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19 December 2013

Dear Sirs

ASX Clear (Futures) Pty Limited/Prudential Regulation/CCP interim opinion

You have asked us to give an opinion in respect of the laws of the State of New South Wales and the federal laws of the Commonwealth of Australia ("**this jurisdiction**") as to the effect of certain netting and collateral arrangements in relation to ASX Clear (Futures) Pty Limited (ABN 91 050 615 864) (the "**Clearing House**" or "**ASX Clear (Futures)**") as between the Clearing House and its Clearing Participants (as defined in the Rules) (each a "**Member**").

We understand that your requirement is for the enforceability and validity of such netting and collateral arrangements to be substantiated by a written and reasoned opinion letter.

References herein to "**this opinion**" are to the opinions given in Section 3 and/or this opinion letter (as applicable).

1. TERMS OF REFERENCE

- 1.1 Except where otherwise defined herein, terms defined in the Rules of the Clearing House have the same meaning in this opinion letter.
- 1.2 The opinions in this opinion letter, unless otherwise indicated, are given in respect of, and confined to, the products covered under the definition of "Contract" in this opinion letter. The opinions in this opinion letter do not consider, and we do not express any opinion on and none may be inferred in respect of, any OTC Open Contracts, any OTC Transaction or the OTC Rules as defined in the Rules.
- 1.3 The opinions given in Section 3 are in respect of a Member's powers under the Rules as at the date of this opinion. We express no opinion as to: (i) any provisions of the

Rules of the Clearing House other than those on which we expressly opine, or (ii) the enforcement of any Contract.

1.4 Where Contracts are governed by laws other than the laws of this jurisdiction, the opinions contained in Section 3 are given in respect of only those Contracts which are capable, under their governing laws, of being terminated and liquidated in accordance with the provisions of the Netting Provision.

1.5 The opinions given in Section 3.7 are given only in relation to Non-cash Collateral comprising securities credited to an account.

1.6 **Definitions**

In this opinion, unless otherwise indicated:

- (a) **"Board"** means the Board of the Clearing House and except in relation to any power to expel a Clearing Participant, a delegate of the Board duly approved pursuant to the Articles;
- (b) **"Client Account"** has the meaning ascribed to the term "Client Clearing Account" in the Rules, being an account that is not a House Account established under Rule 41.2 (Rule 41.2 is set out in the Annex to this opinion);
- (c) **"Contract"** has the meaning ascribed to the term "Open Contract" in the Rules (the relevant Rule is set out in the Annex to this opinion (see also those Rules relating to the registration of a Market Contract));
- (d) **"Corporations Act"** means the *Corporations Act 2001 (Cth)*;
- (e) **"Event of Default"** means the occurrence of the events specified in paragraphs (a) and (b) of Rule 76 (Rule 76 is set out in the Annex to this opinion);
- (f) **"House Account"** has the meaning ascribed to the term "House Clearing Account" in the Rules, and for the purposes of this opinion, being an account established under Rule 41.1 (Rule 41.1 is set out in the Annex to this opinion);
- (g) **"Insolvency Proceedings"** has the meaning given to that term in paragraph 3.1 below;
- (h) **"Market Contract"** has the meaning ascribed to that term in the Rules, but shall be construed, for the purposes of the definition of Contract, to exclude an OTC Transaction;

- (i) "**Netting Provision**" means Rule 76 (Rule 76 is set out in the Annex to this opinion);
- (j) "**Non-cash Collateral**" means the non-cash collateral provided to the Clearing House as margin under the Rules;
- (k) "**Party**" means the Clearing House or the relevant Member;
- (l) "**Netting Act**" means the *Payment Systems and Netting Act 1998 (Cth)*;
- (m) "**PPSA**" means the *Personal Property Securities Act 2009 (Cth)*;
- (n) "**Relevant Courts**" means the Supreme Court of New South Wales and the federal courts of the Commonwealth of Australia;
- (o) "**Rules**" means the rules of the Clearing House in force as at the date of this opinion being the ASX Clear (Futures) Operating Rules (other than the OTC Rules) dated 1 July 2013 (as further amended on 2 and 16 August 2013);
- (p) "**Termination Amount**" means, for the purposes of this opinion, the termination value of terminated obligations, being the present and future obligations of the Clearing House and each Member to make payments and deliveries under the terms of the Contracts that are terminated and no longer required to be made and which are to take into account the amount which would be payable on the Daily Settlement of the relevant Futures Contracts;
- (q) references to the word "**enforceable**" and cognate terms are used to refer to the ability of a Party to exercise its contractual rights in accordance with their terms and without risk of successful challenge. We do not opine on the availability of any judicial remedy; and
- (r) references to a "**section**" or to a "**paragraph**" are (except where the context otherwise requires) to a section or paragraph of this opinion (as the case may be).

2. ASSUMPTIONS

We assume the following:

- 2.1 That, except with regards to the provisions discussed and opined on in this opinion letter, the Rules and Contracts are legally binding and enforceable against both Parties under their governing laws.
- 2.2 That each Party has the capacity, power and authority under all applicable law(s) to

enter into the Rules and Contracts; to perform its obligations under the Rules and Contracts; and that each Party has taken all necessary steps to execute and deliver and perform the Rules and Contracts.

- 2.3 That each Party has obtained, complied with the terms of and maintained all authorisations, approvals, licences and consents required to enable it lawfully to enter into and perform its obligations under the Rules and Contracts and to ensure the legality, validity, enforceability or admissibility in evidence of the Rules in this jurisdiction.
- 2.4 That all Contracts and the Rules were entered into prior to the commencement of any insolvency procedure under the laws of any jurisdiction in respect of either Party. In particular, no Party has notice that any other Party to the Rules is, at the time of entry into the Rules, unable to pay its debts as and when they become due and payable.
- 2.5 That each Party acts in accordance with the powers conferred by the Rules; and that (save in relation to any non-performance leading to the taking of action by the Members under the Netting Provision), each Party performs its obligations under the Rules in accordance with their respective terms.
- 2.6 That, apart from any circulars, notifications and equivalent measures published by the Clearing House in accordance with the Rules, there are not any other agreements, instruments or arrangements between the Parties which modify or supersede the terms of the Rules.
- 2.7 That for the purposes of the opinions at 3.3, 3.4 and 3.5 only, the Member exercising rights under the Netting Provision is solvent and not subject to insolvency proceedings under the laws of any jurisdiction.
- 2.8 That no provision of any arrangement or document (other than the Rules) or a document of which the Rules form a part, or any other arrangement between the Parties, invalidates the enforceability or effectiveness of the Netting Provision, or any security interest created pursuant to the provisions relating to deposit of cash collateral and Non-cash Collateral.
- 2.9 That the Rules and Contracts and each of the transactions referred to, to which the Rules and Contracts relate have been entered into and complied with or carried out by each of the Parties thereto in good faith for the benefit of each of them respectively, on arm's length commercial terms and for the purpose of carrying on and by way of their respective businesses.
- 2.10 That there is an absence of duress or undue influence in respect of each of the Parties (and their respective directors, employees, agents and advisers) in relation to the

Rules, Contracts and each of the transactions to which the Rules relate.

- 2.11 That each Party to the Rules, Contracts and to any transaction contemplated to which the Rules or Contracts relate provided valuable consideration under, or changed its position in reliance on each transaction.
- 2.12 That none of the statements included in our analysis below is or will be affected by the laws (including the public policy) of any jurisdiction other than this jurisdiction and there are no provisions of the laws of any jurisdiction other than this jurisdiction which would have any implication on the opinions we express in this opinion letter.
- 2.13 That no Party or any of its officers, employees, agents or associates has engaged, or will, engage in conduct which is unconscionable, dishonest, misleading or deceptive or is likely to mislead or deceive in relation to the Rules or any transactions contemplated by them.
- 2.14 That for the purposes of Chapter 7 of the *Corporations Act*, the Rules are not transactions in a derivative. The Rules are arrangements between the parties governing how transactions in derivatives, for the purposes of Chapter 7 of the *Corporations Act*, will be settled by the Parties and therefore do not themselves constitute a transaction in a derivative.
- 2.15 That the Clearing House at all material times holds an Australian market licence (as that term is defined in the *Corporations Act*) under section 795B of the *Corporations Act*; and holds an Australian CS facility licence (as that term is defined in the *Corporations Act*) under section 824B of the *Corporations Act* for the purposes of operating a clearing and settlement facility (as that term is defined in the *Corporations Act*) and is otherwise in compliance with all licensing and regulatory requirements applicable to it from time to time.

3. **OPINION**

On the basis of the foregoing terms of reference and assumptions and subject to the qualifications set out in Section 4 below, we are of the following opinions.

3.1 **Insolvency Proceedings**

The only bankruptcy, composition, rehabilitation or other insolvency or reorganisation procedures to which the Clearing House could be subject under the laws of this jurisdiction, and which are relevant for the purposes of this opinion, are:

- (a) winding up;
- (b) compromise or arrangement with creditors;

(c) administration;

(d) receivership,

(each as defined in the *Corporations Act*).

Each of the above proceedings is an Australian law governed "**external administration**" under the *Netting Act*. These procedures are together called "**Insolvency Proceedings**".

The legislation applicable to Insolvency Proceedings is the *Corporations Act*.

3.2 Special provisions of law

There are no special provisions of law that apply to Contracts by virtue of the fact that the Contracts are, or relate to, exchange-traded derivative products and are cleared through the Clearing House.

3.3 Netting: General

3.3.1 The Netting Provision will be immediately (and without fulfilment of any further conditions) enforceable in accordance with its terms so that, upon the occurrence of an Event of Default in relation to the Clearing House:

- (a) the Member would be entitled immediately to exercise its rights under the Netting Provision; and
- (b) the Member would be entitled to receive or be obliged to pay only the net sum of the positive and negative mark-to-market values of the included individual Contracts, together with other losses or gains referable to the Contracts.

We are of this opinion because:

3.3.2 Rule 31.8¹ expressly states that each Contract is a market netting contract for the purposes of the *Netting Act*. This is because a market netting contract is:

- (a) a contract:
 - (i) entered into in accordance with the rules that govern the operation of a netting market; and

¹ Refer to Rule 31.8 as set out in full in the Annex.

- (ii) under which obligations between parties to the contract are netted; or
 - (b) a contract declared by the regulations to be a market netting contract for the purposes of the *Netting Act*;
- (but does not include:
- (c) a contract that constitutes, or is part of, an approved netting arrangement; or
 - (d) a contract declared by the regulations not to be a market netting contract for the purposes of the *Netting Act*.)

3.3.3 A netting market is:

- (a) an arrangement that is:
 - (i) a licensed market or a licensed CS facility as defined in section 761A of the *Corporations Act*; and
 - (ii) approved by the Minister for the purposes of this definition; or
- (b) an arrangement declared by the regulations to be a netting market for the purposes of the *Netting Act*.

3.3.4 ASX Clear (Futures) operates a “netting market” under the Rules for the purposes of the definition of market netting contract.²

3.3.5 Further, section 16(2) provides:

If:

- (a) a party to a market netting contract goes into external administration; and
- (b) Australian law governs either:
 - (i) the external administration; or

² The licensed clearing and settlement facility operated by ASX Clear (Futures) was approved under paragraph (a) of the definition of 'netting market' in the *Netting Act* from 11 March 2004 by the then Parliamentary Secretary to the Treasurer, the Honorable Ross Cameron, MP, on 10 March 2004.

- (ii) the contract;

the following provisions apply:

- (c) obligations may be netted or terminated, termination values may be calculated and a net amount become payable in accordance with the contract;
- (d) obligations that are, or have been, netted or terminated under the contract are to be disregarded in the external administration;
- (e) any net obligation owed by the party under the contract that has not been discharged is provable in the external administration;
- (f) any net obligation owed to the party under the contract that has not been discharged may be recovered by the external administrator for the benefit of creditors;
- (g) any security given by the party, in accordance with the contract, in respect of obligations of a party to the contract may be enforced in accordance with the contract;
- (h) rights and obligations of the party may be transferred in accordance with the contract;
- (i) without limiting paragraph (h):
 - (i) property (including property over which security has been given) of the party may be transferred or otherwise dealt with in accordance with the contract; and
 - (ii) property (including property over which security has been given) of another person on whose behalf the party is acting may, with that other person's prior written consent, be transferred or otherwise dealt with in accordance with the contract;
- (j) none of the following is to be void or voidable in the external administration:
 - (i) the netting or termination of obligations under the contract;
 - (ii) a payment by the party to discharge a net obligation under the contract;

- (iii) a payment, or a transfer of property (whether absolutely or by way of security), by the party to meet an obligation under the contract to pay a deposit or margin call;
- (iv) the enforcement of a security in accordance with the contract;
- (v) a transfer of, or dealing with, rights, obligations or property in accordance with the contract.

3.3.6 Further, there is no rule of the laws of this jurisdiction which would impose a moratorium or stay which would prevent, delay or otherwise affect the exercise of such rights by the Member.

3.3.7 Further, where neither party to a Contract goes into External Administration, Section 16(1) of the *Netting Act* provides that where Australian law governs a market netting contract (as is the case under each Contract) and the Contract is entered into in circumstances that are within Commonwealth constitutional reach (which is the case in respect of Contracts, as ASX Clear (Futures) is a Constitutional Corporation (as defined in the *Netting Act*)), then the following provisions shall apply:

- (a) obligations may be terminated, termination values may be calculated and a net amount become payable in accordance with the Contract;
- (b) any security given, in accordance with the Contract, in respect of obligations of a party to the Contract may be enforced in accordance with the Contract;
- (c) rights and obligations of a party to the Contract may be transferred in accordance with the Contract;
- (d) without limiting paragraph (c) above:
 - (i) property (including property over which security has been given) of a party to the Contract may be transferred or otherwise dealt with in accordance with the Contract; and
 - (ii) property (including property over which security has been given) of another person on whose behalf a party to the Contract is acting may, with that other person's prior written consent, be transferred or otherwise dealt with in accordance with the Contract.

3.3.8 The above paragraphs (a) to (d) apply despite:

- (a) any disposal of rights that may be netted under the Contract; or
- (b) any disposal of rights or property that may be transferred in accordance with the Contract; or
- (c) the creation of any encumbrance, or any other interest, in relation to those rights or that property; or
- (d) the operation of any encumbrance, or any other interest, in relation to those rights or that property that is created after 2 July 1998 (the commencement of section 16(1)),

in contravention of a prohibition in the Contract.

- 3.3.9 For the purposes of any law, the assets of a party to the Contract are taken: (i) to include any net obligation owed to the party under the Contract; and (ii) not to include obligations terminated under the Contract.

3.4 **Netting: House Accounts and Client Accounts**

Where a Member has exercised its rights under the Netting Provision, a Termination Amount payable on any House Account of a Member may be aggregated with or applied to discharge a Termination Amount payable on any House Account of the Member.

This is because:

- 3.4.1 the Netting Provision acknowledges that the present and future obligations of the Clearing House and each Member to make payments and deliveries under the terms of the Open Contracts are terminated and are no longer required to be made. The Clearing House is to calculate the termination value of those terminated obligations. The Clearing House is to net the termination values so calculated in respect of each Member so that only a net cash amount is payable in respect of them between the Clearing House and each respective Member. The net cash amount is to be payable by the party who is determined to owe it on the Business Day on which it is determined and notified to the Member.
- 3.4.2 The Rules contemplate that *upon a Default by a Member*, the Clearing House:
- (a) may apply any surplus in any House Account or any other account of that Member with the Clearing House (whether or not arising from obligations under the Rules) to meet any deficiency in any Client Account of the Member but shall not apply any surplus in any Client

Account to meet any deficiency in any House Account of that Member;

- (b) shall in its absolute discretion have the power to sell, realise, apply and set-off any monies, securities, collateral or other property deposited with the Clearing House by the Member in Default by way of Initial Margin, Commitment or otherwise (whether or not arising from obligations under the Rules) and to apply the proceeds without being required to give notice to or obtain the consent of the Member in Default or any court order, with full power to execute any documents in its own name or as attorney for the Member in Default for that purpose, provided always that any monies, securities, collateral or other property deposited with the Clearing House with respect to open positions designated to a Client Account,³ may be used to meet obligations in a Client Account and shall not be used to meet any obligations in a House Account.

There is no equivalent provision in respect of a Clearing House default.

3.4.3 The Rules further provide that:

- (a) amounts paid to the Clearing House or to the relevant Member which have been designated as House Open Positions or Client Open Positions shall be paid to or from the relevant House Account or Client Account held with respect to that Member, respectively;
- (b) amounts paid by the Clearing House from a Client Account held with respect to a Member shall be paid to a Clients' Segregated Account of the Member;
- (c) each House Account shall be the account to which all monies or property owing to or from the Clearing House in relation to relevant House Positions of a Member shall be referable;
- (d) all securities or other collateral or property held by the Clearing House with respect to Positions designated to a Client Account or House Account shall be dealt with by the Clearing House in the same way as

³ Or amounts which are subject to a written agreement under Regulation 7.8.02 (3) of the Corporations Regulations 2001, or an acknowledgment under Regulation 10 of the Futures Industry (Client Funds) Regulations 1990 of New Zealand.

monies paid to the relevant Account and shall be allocated by the Clearing House to such account; and

- (e) in no circumstances shall any monies payable to, or securities, collateral or other property required to be allocated to, a Client Account be paid to or allocated to or used on the account of or in relation to Positions designated to a House Account.

3.5 Netting: Cross-Product Netting

3.5.1 The effect of the Netting Provision is to apply close-out netting to all affected Contracts cleared by the Member with the Clearing House.

3.5.2 This is because the Rules contemplate exercise of rights by a Member under the Netting Provision upon the default of the Clearing House in respect of all Open Contracts which are affected.

3.6 Cash Collateral

3.6.1 It is not clear from the Rules whether or not payments made by a Member to the Clearing House as cash margin do constitute an absolute transfer of cash, so that, in the event of Insolvency Proceedings relating to the Clearing House, such cash would or would not be treated as property of the Clearing House available to its creditors generally.

3.6.2 Rule 43.1 states:

A Clearing Participant shall deposit with respect to each Open Position with ASX Clear (Futures) an amount determined by ASX Clear (Futures) in its absolute discretion from time to time (whether before or after the opening of such Open Position) upon demand or by such time as is Prescribed in the Schedules or is required by the Board or the Managing Director or his delegate. Such amount shall be held by ASX Clear (Futures) which shall be entitled to apply it in satisfaction of performance by the Clearing Participant of its obligations pursuant to these Rules. The Clearing Participant shall not be entitled to a refund or repayment of any amount so deposited except in accordance with these Rules and until the Position is Closed Out or completed by Delivery or acceptance of Delivery or is Mandatory Cash Settled. In this regard ASX Clear (Futures) shall without limitation of any other rights of ASX Clear (Futures) under the Rules have the rights of set-off referred to in Rule 47. ASX Clear (Futures) may in its absolute discretion accept the provision of securities or other collateral or property as a deposit instead of cash and may determine the valuation of any such property or securities for that purpose.

ASX Clear (Futures) may from time to time require the provision of a deposit by way of further cash, securities, collateral or property to be deposited to ensure that the valuation of such securities or property and any cash is at least equal to the Initial Margin Liability of the Clearing Participant or may require that any securities or property be replaced with cash. The obligation upon a Clearing Participant to make a deposit pursuant to this Rule shall be in addition to any other obligation of the Clearing Participant to make deposits of cash, securities, collateral or property as otherwise provided in accordance with the Rules.

3.6.3 An absolute transfer of cash shall be taken to mean that:

- (a) a full and unconditional transfer of cash by which the Clearing House will be entitled to deal with the cash as an absolute owner with no obligation to return the same money to the Clearing Participant at a later date;
- (b) the Clearing House does not have any obligation to account for any profits resulting from any transfer or use of the money;
- (c) each Party when transferring Margin or any other amount will have full legal and beneficial title to such Margin or any other amount at the time of transfer, free and clear of any lien, claim, charge or encumbrance or any other interest of the transferring party or of any third person (other than a lien routinely imposed on all securities in a relevant clearance or settlement system).

3.6.4 The arrangement described at Rule 43.1 above, because of the uncertainty in the drafting of the relevant Rules, may, *prima facie* constitute a debt due to the relevant Member, subject to the relevant Member satisfying its obligations owed to the Clearing House pursuant to the Rules. The Rules stipulate that a Clearing Participant is not entitled to a refund or repayment of any amount so deposited unless certain conditions as set out above are satisfied. Similarly, Rule 49 gives the Member a right to a refund of deposits held in excess of their Margin and Daily Settlement obligations, provided that, the Clearing House is satisfied in its absolute discretion, that such deposits will not be required to satisfy their obligations under the Rules, including Margin and Daily Settlement obligations regarding any Open Position.⁴

⁴ Refer to Rule 49 as set out in full in the Annex.

- 3.6.5 If the arrangement is not to be characterised as an absolute transfer of cash, it may arguably be considered at law to create a security interest or trust arrangement. This is based upon, the language in the provision referring to a deposit of an amount to be 'held' for application in satisfaction of performance by the Member. However, there is considerable uncertainty as to whether such an argument could be successfully made out (for example, where there is a default by the Clearing House which has been utilising the amount in a pooled investment account).
- 3.6.6 Therefore, there is a risk the Rules will be interpreted as providing for a transfer of cash so that, in the event of Insolvency Proceedings relating to the Clearing House, the cash transferred by the Member to the Clearing House but not applied by the Clearing House would be treated as the property of the Clearing House available to its creditors generally and the claim of the Member would be merely that of an unsecured creditor. The amount of cash would constitute a debt owed by the Clearing House to the Member as principal (subject to fulfilment of the conditions referred to above).

3.7 Non-cash Collateral

- 3.7.1 For the reasons set out above at paragraph 3.6, it is not clear from the drafting of the Rules whether or not any securities provided to the Clearing House as cover for margin (constituting Non-cash Collateral) would be treated as the property of the Clearing House and would be returnable to the Member, in the event of Insolvency Proceedings relating to the Clearing House, subject to the Member satisfying its obligations to the Clearing House.
- 3.7.2 For the reasons set out in paragraph 3.6 above, there is a risk the value of the Non-cash Collateral would constitute a debt owed by the Clearing House to the Member as principal for the reasons set out above at paragraph 3.6.

4. QUALIFICATIONS

The opinions in this opinion letter are subject to the following qualifications:

- 4.1.1 The Rules are currently the subject of proposed revisions.⁵ We have not considered any aspect of the proposed new rules to be introduced (which may alter some of the matters covered in this opinion).

⁵ Refer to the first Consultation Paper on the draft Operating Rules - ASX 24 Exchange Traded Derivatives and OTC Interest Rate Derivatives Client Clearing Service, August 2013 <http://www.asx.com.au/documents/public->

4.1.2 The nature and enforcement of an obligation may be held to be wholly or partly invalid under s588FE of the *Corporations Act* as a result of any of the following sections of the *Corporations Act*:

- (c) section 588FA (*Unfair preferences*): a transaction between a company and a creditor where the transaction results in that creditor receiving more from the company than it would if the transaction was set aside and the creditor were to prove its debt in a winding up of the company. Unlike other similar common law jurisdictions, there is no requirement under the *Corporations Act* for the company to intend that the creditor receives a preference;
- (d) section 588FB (*Uncommercial transactions*): a transaction is uncommercial if a reasonable person in the company's circumstances would not have entered into the transaction having regard to the benefits and/or detriment (and respective benefits to other parties) to the company of entering into the transaction and 'any other relevant matter';
- (e) section 588FC (*Insolvent transactions*): an unfair preference or uncommercial transaction is entered into, or an act is done, or an omission is made for the purpose of giving effect to the transaction, when the company is insolvent or the company becomes insolvent because of, or because of matters including entering into the transaction or acts done or omissions made for the purpose of giving effect to, the transaction;
- (b) section 588FD (*Unfair loans to a company*): an unfair loan is one in which the interest or the charges on the loan were extortionate when the loan was made or have since become so due to a variation, even if the interest or charges are not extortionate at the time of considering whether or not the loan was unfair; or
- (c) section 588FDA (*Unreasonable director-related transactions*): an unreasonable director-related transaction is one in which a payment made or issue of securities, or conveyance, transfer or other disposition by the company, or incurring of an obligation to make such a payment,

[consultations/consultation_paper_1_OTC_Futures_client_clearing_28Aug13.PDF](#) and the second Consultation Paper on the draft Operating Rules - ASX 24 Exchange Traded Derivatives and OTC Interest Rate Derivatives Client Clearing Service, October 2013 http://www.asx.com.au/documents/public-consultations/OTC_futures_client_clearing_consultation_paper_2.pdf.

disposition or issue and it is made to a director or close associate of a director or person on behalf of, or for the benefit of the aforementioned and it may be expected that a reasonable person in the company's circumstances would not have entered into the transaction having regard to the benefits and detriment to the company and other parties by entering into the transaction.

The definition of 'transaction' in the *Corporations Act* is wide and includes conveyances, transfers or other dispositions of property, granting of security interests, including retention of title interests, guarantees, payments, obligations incurred, releases or waivers and loans. The Relevant Courts have wide powers to make orders for the recovery of assets from any third party where it is found to be party to a voidable transaction. However, in the absence of specific facts indicating a clawback circumstance referred to above, we would not expect the terms of a Contract to give rise to particular risk of clawback due to the arm's length nature of the transactions and the value given to the Party in entering into the Contract.

- 4.1.3 Any provision in the Rules which confers, purports to confer or waives a right of set-off or similar right may be ineffective against a liquidator or creditor. This is due to the statutory set-off in section 553C of the *Corporations Act* taking precedent over any contractual provision in the documentation in circumstances set out in section 553C of the *Corporations Act*. A contractual set-off is not enforceable in these circumstances (for example, if it does not contain the same requirement as section 553C of the *Corporations Act* (for example, mutuality)).
- 4.1.4 If the Clearing House does not hold a security interest or security interests over all or substantially all of the assets of the relevant Member, it may not be capable of enforcing, as against the relevant Member, the relevant Rules during the period an administrator is appointed to that relevant Member. The relevant Rules would be enforceable against the applicable Member at the conclusion of the administration period.
- 4.1.5 There are some matters which are not determined by reference to governing law, but which are mandatory in the forum irrespective of the choice of governing law. In particular, where all the elements relevant to a situation being adjudicated upon were, at the time the choice of law was made, connected with a particular country, the courts of this jurisdiction may apply rules of law of that country which cannot be derogated from by contract (including the law under the *PPSA* in relation to the perfection and validity of certain security interests). We express no opinion on the binding effect of the

choice of law provisions in the Rules and any transactions in connection with them (including any relevant Contracts) insofar as they relate to non-contractual obligations arising from or connected with the Rules.

4.1.6 We express no opinion as to whether the Clearing House has created a valid security interest over any asset or right which is situated outside Australia or governed by a foreign law.

4.1.7 Where any security interest in any Contract:

- (a) relates to property in a particular jurisdiction, the Relevant Courts may not apply the choice of law in that Contract and may apply the laws of that jurisdiction; or
- (b) is a security interest as defined under the *PPSA*, then the validity, perfection and the effects of perfection and non-perfection of that security interest will be subject to Part 1.2 of the *PPSA*, even if a different law is expressed in that Contract to be the governing law of that document.

4.1.8 We express no opinion on whether any judgment or proceedings taken in the Relevant Courts will be enforced by the courts of another jurisdiction.

4.1.9 The exclusion of market-netting contracts from the operation of the *PPSA* relates to (i) the rights and interests which are created and held solely under and as an elemental part of a market-netting contract; and (ii) the interests created by transactions under a market-netting contract if those transactions (and therefore those interests) are subject to the market-netting contract process contained in that contract.

Therefore a provision within the body of a market-netting contract which creates a security interest in relation to personal property which falls 'outside' the market-netting contract and which survives the market-netting contract may be characterised as a security interest under the *PPSA*. The *PPSA* remains relatively new law and as yet has not been tested in the Australian courts to provide authority on the point.

4.1.10 Section 553C of the *Corporations Act* operates to make set-off between the Parties automatic and mandatory on the commencement of an external administration if claims are provable in the winding-up of a Party, there is mutuality between the Parties and the claims are enforceable (for example, not time barred by statute). If section 553C of the *Corporations Act* applies, only the balance of the account will be admissible to proof against the insolvent

Party, or will be payable to the insolvent Party, as the case may be. In addition, a Party will not be entitled to the benefit of this set-off if, at the time of giving or receiving the credit, the Party had notice of the fact that the other Party to the Agreement was insolvent.

- 4.1.11 Ad valorem stamp duty is payable on certain security interests over assets located in New South Wales. If the correct stamp duty has not been paid, the instrument from which the security interest arises will not be admissible as evidence in the Relevant Courts until the stamp duty, and accompanying penalties, have been paid. To the extent that the Rules or any transactions related to the Rules provide for the granting of security over the assets of a Member and those assets are located in New South Wales, then ad valorem stamp duty will be payable.
- 4.1.12 The Netting Provision does not apply to any Contracts entered into prior to the date on which the *Netting Act* came into effect (2 July 1998).
- 4.1.13 This opinion does not extend to Open Contracts arising from a Market Contract traded on the New Zealand Futures & Options Exchange Limited ("NZFOE") which are governed by the laws of New Zealand. In any event, we are instructed that Market Contracts are no longer traded on the NZFOE.

This opinion letter and the matters referred herein relate to matters of Australian law only with respect to the laws in force in the State of New South Wales and the Commonwealth of Australia and no laws of any other jurisdiction.

There are no other material issues relevant to the issues addressed in this opinion which we wish to draw to your attention.

This opinion is given for the sole benefit of the Futures and Options Association (the "FOA"). This opinion may not, without our prior written consent, be relied upon for any other purpose or be disclosed to or relied upon by any other person save that it may be disclosed without such consent to:

- (a) such of the FOA's members (excluding associate members) as subscribe to the FOA's opinions library and whose terms of subscription give them access to this opinion (each a "**subscribing member**") and the officers, employees, and professional advisors of such subscribing member;
- (b) any affiliate of a subscribing member (being a member of the subscribing member's group, as defined by the UK Financial Services and Markets Act 2000) and the officers, employees, and professional advisors of such affiliate;

(c) any competent authority supervising a subscribing member or an affiliate of such subscribing member in connection with their compliance with their obligations under prudential regulation;

(d) the officers, employees and professional advisors of the FOA; and

on the basis that (i) such disclosure is made solely to enable any such person to be informed that an opinion has been given and to be made aware of its terms but not for the purposes of reliance, and (ii) we do not assume any duty or liability to any person to whom such disclosure is made.

We accept responsibility to the FOA in relation to the matters opined on in this opinion. However, the provision of this opinion is not to be taken as implying that we assume any other duty or liability to the FOA's members or their affiliates. The provision of this opinion does not create or give rise to any client relationship between this firm and the FOA's members or their affiliates.

Yours faithfully



Clifford Chance

Annex

In order of appearance in Opinion

Rule 41.2

In addition to each House Clearing Account Participant which is an Exchange Dealing Participant a Client Clearing Account shall be established at ASX Clear (Futures) and (unless otherwise Prescribed) in respect of each Relevant Exchange at which the Market Contracts which Clearing Participants' Client Positions arose were originally traded, each such account to be known as a Client Clearing Account. Each Client Clearing Account shall be the account to which all monies or property owing to or from a Clearing Participant with respect to relevant Client Positions shall be referable and to which all liabilities relating to such Client Positions shall attach.

ASX Clear (Futures) may establish an additional Client Clearing Account for a Clearing Participant with respect to a single Relevant Exchange, to which all monies or property owing to or from a Clearing Participant with respect to relevant Client Positions for a prescribed Group of Contracts shall be referable and to which all liabilities relating to such Client Positions shall attach.

Open Contract

- (a) *Except where paragraph (b) applies, a contract of a Clearing Participant with ASX Clear (Futures) deemed to arise from:*
- (i) *the registration of a Market Contract;⁶*
 - (ii) *an Allocation;*
 - (iii) *a Transfer;*
 - (iv) *the Exercise of an Option Contract;⁷ or*
 - (v) *a daily settlement in accordance with Rule 44.*

⁶ The definition of Market Contract in the Rules includes, among others, a Bond Transaction and a Repurchase Agreement as defined in the Rules.

⁷ The definition of Option Contract in the Rules includes both a Futures Options Contract and a Physical Options Contract as defined in the Rules. A Futures Option Contract is defined in the Rules as an option over a Futures Contract and a Physical Option Contract is defined in the Rules as an option over a Commodity or index (as opposed to an option over a futures contract).

- (b) *In the case of a Facility Participant, unless the context otherwise requires, a contract between ASX Clear (Futures) and the Facility Participant referred to in Clearing By-laws 31A.7 and 31A.8.*

Rule 76

If:

- (a) ***ASX Clear (Futures) Payment Default.*** *all of the following occur:*
- (i) *ASX Clear (Futures) fails to make, when due, any payment in respect of a payment claim of a Clearing Participant against ASX Clear (Futures) arising from an Open Contract;*
 - (ii) *such Clearing Participant has notified ASX Clear (Futures) of such failure;*
 - (iii) *such Clearing Participant notifies ASX Clear (Futures) again of such failure after the expiry of a period of not less than five Business Days after the notification in (ii); and*
 - (iv) *ASX Clear (Futures)'s failure to make such payment to such Clearing Participant continues for a period of more than five Business Days after notification in (iii),*

and for this purpose and without limitation, a payment will be considered to have been made by ASX Clear (Futures) if a corresponding amount has been credited to the relevant account of the relevant Clearing Participant. Delays in effecting such credit for technical reasons will not lead to an ASX Clear (Futures) Payment Default provided that funds were available to enable ASX Clear (Futures) to make the credit; or

- (b) ***ASX Clear (Futures) Insolvency Event.*** *ASX Clear (Futures) is wound-up in insolvency under the Corporations Act or is subject to statutory management either instituted by it or against it by a regulator, supervisor or any similar official with primary insolvency, rehabilitative or regulatory jurisdiction over it in Australia,*

then, at the election of either ASX Clear (Futures) or any Clearing Participant (if a Clearing Participant makes this election then only its Open Contracts are affected):

- (I) *the present and future obligations of ASX Clear (Futures) and each Clearing Participant to make payments and deliveries under the terms of the Open Contracts are terminated and are no longer required to be made;*
- (II) *ASX Clear (Futures) is to calculate the termination value of those terminated obligations. The termination values are to take into account the amount which would*

be payable on the Daily Settlement of the relevant Futures Contracts or the Termination Value of the relevant OTC Open Contracts under the OTC Rules (as applicable); and

- (III) *ASX Clear (Futures) will net the termination values so calculated in respect of each Clearing Participant so that only a net cash amount is payable in respect of them between ASX Clear (Futures) and each respective Clearing Participant. The net cash amount is to be payable by the party who is determined to owe it on the Business Day on which it is determined and notified to the Clearing Participant.*

If ASX Clear (Futures) is, for operational reasons, unable to make one or more calculations or determinations required to be made under this Rule then those particular calculations are to be made by the relevant Clearing Participant.

Rule 41.1

An account shall be established at ASX Clear (Futures) with respect to each Clearing Participant and (unless otherwise Prescribed) in respect of such Relevant Exchanges at which the Market Contracts from the Clearing Participants' House Positions were originally traded, each such account to be known as a House Clearing Account. Each House Clearing Account shall be the account to which all monies or property owing to or from ASX Clear (Futures) in relation to relevant House Positions of a Clearing Participant shall be referable.

ASX Clear (Futures) may establish an additional House Clearing Account for a Clearing Participant with respect to a single Relevant Exchange, to which all monies or property owing to or from ASX Clear (Futures) in relation to relevant House Positions of a Clearing Participant for a prescribed Group of Contracts shall be referable.

Rule 31.8

ASX Clear (Futures) and each Clearing Participant acknowledge that Open Contracts are market netting contracts (as defined in the Payment Systems and Netting Act 1998) the terms of which incorporate any and all Rules which provide for or relate to the exercise of default rights, the netting, set-off or termination of obligations, the calculation or payment of termination values or net amounts, the obligation to make a payment, or a transfer of property, to meet a deposit or margin call, the enforcing of security, and the transfer of, or dealing with, rights, obligations or property or which otherwise affect the rights and obligations of the parties to the contracts, including, without limitation, Part 4 of the Rules (including Rule 49.2), and Rule 72 and the OTC Rules (including OTC Rule 5).

Rule 49

All deposits held by ASX Clear (Futures) in a Clearing Participant's House Clearing Account or Client Clearing Account, including any monies deposited in excess of a Clearing Participant's Margin and Daily Settlement obligations at the time of the deposit, are deemed to have been deposited for the purpose of satisfying Margin and Daily Settlement obligations.

Deposits held by ASX Clear (Futures) which are in excess of a Clearing Participant's Margin and Daily Settlement obligations from time to time are refundable to the Clearing Participant by ASX Clear (Futures) upon demand, provided that ASX Clear (Futures) is satisfied, in its absolute discretion, that such deposits will not be required to satisfy the Clearing Participant's obligations under the Rules (including a Margin or Daily Settlement obligation).