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Senate Standing Committees on Economics
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Submission: Inquiry into the Treasury Legislation Amendment (Small Business and Unfair Contract Terms) Bill 2015

The DSAA appreciates the opportunity to make a submission to the Senate Economics Legislation Committee in regard to the Treasury Legislation Amendment (Small Business and Unfair Contract Terms) Bill 2015 (the Bill).

The DSAA acknowledges the potential for small business to experience unfairness in acquiring goods and services for business purposes and understands the Government's objectives in applying unfair contract terms to these transactions. Some small businesses can experience similar unfairness to that a consumer may experience, for which existing provisions of the Australian Consumer Law provide protections.

However, the Bill extends these existing policy protections that relate to consumables further so that they also cover contracts that do not involve the supply or acquisition of goods and services but are purely commercial relationships.

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

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

A key component of standard form agreements used in direct selling relate to the terms of a distributor's remuneration, responsibilities and rights in their position as an independent salesperson. These agreements are structured to attract distributors in a highly competitive market - direct selling in Australia has hundreds of competing companies within the industry as well as the competition for the services of salespeople from other retailers and the wider market. The nature and scale of the direct selling industry and the distributor relationships demands the use of standard form contracts.

The terms of an agreement that might be considered to favour a direct selling company are reasonably necessary to protect legitimate interests of the company. However, the proposed unfair contract provisions would remove the certainty of these contracts and allow assertions of unfairness to be tested where a distributor believes that they have been unfairly treated by a company's contractually authorised action. The provisions can be expected to encourage unmeritorious and vexatious claims with the uncertainty being leveraged in negotiating commercial outcomes for disputes.

There are already significant measures in place to ensure that direct selling distributors receive sufficient protections. This includes a direct selling company's strict compliance with the *Competition and Consumer Act 2010*, including the unconscionable conduct provisions, along with their application of appropriate dispute resolution processes to ensure fair and equitable outcomes in the event of any contractual disagreement. The DSAA also has industry policies and standards that apply compulsorily to members through the Direct Selling Code of Practice, which act to ensure dealings with distributors are conducted transparently and established on fair terms.

Applying the unfair contract provisions to these independent contractor arrangements will result in significant cost and disruption to the industry without any obvious economic benefits in return.

Around half the DSAA's member companies are themselves small businesses with a turnover of less than \$5 million per year. They chose direct selling as an effective and competitive way to bring their products to market. DSAA members will be put to significant expense in reviewing their standard form agreements against vague and subjective unfairness criteria. There is also the substantial cost of renegotiating agreements with existing distributors as some measure against the uncertainty that the proposed provisions will engender.

Applying the subjective assessment of unfairness in extending the unfair contract terms to these agreements will in fact harm the small businesses in the direct selling industry through significant costs and the uncertainty in their contractual arrangements with distributors. The most effective way to remove this impact would be to amend the Bill to limit its application to contracts involving either the supply of goods or services by a small business, or acquisition of goods or services by a small business.

The monetary threshold limits for what constitutes a small business contract in the legislation have been included to ensure small businesses that enter into higher value contracts do so with sufficient diligence. However, it is considered that there should also be a lower limit of \$1,000 introduced for single contracts that are not regularly renewable so that the uncertainty that will surround contracts under the new legislation is only applied where there is a tangible commercial impact. By imposing a lower limit, this will ensure small contractual dealings can be undertaken without ambiguity as to the validity of the contract in cases such as a one-off very low value commercial agreement.

The Bill only proposes to allow exemptions to be made where there are industry-specific commensurate laws. No such law covers direct selling distributor agreements. In order to provide the Government greater flexibility in the application of the new law and to take account of unique circumstances such as in direct selling, we request that the Government should appropriately recognise contracts that come under the operation of the *Independent Contractors Act 2006* in such regulations, and that the Bill be amended to allow the Minister to make general exemptions for any reason, with direct selling companies' distributor agreements be specifically exempted from the new legislative arrangements.

In summary, the DSAA proposes consideration of the following changes to the Bill in order to most effectively achieve the policy outcomes sought by the Government without additional harmful consequences to small businesses in the direct selling industry:

- limit the application of the provisions to contracts involving either the supply or acquisition of goods or services by a small business
- include a lower limit monetary upfront price threshold of \$1,000
- allow a general exemption making power

Yours sincerely

JOHN HOLLOWAY
Executive Director
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