encompasses two overlapping⁸⁶⁹ aspects, namely (i) the right to an environment that is not harmful to health and (ii) the right to an environment that is not harmful to well-being.⁸⁷⁰ Neither "environment" nor "well-being" is defined in the *Constitution*, but there is support for interpreting both terms broadly in the constitutional context.

Starting with the meaning of "environment", reference⁸⁷¹ should be made to the *National Environmental Management Act* 107 of 1998 (hereafter *NEMA*),⁸⁷² which defines an "environment" as:

- the surroundings within which humans exist and that are made up of-
- (i) the land, water and atmosphere of the earth;
 - (ii) micro-organisms, plant and animal life;
 - (iii) any part or combination of (i) and (ii) and the interrelationships among and between them; and
 - (iv) the physical, chemical, aesthetic and cultural properties and conditions of the foregoing that influence human health and well-being.⁸⁷³

Currie and De Waal⁸⁷⁴ submit that the constitutional meaning of "environment" includes but extends beyond the definition in the *NEMA*. These authors note that the word

⁸⁶⁷ Cheadle and Davis *South African Constitutional Law* para 19.3.2; Currie and De Waal *The Bill of Rights Handbook* 517.

⁸⁶⁸ Currie and De Waal *The Bill of Rights Handbook* 518-519.

⁸⁶⁹ As the WTO definition of "health" includes well-being. See part 3.2.1 above.

⁸⁷⁰ Also see Cheadle and Davis *South African Constitutional Law* para 19.5.1.

⁸⁷¹ A comprehensive discussion of the *NEMA* falls outside the scope of this study.

⁸⁷² The *NEMA* was enacted in terms of s 24(b) of the *Constitution*. According to the Preamble of *NEMA*, this Act makes provision for co-operative environmental governance by setting out (i) principles for decision-making on matters affecting the environment, (ii) institutions that will promote cooperative governance and (iii) procedures for co-ordinating environmental functions exercised by organs of state. The *NEMA* also deals with aspects of the administration and enforcement of other environmental management laws, and related matters.

⁸⁷³ See s 1 of *NEMA*.

⁸⁷⁴ Currie and De Waal *The Bill of Rights Handbook* 518-519.

“environment” encompasses the physical surroundings within which humans exist, and refers to “the place of humans in the urban environment, which would include the built environment and the work environment”.⁸⁷⁵ An environment also includes non-physical elements such as cultural and aesthetic components forming part thereof.⁸⁷⁶ That view is also supported by Cheadle and Davis,⁸⁷⁷ who point out that the term “environment” should be interpreted broadly to encompass “our relationship with our natural resources” as well as “our urban environment and our cultural heritage”.

In the context of SDHs, Gilmore *et al*⁸⁷⁸ point out that the term “environment” refers to the settings within which behaviours take place. On a broad level, this would include the physical, socio-economic and digital environment in which persons operate, including as consumers. Turning to more specific aspects of a citizen/consumer’s environment, this covers settings where people live, work and attend school.⁸⁷⁹ The environment also affects the ability of certain citizens/consumers to make a responsible selection of healthy food options.⁸⁸⁰ In this regard, it has been pointed out that:

[n]umerous factors influence people’s ability to eat a healthy diet ... including the social, economic, and cultural environment in which people live and work, issues of accessibility and affordability, and education.⁸⁸¹

As to the term “food environment”, the WHO⁸⁸² defines this concept as “the surroundings that influence and shape consumers’ food behaviours, preferences and values, and prompt consumer decisions”. Swinburn *et al*⁸⁸³ point out that a food environment consists of a combination of physical, economic, policy and socio-cultural conditions, surroundings and opportunities, which collectively impact on the dietary choices and ultimate nutritional status of people. The manner in which foodstuffs are marketed, which includes

⁸⁷⁵ Currie and De Waal *The Bill of Rights Handbook* 519.

⁸⁷⁶ Currie and De Waal *The Bill of Rights Handbook* 519.

⁸⁷⁷ Cheadle and Davis *South African Constitutional Law* para 19.4.

⁸⁷⁸ Gilmore *et al* 2023 *Lancet* 1207.

⁸⁷⁹ Gilmore *et al* 2023 *Lancet* 1207.

⁸⁸⁰ DOH *Obesity Strategy* 17.

⁸⁸¹ DOH *Obesity Strategy* 17.

⁸⁸² WHO *Guideline on Food Marketing Policies* 1.

⁸⁸³ Swinburn *et al* 2013 *Obesity Reviews* 2.

advertising and product labelling, as well as the laws that regulate such conduct by businesses in the foodstuffs industry, form part of consumers' food environment.⁸⁸⁴

Turning to the constitutional meaning of "well-being", in *HTF Developers (Pty) Ltd v Minister of Environmental Affairs and Tourism*,⁸⁸⁵ the High Court noted that this broad term is open-ended and that a precise definition thereof may not be possible. Whilst well-being falls within health, the term is wider than instances that may be harmful to health and includes social components such as human feelings and relationships. Scholars believe that the right to well-being is informed by other constitutional rights.⁸⁸⁶ As poverty implicates the absence of well-being, the term could be seen as the opposite of poverty in a certain sense.⁸⁸⁷ Whilst noting that a precise legal definition of the term "well-being" is difficult to formulate, Cheadle and Davis⁸⁸⁸ observe that:

the term well-being nevertheless encompasses the essence of environmental concern, namely a sense of environmental integrity; a sense that we ought to utilise the environment in a morally responsible, considered and ethical manner.

Consumers consistently encounter foodstuffs labels during product selection, be it in-store or online, as well as when consuming foodstuffs at home, school, work or otherwise. The advertising of foodstuffs is also part of everyday life. It is encountered by consumers whilst engaged in activities such as watching television, listening to the radio, using digital devices, ordering take-away food, or dining at restaurants or food establishments.⁸⁸⁹ It follows, therefore, that foodstuffs labelling and advertising forms part of consumers' urban food environment. In the context of consumer health, foodstuffs advertising and labelling should therefore be morally responsible, considered in the context of the consumer at which it is targeted, and presented in an ethical manner which does not

⁸⁸⁴ WHO *Guideline on Food Marketing Policies* 1; WHO 2021 *Food Systems Delivering Better Health* 3; Swinburn *et al* 2013 *Obesity Reviews* 3.

⁸⁸⁵ *HTF Developers (Pty) Ltd v Minister of Environmental Affairs and Tourism* 2006 5 SA 512 (T) para 18.

⁸⁸⁶ This would include the right not to be subject to slavery or forced labour, as well as rights relating to access to housing, food, and education; equality and dignity. See Currie and De Waal *The Bill of Rights Handbook* 522.

⁸⁸⁷ Currie and De Waal *The Bill of Rights Handbook* 519-522.

⁸⁸⁸ Cheadle and Davis *South African Constitutional Law* para 19.5.2.

⁸⁸⁹ See part 6.4 for a discussion on foodstuffs labelling and advertising complaints lodged by consumers with the ARB.

harm the health or well-being of consumers. As discussed further in this chapter,⁸⁹⁰ foodstuffs labelling and advertising have a direct impact on shaping consumer food consumption behaviour and food preferences.⁸⁹¹ This links with the manner in which the food environment of consumers may have a negative effect on their health and well-being, which is discussed further in part 3.4 below.

3.2.2.2 The right of access to information

As mentioned above, the right of access to information is also an integral component that is closely related to the realisation of the right to health.⁸⁹² Our courts have previously held that the protection of the “public health interest” is a fundamental right in South Africa which may override the interests and justifiably limit the rights of corporate entities as far as the advertising of goods falling within the unhealthy commodities category is concerned.⁸⁹³ The right of access to information is also closely connected with freedom of expression,⁸⁹⁴ which includes the right to receive information or ideas.⁸⁹⁵ In *British American Tobacco South Africa (Pty) Ltd v Minister of Health* (hereafter *BAT v Minister of Health*),⁸⁹⁶ the SCA noted:

[a]dvertising allows the manufacturer, importer, and other trader to impart information concerning its product. It also enables the consumer to receive such information and make consequent informed choices. As it was said, ‘[t]he need for such expression derives from the very nature of our economic system, which is based on the existence of a free market. The orderly operation of that market depends on businesses and consumers having access to abundant and diverse information. Freedom of commercial expression thus entails not only the right to impart information but also the right to receive it.’⁸⁹⁷

⁸⁹⁰ See part 3.4.2 below.

⁸⁹¹ WHO *Food Marketing Exposure and Power and Their Associations with Food-related Attitudes, Beliefs and Behaviours: A Narrative Review* (hereafter “WHO Food Marketing Exposure”) v, 12; Wicks, Wright and Wentzel-Viljoen 2017 *British Journal of Nutrition* 2150.

⁸⁹² *General Comment No 14* para 3.

⁸⁹³ See *British American Tobacco South Africa (Pty) Ltd v Minister of Health* 2011 JDR 1112 (GNP) para 35 as affirmed in *British American Tobacco South Africa (Pty) Ltd v Minister of Health* 2012 JDR 1039 (SCA) paras 25, 41. The case related to alleged infringement of the right to freedom of expression in s 16 of the Constitution following legislative amendments to the *TPCA* that ban the advertising of tobacco products. See further part 4.7.2 below.

⁸⁹⁴ Currie and De Waal *The Bill of Rights Handbook* 692.

⁸⁹⁵ S 16(1)(b) of the *Constitution*.

⁸⁹⁶ 2012 JDR 1039 (SCA).

⁸⁹⁷ *BAT v Minister of Health* para 13.

The DOH *Patients' Rights Charter*⁸⁹⁸ confirms that health information is a component of access to health care services.⁸⁹⁹ It also affirms that "everyone has the right to participate in decision-making on matters affecting one's health".⁹⁰⁰ In *Adcock Ingram Intellectual Property (Pty) Ltd v Cipla Medpro (Pty) Ltd* (hereafter *Adcock v Cipla*),⁹⁰¹ the SCA noted that today patients play an active role in relation to their own health and are expected to do so.⁹⁰² In considering the role of the patient when it comes to the selection of prescription medicines, the court observed that simply reducing a patient to a passive bystander would not accord with the right to participate in any decision affecting a person's health in terms of the *NHA*⁹⁰³ because:

[t]he patient is the ultimate consumer whose wishes may not be disregarded and who has a right to participate in any decision concerning his health.⁹⁰⁴

As information regarding diet is relevant to a person's health and as food is a consumer product that is even more accessible than prescription medication, it is submitted that the SCA's *dictum* in *Adcock v Cipla* is equally applicable to the foodstuffs sector. This aspect also ties in with the right to the education, including adult basic education, afforded to citizens in South Africa.⁹⁰⁵ There is currently a need to educate consumers of

⁸⁹⁸ The *Patients' Rights Charter* (2016) sets out the DOH's commitment to upholding, promoting and protecting the right to have access to health care services. See the *Preamble of the Patients' Rights Charter*.

⁸⁹⁹ *Patients' Rights Charter* vii. Also see para 64 of the *Principles and Guidelines on the Implementation of the African Charter*, which confirms that "the right to health includes effective access to health-related education".

⁹⁰⁰ Preamble of the *Patients' Rights Charter*.

⁹⁰¹ 2012 4 SA 238 (SCA).

⁹⁰² *Adcock v Cipla* para 24.

⁹⁰³ In terms of s 8(1) of the *NHA*, a user has the right to participate in any decision affecting his or her personal health and treatment.

⁹⁰⁴ *Adcock v Cipla* para 30.

⁹⁰⁵ In terms of s 29(1)(a) of the *Constitution*, everyone has the right to basic education, including adult basic education. In *AB v Pridwin Preparatory School 2020* (5) SA 327 (CC) para 154, the Constitutional Court confirmed that s 29(1)(a) encompasses "an overarching right to basic education that applies to all persons", both young and old. The Constitutional Court held further that, in its most general and broad sense, the term "basic education" relates to a person's legal entitlement to have its basic learning needs met. The term "basic education" refers primarily to the actual content of the right to education, and would include the grade 1 to 9 curriculum. See *AB v Pridwin Preparatory School 2020* (5) SA 327 (CC) paras 78, 164, 166, 178; *Governing Body of The Juma Musjid Primary School v Kyubwa* 2011 JDR 0343 (CC) para 38; Cheadle and Davis *South African Constitutional Law* para 24.2. For a discussion of the literacy levels of South African consumers, see part 3.3.2 below. For a discussion of challenges with understanding nutritional information on foodstuffs labels and the suggestions for South Africa to promote plain and understandable nutritional education amongst consumers, see part 4.4.

all ages about the nutritional composition of foodstuffs in a comprehensible manner and in a way that warns the consumer that there may be potential health consequences flowing directly from consuming unhealthy foodstuffs.⁹⁰⁶ Introducing a requirement to include concise information that discloses the presence of unhealthy nutrients through a front-of-pack (hereafter “FOP”) warning label⁹⁰⁷ on unhealthy foodstuffs aims to address this. The DOH’s proposal to introduce so-called FOP warning labelling is discussed in Chapter 4.⁹⁰⁸

3.3 *Relevant social determinants*

According to the WHO,⁹⁰⁹ unfavourable SDHs are a key component of health inequalities⁹¹⁰ that may exist within a country and between countries.⁹¹¹ It is also apparent that WHO member states hold the same view. The *Declaration of Alma-Ata* (1978)⁹¹² provides:

[t]he promotion and protection of the health of the people is essential to sustain economic and social development and contributes to a better quality of life and to world peace.

Scholars are equally in agreement that addressing SDHs will advance health equity, which is ultimately aimed at having fairer societies and healthier lives for all.⁹¹³ Blouin, Chopra, and Van der Hoeven⁹¹⁴ point out that there is a positive correlation between the wealth

⁹⁰⁶ Bopape *et al* 2022 *Appetite* 2; Todd *et al* 2022 *Nutrients* 2; Van Kleef and Dagevos 2015 *Critical Reviews in Food Science and Nutrition* 300. Also see the discussion of s 22 of the *CPA* in part 3.6.1 below.

⁹⁰⁷ A FOP warning label would be required in addition to the other particulars that are generally present on the main panel of a product, such as the type of product and brand name. See the discussion in part 4.4.1 below.

⁹⁰⁸ See part 4.4 below.

⁹⁰⁹ WHO *Operational Framework for SDHs* vii, 3; WHO 2024 https://www.who.int/health-topics/social-determinants-of-health#tab=tab_3.

⁹¹⁰ The term “health inequalities” refers to “unfair and avoidable or remediable systematic differences in health among population groups defined socially, economically, demographically or geographically”. See WHO *Operational Framework for SDHs* xii, 1; Omotoso and Koch 2018 *International Journal of Equity and Health* 9.

⁹¹¹ On average, the life expectancy in low-income countries is 18 years less than in high-income countries. See WHO 2024 https://www.who.int/health-topics/social-determinants-of-health#tab=tab_3.

⁹¹² Para III. The *Declaration of Alma-Ata* was endorsed at the International Conference on Primary Health during September 1978, in Alma Ata formerly part of the Union of Socialist Republics (now Kazakhstan), which was jointly held by the WHO and UNICEF. See WHO 2019 <https://www.who.int/publications/i/item/WHO-EURO-1978-3938-43697-61471>.

⁹¹³ Rasesemola, Mmusi-Phetoe and Havenga 2023 *Curationis* 6-7; Brady *et al* 2023 *World Medical and Health Policy* 449-450; Fonka, Christofides and Jewett 2023 *Public Health in Practice* 4.

⁹¹⁴ Blouin, Chopra and Van der Hoeven 2009 *Lancet* 502.

of a country and the health of its population, as consumers in developed countries have increased access to nutritious food, education and health care. Goslin *et al*⁹¹⁵ note:

[p]oor and disadvantaged communities often have a disproportionate burden of morbidity and premature mortality, as well as the social and economic consequences of disease and injury.

It has also been observed that unhealthy foodstuffs consumption is associated with both lower levels of education⁹¹⁶ and lower income.⁹¹⁷ Rasesemola, Mmusi-Phetoe and Havenga⁹¹⁸ point out that disadvantaged members of society who have low incomes or limited education tend to live shorter and less healthy lives.⁹¹⁹ In this regard South Africa's history of racial discrimination has undoubtedly left its mark on the degree of enjoyment of equality and public health in the country.⁹²⁰ Woker⁹²¹ points out that the South African government has faced, and currently continues to face, a formidable task as:

the apartheid legacy of poverty, high levels of illiteracy, socio-economic inequalities and widespread human rights abuses (including consumer rights abuses) made this task a daunting one.⁹²²

The DOH has identified a number of SDHs that are specifically relevant to South African society, and whose non-realisation has contributed to the increased prevalence of NCDs in this country. These determinants include aspects such as high poverty rates, rapid urbanisation, the globalisation of marketing and trade, poorly developed health systems and negative commercial determinants of health.⁹²³ These aspects are expanded on in the discussion that follows.

⁹¹⁵ Gostin *et al* 2019 *Lancet* 1883.

⁹¹⁶ See part 3.2.2.2 above and 3.3.2 below.

⁹¹⁷ UN *Special Rapporteur Report on the Right to Health* para 42.

⁹¹⁸ Rasesemola, Mmusi-Phetoe and Havenga 2023 *Curationis* 6.

⁹¹⁹ Other factors would include marginalised ethnic or racial groups or persons that have low socio-economic status within a particular community. See WHO *Operational Framework for SDHs* 3.

⁹²⁰ The *World Bank Inequality in Southern Africa* 3.

⁹²¹ Woker 2019 *Stell LR* 98.

⁹²² This statement was made in the context of the "task" of improving consumer rights in the marketplace and implementing consumer protection laws in South Africa. See Woker 2019 *Stell LR* 98.

⁹²³ DOH *NCD National Strategic Plan* 1.

3.3.1 *Considering the pockets of the purchasing public: unemployment, global food supply chain disruptions and food inflation*

South Africa is classified as an upper middle-income country by the World Bank,⁹²⁴ and currently⁹²⁵ deems itself to be a developing country.⁹²⁶ That being said, there are “very high levels of income inequality” in South Africa.⁹²⁷ In fact, of the 164 countries that are included in the global poverty database of the World Bank, South Africa has been identified as the most unequal country in the world.⁹²⁸ In 2022 the World Bank noted that more than 80% of the financial assets in this country are owned by the top 10% of the population. The bottom 10% of the population has almost nothing.⁹²⁹ It comes as no surprise, therefore, that poverty has been identified as one of the main reasons that sub-Saharan Africa has been faced with a disproportionately large burden of disease resulting from NCDs.⁹³⁰

⁹²⁴ World Bank 2024 <https://datahelpdesk.worldbank.org/knowledgebase/articles/906519>.

⁹²⁵ *National Development Plan* 33. Historically, in terms of the self-selection principle, South Africa classified itself as a developed country when the *General Agreement on Tariffs and Trade* (1947) (hereafter “GATT”) was concluded in 1947. However, towards the late 1980s and early 1990s, South Africa was treated by other countries as “an economy in transition” due to the political changes on the horizon. At that time, trade partners afforded certain trade concessions to South Africa, which were generally reserved for developing countries. See Blumberg “South African Trade Policy and Regulation in the 1990s” 40.

⁹²⁶ As South Africa regularly invokes the special and differential treatment provisions under the WTO multilateral trading system, Sucker “(Southern) African Priorities in International Economic Law” 28, 30 notes that this suggests that South Africa has retreated from its designation as a developed country in the 1940s, to that of a developing country in modern times. In *European Union – Measures Concerning the Importation of Citrus Fruit from South Africa* (WTO dispute no WT/DS613/1) filed in 2022, South Africa referred to itself as a developing country. In this first dispute that South Africa has filed before the WTO, South Africa criticised the EU for not taking the developmental needs of this country into consideration when the EU imposed import restrictions on citrus fruit emanating from South Africa. Also see *National Development Plan* 33; Reuters 2022 <https://www.reuters.com/world/africa/south-africa-lodges-wto-complaint-against-eu-over-citrus-fruit-rules-2022-07-29/>.

⁹²⁷ Ataguba, Day and McIntyre 2015 *Global Health Action* 1.

⁹²⁸ The World Bank *Inequality in Southern Africa* 1.

⁹²⁹ The World Bank *Inequality in Southern Africa* 3.

⁹³⁰ Rasesemola, Mmusi-Phetoe and Havenga 2023 *Curationis* 1.

South Africa has high unemployment rates, particularly among the youth,⁹³¹ which contributes to the poverty of a significant portion of consumers in South Africa.⁹³² When considering reasons for the purchasing public's limited financial latitude when it comes to food selection, the first observation lies in access to education, which leads to employability challenges. South Africans have limited access to higher education, and insufficient skills development amongst the poor is an obstacle to employability and therefore the ability to earn a wage.⁹³³ Due to their limited education and skills, the majority of the workforce is able to do only poorly paid "basic jobs".⁹³⁴ This phenomenon has resulted in a so-called "missing middle" in the South African labour market.⁹³⁵ In the current day and age, it has been pointed out that:

[n]ew technologies and changing trade patterns have encouraged the growth of tradable services, leading to a growing demand for skilled labor. But this has not been matched by growth in the supply of skilled labor, for example through higher education or skills development. This has compounded the structural mismatch between demand and supply in the labor market, which undersupplies skilled workers and oversupplies unskilled ones.⁹³⁶

The opening of the country's borders in the mid-1990s⁹³⁷ has also had an unintended negative impact on the employability of South Africans. Blouin, Chopra and Van der Hoeven⁹³⁸ point out that:

trade liberalisation has actually led to widening wage differentials, with a substantial rise in relative rewards for skilled labour whereas unskilled workers remain engaged in informal activities rather than being in regular employment.

Trading in the globalised economy also means that regional and international developments impact on South Africa, including food availability and affordability.⁹³⁹ In recent years the COVID-19 pandemic has had a lasting impact on the disposable income

⁹³¹ According to Statista records, youth unemployment in South Africa was more than 49% in 2022. See Statista 2022 <https://www.statista.com/statistics/813010/youth-unemployment-rate-in-south-africa/#:~:text=The%20youth%20unemployment%20rate%20in,no%20significant%20change%20to%202021>.

⁹³² Ataguba, Day and McIntyre 2015 *Global Health Action* 8.

⁹³³ The World Bank *Inequality in Southern Africa* 3.

⁹³⁴ The World Bank *Inequality in Southern Africa* 4.

⁹³⁵ The World Bank *Inequality in Southern Africa* 2,4.

⁹³⁶ The World Bank *Inequality in Southern Africa* 3-4.

⁹³⁷ See part 3.4.1 below.

⁹³⁸ Blouin, Chopra and Van der Hoeven 2009 *Lancet* 504.

⁹³⁹ *National Development Plan* 30.

of many households and has increased food insecurity on a household level.⁹⁴⁰ It has been noted that:

[t]he effects of inflation in consumer food prices stemming from the economic impacts of the COVID-19 pandemic and the measures put in place to contain it, have increased costs and worsened the unaffordability of a healthy diet around the world.⁹⁴¹

In addition to the negative consequences flowing from the pandemic, the war between Russia and Ukraine has caused additional disruptions to global food supply chains. This, coupled with price spikes in grain, fertiliser, oil, and energy, has severely impacted global food markets and food prices in the past two years.⁹⁴² The ongoing conflict in the Middle East between Israel and Palestine has also impacted global trade channels.⁹⁴³ These global trade disruptions have socio-economic consequences and, ultimately, impact on food prices.⁹⁴⁴ The WHO⁹⁴⁵ has pointed out:

[t]hese crises cause systemic and cascading risks, whereby the impacts of one crisis exacerbate another, creating a spiral of worsening health, social, economic, and other conditions for those who were already falling behind. The confluence of crises is creating negative impacts in a number of areas, including health, education, poverty reduction, the environment, peace and security, and food and nutrition, thereby limiting progress towards achievement of the United Nations Sustainable Development Goals (SDGs) by 2030.

⁹⁴⁰ FAO *et al The State of Food Security and Nutrition in the World 2023* vii, xx; Sucker "(Southern) African Priorities in International Economic Law" 14. For a discussion on the origin and economic impact of COVID-19, see Jansen van Rensburg, Viviers and Parry "Headwinds and Tailwinds in Digital Trade: Can Africa Navigate the Storm?" 16-18.

⁹⁴¹ FAO *et al The State of Food Security and Nutrition in the World 2022* 19. More than 42% of the world (i.e., 31 billion people) could not afford a healthy diet in 2021. See FAO *et al The State of Food Security and Nutrition in the World 2023* xvi.

⁹⁴² FAO *et al The State of Food Security and Nutrition in the World 2023* vii; FAO *et al The State of Food Security and Nutrition in the World 2022* 8. Also see BusinessTech 2022 <https://businesstech.co.za/news/trending/590560/keep-an-eye-on-price-hikes-for-these-food-items-and-household-products-in-south-africa/>.

⁹⁴³ Toward the end of 2023 large shipping companies were forced to deviate from their normal shipping routes through the Red Sea and the Gulf of Aden. Goods vessels were subsequently required to travel via the longer route around Cape Town to ensure the safety of the vessels, contents and employees following attacks on vessels by a militant group. See Maersk 2023 <https://www.maersk.com/news/articles/2023/11/28/temporary-route-diversion-for-lisa-and-maersk-pangani-and-delay-in-delivery-schedule>; CNBC 2023 <https://www.cnbc.com/2023/12/19/houthi-attacks-in-red-sea-maersk-begins-rerouting-via-southern-africa.html>.

⁹⁴⁴ Mearsk 2023 <https://www.maersk.com/news/articles/2023/11/28/temporary-route-diversion-for-lisa-and-maersk-pangani-and-delay-in-delivery-schedule>; CNBC 2023 <https://www.cnbc.com/2023/12/19/houthi-attacks-in-red-sea-maersk-begins-rerouting-via-southern-africa.html>.

⁹⁴⁵ WHO *Operational Framework for SDHs* 4.

In addition to the global challenges, on a national level the production costs of various commodities, including food, have seen a sharp increase over the past years. Despite the easing of food prices globally, food inflation in South Africa has continued to take its toll over the years.⁹⁴⁶ In 2023 food inflation in South Africa was higher than in the preceding fourteen years.⁹⁴⁷ Nationwide electricity cuts (load shedding)⁹⁴⁸ in past years have been a huge factor impacting food inflation. A report issued by the Global Agriculture Information Network⁹⁴⁹ sums up the issue as follows:

[t]he electricity crisis in South Africa has added significant costs across agriculture and food value chains... Load shedding is the major contributor to the rise in the consumer prices of vegetables, dairy products, eggs and meat as these supply chains are heavily reliant upon electrification. Fruit and vegetable farmers experienced a drop in yields and quality as they struggled to keep to irrigation schedules, while livestock and poultry producers are struggling with the effect of load shedding on processing capacity. Across the supply chain, the struggle to continue operations and prevent a break in the cold chain is forcing many companies to purchase backup power sources, most often generators that are expensive to fuel. Ultimately, this significant higher cost of production is passed down to the consumer aggravating food price inflation.

Following from the above, the affordability of the food essential to a healthy diet is a major challenge.⁹⁵⁰ Many consumers struggle to make ends meet and purchase the foods that give the most value for money. Compared to many processed products,⁹⁵¹ better nutrient-based foods such as meat, fish, and fresh fruits and vegetables may be more costly.⁹⁵² Therefore, food prices and affordability are main drivers of consumer purchasing habits.⁹⁵³ In the context of power cuts, consumers also want to purchase foods that are

⁹⁴⁶ Food prices in South Africa increased by 14.4% in 2023, whilst global food prices fell by more than 20%. See Global Agriculture Information Network *Food Inflation Surged to a 14-Year High in South Africa* 1-2.

⁹⁴⁷ Global Agriculture Information Network *Food Inflation Surged to a 14-Year High in South Africa* 1,2.

⁹⁴⁸ South Africa has a constrained power system as a result of various challenges, including infrastructure maintenance backlogs and increased electricity demand. As a result, Eskom Holdings SOC Ltd, which is the primary electricity supplier in this country, has been necessitated to implement so-called load shedding from time to time throughout the country. See Eskom date unknown <https://loadshedding.eskom.co.za/LoadShedding/Description>.

⁹⁴⁹ Global Agriculture Information Network *Food Inflation Surged to a 14-Year High in South Africa* 3-4.

⁹⁵⁰ FAO *et al The State of Food Security and Nutrition in the World 2023* xvi; Ronquest-Ross, Vink and Sigge 2015 *South African Journal of Science* 64.

⁹⁵¹ Energy-dense processed foods are mostly cheaper than healthier alternatives. See Khan, Frank and Swart 2023 *Public Health Nutrition* 2139. For the meaning of “processed” and “ultra-processed”, see part 1.8.2 above.

⁹⁵² Igumbor *et al* 2012 *PLoS Med* 4.

⁹⁵³ Ronquest-Ross, Vink and Sigge 2015 *South African Journal of Science* 64.

convenient and which require little to no preparation. Ultra-processed foods have that additional quality,⁹⁵⁴ adding fuel to the fire of the unhealthy eating habits of many South Africans.

3.3.2 *The literacy levels of consumers in South Africa*

Public health is impacted on by the fact that the literacy levels of South African consumers vary drastically.⁹⁵⁵ In addition to children who are also independent food purchasers during school-going years,⁹⁵⁶ a sizable portion of the country's adult population has limited literacy skills.⁹⁵⁷ Adults within poor communities are generally less educated.⁹⁵⁸ Compared to other countries, South Africa is regarded as a country with a high level of illiteracy.⁹⁵⁹ In this regard Woker⁹⁶⁰ notes:

South Africa has a history of inequality. This has led to a divided economy and a society that is one of the most unequal in the world. South Africa was once described as having two economies. On the one hand, there is a modern first-world industrial, mining, agricultural, financial, and services sector and on the other, a third-world economy, in both urban and rural areas, where the majority of poor, mainly black, people live. It is against this background of a highly developed modern economy living side by side with a very poor underdeveloped third-world economy with high levels of illiteracy, that we must consider the issue of what constitutes meaningful consumer protection. It is all well and good if educated, relatively affluent consumers residing in urban areas have knowledge of their rights. But it cannot be said that there is any meaningful protection for consumers in South Africa unless that message is able to reach and empower the most vulnerable consumers including those residing in the most remote rural areas. This is an enormous challenge for the authorities.

As discussed previously,⁹⁶¹ the advertising of foodstuffs in South Africa is widespread across various platforms, including print, television, radio, billboard and other outdoor

⁹⁵⁴ Frank *et al* 2024 *Public Health Nutrition* 1.

⁹⁵⁵ See part 3.2.2.2 above.

⁹⁵⁶ At tuckshops in schools, for example. See WHO *Food Marketing Exposure* 13; Bopape *et al* 2021 *PLoS ONE* 10; Pettigrew *et al* 2017 *Appetite* 116.

⁹⁵⁷ Woker 2019 *Stell LR* 103; Barnard and Mišćenić 2019 *Journal for Juridical Science* 116.

⁹⁵⁸ Ataguba, Day and McIntyre 2015 *Global Health Action* 8.

⁹⁵⁹ Mupangavanhu and Kerchhoff 2021 *SA Merc LJ* 262. Based on 2020 figures, 3.7 million adults in South Africa are illiterate. See Khuluvhe 2022 Fact Sheet Adult Illiteracy in South Africa 2, 8. The literacy level in South Africa is about 90%, which is higher than in most countries on the African continent. That being said, those figures are lower than those in other developing regions including South American countries such as Brazil, Columbia, Chile and Venezuela. According to 2024 figures for the literacy rate per country, out of 167 countries South Africa ranks at 97. See World Population Review 2024 <https://worldpopulationreview.com/country-rankings/literacy-rate-by-country>.

⁹⁶⁰ Woker 2019 *Stell LR* 104.

⁹⁶¹ See part 1.8.4 above.

advertising, as well as online. When considering the target market in the context of foodstuffs advertising and labelling, it is relevant to remember that food is a necessity consumed by all members of society, from infancy throughout a person's life. The relevant consumer market, therefore, extends from the illiterate, possibly unsophisticated and poor individuals on the one hand, across the spectrum to the most educated, affluent and sophisticated individuals on the other. As such, the labelling and advertising of foodstuffs should be considered with reference to the factors relevant to society as a whole, including the literacy level of the purchasing public, which includes children.⁹⁶² In this regard Arrù *et al*⁹⁶³ point out:

children seem to be highly susceptible to the symbolic meanings of the images and words included on food packages ... [t]his implies a challenge from a public health perspective as children should be educated to minimize the misleading influence of the symbolic and explicit information included on the packages of unhealthful products.

It is submitted that the abovementioned passage is equally applicable to adult members of South African society who are vulnerable due to their limited education or literacy skills. This view is supported by the UN,⁹⁶⁴ which has confirmed that, in addition to children,⁹⁶⁵ adult consumers who are illiterate or who have limited literacy skills, and the poor are deemed to be vulnerable members of society.

3.3.3 *The challenges within the South African health care system*

The severe NCD burden in South Africa⁹⁶⁶ undoubtedly warrants a discussion on the health care system in this country, particularly as this is also a relevant SDH identified by the South African government.⁹⁶⁷ The health care system in South Africa is currently two-tiered, with public and private systems existing side by side.⁹⁶⁸ Most of the citizens of the

⁹⁶² See further the discussion in part 1.8.5.

⁹⁶³ Arrù *et al* 2017 *Appetite* 142.

⁹⁶⁴ UN *Special Rapporteur Report on the Right to Health* paras 17, 34-38, 42-46.

⁹⁶⁵ Children are dependent on parents or caregivers for food especially in their younger years, and may also be more susceptible to advertising and marketing relating to food products. See *Statement by the UN Special Rapporteur on the Right to Health* para 16. Also see s 3(1)(b)(iii) of the CPA.

⁹⁶⁶ See parts 1.1 and 1.2 above.

⁹⁶⁷ See part 3.3 above.

⁹⁶⁸ Carstens and Pearmain *Foundation Principles of South African Medical Law* 229; *National Development Plan* 331; Omotoso and Koch 2018 *International Journal of Equity and Health* 2.

country are dependent on state-funded⁹⁶⁹ public hospitals and clinics for their health care services.⁹⁷⁰ In 2020 it was estimated that about 16% of the public could afford private health care services.⁹⁷¹ More recently, in *Solidarity Trade Union v Minister of Health*⁹⁷² the respondents (which included the Minister of Health and the President of the Republic of South Africa) pointed out that:

the private healthcare sector..., due to its relatively high prices and its geographic concentration of infrastructure in predominantly wealthy areas, caters to that small group of South Africans who can afford medical aid or pay for services out of pocket. In contrast, the public health system, administered and overseen by the National Department of Health and government, is an overburdened and under-resourced system that provides fundamental healthcare services, at no or minimal cost to more than 80% of the South African population.

The *Constitution* affords everyone the right to have access⁹⁷³ to health care services⁹⁷⁴ and in turn places a corresponding positive obligation on the state to realise this right.⁹⁷⁵

⁹⁶⁹ It should be noted that a means test is adopted to establish if a patient is required to pay a fee, and that not all medical services are free of charge to patients receiving treatment at public health care establishments. For a further discussion, see Carstens and Pearmain *Foundation Principles of South African Medical Law* 243-244; Gordon, Booysen and Mbonigaba 2020 *BMC Public Health* 1-2.

⁹⁷⁰ Provincial governments own and control the state hospitals and other state health care facilities in each of the nine provinces in South Africa. See Carstens and Pearmain *Foundation Principles of South African Medical Law* 231; Todd *et al* 2022 *Nutrients* 15.

⁹⁷¹ Gordon, Booysen and Mbonigaba 2020 *BMC Public Health* 2.

⁹⁷² *Solidarity Trade Union v Minister of Health* 2024 JDR 3130 (GP) para 67.

⁹⁷³ The inclusion of the word "access" steers this right away from a direct right to health care services that is free of charge to the patient. Rather, the right to have access to health care services is wide enough to justify fee charges for health care by those who can afford such services, whilst maintaining the notion of persons' taking responsibility for their own health. See Carstens and Pearmain *Foundation Principles of South African Medical Law* 41.

⁹⁷⁴ Section 27(1)(a) of the *Constitution*. Carstens and Pearmain point out that the term "health care services" is not defined in the *Constitution*. In considering the meaning of this term, the authors submit that it should be interpreted broadly to encompass both instances where people have a disease or are ill, as well as health states such as in the instance of a pregnant woman who requires health care to maintain good health for herself and her foetus. See Carstens and Pearmain *Foundation Principles of South African Medical Law* 39. In addition to s 27(1)(a), it should also be noted that in terms of s 27(3) no one may be refused emergency medical treatment. Furthermore, in terms of s 28(1)(c) every child as the right to basic health care services.

⁹⁷⁵ *Minister of Health v Treatment Action Campaign (No 2)* 2002 5 SA 721 (CC) paras 23, 29. Also see Currie and De Waal *The Bill of Rights Handbook* 564. Incidentally, the *National Health Insurance Act* 20 of 2023 was assented to on 15 May 2024. This Act aims inter alia to achieve universal access to quality health care services in South Africa and to establish a national health insurance fund. The National Health Insurance Act is not yet in operation and the commencement date will be proclaimed in due course. However, there are currently at least six anticipated legal challenges to the validity and/or constitutionality of provisions within the *National Health Insurance Act*, and reports suggest that more are likely to be filed in due course. Issues raised include the financial ramifications of implementing the proposed measures to achieve universal access to health care services. Limitations on the nature and extent of health care services that may be offered by medical schemes once the

This right and the consequential obligation in respect of the right to have access to health care are, however, qualified to the extent that the state is required to take measures within its available resources to achieve the progressive realisation thereof.⁹⁷⁶ The unavailability of sufficient government resources limits this right,⁹⁷⁷ as unfettered access to health care services cannot necessarily be realised immediately.⁹⁷⁸ The concept of “progressive realisation” is often linked with the interpretation and implementation of socio-economic rights, which essentially encompasses a continuing duty on the government “to move as expeditiously and effectively as possible towards the full realisation” of such rights.⁹⁷⁹ When considering the rate of progressive realisation, it should be noted that the government’s obligation does not stretch beyond what is permissible within available resources. The availability of resources also impacts on the reasonableness of the measures that are employed to realise socio-economic rights, should they be challenged. In *Government of the Republic of South Africa v Grootboom*⁹⁸⁰ Jacob J observed that:

the goal of the Constitution is that the basic needs of all in our society be effectively met and the requirement of progressive realisation means that the State must take steps to achieve this goal. It means that accessibility should be progressively facilitated: legal, administrative, operational and financial hurdles should be examined and, where possible, lowered over time.

national health insurance model as proposed in the Act has been fully implemented have also been challenged. See Business Day 2024 <https://www.businesslive.co.za/bd/national/health/2024-05-27-solidarity-asks-court-to-declare-nhi-law-unconstitutional/>; Daily Maverick 2024 <https://www.dailymaverick.co.za/article/2024-06-19-consolidated-legal-challenges-to-nhi-act-will-have-more-clout/>; News24 2024 <https://www.news24.com/fin24/economy/solidarity-challenges-nhi-in-court-20240528>. For additional reading, see Adams & Adams 2024 <https://www.adams.africa/commercial-litigation/litigation/dispute-resolution/nhi-litigation-inevitable-here-is-what-you-need-to-know-about-the-national-health-insurance-act/>.

⁹⁷⁶ Section 27(2) of the *Constitution*. In terms of s 4(3) of the *NHA*, certain health services are to be provided at public health care facilities at no charge to members of the public that do not have medical aid, including health services to lactating women and children younger than six, and services related to the termination of pregnancy in terms of the *Choice of Termination of Pregnancy Act* 1992 of 1996.

⁹⁷⁷ *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 1 SA 765 (CC) para 11.

⁹⁷⁸ The Constitutional Court has held that the inclusion of the term “progressive realisation” in certain constitutional provisions (which includes section 27(2) of the *Constitution*, which relates *inter alia* to the right to have access to health care services) demonstrates that the relevant right cannot always be realised immediately. See *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) para 45. Also see *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 1 SA 765 (CC) para 11.

⁹⁷⁹ *Principles and Guidelines on the Implementation of the African Charter* para 13.

⁹⁸⁰ *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) para 46. Also see Pieterse 2007 *South African Journal of Human Rights* 164; Cheadle and Davis *South African Constitutional Law* para 22.2.

Whilst government-led policies and interventions have improved overall access to health care services in South Africa in the past thirty years,⁹⁸¹ it is no secret that the South African public health care system is over-burdened and under immense pressure.⁹⁸² The so-called quadruple burden of disease which includes NCDs,⁹⁸³ budgetary constraints and other additional systematic challenges⁹⁸⁴ has dire implications for the quality of health care service delivery within the public health care system.⁹⁸⁵ Another escalating problem that has drained the health budget in the past 15 years is the increased number and cost of the medical negligence claims instituted against the state. In *TN obo BN v MEC for Health, Eastern Cape*⁹⁸⁶ (hereafter “*TN v MEC for Health*”), the court noted:

[i]t is an accepted fact that up until approximately 2010 large claims of this nature did not exist. Whilst there were a few medical negligence claims, the quantum thereof as awarded by the courts was a drop in the ocean compared to the awards that are made today. Additionally, for various reasons that were debated extensively during evidence and argument, there has been a vast increase in the number of such claims over the past 12 years, particularly [cerebral palsy] claims. Their attendant damages awards have evolved dramatically and appear to average in the region of R25 million to R30 million, and in some cases more. Accordingly, in the earlier days such medical negligence claims formed a small drop in the ocean of the department’s budget, and indeed of the national budget. In a relatively short space of time ... this drop has grown exponentially.⁹⁸⁷

TN v MEC for Health related to a medical negligence claim instituted by a mother on behalf of her child against the Member of Executive Council (“MEC”) for Health in the Eastern Cape province, following a brain injury suffered by the child during the birth of the child, resulting in cerebral palsy.⁹⁸⁸ The MEC conceded medical negligence by a state

⁹⁸¹ *National Development Plan* 330-332; Moyo *et al Socio-Economic Rights: Progressive Realisation?* 378.

⁹⁸² *National Development Plan* 330-332; Moyo *et al Socio-Economic Rights: Progressive Realisation?* 377; Knipe, Omoruyi and Durojaye 2022 *ESR Review* 35; Todd *et al* 2022 *Nutrients* 15.

⁹⁸³ The four main categories of environment-related burdens of disease that are prevalent in South Africa are (i) NCDs; (ii) HIV/AIDS and related diseases including TB and sexually transmitted diseases; (iii) high mother and child morbidity and mortality rates; and (iv) violence, injuries and trauma. See *National Development Plan* 101, 331-332.

⁹⁸⁴ Examples of systemic challenges include a shortage of health care personnel; shortages of medicine and medical device supplies; deteriorating infrastructure; poor management and surveillance systems at state health care establishments; and delays in treating patients. See Moyo *et al Socio-Economic Rights: Progressive Realisation?* 377, 421.

⁹⁸⁵ *National Development Plan* 330-332; Moyo *et al Socio-Economic Rights: Progressive Realisation?* 379.

⁹⁸⁶ 2023 3 SA 270 (ECB).

⁹⁸⁷ *TN v MEC for Health* para 147.

⁹⁸⁸ *TN v MEC for Health* paras 2, 4.

employee of the relevant hospital.⁹⁸⁹ In considering the damages component of the claim, the High Court was required to consider whether or not the established common law position in terms of which damages are paid on a once-and-for-all basis in a monetary lump sum⁹⁹⁰ should be developed⁹⁹¹ to allow for the department to remedy the state's delictual liability in terms of the "public health care" and "undertaking to pay" remedies.⁹⁹² In terms of these remedies the provincial health department would, instead of a lump sum payment of future medical expenses (which exceeded R30 million in this case), provide the requisite health care to the child either through services within public health care facilities or, where necessary, private health services paid for by the department as and when needed throughout the life of the child.⁹⁹³ In considering the matter the High Court took into account the *dictum* in *MEC for Health and Social Development, Gauteng v DZ obo WZ*,⁹⁹⁴ where the Constitutional Court left open the door to possible development of the common law,⁹⁹⁵ noting that:

damages awards in medical negligence claim against public healthcare authorities must also be assessed against the impact they may have on healthcare budgets and the adverse effect they may have on the provision of access to public healthcare for everyone.⁹⁹⁶

⁹⁸⁹ *TN v MEC for Health* para 2. In terms of the principle of vicarious liability, a wrong committed by any servant of the state acting within the capacity and within the scope of the authority afforded to such a person is instituted against the state. See s 1 of the *State Liability Act* 20 of 1957; Carstens and Pearmain *Foundation Principles of South African Medical Law* 495.

⁹⁹⁰ *TN v MEC for Health* para 99. In terms of the common law position, a claimant must sue for both past and future damages relating to a single cause of action at the same time to prevent a multiplicity of actions arising from one cause, and the court awards damages in a lump-sum payment in money. See *MEC for Health and Social Development, Gauteng v DZ obo WZ* 2018 1 SA 335 (CC) (hereafter *MEC for Health v DZ*) paras 15-16.

⁹⁹¹ S 39(2) of the Constitution allows courts to develop the common law in a manner that promotes the spirit, purpose and object of the Bill of Rights. Furthermore, in terms of s 173 of the *Constitution*, the Constitutional Court, SCA and the high courts each have the inherent power to develop the common law, considering the interests of justice.

⁹⁹² These remedies have also been referred to as the "public healthcare defence" and "undertaking to pay defence", in terms of which the future medical costs component of medical negligence claims against the state can be satisfied through the provision of medical services at public health care establishments. See *MEC for Health v DZ* para 6.

⁹⁹³ *TN v MEC for Health* paras 3, 6.

⁹⁹⁴ *MEC for Health v DZ* paras 43-44.

⁹⁹⁵ Whilst sufficient evidence to support the development of the common law position was lacking in the DZ case, the Constitutional Court held that it "does not mean that the door to future development of the common law is shut". See *MEC for Health v DZ* paras 57-58.

⁹⁹⁶ *MEC for Health v DZ* para 13.

In considering extensive evidence on the depleting effect of such claims on the health budget,⁹⁹⁷ the court observed that “a self-defeating feature of payment of these claims upfront [is] that [they] undermine ... the capacity of the state to improve health service delivery over time”.⁹⁹⁸ After concluding that the MEC had established that the relevant public health care facilities in the Eastern Cape province would be able to provide the requisite medical services to the child at a reasonable standard,⁹⁹⁹ Griffiths J held:

I am satisfied, based on the evidence led in this case, that it is also in the interests of justice that the common law be developed to provide courts that adjudicate medical negligence claims with a broader remedial framework, including the remedies pleaded in this case.¹⁰⁰⁰

While the development of the common law to allow for the undertaking-to-pay and public health care remedies may in time alleviate some pressure on the health budget, matters similar to *TN v MEC for Health* will have to be considered by the courts on a case-by-case basis. Whilst the development of the common law may be a step in the right direction as far as realising the right to have access to health care services is concerned, it is by no means a quick solution. Litigation is costly and time-consuming.

Addressing an ever-bigger challenge within public health, namely the prevalence of NCDs, is therefore crucial to realise the right to have access to health care services within the broader fundamental right to health. In the context of NCDs caused by unhealthy diets, the DOH has emphasised that the medical costs associated with obesity and accompanying comorbid diseases have placed pressure on both the public and the private sectors within the South African health care system.¹⁰⁰¹ NCDs cause both premature death and disability,¹⁰⁰² which have dire implications for workforce productivity and consequently negatively impact on socio-economic development.¹⁰⁰³ Whilst life expectancy in South

⁹⁹⁷ *TN v MEC for Health* paras 49-98, 134-157.

⁹⁹⁸ *TN v MEC for Health* para 62.

⁹⁹⁹ *TN v MEC for Health* para 133, 180.

¹⁰⁰⁰ *TN v MEC for Health* para 166.

¹⁰⁰¹ DOH *Obesity Strategy* 12.

¹⁰⁰² For figures on NCDs both globally and in South Africa, see part 1.1.

¹⁰⁰³ Gostin *et al* 2019 *Lancet* 1859. Also see part 1.1.1.

Africa has increased considerably in the past two decades,¹⁰⁰⁴ Brady *et al*¹⁰⁰⁵ note that the current health system is unable to meet the demands of an ageing population with NCDs in South Africa. The authors point out that:

[t]he burden of chronic diseases is estimated to be the biggest global financial challenge to nations and their health care systems...

As mortality rates decline but life expectancy increases, years lived with disability (YLDs) are on the rise. The strain that YLDs, driven by longevity, is having on health systems consists of increased demand and can precipitate out-of-pocket expenditures.¹⁰⁰⁶

Schmitt, Wagner and Kirch¹⁰⁰⁷ also note the negative economic impact of the obesity epidemic due to the significant increase in health care costs in combination with a decrease in workforce productivity. Regulatory intervention in the food environment aimed at shifting consumer behaviours away from unhealthy foodstuffs could alleviate a lot of pressure on the health care system in the future.¹⁰⁰⁸ This aspect is considered further in the discussion that follows.

3.4 South African consumers' food environment and purchasing behaviour

South Africa is currently deemed to be the most industrialised country in Africa.¹⁰⁰⁹ As a member of the WTO, which promotes trade liberalisation and market access in support of global trade, South Africa is currently an international trading partner in various commodities, including food.¹⁰¹⁰ Food products are both exported from¹⁰¹¹ and imported into South Africa.¹⁰¹² Additionally, large supermarket chain stores and fast-food outlets

¹⁰⁰⁴ Between 2000 and 2019, life expectancy improved from 55 years to 65 years. See WHO 2024 <https://data.who.int/countries/710>.

¹⁰⁰⁵ Brady *et al* 2023 *World Medical and Health Policy* 449.

¹⁰⁰⁶ Brady *et al* 2023 *World Medical and Health Policy* 449.

¹⁰⁰⁷ Schmitt, Wagner and Kirch 2007 *Journal of Public Health* 57.

¹⁰⁰⁸ Knipe, Omoruyi and Durojaye 2022 *ESR Review* 34.

¹⁰⁰⁹ Brady *et al* 2023 *World Medical and Health Policy* 436.

¹⁰¹⁰ *National Development Plan* 88.

¹⁰¹¹ Agricultural product exports accounted for about 10% of South African export earnings in 2021. Foodstuffs exports include fruits, nuts and sugar. See International Trade Administration 2024 <https://www.trade.gov/country-commercial-guides/south-africa-agriral-sector>.

¹⁰¹² Major food product categories imported into South Africa in 2022 include palm oil, wheat, rice and sunflower seed. In addition, the importation of processed products has increased significantly since the 1990s. See International Trade Administration 2024 <https://www.trade.gov/country-commercial-guides/south-africa-agricultural-sector>; Igumbor *et al* 2012 *PLoS Med* 4.

are deeply rooted in the country.¹⁰¹³ Khan, Frank and Swart¹⁰¹⁴ point out that modern-day South Africa is characterised as having “a thriving unhealthy food retail environment”. However, the current unhealthy foodstuffs environment has not always existed in this country. Before dealing with this predicament in part 3.4.2, some comments on the transition from a more traditional healthy diet to the current unhealthy foodstuffs environment are set out in part 3.4.1.

3.4.1 Brief comments on how South Africa’s political history and changes in trade policy have impacted local consumer diets

During the apartheid era¹⁰¹⁵ the trade policy in South Africa was protectionist¹⁰¹⁶ in nature and centred on import substitution and replacement.¹⁰¹⁷ The trade sanctions¹⁰¹⁸ imposed against South Africa by the international community during this period played a role in the adoption of this policy.¹⁰¹⁹ Before 1990 large portions of the South African population followed a traditional rural diet. Such people predominantly consumed unrefined maize with vegetables and occasional animal protein. As this diet was low in sugar and fat and high in fibre, it was deemed to be relatively healthy.¹⁰²⁰

¹⁰¹³ Blouin, Chopra and Van der Hoeven 2009 *Lancet* 504; Rasesemola, Mmusi-Phetoe and Havenga 2023 *Curationis* 6.

¹⁰¹⁴ Khan, Frank and Swart 2023 *Public Health Nutrition* 2139.

¹⁰¹⁵ Although racial segregation has been practised ever since European settlers came to the Cape, Apartheid was formally implemented in 1948 and formally abolished in 1994 when the first democratic elections were held in South Africa. See African Union date unknown <https://au.int/en/auhrm-project-focus-area-apartheid>. For further information on the apartheid system and its impacts on the labour market, and education during the apartheid era, see Lowenberg 1997 *Contemporary Economic Policy* 62-64.

¹⁰¹⁶ Lowenberg 1997 *Contemporary Economic Policy* 64. Protectionism refers to government policies aimed at restricting international trade with other countries in order to protect the domestic industries within that country. See Investopedia 2022 <https://www.investopedia.com/terms/p/protectionism.asp>.

¹⁰¹⁷ The importation of goods was de-incentivised through import licensing requirements, imposing restrictions on the quantity of goods that were allowed to enter the country (i.e., quantitative import restrictions) and imposing high tariffs on imports. See Blumberg “South African Trade Policy and Regulation in the 1990s” 37-38, 49; Levy 1999 *The American Economic Review* 416; Lowenberg 1997 *Contemporary Economic Policy* 65.

¹⁰¹⁸ Trade and financial sanctions, resulting in a large loss of foreign direct investment, were imposed against South Africa in the 1960s, 1970s and 1980s to signify disapproval of the political regime and its policy of apartheid at that time. See Levy 1999 *The American Economic Review* 415-417.

¹⁰¹⁹ Economic sanctions were imposed against South Africa by various international organisations (including the UN), multiple countries (including the EU, the USA and Japan), and a number of private entities including foreign banks. See Levy 1999 *The American Economic Review* 415-417.

¹⁰²⁰ *National Development Plan* 334; Marais *et al* 2019 *SAMJ* 328; Igumbor *et al* 2012 *PLoS Med* 1.

However, from the early 1990s onwards the trade policy shifted towards increased trade liberalisation¹⁰²¹ and exports.¹⁰²² The political shift in South Africa towards a democracy overlapped with the Uruguay round of trade negotiations¹⁰²³ that culminated in the establishment of the WTO.¹⁰²⁴ In this regard Blumberg¹⁰²⁵ notes:

[o]n 2 December 1994, the democratically elected South African government, under the leadership of Nelson Mandela, deposited with the GATT Secretariat the signed instrument of accession to the Agreement Establishing the World Trade Organization. On 6 April 1995, after recommendations by both Houses, Parliament approved the accession. South Africa thereby became a member of the WTO and a party to all the multilateral agreements concluded during the Uruguay Round.

South Africa's re-entry into the international trade arena resulted in a significant expansion of supermarkets in urban and rural areas throughout the country,¹⁰²⁶ which replaced fresh food markets and small convenience stores to a large extent.¹⁰²⁷ In addition there was an increase in the number of multinational fast-food outlets opening and expanding throughout the country.¹⁰²⁸ For example McDonald's, the world's largest fast-food chain,¹⁰²⁹ commenced business operations in South Africa only after the country became a democracy.¹⁰³⁰ This was despite its already owning vested South African trade

¹⁰²¹ In contrast to protectionism, liberalisation of trade refers to policies which promote the free flow of goods between countries through the removal of barriers such as tariffs and quotas. See Investopedia 2021 <https://www.investopedia.com/terms/t/trade-liberalization.asp#:~:text=Trade%20liberalization%20removes%20or%20reduces,ones%20at%20a%20greater%20disadvantage.>

¹⁰²² There were both internal pressures to liberalise trade for economic prosperity, as well as external pressures from trade partners such as the EU. See Blumberg "South African Trade Policy and Regulation in the 1990s" 38-39, 49.

¹⁰²³ Blumberg "South African Trade Policy and Regulation in the 1990s" 38-40.

¹⁰²⁴ The WTO was established on 1 January 1995. For further reading on the history of the modern-day multilateral global trading system, see WTO 2024 https://www.wto.org/english/thewto_e/history_e/history_e.htm.

¹⁰²⁵ Blumberg "South African Trade Policy and Regulation in the 1990s" 40.

¹⁰²⁶ Ronquest-Ross, Vink and Sigge 2015 *South African Journal of Science* 64; Khan, Frank and Swart 2023 *Public Health Nutrition* 2139; Igumbor *et al* 2012 *PLoS Med* 4.

¹⁰²⁷ UN *Special Rapporteur Report on the Right to Health* para 9; Igumbor *et al* 2012 *PLoS Med* 4.

¹⁰²⁸ Certain fast-food outlets were, however, present in South Africa in the 1960s and 1970s. Wimpy opened its first store in South Africa in 1967, and KFC has been around since 1971. See Wimpy 2024 <https://wimpy.co.za/our-story/#:~:text=Starts...,for%20shared%20moments%20over%20meals;> News24 2021 <https://www.news24.com/news24/bi-archive/kfc-turns-50-in-south-africa-here-is-how-it-all-started-2021-4>.

¹⁰²⁹ Forbes 2023 <https://www.forbes.com/sites/suzannerowankelleher/2023/06/08/the-worlds-largest-hotel-restaurant-and-leisure-companies-in-2023/?sh=5dc7648071a2>.

¹⁰³⁰ The reason for its delay in entering the South African market related to the sanctions that the USA had imposed against South Africa and the perceived economic prejudice that the company would have suffered globally if it traded with South Africa at a time that the apartheid government was in power.

mark rights¹⁰³¹ and receiving repeated requests to open stores in this country as far back as 1975.¹⁰³² Since opening its doors for the first time in 1995,¹⁰³³ the McDonald's fast food chain has grown exponentially to nearly 400 McDonald's outlets throughout the country, currently serving more than 8 million customers in South Africa per month.¹⁰³⁴ Globally South Africa is deemed to be one of the most successful markets for the McDonald's chain.¹⁰³⁵

The DOH *NCD National Strategic Plan*¹⁰³⁶ points out the stark reality:

South Africa experienced an increase from 1994 to 2012 in energy intake, sugar-sweetened beverages, processed and packaged foods, animal-source foods, and added caloric sweeteners, while the consumption of vegetables decreased. The most drastic increase (>50%) was in the consumption of processed and packaged food, such as soft (sugary) drinks, sauces, dressings and condiments, and sweet and savoury snacks. These significant changes in food consumption patterns may be due to the changing food environment.

The changes in the food environment of consumers over the past three decades have resulted in consumers' behaviour and preferences gradually shifting towards the current westernised diet.¹⁰³⁷ The discussion that follows sets out the current consumer food environment in more detail.

See Dean 1996 *SA Merc LJ* 409, 420; *McDonald's Corporation v Joburgers Drive-Inn Restaurants (Pty) Ltd*; *Dax Prop CC v McDonald's Corporation*; *McDonald Corporation v Joburgers Drive-Inn Restaurants* (TPD) unreported case nos. 93/19719, 16493/94 and 11700/95 collectively heard on 6 October 1995.

¹⁰³¹ McDonald's has owned the trade mark McDONALD'S in South Africa since 1968. See *McDonald's Corporation v Joburgers Drive-Inn Restaurant (Pty) Ltd*; *McDonald's Corporation v Dax Prop CC*; *McDonald's Corporation v Joburgers Drive-Inn Restaurant (Pty) Ltd and Dax Prop CC* 1997 1 SA 1 (A) 10.

¹⁰³² Dean 1996 *SA Merc LJ* 413.

¹⁰³³ The first McDonald's fast food store opened in South Africa in November 1995. See McDonald's 2024 <https://www.mcdonalds.co.za/our-history>.

¹⁰³⁴ McDonald's 2024 <https://www.mcdonalds.co.za/our-history>.

¹⁰³⁵ Igumbor *et al* 2012 *PLoS Med* 4.

¹⁰³⁶ DOH *NCD National Strategic Plan* 11. Also see Ronquest-Ross, Vink and Sigge 2015 *South African Journal of Science* 72; Marais *et al* 2019 *SAMJ* 328; Bopape *et al* 2021 *PLoS ONE* 2.

¹⁰³⁷ Ronquest-Ross, Vink and Sigge 2015 *South African Journal of Science* 64. A study conducted in the North-West province, for example, revealed a dietary shift from a low-fat high carbohydrate diet with maize as the staple feed to a higher-fat diet with increased consumption of red meat and other cereals. See Igumbor *et al* 2012 *PLoS Med* 1.

3.4.2 The current consumer food environment and consumer behaviour

3.4.2.1 Globalisation and industrialisation

Rapid globalisation and technological advances since the end of the previous century have severely impacted on health by expanding the free flow of unhealthy foodstuffs between countries.¹⁰³⁸ The *Johannesburg Declaration on Sustainable Development* (2002) (hereafter *Johannesburg Declaration*) acknowledges that:

[t]he rapid integration of markets, mobility of capital and significant increases in investment flows around the world have opened new challenges and opportunities for the pursuit of sustainable development. However, the benefits and costs of globalization are unevenly distributed, with developing countries facing special difficulties in meeting this challenge.¹⁰³⁹

The globalised technology used during food production and transportation as well as the globalised marketing in the online environment have contributed towards the increased number of transnational foodstuffs manufacturers, supermarket chain stores, fast food outlets and food delivery services termed “Big Food” now housed in the country.¹⁰⁴⁰ In a report by the former UN Special Rapporteur on the Right to Health, Anand Grover,¹⁰⁴¹ it is highlighted that:

[c]hanges in the food system are now largely driven by transnational corporations (TNCs), including food and beverage companies and supermarket chains, which have altered diets from traditional and minimally processed foods to ultraprocessed ones. In fact, 75 per cent of the world’s food sales constitute processed foods, whose largest manufacturers control more than one third of the global market.¹⁰⁴²

¹⁰³⁸ Gostin *et al* 2019 *Lancet* 1858; UN *Special Rapporteur Report on the Right to Health* para 5.

¹⁰³⁹ *Johannesburg Declaration* para 14.

¹⁰⁴⁰ The term “Big Food” refers to large corporate entities that are generally perceived to dominate the food environment in a specific country, including foodstuffs manufacturers, retailers and sellers. In South Africa, Big Food would include locally headquartered companies such as Clover Industries Limited and Premier FMCG, which also trade in various other countries, as well as companies such as Nestlé and Parmalat, that are headquartered overseas. See Igumbor *et al* 2012 *PLoS Med* 1-2, 6; UN *Special Rapporteur Report on the Right to Health* para 6; Clover date unknown <https://www.clover.co.za/about/geographic-footprint/>; Premier 2024 <https://www.premierfmcg.com/about-us/business-footprint/>; Nestlé 2023 <https://www.nestle.com/ask-nestle/our-company/answers/is-nestle-a-swiss-company>; Parmalat date unknown https://www.parmalat.net/en/global_items/faq/general/.

¹⁰⁴¹ UN *Special Rapporteur Report on the Right to Health* para 5.

¹⁰⁴² Also see Frank *et al* 2024 *Public Health Nutrition* 1.

Whilst these increases in supermarkets, fast-food outlets and other food establishments have increased consumer convenience, they have also increased the availability and range of unhealthy foodstuffs.¹⁰⁴³ As such, trade liberalisation, as part of globalisation,¹⁰⁴⁴ has resulted in the increased affordability and availability of unhealthy foodstuffs, including carbonated soft drinks (which are deemed to be “candy in a can”),¹⁰⁴⁵ fast food and street food.¹⁰⁴⁶

Over time a wider range of unhealthy foodstuffs has become available, increasing consumer preference for these foods. As such, the desire for unhealthy foodstuffs is also a consideration.¹⁰⁴⁷ In the circumstances the WHO, the FAO and other international organisations¹⁰⁴⁸ have pointed out that the global food retail environment “is currently skewed towards foods that undermine healthy diets”.¹⁰⁴⁹ Unfortunately this is true for South Africa as well.

3.4.2.2 Urbanisation

It is projected that by 2025 70% of the global population will live in cities.¹⁰⁵⁰ When considering the challenges brought about by increased urbanisation, international organisations¹⁰⁵¹ have pointed out that:

urbanization has also contributed to the spread and consumption of processed and highly processed foods, which are increasingly cheaper and more readily available and marketed. Changes in the lifestyles and employment profiles of both women and men, as well as increasing commuting times, are resulting in greater demand for convenience,

¹⁰⁴³ FAO *et al The State of Food Security and Nutrition in the World 2023* 43. Also see *National Development Plan* 334; UN *Special Rapporteur Report on the Right to Health* paras 5, 10; Hutton and Gresse 2020 *Journal for Consumer Sciences* 127.

¹⁰⁴⁴ The term “globalisation” is defined as the “[p]rocesses by which nations, businesses, and people are becoming more connected and interdependent via increased economic integration and communication exchange, cultural diffusion [...] and travel.” Economic integration has involved “a growing role for supranational institutions and international trade and investment agreements, which have relatively little direct democratic oversight.” See Gilmore *et al 2023 Lancet* 1196.

¹⁰⁴⁵ Swithers 2015 *Appetite* 87.

¹⁰⁴⁶ Blouin, Chopra and Van der Hoeven 2009 *Lancet* 502, 504; UN *Special Rapporteur Report on the Right to Health* para 5; Igumbor *et al 2012 PLoS Med* 1, 2. Also see parts 3.4.2.4 and 3.5.2 below.

¹⁰⁴⁷ Blouin, Chopra and Van der Hoeven 2009 *Lancet* 504.

¹⁰⁴⁸ Namely, the International Fund for Agricultural Development, UNICEF and the UN World Food Programme. See FAO *et al The State of Food Security and Nutrition in the World 2023* 110.

¹⁰⁴⁹ FAO *et al The State of Food Security and Nutrition in the World 2023* 110.

¹⁰⁵⁰ FAO *et al The State of Food Security and Nutrition in the World 2023* viii.

¹⁰⁵¹ FAO *et al The State of Food Security and Nutrition in the World 2023* xxii.

pre-prepared and fast foods. The diet transition is also occurring in rural areas, though lagged and to a lesser extent compared to urban and peri-urban areas.¹⁰⁵²

As one of the most urbanised countries on the African continent, more than 60% of the South African population currently lives in urban areas.¹⁰⁵³ Urbanisation¹⁰⁵⁴ rates are increasing and it is projected that this figure will increase by a further 10% by 2030,¹⁰⁵⁵ and will be 80% by 2050.¹⁰⁵⁶ Bopape *et al*¹⁰⁵⁷ point out that urbanisation is the main factor that has increased accessibility to unhealthy foodstuffs from the 1990s onwards.

The rapid increase in urbanisation in past decades has significantly impacted on consumer lifestyle and behaviour including diets in South Africa and elsewhere.¹⁰⁵⁸ The increased availability of public transport, combined with a shift away from labour-intensive jobs in the industrialised economy, has resulted in members of the public often engaging in less physical activity.¹⁰⁵⁹ The decrease in physical activity has reduced the possibility of burning the excessive calorie intake resulting from the consumption of unhealthy foodstuffs.¹⁰⁶⁰

3.4.2.3 Digitalisation

Consumer behaviour and preferences have been dramatically influenced by an increase in digital commerce in recent years.¹⁰⁶¹ Although internet access remains costly and

¹⁰⁵² A rural area is an area which is more than 1 hours from the closest urban area. A peri-urban area is less than 1 hour from the closest city or town. See FAO *et al The State of Food Security and Nutrition in the World 2023* xxi. Also see Koen, Blaauw and Wentzel-Viljoen 2016 *S Afr J Clin Nutr* 14.

¹⁰⁵³ It has been pointed out that there is an increased link between rural and peri-urban areas, and cities. See FAO *et al The State of Food Security and Nutrition in the World 2023* xvii.

¹⁰⁵⁴ Urbanisation occurs when (i) there is population growth in urban areas, (ii) there is urban expansion in the sense that areas historically classified as rural, are re-classified to peri-urban or urban area, and (iii) there is a migration of people from rural to urban areas. See FAO *et al The State of Food Security and Nutrition in the World 2023* xxi.

¹⁰⁵⁵ *National Development Plan* 29.

¹⁰⁵⁶ UN Human Settlements Programme 2023 <https://unhabitat.org/south-africa>. Also see Parliamentary Monitoring Group date unknown <https://pmg.org.za/page/Urbanisation>.

¹⁰⁵⁷ Bopape *et al* 2021 *PLoS ONE* 2.

¹⁰⁵⁸ Igumbor *et al* 2012 *PLoS Med* 6; Khan, Frank and Swart 2023 *Public Health Nutrition* 2139; FAO *et al The State of Food Security and Nutrition in the World 2023* xxii.

¹⁰⁵⁹ Koen, Blaauw and Wentzel-Viljoen 2016 *S Afr J Clin Nutr* 14; UN *Special Rapporteur Report on the Right to Health* para 3.

¹⁰⁶⁰ UN *Special Rapporteur Report on the Right to Health* para 3.

¹⁰⁶¹ Lehrer and Trenz 2022 *Electronic Markets* 687; Mupangavanhu and Kerchhoff 2023 *De Jure* 88; Todd *et al* 2022 *Nutrients* 11-12.

unevenly available throughout South Africa,¹⁰⁶² the advent of smartphones has reduced this digital divide.¹⁰⁶³ Smartphones serve as a cost-effective tool that connects members of the public to the world wide web.¹⁰⁶⁴ Online shopping is deemed to be one of the most popular commercial activities performed on smart phones.¹⁰⁶⁵ Jansen van Rensburg, Viviers and Parry¹⁰⁶⁶ comment that:

[t]he reason for the digital economy has expanded at the rate that it has in recent years is that billions of people have, in the wake of the [fourth industrial revolution], become connected through digital devices with extraordinary processing power, storage capacity and access to information... The uptake and application of digital technologies in every economic sector have grown exponentially, thus fuelling the digital economy. In fact, it is estimated that by 2022, some 60% of global GDP will be the result of digitalisation, while an estimated 70% of all new economic value created globally will be through digitally enabled platforms.¹⁰⁶⁷

During the COVID-19 pandemic, many businesses were forced to move the sale of their goods or services online.¹⁰⁶⁸ This accelerated the use of e-commerce¹⁰⁶⁹ and behavioural shifts towards online shopping¹⁰⁷⁰ or so-called “omnichannel shopping” continued following the lifting of the lockdown restrictions.¹⁰⁷¹ Omnichannel shopping occurs when

¹⁰⁶² Although the government-driven South Africa Connect broadband connectivity project has led to increased internet access in the country, more than 20% of households in the country remain without internet access. See South African Government 2024 <https://www.gov.za/blog/south-africa-connect>.

¹⁰⁶³ Jansen van Rensburg, Viviers and Parry “Headwinds and Tailwinds in Digital Trade: Can Africa Navigate the Storm?” 37. The digital divide is shaped by the fact that millions of people across the African continent do not have access to digital devices or online platforms. For a further discussion on this situation and its causes, see Parry “Turning Theory Into Action: The Power is in Africa’s Hands” 307-309.

¹⁰⁶⁴ UN Africa Renewal 2017 <https://www.un.org/africarenewal/magazine/may-july-2017/africa%E2%80%99s-digital-rise-hooked-innovation>.

¹⁰⁶⁵ Jansen van Rensburg, Viviers and Parry “Headwinds and Tailwinds in Digital Trade: Can Africa Navigate the Storm?” 21.

¹⁰⁶⁶ Jansen van Rensburg, Viviers and Parry “Headwinds and Tailwinds in Digital Trade: Can Africa Navigate the Storm?” 20.

¹⁰⁶⁷ The fourth industrial revolution is characterised by technology and data in a digital age. See Jansen van Rensburg, Viviers and Parry “Headwinds and Tailwinds in Digital Trade: Can Africa Navigate the Storm?” 3.

¹⁰⁶⁸ Mupangavanhu and Kerchhoff 2023 *De Jure* 89.

¹⁰⁶⁹ E-commerce essentially refers to buying, selling and marketing goods and services via the internet or digital marketplace. See Jansen van Rensburg, Viviers and Parry “Headwinds and Tailwinds in Digital Trade: Can Africa Navigate the Storm?” 20; Mupangavanhu and Kerchhoff 2023 *De Jure* 86.

¹⁰⁷⁰ Mupangavanhu and Kerchhoff 2023 *De Jure* 87.

¹⁰⁷¹ Nielsen 2021 <https://www.nielsen.com/insights/2021/covid-19-elevated-convenience-to-a-new-level-and-thats-how-it-will-stay/#:~:text=It%20means%20that%20retailers%20need,mainstream%20across%20the%20retail%20landscape>. Nielsen is a leading company which tracks and analyses consumer behaviours globally to provide information on media across all media channels. Nielsen operates in more than 50 countries

consumers adopt a combination of physical (i.e., in-store) and digital platforms or media (i.e., websites, mobile applications or social media) when shopping and purchasing goods.¹⁰⁷² Food delivery services via mobile applications such as Mr Delivery,¹⁰⁷³ Uber Eats,¹⁰⁷⁴ and Checkers Sixty60¹⁰⁷⁵ have become popular in the food retail context.¹⁰⁷⁶ Apparent advantages of using such online shopping platforms in the emerging digitalised economy¹⁰⁷⁷ include convenience, having a wider variety of products to choose from, saving on time and, potentially, also being able to pay lower prices.¹⁰⁷⁸

It was noted earlier¹⁰⁷⁹ that food marketing via digital means and social media has expanded significantly in recent years.¹⁰⁸⁰ A shift towards the use of digital communication has played a role in shaping society and the consumer food environment in recent years,¹⁰⁸¹ especially for the younger generation, which has embraced this development.¹⁰⁸² A huge concern is the fact that digital marketing is often used to advertise unhealthy foodstuffs, which assists in normalising the regular consumption thereof.¹⁰⁸³ It has also been observed that active engagement with foodstuffs marketing content available online

around the world and has an office in South Africa. See Nielsen 2023 <https://www.nielsen.com/about-us/about/>. Also see Sajid, Rashid and Haider 2022 *Frontiers in Psychology* 1.

¹⁰⁷² In addition to the traditional physical in-store selection and purchase or the modern-day online order and delivery system, a consumer may also use combination of platforms for the same purchase at the same time. For example, a consumer can pre-order goods online to be picked up at the retail premises, or even use a mobile application whilst standing in-store. Businesses may now adopt an omnichannel business model to cater for the different channels of engagement with customers. The term "omnichannel business" refers to a business that has the requisite processes and information systems in place to realise "a seamless and consistent consumer experience across a plenitude of digital and physical channels". See Lehrer and Trenz 2022 *Electronic Markets* 687-689.

¹⁰⁷³ Mr D 2024 <https://www.mrdfood.com/>.

¹⁰⁷⁴ Uber Eats 2024 <https://www.ubereats.com/za/near-me/south-african>.

¹⁰⁷⁵ Checkers 2024 https://www.sixty60.co.za/?source_caller=ui&shortlink=ef713c6f&c=app_installs&pid=website&af_click_lookback=7d&af_channel=website.

¹⁰⁷⁶ Bannor and Amponsah 2023 *Sustainable Technology and Entrepreneurship* 1,9.

¹⁰⁷⁷ The modern-day digital economy, where data have become the most precious commodity, refers to "an economy that is made up of billions of everyday, online connections between people, businesses, devices, data and processes". It was estimated in 2022 that 60% of global GDP was generated through digitalisation. See Jansen van Rensburg, Viviers and Parry "Headwinds and Tailwinds in Digital Trade: Can Africa Navigate the Storm?" 19-20.

¹⁰⁷⁸ Sajid, Rashid and Haider 2022 *Frontiers in Psychology* 3; Bannor and Amponsah 2023 *Sustainable Technology and Entrepreneurship* 9.

¹⁰⁷⁹ See part 1.8.4 above.

¹⁰⁸⁰ WHO *Food Marketing Exposure* 16; Mupangavanhu and Kerchhoff 2023 *De Jure* 86.

¹⁰⁸¹ WHO *Operational Framework for SDHs* 4.

¹⁰⁸² *National Development Plan* 33.

¹⁰⁸³ Reddy 2020 *TSAR* 446.

by using the “like”, “share” or “comments” tools influences the consumption of the foodstuffs appearing in that online content.¹⁰⁸⁴

3.4.2.4 Consumption patterns of South African consumers

Both in South Africa and elsewhere, globalisation and the power in the hands of large transnational food corporations have caused a dietary shift towards the consumption of processed and unhealthy foodstuffs.¹⁰⁸⁵ The DOH *Obesity Strategy*¹⁰⁸⁶ notes that, in South Africa:

obesity has increased dramatically in adults over a period of 20 years. In addition, the prevalence [of] obesity in children 6 – 14 years of age is higher tha[n] the global average in school children. The causes leading to the high rates of overweight and obesity in the country are multifactorial. The nutrition transition from minimally processed and locally [sic] food to readily available and cheap ultra-processed food and drinks that are high in sugar, salt and/or fat are among the key factors that have contributed to the problem.

Starting with the youngest section of the population, exclusive breastfeeding for the first six months of life in line with WHO recommendations is not common in South Africa.¹⁰⁸⁷ Breast milk substitutes are often introduced to supplement or replace breast milk altogether.¹⁰⁸⁸ Pereira-Kotze, Doherty and Swart¹⁰⁸⁹ highlight that the use of breast milk substitutes may be detrimental to the health and nutritional habits of infants and young children. This issue should, however, be considered in the light of prevailing consumer behaviour. There has over the years been an increase in the number of women entering the workforce.¹⁰⁹⁰ While this has provided additional financial support for families, one of the downsides is that mothers are not always in a position to be with their babies for the first six months of life. Current labour law only requires that employers afford the mother four months of maternity leave, which may commence even before the child is born,¹⁰⁹¹ ultimately reducing the time that the mother has with the child for exclusive breastfeeding. As such, although the WHO sets out best practices, in reality it is not

¹⁰⁸⁴ WHO *Food Marketing Exposure* vi, 12.

¹⁰⁸⁵ UN *Special Rapporteur Report on the Right to Health* para 5; Igumbor *et al* 2012 *PLoS Med* 4.

¹⁰⁸⁶ DOH *Obesity Strategy* 6.

¹⁰⁸⁷ See part 2.6.1 above.

¹⁰⁸⁸ Pereira-Kotze, Doherty and Swart 2020 *BMJ Global Health* 1.

¹⁰⁸⁹ Pereira-Kotze, Doherty and Swart 2020 *BMJ Global Health* 1.

¹⁰⁹⁰ Marais *et al* 2019 *SAMJ* 332.

¹⁰⁹¹ See s 25 of the *Basic Conditions of Employment Act* 75 of 1997.

always possible for mothers, especially those who contribute to the monthly income of a household, to breastfeed exclusively for the first six months of their children's life.

Dietary patterns are formed early in life.¹⁰⁹² As a result, if children are exposed to a healthy diet from a young age this will form the foundation of good nutrition and healthy development throughout their lives.¹⁰⁹³ Unfortunately, the opposite also holds true and is closer to reality in South Africa. A study conducted in 2015 regarding infant foods other than infant formula sold in leading South African supermarkets and retail outlets revealed that the sugar content of such foods was high in 78% of the products that were sampled. More than 80% of infant cereals and pureed desserts contain added sugar.¹⁰⁹⁴ The prevalence of cereals that contain added sugar and taste sweet is a specific concern, as this product is a popular first food for babies.¹⁰⁹⁵ Early-life exposure to predominantly sweet tastes impacts on future food choices and behaviour. Young consumers who are used to and prefer sweet-tasting foods are prone to eating foods that have more sugar later in life. This, in turn, increases the risk of developing NCDs such as obesity.¹⁰⁹⁶

Research has shown that there is extensive food advertising aimed at children and that a significant proportion of the marketing activities aimed at this consumer group relate to foods that are high in fat, sugar and/or salt.¹⁰⁹⁷ Advertising also influences their preferences, purchase requests and consumption patterns.¹⁰⁹⁸

There is also an increased consumer preference for unhealthy foodstuffs young adults and the adult population more generally, as these products are readily available, are preferred due to their palatability, and are often the cheaper food option.¹⁰⁹⁹ Khan, Frank

¹⁰⁹² WHO *Food Marketing Exposure* v.

¹⁰⁹³ Bopape, Taillie and Swart 2022 *Front in Public Health* 2.

¹⁰⁹⁴ More than 230 products from 12 different manufacturers formed part of the study. See Marais *et al* 2019 *SAMJ* 328-329.

¹⁰⁹⁵ Studies in the Gauteng and North-West provinces revealed that more than 30% of the mothers interviewed in each province introduced infant cereal to their babies as their first food. See Marais *et al* 2019 *SAMJ* 330, 331.

¹⁰⁹⁶ Marais *et al* 2019 *SAMJ* 330, 332.

¹⁰⁹⁷ UN *Resolution on the Prevention and Control of NCDs* para 37; Yamoah *et al* 2021 *Int J Environ Res Public Health* 1; Reddy 2020 *TSAR* 444-445.

¹⁰⁹⁸ Yamoah *et al* 2021 *Int J Environ Res Public Health* 9; UN *Resolution on the Prevention and Control of NCDs* para 37; Corea *et al* 2020 *Am J Public Health* 1054.

¹⁰⁹⁹ Khan, Frank and Swart 2023 *Public Health Nutrition* 2139-2140; UN *Special Rapporteur Report on the Right to Health* para 3; Ndlovu *et al* 2018 *South African Health Review* 121; Igumbor *et al* 2012 *PLoS*

and Swart¹¹⁰⁰ point out that, as with children, many of the country's youth who are exposed to unhealthy foodstuffs advertising gravitate towards choosing those products during food selection and consumption. These nutrition and public health scholars also point out that:

[c]hildren and adolescents are most vulnerable to the effects of marketing due to limited cognitive and executive skills. This results in increased preference towards unhealthy products, and purchase requests for these products, resulting in the development of unhealthy dietary patterns.¹¹⁰¹

A study published in 2012 revealed that 55% of households in Johannesburg's lower-income urban population sourced food from fast-food outlets, small shops and restaurants once a week or more.¹¹⁰² A separate study in Soweto revealed that adolescents frequently consume fast foods, sweets, crisps, and carbonated soft drinks.¹¹⁰³ The sale of instant snack bars, noodles and ready-meals increased by more than 40% between 2005 and 2010.¹¹⁰⁴ More recently, a study published by Frank *et al*¹¹⁰⁵ revealed that on average ultra-processed foodstuffs amount to nearly 40% of the diet of adults in low-income areas in South Africa.

Furthermore, South Africa globally ranks among the top ten countries that consume the carbonated soft drink, Coca-Cola.¹¹⁰⁶ On average school-aged children in South Africa consume between two and three servings of SSB each day.¹¹⁰⁷ In this regard, cultural considerations within the country are also relevant.¹¹⁰⁸ Gilmore *et al*¹¹⁰⁹ point out:

Med 4. Also see part 3.4.2 above. For additional reading, see Mills Considering the Best Interests of the Child When Marketing Food to Children: An Analysis of the South African Regulatory Framework 16-39.

¹¹⁰⁰ Khan, Frank and Swart 2023 *Public Health Nutrition* 2139-2140.

¹¹⁰¹ Khan, Frank and Swart 2023 *Public Health Nutrition* 2140. Also see WHO *Food Marketing Exposure* vi.

¹¹⁰² Rudolph *et al* *The State of Food Insecurity in Johannesburg* 19.

¹¹⁰³ Freeley *et al* 2012 *Nutrition* e3.

¹¹⁰⁴ Igumbor *et al* 2012 *PLoS Med* 1.

¹¹⁰⁵ The study was conducted in 2017 and 2018 in Khayelitsha and Langa in the Cape Peninsula and Mount Frere in the Eastern Cape province, and it covered more than 2,500 adult participants. See Frank *et al* 2024 *Public Health Nutrition* 1-2.

¹¹⁰⁶ Gilmore *et al* 2023 *Lancet* 1205. Coca-Cola is a sugar-sweetened beverage (previously abbreviated to SSB in part X) manufactured by The Coca-Cola Company. See The Coca-Cola Company 2024 <https://www.coca-cola.com/us/en>.

¹¹⁰⁷ One serving is 340 ml. See Gilmore *et al* 2023 *Lancet* 1205.

¹¹⁰⁸ WHO *Global Action Plan for NCDs* 13.

¹¹⁰⁹ Gilmore *et al* 2023 *Lancet* 1205.

widespread marketing practices that particularly target poor, mostly Black South Africans and the extensive availability of SSBs in supermarkets, convenience stores, and street vendors in densely populated urban areas and remote rural villages has created physical and cultural environments ... that are persuasive of consumption... SSB branding is prolific: school and shop signs, billboards, and TV channels increasingly expose children to SSBs and public health messaging on nutrition and the harmful effects of SSB consumption is almost non-existent. Marketing has also reshaped cultural norms by emotively linking SSBs with local music, popular sports, and traditional clothing so that SSBs are now perceived as symbols of wealth within South Africa's value system.

Following the above, social status within a specific community also has an impact on food purchases. Kroll¹¹¹⁰ highlights that consumers "emerging from poverty preferentially allocate the additional available income to more costly, less healthy foods", as this is a visible expression to the community of their shifting income status. Moreover, the author notes that:

[s]uccess is symbolised by participating in an ostentatious urban consumer culture projected by a powerful and sophisticated media apparatus. This propaganda apparatus persuasively promotes the conspicuous consumption of its food symbols fast foods, street foods, carbonated beverages, ultra-processed snacks and sweets. This symbolic economy contributes significantly to the extraction of economic value from the people and its accumulation by global finance and local elites. Simultaneously, it serves to legitimise and re-produce the structural drivers of poverty while concealing the inequality, exploitation and ecological devastation on which these value chains rely.¹¹¹¹

With this in mind, a discussion on commercial determinants of health follows below.

3.5 Commercial determinants of health

Private commercial entities¹¹¹² have a large influence and resources in the current global trade and economy.¹¹¹³ Currently, 70 out of the 100 largest economies worldwide are

¹¹¹⁰ Kroll *Working Paper 36: Foodways of the Poor in South Africa* 18. This publication was issued by the Institute for Poverty, Land and Agrarian Studies. It is supported by the DST-NRF Centre of Excellence in Food Security, which is hosted by the University of the Western Cape and co-hosted by the University of Pretoria.

¹¹¹¹ Kroll *Working Paper 36: Foodways of the Poor in South Africa* 26.

¹¹¹² Commercial entities usually form part of the private sector and are not directly controlled by the government. A commercial entity may be one of various forms of business enterprise, such as a company, partnership, or sole proprietorship. Commercial entities are engaged in the buying and selling of goods or services in the course of trade (i.e., in commerce) primarily for profit or a return on investment. See Lacy-Nichols *et al* 2023 *Lancet* 1215; Gilmore *et al* 2023 *Lancet* 1196.

¹¹¹³ Factors that have increased the power of such large corporations include multilateral trade and investment agreements, globalisation, and the development of market-driven and neoliberal economies. See Mialon 2020 *Globalization and Health* 4. Also see WHO 2023 <https://www.who.int/news/item/24-03-2023-experts-call-for-action-on-the-commercial-determinants-of-health-and-health-equity>.

corporations and not states.¹¹¹⁴ Furthermore, 30% of the global GDP is generated by the top 50 multinational corporations.¹¹¹⁵ As such, a large portion of the world's wealth is owned by a handful of large companies or individuals that own them.¹¹¹⁶ This, as various scholars¹¹¹⁷ have pointed out, has resulted in a power imbalance in favour of multinational corporations¹¹¹⁸ whilst consumers (as well as civil society groups advocating for public health) are sometimes left relatively powerless.

Commercial actors often have the resources and power to improve the social, economic and environmental conditions in which consumers live.¹¹¹⁹ In the *Johannesburg Declaration* countries worldwide acknowledged that private-sector commercial actors have "a duty to contribute to the evolution of equitable and sustainable communities and societies."¹¹²⁰ Therefore it has been argued that the responsibility for creating a sustainable future in accordance with the SDGs falls not only on governments and civil society but also on commercial actors in the private sector.¹¹²¹ That being said, the reality is that the goals and interests of public and private stakeholders are often not aligned. In this regard Scheyvens, Banks and Hughes¹¹²² point out that:

[f]rom a development perspective, human wellbeing is of central importance. For those coming from a private sector perspective, business growth and economic development goals are likely to be of central importance, with wellbeing of community stakeholders being somewhat down the list of priorities.¹¹²³

The discussion below is dedicated to commercial determinants of health (hereafter "CDHs"), which are essentially the activities of commercial actors that directly or indirectly

¹¹¹⁴ Lacy-Nichols, Jones and Buse 2023 *Frontiers in Public Health* 2.

¹¹¹⁵ Lacy-Nichols, Jones and Buse 2023 *Frontiers in Public Health* 2.

¹¹¹⁶ Lacy-Nichols *et al* 2023 *Lancet* 1217.

¹¹¹⁷ See Gilmore *et al* 2023 *Lancet* 1200; Scheyvens, Banks and Hughes 2016 *Sustainable Development* 375-376; Eggert 2004 *Chapman Law Review* 2.

¹¹¹⁸ Multinational corporations (or transnational corporations) are large corporations which have business operations in many countries. A common characteristic of such corporations worldwide is that management and ownership are separated in these commercial entities, and owners (or shareholders) generally have limited liability. See Gilmore *et al* 2023 *Lancet* 1195.

¹¹¹⁹ Scheyvens, Banks and Hughes 2016 *Sustainable Development* 372.

¹¹²⁰ *Johannesburg Declaration* para 27.

¹¹²¹ Scheyvens, Banks and Hughes 2016 *Sustainable Development* 372.

¹¹²² Scheyvens, Banks and Hughes 2016 *Sustainable Development* 378.

¹¹²³ Also see part 3.6.2 below.

impact on consumer health.¹¹²⁴ CDHs fall within the broader SDHs category¹¹²⁵ and are defined as “the systems, practices, and pathways through which commercial actors drive health and equity”.¹¹²⁶

CDHs are relevant to all forms of business enterprise, from a small, locally owned business to a large multinational corporation.¹¹²⁷ Focusing on the food sector, it is noteworthy that transnational corporations currently dominate the foodstuffs value chain in this country.¹¹²⁸ These private commercial actors, as well as smaller food producers, are vital in the production and supply of foodstuffs, as essential consumer products, to members of the public.¹¹²⁹

It is also noteworthy that CDHs can either promote health (i.e., be positive) or harm health (i.e., be negative),¹¹³⁰ as explained in 3.5.1 below..

3.5.1 CDHs by the foodstuffs industry which positively impact on consumer health

It is not contested that businesses in various industries significantly contribute to the lives and livelihoods of people worldwide.¹¹³¹ Through actions such as research and innovation, generating wealth, creating employment opportunities and mobilising a country’s resources, private corporations can positively impact on sustainability goals, including poverty reduction and improving consumer health.¹¹³² For example, in the food industry Premier FMCG (Pty) Ltd,¹¹³³ which sells various well-known food brands including IWISA, IMPALA and SUPER SUN maize meal, SNOWFLAKE flour, and BLUE RIBBON bread, employs over 8 000 people across its bakeries, mills, manufacturing facilities and other

¹¹²⁴ WHO 2023 <https://www.who.int/news-room/fact-sheets/detail/commercial-determinants-of-health>.

¹¹²⁵ Mialon 2020 *Globalization and Health* 1.

¹¹²⁶ Gilmore *et al* 2023 *Lancet* 1195.

¹¹²⁷ Gilmore *et al* 2023 *Lancet* 1195-1196; Lacy-Nichols *et al* 2023 *Lancet* 1214.

¹¹²⁸ Gilmore *et al* 2023 *Lancet* 1205; Khan, Frank and Swart 2023 *Public Health Nutrition* 2139.

¹¹²⁹ WHO 2023 <https://www.who.int/news/item/24-03-2023-experts-call-for-action-on-the-commercial-determinants-of-health-and-health-equity>.

¹¹³⁰ Gilmore *et al* 2023 *Lancet* 1195; Lacy-Nichols *et al* 2023 *Lancet* 1218.

¹¹³¹ Scheyvens, Banks and Hughes 2016 *Sustainable Development* 380.

¹¹³² Gilmore *et al* 2023 *Lancet* 1194; Gostin *et al* 2019 *Lancet* 1869; Scheyvens, Banks and Hughes 2016 *Sustainable Development* 375-376.

¹¹³³ As mentioned in part 1.8.1, the abbreviation “FMCG” refers to fast-moving consumer goods.

operations in South Africa.¹¹³⁴ In 2022 the Mail & Guardian¹¹³⁵ reported on how Premier FMCG is helping to feed the nation, highlighting that:

Premier FMCG is committed to improving access to nutritional food by providing consumers with a choice of products available in diverse trade outlets at affordable prices and fortified as per regulations. Our 10 mills and 13 bakeries have the capacity to produce 680 000 tonnes of maize, 980 000 tonnes of wheat and 747 million loaves of bread per annum. With 25 distribution depots and a fleet of bakery vehicles delivering to 45 000 trade outlets per day, Premier FMCG has approximately 26% share of the bread market, 26% share of the wheat flour market, and 17% of the maize market.

Various of the country's large food manufacturers, including Premier FMCG,¹¹³⁶ Tiger Brands¹¹³⁷ and Unilever¹¹³⁸ also donate food to impoverished communities, often working in partnership with credible non-profit organisations such as FoodForward SA.¹¹³⁹

The reformulation of foods¹¹⁴⁰ (i.e., changing the composition of the ingredients) to make them less unhealthy by reducing the sodium or fat content is seen as a positive determinant of health.¹¹⁴¹ In this regard it is encouraging to note that certain supermarket chain stores in South Africa have taken such positive steps. Checkers launched its SIMPLE

¹¹³⁴ Premier FMCG 2024 <https://www.premierfmcg.com/about-us/our-company>.

¹¹³⁵ Mail & Guardian 2022 <https://mg.co.za/special-reports/2022-10-14-sas-food-security-premier-helping-to-feed-the-nation/>.

¹¹³⁶ Premier FMCG 2024 <https://www.premierfmcg.com/sustainability/communities>.

¹¹³⁷ Through The Tiger Brands Foundation, Tiger Brands is partnering with the Department of Basic Education to provide meals at schools. See The Tiger Brands Foundation 2024 [https://thetigerbrandsfoundation.com/#:~:text=The%20Tiger%20Brands%20Foundation%20\(TBF\)%2C%20through%20partnership%20with%20The,breakfast%20and%20lunch%2C%20by%202035](https://thetigerbrandsfoundation.com/#:~:text=The%20Tiger%20Brands%20Foundation%20(TBF)%2C%20through%20partnership%20with%20The,breakfast%20and%20lunch%2C%20by%202035)

¹¹³⁸ See, for example, Unilever 2017 <https://www.unilever.co.za/news/press-releases/2017/share-a-meal-and-stop-hunger-one-post-at-a-time/>.

¹¹³⁹ Other examples include Clover, Danone, Kellogg's, Pick 'n Pay and Foodlovers Market. See FoodForward SA 2023 <https://foodforwardsa.org/2023/07/07/we-have-the-food-you-have-the-hands/>. The NGO FoodForward SA sources, collects and stores edible surplus food from various businesses within the food supply chain for distribution to more than 2 500 vetted beneficiary organisations throughout South Africa. During the 2022/2023 financial year, more than 21 000 tons of food were distributed through this organisation, equating to more than 87 million meals and benefitting more than 900 000 people daily. See FoodForward SA 2024 <https://foodforwardsa.org/our-foodbanking-model/>; FoodForward SA 2024 <https://foodforwardsa.org/>.

¹¹⁴⁰ The WHO defines "food reformulation" as "the process of altering the processing or composition of a food or beverage product to improve its nutritional profile or to reduce its content of ingredients or nutrients of concern (i.e. fat, sugar and/or salt). See WHO *Reformulation of Food and Beverage Products for Healthier Diets* 1.

¹¹⁴¹ WHO 2023 <https://www.who.int/news/item/24-03-2023-experts-call-for-action-on-the-commercial-determinants-of-health-and-health-equity>; UN *Special Rapporteur Report on the Right to Health* paras 31.

TRUTH product range in 2018, which it describes as a “private label wellness range”.¹¹⁴² The range includes a variety of foodstuffs¹¹⁴³ that have reduced sugar or which are high in protein, gluten-free, vegan or vegetarian. For illustrative purposes, an image of products within the SIMPLE TRUTH product range appears in Figure 3-1 below:

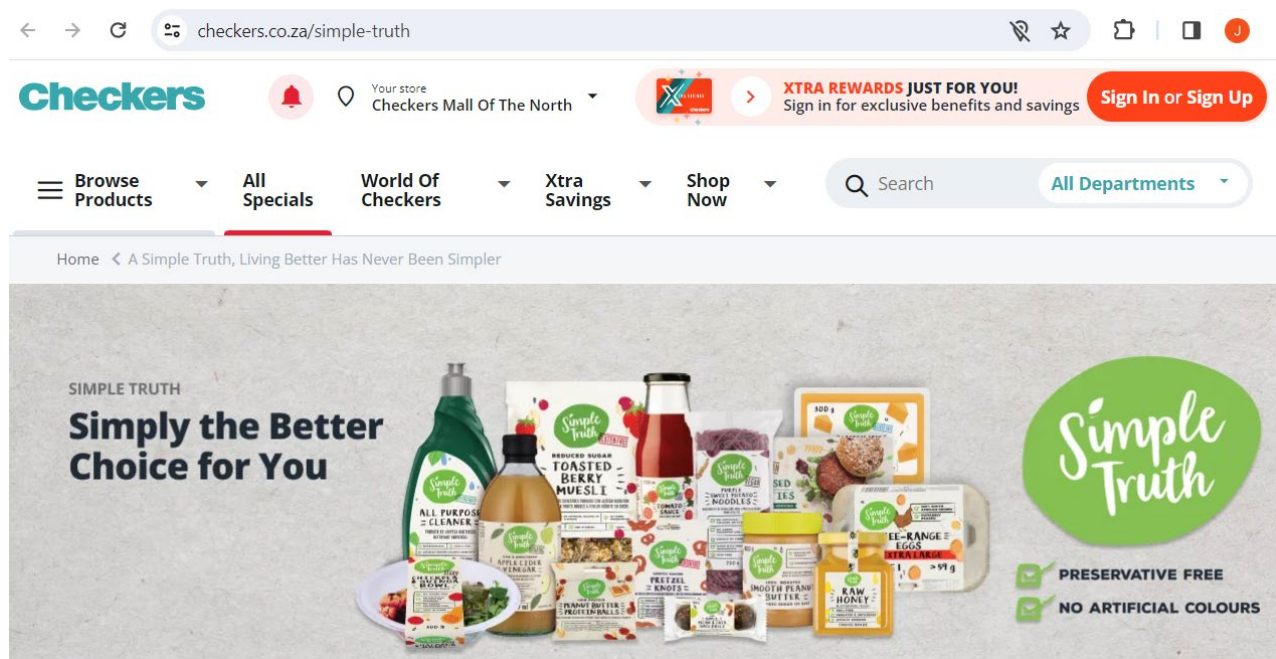


Figure 3-1: Checkers SIMPLE TRUTH product range¹¹⁴⁴

Furthermore, in 2019 Pick 'n Pay launched its LIVE WELL food product range, which is aimed at formulating foods with reduced levels of sugar and salt. By 2023 this food retailer boasted that more than 1000 tons of salt and 2 500 tons of sugar had been removed from the product range in the interest of public health.¹¹⁴⁵ An image of the landing page on the Pick 'n Pay online shopping website for the LIVE WELL range appears in Figure 3-2 below:

¹¹⁴² Checkers 2018 <https://www.shopriteholdings.co.za/articles/Newsroom/2018/Checkers-offers-customers-Simple-Truth.html#:~:text=Simple%20Truth%20will%20be%20available,choices%20in%20even%20more%20categories.>

¹¹⁴³ The product range also includes household cleaning materials.

¹¹⁴⁴ Checkers 2024 <https://www.checkers.co.za/simple-truth.>

¹¹⁴⁵ Food Focus 2023 <https://www.foodfocus.co.za/home/News-and-Events/Industry-News/Pick-n-Pay-removes-3500-tonnes-of-salt-and-sugar-in-five-years.>

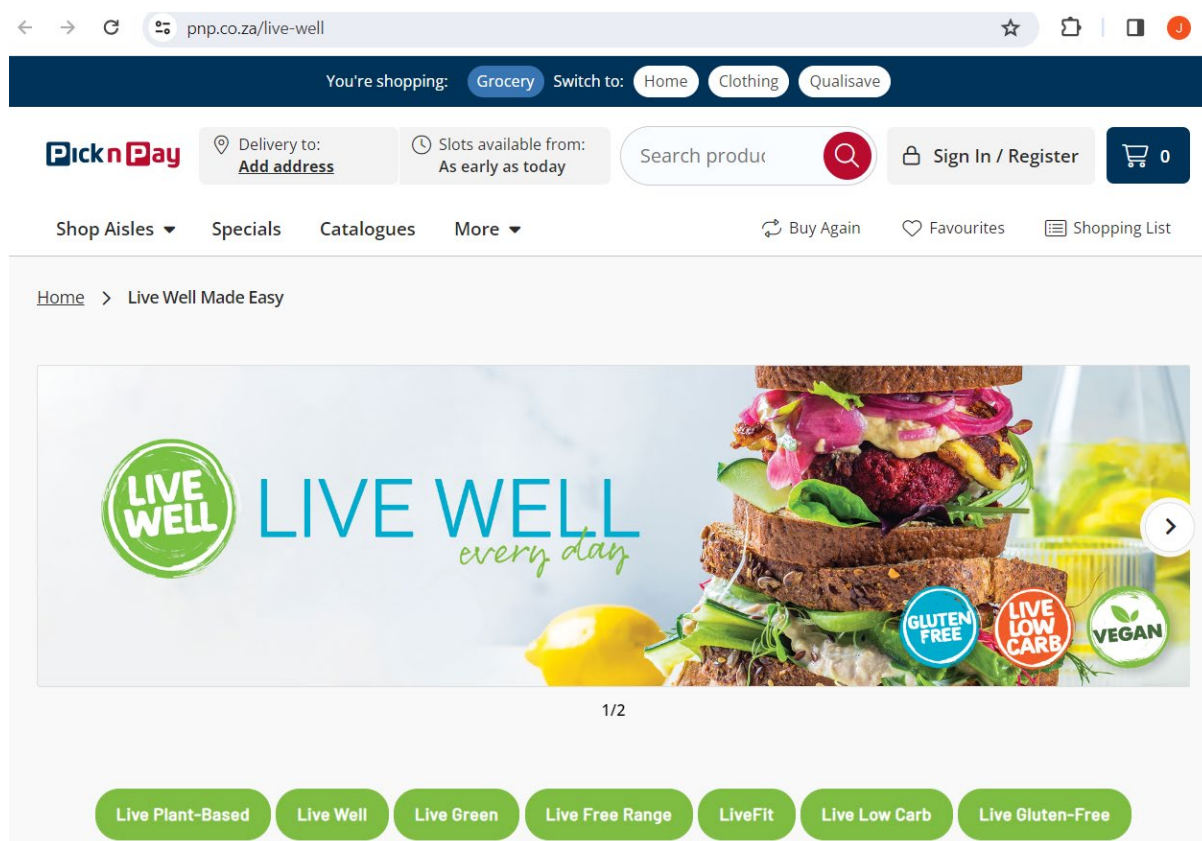


Figure 3-2: Pick 'n Pay LIVE WELL website landing page¹¹⁴⁶

The above illustrates that corporate actors in the food industry have the capacity to positively impact on socio-economic concerns in the country, including consumer health. On the opposite end of the spectrum, however, certain foods classified as unhealthy foodstuffs, together with their marketing, have negatively impacted on consumer health globally.¹¹⁴⁷ This aspect is discussed below.

3.5.2 The advertising and labelling of unhealthy foodstuffs as a CDH which negatively impacts on consumer health

The well-known phrase “money makes the world go round”¹¹⁴⁸ essentially sums up the intention of large commercial actors in the FCMG industry in relation to the

¹¹⁴⁶ Pick 'n Pay 2024 <https://www.pnp.co.za/live-well>.

¹¹⁴⁷ Gostin *et al* 2019 *Lancet* 1869; WHO 2023 <https://www.who.int/news/item/24-03-2023-experts-call-for-action-on-the-commercial-determinants-of-health-and-health-equity>.

¹¹⁴⁸ The phrase stems from a song by Liza Minelli and Joel Gray in the musical drama film *Cabaret* in 1972. See Gordon 2008 *Proceedings of the American Philosophical Society* 443.

manufacturing, marketing and sale of unhealthy commodities to consumers. The production of unhealthy commodities such as tobacco, alcoholic beverages and unhealthy foodstuffs gives rise to lucrative industries,¹¹⁴⁹ and corporations in these industries primarily strive to make a profit.¹¹⁵⁰ Profit-driven business models include marketing practices aimed at selling as much as possible. Increased sales equal increased business revenue.¹¹⁵¹ In this regard Gilmore *et al*¹¹⁵² note:

[m]arketing practices increase the demand for and consumption of products (i.e, unhealthy commodities), including by changing physical and information environments, such as ... increased outlet and marketing density in ways that drive consumption. Marketing also exaggerates structural inequalities by targeting specific geographical areas and population subgroups categorised by ethnicity or vulnerability... Marketing shapes new cultures and norms to drive consumption.

In the foodstuffs sector increased investment in marketing and advertising has “proved to be effective for the generation of sales of highly processed foods.”¹¹⁵³ A reason for the focus on marketing unhealthy foodstuffs as opposed to healthier counterparts is that profit margins from the sale of unhealthy foodstuffs are generally higher.¹¹⁵⁴ Barahona, Otero and Otero¹¹⁵⁵ point out that “firms strategically set prices and nutritional content to maximize profits”. Increased amounts of salt, saturated fats and trans-fats increase the shelf life of such products,¹¹⁵⁶ reduce transportation costs¹¹⁵⁷ and consequently increase profitability.¹¹⁵⁸

¹¹⁴⁹ Ghebreyesus 2023 *Lancet* 1137.

¹¹⁵⁰ Mialon 2020 *Globalization and Health* 3; Gilmore *et al* 2023 *Lancet* 1200.

¹¹⁵¹ Mialon 2020 *Globalization and Health* 3; Gilmore *et al* 2023 *Lancet* 1200; Igumbor *et al* 2012 *PLoS Med* 4.

¹¹⁵² Gilmore *et al* 2023 *Lancet* 1201.

¹¹⁵³ Blouin, Chopra and Van der Hoeven 2009 *Lancet* 505.

¹¹⁵⁴ Chandiwana *et al* 2024 *SAMJ* 1.

¹¹⁵⁵ Barahona, Otero and Otero 2023 *Econometrica* 841.

¹¹⁵⁶ UN *Special Rapporteur Report on the Right to Health* para 6; Sherkar and Shahane 2012 *International Journal of Food and Nutritional Sciences* 3310.

¹¹⁵⁷ Due to their extended shelf life resulting from additives such as sugar, salt or oils in, the transportation of processed foodstuffs may not require refrigeration, effectively lowering transportation costs. In addition, distribution can be more efficient and cheaper, as such products need not be moved from the production facility to the retailer as quickly as products with a more limited shelf life such as fresh fruits and vegetables. See International Food Additives Council date unknown <https://www.foodingredientfacts.org/food-additives-supporting-food-affordability/>.

¹¹⁵⁸ UN *Special Rapporteur Report on the Right to Health* para 6.

From a food manufacturer's point of view, increased marketing leads to the increased purchase and consumption of a product.¹¹⁵⁹ As such, there is a direct link between the marketing of unhealthy foods and the consumption of such products by consumers.¹¹⁶⁰ Due to a decline in unhealthy foodstuffs sales in developed countries, manufacturers of those foods have expanded their markets to developing countries.¹¹⁶¹ This emphasises the power imbalance between the wealthy private manipulators of the business world and vulnerable populations with limited means and often limited literacy skills in developing regions, including South Africa.¹¹⁶² It has also been observed that, whilst all consumers within a specific country are exposed to CDHs, the negative results of CDHs may have an exaggerated impact on young people. In this regard the WHO¹¹⁶³ has pointed out that:

[y]oung people are especially at risk of being influenced by advertisements and celebrity promotion of material. For example, fast-food advertising to youth activates highly sensitive and still-developing pathways in teens' brains.

Consumer behaviour is influenced and shaped by the advertising and marketing of unhealthy commodities.¹¹⁶⁴ As with the marketing of any commodity, food marketing aims to increase consumer demand for the relevant product advertised, thereby guiding consumer behaviour toward the regular consumption of that foodstuff. In line with similar trends across the world,¹¹⁶⁵ unhealthy foodstuffs such as fast food, carbonated soft drinks, confectionary, chocolate, ready-made meals, sugary breakfast cereals and salty snacks are some of the most advertised foodstuffs categories in South Africa.¹¹⁶⁶ Thus a study

¹¹⁵⁹ Mialon 2020 *Globalization and Health* 3.

¹¹⁶⁰ Mialon 2020 *Globalization and Health* 3. There is also a direct link between foodstuffs advertising and food selection. See Schmitt, Wagner and Kirch 2007 *Journal of Public Health* 58.

¹¹⁶¹ Gostin *et al* 2019 *Lancet* 1896; Khan, Frank and Swart 2023 *Public Health Nutrition* 2143. A study conducted by the WHO Food Marketing Exposure 8 indicated "some evidence of social inequality on food marketing exposure" in that exposure to advertising of unhealthy foodstuffs was more prevalent among less affluent communities and areas.

¹¹⁶² Our courts have also highlighted and criticised the inequality in the relationship between large banks and consumers who have limited literacy skills. See *Standard Bank of South Africa Ltd v Dlamini* 2013 1 SA 219 (KZN) para 76.

¹¹⁶³ WHO 2023 <https://www.who.int/news-room/fact-sheets/detail/commercial-determinants-of-health>.

¹¹⁶⁴ UN *Special Rapporteur Report on the Right to Health* para 5.

¹¹⁶⁵ WHO *Food Marketing Exposure* 7.

¹¹⁶⁶ Kelly *et al* 2019 *Obesity Reviews* 120, 122; Khan, Frank and Swart 2023 *Public Health Nutrition* 2140, 2145; Yamoah *et al* 2021 *Int J Environ Res Public Health* 1, 4; Reddy 2020 *TSAR* 445.

by Yamoah *et al*¹¹⁶⁷ revealed that advertisements on free-to-air television channels in South Africa displayed nearly four times more unhealthy foodstuffs advertisements than healthier ones. As advertising is a tool that shapes cultural norms and consumer behaviour towards further sales, these tactics lead to the overconsumption of unhealthy commodities.¹¹⁶⁸

In addition to the prevalence of the advertising of unhealthy foodstuffs, the labelling of such food products also has an impact on consumer choice.¹¹⁶⁹ The packaging and labelling designs of foodstuffs influence or shape consumer behaviour with respect to such products over time.¹¹⁷⁰ In the interest of boosting product sales and profitability:

[c]reative strategies that are frequently used to increase the impact of messages, in particular on children, include use of graphics and visuals designed to appeal to children; use of cartoons and brand equity characters; use of humour, fun and fantasy; movie and sports celebrity endorsements; and tie-ins with competitions and entertainment events.¹¹⁷¹

The results of a recent study¹¹⁷² regarding breakfast cereals available in South African supermarkets that contain child-directed marketing elements such as cartoon-like characters, appealing illustrations, allusions to fantasy and images of role models, revealed:

the nutritional content of breakfast cereals marketed to children [are] unhealthier than those not targeted to children and yet more than 95 % of all breakfast cereals carry a health or nutritional claim. This is misleading to parents who may assume, due to on-package marketing, that these products are healthy and fit for children's consumption and thereby influence their purchase decision.¹¹⁷³

Packaged cereals, which is a growing food category, often contain "hidden sugars" and are deemed to be ultra-processed foods.¹¹⁷⁴ It is apparent from the above that both the products and practices,¹¹⁷⁵ as far as they relate to the advertising and labelling of

¹¹⁶⁷ Yamoah *et al* 2021 *Int J Environ Res Public Health* 7.

¹¹⁶⁸ Gilmore *et al* 2023 *Lancet* 1204; UN *Special Rapporteur Report on the Right to Health* paras 10-12; Corea *et al* 2020 *Am J Public Health* 1054. Also see WHO *Guideline on Food Marketing Policies* x-xi.

¹¹⁶⁹ Szenderák, Fróna and Rákos 2022 *Foods* 15.

¹¹⁷⁰ WHO 2023 <https://www.who.int/news-room/fact-sheets/detail/commercial-determinants-of-health>.

¹¹⁷¹ WHO *Food Marketing Exposure* 2.

¹¹⁷² Khan, Frank and Swart 2023 *Public Health Nutrition* 2139, 2142.

¹¹⁷³ Khan, Frank and Swart 2023 *Public Health Nutrition* 2145.

¹¹⁷⁴ Todd *et al* 2022 *Nutrients* 2.

¹¹⁷⁵ Gilmore *et al* 2023 *Lancet* 1194.

unhealthy foodstuffs, have a negative impact on consumer health.¹¹⁷⁶ Mialon¹¹⁷⁷ points out that there are three aspects or components within CDHs that cumulatively have resulted in a so-called “industrial epidemic” that negatively impacts on consumer health, namely:

- i. the production of unhealthy commodities, which includes unhealthy foodstuffs;¹¹⁷⁸
- ii. harmful business, market and political practices; and
- iii. global drivers of poor health, which include aspects such as globalisation and market-driven economies dominated by multinational corporations,¹¹⁷⁹ that facilitate harmful practices.¹¹⁸⁰

These three areas have resulted in a society that functions in a so-called “obesogenic environment”¹¹⁸¹ which includes “poor socio-economic conditions and restricted choices to adopt a healthy lifestyle”.¹¹⁸² Chandiwana *et al*¹¹⁸³ point out:

[t]he obesogenic environment – structural societal conditions including both our food system and our built environment – is an important driver of the rise in obesity levels in the past 40 years in SA and elsewhere. For example, the introduction of ubiquitous, cheap, highly and ultra-processed food and sugar-sweetened beverages, offered in slick venues and spaza shops accompanied by marketing campaigns often aimed at children, alongside a built environment that hinders sufficient physical activity, are major driving forces.¹¹⁸⁴

The increased consumption of these unhealthy commodities has the knock-on effect of negatively impacting on consumer health¹¹⁸⁵ and ultimately increasing the prevalence of

¹¹⁷⁶ Mialon 2020 *Globalization and Health* 3; Corea *et al* 2020 *Am J Public Health* 1054.

¹¹⁷⁷ Mialon 2020 *Globalization and Health* 4.

¹¹⁷⁸ Tobacco and alcohol also fall in that category, as well as products such as chemicals and pesticides. See Mialon 2020 *Globalization and Health* 2, 4.

¹¹⁷⁹ Mialon 2020 *Globalization and Health* 1, 4.

¹¹⁸⁰ Mialon 2020 *Globalization and Health* 4-5.

¹¹⁸¹ The term “obesogenic environment” refers to “[t]he sum of influences generated by the surroundings, opportunities or conditions of life that promote obesity in individuals or populations”. See DOH *Obesity Strategy* 10, 18.

¹¹⁸² DOH *Obesity Strategy* 13. Also see Wicks, Wright and Wentzel-Viljoen 2017 *British Journal of Nutrition* 2150.

¹¹⁸³ Chandiwana *et al* 2024 *SAMJ* 1.

¹¹⁸⁴ Also see Khan, Frank and Swart 2023 *Public Health Nutrition* 2139; Ndlovu *et al* 2018 *South African Health Review* 121.

¹¹⁸⁵ Mialon 2020 *Globalization and Health* 3; Corea *et al* 2020 *Am J Public Health* 1054.

NCDs.¹¹⁸⁶ As a result of this economic power and the promotion of profit-driven business interests in the short term, consumer health takes a back seat.¹¹⁸⁷ Knipe, Omoruyi and Durojaye¹¹⁸⁸ note that:

[t]he rise in diet-related NCDs can in large part be attributed to the commercial determinants of health, that is, it is the direct product of the corporate activities of the food industry in promoting food products and choices that are detrimental to health. The increasing consumption of unhealthy products is made possible by the wide availability, affordability, palatability and convenience of unhealthy processed foods.¹¹⁸⁹

Whilst scholars advocate a shift in corporate behaviour away from a primary profit-driven model to one that is more focused on the citizenry and sustainability,¹¹⁹⁰ this aspiration seems far removed from the current reality. The responsibility of private actors in the food industry to respect consumers' right to health is discussed later in this chapter.¹¹⁹¹

3.6 A public health imperative: towards a food environment that enables and promotes consumer health and well-being

The discussion above makes it clear that consumers' exposure to unhealthy commodities through advertising and labelling poses a risk to health and well-being.¹¹⁹² Van Kleef and Dagevos¹¹⁹³ point out that:

[w]hen the environment does not support healthier choices, it becomes problematic to expect consumers to act in accordance with long-term health goals.

Considering the prevalence of diet-related NCDs globally, it has become crucial that governments implement measures aimed at reducing consumers' exposure to unhealthy foodstuffs. At the same time, such measures should strengthen the capacity of consumers

¹¹⁸⁶ WHO 2023 <https://www.who.int/news-room/fact-sheets/detail/commercial-determinants-of-health>. Also see parts 1.1.1 and 1.1.2 above.

¹¹⁸⁷ Lacy-Nichols, Jones and Buse 2023 *Frontiers in Public Health* 2; Ghebreyesus 2023 *Lancet* 1137; Knipe, Omoruyi and Durojaye 2022 *ESR Review* 29.

¹¹⁸⁸ Knipe, Omoruyi and Durojaye 2022 *ESR Review* 29.

¹¹⁸⁹ Also see Pūras *Statement by the UN Special Rapporteur on the Right to Health on the Adoption of Front-of-Pack Warning Labelling to Tackle NCDs*, 2020 para 1 (hereafter "*Statement by the UN Special Rapporteur on the Right to Health*") para 4.

¹¹⁹⁰ Scheyvens, Banks and Hughes 2016 *Sustainable Development* 377, 381.

¹¹⁹¹ See part 3.6.2 below.

¹¹⁹² Mialon 2020 *Globalization and Health* 2; Lacy-Nichols, Jones and Buse 2023 *Frontiers in Public Health* 2.

¹¹⁹³ Van Kleef and Dagevos 2015 *Critical Reviews in Food Science and Nutrition* 300-301.

to make healthier food choices and follow lifestyles that promote overall good health.¹¹⁹⁴ On this basis scholars have pointed out that a necessary step in addressing diet-related NCDs in South Africa would be to ensure that consumers are made aware of the dangers of unhealthy foodstuffs.¹¹⁹⁵ Todd *et al*¹¹⁹⁶ also highlight that in the long run more frequent, healthier food choices by consumers “can reasonably be expected to support a reduction in the risk of becoming obese or developing NCDs”.

As an objective linked with the fundamental right to health,¹¹⁹⁷ the WHO *Global Action Plan for NCDs* encourages the creation of “health-promoting environments”.¹¹⁹⁸ As a WHO member state South Africa has committed to creating and promoting “an enabling environment to facilitate healthy lifestyles and choices”.¹¹⁹⁹ The South African *National Development Plan*¹²⁰⁰ reaffirms that behaviour and lifestyle can contribute to ill health. Among the measures aimed at mitigating the prevalence of NCDs and promoting overall health and well-being in the country,¹²⁰¹ consumers need to be encouraged to buy and eat healthy foods.¹²⁰² It is also highlighted that people require information in order to be persuaded of the necessity to change their behaviour and lifestyles *vis-à-vis* food and that “[t]o become a healthy nation, South Africans need to make informed decisions about what they eat”.¹²⁰³

Following from the above, the DOH *Obesity Strategy* focuses *inter alia* on “creating an enabling environment for healthy food choices”.¹²⁰⁴ Whilst recognising that various SDHs impact on consumer health,¹²⁰⁵ cost-effective interventions aimed at changing consumer behaviours towards diet have been identified as measures to assist in addressing the

¹¹⁹⁴ UN *Resolution on the Prevention and Control of NCDs* para 35.

¹¹⁹⁵ Chandiwana *et al* 2024 *SAMJ* 1; Bopape *et al* 2021 *PLoS ONE* 2.

¹¹⁹⁶ Todd *et al* 2022 *Nutrients* 2.

¹¹⁹⁷ See part 3.2.1 above.

¹¹⁹⁸ WHO *Global Action Plan for NCDs* 4.

¹¹⁹⁹ WHO *Global Action Plan for NCDs* 85; UN *Resolution on the Prevention and Control of NCDs* para 43(g).

¹²⁰⁰ *National Development Plan* 330.

¹²⁰¹ Health goal 4 is to significantly reduce the prevalence of NCDs. See *National Development Plan* 333.

¹²⁰² DOH *National NCD Strategic Plan* 29; DOH *Obesity Strategy* 13.

¹²⁰³ *National Development Plan* 330. The right to health includes effective access to health-related education. See *Principles and Guidelines on the Implementation of the African Charter* para 64.

¹²⁰⁴ DOH *Obesity Strategy* 5.

¹²⁰⁵ See part 3.3 above.

escalating problem.¹²⁰⁶ More specifically, the regulation of unhealthy food advertising and labelling has been identified as a cost-effective measure to achieve a reduction of unhealthy foodstuffs consumption.¹²⁰⁷

Within an enabling food environment the use of “consumer-friendly” foodstuffs labelling will encourage consumers to make informed dietary decisions and, ultimately, enable and promote their good health.¹²⁰⁸ As such, foodstuffs labelling and advertising must allow both parents and children to make informed health decisions.¹²⁰⁹

Following from the above, the DOH has pointed out that, to reduce the prevalence of obesity and diet-related NCDs among South African consumers, legislation that supports a healthy food environment must be implemented.¹²¹⁰ Several international organisations including the UN, WHO, FAO, and UNICEF support the enactment of legislation that promotes positive shifts in consumer behaviour towards healthy diets. This includes measures that address unhealthy foodstuffs advertising and implement nutrition labelling policies.¹²¹¹ Various scholars support the establishment of an environment that enables and promotes a healthy diet.¹²¹² The report of the former UN Special Rapporteur on the Right to Health¹²¹³ indicates:

¹²⁰⁶ DOH *Obesity Strategy* 14, 21; Knipe, Omoruyi and Durojaye 2022 *ESR Review* 30.

¹²⁰⁷ Knipe, Omoruyi and Durojaye 2022 *ESR Review* 34; Ares *et al* 2018 *Food Quality and Preference* 215. The only measure that appears more cost-effective is the implementation of fiscal measures in the form of taxes, such as the health promotion levy that was implemented concerning SSBs in South Africa in 2018. Other recommendations include the implementation of measures that improve the nutritional quality of processed foods and drink products, and health procurement policies. See FAO *et al The State of Food Security and Nutrition in the World 2022* 10, 32. Also see brief comments in part 1.2.4 on the health promotion levy. For a discussion on the impact of the health promotion levy on product reformulation in South Africa, see DOH *Obesity Strategy* 22, 24. As the health promotion levy falls outside the scope of this study, no more comments are made on this topic.

¹²⁰⁸ UN *Special Rapporteur Report on the Right to Health* para 18; WHO *Global Action Plan for NCDs* 29, 33.

¹²⁰⁹ *Statement by the UN Special Rapporteur on the Right to Health* para 16; WHO *Global Action Plan for NCDs* 33.

¹²¹⁰ DOH *Obesity Strategy* 13.

¹²¹¹ See UN *Special Rapporteur Report on the Right to Health* paras 18, 21; FAO *et al The State of Food Security and Nutrition in the World 2022* 10, 32.

¹²¹² See, for example, Khan, Frank and Swart 2023 *Public Health Nutrition* 2144; Yamoah *et al* 2021 *Int J Environ Res Public Health* 2; Ndlovu *et al* 2018 *South African Health Review* 121; Chandiwana *et al* 2024 *SAMJ* 1; Knipe, Omoruyi and Durojaye 2022 *ESR Review* 30; Marais *et al* 2019 *SAMJ* 332.

¹²¹³ UN *Special Rapporteur Report on the Right to Health* para 25. Also see *Statement by the UN Special Rapporteur on the Right to Health* para 1.

The responsibility to protect the enjoyment of the right to health warrants State intervention in situations when third parties, such as food companies, use their position to influence dietary habits by directly or indirectly encouraging unhealthy diets, which negatively affect people's health. Therefore, States have a positive duty to regulate unhealthy food advertising and the promotion strategies of food companies. Under the right to health, States are especially required to protect vulnerable groups such as children from violations of their right to health. To reduce opportunities for targeted advertisements, some States have instituted laws to ban companies from advertising their products to children below a certain age and to limit the availability of unhealthy foods in schools.

Whilst consumers have the ultimate responsibility of taking care of their health,¹²¹⁴ it is necessary to create an enabling environment that promotes the prevention and control of NCDs.¹²¹⁵ More specifically, in the context of foodstuffs the DOH¹²¹⁶ has highlighted the importance of creating:

enabling environments where people can have access to available healthy food ... and receive appropriate nutritional information to make decisions that will contribute to healthy eating habits and lifestyles. Legislation to restrict the advertising of unhealthy food and beverages to children is also paramount if we want to halt the rise of obesity in the next generation.

Scholars have argued that law¹²¹⁷ can be seen as a determinant of health. In this regard, Kenyon, Forman and Brolan¹²¹⁸ point out that:

[L]egal empowerment holds real promise in improving the well-being of vulnerable people concerning both social determinants of health and human rights.

... this approach, consisting of 'the use of laws, legal systems/institutions and services for socio-structural change,' has 'gained prominence as a framework for strengthening individuals' capacity to exercise their rights, with implications for their health and well-being.

This view is also supported by Gostin *et al*,¹²¹⁹ who point out that laws have an impact on SDHs and, if designed well, can assist in ensuring safe and nutritious foods as part of building a strong health system. These authors argue further that laws that are evidence-

¹²¹⁴ *Patients' Rights Charter* 3.

¹²¹⁵ WHO *Global Action Plan for NCDs* 4.

¹²¹⁶ DOH *Obesity Strategy* 6.

¹²¹⁷ A broad definition of "law" is adopted in the context of the determinants of health. Law includes statutes, regulations and rules that express or contain public policy, as well as public institutions such as legislatures, agencies, and courts that are responsible for developing, implementing, and interpreting the law. See Gostin *et al* 2019 *Lancet* 1859.

¹²¹⁸ Kenyon, Forman and Brolan 2018 *Health and Human Rights Journal* 6.

¹²¹⁹ Gostin *et al* 2019 *Lancet* 1857.

based, effectively implemented and enforced in a fair manner can assist in creating a good health environment.¹²²⁰

3.6.1 Obligations on states in respect of the right to health and access to information relevant to realising the right to health

States are required to respect,¹²²¹ protect and fulfil the right to health within their boundaries.¹²²² This obligation to protect includes an obligation to implement policy measures aimed at mitigating the prevalence of diet-related NCDs.¹²²³ Such steps would include measures that prevent third parties (i.e., food companies) from infringing on the population's right to health.¹²²⁴ Moreover, states are required to "ensure that third parties do not limit people's access to health-related information".¹²²⁵ The UN *Guiding Principles on Business and Human Rights*¹²²⁶ confirms that states must protect their people against the abuse of the right to health as a fundamental human right¹²²⁷ by third parties, including business enterprises.¹²²⁸

General Comment No 14 makes it clear that a state's failure to discourage the marketing of "tobacco, narcotics and other harmful substances", as well as the production and consumption of such goods by members of society, would amount to a violation of the state's obligation to protect its population.¹²²⁹ Considering the role that unhealthy

¹²²⁰ Gostin *et al* 2019 *Lancet* 1858, 1882.

¹²²¹ The obligation to respect entails that states should not interfere with the enjoyment of the right to health. *General Comment No 14* para 33. Also see *African Commission on Human and Peoples' Rights Communication No. 155/96: The Social and Economic Rights Action Center for Economic and Social Rights (SERAC) v Nigeria* (hereafter "*SERAC v Nigeria*") para 45.

¹²²² UN *Special Rapporteur Report on the Right to Health* para 13. This obligation extends to all human rights. See UN *Guiding Principles on Business and Human Rights* HRC Res 17/4, UN Doc A/HRC/RES/17/4 (2011) (hereafter "*UN Guiding Principles on Business and Human Rights*") 1.

¹²²³ UN *Special Rapporteur Report on the Right to Health* para 13.

¹²²⁴ *General Comment No 14* para 33.

¹²²⁵ *General Comment No 14* para 35.

¹²²⁶ The UN *Guiding Principles on Business and Human Rights* are also known as the so-called "Ruggie principles". The principles were developed by Professor John Ruggie, who was appointed by the UN as a special representative on the issue of human rights and transnational corporations and other business enterprises. The UN *Guiding Principles on Business and Human Rights* are deemed to be the "most authoritative statement" on the aspect of human rights duties and responsibilities of corporations adopted by the UN. See Deva and Bilchitz *Human Rights Obligations of Business* xvii.

¹²²⁷ See the discussion in part 3.2.1 above.

¹²²⁸ UN *Guiding Principles on Business and Human Rights* 3.

¹²²⁹ *General Comment No 14* para 51. Also see UN *Guiding Principles on Business and Human Rights* 3.

foodstuffs play in the prevalence and increase of NCDs globally,¹²³⁰ it is undisputed that this product category is harmful to human health. On this basis it is submitted that unhealthy foodstuffs would qualify as harmful substances as envisaged within *General Comment No 14*. Moreover, it has also been pointed out by the former UN Special Rapporteur¹²³¹ that:

States should make sure that advertisements and promotion by food corporations convey accurate and easily understandable information on possible ill effects of their food products. This is important, as withholding or misrepresenting such information is likely to affect people's diet choices, which impacts on the right to health.

The fulfilment obligation requires the implementation of legislative and other measures to affect the full realisation of the right to health.¹²³² States are required to take positive measures that facilitate the enjoyment of the right to health through actions that create, maintain and restore the health of the nation's population.¹²³³ Within these measures states are obliged to disseminate information relating to healthy lifestyles and nutrition and to support citizens in making informed choices regarding their health.¹²³⁴ In this regard a core obligation of states is to provide access to information concerning the main health problems in the community.

It is submitted that information that discloses to consumers the possible health implications of consuming unhealthy foodstuff links with the above, and with various constitutional rights. Section 32 of the *Constitution* deals with the right of access to information, which extends horizontally¹²³⁵ to private bodies¹²³⁶ to the extent required "for the exercise or protection of any rights".¹²³⁷ The *Promotion of Access to Information Act*

¹²³⁰ See the discussion in parts 1.1.1, 1.1.2, 3.4 and 3.5.2 above.

¹²³¹ UN *Special Rapporteur Report on the Right to Health* para 15.

¹²³² *General Comment No 14* para 33.

¹²³³ *General Comment No 14* para 37.

¹²³⁴ *General Comment No 14* para 37; UN *Special Rapporteur Report on the Right to Health* para 16.

¹²³⁵ See s 8(1) of the *Constitution* read with the preamble of *PAIA*.

¹²³⁶ The term "private body" is defined widely and includes a natural person who carries or has carried on any trade, business or profession, but only in such a capacity; a partnership which carries or has carried on any trade, business or profession; any former or existing juristic person; or a political party. See s 1 of *PAIA*.

¹²³⁷ S 32(1)(b) of the *Constitution*. The right also extends to the government. In terms of s 32(1)(a), everyone has the right of access to any information held by the state.

2 of 2000 (hereafter “*PAIA*”) gives effect to the constitutional right of access to information.¹²³⁸ The preamble of *PAIA* provides that this Act was enacted to:

- * foster a culture of transparency and accountability in public and private bodies by giving effect to the right of access to information;
- * actively promote a society in which the people of South Africa have effective access to information to enable them to more fully exercise and protect all of their rights.

Whilst an in-depth discussion of *PAIA* falls outside the scope of this study,¹²³⁹ some comments on this Act and how it informs section 32 of the *Constitution* are warranted. Currie and De Waal¹²⁴⁰ note that, whilst private bodies are not generally mandated to be transparent with information, the constitutional right of access to information by such bodies would be triggered when there are potential harms or safety concerns if the information is not disclosed. The authors note further that:

the private-sector aspects of the Act aim to protect rights by requiring transparency when information held by the private sector can cause harm to [fundamental] rights or when disclosure can help to prevent harm from being caused.¹²⁴¹

De Vos *et al*¹²⁴² also support the extension of the right of access to information to activities of private persons or institutions in such instances, noting that:

private institutions, such as large corporations, may exercise enormous power in a society. The information these private institutions hold could easily be used to the detriment of individuals or could be required by individuals to exercise their own rights, including their rights as consumers not to be exploited for profit.

Following the discussion of the effect on the average consumer of food advertising, labelling and sale in part 1.8.5, section 22 of the *CPA*, which deals with the consumer’s right to information in plain and understandable language, is also relevant. A notice will be deemed to be in plain language if it is reasonable to conclude that an ordinary

¹²³⁸ As required in terms of s 32(2) of the *Constitution*. See the Preamble of *PAIA*.

¹²³⁹ For a broad overview discussion on this constitutional provision, see De Vos *et al* *South African Constitutional Law in Context* 619-629.

¹²⁴⁰ Currie and De Waal *The Bill of Rights Handbook* 702, 704-705.

¹²⁴¹ Currie and De Waal *The Bill of Rights Handbook* 702, 705.

¹²⁴² De Vos *et al* *South African Constitutional Law in Context* 621.

consumer of the class of persons for whom the notice is intended, with average literacy skills and minimal experience as a consumer of the relevant goods, could be expected to understand the content, significance and import of the notice without undue effort, having regard to (a) the context, comprehensiveness and consistency of the notice, (b) the organisation, form and style of the notice, (c) the vocabulary, usage and sentence structure of the notice, and (d) the use of any illustrations, examples, headings or other aids to reading and understanding.¹²⁴³ Webster, Morley and Joubert¹²⁴⁴ point out that section 22 of the *CPA*, read with the provisions in section 24 which relate to product labelling and trade descriptions:

are aimed at ensuring that consumers are clearly and correctly informed about the goods they are purchasing or services they are receiving, thereby ensuring that the consumer is in the position to make an informed choice.

Following the above, requiring private bodies in the food industry to disclose information relating to artificial sweeteners and/or high quantities of sugar, salt, or fat, as the case may be, in the form of FOP warning labels of unhealthy foodstuffs would be consistent with consumers' right of access to information.¹²⁴⁵ Moreover, as FOP warning labels could further the rights of all members of the public to an environment that is not harmful to their health and well-being, imposing mandatory FOP labelling in relation to unhealthy foodstuffs would seemingly be justified.¹²⁴⁶

3.6.2 The responsibility of the foodstuffs industry to respect consumers' right to health

Although states have the primary responsibility *vis-à-vis* public health, it has been pointed out that "health at a national level is no longer the sole purview of health ministries".¹²⁴⁷ Consumers have the right to fair and responsible marketing.¹²⁴⁸ On the other hand, suppliers have an obligation not to market any goods in a manner that is unfair, unreasonable or unjust.¹²⁴⁹ Considering the current conduct in the context of negative

¹²⁴³ See s 22(2) of the *CPA*.

¹²⁴⁴ Webster, Morley and Joubert *SA Law of Trade Marks* 18-6.

¹²⁴⁵ Bopape *et al* 2021 *PLoS ONE* 9. Also see part 3.2.2.2 above.

¹²⁴⁶ See the discussion in part 4.7 below.

¹²⁴⁷ Gostin *et al* 2019 *Lancet* 1869.

¹²⁴⁸ Mupangavanhu and Kerchhoff 2021 *SA Merc LJ* 266.

¹²⁴⁹ See s 48(1)(b), 48(2) of the *CPA*. Also see part 5.4.2.2 below.

CDHs leading to unhealthy eating patterns and NCDs, there is a dire need for increased regulation of the food industry as far as unhealthy foodstuffs are concerned.¹²⁵⁰ A shift away from undermining public health, geared towards positive CDHs that are focused on health promotion in the context of diet and health, is required.¹²⁵¹ Ghebreyesus¹²⁵² highlights that, , it is essential to address the negative CDHs in order to reduce NCDs. The author notes further:

[p]ublic health cannot and will not improve without action on the commercial determinants of health, from the local to the global level. New forms of public health governance are needed that focus on the imbalances of power and information between the public and private sectors.¹²⁵³

Due to its financial resources and influence, the private sector has a significant role to play in the context of addressing public health challenges.¹²⁵⁴ Friel *et al*¹²⁵⁵ call for governance that promotes public interests¹²⁵⁶ above profits to align with health and healthy equity. Moreover, Freeman *et al*¹²⁵⁷ point out that in addressing CDHs there will have to be a balance between economic considerations and the interests of commercial actors on the one hand, and the health and well-being of the public on the other. The balancing of rights is discussed further in Chapter 4.¹²⁵⁸ The WHO has committed to supporting government efforts that aim to “move companies away from investing in producing and aggressively promoting products that harm health”.¹²⁵⁹

Apart from the state’s regulation of private actors under the state’s duty to protect alluded to above, importantly and independently of state obligations private corporations in the food industry as non-state actors whose business practices impact on diet-related NCDs also have the responsibility to respect the right to health of those that consume their

¹²⁵⁰ Knipe, Omoruyi and Durojaye 2022 *ESR Review* 30.

¹²⁵¹ Chandiwana *et al* 2024 *SAMJ* 1.

¹²⁵² Ghebreyesus 2023 *Lancet* 1138.

¹²⁵³ Ghebreyesus 2023 *Lancet* 1138.

¹²⁵⁴ WHO 2023 <https://www.who.int/news/item/24-03-2023-experts-call-for-action-on-the-commercial-determinants-of-health-and-health-equity>.

¹²⁵⁵ Friel *et al* 2023 *Lancet* 1230.

¹²⁵⁶ The term “public interest” in the context of human rights refers to the “common well-being or general welfare” of that population. See Principles and Guidelines on the Implementation of the African Charter para 1(h).

¹²⁵⁷ Freeman *et al* 2023 *Health Policy* 7.

¹²⁵⁸ See part 4.7 below.

¹²⁵⁹ Ghebreyesus 2023 *Lancet* 1138.

products.¹²⁶⁰ The *UN Guiding Principles on Business and Human Rights* make it clear that the responsibility to respect human rights, including the right to health, is “a global standard of expected conduct for all business enterprises wherever they operate”.¹²⁶¹ While the precise “legal” quality of the independent responsibility to respect of private actors is not quite certain,¹²⁶² it could be conceived as being of a legal nature in South Africa by virtue of the direct horizontal applicability of the Bill of Rights in certain cases, especially in the context of socio-economic rights.¹²⁶³ In terms of section 8(2) of the *Constitution*, a provision of the Bill of Rights binds a juristic person if and to the extent that it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right. In *Governing Body of The Juma Musjid Primary School v Kyubwa*¹²⁶⁴ the Constitutional Court held that:

the purpose of section 8(2) of the Constitution is not to obstruct private autonomy or to impose on a private party the duties of the state in protecting the Bill of Rights. It is rather to require private parties not to interfere with or diminish the enjoyment of a right. Its application also depends on the ‘intensity of the constitutional right in question, coupled with the potential invasion of that right which could be occasioned by persons other than the State or organs of State’.¹²⁶⁵

In warranted circumstances, corporate actors would be bound directly to defer to fundamental rights, such as the right to have access to health care services and the right to an environment which is not harmful to health or well-being, both of which fall within the broader universal right to health.¹²⁶⁶ In this regard Pieterse¹²⁶⁷ points out:

... there is growing consensus that private entities are every bit as capable of harming the enjoyment of socio-economic rights as the state. Apart from the socio-economic significance of individual actions and interactions, corporations (which typically command

¹²⁶⁰ In terms of article 5 of the *ICESCR* neither the state nor any other group or person may engage in any activity which is “aimed at the destruction” of the right to the enjoyment of the highest attainable standard of health. Also see UN *Special Rapporteur Report on the Right to Health* paras 25, 28; *Statement by the UN Special Rapporteur on the Right to Health* para 25; UN *Guiding Principles on Business and Human Rights* para A11.

¹²⁶¹ UN *Guiding Principles on Business and Human Rights* para A11.

¹²⁶² López “The ‘Ruggie Process’: From Legal Obligations to Corporate Social Responsibility?” 77. For a further discussion on this aspect, see López “The ‘Ruggie Process’: From Legal Obligations to Corporate Social Responsibility?” 56-77.

¹²⁶³ Pieterse 2007 *South African Journal of Human Rights* 157-159.

¹²⁶⁴ *Governing Body of The Juma Musjid Primary School v Kyubwa* 2011 JDR 0343 (CC) para 38

¹²⁶⁵ Also see *Khumalo v Holomisa* 2002 (5) SA 401 (CC) para 33; De Vos *et al South African Constitutional Law in Context* 337-328.

¹²⁶⁶ See the discussion in part 3.2.2 above.

¹²⁶⁷ Pieterse 2007 *South African Journal of Human Rights* 159.

substantial power and resources) are increasingly implicated in socio-economic rights violations.

In the context of the harm to consumer health flowing from the marketing and consumption of unhealthy foodstuffs, it is submitted that private actors in the food industry would, by virtue of the horizontal application of the relevant socio-economic rights that inform the right to health, have the legal responsibility to respect and not to interfere with the enjoyment of the right to health and well-being of consumers in South Africa. This responsibility to respect the right to health is two-fold. Firstly, the food industry is required to cease business activities that harm consumer health,¹²⁶⁸ including the aggressive advertising of unhealthy foodstuffs with the purpose of incentivising the consumption of products that are harmful to health. Secondly, the food industry has a responsibility to comply with national food laws, including changes in laws that discourage the consumption of unhealthy foodstuffs and promote healthier dietary choices.¹²⁶⁹ Failure to comply with this responsibility may result in unlawful conduct under national food laws and, additionally, would be a violation of consumers' right to health under international law.¹²⁷⁰ In the South African context direct human rights obligations for private actors of the nature envisaged by the UN *Guiding Principles on Business and Human Rights* are confirmed by the direct horizontal applicability of the Bill of Rights and also the universal right to health, as pointed out above.

3.7 Conclusion

Obesity and diet-related NCDs are caused *inter alia* by unhealthy diets.¹²⁷¹ The current unhealthy foodstuffs environment in South Africa is the result of several factors, including political and economic changes since the 1990s, which also tie in with globalisation and the industrialisation of trade, urbanisation and increased digitalisation. In addition, limited financial means, limited literacy skills and the mounting pressure on the public health

¹²⁶⁸ UN *Special Rapporteur Report on the Right to Health* paras 29, 66(b). Also see UN *Guiding Principles on Business and Human Rights* para A13(a), which requires that businesses avoid causing or contributing to an adverse impact on the right to health, as a human right, through their own business operations, and address such impacts should they occur.

¹²⁶⁹ UN *Special Rapporteur Report on the Right to Health* paras 29, 66(a).

¹²⁷⁰ UN *Special Rapporteur Report on the Right to Health* para 29.

¹²⁷¹ See the discussion in parts 1.2.1 and 1.2.2 above.

system are among the negative SDHs that have led to the current obesogenic environment in which many consumers find themselves. Arrù *et al*¹²⁷² point out that:

for decades, approaches to tackle obesity have failed to recognize the influence of the food system and the environment in shaping food preferences and undermining children and parents' capacity of making informed choices ... For this reason, public policies aimed at addressing the global children obesity epidemic need to modify the food environment to overcome barriers to healthy eating and promote consumption of healthful products.

Maintaining a healthy diet throughout a person's life is a key driver in preventing overweight and obesity and ultimately mitigating the risk of NCDs.¹²⁷³ As things stand it does not appear that South Africa is currently on track to reach the goals set for reducing the prevalence of NCDs.¹²⁷⁴ In this regard it has been pointed out that:

[e]vidence shows that unless urgent action is taken to address the many different determinants of health, South Africa and much of the world, will not meet the Sustainable Development Agenda 2030, and in particular, Sustainable Development Goal (SDG) target 3.4., which embraces the WHO Global Action Plan for the Prevention and Control of NCDs.¹²⁷⁵

Considering the severity of the escalating problem, it is a public health imperative that the South African food environment be transformed to reduce its negative impact on public health by enabling consumers to make healthier dietary choices. This will be achievable only if consumers change the way they perceive and engage with food.¹²⁷⁶

Within the broader universal right to health, South African consumers have the right to a food environment that is not harmful to health and well-being. In addition, they have the right of access nutrition/diet-related information that is relevant to their health and conveyed in a plain and understandable manner.

The South African government's obligation to protect the right to health of its people includes protecting members of the public against violations of this right by private food

¹²⁷² Arrù *et al* 2017 *Appetite* 139.

¹²⁷³ Overweight and obesity are forms of malnutrition. See FAO *et al* *The State of Food Security and Nutrition in the World 2023* 26.

¹²⁷⁴ Marais *et al* 2019 *SAMJ* 331.

¹²⁷⁵ DOH *National NCD Strategic Plan* 1. The *National Development Plan* also includes the aim of promoting consumer health and wellbeing in South Africa. See *National Development Plan* 34, 330-335.

¹²⁷⁶ Willet *et al* 2019 *Lancet* 450.

actors that aggressively market unhealthy foodstuffs.¹²⁷⁷ In addition to the state, the food industry also has a pivotal role to play in addressing NCDs. Private actors in the food industry have a responsibility to respect the right to health of consumers. As such, there is a dire need for the food industry to change the aggressive marketing of unhealthy foodstuffs and adopt forms of marketing that shift consumer behaviour away from the preferences, purchases and consumption of those foods that are detrimental to health and ultimately hinder the realisation of SDG 3. A healthy food environment that empowers consumers to choose healthy diets must be promoted.¹²⁷⁸ Like any corporate entity or business, foodstuffs manufacturers want to boost sales and maximise profits. That being said, there is also a responsibility to ensure that this is done responsibly, especially in the context of broader public health. Ndlovu *et al*¹²⁷⁹ point out:

without formal structures and policies similar to the restrictions placed on tobacco, food companies will continue to shape and influence the policies that should be controlling them, and the negative trajectory of fast-food expansion will continue to result in collateral health damage.

Lacy-Nichols, Jones and Buse¹²⁸⁰ point out that it is crucial to address negative CDHs to meet the UN targets for health-related SDGs, including SDG 3. In considering what measures would be required, Scheyvens, Banks and Hughes¹²⁸¹ point out that:

most businesses do not respond to the soft language of business responsibility; rather, they only make substantive changes if they are obliged to do so ... Industry players contributing to the SDGs have enthused that governments should create an enabling environment for businesses to address the SDGs; however, it will be necessary for governments to also enact appropriate legislation to oblige businesses to be more social [sic] and environmentally responsible.

In the circumstances, national laws and policies that regulate the advertising and labelling of unhealthy foodstuffs are warranted in order for the government to be able to fulfil its obligation to protect public health in South Africa. This includes implementing laws within

¹²⁷⁷ UN *Special Rapporteur Report on the Right to Health* para 15; *Statement by the UN Special Rapporteur on the Right to Health* para 11.

¹²⁷⁸ FAO *et al* *The State of Food Security and Nutrition in the World 2022. Repurposing food and agricultural policies to make healthy diets more affordable 2022* (hereafter "FAO *et al* *The State of Food Security and Nutrition in the World 2022*") 7.

¹²⁷⁹ Ndlovu *et al* 2018 *South African Health Review* 121.

¹²⁸⁰ Lacy-Nichols, Jones and Buse 2023 *Frontiers in Public Health* 1.

¹²⁸¹ Scheyvens, Banks and Hughes 2016 *Sustainable Development* 380.

the food regulation framework that aim to reduce consumers' exposure to unhealthy foodstuffs and ensure that accurate and consumer-friendly information regarding the nutritional composition of foodstuffs is accessible to the purchasing public.¹²⁸²

Against this backdrop, Chapter 4 will consider the labelling and advertising restrictions for unhealthy foodstuffs proposed in R3337.

¹²⁸² UN *Special Rapporteur Report on the Right to Health* para 22.

Chapter 4: Government regulation of unhealthy foodstuffs labelling and advertising: considering the proposed restrictions in R3337

4.1 Introduction

It will be recalled that the research question of this study essentially considers achieving a balance between (i) government regulation and (ii) self-regulation by the advertising industry, as far as it relates to restricting unhealthy foodstuffs advertising and labelling in South Africa. This research was conducted against the backdrop of the government's commitment to reducing the occurrence of diet-related NCDs through unhealthy foodstuffs advertising and labelling restrictions, as discussed in Chapter 1. Chapter 2 has set out the current food law framework relevant to foodstuffs advertising and labelling. Chapter 3 has demonstrated the obesogenic food environment in which many South African consumers live, discussed the government's obligation to protect the right to health of its people, and demonstrated the food industry's responsibility to respect the right to health of consumers. It was consequently found that stricter regulation of unhealthy foodstuffs labelling and advertising is undoubtedly warranted as a measure aimed at reducing NCDs and improving public health and well-being. The contextualisation provided in Chapters 1 to 3 now leads to the enquiry as to the nature of such stricter regulation and, more specifically, how a balance should be drawn between government regulation and the self-regulation of unhealthy foodstuffs labelling and advertising. In this regard Chapters 4 and 5 are dedicated to considering government regulation as part of this enquiry. Self-regulation by the advertising industry is subsequently considered in Chapter 6.

Food labels can be an effective tool to improve the broader public diet and, ultimately, combat obesity and diet-related NCDs.¹²⁸³ Consequently, there is a need for food labels that allow consumers to be better informed about the content of foods in order to make healthier dietary choices. The implementation of measures aimed at minimising the impact of foodstuffs labelling and advertising on unhealthy dietary patterns was identified

¹²⁸³ Barahona, Otero and Otero 2023 *Econometrica* 865.

by the WHO more than two decades ago.¹²⁸⁴ More recently, the WHO proclaimed that effective nutrition labelling, which includes simple-to-use FOP labelling, is a strategy “that countries should use to address the growing global concern of unhealthy dietary patterns”.¹²⁸⁵ The UN,¹²⁸⁶ CAC,¹²⁸⁷ FAO,¹²⁸⁸ and various scholars¹²⁸⁹ also support the adoption of FOP labelling with accompanying measures restricting unhealthy foodstuffs advertising.

It has been pointed out that foodstuffs labelling which provides information on the nutrition properties and the quality of a product in a consumer-friendly manner “has the potential to help rebalance a food retail environment currently skewed towards foods that undermine healthy diets”.¹²⁹⁰ Moreover, it has been observed that:

[f]ood labelling can contribute to a healthy food environment by providing information to the consumer about the content of foods, drawing consumer attention to the benefits and risks of particular nutrients or ingredients of public health concern, and motivating manufacturers to produce foods which have healthier nutrition profiles. Nutrient profiling is a method that assesses the nutritional quality of processed foods and beverages. It is also a tool to guide policy interventions such as front-of-package (FOP) or menu labelling and restrictions on marketing to children to help inform and empower consumers to shift demand towards healthy diets.¹²⁹¹

It was noted earlier¹²⁹² in this context that whilst the foodstuffs framework in South Africa is comprehensive and far-reaching, it does not currently deal with or restrict the labelling and advertising of unhealthy foodstuffs *per se*. Consumer challenges in understanding

¹²⁸⁴ WHO *Strategy on Diet, Physical Activity and Health* (2004) 7-8, 13; Kanter, Vanderlee and Vandevijvere 2018 *Public Health Nutrition* 1399.

¹²⁸⁵ WHO *Framework Manual for Front-of-Pack Labelling for Promoting Healthy Diet* 8.

¹²⁸⁶ UN *Special Rapporteur Report on the Right to Health* para 18. Also see UN 2020 <https://www.ohchr.org/en/statements/2020/07/statement-un-special-rapporteur-right-health-adoption-front-package-warning>.

¹²⁸⁷ *Annex 2: Guidelines on Front-of-Pack Nutrition Labelling* was adopted as part of the CAC *Guidelines on Nutrition Labelling* in 2021.

¹²⁸⁸ FAO *Handbook on Food Labelling to Protect Consumers* 33; FAO *et al The State of Food Security and Nutrition in the World 2023* 123.

¹²⁸⁹ See, for example, Bopape *et al* 2022 *Appetite* 2; Van Kleef and Dagevos 2015 *Critical Reviews in Food Science and Nutrition* 300; Bopape, Taillie and Swart 2022 *Front in Public Health* 10; Frank *et al* 2024 *Public Health Nutrition* 11.

¹²⁹⁰ FAO *et al The State of Food Security and Nutrition in the World 2023* 110.

¹²⁹¹ FAO *et al The State of Food Security and Nutrition in the World 2023* 123.

¹²⁹² See the discussion in part 2.7.

the nutritional information table often found on the back or side panel of product packaging were also noted.¹²⁹³

In line with international commitments and national policy objectives to address NCDs,¹²⁹⁴ the DOH has made concerted efforts to address this *lacuna*, most recently in R3337, which was published for public comment in April 2023.¹²⁹⁵ As mentioned in Chapter 1, this study focuses mainly on four proposals in R3337, notably:

- i. the introduction of mandatory FOP warning labels in relation to unhealthy foodstuffs;
- ii. a ban on the advertising of unhealthy foodstuffs to children;
- iii. the requirement to include a health warning message in unhealthy foodstuffs advertising not directed at children; and
- iv. the removal of graphic elements constituting trade mark matter from unhealthy foodstuffs labelling and advertising.¹²⁹⁶

These proposals in R3337 are referred to collectively as “the proposed measures” or “the proposed restrictions” in the discussion that follows.

It should be noted that South Africa is by no means the only country to implement measures, albeit in draft form at this stage, restricting the labelling and advertising of unhealthy foodstuffs.¹²⁹⁷ Various countries have implemented regulatory measures on unhealthy foodstuffs labelling and advertising.¹²⁹⁸ It has been noted earlier¹²⁹⁹ that the

¹²⁹³ See the discussion in parts 2.4.6 and 3.2.2.

¹²⁹⁴ See the discussion in parts 1.2.1 and 3.1.

¹²⁹⁵ See the discussion in part 4.2 below.

¹²⁹⁶ As mentioned in part 1.2.4, for the purposes of this study it is assumed that trade mark rights vest in those graphic elements that will be restricted under R3337. Whilst it is possible that certain non-trade mark matters may be affected, this study is limited to the elements that constitute IP and, more specifically, trade mark rights.

¹²⁹⁷ Following Chile’s implementation of a multi-pronged approach in restricting unhealthy foodstuffs labelling and advertising in 2016 (as discussed further in this chapter), more than 25 countries have adopted or are in the process of adopting mandatory policies that place restrictions on unhealthy foodstuffs labelling and advertising. See Barahona, Otero and Otero 2023 *Econometrica* 839.

¹²⁹⁸ FAO *et al The State of Food Security and Nutrition in the World 2023* 83.

¹²⁹⁹ See the discussion in part 3.6.

law can be a determinant of health. In this regard, Taillie *et al*¹³⁰⁰ point out that a multi-pronged approach implemented by a government through legislative regulation can change the food environment and consumer behaviour for the better. As discussed in more detail below, the multi-pronged approach consisting of measures (i)-(iv) proposed in R3337 is similar to the approach that has been adopted in Chile. It is noteworthy that Chile is currently deemed to have the most comprehensive set of restrictions on unhealthy foodstuffs labelling and advertising in the world.¹³⁰¹

From the discussion in Chapter 3 it is clear that SDHs such as income, literacy levels, language proficiency and preferences, eating habits and purchase preferences influence the overall socio-economic landscape and public health within a country. These SDHs are also constantly at interplay within the prevailing trade policy and economic development of a country, linking with CDHs. Implementing legislative measures which accommodate the position in South Africa cannot therefore simply be a copy-and-paste exercise involving adopting measures as-is from another country or region. For this reason and as mentioned in part 1.5, this study is not a comparative study. Instead a functional approach has been adopted whereby foodstuffs labelling and advertising regulation or case law in foreign jurisdictions have been considered and discussed, where appropriate, to exemplify what may be considered measures adequate (or inadequate) to achieve the desired policy goals. Trials, tribulations and triumphs in implementing laws regulating unhealthy foodstuffs labelling and advertising in other countries undoubtedly serve as guidance for South Africa, which is in the process of introducing such measures.¹³⁰²

Part 4.2 below sets out background comments on the DOH's efforts to regulate the advertising and labelling of unhealthy foodstuffs in South Africa. This is followed by general introductory comments on R3337 in part 4.3.

Part 4.4 sets out a comprehensive discussion on FOP labelling, which includes comments on the meaning and purpose thereof, the different types of FOP labelling used in other regions or countries, as well as the FOP warning labelling system that has been proposed

¹³⁰⁰ Taillie *et al* 2021 *Lancet Planet Health* 8.

¹³⁰¹ Paraje *et al* 2022 *Nutrients* 1.

¹³⁰² WHO *Guiding Principles for FOP Labelling* 7.

for South Africa under R3337.¹³⁰³ Comments on certain definitions and potential interpretation challenges of draft provisions in R3337 are pointed out, with accompanying suggestions. In addition, the advantages and potential challenges in implementing FOP warning labelling in South Africa are also discussed.

Part 4.5 sets out a discussion on the proposed ban on unhealthy foodstuffs advertising to children, including comments on potential interpretation ambiguities in R3337 with accompanying recommendations. The proposal to include a health warning message in unhealthy foodstuffs advertising which is not directed at children is discussed in part 4.6.

From the position of the food industry, the proposed advertising and labelling restrictions in R3337 will undoubtedly impact on the right to free commercial speech. This aspect is discussed in part 4.7. In addition, the proposed measures that would require trade mark proprietors to remove graphic elements from unhealthy foodstuffs labelling and advertising will impact on the property rights of trade mark rights holders. This aspect is discussed in part 4.8.

Part 4.9 sets out a discussion on anticipated challenges in implementing the proposed measures restricting unhealthy foodstuffs labelling and advertising in R3337, followed by concluding comments in part 4.10.

4.2 Background on the DOH efforts to regulate the advertising and labelling of unhealthy foodstuffs in South Africa

Restrictions on the advertising and labelling of unhealthy foodstuffs were proposed as far back as 2007 when the DOH published draft regulations that included the concept of “foodstuffs not regarded essential as part of a healthy diet and healthy lifestyle”.¹³⁰⁴ The draft regulations set out a list of non-essential foodstuffs that would fall within that

¹³⁰³ The term “front-of-pack”/“front-of-pack label” has not currently been adopted in South African food laws. Rather, the term “main panel” has been adopted, and refers to the part of the food label that bears the brand/trade name and product name in the greatest prominence, or any other part of the label that bears the brand/trade name in equal prominence. See reg 1 of R146. For a discussion on the horizontal labelling requirements for foodstuffs in general, including the elements that should appear on the main panel, see part 2.4.3 above.

¹³⁰⁴ Draft reg 52(2) of the *Draft Regulations Relating to the Labelling and Advertising of Foodstuffs*, GN R642 in GG 30075 of 20 July 2007.

category, which included well-known culprits such as soft drinks containing sweeteners or additives; sweet biscuits and flour confectionery; candies and chocolate confectionery; fast foods; potato crisps and other savoury snacks; and a variety of desserts¹³⁰⁵ which, generally speaking, fall within the unhealthy foodstuffs category.¹³⁰⁶ In respect of such “foodstuffs not regarded essential as part of a healthy diet and healthy lifestyle”, the draft regulations proposed:

- a ban on the advertisement of such non-essential foodstuffs to a child below the age of 16 years, as well as a ban on the advertisement or promotion of such unhealthy foodstuffs in school tuckshops or on any school or pre-school premises;¹³⁰⁷
- prohibiting the use of any cartoon-type character or puppet, computer animation or similar strategy to encourage the use of such foodstuffs;¹³⁰⁸ and
- the inclusion of warning statements on the main panel of such foodstuffs, namely "USE IN MODERATION ONLY SINCE EXCESSIVE CONSUMPTION ON A REGULAR BASIS MAY LEAD TO AN UNHEALTHY INCREASE IN WEIGHT/ OBESITY" or "REGULAR CONSUMPTION NOT RECOMMENDED FOR A HEALTHY DIET".¹³⁰⁹

The abovementioned proposals relating to labelling and advertising restrictions resulted in a severely heated debate amongst the relevant stakeholders due to their restrictive nature and potentially far-reaching consequences, eventually leading to the DOH putting the planned implementation of those restrictions on hold.¹³¹⁰ These provisions were

¹³⁰⁵ For the complete foodstuffs list, see Annexure 6 of the *Draft Regulations Relating to the Labelling and Advertising of Foodstuffs*, GN R642 in GG 30075 of 20 July 2007.

¹³⁰⁶ See part 1.8.2 for a discussion of the meaning of “unhealthy foodstuffs”.

¹³⁰⁷ Draft reg 52(2)(e) and (g) of the *Draft Regulations Relating to the Labelling and Advertising of Foodstuffs*, GN R642 in GG 30075 of 20 July 2007.

¹³⁰⁸ In addition, it proposed disallowing the use of child actors younger than the age of 16 in the advertising of such foodstuffs, as well as the use of any gifts or tokens that would encourage the use of such foodstuffs. See Draft reg 52(2)(e) of the *Draft Regulations Relating to the Labelling and Advertising of Foodstuffs*, GN R642 in GG 30075 of 20 July 2007.

¹³⁰⁹ Draft reg 52(2)(f) and (g) of the *Draft Regulations Relating to the Labelling and Advertising of Foodstuffs*, GN R642 in GG 30075 of 20 July 2007.

¹³¹⁰ Igumbor *et al* 2012 *PLoS Med* 5-6. Initially, the DOH decided to wait for the WHO to publish the WHO Recommendations on the Marketing of Foods. For a further discussion on the WHO *Recommendations on Marketing of Foods*, see part 1.2.3.3.

therefore excluded from the current R146, which subsequently came into effect on 1 March 2012.¹³¹¹

Steps to regulate the advertising and labelling of unhealthy foodstuffs in South Africa surfaced again with the publication of the *Draft Regulations Relating to the Labelling and Advertising of Foods: Amendment*¹³¹² (hereafter “R429”) for public comment in May 2014. Like the 2007 draft regulations, R429 contained provisions that *inter alia* proposed a ban on the advertising of unhealthy foodstuffs to children (this time up to the age of 18)¹³¹³ and proposed restrictions on the use of certain graphic elements on product labels of unhealthy foodstuffs.¹³¹⁴ In addition R429 also proposed the use of FOP nutrient labels in relation to unhealthy foodstuffs, although specifics regarding the design of the proposed FOP labelling were not included.¹³¹⁵

Following the passing of the deadline for public comment on R429,¹³¹⁶ no further developments regarding legislative reform were reported or published by the DOH. R429 ultimately went nowhere. Despite speculation,¹³¹⁷ no formal reasons for essentially abandoning R429 have been made public by the DOH.

Anticipation mounted again in 2023 when the DOH published a new set of draft regulations that place restrictions on the labelling and advertising of unhealthy foodstuffs. Due to various oversights, the draft regulations were published in four separate government notices. Following the initial publication of a reportedly incorrect version¹³¹⁸ in January 2023,¹³¹⁹ draft regulations were published again on 14 April 2023,¹³²⁰ that

¹³¹¹ For a discussion on the labelling and advertising of foodstuffs regulations that preceded R146, see the discussion in part 2.4.1.

¹³¹² GN R429 in GG 37695 of 29 May 2014.

¹³¹³ See item 6(1) and 6(2) of *Draft Guideline 14* to R429.

¹³¹⁴ See item 6(1)(a) of *Draft Guideline 14* to R429.

¹³¹⁵ Draft reg 53(9) of R429.

¹³¹⁶ Which was three months after the publication date of R429 on 29 May 2014, namely 29 August 2014.

¹³¹⁷ Investigations reports suggest that R429 was not pursued due to its lack of scientific backing.

¹³¹⁸ Food & Allergy Consulting & Testing Services 2024 <https://www.factssa.com/news/newly-published-r-3337-draft-labelling-regulations/>.

¹³¹⁹ *Draft Regulations Relating to the Labelling and Advertising of Foodstuffs*, GN R2986 in GG 47965 of 31 January 2023. These draft regulations will be withdrawn if R3337 comes into operation in due course. See reg 76 of R3337.

¹³²⁰ *Draft Regulations Relating to the Labelling and Advertising of Foodstuffs*, GN R3287 in GG 48428 of 14 April 2023.

omitted the signature of the Minister of Health. This was followed by a further publication of draft regulations reportedly under the incorrect government regulations number,¹³²¹ leading to the subsequent publication of the correct and signed version of the draft regulations, namely the *Regulations Relating to the Labelling and Advertising of Foodstuffs*, GN R3337 on 21 April 2023 (hereafter “R3337”).¹³²²

R3337 expands on certain aspects covered in R146,¹³²³ and also proposes numerous additional foodstuffs labelling and advertising provisions that are not included in the current regulations.¹³²⁴ Whilst relevant provisions of R3337 will be highlighted in this chapter, this study focuses mainly on the restrictions that have been proposed and which relate specifically to the advertising and labelling of unhealthy foodstuffs, namely:

- i. implementing nutrient warning descriptors in the form of front-of-pack (“FOP”) labels;
- ii. a ban on the advertising of unhealthy foodstuffs to children;
- iii. introducing a mandatory warning message in relation to unhealthy foodstuffs advertising to adult consumers; and
- iv. placing restrictions on the use of certain graphic elements that constitute trade mark matter in relation to foodstuffs advertising and labelling.

¹³²¹ *Draft Regulations Relating to the Labelling and Advertising of Foodstuffs*, GN 3320 in GG 48445 of 21 April 2023.

¹³²² GN 3337 in GG 48460 of 21 April 2023.

¹³²³ For example, in addition to prohibiting the use of the words “wholesome” and “nutritious” in relation to foodstuffs in line with R146, R3337 proposes prohibiting other superiority claims such as “super-food”, “smart”, “nutraceutical”, “intelligent” or other words that may imply that a specific foodstuff is better than or superior to others in any way. See reg 13(e) of R146; draft reg 9(1)(e) of R3337.

¹³²⁴ There is a vast difference in sheer page volume between R146 and R3337. When considering page count as published in the Government Gazette, R146 was 51 pages, whilst R3337 is nearly five times longer at 249 pages. Examples of additions proposed in R3337 include introducing labelling and composition requirements for alcohol-free or de-alcoholised wine (draft reg 9(4)); provisions relating to natural colouring foods (draft reg 16); requirements for disclosing added caffeine or alcohol in foodstuffs on container labels (draft reg 22); requirements for disclosing an artificial sweetener as an additive in foodstuffs (draft reg 35); requirements for the use of the claim “gluten-free” in relation to foodstuffs (draft reg 40); prohibiting the use of cosmetic claims (draft reg 57); requirements for the use of glycaemic index (GI) or glycaemic load (GL) nutritional information claims (draft reg 67); and setting out requirements for the use of health claims/functional claims with stipulated wording for permissible claims (draft reg 68 read with draft table 4).

As previously mentioned and discussed in more detail below, Chile was the first country to adopt a “multipronged obesity prevention programme” regarding unhealthy foodstuffs labelling and advertising, in terms of the *Ley 20.606, sobre la composición de los alimentos y su publicidad*, which is translated from Spanish to English as *Law 20.606 on the Composition of Foods and their Advertising*, 2012 (Chile).¹³²⁵ In terms of this Act, a combination of regulatory restrictions on unhealthy foodstuffs labelling and advertising was introduced in Chile which, albeit with certain variations, essentially includes restrictions (i)–(iv) that have been proposed in R3337 above.¹³²⁶

4.3 General comments on R3337

Should R3337 come into operation in due course, it will repeal and replace R146.¹³²⁷ As with R146,¹³²⁸ R3337 will as a general rule require that the packaging and bulk stock of all prepackaged foodstuffs¹³²⁹ that are manufactured, imported into, sold or offered for

¹³²⁵ This Act is available only in the official language of Chile, namely Spanish. The Google Translate tool was used to translate the name of the law from Spanish to English. See Google Translate date unknown <https://translate.google.com/?sl=es&tl=en&text=Ley%2020.606%2C%20sobre%20la%20composici%C3%B3n%20de%20los%20alimentos%20y%20su%20publicidad&op=translate>. The Chilean system is discussed in part 4.9.3 below.

¹³²⁶ Taillie *et al* 2021 *Lancet Planet Health* 2; Paraje *et al* 2022 *Nutrients* 1-2; Correa *et al* 2019 *International Journal of Behavioural Nutrition and Physical Activity* 2. Also see Paraje *et al* 2022 *Nutrients* 2 for a schematic representation of all regulatory measures implemented in terms of Chile’s multipronged obesity prevention strategy.

¹³²⁷ See draft reg 75 of R3337. This includes the amendments to R146 in terms of GN R1091 in GG33776 of 19 November 2010 and GN R45 in GG34957 of 19 January 2012. Peculiarly, draft reg 76 of R3337 also mentions a repeal of a provision in the previous *Regulations Relating to the Use of Sweeteners in Foodstuffs*, GN R3128 in GG of 20 December 1991, which were repealed by and replaced with the current *Regulations Relating to the Use of Sweeteners in Foodstuffs*, GN R733 in GG 35672 of 10 September 2012 (hereafter “*Sweeteners Regulations*”) with effect from 10 March 2013. See regs 8 and 9 of the *Sweeteners Regulations*.

¹³²⁸ See the discussion in part 2.4.1.

¹³²⁹ The proposed definition of “pre-packaged” in R3337 expands on the definition of this word in R146. As with R146, the draft regulations define “pre-packaged” as “the packaging of a foodstuff in packaging material ready for sale to the consumer or to a catering establishment”. The additional qualification to that definition in R146, namely “...so that such foodstuff cannot be altered without opening or changing the packaging” has been excluded from the proposed definition in R3337, effectively broadening the term to include foodstuffs in packaging which may be alterable. As with R146, the outer container of bulk stock is excluded from the definition, as well as individually wrapped one-bite sweets/confectionary or chocolate confectionery which is not enclosed in any further packaging material and is not intended for sale as an individual unit. R3337 expands that individually wrapped product range to include other sugars and savoury accompaniments to a meal. See reg 1 of R146; draft reg 1 of R3337.

sale in South Africa are labelled in terms thereof.¹³³⁰ As a new addition, R3337 will also impose this requirement for pre-packaged foodstuffs that are donated.

As a further new addition, R3337 contains a provision which makes it clear who bears the responsibility for the information contained in foodstuffs labels and advertising material. Draft regulation 2(2)(a) provides:

[a] food business operator under whose name or business name a foodstuff is marketed is responsible for the information required by these Regulations.

A “food business operator” is defined as “a foodstuff manufacturer, seller or importer”.¹³³¹ It follows, therefore, that the person or entity under whose name a particular foodstuff is marketed,¹³³² be it the manufacturer, importer or seller, will be responsible for ensuring compliance with the labelling and advertising requirements of R3337.¹³³³ The inclusion of this draft provision seems sensible and sound, as it makes it transparent which person will ultimately be responsible for ensuring compliance with the labelling and advertising provisions contained in R3337.¹³³⁴ In addition, this provision clarifies which person would be responsible and held liable if the label or advertising of a foodstuff, including unhealthy foodstuffs, does not comply with the requirements in R3337.

Like R146, R3337 will also prohibit a person from advertising a foodstuff in a manner which conflicts with these regulations.¹³³⁵ However, R3337 goes one step further than R146 and also prohibits the promotion of foodstuffs in a manner which conflicts with R3337.¹³³⁶ Peculiarly, the word “promote” is not defined in the current version of R3337.

¹³³⁰ Draft reg 2(1) of R3337.

¹³³¹ See draft reg 1 of R3337.

¹³³² The term “marketed” or “marketing” is not defined in R3337. For a general discussion on the meaning of “marketing”, see part 1.8.4. Of importance to this study is the fact that advertising is a form of marketing.

¹³³³ As under R146, the name and physical address of the manufacturer, importer or seller of the relevant foodstuff will be required to appear on the product label. See reg 9(1)(b) of R146, draft reg 5(b) of R3337. It is usually the entity whose name appears on the packaging (be it the manufacturer, or the importer, or the seller) who would be responsible for ensuring that the labelling and advertising of the product comply with South African food laws. If more than one entity is listed on the label, it is possible that all entities mentioned would qualify as food business operators responsible for regulatory compliance. Of course, this would be dependent on the individual circumstances.

¹³³⁴ Transparency in this regard is supported. See Van Kleef and Dagevos 2015 *Critical Reviews in Food Science and Nutrition* 298.

¹³³⁵ Also see reg 51(1) of R146.

¹³³⁶ See reg 1 of R991.

As this concept is generally perceived to be wider than “advertise” *per se*,¹³³⁷ it is suggested that a definition be included in the revised version of R3337 in due course. The *FCDA* does also not contain a definition of “promote”.¹³³⁸ Guidance may, however, be found in R991 covering the labelling and advertising of foodstuffs for infants and young children.¹³³⁹ In terms of R991, the term “to promote” is defined as:

to employ any method scheme or design, of encouraging or enticing a person or group of persons, in whatever form, to purchase or use a designated product, and includes but is not limited to advertising, point-of-sale advertising, the giving of samples, special sales, free supplies, donations, sponsorships, gifts, whether related or unrelated to purchases of designated products, free utensils or other articles, prizes, carrier bags with pack-shots or product logos, prizes or special displays at retail outlets, discount coupons, premiums, loss-leaders, tie-in sales, rebates and other give-aways.¹³⁴⁰

Subject to limited exceptions,¹³⁴¹ R3337 also proposes that nutrient declarations (i.e. a nutrient information table on the back of the product label) will become mandatory in relation to all foodstuffs labels.¹³⁴² This is stricter than the current requirements under R146, where the inclusion of nutrient declarations is mandatory only when nutrient claims, comparative claims or fortification claims are made on foodstuffs labels.¹³⁴³ The compulsory inclusion of a nutrient information table on the label of prepacked foodstuffs is in line with recommendations of the CAC,¹³⁴⁴ as well as the *WHO Guiding Principles on*

¹³³⁷ See the discussion in part 1.2.3.5.

¹³³⁸ A possible explanation for this omission is that “promote” may potentially have different meanings for the different product categories that are regulated in terms of the Act, which includes cosmetics and disinfectants in addition to foodstuffs. See discussion in part 2.1.

¹³³⁹ R991 will not be repealed by R3337, but R146 will. See draft reg 75 of R3337.

¹³⁴⁰ See reg 1 of R991.

¹³⁴¹ Exceptions include foodstuffs produced for sale by a street vendor or small producer which do not carry any nutrition or health claims; various baking condiments (such as baking powder and cream of tartar); culinary condiments such as herbs and spices; coffee extracts and tea; honey and vinegar; and various fresh, unprocessed foodstuffs (including eggs, fruits, vegetables and fish) that carry no nutrition claims. See draft regs 46(1) and 74(3) of R3337.

¹³⁴² Draft reg 46(1) of R3337.

¹³⁴³ For a discussion on when a nutrient declaration is required in terms of R146, see part 2.4.6.

¹³⁴⁴ In terms of s 5 of the CAC *Guidelines on Nutrition Labelling* the use of supplementary nutrition information (which includes FOP labelling) “should only be given in addition to, and not in place of, the nutrient declaration”. There is an exception to this general rule, namely for target populations who have a high illiteracy rate and/or comparatively little knowledge of nutrition, where the use of food group symbols or other pictorial or colour presentations would be acceptable without the disclosure of the product’s nutrient content in the form of a nutritional information table or otherwise.

FOP Labelling, which states that “mandatory nutrient declarations on food packages are a prerequisite for FOPL systems”.¹³⁴⁵

4.4 The proposal to introduce mandatory FOP warning labels in relation to unhealthy foodstuffs

4.4.1 The meaning of FOP and FOP labelling

The term “front-of-pack” (or FOP), in relation to a foodstuff, refers to the principal display panel (also known as the main panel)¹³⁴⁶ on the packaging of that product which bears the brand name or trade name, as well as the product name or a product descriptor in the greatest prominence, enabling the consumer to immediately identify a product in terms of its character or nature.¹³⁴⁷ The food container surface (or surfaces) that are displayed to the consumer under normal conditions of sale (i.e., as packed in retail premises or displayed online during product selection) will be deemed to form the front-of-pack.¹³⁴⁸

Turning to the term FOP labelling (abbreviated in R3337 as FOPL), this refers to a nutrition labelling system displayed in the principal field of vision on the main panel of foodstuffs packaging, i.e., front-of-pack. FOP labelling includes simple information¹³⁴⁹ often displayed by way of graphic representations or logos, on the nutrient content or nutritional quality of foodstuffs, which is intended to complement the more detailed nutrient declarations usually provided on the back or side panel of foodstuffs packaging.¹³⁵⁰ This definition makes it clear that FOP labelling is an add-on to the existing labelling requirements that generally appear on the label, including the ingredients list, net quantity and, in most instances, the nutritional information table.¹³⁵¹

¹³⁴⁵ WHO *Guiding Principles for FOP Labelling* 7, 14.

¹³⁴⁶ See the definition of “main panel” in draft reg 1 of R3337.

¹³⁴⁷ See draft reg 1 of R3337. Also see Hutton and Gresse 2020 *Journal for Consumer Sciences* 127.

¹³⁴⁸ Para 3.1 of Annex 2 of the CAC *Guidelines on Nutrition Labelling*.

¹³⁴⁹ FOP labelling which is both simple and consequently understandable to consumers is preferred. See Van Kleef and Dagevos 2015 *Critical Reviews in Food Science and Nutrition* 294.

¹³⁵⁰ WHO *Guiding Principles for FOP Labelling* 11; para 3.1 of Annex 2 of the CAC *Guidelines on Nutrition Labelling*.

¹³⁵¹ For a discussion of horizontal labelling requirements, see part 2.4.3 above. For a discussion of nutritional information tables on foodstuffs labels, see part 2.4.6.

Whilst FOP labelling is adopted by many countries around the world¹³⁵² either on a mandatory or voluntary basis,¹³⁵³ no unified, harmonised FOP label format has been prescribed by any international organisation or body.¹³⁵⁴ A reason for this is that there is currently no unified global consensus on the optimal FOP label choice.¹³⁵⁵ In addition, the appearance and design of the relevant labels adopted differ based on the preferences of the relevant consumer population and market, which differ from country to country.¹³⁵⁶

4.4.2 Nutrient profiling models that underpin FOP labelling systems

Following the above, the FOP labelling system selected for a country is always underpinned by a nutrient profiling model relating to the overall nutrition quality or the nutrients of concern.¹³⁵⁷ The term “nutrient profiling” refers to “the science of classifying or ranking foods according to their nutritional composition”.¹³⁵⁸

The various FOP labelling systems are underpinned by different nutrient profiling models around the world.¹³⁵⁹ Food is classified in different ways from a nutritional point of view, which results in there being different views on what works best.¹³⁶⁰ The adoption of appropriate nutrient profiling models based on nutrition preferences and habits within a specific country or region is supported by the UN¹³⁶¹ and most scholars.¹³⁶² It has also

¹³⁵² See the discussion in part 4.4.4 below.

¹³⁵³ National legislation may prescribe either mandatory or voluntary FOP labelling. See para 3.2 of Annex 2 of the CAC *Guidelines on Nutrition Labelling*.

¹³⁵⁴ Kanter, Vanderlee and Vandevijvere 2018 *Public Health Nutrition* 1399. The use of FOP labelling dates back to the 1980s, and an array of FOP labelling designs and formats have been developed by governments, NGOs, food industries and health experts over the years. See WHO *Guiding Principles for FOP Labelling* 9. Examples are discussed in part 4.4.4 below.

¹³⁵⁵ Ares *et al* 2018 *Food Quality and Preference* 216; Nieto *et al* 2019 *International Journal of Behavioural Nutrition and Physical Activity* 2.

¹³⁵⁶ Hutton and Gresse 2020 *Journal for Consumer Sciences* 127; Ares *et al* 2018 *Food Quality and Preference* 223; Ferrante 2021 *Rivista di Diritto Alimentare* 76.

¹³⁵⁷ See draft reg 1 of R3337; WHO *Guiding Principles for FOP Labelling* 11.

¹³⁵⁸ WHO *Guiding Principles for FOP Labelling* 11.

¹³⁵⁹ Examples include the South African Nutrient Profiling Model, the UK Office of Communication Nutrient Profiling Model; the WHO Regional Office for Europe Nutrient Profiling Model and the WHO Eastern Mediterranean Nutrient Profiling Model. The multiplicity of nutrient profiling model options has resulted in different methods of classifying foods and ultimately debates amongst experts in the fields of nutrition and public health as to which would be best suited for a specific country. See Wicks, Wright and Wentzel-Viljoen 2027 *British Journal of Nutrition* 2151-2152, 2154. For additional reading, see Ferrante 2021 *Rivista di Diritto Alimentare* 79-80, 84-86.

¹³⁶⁰ See Van Kleef and Dagevos 2015 *Critical Reviews in Food Science and Nutrition* 298.

¹³⁶¹ UN *Special Rapporteur Report on the Right to Health* para 17.

¹³⁶² Arrù *et al* 2017 *Appetite* 144.

been pointed out that the nutrient profiling model selected for a specific country should be both transparent to local consumers by enabling them to distinguish between unhealthy and healthier food options and should be independent of industry involvement.¹³⁶³

There have been considerable debates amongst experts in nutrition and public health, as scientists within those fields disagree as to which nutrient profiling model is most suited for the range of foodstuffs available.¹³⁶⁴ Of course, as the eating habits and food culture of nations across the world differ, no single model would necessarily be suitable across the board on a global level.¹³⁶⁵

For South Africa R3337 proposes the introduction of a nutrient profiling model for the use of health and nutrition claims, which is defined as:

a validated electronic tool based on a set of scientific criteria to categorise foodstuffs according to their total nutritional composition for the purpose of screening foodstuffs to determine their eligibility to make any claim or endorsement with a health or nutrition message.¹³⁶⁶

Under R3337 the proposed FOP warning labelling system for South Africa will disclose the presence of high quantities of one or more unhealthy nutrients that when consumed excessively may contribute to obesity or other NCDs, namely sugar, sodium/salt and saturated fats,¹³⁶⁷ as well as the presence of any artificial sweeteners which may also have negative health consequences.¹³⁶⁸ As mentioned in Chapter 1, an assumption of this study is that the nutrient profiling model that the DOH has selected for South Africa is based on authoritative scientific evidence for the local consumer market.¹³⁶⁹ More

¹³⁶³ Frank *et al* 2021 *Nutrients* 1, 2.

¹³⁶⁴ Van Kleef and Dagevos 2015 *Critical Reviews in Food Science and Nutrition* 298.

¹³⁶⁵ WHO *Guiding Principles for FOP Labelling* 18, 28.

¹³⁶⁶ Draft reg 1 of R3337. For additional reading on the nutrition profile model recommended for South Africa based on the Chilean nutrient profiling model, see Frank *et al* 2021 *Nutrition* 1-22.

¹³⁶⁷ Frank *et al* 2021 *Nutrients* 8.

¹³⁶⁸ See draft reg 1 of R3337. The FOP warning labelling system proposed for South Africa is set out in draft regulation 51 read with draft Annexure 10 of R3337 which is discussed in part 4.4.5 below. For a discussion on the health effects of non-sugar sweeteners, see part 4.4.6 below.

¹³⁶⁹ The DOH, as the branch of government that is responsible for national health and food regulation in South Africa, has the ultimate responsibility and authority over the development, implementation, monitoring and evaluation of the FOP labelling model selected for this country, as well as the nutrient profiling model that underpins the selected model. The nutrient profiling model should be based on authoritative scientific sources. See WHO *Guiding Principles for FOP Labelling* 16.

specifically, the proposed nutrient profiling model in R3337 is informed by the study and recommendations of Frank *et al*¹³⁷⁰ that were published in 2021. In considering the suitability of seven potential nutrient profiling models for the South African market, these scholars in nutrition and public health concluded that the nutrient profiling model that has been adopted in Chile and which informs the mandatory FOP warning label system in that country is the most suitable to use as a nutrient profiling model for South Africa.¹³⁷¹ The fact that that other countries have also adopted this nutrient profiling model, which has shown positive outcomes, also supports the selection of that nutrient profiling model option for South Africa.¹³⁷²

4.4.3 *The purpose of FOP labelling*

According to the UN¹³⁷³ and WHO,¹³⁷⁴ FOP labelling serves as “an important policy tool for countries to help consumers to make healthier food choices”, ultimately promoting healthy diets which in turn will foster positive dietary shifts and assist in the prevention and control of diet-related NCDs.¹³⁷⁵ On this basis the primary aim of FOP labelling is:

to provide convenient, relevant and readily understood nutrition information or guidance on food packs, to assist all consumers to make informed food purchases and healthier eating choices.¹³⁷⁶

Irrespective of the actual format or design, the main purpose of FOP labelling is “decreasing [the] perceived healthfulness” of foodstuffs which have a high content of nutrients that are associated with NCDs.¹³⁷⁷ This is done by providing consumers with information in a manner that is plain and understandable to assist in making food choices.¹³⁷⁸ As a result, FOP labelling has the potential to improve consumers’ diets on a

¹³⁷⁰ Frank *et al* 2021 *Nutrients* 1-22.

¹³⁷¹ Frank *et al* 2021 *Nutrients* 14.

¹³⁷² Both Peru and Israel adopted the Chilean nutrient profiling model. See Frank *et al* 2021 *Nutrients* 14. For a discussion on the nutrient profiling model proposed in R429 and the criticism thereof, see Frank *et al* 2021 *Nutrients* 2, 14-15.

¹³⁷³ UN 2020 <https://www.ohchr.org/en/statements/2020/07/statement-un-special-rapporteur-right-health-adoption-front-package-warning>.

¹³⁷⁴ WHO *Guiding Principles for FOP Labelling* 7, 10.

¹³⁷⁵ Bopape, Taillie and Swart 2022 *Front in Public Health* 2, 8; WHO *Guiding Principles for FOP Labelling* 43.

¹³⁷⁶ WHO *Guiding Principles for FOP Labelling* 10.

¹³⁷⁷ Ares *et al* 2018 *Food Quality and Preference* 223.

¹³⁷⁸ Pettigrew *et al* 2017 *Appetite* 115.

population-wide basis.¹³⁷⁹ In this regard, Ferrante¹³⁸⁰ notes that all FOP labelling models have the same common goal of “greater consumer protection”.

The purpose of FOP labelling includes grabbing consumers’ attention¹³⁸¹ and assisting consumers in making quick informed choices at the point of sale by pointing out if the product contains any unhealthy nutrient in excess of what would fall within acceptable parameters.¹³⁸² In this way FOP warning labels serve as mechanisms that will make it easier to make healthier food choices and to prefer that option to unhealthy alternatives.¹³⁸³ Highlighting the presence of high levels of unhealthy nutrients in a foodstuff through FOP labelling immediately warns the consumer that the relevant product contains one or more unhealthy nutrients at levels higher than recommended.¹³⁸⁴ Bopape *et al*¹³⁸⁵ point out that:

[t]his labelling system aims to discourage purchasing and overconsumption of unhealthy products by flagging products which contain excessive nutrients of concern in a simple, visible and easily understood manner. Highlighting nutrients associated with NCDs may increase risk perception, foster easy identification of unhealthy products, and discourage their purchasing and overconsumption. Consumers have limited shopping time and warning labels that are conspicuous serve as a means to quickly identify unhealthy products within a short period.

Newman, Howlett and Burton¹³⁸⁶ note that, to be effective, FOP labels should be accessible, comprehensible and relevant in assisting the shopper in making purchase decisions. FOP labelling will be deemed to be an effective and practical tool if it can change the purchasing decisions of consumers and encourage healthier food options.¹³⁸⁷ Members of the public within the country adopting FOP labelling should be aware of it

¹³⁷⁹ Pettigrew *et al* 2017 *Appetite* 116.

¹³⁸⁰ Ferrante 2021 *Rivista di Diritto Alimentare* 76.

¹³⁸¹ Bopape, Taillie and Swart 2022 *Front in Public Health* 2.

¹³⁸² Bopape *et al* 2021 *PLoS ONE* 14; Todd *et al* 2022 *Nutrients* 12; Kanter, Vanderlee and Vandevijvere 2018 *Public Health Nutrition* 1399.

¹³⁸³ UN 2020 <https://www.ohchr.org/en/statements/2020/07/statement-un-special-rapporteur-right-health-adoption-front-package-warning>.

¹³⁸⁴ FOP labelling should be consistent with national dietary guidelines. In South Africa, the South African Food-Based Dietary Guidelines would be consulted. See para 1 of Annex 2 of the *CAC Guidelines on Nutrition Labelling*; Bopape *et al* 2021 *PLoS ONE* 3, 15.

¹³⁸⁵ Bopape *et al* 2021 *PLoS ONE* 2.

¹³⁸⁶ Newman, Howlett and Burton 2014 *Journal of Retailing* 22-23.

¹³⁸⁷ Ares *et al* 2018 *Food Quality and Preference* 223; Van Kleef and Dagevos 2015 *Critical Reviews in Food Science and Nutrition* 291-292; Bopape, Taillie and Swart 2022 *Front in Public Health* 1.

and be able to recognise a FOP label on-pack. This would be facilitated by adopting a uniform format and design for all relevant foodstuffs, consistent positioning, and displaying of the FOP label in a large enough size for easy eye access.¹³⁸⁸ Furthermore, consumers in the relevant country should consequently correctly understand the message conveyed by the relevant FOP label and be motivated to use that system as part and parcel of the food selection process.¹³⁸⁹

An additional objective is that a FOP label may serve as a means to prompt foodstuffs manufacturers to re-evaluate product formulation to move towards healthier options.¹³⁹⁰ Foodstuffs manufacturers may either be influenced to reformulate existing foodstuffs required to have FOP labelling or to develop new products that form part of a healthy diet.¹³⁹¹ The reformulation of a product¹³⁹² that is high in sugar so that it contains less total sugar, for example, would potentially assist the manufacturer in avoiding having to display a FOP warning label disclosing that the product is high in sugar.¹³⁹³

Another objective of FOP labelling is that it allows governments to influence public health in a manner which allows consumers to retain the freedom of choice in relation to food purchases and consumption, and without banning the actual production of foodstuffs that fall within the unhealthy category.¹³⁹⁴

It is submitted that the abovementioned objectives of FOP labelling tie in with the various consumer rights that were discussed in Chapter 3, notably (i) the right to health;¹³⁹⁵ (ii) the right to a food environment which is not harmful to health and well-being;¹³⁹⁶ and (iii)

¹³⁸⁸ WHO *Guiding Principles for FOP Labelling* 12.

¹³⁸⁹ WHO *Guiding Principles for FOP Labelling* 12; para 4 of Annex 2 of the CAC *Guidelines on Nutrition Labelling*.

¹³⁹⁰ WHO *Guiding Principles for FOP Labelling* 10.

¹³⁹¹ Hutton and Gresse 2020 *Journal of Consumer Sciences* 135; Kanter, Vanderlee and Vandevijvere 2018 *Public Health Nutrition* 1399, 1406; Van Kleef and Dagevos 2015 *Critical Reviews in Food Science and Nutrition* 292.

¹³⁹² See part 3.5.1 for the meaning of the “reformulation” of foods.

¹³⁹³ Marais *et al* 2019 *SAMJ* 331.

¹³⁹⁴ Van Kleef and Dagevos 2015 *Critical Reviews in Food Science and Nutrition* 292.

¹³⁹⁵ See the discussion in part 3.2.1.

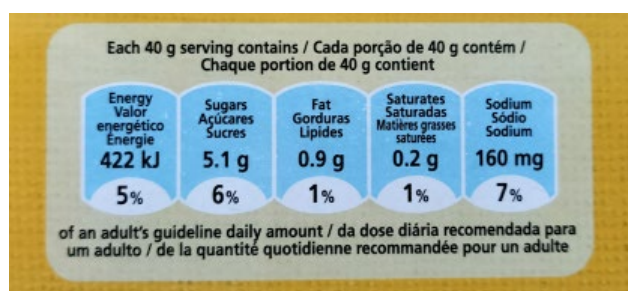
¹³⁹⁶ See the discussion in part 3.6.

the right to have access to information that is conveyed or expressed in a plain and understandable manner.¹³⁹⁷

4.4.4 Types of FOP labelling adopted around the world

4.4.4.1 FOP labelling based on Guideline Daily Amounts

Although not prescribed or mandatory in terms of current food laws, certain foodstuffs manufacturers, notably the multinational Big Food companies,¹³⁹⁸ do take steps to disclose to the consumer the energy content and unhealthy nutrients (i.e., sugar, fats, saturated fats and salt/sodium) in relation to pre-packaged foodstuffs based on Guideline Daily Amounts (GDAs).¹³⁹⁹ A GDA label, which has been identified as the FOP labelling system “favoured by industry”,¹⁴⁰⁰ indicates specific nutrients in a tabular form in relative percentages.¹⁴⁰¹ The logo depicted in Figure 4-1 below for illustrative purposes appears on the back of the container of KELLOGG’S ALL BRAN Flakes. It discloses the total energy, sugars, fat, saturates (saturated fats) and sodium levels contained in each 40 gram single serving of the product based on adult GDA:



Each 40 g serving contains / Cada porção de 40 g contém / Chaque portion de 40 g contient				
Energy Valor energético Energie	Sugars Açúcares Sucres	Fat Gorduras Lipides	Saturates Saturadas Matières grasses saturées	Sodium Sódio Sodium
422 kJ	5.1 g	0.9 g	0.2 g	160 mg
5%	6%	1%	1%	7%
of an adult's guideline daily amount / da dose diária recomendada para um adulto / de la quantité quotidienne recommandée pour un adulte				

Figure 4-1: GDA label for KELLOGG’S ALL BRAN Flakes¹⁴⁰²

¹³⁹⁷ See the discussion in part 3.6.1.

¹³⁹⁸ Including Tiger Brands, Coca-Cola, Spar, Kellogg’s, Danone and Kraft. See Igumbor *et al* 2012 *PLoS Med* 5; Van Kleef and Dagevos 2015 *Critical Reviews in Food Science and Nutrition* 293.

¹³⁹⁹ Bopape *et al* 2022 *Appetite* 2; Todd *et al* 2022 *Nutrients* 2. The use of GDAs on foodstuffs packaging was first adopted in the UK.

¹⁴⁰⁰ Nieto *et al* 2019 *International Journal of Behavioural Nutrition and Physical Activity* 3.

¹⁴⁰¹ Todd *et al* 2022 *Nutrients* 16.

¹⁴⁰² Image taken by the author of this thesis on 10 April 2024. The product container is available from the author on request.

Many Big Food companies also provide nutritional information based on GDAs on their website,¹⁴⁰³ as illustrated by the image of a can of ALL GOLD ripe fig jam appearing in Figure 4-2 below:

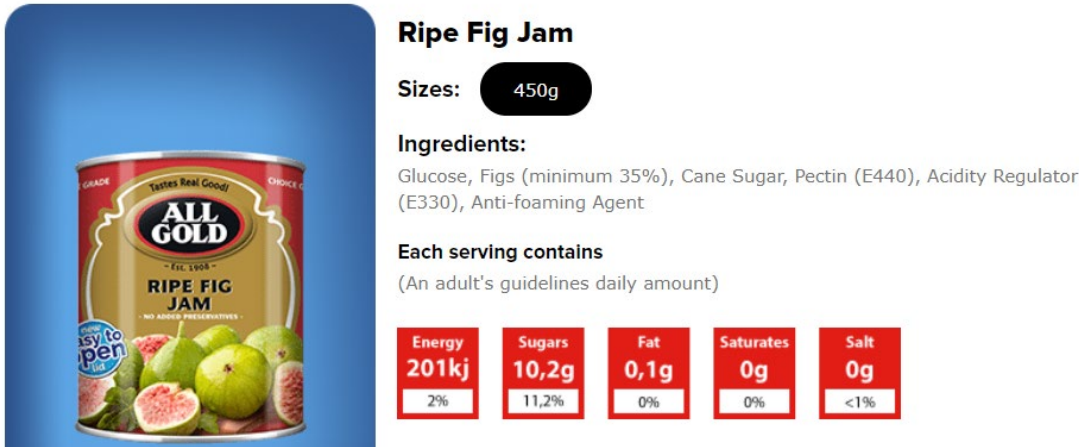


Figure 4-2: GDA information for ALL GOLD ripe fig jam¹⁴⁰⁴

As a first observation, it should be noted that the disclosure of nutrient information based on adult GDA is not prescribed by R146 or any other food laws in South Africa. That information is applied to a product label or used in the advertising of a product completely voluntarily. Also, as the images above illustrate, there is no uniformity in the presentation, design or requirements regarding the placement of that information.¹⁴⁰⁵ When used in South Africa, therefore, GDA labels are not always readily visible or even displayed front-of-pack. For example, with reference to the KELLOGG’S ALL BRAN FLAKES GDA table, the consumer would be required to study the lower portion of the back of the container to locate this information. In the context of grab-and-go consumer products, this may occur only after the purchase or possibly not at all. On this basis the information contained in the GDA label is not readily and easily accessible to the consumer at the point of product selection. In addition, the presence of varying GDA representations found in different places on foodstuffs packaging may confuse consumers.¹⁴⁰⁶

¹⁴⁰³ Igumbor *et al* 2012 *PLoS Med* 5.
¹⁴⁰⁴ Image sourced from All Gold 2024
https://www.allgold.co.za/Products?sc_site=All+Gold#searchprod_prodcategory=Jams.
¹⁴⁰⁵ Todd *et al* 2022 *Nutrients* 16.
¹⁴⁰⁶ Todd *et al* 2022 *Nutrients* 16.

Secondly, it may be challenging or confusing for consumers to interpret and understand GDA labels due to the technical terms used.¹⁴⁰⁷ Todd *et al*¹⁴⁰⁸ point out that the barriers experienced by South African consumers in understanding food labels have to do mainly with “readability” and “comprehensibility”. The FOP labelling system selected for South Africa should address these barriers.¹⁴⁰⁹ The reasons for the existence of these challenges include the limited literacy skills amongst members of the purchasing public and the fact that members of the population consist of consumers whose mother tongue is any one of the eleven official languages in the country.¹⁴¹⁰ Studies conducted in the USA and Mexico have revealed differences across ethnic groups regarding the understanding of GDAs, even amongst better educated consumers,¹⁴¹¹ and the same may hold to be true for South Africa. The use of the chemical term “sodium” in Figure 4-1 above may not be easily understood by consumers to refer to salt, for example.¹⁴¹² Consumers may also not easily understand the figures displayed, requiring mathematical calculations,¹⁴¹³ on a GDA label. In this regard, it has been pointed out that:

[n]umerical-based, non-interpretive systems are less helpful, particularly for population groups with lower levels of food and nutrition literacy, and lower education, and for members of Indigenous or minority ethnic groups.¹⁴¹⁴

Another concern raised with GDA labels is that they are reductive in nature, in that they provide information only on nutrient levels without providing an indication, recommendation or guidance to the consumer about the “healthiness” of the relevant product.¹⁴¹⁵ This means that consumers would be required to understand and interpret

¹⁴⁰⁷ Bopape *et al* 2022 *Appetite* 2-3; Hutton and Gresse 2020 *Journal of Consumer Sciences* 135.

¹⁴⁰⁸ Todd *et al* 2022 *Nutrients* 2.

¹⁴⁰⁹ WHO *Guiding Principles for FOP Labelling* 18.

¹⁴¹⁰ See part 3.3.2 above. Similar concerns have been pointed out in Mexico and the USA, where a study found that, due to the complexity of GDA labels, consumers’ understanding of them is no better than their understanding of the nutritional information tables that appear on the back of foodstuffs packaging. See Nieto *et al* 2019 *International Journal of Behavioural Nutrition and Physical Activity* 8-9.

¹⁴¹¹ Nieto *et al* 2019 *International Journal of Behavioural Nutrition and Physical Activity* 9.

¹⁴¹² Todd *et al* 2022 *Nutrients* 10.

¹⁴¹³ Nieto *et al* 2019 *International Journal of Behavioural Nutrition and Physical Activity* 9.

¹⁴¹⁴ WHO *Guiding Principles for FOP Labelling* 17.

¹⁴¹⁵ Bopape *et al* 2022 *Appetite* 2; Kanter, Vanderlee and Vandevijvere 2018 *Public Health Nutrition* 1401.

the information on the GDA label to make their own value judgement on the overall healthiness of the product.¹⁴¹⁶

Against this background, the usefulness of GDAs on food labels is generally perceived as rather limited.¹⁴¹⁷ For the reasons set out above, scholars do not believe that the GDA system is consumer-friendly, and do not support the current or continued use of this method of conveying nutrient information to the consumer on foodstuffs packaging in South Africa.¹⁴¹⁸

4.4.4.2 The multiple traffic light system

The multiple traffic light system as the format of FOP labelling (hereafter “the traffic light system”) has been adopted in the UK on a voluntary basis since 2004.¹⁴¹⁹ For illustrative purposes, the image in Figure 4-3 below depicts an example:

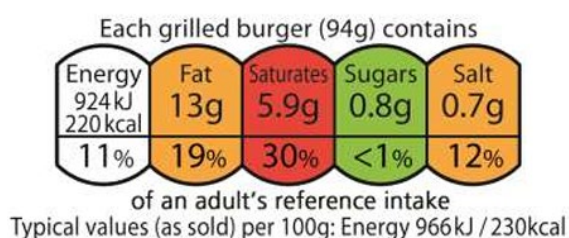


Figure 4-3: Example of traffic light FOP nutrient label¹⁴²⁰

The traffic light system is a nutrient-specific system¹⁴²¹ with accompanying colours and an indication of the nutrient percentage based on an adult’s reference intake for guidance

¹⁴¹⁶ Van Kleef and Dagevos 2015 *Critical Reviews in Food Science and Nutrition* 295.

¹⁴¹⁷ Todd *et al* 2022 *Nutrients* 16.

¹⁴¹⁸ Todd *et al* 2022 *Nutrients* 12; Bopape *et al* 2022 *Appetite* 9; UK Department of Health and Food Standards Agency *Guide to Creating a Front of Pack (FOP) Nutrition Label for Pre-Packed Products* 5.

¹⁴¹⁹ Todd *et al* 2022 *Nutrients* 2; EU Scientists & Health Professionals for Nutri-Score *Why the EC Must Choose the Nutri-Score Nutrition Label* 5. The traffic light system is less popularly implemented than the nutri-score system. Select countries outside Europe have also opted for the multiple traffic light system FOP label format including Sri Lanka, South Korea and Ecuador. See Bopape *et al* 2022 *Appetite* 3; Kanter, Vanderlee and Vandevijvere 2018 *Public Health Nutrition* 1401.

¹⁴²⁰ Image obtained from UK Department of Health and Food Standards Agency *Guide to Creating a Front of Pack (FOP) Nutrition Label for Pre-Packed Products* 21.

¹⁴²¹ As it discloses the level of total energy, fat, saturates, sugars and salt of the relevant product.

to the consumer.¹⁴²² In terms of this system, traffic light colours (i.e. green, amber and red) are used to inform consumers of the level of fat, saturated fat, sugars and sodium in a product, in combination with the total energy of the product.¹⁴²³ Green indicates a low level of the relevant nutrient, red indicates high levels of the relevant nutrient in the product, and an amber colour indicates a medium level of the relevant nutrient.¹⁴²⁴

Whilst studies show that the traffic light system is more effective than the GDA system elsewhere in the world,¹⁴²⁵ Todd *et al*¹⁴²⁶ have also pointed out that this FOP system may not be suitable for South Africa. The implementation of a FOP label consisting of multiple colours (as opposed to simply black and white) will require closer scrutiny and more time to comprehend. Whilst the traffic light system may be effective in assisting consumers in selecting healthier food options,¹⁴²⁷ consumer confusion as to the overall “healthiness” of a product may arise where the relevant FOP label contains different colours for different nutrients.¹⁴²⁸ Figure 4-3 can be used to demonstrate this: if the product is low in sugar, high in saturated fats, and contains moderate levels of fat and salt, how healthy (or unhealthy) is it? This issue is even more prevalent in the context of children, who would generally not be able to evaluate the healthiness of a foodstuff based on varying levels of different nutrients displayed in the form of the traffic light system.¹⁴²⁹

¹⁴²² Kanter, Vanderlee and Vandevijvere 2018 Public Health Nutrition 1401. In the UK the reference intake has replaced GDAs. See UK Department of Health and Food Standards Agency *Guide to Creating a Front of Pack (FOP) Nutrition Label for Pre-Packed Products* 6.

¹⁴²³ UK Department of Health and Food Standards Agency *Guide to Creating a Front of Pack (FOP) Nutrition Label for Pre-Packed Products* 6-7, 19-20.

¹⁴²⁴ UK Department of Health and Food Standards Agency *Guide to Creating a Front of Pack (FOP) Nutrition Label for Pre-Packed Products* 7; Bopape *et al* 2022 *Appetite* 3.

¹⁴²⁵ Van Kleef and Dagevos 2015 *Critical Reviews in Food Science and Nutrition* 295.

¹⁴²⁶ Todd *et al* 2022 *Nutrients* 12.

¹⁴²⁷ Research has also shown that the traffic light system is more effective than the GDA system in relation to consumer knowledge and understanding of the nutritional quality of a foodstuff. See Bopape *et al* 2022 *Appetite* 3.

¹⁴²⁸ Bopape *et al* 2022 *Appetite* 3, 8. A study in the UK revealed that persons with lower education levels, persons from lower social classes and persons aged 65 years and older face difficulties in accurately interpreting traffic light labels. See Van Kleef and Dagevos 2015 *Critical Reviews in Food Science and Nutrition* 294.

¹⁴²⁹ Arrù *et al* 2017 *Appetite* 140.

4.4.4.3 The nutri-score system

The so-called nutri-score labelling system has been adopted on a voluntary basis¹⁴³⁰ by several countries in the EU.¹⁴³¹ France was the first country to introduce the nutri-score system in 2017,¹⁴³² followed by Belgium, Switzerland, Spain, Germany, the Netherlands and Luxembourg.¹⁴³³ An example appears in Figure 4.4 below:



Figure 4-4: Example of Nutri-Score FOP label¹⁴³⁴

As illustrated above, this spectrum label¹⁴³⁵ consists of a scale which is made up of five letters with accompanying colours. The dark green A denotes the healthiest food option, across the spectrum to the unhealthiest food options that have a red E nutri-score.¹⁴³⁶ Foodstuffs imported into South Africa from the EU may contain a nutri-score label which has been included on the label as an interpretive nutrient tool.¹⁴³⁷

¹⁴³⁰ Member states of the EU have the option of introducing national measures that provide for FOP labelling disclosing certain nutrients including sugar, salt, saturates and fats in "forms of expression and/or presented using graphical forms and symbols". See reg 35 read with reg 30(1)-(5) of EU Regulation No. 1169/2011 of the European Parliament and of the Council of 25 October 2011 on the Provision of Food Information to Consumers, as amended; Ferrante 2021 *Rivista di Diritto Alimentare* 74; European Parliamentary Research Service *Nutrition Labelling Schemes Used in Member States* 1-3.

¹⁴³¹ Whilst the European Commission has recommended introducing a harmonised FOP labelling system within the EU "Farm to fork" strategy, it remains to be seen if this will be implemented in due course. See European Parliament 2022 <https://www.europarl.europa.eu/legislative-train/theme-a-european-green-deal/file-mandatory-front-of-pack-nutrition-labelling>.

¹⁴³² Food Navigator Europe 2017 <https://www.foodnavigator.com/Article/2017/10/31/Nutri-Score-labelling-comes-into-force-in-Franc>.

¹⁴³³ Ferrante 2021 *Rivista di Diritto Alimentare* 75; EU Scientists & Health Professionals for Nutri-Score *Why the EC Must Choose the Nutri-Score Nutrition Label* 31.

¹⁴³⁴ Image sourced from Egnell *et al* 2018 *PLoS ONE* 3.

¹⁴³⁵ EU Scientists & Health Professionals for Nutri-Score *Why the EC Must Choose the Nutri-Score Nutrition Label* 5.

¹⁴³⁶ EU Scientists & Health Professionals for Nutri-Score *Why the EC Must Choose the Nutri-Score Nutrition Label* 6.

¹⁴³⁶ Ferrante 2021 *Rivista di Diritto Alimentare* 79.

¹⁴³⁷ Todd *et al* 2022 *Nutrients* 2; Kanter, Vanderlee and Vandevijvere 2018 *Public Health Nutrition* 1401.

The nutri-score system essentially provides an overall impression of the product. An apparent shortcoming of such an approach, when compared to the FOP warning system discussed in part 4.4.4.5 below, is that it does not clearly disclose the presence of high levels of specific unhealthy nutrients.¹⁴³⁸ Furthermore, a study conducted by Hutton and Gresse¹⁴³⁹ in the Nelson Mandela Bay area of South Africa revealed that the nutri-score labelling system posed challenges to less literate consumers, as they found this FOP labelling system difficult to understand.¹⁴⁴⁰ This form of FOP labelling is therefore not the most suitable for the South African population as a whole.

4.4.4.4 The health star rating system

Australia and New Zealand adopted a voluntary health star rating FOP labelling system.¹⁴⁴¹ An example appears in Figure 4-5 below:



Figure 4-5: Example of health star rating FOP labelling¹⁴⁴²

¹⁴³⁸ Ares *et al* 2018 *Food Quality and Preference* 223. Other criticisms of the Nutri-Score system relate to the profiling model used. See European Parliamentary Research Service *Nutrition Labelling Schemes Used in Member States* 7 available at [http://www.europarl.europa.eu/RegData/etudes/BRIE/2020/652028/EPRS_BRI\(2020\)652028_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2020/652028/EPRS_BRI(2020)652028_EN.pdf)

¹⁴³⁹ Hutton and Gresse 2020 *Journal of Consumer Sciences* 132, 135.

¹⁴⁴⁰ It does not appear from the article that relevant participants were required to elaborate or explain why they find the Nutri-score label difficult to understand. Although the authors note that the outcome of their study cannot be generalised as a representation of the greater South African population, this result does demonstrate a potential shortcoming of the nutri-score system in South Africa, which has a high level of illiteracy and limited literacy levels amongst consumers. See Hutton and Gresse 2020 *Journal of Consumer Sciences* 132, 135. For a discussion of literacy in South Africa, see part 3.3.2 above.

¹⁴⁴¹ This system was first introduced in 2014. See Todd *et al* 2022 *Nutrients* 16; Kanter, Vanderlee and Vandevijvere 2018 *Public Health Nutrition* 1401; Pettigrew *et al* 2017 *Appetite* 116.

¹⁴⁴² Image sources from Commonwealth of Australia date unknown <http://www.healthstarrating.gov.au/internet/healthstarrating/publishing.nsf/Content/home>.

Past studies have revealed that the health star rating system was preferred over the traffic light system and GDA labelling by consumers in Australia.¹⁴⁴³ In terms of this system, a health star rating calculator is used to assess and rate the overall nutritional profile of foodstuffs.¹⁴⁴⁴ The rating is then converted into a star system, ranging from ½ star (a product that is considered to be the least healthy) to 5 stars (a product that is considered to be the healthiest).¹⁴⁴⁵

Like the nutri-score system discussed above, the health star rating system is an interpretative tool which provides an overview of the overall healthiness of a foodstuff.¹⁴⁴⁶ This global assessment is based on the product's content of nutrients associated with increasing the risk factors for NCDs (i.e., energy, sugars, saturated fats and sodium). In addition, "positive nutritional aspects" such as fibre and protein also form part of the labelling system.¹⁴⁴⁷

A perceived advantage of the health star rating FOP labelling system is that it awards points for positive (i.e., healthier) food nutrients or components.¹⁴⁴⁸ A FOP labelling system which also includes the disclosure of high levels of positive nutrients may encourage food manufacturers to reformulate products to be more healthy.¹⁴⁴⁹ That being said, it has been shown that evaluations that highlight only negative (or unhealthy) nutrients or qualities in a foodstuff have a greater influence on food purchases,¹⁴⁵⁰ and may improve the accuracy regarding the health perception of the food product amongst

¹⁴⁴³ See Pettigrew *et al* 2017 *Appetite* 116-117, 120 and Talati *et al* 2017 *Food Quality and Preference* 109, 112. Both studies compared three types of warning labels, namely the health star rating system, the traffic light system and FOP labelling similar in appearance to the GDA system, but based on the Daily Intake Guide as opposed to GDA. Warning labels were not included in either study.

¹⁴⁴⁴ For further information, see Australian Department of Health and Aged Care *Health Star Rating System Calculator and Style Guide* 12-24.

¹⁴⁴⁵ Commonwealth of Australia date unknown <http://www.healthstarrating.gov.au/internet/healthstarrating/publishing.nsf/Content/About-health-stars>. Also see Ares *et al* 2018 *Food Quality and Preference* 216.

¹⁴⁴⁶ Ares *et al* 2018 *Food Quality and Preference* 216; Kanter, Vanderlee and Vandevijvere 2018 *Public Health Nutrition* 1401.

¹⁴⁴⁷ Ares *et al* 2018 *Food Quality and Preference* 216; Kanter, Vanderlee and Vandevijvere 2018 *Public Health Nutrition* 1401.

¹⁴⁴⁸ Todd *et al* 2022 *Nutrients* 17; Ares *et al* 2018 *Food Quality and Preference* 216.

¹⁴⁴⁹ Ares *et al* 2018 *Food Quality and Preference* 222.

¹⁴⁵⁰ Hutton and Gresse 2020 *Journal of Consumer Sciences* 132.

consumers.¹⁴⁵¹ Moreover, in recommending that positive nutrients should be excluded from FOP labelling systems, it has also been pointed out by the WHO¹⁴⁵² that:

labels indicating high levels of positive nutrients increase product purchases ... and ... nutrition and health claims about positive nutrients increase consumption of labelled foods ... Thus, the presence of information about positive nutrients may overinflate the perceived healthfulness of products.

A study conducted by Todd *et al*¹⁴⁵³ in South Africa revealed certain positive outcomes in the selection of the health star rating system as a tool in assisting consumers to understand the overall healthiness of foodstuffs. However, the study identified that problems may be encountered when consumers try to interpret health star ratings for products which fall somewhere in the middle of being healthy or not (i.e. when a health rating score around 2.5 out of 5 is awarded). This is because consumers often tend to split food in a binary manner in the context of healthiness in that they either deem foods as healthy or, alternatively, as falling in an unhealthy category.¹⁴⁵⁴ In the circumstances, when compared to other FOP labelling systems,¹⁴⁵⁵ the health star rating FOP labelling system has also been criticised for having “a rather weak effect” as far as it relates to changing consumer behaviour towards healthier food options.¹⁴⁵⁶

In addition, in the South African context where there are varying degrees of consumer education and literacy, another perceived challenge with the health star rating system would be that, like the GDA system, consumers might not be able to understand the figures for nutrient levels included as part of the health star rating label.¹⁴⁵⁷

¹⁴⁵¹ WHO *Guiding Principles for FOP Labelling* 28.

¹⁴⁵² WHO *Guiding Principles for FOP Labelling* 28.

¹⁴⁵³ Todd *et al* 2022 *Nutrients* 18.

¹⁴⁵⁴ Ares *et al* 2018 *Food Quality and Preference* 223.

¹⁴⁵⁵ Namely the nutri-score system and the FOP warning label system. See Ares *et al* 2018 *Food Quality and Preference* 223.

¹⁴⁵⁶ Ares *et al* 2018 *Food Quality and Preference* 223-224.

¹⁴⁵⁷ WHO *Guiding Principles for FOP Labelling* 17.

4.4.4.5 Mandatory FOP warning labels

Chile was the first country to adopt a “multipronged obesity prevention program[me]” regarding unhealthy foodstuffs labelling and advertising in terms of the Chilean *Law 20.606 on the Composition of Foods and their Advertising*, 2012.¹⁴⁵⁸ This programme includes mandatory FOP warning labels disclosing the presence of high levels of unhealthy nutrients with black and white octagonal “stop-sign” shapes,¹⁴⁵⁹ as illustrated in Figure 4-6 below:



Figure 4-6: Mandatory FOP warning labels in Chile¹⁴⁶⁰

The English translation of phrases on the respective icons above, from left to right, are “HIGH IN SUGARS”, “HIGH IN SATURATED FAT”, “HIGH IN SODIUM” and “HIGH IN CALORIES”.¹⁴⁶¹

Other countries that have followed Chile’s example in adopting FOP warning labels, albeit in different variations, include Brazil, Uruguay, Peru and Argentina (all based in South America), as well as Mexico and Israel.¹⁴⁶² Except for Israel, all of these countries are Latin American countries.¹⁴⁶³ An interesting observation is that countries that have adopted the warning label system have not all chosen the same nutrients to display, and

¹⁴⁵⁸ As mentioned in part 4.2 above, this Act, named *Ley 20.606, sobre la composición de los alimentos y su publicidad*, is not available in the English language.

¹⁴⁵⁹ Reyes *et al* 2019 *BMC Public Health* 1; Todd *et al* 2022 *Nutrients* 2; Kanter, Vanderlee and Vandevijvere 2018 *Public Health Nutrition* 1401.

¹⁴⁶⁰ Images sourced from Reyes *et al* 2019 *BMC Public Health* 1.

¹⁴⁶¹ Spanish translated into English with the use of Google Translate 2024 <https://translate.google.com/?hl=en&tab=TT>.

¹⁴⁶² Ferrante 2021 *Rivista di Diritto Alimentare* 75; Paraje *et al* 2022 *Nutrients* 1; Bopape *et al* 2021 *PLoS ONE* 2-3, 14-15.

¹⁴⁶³ Britannica date unknown <https://www.britannica.com/topic/list-of-countries-in-Latin-America-2061416>.

the icons¹⁴⁶⁴ and colours¹⁴⁶⁵ adopted also differ. Whilst the disclosure of total sugars, saturated fats and sodium/salt is generally consistently displayed on the warning label,¹⁴⁶⁶ the calorie level required in the Chilean model displayed in Figure 4-6 above has not been adopted in Peru and Uruguay. Instead of calories, Peru requires the additional disclosure of trans fats,¹⁴⁶⁷ whilst Uruguay requires the disclosure of total fats instead.¹⁴⁶⁸ Mexico, on the other hand, requires the disclosure of all four elements under the Chilean system (i.e., sugar, saturated fats, sodium and calories), but has introduced an additional requirement that the FOP warning label disclose the presence of non-nutritive sweeteners in foodstuffs.¹⁴⁶⁹

As discussed in part 4.4.5 below, it is proposed for the South African FOP warning labelling system that high levels of sugar, fat and salt be disclosed and, as a fourth element, the inclusion of artificial sweeteners. This is in line with recommendations made for South Africa by Frank *et al.*¹⁴⁷⁰

When considering why the requirement to display “HIGH IN CALORIES” on the FOP warning label proposed for South Africa has been excluded, it is necessary to consider the current and proposed requirements regarding the disclosure of energy on foodstuffs labels. In terms of R146 the energy content of foodstuffs sold in South Africa “shall always be declared in ‘kilojoules or ‘kJ’”.¹⁴⁷¹ This requirement has been also retained in R3337.¹⁴⁷² Due to this current requirement in food law, South African consumers who do consider the energy content of foodstuffs are accustomed to the kilojoule value as opposed to

¹⁴⁶⁴ For example, an octagonal shape was selected in Chile and Israel based on consumer preferences in those countries. Brazil, on the other hand, has adopted the triangular shape, which has also been proposed in R3337 for South Africa (as discussed in part 4.4.9 below). See Bopape *et al* 2021 *PLoS ONE* 14.

¹⁴⁶⁵ For example, Chile and Uruguay display the FOP warning label in black and white, whilst Israel adopts red and white elements. See Bopape *et al* 2021 *PLoS ONE* 15.

¹⁴⁶⁶ Kanter, Vanderlee and Vandevijvere 2018 *Public Health Nutrition* 1399.

¹⁴⁶⁷ In South Africa trans fats are not currently permitted in foodstuffs above 2 g per 100g. See reg 2(1) of the *Regulations Relating to Trans-Fat in Foods*, GN R127 published in GG 34027 of 17 February 2011. As higher quantities of trans fats in foodstuffs are prohibited, the disclosure of trans fats by way of FOP warning labels in South Africa would not be warranted. See Frank *et al* 2021 *Nutrients* 11.

¹⁴⁶⁸ Ferrante 2021 *Rivista di Diritto Alimentare* 81.

¹⁴⁶⁹ Ferrante 2021 *Rivista di Diritto Alimentare* 81-82. An information box FOP contains the warning “Contains non-sugar sweeteners, not recommended for children”. See Frank *et al* 2021 *Nutrients* 15.

¹⁴⁷⁰ Frank *et al* 2021 *Nutrients* 12.

¹⁴⁷¹ Reg 50(3)(a) of R146.

¹⁴⁷² Draft reg 46(3)(f)(i) of R3337.

calories. The disclosure of products that are “HIGH IN CALORIES” may, therefore, not necessarily resonate with South African consumers who may not be accustomed to a declaration of calories on foodstuffs packaging. In addition, a reference to “CALORIES” anywhere on foodstuffs packaging would not be consistent with the requirement to disclose energy content in kilojoules proposed in R3337 and in line with R146. In addition, Frank *et al*¹⁴⁷³ note that, because the disclosure of foodstuffs that are high in total sugar, saturated fats or salt is required, most of the foods that are high in energy will already be addressed through a FOP warning labelling (albeit without the disclosure of calories). These scholars note further that:

[d]iet composition, particularly in the case of processed foods, is potentially more harmful to health than the overall calorie balance. In countries facing high levels of stunting, wasting and micronutrient deficiencies, [nutrient profiling models] that focus on energy may be problematic.¹⁴⁷⁴

The scientific team that conducted the research underlying the proposed FOP warning labelling system for South Africa considered FOP warning labelling measures already implemented in other, predominantly Latin-American countries.¹⁴⁷⁵ The successful implementation of FOP warning labels in other jurisdictions served as a basis for the South African study.

FOP warning labels essentially consist of icons or symbols with purposefully coloured pictorial elements in conjunction with to-the-point wording that acts to warn the consumer, such as “warning”, “high in” or “excessive”.¹⁴⁷⁶ A key difference between the FOP warning system on the one hand, and the traffic light and GDA systems on the other, is that the former system highlights only nutrients that are “high in” or “excessive”. The latter two systems, on the other hand, display the level of all unhealthy nutrients even if not present in high quantities.¹⁴⁷⁷ In this way the FOP warning label system functions as

¹⁴⁷³ Frank *et al* 2021 *Nutrients* 11.

¹⁴⁷⁴ Frank *et al* 2021 *Nutrients* 11.

¹⁴⁷⁵ See, for example, Nieto *et al* 2019 *International Journal of Behavioural Nutrition and Physical Activity* 9; Taillie *et al* 2021 *Lancet Planet Health* 1, 7. Paraje *et al* 2022 *Nutrients* 10. Correa *et al* 2019 *International Journal of Behavioural Nutrition and Physical Activity* 7.

¹⁴⁷⁶ Bopape *et al* 2022 *Appetite* 3, 8. The term “high in” has been adopted in Chile, for example, whilst “excessive” has been prescribed in Mexico and Uruguay. See Ferrante 2021 *Rivista di Diritto Alimentare* 83.

¹⁴⁷⁷ Bopape *et al* 2022 *Appetite* 3.

a “binary signal”¹⁴⁷⁸ to consumers by effectively splitting foods into two categories, namely (i) less healthy foods bearing FOP warning labels and (ii) healthier options not bearing FOP warning labels.¹⁴⁷⁹

It is generally accepted that FOP warning labels should be useful and accessible to a country’s consumers from various backgrounds regardless of age, literacy levels and education.¹⁴⁸⁰ As a tool in assisting consumers to identify unhealthy products, studies have shown that FOP warning labels “outperform other labelling formats”.¹⁴⁸¹ Reasons for this include the fact that warning labels are easy to understand by all consumers, from young to old, illiterate to literate. Taillie *et al*¹⁴⁸² have also pointed out that, amongst members of the public, FOP warning labels may have a greater impact on those consumers “with lower health and lower nutrition literacy”, given that it is that portion of the public which struggles most to understand the complex nutritional information tables that appear at the back of foodstuffs packaging. The fact that numerical information (i.e., figures on nutrient levels)¹⁴⁸³ does not appear on a FOP warning label is seen as an additional aid to comprehension by consumers.¹⁴⁸⁴ Due to the simplicity of these labels, they also have the biggest impact on shifting consumer behaviour away from the intention to purchase unhealthy foodstuffs bearing such warning labels.¹⁴⁸⁵

A study published by Bopape *et al*¹⁴⁸⁶ in 2022¹⁴⁸⁷ convincingly showed that, for the South African consumer base, FOP warning labels would best enhance consumers’ nutrient understanding of food. This finding is in line with studies conducted in other countries

¹⁴⁷⁸ Barahona, Otero and Otero 2023 *Econometrica* 841.

¹⁴⁷⁹ Consumers are likely to deem foodstuffs bearing no FOP labelling as healthier than those that have such labels front-of-pack. See Barahona, Otero and Otero 2023 *Econometrica* 839-840.

¹⁴⁸⁰ Van Kleef and Dagevos 2015 *Critical Reviews in Food Science and Nutrition* 292.

¹⁴⁸¹ Bopape *et al* 2022 *Appetite* 3; Ares *et al* 2018 *Food Quality and Preference* 215, 223; Correa *et al* 2019 *International Journal of Behavioural Nutrition and Physical Activity* 7; Nieto *et al* 2019 *International Journal of Behavioural Nutrition and Physical Activity* 9.

¹⁴⁸² Taillie *et al* 2021 *Lancet Planet Health* 3.

¹⁴⁸³ This information will, however, remain accessible in the nutrient information table displayed elsewhere on the product packaging.

¹⁴⁸⁴ WHO *Guiding Principles for FOP Labelling* 17.

¹⁴⁸⁵ Bopape *et al* 2022 *Appetite* 3, 8; Bopape, Taillie and Swart 2022 *Front in Public Health* 2.

¹⁴⁸⁶ Bopape *et al* 2022 *Appetite* 3.

¹⁴⁸⁷ Bopape *et al* 2022 *Appetite* 1-11.

that warning labels are the optimal FOP labelling format.¹⁴⁸⁸ Even in the EU, criticism for failing to consider adopting the FOP warning labels has also been raised.¹⁴⁸⁹ Following a randomised controlled trial with a sample of more than 1 500 South African households across all population groups, provinces, income and literacy levels, authors concluded that¹⁴⁹⁰ the FOP warning labelling was found to perform better than both the GDA labelling system and the traffic light system.¹⁴⁹¹ Bopape *et al*¹⁴⁹² state:

[d]ue to its simplicity, [warning labels] are easy to understand and have been proven to be also effective in children, youth ... and across educational levels ... Our results suggest that the use of simple text and familiar icons such as a triangle within the [warning label] would be particularly useful in a setting with low literacy skills such as South Africa. Additionally, the use of icons may enhance equitable access to nutrition information, given the mix of languages spoken in South Africa.

The study also revealed that the adoption of FOP warning labels in South Africa would have a threefold purpose of (i) enabling consumers to identify products that are high in unhealthy nutrients; (ii) assisting consumers in identifying unhealthy foodstuffs;¹⁴⁹³ and (iii) reducing consumer's intention to purchase unhealthy products, i.e., facilitating behavioural shifts towards healthier food options.¹⁴⁹⁴ In the light of the shockingly high obesity levels in our country, the authors concluded that the introduction of mandatory FOP warning labels in terms of updated foodstuffs legislation is an urgent imperative that would assist the consumer in making an informed choice and, ultimately, choosing healthier food options.¹⁴⁹⁵ The outcome of this study also aligns with the prior outcomes of a study conducted by Ares *et al*,¹⁴⁹⁶ in which it was noted that:

... the effect on consumer behaviour for unhealthful product categories was more pronounced for the [FOP] warning label scheme. This suggests that nutritional warnings

¹⁴⁸⁸ Bopape *et al* 2022 *Appetite* 8. Arrù *et al* 2017 *Appetite* 144; Nieto *et al* 2019 *International Journal of Behavioural Nutrition and Physical Activity* 9-10.

¹⁴⁸⁹ Ferrante 2021 *Rivista di Diritto Alimentare* 88.

¹⁴⁹⁰ Bopape *et al* 2022 *Appetite* 3.

¹⁴⁹¹ Bopape *et al* 2022 *Appetite* 3.

¹⁴⁹² Bopape *et al* 2022 *Appetite* 8.

¹⁴⁹³ Or, at a minimum, foods that contain high quantities of one or more unhealthy nutrients. Bopape *et al* seem to be of the opinion that, as soon as one or more unhealthy nutrients are present in a foodstuff, it is automatically deemed to be unhealthy. Whilst it is questionable that this would be true in all instances, that aspect falls in the area of nutrition as opposed to law. No further comments on this issue will therefore be made in this study.

¹⁴⁹⁴ Bopape *et al* 2022 *Appetite* 7-9.

¹⁴⁹⁵ Bopape *et al* 2022 *Appetite* 8.

¹⁴⁹⁶ Ares *et al* 2018 *Food Quality and Preference* 224.

may have advantages over Nutri-score and the health star rating in the context of the current food environment, characterized by the wide availability of products with [a] high content of nutrients associated with non-communicable diseases.¹⁴⁹⁷

It is apparent, therefore, that FOP warning labels are best suited to shift consumer behaviour towards healthier food purchases.

4.4.5 When will FOP warning labelling be required in terms of R3337?

As a starting point, draft regulation 51(1)(a)-(c) sets out the main criteria for establishing whether or not FOP warning labelling will be required for a foodstuff, by stating:

51.(1) Pre-packaged foodstuffs are required to bear a mandatory Front-Of-Pack-Labelling (FOPL) if the foodstuff-

- (a) contains added saturated fat, added sugar, added sodium;¹⁴⁹⁸ and
- (b) which exceed the nutrient cut-off values for total sugar, total sodium or total saturated fatty acids outlined below; or
- (c) subject to regulation 55(1), contain any artificial sweeteners.

Important aspects of this draft provision are discussed below.

4.4.5.1 Compulsory FOP warning labels

The inclusion of the word “mandatory” in draft regulation 51(1) makes it clear that FOP warning labelling will not be voluntary or optional for pre-packed foodstuffs that meet the criteria for carrying FOP warning labelling. This is supported by Draft Annexure 10, which stipulates that foodstuffs which exceed the relevant nutrient cut-off values are “required to carry” a FOP warning label in terms of regulation 51(1), and “shall carry a label complying with the specifications outlined” in Draft Annexure 10.¹⁴⁹⁹ The proposal for mandatory FOP warning labelling in R3337 is stricter than the initial proposal in R429 of the voluntary disclosure of certain nutritional information relating to foodstuffs by way

¹⁴⁹⁷ A study conducted in the USA and Mexico which compared five FOP labelling formats also revealed that FOP warning labels would be most effective in those countries. See Nieto *et al* 2019 *International Journal of Behavioural Nutrition and Physical Activity* 9-10.

¹⁴⁹⁸ The word “added” in this sub-section means that FOP warning label requirements would not be relevant to products which may naturally be high in sugar, salt or saturated fats, provided that no artificial sweeteners had been added. For example, fresh fruits that had not been processed but were naturally high in fructose would not require FOP warning labelling. See further part 4.4.7 below. For a discussion on processed and unprocessed foods, see part 1.8.2 above.

¹⁴⁹⁹ See para 1 of Draft Annexure 10 of R3337.

of FOP nutrient labelling.¹⁵⁰⁰ Requirements as far as appearance, placement and positioning of the FOP warning label were not set out in R429. Subject to the comments and suggestions in this chapter, the inclusion of these specifics in R3337 is a welcome expansion on R429.

4.4.5.2 Possible interpretations of draft regulation 51(1)

Turning to the wording and interpretation of regulation 51(1), the use of the word “and” after draft regulation 51(1)(a) and “or” after regulation 51(1)(b) warrants some consideration when interpreting the draft provision as a whole. The intention of the legislature may be that regulation 51(1)(a) should be read with regulation 51(1)(b), hence the use of the word “and” between the two sub-sections, whilst the use of the word “or” preceding sub-regulation 51(1)(c) would seemingly deem it an independent qualifier for FOP warning labelling. Based on that interpretation, there would essentially be two instances where FOP warning labelling would be required for a pre-packaged foodstuff, namely where the requirements of sub-regulation 51(1)(a) read with sub-regulation 51(1)(b) have been complied with or, alternatively, where sub-regulation 51(1)(c) has been complied with. That would essentially be in the instances:

1. where the relevant foodstuff contains added saturated fat or added sugar¹⁵⁰¹ or added sodium,¹⁵⁰² and the nutrient cut-off value(s) for the relevant unhealthy nutrient(s) exceeds the prescribed cut-off values;¹⁵⁰³ or
2. where the pre-packaged foodstuff contains artificial sweeteners.¹⁵⁰⁴

¹⁵⁰⁰ R429 provided that when FOP labelling is used it should as a general rule disclose information relating to the energy, total sugar, fat, saturated fat and total sodium of the relevant product (i.e. each of these nutrients should be listed on the FOP label). R429 also contained a provision providing that where appropriate the claims “LOW IN [nutrient name]” or “FREE FROM [nutrient name]” may be used as part of the FOP labelling in the prescribed font and colour. See draft regulation 53(9)(b) of R429.

¹⁵⁰¹ The reference to “added sugar” is underpinned by the notion that intrinsic sugars such as those naturally occurring in fruit are not deemed to be as unhealthy as free sugars that have been added to foodstuffs during production. As fruits do not have “added sugar”, they would not require FOP warning labels even if the total sugar content (derived from the intrinsic sugars occurring naturally in the fruit) is deemed high. See Frank *et al* 2021 *Nutrients* 8-9.

¹⁵⁰² In compliance with draft reg 51(1)(a) of R3337.

¹⁵⁰³ In compliance with draft reg 51(1)(b) of R3337.

¹⁵⁰⁴ In compliance with draft reg 51(1)(c) of R3337.

That being said, an alternative interpretation of draft regulation 51(1) is also plausible. This would be that regulation 51(1)(a) acts as a qualifier for either sub-article 51(1)(b) or 51(1)(c). In this regard, the word “or”, which splits draft regulation 51(1)(b) and 51(1)(c), is significant in that it may serve to indicate that, once the enquiry has passed the requirement 51(1)(a) threshold, the next consideration is whether or not the requirements of either 51(1)(b) or, in the alternative, 51(1)(c) have been met. In those circumstances, FOP warning labelling would essentially be required in one of two instances: when the requirements set out in draft regulation 51(1)(a) read with 51(1)(b) are met, or alternatively in the instance that the requirements set out in draft regulation 51(1)(a) read with 51(1)(c) are met. If this alternative interpretation is adopted, a pre-packaged foodstuff would be required to bear mandatory FOP warning labelling if:

- i. the product contains added sugar, or added saturated fat, or added sodium;¹⁵⁰⁵ and the total sugar/saturated fat/sodium content of the food product exceeds the relevant nutrient cut-off value(s) prescribed for the specific unhealthy nutrient(s);¹⁵⁰⁶ or
- ii. the product contains added sugar, or added saturated fat, or added sodium;¹⁵⁰⁷ as well as any artificial sweetener(s).¹⁵⁰⁸ In this second instance, there would be no need to comply with the cut-off value requirements as set out in draft regulation 51(1)(b).

In this context it is submitted that regulation 51(1) could potentially lead to ambiguity in interpretation when regulation 51(1)(a)-(c) is read as a whole. Whilst the first interpretation would presumably be in line with the actual intention of the legislature given the context,¹⁵⁰⁹ draft regulation 51(1) could be amended as suggested below to

¹⁵⁰⁵ In compliance with draft reg 51(1)(a) of R3337.

¹⁵⁰⁶ In compliance with draft reg 51(1)(b) of R3337.

¹⁵⁰⁷ In compliance with draft reg 51(1)(a) of R3337.

¹⁵⁰⁸ In compliance with draft reg 51(1)(a) of R3337. The requirement that FOP warning labelling be used where a product contains artificial sweeteners is subject to draft reg 55(1).

¹⁵⁰⁹ See the discussion in part 4.4.6 below on the proposed disclosure of artificial sweeteners by way of FOP warning labels and the scientific evidence that underpins this proposal. If the text of the legislation is potentially ambiguous, the courts will consider the context thereof when interpreting that legal text in a sensible manner. See Botha *Statutory Interpretation* 131-132. Also see *Stellenbosch Farmers' Winery Ltd v Distillers Corporation (SA) Ltd* 1962 1 SA 458 (A) 476E-F.

remove possible interpretation challenges (proposed additions are shown in **bold** and deletions are ~~crossed-out~~):

51.(1) Pre-packaged foodstuffs are required to bear a mandatory Front-Of-Pack- Labelling (FOPL) if:

(a) the foodstuff-

~~(a)(i)~~ **(i)** contains added saturated fat, added sugar, added sodium; and

~~(b)(ii)~~ **(ii)** which exceeds the nutrient cut-off values for total sugar, total sodium or total saturated fatty acids outlined below; or

~~(c)(b)~~ **(b)** subject to regulation 55(1), **the foodstuff** contains any artificial sweeteners.

4.4.5.3 Proposed nutrient cut-off values

The details in Table 3 below set out the prescribed nutrient cut-off values for unhealthy nutrients and artificial sweeteners:

Nutrient cut-off values	
Nutrient	Value indicated in nutritional information table
Total sugar(s) in g	Solids: $\geq 10.0\text{g}$ per 100 g
	Liquids: $\geq 5.0\text{g}$ per 100 ml
Total Saturated fatty acids in g	Solids: $\geq 4.0\text{g}$ per 100 g
	Liquids: $\geq 3.0\text{g}$ per 100 ml
Total Sodium in mg	Solids: $\geq 400\text{mg}$ per 100 g
	Liquids: $\geq 100\text{mg}$ per 100 ml
Artificial sweeteners	
Contain any added artificial sweetener	Bear the applicable logo warning as per Annexure 10

Table 3: Nutrient cut-off values proposed in R3337¹⁵¹⁰

¹⁵¹⁰ Draft reg 51(1)(c) of R3337. Draft reg 51(1)(e) clarifies that a foodstuff will be classified as either a solid or liquid based on the ordinary use of such a foodstuff. The unit of measurement as grams or millilitres indicated on the label in accordance with the requirements specified in any other relevant existing legislation may also serve as guidance. As discussed in Chapter 2, liquids are labelled and sold by volume (i.e., millilitres and litres), whilst solids are labelled and sold by mass (e.g., grams, kilograms). See further the discussion in part 2.5.4.1.

In simplified terms, and assuming that one or more of the unhealthy nutrients has been added to a prepacked food product, FOP warning labelling would be required for solids¹⁵¹¹ that contain one or more of the following:

- a total sugar content of 10% or higher;
- a total saturated fatty acid content of 4% or higher;
- a total sodium content of 0.4% or higher; and/or
- artificial sweetener (in any amount).

Following the above, FOP warning labelling would be required for liquids¹⁵¹² that contain one or more of the following:

- a total sugar content of 5% or higher;
- a total saturated fatty acid content of 3% or higher;
- a total sodium content of 0.1% or higher; and/or
- artificial sweetener (in any amount).

The abovementioned cut-off values for the unhealthy nutrients (excluding artificial sweeteners) are the same as those that are currently set in Chile,¹⁵¹³ and which were proposed for the South African consumer market by Frank *et al.*¹⁵¹⁴ That being said, the cut-off values in Chile were implemented in a three-phase staggered approach over three years, where nutrient cut-off values were decreased gradually.¹⁵¹⁵ This aspect is discussed further in part 4.9.3 below.

¹⁵¹¹ Including products such as cereals, bread, maize meal, rice, confectionery and all other prepackaged foods.

¹⁵¹² Including packaged juices, cordials and all other prepackaged beverages.

¹⁵¹³ The proposed cut-off values in R3337 for total sugar, saturated fat and salt are substantially less strict than those that were proposed initially by the DOH in R429 (although those proposals related to unhealthy foodstuffs that should not be marketed to children). For example, under R429 the cut-off value for total sugars in solid foods is 5g per 100g, as opposed to the value now proposed under R3337 at 10 g per 100g. See item 6(2)(c) of *Draft Guideline 14* to R429.

¹⁵¹⁴ Frank *et al* 2021 *Nutrients* 15.

¹⁵¹⁵ Paraje *et al* 2022 *Nutrients* 1; Barahona, Otero and Otero 2023 *Econometrica* 843.

4.4.6 Considering the need to disclose the presence of artificial sweeteners by way of FOP warning labels

In terms of draft regulation 51(1)(c), and subject to draft regulation 55(1), pre-packed foodstuffs that contain artificial sweeteners, irrespective of the quantity, will be required to disclose the presence of that additive by way of FOP warning labelling.

In terms of draft regulation 55(1), a foodstuff which contains added artificial sweeteners (including tabletop artificial sweeteners) may not make any claim with an energy, nutrition or health message or carry any endorsement logo concerning health unless conclusive scientific proof can demonstrate (i) that scientifically substantiated benefits to health in general, as well as a reduction of the risk of NCDs including obesity will result; and (ii) that any of these substances do not contribute to the risk of developing any NCDs in the long term of 20 years or more. This provision is worded somewhat vaguely, as it does not make it clear if the added artificial sweetener as an ingredient, alternatively, the end-product containing that additive, must meet requirements (i) and (ii) in order to apply an energy claim, nutrition claim, or health message/endorsement. What is clear, however, is that there are concerns about the potential risk that artificial sweeteners may pose to human health. R429 contained a similar prohibition in relation to non-nutritive sweeteners,¹⁵¹⁶ but did not make provision for scientific substantiation to overcome the potential health risk concern, as proposed in R3337.

Sweet-tasting foods and beverages are popular worldwide because most people, young and old, like to consume sweet things.¹⁵¹⁷ Sugar or non-sugar sweeteners are used to impart a sweet taste to foods and beverages. Today the use of non-sugar sweeteners as a sugar replacement in foods has become popular worldwide, including in South Africa.¹⁵¹⁸

¹⁵¹⁶ Draft reg 53(11) of R429 provided that "... no food which contain[s] added ... non-nutritive sweeteners ... shall be permitted to make any energy, nutrition, ingredient content or health claim; neither shall it be eligible to carry any endorsement logo(s) concerning health, ingredient content, nutrition, public health or reduction of risk for the development of non-communicable disease matters".

¹⁵¹⁷ In addition to adding a sweet taste to increase palatability, added sugar in foodstuffs also acts as a preservative, contains anti-microbial properties and improves food texture. See Tou, Fitch and Bridges "Sweeteners: Use, Dietary Intake and Health Effects" 1-2.

¹⁵¹⁸ Naicker, Naicker and Singh 2024 *South African Journal of Clinical Nutrition* 30; Debras *et al* 2022 *BMJ* 2. Non-nutritive sweeteners are also found in other consumer products such as toothpaste and medicines. See Frank *et al* 2021 *Nutrients* 12.

The results of a study conducted in 2018 revealed that more than 55% of carbonated soft drinks and nearly 13% of confectionary products contain artificial sweeteners.¹⁵¹⁹ The reasons for this increase include the negative health consequences resulting from the excessive consumption of sugar,¹⁵²⁰ as well as the perceived benefits of using sweeteners to assist in weight loss or weight management.¹⁵²¹ In addition, the use of non-sugar sweeteners may be more cost-effective than the use of sugar in product formulation.¹⁵²² In South Africa, for example, the health promotion levy in relation to SSBs has caused beverage manufacturers to reformulate their products by adding artificial sweeteners to either reduce or completely replace sugars in the beverages.¹⁵²³

Non-sugar sweeteners are broadly divided into two categories, namely natural sweeteners such as honey,¹⁵²⁴ and artificial sweeteners which essentially are “synthetically derived chemicals”.¹⁵²⁵ In terms of R3337, an “artificial sweetener” refers to a food additive that imparts a sweet taste to a food, including artificial, non-nutritive intense sweeteners;¹⁵²⁶ steviol glycosides; and lower energy sweeteners such as polyols.¹⁵²⁷

¹⁵¹⁹ Frank *et al* 2021 *Nutrients* 12.

¹⁵²⁰ Health effects include increased risk of overweight and obesity, NCDs, dental problems and hyperactivity in children. See Rios-Leyvraz and Montez *Health Effects of the Use of Non-Sugar Sweeteners* 2; Willet *et al* 2019 *Lancet* 459.

¹⁵²¹ Naicker, Naicker and Singh 2024 *South African Journal of Clinical Nutrition* 31.

¹⁵²² Larsen 2012 *Nutrafoods* 3; Naicker, Naicker and Singh 2024 *South African Journal of Clinical Nutrition* 36; Frank *et al* 2021 *Nutrients* 12.

¹⁵²³ Naicker, Naicker and Singh 2024 *South African Journal of Clinical Nutrition* 30-31. For additional comments on the health promotion levy, see part 1.6 above.

¹⁵²⁴ Natural sweeteners are non-carcinogenic. See Naicker, Naicker and Singh 2024 *South African Journal of Clinical Nutrition* 30.

¹⁵²⁵ Rios-Leyvraz and Montez *Health Effects of the Use of Non-Sugar Sweeteners* 2; Naicker, Naicker and Singh 2024 *South African Journal of Clinical Nutrition* 30.

¹⁵²⁶ The word “sweetener” refers to any food additive which is used or intended to be used either to impart a sweet taste to foodstuffs, or to be added to a foodstuff as a table-top sweetener. Furthermore, a “non-nutritive sweetener” refers to a sweetener (or a mixture of non-nutritive sweeteners) that has a sweetening level that equals 5 grams of sucrose and which does not have an energy value exceeding 8 kJ. See reg 1 of the *Sweeteners Regulations*; draft reg 1 of R3337. Artificial sweeteners are also known as non-nutritive sweeteners or high-intensity sweeteners as they exceed the sweetness of sucrose. Hence small quantities go a long way. In terms of quantity, nutritive sweeteners, like xylitol for example, are similar to sugar in sweetness. See Whitehouse, Boullata and McCauley 2008 *American Association of Occupational Health Nurses Journal* 251; Tou, Fitch and Bridges “Sweeteners: Use, Dietary Intake and Health Effects” 3.

¹⁵²⁷ See draft reg 1 of R3337. The word “polyol” refers to an alcohol containing multiple hydroxyl groups. See reg 1 of the *Sweeteners Regulations*. Sugars (i.e., all mono and disaccharides) are excluded from any food ingredient that constitutes or forms part of an artificial sweetener. See draft reg 1 of R3337.

Examples of artificial sweeteners commonly used include aspartame, sucralose, stevia and saccharin.¹⁵²⁸

Artificial sweeteners are regularly used in foodstuffs production,¹⁵²⁹ and are a common ingredient in ultra-processed foods including soft drinks, snacks and ready-to-go meals.¹⁵³⁰ Artificial sweeteners are also used as tabletop sweeteners to replace sugar in coffee or tea, for example.¹⁵³¹ As such, artificial sweeteners are additives that add a sweet taste to foodstuffs in a manner that mimics the taste of sugar.¹⁵³² That being said, foods sweetened with artificial sweeteners have fewer calories due to the exclusion or reduction of free sugars.¹⁵³³ In these circumstances, foodstuffs that have been sweetened with artificial sweeteners are often marketed as healthier alternatives to sugar equivalents, or as an aid in assisting in weight loss.¹⁵³⁴

The increased use of artificial sweeteners in food production has led to questions regarding the perceived benefits and health implications of these additives. When considering potential benefits, and despite the mixed results,¹⁵³⁵ some studies have shown that the use of non-sugar sweeteners may positively assist in short-term weight loss.¹⁵³⁶ That being said, there is no consensus among scientists as to whether or not non-sugar sweeteners are actually effective in weight control in the long run.¹⁵³⁷

In addition, various concerns regarding the potential long-term health implications of a regular intake of non-sugar sweeteners have been raised. In the 2022 WHO publication by Rios-Leyvraz and Montez¹⁵³⁸ and the subsequent *WHO Guideline on the Use of Non-*

¹⁵²⁸ Debras *et al* 2022 *BMJ* 1; Naicker, Naicker and Singh 2024 *South African Journal of Clinical Nutrition* 35.

¹⁵²⁹ Larsen 2012 *Nutrafoods* 3.

¹⁵³⁰ Debras *et al* 2022 *BMJ* 2.

¹⁵³¹ Debras *et al* 2022 *BMJ* 2.

¹⁵³² Naicker, Naicker and Singh 2024 *South African Journal of Clinical Nutrition* 30.

¹⁵³³ Debras *et al* 2022 *BMJ* 1.

¹⁵³⁴ Pearlman, Obert and Casey 2017 *Current Gastroenterol Reports* 63.

¹⁵³⁵ Swithers 2015 *Appetite* 86.

¹⁵³⁶ Rios-Leyvraz and Montez *Health Effects of the Use of Non-Sugar Sweeteners* 47-48; Rogers *et al* 2016 *International Journal of Obesity* 390.

¹⁵³⁷ WHO 2023 *Use of Non-Sugar Sweeteners: WHO Guideline* vii. Also see Swithers 2015 *Appetite* 86; Debras *et al* 2022 *BMJ* 2.

¹⁵³⁸ Rios-Leyvraz and Montez *Health Effects of the Use of Non-Sugar Sweeteners* 48.

*Sugar Sweeteners*¹⁵³⁹ it was highlighted that the long-term use of non-nutritive sweeteners may increase the risk of obesity, cardiovascular diseases, type two diabetes and mortality among adults.¹⁵⁴⁰ In addition, studies have also suggested that the consumption of non-sugar sweeteners in pregnant women may have “unfavourable effects” on birthweight and body fat levels (known as adiposity)¹⁵⁴¹ later in children’s lives.¹⁵⁴² Based on the most recent scientific evidence, therefore, artificial sweeteners (and other types of non-sugar sweeteners) cannot be included among the measures aimed at the prevention or control of NCDs, given that this ingredient in foodstuffs may harm public health, including contributing towards the development of NCDs.¹⁵⁴³

In addition, it has also been highlighted that simply replacing free sugars with artificial sweeteners in processed foodstuffs may not improve the overall healthiness of the relevant products.¹⁵⁴⁴ In considering sweetened soft drinks as an example, Swithers¹⁵⁴⁵ points out that:

[i]t is critical to recognize that even if diet soda consumption can produce weightloss compared to SSB, this does not necessarily indicate that artificial sweeteners are healthy, only that they may be less problematic than SSB.

Moreover, the WHO¹⁵⁴⁶ has also pointed out this issue in relation to other unhealthy foods, noting that:

[b]ecause free sugars are often found in highly processed foods and beverages with undesirable nutritional profiles, simply replacing free sugars with [non-sugar sweeteners] results means that the overall quality of the diet is largely unaffected.

Against this background, there is a clear need to inform consumers that products containing artificial sweeteners are not necessarily healthy food options, and may lead to

¹⁵³⁹ WHO *Use of Non-Sugar Sweeteners: WHO Guideline* ix.

¹⁵⁴⁰ Also see Swithers 2015 *Appetite* 87; Debras *et al* 2022 *BMJ* 1-2; Aguayo-Guerrero *et al* 2024 *Life* 9; Zhang, Tang and Li 2024 *PLoS ONE* 10.

¹⁵⁴¹ Bays *et al* 2013 *Journal of Clinical Lipidology* 304.

¹⁵⁴² Rios-Leyvraz and Montez *Health Effects of the Use of Non-Sugar Sweeteners* 48. Also see Whitehouse, Boullata and McCauley 2008 *American Association of Occupational Health Nurses Journal* 258.

¹⁵⁴³ Swithers 2015 *Appetite* 86. Draft reg 55(1) of R3337 mentioned earlier in this part does, however, make provision for potential technological developments and scientific developments over time.

¹⁵⁴⁴ WHO *Use of Non-Sugar Sweeteners: WHO Guideline* xii.

¹⁵⁴⁵ Swithers 2015 *Appetite* 86.

¹⁵⁴⁶ WHO *Use of Non-Sugar Sweeteners: WHO Guideline* xii.

negative health outcomes for consumers, regardless of the sweetener (i.e. sugar or artificial sweetener) used.¹⁵⁴⁷ In these circumstances, as a general rule,¹⁵⁴⁸ the WHO currently recommends that non-sugar sweeteners not be used as a measures aimed at either achieving weight control or reducing NCDs.¹⁵⁴⁹

A concern in the South African context is that consumers are not always aware that artificial sweeteners are ingredients in the foods that they consume daily. A study recently published by Naicker, Naicker and Singh¹⁵⁵⁰ points out that:

South Africans also indicated that they did not use sweeteners in their daily routine, but it is evident from the results of the survey that consumers are consuming [non-sugar sweeteners] unknowingly, which is worrying as consumers are not aware that they are consuming these. Data indicate that participants lacked awareness of [non-sugar sweeteners] and suggests that most participants do not read product labels or do not investigate the ingredients they are consuming, or that they are just not familiar with [non-sugar sweeteners]. This result reinforces the urgent need to introduce simple education measures for consumer awareness in South Africa.

As discussed in part 4.4.5 above, in addition to requiring the disclosure of high levels of sugar, saturated fats and salt, R3337 also proposes that the presence of artificial sweeteners be disclosed by way of FOP warning labelling. The disclosure of sweeteners in foods is also required in Mexico. This is because foodstuffs manufacturers have replaced high sugar content with artificial sweeteners which, as discussed above, may be harmful to health.¹⁵⁵¹ In Chile, for example, the disclosure of artificial sweeteners is not included in the FOP warning system. This has had the unintended consequence that sugar has been replaced by artificial sweeteners to maintain sweetness. More than 55% of prepackaged foodstuffs in Chile contain artificial sweeteners as an ingredient, causing

¹⁵⁴⁷ Swithers 2015 *Appetite* 88.

¹⁵⁴⁸ The recommendation applies to both adults and children of any age, apart from persons who have diabetes as a medical condition. See WHO *Use of Non-Sugar Sweeteners: WHO Guideline* xi. As diabetics cannot tolerate sugar, non-sugar sweeteners may be suitable for persons with that NCD. See Whitehouse, Boullata and McCauley 2008 *American Association of Occupational Health Nurses Journal* 251.

¹⁵⁴⁹ WHO *Use of Non-Sugar Sweeteners: WHO Guideline* viii.

¹⁵⁵⁰ Naicker, Naicker and Singh 2024 *South African Journal of Clinical Nutrition* 35.

¹⁵⁵¹ Ferrante 2021 *Rivista di Diritto Alimentare* 83.

challenges for consumers in that country to select foodstuffs that do not contain this additive.¹⁵⁵²

Considering the health risks posed by artificial sweeteners, the introduction of a FOP warning label which discloses the presence of this additive in foodstuffs seems warranted, considering the broader public health risk. As Frank *et al*¹⁵⁵³ point out:

[a]s food policies should be proactive in protecting the health of the population, the evidence currently available suggests that it is wise to regulate the use of [non-sugar sweeteners] or at the very least, require clear information about its presence and amounts in food products to monitor its presence better. After all, the purpose of food policies is to encourage a shift towards the consumption of more whole, unprocessed foods rather than alternative, ultra-processed foods.

Assisting the consumer in identifying that a product contains one or more artificial sweeteners by way of a simple-to-understand FOP warning label would undoubtedly empower consumers to make better-informed dietary choices and ultimately positively influence consumer health and well-being in South Africa.¹⁵⁵⁴

4.4.7 Foodstuffs that will not require FOP warning labelling under R3337

In terms of draft regulation 51(1) of R3337, FOP warning labelling will be required for prepackaged products that meet the qualifying criteria.¹⁵⁵⁵ On this basis, foodstuffs that are not pre-packaged (such as single-ingredient fruits and vegetables) would not need to display FOP warning labelling.¹⁵⁵⁶ This issue is relevant to the discussion on proposed advertising restrictions on foodstuffs that will be required to bear FOP warning labelling as discussed further in part 4.6 below.

Secondly, if a product is pre-packaged but does not contain any added artificial sweetener and also no added unhealthy nutrients (i.e. no added salt, sugar, fats or artificial sweeteners), a FOP warning labelling would not be required.¹⁵⁵⁷ This means that

¹⁵⁵² Frank *et al* 2021 *Nutrients* 12.

¹⁵⁵³ Frank *et al* 2021 *Nutrients* 12.

¹⁵⁵⁴ Naicker, Naicker and Singh 2024 *South African Journal of Clinical Nutrition* 35; Frank *et al* 2021 *Nutrients* 12.

¹⁵⁵⁵ Draft reg 51(1) of R3337.

¹⁵⁵⁶ As the requirement that a product be prepacked in draft reg 51(1) would not be met.

¹⁵⁵⁷ As the requirement in draft reg 51(1)(a) of R3337 would not be met. Also see part 4.4.5 above.

unprocessed foods¹⁵⁵⁸ that may be naturally high in sugar, salt or fat would not be subject to FOP warning labelling. An example would be unprocessed fruits, which may be naturally high in fructose.

Thirdly, prepackaged products which contain added sugar, saturated fats or sodium (or a combination of these unhealthy nutrients) without exceeding the total sugar, saturated fatty acid and sodium nutrient cut-off values will not require FOP warning labelling provided that no artificial sweeteners are present in the product.¹⁵⁵⁹ If a prepackaged product contains artificial sweetener as well as one or more of the other unhealthy nutrients, a FOP warning label will be required even if the cut-off values are not exceeded.¹⁵⁶⁰ This is because the presence of the artificial sweetener by and in itself is required to be disclosed by way of a FOP warning label irrespective of whether any unhealthy nutrient has been added.¹⁵⁶¹ Of course, where an unhealthy nutrient has been added, the FOP warning labelling requirement comes into operation as soon as any of the unhealthy nutrients exceeds the cut-off threshold value, irrespective of whether or not the product contains artificial sweeteners.¹⁵⁶²

Fourth, R3337 exempts infant formula up to the age of six months categories from the FOP warning labelling requirements.¹⁵⁶³ This seems to be informed by the recommendation of Frank *et al*/¹⁵⁶⁴ that “the appropriate target population” for the nutrient profiling model underpinning the FOPL system in South Africa should include all adults and children older than six months. When considering recommendations by the WHO and CAC, it should be noted that infant formula, as well as follow-up formula (which is manufactured and sold for persons aged between six months and three years)¹⁵⁶⁵ have

¹⁵⁵⁸ For a discussion in unprocessed foods, see part 1.8.2 above.

¹⁵⁵⁹ As neither the requirements of draft reg 51(1)(b) nor 51(1)(c) of R3337 would be met.

¹⁵⁶⁰ As there will be compliance with draft reg 51(1)(a) read with draft reg 51(1)(c) of R3337.

¹⁵⁶¹ Unlike sugar, saturated fats and salt, there is currently insufficient evidence to determine specific cut-off values for artificial sweeteners. See Frank *et al*/2021 *Nutrients* 12. For a discussion on the evidence in support of the cut-off values sugar, fat and salt, respectively, see Frank *et al*/2021 *Nutrients* 18-11.

¹⁵⁶² As there will be compliance with draft reg 51(1)(a) read with draft reg 51(1)(b) of R3337.

¹⁵⁶³ Draft reg 51(4) of R3337.

¹⁵⁶⁴ Frank *et al*/2021 *Nutrients* 6.

¹⁵⁶⁵ For a discussion on follow-up formula, see part 2.6.2.

strict compositional criteria.¹⁵⁶⁶ On this basis the *WHO Guidelines on FOP Labelling*¹⁵⁶⁷ and the CAC *Guidelines on Nutrition Labelling*¹⁵⁶⁸ indicate that FOP labelling is not appropriate for either of these product categories. At face value there does seem to be a basis to consider an increase in the six-month age limitation to exempt foodstuffs intended for both infants and young children up to the age of three years from requiring FOP warning labels.¹⁵⁶⁹ As this discrepancy should ideally be considered further by experts in child nutrition, no further comments on this issue are made in this study.

Lastly, R3337 also exempts foods for special medical purposes from the FOP warning labelling requirements.¹⁵⁷⁰ The term “food for special medical purposes” is not defined in R3337, or in R146 for that matter. Draft regulations relating to the labelling of foods for special medical purposes were published for public comment in 2002.¹⁵⁷¹ To date, however, no regulations regarding this food product category have been enacted. Looking at R991 once again, guidance on what may qualify as a “food for special medical purposes” can be found there. R991 includes “infant or follow-up formula for special dietary management for infants with specific medical conditions” as a product category.¹⁵⁷² Infant formula for infants who struggle with reflux would seemingly fall within this product category and consequently be a food for special medical purposes. Furthermore, *Codex Standard for the Labelling of and Claims for Foods for Special Medical Purposes*, 1991¹⁵⁷³ defines “foods for special medical purposes” as:

are a category of foods for special dietary uses which are specially processed or formulated and presented for the dietary management of patients and may be used only under medical supervision. They are intended for the exclusive or partial feeding of patients with limited or impaired capacity to take, digest, absorb or metabolize ordinary foodstuffs or certain nutrients contained therein, or who have other special medically-determined nutrient requirements, whose dietary management cannot be achieved only

¹⁵⁶⁶ The reformulation of such products should therefore not be encouraged through regulatory measures or otherwise. See *WHO Guiding Principles for FOP Labelling* 10.

¹⁵⁶⁷ *WHO Guiding Principles for FOP Labelling* 29.

¹⁵⁶⁸ Para 2.2 of Annex 2 of the CAC *Guidelines on Nutrition Labelling CXG 2-1985* (1985, as amended).

¹⁵⁶⁹ See further part 2.6 above.

¹⁵⁷⁰ Draft reg 51(1)(a) and (c) of R3337.

¹⁵⁷¹ See *Draft Regulations Relating to the Labelling of Foods for Special Medical Purposes*, GN R493 in GG 23340 of 26 April 2002.

¹⁵⁷² See reg 3 of R991.

¹⁵⁷³ *Codex Standard for the Labelling of and Claims for Foods for Special Medical Purposes, 1991 (Codex Stan 180-1991)* para 2.

by modification of the normal diet, by other foods for special dietary uses, or by a combination of the two.

For the sake of certainty, it is recommended that amendments to R3337 include a definition of “food for special medical purposes”. For the purposes of harmonisation, and in the absence of compelling reasons to the contrary, the adoption of the abovementioned *Codex Standard* definition would seem suitable.

4.4.8 Considering the scientific basis for the FOP warning label design and format proposed by R3337

The WHO *Guiding Principles for FOP Labelling* stress the importance of studies that test consumer perceptions of a proposed FOP labelling system in a country to ensure the suitability of the proposed system for the intended local consumer target market.¹⁵⁷⁴ The CAC *Guidelines on Nutrition Labelling*¹⁵⁷⁵ also stipulate that the format of the FOP labelling design selected should be substantiated by consumer research that is scientifically valid. As such, and before discussing the FOP warning label design that has been proposed in R3337, comments on who or what informed the proposed design for South Africa are warranted.

A study published by Bopape *et al*¹⁵⁷⁶ in 2021 was based on empirical research which explored South African consumers’ perception of FOP labels and consumers’ views on what would amount to effective FOP labels in South Africa. This study was conducted by a group of public health and nutrition experts at two universities in South Africa¹⁵⁷⁷ with the additional assistance of researchers at a university and public health institution located in the USA.¹⁵⁷⁸ The results of the study confirmed that FOP warning labels in South Africa could be a useful tool to assist consumers in identifying unhealthy food in a quick,

¹⁵⁷⁴ WHO *Guiding Principles for FOP Labelling* 17.

¹⁵⁷⁵ Para 4 of Annex 2 of the CAC *Guidelines on Nutrition Labelling*.

¹⁵⁷⁶ Bopape *et al* 2021 *PLoS ONE* 1-20.

¹⁵⁷⁷ The University of the Western Cape and the University of Limpopo.

¹⁵⁷⁸ The University of North Carolina, and Vital Strategies in New York. Principle 13 of the WHO *Guiding Principles for FOP Labelling* requires engagement with “key opinion leaders” (including food and nutrition experts) as an essential step in implementing a FOP labelling system. See WHO *Guiding Principles for FOP Labelling* 21.

plain and understandable manner.¹⁵⁷⁹ In addition, the introduction of FOP labelling could improve consumers' understanding of the potential health risks of unhealthy foodstuffs bearing such labels.¹⁵⁸⁰

Based on the outcome of the 2021 study by Bopape *et al*,¹⁵⁸¹ these scholars made recommendations on a FOP warning label design (including visibility on the pack, the colour, the positioning of the FOP warning label, the text and the symbols) which would enhance the label in a manner which would optimally draw the South African consumers' attention to the risk of consuming the relevant unhealthy foodstuff bearing the FOP warning label. From the discussion that follows, it will be noted that the FOP warning label design proposed in R3337 was predominantly informed by and based on the Bopape *et al*/study, which consisted of inputs from scholars in the fields of public health, human nutrition and dietetics. As this was the first study to investigate the perceptions and understanding of South African consumers of FOP labelling in relation to foodstuffs, reliance on that research, which includes the outcome of South African consumer testing and evidence of the optimal FOP label system performance,¹⁵⁸² would seem sensible and appropriate. Moreover, factors that add to the credibility and weight to be attached to this contribution include that:

- the FOP label design options for South Africa, which included 32 design element options,¹⁵⁸³ were identified by an expert committee consisting of specialists in the fields of nutrition, health and health promotion, economics, media and communication;¹⁵⁸⁴

¹⁵⁷⁹ Bopape *et al* 2021 *PLoS ONE* 15-17. This was also confirmed by the subsequent study by Todd *et al* 2022 *Nutrients* 2.

¹⁵⁸⁰ Bopape *et al* 2021 *PLoS ONE* 17. These results correspond with those of a previous study by Ares *et al*, in which it was noted that the FOP warning label system performs better than the nutri-score system and the health star rating system. See Ares *et al* 2018 *Food Quality and Preference* 223.

¹⁵⁸¹ Bopape *et al* 2021 *PLoS ONE* 11-12.

¹⁵⁸² Principle 8 of the WHO *Guiding Principles for FOP Labelling* requires that the design of a FOP labelling system be understandable to all subgroups within a population, and should be based on the outcome of consumer testing, evidence of system performance and stakeholder engagement. See WHO *Guiding Principles for FOP Labelling* 18.

¹⁵⁸³ Bopape *et al* 2021 *PLoS ONE* 5.

¹⁵⁸⁴ Bopape *et al* 2021 *PLoS ONE* 4-5. Also see Sulcas 2024 Daily Maverick <https://www.dailymaverick.co.za/article/2024-02-16-r3337-food-labelling-regulation-changes-delayed-as-health-department-drags-feet-in-review-process/>.

- the group of participants in the study included adults who are primarily responsible for food shopping in households across differing income groups (low- to middle- high income) and a range of literacy levels (illiterate, low literacy and literate).¹⁵⁸⁵ In addition, participants from both urban and rural areas in South Africa were included in the study, which was conducted across three provinces, namely Gauteng, the Western Cape and KwaZulu-Natal;¹⁵⁸⁶
- to accommodate all language preferences of the participant group, questionnaires forming part of the study as well as moderation discussions during the data collection phase of the study were available in five official languages;¹⁵⁸⁷ and
- an independent market research company collected the data for the study, which was analysed and coded with inputs from an independent, experienced researcher.¹⁵⁸⁸

For obvious reasons, changes in the South African consumer purchase behaviour and foodstuffs reformulations that may be brought about through the introduction of the proposed labelling and advertising restrictions could be observed only in future and well after the implementation of these measures.¹⁵⁸⁹ That being said, it is encouraging that research has been published in recent years which provides guidance on best practices for South Africa and its consumers, and that the proposed provisions in R3337 are largely along the lines of that research. This illustrates that the DOH's proposals in R3337 are backed by recent and up-to-date scientific evidence, as discussed further in this chapter.

¹⁵⁸⁵ A total of 113 people participated in the study. See Bopape *et al* 2021 *PLoS ONE* 4.

¹⁵⁸⁶ These three provinces were purposefully selected as they are representative of the socio-economic diversity as well as cultural beliefs and practices in South Africa. See Bopape *et al* 2021 *PLoS ONE* 4.

¹⁵⁸⁷ Namely English, Zulu, Tswana, Sepedi and Xhosa. See Bopape *et al* 2021 *PLoS ONE* 7.

¹⁵⁸⁸ The independent market research company that was selected for this study had not provided services to any clients in the food industry for two years prior to the research. As part of the study's research, data was collected in the form of questionnaires completed by consumer participants. Participants varied across age, gender and literacy/education levels, and originated from either rural or urban areas across three South African provinces (namely KwaZulu-Natal, Gauteng and the Western Cape). The data collected from participant responses were then coded by a member of the research team and an independent qualitative researcher, to formulate the results and conclusions researched in the study. See Bopape *et al* 2021 *PLoS ONE* 4, 7.

¹⁵⁸⁹ The WHO recommends that these studies be conducted 2-3 years post-implementation. See WHO *Guiding Principles for FOP Labelling* 28, 41.

4.4.9 How should the FOP warning labelling appear on the product label of qualifying products in terms of R3337?

After it has been established that FOP warning labelling is required, Draft Annexure 10 read with draft regulation 51(2) of R3337 sets out the specifics of which icons to use, including requirements regarding the size, placement and prominence of the FOP warning label.

As a first and obvious requirement, the relevant FOP logo(s) must be displayed front-of-pack, meaning that they should appear on the main panel of the container label or product packaging.¹⁵⁹⁰ This requirement serves to ensure that the label is consumer-friendly in that consumers need not search for information regarding unhealthy nutrients.¹⁵⁹¹ As to the placement on the main panel, the FOP warning label should appear towards the top right-hand corner of the label,¹⁵⁹² as that positioning is deemed to be the most visible and attractive part of a the main panel.¹⁵⁹³ Lettering should be in the bold presentation of the font style Arial Black.¹⁵⁹⁴

Turning to colour requirements, the FOP warning label shall consist of a white holding strap with a black border. Lettering should be displayed in black against a white background.¹⁵⁹⁵ Studies have shown that the use of black and white FOP warning labels is the preferred option in South Africa, as that plain colour combination will be the most eye-catching, legible and distinguishable from other elements on product packaging, especially considering that colourful container backgrounds are common in foodstuffs

¹⁵⁹⁰ Draft regs 51(2)(a) and 51(2)(e)(iii) of R3337.

¹⁵⁹¹ Bopape *et al* 2021 *PLoS ONE* 11.

¹⁵⁹² Draft reg 51(2)(e)(iii) of R3337; para 3(a) and (d) of Draft Annexure 10 to R3337.

¹⁵⁹³ Bopape *et al* 2021 *PLoS ONE* 11.

¹⁵⁹⁴ Para 5(a) of Draft Annexure 10 of R3337.

¹⁵⁹⁵ Paras 1(d) and 4 of Draft Annexure 10 of R3337. Depending on the shape of the container (e.g., rectangular, cylindrical, etc.) formulas to calculate the size of the principal display panel, i.e., the FOP surface area of a product label, are set out in draft reg 51(2)(c) and para 3(b) of Draft Annexure 10 of R3337. If the FOP surface area of a foodstuff package is less than 40 cm², each unhealthy nutrient logo should be at least 1.5 cm in width. For a FOP surface area of between 40-60cm², the individual logo width should be 1.8 cm. For a FOP surface area of between 60-100cm², the individual logo width should be 2 cm. For a FOP surface area of between 100-200cm², the individual logo width should be 2.5 cm. For a FOP surface area of between 200-300cm², the individual logo width should be 3 cm. For a FOP surface area of more than 300 cm², the individual logo width should be at least 3.5 cm. See draft reg 51(2)(d) of R3337.

packaging.¹⁵⁹⁶ Another advantage of using black and white FOP warning labelling is that printing costs for that colour combination are generally less than those for colour labelling.¹⁵⁹⁷

When considering the elements to be included in the FOP warning label viewed from left to right on the container label, they should start with the so-called “warning device” on the far-left side, consisting of the word “WARNING” in vertical uppercase text followed by a logo of an exclamation mark appearing in a triangle,¹⁵⁹⁸ referred to as the “anchor logo”,¹⁵⁹⁹ as shown in Figure 4-7 below:



Figure 4-7: Warning device proposed in R3337¹⁶⁰⁰

The combination of the word “WARNING” and the exclamation logo will signal danger and grab the attention of the consumer.¹⁶⁰¹

The warning device is followed by the relevant unhealthy nutrient icon(s)¹⁶⁰² as set out in the table below:

¹⁵⁹⁶ Bopape *et al* 2021 *PLoS ONE* 11, 14; Todd *et al* 2022 *Nutrients* 11, 16.

¹⁵⁹⁷ Todd *et al* 2022 *Nutrients* 16.

¹⁵⁹⁸ In the South African context, consumers preferred the triangular shape of the logos included in the FOP warning label. See Bopape *et al* 2021 *PLoS ONE* 11, 14. The WHO supports the adoption of a FOPL icon which consumers are familiar with. See WHO *Guiding Principles for FOP Labelling* 18.

¹⁵⁹⁹ Draft reg 51(2)(e)(vi) of R3337; paras 2(b) and 4(a) of Draft Annexure 10 to R3337.

¹⁶⁰⁰ See paras 1(c) and 1(d) of Draft Annexure 10 of R3337.

¹⁶⁰¹ See Bopape *et al* 2021 *PLoS ONE* 12, 14.

¹⁶⁰² Draft reg 51(2)(e)(vi) of R3337.

1.	Foodstuffs exceeding nutrient cut-off value for total sugar	 1603
2.	Foodstuffs exceeding nutrient cut-off value for total saturated fat	 1604
3.	Foodstuffs exceeding nutrient cut-off value for total sodium	 1605
4.	Foodstuffs that contain artificial sweetener (in any amount)	 1606

The FOP warning label must include logos for each unhealthy nutrient that exceeds the cut-off values set out in part 4.4.5.3 above.¹⁶⁰⁷ In line with studies performed in South

¹⁶⁰³ Para 2(a)(i) read with fig 2.1 of Draft Annexure 10 of R3337.

¹⁶⁰⁴ Para 2(a)(ii) read with fig 2.2 of Draft Annexure 10 of R3337.

¹⁶⁰⁵ Para 2(a)(iii) read with fig 2.3 of Draft Annexure 10 of R3337.

¹⁶⁰⁶ Para 2(a)(iv) read with fig 2.4 of Draft Annexure 10 of R3337.

¹⁶⁰⁷ Draft reg 51(2)(e)(ii) of R3337.

America,¹⁶⁰⁸ the study conducted by Bopape *et al*¹⁶⁰⁹ revealed that the use of understandable icons in addition to plain wording would ensure that the FOP label is easy to understand for the entire spectrum of purchasing consumers in South Africa. This includes consumers with limited literacy skills and children who may be independent purchasers.¹⁶¹⁰ The authors point out:

[e]vidence shows that icons that summarize [sic] nutritional information are beneficial to less literate groups, which is particularly important for South Africa with low literacy levels.¹⁶¹¹

Todd *et al*¹⁶¹² also support the use of simplified FOP labelling displayed in black and white, including icons. Van Kleef and Dagevos¹⁶¹³ have also pointed out that:

[p]ictorial elements on a package are recognized better than words, particularly by low-literate consumers ... This resembles earlier findings from research on health claims that showed that short claims combining text and graphics using colors are most effective.

The selection of the triangle device for the South African market is based on the fact that consumers are used to that shape as a warning sign.¹⁶¹⁴ In this regard, the study conducted by Bopape *et al*¹⁶¹⁵ revealed that:

[i]n this study South African consumers perceived the black triangle in the warning label as depicting danger. A triangle is commonly used in construction sites, workplaces and road signs in South Africa to signal danger, so it is not surprising that consumers in our study in all sociodemographic groups favored [sic] it over the octagon shape [adopted in other countries].¹⁶¹⁶

If more than one unhealthy nutrient logo is required to be included in the FOP warning label, regulation 51(2)(e)(vi) provides:

the order of the logos shall use the exclamation mark as the first, anchoring logo and be followed by sugar, saturated fat, sodium and then where applicable, artificial sweeteners.

¹⁶⁰⁸ Ares *et al* 2018 *Food Health and Preference* 224.

¹⁶⁰⁹ Bopape *et al* 2021 *PLoS ONE* 14.

¹⁶¹⁰ Bopape *et al* 2021 *PLoS ONE* 3, 12; Arrù *et al* 2017 *Appetite* 140, 145. For a discussion of the relevant public, see parts 1.2.4.3 and 3.3.2.

¹⁶¹¹ Bopape *et al* 2021 *PLoS ONE* 15.

¹⁶¹² Todd *et al* 2022 *Nutrients* 10.

¹⁶¹³ Van Kleef and Dagevos 2015 *Critical Reviews in Food Science and Nutrition* 294.

¹⁶¹⁴ Bopape *et al* 2021 *PLoS ONE* 12.

¹⁶¹⁵ Bopape *et al* 2021 *PLoS ONE* 14.

¹⁶¹⁶ Brazil has also adopted the triangular shape, whilst an octagonal shape was selected in Chile and Israel based on consumer preferences in those countries. See Bopape *et al* 2021 *PLoS ONE* 14.

In terms of that provision, therefore, the order in which the unhealthy nutrient logos should appear after the anchoring logo and from left to right are: sugar > saturated fat > sodium > artificial sweeteners. That being said, Draft Annexure 10 requires only that the anchor device appear on the far-left side of the holding strap, and states that “[t]he order of additional logos is not prescribed”.¹⁶¹⁷ On this basis it seems that draft Annexure 10 is not aligned with draft regulation 51 in the matter of the order in which the unhealthy nutrient logos should appear on the FOP warning label. This is illustrated further by the FOP warning label example appearing in draft Annexure 10 shown in Figure 4-8 below, where the “high in salt” logo follows the “high in sugar” logo, seemingly in conflict with the requirements in draft regulation 51(2)(e)(vi):



Figure 4-8: Example of FOP warning label in Draft Annexure 10¹⁶¹⁸

In order to comply with the order of unhealthy nutrient logos as prescribed in draft regulation 51(2)(e)(vi), the “high in sugar” logo would have to be placed next to the anchor logo, followed by the “high in salt” logo on the right side of the holding strap as illustrated in Figure 4-9 below:



Figure 4-9: Illustration of a FOP warning label which complies with the logo order in draft regulation 52(2)(e)(vi)

¹⁶¹⁷ Para 4(a) of Draft Annexure 10 of R3337.

¹⁶¹⁸ See para 4(a) of Draft Annexure 10 of R3337.

To ensure legal certainty, the apparent discrepancy between draft regulation 52(2)(e)(vi) and paragraph 4(a) of draft Annexure 10 must be addressed. If left unaltered, challenges are likely to result relating to legal interpretation and the consequential regulatory compliance by foodstuffs manufacturers.

In all instances where the packaging allows, the holding strap should be displayed horizontally with the logos next to one another as illustrated in Figure 4-9 above.¹⁶¹⁹ Alternative configurations will be permissible only if the packaging does not allow a horizontal display on the FOP warning label.¹⁶²⁰ Examples of vertical or cluster configurations which may be used if a horizontal FOP warning label is not possible appear in Figures 4-10 and 4-11, respectively:



*Fig 4-10: Example of a vertical FOP label*¹⁶²¹ *Fig 4-11: Example of a clustered configuration FOP warning label*¹⁶²²

The total surface area that the FOP warning label should cover on the main panel will be dependent on the number of unhealthy nutrient logos required, ranging between 10-25%

¹⁶¹⁹ Para 4(b) of Draft Annexure 10 of R3337.

¹⁶²⁰ Para 4(b) of Draft Annexure 10 of R3337. See figures 5.1-5.5 in para 4(b) for the exact proportions in which each logo should be displayed.

¹⁶²¹ Para 4(b) read with fig 4.1 of Draft Annexure 10 of R3337.

¹⁶²² Para 4(b) read with fig 4.2 of Draft Annexure 10 of R3337. Para 4(b) contains a typographical error, as figure 4.1 is inadvertently referred to twice, as opposed to referring to figures 4.1 and 4.2 that follow the text of the provision. This should be corrected in the revised R3337. The order in which the respective unhealthy nutrient logos appear may also not align with draft reg 51(2)(e)(vi). This issue should also be considered as part of the updates to R3337 in due course.

of the total surface area of the FOP.¹⁶²³ The size of the FOP warning label increases with the number of unhealthy nutrient logos that are required to be displayed on the pack. If one logo is required, the warning label size should take up at least 10% of the FOP. With two unhealthy nutrient logos, the warning label size should take up at least 15% of the FOP, and 20% in the instance of three unhealthy nutrient logos. If all four unhealthy nutrient logos are required to be displayed on the FOP, the warning label must cover 25% or more of the total FOP surface area.¹⁶²⁴ These specifications are, however, qualified by the requirement that at a minimum the height of the FOP warning label should be at least 1.5 cm, irrespective of the size of the product packaging.¹⁶²⁵

The relevant FOP warning label should be prominently and clearly visible to the consumer at the point of sale or product selection.¹⁶²⁶ The FOP warning label should as far as is practically possible be integrated into the packaging of the product. However, the use of stickers will be permitted where the container size or existing label of the product cannot accommodate the size of the FOP warning label, provided that the label size, placement and appearance comply with the prescribed requirements.¹⁶²⁷ This means that a sticker may be applied over existing packaging if required.

4.4.10 Considering the advantages of implementing mandatory FOP warning labels in South Africa

In line with the purpose of FOP warning labels discussed in part 4.4.3 above, the adoption of the use of FOP warning label has several advantages for consumers. First of all, FOP

¹⁶²³ Depending on the shape of the container (e.g., rectangular, cylindrical, etc.) formulas to calculate the size of the principal display panel, i.e., the FOP surface area of a product label, are set out in draft reg 51(2)(c) and para 3(b) of Draft Annexure 10 of R3337. If the FOP surface area of a foodstuff package is less than 40 cm², each unhealthy nutrient logo should be at least 1.5 cm in width. For a FOP surface area of between 40-60cm², the individual logo width should be 1.8 cm. For a FOP surface area of between 60-100cm², the individual logo width should be 2 cm. For a FOP surface area of between 100-200cm², the individual logo width should be 2.5 cm. For a FOP surface area of between 200-300cm², the individual logo width should be 3 cm. For a FOP surface area of more than 300 cm², the individual logo width should be at least 3.5 cm. See draft reg 51(2)(d) of R3337.

¹⁶²⁴ Para 3(e) of Draft Annexure 10 of R3337.

¹⁶²⁵ Para 3(c) of Draft Annexure 10 of R3337. Studies have shown that a small font size and the consequential illegibility of the elements on foodstuffs packaging is concerning to consumers. See Todd *et al* 2022 *Nutrients* 10, 16.

¹⁶²⁶ It may not be removed, obscured, distorted or damaged in any way. See draft reg 51(2)(e)(ii) of R3337; paras 1(b) and 3(d) of Draft Annexure 10.

¹⁶²⁷ Draft reg 51(2)(e)(v); para 1(b) of Draft Annexure 10 of R3337.

warning labelling empowers consumers with information regarding the unhealthy nutrient content of a specific foodstuff.¹⁶²⁸ In this regard, Bopape *et al*¹⁶²⁹ note:

A simple, easily understandable food labeling [sic] system could assist consumers in identifying unhealthy food options amid the wide variety of packaged products available in markets and steer consumers away from them. Simplified FOPL has a role to play in addressing these health concerns by empowering consumers with information about products' nutrient content. Front-of-package labeling [sic] (FOPL) is a practical tool that empowers consumers to make informed food choices at the points of purchase and consumption.

Whilst the product label would have to be scrutinised to ascertain all of the ingredients and nutrients in the end product,¹⁶³⁰ the display of a FOP warning label would make it easy for the consumer to identify at first glance foods that are high in one or more unhealthy nutrient, or which contain artificial sweeteners. Allowing consumers to easily identify foodstuffs which are less healthy through the adoption of FOP warning labelling in relation to unhealthy foodstuffs¹⁶³¹ would effectively provided consumers with access to information allowing them to make informed food choices. Moreover, FOP warning labelling would give consumers a voice by providing them with an opportunity to actively participate in decisions regarding their health and the health of their dependents. In this regard, Todd *et al*¹⁶³² point out:

[i]n the long term, improved food choices (made as a result of better understanding the nutritional content of packaged food, including through clearer and simpler food labels) could contribute to the reduction of the NCD burden in South Africa and thus add value to consumers and the government alike.

Barring limited exceptions,¹⁶³³ the FOP warning label system in R3337 will apply to all prepacked foodstuffs across the board. This means that all foods and beverages that exceed the nutrient cut-off values, or which contain artificial sweeteners, will be required

¹⁶²⁸ Bopape *et al* 2021 *PLoS ONE* 2.

¹⁶²⁹ Bopape *et al* 2021 *PLoS ONE* 2.

¹⁶³⁰ In this regard the ingredients list and nutritional information table which usually appear on a side panel or on the back of the product packaging should be consulted. These labelling requirements will disclose the presence of other nutrients such as vitamins, minerals and protein. See part 2.4.6 above for a discussion of the nutritional information on food labels.

¹⁶³¹ Bopape *et al* 2021 *PLoS ONE* 3.

¹⁶³² Todd *et al* 2022 *Nutrients* 15.

¹⁶³³ See the discussion in part 4.4.7.

to have FOP warning labels. This approach aligns with the recommendations of the CAC¹⁶³⁴ as well as the WHO *Guiding Principles for FOP Labelling*, which provide:

[i]mplementation of the developed FOPL system should be widespread and should apply across the majority of packaged, manufactured or processed foods and beverages in the retail food sector required to carry a nutrient declaration.¹⁶³⁵

An advantage of a spectrum-wide approach is that consumers would then be enabled to make comparisons between:

- foods within a specific category (e.g., comparing a pre-sliced white bread brand with another pre-sliced white bread brand);
- foods within a broader food type (e.g., comparing pre-sliced white bread with pre-sliced wholewheat bread); and
- different food categories (e.g., comparing pre-sliced white bread with PRO-VITA crackers).¹⁶³⁶

Scholars support the adoption of an “across-the-board” approach.¹⁶³⁷ In addition to facilitating comparisons both within and across foodstuffs categories, a FOP warning label system covering the majority of pre-packed products would assist in familiarising consumers with this system which in turn would improve consumers’ understanding and use of the information conveyed by way of the FOP warning label.¹⁶³⁸ The introduction of uniform and consistent requirements, as far as the design and placement of FOP warning labels are concerned, is supported, as this would ensure that consumers would easily know where to look on the label to find that information.¹⁶³⁹ If different formats of FOP

¹⁶³⁴ See para 4 of Annex 2 of the CAC *Guidelines on Nutrition Labelling*, which promotes the broad availability of FOP labelling.

¹⁶³⁵ WHO *Guiding Principles for FOP Labelling* 20, 21. Also see Schmitt, Wagner and Kirch 2007 *Journal of Public Health* 61.

¹⁶³⁶ This advantage aligns with principle 10 of the WHO *Guiding Principles for FOP Labelling*. See WHO *Guiding Principles for FOP Labelling* 18.

¹⁶³⁷ Frank *et al* 2021 *Nutrients* 13-14; Van Kleef and Dagevos 2015 *Critical Reviews in Food Science and Nutrition* 294; Schmitt, Wagner and Kirch 2007 *Journal of Public Health* 61.

¹⁶³⁸ WHO *Guiding Principles for FOP Labelling* 29.

¹⁶³⁹ Van Kleef and Dagevos 2015 *Critical Reviews in Food Science and Nutrition* 294. Also see Schmitt, Wagner and Kirch 2007 *Journal of Public Health* 61.

labelling were to be adopted, this might confuse consumers and ultimately pose a challenge for consumers in identifying healthier options quickly and simply.¹⁶⁴⁰

Based on the outcome of the Bopape *et al*/2021 study, it would appear that the proposed FOP warning label in R3337 would assist in overcoming barriers relating to the “readability” and “comprehensibility” of food labels amongst consumers in South Africa.¹⁶⁴¹ This aspect also ties in directly with the promotion of consumers’ right to have access to information and, subsequently, the potential to improve overall public health and well-being through the use of FOP warning labels.¹⁶⁴²

From an equality point of view, FOP warning labels would provide “equality in access to information relevant to health”¹⁶⁴³ as all consumers, irrespective of income or literacy level, would have access to that simple and comprehensible information. This is supported by the proposal in R3337 that foodstuffs requiring FOP warning labels will not be permitted to contain any claims relating to nutrition, health or energy.¹⁶⁴⁴

Another advantage of introducing mandatory and uniform FOP labelling would be that a sense of consistency and reliability would be created in the mind of the consumer, given that all products that qualify for FOP warning labels would, by law, be required to contain them.¹⁶⁴⁵

It comes as no surprise that the study conducted by Bopape *et al*¹⁶⁴⁶ reveals that consumers in South Africa generally felt positive about FOP warning labels for unhealthy

¹⁶⁴⁰ This issue was reported in the USA, where retailers adopt different forms of FOP labelling on a voluntary basis. See Newman, Howett and Burton 2014 *Journal of Retailing* 13-14.

¹⁶⁴¹ These concerns with understanding labelling are highlighted in Todd *et al* 2022 *Nutrients* 2. Also see WHO *Guiding Principles for FOP Labelling* 18.

¹⁶⁴² UN 2020 <https://www.ohchr.org/en/statements/2020/07/statement-un-special-rapporteur-right-health-adoption-front-package-warning>.

¹⁶⁴³ UN 2020 <https://www.ohchr.org/en/statements/2020/07/statement-un-special-rapporteur-right-health-adoption-front-package-warning>.

¹⁶⁴⁴ Draft reg 51(5)(d) of R3337.

¹⁶⁴⁵ It has been noted that voluntary FOP labelling may have a “slow uptake”, meaning that piecemeal implementation occurs over a lengthy period. See Kanter, Vanderlee and Vandevijvere 2018 *Public Health Nutrition* 1406.

¹⁶⁴⁶ Bopape *et al* 2021 *PLoS ONE* 7, 14.

foodstuffs. Perceived advantages that emanated from the study include that introducing mandatory FOP warning labelling will:

- act as a tool that draws attention away from the palatability of the product by highlighting and warning consumers of a potential negative impact on their health due to an excessive consumption of unhealthy foodstuffs. In turn this may ultimately result in a behavioural shift in certain consumers, in that they may purchase and consume that product less often;¹⁶⁴⁷
- provide useful nutritional information in a simplistic and understandable manner at the point of product selection, by disclosing which unhealthy nutrients are present in the product in quantities that are higher than recommended;¹⁶⁴⁸
- educate members of the public and assist them to make informed food choices which ultimately would have an impact on their health;¹⁶⁴⁹
- be easily understandable and accessible to all members of the public, irrespective of their income, level of education or social status, especially with the inclusion of icons that will be understandable to children and people with limited literacy skills; and¹⁶⁵⁰
- provide concise and straight-to-the-point information which would make it easier and quicker for consumers to understand the nutritional qualities of the product without the need to scrutinise the often complex nutritional information table and other elements that do not appear on the front-of-product label.¹⁶⁵¹

FOP labelling has also been found to be of specific advantage to children, as this would assist parents and caregivers, as well as the children themselves,¹⁶⁵² in identifying products that may be harmful to the children's health.¹⁶⁵³ A study conducted in the Limpopo province revealed that FOP warning labels assisted parents in identifying foods

¹⁶⁴⁷ Considering the varying consumer range, certain consumers would be more cautious when it comes to FOP warning labelling. Whilst FOP warning labelling would sway certain consumers away from the regular purchase and consumption of unhealthy foodstuffs, the purchasing behaviour of other consumers may not be impacted by the inclusion of FOP warning labelling at all. See Bopape *et al* 2021 *PLoS ONE* 8, 10, 15. Also see Hutton and Gresse 2020 *Journal of Consumer Sciences* 135.

¹⁶⁴⁸ Bopape *et al* 2021 *PLoS ONE* 9.

¹⁶⁴⁹ Bopape *et al* 2021 *PLoS ONE* 9.

¹⁶⁵⁰ Bopape *et al* 2021 *PLoS ONE* 9; Arrù *et al* 2017 *Appetite* 140.

¹⁶⁵¹ Bopape *et al* 2021 *PLoS ONE* 10, 14.

¹⁶⁵² Bopape *et al* 2021 *PLoS ONE* 3.

¹⁶⁵³ Bopape *et al* 2021 *PLoS ONE* 9-10.

that contained high levels of unhealthy nutrients.¹⁶⁵⁴ On this basis some parents would guide their children towards healthier food purchases not bearing FOP labels warning of unhealthy foodstuffs.¹⁶⁵⁵ While several factors influence parental food purchases for children,¹⁶⁵⁶ this study suggests that FOP warning labels would shift purchases towards healthier options at least amongst some parents.¹⁶⁵⁷ If there are positive behavioural shifts as far as food purchases are concerned, this will result in less unhealthy food being available in consumers' homes and in school lunchboxes.¹⁶⁵⁸ The consequential decrease in unhealthy foodstuffs consumption would assist in reducing the prevalence of obesity and ultimately assist in the prevention and control of NCDs.¹⁶⁵⁹

Against this background, it is clear that the use of FOP warning labels in relation to unhealthy foodstuffs would "foster healthier lives" amongst the general public, including children.¹⁶⁶⁰ This measure, in combination with the additional advertising and labelling restrictions in respect of unhealthy foodstuffs that are discussed further below in this chapter, would therefore help to protect citizens' right to health.¹⁶⁶¹ In this regard the former UN Special Rapporteur on the Right to Health¹⁶⁶² has noted:

[t]he adoption and implementation of front-of-package warning labelling is a rights-compliant response... By delivering clear and complete information in a simple way, it encourages consumers to make informed decisions about their diets, without making additional efforts or requiring qualified knowledge. This allows individuals to decide what they want to eat according to their preferences, tastes and health status. At the same time, front-of-package warning labelling promotes healthy decisions, discourages the consumption of food products that can have a detrimental impact on health, and counteracts the effects of living in an obesogenic environment.

¹⁶⁵⁴ Bopape, Taillie and Swart 2022 *Front in Public Health* 8.

¹⁶⁵⁵ Bopape, Taillie and Swart 2022 *Front in Public Health* 1.

¹⁶⁵⁶ Including affordability, taste preferences, children's requests and in some instances lack of food nutrition knowledge. See Bopape, Taillie and Swart 2022 *Front in Public Health* 1.

¹⁶⁵⁷ Bopape, Taillie and Swart 2022 *Front in Public Health* 8.

¹⁶⁵⁸ These behavioural shifts have been recorded in Chile following the implementation of unhealthy foodstuffs labelling and advertising restrictions. See Correa *et al* 2019 *International Journal of Behavioural Nutrition and Physical Activity* 8-9.

¹⁶⁵⁹ Bopape, Taillie and Swart 2022 *Front in Public Health* 8.

¹⁶⁶⁰ UN 2020 <https://www.ohchr.org/en/statements/2020/07/statement-un-special-rapporteur-right-health-adoption-front-package-warning>.

¹⁶⁶¹ These measures may also support the right to adequate food. See UN 2020 <https://www.ohchr.org/en/statements/2020/07/statement-un-special-rapporteur-right-health-adoption-front-package-warning>.

¹⁶⁶² UN 2020 <https://www.ohchr.org/en/statements/2020/07/statement-un-special-rapporteur-right-health-adoption-front-package-warning>.

Foodstuffs manufacturers and retailers that produce or sell healthier foods that would not require FOP warning labels¹⁶⁶³ might see increased purchases of those goods categories and, ultimately, enjoy a competitive advantage over their competitors.¹⁶⁶⁴ Newman, Howett and Burton¹⁶⁶⁵ point out that the inclusion of FOP labelling might “positively influence shoppers’ perceptions of retailer concern for their well-being” which in turn could lead to an increased intention by consumers to support the relevant foodstuffs retailer.

4.4.11 Potential challenges posed by the implementation of FOP warning labels

Despite the multiplicity of the apparent advantages of FOP warning labelling on unhealthy foodstuffs, it would be naïve to think that this would not generate challenges. As with any legislative reform, the introduction of mandatory FOP warning labelling would undoubtedly have its limitations and potential implementation challenges.¹⁶⁶⁶

As a first observation, FOP warning labels would highlight only products with an excessive content of unhealthy nutrients. As such, this labelling system would not provide any specific guidance on the overall “healthfulness” of foodstuffs that fall within the healthier food product category, as such products would not generally contain FOP warning labels.¹⁶⁶⁷ Positive nutrients would also not be highlighted on FOP warning labels.¹⁶⁶⁸ That being said, one should remember that the purpose of FOP warning labelling would not be to highlight the “healthiness” of products that are deemed to be healthy dietary choices. Rather, the main purpose of FOP warning labelling would be to alert or warn the consumer that the product bearing the FOP warning label contains a high content of one or more unhealthy nutrients or artificial sweeteners.¹⁶⁶⁹ In this regard, Van Kleef and Dagevos¹⁶⁷⁰ note that “[d]ividing foods visually into good ones and bad ones seems to be

¹⁶⁶³ See the examples given in part 3.5.1 of the private labels launched by Checkers and Pick 'n Pay.

¹⁶⁶⁴ Newman, Howett and Burton 2014 *Journal of Retailing* 23.

¹⁶⁶⁵ Newman, Howett and Burton 2014 *Journal of Retailing* 23.

¹⁶⁶⁶ Todd *et al* 2022 *Nutrients* 17-18.

¹⁶⁶⁷ Ares *et al* 2018 *Food Quality and Preference* 222.

¹⁶⁶⁸ Other FOP labelling systems that do highlight positive nutrients include the health star rating system, which is discussed in part 4.4.4.4 above.

¹⁶⁶⁹ Ares *et al* 2018 *Food Quality and Preference* 223. Also see part 4.4.10 above.

¹⁶⁷⁰ Van Kleef and Dagevos 2015 *Critical Reviews in Food Science and Nutrition* 299.

the best option understood by consumers". These authors also point out another risk of including positive-framed nutrient labels, noting that they "may act as a kind of 'good for you' messages that encourage overconsumption" of products bearing such positive attributes FOP.¹⁶⁷¹ Frank *et al*¹⁶⁷² also note that the inclusion of positive nutrients in a product which is otherwise regarded as unhealthy does not automatically make the food product less harmful to health. The requirement to include positive nutrients on a FOP label might also cause complications during implementation.¹⁶⁷³

There is uncertainty as to how South African consumers would perceive foodstuffs that do not bear FOP warning labelling, and if consumers would automatically deem such products healthy.¹⁶⁷⁴ If lessons from Chile are anything to go by, this might very well be the case. A study conducted by Barahona, Otero and Otero¹⁶⁷⁵ regarding breakfast cereals in Chile revealed that, post the implementation of the Chilean system, consumers replaced labelled products with unlabelled products. This illustrates that the introduction of the FOP warning labelling in that country caused a change in consumer behaviour towards healthier food options that did not contain FOP warning labels, at least in the context of breakfast cereals.

As FOP warning labelling will essentially apply across the board to all qualifying prepackaged foodstuffs, another issue that should be kept in mind in implementing effective FOP warning labelling is the need to avoid the so-called "desensitisation" effect.¹⁶⁷⁶ When people become used to common nutritional elements on foodstuffs packaging, there are concerns that they may start to ignore those features over time.¹⁶⁷⁷ Arrù *et al*¹⁶⁷⁸ therefore raise the possible concern that, if the use of FOP labelling is too

¹⁶⁷¹ Van Kleef and Dagevos 2015 *Critical Reviews in Food Science and Nutrition* 300.

¹⁶⁷² Frank *et al* 2021 *Nutrients* 16.

¹⁶⁷³ Frank *et al* 2021 *Nutrients* 6.

¹⁶⁷⁴ Todd *et al* 2022 *Nutrients* 17.

¹⁶⁷⁵ Barahona, Otero and Otero 2023 *Econometrica* 840. The study considered purchases at Walmart, the largest food retailer in Chile, during the period March 2015 to March 2018. Breakfast cereal was selected as the focus product, as this was identified as a food product where consumers generally have misconceptions regarding healthiness. See Barahona, Otero and Otero 2023 *Econometrica* 840, 844. As discussed in part 3.5.2, this food category is also problematic in South Africa, as breakfast cereals are deemed to be ultra-processed foods due to their containing hidden sugars.

¹⁶⁷⁶ Arrù *et al* 2017 *Appetite* 144.

¹⁶⁷⁷ Van Kleef and Dagevos 2015 *Critical Reviews in Food Science and Nutrition* 299.

¹⁶⁷⁸ Arrù *et al* 2017 *Appetite* 139.

widespread, repeated exposure to FOP warning labels may reduce the effectiveness thereof. This development has been reported in relation to health warnings that appear FOP on tobacco products.¹⁶⁷⁹ That being said, whether or not this risk will materialise in the long run requires additional research over an extended period following the introduction of the proposed measures.¹⁶⁸⁰ In this regard Correa *et al*¹⁶⁸¹ note:

[i]n some cases, there has been resistance, skepticism [sic] and criticisms about possible oversaturation, but the fact that people think and discuss ... these issues mean[s] that the discourses about health and food are pervading different sectors of society and may have long-term effects through changes in social norms.

The effectiveness of FOP warning labels will be impacted when ignored by certain members of the public.¹⁶⁸² It has also been noted that certain consumers may experience negative reactions to the use of FOP labelling due to their “feelings of coercion or being pressured to act in a certain way”.¹⁶⁸³ However, this may just be what is required to change the food environment in South Africa. Bopape *et al*¹⁶⁸⁴ point out that FOP warning labels that may create a feeling of discomfort, worry or even fear in consumers act as a method of reducing the intention to purchase such goods.¹⁶⁸⁵ Whilst it is very possible that a certain group of consumers will simply ignore FOP warning labels or perceive the labelling elements as “an unwelcome attempt” by the government to control their behaviour as far as it relates to food choice,¹⁶⁸⁶ this may very well benefit a significant part of the population, including children and persons with limited literacy skills.

It should also be noted that FOP warning labelling will not be introduced in isolation. It has been pointed out that FOP labelling cannot replace the need for broader nutrition

¹⁶⁷⁹ A study comparing consumer attitudes towards plain packaging on tobacco products in London and Singapore (where the Singapore participants were exposed to plain packaging for twice as long in duration) revealed that participants in Singapore “displayed less ‘disgust’ and decreased processing of the health messages” in that shock-value FOP warning label. See Ratneswaran *et al* 2016 *BMJ Open* 4.

¹⁶⁸⁰ Correa *et al* 2019 *International Journal of Behavioural Nutrition and Physical Activity* 8.

¹⁶⁸¹ Correa *et al* 2019 *International Journal of Behavioural Nutrition and Physical Activity* 8.

¹⁶⁸² Todd *et al* 2022 *Nutrients* 17.

¹⁶⁸³ Hutton and Gresse 2020 *Journal of Consumer Sciences* 135. Also see Correa *et al* 2019 *International Journal of Behavioural Nutrition and Physical Activity* 8.

¹⁶⁸⁴ Bopape *et al* 2021 *PLoS ONE* 2, 3.

¹⁶⁸⁵ Also see Hutton and Gresse 2020 *Journal of Consumer Sciences* 135.

¹⁶⁸⁶ Van Kleef and Dagevos 2015 *Critical Reviews in Food Science and Nutrition* 299.

education.¹⁶⁸⁷ Ancillary educational initiatives aimed at improving consumer diet and health should focus on encouraging the consumption of foodstuffs that are minimally processed and that do not contain any added sugar or non-sugar sweeteners.¹⁶⁸⁸ Consumers may not be aware of the potential health implications of the long-term habitual consumption of artificial sweeteners.¹⁶⁸⁹ In addition, consumers are not necessarily aware of the actual names of artificial sweeteners, which means that they will not be able to identify those substances on an ingredient list even if the presence of artificial sweeteners is disclosed on a FOP warning label.¹⁶⁹⁰ Broader public nutrition education should address this issue. Consumers should also be informed that, to cater for sweet tooth preferences, foodstuffs that have a naturally occurring sweetness such as fruits are the healthier food option and should be the preferred choice.¹⁶⁹¹

Due to the generic nature of the icons and images used, FOP warning labelling may not cover each consumer's individual preferences.¹⁶⁹² In this regard Ferrante¹⁶⁹³ points out that, irrespective of individual consumer preferences, labelling requirements that foster responsible foodstuffs consumption should apply. In addition, not all scholars are equally optimistic about the actual impact that this warning system would have on the purchasing habits of consumers (i.e., does FOP warning labelling result in the reduced consumption of foods bearing those labels?)¹⁶⁹⁴ In anticipation of the actual implementation and subsequent evaluation of the outcomes, lessons from Chile may serve as possible guidance and are discussed where relevant in the remainder of this chapter.

¹⁶⁸⁷ Todd *et al* 2022 *Nutrients* 12, 16.

¹⁶⁸⁸ Swithers 2015 *Appetite* 89. For a discussion of the NOVA classification of foodstuffs based on the level of processing, see part 1.8.2 above.

¹⁶⁸⁹ See the discussion in part 4.4.6 above.

¹⁶⁹⁰ A recent study has shown that consumers in South Africa are not familiar with the names of all the artificial sweeteners often found in foodstuffs sold in this country or the fact that many foods that they consume contain artificial sweeteners. See Naicker, Naicker and Singh 2024 *South African Journal of Clinical Nutrition* 35.

¹⁶⁹¹ WHO *Use of Non-Sugar Sweeteners: WHO Guideline* xii.

¹⁶⁹² The habits of consumers also have a role to play in an appropriate diet, as athletes would require a different diet than sedentary persons. A suggestion in this regard is the use of technology (for example scannable codes on-pack) to assist consumers in acquiring additional information on products that do not appear in the FOP warning label, such as allergens. See Ferrante 2021 *Rivista di Diritto Alimentare* 89; Todd *et al* 2022 *Nutrients* 11-12, 17-18.

¹⁶⁹³ Ferrante 2021 *Rivista di Diritto Alimentare* 89.

¹⁶⁹⁴ Todd *et al* 2022 *Nutrients* 17.

4.5 *The proposed ban on unhealthy foodstuffs advertising to children*

In terms of R146 there is currently no specific ban on the advertising of any category of foodstuffs, including those that may be unhealthy. However, as discussed in part 2.6.3, R991 prohibits any promotional practice or device advertising in respect of certain foodstuffs for infants and young children. This prohibition covers *inter alia* advertisements in written publications, broadcasts in television, radio or film, electronic media and email advertisements, exhibitions and outdoor advertising such as large billboards and electronic signs. Notably, the advertising restrictions in R991 apply across the board to the relevant designated products, irrespective of the age of the consumer to whom the advertising is directed or who may be exposed to it. The fact that parents or caregivers are usually those who make the selection of preferred foodstuffs for their infants and young children would seem an obvious reason for adopting this approach. The dietary habits of children are shaped by the foods that they are given to eat by their parents.¹⁶⁹⁵ Of course, food purchases by parents are often impacted on by the so-called “pester power” of children, meaning that parents purchase specific foods that they would otherwise not have bought following repeated requests from their children.¹⁶⁹⁶ As such, children can actively change parents’ attitudes as far as it relates to food product selection.¹⁶⁹⁷ On the flip side of the coin, due to their ability to influence their parents’ actions, children can also be key drivers of household dietary shifts towards healthier food options.¹⁶⁹⁸ It has been noted that children’s influence over what their parents purchase increases with age.¹⁶⁹⁹ This suggests that older children have stronger opinions and attitudes about what food they would like to eat.

Turning to R3337, it essentially proposes a ban on the marketing of unhealthy foodstuffs to children.¹⁷⁰⁰ Before dealing with that aspect further, it is necessary to consider certain definitions and technical suggestions. This proposal seems to have been inspired by the Chilean laws which prohibit the marketing of foodstuffs that are required to bear FOP

¹⁶⁹⁵ Bopape, Taillie and Swart 2022 *Front in Public Health* 3.

¹⁶⁹⁶ Bopape, Taillie and Swart 2022 *Front in Public Health* 9; Pettigrew *et al* 2017 *Appetite* 116.

¹⁶⁹⁷ Schmitt, Wagner and Kirch 2007 *Journal of Public Health* 58.

¹⁶⁹⁸ Correa *et al* 2020 *American Journal of Public Health* 1057.

¹⁶⁹⁹ Schmitt, Wagner and Kirch 2007 *Journal of Public Health* 58.

¹⁷⁰⁰ Draft reg 51(5)(c) of R3337.

warning labels to children below the age of 14 years through media which are primarily aimed or directed at children.¹⁷⁰¹

4.5.1 Suggestions regarding the incorporation of definitions for "infants" and "young children" in R3337

As a starting point, draft regulation 2(3)(c) of R3337 provides that a person may not label a foodstuff for sale in a manner which contradicts any regulations made under the *FCDA* relating to infants, young children or children.¹⁷⁰² By incorporating this provision, R3337 will mandate compliance with other regulations that are specifically applicable to foodstuffs for that consumer group, which would currently include R991. The inclusion of this provision seems sensible and appropriate.¹⁷⁰³

When considering relevant definitions, an interesting observation is that, while a proposed definition of "children" is provided for in R3337, neither "infants" nor "young children" are defined in R3337. It has been noted earlier that under R991 infants are persons that are 12 months of age or younger, whilst a young child is a person between the ages of one and three years.¹⁷⁰⁴ For the sake of certainty and uniformity, it is suggested that these same definitions be included in R3337.

4.5.2 Concerns and suggestions regarding the proposed definition of "children" in R3337

As mentioned above, a proposed definition for "children" is included in R3337, which is set out below:

'children' for the purpose of foods that may not be marketed or advertised to children and the Front-of-pack-labelling logos, are all children 18 years and under.¹⁷⁰⁵

A plain reading of this statement would mean that from birth up to and including the age of 18, all people would be regarded as children. In the context of the definition, that

¹⁷⁰¹ The media will be deemed to be directed primarily at children if 20% or more of the intended audience members are children. See Correa *et al* 2020 *American Journal of Public Health* 1054; Kanter, Vanderlee and Vandevijvere 2018 *Public Health Nutrition* 1401; Paraje *et al* 2022 *Nutrients* 1.

¹⁷⁰² See part 2.1 for general comments on the *FCDA*.

¹⁷⁰³ See part 2.6 for a discussion of R991.

¹⁷⁰⁴ See the discussion in part 2.6.1.

¹⁷⁰⁵ Draft reg 1 of R3337.

would have the result that only once they reach the age of 19 would they no longer be regarded as “children” for the purposes of the advertising restrictions and FOP warning labelling provisions in R3337. It is submitted that this proposed definition for “children” in R3337 is problematic, given that the age of majority in South Africa is currently 18 years. In terms of both the *Constitution*¹⁷⁰⁶ and the *Children’s Act* 38 of 2005, a “child” means a person under the age of 18 years.¹⁷⁰⁷ As such, a person aged 18 is no longer deemed to be a child in terms of existing legislation. In the circumstances it is recommended that the definition of “children” in R3337 should be amended to conform to national legislation. A suggestion would be to amend the portion of the definition that reads “all children 18 years and under” to “all persons under the age of 18 years”. The definition would then read [with the proposed amendment underlined]:

“children” for the purpose of foods that may not be marketed or advertised to children and the Front-of-pack-labelling logos, are all persons under the age of 18 years.

4.5.3 Contemplating the proposed age restriction for unhealthy foodstuffs advertising to children

When considering the proposed age restriction of 18 years in the context of a ban on advertising unhealthy foodstuffs, it should be noted that alcoholic beverages may not be advertised to persons under the age of 18 years.¹⁷⁰⁸ Advertising restrictions on tobacco products are even stricter as they prohibit the advertising and promotion of tobacco products to all consumers, i.e., both children and adults.¹⁷⁰⁹ A common denominator

¹⁷⁰⁶ See s 28(3) of the *Constitution*.

¹⁷⁰⁷ See s 1 of the *Children’s Act* 38 of 2005.

¹⁷⁰⁸ No liquor or methylated spirits may be advertised in a manner that is intended to target or attract minors. See s 9(1)(a)(ii) of the *Liquor Products Act*. South Africa is characterised by a “culture of heavy drinking”. For a further discussion on the harmful use of alcohol in South Africa, see DOH *National NCD Strategic Plan* 9-10.

¹⁷⁰⁹ In terms of s 3(1)(a) of the *TPCA*, “no person shall advertise or promote, or cause any other person to advertise or promote, a tobacco product through any direct or indirect means, including through sponsorship of any organisation, event, service, physical establishment, programme, project, bursary, scholarship or any other method”. For a further discussion on the tobacco epidemic in South Africa, see DOH *National NCD Strategic Plan* 8-9. For a discussion on the tobacco health epidemic, see Visagie “The Mandate of the Advertising Regulatory Board to Rule on Tobacco Products Advertising Complaints in South Africa” 335-338.

between unhealthy foodstuffs, tobacco products and alcoholic beverages is that they are all unhealthy commodities which contribute towards NCDs.¹⁷¹⁰

Whilst it is often argued that alcoholic beverages and tobacco products are different to foodstuffs in that they contain addictive substances, research shows that unhealthy foodstuffs may be as addictive.¹⁷¹¹ After conducting a systematic review of existing research on the topic of food addiction,¹⁷¹² Praxedes *et al*¹⁷¹³ concluded that food addiction “is as prevalent as common addictions, such as alcohol and tobacco”.¹⁷¹⁴ Whilst not all foodstuffs are deemed to be addictive, ultra-processed foods seem to be the main culprit. As pointed out by Gearhardt *et al*,¹⁷¹⁵ ultra-processed foods “are clearly consumed in addictive patterns and leading [sic] to deleterious health outcomes”. Studies have also revealed that food addiction is more common in children and adolescents who are overweight or obese than in persons who have a normal weight.¹⁷¹⁶ Considering the high childhood obesity levels in South Africa, these findings are particularly concerning.

In considering if the age restriction of 18 is too restrictive and should perhaps be lowered to a younger age, the functioning of the school systems as far as it relates to learner age would be a relevant consideration. Schools¹⁷¹⁷ in South Africa enrol learners from the year in which the child turns 6 in grade R (reception), up to grade twelve.¹⁷¹⁸ Barring any failures, each grade takes one school year to complete,¹⁷¹⁹ which means that learners usually turn 18 in their grade twelve school year.¹⁷²⁰ Primary schools in South Africa

¹⁷¹⁰ See part 1.1.2.

¹⁷¹¹ Gearhardt *et al* 2023 *BMJ* 1.

¹⁷¹² For a comprehensive discussion on this topic, see Yekaninejad *et al* 2021 *Obesity Reviews* 2.

¹⁷¹³ Praxedes *et al* 2022 *European Eating Disorder Review* 90.

¹⁷¹⁴ Also see Gearhardt *et al* 2023 *BMJ* 1.

¹⁷¹⁵ Gearhardt *et al* 2023 *BMJ* 2.

¹⁷¹⁶ Yekaninejad *et al* 2021 *Obesity Reviews* 11.

¹⁷¹⁷ Schools can be either public schools or independent schools. See the definition of “school” in s 1 of the *South African Schools Act* 84 of 1996.

¹⁷¹⁸ The attendance of grade R is, however, not compulsory. Learners are required to attend school only from the year in which the child turns seven (i.e., grade 1) until the age of 15 or grade nine, whichever comes first. See s 3 of the *South African Schools Act* 84 of 1996; reg 5 of the *Regulations Regarding the Age Requirements for Admission to an Ordinary Public School*, Gen Not 2433 in GG 19377 of 19 October 1998 as amended by GN 1356 in GG 22928 of 11 December 2001.

¹⁷¹⁹ See the definition of “grade” in s 1 of the *South African Schools Act* 84 of 1996.

¹⁷²⁰ See reg 3 of *Regulations Regarding the Age Requirements for Admission to an Ordinary Public School*, Gen Not 2433 in GG 19377 of 19 October 1998 as amended by GN 1356 in GG 22928 of 11 December 2001.

usually run from grade R through to grade 7. High schools run from grade 8 (i.e., the year in which children are 13 years of age and turn 14) up to grade 12 (i.e., the year in which children are 17 years of age and turn 18). This means that children between the ages of 13 to 18 in a high school will purchase foods from the same tuckshops, for example. On a practical level, therefore, unhealthy foodstuffs advertising restrictions should either run up to the age at which children will enter the last year of primary school (i.e., 12 going on 13), alternatively the age at which children enter the last year of high school (i.e., 17 going on 18). Picking an age somewhere in between would pose practical challenges as children both younger and older than 14 use the same food facilities at tuckshops in high schools in South Africa.

When considering that childhood obesity is prevalent up to the age of 18 years, and that food addiction patterns are prevalent in children and adolescents (essentially covering consumers between the ages of 10 and 19 years),¹⁷²¹ it would conceivably be too mild to pitch a limitation on unhealthy foodstuffs advertising to children much lower than the entire age group under the age of 18 years. Prohibiting unhealthy foodstuffs advertising up to that age may very well be justified, especially in the context of the existing advertising restrictions on alcoholic beverages, tobacco products and foodstuffs for infants and young children regulated under R991.

4.5.4 Typographical challenges and interpretation discrepancies with draft regulation 52(2)(b)

Turning to the more substantive provisions proposed in R3337 relating to unhealthy foodstuffs advertising to children, draft regulation 52(2)(b) provides:

Notwithstanding Regulation 2(1) of these Regulations, any foodstuff offered for sale, irrespective of whether it is pre-packaged or sold, in or on or from a catering establishment, as ready-to-eat foodstuffs-

- i. must comply with regulations 51(5(c) and 6) of said Regulations in terms of general marketing of these foods to children and advertising.
- ii. must comply with this regulation of said Regulations in terms of advertising to children.

¹⁷²¹ See the discussion in part 3.2.1.

As a first observation, draft regulation 52(2)(b)(i) above refers to “regulations 51(5(c) and 6) [sic]”. Starting with the latter reference, draft regulation 6 of R3337 relates to country-of-origin requirements, which seems misplaced in the context of this provision, and there is no sub-regulation 51(6). The reference to regulation “6)” therefore, is unclear. This apparent typographical error should be corrected, as this aspect cannot be considered until it is clear to what or which provision(s) it refers.

Turning to the reference to draft regulation 51(5)(c), this sub-section provides that “FOPL may not be marketed to children”. Whilst the wording of this provision should ideally be expanded for clarity,¹⁷²² it seemingly proposes that foodstuffs that are required to contain FOP warning labelling may not be marketed to children. However, there seems to be a discrepancy between draft regulation 51(5)(c) and draft regulation 52(2)(b). When considering the first part of draft regulation 52(2)(b) above, it refers to both pre-packaged products as well as any ready-to-eat foodstuffs “in or on or from a catering establishment”.¹⁷²³ On this basis, draft regulation 52(2)(b) appears to propose an advertising ban on pre-packaged foodstuffs as well as un-prepacked¹⁷²⁴ foodstuffs that may be sold as ready-to-eat at a catering establishment. The first part of the draft provision, i.e., “Notwithstanding Regulation 2(1)...”¹⁷²⁵ supports this interpretation. That being said, and as discussed in part 4.4.5 above, R3337 proposes FOP warning labelling requirements in relation to pre-packaged foodstuffs only. Ready-to-eat foodstuffs sold at a catering establishment that are not pre-packaged such as foods in restaurants, would not require FOP warning labelling in terms of R3337 in its current form. It follows,

¹⁷²² A suggestion would be “Foodstuffs that are required to carry FOPL in terms of these regulations may not be marketed to children”.

¹⁷²³ The proposed definition of “catering establishment” in R3337 is “an establishment, including a vehicle or a fixed or mobile stand where, in the course of business, ready-to-consume foodstuffs are prepared for direct sale to the consumer for consumption”. This definition is very similar to the definition of “catering establishment” in R146. The only phrases that are different are “mobile stall”, which appears in R146 as opposed to “mobile stand”, which appears in the abovementioned draft definition, and “ready-to-eat” in R146 as opposed to “ready-to-consume” in R3337. The minor differences in wording are not material for the purposes of this study.

¹⁷²⁴ The term “un-prepacked” is included in R3337 with the proposed definition: “a foodstuff that is exhibited for sale without being pre-packaged in a container with a label, excluding a scale label”. See draft reg 1 of R3337.

¹⁷²⁵ In terms of draft regulation 2(1), only pre-packaged foodstuffs will be required to be labelled in accordance with R3337 for lawful manufacture, importation, sale, donation and offering for sale in South Africa. Also see the discussion in part 4.4.5.1 above.

therefore, that proposing advertising restrictions on unhealthy foodstuffs that are both pre-packaged and un-prepacked whilst limiting FOP warning labelling requirements to pre-packaged products only is disjointed and ambiguous.

4.5.5 Exclusion of specifics on unhealthy foodstuffs advertising restrictions in R3337

If the intention is that all foodstuffs that are unhealthy, either in pre-packaged or un-prepacked form, may not be marketed to children, the DOH will need either (i) to expand the FOP warning labelling requirements to all foodstuffs that are high in total sugar, saturated fats or salt, or which contain artificial sweeteners, whether pre-packaged or not, or (ii) to introduce separate criteria for determining whether or not un-prepacked foodstuffs may be marketed to children.

Following the above, it is clear that in its current form the interpretation and practical intention behind draft regulation 52(2) of R3337 appear to be problematic for a number of reasons. If a ban on the advertising of unhealthy foodstuffs is linked with FOP warning labelling requirements, including marketing restrictions that cover foodstuffs to which these requirements apply (pre-packaged foodstuffs) as well as foodstuffs that are not pre-packaged, this is nonsensical.

As an additional observation, although R429 proposed very detailed restrictions on the advertising of unhealthy foodstuffs to children, under R3337 the proposed restrictions are limited to the wording of draft regulation 52(2)(b). R429 contained proposals *inter alia* on television and radio broadcasting time restrictions;¹⁷²⁶ time restrictions on unhealthy foodstuffs advertising on websites, social media and text messaging;¹⁷²⁷ and prohibited unhealthy foodstuffs marketing in any “[s]ettings where children gather” such as nurseries, pre-school centres, school premises, and playgrounds.¹⁷²⁸

¹⁷²⁶ Item 6(3)(a) of *Draft Guideline 14* of R429 provided that the “[c]ommercial marketing or promotion of unhealthy food shall not be advertised on radio or television, between 6.00 and 21.00”.

¹⁷²⁷ Item 6(3)(b) of *Draft Guideline 14* of R429 provided that “[n]o commercial marketing activities to children shall be permitted between 6.00 and 21.00, especially using new media (such as, but not limited to websites, social networking sites and text messaging”.

¹⁷²⁸ Item 6(5) of *Draft Guideline 14* of R429 provided that “[s]ettings where children gather shall be free from all forms of commercial marketing of unhealthy foods. Such settings include, but are not limited, to nurseries, school premises, pre-school centres, playgrounds, family and child clinics and paediatric

Although we live in a digitalised world,¹⁷²⁹ television nevertheless remains one of the most prevalent media and “remains the primary venue for food marketing worldwide”.¹⁷³⁰ In terms of the Chilean system, there is a ban on television advertisements featuring unhealthy foodstuffs from 06h00 in the morning until 22h00 in the evening.¹⁷³¹ Following the implementation of the unhealthy foodstuffs advertising broadcast restrictions on national television in Chile, studies revealed a 27% overall decline in television advertisements for foodstuffs that are “high in” one or more unhealthy nutrients.¹⁷³² The study also revealed that, amongst both the preschool and adolescent age groups of children, there was “significantly less exposure” to unhealthy foodstuffs television advertising, as the advertising of such products moved outside daytime television viewing times, and almost completely disappeared from being flighted before, during or after children’s television programmes.¹⁷³³ The authors note further:

We can also surmise an industry shift away from advertising [high in energy, saturated fats and sugar] versions of sugary sodas, sports and energy drinks, sweet desserts (i.e., candies, chocolate, cookies), and breakfast cereals, food categories that are relevant in the diets of Chilean children and adolescents. Such shifts have occurred in the context of general decreases in advertising of [high in energy, saturated fats and sugar] products across nearly all categories of foods and beverages.¹⁷³⁴

These results demonstrate that the implementation of such advertising restrictions through government regulation served as an effective mechanism to reduce both adult and children consumers’ exposure to unhealthy foodstuffs advertising on television in Chile.¹⁷³⁵ Turning to the South African context, and as discussed in Chapter 6, the ARB’s *Code of Advertising Practice* already includes provisions, albeit of limited scope at this

services during any sporting or cultural activities that are held on these premises. Food operators shall not engage in any direct commercial activity in both pre-school, primary and secondary schools...”

¹⁷²⁹ See the discussion in parts 1.2.3.4 and 3.4.2.3.

¹⁷³⁰ Correa *et al* 2020 *American Journal of Public Health* 1055.

¹⁷³¹ This advertising restriction was implemented in June 2018 with the implementation of phase two of the Chilean model. See Correa *et al* 2020 *American Journal of Public Health* 1054; discussion in part 4.9.3 below

¹⁷³² Correa *et al* 2020 *American Journal of Public Health* 1054.

¹⁷³³ Correa *et al* 2020 *American Journal of Public Health* 1057.

¹⁷³⁴ Correa *et al* 2020 *American Journal of Public Health* 1057-1058.

¹⁷³⁵ Correa *et al* 2020 *American Journal of Public Health* 1054, 1058.

stage, restricting television advertising of unhealthy foodstuffs to children. Suggestions are made to expand those provisions in Chapter 6.¹⁷³⁶

4.6 The proposed inclusion of a health warning message in unhealthy foodstuffs advertising not directed at children

When considering R3337 in its current form, the advertising of foodstuffs bearing FOP warning labelling would still be acceptable under certain conditions when not directed at children. The acceptability of unhealthy foodstuffs advertising to the adult population is apparent from draft regulation 52(3), which provides:

In addition, such advertisements should carry a warning in capital letters on visual or multimedia advertisements or at the end of audio advertisement[s].

An illustration of the proposed health warning message required to appear in the advertising of foodstuffs that will be required to contain FOP warning labelling appears in Figure 4-12 below:

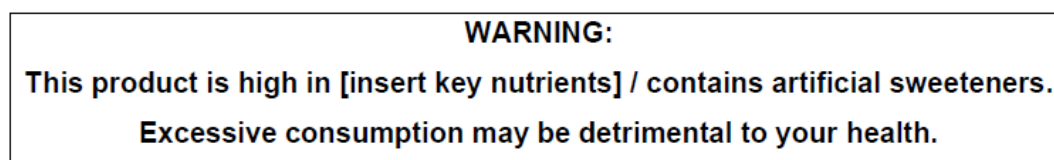


Figure 4-12: Health warning message proposed in R3337¹⁷³⁷

For print, digital or other visual advertisements, the health warning message should be clearly legible and displayed in big and bold black lettering against a white background.¹⁷³⁸

The health warning message should be clear in audio advertisements.¹⁷³⁹ The health

¹⁷³⁶ See part 6.6.4 below.

¹⁷³⁷ Draft reg 52(4)(c) of R3337. When considering why R3337 does not propose that such a health warning message should also appear on the product label, one should be reminded that the actual container label would already disclose the health warning by way of FOP warning labelling in combination with the warning device (as discussed in part 4.4.9 above). An additional health warning message would conceivably amount to a duplication of information. Also most products have limited labelling space, which is perhaps another reason for not proposing FOP warning labels plus additional health warning messages on the unhealthy foodstuffs labels.

¹⁷³⁸ Draft reg 52(4)(a)-(c) of R3337. No font has been prescribed, although the font in the draft warning label seems to be Arial. As this is also the font required for FOP warning labelling, for the sake of consistency it is suggested that R3337 be amended to specify this font.

¹⁷³⁹ Draft reg 52(4)(a) of R3337.

warning message is required to encompass at least one-eighth of the total size (presumably for visual adverts) or length (presumably for audio adverts) of the advertisement.¹⁷⁴⁰

The abovementioned health warning message which is complimentary to FOP warning labels has also been adopted in Peru. Ferrante¹⁷⁴¹ notes that the incorporation of a complementary health warning message (in addition to FOP warning labels) has a subjective impact on consumers' perceptions, giving a clear indication that the consumption of high quantities of foodstuffs containing that warning may be detrimental to health. Studies conducted elsewhere have shown that health warnings on SSBs increased parents' understanding of the health risks that may be associated with their excessive consumption of such products, and consequently reduced parents' intentions to purchase SSBs for their children.¹⁷⁴²

When considering the proposed health warning, it is relevant that South African legislation requiring mandatory health messages on other unhealthy commodities that contribute towards NCDs, notably tobacco products and alcoholic beverages, has been around for some time. Prescribed warnings that are set out in the *Labelling, Advertising and Sale of Tobacco Products Regulations*¹⁷⁴³ promulgated in terms of the *TPCA* include "DANGER: SMOKING CAN KILL YOU", "DANGER: SMOKING CAUSES CANCER", "WARNING DON'T SMOKE NEAR CHILDREN" (these warnings are similar to those shown Figure 4-17 below),¹⁷⁴⁴ which must appear prominently on the FOP container label for cigarettes and cigars, in the prescribed manner.¹⁷⁴⁵ Research has shown that the adoption of health warnings in relation to tobacco products has the potential to reduce the use of this unhealthy commodity.¹⁷⁴⁶

¹⁷⁴⁰ Draft reg 52(4)(b) of R3337.

¹⁷⁴¹ Ferrante 2021 *Rivista di Diritto Alimentare* 83.

¹⁷⁴² Arrù *et al* 2017 *Appetite* 144, 145; Roberto *et al* 2016 *Pediatrics* 9.

¹⁷⁴³ GN R2063 in GG 16111 of 2 December 1994.

¹⁷⁴⁴ See part 4.9.2.2.

¹⁷⁴⁵ See reg 2(1) read with annexures 1 and 2 of the *Labelling, Advertising and Sale of Tobacco Products Regulations*, GN 2063 in GG 16111 of 2 December 1994, as amended.

¹⁷⁴⁶ Bopape *et al* 2021 *PLoS ONE* 3.

The health warnings that are prescribed for alcoholic beverages in terms of the *Health Messages on Container Labels of Alcoholic Beverages Regulations*¹⁷⁴⁷ include “ALCOHOL REDUCES DRIVING ABILITY, DON’T DRINK AND DRIVE”, “ALCOHOL IS ADDICTIVE”, “DRINKING DURING YOUR PREGNANCY CAN BE HARMFUL TO YOUR BABY” and “ALCOHOL IS A MAJOR CAUSE OF VIOLENCE AND CRIME”.¹⁷⁴⁸ It is not currently required that the prescribed warning messages for alcoholic beverages should appear on the FOP label. Notable, however, is the fact that the *Health Messages on Container Labels of Alcoholic Beverages Regulations*¹⁷⁴⁹ were issued in terms of the *FCDA*.

Turning to foodstuffs, R146 does not prescribe mandatory health warnings or nutrient descriptors on the container labels of foodstuffs, either FOP or on the back of the container label. As discussed in Chapter 2, however, mandatory health statements are prescribed in relation to certain foodstuffs for infants in young children in terms of R991. Examples of mandatory statements include “THIS FOOD IS NOT INTENDED FOR INFANTS UNDER 6 MONTHS OF AGE AND EARLY INTRODUCTION IS NOT RECOMMENDED” and “DO NOT ADD SALT AND/OR SUGAR”.¹⁷⁵⁰ There is, however, no requirement for these health statements to appear on the main panel of the product label. The display of those warning statements on the main panel¹⁷⁵¹ would assist in bringing those important messages to the attention of mothers and caregivers. As such, a suggestion is that the display of those messages on the main panel of product packaging be introduced.

¹⁷⁴⁷ GN R764 in GG 30184 of 24 August 2007 as issued in terms of the *FCDA*.

¹⁷⁴⁸ Annexure A to GN R764 in GG 30184 of 24 August 2007 for a complete list of the prescribed health messages.

¹⁷⁴⁹ GN R764 in GG 30184 of 24 August 2007 as issued in terms of the *FCDA*.

¹⁷⁵⁰ Regulations 4(1)(e) and (g) of R991.

¹⁷⁵¹ As mentioned in part 2.4.3, in terms of R146 the “main panel” refers to the part of the food label that bears the brand/trade name and product name in the greatest prominence, or any other part of the label that bears the brand/trade name in equal prominence. In terms of R3337 the first part of the definition would remain the same, but R3337 proposes amending the concluding portion “or any other part of the label that bears the brand/trade name in equal prominence” to read “that enables the consumer to immediately identify a product in terms of its character or nature”. This proposed amendment seems sensible, as it confirms that the main panel is the portion or section of the product label that immediately provides the basic information on the product to the consumer at first sight. See reg 1 of R146; draft reg 1 of R3337.

4.7 *Considering the limitation of the right to free commercial speech of the food industry*

Throughout this chapter, I set out a number of comments on potential ambiguities or interpretation challenges in R3337, with accompanying recommendations on technical aspects such as definitions. The discussion that follows broadly considers the proposed limitation of the freedom of expression of the foodstuffs industry that will be brought about if R3337 is implemented. Furthermore, the balancing of that right against public health and related consumer rights is considered as part of establishing whether or not the limitation may be justifiable.

The implementation of unhealthy foodstuffs measures will necessarily also impact on the rights of businesses in the food industry, including manufacturers, retailers and other advertisers. As discussed in part 4.8, the proposed measures that restrict the use of trade mark matter in relation to unhealthy foodstuffs will limit trade mark proprietors' property rights. As a separate consideration, FOP warning labelling, the proposed ban on the advertising of unhealthy foods to children, and the inclusion of health warnings in relation to unhealthy foodstuffs advertising aimed at adults will place limitations on the commercial speech of foodstuffs manufacturers and retailers. In terms of section 16(1) of the *Constitution*, everyone has the right to freedom of expression which *inter alia* includes freedom to receive or impart information or ideas.¹⁷⁵² The right to freedom of expression includes the protection of commercial speech and, more specifically, advertising.¹⁷⁵³ In *City of Cape Town v Ad Outpost (Pty) Ltd*,¹⁷⁵⁴ the court held that "it is clear that advertising falls within the nature of expression and hence stands to be protected in terms of s 16(1) of the Constitution".

As with other constitutional rights, the right to commercial speech through advertising is not absolute and should fall within the bounds *inter alia* of public health.¹⁷⁵⁵ On this basis

¹⁷⁵² Section 16(1)(b) of the *Constitution*.

¹⁷⁵³ Kruger, Mafuyeka and Karim 2022 *The Journal of Law, Medicine and Ethics* 318; Currie and De Waal *The Bill of Rights Handbook* 361.

¹⁷⁵⁴ *City of Cape Town v Ad Outpost (Pty) Ltd* 2000 2 SA 733 (C) 749E.

¹⁷⁵⁵ Rautenbach "Introduction to the Bill of Rights" para 1A64.3; Currie and De Waal *The Bill of Rights Handbook* 150; For additional reading, see Mills *Considering the Best Interests of the Child When Marketing Food to Children: An Analysis of the South African Regulatory Framework* 101-120.

advertising content may essentially be subject to limitation where justified.¹⁷⁵⁶ In this regard, section 36(1) of the *Constitution* provides:

The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including-

- (a) the nature of the right;
- (b) the importance of the purpose of the limitation;
- (c) the nature and extent of the limitation;
- (d) the relation between the limitation and its purpose; and
- (e) less restrictive means to achieve the purpose.¹⁷⁵⁷

Where an infringement on commercial speech under section 16 of the *Constitution* can be justified in terms of the section 36 criteria, that infringement will be constitutionally sound and permissible.¹⁷⁵⁸ Whilst the test under section 36 requires an overall assessment of the facts and circumstances of each specific case, in all instances the courts are required to balance the competing rights based on proportionality.¹⁷⁵⁹ The purpose for limiting constitutional rights, as well as the impact that such limitation may have on protecting and fulfilling the rights of others, notably the general public, may support the justification of limiting the constitutional rights of corporate entities in the food industry.¹⁷⁶⁰

In an enquiry regarding the limitation of rights, the factors mentioned in section 36(a)-(e) of the *Constitution* are not exhaustive. Those factors, as well as any additional relevant factors, are cumulatively considered in establishing the purpose, effect and importance of the infringing legislative provisions. This in turn forms part of the balancing

¹⁷⁵⁶ Currie and De Waal *The Bill of Rights Handbook* 151, 361. The internal limitation in s 16(2) of the *Constitution*, which relates to aspects such as war propaganda, incitement of violence and advocacy of hatred, is not relevant to this study.

¹⁷⁵⁷ Also see Currie and De Waal *The Bill of Rights Handbook* 163-164; *S v Makwanyane* 1995 2 SACR 1 (CC) para 104. A discussion on the meaning of the term "law of general application" is set out in part 4.8.2 below.

¹⁷⁵⁸ Currie and De Waal *The Bill of Rights Handbook* 151, 153.

¹⁷⁵⁹ *BATSA v Minister of Health* para 16.

¹⁷⁶⁰ Kruger, Mafuyeka and Karim 2022 *The Journal of Law, Medicine and Ethics* 318. Of course, the rights that inform the right to health discussed in Ch 3 are also not absolute and may be subject to limitation in terms of s 36 where justified. Also see the discussion in part 3.3.3 for progressive realisation within available resources.

of rights exercise to establish if the limitation of rights is ultimately justified in terms of section 36.¹⁷⁶¹

4.7.1 *Considering the factors in sub-sections 36(a)-(e) of the Constitution*

4.7.1.1 The nature of the right

When considering factor (a), the nature of the right that will be limited by the proposed measures in R3337 relates to freedom of expression in the context of advertising as an aspect of the commercial speech of the food industry. From a consumer rights perspective, the implementation of the measures proposed in R3337 will undoubtedly have an impact on the various rights of citizens. Notably, those measures will assist in promoting and respecting the right to have access to nutrition information in a plain and understandable manner,¹⁷⁶² and the right to a food environment that is not harmful to health and well-being. These rights fall within the broader universal right to health.¹⁷⁶³ In this regard, Gostin *et al*¹⁷⁶⁴ point out that:

[w]hen states act to ensure the public's health and safety, they can impose restrictions on private interests. Public health interventions can constrain personal autonomy, privacy, or liberty, and can limit businesses' economic freedom. Finding a balance between protecting liberties and securing population health is an enduring theme in public health law and ethics. Failing to strike an appropriate balance might result in disproportionate personal burdens, especially on marginalised populations.

The need to promote broader public health may, therefore, outweigh food manufacturer's rights in certain circumstances.

4.7.1.2 The importance of the limitation

Turning to factor (b), the purpose of the limitation on unhealthy foodstuffs advertising and labelling (consisting of a multi-pronged approach which includes requiring FOP warning labels, banning advertising to children and requiring warning messages on

¹⁷⁶¹ Currie and De Waal *The Bill of Rights Handbook* 164. For additional reading, see Rautenbach "Introduction to the Bill of Rights" paras 1A43-1A52.

¹⁷⁶² Access to nutrition information will also fall under the right to have access to information held by private bodies such as foodstuffs manufacturers. See the discussion in part 3.6.1.

¹⁷⁶³ See the discussion in part 3.2.

¹⁷⁶⁴ Gostin *et al* 2019 *Lancet* 1863.

advertising to adults) is to convey accurate nutritional information on the potential health implications of such unhealthy foodstuffs to consumers. In the context of NCDs being the biggest threat to public health in South Africa and globally, the importance of such measures within a broader policy objective cannot be overestimated.

4.7.1.3 The nature and extent of the limitation

Factor (c) requires an enquiry into the nature and extent of the proposed limitations. In this regard, it is important to note that the proposed labelling and advertising restrictions in R3337 will not apply to all foodstuffs that are sold in South Africa, but only to those that are unhealthy (i.e., which will require FOP warning labelling). Should the proposed measures have the desired result of encouraging the reformulation of unhealthy products to increase the variety of healthier alternatives, the overall percentage of foodstuffs that are affected by these measures should decrease over time. In those circumstances, the extent of the limitation would conceivably reduce in the years following the implementation of the advertising and labelling restrictions as the number of food products affected by those measures would then reduce as reformulation towards healthier food alternatives increases.

4.7.1.4 The relation between the limitation and its purpose

In considering the link between the proposed limitations and their purpose, the proposed restrictions on unhealthy foodstuffs labelling and advertising form part of the broader policy measures aimed at creating a shift in consumer behaviour towards healthier dietary options and fostering a food environment which is not harmful to public health and well-being. Positive shifts in dietary patterns over time will improve public nutrition and ultimately aid in the prevention and control of diet-related NCDs.¹⁷⁶⁵ It is submitted that this perceived benefit to public health at large is undoubtedly a good reason¹⁷⁶⁶ for the

¹⁷⁶⁵ See the discussion in part 4.7.1.5 below for the results in Chile following its implementation of the FOP warning labelling system.

¹⁷⁶⁶ A good reason would serve to justify the potential harm to the rights of the food industry and the potentially benefit to public health that may ensue. See Currie and De Waal *The Bill of Rights Handbook* 196.

proposed limitation of foodstuffs manufacturer's rights as far as they restrict the labelling and advertising of unhealthy foodstuffs.

4.7.1.5 Are there less restrictive means to achieve the purpose?

This is likely to be the most contentious issue in the consideration of the proposed unhealthy foodstuffs labelling and advertising restrictions proposed in R3337. Whilst it remains to be seen whether or not this question will be raised by the food industry in due course, the scientific studies in South Africa which underpin the proposed measures would serve as evidence¹⁷⁶⁷ to justify the selection of advertising and labelling restrictions proposed in R3337.

It should be noted that a court must consider international law when interpreting the Bill of Rights.¹⁷⁶⁸ In addition, foreign law may be considered.¹⁷⁶⁹ As such, scientific findings and recommendations in publications of international food and health organisations such as the WHO, CAC and FAO should also serve as evidence to justify the limitation on commercial speech of the food industry, as these underlie relevant international norms.

In addition, as the proposed model for South Africa is largely based on the approach adopted in Chile, successes in that country following the implementation of the multi-pronged approach there may carry persuasive value. It has been noted above that R3337 is essentially based on the Chilean model, which contains the most comprehensive and far-reaching restrictions on the labelling and advertising of unhealthy foodstuffs in the world. The fact that the Chilean system consists of a multi-pronged approach in restricting unhealthy foodstuffs advertising seems to be one of the key features leading to positive shifts in consumer diet and the overall food environment in that country. As the WHO¹⁷⁷⁰ has pointed out:

[a] positive change in dietary intakes is the ultimate goal of FOPL systems. Implementation of FOPL systems should be one part of a comprehensive suite of

¹⁷⁶⁷ Where policy considerations and factual considerations serve as the basis for limiting rights, evidence that justifies such a limitation is usually tendered. See Currie and De Waal *The Bill of Rights Handbook* 154.

¹⁷⁶⁸ See s 39(1)(b) of the *Constitution*.

¹⁷⁶⁹ See s 39(1)(c) of the *Constitution*.

¹⁷⁷⁰ WHO *Guiding Principles for FOP Labelling* 43.

activities and policy actions to support and promote healthy diets. Dietary changes that are identified over time from national food consumption surveys may not be wholly attributable to the FOPL system intervention, but rather to the range of policy actions that a country has implemented.

A first consideration would be why the DOH has opted for the Chilean system as proposed in R3337, as opposed to one of the other less restrictive systems. Whilst there may be several reasons, they would likely include the fact that a system which, based on current research, has had positive results in another developing economy of the world¹⁷⁷¹ may be better suited to the South African situation than models adopted in developed economies,¹⁷⁷² where consumers are generally more affluent, educated and informed.

Another similarity between South Africa and Latin American countries is that, in addition to obesity among adults, childhood obesity specifically is high in both regions.¹⁷⁷³ The severity of the NCDs and the risk to the younger cohort of consumers may be one of the factors that prompted the selection of the mandatory FOP warning label system that has been adopted in Latin American countries. Chileans generally have a high intake of energy-dense and ultra-processed foodstuffs complemented with a low dietary intake of fruits, vegetables and dairy products.¹⁷⁷⁴ In the context of diet-related NCDs, Correa *et al*¹⁷⁷⁵ note:

[i]n Chile, obesity and diet-related diseases reach epidemic proportions. One out of four school children ... and a third of adult population ... present obesity ... while high body mass index and diet-related risk factors are the main cause of premature death and disability in the country.¹⁷⁷⁶

When considering the abovementioned comments on consumer dietary patterns, obesity levels in South Africa and the impact of NCDs in this country,¹⁷⁷⁷ this seems to be a case

¹⁷⁷¹ See UN Department of Economic and Social Affairs *World Economic Situation and Prospectus 2024* 136, which identifies both Chile and South Africa as developing economies.

¹⁷⁷² The UK, where the multiple traffic light system has been adopted; European countries which have adopted the nutri-score system; as well as Australia and New Zealand, which have adopted the health star rating system, are developed economies. See UN Department of Economic and Social Affairs *World Economic Situation and Prospectus 2024* 136. See parts 4.4.4.2-4.4.4.4 above for a discussion of these FOP labelling systems.

¹⁷⁷³ See the discussion in part 1.2.1; Ferrante 2021 *Rivista di Diritto Alimentare* 87.

¹⁷⁷⁴ Correa *et al* 2020 *American Journal of Public Health* 1054.

¹⁷⁷⁵ Correa *et al* 2019 *International Journal of Behavioural Nutrition and Physical Activity* 2.

¹⁷⁷⁶ Also see Correa *et al* 2020 *American Journal of Public Health* 1054.

¹⁷⁷⁷ See the discussion in part 1.2.2 of the obesity concerns in South Africa.

of *déjà vu*. The socio-economic considerations and challenges in a country like Chile will be closer to the South African reality than to those in the UK, EU member states or Australia, for example, because both Chile and South Africa are developing economies.¹⁷⁷⁸

Mandatory labelling and advertising restrictions aimed specifically at unhealthy foodstuffs are relatively new. Because these measures were implemented less than a decade ago, scientists could only recently start with preliminary research on the actual impact of these measures. Research, therefore, remains limited and ongoing at this stage.¹⁷⁷⁹ However, studies from Chile showing positive outcomes have been published. A study conducted by Taillie *et al*¹⁷⁸⁰ considered the joint impact of the Chilean multipronged obesity prevention programme in examining changes in the levels of sugar, saturated fat, sodium and calories in foodstuffs purchased after the implementation of the first phase. The study examined the nutrient content of foodstuffs purchased in more than 2 300 Chilean households both before and after the implementation of the labelling and advertising restrictions in relation to unhealthy foodstuffs.¹⁷⁸¹ The results revealed “significant decreases” in the overall purchase of unhealthy nutrients, namely sugar, saturated fat and salt, as well as a decline in the overall calories purchased following the implementation of the labelling and advertising restrictions in Chile.¹⁷⁸² The study also revealed that this outcome was largely as a result of reduced consumer purchases of foods and beverages that were “high in” unhealthy nutrients or calories. Within 18 months after implementation, the consumer consumption of breakfast cereals and SSBs reduced by more than 26% and 23% respectively.¹⁷⁸³

Other noteworthy results from studies conducted in Chile following the implementation of the unhealthy foodstuffs measures include that mothers in low- and middle-income households gained nutritional knowledge from the use of FOP warning labels, which had positive outcomes for subsequent food purchases.¹⁷⁸⁴ In addition, children told their

¹⁷⁷⁸ UN Department of Economic and Social Affairs *World Economic Situation and Prospectus 2024* 136.

¹⁷⁷⁹ Taillie *et al* 2021 *Lancet Planet Health* 2.

¹⁷⁸⁰ Taillie *et al* 2021 *Lancet Planet Health* 3.

¹⁷⁸¹ Taillie *et al* 2021 *Lancet Planet Health* 1, 3.

¹⁷⁸² Taillie *et al* 2021 *Lancet Planet Health* 1, 7.

¹⁷⁸³ Paraje *et al* 2022 *Nutrients* 10.

¹⁷⁸⁴ Correa *et al* 2019 *International Journal of Behavioural Nutrition and Physical Activity* 4-5.

mothers not to purchase foodstuffs bearing FOP warning labels, which also resulted in positive outcomes of subsequent food purchases.¹⁷⁸⁵

A study conducted in Chile by Correa *et al*¹⁷⁸⁶ revealed that the implementation of measures that ban the promotion and sale of unhealthy foodstuffs at schools had the knock-on effect of “the school [becoming] a key promoter of food behavioural change by explaining what is healthy or unhealthy”, as teachers encouraged learners to pack healthier snacks in lunchboxes. In highlighting that food environments at schools in Chile have become healthier through the operation of law, the authors note further:

[d]aycares and elementary schools are becoming more restrictive with the snacks that are allowed, and children, particularly younger children from lower-[socio-economic status], have embraced this new healthier culture, discussing about the ‘black labels’ at home and requesting their mothers to buy them healthier snacks. This is related to the appearance of FOP labels and campaigns promoted by the Ministry of Health in public and state-funded schools. As a result, many mothers admit that they have changed their children’s diet, especially school snacking.¹⁷⁸⁷

Following the implementation of the first phase of the unhealthy foodstuffs restrictions in Chile, the proportion of foodstuffs requiring FOP warning labels reduced significantly over time. This was a result of companies reformulating foodstuffs in a way that improved the “health profiles” through significantly reduced levels of sugars and salt of certain products, whereafter no FOP warning labels were required for those foodstuffs.¹⁷⁸⁸ A study by Barahona, Otero and Otero¹⁷⁸⁹ revealed that foodstuffs manufacturers in Chile responded to the regulatory measures by reformulating their products so that the nutritional content was below the respective nutrient cut-off value threshold, effectively doing away with the need to apply FOP warning labelling on those products.

One aspect that may result in different outcomes as far as it relates to product reformulations in South Africa *vis-à-vis* Chile, is that R3337 proposes the disclosure of artificial sweeteners on the FOP warning labels, whilst this is not required in Chile. Foodstuffs manufacturers of products that are high in sugar will not be able to overcome

¹⁷⁸⁵ Correa *et al* 2019 *International Journal of Behavioural Nutrition and Physical Activity* 7.

¹⁷⁸⁶ Correa *et al* 2019 *International Journal of Behavioural Nutrition and Physical Activity* 5,8.

¹⁷⁸⁷ Correa *et al* 2019 *International Journal of Behavioural Nutrition and Physical Activity* 7.

¹⁷⁸⁸ Reyes *et al* 2020 *PLoS Med* 2-3, 31. Also see Taillie *et al* 2021 *Lancet Planet Health* 2.

¹⁷⁸⁹ Barahona, Otero and Otero 2023 *Econometrica* 839.

the need to place a FOP warning label on a high-sugar product by reducing or replacing the sugar with artificial sweeteners in order to keep the product at the same sweetness level, because the presence of artificial sweeteners (in any quantity) would have to be disclosed on the FOP warning label irrespective of the sugar content. On this basis, it is conceivable that the outcomes in Chile, at least as far as they relate to reduced sugar content in foodstuffs, may therefore not be the same in South Africa.¹⁷⁹⁰

4.7.2 Additional factors and comments in the limitation of rights enquiry

As an immediately relevant factor in the limitation of rights enquiry, it should be recalled that the South African government has an obligation to protect the right to health of its citizens. That obligation requires that the state take active steps to regulate the operations of the food industry which negatively impact on public health,¹⁷⁹¹ as these are seen as negative CDHs, as discussed in Chapter 3.¹⁷⁹² If the government simply remains a passive bystander as public health continues to deteriorate as a result of the rise in NCDs, that would amount to the State's violating its obligations towards the people of South Africa.¹⁷⁹³ It has been pointed out that:

the obligation *to fulfil* compels States to adopt appropriate measures towards the full realization of the right to health. This requires that States disseminate appropriate information relating to healthy life and nutrition patterns, encouraging and supporting people in making informed choices about their health... Considering epidemiological evidence of diet-related NCDs, States should also formulate comprehensive policies that improve the availability and accessibility of healthy foods... Front-of-package warning labelling is an essential component of such set of policies, as it prevents unhealthy food products from displacing healthy foods from diets and food systems.¹⁷⁹⁴

¹⁷⁹⁰ The use of artificial sweeteners is potentially beneficial to the nutrition management of persons with pre-existing type 2 diabetes. For a discussion on this aspect, see Tou, Fitch and Bridges "Sweeteners: Use, Dietary Intake and Health Effects" 10-11. Persons with this pre-existing medical condition would therefore benefit from information which discloses the presence of artificial sweeteners (as an alternative to sugar) in foodstuffs.

¹⁷⁹¹ UN 2020 <https://www.ohchr.org/en/statements/2020/07/statement-un-special-rapporteur-right-health-adoption-front-package-warning>.

¹⁷⁹² See the discussion in part 3.5.2.

¹⁷⁹³ See the discussion in part 3.6.1; UN 2020 <https://www.ohchr.org/en/statements/2020/07/statement-un-special-rapporteur-right-health-adoption-front-package-warning>.

¹⁷⁹⁴ UN 2020 <https://www.ohchr.org/en/statements/2020/07/statement-un-special-rapporteur-right-health-adoption-front-package-warning>.

As a second observation, it has been shown in chapter 3¹⁷⁹⁵ that, independent of any state obligations, there is a responsibility on private actors within the food industry to mitigate the damage that their business operations may cause to the public's right to health.

Third, as discussed in part 4.6 above, legislative measures compelling the disclosure of health warnings are nothing new in relation to other unhealthy commodities in South Africa, namely tobacco products and alcoholic beverages. Mandatory health warnings and limitations on trade marks have also been in place in relation to foodstuffs for infants and young children for more than 10 years.¹⁷⁹⁶

Following the implementation of section 3(1)(a) of the *Tobacco Products Control Act* 83 of 1993 ("TPCA")¹⁷⁹⁷ which essentially places an outright ban on the advertising and promotion of tobacco products,¹⁷⁹⁸ the constitutionality of this provision was challenged by the tobacco industry in *British American Tobacco South Africa (Pty) Ltd v Minister of Health*.¹⁷⁹⁹ Essentially, the applicant contended that the advertising ban imposed by section 3(1)(a) was contrary to section 16(1)(b) of the *Constitution* in that it unduly limited the appellant's right to engage in commercial expression with consumers, and in turn denied consumers of tobacco products the right to receive information concerning these products.¹⁸⁰⁰ On appeal the SCA confirmed that the ban on the advertising and promotion of tobacco products was reasonable and justifiable, with Mthiyane DP concluding that:

¹⁷⁹⁵ See the discussion in part 3.6.2.

¹⁷⁹⁶ Reg 16(1) of R991. The relevant provisions in R991 under regs 2-6 respectively, came into operation 12 months following the publication of R991 on 6 December 2012, i.e., on 6 December 2013.

¹⁷⁹⁷ The *TPCA* was amended to include this provision by the *Tobacco Products Control Amendment Act* 63 of 2008 and came into operation on 21 August 2009.

¹⁷⁹⁸ A "tobacco product" is defined as "a product containing tobacco that is intended for human consumption, and includes, but is not limited to, any device, pipe, water pipe, papers, tubes, filters, portion pouches or similar objects manufactured for use in the consumption of tobacco". See s 1 of the *TPCA*.

¹⁷⁹⁹ *British American Tobacco South Africa (Pty) Limited v Minister of Health* 2011 JDR 1112 (GNP).

¹⁸⁰⁰ *British American Tobacco South Africa (Pty) Limited v Minister of Health* 2012 JDR 1039 (SCA) (hereafter *BATSA v Minister of Health*) para 9. For a comprehensive discussion of this case, see Mills *Considering the Best Interests of the Child When Marketing Food to Children: An Analysis of the South African Regulatory Framework* 114-120.

[t]he public health considerations and the countervailing right to a healthy environment make a strong case for the limitation of the right which the appellant seeks to enforce. I am accordingly satisfied that the limitation is reasonable and justified as required by s 36(1) of the Constitution.¹⁸⁰¹

In the balancing of rights on the basis of proportionality, it was held that the dire effects of smoking and the accompanying public health considerations in favour of a ban on tobacco advertising and promotion far outweigh the interests of tobacco products manufacturers.¹⁸⁰² On this basis, public health considerations will outweigh the protection of advertising as commercial speech in terms of section 16(1) of the *Constitution*, particularly if the advertising relates to a product which is harmful to health.¹⁸⁰³ As both tobacco products and unhealthy foodstuffs pose a severe threat to public health, the *dictum* of the SCA would support a ban on the advertising of unhealthy foodstuffs to children.

The broader public health interest was ultimately held to “far out weigh [sic]”¹⁸⁰⁴ the right of commercial speech that was limited by imposing an advertising ban on tobacco products. Should the proposed measures in R3337 be challenged on the basis of the limitation on commercial speech, these very same reasons may very well serve to justify such limitations in favour of public health concerns.

Furthermore, the argument raised that the advertising ban on tobacco products limited certain consumers’ rights (notably smokers) to receive information would also not carry any weight in the context of unhealthy foodstuffs restrictions proposed in R3337. This is because the requirement for FOP warning labels and accompanying health warnings in advertising aimed at adults would go a long way to imparting key information regarding the ingredients, composition and nutrient properties of the relevant food product at the point of sale. In effect, therefore, this ties in with the right of consumers, as the recipients

¹⁸⁰¹ *BATSA v Minister of Health* para 28.

¹⁸⁰² *BATSA v Minister of Health* paras 16, 22 and 25.

¹⁸⁰³ Kruger, Mafuyeka and Karim 2022 *The Journal of Law, Medicine and Ethics* 319.

¹⁸⁰⁴ *BATSA v Minister of Health* para 25.

of advertising, to receive information through that commercial speech in terms of section 16(1)(b) of the *Constitution*. In *BATSA v Minister of Health*, the SCA noted:

[a]dvertising allows the manufacturer, importer and other trader to impart information concerning its product. It also enables the consumer to receive such information and make consequent informed choices... The orderly operation of that market depends on businesses and consumers having access to abundant and diverse information'. Freedom of commercial expression thus entails not only the right to impart information but also the right to receive it.¹⁸⁰⁵

In the circumstances, the inclusion of FOP warning labels and warning restrictions in advertising would serve to promote consumers' right to freedom of expression by assisting members of the public in making informed dietary choices.

Against this background, and when considering the comments on all relevant factors and past case law, it is submitted that the limitation on the right to freedom of expression within the food industry imposed by prescribing requirements for unhealthy foodstuffs labelling and advertising would be justified in terms of section 36 of the *Constitution*. Broader public health considerations and accompanying consumer rights that underpin consumers' right to access to nutrition information would favour the general public.

4.8 The proposed measures that will require trade mark proprietors to remove graphic elements from unhealthy foodstuffs labelling and advertising

Often the label designs of foodstuffs packaging directed at children incorporate bright colours in combination with other eye-catching visual elements such as cartoon characters, references to fun, play or sport, or tie-ins with children's television programmes or movies.¹⁸⁰⁶ These attractive elements increase children's willingness to consume such products.¹⁸⁰⁷ This places parents under pressure from their children to

¹⁸⁰⁵ *BATSA v Minister of Health* para 13.

¹⁸⁰⁶ Arrù *et al* 2017 *Appetite* 140. Photos of celebrities or sports stars may also appear on the packaging, but this aspect, which ties in with copyright laws, falls outside the scope of this study.

¹⁸⁰⁷ Arrù *et al* 2017 *Appetite* 140.

purchase those often unhealthy foodstuffs which in turn stifles efforts to promote healthy eating habits in the household.¹⁸⁰⁸

Other than prohibiting the use of false, misleading or deceptive graphic representations,¹⁸⁰⁹ R146 does not specifically prohibit the use of any graphic elements in relation to foodstuffs advertising or labelling. As discussed in Chapter 2,¹⁸¹⁰ R991 places severe limitations on the graphic representations that may appear on the label of foodstuffs for infants and young children. Essentially, labels of these products may contain only graphic representations that are necessary to show the correct method of preparing and utilising the relevant product.¹⁸¹¹ No other graphic representations as defined in R991 are permitted.

Turning to R3337, draft regulation 52 sets out marketing restrictions for foodstuffs advertising to children. Notably, this draft regulation will apply to foodstuffs that will be required to contain FOP warning labelling.¹⁸¹² In terms of regulation 52(1)(b)(i)(aa), the package, label or advertisement of foodstuffs that are required to carry FOP warning labelling shall not depict or contain a reference *inter alia* to any cartoon-type character, puppet, computer animation or similar strategy.¹⁸¹³ For illustrative purposes, the images shown in Figures 4-13 to 4-16 below provide examples of foodstuffs that may likely be affected if this prohibition were to be enacted. The use of bright colour with eye-catching appeal is also evident from these examples.

¹⁸⁰⁸ Schmitt, Wagner and Kirch 2007 *Journal of Public Health* 59-60.

¹⁸⁰⁹ See reg 34 of R146. Reference is made to "pictorial representations" in reg 34, which will be considered synonymous with the term "graphic representations" or "graphic elements".

¹⁸¹⁰ See the discussion in part 2.6.3.2.

¹⁸¹¹ See reg 2(2) of R991.

¹⁸¹² Draft reg 52(1)(a) of R3337.

¹⁸¹³ This provision also prohibits the depiction of or reference to celebrities or sports stars on foodstuffs packaging. Those aspects may very well be subject to copyright, which falls outside the scope of this study. See part 1.5.



Fig 4-13: Kellogg's COCO POPS breakfast cereal¹⁸¹⁴



Fig 4-14: ZOOM apple flavoured drink¹⁸¹⁵



Figure 4-15: SIMBA potato crisps¹⁸¹⁶



Figure 4-16: M&M's chocolate candy¹⁸¹⁷

¹⁸¹⁴ Image sourced from Kellogg's 2023 <https://www.kelloggs.com/en-za/products/coco-pops/coco-pops-original.html>.

¹⁸¹⁵ Image sourced from Zoomarati 2022 <https://www.zoomarati.co.za/products/>.

¹⁸¹⁶ Image sourced from Simba 2023 <https://simba.co.za/flavour?flavour=simba-salt-and-vinegar> date.

¹⁸¹⁷ Image sourced from Checkers 2024 <https://www.checkers.co.za/All-Departments/Food/Food-Cupboard/Chocolates-and-Sweets/Chocolates-and-Sweet-Party-Packs/MandM%27s-Regular-Chocolate-Sweets-45g/p/10124899EA>.

As mentioned in Chapter 1,¹⁸¹⁸ this study assumes that trade mark rights vest in the graphic elements that are incorporated in labels of unhealthy foodstuffs packaging, and that these intellectual property rights are owned by the relevant product brand owners in South Africa.¹⁸¹⁹ The chocolate-flavoured breakfast cereal, sugary fruit drink, crisps and chocolate candy illustrated above are products which generally have high levels of added unhealthy nutrients. If R3337 comes into operation, the proprietors of those encircled cartoon-type characters deemed to be trade marks will have to remove those appealing graphic elements from the respective product labels and all advertising of those products.

If the use¹⁸²⁰ of these trade mark rights is limited by legislation, this will affect the rights of these brand owners to use their trade marks, which in turn might open the legislation to challenge under section 25 of the *Constitution*.¹⁸²¹ It should be kept in mind, however, that a trade mark proprietor's right to property may not unduly restrict other constitutional rights of third parties. Where trade mark rights potentially restrict other rights afforded in the Bill of Rights, the courts will consider how the respective rights of the relevant parties should be balanced in the light of the spirit and purpose of the *Constitution*.¹⁸²² Intellectual property rights are by no means absolute and may be limited where the circumstances warrant.¹⁸²³ Section 36 of the *Constitution* has been discussed

¹⁸¹⁸ See the discussion in part 1.5.

¹⁸¹⁹ Property rights in South Africa are afforded to both natural persons and juristic entities. See *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 4 SA 768 (CC) (hereafter *FNB v SARS* case) para 45; Muller *et al Silberberg and Schoeman's The Law of Property* 612.

¹⁸²⁰ Trade mark rights include the right to use the mark, as well as the right to prohibit the unauthorised use of the mark (or a confusingly similar mark), by third parties under certain conditions. See Nyatsanza 2016 *Queen Mary Journal of Intellectual Property* 499, 502. For a discussion on the enforcement of trade mark rights, see part 2.5.2.

¹⁸²¹ S 25(4)(b) of the *Constitution* makes it clear that property is not limited to land only. Objections have been raised that the Constitution does not expressly refer to the right to intellectual property. See *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of South Africa*, 1996 4 SA 744 (CC) para 75. The Certification-judgement arguably tends to weaken the constitutional protection of IP rights, as that judgement said that the protection of IP does not constitute a universally recognised human right, and therefore did not need to be added to the list of rights in the Constitution. The argument at the time had been that express protection for IP rights should be added, but the Court rejected this. That issue aside, more recent case law, including the *Laugh It Off* case now confirms that IP rights are recognised as property under s 25 of the *Constitution*. Also see *Phumelela Gaming and Leisure Ltd v Gründlingh* 2007 6 SA 350 (CC) para 40.

¹⁸²² *Laugh It Off* (SCA) paras 10; 21. Also see Van der Merwe *et al Law of Intellectual Property in South Africa* 108-109.

¹⁸²³ *FNB v SARS* para 58.

in part 4.7 above and the discussion does not warrant repetition. It is submitted that the arguments put forward under the general limitation clause would apply equally to the limitation of trade mark property rights when weighed against the general public health objectives that underpin the restrictions proposed in R3337.¹⁸²⁴ The discussion that follows focuses on section 25(1) of the *Constitution*.

Section 25(1) of the *Constitution* provides that no one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.¹⁸²⁵ When framed positively, section 25(1) effectively means that the deprivation of property will be permissible if it is not arbitrary and is carried out in terms of law of general application.¹⁸²⁶ The meaning of the terms “property”, “law of general application”, “deprivation” and “arbitrary” in this constitutional provision should be analysed in order to make it possible to consider if the abovementioned restrictions on trade mark rights proposed in R3337 would be permissible under section 25(1).

4.8.1 Trade marks constitute property in terms of section 25 of the Constitution

As a starting point, it is widely accepted that section 25 of the *Constitution* protects both corporeal and incorporeal property.¹⁸²⁷ More specifically, trade marks are protected by section 25 as they fall within the meaning of “property”.¹⁸²⁸ In *Laugh It Off* (SCA),¹⁸²⁹ the court held that:

¹⁸²⁴ The Constitutional Court has held that, where arbitrary deprivation of property is found in terms of s 25(1) of the Constitution, it would be difficult to justify such arbitrariness under s 36(1). See *Shoprite Checkers (Pty) Ltd v MEC for Economic Development, Eastern Cape* 2015 6 SA 125 (CC) para 87. As such, there is some debate as to whether or not s 36 of the *Constitution* would be relevant in the context of s 25 property rights. For a discussion of this issue see Muller *et al Silberberg and Schoeman's The Law of Property* 613-615.

¹⁸²⁵ Copyright is also property and forms of IP protected in terms of s 25 of the *Constitution*. See *Moneyweb (Pty) Ltd v Media 24 Ltd* 2016 4 SA 591 (GJ) para 108; *Gallo Africa Ltd v Sting Music (Pty) Ltd* 2010 5 SA 329 (SCA) para 17.

¹⁸²⁶ Currie and De Waal *The Bill of Rights Handbook* 538.

¹⁸²⁷ Currie and De Waal *The Bill of Rights Handbook* 536; Muller *et al Silberberg and Schoeman's The Law of Property* 618.

¹⁸²⁸ To disregard trade marks as property would undermine the commercial value that vests in this form of intellectual property. See Currie and De Waal *The Bill of Rights Handbook* 536-537.

¹⁸²⁹ *Laugh It Off* (SCA). As the Constitutional Court did not challenge this dictum in the subsequent appeal, it must be taken to have approved this view of the SCA. See Dean *Deprivation of Trade Marks Through State Interference in Their Usage* 13.

... trademarks are property, albeit intangible or incorporeal. The fact that property is intangible does not make it of a lower order. Our law has always recognised incorporeals as a class of things in spite of theoretical objections thereto. Also, simply because, as the appellant has it, trademark protection and branding are the result and part of a 'capitalistic' economy does not mean that trade marks may be disregarded by those who do not believe in such an economy... But then again, intellectual property rights have no special status. The Constitution ... does not accord them special protection and they are not immune to constitutional challenge. Even if constitutional, their enforcement must be constitutionally justifiable.¹⁸³⁰

Following the above, it is clear that property rights protected under section 25 of the *Constitution* do not expressly guarantee the unlimited right to acquire and possess property. Rather, section 25 "embodies a negative protection of property".¹⁸³¹ The protection of property is always subject to societal considerations and may be limited in justified circumstances.¹⁸³² Importantly, the use of property should "serve the public good".¹⁸³³

4.8.2 R3337 will be promulgated in terms of a law of general application

Turning to the meaning of the term "law of general application", this phrase includes statutes and subordinate legislation.¹⁸³⁴ Legislation which applies equally to everyone and which is impersonal will be deemed to be general.¹⁸³⁵ In this context, Muller *et al*¹⁸³⁶ note:

[p]ermissible deprivations should aim to spread the burden of public health and safety protection evenly and fairly throughout society, thereby affecting all members of a particular group relatively equally.

R3337 will be promulgated in terms of national legislation, namely the *FCDA*, which applies generally to everyone throughout the country.¹⁸³⁷ On this basis, if enacted in due

¹⁸³⁰ *Laugh It Off* (SCA) para 10. As the Constitutional Court did not challenge this dictum in the subsequent appeal, it must be taken to have approved this view of the SCA. See Dean *Deprivation of Trade Marks Through State Interference in Their Usage* 13.

¹⁸³¹ *FNB v SARS* para 48. Also see Muller *et al Silberberg and Schoeman's The Law of Property* 615-616.

¹⁸³² *FNB v SARS* para 49.

¹⁸³³ *FNB v SARS* para 52.

¹⁸³⁴ Dean *Deprivation of Trade Marks Through State Interference in Their Usage* 8; Currie and De Waal *The Bill of Rights Handbook* 156.

¹⁸³⁵ A law which is unequal or personal, or which applies to certain groups only, will not be a law of general application. See Currie and De Waal *The Bill of Rights Handbook* 156-157.

¹⁸³⁶ Muller *et al Silberberg and Schoeman's The Law of Property* 626.

¹⁸³⁷ Currie and De Waal *The Bill of Rights Handbook* 539.

course the proposed restrictions on trade mark rights included in R3337 will form part of a law of general application.

4.8.3 The proposed restriction on trade mark use amount to deprivation of property

Muller *et al*¹⁸³⁸ note that the word “deprivation” in section 25(1) of the *Constitution* “refers to the State’s capacity to regulate the use of property”. As such, the government’s interference with a private person or entity’s use, enjoyment or exploitation of its private property by way of legislative restrictions would amount to “deprivation” of such property.¹⁸³⁹

As previously mentioned, R3337 proposes to prohibit the use of trade mark matter that consists of or includes cartoon-type characters, puppets, computer animations or similar strategies on the packaging, labels and advertising material of foodstuffs that will be required to bear FOP warning labels.¹⁸⁴⁰ If enacted in due course, that provision will undoubtedly restrict the use of such trade marks, in that they will effectively be able to be used only in relation to foodstuffs that are not required to bear FOP warning labels. This limitation on the normal use, enjoyment and exploitation of those trade marks will therefore amount to a “deprivation” of those property rights.

4.8.4 The deprivation of trade mark rights in relation to unhealthy foodstuffs is not arbitrary

Limitations on the use of trade mark rights will be inconsistent with section 25(1) of the *Constitution* only if that deprivation is arbitrary. Deprivation which is duly authorised and which fairly imposes restrictions on the use, enjoyment or exploitation of intellectual

¹⁸³⁸ Muller *et al Silberberg and Schoeman’s The Law of Property* 622.

¹⁸³⁹ *FNB v SARS* para 57; Dean *Deprivation of Trade Marks Through State Interference in Their Usage* 6; Currie and De Waal *The Bill of Rights Handbook* 538. R3337 does not propose that the state expropriate any trade mark rights. Whilst the state’s exercise of its regulatory powers over trade marks (constituting property of trade mark rights holders) would amount to a deprivation of those rights under s 25(1), that IP would remain in the hands of the relevant private person or entity holding those rights. On this basis, s 25(2) of the *Constitution* is not relevant to this study and is not discussed. Article 25(2) essentially provides that property may be expropriated only in terms of law of general application for a public purpose or in the public interest, and is subject to compensation.

¹⁸⁴⁰ Draft regulation 52(1)(b)(i)(aa) of R3337.

property “for the sake of the common good” will not be contrary to section 25(1).¹⁸⁴¹ Currie and De Waal¹⁸⁴² note that the deprivation of property is arbitrary if there are insufficient reasons for such deprivation.¹⁸⁴³ Furthermore, Dean¹⁸⁴⁴ notes:

[d]eprivation of property is arbitrary when the law that effects it does not provide sufficient reason for the particular deprivation. The provision effecting the deprivation should manifest a rational connection between a legitimate government purpose and the deprivation of property, and it should show adequate cause for the deprivation. In effect, this means that the deprivation must be justified by the effect that is sought to be achieved. There must be a causal connection between the deprivation and the objective that the provision seeks to achieve.

The reason for restricting the use of certain graphic elements on unhealthy foodstuffs is essentially to reduce the eye-catching appeal of such products to children. This forms part of the broader government policy measures aimed at creating a shift in consumer behaviour towards healthier dietary options and fostering a food environment which is not harmful to public health and well-being. Positive shifts in dietary patterns over time will improve public nutrition and ultimately assist in the prevention and control of diet-related NCDs.

Following the above, it is submitted that the proposed deprivation of the property of trade mark right holders by restricting the use of trade marks on the labelling and advertising of unhealthy foodstuffs has a sufficient cause and reason, and has a rational connection with government policy objectives of improving the broader public health. In *BATSA v Minister of Health* the court noted that policy considerations underlying the decision to implement legislative measures that restrict rights may serve as part of the basis for justifying a limitation on constitutional rights, particularly in the context of public health considerations.¹⁸⁴⁵ In referring to the *dictum* in *Minister of Home Affairs v National Institute for Crime Prevention and the Reintegration of Offenders*¹⁸⁴⁶ it was noted that:

¹⁸⁴¹ Muller *et al Silberberg and Schoeman's The Law of Property* 626.

¹⁸⁴² The comment is made in the context of substantive arbitrariness. See Currie and De Waal *The Bill of Rights Handbook* 543.

¹⁸⁴³ Dean *Deprivation of Trade Marks Through State Interference in Their Usage* 7.

¹⁸⁴⁴ Dean *Deprivation of Trade Marks Through State Interference in Their Usage* 14.

¹⁸⁴⁵ *BATSA v Minister of Health* paras 21, 22.

¹⁸⁴⁶ 2005 3 SA 280 CC para 35.

... [i]n a justification analysis facts and policy are often intertwined. There may for instance be cases where the concerns to which the legislation is addressed are subjective and not capable of proof as objective facts. A legislative choice is not always subject to courtroom fact-finding and may be based on reasonable inferences unsupported by empirical data. When policy is in issue it may not be possible to prove that a policy directed to a particular concern will be effective. It does not necessarily follow from this, however, that the policy is not reasonable and justifiable. If the concerns are of sufficient importance, the risks associated with them sufficiently high, and there is sufficient connection between means and ends, that may be enough to justify action taken to address them.

When considering the extent of the proposed deprivation,¹⁸⁴⁷ it has also been noted earlier that this will be limited. The proposed trade mark restrictions would not restrict trade mark use in relation to all foodstuffs, but rather those that are deemed to be unhealthy. In effect, this means that the graphic trade mark elements encircled in Figures 4-13 to 4-16 would still be able to be used in relation to healthier food options, i.e., those that will not require FOP warning labels.

Against this background it is submitted that the deprivation of property of trade mark holders arising from restricting the use of graphic trade mark elements in relation to unhealthy foodstuffs labelling and advertising as proposed by R3337, which will be promulgated in terms of a law of general application, will not be arbitrary. As Muller *et al*¹⁸⁴⁸ note:

[i]t may probably be accepted, on the basis of comparative law and the function of the state's regulatory powers that deprivations undertaken for reasons of public health and safety will pass constitutional scrutiny if all other requirements are met.

It is submitted that this is just such an instance, and that the proposed measure that will place restrictions on trade mark rights in terms of government regulation through national legislation would not be unlawful in terms of section 25(1) of the *Constitution*.

4.9 Anticipated challenges in implementing the proposed measures in R3337

Despite the perceived benefits of enacting the provisions that focus on unhealthy foodstuffs regulation through R3337, and subject to the recommendations that have been

¹⁸⁴⁷ This factor is also relevant in considering whether or not deprivation is arbitrary. See Currie and De Waal *The Bill of Rights Handbook* 543.

¹⁸⁴⁸ Muller *et al Silberberg and Schoeman's The Law of Property* 626.

made above, there are likely to be practical challenges both in the lead-up to implementation as well as thereafter.

4.9.1 Delays in legislative reform

As the saying goes, Rome was not built in a day. It has been noted earlier that DOH efforts aimed at strengthening the regulation of unhealthy foodstuffs labelling and advertising stretch as far back as 2007. Although those proposed restrictions have been refined in the past 17 years, they are still in draft form and will likely be so in the foreseeable future. In February 2024 the Daily Maverick¹⁸⁴⁹ reported on enquiries made with the DOH regarding progress with R3337 following the lapse of the September 2023 deadline to submit public comments to these draft regulations.¹⁸⁵⁰ The DOH representative advised that the department was still processing and compiling the large volume of comments received from various stakeholders, and would be able to start the review process only after completing that task. More than 340 comment submissions were made, some amounting to more than 250 pages, which the DOH must consider individually.¹⁸⁵¹ On this basis the representative indicated that it was not possible to estimate when the final regulations would ultimately be enacted, noting:

...it still remains difficult to determine the timeframe to determine when the final regulations would be in place, as based on some of the comments received, the preliminary review has shown that we would still need to engage with a number of stakeholders to conduct further consultations/obtain clarity and also certify the rationale for certain provisions. This latter aspect is also a prerequisite of the Presidency-led Socio-Economic Impact Assessment Study that is mandatory for these Regulations.¹⁸⁵²

¹⁸⁴⁹ Sulcas 2024 Daily Maverick <https://www.dailymaverick.co.za/article/2024-02-16-r3337-food-labelling-regulation-changes-delayed-as-health-department-drags-feet-in-review-process/>.

¹⁸⁵⁰ The initial deadline of 21 July 2023 was extended to 21 September 2023. See GN 3776 in GG 49094 of 8 August 2023. During the public comment phase any stakeholders could have submitted comments on the proposed measures in R3337, which would likely include comments on the proposed nutrient profiling model, FOP labelling model and additional labelling and advertising restrictions proposed in relation to unhealthy foodstuffs. Multisectoral stakeholder engagement is required to implement a trusted system. See WHO *Guiding Principles for FOP Labelling* 17.

¹⁸⁵¹ See Sulcas 2024 Daily Maverick <https://www.dailymaverick.co.za/article/2024-02-16-r3337-food-labelling-regulation-changes-delayed-as-health-department-drags-feet-in-review-process/>.

¹⁸⁵² Sulcas 2024 Daily Maverick <https://www.dailymaverick.co.za/article/2024-02-16-r3337-food-labelling-regulation-changes-delayed-as-health-department-drags-feet-in-review-process/>.

As things currently stand, it seems safe to assume that the implementation of legislative measures that restrict the labelling and advertising of unhealthy foodstuffs will not happen any time soon. In these circumstances the complementary role of advertising self-regulation with respect to unhealthy foodstuffs advertising and labelling regulation is considered in Chapter 6.

4.9.2 *Anticipated resistance by the food industry*

As another potential delay in legislative reform, it is anticipated that the labelling and advertising restrictions that have been proposed in R3337 will not simply be taken by the industry lying down. It is not uncommon for large producers of unhealthy commodities to resort to or threaten litigation in attempts to stifle, delay or weaken the implementation of public health laws.¹⁸⁵³ In this regard, it has been noted that:

the food and beverage industry continues to strongly and extensively oppose front-of-package warning labelling regulations ... Where States have effectively adopted front-of-package warning labelling regulations to promote public health, some companies have resorted to or threatened litigation.¹⁸⁵⁴

Arguments that may be raised by the industry are discussed briefly below.

4.9.2.1 Infringement of the right to freedom of commercial speech

A main argument is often that advertising and labelling restrictions infringe on the freedom of speech of the relevant unhealthy commodity purveyors. The discussion on *BATSA v Minister of Health* earlier in this chapter serves as an example.¹⁸⁵⁵

¹⁸⁵³ Gilmore *et al* 2023 *Lancet* 1200; Gostin *et al* 2019 *Lancet* 1865, 1867. Resistance to advertising or labelling restrictions by tobacco companies has also occurred elsewhere. See for example *JT International SA v Commonwealth of Australia* [2012] HCA 43 (5 October 2012), which was handed down by the High Court in Australia and *British American Tobacco Ltd v Ministry of Health*, Civil Appeal No 112 of 2916, which was issued by the Kenyan Court of Appeal on 17 February 2017. For additional case law examples see Tobacco Control Laws 2024 <https://www.tobaccocontrolaws.org/litigation>.

¹⁸⁵⁴ UN 2020 <https://www.ohchr.org/en/statements/2020/07/statement-un-special-rapporteur-right-health-adoption-front-package-warning>. In Australia the recommendation to implement the traffic light FOP labelling system was abandoned following industry resistance. Instances of industry resistance were also reported in Chile and Canada. See Pettigrew *et al* 2017 *Appetite* 116; Kanter, Vanderlee and Vandevijvere 2018 *Public Health Nutrition* 1406; Van Kleef and Dagevos 2015 *Critical Reviews in Food Science and Nutrition* 299.

¹⁸⁵⁵ See the discussion in part 4.7 above. Also see Gostin *et al* 2019 *Lancet* 1867.

In the context of unhealthy foodstuffs, it has been observed that the food industry's reliance on commercial speech serves to undermine public health regulation that has specifically been designed to assist in the prevention of obesity and diet-related NCDs.¹⁸⁵⁶ The discussion in part 4.7 above puts forward arguments in support of a justified limitation on advertising as a form of commercial speech of the foodstuffs industry, when balanced against the broader need to promote public health.

4.9.2.2 Potential international trade law concerns

It has been discussed earlier that the requirement to refrain from using certain graphic elements that constitute trade mark matter may result in trade mark holders in the foodstuffs industry raising objections based on the property clause in the *Constitution*.¹⁸⁵⁷

A separate consideration in the context of international trade law should also warrant mention. In considering foreign foodstuffs manufacturers whose products are available in South Africa, should the measures proposed in R3337 be implemented in due course, they would be necessitated to amend their product labels to cater for the local food labelling requirement. On this basis it may be argued that these amendments may potentially be seen as barriers to trade¹⁸⁵⁸ or encumbrances of trade mark rights¹⁸⁵⁹ in terms of international trade law.¹⁸⁶⁰ That being said, the protection of human health as a legitimate objective¹⁸⁶¹ may very well justify such measures if raised by the foodstuffs industry. These issues were raised before the WTO Dispute Settlement Body in *Australia*

¹⁸⁵⁶ Gostin *et al* 2019 *Lancet* 1867.

¹⁸⁵⁷ See the discussion in part 4.8 above.

¹⁸⁵⁸ In terms of art 2.2 of the *TBT Agreement*, WTO member states "shall ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade". Furthermore, technical regulations may not be more trade-restrictive than necessary to fulfil a legitimate objective, which includes the protection of human health.

¹⁸⁵⁹ In terms of art 20 of the *TRIPS Agreement*, the use of a trade mark in the course of trade shall not be unjustifiably encumbered by special requirements. Limiting the use of certain trade marks to foodstuffs that do not require FOP warning labels would, arguably, be a special requirement. However, art 8 does, in certain circumstances, permit WHO member states that formulate or amend laws or regulations to "adopt measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic ... development".

¹⁸⁶⁰ Kanter, Vanderlee and Vandevijvere 2018 *Public Health Nutrition* 1399. Also see Willet *et al* 2019 *Lancet* 483, which highlights that international trade policies should potentially be reviewed to ensure that they do not hinder the objective of achieving healthy diets in populations around the world.

¹⁸⁶¹ In terms of art 2.2 of the *TBT Agreement*.

- *Tobacco Plain Packaging*¹⁸⁶² following Australia's implementation of measures that placed restrictions on tobacco product labels and introduced so-called plain packaging essentially consisting of shock-value images to deter the use of tobacco products.¹⁸⁶³ For illustrative purposes, examples appear in Figure 4-17 below:



Figure 4-17: Examples of tobacco plain packaging in Australia¹⁸⁶⁴

As this case has been analysed at length in a separate study,¹⁸⁶⁵ comments on this aspect are summarised. In essence, the WTO Panel held that these measures fulfilled a legitimate objective in the context of public health considerations; that they did not unjustifiably encumber trade mark rights of trade mark proprietors in the tobacco industry; and that they were no more trade restrictive than required to further the legitimate public health objective in deterring the use of tobacco products. The WTO Appellate Body subsequently confirmed the Panel's findings in appeal.¹⁸⁶⁶

4.9.2.3 The current absence of unequivocal science supporting the proposed measures

In the context of laws aimed at improving public health, it has been pointed out that:

¹⁸⁶² *Australia - Certain Measures Concerning Trademarks, Geographical Indications and other Plain Packaging Requirements Applicable to Tobacco Products and Packaging* (consolidated under WTO case nos. WT/DS435/R, WT/DS441/R, WT/DS458/R, WT/DS467/R).

¹⁸⁶³ See part 2 of *Australia's Tobacco Plain Packaging Act 2011*.

¹⁸⁶⁴ Images sourced from Anker 2016 *Public Health Ethics* 209.

¹⁸⁶⁵ For a detailed discussion of this case, see Nyatsanza *Balancing the Protection of Public Health Interests and Trademark Rights in Plain Packaging of Tobacco Products* 284-307.

¹⁸⁶⁶ For additional key facts, dates and findings in this matter, see WTO date unknown https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds435_e.htm.

[L]aws should be informed by scientific evidence, rigorously answering the question: do they improve the health and safety of the population, while not posing undue burdens on individual rights?¹⁸⁶⁷

As part of its objection to FOP labelling elsewhere, the food industry has argued that this tool is “ineffective in improving consumers’ diet and imposes an unnecessary burden on firms”.¹⁸⁶⁸

It should, however, be kept in mind that the implementation of FOP warning labels and additional labelling and advertising restrictions were introduced only a few years ago. As such, research on whether or not such measures in relation to unhealthy foodstuffs actually serve to reduce premature morbidity and mortality due to diet-related NCDs has been limited.¹⁸⁶⁹ As studies should be conducted over longer periods, it has been pointed out that:

There is not enough empirical evidence to draw conclusions on the impact of FOP labels on consumers’ diets and health, as this would require observing daily eating choices over many years.¹⁸⁷⁰

Van Kleef and Dagevos¹⁸⁷¹ point out that the “inherent difficulty of long-term experimental research” in this area has resulted in limited and mixed evidence on this aspect. In the South African context, it has also been noted that, whilst studies such as those conducted by Bopape *et al* appear to have positive outcomes, such studies are experimental in nature. Sample sizes of consumers forming part of the studies as well as the product categories included in studies and geographical areas are predetermined, which poses questions about generalising the outcomes to the population as a whole.¹⁸⁷² Nonetheless, this is the best and most up-to-date scientific evidence, for the South African population, that we have. Whilst the actual impact of FOP warning labelling and other advertising and labelling restrictions will have to be studied and reported on over time and only after

¹⁸⁶⁷ Gostin *et al* 2019 *Lancet* 1882.

¹⁸⁶⁸ Barahona, Otero and Otero 2023 *Econometrica* 840.

¹⁸⁶⁹ Van Kleef and Dagevos 2015 *Critical Reviews in Food Science and Nutrition* 298.

¹⁸⁷⁰ European Parliamentary Research Service *Nutrition Labelling Schemes Used in Member States* 6.

¹⁸⁷¹ Van Kleef and Dagevos 2015 *Critical Reviews in Food Science and Nutrition* 298, 300.

¹⁸⁷² Pettigrew *et al* 2017 *Appetite* 116.

the proposed measures are introduced,¹⁸⁷³ at this point it seems to be the case that the harm in “not trying” would be devastating to overall public health.

4.9.2.4 Potential impact on employment in the foodstuffs sector

Although a large portion of the world’s financial resources are kept in the hands of multinational corporations, the business sector also includes many micro-enterprises, small enterprises and medium enterprises.¹⁸⁷⁴ As such, early engagement by the government with the food industry is pivotal in the implementation of FOP labelling systems.¹⁸⁷⁵ The WHO¹⁸⁷⁶ has pointed out that:

[e]arly engagement with the food industry is essential to familiarize the industry with the proposed FOPL system and to ensure that industry can use the nutrient profiling criteria to identify the appropriate FOPL system for their product or products. This is particularly important for smaller businesses that may not have specialist staff to undertake this process.

If the experience in Chile is anything to go by, the South African food industry may argue that, in addition to costs relating product label amendments,¹⁸⁷⁷ the introduction of unhealthy foodstuffs measures in R3337 may negatively impact employment in South Africa. Whilst it will be possible to assess the validity of this argument only at some time after the implementation of the proposed measures, Paraje *et al*¹⁸⁷⁸ criticise this line of argumentation, noting that such arguments “are based on simplistic textbook economic models with little or no empirical support”. These scholars also point out that the position in Chile 18 months after the implementation of the unhealthy foodstuffs measures revealed “no discernible effect on employment or wages” in the sector of the food industry affected by those measures.¹⁸⁷⁹ A subsequent study conducted by these researchers three

¹⁸⁷³ Bopape, Taillie and Swart 2022 *Front in Public Health* 9.

¹⁸⁷⁴ Lacy-Nichols *et al* 2023 *Lancet* 1217.

¹⁸⁷⁵ Principle 12 of the WHO *Guiding Principles for FOP Labelling* 21.

¹⁸⁷⁶ WHO *Guiding Principles for FOP Labelling* 20.

¹⁸⁷⁷ See discussion in part 4.9.3 below.

¹⁸⁷⁸ Paraje *et al* 2022 *Nutrients* 3.

¹⁸⁷⁹ Paraje *et al* 2022 *Nutrients* 3, 10.

years after implementation revealed no significant deviation from that initial observation.¹⁸⁸⁰ In these circumstances, Paraje *et al*¹⁸⁸¹ conclude:

[o]verall, labor market outcomes and profits were largely unaffected by these regulations. These could be due to firms producing both “high-in” and not-high-in substitutes (e.g., firms producing SSBs and bottled water); and/or reformulation of products to convert them into not-high-in ones, which imply maintaining the demand faced by firms. While the first alternative would eventually imply reallocating workers across lines of production, the second one would mean investing in research and development to change formulas and market the reformulated products.¹⁸⁸²

The anticipated positive outcomes of introducing the unhealthy foodstuffs restrictions in South Africa, including shifting consumer behaviour towards healthier dietary choices and incentivising the reformulation of unhealthy foodstuffs would seem to weigh heavier than potential negative effects on labour markets, if any.

4.9.2.5 Possible impact on innovation in the food sector

It has been pointed out that restrictions on the labelling and advertising of unhealthy foodstuffs may stifle innovation and competition in the food industry.¹⁸⁸³ That being said, one of the main objectives of FOP labelling being to act as an incentive for product development or reformulation, an optimistic view would be that these restrictions could very well serve to foster innovation. In this regard Barahona, Otero and Otero¹⁸⁸⁴ point out that:

[FOP] labels can incentivize firms to design new healthy products targeted to more informed consumers, which improves the bundle of available products in the long run.¹⁸⁸⁵

On the issue of competition, public health should certainly outweigh any competitive edge that may be lost resulting from compliance with R3337. Barahona, Otero and Otero¹⁸⁸⁶ have also pointed out that food labels have an impact on market power. A potential

¹⁸⁸⁰ Paraje *et al* 2022 *Nutrients* 3.

¹⁸⁸¹ Paraje *et al* 2022 *Nutrients* 10.

¹⁸⁸² As many of the Big Food players in South Africa are transnational corporations with similar product ranges, the results in Chile may very well anticipate what we may find in other countries adopting similar measures such as South Africa in years to come. See Paraje *et al* 2022 *Nutrients* 11.

¹⁸⁸³ Van Kleef and Dagevos 2015 *Critical Reviews in Food Science and Nutrition* 299.

¹⁸⁸⁴ Barahona, Otero and Otero 2023 *Econometrica* 866.

¹⁸⁸⁵ Also see Thow *et al* 2019 *Nutrients* 1.

¹⁸⁸⁶ Barahona, Otero and Otero 2023 *Econometrica* 840.

consequence of reformulation is that changes in the taste of the product may decrease demand for the relevant product.¹⁸⁸⁷ In the context of unhealthy foodstuffs, this would be seen as a positive dietary shift.

4.9.3 The anticipated financial impact on the consumer pocket and a suggested phased-in approach

On the topic of reformulation, should the introduction of FOP warning labels and other restrictive measures proposed in R3337 assist in the reduction in the consumer demand for unhealthy foodstuffs as anticipated, producers would possibly be incentivised to reformulate the product in such a way that FOP warning labelling is no longer required. This could, therefore, be seen as a carrot-and-stick approach. Product reformulation may, however, be a costly exercise ultimately increasing the price of the reformulated product.¹⁸⁸⁸ Barahona, Otero and Otero¹⁸⁸⁹ note:

[f]irms may also use healthier ingredients in their products to avoid receiving labels, thus amplifying the positive effects on nutritional intake but also increasing consumer prices as a result of increased production costs. Taken together, the impact of large-scale food labeling regulations is ambiguous.

A study in Chile revealed a price increase of 5.5% in products following reformulation.¹⁸⁹⁰ This shows that it is ultimately the consumer who pays the price for increased food costs due to label amendments and possible product reformulations.

For prepackaged foods that will require FOP warning labelling, the foodstuffs manufacturer would essentially have one of two options. Either amend the product label to disclose the presence of unhealthy nutrients by way of FOP warning label or reformulate the product in such a way that FOP labelling is not required. Either way, costs will be incurred. Whilst the first option will require costs to amend the label only, with option two the reformulation could potentially result in production price increases (due

¹⁸⁸⁷ European Parliamentary Research Service *Nutrition Labelling Schemes Used in Member States* 6.

¹⁸⁸⁸ Barahona, Otero and Otero 2023 *Econometrica* 841.

¹⁸⁸⁹ Barahona, Otero and Otero 2023 *Econometrica* 840.

¹⁸⁹⁰ Barahona, Otero and Otero 2023 *Econometrica* 840.

to other ingredients being used) as well as a label amendment (as the list of ingredients on the label would have to be amended). In this regard, the FAO¹⁸⁹¹ has pointed out:

[i]t is important to consider the costs and benefits over time, since the benefit such as behavior change and reductions in diseases can take years. Some costs, such as analyzing the composition of foods and creating new labels, may be high initially but decrease with time. The cost of ensuring compliance with the policy need [sic] to be considered.

Turning to the timelines for the implementation of the proposed measures in R3337, the FAO currently proposes that draft regulations 51 and 52, which essentially encompass the FOP warning label requirements and additional labelling and advertising restrictions discussed above, should enter into force six months after the date of publication of the final regulations.¹⁸⁹² This would not give foodstuffs manufacturers a lot of time to amend the labels of qualifying products. Label amendments would impact on local as well as cross-border trade and would have economic ramifications.¹⁸⁹³ Foodstuffs producers who sell in both South Africa and other countries would be required to have more than one set of labels per product, i.e., one label for the South African market complying with R3337, and one or more others for the foreign country/countries to which their goods are exported.¹⁸⁹⁴

A study published by Frank *et al* reveals that in 2018 more than 75% of pre-packaged foodstuffs in South African supermarkets were ultra-processed.¹⁸⁹⁵ Assuming that those figures remain a true reflection of the current foodstuffs environment in shopping outlets, this would essentially mean that, if R3337 comes into operation, more than three-quarters of pre-packaged products on shelves will have to be re-labelled to include FOP warning labelling. If the 2018 figures have increased, this requirement may even require labelling changes for a larger portion of foodstuffs. Label amendment requirements for a substantial segment of products on the shelves will unavoidably result in costs.¹⁸⁹⁶

¹⁸⁹¹ FAO *Handbook on Food Labelling to Protect Consumers* 14.

¹⁸⁹² Draft reg 77(4) of R3337.

¹⁸⁹³ Ferrante 2021 *Rivista di Diritto Alimentare* 76.

¹⁸⁹⁴ Ferrante 2021 *Rivista di Diritto Alimentare* 82.

¹⁸⁹⁵ Frank *et al* 2021 *Nutrients* 5.

¹⁸⁹⁶ Van Kleef and Dagevos 2015 *Critical Reviews in Food Science and Nutrition* 299.

Further to the above, in terms of R3337 no FOP label formats other than the FOP warning label as prescribed in R3337, where applicable, would be permitted.¹⁸⁹⁷ Whilst this provision will be beneficial to consumers because it would avoid the co-existence of multiple nutrient labels on product packaging,¹⁸⁹⁸ it would have far-reaching consequences for the food industry. In effect, this would mean that the labels of all foodstuffs (even if not unhealthy) that currently display a form of FOP labelling or nutritional information such as the GDA label or otherwise would have to be amended to remove that matter.

Against this background, and although this is not the intention, rises in food prices have been identified as an unavoidable consequence of implementing additional labelling and advertising requirements in relation to unhealthy foodstuffs.¹⁸⁹⁹ This anticipated consequence following the implementation of the proposed measures will have the most severe impact on the poor and consumers living in low-income areas as they are particularly vulnerable to food price fluctuations.¹⁹⁰⁰ This issue is particularly worrying given that the *National Development Plan* stresses that in the context of economic growth “[i]t is essential to reduce the cost of living in relation to food”.¹⁹⁰¹ The current concern is that, if they are implemented, the proposed measures in R3337 would run counter to that requirement. The Government-mandated “socio-economic impact assessment study” which seems to be in the pipeline for R3337¹⁹⁰² should go a long way towards shedding more light on this concern in due course. The purpose of the socio-economic assessment study is:

¹⁸⁹⁷ In terms of draft reg 48(5), no “nutritional labels, label systems, panels or simplified nutritional information” will be permitted on a foodstuffs label other than, where applicable, the FOP warning label required under reg 51 of R3337.

¹⁸⁹⁸ Multiple nutrient indications on a single product label have been found to cause frustration and comprehension difficulty among consumers. As such, the development and implementation of a single, uniform FOP labelling system across the relevant food spectrum is optimal. See Van Kleef and Dagevos 2015 *Critical Reviews in Food Science and Nutrition* 295; WHO *Guiding Principles for FOP Labelling* 7; para 4 of Annex 2 of the CAC *Guidelines on Nutrition Labelling*.

¹⁸⁹⁹ WHO *Guiding Principles for FOP Labelling* 21.

¹⁹⁰⁰ Frank *et al* 2024 *Public Health Nutrition* 2; Blouin, Chopra and Van der Hoeven 2009 *Lancet* 502. *National Development Plan* 116, 231.

¹⁹⁰¹ *National Development Plan* 114, 116, 231.

¹⁹⁰² See the discussion in part 4.9.1 above.

to minimise unintended consequences, unnecessary costs from implementation and compliance and from unanticipated outcomes as well as to anticipate implementation risks and encourage measures to mitigate them.¹⁹⁰³

As a separate consideration, the phased-in approach as far as it relates to nutrient cut-off values adopted in Chile may be a useful consideration in South Africa, especially as the model proposed in R3337 is essentially underpinned by the Chilean model and the accompanying nutrient cut-off values. In Chile the nutrient cut-off values for sodium, total sugars and saturated fats were implemented in a three-phase staggered approach, decreasing gradually over three years.¹⁹⁰⁴ Table 4 below sets out a redacted version of an illustration of the reduced nutrient cut-off values in Chile over phases 1, 2 and 3 with an indication in red of the nutrient cut-off values proposed in R3337 for South Africa:

Table 1.	Nutrient or Energy	Phase 1: 26 June 2016	Phase 2: 24 Months after Beginning of Phase 1 (27 June 2018)	Phase 3: 36 Months after Beginning of Phase 1 (27 June 2019)
Solid foods	Sodium, milligrams (mg)/100 g	800.0	500.0	400.0
	Total sugars, g/100 g	22.5	15.0	10.0
	Saturated fats, g/100 g	6.0	5.0	4.0
Liquid foods	Sodium, mg/100 mL	100.0	100.0	100.0
	Total sugars, g/100 mL	6.0	5.0	5.0
	Saturated fats, g/100 mL	3.0	3.0	3.0

↑
**Unhealthy nutrient cut-off
values proposed in R3337**

Table 4: Cut-off values for unhealthy nutrients implemented in Chile over phases 1, 2 and 3¹⁹⁰⁵

When considering the above table and the total sugars for solid prepacked foodstuffs for example:

- with phase one implemented on 26 June 2016, the “high in sugar” icon was required on the FOP warning label if the total sugar was 22.5 g per 100 g or more, i.e. if the product contained a sugar content of 22.5% or higher;

¹⁹⁰³ DOH *Obesity Strategy* 32.

¹⁹⁰⁴ Paraje *et al* 2022 *Nutrients* 1; Barahona, Otero and Otero 2023 *Econometrica* 843.

¹⁹⁰⁵ Image (in redacted form) sourced from Paraje *et al* 2022 *Nutrients* 11.

- with the subsequent implementation of phase two 24 months later, the “high in sugar” icon was required on the FOP warning label for products that had a total sugar content of 15% or higher (i.e., 15g per 100g or more); and
- only from phase 3 commencing on 27 June 2019, i.e. 36 months after the implementation of mandatory FOP warning labels in Chile, was the threshold for “high in sugar” lowered to the current level of 10g per 100 g for solids (i.e., which requires the inclusion of that icon on a FOP warning label for solid foods that have a total sugar content of 10% or more). R3337 proposed this cut-off value outright.

The reason why Chile adopted this three-phase staggered approach in lowering nutrient cut-off values gradually was to allow foodstuff manufacturers time to adjust their production processes.¹⁹⁰⁶ It is suggested that this approach also be considered for South Africa, to soften the blow so to speak in relation to product re-labelling and reformulation considerations. Such a flexible implementation would allow the foodstuffs industry time to reformulate products and amend product labels over time which, most importantly, might ultimately reduce the risk of an all-too-sudden and far-reaching surge in foodstuffs prices in South Africa. The DOH *Obesity Strategy* also highlights that “[o]pting for phased transitions” is an element of effective and sustainable interventions aimed at addressing obesity and diet-related NCDs.¹⁹⁰⁷

It should also be noted that a phased-in approach as far as it relates to reductions in nutrients in foodstuffs is nothing new in South Africa. The *Regulations Relating to the Reduction of Sodium in Certain Foodstuffs*¹⁹⁰⁸ (hereafter *Sodium Regulations*) set out requirements for the reduction of total salt in certain foodstuffs such as bread, breakfast cereals, fat spreads and butter spreads, potato crisps and processed meats in a phased-in approach over a number of years. These regulations were published in March 2013¹⁹⁰⁹ and required, as a first phase, sodium reduction for certain products by the end of June

¹⁹⁰⁶ Paraje *et al* 2022 *Nutrients* 1; Taillie *et al* 2021 *Lancet Planet Health* 3. Also see Barahona, Otero and Otero 2023 *Econometrica* 843.

¹⁹⁰⁷ DOH *Obesity Strategy* 23.

¹⁹⁰⁸ *Regulations Relating to the Reduction of Sodium in Certain Foodstuffs and Related Matters*, GN R214 published in GG 36274 of 20 March 2013, and amended by GN 1071 in GG 41164 of 6 October 2017 and GN 812 in GG 42496 of 21 May 2019.

¹⁹⁰⁹ GN R214 published in GG 36274 of 20 March 2013.

2016, followed by a subsequent second phase reduction between June 2019 and April 2020.¹⁹¹⁰ In effect, therefore, the *Sodium Regulations* were phased in over a period of seven years when calculated from the date of the publication of the regulations to the date of the full implementation across all relevant product categories.¹⁹¹¹ Whilst it is not suggested that the same phase-in period be afforded to unhealthy foodstuffs manufacturers, the short six-month phase-in period proposed in R3337 may equally not be appropriate. The approach adopted in Chile seems to be a middle-of-the-road option which should be considered for South Africa.

As a last consideration on this topic, a phased-in approach could also potentially assist in implementing nationwide public education campaigns and consumer engagement to ensure that members of the public are aware of and understand the FOP warning labelling system and accompanying restrictions before implementation. A time lag between pre-emptive consumer education initiatives and the actual implementation of the FOP warning labelling system (especially with the most limited nutrient cut-off values) may very well be in the broader public interest.¹⁹¹²

4.9.4 Effective monitoring and enforcement mechanisms will be required following the implementation of unhealthy foodstuffs labelling and advertising restrictions

Assuming that restrictions on the labelling and advertising of unhealthy foodstuffs are introduced under the *FCDA* in due course in the current or amended form as set out in R3337, the impact and effect of those measures over time will have to be monitored.¹⁹¹³ Compliance monitoring and enforcement of the relevant legislative amendments will be a key component in ensuring the effectiveness of the advertising and labelling

¹⁹¹⁰ In the case of bread, for example, producers were given until 30 June 2016 to ensure that the total sodium did not exceed 400 mg per 100 g. Thereafter an additional three-year period was afforded, until 30 June 2019, to reduce the total sodium levels for bread further to a maximum of 380 mg per 100g. See Table 1 of reg 2 of the *Sodium Regulations*.

¹⁹¹¹ As a side comment, many of the products listed in Table 1 of the *Sodium Regulations* are permitted to contain a sodium level above the nutrient cut-off value of 400 mg per 100 g for solids proposed in R3337 (see the discussion in part 4.4.5.3 above). Examples include fat spreads and butter spreads, ready-to-eat savoury snacks, potato crisps and processed meat.

¹⁹¹² This approach would also be followed in relation to principle 14 within the WHO *Guiding Principles for FOP Labelling* by allowing penetration and consumer awareness in the marketplace. See WHO *Guiding Principles for FOP Labelling* 20, 21.

¹⁹¹³ WHO *Guiding Principles for FOP Labelling* 21.

restrictions.¹⁹¹⁴ If compliance with these legislative changes is not policed, the desired practical outcomes of these measures may remain idle. In this regard Gostin *et al*¹⁹¹⁵ point out that once new laws have been implemented, the challenge becomes the monitoring and enforcement thereof “in arenas often characterised by fragmentation and contestation”.¹⁹¹⁶

Moreover, for the effective implementation of the proposed FOP warning labelling system and accompanying advertising restrictions under R3337, an “appropriate governance structure” should support the implementation of such as system from development to implementation and subsequent monitoring and evaluation.¹⁹¹⁷ Whilst evidence shows that “population-level policy interventions can offer large benefits for population health at a low cost to society”, lack of adequate resources for implementation of the strategy has been identified as one of the challenges in affecting this.¹⁹¹⁸ In considering the effectiveness of the interventions suggested in the *2015-2020 Obesity Strategy* (which preceded the current *Obesity Strategy*), it was noted that:

[p]oor commitment from relevant sectors and a lack of resources meant that some of the planned activities were not effectively carried out. The lack of monitoring and evaluation of the implementation of the strategy underpins the possibility that resources may or may not have been spent sub-optimally, but that it is impossible to determine the efficacy of interventions.¹⁹¹⁹

To address those challenges and strengthen national governance regarding food security in South Africa, the *National Food and Nutrition Security Plan for South Africa 2018-2023*,¹⁹²⁰ which was published in 2017, sets out the government’s objective of establishing a multisectoral Food and Nutrition Security Council.¹⁹²¹ The primary function of this

¹⁹¹⁴ Reviews, adjustments or improvements of the measures may also be necessary over time. See WHO *Guiding Principles for FOP Labelling* 7.

¹⁹¹⁵ Gostin *et al* 2019 *Lancet* 1857.

¹⁹¹⁶ Also see Kushitor *et al* 2022 *Food Security* 890-891.

¹⁹¹⁷ WHO *Guiding Principles for FOP Labelling* 7, 21; para 4 of Annex 2 of the CAC *Guidelines on Nutrition Labelling*.

¹⁹¹⁸ DOH *Obesity Strategy* 49.

¹⁹¹⁹ DOH *Obesity Strategy* 49.

¹⁹²⁰ The *Government of the Republic of South Africa National Food and Nutrition Security Plan for South Africa 2018-2023* (2017) (hereafter “*National Food and Nutrition Security Plan*”).

¹⁹²¹ Once established, the Council will be chaired by the Deputy President of the Republic of South Africa. The premier of each respective province will chair each of the nine provincial sub-councils. For additional information on the planned composition of the Council and the provincial sub-councils, see National Food and Nutrition Security Plan 59-60. For additional reading, see Department of Planning,

Council would be to oversee the alignment of policies, legislation and programmes, as well as the coordination and implementation of programmes and services that address food and nutrition security in South Africa.¹⁹²²

Unfortunately, efforts to set up the Food and Nutrition Security Council have been minimal so far.¹⁹²³ The main reason for this seems to be a lack of financial resources. In October 2023 a report was issued by Genesis Analytics following its evaluation of implementing the *National Food and Nutrition Security Plan*.¹⁹²⁴ The report reveals that there has been slow progress in implementing the *National Food and Nutrition Security Plan*. Aspects that have inhibited the effective implementation in the years covered in the report include:

...lack of budget allocation, non-convening of the National Council, limited awareness among state and non-state actors, fragmented strategic goals, a narrow food system perspective, capacity issues at the ground level, and challenges in securing leadership support at the highest government levels. The onset and impact of the COVID-19 pandemic disrupted planned activities and adversely affected implementation efforts. Financial constraints, particularly the size of the Plan's budget and insufficient funding, pose significant challenges.¹⁹²⁵

In 2019 it was estimated that the costs of implementing the *National Food and Nutrition Security Plan* (which includes the objective of establishing a Food and Nutrition Security Council) would be in the region of R86, 806 billion. At that time already the Parliamentary Monitoring Group noted that “there was no hope of having such a fund being made available”.¹⁹²⁶ As indicated above, the Genesis Analytics report reiterates that funding remains a large challenge. In addition, the report points out that the figure of R86, 806

Monitoring and Evaluation *2018-2023 National Food and Nutrition Security Communication Strategy for South Africa* 16, 52-53, 60-62, 83-86.

¹⁹²² National Food and Nutrition Security Plan 59. Strategic objective 5 within the *National Food and Nutrition Security Plan* centres on influencing people across their life cycles to make informed food and nutrition decisions. See *National Food and Nutrition Security Plan* 95.

¹⁹²³ Kushitor *et al* 2022 *Food Security* 889.

¹⁹²⁴ Genesis Analytics *Implementation Evaluation of the National Food and Nutrition Security Plan* 1. This report was issued upon an instruction from the National Department of Planning, Monitoring and Evaluation.

¹⁹²⁵ Genesis Analytics *Implementation Evaluation of the National Food and Nutrition Security Plan* 2-3. Also see Kushitor *et al* 2022 *Food Security* 889.

¹⁹²⁶ Parliamentary Monitoring Group 2019 Food Security Policy & Food Control Agency available at <https://pmg.org.za/committee-meeting/28093/>; Genesis *Analytics Implementation Evaluation of the National Food and Nutrition Security Plan* 1.

billion figure was not arrived at after the consideration of a detailed implementation plan that assessed the costs and the anticipated the sources of such funding.¹⁹²⁷

An “institutional gap” hindering the effective implementation of the *National Food and Nutrition Security Plan* is the fact that the envisaged Food and Nutrition Security Council has not been established.¹⁹²⁸ However, it seems that the issue funding the Council’s establishment will first have to be resolved. In February 2024 the Parliamentary Monitoring Group reported that financial resource restrictions were hampering progress in the implementation of the *National Food and Nutrition Security Plan* and that funding would have to be sourced to move forward.¹⁹²⁹ Whilst there have not been reported developments on the potential sourcing of funds, the reality seems that *National Food and Nutrition Security Plan* and the envisaged Food and Nutrition Security Council will not come into effect in the near future. As a recommendation to improve food and nutrition security (which includes tackling overweight and obesity in South Africa), the Genesis Analytics report suggests incorporating existing legislative measures and inter-governmental cooperation, whilst engaging with non-state actors.¹⁹³⁰ On this basis, Chapter 5 will consider the existing monitoring and enforcement mechanisms relevant to foodstuffs advertising and labelling regulation within the government regulatory system. Separately, Chapter 6 considers the potential supporting role of the private sector in regulating foodstuffs advertising and labelling, including the advertising industry and consumers, through the operations of the ARB as a self-regulatory body.

4.10 Conclusion

This chapter has focused on the provisions in R3337 which have been proposed to restrict unhealthy foodstuffs labelling and advertising in South Africa, namely (i) the introduction of mandatory FOP warning labels for such foodstuffs; (ii) a ban on the advertising of unhealthy foodstuffs to children; (iii) the requirement to include a health warning message in unhealthy foodstuffs advertising not directed at children; and (iv) the removal

¹⁹²⁷ Genesis Analytics *Implementation Evaluation of the National Food and Nutrition Security Plan* 3.

¹⁹²⁸ Genesis Analytics *Implementation Evaluation of the National Food and Nutrition Security Plan* 3, 18

¹⁹²⁹ Parliamentary Monitoring Group 2024 <https://pmg.org.za/committee-meeting/38403/>.

¹⁹³⁰ Genesis Analytics *Implementation Evaluation of the National Food and Nutrition Security Plan* 1, 23-24.

of graphic elements constituting trade mark matter from unhealthy foodstuffs labelling and advertising. As part of the discussion, a number of comments were made relating to definitions, potential ambiguities and typographical amendments in an attempt to assist in the interpretation and application of the updated R3337 in due course.

When considering the bigger picture, the approach by the South African government to regulating the labelling and advertising of unhealthy foodstuffs appears to be in line with global trends, where the use of FOP labels (albeit not uniform) with accompanying restrictions has recently gained in popularity in several countries.¹⁹³¹ This development is supported by international health and nutrition organisations, as well as various South African and foreign scholars in those fields. Moreover, as the government is primarily responsible for protecting public health, the introduction of provisions that are ultimately aimed at improving the broader public health would fall within that mandate and authority. As such, a multi-pronged approach to addressing diet-related NCDs through the introduction of measures that place restrictions on unhealthy foodstuffs labelling and advertising should be government-led.¹⁹³² Of course, this should be done in collaboration with key stakeholder engagement and input, including that of the private sector, consumers, academia and public health associations.¹⁹³³

Turning to the overall purpose of the measures proposed in R3337, the potential pros seem to far outweigh the anticipated or even unanticipated cons that may arise over time. The prevailing dietary patterns and accompanying poor health status of a significant portion of the South African population undoubtedly serve as the rationale¹⁹³⁴ for the proposed government regulatory intervention aimed at changing the current food environment in South Africa towards that of a nation with good health and well-being. In the same breath, it is submitted that legislative restrictions on the labelling and advertising of unhealthy foodstuffs would be justified both in terms of the relevant constitutional considerations as well as the international law provisions that underpin the

¹⁹³¹ See the discussion in part 4.4.4 above.

¹⁹³² WHO *Guiding Principles for FOP Labelling* 12, 43.

¹⁹³³ WHO *Guiding Principles for FOP Labelling* 7; para 4 of Annex 2 of the CAC *Guidelines on Nutrition Labelling*.

¹⁹³⁴ WHO *Guiding Principles for FOP Labelling* 7, 14.

universal right to health in pursuit of reaching target 3.4 within SDG 3. In pointing out that government regulation that promotes changes across the entire consumer group to address the burden of NCDs has the greatest impact¹⁹³⁵ Gostin *et al*¹⁹³⁶ says:

[g]ood laws can make healthier and safer behaviours the easier or normal choice. In conjunction with health promotion and awareness campaigns, countries can use law to support and encourage communities to resolve the problems arising from the shared risk factors of non-communicable diseases.

A FOP warning labelling system as part of a multi-pronged approach to restrict unhealthy foodstuffs labelling and advertising should be tailored according to a country's own needs.¹⁹³⁷ It is encouraging, therefore, that research has been published in recent years which guides best practices for South Africa and the preferences and needs of its consumers, and which underpin the measures proposed in R3337. That research would undoubtedly assist in demonstrating that the DOH's proposals in R3337 are backed by recent and up-to-date scientific evidence for this country.¹⁹³⁸ Preliminary studies conducted by scholars in South Africa in anticipation of R3337, as well as the success recorded in Chile following its implementation of the multi-pronged approach, support expectations that the implementation of restrictions on the labelling and advertising of unhealthy foodstuffs may yield positive results over time. However, the introduction of such restrictions should form part of a broader multisectoral approach to addressing NCDs and promoting a healthy diet.¹⁹³⁹ Whilst the introduction of the proposed measures will not solve the problem in isolation or overnight, the indications are that such measures will form a significant part of the overall solution.¹⁹⁴⁰ As an add-on measure, accompanying consumer education initiatives would ensure that consumers understand

¹⁹³⁵ Policies that focus entirely on individuals to change their behaviours, on the other hand, are deemed to have a reduced success rate. See DOH Obesity Strategy 22.

¹⁹³⁶ Gostin *et al* 2019 Lancet 1888.

¹⁹³⁷ Ferrante 2021 Rivista di Diritto Alimentare 88.

¹⁹³⁸ See, for example, Bopape *et al* 2021 PLoS ONE 2, 3; Hutton and Gresse 2020 Journal of Consumer Sciences 135; Bopape, Taillie and Swart 2022 Front in Public Health 8.

¹⁹³⁹ Todd *et al* 2022 Nutrients 18; Schmitt, Wagner and Kirch 2007 Journal of Public Health 58.

¹⁹⁴⁰ Van Kleef and Dagevos 2015 Critical Reviews in Food Science and Nutrition 301.

the format of displaying supplementary nutrition information¹⁹⁴¹ such as FOP warnings on foodstuffs labels.¹⁹⁴²

On a practical level, there are likely to be certain challenges in the lead-up to the implementation of the proposed measures, as well as thereafter. First, the development and implementation process has been protracted, and it does not seem that legislative measures will be implemented any time soon. If certain provisions in R3337 are challenged before the courts by the food industry, that litigation may prolong the process even further. With the prevailing obesity and NCDs trends in South Africa, the reality of the slow pace of legislative reform is problematic. The current legislative gap regarding the regulation of unhealthy foodstuff labelling and advertising in South Africa brings about an enquiry as to what can or should be done in the meantime. More specifically, and as discussed in Chapter 6, the possible role and function of self-regulation within the advertising industry, in support of government efforts should be explored.

Second, there is no escaping the fact that the introduction of the proposed measures will have an impact on food prices. Whilst this consequence is unintended, it is also unavoidable. It is not contested that the perceived long-term benefits of improving public health may very well outweigh the short-term impact on consumers' pockets. Nevertheless, as part of the overreaching right to access to information and for the sake of transparency, consumers should ideally be informed of this fact in advance of R3337's coming into operation. It has also been suggested above that adopting a phased-in approach, where unhealthy nutrient cut-off values are decreased over time may ease the potential impact on the pockets of the purchasing public. Foodstuffs manufacturers would then also be afforded an opportunity to reformulate their products. In addition, this would give the government additional time to roll out public education initiatives.

¹⁹⁴¹ Supplementary information, which includes FOP labelling, is information applied to food labels that supplement or are an addition to nutritional declarations (i.e. the nutritional information table) on foodstuffs packaging. See s 5 of the CAC *Guidelines on Nutrition Labelling*. For additional information on nutrient declarations, see the discussion in part 2.4.6.

¹⁹⁴² Bopape, Taillie and Swart 2022 *Front in Public Health* 9; s 5 and para 4 of Annex 2 of the CAC *Guidelines on Nutrition Labelling*; WHO *Guiding Principles for FOP Labelling* 8.

As a final anticipated challenge, following the implementation of the proposed measures, compliance with those requirements should be monitored and enforced in order for them to be effective.¹⁹⁴³ In this regard it has been pointed out that the ability and competence of governments and their agencies to implement and enforce policy provisions could be a challenge in addressing diet-related NCDs.¹⁹⁴⁴ As the establishment of a single Food and Nutrition Security Council is not on the cards in the near future,¹⁹⁴⁵ the existing mechanisms that serve to monitor and enforce food laws in South Africa should be analysed. Chapter 5 is dedicated to this important aspect.

¹⁹⁴³ Yamoah *et al*/2021 International Journal of Environmental Research and Public Health 8.

¹⁹⁴⁴ DOH Obesity Strategy 22.

¹⁹⁴⁵ See part 4.9.4 above.

Chapter 5: Monitoring and enforcement of food laws in South Africa

5.1 Introduction

If enacted in due course, the proposed measures in R3337 restricting unhealthy foodstuffs advertising and labelling will have to be monitored and enforced to be effective.¹⁹⁴⁶ As such, this chapter is dedicated to considering monitoring and enforcing the relevant food laws in South Africa. Compliance monitoring and enforcement of national food laws are crucial in protecting the health and well-being of consumers. Moreover, effective monitoring and enforcement of food laws is an important consideration in effecting, on a practical level, the realisation of the rights of the purchasing public.¹⁹⁴⁷ On this basis, and as part of a multi-stakeholder participation approach, relevant food laws should as far as possible be monitored and enforced by all interested stakeholders. This would include the government, private actors or associations in the food industry, and consumers.¹⁹⁴⁸

As mentioned earlier, a crucial component in this design of this study is to consider the authority and capacity of officials and agencies within the DOH, DOA and DTIC to monitor and enforce food laws in this country. This is because the existing procedures within these three government departments are relevant, albeit to differing degrees, to the current and future regulation of foodstuffs labelling and advertising.¹⁹⁴⁹ It has been noted earlier that the legislative framework relating to foodstuffs labelling and advertising is fragmented, and the monitoring and enforcement of the relevant food laws stretches across different national government departments.¹⁹⁵⁰ The fragmented nature of the food

¹⁹⁴⁶ See the discussion in part 4.9.4 above.

¹⁹⁴⁷ This would include the rights discussed in Chapter 3, such as the right to a food environment which is not harmful to health and well-being, and the right of access to nutrition/diet-related information that is conveyed in a plain and understandable manner. See part 3.2 above.

¹⁹⁴⁸ This would include entities such as the Consumer Goods and Services Council of South Africa and Healthy Living Alliance. See the discussion in Chapter 2, and part 5.3.2 below.

¹⁹⁴⁹ See part 4.9.4 above.

¹⁹⁵⁰ See the discussion in part 2.3 above.

law framework is also apparent from R3337, which contains several references to the *APSA*,¹⁹⁵¹ and also refers to the *NRCS Act*¹⁹⁵² and the *CPA*.¹⁹⁵³

Following the above, part 5.2 sets out a discussion on the monitoring and enforcement of relevant food legislation by investigators appointed by the DOH; assignees designated under the *APSA* within the DOA; the National Regulator for Compulsory Specifications ("NRCS")¹⁹⁵⁴ and the National Consumer Commission ("NCC"),¹⁹⁵⁵ both bodies falling within the Department of Trade, Industry and Competition ("DTIC").¹⁹⁵⁶

Turning to the food industry, part 5.3 sets out a discussion on the monitoring and enforcement activities of private actors in the food industry with a focus on litigation between trade competitors instituted before the South African courts under the *FCDA*, *APSA*, trade mark laws and the *CPA*. Litigation involving food associations is also included in this part.

From a consumer monitoring and enforcement perspective, part 5.4 starts with a discussion on the challenges faced by consumers in approaching the ordinary civil courts. This is followed by a discussion on alternative dispute resolution (hereafter "ARD") mechanisms under the *CPA*, including a discussion on provincial consumer authorities and

¹⁹⁵¹ Certain labelling and advertising requirements in R3337 are subject to the *APSA*. With respect to those provisions, where the *APSA* differs from or expands on R3337, the provisions of the *APSA* will prevail. See for example draft regs 4, 5(a)(i), 7, 31(2) and 74(3) of R3337.

¹⁹⁵² As indicated in part 2.3.3, this is the *National Regulator for Compulsory Specifications Act* 5 of 2008 abbreviation.

¹⁹⁵³ When considering country of origin requirements, draft reg 6(1) of R3337 for instance provides "[u]nless otherwise required by the regulations published in terms of the Agricultural Product Standards Act, the [National Regulator for] Compulsory Specifications Act, and the Consumer Protection Act ... the country of origin of a foodstuff must be declared on the label as follows..." This demonstrates that the *FCDA*, *APSA*, *NRCS Act* and *CPA* may be relevant, depending on the type of foodstuff, to confirm whether a country of origin description on a label is accurate. From a government regulation point of view, the *FCDA* falls within the authority of the DOH, the *APSA* falls within the authority of the DOA, whilst the *NRCS Act* and *CPA* fall within the authority of the DTIC. This demonstrates the need to consider the monitoring and enforcement functions of all three of these government departments within the food law framework. R3337 also refers to trade marks. See draft regs 48(2)(a) and (c) of R3337.

¹⁹⁵⁴ As abbreviated in part 2.2.3.

¹⁹⁵⁵ As abbreviated in part 2.3.3.

¹⁹⁵⁶ As abbreviated in part 1.7.

courts, and the role of the Consumer Goods and Services Ombud (hereafter “CGSO”) as an accredited ombud under the *CPA*.

This chapter ends with part 5.5, which is a summarised discussion and conclusion on the monitoring and enforcement of food laws by relevant stakeholders in South Africa. This includes a discussion on food law litigation between trade competitors before the South African courts, as well as possible challenges that consumers may face in obtaining effective redress in terms of the statutory food law framework.

5.2 Monitoring and enforcement of food laws within relevant government departments

5.2.1 Inspectors authorised by the DOH to monitor and enforce the FDCA

As discussed earlier, although the food law framework is fragmented, the *FCDA* is the primary legislation that controls, amongst other things, the advertising and labelling of foodstuffs in South Africa.¹⁹⁵⁷ Both R146 and R991 were promulgated in terms of the *FCDA*.¹⁹⁵⁸ In addition, R3337 was published for public comment under the *FCDA*.¹⁹⁵⁹

The administration, monitoring and enforcement of the *FCDA*, including R146 promulgated under this Act, falls within the jurisdiction of DOH. It follows therefore that if R3337 replaces R146 at some point in the future,¹⁹⁶⁰ the DOH will be primarily tasked with monitoring compliance with and enforcing the additional labelling and advertising restrictions relating to unhealthy foodstuffs once they come into force. This would include firstly identifying products that qualify as unhealthy foodstuffs and subsequently establishing if such unhealthy foodstuffs contain the prescribed FOP warning labels in the prescribed manner; ensuring that no prohibited trade mark elements feature on container labels or in advertising; and ensuring that restrictions on the advertising of unhealthy

¹⁹⁵⁷ See parts 1.2.4 and 2.3.

¹⁹⁵⁸ See parts 2.4 and 2.6.

¹⁹⁵⁹ See Chapter 4.

¹⁹⁶⁰ Due to delays in legislative reform, the proposed measures under R3337 that aim to restrict unhealthy foodstuffs labelling and advertising may not be implemented in the near future. See part 4.9.1.

foodstuffs have been adhered to.¹⁹⁶¹ As appropriate inspections would have to be done on a product-by-product basis, this would conceivably be a mammoth task.

Following the above, section 10 of the *FCDA* deals with the authorisation of inspectors under the *FCDA*. In terms of section 10(1), the Minister of Health¹⁹⁶² may authorise (i) any employee of the DOA, (ii) an employee of a provincial administration or local authority,¹⁹⁶³ or (iii) any other person who is considered fit as an inspector under the Act. Members of the South African Police Service and employees within the NRCS may also exercise the powers, duties and functions of inspectors in terms of the *FCDA*.¹⁹⁶⁴

The Minister of Health may furthermore, in terms of section 23(1), authorise any municipality (also known as a local authority)¹⁹⁶⁵ to enforce specific provisions of the *FCDA* within its area of jurisdiction.¹⁹⁶⁶ Section 23(1) provides that:

[t]he Minister may by notice in the [Government] *Gazette* authorize any local authority to enforce within its area of jurisdiction and through its duly authorized officers, such provisions of this Act as the Minister may specify in the notice.

The phrase “such provisions of this Act as the Minister may specify in the notice” is significant, as it shows that only the provisions of the *FCDA* that have specifically been mentioned in a Government Gazette notice may be enforced by or on behalf of the relevant local authority. In practice more than 30 municipalities have been authorised in

¹⁹⁶¹ See the discussion in Chapter 4.

¹⁹⁶² As the Director-General and head of the DOH. See s 1 of the *FCDA*.

¹⁹⁶³ Consultation with the head of the relevant provincial department responsible for health is required in these circumstances. See ss 1, 10(1)(b) of the *FCDA*.

¹⁹⁶⁴ See s 10(3)(c) and (d) of the *FCDA*. In terms of s 10(3)(e), a person appointed in terms of s 28 of the *Standards Act* 29 of 1993 may also be an inspector in respect of foodstuffs under the *FCDA*. That being said, the *Standards Act* 29 of 1993 has been repealed by the *Standards Act* 8 of 2008. The regulatory authority of the SABS now vests in the NRCS. Inspectors within the NRCS that monitor and enforce the *FCDA* are discussed in part 5.2.3 below.

¹⁹⁶⁵ See s 1 of the *FCDA*; s 1 of the *Local Government: Municipal Systems Act* 32 of 2000. A municipality, when referred to as an entity, means a municipality described in s 2 of the *Local Government: Municipal Systems Act* 32 of 2000. When referred to as a geographical area, a municipality refers to the municipal area which has been determined in terms of the *Local Government: Municipal Demarcation Act* 27 of 1998.

¹⁹⁶⁶ This is done by way of notice in the Government Gazette. See s 23(1) of the *FCDA*.

terms of notices issued by the Minister of Health in the Government Gazette to enforce sections 10(3)(b), 11 and 24 of the *FCDA* in their respective areas of jurisdiction.¹⁹⁶⁷

In addition to section 23(1) of the *FCDA*, municipalities are also vested with the authority to monitor and enforce the *FCDA* as part of their food control obligations in terms of the *NHA* read with the relevant provisions of the *Constitution*.¹⁹⁶⁸ In terms of section 32(1) of the *NHA*, every metropolitan and district municipality is required to ensure that appropriate municipal health services are effectively and equitably provided in their respective areas of jurisdiction. The definition of municipal health services includes, *inter alia*, food control.¹⁹⁶⁹ Whilst the term “food control” is not defined in the *NHA*, the DOH has issued an information document¹⁹⁷⁰ clarifying this term, which provides that:

Food Control as included in the definition of ‘municipal health services’ in the National Health Act, 2003 (Act 61 of 2003), *inter alia*, includes:

- Enforcement of the food related provisions of the Foodstuffs, Cosmetics and Disinfectants Act, 1972 (Act 54 of 1972) and Regulations.¹⁹⁷¹

Where a municipality has been authorised as an inspector under the *FCDA*, that municipality may in terms of section 10(3)(b) of the *FCDA* provide written authorisation to administer the specified provisions¹⁹⁷² of the *FCDA* within their respective areas of jurisdiction to medical practitioners,¹⁹⁷³ environmental health practitioners (hereafter

¹⁹⁶⁷ See GN R128 in GG 34029 of 17 February 2011; GN R228 in GG 35150 of 15 March 2012; GN R491 in GG 36672 of 15 June 2013; GN 78 in GG 37297 of 4 February 2014; GN 1051 in GG 39358 of 3 November 2015; GN 1409 in GG 40421 of 11 November 2016; GN 602 in GG 40940 of 28 June 2017; GN R896 in GG 42521 of 10 June 2019; and GN 680 in GG 43447 of 19 June 2020.

¹⁹⁶⁸ In terms of s 156(1) read with Part B of Schedule 4 of the *Constitution*, municipalities have exclusive authority in respect of municipal health services.

¹⁹⁶⁹ Other activities falling within municipal health services include water quality monitoring, waste management, health surveillance of premises, environmental pollution control, and chemical safety. See s 1 of the *NHA*.

¹⁹⁷⁰ DOH *Information Document on Food Control* 1-3.

¹⁹⁷¹ DOH *Information Document on Food Control* 1.

¹⁹⁷² The specified provisions are those that the Minister of Health has in terms of s 23(1) specified by notice in the Government Gazette.

¹⁹⁷³ In terms of s 1 of the *FCDA*, a “medical practitioner” refers to any person who has been registered as such in terms of the *Health Professions Act* 56 of 1974.

EHPs),¹⁹⁷⁴ veterinarians¹⁹⁷⁵ or any other persons that are “considered fit”. In the context of foodstuffs, EHPs are tasked with these responsibilities. In terms of the *Regulations Defining the Scope of the Profession of Environmental Health Practitioners*,¹⁹⁷⁶ (hereafter *EHP Regulations*), food control falls within the scope of practice of EHPs. Enforcing food legislation¹⁹⁷⁷ and the *Codex Alimentarius*¹⁹⁷⁸ are listed in the assorted items falling within the food control category.¹⁹⁷⁹ In addition, EHPs’ scope of practice includes the monitoring, inspection, sampling and labelling of imported foodstuffs at all harbours and border posts in South Africa.¹⁹⁸⁰

Section 11 of the *FCDA* sets out the powers, duties and functions of inspectors authorised under the *FCDA*. These powers are wide and include:

- entering any premises in which a foodstuff is manufactured, treated, graded, packed, labelled, stored or sold, and inspecting the operations process relating to the relevant product at that premises;¹⁹⁸¹
- conducting a search at the relevant premises and examining or removing samples of foodstuffs, foodstuffs containers or objects used for or during the manufacture or labelling of the product;¹⁹⁸²

¹⁹⁷⁴ In terms of s 1 of the *FCDA*, an “environmental health practitioner” refers to any person who has been registered as such in terms of the *Health Professions Act* 56 of 1974. For a discussion on the role and functions of EHPs in South Africa, see Erasmus *The implementation and enforcement of the legal environmental health mandate in South Africa* 349-368.

¹⁹⁷⁵ In terms of s 1 of the *FCDA*, a “veterinarian” refers to any person who has been registered as such in terms of the *Veterinary and Para-Veterinary Professions Act* 19 of 1982.

¹⁹⁷⁶ See GN R888 in GG 13184 of 26 April 1991 promulgated in terms of the *Health Professions Act* 56 of 1974.

¹⁹⁷⁷ Whilst “food legislation” is not defined, this would seem to refer to the *FCDA*, which is administered by the DOH. This reading is supported by the *National Environmental Health Norms and Standards for Premises and Acceptable Monitoring Standards for Environmental Health Practitioners* issued in terms of the *NHA*, which lists the *FCDA* specifically as part of the legislative framework within which those norms and standards for EHPs were developed. See reg 4(3)(n) of Gen Not 1229 in GG 39561 of 24 December 2015.

¹⁹⁷⁸ See the discussion in part 3.2.

¹⁹⁷⁹ Other aspects relate to food safety matters, including inspecting food premises and areas where foods are produced, distributed and consumed; promoting the safe handling of milk and meat products; and promoting the safe handling, storage and transporting of foodstuffs. See Annex A(2) of the *EHP Regulations*.

¹⁹⁸⁰ See Annex A(12)(a) of the *EHP Regulations*.

¹⁹⁸¹ An inspector is required to show the written authority to function as an inspector under the *FCDA* to any person who is affected by the exercise or performance of any power, duty or function of such an inspector. See ss 11(1)(a), 11(1)(f) and 11(2) of the *FCDA*.

¹⁹⁸² See s 11(1)(a) of the *FCDA*.

- seizing any foodstuff, material or document which appears to provide evidence of contravention of any provision of the *FCDA*; and
- sealing off any foodstuff or its package or container, or closing any door or opening giving access to that product or item.

Section 24 of the *FCDA* bestows on inspectors the right to prosecute¹⁹⁸³ persons or entities who have contravened the provisions of the *FCDA*.¹⁹⁸⁴ Section 24(1) provides that:

[a] local authority authorized under section 23 to administer any provision of this Act in its area of jurisdiction may, through any person generally or specially authorized by it, prosecute in respect of any contravention of or failure to comply with the provision in question which is alleged to have taken place in the said area.

As highlighted above, the authorisation provided in terms of section 23 of the *FCDA* is restricted to those provisions of the Act which the Minister of Health has specified in the relevant Government Gazette notice. As such, the reference to “the provision” in section 24(1) above would on a narrow reading seemingly apply only to provisions which the relevant local authority (or its authorised representative) has been mandated to administer by notice in the Government Gazette. Unfortunately, there are currently no reported cases relating to prosecutions under R146.¹⁹⁸⁵ It is uncertain therefore if the courts may interpret section 24 narrowly to allow prosecutions of specified provisions in the *FCDA* only, or perhaps adopt a broader approach where contravention of any provision in the *FCDA* could potentially be prosecuted by a local authority representative under section 24 of the *FCDA*.

Whilst the labelling and advertising provisions appear very comprehensive on paper (and will become even more extensive if R3337 comes into operation in due course), there are undoubtedly challenges with the monitoring and enforcement of the foodstuffs labelling and advertising provisions by inspectors appointed in terms of section 10 of the *FCDA*. In considering possible reasons for this, some comments are warranted. Firstly, when considering the relevant Government Gazette notices published in terms of the *FCDA*, it

¹⁹⁸³ Magistrate courts in South Africa are vested with the jurisdiction to impose penalties (which include a fine and/or imprisonment) in terms of the *FCDA*. See ss 18 and 19 of the *FCDA*.

¹⁹⁸⁴ The attorney-general may also prosecute offences under the Act. See ss 24(1) and 24(3) of the *FCDA*.

¹⁹⁸⁵ See the discussion in part 5.3.1 below.

is notable that municipalities have been authorised to enforce only three specific sections of the *FCDA*, namely sections 10(3)(b), 11 and 24, in their respective area of jurisdiction. An example appears below:

GN 602 of 28 June 2017: Enforcement by Local Authority

(Government Gazette No. 40940)

DEPARTMENT OF HEALTH

I, Dr A Motsoaledi, Minister of Health, hereby authorise under section 23 (1) of the Foodstuffs, Cosmetics and Disinfectants Act, 1972 (Act 54 of 1972), the following local authorities to enforce sections 10 (3) (b), 11 and 24 of the said Act within their area of jurisdiction and through duly authorised officers:

Mopani District Municipality

Vhembe District Municipality

Not one of these three provisions seems to directly allow authorised officers within relevant municipalities the power to enforce section 5 of the *FCDA* that prohibits and criminalises the publication of false or misleading advertisements or descriptions concerning foodstuffs.¹⁹⁸⁶ Turning to the regulations promulgated under the *FCDA*, R146 was made in terms of section 15(1) of the Act,¹⁹⁸⁷ a provision which is also not covered by the inspection authority granted to municipalities under the *FCDA*. On this basis, it would seem that municipalities that have been authorised as inspectors in terms of the *FCDA* are not, in terms of the *FCDA*, directly vested with the power to investigate or enforce section 5 of this Act or R146. The same applies to EHPs authorised by municipalities. Although the *EHP Regulations* provide that food control falls within the scope of practice of EHPs, Erasmus¹⁹⁸⁸ notes:

¹⁹⁸⁶ In terms of s 5(1) of the *FCDA*, any person shall be guilty of an offence if he (a) publishes a false or misleading advertisement of any foodstuff; or (b) for purposes of sale, describes any foodstuff in a manner which is false or misleading as regards its origin, nature, substance, composition, quality, strength, nutritive value or other properties or the time, mode or place of its manufacture; or (c) sells, or imports for sale, any foodstuff described in the manner aforesaid.

¹⁹⁸⁷ R991 was also promulgated in terms of s 15 of the *FCDA*.

¹⁹⁸⁸ Erasmus observes that the *EHP Regulations* are not legally binding to the extent that those regulations do not compel EHPs to perform all of the acts listed as falling within the scope of this profession. The fact that EHPs can, by virtue of their profession, perform all of the acts listed in the *EHP Regulations* (see Annexure A) does not mean that they are necessarily compelled to perform all of those acts. See

The provisions in the EHP Regulations are not legally binding however, they merely identify all the acts that fall within the scope of practice of EHPs, which means that EHPs are not legally obligated to perform all the functions as listed in the regulations.

Another complication is the fact that EHP's powers are vested in terms of the *NHA*, which means that they cannot directly enforce other legislation including the *FCDA*. In this regard, Erasmus¹⁹⁸⁹ notes:

EHPs are therefore sufficiently empowered to deliver environmental health services insofar their duties arise from the provisions of the *NHA* and its regulations. It follows though that an EHP can only enforce compliance with a law in terms of the provisions of that particular law, which means that they cannot use these tools to enforce compliance with the other laws that also task them with duties that pertain to the environmental health service delivery function, such as the Foodstuffs Act.

To avoid this potential legal complication, it may be worthwhile for the government to consider issuing fresh inspection notices by the Minister of Health in terms of the *FCDA*. Such notices should apply to all relevant municipalities and include pertinent additional provisions of the *FCDA* that should be covered, including section 5 and regulations issued in terms of section 15 of the *FCDA*. In adopting this approach, it would serve to broaden the legislative mandate and inspection powers of municipalities under the *FCDA* to monitor compliance and, where required, enforce foodstuffs labelling and advertising requirements and restrictions under both the Act and its regulations.

From an enforcement capacity point of view, there also appear to be challenges with EHPs. It should also be noted that food control is one of ten broad categories of activities falling within municipal health services.¹⁹⁹⁰ Looking at food control only, it is also apparent that a significant portion of the duties and functions of EHPs centre around food safety issues, such as inspecting food premises and areas where foods are produced, distributed and consumed; promoting the safe handling of milk and meat products; and promoting

Erasmus *The implementation and enforcement of the legal environmental health mandate in South Africa* 351.

¹⁹⁸⁹ Erasmus *The implementation and enforcement of the legal environmental health mandate in South Africa* 370.

¹⁹⁹⁰ The other categories, subject to certain exclusions, are water quality monitoring; waste management; health surveillance of premises; the surveillance and prevention of communicable diseases; vector control; environmental pollution control; the disposal of the dead; and chemical safety. See s 1 of the *NHA*.

the safe handling, storage and transport of foodstuffs.¹⁹⁹¹ The result of this is that EHPs seem to have very little capacity to focus specifically on the labelling and advertising provisions under the *FCDA*. This is exacerbated by concerns regarding sufficient training of EHPs and a consequential shortage of EHPs in South Africa in recent years. In this regard, Wright, Mathee and Oosthuizen¹⁹⁹² point out:

the systems and funding are not always in place to accommodate all [EHP] trainees, unfairly rendering them unable to graduate or accept work appointments. There is also a well-established shortage of EHPs in the country, with the ratio of EHPs to population falling well below international guidelines.¹⁹⁹³

A 2016 Parliamentary Committee report¹⁹⁹⁴ related to “insufficient legal services (food law)” to support government officials as far as it relates to the legal enforcement of measures. An apparent shortcoming highlighted is:

lack of resources for enforcement of food control measures, which has an impact on food control inspections particularly of big retailers and those in remote areas as EHPs were not sufficient.

Even where students are able to graduate as EHPs, there may be practical challenges from an employability point of view. Following a study conducted during 2013-2016 regarding the human resource challenges in community service placings of EHP graduates in the Eastern Cape, Mbola, Human and Melariri¹⁹⁹⁵ pointed out:

[t]he major problems that were identified included maladministration of EHCS [environmental health community service], which related to the lack of consistency of communication during the organisation of the EHCS programme; a decline in the number of EHCS posts in the Eastern Cape province which led to shortage of human resources;

¹⁹⁹¹ See Annex A(2) of the *EHP Regulations*.

¹⁹⁹² Wright, Mathee and Oosthuizen 2014 *SAMJ* 20.

¹⁹⁹³ Also see Democratic Alliance 2022 [https://www.hpcs.co.za/?contentId=0&menuSubId=46&actionName=Professional%20Boards](https://www.da.org.za/2022/03/shortage-of-environmental-health-practitioners-in-south-africa#:~:text=In%20South%20Africa%2C%20the%20current,do%20so%20once%20a%20year;Naik Saturday Star 4. A person must hold a post-graduate qualification at national qualification phase 6 or higher in order to qualify as a EHP in South Africa. This can be a diploma or a bachelor's degree in environmental health. After obtaining a suitable post-graduate academic qualification and doing practical training, candidates must pass a board examination of the Health Professions Council of South Africa to register as a EHP. For additional reading, see Health Professions Council of South Africa 2024 <a href=).

¹⁹⁹⁴ *Report on the Joint Workshop on Food Security and Food Safety by the Portfolio Committee on Agriculture, Forestry and Fisheries, Portfolio Committee on Health and the Select Committee on Land and Mineral Resources* ATC170406 (2016).

¹⁹⁹⁵ Mbola, Human and Melariri 2019 *SA Journal of Human Resource Management* 8-9.

inadequate provision of material resources for conducting EHCS; lack of induction and inconsistent supervision of EHCS practitioners; and lack of evaluation of the successes or challenges of the EHCS programme. The most alarming resource problem was related to the lack of access to state owned vehicles for some EHCS practitioners during their EHCS period.

Such capacity and skills development constraints undoubtedly have an impact on the available resources to focus specifically on monitoring and enforcing foodstuffs labelling and advertising provisions. In this regard an interesting observation is that the persons listed in section 10(3)(b) of the *FCDA*, namely medical practitioners, EHPs and veterinarians, all fall in the medical field. Whilst this would seem appropriate in the context of foodstuff sampling and food premises inspections for example, one wonders why legal professionals who have the knowledge and background regarding the interpretation of statutes and laws are not mentioned. A person with a medical, environmental health or veterinary background would conceivably face difficulties monitoring and enforcing legislative provisions falling outside that person's area of expertise, including foodstuffs advertising and labelling, which may be linked with other legal fields such as trade mark law. On this basis it is submitted that, depending on the facts and circumstances of a specific matter, a person with a law background may potentially be "considered fit" to administer the *FCDA* on behalf of a municipality, particularly in the context of foodstuffs labelling and advertising concerns. Given the capacity constraints experiences with EHPs, the assistance of duly authorised legal practitioners may potentially increase the monitoring and enforcement activities in terms of the *FCDA*, which may become more pressing if R3337 comes into operation in due course.

5.2.2 Assignees designated under the APSA by the DOA

As discussed earlier¹⁹⁹⁶ within the food law framework, the *APSA* contains labelling and advertising provisions in respect of agricultural food products such as fruits, vegetables, dairy products, meat and eggs. The *APSA* contains labelling requirements that supplement those prescribed in terms of the *FCDA*.¹⁹⁹⁷

¹⁹⁹⁶ See parts 2.3.2, 2.4.4.1 and 2.5.1 above.

¹⁹⁹⁷ Visagie 2024 *THRHR* 158.

In terms of section 2(3)(a) of the *APSA*, the Minister of Agriculture may in respect of a particular product regulated under this Act designate any person, undertaking, body, institution, association or board having particular knowledge in respect of the product concerned as an assignee in respect of that product.¹⁹⁹⁸ On this basis various assignees have been appointed to conduct agricultural product inspections at manufacturing and packaging facilities, and at the point of sale.¹⁹⁹⁹ The appointed local market inspectors for specific agricultural product categories in the foodstuffs sector are listed below:

- Nejamogul Technologies and Agric Services (Pty) Ltd, which is responsible for the inspection of dairy and imitation dairy products, as well as edible ices;²⁰⁰⁰
- The Food Safety Agency (Pty) Ltd, which is responsible for inspecting regulated animal products such as processed meats, poultry and eggs;²⁰⁰¹
- The South African Meat Industry Company, which is responsible for inspecting the classification and marking of meat;²⁰⁰²
- Product Control for Agriculture, which is responsible for the inspection of fresh fruits and vegetables;²⁰⁰³
- Leaf Services, which is responsible for inspecting grain and grain products such as canola, sunflower seeds, dry beans, groundnuts, maize, rice, and barley;²⁰⁰⁴ and
- Impumelelo Agribusiness Solutions (Pty) Ltd, which is responsible for inspecting various processed products such as fruit juice and drinks, frozen fruits and vegetables, and canned processed products.²⁰⁰⁵

¹⁹⁹⁸ For a discussion on the enforcement role of assignees designated in terms of the *APSA*, see Visagie 2024 *THRHR* 159-160.

¹⁹⁹⁹ The powers and duties that are conferred upon these assignees are public powers. See *Bertie van Zyl (Pty) Ltd v Minister of Agriculture, Forestry and Fisheries* 2021 JDR 1544 (SCA) para 35 (hereafter *Bertie van Zyl v Minister of Agriculture*).

²⁰⁰⁰ See Gen Not 7 in GG 40545 of 13 January 2017.

²⁰⁰¹ See Gen Not 7 in GG 40545 of 13 January 2017 read with Gen Not 419 in GG 43591 of 7 August 2020.

²⁰⁰² See Gen Not 121 in GG 18635 of 30 January 1998.

²⁰⁰³ See Gen Not 232 in GG 15557 of 18 March 1994 in respect of potatoes destined for the local market and Gen Not 345 in GG 40075 of 17 June 2016 in respect of various fresh fruits and vegetables destined for the local market. This assignee, trading under the abbreviated business name Prokron, is a non-profit company. For additional reading, see Prokron date unknown <https://www.prokonsa.co.za/>.

²⁰⁰⁴ See Gen Not 345 in GG 40075 of 17 June 2016. For more information on this assignee, see Leaf Services 2024 <https://leafservices.co.za/>.

²⁰⁰⁵ See Gen Not 7 in GG 40545 of 13 January 2017.

In *Top Lay Egg Co-Op Limited v Minister of Agriculture, Forestry and Fisheries*²⁰⁰⁶ the SCA noted that:

[t]he purpose of appointing an assignee is to enable the Minister [of Agriculture] to control agricultural products that are being sold locally and those exported. The control of these products is to ensure that safe and healthy products are sold to the consumer. The assignee is appointed for the purposes of exercising the powers to inspect, grade and sample the products for purposes of quality control.²⁰⁰⁷

Fees may be charged by assignees when conducting inspections, grading and sampling relevant products. The prescribed fees are payable to that assignee by the owner of the relevant product(s).²⁰⁰⁸ A number of cases were previously brought before our courts by food manufacturers and food associations objecting to the determination of inspection fees by appointed assignees under the *APSA*.²⁰⁰⁹

It should also be noted that peremptory product label clearances are not mandatory,²⁰¹⁰ although foodstuffs manufacturers may send the draft labels of new agricultural food products or amended product labels to the appropriate assignee for consideration and comment. This approach can assist in identifying potential concerns at an early stage of product branding or re-branding, as the case may be. However, where an assignee did not object to a label submitted to it for clearance, and non-compliance with the relevant

²⁰⁰⁶ 2023 JDR 1460 (SCA).

²⁰⁰⁷ Para 20.

²⁰⁰⁸ See s 3(1A)(a), 3(1A)(b) and 3A(4) of the *APSA*.

²⁰⁰⁹ In *Bertie van Zyl v Minister of Agriculture, Forestry and Fisheries* the SCA held that the determination of inspection fees by Product Control for Agriculture, which is the designated assignee responsible for the inspection of fresh fruits and vegetables, was based on an unfair process and was irrational. On this basis, those fees were reviewed and set aside. See *Bertie van Zyl v Minister of Agriculture* paras 1; 22; 23; 31; 40. In a separate matter, inspection fees that had been determined by another assignee, Impumelelo Agribusiness Solutions (Pty) Ltd, were also reviewed and set aside by the High Court. As in the first-mentioned matter, the High Court held the determination of inspection fees to be irrational and to have failed to comply with the minimum requirements for a fair administrative action under the *Promotion of Access to Justice Act* 3 of 2003. See *South African Fruit and Vegetable Canners Association v Impumemelo Agri Business Solutions (Pty) Ltd (Perishable Products Export Control Board Amicus Curiae)* 2021 JDR 0913 (GP) paras 44–46 (hereafter *SA Fruit and Vegetable Canners Association v Impumemelo*).

²⁰¹⁰ While s 3 of the *APSA* prohibits the sale of products that do not comply with the specified criteria as set out in the Act, it does not impose mandatory inspections of products or product labels by any assignee or authorised official under the *APSA*. See *SA Fruit and Vegetable Canners Association v Impumemelo* para 21.

labelling requirements under the *APSA* is subsequently raised by a competitor, a court will not be bound by the labelling clearance of such an assignee.²⁰¹¹

Our courts have also considered whether or not the civil courts may be approached directly where there is alleged contravention of the labelling provisions under the *APSA*. In the *Clover v Sigalo Foods* case discussed below²⁰¹² the respondent contended that the applicant should as a first step have filed an objection to the respondent's alleged non-compliance with the *APSA* with the Minister of Agriculture and/or its relevant assignee, Nejamogul Technologies and Agric Services (Pty) Ltd, which was to be exhausted before approaching the High Court. In dismissing this argument the High Court pointed out that there was no suggestion in the *APSA* that bars an aggrieved party from approaching the courts directly. In addition, the court pointed out that the cause of action in this matter was based on alleged unlawful competition where interdictory relief was claimed, and that this relief fell outside the parameters of the authority that might be exercised by the Minister of Agriculture or its assignee under the *APSA*.²⁰¹³ These findings of the court *a quo* were subsequently confirmed by the SCA on appeal.²⁰¹⁴

The role and function of the DOA and the assignees designated under the *APSA* appear to be valuable in respect of the monitoring and enforcing of the food labelling and advertising restrictions under this Act. In the context of this study, however, it should be noted that the mandate of the Minister of Agriculture under the *APSA* does not apply to all foodstuffs, but only those in respect of regulations made under the *APSA*.²⁰¹⁵ Furthermore, an assignee may exercise the powers and perform the duties that are

²⁰¹¹ In *Clover v Sigalo Foods* the respondent relied on a label clearance for its Stork Butter Spread product label that had been issued by an assignee under the *APSA* as part of its defence. It contended that this assignee had found that the label had "passed the regulatory muster, save for font size requirements." Despite these submissions, the court nevertheless held that the label of the product contravened the *APSA* and Dairy Products Regulations. See *Clover v Sigalo Foods* paras 28; 67.

²⁰¹² See part 5.3.2.

²⁰¹³ The powers of the Minister of Agriculture in s 3 relate to the control of prescribed products under the *APSA*. See *Clover v Sigalo Foods* para 64. This finding seems to align with the SCA's earlier ruling in *Bertie van Zyl v Minister of Agriculture* in which the court considered the right of an internal appeal under section 10(1) of the *APSA* regarding inspection fees imposed by assignees under the Act. See *Bertie van Zyl v Minister of Agriculture* para 19.

²⁰¹⁴ See *Sigalo Foods (Pty) Ltd v Clover SA (Pty) Ltd* 2023 JDR 1842 (SCA) paras 37-39.

²⁰¹⁵ See s 1 read with s 15 of the *APSA*. Also see Visagie 2024 *THRHR* 164.

conferred upon it only in respect of the particular product(s) that are assigned to it.²⁰¹⁶ This would include products such as fruits and vegetables, dairy products, eggs, meat, grains and fruit juice which, generally speaking, fall within the healthier food options. Many categories of unhealthy foodstuffs such as confectionary, pastries and carbonated soft drinks, for example, fall outside the scope of the *APSA*. The DOA and assignees authorised under the *APSA* would accordingly not be able to monitor and enforce compliance for a variety of products which would fall within the unhealthy foodstuffs penumbra, including the restrictions that may be brought about if R3337 comes into operation.²⁰¹⁷

5.2.3 The NRCS falling within the DTIC

The NRCS is a public entity which was established in 2008 in terms of the *NRCS Act*.²⁰¹⁸ It functions on behalf of the DTIC by administering, monitoring, and enforcing compliance with compulsory specifications²⁰¹⁹ and technical regulations that have been issued in respect of various products, including foodstuffs.²⁰²⁰ The compulsory specifications issued by the NRCS are in line with international standards in various industries, including food

²⁰¹⁶ See s 2(3)(b)(i) read with s 2(3)(a) of the *APSA*; *CGCSA v FSA* para 32.

²⁰¹⁷ If regulations have been issued under the *APSA* concerning a particular agricultural food product category (such as meat, eggs, dairy, fruits, fruit drinks or vegetables), the labelling requirements for such a product must comply with the horizontal labelling requirements under the *FCDA*, as well as any additional vertical labelling requirements under the *APSA*. See parts 2.4.3, 2.4.4.1, 2.5.1.

²⁰¹⁸ See s 3(1) and 3(2) of the *NRCS Act*; preamble of the *Legal Metrology Act* 9 of 2014. Also see NRCS 2022 <https://www.nrcs.org.za/about-us/overview>. The NRCS Act came into operation on 1 September 2008. See Proc 34 in GG 31391 of 1 September 2008.

²⁰¹⁹ A compulsory specification refers to a technical regulation document which lays down product characteristics and/or their related processes and production methods, including the applicable administrative provisions, with which compliance is mandatory. In terms of section 13(1) of the NRCS Act, the Minister of the DTIC, on the recommendation of the NRCS, is authorised to declare a SANS to be a compulsory specification through the publication of an appropriate notice in the Government Gazette. Such a notice may require that the relevant product or commodity to which the compulsory specification applies be marked in the prescribed manner with a distinctive mark, with a declaration of conformity to the requirements of a compulsory specification.²⁰¹⁹ See ss 1, 13(6)(a) of the *NRCS Act*; reg 1 of the *Regulations Relating to the Compulsory Specification for Processed Meat Products* (VC 9100), published in GN 1058 in GG 42628 of 8 August 2019.

²⁰²⁰ Other product categories include goods in the automotive industry (such as motor vehicles, pneumatic tyres for passenger cars, hydraulic brake and clutch fluid); the chemical industry (such as chemical disinfectants), electrical products and related products (such as electric cables, circuit breakers, plugs and socket-outlets); lighting and heating equipment (such as fluorescent lamps, non-pressure paraffin stoves and heaters); construction materials (such as cement); plastic carrier bags; personal protective equipment; respirators and firearms. Compulsory standards can be viewed on the website of the NRCS. See NRCS 2022 <https://www.nrcs.org.za/compulsory-specifications/compulsory-specifications>.

safety in the food industry.²⁰²¹ Through its business operations the NRCS aims to protect human health and safety and the environment, and to foster fair trade.²⁰²² Within the foodstuffs sector, compulsory specifications which contain labelling requirements, amongst other matters,²⁰²³ have been issued for processed and canned meat products,²⁰²⁴ as well as frozen and canned fish and other marine products.²⁰²⁵ As the name suggests, compliance with compulsory specifications is mandatory.²⁰²⁶

The Food and Associated Industries business unit within the NRCS monitors and inspects factories, processes, and products in the foodstuffs industry to ensure safe and legally compliant products. This business unit of the NRCS works in close co-operation with the DOH. Inspectors with this business unit of the NRCS are authorised to carry out inspections on behalf of the DOH in terms of the *FCDA*. Inspectors may issue non-compliance certificates for products that do not comply with the *FCDA*, a relevant compulsory specification or South African National Standard ("SANS").²⁰²⁷ In practice, it appears that the monitoring and enforcement activities of inspectors within this business unit are focused on the product categories for which compulsory specifications have been

²⁰²¹ Other industries include building regulations, electro-technical devices and motor vehicles. See Naudé and Barnard "Enforcement and Effectiveness of Consumer Law in South Africa" 7. See s 5(1) of the *NRCS Act* and s 4(1) of the *Legal Metrology Act*. Where the need exists the NRCS must request the SABS to draft a SANS for the purposes of a legal metrology technical specification. See s 16(2)(a) of the *Legal Metrology Act*.

²⁰²² See NRCS *Annual Report 2018/2019* 8.

²⁰²³ Compulsory specifications also set out criteria for the quality and composition, handling and processing of products.

²⁰²⁴ See GN 1058 in GG 42628 of 8 August 2019; GN R791 in GG 26531 of 9 July 2004, as amended by GN 1143 in GG 42684 of 6 September 2019; GN 628 in GG 41722 of 22 June 2018. It should be noted that GNR.791 in GG 26531 of 9 July 2004 was issued in terms of the *Standards Act* 29 of 1993 prior to the establishment of the NRCS. This notice is, however, deemed to have been issued in terms of the *NRCS Act*. See s 35(1)(a) of the *NRCS Act*. The *Standards Act* 29 of 1993 was also subsequently repealed and replaced by the *Standards Act* 8 of 2008. See s 35 of the *Standards Act* 8 of 2008.

²⁰²⁵ See GN 339 in GG 38707 of 24 April 2015; GN 340 in GG 38707 of 24 April 2015; GN 628 in GG 41722 of 22 June 2018.

²⁰²⁶ Where a compulsory specification has been issued in respect of a specific product or commodity, such a product may be imported, sold or supplied only if (i) it complies fully with and/or has been manufactured in accordance with the relevant compulsory specification; (ii) it has been labelled according to the requirements of the compulsory specification; and (iii) if the prescribed distinctive mark, if any, has been applied to the product or commodity. Non-compliance with these requirements is a criminal offence. See ss 14(1), 14(2) and 34(1) of the *NRCS Act*.

²⁰²⁷ See NRCS *Annual Report 2018/2019* 40. For a discussion on this topic, see parts 2.3.3 and 2.5.4 above.

issued, namely fishery and canned meat products.²⁰²⁸ During the 2018/2019 reporting period, food products falling into those categories to the value of R72 400 000 were removed from the market and destroyed due to their being unsafe for human consumption.²⁰²⁹ During 2022/203 non-compliant fishery and canned meat products that were removed from the local trade exceeded the value of R26 600 000.²⁰³⁰

The NRCS is also responsible through its Legal Metrology business unit for administering, monitoring and enforcing compliance with legal metrology technical regulations as defined in the *Legal Metrology Act*.²⁰³¹ This business unit aims to foster fair trade by ensuring that the quantity of a product declared on the container label is the actual quantity of the product that is inside²⁰³² in terms of the prescribed measuring unit for South Africa.²⁰³³ This ensures that the consumer receives what is stated on the pre-package of the purchased product, thereby avoiding a misleading quantity description on the product label or packaging.²⁰³⁴ The *NRCS Annual Report 2018/2019* indicates the

²⁰²⁸ During the 2018/2019 period more than 29 000 inspections were conducted in respect of imported, exported and locally produced fishery and canned meat consignments and products. See *NRCS Annual Report 2018/2019* 39; See *NRCS Annual Report 2022/2023* 48.

²⁰²⁹ A total number of 164 non-compliance directives were issued in respect of products that did not comply with the relevant compulsory specifications and which were determined to be of sub-standard quality, unfit for sale (such as those requiring appropriate labelling) and/or unsafe for human consumption. See *NRCS Annual Report 2018/2019* 40.

²⁰³⁰ *NRCS Annual Report 2022/2023* 50.

²⁰³¹ A legal metrology technical regulation refers to "a document which lays down product and measuring instrument characteristics or their related processes and production methods, including the applicable administrative provisions, with which compliance is mandatory". See ss 1, 3 and 4(1)(b)-(d) of the *Legal Metrology Act*. The *Trade Metrology Act* 77 of 1973 (hereafter *Trade Metrology Act*) was repealed and replaced by the *Legal Metrology Act* on 1 August 2014. All proclamations, regulations, notices and the like which were issued under the *Trade Metrology Act* are, however, regarded as having been issued or promulgated in terms of the *Legal Metrology Act*. See Proc 58 in GG 37887 of 1 August 2014, and ss 42(1)-42(2) of the *Legal Metrology Act*.

²⁰³² In respect of measuring instruments, the NRCS also ensures that the reading or measurements given by such an instrument remain accurate within the allowed limits of deviation. See *NRCS Annual Report 2018/2019* 44.

²⁰³³ The prescribed measurement units in South Africa are set out in the *Measurement Units and Measurement Standards Act* 18 of 2006, which is based on the International System of Units (hereafter SI units). South Africa, like most other states, follows the metric measuring unit system. For example, the base unit kilogram (kg) is used for mass, and the litre (L or l) for volume. Where an advertisement of any measurable product to which the *Legal Metrology Act* applies refers to a measurable unit, the measurable unit in the advertisement should be stipulated in the manner is prescribed. Non-compliance with the provision is a criminal offence. See ss 1, 35(1) and 35(3) of the *Legal Metrology Act*; Annex A para A.7 of *SANS 289*.

²⁰³⁴ See the discussion further in this chapter regarding misleading trade descriptions, claims or statements on product packaging.

NRCS market surveillance activities for technical regulations at less than 20% of the total market at that time.²⁰³⁵ The NRCS inspection activities dropped during the COVID-19 period but have seen a steady increase over the past few years.²⁰³⁶ When considering the numbers and figures, however, the NRCS market surveillance activities do not appear to be insignificant. During the 2018/2019 reporting period nearly 2 700 embargoes were issued for pre-packaged goods by the NRCS inspectors. The estimated value of all of the products that were found to be non-compliant and which were either removed from the market or corrected in terms of the relevant legal requirements amounted to more than R 131 million.²⁰³⁷ A number of product categories were inspected by the NRCS and held to be non-compliant with the relevant legal metrology requirements during that reporting period, including foodstuffs.²⁰³⁸ The foodstuffs mentioned specifically include fresh, frozen and canned fish and seafood products; poultry; bread; milk powder; and condiments seasoning, relishes, and sauces.²⁰³⁹

The above illustrates that the NRCS also plays a role in the monitoring and enforcement of certain labelling provisions relating to foodstuffs in South Africa, notably concerning products for which compulsory specifications and technical regulations for net quantity have been issued. Whilst the figures mentioned above demonstrate that noble efforts are being made, like the role of the APSA that of the NRCS, as things currently stand, would be limited when it comes to the monitoring and enforcing labelling and advertising restrictions provisions relating specifically to unhealthy foodstuffs.

²⁰³⁵ NRCS *Annual Report 2018/2019* 46.

²⁰³⁶ The figures are nearly the same as where they were pre-COVID. During the 2018/2019 reporting period 29 834 inspections were conducted by the Food and Associated Industries business unit of the NRCS. Following a sharp decline, inspection numbers increased to 28 662 during the 2022/2023 reporting period. See NRCS *Annual Report 2022/2023* 48, 53.

²⁰³⁷ NRCS *Annual Report 2018/2019* 46-47. During the 2022/2023 reporting period more than 1 200 embargoes for pre-packaged goods and over 2 300 rejection notices based on measurement instrument non-compliance were issued. In monetary terms, goods tested for legal metrology compliance exceeded R1.3 billion. See NRCS *Annual Report 2022/2023* 56.

²⁰³⁸ These products include toiletries, toothpaste, cosmetics and other personal care items. See NRCS *Annual Report 2018/2019* 47.

²⁰³⁹ In terms of value, fresh, chilled or frozen fish was the leading non-compliance product, with an estimated market value of more than R33 million. See NRCS *Annual Report 2018/2019* 46-47. Also see NRCS *Annual Report 2022/2023* 47-48.

5.2.4 Investigations by the NCC under the CPA within the DTIC

From a legislative point of view the NCC²⁰⁴⁰ is considered to be the primary watchdog for consumer protection in South Africa.²⁰⁴¹ The NCC is authorised to investigate alleged contravention of the CPA and is responsible for enforcing the CPA.²⁰⁴² The NCC also has the power to prosecute suppliers who have contravened the CPA by referring appropriate matters to the NCT.²⁰⁴³ Despite these enforcement functions, at a ground level the NCC is not generally responsible for intervening in or directly adjudicating a dispute between a consumer and a supplier unless the parties to a dispute consent to settling the matter during the course of an investigation by the NCC.²⁰⁴⁴

Any person, including a juridic person,²⁰⁴⁵ may file a complaint with the NCC alleging that a person has acted in a manner inconsistent with the CPA.²⁰⁴⁶ The NCC may also directly initiate a complaint concerning any alleged prohibited conduct *mero motu*, or when directed to do so by the Minister of Trade. Furthermore, NCC investigations may follow a request of a provincial consumer protection authority; another regulatory authority such as SARS;²⁰⁴⁷ or an accredited consumer protection group.²⁰⁴⁸

²⁰⁴⁰ The NCC is an organ of state within the public administration. See s 85(1) of the CPA.

²⁰⁴¹ Van Heerden "Protection of Consumers Rights and Consumers' Voice" para 7; Mupangavanhu and Kerchhoff 2021 *SA Merc LJ* 272. In line with the government's priority objective of increasing intra-African trade, the NCC has also become involved in consumer protection within the SADC region. The NCC is a role-player within the Competition and Consumer Laws Committee of the SADC, which aims to harmonise consumer law and competition law within the SADC region. See NCC *Strategic Plan for 2022/2023 – 2025/2026* 6-7.

²⁰⁴² The enforcement functions and responsibilities of the NCC include (i) promoting informal resolution of disputes; (ii) receiving complaints relating to alleged prohibited conduct or an offence in terms of the CPA, (iii) monitoring the consumer market to detect conduct that is prohibited or which constitutes an offence in terms of the CPA, and ensuring that such conduct is prosecuted; (iv) investigating and evaluating alleged contravention of the CPA; (v) issuing and enforcing compliance notices; (vi) negotiating and concluding undertakings and consent orders; and (vii) referring matters to the NCT, where appropriate. See ss 86(b)(i) and s 99 of the CPA.

²⁰⁴³ NCC *Annual Performance Plan 2022/2023* 10; NCC *Strategic Plan for 2022/2023 – 2025/2026* 11.

²⁰⁴⁴ See s 99(a) of the CPA; NCC *Annual Performance Plan 2022/2023* 10; NCC *Annual Report 2020/2021* 13; NCC *Strategic Plan for 2022/2023 – 2025/2026* 11.

²⁰⁴⁵ See s 1 of the CPA.

²⁰⁴⁶ See s 71(1) of the CPA.

²⁰⁴⁷ In the *Soulever Well* case the customs department of SARS detained a consignment of 5000 shopping bags that were imported into South Africa in terms of the *Customs and Excise Act* 91 of 1964. The detention was due to suspected non-compliance with labelling requirements regarding country of origin indications. SARS subsequently notified the NCC of this issue for investigation in terms of the CPA. See *Soulever Well* case paras 8, 9.

²⁰⁴⁸ See s 71(2) of the CPA.

The NCC has wide powers at its disposal during its investigations.²⁰⁴⁹ After concluding an investigation into a complaint, if the Commissioner believes that a person has engaged in prohibited conduct, the NCC has various options including issuing a compliance notice²⁰⁵⁰ or referring the matter to the NCT.²⁰⁵¹ Where the principal place of a business supplier is limited to a single province, the NCC may also elect to refer the matter to the consumer court in that province, if that is possible.²⁰⁵² The number of investigations conducted by the NCC has increased in recent years.²⁰⁵³

Despite the functions described above there are challenges at the ground level. Following the establishment of the NCC in 2011 it was flooded with consumer complaints, resulting in a severe backlog and ultimately increased consumer frustration. In 2012 the NCC decided to discontinue investigating individual consumer complaints.²⁰⁵⁴ Due to a current lack of financial and human resources,²⁰⁵⁵ the NCC cannot investigate individual consumer complaints on a case-by-case basis.²⁰⁵⁶ Challenges relating to infrastructure and human

²⁰⁴⁹ Naudé and Barnard "Enforcement and Effectiveness of Consumer Law in South Africa" 4.

²⁰⁵⁰ See s 73(c)(iv) and 100 of the CPA. In the past many compliance notices that were issued by the NCC were subsequently set aside by the NCT due to procedural irregularities. See Naudé and Barnard "Enforcement and Effectiveness of Consumer Law in South Africa" 16.

²⁰⁵¹ See s 73(2)(b) of the CPA. In *The National Consumer Commission and Nu Menu (Pty) Ltd t/a Nu Menu Solutions* case no NCT/255188/2022/73(2)(b) dated 19 July 2022 paras 12-14 the NCC referred the matter to the NCT following its investigating a consumer complaint where mediation by the relevant provincial consumer affairs office had failed.

²⁰⁵² The Commissioner may elect this option if a provincial consumer court has been established in the relevant province and the Commissioner is of the view that, in making such a referral, the complaint will be dealt with expeditiously and fully. A provincial consumer court has the same powers as the NCT, and may make any order that the NCT may make. In addition, any order of a provincial consumer court made after hearing a matter referred to it in terms of s 73 of the CPA has the same force and effect as if it had been made by the NCT. See ss 73(2)(a), 73(5)(a) and 73(6) of the CPA.

²⁰⁵³ The number of investigations conducted increased from 34 during the 2018/2019 financial year to 289 during the 2020/2021 financial year. Enforcement actions were taken by the NCC for the first time during the 2020/2021 financial year. During the 2020/2021 period enforcement actions taken by the NCC against suppliers contravening the CPA included investigating 289 matters; issuing compliance notices to 110 non-compliant suppliers; referring 19 matters to the NCT; and negotiating settlement agreements. See NCC *Annual Performance Plan 2022/2023* 25; NCC *Annual Report 2020/2021* 9, 24.

²⁰⁵⁴ The NCC has been criticised for this decision. See Woker 2016 *SA Merc LJ* 22; Du Plessis 2022 *Stell LR* 71; Barnard and Mišćenić 2019 *Journal for Juridical Science* 126; Woker 2019 *Stell LR* 107.

²⁰⁵⁵ NCC *Annual Report 2020/2021* 19; NCC *Annual Performance Plan 2022/2023* 16. Even when the NCC does decide to investigate a complaint, there may be lengthy delays. For example, in *National Consumer Commission v Vodacom (Pty) Ltd* (NCT/205517/2021/73(2)(b)) [2022] ZANCT 13 (26 February 2022) para 50 to 54, the NCT criticised the NCC for the four-year delay in investigating the matter. Also see van Heerden "Protection of Consumer Rights and Consumer Voice" para 17.

²⁰⁵⁶ See *CGSO v Voltex* para 14; Woker 2016 *SA Merc LJ* 22; Du Plessis 2022 *Stell LR* 71; Barnard and Mišćenić 2019 *Journal for Juridical Science* 126; Woker 2019 *Stell LR* 107.

resources are an issue within the NCC as the workload has increased in relation to the complaints filed.²⁰⁵⁷ Despite increased efforts at enforcement and the referral of matters to the NCT,²⁰⁵⁸ the NCC has made it clear that it “continues to operate in a very constrained fiscal environment”²⁰⁵⁹ with “very limited resources”.²⁰⁶⁰

Following from the above, the NCC currently promotes the informal settlement of disputes. Individual consumer complaints filed with it are generally referred to other forums such as industry ombuds or a suitable provincial consumer protection authority,²⁰⁶¹ which bodies are discussed later in this chapter.²⁰⁶² Only where the NCC’s “complaints trend analysis”²⁰⁶³ demonstrates that concern has been raised repeatedly with strong indications of “harmful business practices or harmful trends”²⁰⁶⁴ will the NCC investigate the matter. The problem with the NCC’s not investigating individual consumer complaints, as pointed out by Woker,²⁰⁶⁵ is that only the NCC is authorised under the *CPA* to make recommendations for remedial action. A finding of an ombud or other ADR agent is therefore not binding or enforceable and is “more often than not ignored by suppliers”.²⁰⁶⁶

As to the role of the NCC in the foodstuffs industry, it has focused mainly on food safety and product recalls in the past while, and has also investigated excessive food price increases. During the COVID-19 national disaster period in 2020 and 2021 the NCC conducted a series of investigations to mitigate the impact on consumers of excessive

²⁰⁵⁷ NCC *Annual Report 2020/2021* 6, 9, 10. The NCC has identified human capacity and financial resources as weaknesses within the commission. See NCC *Strategic Plan for 2022/2023 – 2025/2026* 16.

²⁰⁵⁸ With an increase in case law reports issued by the NCT in terms of the CPA, jurisprudence on consumer protection law under the CPA is increasing. See NCC *Annual Performance Plan 2022/2023* 6.

²⁰⁵⁹ NCC *Annual Report 2020/2021* 18; NCC *Annual Performance Plan 2022/2023* 7, 14.

²⁰⁶⁰ NCC *Strategic Plan for 2022/2023 – 2025/2026* 7.

²⁰⁶¹ NCC *Annual Performance Plan 2022/2023* 10; Woker 2016 *SA Merc LJ* 23.

²⁰⁶² See part 5.4.2 below.

²⁰⁶³ NCC *Annual Performance Plan 2022/2023* 16.

²⁰⁶⁴ Examples include unfair terms in timeshare contracts; complaints relating to paraffin stoves and heaters; and complaints relating to second-hand car dealers. See Woker 2019 *Stell LR* 107-108.

²⁰⁶⁵ Woker 2019 *Stell LR* 108.

²⁰⁶⁶ Barnard and Mišćenić 2019 *Journal for Juridical Science* 126.

price increases²⁰⁶⁷ relating to specified goods and services.²⁰⁶⁸ Basic food products such as maize meal, rice, pasta, sugar, cooking oils, baby formula and canned goods were included.²⁰⁶⁹ With regard to food safety investigations and food product recalls, it appears that the NCC has increasingly been involved in product monitoring and recalls for unsafe goods,²⁰⁷⁰ including food product recalls.²⁰⁷¹ Examples of NCC activities include:

- the recall of potentially harmful foodstuffs. For example, the immediate recall of processed meat products following a listeriosis outbreak in 2018,²⁰⁷² and a potentially harmful energy drink originating from Zambia in 2019;²⁰⁷³

²⁰⁶⁷ In this context a "price increase" refers to a direct or indirect increase as a result of unfair conduct such as false or misleading pricing practices, the covert manipulation of prices, or manipulation through raising or reducing grade levels of goods or services." See reg 1.5 of the *Consumer and Customer Protection and National Disaster Management Regulations and Directions* published as GN R 350 in GG 43116 of 19 March 2020 (hereafter "*National Disaster Management Regulations*").

²⁰⁶⁸ Such investigations were conducted by the NCC in terms of the *National Disaster Management Regulation*. Eight matters were referred to the NCT, where most of those cases were settled. See NCC *Annual Report 2020/2021* 23-24.

²⁰⁶⁹ See Annexures A and B of the *National Disaster Management Regulations*.

²⁰⁷⁰ NCC *Annual Performance Plan 2022/2023* 6. In terms of s 55(2) of the *CPA*, consumers have the right to receive goods that are reasonably suitable for the purpose for which they are generally intended; which are of good quality; and which apply with applicable standards as set out in the *Standards Act* 29 of 1993 or any other public regulation. In the foodstuffs context, therefore, this would mean that consumers have the right to receive food products that are of good quality and suitable for consumption, and which comply with the relevant food laws, including the labelling and advertising provisions set out in the *FCDA*, *APSA* and the *CPA*. In terms of s 56(1) of the *CPA* there is an implied warranty of quality and compliance with relevant requirements and standards whilst the relevant product is in the possession and control of the relevant producer, retailer, importer or distributor, as the case may be. Turning to s 61 which deals with strict liability, as a general rule the producer, retailer, importer or distributor of any goods is liable for any harm (including illness, injury, death or economic loss) caused wholly or partly as a consequence of the supplying of 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 of whether the harm resulted from any negligence on the part of the producer, importer, distributor or retailer, as the case may be. It follows, therefore, that there is joint and several liability in the supply chain.

²⁰⁷¹ See s 60 of the *CPA* read with the NCC *Consumer Product Safety Recall Guidelines* published as GN 490 in GG35434 of 13 June 2012.

²⁰⁷² On 4 March 2018 the NCC issued an immediate safety recall notice relating to Enterprise-brand ready-to-eat food products (including polony, smoked Russians, and frankfurters) in terms of s 60(2) of the *CPA* following the listeriosis outbreak in the country. See South African Government 2018 <https://www.gov.za/speeches/minister-aaron-motsoaledi-update-listeriosis-outbreak-south-africa-4-mar-2018-0000>; NCC Consumer Safety Alert 1.

²⁰⁷³ NCC 2019 <https://thencc.org.za/national-consumer-commission-to-order-recall-of-potentially-harmful-energy-drink/>.

- investigations into allegations of unsafe foodstuffs. Examples include investigations relating to potentially harmful brands of two-minute noodles²⁰⁷⁴ and apple juice concentrate²⁰⁷⁵ in 2021; and
- issuing notices to consumers which alert them when there has been a voluntary or precautionary recall of foodstuffs products by manufacturers, and urging consumers to return relevant goods for a refund. Examples include alerting consumers to the recall of Appletiser sparkling fruit drink by Coco-Cola Beverages,²⁰⁷⁶ the global recall of Similac Infant Formula by Abbott Laboratories,²⁰⁷⁷ and the recall of Knorr Cup-A-Soup variants by Unilever South Africa in 2022.²⁰⁷⁸

In the context of food safety the NCC also works closely with other regulatory bodies and government departments including the DOH, DOA and NRCS.²⁰⁷⁹ It appears, however, that the current cooperation between these various regulatory and enforcement authorities does not extend to the labelling or advertising of foodstuffs *per se*. The investigations of the NCC under the advertising provisions, notably sections 24, 29 and 41 of the *CPA*, appear to relate primarily to goods that are required by the *CPA* to have a trade description²⁰⁸⁰ applied to them, notably clothing, textiles and leather goods.²⁰⁸¹ As the majority of product-specific labelling requirements regarding foodstuffs are contained

²⁰⁷⁴ NCC 2021 <https://thencc.org.za/the-national-consumer-commission-investigates-grandisync-cc-the-supplier-of-howe-2-minute-noodles/>.

²⁰⁷⁵ NCC 2021 <https://www.sanews.gov.za/south-africa/commission-investigates-elgin-fruit-juice-supply-unsafe-goods>.

²⁰⁷⁶ NCC 2021 <https://thencc.org.za/consumers-are-urged-to-return-recalled-appletiser-products/>.

²⁰⁷⁷ NCC 2022 <https://thencc.org.za/product-recall-the-ncc-urges-consumers-to-return-similac-alimentum-400g-infant-formula/#:~:text=National%20Consumer%20Commission-,Product%20Recall%3A%20The%20NCC%20urges%20Consumers%20to,Similac%20Alimentum%20400G%20infant%20formula&text=To%20contact%20The%20National%20Consumer,found%20on%20our%20Contact%20page>.

²⁰⁷⁸ NCC 2022 <https://thencc.org.za/product-recall-consumers-are-urged-to-return-knorr-cup-a-soup-lite-beef-and-vegetable/>.

²⁰⁷⁹ See NCC *Strategic Plan for 2022/2023–2025/2026* 18; NCC *Annual Performance Plan 2022/2023* 16.

²⁰⁸⁰ See the discussion in part 3.5.3 of the meaning of a “trade description” under the *CPA*.

²⁰⁸¹ The NCC cooperates with other regulatory authorities in enforcing labelling requirements relating to clothing, textiles and leather goods including SARS and border police. During the 2020/2021 period, compliance notices exceeding R 18 000 000 were issued regarding imported consignments of footwear, clothing, leather and textile products which did not comply with provisions under the *CPA*. These non-compliant goods were ordered to be returned to the country of export or to be destroyed, in order to prevent those goods from entering the South African market. See NCC *Annual Report 2020/2021* 10; NCC *Annual Performance Plan 2022/2023* 7; *Soulever Well* case paras 8 and 9.

in the *FCDA* and *APSA*, which do not fall within the authority of the DTIC,²⁰⁸² compliance with labelling requirements of these goods or enforcement of product-specific advertising restrictions do not fall within the authority of the NCC under the *CPA*.

5.2.5 *The National Consumer Tribunal*

As mentioned earlier,²⁰⁸³ the *CPA* is framed in a manner which aims for the informal resolution of disputes under the Act at the early stages and prior to the stage that it reaches the ordinary courts.²⁰⁸⁴ As a general rule, therefore, the NCT cannot be approached directly as the “point of first entry” by a complainant.²⁰⁸⁵ Rather, the NCT is authorised to adjudicate disputes referred to it by the NCC, or in other select circumstances under the *CPA*.²⁰⁸⁶ As foodstuffs labelling and advertising complaints are often filed by consumers,²⁰⁸⁷ this aspect is an immediate limitation to the role of the NCT in this study.

It is also important to reiterate that the *CPA* contains limited food advertising and labelling provisions.²⁰⁸⁸ As discussed in part 2.4 above, most foodstuffs labelling and advertising requirements are prescribed in R146 which was promulgated under the *FCDA*. The *FCDA* is administered by the DOH.²⁰⁸⁹ R991, which relates to labelling and advertising of foodstuffs for infants and young children, also falls within the auspices of the DOH.²⁰⁹⁰ Additional labelling and advertising provisions apply to agricultural food products in terms of the *APSA*, which is administered and enforced by the DOA.²⁰⁹¹ Neither the NCT nor the NCC have the authority to administer or enforce foodstuffs advertising or labelling provisions that are prescribed in terms of the *FCDA* or *APSA*, as those statutes fall outside

²⁰⁸² The *FCDA* is administered and enforced by the DOH and the *APSA* is administered and enforced by the DOA. See the discussion in part 2.3 above.

²⁰⁸³ See part 5.2.4 above.

²⁰⁸⁴ Woker 2016 *SA Merc LJ* 27-28.

²⁰⁸⁵ A consumer cannot simply approach the NCT with a complaint before following the adjudication procedure in section 69 of the *CPA*. See further the discussion in part 5.4.2 below.

²⁰⁸⁶ See s 27(1) of the *National Credit Act* 34 of 2005; s 73(1)(c)(iii) read with s 73(2) of the *CPA*.

²⁰⁸⁷ See discussion in Chapter 6 and Addendum D.

²⁰⁸⁸ See part 2.5.3 above. Aspects such as prescribed details on foodstuffs labels, letter size restrictions, allergen indications, nutritional claims and the format of the nutritional information table completely fall outside the scope of the *CPA*.

²⁰⁸⁹ See part 2.3.1 above.

²⁰⁹⁰ See part 2.6 above.

²⁰⁹¹ See parts 2.3.2 and 2.5.1 above.

the authority of the DTIC and are not regulated under the *CPA*. As such, there would be jurisdictional challenges in approaching the NCT with a foodstuffs advertising or labelling complaint relating to any aspect not explicitly included in the *CPA*.

The NCT has the power to make various orders in relation to prohibited conduct under the *CPA*, including issuing an interdict, confirming consent agreements, and imposing administrative fines.²⁰⁹² Administrative fines imposed may be up to R 1 000 000 or ten per cent of the respondent's annual turnover during the previous financial year, whichever is greater.²⁰⁹³ That said, only ordinary courts have the power to declare marketing activities unjust, unfair or unreasonable under the *CPA*.²⁰⁹⁴ In terms of section 48(2)(c) of the *CPA*, a transaction or agreement or a part thereof will be regarded as unfair, unreasonable or unjust if:

the consumer relied upon a false, misleading or deceptive representation, as contemplated in section 41 or a statement of opinion provided by or on behalf of the supplier, to the detriment of the consumer.²⁰⁹⁵

In addition, only civil courts may award damages to an aggrieved party in a contested dispute.²⁰⁹⁶ This seems to be an additional shortcoming of the NCT for consumer redress where a claim for damages forms part of the desired relief.²⁰⁹⁷ The need to approach the civil court has been criticised by Mupangavanhu and Kerchhoff,²⁰⁹⁸ arguing that:

In practice, the idea of approaching an ordinary court with respect to misleading advertisements or notices that needs to be declared unfair, unreasonable or unjust seems illogical as it does not accord well with the spirit and purpose of consumer protection. It is hoped that such powers can be granted to the National Consumer Tribunal and even the National Consumer Commission to ensure that there is an efficient and effective redress.

²⁰⁹² Any decision, judgment or order of the NCT is enforceable as if it were an order of the High Court. See ss 150 and 152(1) of the *National Credit Act*.

²⁰⁹³ Such fines are to be paid into the National Revenue Fund. s 112(1), 112(2) and 112(5) of the *CPA*.

²⁰⁹⁴ See s 52(3) of the *CPA*.

²⁰⁹⁵ The concept of what is considered fair or unfair in the circumstances will be determined with reference to Constitutional values and public policy considerations. See Barnard and Mišćenić 2019 *Journal for Juridical Science* 131.

²⁰⁹⁶ See s 70(4) of the *CPA*; Barnard and Mišćenić 2019 *Journal for Juridical Science* 124, 132.

²⁰⁹⁷ Naudé and Barnard "Enforcement and Effectiveness of Consumer Law in South Africa" 19.

²⁰⁹⁸ Mupangavanhu and Kerchhoff 2021 *SA Merc LJ* 277.

Where, during proceedings before a court, it is alleged that a supplier contravened section 41 and/or 48 of the *CPA*, and the court finds that the relevant transaction or agreement, or part thereof, was unconscionable, unjust, unreasonable or unfair, the court has a wide discretion as to a suitable order which may be imposed. This could include the restoration of money or property to the consumer to compensate the consumer for losses or expenses relating to the transaction or agreement and/or the court proceedings (i.e., legal costs).²⁰⁹⁹ The NCT is not vested with this power.²¹⁰⁰ Also, it is unclear if it would be permissible under the *CPA* to order an advertiser to withdraw its advertising content. This aspect is discussed further in part 5.4.2.2 below.

5.3 Monitoring and enforcement of food laws by private actors in the food sector

As a starting point, the discussion that follows demonstrates that litigation before the courts regarding food laws is predominantly between trade competitors.²¹⁰¹ By virtue of their vested interest and business activities in the marketplace, food manufacturers are well suited to monitor what their trade rivals are doing. Unlike consumers,²¹⁰² businesses trading in the food industry may also have the financial means, legal standing²¹⁰³ and appetite to take formal steps where warranted. Food law enforcement by private actors promotes fair competition and ultimately serves the interests of both traders in the food sector and consumers. In this regard the High Court noted in *Clover v Sigalo Foods* that:

this false impression or confusion created by the respondent's label should be denounced, primarily for the protection of the consumer not to be confused or misled

²⁰⁹⁹ See s 52(3) of the *CPA*. The courts powers to grant such orders are, however, limited to instances where the CPA does not otherwise provide a remedy that is sufficient to correct the relevant prohibited conduct, unfairness, injustice or unconscionability. See s 52(1)(b) of the *CPA*.

²¹⁰⁰ Mupangavanhu and Kerchhoff 2021 *SA Merc LJ* 276.

²¹⁰¹ In certain instances, associations in the food industry may also be involved in litigation. See for example *Bertie van Zyl v Minister of Agriculture; SA Fruit and Vegetable Canners Association v Impumemelo* discussed below.

²¹⁰² See the discussion in part 5.4.1 below for challenges faced by consumers in enforcing their rights before the courts.

²¹⁰³ See the discussion in part 5.3.4.4 below.

and equally for traders who will unavoidably suffer financial harm due to this unlawful competition.²¹⁰⁴

5.3.1 Case law relating to the FCDA

Although there do not appear to be any reported cases relating specifically to the labelling or advertising of foodstuffs under the *FCDA* or R146,²¹⁰⁵ there is a reported case relating to misleading advertising claims in relation to a cosmetic. In *Elida Gibbs (Pty) Ltd v Colgate Palmolive (Pty) Ltd*²¹⁰⁶ (hereafter *Elida Gibbs v Colgate*) the plaintiff argued that the defendant had made false and misleading claims in the advertising of its MENTADENT P toothpaste²¹⁰⁷ which amounted to unlawful competition and were contrary *inter alia* to section 5 of the *FCDA*.²¹⁰⁸ In considering the interdictory relief claimed by the plaintiff based on unlawful competition, the High Court confirmed that it is a function of the Court to consider the *boni mores*, i.e., the interests of society, relevant to a particular advertising dispute.²¹⁰⁹ In this regard the High Court noted further that a defendant would not be able to defend a claim based on unlawful competition by alleging that it was unaware that the relevant advertising claim may be false or misleading. In this regard Van Schalkwyk J²¹¹⁰ observed:

[c]ommercial warfare is not proscribed by our law. So long as the combatants confine themselves to those legitimate methods of competition which the business community and society recognise as inevitable consequences of participation in commercial enterprise the Courts will refuse to interfere. However, there are certain forms of conduct which, when tested against the *boni mores* of the market place, remain untenable. This

²¹⁰⁴ *Clover v Sigalo Foods* case para 56.

²¹⁰⁵ Reported cases under the predecessor of the *FCDA*, namely the *Food, Drug and Disinfectants Act* 13 of 1929, also do not relate to the labelling and advertising of foodstuffs per se, although two cases did relate to milk. See *Van Rensburg v Springs Municipality P.H.* 1941 (2) TPD relating to the seal on milk containers; and *Van Zyl v Rex P.H.* 1942 (1) OPD relating to inspection of milk fat percentage of milk. The other reported case under the previous Act related to the composition of a cough syrup. See *Alexander v Rex P.H.* 1939 (1) AD.

²¹⁰⁶ *Elida Gibbs (Pty) Ltd v Colgate Palmolive (Pty) Ltd* 1988 2 SA (W).

²¹⁰⁷ The matter had to do with claims by the defendant that, due to the inclusion of zinc tartar as an ingredient in its MENTADENT P toothpaste, that product would cure tartar, and prevent or inhibit the growth of tartar. See *Elida Gibbs v Colgate* 352C-H.

²¹⁰⁸ Section 5 of the *FCDA* prohibits the use of false or misleading claims in the advertising or labelling of the products regulated under this Act, i.e., foodstuffs, cosmetics (which includes non-medicated toothpaste) and disinfectants. See the discussion in part 2.4.8.3 above in the context of foodstuffs advertising and labelling. *Elida Gibbs v Colgate* 351J – 352J.

²¹⁰⁹ *Elida Gibbs v Colgate* 357C-E.

²¹¹⁰ *Elida Gibbs v Colgate* 358F-G.

is so, in my view, whether or not the conduct complained of is deliberate; *a fortiori*, where the remedy sought by the plaintiff is only an interdict.

The product categories covered by the *FCDA*, namely foodstuffs, cosmetics and disinfectants, are all fast-moving consumer goods ("FMCGs").²¹¹¹ On this basis it is submitted that the interests of the general public should be considered in advertising and labelling disputes regarding these products. In the context of foodstuffs, this is well illustrated in the *Clover v Sigalo Foods* case discussed in part 5.3.2 below and the trade mark disputes discussed in part 5.3.3. In essence, it will be noted that the courts consider how the notional consumer, with average eyesight and intelligence, would perceive a claim, mark or statement made on a foodstuffs product label or the advertising of that product in the marketplace. Litigation instituted between competitors in the trade, or associations, where associations in the food sectors are involved, therefore also places the interests of the consumer as the user of the relevant product at the forefront.

5.3.2 Case law relating to the APSA

In recent years two matters relating specifically to the labelling of food products have been considered before our courts. These cases are discussed below.

The first is the *Clover v Sigalo Foods* case, which was touched upon in Chapter 2.²¹¹² In this matter Clover instituted motion proceedings against Sigalo based on several concerns with the use of the phrase "Stork BUTTER SPREAD" on its modified dairy product. The side panel of this product appears in Figure 5-1 below:

²¹¹¹ This term was explained in part 1.8.1 above.

²¹¹² See part 2.5.1.



*Figure 5-1: Side panel of STORK Butter Spread*²¹¹³

For background purposes it is necessary to explain the distinction between primary dairy products and modified dairy products under the *Dairy Products Regulations*.²¹¹⁴ A primary dairy product is milk²¹¹⁵ or another product which has been derived or manufactured solely from milk,²¹¹⁶ including butter (or pure butter).²¹¹⁷ Butter is manufactured by the churning or crystallisation of cream. Importantly, butter may not contain any animal fat, vegetable fat or marine fat.²¹¹⁸ As a primary dairy product, butter is manufactured from cream only.²¹¹⁹ As soon as the product contains fat solids other than those derived from cream, it is no longer pure butter.

Modified dairy products are products that correspond to a primary dairy product in general appearance, presentation and intended use, but which have been derived or manufactured only partially from a primary dairy product and which may contain

²¹¹³ Image sourced from *Sigalo v Clover* (SCA) para 8.

²¹¹⁴ The Dairy Products Regulations also have a third category of dairy products, namely composite dairy products. These are products consisting of a combination of a primary dairy product and another foodstuff, such as yoghurt with added foodstuffs and/or fruit or a fruit dairy dessert. See regs 1, 11 and 22(4) of the *Dairy Products Regulations*. Also see the definition of “dairy product” in reg 1 of the *Dairy Products Regulations*.

²¹¹⁵ The word “milk” refers to the normal secretion of the mammary glands of bovines, goats or sheep or other milking animals. See reg 1 of the *Dairy Products Regulations*.

²¹¹⁶ In addition to milk, primary dairy products may contain permitted food additives which are not intended to replace any part of the milk solids in the product. See the definition of “primary dairy product” in reg 1 of the *Dairy Products Regulations*.

²¹¹⁷ *Sigalo v Clover* (SCA) para 7. Other examples would include cream and cheese. See regs 15(1), 17(1) and 26(6) of the *Dairy Products Regulations*.

²¹¹⁸ See reg 17(1) of the *Dairy Products Regulations*.

²¹¹⁹ Butter is manufactured by churning or the crystallisation of cream. See reg 17(1) of the *Dairy Products Regulations*.

permitted quantities of other fats.²¹²⁰ Modified butter, for example, is manufactured by blending butter fat with plant/animal/marine fat in permitted quantities.²¹²¹ As Siqalo's Stork BUTTER SPREAD product contained a combination of butter fat and plant fats, it qualified as a modified dairy product, namely modified butter, in terms of the *Dairy Products Regulations*.²¹²²

As set out earlier,²¹²³ section 6 of the *APSA* prohibits the use of any name, word or expression that creates or is likely to create a false or misleading impression regarding the nature, quality or other properties of an agricultural food product. In the context of dairy products, section 6 should be read with regulation 32(3)(a) of the *Dairy Products Regulations*, which provides that:

[n]o word, mark, illustration, depiction or other method of expression that constitutes a misrepresentation or directly or by implication creates or may create a misleading impression regarding the quality, nature, class, origin or composition of a dairy product or an imitation dairy product shall be marked on a container of such product.

A dairy product which is marked in a manner which is prohibited in terms of regulation 32 may not be sold in South Africa.²¹²⁴

In relying on the above provisions, Clover argued that, in considering the layout of the label and the prominent use of the word "BUTTER" in capital letters appearing in font size which is "way bigger and accentuated in comparison to" the words "Stork" and "Spread",²¹²⁵ Siqalo was marketing its product in a manner which misrepresented to the public that the product was butter, when this was not the case.²¹²⁶ It was argued that Siqalo's product label was intentionally devised to create a misleading impression regarding the product.²¹²⁷ In support of its contention, Clover pointed out that the class designation of the product, namely "MEDIUM FAT BUTTER SPREAD" in conjunction with

²¹²⁰ In the case of modified dairy products, no more than half of the fat content, protein content and/or carbohydrate content, as the case may be, may be derived from a source other than a primary dairy product. See reg 1 of the *Dairy Products Regulations*.

²¹²¹ See reg 18(1) of the *Dairy Products Regulations*.

²¹²² *Clover v Siqalo a quo* paras 4.2, 8; *Siqalo v Clover* (SCA) para 7.

²¹²³ See part 2.4.8.3.

²¹²⁴ See reg 2(1)(e) of the *Dairy Products Regulations*.

²¹²⁵ *Clover v Siqalo a quo* para 4.4.

²¹²⁶ *Clover v Siqalo a quo* para 5.

²¹²⁷ *Clover v Siqalo a quo* para 10.

the even smaller phrase “WITH SUNFLOWER AND PALM OILS”, appeared in a less prominent white colour and font which was “way smaller in size” than the words “Stork BUTTER SPREAD”.²¹²⁸ On this basis Clover argued that Sigalo’s product label was contrary to section 6 of the *APSA* and regulation 32(3)(a) of the *Dairy Products Regulations* in that it misrepresented the particular nature, substance, attributes, character and composition of the product as butter (i.e., a product which it was not).²¹²⁹

In considering the letter size of the various written elements on the container label, the court *a quo* noted that the mark “Stork BUTTER SPREAD” constituted the dominant feature on the product label, and that the class designation “MEDIUM FAT MODIFIED BUTTER SPREAD” in combination with the phrase “WITH SUNFLOWER AND PALM OILS” was virtually illegible.²¹³⁰ In agreement with the court *a quo*, the SCA also highlighted that the word “BUTTER”, when compared to all other written elements on Sigalo’s product label, was “dimensionally oversized and, therefore, visually accentuated”.²¹³¹

In highlighting the fact that the word “BUTTER” appeared prominently left, right and centre on the product label, the court noted that the average consumer’s first and dominant attraction, when seeing this product in-store, would be to the word “butter” and not to the words “modified butter”, given the “nearly illegible” letter size and white colour of that class designation. This description of the product and the impression created by it based on its prominence in comparison to other written elements on the container label were held to have been undoubtedly created to confuse and/or mislead, alternatively to be likely to confuse or mislead “a lesser vigilant and unsuspecting average consumer”.²¹³² On this basis it was held that the Stork BUTTER SPREAD product label contravened section 6 of the *APSA* and regulation 32(3) of the *Dairy Products Regulations*.²¹³³ As such, Sigalo was interdicted from competing unlawfully by trading in

²¹²⁸ *Clover v Sigalo a quo* paras 4.4 and 4.5.

²¹²⁹ *Clover v Sigalo a quo* para 6.1; *Sigalo v Clover (SCA)* para 4.

²¹³⁰ *Clover v Sigalo a quo* para 54.

²¹³¹ *Sigalo v Clover (SCA)* para 9.

²¹³² *Clover v Sigalo a quo* para 55.

²¹³³ The label also contravened the letter size restrictions in terms of reg 26(7)(a) of the *Dairy Products Regulations*. For a discussion of that aspect, see part 2.5.1.

contravention of the *APSA* and *Dairy Products Regulations* and ordered to cease using the offending label.²¹³⁴

The second case, *Consumer Goods Council of South Africa v Food Safety Agency (Pty) Ltd*,²¹³⁵ related to communications issued by both the DOA and its assignee for processed meat products,²¹³⁶ the Food Standards Agency, regarding the labelling of meat analogues, or so-called “imitation meat” products.²¹³⁷ The DOA issued a communication addressed to all producers, importers and retailers of meat analogues (“interested parties”) essentially stating that those products were not permitted to have product names that were prescribed and reserved for processed meat products. Examples of troublesome product names included in the communication were “Vegan Nuggets”, “Chorizo & Red Pepper Vegetarian Sausages” and “Plant-Based Chicken-Style Strips”.²¹³⁸ The DOA’s communication highlighted that it is an offence under section 11 of the *APSA* to use product names that are prescribed or reserved for processed meat products in relation to meat analogues.²¹³⁹ On this basis interested parties were notified that the Food Safety Agency had been instructed to seize all meat analogues incorrectly labelled with product

²¹³⁴ *Clover v Sigalo a quo* para 69. On appeal the SCA upheld the ruling of the court a quo. See *Sigalo v Clover* (SCA) para 43.

²¹³⁵ 2023 JDR 2708 (GJ).

²¹³⁶ The term “processed meat” refers to meat that has undergone any action that substantially altered its original state (including, but not limited to, heating, smoking, curing, fermenting, maturing, drying, marinating (surface application), extraction or extrusion or any combination of all these processes), but excludes raw processed meat. See reg 1 of the *Meat Products Regulations*. For a discussion on food processing in general, see part 1.8.2 above.

²¹³⁷ A meat analogue, which is also commonly referred to as “imitation meat”, “meat substitute”, “mock meat”, or “faux meat”, is defined as a product that approximates the aesthetic qualities (i.e. the look, taste and feel) and/or chemical characteristics of a specific type of meat, but which is made from non-meat ingredients. Meat analogues are produced to imitate animal meat in terms of taste, texture and appearance, although the composition differs from that of meat. See reg 1 of the *Meat Products Regulations*; Singh and Sit *Food and Bioprocess Technology* 2665-2666. For additional reading on the demand for meat analogues, see Visagie 2024 *THRHR* 156-157.

²¹³⁸ DOA *Illicit Use of the Product Names in Respect of Names Exclusively Prescribed for Processed Meat Products* communication dated 22 June 2022 paras 1, 4.

²¹³⁹ DOA *Meat Analogues Communication* para 6. The DOA *Meat Analogues Communication* failed, however, to indicate which possible provision(s) of the *APSA* which had not been complied with by interested parties would potentially constitute an offence in terms of s 11 of the *APSA*. See Visagie 2024 *THRHR* 160.

names prescribed for processed meat products in terms of the *Meat Products Regulations*.²¹⁴⁰

Following the DOA communication, the Food Standards Agency subsequently issued a further communication advising interested parties that it would commence seizing any meat analogue products using the product names prescribed for processed meat products at all points of sale throughout South Africa. That communication prompted the CGCSA to launch urgent motion proceedings against both the Minister of Agriculture and the Food Standards Agency before the High Court in Johannesburg. The CGCSA essentially argued that the communications issued by the DOA and the Food Standards Agency were “without proper foundation, *ultra vires* and improper”,²¹⁴¹ rendering the proposed action to seize meat analogue products in terms of those communications unlawful. It was further argued that the Food Standards Agency had no authority to take any measures in relation to meat analogue products, as these goods did not fall within the authority granted to this assignee in terms of the *APSA*.²¹⁴²

The High Court granted interim relief to the CGCSA, interdicting the Minister of Agriculture and the Food Standards Agency from seizing any meat analogue products in South Africa.²¹⁴³ This interim relief was granted pending the outcome of a separate review application instituted by the CGCSA before the Johannesburg High Court,²¹⁴⁴ in which it sought an order to review and set aside the communications of the DOA and the Food Safety Agency.²¹⁴⁵ In April 2024 the CGCSA²¹⁴⁶ issued a media statement confirming that the High Court had granted this desired relief, essentially overturning the decisions of the DOA and Food Safety Agency to seize meat analogues.²¹⁴⁷ Whilst it appears that the reasons for the judgment have not yet been issued, the outcome of this ruling is

²¹⁴⁰ DOA *Meat Analogues Communication* para 5. For a detailed discussion of the facts of the case, see Visagie 2024 *THRHR* 160-162.

²¹⁴¹ *CGCSA v FSA* para 35.

²¹⁴² *CGCSA v FSA* para 35; Visagie 2024 *THRHR* 162.

²¹⁴³ *CGCSA v FSA* paras 1, 9 and 68; Visagie 2024 *THRHR* 163-164.

²¹⁴⁴ *CGCSA v FSA* para 9, 68.

²¹⁴⁵ *CGCSA v FSA* para 9.

²¹⁴⁶ See CGSA 2024 <https://www.cgcsa.co.za/Article-Decision-To-Seize-Meat-Analogue-Products/>.

²¹⁴⁷ Also see Vegconomist 2024 <https://vegconomist.com/politics-law/johannesburg-high-court-overturns-seizure-meat-alternatives/>.

supported. As an initial observation, it should be noted that there are currently no regulations under the *APSA* which deal, specifically, with the marketing and labelling of meat analogues.²¹⁴⁸ The *APSA* allows the Minister to control the sale only of “prescribed products” as defined in the *APSA*. Meat analogues are not currently prescribed²¹⁴⁹ or regulated²¹⁵⁰ in terms of the *APSA*. As such, the Minister of Agriculture’s communication relating to the control over the sale of such goods in terms of the *APSA* is *ultra vires* and invalid.²¹⁵¹ Turning to the communication issue by the Food Safety Agency, it is noteworthy that an assignee designated in terms of the *APSA* may exercise only the powers and perform only the duties conferred upon it regarding the particular product(s) assigned to it.²¹⁵² The agricultural food product categories designated to the Food Safety Agency under the *APSA* are eggs, animal products, poultry meat, and other meat or meat products.²¹⁵³ Meat analogues, which, by their very nature, are plant-based foods that do not contain any meat, fall squarely outside the food categories assigned to the Food Safety Agency in terms of the *APSA*. It follows, therefore, that any action that this assignee takes concerning meat analogues, including the seizure of such goods, would be *ultra vires*, as such conduct would fall outside the scope of the authority designated to the Food Safety Agency.²¹⁵⁴

As a concluding remark, the *CGCSA v FSA* matter illustrates that litigation before South African courts, at least relative to the *APSA*, is not limited to trade competitors only. The motion proceedings in this matter were instituted by the CGCSA, a non-profit organisation representing over 9 000 members across South Africa and providing labelling and regulatory advice, advocacy, and engagement with government departments and

²¹⁴⁸ The development of regulations for meat analogue products by the DOA does seem to be in the pipeline. See Visagie 2024 *THRHR* 159; Daily Maverick 2022 <https://www.dailymaverick.co.za/article/2022-08-22-consumer-goods-council-granted-interdict-to-stop-food-safety-authority-from-seizing-meatless-products/>.

²¹⁴⁹ The word “prescribed” means prescribed by regulation (i.e., under s 15 of the *APSA*). See s 1 of the *APSA*.

²¹⁵⁰ A “regulation” refers to a regulation made in terms of s 15 of the *APSA*. See s 1 of the *APSA*.

²¹⁵¹ See s 3(1)(a) of the *APSA*. For a detailed discussion on this aspect, see Visagie 2024 *THRHR* 164-165, 174.

²¹⁵² See s 2(3)(b)(i) read with s 2(3)(a) of the *APSA*; *CGCSA v FSA* para 32. For additional reading, see Visagie 2024 *THRHR* 159-160, 165-166.

²¹⁵³ See Gen Not 7 in GG 40545 of 13 January 2017 read with Gen Not 419 in GG 43591 of 7 August 2020.

²¹⁵⁴ Visagie 2024 *THRHR* 166, 174.

regulatory agencies within the consumer goods and services sector.²¹⁵⁵ The Red Meat Industry Forum, which is a voluntary organisation representing various groups in the red meat industry, also intervened in those proceedings as an interested party.²¹⁵⁶ Other voluntary interested groups that have been parties to disputes relating to inspection fees imposed by assignees under *APSA* include the Tomato Producers' Organisation, the Fresh Produce Importers Association NPC,²¹⁵⁷ and the South African Fruit and Vegetable Canners Association.²¹⁵⁸

5.3.3 Court proceedings in terms of the CPA

Section 4(1)(a) of the *CPA* provides that a person, including a juristic person,²¹⁵⁹ acting on its own behalf may approach a court, alleging that a consumer's rights in terms of the *CPA* have been infringed, impaired or threatened, or that prohibited conduct has occurred or is occurring.²¹⁶⁰ The definition of a "court" in the *CPA* excludes a consumer court,²¹⁶¹ but would include national civil courts in South Africa.²¹⁶²

Members of the public, including those purchasing and consuming foodstuffs, would qualify as consumers in terms of the *CPA*.²¹⁶³ It is no surprise, therefore, that the dispute resolution mechanisms under the *CPA* are primarily aimed at those individuals. In considering who would be in a position to approach the NCT (as well as the NCC,

²¹⁵⁵ See CGCSA 2023 <https://www.cgcsa.co.za/membership/>; *CGCSA v FSA* paras 3, 4; Visagie 2024 *THRHR* 168.

²¹⁵⁶ *CGCSA v FSA* paras 6, 7.

²¹⁵⁷ *Bertie van Zyl v Minister of Agriculture* para 1.

²¹⁵⁸ *SA Fruit and Vegetable Canners Association v Impumemelo* para 3.

²¹⁵⁹ See s 1 of the *CPA*.

²¹⁶⁰ The term "prohibited conduct" refers to any act or omission in contravention of the *CPA*. If the general purpose or effect of any transaction or agreement is to mislead or deceive the consumer, such a transaction or agreement is prohibited in terms of section 51 of the *CPA*. In this context, contravening the general standards for the marketing of goods and services, or applying a false or misleading claim on a product label or trade description in the foodstuffs sector could potentially be prohibited conduct in terms of section 51. See ss 1, s 51(1)(a)(ii) of the *CPA*. See the discussion on ss 24, 29 and 41 of the *CPA* in part 3.5.3; Mupangavanhu and Kerchhoff 2021 *SA Merc LJ* 271.

²¹⁶¹ A consumer court is defined as "a body of that name, or a consumer tribunal, which has been established in terms of applicable provincial consumer legislation." See s 1 of the *CPA*.

²¹⁶² This would include the CC, SCA, high courts, magistrates' courts, the small claims court and, as a specialised court, the Equality Court. See Barnard and Mišćenić 2019 *Journal for Juridical Science* 121.

²¹⁶³ See part 1.8.5 above.

provincial consumer courts and ombuds established in terms of the *CPA*), the exclusion in section 5(2)(b) is of specific relevance to this study. It provides:

(2) This Act does not apply to any transaction-

(b) in terms of which the consumer is a juristic person whose asset value or annual turnover, at the time of the transaction, equals or exceeds the threshold value determined by the Minister in terms of section 6.

The threshold value mentioned above is currently R2 000 000.²¹⁶⁴ The implication of this is that juristic persons who operate in the foodstuffs sector, including manufacturers and retailers, who have an asset value or annual turnover of R2 000 000 or more would not be able to lodge complaints with the NCC, NCT, provincial consumer court or the CGSO based on alleged contravention of the *CPA*. As such, a competitor would generally not be able to approach relevant tribunals or ombuds established to enforce the *CPA* against another competitor in the foodstuffs industry. This limitation would, at face value, seem consistent with legislation that is aimed primarily at consumer rights and the avoidance of abuse of process by large private actors. The exclusion does, however, place limitations on the role of the *CPA* when it comes to disputes relating to the labelling and advertising of foodstuffs. As illustrated by the case law discussed in part 5.3 above, the complainant concerned by the advertising or labelling aspects of foodstuffs is often a business operating in the food sector. As the annual turnover or asset value of many food traders would exceed the current threshold limitations, the *CPA* may not be a viable avenue for these businesses as far as it relates to the ARD mechanisms available under this *Act*.

Despite these limitations it has been argued that the *CPA* may nevertheless be relied upon as a basis of an unlawful competition claim before the courts. The *CPA* repealed the provisions of the *Merchandise Marks Act* 17 of 1941 (hereafter "*Merchandise Marks Act*") that dealt with product labelling and false trade descriptions.²¹⁶⁵ Under the *Merchandise*

²¹⁶⁴ See GN 294 in GG 34181 of 1 April 2011.

²¹⁶⁵ See s 121(2)(a) of the *CPA*; Gen Not 917 in GG 33581 of 23 September 2010. With effect from 31 March 2011, ss 2-13, 16 and 17 of the *Merchandise Marks Act* were repealed by the *CPA*.

Marks Act competitors were able to seek interdictory relief against an offending counter-party.²¹⁶⁶ On this basis, Webster, Morley and Joubert²¹⁶⁷ point out that:

While it is true that the CPA is the Consumer Protection Act and the Act is replete with references to consumers, section 3(1)(c) states that the purpose of the Act is to promote fair business practices. ... It is submitted that the CPA was also passed for the protection of producers, service providers, importers, distributors, retailers, etc., and such persons ought also to be in a position to obtain an interdict in terms of the common law of unlawful competition in the event that a competitor is contravening a provision of the CPA.

In *Clover v Sigalo a quo*, the cause of action was based on unlawful competition due to non-compliance with the *APSA*. To the extent that a supplier²¹⁶⁸ fails to comply with *CPA* provisions that apply to foodstuffs labelling and advertising,²¹⁶⁹ there seems to be no reason why a claim based on unlawful competition could not equally be founded on contravention of the *CPA*. It remains to be seen if this approach is adopted in the future.

5.3.4 Case law relating to trade mark rights

The discussion in Chapter 2²¹⁷⁰ set out the relevance of trade marks to foodstuffs labelling and advertising. Over the years, numerous cases have been instituted under the *TM Act* which relate to trade marks in the foodstuffs classes,²¹⁷¹ and the case law discussion below is by no means exhaustive.²¹⁷² It commences with a selection of trade mark

²¹⁶⁶ See for example *Long John International Ltd v Stellenbosch Wine Trust (Pty) Ltd* 1990 4 SA 136 (D) at 1369B-C.

²¹⁶⁷ Webster, Morley and Joubert *SA Law of Trade Marks* para 18.14. Underlining in quote is from the original text.

²¹⁶⁸ Which would include the manufacturers and sellers of foodstuffs products.

²¹⁶⁹ Such as those prescribing marking requirements for foodstuffs containing GMOs. See the discussion in part 2.4.3.3 above.

²¹⁷⁰ See part 2.5.2.

²¹⁷¹ See part 3.5.2.1 for a discussion on the trade mark classification system.

²¹⁷² Trade mark law forms an integral part of this study. The distinctive brand name of a food product will generally qualify as a trade mark, as it serves to distinguish that product from the same type of product of others in the trade. In addition, the packaging (or get-up) of foodstuffs may qualify for trade mark protection if distinctive in the minds of the public with the manufacturer's business or goods. Trade mark case law has been particularly useful in this study to explain or define various concepts such as "advertise", "consumer" and "food law". See parts 1.8.4-1.8.6, 2.4.3, 2.4.8.3, 2.5.1 and 2.5.2. The relevance of trade mark law to R3337 is discussed in part 4.8 below. Also see part 5.3.4 for a discussion on trade mark law cases relating to foodstuffs, and part 6.3.5 for the relevance of trade mark law to disputes before the ARB.

opposition matters, followed by cases relating to the infringement of trade mark rights under the *TM Act* and subsequently case law under the common law of passing-off.

Trade mark opposition and infringement disputes in the foodstuffs sector often centre on allegations regarding the confusing similarity of a single word or device mark²¹⁷³ between trade competitors. In contrast, passing-off proceedings under the common law relate to disputes concerning entire foodstuffs product get-ups or labels.²¹⁷⁴

5.3.4.1 Trade mark opposition matters

An opposition to a trade mark application is filed with the Registrar of Trade Marks, who possesses the same authority as a single judge in a civil action that has been instituted in the High Court in Pretoria.²¹⁷⁵ The parties to proceedings before the Registrar are deemed to be parties to civil proceedings in a South African court.²¹⁷⁶ The Registrar has the discretion to refer pending trade mark opposition proceedings to the High Courts for hearing, which is often done in contested matters.²¹⁷⁷ Appeals before the courts in trade mark matters are not uncommon.²¹⁷⁸ For these reasons, the discussion below focuses on relevant High Court and SCA rulings.

²¹⁷³ A trade mark can be either a word mark, a device mark (i.e., a graphic representation/logo), or a combination of the two. See parts 2.5.2.1 and 2.5.3 above.

²¹⁷⁴ A product get-up is essentially the elements that make up the features of the product's packaging or label. This would include the product name, the placement of features, and the colour or combinations of colours used on the label. See part 2.5.2.2 above, and the case law examples discussed in part 5.3.4.3 below. For additional reading, see Castleman 2014 <https://www.polity.org.za/article/protecting-the-get-up-of-a-product-and-the-benefits-associated-with-it-2014-02-27>; Webster, Morley and Joubert *SA Law of Trade Marks* para 15.20.

²¹⁷⁵ See s 45(1) and the definition of "court" in s 1 of the *TM Act*. A notice of opposition under s 21 of the *TM Act* is to be supported by an affidavit. See reg 19 of the *TM Regulations* for the procedural aspects regarding a notice of opposition. Trade mark infringement proceedings in terms of ss 34 and 35(3) of the *TM Act* are instituted in the High Court.

²¹⁷⁶ See s 53(5) of the *TM Act*.

²¹⁷⁷ In the *PEPPAMATES* case, for example, the Registrar transferred the contested opposition to the High Court in Pretoria. See *PEPPAMATES* case para 2.

²¹⁷⁸ Appeals against rulings of the Registrar of Trade Marks are brought before the High Court in Pretoria or the SCA. The Registrar of Trade Marks would then usually be cited as a respondent in the appeal, given that the appeal in an opposition matter under the *TM Act* would affect the entry of a trade mark on the trade marks register. See ss 53, 55 and 56 of the *TM Act*. In the *PEPPAMATES* case, the *a quo* ruling of the Pretoria High Court was taken on appeal and heard before the Full Bench and, subsequently, on appeal again before the SCA. See *PEPPAMATES* case paras 2–3.

In *Pepsico Inc v Atlantic Industries*²¹⁷⁹ Pepsico applied to register the trade marks PEPSI TWIST and PEPSI TWIST device in relation to goods in class 32.²¹⁸⁰ Based on the representation of the device mark as shown in Figure 5-2 below, it could be inferred that Pepsico intended to use the trade mark PEPSI TWIST in relation to a lemon-flavoured carbonated soft drink.²¹⁸¹



Figure 5-2: Pepsico's PEPSI TWIST device trade mark application²¹⁸²

Pepsico's trade mark applications were opposed by Atlantic Industries, a wholly-owned subsidiary of The Coca-Cola Company, which sold a lemon-flavoured carbonated soft drink under the trade mark LEMON TWIST at the relevant time.²¹⁸³ In relying on its prior registered trade mark rights in the marks TWIST, LEMON TWIST and DIET TWIST in relation to goods in class 32, Atlantic Industries argued that Pepsico's PEPSI TWIST trade

²¹⁷⁹ *Pepsico Inc v Atlantic Industries* [2017] JOL 38846 (SCA).

²¹⁸⁰ The trade mark specifications included "mineral and aerated waters and other non-alcoholic drinks." *Pepsico Inc v Atlantic Industries* paras 1-2. For a discussion on the trade mark classification system, see part 2.5.2.1 above.

²¹⁸¹ *Pepsico Inc v Atlantic Industries* para 21.

²¹⁸² *Pepsico Inc v Atlantic Industries* para 2.

²¹⁸³ *Pepsico Inc v Atlantic Industries* paras 1, 21. The product name has subsequently changed to TWIST. See Makro 2023 https://www.makro.co.za/beverages-liquor/soft-drinks-juices/cold-drinks/2l-non-returnable-bottles/csd-soft-drink-pet/twist-lemon-1-x-1-5l-/p/000000000000281826_EA.

mark applications were unregistrable in terms of the *TM Act*.²¹⁸⁴ The opposition was based on section 10(14),²¹⁸⁵ which provides that a mark shall not be registered if it is:

identical to a registered trade mark belonging to a different proprietor or so similar thereto that the use thereof in relation to goods or services in respect of which it is sought to be registered and which are the same as or similar to the goods or services in respect of which such trade mark is registered, would be likely to deceive or cause confusion.

After dismissing PepsiCo's counter-application,²¹⁸⁶ the court went on to consider Atlantic Industries' opposition. As the parties' respective marks extended to the same goods in class 32,²¹⁸⁷ the SCA noted that the similarity in goods is inter-related to considering whether or not the parties' marks are confusingly similar, and noted that:

[L]esser similarities in the marks might be counter-balanced by stronger similarities in the goods but ultimately the question remains whether in combination there is a likelihood of confusion or deception.²¹⁸⁸

Importantly, it was also noted that the parties' respective products would be directed at the same consumer market and potentially be sold in the same retail outlets including supermarkets, café's, bars and restaurants.²¹⁸⁹

Turning to a comparison of the parties' respective marks, it was noted that PepsiCo's PEPSI TWIST trade mark applications wholly incorporate Atlantic Industries' prior TWIST trade mark, as well as the dominant feature of the LEMON TWIST and DIET TWIST

²¹⁸⁴ *Pepsico Inc v Atlantic Industries* paras 1, 16.

²¹⁸⁵ In addition s 10(13) was also raised as a ground of opposition, but the court found it unnecessary to consider that ground of opposition. See *Pepsico Inc v Atlantic Industries* para 16.

²¹⁸⁶ PepsiCo filed a counter-application for the expungement of Atlantic Industries' TWIST, LEMON TWIST and DIET TWIST trade mark registrations, essentially arguing that the marks were descriptive of goods in class 32 and did not constitute valid trade marks as they were not capable of distinguishing. These arguments were, however, dismissed by the SCA, which found that most South African consumers would simply deem the use of the trade mark TWIST in relation to class 32 goods as an arbitrary brand name without a specific meaning, resulting in TWIST's being inherently capable of distinguishing in accordance with s 9, 10(2)(a) and 10(2)(b) of the TM Act. See *Pepsico Inc v Atlantic Industries* paras 3, 4-6, 8, 13, 14.

²¹⁸⁷ *Pepsico Inc v Atlantic Industries* para 1.

²¹⁸⁸ *Pepsico Inc v Atlantic Industries* para 19. Also see *Mettenheimer v Zonquasdrif Vineyards* CC2014 2 SA 204 (SCA) para 11.

²¹⁸⁹ *Pepsico Inc v Atlantic Industries* para 22.

marks, i.e.,²¹⁹⁰ the word “TWIST”.²¹⁹¹ In considering if the addition of the word “PEPSI” in Pepsico’s mark was sufficient to distinguish its marks from those of Atlantic Industries, the SCA noted that, if the PEPSICO TWIST trade mark applications were registered under the *TM Act*, Pepsico would be in a position to depict the word “TWIST” visually more prominent than the word “PEPSI” on the product container label.²¹⁹² In dismissing the appeal and confirming the full bench ruling that Pepsico’s trade mark applications were unregistrable in terms of section 10(14) of the *TM Act*,²¹⁹³ the SCA noted:

[w]hile the incorporation of PEPSI into the proposed mark would avoid creating in the minds of ordinary consumers the mistaken belief that Pepsi Twist was produced by a party independent of the Pepsi stable, consumers might be deceived into thinking that, or be confused about whether, the producer of beverages under the name Twist (ie Atlantic) is part of the Pepsi stable. The greater the similarity in the ways in which the producers chose to depict TWIST on their products, the greater the likelihood of this confusion. I have already observed that in fair and reasonable notional use the parties might depict TWIST in similar styles. Having regard to actual use, there is already some similarity in the way in which Atlantic depicts TWIST on its products and the manner in which PepsiCo depicts TWIST in the proposed device mark.²¹⁹⁴

In *Dinnermates (Tvl) CC v Piquante Brands International (Pty) Limited*²¹⁹⁵ (hereafter the *PEPPAMATES* case) the Pretoria High Court held that the trade mark applicant’s PEPPAMATES logo mark shown in Figure 5-3 below was confusingly similar to the opponent’s prior registered PEPPADEW logo mark shown in Figure 5-4. The parties’ respective marks extended to the same foodstuffs classes.²¹⁹⁶

²¹⁹⁰ As the words “LEMON” and “DIET” were descriptive. See *Pepsico Inc v Atlantic Industries* para 23.

²¹⁹¹ *Pepsico Inc v Atlantic Industries* para 23.

²¹⁹² *Pepsico Inc v Atlantic Industries* paras 24, 26.

²¹⁹³ *Pepsico Inc v Atlantic Industries* para 35.

²¹⁹⁴ *Pepsico Inc v Atlantic Industries* para 24.

²¹⁹⁵ [2018] JOL 40194 (SCA).

²¹⁹⁶ Both parties’ marks extended to the class heading for goods in classes 29 and 30. In addition, the trade mark applicant also filed the PEPPAMATES logo mark in class 31. See *PEPPAMATES* case paras 1, 6-7.

 2197	 2198
<i>Figure 5-3: Opposed PEPPAMATES trade mark application filed by Dinnermates (Tvl) CC</i>	<i>Figure 5-4: Prior PEPPADEW logo trade mark registration owned by Piquante Brands International (Pty) Limited</i>

The Full Bench agreed with the court *a quo* in upholding the opposition on the basis of section 10(14) of the *TM Act* and refused the registration of the PEPPAMATES trade mark applications.²¹⁹⁹ On appeal before the SCA, however, the court overturned the ruling and ultimately concluded that the parties' respective logo marks were sufficiently distinct to avoid a likelihood of confusion in the trade.²²⁰⁰ After analysing the visual differences in the parties' respective logo marks,²²⁰¹ the SCA considered the overlap in the word elements PEPPAMATES and PEPPADEW, namely the prefix "PEPPA". On the evidence and facts, the SCA agreed with the trade mark applicant that this prefix, which was by no means used exclusively by the opponent in relation to foodstuffs,²²⁰² was an adaptation of the descriptive word "pepper".²²⁰³ On that basis the SCA noted further:

...PEPPA is an adaptation from the word pepper, obviously chosen because the product to which it was first attached was a pepper. Its use conjures up an image of a pepper. In conjunction with the pepper device, it will be understood as referring to a product with peppers. The distinctive element for trade mark purposes is therefore the suffix

²¹⁹⁷ Image sourced from Mondaq 2018 <https://www.mondaq.com/southafrica/trademark/690614/when-is-a-descriptive-mark-not-a-descriptive-mark>. Also see *PEPPAMATES* case para 6.

²¹⁹⁸ Image sourced from Mondaq 2018 <https://www.mondaq.com/southafrica/trademark/690614/when-is-a-descriptive-mark-not-a-descriptive-mark>. Also see *PEPPAMATES* case para 4.

²¹⁹⁹ *PEPPAMATES* case para 8.

²²⁰⁰ *PEPPAMATES* case paras 23, 24.

²²⁰¹ *PEPPAMATES* case para 20.

²²⁰² Examples of other foodstuffs names that incorporate the prefix are pepperoni, pepperpot, pepper sauce and pepperwort. See *PEPPAMATES* case para 22.

²²⁰³ *PEPPAMATES* case para 19, 22.

DEW, which is wholly different from MATES. Because "PEPPA" phonetically sounds like "pepper", the likelihood of confusion will not arise, especially if it is used in combination with another word such as DEW or MATES.²²⁰⁴

The SCA subsequently concluded that the Full Bench had erred in failing to consider the distinguishing features of the respective marks, namely the distinctive suffixes "MATES" versus "DEW".²²⁰⁵ Mathopo JA noted:

In my view, the use of the word PEPPA by other entities dispels the notion that the respondents have the exclusivity or monopoly in the prefix PEPPA. I can see no reason why the respondents' trade mark cannot coexist with the appellant's trade mark. Coca Cola and Pepsi Cola have existed side by side for a considerable period of time without any difficulty.²²⁰⁶

In upholding the appeal, the SCA dismissed the opposition and directed that the PEPPAMATES trade mark applications proceed to registration.²²⁰⁷

More recently, in *National Brands Limited v Cape Cookies CC*²²⁰⁸ (hereafter the *SNACKCRAX* case), the SCA considered an appeal relating to trade mark opposition proceedings that ensued between two leading biscuit producers in South Africa.²²⁰⁹ National Brands is the proprietor of the well-known trade mark SALTICRAX which has been used extensively and registered for decades in relation to savoury biscuits in class 30.²²¹⁰ It opposed the registration of an application for SNACKCRAX by Cape Cookies extending to the same goods in class 30.²²¹¹ Although various grounds of opposition were raised,²²¹² the SCA ultimately upheld the opposition to Cape Cookies' SNACKCRAX trade mark application on the basis of the anti-dilution opposition provision,²²¹³ namely section

²²⁰⁴ *PEPPAMATES* case para 22.

²²⁰⁵ *PEPPAMATES* case para 23.

²²⁰⁶ *PEPPAMATES* case para 21.

²²⁰⁷ *PEPPAMATES* case para 24.

²²⁰⁸ 2023 JDR 2056 (SCA).

²²⁰⁹ The appeal followed the dismissal of National Brands' opposition to Cape Cookies' trade mark application no. 2013/06837 SNACKCRAX in class 30 by the Pretoria High Court. See *National Brands Limited v Cape Cookies CC* 2021 HIPR 196 (GP).

²²¹⁰ National Brands' opposition included a number of other trade mark registrations, but the matter was decided on the basis of the SALTICRAX trade mark registration. See *SNACKCRAX* case paras 2, 12.

²²¹¹ *SNACKCRAX* case para 1.

²²¹² *SNACKCRAX* case para 5.

²²¹³ See part 3.5.2.1 for a discussion on s 34(1)(c) of the *TM Act*, which is the equivalent provision in the Act dealing with infringement; *SNACKCRAX* case para 7.

10(17) of the *TM Act*.²²¹⁴ As in the *PEPPAMATES* case, where it was argued that the overlapping element in the parties' word marks is descriptive, Cape Cookies argued that the word "CRAX" was simply an abbreviated form of the word "crackers" and, therefore, descriptive of goods in class 30.²²¹⁵ However, after considering various dictionary definitions of the word "CRAX" the court found that there was no basis for concluding that "CRAX" was used as an abbreviation for crackers or that it is a word that forms part of everyday use in the English language.²²¹⁶ On this basis the SCA found the word "CRAX" to be a "coined term" which constituted the dominant feature of both trademarks SNACKCRAX and SALTICRAX.²²¹⁷ The court then went on to consider whether or not the prefixes of the marks, i.e., SNACK v SALTI, were sufficient to distinguish the parties' respective marks bearing in mind that they would both be used in relation to savoury biscuits.²²¹⁸ In this regard the court held that the prefix SNACK was not sufficient to distinguish SNACKCRAX from SALTICRAX on a visual, phonetic or conceptual basis.²²¹⁹

In concluding that the registration of the SNACKCRAX mark would be likely to take unfair advantage of the distinctive character or repute of National Brands' SALTICRAX trade mark and was therefore contrary to section 10(17) of the *TM Act*, the SCA noted:

The use of the similar mark will enable Cape Cookies to 'ride on the coat tails' of National Brands as regards the well-established SALTICRAX mark without itself having to expend time and money to achieve an equally competitive position. It was submitted that this was why Cape Cookies chose a mark similar to SALTICRAX as opposed to a different mark under which it could have traded without that advantage.²²²⁰

²²¹⁴ In terms of s 10(17), a mark shall not be registered as a trade mark if it is identical or similar to a prior-registered trade mark which is well-known in South Africa, if the use of the mark sought to be registered would be likely to take unfair advantage of, or be detrimental to, the distinctive character or the repute of the prior-registered trade mark, notwithstanding the absence of deception or confusion, and unless the proprietor of such a trade mark consents to the registration of such a mark.

²²¹⁵ *SNACKCRAX* case para 28.

²²¹⁶ *SNACKCRAX* case para 29.

²²¹⁷ *SNACKCRAX* case paras 31, 33.

²²¹⁸ *SNACKCRAX* case paras 31, 34.

²²¹⁹ *SNACKCRAX* case para 33.

²²²⁰ *SNACKCRAX* case para 40.

This successful opposition to the SNACKCRAX trade mark application served to prevent Cake Cookies from obtaining registration of²²²¹ and subsequent monopoly rights in the trade mark SNACKCRAX in relation to savoury biscuits.²²²²

5.3.4.2 Trade mark infringement matters

In contrast to trade mark opposition proceedings, infringement proceedings under the *TM Act* are instituted directly before the High Courts, not the Registrar of Trade Marks.²²²³ The seat of the High Court in which the alleged infringing conduct is occurring, or where the respondent is situated, will usually have jurisdiction over the infringement proceedings.²²²⁴

In *Kraft Foods Inc v All Joy Foods (Pty) Ltd*,²²²⁵ (hereafter the *MAGIC WHIP* case) the proprietor of the trade mark MIRACLE WHIP registered in class 29 for “mayonnaise and salad cream” was successful in interdicting the respondent’s use of the trade mark MAGIC WHIP, which was used in relation to salad cream.²²²⁶ The infringement proceedings were instituted and argued on the basis of s 34(1)(a) of the *TM Act*. The court was satisfied that the trade marks MIRACLE WHIP and MAGIC WHIP were so similar on a visual, phonetic and conceptual basis, that there existed a reasonable likelihood of deception or confusion between the parties’ marks, particularly as the infringing mark was used in relation to the same product to which the applicant’s MIRACLE WHIP trade mark registration extended. On the issue of conceptual similarity between the words “MIRACLE” and “MAGIC”, the SCA noted:

Whatever the precise definition of these two words may be, I am satisfied that the two words are conceptually similar. If a prospective customer sees or hears the word 'Miracle Whip' and enters a supermarket sometime later, he or she may very well be confused when he or she sees the trade mark Magic Whip.²²²⁷

²²²¹ If a trade mark application is held to be contrary to one or more of the grounds for unregistrable trade marks in s 10 of the *TM Act*, it will not be registered as a trade mark.

²²²² See the discussion in part 3.5.2.1.

²²²³ See s 34(3) of the *TM Act*; Webster, Morley and Joubert *SA Law of Trade Marks* paras 12.51, 14.2.2.

²²²⁴ Morley and Joubert *SA Law of Trade Marks* para 14.2.2.

²²²⁵ 1999 BIP 122 (T).

²²²⁶ See *MAGIC WHIP* case 124; 132.

²²²⁷ See *MAGIC WHIP* case 132.

Conceptual differences in trade marks played a decisive factor in *National Brands Ltd v Blue Lion Manufacturing (Pty) Ltd*²²²⁸ (hereafter the *ROMANTIC DREAMS* case). The proprietor of the well-known trade mark ROMANY CREAMS, which was widely used and registered in relation to biscuits,²²²⁹ was not successful in stopping the use of the mark ROMANTIC DREAMS in relation to the same product by another trader. In considering whether or not the ROMANTIC DREAMS mark was likely to deceive or cause confusion *vis-à-vis* National Brands' prior trade mark ROMANY CREAMS in terms of section 34(1)(a) of the *TM Act*, the court noted that, in pronunciation, the emphasis is on different syllables in the respective marks and that they "sound quite different".²²³⁰ Turning to the visual similarities between the trade marks which shared a notable overlap in letters, i.e., ROMANTIC DREAMS and ROMANY CREAMS, the SCA was nevertheless of the view that the conceptual differences in the respective marks were sufficient to distinguish them despite the visual overlap. In this regard, the court held:

Where the sense of one word mark differs markedly from that of another (as in this case), and in particular where the registered trade mark is well known, it seems to me that the scope for deception or confusion is reduced, though these are always matters of degree. In my view, the visual distinctions in the words that are in issue in this case, bearing in mind too that each immediately conjures up a different picture, are such that there is not likely to be deception or confusion as contemplated by s 34(1)(a).²²³¹

In *RCL Group Services v Maspark Sales and Marketing (Pty) Ltd*,²²³² the proprietor of the registered trade mark SUNBAKE SPONGIES which extended amongst other things to "cake and cake products, baked goods" was successful in stopping the use of the mark CRAVINGS SPONGIEZ in relation to sponge cake.²²³³ Some comments on this decision are warranted as the court's conclusion seems questionable. As a first remark, it is an established trade mark law principle that marks should be compared holistically²²³⁴ and that consumers generally tend to place emphasis on the first part of a mark.²²³⁵ As such,

²²²⁸ 2001 3 SA 563 (SCA).

²²²⁹ *ROMANY CREAMS* case paras 1, 10.

²²³⁰ *ROMANY CREAMS* case para 9.

²²³¹ *ROMANY CREAMS* case para 9.

²²³² 2022 JDR 2381 (GJ).

²²³³ The infringement proceedings were based on s 34(1)(a) of the *TM Act*. See *RCL v Maspark* case para 6, 7, 54.

²²³⁴ Webster, Morley and Joubert *SA Law of Trade Marks* paras 7.3, 7.13.

²²³⁵ Webster, Morley and Joubert *SA Law of Trade Marks* para 7.14. Also see *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 3 SA 623 (A) 640I-641D.

one wonders why the court did not, in its comparison of the parties' marks CRAVINGS SPONGIEZ and SUNBAKE SPONGIES, highlight the fact that the first word in each mark, namely CRAVINGS versus SUNBAKE, are completely different in sense, sound and appearance. Turning to the second word in the respective marks, i.e., SPONGIES and SPONGIEZ, these words are undoubtedly very similar in pronunciation and visual appearance. In addition, they are arguably identical conceptually as referring at least to a small sponge, i.e., a "spongie". If sufficient evidence regarding the descriptive nature of the word "spongy" (used in the adapted plural form "spongies" and "spongies" in the respective marks) had been placed before the court, it is possible that the court would have dismissed the infringement proceedings based on section 34(1)(a) of the *TM Act*, on the basis that the trade mark CRAVINGS SPONGIEZ is neither identical to nor so nearly resembles the trade mark SUNBAKE SPONGIES as to be likely to deceive or cause confusion in the trade as required to succeeding in terms of section 34(1)(a) of the *TM Act*. The SCA's *dictum* in the *PEPPAMATES* case could have served as a good justification.

Turning to infringement cases where the parties do not trade in relation to the same goods or services class, in *Lucky Star Ltd v Lucky Brands (Pty) Ltd*²²³⁶ (hereafter *LUCKY FISH* case) the proprietor of the trade mark LUCKY STAR, which was used and registered in relation to canned fish, objected to the respondent's use of the trade mark LUCKY FISH in relation to restaurant services selling cooked fish and chips.²²³⁷ In comparing the marks LUCKY FISH and LUCKY STAR the court noted that the first word "LUKCY" is the common element in both marks. In relying on a previous *dictum*,²²³⁸ the SCA noted that this common element as an ordinary word in everyday use "is of minor significance" when comparing the marks as a whole. The court noted further:

[t]he word 'Fish' as opposed to the word 'Star' is distinctive and cannot be ignored. When the marks are compared side by side, and the main or dominant features of the marks are considered, namely the words 'Star' and 'Fish', there is no likelihood of deception or confusion. In this regard the appellant submits that the distinctiveness of the word 'Fish' is diminished because it is used in the context of the sale of fish. As I understood the argument, the word 'Fish' was descriptive of the product sold and not distinctive, because the product sold by both parties was fish, in whatever form. I disagree, the

²²³⁶ 2017 2 SA 588 (SCA).

²²³⁷ *LUCKY FISH* case paras 1, 4.

²²³⁸ See *Bata Ltd v Face Fashions CC2001 1 SA 844* (SCA) paras 10, 11 (hereafter "the *Bata* case").

distinctiveness of this word is not diminished simply because it also serves to describe the product sold. As in *Bata*, I have considerable difficulty in imagining that the notional purchaser of the respondents' fish and chips would focus attention only on the word 'Lucky' as the words 'Star' and 'Fish' are at least equally significant, as the word 'Lucky'.²²³⁹

In concluding that it had not been established that the parties' marks were confusingly similar,²²⁴⁰ the SCA noted:

[t]he overall impression which is created is that the marks do not resemble each other closely and the average customer would not be confused or deceived into believing that respondents' restaurants bearing the Lucky Fish mark are in any way associated with the appellant.²²⁴¹

The above ruling illustrates that trade mark proprietors should, where possible, guard against the adoption of ordinary English words as main features of their trade marks, given that a narrow scope of protection is afforded to such words.²²⁴² It is easier to enforce rights and maintain exclusivity in trade marks that consist of invented or made-up words which are distinctive.²²⁴³ As demonstrated in the *Pioneer Foods* case discussed below, this argument applies equally to the use of a colour or colour combination in relation to a specific product or product variant that may become commonplace in the course of trade.

5.3.4.3 Passing-off proceedings

As with trade mark infringement proceedings, passing-off proceedings are also instituted before the relevant seat of the High Court possessing jurisdiction.²²⁴⁴

In 2011 passing-off proceedings ensued between two market leaders in the frozen and processed fish sector before the Western Cape High Court in *Sea Harvest Corporation*

²²³⁹ *LUCKY FISH* case para 10.

²²⁴⁰ The infringement proceedings were instituted in terms of s 34(1)(a), (b) and (c) of the *TM Act*. All three grounds were dismissed on appeal.

²²⁴¹ *LUCKY FISH* case para 10.

²²⁴² In the *Bata* case, for example, the SCA noted that the word "power" is an ordinary English word that is in everyday use, including in relation to clothing. As such, it was noted that it cannot follow that confusion would probably (or likely) arise if the word "power" was used in combination with another word in the clothing industry. See *Bata* case para 10.

²²⁴³ *Bata* case para 10.

²²⁴⁴ Webster, Morley and Joubert *SA Law of Trade Marks* para 14.2.3. See parts 2.5.2.1 and 2.5.2.2 above for a discussion of registered trade mark rights (including trade mark infringement proceedings) and unregistered trade mark rights (including passing-off), respectively. Also see part 5.3.4 above.

(Pty) Limited v Irvin & Johnson Limited²²⁴⁵ (hereafter *Sea Harvest v I&J*).²²⁴⁶ The applicant, Sea Harvest, claimed that the respondent, I&J, was competing unlawfully with it by passing-off its OVEN CRUNCH product as being that of, or as being associated with, Sea Harvest’s OVEN CRISP product.²²⁴⁷ Images of the parties’ respective product packaging appear below:

 2248	 2249
<i>Figure 5-5: I&J's OVEN CRUNCH packaging</i>	<i>Figure 5-6: Sea Harvest's OVEN CRISP packaging</i>

In considering the likelihood of confusion between the respective get-ups, the court noted the similarities in packaging shape and colour, font, placement of elements on the packaging and the brand names between the parties’ products. It was observed that:

Both have dark blue boxes of similar size. Both have yellowish writing with a similar font at the top of each box. Both are called *Oven* "something" and whether the three pieces of similarly shaped fish appear on the left or right hand side of the box, and one has a piece of parsley displayed whilst the other has two lemon wedges displayed, to my mind really does not matter.²²⁵⁰

On this basis, the court held that there was “an immediate striking similarity” between the parties’ respective products, especially as these are grab-and-go products where

²²⁴⁵ [2019] HIPR 93 (WCC).
²²⁴⁶ *Sea Harvest v I&J* paras 1, 5, 8.
²²⁴⁷ *Sea Harvest v I&J* para 3.
²²⁴⁸ Colour images sourced from Hollesen *Without Prejudice* 28. Also see *Sea Harvest v I&J* para 43, which contains a black and white representation.
²²⁴⁹ Colour images sourced from Hollesen *Without Prejudice* 28. Also see *Sea Harvest v I&J* para 43, which contains a black and white representation.
²²⁵⁰ *Sea Harvest v I&J* para 45.

consumers will usually spend “a matter of seconds” in looking at packaging during selection.²²⁵¹ The differences between the brand logos in the top left corners were not sufficient to distinguish the parties’ products.²²⁵²

In defending the claim, I&J argued that Sea Harvest had failed to produce direct evidence of actual consumer confusion between the parties’ respective products in the trade. In considering this argument, the court observed that the passing-off proceedings were instituted and heard on an urgent basis shortly after the launch of I&J’s OVEN CRUNCH product specifically to avoid harm to Sea Harvest in the event of actual consumer confusion occurring. As such, the court observed that the absence of such direct evidence of confusion “should not count against” Sea Harvest.²²⁵³ In concluding that the passing-off claim should succeed and granting interdictory relief to Sea Harvest,²²⁵⁴ Cloete JA noted:

In my view there is no doubt that the first respondent's get-up and mark of its *Oven Crunch* product is deceptively similar to that of the applicant's *Oven Crisp* product, and there is thus a reasonable likelihood that members of the public may be confused into thinking that the *Oven Crunch* product of the first respondent is that of the applicant's. This will clearly impact negatively on the applicant's goodwill, if not its reputation.²²⁵⁵

In contrast to *Sea Harvest v I&J*, passing-off proceedings were instituted nearly a decade after the product in question entered the trade in the *Pioneer Foods* case. A market leader in the maize meal industry, Pioneer Foods, instituted passing-off proceedings against a competitor, Bothaville Milling. Pioneer Foods essentially claimed that Bothaville Milling was passing-off its STAR super maize meal as that of its WHITE STAR maize meal by selling the STAR product in a get-up which was deceptively or confusingly similar to the WHITE STAR product.²²⁵⁶ The image in Figure 5-7 below depicts the parties’ respective product get-ups when viewed side-by-side:

²²⁵¹ *Sea Harvest v I&J* paras 41, 44.

²²⁵² *Sea Harvest v I&J* para 45.

²²⁵³ *Sea Harvest v I&J* para 35.

²²⁵⁴ *Sea Harvest v I&J* paras 48, 54.

²²⁵⁵ *Sea Harvest v I&J* para 47.

²²⁵⁶ *Pioneer Foods* paras 1, 5.



Figure 5-7: Bothaville Millings' STAR super maize meal (left) and Pioneer Foods' WHITE STAR super maize meal (right)

Pioneer Foods was able to demonstrate that it possessed a reputation in the get-up of its WHITE STAR maize meal brand at all relevant times.²²⁵⁸ Turning to misrepresentation and the likelihood of damage,²²⁵⁹ in defending the proceedings Bothaville Milling argued that the main similarities between the parties' respective product get-ups, namely (i) the word STAR, (ii) a STAR device and (iii) the use of the colour combination green and red against a white background, was commonplace in the course of trade in relation to maize meal.²²⁶⁰ On this basis it argued that those elements were not distinctive of any particular maize meal brand.²²⁶¹ The SCA agreed with those arguments based on the evidence submitted.²²⁶²

Following the above, in considering possible misrepresentation, the court pointed out that the product label and advertising material for Pioneer Foods' product demonstrated that

²²⁵⁷ *Pioneer Foods* para 2. It should be noted that this image sourced from the judgment reflects the green elements on the pack in a very dark colour. They are actually a lighter shade of green in the trade. See, for example, BizCommunity 2014 <https://www.bizcommunity.com/Article/196/178/110906.html>.

²²⁵⁸ The evidence submitted was sufficient to demonstrate the existence of a reputation both at the time that Bothaville Milling launched its STAR maize meal product and at the time of instituting the passing-off claim. See *Pioneer Foods* paras 8, 9, 13.

²²⁵⁹ See the discussion in part 3.5.2.2 of the requirements to prove a passing-off claim.

²²⁶⁰ *Pioneer Foods* para 6.

²²⁶¹ *Pioneer Foods* para 6.

²²⁶² *Pioneer Foods* para 21;

the word “WHITE” was an integral and material part of the WHITE STAR product name and get-up which served to distinguish Pioneer Foods’ product from Bothaville Milling’s STAR product.²²⁶³ Another factor taken into consideration was the notable price difference between the respective products as a means to assist consumers in distinguishing between the parties’ maize meal brands.²²⁶⁴ The court noted:

The evidence from Bothaville Milling is that, even in rural areas, which is the principal target area at which its product is aimed, the average purchaser is brand conscious and knows their preferred brand and its qualities and is familiar with both its packaging and its price.

This is important, as the evidence is that STAR generally retails at a discount of about 15 per cent to the price of WHITE STAR. The evidence of brand surveys put up by Pioneer in support of its claim to a reputation shows that maize meal is one of the most brand loyal products on the South African market. If that is correct it militates against there being confusion in the market place even among relatively unsophisticated consumers, and consumers of super maize meal are by no means all unsophisticated. However, many of them are of limited means and are accordingly careful about how they spend their money, especially on a staple element of their diet. They are more likely to take added care to ensure that they purchase the product they know and like.²²⁶⁵

In addition, the SCA pointed out that, despite the parties’ products having competed directly in the course of trade for a considerable time before the launch of the passing-off proceedings, Pioneer Foods was unable to prove a likelihood of confusion²²⁶⁶ or provide any evidence of actual confusion by consumers or suppliers between the respective products.²²⁶⁷ Wallis JA observed that:

There is undoubtedly some visual similarity between the two get-ups, principally caused by the combination of a broadly white background with the symbols and lettering in red and green. However, the moment a customer saw a package the dissimilarities would become obvious. In my view they are sufficiently apparent and obvious to hold that there is no reasonable likelihood of confusion between the two.

However, if I had some residual doubt about the position, it would be dispelled by the fact that there is simply no evidence of any confusion in the market place between the two products, in the period between 2001 and the commencement of proceedings in August 2011. Although such evidence is not essential to prove a likelihood of confusion in the market place, it can, if it is present, tip the balance in one direction and, if absent, tip it in the other. It is most surprising that after nearly 10 years of competitive trading,

²²⁶³ *Pioneer Foods* para 20.

²²⁶⁴ *Pioneer Foods* para 24.

²²⁶⁵ *Pioneer Foods* para 24.

²²⁶⁶ *Pioneer Foods* paras 16, 17.

²²⁶⁷ *Pioneer Foods* paras 23, 26.

with what are said by Pioneer to be confusingly similar get-ups, not a single customer or store has reported any confusion.²²⁶⁸

As such, the SCA confirmed the court *a quo*'s finding that Pioneer Foods had failed to make out a case of passing-off in this matter and subsequently dismissed the appeal.²²⁶⁹

The Pioneer Foods case is distinguishable from *Sea Harvest v I&J* in two important ways. Firstly, in *Sea Harvest v I&J* passing-off proceedings were instituted almost immediately after I&J launched the OVEN CRUNCH fish product in the offending get-up. Due to the diligent trade mark policing by Sea Harvest, the fact that it was unable to produce actual evidence of consumer confusion in the few months following the launch of the OVEN CRUNCH product did not count against it when the court considered the likelihood of confusion amongst consumers.²²⁷⁰ In the *Pioneer Foods* case, however, the parties' products had been competing in the trade for a decade and, despite that lapse in time, Pioneer Foods was unable to provide direct evidence of consumer confusion between its product and that of Bothaville Milling. This tipped the scales in Bothaville Milling's favour when the court considered the likelihood of confusion.²²⁷¹ This links with the second key difference between the cases. Whilst evidence tendered demonstrated that the main overlapping elements in the *Pioneer Foods* case, which included the use of the colour combination white, red and green and a star device or word mark, were commonplace in the trade in relation to maize meal, no such arguments were raised in relation to the packaging of frozen packaged fish in *Sea Harvest v I&J*. In fact, in that case it was noted that the parties had historically ensured that the get-ups of their respective competing products had "always been clearly distinguishable from each other, specifically through differences in font and colour".²²⁷² On a practical level, therefore, it would be sensible for foodstuffs manufacturers to steer away from the colours or colour combinations which are commonly used by competitors in the trade in relation to identified foodstuffs or foodstuffs categories.

²²⁶⁸ *Pioneer Foods* paras 22, 23.

²²⁶⁹ *Pioneer Foods* para 26.

²²⁷⁰ *Sea Harvest v I&J* para 35.

²²⁷¹ *Pioneer Foods* paras 22, 23.

²²⁷² *Pioneer Foods* para 38, 40.

The above is demonstrated by the recent judgment of the Western Cape High Court between two of the largest grocery shopping retail chain stores in South Africa in *Shoprite Checkers (Pty) Ltd v Pick 'n Pay Retailers (Pty) Ltd*²²⁷³ (hereafter *Checkers v P'nP*). In 2020 Checkers launched a foodstuffs product range called FORAGE AND FEAST in a get-up depicted in Figure 5-8 below.²²⁷⁴ The FORAGE AND FEAST product range was endorsed by a prestigious Michelin star South African chef and extensively marketed and sold nationwide from the date of launch.²²⁷⁵ One of the key features of the product get-up was the prominent use of the colour combination navy blue and gold.²²⁷⁶



Figure 5-8: Checker's FORAGE AND FEAST product range²²⁷⁷

After Checker's had acquired a substantial reputation in the get-up of the FORAGE AND FEAST product range,²²⁷⁸ Pick 'n Pay launched a range of identical or comparable foods under the brand name CRAFTED COLLECTION as shown in Figure 5-9 below.²²⁷⁹

²²⁷³ *Shoprite Checkers (Pty) Ltd v Pick 'n Pay Retailers (Pty) Ltd* 2023 JOL 62027 (WCC).

²²⁷⁴ *Checkers v P'nP* para 3.

²²⁷⁵ *Checkers v P'nP* paras 3, 4.

²²⁷⁶ *Checkers v P'nP* para 6.

²²⁷⁷ Image sourced from *Checkers v P'nP* para 2.

²²⁷⁸ *Checkers v P'nP* paras 31, 39.

²²⁷⁹ *Checkers v P'nP* paras 6, 9.



*Figure 5-9: Pick 'n Pay's CRAFTED COLLECTION product range*²²⁸⁰

Checkers subsequently instituted passing-off proceedings against Pick 'n Pay, arguing that the get-up of the CRAFTED COLLECTION product range infringed upon its common law rights in the get-up of the FORAGE AND FEAST product range.²²⁸¹ In considering the likelihood of deception or confusion between the parties' respective product ranges, the court observed:

Both product lines are competing ranges in the same premium and luxury consumable market. It is evident that the get-ups are visually, and conceptually similar. A cursory look at the respective products reveals that the visual similarities between the get-ups are remarkable. The colour combination of navy blue and gold is being used in similar proportions. The packaging and bottling of the products are identical. The artistic layout of the products is also remarkably similar. Both products labels display the dominant use of the navy background, the use of white and gold fonts in the descriptors, and the suspiciously similar placement of the images of the ingredients. The similarities in the get-up incorporate the same basic identical, fundamental elements.²²⁸²

In highlighting the impact on the purchasing public, the court noted further:

Considering the notable similarities in terms of colour, typefaces and packaging, I am satisfied that the Crafted Collection range, viewed holistically, is almost certain to confuse and deceive the public, and potentially result in damages for the applicant... In my view the notional consumer of average intelligence, viewing the products as a whole or looking at the dominant features of each get-up in general, is likely to be confused, or deceived into buying the product of respondent believing that there is a connection or association, in the course of trade, between Checkers and the goods offered by Pick n Pay.²²⁸³

²²⁸⁰ Image sourced from *Checkers v P'nP* para 2.

²²⁸¹ *Checkers v P'nP* para 1.

²²⁸² *Checkers v P'nP* para 33.

²²⁸³ *Checkers v P'nP* para 38.

The High Court subsequently granted the relief sought by Checkers, including an interdict ordering the destruction of all product packaging and printed materials bearing the infringing CRAFTED COLLECTION get-up.²²⁸⁴ In addition, in having found that Pick 'n Pay was causing damage to Checkers by infringing its common law rights “on an ongoing basis with no intention to cease its conduct”, the High Court directed that an enquiry be held for the purposes of determining the amount of damages to be paid to Checkers.²²⁸⁵

5.3.4.4 Concluding remarks on trade mark law disputes

The discussion above demonstrates that many disputes before our courts in relation to foodstuffs centre on trade mark rights. Trade mark disputes are instituted between competitors in the trade. The reason for this is that, in order to institute proceedings in terms of the *TM Act* or in terms of the common law based on passing-off, the applicant must demonstrate that it has a real and direct interest in the mark that forms the subject matter of the proceedings and is entitled to the relief claimed.²²⁸⁶ This would include the interests of a trade rival wishing to enforce its rights by either opposing a trade mark application of concern,²²⁸⁷ or instituting trade mark infringement or passing-off proceedings.²²⁸⁸

Another observation is that it is not uncommon for trade mark cases to be taken on appeal.²²⁸⁹ As trade mark proceedings are generally instituted between competitors, an unsuccessful party to the proceedings may very well have the appetite and financial means to pursue the matter on appeal. The downside of this occurrence is that it may

²²⁸⁴ *Checkers v P'nP* para 40.

²²⁸⁵ *Checkers v P'nP* paras 40, 41.

²²⁸⁶ The relevant interest would usually be financial or proprietary in nature. See Webster, Morley and Joubert *SA Law of Trade Marks* para 2.15.

²²⁸⁷ In terms of s 21 of the *TM Act*, any interested person may, within three months of the date of the advertisement of a trade mark application in the Patent Journal (or such further time as the Registrar of Trade Marks may allow), oppose the trade mark application. For the opposition procedure, see reg 19 of the *TM Regulations*; Webster, Morley and Joubert *SA Law of Trade Marks* para 8.16.

²²⁸⁸ In trade mark infringement matters, the relief in terms of s 34(3) of the *TM Act* may be granted only to the person or entity who is the proprietor of the relevant trade mark that has been infringed. In certain circumstances a person or entity who is a registered user of the relevant mark may in South Africa also have sufficient standing to institute infringement proceedings. See s 38(4) of the *TM Act*; Webster, Morley and Joubert *SA Law of Trade Marks* para 12.4.

²²⁸⁹ See s 53 of the *TM Act*. Examples of cases taken on appeal and decided by the SCA include *Pepsico Inc v Atlantic Industries*; the *PEPPAMATES* case; the *SNACKCRAX* case; the *MAGIC WHIP* case; the *ROMANY CREAMS* case; the *LUCKY FISH* case; and the *Pioneer Foods* case.

take years for a trade mark dispute to be finalised. Moreover, the ruling of the court *a quo* will remain suspended pending the outcome of an appeal. The trade mark opposition proceedings in *Pepsico v Atlantic Industries*, for example, took more than three years to finalise when calculated from the date of hearing before the court *a quo* until the eventual SCA ruling.²²⁹⁰ In the context of trade mark disputes relating to foodstuffs labelling and advertising, a party ultimately held to offend relevant trade mark law provisions would potentially have the advantage of its product packaging and/or advertising remaining in the trade and being available to consumers until the matter is finally put to rest. This may be another factor adding to the common occurrence of appeals in trade mark law matters.

The next part of this chapter focuses on the monitoring and enforcement of food laws by consumers. The *CPA* plays an important role in this regard.

5.4 Monitoring and enforcement of food laws by consumers

5.4.1 The challenges faced by consumers in approaching the civil courts

In the context of consumer redress and access to justice, traditional legal avenues via litigation in civil courts are often not a viable option. Litigation is time-consuming, unpredictable²²⁹¹ and costly.²²⁹² The ordinary man on the street may not be able to afford legal representation let alone institute and pursue litigation.²²⁹³ Depending on the facts and circumstances, consumers may also not have sufficient legal standing to institute legal proceedings in a particular dispute where there is concern with foodstuffs labelling or advertising material.²²⁹⁴

²²⁹⁰ In terms of s 18(1) of the *Superior Courts Act* 10 of 2013, and subject to certain exceptions, the operation and execution of a decision which is the subject of an application for leave to appeal or of an appeal is suspended pending the decision of the application or appeal.

²²⁹¹ Ordinary courts may lack such specialist knowledge, which leads to the criticism of judgments or conflicting rulings. The frequency of appeals in trade mark disputes seems to confirm this view. See Naudé and Barnard "Enforcement and Effectiveness of Consumer Law in South Africa" 7.

²²⁹² Barnard and Mišćenić 2019 *Journal for Juridical Science* 112; Van Heerden "Protection of Consumer Rights and Consumers' Voice" para 8.

²²⁹³ Even in matters before the NCT, it has been pointed out that it is common for consumers to be unrepresented, contrary to respondent suppliers. See Barnard and Mišćenić 2019 *Journal for Juridical Science* 127. Also see Woker 2019 *Stell LR* 104, 112; Woker 2016 *SA Merc LJ* 24.

²²⁹⁴ See the discussion in part 5.3.4.4 above in the context of trade mark law disputes. However, it may be possible to institute a class action in terms of s 4(1)(c) of the *CPA*, such as the class action instituted

Even in matters where consumers have approached the civil courts, establishing under which circumstances it would be appropriate to approach the civil courts in terms of the *CPA* has caused considerable difficulty over the years.²²⁹⁵ In this regard, section 69(d) provides:

[a] person contemplated in section 4(1) may seek to enforce any right in terms of this Act or in terms of a transaction or agreement, or otherwise resolve any dispute with a supplier, by-

...

(d) approaching a court with jurisdiction over the matter, if all other remedies available to that person in terms of national legislation have been exhausted.

On a plain reading of section 69(d), it would seem that a person may, as a general rule,²²⁹⁶ approach the ordinary civil courts²²⁹⁷ in terms of the *CPA* only if all internal remedies available under the *CPA* (including the ADR mechanisms under this Act), and other national legislation have been exhausted.²²⁹⁸ Over the years, conflicting judgments on this aspect have been issued by the courts.²²⁹⁹ For example, in *Joroy 4440 CC v Potgieter*,²³⁰⁰ the Free State High Court dismissed the matter for the reason that the ARD mechanisms provided for under *CPA* had not been followed before the court was approached.²³⁰¹ In highlighting the word “if” in section 69(d), the court noted that:

in terms of s 61 of the *CPA* following the listeriosis outbreak in South Africa in 2017 and 2018. See *Deltamune (Pty) Ltd v Tiger Brands Ltd* 2022 3 SA 339 (SCA) paras 2-5.

²²⁹⁵ *Motus Corporation (Pty) Ltd t/a Zambezi Multi Franchise v Wentzel* 2021 3 All SA 98 (SCA) (hereafter “*Motus v Wentzel*”) para 25.

²²⁹⁶ There are limited instances where the civil courts have been granted exclusive jurisdiction under the *CPA*. For example, the High Court has confirmed that only an ordinary civil court can deal with the issues raised regarding unfair, unreasonable or unjust contract terms in terms of s 48 of the *CPA*. See *Takealot Online (RF) (Pty) Ltd and Drive Consortium Hatfield (Pty) Ltd* (WC) (unreported) case no 7348/2021 of 11 October 2021 para [15].

²²⁹⁷ This would include small claims courts which, on a practical level, may be more accessible to low-income consumers in rural areas. Naudé and Barnard argue that denying consumers the right to approach the small claims court under the *CPA* without first exhausting all other remedies as set out in s 69(d) may be unconstitutional. See Naudé and Barnard “Enforcement and Effectiveness of Consumer Law in South Africa” 13.

²²⁹⁸ Woker 2019 *Stell LR* 105; *Joroy 4440 v Potgieter* 2016 3 SA 465 (FB) at 467 C-D; Du Plessis 2016 *SA Merc LJ* 148.

²²⁹⁹ *Motus v Wentzel* para 25.

²³⁰⁰ *Joroy 4440 v Potgieter* para 8.

²³⁰¹ *Joroy 4440 v Potgieter* para 5. Also see *Ngoza v Roque Quality Cars CC* (NCT/79905/2017/73(3)&75(1)(b))[2018] ZANCT (28 June 2018); *Sekgala v Steve’s Auto Clinic (Pty) Ltd* 2017 JDR 0180 (GP); *Imperial Group (Pty) Ltd t/a Auto Niche Bloemfontein v MEC: Economic Development, Environmental Affairs and Tourism Free State Government* (FB) (unreported) case

the wording of the said section is clear and unambiguous. It is specifically stated that the consumer may approach the court if all the aforementioned avenues of redress have been exhausted. The legislature was very specific in prescribing the redress that a customer has in terms of this section.²³⁰²

As such, the court dismissed the application without considering the merits, indicating that the applicant “would be free to utilise any of the dispute resolution mechanisms available in terms of the CPA”.²³⁰³

In *Motus v Wentzel* the respondent raised a special plea relating to the jurisdiction of the High Court to hear the matter, arguing that the applicant approached the civil court prematurely as she had failed to exhaust the internal remedies set out in section 69 of the CPA.²³⁰⁴ Ultimately, however, this jurisdictional challenge was abandoned by the respondent as it did not pursue this point during the hearing of the matter on appeal before the SCA. That being said the SCA noted *obiter* in its judgement that section 34 of the *Constitution* would be the “primary guide” in the interpretation of section 69, which “should not lightly be read as excluding the right of consumers to approach the court in order to obtain redress”.²³⁰⁵ The SCA noted further:

[g]iven the purpose of the [CPA] to protect the interests of the consumer, who will always be the person seeking redress under it, there is no apparent reason why they should be precluded from pursuing immediately what may be their most effective remedy. Nor is there any apparent reason why the dissatisfied consumer who turns to a court having jurisdiction should find themselves enmeshed in procedural niceties having no bearing on the problems that caused them to approach the court.²³⁰⁶

The jurisdiction of civil courts was also recently considered in *Christina Johanna Steynberg v Tammy Taylor Nails Franchising No 45 (Pty) Ltd*²³⁰⁷ (hereafter *Steynberg v Tammy Taylor Nails*) in which the Pretoria High Court relied heavily on the SCA’s comments in

number A169/2014 of 9 June 2016; *Oos Vrystaat Kaap Bedryf Bpk v Cilliers* 2019 JDR 0049 (FB); and *Afca Trading & Supply (Pty) Ltd v City Square Trading* 604 (Pty) Ltd 2021 JDR 0344 (FB).

²³⁰² *Joroy 4440 v Potgieter* para 8.

²³⁰³ *Joroy 4440 v Potgieter* para 11.

²³⁰⁴ It was argued that, before a civil court could consider the matter, the applicant was required to refer the matter directly to the NCT, or the applicable industry ombud with jurisdiction accredited in terms of s 82(b) to the consumer court; ADR and filing a complaint with the NCC. See *Motus v Wentzel* para 19, 24.

²³⁰⁵ *Motus v Wentzel* para 26.

²³⁰⁶ *Motus v Wentzel* para 26-27.

²³⁰⁷ *Christina Johanna Steynberg v Tammy Taylor Nails Franchising No 45 (Pty) Ltd* (ZAGPPHC) (unreported) case no 23655/2021 of 21 June 2021.

Motus v Wentzel regarding the interpretation of section 69 of the CPA.²³⁰⁸ In this case, the applicant, Mrs Steynberg, instituted motion proceedings before the High Court without first pursuing any of the ARD mechanisms under the CPA.²³⁰⁹ The respondent, Tammy Taylor Nails, raised a point *in limine*, arguing that the High Court did not possess the jurisdiction to consider the matter in such circumstances. In relying on the wording of section 69(d), the respondent claimed that the applicant had not exhausted all other remedies available to her under the CPA and national legislation prior to approaching the court, which ousted the court's jurisdiction to consider the matter.²³¹⁰ In considering the jurisdictional challenges, the court considered the nature of the relief that was claimed by the applicant, and whether or not any of the other tribunals listed in section 69 would be in a position to provide a remedy that was sufficient to correct the alleged breaches of the respondent.²³¹¹ The relief claimed included a declaratory order that the franchise agreement concluded between the parties be declared void, and repayment of the franchise fee to the applicant.²³¹²

In considering if there might be an appropriate provincial consumer court, Kuny J noted that this avenue did not seem to be available to the applicant.²³¹³ The court was further of the view that an approach to the CGSO would neither be appropriate nor sufficient to deal with the matter as it was doubtful that this ombud had the necessary power to grant the relief sought by the applicant.²³¹⁴ Turning to the suitability of the NCT, the court noted that the NCT "does not appear to have the power to grant declaratory relief or deal with claims for the payment of money". On this basis the court found that the NCT was not in

²³⁰⁸ The High Court noted that the judgement in the *Motus v Wentzel* case was authoritative and carried considerable weight. The High Court also indicated that it did not deem itself bound by *Joroy 4440 v Potgieter*. See *Steynberg v Tammy Taylor Nails* para 22.

²³⁰⁹ The dispute related to the cancellation of a franchise agreement concluded between the parties. See *Steynberg v Tammy Taylor Nails* para 1.

²³¹⁰ *Steynberg v Tammy Taylor Nails* para 4; 6.

²³¹¹ *Steynberg v Tammy Taylor Nails* para 11.

²³¹² *Steynberg v Tammy Taylor Nails* para 2.

²³¹³ The reasons provided were that the respondent had not made any reference to the existence of a consumer court, and the judge could not find any reference to a consumer court having been in terms of provincial legislation in the relevant province. See *Steynberg v Tammy Taylor Nails* para 12. Also see the discussion in part 5.4.2.1 below on consumer courts established in terms of the CPA.

²³¹⁴ *Steynberg v Tammy Taylor Nails* para 13.

a position to provide a sufficient remedy to the applicant in this matter.²³¹⁵ In ultimately ruling that the high court did possess the jurisdiction to consider the matter, the court noted:

I have considered the principles, purposes and provisions of the CPA and the matters set out in subsection 52(2). It is by no means certain that the adjudicative and dispute resolution mechanisms referred to above provide remedies that are sufficient or adequate to deal with the infringements alleged by the applicant. In my view, the relief sought by the applicant in these proceedings could not have been effectively pursued in the manner envisaged in sections 69(b) and 69(c).

Accordingly, I find that this court does have jurisdiction to deal with the matter. No purpose would be served by requiring the applicant to approach the relevant ombud or National Consumer Tribunal or, by requiring her to file a complaint with the National Consumer Commission. This would merely serve to delay the adjudication of the applicant's claims.

From the discussion above, it seems that the powers and functions of the ordinary civil courts in enforcing the CPA where the complainant is an individual consumer is, generally speaking, limited to an instance of final resort.²³¹⁶ The High Court ruling in *Steynberg v Tammy Taylor Nails*, based on the SCA's comments in *Motus v Wentzel* do, however, demonstrate that the relief claimed by a consumer has an impact on whether or not it may be possible for the claimant to approach the civil courts directly. Where the relief claimed does not fall within the mandate of the NCC, NCT or a relevant ADR agent, it may be possible to approach the civil court directly. If the relief claimed can be granted only by the courts, expecting the consumer to pursue the ARD mechanisms and other possible avenues under the CPA before approaching the courts would undoubtedly result in undue delays and frustrations for the consumer.²³¹⁷ This seems to be a potential unintended consequence of section 69(d).

The cases discussed above demonstrate that, in matters where the complainant approached the courts directly, the jurisdiction of the court was raised as part of the respondent's defence. On this basis it is submitted that a deviation from section 69(d)

²³¹⁵ *Steynberg v Tammy Taylor Nails* para 16. Also see *Takealot Online (RF) (Pty) Ltd and Drive Consortium Hatfield (Pty) Ltd* (WC) (unreported) case no 7348/2021 of 11 October 2021 para 15, in which the Western Cape High Court held, in terms of s 52, that only an ordinary civil court can deal with the issues raised regarding unfair, unreasonable or unjust contract terms in terms of s 48 of the CPA.

²³¹⁶ Woker 2019 *Stell LR* 105; Du Plessis 2016 *SA Merc LJ* 148.

²³¹⁷ Barnard and Mišćenić 2019 *Journal for Juridical Science* 126.

would have to be sufficiently motivated in the applicant's founding papers before the court.

5.4.2 ADR mechanisms under the CPA

The CPA promotes consensual consumer dispute resolution through ADR mechanisms, including through accredited ombuds, provincial consumer protection authorities and provincial consumer courts, where available.²³¹⁸ In the event of a legal dispute, all interested parties would prefer that the matter be resolved in a manner that is the most expedient, cost-effective and efficient.²³¹⁹ The ADR mechanism in the CPA aim, at least on paper, to bridge the gap between approaching the ordinary civil courts and failing to take any action at all when there is a grievance or suspected violation of the CPA.²³²⁰ On this basis Barnard and Mišćenić²³²¹ point out:

[t]here is a growing attitude that the enforcement of consumer protection law can be guaranteed more effectively by ADR bodies that are faster, cheaper and, therefore, more convenient for consumers.

Following the above, in terms of section 70(1) a consumer may attempt to resolve a dispute under the CPA by referring the matter to an ADR agent, which includes, amongst other persons, an industry ombud accredited in terms of section 82(6) such as the CGSO, or a consumer court of the province with jurisdiction over the matter. Section 70(1) should be read with section 69(a)-(d), which sets out the options available to the consumer when pursuing rights in terms of the CPA.²³²² In limited cases a consumer may refer a matter under the CPA directly to the NCT, but only after having approached the NCC.²³²³ In all

²³¹⁸ Barnard and Mišćenić 2019 *Journal for Juridical Science* 112, 117.

²³¹⁹ Woker 2016 *SA Merc LJ* 27.

²³²⁰ Woker 2016 *SA Merc LJ* 26. Should the ADR agent be able to assist the parties in resolving the dispute, such an agent may record this in the form of an order. In addition, if the parties consent to that order the agent may submit it to the NCT or the High Court to be made a consent order. If there is no reasonable probability that the matter will be resolved during the process before the relevant ADR agent, such an agent may terminate the dispute resolution process by notice to the parties, whereafter the complainant may file a complaint with the NCC. See ss 70(2), 70(3)(a) and 71 of the CPA.

²³²¹ Barnard and Mišćenić 2019 *Journal for Juridical Science* 114.

²³²² If the consumer decides to pursue remedies under the common law, for example in terms of the law of delict, s 69 of the CPA will not apply, and the civil courts may be approached directly. See s 2(10) of the CPA; Van Heerden "Section 69" para 2.

²³²³ See s 69(a) of the CPA.

other instances, if informal attempts to resolve the dispute among the parties have not been fruitful²³²⁴ the consumer has four options, namely:

- (i) approach an applicable industry ombud that has been accredited under the *CPA*;²³²⁵
- (ii) approach a provincial consumer court;
- (iii) refer the matter to another ARD agent;²³²⁶ or
- (iv) lodge a complaint with the NCC.

Section 69 does not set out a specific hierarchy in which these forums should be approached by consumers. Van Heerden²³²⁷ notes, however, that there is an “implied hierarchy” and that an ADR body listed in (i), (ii) and (iii) above should first be approached in an attempt to resolve a dispute before approaching the NCC. If the matter is then subsequently referred to the NCC, the NCC can either deal with the complaint, refer it to another body in accordance with the provisions of the *CPA*, or issue a notice of non-referral.²³²⁸ Due to the fact that the NCC has discontinued investigating individual consumer complaints,²³²⁹ when a consumer approaches the NCC following failed attempts at ADR, the NCC will then simply refer the consumer to another ADR agent or issue a notice of non-referral.²³³⁰ In this regard the NCC has been criticised for issuing non-referral notices without sufficient justification.²³³¹ This may create an additional obstacle if the matter is heard by the NCT, as matters may be dismissed by the NCT on technical points

²³²⁴ NCC *Annual Report 2020/2021* 19.

²³²⁵ See s 69(c)(i) of the *CPA*. The two ombuds that have been accredited under s 82(6) of the *CPA* are the CGSO and Motor Industry Ombud of South Africa. See the discussion in part 5.4.2.2.

²³²⁶ See s 69(c)(iii) read with s 1 of the *CPA*. Suitable suggestions for ADR agents would include the South African Association of Mediators, the Arbitration Foundation of Southern Africa and university law clinics. Barnard and Mišćenić 2019 *Journal for Juridical Science* 123; Woker 2016 *SA Merc LJ* 29.

²³²⁷ Van Heerden “Section 69” para 3.

²³²⁸ Van Heerden “Section 69” para 3.

²³²⁹ Du Plessis 2022 *Stell LR* 71.

²³³⁰ If the NCC does not believe that there has been a contravention of the *CPA*, it may issue a notice of non-referral of the matter. If the grounds for non-referral relate to reasons other than the prescription of the claim or *res judicata* as set out in s 116 of the *CPA*, the complainant has the option of directly approaching the NCT or a consumer court of the relevant province. See ss 73(1)(a) and 75(1) of the *CPA*; Barnard and Mišćenić 2019 *Journal for Juridical Science* 124.

²³³¹ Du Plessis 2022 *Stell LR* 80; Naudé and Barnard “Enforcement and Effectiveness of Consumer Law in South Africa” 5.

due to procedural irregularities.²³³² This, unfortunately, is a current challenge under the *CPA* redress system.

The discussion that follows sets out the ADR mechanisms under the *CPA*, namely the provincial consumer protection authorities and courts, followed by the CGSO as an accredited ombud under the *CPA*.

5.4.2.1 Provincial consumer protection authorities and provincial consumer courts

The *Constitution* affords concurrent jurisdiction to both national and provincial authorities over consumer protection in South Africa.²³³³ Provincial governments are tasked to ensure that consumer protection authorities within the respective provinces function effectively.²³³⁴ In its *2020/2021 Annual Report* the NCC noted that consumer protection offices have been established in all nine provinces in terms of provincial legislation.²³³⁵

Provincial consumer protection authorities have the power to facilitate the mediation or conciliation of a dispute arising in terms of the *CPA* between or among persons resident within or carrying on business exclusively within that province.²³³⁶ As soon as a complaint is cross-provincial, or where the relevant supplier operates in more than one province in South Africa, provincial protection authorities and provincial courts do not have the jurisdiction to consider the complaint.²³³⁷ In addition, the NCC has no control over the functioning of provincial consumer protection authorities.²³³⁸

Should a provincial consumer protection authority have the jurisdiction over a consumer complaint and that dispute remains unresolved, that authority may refer the dispute to a

²³³² When considering a matter brought to it following a non-referral by the NCC, the NCT must first decide on whether or not such notice of non-referral issued by the NCC was valid and whether or not the NCT will hear the matter. See Barnard and Mišćenić 2019 *Journal for Juridical Science* 126-127; Woker 2019 *Stell LR* 108.

²³³³ See Part A of Sch 4 of the *Constitution*. Also see s 83 and para 7 of schedule 2 of the *CPA*.

²³³⁴ The provincial consumer protection legislation should also be aligned with the *CPA* to ensure that there is consistency as far as the enforcement of consumer protection laws is concerned, especially if a specific supplier conducts business operations in more than one province. See Woker 2019 *Stell LR* 110, 112.

²³³⁵ NCC *Annual Report 2020/2021* 17.

²³³⁶ See s 84(b) of the *CPA*.

²³³⁷ Du Plessis 2022 *Stell LR* 75.

²³³⁸ NCC *Strategic Plan for 2022/2023–2025/2026* 24.

provincial consumer court within that province, if there is one in operation and functional.²³³⁹ A “consumer court” is defined in the *CPA* as:

A body of that name, or a consumer tribunal, that has been established in terms of applicable provincial consumer legislation.²³⁴⁰

In line with this definition, consumer courts can function only in accordance with the relevant provincial consumer legislation in terms of which they were established.²³⁴¹ Consumer courts are vested with the authority only to enforce relevant provincial consumer protection legislation within the respective provinces.²³⁴² It should also be noted that consumer courts are excluded from the definition of a “court”²³⁴³ in the *CPA*, and are not regarded as “courts in the true sense”.²³⁴⁴ Rather, consumer courts function as tribunals in the respective provinces.²³⁴⁵ As such, orders issued by consumer courts cannot be enforced or executed in the same manner as orders of ordinary courts in South Africa.²³⁴⁶ Du Plessis²³⁴⁷ notes that there have been challenges with the enforcement of orders made by consumer courts.

It does not appear that provincial courts in all provinces are currently operational, which has an impact on consumer accessibility.²³⁴⁸ Information on the handling of complaints

²³³⁹ See s 84(c) of the *CPA*. Other powers of a consumer protection authority include (i) issuing a compliance notice on behalf of the NCC to any person carrying on business exclusively in that province, and (ii) requesting the NCC to initiate a complaint in respect of any apparent prohibited conduct or offence in terms of the *CPA* arising within that province. See ss 84(a) and 84(d) of the *CPA*.

²³⁴⁰ See s 1 of the *CPA*.

²³⁴¹ Woker 2016 *SA Merc LJ* 43.

²³⁴² NCC *Annual Report 2020/2021* 18.

²³⁴³ The definition of a “court” in the *CPA* excludes a consumer court, but would include national civil courts. This would include the CC, SCA, high courts, magistrates’ courts, the small claims court and, as a specialised court, the Equality Court. See s 1 of the *CPA*; Barnard and Mišćenić 2019 *Journal for Juridical Science* 121.

²³⁴⁴ Consumer courts may qualify as ARD agents in terms of the *CPA*. In addition to an ombud (discussed below), the definition of an ARD agent includes “a person or entity providing conciliation, mediation or arbitration services to assist in the resolution of consumer disputes”. See s 1 of the *CPA*; Woker 2016 *SA Merc LJ* 29, 43.

²³⁴⁵ Naudé and Barnard “Enforcement and Effectiveness of Consumer Law in South Africa” 8.

²³⁴⁶ This would include, amongst others, the CC, SCA, High Courts and Magistrates Courts. See s 166 of the *Constitution*.

²³⁴⁷ Du Plessis 2022 *Stell LR* 75.

²³⁴⁸ Van Heerden “Section 69” para 18. Woker points out that functioning consumer courts or tribunals in each province would go a long way towards improving enforceability and giving redress to consumers, especially those in rural areas. See Woker 2016 *SA Merc LJ* 45; Woker 2019 *Stell LR* 112.

within provinces is not published,²³⁴⁹ and details on the number of disputes that are or have been heard by the respective provincial courts do not appear to be available publicly. As case law emanating from provincial consumer courts is not readily accessible, it is difficult to ascertain which consumer courts are actually functioning. In this regard, Woker²³⁵⁰ points out:

It is not clear how effective the provincial offices are because very little information is readily available about the work that they are doing. It appears that provincial consumer affairs offices operate largely as advice offices, and that very few suppliers are actually held accountable for their conduct. The few reported cases suggest that when suppliers do not co-operate the complaints are then referred to the Commission. This is problematic because the Commission does not investigate individual cases and so, it seems, consumers hit a roadblock.

Despite this, provincial consumer court rulings have been published on the website of the South African Legal Information Institute (hereafter "SAFLII") during the period 2017-2024 in four provinces, namely Gauteng, Free State, North-West and Kwazulu-Natal.²³⁵¹ As this is the only information available, the discussion below is limited to the provincial consumer court case law available on the SAFLII website which, at this stage, stands at 73 cases.²³⁵²

When considering the functioning of these consumer courts, a number of observations should be made. As a first consideration, it should be noted that not all provincial legislation in terms of which provincial consumer authorities operate is aligned with the CPA. Currently only four provinces have enacted provincial legislation aligned with the CPA.²³⁵³ The remaining provinces are still operating in terms of legislation that pre-dates

²³⁴⁹ Naudé and Barnard "Enforcement and Effectiveness of Consumer Law in South Africa" 10.

²³⁵⁰ Woker 2019 *Stell LR* 110.

²³⁵¹ See SAFLII 2024 <https://www.saflii.org/za/cases/ZACONAF/>.

²³⁵² As at the end of August 2024.

²³⁵³ Namely the *KwaZulu-Natal Consumer Protection Act* 4 of 2013; the *Northern Cape Consumer Protection Act* 1 of 2012; the *Limpopo Consumer Protection Act* 4 of 2015; and the *Eastern Cape Consumer Protection Act* 3 of 2018.

the *CPA*.²³⁵⁴ There have been urgent appeals by scholars²³⁵⁵ that the legislature should align the legislation of the respective consumer courts with the *CPA*. Alignment of provincial consumer legislation with the *CPA* will mitigate consumer confusion and challenges that may arise where a supplier conducts business in more than one province.²³⁵⁶ It is uncertain, however, when all provincial consumer protection legislation will mirror the *CPA*.

Where a consumer authority is unable to resolve a dispute (for the reason of lack of jurisdiction or otherwise), the consumer can approach the NCC. Depending on how the NCC decides to deal with the matter,²³⁵⁷ the consumer may need to approach the NCT to impose appropriate sanctions including an interdict and an administrative fine.²³⁵⁸ For example, in *The National Consumer Commission and Nu Menu (Pty) Ltd t/a Nu Menu Solutions*²³⁵⁹ (hereafter “*Nu Menu Solutions* case”), a consumer purchased a faulty water desalination system from the respondent early in 2018.²³⁶⁰ As the respondent had failed to repair the faulty product or reimburse the consumer, the consumer approached the Western Cape Consumer Affairs Office for assistance.²³⁶¹ Following mediation between the parties by this provincial consumer affairs office, an undertaking was provided on behalf of the respondent in October 2018, with which it did not comply.²³⁶² The consumer subsequently approached the NCC which, after investigation, referred the matter to the NCT based on various grounds constituting prohibited conduct in terms of the *CPA*,

²³⁵⁴ See the *Mpumalanga Consumer Affairs Act* 6 of 1998; *Western Cape Consumer Affairs (Unfair Business Practices) Act* 10 of 2002; *Free State Consumer Affairs Act* 14 of 1998; *Consumer Affairs (Unfair Business Practices) Act* 7 of 1996 in the Gauteng province; and the *Consumer Affairs (Unfair Business Practices) Act* 4 of 1996 in the North-West province. Updates to existing provincial legislation are, however, pending in the North-West province and Gauteng. See the *North West Consumer Affairs Draft Bill*, 2019 published as Provincial Notice 426 of 2023 in Extraordinary Provincial Gazette 8451 of 24 January 2023 and the *Gauteng Consumer Protection Bill*, 2018 published as Provincial Notice 684 of 2018 in Provincial Gazette 179 of 4 July 2018.

²³⁵⁵ See Van Heerden “Section 69” para 20; Woker 2016 *SA Merc LJ* 44.

²³⁵⁶ Woker 2016 *SA Merc LJ* 44.

²³⁵⁷ As mentioned in part 5.2.4 above, the NCC does not have the capacity to consider individual consumer complaints filed with it directly.

²³⁵⁸ s 112(1) and (2) of the *CPA*.

²³⁵⁹ The *National Consumer Commission and Nu Menu (Pty) Ltd t/a Nu Menu Solutions* case no NCT/255188/2022/73(2)(b) dated 19 July 2022.

²³⁶⁰ *Nu Menu Solutions* case para 8.

²³⁶¹ *Nu Menu Solutions* case para 11.

²³⁶² *Nu Menu Solutions* case para 12.

including those relating to false and misleading marketing.²³⁶³ In upholding the merits of the complaint, the NCT made a ruling in July 2022.²³⁶⁴ Despite a positive outcome in the end, the complaint was considered first by a provincial consumer protection authority, followed by the NCC and ultimately the NCT, and took more than three years to be resolved. This serves to confirm the view of Du Plessis²³⁶⁵ that this system of cross-referrals prolongs and frustrates consumer redress under the avenues available under the *CPA*.

When considering the published consumer court rulings, it is apparent that disputes relating to the purchase or repair of motor vehicles have featured quite prominently before the provincial consumer courts.²³⁶⁶ Various cases also deal with the enforcement of consumer transactions relating to the refunding of purchase prices for various goods.²³⁶⁷ For the purposes of this study, it is noteworthy that none of the available provincial consumer court rulings deal outright with issues pertaining to the advertising or labelling of products, or any other aspect related to food products for that matter. One of the reasons for this may be that, more often than not, the availability of a specific food product or brand will not necessarily be limited to a single South African province. As such, even if a consumer's concern with the labelling or advertising of a foodstuff is

²³⁶³ The NCT held that provisions under ss 29 and 41, amongst others, had been contravened by the respondent. See *Nu Menu Solutions* case paras 6, 13, 14, 24-33.

²³⁶⁴ *Nu Menu Solutions* case paras 52, 57.

²³⁶⁵ Du Plessis 2022 *Stell LR* 71, 80.

²³⁶⁶ See, for example, *Marshall Moabi v Katlo Investments* (Consumer Affairs Court for the North West Province case no NW05/2017 dated 15 May 2018); *Sarah Gabaake Molamu v Riedewaan Gora t/a Auto Sales Warehouse* (Consumer Affairs Court for the North West Province case no NW09/2017 dated 12 June 2018); *Thabiso Phika v Janse van Rensburg t/a S.J Motors* (Consumer Affairs Court for the North West Province case no NW21/2018 dated 24 August 2020); *Mogoiwa Isaak Diseko v Pieter Schutte t/a Auto Select* (North West Consumer Affairs Court case no NW02/2019 dated 27 August 2020); *Mzwandile Eddie Nxuma v Tumelo Sedidi* (Free State Consumer Affairs Court case no FSCAC2020/11-5 dated 6 November 2020); *Arthur Vuyisile Magadla v Xavier Used Cars* (Consumer Affairs Court for the Province of Gauteng case no GCC 09/2019 dated 6 November 2020); *Danico Orsmond v Vincent Thoabala* (Free State Consumer Affairs Court case no FSCAC2020/11-4 dated 18 December 2020); and *KwaZulu-Natal Consumer Tribunal and Jordache Govender v GS Signs* (KwaZulu-Natal Consumer Tribunal case no KZNCT04/2022 dated 12 September 2022).

²³⁶⁷ See, for example, *Thabiso Phika v Janse van Rensburg t/a S.J Motors* (Consumer Affairs Court for the North West Province case no NW21/2018 dated 24 August 2020); *Danico Orsmond v Vincent Thoabala* (Free State Consumer Affairs Court case no FSCAC2020/11-4 dated 18 December 2020); and *KwaZulu-Natal Consumer Protector v PAQT (Pty) Ltd* (KwaZulu-Natal Consumer Tribunal case no KZNCT07/2022 dated 12 July 2022).

brought to the attention of a specific provincial consumer protection authority or consumer protection court, there may be challenges from a jurisdictional point of view.

Based on the discussion above, it does not appear that provincial consumer authorities and courts have in actual fact a significant role to play in the context of foodstuffs labelling and advertising disputes. In addition to potential jurisdictional limitations, product-specific provisions on foodstuffs advertising and labelling will likely fall outside the scope of the provincial legislation.²³⁶⁸

5.4.2.2 The CGSO as an accredited ombud under the CPA

The importance of ombuds is recognised in the *CPA*.²³⁶⁹ As noted above, consumers who are unable to resolve a matter directly with a supplier are encouraged by the NCC to refer such matters directly to an ADR agent, including an accredited ombud where possible.²³⁷⁰

Section 82 of the *CPA* deals with the procedure for the accreditation of industry ombuds and prescribed industry codes. In terms of section 82(2)(a) the Minister of Trade may on the recommendation of the NCC²³⁷¹ prescribe an industry code.²³⁷² An industry code may be a code compiled by an “existing scheme that has been voluntarily established within an industry to regulate the conduct of persons conducting business within that industry”.²³⁷³ Where a proposed industry code provides for a scheme of ADR, the NCC may simultaneously recommend to the Minister that such a scheme be accredited as an accredited industry ombud.²³⁷⁴

²³⁶⁸ Given the limited foodstuffs-specific labelling and advertising provisions in the *CPA*. See part 2.5.3 above.

²³⁶⁹ Woker 2019 *Stell LR* 112.

²³⁷⁰ The NCC monitors the effectiveness of such accredited ombuds schemes. See s 82(7) of the *CPA*; NCC *Strategic Plan for 2022/2023–2025/2026* 16–18; NCC *Annual Performance Plan 2022/2023* 6.

²³⁷¹ The recommendation can follow a proposal from persons conducting business in a particular industry; alternatively on the initiative of the NCC. See s 82(3) of the *CPA*.

²³⁷² See s 82(2)(a) of the *CPA*.

²³⁷³ See s 82(1)(b) of the *CPA*. An industry code regulates the interaction between or among persons conducting business within an industry (i.e., trade competitors) and may also regulate the interaction and/or provide for ADR between trade competitors and consumers. See s 82(1)(a) of the *CPA*.

²³⁷⁴ This will be the case if the NCC considers that such a scheme is adequately situated and equipped to provide ADR services comparable to those provided in terms of any public regulation. See s 82(6) of the *CPA*.

To date, two bodies with accompanying industry codes have been accredited as industry ombuds in terms of the *CPA*, notably the CGSO²³⁷⁵ and the Motor Industry Ombud of South Africa.²³⁷⁶ As an aside it should be noted that three additional draft industry codes were published for public comment in 2016, including a code for advertising under the industry association and the predecessor of the ARB, the ASA.²³⁷⁷ No further developments have been reported formally following the publication of the draft code more than 7 years ago. Based on comments made by both the CEO of the CGSO²³⁷⁸ and the CEO of the ARB in 2023,²³⁷⁹ it seems that the possible accreditation of the ARB as an ombud in terms of the *CPA* is no longer on the cards. This aspect is discussed further in Chapter 6.

As foodstuffs are classified as products of the consumer goods and services industry,²³⁸⁰ and as this study excludes the motor vehicle industry, the discussion that follows will focus on the history and functioning of the CGSO.

As mentioned earlier, the NCC was completely overwhelmed with consumer complaints following the entry into force of the *CPA*, which resulted in a bottleneck.²³⁸¹ To alleviate this pressure relating to disputes within the consumer goods and services industry, the CGCSA compiled a proposed industry code aimed at creating an ombud in this industry to provide ADR services as an accredited ombud in terms of the *CPA*. Upon the

²³⁷⁵ See GN R271 in GG 38637 of 30 March 2015.

²³⁷⁶ See GN R817 in GG 38107 of 17 October 2014.

²³⁷⁷ See GN 499 in GG 40159 of 26 July 2016. The two other draft industry codes relate to the franchise and funeral industries respectively. See GN 499 in GG 40159 of 26 July 2016 and GN 978 in GG 40243 of 2 September 2016.

²³⁷⁸ Munyai Q "Enforcement and Redress of Consumer Rights in South Africa", unpublished guest lecture presented at the University of Pretoria seminar for Advanced Consumer Protection Law Master's students (8 May 2023 Pretoria).

²³⁷⁹ Comments made by Gail Schimmel during the ARB Annual General Meeting held on 9 March 2023. A video recording of the meeting can be made available on request.

²³⁸⁰ The term "consumer goods and services industry" is defined as all participants and/or entities involved in the supply chain that provides, markets and/or offers to supply goods and services to consumers, unless excluded by the *The Consumer Goods and Services Industry Code of Conduct* ("CGSO Industry Code"). Entities involved in the supply chain would include producers, importers, distributors and retailers of those goods. A "participant" includes any entity operating within the consumer goods and services industry that is bound by the *CGSO Industry Code* unless expressly excluded. See cl 3.1.10, 3.1.29 and 3.1.38 of the *CGSO Industry Code*; s 1 of the *CPA*.

²³⁸¹ *Consumer Goods and Services Ombud NPC v Voltex (Pty) Ltd* 2021 JDR 0660 GP para 14.

recommendation of the NCC, and after following the process set out in the *CPA*,²³⁸² the Minister of Trade accredited the CGSO as an industry ombud in March 2015.²³⁸³ In addition the *Consumer Goods and Services Industry Code of Conduct* (hereafter “*CGSO Industry Code*”)²³⁸⁴ was prescribed²³⁸⁵ as the industry code for the consumer goods and services industry, which came into effect on 29 April 2015. The *CGSO Industry Code* applies to various industry sectors²³⁸⁶ and would include the foodstuffs sector. As an industry ombud accredited in terms of statute, the CGSO is considered to function as a “legal self-regulation” body.²³⁸⁷

Over the past number of years the CGSO has provided substantial relief to the NCC as far as resolving consumer complaints is concerned.²³⁸⁸ According to the *CGSO Annual Report 2022/23*²³⁸⁹ this ombud has settled more than 72 000 disputes since its accreditation under the *CPA* in 2015, demonstrating actual consumer access to redress.²³⁹⁰ An advantage of dispute resolution via the CGSO includes that there is no complaint filing or dispute handling fee for the consumer.²³⁹¹ In addition, the turnaround time of cases is monitored by the NCC with a view to promoting the expedient resolution

²³⁸² Before a recommendation can be made by the NCC to the Minister, the proposed industry code must first be published for public comment. Once the period for public comment has passed, submissions made during that period must be considered by the NCC. The NCC is also required to consult with persons conducting business within the relevant industry and any relevant accredited consumer protection groups. Any reservations to such a proposed industry code should then be published for public comment. An industry code must be consistent with the purposes and policies of the *CPA*. See s 82(3)-(4) of the *CPA*.

²³⁸³ See s 82(6)(b) of the *CPA*; GN R271 in GG 38637 of 30 March 2015. The CGSO has, however, been operating since 2013. See *CGSO Annual Report 2022/23* 7.

²³⁸⁴ GN R271 in GG 38637 of 30 March 2015.

²³⁸⁵ In terms of s 82(3) of the *CPA*.

²³⁸⁶ Such as the clothing retail, furniture retail and fitness industries. See Scott and Van Dyk 2022 *SALJ* 263. The *CGSO Industry Code* does not, however, extend to the automotive industry; transactions that are not covered by the *CPA* or which are governed by other public regulation; and electronic communication services as defined in terms of the *Electronic Communications Act* 36 of 2005. See cl 4.4 of the *CGSO Industry Code*.

²³⁸⁷ Scott and Van Dyk 2022 *SALJ* 260. The difference between the legal self-regulation of accredited ombuds under the *CPA* (also known as co-regulation), and the voluntary self-regulation system of the ARB is discussed in part 6.2.2 below.

²³⁸⁸ The majority of complaints filed with forums established in terms of the *CPA* have been heard by the CGSO. See Mupangavanhu and Kerchhoff 2021 *SA Merc LJ* 285.

²³⁸⁹ It has also received more than 200 000 queries from consumers. See *CGSO Annual Report 2022/23* 10.

²³⁹⁰ Woker 2019 *Stell LR* 102.

²³⁹¹ See cl 9.2.1 of the *CGSO Industry Code*.

of disputes.²³⁹² Industry participant membership of the CGSO has increased in recent years, and more than 1 300 businesses are currently registered with the CGSO.²³⁹³ On this basis Naudé and Barnard²³⁹⁴ point out that the CGSO can be seen as a “success story” in the context of consumer redress under the *CPA*.

A contentious issue with the CGSO in recent years has been the compulsory membership and mandatory funding of the CGSO. In this regard the CGSO is an industry-funded scheme²³⁹⁵ in accordance with the funding model set out in the *CGSO Industry Code*. Clause 4.2 provides:

It is mandatory for all Participants above to comply with the provisions of this Code, to register with the CGSO in accordance with the procedures provided on the CGSO website from time-to-time, and contribute towards the funding of the CGSO in accordance with the funding model as set out in clause 6.2 below.

Furthermore, section 82(8) of the *CPA* provides that a supplier must not in the ordinary course of business contravene an applicable industry code. It has been noted that the words “must not” in this section indicate that compliance with an applicable industry code, which would include the *CGSO Industry Code*, is peremptory on all relevant suppliers of goods and services in South Africa.²³⁹⁶

The above aspects were considered in the *CGSO v Voltex* case, where the CGSO approached the Pretoria High Court for a declaratory order that compliance with the *CGSO Industry Code* was mandatory for all suppliers in the industry.²³⁹⁷ The Minister of Trade was joined to the proceedings and supported the application.²³⁹⁸ The application was opposed by two industry participants, namely Voltex (Pty) Ltd (the first respondent) and Astral Operations Limited (the fourth respondent) (hereafter referred to collectively as

²³⁹² NCC *Annual Performance Plan 2022/2023* 31.

²³⁹³ CGSO Annual Report 2022/23 6, 13. Between the 2021/2022 and 2022/2023 financial years there was a 29 per cent increase in membership to the CGSO. This significant increase was a result of the High Court’s ruling in *Consumer Goods and Services Ombud NPC v Voltex (Pty) Ltd* 2021 JDR 0660 GP (hereafter “*CGSO v Voltex*”), which is as discussed in this chapter.

²³⁹⁴ Naudé and Barnard “Enforcement and Effectiveness of Consumer Law in South Africa” 11.

²³⁹⁵ CGSO *Annual Report 2022/23* 7.

²³⁹⁶ Mupangavanhu and Kerchhoff 2021 *SA Merc LJ* 272-273.

²³⁹⁷ *CGSO v Voltex* paras 1, 72.

²³⁹⁸ *CGSO v Voltex* para 25.

“the respondents”).²³⁹⁹ In the context of this study, it is relevant to mention that Astral Operations Limited operates in the foodstuffs industry.²⁴⁰⁰ In addition to opposing the application, the respondents filed counter-claims in which they contested the authority of the Minister of Trade to validly proclaim the *CGSO Industry Code* in terms of section 82 of the *CPA*, essentially arguing that the promulgation of the *CGSO Industry Code* was *ultra vires*.²⁴⁰¹ As a first issue the respondents argued that compulsory membership to the CGSO by all industry participants²⁴⁰² constituted a violation of relevant industry member’s right to freedom of association as set out in section 18 of the *Constitution*.²⁴⁰³ It was highlighted that there was no express provision in the *CPA* that made participation in the CGCO compulsory by industry members.²⁴⁰⁴ Moreover, it was argued that both sections 69 and 70 of the *CPA* “contemplate voluntary participation by suppliers” which pointed “towards a system of voluntary (contractual) participation in self-regulation”.²⁴⁰⁵ In considering section 82(1)(b) of the *CPA*,²⁴⁰⁶ the High Court noted that the definition of “proposed industry code” included (but was not limited to) any existing scheme that had been voluntarily established within a specific industry,²⁴⁰⁷ which in this case was the consumer goods and services industry. The court noted further that:

[t]he Section does not stipulate that members of a particular industry must first agree to be bound by the industry code. It means that if there is a scheme that already exists and if it is was [sic] voluntarily established, it is not precluded from the industry code.

²³⁹⁹ The CGCSA was joined as the third respondent in order to ensure that the greater portion of the consumer goods and services industry in South Africa was aware of this application. Although the Consumer Goods Council initially opposed the application, its opposition was withdrawn prior to the hearing of the matter. See *CGSO v Voltex* paras 2, 26, 31.

²⁴⁰⁰ More specifically, Astral Operations Limited falls within the Astral Foods group as one of the leading poultry producers in South Africa. See Astral 2023 <https://www.astralfoods.com/groupstructure.html>. Voltex (Pty) Ltd conducts business in electrical supplies. See Voltex 2023 <https://www.voltex.co.za/about-us/>.

²⁴⁰¹ The respondents argued that the promulgation of the CGSO Industry Code by the Minister of Trade was unconstitutional, unlawful, irrational and unreasonable. See *CGSO v Voltex* paras 7-10, 20, 24.7, 27.3 and 51.

²⁴⁰² Clause 4.1 of the *CGSO Industry Code* provides: The Code applies to all participants, unless they are regulated elsewhere by other public regulation, a Code prescribed by the Minister in terms of section 82 of the CPA and/or where a complaint falls within the jurisdiction of an Ombud with Jurisdiction, or an Industry Ombud accredited in terms of section 82(6) of the CPA.

²⁴⁰³ *CGSO v Voltex* paras 2, 8.1, 9.3, 24.4.

²⁴⁰⁴ *CGSO v Voltex* para 24.5.

²⁴⁰⁵ *CGSO v Voltex* para 24.5.

²⁴⁰⁶ Which deals with the definition of the term “proposal” or “proposed industry code,” which includes any existing scheme that has been voluntarily established within an industry to regulate the conduct of persons conducting business within that industry.

²⁴⁰⁷ *CGSO v Voltex* para 70.

In terms of the guidelines for drafting the codes, the code should be made mandatory for all suppliers belonging to the industry.²⁴⁰⁸

On this basis, the High Court held that the *CGSO Industry Code* was mandatory for all suppliers falling within the consumer goods and services industry in South Africa.

As a second issue, the respondents contested the validity of imposing mandatory levies or fees in the *CGSO Industry Code* in the light of the fact that the *CPA* is not a so-called money bill.²⁴⁰⁹ The respondents argued that the *CPA* “contains no express provisions authorizing the imposition of levies or providing for compulsory membership”.²⁴¹⁰ In considering the meaning of a money bill in terms of section 77 of the *Constitution*,²⁴¹¹ the High Court confirmed that the *CPA* was, in fact, not a money bill.²⁴¹² Judge Strijdom JA went on to note that:

The industry code was created by Regulation and in my view is not a bill which requires a much more stringent process.²⁴¹³

In considering the powers of the Minister of Trade to enact the *CGSO Industry Code*, it was noted that the process followed in enacting the Code accorded with the prescribed procedure as set out in the *CPA*.²⁴¹⁴ The court highlighted that there had been “an extensive public comment and participation process”, and that the *CGSO Industry Code* “enjoys widespread support from stakeholders in the industry”.²⁴¹⁵ In pointing out that “courts should not come to the aid of parties who slept on their rights”,²⁴¹⁶ the High Court observed that neither of the respondents had raised any objection to the *CGSO Industry Code* during the public participation process prior to its enactment.²⁴¹⁷ The court then went on to consider case law relating to the nature and extent of the implied power of

²⁴⁰⁸ See cl 4.2 of the *CGSO Industry Code*; *CGSO v Voltex* para 71.

²⁴⁰⁹ *CGSO v Voltex* paras 2, 82, 9.2 and 20.

²⁴¹⁰ *CGSO v Voltex* para 24.2.

²⁴¹¹ Section 77(1) of the *Constitution* provides that “A Bill is a money Bill if it- (a) appropriates money; (b) imposes national taxes, levies, duties or surcharges; (c) abolishes or reduces, or grants exemptions from, any national taxes, levies, duties or surcharges; or (d) authorises direct charges against the National Revenue Fund, except a Bill envisaged in section 214 authorising direct charges”.

²⁴¹² *CGSO v Voltex* paras 43, 45.

²⁴¹³ *CGSO v Voltex* para 45.

²⁴¹⁴ *CGSO v Voltex* paras 3, 52-54.

²⁴¹⁵ *CGSO v Voltex* para 54.

²⁴¹⁶ *CGSO v Voltex* para 58.

²⁴¹⁷ It was also pointed out that the public participation process had also not been taken on review. See *CGSO v Voltex* para 56-57.

the Minister of Trade in terms of the *CPA* as far as it related to the funding of an ombud accredited in terms of section 82.²⁴¹⁸ It also considered the relevant portion of the *Draft NCC Guidelines for the Development in Industry Codes of Conduct* (hereafter *NCC Draft Guidelines*).²⁴¹⁹ This document sets out suggestions²⁴²⁰ from the NCC relating to sustainable funding models contained in codes of conduct for the effective operation and maintenance of an ombud accredited in terms of the *CPA*, including:

(ii) Provision must be made in the code for collection of fees from all suppliers demarcated into the industry and who voluntarily subscribe to the Ombud.

...

(v) Fees may be billed to none subscribing suppliers, within the accredited industry code value chain or demarcation, for Ombud services rendered.²⁴²¹

In considering the above, it was held that the *CGSO Industry Code* had been drafted in accordance with the *NCC Draft Guidelines* and fell within the implied powers and "regulation making discretion"²⁴²² afforded to the Minister of Trade in terms of the *CPA*.²⁴²³ On this basis the High Court held that the power to levy a fee in terms of the *CGSO Industry Code* was both necessary and incidental, and that the mandatory levying of a fee fell within the power of the Minister of Trade under the *CPA*.²⁴²⁴

Whilst the outcome of this case has been seen as a victory for consumer protection law,²⁴²⁵ some observations are warranted. Firstly, the *CGSO Industry Code* was accredited in terms of section 82 of the *CPA* and not by regulation. Before its signature and promulgation, the *CPA* was a bill. On this basis it is respectfully submitted that the arguments regarding the fact that the *CPA* is not a money bill in terms of which monetary charges may be levied were not fully considered and analysed by the High Court. Another important consideration is that the *NCC Draft Guidelines* referred to in the case on which

²⁴¹⁸ See *Albutt v Centre for the Study of Violence and Reconciliation* 2010 3 SA 293 (CC); *Makhasa v Minister of Law and Order, Lebowa Government* 1988 3 SA 701 (A); and *National Director of Public Prosecutions v Mohamed* 2003 4 SA 1 CC.

²⁴¹⁹ Gen Not 415 in GG 35375 of 23 May 2012; Van Heerden "Section 82" para 8.

²⁴²⁰ The funding model principles contained in the document are "simply suggestive" and are not prescriptive. As such, they are non-binding. See *NCC Draft Guidelines* para 3.1(vi).

²⁴²¹ See *NCC Draft Guidelines* paras 3.1(ii) and 3.1(v).

²⁴²² *CGSO v Voltex* para 59.

²⁴²³ *CGSO v Voltex* para 68.

²⁴²⁴ *CGSO v Voltex* paras 72.2 and 72.3.

²⁴²⁵ Scott and Van Dyk 2022 *SALJ* 273.

certain of the findings are based was merely a draft document published for public comment by the NCC in 2012. The funding model principles contained in the draft document are “simply suggestive” and are not prescriptive.²⁴²⁶ As such, they are non-binding. The High Court’s reliance on this document as the basis for its ruling is therefore questionable.

Whilst leave to appeal was granted following the High Court ruling in the *CGSO v Voltex* case, the matter was ultimately settled out of court in December 2022.²⁴²⁷ As things stand, therefore, it is mandatory for all industry participants to comply with the *CGSO Industry Code* and to contribute towards the funding and operations of the CGSO. Du Plessis²⁴²⁸ notes that the outcome of the *Voltex* case will apply to all industry ombuds accredited in terms of the *CPA*.

When considering the role of the CGSO, it should be noted that most of the consumer complaints received by the CGSO relate to defective goods,²⁴²⁹ the cancellation of agreements and the late delivery of goods.²⁴³⁰ It is notable that complaints relating to marketing are not very prevalent.²⁴³¹ The *CGSO Annual Report 2022/23* reflects that only 2% of the complaints were related to marketing.²⁴³² In the context of misleading advertising, Mupangavanhu and Kerchhoff²⁴³³ point out that the lack of enforcement powers of the CGSO as the forum which has handled a large portion of the consumer complaints filed in terms of the *CPA* has an impact on consumer redress.²⁴³⁴ These authors note that:

²⁴²⁶ See NCC *Draft Guidelines* para 3.1(vi).

²⁴²⁷ Details of the settlement negotiations were not disclosed by the parties. See *CGSO Annual Report 2022/23* 7.

²⁴²⁸ Du Plessis 2022 *Stell LR* 78.

²⁴²⁹ Goods becoming defective within six months of purchase. See ss 55(1) read with s 56(1) and (2) of the CPA; *CGSO Annual Report 2022/23* 21.

²⁴³⁰ *CGSO Annual Report 2022/23* 21.

²⁴³¹ Complaints relating to goods, agreements and services, collectively, amount to 94% of the complaints received by the CGSO. See *CGSO Annual Report 2022/23* 19.

²⁴³² The CGSO has considered complaints relating to incorrectly priced goods or services in advertising material, including incorrectly priced couches, chests of drawers, gazebos and holiday membership fees. See Mupangavanhu and Kerchhoff 2021 *SA Merc LJ* 273-274.

²⁴³³ Mupangavanhu and Kerchhoff 2021 *SA Merc LJ* 285-286.

²⁴³⁴ Also see Du Plessis 2022 *Stell LR* 80.

The enactment of the CPA has not deterred advertisers from using misleading advertisements. This is evidenced by the number of cases that have been reported. ... According to the Chairperson of CGSO, Ms Zulu, the number of non-cooperative suppliers remains a concern. In 2020, 18 per cent of the cases before the CGSO were dismissed due to non-cooperation by suppliers. This is because the CGSO's powers are limited. The referral to NCC or Tribunal inevitably results in unnecessary delays, and it may undermine the objective of the CPA in ensuring a quick and efficient redress of consumer disputes.

Turning to the goods and services categories that are most prevalent in consumer complaints filed with the CGSO, the most popular include online transactions, electronic appliances, cell phones, telecommunication and satellite services.²⁴³⁵ Complaints relating to foods and beverages have accounted for 3% or less in the period running from 2020 to 2023.²⁴³⁶ An apparent reason for such low figures is the fact that the CPA contains limited provisions dealing with the labelling and advertising of foodstuffs *per se*. Coupled with the fact that only consumers as defined in the CPA²⁴³⁷ may lodge complaints with the CGSO,²⁴³⁸ this reduces the suitability of this forum for foodstuffs labelling and advertising disputes.

Another shortcoming of the CGSO in relation to labelling and advertising disputes in general is the nature of the relief available to the complainant under this ADR system. As an ombud accredited in terms of the CPA, the CGSO is limited to mediating a possible resolution of a dispute between parties²⁴³⁹ and making a recommendation in instances where both parties participate.²⁴⁴⁰ Depending on the facts and circumstances of a particular complaint, recommendations made by the CGSO usually centre on the so-called

²⁴³⁵ See CGSO *Annual Report 2022/23*²¹ for goods and services categories and statistics during the three financial years 2020/2021-2022/2023.

²⁴³⁶ When considering the various goods and services sectors to which complaints relate, "groceries" as a category also fell within the lower range, accounting for 4% only in the past two financial years. See CGSO *Annual Report 2022/23* 20-21.

²⁴³⁷ See parts 3.4.4.3 and 3.5.3 above.

²⁴³⁸ Due to the threshold limitation referred to in s 5(2)(b) of the CPA, the CGSO cannot consider complaints filed with the CGSO by a business which has an annual turnover of R 2 000 000 or more. Complainants have been turned away on this basis. See CGSO *Annual Report 2022/23* 23.

²⁴³⁹ See cl 11.6.1 of the CGSO *Industry Code*.

²⁴⁴⁰ Neither of the parties is bound to accept a recommendation made by the CGSO. See cl 2.1 and 11.7.4 of the CGSO *Industry Code*.

triple R: repair, replace or refund,²⁴⁴¹ which may not be suitable in the context of dealing with labelling and advertising disputes.

The CGSO does not have the power to declare marketing activities unjust, unfair or unreasonable under the *CPA*.²⁴⁴² In addition the CGSO does not have the power to order that any advertising which is contrary to the *CPA* be withdrawn or amended. Whilst the functioning of the ARB is discussed in Chapter 6, at this stage it is noteworthy that an advantage of lodging an advertising complaint with the ARB is that the ARB is mandated to rule that the offending advertising be withdrawn or amended.²⁴⁴³ This advantage was confirmed by the Chief Executive Officer (hereafter CEO) of the CGSO, Ms Queen Munyai, during a public seminar hosted by the University of Pretoria on 8 May 2023.²⁴⁴⁴ Mrs Munyai was asked if the CGSO engages with the ARB regarding advertising/marketing complaints, and replied as follows:

If the industry itself has an association body that can deal with those complaints and can give their members better service than we can offer, we allow it. And [the ARB is] one of the 65 that we escalate to.

...

Currently, because [the ARB has] specialised requirements in that industry ... with some of them [i.e., advertising complaints] we do not have the expertise ... [the ARB] deal[s] with their own complaints. [The CGSO is] currently not dealing with any [complaints concerning] adverts because, although they are covered by the CPA, we do not have powers to put down [i.e., withdraw] the ad. For instance, if a supplier is advertising something and its misleading, we can't pull down the ad. We can make a recommendation for the ad to be pulled, but we don't have the powers to enforce and make sure. But the ARB has the powers because they work with other industry players in the broadcasting space who have the authority to be able to pull down the ad. Maybe some [advertisers] are using the same advert that others have used [i.e., imitation]. They are complaining against each other, they are using our brand... Those are the type[s] of complaints that the ARB are now [handling]. The ARB is dealing with those complaints. We are not dealing with them because of the limited resources that we have.²⁴⁴⁵

²⁴⁴¹ This is in line with art 56(2) of the *CPA*. Also see *CGSO Annual Report 2022/23* 27.

²⁴⁴² Only ordinary civil courts are vested with that authority. See ss 48(2), 52(3) of the *CPA*.

²⁴⁴³ For sanctions that the ARB may impose, see part 6.3.3.2 below.

²⁴⁴⁴ Munyai Q "Enforcement and Redress of Consumer Rights in South Africa" unpublished guest lecture presented at the University of Pretoria seminar for Advanced Consumer Protection Law Master's students (8 May 2023 Pretoria).

²⁴⁴⁵ Full transcription of the CEO's comments and the accompanying seminar recording can be provided by the author on request.

In November 2023 enquiries were made with the ARB regarding the frequency of the CGSO referring consumers to the ARB for assistance regarding advertising complaints. The CEO of the ARB²⁴⁴⁶ advised as follows:

We are not always aware when there has been a referral – because the way that it works is that the consumer is told by the CGCSO to contact the ARB; sometimes they will mention this, sometimes they won't.

However, my perception is that we do get a number of referrals. We also refer a number of matters to them – mostly those where it is clear that the consumer wants to 'get the thing' rather than to actually have the ad fixed.

My feeling is that the CGCSO and the ARB work well together to cover a wide area of consumer protection.

Following the above, it seems that on a practical level the CGSO and the ARB work in tandem to assist consumers with complaints relating to advertising. The CGSO does not currently consider complaints relating primarily to advertising *per se*.²⁴⁴⁷ Instead it refers consumers who have concerns regarding advertising content to the ARB in instances where it deems that the ARB could be more suited to consider the complaint and provide appropriate relief. Reasons provided for this include its lack of resources, its lack of expertise in the advertising industry and laws, and its lack of power to provide suitable relief for a complainant to an advertising dispute. This seems to accord with the observations by Van Heerden²⁴⁴⁸ that the *CPA* recognises the importance of self-regulation to enhance consumer protection. The ARB, on the other hand, refers consumers to the CGSO where it deems this to be the more appropriate forum, such as instances in which the consumer seeks the actual product or service which may underlie misleading advertising, or the triple R: repair, refund or replace.

Another aspect to highlight is that whilst the CGSO may be able to assist in mediating a dispute between willing parties, in instances where the consumer seeks the actual product that is the subject of misleading advertising the role of the CGSO is essentially nullified where the relevant supplier does not cooperate in the ARD process. If there is no

²⁴⁴⁶ Email correspondence between the author and Mrs. Gail Schimmel dated 7 November 2023 can be provided upon request.

²⁴⁴⁷ Where a complaint filed with the CGSO relates specifically to an advertising claim.

²⁴⁴⁸ Van Heerden "Protection of Consumer Rights and Consumers Voice" para 10.

reasonable possibility that the matter may be resolved with the assistance of the CGSO, the CGSO is compelled to issue a termination of the complaint and refer the consumer to the NCC.²⁴⁴⁹ Under the ARB complaints resolution system, on the other hand, the ARB has the jurisdiction to consider and rule on an advertising complaint irrespective of whether or not the advertiser participates in the process. This aspect is discussed in part 6.3.5 of Chapter 6.

5.5 Conclusion

In this chapter the monitoring and enforcement of food laws were considered with reference to the role of persons and bodies within relevant government departments; private actors and associations in the food industry that have instituted litigation before the courts; and, from a consumer perspective, tribunals and forums under the *CPA*.

It has been found that various role payers within government are mandated in terms of national legislation to monitor and enforce food laws in South Africa. This includes inspectors (notably EHPs) within the DOH, assignees under the *APSA* within the DOA, and the NRCS and NCC falling within the DTIC.

The Minister of Health has mandated municipalities as investigators who in turn have tasked EHPs with the responsibility to monitor and enforce the *FCDA*. It does not appear, however, that authorised officers within relevant municipalities have been granted the power to directly enforce section 5 or regulations promulgated in terms of section 15 of the *FCDA*, which would include R146, R991 and potentially R3337, in due course. In addition aspects such as financial constraints and a lack of training in foodstuffs law impact on the current effectiveness of the inspection activities of EHPs in enforcing the labelling and advertising provisions of the *FCDA*.

²⁴⁴⁹ If the parties fail to agree to a resolution or if either fails to comply with a resolution agreed to, the CGSO shall inform the parties of the further options available to them, including a referral to the NCC and the institution of legal proceedings at the parties' own expense. See cl 11.7.8 of the *CGSO Industry Code*. In the 2022/2023 reporting year, more than 25% of complaints filed with the CGSO were closed due to the non-cooperation of suppliers against whom complaints were filed. See s 70(2) of the *CPA*; *CGSO Annual Report 2022/23* 10-11, 23.

Various assignees have been designated by the Minister of Agriculture in terms of the *APSA*, and appear to be functioning effectively in monitoring and enforcing within their respective mandates. That being said, the monitoring and enforcement capabilities of these respective assignees are limited to specific categories of foodstuffs that are regulated under the *APSA*, and would exclude a variety of products qualifying as unhealthy foodstuffs that are not regulated in terms of the *APSA*.

Turning to bodies within the DTIC, the NRCS assists in the monitoring and enforcement of labelling provisions for select categories of foodstuffs for which compulsory specifications and technical regulations have been issued, such as preserved fish and meat products. Whilst these are commendable efforts, the role of the NRCS, as things currently stand, would appear to be somewhat limited when it comes to monitoring and enforcing labelling and advertising restrictions relating specifically to unhealthy foodstuffs.

Turning to the NCC, in the foodstuffs sector it has been actively involved in product recalls of unsafe foodstuffs, which is an important function. That being said, the *CPA* contains limited provisions pertaining to foodstuffs labelling and advertising aspects. Most of the product-specific labelling requirements for foodstuffs are contained in the *FCDA* (and to a lesser extent in the *APSA*), which does not fall within the authority of the DTIC. This consequently places limitations on the authority of the NCC as well as ADR agents under the *CPA*, such as the CGSO and provincial consumer courts, when it comes to the monitoring and enforcement of foodstuffs labelling and advertising laws.

Whilst the efforts of monitoring and enforcement authorities and bodies within the DOH, DOA and DTIC should not be overlooked, aspects such as financial constraints and a lack of mandate do have an impact on the role that they will be able to play when it comes to monitoring and enforcing compliance with the relevant provisions of R3337 when they come into operation, especially considering the anticipated influx of product labelling and advertising restrictions that will have to be policed, so to speak. When considering food law monitoring and enforcement in terms of the government regulation system, the existing procedures and functions of government bodies and agencies are collectively valuable. Due to the limitations and challenges pointed out in this chapter, those

procedures alone will, however, not be sufficient to ensure that unhealthy foodstuffs labelling and advertising restrictions are monitored and enforced effectively. As discussed in part 1.2.5 above, the DOH has acknowledged that a multi-stakeholder approach, which includes private actor involvement, will be necessary to address the diet-related NCD burden in South Africa.

In considering the monitoring and enforcement of food laws by private actors, it was noted that disputes in the area of foodstuffs labelling and advertising fall primarily in the field of IP and are instituted between trade competitors. Moreover, the select labelling disputes under the *APSA* and heard before our courts have predominantly been instituted by commercial businesses as trade competitors, whilst associations in the food industry may also be joined to the proceedings. Notably, for various reasons ranging from a lack of standing to the unavailability of funds, consumers do not as a general rule readily have access to courts when enforcing their rights.

Following the above, this chapter also considered the role of the ADR mechanisms, notably provincial consumer authorities and courts as well as the CGSO, that may be approached by consumers under the *CPA*. It was concluded that provincial consumer authorities and functioning consumer courts would, due to their lack of jurisdiction amongst other things, not have a significant role to play in the context of foodstuffs labelling and advertising disputes.

The CGSO appears to be functioning fairly well as far as the mediation of consumer concerns under the *CPA* is concerned. However it does not receive many marketing-related complaints, even less so in the context of foods. Challenges under this ADR mechanism include the fact that it is effective only if the supplier cooperates. Furthermore, the recommendations that can be made are not binding, and the CGSO cannot order that offending advertising be withdrawn. For these reasons, the CEO of the CGSO has confirmed that the CGSO refers consumers who have complaints regarding advertising content to the ARB in instances where it deems that the ARB could be more suited to consider the complaint and provide appropriate relief. At face value, therefore, it seems that the ARB provides additional resources, expertise and enforcement functions

which assist in providing access to redress to the end-consumer in relation to advertising concerns. In the NCC *Annual Performance Plan 2022/2023* it was noted that:

[t]he NCC remains supportive of regulators seeking to protect consumers provided that these regulators are enabled to provide an equivalent or better protection to consumers than that which is contained in the CPA. This is intrinsic to the CPA and consumer protection policy.²⁴⁵⁰

Following the above, Chapter 6 that follows is dedicated to self-regulation in the advertising industry. In that chapter the researcher considers to what extent self-regulation through the operations of the ARB currently offers a forum for consumers to voice their concerns and obtain efficient and effective redress in the context of foodstuffs labelling or advertising. Moreover, the purpose, function and limitations of the ARB as a public watchdog for consumers in the South African advertising industry are discussed and analysed. The relevant provisions of the *ARB Code*, consumer complaints that have been filed with the ARB regarding foodstuffs labelling and advertising, and relevant case law will be considered with a view to postulating the potential role that the ARB can fulfil in assisting with the monitoring and enforcement of restrictions concerning the advertising and labelling of unhealthy foodstuffs in South Africa as part of the multisectoral approach to reducing diet-related NCDs.

²⁴⁵⁰ NCC *Annual Performance Plan 2022/2023* 13.

Chapter 6: Advertising self-regulation and the role of the ARB relating to unhealthy foodstuffs labelling and advertising

6.1 Introduction

As a starting point, one should recall the research question in this study, which reads as follows: With reference to the South African government's commitment to reducing the occurrence of diet-related NCDs amongst consumers by means of advertising and labelling restrictions in relation to unhealthy foodstuffs, and specifically with due analysis of the current and proposed statutory and self-regulation provisions, how can a balance be achieved between legislative regulation by the government, and self-regulation by the advertising industry?

One should also be reminded of the hypothesis of this study, namely that self-regulation within the advertising industry complements government regulation aimed at restricting unhealthy foodstuffs labelling and advertising in South Africa, ultimately advancing the government's commitment to reducing the occurrence of diet-related NCDs in South Africa.

Whilst both the research question and the hypothesis are returned to in Chapter 7, as with the preceding chapters the discussion in this chapter assists in providing an ultimate answer to those aspects.

Up to this point the study has focused on government regulation, consisting of the various statutes and common law principles that are relevant to the food law framework in South Africa. Those laws have been developed and implemented by the government and are enforced by national courts, government officials, agencies, or designated assignees. This has been done to demonstrate government policy and regulation in the context of the state's commitments and obligations aimed at reducing the occurrence of diet-related NCDs by means of advertising and labelling restrictions. On a national level, relevant constitutional provisions,²⁴⁵¹ as well as the food law framework²⁴⁵² and the role of various

²⁴⁵¹ See part 3.2 above.

²⁴⁵² See parts 2.4-2.6 above for the existing legislative provisions. For a discussion of the proposed measures in R3337 see parts 4.4-4.6 above.

government bodies and institutions,²⁴⁵³ have been discussed. The role of private actors in the food industry,²⁴⁵⁴ as well as consumer redress under available legislative channels,²⁴⁵⁵ have also been considered in relation to the monitoring and enforcement of food laws in South Africa.

The South African government has rightfully taken the lead in developing policy measures and drafting legislation addressing diet-related NCDs.²⁴⁵⁶ On a practical level, it has been pointed out that a multi-stakeholder approach would be required to address this enormous task.²⁴⁵⁷ Factors such as human capacity limitations and financial resource constraints within government departments and agencies may have an impact on the measures proposed in R3337 (which in theory are to be introduced in due course), particularly on the front of monitoring and enforcement.²⁴⁵⁸ In addition, legislative reform has been dragging on for many years, and the reality is that R3337 may not come into operation soon. In the interim there is a legislative gap regarding the regulation of unhealthy foodstuff labelling and advertising in South Africa.²⁴⁵⁹

In 1985 Boddewyn²⁴⁶⁰ pointed out the reality that:

the law cannot realistically hope or pretend to be comprehensive and effective in controlling all forms of advertising behavior – a fast-changing and complex field in any case.²⁴⁶¹

That statement was made nearly forty years ago but remains just as relevant today. The DOH *National Strategic Plan* highlights the need to engage private actors outside the health sector to address adverse SDHs, including negative CDHs, to achieve behavioural change as far as consumers' dietary patterns are concerned. The private actors would include the food industry, which forms part of the broader advertising industry in South

²⁴⁵³ See part 5.2.

²⁴⁵⁴ See part 5.3.

²⁴⁵⁵ See part 5.4.

²⁴⁵⁶ See parts 1.2.3-1.2.4.

²⁴⁵⁷ See part 1.2.5.

²⁴⁵⁸ See parts 4.9.4, 5.2.1, 5.2.4 and 5.4.2.

²⁴⁵⁹ See part 4.10.

²⁴⁶⁰ Boddewyn 1985 *Journal of Public Policy & Marketing* 138.

²⁴⁶¹ Also see *Charter of the International Council for Advertising Self-Regulation* (2021) (hereafter "ICAS Charter") 4.

Africa. The DOH has also pointed out that the reduction of NCD risk factors requires a “strengthening of the capacity of individuals and populations to adopt healthier behaviours and lifestyles that foster health and well-being”.²⁴⁶² Therefore, the consumer voice in addressing diet-related NCDs cannot be overlooked.

Against this background and as part of a multi-stakeholder approach the prevailing NCD burden in this country warrants the consideration of avenues to complement or supplement the government’s efforts. In this regard this chapter turns to the role of advertising self-regulation within the advertising industry in South Africa. As discussed in more detail below, the ARB and its predecessor, the Advertising Standards Authority of South Africa (hereafter “ASA”) have formed part of the consumer protection framework in South Africa for many years.²⁴⁶³ The ARB is an independent self-regulatory body and does not function in terms of government regulation. Nevertheless, the ARB performs an important public function in regulating advertising in South Africa.²⁴⁶⁴ Moreover, this chapter considers to what extent self-regulation by the advertising industry currently offers an effective forum for consumers to voice their concerns and obtain efficient and effective redress in the context of foodstuffs labelling or advertising. This is done with a view to postulating the potential role that the ARB, as the self-regulatory body in the South African advertising industry, can play in assisting with the regulation of unhealthy foodstuffs advertising and labelling as part of the multisectoral approach to reducing diet-related NCDs in this country.

Part 6.2 sets out a background to advertising self-regulation. The meaning of self-regulation is discussed, followed by a discussion of the difference between voluntary self-regulation and co-regulation. The difference between self-regulation and self-discipline is also explained.

²⁴⁶² DOH *National NCD Strategic Plan* 29.

²⁴⁶³ Naudé and Barnard “Enforcement and Effectiveness of Consumer Law in South Africa” 584-585, for example, discusses the role of the ASA (now ARB) as part of private regulation in the South African consumer law context. For a comprehensive discussion on the functioning of the ASA, see Woker *Advertising Law in South Africa* 20-34. The focus of this chapter is primarily on the ARB as the current self-regulatory organisation in South Africa. Where relevant, however, reference is made to the ASA.

²⁴⁶⁴ See the discussion in part 6.3.1 below.

Part 6.3 centres on the ARB and its role in assisting in the regulation of advertising in South Africa. Part 6.4 is dedicated to discussing relevant ARB rulings. As the focus of this study relates to food law, it should be noted that the discussion on the ARB is contextualised primarily with reference to relevant ARB rulings relating to foodstuffs labelling and advertising. Relevant case law pertaining to the public function and jurisdiction of the ARB is included. As indicated previously,²⁴⁶⁵ this study is limited to ARB rulings issued since the establishment of the ARB in 2018 up to and including August 2024. For the reader's convenience, Addendum D consists of a table listing ARB rulings relating to foodstuffs labelling and advertising during that period.

Part 6.5 sets out critical comments on guidelines from the International Chamber of Commerce on responsible foodstuffs advertising, and its suggested definition proposed for "children" in relation to foodstuffs advertising restrictions by self-regulatory organisations.²⁴⁶⁶ This is followed by a discussion of *Appendix J: The Food and Beverage Code* (hereafter "*Appendix J*") forming part of the *ARB Code* in part 6.6. That discussion highlights positive contributions currently included in *Appendix J* pertaining to the regulation of unhealthy foodstuffs advertising in South Africa. In addition, various suggestions are made on amendments to *Appendix J* with a view to increasing its value in regulating unhealthy foodstuffs advertising and labelling, against the backdrop of the prevailing dietary health concerns amongst South African consumers.

Part 6.7 is a discussion of the benefits that advertising self-regulation hold for consumers, the advertising industry and the South African government. This is followed in part 6.8 by a discussion on the criticisms, challenges and limitations of advertising self-regulation. Concluding remarks are made in part 6.9.

²⁴⁶⁵ Rulings of the ASA as the predecessor of the ARB fall outside the scope of this study as they are not readily available or accessible. See the discussion in part 1.5.

²⁴⁶⁶ That critical discussion is required in order to consider if the ICC guidelines on those aspects are appropriate for South Africa.

6.2 Background to advertising self-regulation

6.2.1 The meaning of advertising self-regulation

Self-regulation is the situation where an industry-level body that is known as a self-regulatory organisation (hereafter “SRO”)²⁴⁶⁷ sets rules and standards relating to the conduct of businesses in that particular industry.²⁴⁶⁸ These rules and standards are set out in a code of practice and accompanied by a dispute resolution mechanism.²⁴⁶⁹ The relevant SRO monitors business conduct and performance in terms of the relevant code of practice and is responsible for its enforcement through the dispute resolution mechanism contained therein.²⁴⁷⁰ In effect, therefore, the industry assumes responsibility for regulating itself.²⁴⁷¹

In the advertising sector, advertising self-regulation consists of and is defined by several components, namely:

- iii. the establishment of an independent SRO,
- iv. the development of a set of robust “best practice” advertising standards that are based on the promotion of truthful and responsible advertising and fair competition at a national level by the market players²⁴⁷² in the advertising industry;
- v. which is underpinned by a system that caters for the adoption, application and review of the advertising standards;
- vi. which includes a mechanism allowing for the monitoring and enforcement of the advertising standards through the independent SRO; and

²⁴⁶⁷ ICAS *Global Factbook of Advertising Self-Regulatory Organizations 2022/2023* (hereafter “ICAS *Global Factbook*”) 5.

²⁴⁶⁸ Mupangavanhu and Kerchhoff 2021 *SA Merc LJ* 277.

²⁴⁶⁹ Scott and Van Dyk 2022 *SALJ* 260; Woker 2016 *SA Merc LJ* 31.

²⁴⁷⁰ Woker 2016 *SA Merc LJ* 31; Hawkes *Marketing Food To Children: Changes In The Global Regulatory Environment* 15-16.

²⁴⁷¹ Woker *Advertising Law in South Africa* 14.

²⁴⁷² Market players include advertisers, advertising agencies and the media which disseminate advertising content. See ICAS *International Guide on Developing a Self-Regulatory Organization* (hereafter “ICAS *International SRO Guide*”) 5.

vii. that is funded by the advertising industry.²⁴⁷³

According to the International Chamber of Commerce,²⁴⁷⁴ the primary goal of advertising self-regulation is:

to demonstrate and ensure that the industry, and particularly advertisers, are compliant, and to produce responsible advertising with sound ethical standards of marketing and advertising practice to promote consumer confidence, a level competitive playing field, and a robust marketplace where consumer choice and trust thrive.²⁴⁷⁵

The International Council for Advertising Self-Regulation²⁴⁷⁶ has confirmed that the mechanism underpinning advertising self-regulation has two purposes: (i) promoting responsible and ethical advertising practices and (ii) combatting bad advertising practices. Companies that conduct business with other businesses or organisations that have agreed to or which are required to adhere to a code of advertising practice issued by an SRO (hereafter SRO code) can be confident that the trading partner adheres to the minimum acceptable advertising standards or, in the case of non-compliance, will either withdraw or amend advertising that does not conform with the code of advertising practice.²⁴⁷⁷ By setting universal advertising standards, self-regulation aims to set a consistent and acceptable standard for advertising that is truthful, decent, honest and legal.²⁴⁷⁸

There are approximately 50 advertising SROs located across the world.²⁴⁷⁹ Advertising SROs operate throughout most of Europe, as well as in North America, South America,

²⁴⁷³ *ICAS Charter 2*; *ICAS International SRO Guide* 5-6, 16. Also see Boddewyn 1985 *Journal of Public Policy & Marketing* 129-130; Hawkes *Marketing Food To Children: Changes In The Global Regulatory Environment* 15-16; Woker *Advertising Law in South Africa* 14-15.

²⁴⁷⁴ *ICC Benefits of Self-Regulation* 3.

²⁴⁷⁵ As discussed in part 6.2.4.2 below, the ICC sets ethical advertising standards which form the basis of most national SRO codes around the world. Key principles include that (i) advertising should be legal, decent, honest and truthful; (ii) advertising should be identifiable as such, and (iii) claims in advertising should be capable of substantiation and not be misleading. Advertising which complies with the national SRO code in the country in which it is broadcast or published will generally be deemed to be ethical advertising. Also see parts 6.3.4, 6.3.5 and 6.7.2 below.

²⁴⁷⁶ *ICAS Charter* 4.

²⁴⁷⁷ *ICC Benefits of Self-Regulation* 4-5.

²⁴⁷⁸ *ICAS Charter* 5; *ICAS Global Factbook* 5. SRO bodies also have complaint resolution mechanisms. The complaints resolution process of the ARB is discussed in part 6.3.6 below.

²⁴⁷⁹ For a complete list, see *ICAS Global Factbook* 24-27.

the Middle East, Asia and Australia.²⁴⁸⁰ South Africa is the only country on the African continent with a SRO, namely the ARB.²⁴⁸¹ As discussed in more detail below, the ARB and its predecessor, the ASA, are seen as successful SROs.²⁴⁸² The image in Figure 6-1 below is an illustrative depiction of SRO locations globally:



Figure 6-1: Depiction of SROs located globally²⁴⁸³

The SRO in each country has been developed in a manner best suited to the relevant national consumer base, legal framework and advertising landscape in that country.²⁴⁸⁴ As such, self-regulatory systems worldwide do not necessarily function similarly. In this regard the International Council for Advertising Self-Regulation (hereafter “ICAS”)²⁴⁸⁵ has pointed out that no single SRO model would achieve the same outcome in every country. Moreover, it has been observed that:

²⁴⁸⁰ More than half of the SROs are located in Europe, followed by the Americas and the Asia-Pacific Region. See ICC *Commission on Marketing and Advertising Frequently Asked Questions* 6; ICAS *Global Factbook* 6, 11.

²⁴⁸¹ For a complete list of all SROs that are members of ICAS, See ICAS 2022 <https://icas.global/about/members/>.

²⁴⁸² Woker 2016 *SA Merc LJ* 32.

²⁴⁸³ As on 25 August 2022. Image sourced from ICAS 2022 *Request to Maintain the Consideration of Effective Advertising Self-Regulation as Part of the Policy Options Recommended to Member States* 1.

²⁴⁸⁴ ICAS Charter 2.

²⁴⁸⁵ ICAS *Global Factbook* 4; ICAS *International SRO Guide* 13.

Self-Regulation exists in most regions around the world. In some jurisdictions, it has been in place for decades. It takes a wide variety of forms in different countries, but its underlying ethos is always the same: advertising should be legal, decent, honest and truthful, prepared with a due sense of responsibility to the consumer, society, and the environment, and with proper respect for the principle of fair competition.²⁴⁸⁶

The SRO system adopted in South Africa through the operations of the ARB forms the primary focus of this chapter.

6.2.2 Distinguishing between voluntary self-regulation and co-regulation

A self-regulatory system may function in several ways. Firstly, an SRO system may operate completely independently of government regulation.²⁴⁸⁷ This is known as voluntary self-regulation, whereby industry participants wishing to abide by the self-regulatory system freely agree to do so, effectively creating a contractual basis underpinning compliance.²⁴⁸⁸ In terms of the voluntary self-regulation system, businesses in a particular industry are not compelled to agree to abide by an industry code or be regulated in terms thereof. However, pressure from peers in the industry generally has persuasive value.²⁴⁸⁹

Secondly, an SRO system may be mandated in terms of government regulation, where compliance is required in terms of legislation.²⁴⁹⁰ Co-regulation, which is also known as “legal self-regulation” or “enforced self-regulation”,²⁴⁹¹ is a form of self-regulation which is underpinned by legislation.²⁴⁹² In effect, co-regulation is a form of regulation that combines elements of voluntary self-regulation by the industry and government regulation through statute.²⁴⁹³ An industry code of practice underpinning a co-regulation system forms part of the statutory framework. That legislative backdrop often compels adherence to the relevant code of practice, effectively removing it from being a voluntary

²⁴⁸⁶ ICAS *International SRO Guide* 6.

²⁴⁸⁷ Hawkes *Marketing Food To Children: Changes In The Global Regulatory Environment* 16.

²⁴⁸⁸ *Reckitt Benckiser v ARB* para 6; *Bliss v ARB* (CC) para 4. This contractual relationship also aligns with international advertising self-regulation principles. See *ICAS Charter* 3.

²⁴⁸⁹ See the discussion below on the Ad Alert system of the ARB.

²⁴⁹⁰ Hawkes *Marketing Food To Children: Changes In The Global Regulatory Environment* 16.

²⁴⁹¹ Woker 2016 *SA Merc LJ* 33-34.

²⁴⁹² Scott and Van Dyk 2022 *SALJ* 260; Woker 2016 *SA Merc LJ* 33-34.

²⁴⁹³ ICAS 2022 *Request to Maintain the Consideration of Effective Advertising Self-Regulation as Part of the Policy Options Recommended to Member States* 3; OECD *Industry Self-Regulation* 11.

system. In the South African context the *CGSO Industry Code*, which was prescribed in terms of section 82(3) of the *CPA* as the industry code for the consumer goods and services industry, serves as a good example. The discussion in part 5.4.2.2 elaborates on the *CGSO Industry Code*, including the mandatory nature thereof under the *CPA*.²⁴⁹⁴

As discussed in part 6.3.3 below, the advertising self-regulatory system in South Africa is effectively a hybrid of the abovementioned approaches. The ARB system operates primarily on a voluntary self-regulation basis. However, there is a co-regulatory component as broadcast service licensees are compelled to comply with the ARB Code in terms of the *Electronic Communications Act 36 of 2005* (hereafter "*Electronic Communications Act*").²⁴⁹⁵

6.2.3 Distinguishing between self-regulation and self-discipline

A distinction should also be made between self-regulation by an industry body underpinned by either contractual or statutory compliance and the instance where one or more businesses issues non-binding pledges to demonstrate their moral and ethical business convictions and behaviour.²⁴⁹⁶ The latter occurrence is known as self-discipline. Self-discipline generally has no formal controls or compliance mechanisms, and the only sanction in this system is individual business conscience.²⁴⁹⁷

In 2002 the ASA²⁴⁹⁸ made the below submission, which effectively distinguishes a self-regulatory system from mere voluntary self-discipline pledges:

[t]he term self-regulation is potentially misleading, because at first sight it may suggest little more than voluntarily [sic] self-restraint on the part of an individual advertiser or agency. If self-regulation were indeed nothing more than this, it would deserve the lack of confidence sometimes expressed by those who are unfamiliar with it. In reality, properly designed and well administered [sic] self-regulatory systems provide a swift, flexible, inexpensive and effective means of enabling the responsible majority of the industry to restrain the irresponsible minority whose activities might otherwise bring advertising into public disrepute.

²⁴⁹⁴ In the *CGSO v Voltex* case the High Court held that compliance with the *CGSO Industry Code* is mandatory for all suppliers falling within the consumer goods and services industry in South Africa. See part 5.4.2.2 above for this case discussion.

²⁴⁹⁵ See the discussion in part 6.3.3 below.

²⁴⁹⁶ Boddewyn 1985 *Journal of Public Policy & Marketing* 139.

²⁴⁹⁷ Woker *Advertising Law in South Africa* 11; Boddewyn 1985 *Journal of Public Policy & Marketing* 139.

²⁴⁹⁸ ASA 2002 *Transformation of Advertising & Marketing Industry* 1.

The absence of enforceability or accountability mechanisms in instances where a company or business to a pledge fails to follow the voluntary undertakings made therein underlies the general lack of confidence in self-discipline in the advertising industry.²⁴⁹⁹ Unless a pledge forms part of a SRO code, that pledge falls outside the regular self-regulatory mechanism.²⁵⁰⁰

Pledges have been issued by the food industry in some regions,²⁵⁰¹ including Europe²⁵⁰² and the USA.²⁵⁰³ Whilst there have been some reports of positive outcomes following these pledges,²⁵⁰⁴ scholars have not held back from criticising these efforts by the food industry as being ineffective.²⁵⁰⁵ As such, the food industry does not have a good reputation for implementing health-promoting labelling or advertising measures by way of self-discipline pledges.²⁵⁰⁶

6.2.4 *Brief comments on advertising self-regulation in the global context*

The role and value of advertising self-regulation are acknowledged and supported by several international organisations and bodies.²⁵⁰⁷ The discussion below sets out brief comments on the international organisations and bodies that are relevant to this study.

²⁴⁹⁹ Woker *Advertising Law in South Africa* 11.

²⁵⁰⁰ ICAS *International SRO Guide* 14.

²⁵⁰¹ Loerke "Information, Incentives and Choice: A Viable Approach to Preventing Obesity" 218.

²⁵⁰² For additional reading on the *EU Pledge*, see www.eu-pledge.eu.

²⁵⁰³ ICAS *International SRO Guide* 13-14. For additional reading on the pledge in the USA called the Children's Food and Beverage Advertising Initiative, see Council of Better Business Bureau National Programs Inc, 2024 <https://bbbprograms.org/programs/all-programs/cfbai>; OECD *Industry Self-Regulation* 12-13.

²⁵⁰⁴ See Loerke "Information, Incentives and Choice: A Viable Approach to Preventing Obesity" 218; ICAS *Request to Maintain the Consideration of Effective Advertising Self-Regulation as Part of the Policy Options Recommended to Member States* 6-7.

²⁵⁰⁵ See, for example, Ghebreyesus 2023 *Lancet* 1138; Friel *et al* 2023 *Lancet* 1231; Khan, Frank and Swart 2023 *Public Health Nutrition* 2145; Yamoah *et al* 2021 *Int J Environ Res Public Health* 2, 8.

²⁵⁰⁶ Todd *et al* 2022 *Nutrients* 16.

²⁵⁰⁷ ICAS *Charter* 4.

6.2.4.1 The WHO and the UN

Self-regulation forms part of consumer protection.²⁵⁰⁸ The *United Nations Guideline for Consumer Protection* (2016) provides that:

[UN] Member States should, within their own national context, encourage the formulation and implementation by businesses, in cooperation with consumer organizations, of codes of marketing and other business practices to ensure adequate consumer protection. Voluntary agreements may also be established jointly by businesses, consumer organizations and other interested parties.²⁵⁰⁹

The UN also acknowledges that voluntary codes of marketing may form part of a country's consumer protection framework.²⁵¹⁰

The WHO also recognises that advertising self-regulation may have value.²⁵¹¹ Notably, the *WHO Recommendations* indicate that a variety of approaches may be adopted as part of the implementation, monitoring and evaluation of measures aimed at addressing the adverse effects of unhealthy foodstuffs advertising to children. The options listed are:

- i. statutory regulation through which implementation and compliance are a legal requirement, i.e. government regulation by way of legislation;
- ii. industry-led voluntary self-regulation covering the whole advertising industry sector,²⁵¹² which is independent of government regulation but nevertheless mandated by the government in some form, such as the setting of targets and monitoring implementation using key indicators; and/or

²⁵⁰⁸ The link between self-regulation and consumer protection dates back centuries. See Woker *Advertising Law in South Africa* 14.

²⁵⁰⁹ UN *Guidelines for Consumer Protection* para 31.

²⁵¹⁰ UNCTAD *Manual on Consumer Protection* 43-44.

²⁵¹¹ The WHO supports self-regulation in combination with existing statutory measures in respect of the advertising of pesticides, for example. See WHO and FAO *International Code of Conduct on the Distribution and Use of Pesticides Guidelines on Pesticide Advertising* (2010) 6, 13.

²⁵¹² The SCA has confirmed that the *ARB Code* applies to all advertising in South Africa, irrespective of whether or not the relevant advertiser has agreed to abide by the *ARB Code*. This aspect is discussed in part 6.3.5 below.

- iii. co-regulatory mechanisms, comprising statutory, self-regulation and/or voluntary industry initiatives which either exist within the framework of a government mandate or are not formally linked.²⁵¹³

The WHO's follow-up guideline to the *WHO Recommendations*, namely the *WHO Policies to Protect Children From the Harmful Impact of Food Marketing: WHO Guideline* (2023) also confirms that relevant policies may include "[a]ll measures to regulate marketing to which children are exposed", including government regulation by way of legislation, voluntary industry codes of conduct (i.e., self-regulation), as well as a so-called co-regulatory mechanism in terms of which an industry code has a legislative backdrop.

It should be clarified that the abovementioned three options are not mutually exclusive. In addition to government regulation through statutory provisions under *inter alia* the *FCDA*, *APSA*, *CPA* and *TM Act*, the discussion below will also demonstrate that the foodstuffs law framework in South Africa²⁵¹⁴ includes self-regulation by the advertising industry which in turn consists of a combination of voluntary self-regulation and co-regulation.

6.2.4.2 The International Chamber of Commerce

More than 85 years ago the International Chamber of Commerce (hereafter "ICC")²⁵¹⁵ issued the original *ICC Code of Advertising Practice* (1937).²⁵¹⁶ That Code has been updated over the years to keep abreast of developments in practices and technology in the advertising industry, and to ensure that it remains relevant and useful. Today's *ICC Advertising and Marketing Communications Code* (2018) (hereafter "*ICC Advertising Code*") is the tenth version.²⁵¹⁷

²⁵¹³ See *WHO Recommendations on the Marketing of Foods* para 22.

²⁵¹⁴ See part 1.8.6 above for a discussion of the concept of "food law" in South Africa.

²⁵¹⁵ The ICC is the biggest business organisation in the world. Its activities include promoting international trade and responsible business conduct. More than 6 million businesses from across more than 100 countries form part of the ICC business organisation network. See *ICC Advertising Code* 55. For more information, see ICC date unknown <https://iccwbo.org/>.

²⁵¹⁶ *ICC Advertising Code* 50; *ICAS International SRO Guide* 10.

²⁵¹⁷ *ICC Advertising Code* i, 2. A group of experts from around the world, consisting of legal practitioners, advertising practitioners and self-regulation specialists made up the task force within the ICC's Commission on Marketing and Advertising that drafted the 10th edition of the *ICC Advertising Code*.

The *ICC Advertising Code* is widely recognised as the gold standard for self-regulatory organisation codes,²⁵¹⁸ and the principles contained therein form the basis of most SRO codes around the world, including South Africa.²⁵¹⁹ The adoption of an SRO code in each specific jurisdiction is, however, usually tailored by incorporating the *ICC Advertising Code* principles whilst ensuring compliance with national law requirements, as well as suitability for the local consumer culture, language preferences and commercial practices.²⁵²⁰

In 2019 the ICC issued the *ICC Framework for Responsible Food and Beverage Marketing Communications* (hereafter “*ICC Food and Beverage Framework*”). This document is discussed in part 6.5 below.

6.2.4.3 The International Council for Advertising Self-Regulation and the European Advertising Standards Alliance

ICAS is an international platform that promotes responsible advertising through advertising self-regulation across the world.²⁵²¹ The ICAS platform joins various stakeholders, including SROs located in more than 50 countries;²⁵²² international associations that represent the advertising industry;²⁵²³ and legal experts in marketing and advertising.²⁵²⁴

See ICC *Commission on Marketing and Advertising Frequently Asked Questions*5; ICAS *International SRO Guide* 10.

²⁵¹⁸ Clause 4 of the Preface to the *ARB Code*; Mupangavanhu and Kerchhoff 2023 *De Jure* 99. Also see *Mars Inc v Advertising Standards Authority of South Africa* 2000 4 SA 511 (W) 514B-C.

²⁵¹⁹ *ICC Advertising Code* 17; ICC *Benefits of Self-Regulation* 2; *ICAS Charter* 2; ICAS *Global Factbook* 10.

²⁵²⁰ ICC *Benefits of Self-Regulation* 6; ICAS *Global Factbook* 4, 10; ICAS *International SRO Guide* 8, 17.

²⁵²¹ *ICAS Charter* 2; ICAS *Global Factbook* 3. Also see Mupangavanhu and Kerchhoff 2021 *SA Merc LJ* 278.

²⁵²² ICAS *Global Factbook* 6.

²⁵²³ This includes the International Advertising Association, the World Federation of Advertisers and the World Out of Home Organization. See ICAS 2022 <https://icas.global/about/members/>.

²⁵²⁴ *ICAS Charter* 2. Legal experts for part of the Global Advertising Lawyers Association. For more information see Global Advertising Lawyers Association 2024 <https://www.galalaw.com/>.

The European Advertising Standards Alliance (hereafter EASA) is known as the “sister-organisation”²⁵²⁵ of ICAS in Europe, and has more than 26 SRO members across that continent,²⁵²⁶ who also form part of the ICAS SRO membership.²⁵²⁷

Although the operations of SROs globally are not uniform, the principles contained in the *ICAS Charter* are supported by all ICAS members, including the EASA SROs.²⁵²⁸ In this regard all ICAS members have acknowledged that they:

strongly believe that effective advertising self-regulation demonstrates the industry’s ability and responsibility to successfully regulate itself by actively promoting the highest ethical standards in all commercial communications and thus safeguarding the public and consumer interest.²⁵²⁹

Self-regulatory codes should apply to all forms of commercial communications and to all relevant stakeholders in the advertising industry, including:

- i. advertisers who require and pay for advertising;
- ii. agencies that are responsible for creating advertising, both in content and form; and
- iii. the media that disseminate advertising through various platforms such as television, radio, outdoor advertising, print, and the web, and who may ultimately be required to enforce the decisions of the relevant SRO.²⁵³⁰

The involvement and collaborated efforts of all three pillars of the advertising industry promote the effectiveness and legitimacy of the advertising self-regulation mechanism.²⁵³¹ In this regard ICAS²⁵³² has noted that:

²⁵²⁵ ICAS *Global Factbook* 6. ICAS was initially created as a sub-committee within EASA, focusing on SROs from outside Europe. The ASA in South Africa became a member of EASA in 1995. In 2016 ICAS was launched independently of EASA, focusing on all SROs around the world, including those that are members of EASA in Europe. Both ICAS and EASA are headquartered in Brussels, Belgium. See ICAS *International SRO Guide* 9-10; ASA 2002 *Transformation of Advertising & Marketing Industry* 1.

²⁵²⁶ For a complete list of EASA member SROs, see EASA 2024 <https://www.easa-alliance.org/type-of-member/self-regulatory-organisations/>.

²⁵²⁷ ICAS *Global Factbook* 6. For more information on EASA, see ICAS *International SRO Guide* 8-9; EASA 2024 <https://www.easa-alliance.org/about-easa/what-we-do/>.

²⁵²⁸ ICAS *Global Factbook* 4.

²⁵²⁹ ICAS *Charter* 3.

²⁵³⁰ ICAS *Charter* 5. Also see ICAS *Global Factbook* 5; ICAS *International SRO Guide* 1, 18-19.

²⁵³¹ ICAS *Global Factbook* 5; ICAS *International SRO Guide* 19.

²⁵³² ICAS *International SRO Guide* 29.

[a]n effective Self-Regulatory System relies on the support of the entire advertising ecosystem, agencies and media included. Every actor can benefit from Self-Regulation: advertisers have an interest in building consumer trust in brands, agencies benefit from an increase in the demand for their services as brands look to develop creative yet responsible ads, and the media has an interest in making advertising revenues as sustainable as possible.

In its submissions to the WHO relating to updates to the WHO *Global NCD Action Plan 2013-2020*, ICAS confirmed it fully supports WHO efforts aimed at reducing and preventing the avoidable burden of premature death and disability resulting from NCDs. Moreover, ICAS has commended several components of the WHO's approach to addressing NCDs, including:

- promoting multisectoral collaboration and cooperation;
- the recognition and inclusion of voluntary measures (i.e., self-regulatory measures, pledges and codes), within the broad concepts of policy measures that can assist in those endeavours;
- encouraging the private sector to actively foster responsible advertising practices;
- encouraging a "national-level approach" that allows WHO member states to implement actions and policy interventions that are best suited to the national context of the relevant member state; and
- ensuring that recommended policy measures are aligned with up-to-date scientific evidence.²⁵³³

6.2.4.4 The International Food and Beverage Alliance

The International Food and Beverage Alliance (hereafter IFBA) is a non-profit organisation founded by the CEOs of leading multinational foodstuffs companies,²⁵³⁴ with the shared global goal of helping consumers "achieve balanced diets and healthy, sustainable lifestyles".²⁵³⁵ The IFBA has confirmed that its members support the strategies

²⁵³³ ICAS 2022 *Request to Maintain the Consideration of Effective Advertising Self-Regulation as Part of the Policy Options Recommended to Member States* 2.

²⁵³⁴ Including The Coca Cola Company, PepsiCo, Nestlé, Kellanova (previously known as Kellogg Company), Unilever, Kraft Foods, Mondelez, General Mills, Inc, Mars Incorporated, Ferrero and Grupo Bimbo. See IFBA 2022 *Progress Report* 3.

²⁵³⁵ IFBA 2022 *Progress Report* 3. Also see IFBA 2024 <https://ifballiance.org/about-us/>.

of the UN, the WHO and national governments that are aimed at improving consumer health and nutrition.²⁵³⁶ In this regard, it has been noted:

[a]s leading global food and beverage manufacturers, we support the UN Sustainable Development Goals (SDGs) and are committed to helping build a sustainable food system that advances food security, protects the environment and ensures economic opportunity while delivering healthy, sustainable diets to people around the world. We will do our part, using our global reach and scope to help shape a better and healthier world for people and the planet. However, we cannot do it alone. Collaboration and meaningful partnerships among all stakeholders is essential if we are to realize a healthy, sustainable and inclusive food system, capable of achieving the world's development goals.²⁵³⁷

Members of the IFBA support advertising self-regulation and have committed to complying with the *ICC Food and Beverage Framework* in all their advertising and other marketing communications.²⁵³⁸

The IFBA has issued the *IFBA Global Responsible Marketing Policy*, which forms the basis of various voluntary pledges that have been adopted by certain businesses within the food sector in more than 50 countries,²⁵³⁹ including South Africa.²⁵⁴⁰ As part of IFBA initiatives, 31 businesses within the South African food industry signed *The South African Marketing to Children Pledge* in 2009 on the initiative of the CGCSA. The pledge is annexed to this study as Addendum E. *The South African Marketing to Children Pledge* formed the basis of the *Food and Beverage Code*, which was included in the *ASA Code*²⁵⁴¹ and which now forms *Appendix J* to the *ARB Code*.

²⁵³⁶ See IFBA *2022 Progress Report* 3. For additional reading, see the IFBA letter addressed to the Director General of the WHO dated 15 September 2014 available at <https://ifballiance.org/wp-content/uploads/2020/07/59de15d6039fb.pdf>; IFBA letter addressed to the Director General of the WHO dated 13 May 2008 available at <https://ifballiance.org/wp-content/uploads/2020/07/59de14cc5ce7f.pdf>.

²⁵³⁷ IFBA *2022 Progress Report* 4.

²⁵³⁸ See IFBA *Global Responsible Marketing Policy* (2021) 1.

²⁵³⁹ To view all pledges worldwide, see IFBA 2024 <https://ifballiance.org/commitments/responsible-marketing/voluntary-regional-and-national-pledge-programmes/>.

²⁵⁴⁰ IFBA *2022 Progress Report* 12.

²⁵⁴¹ See *The South African Marketing to Children Pledge* 3.

6.2.4.5 Other international bodies and organisations that support self-regulation

In 2015 the Organisation of Economic Cooperation and Development (hereafter “OECD”) published a paper²⁵⁴² on the role and use of industry self-regulation in supporting consumer interests. Whilst acknowledging that industry self-regulation may have certain shortcomings or challenges,²⁵⁴³ the OECD discusses in this paper that industry self-regulation can have its advantages in complementing and supporting government as part of a multi-faceted response to a specific problem.²⁵⁴⁴ Several other global or foreign organisations also support advertising self-regulation,²⁵⁴⁵ including the International Advertising Association,²⁵⁴⁶ the World Federation of Advertisers,²⁵⁴⁷ and the Asia-Pacific Economic Cooperation.²⁵⁴⁸

6.3 The ARB

6.3.1 Background

Self-regulation within the South African advertising industry dates back to 1969.²⁵⁴⁹ Due to financial challenges the ASA was liquidated in 2018.²⁵⁵⁰ When the ASA closed its doors, this created a risk that consumers would be exploited, and the advertising and marketing

²⁵⁴² OECD *Industry Self Regulation: Role and Use in Supporting Consumer Interests* OECD Digital Economy Papers, No. 247, OECD Publishing, Paris (hereafter “OECD *Industry Self Regulation*”).

²⁵⁴³ See the discussion in part 6.8 below.

²⁵⁴⁴ OECD *Industry Self-Regulation* 9.

²⁵⁴⁵ ICC *Benefits of Advertising Self-Regulation* 9.

²⁵⁴⁶ The International Advertising Association is a global association which represents more than 4 000 persons and businesses that are involved in the various spheres of communication, advertising and marketing across the world. It actively promotes advertising self-regulation, and is a member of ICAS. See International Advertising Association 2024 <https://iaa.org.my/about-iaa/>; ICAS International SRO Guide 10.

²⁵⁴⁷ The World Federation of Advertisers is a member of ICAS. It is a global network association in the advertising industry, which has more than 10 000 members. The World Federation of Advertisers membership includes over 150 of the biggest brands in the world, spanning over 90% of the global communication spend. See ICAS *International SRO Guide* 10; World Federation of Advertisers date unknown <https://wfanet.org/about-wfa/who-we-are>.

²⁵⁴⁸ At the Asia-Pacific Economic Cooperation meeting held on 10 November 2017 in Vietnam, the benefits, efficiency and effectiveness of collaborative efforts between the public sector and SROs in that region were recognised. It was also pointed out that self-regulation has the potential to reduce the cost of doing business in the Asia-Pacific region. See *Joint Ministerial Statement of the 2017 Asia-Pacific Economic Cooperation Ministerial Meeting* para 23.

²⁵⁴⁹ ICAS *Global Factbook* 8. Woker *Advertising Law in South Africa* 20.

²⁵⁵⁰ Visagie 2023 *PER* 3.

industry would potentially be brought into disrepute.²⁵⁵¹ Fortunately, however, the ARB was established and registered shortly thereafter as a successor of the ASA,²⁵⁵² and in order to fill the *lacuna* in the regulation of advertising in South Africa.²⁵⁵³

The ARB²⁵⁵⁴ is a non-profit company with members.²⁵⁵⁵ It is an independent body²⁵⁵⁶ which aims to “ensure that its system of self-regulation works in the public interest”.²⁵⁵⁷ The objectives of the ARB include to “self-regulate the content of advertising in South Africa with quality decisions and fair process”.²⁵⁵⁸

The ARB considers itself to be a public watchdog in the advertising industry.²⁵⁵⁹ Its slogan is “PROTECTING CONSUMERS THROUGH RESPONSIBLE ADVERTISING”.²⁵⁶⁰ Moreover, the ARB and its members²⁵⁶¹ unequivocally agree that all advertising, which includes product labels and packaging,²⁵⁶² “should be prepared with a sense of responsibility to the consumer”,²⁵⁶³ and acknowledge that:

[a]dvertising is a service to the public and, as such, should be informative, factual, honest, decent and its content should not violate any of the laws of the country.²⁵⁶⁴

²⁵⁵¹ See *Memorandum of Incorporation of The Advertising Regulatory Board NPC* (hereafter “ARB MOI”) para 3.1.3.

²⁵⁵² *Reckitt Benckiser v ARB* para 5; Mupangavanhu and Kerchhoff 2021 *SA Merc LJ* 277.

²⁵⁵³ ARB MOI para 3.1.3.

²⁵⁵⁴ The Advertising Regulatory Board NPC incorporated in terms of the *Companies Act* under the laws of the Republic of South Africa, with company registration number 2018/5288775/08. See ARB MOI para 1.2(f)(iv); ARB 2024 <https://www.arb.org.za/>.

²⁵⁵⁵ ARB MOI paras 2.1, 9. It also functions as a public benefit organisation. See ARB *2nd Quarter 2022 Newsletter* 2.

²⁵⁵⁶ In the context of the independence of SROs, this means that they function independently of government, specific interest groups and the advertising industry. See *ICAS Charter* 5; *ICAS International SRO Guide* 17.

²⁵⁵⁷ Clause 1 of the *Preface to the ARB Code*; cl 4.2 of Section I to the *ARB Code*.

²⁵⁵⁸ ARB MOI para 3.1.1.

²⁵⁵⁹ Visagie 2023 *PER* 5.

²⁵⁶⁰ ARB 2023 <https://www.arb.org.za/>.

²⁵⁶¹ See the discussion in part 6.3.3 below.

²⁵⁶² Cl 4.1 of Section I of the *ARB Code*; ARB 2023 <https://www.arb.org.za/>. Also see parts 1.8.3 and 1.8.4 above which discuss the meaning of “label” and how it qualifies as “advertising” in terms of the *FCDA*.

²⁵⁶³ Clause 1.2 of Section I of the *ARB Code*.

²⁵⁶⁴ See cl 11 of the *Preface to the ARB Code*; cl 1.1 of Section I of the *ARB Code*.

The ARB is a member of ICAS.²⁵⁶⁵ Impressively the ARB was the winner of the ICAS Special Recognition Award in 2023.²⁵⁶⁶ In addition the ARB's CEO²⁵⁶⁷ served on the ICAS executive committee in 2023.²⁵⁶⁸

Since the establishment of the ARB in 2018²⁵⁶⁹ the South African courts have considered the functioning of this system of self-regulation in two matters. Firstly, in *Reckitt Benckiser Pharmaceuticals Proprietary Limited v The Advertising Regulatory Board and Colgate-Palmolive Limited* 2021 JDR 0300 (GJ) (hereafter *Reckitt Benckiser v ARB*) the Johannesburg High Court was approached to review and set aside a ruling of the final appeal body within the ARB, namely the Final Appeals Committee.²⁵⁷⁰ The second case, namely *Bliss Brands (Pty) Limited v Advertising Regulatory Board NPC* 2021 JDR 1019 (GJ) (hereafter *Bliss v ARB a quo*) was also heard before the Johannesburg High Court, followed by the SCA²⁵⁷¹ and subsequently the Constitutional Court.²⁵⁷² Whilst the Constitutional Court ultimately refused leave to appeal in *Bliss v ARB (CC)*,²⁵⁷³ important comments that justify the legitimacy of the ARB were made by the apex court. In considering the function of the ARB the Constitutional Court noted that:

[the] core function [of the ARB] is to ensure that advertising by its members accords with its Code of Advertising Practice (Code). The Code states its main objects to be: to protect consumers; to ensure that advertisers maintain standards of professionalism; and to ensure that advertising, which is a service to the public, is informative, factual, honest and decent.²⁵⁷⁴

²⁵⁶⁵ The ARB has been an ICAS member since 1 January 2019. See Mupangavanhu and Kerchhoff 2021 *SA Merc LJ* 278; ICAS 2019 <https://icas.global/arb-south-africa-joins-icas/>.

²⁵⁶⁶ See BizCommunity 2023 <https://www.bizcommunity.com/Article/196/12/238289.html>; ARB *2nd Quarter 2023 Newsletter* 1. This is not the first award to the SRO system in South Africa. In 2005 the ASA received the annual EASA award for "best practice in advertising self-regulation". See Hawkes *Marketing Food To Children: Changes In The Global Regulatory Environment* 36.

²⁵⁶⁷ Ms. Gail Schimmel is the current CEO of the ARB. Ms. Schimmel is a qualified attorney in South Africa. For more information on Ms. Schimmel's background, see ARB *First Quarter 2022 Newsletter* 6.

²⁵⁶⁸ ARB *2nd Quarter 2023 Newsletter* 4.

²⁵⁶⁹ Visagie 2023 *PER* 2.

²⁵⁷⁰ For a discussion on review proceedings relating to ARB rulings before the high court, see part 6.3.6.4 below.

²⁵⁷¹ *Advertising Regulatory Board NPC v Bliss Brands (Pty) Ltd* 2022 JDR 0769 (SCA) (hereafter "*ARB v Bliss (SCA)*").

²⁵⁷² *Bliss Brands (Pty) Limited v Advertising Regulatory Board NPC* 2023 JDR 2258 (CC) (hereafter "*Bliss v ARB (CC)*").

²⁵⁷³ *Bliss v ARB (CC)* para 23.

²⁵⁷⁴ *Bliss v ARB (CC)* para 3. Also see *ARB v Bliss (SCA)* para 1.

Importantly, the ARB is seen as “an adjudicative administrative tribunal”.²⁵⁷⁵ In *ARB v Bliss (SCA)* the court noted:

... the ARB's decision-making processes are strictly governed by the Code, the MOI and its internal procedures. Its adjudicative procedures, with rights of appeal before bodies that include legal practitioners and retired judges, are the very antithesis of self-help. As with any completed administrative process that adversely affects a person's rights, a dissatisfied person may approach a court to review decisions taken by the ARB's adjudicative bodies. This is a right guaranteed by ss 33 and 34 of the Constitution.²⁵⁷⁶

Against this background the discussion that follows sets out various components of the ARB's functions under separate sub-headings. General comments are made on the ARB's *Code of Advertising Practice*,²⁵⁷⁷ after which membership of the ARB²⁵⁷⁸ and its mandate to consider advertising complaints²⁵⁷⁹ are discussed. This is followed by comments on the jurisdiction of the ARB to consider advertising complaints against advertisers who are not members of the ARB.²⁵⁸⁰ The ARB's complaints resolution process²⁵⁸¹ sets out the manner in which complaints are dealt with, the sanctions that may be imposed, the internal appeal process, and reviews.²⁵⁸² Lastly, the funding model of the ARB is also explained.²⁵⁸³

6.3.2 *Code of Advertising Practice*

Upon its incorporation the ARB adopted the existing *Code of Advertising Practice* that had until then been administered by the ASA.²⁵⁸⁴ The *ARB Code* is the guiding document of the ARB and sets out the rules that the ARB members in the marketing and advertising industry have agreed to follow in order to foster consumer trust in those businesses within

²⁵⁷⁵ *ARB v Bliss (SCA)* para 50.

²⁵⁷⁶ Section 33 of the *Constitution* deals with just administrative action. In terms of s 33(1), everyone has the right to administrative action that is lawful, reasonable and procedurally fair. Section 34 deals with access to courts, and provides that everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum. The ARB is deemed to be a “tribunal” or “forum” within the ambit of s 34 of the *Constitution*. See *ARB v Bliss (SCA)* paras 50-51. Although the ARB is a private body, it performs a public function. See the discussion in part 6.3.6.4 below.

²⁵⁷⁷ Part 6.3.2

²⁵⁷⁸ Part 6.3.3.

²⁵⁷⁹ Part 6.3.4.

²⁵⁸⁰ Part 6.3.5.

²⁵⁸¹ The dispute resolution mechanism within the ARB was referred to as a “complaints resolution process” in *Reckitt Benckiser v ARB* para 1.

²⁵⁸² Part 6.3.6.

²⁵⁸³ Part 6.3.7.

²⁵⁸⁴ ARB MOI para 3.1.4; *Reckitt Benckiser v ARB* para 5.

the advertising industry.²⁵⁸⁵ The *ARB Code* essentially sets out guidelines on acceptable and unacceptable advertising conduct and content.²⁵⁸⁶ Advertising content should not bring advertising into disrepute or reduce consumer confidence therein as a service to the industry or general public.²⁵⁸⁷

The *ARB Code* primarily regulates commercial advertising in South Africa,²⁵⁸⁸ although it also applies as far as possible to advertising content issued by non-commercial actors as well as government departments and agencies.²⁵⁸⁹ An “advertisement” is defined in the *ARB Code* as any visual or aural communication, representation, reference or notification of any kind which either (i) is intended to promote the sale, leasing or use of any goods or services or (ii) which appeals for or promotes the support of any cause.²⁵⁹⁰ The *ARB Code* also confirms that product labels and packaging are also deemed to be advertising.²⁵⁹¹ Both foodstuffs advertising and labelling would, therefore, constitute “advertisements” under the auspices of the *ARB Code*.²⁵⁹² Advertising extends to all advertising media and wherever it may appear.²⁵⁹³ This includes but is not limited to television, radio, print media (including newspapers and magazines), outdoor advertising (such as billboards or posters) and films, as well as websites and digital media (including social media).²⁵⁹⁴ Having considered ARB rulings issued from the establishment of the

²⁵⁸⁵ ARB MOI para 3.1.4.

²⁵⁸⁶ *Reckitt Benckiser v ARB* para 6.

²⁵⁸⁷ Clause 1.4 of Section I of the *ARB Code*.

²⁵⁸⁸ Clause 2.1 of Section I of the *ARB Code*.

²⁵⁸⁹ Political advertising such as election advertisements is, however, excluded from the scope of the ARB. See cl 2.2 and 2.3 of Section I of the *ARB Code*; ARB *1st Quarter 2024 Newsletter* 1. Despite this exclusion, the ARB may consider advertising complaints relating to non-political activities of government departments. As an example, in *Department of Health / Nonkazimale Mbanja* (Directorate ruling of 13 March 2019), the ARB found that the unauthorised prominent use of an image of the complainant on a billboard of the DOH situated next to the highway was contrary to cl 11 of Section II of the *ARB Code*. See further *KZN Department of Transport / Ismail Kadwa / 872* (Directorate ruling of 29 August 2020).

²⁵⁹⁰ See cl 4.1 of Section I of the *ARB Code*.

²⁵⁹¹ In addition, menus and display material also constitute “advertising”. See cl 4.1 of Section I of the *ARB Code*. See, for example, *Kauai / Craig Kalan / 3049* (Directorate ruling of 8 February 2024) (hereafter *Kauai / Kalan*).

²⁵⁹² See parts 1.8.3 and 1.8.4 above which discuss the meaning of a “label” and how it qualifies as “advertising” in terms of the *FCDA*.

²⁵⁹³ See cl 4.1 of Section I to the *ARB Code*.

²⁵⁹⁴ ARB 2023 <https://www.arb.org.za/complaints.html>; *ICC Advertising Code* 5.

ARB in 2018 up to and including July 2024, it is apparent that foodstuffs advertising complaints relate predominantly to three advertising media categories, namely:

- i. television advertisements;²⁵⁹⁵
- ii. foodstuffs label and packaging;²⁵⁹⁶ and
- iii. digital and online content, including social media.²⁵⁹⁷

In line with most SROs around the world, the basic principles contained in the *ARB Code* are based on the *ICC Advertising Code*.²⁵⁹⁸ These basic principles are set out in Section II of the *ARB Code*. The discussion in parts 6.3 and 6.4 below will include comments on relevant basic principles that have been raised or considered in ARB disputes relating to foodstuffs advertising and labelling.

²⁵⁹⁵ See, for example, *Wimpy / Galane / 1964* (Directorate ruling of 23 May 2022) (hereafter "*Wimpy / Galane*") 1; *Pedros / Nando's / 2307* (Directorate ruling of 8 November 2022) (hereafter "*Pedros / Nando's*") 1; *Clover / Lancewood / 850* (21 July 2020) (hereafter "*Clover / Lancewood*") 1; *Homemark Detox Tea / Dr Harris Steinman / 1048* (hereafter "*Homemark / Steinman*") 1; *Chicken Licken / Ramokhele Dial Mohkele* (Directorate ruling of 25 March 2021) (hereafter "*Chicken Licken / Mokhele*") 1; *Spar / Derick Kruger / 792* (Directorate ruling of 13 May 2020) (hereafter "*Spar / Kruger*") 1; *Doritos / Thato Serapelo / Kevin Harvey / 177* (Directorate ruling of 9 May 2019) 1.

²⁵⁹⁶ Examples include *Spring Meadows Dairy Farm / Offer / 2912* (Directorate ruling of 13 December 2023) (hereafter "*Spring Meadows / Offer*") 1 (yoghurt label); *Zuma Restaurant and Lounge (Pty) Ltd / Azumi Limited / 2596* (Directorate ruling of 25 May 2023) (hereafter "*Zuma Restaurant / Azumi*") 3-5 (restaurant labels and packaging); *Parmalat / Dr Harris Steinman / 2652* (Directorate ruling of 25 June 2023) (hereafter "*Parmalat / Steinman*") 1 (yoghurt label); *Olive Joy / Van Wyk / 1861* (Directorate ruling of 10 February 2022) (hereafter "*Olive Joy / Van Wyk*") 1 (blended oil label); *Tiger Brands / Premier / 989* (Directorate ruling of 23 September 2020) (hereafter "*Tiger Brands / Premier*") 1 (bread packaging); *Clover / Lancewood 1* (yoghurt label); *Woolworths / Jean Naude / 10-01-19* (Directorate ruling of 4 February 2018) (hereafter "*Woolworths / Naude*") 1 (sliced sandwich ham packaging); *Henties Orange Juice / Steinman / 454* (Directorate ruling of 14 October 2019) (hereafter "*Henties Orange Juice / Steinman*") 1 (orange juice label); *Pioneer Foods (Fruitree) / Liesel Kershoff / 23-11-18* (Directorate ruling of 22 January 2019) (hereafter "*Pioneer Foods / Kershoff*") 1 (beverage packaging); *Kelloggs / Bradley Wilson / 08-11-18* (Directorate ruling of 6 December 2018) (hereafter "*Kelloggs / Wilson*") 1 (cereal packaging); *Future Life / Tiger Brands / 1032* (Directorate ruling of 3 December 2020) (cereal packaging).

²⁵⁹⁷ See for example *Zuma Restaurant / Azumi* 1 (website, Facebook and Instagram); *Wimpy / Galane* 1 (YouTube); *McCain / Steers / 78* (Directorate ruling of 26 February 2019) (hereafter "*McCain / Steers*") 1 (Facebook); *Uber Eats / Marina Smith / 566* (Directorate ruling of 29 November 2019) (hereafter "*Uber Eats / Smith*") 1 (email advertisement); *KFC / Irshaad Gangat-Duvenhage / 1425* (Directorate ruling of 12 May 2021) (hereafter "*KFC / Duvenhage*") 1 (Facebook); *Burger & Lobster Cape Town / Werner Lotter / 1420* (Directorate ruling of 7 May 2012) (hereafter "*Burger & Lobster / Lotter*") 1 (Instagram); *Col'acchio / Harrie Esterhuyse* (Directorate ruling of 26 June 2019) 1 (website).

²⁵⁹⁸ Clause 4 of the Preface to the *ARB Code*; *Bliss v ARB* (CC) para 3.

It should be noted that SRO codes should not contradict national legislation, and self-regulatory systems should not deprive consumers of any statutory protection or rights.²⁵⁹⁹ In *Henties Orange Juice / Steinman* the Directorate observed that the ARB can neither make a decision that forces an advertiser to breach any government regulation nor issue a decision that contradicts such regulation.²⁶⁰⁰ This means that the ARB will never issue a ruling which conflicts with legislation. The *ARB Code* has been modelled to fit the circumstances in South Africa,²⁶⁰¹ and it “gives effect and is subject to” the *Constitution*.²⁶⁰² As the *Constitution* is the supreme law in South Africa,²⁶⁰³ this approach is legally sound. It is in line with the intention that the *ICC Advertising Code* should “be applied against the backdrop of whatever legislation may be applicable”²⁶⁰⁴ in the country where it is adopted as the basis of an SRO code. An important example of where the *ARB Code* deviates from the *ICC Advertising Code* to align with the *Constitution* and national legislation is in the definition of “children”. This aspect is discussed in parts 6.5.2 and 6.6 and below.

Various individual codes which relate to specific industries within the broader advertising sector form appendices to and are deemed to be part of the *ARB Code*.²⁶⁰⁵ Of specific relevance to this study is *Appendix J*, which is discussed in part 6.6 below.

The administrative scheme within the ARB essentially consists of three tiers.²⁶⁰⁶ Firstly, the Directorate is primarily tasked with administering and ensuring compliance with the *ARB Code* and will usually, as a point of departure, deal with formal complaints filed.²⁶⁰⁷ The complaints resolution process is discussed in part 6.3.6 below. Secondly, the Advertising Appeals Committee (AAC) considers appeals to Directorate rulings. Thirdly,

²⁵⁹⁹ ASA 2002 *Transformation of Advertising & Marketing Industry* 1.

²⁶⁰⁰ *Henties Orange Juice / Steinman* 3.

²⁶⁰¹ Clause 4 of the Preface to the *ARB Code*.

²⁶⁰² Clause 3.10 of Section I of the *ARB Code*. This conforms to the high standards principle of ICAS. See *ICAS Charter* 5.

²⁶⁰³ See s 2 of the *Constitution*. Any law or conduct which is inconsistent with the *Constitution* is invalid.

²⁶⁰⁴ *ICC Advertising Code* 5.

²⁶⁰⁵ Clause 5 of the Preface to the *ARB Code*; cl 4.9 of Section I of the *ARB Code*.

²⁶⁰⁶ *Reckitt Benckiser v ARB* para 7.

²⁶⁰⁷ Clauses 8.1 and 8.2 of the *Procedural Guide*; ARB MOI para 3.1.2; *Bliss v ARB* (CC) para 8; Visagie 2023 *PER* 8.

the Final Appeals Committee (hereafter “FAC”) deals with appeals to AAC rulings. The appeals process is discussed in part 6.3.6.3 below.

6.3.3 Membership

The three founding members of the ARB are the Marketing Association of South Africa, the Association for Communication and Advertising (hereafter “ACA”) and the Interactive Advertising Bureau South Africa (hereafter “IAB”).²⁶⁰⁸ Other members include the National Association of Broadcasters; the Cosmetic, Toiletries and Fragrances Association of South Africa; the Drinks Federation of South Africa; the Pet Food Industry Association of Southern Africa, and several well-known local newspapers, magazines, radio stations and print industry associations.²⁶⁰⁹ The support of most of the advertising industry lends credibility to the ARB mechanism in South Africa.²⁶¹⁰

Generally membership of the ARB functions on a voluntary basis underpinned by a contractual agreement to abide by the *ARB Code* and decisions issued by the ARB. The ARB MOI²⁶¹¹ provides that any person, corporation, organisation or body which is involved in or affiliated with any of the activities listed below may apply to become a member:

- i. the marketing of any goods or services;
- ii. the preparation, printing, broadcasting or dissemination of advertising;
- iii. sponsorship; or
- iv. the protection of consumers or advertising in an industry.

This diverging range of businesses and organisations demonstrates that the *ARB Code* is applicable to all three categories of participants in the advertising industry, namely the advertiser, advertising agencies, and media channels or platforms.²⁶¹²

²⁶⁰⁸ ARB MOI para 6.38. Also see ARB 2023 <https://www.arb.org.za/stakeholders---funders.html>.

²⁶⁰⁹ Clause 6 of the Preface to the *ARB Code*; Visagie 2023 *PER* 3; ARB 2023 <https://www.arb.org.za/stakeholders---funders.html>.

²⁶¹⁰ ICAS *International SRO Guide* 50.

²⁶¹¹ ARB MOI para 3.1.5. The Board of the ARB is tasked with the consideration and approval of member applications. See ARB MOI para 6.1(a). The Board of the ARB is made up of a chairperson, vice-chairperson, the CEO, and nine directors. See ARB 2023 <https://www.arb.org.za/board---team.html>.

²⁶¹² See clauses 3.8 and 4.5 of Section I of the *ARB Code*.

Members of the ARB have agreed to be bound by the jurisdiction of the ARB and the provisions of the *ARB Code*.²⁶¹³ In addition ARB member bodies which have their own members have also agreed to bind their members to the ARB's jurisdiction and the *ARB Code*.²⁶¹⁴ Members of members are therefore also indirectly bound by the ARB's jurisdiction and *ARB Code*.²⁶¹⁵

There is, however, one exception to the voluntary contractual basis of the ARB membership system. This is currently²⁶¹⁶ found in section 55(1) of the *Electronic Communications Act 36 of 2005* (hereafter *Electronic Communications Act*), which provides that:

[a]ll broadcasting service licensees must adhere to the Code of Advertising Practice ... as from time to time determined and administered by the Advertising Standards Authority of South Africa and to any advertising regulations prescribed by the Authority in respect of scheduling of adverts, infomercials and programme sponsorships.²⁶¹⁷

This provision was formulated at a time when the ASA functioned as the advertising self-regulation body in South Africa. "Advertising Standards Authority of South Africa" is defined in the *Electronic Communications Act* as "the entity which regulates the content of advertising, or any entity that replaces it but has the same functions".²⁶¹⁸ This definition is broad enough to allow section 55(1) of the Act to be equally applicable to the ARB as the successor of the ASA. This was confirmed in *ARB v Bliss (SCA)*, in which the court held that:

[a]ll advertising in the electronic broadcast media is subject to the Electronic Communications Act 36 of 2005 (ECA). Every electronic broadcaster must adhere to the Code as determined and administered by the ARB, which has replaced and performs the same functions as the former Advertising Standards Authority of South Africa (ASA).²⁶¹⁹

²⁶¹³ *ARB MOI* para 3.2.3; cl 6 of the Preface to the *ARB Code*.

²⁶¹⁴ *ARB MOI* para 3.2.3.

²⁶¹⁵ *ARB v Bliss (SCA)* para 18(a). Also see *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority SA 2006 1 SA 461 (SCA)* paras 4, 27.

²⁶¹⁶ Prior to its repeal in terms of s 97 of the *Electronic Communications Act*, the *Independent Broadcast Authority Act 153 of 1993* required that all broadcast advertising comply with the *ASA's Code of Advertising Practice*. See *Woker Advertising Law in South Africa* 20.

²⁶¹⁷ There is a similar legislative requirement in respect of cable television advertising in India. See *ICAS International SRO Guide* 34.

²⁶¹⁸ See s 1 of the *Electronic Communications Act*.

²⁶¹⁹ *ARB v Bliss (SCA)* para 1.

Following the above, all advertising which is broadcast in South Africa by a broadcast service licensee under the *Electronic Communications Act* is subject to compliance with the *ARB Code*, irrespective of whether or not the relevant advertiser is an ARB member.²⁶²⁰ This includes television broadcasters such as the South African Broadcasting Association, MultiChoice, MNet and eTV, as well as national radio stations like Highveld Stereo 94.7 FM, 702, 5 FM, RSG, and Jacaranda FM.²⁶²¹

Section 55(1) of the *Electronic Communications Act* provides legitimacy to the *ARB Code* by recognising its relevance in the South African legal system. It is also formulated in such a manner that changes within the advertising self-regulatory system do not deter the value attached to the local SRO code which is, in principle, based on the *ICC Advertising Code*. Another apparent advantage of this wording is that it does not make amendments to the ARB body or the *ARB Code* subject to the provisions of the *Electronic Communications Act* or approval by the government department that administers this Act,²⁶²² thereby avoiding the pitfall of stifling amendments due to lags in legislative reform.²⁶²³ On this basis the *Electronic Communications Act* serves to acknowledge the *ARB Code* by providing it with a legal backdrop. This is done, however, without entirely transposing the SRO system from voluntary self-regulation to strict co-regulation, where amendments to the *ARB Code* would be subject to government approval.²⁶²⁴

Entities that are bound by the *ARB Code*, either by way of agreement or under the *Electronic Communications Act*, may not prepare or accept any advertising which conflicts with the *ARB Code*. Furthermore, those entities are required to withdraw any advertising that is deemed to be unacceptable by the ARB Directorate or, should a ruling be taken on appeal, the AAC or FAC, as the case may be.²⁶²⁵ In this regard, it should also be mentioned that the ARB has created a series of logos for responsible businesses in the

²⁶²⁰ *ARB v Bliss* (SCA) paras 18(d), 21-23.

²⁶²¹ Visagie 2023 *PER* 4.

²⁶²² Namely, the Department of Communications and Digital Technology. See s 1 of the *Electronic Communications Act*. Also see Department of Communications and Digital Technology 2023 <https://www.dcdt.gov.za/documents/legislations/acts.html>.

²⁶²³ This potential concern with co-regulation has occurred with the CGSO under the *CPA*. See part 6.7.3.3 below.

²⁶²⁴ Also see the additional discussions in parts 6.7.3.3 and 7.3.4 that follow.

²⁶²⁵ Clause 11 of the Preface to the *ARB Code*.

advertising industry that have agreed to abide by the *ARB Code* and ARB rulings, which are illustrated below:



*Figure 6-2: Responsible ARB Advertiser, Agency and Media logos*²⁶²⁶

The use of the abovementioned logos by a business in the advertising industry indicates to others that the relevant business has agreed to adhere to the principles of self-regulation under the *ARB Code*, which demonstrates a commitment to ethical advertising practices that are ultimately aimed at furthering consumer protection in the advertising industry.²⁶²⁷

6.3.4 The mandate of the ARB

As a first observation, it should be noted that the *ARB Code* applies only to advertisements which, as noted above, would include labelling. Any material appearing in the media that does not qualify as an advertisement would therefore not be covered by the provisions of the *ARB Code* and would automatically fall outside the mandate of the ARB. This would include the content of material primarily aimed at entertainment or education, such as television programmes and series or movies.²⁶²⁸ In addition, editorial material such as newspaper articles or news of the day for which no consideration has been paid or received²⁶²⁹ would also not constitute advertising material.²⁶³⁰ Whilst the ARB may consider

²⁶²⁶ Images sourced from ARB 2023 <https://www.arb.org.za/responsible-advertising.html>.

²⁶²⁷ ARB 2023 <https://www.arb.org.za/responsible-advertising.html>.

²⁶²⁸ *ICC Advertising Code* 4. Consumers who are concerned by the content of broadcast programming may file a complaint with the Broadcasting Complaints Commission of South Africa ("BCCSA"). The BCCSA does not consider complaints relating to the advertising of an entity that is bound by, or agreed to comply with, the *ARB Code*. See BCCSA date unknown <https://www.bccsa.co.za/bccsa-procedure/>. For more information on the Broadcasting Complaints Commission of South Africa, see www.bccsa.co.za.

²⁶²⁹ If consideration has been given or received for such editorial matter, it may potentially qualify as an advertisement. See cl 4.1 of Section I of the *ARB Code*.

²⁶³⁰ See, for example, *Zuma Restaurant / Azumi*⁸. In that matter, the Directorate concluded that the press articles and reports of the advertiser in the media fell outside the definition of an "advertisement" in terms of the *ARB Code*. As such, that material was excluded from consideration of the complaint. Generally speaking, the Press Ombud, forming part of the Press Council of South Africa, may be able

the content of advertising, it is not mandated to consider concerns raised regarding the production phase of the advertising. During the COVID-19 period a consumer raised concerns about a television commercial for Food Lover's Market.²⁶³¹ Part of the complaint included the concern that "all Covid precautions and protocols were not followed during the filming of the advertisement."²⁶³² In clarifying the limits of its mandate, the Directorate noted:

the question of whether Covid protocols were observed on the set and during the filming of the commercial falls beyond the scope of the ARB. The only question before the ARB is whether the content of the commercial breaches the Code of Advertising Practice.²⁶³³

Following the above, an important aspect to highlight is the fact that the mandate of the ARB is limited to enforcing the ethical standards and principles contained in the *ARB Code*.²⁶³⁴ The ARB functions as a specialised "adjudicative administrative tribunal",²⁶³⁵ and does not exercise an official judicial function.²⁶³⁶ The ARB is not tasked with enforcing government regulations or other laws that fall within the jurisdiction of other regulators.²⁶³⁷ In *Spring Meadows / Offer*, it was highlighted that the Directorate does not have the power to determine whether or not an advertiser has contravened legislation. In addition the Directorate is not empowered to order an advertiser to withdraw a claim where such a claim is expressly permissible in terms of legislation.²⁶³⁸

That being said, because advertising spans virtually all goods and services in commerce, it is unavoidable that certain provisions of the *ARB Code* will overlap with subject matter regulated in other laws.²⁶³⁹ Broadly speaking, the prohibition against false and misleading advertising in clause 4 of Section II of the *ARB Code* is also contained in the *FCDA*, *APSA*,

to consider complaints relating to editorial content in newspapers, magazines and online publications. For more information see Press Council of South Africa 2024 <https://presscouncil.org.za/>.

²⁶³¹ *Food Lover's Market / Van Wyk / 1702* (Directorate ruling of 8 November 2021) (hereafter "*Food Lover's Market / Van Wyk*") 1.

²⁶³² *Food Lover's Market / Van Wyk* 1.

²⁶³³ *Food Lover's Market / Van Wyk* 4.

²⁶³⁴ Clause 7.3 of the *Procedural Guide*; *ARB v Bliss* (SCA) para 58.

²⁶³⁵ *ARB v Bliss* (SCA) para 50; *Reckitt Benckiser v ARB* para 43.

²⁶³⁶ *ARB v Bliss* (SCA) para 58.

²⁶³⁷ Visagie "The Mandate of the Advertising Regulatory Board" 349.

²⁶³⁸ *Spring Meadows / Offer* 4.

²⁶³⁹ Visagie "The Mandate of the Advertising Regulatory Board" 349; *ICC Advertising Code* 3.

CPA and *Trade Marks Act*, for example.²⁶⁴⁰ Clause 8 in Section II, which deals with the exploitation of advertising goodwill, effectively overlaps with passing off under the common law.²⁶⁴¹ In addition, clause 9 of Section II prohibits imitation, and this may also overlap with trademark or copyright infringement.²⁶⁴² In the circumstances, and depending on the facts of a specific matter, it is also possible that elements of a complaint lodged with the ARB may overlap with a cause of action which could be considered by a different tribunal or court.²⁶⁴³

The primary test to be applied in assessing whether advertising contravenes the *ARB Code* is the probable impact of the advertisement as a whole upon those who are likely to see or hear it. Each part of the advertisement, including all visual and aural components, as well as the nature of the medium through which the advert is conveyed to the consumer, will also be taken into consideration.²⁶⁴⁴ Often, ARB rulings will include reference to the impact or perception of the advertisement on the “hypothetical reasonable consumer”,²⁶⁴⁵ and an objective approach is adopted in considering that aspect in an advertising complaint.²⁶⁴⁶ In *Wimpy / Galane* the Directorate clarified that it deems the hypothetical reasonable consumer as a fictional, reasonable person who is normal, balanced and right-thinking and who is neither over-sensitive nor hypercritical.²⁶⁴⁷

When considering complaints, it is occasionally necessary for the ARB to consider applicable legislative provisions to determine if the advertisement at issue contravenes one or more provisions of the *ARB Code*.²⁶⁴⁸ In fact, several complaints before the ARB

²⁶⁴⁰ For a discussion of misleading advertising under the *FCDA*, *APSA*, *CPA* and *TM Act*, see part 2.4.8.3.

²⁶⁴¹ *ARB v Bliss* (SCA) para 58.

²⁶⁴² *ARB v Bliss* (SCA) para 58. Also see *Nestlé (South Africa) Ltd Ltd v Mars Incorporated* 2001 4 All SA 315 (A) paras 18-21; Visagie 2023 *PER* 22.

²⁶⁴³ *ARB v Bliss* (SCA) para 58. Where relevant, the ARB will consider case law when deciding a matter. See part 6.3.6.3 below for an example.

²⁶⁴⁴ See cl 3.2 of Section I of the *ARB Code*.

²⁶⁴⁵ See, for example, *Kelloggs / Wilson* 6; *Woolworths / Naude* 4; *McCain / Steers* 6; *Olive Joy / Van Wyk* 4; *Tango Fruit / Citrogold* (Directorate ruling of 22 July 2019) (hereafter “*Tango / Citrogold*”) 10; *Tiger Brands / Premier* 5; *Uber Eats / Smith* 3.

²⁶⁴⁶ In *Chicken Licken / Mokhele*, for example, the Directorate held that, when viewed objectively, the animated alien depicted in the relevant television advertisements was clearly friendly and cute, rather than being portrayed frighteningly. See *Chicken Licken / Mokhele* 5.

²⁶⁴⁷ *Wimpy / Galane* 3. That approach was also taken by the ASA. See ASA 2002 *Transformation of Advertising & Marketing Industry* 1.

²⁶⁴⁸ Where alleged contravention of a law (i.e. statute) forms the basis of or forms part of an ARB complaint, and the Directorate is unable to decide the matter without determining whether that law

have included arguments by advertisers regarding compliance with foodstuffs legislation as part of defending complaints. This includes R146 issued in terms of the *FCDA*,²⁶⁴⁹ the *Fruit Juice Regulations, Dairy Products Regulations* issued in terms of the *APSA*, as well as the *TM Act*.²⁶⁵⁰ A few of these cases are discussed below for the purposes of illustration and contextualisation.

In *Henties Orange Juice / Steinman* a consumer lodged a complaint against the claim “100% Orange Juice Blend” in relation to the advertiser’s beverage product. The consumer argued that the use of that claim was misleading, as the inclusion of the other ingredients in the product (namely “Water, Flavours, Citric acid, Preservatives: Potassium sorbate, Sodium benzoate”) invalidated the claim that the product is 100% an orange juice blend. In its response to the complaint, the advertiser submitted that its product label complies with “all applicable legislation and compulsory standards”.²⁶⁵¹ It specifically mentioned the *FCDA*, as well as the *Regulations Relating to the Classification, Packing and Marking of Fruit Juice and Drink Intended for Sale in the Republic of South Africa*²⁶⁵² (hereafter “*Fruit Juice and Drink Regulations*”), which permits the use of preservatives and additives in relation to unsweetened citrus and blended fruit juice products. As the opening remark of its ruling, the Directorate highlighted that the complaint before it was not “a complaint regarding regulation”²⁶⁵³ (the word “regulation” was used by the Directorate in the legislative sense, based on the response submitted by the advertiser). The Directorate also made it clear that the ARB is not mandated to consider whether or not an advertiser has breached a government regulation.²⁶⁵⁴ In considering the matter, the Directorate referred to two opinions from the DOA on the inclusion of preservatives and additives to products bearing the claim “100% juice” that had historically been

has been contravened, it shall refer the complaint to the AAC, from which an appeal to the FAC will lie. See cl 7.1 of the *Procedural Guide*. For a discussion on the mandate of the ARB and disputes where it has been necessary, as part of considering compliance with the *ARB Code*, to interpret food legislation, see part 6.3.4 below.

²⁶⁴⁹ See, for example, *Woolworths / Naude* 2, *Kelloggs / Wilson* 5 and *Olive Joy / Van Wyk* 2-3, all of which included arguments by the advertiser on compliance with the quantitative ingredients declaration requirements set out in reg 26 of R146 as issued under the *FCDA*.

²⁶⁵⁰ See *Zuma Restaurant / Azumi* 3-5; *Pedros / Nando's* 3.

²⁶⁵¹ *Henties Orange Juice / Steinman* 1-2.

²⁶⁵² Published in GN R286 in GG 7290 of 7 November 1980.

²⁶⁵³ *Henties Orange Juice / Steinman* 3.

²⁶⁵⁴ *Henties Orange Juice / Steinman* 3.

obtained from the ASA,²⁶⁵⁵ and where the DOA confirmed that the inclusion of such substances in the product was acceptable in terms of the *Fruit Juice and Drink Regulations*.²⁶⁵⁶ Whilst the Directorate noted that it had slight reservations that not all consumers would understand that a “100% juice” product may nevertheless contain additives and preservatives, it ultimately dismissed the complaint by concluding:

the Directorate has to accept that the reference to being ‘100%’ juice appears to comply with legislation, appears to be endorsed by the National Department of Agriculture, and appears to remain valid even if preservatives, flavours and certain types of acids are added to the product. More importantly, it appears to be the industry norm, and as such, consumers would expect it.²⁶⁵⁷

In *Kelloggs / Wilson* the Directorate had to consider certain provisions of R146 in deciding whether the new packaging of the popular cereal brand KELLOGG’S RICE KRISPIES was misleading in terms of the *ARB Code*. For background purposes, in 2018 Kellogg launched its new, reformulated version of its RICE KRISPIES product in South Africa. The reformulated²⁶⁵⁸ product contained reduced levels of rice compared to the original variant, some rice having been replaced with corn and wheat flour, and an increased sugar content.²⁶⁵⁹ The rollout of the reformulated RICE KRISPIES product was accompanied by new packaging, which contained the following phrases on the FOP label: “NEW AND IMPROVED VANILLA FLAVOUR”, “Puffed Multigrain Cereal” and “made with multigrain”. The ingredients list on the back panel of the packaging disclosed that the product contained *inter alia* 48% rice flour, 13% corn flour and 10% crushed wheat flour. An allergens indication also disclosed that the product “contains wheat (gluten)”.²⁶⁶⁰

The consumer complaint was essentially two-fold. The consumer submitted that the added sugar resulted in the product’s not being suitable for diabetics, and that the

²⁶⁵⁵ *Fruitime Red Grape Juice / Mr R Smith / 4982* (ASA ruling of 13 March 2003) and *Skweez Cranberry Juice / S Wylie / 9922* (ASA ruling of 11 December 2007).

²⁶⁵⁶ *Henties Orange Juice / Steinman 5*.

²⁶⁵⁷ *Henties Orange Juice / Steinman 6*.

²⁶⁵⁸ For a discussion on the meaning of reformulated foods, see part 3.5.1.

²⁶⁵⁹ See News24 2018 <https://www.news24.com/news24/bi-archive/revolt-over-new-rice-krispies-2018-9>. As a side comment, the reformulated RICE KRISPIES product introduced in 2018 was not received well by South African consumers, and there was some negativity surrounding the increased sugar content of the reformulated product. As such, in 2020 Kellogg took the business decision to re-introduce the original variant of RICE KRISPIES into the South African market. See News24 <https://www.news24.com/news24/bi-archive/old-new-rice-krispies-2020-1>.

²⁶⁶⁰ *Kelloggs / Wilson 1-2*.

reformulation change to include multigrain constituted a health hazard to persons who were wheat or gluten-intolerant.²⁶⁶¹ Kellogg responded to this allegation by pointing out that RICE KRISPIES has always contained sugar and gluten (albeit in lower quantities in the original version) and that the product had never been positioned as being suitable for diabetics. In addition, it pointed out that the allergens indication complied with R146.²⁶⁶² After considering those submissions and concluding that consumers are clearly informed about the new formulation of RICE KRISPIES on a prominent position on the FOP label, the Directorate dismissed that portion of the consumer's complaint.²⁶⁶³

Secondly, the consumer argued that the inclusion of the word "RICE" in the product name "RICE KRISPIES" was false because the product no longer contained rice as the primary ingredient. Kellogg pointed out that the ingredients list complies with the requirements set out in R146.²⁶⁶⁴ It was also noted that rice flour remained the primary ingredient (i.e., 48%) of the reformulated product.²⁶⁶⁵ The Directorate summarised the legal issue to be decided as "Will the consumer believe that because the product is called 'Rice Krispies' it is only made up of rice, when in fact it is now a multi-grain cereal?"²⁶⁶⁶ In answering this question and considering the claims on the FOP label, the Directorate observed that the reformulation of the product as a multigrain cereal is made clear to the consumer on the new product packaging. In dismissing this portion of the complaint, the Directorate noted:

Rice Krispies is a well-established brand. According to Wikipedia, the product was released under this name in 1928. Consumers, therefore, have a whole host of expectations and knowledge when they approach the product – a certain look and feel, a certain taste profile, and a certain emotional connotation. The word "rice" therefore does not have the same import that it might have with a new product on the market. Rather, the term "Rice Krispies" creates certain expectations in totality. Given this, in conjunction with the clear communication that the formulation has changed, the Directorate does not consider that the hypothetical reasonable consumer would expect the product to be made primarily of rice.²⁶⁶⁷

²⁶⁶¹ *Kelloggs / Wilson 2.*

²⁶⁶² *Kelloggs / Wilson 4.* For a discussion on allergens indication requirements in terms of R146, see parts 2.4.2 and 2.4.3 above.

²⁶⁶³ *Kelloggs / Wilson 5.*

²⁶⁶⁴ *Kelloggs / Wilson 2, 5.* For a discussion on the ingredients list requirements under R146, see part 2.4.3.

²⁶⁶⁵ *Kelloggs / Wilson 6.*

²⁶⁶⁶ *Kelloggs / Wilson 6.*

²⁶⁶⁷ *Kelloggs / Wilson 6.*

Regulatory compliance in terms of legislation has also featured in competitor complaints. In *Clover / Lancewood*, for example, Lancewood filed a complaint against packaging and television advertising which referred to Clover's BLISS product as "yoghurt".²⁶⁶⁸ In essence, Lancewood claimed that Clover's BLISS product was not yoghurt. Rather, it was classified as a "dairy snack" in terms of the *Dairy Products Regulations* that had been issued by the DOA under *APSA* a few months before the complaint was lodged.²⁶⁶⁹ On this basis, it was argued that the reference to the BLISS product as "yoghurt" was contrary to the *Dairy Products Regulations* and misleading to consumers.²⁶⁷⁰ In defending the complaint Clover confirmed that the product sold under the BLISS brand was initially confirmed by the DOA to be classified as a "dairy snack" in terms of the regulations preceding the *Dairy Products Regulations*.²⁶⁷¹ Clover then explained that the BLISS product had been reformulated to qualify as a "yoghurt" in terms of the *Dairy Products Regulations* shortly before Lancewood's complaint was filed. On this basis Clover clarified that it was in the process of phasing out the old BLISS packaging which incorporated the prior "dairy snack" class designation and introducing new packaging referring to the product as "yoghurt" in compliance with the *Dairy Products Regulations*.²⁶⁷² Before dealing with the merits of the complaint, the Directorate made it clear where the ARB draws the line as far as its mandate is concerned. It was noted that:

[t]he Directorate acknowledges that all advertising must comply with applicable legislation, but it must guard against interpreting or enforcing legislation when appropriate authorities exist for this purpose. This is neither the purpose nor mandate

²⁶⁶⁸ *Clover / Lancewood* 1.

²⁶⁶⁹ The *Dairy Products Regulations* were published on 22 November 2019, and came into operation nine months later, on 22 August 2020. See the preamble of GN R1510 in GG 42850 of 22 November 2019. The ruling in *Clover / Lancewood* was issued on 21 July 2020. The exact date on which the complaint was filed is not stipulated in the Directorate's ruling.

²⁶⁷⁰ *Clover / Lancewood* 2. Under the *Dairy Products Regulations*, a "dairy snack" and "yoghurt" are two separate categories of dairy products which have different composition requirements. The compositional criteria for a "dairy snack" are set out in Table 21, whereas the composition criteria for "yoghurt" are set out in reg 10 read with Table 7 of the *Dairy Products Regulations*. A minimum milk solid quantity is required for a dairy product to qualify as yoghurt, whilst this is not the case for a dairy snack. As such, the dairy content of a dairy snack is less than that of yoghurt.

²⁶⁷¹ *Clover / Lancewood* 3. Also see reg Table 17 of the previous regulations, namely the *Regulations Relating to the Classification, Packing and Marking of Dairy Products and Imitation Dairy Products Intended for Sale in the Republic of South Africa* published in GN R260 in GG 38615 of 17 March 2015. The previous regulations were repealed when the current *Dairy Products Regulations* came into operation.

²⁶⁷² *Clover / Lancewood* 3.

of the ARB, and any alleged contraventions of such laws must be brought before the appropriate regulatory authority empowered to consider them; in this case the DAFF.

The ARB is only mandated to consider whether the advertising breaches the provisions of the Code. In this instance, the allegation relates to whether or not the Advertiser's inclusion of the term "Yoghurt" in its packaging would mislead consumers about the nature and composition of these products. The regulations do, of course, become relevant here, as they form part of the context in which food in this category is presented to the consumer, and part of the context of what a consumer can reasonably expect from a given designation.²⁶⁷³

After considering Clover's explanation and noting that Lancewood was unaware of the reformulation of the BLISS product, the Directorate observed that the BLISS product sold by Clover at the relevant time did qualify as a "yoghurt" in terms of the relevant criteria under the *Dairy Products Regulations*.²⁶⁷⁴ On this basis, the Directorate found that the use of "yoghurt" to describe the BLISS product on the packaging and other advertising material was not misleading in terms of the *ARB Code*. In noting that the older packaging that still referred to BLISS as a "dairy snack" was in the process of being phased out, the Directorate dismissed the complaint. It did, however, encourage Lancewood to approach the DOA if it remained concerned that the BLISS product labelling or advertising nevertheless contravened the *Dairy Products Regulations*.²⁶⁷⁵

As a final remark on the ARB's mandate, it should be noted that the *ARB Code* specifically references the *FCDA* in *Appendix E*,²⁶⁷⁶ which sets out requirements for advertising breast milk substitutes ("BMS"), baby feeding bottles and teats.²⁶⁷⁷ In terms of clause 2.1 of *Appendix E*, product labelling of such goods must comply with the *FCDA*.²⁶⁷⁸ The

²⁶⁷³ *Clover / Lancewood* 5-6.

²⁶⁷⁴ *Clover / Lancewood* 6.

²⁶⁷⁵ *Clover / Lancewood* 6-7.

²⁶⁷⁶ *Appendix E: Advertising of Breast Milk Substitutes, Baby Feeding Bottles and Teats*.

²⁶⁷⁷ Only BMS, which qualify as foodstuffs, are relevant to this study. Teats and feeding bottles fall outside the scope of this study.

²⁶⁷⁸ This clause also states that BMS advertising should comply with the regulations issued under the *FCDA*. Specific mention is made of "R908 and R1130", which appear to be regulations that preceded R146 and R991 respectively. "R908" seems to be a reference to the *Regulation-Advertising and Labelling* published as GN R908 in GG 5565 of 27 May 1977 (as amended), which was repealed in terms of reg 55 of R146. Turning to the reference to "R1130", this seems to be a reference to the *Regulations Relating to Foodstuffs for Infants, Young Children and Children* published as GN R1130 in GG9247 of 8 June 1984, which have been repealed in terms of reg 15 of R991. Whilst cl 2.1 of *Annexure E* should ideally be updated to refer to the current regulations (or simply to exclude specific reference to the repealed regulations), the ARB ruling discussion in part 6.3.4 does demonstrate that the ARB considers current regulations under the *FCDA*, where relevant, in making rulings.

requirement in the *ARB Code* that BMS advertising has to comply with the *FCDA* and regulations issued in terms of this Act confirms that the *ARB Code* is subject to national legislation, and that the *ARB Code* supports government regulation. Whilst it does not appear that the ARB has issued any formal rulings relating to BMS advertising in past years, if an advertising complaint pertaining to such a product is filed in the future, the ARB may very well be compelled to consider the *FCDA* and the current regulations under the Act for those goods, namely R991,²⁶⁷⁹ in considering the matter.

6.3.5 *The jurisdiction of the ARB over advertising content of non-members*

After ascertaining that a complaint falls within its mandate, the ARB will send the complaint to the relevant advertiser for consideration and response. This accords with the *audi alteram partem* principle.²⁶⁸⁰ Often the advertiser responds directly, although there are occasional instances where either the advertising agency that created the relevant content²⁶⁸¹ or legal counsel²⁶⁸² will respond on behalf of the advertiser.

Advertising in South Africa may emanate from entities that are either members or non-members of the ARB.²⁶⁸³ Where a complaint is filed against a member, that member has agreed to abide by the *ARB Code*, which includes the complaints resolution process that is set out in the *Procedural Guide*.²⁶⁸⁴ Members have also agreed to abide by sanctions that may be imposed against them following adverse decisions against their advertising.²⁶⁸⁵

²⁶⁷⁹ For a discussion on R991, see part 2.6 above.

²⁶⁸⁰ Clause 5.4 of the *Procedural Guide*. A literal translation of this principle means “to hear the other side or case”. In terms of this principle, a person against whom allegations or accusations have been made before a formal administrative body should be afforded the opportunity to argue its case and rebut such allegations or accusations before a decision or ruling is taken. This principle fosters both objective and informed decisions or rulings. See *Moredubi v Barker* 2022 JDR 1853 (GP) para 13; Peach *The Application of the Audi Alteram Partem Rule to the Proceedings of Commissions of Inquiry* 3-8.

²⁶⁸¹ See, for example, *Chicken Licken / Mohkele* 3.

²⁶⁸² Examples include *Fair Cape Dairies / Charissa Kemp* (Directorate ruling of 20 September 2019) (hereafter “*Fair Cape Dairies / Kemp*”) 2; *Woolworths / Dr Todd Collins / 3129* (Directorate ruling of 15 May 2024) 2; *Purity / Sifiso Mtsweni / 1997* (Directorate ruling of 15 June 2022) 2.

²⁶⁸³ Visagie 2023 *PER* 4.

²⁶⁸⁴ See cl 6 of the Preface to the *ARB Code*.

²⁶⁸⁵ See cl 3 of the Preface to the *ARB Code*; cl 3.3 of the ARB MOI.

Where a complaint has been filed against a non-member advertiser, that advertiser will be invited by the ARB to take part in the proceedings voluntarily.²⁶⁸⁶ If that non-member subsequently takes part in the ARB complaint resolution process by responding to the merits of the complaint, that advertiser submits itself to the jurisdiction of the ARB in respect of that matter, and must abide by a ruling made by the ARB.²⁶⁸⁷

A non-member who participates in the ARB process cannot, as an afterthought when an adverse ruling is made against it, object to the jurisdiction of the ARB. This is exactly what transpired in *Bliss Brands v ARB* where Bliss Brands objected to the jurisdiction of the ARB in review proceedings before the Johannesburg High Court.²⁶⁸⁸ On appeal before the SCA, Schippers JA (with all justices concurring) pointed out:

Bliss Brands responded in full, contesting the merits of the complaint without raising any objection to the ARB's jurisdiction, its legitimacy or its procedures. It participated fully in the hearing of the complaint at all stages of the proceedings, without a hint of protest. It accepted the Directorate's ruling on the complaint in its favour. When Colgate's appeal to the AAC was upheld, Bliss Brands lodged an appeal to the FAC. It even sought an alternative order of remittal to the FAC for a rehearing, if the main relief for substitution of the FAC's ruling was refused.

...

This Court has repeatedly held that a failure to raise any objection to jurisdiction and subsequent participation in proceedings is sufficient to demonstrate submission to jurisdiction. Bliss Brands unquestionably submitted to the jurisdiction of the ARB.²⁶⁸⁹

There are, of course, instances where a non-member advertiser simply fails to respond to an ARB complaint altogether,²⁶⁹⁰ or responds by simply raising the point that it is not a member and does not submit to the ARB's jurisdiction.²⁶⁹¹ In this regard paragraph 3.3 of the ARB MOI²⁶⁹² confirms that the ARB does not have any jurisdiction over any person or entity who is not an ARB member. The first sentence of paragraph 3.3 goes on to clarify that the ARB:

²⁶⁸⁶ See cl 6.4 of the *Procedural Guide*.

²⁶⁸⁷ *ARB v Bliss* (SCA) paras 2, 12-13. Also see *Bliss v ARB* (CC) paras 15, 18, 20, 22.

²⁶⁸⁸ For a discussion on the facts of this case, see Visagie 2023 *PER* 14-16.

²⁶⁸⁹ *ARB v Bliss* (SCA) paras 12-13. Also see *Herbex*-matter para 18; Visagie 2023 *PER* 12-13.

²⁶⁹⁰ See, for example, *Power Rock Coffee / Karen Bloom / 416* (Directorate ruling of 7 October 2019) (hereafter "*Power Rock Coffee / Bloom*") 2.

²⁶⁹¹ See, for example, *Zuma Restaurant / Azumi* 5-6; *Homemark / Steinman* 2.

²⁶⁹² Clause 3 of the Preface to the *ARB Code* mirrors para 3.3 of the ARB MOI.

may not, in the absence of a submission to its jurisdiction, require non-members to participate in its processes, issue any instruction, order or ruling against the non-member or sanction it.²⁶⁹³

The second sentence to paragraph 3.3 of the ARB's MOI, which has been the subject of contention before our courts, provides:

[h]owever, the [ARB] may consider and issue a ruling to its members (which is not binding on non-members) regarding any advertisement regardless of by whom it is published to determine, on behalf of its members, whether its members should accept any advertisement before it is published or should withdraw any advertisement if it has been published.

In terms of the above, where a non-member does not submit to the jurisdiction of the ARB over an advertising complaint, the ARB will nevertheless consider the matter on its merits. Should the complaint be upheld, the ARB will issue an instruction to its members not to accept the offending advertising material for publication or broadcasting to the public.²⁶⁹⁴ This mechanism is called an "Ad Alert" and effectively underpins the enforcement system of ARB rulings. In *Reckitt Benckiser v ARB*, the High Court noted:

[d]ecisions of the ARB must be enforced by the ARB's members which must refuse to carry advertising which the ARB has ruled must be withdrawn. The ARB therefore works within a consensual contractual framework.²⁶⁹⁵

An advertising dispute between two restaurants in *Zuma Restaurant / Azumi* serves as an illustrative example of the Ad Alert mechanism. The complainant, who was the owner of a Japanese-style restaurant chain called ZUMA that had been trading in various countries for over 20 years, raised concerns about the advertiser's trading name Zuma Restaurant, which was the name of a restaurant that opened in Durban in 2022.²⁶⁹⁶ The ARB forwarded the complaint to the advertiser, who simply responded by advising that it was not a member of the ARB.²⁶⁹⁷ After pointing out that, in terms of clause 3.3 of the

²⁶⁹³ Also see cl 4.22 of Section I of the *ARB Code*, which provides that non-member advertisers may decline or ignore the invitation to partake in ARB proceedings. This accords with the contractual law principle of privity of contract, in terms of which an independent third party cannot be bound by the terms of a contract between others. See Visagie 2023 *PER* 4.

²⁶⁹⁴ See, for example, *Uber Eats / Smith* 3-4; *Pedros / Nando's* 4, 10; *Homemark / Steinman* 2-3, 6.

²⁶⁹⁵ *Reckitt Benckiser v ARB* para 6. Also see *Bliss v ARB* (CC) para 4.

²⁶⁹⁶ The trading name was used in relation to various advertising materials and platforms of the advertiser, including its official website, Facebook and Instagram social media pages, display material, menus, labels and packaging. See *Zuma Restaurant / Azumi* 1-2, 5.

²⁶⁹⁷ *Zuma Restaurant / Azumi* 6-7.

ARB's MOI, it was entitled to rule on the matter for the guidance of its members, the Directorate proceeded to consider the matter and the evidence of the advertiser's global reputation in the trading name ZUMA in relation to a Japanese-style restaurant.²⁶⁹⁸ The complaint was ultimately upheld on the basis that the advertiser had made misleading claims regarding its ownership of the trade mark ZUMA in South Africa, as it did not own that trade mark ZUMA as claimed in its advertising material.²⁶⁹⁹ The Directorate also concluded that the advertiser had selected the trading name Zuma Restaurant to imitate the complainant's well-known ZUMA restaurant chain.²⁷⁰⁰ It observed:

[t]he Directorate is persuaded that the Advertiser consciously and deliberately chose to use the trade name "Zuma" ... with the intention of imitating the Complainant's brand and benefitting therefrom. This becomes especially clear if one considers that in South Africa and especially in KZN, the word "Zuma" is more likely to be associated with the former President, Jacob Zuma, who is not Asian and whose reputation is mixed. Naming a restaurant "Zuma", therefore, is not a logical move for an Asian restaurant, unless the very intention was to imitate the Complainant.²⁷⁰¹

On this basis the Directorate issued the below instructions to its members:

In light of the above findings, members of the ARB are requested not to accept advertising from the Advertiser:

- making use of the trade name "Zuma" or "ZUMA"; or
- any advertising claiming that the Advertiser owns the registered trade mark "Zuma" or "ZUMA", unless the Advertiser can show that it has registered the trade mark.²⁷⁰²

As discussed by Visagie,²⁷⁰³ clause 3.3 of the ARB MOI emanates almost verbatim from the SCA ruling in *Advertising Standards Authority v Herbex (Pty) Ltd*,²⁷⁰⁴ which concerned a dispute regarding the jurisdiction of the ASA as the predecessor of the ARB over non-

²⁶⁹⁸ *Zuma Restaurant / Azumi* 2, 10-11.

²⁶⁹⁹ The advertiser's trade mark application for ZUMA in class 43 had been provisionally refused by the Trade Marks Registry, and the complainant submitted that it intended to oppose that trade mark application in due course. On this basis the Directorate held that the claim by the advertiser that "ZUMA ... is trademarked" would mislead consumers to believe that it was the registered proprietor of the trade mark ZUMA in class 43, which was not the case. See *Zuma Restaurant / Azumi* 3-4, 8.

²⁷⁰⁰ *Zuma Restaurant / Azumi* 11.

²⁷⁰¹ *Zuma Restaurant / Azumi* 11.

²⁷⁰² *Zuma Restaurant / Azumi* 16.

²⁷⁰³ Visagie 2023 *PER* 13.

²⁷⁰⁴ See *Advertising Standards Authority v Herbex (Pty) Ltd* 2017 6 SA 354 (SCA) (hereafter "the *Herbex*-matter") para 18; *ARB v Bliss* (SCA) para 28.

members.²⁷⁰⁵ More recently, both the SCA²⁷⁰⁶ and the Constitutional Court²⁷⁰⁷ have confirmed that the ARB may issue rulings against any advertising in South Africa, even if the advertising originates from a non-member.²⁷⁰⁸ The reasons for this are essentially two-fold. Firstly, members of the ARB have contractually undertaken not to publish or broadcast advertising content which is unacceptable and contrary to the *ARB Code*.²⁷⁰⁹ Secondly, as part of their constitutional rights to freedom of association,²⁷¹⁰ ARB members have the right to dissociate themselves from advertising which is contrary to the *ARB Code*.²⁷¹¹ In *ARB v Bliss (SCA)*, the court noted:

... the members of the ARB ... have organised around the shared goal of promoting ethical standards in advertising, as reflected in the Code. They have agreed to collectively delegate decision-making to the ARB's expert adjudicative bodies that determine complaints on their behalf. In doing so, the ARB's members have given effect to two important components of the s 18 right: the right of self-regulation; and the right to choose not to associate.

...

The right to self-regulation includes the right of associations to adopt rules and standards to regulate their conduct in their dealings with the outside world.²⁷¹²

Following the above, and after severely criticising and overturning the ruling of the court *a quo* on the jurisdiction of the ARB over the advertising of non-members,²⁷¹³ Schippers JA (with all other justices concurring) held:

[a]s regards the powers of the ARB ..., the ARB is entitled to consider, on behalf of its members, complaints in respect of advertisements published by non-members of the ARB, so that its members may make an election whether or not they wish to publish that advertisement. This is an incident of their constitutional rights to freedom of expression and association.²⁷¹⁴

²⁷⁰⁵ For a comprehensive discussion on the *Herbex*-matter, see Visagie 2023 *PER* 10-13.

²⁷⁰⁶ In *ARB v Bliss (SCA)*, the SCA overturned the ruling of the court *a quo* that clause 3.3 of the ARB MOI was unconstitutional. In essence, the SCA held that the High Court was bound, in terms of the principle of stare decises, to the SCA's ruling in the *Herbex*-matter which underpinned and justified cl 3.3 of the ARB MOI. See Visagie 2023 *PER* 17-19 for a detailed discussion of this aspect.

²⁷⁰⁷ *Bliss v ARB (CC)* para 5.

²⁷⁰⁸ Also see Visagie "The Mandate of the Advertising Regulatory Board" 339.

²⁷⁰⁹ *Bliss v ARB (CC)* para 4. Also see *Reckitt Benckiser v ARB* para 6.

²⁷¹⁰ In terms of s 18 of the *Constitution*, everyone has the right to freedom of association.

²⁷¹¹ *ARB v Bliss (SCA)* paras 46-47. Also see Visagie 2023 *PER* 21-22.

²⁷¹² *ARB v Bliss (SCA)* paras 42-43.

²⁷¹³ *ARB v Bliss (SCA)* para 9-13. Also see *Bliss v ARB (CC)* paras 12, 13(e).

²⁷¹⁴ *ARB v Bliss (SCA)* para 24.

In dismissing the appellant's contention that non-members are effectively "coerced" to participate in the ARB proceedings because of the Ad Alert mechanism, the SCA noted:

[a]t first blush, the argument is attractive. However, it does not hold up to scrutiny. In the first place, in the case of a complaint to the ARB, non-submission by a non-member to the ARB's jurisdiction does have a "result" which is materially different to that which would flow from submission to the ARB's jurisdiction. If there is no submission, the ARB's members may not carry the impugned advertisement but there is nothing to stop the non-member from continuing to advertise in media belonging to non-members and (in a case such as the present) from continuing to use the impugned packaging. Where the non-member submits to the ARB's jurisdiction, by contrast, the ARB can make directions which are binding on the non-member.

...

In any event, I think that it is too much of a leap for Bliss Brands to suggest that all non-members that participate in ARB proceedings without demur do so under coercion. Surely, one cannot discount the possibility that some non-members participate in the proceedings willingly, thus submitting to the ARB's jurisdiction.²⁷¹⁵

Indeed, it is not uncommon for non-member advertisers who trade in the foodstuffs industry to respond to ARB complaints.²⁷¹⁶ In *Woolworths / Mokonyane*,²⁷¹⁷ for example, the advertiser, Woolworths, informed the ARB that although it is a non-member of this SRO, it decided to respond to the complaint against it because "it considers itself an ethical and responsible advertiser".²⁷¹⁸ This demonstrates that certain advertisers in South Africa have taken the business decision to abide by the principles set out in the *ARB Code*, even if they have not formally agreed to be members of the ARB.

Against this background, advertisers in South Africa who are not members of the ARB and who do not wish to confirm with the principles in the *ARB Code* are free to ignore an ARB ruling made against their advertising. This effectively allows those non-members to exercise their right to dissociate from this SRO and its complaints resolution process.²⁷¹⁹ That being said, in exercising that right non-members cannot force businesses in the

²⁷¹⁵ *Bliss v ARB* (CC) paras 18-19. Also see *ARB v Bliss* (SCA) para 40.

²⁷¹⁶ See, for example, *Pedros / Nando's* 3; *Clover / Lancewood* 3; *Pioneer Foods / Kershoff* 2-3; *Tango / Citrogold* 3-5; *Kelloggs / Wilson* 2-3; *Snickers / Korb* / 2479 (Directorate ruling of 14 March 2023) (hereafter "*Snickers / Korb*") 2; *Food Lover's Market / Van Wyk* 2-3; *Spar / Kruger* 3; *Bokomo Rusks / Paul Noppe* (Directorate ruling of 5 July 2019) (hereafter "*Bokomo Rusks / Noppe*") 2; *Burger King / Steers* (Directorate ruling of 25 September 2019) (hereafter "*Burger King / Steers*") 3-4.

²⁷¹⁷ *Woolworths / Mokonyane* (Directorate ruling of 18 September 2023) (hereafter "*Woolworths / Mokonyane*").

²⁷¹⁸ *Woolworths / Mokonyane* 3.

²⁷¹⁹ *ARB v Bliss* (SCA) para 48.

advertising industry that wish to comply with the *ARB Code*²⁷²⁰ to disobey an ARB ruling by publishing or broadcasting offending advertising. Such non-members will have to make use of the services of other businesses that want to associate with them and that elect not to abide by the ethical standards in the *ARB Code* to create, publish, broadcast or disseminate the offending advertising of that non-member.²⁷²¹ Whilst this system may result in negative consequences for non-members whose advertising contravenes the *ARB Code*,²⁷²² they should nevertheless respect clause 3.1 of the ARB MOI.²⁷²³ The broader public interest in maintaining an advertising landscape which is responsible and ethically acceptable should prevail. In this regard, Visagie²⁷²⁴ notes:

[a] significant portion of the local advertising and marketing industry has for many decades regarded the *Code* as the measuring stick of what is responsible and ethical in advertising. The *Code* is based on an internationally accepted model, and the importance and value of the *Code* has also been recognised by the South African government, given the reference to this *Code* in legislation, namely the [Electronic Communications Act]. Equally important, the value of the ARB and its predecessor, the ASA, as an advertising watchdog for the public has been recognised by South African courts over the years. On this basis it is submitted that it will serve the public interest if all advertising complies with the *Code* irrespective of whether or not the relevant advertiser has expressly undertaken to do so.

With this in mind, a discussion on the ARB's complaints resolution process follows below.

6.3.6 *The ARB complaints resolution process*

The *ARB Code* includes a system of recourse available to any consumers or trade competitors who believe that they may have been prejudiced or harmed by any advertising content published or broadcast in South Africa.²⁷²⁵ This system is set out in the *Procedural Guide* forming part of the *ARB Code*.²⁷²⁶

²⁷²⁰ Businesses that wish to comply with the *ARB Code* would include (i) all members of the ARB; (ii) broadcast service licencess that are required to comply with the *ARB Code* in terms of the *Electronic Communications Act* and (iii) non-member advertisers who wish to comply with the *ARB Code* as responsible businesses in the advertising industry.

²⁷²¹ *ARB v Bliss* (SCA) para 45; Visagie 2023 *PER* 24.

²⁷²² *Bliss v ARB* (CC) para 5.

²⁷²³ Visagie 2023 *PER* 23.

²⁷²⁴ Visagie 2023 *PER* 26.

²⁷²⁵ ARB MOI para 3.1.4.

²⁷²⁶ Cl 4.9 of Section I of the *ARB Code*.

It should be noted that the ARB functions re-actively, in the sense that it investigates a potential advertising transgression only following the receipt of a complaint. It does not *mero motu* monitor the trade for advertising material which may contravene the *ARB Code*. Formal complaints are lodged electronically with the ARB. The ARB will consider a complaint relating to advertising which is current, or which was published/broadcast within 90 days before the date of lodging the complaint. Complaints relating to older advertising which is no longer available will not be considered.²⁷²⁷ Advertising that has been out of the public eye for 90 days or more would arguably no longer directly impact on public interest. Also, if advertising is no longer available in the trade, it would be a moot issue for the ARB to consider whether or not that old advertising should be withdrawn. This 90-day limitation does, therefore, appear to be based on practical considerations.

Another important consideration is the fact that, in the case of a complaint, the advertiser bears the *onus* to demonstrate that its advertising complies with the relevant provision(s) of the *ARB Code* that is relevant to the dispute.²⁷²⁸

6.3.6.1 Distinguishing between consumer complaints and competitor complaints

A distinction can be made between consumer complaints on the one hand, and competitor complaints on the other. Consumer²⁷²⁹ complaints are essentially complaints filed with the ARB by members of the public or consumer/public interest organisations²⁷³⁰ regarding compliance with the *ARB Code* by a specific advertisement or advertiser. Consumer complaints are free of charge.²⁷³¹ For consumer ease and accessibility, a straightforward

²⁷²⁷ Clause 3.3 of the *Procedural Guide*. In *Clover / Lancewood*, for example, the Directorate held that the print advertisement example of the advertiser's product was older than 90 days and therefore fell outside the ambit of the *ARB Code*. In the circumstances, that advertising material was not considered as part of the complaint. See *Clover / Lancewood* 4-5.

²⁷²⁸ ICC *Benefits of Advertising Self-Regulation* 7; ICAS *International SRO Guide* 20, 52.

²⁷²⁹ The ARB Code defines a "consumer" as "any person who is likely to be reached by or exposed to an advertisement". This would include not only the end consumer but also a user or trade customer of the advertiser. See cl 4.11 of Section I of the *ARB Code*.

²⁷³⁰ In *Tops at Spar / SAAPA* (Directorate ruling of 4 June 2019), for example, the consumer complaint was filed by the Southern African Alcohol Policy Alliance, a civil society organisation promoting the development and implementation of policy in the alcoholic beverage industry.

²⁷³¹ Clause 3.1.6 of the *Procedural Guide*. Appeals filed by consumers or public interest organisations are also free of charge. See clauses 9.2 and 12.2 of the *Procedural Guide*.

online complaints form is available on the official website of the ARB (www.arb.org.za), which consumers should use to lodge complaints.²⁷³² The complaint is required to provide its contact details, information on the type of advertisement, where and when it was seen, who the advertiser was, and the nature of the complainant's concern regarding the content of the advertisement.²⁷³³ Whilst a complainant is free to identify provisions of the *ARB Code* that it may deem to be relevant, this is not a requirement. If the complainant does not identify specific provisions of the *ARB Code*, the complaint will be considered against the provisions that the ARB identifies as relevant.²⁷³⁴ However, where provisions in the *ARB Code* have been identified by the complainant the ARB is limited to considering the complaint against those provisions. In such instances the ARB may not *mero motu* identify additional sections against which to consider the complaint.²⁷³⁵ This approach would seem to accord with the *audi alteram partem* principle discussed in part 6.3.5 above.

A competitor complaint is lodged with the ARB by or on behalf of a commercial entity regarding compliance with the *ARB Code* by another commercial entity (i.e., a trade competitor of the complainant).²⁷³⁶ Competitor complaints should be submitted to the ARB electronically at complaint@arb.org.za.²⁷³⁷ Unlike consumer complaints, competitor complaints are subject to the payment of a non-refundable filing fee.²⁷³⁸ Competitor complaints can be filed by businesses that are either ARB members or non-members.²⁷³⁹ Businesses that contribute towards the funding of the ARB are afforded a reduced filing and appeal fee, as illustrated in Table 5 below:

²⁷³² Clause 4.2 of the *Procedural Guide*; ARB 2024 <https://www.arb.org.za/complaints.html#consumer-complaint-form>; Visagie "The Mandate of the Advertising Regulatory Board" 338.

²⁷³³ Clause 4.12 of Section I of the *ARB Code*.

²⁷³⁴ Clause 3.1.1 of the *Procedural Guide*. This may be seen as a benefit of the ARB system to consumers. See further the discussion in part 6.7.1 below.

²⁷³⁵ Clause 3.1.1 of the *Procedural Guide*.

²⁷³⁶ A natural person who has a commercial interest in the matter may also lodge a competitor complaint. See cl 4.10 of Section I of the *ARB Code*.

²⁷³⁷ Clause 4.1 of the *Procedural Guide*; ARB 2024 <https://www.arb.org.za/complaints.html#consumer-complaint-form>.

²⁷³⁸ Fees are also payable for additional proceedings relating to competitor complaints, such as applications for suspending rulings pending an appeal and complaints relating to alleged breaches of rulings. See ARB 2024 <https://www.arb.org.za/complaints.html#consumer-complaint-form>.

²⁷³⁹ *Reckitt Benckiser v ARB* para 6.

FILING CATEGORY	FEES FOR ARB CONTRIBUTORS		FEES FOR NON-CONTRIBUTORS	
	Excl. VAT	Incl. VAT	Excl. VAT	Incl. VAT
Filing fee	R10,000	R11,500	R25,000	R28,750
Advertising Appeals Committee (AAC)	R40,000	R46,000	R60,000	R69,000
Final Appeal Committee (FAC)	R70,000	R80,500	R90,000	R103,500

Table 5: Competitor complaint filing fees and appeal fees for contributors and non-contributors to the ARB²⁷⁴⁰

6.3.6.2 Complaints handling by the ARB Directorate and sanctions

Formal complaints that the ARB deems to have merit on a *prima facie* basis²⁷⁴¹ are submitted to the person or entity against whom the complaint was filed (i.e., the respondent advertiser) for consideration. The respondent is generally afforded 5 days to respond to a complaint in writing.²⁷⁴² In the written advice informing the respondent of the complaint against it, the respondent is advised that, in the event of an adverse ruling, the Directorate may issue an Ad Alert²⁷⁴³ to its members in respect of the respondent's advertisement.²⁷⁴⁴ The complaint is usually considered either after receiving the respondent's response or, in the absence thereof, the lapse of the deadline to do so. The complainant is not generally afforded the opportunity to file a reply.²⁷⁴⁵

In considering the complaint and response (if filed), the Directorate essentially has the discretion to adopt one of three options. Firstly, it may attempt to resolve the matter between the parties without the need to issue a formal ruling or decision, should it deem

²⁷⁴⁰ Image sourced from ARB 2024 <https://www.arb.org.za/complaints.html#consumer-complaint-form>.

²⁷⁴¹ Complaints that are clearly vexatious or *prima facie* without merit will not be entertained by the ARB. See Clauses 8.2.1.1 and 8.2.1.2 of the *Procedural Guide*.

²⁷⁴² The response period may be lesser if warranted by the urgency of the matter. In addition, it is possible to request an extension of time to file a response. See clause 8.2.2 and 8.2.3 of the *Procedural Guide*.

²⁷⁴³ The Ad Alert mechanism, in terms of which ARB members have undertaken not to accept advertising that offends against one or more provisions of the *ARB Code* for publication or broadcasting is discussed in part 6.3.5 above, and later in part 6.3.6.2.

²⁷⁴⁴ Clause 8.4 of the *Procedural Guide*.

²⁷⁴⁵ The Directorate does, however, have the discretion to afford the complainant an opportunity to file a reply to specific issues raised in the response of the respondent, where warranted. See cl 8.3 of the *Procedural Guide*.

this appropriate in the circumstances.²⁷⁴⁶ Many ARB disputes are resolved without the need to issue a formal decision. In 2021 more than 80% of the complaints received by the ARB were sufficiently resolved in that manner.²⁷⁴⁷

As a second option the Directorate may decide to issue a formal ruling on the complaint, including written reasons for the ruling.²⁷⁴⁸ It may occur that in responding to the complaint and to resolve the matter the respondent voluntarily undertakes either to amend or to withdraw the advertisement in question. In such instances the Directorate may record that voluntary undertaking as a ruling, although it is not obliged to do so.²⁷⁴⁹ In *Millson / Karan Beef*²⁷⁵⁰ two consumers²⁷⁵¹ lodged complaints relating to the claim “WANT A HEALTHY LIFESTYLE? Make beef part of your daily diet” in a newspaper advertisement for Karan Beef, a South African beef producer.²⁷⁵² In responding to the complaint the advertiser advised that it would not make any further reference to the daily consumption of beef in any of its future advertising claims in the absence of evidence to substantiate the use of that claim.²⁷⁵³ As the advertiser had essentially agreed to withdraw the advertising claim, the Directorate concluded that such an undertaking was sufficient to resolve the matter without the need to consider the merits.²⁷⁵⁴

²⁷⁴⁶ Clause 8.5.1 of the *Procedural Guide*.

²⁷⁴⁷ ARB *First Quarter 2022 Newsletter* 3.

²⁷⁴⁸ Clauses 8.5.2 and 8.6 of the *Procedural Guide*.

²⁷⁴⁹ Clause 8.5 of the *Procedural Guide*.

²⁷⁵⁰ *Nicola Millson / Karan Beef / 543* (Directorate ruling of 25 November 2019) (hereafter “*Millson / Karan Beef*”).

²⁷⁵¹ There have been several matters where more than one consumer lodged a complaint against the same advertising material. In *Fair Cape Dairies / Kemp*, the ARB received 11 consumer complaints relating to the use of the claim #happycows in combination with the word humane made by Fair Cape Dairies on social media. The consumers’ concerns related to the belief that dairy farming could neither be humane nor lead to happy cows. See *Fair Cape Dairies / Kemp* 1-3. Also see *Lay’s / Various / 2532* (Directorate ruling of 31 March 2023) 1, where there were three consumer complaints against a television commercial for Lay’s chips.

²⁷⁵² Both consumers raised concerns about the potential carcinogenic properties of red meat consumption. See *Millson / Karan Beef* 2. For more information on Karan Beef, see Karan Beef 2024 <https://www.karanbeef.com/>.

²⁷⁵³ *Millson / Karan Beef* 2.

²⁷⁵⁴ *Millson / Karan Beef* 3. Also see *The Fish & Chip Co / Fishaways / 1305* (Directorate ruling of 15 March 2021) 1-2, where the advertiser provided a voluntary undertaking to cease using the claim “The Fish & Chip Co are the market leaders within the fish [Quick Service Restaurant] category in terms of product, brand awareness, store footprint and preference”, after a trade competitor raised concern with the factual accuracy of that claim. In *Checkers / Teri Boerner / 25-01-2019* (Directorate ruling of 20 February 2019) 1-3, the advertiser agreed to remove the reference to protein on the nutritional information table for Oh My Goodness water, following a consumer complaint that water does not

As a third option, in limited circumstances the Directorate may refer the complaint to another committee within the ARB for consideration.²⁷⁵⁵

When a complaint is upheld, the most common sanction²⁷⁵⁶ imposed is directing the respondent to withdraw the relevant advertisement in the current format and in every advertising medium in which it appears.²⁷⁵⁷ The withdrawal of an offending advertisement should be done as soon as possible. The *Procedural Guide* does provide maximum cut-off deadlines for advertisements in different media forms to be withdrawn, although the ARB has the discretion to deviate therefrom in rulings. As a general rule, advertisements appearing in newspapers, radio, television, magazines or online should be withdrawn immediately or as soon as deadlines permit.²⁷⁵⁸ A two-week phase-out period in respect of outdoor advertisements such as billboards is usually granted.²⁷⁵⁹ For product packaging, advertisers are usually afforded three months to phase out existing packaging and need not remove offending packaging from products already offered for sale on shelves.²⁷⁶⁰ The ARB can also issue practical solutions whilst offending advertising content is being phased out, should this be necessary to protect consumers from being misled. In *Papachinos / Bezuidenhout*²⁷⁶¹ the Directorate held that an advertisement appearing in the advertiser's in-store menus for a Monday pizza special which did not run on public holidays was misleading.²⁷⁶² In addition to instructing the advertiser to immediately

contain protein. That voluntary undertaking was recorded by the ARB and deemed to be sufficient to resolve the matter without the need to rule on the merits.

²⁷⁵⁵ Clause 8.5.3 of the *Procedural Guide*. An example of this would be where, as part of the process of deciding whether the ARB Code has been contravened, it is necessary to consider whether another law has been contravened. In such instances the complaint must be referred to and considered by the AAC. See cl 7.1 of the *Procedural Guide*.

²⁷⁵⁶ *Millson / Karan Beef* 3.

²⁷⁵⁷ Clauses 14.1 and 15.5 of the *Procedural Guide*. If an advertising complaint is upheld and the advertiser is ordered to withdraw the advertisement or a claim in its advertising, it should be withdrawn in all the forms of media in which that advertising or advertising claim appears, even if no specific reference was made to the advert in all the forms of media in which it appears. See *Eskort / RCL Foods / 2531* (Directorate ruling of 28 March 2023) (hereafter "*Eskort / RCL Foods*") 5.

²⁷⁵⁸ Print advertisements published in newspapers and magazines prior to the ruling need not be removed. See clauses 15.3.1-15.3.4, 15.3.8 of the *Procedural Guide*.

²⁷⁵⁹ Clause 15.3.5 of the *Procedural Guide*.

²⁷⁶⁰ Clause 15.3.7 of the *Procedural Guide*.

²⁷⁶¹ *Papachinos / Bezuidenhout / 2839* (Directorate ruling of 12 October 2023) (hereafter "*Papachinos / Bezuidenhout*").

²⁷⁶² *Papachinos / Bezuidenhout* 2, 5. Also see *Burger & Lobster / Lotter*, which related to limitations on a Thursday special on the advertiser's lobster rolls.

commence with updates to the menu to either remove or amend that misleading advertisement, it was also instructed to implement stickers or temporary signage to address the issue in the interim.²⁷⁶³

Whilst a legal costs order may be made on appeal,²⁷⁶⁴ the ARB's sanctions do not extend to the payment of a fine or damages, which are penalties usually reserved for the courts. This does not, however, mean that an adverse ruling against an advertiser does not have a financial impact. The withdrawal of advertising can be costly, especially where significant funds were spent to create the relevant advertising content.²⁷⁶⁵ From a financial point of view, therefore, the threat of non-conforming advertising being withdrawn aids as an incentive to comply with the *ARB Code*.

Where the sanction imposed relates to an amendment to the offending advertisement, the advertiser may be directed to submit the proposed amendment(s)²⁷⁶⁶ to the advertisement to the ACA Advisory Service for pre-publication advice.²⁷⁶⁷ In the case of a repeat offender where two or more adverse rulings have been made against an advertiser within a 12-month period, that advertiser may be directed to submit all future advertising material for pre-clearance by the ACA Advisory Service prior to publication thereof and at its own expense.²⁷⁶⁸ This sanction is usually imposed for a fixed period of six months.²⁷⁶⁹

Adverse publicity is another sanction against offending advertisers.²⁷⁷⁰ In the interest of transparency, all rulings of the ARB are published on the ARB's official website. The names of advertisers are also included in published rulings.²⁷⁷¹ In addition, and where warranted, the advertiser can be directed to publish a summary of the ruling against it in certain

²⁷⁶³ *Papachinos / Bezuidenhout* 5.

²⁷⁶⁴ See cl 9.2 and 12.2 of the *Procedural Guide*.

²⁷⁶⁵ *ICAS International SRO Guide* 20.

²⁷⁶⁶ This should be accompanied by the original advertisement and the relevant ARB ruling setting out the nature of the non-compliance of the advert with the *ARB Code*. See cl 14.2 of the *Procedural Guide*.
²⁷⁶⁷ Clause 14.2 of the *Procedural Guide*. For a discussion on the copy advice services offered by the ACA, see part 7.3.8.1 below.

²⁷⁶⁸ Clause 14.3 of the *Procedural Guide*.

²⁷⁶⁹ Clause 14.3.2 of the *Procedural Guide*.

²⁷⁷⁰ Clause 14.4 of the *Procedural Guide*.

²⁷⁷¹ Clause 5.4 of the *Procedural Guide*. Whilst the names of complainants have historically also been included in published rulings, the ARB has recently decided to cease doing so. This measure is in line with other SROs, and avoids placing consumers who lodge complaints in a negative light. See *ARB 2nd Quarter 2024 Newsletter* 1.

media channels or platforms on which the offending advertising appeared.²⁷⁷² ARB rulings are often scrutinised by trade competitors to ensure that they do not fall foul of the same issue as the respondent in an advertising complaint.²⁷⁷³

As the most severe sanction, the ARB may issue an Ad Alert to its members. In this regard, clause 15.4 of the *Procedural Guide* provides:

Should the respondent ignore a reasonable request for cooperation, the ARB will issue an Ad Alert to its members (including newspapers, magazines, radio, television and the Printing Industries Federation).

An Ad Alert is a direction issued by the ARB to all of its members, advising them either not to accept a specific advertiser's advertisement (if it has not yet been published), or alternatively to withdraw that advertisement if it has already been published.²⁷⁷⁴ This effectively means that, should an advertisement of a non-member be found to be unacceptable in terms of the *ARB Code* and that advertiser refuses to withdraw the advert or otherwise to abide by an ARB ruling, members of the ARB will stop publishing or broadcasting that advertisement if it is already circulating in commercial circles or, if not, will refuse to accept that advertisement for subsequent publication or broadcasting.²⁷⁷⁵

6.3.6.3 Appeals

Turning to appeals, there are two relevant committees within the ARB,²⁷⁷⁶ notably the Advertising Appeals Committee (hereafter "AAC")²⁷⁷⁷ and the Final Appeals Committee (hereafter "FAC")²⁷⁷⁸ which make up the two-tiered appeal process.²⁷⁷⁹

²⁷⁷² If the offending advertiser fails to comply with that request, the ARB may instruct its members to withdraw all advertising space or material of that advertiser on their platforms or channels. See cl 14.5 of the *Procedural Guide*.

²⁷⁷³ ICC *Benefits of Advertising Self-Regulation* 8.

²⁷⁷⁴ *Bliss v ARB* (CC) para 5.

²⁷⁷⁵ *Bliss v ARB* (CC) paras 5, 17; Visagie 2023 *PER* 9.

²⁷⁷⁶ ARB MOI para 7.5(c).

²⁷⁷⁷ See cl 4.3 of Section I of the *ARB Code*; ARB MOI para 13; cl 9 of the *Procedural Guide*.

²⁷⁷⁸ The mandate and functions of both the AAC and the FAC are regulated in terms of the *ARB Code*. See cl 4.2 of Section I of the *ARB Code*; ARB MIO paras 7.5(c) and 14; cl 12 of the *Procedural Guide*.

²⁷⁷⁹ The inclusion of an appeal procedure ensures fairness in a SRO system. See ICAS *International SRO Guide* 23.

A party wishing to appeal a decision of the ARB Directorate may, as a first recourse, appeal to the AAC,²⁷⁸⁰ which is chaired by an independent practising advocate.²⁷⁸¹ Where necessary the *Procedural Guide* also makes allowance for the AAC to co-opt up to four persons who have expertise in the subject matter of the complaint.²⁷⁸² The appeal should be filed within 10 days of the date on which the parties were informed of the Directorate's ruling,²⁷⁸³ and the counter-party will subsequently be afforded 10 days to file a reply.²⁷⁸⁴ Whilst both parties are entitled to be heard before the AAC,²⁷⁸⁵ outside legal representation is not permitted in the absence of exceptional circumstances.²⁷⁸⁶ In general a ruling of the Directorate must be adhered to until it is either suspended pending the outcome of the appeal (if the suspension application is successful),²⁷⁸⁷ or reversed following the outcome of the appeal.²⁷⁸⁸ This feature appears to align with ICAS recommendations that an appeal or review of an SRO decision should be designed in a manner that avoids that option's being used as a mere delaying tactic to postpone the implementation thereof.²⁷⁸⁹ In this regard Visagie²⁷⁹⁰ points out that:

if a ruling were to be automatically suspended pending an appeal, advertisers would simply appeal all adverse ARB rulings issued against them, thereby effectively buying time to phase out advertising pending an appeal. Considering the nature of advertising and that a large portion of advertisements has a limited lifespan, this approach would arguably not be in the public interest.²⁷⁹¹

²⁷⁸⁰ Cl 4.4.2 of Section I of the ARB Code; cl 8.9 of the *Procedural Guide*.

²⁷⁸¹ The Chairman of the AAC is appointed by the ARB board of directors. See ARB MOI para 13.6. Currently, Advocate Nasreen Rajab-Budlender (Senior Counsel) presides as the chairperson of the AAC. See ARB 2023 <https://www.arb.org.za/board---team.html>.

²⁷⁸² Clause 9.8 of the *Procedural Guide*.

²⁷⁸³ The appeal should be filed in writing and submitted to the ARB electronically. If filed by a competitor, the appropriate appeal filing fee should also be paid within that 10-day appeal period. See cl 9.1 of the *Procedural Guide*.

²⁷⁸⁴ Clause 9.3 of the *Procedural Guide*. In terms of cl 10 of the *Procedural Guide*, it is possible to file an application for condonation for the late filing of papers.

²⁷⁸⁵ Either a director or employee of a corporate entity may make representations on its behalf. See cl 9.9 of the *Procedural Guide*.

²⁷⁸⁶ See cl 9.10 of the *Procedural Guide*. The chairperson of the AAC will have the discretion to determine whether the circumstances of the case warrant exceptional circumstances that warrant deviation from the general rule as far as it relates to legal counsel.

²⁷⁸⁷ Applications for a suspension of a Directorate ruling are made in terms of clause 9.17 of the *Procedural Guide*.

²⁷⁸⁸ Clause 9.5 of the *Procedural Guide*.

²⁷⁸⁹ ICAS *International SRO Guide* 52.

²⁷⁹⁰ Visagie 2023 *PER* 9.

²⁷⁹¹ Also see ICAS *International SRO Guide* 6.

An appeal may be lodged against a ruling of the AAC with the FAC.²⁷⁹² The FAC is an instance of last resort within the ARB complaint resolution mechanism, and there is no appeal beyond it.²⁷⁹³ The Chairperson of the FAC is required to be an independent practising or retired legal practitioner or judicial officer with a minimum of ten years of standing.²⁷⁹⁴ As with proceedings before the AAC, the FAC also has the option to co-opt where necessary up to four persons who have expertise in the subject matter of the complaint.²⁷⁹⁵ The appeal should be filed within 20 days of the date of the parties being informed of the AAC ruling,²⁷⁹⁶ and the counter-party will subsequently be afforded 20 days to file a reply.²⁷⁹⁷

An appeal before the FAC is the first time that parties may be represented by legal counsel, although they also have the option to represent themselves. Heads of argument may also be filed prior to the hearing of the appeal.²⁷⁹⁸ The ruling of the AAC must be adhered to until it is either suspended pending the outcome of the appeal to the FAC (if the suspension application is successful)²⁷⁹⁹ or reversed following the outcome of the appeal to the FAC.²⁸⁰⁰

²⁷⁹² Cl 4.4.3 of Section I of the *ARB Code*; cl 9.14 of the *Procedural Guide*.

²⁷⁹³ *Chicken Licken / Cele* (FAC) para 23.7.

²⁷⁹⁴ ARB MOI para 14.4. Currently, Honourable Judge Bernard Ngoepe presides as the chairperson of the FAC. See ARB 2023 <https://www.arb.org.za/board---team.html>. This requirement also aligns with ICAS recommendations. See ICAS *International SRO Guide* 20. Judge Ngoepe has acted as a judge of the High Court, the SCA and the Constitutional Court in South Africa. In addition, he was a judge of the AU's African Court on Human and People's Rights for eight years. See ARB *2nd Quarter 2023 Newsletter* 6.

²⁷⁹⁵ Clause 12.15 of the *Procedural Guide*.

²⁷⁹⁶ The appeal should be filed in writing and submitted to the ARB electronically. If filed by a competitor, the appropriate appeal filing fee should also be paid within that 20-day appeal period. See clause 12.1 of the *Procedural Guide*.

²⁷⁹⁷ Clause 12.8 of the *Procedural Guide*. In terms of cl 10 of the *Procedural Guide*, it is possible to file an application for condonation for the late filing of papers.

²⁷⁹⁸ Clause 12.11 of the *Procedural Guide*.

²⁷⁹⁹ Applications for a suspension of an AAC ruling are made in terms of cl 12.20 of the *Procedural Guide*.

²⁸⁰⁰ The FAC endeavours to hear an appeal within four weeks following the lodgement thereof, and to issue its ruling within two weeks of hearing the appeal. See cl 12.3, 12.12 and 12.13 of the *Procedural Guide*.

A noteworthy matter which was appealed from the Directorate to the AAC²⁸⁰¹ and subsequently the FAC²⁸⁰² is *Chicken Licken / Sandile Cele*.²⁸⁰³ In this matter Mr Sandile Cele filed a consumer complaint against a television advertisement for Chicken Licken's Big John burger. In essence the advert depicted a native African man called John Mjohnana (i.e., Big John) who left his home country in 1650 and travelled by boat across the sea. Big John's adventure leads him to discover a foreign land in 1651 which he calls Europe after greeting two white gentlemen with the phrase "Hola MaNgamla", meaning "Hallo white people".²⁸⁰⁴ The advert essentially depicts a form of "reverse colonialism", and was deemed to be a parody of colonialism.²⁸⁰⁵ In his complaint Mr Cele stated that he believed that the advertisement:

makes a mockery of the struggles of the African people against colonisation by the Europeans in general, and the persecutions suffered at the hands of the Dutch in particular.²⁸⁰⁶

The ARB was required to consider whether or not the advertisement was offensive.²⁸⁰⁷ In this regard clause 1 of Section II of the *ARB Code* provides:

- 1.1 No advertising may offend against good taste or decency or be offensive to public or sectoral values and sensitivities, unless the advertising is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.
- 1.2 Advertisements should contain nothing that is likely to cause serious or widespread or sectoral offence. The fact that a particular product, service or advertisement may be offensive to some is not in itself sufficient grounds for upholding an objection to an advertisement for that product or service. In considering whether an advertisement is offensive, consideration will be given, *inter alia*, to the context, medium, likely audience, the nature of the product or service, prevailing standards, degree of social concern, and public interest.

²⁸⁰¹ *Chicken Licken / Sandile Cele / 30-11-18* (AAC ruling of 19 February 2019) (hereafter "*Chicken Licken / Cele* (AAC)").

²⁸⁰² *Chicken Licken / Sandile Cele / 30-11-18* (FAC ruling of 10 July 2019) (hereafter "*Chicken Licken / Cele* (FAC)").

²⁸⁰³ *Chicken Licken / Sandile Cele / 30-11-18* (Directorate ruling of 14 December 2018) (hereafter "*Chicken Licken / Cele* (Directorate)").

²⁸⁰⁴ *Chicken Licken / Cele* (Directorate) 1-2. For a detailed description of the advertisement, see *Chicken Licken / Cele* (AAC) para 10. Also see *Chicken Licken / Cele* (FAC) paras 10-11.

²⁸⁰⁵ *Chicken Licken / Cele* (AAC) para 22; *Chicken Licken / Cele* (FAC) paras 11-12.

²⁸⁰⁶ *Chicken Licken / Cele* (Directorate) 2; *Chicken Licken / Cele* (FAC) para 2.

²⁸⁰⁷ *Chicken Licken / Cele* (Directorate) 2; *Chicken Licken / Cele* (AAC) para 4.

In considering the matter the AAC highlighted that the wording of clause 1.1 above was “lifted directly” from section 36 of the *Constitution*.²⁸⁰⁸ It was also pointed out that clause 1.2 essentially prohibits three distinct forms of offensive advertising, namely (i) advertising that causes serious offence, (ii) advertising that causes widespread offence,²⁸⁰⁹ and (iii) advertising that causes sectoral offence.²⁸¹⁰ The matter at hand pertained to the first type. In noting that serious offence is based on the gravity of the likely offence caused and need not be widespread or sectoral, the AAC observed:

the fact that only one complainant lodged a complaint could mean that the gravity of the offence caused by an advertisement is serious enough so as to fail the constitutional test of reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.²⁸¹¹

Chicken Licken responded to the complaint by pointing out that the advertisement was not intended to make a mockery of the struggles of colonisation and its effects on Africa and her people. Rather, so it was argued, the advertisement intended to show that South Africa “has all the potential to conquer the world and rewrite history from an African perspective”.²⁸¹² As such, Chicken Licken explained that the underlying purpose of the tongue-in-cheek sense of humour depicted in the advertisement was aimed at creating a sense of patriotism and pride amongst South African people.²⁸¹³

On appeal before the FAC, which was chaired by Honourable Justice Bernard Ngoepe, it was noted that certain subject matters would not easily lend themselves to parody, such as the Holocaust or genocide in Rwanda.²⁸¹⁴ In noting that the UN had declared apartheid to be a crime against humanity,²⁸¹⁵ it was held that the suffering under South African colonialism falls in the same category as those atrocities. As there was no denying that

²⁸⁰⁸ *Chicken Licken / Cele* (AAC) para 23.

²⁸⁰⁹ A widespread offence occurs when a large number of people is likely to be offended by an advertisement. See *Chicken Licken / Cele* (AAC) para 24.

²⁸¹⁰ A sectoral offence occurs when a group of people belonging to a specific sector of society, such as a particular religious or cultural community, is likely to be offended by an advertisement. See *Chicken Licken / Cele* (AAC) para 24.

²⁸¹¹ *Chicken Licken / Cele* (AAC) para 24.

²⁸¹² *Chicken Licken / Cele* (Directorate) 2; *Chicken Licken / Cele* (FAC) para 3.

²⁸¹³ *Chicken Licken / Cele* (Directorate) 2.

²⁸¹⁴ *Chicken Licken / Cele* (FAC) para 13; *Chicken Licken / Cele* (AAC) paras 27-28, 33.

²⁸¹⁵ See art 1 of the *International Convention on the Suppression and Punishment of the Crime of Apartheid* (1973). For additional reading on this topic, see Dugard *Convention on the Suppression and Punishment of the Crime of Apartheid* 1-2.

colonisation in South Africa resulted in immeasurable suffering and oppression, the FAC observed that the matter should be decided on that basis, as a contrary view would greatly offend native South Africans.²⁸¹⁶

The matter essentially centred on balancing the right to the freedom of expression (which includes freedom of commercial speech)²⁸¹⁷ of the advertiser in the context of selling a hamburger against the dignity of people²⁸¹⁸ who suffered as a result of colonisation.²⁸¹⁹ In deciding the matter several important aspects were highlighted in this regard. Firstly, and with reference to *Laugh it Off* (CC),²⁸²⁰ it was pointed out that the constitutional right to freedom of expression is not absolute, and that:

the right to use parody in freedom of commercial speech cannot be separated from a duty of care to ensure that the exercise of that right does not offend or cause harm to others.²⁸²¹

Secondly, in considering the defence raised by Chicken Licken, it was highlighted that only “harmless parody” is acceptable under the *ARB Code*, which was not the case in this matter.²⁸²² Thirdly, it was noted that the advertisement did not depict the human suffering caused by colonisation or any reference to those negative consequences, thereby presenting colonisation as something harmless. In the circumstances the FAC held that this parody advertisement was both insensitive and offensive to those who had suffered under colonisation.²⁸²³ In agreement with both the Directorate²⁸²⁴ and the AAC,²⁸²⁵ the FAC

²⁸¹⁶ *Chicken Licken / Cele* (FAC) para 13; *Chicken Licken / Cele* (Directorate) 3; *Chicken Licken / Cele* (AAC) para 28.

²⁸¹⁷ See s 16 of the *Constitution*; discussion in part 4.7.

²⁸¹⁸ In terms of s 10 of the *Constitution*, all people have inherent dignity and the right to have their dignity respected and protected.

²⁸¹⁹ *Chicken Licken / Cele* (AAC) paras 25, 27; *Chicken Licken / Cele* (FAC) para 13.

²⁸²⁰ *Laugh it Off* (CC) paras 55, 107-109. See *Chicken Licken / Cele* (AAC) paras 25-26; *Chicken Licken / Cele* (FAC) para 13. This Constitutional Court case is also referred to in parts 2.5.2 and 2.5.2.1 above.

²⁸²¹ *Chicken Licken / Cele* (FAC) para 13.

²⁸²² *Chicken Licken / Cele* (FAC) para 13. In terms of cl 4.2.3 of Section II of the *ARB Code*, obvious untruths, harmless parodies or exaggerations that are intended to catch the eye or to amuse are permissible if they are clearly to be seen as humorous or hyperbolic.

²⁸²³ *Chicken Licken / Cele* (FAC) para 16.

²⁸²⁴ *Chicken Licken / Cele* (Directorate) 4.

²⁸²⁵ *Chicken Licken / Cele* (AAC) paras 33-34.

accordingly sanctioned the advertiser to withdraw the television advertisement with immediate effect, and never to use it again.²⁸²⁶

6.3.6.4 Review applications before the High Courts

Decisions issued by the ARB constitute reviewable administrative actions in terms of the *Promotion of Administrative Justice Act* 3 of 2000 (hereafter "*PAJA*").²⁸²⁷ As such, if the internal appeal processes within the ARB complaints resolution system have been exhausted, decisions of the ARB are subject to judicial review before the courts.²⁸²⁸ In *Brandhouse Beverages v ASA* the High Court confirmed that the internal appeal process of the ASA, as it was known at that point in time, constituted a public function.²⁸²⁹ Bertelsmann J observed that:

[t]here can be no doubt what[so]ever that the rendering of a service in the public interest lies at the heart of the Authority's genesis and existence. It is the official regulator of the advertising industry. It prides itself upon its close association with organs of state and consumer organisations.

...

The public nature of the ASA's functions is further evident from the fact that members of the public, ordinary consumers, are invited to interact with the Authority and to file complaints relating to unethical, unlawful or misleading advertising against errant advertisers. Any complaint is investigated with the interests of the public at large and that of consumers and children in particular in mind. The results of investigations of hearings and appeals following upon complaints are published and are readily accessible to the man in the street.

...

The manner in which complaints are dealt with is therefore part and parcel of the ASA's service to and interaction with the public.²⁸³⁰

²⁸²⁶ *Chicken Licken / Cele* (FAC) para 18.

²⁸²⁷ *ARB v Bliss* (SCA) paras 16-17; *Bliss v ARB* (CC) para 10. Possible grounds of review are set out in s 6(2) of *PAJA*. In *Brandhouse Beverages (Pty) Ltd v The Advertising Standards Authority of South Africa* (GP) (unreported) case number 2331/15 of 27 April 2015 (hereafter "*Brandhouse Beverages v ASA*"), for example, the review was brought on the basis of s 6(2)(d), namely that the decision of the ASA was materially influenced by an error of law. See *Brandhouse Beverages v ASA* para 34.

²⁸²⁸ If a review application is filed before the High Court, an application may also be brought for the suspension of an ARB decision pending the outcome of the review. See *Reckitt Benckiser v ARB* paras 2, 4, 6; *ARB v Bliss* (SCA) para 50.

²⁸²⁹ In terms of s 1 of the *PAJA*, an "administrative action" includes *inter alia* any decision taken by a juristic person other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision, which adversely affects the rights of any person, and which has a direct, external legal effect. The MOI as well as the ARB Code (which incorporates the Procedural Guide) constitute empowering provisions in terms of *PAJA*. See *ARB v Bliss* (SCA) paras 16-17; *Bliss v ARB* (CC) para 10; Visagie 2023 *PER* 20.

²⁸³⁰ *Brandhouse Beverages v ASA* paras 28-30.

The above holds equally true for the ARB as the successor of the ASA.²⁸³¹ In *Reckitt Benckiser v ARB*, Reckitt Benckiser approached the Johannesburg High Court to review and set aside decisions of the AAC and FAC taken against it. The matter related to a competitor complaint filed by Colgate-Palmolive²⁸³² against the packaging of Reckitt Benckiser's DETTOL hygiene soap.²⁸³³ Colgate-Palmolive argued that the use of the claim "PROTECTS AGAINST 100 ILLNESS-CAUSING GERMS" in relation to DETTOL hygiene soap, which is a non-medicated soap, was misleading.²⁸³⁴ It argued that the claim "conveys the impression that the product possesses medicinal properties" which was not acceptable in relation to a cosmetic product.²⁸³⁵ Both the AAC and the FAC held that the claim was contrary to the *ARB Code*²⁸³⁶ and subsequently ruled that the contravening DETTOL hygiene soap packaging should be withdrawn.²⁸³⁷ In dismissing the review application and commending the complaints resolution system of the ARB as a specialist tribunal, the High Court noted:

... the FAC was careful to decide the appeal on its merits also. Thus it cannot be argued that Reckitt Benckiser was the victim of a sharply and hastily taken technical point which deprived it of a hearing on the merits. The FAC's reasoning on the merits is faultless. It's treatment and those of AAC on the use of the word 'illness' are findings made by a specialist tribunal and this court is enjoined to pay due regard and deference to its treatment of the matter.

...

In my view, Reckitt Benckiser has been pushing the regulatory boundaries of the ASA and the ARB for some time. It seems that its strategy has been to capitalise on the use of the offending 'illness' descriptor for as long as possible and this has involved abusing the ASA/ARB processes and now those of this Court. The administrative scheme is founded on voluntariness and good faith in the public interest and if these principles are not respected, the scheme will not be sustainable for its purpose.²⁸³⁸

²⁸³¹ *Reckitt Benckiser v ARB* para 5.

²⁸³² Colgate-Palmolive, as the manufacturer of PROTEX hygiene soap, is a direct competitor of Reckitt Benckiser. See *Reckitt Benckiser v ARB* para 3.

²⁸³³ *Reckitt Benckiser v ARB* paras 20, 22.

²⁸³⁴ *Reckitt Benckiser v ARB* para 2.

²⁸³⁵ *Reckitt Benckiser v ARB* para 8. Also see *Reckitt Benckiser Pharmaceuticals (Pty) Ltd / Colgate-Palmolive (Pty) Ltd / 645* (FAC ruling of 29 July 2020) (hereafter "*Reckitt Benckiser / Colgate-Palmolive*") para 2.

²⁸³⁶ At the time of hearing the matter, clause 5 of *Appendix B*, which is the *Cosmetic Advertising Code of Practice*, provided that "...[c]laims that convey the impression that a cosmetic product possesses medicinal properties are not permitted..." See *Reckitt Benckiser / Colgate-Palmolive* para 10. *Appendix B* of the *ARB Code* was subsequently updated in 2023. This prohibition is now contained in cl 7(a)(v) of the updated *Appendix B*.

²⁸³⁷ *Reckitt Benckiser v ARB* paras 4, 20, 22; *Reckitt Benckiser / Colgate-Palmolive* paras 9, 11, 14, 17.4.

²⁸³⁸ *Reckitt Benckiser v ARB* paras 43, 45.

It is apparent, therefore, that the South African courts view the ARB as a specialist advertising tribunal which acts in the public interest, and that the ARB complaints resolution system has a place and is valuable in upholding ethical standards accepted by the advertising industry, as confirmed by South African courts.

The ARB's public function and valued role in the advertising sector can also be seen through its ancillary activities. The ARB engages with other public bodies on relevant issues, such as the Competition Commission²⁸³⁹ and the Film & Publications Board.²⁸⁴⁰ In 2022 the ARB took part in an enquiry by the South African Human Rights Commission into allegations of racial discrimination in advertising.²⁸⁴¹ The ARB also involved itself in transformation in the advertising industry by issuing so-called "MAC certificates" to qualifying advertisers under the *Marketing, Advertising and Communication Sector Code* (2022).²⁸⁴² In addition, it makes submissions on draft policy²⁸⁴³ and draft legislation²⁸⁴⁴ on behalf of its members.

6.3.7 Funding of the ARB

SROs across the world have different funding models.²⁸⁴⁵ In South Africa the ARB is funded by individual businesses within the marketing communication industry on a voluntary basis.²⁸⁴⁶ ICAS identifies the ARB's funding model as a "hybrid model", which has also been adopted by SROs in Sweden, Poland and Switzerland.²⁸⁴⁷ Under this funding

²⁸³⁹ ARB *First Quarter 2022 Newsletter* 1.

²⁸⁴⁰ ARB *December 2022 Newsletter* 1.

²⁸⁴¹ ARB *First Quarter 2022 Newsletter* 1.

²⁸⁴² The Code is also known as the "BBBEE Code", where the acronym BBBEE refers to *Broad-Based Black Economic Empowerment*. The *Broad-Based Black Economic Empowerment Act* 53 of 2003 falls outside the scope of this study. For additional reading see ARB 2024 <https://www.arb.org.za/mac-certificates.html>; ARB *First Quarter 2022 Newsletter* 4.

²⁸⁴³ In 2022 the ARB made submissions on the *Draft White Paper on Audio and Audiovisual Content Services Policy Framework*, GN 1081 in GG 43793 of 9 October 2020. See ARB *First Quarter 2022 Newsletter* 1.

²⁸⁴⁴ The ARB made submissions to R3337. See part 6.6 below.

²⁸⁴⁵ ICAS *Global Factbook* 9. SRO funding can take various forms, including mandatory membership fees (either as a fixed amount or on a sliding scale based on turnover), a levy system (where a small percentage of advertising costs is contributed to the SRO), or a voluntary contribution system (such as with the ARB mechanism in South Africa). See ICAS *Global Factbook* 9. For additional reading on different SRO funding models, see ICAS *How Are Self-Regulatory Organizations Financed?* 1-4; ICAS *International SRO Guide* 27.

²⁸⁴⁶ Clause 1 of the *Preface to the ARB Code*.

²⁸⁴⁷ ICAS *How Are Self-Regulatory Organizations Financed?* 4.

model there is no mandatory levy system,²⁸⁴⁸ and not all of the ARB's members contribute towards its operations.²⁸⁴⁹ Rather, certain businesses referred to as "funders"²⁸⁵⁰ voluntarily sponsor the ARB's operations.²⁸⁵¹ Funders fall within various industries, including the banking sector, insurance, telecommunications, personal care products and retail.²⁸⁵² Most relevant to this study is the fact that several foodstuffs manufacturers and retailers are funders of the ARB, including Tiger Brands, Pioneer Foods, RCL Foods, Premier FMCG, Pepsico, Coca-Cola, Pick 'n Pay, KFC, Debonairs Pizza, Kellanova,²⁸⁵³ Mugg & Bean, Steers and Wimpy.²⁸⁵⁴

In pointing out both the positives and negatives of an industry-funded mechanism, Naudé and Barnard²⁸⁵⁵ observe that industry funding mitigates the problem of under-funding by the government, but may also lead to the questionability of objectivity. In this regard industry-funded SRO systems are constantly under scrutiny by public authorities, public groups and NGOs.²⁸⁵⁶ This in turn has resulted in there being an increased focus on transparency and impartiality in the SRO complaints resolution process.²⁸⁵⁷ The availability of an "impartial complaints resolution system" which functions in a quick and efficient manner is a core objective of advertising self-regulation.²⁸⁵⁸ In focusing on the element of independence of SRO bodies, ICAS²⁸⁵⁹ notes that to be credible and consistent, self-regulation must be impartial, and observes further that:

[o]peration and outcome, as well as decisions of the Self-Regulatory System, should be made independently of government and specific interest groups. The fact that decisions are reached in an independent and impartial manner should be reflected in the design of the complaint handling mechanism.

²⁸⁴⁸ A levy system may exacerbate perceived bias in favour of the industry. See Woker 2016 *SA Merc LJ* 33.

²⁸⁴⁹ *Bliss v ARB* (CC) para 3.

²⁸⁵⁰ ARB 2023 <https://www.arb.org.za/stakeholders---funders.html>.

²⁸⁵¹ ICAS *How Are Self-Regulatory Organizations Financed?* 4.

²⁸⁵² A complete list of the funders of the ARB can be viewed on its official website. See ARB 2023 <https://www.arb.org.za/stakeholders---funders.html>.

²⁸⁵³ Previously known as Kellogg, as indicated in part 6.2.4.4 above. See BizCommunity 2023 <https://www.bizcommunity.com/Article/1/162/236895.html>.

²⁸⁵⁴ ARB 2023 <https://www.arb.org.za/stakeholders---funders.html>.

²⁸⁵⁵ Naudé and Barnard "Enforcement and Effectiveness of Consumer Law in South Africa" 18.

²⁸⁵⁶ ICAS *International SRO Guide* 27.

²⁸⁵⁷ ICC *Benefits of Self-Regulation* 6.

²⁸⁵⁸ ICAS *Charter* 5.

²⁸⁵⁹ ICAS *International SRO Guide* 27.

In the court *a quo* in *Bliss v ARB* Fischer J observed that the ARB's funding model "creates room for the perception of a lack of independence"²⁸⁶⁰ where the complainant is a funder and member of the ARB whilst the respondent is a non-member.²⁸⁶¹ In subsequently dismissing that assertion for lack of evidence, the SCA made the important point that not every member of the ARB contributes towards its operations, highlighting further that:

[n]o reasonable, objective and informed person would consider it likely that the few funders (who are almost exclusively individual companies) influence the running of the entire ARB. Funders represent a minority: 38 out of more than 335 direct and indirect national and international members of the ARB. The members of the AAC or FAC are not informed as to whether or not a complainant or respondent is a funder. Further, the structure of the committees promotes independence: the Chairperson of the AAC must be an independent practising advocate; and the chairperson of the FAC, an independent practising or retired legal practitioner or judge.²⁸⁶²

Against this background it appears that the SCA was satisfied that the complaints handling system of the ARB reflects both impartiality and independence in decision-making. This is also supported by the fact that adverse rulings have been made against a number of the ARB's funders that trade in the food sector, including Tiger Brands,²⁸⁶³ KFC,²⁸⁶⁴ Debonairs²⁸⁶⁵ and Pick 'n Pay.²⁸⁶⁶

6.4 ARB rulings relating to foodstuffs labelling and advertising

The discussion in this section is aimed at demonstrating the types of foodstuffs complaints that the ARB has considered. Whilst it is not possible to discuss all the matters, the reader may refer to Addendum D for additional examples, many of which are included in other parts of this chapter. It is clear from the Addendum that the ARB issued more than 55 rulings during the period 2018 – July 2024 that were relevant to the foodstuffs sector.

²⁸⁶⁰ *Bliss v ARB a quo* para 116.

²⁸⁶¹ *Bliss v ARB a quo* paras 116-117. Also see Van Heerden "Section 82" para 3.

²⁸⁶² *ARB v Bliss* (SCA) para 53.

²⁸⁶³ See *Black Cat Peanut Butter / Smuts / 1447* (Directorate ruling of 3 June 2021) 6.

²⁸⁶⁴ See, for example, *KFC / Strydom / 2800* (Directorate ruling of 10 October 2023) (hereafter "*KFC / Strydom*") 7; *KFC / Brad Iggs / 2726* (Directorate ruling of 8 August 2023) (hereafter "*KFC / Iggs*") 8.

²⁸⁶⁵ See *Debonairs / Lupumzo Madikazi* (Directorate ruling of 15 January 2021) (hereafter "*Debonairs / Madikazi*") 5.

²⁸⁶⁶ See *Pick 'n Pay / Heckroodt / 1205* (Directorate ruling of 14 August 2022) (hereafter "*Pick 'n Pay / Heckroodt*") 3.

Most foodstuffs advertising complaints before the ARB to date have concerned one or more of the general provisions that are found in Section II of the *ARB Code*, including misleading claims, offensive advertising,²⁸⁶⁷ the exploitation of advertising goodwill, and imitation.²⁸⁶⁸ A handful of matters have also included provisions in *Appendix J* as additional grounds of objection, which are discussed separately in part 6.6.

As a starting point, many ARB complaints relate to misleading claims.²⁸⁶⁹ As Woker²⁸⁷⁰ points out, the use of misleading claims in advertising has always been a prevalent issue. In the food sector complaints have extended to various aspects of food production or sale, including alleged misleading claims on product packaging or labels,²⁸⁷¹ product descriptions of foodstuffs on menus,²⁸⁷² foodstuffs prices,²⁸⁷³ takeaway delivery fees,²⁸⁷⁴ foodstuffs sizes,²⁸⁷⁵ quantities²⁸⁷⁶ and ingredients;²⁸⁷⁷ as well as foodstuffs promotions.²⁸⁷⁸ In this regard clause 4.2.1 of Section II of the *ARB Code* provides that:

[a]dvertisements should not contain any statement or visual presentation which, directly or by implication, omission, ambiguity, inaccuracy, exaggerated claim or otherwise, is likely to mislead the consumer.

²⁸⁶⁷ See the discussion on *Chicken Licken / Cele* in part 6.3.6.3.

²⁸⁶⁸ See the discussion on *Zuma Restaurant / Azumi* in part 6.3.5.

²⁸⁶⁹ For a discussion on ARB case examples based on misleading advertising and extending to various consumer products, including foodstuffs, see Mupangavanhu and Kerchhoff 2021 *SA Merc LJ* 278-283.

²⁸⁷⁰ Woker *Advertising Law in South Africa* 5.

²⁸⁷¹ Various examples are discussed or referred to in this chapter, including *Spring Meadows / Offer*; *Parmalat / Steinman*; *Olive Joy / Van Wyk*; *Tiger Brands / Premier*; *Clover / Lancewood*; *Woolworths / Naude*; *Henties Orange Juice / Steinman*; and *Kelloggs / Wilson*.

²⁸⁷² See, for example, *Kauai / Kalan* 1, which related to the product name Salter Caramel Smoothie on the advertiser's menu; *Papachinos / Bezuidenhout* 1-2, which related to a pizza special on the advertiser's menu.

²⁸⁷³ See *Woolworths / Mokonyane* 1, which related to the price of stewing beef on-pack.

²⁸⁷⁴ *KFC / Strydom*; *KFC / Iggs*; *Debonaires Pizza / Mandy Maubane* 1811 (Directorate ruling of 8 January 2022); *KFC / Duvenhage*; *Debonairs / Madikazi*.

²⁸⁷⁵ See *Mr D / van Bergen / 3128* (Directorate ruling of 17 April 2024) (hereafter "*Mr D / van Bergen*") 1-2 relating to the size of a watermelon ordered online. Also see *KFC / van der Spuy / 2009* (Directorate ruling of 5 July 2022) 1-2 relating to the size of a KFC burger.

²⁸⁷⁶ See *Mr D / van Bergen* 4-5 relating to the net quantity of ice cream ordered online; *Bokomo Rusks / Noppe* 1-2, relating to the net quantity of various Bokomo rusk variants.

²⁸⁷⁷ In 2023 the Directorate held that the use of the slogan "There's a glass and a half in everyone" on a television advertisement for CADBURY chocolate formed part of the brand legacy and referred to the generosity of spirit, as opposed to being a literal reference to the actual milk quantity as an ingredient in the advertiser's chocolate bars. See *Cadbury / Sullivan / 2900* (Directorate ruling of 30 November 2023) 1, 3-4.

²⁸⁷⁸ As an example, Pick 'n Pay's limitation of its price special on a six-pack of long life milk to two items per customer only was not made clear in a pamphlet advertising that special and was consequently held to be misleading. See *Pick 'n Pay / Heckroodt* 1-3.

For claims that are capable of objective substantiation (as opposed to subjective matters of opinion, such as how something tastes)²⁸⁷⁹ the *ARB Code* requires that the relevant advertiser hold in its possession documentary evidence that supports such a claim before the advertising is published.²⁸⁸⁰ Such documentary evidence must have market relevance and must be up-to-date and current.²⁸⁸¹ In addition the documentary evidence must emanate from an independent source.²⁸⁸² If the advertiser is unable or fails to provide sufficient substantiation for the use of a specific objective claim, the claim will be deemed to be misleading in terms of clause 4.2.1. In *Homemark / Steinman*, for example the advertiser failed to provide substantiation for various implied health and slimming claims made in a television advertisement for its "Remedy Health 'Detox Tea'", simply raising the fact that it was not a member of the ARB.²⁸⁸³ In the absence of evidence to support those claims, the Directorate was compelled to conclude that those unsubstantiated claims were contrary to clause 4.1 of Section II of the *ARB Code*. Members of the ARB were subsequently instructed not to accept or broadcast that advertisement.²⁸⁸⁴

In *McCain / Steers* the popular fast-food chain Steers lodged a competitor complaint against McCain, whose frozen foods range includes frozen chips. The complaint related to McCain's use of the claim "SA's NO. 1* CHIP" on a billboard advert for McCain Slap Chips and a Facebook advert for McCain Fry Chips.²⁸⁸⁵ Steers, which sells freshly made chips as part of its fast-food offerings, had historically won awards for the "best chips" in that product category in South Africa. On this basis Steers argued that McCain would be

²⁸⁷⁹ In *Nik Naks / Greene / 1905* (Directorate ruling of 5 April 2022), for example, a consumer claimed that the packaging of NIK NAKS Flamin' Hot chilli-flavoured maize snacks had negligible heat and overstated the chilli flavour of the product. In considering whether the chilli flavour in the product was "hot enough", the Directorate observed that this question would always be subjective and dependent on individual consumer perceptions. See *Nik Naks / Greene* 1, 2, 5.

²⁸⁸⁰ Clause 4.1.1 of Section II of the *ARB Code*.

²⁸⁸¹ Clause 4.1.2 of Section II of the *ARB Code*.

²⁸⁸² Clause 4.1.4 of Section II of the *ARB Code*.

²⁸⁸³ The advertisement created the impression that the herbal tea product provided a "detox" and that the consumption of that product would aid digestion, increase energy levels and likely assist with weight loss and body toning. See *Homemark / Steinman* 1-2, 5.

²⁸⁸⁴ *Homemark / Steinman* 6. Similarly, see *Power Rock Coffee / Bloom* 1-3, where ARB members were instructed not to accept any advertising for Power Rock Coffee that made unsubstantiated claims regarding the health and performance properties of that product.

²⁸⁸⁵ *McCain / Steers* 1-2. The asterisk in the claim (*) referred to the visually small disclaimer "Aztec market share data – sales volumes".

unlikely to be able to substantiate the claim that its chips were “SA’s NO. 1”.²⁸⁸⁶ In addition it argued that McCain’s use of that claim was ambiguous as it did not distinguish between frozen chips and fresh-cut chips, and was therefore likely to mislead at least some consumers. In considering the evidence before it, the Directorate identified that the claim that McCains was trying to make was that McCain’s frozen chips range is the best-selling frozen chips brand in South Africa.²⁸⁸⁷ However, it concluded that not all consumers would understand the use of the claim “SA’s NO. 1* CHIP” in that context, as it could be interpreted in more than one way.²⁸⁸⁸ In upholding the complaint based on the contravention of clause 4.2.1, it was observed that:

[t]he Directorate recognises that some consumers will reach the correct conclusion: that the claim is a sales based claim as against other frozen chips. However, this is not patently clear from the communications before the Directorate, and the hypothetical reasonable consumer could also reasonably conclude that the claim is a consumer preference claim and/or in relation to both frozen and fresh chips and/or in relation to only one product.²⁸⁸⁹

In *Parmalat / Steinman*, for example, a consumer lodged a complaint relating to the use of the claim “WITH FRUIT PIECES” prominently on the main label of Parmalat’s fruit cocktail low-fat yoghurt. The claim was accompanied by images of whole strawberries and other sliced fruit.²⁸⁹⁰ The consumer believed that the product label was deceptive and misleading as there was virtually an absence of fruit pieces when the product was diluted with water through a sieve.²⁸⁹¹ The Directorate accepted the arguments by the advertiser that the fruit added as an ingredient in the product would soften and break down during the production process. It also accepted that the product contained 6% of fruit, albeit partially broken down, as indicated in the ingredients list.²⁸⁹² That being said, in considering clause 4.2.1, the Directorate observed that the question before it was whether or not the claim “WITH FRUIT PIECES” accompanied by the prominent images of fruit on the front label would cause consumers to believe that the product contained a

²⁸⁸⁶ *McCain / Steers* 2.

²⁸⁸⁷ *McCain / Steers* 2, 6.

²⁸⁸⁸ *McCain / Steers* 4-5.

²⁸⁸⁹ *McCain / Steers* 6.

²⁸⁹⁰ *Parmalat / Steinman* 1, 5.

²⁸⁹¹ *Parmalat / Steinman* 3, 5.

²⁸⁹² *Parmalat / Steinman* 4, 5.

significant amount of whole fruit pieces when it did not.²⁸⁹³ In holding that the product label was misleading, the Directorate noted:

... the large front-of-pack claim that there are 'fruit pieces' accompanied by a visual of fruit pieces creates the impression that if you are a consumer wanting pieces of fruit in your yoghurt, this is the product you should choose. Based on the Advertiser's submissions, it appears likely that most consumers will not receive a significant number of fruit pieces and will therefore be misled.²⁸⁹⁴

In considering other examples of claims on foodstuffs labels found to be contrary to clause 4.2.1, the Directorate has also held that the use of the claim "42 % CRANBERRY NECTAR BLEND" in relation to a fruit blend product that contained only 3% reconstituted cranberry concentrate to be misleading.²⁸⁹⁵ Similarly, the Directorate held that the claim "SOUTH AFRICA 100% PORK" in relation to sliced sandwich ham which contained 70% pork only, was misleading.²⁸⁹⁶

In *Olive Joy / Van Wyk*, a consumer objected to Shoprite Checkers' use of the product name OLIVE JOY in relation to its product described on the front of the label as "SEED OILS AND OLIVE OIL BLEND".²⁸⁹⁷ The consumer argued that the product name was misleading because the ingredients list disclosed that the product contained 10% olive oil only, whilst 90% of the product consisted of vegetable oils.²⁸⁹⁸ In observing that product descriptor "SEED OILS AND OLIVE OIL BLEND" appeared legibly and in a reasonable font size on the front of the label, the Directorate concluded that the hypothetical reasonable consumer was unlikely to believe that OLIVE JOY was pure olive oil.²⁸⁹⁹ That conclusion was also supported by the fact that the product price was

²⁸⁹³ *Parmalat / Steinman* 5.

²⁸⁹⁴ *Parmalat / Steinman* 6.

²⁸⁹⁵ Besides 3% reconstituted cranberry concentrate, the advertiser's nectar blend contained 19% reconstituted apple concentrate and 18% reconstituted pear concentrate. See *Spring Meadows / Offer* 2.

²⁸⁹⁶ The Directorate held that the hypothetical reasonable consumer would likely understand the use of the claim "SOUTH AFRICA 100% PORK", in the context used on-pack, to mean that the product originates from South Africa and contains 100% pork, which was not the case. See *Woolworths / Naude* 2, 4.

²⁸⁹⁷ *Olive Joy / Van Wyk* 1.

²⁸⁹⁸ *Olive Joy / Van Wyk* 1, 2.

²⁸⁹⁹ *Olive Joy / Van Wyk* 4.

significantly less than the average price of pure olive oil.²⁹⁰⁰ Although the Directorate ultimately dismissed the complaint alleging that the label did not sufficiently draw the consumer's attention to the fact that it is a blended oil product, it did express dismay at how Shoprite Checkers was advertising the product through the label. In this regard, it noted:

[t]here is no doubt in the minds of the Directorate that this product could be more clearly labelled, and that there is a deliberate attempt to 'ride' on the better ingredient (olive oil).²⁹⁰¹

Competitor complaints have also dealt with labelling issues. In *Tango / Citrogold*, the Directorate considered the use of the claim "bee-friendly" in relation to the packaging and in-store promotional material of the advertiser's TANGO seedless citrus fruit varietal.²⁹⁰² From the viewpoint of the public, the Directorate observed that the hypothetical reasonable consumer would understand the use of that claim to mean that bees that come into contact with that citrus fruit variant would not be harmed by any insecticides or pesticides that may be used during the planting and growing of that agricultural product. The submissions of the advertiser disclosed that insecticides and pesticides were used, albeit in small quantities, during the production process.²⁹⁰³ However, no evidence was tendered to demonstrate that those crop protection products were in no way harmful to bees. The Directorate observed that reduced quantities of crop protection products on the advertiser's products may very well cause less harm to bees. That being said, that fact did not substantiate the use of the claim "bee-friendly" because the hypothetical reasonable consumer would understand the use of that claim to mean that no bees were harmed during production. On this basis the Directorate held that the claim "bee-friendly" was "ambiguous at best, or inaccurate at worst".²⁹⁰⁴ As the advertiser

²⁹⁰⁰ It was noted that the OLIVE JOY product sold for around R62 per litre, whereas pure olive oil brands were all priced at more than R100 per litre. See *Olive Joy / Van Wyk* 5.

²⁹⁰¹ *Olive Joy / Van Wyk* 5.

²⁹⁰² *Tango / Citrogold* 1.

²⁹⁰³ *Tango / Citrogold* 9, 10.

²⁹⁰⁴ *Tango / Citrogold* 10. As soon as a claim is ambiguous (i.e., has more than one possible meaning or interpretation), it is potentially misleading and contrary to cl 4.2.1 of Section II of the *ARB Code*. For additional examples, see *Woolworths / Naude* 4; *McCain / Steers* 2.

did not submit to the jurisdiction of the ARB, the ARB instructed its members not to accept any advertising for TANGO citrus fruit that includes the claim “bee-friendly”.²⁹⁰⁵

In *Tiger Brands / Premier*, Premier FMCG (Pty) Ltd lodged a complaint against Tiger Brands relating to the use of the claim “TAMPER PROOF SEAL” displayed in combination with an image of a lock device in relation to ALBANY pre-sliced bread.²⁹⁰⁶ Images depicting the use of the claim in question appear in Figure 6-3 below:

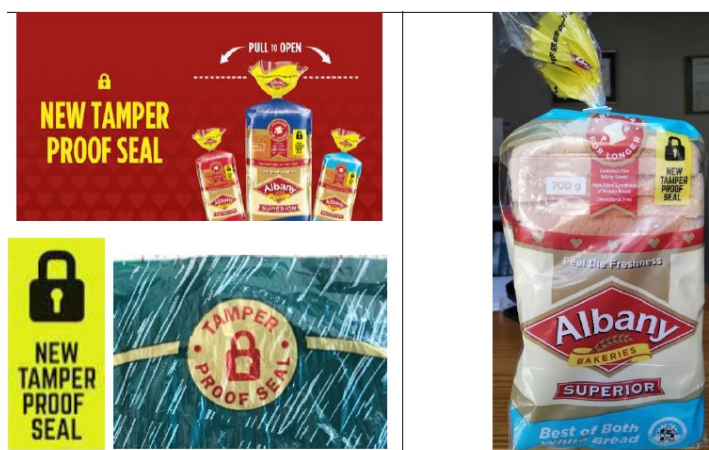


Figure 6-3: Images depicting the use of the claim “TAMPER PROOF SEAL” in relation to ALBANY bread²⁹⁰⁷

²⁹⁰⁵ *Tango / Citrogold* 11.

²⁹⁰⁶ *Tiger Brands / Premier* 1,2. At the end of December 2019 it was reported that a “revolutionary packaging solution” for ALBANY bread loaves had been launched, in terms of which laser seal technology would be implemented to prevent “petty tampering” where slices of bread were taken from packaging as well as fake bread being sold under the ALBANY brand name. For additional information, see Trendhunter 2019 <https://www.trendhunter.com/trends/albany-bakeries#:~:text=Laser%20Seal%20Technology%20%2D%20The%20application,implement%20tamper%2Devident%20packaging%20solutions.>

²⁹⁰⁷ Image sourced from *Tiger Brands / Premier* 2. When the complaint was heard, the word “NEW” was no longer used in combination with the claim of concern. See *Tiger Brands / Premier* 1.

The complaint was filed after the complainant noticed that the packaging of many ALBANY bread loaves was only partially sealed upon purchase.²⁹⁰⁸ In raising various provisions of the *ARB Code* including *Appendix J*,²⁹⁰⁹ Premier FMCG²⁹¹⁰ argued that:

[t]he claim 'TAMPER PROOF SEAL' is misleading, dishonest and untruthful. It implies that bread products bearing this claim are entirely sealed and not capable of being interfered with or meddled with (i.e., tamper proof) from the time that the product leaves the Albany bakery until the time that the product reaches the purchaser's home and is opened.

To support its cause of complaint, Premier FMCG also pointed out that Tiger Brands did not present any evidence to substantiate that all ALBANY bread loaves bearing the claim "TAMPER PROOF SEAL" were tamper-proof or completely sealed from the time that they left that production factory up to the stage that the consumer opens the bread at home after purchase.²⁹¹¹

In responding to the complaint, Tiger Brands²⁹¹² put forward a different interpretation of the claim "TAMPER PROOF SEAL", arguing that:

... the 'proof' in the term 'tamper proof' is intended to reference 'evidence of'. Put differently, the 'TAMPER PROOF SEAL' means that the seal will provide 'PROOF' of tampering that may have occurred (because the seal would no longer be intact).

In considering how the hypothetical reasonable consumer would understand the claim that ALBANY bread contains a "TAMPER PROOF SEAL", the Directorate observed that both Tiger Brands and Premier FMCG "make compelling arguments" as to how consumers would likely interpret the claim in question.²⁹¹³ In highlighting that advertising may not mislead consumers through ambiguity, omission, inaccuracy or otherwise,²⁹¹⁴ the Directorate observed that the mere fact that there are two reasonable interpretations of

²⁹⁰⁸ *Tiger Brands / Premier 2.*

²⁹⁰⁹ The complaint was based on three provisions in Section II of the *ARB Code*, namely cl 2 (relating to honesty), cl 4.1 (relating to substantiation of claims) and cl 4.2.1 (dealing with misleading claims). The overlapping provisions in Appendix J were also cited, namely cl 4.1 (relating to honesty in food and beverage advertising), cl 10.1 (relating to the substantiation of claims in food and beverage advertising), and cl 6 (dealing with misleading claims in food and beverage advertising). See *Tiger Brands / Premier 2.*

²⁹¹⁰ *Tiger Brands / Premier 2.*

²⁹¹¹ *Tiger Brands / Premier 2, 3.*

²⁹¹² *Tiger Brands / Premier 4.*

²⁹¹³ *Tiger Brands / Premier 5.*

²⁹¹⁴ See cl 4.2.1 of Section II of the *ARB Code* and cl 6 of *Appendix J*.

the claim pointed to the conclusion that it was ambiguous. It was also observed that many consumers would understand that claim along the lines of the argument raised by Premier FMCG, i.e., that it prevents tampering with the bread loaf before purchase due to being sealed to the extent that the product is “TAMPER PROOF”, like a child-proof cap on medicine.²⁹¹⁵ In concluding that the claim was likely to mislead consumers, the Directorate instructed Tiger Brands to immediately withdraw the use of that claim on all ALBANY packaging and other advertising material.²⁹¹⁶

As an interesting subsequent development, the images in Figure 6-4 below from a test purchase²⁹¹⁷ of ALBANY pre-sliced bread in July 2024 illustrate that the advertiser has changed the claim “TAMPER PROOF SEAL” to “TAMPER EVIDENT SEAL”:



Figure 6-4: Images illustrating the use of the claim “TAMPER EVIDENT SEAL” in relation to ALBANY bread

The current use of the amended claim “TAMPER EVIDENT SEAL” more accurately reflects Tiger Brands’ intention behind the use of that claim, i.e., that a broken seal would prove

²⁹¹⁵ Tiger Brands / Premier 6.

²⁹¹⁶ Tiger Brands / Premier 7,8.

²⁹¹⁷ The actual ALBANY bread packaging and evidence of the test purchase performed by the author in July 2024 can be made available on request.

that there had been tampering with the product. This seems to avoid a potential ambiguity in interpretation, thereby resolving the potential for misleading certain consumers.

6.5 *Comments on ICC guidelines on foods and beverage advertising*

Before discussing *Appendix J* of the *ARB Code*, some comments should be made on how the ICC contextualises foodstuffs advertising in the global context. Two aspects warrant discussion: firstly the meaning of responsible foodstuffs advertising, and secondly the meaning that should be adopted for “child” or “children” in foodstuffs advertising. Both aspects are contextualised with reference to the food environment and relevant legislation in South Africa.

As discussed earlier, the *ICC Advertising Code* sets out the general principles and definitions for all forms of marketing communications. It should, however, be read in conjunction with additional ICC codes, frameworks and principles that the ICC has issued.²⁹¹⁸ The *ICC Toolkit on Advertising to Children* and the *ICC Food and Beverage Framework* are relevant to this study.

6.5.1 *Responsible foodstuffs advertising*

It will be recalled that the dietary patterns of South African consumers described in Chapter 3²⁹¹⁹ revealed a problem with the frequent consumption of unhealthy foodstuffs by consumers across the age spectrum, including infants and young children, adolescents and adults. Concerns have been raised that the advertising of unhealthy foodstuffs is often targeted at people inured in poverty, which includes adults who have limited literacy skills,²⁹²⁰ and that children and the youth are exposed to it. Increased exposure to unhealthy foodstuffs advertising results in increased selection and consumption of those foodstuffs as part of a consumer’s ordinary diet.²⁹²¹ This situation has contributed to the prevalence of diet-related NCDs in South Africa.

²⁹¹⁸ *ICC Advertising Code* 4

²⁹¹⁹ See part 3.4.2.4.

²⁹²⁰ See discussion in part 3.3.2.

²⁹²¹ See discussion in part 3.5.2.

In 2019 the ICC issued the *ICC Food and Beverage Framework*, which guides SROs worldwide on ethical and responsible food and beverage advertising and other marketing communications.²⁹²² The ICC has highlighted the role of marketing communications in a modern society flooded with information about dietary choices, nutrition and healthy lifestyles. In this regard the ICC²⁹²³ has confirmed that:

[r]esponsible marketing communications can assist consumers in making appropriate choices about food and beverage products, and in understanding the role of nutrition, diet and physical activity in healthy lifestyles. By conveying marketing communication consistent with principles of good nutrition, diet, physical activity and personal choice, business must play an important role.

Whilst recognising the general right to freedom of commercial speech,²⁹²⁴ the ICC highlights that foodstuffs marketers should promote and sell their products to children in a responsible manner. The *ICC Food and Beverage Framework* explains that:

[a]s children are consumers of food and beverages, *they are legitimately a focus of marketing* and have the right to information about the products that interest them. However, because of their lack of experience as consumers, children deserve especially careful treatment by marketers in any marketing communications directed to them. ICC recognises that children constitute an audience with a more limited capacity to assess information in marketing communications, which is why specific provisions on marketing communications to children are included in ICC guidelines and codes.²⁹²⁵

The assertion by the ICC that children as consumers are “legitimately a focus of marketing” warrants some consideration and comment. This statement will, of course, be accurate only to the extent that foodstuffs marketing is not unlawful or illegitimate. If the statement is meant to refer instances where, for example, the advertising content promotes the increased consumption of fruits and vegetables, water and other foodstuffs that generally form part of a healthy diet, it might very well be the case that children are (or may) legitimately be the focus of such food marketing. However, in the context of

²⁹²² The term “marketing communication”, according to the ICC, “should be interpreted broadly to mean any communications produced directly by or on behalf of marketers intended primarily to promote products or to influence consumer behaviour”. In addition to advertising, other forms of marketing communication include promotions, sponsorships, direct marketing and digital marketing communications. See *ICC Advertising Code 7*; *ICC Food and Beverage Framework 1-2*.

²⁹²³ *ICC Food and Beverage Framework 2*.

²⁹²⁴ *ICC Food and Beverage Framework 3*. The right to commercial speech, as part of freedom of expression is, however, not absolute. See the discussion in part 4.7.

²⁹²⁵ Own emphasis added.

marketing unhealthy foodstuffs the accuracy of that statement is highly debatable. Against the backdrop of the universal right to health²⁹²⁶ and the negative impact of unhealthy foodstuffs advertising on the increasing global burden of diet-related NCDs to all consumers of all ages, the averment that children as consumers are “legitimately a focus of marketing” would never be accurate. Advertising as a form of commercial speech can be ethical and responsible only to the extent that it does not aid in causing harm to the persons to whom such advertising is directed or who may be exposed to that advertising. Moreover, as soon as advertising is unlawful, for example, it infringes on the right of any consumer to a food environment that is not harmful to health or well-being,²⁹²⁷ such advertising should, generally speaking, automatically be deemed unethical and irresponsible and therefore unacceptable by the advertising industry.

As an additional comment, the abovementioned discussion illustrates that what is deemed to be responsible advertising, at least in the context of unhealthy foodstuffs, may differ from country to country or regionally. The ICC confirms that SRO guidelines should continuously be reviewed and updated “to assure that communications reflect contemporary standards of responsible marketing”. In this regard it is recommended that the *ICC Food and Beverage Framework* be updated in a manner whereby public health interest in relation to the promotion of diet is foregrounded. The fact that adult consumers may, at least in countries such as South Africa, also form a segment of the vulnerable portion of society should be considered when formulating what is responsible advertising.

6.5.2 The definition of “children” adopted by the ICC

As a starting point, one of the ICC principles is that the SRO code in a country should always be framed in a manner that conforms with national legislation as well as rules and norms within the society and the culture of the people who live in that country.²⁹²⁸ This means that where there is conflict national laws and rules will always trump guidance from the ICC on the provisions to be included in an SRO code.

²⁹²⁶ See the discussion in parts 3.2.1 and 3.2.2.

²⁹²⁷ See the discussion in part 3.2.2.

²⁹²⁸ *ICC Food and Beverage Framework* 1-2.

When considering the South African position about who is deemed to be a child, both the *Constitution*²⁹²⁹ and the *Children's Act*²⁹³⁰ define a "child" as any person under the age of 18 years. This age delineation is also in line with international²⁹³¹ and regional²⁹³² human rights instruments, where a "child" is generally deemed to be a person below the age of 18 years.

Following the above, the *ICC Advertising Code* makes a clear-cut distinction between "children" and "teens". It defines children as "individuals aged 12 years and under", whilst individuals aged 13 to 17 years are deemed to be teens.²⁹³³ The *ICC Advertising Code* confirms that special care should be taken in advertising directed to or featuring either children or teens, effectively covering all individuals below the age of 18 years.

That being said, there seems to be a misalignment between the *ICC Advertising Code* on the one hand, and the *ICC Toolkit on Advertising to Children* and the *ICC Food and Beverage Framework* on the other in relation to the age group of individuals that warrant "special care" in advertising. The *ICC Toolkit on Advertising to Children* explains that the ICC deems individuals aged 12 years and younger as a "distinct group" from individuals in the 13 to 17 age bracket.²⁹³⁴ The age distinction between children (aged 12 years and younger) and teens (i.e., individuals aged from 13 to 17 years) is also adopted in the *ICC Food and Beverage Framework*. The result is that many of the provisions in the *ICC Food and Beverage Framework* are worded to refer only to children up to the age of 12, thereby excluding teens between 13 and 17 years of age from their scope.²⁹³⁵ Moreover, and as one of its core principles on marketing and advertising, the *ICC Toolkit on Advertising to Children* states that:

²⁹²⁹ See s 28(3) of the *Constitution*.

²⁹³⁰ See s 1 of the *Children's Act*.

²⁹³¹ See art 1 of the *UN Convention on the Rights of the Child* (1989).

²⁹³² See art 2 of the *African Children's Charter* (1990).

²⁹³³ ICC Advertising Code 8. Also see ICC Toolkit: Marketing and Advertising to Children (2017) (hereafter "ICC Toolkit on Advertising to Children") 1 available at ICC <https://iccwbo.org/news-publications/policies-reports/icc-toolkit-marketing-advertising-children/>.

²⁹³⁴ *ICC Toolkit on Advertising to Children* 1.

²⁹³⁵ As the IFBA supports the ICC, it has also adopted an approach that places restrictions on "marketing communications that are primarily directed to children under the age of 13", thereby aligning with the ICC's definition of children as individuals aged 12 years and younger. See IFBA *Global Responsible Marketing Policy* 1; IFBA 2022 *Progress Report* 4.

special care is needed when certain advertising techniques are used in marketing to *children*, who are still developing their understanding of commercial communications.²⁹³⁶

The above core principle does not refer to or include teens. This means in effect that the ICC deems individuals as young as 13 years of age as having fully developed an understanding of commercial communications equivalent to adults in the context of food and beverage advertising. The impression created by the above passage from the *ICC Toolkit on Advertising to Children* is that persons aged 13 and older should, across the board and globally, effectively be treated as having the same cognitive skills as adults. In South Africa, a country facing challenges with both child and adult illiteracy,²⁹³⁷ and in the absence of clear scientific and country-based evidence to the contrary, such an assumption would arguably seem naïve and far removed from reality.

A significant deviation from the acceptable age range in the definition of “child” or “children” in various international law instruments and national laws globally renders suspect the motives of the ICC, which deems itself to be the “world business organisation”, especially as a selling point of the *ICC Advertising Code* is that it is the “gold standard” of advertising self-regulation. Whilst the value of the *ICC Advertising Code* should not be underestimated, the ICC’s adoption of a definition of “children” which is significantly narrower than that which is generally accepted internationally indicates that this classification should be revisited as a matter of urgency. A suggestion would be to remove the distinction between “children” and “teens” and simply to harmonise the definition of “child” or “children” with the accepted international law definition, i.e., “individuals below the age of 18 years”, or a definition with a similar meaning.

6.6 *Appendix J: The Food and Beverage Code*

By way of background, the *Food and Beverage Code*, which is currently incorporated into the *ARB Code* as *Appendix J*, has its foundations in a self-disciplinary pledge by industry issued more than 15 years ago. Whilst it appears that the DOH was consulted by the CGCSA in the development of the *Food and Beverage Code*,²⁹³⁸ much has changed since

²⁹³⁶ Own emphasis added. *ICC Toolkit on Advertising to Children* 1.

²⁹³⁷ See part 3.3.2.

²⁹³⁸ The *South African Marketing to Children Pledge* 3.

then, both in the context of public health concerns as well as advertising and marketing platforms and the tactics of foodstuffs manufacturers. On this basis, and as elaborated in the discussion that follows, *Appendix J* is currently outdated. As long ago as in 2012 Igumbor *et al*²⁹³⁹ raised three main criticisms of the *Food and Beverage Code*, namely that (i) it applies only to children below the age of twelve; (ii) it covers television advertising only; and (iii) no monitoring reports on the pledge, now forming part of the ARB self-regulatory system, have been released. These criticisms remain valid today.

In Section I of the *ARB Code* the ARB and its members acknowledge that children and other young people²⁹⁴⁰ are by virtue of their credulity and lack of experience generally likely to attach a more literal meaning to advertising content.²⁹⁴¹ Children are defined in Section I as “persons who are under the age of 18, or who are portrayed as, or who appear to be, under the age of 18”.²⁹⁴² This definition is wider than that adopted in the *Constitution* and the *Children’s Act*, in terms of which a “child” is defined as “a person under the age of 18 years”.²⁹⁴³ However, it is not uncommon for television actors to play roles that differ from their actual ages. The inclusion of “persons who are portrayed as or who appear to be under 18 years of age” in the definition of a child in the *ARB Code* caters for instances where, for example, young adult actors in television adverts appear in roles where they are depicted as children.²⁹⁴⁴ In the context of advertising, therefore, a broader definition of what constitutes a child is potentially warranted.

Following the above, a peculiarity in *Appendix J* is the fact that the provisions contained therein are effectively spread across three consumer age groups. Certain provisions are aimed only at “children of twelve years old and under”, whilst other provisions are

²⁹³⁹ Igumbor *et al* 2012 *PLoS Med* 6.

²⁹⁴⁰ The term “young people” is not defined in the *ARB Code*. Given the broad interpretation afforded to “children”, young people would seemingly be persons older than 18 years and on the younger end of the adult spectrum. For clarity, the meaning of “young people” should be defined in the *ARB Code*. The *African Youth Charter* (2006) defines “youth” or “young people” as “every person between the ages of 15 and 35 years”. This may potentially serve as a guiding definition.

²⁹⁴¹ Clause 3.5 of Section I of the *ARB Code*.

²⁹⁴² See cl 4.8 of Section I of the *ARB Code*.

²⁹⁴³ See s 28(3) of the *Constitution*; s 1 of the *Children’s Act*.

²⁹⁴⁴ Where child viewers see adult actors portrayed as children in advertising, the child viewers may believe that those adults are actually children and relate to the conduct portrayed by those actors in advertising.

seemingly directed at “children” within the broader meaning set out in clause I of the *ARB Code*, which includes all persons below the age of 18 years. Other provisions appear to be directed at all consumers of foodstuffs, which seems sensible and aligned with the food environment of consumers in South Africa.

Where foodstuffs advertising is directed at the public, it will be seen by consumers of all ages. Even where the advertising is directed at adults, as with food labels or daytime television advertising, for example, children are likely to be exposed thereto either with or without adult supervision. This also seems supported by the meaning that should be attached to the “reasonable consumer” in relation to food and beverage advertising. In this regard *Appendix J* clarifies that:

[n]utrition information and claims should be judged by the likely perception of the reasonable person at whom the advertising is directed or who is likely to be exposed to advertising.²⁹⁴⁵

Against this background the discussion that follows is aimed at highlighting certain valuable components that are currently included in *Appendix J* in relation to unhealthy foodstuffs advertising. In addition, the discussion makes several suggestions for amendments to *Appendix J* that are aimed at addressing the criticisms that have been raised against it. The recommendations are made to closer align *Appendix J* with South African legislation and other provisions of the *ARB Code*, and against the backdrop of the current food environment of consumers in South Africa.

For the reader’s convenience Addendum F contains *Appendix J* with proposed amendments which could be consulted in combination with the discussion that follows.

It should also be noted that the ARB hosted a “Food Regulation Round Table” in June 2023 and subsequently made submissions to R3337 on behalf of its members in the food industry.²⁹⁴⁶ This demonstrates that the ARB and its members are aware of the government’s intention to regulate unhealthy foodstuffs labelling and advertising in terms of the *FCDA*.

²⁹⁴⁵ See cl 3.1 of *Appendix J*.

²⁹⁴⁶ ARB 2nd Quarter 2023 Newsletter 1, 4.

6.6.1 General comments

Appendix J is intended to regulate the advertising of food and beverage products in general and in particular the advertising of such products to children.²⁹⁴⁷ When *Appendix J* is considered holistically, it becomes apparent that many of the provisions focus on nutritional, health- and diet-related claims in foodstuffs advertising. In terms of clause 6.1, presentations in foodstuffs advertising are required to accurately represent the material characteristics of the product featured, which includes *inter alia* claims relating to the nutritional content and health benefits of that product.²⁹⁴⁸ In the circumstances it is clear that nutrition claims as well as health claims on foodstuffs labelling and advertising can be considered by the ARB under *Appendix J*. This is also evident from clause 10.1, which provides that all claims, including claims relating to the nutritional or health benefits of a food or beverage product, should be capable of substantiation in accordance with clause 4.1 of Section II of the *ARB Code*.

Certain provisions in *Appendix J* overlap with comparable provisions in Section II of the *ARB Code*. Examples include the provisions requiring honesty,²⁹⁴⁹ substantiation of claims,²⁹⁵⁰ and prohibiting misleading advertising.²⁹⁵¹ In *Burger King / Steers*, Steers claimed that the depiction of Burger King hamburger patties “engulfed in flames” in a television advertisement would create the impression that Burger King’s hamburger patties were flame-grilled when this was not in fact the case.²⁹⁵² On this basis Steers claimed that the Burger King advert offended both the honesty and the misleading advertising clauses in Section II of the *ARB Code* as well as *Appendix J*.²⁹⁵³ The Directorate ultimately upheld that portion of the complaint, concluding that the advertisement was misleading and in breach of clause 4.2.1 of Section II of the *ARB Code* only. While this

²⁹⁴⁷ Cl 2.1 of *Appendix J*.

²⁹⁴⁸ Other material aspects of a foodstuff would include claims relating to aspects such as the taste, size, nature, composition, manufacture date, production method or quality of the relevant product. See cl 6.1 of *Appendix J*.

²⁹⁴⁹ Cl 2 of Section II of the *ARB Code* and cl 4.1 of *Appendix J*.

²⁹⁵⁰ Cl 4.1 of Section II of the *ARB Code* and cl 10 of *Appendix J*.

²⁹⁵¹ Cl 4.2.1 of Section II of the *ARB Code* and cl 6 of *Appendix J*.

²⁹⁵² Burger King patties are prepared in a gas boiler system. Although there is a flame element, the patties are not flame-grilled. See *Burger King / Steers* 3, 6-7.

²⁹⁵³ *Burger King / Steers* 4.

was not stipulated directly, by virtue of the misleading nature of the advert in terms of clause 4.2.1, it would also automatically be in breach of the misleading advertising clause in *Appendix J*, as well as contrary to the honesty clauses in both Section II of the *ARB Code* and *Appendix J*.

6.6.2 Considering the use of the phrase "food and beverage products that do not represent healthy dietary choices and a healthy lifestyle"

Appendix J introduced the use of the terminology "food and beverage products that do not represent healthy dietary choices and a healthy lifestyle" as among the restrictive measures in a number of clauses.²⁹⁵⁴ For example, in terms of clause 14.1:

[f]ood and beverage products that do not represent healthy dietary choices and a healthy lifestyle, consistent with established scientific standards acceptable in terms of Section II, Clause 4.1, shall not advertise on, or in close proximity to, pre-school and primary school premises.

The phrase "food and beverage products that do not represent healthy dietary choices and a healthy lifestyle" would include products that would commonly qualify as unhealthy foodstuffs, such as fast foods, confectionary and SSBs. The phrase is also broader, and would conceivably also include products that may not necessarily qualify as unhealthy in the strict sense (e.g., processed foodstuffs which do not contain excessive levels of unhealthy nutrients or artificial sweeteners), but which nevertheless would not necessarily form part of a healthy dietary choice or lifestyle.

In addition to being a broad term, the use of the terminology "food and beverage products that do not represent healthy dietary choices and a healthy lifestyle" also avoids the need to provide an exact definition of which foodstuffs would fall in that category (or be deemed to be unhealthy). That approach seems suitable, as it would give the ARB sufficient flexibility to consider a complaint based on the evidence tendered by the advertiser, and in the context in which it was made.²⁹⁵⁵

²⁹⁵⁴ See cl 8.1, 10.3, 13.1, 14.1 and 14.2 of *Appendix J*.

²⁹⁵⁵ It has been pointed out in part 6.3.4 above that the ARB does, in certain instances, consider legislative provisions where this may be required in order to determine if the *ARB Code* has been contravened. In the circumstances, once the government has promulgated regulations in terms of the *FCDA* which

Where it is raised in an advertising complaint that a specific foodstuff does not represent a healthy dietary choice or a healthy lifestyle, the *onus* will be on the relevant advertiser to demonstrate that the advertised product represents a healthy dietary choice and comports with a healthy lifestyle, or at least does not constitute an unhealthy dietary choice or fail to comport with a healthy lifestyle.²⁹⁵⁶ As illustrated by clause 14.1 above, evidence required from an advertiser in substantiation of a foodstuff's representing a healthy dietary choice or forming part of a healthy lifestyle would have to comply with the requirements set out in clause 4.1 of Section II of the *ARB Code*.²⁹⁵⁷ In that regard, where an advertising complaint concerns the query as to whether the specific product forming the subject of an advertisement represents a healthy dietary choice and a healthy lifestyle, the advertiser would have to prove this. Evidence tendered in substantiation of such a claim would have to emanate from an independent source and be recent, up-to-date and have market relevance.²⁹⁵⁸

For the reasons that are set out above, the use of the terminology "food and beverage products that do not represent healthy dietary choices and a healthy lifestyle" as among the restrictive measures in *Appendix J* is an appropriate and valuable contribution.

6.6.3 Responsible foodstuffs advertising

As part of the foundational principles applicable to all advertising, the Preamble of the *ARB Code* provides that all advertisements should be prepared with a sense of responsibility to the consumer.²⁹⁵⁹ Furthermore, no advertisement should bring advertising into disrepute or reduce confidence in advertising as a service to the industry and to the public.²⁹⁶⁰ The entire *ARB Code*, including all appendixes thereto, is applied

concretely clarify the meaning of "unhealthy foodstuffs" in terms of that legislation (be it in R3337 or otherwise), those regulations would likely also serve as a useful tool for the ARB to consider the meaning of the phrase "food and beverage products that do not represent health dietary choices and a healthy lifestyle".

²⁹⁵⁶ See part 6.3.6 above.

²⁹⁵⁷ Also see cl 10.1 of *Appendix J*.

²⁹⁵⁸ See cl 4.1.2 and 4.1.4 of Section II of the *ARB Code*.

²⁹⁵⁹ See cl 1.2 of Section I of the *ARB Code*.

²⁹⁶⁰ See cl 1.4 of Section I of the *ARB Code*.

against the backdrop of these foundational principles, which can be seen as the basis of responsible advertising.

In assessing whether or not advertising contravenes the *ARB Code*, the ARB will consider the likely impact of the advertisement on the hypothetical reasonable consumer who is likely to see or hear the relevant advertisement.²⁹⁶¹ As demonstrated by the ARB cases that are discussed in this chapter, foodstuffs advertising in South Africa is visible in all advertising mediums, including print (such as on product labels and menus), broadcast on television, and online. Importantly, consumers of all ages, literacy levels and socio-economic backgrounds are exposed to foodstuffs advertising in many facets of their daily lives. Advertising as a form of commercial communication, therefore, forms an integral part of the food environment in which South African consumers live, work and play. In this regard the ICC has noted:

[n]ever has so much information been as broadly and readily available to so many as it is now. This includes information about healthy lifestyles, nutrition, and dietary choices that is available from a great number of sources, including marketing communications.²⁹⁶²

Following the above, the preamble of *Appendix J* stipulates that:

[f]ood and beverage advertising *to children* should not bring advertising into disrepute or reduce confidence in advertising as a service to the industry and to the public.²⁹⁶³

Under the heading “Responsibility”, clause 5.1 of *Appendix J* provides:

Food and beverage advertising, including promotions, should not encourage poor nutritional habits or an unhealthy lifestyle *in children*, or encourage or condone excess consumption.²⁹⁶⁴

Notably, both the preamble of *Appendix J* and the responsible advertising requirement in clause 5.1 are limited to children only. As the word “children” is not qualified by the age limitation, those provisions would seemingly apply to all children as defined in Section I of the *ARB Code*, effectively including all persons under the age of 18 years. Whilst that

²⁹⁶¹ See the discussion in part 6.3.4 above.

²⁹⁶² ICC *Food and Beverage Framework 2*.

²⁹⁶³ Own emphasis added. See cl 1.1 of *Appendix J*.

²⁹⁶⁴ Own emphasis added.

definition of children is supported (as opposed to the narrower definition discussed below), one needs to consider if it is appropriate that those provisions in *Appendix J* are limited only to those individuals below the age of 18 years.

As the foundational principles in the Preamble of the *ARB Code* include all “consumers”²⁹⁶⁵ and “the public” when highlighting that no advertisement of any kind may bring advertising into disrepute or reduce confidence in advertising as a service to the public, it is not apparent why the Preamble and clause 5.1 of *Appendix J* refer to “children” only. One may argue that those provisions conflict with the foundational principles found in Section I of the *ARB Code*, and also seem misaligned with the current food environment and foodstuffs advertising landscape of consumers in South Africa. In considering the current burden of diet-related NCDs in combination with the fact that many adults have limited literacy skills and education,²⁹⁶⁶ it is submitted that the advertising industry’s commitment to responsible advertising in South Africa would be illustrated much more clearly if the preamble of *Appendix J* were to be amended to cover the entire consumer base in South Africa, irrespective of age. A suggested amendment is set out below (with the deletion crossed out):

[f]ood and beverage advertising ~~to children~~ should not bring advertising into disrepute or reduce confidence in advertising as a service to the industry and to the public.

Such an amendment would also serve to align the Preamble of *Appendix J* with Section I of the *ARB Code*. For the same reasons, it is also suggested that clause 5.1 be expanded. A suggested amendment to clause 5.1 of *Appendix J* (with deletions crossed out) appears below:

Food and beverage advertising, including promotions, should not encourage poor nutritional habits or an unhealthy lifestyle ~~in children~~, or encourage or condone excess consumption.

²⁹⁶⁵ In part 1.8.5 above, it was explained that the meaning of “consumer” as far as it relates to foodstuffs advertising and labelling is very broad. Consumers include people of virtually all ages (other than babies) and extend from the illiterate, possibly unsophisticated and poor individual on the one hand to the most educated, affluent and sophisticated individuals on the other.

²⁹⁶⁶ See part 3.3.2 above.

Clause 5 of *Appendix J* was relevant in *Wimpy / Galane*. In this matter a consumer complained about an advertisement for Wimpy's Double Double Cheeseburger and chips meal which was displayed on television and YouTube.²⁹⁶⁷ The advert essentially depicted a group of jovial elderly ladies who seemingly belong to a traditional *stokvel*.²⁹⁶⁸ One of the concerns raised by the complainant was that it encourages older people to consume unhealthy meals. Moreover, the complainant believed that the advert:

... disregards the wellness of the black elderly community and it is also impartial to its elderly target market by depicting elderly women eating burgers, an unhealthy meal at their age. Healthier options could have been selected on the menu to try and encourage wellness support for elderly communities who are already battling different chronic health conditions.²⁹⁶⁹

In considering the context of the matter, the Directorate observed that the meal promoted in the advertisement was a "treat", and by no means would be understood to be an invitation to the ladies depicted in the advertisement or other elderly people to eat the advertised Wimpy meal daily. Rather, it was depicted as "a money saving option now and then, during a special outing".²⁹⁷⁰ Another aspect highlighted by the Directorate was that the meal portions seemed reasonable and not excessive. In noting that the ladies in the advertisement were portrayed as dancing and joking around, thereby supporting the contention that they were fully capable of making meal choices, the Directorate also observed that:

there is a danger in becoming paternalistic about the aged, which is a form of age discrimination in itself. Older adults are nonetheless adults, entitled to make their own nutrition choices. A double cheese burger [sic] and chips is not the healthiest meal choice for anyone, but the fact that the ladies in the commercial are older does not mean that their eating should be policed. If the Directorate were to find that commercials should not show older people eating certain food, then it would have to apply the same test to anybody eating the food in question.²⁹⁷¹

²⁹⁶⁷ *Wimpy / Galane* 1-2.

²⁹⁶⁸ A *stokvel* is a unique South African custom where a group of individuals (usually middle-aged or elderly black women) agree to set up a financial support system whereby they put money away, or pool, funds. See *Wimpy / Galane* 1, 3-4. For additional information on *stokvels*, see National *Stokvel* Association of South Africa 2021 <https://nasasa.co.za/about-stokvels/>.

²⁹⁶⁹ *Wimpy / Galane* 1. Given the nature of the complaint, the complainant likely meant to use the word "partial" instead of "impartial".

²⁹⁷⁰ *Wimpy / Galane* 5.

²⁹⁷¹ *Wimpy / Galane* 5. In terms of clause 3.4 of Section II of the *ARB Code*, no advertisement may contain discriminatory content unless, in the opinion of the ARB, such discrimination is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.

This matter demonstrates that the ARB is cautious not to be seen as “policing” the dietary preferences of adult consumers, but that it will always consider the context of the advertising in making its decision. At the same time the ARB is willing to consider if an advert may depict excessive portion size, which would be contrary to *Appendix J*,²⁹⁷² or may depict individuals who may not be able to make informed food selection choices themselves, notably children, as mentioned in clause 5.1.

If clause 5.1 were worded in a broader context to include all consumers, as suggested above, the ARB might have come to a different conclusion, given the nature of the product advertised. In those circumstances the withdrawal of the advertisement may not have been warranted. Rather, if the complaint had been upheld²⁹⁷³ the ARB could have instructed the advertiser to display a clear warning message on screen, informing consumers that excessive consumption of the meal displayed in the advertisement would not form part of a healthy dietary choice or a healthy lifestyle.

6.6.4 Limitations on the use of graphic representations in relation to foodstuffs advertising

It will be recalled that restrictions that limit the use of graphic elements on unhealthy foodstuffs labelling have been proposed in R3337. When considering to what extent the existing principles as set out in the *ARB Code* may already support or supplement the DOH’s objectives aimed at prohibiting the use of certain graphic elements in relation to unhealthy foodstuffs, clause 8 of *Appendix J* is relevant. It provides:

8.1 Advertisers promoting food and beverage products that do not represent healthy dietary choices and a healthy lifestyle, consistent with established scientific standards acceptable in terms of Section II, Clause 4.1 of the Code of Advertising Practice, shall not use celebrities or characters licensed from third-parties (such as cartoon characters) in television advertisements targeted at children of twelve years old and under.

8.2 Clause 9.1 does not apply to company-owned characters.

²⁹⁷² See cl 5.2 of *Appendix J*.

²⁹⁷³ The ARB may impose sanctions only if an advertisement is found to be contrary to the *ARB Code*. See cl 14 of the *Procedural Guide*.

8.3 Clause 9.1 does not apply to the use of characters on packaging, provided that the packaging does not appear in television advertising directed at children twelve years old and under.

At the outset, it is notable that both clauses 8.2 and 8.3 refer to “Clause 9.1”. In *Fair Cape Dairies*²⁹⁷⁴ the Directorate observed that this is clearly a typographical error, and that clauses 8.2 and 8.3 “are intended to be provisions to Clause 8.1”.²⁹⁷⁵ For the sake of accuracy and certainty, it is recommended that the ARB should rectify this error.

Turning to the substance of clause 8, it places advertising restrictions, albeit of very limited scope, on the use of licensed third-party characters (such as characters from animation films or cartoons) in relation to “foodstuffs that do not represent healthy dietary choices and healthy lifestyle”. Whilst this restriction has some value, certain shortcomings are immediately apparent. In considering clause 8 holistically, it essentially prohibits:

- the use of cartoon characters, other than those owned by the company (presumably referring to the product manufacturer), and which have been licensed from third parties;
- in television advertisements for unhealthy foodstuffs;
- where such advertisements are targeted at children aged 12 years and under.

It is disappointing that the restrictions in clause 8.1 essentially apply to television advertising which is “targeted at” children aged 12 years and under only. It is also not made clear in *Appendix J* when a television advertisement would be deemed to be “targeted at” children in that age category.²⁹⁷⁶ The limited scope of this clause was apparent in *Fair Cape Dairies*, where a consumer filed a complaint against the packaging

²⁹⁷⁴ *Fair Cape Dairies / Consumer / 3297* (Directorate ruling of 10 July 2024) (hereafter “*Fair Cape Dairies*”).

²⁹⁷⁵ *Fair Cape Dairies* 5.

²⁹⁷⁶ The *South African Marketing to Children Pledge*, which formed the basis of *Appendix J*, does provide some guidance. It provides that the term “children twelve years old and under means advertising to media audiences with a minimum of 50% of children twelve years old and under”. In this context it would seem that television advertisements where at least half of the viewers are children of 12 years and below would likely be deemed to be “targeted at” children. Nevertheless, this aspect remains vague. See *The South African Marketing to Children Pledge* 4.

of the advertiser's full cream sweetened chocolate flavoured milk product. The packaging contained prominent use of the Barbie character, as shown in Figure 6-5 below:



*Figure 6-5: Barbie-branded Fair Cape Dairies sweetened full cream chocolate flavoured milk*²⁹⁷⁷

Whilst clause 8 was not raised by the complainant, the Directorate did dismiss its applicability by pointing out that:

Clause 8.1 of Appendix J prohibits the use of character merchandising (if the product is not healthy) **only** in television commercials. Clause 8.3 confirms this interpretation by specifically excluding product packaging (unless it appears in a television commercial). There is nothing before the Directorate to suggest that this packaging is used in television commercials.²⁹⁷⁸

The Directorate also pointed out that *Appendix J*, when read in its entirety, specifically allows for character merchandising on the packaging of all foodstuffs.²⁹⁷⁹ It is uncertain if this statement was made as a simple matter of fact, or to illustrate an apparent shortcoming of *Appendix J*. Nevertheless, to the extent that the statement may serve as an implied approval by the ARB of the use of “character merchandising” on the packaging of foodstuffs that are unhealthy to children, this statement warrants harsh critique. As

²⁹⁷⁷ Images sourced from ruling. See *Fair Cape Dairies* 1.

²⁹⁷⁸ Emphasis from original ruling text. See *Fair Cape Dairies* 5.

²⁹⁷⁹ *Fair Cape Dairies* 1.

discussed previously,²⁹⁸⁰ the use of visually attractive graphics on foodstuffs labels increases the desirability of those products to children, who subsequently pressure their parents into buying those products for them or the entire household. Whilst such marketing tactics boost product sales and increase manufacturer's profits, this occurs at the expense of the public by undermining a healthy diet and lifestyle.²⁹⁸¹ Surely the ARB and the broader advertising industry upon introspection cannot simply accept this conduct by certain foodstuffs manufacturers, which is so glaringly in conflict with responsible and ethical advertising.

Three main shortcomings in clause 8 can be identified in this context. First, the fact that its scope is limited to television advertising only demonstrates that *Appendix J* is outdated and not aligned with current ICC guidelines. All relevant ICC SRO documents, including the *ICC Advertising Code*,²⁹⁸² the *ICC Toolkit on Advertising to Children*²⁹⁸³ and the *ICC Food and Beverage Framework*²⁹⁸⁴ apply to all advertising, i.e., any form of marketing communication that is carried out by the media in return for payment or other consideration. In addition to television advertising, the media includes an array of other advertising platforms such as radio and other broadcast media, press/print advertising, outdoor advertising, digital media and social media.²⁹⁸⁵

A second issue is the fact that the restriction in clause 8 applies only to advertisements which are targeted to children aged 12 and under. Whilst this age limitation probably emanates from guidelines of the ICC, reasons have been put forward in part 6.5.2 as to why that age delineation is neither in line with South African legislation nor suitable in the South African consumer context.

²⁹⁸⁰ See discussion in parts 3.5.2 and 4.8.

²⁹⁸¹ WHO *Food Marketing Exposure 2*; Arruà *et al* 2017 *Appetite* 140; Schmitt, Wagner and Kirch 2007 *Journal of Public Health* 59-60.

²⁹⁸² *ICC Advertising Code* 4.

²⁹⁸³ This document confirms that it is aimed at "advancing principles of responsible commercial communication through effective self-regulation". As such it refers to all forms of "commercial communications", which would include all types of advertising media. No specific advertising medium is singled out or highlighted. See *ICC Toolkit on Advertising to Children* 1.

²⁹⁸⁴ *ICC Food and Beverage Framework* 1.

²⁹⁸⁵ *ICC Advertising Code* 5.

Thirdly, the fact that company-owned characters are excluded from this restriction is problematic. When considering why the limitations in clauses 8.2 and 8.3 on the clause 8.1 restrictions have been included, it may momentarily seem that the ARB may not want to restrict trade mark rights. That being said, this would upon closer contemplation not necessarily seem to be a valid excuse. Both third-party and company-owned cartoon characters may be the subject of trade mark protection. As such, IP considerations would not seem to be a valid reason for the distinction between third-party and company-owned cartoon characters. Furthermore, and as illustrated in *Chicken Licken / Cele*, the ARB has restricted the constitutional rights of advertisers where the public interest is relevant.²⁹⁸⁶ In that matter the FAC held that the right to human dignity outweighed the freedom of commercial speech of the advertiser. In the context of unhealthy foodstuffs, strong arguments could be put forward in support of balancing the scale in favour of the right to a healthy food environment and the potential deprivation of property rights as well as the freedom of speech of advertisers of unhealthy foodstuffs.²⁹⁸⁷

The fact that the use of characters (presumably both licensed from third parties or company-owned) on foodstuffs packaging is generally²⁹⁸⁸ excluded from the scope of clause 8.1 essentially waters down the practical impact of that provision. This is because cartoon-like characters are often used as a marketing tool on product labels and packaging to attract children.

The practical applicability of the clause 8.1 restriction is therefore very narrow, to say the least. An example of where this provision would conceivably apply is when a food retailer advertises the availability of candy depicting a third-party character (such as a movie or cartoon animation) during a children's programme on national television. It should be noted that no ARB rulings have dealt with this situation. A possible reason for this is that foodstuffs advertisers comply with the provision. Another plausible explanation is that its scope is too narrow and that the practical applicability and application thereof are limited.

²⁹⁸⁶ *Chicken Licken / Cele* (FAC) paras 13, 23.2.

²⁹⁸⁷ See the discussion in parts 2.5.2, 4.7 and 4.8 above.

²⁹⁸⁸ Unless displayed on television.

Against this background it is suggested that the clause 8.1 restriction be expanded to include all cartoon-like characters or images that may be visually appealing to children, irrespective of who is the owner of the IP that may vest in that image or device. Clause 8.1 should also be expanded to cover other forms of advertising besides television, including radio advertising, other forms of broadcast advertising, and product packaging and labels. A meaning should be attached to the term “children” which includes any person below the age of 18 years.

A proposed updated clause 8 would then read (with additions in bold and deletions crossed out):

8.1 Advertisers promoting food and beverage products that do not represent healthy dietary choices and a healthy lifestyle, consistent with established scientific standards acceptable in terms of Section II, Clause 4.1 of the Code of Advertising Practice, shall not use celebrities or characters **that appeal to children** ~~licensed from third parties~~ (such as **but not limited to** cartoon characters) in **or on**:

8.1.1 television, **radio or other broadcast** advertisements targeted at, **or which are likely to be seen by**, children **during the hours of 06h00-19h00 on weekdays and 06h00-12h00 on Saturdays and Sundays** ~~twelve years old and under~~; or

8.1.2 labelling and packaging of such food and beverage products.

~~8.2 Clause 9.1 does not apply to company-owned characters.~~

~~8.3 Clause 9.1 does not apply to the use of characters on packaging, provided that the packaging does not appear in television advertising directed at children of twelve years old and under.~~

The proposed amendments to clause 8 essentially cover all “celebrities or characters”, whether or not trade mark rights may vest in those elements, that may appeal to children. They propose restricting the use of those elements in relation to labelling and packaging of foods and beverages that do not represent healthy dietary choices and a healthy lifestyle, as well as in other forms of advertising during certain broadcast times.

The broadcast time restrictions included in the suggested amendments to clause 8.1 emanate from the broadcast restrictions that are currently applicable to alcoholic beverage advertising in terms of *Appendix A* of the *ARB Code*.²⁹⁸⁹ Essentially, alcoholic

²⁹⁸⁹ See clauses 3.2.4.2, 3.2.4.3, 3.3.1.3 and 3.3.1.4 of *Appendix A*.

beverage advertising may be broadcast only between 19h00 in the evening and 6h00 the next day during the week. On weekends, broadcasting is restricted between 06h00 in the morning and 12h00 in the afternoon. Although this is not entirely clear, the reduced broadcast time restrictions over weekends are probably motivated by the fact that alcoholic beverage companies may sponsor sporting teams or sports events that are broadcast during the afternoons over weekends.²⁹⁹⁰ Thus in the food industry Spur Steak Ranches, a national restaurant chain, sponsors the South African national rugby team.²⁹⁹¹ It is not uncommon, therefore, for Spur to advertise its restaurant foods before, during and after broadcasts of rugby matches over weekends (and usually in the afternoons). As both unhealthy foodstuffs and alcoholic beverages fall within the unhealthy commodities category, adopting the broadcasting time restrictions that the ARB already has in place for alcoholic beverage advertising in South Africa would seem equally suitable for foodstuffs that do not represent healthy dietary choices or lifestyles.

In ascertaining the meaning of the proposed term “advertisements targeted at, or which are likely to be seen by, children”, the so-called 70/30-rule included in *Appendix A* could potentially be adopted.²⁹⁹² In explaining the concept of “adult appeal”, *Appendix A* provides that:

Commercial Communications may only be placed in print, radio, television, or on any form of digital media where, using the best relevant data available, at least 70% of the audience is reasonably expected to be of legal drinking age [i.e., 18 years] or older.

On this basis programmes with a verifiable 30% or more viewership of persons under the age of 18 may not broadcast alcoholic beverage advertisements during certain times.²⁹⁹³ If the 70/30 rule is adopted in *Appendix J*, the term “advertisements targeted at, or which are likely to be seen by, children” could be understood to mean advertisements with a viewership, or likely viewership, of 30% or more persons below the age of 18 years. This

²⁹⁹⁰ As an example, the national soccer team, Bafana Bafana, is sponsored by Castle Lager. See Sport Industry Group 2023 <https://sportindustryawards.co.za/safa-and-castle-lager-extend-partnership/>.

²⁹⁹¹ See South African Rugby 2022 <https://www.springboks.rugby/news-features/articles/2022/10/27/spur-gives-the-springboks-a-new-taste-for-life/#:~:text=Spur%20Steak%20Ranches%2C%20South%20Africa's,until%20the%20end%20of%202024.>

²⁹⁹² See for example clauses 3.2.4.1, 3.2.4.4, 3.3.1.2 and 3.4.1.1 of *Appendix A*.

²⁹⁹³ See clause 1.1.1 of *Appendix A*.

would essentially mean that (i) advertisements promoting food and beverage products that do not represent healthy dietary choices and a healthy lifestyle, (ii) may not use celebrities or characters that appeal to children in or on television, radio or other broadcast advertisements where the viewership of 30% more of consumers is made up of persons below the age of 18 years, (iii) during the hours of 06h00-19h00 on weekdays and 12h00-06h00 on Saturdays and Sundays.

6.6.5 Limitations on the use of nutrition and health claims

Appendix J does not currently deal with nutrition and health claims on foodstuffs labels *per se*. However, clause 10.2 stipulates that claims about the nutrition and health benefits of a food or beverage product should be conveyed in a manner that is easily understood by the reasonable consumer of the goods concerned. An immediate benefit of this provision is that it is framed to cover the entire consumer base. In addition, as there is no limitation on the type of advertising media in this clause, it would seemingly apply to all advertising, which includes foodstuffs labels.

It should, however, be noted that clause 10.2 is framed in a manner which focuses on positive claims or attributes (i.e., benefits) of the relevant food product concerned. To ensure that *Appendix J* aligns with national legislation to be implemented at some time, a suggestion would be to consider amending clause 10.2 by replacing the word “benefits” with “qualities”, as illustrated below (with additions in bold and the deletion crossed out):

- 10.2 Claims about nutritional **value** and health ~~benefits~~ **properties** should be conveyed in a manner easily understood by the reasonable consumer.

A shift from the use of “benefits”, which focuses only on positive qualities, to “properties”, which could include both the positive and the negative nutritional properties of a foodstuff, would broaden the scope and applicability of clause 10.2. The ARB would then be able to consider the use of nutrition and health claims on all foodstuffs, including potentially misleading claims made on foodstuffs that may not form part of a healthy dietary choice or a healthy lifestyle.

Turning to a separate issue, clause 10.3 of *Appendix J* provides:

Nutritional or health claims in television advertisements targeted at children of twelve years old and under, may not be made in respect of products that do not represent healthy dietary choices and a healthy lifestyle, consistent with established scientific standards acceptable in terms of Section II, Clause 4.1.

The practical relevance of the abovementioned clause is reduced by the fact that it applies only to television advertising which, as mentioned above, does not align with the guidelines set out by the ICC.²⁹⁹⁴ Clause 10.3 is narrowed even further in that it does not apply to general television advertising, but only to “television advertisements targeted to children of twelve years and under”. Whilst that term is not defined, it would most likely be limited to television channels or programmes that are aimed at children aged 12 years and younger. Unhealthy foodstuffs advertising that may be seen by children whilst watching other programme material on television²⁹⁹⁵ would therefore not fall under clause 10.3.

For the same reasons as those set out earlier, that age limit is inappropriate in the South African context, especially as this clause aims to reduce children’s exposure to “products that do not represent healthy dietary choices and a healthy lifestyle”. If that clause is considered in the negative, it essentially means that it would be permissible, at least in certain instances, to make unsubstantiated nutritional or health claims in relation to food and beverage products that do not represent healthy dietary choices or a healthy lifestyle in television advertisements that are targeted at children older than 12 years. Surely this would be neither ethical nor responsible advertising.

Assuming that the intention of this clause is to ensure responsible advertising by limiting all children’s exposure to unhealthy foodstuffs advertising, the scope and application could be broadened substantially if clause 10.3 were to be amended along the lines that are set out below (additions are indicated in bold and deletions are crossed out):

Nutritional or health claims in ~~television~~ advertisements targeted at **or which are likely to be seen by** ~~children of twelve years old and under~~, may not be made in respect of products that do not represent healthy dietary choices and a healthy lifestyle, consistent with established scientific standards acceptable in terms of Section II, Clause 4.1.
Advertisers should also ensure that all claims in food and beverage

²⁹⁹⁴ See part 6.6.4 above.

²⁹⁹⁵ Children may watch soaps broadcast on other channels, for example. See *Snickers / Korb* 1.

advertising (including labelling) are permissible in terms of relevant legislation.

The removal of the word “television” would ensure that the provision applies to all advertising content and media that would generally fall within the jurisdiction and mandate of the ARB. The removal of the term “twelve years old and under” would ensure that this provision protects the interest of all children as opposed to only a sub-category under a certain age. It would also align with national legislation and fall within the meaning of “children” in Section I of the *ARB Code*. The addition of “or which are likely to be seen by” broadens the scope of this provision and would effectively allow the ARB to determine, on a case-by-case basis, if the advertising of unhealthy foodstuffs would be harmful to children. The last sentence has been added to avoid any unanticipated discrepancies between the *ARB Code* and foodstuffs legislation and to alert advertisers that compliance with relevant legislation is required regarding claims on foodstuffs advertising and labelling.

It should, however, be kept in mind that under R3337 it is proposed that no nutrition, health or energy claims may be made on labels or advertising of unhealthy foodstuffs.²⁹⁹⁶ If those provisions do come into operation at some time, clause 10.3 would have to be amended in a manner that does not conflict with those provisions. A suggestion which could already be adopted at this stage is set out below (deletions are crossed out and additions are displayed in **bold**):

Nutritional or health claims in ~~television~~ advertisements ~~targeted at children of twelve years old and under~~, may not be made in respect of products that do not represent healthy dietary choices and a healthy lifestyle, consistent with established scientific standards acceptable in terms of Section II, Clause 4.1. **Advertisers should also ensure that all claims in food and beverage advertising (including labelling) are permissible in terms of relevant legislation.**

By removing the reference to children from clause 10.3 altogether, the restrictions on the use of nutrition or health claims in relation to any foodstuffs that do not represent or form part of a healthy diet or lifestyle would not be acceptable on any form of foodstuffs

²⁹⁹⁶ Draft reg 51(5)(d) of R3337 provides that foodstuffs which will be required to contain FOP warning labelling may not “make any claim with an energy, health, or nutrition message...” Also see part 4.4.10 above.

advertising, including labelling. Whilst this provision seems far-reaching, the broader public health interest in South Africa may very well justify this.²⁹⁹⁷ Moreover, and in support of R3337, it would incentivise foodstuffs manufacturers to reformulate their products to healthier alternatives, as suitable nutrition and health claims would nevertheless be permitted in relation to qualifying foods. It is only foodstuffs which may harm public health that would be affected by this provision.

6.6.6 *Social values*

On the topic of social values, clause 7 of *Appendix J* stipulates:

- 7.1 As it is recognised that children of twelve years old and under are impressionable, food and beverage advertising should not mislead children about product benefits from use of the product. Such benefits include, but are not limited to, the acquisition of strength, status, popularity, growth, proficiency and intelligence.
- 7.2 Food and beverage product advertising should not undermine the role of parents or others responsible for a child's welfare in guiding diet and lifestyle choices.
- 7.3 Food and beverage product advertising should not directly appeal to children of twelve years old and under to persuade their parents or others to buy advertised products for them; or suggest any negative consequences of not purchasing the product.

As reflected in Addendum F, and for the reasons that have been set out above, it is suggested that the words "of twelve years old and under" should be removed from both clauses 7.1 and 7.3 and other provisions in *Appendix J*.²⁹⁹⁸

In *Fair Cape Dairies* the Directorate observes that clause 7, when considered in its entirety, underlines the role of parents. As such, the clause effectively means that:

advertising may not tell children to persuade their parents to buy the product, or tell children that there will be negative consequences if they do not buy the product.²⁹⁹⁹

In considering clause 7.3 of *Appendix J* in that context the Directorate was not convinced that the advertisers' sweetened full cream chocolate flavoured milk, the labelling of which

²⁹⁹⁷ For a discussion on the limitation of advertising as a form of commercial speech, see part 4.7 above.

²⁹⁹⁸ Including clauses 8.1, 9.1, 9.3, 11.3, 13.1 and 13.3.

²⁹⁹⁹ *Fair Cape Dairies* 5.

consisted almost entirely of an image of the Barbie character and name on the main panel,³⁰⁰⁰ would appeal to children aged 12 years or below in such a manner that they would attempt to persuade their parents or others to buy that product for them. Arguably, the Directorate's interpretation and application of clause 7.3 in this matter was quite literal and might not align with the underlying principle of interpreting the *ARB Code* both in letter and spirit.³⁰⁰¹ Clause 7.3 does not state that the relevant advertising should "tell" children to persuade their parents to purchase a particular product. Rather, the clause provides that "[f]ood and beverage advertising should not directly appeal to children ... to persuade their parents or others to buy the advertised product". This should also be considered in the light of the fact that Barbie is a well-known children's doll.³⁰⁰² Television shows featuring Barbie are broadcast on national television,³⁰⁰³ and a new Barbie film was released in July 2023.³⁰⁰⁴ The likelihood that the advertiser's milk product would appeal to at least some children who either had either played with a Barbie doll or watched a Barbie show or film, and would move them to ask their parents for that product cannot realistically be discounted. The fact that the ARB also discounted the need for it to consider whether or not the advertiser's product was unhealthy is also disappointing. Although this aspect is not required to determine if clause 7.3 has been contravened, it is submitted that it may very well have been a factor relevant to the determination of the complaint.

Clauses 7.2 and 7.3 were considered in *Eskort / RCL Foods*. In this competitor complaint RCL Foods claimed that Eskort's advertising of its smoked viennas was directed to children below the age of twelve and framed in such a manner that such children would convince their parents to buy Eskort's product. The main character in the television advertisement was a young girl at a children's sleepover, depicted as having a strong preference for Eskort viennas. In considering the context of the advertisement, the Directorate was not convinced that the advert directly appealed to children below the age of twelve years in

³⁰⁰⁰ See Figure 6-5 above.

³⁰⁰¹ See cl 3.1 of Section I of the *ARB Code*.

³⁰⁰² For information on Barbie and its history, see Britannica date unknown <https://www.britannica.com/topic/Barbie>.

³⁰⁰³ See, for example, eTV 2024 <https://www.etv.co.za/shows/barbie-dreamhouse-adventures>.

³⁰⁰⁴ See Ster Kinekor 2023 <https://www.sterkinekor.com/news/detail/15869/has-barbenheimer-fever-hit-south-africa>.

a manner that would encourage them to persuade their parents to buy only the advertiser's particular smoked viennas. In addition the Directorate did not believe that the advertisement could reasonably be seen to undermine the role of parents or others who might be responsible for children's dietary choices. In this regard it observed that:

While the ... mother [hosting the sleepover] is clearly (and, in the opinion of the Directorate, justifiably) irritated, this frustration appears to stem from the perception that the little girl is fussy, not from the fact that she is wilfully disregarding or disobeying healthy dietary advice. The mother has not suggested an alternative foodstuff that the child has refused.

It should also be noted that there are no submissions before the Directorate to suggest that the Advertiser's products are generally considered to be unhealthy, or at least less healthy than what is being prepared by the mother. Both meals appear to be Vienna based hot dogs. Had the mother been preparing a healthier option, one could conceivably argue that the young actress is foregoing a healthier product for one that constitutes a less healthy product (which might be considered a breach of Clause 7.2). This does not, however, appear to be the case, and has not been alleged by either party to this dispute.³⁰⁰⁵

When considering the observations of the Directorate above, it seems that it may have come to a different conclusion if RCL Foods had argued that Eskort's smoked viennas did not form part of a healthy diet. If that contention had been raised, the *onus* would have been on Eskort as the advertiser to substantiate that its smoked viennas do, in fact, form part of a healthy diet. In the absence of such evidence the Directorate may very well have found the advertisement to contravene clause 7.2 of *Appendix J*. However, as this issue was never raised by the advertiser it could not be considered by the ARB.

6.6.7 Restrictions on unhealthy foodstuff advertising and promotion at pre-schools and primary schools

Clause 14 of *Appendix J* places restrictions on foodstuffs advertising and promotional activities at pre-schools and primary schools. In terms of this clause, food and beverage products that do not represent healthy dietary choices and a healthy lifestyle³⁰⁰⁶ shall not:

³⁰⁰⁵ Eskort / RCL Foods 7.

³⁰⁰⁶ As substantiated by established scientific standards that are acceptable in terms of cl 4.1 of Section II of the *ARB Code*. See cl 14.1 and 14.2 of *Appendix J*.

- i. be advertised on, or in close proximity to, pre-school and primary school premises;
or
- ii. use any form of promotional activity such as free gifts, on pre-school and primary school premises.

As is, clause 14 already serves to support Government's efforts at reducing children's exposure to unhealthy foodstuffs advertising. In the context of childhood obesity and the food addiction patterns that are prevalent in children of all ages (i.e. between 0 and 18 years), it would be worthwhile to consider if it would be more responsible to extend the cover of clause 14 to high schools as well.³⁰⁰⁷

It should be noted that the author could not find any ARB ruling where clause 14 of *Appendix J* was raised. There are a few plausible explanations for this. Firstly, it is possible that all foodstuffs advertisers that are members of the ARB adhere to that requirement. In those circumstances this serves as an example of how advertising self-regulation assists government efforts aimed at reducing diet-related NCDs by reducing children's exposure to unhealthy foodstuffs advertising whilst attending pre-school and primary school.

Another possibility is that members of the public may not be aware of this restriction in the *ARB Code*. Enhanced consumer awareness of *Appendix J* will likely lead to increased consumer monitoring of those principles and consequently an increase in the number of complaints filed with the ARB in the event of non-adherence.³⁰⁰⁸ Over time pressure from the public will also aid in affecting compliance with unhealthy foodstuffs advertising restrictions under the ARB mechanism.

It is encouraging that the ARB provides training and webinars to increase awareness of its operations and functions in the South African advertising landscape.³⁰⁰⁹ The focus of these education initiatives seems to provide an overview of the ARB in general as opposed to focusing on specific commodities that are covered by appendixes under the *ARB Code*.

³⁰⁰⁷ For a discussion on the school-going ages of children in South Africa, see part 4.5.3.

³⁰⁰⁸ OECD *Industry Self-Regulation* 8.

³⁰⁰⁹ See ARB *2nd Quarter 2024 Newsletter* 1-2; ARB *2nd Quarter 2023 Newsletter* 1.

It may not be reasonable for the ARB to single out advertising in the food sector unless it is invited to present at a food webinar, conference or another product-specific event.³⁰¹⁰ Consumer education initiatives on unhealthy foodstuffs may be hosted by various relevant stakeholders, including representatives from the DOH, DOA or DTIC government departments, legal practitioners and academics specialising in consumer law or food law. A suggestion would be to invite a representative from the ARB as a guest speaker at in-person or online consumer education initiatives on food labelling and advertising to explain the specific role of the ARB and the features of the *ARB Code* in regulating foodstuffs advertising in South Africa.³⁰¹¹

Of course, the media also have a role to play in increasing consumer knowledge, enhancing consumer education on relevant legal requirements and complaints forums, and shedding light on rogue traders who wilfully disregard responsible advertising standards.³⁰¹² In this regard the Daily Maverick has hosted a series of articles³⁰¹³ and webinars³⁰¹⁴ under its Food Justice initiative to broaden consumer awareness in relation to unhealthy diets. Consumer awareness campaigns through free webinars, for example, could also serve to broaden consumer education and understanding of advertising and labelling restrictions in relation to unhealthy foodstuffs, as well as where to go with a complaint. For example, the civil society organisation Healthy Living Alliance, which is

³⁰¹⁰ This is because the *ARB Code* essentially covers the advertising of all goods and services in South Africa. In addition to food and beverage products, appendixes to the *ARB Code* cover various consumer product categories (including alcoholic beverages, vapour products, and cosmetics), as well as environmental claims, direct marketing, and social media/influencer advertising. If one sector or industry is singled out during a general discussion or presentation, there is potential for perceived bias.

³⁰¹¹ The ARB's CEO has extended invitations to present on the ARB. See ARB *2nd Quarter 2024 Newsletter* 1.

³⁰¹² OECD *Industry Self-Regulation* 24.

³⁰¹³ Examples include Sulcas Daily Maverick available at <https://www.dailymaverick.co.za/article/2023-07-19-activists-call-for-more-restrictions-on-marketing-of-unhealthy-foods-and-drinks-to-children/>; Grimbeek Daily Maverick <https://www.dailymaverick.co.za/article/2023-07-19-aggressive-advertising-of-unhealthy-food-targets-children/>; Shoba Daily Maverick <https://www.dailymaverick.co.za/article/2021-02-18-fast-food-advertising-is-a-threat-to-childrens-right-to-health-says-report/>; Sulcas Daily Maverick <https://www.dailymaverick.co.za/article/2022-01-19-redefining-food-safety-sas-laws-governing-food-advertising-aimed-at-children-need-to-be-jacked-up/>; Sikhakhane Daily Maverick available at <https://www.dailymaverick.co.za/article/2023-10-17-food-marketing-sa-needs-regulation-to-protect-children-experts/>.

³⁰¹⁴ For information on a webinar hosted in April 2022, see Metelerkamp Daily Maverick available at <https://www.dailymaverick.co.za/article/2022-04-20-fast-food-advertising-targeting-children-puts-their-health-and-futures-at-risk-say-experts/>.

focused on “equitable access to healthy food”,³⁰¹⁵ or food compliance businesses such as Food Focus,³⁰¹⁶ which often host webinars on food-related aspects, would seem well-placed to drive such initiatives. These efforts form part of multi-stakeholder efforts aimed at educating members of the public on the health risks of unhealthy diets and promoting healthy dietary patterns.

6.7 Considering the benefits of advertising self-regulation

Effective advertising self-regulation is beneficial to consumers, businesses within the advertising industry, policymakers and governments.³⁰¹⁷ The advantages of the ARB system for each of these stakeholders are discussed below.

6.7.1 Consumer benefits

It has been pointed out earlier³⁰¹⁸ that traditional legal avenues involving court litigation are often not open to ordinary consumers. In this regard Van Heerden³⁰¹⁹ notes that:

[i]n order to enjoy proper protection of consumer rights an **efficient system of redress that is not too costly or dilatory is essential**. Without proper access to redress consumer rights remain lofty ideals and the plight of many hapless consumers is not improved.³⁰²⁰

By its nature, self-regulation is intended to be a “quick, cheap and solution-driven” mechanism.³⁰²¹ Lourke³⁰²² points out that a key component of advertising self-regulation is that it effectively empowers consumers to lodge complaints free of charge whilst affording the consumer effective redress.³⁰²³ The cost-effectiveness of the ARB mechanism aligns with a requirement for interventions aimed at addressing NCDs.³⁰²⁴

³⁰¹⁵ For more information, see Healthy Living Alliance 2024 <https://heala.org/>.

³⁰¹⁶ For more information, see Food Focus 2024 <https://www.foodfocus.co.za/home/about-us>.

³⁰¹⁷ *ICAS Charter 2*; *ICAS International SRO Guide* 6.

³⁰¹⁸ See the discussion in part 5.4.1.

³⁰¹⁹ Van Heerden “Protection of Consumers Rights and Consumers’ Voice” para 1.

³⁰²⁰ The bold emphasis is part of the original text.

³⁰²¹ Clauses 9.18 and 12.20.3 of the *Procedural Guide*; *ICAS Charter* 5.

³⁰²² Loerke “Information, Incentives and Choice: A Viable Approach to Preventing Obesity” 219.

³⁰²³ Also see Van Heerden “Section 82” para 3. Also see See *ICAS Global Factbook* 18.

³⁰²⁴ See DOH *Obesity Strategy* 14; UN *Resolution on the Prevention and Control of NCDs* para 43(g); WHO *Global Action Plan 2013-2020* 10. In terms of the UN Resolution on the Prevention and Control of NCDs para 39, interventions aimed at reducing NCDs must be “evidence-based, affordable, cost-effective, population-wide and multisectoral”. The ARB system, which is based on international

ICAS³⁰²⁵ has noted that government collaboration with an effective SRO in its country can be seen as a cost-effective policy, given that “advertising self-regulation comes at no cost to the taxpayers while being fully independent from the industry in its enforcement”.

In comparison to court litigation, ARB disputes are also resolved or adjudicated relatively quickly.³⁰²⁶ In addition, the *ARB Code* and the rulings issued by the ARB are readily available on the website of the ARB, making them readily accessible to everyone. This serves to promote transparency and credibility in the ARB system.³⁰²⁷

The fact that consumers can lodge ARB complaints in a straightforward manner through the ARB’s online portal also improves consumer accessibility.³⁰²⁸ The *ARB Code* is drafted in a manner which is plainer and more understandable than comparable provisions under foodstuffs legislation, for example. In fact, consumers need not even understand the *ARB Code* to lodge an advertising complaint. This means that there is no need to incur the costs of seeking legal advice or representation when a disgruntled consumer wishes to complain to the ARB regarding advertising. If relevant provisions of the *ARB Code* have not been identified in a complaint, the ARB will *mero motu* identify the relevant provision(s) of the *ARB Code* against which to consider the complaint. In *Chicken Licken / Cele*,³⁰²⁹ for example, the consumer simply noted its concern with the way colonialism was depicted in the television advertisement. It was the Directorate that interpreted the consumer’s concern and identified the provision which deals with offensive advertising³⁰³⁰ to be relevant.³⁰³¹

The appeal proceedings before the FAC in *Chicken Licken / Cele* also illustrate the extent to which the ARB will go to ensure that the consumer’s voice is heard when it comes to

principles of the ICC that have been adopted by SROs globally, can be seen as affordable to consumers and therefore a cost-effective tool forming part of the multi-sectoral approach aimed at addressing NCDs.

³⁰²⁵ ICAS *Request to Maintain the Consideration of Effective Advertising Self-Regulation as Part of the Policy Options Recommended to Member States* 2.

³⁰²⁶ Mupangavanhu and Kerchhoff 2021 *SA Merc LJ* 286; Visagie 2023 *PER* 25. Also see the discussion in part 6.7.2 below.

³⁰²⁷ ICAS *International SRO Guide* 28.

³⁰²⁸ Visagie “The Mandate of the Advertising Regulatory Board” 338-339.

³⁰²⁹ See part 6.3.6.3 above for the discussion of this case.

³⁰³⁰ Cl 1 of Section II of the *ARB Code*.

³⁰³¹ *Chicken Licken / Cele* (Directorate) 2.

matters of public interest. In support of its appeal the advertiser submitted extensive heads of argument and was represented by “a team of lawyers”.³⁰³² Counsel argued the appeal for more than two hours during the FAC appeal hearing.³⁰³³ On the opposite end of the spectrum, the consumer elected not to file a response in the appeal, had no legal representation, and did not even attend the appeal hearing.³⁰³⁴ In the circumstances Judge Ngoepe, sitting as the Chair of the FAC, exercised his discretion to appoint an *amicus curiae*³⁰³⁵ in order to objectively assist the FAC in reaching an informed, fair and just decision.³⁰³⁶ In justifying the need for this measure, Judge Ngoepe³⁰³⁷ noted:

[t]here is a complaint in this country that justice is only for the well resourced; well, only if that can't be helped... As mentioned already, the issue of colonization by definition affects millions of people. This matter cried out for full and proper ventilation, and, thanks to Mr de Klerk's appointment and the role he played as *amicus curiae*, that is exactly what the matter got.

The sanctions which the ARB may impose include the withdrawal of offending advertising, and the Ad Alert mechanism also supports effective consumer redress in the advertising industry. In contrast to the CGSO,³⁰³⁸ the ARB may order the withdrawal of advertising content which is not ethical or responsible under the *ARB Code*. Sanctions by the ARB are, therefore, an effective tool with which to remove unacceptable advertising content from circulation in the trade, which ultimately benefits the consumer.

For all of the abovementioned reasons, advertising self-regulation through the operations of the ARB assists in improving consumer welfare in South Africa.³⁰³⁹ The *ARB Code* sets advertising standards that are based on international best practice but adjusted to the context of the South African legal framework and consumer base. Offering a complaints

³⁰³² *Chicken Licken / Cele* (FAC) para 8.

³⁰³³ *Chicken Licken / Cele* (FAC) paras 8, 23.5.

³⁰³⁴ *Chicken Licken / Cele* (FAC) paras 8, 20-21, 23.4.

³⁰³⁵ An amicus curiae is tasked to draw the attention of the Court (or tribunal in this case) to relevant matters of law and fact that would otherwise not have been highlighted. As such, an amicus curiae is required to provide cogent and helpful submissions that assist the Court or tribunal in reaching a fair decision. An amicus curiae therefore has a duty towards the relevant court or tribunal and not to any of the parties. See *In re certain amicus curiae applications: Minister of Health v Treatment Action Campaign* 2002 5 SA 713 (CC) para 5; *Chicken Licken / Cele* (FAC) paras 25-26.

³⁰³⁶ *Chicken Licken / Cele* (FAC) para 8.

³⁰³⁷ *Chicken Licken / Cele* (FAC) para 27.

³⁰³⁸ For a discussion on the limitations of the CGSO as far as it relates to foodstuffs advertising complaints and possible recommendations that it may make, see part 5.4.2.2.

³⁰³⁹ ICAS *International SRO Guide* 6.

resolution system that is cost-effective, efficient, accessible, transparent, specialised and independent demonstrates the credibility of the ARB in facilitating consumer redress.³⁰⁴⁰ In these circumstances the ARB mechanism can be seen as a system that increases consumer confidence in the South African advertising landscape.³⁰⁴¹

It has been noted that more advertising complaints are generally filed with self-regulatory authorities than before courts in terms of government regulation.³⁰⁴² The growing number of consumer complaints filed with the ARB points towards public confidence and trust in the ARB complaints system and in the effectiveness thereof.³⁰⁴³ During the first half of 2024 the ARB received 46 complaints relating to food advertising.³⁰⁴⁴

6.7.2 Benefits to the advertising industry

For businesses, self-regulation acts to “level the playing field”.³⁰⁴⁵ All businesses that are required to adhere to the ethical and responsible advertising standards contained in the *ARB Code* effectively play by the same rules. Harmonisation in cross-country advertising practices is also promoted by the fact that the *ARB Code*, like most other SRO codes worldwide, is based on the basic core principles contained in the *ICC Advertising Code*.³⁰⁴⁶

A reason for self-regulation in the advertising industry generally being perceived as successful³⁰⁴⁷ is found in the unique nature of advertising. Advertising discloses key information such as company names and brands, making this form of commercial conduct and the person or entity responsible for that material identifiable.³⁰⁴⁸ In the circumstances consumers and the trade competitors of an advert would be able to detect and trace the source of that advertising, especially in the case of advertising that starkly offends against the ethical principles in the *ARB Code*. This has a direct impact on consumer trust and

³⁰⁴⁰ ICAS *International SRO Guide* 40.

³⁰⁴¹ OECD *Industry Self-Regulation* 6.

³⁰⁴² ICC *Commission on Marketing and Advertising Frequently Asked Questions* 3.

³⁰⁴³ Visagie 2023 *PER* 25; ICAS *International SRO Guide* 53.

³⁰⁴⁴ See ARB *1st Quarter 2024 Newsletter* 9; ARB *2nd Quarter 2024 Newsletter* 7.

³⁰⁴⁵ OECD *Industry Self-Regulation* 11.

³⁰⁴⁶ See ICAS *Global Factbook* 23.

³⁰⁴⁷ Woker 2016 *SA Merc LJ* 31; Boddewyn 1989 *Journal of Advertising* 22; ICC *Commission on Marketing and Advertising Frequently Asked Questions* 2.

³⁰⁴⁸ Boddewyn 1989 *Journal of Advertising* 22.

loyalty.³⁰⁴⁹ As self-regulation is based on universally acceptable advertising standards, companies whose advertising content complies with the *ARB Code* also encourage consumer trust and loyalty, ultimately increasing sales and profitability.³⁰⁵⁰

In addition, in a country like South Africa, where the government has acknowledged the role of advertising self-regulation, businesses that have undertaken to comply with the *ARB Code* and its rulings may also be seen in a more favourable light by the government.³⁰⁵¹

On a separate note, the quick turnaround time for dealing with complaints is advantageous for consumers and competitors alike. Whist litigation before the courts may be available to corporations, it should also be noted that the courts often do not consider commercial urgency a sufficient reason to justify a speedy hearing of a case before the courts. In *Clover v Sigalo a quo*, for example,³⁰⁵² the urgent application brought by the applicant in March 2021 was struck off the roll for lack of urgency.³⁰⁵³ Despite highlighting the prejudice that consumers would potentially suffer because of being misled or deceived by the respondent's product packaging,³⁰⁵⁴ the applicant was required to re-enroll that matter on the normal motion court roll. The re-enrolled case was heard five months later, and the court *a quo* ruling was handed down in November 2021.³⁰⁵⁵ On appeal the SCA ruling was delivered in May 2023.³⁰⁵⁶ This means that the offending STORK BUTTER spread packaging remained in circulation for more than two years after the applicant initially instituted proceedings before the High Court. In *Securex / Protex*³⁰⁵⁷ the competitor complaint was filed in December 2019³⁰⁵⁸ and the Directorate issued its ruling in January 2020. On appeal the AAC issued its ruling in April 2020 and the FAC

³⁰⁴⁹ Woker *Advertising Law in South Africa* 16.

³⁰⁵⁰ ICAS *International SRO Guide* 6; OECD *Industry Self-Regulation* 6, 11.

³⁰⁵¹ OECD *Industry Self-Regulation* 11.

³⁰⁵² For a discussion of this case, see parts 2.1.5 and 5.2.2.

³⁰⁵³ *Clover v Sigalo a quo* para 23.

³⁰⁵⁴ *Clover v Sigalo Foods (Pty) Ltd (GP)* (unreported) case number 12130/2021 of 17 May 2021 paras 19-20.

³⁰⁵⁵ *ARB v Bliss* (SCA) para 6.

³⁰⁵⁶ *Sigalo Foods (Pty) Ltd v Clover SA (Pty) Ltd 2023 JDR 1842* (SCA). See parts 2.5.1 and 5.3.2 above for a discussion on this case.

³⁰⁵⁷ *Securex / Protex* (Directorate ruling of 21 January 2020).

³⁰⁵⁸ *ARB v Bliss* (SCA) para 2.

subsequently issued its ruling in August 2020.³⁰⁵⁹ In *Chicken Licken / Sandile Cele* the Directorate issued its ruling on 14 December 2018 in response to a complaint against the television advertisement that was broadcast on 28 November 2018.³⁰⁶⁰ Following two rounds of appeal, the FAC issued its ruling seven months after the Directorate's ruling in July 2019.³⁰⁶¹ This demonstrates the quick turnaround time of the Directorate, as well as a reduced appeal period under the ARB complaints resolution mechanism.

From an advertiser's perspective the voluntary funding mechanism of the ARB may also be advantageous, especially considering that businesses in certain industries may already contribute to other industry bodies and are compelled to contribute to the funding of CGSO. Whilst businesses that contribute towards the ARB pay complaints fees at discounted rates, any commercial entity in South Africa can approach the ARB with a complaint relating to a competitor's advertising even if the complainant is not a member of the ARB or does not fund the ARB.

6.7.3 The benefits of advertising self-regulation for the government

6.7.3.1 Alleviating the burden on the court system

As demonstrated above, litigating before the courts is often lengthy, particularly where appeals are filed.³⁰⁶² In addition to being quicker, the complaints resolution system under the ARB undoubtedly serves to provide relief to overburdened courts.³⁰⁶³

Self-regulation is important to create a trusted space where the consumer knows the industry is regulated. As pointed out by Mupangavanhu and Kerchhoff,³⁰⁶⁴ this is illustrated by the sheer volume of complaints received by the ARB when compared to the other available consumer complaints channel, namely the co-regulatory mechanism of the CGSO. In the context of misleading advertising, these authors note that the ARB:

³⁰⁵⁹ *Bliss Brands (Pty) Ltd / Colgate-Palmolive (Pty) Ltd* (FAC ruling dated 3 August 2020) paras 1, 25.

³⁰⁶⁰ *Chicken Licken / Cele* (AAC) paras 1, 3.

³⁰⁶¹ *Chicken Licken / Cele* (AAC) para 27.

³⁰⁶² Such as those that are common under trade mark disputes.

³⁰⁶³ Boddewyn 1985 *Journal of Public Policy & Marketing* 137; Boddewyn 1989 *Journal of Advertising* 21.

³⁰⁶⁴ Mupangavanhu and Kerchhoff 2021 *SA Merc LJ* 285.

ensures consumer protection through responsible advertising. It indirectly helps in building trust in brands, which in turn increases sales. Manufacturers invest in their brands and are willing to comply with the ARB for fear of reputational harm... the ARB aims to ensure fair play between consumers and businesses. Its role is crucial in curbing the advertising of misleading information.³⁰⁶⁵

Mupangavanhu and Kerchhoff³⁰⁶⁶ also point out that “the enactment of the CPA has not deterred advertisers from using misleading advertisements”, and that the process for dealing with advertising disputes under the *CPA* stifles quick and efficient consumer redress. The shortcomings in effectively regulating foodstuffs labelling and advertising under the *CPA* have been discussed in Chapter 5.³⁰⁶⁷

6.7.3.2 Cost-saving

As the monitoring and enforcement of certain advertising and labelling standards, including those in the foodstuffs industry, are essentially absorbed and dealt with by a private body, the ARB system could be seen to be a cost-saving mechanism from the government’s perspective.³⁰⁶⁸ Because the advertising industry funds the ARB mechanism, the services offered come at no cost to consumers or government authorities. In essence, the ARB mechanism functions in such a way that government resources are effectively “freed up” to deal only with advertisers that actively defy an ARB ruling.³⁰⁶⁹

6.7.3.3 Flexibility in adapting to changes in the advertising landscape

Due to the lags in legislative reform, the law often struggles to keep up with developments in the advertising industry.³⁰⁷⁰ It has been pointed out previously that the slow pace of legislative reform under the *FCDA* is an obstacle to effective consumer protection and, more specifically, to addressing the burden of NCDs in South Africa. The DOH has been

³⁰⁶⁵ Mupangavanhu and Kerchhoff 2021 *SA Merc LJ* 286.

³⁰⁶⁶ Mupangavanhu and Kerchhoff 2021 *SA Merc LJ* 285.

³⁰⁶⁷ See the discussion in parts 5.3.3 and 5.4.2.

³⁰⁶⁸ OECD *Industry Self-Regulation* 5, 19.

³⁰⁶⁹ ICC *Benefits of Advertising Self-Regulation* 8. For a discussion of food law compliance monitoring and enforcement bodies and authorities within the government, see part 5.2 above. For a discussion of high court litigation involving food laws, see part 5.3.

³⁰⁷⁰ Boddewyn 1985 *Journal of Public Policy & Marketing* 137; OECD *Industry Self-Regulation* 18.

trying to regulate unhealthy foodstuffs for the past 17 years, and it remains to be seen when appropriate statutory measures will come into operation.

Even a co-regulatory approach³⁰⁷¹ may in certain instances encounter delays when change is needed. If an industry code forms part of or is subject to a statute, it may occur that the industry code cannot be updated or amended without government approval and an accompanying lengthy legislative reform process. For example, under the *CPA* the NCC published draft amendments to the *CGSO Industry Code* in March 2022³⁰⁷² which are yet to be legislatively enacted. This means that the *CGSO Industry Code* is essentially frozen until the legislative process has taken its course, impacting negatively on the flexibility of that code.³⁰⁷³ That being said, statutory recognition of a self-regulatory code does not always stifle flexibility, as illustrated by the manner in which statutory backing is provided to the *ARB Code* in terms of the *Electronic Communications Act*. This aspect was discussed in part 6.3.3 above and will be returned to in Chapter 7.³⁰⁷⁴

Turning to voluntary self-regulation, the *ARB Code* can be amended much quicker and easier to accommodate changes in marketing trends or consumer habits.³⁰⁷⁵ This is because updates to the *ARB Code* are effectively made by members of the ARB after considering proposals from interested parties.³⁰⁷⁶ The advertising industry's involvement in updating or developing rules under the *ARB Code* serves to promote buy-in from the industry.³⁰⁷⁷

³⁰⁷¹ As discussed in part 6.2.2 above, self-regulation may operate either in terms of (i) a voluntary self-regulation system, which is underpinned by contractual agreement between industry members, or (ii) a co-regulation system, where there is a legal backing to the self-regulatory system.

³⁰⁷² Gen Not 866 in GG 46000 of 22 March 2022.

³⁰⁷³ Boddewyn 1985 *Journal of Public Policy & Marketing* 134.

³⁰⁷⁴ See part 7.3.4 below.

³⁰⁷⁵ Clause 4 of the Preface to the *ARB Code*; Woker 2016 *SA Merc LJ* 32; Mupangavanhu and Kerchhoff 2021 *SA Merc LJ* 286; Mupangavanhu and Kerchhoff 2023 *De Jure* 105. Also see Van Heerden "Section 82" para 3. Also see ICAS *Global Factbook* 18, 19.

³⁰⁷⁶ Under the ARB mechanism, invitations for proposals to amend the ARB Code are extended to all ARB members as well as other interested parties. The ARB's Code Review Committee may make recommendations or suggestions on amendments to the Code. Amendments to the *ARB Code* are made by the ARB's board of directors on the approval of ARB members by way of ordinary resolution. ARB MOI paras 1.2(f)(ii), 7.6(a)-(c). For details of the composition of the board of directors, see ARB MOI para 7.1.

³⁰⁷⁷ See ICC *Benefits of Advertising Self-Regulation* 4. Also see *Tango / Citrogold* 8.

The ARB system can be deemed to be flexible and dynamic, in that it can respond to challenges in advertising quicker than the law.³⁰⁷⁸ For example, the ARB was updated in 2019 to include provisions aimed specifically at advertising content via social media and by so-called influencers.³⁰⁷⁹ As there is currently no legislation in South Africa that deals with online or social media advertising *per se*,³⁰⁸⁰ this development has been welcomed.³⁰⁸¹ Another example includes the addition of provisions dealing with crypto-currency advertising, which were introduced into the *ARB Code* in 2023.³⁰⁸²

6.7.3.4 Filling legislative gaps or complementing existing legislative requirements

As demonstrated above, in appropriate instances the ARB applies statutory rules,³⁰⁸³ thereby supporting government regulation.³⁰⁸⁴ In addition the *ARB Code* fills certain legislative gaps. Influencer advertising and the advertising of crypto assets serve as good examples, given that there are no specific legislative measures in place regarding those forms of advertising. In terms of the *Social Media Code*, which forms *Appendix K* to the *ARB Code*,³⁰⁸⁵ paid-for social media posts or tweets should include an appropriate social media identifier, i.e., “#AD”, “#Advertisement” or “#Sponsored”, to ensure that consumers understand that the social media content is advertising.³⁰⁸⁶ Turning back to the reference to crypto assets advertising introduced in 2023, the *ARB Code* sets out

³⁰⁷⁸ UNCTAD *Manual on Consumer Protection* 43; ICC Commission on Marketing and Advertising *Frequently Asked Questions* 1-2.

³⁰⁷⁹ Influencer marketing occurs when a company hires a person who is well-known amongst certain members of the public, such as a local celebrity, sports star or musician, to boost the sale of the company's goods or services via the influencer's social media profile on online platforms. See Mupangavanhu and Kerchhoff 2023 *De Jure* 90-91.

³⁰⁸⁰ The general advertising and marketing provisions in the CPA would, however, apply to both traditional and online advertising to the extent possible. See Mupangavanhu and Kerchhoff 2023 *De Jure* 104, 106.

³⁰⁸¹ Mupangavanhu and Kerchhoff 2023 *De Jure* 97, 99, 106; Mupangavanhu and Kerchhoff 2021 *SA Merc LJ* 283.

³⁰⁸² See cl 17 of Section III of the *ARB Code*; Baker McKenzie 2023 <https://financialregulationjournal.co.za/2023/02/03/crypto-asset-advertisements-now-regulated-in-south-africa/>.

³⁰⁸³ Although the ARB's mandate is limited to enforcing the provisions of the *ARB Code*, certain provisions of the ARB Code overlap with legislation. In addition, on occasion the ARB considers relevant food laws in considering complaints to determine whether or not the *ARB Code* has been contravened. See the discussion in part 6.3.4 above.

³⁰⁸⁴ Boddewyn 1985 *Journal of Public Policy & Marketing* 137. Self-regulation in South Africa dates back to the late 1960s. See part 6.3 above.

³⁰⁸⁵ See *Appendix K - Social Media Code*.

³⁰⁸⁶ Clause 3.3 of the *Appendix K*. Also see Mupangavanhu and Kerchhoff 2023 *De Jure* 101.

several requirements, including that advertisements for such products “must expressly and clearly state that investing in crypto assets may result in the loss of capital”.³⁰⁸⁷

The *ARB Code* also fills gaps that exist in the law in the context of unhealthy commodities.³⁰⁸⁸ In addition to the provisions in *Appendix J* that are discussed above, the *ARB Code* also contains restrictions on the advertising of vapour products, as well as alcoholic beverage advertising. Government measures to restrict the advertising of electronic delivery systems used in vaping, commonly known as e-cigarettes,³⁰⁸⁹ have been in the pipeline since 2018³⁰⁹⁰ and are still ongoing.³⁰⁹¹ To fill this gap whilst legislative reform is ongoing, in the interest of responsible advertising the *ARB Code* was updated in March 2023 to include *Appendix L*, which sets out advertising rules and restrictions regarding vapour devices³⁰⁹² and vapour e-liquids³⁰⁹³ (collectively referred to as “vapour products”).³⁰⁹⁴ In terms of *Appendix L*, vapour products that contain nicotine are required to contain the warning statement “THIS PRODUCT CONTAINS NICOTINE AND IS ADDICTIVE”.³⁰⁹⁵ Restrictions on the digital advertising of vapour products are also

³⁰⁸⁷ The value of crypto assets is variable and may increase or decrease over time. See cl 17.1 and 17.2 of Section III of the *ARB Code*.

³⁰⁸⁸ UNCTAD *Manual on Consumer Protection* 43.

³⁰⁸⁹ Electronic delivery systems do not usually qualify as “tobacco products”, which means that the current legislative restrictions on advertising under the *TPCA* do not extend to these products. See Visagie “The Mandate of the Advertising Regulatory Board” 334.

³⁰⁹⁰ See WHO 2018 <https://www.afro.who.int/countries/south-africa/news/who-supports-south-africas-draft-bill-control-tobacco-products-and-electronic-delivery-systems>.

³⁰⁹¹ The *Tobacco Products and Electronic Delivery Systems Control Bill* (B33-2022) is still being considered by the national assembly. Nationwide public hearings on this Bill took place in 2023 and 2024. See Parliamentary Monitoring Group 2024 <https://pmg.org.za/bill/1122/>; BizCommunity 2024 <https://www.bizcommunity.com/article/south-africas-tobacco-bill-process-faces-scrutiny-as-experts-uncover-flaws-673661a>.

³⁰⁹² “Vapour devices” are defined as “rechargeable and non-rechargeable devices that heat vapour e-liquids to create an aerosol inhaled by the user of the vapour device”. See cl 1.3 of *Appendix L*.

³⁰⁹³ “Vapour e-liquids” refers to “liquid formulations used in vapour devices and can be nicotine or non-nicotine containing”. See cl 1.4 of *Appendix L*.

³⁰⁹⁴ See cl 1.2 of *Appendix L*.

³⁰⁹⁵ A warning statement which has the same meaning would also be acceptable. See cl 2.5 of *Appendix L*. The Directorate has noted that the intention behind the adoption of *Appendix L* is to promote vaping as a safer alternative to traditional smoking for those who already smoke, and not to attract non-smokers to vaping as a “safe” method of consuming nicotine. Against this backdrop the Directorate has held that the claim “Vaping Saves Lives” on the website of an advertiser who sold vapour products was neither substantiated nor communicated to consumers in a manner that complies with *Appendix L*. See *Bothers Vaping Lounge / Stephen Claassen / 2636* (Directorate ruling of 20 July 2023) 5, 7-8.

included.³⁰⁹⁶ Additional restrictions include that the advertising of vapour products may not be targeted at persons below the age of 18 years;³⁰⁹⁷ appear on the front of the outside cover of any printed publication;³⁰⁹⁸ be placed in any advertising unless at least 75 per cent or more of the intended target audience of the relevant advertising media are persons above the age of 18 years;³⁰⁹⁹ appear at any health care facility;³¹⁰⁰ or be placed within 100 metres of any educational, sports or cultural location where the attendees are predominantly children.³¹⁰¹

Even when there are legislative restrictions on the advertising of products or product categories, industry self-regulation can impose advertising restrictions that are stricter than legislation.³¹⁰² The alcoholic beverage industry serves as an example. In terms of the *Alcohol Industry Code Communication Code of Conduct* which forms *Appendix A* to the *ARB Code*, the so-called “responsible drinking message” is required. Moreover, it is required that all alcoholic beverage commercial communications include a clear, legible and prominent responsible drinking message, i.e., “Not for persons under 18”.³¹⁰³ This requirement is not included in the *Liquor Products Act*³¹⁰⁴ or the *Liquor Act*.³¹⁰⁵ The fact that self-regulation can set out restrictions that improve responsible advertising and which go beyond existing statutory requirements improves consumer protection.³¹⁰⁶

To summarise, in certain cases the *ARB Code* fills legislative gaps. This can occur either in the instance of an absence of legislation (such as social media advertising and cryptocurrency advertising), or where legislative reform is ongoing (such as in the instance of vape products and unhealthy foodstuffs advertising).³¹⁰⁷ In addition, the *ARB*

³⁰⁹⁶ Websites and social media pages are required to clearly indicate that the intended target audience is persons aged 18 years and older, and to include measures that verify the users’ age and restrict access to consumers aged 18 years and above. See cl 2.7 of *Appendix L*.

³⁰⁹⁷ See cl 2.1 of *Appendix L*.

³⁰⁹⁸ See cl 2.2.5 of *Appendix L*.

³⁰⁹⁹ See cl 2.2.6 of *Appendix L*.

³¹⁰⁰ See cl 2.2.8 of *Appendix L*.

³¹⁰¹ See cl 2.2.7 of *Appendix L*.

³¹⁰² Woker *Advertising Law in South Africa* 15. Also see Boddewyn 1989 *Journal of Advertising* 24; Boddewyn 1985 *Journal of Public Policy & Marketing* 131.

³¹⁰³ This claim has been approved by the Drinks Federation of South Africa. See cl 1.8.1 of *Appendix A*.

³¹⁰⁴ *Liquor Products Act* 60 of 1989.

³¹⁰⁵ *Liquor Act* 59 of 2003.

³¹⁰⁶ UNCTAD *Manual on Consumer Protection* 43; OECD *Industry Self-Regulation* 18.

³¹⁰⁷ See part 6.6 above for a discussion on *Appendix J*.

Code serves to strengthen or complement existing legislative measures, such as those relating to alcoholic beverage advertising.

6.7.3.5 Bringing specialist knowledge and resources to the table

Woker³¹⁰⁸ points out that government departments or bodies may not readily have the resources and expertise to know what is reasonable and fair in a specific industry.³¹⁰⁹ An industry that regulates itself will often have the resources and expertise to respond to complaints and identify possible solutions to concerns quickly and effectively, thus advancing consumer interests.³¹¹⁰ Naudé and Barnard³¹¹¹ highlight the advantage that the enforcers of an industry code “are usually experts in the sector”, and that industry codes can include “more tailor-made rules and sanctions than overarching consumer protection legislation”.³¹¹² This holds true when considering the limitations of administering or enforcing provisions relating to foodstuffs labelling and advertising under the *CPA* pointed out in Chapter 5.³¹¹³

According to Mupangavanhu and Kerchhoff,³¹¹⁴ the self-regulatory system within the ARB can be seen as “a more effective way of regulating business” because the advertising industry is abreast of challenges faced by consumers or developments in the trade in this specific industry.³¹¹⁵ The fact that the *ARB Code* is based on the *ICC Advertising Code* also assures foreign businesses that trade in or may wish to enter South Africa that the local industry follows international best practices regarding responsible and ethical advertising.³¹¹⁶

³¹⁰⁸ Woker 2016 *SA Merc LJ* 32.

³¹⁰⁹ Examples would include the mobile service industry or the financial industry where it may be difficult to keep abreast, considering the quick pace of development. See Woker 2016 *SA Merc LJ* 32.

³¹¹⁰ Mupangavanhu and Kerchhoff 2021 *SA Merc LJ* 286; Boddewyn 1985 *Journal of Public Policy & Marketing* 131. Also see ICAS *International SRO Guide* 6; UNCTAD *Manual on Consumer Protection* 43.

³¹¹¹ Naudé and Barnard “Enforcement and Effectiveness of Consumer Law in South Africa” 18.

³¹¹² Van Heerden “Section 82” para 3. Also see UNCTAD *Manual on Consumer Protection* 43.

³¹¹³ See the discussion in parts 5.2.4 and 5.4.2.

³¹¹⁴ Mupangavanhu and Kerchhoff 2021 *SA Merc LJ* 286-287.

³¹¹⁵ Also see ICC *Benefits of Self-Regulation* 5.

³¹¹⁶ ASA 2002 *Transformation of Advertising & Marketing Industry* 1.

6.8 Considering the criticisms, challenges and limitations of advertising self-regulation

6.8.1 Enforcement limitations

Due to the voluntary nature of the ARB system, the enforceability of rulings within the ARB dispute resolution mechanism has its limits. Mupangavanhu and Kerchhoff³¹¹⁷ observe that the enforcement of sanctions within a self-regulation system is weaker than under legislation due to the limitation of the penalties that may be imposed and the expectation of voluntary compliance. That being said, Woker³¹¹⁸ notes that the potential severe sanctions for non-adherence to ARB rulings, which include the Ad Alert mechanism, are seen as a powerful tool to encourage compliance, even in the case of non-members.³¹¹⁹ The wide recognition of the *ARB Code* and the fact that a large segment of the marketing industry generally complies with the *ARB Code* serves to prevent non-compliant advertising from remaining in circulation.³¹²⁰ This is because the publishing and broadcasting media act as intermediaries between the advertiser (and its advertising content) and the actual dissemination thereof to the public.³¹²¹ The Ad Alert mechanism, whereby ARB members agree to refuse to publish or broadcast advertising that is found to be contrary to the *ARB Code*, serves to give teeth to this voluntary compliance system.³¹²² It is deemed to be the most effective means of enforcing ARB rulings.³¹²³

³¹¹⁷ Mupangavanhu and Kerchhoff 2021 *SA Merc LJ* 287.

³¹¹⁸ Woker 2016 *SA Merc LJ* 33.

³¹¹⁹ See part 6.3.6.2 above for a discussion on the sanctions that the ARB may impose.

³¹²⁰ The more industry participants agree to abide by the *ARB Code*, the greater the impact thereof will be. See OECD *Industry Self-Regulation* 7.

³¹²¹ Boddewyn 1985 *Journal of Public Policy & Marketing* 131.

³¹²² Boddewyn 1985 *Journal of Public Policy & Marketing* 138.

³¹²³ ICAS *International SRO Guide* 53.

It should also be noted that the outcome of ARB rulings is often published in articles in popular online newspapers and on platforms such as News24,³¹²⁴ TimesLive,³¹²⁵ SowetanLive,³¹²⁶ BizCommunity³¹²⁷ and IOL.³¹²⁸ The fear of a negative publicity backlash and accompanying reputational harm often acts to incentivise non-member advertisers to comply with the *ARB Code* or an adverse ruling issued by the ARB regarding their advertising.³¹²⁹ The independent media, therefore, also assist with the naming and shaming³¹³⁰ of businesses whose advertising is held to contravene the *ARB Code*.

³¹²⁴ Recent examples include News24 2024 <https://www.news24.com/fin24/companies/discovery-ordered-to-withdraw-misleading-gap-cover-ad-20240703>; News24 2024 <https://www.news24.com/fin24/companies/very-much-a-party-vibe-arb-orders-cassper-nyovests-tequila-brand-to-pull-ad-glamourising-drinking-20240718>; News24 2023 <https://www.news24.com/news24/tech-and-trends/news/four-recent-rulings-by-the-advertising-regulatory-board-that-caught-our-eye-20230529>. Several additional articles on ARB rulings are available on News24 date unknown <https://www.news24.com/tags/topics/arb>.

³¹²⁵ See, for example, TimesLive 2024 <https://www.timeslive.co.za/sunday-times-daily/news/2024-03-19-arb-rules-against-makro-in-cheesy-complaint/>; TimesLive 2022 <https://www.timeslive.co.za/news/south-africa/2022-08-15-advertising-board-finds-pick-n-pay-milk-advert-a-tad-sour/>; TimesLive 2019 <https://www.timeslive.co.za/news/south-africa/2019-02-05-put-a-pork-in-it-woollies-ordered-to-change-meat-label/>; TimesLive 2028 <https://www.timeslive.co.za/news/south-africa/2018-12-13-kfcs-offline-joke-is-not-pc-says-complaint/>.

³¹²⁶ Examples include SowetanLive 2024 <https://www.sowetanlive.co.za/news/south-africa/2024-07-08-arb-orders-cassper-nyovests-alcohol-brand-ad-to-be-withdrawn/>; SowetanLive 2023 <https://www.sowetanlive.co.za/business/2023-02-03-cell-c-insists-data-deal-is-available-after-advertising-regulator-ruled-against-mobile-operator/>; SowetanLive 2022 <https://www.sowetanlive.co.za/news/south-africa/2022-08-22-counting-rands-pick-n-pays-double-trouble-on-handy-andy-adverts/>; SowetanLive 2018 <https://www.sowetanlive.co.za/news/south-africa/2018-12-13-kfcs-offline-joke-is-not-pc-says-complaint/>.

³¹²⁷ Recent articles include BizCommunity 2024 <https://www.bizcommunity.com/artide/arb-rules-in-favour-of-woolworths-in-rbst-free-milk-ad-dispute-451989a>; BizCommunity 2024 <https://www.bizcommunity.com/artide/fair-cape-dairies-advertising-complaint-dismissed-by-arb-472709a>; BizCommunity 2024 <https://www.bizcommunity.com/artide/arb-rules-in-favour-of-loreal-orders-nutriwomen-to-change-dermacare-packaging-239327a>; and BizCommunity 2024 <https://www.bizcommunity.com/artide/arb-rules-that-always-xxl-ad-can-educate-boys-and-girls-694321a>.

³¹²⁸ See, for example, IOL 2024 <https://www.iol.co.za/lifestyle/shopping/ad-regulator-rules-mr-ds-watermelon-advert-was-misleading-after-shoppers-complaint-4bcfa481-0d81-4715-9e9e-d21f748af8e9>; IOL 2023 <https://www.iol.co.za/lifestyle/food-and-restaurants/advertising-regulatory-board-rules-kfc-ad-is-misleading-d0b665eb-b6d7-42c1-9151-458caf1dc537#:~:text=Based%20on%20its%20findings%2C%20ARB,in%20question%20with%20immediate%20effect>; IOL 2023 <https://www.iol.co.za/news/south-africa/toyota-fortuner-is-not-all-new-advertising-regulatory-board-rules-28041ca0-7f6b-4f39-9283-72754a560430>.

³¹²⁹ Mupangavanhu and Kerchhoff 2021 *SA Merc LJ* 277; Also see Visagie 2023 *PER* 25; Visagie "The Mandate of the Advertising Regulatory Board" 351.

³¹³⁰ See ICAS *International SRO Guide* 20.

Further to the above, it has been noted earlier³¹³¹ that it is not uncommon for non-member advertisers who trade in the foodstuffs sector to respond to an ARB complaint filed against their advertising. When doing so, these businesses effectively subject themselves to the jurisdiction of the ARB in relation to complaints filed against them.

A non-member advertiser against whom the ARB has issued a ruling may, however, elect to disseminate that advertising through channels that are not associated with members of the ARB. For example, the importer of products that may wish to advertise those goods in a misleading manner would be able to do so on its official company website, assuming that the website host is not affiliated with the IAB or another ARB member. Whilst this occurrence is not common in South Africa, it remains a shortcoming of self-regulation compared to compulsory government regulation that applies across the board to all relevant persons or businesses.³¹³²

6.8.2 Limitations on the sanctions which may be imposed

The sanctions that may be imposed by the ARB are limited to those mentioned in the *Procedural Guide*. The main relief that the ARB Directorate may grant is to order the withdrawal of the offending advertising. An Ad Alert may also be issued to ARB members if a non-member fails to abide by an adverse ARB ruling or otherwise fails to cooperate in the ARB process.

The ARB cannot order an advertiser to refund a complainant, or award damages. In addition, criminal sanctions cannot be imposed such as those under the *FCDA* or *APSA*. Turning back to the discussion of the CGSO,³¹³³ it will be recalled that the recommendations made by the CGSO usually centre on the so-called triple R: repair, replace or refund. On this basis, the relief sought by the complainant in an advertising dispute will be a guiding factor in establishing if the ARB, or alternatively the CGSO, would be the suitable forum to consider the matter. Of course, in the context of foodstuffs labelling and advertising, the particular concern would also have to fall within the

³¹³¹ See the discussion in part 6.3.5 above.

³¹³² UNCTAD *Manual on Consumer Protection* 43; Boddewyn 1985 *Journal of Public Policy & Marketing* 130; Boddewyn 1989 *Journal of Advertising* 20.

³¹³³ See the discussion in part 5.4.2.2.

parameters of the *CPA* for the CGSO to have authority over the complaint. In this regard Mupangavanhu and Kerchhoff³¹³⁴ argue that the *CPA* remains a key piece of legislation, as it has better enforcement mechanisms and provides consumers with a “variety of remedies”, including the imposition of an administrative fine by the NCT in certain instances. Nevertheless, it is not possible for the CGSO to recommend or order the withdrawal of offending advertising in terms of the *CPA*.³¹³⁵

Turning back to the mandate of the ARB, the ARB cannot generally enforce legislation. Whilst this acts as a limitation of the ARB’s powers, it also seems to support the complementary function of the ARB mechanism *vis-à-vis* government regulation. It has been observed above that legislative provisions often form part of the advertiser’s response when defending an advertising complaint. In such instances the ARB may be required to take relevant legislative provisions into consideration when deciding whether an advertiser has contravened the *ARB Code*. However, the ARB seems to caution against overstepping its mandate, and has repeatedly asserted that it does not enforce government regulation.³¹³⁶

The ARB endeavours as far as possible to maintain close contact with government departments.³¹³⁷ Self-regulatory bodies may refer advertising disputes that fall outside their mandate or jurisdiction to the relevant statutory body.³¹³⁸ Whilst it seems that the system of cross-referrals is working relatively efficiently between the ARB and CGSO,³¹³⁹ there may be room for improvement between the ARB and the DOH. In the context of tobacco products advertising complaints filed with the ARB, Visagie³¹⁴⁰ submits that:

it would be beneficial to the public if the ARB is in a position to do more than simply dismissing a matter ... and advise the consumer to knock on the door of the DOH with its concerns regarding the alleged contravention of tobacco legislation. In the event of ‘close contact’ or at least a cordial relationship between the ARB and the DOH, it would

³¹³⁴ Mupangavanhu and Kerchhoff 2021 *SA Merc LJ* 287.

³¹³⁵ See the discussion in part 5.4.2.2.

³¹³⁶ See, for example, *Spring Meadows / Offer 4; Zuma Restaurant / Azumi 9; Pedros / Nando’s 5*.

³¹³⁷ Clause 10 of the Preface to the *ARB Code*.

³¹³⁸ This occurrence is common in the USA, where advertising disputes are referred to the US Federal Trade Commission by the US self-regulatory advertising body. See ICC *Benefits of Advertising Self-Regulation* 8.

³¹³⁹ See the discussion in part 5.4.2.2.

³¹⁴⁰ Visagie “The Mandate of the Advertising Regulatory Board” 352.

conceivably be in the public interest for the ARB to notify the DOH of any potential contravention of the TPCA, for investigation in terms of that legislation, particularly as criminal sanctions may be imposed under certain conditions.

The same argument could be made in relation to foodstuffs advertising in instances where the ARB is not able to consider an advertising complaint that it has received. This would be in instances where there are limitations under the ARB's mandate, such as where non-compliance with foodstuffs legislation forms the primary basis of a complaint. Moreover, once the DOH has introduced legislative measures that restrict unhealthy foodstuffs advertising and labelling under R3337 or otherwise, the ARB may be well-suited to refer such complaints to the DOH.

Another instance where the ARB would act in the public interest by alerting the DOH to a "rogue trader", would be where a non-member advertiser refuses to submit to the ARB's jurisdiction and continues to publish unethical or irresponsible advertising through media channels that are not associated with the ARB or its members. In those instances the DOH would be able to investigate the matter under the relevant legislation and, in the case of contravention, impose penalties under the relevant legislation.

If non-member advertisers in the foodstuffs industry were to be aware that there were close ties between the DOH and ARB, the threat of the ARB alerting the DOH to a non-compliant advertiser might very well serve as an incentive for them to comply with the ARB or abide by an ARB ruling.³¹⁴¹ Moreover, this might also incentivise compliance with other legislation, standards and laws in the food law framework.

6.8.3 The potential risks associated with voluntary funding

As discussed above, the ARB is funded by certain businesses within the advertising industry on a voluntary basis. Contribution to the ARB is therefore not mandatory and not all members of the ARB fund it. This system comes with its risks, given that the continued operations of the ARB are dependent on continued member funding. Voluntary industry funding is not always a certainty. Given the fact that the ASA was liquidated due to financial challenges, it remains a risk that future funding of the ARB may not always

³¹⁴¹ ICC *Benefits of Advertising Self-Regulation* 8.

be as forthcoming as it is at this stage. In this regard, ICAS warns that an SRO funding model should be both sustainable and “buoyant”, meaning that it should be set up in such a manner that unilateral action by one or more funders should not jeopardise the functioning of the entire system.³¹⁴²

Complaints handling fees assist in the continued operations of the ARB. Whilst consumers can lodge complaints free of charge, fees are charged for competitor complaints. Those fees are used to cover the running expenses of the ARB. In addition, the competitor fee requirement assists in avoiding abuse of the process, as a business would not willingly pay the costs of lodging an ARB complaint that is entirely fruitless or has no merits. This system of requiring competitors to pay a filing fee whilst allowing consumers to lodge complaints with the ARB free of charge seems to be a good balance from a public interest and business operations perspective.

On a separate note, the *CGSO v Voltex* case discussed in Chapter 5 is relevant in considering the future accreditation of industry ombuds under the *CPA*.³¹⁴³ Given the wide scope of the CGSO as an accredited ADR forum which is underpinned by mandatory compliance and funding, one will have to tread lightly to avoid the duplication of forums for which the same industry participants would have to pay double in effect. The upside of the ARB funding model is that an entity that is required to contribute towards the funding of the CGSO does not have to fund the ARB to be a member thereof, or to use the ARB complaints system. Whilst most food enterprises would not be able to lodge complaints against competitors with the CGSO or other tribunals under the *CPA* due to the threshold limitation,³¹⁴⁴ the ARB remains a viable route.

³¹⁴² ICAS *International SRO Guide* 50.

³¹⁴³ Scott and Van Dyk 2022 *SALJ* 261.

³¹⁴⁴ As discussed in part 5.3.3, juridic persons with an asset value or annual turnover of R2 000 000 or more cannot lodge complaints with the NCC, NCT, provincial consumer court or the CGSO. This limitation under s 5(2)(b) of the *CPA* would exclude most foodstuffs manufacturers, retailers and advertisers.

6.8.4 Human capacity constraints

It is also noteworthy that the ARB, like many SROs worldwide,³¹⁴⁵ is currently a small company with only a handful of permanent staff. This means that unless expansion is possible capacity constraints may also curtail some of the advantages of the system, should there be an increase in complaints. If the distribution of complaints includes enough competitor complaints, the complaints handling fees could serve to increase the appointments of specialists to assist in considering complaints and issuing rulings.

6.8.5 Perceived bias or impartiality within a self-regulatory system

Another apparent shortcoming of involvement by the food sector as private profit-driven actors relates to potential reservations regarding trustworthiness and transparency. In this regard Van Kleef and Dagevos³¹⁴⁶ point out:

Industry is typically seen as a less trustworthy source of information. This is because economic interests and motives are key reasons for distrust in the sense that consumers worry that actors who have economic interests for putting labels on food packages will be more concerned about profits than consumers' health interests.

Linking with the above, a potential shortcoming within an SRO system is that standards in contentious areas in advertising may be "watered down to achieve industry support"³¹⁴⁷ and not sufficiently robust to cater for a specific aspect. In this regard, the OECD³¹⁴⁸ notes:

[b]usinesses participating in the development of self-regulatory mechanisms may not share the same interests and, as a result, may have different views on the scope and substance of such mechanisms. Achieving consensus in such situations could result in compromises that favour provisions that are less far-reaching.

This may very well be the reason why *Appendix J*, which does have certain shortcomings in the context of unhealthy foodstuffs advertising and labelling restrictions, has remained unchanged since the establishment of the ARB. This is despite increased light having

³¹⁴⁵ More than half of SROs worldwide have less than 10 permanent staff members. See ICAS Global Factbook 8. Also see Boddewyn 1989 *Journal of Advertising* 24-25.

³¹⁴⁶ Van Kleef and Dagevos 2015 *Critical Reviews in Food Science and Nutrition* 298.

³¹⁴⁷ OECD *Industry Self-Regulation* 6.

³¹⁴⁸ OECD *Industry Self-Regulation* 20.

been shed on the role of the food industry in diet-related NCDs in South Africa. This potential risk also links with so-called “regulatory capture”, where an SRO is deemed to be “too close” to a specific industry sector whose conduct it oversees through its SRO Code.³¹⁴⁹ Whilst many ARB members do not fund it, one cannot overlook the fact that there are large industry players in the South African food industry that do.³¹⁵⁰ In this regard the risk of industry involvement or interference in updates to *Appendix J* in favour of corporate interests as opposed to prioritising public health and the public interest may very well warrant that the ARB look to other independent experts in the food industry to assist with updates to *Appendix J*. Relevant stakeholders might include civil society organisations, DOH officials, and academics in the field of public nutrition, consumer sciences and food law. To avoid the risk of perceived bias or influence, representatives from the food industry who might influence the ARB's functioning would have to be excluded from that update altogether. While this suggestion may not be well received by all, it would nevertheless increase confidence in the SRO system as an independent and transparent body putting consumer interests first in the context of responsible and ethical foodstuffs advertising.

6.9 Conclusion

On a global level, the WHO has identified that the actual implementation of policy measures aimed at reducing consumers' exposure to unhealthy foodstuffs labelling and advertising may be approached by means that stretch beyond pure legislative regulation to include voluntary self-regulation or co-regulation.³¹⁵¹ The UN and other international bodies have also acknowledged that effective advertising self-regulation can form part of a country's advertising law framework.³¹⁵² On a national level the DOH has confirmed that a multi-stakeholder approach, which includes private actor involvement, will be necessary to address the diet-related NCD burden in South Africa.³¹⁵³

³¹⁴⁹ OECD *Industry Self-Regulation* 6.

³¹⁵⁰ See part 6.3.7 above.

³¹⁵¹ See part 1.2.5 above.

³¹⁵² See part 6.2.4 above.

³¹⁵³ See the discussion in part 6.2.4.1 above.

When assessing the role of advertising self-regulation through the operations of the ARB, its effectiveness should be considered both in terms of setting responsible and ethical advertising principles and enforcing them. Woker³¹⁵⁴ points out that self-regulation is deemed to be effective if (i) it is led by an industry body, (ii) that develops a suitable code of conduct for that industry, and (iii) which can monitor and enforce compliance with the code of conduct. Self-regulation in the South African advertising industry is led by the ARB as an industry body. The legitimacy of the ARB as a regulatory body in the advertising industry has been recognised by the South African courts and national legislation, as well as by ICAS through accreditation. Secondly, the ARB in continuing the function of the ASA has developed and continuously updated the *ARB Code*, which is based on the international gold standard for advertising self-regulation³¹⁵⁵ and subject to the *Constitution*. In addition the ARB has the mandate and jurisdiction to enforce compliance with the *ARB Code* by its members. It is also not uncommon for non-member advertisers to comply with the *ARB Code* and rulings of the ARB. By agreeing to abide by the *ARB Code*, businesses in the advertising industry demonstrate to their consumers that they are accountable for their advertising conduct, and committed to responsible and ethical advertising.³¹⁵⁶ Whilst the ARB does not monitor the trade for potentially improper advertising *mero motu*, it acts upon concerns raised by consumers and competitors who effectively act as eyes and ears on the ground.³¹⁵⁷

In addition to setting best practice standards for ethical and responsible advertising, the ARB complaints resolution system is an accessible and effective forum for obtaining effective redress. This specialist advertising tribunal is available to consumers, consumer groups and businesses alike.³¹⁵⁸ The complaints handling procedure is accessible, impartial, quick, and transparent. Consumers require neither legal knowledge nor deep pockets to lodge an advertising complaint. Moreover, the ARB goes to great lengths to

³¹⁵⁴ Woker 2016 *SA Merc LJ* 31.

³¹⁵⁵ Although certain provisions within the *ARB Code* have been tailored for the South African consumer base, the core provisions in the ARB Code that are globally accepted have been adopted. See Clause 4 of the Preface to the *ARB Code*. Also see *Mars Inc v Advertising Standards Authority of South Africa* 2000 4 SA 511 (W) 514B-C.

³¹⁵⁶ Also see ICC *Benefits of Advertising Self-Regulation* 6; ICAS *Chater* 4.

³¹⁵⁷ See the discussion in part 6.3 above.

³¹⁵⁸ See the discussion in part 6.3.6.1.

make the consumer's voice heard, effectively raising the consumer from being perceived as potentially vulnerable to being an asset and a valuable stakeholder in advertising regulation in South Africa.³¹⁵⁹

The ARB system also has a number of benefits for the government. The ARB complaints resolution mechanism relieves the court system at no cost to the government or consumers. The *ARB Code* sets responsible, ethical advertising principles, and it can be adapted or updated quickly to accommodate changes in the advertising landscape. It also serves to “fill” existing legislative gaps in certain sectors, and adds additional advertising requirements in other sectors. The ARB brings specialist knowledge to the regulation, monitoring and enforcement of advertising in South Africa.³¹⁶⁰

For the reasons set out above and elsewhere in this chapter, it is submitted that the ARB is an effective SRO in the context of consumer protection in South Africa. Of course, this is not to say that the ARB system is without challenges and limitations. Due to its voluntary nature, and even though most of the South African advertising industry has agreed to abide by the *ARB Code*, there are limits to the enforceability of ARB rulings. There are also limitations on the nature of the sanctions that the ARB may impose. The fact that the ARB may order the withdrawal of advertising content and, in the instance of non-compliant advertisers, issue an Ad Alert to its members to cease disseminating offending advertising does, however, go a long way to regulating advertising in South Africa.³¹⁶¹

As the law currently stands, and whilst legislative reform is ongoing, *Appendix J* is the only instrument which specifically regulates unhealthy foodstuffs advertising in South Africa, albeit to a limited degree.³¹⁶² *Appendix J* introduces the concept of “food and

³¹⁵⁹ See the discussion in parts 6.7.1 and 6.7.2.

³¹⁶⁰ See the discussion in part 6.7.3.

³¹⁶¹ See the discussion in part 6.8.

³¹⁶² Whilst R3337 is pending, only R991 contains certain labelling and advertising restrictions on designated products, including formulae and complementary foods that are sold for consumption by infants and young children up to the age of 3 years. There is, however, no reference to the term “unhealthy foodstuffs” in R991, which applies to all designated food products for infants and young children, irrespective of nutritional composition or properties. See the discussion on R991 in part 2.6 above. For general labelling and advertising requirements and restrictions on foodstuffs under R146 and other legislation, see parts 2.4 and 2.5 above.

beverage products that do not represent healthy dietary choices and healthy lifestyle”, and places restrictions on the advertising of such products. Restrictions include limitations on the use of certain graphic elements that are visually appealing to children, as well as restricting the use of nutrition and health claims in advertising for such products. *Appendix J* also includes a ban on the advertising or promotion of food and beverage products that do not represent healthy dietary choices and healthy lifestyles at or near pre-schools and primary schools.

It does appear, however, that *Appendix J* is somewhat outdated. Arguably *Appendix J* is also not fully aligned with the advertising content appearing in the food environment in which consumers function in South Africa currently. Suggested amendments to *Appendix J* include that:

- i. it should also be expanded beyond television advertising to cover all forms of advertising;
- ii. a meaning should be adopted for “children” extending beyond the age limit of 12, to include any person below the age of 18 years, in alignment with national legislation;
- iii. restrictions on the use of graphic elements should be expanded to include all cartoon-like characters or images that may be visually appealing to children, irrespective of whether there are IP rights or who the owner of the IP that may vest in that image or device is, which restrictions should extend to their use on packaging; and
- iv. restrictions on advertising and promotion of food and beverage products that do not represent healthy dietary choices and healthy lifestyles at or near schools should be expanded to extend to all schools, including high schools.³¹⁶³

Consequently, the assertion by Mupangavanhu and Kerchhoff³¹⁶⁴ that the ARB has an important role to play in regulating advertising content in South Africa is supported. Moreover, these authors point out that voluntary self-regulation through the operations

³¹⁶³ See further the discussion in part 6.6.

³¹⁶⁴ Mupangavanhu and Kerchhoff 2021 *SA Merc LJ* 287.

of the ARB “provides an additional layer of consumer protection” that complements legislation, which will become even more relevant with the continuing rise in digital advertising.³¹⁶⁵

The submissions by Boddewyn³¹⁶⁶ and Woker³¹⁶⁷ that self-regulation will never be able to replace legislation altogether or be effective on its own in protecting the public interest are also true. Rather, and as expanded in Chapter 7,³¹⁶⁸ it is submitted that effective self-regulation which complements government efforts, interventions and resources³¹⁶⁹ aimed at regulating unhealthy foodstuffs advertising and labelling can go a long way as part of a multistakeholder approach aimed at reducing diet-related NCDs in South Africa.

As a concluding remark, the passage from Woker³¹⁷⁰ quoted below appropriately captures the interplay between government regulation and self-regulation in the South African advertising context:

[t]he role of self-regulation as a mechanism for addressing consumer complaints should not be underestimated. This is one of the institutions that has made a worthwhile contribution to the protection of consumers. There are, however, limits to the role that self-regulation can play, just as there are limits to the roles of the press, the government and legislation, the Courts, the market and competition ... The various means of consumer protection should be regarded as supplementary to each other and not as mutually exclusive alternatives. Neither self-regulation nor government legislation is necessarily superior to the other and there may be a role for both depending on the circumstances. The modern advertiser operates in an increasingly complex and demanding market, therefore it is necessary for the law in its legislative, common law and self-regulatory form to provide a comprehensive framework of principles which function in such a way that advertising is effectively regulated without being unnecessarily stifled.

With this in mind, the discussion in concluding Chapter 7 provides comments and recommendations with a view to formulating an answer to the research question.

³¹⁶⁵ Mupangavanhu and Kerchhoff 2021 *SA Merc LJ* 287-288. Also see ICAS *International SRO Guide* 6-7.

³¹⁶⁶ Boddewyn 1985 *Journal of Public Policy & Marketing* 132; Boddewyn 1989 *Journal of Advertising* 23.

³¹⁶⁷ Woker 2016 *SA Merc LJ* 34.

³¹⁶⁸ See the discussion in part 7.2 below.

³¹⁶⁹ Boddewyn 1985 *Journal of Public Policy & Marketing* 139.

³¹⁷⁰ Woker *Advertising Law in South Africa* 18-19.

7 Summary, conclusion and recommendations

7.1 Chapter summary and findings

The discussion in Chapter 1 set out the background on the severity of the risks that NCDs pose to public health, socio-economic development and ultimately sustainable development, both globally and in South Africa. Narrowing the focus to unhealthy diet as a modifiable risk factor, the policy objectives of the South African government (as informed by UN and WHO policies and recommendations) aimed at reducing the prevalence of diet-related NCDs and obesity in this country were discussed. It was highlighted that a multi-stakeholder approach is required to address the burden of NCDs, as the task is simply too enormous for the government to address alone. Moreover, the government has acknowledged that private actors, including corporate entities and consumers, are relevant stakeholders who have a role to play in addressing the burden of diet-related NCDs. Chapter 1 also introduced the meaning of various key concepts, including “unhealthy foodstuffs” and “consumer” in the context of foodstuffs labelling and advertising in South Africa. In addition, the meaning of “food law” in the South African context was considered, and a working definition was proposed.

In considering the law as initiated by the government, Chapter 2 provided an overview of the legal framework currently applicable to the advertising and labelling of foodstuffs in South Africa. In pointing out that the administration and enforcement of the relevant laws span different government departments, notably the DOH, the DOA and the DTIC, the discussion demonstrated that the relevant legal landscape is fragmented but comprehensive. It consists of a combination of legislative provisions under separate Acts (including the *FCDA*, the *APSA*, the *CPA* and the *TM Act*), common law provisions, and standards (in addition to advertising self-regulation standards discussed separately in Chapter 6).

Chapter 2 also demonstrated that the advertising and labelling of foodstuffs for infants and young children up to the age of three years (including products such as infant formula, powdered milks and complementary foods which are often ultra-processed unhealthy foods) is strictly regulated. Under R991 there are restrictions on advertising

those products, limitations on the graphic representations that may appear on the container labels, and health warning messages that are required to appear on labels of designated products. Other than those restrictions, there are currently no further provisions restricting the labelling and advertising of unhealthy foodstuffs *per se*. That being said, R146 prohibits claims relating to or alluding to health or well-being as well as medicinal claims on foodstuff labels and advertising. Furthermore, strict requirements apply to the use of nutrient claims such as “low fat” or “lite”, and words such as “pure”, “fresh” and “natural”. Whilst these requirements may assist in mitigating the risk of misleading consumers, they are not enough to ensure that all consumers can make an informed food choice when considering a food label. The prevalence and rise in diet-related NCDs in this country attest to this. In this regard, a significant concern with the current legal framework is that nutritional information on food labels is not understandable or comprehensible to all persons who purchase and consume food. In South Africa vulnerable members of society include children as well as adult consumers who are either illiterate or who have limited literacy skills.

Chapter 3 considered the social and commercial determinants of health relevant to consumer food purchase behaviour and dietary patterns in South Africa. It was found that the current obesogenic food environment in which many consumers find themselves is the result of several factors. The factors discussed included political and economic changes in South Africa since the 1990s, globalisation, industrialisation, urbanisation, increased digitalisation, poverty, limited literacy skills, and a struggling public health care system. In addition, it was highlighted how the aggressive marketing of unhealthy foods, primarily driven by profit motives of corporate entities in the food industry, negatively impacts on public health. These relevant social and negative commercial determinants of health were contextualised with reference to a right-to-health framework, including a discussion on the universal right to health and SDG 3. On a national level, relevant constitutional and other consumer rights that inform the right to health were also considered. In analysing the relevant rights, it was found that consumers have the right to a food environment which is not harmful to their health and well-being. Consumers also have the right of access to nutrition or diet-related information that is conveyed in a plain and understandable manner. This is because a healthy food environment that

empowers consumers to choose healthy diets is crucial to addressing obesity and the NCD burden in South Africa.

Chapter 3 also highlighted that the government's obligation to protect public health includes protecting members of the public against the aggressive marketing of unhealthy foodstuffs. This obligation includes implementing laws within the food regulation framework that aim to reduce consumers' exposure to unhealthy foodstuffs and ensure that accurate and consumer-friendly information regarding the nutritional composition of food is accessible to the purchasing public. In addition, it was observed that private actors in the food industry have a responsibility, independent of the government, to respect consumers' right to health. To promote the realisation of SDG 3 there is a dire need for the food industry to change the aggressive marketing of unhealthy foodstuffs and adopt forms of marketing that shift consumer behaviour away from preferring, purchasing and consuming foods that are detrimental to their health.

Following the above, Chapter 4 was dedicated to the proposed measures which the government intends to implement to regulate unhealthy foodstuffs labelling and advertising in South Africa. More specifically, Chapter 4 analysed four proposed measures in R3337, namely (i) the introduction of mandatory FOP warning labels in relation to unhealthy foodstuffs; (ii) a ban on the advertising of unhealthy foodstuffs to children; (iii) the inclusion of a health warning message in unhealthy foodstuffs advertising not directed at children; and (iv) the removal of graphic elements constituting trade mark matter from unhealthy foodstuffs labelling and advertising. Considering the overall purpose of these proposed measures, it was argued that the anticipated benefits far outweigh the anticipated (or even unanticipated) challenges that may arise over time. Preliminary studies conducted in South Africa and the success recorded in Chile following its implementation of similar measures support expectations that implementing restrictions on unhealthy foodstuffs labelling and advertising may yield positive results in addressing diet-related NCDs. Of course the proposed measures will undoubtedly place limitations on the rights of food manufacturers, including the right to freedom of commercial speech through advertising, and the property rights of trade mark holders. However, when balanced against the constitutional provisions that inform the right to health and the

international law provisions that underpin the universal right to health, and subject to the comments on technical aspects and other challenges with R3337, it was argued that such limitations would be justified under section 36 of the *Constitution*.

Turning to the challenges, several technical aspects in formulating certain draft provisions in R3337 requiring attention were pointed out in Chapter 4. As elaborated in part 7.3.2 below, comments and suggestions were made regarding the inclusion of certain key definitions, removing potential ambiguities and making typographical amendments. Those suggestions should ideally be considered before R3337 is published in its final form, as they will assist in the overall interpretation and application of this piece of subordinate legislation. On a practical level, the chapter also pointed out the protracted nature of developing and implementing statutory measures. When considering R3337, it appears that the DOH is still in the process of considering the substantive number of comments received more than a year after the deadline for public comment on these draft regulations passed. Based on February 2024 reports, a socio-economic impact study may also be ongoing as part of the legislative reform process. As things currently stand, it is unlikely that R3337 will be implemented any time soon. Legislative reform is a long process, which is problematic considering the urgent need to address NCDs. In addition, in the lead-up to implementation or even after that it is conceivable that businesses in the food industry may challenge specific provisions in R3337 before the courts. The litigation ensuing in such circumstances may further prolong the proposed measures' implementation.

The discussion in Chapter 4 also pointed out that the introduction of the proposed measures will have an impact on food prices. In this regard it was suggested that a phased-in approach, where unhealthy nutrient cut-off values are decreased over time, may ease the potential impact on the pockets of the purchasing public. A phased-in approach would also allow food manufacturers an opportunity to reformulate products in such a way as to make them healthier. In addition, it would afford the government and other stakeholders additional time to roll out public nutrition education initiatives that inform consumers of the changes to food labels and advertising that R3337 will bring about.

Another anticipated challenge following the implementation of the proposed measures in R3337 centres on the monitoring and enforcement of food laws in South Africa, which was considered in Chapter 5. In looking firstly at the role of functionaries and bodies within relevant government departments, it was found that various role players are mandated in terms of national legislation to monitor and enforce food laws in South Africa. These include environmental health practitioners (“EHPs”) within the DOH, assignees designated in terms of the *APSA* within the DOA, as well as the NRCS and NCC falling within the DTIC. It was found that, whilst the efforts of monitoring and enforcement authorities and bodies within all three of these government departments are beneficial, there are limitations and challenges. Aspects such as financial constraints, human capacity limitations, and limitations in authority impact on the role that they currently play and will be able to fulfil in the compliance monitoring and enforcement of the proposed measures in R3337 if and when they come into operation in due course.

The discussion in Chapter 5 then turned to the role of private actors in monitoring and enforcing food laws that are adopted by government. It was demonstrated that court disputes have primarily been in the IP field and are mainly instituted between trade competitors. It was also noted that there have been select labelling disputes under the *APSA* heard before our courts in recent years, but no cases under the *FCDA* dealing with foodstuffs *per se* have been reported.

Turning to monitoring and enforcing food laws via the consumer as a critical stakeholder, Chapter 5 highlighted that consumers generally do not readily have access to courts. The reasons for limitations on consumer redress via court litigation vary, ranging from lack of standing to lack of funds. Turning to ARD mechanisms under the *CPA*, it was noted that provincial consumer authorities and functioning consumer courts do not have a significant role to play in the context of foodstuffs labelling and advertising disputes due to jurisdictional limitations. The CGSO appears to be functioning reasonably well as far as the mediation of consumer concerns under the *CPA* is concerned. However, the CGSO does not receive many marketing-related complaints; even less so in the context of foods. Challenges under this ADR mechanism include the fact that it is effective only if the supplier cooperates. Furthermore, the recommendations of the CGSO are not binding or

enforceable, and the CGSO cannot order that the offending advertising be withdrawn. Based on advice received from the CEO of both the CGSO and ARB, the current practice is that the CGSO refers consumers who have complaints regarding advertising content (including labelling concerns) to the ARB in instances where it deems that the ARB is better suited to consider the complaint and provide appropriate relief.

Viewing Chapters 2 to 5 holistically shows that existing procedures under the government regulation system are collectively applicable and useful in the foodstuffs advertising and labelling context. However, those procedures alone will not be sufficient to ensure that unhealthy foodstuffs labelling and advertising restrictions are monitored and enforced effectively. Moreover, the DOH has acknowledged that a multi-stakeholder approach, which includes private actor involvement, will be necessary to address the diet-related NCD burden in South Africa. In this context Chapter 6 considered and commented on the ARB's role in regulating unhealthy foodstuffs advertising and labelling. It was found that the ARB, as a consumer watchdog, sets best practice standards for ethical and responsible advertising which in certain instances stretch beyond existing government regulation measures. The ARB complaints resolution system is accessible, impartial, quick and transparent, positioning it as an effective forum for obtaining effective redress for advertising complaints that fall within its mandate and jurisdiction. Consumers require neither legal knowledge nor deep pockets to lodge an advertising complaint with the ARB. Moreover, the ARB goes to great lengths to make the consumer's voice heard, effectively raising the consumer from being perceived as potentially vulnerable to being an asset and a valuable stakeholder in advertising regulation in South Africa.

The self-regulatory system of the ARB also has several benefits for the government. Its complaints resolution mechanism relieves the court system and, in contrast to protracted legislative reform, the *ARB Code* can be updated quickly to accommodate changes in the advertising landscape. The ARB brings specialist knowledge to setting, monitoring and enforcing advertising standards in South Africa. Importantly, the ARB serves to “fill” existing legislative gaps. In fact, as the law currently stands, *Appendix J* is the only instrument specifically regulating unhealthy foodstuffs advertising in South Africa, albeit to a limited degree. Whilst R991 contains certain restrictions on foodstuffs labelling and

advertising, those restrictions apply only to certain food categories for infants and young children (i.e., covering only certain unhealthy foodstuffs sold for the consumption by children up to the age of 3 years). *Appendix J* restricts the use of certain graphic elements visually appealing to children as well as the use of nutrition and health claims in advertising directed at children for food and beverage products that do not represent healthy dietary choices and healthy lifestyle. It includes a ban on advertising or promoting such unhealthy foodstuffs at or near pre-schools and primary schools.

Whilst the ARB is an effective self-regulatory organisation in the context of consumer protection in South Africa, it comes with its own criticisms, challenges and limitations. Due to the voluntary nature of self-regulation, and even though a large portion of the South African advertising industry has agreed to abide by the *ARB Code*, there are limits to the enforceability of ARB rulings. There are also limitations on the nature of the ARB's sanctions. The fact that the ARB may sanction the withdrawal of advertising content and, in the instance of non-compliant advertisers, issue an Ad Alert to its members to cease disseminating offending advertising does, however, go a long way towards regulating advertising in South Africa. When analysing the provisions of *Appendix J* it was pointed out that this appendix to the *ARB Code* is somewhat outdated. *Appendix J* is also not fully aligned with the advertising content appearing in the current food environment in South Africa. Various amendments to *Appendix J* were suggested to improve this self-regulatory system's effectiveness in regulating unhealthy foodstuffs labelling and advertising.

7.2 Conclusion: considering the complementary relationship between government regulation and industry self-regulation

In highlighting the complementary nature of government regulation and self-regulation, ICAS³¹⁷¹ explains that:

[t]he [government] regulatory and self-regulatory approaches complement each other, like the frame and strings of a tennis racquet, to produce a result which neither could achieve on its own. The Law lays down broad principles, e.g. that advertising should not be misleading, while Self-Regulation, because of its greater flexibility and the fact that

³¹⁷¹ ICAS *International SRO Guide* 7, 17.

Standards are interpreted in spirit as well as to the letter, can deal quickly and efficiently with the detail of individual ads.³¹⁷²

Government regulation sets specific statutory legal requirements underpinned by a risk of prosecution and punishment in the event of contravention.³¹⁷³ As such, government regulation has a coercive effect.³¹⁷⁴ Self-regulation, on the other hand, sets standards of ethical and responsible conduct in advertising, which are aimed at fostering professional diligence by businesses when it comes to advertising their goods or services. The ARB is not a punitive body. Rather, SROs of this nature have been described as conciliatory, corrective authorities or bodies.³¹⁷⁵

Generally speaking, advertising content must be legal to potentially qualify as acceptable ethical advertising. This is so in terms of both government regulation and self-regulation. Advertising material (including product labelling) which contravenes provisions in government regulation will, therefore, be unethical in terms of the *ARB Code*.

As an extension, self-regulation also requires that advertising must be decent, honest and informative.³¹⁷⁶ This means that advertising which is, strictly speaking, lawful in terms of government regulation may nevertheless potentially fall foul of what is deemed ethically acceptable in terms of self-regulation.³¹⁷⁷ This demonstrates that self-regulation has different objectives than is the case for government regulation, as conduct which is dishonest, indecent or not sufficiently informative to the consumer at which it is addressed (even if lawful under statute) may be contrary to the ethical principles of responsible advertising set by self-regulation through the operations of the ARB. Provisions contained in *Appendix J* that essentially regulate unhealthy foodstuffs advertising and other examples discussed in Chapter 6 attest to the fact that the *ARB Code* supplements and extends beyond advertising restrictions currently imposed through

³¹⁷² The reference to the interpretation and application of an SRO code both in spirit and letter means that advertisers should not try to circumvent the provisions of an SRO code by “dubious ingenuity”. See ASA 2002 *Transformation of Advertising & Marketing Industry* 1.

³¹⁷³ As discussed in part 2.3.8.3, under both the *FCDA* and *APSA* it is a criminal offence to advertise a foodstuff in a false or misleading manner.

³¹⁷⁴ Boddewyn 1989 *Journal of Advertising* 24.

³¹⁷⁵ Whilst these comments were made in the context of the ASA, it is submitted that they apply equally to its successor, the ARB. See De Jager and Smith *Advertising and the Law* 14.

³¹⁷⁶ *Bliss v ARB* (CC) para 3; *ARB v Bliss* (SCA) para 1.

³¹⁷⁷ *ICC Advertising Code* 3.

government regulation regarding various aspects of advertising.³¹⁷⁸ Furthermore, self-regulation in the advertising industry complements government regulation where it may be outdated, where legislative reform is pending (such as R3337), or where there are challenges in providing effective redress under the government regulatory system to consumers on the ground.³¹⁷⁹

In considering the strengths of government regulation it should be noted that advertising self-regulation is not focused on so-called “rogue traders” whose advertising practices are unlawful. Also, as compliance with an ARB ruling is not mandatory for non-members that have not accepted the ARB’s jurisdiction, there are limitations on the enforceability of sanctions that the ARB may impose regarding specific advertising or labelling found to be unacceptable. The importance and value of government regulation is apparent in such instances. In this regard, it has been noted by the ICC³¹⁸⁰ that:

[a]dvertising self-regulation was not created to deal with rogue traders, whose practices are usually illegal. Complaints regarding such actors and practices can be referred to the statutory authorities who have the power to close these types of businesses down. The very effectiveness of advertising self-regulation in resolving questions by legitimate advertisers allows statutory authorities to focus their efforts and resources on dealing with rogue traders.³¹⁸¹

Legislation therefore provides a crucial backdrop in instances where a specific advertiser deliberately and repeatedly fails to adhere to acceptable advertising standards set by the ARB.³¹⁸² In addition broad legislative provisions provide a catch-all backdrop in instances where the ARB cannot resolve an advertising dispute due to a lack of cooperation from the advertiser or a lack of mandate over the particular dispute. Whilst self-regulation may not be taken seriously by all traders, legislation is enforced by the government, and there is no opting out.³¹⁸³

³¹⁷⁸ For a discussion on the provisions in *Appendix J*, see part 6.6. For additional examples of where the *ARB Code* supplements legislation or fills statutory gaps, see part 6.7.3.4.

³¹⁷⁹ Boddewyn 1985 *Journal of Public Policy & Marketing* 132; ICC *Benefits of Self-Regulation* 2.

³¹⁸⁰ ICC *Benefits of Self-Regulation* 5.

³¹⁸¹ Also see ICAS *International SRO Guide* 7.

³¹⁸² *ICAS Charter* 4; ICAS *International SRO Guide* 7.

³¹⁸³ UNCTAD *Manual on Consumer Protection* 43.

Against this background, the cumulative efforts of both the government and an industry association, coupled with the participation of consumers and trade competitors in the market, are key ingredients of a recipe designed to achieve social order in the advertising sector.³¹⁸⁴ It has been observed by the UNCTAD³¹⁸⁵ that comprehensive advertising regulation through statute in combination with an effective advertising SRO system are mutually reinforcing. It is submitted that this is in theory reflected in the context of the food law framework in South Africa, which consists of a comprehensive legislative framework (as yet lacking important protective rules, though) and common law provisions, in combination with the *ARB Code*. It is submitted that (i) government adoption of relevant food legislation (including the *FCDA*, the *APSA*, the *CPA* and the *TM Act*) and common law provisions and (ii) self-regulation in terms of the *ARB Code* mutually reinforce and complement one another, each having its own strengths and challenges. In the broader context, the complementary nature of government regulation and self-regulation in the advertising industry ultimately furthers consumer protection regarding foodstuffs labelling and advertising.

The above discussion effectively confirms the hypothesis of this study, namely that self-regulation within the advertising industry complements government regulation aimed at restricting unhealthy foodstuffs labelling and advertising in South Africa, ultimately advancing the government's commitment to reducing the occurrence of diet-related NCDs in this country.

Against this background, the focus now once more and explicitly turns to the research question, namely: with reference to the South African government's commitment to reducing the occurrence of diet-related NCDs amongst consumers by means of advertising and labelling restrictions in relation to unhealthy foodstuffs, and specifically with due analysis of the current and proposed statutory and self-regulation provisions, how can a balance be achieved between legislative regulation by the government, and self-regulation by the advertising industry?

³¹⁸⁴ Boddewyn 1985 *Journal of Public Policy & Marketing* 132, 135, 139; Boddewyn 1989 *Journal of Advertising* 27.

³¹⁸⁵ UNCTAD *Manual on Consumer Protection* 44.

7.3 Recommendations: towards a balance between government regulation and industry self-regulation

Consumers in South Africa, both young and old, currently live, work and play in an obesogenic environment. The DOH *Obesity Strategy* highlights that:

[u]ltimately, it is in everyone's interest to enable people living in South Africa to enjoy long and healthy lives. The cost and extent of obesity and overweight in South Africa is [sic] unsustainable and does not contribute towards the Department of Health's vision of a "long and healthy life for all South Africans", or towards achieving global or national health goals. Obesity and overweight affect the quality of life of affected South Africans.³¹⁸⁶

The prevalence and rise in diet-related NCDs in South Africa demonstrate that the current foodstuffs framework is insufficient to enable consumers to make informed dietary choices. In the context of unhealthy foodstuffs labelling and advertising, it is apparent that there is currently not an appropriate balance between government regulation and industry self-regulation. This is because as R3337 is pending the labelling and advertising of unhealthy foodstuffs is not specifically regulated in terms of government regulation, other than by the restrictions on certain types of foodstuffs for infants and young children up to the age of 3 years, under R991. In terms of advertising self-regulation, as the law currently stands the provisions in *Appendix J* span beyond government regulation of unhealthy foodstuffs labelling and advertising. That being said, it has been demonstrated that there is definite room for improvement in the scope and application of *Appendix J*. Recommendations to strengthen both government regulation and self-regulation towards achieving an appropriate balance between these complementary systems are made below.

7.3.1 Adopting a broad definition of "food law" in South Africa

In the context of foodstuffs advertising and labelling, this study has demonstrated that the legal landscape includes legislation, common law provisions, and standards set by the advertising industry through the ARB's voluntary self-regulation system. In considering unhealthy foodstuffs advertising and labelling specifically, there is also a clear

³¹⁸⁶ DOH *Obesity Strategy* 15.

international dimension in the context of the universal right to health. Nationally various constitutional and consumer rights inform the right to health. These would include the right to a food environment which is not harmful to health and well-being, and the right of access to nutrition information that is plain and understandable to consumers of all ages. It has also been demonstrated that the administration and enforcement of food regulation is fragmented and stretches across various departments of government, in addition to self-regulation.

Foodstuffs advertising and labelling is, however, only a piece of the broader food law framework. In line with the discussion in part 1.8.6, and without repeating all aspects considered there, it is suggested that a broad definition of “food law” be adopted in South Africa. The definition should include all areas of law that complement or support the entire food supply chain, from production throughout processing to purchase and consumption by the end consumer. Arguably, the definition could stretch even beyond food consumption to include relevant environmental considerations that are linked with food.

Following the above, a working definition of “food law” for South Africa is proposed, namely:

the legal framework (including but not limited to legislation, regulations, rules, case law, common law, customary law, standards, industry codes and soft law) which regulates or is related to the production, trade, handling, and consumption of foodstuffs, or any activities relevant to the food supply chain.

The above definition is wide enough to include government regulation and self-regulation, as well as co-regulation as a middle ground. The working definition is intentionally left open-ended to provide for a flexible interpretation and refinement by the South African courts or legislature over time.

7.3.2 Suggested amendments and comments to R3337

In the process of analysing the proposed measures in Chapter 4, several aspects that may require technical consideration regarding the current version of R3337 were put forward. While the DOH is in the process of considering comments received to those draft

regulations, the following comments, suggestions and recommendations, which are discussed in Chapter 4, are made:

1. In addition to including advertising and labelling requirements and restrictions, R3337 also aims to extend beyond R146 by regulating the promotion of foodstuffs.³¹⁸⁷ The word “promote” is, however, not defined in the current version of R3337. As promote/promotion is generally perceived to be wider than advertising *per se*,³¹⁸⁸ it is suggested that a definition be included in the revised version of R3337 in due course. Whilst the *FCDA* does not contain a definition of “promote”,³¹⁸⁹ guidance may be found in R991 where the verb “promote” is defined as:

to employ any method scheme or design, of encouraging or enticing a person or group of persons, in whatever form, to purchase or use a designated product, and includes but is not limited to advertising, point-of-sale advertising, the giving of samples, special sales, free supplies, donations, sponsorships, gifts, whether related or unrelated to purchases of designated products, free utensils or other articles, prizes, carrier bags with pack-shots or product logos, prizes or special displays at retail outlets, discount coupons, premiums, loss-leaders, tie-in sales, rebates and other give-aways.³¹⁹⁰

2. As discussed in part 4.4.5.2, when draft regulation 51(1)(a)-(c) is read as a whole, it is currently ambiguous. This may lead to uncertainty or inconsistencies in interpretation. Assuming that the intention of the legislature is that a FOP warning label will be required if a pre-packaged food product (i) contains added sugar, saturated fat or salt and the nutrient cut-off value(s) for the relevant unhealthy nutrient(s) exceeds the prescribed cut-off values, or (ii) contains artificial sweeteners in any amount, draft regulation 51(1) could be amended as suggested below to remove possible interpretation challenges:

³¹⁸⁷ Draft reg 2(3)(b) provides that “[a] person may not promote or advertise a foodstuff in a manner which is in conflict with these Regulations”. Also see draft regs 52(1)(e) and 58 of R3337.

³¹⁸⁸ See the discussion in part 1.2.3.5.

³¹⁸⁹ A possible explanation for this omission is that “promote” may potentially have different meanings for the different product categories that are regulated in terms of the Act, which includes cosmetics and disinfectants in addition to foodstuffs. See the discussion in part 2.1.

³¹⁹⁰ See reg 1 of R991.

51.(1) Pre-packaged foodstuffs are required to bear a mandatory Front-Of-Pack- Labelling (FOPL) if:

(a) the foodstuff-

~~(a)~~**(i)** contains added saturated fat, added sugar, added sodium; and

~~(b)~~**(ii)** which exceeds the nutrient cut-off values for total sugar, total sodium or total saturated fatty acids outlined below; or

~~(c)~~**(b)** subject to regulation 55(1), **the foodstuff** contains any artificial sweeteners.

[NOTE: proposed additions are shown in **bold** and deletions are ~~crossed-out~~]

3. R3337 provides that a person may not label a foodstuff for sale in a manner that contradicts any *FCDA* regulations relating to infants, young children or children.³¹⁹¹

R3337 will therefore mandate compliance with other regulations that are specifically applicable to foodstuffs for that consumer group, which would currently include R991. While a proposed definition of “children” is provided in R3337 (see suggestion 4 below), neither “infants” nor “young children” is defined.³¹⁹² To ensure consistency in interpretation it is suggested that the definitions in R991 be adopted in the updated version of R3337. An “infant” would then refer to a person who is 12 months of age or younger and a “young child” would be a person between the ages of one and three years.³¹⁹³

4. As discussed in part 4.5.2 above, the proposed age delineation in the definition for “children” in R3337 is wider than in national legislation. It would include persons from birth until they turn 19 years old. In the circumstances, it is recommended that the definition of “children” in R3337 should be amended to conform to national legislation³¹⁹⁴ to read:

“children” for the purpose of foods that may not be marketed or advertised to children and the Front-of-pack-labelling logos, are **all persons under the age of 18 years.**

5. In part 4.5.4 a number of comments were made with respect to draft regulation 52(2)(b), read with draft regulation 51(5)(c). Firstly, the reference to “regulations 51(5)(c) and 6)” in draft regulation 52(2)(b) is unclear and seems to contain a typographical error, as there is no regulation 51(6). This should be corrected.

³¹⁹¹ See draft reg 2(3)(c) of R3337.

³¹⁹² See the discussion in part 4.5.1.

³¹⁹³ See the discussion in part 2.6.1.

³¹⁹⁴ See s 28(3) of the *Constitution*; s 1 of the *Children’s Act*.

Secondly, and for the sake of clarity, the phrase “FOPL may not be marketed to children” in draft regulation 51(5)(c) should be amended to read “**Foodstuffs that are required to carry FOPL in terms of these regulations** may not be marketed to children”, or something similar. Thirdly, there seems to be a discrepancy between draft regulation 51(5)(c) and draft regulation 52(2)(b). The latter refers to pre-packaged products and any ready-to-eat foodstuffs “in or on or from a catering establishment”. As such, that draft provision proposes an advertising ban on pre-packaged foodstuffs as well as certain un-prepackaged foodstuffs. However, as discussed in part 4.4.5, R3337 proposes FOP labelling requirements in relation to pre-packaged foodstuffs only. Ready-to-eat foodstuffs sold at a catering establishment that are not pre-packaged such as foods in restaurants would not require FOP labelling in terms of R3337 in its current form.³¹⁹⁵ Proposing advertising restrictions on unhealthy foodstuffs that are both pre-packaged and un-prepackaged in draft regulation 52(2)(b), whilst limiting FOP labelling requirements to pre-packaged products in draft regulation 51(1) only, seems disjointed and ambiguous. This aspect needs to be addressed. The actual amendments will depend on the intention of the legislature.

6. Based on a 2018 estimate of the South African food environment, about 75% of packaged foodstuffs in supermarket stores may be affected by FOP warning label requirements. Although unintentional, changes in food prices have been identified as an unavoidable consequence of implementing additional labelling and advertising

³¹⁹⁵ This is because foods ordered and served at restaurants or from food trucks, for example, are not labelled before being served to the consumer. Under R146, labelling requirements are generally not applicable to ready-to-eat foodstuffs that are not pre-packaged and sold at or from the catering establishment at which the food is made. See the discussion in part 2.4.2 above. In terms of draft reg 74(3)(h) of R3337, ready-to-consume foodstuffs that are prepared and sold on the premises of a catering establishment for consumption, which are not pre-packed, will also be exempt from the labelling requirements under R3337. Details of the ingredients list, common allergens and date of manufacture of such products would, however, have to be printed on the scale label (if the product is weighed or priced at the establishment) or be kept on file by the manufacturer, and be made available upon request by a consumer or other interested party. Under R3337 this exemption from labelling would, however, be subject to two exceptions. Labelling would nevertheless still be required for non-prepackaged ready-to-consumer foodstuffs where (i) R3337, regulations under the *APSA*, or regulations under the *NRCS Act* stipulate otherwise, or (ii) an energy, health, ingredient content or nutrition claim is made in relation to the relevant foodstuff.

requirements in relation to unhealthy foodstuffs. Poor consumers will be hit the hardest. In these circumstances it is suggested that the government consider a phased implementation approach, where unhealthy nutrient cut-off values are lowered gradually over a period of time. As the model proposed in R3337 is essentially underpinned by the Chilean model and accompanying nutrient cut-off values, a three-phase staggered approach along the lines adopted in Chile would appear to be a suitable avenue for the government to consider. This recommendation was discussed comprehensively in part 4.9.3 above.

The above recommendations are made to assist in identifying where updates to the current version of R3337 may be required. The recommendations will conceivably also assist in interpreting and applying the proposed measures if implemented in due course, and as among government provisions regulating the advertising and labelling of unhealthy foodstuffs.

7.3.3 Suggested amendments to Appendix J

The suggested amendments to *Appendix J* are discussed comprehensively in part 6.6 and reflected in Addendum F of this thesis. In essence, they include:

- expanding the scope of *Appendix J* beyond television advertising, to include all forms of advertising;
- aligning the meaning of “children” with national legislation to include any person below the age of 18 years;
- expanding restrictions on the use of graphic elements to include all cartoon-like characters or images that may be visually appealing to children, irrespective of whether there are IP rights or who the owner is of the IP that may vest in that image or device, and it should cover their use on packaging;
- introducing broadcast time restrictions on television, radio or other broadcast advertisements targeted at, or which are likely to be seen by children. To align with the broadcast time restrictions in the *ARB Code* that are relevant to alcoholic beverage advertising, restrictions are proposed during the hours of 06h00 in the morning until

19h00 in the evening on weekdays, and from 06h00 in the morning until 12h00 in the afternoon on Saturdays and Sundays; and

- expanding the restrictions on the advertising and promotion of unhealthy foods to cover all South African schools, including high schools.

As a proviso, it is acknowledged that it would potentially be naïve to assume that all of the abovementioned recommendations and suggestions, as reflected in Addendum F, would simply be accepted and included in updates to *Appendix J*. Whilst some reluctance may be anticipated, these suggestions are made in the context of the responsibility of the foodstuffs industry to respect consumers' right to health in South Africa.³¹⁹⁶ As such, these recommendations aim to put forward best practices that could be adopted by the ARB and its members in the advertising industry to align with DOH policy objectives aimed at addressing NCDs and to ensure a balance between government regulation and self-regulation.

7.3.4 Expanding statutory recognition of the ARB Code

As a starting point, it was observed earlier³¹⁹⁷ that the South African courts have confirmed that the ARB may issue rulings against any advertising in South Africa, even if the advertising originates from a non-member of the ARB.³¹⁹⁸

Whilst compliance with the self-regulatory industry code is often voluntary, an SRO or its advertising code can also be formally recognised in the law.³¹⁹⁹ As discussed in part 6.3.3, compliance with the *ARB Code* is mandatory for all broadcast service licensees in terms of section 55(1) of the *Electronic Communications Act*. This essentially brings a co-regulatory component to the ARB mechanism in South Africa. In this regard ICAS³²⁰⁰ has noted that:

³¹⁹⁶ For a discussion of this aspect, see part 3.6.2 above.

³¹⁹⁷ See part 6.3.5. Also, for a comprehensive discussion of the *ARB v Bliss*-case, see Visagie 2023 *PER* 13-26.

³¹⁹⁸ Also see Visagie "The Mandate of the Advertising Regulatory Board" 339.

³¹⁹⁹ ICAS *International SRO Guide* 7.

³²⁰⁰ ICAS *International SRO Guide* 33.

[m]entioning Self-Regulation as a valid policy option in statutory law is not indispensable but has the benefit of granting a formal recognition to the SRO, creating room for Advertising Self-Regulation to operate in complementarity with the existing legal framework while providing an additional layer of consumer protection. Statutory provisions on Self-Regulation should be generic enough to allow Self-Regulatory Standards to be amended flexibly without any amendments to the law.

Following the above, the possibility of adopting provisions similar to section 55(1) of the *Electronic Communications Act* in the *FCDA* or regulations under that Act should not be discounted. A suitable clause could read:

[a]ll foodstuffs advertisements must adhere to the Code of Advertising Practice as from time to time determined and administered by the Advertising Regulatory Board ("the ARB") or its successor, and to any advertising regulations prescribed by the ARB in respect of scheduling of foodstuffs advertisements.³²⁰¹

Where a conflict exists between the Code of Advertising Practice or other advertising regulations prescribed by the ARB and the Foodstuffs, Cosmetics and Disinfectants Act 54 of 1972 ("the Act") or any regulations promulgated in terms thereof, the Act and/or regulations under the Act take precedence and will prevail.

As the *FCDA* is the primary legislation regulating foodstuffs offered for sale in South Africa, this Act would be most suited to provide statutory backing to the *ARB Code*. More specifically, regulations under the *FCDA* that relate specifically to foodstuffs advertising would be best suited, given that the Act extends to other consumer products besides foodstuffs. Ideally, that clause (or a suitable clause with a similar meaning) should be included in the updated version of R3337. The clause has been drafted in a manner where statutory recognition and backing are provided, but where the ARB or the *ARB Code* are not placed directly under government regulation. This has been suggested in order to retain the advantage of flexibility regarding updates to the *ARB Code*. Also, the second paragraph suggested will ensure that, in the instance of potential misalignment or conflict between the *ARB Code* and the *FCDA* or regulations thereunder, the latter will prevail.

³²⁰¹ The word "scheduling" is also included in s 55(1) of the *Electronic Communications Act*. The word has been retained in the proposed clause and is meant to refer to the proposed broadcast time restrictions (or permitted schedule slots) for unhealthy foodstuffs under *Appendix J*. See the discussion in part 6.6.4 above.

As a side comment, while considering the *CPA* as an alternative legislative backdrop to the *ARB Code* may be tempting, arguments have been set out elsewhere that explain why this would not be conducive in the context of unhealthy foodstuffs advertising and labelling regulation. In summary, when considering the benefits of advertising self-regulation through the current operations of the ARB,³²⁰² reasons that accreditation of the ARB as an ombud in terms of section 82(6) of the *CPA*³²⁰³ would seem impractical and counter-productive include:

- A lack of mandate over foodstuffs labelling and advertising laws: The *CPA* contains limited provisions dealing with the labelling and advertising of foodstuffs *per se*.³²⁰⁴ Most of the product-specific labelling requirements for foodstuffs are contained in the *FCDA* (and to a lesser extent in the *APSA*), which does not fall within the authority of the DTIC. This consequently places limitations on the authority of the NCC, NCT as well as ADR agents under the *CPA*, such as the CGSO and provincial consumer courts, when it comes to the monitoring and enforcement of foodstuffs labelling and advertising laws;³²⁰⁵
- Ill-suited relief under the *CPA*: The nature of the relief available to a complainant under the *CPA* system may often be ill-suited for foodstuffs labelling and advertising complaints. Ordering the withdrawal or amendment of offending advertising content is not possible under the *CPA*'s ARD system;³²⁰⁶
- Lack of enforcement where the supplier is uncooperative: A finding of an ombud or other ADR agent under the *CPA* is not binding or enforceable, and is often ignored by suppliers against whom a complaint is filed. If there is no reasonable possibility that the matter may be resolved with the assistance of an ombud under the *CPA*, that ombud is compelled to terminate the complaint and refer the consumer to the NCC. Due to capacity constraints, the NCC does not consider individual consumer

³²⁰² See part 6.7 above.

³²⁰³ See part 5.4.2.2 above.

³²⁰⁴ See part 5.4.2.2 above.

³²⁰⁵ See parts 2.5.3, 5.2.5 and 5.5 above.

³²⁰⁶ See part 5.4.2.2 above.

complaints.³²⁰⁷ In such circumstances, there is a risk that a consumer is sent from pillar to post, which frustrates the process and impacts the expedient resolution of the matter;³²⁰⁸

- Competitor complaints will fall away: due to the threshold limitation under the *CPA*,³²⁰⁹ the majority of juristic persons who operate in the foodstuffs sector, including manufacturers and retailers, would generally not be able to approach relevant tribunals or ombuds under the *CPA* against another competitor in the foodstuffs industry. This will undoubtedly have dire implications for the ARB's revenue from competitor complaints which is used for day-to-day business operations;³²¹⁰ and
- Loss of flexibility to keep the *ARB Code* abreast of developments in advertising and consumer trends: As with the *CGSO Industry Code* that has been pending amendments since 2022, the flexibility of adapting the *ARB Code* will fall away if the ARB is accredited as an ombud under the *CPA*.³²¹¹

It has been noted elsewhere³²¹² that representations made by both the CGSO and the ARB CEOs have confirmed that accreditation of the ARB as an ombud in terms of the *CPA* is no longer on the cards. The abovementioned issues likely form part of that decision to forego that option as a viable avenue.

7.3.5 Putting a memorandum of understanding in place between the ARB, DOH and CGSO

When consumers are concerned with advertising content, they will often turn to the entity or forum which is most visible in the public eye.³²¹³ It has been observed that the media often reports on ARB rulings,³²¹⁴ making its operations visible to members of the

³²⁰⁷ See part 5.2.4 above.

³²⁰⁸ See parts 5.2.4 and 5.4.2.2 above.

³²⁰⁹ In terms of the threshold limitation, the operation of the *CPA* excludes enterprises with an asset value or annual turnover of R2 000 000 or more. See the discussion in part 5.3.3 above.

³²¹⁰ See part 6.3.6.1 above. For a discussion on the funding of the ARB, see part 6.3.

³²¹¹ See parts 6.7.3.3 and 6.7.3.4 above.

³²¹² See part 5.4.2.2 above.

³²¹³ Woker 2016 *SA Merc LJ* 47.

³²¹⁴ See part 6.8.1.

public. This factor and the fact that consumer complaints are free of charge and resolved relatively quickly³²¹⁵ are reasons why consumers may decide to turn to the ARB for assistance where there are concerns with advertising.

Despite the perceived popularity of the ARB as an advertising complaints resolution forum, there will be instances where the ARB will not be able to consider or resolve an advertising complaint. Reasons include a lack of mandate (such as where the concern is not covered by provisions in the *ARB Code*)³²¹⁶ or where a rogue trader simply chooses to ignore an ARB ruling and continues to disseminate unacceptable advertising via channels that are not associated with members of the ARB.³²¹⁷ As an illustrative example, should FOP warning labels become mandatory in terms of regulations promulgated under the *FCDA* (in terms of R3337 or otherwise) in due course, the ARB would not have the authority to consider an advertising complaint filed with it based solely on a concern raised that a specific food is unhealthy but does not contain a FOP warning label. This is because that requirement would fall squarely within government regulation and enforcement.³²¹⁸ In such instances the DOH should be alerted to the issue, so that it may investigate it and take appropriate steps, which may include criminal action under the *FCDA* and regulations under that Act.³²¹⁹

The relief that a complainant seeks also impacts on whether the ARB is an appropriate forum. If the complainant desires that the advertising content in question be removed or amended, the ARB would likely be suitable.³²²⁰ If, however, the complainant seeks a refund, replacement or repair of the relevant product to which the offending advertisement relates, the ARB would not be suitable as it cannot order such sanctions. In those circumstances the CGSO may be better suited to consider the matter, as this ombud accredited under the *CPA* can recommend the so-called triple R (refund, replace or repair).³²²¹ Whilst the ARB and CGSO already appear to be working in tandem with

³²¹⁵ Advantages of the ARB system to consumers are discussed in part 6.7.2.

³²¹⁶ For a discussion on the mandate of the ARB, see part 6.3.4.

³²¹⁷ The jurisdiction of the ARB over non-members is discussed in part 6.3.5.

³²¹⁸ The DOH administers and enforces the *FCDA*. See part 2.3.1.

³²¹⁹ See part 2.4.8.3.

³²²⁰ For a discussion on the sanctions that may be imposed by the ARB, see part 6.3.6.2.

³²²¹ This aspect is discussed more comprehensively in part 5.4.2.2.

relative efficiency based on information from the current CEO of each body,³²²² there does not seem to be anything formal in writing that sets out their respective roles and responsibilities regarding this arrangement.

In the context of the regulation of unhealthy foodstuffs advertising and labelling, the above demonstrates that the combined efforts of the ARB, DOH and CGSO collectively form a wide net to address foodstuffs labelling and advertising concerns in South Africa.³²²³ Increased stakeholder engagement is valuable. Complaints falling outside the jurisdiction or mandate of the ARB could be referred to a suitable official or office within the DOH or, if relevant, the CGSO. In turn the DOH may also rely on the expertise of the ARB or CGSO, as the case may warrant, to assist in resolving labelling and advertising complaints. In the circumstances, close communication and cooperation between the ARB as a self-regulatory body, and the DOH and CGSO that operate to enforce legislation or government regulations, would be useful and beneficial.³²²⁴ The *ARB Code* confirms that the ARB endeavours to maintain close contact with government departments as far as possible.³²²⁵ In fact, ICAS³²²⁶ has pointed out that strengthening dialogue between governments and their national advertising SROs could assist in efforts aimed at addressing unhealthy foodstuff advertising.

Following from the above, Woker³²²⁷ has suggested that the entities involved in consumer protection should work together and develop a memorandum of understanding (hereafter “MoU”) clearly setting out their respective roles and responsibilities. This suggestion is supported. An MoU that clearly explains the role and authority of relevant

³²²² See part 5.4.2.2.

³²²³ Other relevant bodies that also assist in foodstuffs advertising and labelling regulation include the NRCS and assignees designated in terms of the *APSA* and the *NCC*. The courts also play a crucial role, particularly where there are disputes between trade competitors. See further the discussion in parts 5.2.2-5.2.4; 5.3.

³²²⁴ ICAS *International SRO Guide* 25.

³²²⁵ Clause 10 of the Preface to the *ARB Code*. Other relevant stakeholders with whom the ARB contains close relations include consumer organisations (such as the CGSO), trade associations (such as the CGCSA) and relevant non-government organisations. The ARB’s official website contains a directory list of more than 20 organisations which may be able to assist consumers on matters that fall outside the ARB’s authority. See ARB 2023 <https://www.arb.org.za/other-organisations.html>.

³²²⁶ ICAS *Request to Maintain the Consideration of Effective Advertising Self-Regulation as Part of the Policy Options Recommended to Member States* 10.

³²²⁷ Woker 2016 SA *Merc LJ* 47-48.

bodies that regulate foodstuffs advertising and labelling in South Africa would be an effective tool for a complainant to use in identifying the forum that is most suited to assist it with dispute resolution efficiently and effectively. In addition, the implementation of an MoU which clearly defines roles and responsibilities would avoid the potential for forum shopping and the duplication of resources.³²²⁸

Creating an MoU that clearly sets out the parameters and jurisdiction of each body to consider food labelling and advertising concerns or complaints would be beneficial for the purpose of certainty and continuation in the process.³²²⁹ A suitable MoU would clarify the roles and responsibilities of each body, identify relevant persons or officials, streamline the process, and clarify the nature of the relief falling with the authority of each body. Due to its key role in foodstuffs regulation, it is suggested that the DOH be included in such an MoU or, at the very least, approve it. Inputs from the DOA and DTIC may also be beneficial.

7.3.6 Implementing a feedback loop to the DOH on ARB activities relating to foodstuffs labelling and advertising

The ARB publishes quarterly newsletters that present facts and figures on its complaints handling system.³²³⁰ On a general level that information assists in demonstrating the transparency, effectiveness and accountability of the ARB in regulating advertising in South Africa.³²³¹ Turning to foodstuffs regulation specifically, Lourke³²³² points out that implementing an independent monitoring component within an SRO mechanism will foster stakeholder trust in advertising self-regulation and demonstrate accountability. In this regard the OECD³²³³ has also observed that:

[r]egular monitoring of the operation and effectiveness of [SRO] schemes can help to demonstrate whether objectives are being achieved and members of the scheme are complying. Such monitoring would also need to capture instances of non-compliance to

³²²⁸ Woker 2016 SA *Merc LJ* 47.

³²²⁹ Successors in the management of the ARB and the CGSO, for example, would then be able to continue the cooperation between the two bodies.

³²³⁰ Newsletters are publicly available on the ARB's official website. See ARB date unknown <https://www.arb.org.za/news%2c-advisories---events.html>.

³²³¹ OECD *Industry Self-Regulation* 6-7; ICAS *International SRO Guide* 53.

³²³² Loerke "Information, Incentives and Choice: A Viable Approach to Preventing Obesity" 217.

³²³³ OECD *Industry Self-Regulation* 24.

help build credibility, and should evaluate the effects on consumers. Transparency and public accountability can significantly help build trust and confidence in self regulatory [sic] schemes, helping to enhance its value to all participants and possibly encouraging new firms to join.

In considering monitoring mechanisms, ICAS³²³⁴ has identified that “feedback loops” can be used to demonstrate the value of effective advertising self-regulation in a country. A feedback loop is a tool to monitor the effectiveness of SRO standards, and is part of a continuous improvement process where standards are updated to respond to changes in technology or society.

The ARB’s quarterly newsletters already assist in demonstrating its overall accountability and role in advertising regulation. In addition to that practice, it is recommended that an independent feedback loop to the government on ARB activities relating specifically to foodstuffs regulation should be implemented. Such a measure would improve accountability and demonstrate how much the ARB assists government efforts in regulating foodstuffs advertising and labelling. A feedback loop in the form of a report issued consecutively over a reporting period (perhaps quarterly to align with the current newsletter) should ideally disclose the below details on ARB complaints handling related to foodstuffs advertising and labelling:

- the number of complaints received in the reporting period;
- how the complaints were handled, including how many could be resolved informally between the parties without the need to consider the merits and issue a formal ruling;
- the nature of the advertising medium (i.e., online, labelling, television, *etcetera*) to which individual disputes relate;
- the entities against whom the complaints were filed;
- the ratio of consumer complaints versus competitor complaints;

³²³⁴ ICAS *Request to Maintain the Consideration of Effective Advertising Self-Regulation as Part of the Policy Options Recommended to Member States* 3.

- an indication of the duration of the complaints handling process in each matter;
- the outcome of formal rulings; and
- details on complaints that were referred to other bodies or forums for consideration and resolution.

A periodic feedback loop report from the ARB to the DOH on the outcome of foodstuffs advertising complaints and compliance would assist the government in monitoring the effectiveness of advertising self-regulation in the food sector in South Africa. Over time, such reports may also demonstrate the impact advertising self-regulation, as a mechanism complementary to government regulation, has on the dietary patterns of consumers over time.³²³⁵ In addition, feedback reports would assist in tracking changing patterns or trends in food advertising, and in identifying repeat offenders whose conduct could then be investigated by suitable government bodies or departments in terms of relevant legislation. It is envisaged that over time those outcomes would demonstrate the role of advertising self-regulation through the operations of the ARB in advancing the government's commitment to reducing the occurrence of diet-related NCDs in South Africa.

7.3.7 Consumer education initiatives

In addition to government bodies and industry professionals, consumers should also be aware of the relevant laws surrounding the advertising and labelling of foodstuffs in South Africa.³²³⁶ In the context of overarching consumer law, Woker³²³⁷ notes that:

[c]onsumer education must always be at the top of the list of necessary interventions... consumers have to claim their rights and without the necessary education they will not know how to enforce these rights, or even that they have them.

Consumer education on what constitutes healthy and unhealthy foodstuffs is crucial as part of a multi-pronged approach to changing dietary patterns towards healthier foods.³²³⁸

³²³⁵ Hawkes *Marketing Food To Children: Changes In The Global Regulatory Environment* 54.

³²³⁶ Consumers, businesses within the advertising industry and government officials are the three main types of stakeholders in the context of advertising. See ICAS *International SRO Guide* 40.

³²³⁷ Woker 2016 *SA Merc LJ* 48.

³²³⁸ Willet *et al* 2019 *Lancet* 448; FAO *Handbook on Food Labelling to Protect Consumers* 39.

This initiative would also assist in realising the right of consumers of access to nutrition information, which ultimately informs the right to health in South Africa.³²³⁹

It has been pointed out in Chapter 4 that the proposed measures in R3337 should be accompanied by consumer education initiatives.³²⁴⁰ This would ensure that members of the public understand the labelling and advertising changes related to unhealthy foodstuffs that will be brought about when the current laws are amended. An inclusive approach, whereby relevant public authorities and civil society organisations are involved,³²⁴¹ may also strengthen and amplify public education initiatives on healthy diets.³²⁴² In addition, the food industry is well-placed to assist or support government efforts aimed at nutrition education, including those aimed at improving consumer diets and food offered by parents or caregivers to children. Consumer education initiatives on unhealthy foodstuffs may be hosted by various other relevant stakeholders, including legal practitioners and academics specialising in consumer law or food law.

In Chapter 6 it was noted that the ARB provides training and webinars to increase awareness of its operations and functions.³²⁴³ The focus of these education initiatives currently seems to provide an overview of the ARB in general as opposed to a view of specific commodities that are covered by appendixes under the *ARB Code*. It may not be reasonable for the ARB to single out advertising in the food sector unless the ARB is invited by a relevant stakeholder (such as the media, a government department representative, or a consumer organisation) to present at a food webinar, conference or another product-specific event. That being said, and in line with ICAS recommendations,³²⁴⁴ any updates or new additions to the *ARB Code* should be published widely to ensure that consumers, commercial entities and other relevant stakeholders know about those developments. As such, if *Appendix J* is updated relevant stakeholders, including consumers should be informed of this by the ARB.

³²³⁹ See parts 3.2.2.2, 3.6.1 and 3.7.

³²⁴⁰ See part 4.10.

³²⁴¹ See *ICAS Charter* 5.

³²⁴² Willet *et al* 2019 *Lancet* 480.

³²⁴³ See the discussion in part 6.6.7. Awareness training and initiatives are an advantage of SRO functions. See *ICC Benefits of Advertising Self-Regulation* 6; See *ICAS Global Factbook* 22.

³²⁴⁴ *ICAS International SRO Guide* 18.

If consumers know about *Appendix J* and the restrictions on unhealthy foodstuffs advertising, they will be empowered to alert the ARB (or any other relevant stakeholder) of suspected non-compliance. Consumer awareness campaigns can be subsidised by advertising industry members through providing cost-free advertising space in media advertising, for instance. This would reduce the costs associated with consumer education.³²⁴⁵ The role of the media, such as in webinars and online articles focused on food justice, has also been highlighted elsewhere.³²⁴⁶ In this regard, a suggestion would be to invite a representative from the ARB as a guest speaker during online or in-person seminars, talks, conferences or similar public events on food advertising and labelling, to explain the role of the ARB and the features of the *ARB Code* in regulating foodstuffs advertising in South Africa.³²⁴⁷

An anticipated consequence of increased consumer education regarding the ARB and its advertising complaints system would be an increased number of consumer complaints.³²⁴⁸ Ideally, additional resources to deal with higher volumes of complaints would have to be identified up front and prior to launching awareness campaigns.³²⁴⁹ The recommendation that follows may be a source of income to absorb the costs associated with the possible increase in the number of complaints filed with the ARB.

7.3.8 Considering the implementation of compulsory pre-clearance services by the ARB in respect of unhealthy foodstuffs advertising

An example of an advantage arising from what SROs are capable of doing if sufficiently resourced is ICAS'³²⁵⁰ observation that SROs are well-suited to advise industry members on advertising compliance with the relevant SRO Codes and, where possible, the applicable legislation, ahead of the actual publication or broadcasting of the

³²⁴⁵ ICAS *International SRO Guide* 40, 53.

³²⁴⁶ See the discussion in part 6.6.7.

³²⁴⁷ The ARB's CEO has extended invitations to present on the operations and functioning of the ARB. See *ARB 2nd Quarter 2024 Newsletter* 1.

³²⁴⁸ This is a common occurrence, and ICAS estimates that an increase in complaints of between 20% and 30% following increased consumer awareness activities can be anticipated. See *ICAS International SRO Guide* 24, 42.

³²⁴⁹ ICAS *International SRO Guide* 42.

³²⁵⁰ ICAS *Request to Maintain the Consideration of Effective Advertising Self-Regulation as Part of the Policy Options Recommended to Member States* 4.

advertisement. Such compliance could take one of two forms: copy advice or pre-clearance.

7.3.8.1 Copy advice

Copy advice, which is advice on a proposed advertisement's compliance with a self-regulatory code, is provided before that advertisement is published or broadcast.³²⁵¹ Depending on the nature of the proposed advertisement, either the draft text (in the instance of print or online media) or the draft script (in the instance of audio-visual media) is sent to the relevant SRO for consideration, and written comment on compliance with the relevant self-regulatory code is provided. Copy advice can include suggestions on amendments to proposed advertising to align the copy (the text) with the relevant SRO Code. In this way, copy advice identifies potential problems with advertising content before it is launched, effectively reducing the risk of non-compliance.³²⁵² Copy advice is often provided on a confidential basis and is usually non-binding.³²⁵³ This means that where copy advice is given and an advertising complaint is received after the launch of the relevant advertisement that copy advice will not be binding in the conflict resolution mechanism under the SRO system.³²⁵⁴ It is not uncommon for SROs to provide copy advice services to advertisers and advertising agencies.³²⁵⁵ In fact, more than 90% of SROs globally offer copy advice.³²⁵⁶

In South Africa the ARB does not offer copy advice services.³²⁵⁷ This is probably due to capacity and financial constraints. That being said, one of the founding members of the ARB, the Association for Communications and Advertising ("ACA"),³²⁵⁸ offers copy advice. The ACA's Advisory Services include submitting draft advertising, which the ACA will then

³²⁵¹ ICC *Benefits of Advertising Self-Regulation* 7; ICAS *International SRO Guide* 19.

³²⁵² ICAS *International SRO Guide* 24, 38.

³²⁵³ ICAS *Global Factbook* 16; ICC *Benefits of Advertising Self-Regulation* 7.

³²⁵⁴ ICAS *International SRO Guide* 24.

³²⁵⁵ ICAS *Charter* 5; ICAS *International SRO Guide* 38.

³²⁵⁶ It is estimated that approximately 81 500 advertisements were pre-cleared by way of copy advice in 2022. See ICAS *Global Factbook* 17.

³²⁵⁷ This was confirmed in an email from the CEO of the ARB on 9 September 2024. A copy of the correspondence can be made available on request.

³²⁵⁸ See the discussion in part 6.3.3.

consider in the context of the *ARB Code*.³²⁵⁹ Advertisers or advertising agencies usually employ the ACA Advisory Services on a voluntary basis.³²⁶⁰ However, the ARB may direct that an advertisement be sent to the ACA Advisory Service for copy advice a sanction imposed against an offending advertiser.³²⁶¹ Advice provided by the ACA is at the cost of the relevant advertiser (or advertising agency), and such advice is not binding on the ARB.³²⁶²

Hawkes³²⁶³ points out that “a strong system of copy advice that is accepted and used by marketers” is one of the key features of an SRO that functions well. Whilst the ARB does not offer copy advice, the fact that such services are available in South Africa through the operations of the ACA, which has close ties with the ARB through its membership, serves as a service to support the ARB’s system. In addition to the ACA services, advertisers or advertising agencies may also make use of external compliance advice from practising attorneys³²⁶⁴ or consultancy firms³²⁶⁵ on food labelling and advertising.

7.3.8.2 Mandatory pre-clearance

Pre-clearance is a mechanism where an advertisement must undergo compulsory screening and approval before it is published or broadcast. This requirement could be implemented for specific products or services, or alternatively determined by the consumer base at which it is aimed.³²⁶⁶ In the 1990s the ASA provided advertising pre-clearance services for radio and television advertisements, as the South African Broadcasting Corporation (“SABC”) required pre-clearance for that advertising.³²⁶⁷ At this

³²⁵⁹ ACA *Association for Communication & Advertising Advisory Service* para 1.1.

³²⁶⁰ ACA *Association for Communication & Advertising Advisory Service* para 1.12.

³²⁶¹ See the discussion in part 6.3.6.2 above.

³²⁶² ACA *Association for Communication & Advertising Advisory Service* paras 1.11, 3.

³²⁶³ Hawkes *Marketing Food To Children: Changes In The Global Regulatory Environment* 52-53.

³²⁶⁴ An example would be Hahn & Hahn attorneys in Pretoria, South Africa. See Hahn & Hahn 2024 <https://hahnlaw.co.za/services/food-law>.

³²⁶⁵ For example, SGS, a global leader in providing the testing, inspection and certification of various goods including foods, provides comprehensive food label review services in South Africa. For additional reading see SGS 2024 <https://www.sgs.com/en/services/food-label-compliance>.

³²⁶⁶ ICAS *Global Factbook* 16.

³²⁶⁷ Prior to its repeal in terms of s 97 of the *Electronic Communications Act*, the *Independent Broadcast Authority Act* 153 of 1993 required that all broadcast advertising comply with the ASA’s *Code of Advertising Practice*. See Woker *Advertising Law in South Africa* 20. In 1991 advertising pre-clearance initially done internally within the South African Broadcasting Corporation (hereafter “SABC”) for

stage pre-clearance is not generally a requirement for advertising in any medium in South Africa, although it appears that the SABC still requires advertising pre-clearance for television advertisements on its channels.³²⁶⁸ The ARB does not offer advertising pre-clearance services.³²⁶⁹

Given the public health concerns that are directly linked to an unhealthy diet, the suggestion is made to consider implementing a pre-clearance requirement for foodstuffs advertising and labelling in South Africa. Requiring pre-clearance would go a long way in guiding food advertisers and advertising agencies that create food advertising content towards compliance with the relevant food laws in South Africa. Implementing it efficiently would benefit the advertising industry by highlighting potential pitfalls or compliance issues before advertising copy is finalised and published. In addition to the perceived financial benefits of discovering issues requiring attention in advance, the potential for negative publicity accruing to the advertiser resulting from unacceptable advertising would also be mitigated. Consumers would benefit from pre-clearance as that service would significantly reduce the volume of unethical or unacceptable advertising content being made public.³²⁷⁰ Problems picked up during pre-clearance would be corrected before the advertising was finalised and published or broadcast. By the same token, compulsory pre-clearance of unhealthy foodstuffs advertising would support and further government efforts aimed at reducing the occurrence of diet-related NCDs by effectively reducing the quantity of unacceptable unhealthy foodstuffs advertising displayed to consumers. The ARB would seem to be the most obvious choice of body to offer pre-clearance services. It is independent of the government but possesses specialist knowledge and expertise in advertising content and consumer behaviour, habits and sensitivities. Food manufacturers, retailers and other businesses in the food industry that

television advertising was outsourced to the ASA as an independent and unbiased body. For additional reading see De Jager and Smith *Advertising and the Law* 14-16.

³²⁶⁸ Thompson and Smalberger "South Africa" 71.

³²⁶⁹ This was confirmed in an email from the CEO of the ARB on 9 September 2024. A copy of the correspondence can be made available on request.

³²⁷⁰ De Jager and Smith note that, in 1994 when pre-clearance of television advertisements was required, only 20% of ASA advertising complaints related to television advertising, despite television advertising being amongst the most popular medium then. They ascribe those low figures to the pre-clearance and vetting of unacceptable advertising content prior to its being flighted on national television. See De Jager and Smith *Advertising and the Law* 16.

are members of the ARB could conceivably qualify for a reduced fee for the pre-clearance of advertising content.³²⁷¹ Pre-clearance should be provided at a reasonable rate. Though fees generated from such services may not necessarily be a huge source of revenue,³²⁷² the income could be used to expand the resources of the ARB. A panel of experts, including legal experts in food and advertising law, could be set up to assist with this initiative.

If the recommendation in part 7.3.4 above to provide statutory recognition to the *ARB Code* in terms of the *FCDA* is implemented, that co-regulatory mechanism could potentially serve as a basis for the DOH to require pre-clearance of all foodstuffs advertising and labelling in terms of the *ARB Code*. Occasionally the ARB might be required to consider food legislation in order to be able to assess compliance with the *ARB Code*.³²⁷³ Of course, the ARB would have to be mindful to provide independent advice or opinions on advertising compliance with the *ARB Code* only.³²⁷⁴

Whilst the suggestion to introduce pre-clearance for foodstuffs advertising might seem ambitious, at a minimum the viability of such an approach should be considered by relevant stakeholders. The possibility of implementing mandatory pre-clearance for foodstuffs advertising and labelling would require consultation and deliberation amongst all relevant stakeholders and interested parties. Representatives from the government (which would include the DOH, the DOA and DTIC officials), food law practitioners, legal scholars and experts, the ARB, consumer organisations, civil society groups and consumers would be among the key stakeholders in such discussions aimed at

³²⁷¹ This would be in accordance with ICAS recommendations. See ICAS *International SRO Guide* 24, 38.

³²⁷² ICAS *International SRO Guide* 38.

³²⁷³ Under the ARB complaints resolution system, the mandate of the ARB is limited to enforcing the provisions of the *ARB Code*. As discussed in part 6.3.4 above, in certain advertising disputes the ARB may be required to consider food legislation to determine whether or not provisions of the *ARB Code* have been contravened.

³²⁷⁴ At face value it would seem to be necessary to highlight certain disclaimers upfront to advertisers under a pre-clearance mechanism. An example from the ACA would include that the opinion provided is based on the material submitted by the advertiser, and "does not provide a representation or guarantee or warranty in respect of compliance with all provisions of the ARB Code (and food legislation, where potentially relevant)". See ACA *Association for Communication & Advertising Advisory Service* para 1.12(1).

contemplating the viability and practicality of implementing pre-clearance for foodstuffs advertising and labelling in South Africa.

There would undoubtedly be practical challenges in implementing pre-clearance, such as capacity constraints within the ARB. As a pilot project, the initial focus could be on foodstuffs advertising content that is directed at or likely to be seen by children. Hawkes³²⁷⁵ supports the implementation of compulsory pre-clearance in the context of foodstuffs marketing to children. Depending on the success over time and resource availability, such activities could conceivably be expanded to include all foodstuffs advertising and labelling content.

By offering pre-clearance services for foodstuffs advertising and labelling, the ARB could perform a powerful function in ensuring compliance with relevant advertising standards in the *ARB Code* and, potentially, also the broader food law framework. The provision of such services would increase trust in the ARB's self-regulatory system and its process, and the ARB's role in addressing NCDs in South Africa.

7.4 *Final concluding remarks*

Empowering consumers to make healthier dietary choices through stricter regulation of unhealthy foodstuffs advertising and simpler labelling, by both the government and the advertising industry, is undoubtedly warranted to address the NCD burden. The abovementioned recommendations are made to gradually shift the South African food environment towards a health-promoting environment. Strengthened coordination and cooperation between the government and the food industry would also establish and clarify accessible avenues for consumer redress and become an aspect of the monitoring and enforcement of foodstuffs labelling and advertising. Cumulatively, these developments would enhance the effectiveness of a comprehensive monitoring system aimed at reducing the incidence of NCDs and realising, protecting and respecting the various rights that inform the right to health in South Africa.

³²⁷⁵ Hawkes *Marketing Food To Children: Changes In The Global Regulatory Environment* 54-55.

ADDENDUM A

TABLE 1 OF REGULATION 52 OF R146 WHICH SETS OUT THE CONDITIONS FOR NUTRIENT CONTENT CLAIMS

COMPONENT A	CLAIM	CONDITIONS NOT MORE THAN
Energy	Low Virtually free or free from	170kJ per 100 g (solids [*]) 80kJ per 100 ml (liquids [*]) 17kJ per 100 ml (liquids [*])
Total fat	Low Virtually free or free from	3 g per 100 g (solids [*]) 1.5 g per 100 ml (liquids [*]) 0.5 g per 100 g/ml
Saturated fat	Low Virtually free or free	1,5 g per 100 g (solids [*]) 0,75 g per 100 ml (liquids [*]) and not more than 10% of energy 0,1 g per 100 g (solids [*]) 0,1 g per 100 ml (liquids [*])
Cholesterol	Low Virtually free or free	20 mg per 100 g (solids [*]) 10 mg per 100 ml (liquids [*]) 5 mg per 100 g (solids [*]) 5 mg per 100 ml (liquids [*]) and for both claims, low and free of, less than: 1.5 g saturated fat and trans fat combined per 100 g (solids) or 0,75 g saturated fat per 100 ml (liquids) and 10% ^{**} of energy from saturated fat
Mono - and disaccharides	Virtually free or free	0,5 g per 100 g/ml
Sodium	Low Very low Virtually free or free	120 mg Na per 100 g (equals 305 mg NaCl) 40 mg Na per 100 g (equals 102 mg NaCl) 5 mg Na per 100 g (equals 13 mg NaCl)
Alcohol	Non-alcoholic Virtually free or free	0.5% by volume 0.05% by volume
* refers to end product ** percentage expressed per total energy of end product		

TABLE 1: CONDITIONS FOR NUTRIENT CONTENT CLAIMS (continued)

COMPONENT B	CLAIM	CONDITIONS NOT LESS THAN
Energy	Source of High in	80kJ per 100 ml 950kJ per 100 g or 250kJ per 100 ml
Carbohydrate	High in	13 g per 100 g or 6,5 g per 100 ml
1 Dietary Fibre (as measured by the latest update of the Englyst method as stipulated in the table in Guideline 1)	Source of High in	2.4 g per 100 g (solids) 4.8 g per 100 g (solids)
2 Dietary Fibre (as measured by the latest in update of the specific general AOAC method used which are [sic] listed in the table in Guideline 1)	Source of High in	3 g per 100 g (solids) 6 g per 100 g (solids)
Protein	Source of High in	5 g per 100 g (solids [*]) 2,5 g per 100 ml (liquids [*]) and 2,5 g per 418kJ 10 g per 100 g (solids [*]) 5 g per 100 ml (liquids [*]) and 5 g per 418kJ
Polyunsaturated fatty acids (PUFA's)	Source of High in	>40% ^{****} PUFA's and <20% ^{****} Saturated fatty acids and <1 g Trans fatty acids >60% ^{****} PUFA's and <20% ^{****} Saturated fatty acids and <1 g Trans fatty acids
Monounsaturated fatty acids (MUFA's)	Source of	>35% ^{****} MUFA's and <20% ^{****} Saturated fatty acids and <1 g Trans fatty acids
	High in	>60% ^{****} MUFA's and <20% ^{****} Saturated fatty acids and <1 g Trans fatty acids
* refers to end product **** of total <i>energy from fat</i>		

TABLE 1: CONDITIONS FOR NUTRIENT CONTENT CLAIMS (continued)

COMPONENT B	CLAIM	CONDITIONS NOT LESS THAN
Omega-3 fatty acids	Source of High in Very high in	75 mg per single serving 150 mg per single serving 300 mg per single serving
Vitamins and minerals excluding potassium [#] and sodium	Source of High in Very high in	15% of NRV ^{**} per serving 30% of NRV ^{**} per serving 60% of NRV ^{**} per serving
Carotenoids:		
Betacarotene	Source of High in	0.5 mg per 100 g 2 mg per 100 g
Lycopene	Source of High in	0.5 mg per 100 g ^{**} 2 mg per 100 g ^{***}
Lutein	Source of High in	0.5 mg per 100 g 2 mg per 100 g
Zeaxanthin	Source of High in	0.1 mg per 100 g 0.5 mg per 100 g
* refers to end product ** NRVs for individuals older than 4 years *** Wet weight # The claims ('source of and 'high in'), shall only be permitted for potassium <i>naturally</i> present in foodstuffs.		

ADDENDUM B

NUTRITIONAL INFORMATION TABLE PRESCRIBED IN POINT 1 IN ANNEXURE 2 TO R146

TYPICAL NUTRITIONAL INFORMATION (as packed/ready-to-eat)

Quantified single serving size expressed in grams or millilitres, whatever is appropriate

	Per 100 g/ml	Per single serving
Energy (kJ)		
Protein (g)		
Glycaemic Carbohydrate or carbohydrate (g) of which total sugar (g)		
Total fat (g)		
of which Saturated fat (g)		
<u>*</u>		
<u>**</u>		
<u>**</u>		
<u>***</u>		
Dietary fibre <u>#</u> (g)		
Total Sodium (mg)		
- Any other nutrient or food component to be declared in accordance with these Regulations - in alphabetical order, in the order: vitamins, minerals, others.	Indicated in grams (g), milligrams (mg), micrograms (mcg/µg), or appropriate unit of measurement)	Indicated in grams (g), milligrams (mg), micrograms (mcg/ µg), or appropriate unit of measurement)

Nutrient reference values (NRVs) for individuals 4 years and older (see Annexure 3) expressed per single serving is optional.

*Place the statements required by regulation 50(4) as appropriate here.

* place to insert trans fat

** place for a subgroup nutrient, such as monounsaturated fat, polyunsaturated fat, omega-3 fatty acids *et cetera*

*** place to insert cholesterol when cholesterol information is given

Indicate method of analysis used to determine dietary fibre

ANNEXURE A TO R991

Minimum Mandatory Nutritional Information for infant formula, follow-up formula, or infant formula or follow-up formula for special dietary management for infants with specific medical conditions.

Typical nutritional information:

Quantified single serving size expressed in grams or millilitres, whatever is appropriate

	Per 100 g powder as sold	Per 100 ml reconstituted ready to use	Per 100 kJ ready to use
Energy (kJ)			
Total Protein (g)			
Added individual amino * acids (mg)			
Total Carbohydrate (g)			
of which lactose (g) and/or glucose (g)			
Total fat (g)			
Linoleic acid (mg)			
Linolenic acid (mg)			
Docosahexaenoic acid *			
Eicosapentanoic acid *			
Arachidonic acid *			
Total dietary fibre (g)			
Sodium (mg)			
Vitamins in alphabetic order (in appropriate unit of measurement)			

Minerals and trace elements in alphabetic order (in appropriate unit of measurement)			
Nucleotides*			
L(+) lactic acid producing bacteria *			
* When applicable			

List of ARB rulings relating to foodstuffs advertising and labelling

ADDENDUM D

	Case	Advertiser	Complainant	Foodstuff	Media type	Clauses(s)	Outcome
1	3049-Kauai-Craig Kalan	Kauai Jiuce (Pty) Ltd	Consumer	Smoothie	Menu	4,2,1	Dismissed
2	3128-Mr D-van Bergen	Mr Delivery	Consumer	Watermelon & ice cream	Mobile app	4,2,1	Upheld
3	3129-Woolworths-Dr Tod Collins	Woolworths	Consumer	Hormone-free milk	Print advert	2; 4,2,1	Dismissed
4	2479-Snickers-Korb	Mars Consumer Products (Pty) Ltd	Consumer	Chocolate bar	Television advert	1; 14	Dismissed
5	2912-Spring Meadow Dairy Farm-Offer	Spring Meadow Dairy Farm (Pty) Ltd	Consumer	Cranberry Nectar Blend	Label	4,2,1	Upheld
6	Woolworths-Mokonyane	Woolworths	Consumer	Stewing beef	Label packaging	4,2,1	Upheld
7	2596-Zuma Restaurant amd Lounge	Zuma Restaurant and Lounge (Pty) Ltd	Competitor	Restaurant name	Online and otherwise	2; 4,2,1; 8; 9	Upheld
8	2652-Parmalat-Dr Harris Steinman	Lactalis South Africa (Pty) Ltd	Consumer	Fruit yoghurt	Label packaging	4.2.1	Upheld
9	2839-Papachinos-Bezuidenhout	Papchinos Group	Consumer	Pizza & Pasta special	Menu	4,2,1	Upheld
10	2532-Lay's-Various complainants	Simba Proprietary Limited	Consumers	Crips	Television advert	3.3; 14	Dismissed
11	2800-KFC-Strydom	KFC (Pty) Ltd	Consumer	Burger meals	Social media and website	4.2.1; 4.4	Upheld
12	2726-KFC-Brad Iggs	KFC (Pty) Ltd	Consumer	Chicken piece meal	Website	4.2.1; 16	Upheld
13	2531-Eskort-RCL Foods	Eskort (Pty) Ltd	Competitor	Viennas	Various media	Various, plus Appendix	Undertaking + dismissed
14	2900-Cadbury-Sullivan	Mondelez South Africa (Pty) Ltd	Consumer	Chocolate bar	Television advert	4.2.1	Dismissed
15	1964-Wimpy-Galane	Famous Brands Ltd t/a Wimpy	Consumer	Cheese burger meal	Television & YouTube advert	1, 3.4, Appendix J	Dismissed
16	2247-Uber Eats-Hartzenberg	Uber Eats SA (Pty) Ltd	Consumer	Take-aways	Television advert	4.2.1	Upheld
17	1997-Purity-Sifiso Mtsweni	Tiger Consumer Brands Ltd	Consumer	Baby food	Television advert	3.4; 3.5	Dismissed
18	2105-Pick 'n Pay-Heckroodt	Pick 'n Pay	Consumer	Long-life milk	Pamphlet	4.2.1	Upheld
19	2307-Pedros-Nando's	Pedros Chicken Franchise (Pty) Ltd	Competitor	Take-away chicken	Television adverts, also online	6; 8	Upheld
20	1905-Nik Naks-Greene	Simba (Pty) Ltd	Consumer	Chips	Label packaging	4.2.1	Dismissed
21	2009-KFC-van der Spuy	KFC South Africa	Consumer	Burger meals	In-store advertising	4.2.1	Dismissed
22	2276-KFC-Mthethwa	KFC (Pty) Ltd	Consumer	Fast food	Television advert	4.2.1, 3.4	Partially upheld
23	1861-Olive Joy-van Wyk	Shoprite Checkers (Pty) Ltd	Consumer	Oil blend	Label packaging	4.2.1	Dismissed
24	1811-Debonairs Pizza- Mandy Maubane	Famous Brands Ltd t/a Debonairs Pizza	Consumer	Pizza	Pizza boxes - packaging	4.2.1	Dismissed
25	1305-The Fish and Chip Co-Fishaways	Fiamme Holdings (Pty) Ltd	Competitor	Take-away fish	Advertorial type advert	4.1	Voluntary undertaking
26	1425-KFC-Gangat-Duvenhage	KFC (Pty) Ltd	Consumer	Take-away chicken	Facebook advert	4.2.1	Upheld
27	1702-Food Lover's Market	Food Lover's Holdings (Pty) Ltd	Consumer	Fruit and veg	Television advert	3.3; 13	Dismissed
28	1078-Debonairs-Madikali	Famous Brands Ltd t/a Debonairs Pizza	Consumer	Pizza	Television advert	4.2.1	Upheld
29	1322-Chicken Licken-Mokhele and Euniper	Golden Fried Chicken t/a Chicken Licken	Consumers	Fried chicken	Television advert	1, 14	Dismissed

	Case	Advertiser	Complainant	Foodstuff	Media type	Clauses(s)	Outcome
30	1420-Buger & Lobster Cape Town-Lotter	Burger & Lobster Cape Town	Consumer	Lobster rolls	Instagram	4.2.1; 16	Undertaking
31	1447-Black Cat Peanut Butter-Smuts & Another	Tiger Consumer Brands Ltd	Consumers	Peanut butter	Television advert	3.3; 14.1	Partially upheld
32	989-Tiger Brands-Premier	Tiger Consumer Brands Ltd	Competitor	Bread	Packaging	4.2.1, and others	Partially upheld
33	792-Spar-Derick Kruger	The SPAR Group Ltd	Consumer	Juice & bacon	Television advert	3.3; 4.2.1	Dismissed
34	1032-Future Life-Tiger Brands	Future Life Health Products (Pty) Ltd	Competitor	Breakfast cereal	Packaging	2, 4.2.1, etc	Partially upheld + undertaking
35	850-Clover-Lancewood	Clover SA (Pty) Ltd	Competitor	Yoghurt	Packaging and tv advert	4.2.1	Dismissed
36	1048-Homemark Detox Tea-Dr Harris Steinman	Homemark (Pty) Ltd	Consumer	Detox Tea	Television advert	4.2.1	Upheld
37	Col'Cacchio-Harrie Esterhuysen	Col'Cacchio Holdings (Pty) Ltd	Consumer	Pizza special	Website advertising	4.2.1	Upheld
38	177-Doritos-Serapelo & Harvey	Simba (Pty) Ltd	Consumer	Crisps	Television advert	1; 3.3	Dismissed
39	Fair Cape Dairies-Charissa Kemp and 10 others	Fair Cape Dairies (Pty) Ltd	Consumers	Milk	Social media	4.1; 4.2.1	Dismissed
40	Woolworths-Jean Naude-10-01-19	Woolworths (Pty) Ltd	Consumer	Sandwich ham	Packaging	4.2.1	Upheld
41	454-Henties Orange Juice-Steinman	Henties Juices Cape CC	Consumer	Fruit juice	Packaging	4.2.1	Dismissed
42	543-Nicola Millson & Another	Karan Beef	Consumers	Beef	Newspaper advert	4.2.1	Undertaking
43	78-McCain-Steers-23-01-19	McCain Foods SA (Pty) Ltd	Competitor	Chips	Billboard and Facebook	4.1; 4.2.1	Upheld
44	20-Pioneer Foods (Fruitree)-Liesel Kershoff	Pioneer Foods Groceries (Pty) Ltd	Consumer	Fruit Juice	Packaging	4.2.1	Dismissed
45	416-Power Rock Coffee-Karen Bloom	Herbal Living SA	Consumer	Coffee	Newspaper advert	4.1; 4.2.1	Upheld
46	Simply Asia-Aileen van der Mescht	Cape Thail Restaurants Holding t/a Simply	Consumer	Thai food	Radio commercial	1; 3.4	Undertaking
47	Tango Fruit-Citrogold	Eurosemillas SA	Competitor	Citrus Fruit	Packaging & In-store promo	4.2.1	Upheld
48	566-Uber Eats-Marina Smith	Uber Eats BV	Consumer	Fast food	Email advert	4.2.1	Upheld
49	Bokomo Rusks_Paul Noppe	Pioneer Foods Group Limited	Consumer	Rusks	Packaging	2, 4.2.1	Dismissed
50	Burger King-Steers	Burger King SA (Pty) Ltd	Competitor	Burgers	Television advert	2, 4.2.1, App J	Partially upheld
51	211-Checkers_Leila Chin	Shoprite Checkers (Pty) Ltd	Consumer	Avocados	Packaging	4.2.1	Undertaking
52	Checkers-Teri Boerner-25-01-2019	Shoprite Checkers (Pty) Ltd	Consumer	Water	Label	4.2.1	Undertaking
53	463-Coca-Cola-Andre Claassens	Coca-Cola Africa (Pty) Ltd	Consumer	Carbonated soft drink	Label	4.1; 4.2.1	Dismissed
54	26-Chicken Licken-Sandile Cele-30-11-18	Golden Fried Chicken t/a Chicken Licken	Consumer	Fried chicken	Television advert		1 Upheld
55	KFC-Heyns & Krynauw	KFC (Pty) Ltd	Consumers	Chicken burger	Television advert + online		1 Dismissed
56	Kellogg-Bradley Wilson-08-11-18	Kellogg Company SA (Pty) Ltd	Consumer	Cereal	Packaging	4.2.1	Dismissed
57	08-Checkers-Dave Bennett	Shoprite Checkers (Pty) Ltd	Consumer	Rama fat spread	In-store advertising	4.2.1	Undertaking
58	3297- Fair Cape Dairies	Fair Cape Dairies (Pty) Ltd	Consumer	Chocolate flavoured milk	Packaging	Appendix J, cl 7,3	Dismissed

<u>THE SOUTH AFRICAN MARKETING TO CHILDREN PLEDGE</u>

1. Preface
2. Definitions
3. Core Principles
4. Individual Company Action Plans
5. Compliance and Complaints
6. The South African Pledge
7. Appendix I: CGCSA Members as at May 2009
Appendix II: National Nutrition Week October (to follow)
Appendix III: South African Industry Commitment to Action on the Global Strategy
on Diet, Physical Activity and Health (to follow)
Appendix IV: Appendix M, Food and Beverage Code

1. Preface

The Consumer Goods Council of South Africa (CGCSA) is the national organisation representing the packaged food, beverage and grocery products' industry.

The CGCSA represents the nation's largest manufacturing sector. Membership of CGCSA comprises of approximately 150 companies; subsidiaries and associates which constitute around 8 percent of the gross Rand value of the processed food, beverage and grocery products' sectors. (A list of members is included as Appendix I) By any measure, South Africa's food, beverage and grocery products' industry is a substantial contributor to the economic and social welfare of all South Africans. Effectively, the products of CGCSA's member companies reach every household.

The industry has annual sales and service income in excess of R180 billion and reportedly employs almost one in five of the nation's manufacturing workforce; of all South African's working in the industry, half are based in rural and regional South Africa. Likewise, the processed food sector sources more than 60 percent of its ingredients from South African agriculture.

The CGCSA agenda for business growth centres on public and industry policy for a socio-economic environment conducive to international competitiveness, investment, innovation, employment growth and profitability.

The CGCSA's mandate, in representing member companies, is to ensure a cohesive and credible voice for the industry, to advance policies and manage issues relevant to the industry and to promote the industry and the virtues of its products and services, enabling member companies to grow their businesses.

The Council advocates business matters, public policy and consumer related issues on behalf of a dynamic and rapidly changing industry, operating in an increasingly globalised economy. As global, economic and trade developments continue to test the competitiveness of South African industry, transnational businesses are under increasing pressure to justify South Africa as a strategic location for corporate production, irrespective of whether they are South African or foreign owned. In an increasingly globalised economy, the ability of companies to internationalise their operations is as significant as their ability to trade globally.

Increased trade, rationalisation and consolidation of businesses, increased concentration of ownership among both manufacturers and retailers, intensified competition and dynamic, increasingly complex and demanding consumers are features of the industry across the globe. Moreover, the growing global middleclass of consumers is more sophisticated and discerning, driving innovation and differentiation of products and services.

The CGCSA is working together with government in taking a proactive, even tactical, approach to public policy to enable businesses to tackle the threats, and grasp the dual opportunities of globalisation and changing consumer demands.

To this extent healthy options and in many cases, nutritional and calorie information panels will be displayed on packaging and at Quick Service Restaurants to inform consumers and to assist them in making healthier choices, whilst other member companies have opted not to advertise any of their products to children.

Lastly, CGCSA promotes responsible trading and marketing practice.

Since 2006, the CGCSA has engaged with its members and the Department of Health in the development of a Code for Marketing/ Advertising to Children. The code was finally formally adopted by the Advertising Standards Authority (ASA) on the 1st August 2008 as its *Food and Beverage Code – Appendix M (Appendix IV)*.

2. Definitions

In this initiative:

Marketing Communications means

- a) A matter which is published or broadcast using any medium in all of South Africa or in a substantial section of South Africa for payment or other valuable consideration and which draws the attention to the public or a segment of it, to a product, service, activity, person, organisation, or in line of conduct, in a manner calculated to promote or oppose directly or indirectly that product, service, activity, person, organisation or line of conduct;
- b) Any activity which is undertaken by or on behalf of an advertiser or marketer for payment or other valuable consideration and which draws the attention of the public or a segment of it to a product, service, activity, person, organisation or the line of conduct, in a manner calculated to promote or oppose directly or indirectly the product, service, person, organisation or line of conduct,

But does not include **Excluded Advertising or Marketing Communications**.

Excluded Advertising or Marketing Communications means labels or packaging for products.

Advertising or Marketing Communications to Children means advertising or marketing communications which, having regard to the theme, visuals, and language used, are primarily to children and are for product.

Children twelve years old and under means advertising to media audiences with a minimum of 50% of children twelve years old and under.

Healthy dietary choices and a healthy lifestyle are determined based on established scientific standards¹ that are verified by independent and credible experts which are acceptable to the Advertising Standards Authority of SA.

¹ Substantiation based on statistically valid data, employing a validated, proven scientific method and applicable to the claim being made. Where no official scientific standards have been established, the company will provide technical information (in-house company standards) to support the claim being made, and such in-house standards will be independently verified by a credible expert.

3. Core Principles

Companies participating in the *South African Marketing to Children Pledge* will publicly commit to marketing communications to children twelve years old and under with a view to promoting healthy dietary choices and healthy lifestyles.

Each participant will develop an individual company action plan that outlines how they will meet the following core principles:

I. Advertising Message

Participants will not advertise food and beverage products to children twelve years old and under² in television advertisements unless:

- a. Those products represent healthy dietary choices;

AND / OR

- b. The advertising and/or marketing communication activities reference, or are in the context of, a healthy lifestyle designed to appeal to the intended audience through messaging that encourages:

- i. Good dietary habits, consistent with established scientific standards;

AND/OR

- ii. Physical activity.

II. Product Endorsement

Participants will not use celebrities or characters licensed from third-parties (such as cartoon characters) in television advertisements targeted at Children of twelve years old and under unless those products represent healthy dietary choices and a healthy lifestyle.

This prohibition does not extend to company-owned characters; and to characters used on packaging, provided that the packaging does not appear in television advertising directed at children of twelve years old and under.

² South African Code specifically employs the term “twelve years old and under” to accord with the parental guidance age groups for screening of films is 13 and over, as employed by the Films and Publication Board, and implemented by national broadcasters.

III. Marketing Promotions

- a. Food and beverage products that do not represent healthy dietary choices and a healthy lifestyle will not be used in promotional activity in television advertisements primarily targeted at Children twelve years old and under.
- b. All elements and conditions relating to a promotion should be clearly communicated.

Where promotions are permissible on television, the elements and conditions relating to promotions should also be clearly communicated at point of sale.

Where promotions are permissible to children of twelve years old and under, the likelihood of winning should be clearly communicated in wording readily understandable to them.

IV. Advertising and marketing communications on or in close proximity to pre-school and primary school premises.

- a. Food and beverage products that do not represent healthy dietary choices and a healthy lifestyle shall not advertise or use any form of promotional activity on or in close proximity to, pre-school and primary school premises.
- b. Food and beverage products that do not represent healthy dietary choices and a healthy lifestyle, shall not use celebrities, characters licensed from third-parties or free gifts on or in close proximity to, pre-school and primary school premises except where specifically requested by, or agreed with, the school administration for educational purposes, or related to the healthy lifestyle activities under the supervision of the school administration or appropriate adults.

4. Individual Company Action Plans

AMENDMENT

Companies will sign up to this initiative as a minimum commitment, and may develop and publish individual company action plans which outline how they will meet the core principles of this initiative.

Because companies and their product lines vary, the way companies comply with this framework will differ. However, all commitments will be consistent with the core principles outlined in this initiative. This initiative outlines the minimum commitments required by signatories. Companies may choose to expand if they so wish.

Companies that have signed up for the South African Marketing Initiative are:

Manufacturers

Cadbury*
Coca-Cola*
Danone*
Entyce/ Snackworks (AVI)
Epic
Foodcorp
General Mills*
Kellogg*
Kraft*
Mars*
Nestle*
Oceana brands
Parmalat
Pepsico/Simba*
Pioneer Foods
Rainbow Chicken
Tigerbrands
Unilever

Quick Service Restaurants

Famous Brands (Wimpy, Steers)
KFC
McDonalds*
Nando's

Retailers

Pick n Pay

*Companies that have international pledges in place that may further enhance their commitment. – Please refer to individual websites.

5. Compliance and Complaints

A transparent compliance monitoring programme or study will be developed to support this initiative within twelve months from the commencement of the initiative. However, all consumer, trade and government complaints may be lodged directly with the Advertising Standards Authority. (www.asasa.org.za)

These studies will be repeated periodically. The purpose of these studies will be to measure the industry's response, determine the nature of the improvements in performance and to report on the findings.

The South African Pledge on Marketing to Children

The South African Pledge on Marketing to Children confirms that a number of concerned South African companies in the Food, Beverage, Retail, and Quick Service Restaurant (QSR) sectors wish to commit to:

- Appendix M (Food and Beverage Code) to the *Code of Advertising Practice* as administered by the Advertising Standards Authority of South Africa (see www.asasa.org.za). Moreover;
- The signatories agree that there will be no advertising of products to children twelve years old and under, except where
 - I. These products represent healthy dietary choices; and / or
 - II. The advertising and/or marketing communication activities reference, or are in the context of, a healthy lifestyle designed to appeal to the intended audience through messaging that encourages:
 - a. Good dietary habits, consistent with established scientific standards; and
 - b. Physical activity.
- The signatories voluntarily agree not to use celebrities or characters licensed from third-parties (such as cartoon characters) in television advertisements targeted at children of twelve years old and under unless those products represent healthy dietary choices and a healthy lifestyle.
- The signatories voluntarily agree to limit marketing promotions targeted at children of twelve years old and under unless those products represent healthy dietary choices and a healthy lifestyle.
- The signatories voluntarily agree to limit **Marketing Communications** on or in close proximity of pre-school and primary school premises
- The signatories also agree not to communicate on product that do not represent healthy dietary choices and a healthy lifestyle in primary schools.
- The signatories agree to a transparent compliance monitoring programme or study to measure the industry's response, determine the nature of the improvements in performance and to report on the findings. However, all consumer, trade and government complaints may be lodged directly with the Advertising Standards Authority of South Africa (www.asasa.org.za).
- For the purpose of this initiative, advertising to "children twelve years old and under" means advertising to media audiences with a minimum of 50 % of children twelve years old and under.

For the purpose of this initiative, advertising to "children twelve years old and under" means advertising to media audiences with a minimum of 50 % of children twelve years old and under.

The Signatories still acknowledge and agree to bind themselves to the processes as stipulated by the Advertising Standards Authority for compliance to the Code

Commitment to this Pledge	
Name: _____	Company: _____
Designation: _____	Date: _____
Signature: _____	

Appendix 1: CGCSA MEMBERS AS AT MAY 2009

A B I, SOFT DRINK DIVISION OF SAB
A S M C
A V I FINANCIAL SERVICES (PTY) LTD

- I&J
- ENTYCE
- INDIGO
- SNACKWORKS

ACNIELSEN MARKETING & MEDIA (PTY) LTD
AMKA PRODUCTS PTY LTD
BARLOWORLD LOGISTICS
BAYER (PTY) LTD
BEIERSDORF CONSUMER PRODUCTS
BRITISH AMERICAN TOBACCO S A (PTY) LTD
CADBURY
CHEP S A
CLOVER / DANONE S A
COCA COLA SOUTH AFRICA
DAIRYBELLE
D H L EXEL SUPPLY CHAIN PTY LTD
EDEK MANUFACTURING CC
EPIC FOODS (PTY) LTD
FAMOUS BRANDS FRANCHISE CO (PTY) LTD

- STEERS
- WIMPY
- DEBONAIRS

GLAXOSMITHKLINE BEECHAM
ILLOVO SUGAR LTD
INTERNET SOLUTIONS
KELLOGG COMPANY OF S A (PTY) LTD
KIMBERLY CLARK OF S A (PTY) LTD
KRAFT FOODS SOUTH AFRICA
MARS AFRICA (PTY) LTD
MASSMART SERVICES (a div of MASSTORES (PTY) LTD)
MCDONALD'S S A (PTY) LTD
METCASH TRADING AFRICA PTY LTD
NESTLE
NOLA
OCEANA BRANDS LIMITED
PAKCO (PTY) LTD
PHILIP MORRIS SOUTH AFRICA (PTY) LTD
PICK 'N PAY RETAILERS (PTY) LTD
PIONEER FOODS (PTY) LTD

- SASKO
- BOKOMO
- HEINZ
- THE CERES BEVERAGE COMPANY
- BOWMAN INGREDIENTS SA
- AGRI BUSINESS

PREMIER FOODS
PROCTER & GAMBLE S A (PTY) LTD
S C JOHNSON & SON PTY LTD
SARA LEE HOUSEHOLD & BODY CARE PTY LTD
SIMBA (PTY) LTD
SPAR GROUP LIMITED
TIGER CONSUMER BRANDS LIMITED
TONGAAT HULETT SUGAR LIMITED
TRENSTAR
UNILEVER SOUTH AFRICA (PTY) LTD
VITAL HEALTH FOODS
WILLOWTON OIL
WOOLWORTHS
YUM FOODS RESTAURANT (PTY) LTD



Advertising Standards Authority of South Africa

(Association incorporated under Section 21)
Company Registration Number 1995/00394/08

Appendix IV

Appendix M

Food and beverage code

1. Preamble

- 1.1 Food and beverage advertising to children should not bring advertising into disrepute or reduce confidence in advertising as a service to the industry and to the public.

2. Scope

- 2.1 This code is intended to regulate the advertising of food and beverage products in general, and in particular advertising of such products to children.
- 2.2 This Code is not intended to duplicate or be a substitute for any regulations effecting the labelling and advertising of products relating to health and nutrition.

3. Interpretation

- 3.1 Nutrition information and claims should be judged by the likely perception of the reasonable person at whom the advertising is directed or who is likely to be exposed to advertising.

4. Legality

- 4.1 Food and beverage advertising should adhere to all legal requirements.

5. Honesty

- 5.1 Food and beverage advertising should not be so framed as to abuse the trust of consumers at whom it is directed or who are likely to be exposed to it, or exploit their lack of experience or knowledge or their credulity.

6. Responsibility

- 6.1 Food and beverage advertising, including promotions, should not encourage poor nutritional habits or an unhealthy lifestyle in children, or encourage or condone excess consumption.
- 6.2 Portion sizes featured in food and beverage advertising should not be excessive or more than would be reasonable to consume by a person of the age depicted.

7. Misleading

- 7.1 Presentations in advertising for food and beverage products should accurately represent the material characteristics of the product featured, in particular, but not exclusively, with regard to taste, size, nutritional content, health benefits, nature, composition, method and date of manufacture, range of use, efficiency and performance, quantity, commercial or geographical origin or environmental impact.

8. Social values

- 8.1 As it is recognised that children of twelve years old and under are impressionable, food and beverage advertising should not mislead children about product benefits from use of the product. Such benefits include, but are not limited to, the acquisition of strength, status, popularity, growth, proficiency and intelligence.
- 8.2 Food and beverage product advertising should not undermine the role of parents or others responsible for a child's welfare in guiding diet and lifestyle choices.
- 8.3 Food and beverage product advertising should not directly appeal to children of twelve years old and under to persuade their parents or others to buy advertised products for them; or suggest any negative consequences of not purchasing the product.

9. Product endorsement

- 9.1 Advertisers promoting food and beverage products that do not represent healthy dietary choices and a healthy lifestyle, consistent with established scientific standards acceptable in terms of Section II, Clause 4.1 of the Code of Advertising Practice, shall not use celebrities or characters licensed from third-parties (such as cartoon characters) in television advertisements targeted at children of twelve years old and under.
- 9.2 Clause 9.1 does not apply to company-owned characters.
- 9.3 Clause 9.1 does not apply to the use of characters on packaging, provided that the packaging does not appear in television advertising directed at children of twelve years old and under.

10. Inexperience and credulity

- 10.1 Advertising directed towards children of twelve years old and under for food and beverage products should not create a sense of urgency.
- 10.2 Subject to the provisions of clause 9 dealing with product endorsement, it is recognised that fantasy, including animation, may be appropriate in communication with children.
- 10.3 Care should, however, be taken not to exploit the imagination of a child of twelve years old and under in a way that could create expectations of unattainable product benefits or exploit a child of twelve years old and under difficulty in distinguishing between real benefits and fanciful benefits

11. Substantiation

- 11.1 All claims, including nutritional information and claims about nutrition and health benefits, should be substantiated in accordance with Clause 4.1 of Section II.
- 11.2 Claims about nutrition and health benefits should be conveyed in a manner easily understood by the reasonable consumer.
- 11.3 Nutritional or health claims in television advertisements targeted at children of twelve years old and under, may not be made in respect of products that do not represent healthy dietary choices and a healthy lifestyle, consistent with established scientific standards acceptable in terms of Section II, Clause 4.1.

12. Disclaimers

- 12.3 All disclaimers targeted at children of twelve years old and under should be understandable to them, taking into account their limited vocabularies and level of language skills.

13. Testimonials

- 13.1 Testimonials should not contain any claim or implication to efficacy which is not substantiated in accordance with Section II, Clause 4.1.

14. Marketing promotions

- 14.1 Food and beverage products that do not represent healthy dietary choices and a healthy lifestyle, consistent with established scientific standards acceptable in terms of Section II, Clause 4.1 should not use promotional activity in television advertisements primarily targeted at children of twelve years old and under.
- 14.2 Whenever promotions are used the means of entry, the products to be purchased, if any, and the conditions of the promotion, should be clearly communicated.
- 14.3 Advertising targeted at children of twelve years old and under should clearly communicate the likelihood of winning in wording readily understandable to them.
- 14.4 The prize(s) and the number of prizes should be clearly communicated.
- 14.5 All prizes should be appropriate to the child audience.

15. Marketing communications on pre-school and primary school premises

- 15.1 Food and beverage products that do not represent healthy dietary choices and a healthy lifestyle, consistent with established scientific standards acceptable in terms of Section II, Clause 4.1, shall not advertise on, or in close proximity to, pre-school and primary school premises.

- 15.2 Food and beverage products that do not represent healthy dietary choices and a healthy lifestyle, consistent with established scientific standards acceptable in terms of Section II, Clause 4.1, shall not use any form of promotional activity, such as free gifts, on pre-school and primary school premises.

Appendix J
Food and Beverage Code

Table of Contents

1. Preamble
2. Scope
3. Interpretation
4. Honesty
5. Responsibility
6. Misleading
7. Social values
8. Product endorsement
9. Inexperience and credulity
10. Substantiation
11. Disclaimers
12. Testimonials
13. Marketing promotions
14. Marketing communications on pre-school and primary school premises

1. Preamble

- 1.1 Food and beverage advertising ~~to children~~ should not bring advertising into disrepute or reduce confidence in advertising as a service to the industry and to the public.

2. Scope

- 2.1 This code is intended to regulate the advertising of food and beverage products in general, and in particular advertising of such products to children.

2.2 Children include all persons under the age of 18 years.

3. Interpretation

- 3.1 Nutrition information and claims should be judged by the likely perception of the reasonable person at whom the advertising is directed or who is likely to be exposed to advertising.

4. Honesty

- 4.1 Food and beverage advertising should not be so framed as to abuse the trust of consumers at whom it is directed or who are likely to be exposed to it, or exploit their lack of experience or knowledge or their credulity.

5. Responsibility

- 5.1 Food and beverage advertising, including promotions, should not encourage poor nutritional habits or an unhealthy lifestyle ~~in children~~, or encourage or condone excess consumption.
- 5.2 Portion sizes featured in food and beverage advertising should not be excessive or more than would be reasonable to consume by a person of the age depicted.

6. Misleading

- 6.1 Presentations in advertising for food and beverage products should accurately represent the material characteristics of the product featured, ~~in particular, but~~ not exclusively, with regard to taste, size, nutritional content, health benefits, nature, composition, method and date of manufacture, range of use, efficiency and performance, quantity, commercial or geographical origin or environmental impact.

7. Social values

- 7.1 As it is ~~recognised~~ that children ~~of twelve years old and under~~ are impressionable, food and beverage advertising should not mislead children about product benefits from use of the product. Such benefits include, but are not limited to, the acquisition of strength, status, popularity, growth, proficiency and intelligence.
- 7.2 Food and beverage product advertising should not undermine the role of parents or others responsible for a child's welfare in guiding diet and lifestyle choices.
- 7.3 Food and beverage product advertising should not directly appeal to children ~~of twelve years old and under~~ to persuade their parents or others to buy advertised products for them; or suggest any negative consequences of not purchasing the product.

8. Product endorsement

- 8.1 Advertisers promoting food and beverage products that do not represent healthy dietary choices and a healthy lifestyle, consistent with established scientific standards acceptable in terms of Section II, Clause 4.1 of the Code of Advertising Practice, shall not use celebrities or characters ~~that appeal to children licensed from third parties~~ (such as ~~but not limited to~~ cartoon characters) in ~~or on:~~

8.1.1 television, radio or online advertisements targeted at, or which are likely to be seen by, children during the hours of 06h00-19h00 on weekdays and 06h00-12h00 on Saturdays and Sundays of twelve years old and under; or

8.1.2 labelling and advertising of such food and beverage products.

~~8.2 Clause 9.1 does not apply to company owned characters.~~

~~8.3 Clause 9.1 does not apply to the use of characters on packaging, provided that the packaging does not appear in television advertising directed at children of twelve years old and under.~~

9. Inexperience and credulity

9.1 Advertising directed towards children of twelve years old and under for food and beverage products should not create a sense of urgency.

9.2 Subject to the provisions of Clause 89 dealing with product endorsement, it is recognised that fantasy, including animation, may be appropriate in communication with children.

9.3 Care should, however, be taken not to exploit the imagination of a child of twelve years old and under in a way that could create expectations of unattainable product benefits or exploit a child of twelve years old and under difficulty in distinguishing between real benefits and fanciful benefits

10. Substantiation

10.1 All claims, including nutritional information and claims about nutrition and health benefits, should be substantiated in accordance with Clause 4.1 of Section II.

10.2 Claims about nutritional value and health properties benefits should be conveyed in a manner easily understood by the reasonable consumer.

10.3 Nutritional or health claims in television advertisements targeted at children of twelve years old and under, may not be made in respect of products that

do not represent healthy dietary choices and a healthy lifestyle, consistent with established scientific standards acceptable in terms of Section II, Clause 4.1. **Advertisers should also ensure that all claims in food and beverage advertising (including labelling) are permissible in terms of relevant legislation.**

11. Disclaimers

- 11.3 All disclaimers targeted at children ~~of twelve years old and under~~ should be understandable to them, taking into account their **potential** limited vocabularies and level of language skills.

12. Testimonials

- 12.1 Testimonials should not contain any claim or implication to efficacy which is not substantiated in accordance with Section II, Clause 4.1.

13. Marketing promotions

- 13.1 Food and beverage products that do not represent healthy dietary choices and a healthy lifestyle, consistent with established scientific standards acceptable in terms of Section II, Clause 4.1 should not use promotional activity in **television** advertisements primarily targeted at **or which are likely to be seen by** children ~~of twelve years old and under~~.
- 13.2 Whenever promotions are used the means of entry, the products to be purchased, if any, and the conditions of the promotion, should be clearly communicated.
- 13.3 Advertising targeted at children ~~of twelve years old and under~~ should clearly communicate the likelihood of winning in wording readily understandable to them.
- 13.4 The prize(s) and the number of prizes should be clearly communicated.
- 13.5 Offers or invitations to enter a contract and/or competition or any agreement whereby a child would or could be eligible for a prize or any other benefit of whatever nature should not be aimed at children under the age at which those children can conclude a legally binding contract or agreement, unless such as offer of invitation clearly states that the offer or invitation should be accepted by a legal parent and/or guardian.

14. Marketing communications on ~~pre-school and primary~~ school premises

- 14.1 Food and beverage products that do not represent healthy dietary choices and a healthy lifestyle, consistent with established scientific standards acceptable in terms of Section II, Clause 4.1, shall not advertise on, or in close proximity to, ~~pre-school and primary~~ school premises.

- 14.2 Food and beverage products that do not represent healthy dietary choices and a healthy lifestyle, consistent with established scientific standards acceptable in terms of Section II, Clause 4.1, shall not use any form of promotional activity, such as free gifts, on ~~pre-school and primary~~ school premises.

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