# RIGHT FOR THE WRONG REASONS: ANALYSING THE NEW ZEALAND BANKING OMBUDSMAN'S APPROACH TO AUTHORISED PUSH PAYMENT FRAUD

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*Since time immemorial, people have been trying to trick, con and scam other people. Fraud is not a modern phenomenon. But modern fraudsters are an order of magnitude more technologically sophisticated, and are costing people and businesses billions of dollars globally. This article deals with a particular type of fraud: authorised push payment. Authorised push payment fraud happens when a victim is tricked into transferring money from their own account into that of a fraudster. It is uniquely challenging because, to their bank, the victim appears to have requested and approved the fraudulent transaction. In* Philipp v Barclays Bank*, the United Kingdom Supreme Court held that, unless a bank has actual knowledge of fraud, its common law duty is simply to execute its customers' instructions. Failure to do so will leave the bank prima facie liable for breach of mandate. By contrast, the New Zealand Banking Ombudsman Scheme requires banks, when on notice of "a real possibility that a customer is being scammed", to "make inquiries or warn the customer". I argue that these two approaches are irreconcilable, and this irreconcilability—combined with uncertainty as to when a bank will be "on notice"—creates confusion for both banks and their customers. Accordingly, I suggest Parliament should intervene by enacting new legislation that (i) requires banks to reimburse most authorised push payment fraud victims, and (ii) prevents banks from being liable at common law for taking reasonable fraud prevention steps.*

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Law and policy relating to authorised push payment fraud is rapidly evolving. As such, I note that the content of this article was current in April 2025, and the content of the postscript was current in May 2025.

# I INTRODUCTION

It is 4 o'clock on a Tuesday afternoon. You have made the decision to leave work early. Shortly after walking into your house, you receive a phone call—the caller introduces himself as an investment broker from the firm you were researching over lunch yesterday; he is calling to follow up after you completed an online form requesting information about possible investment options. The two of you speak for half an hour and he explains the very attractive returns on offer if you agree to invest through his firm. Several similar phone calls ensue, and he sends you official-looking emails and documents from an ostensibly legitimate email address. He even has a LinkedIn profile! You develop a sense of trust; this man just wants to help you invest your money wisely, while of course earning a small fee. Eventually, you take the plunge, and instruct your bank to transfer your money to this broker. The bank acts in accordance with your instructions and transfers the money. Instantaneously, the broker appears to vanish from the face of the earth. Feelings of dread start to seep in over the next few days, and you must ultimately admit that you have fallen victim to a scam.

This is a story that more and more New Zealanders of all ages and backgrounds are unwittingly finding themselves the protagonist of. When those New Zealanders are confronted with such a harsh reality, what can they do about it, and what *should* they be able to do about it? In this article, I seek to address those questions.

My analysis is separated into five parts. First, I explain that this kind of fraud is called authorised push payment fraud, and I review its nature and prevalence, as well as the harms that it causes. I also introduce one victim of fraud whose experience animates this article: Borja Ares from Whangārei. Secondly, I describe how the United Kingdom Supreme Court and the New Zealand Banking Ombudsman Scheme approach this problem. Thirdly, I compare and contrast these approaches, and explain why they are irreconcilable. Fourthly, I discuss the problems caused by this disparity. And fifthly, I propose a framework for Parliamentary intervention.

It is important to make clear at the outset that this article is concerned only with the fundamentals of banking law; in other words, the bare-bones relationship implied by law into banking agreements. Banks and customers can and invariably do agree to alter these basic rules, but such contractual arrangements are outside this article's scope.[1]

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1 See *Philipp v Barclays Bank UK PLC* [2023] UKSC 25, [2024] AC 346 [*Philipp SC judgment*] at [111]–[114]; *Westpac New Zealand Ltd v MAP and Associates Ltd* [2011] NZSC 89, [2011] 3 NZLR 751 at [12]; and *Tandem Group Ltd v ASB Bank Ltd* [2021] NZHC 51 at [19]–[27]. See also for example ANZ *General Terms and Conditions* (14 March 2024) at 21, 23 and 29–30; and ASB *Personal Banking Terms and Conditions* at [13].

## *II AUTHORISED PUSH PAYMENT FRAUD*

When a person "instructs their bank to transfer money from their account to someone else's account", that is a push payment.[2] By contrast, a pull payment involves a person instructing their bank to withdraw money from another person's account,[3] for example by way of a direct debit.[4] The focus of this article is on push payments, and, in particular, authorised push payment fraud (APP fraud). APP fraud, as illustrated by the fictitious introductory scenario, is a type of scam that involves a person being manipulated into transferring their money to a fraudster.[5] The significance of the word "authorised" arises from the fact that, to the bank, it appears the victim has consented to—and in fact requested—the relevant transaction.[6]

There are two kinds of APP fraud: malicious payee and malicious redirection.[7] Malicious payee fraud involves a person being tricked into "purchasing goods which don't exist or are never received".[8] Malicious redirection occurs when a person believes they are "paying a legitimate payee … but is tricked into paying some other account".[9]

In the first half of 2023, victims of APP fraud in the United Kingdom lost a total of £239.3 million.[10] Although New Zealand does not record loss specifically attributable to APP fraud, banks reported a total of approximately NZD 200 million lost to scams in 2023.[11] In Australia, reported

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2 *Philipp v Barclays Bank UK PLC* [2021] EWHC 10 (Comm), [2021] All ER (D) 90 (Jan) [*Philipp HC judgment*] at [4].

3 At [4].

4 *Philipp v Barclays Bank UK PLC* [2022] EWCA Civ 318, [2022] QB 578 [*Philipp CA judgment*] at [1].

5 See for example Robyn Maher "A Critical Analysis of Recent Efforts in the United Kingdom to Tackle Authorised Push Payment Scams and the Impact on the Bank-Customer Relationship" (2021) 24 Trinity C L Rev 134 at 135–137; and Finance and Expenditure Committee *Briefing on banks' processes and consumer protections for scams* (17 August 2023) at 3.

6 *Philipp CA judgment*, above n 4, at [1].

7 Payment Systems Regulator "APP scams" (March 2024) <www.psr.org.uk>. See also *Philipp HC judgment*, above n 2, at [6].

8 Payment Systems Regulator, above n 7. See also for example Financial Services Ombudsman "How we helped with a complaint following a vehicle purchase scam" <www.financial-ombudsman.org.uk>.

9 *Philipp HC judgment*, above n 2, at [6].

10 UK Finance "Criminals steal over half a billion pounds and nearly 80 per cent of App fraud starts online" (press release, 25 October 2023).

11 Ministry of Business, Innovation & Employment "198 million dollars lost to scams in the last year" (13 November 2023) <www.mbie.govt.nz>.

scam losses in 2023 were a staggering AUD 2.74 billion.[12] In Canada, it was CAD 567 million.[13] And these numbers are significant underestimates—for example, the Canadian Anti-Fraud Centre believes its data only represents 5–10 per cent of fraud committed.[14]

The United Kingdom Supreme Court (UKSC) has described APP fraud as "a growing social problem [which] can undoubtedly cause great hardship to its victims".[15] This is incontrovertibly true. The individual number of APP fraud cases in the United Kingdom in the first half of 2023, for example, increased by 22 per cent when compared with the same period in 2022.[16] And while the financial harm associated with APP fraud is manifest, the emotional toll can be equally serious. In April 2024, the *New Zealand Herald* reported on 25 individuals who had collectively lost $6.7 million to APP fraud, explaining that "[o]n top of the enormity of losing life-changing sums of money, many victims have suffered intense feelings of shame".[17]

One such victim is Borja Ares.[18] He is a 38-year-old Spanish healthcare worker living in Whangārei. In May of 2023, he and his wife sold their house and decided to invest the proceeds from the sale as well as their life savings, KiwiSaver funds and some money from Ares' mother. In total, this amounted to $330,000. After researching possible options, Ares connected with a "really educated and softly spoken Englishman" who claimed to be an Auckland-based Citibank investment broker. Ares described the trust he felt in this purported broker, saying: "I was fully convinced. I felt my money was very safe."

The softly spoken Englishman offered a fixed-rate Yorkshire Building Society bond which promised a 13.5 per cent return. Ares, feeling reassured by the broker's apparently legitimate LinkedIn profile and Citibank email address, accepted the offer. It was, of course, a scam. Ares came to this

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12 Australian Competition and Consumer Commission *Targeting scams: Report of the National Anti-Scam Centre on scams activity 2023* (April 2024) at 5.

13 Royal Canadian Mounted Police "Fraud Prevention Month 2024: Fighting fraud in the digital era" (press release, 29 February 2024).

14 Royal Canadian Mounted Police, above n 13. See also Australian Competition and Consumer Commission, above n 12, at 6; Radio NZ "Rise in scams & fraud: How are banks responding?" (21 August 2023) <www.rnz.co.nz>; and Lane Nichols "Government instructs banks to urgently implement new safeguards to protect customers from scams" *The New Zealand Herald* (online ed, New Zealand, 1 March 2024).

15 *Philipp SC judgment*, above n 1, at [6].

16 UK Finance, above n 10. See also Australian Competition and Consumer Commission, above n 12, at 1; and Banking Ombudsman Scheme *Annual Report 23-24* at 9.

17 Lane Nichols "Faces of the victims: The 25 scam casualties who lost $6.7 million to fraud" *The New Zealand Herald* (online ed, New Zealand, 14 April 2024).

18 Lane Nichols "Bank scam: Spanish man feels he's failed his children and wife after losing $330k" *The New Zealand Herald* (online ed, New Zealand, 4 June 2023).

conclusion nine days later, at which point he advised BNZ and the New Zealand Police. Only $19,000 was successfully retrieved.[19]

Ares told the Herald in June 2023 that this experience left him "emotionally tortured by shame" and feeling like he has "failed [his] wife and children".[20] He said: "I am terrified, I am scared all the time. I feel like something horrible is going to happen to my family." Ares is far from alone.

## *III THE PHILIPP LITIGATION*

In 2018, Mrs and Dr Philipp similarly fell victim to a highly complex scam in the United Kingdom, losing £700,000. Mrs Philipp is a music teacher and Dr Philipp—before retiring—was a public health physician.[21] Their debacle began when Dr Philipp missed a call, apparently from HSBC Bank, advising him that his account was compromised and £10,000 had been withdrawn.[22] When he returned the call, it was redirected to a "Jonathan Watts" who said he worked for the Financial Conduct Authority and that he, alongside the National Crime Agency, was investigating fraud being committed by staff at HSBC.[23] Watts manipulated the Philipps into believing they had to cooperate with his investigation, and for the time being they needed to transfer money into "safe accounts".[24] This fabrication was bolstered when Dr Philipp subsequently received a call from a phone number matching that of the National Crime Authority and being reassured of Watts' trustworthiness.[25] Forged phone numbers, call redirection, and reassurance from "officials" were common themes of the operation.[26]

Mrs and Dr Philipp were so wholly deceived by Watts and his accomplices that despite being visited by a detective constable and warned about the possibility of this scam—twice—they refused to engage with police.[27] The Philipps were, as the High Court of England and Wales put it, "completely under the spell of the fraudster".[28]

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19 Lane Nichols "BNZ told to reimburse victims nearly $300k after failing to detect Citibank investment scams despite 'red flags'" *The New Zealand Herald* (online ed, New Zealand, 2 February 2024).

20 Nichols, above n 18.

21 *Philipp HC judgment*, above n 2, at [28].

22 At [30].

23 At [31]–[32].

24 At [33].

25 At [33].

26 At [39] and [54].

27 At [38] and [46].

28 At [71].

Dr Philipp moved money from his investments and HSBC accounts to Mrs Philipp's account with Barclays Bank. On two separate occasions the Philipps then visited Barclays branches and requested transfers from Mrs Philipp's account to (fraudulent) United Arab Emirates accounts, the details of which were provided by Watts.[29] On both occasions, Mrs Philipp later expressly confirmed to Barclays via phone call both her identity and her authorisation for the payments.[30] The Philipps made efforts throughout to reduce any potential suspicion.[31] Eventually, the police contacted Barclays directly, and the bank blocked a third attempted transfer.[32] Mrs and Dr Philipp, after considerable protestation, finally accepted that they had fallen victim to a scam.[33]

Mrs Philipp, as the account holder, brought proceedings against Barclays, seeking damages equivalent to her £700,000 loss.[34] She argued that the bank breached its so-called "*Quincecare* duty" by processing the transfers.[35] This duty was formulated as:[36]

> … a duty to refrain from executing an order of Mrs Philipp if and for so long as [Barclays] was put on inquiry, by having reasonable grounds for believing that the order was an attempt to misappropriate funds from Mrs Philipp.

## *A The* Quincecare *Duty*

The *Quincecare* duty has its genesis in the eponymous case of *Barclays Bank plc v Quincecare Ltd*, wherein Steyn J was confronted with a question: when a chairman misappropriates £340,000 of his company's money, to what extent is the bank liable to that company for the loss?[37] The judge answered that question in a now oft-cited passage, worthy of reproduction in full:[38]

> Primarily, the relationship between a banker and customer is that of debtor and creditor. But quoad the drawing and payment of the customer's cheques as against the money of the customer's in the banker's hands the relationship is that of principal and agent … Prima facie every agent for reward is also bound to exercise reasonable care and skill in carrying out the instructions of his principal … There is no logical

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29 At [41] and [44].

30 At [43] and [45].

31 At [41].

32 At [48]–[49].

33 At [52]–[58].

34 At [8].

35 At [8] and [74]–[75].

36 At [74].

37 *Barclays Bank plc v Quincecare Ltd* [1992] 4 All ER 363 (QB) at 365.

38 At 376.

> or sensible reason for holding that bankers are immune from such an elementary obligation. In my judgment it is an implied term of the contract between the bank and the customer that the bank will observe reasonable skill and care in and about executing the customer's orders … Given that the bank owes a legal duty to exercise reasonable care in and about executing a customer's order to transfer money, it is nevertheless a duty which must generally speaking be subordinate to the bank's other conflicting contractual duties … In judging where the line is to be drawn there are countervailing policy considerations. The law should not impose too burdensome an obligation on bankers, which hampers the effective transacting of banking business unnecessarily. On the other hand, the law should guard against the facilitation of fraud, and exact a reasonable standard of care in order to combat fraud and to protect bank customers and innocent third parties. To hold that a bank is only liable when it has displayed a lack of probity would be much too restrictive an approach. On the other hand, to impose liability whenever speculation might suggest dishonesty would impose wholly impractical standards on bankers. In my judgment the sensible compromise, which strikes a fair balance between competing considerations, is simply to say that a banker must refrain from executing an order if and for as long as the banker is 'put on inquiry' in the sense that he has reasonable grounds (although not necessarily proof) for believing that the order is an attempt to misappropriate the funds of the company (see proposition 3 in *Lipkin Gorman* [which reads: "if a bank does not have reasonable grounds for believing that there is fraud, it must pay"]). And, the external standard of the likely perception of an ordinary prudent banker is the governing one. That in my judgment is not too high a standard.

This language was in substance approved by Lady Hale P writing for the court in the UKSC *Singularis* decision,[39] where it was for the first time referred to as the "*Quincecare* duty".[40] Her Ladyship explained that the purpose of the *Quincecare* duty is to protect a customer against misappropriation "by a trusted agent" with authority to make transactions on the customer's behalf.[41]

## *B* Philipp *High Court Decision*

Barclays applied for Mrs Philipp's claim to be struck out and for summary judgment.[42] Russen J agreed on both fronts, struck out the claim and entered summary judgment in favour of the bank.[43]

Having reviewed the authorities, Russen J concluded that the *Quincecare* duty is limited to "cases of attempted misappropriation by an agent of the customer".[44] As a result, the Judge found that

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39 *Singularis Holdings Ltd (in liquidation) v Daiwa Capital Markets Europe Ltd* [2019] UKSC 50, [2020] AC 1189 at [1].

40 See *Philipp SC judgment*, above n 1, at [51].

41 *Singularis*, above n 39, at [35].

42 *Philipp HC judgment*, above n 2, at [10].

43 At [185].

44 At [133].

Mrs Philipp was "seeking to extend the boundaries of the *Quincecare* duty".[45] He rejected such an extension as "unprincipled and impermissible":[46]

> I have been persuaded by the Bank's submission that the Quincecare duty should be confined to cases where the suspicion which has been raised (or objectively ought to have been raised) is one of attempted misappropriation of the customer's funds by an agent of the customer.

As the Judge saw it, there were two fundamental problems with Mrs Philipp's formulation of the duty.[47] First, banks have a primary duty to execute instructions from their customers. On Mrs Philipp's approach, this duty would be emasculated, and banks would essentially be required to second-guess their customers' instructions.[48] Secondly, the language of the *Quincecare* duty does not provide a "clear framework of rules by reference to which the duty, as extended, might sensibly operate".[49] The question for banks would change from "has the customer genuinely authorised this transaction, or is this an attempted misappropriation?" to "the customer has genuinely authorised this transaction, but were they wise to do so?".[50] Such a question could only be answered by reference to a code of industry-recognised rules that explain when and how a bank should interfere with legitimate instructions.[51]

## *C* Philipp *Court of Appeal Decision*

The England and Wales Court of Appeal disagreed, holding that the bank owed Mrs Philipp a duty of reasonable skill and care which—if they were "on inquiry" as to the possibility of APP fraud—would have required pausing her transactions and making inquiries.[52] The term "on inquiry" means having "reasonable grounds for believing that the order was an attempt to misappropriate funds".[53] Whether the duty was engaged in Mrs Philipp's case, let alone whether it was breached, would be a matter for trial.[54]

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45 At [131].

46 At [156] and [184].

47 At [157].

48 At [158].

49 At [159]–[160].

50 My summary of [162]–[165] and [173]–[174].

51 At [159] and [161].

52 *Philipp CA judgment*, above n 4, at [28] and [78].

53 At [27].

54 At [73].

Birss LJ accepted that all previous *Quincecare* duty cases had been decided in the context of a customer's agent attempting to misappropriate their principal's money. But the Judge considered that the reasoning of those cases, not their facts, is what matters.[55] Undeterred by Lady Hale's explanation in *Singularis* of the duty's underlying purpose, his Honour held that this reasoning applies regardless of whether an agent of the customer, or the customer themselves, gives an instruction, "provided the circumstances are such that the bank is on inquiry that executing the order would result in the customer's funds being misappropriated".[56]

## *D* Philipp *Supreme Court Decision*

Lord Leggatt, writing for the UKSC, gave the Court of Appeal's decision short shrift, describing it as "inconsistent with first principles of banking law".[57] According to his Lordship, the *Quincecare* line of authority was wrong to suggest, and the Court of Appeal was wrong to adopt, the notion that banks are under "conflicting duties".[58]

Ordinarily, a bank "is not a trustee or fiduciary of money deposited by a customer, but simply a debtor".[59] It is entitled to deal with this money as it likes, but it must repay the customer upon request, and execute payments according to the customer's instructions.[60] This relationship is one of agency: banks are under a strict duty to comply with their mandate (their mandate being "the terms on which a bank is authorised and undertakes to carry out its customer's instructions").[61] Making an unauthorised transaction, or refusing to process a valid instruction, will typically amount to an unlawful breach of mandate.[62]

As a matter of both contract and tort, it is true that banks are subject to a duty to exercise reasonable skill and care.[63] However, this duty only applies "insofar as the contract gives the [bank] any latitude in how the relevant services are carried out".[64] For example, where a customer requests money be

55 At [27].

56 At [29].

57 *Philipp SC judgment*, above n 1, at [3].

58 At [56] and [63]–[65].

59 At [28].

60 At [28].

61 At [28]–[29]. Although, at least one exception exists—banks may refuse payment instructions where they have actual knowledge that processing the transaction would be illegal: [31]–[33]; and *Westpac*, above n 1, at [16].

62 At [30].

63 At [34].

64 At [35].

transferred, but does not specify how they want the transfer to be completed, a bank must exercise reasonable skill and care in selecting an appropriate method.[65] But where a bank "receives a valid payment order which is clear and leaves no room for interpretation or choice about what is required in order to carry out the order", there is no such latitude, and the instruction must simply be executed.[66]

Applying these basic principles to "the factual circumstances of the *Quincecare* line of cases", Lord Leggatt concluded that ordinary principles of agency law, not matters of policy, best justify the existence of the *Quincecare* duty.[67]

A customer's agent, almost invariably, will not have *actual authority* to issue payment instructions designed to misappropriate the customer's funds.[68] Generally, however, an agent will have *apparent authority* to issue instructions designed to misappropriate the customer's funds, because of "the customer's representation to the bank that the agent is authorised to give payment instructions on its behalf".[69] Such instructions, given by agents with apparent authority, must be processed by the bank pursuant to its duty to execute.[70] It is only when there are "circumstances suggestive of dishonesty apparent to the bank which would cause a reasonable banker before executing an instruction to make inquiries to verify the agent's authority" that an agent will *not* have apparent authority, and banks are required—by their (*Quincecare*) duty to exercise reasonable skill and care—to "ascertain whether the instruction given is one actually authorised by the customer".[71]

On this formulation, the *Quincecare* duty does not apply to APP fraud cases like Mrs Philipp's.[72] Because her instruction to transfer funds was clear and plainly authorised, Barclay's only obligation was to execute it. Indeed, refusal or failure to do so would "prima facie be a breach of duty".[73]

## *IV NEW ZEALAND BANKING OMBUDSMAN SCHEME*

Like the Philipps, Borja Ares also decided to seek reimbursement from his bank, after being advised that it was aware of this particular scam and "should have been alert to the risk".[74] Instead of

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65 At [36].

66 At [63]–[65].

67 At [90].

68 At [90].

69 At [90].

70 At [100].

71 At [90].

72 At [100].

73 At [100].

74 Nichols, above n 18.

going to the courts, however, he complained to the New Zealand Banking Ombudsman Scheme Ltd (BOS).

## *A Overview of the BOS*

The Financial Service Providers (Registration and Dispute Resolution) Act 2008 (the Act) sets out rules for dispute resolution processes in the financial sector. The purpose of these rules is:[75]

> … to promote confidence in financial service providers by improving consumers' access to redress from providers through schemes to resolve disputes. The schemes are intended to be accessible, independent, fair, accountable, efficient, and effective.

Every bank must be a member of a dispute resolution service approved under the Act.[76] The BOS is one such approved service,[77] and all major New Zealand banks are members.[78] As a result, customers may complain to the BOS about alleged breaches of contract, statutory obligations, industry codes, or principles of good banking practice by those banks.[79] However, the BOS will not consider complaints where the bank has not been given a reasonable chance to address the issue;[80] a court or other body should be, or is, considering the issue;[81] or if various other matters of commercial judgement suggest that it would be improper for the BOS to intervene.[82] A complaint must also have a reasonable prospect of success and not be vexatious,[83] and a complainant is required to have suffered loss or significant inconvenience[84] and take action within prescribed timeframes.[85]

When considering a complaint, the BOS "must be fair in all the circumstances, having regard to the law, any relevant code of practice, and principles of good banking practice".[86] It must also comply

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75 Financial Service Providers (Registration and Dispute Resolution) Act 2008, s 47.

76 Section 48.

77 Banking Ombudsman Scheme *Terms of Reference* (18 July 2024) at 1.

78 Banking Ombudsman Scheme "Our participants" <www.bankomb.org.nz>; and *Participation Agreement Relating to the Banking Ombudsman Scheme Ltd* (1 January 2021) at 23.

79 Banking Ombudsman Scheme, above n 77, at [2.3].

80 At [2.4].

81 At [2.6] and [3.3].

82 At [3.5]–[3.7].

83 At [5.1]–[5.2].

84 At [5.3]. See also [3.4].

85 At [2.4] and [6]–[8].

86 At [9]. See also Banking Ombudsman Scheme Operational Guidelines (18 July 2024) at 18–19.

with the rules of natural justice.[87] The BOS emphasises that it "can take a broader approach than the courts", and is not bound by strict legal rules.[88] But it will begin by applying the law and/or relevant industry codes, and only if those do not reflect good banking practice may the Banking Ombudsman seek the industry's view on what is good practice.[89]

The BOS is empowered to order compensation for direct losses of up to $500,000.[90] Any such orders are legally binding on banks and can only be modified by the District Court where they are "manifestly unreasonable".[91]

## *B The BOS Approach to APP Fraud*

In its fraud and scams practice note, the BOS explains that:[92]

> A bank has a strict duty to follow a customer's transaction instructions. However in carrying out the customer's instructions, a bank must act with reasonable care and skill and in accordance with good banking practice. If a bank detects (or ought to have detected) warning signs of a real possibility that a customer is being scammed or defrauded (so-called "red flags"), good banking practice requires that it act. A bank cannot turn a blind eye to indications of a possible scam. When a bank is on notice of a real possibility that the customer may be being scammed or defrauded, good banking practice requires it to make inquiries or warn the customer.

A bank that processes a transaction despite being on notice of a "real possibility a customer is being scammed or defrauded" may be found liable by the BOS for "some or all" of the resulting customer's loss.[93] Banks are, however, "unlikely to be liable" where a customer decides to "proceed with the transaction despite the bank's warning".[94]

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87 At [10] and [23.3].

88 Banking Ombudsman Scheme, above n 86, at 19.

89 At 19.

90 Banking Ombudsman Scheme, above n 77, at [28]–[31].

91 Financial Service Providers (Registration and Dispute Resolution) Act, s 49F.

92 Banking Ombudsman Scheme *Practice Note: Fraud and scams* (March 2025) at 6. See also Finance and Expenditure Committee, above n 5, at 3.

93 Banking Ombudsman Scheme, above n 92, at 6.

94 At 6. See also Banking Ombudsman Scheme "Bank under no further obligation after giving first scam warning" (August 2024) <www.bankomb.org.nz>.

Applying this approach to Borja Ares' complaint, the BOS decided to award Ares $217,000 in compensation.[95] According to the Banking Ombudsman, BNZ "was on notice of a real possibility [that Ares was] being defrauded" and therefore "had an obligation to warn [Ares] the transactions had the hallmarks of a scam involving the impersonation of Citibank".[96]

## V THE BOS APPROACH TO APP FRAUD IS INCONSISTENT WITH THE LAW

In contradistinction to the BOS, New Zealand legislation and regulation "only enables protection for victims of *unauthorised* payment scams".[97] In fact, the Code of Banking Practice, which represents "standards of good banking practice",[98] chooses *not* to impose liability on banks for APP fraud.[99] And while New Zealand courts have not yet considered the issue, it appears likely that they would follow *Philipp*. As North P of the New Zealand Court of Appeal explained in 1970:[100]

> … technically we are not bound by judgments of the House of Lords but it would be idle to suggest that they are not entitled, particularly on a matter of substantive law such as this, to be treated with the very greatest of respect and only departed from on rare occasions where for some good reason or another the law in New Zealand has developed on other lines …

The law in New Zealand, as it relates to APP fraud, does not appear to have "developed on other lines". To the contrary, banking law fundamentals remain in large part derived from seminal UK decisions,[101] and New Zealand's highest courts have—like the UKSC in *Philipp*—emphasised the

95 Banking Ombudsman Scheme "Bank pays $217,000 for failing to act on warning signs of investment scam" (June 2024) <www.bankomb.org.nz>; Rob Stock "BNZ ordered to pay $217K to scam victim after failures to identify warning signs" *The Post* (online ed, Wellington, 2 February 2024); and Rob Stock "BNZ reluctantly agrees to pay $217,000 to scam victim it failed" *The Post* (online ed, Wellington, 29 February 2024).

96 Stock "BNZ ordered to pay $217K to scam victim after failures to identify warning signs", above n 95.

97 Finance and Expenditure Committee, above n 5, at 5 (emphasis added). A possible exception is s 28 of the Consumer Guarantees Act 1993, which requires banks to carry out banking services with reasonable skill and care: Banking Ombudsman, above n 92, at 4. However, this obligation is likely coextensive with a bank's duty in tort and contract to exercise reasonable skill and care, which was dismissed as irrelevant to cases of APP fraud by the UKSC in *Philipp*.

98 Simon Jensen and Kellee Clark "Regulation Protecting Consumers of Bank Products and Services" in Alan L Tyree and others (eds) *Tyree's Banking Law in New Zealand* (3rd ed, LexisNexis, Wellington, 2014) 81 at 81.

99 New Zealand Bankers Association *The Code of Banking Practice* at 5; and Banking Ombudsman Scheme, above n 92, at 5.

100 *Ross v McCarthy* [1970] NZLR 449 (CA) at 453–454.

101 See for example Andru Isac, Simon Jensen and Kellee Clark "Nature of the Banker–Customer Relationship" in Alan L Tyree and others (eds) *Tyree's Banking Law in New Zealand* (3rd ed, LexisNexis, Wellington, 2014) 99 at [3.2.1]–[3.2.2]; *Westpac*, above n 1, at [23]; and *In Re Levin and Company, Ltd* [1936] NZLR 558 (CA) at 580.

primacy of a bank's duty to execute. For example, Tipping J in the Court of Appeal decision of *US International Marketing Ltd v Bank of New Zealand Ltd* held that:[102]

> The starting point must, in my view, be that the bank's clear initial duty is to allow its customer immediate access to cleared funds … too ready or easy an undermining of that obligation will produce much inconvenience and uncertainty in what is a fundamental commercial relationship.

Similarly, in the Supreme Court decision of *Westpac New Zealand Ltd v MAP and Associates Ltd*, Tipping J reiterated that "a bank's clear initial duty is to act in terms of its customer's instructions" and—using the language of *US International Marketing Ltd*—the need for security of contract in banking relationships means that banks should not be able to justify a breach of mandate readily or easily.[103] His Honour concluded that the interests of commerce demand a "strong prima facie rule that banks should ordinarily honour their customers' instructions".[104] Only "very limited exceptions" from this rule are appropriate.[105] These cases accord with the development of New Zealand common law more generally, which continues to be informed by UK authorities.[106]

Against this background, the BOS view that banks are required to make inquiries when a clear, validly authorised instruction shows signs of fraud is jarring. It is squarely at odds with *Philipp*, where Lord Leggatt decided that in such circumstances a bank must simply execute the instruction,[107] and is thus likely irreconcilable with New Zealand law.

## *VI THIS INCONSISTENCY CREATES CONFUSION*

Of course, the BOS does not purport to impose on banks a "legal" duty per se. The scheme is mandated to operate outside the confines of the law, and has described the obligation to make inquiries or warn customers when their transaction has red flags of fraud as a principle of "good banking practice".[108] Nonetheless, principles of good banking practice are binding on banks for the purpose of complaints to the BOS, and BOS determinations are themselves legally binding.[109] As a result, the

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102 *US International Marketing Ltd v Bank of New Zealand Ltd* [2004] 1 NZLR 589 (CA) at [6].

103 *Westpac*, above n 1, at [11].

104 At [24].

105 At [24].

106 See for example *Farish v R* [2024] NZSC 65, [2024] 1 NZLR 223 at [35]; 1*27 Hobson Street Ltd v Honey Bees Preschool Ltd* [2020] NZSC 53, [2020] NZCCLR 30 at [88]; *Brown v New Zealand Basing Ltd* [2017] NZSC 139, [2018] 1 NZLR 245 at [71]–[72] and [78]; *Bradbury v Commissioner of Inland Revenue* [2015] NZSC 80, [2015] 1 NZLR 739 at [10]–[16]; *Beckham v R* [2015] NZSC 98, [2016] 1 NZLR 505 at [93]; and *Attorney-General v Tamil X* [2010] NZSC 107, [2011] 1 NZLR 721 at [67]–[70].

107 *Philipp SC judgment*, above n 1, at [65].

108 Banking Ombudsman Scheme, above n 92, at 6.

109 Financial Service Providers (Registration and Dispute Resolution) Act, s 49F.

inconsistency between this "good banking practice" obligation on the one hand, and current New Zealand law (of which *Philipp* is likely to be part) on the other, creates confusion in two significant ways.

## *A Treatment of Complaints*

First, APP fraud complaints would be treated differently across dispute resolution mechanisms. Victims could seek and likely receive reimbursement through the BOS when their bank was on notice of a real possibility that the transaction was fraudulent. Yet, in identical circumstances, such victims would be unable to claim reimbursement through the courts.

This disparity of treatment is unsatisfactory. The notion that a victim could consistently and reliably receive dramatically more favourable treatment in one forum than another is stingingly reminiscent of the historical divide between common law courts and courts of equity, where claimants intentionally sought out the court more likely to provide a favourable outcome. Significant criticism was levelled at this distinction, with one scholar remonstrating that:[110]

> In the year 1800, what was right at law was wrong in equity. Judgment would be given on the same facts for the plaintiff in Westminster Hall and for the defendant at Lincoln's Inn.

Similarly, Jacob records how "the bewildered litigant was driven backwards and forwards from law to equity and from equity to law".[111] The death knell of this confusion was mercifully sounded by the Judicature Acts of the 1870s.[112] It would be regrettable and regressive for New Zealand to countenance the continued existence of a banking dispute system that so strongly resembles these bygone juridical eras.

## *B Indeterminate Liability*

But secondly, and perhaps even more significantly, the inconsistency—subject to contrary contractual arrangements—effectively places banks in a "damned if you do, damned if you don't" position. The BOS requires banks to question "an apparently valid payment request by a customer" when on notice of a real possibility of fraud.[113] By comparison, *Philipp* says the only duty on a bank having received a valid and clear payment request is "simply to execute the order by making the requisite payment",[114] and failure to do so will amount to a breach of mandate for which banks could

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110 See IH Jacob "Civil Procedure Since 1800" in IH Jacob *The Reform of Civil Procedure Law and Other Essays on Civil Procedure* (Sweet & Maxwell, London, 1982) 193 at 195.

111 At 196.

112 At 210.

113 Banking Ombudsman Scheme "Bank not liable for customer's $45,000 loss to scammers" (December 2023) <www.bankomb.org.nz>. See also Banking Ombudsman Scheme, above n 92, at 6.

114 *Philipp SC judgment*, above n 1, at [63]–[64].

be sued by their customers.[115] Consequently, banks that second-guess an otherwise valid and clear instruction due to suspicion of fraud will avoid liability under the BOS rules, but will subject themselves to a claim for breach of mandate in the courts if the instruction was not fraudulent and the customer suffers loss due to the bank's delay.[116] Of course, banks could avoid liability in the courts by simply executing such an instruction, but if it turns out to have been fraudulent, the BOS will likely order reimbursement.

## *VII THIS IS A MATTER FOR GOVERNMENT*

As Lord Leggatt explains, "[w]hat rule would represent a 'sensible compromise' or 'fair balance' between broad policy goals is a matter for legislators and other policy-makers to consider".[117] New Zealand authorities similarly recognise that:[118]

> Policy is properly made by elected governments. Elected governments are responsible to the electors who, every three years, vote on the composition of Parliament. It is that direct constitutional responsibility which parliamentarians, and the Cabinet Ministers appointed from the ranks of Members of Parliament, have to the electorate which renders it more appropriate for Parliament to make policy choices for difficult societal problems.

APP fraud is clearly a difficult societal problem that requires Parliament to make policy choices: the conflicting interests of banks and their customers do not lend themselves to an easy resolution. In Lord Leggatt's view, legislators and policymakers have five particular areas of expertise that make them most appropriate to address this problem:[119]

> … (i) to bring together a variety of perspectives from individuals with experience and expertise in relevant fields of knowledge; (ii) to acquire and evaluate information about the relative costs and benefits of different possible measures, both for those directly affected and for society at large; (iii) to consult a range of different bodies (and the public more generally); (iv) to design a comprehensive regime containing qualifications, exceptions and safeguards; and (v) in designing such a regime to set temporal, financial or other limits on its scope or otherwise to draw distinctions which may not have a principled basis but are

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115 At [65]. See also *Quincecare*, above n 37, at 376.

116 To reiterate, any such common law liability is invariably modified or excluded by the terms and conditions agreed to by customers, but such agreements are outside the scope of this article.

117 *Philipp SC judgment*, above n 1, at [67].

118 *P v K* [2003] 2 NZLR 787 (HC) at [205]. See also for example *Berkland v R* [2022] NZSC 143, [2022] 1 NZLR 509 at [208]; *Hamed v R* [2011] NZSC 101, [2012] 2 NZLR 305 at [42]; *Poynter v Commerce Commission* [2010] NZSC 38, 3 NZLR 300 at [45]; and *Quake Outcasts v Minister for Canterbury Earthquake Recovery* [2015] NZSC 27, [2016] 1 NZLR 1 at [131].

119 *Philipp SC judgment*, above n 1, at [23].

> considered to promote the common good by achieving an appropriate trade-off or compromise between different policy goals.

By comparison, the BOS is a private company registered under the Companies Act 1993, and is not constitutionally accountable to the electorate, directly or otherwise. Under the Act, it is a dispute resolution scheme; its underlying purpose is "to promote confidence in financial service providers by improving consumers' access to redress".[120] It does not have a regulatory mandate.

The scheme is of course required to decide individual cases in line with what is fair, and while it must accurately identify and consider the law, it is not required to apply it.[121] However, by articulating and enforcing a non-legally cognisable duty on banks—in the form of a principle of good banking practice to second-guess otherwise valid instructions where there are warning signs of fraud—the BOS has assumed a de facto lawmaking role in the absence of action from Parliament and policymakers.

Understandably, the BOS takes a different view. In September 2024, Deputy Banking Ombudsman Sarah Parker said that:[122]

> Like other ombudsman services, BOS's role is to consider what is fair in all the circumstances, having regard to current standards as set out in the law, codes or good industry practice. *It is not our role to create new standards or policy.* In determining principles of good banking practice, BOS takes account of current banking practice as well as general principles such as those set out in the Code of Banking Practice. The principle of good banking practice articulated in our Fraud Practice Note is based on a well-settled banking practice that banks act when on notice a customer is likely being scammed or defrauded.

Also in 2024, the BOS told an independent review that it "is not a regulator or a lawmaker and cannot, by way of its fairness jurisdiction, create a new standard of conduct for banks".[123] To this end, "it says it requires some benchmark by way of law, code or principles of good banking practice".[124]

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120 Financial Service Providers (Registration and Dispute Resolution) Act, s 47.

121 New Zealand and UK courts have consistently acknowledged that bodies like BOS must have regard to the law, but can properly depart from it where necessary to achieve a fair outcome: *Options UK Personal Pensions LLP v Financial Ombudsman Service* [2024] EWCA Civ 541, [2025] 1 All ER (Comm) 589 at [56]–[61] and [73]; *IAG New Zealand Ltd v Forde* [2020] NZHC 3233 at [58] and [63]; and *Vector Ltd v Utilities Disputes Commissioner* [2018] NZHC 3096 at [9] and [88]–[90].

122 Email from Sarah Parker (Deputy Banking Ombudsman) to George Curzon-Hobson regarding this article (5 September 2024) (emphasis added).

123 Deborah Hart *Banking Ombudsman Scheme Te Whare Rama Tōkeke: Independent Review 2024* (2024) at 25.

124 At 25.

By its Terms of Reference, the BOS *is* required to "consult the banking industry in determining [principles of good banking practice]".[125] And its Operational Guidelines explain that principles of good banking practice will only be referred to when "the law or codes of practice do not establish what is good banking practice in a particular case", and these principles will be established by "seek[ing] the industry's view on what is good practice".[126]

But the 2024 independent review of the BOS concluded:[127]

> It is clear to the review that BOS has wider considerations that inform it of good banking practice, including seeking expert advice, and it does not view the banking industry as the sole determiner of good banking practice.

The review also noted a submission "that BOS should pull banks towards better banking practice, rather than passively receive principles of good banking practice from banks" and said that "the way BOS operates already does exactly this and influences better banking practice as a result".[128] Such an approach appears regulatory in nature.

The consequence is an unfortunate state of confusion. Will banks adhere to their obligations under the law, or the principle of good banking practice articulated by the BOS? If the latter, what actually puts a bank "on notice"? Banks and customers have different expectations. And from the banks' perspective, if they delay a transaction that ends up not being fraudulent, will they be liable at common law? These concerns are not merely hypothetical—during consultation for the 2024 independent review, a bank representative:[129]

> … described fairness as "shifting goalposts". Another stated that "BOS decisions risked moving outside of its remit." Yet another referred to the fairness jurisdiction and then said that BOS should just apply "the settled law."

## *VIII PARLIAMENT SHOULD ACT ON APP FRAUD*

For the foregoing reasons, the BOS is not an appropriate body to reform the banking sector's duties and liabilities. However, I emphasise that this is no slight on the BOS—it has acted out of necessity to fill a vast legislative lacuna and provide some recourse to APP fraud victims where none would otherwise exist. Such an approach is obviously necessary and arguably commendable, considering the unacceptably high rates at which even prudent New Zealanders are falling victim to technologically complex fraudsters. The proper solution, then, is not for the BOS to call it quits. Instead, Parliament—

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125 Banking Ombudsman Scheme, above n 77, at [9].

126 Banking Ombudsman Scheme, above n 86, at 6 and 19.

127 Hart, above n 123, at 28.

128 At 28.

129 At 25.

as New Zealand's lawmaking body—must intervene and relieve the BOS of the quasi-regulatory function it has been forced to assume. This part of the article explores recent developments relating to APP fraud in New Zealand, before proposing a skeletal framework for Parliamentary intervention.

## *A Recent Developments*

In 2023, the Finance and Expenditure Committee considered a "briefing on banks' processes and consumer protection for scams".[130] Evidence was heard by the Committee on international scam prevention regulatory schemes, including the United Kingdom's voluntary Contingent Reimbursement Model Code.[131] Under this Code, banks must establish protections against APP fraud,[132] and people who fall victim to APP fraud must be reimbursed by their bank, unless several exceptions relating to customer negligence apply.[133]

The Committee recommended that "a voluntary compensation or reimbursement scheme be investigated for the New Zealand setting, similar to the one operating in the UK".[134] This recommendation was accepted by the Government in March 2024.[135] At the same time, Commerce and Consumer Affairs Minister Hon Andrew Bayly penned an open letter to New Zealand banks:[136]

> … I understand customers victim to authorised payments scams are not reimbursed - for example, if a customer has been deceived into making payments to a scammer. Banks have a duty to act with reasonable care and skill, which includes identifying and acting on possible signs of fraud. Where you do not act on possible signs of fraudulent behaviour, or suspicious payments, my view is that you should reimburse customers. I recommend you investigate a voluntary reimbursement scheme in line with international best practice, and request that you update me by the end of September.

The Minister concluded by warning the industry that he "will be watching [their] progress closely".[137] The industry responded, confirming they "would investigate" such a scheme.[138]

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130 Finance and Expenditure Committee, above n 5.

131 At 4.

132 Lending Standards Board *Contingent Reimbursement Model Code for Authorised Push Payment Scams* (17 October 2023) at [SF1]–[SF2(5)].

133 At [R1]–[R2(2)].

134 Finance and Expenditure Committee, above n 5, at 5.

135 Andrew Bayly "Government supports safer digital transactions" (press release, 1 March 2024).

136 Open letter from Andrew Bayly (Minister of Commerce and Consumer Affairs) to New Zealand banks regarding strengthening bank processes and consumer protections against scams (29 February 2024) at 2.

137 At 2.

138 Nichols, above n 14.

This process has been criticised as inadequate, slow-moving, and insufficient to address the "great, ever-present and evolving" threat of cybercrime.[139] But more fundamentally, the Minister's letter—with respect—demonstrated a misunderstanding of the nature of a bank's duty to "act with reasonable care and skill". *Philipp* establishes that such a duty is incapable of applying to clear and validly authorised payment instructions. It therefore cannot, in a typical APP fraud case, require banks to "[identify] and [act] on possible signs of fraud", as Minister Bayly suggested. A voluntary reimbursement scheme would thus leave banks in the same "damned if you do, damned if you don't" position already described. Compliance with the scheme would likely involve second-guessing otherwise valid instructions, exposing banks to breach of mandate claims. Conversely, a bank that adheres to its legal duty and processes an ultimately fraudulent transaction risks being obliged to reimburse the customer under the scheme.

In July 2024, Dr Duncan Webb MP proposed the Financial Markets (Conduct of Institutions) Amendment (Anti-scam) Amendment Bill.[140] This member's bill would impose a duty on banks to "take all reasonable steps to protect customers from payment scams" and require banks to reimburse customers where they fail to do so, except if the customer acted carelessly (in several specified ways).[141] Crucially, however, the Bill fails to address how such a duty should be balanced by banks against their duty to execute.

## *B New Legislation is Needed*

It was the "breakthrough" case of *Foley v Hill* which first established, in 1848, the common law rule that a bank is nothing more than its customer's debtor.[142] This basic legal underpinning of bank–customer relationships remains largely unchanged today, more than 175 years since *Foley* was decided.[143] Indeed, the case was important to Lord Leggatt's reasoning in *Philipp*.[144]

But *Foley* was, arguably, a product of its time. In 1848, the notion of highly complicated and deceptive internet scams—or the ability to transfer money to fraudsters via the internet in seconds—would have been unthinkable. Yet today, more and more New Zealanders are falling victim to such

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139 Nichols, above n 14.

140 Rob Stock "Labour's Duncan Webb tables tough bank scam compensation bill in Parliament" *The Post* (online ed, Wellington, 31 July 2024).

141 Financial Markets (Conduct of Institutions) Amendment (Anti-scam) Amendment Bill (explanatory note) at 1; and Financial Markets (Conduct of Institutions) Amendment (Anti-scam) Amendment Bill, cl 4.

142 See *Philipp SC judgment*, above n 1, at [28]. See also *Bodenham v Hoskins* (1852) 21 LJ Ch 864 at 869 as cited in *Philipp SC judgment*, above n 1, at [30] which confirmed that as the customer's debtor, a bank is under a generally strict obligation to promptly carry out instructions from their customers without questioning the commercial wisdom of such instructions.

143 *Philipp SC judgment*, above n 1, at [28]; and Isac, Jensen and Clark, above n 101, at [3.2.1].

144 *Philipp SC judgment*, above n 1, at [28].

scams, and losing eye-watering sums of money as a result.[145] At the same time, between October 2022 and September 2023, New Zealand's banks raked in an unprecedented $7.21 billion profit,[146] while the largest four banks continue to dominate the New Zealand market without effective competition.[147] The world in 2025 would be unrecognisable to the judges who decided *Foley*, and yet its influence endures.

Given this context, it is far from unreasonable to propose that increasingly wealthy and technologically capable banks should shoulder greater responsibility for protecting their customers from 21st century fraudsters. Such a proposal is supported by victims of APP fraud,[148] advocacy organisations like Consumer NZ,[149] and indeed the BOS itself.[150] Moreover, Horizon Research polling shows that 73 per cent of New Zealanders believe people who fall victim to scams should be fully reimbursed by their bank if the bank "should have spotted that the transaction was suspicious".[151]

The fact of a departure from *Foley* is not a sufficient reason to avoid requiring more of New Zealand banks. It was Lord Atkin who reminded us that "[w]hen ghosts of the past stand in the path of justice clanking their medieval chains the proper course … is to pass through them undeterred".[152]

One potential source of inspiration for New Zealand is s 72 of the Financial Services and Markets Act 2023 (UK) which required the United Kingdom Payment Systems Regulator (PSR) to consult on,

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145 See for example Radio NZ, above n 14; Radio NZ "Not a joke: Number of ASB customers tricked into investment scams triples" (1 April 2022) <www.rnz.co.nz>; Radio NZ "Police warn Whatsapp users of circulating scam" (24 March 2022) <www.rnz.co.nz>; Radio NZ "Taranaki business loses $70,000 to fake shipping company" (8 February 2022) <www.rnz.co.nz>; Radio NZ "Westpac issues warning over sophisticated scam" (18 January 2022) <www.rnz.co.nz>; Radio NZ "FMA urges vigilance after investor loses $700,000 in overseas scam" (8 December 2021) <www.rnz.co.nz>; and Radio NZ "Cyber criminals becoming more sophisticated – govt watchdog" (7 December 2021) <www.rnz.co.nz>.

146 Gareth Vaughan "Housing lending as a percentage of New Zealand banks' total lending reaches 70%, KPMG's annual FIPS shows" (13 March 2024) Interest <www.interest.co.nz>.

147 Commerce Commission *Personal banking services: Final competition report* (20 August 2024).

148 See for example Nichols, above n 17; and Lane Nichols "Woman who lost $100k to scammers believes ASB should accept liability" *The New Zealand Herald* (online ed, New Zealand, 8 September 2023).

149 Ruairi O'Shea "When is your bank liable for scam losses?" (10 June 2024) Consumer NZ <www.consumer.org.nz>; and Lane Nichols "Consumer NZ boss Jon Duffy wants New Zealand banks forced to refund Kiwi scam victims" *The New Zealand Herald* (online ed, New Zealand, 3 July 2023).

150 Lane Nichols "Banking Ombudsman warns new Government faith in banking sector eroding due to growth in scams" *The New Zealand Herald* (online ed, New Zealand, 29 February 2024).

151 Rob Stock "Banks are failing to protect customers from scams" (11 September 2023) Stuff <www.stuff.co.nz>.

152 *United Australia Ltd v Barclays Bank Ltd* [1941] AC 1 (HL) at 29.

and impose, a requirement that banks reimburse APP fraud victims. The PSR did so,[153] and on 7 October 2024 new rules came into force requiring the majority of banks[154] to reimburse most victims of APP fraud up to £85,000,[155] generally within five business days.[156] Notably, HM Treasury has promulgated complementary regulations that permit banks to delay a customer's transaction by up to four business days where the bank establishes "that there are reasonable grounds to suspect [the transaction] has been placed subsequent to fraud or dishonesty".[157] The regulations also limit banks' liability to "interest and charges a customer directly incurs from a payment delay, and not to wider losses", such as "the loss of opportunity from an investment the customer could not make in a timely way".[158] HM Treasury has thus acknowledged, and sought to solve, the "damned if you do, damned if you don't" issue discussed earlier in this article.

The banking industry in both New Zealand and Australia, as well as some academics, have argued that following the UK's approach of mandatory reimbursement may inadvertently *increase* APP fraud, because customers—comfortable in the knowledge that reimbursement is available—will become less vigilant.[159] Following extensive consultation, the PSR considered and rejected this argument, concluding that its approach strikes "the right balance between encouraging people to be careful while making sure there are high levels of protection".[160] And indeed, TSB UK has reported a *reduction* in fraud, because of "the incentive [that reimbursing 97 per cent of its scam victims] places on [the bank]

153 Payment Systems Regulator *Fighting authorised push payment scams: final decision* (PS23/4, December 2023).

154 The rules apply to the Faster Payments system, through which 97 per cent of UK APP fraud was committed in 2021: Joseph Sullivan "APP fraud: The UK's mandatory reimbursement requirement" (2 April 2024) Thomson Reuters <www.thomsonreuters.com>.

155 Payment Systems Regulator *Specific Requirement 1: Maximum level of reimbursement – Notice of value* (25 September 2024).

156 Pay.UK *FPS Reimbursement Rules* (7 June 2024) at [3.1]–[3.4]. The only exception to this reimbursement requirement is where a customer (other than a "vulnerable consumer") has, through gross negligence, failed to comply with the "consumer standard of caution": [3.5].

157 The Payment Services (Amendment) Regulations 2024 (UK), reg 2(4)(b).

158 Financial Conduct Authority *Guidance for firms that enables a risk-based approach to payments* (FG24/6, 22 November 2024) at [2.36]. See also The Payment Services (Amendment) Regulations, r 5.

159 See for example Nichols, above n 149; Charlotte Grieve "Big banks fight push for billions of dollars in scam refunds" *The Sydney Morning Herald* (online ed, Sydney, 3 February 2022); and Nichols, above n 19.

160 Payment Systems Regulator "PSR continues to take bold action on APP fraud as it publishes final reimbursement details ahead of 2024 implementation" (press release, 19 December 2023). See also Payment Systems Regulator "International Fraud Awareness Week: PSR research shows reimbursed fraud victims feel more vigilant about fraud risks, not less" (press release, 21 November 2024).

to stop fraud happening".[161] Furthermore, as a matter of logic, the industry's concern can be avoided by appropriately calibrating the threshold for reimbursement: if customers know reimbursement will not be available when they act negligently, they are less likely to disregard potential signs of fraud.

I argue that, in line with the UK, New Zealand should pass new legislation—binding on both the courts and the BOS—that clarifies where responsibility falls in cases of APP fraud. I propose a framework for such legislation below, borrowing the structure of Dr Webb's member's bill while seeking to more clearly articulate banks' and customers' duties and liabilities.

First, two new sections—ss 446JA and 446JB—should be inserted into the Financial Markets Conduct Act 2013.

Section 446JA should direct the Financial Markets Authority (FMA) to, within six months, prepare draft regulations that require banks to reimburse APP fraud victims except in a limited number of circumstances. It will be the FMA's responsibility to establish what exactly those circumstances are. This process will necessarily involve, among other things, a complex balancing exercise to determine appropriate relative levels of responsibility between banks and customers. The PSR put vastly greater responsibility on UK banks; whether New Zealand should follow suit is a question that will need to be answered. It makes sense for Parliament to delegate such a difficult and technical policy issue to an agency with relevant expertise.[162]

Section 446JB should prevent banks from being liable at common law for losses caused by reasonable steps taken to protect a customer from APP fraud. This section is necessary to prevent an otherwise indeterminate threat of civil action hampering improvements to fraud detection practices, and its precise scope should be defined with regard to the UK experience. While this provision may cause some non-fraudulent payments to be delayed where they presently would not be, that risk appears insignificant compared to the hundreds of millions of dollars New Zealanders are losing to scams every year. More importantly, the practical effect of s 446JB would arguably be little more than codifying the requirements *already* imposed by the BOS and reflected in many banks' terms and conditions.

Secondly, one new paragraph—s 546(1)(oea)—should be inserted into the Financial Markets Conduct Act, empowering the Governor-General to make regulations by Order in Council prescribing requirements for the purposes of s 446JA, on the recommendation of the relevant Minister. This would be the legal mechanism by which the FMA's draft regulations are given effect.

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161 Michael Atkin "While Australian banks refuse most scam victims refunds, the UK is making them mandatory" (11 July 2023) ABC News <www.abc.net.au>.

162 See Legislation Design and Advisory Committee *Legislation Guidelines: 2021 edition* (September 2021) at 67–78.

Under this legislative model, a government agency would be responsible for drafting the regulations, and these draft regulations must then be reviewed and approved by the relevant Minister, as well as the Executive Council, before becoming law. Beyond the advantages already discussed, it is therefore a tolerably constitutional way to address APP fraud. And it would place New Zealand ahead of the global curve. The Australian Government is poised to impose new fraud prevention, detection and disruption requirements on banks,[163] and the Singaporean Government is cracking down on phishing scams,[164] but neither country—nor jurisdictions like Canada or the United States—mandate reimbursement.[165]

## *IX CONCLUSION*

Authorised push payment fraud occurs when a victim is manipulated into transferring their own money to a scammer's bank account. It is exacting an enormous social, financial, and emotional toll—New Zealanders of all different ages and backgrounds are being victimised at concerning rates, losing millions of dollars and experiencing severe mental distress.

The United Kingdom Supreme Court has ruled, in *Philipp v Barclays Bank*, that banks are obliged to execute clear instructions given by their customers, even when the instructions give rise to a suspicion of APP fraud. That is because such instructions will, by virtue of the fact it is the customer giving them, be validly authorised, and the *Quincecare* duty to "exercise reasonable care in and about executing a customer's order to transfer money" does not apply to clear, validly authorised instructions. Although New Zealand courts have not yet considered the issue, it is likely that *Philipp* would be followed due to the persuasive nature of UK Supreme Court decisions and the fact that New Zealand banking law is heavily derived from the UK.

By comparison, the New Zealand Banking Ombudsman Scheme requires banks, when on notice of a real possibility that a customer may be being scammed, to pause the customer's transaction and

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163 See Josh Gibson *Scams Prevention Framework Bill 2024* (Parliamentary Library, Bills Digest No 33, 2024–25, 24 January 2025) at 7–12; and Cait Kelly "Scam victims to be compensated under Labor plan to fine banks and social media platforms $50m" *The Guardian* (online ed, Australia, 13 September 2024).

164 A&O Shearman "Combatting payment account fraud: Singapore's Shared Responsibility Framework" (10 January 2025) <www.aoshearman.com>; and Monetary Authority of Singapore and Infocomm Media Development Authority *Guidelines on Shared Responsibility Framework* (24 October 2024).

165 Ruairi O'Shea "New Zealand's scam crisis: Are we falling behind?" (30 January 2025) Consumer NZ <www.consumer.org.nz>; Department of Finance Canada *Consultation on Proposals to Strengthen Canada's Financial Sector* (12 August 2024); and Dan Holmes "Scam Liability Shifts: Global Banks Reach an Inflection Point" (6 March 2024) Feedzai <www.feedzai.com>. I note for completeness that reimbursement can be ordered in limited cases by BOS-equivalent bodies, see for example: Ombudsman for Banking Services and Investments "Fraud" <www.obsi.ca>; and Australian Financial Complains Authority "Scam complaints" <www.afca.org.au>.

make inquiries or give warnings. Banks that fail to do so have been ordered by the BOS to provide reimbursement.

The obvious disparity between these two approaches creates uncertainty, which harms both fraud victims and banks. For victims, seeking redress is complicated by the existence of two dispute resolution forums likely to decide identical cases in opposite ways. And for banks, the obligations in cases of authorised push payment fraud are unclear, hence they find themselves in something of a "damned if you do, damned if you don't" position, where compliance with the BOS may lead to liability under the common law, and vice versa.

I have argued that the status quo is unsustainable. Parliamentary intervention is necessary, to clarify the duties and liabilities of both banks and customers. Following the UK model, new legislation—binding on both the courts and the BOS—should be passed, which:

(i) facilitates the imposition of sensible reimbursement requirements on banks through secondary legislation they "took reasonable care when deciding to make or making the payment"; and
(ii) clarifies the scope of banks' common law liability.

Only Parliament is competent to take up the statutory reins and pave a clear path forward.

## *X POSTSCRIPT*

Since this article was written, the New Zealand Banking Association has announced that a voluntary compensation scheme for APP fraud victims will be introduced on 30 November 2025.[166] Under this scheme, victims will be entitled to compensation from their bank of up to $500,000, if:

(i) they satisfy the eligibility criteria;[167]
(ii) they "took reasonable care when deciding to make or making the payment";[168] and
(iii) the bank failed to meet five new anti-scam commitments, including identifying and protecting against high-risk transactions.[169]

This is an industry-led initiative, developed in response to calls from the New Zealand Government for stronger action on scams.[170] Undoubtedly, it goes some distance towards addressing

166 New Zealand Banking Association *Amendment to the Code of Banking Practice to address fraud and scam payment protections and compensation (to apply from 30 November 2025)*; and Lane Nichols "NZ banks introduce new fraud protections, will reimburse scam victims up to $500,000" *The New Zealand Herald* (online ed, New Zealand, 23 April 2025).

167 New Zealand Banking Association, above n 166, at 1–2.

168 At 2.

169 At 2–3.

170 See Scott Simpson "Better compensation for scam victims" (press release, 23 April 2025).

the issues identified in this article. However, I agree with consumer advocates and scam victims that it falls short of the mark.[171] This postscript discusses three particular shortcomings.

First, the eligibility criteria are too strict. Compensation will not be available for international transactions, or transactions that involve goods or services being bought on social media or an equivalent online marketplace,[172] despite such platforms being "rampant" with scams.[173] Secondly, the "reasonable care" threshold is too low. It will allow banks to avoid paying compensation more easily than, for example, in the UK, where the equivalent standard is gross negligence.[174] And thirdly, as Borja Ares has said, the scheme is "vague".[175] Banks and customers are likely to disagree about its application, leaving the BOS to determine whether eligibility criteria have been met, whether banks complied with their anti-scam commitments, whether customers took "reasonable care" and so forth.

171 See Rob Stock "Banks' scam compensation code called 'too little, too late' by victim" *The Post* (online ed, Wellington, 23 April 2025); and Ruairi O'Shea "Banks introduce new compensation measures for scam victims" (1 May 2025) Consumer NZ <www.consumer.org.nz>.

172 New Zealand Banking Association, above n 166, at 1.

173 Stock, above n 171.

174 See Pay.UK *FPS Reimbursement Rules* (4 December 2024) at [3.6].

175 Stock, above n 171.