



Level 6, 179 Queen Street
Melbourne, VIC 3000

info@consumeraction.org.au
consumeraction.org.au
T 03 9670 5088
F 03 9629 6898



Thursday, 11 April 2024

Director
Consumer Policy Unit
Market Conduct and Digital Division
Treasury
By email: consumerlaw@treasury.gov.au

Dear Director

Consultation: Designated complaints determination

Thank you for the opportunity to respond to the exposure draft *Competition and Consumer (Designated Complaints) Determination 2024 (the determination)*.

We are writing on behalf of our consumer sector colleagues:

- Australian Communications Consumer Action Network (ACCAN)
- CHOICE
- Consumer Policy Research Centre
- Consumer Credit Legal Service WA
- Consumers Federation Australia
- Energy Consumers Australia



- Financial Rights Legal Centre
- Indigenous Consumer Action Network
- Public Interest Advocacy Centre
- Redfern Legal Centre

We affirm our previous support for the designated complaints function, and our previous comments about the design and structure of the legislation in our joint submissions to Treasury and the Senate Legislative Committee. The designated complaints regime provides the potential for the ACCC to address systemic and emerging harms including those that may not fit neatly into a case study or set of existing regulations for the ACCC to investigate and take action. Complaints can be investigated quickly and effectively, as informed directly by consumer advocates close to the potential harms. These are the gaps in protections that we understood the regime is trying to bridge.

Our major concern is about the determination's prescribed limit of just three designated complainants. When combined with other limitations in the determination this will have a serious impact on the function and outcomes of the designated complaints regime.

Concerns with just three designated complainants

The limit of three designated complainants under Section 12 is a serious constraint on the designated complaints regime and will significantly limit its utility. We understand that at least one complainant will be chosen based on their representation of small businesses, which likely means the consumer sector is limited to two designated organisations. We strongly urge the Minister to reconsider and allow for a greater number of designated complainants to accommodate the broad and geographically diverse sector and consumers we represent. We suggest, at a minimum, **five** designated complainants for the consumer sector. Our reading of Section 11 is that the Minister may choose to designate less than the maximum number if they find appropriate to do so.

The consumer sector is composed of a great number of excellent organisations working across many diverse areas. We reflect the large regulatory jurisdiction of the ACCC. Many of the signatory organisations to this submission already work constructively with the ACCC through the Consumer Consultative Committee and would work productively with the ACCC to mitigate any risk of inappropriate designated complaints.

The obvious impact of Section 12 is that no more than three designated complaints will be lodged across a year. We also note that Section 5 imposes a 12-month wait to lodge another designated complaint commencing from the lodging of the first, and that complaints issued with a no further action response may be considered – presumably negatively – in further applications for designated complainant status under Section 11(2)(b)(i). In light of this it is reasonable to expect designated complainants will be highly cautious in submitting complaints and there may frequently only be one or even none in any 12-month period.

While we understand the ACCC's need to guard its resources to ensure it is able to address its regulatory priorities, the designated complaints regime will be significantly restricted in practice by the determination. Serious, emerging misconduct frequently arises which requires a response by regulatory bodies regardless of whether it has been planned or budgeted for that financial year. We understood that the designated complaints regime would be supported by adequate resourcing. We are now questioning whether, with what is being proposed, regulatory



responses will be able to be delivered in a timely and transparent way in line with the purpose of the bill as indicated by the Minister in the Explanatory Memorandum to the Bill.

With so few designated complainants proposed, we have concluded that our sector need to divert significant resources to cross-consultation on what matter is most suitable for a designated complaint. This will inevitably result in the referral of a complaint from the most appropriate organisation to whichever is granted designated complainant status. This will divert scarce resources from the designated complainant organisation as they will need to assess and respond to referrals from sector partners.

Two of the considerations that the Minister can take into account when assessing an application by an organisation to become a designated complainant also appear to have real limitation on the consumer sector's capacity to raise the most important issues via the designated complaints regime. These are:

- A mandatory consideration of the applicant's ability to make designated complaints in relation to which the ACCC may take action under subsection 154ZK(1) of the Act;
- A discretionary consideration of the applicant's capability to respond to requests from the ACCC.

Consider a hypothetical scenario where one consumer sector designated complainant is a national service and another is from NSW. A specialised service in Northern Australia identifies a highly concerning, systemic issue impacting regional and remote First Nations consumers which could be effectively investigated and addressed through a designated complaint. If one of the two designated complainant consumer organisations agrees to lodge this complaint on behalf of the specialised service, the designated complainant may not be well-placed to respond to the ACCC's requests for further information (instead the designated complainant would need to go back to the specialised service and spend time and resources acting as a conduit between the two parties). Consequently, the ACCC is not satisfied that the applicant has adequate capability to respond to their requests and issues a no further action notice. The result is that the harmful misconduct not only continues in the short-term, but is emboldened by the official no action response. The no-action outcome is then considered in the designated complainant's next application for status.

While we understand the ACCC can consider issues directly from the specialised service provider as an ordinary complaint, again, it is sometimes challenging to find the right evidence and willing clients to make a traditional regulator complaint. This outcome undermines the effectiveness of the designated complaints regime. We urge the Minister consider a higher cap on the number of designated complainants to ensure the designated complaints regime meets the intended regulatory impact and reflects the many consumer organisations doing important work for consumers across Australia.

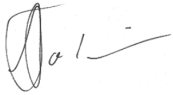
A greater number of designated complainants in the consumer sector will support us to lodge the most important, urgent matters in an efficient and timely manner. It will lessen the burden of cross-sector consultation and assessment on the designated complainants.

Potential costs in response to a designated complaint

Section 7 in the determination also requires the ACCC to consider their potential costs in any action in response to a designated complaint. We question whether it is appropriate to include this. The ACCC can consider this holistically throughout its assessment, and in practice cost barriers are likely to be used by industry to advocate for the ACCC to reject a designated complaint.



Yours faithfully,



Stephanie Tonkin
CEO
Consumer Action Law Centre



Brendan French
CEO
Energy Consumers Australia



Erin Turner
CEO
Consumer Policy Research Centre



Rosie Thomas
Director, Campaigns & Communications
CHOICE



Gerard Brody
Chairperson
Consumers' Federation of Australia



Camilla Pandolfini
CEO
Redfern Legal Centre



Gareth Downing
Deputy CEO
ACCAN



Drew McCrae
Senior Policy & Advocacy Officer
Financial Rights Legal Centre



Bev Jowle
Chief Executive Officer
Consumer Credit Legal Service WA

Douglas McCloskey
Program Director, Energy and Water Consumers'
Advocacy Program
Public Interest Advocacy Centre

Jillian Williams
Indigenous Consumer Assistance Network

