

Memorandum	
Document ref:	11216612
To:	Jennifer Ermert, Acting National Manager, Legal and Enforcement
From:	s 22(1)(a)(ii) Senior Specialist, Policy
Through:	s 22(1)(a)(ii) Acting Director, Rules Exemptions and MOUs
Regarding:	Commonwealth Bank of Australia – Application for exemption
Date:	1 December 2020

Recommendations:

S 47C(1)

Background

- s 47G(1)(a) Commonwealth Bank of Australia (CBA) (ACN 123 123 124) submitted an application for an exemption under paragraph 248(1)(a) of the AML/CTF Act (SAFE: [11217128](#); SAFE: [11217283](#)).
- CBA is seeking an exemption from the 'tipping off' provisions in section 123 of the AML/CTF Act to permit the disclosure of suspicious matter report (SMR) related information to employees of a wholly owned foreign subsidiary of CBA, CBA Services Private Limited located in Bengaluru, India (CBA India). CBA India is incorporated as a private limited company under the *Companies Act 2013*, India.

4. s 47G(1)(a)

5. CBA is seeking an exemption from the following provisions of the AML/CTF Act:

- a. Subsection 123(1) and 123(2) – disclosures relating to suspicious matters; and
- b. Subsection 123(3) – disclosures relating to notices issued under subsection 49(1) of the Act (section 49 notices).

6. Policy and Rules, Exemptions and MOUs (REM) propose that the two different aspects of the exemption be dealt with separately, s 47C(1)

s 47C(1)

s 47C(1) This process will delay the processing of this aspect of CBA's exemption application. On 29 June 2020, Policy and Rules notified CBA of this potential delay. CBA understands the reasons for this delay, noting that there is no existing precedent for the disclosure of section 49-related information offshore.

7. s 47G(1)(a)

8. This memorandum assesses the CBA's application for an exemption from subsections 123(1) and (2) relating to the disclosure of SMR related information only.

9. s 47G(1)(a)

Business of the applicant

10. CBA is an Australian multinational bank with operations across Australia, New Zealand, Fiji, Asia, the United States and the United Kingdom. CBA provides a variety of financial services including retail, business and institutional banking, funds management, superannuation, insurance, investment and broking services.

11. CBA have requested that the application apply to all of the entities within the CBA designated business group (DBG).

Reasons why CBA is seeking an exemption

12. s 47G(1)(a)

13. s 47G(1)(a)

14. s 47G(1)(a)
15.
16.
17.
18.

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Relevant sections of the AML/CTF Act

19. Under subsections 123(1) and 123(2) of the AML/CTF Act, it is a criminal offence for a reporting entity to disclose to someone other than AUSTRAC:
- a. that the reporting entity has reported a suspicion to AUSTRAC; or
 - b. that the reporting entity has formed a reportable suspicion; or

- c. any other information from which the recipient of the information could reasonably be expected to infer that the report has been made or the suspicion has been formed.

20. Amendments to subsection 123(7) in 2017 widened the ability to share SMR information between reporting entities within a corporate group (as well as within a DBG) to manage their ML/TF risks associated with common customers. Although CBA India is a member of the CBA corporate group, the exception in subsection 123(7) does not apply to non-reporting entities or foreign members of a corporate group. s 47G(1)(a)

s 47G(1)(a)

21. As a result, CBA is seeking an exemption from the prohibitions set out in subsections 123(1) and (2) of the AML/CTF Act to be able to disclose information relating to suspicious matters to employees of CBA India.

Phase 1.5 Bill – proposed amendments to section 123

22. The proposed Phase 1.5 reforms in the *Anti-Money Laundering and Counter-Terrorism Financing and Other Legislation Amendment Bill 2019* (the **Phase 1.5 Bill**) will expand the tipping off exception for members of a corporate group to permit the disclosure of SMR related information to foreign members of a corporate group (or DBG).

23. The Bill includes safeguards and controls to ensure the confidentiality of the information being disclosed including:

- a. a reporting entity can only share this type of information with foreign members of a corporate group (or DBG) that are regulated in a foreign jurisdiction by laws that give effect to some or all of the FATF recommendations; and
- b. the foreign member must provide the reporting entity with written undertakings about protecting the confidentiality of information, controlling the use of such information, and ensuring that the information is only used for the purpose it was disclosed.

24. However, the Phase 1.5 Bill provisions would still not apply to the circumstances in this case because:

- a. CBA India is not regulated in India for AML/CTF purposes; and
- b. the disclosure of the information is not for the purposes of informing CBA India about the risks involved in dealing with a customer.

25. AUSTRAC has seen a growth in the number of corporate groups who rely on service companies (including foreign companies) to perform AML/CTF compliance functions on behalf of their subsidiaries.

s 47C(1)

Claims supporting the application for exemption

s 47G(1)(a)

s 47G(1)(a)

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29. The exemption instrument applies to both CBA and reporting entities within the CBA DBG. CBA must enter into an agreement with each entity within the CBA DBG authorising CBA to act on their behalf.
30. The exemption instrument requires that:
 - a. CBA conduct employee due diligence and AML/CTF risk awareness training for all CBA India employees that have access to SMR information
 - b. CBA India employees be approved in writing by CBA's AML/CTF Compliance Officer to receive SMR information
 - c. CBA India employees access the SMR information through the systems provided by CBA

- d. CBA India enter into a confidentiality agreement with CBA about protecting the confidentiality of the information, controlling the use of the information and to ensure that the information is used only for the purpose for which it is disclosed
- e. CBA's compliance with the exemption conditions be subject to ongoing oversight of the CBA board and senior management
- f. CBA conduct audit of CBA's compliance with the conditions as part of its regular independent review of its Part A, AML/CTF program.

s 47G(1)(a)

32. CBA has reviewed the draft instrument and provided comments, which have all been addressed.

Issues

- 33. The exemption application has been considered in accordance with *Guidance note 15/01 – Application for exemptions and modifications under the AML/CTF Act* while taking into account matters for which the AUSTRAC CEO must have regard in performing his or her functions under subsections 212(3) and 212(4) of the AML/CTF Act.
- 34. When considering an exemption that could reasonably be expected to have an impact on the risk associated with money laundering or the financing of terrorism as that risk applies to a designated service, the AUSTRAC CEO (or delegate) must be satisfied for the purposes of subsection 212(3A) of the Act that the risk associated with the proposed exemption, is low. Subsection 212(3A) does not require that the sector or designated service be low risk in order for a modification to be granted.¹

Risk profile of the applicant, the designated services, or the circumstances in which the designated services are provided (paragraphs 212(3)(b) and (d) of the AML/CTF Act)

- 35. Policy and REM have assessed the information provided by CBA in support of its application and are satisfied that the ML/TF risk associated with granting relief is low.
- 36. A standard risk assessment matrix has not been applied in this case. The risk assessment matrix is used to determine whether the risk associated with the provision of a designated service is low. This is appropriate in cases where an applicant is seeking an exemption from obligations under the AML/CTF Act that they consider inappropriate or overly burdensome. CBA is not seeking an exemption from their AML/CTF obligations.

¹ Revised Explanatory Memorandum, *Anti-Money Laundering and Counter-Terrorism Financing Amendment Bill 2017* (Cth) [227]-[229].

s 47G(1)(a)

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s 47G(1)(a)

Impact on the integrity of the financial system, and consistency with the intent and purpose of the FTR Act and AML/CTF Act and Rules (paragraphs 212(3)(a) and (b) of the AML/CTF Act)

40. Policy and REM consider that granting this exemption would not adversely impact the integrity of the financial system and would be consistent with the purpose of the AML/CTF regulatory regime. The exemption will facilitate CBA's continued compliance with its AML/CTF obligations and ML/TF risk management.

Legislative intent of tipping off

41. The legislative intent of the tipping off prohibition is to ensure that customers are not made aware that a reporting entity has formed a suspicion or submitted an SMR in relation to their activities, which may prejudice investigations by law enforcement and endanger the person who submitted the SMR. In lifting this prohibition, the greatest risk is the removal of the protection it provides to reporting entities, individuals completing and submitting SMRs and to law enforcement acting on the information provided.

s 47E(d)

Level of regulatory burden to which the applicant is being subject (paragraphs 212(3)(c) and (g) of the AML/CTF Act)

s 47G(1)(a)

Impact on the market-place and competitive neutrality (paragraphs 212(3)(e), (f) and (g) of the AML/CTF Act)

44. Policy and REM do not consider that granting the proposed exemption would have an appreciable impact on the market place or competitive neutrality. It is likely that other reporting entities will establish similar arrangements to CBA, which may pose an issue for competitive neutrality if future exemption applications are refused.

Consistency in regulation (paragraph 212(3)(i) of the AML/CTF Act)

45. AUSTRAC has previously exempted a number of entities from the application of the tipping-off prohibition, where doing so is consistent with:

- a. The policy objectives of the tipping-off provisions (i.e. not prejudicing investigations by law enforcement or endangering the person who submitted the SMR); and
- b. The objects and purpose of the AML/CTF Act in enhancing a reporting entity's ability to detect, deter, and disrupt ML/TF and other serious crimes.

46. Policy and REM consider that the exemption is consistent with previous exemptions that have been granted in relation to tipping off. AUSTRAC has previously exempted Onepath, CBA, TAB, HSBC and AMP Life from certain tipping off offences.² Each of these exemptions were granted in relation to the specific circumstances of the applicant and were limited in nature.

47. The exemption sought by CBA most closely resembles the exemption granted to HSBC on 29 June 2019 and which was recently extended for another two years. [Exemption 3 of 2020](#) allows HSBC Australia's AML investigations team to make disclosures relating to SMR obligations to the HSBC Global Service Centre (GSC) headquartered in India. The GSC is a corporate service subsidiary and the legal entity to which GSC belongs is a wholly owned subsidiary of HSBC Holdings plc.

48. To the extent that granting an exemption to CBA would establish a precedent, any such precedent would be consistent with the intent and purpose of the AML/CTF Act and decisions taken by AUSTRAC.

Implications for future exemption requests

49. It is likely that the granting of this exemption to CBA will result in future applications from other reporting entities that wish to establish similar offshore service entities to undertake some AML/CTF

² Onepath/ANZ [Exemption 6 of 2019](#), CBA [Exemption 5 of 2018](#), TAB [Exemption 7 of 2016](#), HSBC [Exemption 3 of 2020](#) and AMP Life [Exemption 2 of 2020](#)

functions on behalf of an Australian reporting entity. Any such applications would be appropriately considered on their merits.

Resource implications

50. Policy and REM do not consider there to be any significant resource implications for AUSTRAC should the exemption be granted.

Consultation

51. In preparing this memorandum, Policy and REM consulted with (former) Legal and Policy Branch ([11487123](#)), Regulatory Operations Branch ([11496823](#)) and Intelligence Division ([11498142](#)). s 47C(1)

s 47C(1)


Conclusions

52. Policy and REM recommend S 47C(1)

S 47C(1)

Approval

Approved Not approved

Signed 	Date ...3.../...12.../...2020.....
Jennifer Ermert, Acting National Manager, Legal and Enforcement Branch	

Comments:

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Modification Memorandum

SUMMARY OF APPLICATION ASSESSMENT		
ASSESSMENT DOCUMENT	13013990	RECOMMENDATION: s 47C(1)
APPLICANT:	Commonwealth Bank of Australia (CBA) (ACN 123 123 124)	
APPLICANT SECTOR:	Domestic ADI	
DESIGNATED SERVICES:		
DOCUMENTS:	APPLICATION	SAFE: 1120128 ; SAFE: 11217283
	SUPPLEMENTARY INFORMATION	SAFE: 11353884 , SAFE: 11354984 , SAFE: 11354766
SECTION(S) SUBJECT TO MODIFICATION / EXEMPTION	Subsections 123(1) and (2) – tipping off	
REASON FOR MODIFICATION / EXEMPTION	<p>This modification replaces CBA’s current exemption instrument, which was granted by AUSTRAC on 3 December 2020 (Exemption 17 of 2020, approval memo is at SAFE: 11216612). This modification will replace Exemption 17 of 2020.</p> <p>CBA requested an exemption to disclose both SMR and s. 49-notice information to employees of a wholly owned foreign subsidiary of CBA, CBA Services Private Limited located in Bengaluru, India (CBA India).</p> <p>s 47G(1)(a)</p> <p>s 47G(1)(a) In order to conduct these activities, the employees of CBA India require access to SMR and s. 49 notice related information as well as SMR information.</p> <p>The two different aspects of the exemption (i.e. disclosures of SMR and s. 49 notice related information) were dealt with separately, as the disclosure of information relating to section 49 notices raised complex policy issues, which delayed processing the full exemption.</p> <p>Following extensive consultation with the Department of Home Affairs and partner agencies, it is recommended s 47C(1)</p> <p>s 47C(1)</p>	
SUMMARY OF ASSESSMENT	Applicant’s compliance record	s 47G(1)(a)
	ML/TF risks	Low

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	Impact on the integrity of the financial system	Low
	Consistency with the intent of the AML/CTF Act	Moderate
	Regulatory burden	Significant
	Impact on competitive neutrality	No impact
	Consistency in regulation	Consistent
	Implication for future exemption/modification requests	Minimal
CONSULTATION	Policy and REM consulted with the Regulatory Operations Branch, Intelligence Division and Legal on the proposed conditions for disclosures of s. 49 notice related information to offshore subsidiaries. AUSTRAC has also consulted the Department of Home Affairs, AFP, ACIC, ASIO, CDPP, ABF, ACLEI, DFAT and the ATO on the implications of allowing CBA and other reporting entities an exemption to subsection 123(2) of the AML/CTF Act. The primary purpose of the consultation was to determine the appropriate conditions for the exemption instrument.	
RESOURCE IMPLICATIONS:	N/a	

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EXEMPTION MEMORANDUM

DOCUMENT REF:	13020403	Matter ref:	JIRA or Case Management Ref
APPLICANT:	Commonwealth Bank of Australia (CBA) (ACN 123 123 124)		
TO:	Katie Miller, National Manager, Legal and Enforcement		
THROUGH:	s 22(1)(a)(ii) Director, Rules, Exemptions and MOUs		
FROM:	s 22(1)(a)(ii) Manager, Policy		
DATE:	28 September 2021		

Recommendations

s 47C(1)

Exemption Assessment

1. **s 47G(1)(a)** Commonwealth Bank of Australia (CBA) submitted an application for an exemption from the 'tipping off' provisions in section 123 of the AML/CTF Act. CBA (and members of the CBA designated business group) have requested an exemption to permit the disclosure of suspicious matter report (SMR) and s. 49 notice related information to employees of a wholly owned foreign subsidiary of CBA, CBA Services Private Limited located in Bengaluru, India (CBA India).

2. **s 47G(1)(a)**

3. **s 47G(1)(a)**

s 47G(1)(a)

the employees of CBA India require access to

SMR and s. 49 notice related information as well as SMR information **s 47G(1)(a)**

s 47G(1)(a)

4.

s 47G(1)(a)

5. On 3 December 2020, AUSTRAC granted CBA an exemption to enable the disclosure of SMR information to CBA India ([Exemption 17 of 2020](#)). This exemption memorandum deals with the second aspect of the exemption application – that is, to enable CBA to disclose s. 49 notice related information to employees of CBA India.

6.

s 47C(1)

7.

s 47G(1)(a), s 47E(d)

8. CBA is required to implement internal controls to mitigate the risks of tipping off, which mirror existing requirements under the AML/CTF regime for reporting entities in relation to their own employees located onshore. [Exemption 17 of 2020](#) requires CBA to:

- ensure that the information is only used to provide AML/CTF services
- conduct employee due diligence and AML/CTF risk awareness training for all CBA India employees that are granted access by the CBA AML/CTF Compliance Officer to SMR and s. 49 notice related information
- requiring confidentiality agreements to be signed by the offshore subsidiary
- ensuring oversight and governance of these arrangements by the CBA board and senior management
- conducting audits and internal reviews.

9. This modification instrument covers both SMR and s.49 notice related information and includes additional requirements, including that:


- the disclosures are made in accordance with CBA’s information security policies and procedures
- the suspicious matter material is encrypted and stored on data services located in Australia
- notify AUSTRAC within 5 business days of any event that may affect the ability of:
 - CBA DBG member to comply with the instrument
 - CBA India to comply with the terms of the confidentiality agreement
 - CBA India receiving a request to disclose suspicious matter material under a foreign law.
- CBA undertake an independent review of each CBA DBG member’s compliance with the conditions of the exemption and an internal audit of CBA India’s compliance within 12 months from the day the exemption commences.

10. It is proposed that the modification repeal and supersede Exemption Instrument 17, and that it apply for 3 years, after which CBA would apply for an extension and conduct a review of its operations.

11. The Policy team and the Exemptions and MOUs (REM) team have assessed the information provided by CBA in support of its application and is satisfied that the risks associated with granting relief are mitigated by the measures applied by CBA and the revised and stringent requirements outlined in the modification instrument. s 47C(1)

Delegate Approval

✓ Approved Not approved

Signed 	Date 4/11/21
Kathryn Miller, National Manager, Legal and Enforcement	

Comments:

I am satisfied that the risk posed by the proposed modification is low and that it is appropriate to grant the modification having regard to the matters set out in the exemption assessment.

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Exemption Assessment

OVERVIEW			
ASSESSMENT DOCUMENT REF:	13013990	MATTER REF:	JIRA or Case Management Ref
APPLICANT:	Commonwealth Bank of Australia (CBA) (ACN 123 123 124)		
APPLICANT SECTOR:	Domestic ADI		
DESIGNATED SERVICES:	N/A		
DOCUMENTS:	APPLICATION	SAFE: 11217128 ; SAFE: 11217283	
	SUPPLEMENTARY INFORMATION	SAFE: 11353884 , SAFE: 11354984 , SAFE: 11354766	
SECTION(S) SUBJECT TO EXEMPTION	AML/CTF Act: <ul style="list-style-type: none"> Subsection 123(1) – disclosures relating to suspicious matters; and Subsection 123(2) – disclosures relating to s. 49 notices 		
REASON FOR EXEMPTION	<p>s 47G(1)(a) Commonwealth Bank of Australia (CBA) submitted an application for an exemption from the ‘tipping off’ provisions in section 123 of the AML/CTF Act. CBA has requested an exemption to permit the disclosure of suspicious matter report (SMR) and s. 49 notice related information to employees of a wholly owned foreign subsidiary of CBA, CBA Services Private Limited located in Bengaluru, India (CBA India).</p> <p>On 3 December 2020, AUSTRAC granted CBA an exemption to enable the disclosure of SMR information to CBA India (Exemption 17 of 2020). This exemption memorandum deals with the second aspect of the exemption application – that is, to enable CBA to disclose s. 49 notice related information to employees of CBA India.</p> <p>s 47G(1)(a)</p> <p>This memorandum only assesses the CBA’s application for an exemption from subsection 123(2) relating to the disclosure of s. 49 notice information.</p> <p>It is proposed that the exemption be granted as a modification.</p>		

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s 47G(1)(a)

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APPLICATION ASSESSMENT

s 47G(1)(a)

ML/TF RISKS

Low

A standard risk assessment matrix has not been applied in this case. The risk assessment matrix is used to determine whether the risk associated with the provision of a designated service is low. CBA is not seeking an exemption from their AML/CTF obligations in relation to the provision of a designated service.

The Policy team and the Rules, Exemptions and MOUs (REM) team have assessed the information provided by CBA in support of its application and is satisfied that the risks associated with granting relief are mitigated by the measures applied by CBA and the stringent conditions outlined in the exemption instrument.

Policy and REM considers that granting the exemption carries low risk because CBA will implement systems and controls to manage the risks of tipping off – that is the unauthorised disclosure and misuse of s. 49 notice related information by the CBA India employees.

s 47G(1)(a)

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s 47G(1)(a)

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Requirements

CBA will need to comply with stringent requirements outlined in the modification. A failure by CBA to comply with these requirements is a

		<p>civil penalty provision and may result in the modification being revoked or the AUSTRAC CEO applying to the Federal Court of Australia for a civil penalty order.</p> <p>The modification requires the CBA to have in place risk mitigation measures, most of which CBA has already implemented. This includes:</p> <ul style="list-style-type: none">• ensuring that the information is only used to provide AML/CTF services• conducting employee due diligence and AML/CTF risk awareness training for all CBA India employees that are granted access by the CBA AML/CTF Compliance Officer to s. 49 notice related information• ensuring that the disclosure is made in accordance with CBA's Information Security policies and procedures and the information is encrypted and stored on data servers located in Australia• requiring confidentiality agreements to be signed by the offshore subsidiary• ensuring oversight and governance of these arrangements by the CBA board and senior management•• conducting audits and internal reviews. <p>The modification also requires CBA to inform AUSTRAC of any events of matters that arise that may affect their compliance with the exemption within 5 days of becoming aware of the relevant event or matter. This would include for example, a disclosure of section 49-notice related information or SMR information to a person not permitted to access that information under the exemption or a request by another person, government or body under a law of a foreign country.</p>
<p>IMPACT ON THE INTEGRITY OF THE FINANCIAL SYSTEM</p>	<p>No Adverse Impacts</p>	<p>Policy and REM considers that granting this exemption would not adversely impact the integrity of the financial system and would be consistent with the purpose of the AML/CTF regulatory regime. The exemption will facilitate CBA's continued compliance with its AML/CTF obligations and ML/TF risk management.</p>
<p>S 47C(1)</p>		

s 47C(1)

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REGULATORY BURDEN	Reduction	s 47G(1)(a)
IMPACT ON COMPETITIVE NEUTRALITY	No Impact	<p>AUSTRAC has seen a growth in the number of corporate groups who rely on service companies (including foreign companies) to perform AML/CTF compliance functions on behalf of their subsidiaries.</p> <p>AUSTRAC has received similar exemption applications from ANZ, Westpac and HSBC. It is evident that the banking sector is increasingly globalising its compliance operations and this trend is largely being driven by the need for reporting entities to effectively manage and respond to increasing ML/TF risks and to enhance their reporting to AUSTRAC.</p>

		s 47C(1)
CONSISTENCY IN REGULATION	Consistent	<p>AUSTRAC has not previously provided an exemption to permit the disclosure of s. 49 notice-related information to an offshore subsidiary. The AUSTRAC CEO agreed in principle to grant the exemption subject to further consultation with partner agencies on the risks (SAFE: 12416284).</p> <p>As discussed above, AUSTRAC and the Department of Home Affairs consulted with partner agencies on this exemption.</p>
IMPLICATION FOR FUTURE EXEMPTION / MODIFICATION REQUESTS	Moderate	<p>It is likely that the granting of this exemption to CBA will result in future applications from other reporting entities that wish to establish similar offshore service entities to undertake some AML/CTF functions on behalf of an Australian reporting entity. Any such applications would be appropriately considered on their merits.</p>

CONSULTATION
<p>Extensive consultation has occurred internally and with Home Affairs and partner agencies to finalise this modification.</p>

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