



Determination

Application for authorisation AA1000482
lodged by
the Australian Banking Association
in respect of
financial relief programs for customers experiencing financial difficulties
as a result of COVID-19
Authorisation number: AA1000482

14 August 2020

Commissioners: Rod Sims, Mick Keogh, Delia Rickard, Sarah Court, Stephen Ridgeway

Summary

The ACCC grants conditional authorisation to enable the Australian Banking Association's member banks and third party suppliers or agents (where relevant) to discuss, agree, and give effect to arrangements between them that have the purpose of:

- deferring or varying loan facilities for customers,
- supporting government initiatives to provide emergency relief for individuals and businesses, or
- ensuring continued high levels of customer service and accessibility.

The ACCC grants authorisation only insofar as authorised conduct is directed to providing relief to bank customers who are suffering hardship (including reduced levels of service or reduced access to banking services), or may suffer such hardship without that conduct, as a result of the COVID-19 pandemic and associated government measures.

The ACCC grants authorisation to the ABA subject to two conditions that require:

- The ABA to notify the ACCC where coordination involves third party suppliers and/or agents that compete with each other or with Member Banks, and
- The ABA to notify the ACCC of any other arrangement arising from the authorised conduct prior to its implementation.

The participating banks are not authorised to coordinate on any element of prices for any service or product on which they compete.

The ACCC grants conditional authorisation until 14 August 2021.

This determination is made on 14 August 2020, if no application for review of the determination is made to the Australian Competition Tribunal, the authorisation will come into effect on 5 September 2020.

1. The application for authorisation

- 1.1. On 30 March 2020, the Australian Banking Association (**ABA**) on behalf of its current and future member banks (including third party suppliers and/or agents, where relevant) and their subsidiary banks, lodged application for authorisation AA1000482 with the Australian Competition and Consumer Commission (the **ACCC**).
- 1.2. The ABA is seeking authorisation to allow its current and future member banks to coordinate for the purpose of deferring or varying loan facilities for customers, supporting government initiatives to provide emergency relief for individuals and businesses, or ensuring continued high levels of customer service and accessibility. The ABA is seeking authorisation for a period of 12 months from the ACCC's grant of final authorisation. This application for authorisation AA1000482 was made under subsection 88(1) of the *Competition and Consumer Act 2010* (Cth) (the **Act**).
- 1.3. The ACCC may grant authorisation which provides businesses with legal protection for arrangements that may otherwise risk breaching competition law but are not harmful to competition and/or are likely to result in overall public benefits.

- 1.4. The ABA also requested interim authorisation to enable the participating banks to engage in the proposed conduct while the ACCC is considering the substantive application. On 30 March 2020, the ACCC granted interim authorisation under subsection 91(2) of the Act subject to two conditions, discussed at paragraph 1.11.
- 1.5. The conditional interim authorisation granted on 30 March 2020 remains in place until it is revoked or the date the ACCC's final determination comes into effect.

The Applicants

The Australian Banking Association

- 1.6. The ABA is an association of 22 banks in Australia (**Member Banks**) with the purpose of improving public awareness and understanding of the industry's contribution to the economy and ensuring Australia's banking customers continue to benefit from a stable, competitive and accessible banking industry.
- 1.7. A list of the ABA's current Member Banks can be found at **Annexure 1**.
- 1.8. ABA Member Banks can opt in or out of any particular financial relief program or other arrangement arising from the Proposed Conduct at any point during the period of authorisation.

The Proposed Conduct

- 1.9. The ABA is seeking authorisation to enable current and future ABA members to discuss, agree, and give effect to any contract, arrangement or understanding between them (and potentially third-party suppliers and/or agents where required to achieve the purpose of the relevant relief measures) to benefit their customers that has the purpose of:
 - Deferring or varying loan facilities for customers in any sector of the economy or any customer segment impacted by COVID-19;
 - Supporting government initiatives to provide emergency fiscal stimulus and cost relief for individuals and businesses; or
 - Ensuring continued high levels of customer service and access to banking services across the broadest possible range of times and locations,(the **Proposed Conduct**).
- 1.10. Authorisation of the Proposed Conduct will permit the Member Banks to discuss and work together during the period of authorisation to:
 - Discuss and share information relating to:
 - The uptake by customers of the notified small business package (discussed at paragraph 2.2-2.5) and any other hardship or financial relief programs operated by individual Member Banks;
 - The incidence of customer financial difficulties;
 - Which customers, classes of customers or sectors would benefit most from further financial relief programs; and

- The short term availability of staff and suppliers and ability of Member Banks (including their agents and/or suppliers, where relevant), to operate in particular locations at particular times during the COVID-19 crisis;
- Reach agreement:
 - Between Member Banks as to further financial relief programs; and
 - Between Member Banks and their agents and/or suppliers where relevant, as to logistics for service delivery and banking service accessibility;

To be implemented by Member Banks, and their agents and/or suppliers where relevant;

- Implement, or otherwise give effect to, those agreements; and
- Engage with financial services regulators to ensure continued compliance with regulatory requirements and the protection of the Australian financial system.

1.11. The ABA proposes that the authorisation of the Proposed Conduct be granted subject to two conditions:

Proposed supplier condition

Where the Proposed Conduct involves:

- a) an agreement, arrangement or understanding between two or more Member Banks and one or more supplier(s) or agent(s); and
- b) the supplier or agent competes with Member Banks in relation to any relevant products or services, or where two or more suppliers or agents party to the agreement, arrangement or understanding compete with each other in relation to any relevant products or services,

(Proposed Supplier Conduct).

- c) the ABA (on behalf of Member Banks) must seek the approval of the ACCC by sending an email to adjudication@accc.gov.au, identifying the supplier(s) and/or agent(s) that will be party to the Proposed Supplier Conduct, detailing the Proposed Supplier Conduct and the reasons for the Proposed Supplier Conduct;
- d) if the ACCC approves the Proposed Supplier Conduct, the supplier(s) and/or agents(s) will receive the protection of the interim or final authorisation in relation to the Proposed Supplier Conduct, subject to any conditions imposed by the ACCC, from the time that the ABA is notified of the ACCC's decision;
- e) when considering the Proposed Supplier Conduct, the ACCC may in its absolute discretion, refuse to approve the Proposed Supplier Conduct or impose conditions which restrict the type or extent of the Proposed Supplier Conduct;
- f) unless the ACCC approves the Proposed Supplier Conduct, the supplier(s) and/or agent(s) will not have the protection of the interim or final authorisation in relation to the Proposed Supplier Conduct.

Discussions between two or more Member Banks and a supplier and/or agent that do not amount to a contract, arrangement or understanding will not require ACCC approval.

Particular Conduct condition

- a) The ABA must (on behalf of Member Banks) notify the ACCC of any financial relief program or other arrangement arising from the Proposed Conduct (**Particular Conduct**), prior to the Particular Conduct being implemented, or otherwise given effect to.
 - b) The ABA must provide notification to the ACCC as soon as practical after Member Banks have reached agreement on the terms of the Particular Conduct, but not less than 24 hours before the Particular Conduct is implemented, or otherwise given effect to. The notification to the ACCC must include at a minimum:
 - i. a description of the Particular Conduct, including a description of the customer group/s relevant to the Particular Conduct;
 - ii. the Member Banks which, at the time of the notification, have agreed to implement the Particular Conduct; and
 - iii. when the Particular Conduct is intended to be implemented.
- 1.12. The Proposed Conduct will not involve any contract, arrangement, understanding or determination between the Member Banks of any element of prices for any service or product.
- 1.13. The Proposed Conduct is intended to be temporary and is not intended to endure beyond the COVID-19 pandemic, or where it relates to financial relief, beyond the impact of the crisis (at the latest the end of the period of authorisation).
- 1.14. Where any financial relief program involves a deferral of a loan, Member Banks will not apply or require a payment of the capitalised interest in a lump sum at the end of the deferral period.
- 1.15. Any customer of a Member Bank that is entitled to relief under a Member Bank's existing hardship programs or the authorised Small Business Relief Notification retains that entitlement in addition to any entitlement arising from the Proposed Conduct.
- 1.16. Any financial relief program that arises in the context of the Proposed Conduct is intended to be a minimum level of relief. Member Banks may independently elect to implement more extensive relief measures.

Interim authorisation

- 1.17. The ABA requested interim authorisation to enable Member Banks to engage in the Proposed Conduct while the ACCC is considering the substantive application.
- 1.18. On 30 March 2020, the ACCC granted interim authorisation (the **Interim Authorisation**) under subsection 91(2) of the Act.¹ Interim authorisation will remain in place until the date the ACCC's final determination comes into effect or until the ACCC revokes the interim authorisation.
- 1.19. Interim authorisation was granted due to the urgent need for relief in light of the rapidly deteriorating global and Australian economic climate. COVID-19 and accompanying government measures resulted in a reduction in supply and demand for goods and services, significant deterioration in cash flow, increases in debt and tightening of credit, giving rise to the need for a timely response by financial institutions to implement relief packages for Australian businesses and consumers.

¹ See ACCC decision of 30 March 2020 available at <https://www.accc.gov.au/public-registers/authorisations-and-notifications-registers/authorisations-register/australian-banking-association-financial-relief-programs>

- 1.20. The Interim Authorisation was granted subject to the two conditions discussed at paragraph 1.11.
- 1.21. The full Interim Authorisation decision document is available on the [ACCC's public register](#).

2. Notifications under the condition of interim authorisation

- 2.1. The ABA has, subject to the Particular Conduct Condition, notified the ACCC of three financial relief programs arising from the Proposed Conduct. More information on each notification can be found on the [ACCC's public register](#). The list of Member Banks who are participating in each notified financial relief program can be found at **Annexure 2 (Participating Member Banks)**.

Small business relief package notification

- 2.2. On 29 April 2020, the ABA notified the ACCC of an agreement whereby its current and future Member Banks would agree to and implement a support package for small business customers experiencing financial difficulties as a result of COVID-19 (the **small business relief package**). The small business relief package was previously implemented under a separate interim authorisation granted to the ABA on 20 March 2020.²
- 2.3. The small business relief package:
- Includes deferral of principal and interest repayments for all term loans and retail loans of a small business customer for up to 6 months (interest will be capitalised); and
 - Is open to all current small business customers of a Participating Member Bank, on an opt-in basis where the customer has advised that its business is affected by COVID-19, in all sectors of the economy, and on an opt-in basis.
- 2.4. The definition of “small business” draws on the definition provided by the Banking Code of Practice. A business qualifies as a “small business” if, at the time of applying for the relief it has less than \$3 million total debt to all credit providers.
- 2.5. The following additional definitions apply:
- “current small business customer” means small businesses who have an existing indebtedness with the Participating Member Bank and who were less than 90 days past due in terms of their repayments on their existing facilities at the beginning of the repayment deferral.
 - “opt-in basis” means that small business customers will be required to contact Participating Member Banks to indicate that they would like their term and retail loan account principal and interest repayments to be deferred on application from the customer.
 - “capitalising the interest” means that Participating Member Banks will, based on existing loan terms in the context of customers’ requirements, either:

² This package is similar to the conduct the subject of an application for authorisation lodged by the ABA on 19 March 2020 and which was subsequently withdrawn on 29 April 2020. More information on the ABA's withdrawn application for the small business relief authorisation can be found on the ACCC's authorisations register.

- Extend the term of the loan repayment to account for the interest incurred during the deferral period and keep the level of repayments following the deferral the same as that the customer had paid prior to deferral; or
- Increase the level of the loan repayments to account for the interest incurred during the deferral period, but keep the term of the loan repayment the same as if the deferral had not occurred.

Supplementary business relief package notification

- 2.6. On 30 March 2020, the ABA notified a supplementary business lending relief package. On 29 April 2020, the ABA provided the ACCC an updated notification of certain members' agreement to implement supplementary support measures for Australian businesses affected by COVID-19 (the **supplementary business relief package**).
- 2.7. Participating Member Banks will continue to offer the supplementary business relief package under this notification in substantively the same way as under the previous notification provided to the ACCC on 30 March 2020. The substantive difference is a change to the definition of a 'current business customer', as a result of subsequent changes by the Australian Prudential Regulation Authority (**APRA**) on its capital treatment of loans that have been granted deferrals. Customers who have already received relief under the original supplementary business relief package will not be impacted by the updates to the notification.
- 2.8. The supplementary business relief package consists of:
- A deferral of principal and interest repayments for all standard form business loans of a business customer for 6 months (interest will be capitalised), and
 - Up to 30 September 2020, or for the period of the loan deferral, whichever is later, Participating Member Banks agree to not enforce business loans for non-monetary defaults, other than as set out in paragraph 80 of the March 2020 Banking Code of Practice.
- 2.9. The supplementary business relief package will be available to all current business customers of Participating Member Banks, in all sectors of the economy, and on an opt-in basis, where:
- The customer has advised that its business is affected by COVID-19,
 - The business has a total business loan facilities of less than \$10 million,
 - The customer was less than 90 days past due in terms of their repayment on their existing facilities at the beginning of the repayment deferral,
 - The business is operated in Australia with less than 20% foreign ownership, and
 - For commercial property customers with total loan facilities less than \$10 million, the customer provides a self-declaration that they will not terminate leases or evict tenants based on non-payment of rent for the period during which the interest is capitalised. On the basis the non-payment of rent is a direct result of the COVID-19 pandemic.

Debit card program notification

- 2.10. On 29 April 2020, the ABA notified the ACCC of an agreement whereby Participating Member Banks agreed to implement a program to fast track the issuing of scheme or dual network debit cards to isolated and vulnerable customers in the Australian community (the **debit card program**). Participating Member Banks have agreed that where they create a new account and issue a scheme or dual network debit card linked to that account, they will treat all customers to whom the cards are issued as being eligible for a basic, low or no fee account as contemplated in Chapter 16 of the Banking Code.
- 2.11. The debit card program is aimed at existing Participating Member Bank customers who use passbook accounts or customers who do not have scheme debit cards. These customers are currently required to enter bank branches to withdraw cash and will typically purchase their goods and services with cash. As a result of COVID-19, these customers may find themselves being isolated and unable to make the necessary payments for their goods and services in person or through online shopping.
- 2.12. The debit card program involves Participating Member Banks:
- Issuing a scheme or dual network debit card linked to an existing passbook account;
 - Issuing a scheme or dual network debit card linked to an existing account where a card has not been issued; and/or
 - Creating a new account and issuing a scheme or dual network debit card.
- 2.13. Participating Member Banks may in some circumstances issue the debit card without contacting the customer before or after the card is issued. Where a card is issued ahead of a customer being contacted, Participating Member Banks require the debit cards to be activated online or by phone.
- 2.14. Participating Member Banks are also able to issue activated scheme debit cards prior to the customer being contacted. However, the ABA has stated that no Participating Member Banks will issue, or plan to issue, activated scheme debit cards without first contacting the customer. If this were to happen, additional security measures will be put in place.

Phase Two COVID-19 assistance measures notification

- 2.15. On 23 July 2020, the ABA notified the ACCC of an agreement whereby Participating Member Banks would implement Phase Two COVID-19 assistance measures from late September 2020 to assist customers who had deferred loans but who may still be suffering financial hardship as a result of COVID-19 (**Phase Two Assistance Measures Program**). The Phase Two Assistance Measures Program was developed in response to concerns that a number of industry and government assistance measures (such as loan deferrals and JobKeeper payments) would come to an end at the same time, around late September 2020, and may cause significant financial difficulty for Participating Member Bank customers and the economy more broadly.
- 2.16. The Phase Two Assistance Measures Program involves Participating Member Banks assessing the financial position of each individual customer currently in a repayment deferral to assist them in a way that best addresses their individual circumstances. The

Phase Two Assistance Measures Program will involve the assessment and assistance of three broad categories of customers:

- **Customers who can return to full repayments**

Customers who can return to full repayments at the end of their six-month deferral period will be expected to do so.

- **Customers with ongoing financial difficulty, but with prospects of returning to a financially viable position**

Customers with reduced incomes and/or ongoing financial difficulty due to COVID-19 will be contacted as they approach the end of their deferral period, to ensure that wherever possible they can return to repayments potentially through a restructure or variation of their loan. If these arrangements are not in place at the end of a six-month deferral, customers may be eligible for an extension of their deferral for up to four months.

Participating Member Banks may also grant new deferrals under the existing packages for businesses, as well as to eligible non-business customers impacted by COVID-19 in respect of mortgages and other personal loans.

Any extension of deferrals or the granting of a deferral to a customer who contacts their bank for the first time on or after 1 October 2020 will not be automatic. An extension of deferral will only be provided to customers who, in each Participating Member Bank's opinion, are in genuine need. Participating Member Banks will undertake appropriate credit assessments to establish whether an extension is appropriate for the particular customer given their circumstances. This consideration will include whether there is a reasonable prospect of the customer being able to repay the loan on appropriate terms at the end of the deferral period. For many customers, the period of any extended deferral may be less than four months.

- **Customers who continue to be financially impacted and whose recovery to a financially viable position is unlikely**

Customers who continue to be financially impacted by COVID-19 during or beyond any deferral period and who are unlikely to recover financially will be assisted through each Participating Member Bank's hardship process to determine the best long-term solution for their individual circumstances.

3. Background

- 3.1. The ACCC recognises the significant challenges being faced by the economy as a result of the COVID-19 pandemic. As the government continues to enforce social distancing measures and travel restrictions, various sectors within the economy are suffering from a sharp decline in revenue while continuing to service their existing financial obligations. Some economic effects may last beyond the period of the pandemic itself. These effects in a number of sectors have given rise to the need for relief packages from both government and industry.
- 3.2. The ongoing loss of employment and demand for products and services offered by businesses is making it increasingly difficult for individuals and businesses to continue to operate on a business as usual basis and to meet their financial obligations.
- 3.3. Small businesses play an important role in the Australian economy, employing around 5 million (or 45% of) working Australians and paying more than \$166b in wages and salaries each year. The Participating Member Banks' relief programs are intended to

allow all businesses that fall within that definition to access relief should they meet the other eligibility criteria.

4. Consultation

- 4.1. A public consultation process informs the ACCC's assessment of the likely public benefits and detriments from the Proposed Conduct.
- 4.2. The ACCC invited submissions from a range of potentially interested parties including relevant industry associations or peak bodies, consumer groups, and relevant regulatory bodies.³
- 4.3. The ACCC received five submissions from interested parties in relation to the application. Two of the submissions received were from the Consumers Federation of Australia (**CFA**) and three submissions were from ABA Member Banks (Commonwealth Bank of Australia (**CBA**), ING Bank (**ING**) and ANZ Bank (**ANZ**)).
- 4.4. Submissions received in response to the ABA's application for authorisation were generally supportive of the Proposed Conduct.
- 4.5. The CFA submitted that it is generally supportive of the Proposed Conduct and the explicit reference to the Proposed Conduct being for the benefit of customers. In addition, the CFA submitted that the ABA should consult with consumer representative groups when designing financial relief programs. Furthermore, the ACCC should update the conditions in the interim authorisation and the final authorisation to require the ABA to include a summary of the consumer representative consultation that has been undertaken and any views provided in this consultation. In addition, the CFA also submitted that the ACCC should impose a condition to require the ABA to provide periodic reports to the ACCC, such as on the number of customers assisted and the type of assistance being provided. The CFA also submitted that the Approval Condition should explicitly require the publication of any agreement that is subject to the Approval Condition, to be consistent with the Notification Condition. Finally, the CFA submitted that the ABA may have failed to notify the ACCC of an agreement between Member Banks on how financial relief measures would be represented on consumer credit reports.
- 4.6. Submissions from the ABA and some Member Banks outlined the benefits of the Proposed Conduct and an update of the customer take-up of the various relief packages and support measures.
- 4.7. ANZ submitted that they have implemented a number of relief packages and support measures for customers during the COVID-19 pandemic. On 20 March 2020, ANZ announced its Commercial COVID-19 relief package to allow eligible business customers to defer their loans for a six month period. In addition, ANZ had independently offered its customers other support measures, including:
 - Six month deferrals on homes loans, personal loans and credit cards
 - Overdraft limit increases for small business customers
 - Overdraft for customers eligible for JobKeeper to assist them with cash flow prior to ATO payments becoming available
 - Loans under the Coronavirus SME Guarantee Scheme (under which the government will guarantee 50% of new loans issued to eligible customers).

³ Public submissions received as part of the consultation process are available from the ACCC's public register www.accc.gov.au/authorisationsregister.

- 4.8. As at 24 April 2020, ANZ had received assistance requests for around 105,000 home loan and 42,000 business loan repayment deferrals, these deferrals represent lending assistance of \$36 billion and \$7.5 billion respectively. To meet increased demand for assistance, ANZ has taken steps to process applications more quickly, such as introducing processes to allow home loan customers to accept assistance offers online. Finally, ANZ submitted that the Proposed Conduct has resulted in significant public benefits, including by offering a consistent message to customers, industry wide communications and flow on effects such as the quick implementation of the debit card program.
- 4.9. The CBA submits that the Proposed Conduct has enabled the industry to respond with the necessary speed and flexibility required to provide financial support and certainty to both retail and business bank customers during the COVID-19 pandemic. Pursuant to the debit card program notification, the CBA has now delivered Debit MasterCards to passbook customers to enable them to pay for goods electronically, instead of withdrawing cash in a CBA branch to make purchases in person. In addition, the CBA has deferred loan repayments for over 70,000 small business customers, providing cash flow relief of up to \$500 million per month. The CBA submits that the interim authorisation granted has allowed the banking industry to deliver critical financial assistance to customers impacted by COVID-19 as widely, consistently, equitably and quickly as possible. Therefore, providing a level of certainty and clarity to bank customers that would otherwise be absent if there was no Proposed Conduct.
- 4.10. ING submitted that there have been no unintended downstream benefits or detriments emerging from implementation of the Proposed Conduct, and whilst there was an initial surge in applications, there is now no backlog and application volumes have slowed.
- 4.11. In addition to the submissions from ANZ, CBA and ING, the ABA submits that Member Banks generally have experienced significant uptake of the small business relief program and the supplementary relief packages, and are in the process of issuing hundreds of thousands of debit cards to vulnerable and isolated Australians. At 13 May 2020, Member Banks had issued 205,787 loan deferrals under the small business and supplementary business relief packages to the value of \$56,700,871,324.

ABA response to submissions received

- 4.12. In response to the CFA, the ABA submits that a condition requiring consumer group consultation is not required, given the extent of consultation that occurs as a matter of course and that a requirement of this type may, in circumstances where financial relief programs are required urgently, hamper Member Banks' ability to move quickly to support customers. In addition, the ABA noted that they have established a Consumer Outcomes Group (**COG**), a joint bank and consumer representative forum for discussing and responding to existing and emerging issues to improve consumer outcomes in retail banking. The COG is made up of seven bank representatives and seven representatives for consumers. The ABA submits that they will continue to engage with the COG as part of the development of any further relief programs.
- 4.13. In response to the CFA's concerns regarding the ABA's potential failure to notify the ACCC of an arrangement made under the Interim Authorisation, the ABA submitted that Member Banks do not compete with one another in the reporting to credit bureaus of credit information. As a result, the ABA is of the view that any arrangement relating to credit reporting does not involve conduct that would require authorisation from the ACCC.
- 4.14. In response to the CFA's submission that the ABA should be required to provide periodic reports to the ACCC, the ABA also submitted that it has developed a COVID-

19 webpage on the ABA website for the purposes of educating customers and providing transparency to the public on relief measures available from Member Banks. The webpage provides a description of the key relief measures available, a link to Member Banks' websites for further information on individual support programs and statistics on Member Banks activity during the COVID-19 pandemic, updated on a weekly basis. The ABA submitted that any further reporting requirements would be onerous, without providing additional transparency.

- 4.15. Public submissions by the ABA and interested parties are on the Public Register for this matter.

Submission in response to draft determination

- 4.16. The ACCC received one submission in response to the draft determination made on 1 July 2020 from the CFA. The CFA reiterated its general support of the draft determination, but raised a number of points for ACCC consideration.
- 4.17. The CFA raised concerns regarding the scope of the debit card program (discussed at paragraph 2.10). The CFA submitted that it is not clear why the debit card program extends to issuing activated scheme debit cards prior to the customer being contacted. The CFA notes that some banks are in fact contacting customers to ask them if they would like a debit card, as opposed to issuing an unrequested card. The CFA submits that this is best practice. Further, the CFA submit that only 2% of customers are accepting offers for scheme debit cards, indicating most recipients of an unrequested card do not want the card.
- 4.18. The CFA also stressed the importance of public transparency as to the outcomes of the ACCC's authorisation. The CFA noted that on 8 July 2020 the ABA announced the Phase Two Assistance Measures Program, and that the "agreement has been reached pursuant to the interim authorisation granted by the ACCC."⁴ The CFA noted that the ACCC's public register did not, at the time the submission was made, refer to the Phase Two Assistance Measures Program. As a result, the CFA queried whether the ACCC notification arrangements are working as intended.
- 4.19. Finally, the CFA welcomed the initiative of the ABA in developing a COVID-19 webpage for the purposes of educating customers and providing transparency as to the relief measures available from Member Banks. The CFA noted that the statistical information found on this webpage is helpful, particularly the information on mortgage and business loan deferrals. However, the CFA noted that the statistical information should be made bank-specific, in order to assist with the public evaluation of the benefits of the authorised conduct. Finally, the CFA noted the limited information available on the debit card program, and requested that the ACCC ask the ABA for further information regarding the number of debit cards that have been issued without prior contact with the recipient, and the number of these debit cards that were pre-activated.

ABA response to submissions received following draft determination

- 4.20. In response to the CFA's submission, the ABA clarified certain aspects of the debit card program (discussed at paragraph 2.10). The ABA clarified that no Participating Member Banks have issued, nor intend to issue, pre-activated cards to customers who have not been contacted prior to the card being issued. The ABA submitted that all Participating Member Banks will only provide activated cards to customers who have

⁴ Australian Banking Association, 8 July 2020: <https://www.ausbanking.org.au/banks-enter-phase-two-on-covid-19-deferred-loans/>, last accessed 28 July 2020.

opted in. The ABA submits that the debit card program notification mentioned pre-activated cards because under the relief approved by ASIC, there was a scenario in which Participating Member Banks could issue activated cards to customers who had not been contacted prior to the card being issued. The ABA submitted that under such scenario, additional safeguards would be implemented prior to the Participating Member Banks issuing the cards.

- 4.21. The ABA submitted that the reference to an ABA COG meeting where the CFA indicates that it was told that only 2% of customers are accepting cards was in the context of an initial pilot that one Member Bank was running. Participating Member Banks have reported significant uptake of the debit card program. As at 28 July 2020, Participating Member Banks have issued more than 177,590 debit cards to vulnerable and isolated Australians, of which approximately 31,349 (approximately 18%) have been activated by the customer.
- 4.22. In response to the CFA's concerns regarding public transparency and the operation of the notification condition under the interim authorisation, the ABA clarified the process by which the Phase Two Assistance Measures Program was notified. The ABA submitted that under the interim authorisation they are required to notify the ACCC of any financial relief program or other arrangement within the scope of the interim authorisation as soon as practical after Participating Member Banks have reached agreement on the terms of the conduct, but not less than 24 hours before the conduct is implemented, or otherwise given effect to. The ABA submitted that it has met the notification requirement by notifying the ACCC on 23 July 2020 of the Phase Two Assistance Measures Program that will be implemented in late September 2020. The ABA submitted that the public announcement made on 8 July 2020 was made to assure customers that further measures would be implemented following the impending cessation of initial loan repayment deferrals and the possible winding down of large-scale government support programs, such as JobKeeper. The ABA provided a confidential update to the ACCC ahead of the announcement being made and confirmed with the ACCC that it would submit a notification as required under the interim authorisation as soon as possible. The ABA subsequently submitted the Phase Two Assistance Measures Program notification on 23 July 2020.
- 4.23. In response to the CFA's concerns regarding the availability of information on the ABA's COVID-19 webpage, the ABA submitted that APRA has now developed its own webpage that publishes aggregated data on the loan deferrals from Australia's 20 largest Authorised Deposit-taking Institutions (**ADI**).⁵ The ABA submitted that it has paused the publication of updated statistics on Member Bank activities and has instead included a link to APRA's webpage. Furthermore, the ABA submitted that the data published on APRA's website is a manifestation of the implementation and public benefit of the financial relief programs implemented by Participating Member Banks. The ABA does not consider it appropriate for the ABA to publish confidential statistical information of individual banks.

5. ACCC assessment

- 5.1. The ACCC's assessment of the Proposed Conduct is carried out in accordance with the relevant authorisation test contained in the Act.
- 5.2. The ABA has 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.

⁵ APRA's publication of data is available at: <https://www.apra.gov.au/register-of-authorised-deposit-taking-institutions>

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

- 5.3. To assess the likely effect of the Proposed Conduct, the ACCC will identify the relevant areas of competition likely to be impacted.
- 5.4. The ACCC considers that the relevant areas of competition likely to be affected by the authorisation are:
- The provision of retail banking services to individuals,
 - The provision of banking services to businesses.

Future with and without the Proposed Conduct

- 5.5. 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.⁶
- 5.6. The rationale for Proposed Conduct is closely linked with the impacts of COVID-19 in Australia. The future likelihood and severity of those impacts is uncertain at this point in time. The ACCC notes that, currently, COVID-19 infection rates in Australia are low. However, further outbreaks may occur in Australia and Australian markets (including Australian businesses and consumers) will be impacted by outbreaks in countries that have trade links with Australia. Future government measures to control COVID-19 in Australia and elsewhere will also impact Australian markets.
- 5.7. The ACCC considers that in the absence of the Proposed Conduct, Member Banks would continue to offer separate financial relief packages and other support measures but without standardisation or consistency. For example, the ACCC understands that Member Banks are already individually implementing their existing hardship programs. However, these programs may vary in their terms and implementation. Furthermore, in the absence of the Proposed Conduct, each Member Bank would be required to implement separate communications campaigns regarding access to financial relief packages and other support measures.
- 5.8. The ACCC recognises that there are significant material benefits of the relief measures themselves, including providing financial relief to customers suffering from financial hardship and ensuring customers can still access essential banking services despite self-isolation. However, at least some of these benefits may have been achieved without coordination. The ACCC has not considered it necessary in this case to quantify the extent of any such difference. As a result, the ACCC's assessment of the public benefits and detriments of the authorisation, set out below, has focused on the benefits and detriments arising from the coordination that more clearly would not have arisen absent the Proposed Conduct.

⁶ Re Queensland Independent Wholesalers Ltd (1995) 132 ALR 225; Re Qantas Airways Ltd [2004] ACompT 9;; Re VFF Chicken Meat Growers Boycott Authorisation [2006] ACompT 2; Re Application by Medicines Australia Inc [2007] ACompT 4; Re Macquarie Generation and AGL Energy Ltd [2014] ACompT 1.

Public benefits

5.9. 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.*⁷

5.10. The ACCC has considered the following categories of potential public benefit:

- providing certainty for Member Bank customers regarding the accessibility and availability of financial relief measures and other support measures,
- providing a consistent and extensive industry wide communications plan to be run by the ABA and Member Banks, and
- enabling coordination to allow customers to continue to access high levels of customer service and accessibility at physical bank branches.

Providing certainty for Member Bank customers regarding the accessibility and availability of financial relief measures and other support measures

5.11. The Proposed Conduct provides eligible customers with the certainty that Member Banks will provide a minimum set of meaningful and well defined short-term relief. This certainty for businesses may assist banks' customers stay viable in the short to medium term during the COVID-19 pandemic.

5.12. In support of this benefit, the CBA has submitted that the Proposed Conduct provides bank customers with a level of certainty and clarity regarding the financial assistance that is available to them.

Provide a consistent and extensive industry wide communications plan to be run by the ABA and Member Banks

5.13. The Proposed Conduct will allow for a consistent and extensive communication campaign run by the ABA and Member Banks. A collective communication campaign will be more efficient than multiple communication campaigns implemented by each Member Bank.

5.14. The ABA has already taken a number of marketing and communication initiatives, for example:

- A press conference which led to the Proposed Conduct being the lead news item on Channel Nine News and mentions on all nightly news bulletins.
- Media release to media, also sent to every Australian Parliamentarian, State and Federal,
- Anna Bligh and Member Bank CEO interviews with multiple media outlets,
- National print campaign: full page print ad in every major metro and regional newspaper on 23 March 2020,

⁷ 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.

- National radio campaign: national metro radio campaign in major radio networks on 23 March 2020, and
- Extensive social media campaign: including posts and ads across Facebook, LinkedIn and Twitter.

5.15. The ACCC considers that facilitating a consistent and extensive industry wide communications plan to be run by the ABA and Member Banks which will provide customers with a better understanding of the financial relief packages as they are available and how they can be accessed.

Enabling coordination to allow customers to continue to access high levels of customer service and accessibility at physical bank branches

5.16. The ABA submits that the Proposed Conduct will allow Member Banks to coordinate in relation to the logistics of maintaining the ability of customers across Member Banks (and their agents and/or suppliers, where relevant) to continue to access high levels of customer service and accessibility at different times and across different locations. The ABA submits that arrangements with third party suppliers or providers of services under agency arrangements, where required, will enhance Member Banks' ability to maintain the highest possible level of customer service in the circumstances and improve accessibility of banking services both in terms of time and location.

5.17. To date the ACCC has not been notified of any arrangements under the notification condition for the purpose of allowing customers to continue to access high levels of customer service and accessibility at physical bank branches. However the ACCC considers that, while there remains a risk of further outbreaks of COVID-19 in Australia, there are benefits to Australian bank customers from the Members Banks being in a state of readiness to respond to outbreaks by coordinating to provide high levels of customer service and accessibility to banks. The ability to coordinate in relation to the logistics of maintaining the ability for customers across Member Banks (and their agents and/or suppliers, where relevant) is likely to facilitate access to banking more efficiently and effectively than if Member Banks were implementing measures individually.

ACCC conclusion on public benefit

5.18. The ACCC considers that the Proposed Conduct is likely to result in significant public benefits from:

- Providing certainty to individuals and businesses, including small and medium sized businesses, experiencing financial difficulties by allowing a minimum and consistent set of terms and conditions for all recipients of business financial relief packages and other support measures.
- Providing a consistent and extensive industry wide communications plan by allowing the ABA and Member Banks to coordinate communications and marketing campaigns.
- Enabling coordination to allow customers to continue to access high levels of customer service and accessibility at physical bank branches.

Public detriments

5.19. 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.⁸

- 5.20. Feedback and submissions received in response to the Proposed Conduct, which has been operating under the interim authorisation, have not identified public detriments from the Proposed Conduct to date.
- 5.21. In its submission, the CFA proposed amendments to the existing conditions and a potential additional condition (discussed at paragraph 4.5) to require the ABA to summarise consumer group consultation on any contract, arrangement or understanding reached by Member Banks under the interim authorisation or any final authorisation, and to periodically report to the ACCC on relief provided to Member Bank customers.
- 5.22. The ACCC agrees that consultation with consumer groups could help ensure that relief measures are well targeted and designed. The ACCC encourages the ABA and the Member Banks to undertake such consultation before implementing measures under the authorisation.
- 5.23. However, the ACCC does not propose to amend the conditions in the manner suggested by the CFA. The ACCC notes that the details about relief packages are notified to the ACCC and placed on the ACCC's public register. If there are concerns that any new relief packages that are being agreed to are not for the purpose of providing financial relief measures to customers, then such conduct would be outside the protection of authorisation. In addition, the ACCC notes that the ABA's ongoing engagement with the COG is for the purpose of ensuring that relief measures are for the benefit of consumers and are subject to consumer consultation.
- 5.24. The ACCC notes that arrangements involving competitors in relation to the services they provide is likely to lessen competition relative to a situation where each business individually makes its own decisions. However, the ACCC considers that the Proposed Conduct, for the purpose of providing relief to bank customers who are suffering or may suffer hardship as a result of COVID-19, is likely to result in minimal, if any, public detriment. The potential detriments are minimised by the fact that the Proposed Conduct:
- is a temporary measure,
 - is a voluntary measure,
 - does not extend to Member Banks discussing or agreeing the prices of their various services,
 - only relates to relief measures for customers who are suffering, or who may suffer, hardship as a result of COVID-19, and
 - does not prevent Member Banks from independently offering relief measures to their customers above the minimum terms provided by the Proposed Conduct. For example, some Member Banks have committed to ensuring that customer's credit ratings are not affected by any loan repayment deferrals.

Proposed conditions

- 5.25. The Applicants proposed, and interim authorisation was granted subject to, two conditions, discussed at paragraph 1.11.

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

- 5.26. The ACCC has amended the approval condition outlined at paragraph 1.11 to instead require the ABA to notify the ACCC in the circumstances of both Proposed Supplier Conduct and Particular Conduct. In addition, the authorisation requires any notification of Proposed Supplier Conduct or Particular Conduct to be provided to the ACCC no less than 1 business day before the Proposed Supplier Conduct or Particular Conduct is implemented. Previously, the period was no less than 24 hours.
- 5.27. The ACCC considers the amendments to these conditions are appropriate to assist in the efficient monitoring of the Proposed Conduct and ensuring that any arrangement reached under the Proposed Conduct is for the authorised purpose, and accordingly receives the protection of the interim authorisation or the authorisation.

Balance of public benefit and detriment

- 5.28. For the reasons outlined, the ACCC is satisfied that the Proposed Conduct is likely to result in a public benefit and that this public benefit would outweigh any likely detriment to the public from the Proposed Conduct. The ACCC has amended the conditions proposed by the Applicants and imposed on the interim authorisation as outlined at paragraphs 5.25-5.27 to ensure that the public benefits accepted are realised for the duration of the authorisation. The ACCC considers that amending the conditions will enable the ABA to more quickly and easily implement further relief measures if required, ensuring the public benefits of the Proposed Conduct are fully realised.

Length of authorisation

- 5.29. The Act allows the ACCC to grant authorisation for a limited period of time.⁹ 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.
- 5.30. In this instance, the ABA seeks authorisation for a 12-month period from the date on which the final authorisation is made.
- 5.31. The ACCC grants conditional authorisation until 14 August 2021.
- 5.32. The ACCC considers that this length of authorisation is appropriate in the circumstances. The voluntary nature and 'minimum standard' approach of the Proposed Conduct means that Member Banks can depart from the relief measures agreed at any point during the period of authorisation.

6. Determination

The application

- 6.1. On 30 March 2020, the ABA lodged application for authorisation AA1000482 with the ACCC, seeking authorisation under subsection 88(1) of the Act.
- 6.2. The ABA seeks authorisation to engage in the Proposed Conduct. Subsection 90A(1) of the Act requires that before determining an application for authorisation, the ACCC shall prepare a draft determination.

⁹ Subsection 91(1)

6.3. A draft determination was made on 1 July 2020.

The authorisation test

6.4. Under subsections 90(7) and 90(8) of the Act, the ACCC must not grant authorisation unless it is satisfied in all the circumstances that the Proposed Conduct is likely to result in a benefit to the public and the benefit would outweigh the detriment to the public that would be likely to result from the Proposed Conduct.

6.5. For the reasons outlined in this determination, the ACCC is satisfied, in all the circumstances, that the Proposed Conduct, restricted to the purpose for which authorisation was sought, 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.

6.6. Accordingly, the ACCC grants conditional authorisation.

Conduct which the ACCC authorises

6.7. The ACCC grants conditional authorisation AA1000482 for the Applicants to engage in the Proposed Conduct (defined at paragraph 1.9). However the ACCC grants authorisation for the Proposed Conduct only insofar as it is directed to providing relief to bank customers who are suffering hardship (including reduced levels of service or reduced access to banking services), or may suffer such hardship without the Proposed Conduct, as a result of the COVID-19 pandemic and associated government measures.

6.8. The conditional authorisation AA1000482 does not extend to include any discussion or agreement relating to the prices of any service or product offered by the Member Banks. In addition, participation in the Proposed Conduct as conditionally authorised is voluntary and does not prevent any of the Member Banks from offering terms independent of those agreed under the Proposed Conduct.

6.9. 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.

6.10. The ACCC grants authorisation AA1000482 for 12 months from the date on which authorisation is granted, subject to the below conditions.

6.11. This determination is made on 14 August 2020.

7. Conditions

7.1. The ACCC may specify conditions in an authorisation.¹⁰ The legal protection provided by the authorisation does not apply if any of the conditions are not complied with.¹¹

7.2. The ACCC may specify conditions in circumstances where, although the relevant public benefit test is met, without the conditions the ACCC would not be prepared to exercise its discretion in favour of the authorisation.¹²

7.3. In this instance, the ACCC grants authorisation subject to the following conditions:

¹⁰ Section 88(3) of the Act.

¹¹ Section 88(3) of the Act.

¹² Application by Medicines Australia Inc (2007) ATPR 42-164 at [133].

Proposed supplier condition

Where the Proposed Conduct involves:

- a) an agreement, arrangement or understanding between two or more Member Banks and one or more supplier(s) or agent(s); and
- b) the supplier or agent competes with Member Banks in relation to any relevant products or services, or where two or more suppliers or agents party to the agreement, arrangement or understanding compete with each other in relation to any relevant products or services,

(Proposed Supplier Conduct),

- c) the ABA (on behalf of Member Banks) must notify the ACCC prior to the Proposed Supplier Conduct being implemented, or otherwise given effect to. The notification must include at a minimum:
 - i. identification of the supplier(s) and/or agent(s) that will be party to the Proposed Supplier Conduct,
 - ii. a description of the Proposed Supplier Conduct, including a description of the customer group/s relevant to the Supplier Conduct;
 - iii. a description of the purpose of the Proposed Supplier Conduct;
 - iv. the Member Banks which, at the time of the notification, have agreed to implement the Proposed Supplier Conduct; and
 - v. when the Proposed Supplier Conduct is intended to be implemented; and
- d) the ABA must provide notification to the ACCC as soon as practical after Member Banks have reached agreement on the terms of the Proposed Supplier Conduct, but not less than 1 business day before the Proposed Supplier Conduct is implemented, or otherwise given effect to.

Discussions between two or more Member Banks and a supplier and/or agent that do not amount to a contract, arrangement or understanding will not require ACCC notification.

Particular Conduct condition (the notification condition)

- a) The ABA must (on behalf of Member Banks) notify the ACCC of any financial relief program or other arrangement arising from the Proposed Conduct (Particular Conduct), prior to the Particular Conduct being implemented, or otherwise given effect to.
- b) The ABA must provide notification to the ACCC as soon as practical after Member Banks have reached agreement on the terms of the Particular Conduct, but not less than 1 business day before the Particular Conduct is implemented, or otherwise given effect to. The notification to the ACCC must include at a minimum:
 - i. a description of the Particular Conduct, including a description of the customer group/s relevant to the Particular Conduct;
 - ii. the Member Banks which, at the time of the notification, have agreed to implement the Particular Conduct; and
 - iii. when the Particular Conduct is intended to be implemented.

8. Date authorisation comes into effect

- 8.1. This determination is made on 14 August 2020. If no application for review of the determination is made to the Australian Competition Tribunal, the authorisation will come into effect on 5 September 2020.

Annexure 1 – Current ABA members

1. AMP Bank Limited
2. Australian and New Zealand Banking Group Limited
3. Arab Bank Australia Limited
4. Bank Australia
5. Bank of America Merrill Lynch
6. Bank of China
7. Bank of Queensland Limited
8. Bank of Sydney
9. Bendigo and Adelaide Bank Limited
10. CitiGroup Pty Ltd
11. Commonwealth Bank of Australia
12. HSBC Bank Australia Limited
13. ING Bank (Australia) Limited
14. Macquarie Bank Limited
15. MUFG Bank Limited
16. ME Bank
17. Mystate Bank
18. National Australia Bank Limited
19. Rabobank Australia Limited
20. Suncorp Bank
21. United Overseas Bank Limited
22. Westpac Banking Corporation

Annexure 2 – Participating Member Banks by financial relief program

Small business relief package notification

1. AMP Bank
2. Arab Bank
3. Australia and New Zealand Banking Group Limited
4. Bank Australia
5. Bank of Queensland Limited
6. Bendigo and Adelaide Bank Limited
7. Citigroup Pty Ltd
8. Commonwealth Bank of Australia
9. ING
10. Macquarie Bank
11. MyState
12. National Australia Bank Limited
13. Suncorp Bank
14. Westpac Banking Corporation

Supplementary business relief package notification

1. AMP
2. Australia and New Zealand Banking Group Limited
3. Bank Australia
4. Bank of Queensland
5. Bendigo and Adelaide Bank
6. CBA
7. ING
8. Macquarie Bank
9. MyState
10. NAB
11. Suncorp Bank
12. Westpac

Debit card program notification

1. Australia and New Zealand Banking Group Limited
2. Arab Bank Australia Limited
3. Bank of Queensland Limited
4. Bendigo and Adelaide Bank Limited
5. Commonwealth Bank of Australia
6. MyState Bank

7. National Australia Bank Limited
8. Suncorp Bank
9. Westpac Banking Corporation

Phase Two Assistance Measures Program

1. AMP Bank
2. Australia and New Zealand Banking Group Limited
3. Bank Australia
4. Bank of Queensland Limited
5. Bendigo and Adelaide Bank Limited
6. Citigroup Pty Ltd
7. Commonwealth Bank of Australia
8. ING
9. Macquarie Bank
10. MyState
11. National Australia Bank Limited
12. Suncorp Bank
13. Westpac Banking Corporation