RESPONSE TO AUSTRALIAN CONSUMER LAW REVIEW INTERIM REPORT

Introduction

For context in this response, Direct Selling Australia (DSA) invites attention to its comment on the Issues Paper[1] 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 among market participants. Essential in this is ensuring real risks of consumer and business detriment are evidence based and addressed with appropriate levels of regulatory burden. This won't be achieved with measures that treat all consumers as vulnerable or disadvantaged.

DSA welcomes attempts to clarify, simplify and streamline the Australian Consumer Law (ACL) for better understanding, and importantly "future proofing" it to maintain appropriate levels of consumer protection from emerging business practices. Currently, the uncertainty for DSA members and their independent distributors in interpreting and complying with aspects of the ACL exposes them to unacceptable risk and cost against minimal risk of consumer detriment. DSA believes this has and continues to adversely affect its members' retail competitiveness and growth.

DSA's response to specific questions in the Interim Report are set out below.

1.2 Scope and coverage of the ACL

1.2.3 Fundraising activities and the ACL

1. *Would further regulator guidance on the ACL's application to the activities of charities, not-for-profits and fundraisers help raise consumer awareness and provide greater clarity to the sector?*
   - *If so, what should be included in this guidance?*
2. *Are there currently any regulatory gaps with regard to consumer protection and fundraising activities? If so:*
   - *What is the extent of harmful conduct or consumer detriment that falls within these regulatory gaps or 'grey areas', and does it require regulatory intervention?*
   - *Would generic protections, such as the ACL, provide the level of regulatory detail necessary to address identified areas of detriment? What would be the benefits and costs of this approach?*

[1] Australian Consumer Law Review: Response to Issues Paper, May 2016.

- *Would there be any unintended consequences, risks and challenges from extending the application of the ACL to address regulatory gaps for fundraising activities? If so, how could they be addressed?*

3. *Would extending the ACL to all fundraising activities be necessary or desirable to facilitate potential reforms of state and territory fundraising regulation?*

Many DSA members operate foundations or other entities that conduct charitable fundraising. DSA is unaware of any ACL issues in the conduct of this activity. In principle, the experience of the ACL's general protections, but not its purported control of unsolicited consumer agreements, could be instructive for national fundraising. In the absence of empirical support for reform however, DSA suggests the appropriate course is Option 1, clarifying the ACL's current application and detailed investigation to show if there are regulatory gaps warranting intervention.

1.2.4 Who is protected under the ACL

4. *Should the $40,000 threshold for the definition of 'consumer' be amended? If so, what should the new threshold (if any) be and why?*

DSA notes variation in the meaning of the term "consumer" since its prominence in defining an acquisition of goods and services for personal consumption in the early sixties. While a common definition of "consumer" replacing the various meanings outlined in the Interim Report may be superficially attractive it assumes commonality in levels of consumer and business detriment. Its meaning needs to reflect established detriment. DSA also cautions against any change to the long-standing "trade or commerce" threshold which as the Interim Report says underpins the ACL and its objectives. In the absence of evidence based support to the contrary DSA sees no reason to increase the $40,000 threshold. It notes this level covers practically all goods and services purchased from DSA members.

5. *What goods or services would be captured that are not already?*

The exclusion of goods acquired for re-supply should be retained. Removing this exemption would unjustly impact commercial arrangements for buy-resell (wholesale) models between DSA members and their independent distributors.

1.2.5 Exemptions under the ACL

6. *Are there other priority exemptions that are not discussed in this chapter that should be considered? If so, what are these and why should they be considered?*

Exemptions are required to qualify the meaning of "consumer" where an entitlement to consumer protection rights is not established. Some current exemptions are long-standing, some pre-date the ACL. A number of additional direct selling exemptions coincided with the introduction of the ACL's unsolicited selling provisions and an acceptance of circumstances in which they should not apply. That is, circumstances when consumers are not vulnerable to high pressure selling tactics, nor information asymmetry. DSA does not support any changes to current exemptions and in the absence of a principle-based approach for a more appropriate regulatory policy setting argues exemptions must be increased. A comprehensive "public interest" review of all exemptions under the ACL is unwarranted.

1.2.6 Interaction between the ACL and ASIC Act

7. *Should the ASIC Act be amended to explicitly apply its consumer protections to financial products?*

If the ASIC Act is amended to explicitly apply consumer protections to financial products, there is the need to ensure consistency between key ACL consumer protections, the ASIC Act and related financial products and services legislation, including in the National Consumer Credit Protection Act 2009 and Regulations 2010. For example, the regulations define "unsolicited contact" differently to the ACL for exemption purposes. These issues are relevant to DSA members who may offer goods for sale in conjunction with consumer credit offered by third party licensed credit providers.

The interaction between this legislation also raises structural and policy issues. They were raised in a submission to a Parliamentary Committee[2] concerning proposed enhancements to the National Credit Code. One "enhancement" was designed to stop credit-dependent unsolicited selling, the then Commonwealth government attempting to use its power over credit providers to effectively ban a sales practice sanctioned by all governments (including the Commonwealth) in the ACL. DSA notes similar issues for consideration of recommendations from the recent review of small amount credit contract laws.[3]

2.1 Consumer guarantees

2.1.2 'Acceptable quality' for goods

10. Could the issues about the durability of goods be addressed though further guidance and information?

The durability test needs to remain flexible, principle-based, and designed to account for specific circumstances of individual products, and the reasonable expectations and circumstances of different classes of consumers. DSA considers the existing guidance material and information published by ACL regulators is adequate. Given the circumstances of each product and consumer are different, further "overarching guidance" or examples in product categories, or requiring direct representations about individual product lifespans would be a disproportionate response, and unnecessarily increase compliance costs for goods manufacturers and sellers. Increased cost would likely be passed on to consumers.

Some uncertainty is inevitable – further guidance may only serve to increase uncertainty or diminish the flexibility and principle-based approach currently reflected in the ACL, without any ultimate benefit to consumers.

Special guidance and information may be justified in relation to electrical and whitegoods given the higher price and consumer expectations often attached to these items. This does not necessarily require that further guidance should be published in relation to other consumer goods. DSA does not believe it is a regulator's role to effectively impose additional legal requirements around an issue of durability that is not reflected in the ACL.

11. Are there other areas of uncertainty raised by stakeholders that would benefit from further guidance? For example, the cost of returning rejected goods, including what may constitute 'significant' cost?

No, for the above reasons.

[2] Parliamentary Joint Committee on Corporations and Financial Services, 14 October 2011.
[3] Review of the small amount credit contract laws, Final Report March 2016.

12. *If they are not suited to this approach, why not? For example, do the issues (such as the costs of technicians or returning a good) require further legislative clarification, or should the status quo remain to ensure a high level of flexibility?*

The status quo should remain to ensure a high level of flexibility for goods manufacturers, sellers and consumers.

13. *What more, if anything, can be done to encourage businesses to provide more information about the durability of their products? What, if any, further guidance on durability is feasible while still allowing important differences between goods of a certain type to be recognised?*

The question seems predicated on an assumption that the law should encourage businesses to provide more information about the durability of their products. DSA does not accept this approach. Businesses should be free to choose whether to provide more information about the durability of their products – if they choose to do so, with the consumer guarantees and misleading and deceptive conduct provisions holding businesses to their representations. It is difficult to see how further guidance on durability may appropriately differentiate between goods of a certain type without increasing the complexity and diminishing the flexibility and principle-based approach reflected in the ACL.

2.1.3 Barriers to accessing refunds

It is suggested non-disclosure agreements for settlements offering no more than existing ACL rights should be banned. DSA opposes this. In many cases, an entitlement to ACL remedies, including refund or replacement, is legitimately disputed or uncertain. Consumer loss or damage could arise from misuse of the goods, or failure to follow the manufacturer's instructions. The manufacturer or supplier may also be denied a reasonable opportunity to properly investigate or resolve a claim because of a consumer's refusal to return goods for testing or repair.

DSA submits that banning non-disclosure agreements would be counter-productive from a consumer perspective, as it may discourage businesses from providing any remedy or resolving claims in circumstances where the claim is legitimately disputed or is uncertain.

It is accepted a non-disclosure agreement should not be imposed or enforced to prevent a consumer making a report to a regulator. Any purported "contracting out" of the consumer guarantees under the ACL in this manner is already rendered void by existing provisions, without the need for further regulation.

2.1.4 Lack of clarity about 'major failures'

2.1.5 Industry-specific concerns

14. *Can issues about the acceptable quality of goods that are raised in particular industries be adequately addressed by generic approaches to law reform, in conjunction with industry-specific compliance, enforcement and education activities? What are the advantages and disadvantages of this approach?*

Issues about the acceptable quality of goods raised in particular industries are adequately addressed by industry specific compliance, enforcement and education activities. This approach enhances the position of consumers in those industries while avoiding additional compliance burden and cost on businesses in

industries where there are no apparent issues with current laws. Any additional costs may ultimately be passed on to consumers as price increases.

Subsection 260(a) of the ACL provides that a failure to comply with a statutory guarantee is a major failure if "the goods would not have been acquired by a reasonable consumer fully acquainted with the nature and extent of the failure". This could mean minor failures that can be easily remedied amount to major failures, if it is accepted a "reasonable consumer" would not have acquired the goods if they knew they were faulty. DSA submits subsection 260(a) should be removed on this basis. It also considers there is otherwise no case for generic law reform in this area.

15. *What kinds of industry-specific compliance and education activities should be prioritised in the context of finite resources?*

16. *In what circumstances are repairs and replacement not considered appropriate remedies? Or put another way, are there circumstances that are inherently likely to involve, or point to, a 'major' failure? If so:*

    - *What are these circumstances, and should they be defined, or deemed, to be major failures? For example, should there be discretion for courts to determine the number of 'non-major failures' or type of safety defect that would trigger a 'major failure'?*
    - *Are there any relevant exceptions or qualifications?*

DSA submits there is no need for further definition of what constitutes a major failure. It supports a flexible and principle-based approach to regulation in this area. The courts already have sufficient discretion to determine that a number of "non-major failures" or a safety defect amounts to a major failure, based on the circumstances of individual cases before them.[4] Setting a number of repairs or period of time in which a series of repairs would constitute a major failure would be arbitrary, and could discourage businesses from carrying out straightforward repairs (which could be due to the fault of the consumer) or providing additional customer service, for fear of triggering a major failure.

17. *What are the costs associated with businesses providing refunds in circumstances that are above the costs associated with existing business policies on refunds? What impacts would this have on consumers?*

This cost is difficult to quantify, and with individual refund policies would obviously vary between businesses. Some businesses choose to distinguish themselves with more generous refund policies, often factored into their pricing of goods or services. DSA believes it is not the role of the law to dictate if businesses should choose to provide refund policies over and above what the law requires. Additional cost in most cases will be passed to consumers, so reforms in this area are likely to be neutral or counter-productive.

18. *Are there any unintended consequences, risks or challenges that need to be considered? For example, how would they affect current business policies regarding refunds?*

DSA anticipates many members and other businesses already having more generous refund policies will either continue them (with no additional net benefit to the consumer), or decide to pull back on those

[4] ACL Sections 260(c), (e).

policies if the laws concerning major failure are reformed in favour of the consumer. This may be to the consumer's cost as additional compliance costs are likely to be passed on.

2.1.6 Disclosure of rights under the ACL

19. Is there a need to amend current requirements for the mandatory notice for warranties against defects? If so:

- *how should the text be revised to ensure that consumers are provided with a meaningful notice about the consumer guarantees?*
- *would it, in practice, reduce ongoing costs for business or were they largely incurred when the requirement was introduced?*
- *would it require any transitional arrangements and, if so, what are the preferred arrangements and why?*

If some form of mandatory text is to be retained, then it should be shortened and streamlined to reflect the current law.[5] A statement to the effect that the document does not override the ACL, with a link to a website for further information seems a more practical way of ensuring that consumers have access to information about their rights without imposing an unnecessary burden on businesses.

Ongoing costs of any mandatory text requirement would largely be the same, but there would be additional cost in transitioning to a new form of mandatory text and/or website information. An appropriate transition period would be required to give businesses sufficient time to implement any reform.

20. Are there other and more effective ways to notify consumers about their consumer guarantee rights? Could these potentially replace the mandatory text requirement?

CAANZ could consider a more generic website statement for Australian businesses who supply goods or services to Australian consumers, as an alternative to point of sale terms and conditions or on-pack statements.

2.2 Product safety

2.2.3 General safety provision

25. What are the key principles for an effective product safety regime?

DSA accepts the key principles for an effective product safety regime identified by CAANZ.

26. Would a general safety provision in the ACL better meet those principles? Why, or why not?

DSA takes the view that those key principles are already met by the current product safety regime in the ACL, without the need for a general safety provision that would not meet those principles.

[5] See Baker & McKenzie response to the Issues Paper for examples of current inaccuracies.

27. Would a general safety provision provide an effective and proportionate response to concerns raised about the current regime?

- *What costs would it impose on business, for example, what processes or practices would need to be changed?*
- *What impacts would it have on safety outcomes for consumers?*
- *What, if any, transitional arrangements would be required for businesses?*
- *Are there any unintended consequences of a general safety provision?*

A general safety provision would not provide an effective and proportionate response to concerns raised about the current product safety regime. It would impose additional and unwarranted costs on businesses who already have quality control systems to assure the safety of their products.

DSA considers a general provision would have no positive impact on consumer safety. It is predicated on an assumption that businesses who may presently choose to supply unsafe goods (or who fail to take the necessary quality control measures) would change their practices in order to comply with the new regime.

Whether a product is "safe" or "unsafe" will always have an element of subjectivity, regardless of the definition given. It will not serve any purpose of "clarifying" the law. The proposed "due diligence" defences will also create additional uncertainty for enforcement of any new regime. It will impose unnecessary compliance cost on businesses who already have safety and quality control systems and processes in place to ensure their products are safe. It follows without any net benefit to consumers. Those businesses are already motivated to ensure their products are safe not only because of existing law, but also the need to maintain their reputation in the marketplace.

DSA considers it incorrect to assume a new regime will further eradicate the supply of unsafe goods into Australia. In the global marketplace consumers will source products directly from overseas suppliers if they can't source them locally, regardless of whether those suppliers are subject to any new regime. Local businesses subject to the additional compliance burden and cost will be at a competitive disadvantage to overseas suppliers selling the same products where there is pricing tension.

For DSA members, this would impose a heavy onus on independent distributors who buy and resell products on their own account, but who do not manufacture or have any direct relationship with, or capacity to influence the manufacturer's quality control or product safety standards. The same would also apply to many DSA members that don't manufacture goods themselves.

If a new regime was introduced, it should be limited to manufacturers or producers of consumer products (and not importers as deemed manufacturers). DSA notes a Productivity Commission finding that overall benefits of a general safety provision are likely to be limited.

2.2.8 Performance-based approach to compliance with standards

29. Should a 'performance-based' approach to product safety standards be introduced?

- *What changes would businesses need to implement, and what are the associated costs? What impacts would a 'performance-based' approach have for consumers?*
- *Are there any unintended consequences, and how could these be addressed?*

Aspects of this approach seem sensible, but may also add additional complexity for affected DSA members. The introduction of any new performance-based approach would involve further implementation costs for affected businesses which would only be justified if there were demonstrated positive and balanced impacts for consumers.

2.2.10 Mandatory reporting requirements

31. Should the mandatory reporting triggered be clarified? If so:

- *How should this be achieved?*
- *What changes would businesses need to implement to their current reporting processes, and what impact would this have on their compliance costs?*
- *How would this affect the information that is available to regulators, and product safety outcomes for consumers?*

Clarification of the mandatory reporting triggers would be useful given current uncertainty with the mandatory reporting provisions, particularly in relation to reporting obligations for minor injuries, and what constitutes "use or foreseeable misuse". DSA submits this should be achieved through industry consultation and regulator guidance, rather than changes to the law. But any regulator guidance should avoid creating further complexity and unnecessary compliance burdens for business.

Priority should be on capturing information about "serious" and "acute" physical injuries or illness (or death) caused by the use or foreseeable misuse of products, as opposed to minor injuries. This should improve the quality of reporting to regulators and product safety outcomes for consumers, and reduce unnecessary compliance burdens for business. Short term compliance costs can be expected with any change, but may be outweighed over time if ongoing compliance burdens created by uncertainty with the current mandatory reporting requirements are removed.

32. Should the current timeframe for making a mandatory report be extended? If so:

- *What time period should apply?*
- *Should it be accompanied by other requirements, for example, immediate notification?*
- *What changes to businesses processes would be needed, and what would be the impact on compliance costs?*
- *What, if any, transitional arrangements would be needed?*
- *Are there any unintended consequences, and how could these be addressed?*

The current two-day timeframe for a mandatory report should be extended to ten days to allow sufficient time for meaningful and useful information about an incident to be gathered and reported. The two-day timeframe promotes an unduly conservative approach to reporting and may lead to reports that are incomplete, inaccurate and possibly unnecessary.

An extension of the timeframe is also warranted given practical difficulties associated with reports being made on weekends or via social media, or in the case of DSA members, being made to the independent

distributor who enjoys the primary relationship with the consumer, rather than the DSA member that would ordinarily assume reporting responsibility.

Other requirements would be unnecessary. Immediate notification would create additional impractical and unduly burdensome obligations for businesses who are already challenged by the existing two-day reporting period, with no apparent benefit to the consumer. There may be no need for transitional provisions if the time period is extended in the absence of any additional compliance obligations, and additional compliance costs would be minimal.

2.2.12 Product bans and recalls

33. Should a statutory definition of a voluntary recall be introduced? Would this address the concerns raised? If so:

- *How should a voluntary recall be defined?*
- *What factors or criteria should be included?*

The proposal to introduce a statutory definition of "voluntary recall" has merit if the outcome is to provide greater clarity for businesses to take adequate steps so that a mandatory recall is not required.

The example given which defines a product recall as "corrective action taken post production to address consumer health or safety issues associated with a product" deserves consideration. The use of the words "corrective action" is preferable to the use of the word "recall", because it contemplates a range of action could be taken for a particular consumer risk – for example, giving consumers information or replacement parts to address the risk themselves. The word "recall" suggests a product is to be withdrawn or removed from the market completely. This can lead to uncertainty and unnecessary confusion for businesses and consumers.

34. Should the penalty for a failure to notify a recall be increased and, if so, to what amount?

Only if there was evidence to suggest that an increase in the penalty would have a deterrent effect on businesses who may otherwise choose not to comply.

35. Should current processes for implementing product bans and recalls be streamlined? If so:

- *How should they be streamlined?*
- *What would be the associated benefits and costs?*
- *Are there any unintended consequences, risks or challenges that need to be considered?*

While there is a case for streamlining current processes, including interaction and communication between offices within the same regulator, this must not be at the expense of appropriate checks and balances to ensure product bans and recalls are only issued in appropriate cases. Giving regulators power to issue "administrative orders" to initiate a product safety action may unduly prejudice the legitimate interests of product suppliers, and would not necessarily result in any better outcomes for consumers or eliminate all possible product risks. An alternative to referral to the responsible Minister may be for the regulator to seek an order from a court in respect of product bans or recalls, with provision for expedited hearings.

2.2.13 Public information about unsafe products

36. Is there scope to improve the quality of information available to consumers on safety risks? If so:

- *What are the benefits of increased information, and what costs, risks or challenges need to be considered?*
- *What information is most helpful to consumers, and how should it be used? In a context of finite resources, what information should be prioritised?*
- *How could this be achieved? For example, in what format should information be provided?*

Consumers already have access to a range of information about product safety risks.[6] This should remain the primary source of information on identified risks. Information published on this website is invariably the subject of further reporting and media publicity.

Giving consumers access to more information does not necessarily lead to greater quality of information or balanced outcomes for business and consumers. Information that is inaccurate or incomplete may mislead consumers into believing there is a safety risk with a particular product, when in fact the risk is non-existent or overstated. This would also unduly harm the interests of the product supplier. There is sufficient allowance in the current law and guidelines for regulators to monitor the effectiveness of voluntary recall actions and ensure effective communication with consumers, without the need to require publication of results about the outcomes of voluntary recalls.

DSA does not support the introduction of a mandatory register for consumer products. As the Interim Report notes, this would involve substantial compliance costs and raise privacy concerns, without any obvious and overriding consumer benefit. DSA members and their distributors already recognise and value ongoing contact and relationships with their customers. This will continue to increase as more business and communications are carried out via social media, rather than at a physical contact address.

DSA does not support the publication of mandatory reports of product related deaths or serious injury or illness. Such a requirement would be counter-productive in providing businesses with a disincentive to report. The regulator is best placed to make an assessment of mandatory reports in consultation with suppliers and investigate whether further action should be taken, without the need to open that information to what could be misinformed public debate.

2.3 Unconscionable conduct and unfair trading

2.3.2 Are the provisions working effectively?

37. Is allowing the law on unconscionable conduct to develop an appropriate and proportionate response to the issues raised, and to future issues that may arise?

DSA agrees. The Interim Report records that the existing provisions with judicial clarity are working as intended and there will inevitably remain different views on their interpretation.

38. What are the consequences, risks and challenges of maintaining the status quo, compared with changing the law or codifying existing principles? Are there any better approaches that would address the issues raised while allowing concepts to develop in a flexible way?

[6] See Products Safety Australia website.

Maintaining the status quo in a principle-based approach allows the law to adapt and evolve in response to changing societal values, and individual circumstances. Changing the law or codifying existing principles would deny this flexibility without obvious consumer benefit, and would increase uncertainty and compliance cost for businesses. An obvious outcome of this approach can be seen from the unsolicited selling provisions' inability to match market dynamics.

2.3.3 Unconscionable conduct and public listed companies

39. Is it appropriate to continue to exclude publicly listed companies from the unconscionable conduct provisions and, if so, why?

Publicly listed companies should have the resources to protect themselves, and are not typically exposed to factors that a court would ordinarily have regard to in considering whether conduct was unconscionable. Against reviewed criteria there is obviously a regulatory gap, but is there any evidence of "consumer" detriment, including vulnerability or disadvantage? That said, the protection reaches comparable non-listed and competitive entities.

40. Should the unconscionable conduct provisions be extended to publicly listed companies?

- *What are the benefits for publicly listed companies?*
- *What changes would other business need to make to their existing business practices and what are the associated costs?*
- *Should the protections be extended to all publicly listed companies, or are some exceptions appropriate?*
- *Are there any unintended consequences, and how could these be addressed?*

No, for the reasons above.

2.3.4 Unfair trading

41. Are there any other benefits and disadvantages to a general unfair trading prohibition that should be considered?

DSA submits there is no case for a general unfair trading prohibition. The Interim Report acknowledges the reach of existing unconscionable conduct provisions to unfair and unreasonable trading practices, including instances where there is no individual disadvantage. Adoption of other jurisdictional experience, including the EU Directive argued to support specific regulation of unfair trading practices, would be no greater or necessary benefit to consumers and would lead to more uncertainty and unnecessary compliance cost for business.

2.4 Unfair contract terms

2.4.6 Monetary penalties

44. Should the use of terms previously declared 'unfair' by a court be prohibited? If so:

- *What should be the extent of the prohibition? For example, would it only apply to identical or similar standard form contracts, within a particular sector, or more broadly?*
- *Would this increase the deterrent effect of the unfair contract terms provisions?*
- *What penalties and remedies should apply?*
- *What, if any, transitional arrangements would be required? How should business be made aware of contract terms that have been declared 'unfair'?*
- *Are there any unintended consequences, challenges or risks that need to be considered?*

The use of terms previously declared 'unfair' by a court in one instance should not be prohibited in all instances. Whether a particular term is 'unfair' is necessarily subjective and depends on particular circumstances. It would be inappropriate to extrapolate a finding in a particular case to all cases which could involve different circumstances in which use of the term may not be unfair. The ACL already includes a non-exclusive list of examples of unfair terms. If a prohibition is to be introduced, then the prohibition should only apply to similar terms contained in a contract of substantially the same nature, where the term has the same function and effect. This would perhaps need to be the subject of further proceedings by the regulator and a declaration by the court. This in itself would create uncertainty as to whether a particular contract is covered by the prohibition. If the practical outcome is that the prohibition could only apply to the same supplier and same class of consumers, then the prohibition would do no more than the current provisions. Transitional arrangements would be required, including for each term that is declared unfair.

2.4.7 Representative action by regulators

45. Would empowering ACL regulators to compel evidence from a business to investigate whether a term is unfair be appropriate enforcement tool? If so, what should be the scope of this power?

DSA considers the current enforcement regime for unfair contract terms is adequate. Empowering ACL regulators to compel evidence from a business to investigate whether a term is unfair is not an appropriate enforcement tool. Responding to a regulatory inquiry or investigation can be extremely costly, disruptive and time consuming for businesses that are subject to this action, and disproportionate to any associated consumer benefit or detriment.

2.4.8 Legislative examples of unfair terms

47. Should the 'grey list' of examples of unfair contract terms be expanded? If so:

- *What examples should be added?*
- *Would this help address systemic issues or provide greater clarity for businesses and consumers?*
- *Are there any unintended consequences, risks or challenges that should be considered?*

In response to stakeholder argued additions to the ACL's "grey list" of unfair contract terms, DSA submits

- It should not prohibit new or increased charges not originally in the contract. This is often balanced by a consumer's right to terminate on notice with or without cause before the new change is implemented;

- Automatic renewal of a contract should not be prohibited. Again, this is often balanced by a consumer's right to terminate on notice with or without cause;
- Cancellation fee abuses are illegal penalties under well-established contract law principles;
- Confidentiality or non-disclosure conditions in settlements must not be included. This would potentially apply to the vast majority of settlements where confidentiality and non-disclosure are essential elements of resolving a dispute. It would be a major disincentive for resolving consumer claims without the need for formal legal proceedings or court action;
- Exclusions or restrictions on liability for death or personal injury from negligence seem to be already addressed by the ACL;
- Making a contract the 'entire agreement' between the parties (excluding, for example, verbal representations made by the seller) must not be included. This is an unreasonable interference with fundamental principles around freedom of contract and contractual certainty;
- The list should not restrict arbitration clauses if the contract is with an international party that is not in Australia. Courts already have the jurisdiction to override or read-down contractual choice of jurisdiction or forum in appropriate circumstances.

DSA notes these "grey" examples would not help address systemic issues or provide greater clarity for businesses and consumers. The test of what is unfair is necessarily subjective and should remain so.

2.5 Unsolicited consumer agreements

2.5.4 Concerns about the level of regulation
2.5.5 Industry-specific concerns

48. What are your views on maintaining the current unsolicited selling provisions? Is there another approach that would provide a more effective and proportionate response? If so, how?

CAANZ is urged to fundamentally rethink the ACL's coverage of unsolicited selling practices. In prior submissions and representations, DSA has shown how the lack of clarity in its policy and legislative expression has meant cost and commercial risk for companies and individuals engaged in direct selling businesses that present little, if any consumer risk. DSA has argued that a principle-based approach, rather than the ACL's highly prescriptive regime will offer more certainty and an ability to adapt the law to increasingly integrated aspects of regulated and unregulated direct selling practices. Alternatively, there is the certainty of New Zealand's approach to regulating unsolicited selling.

The Interim Report makes a number of pertinent observations. First, it notes there are gaps in available data about the unsolicited selling industry, which is said to overlap with, but is distinct from, direct selling. The industry views this differently. In distributing consumer products and services direct selling entities, including DSA members and their independently contracted distributors, use various marketing and sales methods including door-to-door, party plan and person-to-person models. Any "unsolicited selling industry" is just a categorisation of the reach of unsolicited selling provisions (with exemptions) to their direct selling activity.

CAANZ notes that in the absence of robust evidence of consumer harm caused by unsolicited sales there are risks in changing the current balance of the unsolicited selling provisions. DSA acknowledges this

lack of evidence of industry performance. It also notes there was no evidence-based support for the ACL's existing regulation of unsolicited selling, particularly its movement from home and workplace transactions to anything not considered store selling. Equally there was no evidence to support the Section 86 payment and supply restrictions, and this same lack of evidence could be levelled at options identified in the Interim Report.

In the absence of robust evidence, changing market conditions and no real measurement of business compliance or consumer utilisation of unsolicited selling provisions there may no risk from an alternative regulatory approach.

CAANZ also notes the current provisions are "technology neutral", reach a wide range of selling locations and allow the law to adapt to market changes by capturing new and emerging sales practices. DSA submits the unsolicited selling provisions are not technology neutral and do not have the desired flexibility to meet new sales practices. This lack of flexibility is shown in previous submissions.[7]

Relevantly an unsolicited selling agreement anticipates negotiations between a dealer and consumer "in each other's presence". This physical presence is reinforced by separate recognition of "telephone" negotiations. It is also clear from the meanings given to "dealer" and "negotiation", and other aspects of unsolicited selling regulation.[8] DSA notes the extensive "paper based" requirements, including for telemarketing sales. Given this, DSA does not accept the unsolicited selling provisions reach sales made through the increasingly popular social media channels[9] and other online selling.

Central to DSA concerns with the unsolicited selling provisions is the effect of its highly prescriptive approach on increasingly consumer driven convergence in retail models. DSA notes arguments for growing or maintaining current regulation do not acknowledge this and are largely based on anecdotal evidence without any real market trends analysis. Nonetheless it notes the potential for consumer detriment in some door-to-door selling and the extent to which systemic issues have been addressed through general ACL provisions.

DSA submits a more effective and proportionate response to the issue of unsolicited selling practices is in the form of either:

- A principle-based approach; or
- A model resembling New Zealand's regulatory approach to unsolicited selling practices.

50. Should the cooling-off period be replaced with an opt-in mechanism?

This "opt-in" proposal which DSA believes has no international precedent is not supported by any evidence of consumer detriment relative to overall industry performance. DSA sees this as an unsupported consumer policy progression from traditional cooling off rights, to restrictions on payment

[7] See DSA submission to Senate Economics Committee Inquiry into the Trade Practices Amendment (Australian Consumer Law) Bill, April 2010.

[8] See for example, ACL Sections 73-78, 80.

[9] For example, an independent distributor opens a micro business reselling through social media cosmetic products manufactured by a DSA member. Sales exceeding $100 may result from online approaches by the distributor, perhaps from referrals. Other sales are consumer initiated from online searching. Assume there is an unsolicited sale, how does a distributor through a technology medium meet the ACL's unsolicited selling requirements?

and supply during cooling off periods, and in the absence of industry bans, the imposition of an opt-in requirement. The Interim Report correctly signals its potential detriment for business and consumers. DSA strongly opposes the "opt-in" concept for the reasons outlined in its response to the Issues Paper and considers it inappropriate to link it to consideration of any Section 86 payment concession. These policy proposals must be considered on their individual merit.

52. Should an enhanced 'risk-based' approach to unsolicited consumer agreement protections be adopted? If so:

- *How should it be designed? For example, what would differentiate low-risk from high-risk sales? What different set of rights and protections would apply?*
- *What impacts would this have on sales across all sectors that engage in unsolicited selling, as distinct from direct selling?*
- *How would this affect outcomes for consumers?*

No, this would introduce further unnecessary complexity into what is already a complex regime. The meaning of "business premises" would not require further clarity if unsolicited selling regulation was limited to selling in someone's home or workplace without invitation.[10]

Any requirement to record telephone sales to counter the proposed presumption that the consumer's version of what was said over the telephone will stand would make telephone sales unnecessarily burdensome and unworkable for direct salespeople operating under independent contractor models.

3.1 Implementing the Australian Consumer Law and its objectives

3.1.3 Barriers to accessing information

54. What enhancements to existing communication channels would be most useful, and what is the level of consumer need? In a context of finite resources, what should be prioritised?

Why look at this question only from the perspective of consumer need? The perspective of businesses operating in consumer markets should also be considered.

55. To what extent would a standalone version of the ACL be used by consumers and businesses? How should it be formatted, and what additional information (if any) should it contain?

A standalone version of the ACL would be useful. It should not include additional information.

3.1.4 Access to remedies

57. What are your views on an expanded 'follow-on' provision, and the extent to which it would assist private litigants?

This may assist private litigants, but with a disproportionate impact to business. Individual cases should be considered on their merits. There is already adequate provision for class action proceedings to be initiated by private litigants, and enforcement proceedings to be initiated by the regulator.

58. What, if any, unintended consequences, risks and challenges should be considered? For example, would this option affect the extent to which businesses are prepared to make admissions of fact?

[10] See the New Zealand model.

Yes, this option could potentially affect the extent to which businesses are prepared to make admissions of fact in one case for fear of having that admission extended to other cases.

3.2 Penalties and remedies

3.2.3 Maximum financial penalties

63. Are the current maximum financial penalties adequate to deter future breaches of the ACL? Would an increase be an appropriate response to the issues raised?

The current maximum financial penalties are adequate.

4.1 Purchasing online

4.1.5 Pricing and safety information

68. Are current measures sufficient to ensure price transparency in online shopping?

The current law is sufficient and should remain technology neutral so as to apply in a range of contexts.

OTHER ISSUES

The Interim Report identifies 'pyramid selling' for further consultation. At issue is whether the ACL's definition of 'pyramid scheme' could be broadened to include multi-level marketing schemes where a successful return is unrealistic. It is argued this would ensure the current definition captures multi-level marketing schemes that are arguably similar to pyramid selling but involve other benefits and transactions.

It is claimed pyramid selling is defined too narrowly and there should be flexibility to extend the definition to schemes where at least some of the reward is derived from a "genuine underlying transaction".[11] Support for this policy shift is claimed from two case studies and generalisation that multi-level marketing schemes commonly operate through psychological manipulations to take advantage of vulnerable people through passive income and self-employment claims. It is claimed there is a strong case for including as illegal pyramid schemes, those that don't provide a realistic chance for a successful return.

Multi-level marketing is a legitimate and integral aspect of the direct selling retail channel. There is ample evidence of its individual and broader economic and societal contributions.[12] The current law adequately covers the commonly understood elements of "pyramid" schemes and suggested broadening of its definition in the ACL to include what seem to be subjectively derived earnings claims will threaten legitimate models for consumer purchases.

DSA opposes any extension of the commonly understood meaning of pyramid selling that could potentially affect network marketing or other legitimate business models. Pyramid selling has a well-established and understood meaning in the ACL being judicially interpreted to reach schemes where rewards are from recruiting new participants, not the genuine economic activity in distributing goods and services. This economic activity in wholesaling and retailing competitive products underpins the legitimacy of network marketing models.

[11] See page 23 of the Consumer Action Law Centre response to the Australian Consumer Law Review Issues Paper.
[12] For example, Social and Economic Impacts of Direct Selling: Deloitte Access Economics, December 2013.

DSA acknowledges the potential for people to be induced to join network marketing or other companies with exaggerated earnings claims. But people join direct selling companies (using multi-level reward structures) for different reasons. Rankings in a recent and independent survey show only just over half were motivated by potential income, and income expectations across product orientation and business models vary considerably. There was no evidence of expectation being fuelled by passive income claims. Relevantly about half those surveyed said they joined companies to acquire products (at wholesale prices) for personal consumption. The obvious question is what is a "realistic return" in their circumstances? This is entirely subjective and varies enormously depending on an individual's motivation, goals and objectives, and the quality of products on offer. Whether the returns (including but not limited to financial returns) match an individual's expectations will again depend on factors such as commitment, confidence, support and change in personal circumstances, and the individual's own ability.

DSA believes the comparative law study is instructive for this issue. Unlike some other countries, Australia has a mix of specific and general controls of pyramid schemes. Where specific control exists in other jurisdictions it generally matches key elements of Australia's regulation. Associated practices such as exaggerated earnings claims now sought to be relied on for altering the definition of pyramid schemes can be controlled through general ACL provisions, notably its proscription of misleading, deceptive and unconscionable conduct, and specific prohibition of misleading income claims relating to "at-home" business opportunities.

DSA submits there is no evidence to support extending the meaning of pyramid selling. If there was, the more appropriate approach to addressing instances of this behaviour lies in enforcing existing ACL provisions, not with extending its meaning in vague criteria that threatens legitimate business models.

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