

Scams Prevention Framework – exposure draft legislation

8 October 2024

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.
- > Place the burden of proof on industry participants to demonstrate compliance with the SPF when defending claims from scam victims.
- > Expressly require the creation of mandatory scam codes for the telecommunications sector, with codes to be drafted and enforced by the ACCC and ACMA, with strong penalties imposed for breaches.

About this submission

The Australian Communications Consumer Action Network (**ACCAN**) is pleased to provide this submission to the Treasury on the Scam Prevention Framework – exposure draft legislation (**SPF**).

ACCAN supports broader reforms to the SPF as set out in the joint consumer submission led by Consumer Action Law Centre (**CALC**). This submission sets out ACCAN's concerns with respect to fundamental incentive problems in the SPF which make it impractical and unworkable and concerns regarding the interaction of the SPF and the *Telecommunications Act 1997* (Cth).

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**Australian Communications
Consumer Action Network**

Australian Communications Consumer Action Network

ACCAN is the peak body that represents consumers on communications issues including telecommunications, broadband, and emerging new services.

ACCAN provides a strong unified voice to industry and government as we work towards communications services that are trusted, inclusive and available for all.

Introduction

Consumers in Australia experience significant economic detriment as a result of scam activity facilitated through financial services, digital platforms and telecommunications providers. In 2023, the combined financial losses reported in 2023 exceeded \$2.7 billion across over 601,000 reports.¹

Communications consumers face material losses due to fraudulent and criminal scam activity. In 2023, Scamwatch data indicated that consumers lost almost \$27 million to SMS scams, with actual losses likely to be significantly higher due to under-reporting.²

Background

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 seeks to achieve this objective through the adoption of a high-level principles covering prevention, detection, reporting, disruption and response to scams.⁴

These principles will then be supported through the establishment of sector specific codes, which may be established following a designation by the Minister.⁵ Initial sectors to be regulated include telecommunications, banking and digital platforms.⁶

Unfortunately, the SPF as drafted will not facilitate achievement of its purpose of protecting against scams due to fundamental design flaws. These flaws, if not corrected, will result in an unwieldy, inefficient and ineffective framework for addressing scam conduct, which will see unnecessary consumer and community harm.

As drafted, the SPF does not provide the strong economic incentives required to achieve its objectives. Conversely, the **SPF provides strong economic incentives for industry participants to engage in strategic behaviour to frustrate the stated objectives of the legislation.** This includes incentives to:

- Increase the costs of seeking compensation and reimbursements for scam victims to delay, defer or discourage the seeking of redress.
- Retain or otherwise fail to disclose information and evidence critical to a consumer substantiating a claim for redress.

In ACCAN's view, substantial revisions to the SPF are necessary for it to achieve its stated object of protecting against scams. In the absence of revisions, ACCAN is of the view that the framework will provide for inadequate and weak protections for communications consumers from scam activity.

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. Exposure Draft, Treasury Laws Amendment Bill 2024: Scams Prevention Framework, s. 58AA.

⁴. Exposure Draft, Treasury Laws Amendment Bill 2024: Scams Prevention Framework, s. 58AB.

⁵. Exposure Draft, Treasury Laws Amendment Bill 2024: Scams Prevention Framework, s. 58AC.

⁶. Exposure Draft, Treasury Laws Amendment Bill 2024: Scams Prevention Framework, s. 58AD.

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 draft legislation be amended to:

- Establish a presumption of reimbursement for scam losses, with limited exceptions where gross negligence can be demonstrated.
- Place the burden of proof on industry participants to demonstrate compliance with the SPF when defending claims from scam victims.
- Expressly require the creation of mandatory scam codes for the telecommunications sector, with codes to be drafted and enforced by the Australian Competition and Consumer Commission (ACCC) and Australian communications and Media Authority (ACMA), with strong penalties imposed for breaches.

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

The SPF should be revised to provide a presumption of consumer reimbursement for scam losses, subject to limited exceptions where gross negligence can be established. The adoption of a presumption of reimbursement will provide the economic incentives needed to drive efficient prevention and precaution to be undertaken by financial institutions, telecommunications and digital platforms services.

The adoption of a constrained presumption of reimbursement will not result in a moral hazard problem, where consumers take less than an efficient level of precautions. Consumers will have incentives to take efficient precautions to avoid the residual risk of scam activity that will still exist even when industry actors take reasonable steps to mitigate risk. If consumers are negligent they may receive no relief under a limited presumption with exceptions for gross negligence.

This is consistent with half a century of economic theory regarding the incentives flowing from alternative liability rules.⁷ Arguments to the contrary, while appealing from an emotive or industry cost perspective, do not align with economic theory and are consequently not a sound basis for the formation of public policy. The allocation of the risk and costs of harm to vulnerable consumers is an indefensible economic and policy proposition, and the SPF should be revised to avoid this outcome.

In keeping with the stated objective of preventing scam losses, the SPF should be amended to adopt a default liability rule that allocates the economic losses attributable to scam harm to banks, telecommunications and digital platforms. The allocation of these losses is consistent with the promotion of overall consumer and community welfare.

Further, the adoption of such a constrained presumption is consistent with established economic theory which aims to reduce the total social cost of harm through the efficient allocation of risk and costs to those parties best placed to avoid harm. The adoption of a constrained presumption, will achieve this by providing all parties strong economic incentives to take efficient precaution, not merely allocate losses to vulnerable consumers, who must then pursue redress through complex and costly legal processes without the necessary information to achieve a successful claim.

⁷. John Prather Brown, 'Toward an Economic Theory of Liability' (1973) 2(2) *The Journal of Legal Studies* 323.

The SPF as drafted will result in the inefficient allocation of risk to consumers

Where a scam can be avoided by multiple parties the risk of scam harm should be allocated to the party that can avoid the scam harm at least cost. Accepted economic theory for more than half a century, the allocation of risk to the least cost avoider will provide strong economic incentives to avoid or reduce the risk of this harm materialising and encourage the taking of efficient precautions.

The allocation of risk in this way, will not only encourage the efficient taking of precautions, but will importantly reduce the total social harm associated with scam activity – at the least possible cost to society. The SPF should be revised to facilitate this outcome, which would support it to achieve its stated purpose of protecting against harm.

In almost all circumstances the parties best placed to eliminate or mitigate scam risk will be banking, telecommunications and digital platform companies. This is because first and foremost they have control over the architecture and design of their systems and processes.

Consumers have little or no effective control over the systems and processes adopted by industry and therefore, irrespective of any personal desire to take appropriate and efficient precautions, are not in a position to do so. This is perhaps starkest in the communications context, where, notwithstanding the lack of consumer control over the security of the numbering system, consumers continue to be required to engage with their financial institutions over unsecured communication channels.

Further, reducing or eliminating the risk of harm associated with scams by consumers is likely to be substantially more costly than actions that may be taken by industry. In practice, in the absence of effective control over the systems and processes exposing them to scam harm, the only practical strategy many consumers have available to them is to limit or cease to use essential banking and communications services.

The withdrawal of consumers from essential service markets will impose significant and undue hardship on them, in the name of inefficient risk mitigation. Further, the reduction in the use of financial and communications services may undermine the economic and productivity benefits that these sectors have provided. In substance, seeing the incremental unwinding of decades of economic progress, derived from hard won technological and policy reform processes.

This process has already begun to occur in the telecommunication context, with consumers increasingly ignoring or refusing to accept calls from unidentified numbers on the basis that the call is likely to be fraudulent. This undermines the underlying economic value of telecommunications infrastructure assets and the numbering system more broadly.

The SPF should be revised to place the onus of proof on industry participants

In order for consumers impacted by scams to effectively seek redress, information relevant to the dispute must be made available by industry participants that are party to internal dispute resolution or external dispute resolution processes. Addressing this information asymmetry is critical to ensuring that consumers have access to appropriate avenues for seeking redress.

Substantiating a claim for redress under the proposed SPF requires consumers to put forward evidence to the effect that an industry participant has failed to adhere to the requirements of the

SPF. Compounding the difficulty, consumers are blocked from accessing crucial evidence needed to build their case. Information about whether an institution acted on 'actionable scam intelligence' or took the required 'reasonable steps' will be unavailable to them, making the process challenging.

In practice, this is likely to impose an impossible bar for a consumer to meet, as the information required to substantiate a claim is held by the entity that has enabled or allowed the scam to occur, and said entities are not required under the SPF to share this information.

Noting the strong financial incentives for industry participants to constrain, limit or preclude access to information relevant to substantiating a claim for redress, ACCAN queries how the framework is expected to be effective. Accordingly, ACCAN recommends that the framework place the onus of proof on industry participants, who should be required to demonstrate adherence to SPF requirements in defending any claim for compensation.

We note the adoption of a presumption of reimbursement would provide efficient incentives for industry participants to disclose all relevant information, as if industry participants were unable to demonstrate compliance with the requirements of the SPF, they would be liable for scam losses. Accordingly, we consider that adopting this presumption should be a priority, to provide efficient incentives for all parties to engage in good faith in dispute resolution processes. Further, a presumption will, as noted above, provide efficient incentives to take precaution for all parties.

The SPF places the burden on vulnerable consumers and cannot work

The SPF, as currently drafted, requires consumers to seek compensation by engaging in internal dispute resolution process (**IDR**), and if unsuccessful, only then to seek redress through an external dispute resolution process (**EDR**). If a consumer is unsuccessful through the EDR process, the SPF places the burden on victims of scams to then commence their own legal action.

In ACCAN's view, expecting vulnerable consumers, many of whom will have no financial resources due to having been a victim of a scam, to self-fund engagement with multiple, lengthy and legally complex redress processes, is impractical. This is in defiance of basic logic and in effect requires a victim of crime to investigate and prosecute their own case against a major Australian corporation.

ACCAN queries how this would be feasible for a consumer that has been a victim of financial crime, noting that their resources would not necessarily allow them to retain relevant legal advice to pursue a civil claim through IDR, EDR and subsequently the Federal Court of Australia.

The proposed SPF 'Response' stage places the full burden on vulnerable consumers—often at one of the lowest points in their lives—to challenge their bank, telco, or social media platform and prove the institution failed to meet SPF requirements. This is a stark contrast to the current ePayments Code, which presumes support for consumers in cases against large corporations, making it easier for them to argue that the scam was not their fault.

The SPF must be revised to ensure effective regulation of telecommunications scams

The SPF has the stated object of establishing a framework to protect against scams.⁸ Achievement of this objective is likely to be frustrated by the operation of the existing provisions of the *Telecommunications Act 1997* (Cth), Section 4 of which states that:

The Parliament intends that telecommunications be regulated in a manner that:

- (a) promotes the greatest practicable use of industry self - regulation; and
- (b) does not impose undue financial and administrative burdens on participants in the Australian telecommunications industry;

but does not compromise the effectiveness of regulation in achieving the objects mentioned in section 3.⁹

Section 558AA of the SPF provides:

‘the object of this Part is to establish a framework to protect against scams’.

In ACCAN’s view, the operation of these provisions is in conflict with the stated objects of the SPF, and is likely to promote the use of self-regulation as the primary mechanism to regulate scam harms in the telecommunications sector. ACCAN notes that ‘codes’ within the *Telecommunications Act 1997* (Cth) are voluntary in nature, with compliance with the requirements voluntary, unless the ACMA has directed a company to comply.¹⁰ This means that any breaches to a code in the first instance cannot be subject to enforcement or penalty action by the ACMA.

The SPF is silent on whether the ‘codes’ envisioned under the framework are intended to be mandatory or voluntary with respect to the telecommunications sector. In the absence of clear guidance, we must presume that the intention is for the terms of the *Telecommunications Act 1997* (Cth) to preside over such matters.

ACCAN considers that the introduction of voluntary requirements for the telecommunications sector will provide limited incentives for telecommunications companies to take efficient precautions to eliminate or mitigate consumer harm. Voluntary industry codes such as the Telecommunications Consumer Protection (TCP) Code have not historically provided sufficient consumer protections.

ACCAN holds material concerns that the operation of a voluntary framework for the telecommunications sector will result in communications consumers continuing to face significant scam harm, and directly undermine the efficacy of the SPF’s stated objectives. Further, we consider that such an approach is in contravention to the ‘ecosystem’ approach which ostensibly seeks to reduce scam harms by incentivising efficient precaution and mitigation action by all parties.

The SPF must be revised to explicitly state that any telecommunications industry-specific scams codes are mandatory and are within the enforcement authority of the ACCC as the overarching regulator. If sector specific regulation is devolved to the ACMA, the ACMA must be empowered to immediately take action to enforce the provisions of the SPF and impose significant penalties.

⁸. Exposure Draft, Treasury Laws Amendment Bill 2024: Scams Prevention Framework, s. 58AA.

⁹. Telecommunications Act 1997 (Cth) s. 4 – Regulatory Policy.

¹⁰. Telecommunications Act 1997 (Cth) s. 106.

ACCAN recommends that The Treasury amend the SPF to make it explicit that the SPF is mandatory for the telecommunications sector and attracts the same penalties and enforcement actions as other sectors. The code as applied to telecommunications must be drafted and overseen by the ACCC to ensure a consistent whole of ecosystem approach.

In ACCAN's experience, weak consumer protections flow from industry drafted codes such as the TCP Code, which typically provided limited and unenforceable protections for consumers. We note the limitations of the TCP Code are so profound that all consumer and community organisations, barring ACCAN, have refused to engage further with the ongoing TCP Code review.

Further, we consider that the enforcement powers and penalties afforded to the ACCC or the ACMA as a sector-specific regulator must allow for immediate, timely and effective enforcement action to be taken. ACCAN raises this matter due to long-standing concerns regarding the effectiveness of current enforcement and penalties arrangements provided for under the terms of the *Telecommunications Act 1997* (Cth).

Independent research has shown that according to publicly available information, between 1 January 2010 and 30 June 2023 (around 13 years), the Australian Communications and Media Authority (ACMA) issued an estimated 24 infringement notices with a total value of \$6,143,160 for breaches to the *Telecommunications Act 1997* (Cth).¹¹ In ACCAN's view this is reflective of an inadequate and ineffective regulatory framework which undermines the authority of the regulator.

The report indicates that the ACMA may not have appropriate resourcing and a suitable regulatory framework to protect consumers. The ACMA relies heavily on warnings and other non-financial actions to enforce compliance. Noting the significant harms that consumers face from scams, we consider that such an approach would be inappropriate.

Conclusion

The SPF has the potential to address some of the harms faced by communications consumers. However, in its current form, it is unlikely to improve outcomes and is likely to compound the impact of scams harms for consumers. It requires fundamental change to achieve its stated objectives.

In ACCAN's view the material shortcomings of the proposed SPF mean that it will be ineffective and fail to achieve its stated objective. Accordingly, ACCAN recommends material revisions to the framework in order to drive reduced scam harms and ensure that consumers and the community receive the appropriate protection from scams necessary to underpin ongoing confidence in telecommunications, digital platforms and financial institutions.

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](#)

¹¹. Karen Lee, Derek Wilding, Kieran Lindsay & Vidya Kathirgamalingam, *The Enforcement of Telecommunications Consumer Protections* (Report, 2024).