



ESTABLISHED 1967

# DIRECT SELLING ASSOCIATION

## OF AUSTRALIA INC

ABN 68 413 038 101

16 March 2005

Submission No. 43.....

The Chairman and Members  
House of Representatives Employment, Workplace  
Relations and Workforce Participation Committee  
Parliament House  
CANBERRA ACT 2600

Ladies and Gentlemen,

### Re: Independent Contractors

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.

Your Committee has been asked to inquire into and report on -

- The Status and range of independent contracting and labour hire arrangements
- Ways independent contracting can be pursued consistently across state and federal jurisdictions
- The role of labour hire arrangements in the modern Australian economy, and
- Strategies to ensure independent contract arrangements are legitimate

#### 1. *The Status and Range of Independent Contracting*

1.1 The trend towards the use of independent contractors as an alternative to the use of statutory employees began in earnest soon after the Second World War in the mid 1950's. It was accelerated in the early to mid 1980's as a result of developing technology and "electronic business".

1.2 A further and, in our opinion, a major factor in the growth of contracting has been the exceptional growth in "work from home" arrangements and where there is no controlled workplace. The absence of control over the workplace creates the need for contractors to be responsible for their own workplace environs and their own insurance arrangements.

1.3 The practice is now widespread over many industries including: -

- Cleaning
- Transport
- Building
- Architecture and engineering
- Information technology
- Real estate
- Life insurance/investment advising
- Textiles and clothing
- Motor vehicle repairs
- Direct selling



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- 1.4 Historically, all of the industry sectors mentioned in 1.2 above have made the transition from employment to contracting, in most cases, over the last 50-60 years.

**The direct selling industry, on the other hand, has not made any such transition. Independent salespersons in the direct selling industry have always been engaged as independent contractors. That has not changed since the late nineteenth century and remains the position to the present day.**

- 1.5 A further contributing factor in the growth of independent contracting is, we believe, the present income tax arrangements, in particular, the differential rates of personal taxation at the higher levels compared with the lower flat rate of corporate tax.

## **2. Ways Independent Contracting Can be Pursued Consistently across State and Federal Jurisdictions**

- 2.1 The question of how to define a worker was dealt with at some length in the report, dated 6 March 2004, by the Productivity Commission on its inquiry into *National Workers Compensation and Occupational Health and Safety Frameworks*.

- 2.2 The Commission stated on Page 173 of that Report -

*"The Commission considers that the income tax definition of personal services should be used as a basis for defining employee for the purposes of coverage under a national workers compensation scheme".*

- 2.3 The Income Tax Act defines personal services income as -

*"Income which is mainly a reward for an individual's personal efforts or skills"*

- 2.4 Examples of personal services income include salary or wages, income payable under a contract which is wholly or principally for the labour or services of a person and income derived by consultants from the exercise of personal expertise.

- 2.5 Personal services income does not include income that is mainly generated by the use of assets, the sale of goods or a business structure, (Taxation Ruling TR2001/7).

- 2.6 In addition to finding a universally acceptable definition of employee, consideration should also be given to finding an acceptable definition of independent contractor. We believe that the starting point to such a definition would be a written contract between the parties which would include statements to the effect that:

2.6.1 The relationship between the parties was one of independent contractor

2.6.2 The contractor had the right to delegate his duties under the contract

- 2.6.3 The contract required the contractor to produce a specific result and payment was dependent on achieving that result
- 2.6.4 The contractor was to provide the tools, equipment, literature, stationery and other materials required to achieve the result
- 2.6.5 The contractor was responsible for rectifying any faults in the process
- 2.7 We do not believe that the issues should be dealt with by attempting to define an "employer" since that could leave much of the present uncertainty intact.
- 2.8 As well as finding a practical definition or set of rules to establish the existence of an independent contractor relationship, it is, we believe, extremely important to find a definition of worker/employee which will be acceptable in all jurisdictions, namely:
- |                        |   |                           |
|------------------------|---|---------------------------|
| Federal                | - | Income tax                |
|                        | - | Fringe benefits tax       |
|                        | - | Compulsory superannuation |
| States and Territories | - | Workplace insurance       |
|                        | - | Payroll Tax               |
- 2.9 Fringe benefits tax, compulsory superannuation, workplace insurance and payroll tax are all based on the existence of an employer/employee relationship and we can see no valid reason why the present approach of several different definitions should continue. The proposal to now formally recognise the status of the independent contractor should be seen as an opportunity for all jurisdictions to agree on a common definition of worker/employee. If it is not done the present uncertainty and confusion will remain.

### **3. Role of Labour Hire Arrangements in the Modern Australian Economy**

We believe that the growth of labour hire arrangements over recent years is due to the modern day business practice to "out source" many functions formerly provided by employees. We see labour hire organisations as almost in the nature of co-operatives promoting the services of unattached professional and trades persons.

The majority of these professional and trades persons have, we believe, moved from employment positions either voluntarily or through redundancies, and it is sensible and businesslike that their services are promoted on a collective and almost "generic" basis.

The role of such arrangements in the Australian economy will, we believe become more important as businesses continue to outsource many of their functions and because they represent an efficient and cost effective means to organise the services of those concerned.

#### **4. Strategies to Ensure Independent Contract Arrangements are Legitimate**

The measures introduced on 1 July 2000 with the "A New Tax System" (ANTS) no doubt represent substantial improvements on all previous means used to ensure that independent contract arrangements are legitimate.

The ABN, GST and ABN withholding provisions provide substantial incentives for all parties in business transactions to "get it right".

The introduction of the *New Business Tax System (Alienation of Personal Services Income) Act 2000* has also, no doubt, added a further incentive.

The matters raised in paragraph 2.6 above would provide still further measures to ensure that arrangements entered into were legitimate.

Paragraph 5.1 of the Interim Report (October 2003) of the National Workers Compensation and Occupational Health and Safety Frameworks contains a useful summary of the factors courts consider when determining whether a worker is an employee or independent contractor. A copy of this summary is attached and provides a valuable check list of the matters to be considered when drafting the new legislation to attempt to define an independent contractor.

We don't believe there is a simple or straightforward strategy to ensure contracting arrangements are legitimate. We do believe, however, that there are relatively simple ways to define a worker/employee and perhaps that opens the way to the statement

*"If he/she is not a worker/employee then he/she must be a contractor or an employer."*

But in the extremely complex world of Federal and State taxation that may be altogether too simple a strategy.

We will be pleased to discuss any or all of these matters with you at your convenience.

Sincerely,



Les Dell  
**Executive Director**

Attachments

# Direct Selling Association of Australia

## Attachment re Independent Contractors

### Box 5.1

#### Factors courts consider when determining whether a worker is an employee or independent contractor

The Full Bench of the Australian Industrial Relations Commission provided the following summary of the current state of the law as it pertains to determination of whether an individual is an employee or independent contractor:

1. Whether a worker is an employee or an independent contractor turns on whether the relationship to which the contract between the worker and the putative employer gives rise is a relationship where the contract between the parties is to be characterised as a contract of service or a contract for the provision of services. The ultimate question will always be whether the worker is the servant of another in that other's business, or whether the worker carries on a trade or business of his or her own behalf: that is, whether, viewed as a practical matter, the putative worker could be said to be conducting a business of his or her own. This question is answered by considering the totality of the relationship.
2. The nature of the work performed and the manner in which it is performed must always be considered.
3. The terms and terminology of the contract are always important and must be considered. However, in so doing, it should be borne in mind that parties cannot alter the true nature of their relationship by putting a different label on it.
4. Consideration should then be given to the following "indicia" bearing in mind that no list of indicia is to be regarded as comprehensive:
  - (a) Whether the putative employer exercises, or has the right to exercise, control over the manner in which work is performed, place of work, hours of work and the like. Control of this sort is indicative of a relationship of employment.
  - (b) Whether the worker performs work for others (or has a genuine and practical entitlement to do so).
  - (c) Whether the worker has a separate place of work and or advertises his or her services to the world at large.
  - (d) Whether the worker provides and maintains significant tools or equipment.
  - (e) Whether the work can be delegated or subcontracted.
  - (f) Whether the putative employer has the right to suspend or dismiss the person engaged.
  - (g) Whether the putative employer presents the worker to the world at large as an emanation of the business. Typically, this will arise because the worker is required to wear the livery of the putative employer.
  - (h) Whether income tax is deducted from remuneration paid to the worker.
  - (i) Whether the worker is remunerated by periodic wage or salary or by reference to completion of tasks.
  - (j) Whether the worker is provided with paid holidays or sick leave.
  - (k) Whether the work involves a profession, trade or distinct calling on the part of the person engaged. Such persons tend to be engaged as independent contractors rather than as employees.
  - (l) Whether the worker creates goodwill or saleable assets in the course of his or her work.
  - (m) Whether the worker spends a significant portion of his remuneration on business expenses.

This list is not exhaustive. Features of the relationship in a particular case which do not appear in this list may nevertheless be relevant to a determination of the ultimate question.

# Direct Selling Association of Australia

## 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.

In its early years the Association operated within the Victoria Chamber of Manufacturers and in 1973 a separate and autonomous Secretariat was established. The Association's headquarters were moved to Sydney in September 2003.

From those beginnings the Association has grown to nearly seventy Members representing more than 600,000 independent salespersons in Australia.

In addition to our trading Members the DSAA has over thirty Supplier Members and nine Life Members.

Direct Selling involves the sale of goods and services by or through independent salespersons who make approximately two million visits every month to customers' homes, workplaces and other meeting places throughout Australia.

Members supply a great variety of products in a process that is very different from standard retail systems. Some of the products are:

- Non perishable food and condiments
- Clothing and intimate apparel
- Cosmetics, personal care and skin care
- Toys, books and educational materials
- Health foods, nutritional supplements and sports drinks
- Household cleaning products and cleaning aids
- Cookware and household electrical appliances
- Kitchenware, tableware, food storage systems and cutlery
- Car care products and lubricants
- Perfumes, fragranced candles and associated items
- Electrical goods and household accessories
- Jewellery, handbags and fashion accessories
- Essential oils, aromatherapy and associated accessories
- Linen and manchester
- Security systems
- Wines
- Adult products
- Water filters and air purifiers
- Therapeutic massage equipment
- Pet care
- Key labels and key register systems

Annual retail sales of Members in Australia are approximately \$1.3 billion.

The vast majority of independent salespersons are women (71%) and a big majority 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.

One of the unique features of the direct selling industry, when compared with other channels of distribution, is the low cost of entry for independent salespersons. The low entry cost permits salespersons to commence their own businesses with relative ease and to grow rapidly in a happy, positive and rewarding environment.

Not all direct selling organizations operate on an international basis. There are many small and medium size organizations operating successfully in Australia alone and a number have been doing so for several decades.

As the name implies, direct selling is a system of distribution of goods and services by an independent salesperson directly to consumers in a face to face manner, generally in their homes or the homes of others, at their workplace and other places away from permanent retail locations, usually through explanation or personal demonstration.

The methods of demonstration vary from door to door calling and person to person presentations, to the party plan method where a salesperson demonstrates the product to a group of prospective customers organised by a host or hostess usually in a private home.

The history of the Industry in Australia clearly indicates that the direct selling method of distribution has been embraced by the Australian people. It provides consumers with ready access to product, and independent salespersons with outstanding opportunities to supplement existing family incomes or build satisfying and rewarding careers, as many thousands have done.

These opportunities are available to all Australians irrespective of age, sex or educational background, and clearly represent the best and most accessible "work from home" opportunities available.

Sydney  
20 December 2004