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Director
Consumer Policy Unit
Market Conduct and Digital Division
The Treasury

By email: consumerlaw@treasury.gov.au

RE: Designated Complaints Function within the Australian Competition and Consumer Commission

INTRODUCTION

The Internet Association of Australia (**IAA**) thanks the Treasury for the opportunity to respond to the consultation on the proposed amendment to the *Competition and Consumer Act 2010* (**CCA**) to introduce a new designated complaints function within the Australian Competition and Consumer Commission (**Commission**).

IAA is a member-based association representing Australia's Internet community. Our membership is largely comprised of small to medium sized Internet service providers who also provide other telecommunications services, many of whom would constitute small businesses for the purposes of the CCA and the proposed designated complaints function. Should the designated complaints function be implemented, IAA would seek to become a designated complainant for the purposes of representing small businesses in the telecommunications sector.

Overall, we are in support of the designated complaints function. We see the value in having a designated complaints function that would alert the Commission's attention to specific issues, particularly in relation to the telecommunications industry which is largely dominated by a small number of large players.

However, the drafting of some of the provisions as set out in the Exposure Draft seem to limit the operation of the designated complaints function, are unclear or are otherwise not suitable to ensure the designated complaints function will operate as per the objectives of introducing such a scheme. We offer our feedback in regard to such provisions below.

OUR RESPONSE

Subsection 154ZK(1): The Commission may give the designated complainant a notice under this section if the Commission is 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.

We are concerned that this two-pronged limb for a complaint to give rise to action by the Commission would limit the effectiveness of the designated complaints function. In particular, the second limb of a complaint having to either relate to a potential breach of the CCA, or to the Commission's powers or functions is not broad enough to achieve the objective of the designated complaints function which is to alert the Commission of matters that give rise to harm to consumers and market competition.

We acknowledge and appreciate that paragraph (ii) has been included to ensure issues that may not necessarily relate to a breach of the CCA will still be addressed. For example, at Example 1.6 provided in the Explanatory Memorandum, section 28 of the CCA is referenced to highlight the other functions of the Commission. However, we note that provisions of section 28 of the CCA that deals with the Commission's law reform, research and information dissemination functions predominately relate to protection of consumers, and not to competition (and thus the interest of small businesses) more generally. We appreciate the designated complaints function also seeks to address issues that relate to small businesses, and not just consumers. Thus, we are concerned that this requirement that a complaint relate to either a breach of, or a specified power or function of the Commission under the CCA would mean that issues that relate to small businesses that don't necessarily relate to a breach of the CCA will not be given due consideration.

We note that any changes to the requirement under paragraph 154ZK(1)(b) would also result in the need to amend paragraph 154ZH(2)(b) accordingly.

Subsection 154ZG(2): If, before the Commission gives a notice under subsection (1) to the complainant, it ceases to be a designated complainant, for the purposes of subsection (1), the complaint is taken never to have been made.

We disagree that a designated complainant that ceases to be a complainant should then disqualify a complaint that was validly made while the entity was still a designated complainant. We note that as per the proposed section 154ZV, an entity's status as a designated complainant may be revoked for various reasons, especially as per paragraph (3)(c), which provides that in satisfying itself to make a variation or revocation, the Minister consider "any other matter the Minister considers relevant".

Therefore, we propose that in such situations where an entity ceases to be a designated complainant, the Commission and/or Minister may treat the complaint to never have been made only if the Commission and/or Minister is satisfied that the reasons for the entity ceasing to be a designated complainant is materially relevant to the complaint, and as a result, the complaint is also no longer valid, or relevant, or otherwise not appropriate to be dealt with as a complaint.

Subsection 154ZH(1): The Commission:

(c) must give the designated complainant a notice under this section if subsection (2) applies in relation to the complaint; and

(d) may give the designated complainant a notice under this section if subsection (3), (4) or (5) applies in relation to the complaint.

We believe that this provision should be amended so that the Commission **must** give the designated complainant a notice, for any of the situations under which the Commission may not take any further action on a complaint. We do not understand why providing a notice that the Commission will not be taking any action in relation to a complaint should be discretionary for the other scenarios set out in subsection (3) to (5). Should the Commission exercise its discretion and not provide a no further action notice under the proposed drafting, this would only cause unnecessary confusion for designated complainants, and more work for both the Commission and designated complainants as designated complainants would likely contact the Commission to find out about the Commission's decision, to which the Commission would have to respond.

Paragraph 154ZH(5)(b): This section applies if:

(b) the Commission is satisfied that it is appropriate to take no further action in relation to the complaint; and

We recommend that the legislation provides for a list of considerations that the Commission must consider in order to satisfy itself that is appropriate to take no further action. This may include, but not limited to the following considerations:

- nature of issue highlighted by the complaint;
- cost of taking action;
- harm to consumers and/or small businesses if no action is taken; and
- what other action is being taken or other initiatives already underway, including by other bodies.

Subsection 154ZL(2)(d): if paragraph (1)(a) applies:

(d) treat paragraphs 154ZK(3)(a) and (b) as requiring the Commission to commence the actions set out in the replacement notice as soon as practicable after it is given.

This provision is not very clear as paragraphs 154ZK(3)(a) and (b) sets out that the Commission must commence actions as soon as practicable, and in any case within a period no longer than 6 months, whereas the provision itself only states the Commission is to commence actions set out in the replacement notice as soon as practicable after it is given. Under its current drafting, this suggests that the Commission is only required to commence actions set out in the replacement notice as soon as practicable, without the requirement to commence such actions within 6 months. Furthermore, we understand as per paragraph 1.91 of the Explanatory Memorandum that the provision under paragraph 154ZL(2)(d) intends to require the Commission to commence actions within 6 months of the initial notice being issued, and not within 6 months of the replacement notice being issued. If this understanding is correct, we recommend the provision to be amended as follows:

if paragraph (1)(a) applies:

- (d) *the Commission shall be required to commence actions set out in the replacement notice as soon as practicable after it is given, and in any case, commence actions set out in the replacement notice within 6 months after giving the initial further action notice.*

Subsection 154ZN(2): However, subsection (1) does not require the Commission to publish information if:

- (a) the Commission is satisfied that it is appropriate not to publish the information because of its confidential nature; or**
(b) the Commission is satisfied that a circumstance determined under subsection (3) applies to the publication of the information.

We recommend that the provision should prescribe a non-exhaustive list of matters that Commission must consider to satisfy itself it is appropriate not to publish the information. This may include amongst other matters, nature of confidential information, public interest, and whether it is possible to publish information while redacting certain confidential information.

Division 3 – Designated Complainants

We recommend that entities should be able to appeal decisions where Minister rejects applications for an entity to become a designated complainant, revokes or varies its approval, or imposes conditions on a designated complainant.

Furthermore, we recommend that under section 154ZT, a provision should be included that requires the Minister to state the reason why an entity has not been granted approval to become a designated complainant in the notice of its decision.

We also note that section 154ZT should set a timeframe in which the Minister must make its decision instead of only providing that such a notice should be provided “as soon as practicable”. We believe 30 days seems to be a reasonable timeframe for the Minister to make its decision. If necessary, the legislation can include another provision that allows for an extension of time where the Minister considers it necessary, in which case the Minister should provide the entity that such an extension of time will be exercised.

Under section 154ZV, we recommend that following the Minister’s issue of a notice under subsection (5) that states the Minister proposes to vary or revoke a designated complainant approval of an entity, that entity should be given an opportunity to consult with the Minister so as to be able to retain approval or otherwise not have its approval varied. We believe this is necessary given the broad range of matters that the Minister may consider to satisfy itself that a revocation or variation of approval is appropriate, including “any other matter the Minister considers relevant.”

CONCLUSION

Once again, IAA appreciates the opportunity to contribute to the proposed designated complaints function of the Commission. We agree that this function would boost the protection of consumers and market competition in Australia. Our feedback provided above is to further elevate the

effectiveness of such a framework. We sincerely look forward to working with the Treasury, Commission, and other stakeholders to develop a legislative framework that will ensure the meaningful, effective and practical operation of the designated complaints framework.

ABOUT THE INTERNET ASSOCIATION OF AUSTRALIA

The Internet Association of Australia (IAA) is a member-based association representing the Internet community. Founded in 1995, as the Western Australian Internet Association (WAIA), the Association changed its name in early 2016 to better reflect our national membership and growth.

Our members comprise industry professionals, corporations, and affiliate organisations. IAA provides a range of services and resources for members and supports the development of the Internet industry both within Australia and internationally. Providing technical services as well as social and professional development events, IAA aims to provide services and resources that our members need.

IX-Australia is a service provided by the Internet Association of Australia to Corporate and Affiliate members. It is the longest running carrier neutral Internet Exchange in Australia. Spanning six states and territories, IAA operates over 30 points of presence and operates the New Zealand Internet Exchange on behalf of NZIX Inc in New Zealand.

IAA is also a licenced telecommunications carrier, and operates on a not-for-profit basis.

Yours faithfully,

Narelle Clark
Chief Executive Officer
Internet Association of Australia