

Inquiry into Scams Prevention Framework Bill 2024 [Provisions]

Public Hearing on 28 January 2025

31 January 2025

Communications Alliance: Luke Coleman (CEO), Christiane Gillespie-Jones (Deputy CEO)

Question on Notice:

Senator Dean Smith: Just on this point because I think it's an important one just on the point you were labouring over with Pocock. On notice can you provide to the committee why it is that the consumer redress mechanism that's in division 6 is not a simple, faster and effective form of redress?

Communications Alliance response:

Division 6, subdivision G and following sections set out the proposed rules for consumers to bring action (in a Court) for compensation of damages (and more) against regulated entities that, allegedly, failed to comply with either the rules of sector-specific codes and/or the overarching SPF framework.

Regulators can bring such action on behalf of a consumer (with the consumer's consent).

Claims can be made against multiple regulated entities in multiple sectors. Each entity is only to bear the proportion of the claim that reflects the respective entity's contribution to the loss, as deemed just by the Court, and taking into account any potential negligence by the consumer.

The defendant (a regulated entity) is required to provide details of other regulated entities if it believes that another entity's conducts has contributed to the loss. Otherwise, the defendant may be liable to reimbursement of costs of discovery in the proceedings.

The apportioning of the claim is, therefore, left to the Courts. This is inefficient for the following reasons:

- A private right to action (and/or class actions) will be reserved for those consumers who can afford to bring such action. A class action is often commercially motivated by law firms specialising in such action.
- Lawsuits are likely to take a substantial amount of time, often years.
- Courts are ill-equipped to deal with the actions brought before them. They require substantial technical and sector-specific legal expertise. Where action is brought against multiple entities and apportioning of damages is required, such expertise is required for each sector involved. A good understanding of interdependencies between the sectors will be required to apportion comparative responsibility.

Division 4, section 58DC provides for an EDR scheme (envisaged to be AFCA) to be empowered to "make determinations imposing financial and non-financial remedies" on regulated entities. The SPF does not provide further detail as to how the EDR scheme would apportion such remedies where two or more entities may be involved in a contravention of either the respective sector code and/or the overarching SPF rules.

It appears that in this scenario, each respective sector-regulator and the general regulator are to provide their input with respect to potential contraventions and comparative responsibility.

This is, in our view, impractical and unlikely to lead to satisfactory consumer redress.

Consequently, we propose the following:

- Delegate all detail to sector-specific codes.

- The sector codes are to reflect the current state of technology, capability and responsibility of the respective sector.
- Compliance with the sector codes establishes compliance with the SPF. Compliant entities are not liable to civil penalties or compensation/redress.
- Remove the private right to action (and class action) or, at least, introduce a threshold of negligence before such action can be brought.
- Financial gain turns an attempted scam into an actual scam (and incentivises future scams). Consequently, financial institutions are to compensate consumers where they have not complied with their sector code.
- If financial institutions have complied with their sector code, compensation is to be paid by the non-compliant entities of other sectors.
- The telecommunications sector stands ready to develop a transparent and easy-to-navigate mechanism for apportioning liability for compensation where multiple (non-banking) entities are involved in non-compliant conduct.
- The telecommunications sector also stands ready to work with Government and other sectors on information sharing arrangements for the purpose of enhanced internal dispute resolution arrangements, across sectors.

This proposed approach ('waterfall') is closely aligned with the approach taken by other jurisdictions (i.e. Singapore (waterfall), UK (banks bear all liability)).

The delegation of liability to a single layer of regulation (sector codes) creates the required clarity and transparency while also reducing the number of regulators involved.

The waterfall approach creates a logical default position and reduces the need for further apportioning of liability, thereby minimising complexity for consumers.