



# Explanatory statement

## accompanying

### Banking (Exemption) Order No 104

*Banking Act 1959*

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#### Authority

1. This explanatory statement is issued by the Australian Prudential Regulation Authority (*APRA*).

#### The instrument to which this explanatory statement relates

2. This explanatory statement relates to the exemption order made under subsections 11(1) and (4) of the *Banking Act 1959* (the ***Banking Act***) dated 18 August 2005 (***Exemption Order No 104***). Exemption Order No 104 revokes *Banking (Exemption) Order No 65* (***Exemption Order No 65***) and re-makes the parts of that order which permit a certain class of registered entities to use restricted expressions relating to merchant banking.

#### Background to and explanation of Exemption Order No 104

3. Section 11 of the *Banking Act* confers a wide power on APRA to grant exemptions from the *Banking Act*.

4. Subsection 11(1) empowers APRA to make an order that all provisions or specified provisions of the *Banking Act* (other than section 63) do not apply to a person. By virtue of subsection 11(2), such an order may apply to a particular person or a class of persons, and may be given subject to conditions.

5. Under subsection 11(4), APRA can make an order varying or revoking an order made under subsection 11(1).

6. Section 66 of the *Banking Act* prohibits the use of certain restricted terms relating to banking, including the words *bank*, *banker* and *banking* (subject to certain limited exceptions none of which are presently relevant). It also makes provision for APRA to give consent to the use of restricted expressions. The consent can be given to particular persons or to a class of persons, and may be given subject to conditions.

7. Exemption Order No 65 was made under an earlier version of subsection 11(1) in 1990. It granted a conditional exemption from section 66 of the Banking Act to financial corporations listed in Category D (Money Market Corporations) of the list kept by the Reserve Bank of Australia (which was then responsible for monitoring financial corporations) under section 10 of the *Financial Corporations Act 1974* (the ***Financial Corporations Act***). Exemption Order No 65 provided for two things:

First, it gave consent to all Category D financial corporations to use the restricted terms *bank*, *banker* and *banking* in relation to their business, but only in the expressions *merchant bank*, *merchant banker* and *merchant banking*. (This will be referred to as the ***old merchant banking consent***.)

Second, it gave consent to those Category D financial corporations that are offshore banking units to use the restricted term *banking* in the expression *offshore banking unit*. Offshore banking units are financial entities which are authorised under section 128AE of the *Income Tax Assessment Act 1936* to carry out various kinds of financial transactions between non-residents on a concessionally taxed basis. (This will be referred to as the ***old OBU consent***.)

8. Exemption Order No 65 imposed the same set of conditions in respect of both consents. The conditions were that the corporation not state, imply or suggest:

- (i) that the word *bank* is part of the registered name of the corporation under State or Territory law; or
  - (ii) that the word *bank* is part of the registered name of the corporation's business under State or Territory law; or
  - (iii) that the corporation is a bank within the meaning of the Banking Act; or
  - (iv) that the corporation is subject to prudential supervision by the Reserve Bank.
- Note with regard to condition (iii) that when Exemption Order No 65 was made, the Banking Act regulated banks, whereas now it regulates a wider group of deposit-taking institutions which have to be authorised under that Act and which are called "authorised deposit-taking institutions". And note with regard to condition (iv) that when Exemption Order No 65 was made the Reserve Bank, rather than APRA, was responsible for prudentially supervising banks.

9. The earlier version of section 11 of the Banking Act, under which Exemption Order No 65 was made, was replaced by the current version in 1998, when the Banking Act was amended by the *Financial Sector Reform (Amendments and Transitional Provisions) Act 1998* (the ***Amendment Act***). By virtue of item 6 of Part 1 of Schedule 19 of the Amendment Act, Exemption Order No 65 continued to have effect after the amendments as if it had been made under the current subsection 11(1).

10. The Financial Corporations Act was repealed and replaced by the *Financial Sector (Collection of Data) Act 2001* (the ***Collection of Data Act***) in 2001. Section 11 of the Collection of Data Act broadly corresponds to section 10 of the Financial Corporations Act – section 11 requires APRA to keep a register of "registered entities" (which are financial corporations not regulated under the Banking Act), divided into categories determined by APRA. Financial corporations that used to be in Category D of the list kept under section 10 of the Financial Corporations Act are now allocated to Category D of the list kept under section 11 of the Collection of Data Act.

11. After the repeal of the Financial Corporations Act, by virtue of a transitional provision (namely, subitem 3(1) of Schedule 3 of the *Financial Sector (Collection of Data – Consequential and Transitional Provisions) Act 2001*), references in an instrument to a class of financial corporations in the list kept under section 10 of the

Financial Corporations Act are to be read as if they were a reference to the corresponding class of registered entities in the list kept under section 11 of the Collection of Data Act. The effect of this transitional provision was that, after the repeal, Exemption Order No 65 applied to the financial corporations in Category D of the list kept under section 11 of the Collection of Data Act.

12. On 16 June 2005, APRA issued a consent under section 66 of the Banking Act, which is entitled *Consent to use restricted expression – Offshore Banking Units (the Section 66 OBU Consent)*.<sup>1</sup> The Section 66 OBU Consent allows offshore banking units to use the restricted term *banking* in connection with their offshore banking unit business, as part of the expression *offshore banking unit*, subject to conditions set out in the consent. Basically, those conditions require the offshore banking unit to give a consumer warning to certain classes of its customers which makes it clear to them that the offshore banking unit is not an authorised deposit-taking institution under the Banking Act and is not prudentially supervised by APRA, and that a deposit with or loan to the offshore banking unit is not subject to the depositor protection provision in section 13A of the Banking Act. (The purpose and operation of the Section 66 OBU Consent is described in detail in the explanatory statement which accompanies it.)

13. The Section 66 OBU Consent is intended to replace the old OBU consent in Exemption Order No 65. It is therefore necessary to revoke the part of that order which contains the old OBU consent.

14. The old merchant banking consent in Exemption Order No 65 is intended to continue. However, it needs minor updating as a consequence of the legislative changes that have taken place since it was made. This involves replacing references to provisions of the Financial Corporations Act with references to the corresponding provisions of the Collection of Data Act, replacing the reference to the Reserve Bank with a reference to APRA, and replacing the reference to a bank within the meaning of the Banking Act with a reference to an authorised deposit-taking institution within the meaning of the Banking Act.

15. Because of the need to make these changes to Exemption Order No 65, APRA has decided to replace it with Exemption Order No 104. Exemption Order No 104 revokes Exemption Order No 65 and re-enacts the old merchant banking consent which was given by Exemption Order No 65, in identical terms to those in Exemption Order No 65 (subject to making the minor updating terminological changes mentioned in paragraph 14 above).

## Consultation

16. Section 17 of the *Legislative Instruments Act 2003* (the *Legislative Instruments Act*) imposes consultation obligations on the makers of legislative instruments. Subsection 17(1) requires the maker of a legislative instrument to undertake consultation which the maker considers to be appropriate and which is reasonably practicable before making the legislative instrument. This obligation applies particularly where the proposed instrument is likely to:

- (a) have a direct, or a substantial indirect, effect on business; or
- (b) restrict competition.

(These paragraphs correspond to paragraphs 17(1)(a) and (b).)

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<sup>1</sup> Federal Register of Legislative Instruments No F2005L01597 on [www.comlaw.gov.au](http://www.comlaw.gov.au).

17. Section 18 of the Legislative Instruments Act sets out circumstances where consultation may be unnecessary or inappropriate. They include the circumstance that the legislative instrument is of a minor or machinery nature and does not substantially alter existing arrangements: paragraph 18(2)(a).

18. In the present case, Exemption Order No 104 in effect simply re-enacts Exemption Order No 65 in an updated form which takes account of the making of the Section 66 OBU Consent (which has rendered the old OBU consent contained in Exemption Order No 65 redundant) as well as of legislative changes that have occurred in recent years.

19. For these reasons, Exemption Order No 104 is purely consequential and of a legal machinery nature, and therefore consultation is not warranted.