

Submission  
No 33

**INQUIRY INTO IMPACT OF TECHNOLOGICAL AND  
OTHER CHANGE ON THE FUTURE OF WORK AND  
WORKERS IN NEW SOUTH WALES**

**Organisation:** Direct Selling Australia

**Date Received:** 3 November 2020

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**DIRECT SELLING  
AUSTRALIA**

## **Inquiry into the impact of technological and other change on the future of work and workers in New South Wales**

1. Direct Selling Australia (**DSA**) understands that a select committee has been established to inquire and report on the impact of technological and other change on the future of work and workers in New South Wales (**Inquiry**). DSA previously participated the [Future of Work Inquiry and made a submission in August 2018. DSA has also more recently participated in the Inquiry into the Victorian On-Demand Workforce making submissions in September 2018 and October 2020 in response to concerns about the wages and conditions of workers in the on-demand or 'gig' economy.
2. DSA welcomes the opportunity to comment on certain issues raised by the Inquiry, particularly in relation to employment status, the 'on-demand' or 'gig economy' and the application of workplace laws and instruments to people working in those sectors as well as the impact of accident compensation schemes and payroll taxes etc. DSA's members engage with distribution networks made up primarily of independent contractors to supply their products to consumers.
3. The direct selling industry is over 100 years old and is an industry with over half a million active participants throughout Australia, a significant number of which are in New South Wales. DSA is concerned that any changes to the current definitions of independent contractor and employee for the purposes of employment law in Australia which further increase rigidity of definitions or directly or indirectly reclassify independent salespeople as employees would be devastating to direct selling business models and the industry. DSA is concerned that changes made to address online on-demand service-based offerings or the "gig-economy" could impact on selling companies with negative outcomes.

4. DSA does not object to recommendations that strive for clarity and consistency of “worker” definitions across different policy arenas to the extent that direct sellers are permitted to maintain their autonomous status as independent contractors. DSA suggests that if the recommendation were to be adopted, a specific legislated amendment to reflect the unique and historic status of direct sellers should be considered to ensure clarity. This exemption model has been adopted in California pursuant to its recent legislative efforts to regulate “gig” work.

## Introduction - Direct Selling

5. DSA is an industry body that for over 50 years has been representing companies operating direct selling businesses in Australia (**Members**). “Direct selling” describes the retailing of goods and services to consumers away from a fixed location.
6. The predominant activity of a direct seller (more commonly referred to in the industry as an independent salesperson) is selling or using a Member’s products or service away from a fixed store, typically person-to-person, in a small group setting and increasingly via social media networks. Independent salespeople may also engage in recruiting other persons to become a distributor and sell products (often that they purchased and liked themselves).
7. An independent survey recently identified that DSA Member companies generated sales of \$1.38 billion in the 2017 financial year and that 576,000 independent salespeople in Australia were involved with Members. The industry is estimated to have grown at a real compound average growth rate of approximately 1.5% each year in the four years prior to that. DSA estimates that it represents approximately 46% of the direct selling markets in terms of the number of organisations and 69% of the sales generated by the Australian direct selling industry. Of the DSA Member sales generated in 2017, 25.9% related to cosmetic products, 24.7% wellness products, 10.8% household goods, 9.2% clothing and accessories, 4.7% homecare and 2.4% foodstuff and beverages.
8. The direct selling industry identified many years ago a demand for highly flexible, low friction work. Whilst direct selling companies do employ people at a corporate level, independent salespeople generally are not employees, they are independent contractors who sell the products of a company in return for either a marginal profit or a commission.
9. DSA notes that the Inquiry has received many definitions of “on-demand” and “gig-economy” work. During the Victorian Inquiry, DSA submitted that whilst the industry offered “on-demand” opportunities, that is for flexible work as an independent contractor, direct sellers were not generally involved in the platform work which appeared to define the “digital on-demand” work referenced in that consultation.
10. The direct selling industry was arguably an innovator of on-demand work when taken to be “irregular” or “non-standard” work. The global direct selling business model has

existed for over 100 years and represents an entrepreneurial opportunity for those who seek to build a business. Companies in this industry have always provided to their independent business owners compensation plans that rewards more for successful effort and a specific guide for learning the skills associated with the new business opportunity – a franchise type of opportunity without the franchise investment. DSA notes that only a small proportion of direct sellers engage with it on a full-time basis and the majority seek supplemental income from their selling efforts

11. DSA is therefore concerned about any policy decisions which aim at regulating the on-demand workforce, the on-line on-demand workforce, which may have inadvertent consequences for direct selling companies and the significant number of independent contractors they engage with.

## **Independent Contractor Status**

12. Protecting the direct selling industry's independent salesforce and their ability to build a business on their own terms remains a critical issue for DSA and its Members. Independent contractor status is the key feature of the entire direct selling channel. Without it, companies cannot operate. While there are many similarities between the direct selling industry and the broader retail industry there are several important differences. In particular, there is a distinction between the relationship which exists between an independent salesperson and direct selling company (which is generally on a re-sell or contractor arrangement) and traditional retailers (who hire employees). In this way, independent salespeople are not employees of the direct selling companies in the same way retail workers in the broader industry are employed. The role of independent salespersons in the distribution of products and services is a key characteristic of direct selling.
13. Independent salespersons can choose their level of involvement and set their own hours. In 2013, Deloitte Access Economics reported 477,000 people across Australia were contracted by DSA Members, however only 32,000 of these spent over 9 hours per week working on their business and only 7,700 of those worked on a full-time basis. DSA would concur with Deliveroo's experience noted at 1.13 of the consultation documents, in that direct sellers can chose when and whether or not to work and it represents more often or not an opportunity to earn supplemental income either whilst parenting or alongside an employed or other independent contracting role.
14. As the "original entrepreneurs", direct sellers have long enjoyed the dynamic of independent contracting model offered by direct selling companies. Direct sellers sign a distributor contract with the direct selling company they choose to partner with which sets out the respective rights and responsibilities of the parties. In general, distributor contracts set out the perimeters of the working relationship including specific company policies and procedures aimed at assisting independent salespeople to reduce their exposure to any liability when running their business (e.g. privacy, social media, Australian consumer law, therapeutic claims, use of intellectual property etc).

15. DSA considers that any changes to the current definitions of independent contractor and employee for the purposes of employment law in Australia which further increase rigidity of definitions or directly or indirectly reclassify independent salespeople as employees would be devastating to direct selling business models and the industry. DSA is concerned that changes made to address online on-demand service-based offerings could impact on selling companies with negative outcomes. For example, DSA considers that the recommendations in the Inquiry Report to adopt the “entrepreneurial test” are overly simplistic and do not sufficiently cater for a variety of business models. There is a real risk that such a test could inadvertently capture direct selling models and reclassify distributors as “employees” which would render many direct selling business models inoperable.
16. DSA notes that in many states, legislation relating to payroll tax and workers’ compensation are already drafted to capture “deemed workers” which is often a term very broadly defined. DSA’s experience is that such broad definitions can already be problematic. For instance, the removal of an exemption in NSW payroll tax legislation has resulted in a lack of harmonisation across jurisdictions for direct selling companies to include independent contractors in payroll tax calculations and thus unlikely to incentivise new overseas direct selling companies from establishing in New South Wales. Similarly, broad interpretations in relation to workers’ compensation can inadvertently place liability on companies for non-employees who are or should be adequately covered by other forms of insurance thus permitting “insurance shopping” and unnecessary costs for business.

## Overseas regulation

### AB5 California

17. DSA notes that certain overseas jurisdictions that have attempted to legislate to regulate the issues raised by digital platforms and the “gig-economy” have expressly recognised that direct sellers are legitimate independent contractors. In 2019 for example, California’s Governor Gavin Newsom signed Assembly Bill 5 (AB5) to provide new wage and benefit protections to workers at “gig economy” companies. However, AB5 was drafted to specifically include an exemption for direct sellers. Without the exemption, the bill would have created an uncertain framework for more than 2.2 million Californians involved in direct selling.<sup>1</sup>

**3 November 2020**

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<sup>1</sup> <https://www.dsa.org/events/news/individual-press-release/direct-selling-association-applauds-direct-seller-exemption-in-california-ab-5>