



**DIRECT SELLING
AUSTRALIA**

Inquiry into the Victorian On-Demand Workforce

20 February 2019

Terms of Reference

1. On 22 September 2018 the former Minister for Industrial Relations announced an Inquiry into the On-Demand Workforce in Victoria (**Inquiry**) to inquire into, consider and report on the extent and nature of the on-demand economy in Victoria, for the purposes of considering its impact on both the Victorian labour market and Victorian economy. The more detailed aspects raised in the Inquiries Terms of Reference are set out at Annexure A.
2. Direct Selling Australia (**DSA**) welcomes the opportunity to comment on the issues raised as part of the Inquiry.
3. This submission seeks to provide information about some of the issues raised based on the experiences of the direct selling industry, an industry with over half a million active participants throughout Australia, a significant number of which are located in Victoria. In particular, DSA is concerned that any attempts to alter the current legislative framework, especially in relation to employment status and the distinction of employee and independent contractor may have unintended adverse consequences for participants in the direct selling industry.

Introduction - Direct Selling

4. 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.
5. 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).
6. An independent survey¹ 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.
7. 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.² **Annexure B** sets out a graph demonstrating direct selling revenue by reference to both sales channel and product. The operational models and sales channels used by Members in Australia vary enormously and the organisational structure for the supply chain that direct selling companies operate under is either a wholesale (or buy-resell) model, an agency model or hybrid model. A description of the wholesale versus agency models in direct selling is set out at **Annexure C**.
8. The role of independent salespersons under either operational model is essentially the same - sales can be made through person-to-person sales, social media channels and to a lesser extent at party plan events. To participate in direct selling, individuals require the skills, interest and willingness to be a salesperson.³

¹ Survey Matters DSA 2017 Member Survey (December 2017)

² Survey Matters DSA 2017 Member Survey (December 2017)

³ <https://www.smallbizlabs.com/2017/07/direct-selling-is-a-large-part-of-the-gig-economy.html>

9. 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 a commission.

10. The direct selling industry was arguably an innovator of on-demand work. The global direct selling business model has existed for over 100 years and represents not only a “gig opportunity” but also 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.⁴ The motivations for working in direct selling are similar to the motivations in the online-on-demand economy with the exception of product discounts. A 2015 article (US) noted that:

*“...a new economy is emerging, an economy where more and more people are working as micro-entrepreneurs and independent contractors instead of, or in addition to, a traditional job. These days the terms “gig economy”, “sharing economy” are even being referenced and debated in the speeches of presidential candidates. We think that this transformation brings direct selling more in to the main stream of the conversation about how people work. More and more individuals are coming to understand and appreciate the nature of an independent association with a larger company that provides a chance to earn flexible income. This principle, of course, has been the foundation of the direct selling industry for decades. The common denominator between direct selling and these new opportunities are two words: **independent contractor**.”⁵*

11. A 2017 Report cited direct selling as one of the top three types of gig work for women in the United States, representing 32% of the female participants in the survey.⁶ Due to the flexible nature of more recent on-demand work opportunities offered via online platform by companies such as Uber, Airtasker, Esty and Airbnb, DSA considers that many companies offering these types of digital opportunities are now competing with direct selling companies in respect of the acquisition of labour from independent contractors seeking flexible “gig opportunities.” Those companies too offer independent work opportunities for a person to have total or greater control over their work hours and location.

⁴ <https://directsellingnews.com/the-new-economy-and-why-direct-sellers-should-pay-attention>

⁵ <https://directsellingnews.com/the-new-economy-and-why-direct-sellers-should-pay-attention>

⁶ Hyperwallet, “*The Future of Gig Work is Female*” (2017)

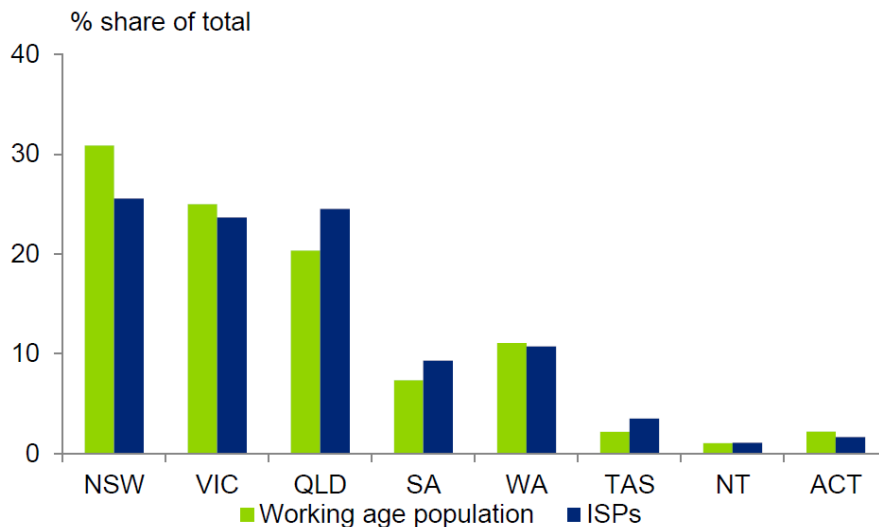
12. DSA is therefore concerned about any policy decisions which aim at regulating the on-demand workforce, in particular the on-line on-demand workforce, which may have inadvertent consequences for direct selling companies and the significant number of independent contractors they engage with.

The Direct Selling Salesforce

13. Direct selling is present throughout Australia. In 2017, a Survey Matters Report for DSA indicated that there were 576,000 independent salespeople Australia-wide. The majority of independent salespeople reside in the major metropolitan centres as might be expected. However, there are also significant number of independent salespeople located outside the main metropolitan centres including throughout regional Australia. Outside of the capital cities there are areas of significant direct selling activity in Queensland, New South Wales and Victoria.

14. Given that the focus of this Inquiry is on-demand work in Victoria, it is important to note that, as shown in the graph and table below, in 2013, almost 117,000 independent salespeople were located in Victoria, representing approximately 24% of the total number of Australian independent salespeople.

Where do independent salespeople and Australia's working age population live?



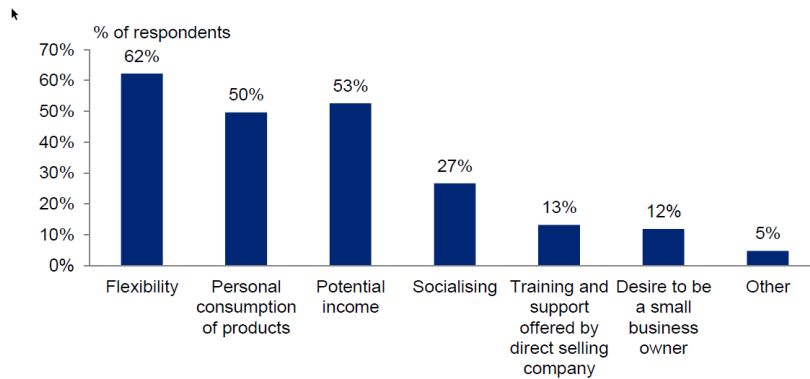
Source: Deloitte Access Economics, ISP survey, Census 2011.

Breakdown by State of Australian independent salespeople

State / Territory	Number of ISPs	Share (%)
New South Wales	118,085	25
Victoria	116,804	24
Queensland	114,242	24
South Australia	44,522	9
Western Australia	51,355	11
Tasmania	16,976	4
Northern Territory	5,125	1
Australian Capital Territory	10,890	2
Total	478,000	100

15. There is an important social element that the direct selling industry contributes to the Australian community in addition to the economic contribution. The popularity in regional areas may be the result of fewer opportunities for social interaction and less choice for retail offerings outside of the major metropolitan areas.
16. Many independent sales persons involved in direct selling small and micro-businesspeople are women, working part time while they have young children and seeking supplementary income for their families and flexibility in the way they earn this income. The age and gender profile of independent salespeople in the industry support this.
17. The graph below sets out the primary motivations for individuals seeking to become an independent salesperson for a direct selling company. The top 3 reasons given for becoming an independent salesperson were: flexibility (62%), personal consumption of product (50%) and potential income (53%). With low entry costs and on-going training and support, Members offer independent salespersons the opportunity to develop new skills in a home-based business. Other sectors of the economy benefit from this skill development if an independent salesperson subsequently works outside of the direct selling industry.

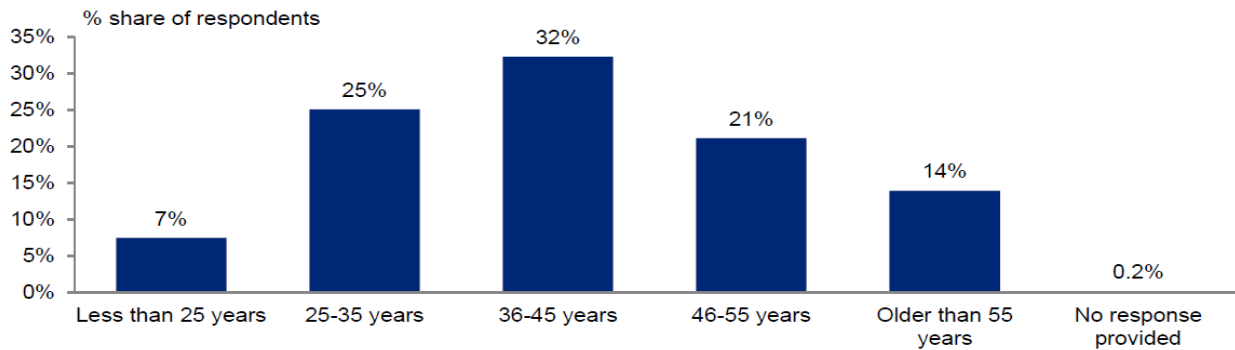
Motivation for involvement in industry?



Source: Deloitte Access Economics, ISP survey. Note: respondents were able to select more than one response.

18. The age profile of the independent salespeople shows that a majority (57%) of them are between 25 and 45 years old, around one third are under 35 which indicates that Gen Y are well represented in the industry.

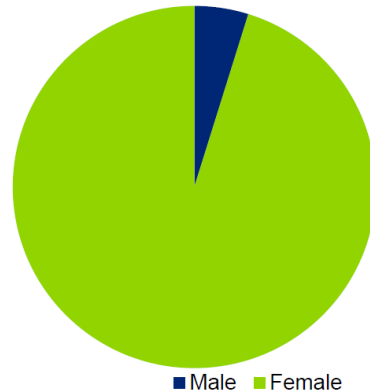
Age profile of independent salespeople



Source: Deloitte Access Economics, ISP survey

19. The chart below demonstrates that a majority (95%) of independent salespeople are female. Leaving aside the target market for the product, male independent salespeople were much more prevalent in the network marketing sector of the industry, motivated by the opportunity for them to build a business.

Independent salespersons gender: % share of independent salespersons



Source: Deloitte Access Economics, ISP survey

20. The changing composition of the Australian workforce has had an impact on the direct selling industry. In particular, the increasing participation of women in the workforce is affecting the nature of participation in the direct selling industry by women (Monash University, 2010).
21. Evolving consumption patterns mean that dual income homes are becoming the norm, and the income earned by participants in the direct selling industry is evolving to reflect this. Previously an independent sales person may have joined the industry for a discrete period of time to earn income for a specific purchase. However, to sustain a continuous second income flow an independent sales person will need to be more actively, and continuously, involved in the industry. This may mean that an independent sales person may only be involved for a few hours per week over an extended period of time earning ongoing supplementary income.

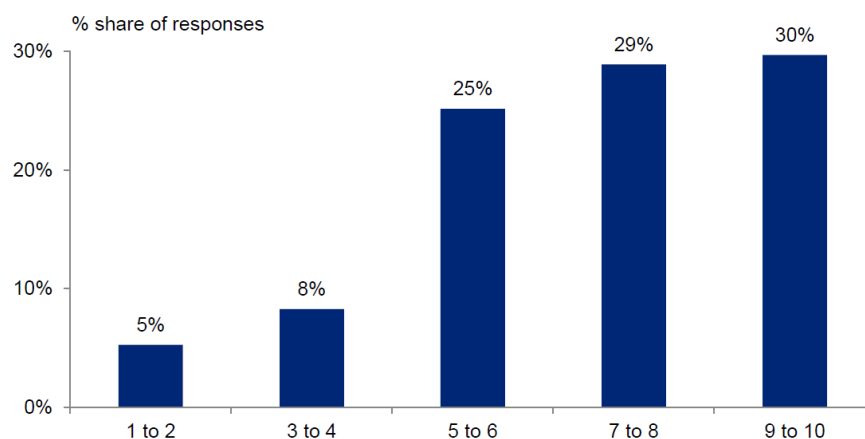
Independent Contractor Status

22. While there are many similarities between the direct selling industry and the broader retail industry there are a number of 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.

23. Independent salespersons have the ability to 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.

Number of hours worked each week



Source: Deloitte Access Economics, ISP survey. Note: Share does not sum to 100%; 3% of respondents did not answer this question.

24. Many independent salespeople are employed part or full-time in other more traditional forms of employment and direct selling often represents an additional form of income for them. Direct selling companies recognize their role in providing the flexible income options which may not be a sole source of income for an independent salesperson. Some direct selling companies place no restraints on independent salespeople working for other direct selling companies, however, it is not uncommon to implement some restraints on the ability of independent salespeople to contract with direct selling companies who sell competing products.

25. 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).

26. 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. First, it must be recognized that the recurring question of employee versus independent contractor is not a one-dimensional issue. There are many legitimate competing constituencies with a stake: small businesses, entrepreneurs, taxpayers, workers, channels of distribution such as direct selling, etc
27. It is of increasing concern that current legislative and/or administrative employment classifications demonstrate a level of rigidity in determining employment status and limit the scope of the regulators to exercise discretion when imposing these tests (for example, the ATO's independent contractor tool). Rigid mechanisms for determination can often provide fewer flexible outcomes than employment tests used by the courts and can have unforeseen and detrimental consequences.
28. The Australian Federal Court was recently required to determine this issue in the direct selling context in *Fair Work Ombudsman v Ecosway Pty Ltd* [2016]. Ecosway Pty Ltd (**Ecosway**) had a business model based on a multi-level network marketing (**MLM**) system. Ecosway engaged independent contractors to sell healthcare, nutrition and beauty products to consumers and to enroll other independent contractors into their own "downline" who would also sell Ecosway products to consumers and recruit others into their own networks or downlines.
29. While the worker in question had been engaged as an independent contractor by a company in the direct selling sector, the Fair Work Ombudsman argued that the worker was really an employee. The Federal Court held, after considering numerous factors relevant to the nature of the relationship between Ecosway and the worker, that the worker was engaged as an independent contractor.
30. On balance, the Court concluded that when the relationship as a whole was considered, the strong impression was that there was no employment relationship. The worker was required to take on a number of risks in the business and the agreement contained numerous provisions which would not have been required had the worker been an employee. Indeed, in the context of direct selling, the Court considered that while many of the indicators of an employment relationship were present, they were required for the operation of Ecosway's multi-level marketing system. The presence of these indicators however, did not make the worker an employee.

31. Unfortunately, the Court's decision is based on specific facts but DSA submits that based on the facts of this case, the majority of independent salespeople would legitimately fall into the independent contractor status.

Independent contracting - the U.S. Experience

32. Prior to 1982, the direct selling industry suffered uncertainty, i.e., the potential that the distributors of direct selling companies might be classified as employees for federal tax purposes, with all the onerous challenges of withholding, record keeping, payment of employee taxes, etc. Such burdens threatened the economics of the direct selling model. The industry needed relief and certainty for its channel of distribution. The US DSA had a significant achievement in negotiating an amendment to the U.S. Internal Revenue Code (TEFRA - Tax Equity Fairness Responsibility Act) which recognised the independent contractor status of independent salespeople for federal tax purposes. 26 U.S Code § 3508. 38 states have already adopted a similar umbrella exemption, the most recent DSA accomplishment: North Carolina, effective July 1, 2018.
33. In July, 2018, the US Direct Selling Association, announced an industry-wide initiative to update state unemployment legislation to be in sync with federal standards, in place since 1982, which acknowledge independent salespeople as independent contractors.⁷

Independent contracting – the New Zealand Experience

34. DSA is aware that in New Zealand, whilst independent salespeople are normally independent from the direct selling company, for tax purposes, the Inland Revenue has recognized three separate categories of workers in the direct selling industry - commission agent, independent reseller or employee. The first two types of distributors are normally self-employed but there are important differences in their tax treatment. The tax rules for employees are entirely different from the rules for self-employed people.⁸ DSA understands that unlike Australia, New Zealand does not have a mandatory ABN equivalent and so the tax system allows for more flexibility in classifying direct sellers for tax purposes. DSA submits that an approach to classification as taken by the New Zealand tax authorities by carving out direct selling for an analysis which corresponds to the industry model would be far more effective not only for taxation issues but other policy areas where the independent contractor/employee definitions are currently used.
35. DSA submits that any changes to the current definitions of independent contractor and employee for the purposes of employment law in Australia which further increase rigidity

⁷ <https://www.worldofdirectselling.com/independent-contractor-initiative/> 27 August 2018

⁸ http://dsanz.co.nz/taxation/Direct_Selling_Tax_Booklet-IR_261.pdf

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 the definitions employed by direct selling companies with negative outcomes. Therefore, if no satisfactory definitions can be found on a one-size fits all basis, consideration could be given to industry-specific solutions or alternatively the status quo should be maintained.

36. In any event, DSA does not consider that any changes to the legal definitions of either employees or independent contractors or indeed the regulation of online technologies servicing the on-demand economy should be made on a state-by-state basis. Carve-outs of this nature would significantly increase the compliance costs for companies trying to deal with separate legislation for a specific state. The current payroll tax regime is an example in the direct selling context of the difficulty of complying with legislative provisions across states and territories. Increased state-based legislative requirements and compliance burdens deter global direct selling companies from establishing their Australian operations in those states. This is certainly the experience DSA has witnessed when overseas direct selling companies seek to determine which location would be most beneficial to start an Australian corporate head office.

Technological changes & regulation – current and future challenges

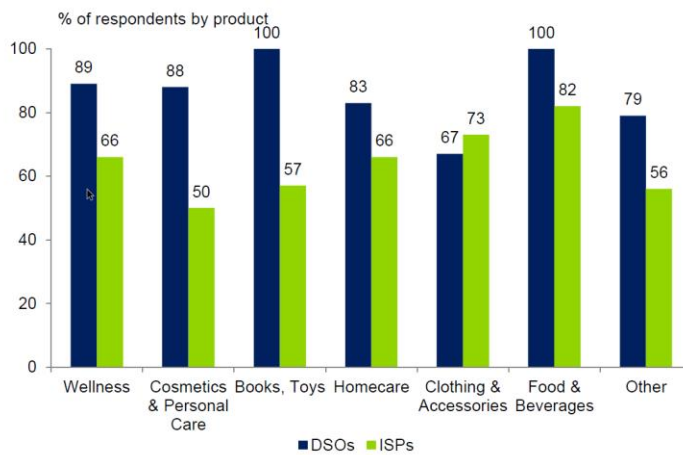
37. The direct selling industry is part of the retail sector and is therefore subject to the laws that regulate the manufacture and supply of consumer products in Australia. However, the regulatory environment faced by the direct selling industry is distinct in some ways from the general retail environment.
38. The impact of technology in the direct selling sector can primarily be seen as a tool by which independent contractors have been able to broaden the scope of their selling networks through social media channels. In previous generations, much direct selling occurred by way of face-to-face interactions and was, as a result, more likely to be constrained in terms of the geographic reach of any individual's network. However, with the advent of social media, direct selling is now an attractive offering for millennials as well as offering the opportunity for established independent salespersons to broaden the geographic scope of their selling opportunities, particularly for those direct sellers located in more regional or remote areas. By the way in which it brings together a person's network, social media can be viewed as a complementary tool which can be effectively harnessed to enhance the traditional direct selling method of marketing and selling, in existence for 150 years.

39. However, it is important to emphasise that in a direct selling context, the technology utilized is that which is available to the general public at large, for example Facebook and Instagram. It is not a direct selling company specific technology provided to independent salespeople to aid their product sales. This contrasts to sites such as Uber and Airtasker which are tools specifically built to develop two-sided markets around a service provider and creating an introduction to a customer. In direct selling, the direct selling company provides the product and the independent salesperson is still required to source their own customers using whatever methods they chose, whether that be face-to-face or via a social media platform. The direct selling company is not providing the means to source a customer base and does not control that interaction in any way. If there were a specific problem with the product provided to the end-consumer, then that customer would potentially be able to also approach the direct selling company as well as the independent salesperson for redress under the Australian Consumer Law and under the DSA Code of Conduct.

Training

40. Many DSA Members provide ongoing training for their independent salespeople, albeit at different levels. Consultations indicated that training is an integral part of the ongoing development of independent salespeople in order to maintain longevity in the business. Training can be tailored to suit the skill level of the independent salesperson, this has been made easier through the use of technology, including, e-learning and webinars, which allows independent salespeople to receive training at their level and in their own time, and gaining experience, for example, through observing at parties before running a party.
41. Almost all direct selling companies surveyed primarily selling wellness products stated that they delivered training. For those particular direct selling companies, between 57% and 82% of independent salespeople respectively said they received training from the direct selling companies (see table below).

Training provided and received



Source: Deloitte Access Economics, ISP survey and Deloitte Access Economics, DSO survey. Note: respondents were able to select more than one response.

42. The direct selling industry includes a number of small and medium businesses, additional regulations placed on these industries is relatively more burdensome as they may lack the capacity to ensure compliance.
43. Even though they are independent contractors running their own businesses, many DSA Members also specifically provide training in respect of an independent sales person's legal obligations, given that the direct selling company has the economies of size and sale to be able to offer this training with the benefit of protecting individual independent salespeople and the overall brand. The opportunities for more online learning and training are increasingly becoming a cost-effective way to reach a large sales-force, therefore creating more opportunities for individuals to upskill.
44. The Australian Consumer Law (**ACL**) is the main binding set of regulations on the direct selling industry and, for examples, DSA Members are likely to offer training in respect of product and earnings claims to the independent contractors they engage. The increased use of technology and social media as a selling platform also raises additional compliance issues - given the broader audience that can be reached, it is more crucial than ever that salespersons are cognisant of their obligations under relevant legislation, such as the ACL.
45. Legislative and administrative tests which rely on "control" as a determinant of employee status can have the unintended consequence of deterring businesses who engage independent contractors from providing additional training to independent contractors in order to avoid being seen to "control" them.

46. Ultimately, DSA submits that training is of significant benefit to the skill set of individual workers and opportunities for independent contractors in this regard should not be constrained due to unnecessary regulation or archaic definitions of employee versus independent contractors and that training requirements represent any form of “control” over an independent contractor. The maze of regulation engulfing product sales means that standardized policies and procedures are both essential to the operation of direct selling companies and provide invaluable benefit to independent salespeople who are bound by the law but usually without the necessary means to create their own compliance systems.

Annexure A

Inquiry Terms of Reference

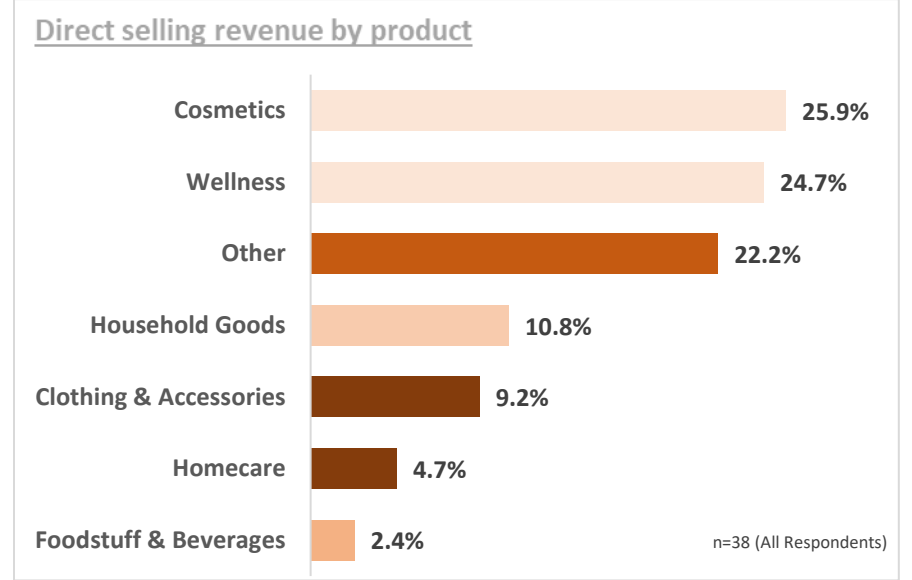
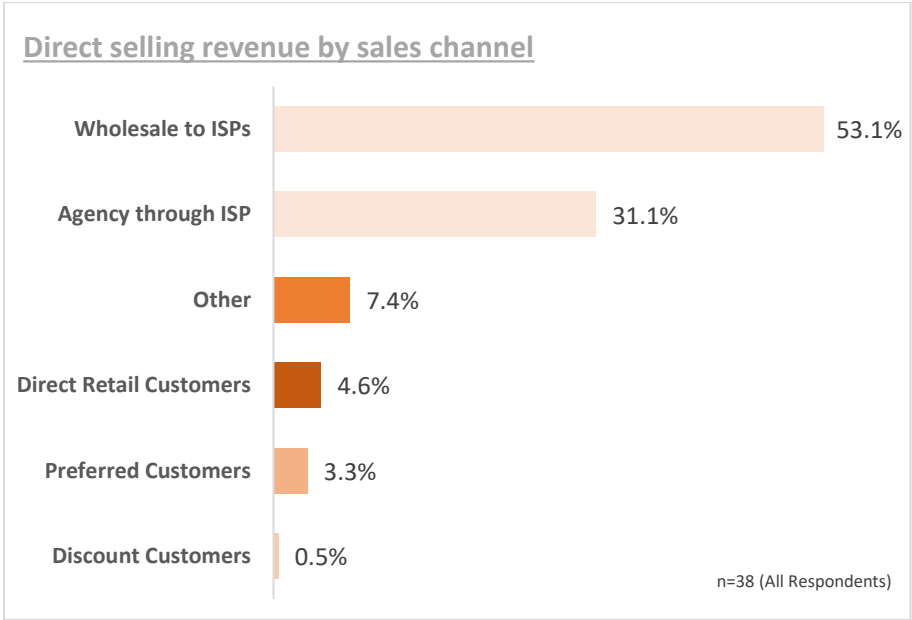
To inquire into, consider and report to the Minister for Industrial Relations on:

- A. The extent and nature of the on-demand economy in Victoria, for the purposes of considering its impact on both the Victorian labour market and Victorian economy more broadly, including but not limited to:
 - I. the legal or work status of persons working for, or with, businesses using on-line platforms;
 - II. the application of workplace laws and instruments to those persons, including accident compensation, payroll or similar taxes, superannuation and health and safety laws;
 - III. whether contracting or other arrangements are being used to avoid the application of workplace laws and other statutory obligations;
 - IV. the effectiveness of the enforcement of those laws.

- B. **In making recommendations, the Inquiry should have regard to matters including:**
 - I. the capacity of existing legal and regulatory frameworks to protect the rights and vulnerable workers;
 - II. the impact on the health and safety of third parties such as consumers and the general public, for example, road safety;
 - III. responsibility for insurance coverage and implication for State revenue;
 - IV. the impacts of on-demand services on businesses operating in metropolitan, regional or rural settings;
 - V. regulation in other Australian jurisdictions and in other countries, including how other jurisdictions regulate the on-demand workforce
 - VI. Australian's obligations under international law, including international labour Organization Conventions;
 - VII. the limitation of Victoria's legislative powers over industrial relations and related matters and the capacity to regulate these matters; and
 - VIII. the ability of any Victorian regulatory arrangements to operate effectively in the absence of a national approach.

Annexure B

Direct Selling Revenue



Annexure C

Direct Selling Business Models

Wholesale Model

In a wholesale model (also known as Buy / Resell), the direct selling company sells goods to the independent salesperson at a wholesale price. The independent salesperson takes legal title over the goods and is able to re-sell those goods to a retail consumer (usually at an RRP suggested by the direct selling company) or keep and consume the products themselves.

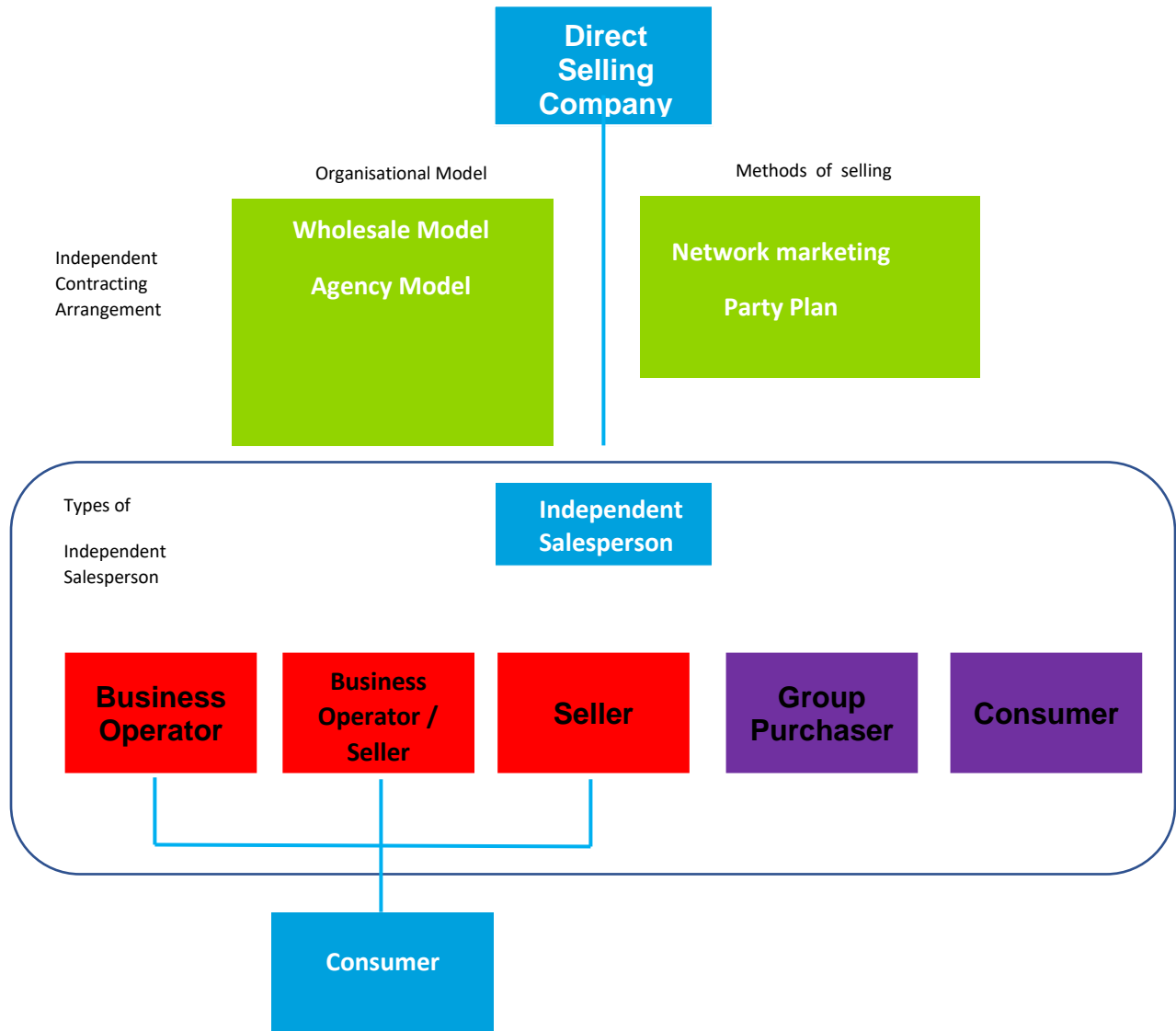
An independent salesperson's income consists of the retail margin between wholesale and retail price and any other commissions payable under the compensation plan. Just over half (54.2%) of the direct selling company who completed the survey operate under a wholesale business model.

Income is earned by the independent salesperson from the margin between the wholesale purchase price and the retail price. Income can also be earned on the sales of others who are introduced into the business by the independent salesperson (known as a 'downline').

In this model there is a contract between the direct selling company and the independent salesperson that sets out the terms of this relationship. Income is earned through commissions on the sales made by the independent salesperson and on sales made by people that are introduced into the business by the salesperson (the 'downline'). In this model there is also a contract between the direct selling company and the independent salesperson that sets out the terms of this relationship and the circumstances in which commissions and bonuses are paid.

Agency Model

In an Agency model, the direct selling company appoints the independent salesperson to act as its independent agent to procure the sale of goods or services. Sales are made by the independent salesperson at a retail price set either to customers or to themselves if they or their families wish to consume the products. Independent salespersons do not assume legal title over the products. Independent Salesperson's income consists of commission for the retail sale plus other commissions payable under the compensation plan. Thirty four percent (34.1%) of respondents operate an agency model direct selling company. A Hybrid model comprises a mix of agency and wholesale transactions. A total of 11.7% of responding direct selling companies operate under a hybrid business structure.



As well as sales made through independent salespersons, organisations make sales directly to end consumers under one of three methods: sales to discount customers, preferred customers or direct retail customers.

Discount customers are eligible to sell, sponsor and buy products at a discount, but in practice only does the latter. Preferred customers are eligible to purchase at a discount while direct retail customers are eligible to purchase products at a price set by the direct selling company.

Independent salespersons in direct selling can be categorised into 5 types:

1. Business Operator – one who builds and manages a downline that makes sales but does not sell product themselves
2. Seller/Business Operator – one who makes sales as well as building and managing a downline
3. Seller – one who sells product to others but does not manage a downline
4. Group Purchaser – one who purchases product for family and friends for consumption at wholesale prices but does not on-sell products
5. Consumer – one who purchases at wholesale for their own consumption and does not on-sell