

Treasury Consultation – Scams – Mandatory Industry Codes

Submission by Legal Aid Queensland

29 January 2024

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Introduction

Legal Aid Queensland (LAQ) welcomes the opportunity to make a submission to Treasury's Consultation on proposed mandatory industry codes as they relate to scams. LAQ provides input into State and Commonwealth policy development and law reform processes to advance its organisational objectives. Under the *Legal Aid Queensland Act 1997*, LAQ is established for the purpose of "giving legal assistance to financially disadvantaged persons in the most effective, efficient and economical way" and is required to give this "legal assistance at a reasonable cost to the community and on an equitable basis throughout the State". Consistent with these statutory objects, LAQ contributes to government policy processes about proposals that will impact on the cost-effectiveness of LAQ's services, either directly or consequentially through impacts on the efficient functioning of the justice system.

LAQ always seeks to offer policy input that is constructive and is based on the extensive experience of LAQ's lawyers in the day-to-day application of the law in courts and tribunals. LAQ believes that this experience provides LAQ with valuable knowledge and insights into the operation of the justice system that can contribute to government policy development. LAQ also endeavours to offer policy options that may enable government to pursue policy objectives in the most effective and efficient way.

LAQ's Consumer Protection Unit and Farm and Rural lawyers have extensive experience providing specialist advice and representation to vulnerable clients in consumer law matters. The unit provides advice to clients as well as lawyers and financial counsellors throughout Queensland in relation to mortgage stress, housing repossession, debt, contracts, loans, telecommunications, and unsolicited consumer agreements.

Answers to posed questions.

Questions on the proposed Framework

Q1. Does the Framework appropriately address the harm of scams, considering the initial designated sectors and the proposed obligations outlined?

LAQ supports the proposed Framework and the introduction of mandatory industry codes. In LAQ's view the initial designated sectors are appropriate.

Through LAQ's consumer advice service, lawyers regularly assist scam victims. As a result of this work, LAQ has seen significant gaps in the regulatory framework that leave consumers vulnerable, out of pocket financially and not adequately protected.

LAQ strongly supports sector-specific codes and standards being introduced about banking, telecommunications providers and digital communication platforms. LAQ has observed through its consumer protection advice service that there is also a pressing need for further regulation of digital currency exchange programs such as cryptocurrency to address scam activity in that sector.

Q2. Is the structure of the Framework workable – can it be implemented in an efficient manner? Are there other options for how a Framework could be structured that would provide a more efficient outcome?

LAQ supports the framework which includes sector-specific mandatory codes under the *Telecommunications Act 1997* (Cth), and under legislation administered by the Australian Securities and Investments Commission and the Australian Communications and Media Authority, as well as overarching "principle-based obligations" contained within the *Competition and Consumer Act 2010* (CCA). The Framework would be strengthened by the Australian Competition and Consumer Commission (ACCC) issuing guidance as to what the sector-specific codes ought to contain to ensure consistency across the sectors.

Q3. Are the legislative mechanisms and regulators under the Framework appropriate, or are other elements needed to ensure successful implementation?

LAQ submits that the legislative mechanisms and regulators under the Framework are appropriate.

Q4. Does the Framework provide appropriate mechanisms to enforce consistent obligations across sectors?

To achieve greater consistency in regulation across sectors in response to Scams, LAQ recommends a Memorandum of Understanding be introduced which sets out the responsibilities between regulators to coordinate enforcement and compliance.

The Framework should also promote collaboration and information sharing across sectors and regulators including in relation to External Dispute Resolution (EDR) schemes and consumer complaints. Please see LAQ's response to Question 31 of the Consultation Paper.

- Q5. *Is the Framework sufficiently capable of capturing other sectors where scams may take place or move to in the future?***
- Q6. *What future sectors should be designated and brought under the Framework?***
- Q7. *What impacts should the Government consider in deciding a final structure of the Framework?***

The Consultation Paper proposes that under the Framework there will be scope for the relevant Minister to designate further sectors in the future. In addition, LAQ recommends that the Framework should include a forum convened by the Regulator for relevant stakeholders to raise systemic scam-related issues experienced by consumers that fall outside of the sectors already regulated by the Mandatory Codes.

In LAQ's submission, digital currency exchange programs such as cryptocurrency should also be regulated by a mandatory code.

Questions on definitions:

- Q8. *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?***
- Q9. *Does a 'dishonest invitation, request, notification, or offer' appropriately cover the types of conduct that scammers engage in?***
- Q10. *Does the proposed definition of a scam appropriately capture the scope of harms that should be regulated under the Framework?***
- Q11. *What impacts should be considered in legislating a definition of a scam for the purposes of this Framework?***

LAQ supports the proposed alignment between the definition of scam and fraud to cover both instances of unauthorised access to personal information without consent and the manipulation of victims into providing personal information for the benefit of the scammer.

The Framework deliberately excludes the harm caused by unauthorised transactions which is regulated separately by the ePayments Code. The two regimes may overlap such as when a consumer is induced by fraud to provide information that is used by a scammer to make an unauthorised transaction. It is important that any overlap between the Codes should be minimised to avoid duplication.

Q12. Will the proposed definitions for designated sectors result in any unintended consequences for businesses that could not, or should not, be required to meet the obligations set out within the Framework and sector-specific codes?

Q13. What impacts should the Government consider in deciding the definitions of digital communications platform or ADI?

Q14. Should the definitions of sectors captured by the Framework be set out in the primary law or in the industry-specific codes?

LAQ supports locating the definition of the regulated sector in the specific codes themselves as this may better ensure that the Framework remains agile and responsive to developments.

LAQ supports the Framework's intention is for it to apply to all digital communications platforms and to a body corporate that is an Authorised Deposit Taking Institution ("ADI"), pursuant to section 9 of the *Banking Act 1959*.

LAQ recommends that the introduction of the Framework may be facilitated in a wholistic sense by considering including digital currency exchanges and transaction-based digital platforms like online marketplaces in the initial rollout.

Questions on overarching principles-based obligations:

Q15. Are there additional overarching obligations the Government should consider for the Framework?

LAQ supports the proposed ecosystem-wide obligations to be included in the CCA with respect to prevention, detection and disruption, response and reporting obligations.

LAQ supports the inclusion of an obligation to develop, maintain and implement an anti-scam strategy. LAQ further supports the obligation for businesses to provide their consumers with information about minimising the risk of being scammed, however, a specific business' approach to scam prevention or anti-scam strategy ought not to be public information. Businesses should not disclose operational or technical information that may be useful to scammers.

Given the pace of change in the development of technology, scam methods and industry best practice, LAQ recommends that an obligation to consider and take reasonable steps to implement regulatory best practice guidance should be considered as part of the Framework.

Q16. 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?

LAQ agrees that the obligations are set at the right level, however, greater specificity of what is required by the obligations is needed. Specific timeframes should be included with respect to the response and reporting obligations for consumers, businesses, and regulators.

LAQ supports the requirement to have a complaints handling process that is effective and transparent. Transparency would require at a minimum that the business explain the reason

for its decision in relation to the complaint, including how its conduct has met or not met its obligations under the Principles, Mandatory Code, and any other relevant source of obligation.

Q17. Do the overarching obligations affect or interact with existing businesses objectives or mandates around efficient and safe provision of services to consumers?

Q18. 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?

Q19. What changes could businesses be expected to make to meet these obligations, and what would be the estimated regulatory cost associated with these changes?

LAQ supports a simple and clear process for the reporting of scam related information by businesses. LAQ does not perceive any negative consequences for a business to share the same information one time with other businesses, the National Anti-Scam Centre and relevant regulators, provided information is stored, collected and transmitted via a safe and secure manner/platform.

Questions on anti-scams strategy obligation

Q20. What additional resources would be required for establishing and maintaining an anti-scam strategy?

Q21. Are there any other processes or reporting requirements the Government should consider?

Q22. Are there parts of a business's anti-scam strategy that should be made public, for example, commitments to consumers that provides consumers an understanding of their rights?

Q23. How often should businesses be required to review their anti-scam strategies and should this be legislated?

LAQ supports business' publishing their commitments to consumers and advice on consumer rights in relation to scam issues. However, LAQ recommends that a specific business' approach to scam prevention or anti-scam strategy should not be public information. Businesses should not disclose functional or specialist information that may be helpful to scammers in avoiding being caught.

LAQ supports an obligation for regulated businesses to undertake annual reviews of their anti-scam strategy. This should occur at regular intervals that are appropriate to ensure that businesses keep pace with changes in technology, scam methods and industry best practice.

Q24. Are there any reasons why the anti-scams strategy should not be signed off by the highest level of governance within a business? If not, what level would be appropriate?

LAQ supports the proposal that anti-scams strategies should include a high-level sign off such as the board or similar level of governance.

Q25. What level of review and engagement should regulators undertake to support businesses in creating a compliant anti-scam strategy?

LAQ supports a business' anti-scam strategy being reviewed by the ACCC to ensure the strategies are fit-for-purpose.

LAQ has no comment to make in relation to questions 26 – 29 of the Consultation Paper.

Questions on consumer reports, complaints handling and dispute resolution

Q30. 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?

LAQ supports a simple and free redress pathway for consumers. LAQ recommends achieving this by the implementation of mandatory Internal Dispute Resolution (IDR) standards and ensuring access to a relevant ombudsman scheme, including for scam victims within the digital platforms sector, as suggested in the Government's Response to the ACCC's September 2022 DPSI Interim Report.

Q31. If the remit for existing EDR schemes is expanded for complaints in relation to this Framework:

a) What criteria should be considered in relation to apportioning responsibility across business in different sectors?

LAQ considers that from the perspective of vulnerable consumers, it is important that whatever criteria is adopted for the apportionment of responsibility across businesses in different sectors, the resolution of that issue does not delay or impede a scam victim from receiving a satisfactory and prompt resolution to their complaint. A consumer should not be denied a satisfactory remedy under the EDR scheme of one sector because the responding business considers that a business in another sector is also responsible.

b) How should the different EDR schemes operate to ensure consumers are not referred back and forth?

EDR schemes should identify when a complaint raises potential breaches of Framework obligations in another regulated sector, inform the consumer, and if the consumer elects, initiate a complaint with the other EDR scheme on the consumer's behalf. Provided the consumer gives their consent, information could be shared with the other EDR scheme to reduce inefficiency and streamline the process for the consumer.

c) What impacts would this have on your business or sector?

LAQ does not make any submission with respect to this question.

Q32. 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?

Q33. Does the Framework set out a clear pathway for compensation to consumers if obligations are breached by regulated business?

LAQ does not support establishing compensation caps for EDR mechanisms across different sectors regulated by the Framework. Consumers should be afforded the opportunity to be placed back in their original position, which will be assessed as to whether this is achievable on a case-by-case basis.

Questions on sector-specific codes

Questions 34 to 42 relate to the sector specific obligations outlined in the Consultation Paper and intended to be reflected in the Mandatory Codes for each sector. LAQ supports the possible obligations in relation to businesses in those sectors as outlined in the Consultation Paper. LAQ further notes its submission in relation to the adoption of specific timeframes for action to be taken by businesses in response to scams and complaints (Q2 and Q16) and for the adoption of an obligation across sectors to observe regulatory best practice guidance. LAQ considers that these principles could be reflected in sector appropriate standards in each of the sector-based codes.

Questions on approach to oversight, enforcement and non-compliance

Q43. How would multi-regulator oversight impact different industries within the scams ecosystem? Are there any risks or additional costs for businesses associated with having a multi-regulator oversight for enforcing the Framework?

Q44. Are there other factors the Government should consider to ensure a consistent enforcement approach?

Q45. Should the penalties for breaches of sector-specific codes, which sit in their respective sector legislation, be equal across all sectors?

LAQ supports the introduction of a compliance and enforcement approach by each regulator. LAQ notes the need for consistency in this regard and supports the expectation for each regulator to work closely together to enforce the Framework.

LAQ supports penalties for non-compliance as provided by the CCA, to be equal across all sectors. LAQ further supports additional penalties for breaches of sector-specific codes to also remain consistent and equal.

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