DIRECT SELLING ASSOCIATION OF NEW ZEALAND

Founding Member of:

wfDSA

Submission on

Extending Unfair Contract Term Protections to Small Businesses

To the Australian Treasury

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Contents of Submission

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The Direct Selling Association of New Zealand is available for contact if requested to clarify any aspects of this submission.

Submission

The Direct Selling Association of New Zealand is supportive of the submission made by our Sister organisation the Direct Selling Association of Australia.

Our key concerns are focused on:

1. Is this necessary law and meet the COAG principles
2. Is this law appropriate for association to consumer law
3. Is this law consistent with reducing compliance costs to business
4. Will this law if extended, interfere with the operations of businesses on a trans-Tasman basis
5. If this law is implemented, could it be a breach of the CER agreement and Mutual Recognition Treaties between New Zealand and Australia
6. For the Direct Selling industry will this law place unreasonable obligations on what is a mutual benefit relationship between Direct Selling Companies and their independent contractor sales force

In our detailed submission we will explore each of these points and our views for each aspect of these key concerns are explained.

Summary Statements

We believe that the application of an extension of the “Unfair Contract Term Protections” to small businesses is unnecessary and will inhibit and burden both small business and those businesses that deal with them.

We believe that such an extension is not fully taking into account the necessary protections that businesses should be able to place on their trading relationships with other businesses and that of company and directorship obligations that every business must meet.

We believe that such an extension will hinder and potentially damage our Direct Selling member companies operations in Australia and make it impossible to have consistent contractual documentation between New Zealand and Australia for our independent contractors who may also operate across both markets.

We support option 1 or retention of the status quo for Australia which is consistent with the legal position for New Zealand and New Zealand companies who also operate in Australia.

We support the exemption of Direct Sellers from any coverage should a law extending this coverage proceed due to the existing protections offered under the DSANZ and DSAA Codes of Practice and under the World Federation of Direct Selling Associations Code of Practice.

Submission in Depth

Response to Key Focus Questions

The key focus questions assume that there is a problem for SME's and that this must be widespread.
We do not believe that form contracts or standard terms and conditions are a problem for small business and therefore there is any need for regulations to control such contracts.

Contract law in Australia as in New Zealand is based on the principles of old English contract law going as far back as the Magna Carta, although clearly subsequent law within Australia has defined and refined (as listed below) what such principles should be in relation to the Australian Commonwealth. Such law has fairness inherently built in and sets down the rights of business to be able to negotiate its terms of trade within that fairness established both within law.
Such laws may include (but not exclusively):

- The Corporations Act 2001 (including its small business guide section and the right of a business to contract)
- The Constitution Section IV (Trade and Finance)
- The Statute of Westminster Adoption Act 1942
- The Australia Act 1986
- The Trade Practices Act (Repealed and replaced)
- State Fair Trading Acts (Replaced by the 2010 Act)
- The Competition and Consumer Act 2010 (replacing the Trade Practices Act and adding the unfair contracts provision to protect consumers)

It should be noted that New Zealand has specific laws that are light handed giving all companies who enter contracts legal remedies to pursue via the courts at any time. These include:

- Sale of Goods Act 1908 (Business to business sales of goods, quality and remedies provisions)
- Contracts (Privity) Act 1982 (Addressing third party enforcement of contracts)
- Contractual Mistakes Act 1977 (providing remedy where the mistake is known to the other party at the time of the contract)
- Contractual Remedies Act 1977 (addressing misrepresentations and giving the court powers to discharge or release the contract and apply damages to the other party if necessary)

All such laws are available to businesses and are targeted to provide legal remedy appropriate to a business to business relationship without external enforcement and with both parties able to provide to the courts their respective arguments around the nature of the contract.

None of these laws are apply to any jurisdiction outside of New Zealand and none adversely affect common documentation used by Trans-Tasman businesses for contractual arrangements with other businesses. We would suggest that if an issue exists in Australia that any law modelled on these would be more appropriate and placing the power with the courts rather than a regulator to make decisions on the validity of a contract and any remedy if required.

DSANZ Specific Comments (As summarised)

1. **Is this law necessary and meet the COAG principles?**
   We believe this extension of law is not necessary and will add compliance costs along with unnecessary regulatory impositions on companies' ability to contract. We further believe this is contrary to the Corporations Act 2001 in stabling the right of small companies to contract.

2. **Is this law appropriate for association to consumer law?**
   The main thrust of the Competition and Consumer Act 2010 was the protection of consumers. Business and including SME business are not the same as an end consumer. It is therefore important to allow business remedies such as those provided in New Zealand but not to impose law where the regulator will decide what a business to business transaction should look like. Such imposition will make it impossible for businesses to trade with any surety and ultimately may damage local supply chains in favour of international supply chain agreements.
   When you try and merge consumer and commercial trading laws you will inevitably end up with law that is not fit for purpose.

3. **Is this law consistent with reducing compliance costs to business?**
   Government should be aiming to get out of business and in particular reduce compliance costs for business by regulating only those areas that need genuine protection. The proposal to extend this coverage in the exact opposite and will both intrude on business practices and add significant legal compliance costs to all businesses as companies try and ensure they meet the tight definitions of what is a fair contract.

4. **Will this law if extended interfere with the operations of businesses on a trans-Tasman basis?**
   We believe this law extension will impede Business to Business transactions on a Trans-Tasman basis and due to the lack of consistency will encourage more Free on Board transactions over Free to Store. In terms of our members this will make it more difficult to operate one set of terms and conditions for our independent Contractor Sales Force for Australia and a different set for virtually everywhere else including New Zealand.

5. If this law is implemented could it be a breach of the CER agreement and Mutual Recognition Treaties between New Zealand and Australia
   Depending on how this law is applied we believe there is a real possibility that it will cross the Mutual Recognition Treaty obligations by not recognising services in the same way as applied for New Zealand. We strongly recommend that this obligation be addressed fully before any consideration of progressing is made. Application of this extension by a regulator within a regulated industry sector may in fact cross the line under the TTMRA even if the inclusion of the law itself does not.

6. **For the Direct Selling industry will this law place unreasonable obligations on what is a mutual benefit relationship between Direct Selling Companies and their independent contractor sales force?**
   Our members use Independent Contractors as the main delivery of sales within Australia and New Zealand and this involves use of contracts that are form contracts by nature in both markets.

We submit that Direct Selling contracts should not be part of this law if it proceeds and that interfering with these form contracts by our members will damage both New Zealand and Australian businesses that operate in this sales channel. Our members look to consistency across both markets and to have one set of rules that apply differently in Australia to New Zealand would both adds costs and confusion within the sales force if the regulator were to apply changes to their contracts or force different terms.
Many of our members trade across a wide range of countries and consistency for their independent contractor agreements ensures that the message is the same in terms of building their own businesses and rights under our Code of Practice are adhered to.

We would finally like to point out that our members are obliged to follow our Code of Practice if they are New Zealand based and trading in Australia unless they are a member of the DSAA in which case they must follow the DSAA Code of Practice. This gives specific rights of cancellation, refunds and safe guards to the Independent Contractors who form the sales force of our member companies. We submit that with these protections already in force there is no additional need for legislation governing our members.
The DSANZ Code of Practice is downloadable at http://www.dsanz.co.nz/code/Code_of_Practice_For_Direct_Selling_2009.pdf

The World Federation Code of Ethics for Direct Sellers if available for download at http://www.wfdsa.org/files/world-codes/our-promise-direct-sellers.pdf

Background Information

The Direct Selling Association of New Zealand Inc. (DSANZ) is a membership organisation representing companies engaged with Direct Selling in New Zealand
The DSANZ is a sister organisation of the Direct Selling Association of Australia (DSAA) and both founding members of the World Federation of Direct Selling Associations.
The DSAA is the lead body for this industry in Australia and the DSANZ fully supports their views in regard to regulation of the industry within Australia.

Direct Selling is defined as Person to Person selling away from fixed retail location sometimes known as personal selling.

Methods of Direct Selling include Network Marketing (sometimes known as Multi-Level Marketing), Party Plan and Door to Door or traditional Direct Selling. Such methods can cross over between the various methods to incorporate components of more than one although Door to Door selling is rarely used for nutritional product.

The Direct Selling industry in New Zealand currently has a wholesale value of $253 Million dollars with around 95,000 independent contractors/distributors.

The 2013 Deloittes Access Social and Economic impact of Direct Selling in New Zealand has assessed the FTE (Full Time Equivalent) value of the industry as 4662 FTE and while not included in the study, the industry is now responsible for more than $140 million in exports mostly in the Nutritional Supplements, cosmetics and to a lesser extent food and beverage products.

Membership of the Direct Selling Association is voluntary however it is governed through self-regulation under a Code of Practice governing conduct and ethics addressing three principle areas. These are Conduct towards Consumers, Conduct towards Distributors and Conduct towards other Direct Selling Companies.

All members on joining agree to abide by the DSANZ Code of Practice which provides significant consumer protection and redress provisions as its mainstay but also provide the same levels of protection and redress for distributors and for other member companies against practices that are unfair or unethical.

Currently the membership totals 42 members and included supplier companies and life members.
Over 70% of our member companies operate across both the New Zealand and Australian markets with around 10% headquartered in New Zealand with subsidiary operations in Australia.

Full membership is attained only once ethical behaviour has been established for the company within New Zealand. This may be assisted by references from other countries where operations occur however normally a probationary period occurs for around 2 years from first application for membership.