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Dear Sir,

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Submission on the Consumer Protection Bill, 2008

We represent Pick 'n Pay Retailers (Pty) Ltd and are submitting the attached proposals and comments on their behalf.

Pick 'n Pay is a South African retailer with a history of over 40 years, having an annual turnover in excess of R 45 bn in 2007. It is one of the largest food retailers in South Africa. Pick 'n Pay is also a main board member of Consumer Goods Council of South Africa (CGCSA).

In addition, Pick 'n Pay operates a successful franchise business in terms of which private individuals, who often invest their life savings, become franchisees of Pick 'n Pay and trade as Pick 'n Pay Family Supermarkets. These franchisees are viewed as small to medium retailers.

Pick 'n Pay applauds the Bill and is strongly supportive of the principles enshrined therein. Pick 'n Pay has always maintained a strong consumer driven ethic and believes it is high time that all retailers are held to the same high standards that Pick 'n Pay has implemented.

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However, having reviewed the Bill, there are several issues which would have direct and indirect consequences for the consumer it intends to protect as set out in Section 3(1)(b), and the entire supply chain.

Comments and Submissions

1. Foodstuffs

Firstly, we believe that foodstuffs are already dealt with by the Foodstuffs, Cosmetics and Disinfectants Act and related Regulations, and that this should be retained. Foodstuffs should be excluded from the Bill by way of a legislated, rather than a discretionary, exemption in terms of Section 5(2).

We believe that since foodstuffs are fragile and have a limited shelf life, various provisions of the Bill are inappropriate. For example, the opening and inspection of goods prior to delivery, periods of several days (sometimes weeks) for the return of goods, strict product liability, and other such matters are not appropriate in respect of foodstuffs. The simplest way to deal with the inappropriateness would be to have a blanket exemption for foodstuffs.

It may be proposed by some that large retailers such as Pick ‘n Pay can deal with the inclusion of foodstuffs and that the best way to deal with small dealers would be by way of the threshold in terms of Section 5(2)(b)(i). However, this would not remove the liability of those persons who supply such small businesses. There is a real threat that such persons may be disinclined to continue supplying the small businesses. The risk of liability on the basis of the actions of such small, often unsophisticated, businesses is too great.

Furthermore, the use of the word “and” between Sections 5(2)(b)(i) and (ii) means that both conditions must be present for the exemption to apply. Surely there are very few situations where both of these conditions would be present. In any event, Section 5(5) states that all transactions, even those to which the Bill would not apply, would be subject to the recall and strict liability provisions of Sections 60 and 61.

We thus propose that the issue with foodstuffs be solved by including an exemption in Section 5(2)(a) by way of the following suggested amendment:

Section 5(2)

“ (a)

(i) in terms of which goods or services are promoted to the State, or are supplied to or at the discretion of the State; *[or]*

(ii) in respect of foodstuffs which fall within the scope of the Foodstuffs, Cosmetics and Disinfectants Act and the Regulations thereunder; or”

2. Franchise Agreements and Franchisees

The stated objective of the Bill, at Section 3 thereof, is to promote and advance the social and economic welfare of consumers in South Africa. Section 3(1)(b)(i) is often referred to and it is clear that the primary purpose of the Bill is the protection of low income persons or persons comprising low income communities.

The Bill has at the eleventh hour introduced the concept that a franchisee is a type of consumer rather than a business entity exempted from the ambit of the Act if the franchise value is above a threshold to be set by regulation.

It is common knowledge that franchises are one of the most effective methods of job creation in a free market system. The Bill's objective to protect low income persons under Section 3(1)(b)(i) may affect the very persons who become franchisees. Such franchisees will create further employment. But the onerous obligations on a franchisor may change the franchise environment to such an extent that franchisors may decide that these types of business are unsustainable. The option would then be open to the franchisor to operate businesses as wholly owned subsidiaries over which they have control.

Pick 'n Pay strongly support the right to full disclosure to prospective franchisees, as well as honest dealing in such matters. However, it should not be forgotten that a franchisor spends huge amounts of time and money building a franchise business and the brand associated therewith. It seems inequitable that the Bill protects the franchisee to the hilt, but the franchisor who has created the business and built the brand is left out on a limb.

In particular, the Bill as it now stands seems to provide for the cancellation by the franchisee of the franchise agreement on 20 days notice. The franchisor could then stand unrepresented in an area for a long period while a new franchisee is sought and the new franchise put in place.

A further concern is the provision that a franchisor would not be entitled to require that a franchisee purchase goods and services from specific suppliers, enter into additional agreements or transactions with the same or another supplier or agree to purchase any goods or services from a designated third party, unless the relevant goods are reasonably related to the franchisor's trade marks. Further, the concept of bundling or tying products, such as, for example, attaching a promotional coupon, credit slip or voucher to goods purchased, could be a problem, unless the products are again reasonably related to the Franchisor's trade marks.

The franchise business is not merely limited to trade related to the trade marks at any particular time. The business of the franchisor may extend over time. It would be necessary for franchisees to be required to assist in the development of the business through the responsible stocking of quality products other than those strictly connected to the trade mark of the franchisor. After all, if a consumer purchases a poor quality product from a franchise outlet, in the consumers mind that product, even if not branded with the franchisor's trade mark, becomes indelibly linked to the franchisor's brand. This is detrimental to the franchisor. In addition, all other franchisees would suffer the negative consequences of damage to the reputation of the brand.

The requirement of full disclosure protects the franchisee against an unscrupulous franchisor. If the franchisee, having full knowledge, enters into an agreement in terms of which he is required to purchase certain products from a designated third party or branded products not strictly related to the business of the franchise rather than other unrelated similar products, then for the protection of the franchisor and all franchisees this should be respected.

A possible solution to the conundrum of protection of the franchisor, the brand, and other franchisees under a regime such as that proposed in the Bill is to amend Section 13(2) as follows:

“Section 13(2). Except to the extent that any other law provides otherwise, in any transaction between a franchisee and franchisor in terms of their franchise agreement, it is a defence to an allegation that the franchisor, as supplier to the franchisee, has contravened this section if it was disclosed beforehand in the franchise agreement [any goods or services] that the franchisee was required to purchase any goods and services from or at the direction of the franchisor regardless of whether same are reasonably related to the branded products or services that are the subject of the franchise agreement.”

As regards the cancellation period of 20 days, franchise agreements should summarily be excluded from Section 14(1)(b)(i) or at least (bb) thereof.

3. Right To Fair Value, Good Quality and Safety

Pick ‘n Pay is supportive without reservation of the right of all consumers to fair value, good quality and safety.

Pick ‘n Pay’s concerns lie in the implementation of the right and the effect thereof on the economy and, in particular, small businesses such as those who supply Pick ‘n Pay.

Without dissecting each of Sections 54 to 61 of the Bill, we wish to point out the consequences, possibly unforeseen, of the implementation of these sections on small business and the economy as a whole runs contrary to the stated objective of the Bill in Section 3 thereof, to promote and advance the social and economic welfare of consumers in South Africa.

It is important to realize that on an individual level we are all consumers and thus, whether you are a government official, a director of Pick ‘n Pay, an employee of a supplier to Pick ‘n Pay, the owner of a spaza shop in a rural area, or a housewife in Johannesburg, the objective of the Bill is to promote and advance our social and economic welfare by establishing a legal framework for the achievement and maintenance of a consumer market that is fair, accessible, efficient, sustainable and responsible.

We have highlighted an extract from Section 3(1)(a) of the Bill as these are the stated mechanisms for achieving the purpose of the Bill, but clearly are also required for the economy to grow, for jobs to be created, and thereby to achieve a better life for all. If the consequences of the implementation of the Bill were to make the market less accessible or less efficient, or unsustainable then clearly these would be unforeseen consequences. It is these consequences that we are pointing out so that they may be avoided.

3.1 Access to Market by Producers, Importers, and Distributors

In terms of the Bill in the case of an alleged defect or product failure, a consumer lays a complaint with the Commission and then stands back while the Commission investigates the complaint and the retailer. The complainant has very little incentive not to lodge spurious complaints. It is possible that a consumer may use the threat of a complaint, even when not justified, as a means of obtaining money from a retailer.

Typically, where a retailer has to take part in such an investigation and incurs costs for laboratory services, legal fees and eventually payment to a consumer, the retailer would have a back to back agreement with its suppliers in terms of which the producer, importer, or other

supplier indemnifies it for such costs and charges. However, the implication of this is that the retailer could only do business with producers, importers, and other suppliers who are strong enough financially to make good on such an indemnity. It is highly likely that many smaller producers and importers would have to close their doors, with the loss of many jobs, as big retailers decide to only obtain products from producers and importers of substance, many of whom are global multinationals, at the expense of local industry.

In terms of Section 61(5), the only defences to strict liability will be those set out in (a) to (d) thereof of which at least (b) and (c) require vast infrastructure for product testing, failure analysis, and the like. It is extremely unlikely that small to medium businesses will have access to such infrastructure as this is very expensive to set up and to run.

Thus, an unforeseen consequence of the Bill could be a reduction in competition as well as a loss of jobs and the closure of South African industries in favour of large multinationals, who are able to sustain such investigations and costs even where the complaints are spurious.

A further unforeseen consequence would be across-the-board price increases to account for the costs of the systems which would need to be put in place to deal with Commission investigations, many of which are likely to be undertaken as a result of spurious complaints.

The Bill, as it now stands, is likely to lead to less market access, lower market efficiency, and the unsustainability of entire sectors of the market, particularly for small and medium enterprises, South African producers and importers.

The Bill would thus harm the most vulnerable, as defined in Section 3(1)(b)(i), by denying them market access as well as increasing prices.

3.2. Warranty and Right to Return Goods

The hapless retailer who supplies a product to a consumer, with which the consumer is not satisfied as a result of allegations that the consumer thought the product worked differently, would be faced with huge economic loss for products which have been returned. Any return charges are likely to be severely limited. The importer or producer is also likely to renounce responsibility, leaving the small to medium retailer out of pocket. This is clearly unsustainable.

An example where the consumer often feels they have not got what they thought they would get but in fact received exactly what they paid for is when a consumer purchases a computer with an operating system such as Windows Vista and, upon taking the computer home, finds it very difficult, if not impossible, to set up the computer to work with peripherals such as modems, printers, and the like. Although this is clearly very frustrating for the consumer, it is not the fault of the retailer. They have no influence over foreign-based companies such as Intel and Microsoft who design and provide the technology in these computers. It would be unreasonable and inequitable to expect a retailer, such as Pick 'n Pay to acquire sufficient expertise to be able to deal with such complex issues when computers are a very small part of its business. The consumer must accept some responsibility for research before purchasing such a product.

The logical consequence of such a regime would thus be to no longer stock complex equipment such as computers and home theatres, or to refuse to sell stock to unsophisticated consumers. Such discrimination amongst consumers would be untenable. But to do otherwise

would expose the retailer to the threat of continuously dealing with product returns as these products did not perform as expected. It is not the products that are the defective but rather the expectations of the consumer that are unrealistic.

Furthermore, knowledgeable consumers could easily abuse the system by asking complex questions which an average sales person would not be able to answer, and then later allege that the sales person had agreed with various statements, when returning the goods.

In addition, the Bill provides for a refund or replacement policy where goods have failed twice in a nine month period. Although such a policy seems equitable and may well work with simple products such as a hammer or a chair where the cause of failure can be easily identified, it is more difficult with complex products having thousands of parts and electronic components. Even an expert may not be able to determine the cause of failure i.e. whether it is an inherent fault or whether it was as a result of misuse or abuse of the product. This could lead to a situation where a consumer wanting a refund would merely induce two failures within the contemplated period and then demand a refund or a replacement. It is highly likely that there would be a lack of consensus between the consumer, who believes the product failed as a result of poor materials or workmanship, and the retailer supported by experts, who contend that the failure is as a result of abuse or even normal wear and tear.

Thus, the warranty and right to return goods is likely to lead to less market access, lower market efficiency, and unsustainability of entire sectors of the market, particularly for small and medium enterprises and South African producers and importers.

The Bill could lead to a situation where those intended to be protected as defined in Section 3(1)(b)(i) could be excluded from purchasing certain products, as well as being denied market access and facing higher prices for the reasons set out above.

Conclusion

The above deals only with the Sections of most immediate importance to Pick 'n Pay and we will likely make further submissions when public hearings are held to discuss the Bill at Committee level.

It has not been possible to propose amendments to the Bill for most of our comments as these are policy issues and would require rewriting of entire sections of the Bill or even abandonment of portions thereof. However, we would be pleased to assist the Committee in preparing such amendments when the need arises.

We trust that the above proposals will receive your favourable consideration and we are available to discuss same at your convenience.

Yours sincerely
Hahn & Hahn Attorneys



J F Luterek, Pr.Eng, Attorney