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# Scams and consumer rights

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# Overview of Scam Losses

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According to CALC, as at September 2022:

- Annual scam-related losses in Australia amount to approximately \$2 billion, marking an 84% increase from the previous year.
- Implications of such losses extend beyond individual impact, posing a significant national security threat and a macroeconomic concern.



# AFCA Determinations and Consumer Refunds

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- Analysis of the Australian Financial Complaints Authority (AFCA) determinations reveals a significant imbalance:
  - 62 determinations favoured the banks, whereas only 5 were in favour of consumers.
  - Complaints amounted to \$10,511,896 in scam losses, indicating a stark discrepancy in the resolution process.
- Consumer refunds in these cases were notably low, totalling only \$706,313, representing a mere 6.72% return compared to the losses complained about.



# Challenges in Obtaining Refunds

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- The process of securing refunds for scam losses through AFCA complaints is fraught with challenges:
  - Banks tend to offer ‘low-ball’ compensation, rarely covering the entire loss, leading to financial strain on affected individuals.
  - Limited success in obtaining full refunds further contributes to distrust and dissatisfaction among consumers.



# Banking Industry Obligations and Inconsistent Responses

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- Banks' responsibilities and legal obligations in preventing scams and protecting consumers:
  - Existing duties require banks to identify 'red flags' and potential scam activities.
  - However, inconsistent and inadequate responses to scam-related losses raise concerns, leading to consumer distrust and financial distress.



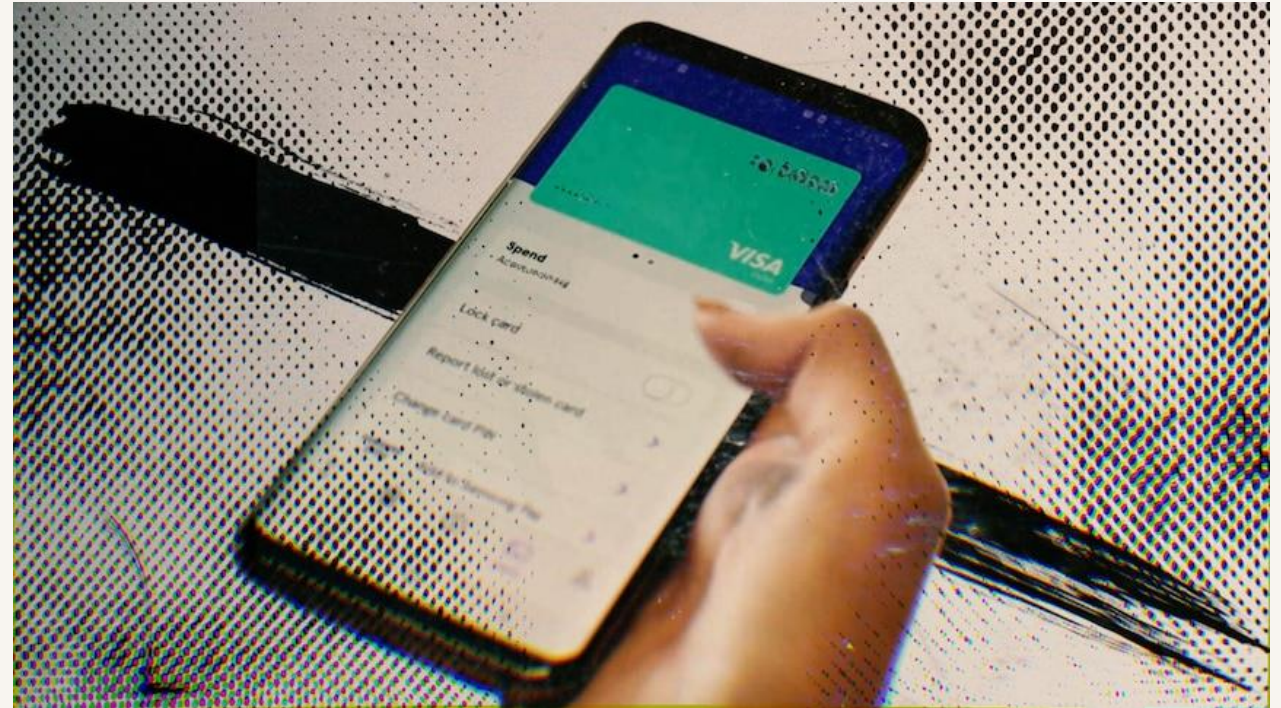
# Specific duties on Banks

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- Banks are obligated to exercise due care and skill under implied warranties in the customer-firm contract.
- That includes making reasonable enquires about the purpose of the transaction and not proceed with the transfer until they are reasonably satisfied that the transaction is not fraudulent.
- AUSTRAC-regulated banks must monitor customer transactions to detect criminal activities.
- Emphasis on conducting services 'efficiently, honestly, and fairly' (CORPORATIONS ACT 2001 - SECT 912A) has increased post the Banking Royal Commission, urging banks to invest in fraud detection capabilities rather than burdening consumers.
- The Code of Banking Practice and the Australian Banking Association guidelines prioritize fair, ethical, and reasonable conduct, particularly in protecting *vulnerable customers* from financial abuse, including scams.
- Banks might be liable if they are aware of undue influence preventing a customer's free and genuine choice during a transaction, observed through call recordings between banks and customers.

# Michael's Scam Story

- Vulnerability – Mild Intellectual Disability
- Bank calls from “No Caller ID”
- Suspicious activity on debit card
- Debit Card last 4 digits & ATM PIN requested
- Bogus joint accounts set up in Michael's name with unknown person 'Calvin'
- \$28,988 life savings transferred from Michael's account to shared bogus accounts and stolen







# Michael Scam Story

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- No accountability from bank
- Michael “gave the keys” to the caller when he gave his PIN number
- AFCA complaint lodged – \$1,000 offer of compensation made
- Michael engaged Maurice Blackburn to take over AFCA complaint & advocate at conciliation

# Michael's Scam Story - Before conciliation

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Demanded:

1. Call recording of initial call when bank account set up and bank notified of intellectual disability
2. Call recordings when notified of scam
3. Records as to when monies transferred from bogus shared account to other Ubank accounts
4. Records as to when staff member froze each of the 2 legitimate accounts and the bogus account, and what attempts were made to trace the money and recover it
5. Bank account to which money transferred and person/entity to which it was transferred
6. Copies of bank's procedures relating to consumers with vulnerability

# Michael's Scam Story - Before conciliation

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Demanded explanation as to the steps the bank takes to prevent scam activity and protect vulnerable consumers like Michael:

- a. the identification of scams and implementation of friction in the processing of funds;
- b. the identification and management of customers experiencing a vulnerability;
- c. the training of frontline scam staff in vulnerability management; and
- d. whether any changes have been made by the bank to the steps it requires/process for a customer to register a new device on a bank account since the scam activity.

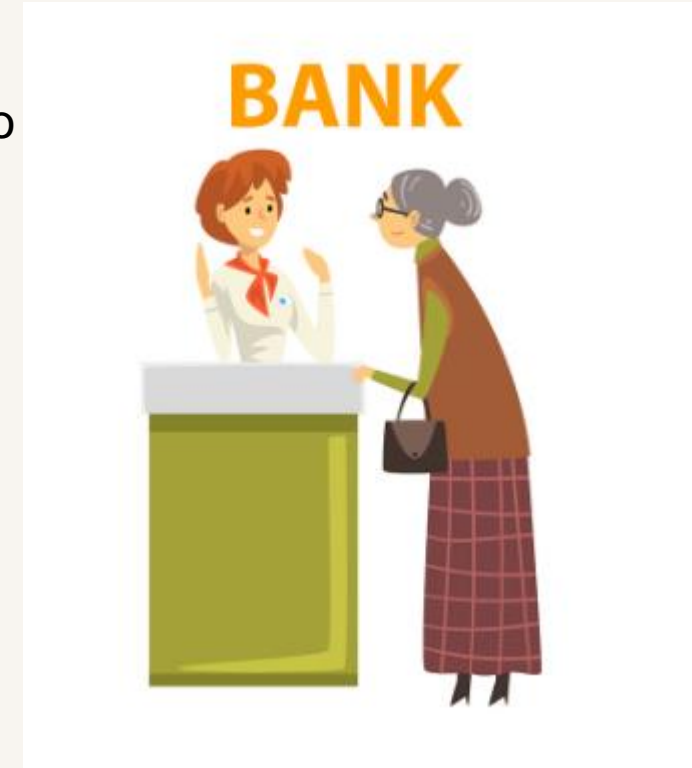
Flagged systemic issue complaint may be raised if didn't resolve at conciliation.

Highlighted similar story in recent news article

# Michael's Scam Story – Arguments at Conciliation

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- Duties of Banks to identify red flags
- s12ED ASIC Act: Implied warranties in a customer-firm contract imposes duty to exercise due care and skill
- Banks regulated by AUSTRAC required to monitor transactions for criminal activity
- s912A(1)(a) Corporations Act – obligation to act efficiently, honestly and fairly
- Code of Banking Practice – protect vulnerable customers from financial abuse
- ASIC report 761 – Scam Prevention, Detection and Response by Big4 banks



# Michael's Scam – AFCA Conciliation

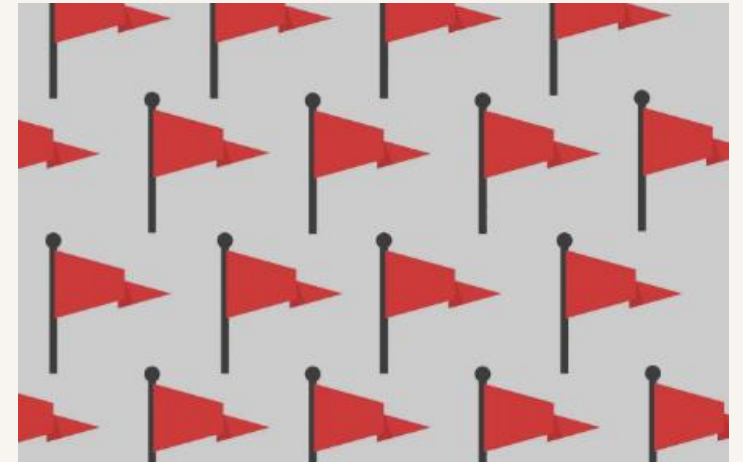
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- \$28,998 stolen funds
- Transfer exceeded the daily limit of \$20,000 a day
- Daily limit was high compared to other Big4 banks
- No friction to slow down transfers of money
- No alert system to detect suspicious activity on account given Michael's vulnerability never set up
- Bank slow to respond despite dedicated call channel set up and staff members not equipped to deal with hastily
- Bank finally agreed to pay \$28,988 plus \$1000 of non financial loss to Michael

# Look for evidence of these red flags

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- Transaction size: Larger-than-normal transactions.
- Deviation from usual transaction patterns.
- Transfers to jurisdictions known for scam activities.
- Vulnerability of the customer, such as age or disability.
- Requests to increase transfer limits made by the customer.
- Lack of clarity regarding the purpose of transfers.
- Receiving instructions from a third party other than the customer.



# Super scams

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## Lee's story:

<https://www.abc.net.au/news/2024-06-27/superannuation-scam-hostplus-fraud-afca-court-cryptocurrency/103962762>

<https://www.youtube.com/watch?v=BjwVvl2I8-8>



# Super Fund Obligations

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## **Braz v Host-Plus Pty Ltd [2023] FCA 1454**

- ‘SIS Regulation 6.33(1) provides that “[a] member of a regulated superannuation fund ... may request, in writing, that the whole or a part of the member’s withdrawal benefit in the transferring fund be rolled over” to a receiving fund.’
- ‘Reg 6.28, which deals with “Rollover—regulated superannuation funds and approved deposit funds”, provides:
  - (1) Except where it is otherwise provided by the Act, the *Corporations Act 2001*, the *Corporations Regulations 2001* or these regulations, a member’s benefits in a regulated superannuation fund ... must not be rolled over from the fund unless:
    - (a) the member has given to the trustee the member’s **consent** to the rollover; or’
- ‘This issue should have been considered by the AFCA. The failure to do so is an error of law.’



# Super Fund Obligations

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## What is consent?

### **SUPERANNUATION INDUSTRY (SUPERVISION) REGULATIONS 1994 - REG 6.27B**

#### **Definition**

In this Division:

*"consent"* means:

- (a) written consent; or
- (b) any other form of consent determined by the Regulator as sufficient in the circumstances.

AFCA, in its redetermination of Mr Braz's matter found the super fund had 'apparent consent' even though it didn't have actual consent.

# Super Fund Obligations

**What is consent?** [https://www.apra.gov.au/sites/default/files/sis-regulations-determination-form-of-non-written-consent-for-rollovers-and-transfers-2002\\_0.pdf](https://www.apra.gov.au/sites/default/files/sis-regulations-determination-form-of-non-written-consent-for-rollovers-and-transfers-2002_0.pdf)

APRA determination from 2002

FORM OF NON WRITTEN CONSENT SUFFICIENT FOR ROLLING OVER OR TRANSFERRING BENEFITS

It sets out very strict criteria for when non-written consent can be accepted for a super transfer.

It states: *'A transaction can only be validly made: (a) after the member has properly conveyed his or her non written consent using the identifier;'*

The explanatory memorandum says: *'The usage of non written consent is optional. It is for the fund's trustee to decide whether the circumstances of the fund are such that providing for non written consent for rollovers or transfers is viable or desirable. If a trustee chooses to accept non written consent to such transactions the Determination must be complied with.'*

Unsurprisingly, this APRA Determination makes no reference to 'apparent consent'.

"identifier" means a unique identifier allocated to a member by a trustee under item 2 of this Schedule, other than a Tax File Number, which may be, for example:

- (i) a number or group of numbers; or
  - (ii) a password;
- that is capable of being conveyed to the trustee by non written means;

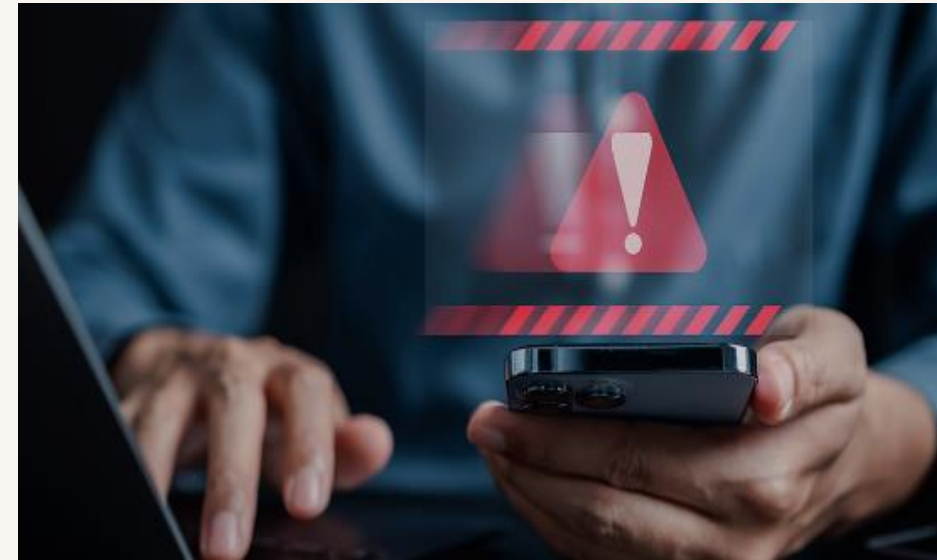
# Super Fund Obligations

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## Australian Prudential Regulation Authority (APRA) SPG 280 – Payment Standards

### Illegal early release and identity crimes

- APRA identifies illegal early release (IER) schemes and identity crimes as significant threats to the superannuation industry.
- Registered Superannuation Entities (RSE) licensees are expected to identify and mitigate these risks.
- Breach of payment standards or risk management obligations due to IER or identity crimes may render an RSE licensee liable to affected members for any losses incurred.
- While risks are typically higher in Self-Managed Superannuation Funds (SMSFs), they are relevant across all Registered Superannuation Entities (RSEs) and SMSFs.



# Super Fund Obligations

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## Australian Prudential Regulation Authority (APRA) SPG 280 – Payment Standards (cont.)

- RSE licensees are advised to include specific provisions within their risk management frameworks to establish robust systems and procedures aimed at significantly reducing the risk and opportunity for IER schemes and identity crimes.
- These systems and procedures aim to ensure that benefits are directed to the appropriate recipient (i.e., member, dependent, or another registered superannuation entity), utilizing the Australian Taxation Office's electronic services.
- Upon completion of risk assessments, APRA generally expects RSE licensees to process rollovers or transfers in line with the member's valid request and the portability rules outlined in the superannuation data and payment regulations.
- Specifically, these rules dictate that RSE licensees should aim to complete the rollover or transfer within three business days of receiving all mandatory information from the member, as specified for standard rollovers or transfers.

# Peter's case – Super fund rollover (AFCA case number 806447)

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Peter's superannuation was lost due to a scam initiated by Max Super, who advised him to establish an SMSF for better investment control.

A rollover request was submitted shortly after this advice, allegedly without Peter's authorization.

He contends that the trustee (LGIA Super) should have noticed anomalies in the request, used enhanced security measures, and is responsible for his \$220,782.52 loss.

The trustee's stance is that they processed the request as per APRA guidelines and are not liable for the loss.

They argue that Peter provided Max Super with the necessary information for the rollover request and no anomalies suggested a fraudulent request.

AFCA noted that the trustee checked the SMSF's ABN and it conducted a member verification search confirming the complainant's status within the SMSF.

# Peter's case – Super fund rollover (AFCA case number 806447)

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## Red flag 1:

- The Justice of the Peace's (JP) stamp on the certified copy of his driver's licence was a forgery.
- Peter says he was able to contact the JP who has confirmed that he did not certify his driver's licence and bank statement.
- He says the trustee should have also noticed the JP is in Victoria while he lives in Queensland.
- The trustee says its internal guidelines only require that it reviews the certified copy to confirm the certifiers name, qualification, signature and date are recorded.
- The trustee also says its guidelines only require it to take further steps where there is an inconsistent date of birth, address or signature on the face of the document.

# Peter's case – Super fund rollover (AFCA case number 806447)

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AFCA found in favour of the trustee:

*'I am satisfied the checks the trustee conducted were reasonable. While, in hindsight, I accept the JP being in a different state was anomalous, in processing a rollover a trustee must strike an adequate balance between checking the request is valid, but also not making it so difficult for someone to rollover their funds that they can't achieve it without significant effort. After all it is that person's money. In any event there could have been reasonable explanations for the JP being in a different state, including that the complainant was travelling, or that he had moved. I also note that while the complainant says that the JP told him that he did not certify the documents, he has not provided any evidence of this.'*

# Peter's case – Super fund rollover (AFCA case number 806447)

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## Red flag 2:

- Peter says the address used on the SMSF documentation was incorrect.
- While it has the same house number, street name and state as his actual address, it has a different suburb and postcode.
- The trustee says its guidelines do not require a customer to provide SMSF documentation for a roll-over request. Rather it checks that the address on the roll-over request matched the address it held on file (which it did).



# Peter's case – Super fund rollover (AFCA case number 806447)

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AFCA found in favour of the trustee:

*'While I accept the address on the SMSF documentation was incorrectly stated, APRA does not specifically require that a trustee get copies of the SMSF documentation before processing a roll-over. In such circumstances I do not accept the trustee erred in this regard.'*



# Peter's case – Super fund rollover (AFCA case number 806447)

Peter also argued that the trustee's processes are outdated, and it should have, at the very least, used two-factor authentication to authorise the rollover.

However AFCA stated:

*'...2-factor authorisation, is not required by APRA or AUSTRAC for roll-overs, and that the trustee's protocols and guidelines meet relevant standards.'*



# AFCA Annual Review 2023-24

<https://www.afca.org.au/annual-review-scams>

## Top five scam complaint products (received)

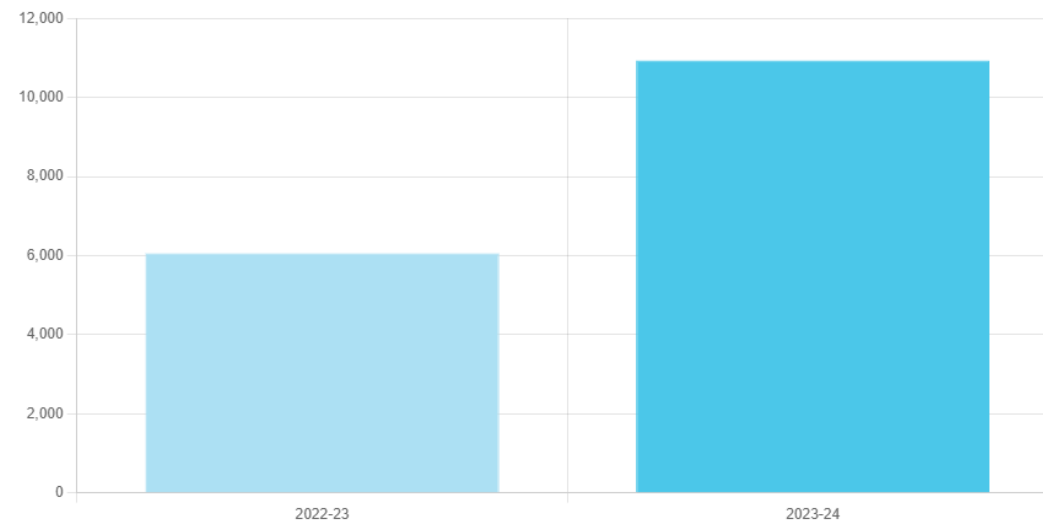
Product	2023-24
Personal transaction accounts	6,163
Credit cards	2,163
Online accounts <sup>1</sup>	887
Electronic banking	531
Business transaction accounts	210

‘Phishing, spoofing, and remote access scams remain widespread. There has been a significant increase in bank **impersonation scams**, while **investment and romance scams** continue to cause major financial losses. Investment scams often involve transferring funds to cryptocurrency platforms, although efforts by financial firms to restrict these transfers have had some success.’

10,928 complaints received

10,440 complaints closed

## Scam complaints received



# AFCA Annual Review 2023-24

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## Mandatory industry code

‘AFCA anticipates that the introduction of mandatory industry codes by the government will enhance scam prevention and protection, potentially reducing the volume of scam-related complaints reaching us.’

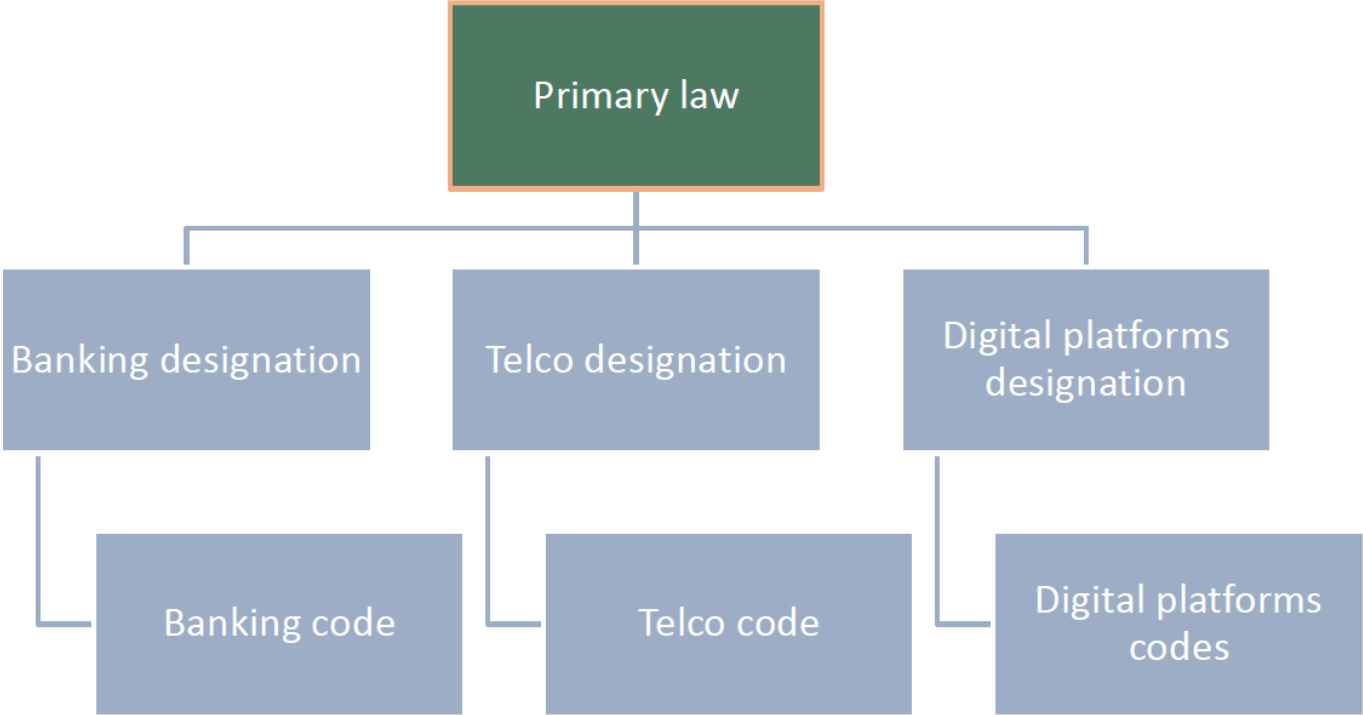
## Super scams

‘While complaints about scams and fraud within super remain low, AFCA is very concerned there are signs that cyber-criminals are beginning to turn their attention to the superannuation industry, and we strongly urge trustees to strengthen their safeguards against this activity.’

# Draft reforms - Scam Prevention Framework

<https://treasury.gov.au/consultation/c2024-573813>

## Scam Prevention Framework



# Draft reforms - Scam Prevention Framework

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## EXPOSURE DRAFT EXPLANATORY MATERIALS

1.22 The amendments introduce a framework for protecting Australians against scams with the following features:

- overarching principles (SPF principles) that apply to regulated entities;
- sector-specific codes (SPF codes) that apply to regulated sectors;
- a multi-regulator framework; and
- dispute resolution mechanisms.

1.23 ... The SPF principles relate to:

- governance arrangements relating to scams;
- preventing scams;
- detecting scams;
- reporting scams;
- disrupting scams; and
- responding to scams.

# Draft reforms - Scam Prevention Framework (SPF)

<https://treasury.gov.au/consultation/c2024-573813>

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## SUMMARY OF REFORMS

- The Treasury Minister may use the designation mechanism to designate further sectors and the relevant regulator into the framework over time where scam activity shifts. This could include **superannuation funds**, digital currency exchanges, other payment providers, and transaction-based digital platforms like online marketplaces.

## Limitations:

- Codes yet to be developed;
- A scam must **involve deception** and if successful, would result in a loss or harm to the consumer – won't cover all unauthorised transactions (e.g. where it happened without the customer's knowledge);
- 'The proposed definition [of SPF customer] is **not intended to capture unauthorised fraud**, such as cybercrimes that may use hacking and data breaches that do not involve the deception of a consumer into performing an action that results in loss or harm, including unauthorised payments. This is because scams are related to, but distinguished from, other types of fraud.'

# Multi-regulator model

ACCC

*Whole of ecosystem regulator responsible for the overarching framework*

ACCC will take enforcement action in response to a breach of a principles-based obligations (such as where there has been no code breach), or in response a referral from a sector regulator.



Sector regulators may refer a matter to the ACCC where there are persistent, systemic breaches of sector code obligations and higher penalties are appropriate.

ASIC

*administer and enforce the sector specific code for banks (when made)*

ACMA

*administer and enforce the sector specific code for telcos (when made)*

ACCC

*administer and enforce the sector specific code for digital platform service providers (when made)*

Sector specific regulators will be the first point of action for breaches of sector specific codes



# Penalties

The framework establishes a **tiered penalty regime**, with higher penalties applying to serious contraventions with more significant consumer impacts.

	Tier 1 contravention	Tier 2 contravention
	<i>Breaches of the principles-based obligations in the primary law relating to preventing, detecting, disrupting, and responding to scams</i>	Breaches of the principles-based obligations in the primary law relating to reporting, governance, and any breaches of the sector codes
Penalty for an entity	The greater of: <ul style="list-style-type: none"><li>• \$50 million;</li><li>• three times of the value of the benefit obtained;</li><li>• 30 per cent of the turnover during the period in breach</li></ul>	The greater of: <ul style="list-style-type: none"><li>• \$10 million;</li><li>• three times of the value of the benefit obtained;</li><li>• 10 per cent of the turnover during the period in breach</li></ul>
Penalty for an individual	<ul style="list-style-type: none"><li>• \$2,500,000</li></ul>	<ul style="list-style-type: none"><li>• \$500,8000</li></ul>

# Get in touch

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Thank you