



DIRECT SELLING ASSOCIATION OF NEW ZEALAND



Founding Member of:



## **Submission On:**

***Protecting Businesses and Consumers from unfair commercial practices***

**To**

**Ministry of Business Innovation and Employment**

## Contents of Submission

1. Contact Details
2. Summary statements
3. Submission in Depth
4. Background

## Contact Details

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### **Confidentiality waiver/privacy:**

The DSANZ does not require our submission to be confidential and accepts it may be publically available.

The DSANZ is happy to be available for further consultation on this submission should the Ministry wish to undertake this directly.

### **3. Submission Summary Statements**

The DSA in New Zealand represents those companies that wish to ensure consumers and its sales force are protected by establishing clear ethical practices for Direct Selling businesses.

While we have answered, the specific questions raised within the discussion document, we believe that additional changes to the Fair Trading Act around unfair contracts should provide an exemption for member companies due to the current protections offered under the DSA Code of Practice to the independent contractors who make up our sales force.

Where an industry such as the DSA has established firm criteria to protect unfair contracts and practices between businesses and to consumers, it should be recognised as such, and should not need additional regulatory obligations.

Those that operate outside of such codes may need to be subject to legal obligations to adhere to the code, or within the broader context across all contractual parameters around what is or is not unfair under that law.

We therefore propose that should unfair conduct or an extension of unfair contracts to business occur, DSA members bound by the DSANZ Code of Practice be exempted from coverage of these changes within the Fair Trading Act.

We believe that those who hold membership are already providing the necessary protections to consumers and to those business people in the form of independent contractors who engage with our member companies.

## 4. DSA Specific Comments

DSA New Zealand responses to questions raised in the discussion paper.

### **Question 1:**

We are not aware of any unfair business to business contract terms in relation to our industry membership.

### **Question 2:**

We have not seen any adverse impact from our member's contractual arrangements due to full compliance with our Code of Practice

### **Question 3:**

We do not believe that government intervention in relation to our member's contract is warranted as a full resolution system is in place should any member of the DSA contravene the obligations set out in our Code of Practice.

### **Question 4:**

We have not seen any unfair business to business conduct by our members and are not aware of any outside of our membership.

### **Question 5:**

Because individual contractors to our member companies have access to independent arbitration through our Code Administrator we have not seen any of them adversely affected and thus no impact!

### **Question 6:**

We do not believe that in relation to Direct Selling there is any reason for government intervention. We do not have a position in relation to other sectors.

### **Question 7:**

Our Code of Practice establishes firm rules around conduct between our member's independent contractors and consumers. This include clear rights of cancellation beyond the current law, practices that are not acceptable including in section 2 clauses 6 and 7 conduct towards consumers. We cite paragraph 6(g) and all of clause 7 as firmly establishing unacceptable conduct in relation to our industry.

Our Code of Practice is available on our web site [www.dsanz.nz](http://www.dsanz.nz) in full and downloadable formats.

### **Question 8:**

In terms of our membership we have not seen any adverse impacts from conduct however we have on occasion given supportive advice to consumers in relation to non-members conduct and infrequently lodged complaints to the Commerce Commission when we believe that conduct illegal under the existing law.

### **Question 9:**

In relation to the Direct Sellers who are members of the DSA, we do not believe there is any case for intervention by government. We believe that there is sufficient law to ensure conduct by Direct Seller independent contractors is appropriate but should there be

deemed a necessity then the DSA Code Section 2 Clauses 6, 7 and 8 provides the benchmark for those who are not DSA members.

**Question 10:**

We agree that the high-level objectives are important for any regulatory framework in protecting against unfair practices. We also believe that the use of industry codes such as the DSA Code of Practice, which MBIE and other stakeholders were consulted on for the latest update early in 2018, is the best vehicle for protection of both consumers and independent contractors for our industry.

**Question 11:**

We do not believe that there is justification for a high-level prohibition against unfair conduct as the existing provisions under the Fair Trading Act already have sufficient teeth to address most issues. In terms of our sector, we believe the industry code is the benchmark on what is unfair conduct and note that the case cited in Annex 1 around conduct would have been in breach of our Code.

**Question 12:**

While we do not believe any of the options to be necessary, option 1C does provide the most pragmatic description of unfair commercial practices and given this could use the industry codes as a benchmark. We do not support the Australian model of 1A as this becomes highly subjective without strong case law and even then has the potential to have adverse consequence if the interpretation by the courts is incorrect.

**Question 13:**

We do not support use of Unconscionable Conduct as the term is open to wide interpretation of what this might be. We believe that if a particular conduct is not acceptable, then it is that specific conduct that should be regulated to address the specific issue. This is the basis of a number of existing clauses within the Fair Trading Act.

**Question 14:**

Good faith is a key tenant of good business however, it may sometimes be difficult to assess whether a particular action is done in good faith without specific reference. We believe that the DSA Code of Practice provides this for this industry sector and a business that is complying with an industry code is likely to be acting in good faith.

**Question 15:**

While we are not supportive of option 1, we believe that 1C combined with citation of benchmark industry codes provides more clarity for business on their obligations, and how to comply.

**Question 16:**

We do not believe that option 1 should extend to matters relating to the contract, as the existing unfair contract provisions are sufficient.

**Question 17:**

We believe that any protections should only extend to consumers, as industry codes are adequate in our sector to protect independent contractors. We do not support extension to business. Should there be an extension to business, then Direct Selling/DSA members

should be exempted or excluded, as our Code of Practice provides for adequate protection for independent contractors of those member companies.

**Question 18:**

We do not accept that there is a necessity to extend unfair contract provisions to business however should this occur we believe that the protections for independent contractors built into our Code of Practice ensures that should be unnecessary to include DSA members. An exemption should therefore be provided should this occur.

**Question 19:**

We do not believe the examples under the FTA consumer grey list should be carried over if unfair contract provisions are extended to business transactions. Contract terms in a business-to-business setting are often different and by the very nature of ongoing transactions, it will be necessary for businesses to be able to vary pricing, commissions and other remunerations in order to remain in business. Placing these fully in the bounds of equal negotiation powers would be a considerable barrier to business.

**Question 20:**

We believe that unfair contracts should remain only to consumer as presently applied. We see the extension to business problematic for many business models and a significant burden should it be applied. Direct Selling businesses each deal with thousands of independent contractors for their businesses. It is not possible to negotiate with these numbers around contracts individually and so we believe that the extension should not occur and if an extension does occur an exemption should apply for Direct Selling businesses.

**Question 21:**

The suggestion of a transactional value for extension of unfair contracts to business would cause significant issues for Direct Selling businesses as most sales are below \$100 currently but maybe made up of many such sales to the independent contractors. Some independent contractors will have a large volume while others are little more than wholesale buyers of products who self-consume the majority of what they purchase. We do not support a transactional value should this extension proceed for this reason.

**Question 22:**

We support reparations and a fair determination of what should apply, however we do not believe there is a case for penalties to be applied for an unfair contract. All such cases must be undertaken via the court process with the ability of the business to provide a settlement with the Commerce Commission prior to the case going to court. We do not support remedies or penalties being pursued outside of the Commerce Commission.

**Question 23:**

We believe that formally recognising some industry codes may assist in addressing unfair conduct but have no additional comment on unfair contracts.

## Background Information

The Direct Selling Association of New Zealand Inc. (DSANZ) is a membership organisation representing companies engaged with Direct Selling.

Direct Selling is defined as Person to Person selling away from fixed retail location sometimes known as personal selling.

Methods of Direct Selling include Network Marketing (sometimes called Multi-Level Marketing which is actually only a reward system), Party Plan and Door to Door or traditional Direct Selling. Such methods can cross over between the various methods to incorporate components of more than one although Door to Door selling is rarely used by our members.

The Direct Selling industry in New Zealand currently has a wholesale value of \$253 Million dollars with around 110,000 independent distributors.

In 2013 Deloitte's Access undertook a Social and Economic impact of Direct Selling in New Zealand. The study assessed the FTE (Full Time Equivalent) value of the industry as **4662 FTE**.

While not included in the study, the industry is responsible for more than \$140 million in exports, mostly in the Nutritional Supplements, cosmetics and to a lesser extent food and beverage products.

Membership of the Direct Selling Association is voluntary however it is governed through self-regulation under a Code of Practice/Ethics governing conduct and ethics addressing three principle areas. These are; Conduct towards Consumers, Conduct towards Distributors and Conduct towards other Direct Selling Companies.

All members on joining agree to abide by the DSANZ Code of Practice/Ethics which provides significant consumer protection and fast redress provisions as its mainstay, but also provides the same levels of protection and redress for distributors and for other member companies against practices that are unfair or unethical.

The DSANZ Code of Practice is based on the principles established under the World Federation of Direct Selling Associations Code of Ethics 2017 but with additional elements designed to ensure alignment with New Zealand law.

Currently the membership totals 40 members and included supplier companies and life members.

Full membership is attained only once ethical behaviour has been established for the company within New Zealand. This may be assisted by references from other countries where operations occur and a probationary period occurs for around 2 years from first application for membership where such references are not available.