SCAMS PREVENTION FRAMEWORK SUBMISSION TO THE TREASURY

October 2024

PUBLIC

INTRODUCTION

1. ANZ thanks the Treasury for the opportunity to comment on the proposed scams prevention framework (**Framework**) set out in the draft Treasury Laws Amendment Bill 2024: Scams Prevention Framework (**Draft Bill**).

2. ANZ strongly supports the Government's work to protect Australians from the financial and emotional impact of scams. The Framework's approach of implementing a cross-sectoral approach to identifying, disrupting and responding to scams is the right thing to do to help Australians. We look forward to working with the Government on refining, implementing, and helping ensure the success of the Framework.

3. In this context of support, our submission focuses on areas where we perceive that the Draft Bill could be refined to better achieve our understanding of the Government's policy. We have made comments on both the policy effect of the Framework as set out in the Draft Bill and the drafting of the Draft Bill. Our key points on the policy are the following.

Consider making SPF codes the primary source of obligations

The Draft Bill requires separate compliance assessments for 'SPF codes' and 'SPF principles'. This creates uncertainty for regulated entities about whether their actions will be interpreted as adequate by external bodies. Defining conduct standards solely in the SPF codes would provide more certainty for SPF consumers and ensure consistent behaviour from regulated entities, while allowing for necessary adjustments over time.

Consider the breadth of the Framework

The Draft Bill operates broadly because of a range of definitions and mechanisms including how 'scam' is defined; the Framework's application to acts outside of Australia; the definition of SPF consumer effectively capturing all people in Australia for each regulated entity (including citizens and permanent residents outside of Australia); and regulated entities needing to consider potential harm to associates of SPF consumers. We think the Framework would operate more effectively if its scope across a range of concepts was more targeted at clearly identifiable instances of harm or potential harm that have a closer nexus to the regulated entity. We have made some suggestions below to recalibrate the operation of the Framework.

The definition of businesses that are SPF consumers should include a turnover limit as well

Section 58AH uses an employee test to determine which Australian businesses are SPF consumers. While any test must be objectively applicable, it should also be well tuned to ensure it targets businesses that align with the regime's goals. Section 58AH seems to include entities that might be quite advanced, such as funds management companies. It may be suitable to add another criterion so that only entities with a financial turnover below a certain threshold are SPF consumers. In making this suggestion, we note that regulated entities might still find it challenging to identify which businesses fall under the Framework, given that the definitional test would need to be applied continually.

Allow regulated entities to join other regulated entities in internal dispute resolution to give SPF consumers a simple way to make complaints

To make good on the Framework's policy premise of protecting SPF consumers from scams which unfold across regulated sectors, the Draft Bill should explicitly allow regulated entities to bring other regulated entities into consolidated internal dispute resolution processes. This would let SPF consumers attempt to resolve scam complaints involving multiple regulated entities by filing with just one. To make this work, there would need to be advanced rules ensuring easy access to internal dispute resolution for SPF consumers, supported by clear guidelines on compensation and loss sharing among the entities and consumers.

Make intelligence sharing more focused on truly actionable information

The Draft Bill includes several obligations to provide information to the SPF regulators. Because these are based on a broad definition of 'actionable scam intelligence' and apply to each 'scam', the SPF regulators will receive significant amounts of information. It is not clear how much of this will be 'actionable' or useful from a policy perspective. A similar point can be made with respect to the information provided to SPF consumers. The Framework could see SPF consumers receive too much information, risking their desensitisation to warnings. We would recommend a more calibrated information sharing regime that focuses on truly actionable information for both the SPF regulators and SPF consumers.

4. Terms used but not defined in this submission take their meaning from the Draft Bill. References to 'sections' are references to the sections that would be included in the *Competition and Consumer Act 2010* (Cth) if the Draft Bill were passed in the form consulted upon.

COMMENTS ON POLICY

SPF Principles and SPF Codes

5. The Framework consists of both primary obligations (SPF principles) in the Draft Bill (e.g. section 58BJ) and the potential for more detailed obligations to be imposed through the SPF codes. The SPF principles operate independently from the SPF codes even if the SPF codes can set out detail on, for example, what are reasonable steps. SPF codes must be consistent with SPF principles.

6. This arrangement means that regulated entities will need to comply with the SPF principles and the SPF codes separately. As drafted, adherence to the SPF codes would not mean that a regulated entity will have met the obligation in the SPF principle. This means that SPF consumers and regulated entities will be uncertain as to what standard of conduct is to be expected under the Framework. We had understood that the policy intent was to set clear standards of conduct for regulated entities (and thus giving certainty to SPF consumers). Because of the uncertainty that would be created by the Framework, as proposed, it is unclear that this policy intent will be met.

7. It could be preferable if the standards of conduct required by the Framework were set out exhaustively by well-articulated SPF codes. Two models to achieve this are:

    - Remove the SPF principles (at least as obligations that attract civil penalties for non-adherence; they could be left as normative statements) and impose obligations exclusively through the SPF codes; or

    - Leave the SPF principles in place but provide that adherence to any relevant promulgated SPF codes will meet the SPF principles (i.e. the SPF codes become a safe harbour for compliance).

8. Both models would allow developmental flexibility in the standards while also providing certainty to SPF consumers and regulated entities.

9. One advantage of the current Draft Bill is that new regulated sectors can be added and held to standards without developing SPF codes. This supports the quick inclusion of new regulated sectors. However, both models mentioned above could also allow this. The first model could feature layered SPF standards, with sector-agnostic obligations and sector-specific ones. This would give newly designated regulated sectors general obligations to comply with while specific standards are being created.

10. The second model would mean that the SPF principles would apply to the extent that SPF codes had not been made in respect of a regulated sector. This would also achieve the outcome of allowing the prompt application of standards to newly designated regulated sectors.

Small business

11. The Framework would apply to what are, ostensibly, small businesses via section 58AH. The key test to work out whether the Framework applies is whether the business, on a stand-alone basis, employs fewer than 100 people. This test would need to be applied constantly; it does not apply at a particularly point in time, unlike the test in section 23(4) of the Australian Consumer Law which only applies when a contract is made.

12. There are arguably two dimensions across which the test of which businesses are protected needs to work; the ease of its application by stakeholders, and its appropriate calibration to the policy objectives.

13. First, the test should be objectively applicable so that all parties know when the Framework applies. While using employees provides a clear metric, regulated entities would need to gather, and then continuously maintain, this information. Entities with formal onboarding (and contractual privity) may be able to do this initially, but those without may struggle. Additionally, it's uncertain whether any regulated entity would be able to keep this information current.

14. Second, the test must be accurately calibrated to ensure it identifies the businesses that Parliament genuinely aims to protect under the Framework. The existing test gauges sophistication solely on employee count. However, some businesses can exhibit a high level of sophistication despite having fewer than 100 employees, such as advanced fund management firms or specialised investment vehicles. It may be appropriate to incorporate a financial turnover or revenue test as a secondary, cumulative, limb to the employee test. Doing this could mean that the Framework is applied on a more calibrated basis.

15. For support for this policy change, we would draw the Treasury's attention to ASIC's no action letter dated 2 February 2024 wherein it effectively removed certain sophisticated entities from the protections of the unfair contracts regime in the

Australian Securities and Investments Act 2001 (Cth).[1] We anticipate similar concerns could arise with respect to the definition used in the Draft Bill and would encourage the Treasury to consider that letter and the appropriateness of incorporating its policy position into the Framework.

16. We also suggest applying the tests on a group basis, aggregating employees and turnover of related entities. This approach prevents small subsidiaries within large corporate groups from being inappropriately included in the Framework.

Intelligence sharing

17. The Draft Bill sets up a significant reporting framework through the concept of 'actionable scam intelligence' and the obligations in sections 58BR and 58BX.

18. We note that sections 58BR(1) and 58BX(2) both state that if a regulated entity has actionable scam intelligence about a suspected scam, it needs to provide a report to the SPF regulator (for section 58BR) or the SPF general regulator (for section 58BX). There are slight differences between the two reporting regimes, but it is difficult to conceptualise how these will result in substantially different reports:

    - Section 58BR contemplates a report which is due to the SPF regulator as soon as reasonably practicable, while reports under section 58BX to the SPF general regulator must be given at the end of the period referred to in paragraph 58BZ(2)(d). This means that a report under section 58BR could be provided in advance of a report under section 58BX.

      However, if a regulated entity immediately concluded that actionable scam intelligence evidenced a scam, the period under 58BZ(2)(d) would end and the report under section 58BX would be due 24 hours later. This period may be shorter than the one contemplated by section 58BR as that period allows for administrative actions to be completed before the report is due. No such allowance is made under section 58BX.

    - The contents of the reports given under sections 58BR and 58BX are not set out in the Draft Bill. It is possible that the content of a report under section 58BR concerns preliminary intelligence of the scam while the report under

[1] Available at: Class no-action letter – s12BF(2A) and (2C) of the Australian Securities and Investments Commission Act 2001 and s912A(1)(c) and 912D(1) of the Corporations Act 2001 (asic.gov.au)

section 58BX concerns more detail on the scam's impact. However, note 2 to section 58BS(2) goes against this interpretation as it suggests that the form of harm or loss would be covered by a report under section 58BR.

Moreover, a report under section 58BX could be due before the regulated entity has concluded that an activity is a scam. Section 58BZ(2)(d) provides that the period ends on the earlier of 28 days after getting actionable scam intelligence or the conclusion being reached. This means that the report under section 58BX could be just as preliminary as the one under section 58BR.

- This timing requirement also means that a report under section 58BX could be due before the regulated entity is able to provide some of the details prescribed by section 58BX(5). For example, there is no guarantee that the regulated entity will be able to report, at the end of the period referred to in section 58BZ(2)(d), if it reasonably believes that the activity is a scam. The period could have ended before such a conclusion has been reached.

19. Because of the overlap of sections 58BR and 58BX, the Treasury could consider crafting a single reporting obligation. This obligation should allow for the different levels of information that regulated entities could have at the point when they come to hold 'actionable scam intelligence'. They may be unable to provide the level of detail that is currently contemplated, particularly by section 58BX(5).

20. Separately, the threshold set for 'actionable scam intelligence' is very low. This means that, subject to the content of the instruments made under sections 58BS and 58BX(4), regulated entities could be providing significant amounts of information to the SPF regulators. It is unclear whether this information will be useful to the SPF regulators.

21. Further, we note the potential for the reports to be given under these provisions to intersect with the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) (**AML/CTF Act**) in two ways. The Treasury may like to consider how to address these intersections.

    - Firstly, the type of information that is caught by the reports could be information which banks are unable to share due to the tipping off provisions.

    - Second, the information that is contemplated by the reports would likely be covered by the suspicious matter reports required under section 41 of the AML/CTF Act.

Joinder of regulated entities in internal dispute resolution

22. Section 58BZC mandates that regulated entities implement internal dispute resolution (**IDR**) mechanisms to address complaints related to scams. This requirement is essential. However, considering that scams frequently involve multiple regulated entities, it is necessary to establish a means for these entities to compel other regulated entities to participate in resolving complaints. This would prevent SPF consumers from having to contact multiple parties, such as the sending and receiving bank or a social media platform and bank. Such a system would provide SPF consumers with a 'no wrong door' approach. If the IDR process doesn't offer SPF consumers a straightforward way to interact with all relevant regulated entities, they might take their complaints to external dispute resolution (**EDR**) instead. This could render IDR ineffective and overwhelm the EDR system.

23. To do this well, the SPF codes would need to be clear on issues such as:

    - How regulated entities work together to fairly engage with SPF consumers.
    - How to deal with differences of opinion between regulated entities of whether the SPF consumer has been affected by a scam or the extent of harm or loss.
    - What rules apply for the apportionment of loss across regulated entities and SPF consumers.
    - How resolution of a scam complaint interacts with resolution of other complaints that arise from the same fact pattern.

24. The SPF codes will also need to address the interaction of the scams IDR process with the requirements set out in ASIC Regulatory Guide 271: Internal Dispute Resolution (**RG 271**). RG 271 imposes requirements concerning how and when disputes need to be addressed. Some of these requirements, including the timeliness of resolution may not be able to be met if banking regulated entities bring other regulated entities into the process (or vice versa).

25. We note that the Draft Bill lacks details on how liability for failing to meet Framework standards will be divided among regulated entities and, to the extent relevant, SPF consumers. We look forward to working with the Government on fair liability apportionment standards. Addressing the 'reasonableness' concept in the SPF codes to identify any steps SPF consumers should take to protect themselves will be important.

Penalties

26. Consistent with the consumer law and anti-competitive practices provisions of the *Competition and Consumer Act 2010* (Cth), significant civil penalties apply for contravention of primary obligations under the Draft Bill. These penalties are the greater of $50 million, three times the benefit gained by the regulated entity or 30% of corporate turnover during the breach turnover period. These operate together with other consequences for any contravention.

27. Importantly, the penalties may be imposed for each individual breach of the obligations. Since 'scam' is defined with reference to a single SPF consumer and the SPF principles generally address individual scams, a single scam could result in multiple breaches of primary obligations (one for each affected SPF consumer). Given the broad definition of 'SPF consumer' (discussed below) and the large scale of many scams, section 85(1) of the *Regulatory Powers (Standard Provisions) Act 2014* means that regulated entities could often incur fines for a single course of conduct that exceed their annual revenue.

28. Applying the civil penalties in section 58FH to serious and systemic breaches of the SPF principles (if retained as direct obligations) or SPF codes could be more proportionate.

Intersection with e-Payments Code

29. Section 58AG(3) envisions that the SPF rules might classify certain attempts as non-scams. Paragraph 1.78 of the Explanatory Memorandum to the Draft Bill suggests that this authority might exclude specific types of fraud, like credit card fraud, where benefits are obtained dishonestly without consumer involvement. Some of these frauds (unauthorised transactions) might be addressed in chapter C of the ePayments Code. The ePayments Code doesn't cover business facilities or those where the consumer and the subscriber lack a contractual relationship. Consequently, its scope is more limited than that of the Framework.

30. Depending on how any carveout is framed by the SPF rules, there are issues with the potential intersection between the ePayments Code and the Framework:

    - It is conceivable that a fraud falls within both the ePayments Code and the Framework, leading to ambiguity about which set of rules apply.

    - The protections outlined in the ePayments Code and the Framework may vary. For example, the Framework sets up an extensive protection system, while

chapter C of the ePayments Code primarily considers whether the 'user' contributed to the loss. This distinction applies even when two scams are substantively similar but implemented through different methods (e.g., various types of remote access scams).

- The ePayments Code does not have cross-sectoral application like the Framework. If fraud under the ePayments Code is excluded from the Framework, regulated entities which are not subscribers to the ePayments Code may lack motivation to detect, prevent, or report such fraud, even if it concerns their regulated service.

31. Although there is no clear answer of what to do about the intersection between the ePayments Code and the Framework, two options are to:

    - Incorporate fraud covered by the ePayments Code into the Framework, thus offering consumers its protections and clarifying any uncertainties about how the systems interact.

    - Modify the ePayments Code to clearly exempt any cases of fraud addressed by the Framework (like the exemption discussed in paragraph 1.78 of the Explanatory Memorandum). This change would create a separate operational scope for the ePayments Code distinct from the Framework.

    Our preference would be the first option. It would seem to be a significantly simpler regime for both consumers and regulated entities.

Extraterritorial application

32. The Framework is applied by section 58AJ to acts, omissions, matters and things outside of Australia. This means that the Framework will intersect with the application of other scams frameworks, such as those which apply in the United Kingdom and Singapore. It is unclear how this is intended to work.

33. Additionally, if a permanent resident moves to their home country or a citizen relocates abroad, the Framework will apply in those locations as well. It is uncertain how regulated entities can offer the same level of protection or assistance to people overseas as they do when these individuals are in Australia (for instance, entities might not have contact details for those overseas). While many SPF principles are calibrated by reference to 'reasonable steps', regulated entities will still need to take any reasonable steps even if they are overseas.

34. Likewise, if a company is based in Australia but operates overseas as well, section 58AJ extends the Framework to their offshore activities. It is, again, uncertain how regulated entities can protect these businesses in respect of their international activities to the same extent as their domestic activities.

35. We also note that section 5 of the *Competition and Consumer Act 2010* would arguably already apply the Framework extraterritorially, although using a different construct focusing on conduct (whereas section 58AJ focuses on acts, omissions and things outside of Australia).

Transition Period

36. The Treasury has sought guidance on a suitable transition period for implementing the changes. Although ANZ has already taken steps aligned with the Framework, we estimate it will take 18-24 months to fully align our actions and processes after the SPF codes are finalised. We understand that the Treasury may wish to adopt the SPF principles earlier. However, we believe the detailed SPF codes will be crucial for meeting the Framework's expectations. Additionally, clear standards for liability apportionment would assist regulated entities in implementing the Framework.

COMMENTS ON DRAFTING

Section 58AC/AD

Payments may not be caught by business of banking

37. Section 58AC(2) proposes that the 'business of banking' could be designated as a class of business. The provision defines this by reference to section 51(xiii) of the Constitution. There is a question of whether this definition would only capture the business of taking deposits and lending money. See, for example, *Commissioners of the State Savings Bank of Victoria v Permewan Wright & Co Ltd* (1914) 19 CLR 457. As such, the Treasury may like to confirm with section 58AC(2) would capture the making of payments in all their relevant forms. If modern payments are not 'banking business' as defined by case law for the purposes of section 51(xiii) of the Constitution, then they would not be captured by designating 'business of banking' as a 'regulated service'. This would obviously have implications for the operation of the Framework.

38. We note that section 5 of the *Banking Act 1959* (Cth) uses a broader definition of banking business that refers to section 51(xx) of the Constitution and allows additional activities to be designated as banking business. Regulation 6 of the Banking Regulations 2016 allows the Australian Prudential Regulation Authority to determine that purchased payment facilities are part of a 'banking business'.

Regulated entities in relation to banking business could go well beyond banks

39. Section 58AD(1)(a) includes entities acting '…in relation to…' the business or service designated under section 58AC(2). This extends beyond direct providers. For example, in banking, third parties like consultants act in relation to banking without offering banking services themselves. Section 58AD(1)(a) would mean that these entities would be 'regulated entities' themselves and subject, directly, to the obligations imposed by the Framework.

40. If the aim is to ensure regulated entities can't bypass obligations by using third parties, a rule stating they are responsible for those providing services on their behalf or for a regulated service should suffice.

Section 58AE

Consultation on designation

41. In addition to the matters for consideration set out in this section, we think it will be important that the Minister engages in public consultation to ensure that any designation is well articulated and calibrated.

Section 58AG

Scam attempts only

42. Section 58AG appears to capture only attempts to carry out a scam. While there is a question of whether every successful scam necessarily includes an attempt to carry out a scam, the provision does not explicitly capture the actions which occur after those which are sufficient to constitute an 'attempt'. This could significantly curtail the scope of the Framework and would seem to be inconsistent with the Government's policy objectives.

Associates

43. The provision broadens the idea of harm or loss to that incurred by 'associates' of SPF consumers. It's unclear how regulated entities can identify associates of all SPF consumers to evaluate potential losses under section 58AG. An example of the issues this drafting creates lies in section 58BN(3). This obliges regulated entities to identify SPF consumers who have been impacted by a scam and the nature of the impact. The extension of scam to 'associates' means that regulated entities will need to take reasonable steps to identify each associate of SPF consumers who may have been impacted by the scam and attempt to understand the nature of that impact.

Section 58AH

Definition captures all people and small businesses in Australia

44. The definition of an SPF consumer encompasses all businesses and individuals in Australia, including those who are ordinarily residents, permanent residents, or citizens when they are abroad. This definition is relevant irrespective of any pre-existing relationship with a regulated entity, as it encompasses anyone who might receive a regulated service. For instance, banks could theoretically offer banking services to most individuals or businesses in Australia, subject to age and contractual capacity limitations. In essence, regulated entities must treat the entire Australian population and all businesses with fewer than 100 employees (and Australians, Australian businesses operating, outside of Australia) as relevant SPF consumers.

This greatly affects provisions like 58BX(1), which requires providing information to SPF consumers.

45. While this drafting gives SPF consumer a very broad scope of operation, it also might restrict the Framework in ways that the Treasury does not intend. For example, it is not entirely clear what service has been provided, directly or indirectly, to a person making a payment by the bank which operates the receiving account. This may mean that the payer is not an SPF consumer with respect to the specific actions which are in question.

Purported provision

46. The definition also includes people who are supposedly provided the regulated service. This might be redundant since it already covers those who may receive the service. However, since 'purported' implies something appears true when it's not, individuals and businesses could make themselves as SPF consumers by claiming to have received the service. We recognise that the goal of this concept is to identify individuals who fall victim to impersonation scams, where a malicious actor masquerades as a regulated entity. Nonetheless, this situation would be more effectively addressed with clearer language.

Section 58BG

47. It's unclear how a regulated entity could maintain a record of every consideration by its senior officers, as these could occur informally or randomly. Besides the practical challenges, the policy intent behind this obligation is also not clear.

Section 58BJ

Overlap with other provisions

48. Section 58BJ requires regulated entities to take reasonable steps to prevent persons from committing scams. This provision presents several challenges. Some of these challenges are created by overlaps between the idea of prevention in SPF principle 2 and the concepts of detection and disruption contained in SPF principles 3 and 5. We acknowledge that steps in respect of scams often follow the pattern set out in the Framework (prevention, detection, report, disrupt and response). However, as these steps have been reduced to legislative drafting, a degree of overlap has emerged (the same issue has arisen in respect of reporting, as discussed above). Whether this overlap is problematic is a policy matter for the Treasury. However, as noted below, there are perhaps more economical ways of setting out the standards of conduct expected of regulated entities.

49. First, according to section 58AG, scams are defined as attempts to deceive SPF consumers. Thus, a regulated entity might entirely protect an SPF consumer from harm (e.g., by blocking account transactions) yet still breach section 58BJ due to the attempt itself. This seems peculiar.

50. Second, to address this issue, section 58BJ could be revised to protect SPF consumers from scam harm rather than the prevention of attempts. However, section 58BW(1)(b) already mandates regulated entities to take reasonable measures to prevent scam-related loss or harm. This seems to achieve the same goal as section 58BJ.

51. Third, the provision isn't directly linked to the regulated entity's awareness or possession of scam intelligence. Therefore, as written, section 58BJ mandates taking reasonable steps to detect scams. This appears to duplicate the requirement in section 58BN, which already obligates entities to take reasonable steps to uncover scams.

52. Fourth, sections 58BJ and 58BW seem to overlap. Section 58BW requires reasonable steps to disrupt a scam that relates to actionable scam intelligence. Paragraph 1.133 of the explanatory memorandum states that prevention activities aim to stop scam activity before it reaches consumers, while paragraph 1.174 explains that disruption involves actions taken against ongoing scams. However, this nuance is arguably lacking from the drafting in the Draft Bill. It is unclear what steps a regulated entity would take to 'disrupt' a scam that were not also relevant to 'preventing'.

53. Moreover, it is unclear if this nuance is useful as a regulatory construct. It seeks to draw a distinction between steps taken antecedent to the scam 'reaching' the SPF consumer and steps taken after that fact. It could be simpler to say that regulated entities need to take reasonable steps to prevent SPF consumers from suffering loss or harm arising from a scam.

Section 58BK

Reasonableness

54. This provision lacks a concept of reasonableness. As such, there is the potential that the information which is required to be provided to SPF consumers needs to be sufficient to allow them to identify *all* scams relating to the regulated service. It is unclear how any SPF consumer would be able to achieve a state of awareness based on information that allows them to do this. It would be clearer, and more feasible, if the provision included the words 'take steps to…' at the start of section 58BK(1)(a).

55. As noted above, this provision currently requires regulated entities to make information accessible to all Australian persons and small businesses.

Sections 58BK(2), 58BN, 58BO(1) and 58BX

Overlap among provisions

56. There is considerable overlap in these provisions, presenting a chance to streamline them, ensuring obligations are mentioned only once to prevent inconsistencies.

57. For instance, section 58BK(2) mandates that regulated entities identify groups of SPF consumers at higher risk of scams and warn each consumer in those groups. However, as it focuses on 'a scam', it requires evaluating the risk for each identified scam rather than a general assessment.

58. This drafting causes section 58BK(2) to overlap with section 58BO(1), requiring the identification of SPF consumers potentially affected by scams. Since section 58BO(1) broadly requires this identification, section 58BK becomes redundant as section 58BO(1) necessarily includes all high-risk SPF consumers within its scope. This wouldn't be the case if section 58BK(2) focused on scam categories instead of individual scams. Additionally, section 58BN(3) mandates identifying SPF consumers affected by scams, mirroring the requirement in section 58BO(1).

59. Likewise, section 58BX(1) mandates that regulated entities provide SPF consumers with enough information to respond to a suspected scam. This requirement appears to render section 58BK(2) again unnecessary (at least on its current drafting).

60. We also note that section 58BX(1) does not predicate the need to disclose information to SPF consumers on the risk that SPF consumers may be impacted by a scam. It simply requires communication with *all* SPF consumers. Given the breadth of the concept of SPF consumers, this practically means that when regulated entities have actionable scam intelligence, they will need to disclose this to all Australian natural persons (including citizens and permanent residents outside of Australia) and small businesses. Multiplied across all regulated entities, and considering how much actionable scam intelligence there will be, we suspect Australians risk being inundated with information because of these provisions.

Section 58BN

Identifying associates

61. As noted above, because the idea of harm and loss in the definition of scam extends to associates, the identification required by section 58BN(3)(ii) will require significant

investigation. While regulated entities only need to take reasonable steps, they would seem to be contravening the provision if they didn't take reasonable steps to identify the associates of SPF consumers who had been impacted.

Section 58BT

Exemption only applies to one reporting obligation

62. Section 58BT only disapplies the duty of confidence from section 58BR(1). However, section 58BX imposes reporting obligations that are largely equivalent to section 58BR(1) (as discussed above). It is not clear why section 58BT would only give regulated entities protections with respect to one reporting obligation but not the other.

Section 58BZ

Limited operation of safe harbour – make equivalent to AML/CTF Act

63. Section 58BZ offers protection from civil action for actions taken to disrupt scams. However, this protection does not cover all measures to prevent loss (under section 58BW(1)(b)) or steps to prevent a scam (under section 58BJ), making its scope quite limited.

64. The usefulness of the newly drafted provision is further limited as it only applies when the regulated entity has reasonable grounds to suspect a scam, but becomes inapplicable once these suspicions are confirmed. This results in the safe harbour having a potentially limited duration of effectiveness.

65. We recommend that the Treasury uses section 235 of the AML/CTF Act as a model safe harbour for actions taken under the Framework. This section protects against liability for actions done in compliance with the AML/CTF Act, and it doesn't limit protection to a specific timeframe. Since the Framework also addresses financial crime, replicating section 235 in the Draft Bill would be suitable.

Section 58FZ

66. This provision allows recovery from any person involved in a contravention of a civil penalty provision of an SPF principle or an SPF code. This theoretically opens employees of regulated entities to personal liability for scam losses.

67. This provision does not address proportional liability for scam losses or contributory negligence by an SPF consumer. Even if there are loss apportionment rules in the

EDR mechanism, SPF consumers could still use section 58FZ to claim all losses from a specific regulated entity.

ENDS