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**MASSMART**

The Secretary of Parliament  
Cape Town

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3 June 2008

Dear Sirs,

**Submission on the Consumer Protection Bill, 2008**

Massmart Holdings Limited is a South African based managed portfolio of twelve wholesale and/or retail outlet chains, with a store footprint in excess of 220 stores within South Africa and a further 22 stores within the African continent, each focused on high volume and low margin supplies of consumer goods for cash. These wholesale chains supply the retail sector and the general public on a so-called "cash and carry" basis. The Massmart group is the third largest supplier of consumer goods in Africa and includes well known brands such as Game, Makro, Shield, Cash & Carry Wholesalers (CCW), and Jumbo Cash & Carry with a group annual turnover of R 34.8 Bn.

The Massmart cash and carry wholesale stores play an important role in affording small retailers in the informal sector (many of whom are from previously disadvantaged backgrounds) the opportunity of making a living through distributing brands in high density areas to low income groups. This cash and carry wholesale portion of the South African food market accounts for approximately R40 bn of merchandise flow in South Africa – a market which requires Consumer Protection Legislation and Regulations which can be easily understood and implemented by both the consumers it is intended to protect, as well as producers, importers, and wholesalers while enabling a consumer market which is fair, accessible, efficient, sustainable and responsible as set out in Section 3(1)(a) of the Bill.

Massmart applauds the Bill and is strongly supportive of the principles enshrined therein and has always maintained a strong consumer driven ethic and believes it is high time that all retailers and wholesalers are held to the same high standards that Massmart had set for itself and implemented.

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.

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**Directors:** MJ Lamberti (Chairman), CS Seabrooke (Deputy Chairman), GM Pattison (Chief Executive Officer), GRC Hayward (Chief Financial Officer), MD Brand, ZL Combi, KD Dlamini, Dr NN Gwagwa, JC Hodgkinson\*, P Langeni, IN Matthews, P Maw, DNM Mokhobo, MJ Rubin. \* United Kingdom  
**Company Secretary:** I Zwarenstein

Registration Number: 1940/014066/06

## Comments and Submissions

### 1. Foodstuffs, Liquor and Tobacco

Firstly, we believe that foodstuffs are and should be dealt with under the Foodstuffs, Cosmetics and Disinfectants Act and the Regulations thereunder and should be excluded from the Bill by way of a legislated, rather than a discretionary, exemption in terms of Section 5(2). Similar considerations apply for both Liquor and Tobacco Products.

We believe that since foodstuffs are fragile, have a limited shelf life, are often sold by small businesses such as spaza shops, various provisions of the Bill which provide, amongst other things, for the opening and inspection of goods prior to delivery, periods of several days, if not weeks, for the return of goods, strict product liability, and other such matters are not appropriate in respect of foodstuffs and the simplest way to deal with the inappropriateness would be to have a blanket exemption for foodstuffs.

It may be proposed by some that the best way to deal with such 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 who may then be disinclined to continue with such supply due to the risk of liability on the basis of the actions of such small, often unsophisticated, businesses.

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 and thus, it appears to the writer, there are very few situations where both of these conditions would be present which would assist in the above situation. 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 problem with foodstuffs be solved by including an exemption in Section 5(2)(a) by way of the following amendment thereto:

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 and liquor products which fall within the scope of the Foodstuffs, Cosmetics and Disinfectants Act and the Regulations thereunder, liquor products which fall within the scope of the Liquor Act and the Regulations thereunder, and tobacco products which fall within the scope of the Tobacco Products Control Act; or*”

### 2. Business to Business Activities

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.

Accordingly, all business to business activities, without exception, should be exempted from the ambit of the Bill, including that of Section 5(5).

It is thus proposed that Section 5(2) be amended to include a blanket exemption for business to business transactions in terms similar to that in respect of goods or services promoted or supplied to the State rather than the complex exclusion stated in Section 5(2)(b) which requires a particular transaction to be in excess of a certain threshold value which could lead to a situation where a smaller transaction between large businesses is exempted whereas a bigger transaction by a small business is not exempted

Further, there is no reason why a business cannot in some circumstances be a consumer, for example, where a business acquires office equipment or a vehicle, and it should be clear that in such transactions the business is afforded the same protection as any other consumer.

We thus propose the inclusion of an exemption in Section 5(2)(a) by way of the following amendment thereto:

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 and liquor products which fall within the scope of the Foodstuffs, Cosmetics and Disinfectants Act and the Regulations thereunder, liquor products which fall within the scope of the Liquor Act and the Regulations thereunder, and tobacco products which fall within the scope of the Tobacco Products Control Act; or;*

*(iii) in terms of which goods or services are promoted or supplied to a person in the supply chain who is not a consumer thereof; or”*

Alternatively, Section 5(2)(b)(i) may be deleted.

### 3. Right To Fair Value, Good Quality and Safety

Massmart is supportive without reservation of the right of all consumers to fair value, good quality and safety.

Massmart’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 Massmart and those who are customers of Massmart and supply to the public.

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 which 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 Massmart, an employee of a supplier to Massmart, the owner of a spaza shop in a rural area, or an ordinary 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 certain words which appear in 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 have been unforeseen consequences which could be avoided by reconsideration of various policies underlying the Bill.

### 3.1 Access to Market by Producers, Importers, and Distributors

In the case of an alleged defect or product failure, a consumer merely lays a complaint with the Commission and then stands back while the Commission investigates the complaint and the retailer or distributor. Thus the complainant has very little disincentive not to lodge spurious complaints or to 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 and 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, which small to medium business just will not have access to and which are very expensive to set up and to run.

Thus, the unforeseen consequence of the Bill would 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 the 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 in respect of spurious complaints..

Thus, the Bill, as it now stands, 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 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 or wholesaler 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, the return charges if any being severely limited and the importer or producer renouncing 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, this is not the fault of the retailer as they have no influence over foreign based US\$100 Billion companies such as Intel and Microsoft who design and provide the technology in these computers and it would be inequitable to expect a retailer, such as Massmart of which computers are a small part of its business, to acquire sufficient expertise to be able to deal with such complex issues.

Would the logical consequence thus be not to sell complex equipment such as computers and home theatres to unsophisticated consumers thereby excluding them from the market? To do otherwise would expose the retailer to the threat of continuously dealing with product returns as these products did not perform as expected whereas it is not the products that are the defective but rather the expectations which are unrealistic.

Furthermore, knowledgeable consumers could easily abuse the system by asking complex questions which sales person often cannot answer, and then later alleging that they had agreed with various statements and returning the goods.

Further, the Bill provides for a refund or replacement policy where goods have failed again after having been repaired. 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, with complex products having thousands of parts and electronic components it is often not possible, even for an expert, 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 and this would 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.

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.

Again, 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.

### **Conclusions**

The above deals only with the Sections of most immediate importance to Massmart 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

**Massmart Holdings Limited**

A handwritten signature in black ink, appearing to read 'J B Currie', written in a cursive style.

**p.p. J B Currie**  
**Group Commercial Executive**