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Dear Susie and Jennifer

ABA Banking Code – A joint consumer response to the concerns raised by the ABA to the ACCC on 31 October 2019

Consumer Action Law Centre (**Consumer Action**), Financial Rights Legal Centre (**Financial Rights**) and Financial Counselling Australia (**FCA**) were asked by the Australian Securities and Investments Commission (**ASIC**) to respond to the Australian Banking Association (**ABA**)'s 31 October 2019 proposed changes to paragraphs 44B and 47 and the definition of 'eligible customer' in Chapter 16 of the Banking Code of Practice (the **Code**). We note the ABA's 31 October 2019 letter proposing the changes was addressed to the Australian Competition and Consumer Commission (**ACCC**); therefore, we will be sending our joint consumer response to both ASIC and the ACCC.

Our letter addresses paragraphs 44B and 47 and 'eligible customer' immediately below. We have also included our feedback on the other issues addressed in the ABA letter, which are in relation to interest on informal overdrafts, Basic Bank Account (**BBA**) reporting and proactive identification.

Clarifying choice of debit cards – Paragraph 44B(e)

We are supportive of the ABA 31 October 2019 proposed amendment to subparagraph 44B(e).

Clarifying eligibility and the application of the obligations in paragraph 47 of the Code

We find the revised drafting of paragraph 47, and its relation to paragraph 44B, to be confusing and inconsistent with the Code's Guiding Principle 4 – *Transparency and accountability*, which includes clear and transparent communications. The Code is designed to be used by banks, bank staff and consumers and their representatives, such as financial counsellors. It must be clear and intelligible.

As an example of the lack of clarity, we found it difficult to fully understand the limitations implicit in the most recent proposed drafting of paragraphs 44B and 47, which we now understand as follows:

1. As per 44A and 44B, banks may offer BBAs which have certain minimum requirements. These minimum requirements do not include restrictions on informal overdrafts, dishonour fees and overdrawn fees.
2. Under paragraph 47, all banks will offer special features for basic, low or no-fee accounts but only for *eligible* customers (i.e. individuals who hold a Government Concession Card) rather than all low-income customers. These special features will feature no informal overdrafts, no dishonour fees and no overdrawn fees as per the Royal Commission recommendations. They will also feature the minimum requirements at 44B, if the bank offers a basic bank account. Consumers won't be obliged to take up the offer. And the bank may, if they wish, offer other accounts that include these special features to non-eligible customers.
3. 'Eligible customers' have been further limited to *only* those who hold a Government Concession Card – where previously we understood this to be a minimum.

These limitations are despite the following:

1. This is *not* what the Royal Commissioner sought. He recommended that 'basic accounts' should not provide informal overdrafts, not charge dishonour fees and include no overdrawn fees. These elements should therefore be applied as minimum requirements to BBAs under the 44B – noting that Hayne counts "basic accounts" to embrace BBAs and low or no fee accounts. Furthermore, BBAs were designed to meet the needs of vulnerable and disadvantaged customers. ABA material states that BBAs 'are aimed at ensuring those on lower incomes have access to affordable banking services.'¹

We find this lack of alignment with the criteria of a basic bank account to cause unnecessary confusion. It seems counter to the intentions of the Royal Commission recommendation that a basic bank account will no longer need to offer all of the fee reduction features designed to help low-income consumers. We recommend that the Royal Commission recommendations should apply to all BBAs at a minimum (as well as low or no fee accounts for eligible customers²). If a current BBA will not prohibit informal overdrafts or will continue to charge dishonour fees, then it should not be considered to meet the criteria of a BBA once the Royal Commission recommendations are implemented.

2. In making his recommendations, Commissioner Hayne wrote that basic accounts (including low or no-fee accounts) were helpful for low-income individuals – he did not limit this to low income individuals who held a Government Concession Card. "*Those who are on a low income, especially those in receipt of certain*

¹ List of Australian Banks that offer basic bank accounts, accessed 19 November 2019 here: https://www.ausbanking.org.au/wp-content/uploads/2019/04/Basic_Bank_Accounts_July_2016.pdf; 'Reducing Fees', Australian Banking Association (website) accessed 19 November 2019 here: <https://www.ausbanking.org.au/for-customers/reducing-fees/>.

² Indeed, it would be much simpler if there was just one type of concession bank accounts, i.e. BBAs; rather than the confusing mix of BBAs and 'basic, low or no-fee accounts' and BBAs.

government benefits or holding government concession cards, may find that a 'basic account' suits their needs better than other forms of account.”³

Draft paragraph 47 does not require banks to provide access to the Royal Commission recommendations for people living in poverty who are not accessing Government payments that enable them to qualify for a Government Concession Card. The *Poverty in Australia 2018* report released by the Australian Council of Social Services and UNSW Sydney shows that 25.9% of people living in poverty⁴ live in households where the reference person is employed full time.⁵ This has increased from 18.1% of people in poverty in 2009.⁶ While a bank may choose to expand the criteria of people who will be offered accounts with the special conditions as per the second to last sentence in para 47, it is not obliged to do so. Mandating the special conditions for only individuals with a Government Concession Card does not fulfil Commissioner Hayne’s recommendation.

We understand that the ABA have drafted these clauses in this manner because a number of members – including Bank Australia, Citibank and the National Australia Bank (**NAB**) – have long offered a BBA to all transaction account customers and some of these members do not think it appropriate to extend these new features to customers across the board. Offering a BBA to all customers has been something that these members should continue to be applauded for, saving all customers thousands in bank fees and protecting low income customers with the same approach. However, the current drafting contortions under the proposed clauses 44A, 44B and 47 in order to maintain the status quo are detracting from the powerful simplicity of the original intention of the Code revisions. Rather than complicating matters for the entire sector and for consumers we believe the time has come for these members to name these accounts something else in order to ensure that there is one simple definition for a basic bank account.

Put simply, the proposed Code needs to be amended as Hayne recommends to ensure that:

- without prior express agreement with the customer, banks will not allow informal overdrafts on basic accounts; and*
- banks will not charge dishonour fees on basic accounts.⁷*

Therefore, we recommend the Code be simplified as follows:

- 44B should detail that BBAs minimum features include not providing informal overdrafts, not charging dishonour fees and including no overdrawn fees.
- paragraph 47 should be directed at ensuring that Member Banks proactively identify and offer BBAs to their customers including but not limited to low income people and Government Concession Card holders.

Anything more complicated than this, such as the new proposed paragraph 47, limits the scope of Hayne’s recommendation by complicating it or shrinking the group of customers to which it should apply.

Specific improvements to draft para 47

In addition to our recommendations above, at a bare minimum it is critical that:

³ *Final Report*, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, (Vol 1) February 2019, p 91.

⁴ Based on 50% of median income poverty line.

⁵ ACOSS and UNSW Sydney, *Poverty in Australia 2018*, p 57 accessed 19 November 2019 here: https://www.acoss.org.au/wp-content/uploads/2018/10/ACOSS_Poverty-in-Australia-Report_Web-Final.pdf.

⁶ ACOSS and UNSW Sydney, *Poverty in Australia 2018*, p 56 accessed 19 November 2019 here: https://www.acoss.org.au/wp-content/uploads/2018/10/ACOSS_Poverty-in-Australia-Report_Web-Final.pdf.

⁷ *Final Report*, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, Vol 1 (February 2019) Recommendation 1.8 parts 3 and 4.

- The clause in para 47 that starts "*You are not obliged to accept our offer of an account with the special features. You may request...*" should be removed. This clause is redundant because the nature of an offer is that it can always be accepted or rejected. Instead of clarifying, it further confuses the message and could actually undermine access to the special features for people who would benefit from them.
- The overdraft clause should also specify that in cases of an informal overdraft being impossible or reasonably impractical to prevent, there will be no interest on it so that it is clear to financial counsellors, bank staff and consumers.

Interest on informal overdrafts

We think the differentiated implementation proposal from ACCC is appropriate and reasonable.

We note that the prevention or requirement to refund interest on informally overdrawn accounts is not at all 'an additional measure over and above those recommended by the Royal Commission'. In fact, the Royal Commission recommendation was to 'not allow informal overdrafts on basic accounts'. The necessary requirement to prevent interest is, in fact, because the ABA has applied for authorisation of Code changes to not allow informal overdrafts *except where it is impossible or reasonably impractical for the bank to prevent an informal overdraft from occurring*, which means they will still occur. The prevention of interest on informal overdrafts would be unnecessary if this was not the case.

In light of the fact that the need to prevent or refund interest is a direct result of the way in which the ABA has implemented the Royal Commission recommendation, we do not consider the reasons put forward for delay are compelling or will lead to unfair burdens placed on the banks. By contrast, a delay to 1 March 2021 would be overly burdensome to low income consumers and will subtract from the public benefit intended by the amendment to removal informal overdrafts.

Even if 'interest charged in the relevant circumstances is minimal compared to the overdrawn fees', minimal costs of this nature are still significant to customers experiencing financial hardship and other difficulties. Furthermore, the evidence of the Royal Commission showed that more than \$215,000 in interest on informal overdraft was charged in each of 2016 and 2017 by just one bank in the Northern Territory.⁸ This shows that the total interest burden imposed on customers is not insubstantial. Prioritising the 'burden' placed on the profitable businesses to update their systems over the endemic harm caused to low-income consumers is not fair or justified.

Basic Bank Account (reporting)

We disagree with the ABA response that reporting condition should be limited to BBAs and not extend to the offering of other low or no fee accounts. Commissioner Hayne conceived of basic accounts as including all three types of accounts and therefore there is a need to track these. The ABA have reduced this to BBAs.

The ABA provided no substantive objective justification for not reporting on these. It is important to understand whether eligible customers or otherwise are taking up BBAs v low v no fee accounts. Our concern is that more low-income bank customers should ideally be offered BBAs that meet the Royal Commission recommendations rather than not low or no fee accounts. In order to understand these dynamics, we need to understand how many are using all these types of accounts. If for example the data were to show that 90% of eligible customers are using low fee accounts then this would suggest something is wrong with the implementation of this policy.

Proactive Identification of eligible customers

The ABA have requested limiting data on proactive identification to eligible customers as defined in draft paragraph 47. However, as raised above, the ABA has limited the definition of eligible customers to individuals

⁸ *Interim Report*, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, Vol 2, page 481.

with a Government Concession Card. We do not accept this restriction, and as stated above, note it does not align with Chapter 15 paragraph 42.

Please contact Policy Officer **Brigette Rose** at **Consumer Action Law Centre** on 03 9670 5088 or at brigette@consumeraction.org.au if you have any questions about this submission.

Yours Sincerely,

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