



**DIRECT SELLING
AUSTRALIA**

DIGITAL PLATFORMS: GOVERNMENT CONSULTATION ON ACCC'S REGULATORY REFORM RECOMMENDATIONS

Background

Direct Selling Australia Limited (**DSA**) represents about fifty-five members using the direct sales channel to bring consumer goods and services to Australia's market, a majority of which operate as small to medium sized businesses in Australia.

Direct selling is often characterised in party plan and network marketing practices and the channel is known for its relationship and experiential selling strengths. Within DSA membership, doorstop business models have declined and party plan and network marketing models are increasingly integrated. For at least the past decade, technology and its resulting consumer empowerment has encouraged direct selling models to respond to the marketing and sales opportunities in social media, a concomitant of personal marketing.

A key feature of these business models is wholesale and retail distribution of products through independent contractors. They are small and micro businesspeople, 75% are women and 62% are in the lower half of the socio-economic spectrum. Supplementary income, work balance and flexibility are the main drivers for their industry involvement.

Unfair Trading Prohibition

DSA welcomes this opportunity for engagement in specifically considering the ACCC's recommendation for economy-wide measures including a prohibition against unfair trading practices in the context of the Digital Platform Services Inquiry.

DSA's consistent view is that consumer policy must appropriately balance addressing consumer harm in a meaningful way, while not imposing unnecessary compliance burdens on business. Essential in this analysis is whether real risks of consumer and business detriment are addressed with an appropriate level of regulatory burden.

DSA notes the ACCC Recommendation 1 in the Fifth Interim Report for "Economy-wide Consumer Measures" including a recommendation for an economy-wide unfair trading practices prohibition.

DSA is very concerned about the introduction of any unfair trading prohibition which would traverse both offline and online behaviour. DSA notes that the focus of both this Inquiry and the previous Digital Platform Inquiry in relation to unfair trading practices have squarely centred

around online behaviours, for example, dark patterns, excessive tracking of user data, click-round contracts, take-it or leave it online contracts etc. The Inquiries have not provided significant notification of the types of offline behaviours which would be captured by an economy-wide unfair trading prohibition and this should form part of a separate and specific consultation process to understand fully the ramifications.

DSA submits the introduction of a fair trading prohibition would reduce certainty and make it more difficult and costly (especially smaller businesses) to comply with the law – particularly under Australia’s current enforcement framework and the high penalties in place.

Small to medium sized businesses and micro-business are already subject to a myriad of consumer legislation and DSA’s Code of Conduct, for example, reinforces (and in some instance goes beyond) the requirements of the Australian Consumer Law, privacy legislation and therapeutic goods legislation for both member companies and the direct sellers that they engage with. The Australian Consumer Law already places significant obligations on small retailing businesses through provisions relating to misleading and deceptive conduct, unconscionable conduct, refund obligations. The current law also places significant and substantially increased penalties on businesses that breach these provisions. DSA submits that any general prohibition would result in duplication with prohibitions already included under the current Australian Consumer Law. Businesses in our industry are adjusting to the requirements of the unfair contract terms regime and there is no indication that a new unfair trading prohibition is likely to add any useful protections for consumers in an offline environment, except to say that it is a very vague, broad and subjective term which is likely to :

- a) needlessly complicate the Australian legal framework;
- b) cause confusion to consumers regarding their rights at the “shop front” (i.e. a customer might think it “unfair” that they can’t return a product due to a change of mind if they don’t understand the other provisions of the ACL);
- c) be of little practical use in the short to medium term as it would need to be presented to a tribunal for subjective determination of whether an action was “unfair”. Fairness is an unfamiliar concept in Australian law and likely to cause further confusion to business still adjusting to the concepts put forward in the unfair contract terms provisions of the ACL;
- d) create further uncertainty and the resulting costs will be detrimental if applicable to small and medium-sized businesses.

DSA submits that it would be better to wait and understand the effectiveness of outcomes arising from the implementation of increased ACL penalties and strengthening of the unfair contract terms provisions prior to determining whether an unfair trading prohibition is necessary. It would also be useful to establish further evidence that such a prohibition would be effective with regard to the dark practices and other concerning practices on the web, again given the time required to prosecute practices and bad actors.

DSA considers that if any measures are introduced, they should either be limited to online platforms in order to assess their effectiveness or take the form of a Code for digital platforms would be more useful in reacting proactively to threats which may exist in an online context due to the greater flexibility afforded in applying and amending Code provisions rather than primary legislation or awaiting court outcomes.

DSA’s view is that introducing an economy-wide unfair trading prohibition in the context of an online Platform Services Inquiry is not appropriate due to the adverse consequences to many businesses which would face significant uncertainty as to how the prohibition may be

subjectively applied. A general unfair trading prohibition should not be contemplated unless there is clear evidence of a gap in the law. We do not believe this to be the case economy-wide.