



9 April 2020

Mr Sean Hughes  
Commissioner  
Australian Securities and Investments Commission  
By email: [REDACTED]

Dear Commissioner,

## Regulatory approach to lending during Coronavirus (COVID-19) pandemic

Australian banks have moved quickly to ensure that they play their part in bolstering the Australian economy against the threat posed by the COVID-19 global pandemic. Australian Banking Association (**ABA**) member banks have announced measures to support both small business and individual customers impacted by COVID-19, including:

- **Business loan deferrals:** with Australian Competition and Consumer Commission authorisation, ABA member banks have agreed to offer the deferral of principal and interest loan repayments for business customers with less than \$10 million total loans.
- **Home loan deferrals:** ABA member banks have individually committed to offering the deferral of principal and interest loan repayments for customers with mortgages.
- **Consumer credit relief:** ABA member banks are developing and offering other measures to assist customers in financial difficulty across all other forms of consumer credit, including credit cards and personal loans.

Our immediate priority has been rolling out these support measures for customers to protect them as much as possible against the effects of the deteriorating economic situation; but we now wish to prioritise addressing a range of regulatory issues that arise from these support measures, including:

- responsible lending obligations in COVID-19 impacted circumstances
- industry assistance for home loan customers
- settlement of loans involving COVID-19 impacted customers
- National Credit Code (**NCC**) requirements for loan repayment deferrals and other variations
- Banking Code of Practice (**BCoP**) requirements, and
- electronic communication and execution of document requirements.

In line with the discussions that we have been conducting primarily through Tim Gough, we seek Australian Securities and Investments Commission's (**ASIC**) written advice to provide guidance and clarification to our member banks on these regulatory issues.

In addition, the ABA will shortly be seeking relief from ASIC to fast track the issuance of scheme or dual network debit cards to certain cohorts of bank customers to provide them with important access to payments.



## Banking regulatory environment

As Authorised Deposit-taking Institutions (**ADIs**), ABA member banks are highly regulated and subject to regular supervision and enforcement by regulators, including by Australian Prudential Regulation Authority (**APRA**) to protect deposit holders, and by ASIC in respect of conduct, disclosure and accountability. The banking industry takes its regulatory obligations seriously.

APRA sets prudential standards that ensure ADIs operate efficiently, remain well capitalised and meet the highest international standards. This means that ADI customers can be assured that their bank will be around to provide services even when there are tough economic times. APRA conducts ongoing supervision of ADIs and sets out stringent reporting requirements. The four major banks (all of which are ADIs) in particular are subject to more intense supervision given their significant importance to the Australian economy and wider community.

ASIC regulates banks, sets and enforces banking standards and investigates and acts against misconduct in the banking sector. It requires banks to be licensed and meet stringent licence conditions including that banks act fairly to customers, provide products that meet customer needs, comply with responsible lending obligations and provide proper disclosure to customers.

In addition, all ABA member banks with a retail presence in Australia have subscribed to the BCoP. Approved by ASIC, the BCoP sets the standards of practice for banks, their staff and their representatives. The BCoP provides safeguards and protections not set out in the law. It complements the law and, in some areas, sets higher standards than the law.

During this COVID-19 crisis, ABA member banks have been liaising closely with both APRA and ASIC to ensure the industry remains resilient and well placed to ensure financial markets continue to operate effectively and that credit is available to households and businesses.

## Responsible lending obligations in COVID-19 impacted circumstances

The considerable financial difficulty imposed on many in our community due to COVID-19 has created uncertainty and made it difficult for banks to apply parts of the responsible lending regime under the National Consumer Credit Protection Act (**NCCP Act**) in the way that ASIC would typically expect.

These challenges have the potential to interfere with the flow of credit to the community, as it could adversely impact consumers' ability to access credit generally during any time for which they are impacted by this crisis. To address this, we request that ASIC confirms its expectations in terms of how lenders should determine what is reasonable in meeting responsible lending obligations in COVID-19 impacted circumstances.

In the current environment, with the significant flow-on of economic effects from COVID-19, there is a clear need to support how customers manage their commitments on existing credit products as well as to ensure the continued flow of credit in the economy. However, the desire to provide credit must be balanced with taking the appropriate steps to ensure decisions made today will not have an adverse impact on customers over the long term. This may require considering the principles below in different circumstances and applying them differently where appropriate.

ABA member banks are following some key principles in meeting their responsible lending obligations during this COVID-19 period, which are focused on meeting the Government's objectives of assisting businesses and individuals to remain viable and maintaining credit flow in the economy. In assessing a customer's circumstances in response to an application for new loans, or adjustments to existing consumer credit products, ABA member banks are, where appropriate, considering that the effects of COVID-19 will be temporary and that the previous economic situation will be restored over time as restrictions during the pandemic are wound back. We, therefore, seek ASIC's clarification that it is appropriate for ABA member banks to consider:

- That the income of employees or small business operators (when obtaining consumer credit) who are adversely impacted by the economic conditions under COVID-19 are likely to regain their previous income within a reasonable period after restrictions are removed and conditions ease.



- That any deterioration in asset values during the COVID-19 pandemic are unlikely to be permanent.
- That a borrower's requirements and objectives relating to their COVID-19 impacted financial position are likely to be a prominent consideration in meeting responsible lending obligations in amending existing credit arrangements or extending new credit.

It would be helpful for ASIC to acknowledge that it will enforce the law around compliance with responsible lending obligations mindful of the need for lenders to consider a customer's financial situation in a way that looks beyond current economic conditions. Further, we suggest it is reasonable for lenders to be assessing ability to make repayments based on a reasonable view of the customer's situation and that their financial position is likely to be restored to the same or a similar position once the economic impacts of COVID-19 stabilise. The industry will need to consider the development of a definition of post-crisis in due course given the assumptions made about customer performance following the conclusion of the pandemic.

We anticipate that conditions for the banks, our customers and the economy will continue to change at a rapid rate over the next few months. Accordingly, whilst the considerations set out above represent our members' current approach, we consider that ongoing engagement with ASIC will be necessary as lenders adapt their practices to meet responsible lending obligations.

In addition to these general responsible lending issues, we outline below some specific regulatory challenges facing the banking sector during this COVID-19 pandemic.

## Industry assistance for home loan borrowers

ABA member banks are working to provide appropriate hardship support for home loan borrowers in financial difficulty due to COVID-19. This is often through providing loan repayment deferrals that banks have made available to these borrowers. Based on our discussions, we ask that ASIC confirms our understanding that deferral of home loan repayments, including capitalising interest, does not trigger responsible lending obligations.

In addition to deferrals, as we have discussed with ASIC during this pandemic period, in some cases, banks may be in a position to provide other forms of assistance where appropriate such as where some form of repayments are still affordable, including:

- Changing a principal & interest loan to interest only during the COVID-19 period.
- Refinancing a customer with a reset loan term (e.g. extended period from 25 to 30 years) to reduce the repayments required under the loan.
- Undertaking an overall approach of debt consolidation across a consumer's credit portfolio to reduce overall repayments and/or interest charges.

The ABA acknowledges that some of these support measures aimed at ensuring customers can get through this difficult period may result in increased costs over the life of the credit product.

We note that, in relation to some matters such as this, ASIC has expressed views in the past that may have a bearing on banks' willingness to assist customers in these ways. For example, in less challenging economic conditions, ASIC has previously stated it expects close scrutiny of a customer's needs and financial circumstances when providing interest only loans. We note ASIC's comments<sup>1</sup> indicating that switching to IO will not trigger responsible lending requirements. The ABA would welcome a similar assurance that this conduct would not breach other NCCP Act requirements, such as the obligation to act efficiently, honestly and fairly under section 47(1)(a) of that Act and, for financial service providers, under section 912A(1)(a) of the *Corporations Act*.

<sup>1</sup> <https://www.afr.com/property/residential/no-breach-for-lenders-as-homeowners-switch-to-interest-only-20200401-p54g6e>



## Disrupted property settlements

The rapid onset of the COVID-19 crisis has created significant uncertainty about how to proceed with property settlements if there is a deterioration in the borrower's financial situation post loan approval, in particular job loss. Here, a lender has appropriately discharged their responsible lending obligations at the time of the assessment and settlements should be able to proceed on the basis of that assessment, noting the relief measures being made available to residential mortgage customers.

For example, where a home loan is approved and the credit agreement is signed on the basis of proper inquiry, verification and assessment and before the settlement date of the property sale, the consumer loses their job, and advises the lender of this. The lender could discuss the situation with the consumer and, where the consumer wishes to proceed with the loan, continue with the loan, or an amended version of the loan.

It would be very helpful if ASIC confirmed its position on this issue.

## NCC Variation Rules

The take-up of the deferral of repayments has been high and this has the potential to produce a significant regulatory burden on banks if some regulatory requirements are not relaxed.

Credit providers are making best efforts to respond to requests and document changes as soon as possible, but there is a risk of inadvertent breach of timeline requirements due to the unprecedented volume of requests.

For this reason, we request that ASIC issues a legislative instrument under National Credit Code (**NCC**) s 203A(3) exempting the application of the following rules relating to variations under the NCC:

- **NCC s 61:** NCC s 61(1) requires a guarantor notice and acceptance process for changes to the credit contract. S 61(2)(d) provides this is not required for 90-day deferrals. This should be extended to also exempt 182-day deferrals (to cover the six-month loan deferrals announced by the banks).
- **NCC s 71:** NCC s 71 requires that on any agreed change to a credit contract, the credit provider must give written notice of the change within 30 days. ASIC Class Order CO14/41 currently exempts 90-day deferrals from this requirement. ASIC Class Order CO14/41 should be amended so that:
  - The 30-day notice period is extended to 90 days, to deal with the large increase in agreed changes caused by COVID-19.
  - No written notice needs to be given for 182-day deferrals (to cover the six-month loan deferrals announced by the banks).
  - No written notice needs to be given for any other change made pursuant to a credit provider's publicly announced policy of COVID-19 relief for its customers.

Lenders also need flexibility to provide these notices via digital channels. For example, if an applicant provides an email address, providing notice via email (see below).

## NCC Hardship Rules

A number of lenders are treating their COVID-19 relief measures as temporary relief, not formal hardship as regulated by the NCC. This aligns with the public policy intent of these measures to assist customers manage through this period and prevent more protracted financial difficulty. At the same time, a high volume of requests for hardship continue to be received and are also anticipated into the future.

Accordingly, we further request that ASIC issues a legislative instrument under section 203A(3) of the NCC exempting the application of the following rules relating to the hardship process. All of these requests are for extended time periods, to deal with the large increase in hardship requests caused by COVID-19.



The requested changes are:

- NCC s 72(2): this allows a credit provider to request more information from the debtor response to a hardship request. The credit provider must make the request within 21 days, and the debtor must provide the information within a further 21 days. Both of these periods should be extended to 90 days.
- NCC s 72(5): this sets out the time period with which the hardship request must be dealt. Slightly different time periods apply depending on whether or not further information is requested or provided. All of these periods should be extended to 90 days.
- NCC s 73: this requires that on any change to a credit contract under the hardship process, the credit provider must give written notice of the change within 30 days. This should be extended to 90 days.

Alternatively, ASIC could make a statement acknowledging the potential difficulty of meeting the hardship rule timing commitments in the current circumstances and indicating the approach it is likely to take in respect of them (for example, this might take the form of a facilitative compliance approach where lenders are making reasonable efforts to comply).

## Banking Code of Practice

The BCoP contains a broad requirement that lenders should exercise the care and skill of a diligent and prudent banker when considering providing customers with new or additional credit. It also contains provisions dealing with financial difficulty, including when a borrower or guarantor should receive certain notices (such as clauses 101(b) and 178). For lenders, ambiguity on the scope of the diligent and prudent banker obligation in emergency scenarios raises a risk of exposure to legal proceedings based on a breach of this provision. Addressing this may require an amendment to the Code, such as by the addition of a provision qualifying the scope of the diligent and prudent banker obligation in relation to emergency scenario lending or by modifying the obligation to notify guarantors in relation to financial difficulty provisions. The ABA proposes to develop amendments to address the matters raised above and seeks expedited approval from ASIC under section 1101A of the Corporations Act.

## Electronic communications & execution of documents

With COVID-19 social distancing rules and restrictions now in place, there are some significant issues being faced where transactions have traditionally required face-to-face contact. In some circumstances, it is not possible without breaching the law for some customers to meet face-to-face due to obligations to self-isolate or be quarantined. Even where this may be technically allowed, we have found that borrowers are increasingly requesting changes using non-face-to-face methods. In response to the pandemic, lenders have been actively encouraging customers to contact them via phone or digital channels. This results in various challenges in the credit process, such as:

- The current Electronic Transactions Regulations do not clearly state whether electronic execution of guarantees is permitted or prohibited. The Regulations exclude a number of aspects of consumer guarantees from the Electronic Transactions Act, but the legal consequence of this is unclear.
- Formal consent requirements for customer consent to electronic communications are also creating problems and confusion, particularly where customers are initiating COVID-19 discussions by phone, email or text, e.g. requesting payment deferrals through the bank's online forms etc.
- Obtaining consent from all parties of the loan to proceed with a COVID-19 relief measure in a timely manner, especially from those that typically use face-to-face approaches to interact with their credit providers.





## Australian Banking Association

Given how critical digital modes of communication have been during the crisis, we suggest that the default should be that lenders will satisfy applicable communication requirements with customers where they use electronic communications during the COVID-19 period (where an electronic address or account is available).

To address these issues, we request that ASIC issues a legislative instrument under section 203A(3) of the NCC to modify the operation of section 187 of the NCC so that:

- Guarantees and related arrangements may be signed and made electronically in accordance with the Electronic Transactions Act 1999 (Cth).
- All Electronic Transactions rules and NCCPR consent requirements for electronic transactions are taken to be satisfied where a customer has provided an electronic address or account, without the need for any written or other express consent from the consumer.

Alternatively, ASIC could, also by amending section 187 of the NCC, permit a 'publish and notify' approach similar to that permitted under the *Corporations Act 2001 (Cth)* under Legislative Instrument 2015/647.

For the information of ASIC, the ABA notes it has also joined with a number of parties to seek the support of the Commonwealth Treasurer and Attorney-General for a number of urgent reforms relating to electronic execution of documents and witnessing requirements, particularly where action is needed across both Federal and State agencies. In particular, this push for reform is focused on overcoming difficulties faced in executing agreements, notices and deeds under section 127 of the *Corporations Act 2001 (Cth)* where physical signatures cannot be obtained and facilitating electronic execution where appropriate.

We would welcome the opportunity to discuss the matters raised above in more detail or answer any questions you may have. Please contact Justin Mining for NCCP Act issues on [REDACTED] or Jerome Davidson on [REDACTED] for BCoP and electronic communications and execution matters.

Yours sincerely,



The Hon Anna Bligh AC  
Chief Executive Officer