Memorandum

Document ref:	11216612
То:	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:



- 2. 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).
- 3. 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.

^₄s 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 4/C(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.

⁻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.
- [•] 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





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)
- 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

47G(1)(a)

- S 47G(1)(a 29. The exemption is rument applies to both CBA and reporting entities within the CBA DBG. CBA must enter into appreement with each entity within the CBA DBG authorising CBA to act on their behalf.
 - 30. The exemption instrument requires that:
 - 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 the addressed.

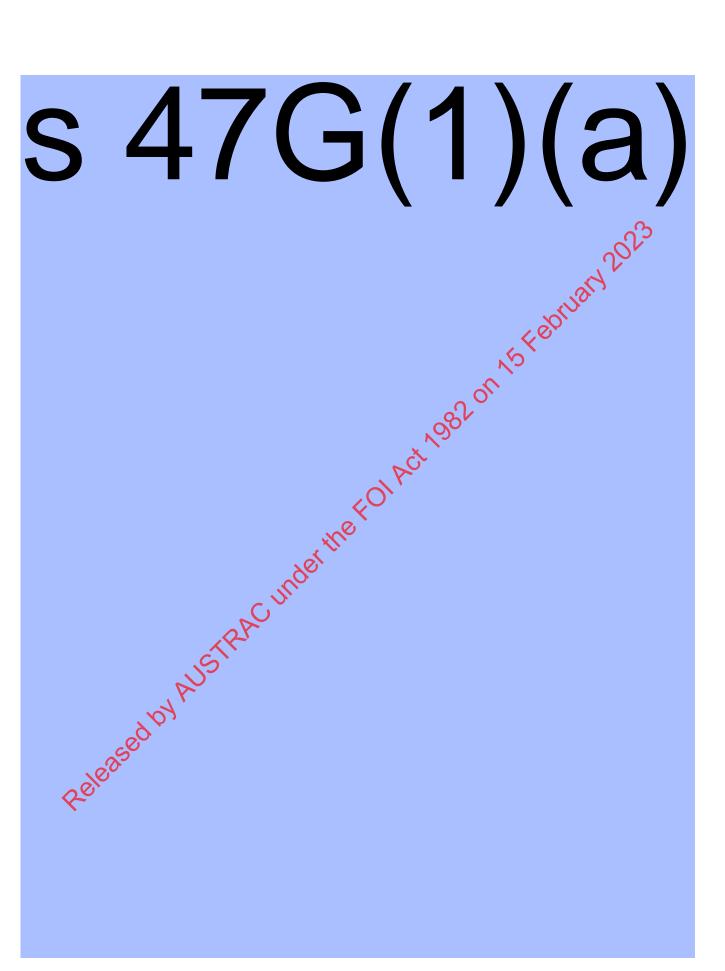
Issues

- 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 of 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].



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 (panagraphs 212(3)(a) and (b) of the AML/CTF Act)

47G(1)(a)

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.



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. of 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 offence? 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. <u>Exemption 3 of 2020</u> 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 hat 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.

Implimitions 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 (<u>11487123</u>), Regulatory Operations Branch (<u>11496823</u>) and Intelligence Division (<u>1149842</u>). s 47C(1)

s 47C(1)	reput
Conclusions	NS I
52. Policy and REM recommend \$ 47C(1)	school (1)
Approval Approved Not approved	
Signed Book	Date3/12/2020
Jennifer Ermert, Acting National Manager, Legal and E	nforcement Branch

Comments:

Released by AUSTRAC under the FOLACT 982 on 15 February 2023

Modification Memorandum

SUMMARY OF APPLICATION ASSESSMENT

		•		
ASSESSMENT DOCUMENT	<u>13013990</u>	RECOMMENDATI	^{on:} S	47C(1)
APPLICANT:	Commonwealth Bank of Australia (CBA) (ACN 123 123 124)			
APPLICANT SECTOR:	Domestic ADI			,22
DESIGNATED SERVICES:	ruary			
DOCUMENTS:	APPLICATION		SAFE: 1120	128; SAFE: 11217283
	SUPPLEMENTARY INFORMA	TION	SAFE: <u>11353</u> SAFE: <u>11354</u>	8884, SAFE: <u>11354984,</u> 1766
SECTION(S) SUBJECT TO MODIFICATION / EXEMPTION	Subsections 123(1) and (2) – tipping off			
REASON FOR MODIFICATION / EXEMPTION	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: <u>11216612</u>). This modification will replace Exemption 17 of 2020.			
	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).			
· · · · · ·	S 47G S 47G(1)(a) order to conduct these activ and s. 49 notice related info		es of CBA Indi	-
Released D'	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.			
Following extensive consultation with the Department of Home Affairs and agencies, it is recommended \$ 47C(1) \$ 47C(1)				
SUMMARY OF	Applicant's compliance reco	rd S 4	17G(1)(a)
ASSESSMENT	ML/TF risks	Low	/	

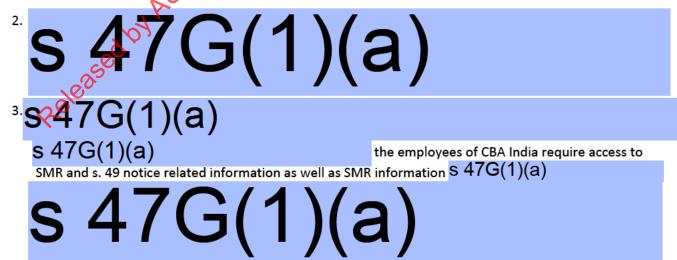
Impact on the integrity of the financial system	Low	
Consistency with the intent of the AML/CTF Act	Moderate	
Regulatory burden	Significant	
Impact on competitive neutrality	No impact	
Consistency in regulation	Consistent	
Implication for future exemption/modification requests	Minimal	
information to 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 AMI (CTE Act. The primary purpose of the consultation was		
N/a	9	
AUSTRAC Under the FOL.		
	system Consistency with the intent of the AML/CTF Act Regulatory burden Impact on competitive neutrality Consistency in regulation Implication for future exemption/modification requests Policy and REM consulted with the Regula Division and Legal on the proposed condit information to offshore subsidiaries. AUST of Home Affairs, AFP, ACIC, ASIO, CDPP, Al implications of allowing CBA and other rep subsection 123(2) of the AML/CTF Act. The to determine the appropriate conditions for N/a N/a	

EXEMPTION MEMORANDUM			
DOCUMENT REF:	13020403	Matter ref:	JIRA or Case Management Ref
APPLICANT:	Commonwealth Bank of Australia (CBA) (ACN 123 123 124)		
то:	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		oru

Recommendations



from the 'tipping off' provisions in section 123 of the AML/CTF Act. CBA (and members of the CBA designated business group) we requested an exemption to permit the disclosure of suspicious matter report (SMR) and s. 49 potice related information to employees of a wholly owned foreign subsidiary of CBA, CBA Services Private Limited located in Bengaluru, India (CBA India).



- 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.
- s 47C(1) s 47G(1)(a) s 47E(d) Cunderther
- 8. CBA is required to implemed 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.

47C(1)

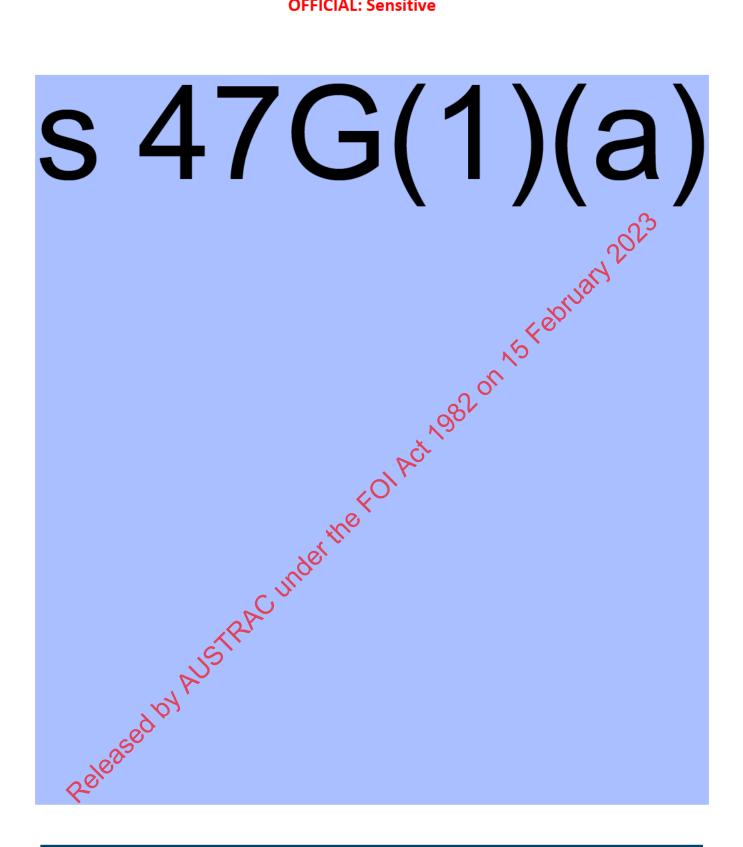
9. This modification instrument covers both SMR and s.49 notice related information and includes additional requirements, including that:

- 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:
 - o 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 aceview 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	
KII in LINDE	
Signed Alla	Date 4/11/21
Kathryn Miller, National Manager, Legal and Enforceme	ent
Comments:	
I am satisfied that the risk posed by the proposed modific	ation is low and that it is appropriate to grant the
modification having regard to the matters set out in the e	exemption assessment.

Exemption Assessment

OVERVIEW			
ASSESSMENT DOCUMENT REF:	13013990	MATTER REF:	JIRA or Case Management Refs
APPLICANT:	Commonwealth Bank of A	Australia (CBA) (ACN 123 123 12	
APPLICANT SECTOR:	Domestic ADI N/A		
DESIGNATED SERVICES:	N/A	5	, o,
DOCUMENTS:	APPLICATION	SAFE: 11217128; SAFE	
	SUPPLEMENTARY INFORMATION	SAFE: 11353884, SAFE: 113549	<u>84</u> , SAFE: <u>11354766</u>
SECTION(S) SUBJECT TO EXEMPTION		- disclosures relating to suspice - disclosures relating to s. 49	
REASON FOR EXEMPTION	 S 47G(1)(a) Sommonwealth 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). 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. 		
Reit	s 47	7G(1)(a)
	This memorandum only assesses the CBA's application for an exemption from subsection 123(2) relating to the disclosure of s. 49 notice information.		
	It is proposed that the ex	emption be granted as a modifie	cation.



APPLICATION ASSESSMENT

s 47G(1)(a)

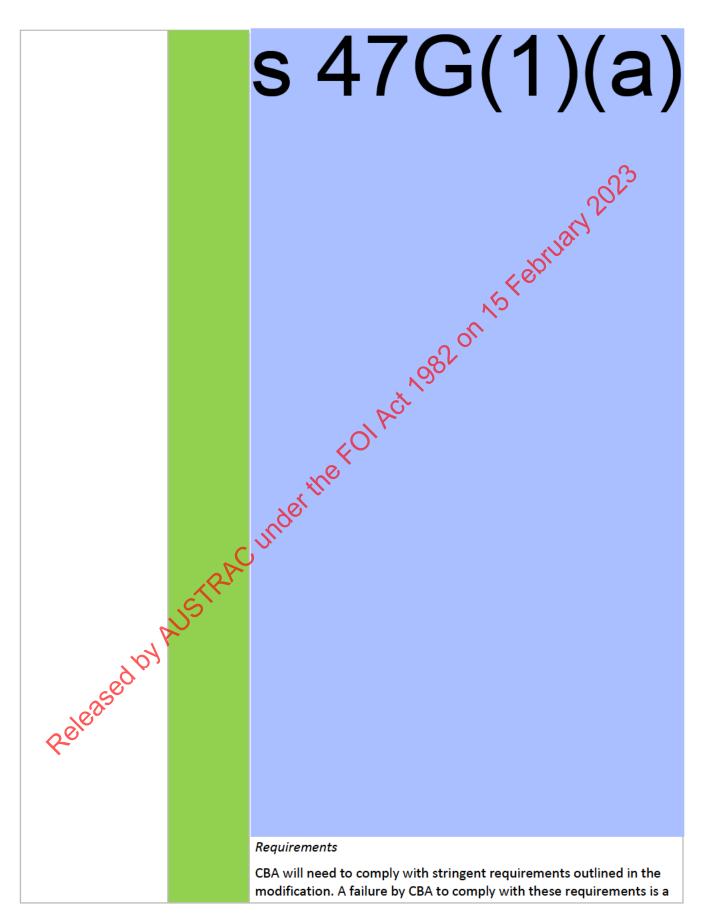
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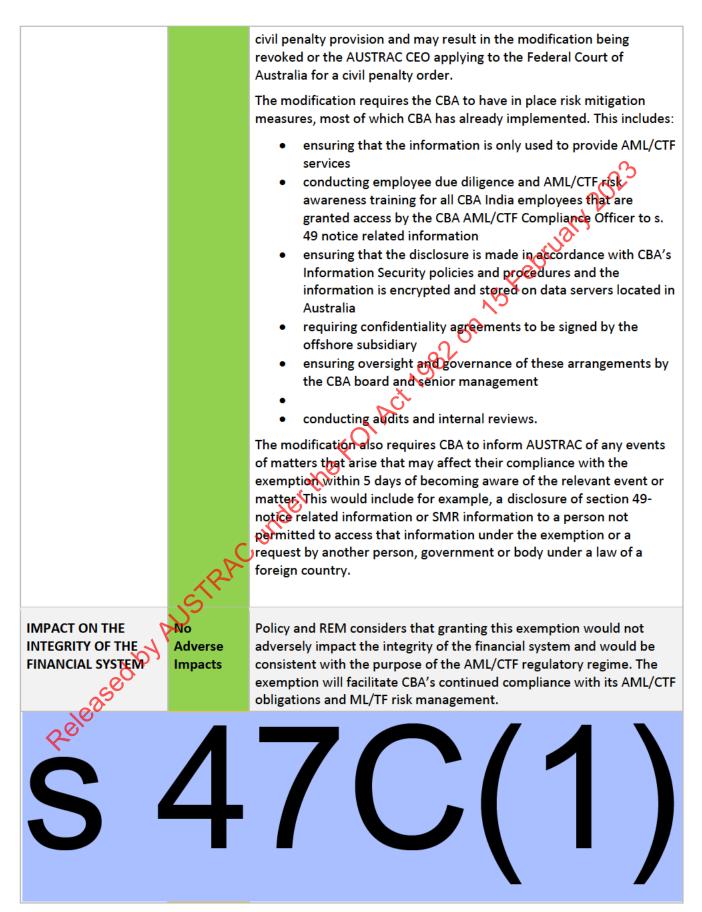
ML/TF RISKS

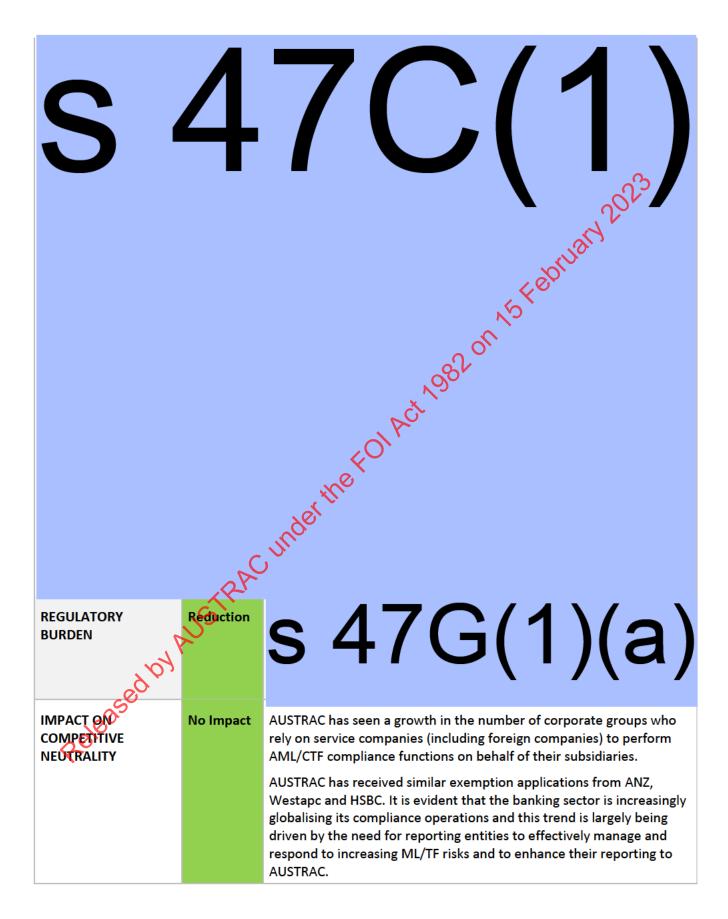
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The Policy team and the Rules, Exemptions and MOUs (REM) team have assessed the information provided by CBA in support of its









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		s 47C(1)
CONSISTENCY IN REGULATION	Consistent	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: <u>12416284</u>). As discussed above, AUSTRAC and the Department of Home Affairs consulted with partner agencies on this exemption
IMPLICATION FOR FUTURE EXEMPTION / MODIFICATION REQUESTS	Moderate	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.
N981		
CONSULTATION		OLACT

Extensive consultation has occurred internally and with Home Affairs and partner agencies to finalise this modification.