

## Submission to the Senate Economics Legislation Committee

### Competition and Consumer Amendment (Fair Go for Consumers and Small Business) Bill 2024

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#### Summary of Submission

The Competition and Consumer Amendment (Fair Go for Consumers and Small Business) Bill 2024 should be amended as follows:

1. In section 154ZE after 'approval' insert:

**consumer** means an individual who acquires goods or services from a supplier of those goods and services and the acquisition is wholly or predominantly for personal, domestic or household use or consumption

2. Amend section 154ZH (2)(a) and (b) and section 154ZK(1) (a) and (b) as follows:

- (a) relates to a significant ~~or systemic market~~ issue that affects consumers or small businesses in Australia (or both); and
- (b) either:
  - (i) relates to a potential breach of this Act; or
  - (ii) relates to one or more of the Commission's powers or functions under this Act.

3. Delete subsections 154ZH (5) and (6).

4. Amend section 154ZJ by adding a new paragraph (d) as follows:

(d) whether the Commission is of the view that the complaint relates or may relate to the powers, functions or operations of an entity, other than the Commission

5. Amend section 82(5)(b) as follows:

- (b) the action raises an issue that is not only significant for the applicant, but may also be significant for other persons or groups of persons (including because the action relates to a matter that was the subject of a complaint by a designated complainant to the Commission under section 154ZF(1)).

6. Amend section 155(2)(b) by adding the following new paragraph after paragraph (v):

(vi) the Commission considering or inquiring into any matter disclosed in a complaint made by a designated complainant under section 154ZF(1).

## Introduction

This is a submission to the Senate Economics Legislation Committee in relation to the Competition and Consumer Amendment (Fair Go for Consumers and Small Business) Bill 2024 (**Bill**) and the accompanying Explanatory Memorandum (**EM**), introduced into the House of Representatives on 15 February 2024.

This submission supports the introduction of the Bill and the stated policy aims behind its introduction.<sup>1</sup> The purpose of this submission is to identify issues which may enhance the Bill's operation and effectiveness.

### 1. Action in relation to a complaint

Once a complying designated complaint is made to the Australian Competition and Consumer Commission (**ACCC**), the ACCC has principally<sup>2</sup> two options - either reject the complaint (by giving a no further action notice under section 154ZH (2)) or accept the complaint by giving a further action notice under section 154ZK (1)).

The test for whether the ACCC may reject a complaint under section 154ZH (2) or accept a complaint under section 154ZK (1) is the same.

The ACCC may reject a complaint under section 154ZH (2). It provides:

- (2) This subsection applies if the Commission is not satisfied that the complaint:
  - (a) relates to a significant or systemic market issue that affects consumers or small businesses in Australia (or both); and
  - (b) either:
    - (i) relates to a potential breach of this Act; or
    - (ii) relates to one or more of the Commission's powers or functions under this Act.

The Bill does not specify the criteria which a designated complainant must satisfy before being eligible to complain to the ACCC.<sup>3</sup> However as the ACCC must<sup>4</sup> reject a complaint that does not satisfy the criteria in s154ZH(2), it follows that in effect a complaint must satisfy those criteria otherwise it will be rejected. The ACCC is similarly bound by those criteria. The

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<sup>1</sup> Disclosed in the EM, paras 1.9-1.13. Also Bills Digest, No. 50, 2023–24, 26 February 2024 and the documents provided by links in that Digest.

<sup>2</sup> The ACCC has other options under section 154ZH (3)-(5).

<sup>3</sup> Other than anything which may be specified in a designated complaints determination made by the Minister under section 154ZZ.

<sup>4</sup> Bill, section 154ZH(1).

circumstances specified in section 154ZH (2) (and its equivalent in section 154ZK(1)) are therefore critical to both a complainant and the ACCC.

### 1.1 ‘*market issue*’

Section 152AH(2)(a) applies if the complaint ‘relates to a significant or systemic **market issue**...’

The expressions ‘market’ and ‘market issue’ are not defined in the new Part XIE. However, as the EM notes, ‘market’ is defined in section 4E and would apply to Part XIE.<sup>5</sup> Section 4E, among other things, provides that a market includes goods and services which are substitutable for each other.

Section 4E imports the economic test of substitutability in defining the product and geographic boundaries of a market. It is relevant principally to Part IV of the Competition and Consumer Act 2010 (**CCA**) which houses the majority of Australia’s competition law. For example, section 46(1)(a) CCA, prohibits a corporation that has a substantial degree of power in a *market* from engaging in conduct that substantially lessens competition in that *market*.

The expression ‘market’ therefore has a very specialised meaning in section 4E and requires considerable information to determine its boundaries. Although the ACCC could do so, it may find it difficult within the 90 days required by section 154ZG. Certainly, a designated complainant would not have the capacity to do so when making a complaint.

A further issue in including the expression ‘market’ is that, as indicated, it is relevant only to Part IV. It does not apply to the Australian Consumer Law (**ACL**).<sup>6</sup> For example, a complaint by a designated complainant that a company has made misleading statements to consumers about the price of its on-line products would attract section 18 ACL. Section 18 does not import the requirement of a ‘market’.

The difficulty with section 154ZH(2) is that the complaint must relate to a significant or systemic ‘market’ issue, even though the concept of a market is not relevant to the majority of claims under the ACL.

The EA indicates that the designated complaints function draws on the United Kingdom’s ‘super complaints’ framework. The EA notes that “the *Enterprise Act 2002* (UK) allows complaints from designated consumer organisations to the Competition and Markets Authority in relation to ‘any feature, or combination of features, of a market in the UK for goods or services is or appears to be significantly harming the interests of consumers’”.

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<sup>5</sup> EM, para 1.72.

<sup>6</sup> Schedule 2 of the Competition and Consumer Act 2010.

However, although those criteria are included in similar terms in both 152AH(2)(a) and the Enterprise Act 2002,<sup>7</sup> (**Enterprise Act**) the Enterprise Act does not make the determination of the Competition and Markets Authority (**CMA**), contingent on the CMA being satisfied of those criteria, in the same strict way as section 152AH(2)(a) does. The CMA must only indicate whether or not it proposes to take action and what action it proposes.<sup>8</sup> Indeed, in practice it appears the CMA treats a 'market' more liberally as akin to an industry, not in the strict terms of section 4E.<sup>9</sup>

Finally the structure of section 152AH(2) makes the reference to a 'market' in subsection (1) unnecessary. Under section 152AH(2)(b) the ACCC must also be satisfied that the complaint relates either to a potential breach of the Act or relates to the ACCC's powers or functions.<sup>10</sup>

If a complaint relates to Part IV, then the concept of a market is an inherent component of a relevant prohibition under that Part and the ACCC will need to consider it. If the complaint relates to the ACL, no issue of market typically arises and the ACCC would not need to be put to the burden of having to consider the relevant market. Yet, under section 154ZH(2) the ACCC would need to consider a 'market' not only in relation to a Part IV matter but also an ACL matter.

## 1.2 'significant or systemic' market issue

Section 154ZH (2)(a) applies to a significant or 'systemic' market issue. The Enterprise Act does not use the expression 'systemic'. It only uses the concept of significant harm:

This section applies where a designated consumer body makes a complaint to the [CMA] that any feature, or combination of features, of a market in the United Kingdom for goods or services is or appears to be significantly harming the interests of consumers.

The EM suggests that 'A systemic market issue affecting consumers or small businesses is intended to capture market issues reaching and affecting a large group of Australian consumers or small businesses (or both).'<sup>11</sup>

The EM seems to equate 'systemic' with 'scale'. However, the usual meaning of systemic is something that relates to a system. The expression 'system' has been interpreted narrowly as an internal method of working.<sup>12</sup>

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<sup>7</sup> Enterprise Act 2002 (UK), s 11(1).

<sup>8</sup> Enterprise Act 2002 (UK), s 11(2)(a).

<sup>9</sup> See Competition and Markets Authority, *Pricing Practices in the Groceries Market: Response to a super-complaint made by Which?* on 21 April 2015.

<sup>10</sup> Section 152ZH(2) uses 'and'.

<sup>11</sup> EM, para 1.74.

<sup>12</sup> See ACL, 21(4)(b) and *Unique International College Pty Ltd v Australian Competition and Consumer Commission* [2018] FCAFC 155 at [104].

If scale is what is intended then an alternative expression should be used. However, the best option is to remove the expression altogether (as in the UK) as ‘significant’ is capable of capturing both the importance of an issue as well as its scale.

## Recommendation

Section 154ZH (2)(a) and section 154 ZK (1) should be amended to remove the reference to ‘market’ and the expression ‘systemic’.

Amend section 154ZH (2)(a) and (b) and section 154ZK(1) (a) and (b) as follows:

- (a) relates to a significant ~~or systemic market~~ issue that affects consumers or small businesses in Australia (or both); and
- (b) either:
  - (i) relates to a potential breach of this Act; or
  - (ii) relates to one or more of the Commission’s powers or functions under this Act.

### 1.3 ‘that affects *consumers*’

Section 154ZH (2)(a) does not define ‘consumer’ or ‘small business’. Presumably this to give both expressions their broadest meaning.

However, possibly inadvertently, section 4B of the CCA will apply (in the absence of a contrary intention in Part XIE), because section 4B extends to the whole of the CCA, including the proposed new Part XIE.

Section 4B adopts the definition of ‘consumer’ in section 3 of the ACL<sup>13</sup> which provides:

- (1) A person is taken to have acquired particular goods as a **consumer** if, and only if:
  - (a) the amount paid or payable for the goods, as worked out under subsections (4) to (9), did not exceed:
    - (i) \$40,000;<sup>14</sup> or
    - (ii) if a greater amount is prescribed for the purposes of this paragraph—that greater amount; or

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<sup>13</sup> Section 3(3) also applies to the acquisition of services.

<sup>14</sup> The amount is now \$100,000: Treasury Laws Amendment (Acquisition as Consumer – Financial Thresholds) Regulations 2020.

(b) the goods were of a kind ordinarily acquired for personal, domestic or household use or consumption; or

(c) the goods consisted of a vehicle or trailer acquired for use principally in the transport of goods on public roads.<sup>15</sup>

The principal application of this definition is in relation consumer guarantees under Part 3-2 ACL. Its use there is appropriate as the Part imposes guarantee obligations on suppliers of goods to particular consumers who satisfy the definition.

Arguably the definition is not suitable for section 154ZH (2)(a). First, a designated complainant will not be able to ascertain whether a particular consumer satisfies the monetary threshold in section 3 ACL.

Second, that threshold and some of the other features of the definition are not relevant to a designated complaint – a designated complaint relates to conduct which impacts consumers broadly, not individual consumers in the narrow sense of section 3 ACL.

The Enterprise Act defines a consumer in these terms:<sup>16</sup>

“consumer” means any person who is—

(a) a person to whom goods are or are sought to be supplied (whether by way of sale or otherwise) in the course of a business carried on by the person supplying or seeking to supply them; or

(b) a person for whom services are or are sought to be supplied in the course of a business carried on by the person supplying or seeking to supply them;

and who does not receive or seek to receive the goods or services in the course of a business carried on by him;

To avoid introducing concepts not already in the CCA, section 154ZH (2)(a) should rely on an existing definition of ‘consumer’. One alternative expression is to adopt the definition of ‘consumer’ inherent in the expression ‘consumer contract’ in section 23(3) ACL. A consumer contract is defined in section 23(3) as a contract for a supply of goods or services ‘to an individual whose acquisition... is wholly or predominantly for personal, domestic or household use or consumption.’

Another alternative is section 21 ACL which applies to the situation where a person in trade or commerce supplies goods or services to a person.

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<sup>15</sup> However, subsection (1) does not apply if the person acquired the goods, or held himself or herself out as acquiring the goods:

(a) for the following purpose:

(i) for goods other than gift cards—for the purpose of re-supply;

(ii) for gift cards—for the purpose of re-supply in trade or commerce; or

(b) for the purpose of using them up or transforming them, in trade or commerce:

(i) in the course of a process of production or manufacture; or

(ii) in the course of repairing or treating other goods or fixtures on land.

<sup>16</sup> Enterprise Act 2002 (UK), s 11(9)(b) and s 183(1).

## Recommendation

On balance, the definition in section 23(3) is the most appropriate definition of a consumer for a complaints function, with some minor modifications.

In section 154ZE after 'approval' insert:

**“consumer** means an individual who acquires goods or services from a supplier of those goods and services and the acquisition is wholly or predominantly for personal, domestic or household use or consumption”

## 2. No further action in relation to the complaint

Section 154ZH(5) permits the ACCC to take no further action in relation to a complaint if it has assessed the complaint and is satisfied that 'it is appropriate to take no further action in relation to the complaint'.

The circumstances in which the ACCC may decide not to take any further action under section 154ZH(5) are not specified, except only that it must have regard to any matter in a designated complaints determination. Section 154ZH(5) is a ground of rejection separate to section 154ZH(2).

Section 154ZH(5) is inappropriate in circumstances where the policy intent of the Bill is to allow the broadest area of consumer complaint. The ACCC is given powers under Part XIE because it is the most suitable agency to investigate a complaint. It ought to be able to reject a complaint only where it does not have the power to do so, as section 154ZH(2) already provides.

In addition to the power of the ACCC to reject a complaint under section 154ZH(2), the ACCC may also reject a complaint under section 154ZH(3) (where a complaint does not comply with a designated complaints determination) or section 154ZH(4) (where the complaint is the subject of other inquiries).

## Recommendation

There are adequate grounds for the ACCC to reject a complaint - section 154ZH(5) is unnecessary.

Delete subsections 154ZH (5) and (6).

### **3. Functions and powers of other regulators**

The ACCC does not have a power under the CCA in relation to ACL issues involving financial products. This is regulated by the Australian Securities and Investments Commission. There are potentially other regulators who may have responsibility for other areas of a complaint.

Under Part XIE the ACCC must relevantly accept or reject a complaint. It cannot for example, transfer a complaint to another regulator or indicate whether it considers that the complaint may be better addressed by another regulator.

If the ACCC rejects a complaint, it must provide reasons under section 154ZJ(c). Ideally in those reasons the ACCC should indicate whether it considers that the complaint may be better addressed by another regulator or indeed a non-regulatory agency. This is appropriate because the complainant may not have the expertise to determine which other regulators or agencies may be best placed to consider the complaint.

#### **Recommendation**

Section 154ZJ could be amended to require the ACCC to provide that guidance, where it is able.

Amend section 154ZJ by adding a new paragraph (d) as follows:

(d) whether the Commission is of the view that the complaint relates or may relate to the powers, functions or operations of an entity, other than the Commission

### **4. No adverse costs order under section 82**

Section 82(3) was introduced in 2019 to enable a court to make an order that an applicant who seeks damages in relation to Part IV conduct, may not be liable for the respondent's costs.

The court may make the order under section 82(5) if it is satisfied that:

- (a) the action raises a reasonable issue for trial;
- (b) the action raises an issue that is not only significant for the applicant, but may also be significant for other persons or groups of persons; and
- (c) the disparity between the financial position of the applicant and the financial position of the respondent or respondents is such that the possibility of a costs order that no favour the applicant might deter the applicant from pursuing the action

Section 82(5)(b) traverses matters that may be the subject of a complaint under Part XIE which may affect many consumers.



## Recommendation

Section 82(5)(b) should now be amended to allow a court to recognise that an action is significant because it is the subject of a complaint under Part XIE.

Amend section 82(5)(b) as follows:

- (b) the action raises an issue that is not only significant for the applicant, but may also be significant for other persons or groups of persons (including because the action relates to a matter that was the subject of a complaint by a designated complainant to the Commission under section 154ZF(1)).

## 5. Power to obtain information under section 155

An important source of the ACCC's investigative powers is its ability to obtain information and documents under section 155 CCA.

Arguably section 155(2)(a) allows the ACCC to issue a notice if it has reason to believe that a person has information relating to a breach of the Act, which would include the new Part XIE.

However, as has occurred with the introduction of newer parts of the CCA, those parts have been expressly mentioned in section 155(2)(b), putting beyond doubt the ACCC's power to use section 155.

## Recommendation

Section 155(2)(b) should be amended to expressly refer to Part XIE.

Amend section 155(2)(b) by adding the following new paragraph after paragraph (v):

“(vi) the Commission considering or inquiring into any matter disclosed in a complaint made by a designated complainant under section 154ZF(1).”

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<sup>17</sup> The submission is made only in the capacity indicated.