

Consumer Policy Framework Unit
Small Business Competition and Consumer Policy Division
The Treasury
Langton Crescent
PARKES ACT 2600

12/05/2015

Submission – Extension of unfair contract provisions to small businesses

The Direct Selling Association of Australia (DSAA) is pleased to make the following submission to the Government's exposure draft legislation to extend the unfair contract provisions contained in the *Competition and Consumer Act 2010* to small business. This submission should be read in conjunction and addition to the DSAA's submission on this matter which was made during the initial consultation phase in 2014.

The DSAA acknowledges the potential for small business to experience unfairness in acquiring goods and services for business purposes and understands the Government's objectives in applying unfair contract terms to these transactions. It is also apposite that the Government's proposed legislative provisions allow for regulations to be made to specify exemptions where existing laws apply similar protections. The Government should therefore appropriately recognise contracts that come under the operation of the *Independent Contractors Act 2006* in such regulations.

Standard form contracts are used extensively in direct selling and the current proposal will reach the commercial relationship that exists between a direct selling company and its independent contractors who are engaged as distributors for the company's products. These are agreements under which a distributor is providing services as an agent or more likely as a reseller of products.

A key component of standard form agreements used in direct selling relate to the terms of a distributor's remuneration, responsibilities and rights in their position as an independent salesperson.

These agreements are structured to attract distributors in a highly competitive market - direct selling in Australia has hundreds of competing companies within the industry as well as the competition for the services of salespeople from other retailers and the wider market. The nature and scale of the direct selling industry and the distributor relationships demands the use of standard form contracts.

The terms of an agreement that could be considered to favour a direct selling company are reasonably necessary to protect legitimate interests of the company. However, the proposed unfair contract provisions would remove the certainty of these contracts and allow assertions of unfairness to be tested where a distributor believes that they have been unfairly treated by a company's contractually authorised action. The provisions will be a source of unmeritorious and vexatious claims.

There are already significant measures in place to ensure that direct selling distributors receive sufficient protections. This includes a direct selling company's strict compliance with the *Competition and Consumer Act 2010*, including the unconscionable conduct provisions, along with their application of appropriate dispute resolution processes to ensure fair and equitable outcomes in the event of any contractual disagreement.

The DSAA has industry policies and standards that apply compulsorily to members through the Direct Selling Code of Practice, which act to ensure dealings with distributors are conducted transparently and established on fair terms.

Applying the unfair contract provisions to these independent contractor arrangements will result in significant cost and disruption to the industry without any obvious economic benefits in return. DSAA members, mostly small businesses themselves, will be put to significant expense in reviewing their standard form agreements against vague and subjective unfairness criteria. There is also the substantial cost of renegotiating agreements with existing distributors as a precautionary measure against the uncertainty that the proposed provisions will engender.

The overwhelming rationale given for the pursuit of this proposal is in areas where there is a high concentration of market power. Unlike the potential unfairness found in other industries such as supermarkets and retail leases, insurance and other financial services, franchising, and utilities, there is no such market failure for the small businesses in the direct selling industry.

On the contrary, introducing such a broad new policy will in fact harm the small businesses in the direct selling industry through significant costs and the uncertainty in their contractual arrangements with their distributors.

Therefore the DSAA strongly recommends that direct selling companies' distributor agreements must be specifically exempted from the new legislative arrangements.

For further information and any questions please contact Daniel Hoenic on 02 8567 6200 or daniel.hoenig@dsaa.asn.au

Yours sincerely

A handwritten signature in black ink, appearing to read 'Daniel Hoenic', written over the words 'Yours sincerely'.

DANIEL HOENIG
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