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Scams Taskforce
Market Conduct Division
Treasury
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Scams Prevention Framework – exposure draft legislation

Berrill & Watson Lawyers submission

About us

Berrill & Watson Lawyers is a leading consumer law firm who represent consumers in various disputes with financial service providers, including banks, financial advisors, insurers and superannuation funds. We are one of the largest life insurance and superannuation practices in Australia. We act for consumers in every state in Australia.

Berrill & Watson has represented many scam victims ranging across a large spectrum of circumstances, including for scams involving authorised and unauthorised fraudulent transactions. We have represented consumers against their banks before the Australian Financial Complaints Authority (**AFCA**) and before the courts.

We welcome the opportunity to provide our views on the Scams Prevention Framework (**SPF**) draft legislation.

We do not practice in the telecommunications or social media industries. These submissions are therefore based on our experience in representing consumers against financial institutions (such as banks) and are limited only to those industries as regulated under the proposed legislation.

Background and recommendations

It has become abundantly clear that scam victims in Australia have faced considerable difficulty in obtaining compensation from banks for scams under the existing law.

We welcome the announcement of the SPF which represent a considerable leap in the right direction to protect consumers from the growing scourge of scams.

However, in our view, Government should amend the draft legislation by:

- (a) Expanding the definition of “scam” to cover unauthorised transactions.
- (b) Strengthening the definition of “SPF consumer” to make it clear a customer relationship is not required between a consumer and a regulated entity.

In addition, to support the SPF external dispute resolution (**EDR**) mechanism, Government should also:

- (a) Expand the existing jurisdiction and compensation limitations of AFCA as the preferred external dispute resolution (**EDR**) scheme to deal with consumer complaints regarding breaches of the SPF.
- (b) Provide funding to the community sector for legal representation in complaints before AFCA for breaches of the SPF.

Given the broad brush of the SPF and the complexity of the obligations contained within in it, it will also be crucial to ensure that AFCA and the community sector is adequately resourced to deal with consumer complaints.

We look forward to reviewing the proposed sector-specific codes which will carry substantial significance in defining the expectations of SPF entities in implementing the SPF principles. In particular, we eagerly await the banking sector code and how it proposes to define the scope of the obligation to “take reasonable steps to prevent another person from committing a scam” under s 58BJ of the draft legislation.

The meaning of “scam” – s 58AG

The draft legislation contains a gateway provision which attempts to define the scope of the SPF via a definition of “scam” under s 58AG.

Notably, s 58AG(1)(a) requires that a “scam” for the purpose of the SPF must “involve deception”. Whether an “attempt” of a scammer “involves deception” is then broken down into an exhaustive list under s 58AG(2).

That list covers circumstances where the “attempt” of the would-be scammer:

- (a) deceptively represents something to be (or to be related to) the regulated service; or
- (b) deceptively impersonates a regulated entity in connection with the regulated service; or
- (c) is an attempt to deceive the SPF consumer into facilitating an action using the regulated service; or
- (d) is an attempt to deceive the SPF consumer that is made using the regulated service.

Whilst Government should be commended for the intention to broaden the definition of a “scam” to the circumstances above, the definition is likely to only capture scams involving unauthorised transactions. For example, where an SPF consumer is deceived by a scammer into sending money to a person or entity thinking that person or entity to be someone or something legitimate.

However, the limitation of the definition of “scam” to only include the listed circumstances in s 58AG(2) would likely leave a class of scam victims behind – being those that become victims of scams involving transactions made without their knowledge (i.e. unauthorised transactions). Whilst we appreciate that unauthorised transactions may involve a different class of fraudulent activity, consumers would reasonably expect that SPF entities are taking action with respect to *all* types of scams.

Government should further extend the definition of “scam” to include cases of fraud which involve transactions which are not authorised by the consumer, so as to not leave behind a class of scam victims involved in these types of scams.

Whilst some voluntary industry codes already put obligations on soon-to-be SPF entities to compensate consumers for unauthorised transactions, those industry codes do not carry the same detailed obligations as the SPF framework – notably with respect to the proposed obligations in the draft legislation to proactively prevent, detect and disrupt scam activity, as well as the vital obligation to report those scams and share actionable scam intelligence with the ACCC.

For example, the *ePayments Code*, which most Australian banks currently subscribe to, places liability on a bank for unauthorised transactions (clause 10), but is also subject to a series of exceptions which places liability on the consumer – including passcode security requirements (clause 12) and where a consumer delays in reporting the loss to the service provider (clause 11.5).

Existing industry codes are also voluntary codes of practice, meaning not all SPF entities are subscribers and existing subscribers could opt-out of those voluntary codes at any time.

Government should strongly consider mandating the obligations under existing voluntary codes by expanding the definition of “scam” under s 58(AG) to include an attempt to deceive the *regulated service* into facilitating an action using the regulated service. This would bring the welcomed obligations to prevent, detect, disrupt and report scam activity to all types of scams and greater protect consumers.

Without such a change, there would be a considerable hole in the shield intended to be provided to Australian consumers by the SPF. It would also mean that, whilst an SPF entity would be required to share actionable scam intelligence involving authorised transactions with the ACCC and other SPF entities, there would be no requirement to do so for unauthorised transactions – even though that information may alert other SPF entities to scam activity with respect to their service, allowing them to take action to greater protect consumers.

We further note that s 58AG(3) allows for the SPF rules to prescribe when an attempt is *not* a “scam” regulated under the SPF. There is however no provision allowing the SPF rules to specify

what is a scam, meaning any scam that may currently fall through the gaps could only be included via legislative amendment.

To the extent that any particular type of authorised transaction scam proves to be better regulated elsewhere as the SPF is rolled out, s 58AG(3) provides the flexibility to adapt in future as the need arises and to exclude those scams without amending the legislation. Indeed we note that paragraph 1.78 of the explanatory materials to the draft legislation suggests that s 58AG(3) could be used in this exact way.

Given this, the SPF should start broader in its definition of a “scam” from the outset.

Meaning of “SPF consumer” – s 58AH

The definition of “SPF consumer” requires, inter alia, that the person (including a small business) be “a person to whom the regulated service is or may be provided or purportedly provided.”

Paragraph 1.85 of the explanatory materials to the draft legislation suggests that it is intended an “SPF consumer” will include a person engaging with a regulated service, even if they do not have a direct customer relationship with the regulated entity providing or carrying on that regulated service for the regulated sector. An example provided in the explanatory materials is a person who makes a payment in furtherance of a scam to a recipient bank which the individual does not have a direct customer relationship with. This is an important component of the draft legislation and is essential to ensure its objective to protect Australian consumers against scams.

However, the legislation as proposed arguably may not achieve the stated intention. The draft legislation does not currently provide a clear definition of what it means to “provide” or “purportedly provide” a service.

Section 58AH(2) appears to attempt to clarify that there need not be a contract, arrangement or understanding between the regulated service and the person for that person to be considered a “SPF consumer”. However, the legislation as drafted still requires a “provision” (or purported provision) of the service. Without any express section of the legislation clarifying that the provision or purported provision of a regulated service includes the receipt of a consumer’s money or other goods, this component of the legislation is subject to misapplication or exploitation by entities otherwise regulated by the SPF.

Government should therefore consider tightening the wording used to make it clear that s 58AH(1) includes circumstances where there is no customer relationship with the consumer.

The identified regulated sectors, entities and services

The draft legislation allows for regulated sectors subject to the SPF to be designated by the Minister via legislative instrument under s 58AC. We agree that this is an appropriate approach that allows the SPF to be flexible as scams and scammers evolve over time to target different industries.

We commend Government for its current commitment to initially designate telecommunication providers, banks and digital platform services relating to social media, paid search engine advertising and direct messaging as regulated sectors.

In our experience in speaking with and acting on behalf of consumers who have fallen victim to scams, a substantial proportion of those scams are conducted via cryptocurrency exchanges. Scammers take advantage of the lack of regulation of such exchanges and the lack of in-depth knowledge of how cryptocurrencies work among everyday consumers – who may be making cryptocurrency investments for the first time (or being deceived into believing they are doing so).

Cryptocurrency exchanges represent an unacceptable area of risk for Australian consumers being scammed and to which consumers currently have limited recourse to seek compensation. In our view, it is appropriate that Cryptocurrency Exchanges have the same or similar obligations as banks under the SPF framework to ensure that they take the necessary steps to protect consumers and deter scam activity.

In this regard, we note that large cryptocurrency exchanges are not currently required to hold Australian financial services licences (**AFSLs**), although Government has indicated previously its intention to change this. Until such time that cryptocurrency exchanges are required to hold an AFSL, they are not required to be members of AFCA or any other EDR scheme.

We therefore call on Government to extend their commitment to designate cryptocurrency exchange platforms as regulated sectors for the purposes of the SPF.

AFCA as the preferred EDR scheme

The explanatory materials to the draft legislation indicates that the Minister intends to prescribe AFCA as the single EDR scheme for the three initial sectors designated under the framework.

Berrill & Watson Lawyers has considerable experience representing consumers in complaints before AFCA across a range of issues, including scam-related complaints against banks.

There are current limitations of the AFCA scheme set out under the AFCA Rules which may limit the ability of AFCA to adequately compensate consumers for breaches of the SPF by regulated entities. We have seen many scam victims who have suffered losses that far exceed the AFCA jurisdictional limits. In our view, it is important that such victims don't lose their rights due to the amount that they have lost in a scam.

Inevitably, administrative changes will need to be made to the AFCA Rules to expand its existing jurisdiction to incorporate complaints against SPF entities. In making those administrative changes, Government should strongly consider expanding the AFCA Rules with respect to the monetary jurisdictional cap on scam-related complaints AFCA is able to currently consider and the current caps on the compensation AFCA is able to award a consumer in the event their complaint is successful.

The AFCA Rules limit the complaints it can consider and the compensation it can award to successful complainants.

The AFCA Rules specify the following jurisdictional limitations:

- (a) AFCA must exclude a non-superannuation complaint where the value of the claim exceeds \$1,263,000 for complaints lodged after 1 January 2024 (Rule C.1.2(e) and the table appended to Rule D.4). There is no monetary cap on AFCA's jurisdiction with respect to superannuation complaints (Rule D.1).
- (b) Under Rule B.4.3.1 a complaint, other than a superannuation complaint or complaint under the National Credit Code, must generally be lodged within the earlier of:
 - i. six years from the date when the complainant first became aware (or should reasonably have become aware) that they suffered the loss; and
 - ii. two years from the date the financial firm provided a response to the complainant's Internal Dispute Resolution (IDR) complaint.

The AFCA Rules specify that AFCA can award compensation to a complainant for direct financial loss up to \$631,500 for non-superannuation complaints lodged after 1 January 2024 (Rule D 3.1 and the table appended to Rule D 4). There is no such limitation for a superannuation complaint.

For a current scam complaint against a financial institution currently regulated by the AFCA scheme (such as a bank), this means that while AFCA has jurisdiction to consider complaints where the scam losses are up to \$1,263,000, it can only award compensation for direct financial loss of up to \$631,500.

AFCA can also award compensation for indirect financial loss up to \$6,300 for complaints lodged on or after 1 January 2024 (Rule D.3.2 and the table appended to Rule D.4).

In our experience, many scams involve considerable losses that may exceed the AFCA compensation cap. This means that, should the current compensation caps remain for scam complaints under the SPF, even if an SPF entity has clearly breached its obligations under the SPF, a consumer would not be able to recover their full loss should it exceed \$631,500, or may be excluded altogether.

Berrill & Watson has also spoken to consumers who have suffered losses that exceed the current jurisdictional cap at AFCA of \$1,263,000. This is particularly an issue for more complex investments scams or cryptocurrency scams. These consumers can currently only seek compensation via costly court cases. Many consumers that suffer substantial scam losses are often left financially destitute and do not have the financial resources to proceed with a costly court case against a financial service provider such as a bank because of this. Those consumers end up wearing the entirety of the loss – which can be life changing.

Given this, we call on Government to either remove or substantially increase the jurisdictional and compensation caps at AFCA for complaints under the SPF scheme.

Community sector funding

The obligations set out in the draft legislation are extensive. We eagerly await clarity on the specific actions expected of SPF regulated sectors in the industry-specific codes once the SPF is legislated.

Whatever those specific expectations look like, it is clear that consumer complaints to AFCA are likely to be complicated – both in terms of the factual circumstances of how the scam occurred, and also with respect to the application of the SPF principles and obligations within the industry codes.

Consumers who are unable to resolve their complaints via the mandatory internal dispute resolution process required under s 58BZC of the draft legislation will likely end up in complaints before AFCA as the intended EDR scheme. Although AFCA is designed to be a consumer friendly scheme which a consumer can access without legal representation, the reality of complicated cases such as scam complaints and the substantial knowledge and resource imbalance between consumers and banks, telecommunication providers, social media networks and other entities who will be covered under the SPF, means that many consumers will require legal representation to assist them in making a complaint through AFCA.

For this reason, we call on Government to provide greater funding for the community sector for vulnerable persons to access funded or subsidised legal representation in scam complaints with AFCA. This is essential to level the playing field and the considerable power imbalance between consumers and regulated entities under the SPF – some of which are multi-million or even multi-billion-dollar companies.

We note that many not-for-profit community legal centres provide assistance to scam victims. In the event that such organisations are successful in recovering money for consumers via AFCA for SPF complaints due to breaches of SPF obligations, such organisations should be able to be awarded some legal costs (in an amount to be determined by the AFCA) for the work done supporting consumers, even though such services are generally provided pro-bono. This will help those not-for-profit community legal centres to continue their important work for vulnerable consumers and ensure the accountability of SPF entities and the effective administration of the SPF and industry-specific codes, and recognises the important role the community sector plays in representing vulnerable consumers.

The current AFCA Rules provide AFCA with a discretion to award a complainant legal and other professional costs incurred in the pursuit of an AFCA complaint. However, it cannot award more than \$5,000, unless special circumstances apply (Rules D.5.1 and D.5.2).

The SPF is extensive and covers multiple industries that may be involved in a single scam simultaneously. For example, a consumer could be involved in a scam which originated via a fraudulent social media advertisement or a fraudulent cold call or text message. The scam could then move to a direct messaging service to deceive the person into sending money to the scammer. The scam could then involve a series of bank transactions made to accounts controlled by scammers.

Some AFCA complaints involving alleged breaches of the SPF obligations and industry-specific codes could therefore involve multiple respondent service providers across different industries – each with different obligations. A typical consumer is unlikely to be adequately equipped to provide submissions or other material to AFCA on their own, which is part of the normal AFCA complaints process.

Given this, Government should ensure that the AFCA is empowered to award legal costs to community legal centres who provide assistance to vulnerable consumers and should consider increasing the compensation cap for such costs where community legal centres represent the consumer.

We thank you for the opportunity to provide our views in relation to the consultation.

We are happy to provide further clarification in respect of the above, should you request the same.

If you have any questions, please contact the writers.



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