

9 January 2025

Dr Sean Turner
Committee Secretary
Senate Standing Committee on Economics

Via email: economics.sen@aph.gov.au

Dear Committee Secretary

Inquiry into the Scams Prevention Framework Bill 2024

COBA thanks the Committee for the opportunity to provide input into its inquiry into the Scams Prevention Framework Bill 2024 (SPF Bill).

COBA is the industry association for Australia's customer owned banks (mutual banks and credit unions). Collectively, our sector has over \$179 billion in assets and is the fifth largest holder of household deposits. Our members range in size from less than \$200 million in assets to around \$25 billion in assets – all significantly smaller than their ASX-listed peers. Customer-owned banks account for around two thirds of the total number of domestic Authorised Deposit-taking Institutions (ADIs) and deliver competition and market leading levels of customer satisfaction in the retail banking market.

Key points

COBA supports the Government's intention to create a consistent ecosystem Scams Prevention Framework (SPF) to combat scams.

COBA broadly supports the SPF Bill and believes that, with amendments, it should be passed by the Parliament.

COBA believes greater clarity should be added to key aspects of the SPF Bill before it is passed by the Parliament, particularly on the definition of "SPF consumer", the interaction between the SPF Principles and Code, the ability to issue guidelines on apportionment of liability to the external dispute resolution (EDR) provider, and the proportionality of penalties.

Overall comment on the SPF Bill

COBA acknowledges the significant impact of financial crime on Australian consumers and that is why we support the Government's decision to adopt an ecosystem approach to scam detection, prevention and disruption. This approach is critical to ensuring that all parties are incentivised to take proactive action and gives the best chance of disruption across the scam lifecycle.

As part of this holistic approach, banks recognise their key role as evidenced by the strong actions committed to under the historic industry-led [Scam-Safe Accord](#). The Accord committed banks to taking

Suite 403, Level 4, 151 Castlereagh Street,
Sydney NSW 2000

Suite 4C, 16 National Circuit,
Barton ACT 2600

Customerownedbanking.asn.au

concrete actions to prevent scams, including the development of a confirmation of payee system, increased warnings and protections for customers, and improved sharing and usage of scams intelligence through the Australian Financial Crimes Exchange. However, too many Australians are still being targeted and manipulated by scammers indicating that more still needs to be done across the scam lifecycle.

Customer-owned banks are committed to proactively combatting scams and are already:

- acting to protect their customers by providing secure banking services;
- advising and warning customers against making payments to scammers when suspected scam transactions are identified; and
- attempting to retrieve funds in a timely manner for their customers where possible.

In a typical scam a customer will be contacted by a scammer through a phone call, text message, website or advertisement on social media or other platforms before the customer initiates a payment with their bank. Unfortunately, as our members are at the end of the scam lifecycle, bank staff do not have access to the full picture and operate with limited or no information about the customer's communication with a scammer. Even where a red flag is present staff may not have enough information to make an assessment as to the legitimacy of the payment.

These conversations can also cause significant friction and prove very challenging for staff, as many customers become angry or upset when their payment instructions are questioned. This is why an ecosystem approach must be adopted in order to detect and prevent scams reaching customers in the first place.

COBA supports, with amendment, the passage of the SPF Bill. The Bill creates a consistent ecosystem approach with obligations being imposed on entities that can play a role in disrupting scams at key stages throughout its lifecycle. While the scheme is only currently limited in its initial application to banks, telecommunications providers, and digital platforms it contains the flexibility to be expanded to other sectors, such as digital marketplaces and cryptocurrency exchanges.

Issues needing amendment in the Bill

While COBA supports the passage of the SPF Bill, we believe that it could be further improved and made more effective through targeted amendments. This would improve the operation of the Bill by removing ambiguities and bringing more proportionality to its application.

Definition of "SPF consumer"

While COBA understands the desire to include small businesses within the protection of the SPF Bill, we do not believe that the current definition of "small business operator" contained within the "SPF consumer" definition is appropriate. The approach in this Bill creates yet another definition of "small business" within Commonwealth law that is inconsistent with pre-existing definitions under other laws. This adds to the overall complexity of the law generally as our members will be required to apply different definitions of small business in differing circumstances.

COBA is concerned as the "small business operator" definition creates a test where the business must have both fewer than 100 employees and an annual turnover of less than \$10 million. We do not believe that a business that employs 99 people should be considered a small business with limited resources and as such, we believe it is inappropriate to include such operations within the definition of "SPF consumer".

Additionally, it is unclear how our members are to know or validate that a scammed "small business operator" meets the employee and turnover tests in the SPF Bill. Our members do not routinely collect this kind of information from their business customers, and it is not clear how they would go about verifying the employee numbers or turnover in borderline cases. It is likely that some form of validation

would need to be created by the Commonwealth, via the ATO or other agencies, to easily allow our members to confirm whether a business meets the employee and turnover tests.

COBA suggests for simplicity and consistency that the definition should be aligned with the definition under section 23 of the *Fair Work Act 2009* which provides that a small business employs fewer than 15 people and does not include a turnover component. While we recognise our members would still have similar verification challenges, as noted above, we believe that this definition more closely aligns with the policy intent to protect those businesses that:

- may lack the resources to have a comprehensive scams protection approach;
- are at greater risk of a single point of failure; and
- where a scam loss could be more debilitating to the business's survival.

Interaction between the Act and Codes

It is unclear to COBA exactly how the SPF Principles contained in the SPF Bill and the future Codes will interact. We are particularly concerned about situations where our members acting in good faith have met all their requirements under the Code could still be found to have breached the Principles and be subject to significant penalties.

COBA recommends that a provision be added to the Bill providing that if an entity, acting in good faith, has complied with the obligations under the Code, then there should be a presumption that is compliant with the SPF Principles. Further the provision should also provide, for the avoidance of doubt, that if an entity has breached a Code provision that this does not automatically mean that an obligation under the SPF Principles has also been breached. This is because the intention of the Codes is to guide regulated entities on what is expected as a minimum under the SPF Principles. Where entities have in good faith sought to comply with the SPF and the Code it is unreasonable that they could be found to have breached the SPF Principles despite having met the Code obligations.

COBA believes that this provision should clarify that:

- meeting Code obligations creates a presumption that the entity meets its SPF Principle obligations; and
- breaching Code obligations does not always mean that an entity breaches its SPF Principle obligations.

This provision will ensure an entity can focus on meeting its obligations in an efficient manner that focuses on protecting customers from scams rather than on technical compliance in order to avoid regulator and court action.

Guidelines on apportionment of liability for external dispute resolution provider

COBA believes that the Bill should allow the SPF Rules the ability to prescribe guidelines on how the EDR provider is to apportion liability of complaints in a similar manner as the Rules can provide guidance on apportionment in internal dispute resolution (IDR). The Bill at section 58BZE(1)(b)(ii) currently provides that regulated entities, in managing their IDR processes, must have regard to any guidelines prescribed in the SPF Rules for the apportioning of any liability arising from the complaint. The Explanatory Memorandum provides that these guidelines for IDR are intended to assist regulated entities in dealing with complaints that involve multiple parts of the ecosystem that may have not met obligations under the SPF.¹

In contrast, the Bill only currently allows for the Rules to prescribe requirements for the EDR provider on operational matters like the organisational requirement for membership, and how the scheme is to

¹ Scams Prevention Framework Bill 2024 Explanatory Memorandum, at [1.266]-[1.267].

operate. COBA believes it would be appropriate for the Bill to contain a similar provision to section 58BZE(1)(b)(ii) that empowers the SPF Rules to create guidelines on the apportionment of liability that are to be considered by the EDR provider. The ability to issue similar guidance to the EDR provider will assist it in how it approaches the apportionment of liability by allowing the Government to give direction on how it believes that liability should fall across the ecosystem, including how it should be apportioned between regulated entities/sectors and consumers, and the interaction with other relevant regimes such as the ePayments Code administered by ASIC.

To be effective, an ecosystem approach should clearly outline the responsibilities of all parties, including regulated entities and consumers. This includes the relationship between the responsibilities of regulated entities under the Bill and the apportionment of liability, and the responsibilities of consumers. For example, in circumstances where an institution detects a red flag and repeatedly warns a consumer not to make a transaction but the customer insists on proceeding.

A clear set of guidelines outlining the role of apportionment across the ecosystem, including the treatment and role of consumers, will set clear expectations and assist both regulated entities and the EDR provider in dealing fairly with complaints under both IDR and EDR, and provide greater clarity to consumers in relation to how complaints will be treated.

Excessive penalties

COBA is concerned with the very significant penalties capable of being awarded against our members of between \$10 million and \$50 million per offence. While we note courts will have discretion in relation to awarding penalties, we consider the total amount capable of being awarded per offence is manifestly excessive for smaller regulated entities.

We appreciate that the policy intent was likely to ensure that large multinational corporations would have a strong incentive to comply with the regime. However, this could have the unintended consequence that smaller entities, such as customer owned banks, bear disproportionately higher penalties. For context, the largest customer owned bank in Australia is 3% the size of the Commonwealth Bank. We note such significant penalties may result in unintended consequences such as increasing the level of capital smaller banks are required to hold.

We note that section 58BB requires a decision-maker to consider the size of a regulated entity when considering whether a regulated entity has taken reasonable steps to comply with SPF Principles and consider proportionality should also be imported into the penalty regime. Such proportionality could include a list of discretionary factors that the court must consider when awarding penalties, such as the size of the entity by turnover and its capacity to pay the penalty.

Other issues and concerns with the Bill

COBA has been engaged with the Government throughout the policy development process and we have expressed our concerns with several design aspects of the SPF and the SPF Bill beyond those raised above. A non-exhaustive list of these matters include:

- The multi-regulator approach.
- The significant and complex reporting burden.
- The lack of clarity in how SPF obligations are to be applied.
- The interaction between the IDR and EDR schemes.

However, COBA understands that many of these issues should be resolved through the creation of the SPF Rules and the Codes. COBA looks forward to engaging with the Government further on these issues during the development of the Rules and Codes if the Parliament passes the SPF Bill.

We thank the Committee for taking our views into account. Please do not hesitate to contact Alysia Smith, Government Relations Manager (asmith@coba.asn.au) if you have any questions about our submission.

Yours sincerely

A handwritten signature in blue ink, appearing to read 'Michael Lawrence', with a stylized flourish at the end.

MICHAEL LAWRENCE
Chief Executive Officer