

Hard copies of documents supplied by the Consumers' Association in support of this application can be obtained from Marie Cawley, Consumer and Competition Policy Directorate, DTI. Tel: 020 7215 6771, or e-mail: marie.cawley@dti.gsi.gov.uk

Marie Cawley
Consumer and Competition Policy Directorate
1 Victoria Street
London
SW1H 0ET

17th June 2003

Dear Ms Cawley

Designation as a 'super-complainant' under the Enterprise Act 2002

I am writing on behalf of Consumers' Association to apply to be designated by you as a 'super-complainant' under section 11 of the Enterprise Act 2002 (the 'Act'), for claims on behalf of consumers under section 19.

Criterion 1

The body is so constituted, managed and controlled as to be expected to act independently, impartially and with complete integrity

The applicant, CA, is the leading independent consumer organisation in the United Kingdom.

CA is a registered charity and a company limited by guarantee, which was incorporated in 1957. It is an independent consumer organisation devoted to improving consumer goods and services. It promotes, for the benefit of the public as consumers, impartial scientific analysis of, and research into, the standards, safety and quality of goods and services available to the public as consumers. CA also seeks to advance and disseminate knowledge of the laws relating to consumer protection. A copy of the Memorandum and Articles of Association of CA is attached at Appendix 1, where the Associations' objects are listed under clause 3.

The results of the research, product testing and investigations carried out by CA. are published in a variety of magazines and books by its wholly owned subsidiary, Which? Limited. The Memorandum of Association of Which? Limited can be found at Appendix 2.

As can be seen from our Annual Reports for the period 2000 to 2001 and 2001-2002, attached as Appendix 3, Which? Limited's flagship publication is Which? magazine. Which? and its sister magazines are sold on subscription. Subscribers to our publications are entitled to apply for membership of CA. Membership of CA is spread throughout the UK and currently stands at 660,000 members. It is estimated that, for example, over 2 million people read Which? magazine each month.

CA and Which? magazine have an unparalleled reputation for unbiased, reliable research into consumer goods and services. First and foremost CA is, and take care to be, independent of all interests other than those of the consumer. CA receives no grants or subsidies from government or industry. CA's resources come entirely from the sale of their magazines, together with the sales of other publications, research and advisory services. Consequently, reports in Which?, its sister magazines and our other publications are frequently cited as authoritative in the national press, magazines and on television and radio. CA and Which? are widely recognised by members of the public throughout the UK and are household names in the field of consumer advice and protection.

We believe that CA satisfies the criteria set out in section 11 (6) (a) of the Act, and attach the information required to meet the additional criterion 1 as set out in the Guidance, that being a current list of directors of Consumers' Association and their curriculum vitae (appendix 4), a current list of directors of Which? and their curriculum vitae of the directors (appendix 5) information relating to the substantial interests held by the directors (appendix 6) and details of shareholdings (appendix 7)

Criterion 2

The body can demonstrate considerable experience and competence in representing the interests of consumers of any description

And

Criterion 3

The body has the capability to put together reasoned super-complaints on a range of issues

CA has extensive experience of acting in the interests of consumers, and currently employs five lawyers. The legal department consists of 2 in-house lawyers reporting to the Operations Director who deal with general commercial, libel, contracts, charity issues, and consumer issues, and 3 campaigning lawyers who work to support our campaigns directly in the areas of consumer markets, food and health and personal finance. CA also employs a legal administrator. At times CA consults external specialists on areas outside expertise.

In addition, Which? run a legal service based in Hertford which provides general consumer law advice to members.

The descriptions set out below detail our success as an organisation on behalf of consumers to date, will, we hope, demonstrate our ability to deal with any competition and economics issues involved in super-complainant cases, through our in-house experience and use of external advice.

Since 1 October 1999, CA has been one of the qualifying bodies entitled to take action under the Unfair Terms in Consumer Contracts Regulations 1999: see Part Two of Schedule 1 to these Regulations. CA was the first qualifying body specified in Schedule 1 to the 1999 Regulations to sign a concordat with the Office of Fair Trading - and continues to enjoy an open and co-operative relationship with the Office and other bodies qualified to enforce the 1999 Regulations.

CA is also actively involved in a large number of campaigns on consumer issues at national, European and international level. Our campaigns have attracted extensive publicity and, in certain cases, led directly to considerable improvements in the rights of consumers. In particular, CA promoted the private member's Bill that became the Unfair Contract Terms Act 1977. CA has recently sponsored with success the private member's Bills which led to the Property Misdescriptions Act 1991, the Cheques Act 1992, the Sale and Supply of Goods Act 1994, the Private Hire Vehicles (London) Act 1998 and the Health Services Commissioner (Amendment) Act 2000.

CA is recognised by the Government as being representative of the consumer interest in all matters relating to consumer protection. For example, the DTI's publication *"Thinking About Regulating - A Guide To Good Regulation"* refers to CA, at page 36 under the heading "Consumer Bodies", as a body with consultative status. The Consumer White Paper, *"Modern Markets: Confident Consumers"* also refers in a number of ways to the "important role" we play.

As a further example of our recognised position as a body representative of consumers, in 2002 alone, CA was asked to respond to 264 separate consultation documents issued by Departments of State and statutory bodies on matters concerned with consumer protection. CA is also represented on, and has been invited to nominate consumer representatives to, a large number of Government, standards setting and other official committees.

Further, as you will also know, CA is the consumer body which, together with the Alliance for Electronic Business, set up Trust UK to better enable consumers to buy online with confidence.

The European Commission has also recognised CA as one of the main organisations in the UK responsible for consumer protection. See, for example, the Commission's document, "European Consumer Guide to the Single Market" (1994) and DG XXIV's paper "Consumer Policy in the United Kingdom" (July 1999).

The standing of CA as an organisation having a legitimate interest in protecting the collective interests of consumers has also been well recognised by the courts. In particular,

1. In 1996, CA applied for judicial review of the decision of the then Secretary of State for Trade and Industry as to the implementation of the UK's obligations under Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts. Our complaint concerned the facts that UK legislation implementing the Directive deprived consumer organisations, such as ours, of the right to take action under English law to obtain decisions by a court or tribunal as to whether contractual terms drawn up for general use are unfair. Our arguments succeeded before the High Court, where Mr Justice Hidden decided to refer the matter for a preliminary ruling by the European Court of Justice (*Case C-82/96 The Queen v Secretary of State for Trade and Industry ex-p Consumers' Association and Which? Ltd*). Following an agreement between the parties the case was closed - and the law has now changed, of course.
2. When giving judgement on the preliminary issue of whether to make a pre-emptive costs order protecting a representative policyholder objecting to a scheme for the reorganisation of a life insurance business, Mr Justice Evans Lombe, sitting in the Chancery Division of the High Court, observed that CA was a "well known" consumer protection body "with which we are all familiar": *In the matter of AXA Equity and Law Life Assurance Society plc and others* (unreported, 1 November 2000). (The representative policyholder, through CA, represented 1,800 policyholders objecting to the restructuring. Evans-Lombe J observed that the presence of the objectors was "necessary for the proper testing of the provisions of the scheme as to whether they are fair under the relevant legislation": *ibid.*)

CA has a long track record of intervening in competition cases in the UK and EU. Our in house competition specialist is regularly approached by the OFT to submit evidence in merger cases and has submitted evidence on most of the recent important merger cases in the UK, including such recent cases as the various bids for Safeway and the Lloyds/TSB Abbey National proposal. All interventions in merger cases will be on file at the OFT.

CA has also submitted evidence in a number of Competition Commission investigations on both merger and complex monopoly cases and has contributed to DTI consultations on competition law reforms. The CA competition expert has been invited to lecture OFT economists on developments in a consumer approach to competition law. CA has also spoken at most of the public hearings held by the Competition Commission on merger and complex monopoly cases. CA's in-house expert has also spoken at a number of WTO symposia on competition policy and law and has participated in technical assistance programmes of the WTO and lead consumer delegations to the Global Competition Forum at the OECD. CA has also been involved with the International Competition Network. Of course it

should also be noted that CA submitted the first ever 'super-complaint' on private dentistry, a complaint the OFT took forward.

CA has referred to OFT guidance on how to make a super-complaint, and confirm that we are able to comply fully.

Criterion 4

The body is ready and willing to co-operate with the Office of Fair Trading (OFT), and/or with any other authority, body or person having responsibility for responding to super-complaint.

CA wish to indicate a readiness and willingness to co-operate with bodies such as the regulators that will be designated by order under section 205 of the Act. As you know, we have experience of working with other bodies, in particular, the OFT, and agree to take into account any guidance issued by the OFT as stated in Criterion 4.

Criterion 5

The fact that a body has a trading arm will not disqualify it from being designated provided that the trading arm does not control the body, and any profits of the trading arm are only used to further the stated objectives of the body and the body has established procedures to ensure that any potential conflicts of interest are properly dealt with.

We refer to the Memorandum of Association of Which? Limited (appendix 3) which sets out the objectives for the company at clause 3 (1)-(4).

The aims and objectives of Which? Limited are to, through publication of its magazine and books, to improve and maintain the standard of goods or commodities sold and services rendered to the public through the promotion and advancement of public knowledge in all matters concerning users and consumers of materials, goods and services, and to give advice to consumers on consumer matters. Also, in a research capacity, to collect and diffuse information concerning the use, purchase or hire-purchase, qualities, properties and prices of materials, goods, and commodities.

Consumers' Association (CA) uses the profits of its trading arm (Which Limited and its subsidiary company) to promote its overall aim of making consumers more aware so that they can make informed choices and, if they so wish, take action.

This is achieved by carrying out research into consumer issues and by campaigning across a variety of areas of concern, primarily in the Consumer Markets, Financial Services, Food and Health sectors. 69% of the money spent by CA was on research for the magazines, 16% related to other research

including spending to improve product standards. 15% was spent directly on campaigning (though the publications all play an important role in promoting CA campaigns for consumers). Please refer to the Annual Report of Consumers' Association at appendix 3 for further details.

CA's procedure for identifying potential super-complaints is carried by its competition expert who is housed in the Policy Research Department. The range of issues dealt with in this department are insulated from the trading arm of the organisation and there has been no contact between the trading arm of the organisation and its policy department on possible investigations linked to the commercial activities of the organisation. CA make an assurance that it will not make super-complaints about markets in which we have a commercial interest.

The procedure for making a super-complaint involves the carrying out of detailed economic analysis of the sector in question and the internal circulation of drafts. Candidates for investigation are raised as a result of research carried out for the Which? stable of magazines and by Policy Research itself, or as a result of discussions with other organisations working on sector specific issues. The final decision on which super-complaint issues are taken forward lies with the Director of Consumers' Association.

Finally, CA formally undertake to notify the Secretary of State of any material changes to the information supplied which could be relevant to meeting any of the criteria.

In the light of the functions of CA, and the recognition of those functions by Government, we very much believe that CA meets the criteria set out section 11(6)(a) of the Act. We therefore look forward to becoming designated as a 'super-complainant'.

Yours sincerely,

Shelia McKechnie
Director