

15 October 2019

Susie Black
Director (A/g) Merger & Authorisation Review Division
Australian Competition and Consumer Commission
By email: Susie.black@acc.gov.au

Dear Ms Black,

Australian Banking Association (ABA) application for authorisation AA1000441— submission on draft determination

I refer to David Jones' letter of 27 September 2019, advising of the making of the ACCC's Draft Determination in this matter.

The ABA welcomes the ACCC's proposed unconditional authorisation of the Agriculture Proposal. We are encouraged by the ACCC's willingness to grant authorisation for the other proposals outlined in our submission. This letter sets out the issues we have identified regarding some of the conditions on which the ACCC is proposing to make the grant. We outline these issues in detail below, and make further observations on the framing of the conditions to better align them with the objectives being sought, together with some points that we believe require clarification.

Key points

- The term 'Basic Banking Products' should be replaced in the Draft Determination, as this term is defined in the Corporations Act more broadly than we understand the ACCC intends to apply it in this context.
- The Draft Determination should be clear that the Proposed Conduct relating to the implementation of the recommendations of the Financial Services Royal Commission on basic, low or no-fee accounts (and any conditions imposed in relation thereto), is confined to such accounts where they are provided to 'eligible customers' as defined in the Banking Code of Practice (the Code). References in the Final Determination to:
 - obligations around informal overdrafts
 - any associated conditions such as those relating to the charging of interest, or
 - associated reporting obligations,

should be qualified by use of a term such as: "*basic accounts provided under paragraph 47 of the Code*".

- The ABA is opposed to the proposed condition for the inclusion in the Code of a prohibition on the charging of interest on informal overdrafts on basic, low or no fee accounts held by eligible customers. However, if such a condition requiring such a provision is included in the Final Determination:
 - The condition should take effect from 1 March 2021; and
 - There should be a reasonable time allowed (at least 3 months) from the time of the charging of interest for banks to make a refund.
- The condition requiring reporting on informal overdrafts should be limited to:



- the percentage of the total number of basic accounts provided under paragraph 47 of the Code which have been overdrawn during the reporting period without the account holder's express agreement, and how many times (on average) these accounts have become overdrawn; and
- the reference to the period in which to report should be from the time the Code amendments take effect (1 March 2020) rather than 'after authorisation'.
- *Member Banks put forward the Basic Bank Account (BBA) proposal in good faith for the benefit of the public and those that currently offer BBAs have no intention of ceasing to offer these products.* However, the ABA does not support the proposed condition that the Code include a provision that Member Banks which currently offer a BBA to continue to do so for the course of the authorisation. In lieu of this proposed condition, there should be a condition that the ABA report annually to the ACCC on the number of Member Banks offering BBAs.
- The Final Determination should not contain a condition requiring the Banking Code be amended to require Member Banks to use data analysis and take other proactive steps to identify and contact potentially eligible customers to provide information about basic banking products and inviting them to apply if eligible. Conditions on the proactive identification of eligible customers should be limited to:
 - A condition requiring banks to publicly report to the ACCC, over the relevant period, on:
 - actions taken by Member Banks to identify and contact existing customers potentially eligible for BBAs
 - how many BBAs were opened (including by existing customers); and
 - the reference to the period/s in which to report should be from the time the Code takes effect (1 March 2020) rather than 'after authorisation'. This would allow time for an appropriate data set to build upon which to base the report/s.

Clarifications

'Basic Banking Products' Proposal

We note that, in the draft determination, the ACCC has adopted the phrase "basic banking products", which it defines to mean 'basic, low or no fee accounts'. To avoid confusion, we suggest the ACCC instead use an alternative phrase such as 'basic accounts' (the terminology used by the Royal Commission).

This is because the term "basic banking product" is a defined term in the Corporations Act and has a meaning broader than that intended by the ACCC in the Draft Determination.

961F What is a basic banking product?

Each of the following is a basic banking product:

- (a) a basic deposit product;
- (b) a facility for making non-cash payments (see section 763D);
- (d) a facility for providing traveller's cheques;
- (e) any other product prescribed by regulations for the purposes of this paragraph.

Despite the inclusion of a separate definition in the Draft Determination, the use of a phrase defined elsewhere in legislation could cause uncertainty.

Where the term is used to describe obligations that implement the Royal Commission recommendations on around informal overdrafts and dishonour fees, the term should be qualified to read: "basic accounts provided under paragraph 47 of the Code" (see below).

Royal Commission recommendations on basic, low or no fee accounts held by eligible customers

We note that the Draft Determination proceeds on the basis that the Royal Commission recommended “that banks should not offer informal overdrafts on basic banking products without express agreement from the customer”,¹ and that the ACCC characterises the ABA proposal in the same way.² However, this overlooks the important qualification that the Proposed Conduct in this regard is limited to basic, low or no fee accounts *held by eligible customers in the circumstances described in paragraph 47 of the Code*.

This is the basis that the Application and the relevant draft provision/s of the Code (see paragraph 47) have been drafted. Paragraph 47 is intended to operate in this way:

- Eligible customers who ask for a basic account will be provided with one by Member Banks who offer one and an account provided in these circumstances will have the characteristics outlined in 47(a) to (c).
- Eligible customers who ask for a basic account where a Member Bank does not offer such a product will instead be offered a low or no fee account that has the features outlined in 47(a) to (c).

As outlined in our earlier submissions, some Member Banks will offer basic, low or no fee accounts to a greater variety of customers (even, in some cases, to all customers). Where accounts are offered outside the circumstances in paragraph 47, the obligations around the inclusion of the features outlined in that paragraph will not apply. This will be the case where:

- A customer other than an eligible customer holds a basic, low or no fee account.
- An eligible customer, having been offered a basic, low or no fee account that complies with paragraph 47, declines such offer and instead opts for an account with other features - even if that other account has low or no fees.

The above interpretation is, in our submission, flexible and sensible. It allows for circumstances where, for example, a pensioner holding a government concession card required a share trading account. Such an account may have low or no fees, but does not attract the paragraph 47 features under our proposal.

It is not the ABA’s intention, nor in our submission was it the Royal Commission’s intention, that the limitations on basic accounts apply where they are held by customers other than ‘eligible customers’. This is why the relevant proposed provision of the Code – paragraph 47 – is limited to accounts held by eligible customers. It is not proposed to apply the Royal Commission limitations to accounts outside the terms of paragraph 47.

Accordingly, any reference in the Final Determination to obligations arising from paragraph 47, or to any associated conditions such as those relating to the charging of interest, or to reporting obligations, should be qualified by use of a term such as: “basic accounts offered under paragraph 47 of the Code”.

Proposed conditions

Charging interest on informal overdrafts for basic, low or no fee accounts held by eligible customers

We note that the Draft Determination proposes to impose a condition that the Banking Code be amended to require signatories to the Code to either:

- a) not charge interest on informal overdrafts in relation to basic banking products where a customer has not expressly sought that facility, or

¹ Paragraph 4.17

² Paragraph 4.22



- b) where it is not possible for a bank to prevent interest being charged in the above circumstances, for the amount of interest to be refunded at the end of the month.

The reasons given for the proposed imposition of this condition indicate that the ACCC is concerned that the lack of a prohibition on the charging of interest in circumstances where informal overdrafts have not been able to be prevented does not 'effectively address the harms identified by the Royal Commission', and that this results in 'public detriment'.³

In our submission, this conclusion is flawed on two grounds:

- a) The proper application of the authorisation test outlined in section 90 of the Australian Competition and Consumer Act (the Act) requires 'comparison of a future in which the conduct, *the subject of the authorisation application*, occurs with a future in which that conduct does not occur'⁴. The test should not involve the weighing of the consequence of not doing some further conduct – such as not charging interest – that is not the subject of the application.
- b) The Proposed Conduct as outlined in the ABA application does effectively address the harms identified by the Royal Commission as the key harm identified by the Commission related to overdrawn fees.

Practical concerns around implementation

If the condition on the inclusion of a prohibition on the charging of interest on basic, low or no fee accounts held by eligible customers is maintained in the Final Determination, Member Banks would not be in a position to comply with the obligation in time to meet the current planned date for Release 2 of the Code – 1 March 2020.

This is because, as noted in earlier submissions, for Member Banks who currently charge interest on overdrawn BBAs, substantial time and costs could be involved to build systems to prevent or limit interest on BBAs or low or no fee accounts held by eligible customers, or to refund fees charged.

For example, one major bank has indicated its relevant BBAs operate on two Core Banking Platforms. The ACCC's proposed condition to change or remove debit interest on BBAs (as defined in Chapter 16 of the March 2020 Banking Code), would require this major bank to undergo significant assessment and testing of these systems to ensure the required changes are implemented correctly. Rigorous testing is required to ensure that no unforeseen impacts occur, including to any downstream processes or outputs – for example, there would need to be significant regression testing on customer statements.

Given the complexity of these systems, changes of this nature have a long delivery lead time and further implementation timing is linked to quarterly enterprise releases. The majority of upcoming releases are already locked in and full due to implementation of existing regulatory changes across a range of regulatory change projects. For this major bank it would be unfeasible and challenging to de-prioritise current planned releases in relation to other regulatory changes, in favour of the ACCC's proposed condition. In this major bank's experience, typically the required changes to core banking systems would have a 9 to 12 month lead time.

Without the necessary systems changes, refunding the interest charges on these accounts in the interim is likely to require significant additional resources and lead-time to put in place as it would require manual processes and reporting. The significant disadvantage of a manual interim solution would be that it is also likely to increase the risk of error. Given the minimal average value of interest charged on these accounts, the cost burden and risks involved in adopting manual solutions outweigh any customer benefit.

For these reasons, the ABA proposes that, if this condition is to be maintained, that it be modified by providing a transition period for banks to put systems in place to comply. The ABA is currently planning a further release - Release 3 of the Code - for 1 March 2021. In our submission, it would be more appropriate if the condition took effect from 1 March 2021, as this would allow enough time for Member

³ Paragraph 4.97

⁴ *Re Medicines Australia Inc* [2007] ACompT 4 (27 June 2007)

Banks to comply. We note again that any such condition should be limited to basic, low or no fee accounts *provided under paragraph 47 of the Code*.

Member Banks also seek that the condition in paragraph 4.38 of the Draft Determination be modified by substituting the words “within 3 months” in lieu of “at the end of the month”. Member Banks who choose to utilise this second limb of the condition – especially smaller banks - may well have to rely on manual processes to identify transactions in the relevant category. Requiring interest to be paid at the end of the month in which the charge was made would be an onerous requirement for such banks.

Conditions on reporting on informal overdrafts

We note that the Draft Determination proposes that there be a condition that requires the ABA to report to the ACCC 12 months after conditional authorisation has been granted, for “the purposes of assessing how frequently [the relevant accounts] in practice, go into overdraft without customer’s express consent”. We welcome the ACCC expressed willingness to consult with the ABA and interested parties to ensure that the ACCC has the information it needs without placing an unnecessary burden on Member Banks.

At the outset, we note that, in our view, the list of possible data points outlined in the Draft Determination (below) would, if implemented in full, place an unnecessary burden on Member Banks:

- a) the percentage of the total number of Basic Banking Product accounts which have been overdrawn during the reporting period without the account holder’s express agreement, and how many times (on average) these accounts have become overdrawn
- b) the types of transactions that have caused basic bank accounts to go into overdraft
- c) the number of transactions that have caused basic bank accounts to go into overdraft in each category
- d) the cause of each overdraft (e.g. overnight processing of transactions, system outage, etc), where this can be identified
- e) steps taken by Member Banks to reduce the circumstances in which informal overdrafts occur.

Members banks have varying capacities to provide data as outlined in the above list but none have automated systems in place that could cope with all the above data points. In particular, the points in (b), (c), and (d) above would, even for major banks with more sophisticated systems, require manual intervention and would be time consuming and costly. In relation to the point in (e), the primary step that Member Banks will take to reduce the occurrence of informal overdrafts is the implementation of the Code’s prohibition on allowing informal overdrafts. The type of informal overdrafts under discussion are those that are ‘impossible or reasonably impractical to prevent’. There is limited scope to reduce the number of this type of informal overdraft.

The ABA submits that an appropriate reporting condition would be limited to the data point in paragraph (a). Data under paragraph (a) would meet the ACCC’s needs in the circumstances by providing an accurate picture of prevalence of informal overdrafts that are ‘impossible or reasonably impractical to prevent’ in these types of accounts. Further, the provision of data under point (a) would not unduly burden Member Banks.

As for the time in which to provide the reports, in our submission this should be expressed to be 12 months after the Code provision comes into effect, rather than 12 months ‘after authorisation’. This would allow for an appropriate data set to build upon which to base the reports.

Condition on continuing to offer Basic Bank Accounts

We note that the Draft Determination proposes a condition that the Banking Code be amended to require all Member Banks which currently offer a BBA product to continue to do so for the course of the authorisation.

At the outset, we note that Member Banks put forward the BBA proposal in good faith for the benefit of the public and those that currently offer BBAs have no intention of ceasing to offer these products.

That said, the ABA opposes this being made a provision of the Code. The inclusion of such a condition would be unusual in at least two respects:

1. It would mandate the offer a highly specific commercial product; and
2. It would impose this obligation on only a subset of subscribers, with the result that subscribers to the Code are not treated equally.

As we are sure the ACCC appreciates, the current commercial environment for banking is highly dynamic, with new entrants with radically different business models being approved by regulators to enter the market. Rigidly constraining banks' ability to adjust products as business models evolve would, in our submission, be an undue constraint.

We accept that the ACCC has a legitimate interest in monitoring the offering of BBAs and ensuring that the authorised conduct meets the requisite benefit test. However, we believe that this could be achieved by the imposition of a reporting requirement under which the ACCC would be kept aware of any reduction (or increase) in the numbers of Member Banks offering BBAs.

We propose that, in lieu of the condition outlined in paragraph 4.57 of the Draft Determination, that there be a condition that the ABA report annually to the ACCC on the number of Member Banks offering BBAs.

Condition on proactive identification of potentially eligible customers and associated reporting

As noted in earlier submissions, Member Banks are taking a number of steps for proactively identifying eligible customers, but that the efforts of banks in this regard require the co-operation of the relevant Federal Government agencies who provide support payments, such as the Department of Human Services and Centrelink, to overcome technical issues associated with identifying eligible customers through payment codes.

We've also noted that the ABA's advertising campaign included specific communications regarding the availability of low and no fee accounts, including a prompt to customers to ask their bank about eligibility, and that recent campaign data commissioned by the ABA shows that this campaign has reached 1 in 5 Australians.

Nevertheless, we note that the ACCC remains concerned about the proactive identification of this category of customer, and that the Draft Determination proposes to impose:

1. A condition that the Banking Code be amended to require Member Banks to use data analysis and take other proactive steps to identify and contact potentially eligible customers to provide information about basic banking products and inviting them to apply if eligible; and
2. A condition requiring banks to publicly report to the ACCC 12 months after authorisation is granted, and again 36 months after authorisation is granted, on:
 - a) actions taken by Member Banks to identify and contact existing customers potentially eligible for BBAs
 - b) how many BBAs were opened (including by existing customers); and
 - c) actions taken by Member Banks and the ABA to work with government departments to address technical issues in the identification of eligible or potentially eligible customers.⁵

The ABA is opposed to the first of these conditions. The Code is essentially a document that sets the standards of practice for banks and informs customers of their rights. As a consumer facing document, the ABA considers that the Code should not be used as a means to enforce conditions related to the authorisation (except where those conditions bear directly on customers' rights). In our submission, the

⁵ Paragraphs 4.72, 4.73



ACCC's concerns around Member Banks' commitment to proactively identify eligible customers could be addressed by the reporting condition outlined in paragraph 2 above.

Member Banks would be able to comply with a reporting condition based on paragraphs 2 (a) and (b) above. Member Banks have concerns about the proposed reporting condition in 2(c). The ABA submits that a requirement to report to the ACCC on engagement with Commonwealth Government departments is not appropriate and could impede that process due to concerns around confidentiality, both from industry and Commonwealth Government perspectives. The ACCC would presumably be at liberty to consult with the relevant Government departments if it wanted confirmation that discussions on this issue had progressed.

In our submission, the reporting requirement should relate to periods that commence from the date the Code provisions take effect (1 March 2020) rather than 'after authorisation'. This would allow time for an appropriate data set to build upon which to base the report/s.

Please do not hesitate to contact us regarding any further queries or clarification of the above points.

Yours sincerely



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