



Determination

Application for minor variation of authorisation AA1000609
lodged by
Customer Owned Banking Association
in respect of
certain provisions of its Code of Practice
Authorisation number: AA1000609

Date: 6 October 2023

Commissioners: Keogh
Brakey
Carver
Lowe

Summary

The ACCC has decided to vary authorisation AA1000609, which was granted in 2022 to the Customer Owned Banking Association (COBA) and its current and future members in respect of certain provisions of its Customer Owned Banking Code of Practice (the Code). In broad terms, the provisions relate to commitments by signatories to limit fees and charges and enhance protections offered to customers and guarantors, including in cases of financial hardship.

COBA's members are mutual banks, credit unions and building societies that provide retail banking services and in some cases business banking services in competition with national and regional banks.

The minor variation sought is to amend paragraph 91 of COBA's Code which deals with declining credit card transactions that would result in the customer exceeding their credit limit by more than 10%. Currently, paragraph 91 of the Code states that such transactions will be dishonoured. COBA advises that in implementing the Code its members have identified some scenarios in which credit card scheme card rules deny them the opportunity to undertake real time vetting of credit card transactions, which is required to comply with paragraph 91 of the Code. To address this, the proposed minor variation provides that these transactions will be declined *where this option is available under credit card scheme rules*.

The ACCC considers that the proposed changes to paragraph 91 of the Code are minor and are unlikely to reduce the extent to which the relevant provisions of the Code are likely to result in a net public benefit. With or without proposed change signatories to the Code will only be able to decline a credit card transaction that would result in the customer exceeding its credit limit by more than 10% where this option is available under card scheme rules. The proposed changes more clearly reflect the circumstances in which Code signatories will decline a credit card transaction that would result in the customer exceeding their credit limit by more than 10%.

In 2022, the ACCC granted authorisation until 19 August 2027. Authorisation AA1000609, as varied by this determination, will remain in effect until 19 August 2027.

1. The application for minor variation

- 1.1. On 27 July 2023, the Customer Owned Banking Association (**COBA**) lodged an application for a minor variation to authorisation AA1000609 granted by the Australian Competition and Consumer Commission (the **ACCC**). This application for a minor variation was made under subsection 91A of the Competition and Consumer Act 2010 (Cth) (the Act).
- 1.2. The ACCC granted authorisation AA1000609 on 9 August 2022 until 19 August 2027. The authorisation enables COBA, and its current and future members, to implement certain provisions of its Customer Owned Banking Code of Practice (**the Code**) relating to commitments by signatories to limit fees and charges and enhance protections offered to customers and guarantors including in cases of financial hardship (**the Authorised Conduct**).¹
- 1.3. Compliance with the Code is voluntary for COBA members and COBA members may remain members without subscribing to the Code.

¹ See ACCC Final determination AA1000609 for further details about the Authorised Conduct.

1.4. The provisions in the Code that are authorised relate to commitments to:

- not charge, or only to charge at cost, a fee, cost or interest (or rebate such fee or interest charged) in connection with the relevant products or services provided by COBA member institutions
- dishonour credit card transactions that would result in a customer exceeding their credit limit by more than 10%
- not require customers experiencing financial difficulty to access their superannuation to meet their loan obligations
- restrict the circumstances under which the customer's debt will be sold, particularly when the customer is experiencing financial difficulty or if the debt arose from violence or abuse
- not take enforcement actions against the customer (including small businesses) or guarantor in connection with the customer's loan in certain circumstances, and
- not include a general material adverse change default clause in small business loan contracts.

1.5. COBA is seeking a minor variation to the Authorised Conduct to amend paragraph 91² of the Code to address a potential conflict with card scheme rules which has arisen as the Code has been given effect to. The proposed changes to paragraph 91 are presented below with strikethrough text for deletion and underlined text for new wording:

We will ~~dishonour~~ decline a credit card transaction that would result in you exceeding your credit limit by more than 10% where this option is available under card scheme rules. (This commitment does not restrict us from ~~dishonouring~~ declining a credit card transaction that would result in any exceeding of your credit limit. We may consider that to do so would be consistent with our prudential obligations.)

(the Proposed Variation).

1.6. COBA submits that the aim of paragraph 91 of the Code is to prevent customers from incurring excessive credit card debt, which could lead to customer financial hardship and even default. To fulfil this aim, paragraph 91 requires Code subscribers to dishonour (decline) a credit card transaction that would result in the customer exceeding their credit limit by more than a 10% buffer. COBA submits that this provision is in line with the Australian Securities and Investments Commission's recommendation in Report 580 Credit Card Lending in Australia.

1.7. COBA submits that the ability of Code subscribers to comply with paragraph 91 of the Code depends on banks having systems in place to:

- identify in real time customer credit card transactions that would result in the customer exceeding their credit limit by more than the 10% buffer (real time vetting of pending credit card transactions), and
- stop a credit card transaction from proceeding in these circumstances.

1.8. COBA submits that Code subscribers' systems currently have this capability. However, in the course of implementing the Code, Code subscribers identified some limited scenarios in which credit card scheme rules deny them the opportunity to undertake

² Code paragraph 91 was paragraph 57 in COBA's original application for authorisation – the Applicants submit that the Code was re-organised and re-numbered after the ACCC granted authorisation to improve readability.

real time vetting of credit card transactions. In these scenarios, there is risk that subscribing banks will breach paragraph 91.

- 1.9. Therefore, the minor variation proposed by COBA will reflect situations where Code subscribers are not able to undertake real time vetting of credit card transactions. COBA submits that this would have the advantage for customers of more realistically establishing the extent to which they can rely on their bank (Code subscriber) to ensure that their credit card transactions do not exceed their credit limit by more than the permitted 10% buffer.
- 1.10. COBA submits that credit card scheme rules are extremely detailed and complex. Credit card scheme rules are standard form and apply to all banks issuing the card and all merchants accepting the card as a payment instrument. COBA submits that Code subscribers are not able to negotiate amendments to the rules. COBA provided examples, by reference to the Visa Core Rules and Visa Product and Systems Rules, of where card scheme rules create difficulties with compliance with paragraph 91 of the Code as currently drafted. Specifically:
 - Some card schemes permit some merchants to proceed without first obtaining authorisation from the card issuer (for present purposes, the Code subscriber) where the credit card transaction is for a small amount (i.e. less than the card scheme-approved floor limit for the merchant type).
 - Sometimes merchants obtain the card issuer's authorisation for a credit card transaction, and then are permitted by scheme rules to rely on that initial authorisation to subsequently add to the amounts charged to the consumer. This commonly happens in cases such as credit card payments for hotel accommodation after which additional charges are imposed (e.g. mini-bar or hotel room damage) or credit card car hire payments where the hire company later imposes additional charges (e.g. for petrol, parking fine or damage to the car).
 - Sometimes normal credit card transaction processes are disrupted by information technology system outages. If the merchant's systems are offline, this may mean that it must process a Deferred Authorisation Request and subsequently request an authorisation within a specified timeframe.
 - The Visa Rules permit differences between the authorising amount and the clearing amount processed by a merchant by up to 20% in specified circumstances.
- 1.11. COBA submits that recognising that these issues arise as consequences of the practical operation of card scheme rules, the Proposed Variation is intended to qualify paragraph 91 of the Code so that it applies only where the option of credit card transaction decline is available under the relevant card scheme rules.
- 1.12. The ACCC sought clarification about the change from 'dishonour/dishonouring' to 'decline/declining'. COBA stated that the terms may be used interchangeably but that with respect to credit cards, 'decline' is the word that is used, including in credit card scheme rules and by the banking industry when referring to credit card transactions.

2. Background – the Applicant

- 2.1. COBA is the industry association for Australia's customer owned banking institutions (mutual banks, credit unions and building societies). COBA provides representation and advocacy for its member institutions and provides advisory and support services such as in the area of fraud and financial crimes.

2.2. There are currently 57 subscribers to the Code.

3. Consultation

- 3.1. For the purpose of consultation, the ACCC made an initial assessment that the application is capable of being a 'minor' variation consistent with the definition of a minor variation in the Act.³
- 3.2. The ACCC then invited submissions from a range of potentially interested parties including major competitors, relevant industry associations and state and federal government stakeholders. No submissions were received.

4. ACCC assessment

- 4.1. Under section 91A, the ACCC may grant an application for minor variation of an authorisation if it is satisfied that:
 - the proposed variation is minor, and
 - the variation would not be likely to reduce the extent to which the benefit to the public from the authorisation outweighs any anti-competitive detriment caused by the authorisation (the minor variation test).

The proposed variation is minor

- 4.2. The ACCC is satisfied that the proposed variation is minor. The ACCC considers that the Proposed Variation will not involve a material change in the effect of the authorisation that was originally granted. The ACCC considers that the proposed variation to paragraph 91 of the Code would not change the nature of the Authorised Conduct in a meaningful way.
- 4.3. The ACCC understands that during the course of implementing the Code, the potential conflict with card scheme rules has become apparent. The ACCC considers that the Proposed Variation reflects what happens in practice, without undermining the objectives of the Code.

No reduction in the net public benefit of the arrangements

- 4.4. In its 2022 determination, the ACCC concluded that the relevant provisions in the Code were likely to result in a net public benefit. In particular, the ACCC considered that the relevant provisions in the Code would be likely to result in public benefits arising through the reduced fees which would improve the accessibility and affordability of basic banking services for customers of COBA members who subscribe to the Code, enhanced protection for customers and guarantors and, to the extent that compliance with the Code enhances the product offering of COBA members, enhanced competition by COBA members with other participants in the banking sector.
- 4.5. The ACCC does not consider that the Proposed Variation is likely to impact the public benefits from the authorisation. Code subscribers will still be required to have systems in place that allow them to undertake real time vetting of credit card transactions.
- 4.6. However, with or without the Proposed Variation, signatories to the Code will only be able to decline a credit card transaction that would result in the customer exceeding its

³ Section 87ZP(1) of the Act

credit limit by more than 10% where this option is available under card scheme rules. The Proposed Variation aligns the relevant code provisions with this and provides a clearer description of the circumstances in which a credit card transaction that would result in the customer exceeding its credit limit by more than 10% would not be declined.

- 4.7. In its 2022 determination the ACCC concluded that it was unlikely that the Code would have a significant detrimental impact on competition or result in any other material public detriment. This conclusion was informed by the following:
- COBA's members represent a relatively low share of consumer transaction accounts, mortgage lending and small business lending in Australia.
 - The Code is voluntary and COBA members may remain members without subscribing to the Code.
 - The Code has a complaints handling and enforcement mechanism with more serious complaints able to be referred to appropriate dispute resolution channels and regulators.
- 4.8. For the reasons set out at paragraphs 4.4 and 4.5, the ACCC considers that the Proposed Conduct Change will not impact any of the factors set out above or result in any increase in likely public detriments.
- 4.9. With respect to the change in terminology from 'dishonour' to 'decline' the ACCC considers that the proposed change aligns the Code with industry parlance and is unlikely to have any impact on the net public benefits from the Authorised Conduct.
- 4.10. For these reasons, the ACCC considers that the Proposed Variation will not be likely to reduce the extent to which the benefit to the public from the authorisation outweighs any anti-competitive detriment caused by the authorisation.

5. Determination

- 5.1. The ACCC is satisfied that the variation is minor as defined by section 87ZP of the Act.
- 5.2. The ACCC is also satisfied that the public benefit test in section 91A(4)(b) of the Act is met. That is, the variation would not result, or would not be likely to result, in a reduction in the extent to which the benefit to the public of authorisation AA1000609 outweighs any detriment to the public caused by the authorisation.
- 5.3. Pursuant to section 91A(3) of the Act, the ACCC makes this determination varying authorisation AA1000609 to enable COBA and its current and future members to vary the Relevant Provisions of the COBA Code as authorised by the ACCC on 9 August 2022 with the following amendment:

Paragraph 91:

We will decline a credit card transaction that would result in you exceeding your credit limit by more than 10% where this option is available under card scheme rules. (This commitment does not restrict us from declining a credit card transaction that would result in any exceeding of your credit limit. We may consider that to do so would be consistent with our prudential obligations.)

- 5.4. Authorisation AA1000609, as varied, will remain in place until 19 August 2027.

5.5. This determination is made on 6 October 2023. If no application for a review of the determination is made with the Australian Competition Tribunal, the determination will come into force on 28 October 2023.