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Unfair Contract Terms Consultation Paper
Small Business, Competition and Consumer Policy Division
The Treasury
Langton Crescent
PARKES ACT 2600

SUBMISSION – EXTENSION OF UNFAIR CONTRACTS TO SMALL BUSINESS

The Direct Selling Association of Australia Inc (DSAA) includes and represents almost seventy local and foreign entities using the direct sales channel to distribute consumer products and services in Australia's retail market. They include large transnational corporations and small businesses. Almost sixty percent of our members are small businesses attracted to the channel because of its relatively low entry and operating costs compared with a traditional retail presence.

In distributing their products these entities offer a business opportunity in their supply chain for independent contractors. This results in many thousands of small or micro businesses with independently credentialed social and economic benefits. Through standard form agreements almost 480,000 Australians are variously engaged with our members in distributing their products. Whether small or micro businesses these people are generally unincorporated, predominantly women, over half of them in the lower half of socio-economic status.

The nature and scale of these distribution relationships demand standard form contracts. These agreements will be adversely affected, perhaps unintentionally, by the extension of unfair contract terms regulation to business to business transactions.

DSAA acknowledges that categorisation as a small or micro business does not in itself vest requisite acumen in persons conducting the business. It also accepts that criteria for unfair contract terms in consumer transactions will from competitive or other forces exist in business to business agreements in some sectors. But for a sector with no history of recurring unfair commercial agreements the direct selling industry will be subjected to the uncertainty and cost of complying with unnecessary intrusion with no apparent global precedent.

Direct Selling Channel

Direct selling is commonly understood as door-to-door, party plan and network marketing supply of consumer goods and services. But shifts in technology and consumer behaviour are taking direct selling to an omni channel presence while retaining its intrinsic strengths in experiential and relationship selling. The channel uses agency models where consumer sales are made by independent sellers as agents for direct selling entities, but predominantly operates with a wholesale model where these independent contractors act as re-sellers of their products.

Direct selling is a cost effective entry for small and micro business throughout its supply chain. However for many distributors engagement with the industry through commercial arrangements is to acquire products for personal consumption at wholesale prices. Recent and independent analysis of the economic contribution of Association members showed that a population of 477,767 distributors yielded 32,183 people working nine hours each week and a full time equivalent of 7,724 persons.

Application of Unfair Contract Terms

Standard form contracts are used extensively in direct selling. A recurrent theme in the Consultation Paper is the potential for small business when acquiring goods and services for business purposes to experience the same unfairness that the unfair contract terms were designed to address in consumer transactions. Standard form contracts to record consumer transactions comply with the Australian Consumer Law.

DSAA believes this compliance extends to goods and services acquired for business purposes and does not object to applying unfair contract terms to these transactions. However, any application of unfair contract terms to small business agreements will reach the commercial relationship that exists between a direct selling entity and its distributors. These are agreements under which a distributor is providing services under a contract for services or more likely as a reseller of products.

The Consultation Paper recognises the purpose and benefit of standard form contracts for business. Its claim that standard form contracts are pre-prepared by one party to the transaction does not necessarily reflect practice in the direct selling industry.

A key component of standard form agreements used in direct selling relate to the terms of a distributor's remuneration. These terms vary considerably but are structured to achieve many objectives not least to encourage productivity and maintain an entity's viability. These agreements typically limit an entity's exposure to brand or reputation damage, impose marketing and transactional requirements on distributors and encourage other ethical behaviour in their supply chain. The agreements also include some indicia of unfair contract terms in matters like termination, variation or renewal entitlements.

At inception these agreements are structured to attract distributors in a highly competitive market. They are periodically reviewed in consultation and negotiation with senior members of an entity's distribution system, resulting in something akin to a collective bargaining agreement. It could be argued that in inception and review the terms of the agreement do not result in a significant imbalance in the parties rights and obligations, and that they are reasonably necessary to protect legitimate interests of the direct selling entity; but the unfair contract provisions would allow these assertions to be tested where a distributor is detrimentally affected by an entity's contractually authorised action. While disputation is historically small, extending these terms has obvious implications from unmeritorious claims. The question is the extent to which the regulation will be used to extract a commercial outcome and with what indemnity cost and consequences.

Applying the unfair contract provisions to these independent contractor arrangements will result in significant cost and disruption to the industry. Our members, mostly small businesses themselves, will be put to significant expense in reviewing and probably re-designing their standard form agreements against vague and subjective unfairness criteria. There is also the substantial cost of re-negotiating agreements with existing distributors.

DSAA makes two more points. The Consultation Paper is significant for its philosophical and anecdotal reasoning for extending the unfair terms protections but there is little empirical support for the scale of the problem being addressed. DSAA particularly notes the ACCC's modest complaints experience in absolute terms since the inception of unfair contract terms in consumer transactions.

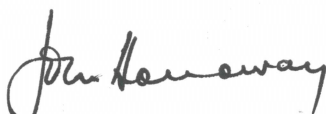
Also, any attempt at defining a small business not least by reference to its financial turnover, employees or transaction size will be arbitrary. Lack of business acumen or consumer comparable vulnerability can exist in small and larger businesses. Equally any suggestion of exempting small business to small business transactions will challenge the efficacy of the underlying policy of extending unfair contract terms with inevitable discriminatory results. This would mean that the bulk of standard form contracts by DSAA members would be exempted with obvious issues for a competitive distributor market.

Conclusion

DSAA respects the Government's commitment to aligning small business, however defined, with existing regulation of unfair contracts in consumer transactions and if the outcome of its consultation is that path it urges a staged progression. The Association recommends the Government adopt the light touch approach canvassed as Option 2 in the Consultation Paper so that the red tape burden on business is minimised and existing legislation such as Part 3 of the Independent Contractors Act 2006 can be reviewed for its effectiveness. This is an opportunity to identify problematic sectors and establish industry supported solutions. In any event DSAA believes it has a strong case for its members' distributor agreements to be exempted from any new regulation. DSAA urges the Government to accept the link in its preferred position and its competition policy review and await any findings from the review on the economic and productivity effects of a blanket application of the unfair contracts terms coverage.

DSAA thanks the Government for the opportunity of making these comments and is obviously available to discuss these and any other issues. Our contact is Daniel Hoenig who may be reached on 02 8567 6200 or daniel.hoenig@dsaa.asn.au

Yours sincerely



JOHN HOLLOWAY
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