

REPUBLIC OF SOUTH AFRICA

AGRICULTURAL PRODUCT STANDARDS AMENDMENT BILL

*(As introduced in the National Assembly (proposed section 76); explanatory summary
of Bill published in Government Gazette No. 41052 of 18 August 2017)
(The English text is the official text of the Bill)*

(MINISTER OF AGRICULTURE, FORESTRY AND FISHERIES)

[B 21—2017]

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GENERAL EXPLANATORY NOTE:

[] Words in bold type in square brackets indicate omissions from existing enactments.

 Words underlined with a solid line indicate insertions in existing enactments.

BILL

To amend the Agricultural Product Standards Act, 1990, so as to insert definitions and substitute others; to provide for auditing of a product for management control systems; to make provision for setting of tariffs by assignees on a cost-recovery basis; to make further provisions for Minister to make regulations pertaining to audit and management control systems; and to provide for matters connected therewith.

BE IT ENACTED by the Parliament of the Republic of South Africa, as follows:—

Amendment of section 1 of Act 119 of 1990, as amended by section 1 of Act 63 of 1998

1. Section 1 of the Agricultural Product Standards Act, 1990 (Act No. 119 of 1990) (hereinafter referred to as the principal Act), is hereby amended—

- (a) by the substitution for the definition of “assignee” of the following definition:
“ **‘assignee’** means a person, undertaking, body, institution, association or board designated as such under section 2(3), which does not have a direct or indirect interest in the product concerned;”;
- (b) by the insertion after the definition of “assignee” of the following definition:
“ **‘audit’** means a systematic and functionally independent examination of the management control system in order to determine whether activities and related results comply with the claims associated with the product;”;
- (c) by the substitution for the definition of “department” of the following definition:
“ **‘department’** means the Department of Agriculture, Forestry and Fisheries;”;
- (d) by the substitution for the definition of “Director-General” of the following definition:
“ **‘Director-General’** means the Director-General [**: Agriculture**] of the department;”;

- (e) by the substitution for the definition of “management control system” of the following definition:
 “**‘management control system’** means the [**principles of procedure with regard to a product, from its primary production to its sale or export**] manner or method of production which may be claimed through the use of a 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 respect of the sale or export of a product;”;
- (f) by the substitution for the definition of “Minister” of the following definition:
 “**‘Minister’** means the [**Minister of Agriculture**] Cabinet member responsible for agriculture, forestry and fisheries;”;
- (g) by the substitution for the definition of “sell” of the following definition:
 “**‘sell’** includes [**agree**] to [**sell, or**] offer, advertise, keep, expose, transmit, convey, deliver or prepare for sale, or to exchange or to dispose of to any person in any way for [**any**] a consideration or otherwise; and “sold”, “selling” and “sale” have a corresponding meaning;”.

Amendment of section 2 of Act 119 of 1990, as amended by section 2 of Act 63 of 1998

2. Section 2 of the principal Act is hereby amended by the substitution in subsection (3) for paragraph (a) of the following paragraph:
 “(a) The Minister may, for the purposes of the application of this Act or certain provisions thereof— [, **with regard to a particular product, 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**]
 (i) designate as assignee a person, undertaking, body, institution, association, or board having a particular knowledge in respect of the product concerned; and
 (ii) in addition to the designation referred to in subparagraph (i), designate as assignee one or more persons, undertakings, bodies, institutions, associations, or boards having a particular knowledge in respect of the management control systems related to that product;”.

Amendment of section 3 of Act 119 of 1990, as amended by section 3 of Act 63 of 1998

3. Section 3 of the principal Act is hereby amended by the insertion after subsection (1A) of the following subsection:
 “(1B) Any fee determined in terms of subsection (1A)(b)(ii) shall be calculated on a cost-recovery basis, and shall only come into effect if—
 (a) the assignee concerned has submitted a business plan and budget setting out the powers and duties to be exercised and performed by the assignee and the expected costs associated therewith to the executive officer for consideration;
 (b) the executive officer, within a specified period, has invited written comment on the business plan and budget of such assignee from the interested parties or individuals who, in the opinion of the executive officer, are directly affected by the actions of that assignee; and
 (c) the executive officer, after consideration of the comments received in terms of paragraph (b), has in writing approved the business plan and budget of the assignee for a specified period set out in such approval.”.

Amendment of section 3A of Act 119 of 1990, as inserted by section 4 of Act 63 of 1998

4. Section 3A of the principal Act is hereby amended—
 (a) by the substitution for the heading of the following heading:
 “**3A. [Inspection] Audit or inspection, grading and sampling for quality control;**”;

- (b) by the substitution in subsection (1) for paragraph (d) of the following paragraph: 5
 “(d) audit or inspect or test or cause to be tested any quantity of a product, material, substance or other article which is used or suspected to be used at or in connection with the production, processing, treatment, preparation, classification, grading, packing, marking, labelling, keeping, removal, transporting, exhibition or sale of such product;” and
- (c) by the substitution in subsection (2) for paragraph (c) of the following paragraph: 10
 “(c) In the case of action under subsection (1)(d), the relevant person referred to in subsection (1) may [**inspect**] audit the management control system in connection with any action referred to in subsection (1)(d), and demand from the owner or custodian of the product, material, substance or other article in question, or from the person supervising such management control system, any information or an explanation regarding the management control system, product, material, substance or other article in question.”. 15

Amendment of section 15 of Act 119 of 1990, as amended by section 15 of Act 63 of 1998 20

5. Section 15 of the principal Act is hereby amended—
- (a) by the insertion in subsection (1) after paragraph (d) of the following paragraph:
 “(dA) management control system;” and
- (b) by the substitution in subsection (1) for paragraph (g) of the following paragraph: 25
 “(g) audit or inspection fees that have been determined by the assignee;”.

Short title and commencement

6. This Act is called the Agricultural Product Standards Amendment Act, 2017, and 30 comes into operation on a date fixed by the President by proclamation in the *Gazette*.

MEMORANDUM ON THE OBJECTS OF THE AGRICULTURAL PRODUCT STANDARDS AMENDMENT BILL, 2017

1. PURPOSE AND BACKGROUND

- 1.1 The Agricultural Product Standards Amendment Bill 2017 (“the Bill”), seeks to amend the Agricultural Product Standards Act, 1990 (Act No. 119 of 1990) (hereinafter referred to as “the Act”). The Act provides for control over the sale and export of certain agricultural products, control over the sale of certain imported agricultural products, control over other related products, and for matters connected therewith.
- 1.2 Various deficiencies in the Act which necessitated the amendments were identified. A key deficiency in the definition of management control system, which covered all management systems pertaining to inspection, audition and production practices and was found to have not been correctly captured in order to fully address what was intended. This revelation was made by the State Law Adviser when the Organic regulations were developed which were found to be *ultra vires* (beyond the scope of the Act).
- 1.3 The main purpose of the Bill is—
- (a) to provide for a clear and effective application of management control systems;
 - (b) to provide for auditing of a product for quality control; and
 - (c) to make further provision for matters to be prescribed.

2. SUMMARY OF BILL

2.1 Clause 1: Amendment of section 1

This clause amends certain definitions namely “assignee”, “auditor”, “Director-General”, “management control system”, “Minister” and “sell”, and inserts a new definition for “audit”.

2.2 Clause 2: Amendment of section 2

This clause provides that the Minister may designate as an assignee, for the purpose of inspection of the commodity for quality control and auditing for management control system, that an entity, undertaking, body, institution, association or board who or which, as the case may be, has particular knowledge.

2.3 Clause 3: Amendment of section 3

This clause amends section 3 in order to provide for the procedure in respect of the determination of fees by the assignee.

2.4 Clause 4: Amendment of section 3A

This clause provides for the insertion of the word “audit”.

2.5 Clause 5: Amendment of section 15

This clause inserts references to “management control system” (subsection (1)(dA)) and “audit” (in subsection (1)(g)), as matters in respect of which the Minister may make regulations.

3. BODIES CONSULTED

- 3.1 Complete list of all Government (National, Provincial and Local), Public entities and Third Party Stakeholders consulted.

- 3.2 The stakeholders that have been consulted thus far are the internal (Directorates Food Safety and Quality Assurance and the Inspection Services). Assignees: Perishable Product Export Control Board (PPECB), Product Control (PROKON), and South African Meat Industry Company (SAMIC).
- 3.3 Public consultations were held with the following stakeholders relating to the Bill, which was also published for comment:
- Various national departments, provincial and local government units;
 - Various commodity associations such as Hortgro, CGA, GrainSA, Grain Silo Industry;
 - Representative associations /unions such as AgriSA, NAFU;
 - Retailers and wholesalers;
 - Exporters, transporters, packhouses and agencies;
 - Sellers and importers;
 - Consumer Unions; and
 - Ordinary interest citizens.

4. IMPLICATIONS FOR NATIONAL GOVERNMENT DEPARTMENTS AND PUBLIC ENTITIES

- 4.1 There will be minimal implications in so far as personnel, financial and infrastructural needs are concerned. The amendment of “management control system” may have implications relating to acquisition of personnel, either in the public entities or in the designation of assignees.
- 4.2 Exporters, farmers and sellers may benefit from guarantees that may come with claims such as Organic, free range that may be authenticated. Consumers will also benefit from being protected against misleading claims, thereby getting value for their money. Quality of products offered for sale will also be enhanced. South Africa may have a strengthened food control system as a consequence of the anticipated proposed changes which will serve as a good base for facilitation of trade and market access.

5. IMPLICATIONS FOR DEPARTMENT

There will be minimal implications apart from a minor structural adjustment within the Directorates: Food Safety and Quality Assurance and Inspection Service.

6. IMPLICATIONS FOR PROVINCIAL GOVERNMENT

None.

7. PARLIAMENTARY PROCEDURE

- 7.1 The State Law Advisers and the Department are of the opinion that this Bill must be dealt with in accordance with the procedure established by section 76 of the Constitution on the following basis:
- 7.2 Chapter 4 of the Constitution specifies the manner in which legislation must be enacted by Parliament. It prescribes different procedures for Bills, including ordinary Bills not affecting provinces (section 75 procedure), and ordinary Bills affecting provinces (section 76 procedure). The determination of the procedure to be followed in processing the Bill is referred to as tagging.

- 7.3 In terms of section 76(3) of the Constitution, a Bill must be dealt with in accordance with section 76 if it falls within a functional area listed in Schedule 4. Schedule 4 to the Constitution lists functional areas of concurrent national and provincial legislative competence. In the matter of the constitutionality of the Liquor Bill, the court stated the following:

“ . . . It must be borne in mind that section 76 is headed ‘ordinary Bills affecting provinces’. This is in my view, a strong textual indication that section 76(3) must be understood as requiring that any Bill whose provisions in substantial measure fall within a functional area listed in Schedule 4 be dealt with under section 76.

Once a Bill falls within a functional area listed in Schedule 4, it must be dealt with not in terms of section 75, but by either the section 76(1) or the section 76(2) procedure”.

- 7.4 Following the earlier decision on the Liquor Bill, the Court in *Tongoane and Others vs Minister for Agriculture and Land Affairs and Others*¹, confirmed that “a Bill whose provisions in substantial measure fall within a functional area listed in Schedule 4 must be dealt with under section 76’. This test ‘focuses on all the provisions of the Bill in order to determine the extent to which they substantially affect functional areas listed in Schedule 4, and not on whether any of its provisions are incidental to its substance.”.

- 7.5 Furthermore, the Constitutional Court stated that:

“ . . . procedural safeguards are designed to give more weight to the voice of the provinces in legislation substantially affecting them . . . they are fundamental to the role of the NCOP in ensuring that provincial interests are taken into account in the national sphere of government . . . ” (see para 66)

- 7.6 As the Court held in *Tongoane*, ‘a Bill must be tagged as a section 76 Bill even if only one provision or feature in substantial measure deals with a Schedule 4 functional area’.
- 7.7 The State Law Advisers are of the view that the Bill should be classified as a section 76 Bill, which is an ordinary Bill affecting provinces since it falls within a functional area listed in Schedule 4 to the Constitution, namely “Agriculture.”
- 7.8 The State Law Advisers are of the opinion that it is not necessary to refer this Bill to the National House of Traditional Leaders in terms of section 18(1)(a) of the Traditional Leadership and Governance Framework Act, 2003 (Act No. 41 of 2003), since it does not contain provisions pertaining to customary law or customs of traditional communities.

¹ 2010 (8) BCLR 741 (CC)

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