

Scams Prevention Framework – Exposure Draft Legislation

Submission to The Treasury

Westpac Banking Corporation
4 October 2024

WE ARE

 GROUP

INTRODUCTION

Thank you for the opportunity to provide a submission to the Scams Prevention Framework (SPF) exposure draft legislation.

Westpac has also contributed to the Australian Banking Association (ABA) submission and we endorse its recommendations.

In providing our bilateral submission, Westpac would like to reinforce areas we believe are absolutely critical to ensuring the SPF legislation is effective for tackling scams through a whole-of-ecosystem approach. These recommendations include:

1. Better aligning the SPF Principles and Codes, including the interplay and application of penalties;
2. Clarifying liability and apportionment under Internal Dispute Resolution (IDR) and External Dispute Resolution (EDR);
3. Ensuring all SPF Codes are reviewed and approved by the Commission;
4. Clarifying the scope of actionable scam intelligence, as well as what, when and how this intel should be reported;
5. Extending the safe harbour for actions taken after a Regulated Entity (RE) reasonably considers an activity to be a scam; and
6. Clarifying the definition of a scam and SPF Consumer.

Westpac believes these changes would better reflect the underlying intent of the SPF and are designed to:

- improve the efficiency and consistency of the measures to combat scams across the scam ecosystem;
- provide for clear and objective obligations that are responsive to the evolving scams environment and are effective, appropriate and proportionate;
- allow for the effective use of resources by both the REs and the regulators in combatting scams;
- facilitate the effective and efficient handling and resolution of complaints.

For ease of reference, Westpac's submission is segmented into three sections:

- [Part 1](#): An Executive Summary table of recommended changes to the legislation.
- [Part 2](#): Suggested legislative drafting to address the recommendations outlined in the Executive Summary table.
- [Part 3](#): Further detail and discussion on the rationale and intent behind Westpac's recommended changes.

PART 1: EXECUTIVE SUMMARY OF RECOMMENDATIONS & DRAFTING CHANGES

Recommendation	Rationale	Proposed solution/s & drafting changes
1. Better align the SPF Principles and Codes and their associated penalties	Principles-based obligations alongside sector-specific obligations in the SPF Codes will create uncertainty, ambiguity and unnecessary duplication.	See Appendix A . <ul style="list-style-type: none"> Amend the principles to set positive obligations for SPF Code development. Refer to proposed drafting provided by the ABA (page 8, ABA submission, 'Amendments to the SPF Principles, Approach 1').
	Current drafting means REs can be compliant with Code obligations while concurrently in breach of SPF Principles. This will significantly hinder REs' abilities to make investment decisions about appropriate scam prevention measures.	See Appendix B . <ul style="list-style-type: none"> Apply a significance or materiality test to the civil penalties regime. Refer to proposed drafting provided by the ABA (pages 9-10, ABA submission, 'Amendments to the SPF Principles, Approach 2' & 'Amendments to ensure the SPF Principles operate at a systemic level, Approach 3').
2. Clarify liability and apportionment rules under IDR and EDR	Appropriate cross-sector input and clearly defined liability apportionment is essential to delivering an effective whole-of-ecosystem approach and to protect Australians from scams. Additionally, ensures a much better customer IDR experience and prevents an increase in escalated EDR complaints.	See Appendix C . <ul style="list-style-type: none"> Amend section 58BZC to stipulate all REs involved in a scam are included in the IDR process and clarify this effect in the ePayments Code. Amend section 58GE to give the Minister the power to impose a whole-of-ecosystem liability rules and a liability apportionment mechanism at both IDR and EDR. Refer to proposed recommendations & drafting provided by the ABA (pages 10-13, ABA submission).
3. All SPF Codes should be reviewed and approved by the Commission	SPF Codes need to be consistent and meet the same level of standard to ensure an effective whole-of-ecosystem approach to stopping scams.	See Appendix D . <ul style="list-style-type: none"> Amend the Minister's delegation-making power in section 58CD.
4. Clarify the scope of actionable scam intelligence, as well as what, when and how this intel should be reported	Not all intel will be relevant or effective for stopping scams. Reporting should be limited to information that will genuinely make an impact when it comes to scam prevention.	See Appendix E . <ul style="list-style-type: none"> Amend the definition of "actionable scam intelligence" in section 58AI. Refer to proposed recommendations and drafting provided by the ABA (pages 13-15, ABA submission).
	High frequency of alerts can breed complacency and warning fatigue among SPF Consumers.	See Appendix F . <ul style="list-style-type: none"> Amend section 58BX to stipulate that REs don't have to report activity that is subject to actionable scam intelligence if it is not determined to be a scam. Amend sections 58BK & 58BL to clarify an RE's obligations to identify SPF consumers and take reasonable steps.
5. Extend the safe harbour for actions taken after a RE reasonably identifies an activity to be a scam	Current drafting significantly limits the scope beyond what we assume is intended. Our assumption is the intent is to provide safe harbour to REs when they are taking action to stop a scam.	See Appendix G . <ul style="list-style-type: none"> Amend section 58BZ so that safe harbour applies: <ul style="list-style-type: none"> if an RE reasonably considers it may have actionable scam intelligence to an action taken if an activity is identified as a scam. The proportionality of the action must be assessed against the time within which action was to be taken, and the potential for an SPF consumer to suffer loss and damage.
6. Clarify the definition of a scam and SPF Consumer	Provide certainty and ensure the intended coverage for SPF Consumers and Res.	See Appendix H . <ul style="list-style-type: none"> Amend the definition of "scam" in section 58AG. Amend the definition of "SPF Consumer" in section 58AH. Refer to proposed drafting provided by the ABA (pages 14-15, ABA submission).

PART 2: DRAFTING SUGGESTIONS

Please note, text in red denotes new additions or amendments to current drafting.

APPENDIX A

Recommendation 1:

Better align the SPF Principles and Codes and their associated penalties

Principles-based obligations alongside sector-specific obligations in the SPF Codes will create uncertainty, ambiguity and unnecessary duplication. Further explanation on the importance of this change is detailed on [pages 10-11](#) of this document (“1.1 Align the SPF Codes and the SPF principles”).

As also outlined on page 8 of the ABA’s submission (“Amendments to the SPF Principles, Approach 1”), we suggest redrafting the principles so that they are positive obligations that the SPF Code must reflect, for example by:

replacing, where relevant “A regulated entity contravenes this subsection if the entity...” with **“The SPF Code must set out obligations on regulated entities to...”**

APPENDIX B

Recommendation 1:

Better align the SPF Principles and Codes and their associated penalties

Current drafting means REs can be compliant with Code obligations while concurrently in breach of SPF Principles. This will significantly hinder the ability of REs to make investment decisions about appropriate scam prevention measures. Further explanation on the importance of this change is detailed on [pages 10-11](#) of this document (“1.2 Align penalties so they are proportionate and incentivise the maintenance of robust systems and processes to meet SPF obligations”).

In addition to the recommended drafting changes put forward by the ABA on pages 9-10 of its submission (“Amendments to the SPF Principles, Approach 2” & “Amendments to ensure the SPF Principles operate at a systemic level, Approach 3”), we suggest applying a significance or materiality test to the application of the civil penalties by including in Division 6 Subdivision C a provision similar to section 1317G of the Corporations Act 2001 (Cth):

A Court may order a person to pay to the Commonwealth a pecuniary penalty in relation to the contravention of a civil penalty provision if the contravention:

(a) is serious, having regard to:

(i) the nature and extent of the contravention;

- (ii) the nature and extent of any loss or damage suffered because of the contravention;
 - (iii) the circumstances in which the contravention took place;
 - (iv) any other matters prescribed by regulation for the purpose of this paragraph; or
- (b) materially prejudices the interests of a significant number of SPF consumers.

APPENDIX C

Recommendation 2:

Clarify liability and apportionment rules under IDR and EDR

Appropriate cross-sector input and clearly defined liability apportionment is essential to delivering an effective whole-of-ecosystem approach in protecting Australians from scams. Additionally, this would ensure a much better IDR customer experience while also mitigating an increase in escalated EDR complaints. Further explanation on the importance of this change is detailed on [pages 11-14](#) of this document.

In addition to the recommendations and drafting that has been put forward by the ABA on pages 10-13 of its submission, we recommend the following:

Amend section **58BZC** as follows:

- (1) A regulated entity contravenes this subsection if the entity does not have an accessible and transparent internal dispute resolution mechanism
- (a) for SPF consumers of the entity's regulated services to complain about:
- (i) scams relating to those services; and
 - (ii) the entity's conduct relating to such scams
- (b) for complaints by an SPF consumer to any other regulated entity about a scam or alleged scam involving the entity to be resolved promptly and efficiently.

Include a new sub-section within section **58GE** to the following effect:

“The SPF rules will contain guidance, to be applied by a regulated entity's internal dispute resolution mechanism and by a SPF EDR scheme, as to how liability to a SPF consumer is to be apportioned in circumstances where regulated entities in different regulated sectors have each failed to comply with their obligations under an applicable SPF code. In issuing such guidance, the Minister may (but is not required to) adopt any guidance that has been formulated and agreed between industry bodies representing the regulated sectors.”

Amend SPF to the following effect:

“Notwithstanding anything else, liability is to be determined in accordance with the SPF rules.”

Amend clause 9 of ePayments Code to the following effect:

“This Chapter does not apply in respect of any transaction arising from a scam as defined in Section 58AG of the Competition and Consumer Act”

APPENDIX D

Recommendation 3:

All SPF Codes should be reviewed and approved by the Commission

SPF Codes need to be consistent and meet the same level of standard to ensure an effective whole-of-ecosystem approach to stopping scams. Further explanation on the importance of this change is detailed on [page 14](#) of this document.

As an alternative to the suggested drafting the ABA has put forward on page 19 of its submission, we think this could be achieved by amending the Minister's delegation making power in section **58CD** as follows:

The Minister may, in writing, delegate the Minister's power under section 58CB to make a code for a regulated sector to:

- (a) another Minister; or**
- (b) the Commission; ~~or~~**
- ~~(c) the entity that is, or is to be, the SPF sector regulator for the sector.~~**

APPENDIX E

Recommendation 4:

Clarify the scope of actionable scam intelligence, as well as what, when and how this intel should be reported

Not all intelligence will be relevant or effective for stopping scams. Reporting should therefore be limited to information that will genuinely make an impact when it comes to scam prevention. Further explanation on the importance of this change is detailed on [pages 14-16](#) of this document.

Building on the proposed drafting changes on pages 13-15 of the ABA's submission, we recommend amending section **58AI** as follows:

A regulated entity ~~identifies, or~~ has actionable scam intelligence if (and when):

- (a) there are reasonable grounds for the entity to suspect that a communication, transaction or other activity on, or relating to, a regulated service of **any** entity is a scam;
- (b) **it is a kind prescribed by the SPF rules; and**
- (c) **the intelligence is reasonably able to serve as the basis for the regulated entity to decide to act on the suspected scam**

APPENDIX F

Recommendation 4:

Clarify the scope of actionable scam intelligence, as well as what, when and how this intel should be reported

A high frequency of alerts can breed complacency and warning fatigue among SPF Consumers, thereby rendering them ineffective. Further explanation on the importance of this change is detailed on [pages 14-16](#) of this document.

In addition to the proposed drafting changes by the ABA on pages 13-15 of its submission, we suggest the following:

Amend section **58BX** as follows:

Sharing with the SPF general regulator—obligation

(2) A regulated entity contravenes this subsection if the entity:

(a) has actionable scam intelligence about a suspected scam relating to a regulated service of the entity; and

(b) unless by the end of the period referred to in paragraph 58BZ(2) (d) (i) the regulated entity has identified that the activity the subject of that intelligence is not a scam, fails to give the SPF general regulator a report that:

(i) complies with subsection (3); and

(ii) deals with the matters set out in subsection (5).

Sharing with the SPF general regulator—timing and form

(3) A report complies with this subsection if the report:

(a) is given to the SPF general regulator within 24 hours after the end of the period referred to in paragraph 58BZ(2)(d)(i) for that intelligence; and

(b) contains the information, and is in the form, approved under subsection (4) of this section.

Sharing with the SPF general regulator—content of report

(5) For the purposes of subparagraph (2)(b)(ii), a report must:

(a) advise whether the entity reasonably believes that the activity that is the subject of the intelligence referred to in paragraph (2)(a) is a scam; and

(b) if the entity reasonably believes that the activity is a scam—set out:

(i) what loss or harm may have resulted from the scam, what disruptive actions the entity has taken and whether any of those actions have been reversed; and

(ii) what steps the entity is taking to disrupt similar scams, and to prevent loss or harm resulting from similar scams. ~~;~~ **and**

~~(c) if the entity reasonably believes that the activity is not a scam—set out what disruptive actions the entity has taken and whether any of those actions have been reversed.~~

Amend sections 58BK(2) and 58BL(2) as follows:

Identifying and warning higher risk SPF consumers

(2) A regulated entity contravenes this subsection if the entity fails to take reasonable steps **in accordance with section 58BL(2)** to:

(a) identify the classes of SPF consumers (if any) of a regulated service of the entity who have a higher risk of being targeted by a scam relating to the regulated service; or

(b) provide warnings about such a scam to each SPF consumer belonging to such a class.

Further sector specific details can be set out in SPF codes

(2) For the purposes of ~~(but without limiting)~~ subsection 58CC(1), the SPF code for a regulated sector **may must** include sector specific details about:

(a) what are reasonable steps; or

(b) what are relevant resources; or

(c) identifying the classes of SPF consumers who have a higher risk of being targeted by a scam; for the purposes of this Subdivision.

APPENDIX G

Recommendation 5:

Extend the safe harbour for actions taken after a RE reasonably identifies an activity to be a scam

Current drafting significantly limits the scope beyond what we assume is intended. Our assumption is the intent is to provide safe harbour to REs when they are taking action to stop a scam. Further explanation on the importance of this change is detailed on [pages 16-17](#) of this document.

In addition to the recommendations put forward by the ABA on page 23 of its submission (section 3.2.5 'Safe harbour'), we suggest amending section **58BZ** as follows:

- (1) This section applies to a regulated entity if the entity **reasonably considers it may have actionable scam intelligence of the kind described in section 58AI** about a suspected scam relating to a regulated service of **an** entity.
- (2) The regulated entity is not liable in a civil action or civil proceeding for taking action to disrupt an activity that is the subject of that intelligence if the action:
 - (a) is taken in good faith; and
 - (b) is taken in compliance with the SPF provisions; and
 - (c) is reasonably proportionate to the suspected scam, and to information that **would** is reasonably **be-expected-to-be** available to the entity about the suspected scam, **having regard to the circumstances including the time available to take the action and the potential loss or damage if the action is not taken**; and
 - (d) is taken:
 - (i) during the period:
 - (A) starting on the day that the intelligence becomes actionable scam intelligence for the entity; and
 - (B) ending when the entity identifies whether or not the activity is a scam, or after 28 days, whichever is the earlier; **or**
 - (ii) **after the entity identifies the activity is a scam; and**

(e) is promptly reversed if:

- (i) the entity identifies that the activity is not a scam; and**
- (ii) it is reasonably practicable to reverse the action.**

APPENDIX H

Recommendation 6:

Clarify the definition of a scam and SPF Consumer

This will provide certainty and ensure the intended coverage for SPF Consumers and REs. Further explanation on the importance of this change is detailed on [pages 17-18](#) of this document.

Westpac supports the suggested changes and drafting put forward by the ABA on pages 15-17 of its submission regarding the definition of an SPF consumer.

Regarding the definition of a scam, we suggest amending section **58AG** as follows:

(1) A scam is a direct or indirect attempt to engage an SPF consumer of a regulated service that:

- (a) involves deception (see subsection (2)); and**
- (b) would, if successful, cause loss or harm including obtaining personal information of, or a benefit (such as a financial benefit) from, the SPF consumer or the SPF consumer's associates; and**
- (c) meets the requirements prescribed by the SPF rules.**

PART 3: RATIONALE FOR RECOMMENDATIONS

Recommendation 1

Better align the SPF Principles and Codes and their associated penalties (so that they are proportionate and appropriately incentivise compliance)

1.1 Align the SPF Principles and the SPF Codes

The exposure draft contemplates that there will be principles-based obligations, as well as sector specific SPF Codes that set out requirements for REs in that sector relating to those principles-based obligations¹.

The principles are broad and imprecise, making repeated references to reasonableness. The proposed structure results in the prospect of REs being compliant with the SPF Code obligations, but still having the potential of being found liable for a breach of the broader principle to which the SPF Code was directed. That creates significant uncertainty and duplication. Making investment decisions in relation to systems and processes to combat scams is difficult where the standard as set out in the principle is amorphous and undefined and has the potential to be determined on a case-by-case basis.

Treasury has indicated that it is intended that the SPF Codes will provide specific obligations tailored to scam activity in different sectors and provide flexibility to adapt to new and emerging scams, reflecting the fast changing and dynamic nature of scam activity in the digital economy². Consistent with that, the exposure draft can be amended to require the SPF Codes to contain the specific objective measures and obligations that reflect the principles, whilst at the same time providing the flexibility to adapt to new and emerging scams. If that is done, there will then be no need to have the principles-based obligations in addition to the SPF Codes.

The advantages of this approach include:

- (a) a clear set of obligations directed to the particular sector to which they relate;
- (b) greater clarity and certainty as to the content of each REs obligations; and
- (c) removal of duplication.

This recommendation could be enacted by redrafting the principles so that they are positive obligations that the SPF Code must reflect:

→ See [Appendix A](#)

¹ Excluding principle 4

² Scams Prevention Framework – Summary of reforms released by the Treasury dated September 2024

1.2 Align penalties so they are proportionate and incentivise the maintenance of robust systems and processes to meet SPF obligations

The exposure draft proposes that certain provisions will be civil penalty provisions. As currently drafted, there are no materiality considerations affecting the attraction of the civil penalty. A single breach for a single SPF consumer exposes the RE to significant civil penalties, in the same way that a manifest deficiency in a system or procedure does.

The volume of information in relation to potential scams is significant and the speed at which action must be taken increases the risk of single breaches, even where an entity has implemented and maintained very robust systems and procedures to combat scams. In those circumstances, it is disproportionate for REs to be at risk of a significant penalty for single isolated breaches (such as a single failure to make a report within the 24-hour timeframes). The civil penalties should reflect the materiality of the breach.

To combat scams, entities need to introduce robust systems and processes directed to that outcome, and obligations in the exposure draft reflect that. The penalty regime should also reflect that and be designed to encourage the implementation and maintenance of those robust systems and processes.

For those reasons, Westpac recommends that the exposure draft be amended so that a significance or materiality test applies to the application of the civil penalties. That could be done by including in Division 6 Subdivision C a provision similar to section 1317G of the Corporations Act 2001 (Cth), such as:

→ See [Appendix B](#)

Westpac notes this change will not mean there are no consequences for an RE in the case of a single breach for a single SPF Consumer. For individual breaches that have caused loss or damage, SPF Consumers will have a right to recover loss or damage under the exposure draft and, having regard to Westpac's recommendation 2 below, the principles for the allocation of liability will be responsive to single breaches of the obligations under the framework.

Recommendation 2

Clarify liability and apportionment rules under IDR and EDR

Westpac supports measures that facilitate the establishment and maintenance of efficient and effective IDR and EDR processes that incentivise compliance with the SPF.

However, the proposed framework contains:

- (a) no mechanism for apportioning liability across sectors or across REs within the same industry segment; and
- (b) no power to join an external party at an IDR stage. It contemplates that IDR will be dealt with at a RE level.

This will severely hamper the effectiveness of the IDR and EDR process. In particular:

- (a) as a scam will typically involve more than one RE, that will mean an SPF consumer may need to make separate complaints about the one scam to multiple entities. Not only is that sub-optimal for the customer, but it also gives rise to the potential for overlapping or inconsistent determinations relating to the one scam.
- (b) it will make it difficult to apportion liability when all participants are not involved in the investigation and resolution of a complaint.
- (c) it is likely to result in more cases being referred to EDR. It is critical for the efficient running of an EDR scheme that there are effective and efficient supporting IDR processes.

The IDR and EDR processes supporting the SPF need to:

- (a) be efficient and effective, transparent and minimise duplication for consumers. Consumers should not be required to make multiple complaints to multiple participants in the ecosystem.
- (b) facilitate good consumer outcomes that are consistent irrespective of the participant to whom a complaint is made and incentivise compliance by aligning IDR and EDR outcomes to a breach of the obligation under SPF.

Accordingly, Westpac recommends the exposure draft be amended to:

- (a) require each SPF Code to include, as a condition that must be met for an IDR process, that the IDR process require and facilitate the involvement of all REs involved in the scam the subject of that complaint in the resolution of a complaint in a way that facilitates the prompt and efficient resolution of that complaint and compel information sharing between them. That could be done by requiring each SPF Code to include as a condition that must be met for an IDR process that the IDR process in each designated sector require and facilitate the involvement of all REs involved in the scam the subject of that complaint in the resolution of a complaint. To avoid a breach of the Privacy Act, it will need to be drafted so that any disclosure and collection of personal information needed to achieve that is required under the Code; and
- (b) provide for the development of guidelines concerning liability apportionment across the ecosystem both in IDR and EDR.

This could be achieved by:

- (a) Amending section 58BZC as follows:

→ See [Appendix C](#)

- (b) Amending the exposure draft to require each of the SPF Codes to contain consistent guidelines concerning liability apportionment across the ecosystem

under which liability is determined based on compliance with the SPF Codes and, to provide the Minister with the power to impose rules and guidance for liability apportionment based on compliance with the SPF Codes at both IDR and EDR.

We add that it is important to ensure that the EDR scheme has the power to:

- (a) investigate and determine a complaint against one RE as if the complaint made against all REs involved in the scam the subject of that complaint; and
- (b) has sufficient powers to require the participation and cooperation of all of those entities in relation to the complaint and to make binding determinations in respect of all or any of them.

In addition, constraints on information sharing contained in other laws, including AML/CTF laws, will need to be reviewed and amended to allow for the disclosure of information needed to support the IDR and EDR process, as well as the information sharing contemplated by the SPF. In particular, scams typically engage the tipping-off provisions in the AML/CTF Act that prevent disclosure of information relating to the matter. Whilst these provisions are currently subject of a separate review and amendment process, that review will need to ensure the tipping-off provisions are amended to accommodate the disclosures needed under the SPF, or alternatively, the SPF contain provisions which have the effect of permitting disclosure for the purposes of the SPF, notwithstanding the tipping-off provisions.

In addition, currently liability for scams is determined primarily on the basis of the ePayments Code and, in particular, whether the particular transaction that resulted in the movement of funds from the paying bank was unauthorised or authorised by the customer. A distinction between an unauthorised or authorised transaction is not consistent with the definition of a scam in the exposure draft or with consistent and comprehensive coverage of scams – a scam could involve either an unauthorised or authorised transaction. If the ePayments Code and the SPF both apply to scams:

- (a) it will lead to confusion and overlap,
- (b) it will retain the current inconsistent outcomes based on whether the transaction is authorised or unauthorised, and
- (c) it will result in the potential for liability to be not aligned to compliance with the obligations under the SPA, resulting in a misalignment of incentives to comply with those obligations.

Accordingly, the ePayments Code must be amended to facilitate the determination of liability in accordance with the guidance in the SPF Codes. That could be done by the ePayments Code being amended to provide that the assessment of liability that relates to a scam as defined in the exposure draft is to be determined in accordance with the SPF Codes and not the ePayments Code. This could be done by making the following amendments:

→ See [Appendix C](#)

Recommendation 3

All SPF Codes should be reviewed and approved by the Commission

Westpac is supportive of the development of the SPF Codes for each designated sector. However, reflecting the ecosystem approach, there should be a mechanism to ensure consistency across the sector SPF Codes to ensure they collectively contain robust measures to combat scams across the ecosystem.

To achieve this, Westpac agrees with the views put forward by the ABA that the power to make an SPF Code should not be delegated to an SPF sector regulator, given that regulator will not have a system-wide view.

Recommended changes to achieve this:

→ See [Appendix D](#)

Recommendation 4

Clarify the scope of actionable scam intelligence, as well as what, when and how this intel should be reported

4.1 Definition of actionable scam intelligence

The exposure draft requires entities to report and take steps in response to actionable scam intelligence. Westpac supports the reporting and sharing of information relating to scams as a critical part of an effective framework to combat scams.

However, the definition of actionable scam intelligence is extremely broad. It includes where there are reasonable grounds for the entity to suspect that a transaction on a regulated service of the entity is a scam. Accordingly, it would include where there are reasonable grounds for a bank to suspect that a transaction on an account or other interactions using its channels is a scam.

Westpac undertakes extensive monitoring to detect potential scams, including more than 30 million banking interactions each day. Alerted activity that is detected through these measures may or may not be a scam. The action that is then taken depends on the nature of the events and the transaction or interaction. For example, if it is a new payee, additional steps may be required to be taken by the customer to add that new payee.

Accordingly, given the breadth of the definition of actionable scam intelligence, it could result in the reporting of a very significant volume of information that will not only be very onerous and costly for the REs, but burden the recipient regulator with a volume of information that will impede the effective use of that information.

The burden on REs will be particularly onerous given each report must be made to the general regulator within 24 hours after the earlier of either the identification of the scam or 28

days, and the report will require not only the reporting of the actionable scam intelligence but also other information such as the steps taken in response.

Westpac recommends that the definition of actionable scam intelligence be amended so that the rules will set out the type of intelligence that is actionable scam intelligence. That will allow those rules to be informed by a consideration of the types of information an entity may have or identify and what is most effective to be reported to combat scams.

This can be done by amending section 58AI as follows:

→ See [Appendix E](#)

4.2 Reporting matters that an entity identifies is not a scam

The exposure draft requires reporting of actionable scam intelligence to a general regulator even if the reporting entity identifies that the activity is not a scam. Again, this impacts the volume and utility of the information. Westpac recommends that REs should not have to report if they identify the activity the subject of the actionable scam intelligence is not a scam.

This could be achieved by amending sections 58BX, 58BK(2) and 58BL(2):

→ See [Appendix F](#)

4.3 Warning SPF Customers

Westpac supports measures that inform and warn customers of scams.

Under the exposure draft, REs are required to provide warnings to each SPF consumer belonging to relevant classes. Those consumers may include consumers for whom a RE does not have a service relationship.

However, the exposure draft gives rise to the following issues:

- (a) it applies to "a scam". It is not clear of that is intended to be include *any* scam, meaning that for *any* scam activity, REs must identify the relevant class and provide warnings, irrespective of the materiality.
- (b) what constitutes reasonable steps, including the mode of communication and the frequency. This is particularly so when the relevant SPF consumers may not be customers of the entity.
- (c) there is a risk that the volume of warnings that will be required to be generated will lead to warning fatigue by SPF consumers.

The legislation contemplates that the SPF Code may include details relating to the identification of consumers and reasonable steps.

Westpac recommends that the exposure draft be amended so that the SPF Code must include details of those matters. One advantage of that option is that it gives consistency for

SPF consumers on the types of communications they are likely to receive about scams and can assist in avoiding warning fatigue by SPF consumers.

This can be achieved by amending sections 58BK(2)(b), 58BL(2) and 58BX.

→ See [Appendix F](#)

Recommendation 5

Extend the safe harbour for actions taken after an RE reasonably identifies an activity to be a scam

5.1 Safe harbour

The safe harbour can apply if an entity has actionable scam intelligence about a suspected scam relating to its regulated services. Give the definition of actionable scam intelligence, this means there must be reasonable grounds to suspect it is a scam before the safe harbour applies.

As set out in recommendation 4.2 above, a high volume of alerted activity can be generated, much of which may be false positives. Having regard to the imperative to act quickly in connection with scams, particularly where it relates to a transaction or activity on an account, action may be taken where a RE reasonably considers it *may* have intelligence about a suspected scam. That is, it may be too late if action is taken only where the entity objectively does have reasonable grounds for suspecting that a transaction is a scam. In many cases, it is critical that the action is taken promptly to avoid loss to the SPF consumer.

Further, the safe harbour ends when the RE identifies an activity is a scam. Therefore, the safe harbour does not apply to any action taken once the RE determines it is a scam. The safe harbour should be consistent with encouraging the taking of action after a scam has been identified.

Accordingly, Westpac recommends that the safe harbour be amended so that:

- (a) it applies if the RE reasonably considers that they may have actionable scam intelligence;
- (b) it applies to an action taken if it is identified that the activity is a scam; and
- (c) the proportionality of the action has regard to the time in which action is to be taken and potential for an SPF consumer to suffer loss and damage.

This can be achieved by amending section 58BZ:

→ See [Appendix G](#)

5.2 Utilising the Australian Financial Crimes Exchange (AFCX)

Westpac encourages the utilisation of existing mechanisms in this reporting so that existing APIs and existing reporting structures can be utilised. Existing private sector mechanisms such as the AFCX could be utilised for that purpose. That could be done by giving power to the general SPF Regulator to designate an institution to whom the information is to be provided. Not only would that avoid duplication of resources, but it would also allow the general SPF regulator to, for example:

- (a) issue takedown directives, and
- (b) obtain SLA reports on the timeliness of ecosystem participants' actions, aiding regulatory enforcement.

Recommendation 6

Clarify the definition of a scam and SPF Consumer

6.1 Definition of a scam

The definition of scam is very broad. As drafted, it could extend beyond scams to circumstances of financial or elder abuse, given that they can involve deceiving the customer into facilitating an action which can involve a regulated service. In that way:

- (a) it could lead to the application of scam related measures to circumstances in which they are not designed or fit; and
- (b) it will also lead to overlapping, and potentially inconsistent, obligations and outcomes.

The definition should therefore be amended to exclude non-scam related fraud. One option is to provide that a scam has the characteristics set out in the existing definition and also characteristics specified in the rules. That would then allow rules to be developed, and allow flexibility, to ensure scams, but no other fraud or other activities are the subject of the exposure draft.

Accordingly, Westpac recommends that the definition of scam be amended to provide that it must meet the characteristics set out in the rules.

This could be done by amending section 58AG as follows:

→ See [Appendix H](#)

6.2 Definition of SPF consumer

The definition of SPF consumer includes small business. For banks, there are a range of obligations relating to the provision of financial services which apply either differing definitions of small business or different concepts. For example:

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- (a) Chapter 7 of the Corporations Act distinguishes between retail and whole clients; and
 - (b) the ePayments Code does not apply to facilities designed primarily for use for business.

The SPF should seek to align with existing classifications as much as possible. To allow that to occur, Westpac recommends the definition of small business be a matter that is required to be addressed in the Code.