



21 December 2023

Director

Consumer Policy Unit, Market Conduct and Digital Division

Treasury

Langton Crescent, Parkes ACT 2600

Via email: [consumerlaw@treasury.gov.au](mailto:consumerlaw@treasury.gov.au)

Dear Minister,

**Treasury Laws Amendment (Measures for Consultation) Bill 2023: ACCC designated complaints function.**

The ASBFEO welcomes the opportunity to provide comments to the Treasury regarding the proposed *Treasury Laws Amendments (Measures for Consultation) Bill 2023: ACCC designated complaints function* (the bill). We support the bill's objective to require the Australian Competition and Consumer Commission (ACCC) to rank, assess and respond publicly to complaints about significant or systemic market issues that are submitted by designated consumer and small business advocates. This is an important reform to help ensure that the ACCC receives and promptly acts on critical intelligence.

**Recommendation 1: Strengthen the integrity of designated complainant**

The ASBFEO supports the bill's broad treatment of designated complaint, which relates to:

- significant or systemic market issues affecting consumers and small businesses in Australia
- potential breaches of the *Competition and Consumer Act 2010*, or the ACCC's powers under it.

It is also appropriate that in approving applications from entities to be a designated complainant, the bill requires the Minister to have regard to:

- the experience and ability of the applicant to represent the interests of consumers and/or small businesses in Australia, in relation to a range of market issues
- the integrity of the applicant, in connection with being a designated complainant.

To prevent unmeritorious or excessive complaints, the bill enables the Minister to determine requirements relating to the number and types of designated complaints that a designated complainant may make during a specified period.

To strengthen the integrity of the approved designated complainant, we recommend that entities that meet the following criteria be assigned priority for eligibility:

- the entity has the authority to provide assistance to small businesses or consumers to resolve disputes and seek commercially realistic remedies in the near term, while regulators consider longer term actions of investigation and possibly enforcement
- the entity is required to act impartially
- the entity has authority to obtain information or documents from both parties to a dispute.



The ASBFEO's enabling legislation provides for referrals to appropriate regulators, where patterns of disputes give rise to concerns about non-compliance or unlawful conduct. At this time, we cannot be confident that there will be timely investigation and follow-up of these referrals.

Examples include a franchise chain that was the subject of multiple grievances raised with our agency, which pointed to numerous franchising code breaches. While these breaches were referred to the ACCC, considerable time elapsed before they were investigated and prosecuted. Similar examples involving the Australian Securities and Investment Commission related to multiple complaints, which appeared to arise from phoenixing activity. A more recent referral involves apparent breaches of unfair contract terms protections by a digital service provider.

The ASBFEO urges the government to consider the extending the designated complaints function to ASIC and the Australian Financial Security Authority, to encompass both the examples cited above, as well as dishonest director conduct, concerns about the conduct of 'fringe financiers' that operate outside the AFCA scheme, and 'improper asset recovery' activity – all of which have arisen from our cases.

### **Recommendation 2: Support mechanisms for small businesses to defend their economic interests**

The Productivity Commission's review in 2021 of the right-to-repair issue, and the ACCC's response, highlighted the difficulties consumers face in enforcing their legal rights when affordable alternative dispute resolution is not available.<sup>1</sup> The ASBFEO considers that the Productivity Commission's recommendation to expand the ACCC's enforcement powers to include the power to levy fines for breaches of Australian Consumer Law would improve small business and consumer outcomes when disputes arise.

In the absence of a civil sanction for breaches of Australian Consumer Law, the capacity of the designated complaints function to support competitive markets is limited. While the designated complaints function enables the ACCC to investigate and respond to systemic or significant market issues, it does not constitute a mechanism for commercially relevant remedies for small businesses that have incurred financial harm. The ASBFEO supports processes that enable small businesses to defend their economic interests, including through mediation or alternative dispute resolution. However, these alternative processes can still result in unsuccessful outcomes, where small business have been unable to receive restorative justice.

The ASBFEO proposes that the Australian Government introduce a Federal Small Business and Codes List into the Federal Circuit and Family Court of Australia, to provide small businesses with an affordable and timely means of enforcing their legal rights. This jurisdiction could also facilitate enforcement by regulators, as well as free up the ACCC and higher courts to deal with litigation focused on systemic and significant market issues.

Further, a Federal Small Business and Codes List would complement the government's plan to establish a dedicated and accessible mechanism for the Fair Work Commission to deal with disputes over unfair contract terms for independent contractors earning below a high-income threshold. In contrast, the list would cover commercial and contractual performance matters not relating to workplace relations, which fall outside the jurisdiction envisaged for the commission.

---

<sup>1</sup> Productivity Commission, *Right to repair: Inquiry Report*, 29 October 2021, released 1 December 2021.



Australian Government



Australian  
**Small Business** and  
**Family Enterprise**  
Ombudsman

If you require any further information, please do not hesitate to contact Mr Jeff Morello, Policy Analyst, on [redacted] or via email at [advocacy@asbfeo.gov.au](mailto:advocacy@asbfeo.gov.au).

Yours sincerely

**The Hon Bruce Billson**

Australian Small Business and Family Enterprise Ombudsman