



4 October 2024

Scams Taskforce
Market Conduct and Digital Division
The Treasury
Langton Cres
Parkes ACT 2600

Via email: scampolicy@treasury.gov.au

Dear Treasury,

Treasury Laws Amendment Bill 2024: Scams Prevention Framework

The Australian Financial Markets Association (**AFMA**) is the leading industry association promoting efficiency, integrity and professionalism in Australia's financial markets, including the capital, credit, derivatives, foreign exchange, energy, carbon, and other specialist markets. Our membership base is comprised of over 125 of Australia's leading financial market participants, including Australian and foreign banks, securities companies, state government treasury corporations, fund managers, energy firms, as well as other specialised markets and industry service providers.

AFMA welcomes the opportunity to make a submission to the Exposure Draft and draft Explanatory Memorandum to give effect to the Scams Prevention Framework.

Executive Summary

AFMA notes the following by way of executive summary:

- The Bill and Explanatory Memorandum should explicitly reference that the ADIs that should be subject to the Mandatory Code are only those that are authorised by APRA to provide services to retail customers;
- The factors that the Minister must consider in designating a sector should also be mandatory in determining classes of entities that should be excluded, particularly regulatory and compliance costs;
- Non-retail banking services should be confirmed in the Bill/Explanatory Memorandum as not being regulated services;
- In relation to businesses, the definition of SPF Consumer should be aligned to the AFCA definition, that is, be tested on a group-wide basis;

- In relation to the definition of “scam”, it should be made clear in the Bill/Explanatory Memorandum that recourse cannot be taken against entities where there is no customer relationship with the consumer;
- The legislation should confirm that the obligations of regulated entities in relation to their regulated services are limited to the course of carrying on their regulated businesses in Australia.

Restatement of AFMA Position

In AFMA’s Submission to the Treasury Discussion Paper on Scams Mandatory Industry Codes, AFMA stated its overarching policy position as being that the authorised deposit-taking institutions (**ADIs**) that should be subject to the Mandatory Code are only those that are authorised by APRA to provide banking services to retail customers. Therefore, AFMA’s policy position remains that foreign banks operating via Australian branches (defined as ‘foreign ADIs’ in the *Banking Act 1959 (C’t)* (**Banking Act**)) should be excluded because their Australian Prudential Regulatory Authority (**APRA**) ADI authorisations only authorise them to conducting banking business to “wholesale clients”.¹ This remains the AFMA position. This policy position is predicated on the basis that scam mitigation initiatives are focused on protection of consumers and, accordingly, in relation to banking services only those institutions that are authorised by APRA to provide services to retail clients should be within scope for such measures.

The Exposure Draft does not include this limitation with respect to banks, although AFMA acknowledges that refining the scope of the services in the proposed designation instrument may be the more appropriate method to exclude non-retail banks from the SPF provisions. However, we have made comments below in relation to the Exposure Draft and draft Explanatory Memorandum that are reflective of the AFMA policy position and may inform the Minister as to the intention of Parliament when making the designation instruments.

In reiterating our policy position, AFMA highlights the significant, disproportionate and unnecessary compliance costs that would be borne by foreign branch ADIs if they were brought within scope. In particular, the preparations that retail banks have already undertaken to implement scam mitigation measures means the relative uplift required to comply with the SPF provisions is reduced as compared with costs that will need to be incurred for banks with wholesale-only APRA authorisations. It is also not clear what the nature of the risks of scams and the resulting harm is for non-retail clients of banking services as, to date, the regulatory focus by the Australian Securities and Investments Commission has been primarily in relation to retail banking services.

We note that the draft Explanatory Memorandum states (at paragraph 1.17) that “all banks committed to implement a range of measures to improve scam protections and consumer outcomes through the industry-led *Scam Safe Accord*.” This statement is not accurate; the banks that made this commitment were the banks that provide services to retail customers and this commitment was made through their representative associations, namely the ABA and COBA. At no point has AFMA sought to be involved in the ABA and COBA initiatives, and those associations did not seek to include us given the shared view that scams relate to retail banking operations and not wholesale entities. Accordingly, AFMA, which represents the wholesale sector, while acknowledging the harm that scams cause on Australian consumers, did not need to be part of the development of the Scam Safe Accord.

¹ This submission uses the expressions “retail client” and “wholesale client” consistently with APRA’s use of those expressions in its [Guidelines - Overseas Banks Operating in Australia](#) (August 2021) in discussing the authorisations of foreign ADIs to conduct banking business.

To the extent that the SPF provisions are applied beyond the provision of banking services to retail customers (which, as stated, is not AFMA’s policy position) then consideration should first be given to how the SPF provisions should be substantially scaled back, owing to the *de minimis* risks of banking services to non-retail clients, and it would also be necessary to allow for additional time for implementation relative to retail banks.

Designation of a Regulated Sector

In designating a regulated sector, the draft Explanatory Memorandum makes it clear that the Minister may designate services by class and then may exclude certain classes of businesses or entities from the designation. AFMA agrees with this approach and specifically notes the example in Paragraph 1.41 of the draft Explanatory Memorandum regarding the potential exclusion of providers of purchase payment facilities on the basis that the “SPF code obligations may not be appropriately targeted at this type of business because this service does not operate like a traditional banking business.” AFMA believes that this rationale would apply equally to wholesale banking and would strongly welcome the inclusion of a similar example in relation to foreign branch ADIs (leveraging an existing definition under the Banking Act similar to the example for purchased payment facilities) in the Explanatory Memorandum on the basis that wholesale banking businesses do not operate like a traditional banking business, so that paragraph 1.41 reads:

“For example, the Treasury Minister may designate the banking sector, leveraging the definition of authorised deposit-taking institution under section 5 of the Banking Act 1959 to define the sector for the purpose of designation. The Minister may exclude from that designation providers of purchased payment facilities and/or foreign branch ADIs as defined under the Banking Act 1959; the SPF code obligations may not be appropriately targeted at this type of businesses because these services do not operate like a traditional banking business”.

AFMA also is of the view that the factors that the Minister must take into account in determining whether to designate a sector should also be required to be taken into account in determining whether a particular class of business or sub-sector is excluded from the designation. In particular, the legislation should specify that the Minister must take into account the implementation and ongoing compliance/regulatory costs and the regulatory impact of designation in determining whether to exclude a class of business or sub-sector from the designation. Contrary to the provisions in the Exposure Draft, our view is that failure to take into account such matters should invalidate the designation instrument.

Designation of a Regulated Service

Similarly, it is noted that the Exposure Draft and draft Explanatory Memorandum provide not only for the determination of regulated entities but also regulated services. The example at paragraph 1.53 of the Explanatory Memorandum states that, in relation to banks, it will only be the banking business of the entity that would be a regulated service. Our view is that this example could contemplate that if the Minister does not designate non-retail banking services it will only be the retail banking services that would be the regulated services, which would also ensure that non-retail services provided by diversified institutions or foreign ADIs that are precluded by their ADI authorisations from accepting deposits from retail clients are not also inadvertently brought into scope.

Meaning of SPF Consumer

AFMA notes that the SPF Framework only applies to “SPF Consumers,” which serves to reinforce the appropriateness of AFMA’s policy position, i.e. that wholesale/institutional activities should not be within scope. We note that the definition of “SPF Consumer” includes natural persons who are in Australia, ordinarily resident in Australia, an Australian citizen or a permanent resident. Apart from the comments on extra-territoriality below, AFMA has no comment on the extension of the definition of SPF Consumer to natural persons.

The definition of “SPF Consumer” in Section 58AH(12) also extends to businesses with 100 employees or less and a principal place of business in Australia, which we understand is designed to align with the definition of small business for AFCA purposes. However, it does not appear that this definition is on a group-wide basis, meaning that under the Exposure Draft, the determination of whether a business is “small” is determined on an entity-by-entity basis.

AFMA strongly is of the view that the definition of SPF Consumer, as it relates to small businesses, be on a group-wide basis. That is, there should be alignment with the AFCA definition of “small business” under the AFCA Rules which excludes complainants where the complainant is a member of a group of related bodies corporate and that group has 100 employees or more.

Alignment of the definition of SPF Consumer to the AFCA definition will ensure that the obligations under the SPF framework only apply in respect of those clients that are currently able to bring complaints against members of AFCA, which is appropriate given the proposal to have AFCA as the External Dispute Resolution scheme in respect of regulated banks.

Meaning of Scam

AFMA is concerned that the definition of scam, particularly in the context of an impersonation scam, may include circumstances where the individual does not have a direct customer relationship with the regulated entity. While AFMA’s position remains that institutions that only provide services to wholesale clients will not be regulated entities, the Bill/Explanatory Memorandum should make it clearer that in circumstances where there is a scam and the consumer does not have a relationship with the entity being impersonated, then the consumer should not have recourse against the entity being impersonated.

Limit of Extraterritoriality

AFMA notes that the effect of proposed Section 58AJ is to extend the operation of the Scams Protection Framework to conduct outside Australia. This is particularly concerning from the perspective of a foreign-ADI or locally incorporated ADI which may operate branches in multiple jurisdictions but within the same legal entity. Accordingly, there appears to be a risk that the SPF requirements could technically extend, for example, to the overseas operations of an entity that is providing services to a person who is an SPF Consumer, such as an Australian citizen living abroad. To the extent that the overseas jurisdiction already has scam mitigation measures in place, then the potentially extraterritorial application of the Australian measures would give rise to substantial regulatory duplication.

AFMA notes that proposed extraterritorial scope in the Exposure Draft would also not align with the approach taken in other regulatory regimes such as the Financial Accountability Regime under the *Financial Accountability Regime Act 2023* (C’t) that only imposes obligations on foreign accountable entities like foreign ADIs and insurers to the extent that they operate branches in Australia, and the

Australian financial service licensing regime under the *Corporations Act 2001* (C'th) that applies only to the carrying on of financial services business in Australia.

Accordingly, in determining the scope of the operation of the SPF provisions, AFMA submits that the scope of a regulated entity should extend only to its Australian operations and not those offshore. This could be done through ensuring that the SPF provisions apply only to regulated entities in the course of carrying on their regulated businesses in Australia.

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Thank you for the opportunity to provide a submission to the Exposure Draft and AFMA would welcome the opportunity to engage further.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Rob Colquhoun', written in a cursive style.

Rob Colquhoun