

NETTING ANALYSER LIBRARY

The Futures & Options Association
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4 February 2013

Dear Sirs

FOA Collateral Opinion

You have asked us to give an opinion in respect of the laws of Australia (which for the purposes of this opinion shall be taken to be a reference to the laws of the States, the Territories and the Commonwealth of Australia) ("**this jurisdiction**") in respect of the Security Interests given under Agreements in the forms specified in Annex 1 to this opinion letter (each an "**Agreement**") or under an Equivalent Agreement (as defined below).

Terms used in this opinion letter and not otherwise defined herein shall have the meanings ascribed to them in the Agreement.

We understand that your fundamental requirement is for the effectiveness of the Security Interest Provisions of the Agreement to be substantiated by a written and reasoned opinion. Our opinion on the validity of the Security Interest Provisions is given in paragraph 3 of this opinion letter.

References herein to "*this opinion*" are to the opinions given in paragraph 3.

1. **TERMS OF REFERENCE AND DEFINITIONS**

1.1 Subject as provided at paragraph 1.2, this opinion is given in respect of

1.1.1 Australian Companies (including Australian companies which are authorised deposit taking institutions);

1.1.2 foreign companies; and

1.1.3 in respect of paragraph 3.3, the entities referred to in such paragraph,

insofar as each may act as a counterparty (a "**Counterparty**") providing Collateral (as defined in paragraph 1.3) to a member firm of the Futures and Options Association (each a "**Firm**") under an Agreement.

1.2 However, this opinion is also given in respect of Counterparties providing Collateral to a Firm that are any of the following, subject to the terms of reference, definitions, modifications and additional assumptions and qualifications set out in the applicable schedule:

- 1.2.1 Authorised Deposit Taking Institutions (Schedule 1);
- 1.2.2 Individuals (Schedule 2);
- 1.2.3 Insurers (Schedule 3);
- 1.2.4 Partnerships (Schedule 4);
- 1.2.5 Trustees of Trusts (other than Charitable Trusts) (Schedule 5);
- 1.2.6 Trustees of Charitable Trusts (Schedule 6);
- 1.2.7 Charitable Associations (Schedule 7); and
- 1.2.8 Reserve Bank of Australia (Schedule 8),

insofar as each may act as a Counterparty to a Firm under an Agreement.

1.3 This opinion is given in respect of cash and account-held securities which are the subject of the Security Interest Provisions ("**Collateral**"). The amount and value of such Collateral may fluctuate from time to time on a day to day, and possibly intra-day basis.

1.4 For these purposes and subject as follows:

- 1.4.1 "**account-held securities**" means intermediated securities as defined under the PPSA;
- 1.4.2 an "**Australian company**" is a company which is formed and registered under the Corporations Act 2001 (Cth) (the "**Corporations Act**");
- 1.4.3 a "**foreign company**" is a company which is incorporated or formed under the laws of another jurisdiction with a branch or branches established or located in this jurisdiction;

- 1.4.4 **"FOA Published Form Agreement"** means a document listed at Annex 1 in the form published by the Futures and Options Association on its website as at the date of this opinion;
- 1.4.5 a **"Party"** means a party to the Agreement; and
- 1.4.6 the opinions are not given in respect of any person found or alleged to be a trustee of a constructive, implied, resulting or other trust constituted by operation of law, nor are they given in respect of a person who is a trustee in bankruptcy.

1.5 In this opinion letter:

- 1.5.1 **"Security Interest"** means the security interest created pursuant to the Security Interest Provisions;
- 1.5.2 **"Equivalent Agreement"** means an agreement:
 - (a) which is governed by the law of England and Wales;
 - (b) which has a broadly similar function to any of the Agreements listed in Annex 1;
 - (c) which contains the Core Provisions (with no amendments, or with Non-material Amendments); and
 - (d) which neither contains (nor is modified, amended, or superseded by) any other provision which may invalidate, adversely affect, modify, amend, supersede, conflict with, provide alternatives to, compromise or fetter the operation, implementation, enforceability and effectiveness of all or part of the Core Provisions (in each case, excepting Non-material Amendments).

References to the **"Agreement"** in this letter (other than specific cross references to clauses in such Agreement and references in the first paragraph of this letter) shall be deemed also to apply to an Equivalent Agreement;

- 1.5.3 A **"Non-material Amendment"** means an amendment having the effect of one of the amendments set out at Annex 3;
- 1.5.4 **"enforcement"** means, in the relation to the Security Interest, the act of:
 - (i) sale and application of proceeds of the sale of Collateral against monies owed, or

(ii) appropriation of the Collateral,

in either case in accordance with the Security Interest Provisions;

- 1.5.5 in other instances other than those referred to at 1.5.4 above, 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;
- 1.5.6 "**Insolvency Proceedings**" means insolvency, bankruptcy or analogous proceedings (where, for the purposes of paragraph 3 of this opinion, the occurrence of such proceedings in respect of the Counterparty falls within the definition of Event of Default under the Agreement);
- 1.5.7 "**PPSA**" means the Personal Property Securities Act 2009 (Cth);
- 1.5.8 "**PPSA Security Interest**" has the meaning given to the term "security interest" in the PPSA;
- 1.5.9 "**Personal Property Securities Register**" has the meaning given to the term "register" in the PPSA;
- 1.5.10 "**Relevant Courts**" means the Supreme Courts of the States and the Territories and the federal courts of the Commonwealth of Australia;
- 1.5.11 "**Relevant Laws**" means the laws of the States and the Territories and the federal laws of the Commonwealth of Australia;
- 1.5.12 "**States**" means the State of New South Wales, the State of Victoria, the State of Queensland, the State of Tasmania, the State of South Australia and the State of Western Australia;
- 1.5.13 "**Territories**" means the Australian Capital Territory and the Northern Territory;
- 1.5.14 references to a "**Clause**" are to a clause of the Agreement;
- 1.5.15 references to a "**paragraph**" are (except where the context otherwise requires) to a paragraph of this opinion letter;
- 1.5.16 references to "**Core Provisions**" include Core Provisions that have been modified by Non-Material Amendments (as defined herein);

- 1.5.17 terms defined or given a particular construction in the Agreement have the same meaning in this opinion letter unless a contrary indication appears;
 - 1.5.18 any reference to any legislation (whether primary legislation or regulations or other subsidiary legislation made pursuant to primary legislation) shall be construed as a reference to such legislation as the same may have been amended or re-enacted on or before the date of this opinion letter;
 - 1.5.19 certain terms relating specifically to the Agreement or to the provisions thereof are set out at Annex 2; and
 - 1.5.20 headings in this opinion letter are for ease of reference only and shall not affect its interpretation.
- 1.6 For the purpose of issuing this opinion letter we have reviewed only the form of Agreements referred to at Annex 1 to this opinion letter.
- 1.7 This opinion letter relates solely to matters of the Relevant Laws and does not consider the impact of any laws (including insolvency laws) other than the Relevant Laws, even where, under the Relevant Laws, any foreign law falls to be applied. This opinion letter and the opinions given in it are governed by the Relevant Laws and relate only to the Relevant Laws as applied by the Relevant Courts as at today's date. All non-contractual obligations and any other matters arising out of or in connection with this opinion letter are governed by the Relevant Laws. We express no opinion in this opinion letter on the laws of any other jurisdiction.
- 1.8 The opinions given in this opinion letter are given on the basis of the assumptions set out in paragraph 2 and are subject to the qualifications set out in paragraph 4 to this opinion letter. The opinions given in this opinion letter are strictly limited to the matters stated in paragraph 3 and do not extend to any other matters.

2. ASSUMPTIONS

We assume the following:

- 2.1 That the Agreements 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 Agreement and Transactions, to perform its obligations under the Agreement and Transactions (and more specifically, the Collateral does not belong to

a client of a Counterparty) and that each Party has taken all necessary steps to execute, deliver and perform the Agreement.

- 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 Agreement and Transactions and to ensure the legality, validity, enforceability or admissibility in evidence of the Agreement in this jurisdiction.
- 2.4 That the Agreement has been properly executed by both Parties.
- 2.5 That the Agreements create a valid and enforceable security interest under their governing laws.
- 2.6 That the Agreement is entered into prior to the commencement of any Insolvency Proceedings in respect of either Party. In particular, no Party has notice that any other Party to an Agreement is, at the time of entry into the Agreement, unable to pay their debts as and when they become due and payable. None of the relevant parties entered or will enter into an Agreement and/or any relevant Transaction, and has granted or will grant any collateral when it has reasonable grounds for suspecting that a Party to an Agreement and/or any relevant Transaction is unable to pay its debts as and when they become due and payable, is insolvent or will become insolvent because of, or because of matters including:
 - 2.6.1 entering into the Agreement and/or any relevant Transaction; or
 - 2.6.2 a person doing an act, or making an omission, for the purposes of giving effect to the Agreement and/or any relevant Transaction.
- 2.7 That any party to the Agreement which is at any time carrying on, or purporting to carry on, a financial services business in Australia within the meaning of the Corporations Act will at all relevant times be doing so in accordance with the licence requirements set out in the Corporations Act.
- 2.8 The Agreement has been entered into, and each of the Transactions referred to therein is carried out, by each of the parties thereto in good faith, for the benefit of each of them respectively, on arms' length commercial terms and for the purpose of carrying on, and by way of, their respective businesses.
- 2.9 That the Agreement accurately reflects the true intentions of each Party.
- 2.10 That no provision of the Agreement, or a document of which the Agreement forms part, or any other arrangement between the Parties, invalidate the enforceability or

effectiveness of the Security Interest Provisions or Rehypothecation Clause under the governing law of the Agreement.

- 2.11 That there is no other agreement, instrument or other arrangement between the Firm and the Counterparty which modifies or supersedes the Agreement which is the subject of, or relevant to, this Opinion.
- 2.12 That all acts, conditions or things required to be fulfilled, performed or effected in connection with the Agreement and the creation and perfection of the security interests thereunder pursuant to laws of any jurisdiction other than this jurisdiction have been duly fulfilled, performed and effected.
- 2.13 That there are no provisions of the laws of any jurisdiction (apart from this jurisdiction) which would be contravened by the execution or the delivery of the Agreement.
- 2.14 That, except with respect to our opinion at paragraph 3.3, any accounts and the assets expressed to be subject to a Security Interest pursuant to the Security Interest Provisions may be located either within or outside this jurisdiction.
- 2.15 That any cash comprising the Collateral is in a currency that is freely transferable internationally under the laws of all relevant jurisdictions.
- 2.16 That each Party when transferring Collateral pursuant to the Security Interest Provisions, will have full legal title to such Collateral 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).
- 2.17 That there is an absence of duress or undue influence in respect of any of the Parties (and their respective directors, employees, agents and advisers) in relation to the Agreement or the Transactions.
- 2.18 That no new Transaction will be entered into following the occurrence of an Event of Default.
- 2.19 That all Parties to the Agreement provided valuable consideration under, or changed their position in reliance on, the transaction(s) contemplated by the Agreements.
- 2.20 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.
- 2.21 That there is no conflict between the Relevant Laws and the laws of England and Wales and that the choice of English law to govern the Agreements are a valid choice of law under England and Wales law.

- 2.22 That words and phrases used in the Agreement have the same meaning and effect as they would if the Agreement were governed by the laws of this jurisdiction.
- 2.23 That no Party to the Agreement has contravened or will contravene the prohibitions on related party transactions in Chapter 2E (*Related Party Transactions*) of the Corporations Act or its equivalent under the laws of that Party's place of incorporation, residence or constitution by entering into the Agreement or a transaction in connection with the Agreement. Any contravention of Chapter 2E (*Related Party Transactions*) of the Corporations Act does not affect the validity of any contract or transaction connected with the giving of the benefit, however directors involved in any dishonest contravention of this section of the Corporations Act may be liable for civil penalties.
- 2.24 That the purpose of the transactions contemplated by the Agreement does not include any financing or refinancing of an acquisition of shares in contravention of Part 2J.3 (*Financial Assistance*) of the Corporations Act. Any contravention of Part 2J.3 (*Financial Assistance*) of the Corporations Act does not affect the validity of the financial assistance or of any contract or transaction connected with it, however directors involved in any dishonest contravention of this section of the Corporations Act may be liable for civil penalties.
- 2.25 That no Party to any Agreement or any of its officers, employees, agents or associates has, or will, engage in conduct which is unconscionable, dishonest, misleading or deceptive or is likely to mislead or deceive in relation to the Agreement.
- 2.26 That no Party enters into any Agreement in the capacity of a trustee of any trust, apart from a trustee as referred to in Schedule 5 (*Trustees of Trusts (other than Charitable Trusts)*) and Schedule 6 (*Trustees of Charitable Trusts*).
- 2.27 That each relevant Party has title to the Collateral or in the case of a PPS Security Interest, sufficient rights (or the power to transfer rights) in the Collateral under section 19(1) of the PPSA for the Security Interest to attach to that Collateral (or in the case of after-acquired property, will have such rights or powers at the time the relevant Party acquires rights in that property).
- 2.28 That any PPS Security Interest has been duly registered in accordance with the PPSA and there are no prior ranking or superior security interests in the collateral.
- 2.29 That no third party has 'possession' of or 'control' over the Collateral as defined in the PPSA.
- 2.30 That no provision of the Agreement that is necessary for the giving of our opinions and advice in this opinion letter has been altered in any material respect. In our view, an alteration contemplated in the definition of "Equivalent Agreement" above would not constitute a material alteration for this purpose. We express no view whether an

alteration not contemplated in the definition of Equivalent Agreement would or would not constitute a material alteration of the Agreement.

3. OPINIONS

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

3.1 Valid Security Interest

3.1.1 The Security Interest Provisions would create a valid security interest over the Collateral.

3.1.2 Subject to paragraph 3.1.3 below, following the occurrence of an Event of Default, including as a result of the opening of any Insolvency Proceedings, the Non-Defaulting Party would be entitled to enforce the Security Interest in respect of the Collateral.

3.1.3 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 right to enforce the Security Interest by the Non-Defaulting Party, provided the Defaulting Party is not subject to insolvency proceedings.

If the Defaulting Party is subject to insolvency proceedings, the Non-Defaulting Party's right to enforce the Security Interest may be affected by a moratorium or by statutory clawbacks as set out in paragraphs 4.3 (*Limitations arising from Insolvency Law*).

3.1.4 Following exercise of the Firm's rights under the Security Interest Provisions, the Firm's rights in respect of the proceeds of realisation of any Collateral located within this jurisdiction would rank at least *pari passu* with the claims of all their other unsecured and unsubordinated creditors other than those whose claims are preferred by any bankruptcy, insolvency, liquidation or other similar laws of general application.

3.2 Further acts

Subject to registration on the Personal Property Security Register¹, no further acts, conditions or things would be required by the law of this jurisdiction to be done,

¹ Except where the security interest forms an integral part of a close-out netting contract for the purposes of the PPSA.

fulfilled or performed under the laws of this jurisdiction in order to enable the Non-Defaulting Party to enforce the Security Interest in respect of the Collateral.

3.3 **Foreign Collateral Providers**

Moreover, the opinions given at paragraphs 3.1 and 3.2 also apply in respect of any Counterparty that is not established or resident in this jurisdiction, where any accounts and the assets expressed to be subject to a Security Interest pursuant to the Security Interest Provisions are located within this jurisdiction.

3.4 **Right of re-use**

3.4.1 With respect to the Eligible Counterparty Agreement 2011, the Retail Client Agreement 2011, the Professional Client Agreement 2011 (or an Equivalent Agreement in the form of one of the foregoing), the Rehypothecation Clause would be effective in accordance with its terms, such that that Firm is entitled to borrow, lend, appropriate, dispose of or otherwise use for its own purposes all non-cash Collateral, subject to the further rights and obligations set out in the Rehypothecation Clause.

3.4.2 The opinion given at this paragraph 3.4 does not apply in respect of an Equivalent 2011 Agreement without Core Rehypothecation Clause.

4. **QUALIFICATIONS**

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

4.1 **Registration of Security on the Personal Property Securities Register**

In relation to a security interest in goods or financial property (i) located in Australia or (ii) granted by a Party which is an Australian entity, pursuant to the PPSA, the Agreement must be registered on the Personal Property Securities Register within twenty business days after the date of creation of the charges constituted by the Security Interest Provisions (which, in most cases, will be the date on which the Agreement was originally entered into by the Parties). Otherwise, the charges will be void against the liquidator or administrator or any creditor of such Counterparty.

4.2 **Stamp Duty**

A document may not be admissible in court proceedings unless applicable stamp duty has been paid.

4.3 Limitations Arising From Insolvency Law

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

- (a) 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;
- (b) 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';
- (c) 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; or
- (d) 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.

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 the Agreement 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 Agreement.

4.4 **Set-Off**

Section 553C of the Corporations Act ("**Statutory Insolvency Set-Off**") 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. Section 553C may therefore operate to reduce amounts recoverable under collateral where it applies to reduce the secured property.

4.5 **Contingent Debts**

Section 553 of the Corporations Act provides that contingent debts owing *by* a Company in winding up (the Insolvent Party) to another person are provable. An estimate can be made by the liquidator of the value of such contingent debts however, these provisions do not apply to contingent debts owing *to* the Insolvent Party. Accordingly, if a debt to the Insolvent Party remains contingent, the fact that nothing is "due" in respect of it, whether by way of an estimate of its value or otherwise, means that it cannot be brought into account in a set-off, unless the contingency is fulfilled during the course of the insolvency proceeding. *Gye v McIntyre* (1991) 171 CLR 609; 98 ALR 393 is authority for the requirement of commensurability which means that section 553C of the Corporations Act does not operate when the claim of the Insolvent Party remains contingent as there is no mechanism for the valuation of such claims.

4.6 **Effectiveness of Security**

4.6.1 We express no opinion as to:

- (a) whether a Counterparty has good legal or other title to the assets or rights which are expressed to be subject to the Security Interest under the Agreement, or as to the existence or value of any such assets or rights;

- (b) whether the Security Interest constitutes a legal or equitable security interest or a fixed or specific (rather than a circulating) charge;
- (c) whether any events in relation to the Collateral or issuer of Collateral may devalue the Collateral or impair the Firm's ability to enjoy such Collateral or the full value thereof; or
- (d) whether the Agreement breach any other agreement or instrument.

4.6.2 The exercise by a Party of the powers and remedies conferred by any Agreement or by law is subject to general equitable principles regarding the enforcement of security.

4.6.3 The opinions set out in paragraph 3.1 (*Valid security interest*) and 3.2 (*Further acts*) of this Opinion Letter are subject to:

- (a) any asset being capable of forming the subject of a security interest and not otherwise being personal to the grantor of such interest;
- (b) without prejudice to the opinion given at paragraph 3.2 (*Further Acts*), the creation of such security interest not requiring any authorisation, consent or fulfilment of any other pre-condition or formality which has not been satisfied, obtained or done; and
- (c) any relevant contract comprised in such security being capable of being set aside as a result of any fraud, misrepresentation or any bribe or corrupt conduct.

4.7 PPSA Reservations

4.7.1 In addition to, and without limiting the reservations set out in paragraph 4.6 (*Effectiveness of Security*), in certain circumstances, certain claims or rights may, in connection with the PPSA, have or obtain priority (either in whole or in part) over the claims secured by a registered security agreement, for example:

- (a) claims or rights in relation to:
 - (i) a PPSA Security Interest in goods that become an unidentifiable part of a larger product or mass or which exists in relation to that larger product or mass;
 - (ii) tangible property that becomes an accession;

- (iii) temporarily perfected PPSA Security Interests;
 - (iv) PPSA Security Interests perfected by possession or control;
 - (v) circulating PPSA Security Interests (as defined in section 51C of the Corporations Act and including security interests in assets such as currency, inventory and accounts used in the ordinary course of business) as regards unpaid audit fees, unpaid wages and superannuation contributions in respect of retrenchment or any leave of absence and long service or extended leave;
 - (vi) Security Interests on, over, or in, property registrable under specific legislation other than the PPSA (for example, in New South Wales property law is governed by the Real Property Act 1900 (NSW) and the Conveyancing Act 1919), relating to title to, or encumbrances over, that property; and
 - (vii) interests akin to Security Interests over certain types of property which are not registrable under the PPSA or any other specific legislation, for example, rights of set-off, interests in superannuation funds, security interests taken by pawnbrokers and rights in relation to the control, use or flow of water;
- (b) the claims of chargees, mortgagees, secured parties and other persons having the benefit of a purchase money PPSA Security Interest;
 - (c) the rights of a buyer or lessee of collateral who takes the collateral free of a PPSA Security Interest pursuant to Part 2.5 of the PPSA;
 - (d) the rights of a creditor of a grantor who receives payment of a debt;
 - (e) the rights of persons acquiring negotiable instruments or chattel paper from a grantor or the holders of a negotiable document of title;
 - (f) the rights of an execution creditor arising prior to perfection of a PPSA Security Interest; and
 - (g) the rights of any person holding or acquiring a right of set-off, counterclaim, consolidation or combination of accounts or other personal equity, whether arising at law or in equity or under statute.

4.7.2 The claims and rights of a secured party:

- (i) are subject to the provisions in the PPSA relating to the redemption of collateral or the reinstatement of a security agreement; and
- (ii) which relate to the conduct of an enforcement are, in certain cases, subject to the provisions of the PPSA and related laws and regulations,

but in this regard the position of the secured party is not materially different from any person taking a similar Security Interest in similar collateral in this jurisdiction.

4.7.3 A secured party may in a security agreement or otherwise subordinate a Security Interest of that secured party in collateral to any other interest in collateral.

4.7.4 A secured party under a perfected Security Interest in relation to collateral may lose rights to trace, or be defeated in priority applicable to collateral in relation to, proceeds arising from any dealing with the collateral.

4.7.5 Collateral may be transferred, despite any provision in a security agreement prohibiting that transfer or declaring that transfer to be an event of default (howsoever described).

4.7.6 A dealing with collateral may result in a PPSA Security Interest becoming unperfected or extinguished (temporarily or permanently) under the “take free” rules in the PPSA.

4.7.7 Where any Security Interest in the Agreement is a PPSA Security Interest, 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 the Agreement to be the governing law of that document.

4.7.8 A registration of a PPSA Security Interest on the Personal Property Securities Register:

- (a) will end in accordance with the time period specified in the applicable financing statement, unless a financing change statement to extend the

registration period is duly filed within the applicable period required under the PPSA; and

- (b) may become defective in a number of circumstances set out in sections 164 (*Defects in registration – general rule*), 165 (*Defects in registration – particular defects*) and 166 (*Defects in registration – temporary effectiveness*) of the PPSA including, but not limited to, seriously misleading defects, registrations of purchase money security interest that are not, in fact, purchase money security interest and if any secured party obtains actual or constructive knowledge of the fact that any grantor of any PPSA Security Interest has changed its name and the secured party does not amend its registration within 5 business days of acquiring the knowledge,

but in this regards the position of the secured party is not materially different from any person taking a similar Security Interest in similar collateral in this jurisdiction.

4.7.9 We express no opinion as to:

- (a) regarding the existence, validity, enforceability, effectiveness or perfection of any Security Interests that may be contemplated, created, arise or provided for under an Agreement, other than the PPS Security Interest; or
- (b) the validity or any PPS Security Interest expressed to be created in any proceeds of personal property which are not identifiable or traceable or do not otherwise fall within the definition of “proceeds” in section 31(1) of the PPSA or which are not capable of being described in a financing statement relating to any PPS Security Interest.

4.7.10 The PPSA is new law in Australia. Its drafting is not always clear and there is no case law on its interpretation. The courts may adopt interpretations which differ from ours.

4.8 Corporations Act

4.8.1 The Corporations Act provides for three main types of insolvency proceedings, being receivership, administration and winding up. If an administrator is appointed to a company a creditor is generally prevented from enforcing their rights to security unless:

- (a) it holds a charge over the whole, or substantially the whole, of the assets (in which case the creditor must elect to enforce its power of sale or appoint a receiver in respect of the secured property within 13 Business Days (the 'decision period' defined in the Corporations Act and amended by the *Corporations Amendment (Insolvency) Act 2007* (Cth)) of the appointment or the date on which the notice of appointment (if required) is given to the creditor) which is correctly registered,
- (b) the court grants permission, or
- (c) the enforcement is in respect of perishable property.

4.8.2 Given the terms of the Agreement, it is unlikely that any Non-Defaulting Party will satisfy the first or third limbs and would therefore, in the circumstances referred to above, need to apply to the Australian Courts for permission to enforce any security interests they have been granted by the Defaulting Party.

4.9 Client Money Rules

4.9.1 Parts 7.8 of the Corporations Act and of the Corporations Regulations 2001 regulate client accounts. Under these rules, payments can be made out of a client account in accordance with the written directions of the client and such terms are permitted to be very broad. Moneys held in connection with derivatives transactions can also be used for the purpose of 'meeting obligations incurred by the licensee in connection with margining, guaranteeing, securing, transferring, adjusting or settling dealings in derivatives by the licensee (including dealings on behalf of people other than the client).' In addition, property other than money can be used in this manner.

4.9.2 These rules are there subject of a government consultation, but until such time as stricter compliance rules or regulations are published by the Government, any moneys held in a client account could be used for margining, guaranteeing, securing, transferring, adjusting or settling dealings in derivatives entered into by parties other than that client, which could lead to a shortfall in funds on any insolvency. Any such shortfall would be an unsecured claim of the creditor.

4.10 Governing Law

A Relevant Court may not apply English law as the governing law of the Agreement if to do so would be contrary to public policy or overriding mandatory provisions of the Relevant Laws.

4.11 Other Qualifications

- 4.11.1 Where any party to the Agreement is vested with a discretion or may determine a matter in its opinion, that Party may be required to exercise its discretion in good faith, reasonably and for a proper purpose, and to form its opinion in good faith and on reasonable grounds. Any provision in the Agreement providing that any calculation, determination or certification is to be conclusive and binding may not be effective if such calculation, determination or certification is fraudulent or manifestly incorrect and a court may regard any certification, determination or calculation as no more than prima facie evidence.
- 4.11.2 The opinions expressed in this Opinion Letter are subject to the effects of any United Nations, European Union or Australian sanctions or other similar measures implemented or effective in this jurisdiction with respect to any Party to the Agreement which is, or is controlled by or otherwise connected with, a person resident in, incorporated in or constituted under the laws of, or carrying on business in a country to which any such sanctions or other similar measures apply, or is otherwise the target of any such sanctions or other similar measures.
- 4.11.3 Any provision of the Agreement stating that a failure or delay, on the part of any party, in exercising any right or remedy under the Agreement shall not operate as a waiver of such right or remedy may not be effective.
- 4.11.4 If the effect of proceedings in a forum outside this jurisdiction is to extinguish claims or liabilities under the governing law of those claims or liabilities, the Relevant Courts may recognise the extinction of those claims or liabilities.
- 4.11.5 Any provision of the Agreement requiring any person to pay amounts imposed in circumstances of breach or default may be held to be unenforceable on the grounds that it is a penalty.
- 4.11.6 An exchange contract (which, in our view, includes the Agreement and possibly some Obligations) is unenforceable in Australia if (i) it involves the currency of any member of the International Monetary Fund and (ii) it is contrary to the exchange control regulations of any member of the International Monetary Fund maintained or imposed consistently with the International Monetary Fund Agreement. In our opinion the Agreement is not contrary to any exchange control regulations maintained or imposed by the Australia. Further, there is inconsistent authority on what amounts to an

"exchange contract" for these purposes. It is not clear whether the term encompasses any contract which in any way affects a country's exchange resources or only a contract for the exchange of one currency for another, although the better view is probably that the latter (narrow) interpretation is correct.

- 4.11.7 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 security agreement describing the security interest will not be admissible as evidence in a Relevant Court until the stamp duty, and accompanying penalties, have been paid.
- 4.11.8 We express no opinion as to the taxation or stamp duty consequences of a Party entering into the Agreement.
- 4.11.9 As the Agreement is an arrangement between the parties governing how transactions in derivatives, for the purposes of Chapter 7 of the Corporations Act, will be settled by the Parties, we express no opinion as to the licensing or other requirements which may apply under Chapter 7 of the Corporations Act where the Parties enter into a transaction which is a derivative under the Corporations Act.
- 4.11.10 The effectiveness of any provision of an Agreement which allows an invalid provision to be severed in order to save the remainder of that Agreement will be determined by the Relevant Courts in their discretion.

5. ADDRESSEES AND PURPOSE

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 and such of its members (excluding associate members) as subscribe to the Futures and Options Association's opinions library (and whose terms of subscription give them access to this opinion). This opinion may not be relied upon by any other person unless we otherwise specifically agree with that person in writing, although we consent to it being shown to such Futures and Options Association members' affiliates (being members of such persons' groups, as defined by the UK Financial Services and Markets Act 2000) and to any competent authority supervising such member firms and their affiliates in connection with their compliance with their obligations under prudential regulation.

Yours faithfully,

A handwritten signature in black ink that reads "Clifford Chance". The signature is written in a cursive, flowing style with a large initial 'C'.

Clifford Chance

SCHEDULE 1
AUTHORISED DEPOSIT TAKING INSTITUTIONS

Subject to the modifications and additions set out in this Schedule 1 (*Authorised Deposit Taking Institutions*), the opinions, assumptions and qualifications set out in this opinion letter will also apply in respect of Parties which are Authorised Deposit Taking Institutions.

For the purposes of this Schedule 1 (*Authorised Deposit Taking Institutions*), "**Authorised Deposit Taking Institution**" or "ADI" means a body corporate in relation to which an authority under subsection 9(3) of the Banking Act 1959 (Cth) (the "**Banking Act**") is in force.

Except where the context otherwise requires, references in this Schedule to "*paragraph*" are to paragraphs in the opinion letter (but not to its Annexes or Schedules) and references to "*sections*" are to sections of this Schedule.

1. MODIFICATIONS TO TERMS OF REFERENCE AND DEFINITIONS

None applicable.

2. ADDITIONAL ASSUMPTIONS

None applicable.

3. MODIFICATION TO THE OPINIONS

None applicable.

4. ADDITIONAL QUALIFICATIONS

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

4.1 Banking Act

4.1.1 The Banking Act contains various provisions which might affect the effectiveness of the Security Interest Provisions. In particular, Part 2 of the Banking Act provides for various remedies for a failing ADI, which include the ability of APRA to issue directions regarding the operation of the ADI and to appoint a statutory manager (an "**ADI Statutory Manager**") to take control of the ADI. The ADI Statutory Manager has specific powers to sell the whole, or any part, of the ADI's business and to alter the ADI's constitution.

4.1.2 In addition to the above, the Banking Act also states that if an ADI is unable to meet its obligations or suspends payments, the assets of the ADI in Australia are to be used to meet the ADI's liabilities in the following order:

- (a) *first*, the ADI's liabilities to APRA because of the rights APRA has against the ADI in respect of amounts payable to holders of 'protected accounts' in connection with the Financial Claims Scheme (a form of deposit insurance) established under the Banking Act;
- (b) *secondly*, the ADI's liabilities to APRA for costs incurred (if any) in performing its functions in respect of the Financial Claims Scheme payments listed in (i) above;
- (c) *thirdly*, the ADI's liabilities in Australia in relation to protected accounts that account holders keep with the ADI;
- (d) *fourthly*, the ADI's debts to the Reserve Bank of Australia;
- (e) *fifth*, the ADI's liabilities under any industry support contract (being a contract under which emergency financial support is provided to the parties to the contract in specified circumstances) that has been certified under the Banking Act; and
- (f) *sixth*, the ADI's other liabilities in the order of their priority.

4.2 **Restructuring Act**

The Financial Sector (Business Transfer and Group Restructure) Act 1999 (the "**Restructure Act**") is intended to enable an ADI Statutory Manager to transfer some or all of the business of the ADI to another ADI or to a bridge bank, and/or to remove impaired assets from the balance sheet in defined circumstances (principally relating to financial distress). The Restructure Act contains provisions allowing such transfers to take effect despite any provisions of contracts or consent requirements applicable in respect to the relevant (distressed) ADI and section 36AA(2) of the Restructure Act provides that the fact that an act is done under the Restructure Act to effect a voluntary or compulsory transfer, or that a certificate of transfer comes into force, in connection with an ADI, prohibits any other party to the contract from doing any of the following:

- 4.2.1 deny any obligation under that contract;
- 4.2.2 accelerate any debt under that contract;

4.2.3 close out any transaction relating to that contract.

These wide-ranging clauses will affect the rights of a secured creditor and to the extent an ADI Statutory Manager were to use these powers, the validity of a security interest, or the assets such interest covers, may be adversely affected².

5. MODIFICATION TO QUALIFICATIONS

None applicable.

² APRA has released a consultation paper entitled 'Strengthening APRA's crisis management powers' in October 2012. To the extent the proposals in this report are adopted, APRA's powers to intervene in a distressed ADI may increase, which could potentially further reduce creditor's rights in respect of assets located in Australia.

SCHEDULE 2 INDIVIDUALS

Subject to the modifications and additions set out in this Schedule 2 (*Individuals*), the opinions, assumptions and qualifications set out in this opinion letter will also apply in respect of Parties which are individuals. For the purposes of this Schedule 2 (*Individuals*), an "**individual**" is a natural person as defined in the Acts Interpretation Act 1901 (Cth) and falls within the definition of "person" under that Act.

Except where the context otherwise requires, references in this Schedule to "paragraph" are to paragraphs in the opinion letter (but not to its Annexes or Schedules) and references to "sections" are to sections of this Schedule.

1. MODIFICATIONS TO TERMS OF REFERENCE AND DEFINITIONS

None applicable.

2. ADDITIONAL ASSUMPTIONS

The assumption at paragraph 2.8 shall be deemed deleted and replaced with the following:

Any Party that is an individual has entered into the Agreement, and each of the Transactions referred to therein is carried out in good faith, for the benefit of himself or herself, on arms' length commercial terms and for purposes other than personal, domestic and household use and that no party enters into an agreement as a 'retail' customer as defined in the Corporations Act.

3. MODIFICATION TO THE OPINIONS

None applicable.

4. ADDITIONAL QUALIFICATIONS

None applicable.

5. MODIFICATION TO QUALIFICATIONS

Furthermore, the qualifications at paragraph 4 are deemed modified as follows:

Paragraph 4.3 shall be deemed deleted and replaced with the following:

5.1 Limitations Arising From Insolvency Law

- 5.1.1 The nature and enforcement of an obligation may be held to be wholly or partly invalid as a result of any of the following sections of the Bankruptcy Act:
- (a) section 120 (*Undervalued transactions*): a transaction which took place within five years of the commencement of the bankruptcy (if the transferor was insolvent at the time of the transaction) or within two years of the commencement of the bankruptcy, under which the transferee gave no consideration for the transfer or gave consideration of less value than the market value of the property.
 - (b) section 121 (*Transfers to defeat creditors*): a transfer of property where the main purpose in making the transfer was to prevent the property from becoming divisible among the transferor's creditors or to hinder or delay the process of making the property available to the transferor's creditors; and
 - (c) section 122 (*Avoidance of preferences*): a transfer of property between a debtor and a creditor where the transaction results in that creditor receiving a preference, priority or advantage over other creditors.
- 5.1.2 The definition of 'property' in the Bankruptcy Act is wide and includes any estate, interest or profit, whether present or future, vested or contingent, arising out of or incidental to any real or personal property, whether situated in Australia or elsewhere. However, in the absence of specific facts indicating a clawback circumstance referred to above, we would not expect the terms of the Agreement 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 Agreement.

SCHEDULE 3 INSURERS

Subject to the modifications and additions set out in this Schedule 3 (*Insurers*), the opinions, assumptions and qualifications set out in this opinion letter will also apply in respect of Parties which are Insurers.

For the purpose of this Schedule 3 (*Insurers*), an "**Insurer**" has the meaning given to "general insurer" in section 11 of the Insurance Act 1973 (Cth) (the "**Insurance Act**") (defined as a body corporate that is authorised under section 12 to carry on insurance business in Australia but does not include a company carrying on re-insurance business) and to "**life company**" (defined as a company that is carrying on life insurance business in Australia under the Life Insurance Act 1995 (Cth) (the "**Life Insurance Act**"). The Life Insurance Act defines "company" as a company incorporated under the Corporations Act; or a body corporate incorporated, or continued in existence, by or under any law of a State or Territory; or an eligible foreign life insurance company.

Except where the context otherwise requires, references in this Schedule to "paragraph" are to paragraphs in the opinion letter (but not to its Annexes or Schedules) and references to "sections" are to sections of this Schedule.

1. **MODIFICATIONS TO TERMS OF REFERENCE AND DEFINITIONS**

The opinions in this opinion letter are subject to the following additional modification to the terms of reference.

- 1.1 The opinion does not apply to any insurance undertakings that are friendly societies, nor in respect of the Lloyds Insurance Market.

2. **ADDITIONAL ASSUMPTIONS**

None applicable.

3. **MODIFICATION TO THE OPINIONS**

None applicable.

4. **ADDITIONAL QUALIFICATIONS**

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

4.1 **Insurance Act**

Section 116(3) of the Insurance Act states that ‘in the winding up of a general insurer, the Insurer’s assets in Australia must not be applied in the discharge of its liabilities other than its liabilities in Australia unless it has no liabilities in Australia’. It is therefore unclear if a secured party would be able to enforce any security held over the assets of an Insurer where the assets are located in Australia but the liabilities arise elsewhere.

4.2 **Life Insurance Act**

Section 38(3) of the Life Insurance Act restricts a life company from mortgage or charging any of the assets of a statutory fund except in the following circumstances:

- (a) to secure a bank overdraft; or
- (b) in connection with the undertaking of a major development project and in accordance with section 40 of the Life Insurance Act; or
- (c) for such other purposes, and subject to such other conditions, as are prescribed by the regulations.

5. **MODIFICATION TO QUALIFICATIONS**

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

- 5.1 The opinion is given in respect of the Insurance Act and the Life Insurance Act. There may be specific regulations or acts of parliament applicable to an Insurer or life company or conditions or limitations that have been included in the licences held by the relevant Insurer or life company which impact the opinions in this opinion letter.

SCHEDULE 4 PARTNERSHIPS

Subject to the modifications and additions set out in this Schedule 4 (*Partnerships*), the opinions, assumptions and qualifications set out in this opinion letter will also apply in respect of Parties which are "**Partnerships**".

For the purposes of this Schedule 4 (*Partnership*), a Partnership means a partnership or a limited partnership (but does not include an incorporated limited partnership) within the meaning of parts 1 and 3 of the Partnership Act 1892 (NSW) (the "**Partnership Act**") and which is organised, established or formed under the laws of the State of New South Wales.

Except where the context otherwise requires, references in this Schedule to "paragraph" are to paragraphs in the opinion letter (but not to its Annexes or Schedules) and references to "sections" are to sections of this Schedule.

1. MODIFICATIONS TO TERMS OF REFERENCE AND DEFINITIONS

1.1 The following definitions are deemed deleted and replaced with the following:

1.1.1 *""this jurisdiction" means the State of New South Wales and the Commonwealth of Australia."*

1.1.2 *""Relevant Courts" means the Supreme Court of New South Wales and the federal courts of Australia."*

1.1.3 *""Relevant Laws" means the laws of the State of New South Wales and the federal laws of the Commonwealth of Australia."*

2. ADDITIONAL ASSUMPTIONS

We assume the following:

2.1 That where the Agreement is entered into with a partnership, during the life of the Agreement, the members of the partnership will remain unchanged.

2.2 That where the Agreement is entered into with a partnership, such partnership is not an Authorised Deposit Taking Institution or Insurer or Life Insurer.

3. MODIFICATIONS TO OPINIONS

None applicable.

4. ADDITIONAL QUALIFICATIONS

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

- 4.1 In relation to the assumption at section 2.1 of this Schedule 4 (*Partnerships*), where there is a change in partnership, incoming partners may have no liability for the acts of their predecessor partner(s) unless they expressly undertake such liability (Re Boots; Ex parte Official Receiver (1976) 26 FLR 320). Section 17 of the Partnership Act provides that an incoming partner does not become liable to the creditors of the partnership for anything done before he became a partner. Under the laws of the State of New South Wales the introduction of a new partner will constitute a new partnership. Accordingly, it might be argued (a) that the Agreement is not binding on the incoming partner(s), or (b) that Transactions entered into by the former partners are not binding on incoming partner(s), with the consequence that not all obligations are subject to the Agreement, so that the Security Interest Provisions would be ineffective against the new partnership.

5. MODIFICATIONS TO QUALIFICATIONS

Furthermore, if a partner is an individual, the qualifications at paragraph 4 are deemed modified as follows:

Paragraph 4.3 shall be deemed deleted and replaced paragraph 5.1 (*Limitations Arising from Insolvency Law*) of Schedule 2 (*Individuals*).

SCHEDULE 5
TRUSTEES OF TRUSTS (OTHER THAN CHARITABLE TRUSTS)

Subject to the modifications set out in this Schedule 5 (*Trustees of Trusts (other than Charitable Trusts)*), the opinions, assumptions and qualifications set out in this opinion letter (as modified and added to pursuant to Schedule 2 (*Individuals*) in the case of a Trustee that is an Individual) will also apply in respect of Parties which are acting as Trustees of a Trust (other than a Charitable Trust).

For the purpose of this Schedule 5 (*Trustees of Trusts (other than Charitable Trusts)*), a "Trust" means an express trust validly constituted under the Relevant Laws; and "Trustee" means a person who is an individual, an Australian company or a foreign company and acting as trustee of a Trust.

Except where the context otherwise requires, references in this Schedule to "paragraph" are to paragraphs in the opinion letter (but not to its Annexes or Schedules) and references to "sections" are to sections of this Schedule (or of Schedule 2 (*Individuals*) in the case of a Trustee that is an individual, as applicable).

1. MODIFICATIONS TO TERMS OF REFERENCE AND DEFINITIONS

- 1.1 To the extent this opinion relates to Trustees, it is given in respect of a Party which, in entering into the Agreement, acts as Trustee in respect of a single Trust. Where a Party acts as Trustee of more than one Trust, no opinion is expressed in relation to the Agreement except to the extent that the terms of the Agreement apply separately in relation to each Trust. The opinions are not given in respect of any Trust which is a pension scheme, statutory trust, a testamentary trust, a Charitable Trust, or a trust for sale.
- 1.2 A defaulting Party may for the purposes of this opinion be regarded as acting as Trustee only if it comprises a single trustee or a body of trustees, and references in this opinion to a Trustee include a body of persons acting jointly as Trustee.

2. ADDITIONAL ASSUMPTIONS

We assume the following:

- 2.1 That each Party has the capacity, power and authority under the terms of any applicable Trust of which a Party is a Trustee to enter into the Agreement and Transactions; to perform its obligations under the Agreement and Transactions; and that each Party has taken all necessary steps to execute, deliver and perform the Agreement.

- 2.2 That during the life of any Transaction, the Trustee(s) of the relevant Trust in respect of which a Party is acting as Trustee will remain unchanged.
- 2.3 That there will only be a single Trustee acting on behalf of the Trust.
- 2.4 Our assumption at paragraph 2.26 is disappplied for the purposes of this Schedule.

3. MODIFICATIONS TO OPINIONS

None applicable.

4. ADDITIONAL QUALIFICATIONS

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

- 4.1 In relation to the assumption at section 2.2 of this Schedule 5 (*Trustees of Trusts (other than Charitable Trusts)*) where there is a change of trustee in respect of a Trust, an incoming trustee will have no liability for the acts of her, his or its predecessor in office unless the incoming trustee undertakes such liability. Under the Relevant Laws trustees' obligations under contracts which they enter into are owed by them personally. An incoming trustee, therefore, will not become liable to discharge obligations owed by a former trustee, such as obligations incurred by another trustee before the incoming trustee's appointment, but may agree to undertake such obligations (for example, by novation of contracts entered into by the former trustee). Accordingly, it might be argued that the Agreement is not binding on the incoming trustees. If, following a change of trustee, the incoming trustee does not adopt the Agreement it could be the case that the Security Interest Provisions would be ineffective.

5. MODIFICATIONS TO QUALIFICATIONS

Furthermore, if a trustee is an individual, the qualifications at paragraph 4 are deemed modified as follows:

Paragraph 4.3 shall be deemed deleted and replaced paragraph 5.1 (*Limitations Arising from Insolvency Law*) of Schedule 2 (*Individuals*).

SCHEDULE 6
TRUSTEES OF CHARITABLE TRUSTS

Subject to the further additions and modifications set out in this Schedule 6 (*Trustees of Charitable Trusts*), the opinions, assumptions and qualifications set out in this opinion letter (as modified and added to pursuant to Schedule 5 (*Trustees of Trusts (other than Charitable Trusts)*)) will also apply in respect of Parties which are acting as Trustees of a Charitable Trust.

For the purposes of this Schedule 6 (*Trustees of Charitable Trusts*), a "**Charitable Trust**" means an express trust validly constituted under the Relevant Laws, which is established for a charitable purpose. Except where the context otherwise requires, references in this Schedule to "paragraph" are to paragraphs in the opinion letter (but not to its Annexes or Schedules) and references to "sections" are to sections of this Schedule or of Schedule 5 (*Trustees of Trusts (other than Charitable Trusts)*), as applicable.

1. MODIFICATIONS TO TERMS OF REFERENCE AND DEFINITIONS

1.1 The following definitions are deemed deleted and replaced with the following:

1.1.1 *""this jurisdiction" means the State of New South Wales and the Commonwealth of Australia."*

1.1.2 *""Relevant Courts" means the Supreme Court of New South Wales and the federal courts of Australia."*

1.1.3 *""Relevant Laws" means the laws of the State of New South Wales and the federal laws of the Commonwealth of Australia."*

1.2 The words ", a Charitable Trust," are deemed deleted from Schedule 5 (*Trustees of Trusts (other than Charitable Trusts)*) for the purposes of this Schedule 6 (*Trustees of a Charitable Trust*).

1.3 In addition, the following additional terms of reference and definitions shall apply:

"Charitable Trusts Act" means the Charitable Trusts Act 1993 (NSW).

2. ADDITIONAL ASSUMPTIONS

None applicable.

3. MODIFICATIONS TO OPINIONS

None applicable.

4. ADDITIONAL QUALIFICATIONS

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

- 4.1 The Charitable Trusts Act grants the Supreme Court of New South Wales certain wide powers in circumstances where a proceeding is brought before the Supreme Court of New South Wales with respect to any breach or alleged breach of a Charitable Trust or with respect to the administration of a Charitable Trust and the Supreme Court of New South Wales is satisfied that (a) there is or has been misconduct or mismanagement in the administration of the Charitable Trust; or (b) it is necessary or desirable to act for the purpose of protecting existing or future trust property or securing a proper application, for the purposes of the Charitable Trust, of existing or future trust property (as stated in section 7(1) of that Act). The Charitable Trusts Act also provides that the Attorney General of New South Wales may by order establish a scheme for the administration of any charitable trust. Such a scheme can include the alteration of the original purposes, extending or varying trustee powers or, in the case of two or more Charitable Trusts, authorise the trustees to use common premises, employ common staff, pool trust property or otherwise combine the administration of the trusts.
- 4.2 It is possible that action taken by the Supreme Court of New South Wales or the Attorney General of New South Wales pursuant to such powers might adversely affect the operation of the Security Interest Provisions, as it might result in the legal separation of obligations or the transfer of Collateral to a third party who is not bound by any such Agreement.

5. MODIFICATIONS TO QUALIFICATIONS

None applicable.

SCHEDULE 7
CHARITABLE ASSOCIATIONS

Subject to the additions set out in this Schedule 7 (*Charitable Associations*), the opinions, assumptions and qualifications set out in this opinion letter will also apply in respect of Parties which are Charitable Associations.

For the purposes of this Schedule 7 (*Charitable Associations*), a "**Charitable Association**" means an incorporated association or society, which is registered under the Associations Incorporation Act 2009 (NSW).

1. MODIFICATIONS TO TERMS OF REFERENCE AND DEFINITIONS

1.1 The following definitions are deemed deleted and replaced with the following:

1.1.1 *"this jurisdiction" means the State of New South Wales and the Commonwealth of Australia."*

1.1.2 *"Relevant Courts" means the Supreme Court of New South Wales and the federal courts of Australia."*

1.1.3 *"Relevant Laws" means the laws of the State of New South Wales and the federal laws of the Commonwealth of Australia."*

2. ADDITIONAL ASSUMPTIONS

None applicable.

3. MODIFICATIONS TO OPINIONS

None applicable.

4. ADDITIONAL QUALIFICATIONS

None applicable.

5. MODIFICATIONS TO QUALIFICATIONS

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

5.1 Section 60 of the Associations Incorporation Act 2009 (NSW) states that, if Director-General appoints an administrator to conduct an association's affairs, a person must not begin or continue any legal proceedings against the association until the

administrator's appointment is revoked, except with the leave of the Supreme Court. This section could affect the ability of a secured creditor to enforce their security if legal proceedings are required for such enforcement.

SCHEDULE 8
RESERVE BANK OF AUSTRALIA

Subject to the modifications and additions set out in this Schedule 8 (*Reserve Bank of Australia*), the opinions, assumptions and qualifications set out in this opinion letter will also apply in respect of the Reserve Bank of Australia where it is a Party.

For the purposes of this Schedule 8 (*Reserve Bank of Australia*), the "**Reserve Bank of Australia**" means the Reserve Bank of Australia as the central bank for Australia, as regulated by the Reserve Bank Act 1959 (Cth) (the "**Reserve Bank Act**").

Except where the context otherwise requires, references in this Schedule to "paragraph" are to paragraphs in the opinion letter (but not to its Annexes or Schedules) and references to "sections" are to sections of this Schedule.

1. **MODIFICATIONS TO TERMS OF REFERENCE AND DEFINITIONS**

None applicable.

2. **ADDITIONAL ASSUMPTIONS**

None applicable.

3. **MODIFICATIONS TO OPINIONS**

None applicable.

4. **ADDITIONAL QUALIFICATIONS**

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

- 4.1 Section 8 of the Reserve Bank Act states that the Reserve Bank of Australia has such powers as are necessary for the purposes of the Reserve Bank Act and any other Act conferring functions on the Reserve Bank of Australia and, in particular, and in addition to any other powers conferred on it by the Reserve Bank Act and such other Acts, has power (a) to receive money on deposit, (b) to borrow money, (c) to lend money; (d) to buy, sell, discount and re-discount bills of exchange, promissory notes and treasury bills, (e) to buy and sell securities issued by the Commonwealth and other securities, (f) to buy, sell and otherwise deal in foreign currency, specie, gold and other precious metals, (g) to establish credits and give guarantees, (h) to issue bills and drafts and effect transfers of money, (i) to underwrite loans and (j) to do anything incidental to any of its powers. Accordingly, whether the Reserve Bank of

Australia has sufficient power to give security will be dependent on the facts and circumstances relating to the security and the purpose of providing such security.

- 4.2 There is no statutory regime in Australia that contemplates the insolvency of the Reserve Bank of Australia. It is conceivable that the Reserve Bank of Australia could be subject to the same insolvency proceedings as an ADI, however, given the political and economical consequences of insolvency of the central bank of Australia, it is more likely that specific legislation would be enacted to address such a situation. As such, we are unable to speculate on what form such insolvency proceeding would take and what the effects on the Security Interest Provisions could be.

5. **MODIFICATIONS TO QUALIFICATIONS**

None applicable.

ANNEX 1
FORM OF FOA AGREEMENTS

1. Professional Client Agreement (2007 Version), including Module G (*Margin and Collateral*) (the "**Professional Client Agreement 2007**")
2. Professional Client Agreement (2009 Version), including Module G (*Margin and Collateral*) (the "**Professional Client Agreement 2009**")
3. Professional Client Agreement (2011 Version) including Module G (*Margin and Collateral*) (the "**Professional Client Agreement 2011**")
4. Retail Client Agreement (2007 Version) including Module G (*Margin and Collateral*) (the "**Retail Client Agreement 2007**")
5. Retail Client Agreement (2009 Version) including Module G (*Margin and Collateral*) (the "**Retail Client Agreement 2009**")
6. Retail Client Agreement (2011 Version) including Module G (*Margin and Collateral*) (the "**Retail Client Agreement 2011**")
7. Eligible Counterparty Agreement (2007 Version) including Module G (*Margin*) (the "**Eligible Counterparty Agreement 2007**")
8. Eligible Counterparty Agreement (2009 Version) including Module G (*Margin*) (the "**Eligible Counterparty Agreement 2009**")
9. Eligible Counterparty Agreement (2011 Version) including Module G (*Margin*) (the "**Eligible Counterparty Agreement 2011**")

For the avoidance of doubt none of the forms of the Agreements listed at this Annex 1 include or incorporate the Title Transfer Securities and Physical Collateral Annex to the Netting Modules published by the Futures and Options Association.

Where a FOA Published Form Agreement expressly contemplates the election of certain variables and alternatives, the Agreements listed above shall be deemed to include any such document in respect of which the parties have made such expressly contemplated elections (and have made any deletions required by such elections, where such deletions are expressly contemplated in the event of such election by the applicable FOA Published Form Agreement).

Each of the Agreements listed in this Annex 1 may be deemed to include Agreements identical to the relevant FOA Published Form Agreement, save for the substitution of Two Way Clauses in place of the equivalent terms in the FOA Published Form Agreement.

ANNEX 2
DEFINED TERMS RELATING TO THE AGREEMENTS

1. The "**Eligible Counterparty Agreements**" means each of the Eligible Counterparty Agreement 2007, the Eligible Counterparty Agreement 2009 and the Eligible Counterparty Agreement 2011 (each as listed and defined at Annex 1).
2. The "**Professional Client Agreements**" means each of the Professional Client Agreement 2007, the Professional Client Agreement 2009 and the Professional Client Agreement 2011 (each as listed and defined at Annex 1).
3. The "**Retail Client Agreements**" means each of the Retail Client Agreement 2007, the Retail Client Agreement 2009 and the Retail Client Agreement 2011 (each as listed and defined at Annex 1).
4. An "**Equivalent 2011 Agreement without Core Rehypothecation Clause**" means an Equivalent Agreement in the form of the Eligible Counterparty Agreement 2011, Retail Client Agreement 2011 or Professional Client Agreement 2011 but which does not contain the Rehypothecation Clause.
5. "**Core Provisions**" means:
 - (a) with respect to all Equivalent Agreements, the Security Interest Provisions; and
 - (b) with respect to Equivalent Agreements that are in the form of the Eligible Counterparty Agreement 2011, Retail Client Agreement 2011 or Professional Client Agreement 2011 (but not with respect to an Equivalent 2011 Agreement without Core Rehypothecation Clause), the Rehypothecation Clause.
6. "**Rehypothecation Clause**" means:
 - (i) in the case of Agreements in the form of the Professional Client Agreement 2011, clause 8.13 (***Rehypothecation***);
 - (ii) in the case of Agreements in the form of the Retail Client Agreement 2011, clause 8.15 (***Rehypothecation***);
 - (iii) in the case of Agreements in the form of the Eligible Counterparty Agreement 2011, clause 7.13 (***Rehypothecation***); and
 - (iv) in the case of an Equivalent Agreement, a clause that is identically the same in form and language as a clause referred to in any of the foregoing paragraphs (i) to (iii) of this definition (except insofar as variations may be required for internal cross-referencing purposes).

7. "Security Interest Provisions" means:

- (a) the "Security Interest Clause", being:
 - (i) in the case of Agreements in the form of the Professional Client Agreement 2007, clause 8.6 (*Security interest*);
 - (ii) in the case of Agreements in the form of the Professional Client Agreement 2009, clause 8.6 (*Security interest*);
 - (iii) in the case of Agreements in the form of the Professional Client Agreement 2011, clause 8.7 (*Security interest*);
 - (iv) in the case of Agreements in the form of the Retail Client Agreement 2007, clause 8.8 (*Security interest*);
 - (v) in the case of Agreements in the form of the Retail Client Agreement 2009, clause 8.8 (*Security interest*);
 - (vi) in the case of Agreements in the form of the Retail Client Agreement 2011, clause 8.9 (*Security interest*);
 - (vii) in the case of Agreements in the form of the Eligible Counterparty Agreement 2007, clause 7.6 (*Security interest*);
 - (viii) in the case of Agreements in the form of the Eligible Counterparty Agreement 2009, clause 7.6 (*Security interest*);
 - (ix) in the case of Agreements in the form of the Eligible Counterparty Agreement 2011, clause 7.7 (*Security interest*); and
 - (x) the case of an Equivalent Agreement, a clause that is identically the same in form and language as a clause referred to in any of the foregoing paragraphs (i) to (ix) of this definition (except insofar as variations may be required for internal cross-referencing purposes);
- (b) the "Power to Charge Clause", being:
 - (i) in the case of Agreements in the form of the Professional Client Agreement 2007, clause 8.10 (*Power to charge*);
 - (ii) in the case of Agreements in the form of the Professional Client Agreement 2009, clause 8.10 (*Power to charge*);
 - (iii) in the case of Agreements in the form of the Professional Client Agreement 2011, clause 8.10 (*Power to charge*);
 - (iv) in the case of Agreements in the form of the Retail Client Agreement 2007, clause 8.12 (*Power to charge*);

- (v) in the case of Agreements in the form of the Retail Client Agreement 2009, clause 8.12 (*Power to charge*);
 - (vi) in the case of Agreements in the form of the Retail Client Agreement 2011, clause 8.12 (*Power to charge*);
 - (vii) in the case of Agreements in the form of the Eligible Counterparty Agreement 2007, clause 7.10 (*Power to charge*);
 - (viii) in the case of Agreements in the form of the Eligible Counterparty Agreement 2009, clause 7.10 (*Power to charge*);
 - (ix) in the case of Agreements in the form of the Eligible Counterparty Agreement 2011, clause 7.10 (*Power to charge*); and
 - (x) in the case of an Equivalent Agreement, a clause that is identically the same in form and language as a clause referred to in any of the foregoing paragraphs (i) to (ix) of this definition (except insofar as variations may be required for internal cross-referencing purposes);
- (c) the "**Power of Sale Clause**", being:
- (i) in the case of Agreements in the form of the Professional Client Agreement 2007, clause 8.11 (*Power of sale*);
 - (ii) in the case of Agreements in the form of the Professional Client Agreement 2009, clause 8.11 (*Power of sale*);
 - (iii) in the case of Agreements in the form of the Professional Client Agreement 2011, clause 8.11 (*Power of sale*);
 - (iv) in the case of Agreements in the form of the Retail Client Agreement 2007, clause 8.13 (*Power of sale*);
 - (v) in the case of Agreements in the form of the Retail Client Agreement 2009, clause 8.13 (*Power of sale*);
 - (vi) in the case of Agreements in the form of the Retail Client Agreement 2011, clause 8.13 (*Power of sale*);
 - (vii) in the case of Agreements in the form of the Eligible Counterparty Agreement 2007, clause 7.11 (*Power of sale*);
 - (viii) in the case of Agreements in the form of the Eligible Counterparty Agreement 2009, clause 7.11 (*Power of sale*);
 - (ix) in the case of Agreements in the form of the Eligible Counterparty Agreement 2011, clause 7.11 (*Power of sale*); and

- (x) in the case of an Equivalent Agreement, a clause that is identically the same in form and language as a clause referred to in any of the foregoing paragraphs (i) to (ix) of this definition (except insofar as variations may be required for internal cross-referencing purposes);
- (d) the "**Power of Appropriation Clause**", being:
- (i) in the case of Agreements in the form of the Professional Client Agreement 2007, clause 8.12 (*Power of appropriation*);
 - (ii) in the case of Agreements in the form of the Professional Client Agreement 2009, clause 8.12 (*Power of appropriation*);
 - (iii) in the case of Agreements in the form of the Professional Client Agreement 2011, clause 8.12 (*Power of appropriation*);
 - (iv) in the case of Agreements in the form of the Retail Client Agreement 2007, clause 8.14 (*Power of appropriation*);
 - (v) in the case of Agreements in the form of the Retail Client Agreement 2009, clause 8.14 (*Power of appropriation*);
 - (vi) in the case of Agreements in the form of the Retail Client Agreement 2011, clause 8.14 (*Power of appropriation*);
 - (vii) in the case of Agreements in the form of the Eligible Counterparty Agreement 2007, clause 7.13 (*Power of appropriation*);
 - (viii) in the case of Agreements in the form of the Eligible Counterparty Agreement 2009, clause 7.13 (*Power of appropriation*);
 - (ix) in the case of Agreements in the form of the Eligible Counterparty Agreement 2011, clause 7.12 (*Power of appropriation*); and
 - (x) in the case of an Equivalent Agreement, a clause that is identically the same in form and language as a clause referred to in any of the foregoing paragraphs (i) to (ix) of this definition (except insofar as variations may be required for internal cross-referencing purposes);
- (e) the "**Lien Clause**", being:
- (i) in the case of Agreements in the form of the Professional Client Agreement 2007, clause 8.13 (*General lien*);
 - (ii) in the case of Agreements in the form of the Professional Client Agreement 2009, clause 8.13 (*General lien*);
 - (iii) in the case of Agreements in the form of the Professional Client Agreement 2011, clause 8.14 (*General lien*);

- (iv) in the case of Agreements in the form of the Retail Client Agreement 2007, clause 8.15 (*General lien*);
 - (v) in the case of Agreements in the form of the Retail Client Agreement 2009, clause 8.15 (*General lien*);
 - (vi) in the case of Agreements in the form of the Retail Client Agreement 2011, clause 8.16 (*General lien*);
 - (vii) in the case of Agreements in the form of the Eligible Counterparty Agreement 2007, clause 7.12 (*General lien*);
 - (viii) in the case of Agreements in the form of the Eligible Counterparty Agreement 2009, clause 7.12 (*General lien*);
 - (ix) in the case of Agreements in the form of the Eligible Counterparty Agreement 2011, clause 7.14 (*General lien*); and
 - (x) in the case of an Equivalent Agreement, a clause that is identically the same in form and language as a clause referred to in any of the foregoing paragraphs (i) to (ix) of this definition (except insofar as variations may be required for internal cross-referencing purposes); and
- (f) the "**Client Money Additional Security Clause**", being:
- (i) in the case of Agreements in the form of the Professional Client Agreement 2007, clause 7.8 (*Additional security*) at module F Option 4 (where incorporated into such Agreement);
 - (ii) in the case of Agreements in the form of the Professional Client Agreement 2009, clause 7.9 (*Additional security*) at module F Option 1 (where incorporated into such Agreement);
 - (iii) in the case of Agreements in the form of the Professional Client Agreement 2011, clause 7.9 (*Additional security*) at module F Option 1 (where incorporated into such Agreement);
 - (iv) in the case of Agreements in the form of the Retail Client Agreement 2007, clause 7.8 (*Additional security*) at module F Option 4 (where incorporated into such Agreement);
 - (v) in the case of Agreements in the form of the Retail Client Agreement 2009, clause 7.9 (*Additional security*) at module F Option 1 (where incorporated into such Agreement);
 - (vi) in the case of Agreements in the form of the Retail Client Agreement 2011, clause 7.9 (*Additional security*) at module F Option 1 (where incorporated into such Agreement);

- (vii) in the case of Agreements in the form of the Eligible Counterparty Agreement 2007, clause 6.8 (*Additional security*) at module F Option 4 (where incorporated into such Agreement);
 - (viii) in the case of Agreements in the form of the Eligible Counterparty Agreement 2009, clause 6.9 (*Additional security*) at module F Option 1 (where incorporated into such Agreement);
 - (ix) in the case of Agreements in the form of the Eligible Counterparty Agreement 2011, clause 6.9 (*Additional security*) at module F Option 1 (where incorporated into such Agreement); and
 - (x) in the case of an Equivalent Agreement, a clause that is identically the same in form and language as a clause referred to in any of the foregoing paragraphs (i) to (ix) of this definition (except insofar as variations may be required for internal cross-referencing purposes).
8. **"Two Way Clauses"** means each of the Futures and Options Association's Short-Form Two-Way Clauses 2007, the Short-Form Two-Way Clauses 2009, the Short-Form Two-Way Clauses 2011, the Long-Form Two-Way Clauses 2007, the Long-Form Two-Way Clauses 2009 and the Long-Form Two-Way Clauses 2011.

ANNEX 3
NON-MATERIAL AMENDMENTS

1. Any change to the numbering or order of a provision or provisions or the drafting style thereof (e.g., addressing the other party as “you”, “Counterparty”, “Party A/Party B”) provided in each case that the plain English sense and legal effect both of each such provision and of the Agreement as a whole (including the integrity of any cross references and usage of defined terms) remains unchanged.
2. Any change to a provision or provisions by defining certain key terms (e.g., party, exchange, currency, defaulting party or non-defaulting party) and using these terms in large caps throughout the Agreement provided in each case that the plain English sense and legal effect both of each such provision and of the Agreement as a whole (including the integrity of any cross references and usage of defined terms) remains unchanged.
3. An addition to the list of events that constitute an Event of Default (e.g. without limitation, the failure to deliver securities or other assets, a force majeure, cross default or downgrading event the death or incapacity of a Party or its general partner any default under a specified transaction or a specified master agreement), such change may or may not be coupled with a grace period or the serving of a written notice on the Defaulting Party by the Non-Defaulting Party, such change may be expressed to apply to one only of the Parties.
4. Any change to an Insolvency Event of Default (i) introducing a grace period for the filing of a petition for bankruptcy proceedings (of e.g. 15 or 30 days), (ii) modifying or deleting any such grace period, (iii) requiring that the filing of the petition is not frivolous, vexatious or otherwise unwarranted or (iv) that the non-defaulting party has reasonable grounds to conclude that the performance by the defaulting party of its obligations under the Agreement, Transactions, or both, is endangered.
5. Any change to an Insolvency Event of Default more particularly describing (i) the relevant procedures that would or would not constitute such event of default or termination event (ii) the relevant officers the appointment of which would or would not constitute such Insolvency Event of Default.
6. Any change to an Insolvency Event of Default extending its scope to events occurring with respect to the credit support provider, an affiliate, a custodian or trustee of a Party.
7. Any change to an Insolvency Event of Default replacing such event of default with a provision aligned to Section 5(a)(vii) of the 1992 or 2002 ISDA Master Agreement (or relevant part thereof).
8. Any change to the Agreement requiring the Non-defaulting Party when exercising its rights under the Security Interest Provisions (or other provisions) or making determinations to act in good faith and/or a commercially reasonable manner.

9. Any change clarifying that the Non-defaulting Party must, or may not, notify the other party of its exercise of rights under the Security Interest Provisions or other provision.