



**DIRECT SELLING  
AUSTRALIA**

# Improving the effectiveness of the consumer guarantee and supplier indemnification provisions under the Australian Consumer Law

*Submission to the Treasury 11 February 2022*

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## Background

Direct Selling Australia (**DSA**) welcomes the opportunity to comment on the Consultation Regulatory Impact Statement (**CRIS**): Improving the effectiveness of the consumer guarantee and supplier indemnification provisions under the Australian Consumer Law.

In preparing this response, DSA represents 53 members who are organisations operating a direct selling business in Australia (**Members**). An independent survey<sup>1</sup> recently identified that Member companies generated sales of \$1.35 billion in the last financial year and that approximately 482,000 independent sales people in Australia were involved with Members. The predominant activity of a direct seller is selling or using a Member's products but they are also

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<sup>1</sup> Survey Matters DSA 2020 Member Survey (March 2021)

engaged to recruit other persons to join and sell. The operational models and sales channels used by Members vary enormously.

The product categories represented by Members are diverse. The two major categories represented are wellness and cosmetics. Respectively, these account for 41% and 27% of total sales. Products are typically low value with the vast majority of items having a recommended retail price of under \$200. DSA's response to the CRIS reflects an industry which is diverse in respect of business models, product ranges and price points. DSA is concerned about the potentially negative effects of the proposed reforms given the low incidence of consumer detriment in the direct selling space and significant consumer protection already afforded by the existing consumer guarantees, Member company policies and DSA's Code of Practice.

We have set out below our responses to the specific questions posed in the CRIS which we believe DSA can most usefully answer.

## PART A: Receiving remedies

### Focus Questions

#### *Question 7*

*Please provide any relevant information or data you have to help estimate the extent to which consumers are unable to access consumer guarantee remedies when entitled.*

DSA's experience relating to consumer guarantee remedies arises in the context of complaints we receive under the provisions in our Code of Practice. Most of our members have policies in place which offer a 30-day money back guarantee and in any event, our Code of Practice guarantees a 10 day cooling off period for the purchase of any product. A hallmark feature of many direct selling companies is that product satisfaction is key to the business model. DSA rarely receives complaints regarding product quality or issues with returns of products to consumers. To the best of our

knowledge, our members have rarely, if ever, appeared on the NSW Fair Trading Complaints Register.

In a unique feature of the direct selling business, our Code of Practice also requires that unsold product can be returned by independent distributors upon termination of their contracts if bought within the previous 12 months. Again, it is rare that we receive complaints relating to returns but on those occasions, we are able to assist in resolving the matter with our members under the relevant Code provisions.

DSA can supply a copy of our Code of Practice which is heavily focused on compliance with the Australian Consumer

#### **Question 7**

*If the status quo was maintained, what other potential costs could there be to industry, consumers and businesses?*

In the direct selling industry, DSA does not believe there would be any potential costs to maintaining the status quo.

#### **Question 8**

*What do you consider would be an appropriate maximum penalty for a supplier or manufacturer failing to provide a remedy for a failure to comply with a consumer guarantee when required under the ACL? Please detail reasons for your position.*

DSA's view is that penalties are not appropriate in the direct selling context and are likely to deter individuals seeking a supplementary source of income from joining a direct sales company. DSA does not believe that a "one-size fits all" approach to penalties is appropriate. Some of our member's direct sellers may only make a nominal amount from the sales of products whilst others operate as a full-time business. However, those microbusinesses are miniscule compared to much larger retail businesses who would also be covered by any changes to remedies.

### **Question 9**

*What do you consider would be an appropriate infringement notice amount for an alleged contravention of a requirement to provide a remedy for a failure to comply with a consumer guarantee? Please detail reasons for your position.*

We are aware of smaller companies who have been hit with infringement notices from regulators such as the TGA to the tune of \$12,500 per offence. Even this level of penalty would be devastating for an independent salesperson on a small income if it were to be imposed. Many direct sellers engage in the activity in order to make some modest supplementary income and the imposition of potential penalties may lead many to conclude that the regulatory overreach and potential risk of being a direct seller outweighs the benefits.

### **Question 10**

*What would be the most effective way of implementing a civil prohibition for a failure to provide a consumer guarantee remedy? Should the circumstances in which a penalty applies be limited in any way?*

DSA believes that a stronger education piece is the most appropriate method of addressing the issues of concern in relation to consumer guarantee remedies. At DSA we regularly conduct member education pieces around the Australian Consumer Law on topics we perceive to be pertinent and relevant and we have a high engagement with our membership. As previously cited, we also actively engage with our members regarding their obligations under our Code of Practice. We regularly review this Code and the extent that we can make our provisions more robust in relation to remedies, as the industry leader we would be willing to do so. Our refund provisions currently go beyond those provided for in the Australian Consumer Law.

### **Question 13**

*Are there any unintended consequences, risks or challenges that need to be considered with creating such civil prohibitions?*

DSA's members manufacture products and then contract with independent salespeople in order to sell product. Whilst some arrangements are agency in that the actual retailer of the product is the manufacturer, in many instances a wholesaling arrangement is in place. DSA would be concerned with any civil prohibitions that implemented large fines applicable to independent salespeople who may inadvertently breach a provision. Our Code of Practice has provisions which relate to the refund of product and in our experience the few complaints we receive about product are dealt with swiftly to the satisfaction of the consumer. Civil prohibitions accompanied by large fines are likely to deter individuals from becoming independent salespeople and stifle innovation by direct selling companies who are likely to see Australia as a less attractive country in which to set up.

### **Question 14**

*Do you think introducing a civil prohibition would deter businesses from failing to provide the applicable consumer guarantee remedy to consumers who are entitled to one?*

The majority of DSA members already have in place 30 day back guarantee and are also subject to DSA's Code of Practice 10-day cooling off period. Therefore, within the direct selling industry, the additional deterrent effect from a consumer guarantee remedy is likely to be limited.

## PART B: Supplier indemnification

### Focus Questions

#### *Questions 26*

*How (if at all) would a civil prohibition change your response to requests for indemnification?*

DSA understands that when a wholesale direct seller replaces faulty product for a consumer (as a supplier) they then return the product to our members (as a manufacturer or deemed manufacturer) either for stock replacement or a refund/credit to their account. DSA's Code of Practice requires members to comply with the Australian Consumer Law and in the event this does not happen, direct sellers may complain to us. DSA has investigation and disciplinary tools available to it. It is rare that we receive complaints regarding a failure by one of our members to not providing a replacement or refund for faulty products.

#### *Question 33*

*What would be the most effective way of implementing a civil prohibition for a failure to provide a consumer guarantee remedy? Should the circumstances in which a penalty applies be limited in any way?*

If penalties were to be applied for a failure to provide a consumer guarantee, they should be limited in a manner proportionate to the size of the business. Many independent salespeople operate ultimately as small or microbusiness with some choosing to sell product as a side "gig" to other employment. Imposing large fines would not have a deterrent effect, but a devastating effect and be likely to put those individuals out of business and potentially place their assets at risk.