

Scams Prevention Framework Bill 2024 [Provisions]

15 January 2025

Recommendations

This submission recommends that the draft legislation:

- > Establish a presumption of reimbursement for scam losses, with limited exceptions where gross negligence can be demonstrated.
- > Extend penalties to senior officers under the SPF when certificates have been issued falsely or recklessly.
- > Further clarify what constitutes 'reasonable steps' to provide regulatory certainty.

About this submission

The Australian Communications Consumer Action Network (**ACCAN**) is pleased to provide this submission to the Senate Economics Legislation Committee (**the Committee**) on the Scams Prevention Framework Bill 2024 [Provisions] (**the SPF**).

ACCAN supports broader reforms to the SPF as set out in the joint consumer submission led by the Consumer Action Law Centre. This submission sets out ACCAN's further views with respect to issues raised by the telecommunications and digital platforms services sectors.

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**Australian Communications
Consumer Action Network**

Australian Communications Consumer Action Network

ACCAN is the peak national consumer advocacy organisation for communications working to achieve trusted, accessible, inclusive, affordable and available communications and digital services for all Australians.

Background

Scams have resulted in Australian consumers experiencing significant economic losses. Facilitated through financial services, digital platforms and telecommunications providers, in 2023 the combined total losses reported by consumers exceeded \$2.7 billion.¹ SMS scams alone resulted in consumers reporting almost \$27m in losses, with actual losses likely to be significantly higher due to under-reporting.²

The proposed SPF will provide the legal framework for the Government's approach to preventing and limiting scam activity. The SPF has the stated object of establishing a framework to protect against scams.³ The SPF will initially apply to banking, insurance, telecommunications, social media and broadcasting.⁴

Key Issues

In order to provide the strong economic incentives needed to drive action by telecommunications companies, financial institutions and digital platforms, ACCAN recommends that the SPF be amended to:

- Establish a presumption of reimbursement for scam losses, with limited exceptions where gross negligence can be demonstrated.
- Extend accountability to senior officers under the SPF.
- Further clarify what constitutes 'reasonable steps' to provide regulatory certainty.

A presumption of reimbursement should be adopted to achieve the objects of the SPF

Adopting a presumption of reimbursement is in ACCAN's view, the most effective way to set efficient incentives for all parties to take precaution to avoid scam harms. A presumption of reimbursement with exceptions for cases of gross negligence, will incentivise effective prevention by financial institutions, telecommunications providers, and digital platforms. This approach aligns with established economic theory, which supports allocating risks and costs to parties best positioned to mitigate harm, thereby reducing overall social costs.⁵

In adopting a constrained presumption, the SPF can effectively avoid moral hazard by encouraging all participants to take reasonable precautions, as a failure to do so may expose them to loss. In establishing incentives for all participants in the scam ecosystem to take precautions, the total economic and social costs of scams can be efficiently reduced.

¹ ACCC, *Targeting scams: report of the ACCC on scams activity 2023* (Report, 2024) 1. Available at: <https://www.accc.gov.au/about-us/publications/serial-publications/targeting-scams-reports-on-scams-activity/targeting-scams-report-of-the-accc-on-scams-activity-2023>.

² DITRDCA, *SMS Sender ID Registry - Fighting SMS Impersonation Scams* (Report, 2024) 5. Available at: <https://www.infrastructure.gov.au/have-your-say/sms-sender-id-registry-fighting-sms-impersonation-scams>.

³ Scams Prevention Framework Bill 2024 [Provisions], s. 58AA.

⁴ Scams Prevention Framework Bill 2024 [Provisions], s. 58AC.

⁵ John Prather Brown, 'Toward an Economic Theory of Liability' (1973) 2(2) *The Journal of Legal Studies* 323.

The SPF certification scheme should be supported by effective penalties

ACCAN supports the SPF certification scheme. However, we note that if the certification scheme in the SPF is intended to function in lieu of a burden of proof, then accountability needs to be taken at both the entity and senior officer level. The current SPF provides for civil penalties for failing to comply with record keeping and reporting requirements.⁶

A senior officer of a regulated entity is defined as:

- a) an officer (within the meaning of the *Corporations Act 2001*) of the entity; or
- b) a senior manager (within the meaning of that Act) of the entity.

In ACCAN's view, Sections 58BF and 58BG should be amended to extend the compliance standards to senior officers in addition to regulated entities. We note that the extension of civil penalties to senior officers that falsely or recklessly certify that a regulated entity is compliant is appropriate, noting the SPF envisions certificates having evidentiary value in decisions regarding compensation.

ACCAN notes that the imposition of penalties, including imprisonment is standard practice where an individual is providing a statutory declaration. As such, declarations have evidentiary or probative value when subject to consideration by courts and tribunals. The adoption of equivalent provisions would provide sound incentives for officers to undertake appropriate due diligence prior to providing a certificate.

The legislation already ensures distinct categories of penalties and infringements for 'body corporates' and 'other persons'. Sections 58FK and 58FL also feature two tiers of contraventions and provisions for the maximum penalty for both 'body corporates' and 'other persons'. The legislation provides:

Tier 1

- Body corporate
 - a) 159,745 penalty units
 - b) Three times the total value obtained
 - c) 30% of turnover
- For persons other than body corporate 7,990 penalty units.

Tier 2

- Body corporate
 - d) 31,950 penalty units
 - e) Three times the total value obtained
 - f) 10% of turnover
- For persons other than body corporate 1,600 penalty units.

Subdivision D, 58FQ provides for infringement notices provides for

- 'body corporate' is 60 penalty units.
- 'otherwise' is 12 penalty units

⁶ Scams Prevention Framework Bill 2024 [Provisions], s. 58BF & 58BG.

The different penalties and infringement amounts demonstrate that the legislation has the flexibility to encompass accountability for both regulated entities and senior officers. Extending penalties to individual senior officers will drive compliance and ensure that the SPF meets its intended objectives. Extending accountability to senior officers under the SPF will also support consumer confidence in the framework.

Reasonableness requirements can be strengthened and clarified

Recent discussion around the SPF has raised concerns about uncertainty stemming from the requirement for regulated entities to take reasonable steps to prevent, detect, report, disrupt and respond to scams. In ACCAN's view, this commentary ignores pre-existing jurisprudence regarding the interpretation and application of the concept of 'reasonableness'. ACCAN notes that there is extensive precedent regarding the interpretation and application of reasonableness, and consequently regulated entities may draw upon this in informing their approach to compliance.

Notwithstanding the above, ACCAN considers that the application of reasonableness in the SPF can be clarified by drawing upon similar principle-based approaches in other legal regimes. The SPF considers matters relevant to 'reasonable steps' to include:

- a) the size of the regulated entity; and
- b) the kind of regulated services concerned; and
- c) the consumer base of those services; and
- d) the kinds of scam risks those services face; and
- e) whether the regulated entity has complied with any relevant SPF code obligations relating to that provision.⁷

Industry submissions made to the SPF Exposure draft argue that lack of clarity in the SPF around reasonable steps give regulated entities undue liability.⁸ Communications Alliance argues that meeting industry codes should satisfy the requirements to have taken all reasonable steps.⁹ In DIGI's view, reasonable steps should be outlined in mandatory sector-specific codes.¹⁰

In ACCAN's view, sector specific codes should operate to support the achievement of the overarching obligation to take reasonable steps, but in of itself is not necessarily sufficient to meet this obligation. We note that in the context of a rapidly evolving scam environment, tying the substantive obligations on firms to a code is likely to result in inefficiently high scam losses due to underinvestment in prevention measures. In our experience, codes can rapidly become obsolete and may take years to be updated, even in circumstances where issues or deficiencies have been repeatedly identified by relevant stakeholders.¹¹

Accordingly, we consider a framework that is wholly reliant on codes is unlikely to achieve the objects of the legislation, and consequently we do not consider that code compliance should provide a defence for a regulated entity that has failed to take reasonable steps to prevent, detect, report, disrupt and respond to scams.

⁷ Scams Prevention Framework Bill 2024 [Provisions], s. 58BB

⁸ For example: Telstra, Submission to SPF Exposure Draft (2024) 7.

⁹ Communications Alliance, Submission to SPF Exposure Draft (2024) 9.

¹⁰ DIGI, Submission to SPF Exposure Draft (2024) 20.

¹¹ For example, ACCAN notes that the current revision of the TCP Code has been ongoing since June 2023.

In ACCAN's view reasonable steps is already used in risk-based legislation and the requirement for reasonable steps should be kept in the primary legislation. We recommend drawing on elements to the definition of reasonableness from the *Work Health and Safety Act 2011 (Cth)* (**the Act**) sets out what is 'reasonably practicable' in ensuring health and safety. The Act states:

In this Act, reasonably practicable, in relation to a duty to ensure health and safety, means that which is, or was at a particular time, reasonably able to be done in relation to ensuring health and safety, taking into account and weighing up all relevant matters including:

- a) the likelihood of the hazard or the risk concerned occurring; and
- b) the degree of harm that might result from the hazard or the risk; and
- c) what the person concerned knows, or ought reasonably to know, about:
 - a. the hazard or the risk; and
 - b. ways of eliminating or minimising the risk; and
- d) the availability and suitability of ways to eliminate or minimise the risk; and
- e) after assessing the extent of the risk and the available ways of eliminating or minimising the risk, the cost associated with available ways of eliminating or minimising the risk, including whether the cost is grossly disproportionate to the risk.¹²

In ACCAN's view, drawing upon the above factors in defining reasonableness in the context of the SPF would provide appropriate clarity to regulated entities as to the reasonable steps that they must take to acquit their obligation.

Penalties and compensation are not the same

ACCAN has observed that recent commentary regarding the SPF appears to conflate penalties and compensation, with several stakeholders arguing that the proposed regime will result in double jeopardy for breaches.

Communications Alliance argues that this creates complexity for regulated entities. Instead they argue that entities 'that comply with the Scams Code have discharged of their responsibilities in relation to scam prevention, noting that some carriers may be able to exceed the minimum requirements set out in the Scams Code'.¹³ Communications Alliance notes that 'where entities are subject to liability and penalties, they must also be enabled to limit their exposure to such liability and penalties through compliance with clear and enforceable legislation/regulation'.¹⁴ In ACCAN's view, this commentary misconstrues the substantive operation of the provisions of the SPF.

The SPF, like other legal regimes fundamentally provides for:

- **Compensation** - which seeks to place impacted consumers in the position in which they would have been in the event that a breach did not occur.
- **Penalties** - for breaches of the provisions of the enactment and which serve to deter unwanted behaviour or non-compliance by entities.

¹² Work Health and Safety Act 2011 (Cth), s.18.

¹³ Communications Alliance, Submission to SPF Exposure Draft (2024) 10.

¹⁴ Communications Alliance, Submission to SPF Exposure Draft (2024) 8.

For example, Communications Alliance has made the argument that Carriers and Carriage Service Providers (C/CSPs) face a quadruple jeopardy through the interaction between:

1. the SPF itself;
2. subordinate regulation;
3. an external dispute resolution scheme (EDR), envisaged to be the Australian Financial Complaints Authority (AFCA);
4. the right to private action which in turn hinges on compliance with the dual regime of obligations.¹⁵

ACCAN notes that the above does not provide for 'quadruple jeopardy'. Instead, the drafting of the SPF in substance provides for:

- A framework for compensation of individuals – with individuals initially able to seek redress via an EDR process, with the ability to further seek redress via a private action in the federal court.
- A principle-based framework of legal obligations supported by subordinate regulation – with CSPs subject to tiered obligations prevent scam harm.

The characterisation of the regime as one imposing 'dual regime of obligations' reflects a misinterpretation of the substantive requirements of the SPF. In ACCAN's view the SPF does not impose a 'dual regime' of obligations, but instead clearly articulates a series of primary obligations via the primary legislation and envisions the creation of sector specific codes to address sector specific risks.

ACCAN notes that this approach to institutional design has been extremely effective in the context of work health and safety, which imposes clear overarching duties, supported by specific regulatory requirements on identified and established risks. This approach draws upon the relative strength of principle based legal frameworks in providing flexibility for firms to address uncertain and evolving risks, while providing clarity and consistency through the codification of approaches to address established risks.

Clarifying redress pathways does not provide consumers the opportunity to over-recover

ACCAN notes that the ordinary principles of law would apply to the consideration of the quantum and nature of relief to be provided to an individual that suffered loss as a result of a breach of the SPF. This is to say, that an individual that sought and received compensation, such that it would remedy the injury that they had suffered due to the non-compliance of the entity, would not be in a position to obtain further recovery via a private action.

Accordingly, rather than providing for 'quadruple jeopardy' the SPF clarifies that an impacted consumer has a clear set of legal pathways through which they may seek redress. The articulation of these processes do not provide for the prospect of double recovery or over-recovery in excess of any loss substantiated by a consumer.¹⁶

¹⁵ Communications Alliance, Submission to SPF Exposure Draft (2024) 8.

¹⁶ Scams Prevention Framework Bill 2024 [Provisions], s.58FZI

We note that the operation of the SPF, consistent with other legal regimes provides initially for external dispute resolution but does not extinguish the right of an individual to seek redress via the courts. ACCAN notes that existing EDR frameworks similarly do not extinguish the ability of a consumer to seek redress at law. Accordingly, we query to what extent the SPF is in any fashion more complex than the legislative frameworks that already operate with respect to industries that afford consumers access to EDR.

The proposed framework does not impose double jeopardy for non-compliance

The SPF, similar to a variety of other legal frameworks provides penalties for non-compliance with its core obligations, set out in the primary legislation. The SPF, in addition envisions the creation of sector-specific code requirements and compliance obligations, whereby regulated entities would be required to comply with obligations that contribute to the achievement of the object of the SPF.

ACCAN notes that the specification of additional requirements in the underlying regulation does not mean that a regulated entity will face penalties for non-compliance with the primary obligations set out in the SPF. For example, while the subordinate legislation may impose subsidiary obligations to facilitate the achievement of the objects of the SPF through process, operational and administrative requirements, these obligations would be distinct requirements from the general duty imposed by the proposed SPF.

While we acknowledge the concerns of industry participants, we note that in many instances the breach of a subsidiary obligation will be insufficient to trigger the imposition of penalties for breaches of the principal legislation. For example, a penalty imposed for failure to meet procedural requirements for reporting, does not imply a breach of substantive obligations to prevent scam activity. Further, we note that the imposition of penalties for lower order breaches is appropriate to ensure ongoing focus on the functional operation of the SPF codes and ensure that organisations are acting to acquit their substantive obligations.

Conclusion

ACCAN thanks the Committee for the opportunity to comment on the SPF. The SPF has the potential to address some of the harms faced by communications consumers. ACCAN supports the SPF, but we believe it would better meet its stated objectives by strengthening compliance measures and clarification of 'reasonable steps' while retaining strong consumer protections. By adopting a presumption of reimbursement, extending accountability to individuals of authority, and clarifying reasonableness the SPF will better protect Australian communications consumers.

Scams ruin people's lives, are a drain on the economy and undermine trust in communications systems, the SPF needs to be as robust as possible to properly contribute to the curtailment of these harms.

The Australian Communications Consumer Action Network (ACCAN) is Australia's peak communication consumer organisation. The operation of ACCAN is made possible by funding provided by the Commonwealth of Australia under section 593 of the Telecommunications Act 1997. This funding is recovered from charges on telecommunications carriers. ACCAN is committed to reconciliation that acknowledges Australia's past and values the unique culture and heritage of Aboriginal and Torres Strait Islander peoples. [Read our RAP](#)
