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Scanned copy of submission

The Assistant Commissioner
Productivity Commission
PO Box 80
Belconnen ACT 2616

Dear Sir

**Re National Workers Compensation and Occupational Health and
Safety Frameworks**

This submission is made by the Direct Selling Association of Australia Inc (DSAA).

The DSAA is the appropriate Association to make submissions on behalf of the Direct Selling Industry. A Profile of the Association and a list of members is attached.

The Inquiry will examine a very wide spectrum of issues in relation to the existing arrangements dealing with Workers Compensation (WC) and Occupational, Health and Safety (OHS) but this submission will be confined to the definitions of employee or worker in the States' Workers Compensation Acts and the "deemed worker" provisions in those Acts.

It has been well established for many years that Members' independent salespersons (agents, distributors, consultants, representatives etc) are genuine independent contractors. This position is accepted by the Australian Taxation Office, by Treasury and by the Taxing Authorities in the States.

In Victoria, independent salespersons engaged in the door to door sale of goods are exempt from the Accident Compensation Act by section 9 (1) (g). The definition of "door to door" sales in section 9 (6) (e) of that Act, effectively covers, we believe, the operations of independent salespersons in the Industry.

In New South Wales, independent salespersons are not workers as described by the definition of worker in section 4 (1) of the Workplace Injury Management and Workers Compensation Act 1998. However, an element of doubt has sometimes arisen because of clause 5 of Schedule 1 of the Act which states that:

***"A salesperson -----aid wholly or partly by commission
is -----a worker -----unless the commission is received for
or in connection with -----a trade or business regularly
carried on by the salesperson -----".***

The Association referred the matter, in 1989, to the then NSW Minister for Industrial Relations and Minister for Employment, Mr John Fahey, who advised that

***---the activities of direct selling agents
do not presently fall within the operation
of the Act".***

A copy of Mr Fahey's letter is attached.

A major Insurer in NSW has recently created doubt on whether independent salespersons in the direct selling industry are outside the scope of the WC Act in NSW, and in particular, whether they should be treated as "deemed workers" in accordance with clause 5 of Schedule 1 of the Act. Advice received recently by the Association from Senior Counsel has confirmed that these independent salespersons are not "deemed workers" as envisaged by clause 5 of Schedule and independent advice sought by the relevant Minister from other Senior Counsel has confirmed that view.

We support the Commission's Inquiry in seeking a consistent definition of employer and employee and in doing so we strongly recommend that independent salespersons in the direct selling industry be specifically excluded from the definition. This can be achieved by adopting the method used in the Victorian Accident Compensation Act or by consideration of the "7 Point Test" set out in the Final Report (September 2002) of Penny Le Couteur and Neil Warren,

***"Review of Employers Compliance with Workers
Compensation Premiums and Pay-Roll Tax in NSW"***

(Reference Chapter 4, para 4.3 and para 4.3.1) A
copy of para 4.3.1 is attached

If such a proposal was accepted, we believe that independent salespersons would be excluded by test 1 (labour content less than 50%) and/or test 4 (services provided to a householder) but we would seek, in addition, a specific exemption as discussed in para 4.3.1 at the top of page 55.

The direct selling industry for the last one hundred years has operated on the basis that independent salespersons in the industry are not workers for the purposes of Workers Compensation Laws. If consistent definitions for employer and worker are to be established, we believe that such independent salespersons should be specifically exempted so as to reflect the position which has been in place for a century.

For any further information which may be required, please contact Les Dell on
(02) 9547 1267.

Sincerely,
Les Dell

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Director, Government Affairs



Direct Selling Association of Australia Inc
INDUSTRY PROFILE

- In 1967 five companies, including current Members AVON and TUPPERWARE, formed a National Association of Direct Selling Organisations to promote and protect the ideals and opportunities of what was then a fledgling industry.
- The Association (DSAA) now represents the interests of more than seventy five organisations engaged in the direct selling industry.
- Members' products and services are sold by independent salespersons who make approximately two million home visits every month throughout Australia.
- There are at present approximately 620,000 independent salespersons associated with DSAA Members.
- The Industry brings a great variety of products into peoples' homes in a process that is very different from standard retail systems. Some of the products are:

clothing and accessories

cosmetics, personal care and skin care
toys, books and educational material complementary
health care and nutritional products household cleaning
products cookware and household electrical appliances
kitchenware, tableware and food storage systems car
care products and lubricants perfumes, fragranced
candles and associated items electrical goods

jewellery
essential oils and aromatherapy items
linen and manchester

security systems

- The majority of independent salespersons are women, most of whom operate in the industry on a part-time basis. Salespersons set their own goals and are able to operate their businesses to suit their lifestyles and their family and other commitments. They achieve their modest goals without ever approaching the taxation threshold of \$6000 per annum. When their children grow up many mothers are able to re-enter the workforce via the direct selling industry which permits flexible hours and provides a considerable amount of social contact for women.

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- Approximately 97.9% of independent salespersons earn below the tax threshold of \$6,000 per annum and about 90% earn less than \$1,000 per annum.
- At least 20 percent of all direct selling industry sales are for the personal use of independent sales persons and their families. Clearly, they do not obtain income from these sales but effectively purchase goods at a discount.
- The average time spent in the Industry by an independent salesperson with one Company is less than one year.

DSaa

ESTABLISHED 1967

DIRECT SELLING

ASSOCIATION OF

AUSTRALIA INC

MEMBERSHIP LIST APRIL 2003

A Better Chance Pty Ltd

AFS Pty Ltd

A Touch of Tahiti

Amway of Australia

Avon Products Pty Ltd

Bessemer Sales

Crafty Kids Pty Ltd

Creative Memories Australia Pty Ltd

Cutco (Australia) Pty Ltd

Dine Rite Pty Ltd

Dominant (Australia) Pty Ltd

Emma Page Pty Ltd Enjo Pty Ltd

Essential Additions

Furlong Wine Tastings

Giftware Plus

GNLD International Pty Ltd

Harvest Grove

Herbalife Australasia Pty Ltd

Homecare Direct Shopping

Hsin Ten Enterprise (Aust) Pty Ltd

Intimo Lingerie Pty Ltd Jigsaw Toy

Factory Pty Ltd Le Rive Pty Ltd

Life Force Networking Australasia Pty Ltd

Lorraine Lea Linen Pty Ltd Lux Direct Pty Ltd

Mannatech Australia Pty Ltd

Mary Key Cosmetics Pty Ltd

Morinda International (Aust) Pty Ltd

Nature's Sunshine Products of Australia Pty Ltd

New Image International Australia Pty Ltd

Niagara Therapy Manufacturing (Aust) Pty Ltd

NSA (Australia) Pty Ltd

Nu-Skin Australia. Inc.

Nutrimetics International (Australia) Pty Ltd

Omegatrend Australia Pty Ltd

Pola Cosmetics. (Aust) Pty Ltd

Postie Fashions

Pro-Ma Systems (Aust) Pty Ltd

Pro-Sales Direct Pty Ltd Rawleigh Pty Ltd

Reiiv Australia Pty Ltd

Sunrtder International Australia

Swipe & NaturCare Pty Ltd

Sympatico Bodyworks Pty Ltd

The Body Shop at Home

The Commonwealth Key & Property Register

Tupperware Australasia

UndercoverWear Collection

USANA Australia Pty Ltd

Watch 24 Pty Ltd

Weekenders Australia Pty Ltd

ESTABLISHED 1967
DIRECT SELLING
ASSOCIATION Of
AUSTRALIA INC

PROVISIONAL MEMBERS LIST

APRIL 2003

Jeunique International (Australia) Pty Ltd

Liqua Health Marketing Pty Ltd PartyLite

Pty Ltd

The Little Black Dress Company

Viviannes Collection Australia Pty Ltd

ESTABLISHED 1967
DIRECT SELLING
ASSOCIATION OF
AUSTRALIA INC

SUPPLIER MEMBERSHIP LIST

APRIL 2003

Brand Promotions Pty Ltd
Brian C. Leggett
C & R Printing Company
Cher International
Chocolate Graphics Pty Ltd
Frost Promotions Pty Ltd
Home Delivery System Pty Ltd
In Home Marketing Pty Ltd
Island Visual Solutions
John Watt Consulting Pty Ltd
Pinnacle Software Solutions Pty Ltd
Premiere Conferencing
Robert Forbes & Associates Pty Ltd
Sandy McDonald
Santen Corporate Jewellery
Simple Successful Pty Ltd +
Spectrum Marketing Services
D.F.C. Thompson Australia Pty Ltd
Voice-Tel Pty Ltd
X² Consulting Pty Ltd

COPY

Mr J. Fulton
Executive Director
Direct Selling Association of
Australia
G.P.O. Box 1469N
MELBOURNE VIC 3001

MINISTER FOR INDUSTRIAL RELATIONS

MINISTER FOR EMPLOYMENT

MINISTER ASSISTING THE *PREMIER*

22nd Level
1 Oxford Street
DARLINGHURST NSW 2010
22 JUN 1989

Dear Mr Fulton,

I refer to your recent correspondence concerning the position of direct selling agents in relation to the Workers Compensation Act 1987.

Clause 5 of Schedule I of the workers Compensation Act 1987, provides that a salesperson, canvasser, collector or other person paid wholly or partly by commission shall, for the purposes of the Act, be deemed to be a worker in the employment of the person by whom the commission is payable, unless the commission is received for in connection with work incidental to a trade or business regularly carried on by the salesperson, canvasser, collector or other person or by a firm of which he or she is a member.

I understand that direct selling agents are involved in the distribution of goods sold either by "party plan" or door to door selling and that there is no control of the activities of the persons who "sell" the goods, by the direct selling agent who procures and forwards on stock to that person.

In the light of the definition set out in Schedule I, the activities of direct selling agents vis a vis persons "selling" goods in the ways described do not presently fall within the operation of the Act .

At this stage, no changes are contemplated as a result of the recent review of WorkCover to alter the status of direct selling agents under the legislation.

I have enclosed a copy of press releases concerning proposed changes to the WorkCover Scheme for your information.

Yours faithfully,

JOHN FAHEY
Minister for Industrial Relations and Employment Minister
Assisting the Premier

4.3.1 Step 2 Explained

Following a review of the approaches applied in respect of workers compensation and pay-roll tax for determining who is included as a worker/employee, an amalgam of the two is proposed to operationalise step 2. The foundation of the approach recommended in this report is based around the current pay-roll tax definition of 'relevant contracts' and the treatment of employment agents modified to also suit workers compensation.

Under the pay-roll tax legislation, contractors would be included as workers should they be providing services under a 'relevant contract'. A relevant contract would include any contract which includes the provision of services, with a limited number of exemptions for equity and ease of practical application.

A number of types of tests were considered. These tests should meet the following criteria:

1. simple and easy for the employer to comply with.
2. objective, rather than subjective, so that they can be used equally for the purposes of determining workers compensation premium coverage and eligibility to claim against the employers workers compensation policy, without a broader interpretation being made by the courts after an injury.
3. able to be applied at the beginning of a contract, so that the position of each worker is clear upfront. This is particularly important for workers compensation coverage in the case of an injury.
4. rely on information which would normally be known to the employer rather than private business information of the contractor.
5. provide a reasonable balance between onerous compliance on genuine businesses and open opportunities for those who will seek to avoid their responsibilities.

Step 2 would see contracts excluded based any of the following tests:

Test 1 the labour content of the contract is less than 50% of its total value, excluding GST.

These contracts are excluded because the labour is ancillary to the supply of goods, or the use of plant or vehicles in completing the contract.

A single set of rules, based on the labour content rules used by OSR and WorkCover, should be adopted to guide employers in determining which contracts are excluded on this basis and the proportion of the contract value that is included as labour content. Refer to Appendix 10 for labour content rules currently used by WorkCover and OSR. The labour content rules will need to separately identify contractors who supply labour only, labour and tools, labour and plant, labour plant and materials, as is the case with the current WorkCover guidelines. It is recommended that the rules be revised to include more detail in terms of industries covered.

Any arbitrary threshold creates an opportunity for avoidance. As an anti-avoidance measure, this test should include discretion to include any contract should it be determined by the relevant authority that the arrangement was structured to reduce pay-roll tax or workers compensation premiums.

Test 2 The services are provided by a business which is carried on by an incorporated entity with two or more employees or in any other case, the business has at least one employee.

Contractors employing staff are seen, by this test, to be in business, not simply providing labour akin to an employee. They would therefore be required to have their own workers compensation policies and if the wages of their enterprise exceed the tax-free threshold, would be required to register for payroll tax. This significantly clarifies and simplifies *Pay-roll Tax Act 1971*, para 3A(1)(f)⁹⁰

This test should be subject to anti-avoidance provisions to ensure arrangements which are not bona-fide are included in principal's workers compensation premium or pay-roll tax.

Test 3 The services are provided under one or more contracts with a total value of less than \$10,000 (excluding GST) in any financial year.

This test applies to sole traders and partnerships that do not engage employees and to incorporated entities with one employee for pay-roll tax only as all other situations would have been excluded under tests 2 and 7. The exemption is required to ensure that the provisions are workable in practice, by excluding minor and infrequent contracts, for example services provided by accountants, architects, and plumbers.

The threshold of \$10,000 is recommended as it is low enough to discourage contract fragmentation yet high enough to exclude minor contracts. The value is determined excluding GST for neutrality between those contracts which include GST and those which do not.

However, introducing a threshold raises issues about its application across groups, periods (financial years versus policy years), and multiple contracts with the same principal which individually do not exceed the threshold but in aggregate do.

It is proposed that the threshold applies to a group for workers compensation and pay-roll tax purposes (refer Chapter 6). Further, the threshold is proposed to cover a financial year as opposed to a policy year. This aligns with the payroll tax year and the period businesses commonly report their financial position for tax and accounting purposes. Workers compensation policy renewal dates are spread through out the year and it was considered impractical to apply the threshold over these varying periods.

In respect of multiple contracts, rules need to be implemented clarifying the point at which workers compensation and pay-roll tax liabilities arise. It is proposed that this takes place when the threshold is reached, ie it cannot apply retrospectively. Once the aggregate value of contracts in a financial year exceeds the \$10,000 threshold, the labour content in the contract that crossed the threshold (and any subsequent contracts) would be included in the principal's workers compensation and pay-roll tax coverage.

As indicated above, any arbitrary threshold creates an opportunity for avoidance. As an anti-avoidance measure, this test should also include

⁹⁰ See Appendix 6

discretion to include any contract should it be determined by the relevant authority that the arrangement was structured to reduce pay-roll tax or workers compensation premiums.

It is important to note that this test only applies to sole traders and partnerships that do not engage employees and for pay-roll tax only, incorporated entities with one employee.

Test 4 The services are provided to a householder.

Householders are not employers⁹¹. This exemption is to ensure that the workers compensation and pay-roll tax responsibilities are not placed on household consumers of services.

This test would only extend to contractors with direct contracts with householders. It would not exempt a contractor from including any subcontractors in their own workers compensation and pay-roll tax responsibilities.

Test 5 The services are provided in special cases.

There are a small number of contracts which will not meet tests 2, 3 or 4 but need to be excluded, as they are with genuinely independent businesses. These will arise in cases where:

- (a) a contract fails test 2 as the contractor is required to contract as an individual and not legally able to provide their services through a company structure (such as barristers).
- (b) a contract fails test 3 because the contractor provides services to multiple entities, while the contract for remuneration is with a third party (as with financial planners who receive commission from a funds manager in respect of multiple clients).
- (c) a contract fails test 4 because although the service is provided to a householder, the contract for remuneration is with a non-householder third party (as in the case of insurance sellers and financial planners).

A short and specific list of special cases should be determined by WorkCover and OSR.

Test 6 For payroll tax purposes only, the services are provided by an entity which is exempt from pay-roll tax.

Charities, for example, are exempted from pay-roll tax. The operation of these tests is not intended to change the position of entities specifically exempted from pay-roll tax.

⁹¹ Where a householder employs a full-time nanny, for example, the wages paid will be subject to PAYG withholding and included in wages for the purposes of workers compensation and pay-roll tax. As a result, the householder is, for this purpose, an employer and the nanny is an employee under step 1. For workers compensation, domestic employees in private homes are covered by domestic workers compensation policies, which can be included in home contents insurance. For pay-roll tax, they would usually fall below the tax-free threshold.

Test 7 For workers compensation purposes only, the contract is with an incorporated body.

This applies to incorporated individuals, as all other incorporated bodies have been excluded under test 2. It continues the current position for both workers compensation and pay-roll tax. Such contracts are included in the pay-roll tax base, while they are excluded from workers compensation. Single employee companies are currently required to have their own workers compensation policies.

The approach set out above in relation to step 2 adopts a similar approach to that currently used for pay-roll tax⁹². It also simplifies it by eliminating a number of categories of exclusion which are considered unworkable or unnecessary, including where:

- *the services are not ordinarily required by the employer and the contractor provides services to the public generally.*

This is not simple to administer or certain in its impact on contracts. It has been difficult to enforce due to the broad scope for interpretation of the phrase 'not ordinarily required', which is not defined in the legislation and the lack of a test for determining when an entity is providing services to the public generally.

- *the services are ordinarily required by the employer for less than 180 days in the financial year.*

There is no underlying reason providing for an exclusion based on a rigid and arbitrary time period which creates an avenue for non-compliance. Additionally, 'ordinarily required' is subject to broad interpretation and is therefore not simple to administer.

- *the services are provided by the contractor for no more than 90 days in the financial year*

This category is inappropriate for the reasons outlined for the previous category. Additionally, this exclusion is inappropriate for industries like the building industry, where contractors work for many employers for short periods of time. On this basis, application of this exclusion is not economically neutral.

- *the services are provided by a contractor who ordinarily provides services to the public generally.*

This has been difficult to enforce as there is no simple and effective test, and there are a number of easy and inexpensive ways to show an apparent provision of services to the general public. As a consequence it is relatively easily abused.

- *the contract consideration is \$800, 000 p. a. or more.*

This exclusion assumes the labour component will exceed the pay-roll tax threshold. However, this may not necessarily be the case. It therefore provides an opportunity for manipulation and avoidance.

⁹² Pay-roll Tax Act 1971, s 3A. (see Appendix 6)

- *the contractor is selling insurance or is a door to door salesperson.*
Door to door sales people are a diverse group, and may be excluded by test 1, where services are ancillary to the supply of goods, as well as in many cases selling to householders which would be excluded under test 4. Insurance agents and financial planners would be excluded under test 5.
- *the provision of services is ancillary to the use of the contractor's vehicle (owner/driver).*
In these cases, the services are ancillary to the use of the vehicle. For heavy vehicles, these contracts will be excluded under the first test. Owner/drivers of small vehicles will not be excluded under that test however they may be excluded under other tests.

While elimination of these categories of exclusions apparently leads to the inclusion of a range of contracts currently exempt for pay-roll tax purposes, in practice most of these contracts would continue to be excluded under the proposed tests in step 2 above.

The approach taken in step 2 has been designed to cope with an evolving labour market environment. For example, it is considered that the new method of labour provision through 'Odco arrangements'⁹³ will be included under step 2. These contracts operate under a 'contract to service' rather than a contract of service (employment) or contract for service (traditional contracting). As a result, they are currently not included in NSW workers compensation coverage. These arrangements should be caught under the operation of the provisions of step 2, as a contract is in existence. Should legal advice indicate that not to be the case, then they should be included in step 3, which would need to be extended to cover both workers compensation and pay-roll tax, with some categories applying only for workers compensation purposes. The Victorian workers compensation deeming provisions have been legally tested and found to be effective in including these arrangements, and could be used as a guide.

In view of the significant changes to the concepts underlying the definition of a worker for both workers compensation and pay-roll tax purposes, it is recommended that there be further consultation with stakeholders before implementation.

4.3.2 Step 3 Explained

The need for step 3 arises because it is desirable to include a small number of special cases for workers compensation purposes. These include individuals such as those for whom there are no payments made in respect of work performed, and thus who may fall outside the scope of steps 1 and 2.

There are currently 19 categories of deemed workers under the workers compensation scheme (see Appendix 7). Examples include jockeys and taxi drivers. Special legislation and arrangements for the collection of premiums to cover some of these categories of deemed workers currently exist and would need to continue. The deeming provisions also have the function of changing the employer for some specific categories of worker.

⁹³ Refer www.odco.com.au for details.