



Determination

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

Date 21 November 2019

Commissioners: Keogh
Cifuentes
Court
Ridgeway

Summary

The ACCC has decided 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 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 Banking Code changes are to come into effect on 1 March 2020.

Authorisation is subject to conditions, which broadly require:

- the ABA to report to the ACCC on informal overdrafts that occur in certain circumstances without customers' agreement, any change in the number of banks offering basic bank accounts, steps taken by banks to identify customers eligible for basic accounts, and the uptake of these accounts.
- banks not to charge interest on informal overdrafts, or alternatively to refund any interest charged on informal overdrafts on basic accounts held by eligible customers, and to take proactive steps to contact customers potentially eligible for basic accounts.

The ACCC considers that these conditions will ensure that the public benefits associated with the ABA implementing Royal Commission recommendations and its other Banking Code changes are likely to result. In particular, there is a likely public benefit from improving the accessibility and affordability of banking services for low income customers and providing relief from default interest for farmers in times of drought and other natural disasters. The reporting conditions will also allow the ACCC to assess whether the public benefits arise throughout the term of the authorisation.

The ACCC considers the proposed Banking Code changes are likely to have a limited impact on competition. Any likely public detriment from the changes failing to meaningfully 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, is likely to be addressed by the conditions of authorisation.

The ACCC grants conditional authorisation until 12 December 2024.

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 sought 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 sought authorisation only for these particular amendments, rather than the entirety of the Banking Code. Authorisation extends only to those aspects of the Banking Code for which authorisation has been sought. The ABA advises 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 held by low income customers without prior express agreement with the customer, and
 - banks not charging dishonour fees or overdrawn fees on BBAs, low or no fee accounts held by low income customers, (together the **Basic Accounts 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 (**Agriculture Proposal**).¹
- 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 accounts including BBAs, low fee and no fee accounts (**Eligibility Proposal**), were not specifically recommended by the Royal Commission. The ABA submits these proposed changes to the Banking Code expand on, and provide a more extensive response to, Royal Commission recommendations.²
- 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.³
- 1.6. The Basic Accounts Proposal, Agriculture Proposal, Minimum Standards Proposal and Eligibility Proposal together constitute the **Proposed Conduct**.
- 1.7. The Basic Accounts Proposal will apply to customers who hold either a Commonwealth Seniors Health Card, a Health Care Card, or a Pensioner Concession Card (an **eligible customer**) (although Member Banks can choose to offer these features more broadly).
- 1.8. 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.
- 1.9. 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.
- 1.10. A copy of the application is available on the [ACCC Public Register](#).

The Applicant

- 1.11. 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

¹ Australian Banking Association's application for authorisation AA1000441, 17 May 2019, p. 14.

² Australian Banking Association's application for authorisation AA1000441, 17 May 2019, p. 13.

³ Australian Banking Association's application for authorisation AA1000441, 17 May 2019, p. 13.

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).⁴ 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 Corporation⁵

Interim authorisation

1.12. 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.

1.13. On 11 July 2019 the ACCC granted interim authorisation under subsection 91(2) of the Act⁶ to allow ABA members and the ABA Council to agree to make the relevant

⁴ Australian Banking Association's application for authorisation AA1000441, 17 May 2019, p. 7.

⁵ Australian Banking Association's application for authorisation AA1000441, 17 May 2019, Annexure 1.

⁶ 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>.

amendments to the Banking Code in response to specific Royal Commission recommendations, and for individual ABA members to implement the amendments immediately. Interim authorisation was extended to the ABA's other proposed code changes when the ACCC issued its Draft Determination on 27 September 2019.

- 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.

2. Background

Banking Code

- 2.1. There has been a voluntary banking code of practice in Australia, overseen by the ABA, since 1993. The 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 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 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 are also being considered by ASIC,⁷ and will be incorporated into the Banking Code (subject to approval by 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.⁸ The Hon Kenneth Hayne AC QC was appointed as Commissioner.
- 2.5. The Royal Commission was instructed to examine the banking, financial advice, superannuation, and insurance sectors' culture, governance and remuneration, and the effectiveness of existing legislation, regulation and regulators.⁹
- 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.¹⁰
- 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 recommendations were in relation to banking, financial advice, superannuation, insurance, culture, governance and remuneration, and regulators.

⁷ ASIC is also considering the ABA's other proposed Code changes for which the ABA has not sought ACCC authorisation.

⁸ 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/default.aspx>>

⁹ Interim Report of the Royal Commission into Misconduct in the Banking, Superannuation, and Financial Services Industry, Vol. 1, 2019, Commonwealth of Australia, p.4-5.

¹⁰ Interim Report of the Royal Commission into Misconduct in the Banking, Superannuation, and Financial Services Industry, Vol. 1, 2019, Commonwealth of Australia, p.4-5.

Recommendations the ABA is not seeking authorisation for

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 Banking Code, and designating terms of the Banking Code relating to contracts and guarantees as 'enforceable code provisions'.¹¹

Basic 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.¹²

2.10. In this determination '**basic accounts**' refers to all three types of account, and Basic Bank Account or '**BBA**' refers 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 basic accounts differ between banks. They are often offered according to particular eligibility criteria, generally to customers who hold particular government concession cards or receive particular income support.¹³ However, a number of banks offer BBAs, low or no fee accounts more widely, with no or much wider eligibility criteria. The Royal Commission's 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. The ACCC understands that the Royal Commission's concerns regarding basic accounts related to the availability and features of affordable banking products for low income customers.

Origin of basic accounts and ACCC's previous consideration of BBAs

2.13. Banks began offering basic accounts in the latter half of the 1990s in response to the then-Prices Surveillance Authority's (**PSA**) Inquiry into Fees and Charges imposed on Retail Accounts by Banks and other Financial Institutions and by Retailers on EFTPOS Transactions.¹⁴ The inquiry was conducted in response to concerns by consumer and

¹¹ 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.

¹² 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.

¹³ 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.

¹⁴ 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

welfare groups about access to, and affordability of, retail transaction accounts, including that charging fees on low balance accounts imposed an unreasonable burden on low income customers (particularly when a transaction account was required to receive social security payments).

- 2.14. The idea of a basic account 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 account to assist policy debate on providing such an account.¹⁵ 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 account 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 Banking Code, the ABA announced a 'BBA initiative'.¹⁶ The basis on which banks offer BBAs and compete in relation to these products is discussed further at paragraphs 4.46 – 4.52 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 BBAs.¹⁷
- 2.17. The ACCC issued a Draft Determination proposing to deny the 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 by individual banks 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.¹⁸
- 2.18. The ABA's 2002 proposal differs from its current proposal in a number of ways, including that the current proposal sets a higher minimum standard than under the 2002 proposal, but unlike the 2002 proposal it does not require Member Banks 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). As such there is not the same concern about the minimum standards setting a lower 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.¹⁹ Banks may also charge interest on the overdrawn amount while it remains overdrawn.

¹⁵ Australian Bankers' Association application for authorisation A30214 draft determination, dated 16 December 2002, p. 6, available: [ACCC public register](#).

¹⁶ Australian Bankers' Association application for authorisation A30214, dated 20 May 2002, available: [ACCC public register](#).

¹⁷ Australian Bankers' Association application for authorisation A30214 draft determination, dated 16 December 2002, p. 8, available: [ACCC public register](#).

¹⁸ Australian Bankers' Association application for authorisation A30214 draft determination, dated 16 December 2002, available: [ACCC public register](#).

¹⁹ 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.

- 2.20. 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.
- 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.²⁰ 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. On receiving the application, the ACCC invited submissions from a range of potentially interested parties including industry associations, consumer organisations, financial counselling organisations (including rural), and state and federal government departments and regulators. Further submissions were invited in response to the Draft Determination and proposed conditions of authorisation. All public submissions are available at the [ACCC Public Register](#).
- 3.3. The ACCC received six public submissions from interested parties prior to issuing its Draft Determination, which are discussed in the [ACCC's Draft Determination](#).²¹ The ACCC received seven public submissions after the Draft Determination, which primarily responded to the ACCC's proposed conditions of authorisation, including two from the Applicant.²²
- 3.4. Three joint submissions from the Consumer Action Law Centre, the Financial Rights Legal Centre and Financial Counselling Australia (**joint submission**) strongly supported the proposed conditions of authorisation. They requested clarifications to the Banking Code in relation to eligibility criteria for basic accounts to ensure it was clear that eligibility was not limited to individuals holding concession cards.²³
- 3.5. The joint submission also raised concerns regarding:
- the ABA's proposal to delay the implementation of the ban on interest for informal overdrafts and that banks should be given three months to refund interest, submitting that this would cause some consumers to experience further financial harm.²⁴
 - the ACCC's proposal to reduce the number of data points for informal overdraft reporting, submitting that the scope to reduce informal overdrafts in the future will remain limited as long as data is not being collected on their types and causes.²⁵

²⁰ Interim Report of the Royal Commission into Misconduct in the Banking, Superannuation, and Financial Services Industry, Vol. 1, 2019, Commonwealth of Australia, p. 262.

²¹ Available at the [ACCC Public Register](#). See sections 3.1 to 3.9 of the [Draft Determination](#).

²² Available at the [ACCC Public Register](#).

²³ Submission from Consumer Action Law Centre, the Financial Rights Legal Centre and Financial Counselling Australia, 10 October 2019, p. 1.

²⁴ Submission from Consumer Action Law Centre, the Financial Rights Legal Centre and Financial Counselling Australia, 31 October 2019, p. 1-2.

²⁵ Submission from Consumer Action Law Centre, the Financial Rights Legal Centre and Financial Counselling Australia, 31 October 2019, p. 2.

- the ABA’s characterisation that codes of conduct approved by ASIC under the *Corporations Act 2001* (Cth) for the financial services sector are limited to setting standards of practice for banks and informing customers of their rights, such that it would not be appropriate for the Banking Code to commit banks to taking proactive steps to identify potentially eligible customers. The joint submission considers this kind of obligation is well within the scope of the Banking Code, citing ASIC regulatory guidance that a code is “essentially a set of enforceable rules that sets out a progressive model of conduct and disclosure for industry members” and “the primary role of a financial services sector code is to raise standards.”²⁶
- 3.6. Legal Aid Queensland, the Australian Financial Complaints Authority (**AFCA**) and David Tennant made submissions in support of the proposed conditions.²⁷
 - 3.7. The AFCA, while noting that the decision to offer basic bank accounts is a commercial decision for banks, submitted it supported “appropriate measures to maintain the current availability of BBAs”.²⁸
 - 3.8. The joint submission and Mr Tennant raised concerns that Indue Ltd, the Cashless Debit Card (**CDC**) provider, is not a signatory to the Banking Code, and will therefore not be subject to the conditions of authorisation. The ACCC notes Indue Ltd is not a member of the ABA, and the terms on which CDCs are offered are outside the scope of this authorisation, and therefore fall outside of the scope of the ACCC’s consideration of this application for authorisation.
 - 3.9. A pre-decision conference was not called in response to the Draft Determination.
 - 3.10. Public submissions from the ABA and interested parties and ACCC information requests to the ABA are on the [ACCC Public Register](#).
 - 3.11. Issues raised by interested parties and the ABA are discussed in the assessment section of this Determination.

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.

²⁶ Submission from Consumer Action Law Centre, the Financial Rights Legal Centre and Financial Counselling Australia, 31 October 2019, p. 2-3.

²⁷ Submission from Australian Financial Complaints Authority, 11 October 2019, p. 1; Submission from David Tennant, 8 October 2019, p. 1; Submission from Legal Aid Queensland, 8 October 2019, p. 1.

²⁸ Submission from Australian Financial Complaints Authority, 11 October 2019, p. 2.

- 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.²⁹
- 4.5. Aside from the supply of loans to farmers, the Proposed Conduct relates specifically to the supply of basic accounts to low income customers. The scope of the relevant market submitted by the ABA – retail transaction banking services – is broader. 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 for low income customers, not all retail transaction banking services are likely to be a close substitute for the supply of basic accounts, due to the fees which may be associated with some accounts. Indeed, the relative unsuitability of other forms of account to concession card holders was recognised by the Royal Commission and was the basis for making recommendations specifically relating to basic accounts.³⁰
- 4.6. For this reason the ACCC considers that the relevant areas of competition are likely to be those for:
- the supply of basic accounts 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.³¹
- 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 accounts and agricultural loans, including whether or not to implement Royal Commission recommendations in relation to informal overdrafts and dishonour fees on basic accounts 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,³² the ACCC considers that a legislative or other regulatory response would be likely, in the absence of ABA

²⁹ Australian Banking Association's application for authorisation AA1000441, 17 May 2019, p.18.

³⁰ See Interim Report of the Royal Commission into Misconduct in the Banking, Superannuation, and Financial Services Industry, Vol. 1, 2019, Commonwealth of Australia, p. 260; Final Report of the Royal Commission into Misconduct in the Banking, Superannuation, and Financial Services Industry, Vol. 1, 2019, Commonwealth of Australia, p. 91.

³¹ Australian Banking Association's application for authorisation AA1000441, 17 May 2019, p. 29.

³² The Hon Josh Frydenberg MP, Taking action on the Banking, Superannuation & Financial Services Royal Commission – implementation roadmap, 19 August 2019: <<http://ministers.treasury.gov.au/ministers/josh-frydenberg-2018/media-releases/taking-action-banking-superannuation-financial>>

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 accounts is not required for the ABA and its members to jointly promote basic accounts 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.*³³

- 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 objective of recommendation 1.8 to remove financial barriers to the access of banking services
 - 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 drought or other natural disaster
 - i) increased certainty for farmers in drought or other natural disaster.³⁴
- 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.
- 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

³³ 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.

³⁴ Australian Banking Association's application for authorisation AA1000441, 17 May 2019, p. 2-3, 18-19 & 21.

financial hardship experienced by farmers in drought- and natural-disaster-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, some of the public benefits listed at 4.13 above will be illusory and unlikely to arise in practice. The ACCC has therefore decided to impose conditions of authorisation to address its concerns. Further discussion of the ABA's proposals, the ACCC's concerns, and the conditions of authorisation, is below.

Basic Accounts Proposal

Royal Commission's recommendations

- 4.17. The Royal Commission recommended that banks should not offer informal overdrafts on basic accounts held by low income customers 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.³⁵
- 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 loan and the associated fee will cause hardship.³⁶
- 4.19. The Royal Commission's recommendation regarding informal overdrafts was also due to concerns that customers were not aware that informal overdrafts 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.³⁷
- 4.20. The Royal Commission was similarly concerned with the ability for dishonour fees to mount up over time.³⁸
- 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.'³⁹

³⁵ 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.

³⁶ 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.

³⁷ 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.

³⁸ Interim Report of the Royal Commission into Misconduct in the Banking, Superannuation, and Financial Services Industry, Vol. 1, 2019, Commonwealth of Australia, p. 262.

³⁹ 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.

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 held by an eligible customer without express agreement from the account holder. However, under the ABA's proposal, banks would still be able to allow informal overdrafts where it is 'impossible' or 'reasonably impractical' for the banks to prevent them. The ABA advises these exceptions are:
- holding deposits by merchants
 - telecommunication system outages, and
 - offline transaction and payment network outages.⁴⁰
- 4.23. The ABA's proposal differs from the Royal Commission's recommendation, which did not contain any exceptions.
- 4.24. The ABA also proposes not to charge overdrawn fees or dishonour fees on basic accounts where they are held by an eligible customer. However, the ABA proposal would still allow banks to charge interest on the amount in debit including in circumstances where the customer was not aware that they had been provided, and inadvertently made use of, an informal overdraft.

Condition of authorisation – Basic Accounts Proposal

- 4.25. Taking into account submissions and information received from interested parties and the ABA prior to, and following, the release of the Draft Determination, the ACCC has decided to impose conditions requiring:
- a. Member Banks not to charge interest on informal overdrafts on basic accounts held by eligible customers where the customer has not expressly agreed to the overdraft, or to refund any interest that is charged in these circumstances, and
 - b. the ABA to provide a report to the ACCC, for publication on the public register, of the percentage of the total number of basic accounts held by eligible customers which have been overdrawn (and which remain overdrawn after the bank's batch payment and dishonour processing completes) without the account holder's agreement, and how many times (on average) these accounts have been overdrawn.

Why are the conditions necessary?

- 4.26. The ACCC considers conditions are necessary to ensure the claimed public benefits associated with the Basic Accounts Proposal, including improving the accessibility and affordability of banking services for low income customers, arise in practice. More specifically, the ACCC notes that the Royal Commission did not specify exceptions to its recommendation to ban informal overdrafts on basic accounts held by low income customers, 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.
- 4.27. While the ACCC accepts that there will be circumstances in which informal overdrafts are 'impossible' or 'reasonably impractical' to prevent, it is concerned that it is not

⁴⁰ Australian Banking Association submission in response to ACCC request for information, dated 11 September 2019, p. 2-3.

currently able to assess how often the exception will occur. The ACCC's reporting condition will enable the ACCC to assess the extent of the exceptions, and whether the authorisation is achieving the claimed public benefits flowing from addressing the harms identified by the Royal Commission.

- 4.28. The ACCC is also concerned that under the ABA's proposal, Member Banks would remain free to charge interest on informal overdrafts that the customer has not requested and may not have been aware that they had been provided.
- 4.29. 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, particularly when interest rates are as high as 20 per cent. Further, given that the Royal Commission recommended there not be informal overdrafts at all on basic accounts, the ACCC considers it is appropriate to prohibit banks from charging interest on informal overdrafts or to require the repayment of any interest charged to ensure the claimed public benefits arise, except in circumstances where the customer has expressly sought an informal overdraft facility on their basic account.
- 4.30. The ABA submitted that the ACCC's reasons for imposing a condition in relation to interest on informal overdrafts were flawed on the basis that:
- the proper application of the authorisation test should not involve the weighing of the consequence of not doing some further conduct – such as not charging interest – that is not the subject of the application, and
 - the proposal outlined in the ABA application does effectively address the harms identified by the Royal Commission as the key harm identified by the Royal Commission was in relation to overdrawn fees.
- 4.31. As noted above, the Royal Commission was not only concerned with the hardship caused to low income consumers from overdrawn fees, it was also concerned about the harms that arise when customers are charged fees for informal overdrafts that they did not know they had been offered or made use of.⁴¹ The ACCC considers that absent the condition, these harms are likely to still occur due to interest effectively functioning as a fee for the use of the informal overdraft which the customer has not consented to.
- 4.32. Interested party submissions in response to the Draft Determination were in favour of the proposed conditions, submitting that they would:
- benefit consumers in vulnerable circumstances
 - enable effective assessment of the claimed public benefits
 - increase transparency and improve access to basic accounts, and
 - ensure the Banking Code more closely aligns with Royal Commission recommendations.

⁴¹ 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.

Changes to conditions since the Draft Determination

Reporting on informal overdrafts

- 4.33. The ACCC is requiring the ABA to report on a narrower set of data points than proposed in the Draft Determination, based on ABA feedback that:
- compliance with the proposed condition in the Draft Determination would place a considerable burden on Member Banks
 - Member Banks vary in their capacity to deal with the requested data points
 - no Member Banks have automated systems to process all of the data points, and
 - the condition should not extend to reporting on steps taken to reduce informal overdrafts occurring as the types of overdrafts in question are those that are 'reasonably impossible or impractical to prevent.'⁴²
- 4.34. The ACCC is not requiring the ABA to report on instances where a basic account held by an eligible customer and subject to the special features is overdrawn but the account is not overdrawn after the bank's batch payment and dishonour processing completes. The ABA submits that in these circumstances, customers are not ordinarily charged a fee and/or interest. The ABA submits an example of this might be where a direct debit is processed close in time, but prior to, the processing of the deposit of a customer's salary into their account. Any overdraft would be quickly remedied by the crediting of the salary amount, and hence would not ordinarily have resulted in any fee or charge.⁴³
- 4.35. The condition requires that any overdraft which is not quickly remedied or reversed such that a fee or interest would be applied, must be included in the data reported to the ACCC.
- 4.36. The ACCC's principal concern in imposing the condition is to ensure that this aspect of the authorisation is achieving the ABA's claimed public benefit of implementing the Royal Commission recommendations given the ABA is implementing the recommendation with exceptions. The ACCC is satisfied that the reporting condition will allow the ACCC to make this assessment. In particular, the ACCC is satisfied that the information to be provided will enable the ACCC to assess the frequency and extent of informal overdrafts, which will in turn help the ACCC to assess if further information or action is required.

Prohibition or refunding of interest

- 4.37. The prohibition on banks charging interest on informal overdrafts, or being required to repay any interest charged, will not commence until March 2021. The ACCC notes feedback from the ABA⁴⁴ that significant system changes would be required for the implementation of this condition, and that these changes will involve long lead times given the scope of change required, and the already significant number of regulatory changes banks are implementing.⁴⁵

⁴² Australian Banking Association submission in response to ACCC request for information, dated 31 October 2019, p. 3-4.

⁴³ Australian Banking Association supplementary submission dated 15 November 2019, p. 1.

⁴⁴ Australian Banking Association submission in response to ACCC request for information, dated 31 October 2019, p. 1-2.

⁴⁵ Australian Banking Association submission in response to ACCC request for information, dated 31 October 2019, p. 4.

Eligibility Proposal

- 4.38. As noted, the ABA proposes to define minimum eligibility criteria for basic accounts based on whether a person holds a relevant current government 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 account).
- 4.39. 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”⁴⁶ as being among those who may find particular benefit from a basic account.
- 4.40. Interested parties have raised concerns that the wording in the proposed Banking Code:
- was ambiguous as to whether Member Banks are able to offer basic accounts to a broader range of customers than those defined as eligible in the Banking Code, and submitted that the Banking Code explicitly state that the products can be offered to a broader range of customers, and
 - enables banks that offer BBAs to avoid providing information on these accounts to customers who would be eligible (instead offering ‘low fee’ accounts).
- 4.41. In its submission of 31 October 2019, the ABA proposed amendments to the Banking Code to address these concerns. In particular:
- paragraph 47 will be amended to clarify that Member Banks may offer basic accounts to a broader range of customers than those defined as an ‘eligible customer’ within the meaning of the Banking Code, and those accounts may offer some or all of the special features listed in paragraph 47 and/or 44B of the Banking Code.
 - the obligation in paragraph 44 for banks to provide information about banking services with low or no standard fee accounts includes an obligation to inform customers about basic bank accounts.
- 4.42. The ACCC considers that these changes clarify that banks remain free to decide on an individual basis to offer BBAs, low and no fee accounts to a broader range of consumers than those defined as an ‘eligible customer’ under paragraph 47 the Banking Code. The full revised text for paragraphs 44 and 47 is at Schedule 1 to this Determination.

Minimum Standards Proposal

ABA’s proposal

- 4.43. 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:

“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.”

⁴⁶ Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, *Final Report*, vol 1, 4 February 2019, p19.

4.44. 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.

Condition of authorisation

4.45. The ACCC has decided to impose a condition requiring the ABA to provide the ACCC with a report, annually, for publication on the ACCC's public register, listing the names of Member Banks that have started, continued and ceased to offer BBAs.

Why is the condition necessary?

4.46. The ACCC is concerned that the number of available BBAs in the market may decrease, rather than increase, over time as Member Banks may cease 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.

4.47. The ACCC notes the ABA's submission that ten of the ABA's 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.

4.48. 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, and
- 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.

4.49. Given the incentive for banks to offer BBA products (as opposed to low or no fee accounts with lower standards) is historically aligned to community and government expectation, it is not certain that Member Banks will continue to offer BBAs over time.

4.50. Concerns have also been raised by interested parties that Member Banks should be required to provide a BBA as defined, to prevent Member Banks from avoiding BBA requirements by instead offering low or no fee accounts with weaker standards.

4.51. 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). In the event that some of these banks withdraw their BBAs, the benefits claimed in relation to the Minimum Standards Proposal may not arise or may be reduced. This would be concerning in circumstances where the ABA claims to be expanding on and going beyond Royal Commission recommendations through its Minimum Standards Proposal.

4.52. The ACCC considers the condition will provide transparency over the availability of BBAs and therefore is likely to provide an incentive for Member Banks to continue to offer these.

Changes to condition since the Draft Determination

4.53. In its Draft Determination the ACCC proposed a condition requiring all Member Banks which currently offer a BBA product to continue to do so for the period of the authorisation.

4.54. Interested parties including CALC, FRLC, FCA, AFCA, LAQ and Mr Tennant supported the condition proposed by the ACCC.

4.55. However, the ABA opposed the proposed condition and submitted that:

- to offer a BBA is a commercial decision for individual banks and the condition would be unusual in mandating the offering of this product, and on only a subset of its members,
- 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, and
- the ACCC's objectives would be achieved by a reporting requirement under which the ABA reported annually to the ACCC of any reduction (or increase) in the number of Member Banks offering BBAs.

4.56. The ABA also advised that Member Banks that currently offer BBAs have no intention of ceasing to offer these products.

4.57. The ACCC notes that, if there was a decrease in the number of banks offering BBAs such that BBAs became less available than they currently are, this may amount to a material change in circumstances which could prompt a review of the authorisation by the ACCC. The ACCC notes that banks currently offering BBAs represent 85% of the market when considering total deposits held by all banks, and as such BBAs are reasonably available to eligible customers. However a reduction in the number of banks offering BBAs may make BBAs less available to eligible customers.

4.58. The ACCC may also consider making a recommendation to Government that it legislate a requirement that all banks offer BBAs, in the event that BBAs become less available over time.

Content of the minimum standards

4.59. In response to concerns raised by consumer groups, the ABA has amended the proposed wording of the Banking Code in order to:

- provide that eligible customers who hold a BBA can choose between a debit card or a scheme debit card (either Visa Debit or Master Card Debit, as offered by the Member Bank)
- specify that eligible customers who hold a BBA can choose to receive free statements monthly or at longer intervals.

- 4.60. Consumer groups also raised other concerns with the minimum standards for BBAs proposed by the ABA, specifically:
- all ATM transactions should be free (including those from ATMs owned and operated by third parties)
 - it should be clarified which ‘ancillary services’ may be charged for under the proposed standard (including whether online transactions processed in Australia would be free).
- 4.61. In relation to ATM fees, the ABA advised that requiring banks to subsidise ATM services would disincentivise banks from participating in ATM networks, that fees charged by third party ATM operators make 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. Consistent with the view expressed in the Draft Determination, the ACCC welcomes the ABA’s modifications in relation to scheme debit and free periodic statements, and does not intend to impose conditions or require further changes to the specified minimum standards for BBAs. The full revised text of paragraph 44B is at Schedule 1 to this Determination.

Identification of potentially eligible customers for basic accounts

- 4.64. As noted, the ABA’s amendments to the Banking Code to include uniform procedures for banks to identify potentially eligible customers were not an aspect of the Royal Commission recommendations. However, the Royal Commission heard evidence regarding difficulties with the accessibility of these accounts for vulnerable customers,⁴⁷ and raised concerns that the Banking Code placed the onus on customers to self-identify as vulnerable before they were offered suitable banking products.⁴⁸ The Royal Commission recommended that provision should be made in the 2019 Banking Code to require banks to work with customers who live in remote areas, or who are not adept in using English, to identify a suitable way for those customers to access and undertake their banking.⁴⁹ The Royal Commission also emphasised the importance of continuing to develop innovative solutions to address barriers to access for vulnerable customers.⁵⁰
- 4.65. The ABA is proposing to have the following procedures for Member Banks to make customers aware of basic accounts:
- a) if someone self identifies as a low income earner, Member Banks will provide information on available basic accounts

⁴⁷ Royal Commission into Misconduct in the Banking, Superannuation, and Financial Services Industry, Transcript of Nathan Boyle, 3 July 2018, p. 3721.

⁴⁸ Final Report of the Royal Commission into Misconduct in the Banking, Superannuation, and Financial Services Industry, Vol. 1, 2019, Commonwealth of Australia, p. 89.

⁴⁹ Final Report of the Royal Commission into Misconduct in the Banking, Superannuation, and Financial Services Industry, Vol. 1, 2019, Commonwealth of Australia, p. 90.

⁵⁰ Final Report of the Royal Commission into Misconduct in the Banking, Superannuation, and Financial Services Industry, Vol. 1, 2019, Commonwealth of Australia, p. 93

- 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 accounts,
- c) a general commitment to raising awareness about basic accounts and providing easily accessible information, and
- d) training staff to recognise potentially eligible customers.⁵¹

Condition of authorisation

4.66. Taking into account submissions and information received from interested parties and the ABA prior to, and following the release of, the Draft Determination,⁵² the ACCC has decided to impose conditions requiring:

- a) Member Banks to take reasonable steps to identify and contact existing customers who are, or may be, eligible for a basic account and who do not already hold a basic account, and
- b) the ABA to provide, twice during the period of authorisation, a written report to the ACCC for publication on the ACCC's public register, providing information on actions taken by each of the Member Banks to make existing customers who may be eligible for a basic account aware of their potential eligibility and the special features of these accounts, and reporting the number of basic accounts opened for eligible customers.

Why are the conditions necessary?

4.67. The ACCC is concerned that the current provisions in the Banking Code are not sufficient to ensure that customers are made aware of the availability of basic accounts. If customers are not aware of such accounts, they are unlikely to switch to a basic account and may instead stay in a fee-paying account, which may be less suited to their needs. The ACCC therefore considers a condition is required to ensure that the claimed public benefits associated with the Basic Accounts and Minimum Standards Proposals, including improving the accessibility and affordability of banking services for low income customers, arise in practice.

4.68. The ABA opposes the condition, submitting:

- the ABA and Member Banks are currently working to promote the availability of basic accounts through marketing, and
- Member Banks are already taking proactive steps, but that it is difficult without the cooperation of relevant government departments.⁵³

4.69. However, the ACCC considers it is important that conditions impose obligations on banks to proactively identify potentially eligible customers, and that banks report on their activities to do so, in order to ensure the claimed benefits arise. As noted, given the nature of BBAs, community and government pressure rather than commercial pressure appears to be a factor in banks offering BBAs to eligible customers, as these accounts are less profitable than fee paying accounts, which customers are likely to hold if they are not aware of the existence of BBAs.

⁵¹ Australian Banking Association's application for authorisation AA1000441, 17 May 2019, p. 12-15.

⁵² Available at the [ACCC Public Register](#)

⁵³ Australian Banking Association response to ACCC Draft Determination, 15 October 2019, p. 7.

4.70. Interested party submissions in response to the Draft Determination were in favour of the proposed conditions:

- the joint submission strongly supported the proposed conditions, submitting that it was crucial the proposed data was provided and reported publicly for transparency.⁵⁴
- Legal Aid Queensland supported the proposed conditions, submitting that consumers in difficult circumstances are often unaware of the existence of BBAs or their eligibility for them, and that banks have access to data which would allow them to identify which consumers would benefit from a BBA.⁵⁵
- Mr Tennant submitted that consumers should not carry the responsibility for self-identifying as eligible, and suggested the following further conditions of authorisation:
 - inform every consumer applying for a new account of its availability and inquire as to eligibility, and
 - note at the point of application for a new account if the banks does not offer a BBA.⁵⁶

4.71. The ACCC notes the revised Banking Code as proposed by the ABA imposes obligations on Member Banks to inquire as to the eligibility of customers opening new accounts, and does not consider it necessary to impose specific proactive measures for contacting eligible customers.

Changes to conditions since the Draft Determination

4.72. The ACCC has made changes to the proposed conditions and associated reporting requirements from what was proposed in the Draft Determination in response to ABA feedback regarding its ability to comply with the proposed conditions.

4.73. In relation to the reporting condition, the ABA submitted that its members would only be able to comply with two out of the three limbs of the ACCC's proposed reporting condition, specifically:

- a) actions taken by Member Banks to identify and contact existing customers potentially eligible for BBAs, and
- b) how many BBAs were opened (including by existing customers).⁵⁷

4.74. The ABA opposed the third limb requiring reporting on actions taken by banks to address technical issues with government departments, submitting that this was not appropriate and could impede discussions with these agencies due to concerns around confidentiality, both from industry and Commonwealth Government perspectives.

4.75. The ACCC has decided not to require reporting on discussions with government agencies.

4.76. The ABA noted that there are technical issues that need to be overcome in identifying eligible customers, which may make it difficult for some banks to comply with this

⁵⁴ Submission from Consumer Action Law Centre, Financial Rights Legal Centre, and Financial Counselling Australia in response to Draft Determination, 10 October 2019, p. 2; Submission from Australian Financial Complaints Authority in response to Draft Determination, 11 October 2019, p. 2

⁵⁵ Submission from Australian Financial Complaints Authority in response to Draft Determination, 8 October 2019, p. 3.

⁵⁶ Submission from David Tennant in response to Draft Determination, 8 October 2019, p. 2.

⁵⁷ Australian Banking Association response to ACCC Draft Determination, 15 October 2019, p. 7.

condition. The ACCC considers these technical difficulties could be minimised by not requiring the use of data analysis and that an overarching obligation to proactively contact eligible customers and publicly report on the steps taken is sufficient to ensure eligible customers are made aware of basic accounts.

Agriculture Proposal

- 4.77. 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.
- 4.78. The Royal Commission recommended that there be no charging of default interest on loans secured by agricultural land in an area declared to be affected by drought or other natural disaster.⁵⁸ This was 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. The Royal Commission 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.⁵⁹ The Royal Commission 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.⁶⁰
- 4.79. 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 another 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.
- 4.80. The ABA submits that the proposed amendments go further than the Royal Commission recommendations, as they will apply to farming operations even where the loan 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.⁶¹

⁵⁸ Final Report of the Royal Commission into Misconduct in the Banking, Superannuation, and Financial Services Industry, Vol. 1, 2019, Commonwealth of Australia, p. 103.

⁵⁹ Final Report of the Royal Commission into Misconduct in the Banking, Superannuation, and Financial Services Industry, Vol. 1, 2019, Commonwealth of Australia, p. 103.

⁶⁰ Final Report of the Royal Commission into Misconduct in the Banking, Superannuation, and Financial Services Industry, Vol. 1, 2019, Commonwealth of Australia, p. 102-103.

⁶¹ Australian Banking Association's application for authorisation AA1000441, 17 May 2019, p. 15

- 4.81. 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.⁶²
- 4.82. 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.
- 4.83. The ACCC was concerned that, while the ABA 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.
- 4.84. In response, the ABA proposed a further amendment to the Banking Code 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).
- 4.85. The ACCC welcomes the ABA's willingness to address this issue and considers that the ABA's amended wording addresses its concerns in relation to the Agriculture Proposal.

ACCC conclusion on public benefit

- 4.86. 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 drought and other natural disaster, and
 - increased certainty for farmers in drought and other natural disasters.
- 4.87. The ACCC considers that the ABA's proposals relating to basic accounts 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 of the average BBA offering
 - 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.

⁶² Australian Banking Association's application for authorisation AA1000441, 17 May 2019, p. 18

4.88. 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 accounts held by low income customers, in circumstances where the customer has not expressly agreed to an informal overdraft
- failing to take adequate steps to ensure banks continue to offer BBAs to low income customers, and
- failing to impose any obligation for Member Banks to proactively identify and contact customers who may potentially be eligible for basic accounts on a regular basis.

4.89. The ACCC considers that unless these concerns are addressed, key aspects of the claimed public benefits are unlikely to arise in practice. The ACCC has therefore decided to impose a number of conditions of authorisation to address its concerns (outlined below).

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

- a number of the conditions require Member Banks to continue to take actions they are already undertaking (or that many of the banks are taking),
- reporting on the number and circumstances of informal overdrafts is to be required once, 12 months after the revised Banking Code comes into effect, and reporting on identification of and contact with potentially eligible customers is to be required twice during the period of authorisation, and
- input from and engagement by the ABA was invited by the ACCC to ensure the conditions were 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. Feedback from the ABA has been taken into account in drafting the conditions.

Public detriments

4.91. 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.*⁶³

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

- banks do not compete with each other in respect of BBA features considered to be minimum community standards

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

- Member Banks are free to compete in offering additional features in relation to basic accounts
- Member Banks also have incentive to make constant improvements to features and terms of basic accounts 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.

4.93. The ACCC considers that the Proposed Conduct is likely to have limited impact on competition in relation to basic accounts and agricultural loans because:

- it appears that there is limited competition between banks in relation to basic accounts offered to low income customers, and that banks appear to be motivated by reasons of social responsibility rather than profit in offering and improving these products, as discussed above. The ACCC also considers that the proposed minimum standards do not set a lower benchmark for features across all BBAs on these accounts compared to the features currently offered on BBAs individually.
- 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.

4.94. However, the ACCC considers that there is likely to be public detriment, 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.

4.95. 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 has decided to grant conditional authorisation.

Balance of public benefit and detriment

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

4.97. The ACCC considers that without the conditions, 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.

4.98. 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.

4.99. The Act 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.

4.100. The ACCC has decided to address its concerns relating to the Proposed Conduct by imposing conditions.

4.101. Therefore, for the reasons outlined in this Determination, the ACCC is satisfied, subject to the conditions of authorisation, the Proposed Conduct is likely to result in a public benefit that would outweigh the likely public detriment.

Length of authorisation

4.102. The Act allows the ACCC to grant authorisation for a limited period of time.⁶⁴ 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.

4.103. 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.

4.104. In considering the appropriate period of authorisation, the ACCC notes that:

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

⁶⁴ Subsection 91(1)

4.105. The ACCC has therefore decided to grant conditional authorisation for a period of five years.

5. 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.

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 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 conditions, the ACCC has decided to grant authorisation.

Conduct which the ACCC has decided to authorise

- 5.6. The ACCC has decided 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 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.
- 5.8. The authorisation AA1000441 is subject to the following conditions:

Informal Overdrafts

- a. Except where a customer has expressly agreed to an informal overdraft on their basic account, Member Banks must not charge interest on informal overdrafts on basic accounts, held by eligible customers and subject to the special features in paragraph 47 of the Banking Code (as outlined in Schedule 1), or where it is impossible or reasonably impractical to prevent such a charge:
 - i. Member Banks that use manual processes for refunding interest charges must refund any such interest charge within three calendar months of the interest charge to the customer, or
 - ii. Member Banks that have automated systems for refunding interest charges must refund any such interest charge within one calendar month of the interest charge to the customer.

Each Member Bank must comply with the above condition as soon as is reasonably practical, and by no later than 1 March 2021.

- b. The ABA must provide a written report to the ACCC by the dates specified in condition 5.8(f) below, for publication on the ACCC's public register, providing the following information:
- i. for each Member Bank, the percentage of the total number of accounts, held by eligible customers and subject to the special features in paragraph 47 of the Banking Code (as outlined in Schedule 1), which have been overdrawn (and which remain overdrawn after the bank's batch payment and dishonour processing completes such that the bank would have, but for the special features in paragraph 47 of the Banking Code, charged a fee and/or interest on the account) during the period specified in condition 5.8(f) below, without the account holder's express agreement, and
 - ii. for each Member Bank, how many times (on average) such accounts have been overdrawn during the period specified below.

Proactive identification of eligible customers, existing and future:

- c. Member Banks must, periodically and at least once annually, take reasonable steps to identify and contact existing customers who are, or may be, eligible for a basic account pursuant to the definition in paragraph 47 of the Banking Code (as outlined in Schedule 1) and who do not already hold accounts with the special features in paragraph 47 of the Banking Code.
- d. The ABA must provide a written report to the ACCC for publication on the ACCC's public register by the dates specified in, and for the period specified in, condition 5.8(f) below, providing the following information:
- i. actions taken by each of the Member Banks to make existing customers who may be eligible for an account under paragraph 47 of the Banking Code (as outlined in Schedule 1) aware of their potential eligibility and the special features of those accounts in compliance with condition 5.8(c) above, and
 - ii. the number of basic accounts, subject to the special features in paragraph 47 (as outlined in Schedule 1) of the Banking Code, that were opened for eligible customers under paragraph 47 by each of the Member Banks.

Basic bank accounts

- e. The ABA must provide a written report to the ACCC by the dates specified in, and for the period specified in, condition 5.8(f) below, for publication on the ACCC's public register, providing the names of Member Banks that have commenced, continued and ceased to offer BBAs.

Dates for reporting

- f. The above written reports must be received by the ACCC as follows:
- On or before 31 October 2021 for the period 1 September 2020 to 31 August 2021 (inclusive), in relation to information outlined at paragraphs b, d and e above,
 - On or before 31 October 2022 for the period 1 September 2021 to 31 August 2022 (inclusive), in relation to information outlined at paragraph e above,

- On or before 31 October 2023 for the period 1 September 2022 to 31 August 2023 (inclusive), in relation to information outlined at paragraph e above,
- On or before 31 October 2024 for the period 1 September 2021 to 31 August 2024 (inclusive), in relation to information outlined at paragraph d above, and
- On or before 31 October 2024 for the period 1 September 2023 to 31 August 2024 (inclusive), in relation to information outlined at paragraph e above.

Alterations to reporting conditions

- g. The reporting conditions set out at conditions 5.8 (b), (d), (e) and (f) above may be subject to exemptions or variations where requested by the ABA in writing and approved by the ACCC in writing and published on the public register.

5.9. The ACCC has decided to grant authorisation AA1000441 until 12 December 2024.

6. Date determination comes into effect

5.10. This determination is made on 21 November 2019. If no application for review of the determination is made to the Australian Competition Tribunal it will come into force on 13 December 2019

If you receive a Commonwealth pension or concession, we will give you information about our low or no fee accounts

44. If you apply for a new transaction account, we will ask you if you have any of the following government cards. If you tell us that you have one of these cards, then we will give you information about any basic bank accounts or other banking services we offer that have low or no standard fees and charges (see Chapter 16):
- a) a Commonwealth Seniors Health Card;
 - b) a Health Care Card; or
 - c) a Pensioner Concession Card.

Basic Accounts

44B. Basic accounts have, at a minimum:

- No account keeping fees
- Free periodic statements (you can choose monthly or longer intervals)
- No minimum deposits (except that you may be required to have your government benefit payment paid into this account)
- Free direct debit facilities
- Access to your choice of a debit card (such as eftpos), or a scheme debit card offered by us (such as Visa Debit or Mastercard Debit) at no extra cost
- Free and unlimited Australian domestic transactions*

*Note that you may be charged for certain ancillary services. For example, bank cheques, telegraphic transfers, or transactions at ATMs owned and operated by third parties.

Special features for basic, low or no-fee accounts for eligible customers

47. If you are an eligible customer and you ask for a basic account, or a low or no fee account, we will offer you one of these accounts that has the special features listed in this paragraph and, if we offer basic accounts, will also have the features listed in paragraph 44B. The special features are:
- a) No informal overdrafts (except where it is impossible or reasonably impractical for us to prevent your account from being overdrawn)
 - b) No dishonour fees; and
 - c) No overdrawn fees.

You are not obliged to accept our offer of an account with the special features. You may request (or we may offer you) other accounts (including other basic, low fee or no fee accounts) which do not have some or all the special features, or may have additional features.

We may also offer accounts with some or all of the special features, (and / or the features in paragraph 44B), to individuals who are not eligible customers under this Chapter

For the purposes of this Chapter:

'eligible customer' means an individual that is not a business who holds a current government concession card listed in paragraph 44