



Level 6, 179 Queen Street
Melbourne, VIC 3000

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



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Alan Raine
Committee Secretary
Senate Economics Legislation Committee

Dear Committee

Inquiry into the Competition and Consumer Amendment (Fair Go for Consumers and Small Business) Bill 2024

Thank you for the invitation to make a submission to the Inquiry into the *Competition and Consumer Amendment (Fair Go for Consumers and Small Business) Bill 2024 (designated complaints bill)*.

This response is on behalf of a coalition of consumer organisations:

- Australian Communications Consumer Action Network (ACCAN)
- CHOICE
- Consumer Action Law Centre
- Consumers' Federation of Australia
- Consumer Policy Research Centre
- Public Interest Advocacy Centre
- Super Consumers Australia

We refer to our submission in response to the draft exposure legislation (**Appendix A**) and affirm our previous comments about the design of the designated complaints bill. We are strongly supportive of a designated complaints function as an important addition to the regulatory landscape in Australia, reflecting the value of intelligence and quality of decision making in the consumer sector.



The designated complaints function is a missing piece of the regulatory puzzle in addressing systemic and significant market issues. There are often limited levers that a regulator, government or decision-maker alone can pull to effectively address complex issues. We are likely to see this in the immediate future in relation to artificial intelligence use and misuse, sectors where there are power imbalances and monopolies like telecommunications, dark patterns and other areas with major information asymmetries between businesses and consumer. In this context, the designated complaints power enlivens the ACCC's ability to investigate and improve the system for all consumers, especially marginalised groups and people experiencing vulnerability.

In the context of limited public comment on ongoing regulatory actions, the mandated public reporting in response to designated complaints is powerful. It will enhance consumer confidence in a fair market and put businesses engaging in harmful practices on notice.

The designated complaints function should apply to all sectors over which the ACCC has remit.

We are supportive of the designated complaints bill subject to our outstanding concerns being addressed, which can be achieved through minimal amendment to the bill and additional guidance in the Explanatory Memorandum.

ACCC discretion for no further action on a designated complaint

The bill affords the ACCC discretion to determine to take no further action in relation to a designated complaint in two circumstances. We are very concerned with the breadth of the third circumstance, where the subject matter of the complaint is subject of another inquiry or action. The basis for excluding a complaint was expanded from the exposure draft legislation. Its breadth suggests that the other inquiries and actions are a holistic substitute to ACCC action. This is rarely the case.

Section 154ZH(4) provides the ACCC with a broad discretion to determine a complaint should not be accepted as a designated complaint if it is satisfied that the subject matter of the complaint is, or is part of a matter:

(a) into which any of the following is inquiring or has within the past 2 years inquired:

- (i) a committee of the Parliament or of either House of the Parliament;
- (ii) a Royal Commission;
- (iii) a coronial inquiry, coronial investigation or coronial inquest; or

(b) which is the subject of:

- (i) legal proceedings; or
- (ii) an inquiry, investigation or review conducted by the Commonwealth, a State or Territory, an industry organisation, a consumer organisation or another person;

that is, or is of a kind, prescribed in the designated complaints determination.

While we acknowledge the merits and necessity in avoiding duplicate work and wasting resources, we consider this can be safely achieved under Section 154ZH(5) which allows the ACCC to take no further action in relation to

a designated complaint if it is satisfied that it is appropriate to do so. This section could be relied upon where a designated complaint is lodged about matters that have been well-ventilated and resolved or soon to be resolved through another avenue.

Section 154ZH(4) is excessively broad and undermines the purpose of a designated complaints function. It gives rise to a situation where a class action could be relied upon to exclude a designated complaint to the ACCC. For example, the JB Hi-Fi warranty class action may secure compensation for customers, but is not timely and does not result in regulatory deterrence. Disputes heard in a State tribunal could likewise exclude a designated complaint. It could prompt industry groups to litigate or hold reviews in order to preclude or significantly delay the ACCC considering a designated complaint of the same nature. There is no clear example of what an industry inquiry is or the level of detail it needs to meet to qualify in this provision. Further, the outcome of a private legal proceeding, industry inquiry or a coronial inquest are very unlikely to replicate the outcome the ACCC can achieve by exercising regulatory powers.

When an issue is systemic – and likely to be the subject of a designated complaint – it is common for multiple avenues to ventilate the issue, including parliamentary inquiries, industry forums and regulator investigations. These are complementary ways to resolve significant issues and not substitutes.

The Parliamentary Inquiry into insurers' responses to 2022 major floods claims is raising many issues that the General Insurance Code Governance Committee has investigated, such as use and oversight of expert reports and claims handling decision making. CHOICE (together with Financial Rights Legal Centre, Financial Counselling Australia, the Tenants' Union and the Climate Council),¹ ASIC,² and the Insurance Council of Australia³ have also produced separate bodies of work on the same or overlapping issues in relation to the 2022 floods claims. Similarly, there are currently 6 different inquiries raised into supermarket pricing and competition by the ACCC, Treasury, the House of Representatives, the Senate and the ACTU. While each has been initiated by the same major concerns, the aims and outcomes of each are distinct and important. It does not follow that a designated complaint cannot run concurrently with other inquiries and reviews.

It is concerning that this exception also extends to inquiries, investigations or reviews conducted by consumer organisations. If regularly relied upon by the ACCC, it could create a perverse incentive where consumer organisations are reluctant to commence reviews or research prior to determining if the ACCC may accept a designated complaint. It adds an additional, unnecessary complexity to deciding what work should be prioritised and may necessitate additional consultation with other consumer organisations to ensure that we are not going to impact on each other's designated complaints. This would delay important work and create a further strain on limited public resources. The important work that CHOICE, the Consumer Policy Research Centre and other bodies do in exploring and reporting harmful industry practices informs public discourse and the ACCC – but they have no powers and are not a substitute for regulatory intervention. We rely upon regulators to take action to prevent harm – we can't do it ourselves.

¹ Weathering the Storm: Insurance in a Changing Climate (August 2023) available online at www.choice.com.au/consumer-advocacy/policy/policy-submissions/2023/august/climate-insurance-report

² REP 768 Navigating the storm: ASIC's review of home insurance claims (16 August 2023) www.asic.gov.au/regulatory-resources/find-a-document/reports/rep-768-navigating-the-storm-asic-s-review-of-home-insurance-claims/

³ The new benchmark for catastrophe preparedness in Australia: A review of the insurance industry's response to the 2022 floods in South East Queensland and New South Wales (CAT221) (also known as the 'Deloitte Report') October 2023.

It is equally concerning that Section 154ZL(1)(b) allows the ACCC discretion to replace a further action notice with a no further action notice if Section 154AH(4) applies – in effect, to cease considering the designated complaint if another inquiry or proceeding is commenced. This will have a chilling effect on the work of government, the houses of parliament, consumer organisations and even on consumers contemplating legal proceedings in respect of their disputes. It also gives industry the power to call their own inquiry in response to the ACCC issuing a further action notice to a designated complaint, and then advocate for the ACCC to cease their investigation. Such an outcome would unduly constrain the ACCC from discharging its responsibilities.

The number and nature of designated complaints will already be limited by virtue of the prescription of bodies eligible to make designated complaints. This control is contemplated in how the function will work and therefore reduces the need for wide-ranging exclusions in section 154ZH(4).

We recommend that Section 154ZH(4) is removed from the bill. It is unnecessary and give rises to perverse incentives and delays in addressing significant consumer detriment. The ACCC could then develop clear and flexible guidelines under Section 154ZH(5) to indicate more specifically where it will be appropriate to take no further action in response to a designated complaint that has been the subject of another inquiry or review.

In the alternative, the section should be drafted to introduce a requirement (that can be expanded upon in the Explanatory Memorandum) that the ACCC must be satisfied that:

- The outcome of the inquiry or action has, or is reasonably likely to, fully address the issue raised in the designated complaint and in a timely manner; or
- The outcome of the other inquiry or action is, or is reasonably likely to be, substantially the same (in outcome and timing) as if the ACCC accepted and actioned the designated complaint.

Limitation on number of designated complainants and complaints

We note that Section 154ZZ gives the Minister the power to make a legislative determination (**the designated complaints determination**) that, amongst other things, can impose a limit on the number of designated complainants approved and designated complaints lodged in a certain time period.

We acknowledge that the lodging of a designated complaint will create a significant workload for the ACCC and limits may be necessary to avoid the unreasonable diversion of resources from the ACCC's priority work. However, the broad discretion in this section suggests that a minister could determine that no designated complainants should be approved or designated complaints accepted. This undermines the purpose of the legislation and creates the unnecessary risk of no designated complainants being appointed and consequentially, no designated complaints lodged.

We recommend that a minimum number of designated complainants and designated complaints are mandated in the legislation to ensure that the designated complaints bill is not, in effect, able to be nullified by future Ministerial discretion. A minimum would not mean that number of applications or complaints must be approved, only that the designated complaints determination cannot mandate less than a certain number. Approval of designated complainant applications and complaints would be subject to the merits of each.

Significant and systemic market issue definitions



We have some concerns about the definitions of significant market issue and systemic market issue in the Explanatory Memorandum at [1.73-1.74].

We refer to our previous submission and recommend that the Explanatory Memorandum is amended to acknowledge that issues may be significant and/or systemic where they impact vulnerable consumers, even if the number of consumers or financial losses is relatively small. We are concerned that First Nations and regional and remote communities are particularly likely to be impacted by serious breaches of consumer law.

We also note that 'systemic market issue' does not refer to consumer detriment. It also refers only to current market disruption, and not a likely or future impact. This may in practice significantly limit designated complaints under this provision.

We point to ASIC's Productive Intervention Order in Part 7.9A of the *Corporations Act* as best practice for considering consumer detriment. This includes a consideration of non-financial detriment and likely future detriment, and allows ASIC to exercise this power in advance of significant consumer harm.

We trust the committee will consider our concerns with due regard. We are able to provide further commentary if necessary. Please contact Policy Officer Rose Bruce-Smith at [REDACTED] if you would like to discuss this submission further.

Yours sincerely,

[REDACTED]

Stephanie Tonkin
CEO
Consumer Action Law Centre

[REDACTED]

Erin Turner
CEO
Consumer Policy Research Centre

[REDACTED]

Gerard Brody
Chairperson
Consumers' Federation of Australia

[REDACTED]

Brendan French
CEO
Energy Consumers Australia

[REDACTED]

Rosie Thomas
Director, Campaigns & Communications
CHOICE

[REDACTED]

Xavier O'Halloran
Director
Super Consumers Australia



Gareth Downing
Deputy CEO
ACCAN

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

