

Consumer Protection Act: A Legal Perspective

3 June 2011

SAPRAA

Bytes Conference Centre, Midrand

By

Esmé Prins-Van den Berg

Benguela Health



benguela

Health. Solutions. Life. Africa



Extensive Consumer Protection Since 31 March 2011

- Right of Equality
- Right to Privacy
- Right to Choose
- Right to Disclosure and Information
- Right to Fair and Responsible Marketing
- Right to Fair and Honest Dealing
- Right to Fair, Just and Reasonable Terms and Conditions and
- Right to Fair Value, Good Quality and Safety



benguela

Health. Solutions. Life. Africa

Enforcement (S 68 – 71)

- Individuals acting on own/others' behalf, class actions, associations on behalf of members, person acting in public interest with permission from Tribunal/court, accredited consumer protection group, etc. can enforce consumer rights
- Mechanisms...in addition to other mechanisms that exist in terms of other legislation
 - National Consumer Commission
 - National Consumer Tribunal
 - Ombud
 - Consumer/Equality/Other Court
 - Alternative Dispute Resolution
- Search warrants issued by High Court or Magistrate if believed contravention of Act has occurred
- Draft Guidelines



benguela

Health. Solutions. Life. Africa

Enforcement

- Various offences
 - Penalties: Fine and/or imprisonment of 12 months
- Administrative fines
 - Tribunal may impose for prohibited or required conduct
 - Maximum = Greater of 10% of annual turnover (Total income of supplier during preceding financial year) or R1m
 - Factors to be considered
 - Paid into National Revenue Fund
- Vicarious liability
 - Employer and principal jointly and severally liable for conduct of employee or agent



benguela

Health. Solutions. Life. Africa

Complaints

- Numerous complaints iro health care industry since implementation of Act
 - Medical schemes
 - Hospitals
 - Traditional healers
 - Pharmaceutical industry
- Launch investigation



benguela

Health. Solutions. Life. Africa

Interpretation

- If other legislation also applicable (e.g. Medicines Act):
 - All apply concurrently to extent possible...without contravening one
 - Otherwise, one offering greater protection to consumer applies
- Tribunal / court must interpret

any standard **form / contract / other document** prepared / published by / on behalf of supplier or required by CPA to be produced

to **benefit of consumer**

- Any **ambiguity** allowing more than one reasonable interpretation:
Resolve to **benefit of consumer**



benguela

Health. Solutions. Life. Africa

Application of Act (S 5)

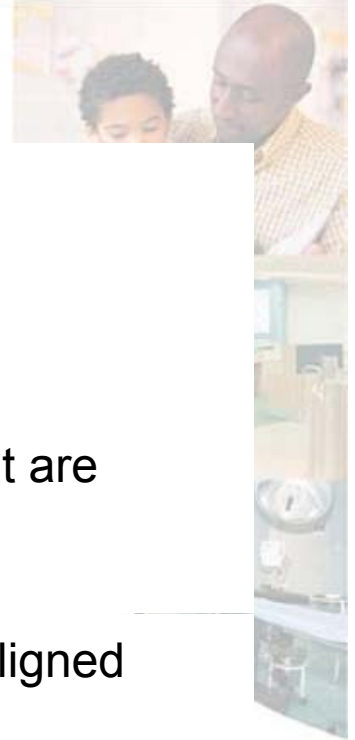
- All transactions (includes agreements) in RSA for supply of goods and performance of services
- Promotion of goods / services / supplier of goods & services in RSA
- Goods and services provided by trade unions, societies, associations (e.g. SAPRAA) to members irrespective of membership fee being paid = regarded as transaction between supplier and consumer
- Applies to for-profit and not-for-profit businesses and irrespective of supplier having principal office within RSA



benguela

Health. Solutions. Life. Africa

Application of Act



- Exclusions:
 - Goods or services promoted / supplied to state
 - Services supplied under employment contract
 - Collective (bargaining) agreements
 - Credit agreement, but CPA applies to goods and services that are *subject* of credit agreement
 - Municipalities: Not indefinite
 - Long-term and short-term insurance industries: Laws to be aligned within 18 months
 - When consumers are juristic persons and annual turnover / asset value > R2m (Regulations: Calculation)
 - Transactions falling within industry-wide exemption
 - Regulatory authority to apply to Minister of Trade and Industry for exemption from provisions of CPA
 - Criteria
- BUT: S 60 (safety monitoring and recall) and S 61 (product liability) will always apply

Application of Act to Health Care

- **Suppliers** (Includes individuals, partnerships, juristic persons, organs of state, PPPs, etc.)
 - = Person marketing / supplying goods / services
 - Supply for consideration
 - Application:
 - Pharmaceutical companies
 - Other service providers e.g. medical practitioners, hospitals
 - Medical schemes
- **Consumers**
 - Person to whom goods and services are marketed / supplied in ordinary course of supplier's business
 - Person who has entered into transaction with supplier (unless transaction exempt)
 - User of goods or recipient / beneficiary of services even if not party to transaction
 - Application:
 - Patients
 - Health care practitioners



benguela

Health. Solutions. Life. Africa

“Services”

- Include (Not limited)
 - Work or undertaking performed for direct/indirect benefit of another
 - Provision of education, information, advice or consultation (Advice subject to FAIS Act excluded)
 - Banking services, related/similar financial services, undertaking, underwriting or assumption of risk by person on behalf of another (Excl advice/intermediary services ito FAIS Act, services regulated by Long-Term and Short-Term Insurance Acts)
 - Transportation of individuals or goods
 - Provision of accommodation, entertainment, access to event / premises / activity / facility, etc.

Irrespective of whether person promoting, offering or providing services participates in, supervises or engages directly / indirectly in service

- Application:
 - Health care services
 - Medical scheme cover



benguela

Health. Solutions. Life. Africa

“Goods”

- Include (Not limited)
 - Anything marketed (supplied) for human consumption
 - Any tangible object, including any medium on which anything is written or encoded
 - Any literature, music, photograph, motion picture, game, information, data, software, code or other intangible product written or encoded on any medium or a license to use any such intangible product
- Application:
 - Medicines / Scheduled substances
 - Devices
 - Consumables
 - Prosthesis



benguela

Health. Solutions. Life. Africa

Marketing Practices

- All marketing activities related to goods and services regulated
- General standards for marketing (S 29)
 - Honesty
 - No false, misleading or deceptive representation concerning material facts of goods / services
 - Manner may not be misleading, fraudulent, deceptive e.g. in respect of nature, applicable conditions, advantages, price, comparison with competitor's price, etc.
- Various forms of marketing regulated e.g. bait marketing, negative option marketing, referral selling
- Times during which consumers may be contacted at home for purposes of direct marketing regulated....electronic communication



benguela

Health. Solutions. Life. Africa

Restriction of Unwanted Direct Marketing (S 11, Reg 4)

- Consumer may
 - Refuse to accept / indicate that no further approach / communication primarily for purpose of *direct marketing* (includes e-mail, sms) may occur (free of charge)
 - Placed e.g. communication / sign (e.g. “no adverts” or image) on postal box / other container that s/he does not want to receive such mail ...nothing to be placed near post box, fence, gate, premises of consumer
 - Register pre-emptive block on Registry
- Must respect wishes of consumer
- Acknowledge receipt of request
- Existing clients could indicate after 1/4/2011 their willingness to supplier to receive direct marketing material
- National Registry to be established: Check Registry..... onerous requirements



benguela

Health. Solutions. Life. Africa

Cooling-Off Period (S 16)

- Direct marketing (S 32)
 - Person who **directly markets and concludes transaction** must inform consumer of right to rescind agreement
 - Prescribed manner and form...not yet prescribed
 - **Cooling-off** period after direct marketing (S 16)
 - Rescind transaction as result of direct marketing
 - Within 5 business days
 - No penalty to consumer
 - Return payment received from consumer
 - Electronic transactions: S44 of ECTA applies....cooling-off period of 7 days
- [Application](#)



benguela

Health. Solutions. Life. Africa

Promotional Competitions (S 36, Regulation 11)

- Promotional Competitions
 - Cost of electronic entry: Maximum R1.50
 - Competition, scheme, system, etc. for distributing prizes by lot / chance for promotional purposes
 - Prize exceeds R1!
 - Prize includes gift, free goods or services, etc.
 - Criteria including Competition rules available to Commission
- Regulations
 - Onerous requirements in respect of disclosure, who may conduct and record-keeping of specified info for 3 years
 - Independent accountant, registered auditor, attorney or advocate oversees & certifies conduct of competition
 - Certification of competition e.g. through internal audit / other validation or verification procedures
- Application



benguela

Health. Solutions. Life. Africa

Promotional Offers (S 34)

- **Promotional offers** e.g. free delivery of goods and services or price reductions
 - Criteria e.g. nature of free good or service / price reduction, goods + services to which offer relates, how to accept offer, etc.
 - Must be with intention to fulfill
 - Offer sufficient to accommodate all reasonably anticipated demands
 - Trade coupons: No administration or processing charges
- Application



benguela

Health. Solutions. Life. Africa

Identification of Deliverers, Installers & Others (S 28)

- Person must visibly display/wear badge for identification purposes or present **suitable identification** if
 - **Direct marketing** at premises of consumer
 - Perform **services** at consumer's premises
 - Deliver **goods** at consumer's premises
- Application



benguela

Health. Solutions. Life. Africa

Unfair Discrimination

- Constitution
- Promotion of Equality and Prevention of Unfair Discrimination Act (Equality Act)
- No *unfair* discrimination on basis of prohibited grounds in Constitution e.g. age, race, gender, disability.....iro
 - Marketing
 - Treatment of consumers
- Prohibited
 - Discriminatory marketing, which is unfair
 - Differential treatment of consumers that is unfair



benguela

Health. Solutions. Life. Africa

Discriminatory Marketing (S 8-9)

- Unfair discrimination in following instances (court can extend list) prohibited:
 - *Unfairly* excluding persons from accessing goods or services (e.g. deny access to certain medication)
 - *Unfairly* granting (category of) persons exclusive access to goods / services
 - *Unfairly* assigning priority supply of goods / services to (category of) persons
 - *Unfairly* supplying different quality of goods / services to categories of persons
 - *Unfairly* charging persons different prices for goods / services
 - *Unfairly* targeting (or excluding) specific market segments for exclusive / preferential supply (e.g. target doctors only in certain suburbs....be careful of indirect discrimination)

Unless: Goods and services designed / reasonably intended to satisfy their common / unique needs / interests



benguela

Health. Solutions. Life. Africa

Unfair Treatment (S 8-9)

- Direct or indirect differential treatment of persons in following instances (court can extend list) prohibited if it constitutes unfair discrimination, e.g.:
 - Assessing ability of person to pay / meet obligations
 - Deciding whether to enter into agreement
 - Determining cost
 - Interacting with consumer at supplier's place of business or when displaying goods / negotiating terms of agreement....also staff
 - Agreeing terms and conditions of transaction
 - Determining whether to terminate / enforce agreement
 - Determining whether to report any personal information
- Presumption: Differential treatment = unfair unless proved otherwise
- Reasonable grounds for differential treatment
 - Age, gender



benguela

Health. Solutions. Life. Africa

False, Misleading or Deceptive Representations (S 41, 52)

- It is a false, misleading or deceptive representation to
 - Falsely state /imply
 - Fail to correct consumer's misapprehension
- Supplier has particular status / affiliation
- Regarding ingredients, performance characteristics, quality, etc. of goods / services (e.g. medicines, devices)
- Charge is for specific purpose
- Services can be performed within a specified time
- Specific price advantage exists
- Specific solicitation of or communication with consumer is for particular purpose
- Consumer will derive particular benefit if s/he assists to obtain potential customer



benguela

Health. Solutions. Life. Africa

Right to Select Suppliers (S 13)

- **No condition** for supplying goods / services that consumer
 - Must purchase other goods / services from supplier
 - Enter into further agreement to purchase from supplier / designated 3rd party
 - Agree to *purchase* and particular goods/services from designated 3rd party
- **Unless:**
 - Convenience outweighs limitation of right to choice
 - Economic benefit *or*
 - Offer separately and at individual prices
- Bundling of goods and services
- Application:
 - Bundled offerings of pharma companies its equipment and consumables



benguela

Health. Solutions. Life. Africa

Safe, Good Quality Goods (S 20, 53, 55, 56)

- Consumer has right to expect that
 - Goods are reasonably **suitable for purposes** for which generally intended or purpose specified by consumer
 - Are of **good quality**, in good working order and free from defects
 - **Usable and durable** for reasonable period of time
 - Comply with **standards** under Standards Act
- **Implied warranty** in any transaction by entire **supply chain** that goods comply with requirements and standards...in addition to other warranties
- **Supply chain** = Producer, importer, distributor or retailer
- **Return goods within 6 months at supplier's risk & expense** and without penalty...Consumer chooses: Repair, replace or refund

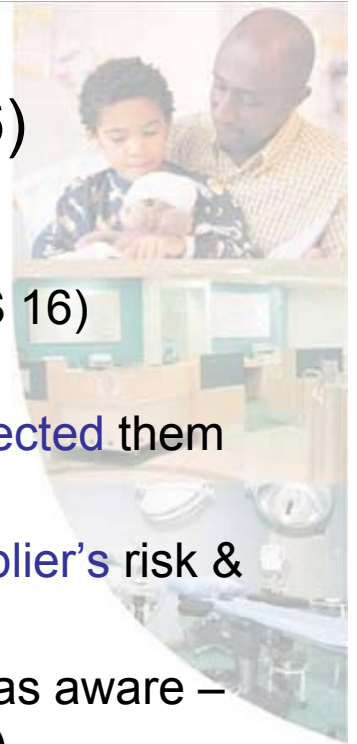


benguela

Health. Solutions. Life. Africa

Safe, Good Quality Goods (S 20, 53, 55, 56)

- Return goods within 10 days against full refund:
 - Consumer rescinded agreement during cooling-off period (S 16) (consumer's risk & expense)
 - Consumer could not examine goods before delivery and rejected them ito S 19(5) (supplier's risk & expense)
 - Supplier delivered mixture of goods that were rejected (supplier's risk & expense)
 - Goods unsuitable for particular purpose of which supplier was aware – consumer has 10 days to assess (supplier's risk & expense)
- Not applicable to
 - Goods that may not be returned ito public regulation for reasons of public health
 - Goods disassembled, physically altered, affixed
- Refund price less any reasonable charges as prescribed e.g. use, consumption
- Application

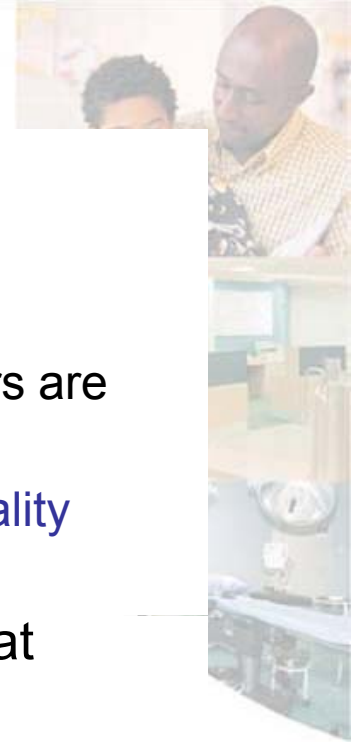


benguela

Health. Solutions. Life. Africa

Quality of Service (S 19, 54)

- Right to
 - Timely performance and completion of services
 - Timely notice of unavoidable delay
 - Performance of services in manner and of quality consumers are generally entitled to expect
 - Use / delivery of goods that are free from defects and of quality generally expected
- Unless expressly provided otherwise, it is implied term that supplier must perform services / supply goods
 - On agreed date
 - On agreed time (otherwise reasonable time) and
 - At agreed place...
 - If not: Unsolicited goods / servicesno obligation to pay...Consumer can recover any payments made with interest
- Service does not meet standards: Remedy defect / Refund reasonable proportion of price for goods/services
- Application



la

Unethical / Unconscionable Conduct Prohibited (S40, 52)

- Unconscionable:
 - Character in S 40
 - Unethical /improper to degree that would shock conscience of reasonable person
- S 40:
 1. Physical force, coercion, undue influence, pressure, duress, harassment or unfair tactics by supplier / agent when
 - Marketing goods and services
 - Supplying goods / services
 - Negotiating, concluding, executing, enforcing agreement to supply goods / services
 - Collecting payment for goods / services

→ Application



benguela

Health. Solutions. Life. Africa

Unethical / Unconscionable Conduct Prohibited (S40, 52)

2. Unconscionable if supplier knowingly takes advantage of fact that consumer is substantially unable to protect own interests because of
 - Physical, mental disability
 - Illiteracy
 - Ignorance
 - Inability to understand language of agreement
 - Any similar factor

→ Application



benguela

Health. Solutions. Life. Africa

Information, Records and Disclosures (S 22)

- Notices, documents or visual representations provided / displayed to consumers in terms of CPA or *any other law*
 - Form prescribed ito CPA / other legislation
 - If no form prescribed: Must be in plain language
 - Reasonable to conclude that
 - Consumer of class of persons to whom intended
 - With average literacy skills and
 - Minimal experience as consumer
 - Could be expected to understand content, significance and import of notices / documents
 - Form, style, vocabulary, illustrations, context, comprehensiveness, etc.
 - Guidelines to be issued by Commission
- Application
 - Official language?
 - Package inserts
 - Patient information leaflets



benguela

Health. Solutions. Life. Africa

Disclosure of Price (S 23)

- Retailers must display goods for sale together with **price**.... sometimes also of services....not clear
 - Not when in area to which public does not have ordinarily access
 - Not with goods predominantly displayed as advertisement
 - Criteria for “adequately display”
- Consumers may not be required to pay more than displayed price for goods and services
- More than 1 price displayed: Lowest price applies
- Not applicable to prices determined in terms of public regulation (e.g. **SEP of medicines**)
- Inadvertent and obvious error.....correct error, take reasonable steps to inform consumers
- [Application](#)



benguela

Health. Solutions. Life. Africa

Product Labelling and Trade Descriptions (S 24)

- Trade description = E.g.
 - Description, statement, etc. (not trademark) e.g. weight, name of producer, ingredients, country of origin, etc. or
 - Figure or mark reflects above
- May not mislead consumers
- Minister may prescribe categories of goods requiring trade descriptions
 - Regulations:
 - Textiles, clothing, shoes and leather goods
 - Genetically modified organisms
- [Application](#)



benguela

Health. Solutions. Life. Africa

Sales Records (Invoices) (S 26)

- **Written records of every transaction** in terms of which goods / services supplied, must be provided to consumers
- Following info must be included as minimum
 - Supplier's full name / registered business name and VAT nr
 - Address at which goods / services supplied
 - Date of transaction
 - Name or description of goods / services
 - Unit price
 - Quantity of goods / services
 - Total price with and without applicable taxes
- Minister may exempt categories**Hawkers; Consumers expressly do not require sales records**
- Application



benguela

Health. Solutions. Life. Africa

Contracts (S 48 - 51, 58)

- Contracts with doctors, consultants, speakers, etc.
- Minister to provide which agreements must be in writing
- Supplier must supply consumer with free copy / free electronic access to copy of terms and conditions of agreement
 - Must be in plain language
 - Contain itemised break-down of consumer's financial obligations
- Contracts could be invalid or terms could be severed from agreements
- Fixed-term agreements
- Prohibited terms



benguela

Health. Solutions. Life. Africa

Fixed-Term Agreements (S 14, Regulation 5)

- *Not applicable* to transactions between **juristic persons**
- Fixed-term consumer agreement
 - **Maximum period: 2 years** from date of signature by consumer
 - Only longer period, if
 - Expressly agreed with consumer *and* demonstrable financial benefit to consumer
 - Regulation
 - Industry Code
- Consumer may cancel at expiry of term or before with 20 business days' written notice...reasonable cancellation penalty
- Supplier may cancel after 20 business days' written notice for material failure unless rectified
- Requirements in terms of notifications to consumers regarding impending expiry, changes to contract, renewal, etc.
- Application



benguela

Health. Solutions. Life. Africa

Impermissible Terms and Conditions (S 51)

- *Unfair, unreasonable and unjust* contract terms = E.g.
 - Excessively one-sided in favour of another person (not consumer)
 - So adverse to consumer that inequitable
 - Consumer relied upon false, misleading or deceptive representation
Waive or *deprive consumer of right* in terms of CPA
- *Impermissible* contract terms = E.g.
 - *Mislead* / deceive consumer
 - *Indemnification* of supplier for gross negligence
 - *Assumption of risk / liability* by consumer for losses as result of gross negligence of supplier



benguela

Health. Solutions. Life. Africa

Unfair Terms and Conditions (S 48 - 51, 58, Reg 44)

- Contract terms *deemed to be unfair*
 - Regulation 44.....28 terms
 - Consumer agreement between *for-profit supplier* wholly /mainly related to his profession/business and consumer wholly / mainly unrelated to his business/profession
 - Non-exhaustive
 - Indicative
 - Presumed to be unfair
 - Could be fair in circumstances
 - “Balance rights of suppliers and consumers”
 - E.g.
 - Excluding / limiting liability of supplier for death / personal injury caused to consumer through his/her act/omission
 - Limiting supplier’s vicarious liability for agents

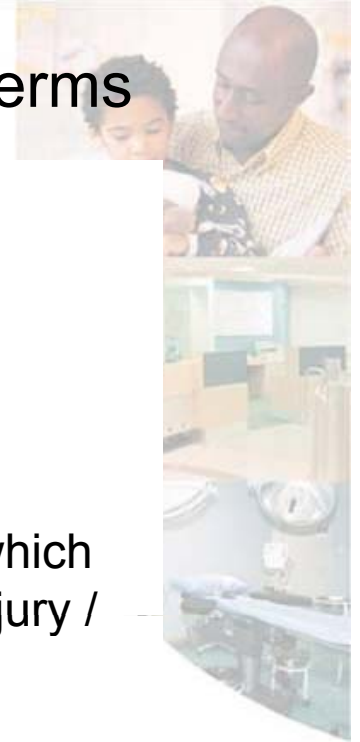


benguela

Health. Solutions. Life. Africa

Must Draw Attention of Consumer to Certain Terms

- Which conditions?
 - Limit risk / liability of supplier
 - Indemnify supplier for any cause
 - Consumer assumes risk / liability
 - Consumer acknowledges any fact
 - Concerns activity / facility subject to risk of unusual nature of which consumer not reasonably aware of or could result in serious injury / death
- How?
 - Notice / provision / condition = Written in plain language
 - Fact, nature and effect of provision drawn to attention of consumer in conspicuous way *before* entering into agreement / engaging in activity / gaining access to facility / accepting payment (whichever occurs first)
 - Consumer must have adequate opportunity to receive and comprehend notice



rela

Must Draw Attention of Consumer

- Which conditions?

- Limit risk / liability of supplier
- Indemnify supplier for any cause
- Consumer assumes risk / liability
- Consumer acknowledges any fact
- Concerns activity / facility subject to risk of unusual nature of which consumer not reasonably aware of or could result in serious injury / death

- How?

- Notice / provision / condition = Written in plain language
- Fact, nature and effect of provision drawn to attention of consumer in conspicuous way *before* entering into agreement / engaging in activity / gaining access to facility / accepting payment (whichever occurs first)
- Consumer must have adequate opportunity to receive and comprehend notice

Fact, nature and potential effect of risk pointed out as prescribed and consumer must assent to this e.g. through signature / conduct = acknowledgment of notice

The logo for 'iela' is located in the bottom right corner of the slide. It consists of the lowercase letters 'iela' in a blue, sans-serif font.

Safety Monitoring and Recall (S 60)

- Commission could promote development of **industry-wide codes** providing for e.g.
 - Receipt of notices regarding consumer complaints, reporting of product failures, personal injury or illness
 - Conducting of investigations
 - Notifications to consumers regarding risks
 - Recalls of unsafe goods
- Commission could also
 - Conduct investigations
 - Require producer to carry out **recall programme**



benguela

Health. Solutions. Life. Africa

Liability (S 61)

- Retrospective application from 24/4/2010!
- Supply chain
 - Producer, importer, distributor, retailer
 - Includes **service provider** / supplier of services
 - If direct / indirect contribution iro supply of goods
 - Who provides access to goods in conjunction with performance of services also regarded as supplier of those goods.....**Prescribing doctor?**
- Producer, importer, distributor or retailer (**supply chain**) liable *irrespective* of any **negligence** for harm caused wholly / partly as consequence of
 - Supplying unsafe goods
 - Product failure, defect or hazard in goods or
 - Inadequate instructions / warnings to consumer iro hazard associated with goods

(E.g. medicines, consumables, devices)



benguela

Health. Solutions. Life. Africa

Liability

- Defences: No liability, e.g.
 - Unsafe product characteristic, failure, defect or hazard results in harm = attributable to **compliance with public regulation**
 - **Unreasonable** to expect distributor / retailer to have **discovered** unsafe product characteristic, failure, defect or hazard with regard to **person's role in marketing (supplying) of goods**
 - Unsafe product characteristic, failure, defect or hazard
 - **Did not exist** at time that goods were supplied or
 - Attributable to **compliance** with instructions of supplier
 - Claim for damages brought **3 years after** death / injury / last date on which economic loss suffered
- Joint and several liability
- Harm...apportioned
 - Death / injury
 - Illness
 - Loss or physical damage to property
 - Economic loss



benguela

Health. Solutions. Life. Africa

Waste Management (S 59)

- If national legislation prohibits disposal of any goods, remnants, packaging, etc. in waste collection system
- Any person in supply chain of those goods must accept return of goods, components, packaging, etc. without charge
- [Application](#)



benguela

Health. Solutions. Life. Africa

To Do

- Study CPA and Regulations
- Review conduct and practices....also that of staff....training
- Review contracts
- Review documentation
- Review advertising and marketing practices
- Align business practices



Remember to ski and snowboard responsibly. www.boeriusa.com

boeri
it's your head

benguela

Health. Solutions. Life. Africa

© Benguela Health (Pty) Ltd 2011

Questions?

Thank You

esme@benguelahealth.com

benguela

Health. Solutions. Life. Africa

