Law Council
OF AUSTRALIA

Scam Prevention Framework: Proposed Rule Changes

Australian Financial Complaints Authority

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- the Australian Consumer Law Committee of the Law Council's Legal Practice Section; and
- the Financial Services Committee and Privacy Law Committee of the Law Council's Business Law Section

for their contribution to the preparation of this submission.

Introduction

1. The Law Council of Australia welcomes the opportunity to provide a submission on proposed changes to the Australian Financial Complaints Authority (**AFCA**) Rules to enable scam-related complaints under the Scams Prevention Framework (**SPF**) from 31 March 2027.

2. We note that the proposed model would retain a single AFCA scheme with two parallel divisions: the existing financial services jurisdiction for complaints dealt with under the amended AFCA Financial Firm Rules, and a new SPF jurisdiction for scam-related complaints against entities in the banking, telecommunications and digital platform sectors under the proposed Scam Rules.

3. This submission focusses on selected issues arising from the consultation paper where further operational clarity would assist, with the view to supporting an accessible and effective external dispute resolution (**EDR**) framework that also promotes regulatory certainty, proportionality and procedural fairness. In some instances, there are differing views within the legal profession as to how to achieve these policy goals. Where views diverge, positions are attributed to specific contributors.

Interaction between Financial Firm Rules and proposed Scam Rules

4. Unlike AFCA's existing financial services jurisdiction which covers complaints against Financial Firms, the new SPF jurisdiction covers complaints against a 'Regulated Entity'. The proposed Scam Rules establish a separate pathway for two categories of complaint: an 'SPF Complaint' concerning a 'Regulated Entity', and a complaint concerning a 'Financial Firm'.

5. Section 58AC of the *Competition and Consumer Act 2010* (Cth) permits the Minister to, by legislative instrument, designate one or more businesses or services to be a regulated sector for the purposes of the SPF. To date, the Government has designated banking, telecommunications and digital platforms, and has indicated an intention to include other sectors into the future.

6. Where an entity is both a Financial Firm subject to the Financial Firm Rules and a Regulated Entity subject to the proposed Scam Rules, the applicable framework will depend on the nature of the complaint. While this approach is intended to delineate the two jurisdictions, further clarification may assist in ensuring that standards developed specifically for the SPF are not treated as applicable to a Financial Firm that is not also a Regulated Entity.

7. For example, concerns have been raised with respect to non-bank lenders that are presently Financial Firms for the purposes of AFCA's existing jurisdiction but are not Regulated Entities under the SPF. Under rule A.14.2 of the Financial Firm Rules, AFCA Decision Makers are required to determine complaints having regard to (amongst other considerations) applicable industry codes or guidance, and good industry practice. In the absence of further clarification, there is a concern that

standards developed specifically for banks or under the SPF could influence determinations concerning non-bank lenders, even though those lenders are neither subject to the relevant banking codes nor designated under the SPF.

8. It is therefore suggested that rule A.14.2, or the proposed Operational Guidelines, expressly clarify that standards developed specifically for the SPF do not, in themselves, constitute applicable industry guidance or good industry practice when determining complaints against Financial Firms that are not designated Regulated Entities, particularly where standards developed for larger entities may impose disproportionate expectations on smaller firms. This would preserve the intended distinction between the two jurisdictions while allowing AFCA to consider standards genuinely applicable to the entity and conduct in question, and would provide greater certainty for consumers, Regulated Entities and Financial Firms.

Refer-back arrangements for multi-party SPF complaints

9. The Law Council supports the discretion in the proposed Scam Rules to consider a complaint where relevant entities have completed adequate internal dispute resolution (**IDR**), and to refer a complaint back where an entity has not had a reasonable opportunity to investigate and respond. While the Consultation Paper addresses processes for referrals and the avoidance of duplicative IDR, several implementation matters remain uncertain.

10. To supplement the matters addressed in the Scam Rules and promote procedural clarity and consistency, the Law Council suggests that any Operational Guidelines that are developed should provide further detail on:

    - how AFCA will identify, at an early stage, all regulated entities materially connected to the alleged scam;
    - when AFCA will add a further entity and the IDR or referral period that will apply;
    - whether the addition of an entity will affect existing timeframes or procedural steps; and
    - how AFCA will determine whether an entity has already had an adequate opportunity to respond through IDR, such that a further referral would cause unnecessary delay or duplication.

11. We would welcome consultation on future Operational Guidelines as they relate to refer-back arrangements, with sufficient time for consideration before the 31 March 2027 commencement date.

Multi-party complaints

12. The Law Council generally supports the proposed approach to the multi-party character of SPF complaints. A determination concerning one institution, made without consideration of other materially connected entities, may result in inconsistent outcomes or an incomplete assessment of causation and liability. As discussed above in relation to refer-back arrangements, this underscores the importance of identifying all relevant entities at an early stage.

13. While the proposed Scam Rules provide a high-level framework for multi-party complaints, further guidance would assist parties to understand how the rules will operate in practice, including in relation to:

    - criteria and timing for joining firms or Regulated Entities connected to the scam;
    - the effect of settlements on other parties, including double recovery;
    - proportionate allocation of AFCA fees and expert costs;
    - procedural fairness for joined entities, including where entities from different regulated sectors are involved; and
    - the assessment of causation and allocation of liability among entities.

14. Feedback received by the Law Council suggests that the proposed Scam Rules, and in particular, rule 1.15, should precisely identify the source document for determining liability for scam losses. Section 58BZE of the Competition and Consumer Act expressly contemplates guidelines prescribed by the proposed Scam Rules for apportioning any liability arising from the complaint.

15. Instead of referring to liability and apportionment provisions of the proposed Scam Rules, rule 1.15 of the proposed Scam Rules requires consideration of a much wider range of matters replicating those set out in rule A14.2 of the Financial Firm Rules. This gives rise to considerable doubt about whether the liability and apportionment guidelines of the SPF would be respected. While rule A14.2 of the Financial Firm Rules may be appropriate for resolution of a bilateral service complaint made by a consumer to their own Financial Firm, it is not appropriate for the apportionment of scam losses which are perpetrated by a third party and which usually involve allocating responsibility among the consumer and potentially multiple Regulated Entities depending upon their own behaviours and contribution to losses.

Mandatory exclusions

16. We note that rules 1.4.8(a) and 2.1.1 of the proposed Scam Rules require AFCA to exclude an SPF complaint, or an aspect of it, where a mandatory exclusion applies (broadly, in circumstances where the complaint has already been dealt with by AFCA or a court or tribunal, or exceeds AFCA's monetary jurisdiction). Further guidance may assist parties to understand how AFCA will apply those exclusions where a complaint involves multiple issues or causes of loss, only some of which fall within an exclusion. In particular, the Law Council suggests that the Operational Guidelines clarify whether AFCA will consider each cause or issue separately, and how an exclusion will affect its consideration of the remaining parts of the complaint.

17. A transparent and consistently applied approach would promote regulatory certainty and procedural fairness by enabling parties to understand whether an exclusion affects the complaint as a whole or only the relevant cause or issue.

Definition of Paid Representative

18. Section 4 of the proposed Scam Rules defines a Paid Representative as:

> *a person (and their officers, employees and agents) who may receive financial remuneration for acting for a Complainant or joined party in relation to their*

complaint lodged with AFCA, but does not include a lawyer with a current practising certificate, a registered law practice or an Accountant.

19. This approach mirrors the definition of Paid Representative in the Financial Firm Rules and is supported by the Law Council. In doing so, we recognise AFCA's role as an accessible and informal forum in which parties may participate without representation. Where legal assistance is sought, lawyers can support effective participation by helping clients understand the issues, make informed decisions, narrow the matters in dispute and document any settlement.

20. We note that the consultation paper (at question 18) asks whether the definition of 'Paid Representative' should be expanded to include lawyers. The Law Council does not support the inclusion of lawyers in the definition. Lawyers are already subject to a comprehensive regulatory regime: practising certificate requirements, legal profession legislation, professional conduct rules, fiduciary and disclosure obligations, and independent disciplinary bodies with powers well beyond anything in the Scam Rules. Subjecting legal representatives to AFCA imposed conditions, restrictions and exclusions would duplicate and cut across that regime.

21. Further, SPF complaints will be complex, involving multiple parties, a new and untested statutory framework, and apportionment questions of real technicality. Many victims, particularly those with large losses, cognitive impairment or limited English, will genuinely need legal help to put their case. Measures that make lawyers more reluctant to act in scam matters will simply leave vulnerable consumers to face multiple institutional parties alone. The existing exclusion of lawyers from the definition should be retained.

Expert advice costs

22. Rule 1.9.9 of the proposed Scam Rules states that unless special circumstances apply, AFCA will not require a Regulated Entity to contribute more than $10,000 per complaint to the cost of expert advice obtained by AFCA.

23. The reference to 'special circumstances' will be important, as the proposed $10,000 cap may not be suitable for every SPF complaint. In particular, multi-party complaints may require complex technical, cyber, forensic or industry expertise for which that amount is insufficient. At the same time, clear safeguards are appropriate to limit open-ended or duplicative expert costs for Regulated Entities.

24. The proposed Operational Guidelines should clarify the circumstances in which AFCA may require a contribution exceeding $10,000, including the relevance of the complexity of the complaint, the necessity and proportionality of the expert advice, and the involvement of multiple parties. This would support transparent and consistent use of the existing special circumstances exception.

25. Additional comments provided by the Financial Services Committee of the Law Council's Business Law Section (**Financial Services Committee**) state that the cap should also be proportionate to the loss being investigated, noting that the $10,000 limit may be disproportionate for small losses. The Financial Services Committee submits that the limit should be the lesser of $10,000 or 50 percent of the direct financial loss claimed by the Complainant for the relevant scam activity.

Fraud and cybercrime carve outs

26. The statutory definition of a scam carves out fraud and cybercrime. Many vulnerable consumers will not be able to know in advance whether what happened to them will be characterised as a scam, a fraud, or a hack, and the characterisation may only become clear well into an investigation. If the complaint cannot be considered under the proposed Scam Rules, it cannot be considered at all and must be excluded. A consumer harmed through a digital platform whose matter is ultimately characterised as cybercrime will have no forum to pursue that platform anywhere. The Law Council suggests that AFCA determine characterisation issues as early as possible, give clear plain language guidance on the boundary, and establish referral protocols so consumers are not simply turned away.

Default listings on credit information files

27. Proposed rule 1.7.1(c)(iv) stipulates that, while AFCA is considering a SPF Complaint, the Regulated Entity may not list a default on a Complainant's credit file. The Financial Services Committee notes that this incorrectly assumes that default listing is a choice for a Regulated Entity, when in fact, it may be an obligation, including under the *Principles of Reciprocity & Data Exchange* rules which support Australia's consumer credit reporting system. An appropriate qualification is required for this.

Defamation

28. Rule 1.7.4 stipulates that a Regulated Entity must not instigate defamation action of any kind in relation to allegations about the Regulated Entity made to AFCA by the Complainant or anyone else joined as a party to the SPF Complaint. Given that Regulated Entities would invariably be large commercial corporations, the Financial Services Committee has submitted that this restriction should be directed at the tort of injurious falsehood rather than defamation.

Use of generative artificial intelligence

29. The Law Council supports the development of AFCA guidance on the use of generative artificial intelligence (**GenAI**). There is a real risk that material prepared by unrepresented parties with limited familiarity with responsible GenAI use may be lengthy, repetitive, irrelevant or inaccurate. Any guidance would benefit from preserving accessibility and adopting a proportionate approach that supports responsible use without discouraging unrepresented complainants from engaging with AFCA.

30. In our view, the guidance could usefully address:

    - complainant responsibility for the accuracy, relevance and completeness of submitted material;
    - protection of personal and confidential information, having regard to the tool's information-handling arrangements;
    - review of GenAI-generated material before submission;

- targeted disclosure of GenAI use where reliability, authenticity or procedural fairness requires it; and
- proportionate measures to manage excessive length, duplication and inappropriate use of GenAI.

31. The Federal Court's *Use of Generative Artificial Intelligence Practice Note* may provide a useful reference point.[1] Adapted to AFCA's EDR setting, a similar principles-based approach would support reliable and responsible GenAI use without imposing disproportionate procedural requirements on parties.

Privacy and data protection

32. The scheme envisages an exchange of large volumes of data, some of which will be confidential personal information, including sensitive information as defined under the *Privacy Act 1988* (Cth). It will be important to ensure that the data architecture reflects this level of potential risk to individuals by requiring participants to implement appropriate data protection controls. Consideration should be given to introduction of governance and accountability measures such as a privacy impact assessment or similar review to address data protection risks.

Additional views of the Australian Consumer Law Committee

33. As noted from the outset of this submission, there are areas within the proposed Scam Rules where differences of views exist between Law Council Section Committees. The following points are made by the Australian Consumer Law Committee (**Consumer Committee**) of the Law Council's Legal Practice Section, and do not reflect a consensus view of the Law Council. As such, these perspectives should be attributed to the Consumer Committee.

Monetary limits and compensation caps

34. The Consumer Committee strongly supports the proposal to lift the compensation cap for direct financial loss to match the monetary limit of $1,263,000. The gap between what AFCA can consider and what it can award has long been a source of confusion and under-compensation, and the Ramsay Review said as much.[2] Removing it for SPF complaints is a genuine improvement for consumers.

35. The Consumer Committee is, however, concerned about how the monetary limit is proposed to operate. Under the Financial Firm Rules, jurisdiction is assessed by reference to the amount claimed against each individual firm including when those amounts are aggregated. Under the proposed Scam Rules, jurisdiction is assessed against the Complainant's total direct financial loss attributable to the scam, no matter how many Regulated Entities are involved. Example 15 illustrates the result: a consumer who loses $2,300,000 across seven banks is wholly outside the scheme, and AFCA says it will not allow the consumer to abandon part of the claim to come within the jurisdiction of the SPF.

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1 (GPN-AI),16 April 2026, online, <https://www.fedcourt.gov.au/law-and-practice/practice-documents/practice-notes/gpn-ai>.

2 The Treasury, *Review into External Dispute Resolution and Complaints Framework* (Final Report, April 2017).

36. The Consumer Committee notes that in many instances where a consumer has suffered substantial losses, the fact of their losses may mean that pursuing their rights through the courts may not be feasible due to the costs and risks associated with litigation. It would, in the view of the Consumer Committee, be regrettable for consumers who have suffered the largest losses in scams to be excluded from the jurisdiction of AFCA. That is, it is the view of the Consumer Committee that a consumer ought to be able to limit their claim at the maximum monetary limit ($1,263,000). The Consumer Committee is not aware of any compelling reason to exclude such complaints.

37. If a Regulated Entity has caused a person to suffer losses of $2,000,000 and a consumer is prepared to limit their claim at AFCA to $1,263,000, such an outcome would enable a consumer to receive meaningful compensation, but they would need to provide a substantial concession in any potential award simply to access the scheme.

38. Further, if a consumer has lost $1,300,000 in losses due to a scam and conduct of a Regulated Entity, they will be excluded altogether from holding a Regulated Entity to account for those losses. The outcome is that the consumer suffers those losses with potentially no redress other than multi-party litigation before the courts. For many, that will mean no redress at all. It is submitted by the Consumer Committee that access to justice is a critical aspect of the AFCA scheme and the SPF would be meaningfully improved if AFCA was available to assist in the resolution of such complaints.

39. The practical effect is that the people who have suffered the most catastrophic losses, very often older Australians who have lost their retirement savings to sophisticated investment scams, are the only scam victims with no access to free dispute resolution at all. Their alternative is court proceedings against multiple well-resourced defendants, under a new statutory scheme with an untested liability apportionment framework, at a cost that may be prohibitive for someone who has just lost everything. The Consumer Committee regards court proceedings as an unrealistic alternative for this cohort.

40. The Consumer Committee recommends that a Complainant be permitted to elect to cap their claim at the monetary limit and forego the excess. That approach respects the jurisdictional ceiling while keeping the scheme's doors open to the victims who need it most. If the concern is that partial claims complicate apportionment between entities, that is a matter that can be managed through the proposed Scam Rules and Operational Guidelines rather than by excluding the consumer altogether.

Indirect and non-financial loss

41. The Consumer Committee regards the cap for indirect and non-financial loss of $6,300 per Regulated Entity to be too low in the scam context. Scam victims routinely suffer consequential losses well beyond that figure: borrowing costs while funds are unrecovered, break fees, forced sales of assets, and lost returns on stolen savings. The Consumer Committee recommends that the cap be increased and, at a minimum, kept under review once claims data emerges.

42. The doubling of the non-financial loss cap to $12,600 is welcomed by the Consumer Committee. But the qualifying wording, imported from the Financial Firm Rules, requires an 'unusual degree' of inconvenience or interference with peace of mind. In scam matters, severe distress is not unusual. It is the norm, and the consultation paper acknowledges the serious emotional and psychological harm scams cause. Requiring a consumer to meet an “unusual degree” threshold to recover non-financial loss risks decision makers treating ordinary scam trauma as non-compensable precisely because it is so common.

43. The Consumer Committee is of the view that where a consumer has suffered inconvenience or interference with their state of mind either because of poor conduct of a Regulated Entity, or because a Regulated Entity has been found to be responsible for a scam having occurred, they should be able to be awarded non-financial loss, and there should be no requirement of an “unusual degree” of inconvenience or interference with peace of mind.

Time limits

44. The two-year time limit runs from the date of an IDR response. The Consumer Committee notes that in a multi-party scam complaint, there may be three or four IDR responses issued weeks or months apart, producing different deadlines against different entities within the same scam. A consumer may be in time against their bank but out of time against the platform, without ever realising it. The position is made harder by the fact that the 'IDR Response' trigger itself is not yet settled in the SPF Codes and Scam Rules.

45. The Consumer Committee recommends a single, clear rule: where multiple regulated entities are or could be parties to a complaint about the same scam, time should run from the latest IDR response. The Consumer Committee also recommends that the Operational Guidelines confirm that the special circumstances discretion will be applied generously in scam matters, recognising that trauma, embarrassment and the drawn-out process of even discovering the full extent of a scam commonly delay the making of complaints.

Excluding complaints against entities that were never parties

46. It is noted that AFCA will have a power to exclude a complaint that has been adequately dealt with. Example 7 in the consultation paper shows that circumstances can arise where a consumer may be excluded from pursuing a complaint through AFCA against a party who may have never been a party to the original complaint. The example given provides a circumstance where a consumer had already recovered some losses from an earlier complaint against different entities. However, it is possible that a consumer may lodge a complaint against an entity and be unsuccessful against that entity but discover in the course of that complaint that a different entity is responsible for the losses.

47. Alternatively, the Financial Services Committee notes that a consumer might lodge a complaint against several Regulated Entities and be awarded an amount of compensation that is less than AFCA’s maximum monetary limit and less than the amount of loss suffered. A subsequent claim by the same consumer in relation to the same complaint but against a different Regulated Entity could provide additional

compensation and address any compensation deficiencies suffered by the consumer due to the fact that the additional party was never part of the original complaint, noting that the aggregate amount of compensation awarded could not exceed AFCA's maximum monetary limit.

48. It appears from the example given that AFCA would retain a discretion to exclude such a complaint if the subject matter has previously been dealt with even though the entity complained about was not a party to the original complaint and/or the original compensation awarded may not cover the entirety of the loss suffered, up to the maximum monetary limit.

49. Example 7 contemplates AFCA excluding a complaint against a Regulated Entity that was not a party to the earlier complaint, on the basis that the subject matter has been adequately dealt with. This sits awkwardly with the consultation paper's own acknowledgment that complainants face inherent information asymmetry and may have limited visibility of the entities involved, particularly at the point of time of lodgement of a complaint.

50. It is submitted by the Consumer Committee that it ought to be made clear that a consumer will not be excluded from lodging a complaint against a Regulated Entity that has not previously been the subject of a complaint.

Reliance on information not shared with a party

51. The Consumer Committee notes that the proposed Scam Rules allow AFCA, in special circumstances, to make a finding adverse to a party based on information that could not be shared with them. For a consumer, an adverse finding built on material they have never seen and cannot answer raises procedural fairness concerns, particularly where the material is withheld on a commercial sensitivity claim made by the very entity resisting the complaint.

52. The Consumer Committee notes that special circumstances should be genuinely exceptional, and unshared material should never be determinative of the outcome against a consumer.

Releases

53. The Consumer Committee welcomes the explicit reference in the proposed Scam Rules that where a consumer is successful in a determination before AFCA, any release provided by the Regulated Entity cannot include a non-disclosure clause.[3] This is, in the Consumer Committee's view, an important requirement for two reasons. Firstly, where a Regulated Entity makes offers to resolve a complaint prior to determination, the Regulated Entity will retain a right to include a non-disclosure clause. That provides an early resolution incentive to a Regulated Entity consistent with AFCA's goal to resolve complaints efficiently, effectively, and in a timely manner. Secondly, where a consumer has succeeded in a complaint, it is important that the Regulated Entity and the consumer have finality while at the same time, the consumer remains entitled to disclose the facts of their successfully determined dispute without restriction.

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[3] Proposed rule 1.16.3.

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- the Law Society Northern Territory;
- the Bar Association of Queensland;
- the Queensland Law Society;
- the South Australian Bar Association;
- the Law Society of South Australia;
- the Tasmanian Bar;
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