

ADVISORY NOTE 6: CONSUMER’S RIGHTS REGARDING EXPIRY DATES

This note is provided by the office of the Consumer Goods and Services Ombudsman to guide suppliers and consumers as to their rights and obligations under the Consumer Protection Act.

Introduction

The CGSO has received various claims arising from claimed illness caused by expired foodstuffs, including a claim seeking compensation for a miscarriage and the loss of an RDP home following an illness allegedly caused by stale crisps.

Summary

“The **'best before'** dates are **more about quality than safety**, except for eggs. So when the date runs out it doesn't mean that the food will be harmful, but it might begin to lose its flavour and texture.”¹

“It will be noted that none of these definitions state that after such a date, whether Best Before, Sell By, or Use By, the food is unsafe to consume. In fact GNR146 seems to focus on marketability and quality rather than food safety in respect of these durability definitions.”²

“However, shelf life alone is not an accurate indicator of how long the food can safely be stored. For example, pasteurized milk can remain fresh for five days after its sell-by date if it is refrigerated properly. In contrast, if milk already has harmful bacteria, the use-by dates become irrelevant.^[3] ...According to former UK minister Hilary Benn, the use by date and sell by dates are old technologies that are outdated and should be replaced by other solutions or disposed of altogether.^[22]”³

The Norwegian Canning Museum houses tins [of sardines] up to 100 years old that are still edible:

www.getholistichealth.com/12133/the-oldest-foods-ever-consumed/

See also the Advisory Note on Food Poisoning:

<http://www.cgso.org.za/ClientData/10102/Uploads/cgso%20advisory%20note%204%20food%20poisoning%20v2.pdf>

¹ See Annexure B

² See Annexure A

³ See Annexure C

Expiry or Date of Durability on Foodstuffs and the Consumer Protection Act

Introduction

The Consumer Protection Act ("CPA") provides, amongst others, for a warranty of quality and durability, the right to safe, good quality goods, warnings concerning the fact and nature of risks associated with goods, safety monitoring and recall of products, and liability for damage caused by goods. It seems likely that the liability for damage caused by goods will have the most far reaching effects on the food industry. This risk is closely linked to the date of durability marked on the food product.

In addition to the CPA, the Foodstuffs, Cosmetics and Disinfectants Act ("FCD Act") 54 of 1972, in Regulation GNR 146 of 1 March 2010 has specific provisions in respect of the date of durability of a foodstuff and the marking thereof. Failure to comply with these provisions may lead to criminal prosecution. The actual date of durability for any foodstuff is however not prescribed and is left up to each manufacturer to determine.

Further, the FCD Act makes it a criminal offence to sell or offer to sell any foodstuff which is contaminated or unsafe to eat and inspectors have the power in terms of GNR 328 to order the removal from sale of such contaminated or unsafe foodstuffs. It should however be noted here that a foodstuff that has reached its "Sell By", "Use By" or "Best Before" date is not automatically considered to be contaminated or unsafe to consume.

GNR146 of 1 March 2010 under Act 54 of 1972

The Foodstuffs Act, and in particular R146 provides for the application of a date of durability to food products and in particular:

" 'date of minimum durability' ("Best Before" or "Best Before End") means the date which signifies the end of the period under any stated storage conditions during which the product will remain fully marketable and will retain any specific qualities for which tacit or express claims have been made, However, beyond the date the food may still be perfectly satisfactory;"

" 'sell by' or 'display until' means the last date of offer for sale to the consumer after which there remains a reasonable storage period at home;"

" 'Use by' (Best Consumed Before, Recommended Last Consumption Date, Expiry Date) means the date which signifies the end of the estimated period under the stated storage conditions, after which the product probably will not have the quality attributes normally expected by the consumers and after which date the food should not be regarded as marketable;"

It will be noted that none of these definitions state that after such a date, whether Best Before, Sell By, or Use By, the food is unsafe to consume. In fact GNR146 seems to focus on marketability and quality rather than food safety in respect of these durability definitions.

It is illegal to tamper with, change, or in any way alter the date of durability once it has been applied to a foodstuff. However, the actual “Best Before”, “Use By” and “Sell By” dates are not prescribed for any foodstuff i.e. the Regulation does not state how long the periods can be, and they are determined by the manufacturer.

GNR 328 of 20 April 2007 under the FCD Act – Powers and Duties of Inspectors

The Regulation provides that an inspector may take a sample for analyses and if it is found to be unsound, seize the foodstuffs in question or order them quarantined pending further investigation.

“4(1) An inspector may-

(a) if, after an examination of any food contemplated in regulation 2(1)(e) , he or she is satisfied that such food is unsound, or unwholesome or contaminated; or

(b) where it appears from the testing or analysis of a sample referred to in regulation 2(1)(f), that the sample or any part of it is unsound, unwholesome or contaminated, by written order in a format provided in Annexure D, signed by him or her, seize the food concerned, or the lot or consignment of food from which the sample was taken if he or she is satisfied that the food in that lot or consignment is in the same condition or possesses the same properties as the sample.”

There is no reference to dates of durability in the above and the only question is whether the foodstuff is unsound, unwholesome, or contaminated.

Liability to a Consumer in terms of the CPA

Section 61 of the CPA, which provides for so called “no fault” liability of the importer, manufacturer, wholesaler, and retailer of unsafe, defective, failed or hazardous goods, or where inadequate instructions or warnings have been provided.

Thus, where a consumer purchases a foodstuff marked with a Best Before date and then consumes it after the Best Before date and falls ill, the Best Before date would not be a defence for the retailer or the distributor as the definition of Best Before indicates to a consumer that the foodstuff could still be “perfectly satisfactory” but may be of reduced quality e.g. colour, taste, smell for quite some time and there is no cut off for this period and thus the use of Best Before, although it extends saleability, may leave the supplier exposed to liability under the Consumer Protection Act.

Even the use of Sell By date labelling falls to the same considerations as the Best Before labelling, although to a lesser extent and a consumer would be expected to consume the product within a few days of the Sell By date, although again the exact period is not defined.

The lowest risk labelling in terms of durability versus liability is Use By labelling as this clearly indicates to a consumer that the product should be consumed by a certain date although R146 does not make this a requirement for the use of the Use By labelling and this may cause some difficulties to a company trying to rely on this as a defence.

Consequences

The sword of the Consumer Tribunal will hang over the heads of repeat, intentional, or grossly negligent transgressors where a fine of upto 10 % of turnover of a company may be levied. In terms of other provisions there are criminal sanctions against individuals which carry prison terms of upto 1 years.

The CPA also puts in place a product recall regime in terms of which product recalls may be ordered by the National Consumer Commission for example where foodstuffs have caused illness or other harm.

Suppliers are reminded that liability for harm or injury caused by goods introduced under the Act is vastly different from the position prior to the coming into effect of Act in that under the Act the supplier need not have been negligent nor breached an explicit or implied contractual term in order to be liable. Thus the Act imposes a no fault liability on **any producer or importer, distributor or retailer of any goods** for damage caused wholly or partly as a consequence of supplying 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 whether the harm resulted from any negligence on the part of the producer, importer, distributor or retailer, as the case may be. The date of durability as discussed above should be viewed as “instructions or warnings” in terms of the above.

The only defences open to a person in the supply chain alleged to be liable for harm caused to a consumer will be that:

- (a) the unsafe product characteristic, failure, defect or hazard that results in harm is wholly attributable to compliance with any public regulation;
- (b) the alleged unsafe product characteristic, failure, defect or hazard—
 - (i) did not exist in the goods at the time it was supplied by that person to another person alleged to be liable; or
 - (ii) was wholly attributable to compliance by that person with instructions provided by the person who supplied the goods to that person, in which case, subparagraph (i) does not apply;

- (c) it is unreasonable to expect the distributor or retailer to have discovered the unsafe product characteristic, failure, defect or hazard, having regard to that person's role in marketing the goods to consumers; or
- (d) the claim for damages has prescribed in terms of Section 61(5).

A further element of liability which is introduced by the CPA is that of no fault vicarious liability in terms of which if an employee or agent of a person is liable in terms of this Act for anything done or omitted in the course of that person's employment or activities on behalf of their principal, the employer or principal is jointly and severally liable with that person.

Thus, it would not be a defence for a retailer to claim that the Merchandiser or their supplier had not removed "expired" stock from the shelf or that the consumer should have seen the Best Before or Sell By date, unless this is accompanied by a suitable warning of the danger of consuming the product after expiry of said date.

In addition to any liability under the CPA, the person in charge of premises where unsound, unwholesome, or contaminated foodstuffs were sold can be prosecuted under the FCD Act and be sentenced to a fine or equivalent imprisonment of between 6 and 24 months, depending on whether it is a first offence or not.

Warranty and Right to Return Goods

Besides the issue of claims for damages as a result of harm caused by foodstuffs, every consumer has a right to receive goods that are reasonably suitable for the purposes for which they are generally intended for, are of good quality, and will be useable for a reasonable period of time taking into account the Best Before, Sell By or Use By date.

It is irrelevant whether a product failure or defect was latent or patent, or whether it could have been detected by a consumer before taking delivery of the goods unless the consumer has been expressly informed that particular goods were offered in a specific condition, and has expressly agreed to accept the goods in that condition.

Thus, in the context of food products, the consumer is entitled to food products which have the product characteristic as indicated on the packaging and in marketing, which will have a reasonable shelf life depending on the type of product, for example, fresh pasteurised, UHT, and the like and the producer or importer, the distributor and the retailer **each** warrant that the goods comply with the requirements and standards contemplated above and the retailer, for example, cannot merely refer the consumer back to its supplier when a situation arises.

Within six months after the delivery of any goods to a consumer, but before the Sell By or Use By date in the case of foodstuffs, the consumer may return the goods to the retailer or supplier, without penalty and at the supplier's risk and expense, if the goods fail to satisfy the abovementioned requirements and standards, and the supplier must either replace the failed, unsafe or defective goods, or refund to the consumer the price paid by the consumer for the goods, at the direction of the consumer.

Thus, it is no longer Caveat Emptor but rather Caveat Vendor!

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What's the difference between best before and use by dates?

<http://www.food.gov.uk/>

You will see 'use by' dates on food that goes off quickly, such as smoked fish, meat products and ready-prepared salads. Don't use any food or drink after the end of the 'use by' date on the label, even if it looks and smells fine. This is because using it after this date could put your health at risk.

For the 'use by' date to be a valid guide, you must follow carefully storage instructions such as 'keep in a refrigerator'. If you don't follow these instructions, the food will spoil more quickly and you may risk food poisoning. 'Use by' does not always mean 'eat by'. If a food can be frozen its life can be extended beyond the 'use by' date. Once a food with a 'use by' date on it has been opened, you also need to follow any instructions such as 'eat within a week of opening'. But if the 'use by' date is tomorrow, then you must use the food by the end of tomorrow, even if you only opened it today.

'Best before' dates appear on a wide range of frozen, dried, tinned and other foods.

The 'best before' dates are more about quality than safety, except for eggs. So when the date runs out it doesn't mean that the food will be harmful, but it might begin to lose its flavour and texture.

You can eat eggs a day or two after the 'best before' date, providing the eggs are cooked thoroughly until yolk and white are both solid, or if they are used in dishes where they will be fully cooked, such as a cake. After the 'best before' date, the quality of the egg will deteriorate and if any salmonella bacteria are present, they could multiply to high levels and could make you ill. The 'best before' date will only be accurate if the food is stored according to the instructions on the label, such as 'store in a cool dry place' or 'keep in the fridge once opened'.

Date marks such as 'display until' or 'sell by' often appear near or next to the 'best before' or 'use by' date. They are used by some shops to help with stock control and are instructions for shop staff, not shoppers.

Shelf life

From Wikipedia, the free encyclopedia

For other uses, see [Shelf Life \(disambiguation\)](#).



This pack of diced pork says 'display until' 7 May and 'use by' 8 May



[Package testing](#): Heat sealing film for evaluation of shelf life of lettuce

Shelf life is the length of time that a commodity may be stored without becoming unfit for use or consumption.^[1] It applies to [foods](#), beverages, [pharmaceutical drugs](#), [chemicals](#), and many other [perishable](#) items. In some regions, an advisory *best before*, mandatory *use by*, or *freshness date* is required on packaged perishable foods.

Shelf life is the recommended maximum time for which products can be stored, during which the defined quality of a specified proportion of the goods remains acceptable under expected (or specified) conditions of distribution, storage and display.^[2]

Most expiry dates are used as guidelines based on normal and expected handling and exposure to temperature. Use prior to the expiration date does not guarantee the safety of a food or drug, and a product is not necessarily dangerous or ineffective after the expiration date.^[3]

For food, shelf life is different from *expiration date*: the former refers to [food quality](#), the latter to [food safety](#).^[4] A product that has passed its shelf life might still be safe, but quality is no longer guaranteed. In most food stores, waste is minimized by using [stock rotation](#), which involves moving products with the earliest sell by date from the warehouse to the sales area, and then to the front of the shelf, so that most shoppers will pick them up first and thus they are likely to be sold before the end of their shelf life. This is important, as consumers enjoy fresher goods, and furthermore some stores can be fined for selling out of date products; most if not all would have to mark such products down as [wasted](#), resulting in a financial loss.

Shelf life is most influenced by several factors: exposure to [light](#) and [heat](#), transmission of [gases](#) (including humidity), mechanical [stresses](#), and contamination by things such as micro-organisms. Product quality is

often mathematically modelled around a parameter (concentration of a chemical compound, a microbiological index, or moisture content).^[5]

For some foods, health issues are important in determining shelf life. Bacterial contaminants are ubiquitous, and foods left unused too long will often be contaminated by substantial amounts of bacterial colonies and become dangerous to eat, leading to [food poisoning](#). However, shelf life alone is not an accurate indicator of how long the food can safely be stored. For example, pasteurized milk can remain fresh for five days after its sell-by date if it is refrigerated properly. In contrast, if milk already has harmful bacteria, the use-by dates become irrelevant.^[3]

The expiration date of pharmaceuticals specifies the date the manufacturer guarantees the full potency and safety of a drug. Most medications continue to be effective and safe for a time after the expiration date. A rare exception is a case of renal tubular acidosis purportedly caused by expired [tetracycline](#).^[6] A study conducted by the U.S. Food and Drug Administration covered over 100 drugs, prescription and over-the-counter. The study showed that about 90% of them were safe and effective as long as 15 years past their expiration dates. Joel Davis, a former FDA expiration-date compliance chief, said that with a handful of exceptions - notably nitroglycerin, insulin and some liquid antibiotics - most expired drugs are probably effective.^[7]

Shelf life is not significantly studied during drug development^[dubious – discuss], and drug manufacturers have economic and liability incentives to specify shorter shelf lives so that consumers are encouraged to discard and repurchase products. One major exception is the [Shelf Life Extension Program](#) (SLEP) of the [U.S. Department of Defense](#) (DoD), which commissioned a major study of drug efficacy from the FDA starting in the mid-1980s. One criticism is that the U.S. [Food and Drug Administration](#) (FDA) refused to issue guidelines based on SLEP research for normal marketing of pharmaceuticals even though the FDA performed the study. The SLEP and FDA signed a memorandum that scientific data could not be shared with the public, public health departments, other government agencies, and drug manufacturers.^[8] State and local programs are not permitted to participate.^[9] The failure to share data has caused foreign governments to refuse donations of expired medications.^[10] One exception occurred during the 2010 [Swine Flu Epidemic](#) when the FDA authorized expired [Tamiflu](#) based on SLEP Data.^[11] The SLEP discovered that drugs such as [Cipro](#) remained effective nine years after their shelf life, and, as a cost-saving measure, the US military routinely uses a wide range of SLEP tested products past their official shelf life if drugs have been stored properly.^[12]

[Preservatives](#) and [antioxidants](#) may be incorporated into some food and drug products to extend their shelf life. Some companies use [induction sealing](#) and [vacuum/oxygen-barrier](#) pouches to assist in the extension of the shelf life of their products where oxygen causes the loss.

The DoD Shelf-Life Program defines shelf-life as,

The total period of time beginning with the date of manufacture, date of cure (for elastomeric and rubber products only), date of assembly, or date of pack (subsistence only), and terminated by the date by which

an item must be used (expiration date) or subjected to inspection, test, restoration, or disposal action; or after inspection/laboratory test/restorative action that an item may remain in the combined wholesale (including manufacture's) and retail storage systems and still be suitable for issue or use by the end user. Shelf-life is not to be confused with service-life (defined as, A general term used to quantify the average or standard life expectancy of an item or equipment while in use. When a shelf-life item is unpacked and introduced to mission requirements, installed into intended application, or merely left in storage, placed in pre-expended bins, or held as [bench stock](#), shelf-life management stops and service life begins.)^[13]

Shelf life is often specified in conjunction with a specific product, package, and distribution system. For example, an [MRE field ration](#) is designed to have a shelf life of three years at 80°F and six months at 100°F.^[14]

Temperature control^[edit]

Main article: [Cold chain](#)

Nearly all chemical reactions can occur at normal temperatures (although different reactions proceed at different rates). However most reactions are accelerated by high temperatures, and the degradation of foods and pharmaceuticals is no exception. The same applies to the breakdown of many chemical explosives into more unstable compounds. [Nitroglycerine](#) is notorious. Old [explosives](#) are thus more dangerous (i.e. liable to be triggered to explode by very small disturbances, even trivial jiggling) than more recently manufactured explosives. [Rubber](#) products also degrade as [sulphur bonds](#) induced during [vulcanization](#) revert; this is why old [rubber bands](#) and other rubber products soften and get crispy, and lose their elasticity as they age.

The usually quoted [rule of thumb](#) is that chemical reactions double their rate for each temperature increase of 10 degrees Celsius (°C) because [activation energy](#) barriers are more easily surmounted at higher temperatures. However, as with many rules of thumb, there are many [caveats](#) and exceptions. The rule works best for reactions with [activation energy](#) values around 50 kJ/mole; many of these are important at the usual temperatures we encounter. It is often applied in shelf life estimation, sometimes wrongly. There is a widespread impression, for instance in industry, that "triple time" can be simulated in practice by increasing the temperature by 15 °C, e.g., storing a product for one month at 35 °C simulates three months at 20 °C. This is mathematically incorrect (if the rule was precisely accurate the required temperature increase would be about 15.8 °C), and in any case the rule is only a rough approximation and cannot always be relied on.

The same is true, up to a point, of the chemical reactions of living things. They are usually catalyzed by [enzymes](#) which change reaction rates, but with no variation in catalytic action, the rule of thumb is still mostly applicable. In the case of [bacteria](#) and [fungi](#), the reactions needed to feed and reproduce speed up at higher temperatures, up to the point that the proteins and other compounds in their cells themselves begin to break down, or [denature](#), so quickly that they cannot be replaced. This is why high temperatures kill bacteria and other micro-organisms: 'tissue' breakdown reactions reach such rates that they cannot be

compensated for and the cell dies. On the other hand, 'elevated' temperatures short of these result in increased growth and reproduction; if the organism is harmful, perhaps to dangerous levels.

Just as temperature increases speed up reactions, temperature decreases reduce them. Therefore, to make explosives stable for longer periods, or to keep rubber bands springy, or to force bacteria to slow down their growth, they can be cooled. That is why shelf life is generally extended by temperature control: ([refrigeration](#), [insulated shipping containers](#), controlled [cold chain](#), etc.) and why some medicines and foods *must* be refrigerated.

[Temperature data loggers](#) and [time temperature indicators](#) can record the temperature history of a shipment to help estimate their remaining shelf life.^[15]

Packaging^[edit]

Barrier packaging can often help control or extend shelf life. When moisture content is a mechanism for product degradation, packaging with a low [moisture vapor transmission rate](#) and the use of [desiccants](#) help keep the moisture in the package within acceptable limits. When [oxidation](#) is the primary concern, packaging with a low [oxygen transmission rate](#) and the use of [oxygen absorbers](#) can help extend the shelf life. [Produce](#) and other products with respiration often require packaging with controlled barrier properties. The use of a [modified atmosphere](#) in the package can extend the shelf life for some products. Some [active packaging](#) is also available with antibacterial properties.

Parallel names^[edit]

Best before^[edit]

Best before or *best by* dates appear on a wide range of frozen, dried, tinned and other foods. These dates are only advisory and refer to the quality of the product, in contrast with *use by* dates, which indicate that the product may no longer be safe to consume after the specified date.^[16] Food kept after the *best before* date will not necessarily be harmful, but may begin to lose its optimum flavour and texture. Eggs are a special case, since they may contain [salmonella](#) which multiplies over time; they should therefore be eaten before the *best before* date, which is a maximum of 45 days after the eggs are packed.^[17]

Sometimes the packaging process involves using pre-printed labels, making it impractical to write the *best before* date in a clearly visible location. In this case, wording like *best before see bottom* or *best before see lid* might be printed on the label and the date marked in a different location as indicated.

Use by^[edit]

Generally, foods that have a *use by* date written on the packaging must not be eaten after the specified date. This is because such foods usually go bad quickly and may be injurious to health if spoiled. It is also important to follow storage instructions carefully for these foods (for example, if they specify that the product must be [refrigerated](#)).

Foods with a *best before* date are usually safe to eat for a time after that date, although they are likely to have deteriorated either in flavour, texture, appearance or nutritional value.

Bathroom products and toiletries usually state a time in months from the date the product is opened, by which they should be used. This is often indicated by a [graphic of an open tub](#), with the number of months written inside (e.g., "12M" means use the product within 12 months of opening).^[18] Similarly, some food products say "eat within X days of opening".

Open dating^[edit]

Open dating is the use of a date or code stamped on the package of a food product to help determine how long to display the product for sale. This benefits the consumer by ensuring that the product is of an acceptable quality when sold. An open date does not supersede a [use-by date](#), which should still be followed.^[19]

Sell by / display until^[edit]

These dates are intended to help keep track of the stock in stores. Food that has passed its *sell by* or *display until* date, but has not yet reached its use by / best before date will still be edible, assuming it has been stored correctly. It is common practice in large stores to throw away such food, as it makes the stock control process easier; another common practice is for wholesalers to repurchase the expired product and resell it to [discount stores](#) at much lower [clearance sale](#) prices. These practices reduce the risk of customers unknowingly buying food without looking at the date, only to find out the next day that they cannot use it. Tampering with the posted date is illegal in many countries.

Most stores will [rotate stock](#) by moving the products with the earliest dates to the front of shelving units, which encourages customers to buy them first and hopefully saves them from having to be either marked down or thrown away, both of which would result in financial loss.

Issues associated with sell by / use by dates^[edit]

According to the UK [Waste & Resources Action Programme](#) (WRAP), 33% percent of all food produced is wasted along the [chill chain](#) or by the consumer.^{[20]^[citation needed]} At the same time, a large number of people get sick every year due to spoiled food. According to the [WHO](#) and [CDC](#), every year in the USA there are 76 million [foodborne illnesses](#), leading to 325,000 hospitalizations and 5,000 deaths.^[21]

According to former UK minister [Hilary Benn](#), the use by date and sell by dates are old technologies that are outdated and should be replaced by other solutions or disposed of altogether.^[22] The UK government's [Department for Environment, Food and Rural Affairs](#) revised guidance in 2011 to exclude the use of sell by dates. The guidance was prepared in consultation with the food industry, consumer groups, regulators, and [Waste & Resources Action Programme](#) (WRAP). It aims to reduce the annual £12bn of wasted supermarket food.^[23]