Direct Selling Association of Australia Inc

Trade Practices Amendment (Australian Consumer Law) Bill (No.2) 2010

Submission to the Senate Economics Committee Inquiry by the Direct Selling Association of Australia

April 2010

CONTENTS

ABBREVIATIONS

ACL	Trade Practices Amendment (Australian Consumer Law) Bill (No.2) 2010
BRCWG	Business Regulation and Competition Working Group of COAG
COAG	Council of Australian Governments
DSAA	Direct Selling Association of Australia
DSO	Direct Sales Organisation
ISP	Independent Salesperson
MCCA	Ministerial Council on Consumer Affairs
RIS	Regulation Impact Statement
SCOCA	Standing Committee of Officials on Consumer Affairs
TPA	Trade Practices Act 1974

SUMMARY

As the second tranche of the new Australian Consumer Law the Commonwealth Government has introduced the Trade *Practices Amendment (Australian Consumer Law) Bill (No.2.) 2010* into the Parliament. The proposed legislation is being considered by a Senate Inquiry which is expected to report on 21 May 2010. It is intended the new law, with subordinate legislation, be adopted by Commonwealth, State and Territory legislatures to achieve the goal of the Council of Australian Governments that national consumer laws commence on 1 January 2011.

DSAA welcomes and supports national regulation of consumer issues to the extent that it addresses real issues and is premised on a recognition and acceptance of the business and consumer benefits from efficiently functioning markets. This is achieved for most of the proposed law. An obvious exception is in the proposed regulation of unsolicited selling.

DSAA members operate in an established and competitive retail channel. The proposed unsolicited selling provisions will destroy the business models operated by DSAA members. The lives of many Australians involved with the industry will be adversely affected and there will inevitably be unemployment consequences. The effect of the proposals will be to deny consumers choice.

This submission describes the Association, its members and the business models they use in the direct sales retail channel. It shows that the consumer outcomes sought from the unsolicited selling provisions already exist within the professional standards demanded for Association membership, without the unacceptably prescriptive and discriminatory unsolicited selling provisions proposed for the Australian Consumer Law.

The submission is designed to identify issues for the Senate Committee in analysing the application of the proposed provisions to DSAA members and others involved in the direct sales channel. These issues may also have implications for other trade and commerce. The submission particularly raises the development and consultative process and the impact of the proposed unsolicited selling provisions on business and consumers. The inappropriateness of this regulation is demonstrably shown in commentary on the provisions and a number of case studies. The full implications of the proposals will only be evident after they have been assessed against individual circumstances.

DSAA opposes the proposed regulation of unsolicited selling practices.

RECOMMENDATION

DSAA urges the Senate Economics Committee to recommend that so much of the Australian Consumer Law that relates to the regulation of unsolicited consumer agreements be deleted from the ACL and referred to the Ministerial Council on Consumer Affairs (MCCA) for further analysis and consultation. This will allow the remainder of the ACL to take effect as planned on 1 January 2011.

1. DIRECT SELLING ASSOCIATION OF AUSTRALIA

Established in 1967 the Direct Selling Association of Australia (DSAA) is the national trade association and voice of Australia's direct selling industry. With its members, and their commitment to professional standards, the DSAA builds awareness, understanding and credibility for its retail channel with a diverse range of stakeholders. The Association indirectly represents the interests of half a million or more Australians who deal with its members.

DSAA's mission is to –

- Serve and promote the interests of members.
- Protect and promote the direct selling industry, its aims and opportunities within the Australian community.
- Ensure the marketing of products and/or the direct sales opportunity by its members is conducted within the highest level of business ethics and service to consumers.

2. MEMBERS

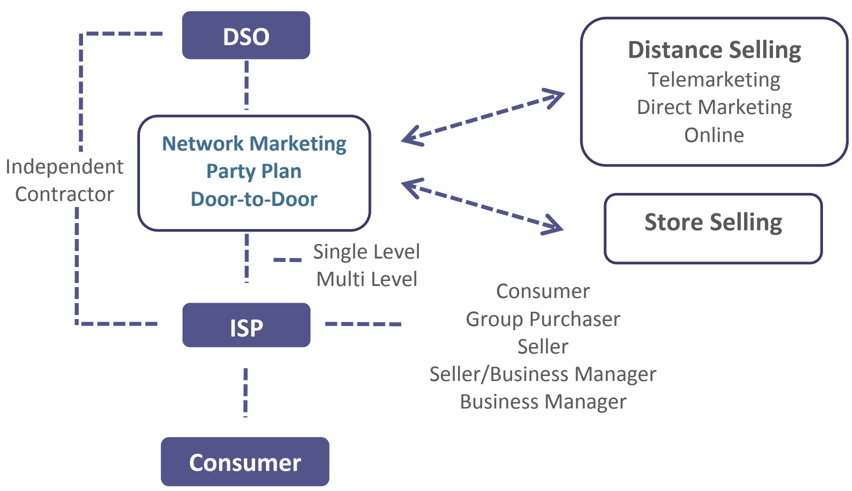
2.1 Profile

DSAA represents major businesses in the direct sales channel and small to medium sized enterprises that have chosen the direct sales channel to bring products to market. The channel offers a point of entry for new suppliers with products that are suited to the relationship management strengths of direct selling, or who are not geared for the cost associated with marketing and distributing products through other retail channels. With annual turnover of less than $5 million more than sixty percent of DSAA members are in this category. The direct sales channel supports an increasing presence of micro business activity. Current DSAA members are shown at Appendix A.

2.2 Business Models

Direct selling in respects is a unique and misunderstood channel for distributing goods and services. In assessing the impact of the proposed regulation of unsolicited consumer agreements on direct selling it is necessary to have an understanding of the business models used by DSAA members and others in the direct sales channel.

As a general proposition DSAA regards direct selling as the supply of a product or service where, regardless of other characteristics, the supply arises or emanates from a relationship that is personally negotiated between an independent sales person and a consumer away from a fixed retail location, commonly in a home or workplace. The supply chain may be illustrated as follows:



The Direct Selling Organisation (DSO) often as a manufacturer and/or importer originates the supply of goods and services. Products are supplied to end consumers through salespeople who are retained by DSOs as independent contractors under agency or reselling arrangements. DSAA members operate almost exclusively under reselling arrangements where the legal title in products vests in an independent salesperson (ISP) for the purposes of their sale to consumers. In these circumstances a DSO is a wholesaler. It is important to note that ISPs as much as they identify with DSOs and their products, and whether large or small are operating independent businesses.

ISPs are rewarded on their individual sales and also against the level of sales generated by their "down lines", that is people they have introduced to the DSO's business and who are also contracted with a DSO as an ISP. Hence business models are described as being either a single level where reward derives from personal sales only, or multilevel where an ISP is also or exclusively rewarded for the management and training in a team leader context of other ISPs in the down line who generate sales of the DSOs products. Critically all reward relates to the genuine economic activity associated with the sale and consumption of products, not of itself the act of introducing new ISPs to the business.

New and emerging models challenge the common understanding of direct selling as the sale of products in a home or workplace. The industry's traditional elements – network marketing, party plan, and door-to-door selling – remain, but drivers such as technology and consumer demand, and competitive forces generally, are encouraging convergence of these elements with other retail models, particularly elements of distance and store selling.

Network marketing describes a process in which ISPs establish and maintain relationships that may result in the sale of products. It is impossible to define all the circumstances in which these relationships are established beyond saying they are not confined to a home or workplace. Establishing relationships and providing a foundation for future sales could even be made from retail premises. Introductions may be solicited or unsolicited.

Party plan is a better known direct selling model. Typically prospective purchasers are invited to a home or other setting, generally by a host (who is not the ISP) where products are demonstrated and possibly sold in a group dynamic. There are now many models with creative and experiential variations on the party plan theme. Parties are used to generate sales and like network marketing, recruitment to the industry. It is not uncommon for demonstrations to encourage subsequent online ordering of products.

Doorstop selling is the model most directly identified with door-to-door trading – generally cold canvassers doorknocking with any number of product options. It is the vulnerability of some consumers in their home and workplace that has been the catalyst, globally, for long standing regulation of this method of selling. While it obviously exists, there is scarcely mention of comparable consumer vulnerability in transactions conducted in bricks and mortar and other retail settings.

In doorstop selling the focus is on selling products with little, if any, recruitment activity. Somewhat ironically for an organisation often characterised as representing door-to-door sellers only one DSAA member is engaged in cold canvassing and this activity is only a small part of its business. The closest other members come to this notion of unsolicited selling is leaving product catalogues at premises with sales generated by consumer orders. Physical contact between an ISP and a consumer usually occurs for the first time when a product is delivered.

It is common for DSOs to use more than one of these methods in their business models, for example door-to-door or party plan selling supporting subsequent network marketing. It is noted that DSAA members and their ISPs in supplying their products are early and high adopters of technology, particularly social media.

ISPs too are not easily categorised. All are engaged to distribute DSO products as independent contractors but their motivation for industry involvement often differs. For some it is simply a business relationship to acquire products at wholesale prices for themselves, or perhaps also family and friends. Some become an ISP to only sell products. Others sell products and recruit and manage a down line, while some ISPs are solely business builders with their income tied entirely to the sales performance of their down lines. The vast majority of ISPs are operating micro businesses with reward obviously commensurate with effort.

DSAA members do not employ ISPs in distributing their products. In form and substance their business models are predicated on independent contracting arrangements with their ISPs. For present purposes it is instructive to note that DSOs have no direction, control or supervision of ISPs beyond contractual requirements and these are generally limited to issues such as quality assurance, intellectual property, and issues of brand and reputation. Despite this DSOs provide considerable assistance with the logistics of conducting a direct selling business, particularly the recording of transactions and delivery of products. For example, DSOs commonly provide ISPs with the documentation required for evidencing a transaction, and ISPs are able to conclude online ordering through systems developed and managed by DSOs. Delivery of products by the DSO can be to the ISP or direct o the consumer.

2.3 Market Indicators

Appendix B gives an indication of the range of products offered by DSAA members. The direct sales channel is prominent in the supply of cosmetics and has a growing presence in complementary healthcare products. Members report annual retail sales of $1.2 billion, although this is thought to be conservative. DSAA is unaware of any statistics that show the total size of the industry, particularly the incidence of doorstop selling.

While the number of ISPs varies with seasonal factors it is not uncommon for half a million Australians to be associated with our members. DSAA members are estimated to be involved in at least 750,000 transactions each month. Research suggests that eighty percent of ISPs are women and that about seventy percent earn less than $10,000 per annum from direct selling activity.

2.4 Professional Standards

DSAA has strict standards for membership. Relevantly its Code of Practice offers appropriate levels of consumer protection through requirements for selling methods, sales documentation, calling hours and cooling-off rights. Members also offer generous product guarantees.

3. SUBMISSIONS

3.1 Australian Consumer Law

DSAA generally supports the Australian Consumer Law (ACL) and views it as a commendable achievement against Australia's record of managing consumer issues through its federated structure. Adopting and enhancing Trade Practices Act (TPA) provisions in all Australian jurisdictions has obvious benefits for business and consumers alike.

This cannot be said for the proposed regulation, against so called best practice standards, of commonly termed door-to-door selling. The concept of "unsolicited consumer agreements" and the manner of their intended regulation will address some, but not all, the excesses recorded in complaints about door-to-door selling. But applying the regulation to the supply of all goods and services negotiated away from a supplier's business or trade premises will present insurmountable difficulties for the direct selling industry and possibly other sectors.

Against the generic regulation elsewhere in the ACL which provides business with the flexibility to accommodate its principles in their business operations, the unsolicited selling provisions forsake a principles based approach in maintaining the questionable command and control regulatory mindset of past decades. Government, business and consumers are all losers in this approach. What should be concerning for the Australian community is that these proposed measures have the apparent approval of all governments throughout Australia, measures introduced without adequate, if any, analysis of their impact on properly functioning markets.

In contrast to the proposed unsolicited selling provisions DSAA's globally inspired and locally adapted membership standards give business the flexibility it needs in assuring balanced and certain consumer protection outcomes.

DSAA opposes the proposed regulation of unsolicited selling practices and seeks clarification on the rewriting of provisions to regulate pyramid selling schemes.

For reasons that will be obvious in reading this submission DSAA urges the Senate Economics Committee to recommend that so much of the ACL that relates to the regulation of unsolicited consumer agreements be deleted from the ACL and referred to the Ministerial Council on Consumer Affairs (MCCA) for further analysis and consultation. This will allow the remainder of the ACL to take effect as planned on 1 January 2011.

3.2 Pyramid Selling

DSAA welcomes this renewed attempt to harmonise the regulation of this pernicious practice, particularly in so far as scheme promoters attempt disguise as legitimate direct selling businesses.

The ACL prohibits anyone from participating or inducing or attempting to induce anyone to participate in a pyramid scheme. The Explanatory Memorandum (6.46, page 84) notes that the MCCA resolved that the existing pyramid scheme provisions be retained in the ACL, with some minor changes to clarify the operations of the provisions.

The pyramid selling provisions in the ACL differ in respects from the current provisions in the TPA for no obvious purpose. The TPA provisions have had significant judicial analysis, including consideration by the High Court, and are now well understood. The drafting change serves no apparent purpose and re-introduces uncertainty to these complex provisions.

Under the TPA (section 65AAE) a court has discretion in whether it will consider the extent to which a participation payment bears a reasonable relationship to the value of goods or services supplied under a scheme. This discretion is removed in the ACL. Clause 46(1) makes it mandatory for a court to consider if the participation payment has that relationship. DSAA seeks clarification on this substantive change.

3.3 Unsolicited Consumer Agreements

This section provides general commentary on the proposed regulation of unsolicited selling. It is complemented with case studies at Appendix C.

3.3.1 Development and Consultative Process

The Explanatory Memorandum gives a thorough analysis of the process that has lead to this second tranche of the Australian Consumer Law being introduced into the Australian Parliament and referred for investigation and report by the Senate Economics Committee. The underlying imperative seems to be the timeline set by the Council of Australian Governments (COAG) which requires the new law to commence on 1 January 2011. For the unsolicited selling provisions DSAA considers this an unreasonable and unachievable deadline.

The Regulation Impact Statement (RIS) (at page 455) says that the COAG decision to establish a national consumer law to include reforms based on best practice in existing State and Territory consumer laws was based on “detailed reform proposals” developed by the MCCA and agreed by a COAG working group, the Business Regulation and Competition Working Group (BRCWG). DSAA asks whether the BRCWG analysed the proposed unsolicited selling provisions, and if it did, the basis of its satisfaction that the proposals met its objectives, particularly accelerating and broadening the regulation reduction agenda to reduce the regulatory burden on business. It also questions how the unsolicited selling proposals sit with the MCCA’s operational policy objective of proportionate, risk based enforcement.

It is said (at page 456) that in considering the proposals set out in the RIS the practical experience of State and Territory agencies in developing, administering and enforcing State and Territory consumer laws was integral to the analysis of options. Also where relevant, previous consultation on, or reviews of existing State and Territory provisions are said to have been taken into account.

DSAA makes the point that reference to regulating unsolicited selling in material released as recently as November 2009 (the draft Regulation Impact Statement) had not defined the impact of the proposals on business and that the RIS process would have benefited enormously had business been able to respond to what is now proposed in the unsolicited selling provisions. DSAA submits it is grossly unfair that the implications of these proposals for genuine direct selling activity must be examined and determined by 21 May 2010 and against the broader coverage of the ACL. This submission records our present analysis but further issues are likely to emerge as its effect is considered by members.

DSAA submits the cost to its members and the users of their products clearly outweighs any consumer benefit from the highly prescriptive approach taken in the proposed unsolicited selling provisions. This highlights inadequacy in the Regulation Impact Statement. DSAA’s in principle support for Option C in the draft Regulation Impact Statement cannot be construed as any support for the unsolicited selling provisions in the ACL. For reference a copy of DSAA’s submission on the draft Regulation Impact Statement released in November 2009 is attached as Appendix D.

3.3.2 Impact on Business

The proposed law will have a devastating effect on DSAA members. Prohibitions on supply and payment within excessive cooling off periods will mean larger businesses will not be able to sustain the models they have invested heavily in to improve their competitiveness with retail outlets. Smaller businesses will be denied the cash flow needed to establish and grow profitable businesses. The provisions will result in business closures and consequent unemployment.

Prohibition of supply and payment is not the only issue. The highly prescriptive nature of the unsolicited selling provisions, the extraordinary uncertainty they bring to established operations and the associated risk are unacceptable for legitimate retail alternatives that range from micro businesses to listed entities.

The new provisions come at significant cost. A good example is in the documentation requirements. DSAA members are estimated to have at least three quarters of a million transactions monthly, with minimal exercise of cooling off rights. Consumers are currently informed of their cooling off rights in the sales agreement. The new provisions will require our members' customers to be handed another one and a half million pieces of paper each month. Members or their ISPs will be required to give their customers an agreement, a notice informing them of their cooling off rights and another document (which doesn't have to be used) for exercising their cooling off rights. In a comparable store sale all the customer would get is a printed receipt.

It follows the provisions will be a disincentive for new market entrants, particularly young businesses with innovative products, but without the marketing and logistics capacity for a traditional retail presence. It is inconceivable the effect of these provisions on existing and emerging businesses is intended.

3.3.3 Impact on Consumers

The unsolicited selling provisions will deny consumers choice and convenience. An issue for the direct sales channel is delivery times. In retail outlets consumers make a purchasing decision and ordinarily take the product with them on purchase. With the exception of those who have an element of store selling in their models direct selling companies cannot replicate this. But this is changing. Online ordering and improved warehousing and distribution systems have dramatically altered these times. For consumables, say cosmetics, direct selling now offers competitive delivery and the product knowledge, trust and convenience not necessarily associated with other retail purchases. Under the proposed provisions consumers are effectively denied delivery of their purchases for at least fourteen days.

3.3.4 Education & Training

DSAA believes its members can be aware and compliant with other requirements of the ACL by the beginning of next year. The same cannot be said for the unsolicited selling provisions. Assume for the moment the provisions pass their present form and that industry was able to meet their requirements (which it can't), the ACL must be adopted by all State and Territory governments. Within sovereign parliamentary structures they must also ensure there is no inconsistency from existing regulation. At the same time there is the need for all jurisdictions to settle many operational issues foreshadowed for subordinate legislation.

This task looks impossible before January 2011. Against this uncertainty DSAA members would need to revise risk management strategies, re-engineer systems, make significant changes to their documentation requiring considerable legal analysis and advice, and then train salespeople. As mentioned earlier members rely on independent contracting arrangements for the distribution of their products, resellers who number up to half a million people. With significant entry and exit numbers the education and training reach will be higher.

3.3.5 Compliance

DSAA submits that given the breadth and uncertainty of the unsolicited selling proposals authorities should expect the new provisions to be honoured as much in breach as observance. For DSAA member transactions at least half a million people, and more, will need to be educated, trained and (with supplier liability) monitored in how they interpret and conduct transactions against highly prescriptive and uncertain regulatory requirements, and requirements with civil and criminal sanctions for non compliance. The unfairness of the proposals and cost to business, consumers, government and the community more generally in administering the proposed provisions in untouched in the RIS.

What also needs to be questioned is the level of compliance that can be expected from many of the suppliers who engage in the mischief underpinning the proposals. Fly by night and recalcitrant operators in whatever field are unlikely to observe the new provisions.

This must all be considered within the remit of agencies that are increasingly under the pressures of increasing expectation and shrinking budgets. DSAA believes that a principles based approach will do much more to encourage a compliance culture. It would allow the real concern in this small transaction base to be targeted for compliance with the enforcement of broader consumer protection measures.

3.3.6 Competitive Neutrality

The rationale for the proposed regulation lies in the consumer vulnerability mentioned in the RIS (at page 468). DSAA accepts this vulnerability exists. It also submits this vulnerability in relative terms is small and can be addressed by better targeting other provisions of the ACL. The RIS mentions complaints and enquiry experience at fair trading agency level. There is no analysis of the nature of these complaints or resolution outcomes, nor is there any analysis of the inquiries made to these bodies. It is also noted that complaints about DSAA members to the Association, and so far as DSAA is aware regulatory authorities, are negligible. The reasons for this could lie in the standards expected of members in the DSAA's Code of Practice. Perhaps equally it is the business sense of consumer care and protection in a relationship built retail sector.

It may be that information asymmetry and unfair conduct concerns also exist in purchases from retail outlets. An obvious flaw in the approach being taken with the unsolicited selling provisions is the assumption that every consumer transaction that is conducted away from a fixed retail location exposes consumers to this vulnerability. The proposed provisions give retail outlets a massive competitive advantage over direct sellers in retailing products that are comparable in price and quality.

4. COMMENT ON UNSOLICITED SELLING PROVISIONS

This section offers comment on policy and drafting issues that have been identified in the short time available to examine the ACL. DSAA expects further issues will come to light as members assess the implications of the ACL and particularly the unsolicited selling provisions for their individual businesses.

4.1 Meaning of Unsolicited Consumer Agreement

Unsolicited selling is defined by reference to an "unsolicited consumer agreement" (cl 69). The term has four elements each of which in interpretation and application is problematic.

A DSAA member sells a product to a person under an independent contracting arrangement for resupply. The motivation of the person is to acquire the product for personal use at a wholesale price. Despite the form of the agreement would this be treated within cl 69(1)(a) as the supply of goods to a consumer?

The agreement must result from negotiations between a dealer and a consumer in each other's presence at a place that is not the supplier's business or trade premises, or by telephone (cl 69(1)(b)). Is this a physical presence, or could it be construed as applying to transactions conducted in real time online? And if it isn't a regulated presence and consumer vulnerability is said to exist in telephone discussions why wouldn't it also exist with other interactive technologies? Also, what is meant by the term "business or trade premises"?

A consumer must not have invited the supplier to open the negotiations that lead to the supply of goods or services (cl 69(1)(c). This is obviously essential to the definition but as the case studies show it can have perverse consequences. This definition provides little certainty for determining unsolicited approaches.

Monetary limits for an exemption are always arbitrary, but $100 is unrealistic for many transactions. The drafting approach produces the anomaly that if a sale is $99 it is exempted, but if the price of the product had to be determined but would certainly be between $70 - $90, this sale is regulated.

An invitation to quote a price is not to be taken as a solicited request to enter an agreement. Consider a consumer having thoroughly researched a proposed purchase asks a number of suppliers to visit a home for discussion and quotes. If the consumer makes a decision to purchase the product or service, the supplier would need to have the consumer visit its business premises to be assured of the sale, particularly where the goods or services are unique to the consumer's circumstances. Otherwise the unsolicited selling provisions would apply. And what is to say that any consumer vulnerability ceases on entering the supplier's premises?

4.2 Presumption that agreements are unsolicited agreements

DSAA submits that the commercial and practical effect of making it a rebuttable presumption that an agreement is an unsolicited consumer agreement will be to make many non regulated agreements, regulated.

4.3 Permitted hours

DSAA notes that permitted calling hours under the Do Not Call Register legislation are between 9 am and 8 pm, Monday to Friday. Although not preventing telemarketing calls the unsolicited selling provisions would preclude a sale being made, even if the consumer consents, after 6 pm. DSAA also questions the rationale for limiting calls to 5 pm on Saturdays.

4.4 Disclosing purpose and identity

Clause 74 requires dealers to provide identity and disclose that the purpose of a call is to supply goods or services. While there is merit in one off calls this is a ridiculous proposition for renewed calls or established relationships which are inadvertently caught by the unsolicited selling provisions. Regulation of cold canvassing has traditionally been limited to home or workplace selling. Curiously subclause (b) in its reference to "premises" may limit the application to this disclosure requirement to all non-store activity.

Two further points. What is intended by the use of the words "or for an incidental or related purpose"? In the context of DSAA members could this be literally applied to negotiations to become an independent sales person? It seems the provision is intended to have broader application than any possible reference to clause 83. And what information relating to identity is intended to be prescribed by regulation?

4.5 Ceasing to negotiate on request

Clause 75 allows a consumer to terminate a cold call. Again the use of the term "premises" seems to limit the regulation to its traditional meaning. The provisions codify the law of trespass with respect to an occupier's request for a dealer to leave the premises. But this does not prevent the supplier re-contacting the prospective consumer within thirty days, nor even if asked to leave by the prospective consumer, the same dealer can approach the prospective consumer within thirty days about another product. This is curious policy against a rationale of consumer vulnerability. It is also unclear what is intended by subclause (3)(a). Presumably it is directed to employment relationships where the dealer is the supplier's agent. If it does it exposes the supplier to strict liability for a potentially unknown offence.

4.6 Informing termination period

A dealer must give information to a consumer of the right to terminate the agreement and how it may be terminated in writing before the agreement is made. For telephone agreements the information must be verbally given and followed by written information This needs to be considered with clause 79 which regulates the form of agreements. It is unclear if separate documents are required or if the requirements of clause 76 may be incorporated into the agreement.

4.7 Supplier liability

Vicarious liability exists with suppliers for certain acts of intermediaries in a regulated transaction. While there may be merit for this in employment relationships its application to independent contracting arrangements is problematic. Any attempt to secure the regulatory objectives could be construed as a supplier exercising the degree of control necessary at common law to establish an employment relationship with consequences for both the supplier and the independent contractor. As a matter of public policy it is unacceptable that transactional regulation affects, or potentially affects, commercial relationships.

4.8 Requirement to give document to consumer

Where an agreement is physically negotiated a consumer must be given a copy of the agreement immediately after it is signed. If the sale is concluded by telephone the consumer must be given a document evidencing the agreement within five days. An obvious question is why in the physically negotiated agreement the consumer is required to sign the agreement.

4.9 Requirements for unsolicited agreements

The agreement or document evidencing the agreement must comply with the requirements of clause 79. Both must set out the "full terms" of the agreement. This is not defined and taken literally could require the incorporation into the agreement of all the express terms and implied terms, for example the new guarantees under the ACL. The front page of either document must conspicuously and prominently inform the consumer of the consumer's right to terminate the agreement. More information is clearly anticipated through subordinate legislation. The consumer must also be given a document but doesn't have to use it to terminate the agreement.

The agreement or document evidencing the agreement must also contain details of the supplier, which is not dissimilar to requirements for other retail transactions. But unlike retail situations the supplier can also be required to supply a residential address. It is again noted that in direct selling models, the supplier is usually the ISP. The privacy and potential security concerns around a requirement to provide a residential address should be obvious. Equally if an ISP was acting under an agency arrangement, clause 80, residency may also have to be disclosed even though the consumer has details of the supplier. These requirements need to be considered in the context of the purchase of an identical or comparable product from a retail outlet, particularly residency disclosure by front line staff.

It is also unclear what is sought by the use of the word "transparent" in clause 79(f).

4.10 Terminating agreements

A consumer may exercise cooling off rights within one of three periods – ten days, three months or six months. If the transaction has been conducted in accordance with the unsolicited selling provisions the period is ten clear business days. Although the provisions anticipate business being conducted on a Saturday it is not included as a business day. This means that a consumer has at least 14 elapsed days (for telephone agreements possibly 19 days) to cancel an agreement. Despite the reliance on documentation throughout the provisions, a consumer may orally exercise cooling off rights and the right can be exercised even if an agreement is fully executed. The evidentiary burden for establishing the exercise of the cooling off rights will shift to the supplier immediately the consumer claims to have orally cancelled the agreement. The potential for concluded arrangements to be upset after the cooling off period are obvious, and there will be a point at which suppliers will compromise on commercial and practical considerations.

If nominated provisions have not been observed cooling off rights are extended for three, possibly six months. Just how these provisions are activated is not clear, but presumably it is not anticipated to follow a conviction for a breach of a relevant provision.

4.11 Effect of termination

If an unsolicited consumer agreement is terminated by a consumer the agreement is taken to have been rescinded by mutual consent. This has effect even if the supplier has not received the notice of termination and even if the goods have been wholly or partly consumed or used. Suppliers are under an obligation to refund any moneys paid to the consumer. Consumers may elect to return the goods, or nominate a place where they can be collected. If not collected within thirty days they become the consumer's property.

4.12 Prohibition on supplies

If the agreement is an unsolicited consumer agreement a supplier is unable to supply goods to the consumer for at least ten clear business days after the purchase.

APPENDIX A

DSAA MEMBERS

4 Life Research Pty Ltd
A Better Chance
ACN Pacific Pty Ltd
AGEL Australia Pty Ltd
Amway of Australia
Arbonne Australia Pty Ltd
Atise Pty Ltd
Avon Products Pty Ltd
Become International Pty Ltd
Bessemer Sales
Bevilles Party Plan Pty Ltd
Creative Memories Australia Pty Ltd
CResults Australia Pty Ltd
CT Healthcare Pty Ltd
Digital Crown Holdings Pte Ltd
Do You Have a Card
Dominant Homecare Products
Eco-Flow PLC
Emma Page Pty Ltd
Enjo Pty Ltd
Envy Jewellery Pty Ltd
Essential Additions
Esteem Jewellery
Fifth Avenue Collection Pty Ltd
Foodie Parties
FreeLife International Australia Pty Ltd
Furlong Wines
GNLD International Pty Ltd
Herbalife Australasia Pty Ltd
Homecare Direct Shopping Pty Ltd
Intimo Lingerie Pty Ltd
Isagenix (Asia/Pacific) Australia Pty Ltd
Kampai Pty Ltd
Kaszazz Pty Ltd
Life Force Australasia Pty Ltd
Le Reve Pty Ltd
Lorraine Lea Linen
Mannatech Swiss International
Mary Kay Cosmetics Pty Ltd
Nature's Sunshine Products of Australia Pty Ltd
New Image International
Nikken Wellness Pty Ltd
Norwex Australia Pty Ltd
NSA (Australia) Pty Ltd
Nu Skin
Nutrimetics Australia Pty Ltd
PartyLite Pty Ltd
Pash Australia Pty Ltd
Penny Miller Pty Ltd
Phoenix Trading (Aust) Pty Ltd
Postie Fashions Pty Ltd
Pro-Ma Systems (Aust) Pty Ltd
Reliv Australia Pty Ltd
Sunrider Australia
Swipe Australia Pty Ltd
Swiss Clinical Australia Pty Ltd
Synergy WorldWide Australia Pty Ltd
Tahitian Noni International
The Body Shop At Home
The Chef's Toolbox Pty Ltd
The Commonwealth Key & Property Register
The Learning Ladder Pty Ltd
Thermomix in Australia
Tupperware Australia & New Zealand Pty Ltd
UnderCoverWear Ltd
USANA Australia Pty Ltd
Wicked Wix
Youngevity Australia

APPENDIX B

PRODUCTS

Products supplied by DSAA Members include:

Arts and Crafts Products
BioEnergetics
Candles and associated items
Car care products and lubricants
CDs, DVDs, training aids and inspirational/motivational/personal growth books
Clothing, intimate apparel and underfashions
Cookware and household electrical appliances
Cosmetics, personal care and skin care
Electrical goods and household accessories
Essential oils, aromatherapy and associated accessories
Formulated Supplementary Sports Food
Greeting Cards, wrapping paper and associated items
Health foods, nutritional supplements and sports drinks
Home mortgage and insurance products
Home wares and soft furnishings
Household cleaning products and cleaning aids
Jewellery, handbags and fashion accessories
Key Labels, key register systems and Personal Photographic I.D cards (keypass)
Kitchenware, tableware, food storage systems and cutlery
Linen and manchester
Manufacturing (Dry Products), pharmaceutical, health foods, nutritional supplements, sports Drink and cosmetics
Microfibre cleaning products
Non perishable food and condiments
Perfumes
Personal colour and image products
Pet care
Photo safe albums and supplies
Security systems
Telecommunications
Therapeutic massage equipment
Toys, books and educational materials
Water filters and air purification systems (Personal, Domestic and Commercial)
Weight loss and management products
Wines

APPENDIX C

CASE STUDIES

Case Study 1

Bill is a reseller of a Direct Selling Organisation's (DSO) complementary healthcare products. Bill hears from a friend that Adam is interested in the products and business opportunity. Bill meets Adam at a football game and introduces himself. Bill explains the benefits of the products and how selling the products and recruiting others to sell products could provide Adam with additional income. Adam later invites Bill to his home the following Sunday to further discuss the business opportunity. When they meet Adam agrees to join the DSO as an reseller, agrees to purchase $120 worth of DSOs products, and also products from another DSO that Bill represents for $99.

Analysis

As a reseller Bill will have anywhere between an occasional and full time commitment to direct selling. So too, the business sophistication in resellers varies enormously. As a reseller and not an agent of DSO Bill is the person primarily covered by the ACL, particularly the provisions dealing with unsolicited consumer agreements.

Is the sale of products associated with Adam becoming a reseller covered by the ACL? Clearly it is an <u>agreement</u>, in <u>trade or commerce</u> for the <u>supply</u> of <u>goods</u> to a <u>consumer</u>. The agreement resulted from <u>negotiations</u> between Bill (a dealer) and Adam (a consumer) <u>in each other's presence</u> . The subsequent invitation from Adam was to discuss the business opportunity and the earlier discussions about the products are irrelevant. Adam's invitation was not expressly for the purposes of entering into negotiations relating to the supply of either DSOs products. [the emphasised terms are defined in the ACL].

The supply of products therefore meets three of the four tests in determining whether the transaction is regulated as an unsolicited consumer agreement. The last test is the monetary value of the transactions. If the transaction cost associated with the business opportunity discussion is $120, the agreement is covered. The sale of products of the other DSO are $99 and not covered

Applying the unsolicited selling provisions to this example:

- In a reversal of the onus of proof there is a rebuttable presumption that the agreement is regulated (ACL c.70). Bill has to prove it isn't regulated.

- Bill has breached the calling hour provisions and faces serious penalties because Adam's consent for Bill to attend his home on a Sunday was limited to discussing the business opportunity, not the sale of products (ACL cl.73).

- Bill is required to <u>clearly</u> [this term is not defined] advise Adam of the purpose of the discussion, advise Adam that he (Bill) must leave <u>the premises</u> [it is unclear what this means against the intended coverage of all transactions away from Bill's business or trade premises] at Adam's request, and Bill must provide (yet to be prescribed) information about his identity (ACL c.74). This would presumably be required for both Bill's meetings at the football and Adam's home. It is noted the Explanatory Memorandum offers no guidance for interpreting the words "or for an incidental or related purpose" in clause 74.

- If Adam had requested, Bill would have had to leave the premises [football grandstand]. After that Bill could not contact Adam for at least 30 days about the sale of the products and possibly the related business opportunity. However Bill is not prevented from contacting Adam in this period about other DSO's products. If Bill was not a reseller, but acting as an agent of the DSO, this requirement, with its pecuniary penalties, would apply to the DSO even if the DSO has no knowledge of Adam's request. (ACL c.75)

- Before selling Adam the products valued at $120 Bill must –
  - Inform Adam of his right to terminate the agreement within the termination period [ten clear business days, and possibly three months or six months].
  - Inform Adam of how he can exercise this cooling-off right.
  - Inform Adam of other matters to be prescribed.
  - Give this information to Adam in writing.
  - Ensure the form and how it is given complies with requirements to be prescribed. (ACL cl 76)

- If within their independent contracting arrangements Bill was not a reseller, but acting as an agent of the DSO, the DSO is also strictly liable for any failure by Bill to observe calling hours, purpose and identity disclosure requirements, failing to observe a request to leave premises, and failing to inform Adam of termination rights, even though the DSO had little if any control over Bill's actions.

- Bill must give Adam a copy of the sale agreement immediately after it is signed by Adam. Bill must also sign the agreement. (ACL cl 78)

- Bill must ensure the agreement–
  - Sets out in full all the terms [it is unclear whether this also includes terms implied by law] of the agreement, including total consideration payable, post or delivery charges.
  - Displays the right to terminate the agreement, and any other prescribed information conspicuously and prominently on the front page of the agreement.
  - Is accompanied by a notice in any prescribed form, that Adam may, but doesn't have to, use to terminate the agreement.
  - Sets out Bill's name in full, any ABN or ACN , Bill's business address or if he doesn't have a business address his residential address [with related privacy and security issues particularly in a female dominant retail channel].
  - Includes any email account or fax number that Bill may have.
  - Is printed clearly or typewritten, and is
  - Transparent [undefined in the ACL].

  If Bill was acting under an agency arrangement with DSO, he would also have to disclose his personal information to Adam.

- Within ten clear business days [potentially 14 elapsed days because Saturday is excluded as a business day although the ACL recognises business being transacted on Saturdays) Adam can terminate the agreement by oral [raising obvious evidentiary issues and contrary to the certainty sought elsewhere in the provisions] or written notice. This right exists even if the agreement is fully executed, that is products are delivered and paid for. (ACL cl.82)

- If ISP has breached the calling hours, purpose and identity disclosure, or ceasing to negotiate requirements the cooling off period is extended to 3 months, and 6 months if Bill has breached documentation and notice requirements, or has delivered the products within the ten day cooling off period [it is unclear how these breaches need to be established for the purposes of the ACL].

- If Adam exercises his cooling off rights within ten business days and regardless of whether Bill is informed
  - the agreement is deemed rescinded by mutual consent and any related contract is void [it is not clear what is intended to be covered by this provision]. This is so even if Adam has partly or totally consumed the products. (ACL cl.83)
  - Bill must refund any payment in full.
  - Adam must make available for collection by Bill products that have not been consumed.
  - Bill forfeits the goods to Adam if Adam tells Bill he wants them collected and they are not collected within thirty days.

- If Adam exercises his cooling off rights within the three or six months timeframes and regardless of whether Bill is informed:
  - the agreement is deemed rescinded by mutual consent and any related contract is void [it is not clear what is intended to be covered by this provision].
  - Bill must refund his payment in full.
  - Adam is liable to pay compensation to Bill for any damage or depreciation of the products, not being damage or depreciation attributable to normal use of the products or circumstances beyond Adam's control. Adam may therefore continue to use the products while they are in his possession.

- Bill cannot supply the products or require or accept any payment for the products within the cooling off period. (ACL cl.86)

- Adam and Bill are not allowed to modify or exclude the provisions of the ACL from their arrangements.

<u>Case Study 2</u>

Carol promotes and sells cosmetic products as an agent of a DSO at home parties. She is also a reseller of lingerie products for another DSO.

At Carol's invitation Homeowner Alice invites eight women she knows to her home for a demonstration of a new range of cosmetics. Six attend and another woman arrives unannounced. After the demonstration all agree the products and pricing compare favourably with cosmetics offered in retail stores.

Barbara decides to become a cosmetics DSO agent and purchases a start up kit that includes a range of products at discounted prices.

Cathy orders and pays $98 to Carol for products for her personal use.

Elaine orders and pays Carol $101 for cosmetics she purchases for gifts.

Fay's purchase is $150 and she orders her products from DSO using Alice's computer.

Gail expresses interest in the products but decides not to purchase anything at the demonstration. Carol later telephones Gail to ask if she is still interested and Gail says she had already decided to order products valued at $101.

Heather, the uninvited attendee, didn't purchase any cosmetics but decided to purchase a lingerie product which Carol had discussed with her privately after the cosmetics demonstration had ended. She paid $120 for and received the product at the event, but decided to return it after wearing and damaging the garment.

Analysis

The transactions with Elaine, Fay, Gail and Heather are clearly regulated as unsolicited consumer agreements under the ACL. Each is for the supply in trade or commerce of goods to a consumer. They each resulted from negotiations conducted physically with Carol (for Gail, the negotiation was finalised by telephone). Carol was not invited by these consumers; she was invited by Alice who in turn invited all but Heather. And finally, the price for the goods purchased exceeded $100.

The transaction with Cathy is not regulated because it was only $98, but the transaction with Fay is regulated because the negotiations took place at Alice's home, even though the online acceptance of Fay's offer was made at DSO's business or trade premises.

The transaction with Barbara is not regulated because it purported to be a decision to become an agent of the cosmetics DSO and all that was purchased was a kit for demonstrating products at other parties. At face value the kit or goods were not acquired for personal, domestic or household use or consumption, although Barbara had no intention of becoming involved with DSO's business and simply bought the heavily discounted kit for personal use.

The impact of the ACL on regulated agreements in Case Study 1 is equally relevant to these regulated transactions. Specifically noted in respect of the transactions with Elaine, Fay, Gail and Heather–

- Product demonstrations can only be held Monday to Friday between 9 am and 6 pm, Saturday between 9 am and 5 pm, and not at all on Sundays or public holidays [even though the invitees would have been prepared to attend on Sunday, a public holiday or after hours].
- Carol must disclose the purpose of the negotiations and her identity
- Carol must leave Alice's premises if requested by just one consumer, say Fay.
- Carol cannot contact Fay again for thirty days concerning cosmetics but may contact her about lingerie products. DSO is also vicariously liable if Carol contacts Fay.
- DSO is also liable for other contraventions by Carol.
- Carol cannot accept payment for goods at the demonstration.
- DSO cannot supply cosmetics during the cooling off period
- Heather is effectively able to retain her product without payment simply by orally, or claiming to have orally, exercised her cooling off rights.

<u>Case Study 3</u>

David is a reseller with a DSO offering homecare products. He leaves catalogues at residential and work premises. David leaves a catalogue at Sue's home and returns some time later to find that she had completed an order form for a product valued at $200. When filling the order David discovers, and telephones Sue to inform her that a new and improved product will be available the following week at the same price. Sue asks David to substitute the new product in the order form and David later delivers the product to Sue and collects payment.

On that same round David was about to leave a catalogue at Bob's front door when it opened. He physically handed the catalogue to Bob and spoke briefly to him about the catalogue and products offered. Bob later purchased products valued at $150 by leaving his order to be collected at the front door. Bob discussed the products with his next door neighbour Colin, who made an identical purchase by leaving his order to be collected with Bob's.

Analysis

Sue's completion of the order is not solicited, and is therefore not regulated as an unsolicited consumer agreement in the ACL. Clearly it is an agreement for the supply, in trade or commerce, of goods to a consumer, Sue didn't invite David to leave the catalogue at her home and the value of the transaction exceeds $100, but the agreement was not negotiated between David and Sue in each other's presence. In telephoning Sue and substituting the new product the agreement becomes an unsolicited consumer agreement and regulated by the ACL regardless of the earlier negotiations and order.

Colin's transaction is not regulated. While other factors for making it an unsolicited consumer agreement may be present the agreement was not negotiated between David and Colin in each other's presence. However, this physical presence exists in negotiations that preceded Bob's order and it is therefore regulated.

The impact of the ACL on regulated agreements in Case Study 1 is equally relevant to these regulated transactions. It is noted in respect of these transactions:

- Sue's transaction has moved from an unregulated to regulated transaction even though there was no detriment to Sue.
- If Sue's transaction had been for $75 and not $200, it would not have been regulated.

- Bob's transaction is regulated. The chance physical contact between David and Bob prevented the completion of the transaction in the form anticipated within this business model.
- Colin's transaction, identical to Bob's except for the non physical interaction, is not regulated.

<u>Case Study 4</u>

Charlie has customers who regularly use DSO's nutritional supplements. Andrew usually contacts Charlie and purchases $101 worth of products every two months. Charlie notices that Andrew missed this month and telephones him to ask if there is a problem. Andrew says it was his oversight and orders his regular supply of product.

Analysis

Andrew is a long time user of DSO's nutritional products which are purchased through Charlie. Andrew's usual procedure of contacting Charlie for a periodic supply of products is not regulated as an unsolicited consumer agreement under the ACL. Each purchase forms a separate contractual arrangement. By telephoning Andrew, Charlie has entered into a regulated transaction. It is the supply of goods in trade or commerce. The transaction resulted from a telephone call. Andrew did not invite Charlie to make the call. The value of the sale was $101.

The impact of the ACL on regulated agreements in Case Study 1 is equally relevant to this regulated transaction. It is noted:

- Andrew's transaction has moved from an established unregulated to regulated transaction even though there was no detriment to Andrew.
- If Andrew's transaction had been for $75 and not $101, it would not have been regulated. If the products were sold individually in there transactions, all less than $100, they would still be regulated because the ACL requires them to be aggregated for the purposes of applying the unsolicited selling provisions.

<u>Case Study 5</u>

Penny is a reseller of cookware products manufactured by DSO. Penny visits Bronwyn's home uninvited and sells a frypan for $120. Bronwyn wants the product as soon as possible and it is delivered and paid for two days later. Bronwyn is informed of her rights to cancel the agreement.

After the cooling off period Bronwyn receives a comparable frypan as a gift. She returns the frypan to Penny which shows signs of wear and asks for a refund. Penny responds that the cooling off period has expired, but Bronwyn insists she telephoned Penny during the period to cancel the agreement and says that Penny couldn't prove she didn't. In any event, because Penny accepted payment within the ten day cooling off period, the cooling off right is extended to six months.

Analysis

The impact of the ACL on regulated agreements in Case Study 1 is equally relevant to this regulated transaction. It is noted in respect of this transaction:

- Penny has complied with all requirements under the ACL except the prohibition on accepting payment and delivering product within the ten day cooling off period.
- Penny delivered the product and accepted payment because she didn't want to lose the sale and could see no potential harm to Bronwyn given her cooling off rights.
- Bronwyn's motivation for returning the frypan was the acquisition of a comparable product.
- Penny has no way of refuting or is unprepared to meet the cost of attempting to refute Bronwyn's claim that she orally terminated the agreement during the ten day cooling off period and accepts that the period has been extended to six months.
- Bronwyn could not waive her rights under the ACL.
- Penny is exposed to criminal sanctions for not observing supply and payment prohibitions.
- The cooling off period is extended to six months from the supply during the cooling off period. (ACL cl 86).

Case Study 6

Mary takes a stand at an event to promote and sell a range of household furnishings. Michael visits the stand and purchases products valued at $1,000. After passing but not visiting the stand Tony is approached by Mary and invited to come back for a presentation. Tony later decides to buy the same products. Michael's purchase was clearly made because of his vulnerability to a sales pitch. Tony's purchase was an informed and rational decision.

Analysis

This raises the question of what constitutes the business or trade premises of the supplier. If both transactions were negotiated at such premises the agreements are unregulated. For present purposes it is assumed the stand is not Mary's premises. Despite the circumstances of the $1,000 purchase Michael's transaction is not regulated by the ACL. In what is substantially the same transaction albeit with an informed and rational consumer, the fact that Mary solicited the sale to Tony exposes it to ACL regulation.

APPENDIX D

SUBMISSION ON DRAFT REGULATION IMPACT STATEMENT

SCOCA Australian Consumer Law Draft RIS Consultation
Competition and Consumer Policy Division
Treasury
Langton Crescent
PARKES ACT 2600

The Direct Selling Association of Australia ("DSAA") welcomes the opportunity to comment on Proposals 1 and 6 of the paper on *The Australian Consumer Law: Consultation on draft Regulation Impact Statements* ("Consultation draft"), that relates to whether a need exists for national regulation of all forms of unsolicited offers and sales that occur in a non-retail environment, in person or by telephone, in the proposed Australian Consumer Law.

DSAA

DSAA was established in 1967, among other things to represent organisations involved in direct selling. Our Association represents the major companies in the direct sales channel, but also has in its membership younger and smaller companies bringing products and services to an increasingly concentrated retail market. Almost 67% of our members are small business entities with annual retail sales of less than $5 million. Retail sales of members are about $1.2 billion annually. Direct selling is an evolving and often misunderstood channel delivering clear social and economic benefits. Within economic and seasonal conditions it is not unusual for up to half a million Australians to be contracted to our members in distributing their products. With international influences, particularly membership of a world federation of direct selling associations, DSAA membership imposes exacting professional standards.

Proposal 1 – Unsolicited Selling

General Comment

The New South Wales and Victorian studies referenced in the Consultation draft establish the preference for cooling-off rights over general remedies in a range of trading circumstances. The challenge for policy makers is to adequately define the behaviour that should attract these rights.

The Consultation draft explores the application of jurisdictional best practice to the regulation of unsolicited selling. Direct selling is said to occur "when a trader approaches a consumer directly to offer for sale a product or service and where a consumer agrees to make a purchase and then enters into an agreement with the supplier either at the consumer's home or another place that is outside of a retail environment (or not the supplier's usual place of business) or over the phone" [Consultation draft, p.16].

Depending on the interpretation of "unsolicited", and in practice regardless of its definition, this imposes cooling-off rights across a range of transactions that are clearly beyond underlying policy objectives. For direct selling models this blanket application, and the highly and unnecessarily prescriptive regulatory structures across Australian jurisdictions, raises issues not least in cost and competitive neutrality.

Direct selling, traditionally defined, is the sale of a product or service, face-to-face, away from a fixed retail location, usually in a home or workplace. Modern direct selling models, however, are not so obvious. The fundamentals of direct selling (network marketing, party plan and doorstop selling) remain, but business strategy and technology have and continue to influence convergence with other retail models, particularly distance selling.

Network Marketing
This describes a supply of goods or services arising from establishing and maintaining a personal, one-on-one selling relationship. These relationships arise from any number of circumstances. They can be from solicited and unsolicited approaches, rarely from door-to-door canvassing, and usually away from a fixed retail location and a seller's business premises. Relationships and ongoing sales can arise from telephone contact and online ordering of products. The product knowledge, trust and service inherent in direct selling, and particularly this model, illustrates the increasing acceptance of direct selling in a wide range of consumer markets, notably complementary healthcare.

Party Plan
Party plan is a well known direct selling model although it too is changing. Typically prospective purchasers are invited to a home or other setting where products are demonstrated and perhaps purchased in a group dynamic. Some, having further considered a product, may later choose to purchase it online or through other arrangements.

Doorstop Selling
This is the model most closely identified with "door-to-door selling", generally cold canvassers, door knocking with purchase options. Only one DSAA member with a brand and product rivalling major retailers continues to use this method in its business model. Others now leave catalogues at premises and consumers place orders for products from the catalogue. Any physical contact is limited to the delivery and payment for goods purchased.

DSAA considers that only a very small part of the business operations of its members could be said to potentially hold the mischief sought to be addressed by cooling-off rights. But because of the breadth and uncertainty in defining "unsolicited direct selling" and business system imperatives, the practical effect is that all its business is treated as subject to these rights, including business which is clearly no different to other unregulated retail models.

The Productivity Commission correctly identified the state of regulation within Australian jurisdictions and its impact on nationally operating businesses. Some jurisdictions impose highly prescriptive notice and documentation requirements with significant sanctions for non-compliance. The challenge for our nationally operating businesses is obvious. This has been largely addressed in the DSAA's Code of Practice. It essentially requires cooling-off rights without monetary limit for all our members' transactions, and the transactions of their distributors.

This responsibility for distributors should be clarified. Direct selling companies operate predominantly on a buy-resell model, which means they supply products to independent contractors who then retail the products. It is therefore the distributor who is legally obliged to comply with regulatory requirements. Nonetheless, the Association's Code requires a member to effectively guarantee consumer rights in the purchase of their products. This requires training and other assistance for distributors in complying with cooling-off and other rights. Against related cost and competitive issues it is noted that the exercise of cooling off rights against distributors and our members is negligible.

Question 1.1
Is there further evidence about the impact of existing unsolicited selling regulation on consumers and business?

From an overall transaction perspective the levels of complaint identified in the Consultation draft may appear insignificant. There is also no mention of the nature of complaints, nor the extent to which they were found to be justified. That said the Association accepts there is evidence, particularly in the Victorian study, of the need for this protection, and its effect on business. In our members' circumstances there are obvious costs associated with compliance and business interruption that are not incurred by competitors, costs which are not necessarily capable of being absorbed in the pricing structure. Consumers may equally be exposed to the unfair conduct and information asymmetry issues identified in the Consultation draft in non unsolicited selling.

Question 1.2

Would broad consumer protection provisions such as the prohibitions on misleading and deceptive conduct or unconscionable conduct, among others, provide sufficient consumer protection in the absence of specific unsolicited selling regulation?

Broader consumer protection provisions would suffice for a large percentage of the "direct selling" market, but not all as established from in the New South Wales and Victorian studies. For a relatively small number of transactions cooling-off rights would serve as the most expedient in resolving consumer issues arising from high pressure selling, information this behaviour exists, or may exist, in particular markets it seems inevitable that some measure of specific direct selling regulation will continue. The question is what the level of regulation should be. DSAA suggests asymmetry, or unfair conduct issues. In the absence of being able to precisely define where this can best be achieved by moving from the existing fragmented and highly prescriptive approach to a harmonised, principles based solution. This approach should also recognise the exclusion of products and pricing that present no real consumer detriment.

Question 1.3

In moving to a national regime, which aspect(s) of the harmonised framework would carry the greatest compliance costs for businesses beyond those currently in existence under state and territory laws?

As identified in the Consultation draft this raises the need to define "what constitutes a sale or marketing approach outside of a retail environment". As mentioned earlier, DSAA has attempted to resolve the difficulty for its members in complying with door-to-door regulation by importing a high denominator as part of its professional standards requirements for membership.

Subject to its continued opposition of any form of identification requirement, DSAA supports the principle in Option C. That said, we see an opportunity to lift the level of prescription with for example requirements for cooling-off rights and cancellation notice being generalised and the manner of their implementation left to individual businesses. This overcomes prescriptive requirements about forms of notice, size of disclosures etc.

Proposal 6 – Bills and Receipts

As identified in the Consultation draft the GST in requiring tax invoices for taxable supplies will cover most consumer transactions. It identifies the date of issue of the invoice, price and description of the goods or services being sold. For transactions exceeding $1,000 the invoice must also include supplier's name and ABN, and a description of the quantity and goods being supplied. DSAA believes that this is sufficient, and that the provision of bills and receipts should not be included in the Australian Consumer Law.

25 November 2009