

EXPOSURE DRAFT EXPLANATORY STATEMENT

Issued by authority of the Assistant Minister for Competition, Charities and Treasury

Competition and Consumer Act 2010

Competition and Consumer (Designated Complaints) Determination 2024

Section 154ZZ of the *Competition and Consumer Act 2010* (the Act) provides that the Minister may, by legislative instrument, make a determination (the designated complaints determination) prescribing matters required or permitted by Part XIE of the Act to be prescribed by the designated complaints determination.

The designated complaints function was established through amendments to the Act made pursuant to the *Competition and Consumer Amendment (Fair Go for Consumers and Small Business) Bill 2024*. It implements one part of the Government's Better Competition election commitment to establish a 'super complaints' (now referred to as 'designated complaints') function within the Australian Competition and Consumer Commission (ACCC).

The designated complaints function requires the ACCC to assess, and respond to, designated complaints submitted by designated complainants. The ACCC may take further action in relation to a designated complaint if the complaint relates to significant or systemic market issues that affect consumers or small businesses (or both), and relates to either a breach of the Act or a power or function of the ACCC under the Act.

The *Competition and Consumer (Designated Complaints) Determination 2024* (the Determination) supports the establishment of the designated complaints function in the Act by prescribing:

- the maximum number of designated complainants;
- the maximum number of designated complaints a designated complainant may make during a specified period;
- matters relating to no further action notices;
- circumstances in which the ACCC is not required to publish information;
- the period during which an entity may apply to be a designated complainant; and
- matters to be considered in relation to the approval of a designated complainant.

The Act does not specify any conditions that need to be satisfied before the power to make the Determination may be exercised.

The Determination is subject to sunseting under section 50 of the *Legislation Act 2003*.

The Determination is a disallowable legislative instrument for the purposes of the *Legislation Act 2003*, is subject to Parliamentary scrutiny and is available on the Federal Register of Legislation.

The Determination commenced at the same time as Schedule 1 to the *Competition and Consumer Amendment (Fair Go for Consumers and Small Business) Bill 2024*.

Details of the Determination are set out in [Attachment A](#).

Details of the *Competition and Consumer (Designated Complaints) Determination 2024*

Part 1 – Preliminary

Part 1 of the *Competition and Consumer (Designated Complaints) Determination 2024* (the Determination) provides fundamental information on the Determination including the name, commencement date, authority by which the Determination is made, and relevant definitions.

Section 1 – Name

This section provides that the name of the instrument is the *Competition and Consumer (Designated Complaints) Determination 2024*.

Section 2 – Commencement

This section provides that the Determination commenced at the same time as Schedule 1 to the *Competition and Consumer Amendment (Fair Go for Consumers and Small Business) Bill 2024*.

Section 3 – Authority

This section provides that the Determination is made under the *Competition and Consumer Act 2010* (the Act).

Section 4 – Definitions

This section sets out the relevant definitions for the Determination. An explanatory note is included to remind readers that a number of expressions used in the Determination are defined in the Act, and have the same meaning as in the Act (as in force from time to time).

Part 2 – Designated Complaints

Designated complaints are complaints submitted by a designated complainant to the ACCC under section 154ZF of the Act.

The ACCC administers and enforces the Act to protect consumers and promote competition in markets and fair trading by businesses. Anyone can submit a complaint in a report to the ACCC. The ACCC does not resolve individual issues or disputes but uses data from these reports to identify significant and systemic breaches of the Act, and to inform their compliance and education activities, industry engagement, advocacy and research.

When deciding whether to pursue a matter, the ACCC prioritises issues that fall within its current enforcement and compliance priority areas, which are reviewed each year. These priorities are determined following external consultation and an assessment of existing or emerging issues and their impact on consumer welfare and the competitive process. The ACCC retain capacity to pursue other matters that display certain priority factors, such as conduct that results in substantial consumer or small business detriment.

In accordance with the Act, designated complaints have a different status to general complaints detailed in reports submitted to the ACCC. While anyone in Australia may

submit a complaint in a report to the ACCC, only a designated complainant approved by the Minister may make a designated complaint. The ACCC must assess a designated complaint and respond by giving either a 'further action notice' or 'no further action notice' in relation to the complaint. The ACCC must also publish certain information on its website in relation to the complaint.

Part 2 prescribes specific details in relation to designated complaints to support the establishment of the designated complaints function.

Section 5 – Maximum number of designated complaints in a 12 month period

A designated complainant may submit a complaint for consideration by the ACCC under section 154ZF of the Act. A complaint becomes a designated complaint from the day it meets the requirements set out in subsection 154ZF(2) of the Act (see subsection 154ZF(3) of the Act), including requirements prescribed in the Determination relating to the number of designated complaints that a designated complainant may make during a specified period.

Section 5 provides, for the purposes of paragraph 154ZF(2)(d) of the Act, that a complaint made by a designated complainant must meet the requirement that the designated complainant has not made a designated complaint in a 12 month period ending on the day the complaint is made to the ACCC. Limiting the number of designated complaints ensures that there are appropriate resources for the ACCC to respond to designated complaints alongside its other functions and compliance and enforcement work, including work on matters within its identified compliance and enforcement priorities.

Example

A designated complainant makes a designated complaint (that is, a complaint that meets the requirements under subsection 154ZF(2) of the Act) on 1 November 2024. The designated complainant then makes another complaint on 1 March 2025. The complaint made on 1 March 2025 could not meet the requirements to become a designated complaint because the designated complainant made a designated complaint in the 12 months prior to 1 March 2025.

Sections 6 to 7 – No further action on complaint

The ACCC must give a designated complainant a no further action notice in relation to a designated complaint if the ACCC is not satisfied that the complaint relates to a significant or systemic issue that affects consumers or small businesses in Australia (or both) and either relates to a potential breach of the Act or relates to the ACCC's powers or functions under the Act (see section 154ZH of the Act).

The ACCC may also issue a no further action notice in other circumstances. Section 6 and 7 inform when the ACCC may give a designated complainant a no further action notice in relation to a designated complaint.

Section 6 provides that, for the purposes of paragraph 154ZH(4)(b) of the Act, the ACCC may issue a no further action notice if the ACCC is satisfied that the subject matter of the designated complaint is, or is part of, a matter which is the subject of:

- any legal proceedings to which the Australian Securities and Investment Commission (ASIC) or the ACCC are a party and that have not come to an end; or

- any ongoing inquiry, investigation or review being conducted by ASIC or the Productivity Commission.

The option for the ACCC to take no further action on a designated complaint in these circumstances is appropriate as the outcome of relevant, ongoing legal proceedings or a relevant, ongoing inquiry, investigation or review may resolve issues raised in, or impact the significance of, a designated complaint. It is open to the ACCC to investigate a matter raised in a designated complaint outside of the designated complaints function, after the relevant legal proceedings, inquiry, investigation or review concludes.

Subsection 154ZH(5) of the Act provides that a no further action notice may be given if the ACCC has assessed the complaint and is satisfied that it is appropriate to take no further action.

Section 7 prescribes matters that must or may be considered by the ACCC when considering whether it is appropriate to take no further action for the purposes of paragraph 154ZH(5)(b) of the Act, pursuant to paragraphs 154ZH(6)(a) and (b) of the Act respectively.

The ACCC *must* consider the following mandatory matters for the purposes of paragraph 154ZH(6)(a) of the Act:

- the nature of the market issue to which the complaint relates, including the significance of the issue affecting consumers or small business (or both) in Australia and extent to which the issue is systemic. This includes consideration of whether the market issue affects one market or multiple markets;
- the nature and extent of any actual or potential harm to consumers or small businesses (or both) in Australia caused by the market issue to which the complaint relates (if any) and whether that assessment of the potential harm changes if no action is taken in relation to the complaint;
- the cost to the ACCC of acting on the complaint; and
- whether further action will have a broad public benefit, such as whether further action will act as a deterrent against specific breaches of the Act or inform or educate consumers and businesses of their rights and obligations under the Act.

The ACCC *may* consider any the following discretionary matters for the purposes of paragraph 154ZH(6)(b) of the Act:

- whether the subject matter of the complaint is substantially similar to the subject matter of a designated complaint for which the ACCC has made a notification under paragraph 154ZK(3)(c) of the Act (that is, an ‘action complete’ notice) in the 2 year period prior to the complaint being made to the ACCC;
- whether the subject matter of the complaint is, or is part of, a matter which is the subject of legal proceedings (other than proceedings covered by section 6) that have not come to an end;
- whether the subject matter of the complaint is, or is part of, a matter that is the subject of an ongoing inquiry, investigation or review conducted by the Commonwealth, a State or Territory (other than an inquiry, investigation or review covered by section 6); or

- any other matter relevant matter.

Section 8 – Circumstances in which Commission is not required to take further action after a further action notice has been issued

If the ACCC issues a further action notice in relation to a designated complaint, the ACCC must use its best endeavours to commence the actions specified in that notice as soon as practicable and, in any case, within 6 months after giving the notice. The ACCC must also use its best endeavours to issue an action complete notice; that is, to notify the entity that submitted a designated complaint when the actions in a further action notice are complete (see subsection 154ZK(3) of the Act).

Section 8 prescribes, for the purposes of subsection 154ZK(4) of the Act, an exception to the requirements in subsection 154ZK(3) of the Act. The ACCC is not required to commence action or issue an action complete notice as described above in circumstances that:

- are exceptional;
- have significantly constrained the ACCC's ability to take the actions set out in a further action notice given under subsection 154ZK(1) of the Act, and
- have prevented, or will prevent, the ACCC from taking those actions for more than 6 months after the giving of the notice.

Exceptional circumstances are intended to be narrow and may include, for example, a global pandemic.

The ACCC must use its best endeavours to notify the entity that made the designated complaint that it is satisfied that the above circumstances apply (and therefore, that it is not required to take the steps outlined in subsection 154ZK(3) of the Act) in accordance with subsection 154ZK(5) of the Act. Through a separate process, the ACCC may also replace a further action notice with a no further action notice in certain circumstances pursuant to paragraph 154ZL(1)(b) of the Act.

Section 9 – Commission not required to publish information

Section 9 prescribes circumstances in which the ACCC is not required to publish information in a notice, notification or replacement notice listed in subsection 154ZN(1) of the Act, such as no further action notices or further action notices, for the purposes of paragraph 154ZN(2)(b) of the Act.

While the designated complaints function ensures transparency by requiring the ACCC to publish specific notices, notifications and replacement notices in relation to designated complaints, the ACCC is not required to publish relevant information in the following circumstances:

- when publication of the information would contravene a law of the Commonwealth, a State or Territory;
- when publication of the information would harm a non-public ongoing investigation being conducted by the ACCC; or
- when publication of the information would contravene an order of a court or tribunal of the Commonwealth, State or Territory.

Part 3 – Designated Complainants

A designated complainant is defined under section 154ZE of the Act as an entity that has an approval in force under Part XIE of the Act.

The Act allows certain entities to apply to the Minister to be approved as designated complainants. Once approved, designated complainants are empowered to make designated complaints to the ACCC.

Part 3 prescribes specific details in relation to designated complainants to support the establishment of the designated complaints function.

Section 10 – Period during which designated complainant applications may be made

Section 10 prescribes the period during which an entity may apply to the Minister to be a designated complainant for the purpose of subsection 154ZP(4) of the Act.

An entity may apply to the Minister to be a designated complainant during a recurring period of at least 3 weeks every 3 years. The start and end of each period is as, or as will be, set out on the Department's website.

The restriction on when an application may be made prevents an entity making an application that cannot progress, as the Minister can only approve a designated complainant if doing so would not exceed the maximum number of designated complainants permitted under section 12.

Section 10 is intended to ensure that an entity may apply to be a designated complainant during a period of at least 3 weeks every 3 years, at a minimum. The Minister may open multiple application periods of at least 3 weeks each, within a 3 year period.

Example – multiple application periods within 3 years

The Department's website provides that an entity may apply to be a designated complainant during the period starting on 1 January 2025 and ending on 1 March 2025. Subsequently, the Department's website provides that an entity may apply to be a designated complainant during the period starting on 30 November 2026 and ending on 30 December 2026.

Example – maximum time between application periods

The Department's website provides that an entity may apply to be a designated complainant during the period starting on 1 January 2025 and ending on 1 March 2025. Pursuant to section 10, the Minister must open another application period within 3 years, (in this example, the 3 years would start on 2 March 2025 when the previous application period closes). To comply with section 10, the Department's website subsequently provides that an entity may apply to be a designated complainant during the period starting on 1 January 2028 and ending on 1 March 2028.

Section 11 – Approval of designated complainant–matters to be considered

Section 11 prescribes matters the Minister must or may consider when deciding whether it is appropriate to grant approval of an entity as a designated complainant..

The Minister *must* have regard to the following mandatory criteria when deciding whether it is appropriate to grant approval of an entity (the *applicant*) as a designated complainant

pursuant to paragraph 154ZQ(4)(a) of the Act, for the purposes of paragraph 154ZQ(2)(c) of the Act:

- the applicant's ability to make designated complaints in relation to which the ACCC may take action under subsection 154ZK(1) of the Act, including the applicant's ability to research, prepare and make designated complaints based on information of a high quality;
- if the applicant has commercial activities, any conflicts of interest the applicant has, or may have, if approved as a designated complainant, as well as any arrangements the applicant has, or proposes to have, in place in relation to managing or mitigating those conflicts of interest.

The Minister *may* have regard to the following discretionary criteria when deciding whether it is appropriate to grant approval of the applicant as a designated complainant pursuant to paragraph 154ZQ(4)(b) of the Act, for the purposes of paragraph 154ZQ(3)(a) of the Act:

- the applicant's willingness to cooperate with the ACCC, including the applicant's capability to respond to requests from the ACCC;
- whether the applicant has previously been a designated complainant, and if so:
 - any previously submitted designated complaints including the extent to which the complaints were actionable by the ACCC; and
 - their conduct as a designated complainant;
- whether the applicant has an ongoing relationship with consumers or small businesses (or both) in Australia, including through regular contact and communication;
- the applicant's access to, or ability to obtain, timely, quality and relevant data about the interests of consumers or small businesses (or both) in Australia.

The Minister may also consider the mandatory and discretionary criteria described above when deciding whether to vary or revoke the approval of a designated complainant in accordance with paragraph 154ZV(3)(a) of the Act.

Section 12 – Maximum number of designated complainants

Section 12 limits the number of designated complainants that the Minister may approve for the purposes of subsection 154ZQ(5) of the Act. The Minister must not approve a designated complainant if doing so would result in the number of complainants being above 3 at any time.

Limiting the number of designated complainants, and in turn, the number of designated complaints that may be made per designated complainant pursuant to section 5, ensures that there are appropriate resources for the ACCC to respond to designated complaints alongside its other functions and compliance and enforcement work, including work on matters within its identified compliance and enforcement priorities.

Example

The Minister has approved 3 designated complainants as at 1 January 2025. If the application period is open (see section 10) and another entity submits an application to become a designated complainant on 1 January 2025, it must not be approved by the Minister.