



Premier FMCG:

**Presentation for the virtual hearing on the
Agricultural Product Standards Amendment Bill
[B 15—2021]**

Premier FMGC



1. Premier is a stakeholder in the grain and grain product supply chain with an interest in the regulation (i.e. control of the sale and export of) of grain products.
2. To this end, Premier made written representations to the Portfolio Committee on Agriculture, Land Reform and Rural Development on the Bill

Summary of Premier's comments



1. First, Premier commented on the definition of an “assignee” as it is sought to be amended by the Bill, and has cautioned that the definition is under-inclusive in certain material respects and creates potential inconsistencies with other provisions of the Act.
2. Second, Premier commented on the introduction of the defined term “audit” in the Bill (which was introduced as something that is separate and distinct from an activity of “inspection”, which is already contained in the Act, but which is not defined) and an amendment to the existing definition of “management control system”, as well as a new provision for the appointment of an additional assignee solely in respect of “management control systems” (new section 2((3)a)(ii)).
3. Third, Premier commented on the Bill’s new definition of “sell” and cautioned that it is overly broad, and may be considered irrational and *ultra vires* the purpose of the Act.

Summary of Premier's comments (continued)



1. Fourth, Premier commented on a new provision (sought to be introduced into the Bill) regarding the calculation of assignee fees on a cost-recovery basis.
2. Fifthly, Premier commented on the missed opportunity for introducing safeguards and detailed provisions for the exercise of assignee powers.

First comment: the amendment to the definition of “assignee”



1. The APS Act presently has a definition of “assignee”. The Bill seeks to amend the definition, by including a certain qualification about a quality or feature of an assignee (namely, that an assignee “*does not have direct or indirect interest in the product concerned*”)
2. However, the introduction of a single qualification is unhelpful it is under inclusive and, in being under-inclusive, creates a definition of assignee which is not consistent with the rest of the Act – see section 2(3)(a)
3. Premier proposes that the definition be enhanced “*to expand the definition of an ‘assignee’ to include that the assignee must, have the existing necessary skill, experience, resources and infrastructure to carry out its function*” and that the definition should stipulate that it must be a juristic person, registered and with a controlling interest in South Africa / by South African entities

Second comment: “audit”, “management control system” and an additional assignee



1. The Bill seeks to introduce the defined term ‘*audit*’, amend the definition of ‘*management control system*’ and insert a new provision (section 2(3)(a)(ii)). The combined effect is unclear and problematic.
2. It is not clear what the purpose of the audit function is, separate and distinct from the “inspection” function (which remains undefined in the Bill).
3. It appears that the envisaged audit of the management control systems is intended to ensure that the product aligns with the description thereof provided to the market / the consumer. If this is so (and this is unclear), this function appears to fall more squarely within the purpose of other legislation.
4. The purpose of a provision (in section 2(3)(a)(ii)) for the appointment of an additional assignee to perform the “*management control systems related to that product*” is unclear and the effect is duplicative.

Third comment: amendment to the definition of “sell”



1. The Bill seeks to amend the definition of “sell” to include disposal "for a consideration or otherwise"
2. This is an overly broad definition which includes transactions in respect of which no consideration is received. There does not appear to be a rational basis for this amendment and it would appear to apply to donations without consideration. This may have an impact on or application to the informal economy without having been considered.

Fourth comment: cost recovery basis for assignee fees



1. Section 3(1B) seeks to introduce a method for fee determination which is calculated on a “cost-recovery basis”. While this is a positive development, the following concerns arise:
 - i. Firstly, it is unclear whether the process outlined in section 3(1B)(a)-(c) is intended to be in addition to (and following) the mandatory publishing of the fee, determined in terms of section 3 (1A)(b)(ii), for comment in the Government Gazette or whether the intention is that it supplants this process.
 - ii. Secondly, section 3(1B)(b) of the Bill provides for the Executive Officer to determine, in his opinion, who is “directly affected” by the actions of an assignee and therefore subjectively to determine who is an interested party for the purposes of the Act. This conflicts with the constitutional principles of procedural fairness.
 - iii. Thirdly, the stipulated period for approval provided in terms of section 3(1B)(c) of the Bill should not exceed a period of 12 months.

Fifth comment



1. The Bill presents a missed opportunity for bringing the APS Act in line with current case law and introduce the necessary and applicable safeguards in respect of assignees. The Bill should, for example, expressly:
 - I. provide for oversight and direction of the Executive Officer over the assignee;
 - II. include provision for the appointment of more than one assignee per product (grains and grain products, only one of whom may levy fees) to provide industry with choice as to the assignee, to ensure that the determined fee and performance remains competitive amongst assignees; and
 - III. require the Executive Officer to take into consideration the functions currently fulfilled by industry before appointing an assignee, to avoid duplication of functions and cost).



Thank you

Premier would like to thank the Portfolio Committee for the opportunity to present these oral submissions