
From: s 22 @afca.org.au>
Sent: Wednesday, 16 October 2024 11:36 AM
To: Robertson, Belinda
Cc: s 22
Subject: AFCA briefing - liability framework s 22
Attachments: 20241014 - Brief to Treasury - SPF - Liability framework.pdf; s 22
s 22

Categories: Maybe

Hi Belinda

Hope you are well.

s 22 mentioned that you recently met with him to discuss the Scams Prevention Framework.

We have recently responded to queries from Treasury on the draft legislation, which may be of interest to you as well. I attach our Brief to Treasury for your information. In our brief we explore how remediation programs (which is a current regulatory tool and has been used previously) may work to resolve scam related matters before they reach EDR.

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Please feel free to reach out if you have any queries.

Kind regards

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| Free Call 1800 931 678



AFCA acknowledges the traditional owners of country throughout Australia and their continuing connection to land, culture and community.
We pay our respects to elders past, present and future.

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To	s 22 [REDACTED] Scams Taskforce
Cc:	s 22 [REDACTED]
From	AFCA
Date	14 October 2024
Subject	Scams Prevention Framework (SPF): Remediation and Redress

Confidential – not for external communication

Purpose

On 9 October, Treasury requested AFCA's views on provisions that deal with proportionate liability in misleading and deceptive conduct in [Part VIA of the Competition and Consumer Act](#), and under [Part 7.10 Division 2A of the Corporations Act](#) as potentially relevant for inclusion in the primary legislation that may also address circumstances where consumer negligence is relevant.

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s 22 [REDACTED]

Policy outcomes from SPF framework

AFCA has reflected on the policy objectives of the SPF informed by the Minister's comments on 11 October 2024 where he articulated his key priorities and the outcomes he is seeking from the SPF, specifically a:

- focus on prevention and upstream interventions on industrial scam activity
- priority to incentivise the right behaviour by in-scope sector firms
- focus on timeliness, efficiency and accountability

- need for specific and legally binding obligations supported by clear regulatory responsibilities.

Applying this outcomes lens (and informed by feedback offered in submissions), AFCA offers the following observations on the Respond limb of the SPF to ensure these objectives are met when losses have occurred.

Systemic issues and remediation¹

AFCA has deep experience of systemic issues and remediation work over many years. This has resulted in remediation outcomes for consumers at scale.² Critically, for the SPF, this includes outcomes for consumers who may have been affected by a misconduct or other firm failure or breach but who not lodged a complaint.

This work has resulted in many millions of dollars in compensation to consumers (and other remedial activities by firms) in a timely, efficient and cost-effective way that avoids putting *all* affected consumers through a complaints process.

We also note that remediation was a successful regulatory tool used to significant and successful effect after the Hayne Royal Commission to provide \$billions in redress to Australian consumers affected by misconduct. Importantly, it shifts the onus to the firm (not the customer) to provide a simple, accessible pathway to customer redress where misconduct or other failure affecting a group of consumers, is identified.

Under the proposed SPF, the ACCC as the primary regulator will have close to real-time intelligence about scams which they will be sharing with firms to meet their prevent, detect, disrupt and respond obligations, often ahead of consumer complaints.

A directions or consumer redress power

We consider there is an opportunity to materially enhance the SPF—in line with the Minister’s expectations—by empowering the primary regulator to direct firms to remediate where it has formed a view that a firm(s) conduct under the SPF has contributed to losses and where remediation for affected consumers, is appropriate.

Intervening in this way, may circumvent the need for *all* affected consumers to lodge a complaint to IDR or to AFCA, to receive an outcome. It may significantly enhance the efficiency and responsiveness of the SPF and the consumer experience.

[ASIC Regulatory Guide 277: Consumer Remediation](#) (RG 277) provides a streamlined and clear consumer-centred remediation framework for licensees to apply

¹ Note in Row 50 of AFCA’s officer level feedback to Treasury we noted that Court ordered remediations may be appropriate in certain circumstances and suggested consideration of settings in ASIC RG 277.

² For example, in FY 23-24, AFCA investigated and addressed systemic issues, resulting in remediation for **159,051 consumers** and small businesses and secured **\$44,706,897 in remediation and refunds for consumers**.

where they have engaged in *misconduct or other failure* that may have caused consumer loss. This may present a useful remediation model for SPF firms.

Legislative design:

- Include in the primary law—under the Response Principle—a specific obligation that in scope firms have an obligation to remediate where a breach or other failure under the SPF has occurred (e.g. new 58 BZF)
- Introduce a specific power for the ACCC to direct a firm or firms to remediate in appropriate circumstances (e.g. in line with the liability rules or formulas in the Code (or specific rules made by the ACCC as relevant to the fact scenario)
- Provide that Codes include rules / formulas that can be applied in a broad-based remediation (at scale) and at IDR/ AFCA in an individual or class of complaints.

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Scams occur at scale: potential remedial tools to deliver scalable outcomes

Because of the industrial scale of much scam activity, there are limits to the ‘individual complaint’ model of the response limb of the SPF, however, that model remains essential for individual complaints where the wrongdoing is not systemic. In cases, where the misconduct or failure is systemic, the application of a remediation lens supported by appropriate regulatory powers, may more efficiently and effectively deliver the SPF policy outcome.

We note that financial services licensees (future regulated firms under the SPF) have general obligations which include compensation and remediation under ss912A and 912B of the Corporations Act. As noted above, [ASIC Regulatory Guide 277: Consumer Remediation](#) (RG 277) may present a useful remediation model for SPF firms.

In addition to a directions power³, another potential model is the Consumer Redress power used by the Financial Conduct Authority (FCA) in the UK that may warrant consideration in the SPF context.⁴

Provision for proportionate liability rules in the Code

As AFCA understands the policy intent under the SPF, which is to apply across multiple sectors, the ability to apportion liability as and between firms is preferred.

To achieve this outcome for the SPF, the **SPF Bill needs to expressly provide for the apportionment of liability**, which it currently does not.

The decision-making criteria in the AFCA Rules (for non-superannuation complaints) includes having regard to the law, industry codes and standards etc. Each of the limbs of AFCA’s decision-making test informs how we understand and apply our fairness jurisdiction in determining what is *fair in all the circumstances* of a particular complaint. In deciding SPF complaints that may involve apportioning liability as and between different sectors, statutory authority for apportionment in the primary law would be necessary.

In addition to express provision for apportionment in the primary law, further policy options for the development of applicable rules include that the:

³ See for example, ASIC directions powers under the Corporations Act to issue regulatory requirements (including by legislative instrument) to AFCA relating to compliance with the mandatory requirements under s1051 or to direct AFCA to increase limits on the value of claims that may be made or remedies that may be determined etc. See ss 1052C and ss1052B and BA.

⁴ See s404 of the UK Financial Services and Markets Act 2000 which provides that if the regulator identifies that there may have been a widespread or regular failure by relevant firms to comply with requirements applicable to the carrying on by them of any activity; (b) it appears to it that, as a result, consumers have suffered (or may suffer) loss or damage in respect of which, if they brought legal proceedings, a remedy or relief would be available in the proceedings; and (c) it considers that it is desirable to make rules for the purpose of securing that redress is made to the consumers in respect of the failure (having regard to other ways in which consumers may obtain redress). [CONRED 1.8 Imposing a consumer redress scheme on a firm under section 404F\(7\) of the Act - FCA Handbook](#)

- bill could set up the apportionment rules / formulas in their entirety, or
- bill may provide for the development of apportionment rules/ formulas to be contained in the Code(s) to set out the detail as to how they apply in practice
- Code formulas cap liability up to certain caps (see attached slides).

We consider that the models in the Competition and Consumer Act (CCA) and Corporations Act (CA) referenced by Treasury are appropriate models for consideration. We expect Treasury is also engaging with ASIC and the ACCC as to their views as to the operation of these provisions in legislation they administer.

Consistency: Code development

Applying a whole of sector outcomes lens, we consider it essential that:

- the power to determine the liability regime is located in the bill in such a way as to ensure that it applies across all Codes
- relevant codes have **identical settings for apportionable claims under the SPF** so that IDR, AFCA and any remediation process can produce consistent outcomes in making a consumer 'whole' following scam losses.

To be effective, we would expect the liability regime (Code contents) will need to be quite prescriptive as to how liability is adjusted between the parties again so there is consistency, and the regime is workable.

One possible option to ensure such consistency is to have a specific delegated instrument solely for the purposes of setting consistent liability arrangements under the Codes that applies across all Codes. Such an approach will ensure consistency and mean only one instrument relating to liability will need modification where new sectors come on board, supporting the effective future proofing of the SPF.

Attachment B – Policy issues and recommendations

Changes to policy	Issue raised	Treasury recommendation	Minister's decision
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[Redacted content]			

Changes to policy		Treasury recommendation	Minister's decision
Key feature	Issue raised		
S 22			
Dispute resolution	<p><u>Operation of IDR</u></p> <p>Both consumer and industry stakeholders raised concerns about the lack of clarity on IDR arrangements in primary law, particularly where multiple entities are involved in a scam. Feedback highlighted the importance of co-operation between regulated entities involved in the same scam, in order to support efficient IDR arrangements that avoids the consumer going through multiple IDR processes and inundation of complaints at EDR.</p>	<p>Treasury recommends that sector codes require regulated entities to engage and cooperate with one another to facilitate the resolution of disputes prior to escalation to EDR. Ahead of this, further stakeholder consultation will be undertaken on the operation of dispute resolution arrangements. The explanatory memorandum will set out the policy intent that consumers should not be bounced between multiple IDR processes, and that the sector codes will set out consumer-centric and prescriptive IDR requirements.</p>	<p>Agreed</p> <p>To discuss</p>
	<p><u>Statutory review</u></p> <p>Consumer groups submitted that the dispute resolution arrangements should be subject to statutory review.</p>	<p>Treasury recommends incorporating a requirement for a statutory review of the dispute resolution arrangements under the SPF.</p> <p>Subject to drafting, the provision will provide that the Minister must cause a review within 3 years of the commencement of the first sector code, allowing for flexibility to start the review earlier if there are known issues. The report of the review will be tabled in Parliament.</p>	<p>Agreed</p> <p>To discuss</p>
	<p><u>Proportionate liability and liability guidelines</u></p> <p>Industry stakeholders strongly sought clarity around how liability may be apportioned between regulated entities where regulated entities have breached SPF obligations. This is relevant where multiple regulated entities have breached SPF obligations and have caused or contributed to loss or harm arising from a scam. This could include for example, a sending bank, a receiving bank, a telecommunication service provider, and a digital platform.</p> <p>Many stakeholders (including AFCA) have also sought specific liability apportionment guidelines to be provided in the framework.</p>	<p>Treasury recommends provisions relating to actions for damages to allow for proportionate liability, consistent with those set out in the CCA and Corporations Act, so that a court can apportion liability between regulated entities having regard to the extent to which an entity is responsible for the damage or loss. In apportioning liability, the court will consider the actions of the consumer and any unregulated entities involved.</p> <p>This means that regulated entities' liability for compensation under the SPF may be less than 100% in circumstances where regulated entities are not fully and wholly causing or contributing to the scam loss (i.e. unregulated entities involved and/or consumer has been contributorily negligent). This approach is consistent with other proportionate liability frameworks.</p> <p>On liability guidelines, Treasury is seeking legal advice on whether some form of liability guidance in relation to IDR and EDR can be provided under subordinate legislation, if desired. This will create flexibility to issue guidelines without mandating it, given the policy intent to date has been that liability is apportioned on a case-by-case basis.</p>	<p>Agreed</p> <p>To discuss</p>
<p><u>Remediation</u></p> <p>ASIC has suggested that a regulator should have the ability to seek damages for scam losses suffered by consumers in court, consistent with similar provisions in the ASIC Act.</p>	<p>Treasury recommends a regulator having the ability to seek damages on behalf of scam victims, where a regulator is taking legal action against a regulated entity.</p>	<p>Agreed</p> <p>To discuss</p>	

Changes to policy			
Key feature	Issue raised	Treasury recommendation	Minister's decision
	<p>AFCA suggested that:</p> <ul style="list-style-type: none"> regulated entities should be subject to obligations to actively identify and remediate consumers in line with pre-determined liability rules where a breach in obligations under the SPF is identified that impacts a number of their customers. the ACCC have the specific power to direct a regulated entity to remediate in line with pre-determined liability rules in circumstances where there is evidence that regulated entities have caused harm and not provided sufficient remediation for consumers. 	<p>Treasury does not recommend a requirement for regulated entities to remediate where the entities have self-identified a breach that may lead to scam harm for their customers or where the regulator has directed the entity to undertake remediation of this kind, for a number of reasons:</p> <ul style="list-style-type: none"> would be difficult to operationalise without pre-determined liability rules (the viability of which is subject to pending legal advice). it is unclear how this will operate in a scam context where multiple regulated entities are involved who may not always be aware if a person was involved in a specific scam, making it difficult for regulated entities to manage and quantify the risk and impose considerable and unknown costs on regulated entities. may have the unintended effect that regulated entities limit information sharing to avoid triggering liability. this would involve a significant change in policy position and would require further consultation with stakeholders so could be considered as part of the statutory review of dispute resolution arrangements. 	

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Scams Prevention Framework Bill 2024

Q&As

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1. What is the Scams Prevention Framework?

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- The SPF will require regulated entities to have dispute resolution processes in place to deal with consumer complaints. A regulated entity may be responsible for providing compensation to a scam victim where that entity has not met its obligations under the SPF. That responsibility may be shared between multiple regulated entities where more than one entity has not met its obligations in relation to a particular scam.

2. Why is this legislation needed?

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- The SPF establishes clear, consistent roles and responsibilities for the private sector to ensure scammers do not exploit vulnerabilities in the ecosystem and also provides scam victims pathways to seek redress.

3. What is the benefit to the Australian community?

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The SPF also mandates dispute resolution arrangements that will improve the way businesses respond to affected consumers and strengthen redress pathways.

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10. How will the Framework protect consumers?

- Consumers can expect regulated businesses that provide services to them to have anti-scam protections in place and provide accessible means to report potential scams, as well as access to adequate support when they are affected by a scam.
- In addition to the obligations under the SPF to prevent, detect and disrupt scams, businesses must also take steps to provide consumers with:
 - information and warnings about observed scam activity and steps consumers can take to minimise the risks of harm using those services,
 - disclosure to consumers that have been affected by a scam in a specified timeframe, including support on how to prevent further harm,
 - accessible mechanisms to provide reports about activity that is or may be a scam that are easy to locate and use,
 - accessible and transparent internal dispute resolution processes and the ability to escalate their complaint to an external dispute resolution (EDR) scheme.

11. What type of scams will this legislation address?

- A scam is defined as conduct that aims to deceive a consumer into facilitating an action, such as providing personal information, or making a payment.
- The legislation will provide protections from scam activity, whether or not it is successful in causing harm to a consumer.

- Scams are distinguished from other types of crime as the interactions between the consumer and the scammer lead to the harm.

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14. Why is AFCA the EDR scheme rather than the TIO or another body?

- Leveraging existing EDR infrastructure and expertise is essential to ensure a single scheme can be in place from the commencement of sector codes under the SPF. This approach is important so that there is a single door for consumers to raise complaints, and have them resolved.
- As scams relate to economic harm and often include financial losses by the consumer, AFCA, the largest existing EDR body among the initial sectors, is the most appropriate single EDR body to address scam complaints regarding banks, telecommunications service providers and certain digital platforms.
- AFCA has experience in resolving scam-related complaints relating to the financial sector, and resolved more than 10,000 scam complaints in 2023-24.
- AFCA will work with the Telecommunications Industry Ombudsman (TIO) to ensure that there is an effective, holistic and consumer-centric complaints-handling system in place.

15. Will consumers get their money back if they are a victim of a scam?

- Entities with SPF obligations may need to compensate scam victims for any loss or damage that those entities are responsible for where they have not met their SPF obligations. A scam victim should lodge a complaint through a regulated entity's internal dispute resolution mechanism in the first instance to seek compensation where an entity has not met its obligations.

16. How will liability be apportioned between entities?

- Liability of regulated entities will be linked to whether there has been a breach of obligations under the SPF, and the extent of those breaches. Given the diverse nature of scams, liability is likely to vary in different circumstances.
- Under the SPF, the Minister has the power to provide guidance on how to apportion liability between multiple regulated entities that have breached their SPF obligations in relation to a particular scam.
- Regulated entities dealing with a complaint at internal dispute resolution must have regard to the any guidelines prescribed for apportioning any liability.

17. Why hasn't the UK's mandatory bank reimbursement model been adopted in the SPF?

- The conduct of a scam can involve interactions between a consumer and a scammer across multiple platforms and services. The multi-sector approach of the SPF recognises the need for stronger actions and interventions to protect consumers by businesses across the entire life cycle of scam activity.
- Under the SPF, businesses in the scams ecosystem each have responsibilities to address scam activity on their platforms and services; and where they do not meet their obligations can be liable for compensation to a consumer. Banks have responsibilities to address scams within the scope of the services they provide to consumers.
- A mandatory presumption of bank reimbursement for scam transactions allocates liabilities for failing to address scams to banks alone. It does not immediately incentivise actions to address the upstream sources of scam activity in the economy. The SPF creates strong incentives at each stage in the scam chain for businesses to take effective action, to minimise the risk of penalties and related liability for consumer compensation.
- Although banks may improve their practices to minimise their liabilities, a reimbursement model does not set specific or proactive standards on how businesses should improve their policies and procedures to address scams.
- The Government will undertake consultation on the design of the dispute resolution model in 2025 to ensure delivery of a consumer-centric complaints process for scams.

18. If an entity breaches only one obligation under the Framework, will they be penalised?

- Regulators have a range of tools to enable them to respond to breaches of SPF obligations in a proportionate way. These include notices, directions, and orders to take appropriate steps remedy loss or harm caused by a breach.
- Breaches of the SPF are subject to a civil penalty regime, where the quantum of any monetary penalties will be proportionate to the nature of the breach.

These include up to a maximum of \$50 million in penalties for breaches of obligations to prevent, detect, disrupt and respond to scams, and \$10 million for a failure to adhere to governance or report obligations or a sector-specific code.

19. Will victims be compensated for scams that occurred before the SPF come into effect?

- The SPF does not introduce avenues for consumers who have been affected by a scam prior to legislation to seek compensation from a regulated business. This is not envisaged as retrospective compensation would penalise entities for actions occurring during a time that legislation was not in force.
- Businesses are entitled to have certainty that they are held by the legal standards of the day when they undertake trade in compliance with the law.

20. When will more sectors be designated?

- The SPF is a flexible framework that allows for additional sectors to be designated in response to new or emerging scam trends. It is important that all sectors which are shown to be used as a key means by which scammers harm consumers play a part in addressing scams on their platforms and services.
- As Government works to develop sector-specific codes for the three initially designated sectors, it will also consider the role of other industry sectors in the scams ecosystem and their potential for designation under the SPF.
- Superannuation, cryptocurrency, online marketplaces and other payment providers have been discussed by stakeholders as the next sectors that could be considered for designation under the SPF.

21. How will the SPF interact with existing industry codes?

- The Government recognises that parts of industry have committed to a range of voluntary measures to address scams, including the Scam-Safe Accord for banks, the Australian Online Scams Code for digital platforms.
- Telecommunications providers are already subject to mandatory requirements under the Reducing Scam Calls and SMs Code, which will be replaced by the SPF telecommunications code.

- The SPF aims to build upon existing industry codes and initiatives in introducing strong enforceable obligations and penalties. The Government will consult extensively with relevant industry sectors in 2025 during the development of designation instruments and sector codes.

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ASIC Sign Off

Quality assuring legislative proposals

Treasury Laws Amendment Bill 2024: Scams Prevention Framework

5 November 2024

ASIC has undertaken a quality assurance process in relation to the draft legislation and the Senior ASIC Officer provides the following statement:

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2. Identified issues of concern have been raised with Treasury as soon as practicable. Issues that ASIC has raised with Treasury that remain unresolved are outlined in **Attachment A**.

Senior ASIC Officer:

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Senior Executive Leader, Enforcement & Compliance
ASIC

5 November 2024



ASIC
Australian Securities &
Investments Commission

FOI 3784
Document 7B

Attachment A – Issues Register

Treasury Laws Amendment Bill 2024: Scams Prevention Framework - Issues identified by ASIC

ASIC documented and raised a range of concerns with Treasury. Key unresolved issues are identified in the table below:

Issue	Summary	Resolved	History
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Effective dispute resolution under the SPF

The draft Bill does not contain any express provisions regarding how liability for consumer compensation is to be determined, or how liability is to be apportioned where multiple regulated entities are at fault.

The draft Bill enables the SPF rules (a legislative instrument to be made by the Minister) to provide for mandatory processes and liability apportionment settings to apply during internal dispute resolution (IDR).

No

Raised by ASIC with Treasury:

- in ASIC's 2 February 2024 submission in response to Treasury's consultation paper *Scams – mandatory industry codes*;

	<p>However, these processes and settings have not yet been developed, and the timing and content of the SPF rules is currently unknown.</p> <p>The absence of liability settings is likely to have material adverse implications for the effectiveness of IDR, as well as for external dispute resolution by AFCA, under the SPF, impacting the ability for consumers to readily access redress where a regulated entity has breached their SPF obligations in line with the policy intent.</p> <p>This may also have implications for ASIC's oversight function in respect of the effective operation of the dispute resolution system for financial firms, which includes financial firms' IDR processes as well as oversight of AFCA.</p>		<ul style="list-style-type: none"> - by email on 22 April, 3 May and 14 August 2024; and - in discussions on 16 August, 5 September, 30 September and 30 October 2024.
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Assistant Treasurer and Minister for Financial Services – Hot Issues

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10. Consumer Affairs – Scams

Key grabs

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- Importantly, our codes will provide **clear pathways for consumers to be compensated** if a bank, telco or digital platform has done the wrong thing.

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If asked – Scams Prevention Framework (SPF)

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- The SPF will impose requirements on industry to have mandatory internal dispute resolution (IDR) process. This will provide consumers with a pathway for mandatory redress where the entity has done the wrong thing.
- In addition, industry will be required to be part of a mandatory external dispute resolution scheme. This will offer an independent, impartial, free and fair mechanism to consumers to resolve complaints.
- The SPF is only the start of a significant uplift in protection laws, prioritising Australian consumers and putting industry on notice.

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If asked – Why isn't Australia replicating the UK model of enforcing mandatory reimbursement.

- Our Framework will focus on prevention. Reimbursement should not be the first line of defence. We do not want to allow criminal scammers to get their hands on Australians' hard-earned money in the first place.
- Our model includes fines and compensation. We will create sector-specific codes that set tough obligations on industry. If a bank, telco or social media company fails to meet these high standards and breaches the code, then the responsible company will need to pay compensation to a victim that loses money.
- Our approach will make Australia the toughest place in the world for scammers to target.

If pushed –

- The mandatory UK scheme has only just commenced (7 October). In early September, the UK Government consulted on (and subsequently decreased) the mandatory payment. There has been concern about the viability of this model and that it creates a moral hazard problem – and this is before the scheme was even made mandatory.
- Further to this, the UK Government released a cost benefit analysis and consultation paper determining that the mandatory payment threshold will be reduced from £415,000 pounds (\$800,000 AUD) to £85,000 pounds (\$165,000 AUD).
- The UK model is also not as extensive as ours. Our approach will hold all of the ecosystem to account – not just the bank, but the telco who allowed the call through, or the social media company that gave a platform to a scam ad.
- Our Framework will ensure that the responsible companies are held liable.
- This lifts consumer protections and helps keep Australians' money safe.

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11. Consumer Affairs – Scams (defensive)

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- They will face fines of up to \$50 million AND be required to compensate victims.

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Dispute resolution

- Our dispute resolution pathway **empowers victims to seek compensation by setting clear guardrails.**
- Without our laws, victims face an uphill battle against these big companies.
- With our laws, redress pathways will be clear and consumer centric.
- It will **not be on the individual victim to determine who pays.** The government will set the criteria of apportionment in the Codes.
- The full process of the IDR and EDR will be designed upon passage of the legislation.
- Breaches are enforceable. Not doing an IDR or EDR correctly will result in penalties.
- **Consumers are at the centre of this legislation** and will be the centre of the design for dispute resolution.

If Asked: Treasury recommended UK model?

- The department has NEVER recommended a UK model.
- They have consistently recommended a model of shared responsibility among the scam's ecosystem – banks, telcos, social media.