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To the Chief Scams Officer
Australian Financial Complaints Authority
By email: consultation@afca.org.au

RE: Proposed AFCA Scam Rules

The Internet Association of Australia Ltd (**IAA**) thanks the Australian Financial Complaints Authority (**AFCA**) for the opportunity to respond to the consultation on the AFCA's proposed scam rules to govern its external dispute resolution process under the Scam Prevention Framework (**SPF**) (**SPF EDR Rules**).

IAA is a member-based association representing Australia's Internet community. Our membership is largely comprised of small to medium sized Internet service providers (**ISPs**). Internet services is not currently a designated service under the SPF. However, many of our member ISPs also provide voice and messaging services, and are therefore subject to the SPF. IAA has thus been actively engaged in regulatory reform in relation to the SPF, on behalf of our members and the broader public good of the telecommunications sector.

From the outset, IAA emphasises our commitment to combatting scam and our support for fit-for-purpose regulatory frameworks that will help reduce scam activity in Australia. We also recognise the important role of telecommunications as a service that can be, and is misused to conduct scam activity, and therefore the role of the telecommunications industry to play its part in combatting scams. We are furthermore proud to be part of an industry that takes combatting scams seriously, with industry having developed and implemented co-regulatory instruments and practices to reduce scam calls and messages to protect Australian consumers.

IAA also recognises the importance of providing Australian consumers with appropriate avenues for redress where harm from scam activity has occurred. To that end, we also express our recognition of the important role that the AFCA will play as part of the ecosystem by ensuring consumers are able to bring complaints where service providers have failed to meet their obligations, and receive compensation, where appropriate.

IAA thus offers our response to the AFCA's consultation of the SPF EDR Rules to ensure it is effective and fit-for-purpose. Our submission is largely in representation of the smaller telecommunications providers within the industry. As will be further discussed below, we are overall concerned that several aspects of the proposed SPF EDR Rules do not account for the significant disparity in size and resourcing between Regulated Entities, not only across sectors, but even within the telecommunications industry. Costs that may be absorbed by large banks, digital platforms, and even other telecommunications providers are likely to impose disproportionate burden on smaller telecommunications providers who simply do not have comparable profit margins. We believe due consideration should be given to principles of

proportionality to ensure that the SPF EDR Scheme reflects its principles of fairness, efficiency, and effectiveness.

OUR RESPONSE

GENERAL FEEDBACK

Impact on small telecommunications providers

From the outset, IAA raises that several of the proposed SPF EDR Rules will have a disproportionate impact on small telecommunications providers, in comparison to large telecommunications and Regulated Entities of other sectors. This includes (but is not limited to) in relation to information-gathering obligations, contribution to expert costs, and compensation limits, given the limited profit margins of smaller telecommunications providers. Such disproportionate costs will be discussed further below.

IAA also submits that the dual external dispute resolution scheme between the AFCA and Telecommunications Industry Ombudsman (**TIO**) is likely to cause significant stress and confusion for smaller telecommunications providers, who lack the expertise and capacity to navigate complex regulatory frameworks. We anticipate that despite efforts, there may still be a number of telecommunications providers who are unaware of their obligations to join the AFCA as a separate EDR scheme to govern SPF complaints, as distinct from the TIO EDR scheme. We note that the confusion is likely exacerbated given the compressed implementation timeframe of the SPF, the SPF Codes yet to be finalised, and the AFCA's separate timeline requirements for membership.

However, we understand that failure to join the AFCA is intended to be treated as an example of a 'serious contravention' reportable under proposed rule 1.18.1. **Given the SPF framework, including the SPF EDR scheme is new and awareness may take some time to reach all providers -particularly smaller telecommunications providers – we recommend that for at least the first 12 months following the commencement of the SPF Codes:**

- **a failure to become an AFCA member is not automatically treated as a 'serious contravention' for reporting purposes under rule 1.18.1; and**
- **instead, the AFCA should take an awareness-raising and educative approach, proportionate to the size of the Regulated Entity.**

Additionally, we respectfully request the AFCA:

- **works with industry, the Australian Communications and Media Authority (ACMA), and the TIO to raise awareness of the SPF, including the SPF EDR scheme, particularly amongst smaller entities within the telecommunications industry; and**
- **publishes clear operational guidelines, and other joint guidance material in relation to the triage, referral and other operational processes in respect of the TIO and AFCA EDR schemes, for telecommunications providers.**

Cost model

We understand that the AFCA currently operates under a user-pays basis. We further understand that the AFCA intends to consult separately on the cost model for AFCA fees. However, we take this opportunity to flag a structural issue informed by the telecommunications sector's experience with the TIO's funding model, and how it affects the complaints handling process. The TIO is similarly structured on a user-pays basis, with a portion of funding coming from membership fees, and the other portion from case management fees. As an entity's fees increase with the increase in the number of, and the extent of the TIO's involvement in complaints handled by the TIO in respect of that entity, entities are often

commercially incentivised to settle a complaint directly with a complainant early on in the process, which often includes offering financial compensation, rather than risk incurring higher fees, *regardless of whether the entity was in breach of any obligations*. We anticipate this dynamic will be more pronounced for smaller telecommunications providers, given the greater impact of case management fees on entities with limited resources. A corollary to this is the perception that the TIO may be dependant on a high rate of complaint in order to meet its own funding needs.

While we understand the scope of this consultation is not to consider the AFCA's cost model, we raise this structural issue due to its implications on the SPF EDR Rules. For example, we consider this highly relevant in the context of (but not limited to) the refer back process, and proposed compensation caps, as will be discussed further below.

Potential drafting errors

Rule 1.4.1

We note that proposed rule 1.4.1 refers to a complaint being "...if excluded under rule **1.4.9**." (emphasis added). Rule 1.4.9 deals with AFCA giving written reasons for an exclusion decision, whereas the exclusion power is set out in rule 1.4.8. We assume this cross-reference in rule 1.4.1 should read "...if excluded under rule **1.4.8**." (emphasis added).

Rule 1.8.2(c)

Additionally, proposed rule 1.8.2(c) currently states "to determine one **of** more SPF Complaints on a common basis..." (emphasis added). We assume this should state "to determine one **or** more SPF Complaints..." (emphasis added).

SPF COMPLAINT LODGEMENT AND REFERRAL TO REGULATED ENTITIES

Refer-back to regulated entities

Q1. Is our proposed approach to refer-back appropriate for multi-party scam complaints?

IAA submits that the opportunity for a Regulated Entity to resolve a complaint through internal dispute resolution prior to AFCA commencing its own investigation should be made explicit in the SPF EDR Rules. As abovementioned, we understand that a Regulated Entity's fees will likely depend on the number of complaints managed by the AFCA. Reiterating the comparatively low profit margins for smaller telecommunications providers, the opportunity to resolve a complaint directly and minimise AFCA fees is critical. Furthermore, we consider this to be in the mutual benefit of all parties to ensure the timely and efficient management of complaints.

We appreciate that the AFCA's operations may already be to promote IDR where that hasn't already occurred. However, we consider that expressly setting this out in the rules is required to clearly set expectations. **IAA therefore recommends that proposed rule 1.5.2 be amended to explicitly set out that where a Regulated Entity has not been given a reasonable opportunity to resolve the SPF Complaint, the SPF Complaint will be referred to the Regulated Entity for IDR processes.**

EXCLUSIONS

Q4. What further guidance regarding this proposed approach to mandatory exclusions would be useful for the Operational Guidelines?

IAA seeks clarity on whether the mandatory exclusion set out in proposed rule 2.1.1(a) for a complaint "previously dealt with by AFCA" applies only where AFCA has issued a formal Determination, or whether it also extends to complaints resolved by agreement between the parties, without reaching investigation or determination, such as where the parties reach a settlement during the case management process but

prior to the AFCA issuing a decision. In particular, we request clarity on the applicable process where parties reach a negotiated resolution without an AFCA decision, and the complainant subsequently seeks to reopen the matter despite there being no failure of the Regulated Entity in complying with the settlement, nor any material changes to the original complaint. **IAA recommends that proposed rule 2.1.1(a) should apply to complaints considered by the AFCA, including where the complaint has been resolved between the parties, and not by an AFCA decision or determination, and there being no materially new information to justify a complaint being re-opened or reconsidered.**

We understand that it is the AFCA's intent to include the TIO's EDR Scheme as a 'court or dispute resolution tribunal established by legislation' for the purposes of proposed rule 2.1.1(b). **IAA recommends that the SPF EDR rules (whether within proposed rule 2.1.1(b) or via the defined terms) expressly states that the TIO falls within scope of this exclusion to avoid any ambiguity and minimise confusion between the parallel EDR schemes.**

MULTI-PARTY COMPLAINTS AND COMPLAINT RESOLUTION APPROACH

Q6. Does the proposed approach appropriately reflect the multi-party nature of SPF complaints?

IAA supports proposed rule 1.6 in principle. However, given the SPF Codes governing the nature of multi-party complaints and liability apportionment have not yet been finalised, we note that further consultation may be required in relation to rule 1.6 (and potentially other related rules) once the SPF Codes have been finalised.

Q7. What further guidance regarding this proposed approach would be useful for the Operational Guidelines?

IAA seeks clarity on the procedures in relation to a Regulated Entity who is joined to a complaint after its original commencement. We appreciate that example 13 provided in the Consultation Paper suggests that a joined entity's right to attempt to resolve an SPF Complaint via IDR will be preserved. However, it seems that whether a Regulated Entity will be afforded this procedural fairness may be subject to the AFCA's discretion, noting that the example states "As the digital platform had not gone through IDR, AFCA **may** provide the digital platform the full IDR referral period before commencing with any investigation against it" (emphasis added).

We strongly believe that any Regulated Entity who is subject to being joined to a SPF Complaint must be afforded all rights as a matter of procedural fairness, including right to deal with a complaint via its IDR processes. This is again, particularly important for small telecommunications providers who may be subject to higher AFCA fees if they are not afforded this right.

We therefore recommend that the SPF EDR Rules explicitly set out a joined entity's right to engage in IDR processes prior to the AFCA commencing with investigations under the EDR scheme.

COMPLAINTS RESOLUTION APPROACH

Q8. How should AFCA adapt its current complaint resolution and decision making approaches to handle similar SPF complaints under Rule 1.8.2c)?

IAA acknowledges that many scam events are systematic in nature, and in principle, support the AFCA's ability to resolve or determine multiple related complaints on a common basis, as set out in proposed rule 1.8.2(c). However, we also submit that individual Regulated Entities' conduct, and therefore liability, may differ materially, even within the same scam event. For example, what constitutes 'reasonable steps' in respect of an entity's obligations may differ having regard to the entity's size and service type.

IAA therefore recommend that the SPF EDR Rules, or the operational guidelines make clear that a common complaints resolution determination will only be made where it is reasonable to do so in

the circumstances. This may be subject to consultation with the relevant parties, and a range of factors to be considered, such as whether procedural fairness has been afforded, and whether each Regulated Entity has had a genuine opportunity to respond to allegations specific to its own conduct, whether the facts and degree of culpability of each Regulated Entity are sufficiently similar to justify a common approach, and whether a common determination would result in a fair, accurate and reasonable assessment of each Regulated Entity's compliance with its SPF obligations, having regard to its size, service type and risk profile.

HOW AFCA WILL GATHER AND SHARE INFORMATION FOR SPF COMPLAINTS

Information gathering

Q9. Does the proposed information gathering approach appropriately enable AFCA to obtain information necessary to resolve SPF complaints?

IAA supports the principles behind proposed rules 1.9.1-1.9.9 but we raise the disproportionate cost impact on small telecommunications providers.

In particular, proposed rule 1.9.5(b) which allows the AFCA to require a Regulated Entity to appoint an independent expert, and rule 1.9.9 which allows the AFCA to directly appoint an independent expert whose costs may be contributed to by a Regulated Entity subject to a complaint. These rules are likely to impose substantial unbudgeted costs on a smaller entity who lacks the profit margins of a major bank, digital platform or a large telecommunications provider to absorb such costs. **We request that this discretion of the AFCA to require a Regulated Entity to appoint an independent expert, or to directly seek expert advice be subject to clear safeguards so that the discretion is only exercised where it is reasonable to do so. This should have regard to the cost/benefit proportionality, and whether the Regulated Entity has been given an opportunity to make submissions as to why the appointment of an independent expert is unreasonable.**

We also submit that in respect of proposed rules 1.9.3 and 1.9.6(a), the timeframes for providing information must be aligned with the technical complexity, and potentially high volume of data involved in telecommunications related scams. Telecommunications providers should not be unfairly subject to an adverse inference where information gathering takes a longer time due to the nature of the service.

Q10. Is a \$10,000 cap appropriate for expert advice costs?

IAA does not consider the \$10,000 cap appropriate for expert advice costs. We understand that this cap has been doubled since the existing cap under the Financial Firm Rules. This is a significant increase, and a material cost for small telecommunications providers.

We appreciate that under the current Financial Firm Rules, this mechanism is rarely used and reserved for exceptional cases (such as in relation to significant data breaches). However we also understand that the AFCA anticipates that scam complaints may reasonably require more frequent recourse to expert evidence, potentially shared between participants.

We reiterate our point above that the AFCA should have regard to certain factors prior to exercising its discretion to seek external advice, including consultation with the Regulated Entity before appointing an expert. **As part of this consultation, the likely fees should also be advised to the Regulated Entity so that expectations of 'reasonable fees' are aligned between the AFCA and the entity.**

Opportunity to parties to provide their views

Q11. What guidance should be developed by AFCA to manage the use of GenAI by parties to a complaint?

IAA is significantly concerned about the increase in the use of generative artificial intelligence (**GenAI**) to bolster complaint claims in dispute resolution proceedings. We consider this is likely to be relevant in the

SPF EDR context going forward. Especially coupled with the proposed increase to compensation limits – as will be further discussed below – we are concerned about the implications for smaller telecommunications providers who will be disproportionately burdened by having to respond to unnecessarily long and inflated complaints given the resource constraints of these entities. **We urge the AFCA to maintain strict operational procedures regarding vexatious, excessively long or immaterial complaints that have been generated with the assistance of GenAI. This guidance should cover:**

- **reasonable limits on the length and number of submissions a party may provide;**
- **a requirement that parties confirm the accuracy of any GenAI-assisted content and disclose its use to support the AFCA’s ability to assess the reliability of information provided to it;**
- **a guarantee that the AFCA will immediately dismiss any complaint lodged that has no basis/is spurious; and**
- **clear consequences where a party’s use of GenAI results in submissions that are repetitive, irrelevant or otherwise amount to abuse of the SPF EDR scheme.**

We also consider it may be necessary to expand proposed rule 1.8.4 to set out where the use of GenAI to unreasonably inflate a complaint may be grounds to discontinue the consideration of a complaint.

PROPOSED MONETARY AND COMPENSATION LIMITS FOR SPF COMPLAINTS

Q12. Do the proposed compensation limits appropriately reflect the nature and impact of scam-related harm that should be considered by AFCA?

In general, IAA is concerned about the likely consequences for smaller telecommunications providers from the proposal to increase compensation caps. We reiterate points abovementioned regarding the structural issues inherent within user-pays models often found in EDR schemes. Regulated Entities are often incentivised to settle a complaint with customers without undergoing the EDR process, regardless of whether the Regulated Entity is actually at fault. As such, any increase in compensation caps is likely to also result in increased settlement claims as customers understand the compensation limits available to them. This can result in cases where a telecommunications entity is forced to unduly compensate complainants, regardless of whether they were in breach of their SPF obligations, simply because it is commercially preferable to do so than to incur AFCA’s case management fees, as discussed above. We consider this dynamic to be exacerbated by not only the increase of compensation caps, but the increased use of GenAI to inflate claims.

Thus in general, we do not support the proposal to increase compensation limits in relation to SPF complaints.

Direct financial loss compensation limit

IAA is seriously concerned about the implications of aligning the compensation cap with the monetary jurisdiction limit (effectively doubling the current \$631,500 compensation cap, to \$1,263,000). We appreciate the rationale of removing potential confusion caused by maintaining a different monetary jurisdiction and compensation limits, but consider simplicity alone should not justify such a significant increase in potential liability for Regulated Entities. We further understand that the AFCA’s data suggests only a small proportion of scam complaints currently seek compensation above the \$631,500 cap. However, we anticipate this may increase, given the increase in scam activity, and also as GenAI is increasingly used in preparing complaints and claims, which may tend to inflate claimed losses. Such a huge increase in compensation cap exposes smaller telecommunications providers to an unreasonably large liability risk.

IAA recommends that the direct financial loss compensation cap is maintained at \$631,500. We consider that as the SPF, including the SPF Codes and EDR process is implemented, and as the AFCA begins

case management, it will become clear whether an increase to the compensation cap is necessary, at which point a review of the compensation cap can be completed.

We also ask the AFCA to develop clear guidance on when compensation at the higher end of the range would be awarded. For example, we believe such high compensation should be strictly confined to cases involving serious or gross breaches of SPF obligations.

Non-financial loss

We reiterate our concerns about the disproportionate impact of significantly increasing compensation caps due to liability exposure that smaller providers are not sufficiently resourced to bear. Furthermore, given the inherent difficulty in quantifying non-financial loss, it is unclear whether the proposal to double the compensation cap to \$12,600 is proportionate. On balance, including the impact on industry, and particularly the implications for smaller providers, we submit that the proposed increase may be unreasonable, without further justification being provided.

As above, we recommend that the non-financial loss compensation cap is maintained at the current limit of \$6,300 for the time being, until complaints handling data proves the cap is insufficient.

At minimum, we request that the AFCA provide clear examples of when and how non-financial loss compensation will be awarded, and what would constitute a significant harm that would likely result in the AFCA awarding compensation for non-financial loss, especially where higher compensation amounts would be considered necessary.

Legal and other professional costs

Q13. Are the proposed limits for legal and other professional costs adequate?

It is unclear as to why legal, other professional or travel costs are treated separately to claim for indirect financial loss. We posit that including this claim type as part of indirect financial loss would more clearly signify the AFCA's expectations that paid professional representation should not be necessary in ordinary circumstances to pursue an SPF complaint, and would discourage complainants from incurring such costs unnecessarily, or in bad faith.

IAA recommends that legal, professional and travel costs are folded into the indirect financial loss compensation category.

We also request that at minimum, the SPF EDR Rules or operational guidelines clearly set out the circumstances in which professional costs will be considered reasonably reimbursable, given the potential for this category to be exploited. We consider the reasonable test should have two limbs:

- (1) that it was reasonable in the circumstances to seek paid professional help; and**
- (2) that the cost of that professional help was reasonable, including in comparison to market rates.**

Indexation of compensation limits

Notwithstanding our position stated above, in the event that the AFCA pursues the increase of compensation caps, and/or maintains a separate category for legal and other professional cost claims, given all relevant caps are already proposed to increase materially as part of this reform, we consider indexation from 1 January 2027 is unnecessary at this time.

Additionally, in respect of rounding, we submit that rounding to the nearest \$100 (rather than \$500) for direct financial loss, and to the nearest \$50 (rather than \$100) for rows 2–4, would be more proportionate and avoid disproportionately large rounding increments.

DECISION-MAKING APPROACH

Q16. What further guidance about AFCA's proposed approach to decision making would be useful?

In relation to proposed rule 1.15.3(e), we ask AFCA to provide examples of what would constitute "any other remedy the Decision Maker considers appropriate" for non-monetary resolution, to assist parties in understanding the likely scope of this provision.

SYSTEMIC ISSUES AND REPORTABLE MATTERS

Proposed rule 1.17.4

In principle, we support the intent behind proposed rule 1.17.4. However, we note that this rule confers broad powers on the AFCA to direct a Regulated Entity's actions, despite the AFCA not itself being a regulator. **IAA therefore recommends that this power be subject to additional safeguards, including:**

- **a requirement for the AFCA to consult with the regulated entity before requiring it take, or refrain from action; and**
- **express factors that the AFCA must have regard to before exercising this power (including, but not limited to proportionality, cost/benefit analysis, and the size and resources of the Regulated Entity).**

We consider these safeguards as necessary to ensure AFCA's systemic issues function is exercised in a manner that is proportionate, transparent, and consistent with AFCA's role as an independent dispute resolution body, rather than as a regulator with enforcement powers.

EXPECTATIONS OF PARTY BEHAVIOUR

AFCA's approach to paid representatives under the SPF

Q.18 Should the definition of 'Paid Representative' be expanded to include lawyers and accountants? Does this give rise to any unintended consequences?

At this stage, IAA does not have a position on unintended consequences that would arise from the expansion of 'Paid Representatives' to include lawyers and accountants. We consider the expansion reasonable. Furthermore, we seek clarity on whether 'Paid Representatives' is intended to fall within the scope of compensation for reimbursement of 'other professional' costs incurred by a complainant. **We reiterate our position that the SPF EDR Rules and/or operational guidelines should make clear that costs for engaging a professional to represent the complainant is not automatically compensable.**

CONCLUSION

Once again, IAA appreciates the opportunity to contribute to the proposed SPF EDR Rules. We reiterate our support for the policy intent underpinning the SPF, and the AFCA's efforts to establish a fair, accessible and effective SPF EDR scheme. To that end, we respectfully request the AFCA give due consideration to the disproportionate impact certain rules may have, as currently drafted, on smaller Regulated Entities – particularly smaller telecommunications providers. IAA looks forward to continue working with the AFCA in the development of the SPF EDR Rules, and the broader SPF EDR scheme overall.

ABOUT THE INTERNET ASSOCIATION OF AUSTRALIA

The Internet Association of Australia Ltd (**IAA**) is a not-for-profit member-based association representing the Internet community. Founded in 1995, as the Western Australian Internet Association (**WAIA**), the Association changed its name in early 2016 to better reflect our national membership and growth.

Our members comprise industry professionals, corporations, and affiliate organisations. IAA provides a range of services and resources for members and supports the development of the Internet industry both within Australia and internationally. Providing technical services as well as social and professional development events, IAA aims to provide services and resources that our members need.

IAA regularly engages with government and regulatory bodies on policy matters affecting the Internet industry. In particular, our advocacy efforts represent the small to medium sized internet service providers in Australia who are often disproportionately disadvantaged by law reform affecting the telecommunications sector. Our public policy work is guided by the following principles:

We stand for an internet for the common good

We stand for an open internet platform

We stand for measured, effective and practical regulation

IAA is also a licenced telecommunications carrier and provides the IX-Australia service to Corporate and Affiliate members on a not-for-profit basis. It is the longest running carrier neutral Internet Exchange in Australia. Spanning seven states and territories, IAA operates over 30 points of presence and operates the New Zealand Internet Exchange on behalf of NZIX Inc in New Zealand.