



## DIRECT SELLING AUSTRALIA

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### **Enhancements to Unfair Contract Term Protections**

We thank Treasury for inviting Direct Selling Australia (**DSA**) to consult on the Enhancements to Unfair Contract Term Protections.

#### **Background**

DSA represents, nationally, approximately 65 corporate entities using the direct sales channel for retailing a wide range of consumer products and services. Its members enjoy a prominent and growing presence in cosmetics, skin and personal care, nutritional and therapeutic products and household products markets. In the last financial year, our 65 member companies had a combined total revenue of \$1.4 billion, retailing through a network of over 400,000 independent salespeople (**ISPs**).

#### **Direct Selling**

Direct selling is the sale of a product or service away from a fixed store, typically person-to-person or in a small group setting. Direct sellers generally are not employees, they are independent contractors who sell the products or services of a company in return for a commission.

A key characteristic of direct selling is the role of Independent Sales Persons (**ISPs**) in the distribution of products and services. **ISPs** can choose their level of involvement and set their own hours. Some may work a few hours a week, others considerably more. In the 2013 Deloitte study, the top 3 reasons given for becoming an **ISP** were: flexibility, personal consumption of product and potential income. With low entry costs and on-going training and support, Members offer **ISPs** the opportunity to develop new skills in a home-based business. Other sectors of the economy benefit from this skill development if an **ISP** subsequently works outside of the direct selling industry.

#### **Contracts**

Many of these **ISPs** may also purchase products for personal use. However, for the purposes of engaging as a distributor, they will usually sign up to a distribution contract with the member company which outlines the responsibilities and expectations of both parties. **DSA's** experience is that **ISPs** are small micro-businesses whose incomes may range from a modest

supplementary income to a small number of ISPs who may earn more than 6 figures annually as part of their direct selling business. Direct sellers may manage and mentor other direct sellers in their “downline”, however, they are all independent contractors and individually sign up to a distribution contract with the member company so they do not have employees and would not have sufficient turnover to be recognised as anything but a small business.

DSA’s member companies represent a range in terms of annual revenues from several million dollars to more than \$100 million. The clear majority of member companies employ employees but many have less than 20 employees so they would currently qualify as small businesses. However, approximately half of DSA Member companies have head offices located overseas where additional employees are located.

Considering the context set-out above, DSA makes the following specific responses to certain questions raised in the consultation document.:

### **3. Legality and Penalties**

*6. Do you consider making UCTs illegal and introducing financial penalties for breaches would strengthen the deterrence for businesses not to use UCTs in standard form contracts?*

Half of DSA’s membership are currently classed as small businesses themselves. Both parties to their distribution contracts are therefore small businesses. Whilst these members are very conscious of seeking to comply with all their legal obligations, the compliance spend of most small businesses is not as great as larger businesses with ready access to either in-house or external legal counsel. It would be alarming for small businesses currently caught by the provisions to inadvertently fail to comply and then be subject to significant penalties (up to \$10 million if the penalties were to be brought in line with the ACL.) For direct sellers, there are potentially thousands upon thousands of historic contracts which would need to be reviewed depending upon when distributors had contracted with a company so the potential legal spend for some small businesses would be well beyond what they would be able to afford, particularly in the current economic crisis. DSA would therefore advocate for some form of dispensation from harsh penalties in circumstances where both parties to a contract are small businesses even where one party has drafted the standard form contract. Therefore, DSA would favour either Option 1 or 2 in respect of those contracts where both parties are small businesses.

DSA considers that the nature of determining whether a clause in a contract is unfair is particularly subjective and therefore Options 3 and Options 4 relating to making unfair contract terms illegal or subject to regulatory intervention are not preferred options, particularly as they might attach liability to small businesses contracting with other small businesses.

Further education and guidance on an industry specific basis with examples of the types of clauses which may contravene the legislative provisions would be very helpful for smaller businesses drafting or using standard form contracts – particularly where companies may be using clauses extracted from standard form contracts drafted overseas with clauses of the type that do not comply with the requirements of the Australian Consumer Law.

### **Definition of small business**

*15. Do you consider \$10 million annual turnover to be an appropriate threshold? Please detail reasons for your position, including the impact this might have on your business.*

DSA considers that \$10 million annual turnover threshold may be appropriate if used in conjunction with an employee threshold. An analysis of the current DSA membership indicates that approximately half our members have a turnover of less than \$10 million but also have less than 20 employees so would qualify as a small business under either definition. However,

a further 18 companies who currently qualify to benefit from the benefits of the existing regime by having less than 20 employees would lose this protection if the test was limited to only a \$10 million turnover as their annual turnover exceeds this threshold. It should also be noted that many members can experience significant growth over the course of several years and it is quite conceivable that under a turnover only test, they qualify as a small business one year but not the next, as such an increase in employee growth may represent a more stable indicator of business growth depending on the nature of the business and/or industry.

DSA would therefore support Option 3 (as set out in section 6.5 of the Consultation document) so that a contract would be considered a small business contract if at least one party to the contract is a business that employs less than 100 employees or has an annual turnover of less than \$10 million. If the headcount threshold were increased to less than 100 employees a greater number of our members would benefit from protection when signing contracts with larger suppliers but in terms of their own distributor facing contracts, it would make little practical difference.

### **Related bodies corporate**

As previously stated, at least half the DSA membership has a corporate head office (and other subsidiaries of those head offices) overseas with employees located overseas. It is therefore likely that many of those companies would no longer qualify as a small business definition with a 20-employee threshold. It should be noted however, that due to the unique Australian Consumer Law regime in Australia, many members have to instruct and fund local legal counsel out of their local budgets which are usually significantly lower than those of overseas head offices such that locally based members still operate in the same manner as a local small business despite being under a broader international banner although this is different on a company to company basis. Due to the uncertain effect, DSA submits its preference for Option1 – Status quo (6.6.1).

Please feel free to contact us should you require further clarification on any of the points raised above.

Kind regards

**Gillian Stapleton**

**Chief Executive Officer**