

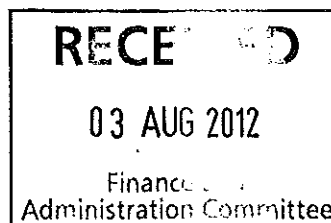


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Mr Michael Crandon MP
Chair, Finance and Administration Committee
Queensland Parliament
Alice and George Streets
BRISBANE QLD 4000



**Inquiry into the operation of Queensland's workers' compensation scheme
Submission by the Direct Selling Association of Australia Inc.**

Dear Mr Crandon

The Direct Selling Association of Australia Inc. (DSAA) is a trade association in Australia's direct selling industry. Among its membership are more than seventy leading direct selling companies who engage around 400,000 Australians in distributing their products.

Direct selling offers a unique opportunity for distributing goods and services and is increasingly relevant for a competitive retail environment. Its distribution channel offers a point of entry for suppliers with products that are suited to the relationship management strengths of direct selling, or who are not geared for the cost in marketing and distributing their products through other retail channels. While DSAA members include large transnational corporations with well-known brands about half its members are small businesses with an annual turnover of less than \$5 million.

Direct selling in Australia offers a competitive and expanding range of consumables that include skin care, cosmetics, dietary supplements, jewellery, home wares and other household products. It also attracts niche products like craft, scrapbooking and innovative food preparation systems.

For the small and micro business people in its distributor sales force, direct selling offers a low entry cost and business building opportunity as well as personal skills development. Direct selling is counter-cyclical. It typically excels in poor economic conditions where its low business establishment cost offers an opportunity for immediate income. This was evident in the initial stages of the recent global financial crisis with significant increases in distributor recruitment.

The involvement of distributors varies enormously, so too their level of financial resources, industry presence and market knowledge. For many their motivation is supplementing family income or earning income for a special purpose or for the social connection the industry offers. Earnings vary considerably and are ultimately linked to a distributor's effort and business acumen.

DSAA believes it essential in analysing and reviewing workers compensation schemes to reasonably balance the benefits and protection provided for workplace injuries with the affordability and cost to both business and government in operating the scheme. The Government is commended for looking to address existing inefficiencies within the scheme, and seeking to create a resilient and equitable structure.

Most DSAA members conduct their businesses throughout Australia. The Association supports current efforts to harmonise workplace safety requirements across jurisdictions and would welcome similar attention to harmonising its related insurance arrangements.

DSAA believes its members are not adversely affected by Queensland's workers compensation arrangements, as long as the definition of "worker" in the *Workers' Compensation and Rehabilitation Act 2003* (the Act) excludes independent contractors engaged in supplying members' products.

Section 11 of the Act provides that a worker is a person who works under a contract of service or is otherwise defined as a worker in schedule 2 of the Act. Business arrangements between members and their distributors do not ordinarily meet the common law tests for establishing a contract of service. The question then is whether distributors are deemed workers for the purposes of the Act. Relevantly Schedule 2, clause 4 says:

A salesperson, canvasser, collector or other person (salesperson) paid entirely or partly by commission is a worker, if the commission is not received for or in connection with work incident to a trade or business regularly carried on by the salesperson, individually or by way of a partnership. (emphasis added)

There is considerable legal argument and precedent that sees a determination based upon the definition of 'incident to' as "*liable to happen because of; resulting from*" (Oxford Dictionary).

Thus, excluded as workers are persons not engaged under a contract of service and who are engaged as a business entity and compensated as a result of their business activity.

Case law is instructive. In the landmark judgement in *Humberstone v Northern Timber Mills* [1949] HCA 49 Dixon J states:

"No doubt the policy is a matter of inference but it seems reasonable to suppose that it was considered proper that a person conducting a business in the course of which he contracted to perform work should himself carry the risk of personal injury as one of the hazards of his business, while the man who worked under contract but only for the employer or without any general trade or business or outside his trade or business should, like an ordinary employee, be insured by the Act against the risk of injury in his work."

In the same judgement Latham CJ explains:

I illustrate my understanding of the sub-section by taking the case of a man who is a plumber.... if he carries on business on his own account as a plumber and agrees to do plumbing work for a person A he is prima facie an independent contractor and not a servant of A. If, however, he agrees with A to do any work for A other than plumbing (e.g. carpentry) then he is to be treated as a worker within the meaning of the Act whether or not he carries on business on his own account as a plumber and whether or not he carries on that business regularly.

Commentary on similar aspects of the New South Wales scheme is also instructive. The *Law Handbook (NSW)* notes that its deemed worker provisions extend to "sellers, canvassers and collectors and other people paid on commission who are not carrying on a business on their own account." (emphasis added)

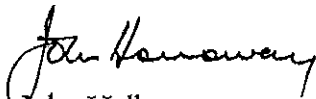
An underlying policy issue is the ability of direct selling companies to direct and control the workplaces and systems of work of their distributors. Distributors make their own choices in how they operate their businesses. Most direct selling models operate under buy/resell arrangements where a distributor is ostensibly a retailer and a direct selling company the wholesaler. Some companies use an agency model – yet even with this model a company does not control a distributor's business. As there is no ability for a company to direct or control, there is therefore no ability to ensure safe systems of work. This means a company cannot respond to claims and premium increases by changing work practices or other measures.

DSAA believes there would be major policy and cost implications for the Government if an alternative interpretation was made and direct selling distributors were deemed to be workers for workers compensation purposes.

While seasonal, about 80,000 people can be engaged by members in distributing their products in Queensland. While technically these people are contracted as distributors the involvement of many is to acquire products for personal or group consumption at wholesale prices. It follows that if as deemed workers they had access to workers compensation entitlements this would raise the respective liability of members and government to insurance cost and claims.

This Inquiry presents the opportunity to make it abundantly clear that independent contractors engaged as distributors in the direct selling channel are not workers for the purposes of Queensland's workers compensation scheme.

Yours sincerely



John Holloway
Executive Director
3 August 2012