



MINISTRY OF CONSUMER AFFAIRS
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Regulation of Uninvited Direct Selling

Introduction

This paper proposes the direction of regulation of direct selling following consideration of submissions to the Ministry of Consumer Affairs' discussion paper "Consumer Law Reform" released in June 2010.

Direct selling involves a vendor approaching consumers directly, in person or by telephone to sell goods, often in the home or work place.

In a direct selling situation:

- often the seller makes an uninvited and unexpected initial approach;
- the seller only offers a limited range of products; and
- the seller makes use of direct selling techniques and strategies which take psychological advantage of the selling environment (usually the consumer's home, workplace or other environment where the consumer cannot easily walk away without buying something first) to pressure the consumer.

As well as being subjected to pressure sales techniques, consumers in uninvited direct selling situations are likely to feel vulnerable because they are unprepared for the sale and a stranger is in their house or workplace uninvited. These characteristics can lead to poor purchasing decisions.

Recognising that consumers are vulnerable to making poor purchasing decisions because of the undesirable practices and pressures that are sometimes applied in uninvited direct selling, the Door to Door Sales Act (DDSA) was passed in 1967 to provide some redress.

The DDSA applies to any credit sale agreement made at other than the "appropriate trade premises" of the vendor, and provides protection in the form of a 7 day cooling-off period. The DDSA also provides that the seller must disclose to the consumer the rights of cancellation in a written statement.

The DDSA is now over 40 years old and there are a number of specific problems with its application and interpretation. In particular, it applies to credit agreements but not to sale of goods by cash or credit card. It is also unclear as to what is meant by appropriate trade premises and whether the DDSA applies to some of the sales techniques (e.g. telemarketing) that have been developed since its enactment.

Is consumer protection still required in the area of direct selling?

Just over one third of submitters to the Consumer Law Reform discussion paper commented on direct selling. Most of these submitters agree that uninvited direct selling is an area where some regulation is still needed.

The Commerce Commission commented that it receives a disproportionate number of complaints regarding door to door selling and telemarketing when compared with complaints regarding sales at either physical retail stores or online. In particular, in recent years, telemarketing calls from telecommunications or electricity companies have resulted in a significant number of complaints to the Commission.

Feedback from submitters suggests that much of the DDSA is still relevant but requires updating and clarification rather than significant change. Submissions from businesses said that clear, workable provisions are wanted. Ambiguous legislation can result in added compliance costs to interpret the law and then to implement workarounds for what might otherwise be legitimate business. Ambiguous legislation can also result in loss of business opportunities because of conservative interpretation.

The Direct Selling Association and the New Zealand Marketing Association both have existing industry codes that offer consumers more protection than the DDSA. The New Zealand Marketing Association thought that formal recognition of these codes in regulation would be the most satisfactory method of regulation.

Form of regulation and enforcement

Most of the submitters on direct selling agreed that a principles-based approach (supplemented by some prescription) to regulating uninvited direct selling should be incorporated into an enhanced Fair Trading Act.

The Commerce Commission commented that it would have a wider range of enforcement tools to deal with uninvited direct selling conduct if direct selling provisions are incorporated into the Fair Trading Act. Currently, the DDSA is self-enforced and the Commerce Commission has to rely solely on evidence of alleged misrepresentation to deal with complaints about door to door selling. However, it can sometimes be difficult to obtain clear evidence on these as the representations will usually be verbal in nature and the recall of them by complainants, some of who are elderly, is often sketchy and/or confused.

What transactions should the law apply to?

What type of direct selling should be covered?

Many of the submitters responded that all types of direct selling should be regulated; but they did not list the types of direct selling or define “direct selling”. The Direct Selling Association uses a worldwide agreed definition and defines direct selling as “*The sale of consumer products or services in a face to face manner away from a fixed retail location*”. Using this definition, direct selling could include door to door selling, telemarketing (if the definition is extended to person to person), party plans, seminar selling, trade stands and mobile stores.

Not all types of direct selling result in detriment for consumers. It appears that few problems are encountered with party plans or trade stands. In these situations, while the sale is made away from a fixed retail location, the consumer has the choice

whether to attend the party or approach the stand or to walk away. One of the reasons why party plan selling may not have problems is the self-regulatory Direct Selling Association Code.

A few submissions suggested that mobile store selling should be regulated by direct selling legislation. On closer analysis of the issues with mobile stores, the detriment arises not so much from pressure selling but from the often high prices charged and practices around repayment of credit and direct debits. Direct selling legislation is not likely to address these issues.

As noted above, much of a consumer's vulnerability from direct selling arises when it is uninvited and from unpreparedness for the sale and the pressure sales techniques. The DDSA provides protection for sales where the initial approach was made by the seller; but some direct sellers try to avoid regulation under the DDSA by using practices to get invited into consumers' homes, for example, to demonstrate a product or to deliver a prize won in a competition. Seminar selling is a form of direct selling in which consumers are often "enticed" (with free holidays or dinners) to attend an information evening on the product. Once there, the trader often applies pressure sales tactics, including getting seminar attendees to complete paperwork although the consumer may not have made a final decision.

To deter 'entitlement' practices and clarify application of legislation, it is proposed that New Zealand legislation adopt a similar approach to that of the Australian Consumer Law which places emphasis on the concept of invitation to enter into negotiation. The Australian Consumer Law defines what they call an unsolicited consumer agreement to be when:

"(1)...

(c) the consumer did not invite the dealer to come to that place, or to make a telephone call, for the purposes of entering into negotiations relating to the supply of those goods or services (whether or not the consumer made such an invitation in relation to a different supply); and...

(1A) the consumer is not taken, for the purposes of subsection (1)(c), to have invited the dealer to come to that place, or to make a telephone call, merely because the consumer has:

(a) given his or her name or contact details other than for the predominant purpose of entering into negotiations relating to the supply of the goods or services referred to in subsection (1)(c); or
(b) contacted the dealer in connection with an unsuccessful attempt by the dealer to contact the consumer.

(2) an invitation merely to quote a price for a supply is not taken, for the purposes of subsection (1)(c), to be an invitation to enter into negotiations for a supply..."

Purchase value threshold

Submitters did not express a strong view one way or the other as to whether there should be a threshold (the discussion paper suggested \$100) above which direct selling law applies. Most consumer groups and legal organisations and a few business organisations opposed a threshold, arguing that an arbitrary threshold encourages unscrupulous traders to manipulate the law, and would undermine the purpose of reform, being to protect consumers. Support for a threshold was mainly from businesses and related to minimising compliance and reversal costs.

To balance compliance costs for traders and protection provided to consumers, a \$100 purchase value threshold is proposed. The \$100 threshold updates the DDSA \$40 threshold which has applied since 1967. The \$40 threshold has not appeared to pose issues for consumers. A threshold also ensures that charities or fund raisers selling goods or services door to door are not caught e.g. Girl Guide biscuits or schools selling chocolates are not caught.

What type of sale?

As noted, the DDSA only applies to credit agreements. This not only carves out protection for a significant number of consumers – the detriment from pressure selling exists irrespective of whether the purchase is paid by cash, credit card or credit arrangements, but also the DDSA confuses the objective of the Act because of its focus on credit agreements. That is, does the Act provide protection for the sale or the credit arrangements? We believe it should be the former. Thus, it is proposed that reformed direct selling regulations will apply to both credit and cash sales, and any credit arrangements to facilitate the sale will be separate from the sale agreement.

The credit arrangements for a direct sale are regulated, and the consumer protected, by the Credit Contracts and Consumer Finance Act (CCCFA).

Application of new legislation

In summary, it is proposed that new direct selling legislation will apply to goods or services purchased that are:

- where the trader made the first approach or the consumer did not invite the trader for the purposes of entering into negotiations relating to the supply of the goods or services; and
- made person to person (including by telephone) at other than a place of business of the supplier;
- priced at \$100 or more; and
- paid by cash, credit card or credit arrangements.

It is intended that direct selling regulations specifically cover door to door selling and telemarketing but not party plans, trade stands or mobile stores.

Protection

It is proposed that protection for consumers in the area of direct selling remain largely the same as currently provided by the DDSA, focusing on a cooling-off period and disclosure.

Cooling-off period and termination of agreement

Almost all submissions supported a cooling-off period of either 7 days or 10 working days. It is proposed that legislation continue to require a cooling-off period of 5 working days which is based on the 7 days in the DDSA. There is no evidence to suggest that this is not long enough. Five working days does not reduce the current cooling off period, aligns with the CCCFA which has a three working day cooling-off period and 5 working days is not so long a period for electricity suppliers that decide to not switch customers until after the cooling-off period has ended.

Some consumer organisations called for a 10 day cooling-off period. The Direct Selling Association voluntarily provides this and they report that approximately 90 percent of direct sellers are members of the Association.

The termination of the purchase agreement within the 5 working day period will also cancel any related credit or other agreement. However, if the consumer wishes to cancel or change the terms of the credit agreement, the CCCFA applies and so the cancellation or change must be made within three working days of the date of the credit agreement (which may be different from the date of the sales agreement). Some submitters have called for the cooling-off period under the CCCFA to be aligned with that under the new direct selling legislation – this will be considered in the review of the CCCFA.

Disclosure

The current disclosure requirements under the DDSA are:

- agreement in writing signed by both parties;
- notice of cancellation rights and how to cancel the agreement. This notice is required to be on the same page as the particulars of the goods or services purchased and the signature of the purchaser;
- full name and address of vendor;
- the total consideration of the purchase.

It is proposed that these disclosure requirements will be retained but with some slight amendments.

It is proposed that in new regulations, a written disclosure about cancellation appears conspicuously and prominently on the front page of documentation provided to the consumer, and the information is also disclosed to the consumer verbally. This change is proposed because often people do not read paperwork or some people cannot read English (e.g. where English is their second language). The added requirement of a verbal statement is proposed to provide greater assurance that the consumer knows and understands the length of time they have to reconsider and cancel the purchase if they change their mind.

The DDSA requires a statement containing the full name and address of the vendor to be provided to the customer. However, this information does not necessarily provide details for the consumer to contact the vendor to cancel an agreement or to have problems resolved. To ensure that customers are able to contact the trader, it is proposed the trader must provide a street address, telephone number and email. For the purpose of notifying the vendor of cancellation of an agreement, it is proposed that cancellation may be via letter, phone or email.

As it is proposed that the credit arrangements for a direct sale will be a separate agreement, a direct sale transaction involving credit will be subject to two different regulations – the new direct selling regulations and the CCCFA. The consumer needs to be made aware of the different cooling-off and cancellation provisions and interplay of the two Acts. The vendor must make the consumer aware that if the consumer wishes to cancel the purchase (the credit arrangements will also be cancelled), it must be done within 5 working days after the sale. However, if the consumer wishes to cancel the credit agreement but still purchase the goods, the cancellation of the credit agreement must be done within three days of receiving disclosure documents.

The proposed disclosure requirements are:

- on the front page of any documentation or agreement provided to the purchaser:
 - the consumer's right to terminate the agreement;
 - how the consumer can terminate the agreement;
 - the vendor's name, business street address, telephone number and email address;
- description of the good and the total consideration of the purchase;
- verbal advice of the termination rights and how to terminate the agreement.

These disclosure requirements are not considered onerous, and are likely to only require one page of documentation which can be a pre-printed form. For direct sellers, whose goods cost \$100 or more and are paid for by cash or credit card, the proposed disclosure requirements will be a new compliance cost. For other direct sellers, a change in their documentation may be required.

Protection will not include

Prohibition of supply

The Australian Consumer Law includes a prohibition of supply during the cooling-off period. The discussion paper asked for views on this approach. Some consumer advocate submissions supported a prohibition; traders did not.

Supporters of prohibition of supply argued that having the good increases the pressure to buy and it can be inconvenient to return goods. It can also be argued that consumers, having the good and being able to inspect it more closely, may decide that they no longer want it.

Traders are against prohibition of supply because it places them at a commercial disadvantage with other suppliers who are not subject to a prohibition of supply. Recently, following representations from the Australian Direct Selling Association, the Australian Consumer Law amended the proposal to prohibit the supply of goods during the 10 day cooling-off period to exempt purchases up to the value of \$500 from the provision.

Submissions and other sources have not provided compelling evidence of significant issues in New Zealand relating to supply of goods during a cooling-off period, and therefore it is proposed the status quo remains. Supply of goods during the cooling-off period will be at the discretion of the seller.

Regulation of hours

The Australian Consumer Law includes a prohibition on unsolicited direct selling at defined times. The discussion paper sought comments on this approach. Support for and against the regulation of hours was again split by consumer and business interests. While telemarketing calls in the evenings, especially, are considered to be a nuisance, there does not appear to be strong evidence of significant issues relating to calling hours, to warrant the regulation of calling hours.

It is noted that industry self-regulation through the New Zealand Marketing Association's Telemarketing Code of Practice and the Direct Selling Association of New Zealand Code of Practice appears to have played a part in minimising the

problems associated with calling hours. Moreover, any attempts by businesses to call during inopportune hours will only harm their own prospects, without the need for regulation.

The New Zealand Marketing Association operates a relatively effective, but albeit not widely known and voluntary Do Not Call Register. The Do Not Call Register provides consumers with the opportunity to opt out from direct marketing on a generic basis, rather than an agency by agency basis. A review of the Privacy Act included direct marketing issues and suggested putting the Do Not Call Register on a statutory footing to make it compulsory for all direct marketers and sellers to observe consumer preferences on the register. This would make the register more effective, give consumers choice and does not regulate hours. This option requires further investigation, especially as there may be significant costs in operating a mandatory register. An alternative is government assistance in promoting the voluntary register.

Recommendations

It is recommended that principles-based regulation of uninvited direct selling is included in the Fair Trading Act with specific provisions that:

- apply to goods or services purchased that are:
 - where the trader made the first approach or the consumer did not invite the trader for the purposes of entering into negotiations relating to the supply of the goods or services; and
 - made person to person (including by telephone) at other than a place of business of the supplier;
 - priced at \$100 or more; and
 - paid by cash, credit card or credit arrangements;
- provide for a 5 working day cooling-off period from receipt of disclosure documentation;
- require the trader entering into uninvited direct sales to provide a written statement which includes:
 - on the front page in clear, readable font:
 - the consumer's right to terminate the agreement;
 - how the consumer can terminate the agreement;
 - the vendor's name, business street address, telephone number, email address;
 - description of the goods or services;
 - the total consideration of the purchase.
- require the trader entering into uninvited direct sales to provide verbal advice of the termination rights and how to terminate the agreement.