

22 December 2023

Submitted by email.

To the Director – Consumer Policy Unit, Treasury,

Re: Submission to the consultation on a new designated complaints function

Our organisations are strongly supportive of a designated complaints function. A designated complaints function recognises the value of complaints from organisations with strong connections to communities, who are able to identify consumer issues at an early stage. Designated complaints will result in problems most affecting Australians being addressed appropriately and in a timely manner.

This submission outlines minor changes that could be made to the draft legislation and the suggested approach to designated complaints to get the best outcome from the new power.

Designated complaints should be able to be lodged with a wide range of regulators

The proposed legislation establishes a designated complaints function with the Australian Competition and Consumer Commission (the ACCC). This is an important first step.

However, the ACCC is only one of the regulators responsible for consumer markets in Australia. It is also a regulator with existing strong mechanisms to consult with consumer groups. While we welcome a designated complaints function being established with the ACCC, the power needs to be extended to other consumer regulators including regulators responsible for the financial services sector, food, health, communications, and the energy market.

At minimum, a designated complaints function should exist for the Australian Securities and Investments Commission (ASIC), Food Standard Australia New Zealand (FSANZ), the Therapeutic Goods Administration (TGA), the Australian Energy Regulator (AER), the Australian Communications and Media Authority (ACMA) and state-based consumer law regulators. There is also value in extending the complaints function to regulators responsible for care and community services, such as the NDIS Quality and Safeguards Commission, or Aged Care Quality and Safeguards Commission. These are vital regulators upholding standards and a designated complaints function can deliver greater responsiveness to community concerns.

Amend appointments process to create clearer criteria for designated complainants

The draft legislation sets out a process for the Minister responsible for consumer affairs to appoint organisations or individuals as designated complainants. The appointment process, outlined in draft sections 154ZP-154ZX gives significant discretion to a Minister and puts vague requirements on organisations.

For example, the Minister must consider if an organisation will “act with integrity” - this forward-looking requirement places broad and poorly defined obligations on independent consumer organisations. Instead, a test that considers if an organisation has had an appropriate track record representing the interests of consumers or small businesses would be more appropriate. Further clear criteria could be added to require that designated complainants:

- (if they are consumer representatives) must not represent the interests of industry.
- Must have expertise and experience in advocacy, research, or in representing the interests of consumers or small businesses.
- Must cooperate with the regulator undertaking the designated complaints process.

- Must have a track record of working effectively and collaborating with other consumer or small business representative organisations.

Overall, we would prefer that the legislation sets out clear requirements for designated complaints bodies to meet and an automatic approval process for those entities.

Resourcing and appointing a diverse range of organisations as designated complainants

We note that there are some concerns in the Explanatory Memorandum about the ACCC not having the resources it needs to respond to designated complaints.

Consumer groups recognise the importance of the designated complaints function and the need to only use it when required. Given the ACCC has well-established consultation mechanisms with consumer groups, we expect to only need to use the designated complaints function rarely across all consumer groups.

With this in mind, the Minister should appoint organisations as designated complainants for an initial period of at least five years and ensure that a diverse range of organisations are appointed as designated complainants. Designated complainants should include large consumer groups as well as speciality organisations, including organisations with strong community links to First Nations Australians and Culturally and Linguistically Diverse communities.

Ensure that designated complaints can be made about serious issues affecting small groups of Australians

The Explanatory Memorandum includes definitions of significant issues and systemic market issues that it expects will be the subject of designated complaints. Both definitions in the explanatory memorandum refer to issues that affect “a sizeable group of consumers or small businesses” or “a large group of Australian consumers or small businesses”. Rather than defining significant or systemic harm by the number of people affected, definitions should consider the significance of the harm caused, especially to people experiencing vulnerability.

The current definitions don’t adequately capture issues that cause significant harm to small groups of Australians. This could mean that, for example, issues related to unfair business practices targeting remote First Nations communities or door-to-door sales in regional areas could be excluded. The Explanatory Memorandum should be amended to clarify that designated complaints can be made about issues experienced by small groups of Australians, including issues related to vulnerability.

Restrict designated complainants to organisations with appropriate governance arrangements

The legislation will allow the Minister to appoint both individuals and organisations as designated complainants. Given the resource implications this power can have for regulators, we believe it should be restricted only to organisations with appropriate governance arrangements rather than individuals. The draft legislation should be amended so that s 154ZE no longer includes “individuals”.

Place appropriate limits on publication exemptions

Draft section 154ZN (2) in the legislation limits what information the ACCC may release about designated complaints. The ACCC won’t be required to publish information about a designated complaint response if they deem that it is “confidential in nature”. While this may be appropriate for some legal actions, publication should only be limited when absolutely necessary. The current drafting leaves too much discretion and could result in very little information being released about responses to designated complaints.

Section 154ZN(2) could be tightened ensure that the ACCC is only able to limit information release when there is “a direct impact on litigation or planned litigation.”

Introduce a review mechanism for rejected complaints

Draft section 154ZH allows for the ACCC to determine that no action or no further action is required for a designated complaint. This effectively ends the complaints process.

This will be an appropriate outcome for some complaints, especially those that are then captured by, for example, a Royal Commission or other review process. However, there is a risk that complaints with merit could be ended prematurely. Section 154ZH should be expanded to require that the ACCC meet with the designated complainant to discuss the outcome before issuing a no action or no further action notice.

We look forward to working with the Federal Government as it implements this important new protection. Please contact us on _____ with any questions about this submission.

Kind regards,

Dr Gareth Downing
Deputy CEO
Australian Communications Consumer Action Network

Rosie Thomas
Director – Campaigns & Communications
CHOICE

Stephanie Tonkin
Chief Executive Officer
Consumer Action Law Centre

Gerard Brody
Chair
Consumers Federation of Australia

Erin Turner
Chief Executive Officer
Consumer Policy Research Centre

Brendan French
Chief Executive Officer
Energy Consumers Australia

Drew MacRae
Senior Policy and Advocacy Officer
Financial Rights Legal Centre

Jonathon Hunyor
Chief Executive Officer
Public Interest Advocacy Centre (PIAC)

Rebekah Sarkoezy
Policy Manager
Super Consumers Australia