

25 June 2019

By email: adjudication@accc.gov.au

Susie Black
Director (A/g), Adjudication
ACCC
GPO Box 3131
Canberra ACT 2601

Dear Ms Black

Australian Banking Association application for authorisation aa1000441 – interested party consultation

Consumer Action Law Centre (**Consumer Action**), the Financial Rights Legal Centre (**Financial Rights**) and Financial Counselling Australia (**FCA**) welcome the opportunity to comment on the Australian Banking Association (**ABA**) application for Australian Competition and Consumer Commission (**ACCC**) authorisation of amendments to the 2019 Banking Code of Practice (the **Code**) in response to the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (the **Royal Commission**) Final Report recommendations 1.8 (parts 3 and 4) and 1.13. We have largely limited our response to the changes in response to recommendation 1.8 (parts 3 and 4) and related basic bank account changes.

Generally, we are supportive of the ABA application and agree there will be a net public benefit with the introduction of changes to the Code that outweigh any competitive detriments that may arise. We welcome the amendments addressing dishonour and overdrawn fees and informal overdrafts as well as the introduction of minimum features and the general concept of basic bank accounts. However, we suggest the following further amendments to enhance the consumer benefit of the proposed changes. The suggested amendments in this submission reflect and expand upon our joint feedback to the ABA directly and to the related Australian Securities and Investments Commission (**ASIC**) application.

About Consumer Action Law Centre

Consumer Action is an independent, not-for profit consumer organisation with deep expertise in consumer and consumer credit laws, policy and direct knowledge of people's experience of modern markets. We work for a just marketplace, where people have power and business plays fair. We make life easier for people experiencing vulnerability and disadvantage in Australia, through financial counselling, legal advice, legal representation, policy work and campaigns. Based in Melbourne, our direct services assist Victorians and our advocacy supports a just marketplace for all Australians.

About Financial Rights Legal Centre

The Financial Rights Legal Centre is a community legal centre that specialises in helping consumers understand and enforce their financial rights, especially low income and otherwise marginalised or vulnerable consumers. We provide free and independent financial counselling, legal advice and representation to individuals about a broad range of financial issues. Financial Rights operates the National Debt Helpline, which helps NSW consumers experiencing financial difficulties. We also operate the Insurance Law Service which provides advice nationally to consumers about insurance claims and debts to insurance companies, and the Mob Strong Debt Help services which assist Aboriginal and Torres Strait Islander Peoples with credit, debt and insurance matters. Financial Rights took close to 25,000 calls for advice or assistance during the 2017/2018 financial year.

Financial Rights also conducts research and collects data from our extensive contact with consumers and the legal consumer protection framework to lobby for changes to law and industry practice for the benefit of consumers. We also provide extensive web-based resources, other education resources, workshops, presentations and media comment.

About Financial Counselling Australia

FCA is the peak body for financial counsellors in Australia. FCA's member groups are the State and Territory financial counselling associations. FCA provides a voice for the financial counselling profession, provides training, support and resources for financial counsellors and advocates for a fairer marketplace for the clients of financial counsellors.

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TIMING

We recommend bringing forward the deadline for implementation from 1 March 2020 to 1 January 2020. These changes will start to address bank account issues that have been causing harm to consumers for years, as demonstrated during the Royal Commission in 2018. While some banks are making changes earlier, we do not consider it appropriate or fair for others to continue to allow for harmful impacts associated with inappropriate bank accounts—we contend the proposed changes should not be delayed until March 2020.

RECOMMENDATION 1. Implement the ABA Code changes by 1 January 2020.

PROPOSED CHANGES

Basic bank accounts

It is our view that all ABA member banks should provide a basic bank account as defined rather than an alternative or low or no-fee account with weaker standards. This should not affect competition between banks as banks could broaden their eligibility criteria and/or the minimum features of a basic bank account. With the currently proposed ABA amendments, banks could simply avoid basic bank account requirements by offering low or 'no'-fee accounts that may include fees for debit cards, for example, instead.

At the very least, there could be a requirement for those that do not offer a basic bank account to disclose prominently that they do not, including having to specifically tell people otherwise entitled to access a basic bank account under the terms of the Code and recommend that they shop around.

We also note with concern that the provider of the Cashless Debit Card (**CDC**), Indue Ltd, is not a signatory to the Banking Code. We consider that the minimum eligibility criteria for basic bank accounts should apply equally to the CDC and suggest that the ACCC raise any inconsistency in protection with the Minister for Social Services. The market for basic bank accounts and the CDC are likely to overlap, and it is important that everyone eligible for a basic bank account is able to benefit from the proposed code changes.

RECOMMENDATION 2. All ABA member banks should provide a basic bank account.

RECOMMENDATION 3. The basic banking code protections should apply equally to the Cashless Debit Card.

Minimum eligibility criteria

While the ABA submission states that eligibility criteria for basic bank accounts are a 'minimum' criteria and 'that banks may operate broader eligibility criteria',¹ we consider the Banking Code amendments to be unclear on this point. The definition of 'eligible customer' in clause 47 does not mention that banks can use broader eligibility criteria than that listed in clause 44. We recommend this be stated explicitly.

Furthermore, we recommend 'basic account' be included in clause 44 of the Banking Code. Without reference to 'basic accounts' in clause 44, the wording enables even banks that offer basic accounts to avoid providing information on these accounts to customers who would be eligible (offering 'low fee' accounts instead). Adding 'basic account' to the wording of clause 44 would also align with the ABA's description of their response to consumer representative feedback on page 23 of their application for authorisation.

RECOMMENDATION 4. Clarify that basic bank accounts should be offered to holders of government concession or pension cards, and that banks can broaden the eligibility criteria for basic bank accounts.

Proactive provision of basic bank accounts

While we are generally supportive of the changes to the Banking Code, we are very concerned that the Code places the onus on the customer to request a basic account.² The community expects that banks will proactively provide appropriate bank accounts, including basic bank accounts, to its customers. We welcome the requirement for banks to ask a customer applying for a new transaction account if they have a government concession card;³ however, customers who start receiving government support payments after opening an account should also be flagged for notification about basic, low or no-fee accounts. We are aware that individual banks are considering processes for manual and/or systematic identification of potentially eligible customers, which is positive. We encourage codification of the need for proactive approaches including data analysis. Banks should commit to establishing a broad range of indicators to help identify those that need additional or personalised support, to comprehensively training staff on how to apply these indicators in practice and adopting a clear plan on how the bank will respond when they identify such needs.

We note the ABA commitment to considering consumer group feedback, including on this issue, in the next review of the Banking Code (to be undertaken by 1 July 2022),⁴ and are disappointed by this timeframe. At the very least, we seek a commitment that banks will be ready to be make this commitment in the next iteration of the Code.

RECOMMENDATION 5. Codify proactive provision of basic, low and no-fee accounts for new and existing bank customers, including through data analysis.

¹ ABA (prepared by Gilbert + Tobin), Submission to ACCC, *Submission in support of application for authorisation by the ABA on behalf of its member retail banks*, (17 May 2019), page 1, 4.

² Proposed amendments to Banking Code clause 47.

³ Banking Code clause 44.

⁴ ABA (prepared by Gilbert + Tobin), Submission to ACCC, *Submission in support of application for authorisation by the ABA on behalf of its member retail banks*, (17 May 2019), page 23.

Minimum features of a basic bank account (clause 44B)

No account keeping fees

We support this feature.

Free periodic statements

We welcome this feature; however, we think the regularity of free statements should be clarified. If the regularity is at the discretion of the customer, this should be stated. We note the Banking Code specifies that deposit account statements will be given 'at least every 6 months – or more frequently if you ask...' ⁵ but it is unclear whether more frequent statements would remain free.

Furthermore, in order to ensure that all customers, including basic account customers, are provided with statements at their desired frequency, the code should commit banks to asking the customer—rather than waiting for the customer to ask.

No minimum deposits

We support this feature.

Free direct debit

We support this feature but stress that Banking Code Compliance Monitoring Committee (CCMC) reports have consistently demonstrated a systemic failure to comply with the current Code requirement to cancel direct debits on request.⁶ The 2019 code was a missed opportunity to include some mechanism to address this non-compliance, and to extend this protection to recurrent payments on credit and scheme debit cards. We emphasise the harm that occurs when banks do not comply with their obligation to cancel direct debit, which can be devastating for customers with low incomes.

Being able to cancel a direct debit is a basic banking right. A person who wants to cancel a direct debit, and manage their own money, is withdrawing their authority for a third party to access their bank account. Banks should act on that instruction.

Issues with cancellation of direct debits are common. When a person is in financial difficulty or on a low income, they need to be able to prioritise basic living expenses and shelter. A direct debit that cannot be cancelled can mean a person pays their full credit card payment to the exclusion of food or shelter. This can even occur when a person has given a financial hardship notice and is seeking to make lower repayments. A person may also want to cancel a direct debit where there is a dispute with a service provider.

⁵ Banking Code clause 119.

⁶ CCMC, *Compliance with the Code of Banking Practice 2017-18*, Report (November 2018), available at: <http://www.ccmc.org.au/cms/wp-content/uploads/2018/11/CCMC-Report-Compliance-with-the-Code-of-Banking-Practice-2017%E2%80%9918.pdf> p59-60; Chapter 34 of the Banking Code (Chapter 19 of the 2013 Banking Code).

Debit card

We support this feature but recommend that a scheme debit card should be a minimum requirement rather than simply an EFTPOS card. Without access to scheme debit, banks will be excluding low-income consumers from online transactions.

Free and unlimited Australian domestic transactions

We support this feature but express concern that it is qualified with: 'Note that you may be charged for certain ancillary services. For example, bank cheques, telegraphic transfers, or transactions at ATMs owned and operated by third parties.'⁷ This means customers will still be required to pay for ATM transactions where the bank has not provided adequate access. The community expects widespread access to fee-free ATMs, despite this being a 'cost' to the banks. This is part of the utility of banking services. A lack of codified action will continue to entrench disadvantage. This specific issue has been raised in the recent release of a UK Parliament report into consumer access to financial services.⁸ It also continues to garner negative headlines for Australian banks, such the recent articles about \$30,000 in ATM fees for Commonwealth Bank customers on Palm Island.⁹ The ABA application for Banking Code authorisation itself also mentions the issue of ATM fees in relation to its section on significant public benefits of basic bank accounts, referring to a customer who 'lived in a remote community and had access to only one privately owned ATM that charged fees for use'.¹⁰

We also flag that this open-ended exemption for 'ancillary services' may be used in order to charge for domestic transactions. For example, it is not currently clear in the Code that online transactions processed in Australia would be free—we contend they should be.

RECOMMENDATION 6. Strengthen the minimum features of basic bank accounts to clarify free periodic statements, to require scheme debit, to waive all ATM fees (including from third parties) and to reduce the exempted 'ancillary services'.

No Informal overdrafts, no dishonour fees, no overdrawn fees (clause 47)

We support the ban on informal overdrafts for basic, low and no-fee accounts but are concerned about the blanket exclusion of 'instances where it is impossible or reasonably impractical for us to prevent your

⁷ Proposed clause 44B Banking Code.

⁸ Treasury Committee, *Consumers' access to financial services* (House of Commons Report 29, Session 2017 – 19) page 32-35, available at: <https://www.parliament.uk/business/committees/committees-a-z/commons-select/treasury-committee/news-parliament-2017/consumers-access-to-financial-services-report-published-17-19/>.

⁹ E.g. Natassia Chrysanthos, "\$30,000 on ATM fees: Palm Island bank customers highlight Indigenous finance problems" (12 May 2019) *The Sydney Morning Herald*, available at: <https://www.smh.com.au/business/banking-and-finance/30-000-on-atm-fees-palm-island-bank-customers-highlight-indigenous-finance-problems-20190418-p51fcz.html>.

¹⁰ ABA (prepared by Gilbert + Tobin), Submission to ACCC, *Submission in support of application for authorisation by the ABA on behalf of its member retail banks*, (17 May 2019), page 20 citing Kenneth M Hayne, Royal Commission, Interim Report Volume 2 at p 470-475.

account from being overdrawn'.¹¹ Our understanding of the explanation of informal overdrafts is that it is considered impossible or reasonably impractical for a bank to prevent informal overdrafts in the following circumstances:

- transactions made at off-line ATMs or point of sale machines
- 'offline contactless (Paywave, Paypass etc) transactions which are chip based with a monetary limit per transaction and processed by the bank as an overnight batch only'
- 'recurring transactions (i.e. scheme based) and direct debits (BECS regulated)', in cases where 'a merchant processes the transaction without reference to a bank authorisation process'
- single online shopping transactions where there is no authorisation process by the merchant (such as when the merchant does not collect the CVV number of a card).¹²

This list includes some of the most common types of transactions made by bank customers. Merchants commonly pressure customers to use Paywave (or similar contactless payment), or even simply 'tap' on a consumer's behalf. While technically disallowed, it seems informal overdrafts will still occur frequently due to transactions beyond the banks' control. The Code clearly states 'no informal overdrafts'. We consider the current drafting of this clause to be misleading.

Basic, low and no-fee account customers need to be explicitly informed that their accounts with 'no informal overdrafts' may *frequently* still incur informal overdrafts due to impracticalities mentioned in the definitions. At the very least, the Code should explicitly identify the above instances where informal overdrafts would still occur (potentially causing associated interest – see next). While there is still such a high likelihood of informal overdrafts, this information must be provided clearly and in plain language to any customer who opens a basic, low or no-fee account.

Interest

While we strongly support the Code's removal of overdrawn and dishonour fees for basic, low and no-fee accounts, we are very concerned that the Code allows interest to be charged on overdrawn amounts incurred as above. While banks may have no control over an offline transaction overdrawing a customer's account, they are able to prohibit interest on informal overdrafts for basic, low and no-fee account holders. We strongly recommend this be codified and consider that the current statement that 'you may be charged interest on the amount in debit'¹³ be removed, particularly when the account is not technically supposed to allow informal overdrafts at all.

RECOMMENDATION 7. Clearly state in the Code the most common instances in which informal overdrafts will still occur and ensure banks are required to inform their customers about this clearly and in plain language.

¹¹ Proposed clause 47 Banking Code.

¹² ABA (prepared by Gilbert + Tobin), Submission to ACCC, *Submission in support of application for authorisation by the ABA on behalf of its member retail banks*, (17 May 2019), page 8-10.

¹³ Proposed clause 47 Banking Code.

RECOMMENDATION 8. The Code should explicitly prohibit banks charging interest on an overdrawn amount for basic, low and no-fee accounts.

Other issues

Clause 32 & 34 'people with limited English'

The wording of clauses 32 & 34 does not clearly include people with no or limited English. It would be preferable to state 'people of non-English speaking backgrounds'.

Clause 36

We agree the amended wording is an improvement as the previous clause only committed banks to making information about services accessible. However, this could be further strengthened and clarified by the clause stating: "We will assist our customers who reside in remote communities (including remote Indigenous communities) to access and undertake their banking services." We acknowledge this clause has been updated in a way that reflects language used by Commissioner Hayne, but we think the above better meets community expectations.

Clause 170

We recommend amending the final sentence under 'restoring your financial position is unlikely' to 'we may refer you to people who can help you find a financial adviser or FINANCIAL counsellor'.

Co-borrowing (Clause 54)

We recommend amending clause 54 so that there is a prohibition on a bank entering into a co-borrowing arrangement unless each borrower receives a substantial benefit from the arrangement. The risk of harm caused by co-borrowing arrangements is significant, particularly in the context of economic abuse by family members.

We understand that the banks wish to continue allowing co-borrowing in instances where parents enter into a loan jointly with their dependent to purchase property (to facilitate inter-generational transfer of wealth). If the Code is to allow these arrangements, then the prohibition on co-borrowing unless both parties receive a substantial benefit should have a limited exemption in the case of loans for the purchase of real property.

The current code states that, in considering whether or not to approve a co-borrower that does not receive a substantial benefit, banks consider 'information that you have provided to us in the course of applying for this loan'. We consider that banks should consider other information available to the bank, including information from previous banking relationships (e.g. a transaction account previously held with the bank).

Clause 54 should also clarify that a co-borrower's liability should be reduced to the amount of the benefit they received from the loan funds. The legal requirements actually go further than what Clause 54 currently

provides for and the banks have accepted this.¹⁴ Given the Code informs bank compliance systems, it would be far better for this legal position to be reflected in the wording of the Code. This suggested change should also significantly aid dispute resolution.

RECOMMENDATION 9. Amend clause 54 to limit the ability to co-borrow without receiving a substantial benefit to secured loans only, and to clarify that a co-borrower's liability should be reduced to the amount of the benefit they received from the (secured) loan funds.

SUMMARY OF RECOMMENDATIONS

RECOMMENDATION 1. Implement the ABA Code changes by 1 January 2020.

RECOMMENDATION 2. All ABA member banks should provide a basic bank account.

RECOMMENDATION 3. The basic banking code protections should apply equally to the Cashless Debit Card.

RECOMMENDATION 4. Clarify that basic bank accounts should be offered to holders of government concession or pension cards, and that banks can broaden the eligibility criteria for basic bank accounts.

RECOMMENDATION 5. Codify proactive provision of basic, low and no-fee accounts for new and existing bank customers, including through data analysis.

RECOMMENDATION 6. Strengthen the minimum features of basic bank accounts to clarify free periodic statements, to require scheme debit, to waive all ATM fees (including from third parties) and to reduce the exempted 'ancillary services'.

RECOMMENDATION 7. Clearly state in the Code the most common instances in which informal overdrafts will still occur and ensure banks are required to inform their customers about this clearly and in plain language.

RECOMMENDATION 8. The Code should explicitly prohibit banks charging interest on an overdrawn amount for basic, low and no-fee accounts.


RECOMMENDATION 9. Amend clause 54 to limit the ability to co-borrow without receiving a substantial benefit to secured loans only, and to clarify that a co-borrower's liability should be reduced to the amount of the benefit they received from the (secured) loan funds.

¹⁴ Personal communication from ABA to Consumer Action Law Centre, August 2018; See also FOS determination 412040 as an example of how the law operates to reduce the borrower's liability to the amount of the benefit, available here: <https://service02.afca.org.au/CaseFiles/FOSSIC/412040.pdf>.

Please contact Senior Policy Officer **Brigette Rose** at **Consumer Action Law Centre** on 03 9670 5088 or at brigette@consumeraction.org.au if you have any questions about this submission.

Yours Sincerely,

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