



**Law Council**  
OF AUSTRALIA

# Scams Prevention Framework Bill 2024

**Senate Economics Legislation Committee**

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*Telephone* +61 2 6246 3788  
*Email* [mail@lawcouncil.au](mailto:mail@lawcouncil.au)  
PO Box 5350, Braddon ACT 2612  
Level 1, MODE3, 24 Lonsdale Street,  
Braddon ACT 2612  
Law Council of Australia Limited ABN 85 005 260 622  
[www.lawcouncil.au](http://www.lawcouncil.au)

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## About the Law Council of Australia

The Law Council of Australia represents the legal profession at the national level; speaks on behalf of its Constituent Bodies on federal, national, and international issues; promotes and defends the rule of law; and promotes the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts, and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world. The Law Council was established in 1933, and represents its Constituent Bodies: 16 Australian State and Territory law societies and bar associations, and Law Firms Australia. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Law Society of the Australian Capital Territory
- New South Wales Bar Association
- Law Society of New South Wales
- Northern Territory Bar Association
- Law Society Northern Territory
- Bar Association of Queensland
- Queensland Law Society
- South Australian Bar Association
- Law Society of South Australia
- Tasmanian Bar
- Law Society of Tasmania
- The Victorian Bar Incorporated
- Law Institute of Victoria
- Western Australian Bar Association
- Law Society of Western Australia
- Law Firms Australia

Through this representation, the Law Council acts on behalf of more than 104,000 Australian lawyers.

The Law Council is governed by a Board of 23 Directors: one from each of the Constituent Bodies, and six elected Executive members. The Directors meet quarterly to set objectives, policy, and priorities for the Law Council. Between Directors' meetings, responsibility for the policies and governance of the Law Council is exercised by the Executive members, led by the President who normally serves a one-year term. The Board of Directors elects the Executive members.

The members of the Law Council Executive for 2025 are:

- Ms Juliana Warner, President
- Ms Tania Wolff, President-elect
- Ms Elizabeth Shearer, Treasurer
- Mr Lachlan Molesworth, Executive Member
- Mr Justin Stewart-Rattray, Executive Member
- Mr Ante Golem, Executive Member

The Chief Executive Officer of the Law Council is Dr James Pople. The Secretariat serves the Law Council nationally and is based in Canberra.

The Law Council's website is [www.lawcouncil.au](http://www.lawcouncil.au).

## Acknowledgements

The Law Council of Australia is grateful for the assistance of the Law Institute of Victoria and the Queensland Law Society in the preparation of this submission.

We also gratefully acknowledge the contributions of the Law Council's Business Law Section, particularly the Competition and Consumer Committee and the Financial Services Committee.

## Executive Summary

1. The Law Council of Australia is pleased to make a submission to the Senate Economics Legislation Committee in response to its inquiry into the provisions of the Scams Prevention Framework Bill 2024 (the **Bill**).
2. Regrettably, in the time available, the majority of the Law Council Constituent Bodies, Sections, and Committees were unable to meaningfully consider the Bill and provide views to inform this submission. This was largely due to the brief inquiry timeframe, particularly in the context of the inquiry predominantly occurring over the summer period, at a time when the legal profession has been, for the most part, unavailable.
3. As a result, this submission contains high-level, preliminary feedback on the Scams Protection Framework (**SPF**) that the Bill proposes to insert into the *Competition and Consumer Act 2010* (Cth) (the **Act**). The Law Council makes the following recommendations:
  - the Bill should be amended to include a transitional period of at least six months;
  - proposed section 58AE of the Bill should be amended to require public consultation on a draft designation instrument, and to include consultation responses as a matter to which the Minister must have regard;
  - the definition of ‘scam’ in proposed section 58AG should be amended in order to more comprehensively capture various forms of scam activity, including phishing and remote access scams;
  - further consideration should be given to the definition of ‘small business operator’ in the Bill, in order to more fully align it with the existing ‘small business’ definition under subsection 23(4) of the Australian Consumer Law;
  - the Bill should reserve civil penalty provisions for systemic conduct in breach of the overarching SPF Principles or SPF Code, rather than making any failure to detect or prevent an isolated scam event subject to a civil penalty;
  - clarification should be sought from the Treasury about the following matters:
    - the rationale for the inclusion of proposed subsection 58BT(3), relating to the sharing of SPF personal information, and this rationale should be inserted into the Bill’s Explanatory Memorandum;
    - the basis for limiting the safe harbour period to a maximum of 28 days in proposed section 58BZA of the Bill; and
    - the intended operation and interaction between the various dispute resolution processes provided for under the Bill;
  - the Bill should provide clear and simple liability principles (including for the apportionment of liability) to accompany the internal and external dispute resolution processes and assist in the determination of compensation and promotion of the rule of law; and
  - the Bill should be amended to incorporate specific details about the external dispute resolution model to be followed, in addition to a clear process for handling multi-party complaints.
4. This submission should be read in conjunction with the Law Council’s submission to the Treasury dated October 2024, prepared in response to an exposure draft of the Bill, **enclosed** as **Appendix A**.

## General comments

5. The Law Council supports the introduction of a comprehensive regulatory framework to better protect Australian consumers from scams. We agree that a whole-of-ecosystem approach is required to reduce gaps which can be exploited by scammers. The rise in sophisticated scams over recent years has resulted in significant consumer and business losses, and reduced trust and confidence in digital and financial services.
6. The Bill represents a significant step towards achieving the objective of preventing and responding to scams targeting consumers. We are eager to ensure that the SPF, if enacted, is fit-for-purpose and successful. As such, we are pleased to note that a range of substantive revisions have been made to the proposed framework since the Treasury's consultation process in late 2024. We thank the Treasury for its engagement to date, and particularly welcome:
  - the insertion into the Bill of proposed section 58GF, requiring a statutory review of the SPF to be conducted within three years;
  - refinements to key definitional concepts in the Bill;
  - a new requirement in proposed section 58AE that, before designating a sector to be subject to the SPF under section 58AC (including any partial exceptions contemplated under section 58AD(5)), the Minister must consult relevant consumer groups and the businesses or services making up the sector, or such associations or other bodies representing them; and
  - the revision of the Bill to clarify liability for compensation, including addressing the apportionment of liability for concurrent wrongdoers in proposed sections 58FZD to 58FZK.
7. These changes to the Bill are broadly consistent with recommendations made in the Law Council's October 2024 submission to the Treasury<sup>1</sup> (**enclosed as Appendix A**). The responsiveness to the feedback we provided during the consultation phase is appreciated and supported.
8. We are also supportive of the changes made to proposed section 58AA, in order to provide more specificity as to the intended object of new Part IVF, including clarifying the jurisdictional nexus with Australia.
9. Nonetheless, multiple other recommendations from our October 2024 submission do not appear to have been satisfactorily addressed in the Bill, including that:
  - the Minister should be required, by primary legislation, to consult stakeholders before making an industry code under proposed section 58CB of the Bill;<sup>2</sup>
  - further consideration should be given to alternatives to reduce the complexity of the multi-regulator model, either through demarcating roles and responsibilities clearly, or by establishing a one-stop shop coordinator office to interface with industry and consumers;<sup>3</sup>

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<sup>1</sup> Law Council of Australia, *Exposure Draft—Treasury Laws Amendment Bill 2024: Scams Prevention Framework* ([Submission to the Treasury](#), 17 October 2024), 9-10 (Recommendation 1, noting the Law Council recommended that an independent statutory review be conducted within 12 months, not three years), 10-11 (Recommendation 2), 11-12 (Recommendation 3), 13-14 (Recommendation 4), 20-21 (Recommendation 9).

<sup>2</sup> *Ibid* 15-16 (Recommendation 6).

<sup>3</sup> *Ibid* 17-18 (Recommendation 7).

- liability principles for compensation should be specified in primary legislation, and these should be able to be consistently applied to internal and external dispute resolution, and statutory actions for compensation under the Bill;<sup>4</sup>
  - the Bill should reserve civil penalty provisions for systemic conduct in breach of the overarching SPF Principles or SPF Code;<sup>5</sup>
  - further consideration should be given to the interaction and appropriateness of the combination of internal dispute resolution, external dispute resolution and, potentially, civil actions under the SPF;<sup>6</sup>
  - the Minister’s intention to authorise the Australian Financial Complaints Authority (**AFCA**) as the single external dispute resolution scheme for the three initially designated sectors<sup>7</sup> should be specified in the primary legislation, not just the Explanatory Memorandum;<sup>8</sup> and
  - the extraterritoriality provision in proposed section 58AJ should be removed from the Bill and, instead, new Part IVF should be listed in section 5(1) of the Act. There should also be further consideration of how extraterritorial application will be enforced in the context of the SPF.<sup>9</sup>
10. Should the Bill pass, it is vital that the implementation of the SPF is accompanied by sufficient resourcing for the relevant regulators, in addition to the legal assistance sector, to ensure that the existing funding pressures facing these entities is not exacerbated. In this respect, we draw the Committee’s attention to our broader recommendations to address the financial and resourcing implications of the Bill, specifically that:
- all regulators responsible for enforcing the SPF principles and SPF codes should have adequate resources to do so competently and efficiently;<sup>10</sup>
  - the Government must ensure that AFCA receives sufficient resourcing to manage expected increases in complaint volume and reduce delays;<sup>11</sup> and
  - there should be additional resourcing to ensure access to properly funded legal assistance services, including resourcing specialised legal assistance services and increasing grants of aid in civil matters.<sup>12</sup>
11. To best assist the Committee to consider the Bill in its limited inquiry timeframe, we do not seek to repeat in full all of the above recommendations in this submission, given that they are already set out in detail in our October 2024 submission to the Treasury. We strongly encourage the Committee to have regard to this earlier submission in the course of its inquiry. Instead, this submission largely focuses on discrete drafting suggestions and opportunities to minimise the risk of unintended consequences arising from various aspects of the Bill.

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<sup>4</sup> Ibid 18-19 (Recommendation 8).

<sup>5</sup> Ibid 21-22 (Recommendation 10).

<sup>6</sup> Ibid 22-24 (Recommendation 11).

<sup>7</sup> Explanatory Memorandum, Scams Prevention Framework Bill 2024, 7, 66.

<sup>8</sup> Law Council of Australia, *Exposure Draft—Treasury Laws Amendment Bill 2024: Scams Prevention Framework* ([Submission to the Treasury](#), 17 October 2024) 24 (Recommendation 12).

<sup>9</sup> Ibid 24-25 (Recommendation 13).

<sup>10</sup> Ibid 17-18 (Recommendation 7).

<sup>11</sup> Ibid 24 (Recommendation 12).

<sup>12</sup> Ibid 25-26 (Recommendation 14).

## Specific comments

### Commencement

12. Clause 2 of the Bill provides that the Bill will take immediate effect, upon receiving Royal Assent.

13. We acknowledge, as outlined in the Explanatory Memorandum, that:

*The commencement of the SPF does not in itself impose any obligations on entities until a designation is made with respect to a regulated sector, and that designation instrument is in force (and any transitional arrangements in the instrument are taken into account).<sup>13</sup>*

14. Nonetheless, the Bill should include a transitional period of at least six months. Although many entities in relevant sectors are already working to improve their SPFs, an adequate transitional period is needed to allow regulated entities to:

- create new SPFs or adjust existing SPFs to comply with the specific obligations in the Bill;
- educate their customers/clients; and
- develop necessary internal policies and procedures to educate and support staff in applying complaint SPFs.

15. We are concerned that, without an appropriate transitional period, entities may be exposed to penalty regimes for non-compliance, despite their best efforts to prevent scams.

#### Recommendation 1

- **The Bill should be amended to include a transitional period of at least six months.**

### Potential expansion of the scheme

16. The Explanatory Memorandum says that:

*The Government has committed to initially designating telecommunications services, banking services and digital platform services relating to social media, paid search engine advertising and direct messaging, as each of these sectors represent a significant vector of scam activity. The SPF is responsive and adaptable, and enables other sectors to be brought under the framework where scam harms arise.<sup>14</sup>*

17. Care must be exercised before expanding the proposed scheme in the manner described above. Scam prevention regulation is not without cost, and it is important that designation instruments are appropriately targeted, and that their terms are clear and certain, to ensure fairness, accountability, and the smooth implementation of the new scheme. However, we are concerned about the lack of transparency about what additional industries may be incorporated into the SPF scheme.

<sup>13</sup> Explanatory Memorandum, Scams Prevention Framework Bill 2024, 8.

<sup>14</sup> Ibid 5.

18. The absence of this information about ‘other sectors’ to be brought under the framework makes it difficult for businesses, and stakeholders in other sectors, to understand their potential future obligations and prepare accordingly. Importantly, it makes it difficult to assess whether the proposed new laws will be proportionate to the risk posed by various businesses. This is especially concerning in light of the extensive civil penalty regime provided for under the Bill.
19. We acknowledge that, under proposed section 58AE, the Minister must consider a variety of matters and consult the relevant businesses, services, and associations that make up a sector before making an instrument under subsection 58AC(1) about a sector of the economy. We strongly support this consultative approach, provided that this process enables interested stakeholders to meaningfully engage.
20. To strengthen this consultation requirement, we suggest that section 58AE could be revised to require public consultation on a draft designation instrument, and to include consultation responses as a matter to which the Minister must have regard to when making their decision. This change would ensure that a more robust statutory consultation requirement is in place—beyond what is provided for in the *Legislation Act 2003* (Cth).<sup>15</sup>
21. Input by affected stakeholders will be critical to ensuring that the designation of a regulated sector—and any exceptions—is appropriately targeted to achieve the objectives of proposed Part IVF, with minimal unintended consequences. This engagement is essential, given the complexity of the sectors identified in the Explanatory Memorandum, and the likelihood that there will be a range of interrelated and overlapping services within those sectors.
22. It will, therefore, be critical to ensure that everyday businesses (especially those without the extensive resources of financial institutions) are not unnecessarily captured by a future scheme that is not tailored to the risk levels of those businesses.

#### Recommendation 2

- **Proposed section 58AE of the Bill should be amended to require public consultation on a draft designation instrument, and to include consultation responses as a matter to which the Minister must have regard.**

## Definitions

### ‘Scam’

23. Proposed section 58AG defines ‘scam’. Whilst this definition has been refined following the Treasury’s consultation on the exposure draft of the Bill, we remain concerned that the definition, as currently drafted, will not capture some of the most significant forms of scam activity. This has the potential to undermine the effectiveness of the SPF.
24. For example, while a phishing scam involves an element of deception (as required under paragraph 58AG(1)(a)), it arguably does not involve deception of a kind that is described in section 58AG(2). In particular, a phishing scam:
  - may not deceptively represent something to be (or to be related to) a regulated service (as contemplated in paragraph 58AG(2)(a)). Instead, a phishing scam

<sup>15</sup> See *Legislation Act 2003* ss 15J(2), 17, 19.

usually represents the scammer to be a legitimate and trusted third-party business;

- may not impersonate a regulated entity in connection with the regulated service (as contemplated in paragraph 58AG(2)(b)). Instead, a phishing scam typically uses a regulated service to impersonate a legitimate and trusted third-party business;
- may not necessarily attempt to deceive the SPF consumer into performing an action using the regulated service or facilitating another person to do so (as contemplated in paragraph 58AG(2)(c)). Instead, a scammer who sends a fraudulent text message or email might induce the SPF consumer (or other person) to perform an action using a different service; and
- may not attempt to deceive the SPF consumer using the regulated service (as contemplated in paragraph 58AG(2)(d)). This is because the deception might be made using one type of service, such as a telecommunication service, but action may be ultimately taken by the SPF consumer using another type of service, such as a banking service.

25. Similar considerations arise in respect of remote access scams.<sup>16</sup>

### Recommendation 3

- **The definition of ‘scam’ in proposed section 58AG should be amended to more comprehensively capture various forms of scam activity, including phishing and remote access scams.**

### ‘Small business operator’

26. Proposed section 58AH(5) defines ‘small business operator’. We appreciate that this definition has been slightly refined, following the Treasury’s consultation on the exposure draft of the Bill.
27. However, the definition of ‘small business operator’ does not fully align with the definition of ‘small business contract’ under the Australian Consumer Law in Schedule 2 to the Act. We reiterate the concerns raised in our October 2024 submission to the Treasury about the creation of unnecessary regulatory complexities in this respect.<sup>17</sup>
28. Whilst the introduction of a \$10 million annual turnover requirement achieves greater alignment with the existing small business definition under the Australian Consumer Law,<sup>18</sup> consistency has still not been achieved. In particular, the Bill:
- does not adopt the existing test for calculating ‘annual turnover’ for small businesses under the Australian Consumer Law,<sup>19</sup> instead referring to the definition that appears in the *Corporations Act 2001* (Cth);
  - does not adopt the existing distinction in the Australian Consumer Law between casual, part-time, and full-time employees,<sup>20</sup> for the purposes of determining whether an entity has fewer than 100 employees; and

<sup>16</sup> Australian Government, *ScamWatch: Remote access scams* ([Web Page](#), 2024).

<sup>17</sup> Law Council of Australia, *Exposure Draft—Treasury Laws Amendment Bill 2024: Scams Prevention Framework* ([Submission to the Treasury](#), 17 October 2024) 10-11.

<sup>18</sup> *Competition and Consumer Act 2010* (Cth) sch 2, s 23(4).

<sup>19</sup> *Ibid* s 23(4)(b)(ii).

<sup>20</sup> *Ibid* s 23(5).

- contains a 'principal place of business' requirement that does not exist in other definitions of 'small business'.
29. Amending the definition of 'small business operator' in the Bill to fully align with the equivalent definition under the Australian Consumer Law would promote greater consistency and harmonisation, and would ensure that only genuine small businesses—as opposed to conglomerates that may conduct multi-million-dollar businesses despite using entities with few (or no) employees—are captured within this definition.

#### Recommendation 4

- **Further consideration should be given to the definition of 'small business operator' in the Bill, in order to more fully align it with the existing 'small business' definition under subsection 23(4) of the Australian Consumer Law.**

### Civil penalty framework

30. The Bill contains an extensive range of civil penalty provisions. For example:
- proposed section 58BJ provides for civil penalty liability where an entity fails to take reasonable steps to prevent another person from committing a scam; and
  - proposed section 58BN indicates that a civil penalty could be imposed for a failure to take reasonable steps to act on actionable scam intelligence concerning a single scam.
31. We reiterate our view, expressed in our October 2024 submission, that civil penalties arising from any failure to detect or prevent a scam should be reserved for *systemic* conduct in breach of the overarching SPF Principles or SPF Code.<sup>21</sup> Given the limited resources of regulators, we query whether these civil penalties are an appropriate or necessary sanction for isolated scam events. At the individual customer level, the focus should instead be on the obligation of the regulated entity to provide avenues for compensation and redress to the SPF consumer.
32. We consider that limiting the application of civil penalties in this way would not impact the rights of any individual SPF consumer that is affected by a scam, including rights to seek compensation.
33. We have also received feedback from the Law Institute of Victoria that, instead of relying on a two-tier penalty regime (that could lead to inconsistencies in enforcement, particularly when distinguishing between different types of scams), breaches of the SPF Principles should have clear, uniform penalties, focusing on proportionality by reference to the harm caused.

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<sup>21</sup> Law Council of Australia, *Exposure Draft—Treasury Laws Amendment Bill 2024: Scams Prevention Framework* ([Submission to the Treasury](#), 17 October 2024) 21-22.

#### Recommendation 5

- **The Bill should reserve civil penalty provisions for *systemic* conduct in breach of the overarching SPF Principles or SPF Code, rather than making any failure to detect or prevent an isolated scam event subject to a civil penalty.**

### Sharing of SPF personal information

34. Proposed subsection 58BT(3) provides that:

*A person authorised under the scheme may use or disclose SPF personal information to the extent that this is reasonably necessary to achieve the object of this Part.*

35. We query the rationale for the inclusion of this subsection, particularly as the Explanatory Memorandum does not provide any guidance on this matter. Careful consideration must be given to the potential consequences of this provision, including the likely need to update privacy policies and privacy disclosure and consent statements. Further, SPF consumers would need to understand the potential for this data sharing to occur, prior to providing their own personal information.
36. This issue also arises under proposed paragraph 50CC(2)(i), which provides for SPF Codes to authorise the use or disclosure of SPF personal information, to the extent necessary to comply with an entity's obligations under the SPF Code.

#### Recommendation 6

- **Clarification should be sought from the Treasury about the rationale for the inclusion of proposed subsection 58BT(3), relating to the sharing of SPF personal information, and this rationale should be inserted into the Bill's Explanatory Memorandum.**

### Safe harbour protection for scam disruption activity

37. We support a regime providing protection from liability while a regulated entity investigates actionable scam intelligence, so that that entity can implement measures to reduce the risk of loss or damage to SPF consumers.
38. We also welcome that proposed section 58BZA includes 'matters relevant to whether the action is reasonably proportionate to the activity'. However, we remain concerned that the 'reasonably proportionate' standard is ambiguous. Acknowledging the challenges in providing any greater specificity within the Bill, we consider that further guidance about what is 'reasonably proportionate' would assist regulated entities.
39. As paragraph 58BZA(2)(d) is presently drafted, the safe harbour in the Bill is only available in respect of action taken during a period starting on the day that intelligence becomes 'actionable scam intelligence', and ends at the earlier of:
- the time the entity reasonably believes the activity is or is not a scam; or
  - after 28 days.

40. The Explanatory Memorandum says:

*The intention of the safe harbour provision is to enable timely and responsive disruptive action where a regulated entity reasonably suspects scam activity, while also setting clear guardrails and parameters to ensure third parties are protected from ongoing disruptive action where they are not involved in scam activity ...*

*The safe harbour protection applies to allow proportionate action for a maximum of 28 days.<sup>22</sup>*

41. It is not clear to us why the safe harbour period is limited to a maximum of 28 days. In practice, there will be circumstances where it may take longer than 28 days to determine whether an activity is a scam, which could be for reasons outside the regulated entity's control (e.g., where the SPF consumer has been contacted to provide more information but has not responded).
42. Moreover, there will be circumstances in which the regulated entity will still need to take steps to disrupt scam activity or prevent loss or harm once the activity is determined to be a scam. This is made clear in the Explanatory Memorandum, which says that a regulated entity must implement 'ongoing disruptive steps such as permanently removing a scam advertisement or social media account associated with scam activity'.<sup>23</sup>
43. By contrast, we observe that there is no limitation as to the period for which immunity applies in section 235 of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth), nor section 241 of the *Superannuation Industry (Supervision) Act 1993* (Cth).

#### **Recommendation 7**

- **Clarification should be sought from the Treasury about the basis for limiting the safe harbour period to a maximum of 28 days in proposed section 58BZA of the Bill.**

## **Dispute Resolution**

### **Interaction between various processes**

44. In our October 2024 submission to the Treasury, we recommended that further consideration should be given to the interaction and appropriateness of the combination of internal dispute resolution, external dispute resolution, and potentially civil actions under the SPF.<sup>24</sup>
45. While amendments have been made to provisions in the Bill about internal and external dispute resolution, there does not appear to be any further clarification about the interaction of those provisions, or their effect in combination. We remain concerned that the existence of multiple pathways to dispute resolution risks delays, consumer confusion, and sub-optimal outcomes. Further clarity should be sought

<sup>22</sup> Explanatory Memorandum, Scams Prevention Framework Bill 2024, 51.

<sup>23</sup> Ibid.

<sup>24</sup> Law Council of Australia, *Exposure Draft—Treasury Laws Amendment Bill 2024: Scams Prevention Framework* ([Submission to the Treasury](#), 17 October 2024) 22-24.

from the Treasury about the intended operation and interaction between these processes.

#### **Recommendation 8**

- **Clarification should be sought from the Treasury about the intended operation and interaction between the various dispute resolution processes provided for under the Bill.**

#### **Apportionment of liability**

46. We endorse the inclusion of a regime for the apportionment of liability in proposed sections 58FDZ to 58FZK of the Bill. Nonetheless, the obligations under Subdivision G to have internal and external dispute resolution mechanisms can only be effective in the context of scams if supported by a clear liability framework. We remain of the view that it is critical that there be consistency in relation to the apportionment of liability across the multiple complaints and dispute resolution pathways under the SPF.
47. As presently drafted, the apportionment of liability regime in proposed sections 58FZD to 58FZK would apply only to liability between concurrent wrongdoers in the context of statutory actions for compensation.
48. In relation to internal dispute resolution, new section 58BZE would require regulated entities to have regard to 'any guidelines prescribed by the SPF rules for apportioning any liability arising from' a relevant complaint when undertaking internal dispute resolution. However, this is sub-optimal to the extent the SPF rules might differ from the apportionment regime in sections 58FZD to 58FZK, where there is no clear requirement that any SPF rules adopt the apportionment of liability regime that applies to statutory actions.
49. Further, the Bill does not provide at all for apportionment in relation to the external dispute resolution scheme(s). The approach to apportionment across all possible dispute resolution pathways should be aligned and should be specified in the primary legislation.
50. Relatedly, the Bill also does not address how, as a practical matter, apportionment of liability will operate in the context of internal or external dispute resolution. For example, there is no formal mechanism by which a regulated entity can seek contribution from another regulated entity (an alleged concurrent wrongdoer) in negotiating a resolution with a victim via internal or external dispute resolution. This may undermine the prospects of successful resolutions being agreed via dispute resolution in cases involving concurrent wrongdoers and could potentially increase the barriers to beneficial outcomes being achieved by SPF consumers.
51. Further, the apportionment regime in proposed sections 58FZD to 58FZK only apportions liability between concurrent wrongdoers (that is, defendants). As drafted, the Bill does not contain a mechanism accounting for contributory negligence of the customer/victim, other than to the extent that subsection 58FZF(3)(a) provides that, when apportioning responsibility between defendants in proceedings, the Court is to exclude that proportion of the loss or damage in relation to which the victim is contributorily negligent under any relevant law.

52. This stands in contrast to:
- existing regimes in Australia that apply to claims for damages relating to misleading and deceptive conduct, such as under section 137B of the Act; and
  - the mandatory reimbursement regime in the United Kingdom that allows payment service providers to refuse reimbursement where they can show that a consumer has been grossly negligent in specific circumstances.

### **Liability principles**

53. Existing internal and external dispute resolution arrangements—which largely provide avenues for recourse for deficient customer servicing—depend upon the rights available to consumers under legislation, contracts, and industry codes. In the context of scams, to the extent that any such liability framework exists, and without new liability principles, this would primarily result in compensation being denied to SPF consumers. For example, provisions under the ePayments Code make consumers liable where they have shared a password that was supposed to be kept secret, even if they have been acting under a misapprehension about what they were sharing, or who they were sharing it with.<sup>25</sup>
54. To change this position, decision makers in internal and external dispute resolution schemes need to have express liability principles—for example, a principle under which a failure to act on actionable scam intelligence gives rise to liability, if it causes a loss to an SPF consumer.
55. The need for clear and simple liability principles is especially important in the context of scams that commonly involve businesses across multiple sectors, as this gives rise to the potential for SPF consumers to choose the internal dispute resolution scheme of the incorrect business. For instance, it is reasonable to expect that SPF consumers will take complaints to their banking institution’s internal dispute resolution scheme, even where it was the consumer’s telecommunications carrier, or social media platform, that failed to meet its obligations under the framework.
56. Moreover, unlike a court action for damages (such as that proposed under section 58FZC) that would require proof of a breach of an SPF Principle or SPF Code—which is likely to be unduly onerous for an individual SPF consumer—no direction is given in the Bill as to how compensation would be determined through internal or external dispute resolution.
57. Simple compensation principles would provide an efficient basis for relief while not being particularly resource-intensive to assess. For example, there could be a simple liability principle under which a bank is liable if it has failed to block a payment to an account listed on the AFCX Exchange.
58. Even if simple liability principles are not adopted, and it is intended that—as for the proposed statutory action for damages under section 58FZC—determinations of liability through internal and external dispute resolution processes are to depend upon a breach of:
- a civil penalty provision of an SPF Principle; or
  - a civil penalty provision of an SPF Code,

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<sup>25</sup> Australian Securities and Investments Commission, [ePayments Code](#) (June 2022) cl 11.

then this needs to be expressly stated in the Bill. Otherwise, there will remain no guidance or certainty as to the basis of internal or external dispute resolution determinations of liability, including for apportionment.

#### **Recommendation 9**

- **The Bill should provide for clear and simple liability principles (including for the apportionment of liability) to accompany the internal and external dispute resolution processes, and assist in the determination of compensation and promotion of the rule of law.**

#### **Role of AFCA in external dispute resolution**

59. The Explanatory Memorandum says that the Minister's intention is to authorise the AFCA scheme as the single SPF external dispute resolution scheme for the initially designated sectors.<sup>26</sup>
60. Whilst AFCA's remit means it is well-placed to determine complaints relating to banking scams, we observe that telecommunications companies are generally overseen by the Telecommunications Industry Ombudsman (**TIO**). This creates a risk of jurisdictional disputes arising as to whether a complaint relates to a scam (and is, therefore, an AFCA complaint), or whether the complaint is not scam-related (and is, therefore, a TIO complaint).
61. Furthermore, it is unclear how AFCA would handle a multi-party complaint, such as one that involves a bank, a telecommunication company, and a digital platform provider.
62. We have received feedback that the above features create a risk that the proposed external dispute resolution model will result in protracted examinations of different entities' relative roles in the scammer's attack to determine possible redress. Consequently, disputes could take significant time to resolve, including for any reimbursement of affected consumers to occur.
63. The Explanatory Memorandum states that:
- The processes and guidelines prescribed by the SPF rules will assist in streamlining [internal dispute resolution] for complaints involving multiple regulated entities. For example, the Minister may prescribe a process outlining how regulated entities should interact with each other at the IDR stage to allow for early resolution of disputes where more than one entity may not have met its obligations under the SPF.<sup>27</sup>*
64. We are concerned that relying on secondary legislation, as contemplated in the Explanatory Memorandum, could lead to ambiguity, delays, and inconsistent application of processes that could undermine the effectiveness of the external dispute resolution model under the SPF.
65. The Bill should be amended to incorporate specific details about the external dispute resolution model to be followed, in addition to a clear process for handling multi-party complaints. This change would ensure that the external dispute resolution model followed is transparent, well-defined, and easily accessible to all parties. Enshrining

<sup>26</sup> Explanatory Memorandum, Scams Prevention Framework Bill 2024, 7.

<sup>27</sup> Ibid 57.

these essential details in the primary legislation would establish a more robust and consistent system for resolving complaints.

#### **Recommendation 10**

- **The Bill should be amended to incorporate specific details about the external dispute resolution model to be followed, in addition to a clear process for handling multi-party complaints.**

#### **Rule of law**

66. A fundamental requirement of the rule of law is that similar cases are treated consistently.<sup>28</sup> However, if AFCA is to be the external dispute resolution body under the SPF, it is likely to apply its own fairness principles, in place of the rule of law. As a consequence, no formal doctrine of precedent will apply, and there will be a lack of legal certainty of outcomes for any given fact situation—such that lawyers will be unable to provide meaningful advice about likely outcomes.<sup>29</sup>
67. Even if there is a sound rationale for applying general principles of fairness (in place of the rule of law) for customer service disputes of the kind currently considered by AFCA, the same cannot be said for compensation claims of the kind contemplated under the Bill. This is because, in the context of compensation claims for scam losses—in which regulated businesses are wholly or partially indemnifying victims for fraud losses perpetrated by scammers—there will invariably be multiple contributing wrongdoers.
68. In some cases, the losses may be substantial, and there could be significant commercial consequences for the allocation of liability between various regulated businesses involved. It is not reasonable—nor consistent with the rule of law—for the allocation of liability between regulated businesses to be determined based upon general principles of ‘fairness’.
69. The splitting of losses across different business sectors should, instead, be based upon the application of specific liability rules and causation, and recognise other competing obligations (such as the bank’s obligation to act in accordance with the instructions of its customer). We reiterate Recommendations 9 and 10 in this respect.

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<sup>28</sup> See Law Council of Australia, *Rule of Law Principles* ([Policy Statement](#), March 2011) Principle 2.

<sup>29</sup> *Ibid.*