



3 September 2021

Julie Abramason and Paul Lindwall
Commissioners
Productivity Commission
4 National Circuit
Barton ACT 2600

Dear Commissioners

Productivity Commission Right to Repair Inquiry – further submission from Consumers’ Federation of Australia

We are writing having seen various stakeholders’ comments on the proposed super-complaint process for guarantees, set out in the recommendation 3.3 of the draft Commission report. We are particularly concerned by the objections to this proposal set out by the Australian Competition and Consumer Commission (ACCC), which we consider to be misjudged; and we note that a number of other respondents do not appear to understand fully how the proposed model would work.

Beyond querying its application to consumer guarantees, the ACCC essentially makes four general objections to a super-complaint model:

- The ACCC already has a number of processes to capture emerging ACL issues, which mean that a super-complaints system would not add anything to its intelligence gathering and decision making.
- This includes engagement with consumer organisations through its Consumer Consultative Committee (CCC), so that the ACCC is already highly responsive to them.
- A super-complaints system would create an unnecessary administrative and resource burden – resources are always fully utilised. Dealing with a super-complaint, particularly multiple super-complaints in any one period, would have a profound impact on ACCC resourcing and priorities.
- It would divert focus away from the ACCC’s annual Compliance and Enforcement Priorities, forcing the ACCC to deprioritise existing work to achieve the deadline imposed by a super-complaints process.

We do not consider that any of these objections are well-founded or persuasive.

Consumer intelligence and insight

In our experience across multiple sectors and countries, high-performing regulators want and need multiple high-quality sources of intelligence insight about emerging consumer harm, they create open and engaging ways of prompting and gathering this insight, and they use this to challenge

themselves about their priorities and analysis. We are strong supporters of the ACCC and the work that it does, but its response to the super-complaint proposal comes across as complacent and lacking in the agility and drive that we would normally associate with the ACCC.

This model has in the UK proved to be a mechanism for high-quality insight which has led to very substantial benefits for consumers, and we are strongly of the view that this would add real value to the ACCC's work. The Citizens Advice 2018 super-complaint on the 'loyalty penalty' in five sectors resulted in the CMA finding £4 billion of consumer harm and concluding that *'Not enough has been done in the past by the CMA and regulators; there needs to be a step-change to tackle these problems more effectively.'* This then led to several programs of work, which have continued into 2021. The 2016 super-complaint by Which? on scams led to a significant change of approach by the regulator, as did its 2015 super-complaint on compensation for train delays. In each case, the super-complaint prompted the agency to consider a new issue or think differently about an existing issue, and to reflect about its own role, recognising that no organisation has perfect intelligence about a market or flawless prioritisation processes.

Consumer organisations are better placed than the ACCC to judge whether its current consumer insight and engagement is working as well as possible and whether consumer organisations feel sufficiently able to shape the ACCC's priorities on an ongoing basis. A number of our individual members participate in the CCC and find this worthwhile, but they also consider that this is not enough. CFA members CHOICE and Consumer Action have already made submissions to this inquiry calling for the introduction of a super-complaint mechanism covering all Australian Consumer Law matters, not just guarantees, and this view is shared by CFA more broadly. Consumer groups have also argued for broad super complaints powers, extending across multiple regulators including ASIC, the TGA, the ACMA and others.

Evidence gained through individual consumer contacts represents useful but not sufficient intelligence, and is in no way a substitute for super-complaints which involve more research and analysis that any one individual consumer could be reasonably expected to do. Making a super-complaint is an opportunity to identify a new issue or area of emerging consumer harm, frame a known issue in a new way, take a cross sector/thematic perspective, introduce new evidence, and/or make the case for why something should be prioritised – it is a lot more than merely presenting new information about individual consumer cases.

A transparent and engaging approach

The ACCC submission mentions that it relied on 118,000 contacts from individual consumers which it received last year, and that it has a team which analyses this data. Regrettably, however, the ACCC does not share this data or its analysis, unlike other bodies such as NSW Fair Trading and various redress schemes, and so both businesses and consumer advocates are completely unsighted on how the ACCC analyses and applies the information gathered from contacts. This also means that stakeholders are less able to engage meaningfully in the ACCC's prioritisation process, because they are unable to see the evidence base that the ACCC is using to develop its proposed priorities for consultation, and in particular what it chooses not to prioritise.

In contrast, the super-complaints model is a highly transparent approach, in which a consumer organisation submits its evidence and analysis in public, which can then be assessed and debated by not only the agency receiving it but also businesses, consumer advocates and other stakeholders. This transparency both prompts high quality work by consumer organisations, who need to substantiate their concerns about a market, and supports greater regulatory accountability.

Impact on ACCC priorities and resources

The ACCC's suggestion that once it has selected its priorities there is no flex in the system to take account of changing circumstances and emerging consumer harm suggests a surprising lack of organisational agility and also does not appear to accord with what actually happens in practice. For example its 2020 priorities, published in late February 2020, unsurprisingly did not mention COVID-related issues, which quickly became a major area of work throughout the year. More generally in areas such as mergers, the ACCC has to allocate resources for the year ahead without knowing which specific mergers it will be working on.

Recipients of super-complaints are able to determine the seriousness of the issue and prioritise appropriately. So beyond the initial assessment period (90 days in the UK model), it is the regulator's assessment of the issue raised that will determine how much resource is invested and when. Establishing a full market study is just one option available to it, and it may conclude that the issue does not merit that degree of investment.

Even if it decides that this is a serious matter worthy of further work, it need not all happen immediately, as evidenced by the 2018 loyalty penalty super-complaint where some of the work was undertaken by the CMA earlier this year. The ACCC could decide the timing of any substantive work, taking into account existing priorities and workload – but the key point is that this would be done transparently, taking account of its initial assessment of the issues identified in the super-complaint.

The ACCC's fear that it might face a deluge of multiple super-complaints is not supported by the actual operation of this mechanism in the UK, where there has on average been one super-complaint each year over the past two decades, with the highest number in a single year being three (in 2011).

Frivolous or vexatious super-complaints

We understand that some respondents to the review have expressed concern about the prospect of frivolous or vexatious super-complaints.

The super-complaint model is that organisations representing consumers are able to apply for super-complainant status. The approving body can set out criteria for approval, which means it can effectively limit the power to recognised consumer advocacy bodies that are highly unlikely to make frivolous or vexatious super-complaints. There have been about 20 super-complaints in the UK, and although some have probably been seen as more impactful than others, none of them have been considered to be frivolous or vexatious.

The fact that there has on average been just one super-complaint a year in the UK indicates the extent to which consumer bodies give them serious consideration and provide substantial evidence and analysis as part of the process.

In any event, if there were somehow a frivolous super-complaint, the relevant regulator such as the ACCC could quickly reject it without doing much work. The probable reputational damage to the consumer organisation makes this scenario very unlikely though.

Engagement between consumer advocates and the ACCC

Experience of the super-complaint mechanism in the UK suggests that the ACCC's arrangements for engagement with consumer advocates would make a super-complaint mechanism more workable, rather than duplicating it. Super-complaints work best where there is constructive dialogue between

the regulator and consumer group, so that each side understands the other's perspectives and there are no surprises, and the ACCC's engagement through the CCC, as well as bilateral dialogue, would help in this respect. This positive, engaging approach is the spirit in which our members would exercise super-complaint powers.

We would be happy to discuss these issues with you further.

Gerard Brody
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CHOICE