Designated complaints exposure draft – submission by Consumer-wise Consulting, January 2024

The proposal to establish a designated complaints regime in Australia is very welcome. The UK experience of its similar super-complaints regime over the past two decades, which we have analysed in depth[1], suggests that there are likely to be significant benefits for consumers, regulators, regulated businesses and the wider Australian economy.

The detailed arrangements for establishing the Australian regime will be critical to the success of designated complaints, and so the opportunity to comment on the exposure draft of the legislation is a valuable one. The current draft contains both some very welcome elements, and some aspects (and omissions) that may undermine the objectives of the new regime. We focus below on the areas where the draft needs to be improved, in order to deliver a robust process characterised by high-quality, well-evidenced complaints focused on consumer harm and effective regulatory intervention across different markets.

Subject of designated complaints

Clause 154ZD requires that the subject of any complaint *'relates to a significant or systemic market issue that affects consumers or small businesses in Australia*.' This appears a good starting-point, but it is worth emphasising that this definition needs to encompass three particular concepts that might otherwise be excluded:

- *Consumer harm can be deep as well as wide*. A designated complaint might focus on a instances where relatively small number of consumers, perhaps from a particular community, experience a high level of detriment - the test should not necessarily be that the majority of consumers are impacted.
- *A 'market issue' might sometimes be a consumer-focused theme across different markets, not just an issue within an individual market*. The UK super-complaint on the 'loyalty penalty' in five different markets has had a major impact over the last few years, and the Australian regime should allow for this kind of approach.
- *A designated complaint should be able to relate to prospective as well as current harm*. Consumer organisations can often helpfully bring regulators insights into new and emerging issues in markets, not just reporting on what has already gone wrong. It should be possible for a designated complaint to focus on the first signs of a potentially major problem.

Volume and timing of complaints

The exposure draft reflects concerns identified in the explanatory memorandum that there could be a high number of designated complaints made, with the result that the ACCC may be overwhelmed by them. It creates powers for the Minister to tightly manage the flow of

[1] https://medium.com/@PhilipCullum/up-up-and-away-what-australia-can-learn-from-two-decades-of-uk-super-complaints-848e4469a748

complaints, by potentially limiting the number of complainants, the number of complaints in a particular period, and the period in which they may be made:

Clause 154ZF – '*the Minister may, by legislative instrument, determine requirements relating to the number and types of designated complaints that a designated complainant may make during a specified period.*'

Clause154ZP – '*the Minister may, by legislative instrument, determine periods during which applications may be made'*

Clause 154ZQ – '*the Minister may, by legislative instrument, determine a limit on the number of designated complainants'.*

This concern is misconceived. The UK experience (where there are no similar ministerial powers) over 20 years is that there have been fewer super-complaints made than initially expected, with complainants prioritising the quality of complaints made over the number submitted. This is in spite of the fact that the two main consumer organisations with super-complainant status are substantially larger and better resourced than their Australian counterparts and so better able to submit such complaints. It therefore seems highly unlikely that there will be an excessive number of designated complaints made. The ACCC's extensive existing arrangements for engaging with consumer organisations are also likely to limit the number of designated complaints, with many issues being brought to the ACCC's attention in other ways.

But in any event the approach set out in the exposure draft is not the best or most appropriate way of managing a high volume of designated complaints. Indeed the approach set out here may have the unintended consequence of encouraging complainants to rush out designated complaints before they are fully developed, in order to fall within an application period or squeeze in before any general cap imposed by a Minister is exceeded.

One of the great merits of the UK scheme has been the way in which it has prompted consumer organisations to develop substantial, high-quality and evidence-based submissions. The Australian regime should encourage this too and treat quality designated complaints as a good thing not a threat. So where consumer organisations feel they have a well-worked complaint that identifies important consumer harm, they should be encouraged to submit it, rather than being constrained in their ability to articulate their concerns or pushed into raising an issue in a less developed way.

A better approach to ensure a suitable the flow would be to focus on two elements of the regime:

- *The criteria for gaining complainant status.* These should be robust and clearly articulated, focusing on the demonstrated track record of applicants in analysing diverse consumer experiences, identifying consumer harm in markets, making recommendations on behalf of consumers to tackle this detriment, and using this work to influence decision-makers such as regulators. This would mean that complainants have the experience to engage effectively with the ACCC, producing good quality work and where possible giving the ACCC an opportunity to plan its workload.

- *The requirements for how the ACCC deals with designated complaints.* The 90-day period for the initial consideration of a complaint has worked well in the UK and it is good to see it included here too. This means that the ACCC could not ignore the issue or delay its initial consideration of the designated complaint. But the second of the two options included in the draft at the end of this 90-day period (the notice of further action) may be too prescriptive and expect too much of the Commission in what may still be a relatively early stage. The ACCC should have the option of initiating a further study to consider the issues in more detail, for example, rather than either rejecting the complaint or identifying specific breaches. This would then mean the ACCC would have more power to plan its workload. This might be particularly relevant where the issues raised touch on more than one market, and the ACCC will not be able to work on each one immediately. (As an example, the UK Competition and Markets Authority was still running a series of projects relating to the 'loyalty penalty' super-complaint several years after it was first submitted, some looking at markets which were not a focus of the original complaint.)

Designated complaint recipients

It makes sense to start with the ACCC as the first recipient of designated complaints, so that the new arrangements can bed in effectively, but limiting the regime to the Commission is likely to cause substantial frustration in the medium term and will represent a missed opportunity.

In the UK around half of the super-complaints made over the past two decades have related to financial services, and if anything Australian consumer organisations are even more focused than their UK counterparts on harm in this sector.

It would be much better to establish a regime that provides an opportunity and prompt for advocates to submit well-worked designated complaints to ASIC on the issues that they see in banking, insurance, superannuation, etc, and potentially to regulators in other sectors too, such as ACMA.

But as currently drafted, consumer organisations will not be able to submit what might otherwise be seen as well-evidenced complaints identifying consumer harm in financial services. Alternatively some or all of these complaints will still be made, but framed as matters for the ACCC when they might in reality be better handled by ASIC.

We therefore propose that the legislation should include:

- a power for the Minister to extend the regime to other regulators of consumer markets (i.e. including but not limited to ASIC), and
- a requirement for an independent review of the regime and its application to other regulators to be undertaken no later than three years from date on which the first designated complainant application is approved.

Designated complainants

The definition in clause 154ZE of an 'entity' which can gain complainant status includes an individual. This is inappropriate and it should be removed from the draft.

Clause 154ZP states that in granting complainant status the Minister should consider '*the experience and ability of the applicant in representing the interests of consumers or small businesses (or both) in Australia in relation to a range of market issues that affect them'*.

This is helpful but insufficient drafting, and it should go further in setting out the key criteria that the Minister will consider, rather than allowing this to be developed elsewhere. We have suggested some elements to be included, above. The content included in para 1.21of the explanatory memorandum is generally good and should be included on the face of the Bill.

In contrast, the reference in this clause to the need for applicants to demonstrate '*integrity'* is misjudged. This wholly subjective term might have the effect of constraining applications from a more diverse range of organisations or the submission of more challenging complaints, which are perceived to be irritating or inconvenient rather than indicating any actual lack of integrity. It should be deleted.

The exposure draft allows the Minister to remove complainant status at short notice. It also specifies that any complaint submitted by a complainant which then ceases to have complainant status should be treated as if it had not been made (so long as the ACCC has not yet issued a notice to reject it or take further action).

This combination potentially allows a Minister to kill a designated complaint even after it has been made. This threatens the very essence of the regime, which is that complainants are given the power to submit reasoned complaints without fear or favour.

The removal of complainant status should be set as a high bar, coming only after a number of complaints have been rejected out of hand by the ACCC (which is a far more effective way of ensuring quality), or where the complainant has repeatedly refused to engage positively with the ACCC during its consideration of complaints.

We suggest that the Minister should only be able to withdraw complainant status on the advice of the ACCC. Once a complaint has been made, only the complainant should be able to withdraw it, and a validly submitted complaint should continue to be considered by the ACCC even where the body submitting it has subsequently lost its complainant status.

The draft gives the Minister the ability to set conditions for the approval of individual applications. This should be deleted. Neither the Bill nor the explanatory memorandum give any meaningful indication of why this might be necessary, and again this might constrain the ability of complainants to make complaints which they consider important. The most appropriate handling of misconceived or poor-quality complaints is simply for the ACCC to reject them, rather than a Minister trying to anticipate potential future problems.

Confidentiality

Designated complaints and ACCC responses should be published in full, unless there is an exceptional reason not to do so, such as a company's commercially sensitive information gathered by the ACCC or information relating to litigation. The current draft is too widely drawn and gives the ACCC (which has a poor record on the publication of consumer complaints data more generally) too much scope to withhold information in what should aim to be a transparent process.

Consumer-wise

About Consumer-wise Consulting

- Consumer-wise Consulting was established by Philip Cullum in 2021 to advise on strategy, governance, policy and engagement in relation to consumers and regulation. As a consumer advocate in the UK he was closely involved in the submission of three super-complaints and in September 2022 he published an analysis of the lessons from the UK experience of super-complaints for a future Australian model.
- Philip is a Board member of Consumer Action and the Clean Energy Council, a member of the Code committee for customer-owned banks, chair of the Financial Basics Foundation and the Customer Advisory Panel for three energy distribution networks, and a member of the financial ombudsman AFCA's expert panel. The analysis set out here should not be taken as representing the views of any of these organisations.
- Philip was previously Consumers and Sustainability Partner at the UK energy regulator Ofgem and Senior Advisor at the Australian Competition and Consumer Commission then the Australian Energy Regulator.
- He held senior roles at three UK consumer organisations, was a member of various UK panels advising regulators and regulated businesses in water, aviation, food safety and financial services, and was appointed by ministers to the UK's Better Regulation Commission, Risk and Regulation Advisory Council and Regulatory Policy Committee.

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