



# Draft Determination

Application for authorisation  
lodged by  
the Australian Banking Association  
in respect of  
certain amendments to the 2019 Banking Code  
Authorisation number: AA1000441

27 September 2019

Commissioners: Sims  
Keogh  
Rickard  
Cifuentes  
Court  
Ridgeway

## Summary

The ACCC proposes to grant conditional authorisation to enable the Australian Banking Association, its member retail banks and future member retail banks, to implement certain amendments to the 2019 Banking Code. The proposed changes are in response to recommendations of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (Royal Commission), in addition to changes which codify the concept of a Basic Bank Account and set minimum eligibility criteria for basic bank accounts, low fee accounts and no fee accounts. All changes are proposed to come into effect on 1 March 2020.

The ACCC considers there is potential for public benefits to arise from the ABA addressing the Royal Commission recommendations and its other proposed Code changes. However, the ACCC has proposed conditions on authorisation to ensure that the Royal Commission recommendations are effectively addressed in substance and spirit such that those benefits eventuate in practice, and the claimed benefits associated with the Code changes not directly related to Royal Commission recommendations also arise in practice.

The ACCC also proposes, and invites submissions on, a further condition requiring banks to continue to offer a Basic Bank Account product to ensure that the claimed benefits associated with the ABA's proposals arise.

The ACCC proposes to grant conditional authorisation for five years.

On 11 July 2019 the ACCC granted interim authorisation to allow the ABA and its Member Banks to respond to Royal Commission recommendations by agreeing to amend the Banking Code and to permit individual Member Banks to begin implementing Royal Commission recommendations. The ACCC has now decided to grant interim authorisation to also allow the ABA and its Member Banks to agree to make amendments to the Code to prescribe minimum criteria for eligibility for, and the minimum features of, basic bank accounts. The ACCC considers there is benefit in permitting ABA members to work towards implementation of the revised Banking Code ahead of March 2020, taking into account the ACCC's views expressed in this draft determination.

The ACCC invites submissions in relation to this draft determination by 14 October 2019 before making its final decision.

### 1. The application for authorisation

- 1.1. On 22 May 2019 the Australian Banking Association (the **ABA**), on behalf of itself, its Member Banks, their subsidiary banks, and any future Member Banks, lodged application for authorisation AA1000441 with the Australian Competition and Consumer Commission (the **ACCC**).
- 1.2. The ABA is seeking authorisation for certain amendments to the 2019 Banking Code of Practice (the **Banking Code**), and for its members to implement the amendments, for 10 years. The ABA seeks authorisation only for these particular amendments, rather than the entirety of the Banking Code. Authorisation, if ultimately granted, will extend only to those aspects of the Banking Code for which authorisation has been sought. The ABA proposes that these amendments will come into force from 1 March 2020.

- 1.3. Some of the proposed changes to the Banking Code are intended to directly implement specific recommendations made in the Final Report of the Royal Commission, being:
  - banks not allowing informal overdrafts on Basic Bank Accounts (**BBAs**), low or no fee accounts without prior express agreement with the customer, and
  - banks not charging dishonour fees or overdrawn fees on BBAs, low or no fee accounts, (together the **Basic Banking Products Proposal**), and
  - banks not charging default interest on loans secured by agricultural land in drought affected or other natural disaster areas while a declaration remains in force (recommendation 1.13) (**Agriculture Proposal**).
- 1.4. Other changes which prescribe certain minimum requirements relating to BBAs, when a Member Bank elects to offer a BBA (**Minimum Standards Proposal**) and set minimum eligibility criteria for basic banking products including BBAs, low fee and no fee accounts (**Eligibility Proposal**), were not specifically recommended by the Royal Commission. The ABA submits these proposals expand on, and provide a more extensive response to, Royal Commission recommendations.
- 1.5. The current Banking Code does not define the features of a BBA. The minimum features the ABA seeks to mandate include: no account keeping fees, free periodic statements, no minimum deposits, free direct debit facilities, access to a debit card at no extra cost and free unlimited domestic transactions.
- 1.6. The Basic Banking Products Proposal, Agriculture Proposal, Minimum Standards Proposal and Eligibility Proposal together constitute the **Proposed Conduct**.
- 1.7. This application for authorisation AA1000411 was made under subsection 88(1) of the *Competition and Consumer Act 2010* (Cth) (the **Act**). Authorisation has been sought because the arrangements may involve a cartel provision within the meaning of Division 1 of Part IV of the Act or may have the purpose or effect of substantially lessening competition within the meaning of section 45 of the Act.
- 1.8. The ACCC can grant authorisation which provides businesses with legal protection for arrangements that may otherwise risk breaching the law but are not harmful to competition and/or are likely to result in overall public benefits.

## The Applicant

- 1.9. The ABA is an association of 23 Member Banks in Australia. Of these, 20 members have retail banking businesses in Australia. These members subscribe to the 2019 Banking Code of Practice, and the ABA has applied for authorisation on their behalf (along with their subsidiaries and any banks which may join in the future). They are:
  - AMP Bank Limited
  - Australia and New Zealand Banking Group Limited
  - Arab Bank Australia Limited
  - Bank Australia
  - Bank of China
  - Bank of Queensland Limited

- Bank of Sydney
- Bendigo and Adelaide Bank Limited
- Citigroup Pty Ltd
- Commonwealth Bank of Australia
- HSBC Bank Australia Limited
- ING Bank (Australia) Limited
- Macquarie Bank Limited
- ME Bank
- MyState Bank
- National Australia Bank Limited
- Rural Bank Limited
- Rabobank Australia Limited
- Suncorp Bank
- Westpac Banking Corporation

## Interim authorisation

- 1.10. At the time of lodging its application the ABA also requested interim authorisation to enable it, and its members to agree to amend the relevant provisions of the Banking Code (which were not to be enforceable under the Banking Code until 1 March 2020, subject to approval by ASIC and the ACCC), and for its members to begin to implement these provisions immediately.
- 1.11. On 11 July 2019 the ACCC granted interim authorisation under subsection 91(2) of the Act<sup>1</sup> to allow ABA members and the ABA Council to agree to make the relevant amendments to the Banking Code in response to specific Royal Commission recommendations, and for individual ABA members to implement the amendments immediately.
- 1.12. However the ACCC did not at that time grant interim authorisation in relation to the Minimum Standards Proposal and the Eligibility Proposal, as we identified the need for further consideration and consultation on these aspects. The ACCC advised its intention to revisit this decision and related issues in this draft determination document.
- 1.13. While the ACCC proposes to impose conditions on the authorisation and notes there may be some changes required to a number of aspects of the Proposed Conduct before final authorisation is granted, the ACCC has now decided to grant interim authorisation to the Minimum Standards Proposal and Eligibility Proposal, and for the existing interim authorisation granted on 11 July to remain in place. The ACCC

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<sup>1</sup> See ACCC decision of 11 July 2019 available at <https://www.accc.gov.au/public-registers/authorisations-and-notifications-registers/authorisations-register/the-australian-banking-association>.

considers that there is benefit in permitting ABA members to continue to work towards implementation of the revised Banking Code in March 2020, taking into account the ACCC's views as expressed in this draft determination, and that there is not likely to be harm resulting from continuing to allow interim authorisation, to remain in place while the ACCC considers the substantive application.

1.14. Interim authorisation will remain in place until the date the ACCC's final determination comes into effect or until the ACCC decides to revoke interim authorisation.

1.15. Interim authorisation is discussed in further detail below.

## 2. Background

### Banking Code

- 2.1. There has been a voluntary banking code of practice in Australia, overseen by the ABA, since 1993. The 2019 Banking Code sets out the standards of practice and service of Australian banks for individual and small business consumers.
- 2.2. The current version of the 2019 Banking Code became binding on all ABA Member Banks with a retail presence in Australia on 1 July 2019.
- 2.3. The current version of the 2019 Banking Code does not incorporate the changes being considered by the ACCC in this authorisation process, which have arisen in response to the recommendations of the Final Report of the Royal Commission in February 2019. These proposed changes<sup>2</sup> are also being considered by ASIC, and will be incorporated into the Banking Code (subject to approval by the ACCC and ASIC) on 1 March 2020.

### Royal Commission

- 2.4. The Royal Commission was established on 14 December 2017 by the Australian government to inquire into and report on misconduct in the banking, superannuation, and financial services industry.<sup>3</sup> The Hon Kenneth Hayne AC QC, a former Justice of the High Court of Australia, was appointed as Commissioner.
- 2.5. The Royal Commission was instructed to examine banking, financial advice, superannuation, insurance sectors, culture, governance and remuneration, the effectiveness of existing legislation, regulation and regulators.<sup>4</sup>
- 2.6. The Royal Commission was established as a result of the identification of gaps in how the regulatory framework for financial systems protects consumers and investors.<sup>5</sup>
- 2.7. The final report was tabled in parliament on 4 February 2019 and made 76 recommendations, for implementation by the Commonwealth government and parliament, regulators, and various industry bodies including the ABA. The

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<sup>2</sup> ASIC is also considering the ABA's other proposed Code changes for which the ABA has not sought ACCC authorisation.

<sup>3</sup> Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, *Home*, Commonwealth of Australia, Canberra, 2019, viewed 29 August 2019, <<https://financialservices.royalcommission.gov.au/Pages/Copyright.aspx>>

<sup>4</sup> Final Report of the Royal Commission into Misconduct in the Banking, Superannuation, and Financial Services Industry, Vol. 1, 2019, Commonwealth of Australia, p.1.

<sup>5</sup> Commonwealth Department of Treasury, *Government Response to the Final Report of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry*, Canberra, 2019, viewed 2 September 2019, <<https://treasury.gov.au/sites/default/files/2019-03/FSRC-Government-Response-1.pdf>>

recommendations were in relation to banking, financial advice, superannuation, insurance, culture, governance and remuneration, and regulators.

- 2.8. In addition to those recommendations of the Royal Commission the ABA is seeking authorisation to implement, the Royal Commission also made three further recommendations for the ABA. These include requiring banks to work with vulnerable customers, follow AUSTRAC's guidance about the identification and verification of persons of Aboriginal or Torres Strait Islander heritage, amending the definition of small business in the Code, and designating terms of the Code relating to contracts and guarantees as 'enforceable code provisions'.<sup>6</sup>

## Basic Bank Accounts

- 2.9. The Interim and Final Reports of the Royal Commission referred to a 'basic account' as 'a bank account that provides the account holder with essential banking services at a lower cost than other forms of account.' The Final Report of the Royal Commission noted that the 2019 Banking Code referred to 'basic, low or no fee accounts'. The Royal Commission used the expression 'basic account' to refer to all three types of accounts.<sup>7</sup>
- 2.10. This draft determination will refer to '**basic banking products**' to refer to all three types of account, and Basic Bank Account or '**BBA**' to refer to the subset of these products which the ABA proposes to define in the amended 2019 Banking Code.
- 2.11. There is no agreed or codified definition of a BBA, low fee or no fee account, or an agreement as to what distinguishes these account types from each other. These accounts often offer features such as fee free transactions, and no account keeping fees. The ACCC understands that BBAs tend to meet a higher standard in terms of the features offered. The ABA advises that ten of its Member Banks currently offer some form of BBA.
- 2.12. The features of these accounts differ between banks. They are typically offered according to particular eligibility criteria, generally to customers who hold particular government concession cards or receive particular income support.<sup>8</sup> The Royal Commission Final Report stated that people on a low income, especially those in receipt of certain government benefits or holding government concession cards, may find that a 'basic account' suits their needs better than other forms of account.

## Origin of basic banking products and ACCC's previous consideration of BBAs

- 2.13. Banks began offering basic banking products in the latter half of the 1990s in response to the then-Prices Surveillance Authority's Inquiry into Fees and Charges imposed on Retail Accounts by Banks and other Financial Institutions and by Retailers on EFTPOS Transactions.<sup>9</sup> The inquiry was conducted in response to concerns by consumer and welfare groups about access to, and affordability of, retail transaction accounts, including that charging fees on low balance accounts imposed an unreasonable

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<sup>6</sup> Final Report of the Royal Commission into Misconduct in the Banking, Superannuation, and Financial Services Industry, Vol. 1, 2019, Commonwealth of Australia, p. 94, 97 & 112.

<sup>7</sup> Final Report of the Royal Commission into Misconduct in the Banking, Superannuation, and Financial Services Industry, Vol. 1, 2019, Commonwealth of Australia, p. 91; Interim Report of the Royal Commission into Misconduct in the Banking, Superannuation, and Financial Services Industry, Vol. 1, 2019, Commonwealth of Australia, p. 260.

<sup>8</sup> Final Report of the Royal Commission into Misconduct in the Banking, Superannuation, and Financial Services Industry, Vol. 1, 2019, Commonwealth of Australia, p. 91; Interim Report of the Royal Commission into Misconduct in the Banking, Superannuation, and Financial Services Industry, Vol. 1, 2019, Commonwealth of Australia, p. 260.

<sup>9</sup> Phil Hanratty, 1997, The Wallis Report on the Australian Financial System: Summary and Critique [https://www.apf.gov.au/About\\_Parliament/Parliamentary\\_Departments/Parliamentary\\_Library/pubs/rp/RP9697/97rp16](https://www.apf.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/RP9697/97rp16)

burden on low income customers (particularly when a transaction account was required to receive social security payments).

- 2.14. The idea of a basic banking product and proposal for a regulatory requirement for such a product were the subject of much discussion in Inquiry hearings and in written submissions. The inquiry prepared a draft basic bank account to assist policy debate on providing such an account.<sup>10</sup> The PSA noted that if the costs associated with retail transaction accounts were such as to prevent access for low income earners, a Government-regulated basic banking product may be necessary in future.
- 2.15. On 26 March 2001 in response to community concerns regarding access to banking products for low income earners raised in a review of the Code, the ABA announced a 'BBA initiative'.<sup>11</sup> The basis on which banks offer BBAs and compete in relation to these products is discussed further at paragraphs 4.51 – 4.53 below.
- 2.16. Following the release of the report associated with this review, the ABA lodged an application for authorisation with the ACCC (A30214) in 2002 proposing banks agree to a range of minimum features for basic bank accounts.
- 2.17. The ACCC issued a draft determination proposing to deny this 2002 application, and the ABA subsequently withdrew it. The ACCC noted that the proposed minimum features offered a lower standard of features than most of the BBAs already offered at that time. The ACCC was concerned that the minimum features may become the de facto industry standard, which may have the effect of reducing the features of BBAs then available to low income consumers and reducing consumer choice.
- 2.18. The ABA's 2002 proposal differed from its current proposal in a number of ways, including that the current proposal would set a higher minimum standard than under the 2002 proposal, but unlike the 2002 proposal it does not require any Member Bank to offer a BBA product. The currently proposed minimum standards are generally consistent with (or better than) the features of BBAs available on the market today, with some limited exceptions (e.g. some accounts have broader eligibility criteria than those proposed), such that there is not the same level of concern about risk of setting a new, lower, de facto standard for BBAs as there was in 2002.

### **What are informal overdrafts and dishonour fees?**

- 2.19. Informal overdrafts allow a customer to withdraw more than the amount of funds available in their account. As highlighted by the Royal Commission, in some cases banks allow overdrawing of accounts without prior express agreement with the customer. Currently, banks generally charge a fee for lending the customer the amount of the informal overdraft, which is referred to as an overdrawn fee.<sup>12</sup> Banks may also charge interest on the overdrawn amount while it remains overdrawn.
- 2.20. Informal overdrafts may be allowed by a bank without any prior agreement with the customer, and therefore differ from formal overdrafts that are agreed between the customer and the banks in advance and are subject to responsible lending requirements.

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<sup>10</sup> Australian Bankers' Association application for authorisation A30214 draft determination, dated 16 December 2002, p. 6, available: [ACCC public register](#).

<sup>11</sup> Australian Bankers' Association application for authorisation A30214 draft determination, dated 16 December 2002, p. 8, available: [ACCC public register](#).

<sup>12</sup> Interim Report of the Royal Commission into Misconduct in the Banking, Superannuation, and Financial Services Industry, Vol. 1, 2019, Commonwealth of Australia, p. 260-261.

2.21. Dishonour fees are charged to customers when the account that a customer has given authority for a direct debit or periodic payment has insufficient funds.<sup>13</sup> This is different to a fee for an informal overdraft, which banks may charge when an informal overdraft is provided.

### 3. Consultation

- 3.1. A public consultation process informs the ACCC's assessment of the likely public benefits and detriments from the Proposed Conduct.
- 3.2. The ACCC invited submissions from a range of potentially interested parties including industry associations, consumer organisations, and state and federal government departments and regulators.
- 3.3. The ACCC received three public submissions in response, from the Banking Code Compliance Monitoring Committee (**CMCC**), the Customer Owned Banking Association (**COBA**) and a joint submission from the Consumer Action Law Centre (**CALC**), Financial Rights Legal Centre (**Financial Rights**) and Financial Counselling Australia (**FCA**) (the **joint submission**).
- 3.4. The CMCC is an independent compliance monitoring body established under the Banking Code. Its purpose is to monitor and drive best practice Banking Code compliance. The CMCC advises it does not have any substantive comment to make on the issue of competition, but that it considers the Proposed Conduct is likely to result in a public benefit because the changes are intended to protect vulnerable consumers, and provide protection for bank customers including small business and farming customers.
- 3.5. COBA is the industry association for Australian member owned banks, such as credit unions, mutual banks and building societies. COBA advised that, having consulted its membership, it had not identified any concerns with the ABA's basic banking product proposals.
- 3.6. The joint submission was generally supportive of the application and considered that there would be a net public benefit from the changes, but proposed a range of further amendments to enhance the consumer benefit of the Proposed Conduct. A number of the proposals relate to changes which are beyond the scope of the authorisation the ACCC has been asked to consider,<sup>14</sup> those which are relevant to the application are discussed in the sections that follow.
- 3.7. The ACCC also requested further information from the ABA in letters dated 15 July 2019 and 21 August 2019, and sought a response to a number of concerns.<sup>15</sup> The ABA provided submissions in response on 2 August 2019 and 11 September 2019.
- 3.8. These issues are discussed in further detail in the assessment sections of this draft determination.

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<sup>13</sup> Interim Report of the Royal Commission into Misconduct in the Banking, Superannuation, and Financial Services Industry, Vol. 1, 2019, Commonwealth of Australia, p. 262.

<sup>14</sup> Including suggesting language which would strengthen the proposed changes to banks' commitments to making services more accessible to those in remote or indigenous communities; modifying the wording of other clauses to ensure they capture people from non-English speaking backgrounds, and a prohibition on a bank entering into a co-borrowing arrangement unless each borrower receives a substantial benefit from the arrangement.

<sup>15</sup> Discussed in further detail at paragraphs 4.26, 4.31-4.32, 4.50-4.53, 4.64, 4.69 and 4.82 below.



- 3.9. Public submissions by the ABA and interested parties (and information requests by the ACCC) are on the Public Register for this matter.

## 4. ACCC assessment

- 4.1. The ACCC's assessment of the Proposed Conduct is carried out in accordance with the relevant authorisation test contained in the Act.
- 4.2. The ABA sought authorisation for Proposed Conduct that would or might constitute a cartel provision within the meaning of Division 1 of Part IV of the Act and may substantially lessen competition within the meaning of section 45 of the Act. Consistent with subsection 90(7) and 90(8) of the Act, the ACCC must not grant authorisation unless it is satisfied, in all the circumstances, that the conduct would result or be likely to result in a benefit to the public, and the benefit would outweigh the detriment to the public that would be likely to result (authorisation test).

### Relevant areas of Competition

- 4.3. To assess the likely effect of the Proposed Conduct, the ACCC will identify the relevant areas of competition likely to be impacted.
- 4.4. The ABA submits that the markets relevant for the purposes of the ACCC's assessment are those for the supply of retail transaction banking services in Australia, and for the supply of loans to farmers for farming operations.
- 4.5. While the ACCC considers that it is not necessary to precisely define the area of competition for the purposes of this assessment, the ACCC considers that retail transaction banking services are unlikely to be a close substitute for low income customers, due to the fees which may be associated with these accounts.
- 4.6. For this reason the ACCC considers that the relevant areas of competition are likely to be those for:
- the supply of basic banking products to low income customers, and
  - the supply of loans to farmers for farming operations.

### Future with and without the Proposed Conduct

- 4.7. In applying the authorisation test, the ACCC compares the likely future with the Proposed Conduct that is the subject of the authorisation to the likely future in which the Proposed Conduct does not occur.
- 4.8. The ABA submits that, in the absence of the Proposed Conduct:
- Member Banks who choose to supply BBAs will do so without any minimum standards (and without promotion of BBAs as a product defined by a minimum set of features), and
  - there will be no consistency between the banks as to the details of the circumstances under which they will provide relief from default interest on agricultural loans in the context of natural disasters.
- 4.9. The ACCC considers that, in the absence of the Proposed Conduct, it is likely that ABA members will continue to make individual decisions about the features of their basic banking products and agricultural loans, including whether or not to implement Royal Commission recommendations in relation to informal overdrafts and dishonour

fees on basic banking products for low income customers, and in relation to charging default interest on agricultural loans in circumstances of natural disaster.

- 4.10. Given the statements of the Federal Government indicating its commitment to implement the recommendations of the Royal Commission, the ACCC considers that a legislative or other regulatory response would be likely, in the absence of ABA implementation of the recommendations by means of amendments to the Banking Code.
- 4.11. The ACCC notes that agreement between the banks as to minimum standards for a subset of basic banking products is not required for the ABA and its members to jointly promote basic banking products to potentially eligible customers (albeit potentially with less consistent features).

## Public benefits

- 4.12. The Act does not define what constitutes a public benefit. The ACCC adopts a broad approach. This is consistent with the Australian Competition Tribunal (the **Tribunal**) which has stated that the term should be given its widest possible meaning, and includes:

*...anything of value to the community generally, any contribution to the aims pursued by society including as one of its principal elements ... the achievement of the economic goals of efficiency and progress.*<sup>16</sup>

- 4.13. The ABA submits the Proposed Conduct will result in significant public benefits, including:
- a) the codification of minimum community standards for transaction and account features, reflecting the concern articulated in the Royal Commission Final Report
  - b) greater certainty and protection for customers that BBA products offered by Member Banks will meet minimum standards
  - c) enhanced customer awareness of the availability and content of BBAs, including through increased promotion of BBAs to suitable customers on behalf of banks
  - d) increased availability of higher quality BBA products through standardised minimum requirements
  - e) raising the standard average BBA offering
  - f) improved availability of accessible and affordable banking, consistent with the Royal Commission's recommendation 1.8's objective of removing financial barriers to the access of banking services<sup>17</sup>
  - g) removal of access to informal overdrafts and removal of overdrawn and dishonour fees from basic, low and no fee accounts
  - h) greater protection for farmers and the agricultural industry in times of natural disaster and drought
  - i) increased certainty for farmers in natural disaster or drought.
- 4.14. Submissions received by the ACCC from interested parties agreed that the Proposed Conduct was likely to result in public benefits, with some issues raised about specific elements of the Proposed Conduct. These issues are discussed in further detail below.

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<sup>16</sup> Queensland Co-operative Milling Association Ltd (1976) ATPR 40-012 at 17,242; cited with approval in Re 7-Eleven Stores (1994) ATPR 41-357 at 42,677.

<sup>17</sup> Australian Banking Association's application for authorisation AA1000441, 17 May 2019, p. 2-3, 18-19 & 21.

- 4.15. The ACCC accepts that the claimed public benefits listed at 4.13 above have potential to result from implementation of the Proposed Conduct, and in particular by meeting community expectations and addressing particular causes of harm identified by the Royal Commission around access to banking services for low income customers and financial hardship experienced by farmers in drought affected areas.
- 4.16. However, for the reasons set out below, the ACCC has concerns about certain aspects of the Proposed Conduct, which it considers do not effectively address the Royal Commission's recommendations. The ACCC considers, that unless these concerns are addressed, all or some of the public benefits set out at 4.13 above will be illusory and unlikely to arise in practice. The ACCC is therefore proposing conditions of authorisation to address its concerns. Further, discussion of the ABA's proposals, the ACCC's concerns, and its proposed conditions of authorisation, is below.

## **Basic Banking Products Proposal**

### *Royal Commission's recommendations*

- 4.17. The Royal Commission recommended that banks should not offer informal overdrafts on basic banking products without express agreement from the customer, due to concerns regarding the ability for the amount owed to mount up over time, and the impact of this on low income customers.<sup>18</sup>
- 4.18. The Royal Commission noted that in many cases, making a loan through an informal overdraft to a Centrelink recipient in this manner will be unsuitable because repayment of the amount lent and the associated fee will cause hardship.<sup>19</sup>
- 4.19. The recommendation by the Royal Commission regarding informal overdrafts was also due to concerns that customers were not aware that they had been provided, and inadvertently made use of, an informal overdraft. The Royal Commission noted that some customers knew nothing more than that their request to withdraw money had been met.<sup>20</sup>
- 4.20. The Royal Commission was similarly concerned with the ability for dishonour fees to mount up over time.<sup>21</sup>
- 4.21. The Royal Commission also noted that it is, 'unsurprising that large entities, carrying on their businesses in all parts of Australia, apply the same policies and procedures whenever they can,' but that the Royal Commission demonstrated, 'not all consumers benefit from 'standard offerings' such as informal overdrafts.'<sup>22</sup>

### *ABA's proposal*

- 4.22. The ABA is proposing to amend the Banking Code to specify that there will be no informal overdrafts on basic, low and no fee accounts without express agreement from the account holder. However, the ABA will still allow informal overdrafts where it is

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<sup>18</sup> Final Report of the Royal Commission into Misconduct in the Banking, Superannuation, and Financial Services Industry, Vol. 1, 2019, Commonwealth of Australia, p. 91-92.

<sup>19</sup> Interim Report of the Royal Commission into Misconduct in the Banking, Superannuation, and Financial Services Industry, Vol. 1, 2019, Commonwealth of Australia, p. 260-261.

<sup>20</sup> Final Report of the Royal Commission into Misconduct in the Banking, Superannuation, and Financial Services Industry, Vol. 1, 2019, Commonwealth of Australia, p. 92; Royal Commission into Misconduct in the Banking, Superannuation, and Financial Services Industry, Transcript of Nathan Boyle, 3 July 2018, p. 3721.

<sup>21</sup> Interim Report of the Royal Commission into Misconduct in the Banking, Superannuation, and Financial Services Industry, Vol. 1, 2019, Commonwealth of Australia, p. 262.

<sup>22</sup> Final Report of the Royal Commission into Misconduct in the Banking, Superannuation, and Financial Services Industry, Vol. 1, 2019, Commonwealth of Australia, p. 88-89.

'impossible' or 'reasonably impractical' for the banks to prevent them. This differs from the Royal Commission's recommendation, which did not contain any exceptions. The ABA proposal would still allow banks to be able to charge interest on the amount in debit.

- 4.23. The ABA also proposes not to charge overdrawn fees or dishonour fees on basic, low and no fee accounts where they are opened by customers that hold a current government concession card.

#### *Interested party concerns*

- 4.24. The joint submission from consumer groups raised concerns that the exception to informal overdrafts will arise in off-line ATM, off-line contactless and online shopping transactions, which would comprise the majority of transactions. The joint submission noted that the Code's statement of 'no informal overdrafts' is misleading, as the exceptions comprise some of the most common types of transactions. The joint submission recommended that the Code clearly state the most common instances in which informal overdrafts occur, and ensure banks are required to inform their customers about this clearly and in plain language.<sup>23</sup>
- 4.25. The joint submission also raised concerns that, under the Code, banks can still charge interest on overdrawn amounts. It submitted that, while banks may not have control over offline transactions, banks are able to prevent the charging of interest on informal overdrafts. The joint submission recommended that the Code explicitly prohibit banks charging interest on overdrawn amounts for basic, low and no-fee accounts given that no overdraft would occur were banks adhering strictly to the Royal Commission recommendation.<sup>24</sup>

#### *ACCC information requests and ABA responses*

- 4.26. The ACCC has sought clarification twice from the ABA regarding the circumstances in which the exceptions to the no informal overdrafts requirement on basic bank accounts would apply.
- 4.27. The ABA responded that there are three sets of circumstances in which informal overdrafts can occur in circumstances that are beyond the banks' control or reasonably impractical to prevent. These are:
- holding deposits by merchants
  - telecommunication system outages, and
  - offline transaction and payment network outages.
- 4.28. The ABA advises that it is generally *not* impossible or reasonably impractical to prevent informal overdrafts occurring as a result of the use of contactless payment technology, but that (as with other forms of electronic and card payments) there are some limited circumstances where an informal overdraft could occur via the use of contactless technology.

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<sup>23</sup> Submission from Consumer Action Law Centre, Financial Rights Legal Centre, and Financial Counselling Australia submission, 25 June 2019, p. 8.

<sup>24</sup> Submission from Consumer Action Law Centre, Financial Rights Legal Centre, and Financial Counselling Australia submission, 25 June 2019, p. 8.

- 4.29. The ABA further submitted that it was not preferable to block access to informal overdrafts in their entirety as:
- a) it could cause inconvenience and cost for customers due to late fees or interest charged by merchants/utilities if a scheduled regular payment cannot be processed
  - b) it could force customers to resort to expensive fringe short term credit options, and
  - c) it could cause detriment to the general economy.<sup>25</sup>

#### *ACCC view*

##### *Informal overdrafts*

- 4.30. The ACCC notes that the Royal Commission did not specify exceptions to its recommendation to ban informal overdrafts on basic, low or no fee accounts, where there had been no express agreement to an informal overdraft by the customer, and was concerned about low income customers incurring debts, without being aware they had done so, the repayment of which may cause hardship.
- 4.31. The ACCC accepts that there will be some circumstances in which informal overdrafts cannot be prevented by banks. However the ACCC is concerned that account holders of basic banking products may continue to frequently go into overdraft without their knowledge, and potentially incur interest on these overdrawn amounts. Further, that this may be in circumstances where customers have not expressly agreed to an overdraft facility and the overdraft has occurred because of a limitation in systems or processes, rather than a deliberate act by the customer.
- 4.32. The ACCC notes that overdrafts may be beneficial to some customers in some circumstances (including customers with basic banking products), for example in avoiding late fees charged by utility companies on utility bills. . However, the ACCC agrees with the Royal Commission that overdrafts should not occur without the customer's agreement. Under the proposal, customers will still be able to request a formal overdraft facility be made available on their account. The ACCC would expect banks to clearly explain any applicable fees or other charges (such as interest).

##### *Interest charged on informal overdrafts*

- 4.33. The ACCC is particularly concerned that, under the ABA's proposal, Member Banks remain free to charge interest on informal overdrafts that the customer has not requested. Permitting Member Banks to charge interest on informal overdrafts in relation to basic banking products may also undermine the claimed public benefits if banks are able to charge interest on overdrawn amounts. While the ACCC acknowledges that the amounts may be small, the ACCC shares the Royal Commission's concern about the ability for small amounts to mount up over time and the impact this would have on low income customers.
- 4.34. The ABA's response to the ACCC's concerns on this issue was that:
- any interest burden on customers is relatively low
  - Commissioner Hayne referred only to the charging of fees, not interest, on informal overdrafts

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<sup>25</sup> Australian Banking Association response to ACCC request for information, 2 August 2019, p. 8.

- to not charge interest on informal overdrafts would remove the incentive for customers to repay the overdrawn amount
  - 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 basic banking products and these could not be developed and implemented by March 2020, and
  - it does not propose to agree to a general prohibition in the Banking Code on the charging of interest on informal overdrafts for eligible customers or otherwise.
- 4.35. The ACCC understands that interest rates charged on overdrawn amounts vary but are generally higher than the rates banks pay to depositors – in some cases close to 20 per cent per annum. The ACCC considers that, in circumstances where a customer has not requested an overdraft and may not be aware they have been granted one, the charging of interest, particularly at high rates, may cause hardship, particularly for low income customers.
- 4.36. Further, the ACCC considers, in light of the scope of the recommendation of the Royal Commission (to not allow informal overdrafts except with the express agreement of the customer), it would be appropriate for banks to be prohibited from charging interest on overdrawn amounts in relation to basic banking products, except where this overdraft has been granted at the request of the customer. Alternatively, if the charging of interest cannot be avoided, banks should be required to refund the interest amount. This would provide banks with an incentive to ensure that the Royal Commission recommendations are effectively implemented, since it will prevent banks from profiting from high interest rates when these accounts are overdrawn.

*Proposed conditions*

- 4.37. The ACCC is proposing to impose conditions in relation to the above concerns regarding informal overdrafts.
- 4.38. The ACCC proposes a condition of authorisation to be the amendment of the Banking Code to require Member Banks to the Code to:
- a. not charge interest on informal overdrafts in relation to basic banking products where a customer has not expressly sought that facility, or
  - b. where it is not possible for a bank to prevent interest being charged in the above circumstances, for the amount of interest charged to be refunded at the end of the month.
- 4.39. The ACCC is also proposing to impose a condition of authorisation requiring the ABA to report to the ACCC 12 months after conditional authorisation has been granted, for the purpose of assessing how frequently Basic Banking Products, in practice, go into overdraft without customers' express agreement. This will help the ACCC assess whether the claimed benefits of the Proposed Conduct are in fact arising during the course of the authorisation, and to assist in any future assessment should the ABA seek re-authorisation of the Proposed Conduct. The ACCC considers the following information would assist in making these assessments:
- 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.

4.40. The ACCC would welcome input from the ABA and interested parties in framing the above condition to ensure the ACCC has the information it needs without placing an unnecessary burden on Member Banks in the provision of data.

### **Eligibility Proposal**

4.41. The ABA proposes to define minimum eligibility criteria for basic banking products as a person who holds a current government concession card, specifically a Commonwealth Seniors Health Card, a Health Care Card, or a Pensioner Concession Card. The ACCC understands that most customers relying on payments from Centrelink for their income would be eligible for one of these cards (and therefore a basic banking product).

4.42. The Royal Commission referred to “those who are on a low income, especially those in receipt of certain government benefits or holding government concession cards”<sup>26</sup> as being among those who may find particular benefit from a basic banking product.

4.43. The ABA’s application notes that banks are free to offer broader eligibility criteria; however this is not specifically noted in the proposed Banking Code itself.

4.44. The joint submission by consumer groups raised concerns that the wording in the proposed Banking Code:

- was ambiguous as to whether Member Banks can choose to offer broader eligibility criteria than those listed, and recommended explicitly stating this, and
- enables banks that offer BBAs to avoid providing information on these accounts to customers who would be eligible (instead offering ‘low fee’ accounts).

4.45. In response to these concerns, the ABA proposed to include explicit reference to basic bank accounts at paragraph 44 of the proposed Banking Code, and to particularly note at paragraph 47 that Member Banks may offer broader eligibility criteria than those listed.

4.46. The ACCC welcomes the ABA’s willingness to clarify the points raised by interested parties outlined above and considers this will provide public benefit, but is concerned that the ABA’s proposed changes may be insufficiently clear that the proposed criteria are a minimum rather than mandatory. The ACCC invites submissions on this point.

### **Minimum Standards Proposal**

4.47. The ABA proposal to set minimum standards for BBAs was not in response to any recommendation of the Royal Commission. The ABA’s application states:

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<sup>26</sup> Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, *Final Report, vol 1*, 4 February 2019, p19.

*“While not all parts of the BBA proposals put forward by the ABA in this Application were expressly recommended by the Royal Commission, these minimum requirements are consistent with and give effect to the intention of Recommendation 1.8 of the Royal Commission, with a more extensive response than provided for in that recommendations... [The minimum set of features] expands the Royal Commission recommendations relating to informal overdrafts and dishonour fees.”*

4.48. The ABA has previously sought (in 2002), but was not granted, authorisation to agree minimum standards for BBAs, as outlined above. The Banking Code does not require Member Banks to offer a BBA product; members can instead choose to offer low or no fee accounts to which the higher proposed minimum standards do not apply.

4.49. The joint submission by consumer groups noted that:

- all Member Banks should provide a BBA as defined, to prevent Member Banks from avoiding BBA requirements by instead offering low or no fee accounts with weaker standards, and
- the minimum standards should be altered to improve the standards in specific ways. These issues are discussed in further detail below.

4.50. The ACCC notes the ABA submission that ten of its Member Banks currently offer a BBA, specifically: ANZ; Suncorp; National Australia Bank; Bendigo and Adelaide Bank Limited; ING; Westpac; Commonwealth Bank; MyState; Bankwest and AMP.

4.51. The ACCC considers that there is uncertainty as to whether Member Banks will continue to offer BBAs over time. The ACCC would be concerned if, rather than increasing, the number of available BBAs in the market decreased over time as Member Banks ceased to offer them. The ACCC considers that it would be unlikely in these circumstances that the claimed benefits in relation to the Minimum Standards Proposal would arise in practice.

4.52. In this respect, the ACCC notes that:

- the Banking Code does not require Member Banks to offer a BBA product, or to continue to offer a BBA product if they currently do so. Member Banks may instead move to offering low or no fee accounts, to which lower standards apply.
- the ABA submits that BBA products are primarily offered by banks for social responsibility (and related) motivations, not profit motives
- BBAs began to be offered, historically, in response to community and government concern about accessibility and affordability of banking services, rather than in response to market forces.

4.53. Given the incentive for banks to offer BBA products (as opposed to low or no fee accounts with lower standards) appears to be a result of community and government pressure, it is not certain that Member Banks will to retain an interest, over time, in continuing to offer BBAs.

4.54. In response to the ACCC’s concern on this issue, the ABA submits that:

- its proposal did not involve mandating that banks offer such accounts; to offer a BBA is a commercial decision for individual banks



- banks currently offering BBAs represent 85% of the market when looking at total deposits held by all banks. Among the banks that do not offer a BBA (but instead offer a low or no fee account) are foreign banks, and
  - mandating the offering of a BBA could act as a barrier to competition, to deter new entrants to the Australian market or to join the ABA and adopt the Banking Code, due to the investment in systems and training required to offer such accounts.
- 4.55. The ACCC accepts that it is not essential for all banks to offer BBAs in order for public benefits to arise from the proposed minimum standards, but remains concerned that banks which currently offer a BBA may not have sufficient incentive to continue to do so over time (in preference to a low or no fee account to which lower standards apply). Given the risk that some of these banks may withdraw their BBAs, the benefits claimed in relation to the Minimum Standards Proposal therefore may not arise. This would be concerning in circumstances where the ABA claims to be expanding on and going beyond Royal Commission recommendations.
- 4.56. The ACCC therefore considers that the imposition of a condition in relation to the Minimum Standards Proposal is appropriate in order to ensure that the claimed benefits of this proposal arise and continue to arise over the course of the period of authorisation.
- 4.57. The ACCC is proposing to impose a condition that the Banking Code be amended to require all Member Banks which currently offer a BBA product (listed at paragraph 4.50 above) to continue to do so for the course of the authorisation. The ACCC invites submissions from interested parties and the Applicant on this issue.
- 4.58. It would also be open to Member Banks, as applicants, to make submissions to the ACCC indicating their commitment to continue to offer BBAs throughout the period of the authorisation.

#### Content of the minimum standards

- 4.59. The joint submission by consumer groups raised concerns with the minimum standards for BBAs proposed by the ABA, specifically:
- the regularity of free statements should be specified in the standard
  - scheme debit (i.e. a debit Visa or Mastercard - not simply a debit card) should be a minimum requirement (in order to avoid low income consumers being excluded from online transactions)
  - all ATM transactions should be free (including those from ATMs owned and operated by third parties)
  - clarify which 'ancillary services' may be charged for under the proposed standard (including whether online transactions processed in Australia would be free).
- 4.60. In response to the concerns raised in the submission, the ABA proposed that the proposed minimum standard be amended to specify:
- "free periodic statements (you can choose monthly or longer intervals)"
  - "access to a debit card (such as eftpos, or a scheme debit card, such as Visa Debit or Mastercard Debit) at no extra cost."

- 4.61. In relation to ATM fees, the ABA advised that requiring banks to subsidise ATM services would disincentivise banks to participate in ATM networks, that fees charged by third party ATM operators makes the deployment of the machines viable, and noted that the use of cash is steadily decreasing.
- 4.62. The ABA advised it did not propose to provide an exhaustive list of ancillary services which may be charged for, as to do so would result in reduced flexibility, that the minimum features of BBAs cover around 95% of electronic banking transactions, and that domestic online transactions would be free under the proposed minimum standard.
- 4.63. The ACCC does not intend to impose conditions or require changes to the specified minimum standards for BBAs at this time. However, while the ACCC notes the ABA's expressed intention that scheme debit should be available to BBA account holders if the customer wishes, the ACCC considers the ABA's proposed modification to the text of the Banking Code is potentially ambiguous on the point of whether the customer has the right to choose a scheme debit card and would benefit from clarification.

### **Identification of potentially eligible customers for basic accounts**

- 4.64. The ACCC considers that the benefits claimed by the ABA in relation to its Basic Banking Products Proposal and Minimum Standards Proposal are unlikely to arise if customers who are eligible for, and would benefit from access to, basic banking products are not aware of the existence of these products. This includes existing customers of a member bank who may be, or become, eligible for a basic banking product. Currently, the ABA is proposing to offer the accounts in the following ways:
- a) if someone self identifies as a low income earner, Member Banks will provide information on available basic banking products,
  - b) when a customer applies for a new account, Member Banks will ask if they have a concession card, and if so will provide information on available basic banking products,
  - c) a general commitment to raising awareness about basic banking products and providing easily accessible information, and
  - d) training staff to recognise potentially eligible customers.<sup>27</sup>
- 4.65. The joint submission by consumer groups submitted that they were, 'very concerned that the Code places the onus on the customer to request a bank account,' and that, 'the community expects that banks will proactively provide appropriate bank accounts, including basic bank accounts, to its customers.' The joint submission noted the importance of data analysis and appropriate staff training on identification, and recommended that the Code, 'codify proactive provision of basic, low and no-fee accounts for new and existing bank customers, including through data analysis.'<sup>28</sup>
- 4.66. In response to these concerns, the ABA made the following submissions:
- a) a basic bank account may not be the most suitable account for the customer. For example, a customer may require share-broking services, which the account would not have.<sup>29</sup>

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<sup>27</sup> Australian Banking Association's application for authorisation AA1000441, 17 May 2019, p. 12-15.

<sup>28</sup> Submission from Consumer Action Law Centre, Financial Rights Legal Centre, and Financial Counselling Australia submission, 25 June 2019, p. 5.

<sup>29</sup> Australian Banking Association response to ACCC request for information, 2 August 2019, p. 8.

- b) data analysis requires the cooperation of relevant Federal Government agencies who provide these payments, such as the Department of Human Services and Centrelink, to overcome technical issues. The ABA noted that correct identification requires extensive engagement with government for banks to proactively determine with certainty which payment recipients hold eligible government cards. The ABA submitted that bank members, 'will continue to work with the relevant government agencies with a view to resolving this issue by the next Code review in 2022 if the technical issues we refer to can be overcome.'<sup>30</sup>
  - c) the ABA and members are currently working to promote the availability of low and no fee accounts through advertising.
- 4.67. The ACCC accepts that in some instances a basic, low or no fee account would not be the most suitable product for a customer. However, the ACCC considers that there should be an obligation on banks to inform potentially eligible customers of the existence of, and their potential eligibility for, basic banking products.
- 4.68. The ACCC also accepts that it may be difficult at this time for Member Banks to identify with precision eligible customers. However, the ACCC notes that banks do not need to identify with precision who may be eligible in order to ensure *potentially eligible* customers are informed. Banks could use other forms of data analysis to determine who may potentially be eligible, and contact them about the account on this basis.
- 4.69. The ACCC notes that if customers are not aware of these accounts, they are likely to stay in fee paying accounts, which may not be the most suitable for their needs. The ACCC is concerned that if the Banking Code does not require banks to regularly identify potentially eligible existing customers, the claimed public benefits will be unlikely to result (or at a minimum they would be reduced), as Member Banks will not have an incentive to offer BBAs. As noted at paragraphs 4.51 – 4.53, the motivation to offer these products appears not to be profitability, but rather, community and government expectations. Therefore, it is not certain that Member Banks will have an incentive over time to continue to identify new customers, and develop more effective ways of doing this.
- 4.70. The ACCC considers that, in the absence of an obligation on Member Banks to proactively identify and contact potentially eligible customers on a regular basis, it cannot have confidence that the claimed public benefits in relation to the ABA's proposals regarding basic banking products will arise in practice.
- 4.71. The ACCC is therefore proposing to impose two conditions of authorisation in relation to this issue.
- 4.72. The ACCC proposes to impose 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.
- 4.73. The ACCC also proposes to impose 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

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<sup>30</sup> Australian Banking Association response to ACCC request for information, 2 August 2019, p. 3.

- b) how many BBAs were opened
- 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.

4.74. The ACCC considers this will provide it with comfort that the claimed benefits will arise, and will continue to arise, in practice, and to provide information to inform the ACCC's assessment of any application for re-authorisation at the conclusion of the authorisation period.

4.75. The ACCC invites submissions from interested parties and the ABA on the merits of these proposals and the particular form such conditions may take.

### **Agriculture Proposal**

4.76. Loan agreements contain provisions providing for the charging of default interest where payments are not made on time. Default interest rates may be markedly higher than the regular rate paid when payments are made when due. Banks may also charge fees in addition to a default interest when payments are not made on time.

4.77. The Royal Commission recommended that there be no charging of default interest while a declaration of drought remains in force, due to concerns that banks were using default interest as a bargaining chip to persuade borrowers to sell the secured property to pay back the debt. Commissioner Hayne questioned what commercial purpose could be served by the charging of default interest if the balance of the loan outstrips the likely worth of the security property. Commissioner Hayne also noted that charging default interest for any extended period of time will amplify the borrower's difficulties, and questioned whether when default interest is being charged repeatedly, it wouldn't be more appropriate for the loan to be enforced.

4.78. In response to the Royal Commission's recommendation, the ABA proposes to amend the Banking Code to provide that:

- farmers who have been provided with a loan for the purposes of a farming operation will not be charged default interest on that loan by a bank during any period that the land they use for that operation is in drought or subject to another natural disaster
- in circumstances where the bank subsequently becomes aware that the land is in drought or impacted by natural disaster, or where the customer brings their loan purpose to the attention of the bank, the bank will refund interest charged as a result of the default during the drought or other natural disaster
- land will be considered to be in drought or subject to another natural disaster where an Australian State or Territory Government makes a declaration to that effect; or if no such declaration is made, where the bank is satisfied on other grounds that the land is in drought or subject to another natural disaster
- the above amendments are to apply to loans to farmers, running farming operations, as defined by the NSW Farm Debt Mediation Act.

4.79. The ABA submits that the proposed amendments go further than the Royal Commission recommendations, as they will apply to farming operations even where

the land is not secured by agricultural land, and will include farmers who lease their land or do not use it, but who take loans out to fund their farming operations.<sup>31</sup>

4.80. The ABA notes that Member Banks currently offer relief by way of no default interest on agricultural loans, but that there is no consistency between what triggers a prohibition, the scope of application, and when a drought or other natural disaster is considered to give rise to the prohibition<sup>32</sup>.

4.81. No concerns have been raised with the ACCC by interested parties in relation to the ABA's proposed response to the Royal Commission's recommendations in relation to default interest on agricultural loans.

4.82. The ACCC raised a concern with the ABA that, while it proposed that the Banking Code prohibit the charging of default interest on agricultural loans in times of natural disaster (in line with the Royal Commission recommendation), it remained possible for Member Banks to not comply with the intention of the recommendation by charging default fees (rather than interest) on agricultural loans in times of natural disaster.

4.83. In response, the ABA proposed a further amendment to include a prohibition on the charging of fees in lieu of default interest by Member Banks in these circumstances (or to refund any of these fees charged once the bank subsequently becomes aware of the circumstances).

4.84. The ACCC welcomes the ABA's willingness to address this concern and considers that the ABA's amended wording addresses its concerns in relation to the Agriculture Proposal.

### **ACCC conclusion on public benefit**

4.85. The ACCC considers that implementation of the Agriculture Proposal is likely to result in public benefits in the form of:

- greater protection for farmers and the agricultural industry in times of natural disaster and drought, and
- increased certainty for farmers in natural disaster or drought.

4.86. The ACCC considers that the ABA's proposals relating to basic banking products have potential to result in public benefits by:

- ensuring banks' compliance with minimum community expectations and standards for transaction and account features and agricultural loans, and addressing the harms identified by the Royal Commission
- greater certainty and protection for customers that BBA products offered by Member Banks will meet minimum standards
- increased availability of higher quality BBA products through standardised minimum requirements
- enhanced customer awareness of the availability and content of BBAs, including through increased promotion of BBAs to suitable customers on behalf of banks
- raising the standard average BBA offering

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<sup>31</sup> Australian Banking Association's application for authorisation AA1000441, 17 May 2019, p. 15

<sup>32</sup> Australian Banking Association's application for authorisation AA1000441, 17 May 2019, p. 18

- improved availability of accessible and affordable banking, consistent with the objective of the Royal Commission's recommendation 1.8 of removing financial barriers to the access of banking services, and
- reduced access to informal overdrafts and removal of overdrawn and dishonour fees from basic, low and no fee accounts.

4.87. However, as discussed above, the ACCC has concerns about some areas in which it considers the ABA's proposals do not effectively address the Royal Commission's recommendations and where the public benefit will be illusory or unlikely to arise in practice, specifically by:

- permitting the charging of interest on overdrawn amounts in relation to basic banking products, in circumstances where the customer has not expressly agreed to an informal overdraft
- failing to impose any obligation on banks to offer a BBA, or to continue to do so, and
- failing to impose any obligation for Member Banks to proactively identify and contact customers who may potentially be eligible for basic banking products on a regular basis.

4.88. The ACCC considers that unless these concerns are addressed, the claimed public benefits are unlikely to arise in practice. The ACCC is therefore proposing a number of conditions of authorisation to address its concerns (outlined below).

4.89. The ACCC considers that the proposed conditions will not impose an overly onerous burden on the ABA and its members in circumstances where:

- a number of the conditions only require Member Banks to continue to do things they are currently doing (or that many of them are already doing),
- reporting on the number and circumstances of informal overdrafts is proposed to be required only once, 12 months into authorisation, and reporting on identification of and contact with potentially eligible customers is proposed to be required twice during the period of authorisation, and
- input from and engagement by the ABA is invited by the ACCC to ensure the final conditions are drafted to minimise the burden on the ABA and its members, while providing the ACCC with confidence that the public benefits will arise and will continue to do so for the period of authorisation.

## Public detriments

4.90. The Act does not define what constitutes a public detriment. The ACCC adopts a broad approach. This is consistent with the Tribunal which has defined it as:

*...any impairment to the community generally, any harm or damage to the aims pursued by the society including as one of its principal elements the achievement of the goal of economic efficiency.*<sup>33</sup>

4.91. The ABA submits that the Proposed Conduct will not result in any competitive detriment in the relevant markets including because:

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<sup>33</sup> Re 7-Eleven Stores (1994) ATPR 41-357 at 42,683.

- banks do not compete with each other in respect of BBA features considered to be minimum community standards
- Member Banks are free to compete in offering additional features in relation to basic banking products
- Member Banks also have incentive to make constant improvements to features and terms of basic banking products as a means of addressing the increasing social responsibility expected by the community, and
- the Agriculture Proposal extends only to a limited number of loans and only in certain circumstances. Banks remain free to compete on other aspects of an agricultural loan agreement.

4.92. On the basis of the information currently before it, the ACCC considers that the Proposed Conduct is likely to have limited impact on competition in relation to basic banking products and agricultural loans because:

- it appears that the level of competition between banks in relation to basic banking products is very low (with banks motivated by reasons of social responsibility rather than profit, as discussed above), noting that banks do not appear to actively compete for customers eligible for basic banking products and do not widely promote these products
- in relation to the Agriculture Proposal, Member Banks remain free to compete on all other aspects of an agricultural loan agreement, and
- following the Final Report of the Royal Commission, no member bank that provides loans for farming operations charges default interest for a loan affected by drought or other natural disaster.

4.93. However the ACCC considers that there is likely to be detriment to the community, in circumstances where:

- Royal Commission recommendations are not meaningfully and effectively implemented, in both substance and spirit to address the harms identified by the Royal Commission, resulting in low income customers not having access to affordable banking services which are appropriate to their needs, and
- industry actions which are claimed to extend, expand or go beyond Royal Commission recommendations do not have any significant positive practical impact on the relevant class of customers.

4.94. To reduce the likelihood of these detriments occurring (and to increase the likelihood of lasting benefit) as a result of the Proposed Conduct, the ACCC proposes to grant conditional authorisation, as outlined below.

### Balance of public benefit and detriment

4.95. The ACCC considers that the Proposed Conduct is likely to result in some public benefits in the form of greater protection for farmers and the agricultural industry in times of natural disaster and drought, and increased certainty for farmers in natural disaster or drought.

4.96. The ACCC considers that without the conditions proposed, the Proposed Conduct will provide limited public benefit due to the ABA's proposals, in practice, not addressing

all of the harms identified by the Royal Commission in relation to access to banking services for low income customers.

- 4.97. The ACCC considers that the Proposed Conduct is likely to result in public detriment to the community insofar as the Proposed Conduct does not effectively address the harms identified by the Royal Commission with the result that low income customers are not provided with banking services which are accessible, affordable and appropriate to their needs.
- 4.98. The CCA allows the ACCC to grant authorisation subject to conditions. Generally, the ACCC may impose conditions to ensure that the relevant statutory test is met or continues to be met over the proposed period of authorisation.
- 4.99. The ACCC proposes to address its concerns relating to the Proposed Conduct by imposing conditions, and is considering imposing further conditions, as discussed above.
- 4.100. Therefore, for the reasons outlined in this draft determination, the ACCC is satisfied, subject to the proposed conditions of authorisation, that the Proposed Conduct is likely to result in a public benefit that would outweigh the likely public detriment.

### Length of authorisation

- 4.101. The Act allows the ACCC to grant authorisation for a limited period of time.<sup>34</sup> This enables the ACCC to be in a position to be satisfied that the likely public benefits will outweigh the detriment for the period of authorisation. It also enables the ACCC to review the authorisation, and the public benefits and detriments that have resulted, after an appropriate period.
- 4.102. In this instance, the ABA seeks authorisation for 10 years. The ABA submits that the implementation of the Royal Commission recommendations should not be regarded as temporary, or at least should warrant a longer than usual period of authorisation by virtue of the weight they carry in the community interest. Further, the ABA submits that banks will be investing significant amounts in systems and training in order to comply with the new requirements of the BBA proposal. The ABA submits this should be recognised by giving banks confidence their regulatory environment will not change for a substantial period.
- 4.103. In considering the appropriate period of authorisation, the ACCC notes that:
- the ACCC considers it requires further information about how the Proposed Conduct is working in practice and to consider the information in relation to this (including the provision of data through the proposed reporting conditions), before considering whether to grant authorisation for a further period,
  - the ACCC tends to grant authorisation for periods shorter than 10 years in circumstances where the Proposed Conduct has not been authorised previously and/or there is a higher risk of detriment,
  - it remains open to the ABA to seek re-authorisation should it be appropriate for it to do so at the end of the period of authorisation, and

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<sup>34</sup> Subsection 91(1)



- there is a risk of changing community standards and expectations in relation to basic banking products within the next 10 years, and therefore the ACCC's assessment of benefits and detriments may change during that period.

4.104. The ACCC therefore proposes to grant conditional authorisation for a period of five years.

## 5. Draft determination

### The application

- 5.1. On 22 May 2019, the ABA lodged application AA1000441 with the ACCC, seeking authorisation under subsection 88(1) of the Act.
- 5.2. The ABA seeks authorisation for the Proposed Conduct defined at paragraphs 1.3-1.6 above. Subsection 90A(1) of the Act requires that before determining an application for authorisation, the ACCC shall prepare a draft determination.

### The authorisation test

- 5.3. Under subsections 90(7) and 90(8) of the Act, the ACCC must not grant authorisation unless it is satisfied in all the circumstances that the Proposed Conduct is likely to result in a benefit to the public and the benefit would outweigh the detriment to the public that would be likely to result from the Proposed Conduct.
- 5.4. For the reasons outlined in this draft determination and subject to the conditions below, the ACCC is satisfied, in all the circumstances, that the Proposed Conduct would be likely to result in a benefit to the public and the benefit to the public would outweigh the detriment to the public that would result or be likely to result from the Proposed Conduct, including any lessening of competition.
- 5.5. Accordingly, subject to the proposed conditions, the ACCC proposes to grant authorisation.

### Conduct which the ACCC proposes to authorise

- 5.6. The ACCC proposes to grant conditional authorisation AA1000441 to enable the ABA and its Member Banks to make and implement certain changes to the Banking Code, as described in paragraphs 1.3-1.6 and defined as the Proposed Conduct.
- 5.7. The proposed authorisation AA1000441 is subject to the following conditions:
  - 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
    - 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.
  - Member Banks are to report to the ACCC 12 months after authorisation is granted on:
    - 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 caused the account to go into overdraft in each category
  - d. the cause of the 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
- The Banking Code be amended to require Member Banks who currently offer a BBA product (listed at paragraph 4.50 above) to continue to do so for the period of authorisation.
  - 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.
  - Member Banks must publicly report to the ACCC 12 months after authorisation is granted, and again 36 months after authorisation is granted, on:
    - a. the steps Member Banks took to identify existing customers potentially eligible for the basic banking products
    - b. how many BBAs were opened, and
    - c. the steps each Member Bank and the ABA took to work with government departments to address technical issues in the identification of eligible or potentially eligible customers.

5.8. The Proposed Conduct may involve a cartel provision within the meaning of Division 1 of Part IV of the Act or may have the purpose or effect of substantially lessening competition within the meaning of section 45 of the Act.

5.9. The ACCC proposes to grant authorisation AA1000441 for five years.

5.10. This draft determination is made on 27 September 2019.

### 5.11. Interim authorisation

5.12. At the time of lodging the application, the ABA requested interim authorisation to allow itself, its member retail banks, and any banks that may become ABA members in the future, to agree to amend certain provisions of the Banking Code (discussed in the Draft Determination above), and to implement these provisions.

5.13. The ABA requested interim authorisation on the basis that:

- it would enable the ABA to make appropriate practical arrangements for publication of the version of the Banking Code containing the relevant amendments on 1 March 2020
- it would ensure Member Banks have sufficient time to put systems and processes in place to comply with the revised Banking Code by 1 March 2020

- it would enable the recommendations of the Royal Commission to be implemented more quickly and avoid consumer confusion by ensuring consistency and certainty
- the proposed amendments represent no material competition risk as there are no competitive detriments, and any limited detriment is outweighed by a significant public benefit.

5.14. On 11 July 2019, the ACCC granted interim authorisation under subsection 91(2) of the Act to allow ABA members and the ABA Council to agree to make the relevant amendments to the Banking Code in response to specific Royal Commission recommendations, and for individual ABA members to implement the amendments immediately.

5.15. However the ACCC did not at that time grant interim authorisation in relation to the Minimum Standards Proposal and the Eligibility Proposal, as it identified the need for further consideration and consultation on these aspects. The ACCC advised its intention to revisit this decision and related issues at the time of the draft determination.

5.16. The ACCC has decided to grant interim authorisation to also enable ABA members and the ABA Council to agree to make amendments to the Code to prescribe, and for individual ABA members to implement based on amendments to the Code, or take steps towards implementing, minimum criteria for eligibility for a Basic Banking Product, and minimum features of a BBA, as set out at clause 44A and 44B in Chapter 16 of schedule 7 of the application.

5.17. In granting interim authorisation, the ACCC considers that there:

- are likely to be public benefits in allowing the ABA to agree to make the relevant amendments, and in allowing individual banks to implement the required changes
- is a level of urgency for banks and the ABA to prepare to implement planned changes to the Code
- may be harm to the ABA and its members if interim authorisation is denied due to having insufficient lead time to prepare for changes to the Code
- are unlikely to be any significant detriments to competition as a result of granting interim authorisation, given that competition between banks in relation to basic banking products appears to be low.

5.18. The ACCC notes that interim authorisation is granted to allow implementation of these further aspects of the Proposed Conduct, in the context of the concerns discussed within this Draft Determination, and notes that changes to the arrangements are likely before final authorisation is granted.

5.19. Interim authorisation will remain in place until the date the ACCC's final determination comes into effect or until the ACCC decides to revoke interim authorisation.

## 6. Next steps

5.20. The ACCC now invites submissions in response to this draft determination by 14 October 2019. In addition, consistent with section 90A of the Act, the applicant or an

interested party may request that the ACCC hold a conference to discuss the draft determination.