



**DIRECT SELLING
AUSTRALIA**

AUSTRALIAN CONSUMER LAW REVIEW RESPONSE TO ISSUES PAPER

The Direct Selling Association of Australia Inc. ("DSA") represents about seventy members using the direct sales channel to bring consumer goods and services to Australia's market.

Direct selling is often characterised in door-to-door, party plan and network marketing practices and the channel is known for its relationship and experiential selling strengths. Within DSA membership doorstep business models have declined and party plan and network marketing models are increasingly integrated. For at least the past decade technology and its resulting consumer empowerment has encouraged direct selling models to adopt other aspects of retailing, particularly distance selling. These models are also responding to the marketing and sales challenges in social media, a concomitant of personal marketing.

A key feature of these business models is wholesale and retail distribution of products through independent contractors. They are small and micro business people, 75% are women and 62% are in the lower half of the socio-economic spectrum. Supplementary income, work balance and flexibility are the main drivers for their industry involvement. A recent study gives a picture of Australia's direct selling industry through the contribution of DSA members.¹

DSA welcomes this opportunity for initial engagement in reviewing the Australian Consumer Law ("ACL") with this response to the Australian Consumer Law Review Issues Paper (March 2016).

Its response draws on recognition in the Issues Paper that consumer policy must appropriately balance addressing consumer harm in a meaningful way, while not imposing unnecessary compliance burdens on business or stifling effective competition and innovation against market participants. Essential in this analysis is whether real risks of consumer and business detriment are addressed with an appropriate level of regulatory burden. DSA also notes recognition in consumer policy development guides of the importance for evidence based approaches to policy making.²

The intergovernmental agreement³ gives the framework for the ACL's overarching and operational objectives. It aimed to enhance consumer protection and reduce regulatory complexity for business through consumer empowerment and protection, effective competition and fair trading. DSA believes the agreement would have also benefited from a goal of regulatory balance to encourage entrepreneurship and business innovation. Operational objectives relevantly included preventing unfair practices, meeting the needs of (undefined) vulnerable and disadvantaged consumers, and promoting risk-based enforcement.

¹ Social and economic impacts of direct selling. Deloitte Access Economics, December 2013.

² OECD Consumer Policy Toolkit, July 2010 and its Australian Companion, March 2011.

³ Intergovernmental Agreement for the Australian Consumer Law, 2 July 2009.

The ACL is a mixed outcome for direct selling. It's a milestone in consumer protection and fair trading. A single law for nationally operating markets, an emphasis on general protection measures and more regulatory cohesion and consistency is welcomed. This can't be said for the application of its unsolicited consumer agreements provisions ("unsolicited selling") to the industry where the concerns raised by DSA in their development and implementation have not been ameliorated in subsequent ACL experience.

Drawing from Productivity Commission recommendations⁴ the ACL's key elements anticipated replication of the general consumer protection provisions of the (then) Trade Practices Act and new or amended provisions based on best practice in State and Territory regulation of specific industry practices. This included unsolicited selling and as a precursor and context for responses to questions in the paper DSA comments on these provisions.

Unsolicited Selling

The long accepted rationale for controlling unsolicited selling is a need to protect consumers from poor purchasing decisions because of high pressure selling and information asymmetry issues arising from an uninvited sales presence in their home, workplace and latterly over their telephone. Typically, this control centred on "cooling-off" rights with associated notice and remedial policy allowing consumers to reconsider decisions and avoid purchases. DSA accepts the potential for vulnerability in these circumstances and notes that cooling-off rights have been a membership requirement for decades.

DSA saw the ACL as an opportunity to overcome many practical challenges for nationally operating direct selling businesses in meeting individual jurisdictional requirements. What emerged from the unique circumstances of its development and introduction however were significant and unannounced policy shifts in controlling unsolicited selling. Unrealistic deadlines and token consultation precluded adequate assessment of these shifts against better regulation principles.

Two shifts fuelled the uncertainty and disproportionate response of the unsolicited selling provisions. First, extending them beyond home, work and telephone generated transactions to practically any unsolicited sale outside business premises.⁵ Second, prohibiting supply and payment for goods during cooling-off periods.⁶

Since the tabling of legislative instruments DSA has on many occasions highlighted the regulatory complexity and uncertainty of these shifts.⁷ The uncertainty is in whether a particular transaction is an "unsolicited" sale, if it is subordinately exempted and in anticipating subjective and judicial interpretation.⁸ DSA's own legal advice and the ACL regulators' response⁹ to requests for guidance on how aspects of the law would be interpreted and applied confirms the complexity and uncertainty. The uncertainty is exacerbated in the technology (including social media) and consumer driven migration of direct selling companies and their distributors to a broader retail presence.

As earlier mentioned, most DSA members use a buy-resell or wholesale model which means it's a distributor, essentially a retail sales person, who must comply with the unsolicited selling law. Couple the uncertainty and complexity of the unsolicited selling requirements with concepts of rebuttable

⁴ Review of Australia's Consumer Policy Framework – Inquiry Report, April 2008.

⁵ ACL Section 69(1)(b).

⁶ ACL Section 86.

⁷ For example, see DSA's submission to the Senate Economics Committee Inquiry into the Trade Practices Amendment (Australian Consumer Law) Bill, April 2010; Submission on the Regulatory Impact Statement; Representations for concessions from the application of ACL, Section 86.

⁸ For example, a decision construing a "Do Not Knock" sticker a request within the meaning of ACL, Section 75.

⁹ See ACCC's response on behalf of ACL regulators, May 2012.

presumption and reverse onus of proof and these people face exceptional risk for innocent breach, within a product, transaction, price and sales orientation unsupported by any relatively concerning level of consumer detriment. As they can DSA members educate and train these people and encourage compliance through supporting systems with its risk to the independent contractor status of these distributors.

DSA considers on balance the general protections in the ACL (and former Trade Practices Act) have adequately served the interests of business, consumers and government agencies. Their appeal lies in the potential to track and respond to changes in market behaviour and consumer issues. The use of the ACL's general provisions for misleading, deceptive and unconscionable conduct in responding to unsolicited selling excesses is noted.

That said, these general provisions are inherently remedial and DSA accepts that potential consumer detriment arising from home and workplace selling and telemarketing initiated sales supports a measure of pro-active management of privacy entitlement, marketing and sales practices and remedies.

The rationale for unsolicited selling regulation remains in home, workplace and telephone selling. This is where compliance activity is focused and it remains the source of commentary on consumer detriment.¹⁰ DSA believes that unsolicited selling protection should be confined to these transactions. For regulatory and compliance flexibility it prefers an interpretative principle based approach. But for specific regulation the New Zealand experience is instructive.¹¹ Compared with the ACL, DSA argues it is more effective, pursues a level playing field, reduces regulatory burden and offers a better compliance and enforcement capability.

Section 86 presents obvious issues for direct selling transactions with no possible consumer detriment. It prohibits the supply and payment for goods and services during a cooling-off period. As already mentioned it was envisaged that any control of specific industry practices would be based on State/Territory best practice regulation.

Section 86 had no precedent in so called best practice. None of the eight participating jurisdictions restricted the supply of goods in cooling-off periods. Australia's two most populous jurisdictions didn't restrict payment. With no evidence of consumer detriment in those jurisdictions and the apparent lack of payment restrictions being enforced in other jurisdictions, arguably their policy was and remains best practice. It is noted this policy is not in a subsequent European Union consumer protection directive, nor in comparable New Zealand legislation.

Section 86 was included in the Bill introducing the ACL to the Parliament without notice or industry dialogue. DSA raised its implications for business and consumers. Competition issues in restricting supply and payment for products, and sales practices presenting no more risk than purchases in retail stores. Consumers were denied the opportunity of assessing and rejecting products during the cooling-off period. DSA analysis at the time showed 90% of member related transactions were for \$500, or less. This amount was later accepted for a supply exemption, but not payment. With cash flow and credit implications the supply prohibition is effectively maintained.

When introducing the review, the chair of the Consumer Affairs Australia and New Zealand officials' forum opined that it's time to review if the law is operating as intended, and if its framework is sufficiently flexible to respond to new and emerging issues in the marketplace. DSA is unaware of any published criteria for assessing if the unsolicited selling provisions are operating as intended, and they clearly fail the second test.

¹⁰ For example, "Unsolicited and door-to-door selling practices still hurting consumers, advocates say", SMH 18 May 2016.

¹¹ NZ Fair Trading Act 1986, Sections 36K-36S.

Against the better regulation guidance mentioned earlier DSA argues there is a strong case for section 86 to be repealed. If its underlying concern lies in high value transactions, then it should be limited to those transactions. There is undeniably a case for full exemption of relatively small transactions that are akin to other retailing practices with no evidence of disproportionate consumer detriment.

The Issues Paper frames questions for possible future ACL policy from commentary that “issues have been raised”. Without background or supporting material DSA’s response is general or qualified comment from its perceptions of market and regulatory behaviour.

Consumer Policy in Australia

1. Do the national consumer policy framework’s overarching and operational objectives remain relevant? What changes could be made?

DSA believes the overarching and operational objectives remain relevant. Conceptually, the ACL’s blend of general and specific regulation is appropriate. The content of specific regulation requires careful balance and in this DSA urges the review team to be mindful of the intergovernmental supported objectives of reducing regulatory complexity, stimulating effective competition and promoting risk-based enforcement.

DSA supports the application of general provisions for consumer protection and fair trading. Their adoption in the ACL brought a strong body of jurisprudence from their application to Australian commerce and retain the requisite regulatory flexibility to respond to emerging consumer protection and fair trading issues in constantly changing markets – market changes acknowledged in the Issues Paper from technology, trade liberalisation and changing consumer preferences. These provisions underpin consumer empowerment and DSA is encouraged by the policy and operational consistency that seems to have emerged between governments and their agencies. As mentioned above, this support doesn’t extend to the ACL’s purported control of unsolicited selling.

To draw from the Issues Paper, DSA argues as it did when unsolicited selling controls were introduced, that its policy framework and legislative expression didn’t “appropriately balance addressing consumer harm in a meaningful way, while not imposing unnecessary compliance burdens on business or stifling effective competition and market innovation”.

DSA believes that the harm sought to be addressed by the unsolicited selling provisions could be better dealt with through interpretative general provisions.¹² There is no valid reason for continuing the application of Section 86 to its members’ businesses.

2. Are there any overseas consumer policy frameworks that provide a useful guide?

Except for its purported control of unsolicited selling, DSA is unaware of overseas experience that would better inform Australia’s consumer policy framework. With respect to unsolicited selling DSA notes commentary in the intergovernmental agreement on relations with New Zealand and believes its treatment of unsolicited selling against Australia’s experience is clearly instructive for achieving of IGA objectives. Specifically, in the consumer and business certainty from its definition and regulation of unsolicited selling practices.

¹² There may be value in testing this approach with consumer interests. See Choice response to “An Australian Consumer Law: Fair Markets – Confident Consumers, at page 10.

3. Are there new approaches that could help support the objectives of the national consumer policy framework, for example, innovative ways to engage with stakeholders on ACL issues?

DSA had dialogue with some decision makers and advisers during the ACL's development and implementation. Regrettably the circumstances of its introduction suggested pre-disposed attitudes and token consultation, something perhaps observed by other stakeholders.¹³ Since then for clarification and education and training purposes DSA sought guidance on how regulators proposed to interpret and enforce aspects of the unsolicited selling provisions. This dialogue was initiated by DSA. It's disappointing there has been no government or agency initiated dialogue over the four years' operation of the unsolicited selling provisions on their industry effect. This also applies to industry perceptions on consumer impacts and DSA would have welcomed input into the consumer survey which may inform aspects of the Issues Paper.

Australian Consumer Law – the legal framework

4. Is the language of the ACL clear and simple to understand? Are there aspects that could be improved?

For unsolicited selling regulation the answer is categorically no. This is shown in DSA submissions and particularly against DSA's own legal advice which can be made available to the review team. The complexity and uncertainty of the provisions can also be seen in the regulators' response¹⁴ to issues raised by DSA for the benefit of educating its members and their independent distributors. This complexity and uncertainty no doubt reflects the circumstances, particularly time imperatives, in delivering the ACL. For direct selling it's the difficulty and risk for a unique supply chain of companies and independent contractors in identifying and responding to regulated and non-regulated activity in increasingly diverse and centrally operated business models.

6. Are there overseas consumer protection laws that provide a useful model?

The New Zealand Fair Trading Act 1986, as amended, particularly sections 36K-36S.

7. Is the ACL's treatment of 'consumer' appropriate? Is \$40,000 still an appropriate threshold for consumer purchases?

DSA considers for fair trading and consumer protection purposes the existing delineation of "consumer" for ACL purposes remains appropriate. No real advancement is obvious from the UK definition of "consumer".

General Protections of the Australian Consumer Law

8. Are the ACL's general protections working effectively? Do they address the risks of consumer and business harm without imposing disproportionate or unnecessary costs on businesses?

¹³ See submission to the Senate Economics Legislation Committee by consumer groups under the auspices of the Consumer Law Action Centre, April 2010 at page 3.

¹⁴ ACL Regulators' response to issues raised by DSA, under cover of letter from the Australian Competition and Consumer Commission dated 24 May 2012.

DSA considers on balance the general protections in the ACL (and former Trade Practices Act) have adequately served the interests of business and consumers in their administration. Their appeal lies in the potential to respond to changes in market behaviour and consumer issues. The use of the ACL's general provisions for misleading, deceptive and unconscionable conduct in responding to unsolicited selling excesses is noted. That said, it's acknowledged general provisions are inherently remedial in nature and markets sometimes require more pro-active effort for desired market behaviour. DSA believes the current approach to silences or omissions remains appropriate and the ACL doesn't need to draw on overseas experience in being extended to non-legislated controls of "unfair" commercial practice. It also considers the existing structure for sanctions is appropriate.

The Australian Consumer Law's specific protections

10. Are the ACL's specific protections working effectively? Do they address the risks of consumer and business harm without imposing disproportionate or unnecessary costs on businesses?

Business needs a regulatory environment encouraging innovation for new and improved products. Specific protections should not be framed to stifle competition, innovation and consumer choice. Above all, they should give clarity and certainty for consumers and business in defining their respective rights and obligations. As shown earlier this has not been achieved in the ACL's purported control of unsolicited selling.

In their setting and application, the unsolicited selling provisions are highly uncertain. Their applicability to individual transactions often turns on a subjective assessment against deference of conventional evidentiary burdens to consumer biased rebuttable presumptions and reverse onus of proof.

It is noted again in most instances it is not a DSA member that contracts with a consumer. It is an independent contractor who re-sells member products as a supplier. Unlike agency selling relationships in these wholesale arrangements members attract no vicarious liability for the actions of their contracted distributors.

In a "people industry" members don't want to risk their reputation, the standing of their products and field security so they invest in distributor compliance through marketing and sales systems and related training. With the relatively small cost of consumer purchases, but nonetheless above the current exemption and their retail orientation, this is clearly a disproportionate and unnecessary business cost.

There are many aspects of the unsolicited consumer agreement provisions that make them anti-competitive, unnecessarily complex and difficult to enforce. They have adversely affected the direct selling industry, particularly for sales under network marketing models that are most affected by their controls. The application of the provisions to transactions not considered store selling doesn't recognise potential consumer detriment in a fair and competitively neutral way across all retailing.

The Issues Paper invites comment on the ACL's control of pyramid schemes and referral selling practices. Direct selling models generally use multi-level reward structures for the marketing and sales of products and services. A key aspect of this is providing financial and other incentives for building and maintaining a sales force of independent contractors. Any cost associated with joining a member represents value and is tied to a business purpose. Rewards are derived from the sale of products in open, informed and competitive markets. DSA is ever conscious of the potential for pyramid schemes to attempt to disguise themselves as legitimate direct selling. That this behaviour is well contained in Australia speaks highly of the state of the ACL's regulation of the practice and its enforcement. DSA considers the ACL's provisions, aided by judicial authority, are effective.

Referral selling too is a pernicious practice where a consumer's motivation for a purchase results from the promotion and expectation of reward from encouraging similar purchases from others. It is not concerned with situations where a purchase is on its own merit, regardless of a consumer also realising some reward for introducing others. DSA considers this distinction can be taken from the ACL's existing language, but accepts the distinction could be made clearer.

11. Are there any changes that could be made to improve their effectiveness, or address any of the issues raised in section 2.3? Are there any gaps that need to be addressed, or overseas models that could provide a useful guide?

The Issues Paper makes clear the unsolicited selling provisions are meant to protect consumers in circumstances (home selling) where they may be subject to **additional** (emphasis added) vulnerability or disadvantage from aggressive or high-pressure selling techniques and information asymmetry. Presumably other vulnerability is addressed through regulation under general principles.

In some circumstances, but not generally, it's arguable this added vulnerability exists in solicited home transactions and for that matter in some transactions conducted from "business premises". DSA notes its own membership requirements do not distinguish between solicited and unsolicited "regulated" selling. Any broader application of the unsolicited selling regulatory rationale to solicited transactions, as well as online transactions, including aspects of the sharing economy necessarily require deference of prescriptive regulatory approaches to a general and interpretative principles approaches.

The Issues Paper canvasses an "opt-in" arrangement within a certain time and without further contact from a supplier, rather than existing "opt-out" arrangements. DSA strongly opposes this. In so doing it draws from all principles supporting effective regulation, but particularly its obvious market distortion and competition issues and clear lack of evidence based support.

DSA prefers an interpretative principle based approach for regulating unsolicited selling. But for specific regulation the New Zealand experience is instructive. Against this and other jurisdictional experience DSA submits in the interests of consumers, business and regulators the underlying policy supporting the following aspects of the ACL's unsolicited selling provisions be revisited

- Definition of unsolicited consumer agreement. DSA argues this should be limited to home, workplace and telephone sales and not to anywhere not regarded as permanent business premises.
- Documentation requirements: These requirements need to acknowledge and facilitate the circumstances of individual transactions in multi-channel and e-commerce supported business models. Existing requirements are framed against dated business models without regard to technology and consumer driven shifts in relatively small transactions.
- Calling hours: DSA understands and supports the underlying privacy objectives in proscribing unsolicited calls. But the unsolicited selling provisions don't achieve the policy. For example, privacy considerations are not realised in sales people attending for introduction or demonstration purposes, or for sales that are either monetarily or otherwise exempted.
- Identification requirements: DSA supports identification requirements but not such that it exposes sales people to privacy risks in disclosing personal home details.
- Cooling-off requirements: DSA supports cooling-off rights, a long standing membership requirement that also covers measures of non-regulated unsolicited selling. The tiered approach in non-compliance sanctions are clearly aimed at high end transactions and disproportionately reach the vast majority in small value direct selling transactions.
- Supply and payment prohibitions in cooling-off periods: The ACL's treatment of unsolicited selling is seemingly drawn from different sources, including European Union experience. It is noted the recent EU Directive on consumer protection does not include the ACL's section 86 policy. New

Zealand also has not adopted this policy. As mentioned earlier prior to the ACL supply was never restricted in Australia and payment was not restricted in Victoria and New South Wales. The review needs to justify continued retention of the section 86 policy against its market impact, particularly as it affects the motivation and earning capacity of micro business distributors.¹⁵

- Reverse onus of proof: DSA believes a reverse onus of proof is inconsistent with the ACL’s highly prescriptive regulation of unsolicited selling. It potentially assists false and vindictive claims.
- Vicarious liability: In agency relationships direct selling companies unquestionably stand behind the actions of their distributors, even though they are independent contractors and not employed by the organisation. DSA believes this same policy should not reach the activities of independent contractors acting in wholesale arrangements.

It is noted in support of the unsolicited selling regulation there is reference to two studies¹⁶ both of which relate to selling practices and products not generally used or marketed by DSA members.

13. Do the ACL product safety provisions respond effectively to new product safety issues, and to the changing needs of business in today’s marketplace?

DSA considers the existing ACL provisions remain appropriate for managing product safety issues.

Other Issues

15. Should the ACL prohibit certain commercial practices or business models that are considered unfair?

DSA notes the Productivity Commission’s comment on generally prohibiting unfair commercial practices as being perhaps more conceptually neat than practically useful. In its understanding it considers overseas experience, including that in the European Union, is adequately covered in the ACL’s existing and extensive consumer protection and fair trading coverage.

Administering and enforcing the Australian Consumer Law

18. Does the ACL promote a proportionate, risk-based approach to enforcement?

As mentioned earlier, DSA is encouraged by the apparent consistency and harmony between jurisdictions in contributing to ACL enforcement, which for the most part has reflected a proportionate and risk based enforcement tone. That said it offers some observations.

It is self-evident business wants clarity and certainty for their commercial dealings. This should come from a variety of sources not least the quality of the policy and its legislative expression but equally its interpretation and enforcement by regulators. DSA accepts much has been done in this last respect, but believes more could and should be done through guidance, particularly for unsolicited selling regulation.

DSA notes it was left to litigation to determine a meaning for Section 75 that so far as DSA can determine was never in the minds of legislators, nor canvassed in any pre or post legislative activity. DSA is also unaware of any comment from regulators that disregarding a “do-not-knock sticker” was thought to be covered by the provision. DSA accepts the commercial sense in respecting an owner or occupier’s request for no cold calling. In the circumstances however it believes proscription of the conduct should have been from enabling or subordinate legislation, not regulator guidance or first instance judicial interpretation.

¹⁵ See DSA’s submission to the Competition Policy Review, June 2014.

¹⁶ Shutting the Gates. An analysis of the psychology of in-home sales of educational software. Deakin University and Consumer Action Law Centre Research, March 2010. Research into the Door-to-Door Sales Industry in Australia. Frost & Sullivan, August 2012.

DSA also notes regulators' use of publicity as a compliance tool. This generally includes media prominence in naming a target, its alleged conduct and desired outcomes. While the litigation process is less promoted favourable decisions are. DSA understands and supports this as a key element of law enforcement strategy. It simply makes the point that in fairness and the broader public interest unsuccessful results should have equal prominence.

The ACL provides a rich suite of options for law enforcement. DSA believes the potential penalties for breach of the unsolicited selling provisions by individuals are too harsh, particularly again in the unsolicited selling context in the inherent risk from its uncertain application. DSA also notes earlier comment on reverse onus of proof, rebuttable presumptions and vicarious liability.

Emerging consumer policy issues

30. Does the ACL adequately address consumer harm from unsolicited sales? Are there areas of the law that need to be amended?

No. See earlier comments.

31. Does the distinction between 'solicited' and 'unsolicited' sales remain valid? Should protections apply to all sales conducted away from business premises, or all sales involving 'pressure selling'?

See earlier comments.

32. Do the unsolicited selling provisions require clarification with regard to sales made away from business premises, for example, 'pop-up' stores?

Applying unsolicited selling requirements to so called "pop-up" stores presents obvious anomalies and risks. Pop-up stores include a myriad of selling situations including stalls or booths at markets, kiosks, school fetes, a non-adjacent presence of an established shopping centre retailers, conferences, tasting and purchase booths at airports, agricultural shows, quite literally non home or workplace "off-business" premises. Whether a transaction is regulated or not depends if negotiations resulting in a sale were initiated by a consumer or trader, the individual or aggregate cost of goods purchased with all the ACL's attendant disclosure, documentation and remedial requirements. For established retailers, transactions in their store are un-regulated, except for sales they make on consignment. From their pop-up store where the sales process is identical their sales could breach ACL requirements.

Analysing consumer protection and fair trading policy issues from pop-up store transactions and the use of online and social media in marketing and selling practices should be instructive for the future regulation of unsolicited selling.

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