



Draft Determination

Application for authorisation AA1000645

lodged by

Australian Banking Association Ltd

in respect of

development of potential industry initiatives to prevent, detect, disrupt
and respond to scams affecting individual and small business customers

Authorisation number: AA1000645

13 October 2023

Commissioners: Keogh
Brakey
Carver

Summary

The ACCC proposes to grant authorisation with conditions to enable the Australian Banking Association (ABA) Member Banks to engage in discussions for the purpose of developing potential industry initiatives to prevent, detect, disrupt and respond to scams affecting individual and small business customers, and develop and in principle agree to the content of a standard reflecting these initiatives.

The ACCC proposes to grant authorisation with conditions until 30 June 2024.

The ACCC considers that the Proposed Authorised Conduct is likely to result in some public benefit in the form of facilitating development of initiatives to prevent avoidable scam losses in the interim period prior to the Government's planned development of a legislated industry-wide mandatory code of conduct. However, the extent of this public benefit depends upon how widely the ABA Member Banks take into account views of relevant interested parties, such as other financial institutions and consumer groups so that the proposed standard is able to be applied system-wide.

The ACCC considers that collaboration to explore and develop initiatives for inclusion in a banking industry standard that would limit or impact access to redress for consumer or business customers would be a public detriment.

To mitigate the potential for public detriment, the ACCC considers it appropriate to grant authorisation with conditions. The ACCC proposes to require as a condition of authorisation that the ABA provide regular reports on any industry initiatives they propose, such as circumstances where customers would be reimbursed or entitled to remedies. The proposed conditions of authorisation also include a measure to manage the risk of the banks coordinating on anything beyond scam prevention.

The conditional interim authorisation granted by the ACCC on 3 August 2023 remains in place and it enables ABA Member Banks to engage in the arrangements while the ACCC is considering the substantive condition. Interim authorisation will remain in place until the date the ACCC's final determination comes into effect, the application for authorisation is withdrawn, or until it is revoked.

The ACCC invites submissions in relation to this draft determination by 10 November 2023 before making its final decision.

The application for authorisation

- 1.1. On 10 July 2023, the Australian Banking Association Ltd (**ABA**) lodged application for authorisation AA1000645 with the Australian Competition and Consumer Commission (**ACCC**). ABA is seeking authorisation for the Proposed Conduct described at paragraphs 1.6 – 1.7. Authorisation is sought for 12 months from the date the ACCC's final determination comes into effect.
- 1.2. This application for authorisation was made under subsection 88(1) of the *Competition and Consumer Act 2010* (Cth) (the **Act**). If granted, an authorisation provides businesses with protection from legal action under the competition provisions in Part IV of the Act. The ACCC has a discretion to grant authorisation, but must not do so unless it is satisfied in all the circumstances that the conduct would result in benefit to the public that would outweigh any likely public detriment (ss 90(7) and 90(8) of the Act (the **authorisation test**)).

- 1.3. The conditional interim authorisation granted on 3 August 2023 remains in place until it is revoked or the date the ACCC's final determination comes into effect.

The Applicant

- 1.4. The ABA is an association of 20 banks in Australia (**Member Banks**, listed in Annexure 1). The ABA provides analysis, advice and advocacy for the banking industry and contributes to the development of public policy on banking and other financial services.
- 1.5. The ABA is seeking authorisation on behalf of:
- its Member Banks and their subsidiary banks; and
 - any banks that may become ABA members in the future.

The Proposed Conduct

- 1.6. The ABA seeks authorisation for Member Banks to explore and develop initiatives for inclusion in a banking industry standard to prevent, disrupt and respond to scams affecting individual and small business customers (**Industry Standard**).
- 1.7. The ABA anticipates that development of the Industry Standard will require:
- discussions and exchange of information between the ABA and Member Banks regarding matters directly necessary for purposes of developing the Industry Standard, including:
 - the scope and provisions of the Industry Standard such as how Member Banks can ensure that there is an effective operational framework for protecting consumers against increasingly sophisticated scams that pose a high risk to their financial wellbeing
 - the role(s) of Member Banks in identifying, reporting, disrupting and responding to scams in coordination with other sectors, regulators, government, law enforcement or other relevant stakeholders
 - the role(s) of suppliers of services who have a key role to play in scam disruption in relation to the Industry Standard including financial services providers, payment platforms and service providers, digital platforms and telecommunications providers
 - scam activity, including the volume of scam activity, victims, types of scams carried out and how they are carried out
 - the nature and extent of financial, reputational and other impacts of scams on individuals and small businesses (including customers of the Applicants)
 - existing measures deployed by Applicants to prevent, disrupt and respond to scams and the effectiveness of those measures
 - identification of potential scam perpetrators and actions that may be taken to monitor and raise awareness of their activities
 - potential industry measures to prevent, detect, disrupt and respond to scams - for example, preventing or delaying payments to specific high-risk businesses, accounts or destinations associated with scam activity
 - the impact of current and potential measures on the Member Banks' businesses
 - options for the adoption of a payee verification solution or solutions, and the potential providers of that solution - to ensure that consumers are more aware

of who they are making transfers to, and to reduce the number of scams that rely on the payer not knowing who they are paying come to fruition

- information required to prepare a separate application to the ACCC for authorisation of the Industry Standard and respond to any queries that the ACCC may have
- responses and submissions to any consultation undertaken by government related to scams, and
- an agreement in principle between the Applicants on the form and content of the Industry Standard, subject to a separate ACCC authorisation.

(the **Proposed Conduct**).

- 1.8. The application for authorisation is not for the implementation of the Industry Standard by the ABA and Member Banks. The ABA has indicated it will seek a further authorisation for implementation of a standard at the appropriate time.

Interim authorisation

- 1.9. The ABA requested urgent interim authorisation to enable its member banks to engage in the Proposed Conduct while the ACCC considers the substantive application.
- 1.10. On 3 August 2023, the ACCC granted interim authorisation with conditions, in accordance with subsection 91(2) of the Act.¹ 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.
- 1.11. The ACCC granted interim authorisation with 2 conditions. The first condition requires that the ABA provide regular reports to the ACCC setting out material activities, discussions developments and/or decisions including topics discussed at meetings involving the ABA and Member Banks, whether any discussions sought to limit the range of issues that any proposed industry initiatives would address, and the consultation undertaken with individual and small business groups. The second condition of interim authorisation requires the presence of a competition lawyer at meetings between Authorised Parties, as a measure to manage the risk of the banks coordinating on anything beyond scam prevention.
- 1.12. Public versions of documents provided to the ACCC pursuant to these conditions will be made available on the [ACCC's public register](#).

2. Background

- 2.1. As reported in the ACCC's Targeting Scams Report 2022², losses to scams have increased significantly in recent years. The combined losses reported to Scamwatch, ReportCyber, the Australian Financial Crimes Exchange, IDCARE, ASIC and other government agencies was at least \$3.1 billion in 2022. This is an 80% increase on total losses recorded in 2021.
- 2.2. The ABA and Member Banks acknowledge the detriment caused by scams on a daily basis, and the importance of finding robust and meaningful solutions.

¹ See ACCC decision of 3 August 2023 available at <https://www.accc.gov.au/public-registers/authorisations-and-notifications-registers/authorisations-register/australian-banking-association-limited>.

² <https://www.accc.gov.au/about-us/publications/serial-publications/targeting-scams-report-on-scams-activity/targeting-scams-report-of-the-accc-on-scams-activity-2022>

- 2.3. The ABA notes that Member Banks are already individually implementing prevention, detection and disruption initiatives to combat scams and recover losses.
- 2.4. The ABA submits that allowing collaboration between the Member Banks to develop an industry standard will ensure there will be a robust, effective and fit for purpose mechanism in place to:
 - enable efficient exchange of information and coordination of processes to prevent and detect scams and protect consumers from scams and identity misuse
 - articulate the roles and responsibilities of each participant in the Industry Standard and the consequences for non-compliance with their obligations, and
 - improve the ability of customers to report and recover losses from the responsible entity in a timely manner and for the responsible entity to assist the customer to address their losses.
- 2.5. The ABA notes that the Federal Government has recently announced that a legislated cross-industry Code will be introduced for banks, telcos, social media platforms and others in the near term. The ABA submits that Member Banks have also been encouraged by government to develop the industry standard because a robust and well considered banking industry standard can form the building blocks of the legislated cross-industry code. The ABA submits that to the extent Member Banks are not able to engage in effective, multilateral discussions now, this would impede the development of the industry standard and could potentially delay the development of a legislated cross-industry code.

3. Consultation

- 3.1. The ACCC invited submissions from a range of potentially interested parties including major industry associations, consumer groups, and relevant federal government and relevant regulatory bodies.³
- 3.2. The ACCC received 3 public submissions, from IDCARE, Australian Payments Plus, and a joint submission from Consumer Action Law Centre, CHOICE and Financial Rights Legal Centre.

IDCARE

- 3.3. IDCARE, Australia's national identity and cyber support community service, made a submission which supports the intent of enabling collaboration across the banking industry. It supports testing new initiatives that may make Australian banking institutions more resilient and responsive to the scam activities.
- 3.4. IDCARE submits that the interconnectivity between the scam victim and scam offending is not contained within one institution or industry. IDCARE notes that in almost all scam cases it supports, there are touch points across more than one banking institution and industry. It also submits that many of its clients feel as harmed by the response system as they are by the scam events, and that the individual victim is relied on to do the 'heavy lift' in responding.

Australian Payments Plus (AP+)

- 3.5. AP+, the holding company for Australia's 3 domestic payment organisations (BPAY Group, eftpos and NPP Australia) supports the application for authorisation, noting that

³ A list of the parties consulted and the public submissions received is available from the ACCC's public register www.accc.gov.au/authorisationsregister.

the ABA's initiatives include elements which have a focus on early intervention and information sharing to disrupt scams.

Consumer Action Law Centre, CHOICE, Financial Rights Legal Centre (Consumer Groups)

- 3.6. The Consumer Action Law Centre, CHOICE and the Financial Rights Legal Centre (Consumer Groups) made a joint submission that while greater coordination between banks is important, any coordinated action is unlikely to result in adequate protection for consumers from scams.
- 3.7. The Consumer Groups submit that the ACCC should be clear that any authorisation arising from this application is not a substitute for a mandatory and enforceable code of conduct. They strongly support the Federal Government's commitment to establish a mandatory code of conduct for bank scams, and they consider that adequate consumer protection can only be achieved through mandatory obligations implemented by the government.
- 3.8. The Consumer Groups also suggest that there is a risk that the Proposed Conduct may confer a significant competitive advantage on Member Banks over smaller banks and credit unions. This is discussed below at paragraphs 4.32–4.36.

4. ACCC assessment

- 4.1. The ACCC's assessment of the Proposed Authorised Conduct is conducted in accordance with the relevant authorisation test contained in the Act.
- 4.2. The ABA submits that the relevant provisions of the Act which might apply to the conduct are:
 - a) cartel conduct (Division 1 of Part IV)
 - b) contracts, arrangements or understandings that restrict dealings or affect competition (section 45)
 - c) concerted practices (section 45).
- 4.3. The ABA has sought authorisation for conduct that would or might constitute a cartel provision within the meaning of Division 1 of the Act and may substantially lessen competition within the meaning of section 45 of the Act. Consistent with 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 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.

Relevant areas of Competition

- 4.4. To assist with the assessment of the Proposed Conduct, the ACCC considers the relevant areas of competition likely to be impacted.
- 4.5. Having regard to the nature of the Proposed Conduct, the ACCC considers that the relevant areas of competition are likely to be the supply of retail banking services, and the supply of goods and services relating to the prevention, detection, disruption and response to scam activities.

Future with and without the Proposed Conduct

- 4.6. 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.

- 4.7. The ACCC considers that in the future with the Proposed Conduct, Member Banks will continue to share information, jointly explore potential industry initiatives to prevent, detect, disrupt and respond to scams affecting individual and small business customers (as currently authorised under interim authorisation) and coordinate on a response to the Federal Government's consultation on the legislated code.
- 4.8. The ACCC considers that in the future with and without the Proposed Conduct, Member Banks will continue to individually implement prevention, detection and disruption initiatives to combat scams and recover losses. However, these initiatives may vary in terms of their effectiveness.
- 4.9. In the future without the Proposed Conduct, the ACCC also considers that Member Banks may not be able to share information nor work together as effectively to combat and address harm arising from scams.
- 4.10. Given the statements of the Federal Government indicating an intention to proceed with plans to develop enforceable and mandatory standards for industry regarding scams in early 2024, the ACCC considers that a legislative or regulatory response is likely in both the future with and without the Proposed Conduct.

Public benefits

- 4.11. 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 in considering public benefits:

...we would not wish to rule out of consideration any argument coming within the widest possible conception of public benefit. This we see as 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.⁴

- 4.12. The ACCC notes the significant harm to consumers and businesses in Australia arising from the proliferation of scams in Australia, and the trend towards increased losses and more sophisticated scams.
- 4.13. The ACCC considers that the banking sector has a key role in taking steps to materially increase scam protections for consumers, and to implement robust processes to protect customers from scams.
- 4.14. The ACCC considers that the Proposed Authorised Conduct is likely to expedite the development of initiatives to prevent avoidable scam losses in the interim period prior to the Government's planned development of a legislated industry-wide mandatory code of conduct and this is a likely public benefit.
- 4.15. The ACCC considers that the likely benefits would be enhanced with greater consultation with other interested parties (including other financial institutions and consumer groups).
- 4.16. The ACCC also considers that the information sharing and collaboration between Member Banks is likely to result in the development of a better or more effective Industry Standard than may be achieved without the Proposed Authorised Conduct. However, the effectiveness of the Industry Standard depends on whether it leads to the establishment of whole of eco-system obligations and industry specific, enforceable codes with clear requirements for businesses to take steps against scams.

4 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.

This is less likely to be achieved if there is not a mechanism to share the initiatives more broadly, or if there are not processes designed to do so. Ultimately, any public benefits arising from entering into and giving effect to any Industry Standard that is developed under this authorisation would be considered as part of a separate application for authorisation.

4.17. The ACCC considers that the Proposed Authorised Conduct is likely to result in public benefits in the form of a more cohesive and effective approach to scam prevention and detection by the Member Banks, in an expedited timeframe compared to the future absent the Proposed Authorised Conduct where the ABA and Member Banks develop their approaches individually ahead of the Government's planned development of a legislated industry-wide mandatory code of conduct.

Public detriments

4.18. 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.⁵

4.19. While it considers that any theoretical detriment is highly unlikely to manifest given the very limited scope of the Proposed Conduct, the ABA submits that the conduct for which authorisation is sought may be seen to give rise to the following theoretical competitive detriments:

- Member Banks may obtain a degree of visibility in relation to other Member Banks' confidential information relating to the impact of scams on their customers.
- The Proposed Conduct has the potential to dampen the incentive of Member Banks to innovate in relation to scam prevention, detection and disruption.

4.20. As a general proposition, any coordination between Member Banks leads to a result of a reduction in competition in some form, and that this constitutes a public detriment.

4.21. The ACCC has considered the following public detriments:

- Potential for initiatives to be developed that limit access to redress for consumers and businesses or fail to emphasise that redress is available in any proposed Industry Standard
- potential for reduced competition in relation to scam prevention, detection and disruption
- potential for coordination to facilitate unauthorised conduct between Member Banks
- potential competitive impacts on non-Member Banks.

Initiatives to limit access to redress for consumers or businesses in any proposed Industry Standard

4.22. The Member Banks are competitors for individual and business customers and offer a range of bank accounts with terms and conditions that may deal with redress for customers as a result of scams or other unauthorised activity.

5 Re 7-Eleven Stores (1994) ATPR 41-357 at 42,683.

- 4.23. The ACCC considers that collaboration to explore and develop initiatives for inclusion in a banking industry standard that would limit or impact access to redress for consumer or business customers would be a public detriment.
- 4.24. Importantly collaboration that also seeks to exclude any consumer or business customer redress from any proposed Industry Standard would be a public detriment, particularly if there is no transparency on what initiatives have been considered.
- 4.25. The ACCC considers that this likely public detriment will be mitigated by the proposed conditions set out at paragraphs 5.15–5.16. For example, under a proposed condition of authorisation, the ABA will be required to provide regular, public reports to the ACCC including on whether any discussions sought to limit the range of issues that any proposed industry initiatives would seek to address together with the nature and extent of any consultation with stakeholders.

Reduced competition in relation to scam prevention, detection and disruption

- 4.26. By collaborating and discussing initiatives that may form part of an Industry Standard, the Proposed Authorised Conduct may dampen innovation and competition between Member Banks to develop and implement the most effective and highest standards in relation to scam prevention, detection and disruption.
- 4.27. However, the ACCC is not satisfied that this detriment is likely to arise during the period of authorisation sought because the Proposed Authorised Conduct:
- is narrow in scope, and only relates to discussions for the purpose of developing potential industry initiatives to prevent, detect, disrupt and respond to scams affecting individual and small business customers, and development and in principle agreement to the content of a standard reflecting these initiatives, and
 - does not prevent Member Banks from independently innovating on scam mitigation processes and technologies and offering superior scam protection services and consumer redress measures above any initiatives that may be discussed and agreed arising from the Proposed Authorised Conduct, and the Member Banks may have an incentive to compete on these issues.
 - can be regarded as an interim measure ahead of the Government's planned development of a legislated industry-wide mandatory code of conduct.

Potential to facilitate anticompetitive conduct

- 4.28. The ACCC considers that public detriments may arise if contracts, arrangements or understandings create or enhance the potential for coordinated (rather than competitive) conduct on other matters that are beyond the scope of the proposed conduct.
- 4.29. The ACCC considers that the discussions between Member Banks, and the sharing of confidential information, may give rise to the risk that the Member Banks discuss and coordinate on other matters, which may affect competition in the supply of retail banking services, and the supply of goods and services relating to the prevention, detection, disruption and response to scam activities.
- 4.30. The ACCC notes that such conduct would not fall within the scope of the Proposed Authorised Conduct and may breach the Act.
- 4.31. However, the ACCC is not satisfied that this potential detriment is likely to arise from the Proposed Authorised Conduct. The likelihood of this detriment is minimised further due to the proposed conditions that the ACCC considers will address other likely public detriments.

Potential competitive impacts on non-member banks

- 4.32. The Consumer Action Law Centre, CHOICE and the Financial Rights Legal Centre (Consumer Groups) jointly submits that the Proposed Conduct risks causing public detriment or lessening competition if it gives Member Banks a significant competitive advantage over non-member banks in the way that scams are addressed. The Consumer Groups note that scammers are adept at targeting the weakest points, and that if smaller banks and credit unions are left behind in scam prevention, scammers will target their efforts at that part of the industry.
- 4.33. The Consumer Groups also suggest that the ACCC consider imposing a condition on any authorisation requiring the ABA inform the Customer Owned Banking Association (**COBA**) of any major opportunities, risks or outputs it identifies out of the proposed conduct that could impact the ability of the banks to detect and prevent scams, and a condition (if possible) that the ABA offers to include COBA members in initiatives that arise from the Proposed Authorised Conduct.
- 4.34. In response, the ABA notes that COBA and its members are not covered by the Proposed Conduct. The ABA submits that while it intends to keep COBA informed of its progress at a general level, there are limits to what information can be shared with COBA and its members in compliance with competition law. The ABA considers that conduct or engagement between the ABA and COBA and their respective members that falls within the scope of the conduct that is the subject of the interim authorisation and the ABA Application would potentially require a separate authorisation.
- 4.35. The ACCC considers that non-ABA Member Banks will continue to develop and implement initiatives to combat scams with or without the Proposed Authorised Conduct. While recognising the potential detriment on non-Member banks not being involved in the Proposed Authorised Conduct, the ACCC also considers that the extent of potential competitive harm on non-Member Banks will be limited by:
- the duration of the authorisation period
 - the fact that the Proposed Authorised Conduct is intended to expedite development of an industry standard on scam mitigation initiatives
 - the proposed reporting condition set out at paragraph 5.15.
- 4.36. The ACCC is not satisfied at this time that the risk of potential competitive harm on non-Member Banks is likely to be a public detriment arising from the Proposed Authorised Conduct.
- 4.37. In considering any future application for authorisation relating to implementation of a Industry Standard (once developed), the ACCC will carefully consider the nature, extent and likelihood of any public detriment, if the proposed Industry Standard does not meet the needs of non-Member banks and their customers.

ACCC conclusion on public detriment

- 4.38. The ACCC considers that the Proposed Conduct is likely to result in public detriments if it facilitates the limitation or exclusion of consumer and small business customer redress in any proposed Industry Standard. This is particularly the case if the proposed Industry Standard does not lead to the establishment of whole of eco-system obligations and industry specific, enforceable codes with clear requirements for banks to take steps against scams, including providing redress.
- 4.39. To reduce the likelihood of these detriments occurring (and the increase the likelihood of benefits) as a result of the Proposed Authorised Conduct, the ACCC proposes to grant authorisation with conditions, as outlined below.

4.40. The ACCC is not satisfied that the other potential public detriments outlined above are likely to arise from the Proposed Authorised Conduct. Accordingly, they have not been taken into account in the weighing of public benefits and detriments.

Balance of public benefit and detriment

4.41. The ACCC considers that the Proposed Conduct is likely to result in some public benefits in the form of a more cohesive and effective industry approach to scam mitigation initiatives, and expedited prevention of avoidable scam losses, in the interim period prior to the Government's planned development of a legislated industry-wide mandatory code of conduct.

4.42. The ACCC considers that the Proposed Conduct is likely to result in some public detriments if it facilitates the limitation or exclusion of consumer and small business customer redress in any proposed Industry Standard.

4.43. For the reasons outlined in this draft determination, and with the conditions below, the ACCC is satisfied that the Proposed Conduct would be likely to result in a public benefit and this public benefit would outweigh any likely detriment to the public from the Proposed Conduct.

Length of authorisation

4.44. The Act allows the ACCC to grant authorisation for a limited period of time.⁶ 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.

4.45. In this instance, the ABA seeks authorisation for 12 months from the date on which final authorisation is granted.

4.46. The Federal Government has concurrent plans to develop enforceable and mandatory standards for industry regarding scams. The Assistant Treasurer anticipates that legislation for an industry code regarding scams will commence early in 2024.⁷

4.47. The Consumer Groups submit that the ACCC should state in its final determination that any authorisation is not a substitute for, and should not delay, the development of an industry-wide mandatory code of conduct.

4.48. The ACCC considers that effective standards are best achieved through a mandatory code/s, and notes the government's intention that legislation for an industry code will commence in early 2024.

4.49. In light of this, the ACCC considers that a duration shorter than the 12 months sought by the ABA is likely to be appropriate. The ACCC proposes to grant authorisation until 30 June 2024.

⁶ Subsection 91(1)

⁷ <https://www.abc.net.au/news/2023-08-03/assistant-treasurer-says-australia-facing-a-scams-crisis/102682328>

5. Draft determination

The application

- 5.1. On 10 July 2023, the Australian Banking Association Ltd lodged application AA1000645 with the ACCC, seeking authorisation under subsection 88(1) of the Act.
- 5.2. The Applicant seeks authorisation for Proposed Conduct as described in paragraphs 1.6 – 1.7. The Proposed Conduct only relates to the development of initiatives and in principle agreement of a draft industry standard to prevent, detect, disrupt and respond to scams. Once the standard has been developed, the ABA will separately apply for authorisation to cover its implementation by the ABA and Member Banks.
- 5.3. Subsection 90A(1) of the Act requires that before determining an application for authorisation, the ACCC shall prepare a draft determination.

The authorisation test

- 5.4. 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.
- 5.5. For the reasons outlined in this draft determination, the ACCC is satisfied, in all the circumstances, that the Proposed Authorised Conduct, with conditions, 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 Authorised Conduct, including any lessening of competition.
- 5.6. Accordingly, the ACCC proposes to grant authorisation with conditions for the Proposed Authorised Conduct as detailed below.

Conduct which the ACCC proposes to authorise

- 5.7. The ACCC proposes to grant authorisation AA1000645 with conditions in respect of Division 1 of Part IV of the Act and section 45 of the Act for the Authorised Parties to:
 - a) engage in discussions and exchange information solely for the purpose of developing a banking industry standard in relation to the prevention of, disruption to, and response to, scams that will or may affect individual and small business customers (Industry Standard); and
 - b) reach in principle agreement on the form and content of the Industry Standard (the entering and giving effect to which will be subject to a separate application for ACCC authorisation).(the **Proposed Authorised Conduct**).
- 5.8. The ACCC proposes that authorisation AA1000645 be granted with the conditions detailed in paragraphs 5.15–5.16.
- 5.9. The Proposed Authorised 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.
- 5.10. The ACCC proposes to grant authorisation AA1000645 until 30 June 2024.
- 5.11. This draft determination is made on 13 October 2023.

Conditions of authorisation

5.12. The ACCC may specify conditions in an authorisation. The legal protection provided by the authorisation does not apply if any of the conditions are not complied with.⁸

5.13. The ACCC may specify conditions in circumstances including where, although the relevant public benefit test is met, without the conditions the ACCC would not be prepared to exercise its discretion in favour of the authorisation.⁹

5.14. The ACCC proposes to grant authorisation AA1000645 with the following conditions.

5.15. **Condition 1 – Reporting requirements:** The ABA will provide each month (or such other period as the ACCC may approve) a report to the ACCC setting out material activities, discussions, developments and/or decisions in the previous period that involved conduct enabled by this authorisation, including:

- topics discussed at meetings involving the ABA and Member Banks
- whether any discussions sought to limit the range of issues that any proposed industry initiatives would address, such as the circumstances in which customers would be reimbursed or entitled to remedies
- consultation with individual and small business consumer groups, including the views expressed during the consultation (and any decision not to consult).

The ABA will provide each report on or before the last day of each month and the first such report will be provided on or before 31 January 2024. Where possible, a non-confidential version of each report will be provided for publication on the ACCC's authorisations public register.

5.16. **Condition 2 – Presence of competition lawyer:** Where the Proposed Authorised Conduct involves a meeting of or discussions between Authorised Parties, an external lawyer with expertise in competition law, engaged by the ABA and approved by the ACCC, must attend the meetings with instructions to immediately advise the attendees if, during the course of the meeting, they develop concerns that there is conduct occurring that is outside the scope of this authorisation and risks of breaching the Act.

5.17. The ACCC may authorise a Committee or Division of the ACCC, a member of the ACCC or a member of the ACCC staff, to exercise a decision-making function under the conditions of authorisation on its behalf.

6. Next steps

6.1. The ACCC now invites submissions in response to this draft determination. 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.

⁸ Subsection 88(3) of the Act.

⁹ Application by Medicines Australia Inc (2007) ATPR 42-164 at [133].

Current ABA Member Banks

1. AMP Bank Limited
2. Australia and New Zealand Banking Group Limited
3. Arab Bank Australia Limited
4. Bank Australia
5. Bank of China
6. Bank of Queensland Limited
7. Bank of Sydney
8. Bendigo and Adelaide Bank Limited
9. Citigroup Pty Ltd
10. Commonwealth Bank of Australia
11. HSBC Bank Australia Limited
12. ING Bank (Australia) Limited
13. J.P. Morgan Australia and New Zealand
14. Macquarie Bank Limited
15. MUFG Bank Limited
16. MyState Bank
17. National Australia Bank Limited
18. Rabobank Australia Limited
19. Suncorp Bank
20. Westpac Banking Corporation