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International Swaps and Derivatives Association, Inc (“ISDA”)

Australian law legal opinion – ISDA/FIA Client Cleared OTC Derivatives Addendum – Client Reliance

1 Introduction

1.1 This opinion considers whether under Australian Law:

- (a) the provisions covering the consequences of a CM Trigger Event in Section 8(b) of the Addendum are enforceable, both in the absence of and in the event of Insolvency Proceedings in relation to the Clearing Member (please see paragraph 6 of this opinion);
- (b) the conclusions reached in our Netting Opinion, other than any conclusions relating to the matters discussed in our response in paragraph 6 of this opinion, in relation to a Covered Base Agreement, apply equally where a Covered Base Agreement is used in conjunction with the Addendum (please see paragraph 7 of this opinion);
- (c) the provisions covering the consequences of a CCP Default in Section 8(c) of the Addendum are enforceable in the absence of Insolvency Proceedings in relation to the Clearing Member (please see paragraph 8 of this opinion);
- (d) the hierarchy of applicable events provisions contained in Section 8(d) of the Addendum are enforceable in circumstances where a CM Trigger Event and a CCP Default occur in proximity to each other, both in the absence of and in the event of Insolvency Proceedings in relation to the Clearing Member (please see paragraph 9 of this opinion);
- (e) the set-off provisions contained in Section 8(e) of the Addendum are enforceable in the absence of an Insolvency Proceeding in relation to the Clearing Member (please see paragraph 10 of this opinion);

- (f) the limited recourse provisions contained in Section 15 of the Addendum are enforceable, in the absence of an Insolvency Proceeding in relation to the Clearing Member (please see paragraph 11 of this opinion);
- (g) the Addendum materially impacts on or prejudices the operation of any terms of a Rule Set in respect of an Agreed CCP Service providing for the transfer of CM/CCP Transactions from the Clearing Member to another clearing member of the relevant Agreed CCP on the default of the Clearing Member or otherwise (please see paragraph 12 of this opinion);
- (h) the use of the Addendum in conjunction with a Covered Base Agreement would affect the conclusions reached in our Netting Opinion to the extent that those conclusions relate to Transactions other than Client Transactions (please see paragraph 13 of this opinion);
- (i) the conclusions reached in our Collateral Opinion, other than any conclusions relating to the matters discussed in paragraphs 6 and 8 of this opinion, in relation to the use of the Credit Support Document apply equally where the relevant Credit Support Document is used in conjunction with the Paragraph 11 or the Paragraph 13, as applicable (please see paragraph 14 of this opinion);
- (j) the use of the Paragraph 11 or the Paragraph 13 in conjunction with the relevant Credit Support Document would affect the conclusions reached in our Collateral Opinion to the extent that those conclusions relate to any Existing Collateral Agreement (please see paragraph 15 of this opinion); and
- (k) assuming that the Addendum was amended to incorporate the CM Default Amendments, would such amendments be enforceable, both in the absence of, and in the event of, Insolvency Proceedings in respect of the Clearing Member (please see paragraph 16 of this opinion).

1.2 As requested, we have addressed the issues raised by ISDA in its letter to us of 20 June 2016 (“**Instruction Letter**”) on the basis of the assumptions that we have been asked to make. We have also set out in this opinion certain other assumptions that we consider necessary in order for us to answer the questions posed. This opinion is limited to answering the specific questions asked. We have excerpted, in italics, the specific issues raised by ISDA in the Instruction Letter at the start of each relevant paragraph.

2 Scope

2.1 In this opinion, we advise on the laws of the Commonwealth of Australia, New South Wales, Victoria, Queensland, Western Australia and the Australian Capital Territory (“**Australian Jurisdictions**”). We express no opinion about the laws of any other jurisdiction. However, the *Corporations Act 2001* of Australia (“**Corporations Act**”) is uniform throughout Australia and the other statutes mentioned in this opinion are Commonwealth statutes. The courts of the Australian Jurisdictions are sometimes referred to as the “**Australian Courts**” in this opinion and the laws in force in the Australian Jurisdictions are sometimes referred to as “**Australian Law**”.

2.2 This opinion is subject to the assumptions and qualifications set out in, and should be read in conjunction with, our ISDA Opinions. This opinion does not purport to update or reissue our ISDA Opinions in any way, and our opinions in this opinion on the application of our ISDA Opinions are given as of the date of the relevant ISDA Opinion.

- 2.3 This opinion is strictly limited to the matters stated in it and does not, by implication or otherwise, apply to other matters. For example, this opinion is not an analysis of all issues which could arise in entering a Covered Base Agreement, Addendum, Amended Annex, Transaction or Client Transaction or in connection with clearing transactions or dealing with an Agreed CCP, and is not a general enforceability opinion with respect to any of those documents, transactions or dealings or the parties' obligations under or in connection with any of them.
- 2.4 We express no opinion in relation to (i) any Transactions, Client Transactions, Confirmations or Confirms which may be, or may have been, entered into between a Client and a Clearing Member under any Covered Base Agreement (whether or not amended by the Addendum) or (ii) any Core Provisions, Mandatory CCP Provisions, a Rule Set or the rules of any Agreed CCP, and have assumed that no such document, rule or transaction affects our opinion as set out below. We express no opinion in relation to the enforceability of any Covered Base Agreement, Addendum or Amended Annex against a Client, or the application of our ISDA Opinions in respect of a Client.
- 2.5 This opinion is subject to the following:
- (a) The advice in this opinion is only in relation to Australian Law as it stands at 9:00am local time on the date of this opinion, and we have assumed that no law of a jurisdiction other than the Australian Jurisdictions adversely affects the conclusions in this opinion. We have made no investigation of, and make no comment on, the laws of any other jurisdictions.
 - (b) This opinion incorporates all the assumptions contained in the Instruction Letter (which for convenience are repeated in Schedule 1 to this opinion).
 - (c) We assume in this opinion that the Clearing Member is an "**Australian Company**", as defined in our Collateral Opinion, which means a company which is registered as a company under the *Corporations Act*. Australian Company does not include foreign companies or entities, companies which do not have their centre of main interests in Australia for the purposes of the UNCITRAL Model Law on Cross-Border Insolvency ("**Model Law**"), private health insurers, the Crown and statutory corporations organised under any Australian law.

In this opinion, we also assume that the Clearing Member is an Australian Company which is either an Australian Authorised Deposit-taking Institution ("**ADI**") under the *Banking Act 1959* (Cth) or is acting in no special capacity (for example, this excludes general insurers under the *Insurance Act 1973* (Cth), life insurers under the *Life Insurance Act 1995* (Cth) and trustees, including superannuation trustees and responsible entities of managed investment schemes).
 - (d) We assume that:
 - (i) where a *Transfer Annex* is used, each of the Addendum, Covered Base Agreement and *Transfer Annex* are governed by English law; and
 - (ii) where a *NY Annex* is used, each of the Addendum, Covered Base Agreement and *NY Annex* are governed by New York law.

- (e) We do not consider in this opinion:
- (i) the insolvency or commencement of insolvency proceedings in respect of any entity other than a Clearing Member that is an Australian Company, including a Client or an Agreed CCP;
 - (ii) the effect of any client asset protection laws, unfair contract terms laws, regimes or regulations or privacy or confidentiality laws;
 - (iii) any tax-related matters;
 - (iv) any prudential, commercial or factual matters; or
 - (v) any recovery or resolution regime applicable to any Agreed CCP or a CCP Default.
- (f) This opinion is addressed to ISDA solely for the benefit of its members in relation to their use of Clearing Agreements and related Amended Annexes. No other person may rely on this opinion for any purpose without prior written consent. This opinion may, however, be shown by an ISDA member to a competent regulatory or supervisory authority or professional advisors for such ISDA member for the purposes of information only, on the basis that we assume no responsibility to such authority or to any person as a result, or otherwise.
- (g) This opinion does not apply in relation to any Clearing Member or Client, or any document to which a Clearing Member or a Client is a party, unless the relevant Clearing Member is an Australian Company.

3 Addendum and Clearing Agreement

3.1 In accordance with the Instruction Letter, we understand the following:

- (a) The Addendum operates in conjunction with an existing master agreement (for the purpose of this opinion, this is assumed to be a Covered Base Agreement) to facilitate the standardised documentation of client clearing and to support the delivery of the client protections used by central counterparties (“CCPs”) on the default of a Clearing Member. The Addendum supplements, and forms part of, the existing Covered Base Agreement between the Clearing Member and the Client, regardless of its form.
- (b) The Addendum operates on the principal-to-principal client clearing model and is designed to operate on a cross CCP basis in conjunction with any non-US CCP that adopts a client clearing structure capable of being used with the Addendum.
- (c) The Addendum applies from the point at which a Client Transaction arises between the Clearing Member and the relevant Agreed CCP, which may include any transactions that are transferred to the Clearing Member as a result of a pre-default or post-default porting. Therefore, the Clearing Agreement governs the cleared transactions between the parties and the relevant Covered Base Agreement (without the Addendum) continues to govern any uncleared transactions. Except to the extent expressly opined on in paragraph 13 below, this opinion does not consider the enforceability or efficacy of any transaction prior to the point it becomes a Client Transaction for the purposes of the Addendum or the means by which it became a Client Transaction.

- (d) The Addendum includes an Addendum Annex which enables the Clearing Member and the Client to specify which CCPs and which product types are covered by the Addendum and to make certain elections and otherwise customise their client clearing relationship.

4 Definitions

4.1 In this opinion, the following terms have the meaning set out below:

- (a) **Addendum** means the Client Cleared OTC Derivatives Addendum in the form published by ISDA and FIA, Inc. (formerly the Futures and Options Association) on 9 February 2016 to be entered into between a Clearing Member and its Client, including the relevant Addendum Annex.
- (b) **Amended Annex** means the Amended NY Annex or the Amended Transfer Annex.
- (c) **Amended NY Annex** means the *NY Annex* including Paragraph 13 deemed to supplement and form part of the Clearing Agreement in accordance with Section 10(a)(ii) of the Addendum.
- (d) **Amended Transfer Annex** means the *Transfer Annex* including Paragraph 11 deemed to supplement and form part of the Clearing Agreement in accordance with Section 10(a)(ii) of the Addendum.
- (e) **Clearing Agreement** means the Covered Base Agreement as supplemented by the Addendum and, in respect of a Client Transaction, the Confirm.
- (f) **Collateral Opinion** means our opinion to ISDA dated 8 August 2017.
- (g) **Covered Base Agreement** means a *Master Agreement* governed by English law or New York law.
- (h) **Credit Support Document** means the *Transfer Annex* or the *NY Annex*, as applicable.
- (i) **Insolvency Proceedings** means the insolvency proceedings to which an Australian Company may become subject under Australian Law, as described in Part C and Part I of our Netting Opinion.
- (j) **ISDA Opinions** means either our Collateral Opinion or our Netting Opinion or both, as context requires.
- (k) **Limited Recourse Provisions** means the provisions in Section 15 (“Limited Recourse”) of the Addendum.
- (l) **Netting Opinion** means our opinion to ISDA dated 28 February 2017.
- (m) **Paragraph 11** means Paragraph 11 to a *Transfer Annex* in the form published by ISDA and FIA Europe on 9 June 2015 as the English Law CSA Collateral Terms with respect to the Addendum.
- (n) **Paragraph 13** means Paragraph 13 to a *NY Annex* in the form published by ISDA and FIA Europe on 9 June 2015 as the New York Law CSA Collateral Terms with respect to the Addendum.

- (o) **Transfer Provisions** is a reference to provisions of the Addendum which provide for the Transfer of a transaction credited to the client account of another clearing member for the account of the Client to the Clearing Member for credit to the Client Account.
- (p) **Valuation Mechanisms** means the mechanisms specified in the Addendum (including the mechanisms in Sections 8(a), (b), (c) and 9 and the associated definitions such as Aggregate Transaction Value and Relevant Collateral Value) in connection with the calculation of termination values on the termination of some or all Client Transactions.

4.2 Capitalised terms used but not otherwise defined in this opinion have the meanings given to them in the Covered Base Agreement, the Addendum or an Amended Annex, as the case may be. Italicised terms used in this opinion have the meaning given in our ISDA Opinions, as context requires.

5 Assumptions and qualifications

The conclusions set out in this opinion are based on the assumptions, qualifications and limitations set out in our ISDA Opinions (subject to any necessary changes for context), as well as the assumptions in the Instruction Letter we have been instructed to make and certain other assumptions and qualifications that we consider necessary in order for us to answer the questions posed, as set out in Schedule 1 and in the relevant parts of this opinion.

6 *Are the provisions covering the consequences of a CM Trigger Event in Section 8(b) of the Addendum enforceable under the laws of your jurisdiction, both in the absence of and in the event of insolvency proceedings in your jurisdiction in relation to the Clearing Member?*

Please explain whether:

- (a) *your answer would be different if more than one CM Trigger Event occurred in respect of separate Agreed CCP Services;*
- (b) *your answer would be different if one or more CM Trigger Events occurred and an event of default in respect of the Clearing Member occurred under the Covered Base Agreement entitling Client to designate an Early Termination Date (or resulting in an Early Termination Date automatically occurring) in respect of Transactions other than Client Transactions; and*
- (c) *your answer would be different depending on the Type of Client Account?*

6.1 CM Trigger Event

In summary, for the reasons set out below, in our view:

- (a) prior to a Clearing Member being subject to Insolvency Proceedings, an Australian Court applying English or New York law would recognise the enforceability¹ of the provisions covering the close-out netting consequences of a CM Trigger Event in Section 8(b) of the Addendum against the Clearing Member; and
- (b) following the commencement of Insolvency Proceedings in respect of the Clearing Member, the provisions covering the close-out netting consequences of a CM Trigger Event in

¹ Throughout this opinion, the expression “enforceable” means that the relevant obligations are of a type that Australian Courts enforce and does not mean that the obligations will necessarily be enforced in all circumstances in accordance with their terms.

Section 8(b) of the Addendum would be validated under Australian Law, subject to any applicable “specified stay provision” that applies to the Clearing Agreement.

This view would not differ if:

- (i) more than one CM Trigger Event occurred in respect of separate Agreed CCP Services;
- (ii) one or more CM Trigger Events occurred and an event of default in respect of the Clearing Member occurred under the Covered Base Agreement entitling the Client to designate an Early Termination Date (or resulting in an Early Termination Date automatically occurring) in respect of Transactions other than Client Transactions; or
- (iii) the Type of Client Account.

Prior to Insolvency Proceedings

Prior to a Clearing Member being subject to Insolvency Proceedings, and on the assumption that Section 8(b) of the Addendum is enforceable in accordance with its terms under English or New York law, an Australian Court applying English or New York law would recognise the enforceability of the provisions covering the close-out netting consequences of a CM Trigger Event in Section 8(b) of the Addendum against the Clearing Member.

We note that, as considered in paragraphs B.2.5 and B.2.6 and Part J of our Netting Opinion, a statutory manager may be appointed to the Clearing Member in certain circumstances, or another “specified stay provision” may apply to the Clearing Agreement. The “specified stay provisions” do not allow any other party to a contract to which the Clearing Member is a party to deny any obligations under that contract, accelerate any debt under that contract, close out any transaction relating to that contract, or enforce any security under that contract due to specified events. As noted in paragraphs B.2.6 and J.3.4 of our Netting Opinion, we consider that the relevant trigger event described in the “specified stay provisions”, and the framework, does not prohibit a party from closing out *transactions* under the *close-out netting contract* (whether or not an obligation under the contract of a party to the contract is an eligible obligation or an obligation of a prescribed kind) for any other reason.

Following the commencement of Insolvency Proceedings

The Clearing Agreement is governed by English or New York law, as applicable, and, accordingly, the construction of the rights created under the Clearing Agreement is not a matter of Australian Law. However, we consider that the close-out netting rights under Section 8(b) of the Addendum summarised in this section 6 above would, if the Clearing Agreement were governed by Australian Law, comprise rights which would be validated by the *Netting Act* following the *external administration* of the Clearing Member, taking into account the relevant analysis in our Netting Opinion.² We are of this view because:

² Including the application of a specified stay provision that may apply to the Clearing Agreement (as discussed in Paragraphs B.2.5 and B.2.6 and Part J of the Netting Opinion) and the circumstances that may affect the application of the Netting Act (as discussed in Paragraph D.3.5 and D.3.6 of the Netting Opinion).

- (a) the Clearing Agreement meets the criteria of a 'close-out netting contract' as defined in the *Netting Act*;³ and
- (b) as considered in our Netting Opinion, where one party to the Clearing Agreement is subject to *external administration*, section 14(2)(c) of the *Netting Act* validates:
 - (i) the termination of obligations;
 - (ii) the calculation of termination values in respect of each terminated obligation; and
 - (iii) a net amount becoming payable,in accordance with the Clearing Agreement.

Section 14(2) of the *Netting Act* applies "despite any other law" but subject to:

- (A) any specified stay provision which is applicable to the close-out netting contract;⁴ and
- (B) sections 14(4) and 14(5) of the *Netting Act*, as considered in paragraphs 3.5 and 3.6 of Part D of our Netting Opinion.

Assuming that Section 8(b) of the Addendum would be construed, under English or New York law, as applicable, consistently with the summary in this section 6 above then, subject to our comments in paragraphs (I) to (IV) immediately below, the rights under Section 8(b) would be validated by the *Netting Act*, subject to the application of a "specified stay provision" that applies to the contract.⁵

We draw your attention to the following matters:

(I) (valuation methodology)

Sections 8(a) ("Termination by Clearing Member and Automatic Termination"), 8(b) ("Clearing Member Events"), 8(c) ("CCP Default") and 9 ("Early Termination in Circumstances other than Default") of the Addendum amend the close-out valuation mechanics under Section 6(e) of the Covered Base Agreement which will apply in certain circumstances. For example, under Section 8(a) ("Termination by Clearing Member and Automatic Termination"), relevantly, the Clearing Member will, in determining the Close-out Amount:

- (i) act at all times in accordance with the Close-out Standard;

³ As considered in Paragraphs B.2.1 and B.2.2 of our Netting Opinion.

⁴ Please see paragraph 2.6 of Part B and Part J of our Netting Opinion for further consideration of the 'specified stay provisions', which are generally most relevant to *authorised deposit-taking institutions, general insurers and life companies*.

⁵ The application of a specified stay provision to a *close-out netting contract* is discussed in Paragraphs B.2.5 and B.2.6 and Part J of our Netting Opinion.

- (ii) subject to certain conditions, be entitled to take into account certain amounts⁶ intended to account for the cost or gain of neutralising the corresponding transactions at the relevant Agreed CCP when determining the transaction amount;
- (iii) make an assessment of the number and nature of the relevant Client Transactions and the then-prevailing conditions in the relevant markets in which quotations for Close-out Transactions and Risk Hedging Transactions could be sought (subject to certain criteria); and
- (iv) then take certain specified actions that it determines to be most commercially reasonable taking into account the factors described above, being entering into Close-out Transactions, entering into Risk Hedging Transactions, taking any other actions in accordance with any other method permitted by the Covered Base Agreement or effecting any combination of those actions.⁷

Please see paragraph 6.1(II) below for analysis with respect to the close-out valuation mechanics under Sections 8(b) (“Clearing Member Events”), 8(c) (“CCP Default”) and 9 (“Early Termination in Circumstances other than Default”).

We do not offer any opinion on the adequacy of the valuation methodology applied pursuant to the Valuation Mechanisms. However, as noted in paragraph D.3.3 of our Netting Opinion, the 1998 *Explanatory Memorandum* states that the *Netting Act* will not apply to contracts where the mechanism for calculation of the termination value is a ‘device’ to deprive a party of value as follows:

“A device of the kind used in *Ex parte Mackay* (1883) 8 Ch App 643 would not fall within the definition because it would not reflect any attempt to calculate the true termination value of the obligation under consideration.”

Accordingly it is important that each of the Valuation Mechanisms is an appropriate calculation of value and not a contrivance intended to gain an advantage on a party’s default.

Please also see paragraph 14(b) below with respect to the inclusion and netting of an amount equal to the Value of the Credit Support Balance under the Amended Transfer Annex pursuant to Section 6(e) of the Covered Base Agreement or Sections 8(b) or 8(c) of the Addendum.

⁶ Such amounts include (A) any amount attributable to the relevant Client Transactions under the Clearing Agreement or any related Collateral Agreement, pro-rated where necessary if such amount can be partially attributed to transactions other than the relevant Client Transactions, which was payable but unpaid at the time of termination and is not otherwise accounted for and/or (B) any gains or losses realised or incurred by the Clearing Member (or its Affiliates to the extent its Affiliates enter into Risk Hedging Transactions with respect to CM/CCP Transactions on the Clearing Member’s behalf) in connection with or attributable to (I) terminating the relevant CM/CCP Transactions (including, without limitation, as a result of a Transfer of a CM/CCP Transaction from the relevant Client Account to Clearing Member’s proprietary account, any offset of a CM/CCP Transaction with other transactions in Clearing Member’s proprietary account, where applicable, and subsequent re-establishment of transactions in the Clearing Member’s proprietary account following any such offset, where applicable), (II) entering into Close-out Transactions and/or (III) entering into or unwinding any Risk Hedging Transactions in whole or in part and whether on an individual transaction or portfolio basis.

⁷ Provided that a Close-out Transaction and a Risk Hedging Transaction cannot be entered into in respect of a single CM/CCP Transaction.

(II) (termination of Client Transactions and close-out netting under the Addendum)

(i) Introduction

Certain Sections of the Addendum, such as Sections 3(c)(i)(2) (“Modification Events”), 7 (“Illegality/Impossibility”), 8(b) (“Clearing Member Events”), 8(c) (“CCP Default”), 9 (“Early Termination in Circumstances other than Default”) and 17(a) (“Termination of Agreed CCP Services”):

- (A) alter the grounds on which Client Transactions may otherwise have been terminated under the Covered Base Agreement;⁸
- (B) alter the time at which Client Transactions are deemed to be terminated; or
- (C) introduce additional grounds on which Client Transactions may be terminated.

(ii) Section 9 (“Early Termination in Circumstances other than Default”) of the Addendum

Section 9 (“Early Termination in Circumstances other than Default”) of the Addendum applies if any Client Transaction is terminated early pursuant to the Addendum other than under Section 8 (“Early Termination following Default”). For example, Section 9 may apply on the occurrence of any of the following:

- (A) if, under Section 3(c)(i)(2) of the Addendum, either: (A) a Modification Event is a Modification Mismatch Event and it is impossible or impracticable for the Clearing Member to make modifications to the terms; of the related Client Transaction or (B) a Modification Event is a Modification Change Event and it is impossible or impracticable for the Clearing Member to maintain the related Client Transaction following such Modification Change Event;
- (B) in certain circumstances with respect to Cleared Transaction Illegality/Impossibility (under Section 7 of the Addendum); and
- (C) in certain circumstances with respect to the termination of Agreed CCP Services (under Section 17 of the Addendum).

Section 9 provides that the consequences of an early termination in these circumstances (including the provisions relating to calculation of, and obligation to pay, any amount payable by either party following such early termination) will be determined in accordance with the Clearing Agreement as if an event of default in respect of the Client had occurred under the Clearing Agreement and the Relevant

⁸ For example, Section 8(b) provides that certain provisions are specified to not apply in respect to Client Transactions. This includes provisions which would entitle the Client to withhold payment or delivery in certain circumstances in respect of the Clearing Member, which would entitle the Client to terminate transactions early on the occurrence of certain events or would automatically terminate transactions early on the occurrence of certain events in respect of the Clearing Member, or which provide for the consequences of, and rights arising upon or pursuant to, the occurrence of any such event (including, without limitation, provisions relating to the calculation of, and obligation to pay, any amount payable by either party following such termination).

Client Transaction(s) were the only transactions under the Clearing Agreement. This early termination is without prejudice to any obligations which arose under the terms of the Relevant Client Transaction(s) on or prior to the relevant date of termination. We assume that, under the Addendum's governing law, Section 9 operates to apply the termination mechanics of the relevant Covered Base Agreement in circumstances where a Relevant Client Transaction is terminated early under the Addendum other than as a result of Section 8 of the Addendum. We consider that the conclusions in our Netting Opinion in connection with close-out netting under Section 6(e) of the Covered Base Agreement will apply to the termination of Relevant Client Transactions, calculation of termination values and netting of those values which occurs pursuant to Section 9 of the Addendum.

The *Netting Act* does not prescribe particular events which are required to have occurred before termination can take place.⁹ Accordingly, subject to our discussion above, we do not consider that the following matters, as contemplated by the Addendum, affect the conclusions reached in our Netting Opinion:

- (I) the alteration of grounds on which Client Transactions are terminated;
 - (II) the restriction of the circumstances in which a party may exercise its rights to rights to terminate and net obligations; or
 - (III) the alteration of the time at which the Client Transactions are terminated.
- (iii) **Sections 8(b) (“Clearing Member Events”) and 8(c) (“CCP Default”) of the Addendum**

Sections 8(b) and 8(c) of the Addendum introduce an alternative process by which Client Transactions may be terminated, termination values are calculated and those values are netted in specified circumstances. In general terms, on the occurrence of a CM Trigger Event or a CCP Default, each Client Transaction in the relevant Cleared Transaction Set will automatically terminate at the same time as the related CM/CCP Transaction is terminated or, in the case of a CM Trigger Event, Transferred, and the amount payable following such termination will be the Cleared Set Termination Amount determined under Section 8(b)(ii) or 8(c)(iii) (respectively).¹⁰ In each case, the value of each such terminated Client Transaction for the purposes of calculating the applicable Cleared Set Termination Amount and Aggregate Transaction Values will be equal to the relevant CM/CCP Transaction Value or relevant part thereof.

The Cleared Set Termination Amount payable on the occurrence of a CM Trigger Event or CCP Default is determined under Sections 8(b)(ii) and 8(c)(iii) respectively. However, generally, we understand that the aggregation mechanisms in each of these clauses are substantially similar. In broad terms, the Cleared Set Termination Amount, in respect of the termination of Client Transactions of a Cleared

⁹ We are of this opinion on the basis that the *Netting Act* defines a *close-out netting contract* as, relevantly, a contract under which, “if a particular event happens: (i) particular obligations of the parties terminate or may be terminated; and (ii) the termination values of the obligations are calculated or may be calculated; and (iii) the termination values are netted, or may be netted, so that only a net cash amount (whether in Australian currency or some other currency) is payable; ...”.

¹⁰ Sections 8(b)(ii) and 8(c) apply except to the extent otherwise stated in the Core Provisions of the relevant Rule Set.

Transaction Set on the occurrence of a CM Trigger Event or CCP Default, equals to the sum of:

- (A) the Aggregate Transaction Value, being broadly the aggregate of CM/CCP Transaction Values (ie the value determined in respect of or otherwise ascribed to the related CM/CCP Transaction(s) in accordance with the relevant Rule Set following a CM Trigger Event or CCP Default) for all Client Transactions in the relevant Cleared Transaction Set;
- (B) certain other amounts which became payable, or which would have become payable but for an unsatisfied condition precedent, in respect of any such Client Transaction on or prior to the termination of such transactions but which remain unpaid at the time of termination, plus certain interest amounts;
- (C) an amount equal to the Relevant Collateral Value in respect of the relevant Client Transactions; and
- (D) any other amount attributable to the relevant Client Transactions under the Clearing Agreement and/or any related Collateral Agreement (pro-rated if necessary) which was payable but unpaid at the time of termination and is not otherwise included in Sections 8(b)(ii)(3)(A) to 8(b)(ii)(3)(C), together with certain interest amounts.

We assume that, under the Addendum's governing law, Sections 8(b) and 8(c) of the Addendum prevail over Section 6(e) of the Covered Base Agreement on the occurrence of a CM Trigger Event or a CCP Default. On this basis, the conclusions in our Netting Opinion in connection with close-out netting under Section 6(e) of the Covered Base Agreement will not apply to the termination of Client Transactions, calculation of termination values and netting of those values which occurs by virtue of Sections 8(b) and 8(c) of the Addendum.

As noted in paragraph 2.5(d) above, the Clearing Agreement is governed by English law or New York law. Accordingly, the construction of the rights created under the Clearing Agreement is not a question of Australian Law. However, we consider that the rights which arise under Sections 8(b) and 8(c) of the Addendum would, if the Clearing Agreement were governed by Australian Law, comprise the rights which would be protected under the *Netting Act* following the *external administration* of the Clearing Member, taking into account the relevant analysis in our Netting Opinion. This is because it appears that the effect of Sections 8(b) and 8(c) is that, following a CM Trigger Event or a CCP Default:

- (I) particular obligations are terminated in the sense of the obligation coming to an end by being accelerated and liquidated (ie converted into a money debt). We consider that the termination of Client Transactions under the Clearing Agreement following the occurrence of either a CM Trigger Event or a CCP Default under Sections 8(b)(ii)(1) and 8(c)(i) will be enforceable following the *external administration* of the Clearing Member subject to a specified stay provision that applies to the Covered Base Agreement and provided that neither section 14(4) nor section 14(5) of the *Netting Act* applies. This right to terminate is expressly permitted under section 14(2)(c) of the *Netting Act*. As noted above, please note that the

Netting Act does not prescribe particular events which are required to have occurred before termination can take place;

- (II) upon being terminated, the terminated obligations are given a value. Please refer to our comments in paragraph 6.1(I) above with respect to valuation methodology. On the assumption that the mechanisms for calculation of termination values under Sections 8(b) and 8(c) comply with the requirements we have discussed in paragraph 6.1(I), above, we consider that the calculation of a Cleared Set Termination Amount under those Sections in respect of the termination Client Transactions under the Clearing Agreement following a CM Trigger Event or a CCP Default will be enforceable under Australian Law against the Clearing Member following the *external administration* of the Clearing Member, subject to a specified stay provision that applies to the Covered Base Agreement and provided that neither section 14(4) nor section 14(5) of the *Netting Act* applies. This right to calculate termination values is expressly permitted under section 14(2)(c) of the *Netting Act*; and
- (III) the termination values are netted against each other so that only a net cash amount is payable. Sections 8(b) and 8(c) of the Addendum require a process to be followed to determine an overall amount payable by one party to the other following early termination in certain circumstances. We consider that the aggregation of amounts described in paragraphs 6.1(II)(iii)(A) to 6.1(II)(iii)(D) above constitutes the netting of the termination values of obligations that have been terminated. This netting of termination values under the Clearing Agreement in respect of the Cleared Set Termination Amount following a CM Trigger Event or a CCP Default will be enforceable following the *external administration* of the Clearing Member, subject to a specified stay provision that applies to the Covered Base Agreement and provided that neither section 14(4) nor section 14(5) of the *Netting Act* applies.

We assume that no proprietary interests are subject to the close-out netting process under Sections 8(b) and 8(c) of the Addendum. Please see paragraph 14 below regarding the Relevant Collateral Value in respect of an Amended NY Annex.

Assuming that this is the construction of Sections 8(b) and 8(c) under their governing law, on the bases set out above, then the rights under these Sections would be validated by the *Netting Act*, subject to a specified stay provision that applies to the Covered Base Agreement and provided that neither section 14(4) nor section 14(5) of the *Netting Act* applies.

(III) (Transfer Provisions)

The Transfer Provisions provide for the transfer of certain transactions in particular circumstances. For example, the transfer of a particular Client Transaction pursuant to Section 3(b) ("Transferred transactions") of the Addendum is contingent on a transaction in relation to an Agreed CCP Service between another clearing member of an Agreed CCP and such Agreed CCP credited to the client account of that other clearing member for the account of the Client being Transferred to the Clearing Member for credit to the Client Account in accordance with the relevant Rule Set as a result of agreement by the Clearing Member.

We understand that the transfer of a transaction under the Transfer Provisions may take effect, under Section 3(b) of the Addendum, as a new Client Transaction arising between the Clearing Member and the Client under the Clearing Agreement at the time at which the related CM/CCP Transaction arises in accordance with the relevant Rule Set for the account of the Client.

As considered in our Netting Opinion, section 14(2) of the *Netting Act* can apply where a party to a Covered Base Agreement goes into *external administration* governed by Australian law. Paragraph D.3.6 of our Netting Opinion considers the effect of section 14(5) of the *Netting Act*, which provides that the validation of close-out netting provided by section 14(2) of the *Netting Act* does not apply to an obligation owed by a party to a close-out netting contract to another person if:

- (a) the party goes into *external administration*;
- (b) the party acquired the obligation otherwise than as a result of the operation of section 22, 35 or 36R of the *Business Transfer Act*; and
- (c) any of the following are satisfied:
 - (i) the other person did not act in good faith in entering into the transaction that created the terminated obligation; or
 - (ii) when that transaction was entered into, the other person had reasonable grounds for suspecting that the party was insolvent at that time or would become insolvent because of, or because of matters including:
 - (A) entering into the transaction; or
 - (B) doing an act, or making an omission, for the purposes of giving effect to the transaction; or
 - (iii) the other person neither provided valuable consideration under, nor changed their position in reliance on, the transaction.

We also note our discussion of section 14(4) of the *Netting Act* in paragraph D.3.5 of our Netting Opinion. This section provides that the protection for close-out netting provided by section 14(2) of the *Netting Act* does not apply to a right or obligation under a close-out netting contract if:

- (I) the person acquired the right or obligation from another person with notice that that other person, or the other party to the contract, was at the time unable to pay their debts as and when they became due and payable; and
- (II) the person acquired the right or obligation otherwise than as a result of the operation of section 22, 35 or 36R of the *Business Transfer Act*.

Accordingly, it is important that none of these factors which disentitle reliance on the *Netting Act* are present (our Netting Opinion provides more detail on these requirements).

(IV) (Modification Events)

Section 3(c) (“Modification Events”) of the Addendum generally provides that, following the occurrence of certain Modification Events, the Clearing Member may make certain modifications to the terms of the related Client Transactions and determine any Modification Loss Amount. If the modifications to the terms of a Client Transaction are sufficient to be regarded as creating a new obligation under the Clearing Agreement under its governing law, then particular attention should be paid to the operation of sections 14(5) and 14(6) of the *Netting Act* and the requirements of good faith, no reasonable grounds for suspecting insolvency and valuable consideration in connection with any modifications to the terms of the related Client Transactions, as considered in paragraph (II) immediately above.

(V) (Specified Stay Provisions)

To the extent the *Netting Act* would permit a party to close-out a Clearing Agreement in accordance with its terms, the protection is subject to any specified stay provision that applies to the Clearing Agreement. The “specified stay provisions” do not allow, relevantly, the close-out of transactions with an Australian Company that is, relevantly, an ADI due to specified events, and are considered in detail in Part J of our Netting Opinion.

We expect that the most relevant “specified stay provision” in the context of the Clearing Agreement is the stay that applies on the *appointment of a statutory manager*. As noted in paragraph C.2.2 of our Netting Opinion, the *appointment of a statutory manager* is an insolvency proceeding to which an Australian Company that is an *Australian bank* may become subject to under Australian Law, and that this type of insolvency proceeding falls within the definition of *external administration* in the *Netting Act*. We understand that the *appointment of a statutory manager* to a Clearing Member that is an ADI will only trigger a CM Trigger Event if either (a) the applicable Agreed CCP formally declares to Clearing Member constitutes a default in respect of Clearing Member or (b) the appointment results in the automatic termination of all relevant CM/CCP Transactions (or would result in the automatic termination of all relevant CM/CCP Transactions if there were CM/CCP Transactions outstanding at that time), in each case in accordance with the relevant Rule Set.

The effect of the stay on the *appointment of a statutory manager* on a *close-out netting contract* is considered in detail in paragraph B.2.6 of our Netting Opinion and applies equally to a CM Trigger Event in Section 8(b) of the Addendum as it does to a Bankruptcy Event of Default under the *Master Agreement*.

As noted above, a specified stay provision that applies to a contract prevents the other party from, relevantly, closing out any transaction relating to that contract. However, the stay framework does not prohibit a counterparty from closing out *transactions* under a Clearing Agreement for any other reason (as discussed in paragraphs B.2.6 and J.3.4 of our Netting Opinion). For example, to the extent that a CM Trigger Event under the Clearing Agreement has occurred due to an event that is not described in a specified stay provision, then the Client may still close out any Client Transactions in the relevant Cleared Transaction Set under Clearing Agreement if it has a right to do so in accordance with the terms of the Clearing Agreement due to that CM Trigger Event occurring and continuing.

6.2 Occurrence of multiple CM Trigger Events in respect of separate Agreed CCP Services

We assume that the effect of Section 8(b)(ii) under English or New York law, as applicable, is that, on the occurrence of multiple CM Trigger Events, in respect of each Agreed CCP Service that the CM Trigger Events relate to, each Client Transaction in the Cleared Transaction Set for the Agreed CCP Service will be terminated, termination values are calculated and those values are netted.

In our view, the fact that such multiple CM Trigger Events could occur and multiple net amounts could be calculated does not affect our view that the provisions covering the close-out netting consequences of a CM Trigger Event in Section 8(b) are validated under Australian Law both in the absence of and in the event of the Clearing Member being subject to Insolvency Proceedings. The reasons for this include that our analysis in section 6.1 of this opinion above applies equally if multiple CM Trigger Events occur and multiple net amounts are calculated.

6.3 Occurrence of one or more CM Trigger Events and an event of default in respect of Clearing Member occurred under the Covered Base Agreement

Subject to the below, the occurrence of an event of default in respect of the Clearing Member under the Covered Base Agreement would not affect our views in sections 6.1 and 6.2 above regarding the validity of the provisions covering the close-out netting consequences of one or more CM Trigger Event in Section 8(b) of the Addendum.

This opinion is given on the basis that the Clearing Agreement is governed by the laws of England or New York and is not governed by Australian law. Accordingly, the construction of the rights created under a Clearing Agreement is not a question of Australian law. However, as noted in paragraph B.2.6 of our Netting Opinion, our expectation is that the *appointment of a statutory manager* should trigger an *Event of Default* under the Covered Base Agreements where the *Events of Defaults* under the Covered Base Agreements include the unamended Bankruptcy Event of Default in Section 5(a)(vii) of the Covered Base Agreements, but this depends on the terms of the Covered Base Agreement. The effect of the *appointment of a statutory manager* on a Covered Base Agreement is discussed in paragraphs B.2.6 and Part J of the Netting Opinion. However, we note that each specified stay provision only relates to the relevant event described in that specified stay provision. The stay framework does not prohibit a counterparty from closing out transactions under a Clearing Agreement for any other reason. For example, to the extent that a CM Trigger Event has occurred due to an event that is not described in a specified stay provision, then the Client may still close out transactions under a Clearing Agreement if it has a right to do so in accordance with the terms of the Clearing Agreement due to that CM Trigger Event occurring and continuing.

7 Would the conclusions reached in the Netting Opinion, other than the conclusions relating to the matters discussed in section 6 above, in relation to a Covered Base Agreement apply equally where a Covered Base Agreement is used in conjunction with the Addendum?

Other than the conclusions relating to the matters considered in section 6 above, we are of the opinion that the conclusions set out in our Netting Opinion with respect to Transactions would not be materially and adversely affected by the use of the Addendum in conjunction with the Covered Base Agreement.

8 Are the provisions covering the consequences of a CCP Default in Section 8(c) of the Addendum enforceable under the laws of your jurisdiction in the absence of insolvency proceedings in relation to the Clearing Member?

By way of background, Section 8(c) of the Addendum provides that, upon the occurrence of a CCP Default, each Client Transaction in the relevant Cleared Transaction Set automatically terminates at

the same time as the related CM/CCP Transaction, and the amount payable following such termination will be the Cleared Set Termination Amount determined under Section 8(c)(iii). The value of each such terminated Client Transaction for the purposes of calculating the applicable Cleared Set Termination Amount and Aggregate Transaction Values will be equal to the relevant CM/CCP Transaction Value or relevant part thereof.

Prior to a Clearing Member being subject to Insolvency Proceedings, and on the assumption that Section 8(c) of the Addendum is enforceable in accordance with its terms under English or New York law, as applicable, an Australian Court applying English or New York law, as applicable, would recognise the enforceability of the provisions covering the close-out netting consequences of a CCP Default in Section 8(c) of the Addendum against the Clearing Member.

Please see section 6.1 of this opinion above regarding the restrictions on denying obligations under a contract, accelerating debts under a contract, closing out transactions relating to a contract and enforcing security under a contract (in each case being a contract to which the Clearing Member is a party) on the grounds set out in a specified stay provision that applies to the Clearing Agreement, including the *appointment of a statutory manager* under the *Banking Act*.

9 *Are the hierarchy of applicable events provisions contained in Section 8(d) of the Addendum enforceable under the laws of your jurisdiction in circumstances where a CM Trigger Event and a CCP Default occur in proximity to each other, both in the absence of and in the event of insolvency proceedings in relation to the Clearing Member?*

Relevantly and in summary, Section 8(d)(ii) of the Addendum provides that in the circumstances where a CM Trigger Event and a CCP Default have occurred, the relevant close-out provisions of the Addendum will take priority in accordance with the order or priority given to such events in the relevant Rule Set, if any, and otherwise in accordance with the order in respect of which a party first acts to terminate Client Transactions (or Client Transactions are otherwise terminated) in accordance with the relevant Sections of the Addendum.

In our view, both prior to and following a Clearing Member being subject to Insolvency Proceedings, and on the assumption that Section 8(d) of the Addendum is enforceable in accordance with its terms under English or New York law, as applicable, an Australian Court applying English or New York law, as applicable, would recognise the enforceability of that Section against the Clearing Member.

10 *Are the set-off provisions contained in Section 8(e) of the Addendum enforceable under the laws of your jurisdiction in the absence of insolvency proceedings in relation to the Clearing Member?*

In the absence of Insolvency Proceedings in relation to the Clearing Member, and on the assumption that Section 8(e) of the Addendum is enforceable in accordance with its terms under English or New York law, as applicable, an Australian Court applying English or New York law, as applicable, would recognise the enforceability of that Section against the Clearing Member.

Please see section 6.1 of this opinion above regarding the restrictions on denying obligations under a contract, accelerating debts under a contract, closing out transactions relating to a contract and enforcing security under a contract (in each case being a contract to which the Clearing Member is a party) on certain grounds following the *appointment of a statutory manager* under the *Banking Act*.

11 *Are the limited recourse provisions contained in Section 15 of the Addendum enforceable under the laws of your jurisdiction, in the absence of insolvency proceedings in your jurisdiction in relation to the Clearing Member?*

In the absence of Insolvency Proceedings in relation to the Clearing Member, and on the assumption that the Limited Recourse Provisions are enforceable in accordance with their terms under English or New York law, as applicable, an Australian Court applying English or New York law, as applicable, would recognise the enforceability of the Limited Recourse Provisions against the Clearing Member.

12 *Would the Addendum materially impact on or prejudice the operation of any terms of a Rule Set in respect of an Agreed CCP Service providing for the transfer of CM/CCP Transactions from the Clearing Member to another clearing member of the relevant Agreed CCP on the default of the Clearing Member or otherwise?*

We do not consider that the Addendum would materially impact on or prejudice the operation of any terms of a Rule Set in respect of an Agreed CCP Service providing for the transfer of CM/CCP Transactions from the Clearing Member to another clearing member of the relevant Agreed CCP on the default of the Clearing Member or otherwise.

On the default of Clearing Member

In respect of the default of the Clearing Member, our understanding is that the critical Addendum provisions which may apply in those circumstances would be section 8(b) of the Addendum, which are enlivened upon the occurrence of a CM Trigger Event. In those circumstances, section 8(b)(ii)(1) expressly contemplates the transfer of CM/CCP Transactions from the Clearing Member to another clearing member as the termination of each Client Transaction in the relevant Cleared Transaction Set occurs at “the same time as the related CM/CCP Transaction is terminated or Transferred.” In addition, section 8(b)(ii) of the Addendum expressly states that those provisions are not enlivened, “except to the extent otherwise stated in the Core Provisions of the Rule Set”. The Core Provisions are defined as those which are specified in respect of the Agreed CCP Service in Table A, and otherwise the provisions of the Rule Set that relate to Client Transactions and the consequences for Client of a CM Trigger Event. We would expect that the provisions dealing with the Transfer of CM/CCP Transactions between clearing members of an Agreed CCP Service would be included in the Core Provisions for that CCP Service.

Otherwise than on default of Clearing Member

We note that the Addendum also expressly provides for Client to request the Clearing Member to Transfer one or more Client Transaction(s) and the related CM/CCP Transaction(s) in Section 5. Whilst Section 5 refers to the fact that Clearing Member’s actions occur provided “no CCP Default, CM Trigger Event or Transfer Condition Default has occurred and is continuing ... the Transfer Conditions have been satisfied”, Section 5 is also “subject to the relevant Rule Set and Applicable Law”. In addition, the actions that the Clearing Member must take are those which the “Rule Set and the rules and procedures of any electronic facility, trade repository, system or platform used by the relevant Agreed CCP or Clearing Member” contemplate should be taken in respect of the transfer. On this basis, we do not consider that the Addendum would impact on or prejudice the operation of any terms of a Rule Set in respect of an Agreed CCP Service providing for the transfer of CM/CCP Transactions from the Clearing Member to another clearing member of the relevant Agreed CCP in the absence of a default.

13 *Would the use of the Addendum in conjunction with a Covered Base Agreement affect the conclusions reached in the Industry Netting Opinion in relation to Transactions other than Client Transactions?*

Other than the conclusions relating to the matters considered in section 6 above, we are of the opinion that the conclusions set out in our Netting Opinion with respect to Transactions would not be materially and adversely affected by the use of the Addendum in conjunction with the Covered Base Agreement in relation to Transactions other than Client Transactions.

14 *Would the conclusions reached in the Collateral Opinion, other than any conclusions relating to the matters discussed in Sections 6 and 10 of this opinion in relation to the use of the Credit Support Document apply equally where the relevant Credit Support Document is used in conjunction with the Paragraph 11 or the Paragraph 13, as applicable?*

Subject to comments set out below and the terms of the Amended Annex, we are of the opinion that the conclusions set out in our Collateral Opinion in relation to the use of the Credit Support Document would apply equally in circumstances where the relevant Credit Support Document is used in conjunction with Paragraph 11 or Paragraph 13, as applicable.

We draw your attention to the following matters in respect of the Amended Transfer Annex:

(a) (Specification of credit support to be transferred)

Paragraph 11(i) of the Amended Transfer Annex appears to have the effect that the Clearing Member or Client may, depending on which specification is made in the Addendum Annex, specify that the assets transferred by the other party as Eligible Credit Support or Equivalent Credit Support must correspond to the collateral or margin, howsoever described, received from the Agreed CCP in relation to the relevant CM/CCP Transactions and the relevant Delivery Amount or Return Amount, as applicable.

The effect of Paragraph 11(j) appears to be that,¹¹ in certain circumstances, the Clearing Member may elect to deem the original Eligible Credit Support comprised in the Credit Support Balance with respect to the Client as Transferor to comprise such amount and type of the substituted Eligible Credit Support as determined by the Clearing Member as having an equivalent Value to such original Eligible Credit Support then comprised in the Credit Support Balance with respect to the Client.

Provided that, under the governing law of the Amended Transfer Annex, the Amended Transfer Annex (including Paragraphs 11(i) and (j)) does not permit specific assets to be identified or grant a security interest over those assets, those Paragraphs should not change the characterisation of the transaction effected under the Amended Transfer Annex from that of transfers by way of unconditional transfers of title.

(b) (Value and adjustments to Credit Support Balance)

Paragraph 11(g) of the Amended Transfer Annex amends Paragraph 6 of the Transfer Annex in its entirety.

Under the amended Paragraph 6 of the Amended Transfer Annex, an amount equal to the Value of a party's Credit Support Balance, determined as though the Early Termination Date

¹¹ If Substitution is specified as applicable in the Addendum Annex.

were a Valuation Date, will be deemed to be an Unpaid Amount due to that party for the purpose of Section 6(e) of the Covered Base Agreement if an Early Termination Date is designated or deemed to occur as a result of:

- (i) an Event of Default in respect of which the Client is the Defaulting Party or a Termination Event in respect of which the Client is the sole Affected Party and all Client Transactions in the relevant Cleared Transaction Set to which the Amended Transfer Annex applies are Terminated Transactions; or
- (ii) as a result of any other event, howsoever described, (other than a CM Trigger Event or CCP Default) in respect of which all Client Transactions in the relevant Cleared Transaction Set are terminated.

However, under the amended Paragraph 6 of the Amended Transfer Annex, on termination of all Client Transactions in the relevant Cleared Transaction Set following a CM Trigger Event or CCP Default, for the purposes of Sections 8(b)(ii)(3)(C) or 8(c)(iii)(3) of the Addendum, as applicable, the Value of all collateral transferred from one party to another under the relevant Amended Transfer Annex is equal to the Value of that party's Credit Support Balance at the time of determination. This amount is included in the calculation of the Cleared Set Termination Amount under Sections 8(b) and 8(c) as an amount equal to the Relevant Collateral Value in respect of the relevant Client Transactions.¹²

In any event, we understand that, under the governing law of the Clearing Agreement, each Amended Transfer Annex will apply only to Client Transactions in a single Cleared Transaction Set and, in respect of a termination of all such Client Transactions in a Cleared Transaction Set under Section 8(b) or 8(c) of the Addendum, the Amended Transfer Annex that applies to those Client Transactions is terminated at the same time as the Client Transactions. In respect of a termination of all such Client Transactions in a Cleared Transaction Set under Sections 8(b) or 8(c) of the Addendum, this understanding is on the basis that a termination value in respect of all collateral that has been transferred under the Amended Transfer Annex is included in the close-out netting process under Sections 8(b)(ii)(3)(C) or 8(c)(iii)(3) of the Addendum, as applicable.

We consider that this effects a termination of the Transaction comprised in the Amended Transfer Annex, on the assumption that, under its governing law, the original obligations of the parties to transfer collateral under the Amended Transfer Annex are discharged without being performed.¹³

On this basis, we consider that our conclusions in our Collateral Opinion, particularly in paragraph 4 of Part C, apply to the extent that the Value of the relevant party's Credit Support Balance is included in the calculation of the relevant net amount payable, whether it be payable under Section 6 of the Covered Base Agreement (by virtue of the operation of Sections 8(a) or 9 of the Addendum) or under Sections 8(b) or 8(c) of the Addendum (due to

¹² On this basis, we assume that the transaction contemplated by the Amended Transfer Annex does not constitute a Client Transaction.

¹³ This conclusion is supported by the decision of the Federal Court of Australia in *In the Matter of Opes Prime Stock Broking Limited (Administrators appointed) and Leveraged Capital Pty Limited* (2008) 171 FCR 473; [2008] FCA 1425 (17 September 2008), in which the court affirmed the applicability of the *Netting Act* to the close-out netting provisions of securities lending agreements. The decision affirms the breadth of the protection given by the *Netting Act*. In that decision (at paragraph 42), the judge states that: "The evident purpose of the *Netting Act* supports my conclusion. It was Parliament's intention to ensure that close-out netting contracts used in a variety of financial market transactions be effective under insolvency laws".

the termination of Client Transactions as a result of the occurrence of a CM Trigger Event or a CCP Default). The protection under the *Netting Act* of rights to terminate an Amended Transfer Annex, and calculate and net those termination values in insolvency is subject to the same considerations as discussed in paragraph 6 above.

(c) **(Other adjustment provisions)**

Particular attention should be paid to the operation of sections 14(5) and 14(6) of the *Netting Act* and the requirements of good faith, no reasonable grounds for suspecting insolvency and valuable consideration that are considered in paragraph 6.1 above in connection with any deemed adjustments to the Credit Support Balance in respect of which Clearing Member is the Transferee pursuant to Paragraph 11(m) of the Amended Transfer Annex or any modifications to the terms of the Amended Transfer Annex by the Clearing Member pursuant to 11(n)(i) of the Amended Transfer Annex.

We draw your attention to the following matters in respect of the Amended NY Annex:

(d) **(Holding and Using Posted Collateral and possession and control of Posted Collateral)**

Under Paragraph 13(g) of the Amended NY Annex, the parties may impose eligibility conditions on the ability of Client, Clearing Member, or their respective Custodians to hold Posted Collateral. We note the following regarding possession and control of the Posted Collateral.

First, the protection provided to the enforcement of security under the *Netting Act* only applies to the extent that, before the enforcement, the financial property is transferred or otherwise dealt with so as to be in the possession or under the control of the secured person, or another person (who is not the grantor) on behalf of the secured person under the terms of an arrangement evidenced in writing. Please refer to Part B.5.1 of our Collateral Opinion for more detail in relation to the concepts of possession and control for the purposes of the *Netting Act*.

Second, we refer to our recommendation in Part A.4 of our Collateral Opinion that the steps for attachment and perfection under the PPSA are taken, even where it is expected that the conditions for the application of the *Netting Act* protection for the enforcement of security will be satisfied. The steps for attachment and perfection under the PPSA continue to be relevant to an enforcement of security where the *Netting Act* does not apply. The PPSA requirements for attachment and perfection are considered in Part B.5.2 to 5.4 of our Collateral Opinion, including the requirements for perfection by control and possession.

(e) **(Amendment to the definition of “Obligations” in respect of Client and “eligible obligations” under the Netting Act)**

Paragraph 13(v) of the Amended NY Annex amends the definition of “Obligations” to mean:

- (i) with respect to Client as Pledgor, all present and future obligations of Client under the Clearing Agreement and any additional obligations specified for Client in Paragraph 13; and
- (ii) with respect to Clearing Member as the Pledgor, all present and future obligations of Clearing Member under the Clearing Agreement and any additional obligations

specified for that party in Paragraph 13, in each case, such obligations of the Clearing Member being in respect of the Client Transactions in the Cleared Transaction Set to which this Annex relates.

In this regard, we note the protection provided to the enforcement of security under the *Netting Act* applies to the enforcement of security over financial property, in respect of obligations of a party to a close-out netting contract, only to the extent that, the obligations secured by the financial property, and discharged through the enforcement, are:

- (A) eligible obligations in relation to the contract; or
- (B) obligations under the contract of a party to the contract to pay interest on an eligible obligation; or
- (C) obligations of a party to the close-out netting contract to pay costs and expenses incurred in connection with enforcing security given in respect of an eligible obligation.

Please refer to paragraph A.6.6 of our Collateral Opinion for more discussion on these types of obligations.

(f) **(Other adjustment provisions)**

Particular attention should be paid to the operation of sections 14(5) and 14(6) of the *Netting Act* and the requirements of good faith, no reasonable grounds for suspecting insolvency and valuable consideration in connection with any deemed adjustments to the Posted Credit Support in respect of which Clearing Member is the Secured Party pursuant to Paragraph 13(r) of the Amended NY Annex or any modifications to the terms of the Amended NY Annex by the Clearing Member pursuant to 13(s)(i) of the Amended NY Annex.

(g) **(Relevant Collateral Value)**

One of the amendments in Appendix 4 (ISDA/FIA Addendum – NY CSA Amendments to Addendum Content) of the Addendum inserts the following into the Addendum Annex:

"Relevant Collateral Value" means, in respect of the termination of Client Transactions in a Cleared Transaction Set, the value (without applying any "haircut" but otherwise as determined in accordance with the Collateral Agreement) of all collateral that:

- (a) is attributable to such Client Transactions;
- (b) has been transferred by one party to the other or is an interest amount or distribution attributable to such collateral, in each case in accordance with the Collateral Agreement or pursuant to Section 10 and has not been returned at the time of such termination or otherwise applied or reduced in accordance with the terms of the relevant Collateral Agreement;
- (c) is not beneficially owned by, or subject to any encumbrances or any other interest of, the transferring party or of any third person; and
- (d) if (i) "Collateral Standard Terms" applies; (ii) the Agreement is a form of the 1992 ISDA Master Agreement or the ISDA 2002 Master Agreement; and (iii) the Agreement is governed by the laws of the State of New York, is Cash (either as a result of the relevant Posted Credit

Support (as defined in the CSA) being Cash or a result of the relevant Posted Credit Support (as defined in the relevant CSA) being liquidated pursuant to Paragraph 8(a) or 8(b), as applicable, of the Collateral Agreement).

The Relevant Collateral Value will constitute a positive amount if the relevant collateral has been transferred by Client to Clearing Member and it or equivalent collateral has not been returned at the time of termination or otherwise applied or reduced in accordance with the terms of the relevant Collateral Agreement and a negative amount if the relevant collateral has been transferred by Clearing Member to Client and it or equivalent collateral has not been returned at the time of termination or otherwise applied or reduced in accordance with the terms of the relevant Collateral Agreement.

Notwithstanding the foregoing, where any Collateral Agreement specifies a methodology for calculating the "Relevant Collateral Value", then such methodology will prevail for the purposes of determining the Relevant Collateral Value.

The Relevant Collateral Value is included in the calculation of the Cleared Set Termination Amount under Sections 8(b)(ii)(3)(C) or 8(c)(iii)(3) of the Addendum, as applicable, on the occurrence of a CM Trigger Event or a CCP Default.

As noted in paragraph 6.1(l) above, we assume that no proprietary interests are subject to the close-out netting process under Sections 8(b)(ii)(3)(C) or 8(c)(iii)(3) of the Addendum. This appears to be consistent with paragraph (c) of the definition of Relevant Collateral Value, which requires that the collateral is not beneficially owned by, or subject to any encumbrances or any other interest of, the transferring party or of any third person.

We understand that, under the governing law of the Clearing Agreement, each Amended *NY Annex* will apply only to Client Transactions in a single Cleared Transaction Set and, in respect of a termination of all such Client Transactions in a Cleared Transaction Set under Sections 8(b) or 8(c) of the Addendum, the contractual obligation on the Secured Party to return collateral that has not been returned at the time of termination or otherwise applied or reduced in accordance with the terms of the Collateral Agreement is terminated at the same time as the Client Transactions. The protection under the *Netting Act* of rights to terminate this contractual obligation, and calculate and net termination values in accordance with the close-out netting process under Sections 8(b)(ii)(3)(C) or 8(c)(iii)(3) of the Addendum is considered in discussed in paragraph 6 above.

- 15 ***Would the use of the Paragraph 11 or the Paragraph 13, as applicable, in conjunction with the relevant Credit Support Document affect the conclusions reached in the Collateral Opinion to the extent that those conclusions relate to any Existing Collateral Agreement?***

Subject to the comments set out in 14 above, we are of the opinion that the conclusions set out in our Collateral Opinion with respect to a *Transfer Annex* or a *NY Annex* (as applicable) would not be materially and adversely affected by the use of the Paragraph 11 in conjunction with the *Transfer Annex* or the Paragraph 13 in conjunction with the *NY Annex* (as applicable).

- 16 ***Assuming that the Addendum was amended to incorporate the CM Default Amendments, would such amendments be enforceable under the laws of your jurisdiction, both in the absence of and in the event of insolvency proceedings in your jurisdiction in relation to the Clearing Member? Please explain whether:***

- (a) ***your answer would be different if more than one Relevant CM Default (as defined in the CM Default Amendments) occurred in respect of separate Agreed CCP Services;***

- (b) ***your answer would be different if one or more Relevant CM Defaults occurred and an event of default in respect of the Clearing Member occurred under the Covered Base Agreement entitling Client to designate an Early Termination Date (or resulting in an Early Termination Date automatically occurring) in respect of Transactions other than Client Transactions; and***
- (c) ***your answer would be different depending on the Type of Client Account.***

We understand that, as a matter of English or New York Law, where the CM Default Amendments are made to the Clearing Agreement, the effect is that the following provisions of the Covered Base Agreement, which would otherwise be disapplied under Section 8(a)(i) of the Addendum, continue to apply in respect of Client Transactions, subject to the provisions contained in the CM Default Amendments:

- (a) provisions that would entitle Client to terminate transactions early upon the occurrence of a Relevant CM Default or would automatically terminate transactions early upon the occurrence of a Relevant CM Default; or
- (b) provisions that provide for the consequences of, and rights arising as a result of or pursuant to, an early termination of transactions upon the occurrence of any Relevant CM Default (including, without limitation, the provisions relating to the calculation of, and obligation to pay, any amount payable by either party following such early termination).

For these purposes, the definition of Relevant CM Default means a failure to pay or deliver event of default (with a deemed three Business Day grace period) or a bankruptcy event of default.

Subject to, and for the reasons set out in, the analysis in this opinion (in particular paragraphs 6 and 14) in our view:

- (A) prior to a Clearing Member being subject to Insolvency Proceedings, an Australian Court applying English or New York law would recognise the enforceability of the CM Default Amendments against the Clearing Member;
- (B) following the commencement of Insolvency Proceedings in respect of the Clearing Member:
 - (i) the provisions covering the close-out netting consequences of a Covered Base Agreement that apply as a result of the CM Default Amendments would be validated under Australian Law, subject to any applicable "specified stay provision" that applies to the Clearing Agreement.¹⁴ In this regard, we note that we have assumed that none of the provisions of the Covered Base Agreement that we deem crucial to our Netting Opinion have been amended in any material respect; and
 - (ii) otherwise, an Australian Court applying English or New York law would recognise the enforceability of the CM Default Amendments against the Clearing Member.

¹⁴ The specified stay provisions are considered in paragraph B.2.6 and Part J of our Netting Opinion.

This view would not differ if:

- (I) more than one Relevant CM Defaults occurred in respect of separate Agreed CCP Services;
- (II) one or more Relevant CM Defaults occurred and an event of default in respect of the Clearing Member occurred under the Covered Base Agreement entitling the Client to designate an Early Termination Date (or resulting in an Early Termination Date automatically occurring) in respect of Transactions other than Client Transactions; or
- (III) the Type of Client Account.

We note that Section 1.2([reference to be inserted based on location in Part 5 of the Addendum Annex])(v)(2) (the second (2)) purports to insert the words "or Part []4(i) of the Addendum Annex" "after the words "Section 8(a)" on the third line of Section 8(d)(iii)". We note that the third line of Section 8(d)(iii) does not appear to include a reference to "Section 8(a)". We assume that this does not adversely affect our conclusions in this opinion.

Yours faithfully

A handwritten signature in black ink, appearing to be the initials 'K+WM' followed by a large, sweeping flourish that curves under the signature.

SCHEDULE 1
Assumptions and qualifications

1 Assumptions

1A Instruction Letter assumptions

Following are the assumptions set out in the Instruction Letter which we have been instructed to assume in preparing this opinion. Capitalised terms used in this Part 1A of this Schedule have the meaning given to them in the Instruction Letter.

(a) *The Addendum*

- (i) *Two institutions (either two derivatives dealers or a derivatives dealer and a sophisticated end-user of derivatives and together, the “Parties”), have entered into the Addendum, one as the Clearing Member and one as the Client. The Clearing Member is organised in your jurisdiction.*
- (ii) *The master agreement (i.e. the underlying agreement that is supplemented by the Addendum) is a Covered Base Agreement.*
- (iii) *The Addendum is governed by English law or New York law, as the case may be, and, unless your jurisdiction is England and Wales or the State of New York, is enforceable under the laws of England and Wales or the State of New York, as the case may be.*
- (iv) *Provisions of the Addendum that you deem crucial to your opinion have not been altered in any material respect in the version entered into between the Parties.*
- (v) *On the basis of the terms and conditions of the Clearing Agreement and other relevant factors, and acting in a manner consistent with the intentions stated in the Clearing Agreement, the Parties over time enter into a number of Client Transactions, of a type covered by the Industry Opinions, that are intended to supplement, form part of and be subject to the Clearing Agreement.*
- (vi) *The Client Transactions entered into result in at least one Cleared Transaction Set under the Clearing Agreement.*
- (vii) *The Core Provisions of each Agreed CCP Service are legal, valid and binding under the relevant governing law and against the relevant Agreed CCP and the Clearing Member (including upon the insolvency of the relevant Agreed CCP and/or the Clearing Member).*
- (viii) *If automatic early termination is specified as necessary in the Industry Netting Opinion then, although the Addendum disapplies the operation of automatic early termination in respect of the Clearing Member pursuant to its terms, the relevant Rule Set provides for an equivalent to the concept of automatic early termination in relation to the transactions between the Clearing Member and the Agreed CCP that correspond to the Client Transactions on the insolvency of the Clearing Member.*

(b) *Covered Base Agreement*

- (i) *Prior to, or at the same time as, entering into the Addendum, the Parties have entered into a Covered Base Agreement.*
- (ii) *The Covered Base Agreement is governed by English law or New York law, as the case may be.*
- (iii) *Other than pursuant to the Addendum, no provision of the Covered Base Agreement that is necessary for the giving of the Industry Netting Opinion in respect of the Covered Base Agreement has been altered in any material respect.*

- (iv) *On the basis of the terms and conditions of the Covered Base Agreement and other relevant factors, and acting in a manner consistent with the intentions stated in the Covered Base Agreement, the Parties over time enter into a number of Transactions that are intended to be governed by the Covered Base Agreement. The Transactions are of a type covered by the Industry Opinions.*
- (c) *Credit Support Document*
 - (i) *The Parties have entered into a Credit Support Document, either directly or due to the Addendum deeming that a Credit Support Document supplements and forms part of the Clearing Agreement.*
 - (ii) *The Credit Support Document is governed by English law or New York law, as applicable.*
 - (iii) *Other than pursuant to the Addendum and the Paragraph 11 or the Paragraph 13, as applicable, no provision of the Credit Support Documents that is necessary for the giving of the Industry Collateral Opinion in respect of the Credit Support Documents has been altered in any material respect.*

1B Additional assumptions

We have also assumed that:

- (a) where relevant, each reference in our ISDA Opinions to:
 - (i) a “*Master Agreement*” or “Master Agreement” should be read as a reference to a “Clearing Agreement” and “Amended Annex”;
 - (ii) a “*transaction*” or “Transaction” should be read as a Client Transaction; and
 - (iii) an ISDA Opinion should be read as including this opinion;
- (b) no provision of the Clearing Agreement or Amended Annex that is necessary for the giving of our advice in this opinion has been altered in any material respect (including by any adjustment);
- (c) an Australian Court would recognise the validity of the choice of English law or New York law, as applicable, as governing each Covered Base Agreement, Addendum, Amended Transfer Annex, Confirmation and Confirm; and
- (d) in accordance with Section 10(a)(ii)(1) of the Addendum, an Existing Collateral Agreement does not apply to Client Transactions or any amounts provided in connection with an Amended Annex deemed to supplement and form part of the Clearing Agreement in accordance with Section 10(a)(ii) of the Addendum.

We have not taken steps to verify these assumptions.

2 Qualifications

Our opinion is subject to the following qualifications:

- (a) an obligation which imposes a detriment on a party may be unenforceable in its entirety or to the extent that the detriment exceeds the amount of the relevant loss or damage, if that detriment is held to constitute a penalty; and
- (b) we express no opinion as to:
 - (i) matters of fact;
 - (ii) the effectiveness or enforceability of:
 - (A) Sections 3(b) (“Transferred transactions”), 3(e) (“Rule Set – Client”), 8(a)(iv)(4) (“Termination by Clearing Member and Automatic Termination”), 8(e) (“Set-off”) or 10(b) (“Clearing Member’s Use of Collateral”) of the Addendum;

- (B) Transaction Porting, Compression, a party's right to Transfer a Client Transaction or a CM/CCP Transaction, or a party's rights of set-off; or
 - (C) a Modification Loss Amount (or the adequacy of the associated valuation methodology);
- (iii) the Clearing Member's ability to enter into, or the efficacy and enforceability of, Close-out Transactions or Risk Hedging Transactions or to take other actions (other than the close-out netting processes described in this opinion) to hedge, reduce or offset CM/CCP Transactions or actions entered into or carried out for purposes of determining the termination amount payable in respect of such Cleared Transaction Set;
 - (iv) the adequacy of the valuation methodology applied pursuant to the amended definition of "Value" in an Amended Annex;
 - (v) the regulatory capital treatment of the transactions envisaged by a Covered Base Agreement, Addendum or Amended Annex with respect to either the Clearing Member or its Client;
 - (vi) the obligations of an Australian financial services licensee or any other licensee in connection with its licence or other regulatory matters;
 - (vii) how any conflict between any provisions of the Clearing Agreement, Addendum, Amended Annex, Confirmation or Confirm governed by any law (other than Australian Law) would be resolved;
 - (viii) how any conflict between any provisions of a Rule Set (including a Mandatory CCP Provision or Core Provision), or between any provision of a Rule Set (including a Mandatory CCP Provision or Core Provision) and a provision of a Clearing Agreement, Addendum, Amended Annex, Transaction or Client Transaction, in any particular circumstances would be resolved; and
 - (ix) the enforceability of the obligation to pay a net amount once the close-out netting process has taken effect.

Annex – CM Default Amendments

PRUDENTIALLY REGULATED CLIENTS: POTENTIAL STANDARD CM DEFAULT AMENDMENTS¹⁵

1.1 Additional Definitions¹⁶

"**Relevant CM Default**" means a failure to pay or deliver event of default or a bankruptcy event of default, in each case, if any and howsoever described in the Agreement, in respect of Clearing Member, provided that, for the purposes of a failure to pay or deliver event of default only and notwithstanding anything to the contrary in the Agreement, if the applicable grace period is shorter than three Business Days, such grace period shall instead be deemed to be three Business Days.

1.2 Other Provisions¹⁷

([●]¹⁸) **Relevant CM Default.**

- (i) Notwithstanding Section 8(b)(i) of this Addendum, any provisions of the Agreement that without prejudice to Client's right to terminate Client Transactions pursuant to Section 7, (A) would entitle Client to terminate transactions early upon the occurrence of a Relevant CM Default or would automatically terminate transactions early upon the occurrence of a Relevant CM Default or (B) provide for the consequences of, and rights arising as a result of or pursuant to, an early termination of transactions upon the occurrence of any Relevant CM Default (including, without limitation, the provisions relating to the calculation of, and obligation to pay, any amount payable by either party following such early termination),] will continue to apply in respect of Client Transactions subject to the provisions of this Part [●]¹⁸.
- (ii) If at any time a Relevant CM Default has occurred and is continuing and Client provides notice to Clearing Member designating an early termination date in accordance with the Agreement, all Client Transactions will terminate on such early termination date and, subject to Part [●]¹⁸ (iii) below, the provisions of Section 9 will apply in respect of such Client Transactions. For the avoidance of doubt, the early termination of any Client Transaction for the purposes of Section 9 is not a termination pursuant to Section 8.
- (iii) If Clearing Member fails to notify Client of its valuation of all Client Transactions in accordance with Section 9 within 30 calendar days of the early termination date, Client may notify [in writing] Clearing Member (the "**Calculation Notice**") that it intends to value the Residual Portfolio, in which case (A) Client shall value such Residual Portfolio in accordance with the terms of the Agreement and (B) all values determined by the Clearing Member and notified to the Client prior to the effective date of the Calculation Notice shall be included in the Client's calculation of the amount payable by either party to the other in accordance with the Agreement.

¹⁵ **The provisions set out herein are suggested as potential amendments to the Addendum only in circumstances where the Client is prudentially regulated such that it is required, by law or regulation applicable to it, to have certain termination rights against the Clearing Member. Such amendments may result in loss of client protections and other risks to the Client and should be assessed by the parties based on their own circumstances.**

¹⁶ To be included in Part 1 of the Addendum Annex.

¹⁷ To be included in Part 5 of the Addendum Annex.

¹⁸ Number of this Relevant CM Default provision as it appears in the Addendum Annex.

For purposes of this Part [●]¹⁸ (iii), “**Residual Portfolio**” means, in relation to any Client Transaction in any Cleared Transaction Set, such Client Transactions that relate to CM/CCP Transactions for which there remains an outstanding, unhedged economic exposure of the Clearing Member, determined by reference to Close-Out Transactions, Risk Hedging Transactions and any other actions in accordance with any other method permitted by the Agreement that (i) hedge, reduce or offset such CM/CCP Transactions or were entered into or carried out for purposes of determining the termination amount payable in respect of such Cleared Transaction Set and (ii) the value and nature of which have been notified by the Clearing Member to the Client prior to the effective date of the Calculation Notice. Such outstanding, unhedged economic exposure of the Clearing Member under such CM/CCP Transactions shall be determined as if such Cleared Transaction Set comprised such CM/CCP Transactions, Close-Out Transactions, Risk Hedging Transactions and any such other arrangements actually or notionally entered into under such permitted actions, so that any such components that offset each other on a portfolio basis shall be disregarded for purposes of valuation. If Clearing Member does not notify Client of any values prior to the effective date of the Calculation Notice, the Residual Portfolio will be all Client Transactions in the relevant Cleared Transaction Set.(iv) Section 7 of this Addendum is amended by inserting the words "or Client's right to terminate transactions pursuant to Part [●]¹⁸(i) of the Addendum Annex" after the words "Section 8(a)" on the second line of Section 7(b).

- (v) Section 8 of this Addendum is amended as follows:
 - (1) by inserting the words ", Relevant CM Default" after "CM Trigger Event" on the fourth line of Section 8(a)(ii);
 - (2) by inserting the words ", Relevant CM Default" after "CM Trigger Event" on the sixth line of Section 8(a)(iii);
 - (3) by inserting the words "Part [●]¹⁸ (i) of the Addendum Annex," before "Section 8(a)" on the second line of Section 8(d)(i); and
 - (2) by inserting the words "or Part [●]¹⁸(i) of the Addendum Annex after the words "Section 8(a)" on the third line of Section 8(d)(iii).
- (vi) The CSA Elections table in Part 3(c) of the Addendum Annex is amended by inserting the words "or Relevant CM Default" after each occurrence of the words "CM Trigger Event" therein.