

26 January 2024

Tony McDonald
Assistant Secretary
Market Conduct and Digital Division
Treasury
Langton Cres
Parkes ACT 2600
Via email: scampolicy@treasury.gov.au

Dear Mr McDonald

RE: Scams – Mandatory Industry Codes Consultation Paper

The Financial Services Council (**FSC**) welcomes the opportunity to consult on the Scams – Mandatory Industry Codes Consultation Paper.

Although the FSC does not represent any of the industries currently proposed to be captured by the industry codes (**the Code**), it does represent forward looking industries, such as superannuation funds.

The FSC is supportive of the proposed measures that will set a minimum standard for scam mitigation and disruption. This provides certainty and confidence to consumers while ensuring that all members of the scam prevention ecosystem take adequate responsibility for protecting their customers from harm.

The approach outlined in the Consultation Paper is appropriate however, the FSC wishes to bring to the Government's attention a few items, particularly the need for greater whole of government coordination and cohesion in relation to the overarching strategic approach to scams and fraud, but also cybersecurity. This would ensure that these initiatives can deliver regulatory efficiencies and cost savings while also ensuring that actions are consistent in mitigating these threats.

Further, the FSC believes there are several areas where further clarity is warranted, for example the definition of scams as proposed in the paper and what kind of guidance industry can expect in relation to compliance with the Codes.

About the Financial Services Council

The FSC is a peak body which sets mandatory Standards and develops policy for more than 100 member companies in one of Australia's largest industry sectors, financial services. Our Full Members represent Australia's retail and wholesale funds management businesses, superannuation funds, and financial advice licensees.

The financial services industry is responsible for investing more than \$3 trillion on behalf of over 15.6 million Australians. The pool of funds under management is larger than Australia's GDP and the capitalisation of the Australian Securities Exchange and is one of the largest pools of managed funds in the world.

Summary of Recommendations

1. Government considers creating a whole-of-government scams, fraud, and cybersecurity strategy that clearly outlines goals for protecting Australians from the harms caused by economic and cyber-crime.
2. Government ensures any approaches to scam and fraud mitigation is consistent across other Government work including AML/CTF, privacy, cybersecurity, and wider prudential regulation.
3. Government agrees to publishing indicative implementation timelines and complete significant further consultation before expanding the Framework beyond the three sectors currently identified.
4. The FSC recommends a definition that is specific to scams, as distinct from fraud, and does not leave any question as to the distinction between the two different terms.
5. Government provide further clarity about the definition of scams as it extends to instances of fraud that were not predicated on a scam.
6. Where appropriate, sectors should be defined by any prevailing legislation to ensure consistency. Where there is no such definition, the FSC is supportive of a definition being placed in the Industry Code to create flexibility, but with the expectation that there will be appropriate stakeholder consultation on changes to the definition (and other relevant matters) and that this commitment will be embedded in the Code.
7. Government provide non-binding guidance for industry in relation to how it sees compliance with the Code, including examples, to help maintain consistency but still emphasising the importance of flexibility to accommodate different business models and resourcing requirements.
8. Government provide a one-stop shop solution for all reporting requirements, including those not contemplated by the Codes, to ease the reporting burden for industry and create more efficient communication channels.
9. Government provide certainty for industry in relation to information sharing boundaries under the Privacy Act and AUSTRAC's tipping off framework. This could be through the creation of Government endorsed forums or information sharing guidelines.
10. The FSC is not supportive of the creation of new IDR and EDR frameworks that are specific to scams. Scams should be incorporated into the existing IDR and EDR framework following extensive consultation with industry.
11. There should be a "no-wrong doors" approach to EDR so that complaints started in one EDR framework and handled seamlessly and concurrently with another EDR framework, without intervention by the consumer.
12. The FSC is supportive of establishing compensation caps for EDR and having a strong set of rules that outline when compensation should be paid, and by who. Compensation should be appropriately apportioned across the scams ecosystem based on failures of the respective codes.
13. The FSC is supportive of a sector-specific approach that adequately reflects the differences between the different types of sectors. That said, the approaches should be largely the same and work from the same set of principles where appropriate, only differing where necessary.

Key Features of the Proposed Scams Code Framework

Question 1: Does the Framework appropriately address the harm of scams, considering the initial designated sectors and the proposed obligations later in this paper?

The FSC and its members are supportive of the approach outlined in the Consultation Paper. A strong regulatory framework will provide clarity and certainty to both consumers and organisations as to the expected behaviours in relation to scam mitigation.

The Framework, however, does not appear to consider the likely impacts of current work happening across government in relation to not just scams, but also other forms of cyber and economic crime, including cybersecurity.

Industry would benefit significantly from a coordinated cross-government scams, fraud, and cybersecurity strategy. This would bring together significant pieces of work such as these proposed codes, the work of the National Anti-Scams Centre (**NASC**), and the National Cyber Security Strategy as well as more targeted pieces of work such as the implementation of the Digital ID Framework, proposed revisions and enhancements to Anti-Money Laundering and Counter Terrorism Financing (**AML/CTF**) and privacy legislation, and individual regulator actions. This would provide much needed certainty and a clear set of goals.

There is some concern that some of the work happening across government is incongruent and may lead to conflicting expectations placed on organisations, thereby increasing the regulatory burden. For example, there is a strong push for organisations to collect less sensitive data to protect against cyber-attacks, but that sensitive data is exactly what may be needed for intelligence purposes that is used to combat scams and fraud.

A consistent and coordinated strategy would benefit both Government, regulators, industry, and consumers to understand the clear vision to protect Australians from the harms of economic and cybercrime.

Recommendation 1

Government considers creating a whole-of-government scams, fraud, and cybersecurity strategy that clearly outlines goals for protecting Australians from the harms caused by economic and cyber-crime.

Acknowledging that the creation of a new strategy that brings together all of the Government's work under an aligned set of goals may not be a feasible task, the FSC submits that the Government seek to ensure that all work going forward is duly aligned with existing frameworks. This will ensure that there is consistency of approach, and that industry is not asked to implement measures that are at odds.

Recommendation 2

Government ensures any approaches to scam and fraud mitigation is consistent across other Government work including AML/CTF, privacy, cybersecurity, and wider prudential regulation.

Question 6: What future sectors should be designated and brought under the Framework?

The FSC and its members are supportive of potentially expanding the Framework to superannuation funds in the future. FSC Members take their responsibilities as custodians of Australia's retirement savings very seriously and a consistent approach across industry will help to uplift scam prevention for the whole industry.

The FSC believes there is some benefit in a consistent approach to other financial services sectors, such as Authorised Deposit Taking Institutions (**ADIs**) however, there are also significant differences between an ADI and a superannuation fund. It is important that any code for the superannuation sector accurately reflects the reality of the operating environment of this sector, including balancing the impact scam mitigation might have in delaying an individual's access to their retirement savings.

The FSC wants to ensure that any consideration for future expansion of the Framework will include significant consultation with affected industry and an undertaking to ensure that an equally principles-based approach is applied to further sectors.

We also recommend that if the Government is committed to extending the Code obligation to other industry cohorts such as superannuation, it includes undertakings to publish indicative implementation timelines. This would not only provide regulatory certainty but will enable the affected sectors to conduct forward planning and preparation.

Recommendation 3

Government agrees to publishing indicative implementation timelines and complete significant further consultation before expanding the Framework beyond the three sectors currently identified.

Definitions

Question 8: Is maintaining alignment between the definition of 'scam' and 'fraud' appropriate, and are there any unintended consequences of this approach that the Government should consider?

The FSC notes that there is a functional difference between the term scam and the term fraud. Superannuation funds are affected by both scams and fraud and the approach to mitigating these risks, whilst having some overlap, is different. Further, it is acknowledged that scam activity may, in fact, be a precursor to fraud activity where, for example, a person has had their identity stolen in a phishing attack and these details are then used to fraudulently access superannuation accounts.

The definitional division of the two is confusing, and it may be the case that aligning the definition of scams, to an already legislated definition of fraud, may lead to more confusion for consumers – all scams are a type of fraud but not all fraud is a scam.

For example, the paper proposes a strict definition that aligns, predominantly, with the prevailing definition of scams, but does not necessarily capture fraud. Specifically, the definition contemplates a dishonest act designed to obtain personal information but does not necessarily clearly contemplate that that personal information gleaned may then be used for a financial benefit.

This may leave a gap where a person has their money fraudulently accessed because their details were stolen in a phishing attack.

Clarity is sought about whether there is an expectation that the proposed Codes will capture

fraud committed as a result of a scam.

Recommendation 4

The FSC recommends a definition that is specific to scams, as distinct from fraud, and does not leave any question as to the distinction between the two different terms.

Further, if the definition is to be taken to include fraud committed as a result of a scam, the FSC seeks clarity in relation to how these circumstances would be treated differently to a fraud committed by, for example, a family member.

In some instances of fraud seen in superannuation funds, funds are accessed fraudulently, not by a scammer who has obtained the details through a scam but by a family member who may have ready access to the relevant information. Examples of this include what is commonly known as elder abuse, but has also been witnessed in parent carers of children with disabilities. In these cases, FSC members have implemented strong mitigation and disruption measures to minimise the impact of these incidents, however, clarity is sought as to whether both instances would be captured by the definition of scam under the Codes or if there is a delineation.

The FSC submits that if there were to be a delineation, this might be confusing for both industry and consumers. But that it equally might not be a good outcome to expand the definition of scams to include clear fraud offences.

Recommendation 5

Government provide further clarity about the definition of scams as it extends to instances of fraud that were not predicated on a scam.

Question 13: Should the definitions of sectors captured by the Framework be set out in the primary law or in the industry-specific codes?

Where possible, definitions of sectors captured should align to any existing frameworks to provide certainty to industry and consumers.

For example, the definition of ADI should be aligned with the existing legislative definition as defined in the *Banking Act 1959 (Cth)* and used by industry regulator APRA. This can then be referred to in either the primary law and/or the industry specific codes.

Any significant changes to the definition of those sectors will be captured by the appropriate legislative change and passed on to the relevant industry code through this process.

The FSC is supportive of placing the definition of a sector that is not currently defined by legislation into the industry code in order to ensure that it is flexible enough to be amended when new players enter the market that may not be captured by the existing definition. That said, there should be an undertaking from Government that any changes to the Code, either the definition of the sector or otherwise, would be subject to appropriate stakeholder consultation with the impacted industry and other key stakeholders.

Recommendation 6

Where appropriate, sectors should be defined by any prevailing legislation to ensure consistency. Where there is no such definition, the FSC is supportive of a definition being placed in the Industry Code to create flexibility, but with the expectation that there will be

appropriate stakeholder consultation on changes to the definition (and other relevant matters) and that this commitment will be embedded in the Code.

Principles Based Obligations

Question 16: Are the obligations set at the right level and are there areas that would benefit from greater specificity e.g., required timeframes for taking a specific action or length of time for scam related record-keeping.

The FSC is confident that the obligations are set at the right level, allowing flexibility for industry to implement the Codes in a way that works best for them and their customers. That said, clarity is sought in relation to what guidance Government intends to provide to industry in relation to the implementation of the Codes.

While the FSC is not supportive of prescription in relation to what, for example, an 'Anti-Scam Code' might look like, non-binding examples of minimum expectations will ensure not only that industry are meeting these expectations but also that there is a consistent approach across industry cohorts.

While these non-binding examples may guide enforcement, participants who deviate from the examples but who can adequately explain why should still be found to be compliant with the Codes. This provides a level of certainty whilst still maintaining the flexibility for businesses of different sizes and compositions to comply with the Code in a way that works for their business models.

Furthermore, stakeholders expect that Government, with the assistance of the supporting agencies, will include provision for an appropriate transition period to enable industry participants to effectively implement and operationalise the systems and controls required to support their obligations under the Code. This should also be complemented by a coordinated education campaign that not only assists industry but also benefits consumers.

Recommendation 7

Government provide non-binding guidance for industry in relation to how it sees compliance with the Code, including examples, to help maintain consistency but still emphasising the importance of flexibility to accommodate different business models and resourcing requirements.

Question 18: Are there opportunities to minimise the burden of any reporting obligations on businesses, such as by ensuring the same information can be shared once with multiple entities?

The FSC is supportive of any approach that minimises the red tape associated with the reporting of scams and scam related activities. This includes any reporting beyond the matters contained in the codes (such as reporting requirements to regulators under prudential standards) to allow industry to meet all of their reporting requirements in relation to scams in an efficient way.

A one-stop shop approach to reporting will streamline reporting requirements between industry and Government and will ultimately improve cross-government communication as well.

Recommendation 8

Government provide a one-stop shop solution for all reporting requirements, including those not contemplated by the Codes, to ease the reporting burden for industry and create more efficient communication channels.

Information Sharing Requirements

Question 26: What resources would be required for establishing and maintaining additional information sharing arrangements with other businesses, the NASC and sector-specific regulators under the Framework?

Although there are currently systems, such as the Australian Financial Crimes Exchange (AFCX), that provide an interface between participant banks to allow them to share scam data more easily, this is not currently available for superannuation funds. Depending on the technical specifications of any such build, there may be significant resourcing costs for FSC members in implementing information sharing arrangements.

Question 27: What safeguards and/or limitations (regulatory, technical, logistical or administrative) should the Government consider regarding the sharing of information between businesses, the NASC or sector-specific regulators?

One of the current barriers to information sharing is uncertainty from industry about what is able to be shared without breaching privacy and AML/CTF legislation. Equally, regulators such as AUSTRAC have proven reluctant to provide certainty to industry on this by endorsing forums designed to facilitate information sharing. This is particularly relevant because organisations regulated under the AML/CTF Act are required to submit suspicious matter reports as they relate to scams and fraud because they constitute a predicate offence to money laundering and terrorism financing. This reporting obligation, however, triggers the section 123 tipping off requirements, which impedes information sharing. This can sometimes cause industry to be shy about proactively establishing new forums and sharing information in appropriate forums.

Government could provide certainty in this way for industry by either creating appropriate forums and/or providing clarity on appropriate information sharing practices to allow industry to create their own forums. The FSC acknowledges that this has been successfully implemented in other areas and for other industries, but superannuation does not have a specific forum, nor is much of the industry currently included in existing forums.

Equally, providing an exception for inadvertent minor contraventions of privacy and/or AML/CTF tipping off provisions through industry information sharing initiatives or forums, in appropriate circumstances, may also provide a level of comfort for industry and encourage more information sharing in the interests of scam mitigation and increased protection for consumers.

Recommendation 9

Government provide certainty for industry in relation to information sharing boundaries under the Privacy Act and AUSTRAC's tipping off framework. This could be through the creation of Government endorsed forums or information sharing guidelines.

Consumer Reports, Complaints Handling, and Dispute Resolution

Question 30: What are the limitations or gaps that need to be considered in leveraging existing IDR requirements and EDR schemes for the purposes of this Framework?

Where possible, Government should leverage the existing internal dispute resolution (IDR) and external dispute resolution (EDR) frameworks. For ADIs (and superannuation funds) these requirements are overseen by ASIC and the Australian Financial Complaints Authority (AFCA) respectively.

Creating additional IDR and EDR measures that are separate to the existing arrangements will not lead to good consumer outcomes and will create more resourcing burden for funds who will have to comply with multiple functions.

The FSC submits that both frameworks are currently able to manage complaints relating to scams but that any potential gaps be mitigated by appropriate, well consulted, changes to the existing frameworks.

Recommendation 10

The FSC is not supportive of the creation of new IDR and EDR frameworks that are specific to scams. Scams should be incorporated into the existing IDR and EDR framework following extensive consultation with industry.

Question 31b: If the remit for existing EDR schemes is expanded for complaints in relation to this Framework how should the different EDR schemes operate to ensure consumers are not referred back and forth?

The FSC suggests that there be a “no-wrong doors” approach to EDR in that complaints started in one EDR framework, such as the Telecommunications Ombudsman be seamlessly handled concurrently, and without intervention by the consumer, or by another relevant EDR process such as AFCA. This may require a MoU to be signed between the EDR Frameworks that outlines their approach and a commitment to a clear and consistent approach to scam complaints to enable information sharing and collaboration.

This will also ensure that the various participants in the scam ecosystem take responsibility for their individual roles in mitigating scams and fraud. That is, should a person bring a complaint to AFCA, any issues that arise that would have been the responsibility of a telecommunications provider, for example, should be seamlessly referred on to the Telecommunications Ombudsman for consideration. This will ensure that any repatriations are appropriately apportioned across the ecosystem.

The FSC is not supportive of establishing a completely new EDR framework specifically to deal with scams citing the resourcing costs to both participants and Government, especially when the appropriate structures are already functioning effectively and efficiently.

Recommendation 11

There should be a “no-wrong doors” approach to EDR so that complaints started in one EDR framework and handled seamlessly and concurrently with another EDR framework, without intervention by the consumer.

Question 32: Should the Government consider establishing compensation caps for EDR mechanisms across different sectors regulated by the Framework? Should these be equal across all sectors and how should they be set?

The FSC is supportive of establishing compensation caps for EDR and having a strong set of rules that outline when compensation should be paid, and by who. As noted above, compensation should be appropriately apportioned across the scams ecosystem based on failures of the respective codes.

Recommendation 12

The FSC is supportive of establishing compensation caps for EDR and having a strong set of rules that outline when compensation should be paid, and by who. Compensation should be appropriately apportioned across the scams ecosystem based on failures of the respective codes.

Sector Specific Codes

Question 34: Are sector-specific obligations, in addition to the overarching obligations in the CCA, appropriate to address the rising issue of scams?

The FSC is supportive of a sector-specific approach that adequately reflects the differences between the different types of sectors. That said, the approaches should be largely the same and work from the same set of principles where appropriate, only differing where necessary. This will also enable organisations that sit across various sectors, such as banking, loans, and superannuation to have a whole-of-business approach, without unduly increasing overhead.

This consistency will provide confidence to consumers that all aspects of the scams ecosystem are working together and will not unduly apportion any one actor in the ecosystem with a greater burden of prevention than others.

Recommendation 13

The FSC is supportive of a sector-specific approach that adequately reflects the differences between the different types of sectors. That said, the approaches should be largely the same and work from the same set of principles where appropriate, only differing where necessary.

If you have any questions about this submission, please do not hesitate to contact me.

Yours sincerely,

Kirsten Samuels
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