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17 December 2013

Dear Sirs,

FOA netting opinion issued in relation to the FOA Netting Agreements, FOA Clearing Module and ISDA/FOA Clearing Addendum

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 enforceability and validity of the FOA Netting Provision, the Clearing Module Netting Provision and the Addendum Netting Provision contained in a FOA Netting Agreement or a Clearing Agreement.

We understand that your fundamental requirement is for the enforceability of the FOA Netting Provision, the Clearing Module Netting Provision and the Addendum Netting Provision to be substantiated by a written and reasoned opinion. Our opinions on the enforceability of the FOA Netting Provision, the Clearing Module Netting Provision and the Addendum Netting Provision are given in paragraph 3 of this opinion letter.

Further, this opinion letter covers the enforceability of the FOA Set-Off Provisions, the Clearing Module Set-Off Provision, the Addendum Set-Off Provision and the Title Transfer Provisions.

1. TERMS OF REFERENCE AND DEFINITIONS

1.1 Subject as provided at paragraph 1.2, this opinion is given:

- 1.1.1 generally, in respect of Parties which are companies incorporated under the Corporations Act 2001 (Cth) ("Corporations Act");
- 1.1.2 in respect of body corporates in relation to which an authority under subsection 9(3) of the Banking Act 1959 (Cth) (the "Banking Act") is in force (such term including a building society) (an "Authorised Deposit Taking Institution" or "ADI"); and
- 1.1.3 generally, in respect of Parties incorporated or formed under the laws of another jurisdiction which are companies, banks or insurance companies and which have a branch or branches located in this jurisdiction.

1.2 This opinion is also given in respect of Parties 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 Individuals (Schedule 1);
- 1.2.2 Insurers (Schedule 2);
- 1.2.3 Partnerships (Schedule 3);
- 1.2.4 Trustees of Trusts (other than Charitable Trusts and Superannuation Funds) (Schedule 4);
- 1.2.5 Trustees of Charitable Trusts (Schedule 5);
- 1.2.6 Charitable Associations (Schedule 6);
- 1.2.7 Reserve Bank of Australia (Schedule 7);
- 1.2.8 Responsible Entities (Managed Investment Schemes) (Schedule 8); and
- 1.2.9 Superannuation Funds (Schedule 9).

1.3 This opinion is given in respect of the FOA Netting Agreement and the Clearing Agreement when the FOA Netting Agreement and the Clearing Agreement are expressed to be governed by English law.

1.4 This opinion is given in respect of only such of those Transactions which:

- 1.4.1 fall within any of paragraphs (A)(i) to (iv), (B), (C), (D) and (E) of the list of Transactions or Client Transactions provided in Annex 2 to this opinion letter; or
- 1.4.2 otherwise, are futures, options, contracts for differences, swaps, spot or forward contracts of any kind in relation to any commodity, metal, financial instrument, currency, interest rate, index or any combination thereof,

in each case, whether entered into on a recognised investment exchange, any other form of organised market place or multilateral trading facility, or over the counter, and which are capable, under their governing laws, of being terminated and liquidated in accordance with the FOA Netting Provision, the Clearing Module Netting Provision or, as the case may be, the Addendum Netting Provision.

1.5 In this opinion, 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.

1.6 This opinion letter relates solely to matters of law in this jurisdiction and does not consider the impact of any laws (including insolvency laws) other than the law of this jurisdiction, even where, under the Relevant Laws, any foreign law fails to be applied. This opinion letter and the opinions given in it are governed by the Relevant Laws and relate only to the Relevant Law 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 Law. We express no opinion in this opinion letter on the laws of any other jurisdiction.

- 1.7 We express no opinion as to any provisions of the FOA Netting Agreement and the Clearing Agreement other than those to which express reference is made in this opinion letter except insofar as any such provision relates to the effectiveness of the FOA Netting Provision, the Clearing Module Netting Provision or, as the case may be, the Addendum Netting Provision.
- 1.8 We do not express any opinion as to any matters of fact.
- 1.9 We do not opine on the enforceability of any net obligation resulting from any netting or set-off.

1.10 Definitions

Terms used in this opinion letter and not otherwise defined herein shall have the meanings ascribed to them in the FOA Netting Agreement or the Clearing Agreement, unless the context specifies otherwise. Where, in an FOA Netting Agreement or, as the case may be, a Clearing Agreement, a defined term has been changed but the changed term corresponds to a term defined in a FOA Published Form Agreement or, as the case may, the FOA Clearing Module and/or the ISDA/FOA Clearing Addendum, or this opinion letter, this opinion letter may be read as if terms used herein were the terms as so changed.

1.10.1 A contract or arrangement is entered into in circumstances that are within "**Commonwealth Constitutional Reach**" if:

- (a) a constitutional corporation is a party to the contract or arrangement; or
- (b) the contract or agreement has a significant effect on the business affairs, or an activity, of a constitutional corporation; or
- (c) the contract or arrangement is entered into in the course of, for the purposes of or in relation to one or more of the following:
 - (i) dealings in currency, bills of exchange or promissory notes;
 - (ii) money borrowed on the public credit of the Commonwealth;
 - (iii) trade and commerce between Australia and places outside Australia or between places outside Australia;
 - (iv) trade or commerce among the States;
 - (v) trade or commerce within a Territory, between a State and a Territory or between 2 Territories;
 - (vi) banking (other than State banking);
 - (vii) insurance (other than State insurance); or

- (d) the contract or arrangement is entered into by means of or in relation to, postal, telegraphic, telephonic or other like services.

1.10.2 "**External Administration**": is defined in the Netting Act as follows:

a person goes into external administration if:

- (a) they become a body corporate that is an externally administered body corporate within the meaning of the Corporations Act; or
- (b) they become an individual who is an insolvent under administration; or
- (c) someone takes control of the person's property for the benefit of the person's creditors because the person is, or is likely to become, insolvent;

1.10.3 As defined in the Netting Act, an "**External Administrator**" for a person who goes into External Administration is the person who takes control of the person's property under the administration;

1.10.4 "**FOA Member**" means a member (excluding associate members) of the Futures and Options Association which subscribes to the Futures and Options Association's Netting Analyser service (and whose terms of subscription give access to this opinion);

1.10.5 "**Insolvency Proceedings**" means the procedures listed in paragraph 3.1;

1.10.6 "**Insolvency Representative**" means a liquidator, administrator, receiver or analogous or equivalent official in this jurisdiction;

1.10.7 "**Netting Act**" means the Payment Systems and Netting Act 1998 (Cth);

1.10.8 A reference to a "**paragraph**" is to a paragraph of this opinion letter;

1.10.9 "**PPSA**" means the Personal Property Securities Act 2009 (Cth);

1.10.10 "**Relevant Courts**" means the Supreme Courts of the States and the Territories and the federal courts of the Commonwealth of Australia;

1.10.11 "**Relevant Laws**" means the laws of the States and the Territories and the federal laws of the Commonwealth of Australia;

1.10.12 "**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; and

1.10.13 "**Territories**" means the Australian Capital Territory and the Northern Territory.

Annex 3 contains further definitions of terms relating to the FOA Netting Agreement and the Clearing Agreement.

2. ASSUMPTIONS

We assume:

- 2.1 That no provision of the FOA Netting Agreement or Clearing Agreement that is necessary for the giving of our opinions and advice in this opinion letter has been altered in any material respect, including by reason of a Mandatory CCP Provision. In our view, an alteration contemplated in Part 2 (*Non-material Amendments*) of Annex 4 hereto would not constitute a material alteration for this purpose. We express no view whether an alteration not contemplated in Part 2 (*Non-material Amendments*) of Annex 4 hereto would or would not constitute a material alteration.
- 2.2 That the FOA Netting Agreement or, as the case may be, the Clearing Agreement, and the Transactions are legally binding and enforceable against both Parties under their governing laws.
- 2.3 That each Party has the capacity, power and authority under all applicable law(s) to enter into the FOA Netting Agreement or, as the case may be, the Clearing Agreement, and the Transactions; to perform its obligations under the FOA Netting Agreement or, as the case may be, the Clearing Agreement, and the Transactions; and that each Party has taken all necessary steps to execute, deliver and perform the FOA Netting Agreement or, as the case may be, the Clearing Agreement.
- 2.4 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 FOA Netting Agreement or, as the case may be, the Clearing Agreement, and the Transactions and to ensure the legality, validity, enforceability or admissibility in evidence of the FOA Netting Agreement or, as the case may be, the Clearing Agreement in this jurisdiction.
- 2.5 That the FOA Netting Agreement or, as the case may be, the Clearing Agreement is entered into prior to the commencement of any Insolvency Proceedings against either Party. In particular, in respect of the availability of netting pursuant to the Netting Act and Statutory Insolvency Set-Off (as defined below) pursuant to the Corporations Act, each party has provided valuable consideration under, or has changed their position in reliance on, the transaction and no Party has notice that any other Party to the FOA Netting Agreement or, as the case may be, the Clearing Agreement is, at the time of entry into the FOA Netting Agreement or the Clearing Agreement, unable to pay their debts as and when they become due and payable.
- 2.6 That any Party to the FOA Netting Agreement or, as the case may be, the Clearing 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.
- 2.7 That no provision of the FOA Netting Agreement or, as the case may be, the Clearing Agreement, or a document of which the FOA Netting Agreement or, as the case may be, the Clearing Agreement forms part, or any other arrangement between the Parties, or any Mandatory CCP Provision, constitutes an Adverse Amendment.

- 2.8 The FOA Netting Agreement or, as the case may be, the Clearing 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 FOA Netting Agreement or, as the case may be, the Clearing Agreement accurately reflects the true intentions of each Party.
- 2.10 In relation to the opinions set out at paragraphs 3.8 and 3.9 only, that each form of Insolvency Proceeding respectively constitutes a Firm Trigger Event or a CM Trigger Event under the relevant Rule Set.
- 2.11 That, in relation to a Clearing Agreement, a Party incorporated in this jurisdiction which acts as "Firm" (as defined in the FOA Clearing Module) or "Clearing Member" (as defined in the ISDA/FOA Clearing Addendum) will be (a) a clearing member in respect of any Agreed CCP Service to which the Clearing Agreement relates and (b) will be a company incorporated under the Corporations Act 2001 or an ADI.
- 2.12 That each Party, when transferring margin pursuant to the Title Transfer Provisions, has full legal title to such margin 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).
- 2.13 That all margin transferred pursuant to the Title Transfer Provision is freely transferable and all acts or things required by the laws of this or any other jurisdiction to be done to ensure the validity of each transfer of margin pursuant to the Title Transfer Provisions will have been effectively carried out, by virtue of which the receiving Party will be entitled to deal with the margin transferred as absolute owner with no obligation to return the same margin to any Party at a later date.
- 2.14 That any cash provided as margin is in a currency that is freely transferable internationally under the laws of all relevant jurisdictions.
- 2.15 That no Party has any obligation to account for any profits resulting from any transfer or use of any margin transferred pursuant to the Title Transfer Provisions.
- 2.16 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 FOA Netting Agreement or, as the case may be, the Clearing Agreement or the Transactions.
- 2.17 That the choice of England and Wales law to govern the FOA Netting Agreement or, as the case may be, the Clearing Agreement is a valid choice of law under England and Wales law.
- 2.18 That words and phrases used in the FOA Netting Agreement or, as the case may be, the Clearing Agreement have the same meaning and effect as they would if the FOA Netting Agreement or, as the case may be, the Clearing Agreement were governed by

the laws of this jurisdiction in respect of matters to be determined pursuant to any legislation in this jurisdiction.

2.19 That no Party to the FOA Netting Agreement or, as the case may be, the Clearing Agreement has contravened or will contravene the prohibitions on related party transactions in Chapter 2E of the Corporations Act or its equivalent under the laws of that Party's place of incorporation, residence or constitution by entering into the FOA Netting Agreement or, as the case may be, the Clearing Agreement or a transaction in connection with the FOA Netting Agreement or, as the case may be, the Clearing Agreement. Any contravention of Chapter 2E 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.

2.20 That the purpose of the transactions contemplated by the FOA Netting Agreement or, as the case may be, the Clearing 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.

2.21 That no Party enters into any FOA Netting Agreement or, as the case may be, any Clearing Agreement in the capacity of a trustee of any trust, apart from a trustee as referred to in Schedule 4 (*Trustees of Trusts (other than Charitable Trusts and Superannuation Funds)*), Schedule 5 (*Trustees of Charitable Trusts*) and Schedule 9 (*Trustees of Superannuation Funds*).

3. **OPINION**

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 **Insolvency Proceedings**

The only bankruptcy, composition, rehabilitation (e.g. liquidation, administration, receivership or voluntary arrangement) or other insolvency laws and procedures to which a Party would be subject in this jurisdiction are the following:

- (a) winding up;
- (b) compromise or arrangement with creditors;
- (c) administration;
- (d) receivership;

(as each is defined in the Corporations Act)

- (e) the appointment of an ADI Statutory Manager (as such term is defined in the Banking Act) of an ADI,

each such proceeding being an Australian law governed ‘External Administration’ under the Netting Act (provided that, in respect of (e), the ADI is insolvent, or is likely to become insolvent, and the ADI Statutory Manager has taken control of its property for the benefit of its creditors).

We confirm that the events specified in the Insolvency Events of Default Clause adequately refer to all Insolvency Proceedings without the need for any additions.

3.2 **Recognition of choice of law**

3.2.1 The choice of English law to govern the FOA Netting Agreement or, as the case may be, the Clearing Agreement will be recognised in this jurisdiction even if neither Party is incorporated or established in England.

However, 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 Relevant Courts 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 FOA Netting Agreement or, as the case may be, the Clearing Agreement insofar as they relate to non-contractual obligations arising from or connected with the FOA Netting Agreement or, as the case may be, the Clearing Agreement.

3.2.2 An Insolvency Representative or court in this jurisdiction would have regard to English law, as the governing law of the FOA Netting Agreement or, as the case may be, the Clearing Agreement, in determining the enforceability or effectiveness of the (i) FOA Netting Provision and the FOA Set-Off Provision or, as the case may be, of the Clearing Module Netting Provision and/or the Addendum Netting Provision, and the Clearing Module Set-Off Provision and/or the Addendum Set-Off Provision, and (ii) the Title Transfer Provisions, but may in certain circumstances (as particularised in paragraph 4 below) have regard to other legal systems (for example see paragraph 3.3 below in relation to the effect of the Netting Act and paragraph 3.6 below in relation to circumstances where mandatory set-off will apply under the Corporations Act).

3.3 **Enforceability of FOA Netting Provision**

In relation to an FOA Netting Agreement, or in relation to a Clearing Agreement where the Defaulting Party acts as Client, the FOA Netting Provision will be immediately (and without fulfilment of any further conditions) enforceable in accordance with its terms so that following an Event of Default:

3.3.1 prior to the commencement of any External Administration governed by the Relevant Laws, the Relevant Courts would recognise the choice of the laws of England and Wales to govern the FOA Netting Agreement or, as the case may be, the Clearing Agreement.

3.3.2 in any External Administration governed by the Relevant Laws:

- (a) the Non-Defaulting Party would be entitled immediately to exercise its rights under the FOA Netting Provision; and
- (b) the Non-Defaulting Party would be entitled to receive or obliged to pay only the net sum of the positive and negative mark-to-market values of individual Transactions.

We are of this opinion because, where an Event of Default occurs with respect to the Party which is subject to an External Administration under the Relevant Law, the FOA Netting Provision is enforceable under the Netting Act which expressly provides that:

- (i) obligations may be terminated, termination values may be calculated and a net amount become payable in accordance with the close-out netting contract;
- (ii) obligations that are, or have been, terminated under the close-out netting contract are to be disregarded in the External Administration;
- (iii) any net obligation owed by a Party under the close-out netting contract that has not been discharged is provable in the External Administration;
- (iv) any net obligation owed to the Party under the close-out netting contract that has not been discharged may be recovered by the External Administrator for the benefit of creditors;
- (v) the termination of obligations, the netting of obligations and any payment made by the Party under the agreement to discharge a net obligation are not void or voidable in the External Administration,

with the effect under the Netting Act that the amount due in respect of the obligations of the Party would be a net sum, irrespective of the governing law(s) of the FOA Netting Agreement or, as the case may be, the Clearing Agreement to which those obligations relate.

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 Non-Defaulting Party.

No amendments to the FOA Netting Provision are necessary in order for the opinions expressed in this paragraph 3.3.2 to apply.

3.4 **Enforceability of the Clearing Module Netting Provision**

In relation to a Clearing Agreement which includes the Clearing Module Netting Provision, the Clearing Module Netting Provision will be immediately (and without fulfilment of any further conditions) enforceable in accordance with its terms so that following (i) a Firm Trigger Event or (ii) a CCP Default, the Parties would receive or be obliged to pay only the net sum of the positive and negative mark-to-market values

of the relevant individual Client Transactions that are terminated in accordance with the Clearing Agreement.

We are of this opinion because:

- 3.4.1 prior to the commencement of any External Administration governed by the Relevant Laws, the Relevant Courts would recognise the choice of the laws of England and Wales to govern the Clearing Agreement.
- 3.4.2 in any External Administration governed by the Relevant Laws:
 - (a) the parties would be entitled immediately to exercise its rights under the Clearing Module Netting Provision; and
 - (b) the parties would be entitled to receive or obliged to pay only the net sum of the positive and negative mark-to-market values of individual Transactions.

We are of this opinion because, where a Firm Trigger Event or a CCP Default occurs with respect to the Party which is subject to an External Administration under the Relevant Law, the Clearing Module Netting Provision is enforceable under the Netting Act which expressly provides that:

- (i) obligations may be terminated, termination values may be calculated and a net amount become payable in accordance with the close-out netting contract;
- (ii) obligations that are, or have been, terminated under the close-out netting contract are to be disregarded in the External Administration;
- (iii) any net obligation owed by a Party under the close-out netting contract that has not been discharged is provable in the External Administration;
- (iv) any net obligation owed to the Party under the close-out netting contract that has not been discharged may be recovered by the External Administrator for the benefit of creditors;
- (v) the termination of obligations, the netting of obligations and any payment made by the Party under the agreement to discharge a net obligation are not void or voidable in the External Administration,

with the effect under the Netting Act that the amount due in respect of the obligations of the Party would be a net sum, irrespective of the governing law(s) of the Clearing Agreement to which those obligations relate.

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 under the Clearing Module Netting Provisions.

No amendments to the Clearing Module Netting Provisions are necessary in order for the opinions expressed in this paragraph 3.4.2 to apply.

3.5 Enforceability of the Addendum Netting Provision

In relation to a Clearing Agreement which includes the Addendum Netting Provision, the Addendum Netting Provision will be immediately (and without fulfilment of any further conditions) enforceable in accordance with its terms so that following (i) a CM Trigger Event or (ii) a CCP Default, the Parties would receive or be obliged to pay only the net sum of the positive and negative mark-to-market values of the relevant individual Client Transactions that are terminated in accordance with the Clearing Agreement.

We are of this opinion because:

- 3.5.1 prior to the commencement of any External Administration governed by the Relevant Laws, the Relevant Courts would recognise the choice of the laws of England and Wales to govern the Clearing Agreement.
- 3.5.2 in any External Administration governed by the Relevant Laws:
 - (a) the parties would be entitled immediately to exercise its rights under the Addendum Netting Provision; and
 - (b) the parties would be entitled to receive or obliged to pay only the net sum of the positive and negative mark-to-market values of individual Transactions.

We are of this opinion because, where a CM Trigger Event or a CCP Default occurs with respect to the Party which is subject to an External Administration under the Relevant Law, the Addendum Netting Provision is enforceable under the Netting Act which expressly provides that:

- (i) obligations may be terminated, termination values may be calculated and a net amount become payable in accordance with the close-out netting contract;
- (ii) obligations that are, or have been, terminated under the close-out netting contract are to be disregarded in the External Administration;
- (iii) any net obligation owed by a Party under the close-out netting contract that has not been discharged is provable in the External Administration;
- (iv) any net obligation owed to the Party under the close-out netting contract that has not been discharged may be recovered by the External Administrator for the benefit of creditors;
- (v) the termination of obligations, the netting of obligations and any payment made by the Party under the agreement to discharge a net obligation are not void or voidable in the External Administration,

with the effect under the Netting Act that the amount due in respect of the obligations of the Party would be a net sum, irrespective of the governing law(s) of the Clearing Agreement to which those obligations relate.

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 rights under the Addendum Netting Provisions.

No amendments to the Addendum Netting Provisions are necessary in order for the opinions expressed in this paragraph 3.5.2 to apply.

3.6 Use of FOA Clearing Module or ISDA/FOA Clearing Addendum not detrimental to FOA Netting Provision

In relation to a Clearing Agreement, the opinions expressed at paragraph 3.3 (*Enforceability of FOA Netting Provision*) above in relation to the FOA Netting Provision are not affected by the use of the FOA Clearing Module or the ISDA/FOA Clearing Addendum in conjunction with the FOA Netting Agreement. In a case where a Party, who would (but for the use of the FOA Clearing Agreement or the ISDA/FOA Clearing Agreement) be the Defaulting Party for the purposes of the FOA Netting Agreement, acts as Firm (as defined in the FOA Clearing Module) or Clearing Member (as defined in the ISDA/FOA Clearing Addendum), the question as to whether the FOA Netting Provision will, to the extent inconsistent with the Clearing Module Netting Provision or, as the case may be, the Addendum Netting Provision, be superseded by the Clearing Module Netting Provision or, as the case may be, the Addendum Netting Provision would be determined under the governing law of the Clearing Agreement.

3.7 Enforceability of the FOA Set-Off Provisions

3.7.1 In relation to an FOA Netting Agreement which includes the FOA Set-Off Provisions, the FOA Set-Off Provisions will be immediately (and without fulfilment of any further conditions) enforceable in accordance with their terms, so that following an Event of Default, the Non-Defaulting Party would be immediately entitled to exercise its rights under either or both of the FOA Set-Off Provisions, and in particular so that, upon the exercise of such rights:

- (a) where the FOA Set-Off Provisions include the General Set-Off Clause:
 - (i) the value of any cash balance owed by the Non-Defaulting Party to the Defaulting Party would be set off against the Liquidation Amount (where such liquidation amount is owed by the Defaulting Party); or
 - (ii) the value of any cash balance owed by the Defaulting Party to the Non-Defaulting Party would be set off against the Liquidation Amount (where such liquidation amount is owed by the Non-Defaulting Party); or
- (b) where the FOA Set-Off Provisions comprise the Margin Cash Set-Off Clause only, the value of any cash margin owed by the Firm to the Client would be set-off against the Liquidation Amount (where such Liquidation Amount is owed by the Client).

We are of this opinion because, in respect of any Event of Default where neither party is subject to an External Administration which is a winding up, our opinion on the recognition of choice of law at paragraph 3.2 (*Recognition of choice of law*) above, and in respect of any Event of Default where the Defaulting Party is subject to an External Administration which is a winding up, Section 553C of the Corporations Act ("Statutory Insolvency Set-Off") operates such that where there have been mutual credits, mutual debts or other mutual dealings between an insolvent company that is being wound up and a person who wants to have a debt or claim admitted against the company, an account is to be taken of what is due from the one party to the other in respect of those mutual dealings, the sum due from the one party is to be set off against any sum due from the other party and only the balance of the account is admissible to proof against the company, or is payable to the company, as the case may be. Under the laws of this jurisdiction it is not possible to contract out of Statutory Insolvency Set-Off, so that the FOA Set-Off Provisions may be overridden to the extent of inconsistency with Statutory Insolvency Set-Off.

No amendments to the General Set-Off Clause and the Margin Cash Set-Off Clause are necessary in order for the opinions expressed in this paragraph 3.7.1 to apply.

3.7.2 In relation to a Clearing Agreement which includes the FOA Set-Off Provisions and the Clearing Module Set-Off Provision and/or the Addendum Set-Off Provision, the FOA Set-Off Provisions will be immediately (and without fulfilment of any further conditions) enforceable in accordance with their terms, so that following an Event of Default in respect of the Client, the Firm or, as the case may be, the Clearing Member would be immediately entitled to exercise its rights under either or both of the FOA Set-Off Provisions, and in particular so that, upon the exercise of such rights:

- (i) where the FOA Set-Off Provisions includes the General Set-Off Clause:
 - (a) the value of any cash balance owed by the Firm or, as the case may be, the Clearing Member to the Client would be set off against the Liquidation Amount (where such liquidation amount is owed by the Client); or
 - (b) the value of any cash balance owed by the Client to the Firm or, as the case may be, the Clearing Member would be set off against the Liquidation Amount (where such liquidation amount is owed by the Firm or, as the case may be, the Clearing Member); or
- (ii) where the FOA Set-Off Provisions comprise the Margin Cash Set-Off Clause only, the value of any cash margin owed by the Firm or, as the case may be, the Clearing Member to the Client would be set-off against the Liquidation Amount (where such Liquidation Amount is owed by the Client).

We are of this opinion because, in respect of any Event of Default where neither party is subject to an External Administration which is a winding up, our opinion on the recognition of choice of law at paragraph 3.2 (*Recognition of choice of law*) above, and in respect of any Event of Default where the Defaulting Party is subject to an External Administration which is a winding up, Section 553C of the Corporations Act operates such that where there have been mutual credits, mutual debts or other mutual dealings between an insolvent company that is being wound up and a person who wants to have a debt or claim admitted against the company, an account is to be taken of what is due from the one party to the other in respect of those mutual dealings, the sum due from the one party is to be set off against any sum due from the other party and only the balance of the account is admissible to proof against the company, or is payable to the company, as the case may be. Under the laws of this jurisdiction it is not possible to contract out of Statutory Insolvency Set-Off, so that the FOA Set-Off Provisions may be overridden to the extent of inconsistency with Statutory Insolvency Set-Off.

3.8 Set-Off under a Clearing Agreement with a Clearing Module Set-Off Provision

3.8.1 In relation to a Clearing Agreement which includes the Clearing Module Set-Off Provision (whether or not the FOA Set-Off Provisions is a Disapplied Set-Off Provisions, insofar as constituting part of the Clearing Agreement), the Clearing Module Set-Off Provision will be immediately (and without fulfilment of any further conditions) enforceable in accordance with its terms, the Firm would be immediately entitled to exercise its rights under the Clearing Module Set-Off Provision, and in particular, upon the exercise of such rights:

- (a) if the Client is a Defaulting Party, so that the value of any cash balance owed by the Firm to the Client would be set-off against any Liquidation Amount owed by the Client to the Firm; and
- (b) if there has been a Firm Trigger Event or a CCP Default, so that the value of any cash balance owed by one Party to the other would, insofar as not already brought into account as part of the Relevant Collateral Value, be set off against any Available Termination Amount owed by the Party entitled to receive the cash balance.

We are of this opinion because, in respect of any Event of Default where neither party is subject to an External Administration which is a winding up, our opinion on the recognition of choice of law at paragraph 3.2 (*Recognition of choice of law*) above, and in respect of any Event of Default where the Defaulting Party is subject to an External Administration which is a winding up, Section 553C of the Corporations Act operates such that where there have been mutual credits, mutual debts or other mutual dealings between an insolvent company that is being wound up and a person who wants to have a debt or claim admitted against the company, an account is to be taken of what is due from the one party to the other in respect of those mutual dealings, the sum due from the one party is to be set off against any sum due from the other party and only the balance of the account is admissible to proof against the company, or is payable to the company, as the case may be. Under the laws of

this jurisdiction it is not possible to contract out of Statutory Insolvency Set-Off, so that the Clearing Module Set-Off Provision may be overridden to the extent of inconsistency with Statutory Insolvency Set-Off.

No amendments to the Clearing Module Set-Off Provision are necessary in order for the opinions expressed in this paragraph 3.8.1 to apply.

3.8.2 In relation to a Clearing Agreement which includes the Clearing Module Set-Off Provision for which the FOA Set-Off Provisions (insofar as constituting part of the FOA Netting Agreement) is not a Disapplied Set-Off Provision, the Clearing Module Set-Off Provision will be immediately (and without fulfilment of any further conditions) enforceable in accordance with its terms, as set out in paragraph 3.8.1 above; and the FOA Set-Off Provisions will, to the extent that set-off is not already covered by the Clearing Module Set-Off Provision, be immediately (and without fulfilment of any further conditions) enforceable in accordance with its terms, as set out in paragraph 3.8.1 above.

3.9 Set-Off under a Clearing Agreement with an Addendum Set-Off Provision

In relation to a Clearing Agreement which includes the Addendum Set-Off Provision, the Addendum Set-Off Provision will be immediately (and without fulfilment of any further conditions) enforceable in accordance with its terms so that following (i) a CM Trigger Event (as defined in the ISDA/FOA Clearing Addendum) or (iii) a CCP Default (as defined in the ISDA/FOA Clearing Addendum):

- (a) in the case of a CM Trigger Event, the Client (as defined in the ISDA/FOA Clearing Addendum); or
- (b) in the case of a CCP Default, either Party (the "**Electing Party**"),

would be immediately entitled to exercise its rights under the Addendum Set-Off Provision, and in particular so that, upon the exercise of such rights, in the case of a CM Trigger Event, any Available Termination Amount would be reduced by its set-off against any cash balance which constitutes a termination amount payable by (or to) the Party which is owed (or owes) the Available Termination Amount, insofar as not already brought into account as part of the Relevant Collateral Value.

We are of this opinion because, in respect of any Event of Default where neither party is subject to an External Administration which is a winding up, our opinion on the recognition of choice of law at paragraph 3.2 (*Recognition of choice of law*) above, and in respect of any Event of Default where the Defaulting Party is subject to an External Administration which is a winding up, Section 553C of the Corporations Act operates to make set-off between the Parties automatic and mandatory on the commencement of the External Administration if claim are provable in the winding up of a Party, there is mutuality between the Parties and the claims are enforceable. Under the laws of this jurisdiction it is not possible to contract out of Statutory Insolvency Set-Off, so that the Addendum Set-Off Provision may be overridden to the extent of inconsistency with Statutory Insolvency Set-Off.

No amendments to the Addendum Set-Off Provision are necessary in order for the opinions expressed in this paragraph 3.9 to apply.

3.10 Enforceability of the Title Transfer Provisions

- 3.10.1 In relation to an FOA Netting Agreement (with Title Transfer Provisions) and in relation to a Clearing Agreement which includes the Title Transfer Provisions where the Client is a Defaulting Party, following the specification or deemed occurrence of a Liquidation Date, the Non-Defaulting Party would be immediately (and without fulfilment of any further condition) entitled to exercise its rights under the Title Transfer Provisions, so that the Default Margin Amount (as calculated pursuant to the terms of the Title Transfer Provisions) shall be taken into account for the purposes of calculating the Liquidation Amount pursuant to the FOA Netting Provision.
- 3.10.2 In relation to a Clearing Agreement which includes the Title Transfer Provisions, and in the case of a Firm Trigger Event, a CM Trigger Event, or a CCP Default, the value of the transferred margin would be taken into account as part of the Relevant Collateral Value.
- 3.10.3 The Relevant Courts would not recharacterise transfers of margin under the Title Transfer Provisions of an FOA Netting Agreement (with Title Transfer Provisions) or, as the case may be, a Clearing Agreement which includes the Title Transfer Provisions as creating a security interest¹.
- 3.10.4 A Party shall be entitled to use or invest for its own benefit, as outright owner and without restriction, any margin transferred to it pursuant to the Title Transfer Provisions of an FOA Netting Agreement (with Title Transfer Provisions) or, as the case may be, a Clearing Agreement which includes the Title Transfer Provisions.

We are of this opinion because, in respect of any Event of Default where neither party is subject to an External Administration, of our opinion on the recognition of choice of law at paragraph 3.2 (*Recognition of choice of law*) above, and in respect of any

¹ In any event, the PPSA excludes any right or interest held by a person, or any interest provided for by any transaction, under a close-out netting contract from the definition of a 'security interest' which is the subject of the PPSA.

Event of Default where the Defaulting Party is subject to an External Administration, of our opinion on the FOA Netting Provisions at paragraph 3.3 (*Enforceability of FOA Netting Provision*) above.

No amendments to the Title Transfer Provisions are necessary in order for the opinions expressed in this paragraph 3.10 to apply.

3.11 Use of security interest margin not detrimental to Title Transfer Provisions

In relation to an FOA Netting Agreement (with Title Transfer Provisions) and in relation to a Clearing Agreement which includes the Title Transfer Provisions, the opinions expressed above in paragraph 3.10 (*Enforceability of the Title Transfer Provisions*) in relation to the Title Transfer Provisions are not affected by the use also in the same agreement of the Non-Cash Security Interest Provisions (used with or without the Rehypothecation Clause) and/or the Client Money Additional Security Clause, provided always that:

- (i) a provision in the form of, or with equivalent effect to, Clauses 4.3 and/or 4.4 of the FOA Clearing Module is used or the agreement otherwise unambiguously specifies the circumstances in which the security interest provisions or the Title Transfer Provisions apply in respect of any given item of margin so that it is not possible for both the security interest provisions and the Title Transfer Provisions to apply simultaneously to the same item of margin; and
- (ii) the pool of margin subject to a security interest and the pool of margin subject to the Title Transfer Provisions are operationally segregated.

3.12 Single Agreement

Under the laws of this jurisdiction it is not necessary that the Transactions and the FOA Netting Agreement or, as the case may be, the Clearing Agreement are part of a single agreement in order for the termination and liquidation under the FOA Netting Provision, the Clearing Module Netting Provision or the Addendum Netting Provision to be enforceable. In our view, the FOA Netting Agreement or, as the case may be, the Clearing Agreement, and Transactions are part of a single agreement.

3.13 Automatic Termination

Under the Relevant Laws, it is not necessary for the Parties to agree to an automatic, rather than an optional, termination and liquidation under the FOA Netting Provision, the Clearing Module Netting Provision and/or the Addendum Netting Provision to ensure the effectiveness of netting under the FOA Netting Agreement or, as the case may be, the Clearing Agreement in the event of an External Administration.

3.14 Multibranch Parties

We do not consider that the use of the FOA Netting Agreement or, as the case may be, the Clearing Agreement by a party with branches in a number of different jurisdictions, including some where netting may not be enforceable would jeopardise the enforceability of the FOA Netting Provision, the Clearing Module Netting Provision, the Addendum Netting Provision, the FOA Set-Off Provision, the Clearing

Module Set-Off Provision, the Addendum Set-Off Provision or the Title Transfer Provisions in so far as the laws of this jurisdiction are concerned.

3.15 Insolvency of Foreign Parties

Where a Party is incorporated or formed under the laws of another jurisdiction and an Event of Default or a Firm Trigger Event or, as the case may be, a CM Trigger Event occurs in respect of such Party (a "**Foreign Defaulting Party**") the Foreign Defaulting Party can be subject to an External Administration in this jurisdiction.

3.16 Special legal provisions for market contracts

Subject to our qualifications in paragraphs 4.6 (*Porting*), 4.8 (*Banking Act and Restructure Act*) and 4.9 (*Amendments to the Banking Act*), there are no special provisions of law which would affect the opinions given in this paragraph 3 which would apply to a Transaction between two Parties as a result of the fact that such Transaction was entered into on, or is back to back with a Transaction entered into on, an exchange (in this or another jurisdiction), or is cleared at, or is a back-to-back with a transaction to be cleared at a central counterparty.

4. QUALIFICATIONS

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

4.1 Enforcement of judgments or proceedings

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

4.2 Cross-border Insolvency

- 4.2.1 The Relevant Courts may give assistance to courts in which concurrent insolvency proceedings have commenced under the laws of another jurisdiction. Such assistance may take the form of, for example, dealing with only those assets located in this jurisdiction or selectively applying provisions of foreign law in Insolvency Proceedings which are otherwise generally governed by the Relevant Laws. The Relevant Courts may accordingly apply foreign systems of law rather than the Relevant Laws where the insolvent Party is subject to insolvency proceedings in another jurisdiction.
- 4.2.2 A Relevant Court may stay Insolvency Proceedings where it is of the opinion that proceedings in another forum would be more convenient or if concurrent proceedings are being brought elsewhere, but will often take into account whether or not this will prejudice creditors whose claims have a close connection with this jurisdiction.
- 4.2.3 The Netting Act applies to (i) contracts governed by Australian law and entered into in circumstances that are within Commonwealth Constitutional Reach, and (ii) contracts governed by any other laws, if a party to the contract is subject to External Administration governed by Australian law. Accordingly, the Netting Act may not apply to an insolvency proceeding

commenced outside this jurisdiction such as where an Australian incorporated company is wound up under an ancillary liquidation pursuant to English law.

4.2.4 We express no view in this opinion as to steps which may be taken in any other jurisdiction if the Netting Provision is not effective under the laws of such other jurisdiction.

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.

4.3.2 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 FOA Netting Agreement or, as

the case may be, the Clearing 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 FOA Netting Agreement or, as the case may be, the Clearing Agreement.

4.4 Set-Off

- 4.4.1 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 FOA Netting Agreement or, as the case may be, the Clearing Agreement, was insolvent.
- 4.4.2 Statutory Insolvency Set-Off only applies whether the amounts being set-off are "mutual" between the parties. In this context, "mutual" means that the Parties are each personally and solely liable as regards obligations owing by it to the other Party and solely entitled to the benefit of obligations owed to it by the other Party. Circumstances in which the requisite mutuality will not be established include, without limitation, where a Party is acting as agent for another person, where a Party is acting as a trustee, where a Party has a joint interest (other than where a Party is a partnership organised under the laws of this jurisdiction and then only in relation to the position between the partnership and the other Party to the FOA Netting Agreement or, as the case may be, Clearing Agreement), or where a Party's rights or obligations or any interest therein have been assigned, charged or transferred (whether in whole or in part) whether unilaterally, by agreement or by operation of law or by order. Accordingly, where such mutuality does not exist in respect of any Transactions or Client Transactions (as the case may be), amounts in respect of such Transactions shall not be included in any Statutory Insolvency Set-Off.
- 4.4.3 Statutory Insolvency Set-Off similarly only applies when an insolvent company is being wound and a person 'wants to have a debt or claim admitted against the company being wound up'. Arguably therefore, where a person is enforcing a security interest they hold, or pursuing any other available avenue for the recovery of a debt, and that person does not want to have a debt or claim admitted against the company, or possibly the whole of the debt or claim, admitted against the company, Statutory Insolvency Set-Off may not apply to all outstanding amounts between the creditor and the debtor.

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 **Partial Netting**

The opinions given in paragraphs 3.4 (*Enforceability of the Clearing Module Netting Provision*) and 3.5 (*Enforceability of the Addendum Netting Provision*) in relation to the Clearing Module Netting Provision and the Addendum Netting Provision, rely on the Clearing Agreement being a close-out netting contract, as defined under the Netting Act. The Netting Act refers to netting occurring in respect of 'particular obligations', which may include Netting Sets, however we are not aware of any binding authority addressing provisions of the Netting Act in relation to partial netting. However, in the event of an External Administration of a Party under the laws of this jurisdiction, Statutory Insolvency Set-Off (as described in paragraph 3.7 (*Enforceability of the FOA Set-Off Provisions*) and subject to qualifications in paragraph 4.4 (*Set-Off*)) of amounts due between the Parties would apply. The effect of Statutory Insolvency Set-Off would be to aggregate and set off all Cleared Set Termination Amounts or Available Termination Amounts, as applicable, together with all other amounts due between the Parties so that only a single net sum is payable, notwithstanding that the Clearing Module Netting Provision or the Addendum Netting Provision, as applicable provides for each Cleared Set Termination Amount or Available Termination Amount to be payable separately in respect of each Agreed CCP Service. Under the laws of this jurisdiction it is not possible to contract out of Statutory Insolvency Set-Off, so that the Clearing Module Netting Provision and the Addendum Netting Provision may be overridden to the extent of inconsistency with Statutory Insolvency Set-Off.

4.7 **Porting**

The Netting Act was amended pursuant to the Corporations and Financial Sector Legislation Amendment Act 2013 to specifically provide for porting if the parties have entered into a 'market netting contract' that is either (i) governed by Australian law, or if (ii) the party to the market netting contract goes into an Australian law governed External Administration. A market netting contract is a contract which is entered into in accordance with the rules that govern the operation of a netting market (being an arrangement that is a licensed market or a licensed CS facility as defined in section 761A of the Corporations Act 2001 and approved by the Minister for the purposes of the definition, or, an arrangement declared by the regulations to be a netting market for the purposes of the Netting Act) and under which obligations between parties to the contract are netted, or, a contract declared by regulations to be a market netting contract for the purposes of the Netting Act. All other contracts to which the Netting Act applies are either close-out netting contracts or approved

netting arrangements, to which the legislative changes supporting porting have not been applied.

At present the only entities that are so licensed are ASX Clear Pty Limited, ASX Settlement Pty Limited, ASX Clear (Futures) Pty Limited, Austraclear Limited, IMB Ltd and LCH.Clearnet Ltd. Accordingly, if an FOA Netting Agreement, or as the case may be, a Clearing Agreement, is entered into with a party that is not licensed in accordance with section 761A of the Corporations Act 2001 and so approved, it is unclear whether any provision of such FOA Netting Agreement, or as the case may be, Clearing Agreement, which transfers, or attempts to transfer (or attempts to alter the value of rights upon or in connection with any Transfer), Transactions on a default ('porting') will be upheld in an External Administration.

4.8 **Banking Act and Restructure Act**

- 4.8.1 Section 15C of the Banking Act states that the appointment of an ADI Statutory Manager to control an Authorised Deposit Taking Institution does not allow a party to a contract to close-out any transaction relating to that contract and close-out would only be possible under the contract if there were other grounds for terminating the agreement, such as non-payment. This section potentially conflicts with Section 14(2) of the Netting Act which provides for rights to be exercised under the Netting Provision where a party to the contract goes into External Administration. The interaction of the Netting Act and Section 15C of the Banking Act is uncertain and is currently the subject of a new Bill to be put before the Australian Parliament (as discussed below).
- 4.8.2 Section 15B of the Banking Act also provides that a person cannot begin or continue a proceeding in a Relevant Court against an ADI while a Statutory Manager is in control of the ADI without the leave of the court or APRA's consent.
- 4.8.3 Similar provisions are also contained in the Financial Sector (Business Transfer and Group Restructure) Act 1999 (the "**Restructure Act**") which 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. Similar to section 15C of the Banking Act, 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:
 - (a) deny any obligation under that contract;
 - (b) accelerate any debt under that contract;
 - (c) close out any transaction relating to that contract.

- 4.8.4 The Restructure Act is relevantly expressed to apply despite any other law or provision of a contract. Therefore a transfer or restructure pursuant to the Restructure Act will take effect (without triggering a close-out under the Netting Provision).
- 4.8.5 Sections 15C of the Banking Act and 36AA(2) of the Restructure Act do not prevent close-out netting if the ADI Statutory Manager elects not to meet, or does not meet, the ADI's liabilities under close-out netting contracts. The failure by an ADI in statutory management to meet its commitments under a contract, for example, would provide the grounds for termination and close-out where this triggers an event of default in the contract itself.

4.9 **Amendments to the Banking Act**

- 4.9.1 The *Financial Sector Legislation Amendment (Close-out Netting Contracts) Bill 2011* has been drafted by The Treasury department of the Australian Government. If enacted in its current form, this bill would amend the Banking Act such that an ADI Statutory Manager has a period of 48 hours in which a stay of action would prevent a close-out from occurring in order to enable the ADI Statutory Manager to determine whether to allow contracts to be terminated.
- 4.9.2 During this 48 hour period, the ADI Statutory Manager will be able to give notice to the Non-Defaulting Party that liabilities under the FOA Netting Agreement or, as the case may be, the Clearing Agreement, will continue to be met as and when they become payable, in which case the FOA Netting Agreement or, as the case may be, the Clearing Agreement, will continue unless there are other grounds for termination.
- 4.9.3 If the ADI Statutory Manager has not provided notice of its intention to continue the FOA Netting Agreement or, as the case may be, the Clearing Agreement, within the proposed 48 hour period (or earlier if the ADI Statutory Manager gives notice within that period that the ADI will not be able to meet its liabilities under the FOA Netting Agreement or, as the case may be, the Clearing Agreement) section 15C will cease to apply and the Non-Defaulting Party will be able to exercise its contractual close out netting rights.

4.10 **General**

- 4.10.1 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.
- 4.10.2 Transactions entered into after commencement of an External Administration in relation to a Party might not be capable of inclusion in the netting under the Netting Provision or a set-off pursuant to a Statutory Insolvency Set-Off, but this would not impair the effectiveness of the Netting Provision or a Statutory Insolvency Set-off in respect of Transactions entered into before the commencement of such Insolvency Proceedings.

- 4.10.3 Any provision of the FOA Netting Agreement or, as the case may be, the Clearing 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.
- 4.10.4 Any provision of the FOA Netting Agreement or, as the case may be, the Clearing Agreement, providing for pro-rating of amounts to Transactions, only some of which are to be netted or set-off, may not be capable of inclusion in the netting under the Netting Provision.
- 4.10.5 Any judgment in a currency other than Australian dollars will be registered in Australian dollars on the basis of the rate of exchange prevailing on the second business day before the day of the application for registration, unless the judgment creditor requests that it be registered in the foreign currency.
- 4.10.6 Where any Party to the FOA Netting Agreement or, as the case may be, the Clearing 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 and on reasonable grounds. Any provision in the FOA Netting Agreement or, as the case may be, the Clearing 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.
- 4.10.7 In giving our opinions at paragraphs 3.3, 3.4, 3.5, 3.6 and 3.10 in relation to the application of the Netting Act, the Netting Act does not apply in circumstances where a Party to a close-out netting contract either (i) did not act in good faith in entering into the transaction that created the terminated obligation, (ii) when the transaction that created the terminated obligation was entered into, the person had reasonable grounds for suspecting that the other party was insolvent at that time or would become insolvent because of, or because of matters including: (A) entering into the transaction; or (B) a person doing an act, or making an omission, for the purposes of giving effect to the transaction; or (iii) the person neither provided valuable consideration under, nor changed their position in reliance on, the transaction. Whether the occurrence any of the circumstances referred to above would lead to the Netting Act not being applicable to only transactions entered into after such circumstances arose, or whether it would be held to affect all transactions entered into pursuant to that Close-Out Netting Contract is currently untested in Australia, and accordingly, the Netting Provisions may not be enforceable in relation to the obligations entered into after such circumstances have occurred under the law relating to insolvency as set out in paragraph 4.3 above.
- 4.10.8 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 FOA Netting Agreement or, as the case may be, the Clearing 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.

- 4.10.9 An exchange contract (which, in our view, includes the FOA Netting Agreement or, as the case may be, the Clearing 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 FOA Netting Agreement or, as the case may be, the Clearing 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.
- 4.10.10 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.
- 4.10.11 We express no opinion as to the taxation or stamp duty consequences of a Party entering into the FOA Netting Agreement or, as the case may be, the Clearing Agreement.
- 4.10.12 As the FOA Netting Agreement or, as the case may be, the Clearing 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.
- 4.10.13 This opinion does not consider the impact of insolvency laws other than the External Administrations which are governed by the Relevant Laws.

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 (each a "subscribing member").

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) 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, auditors and professional advisers of such affiliate;
- (b) any person to whom disclosure is required to be made by applicable law or court order or pursuant to the rules or regulations of any supervisory or regulatory body or in connection with any judicial proceedings;
- (c) the officers, employees, auditors and professional advisers of any addressee; and
- (d) any competent authority supervising a subscribing member or its affiliates in connection with their compliance with their obligations under prudential regulation

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 and in preparing this opinion we have only had regard to the interests of our client.

We accept responsibility to the Futures and Options Association and subscribing members 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 Futures and Options Association'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 Futures and Options Association's members or their affiliates.

Yours faithfully,

A handwritten signature in black ink, appearing to read "Clifford Chee".

SCHEDULE 1 INDIVIDUALS

Subject to the modifications and additions set out in this Schedule 1 (*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 1 (*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

Paragraph 1.10.5 is deemed deleted and replaced with the following:

***"Insolvency Proceedings"* means the procedures listed in section 3.1 of Schedule 1 (*Individuals*), where governed by the Relevant law.**

2. ADDITIONAL ASSUMPTIONS

None applicable.

3. MODIFICATIONS TO OPINIONS

On the basis of the terms of reference and assumptions and subject to the qualifications (in each case set out in this opinion letter as modified, or added to, by this Schedule), we are of the following opinion.

3.1 Insolvency Proceedings: Individuals

The only bankruptcy, composition, rehabilitation or other insolvency or reorganisation procedures to which a Party that is an individual could be subject under the laws of this jurisdiction, and which are relevant for the purposes of this opinion letter, are bankruptcy, debt agreements and personal insolvency agreements, (together, "**Insolvency Proceedings**").

The legislation applicable to such Insolvency Proceedings is:

- 3.1.1 the Bankruptcy Act 1966 (Cth) (the "**Bankruptcy Act**"); and
- 3.1.2 the Bankruptcy Regulations 1996 (Cth).

We confirm that the events specified in the Insolvency Events of Default Clause adequately refer to all Insolvency Proceedings in relation to individuals without the need for any additions. However, we recommend that an additional event of default be included in respect of an individual, being an Insolvency Event of Default when an application is made for ancillary relief relating to the property or entitlement under any contract of a Party in any matrimonial proceedings relating to that Party.

3.2 **Enforceability of the Set-Off Provisions**

Paragraphs 2.5 (*Assumptions*), 3.6 (*Enforceability of the FOA Set-Off Provisions*), 3.8 (*Set-Off under a Clearing Agreement with a Clearing Module Set-Off Provision*) and 3.9 (*Set-Off under a Clearing Agreement with an Addendum Set-Off Provision*) shall be amended so as to refer to section 86 of the Bankruptcy Act.

3.3 **Multibranch Parties: Individuals**

The opinion in paragraph 3.14 (*Multibranch Parties*) is not applicable if the Party in question is an Individual.

3.4 **Insolvency of Foreign Parties: Individuals**

The opinion in paragraph 3.15 (*Insolvency of Foreign Parties*) is not applicable if the Party in question is an Individual.

4. ADDITIONAL QUALIFICATIONS

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

4.1 In many circumstances death of an individual terminates authority of another person to bind the estate of the individual. Accordingly, we express no opinion in relation to the ability to include within the Termination Amount a value attributable to a Transaction purportedly entered into after the death of a Party.

4.2 It is open to the court to make dispositions of an individual's property in favour of an ex-spouse in matrimonial proceedings. If any such disposition were to affect the rights of a Party under any Transaction, such rights may no longer be mutual following such a disposition with countervailing rights exercisable by the other Party under other Transactions or the FOA Netting Agreement or, as the case may be, the Clearing Agreement, and the effectiveness of the Netting Provision may be impaired.

5. MODIFICATIONS 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 FOA Netting Agreement or, as the case may be, the Clearing 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 FOA Netting Agreement or, as the case may be, the Clearing Agreement.

SCHEDULE 2 INSURERS

Subject to the modifications and additions set out in this Schedule 2 (*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 2 (*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

1.1 Paragraph 1.10.5 is deemed deleted and replaced with the following:

"Insolvency Proceedings" means the procedures listed in section 3.1 of Schedule 2 (Insurers), where governed by the Relevant Law."

1.2 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. MODIFICATIONS TO OPINIONS

On the basis of the terms of reference and assumptions and subject to the qualifications (in each case set out in this opinion letter as modified, or added to, by this Schedule), we are of the following opinion.

3.1 **Insolvency Proceedings: Insurers**

The only bankruptcy, composition, rehabilitation or other insolvency or reorganisation procedures to which a Party which is an Insurer could be subject under the laws of this jurisdiction, and which are relevant for the purposes of this opinion letter, are winding up and judicial management under the Insurance Act and the Life Insurance Act.

The legislation applicable to such Insolvency Proceedings is:

- 3.1.1 in relation to all Insolvency Proceedings initiated after the date of this opinion letter, the provisions of the Insurance Act and the Life Insurance Act; and
- 3.1.2 the Corporations Act.

We confirm that the events specified in the Insolvency Events of Default Clause adequately refer to all Insolvency Proceedings in relation to bodies corporate that are insurers, without the need for any additions.

4. ADDITIONAL QUALIFICATIONS

4.1 Insurance Act and Life Insurance Act

- 4.1.1 Section 62V of the Insurance Act and section 165B of the Life Insurance Act state that the appointment of a judicial manager to control a general insurer or a life insurer does not allow a party to a contract to close-out any transaction relating to that contract and close-out would only be possible under the contract if there were other grounds for terminating the agreement, such as non-payment. This section conflicts with Section 14(2) of the Netting Act which provides for rights to be exercised under the Netting Provision to be used where a party to the contract goes into External Administration. The interaction of the Netting Act, section 62V of the Insurance Act and section 165B of the Life Insurance Act is uncertain and is currently the subject of a consultation by Australian government.
- 4.1.2 Sections 62V of the Insurance Act and section 165B of the Life Insurance Act do not prevent close-out netting if the judicial manager elects not to meet, or does not meet, the relevant general insurer's or life insurer's liabilities under close-out netting contracts. The failure by a general insurer or a life insurer in judicial management to meet its commitments under a contract, for example, would provide the grounds for termination and close-out where this triggers an event of default in the contract itself.

4.2 Amendments to the Insurance Act and the Life Insurance Act

- 4.2.1 The *Financial Sector Legislation Amendment (Close-out Netting Contracts) Bill 2011* has been drafted by The Treasury department of the Australian Government. If enacted in its current form, this bill would amend the Insurance Act and the Life Insurance Act such that a judicial manager has a period of 48 hours in which a stay of action would prevent a close-out from occurring in order to enable the judicial manager to determine whether to allow contracts to be terminated.
- 4.2.2 During this 48 hour period, the judicial manager will be able to give notice to the Non-Defaulting Party that liabilities under the FOA Netting Agreement or, as the case may be, the Clearing Agreement, will continue to be met as and when they become payable, in which case the FOA Netting Agreement or, as the case may be, the Clearing Agreement, will continue unless there are other grounds for termination.

- 4.2.3 If the judicial manager has not provided notice of its intention to continue the FOA Netting Agreement or, as the case may be, the Clearing Agreement, within the proposed 48 hour period (or earlier if the judicial manager gives notice within that period that the general insurer or life insurer will not be able to meet its liabilities under the FOA Netting Agreement or, as the case may be, the Clearing Agreement) section 62V of the Insurance Act and section 165B of the Life Insurance Act will cease to apply and the Non-Defaulting Party will be able to exercise its contractual close out netting rights.

5. **MODIFICATIONS TO QUALIFICATIONS**

None applicable.

SCHEDULE 3 PARTNERSHIPS

Subject to the modifications and additions set out in this Schedule 3 (*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 3 (*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 ***""Insolvency Proceedings*** means the procedures listed in section 3.1 of Schedule 3 (*Partnerships*), where governed by the Relevant Law."
- 1.1.2 ***""this jurisdiction*** means the State of New South Wales and the Commonwealth of Australia."
- 1.1.3 ***""Relevant Courts*** means the Supreme Court of New South Wales and the federal courts of Australia."
- 1.1.4 ***""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 FOA Netting Agreement or, as the case may be, the Clearing Agreement, is entered into with a partnership, during the life of the FOA Netting Agreement or, as the case may be, the Clearing Agreement, the members of the partnership will remain unchanged.
- 2.2 That where the FOA Netting Agreement or, as the case may be, the Clearing 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

On the basis of the terms of reference and assumptions and subject to the qualifications (in each case set out in this opinion letter as modified by or added to this Schedule), we are of the following opinion.

3.1 Insolvency Proceedings: Partnerships

The only bankruptcy, composition, rehabilitation or other insolvency or reorganisation procedures to which a Party which is a partnership could be subject under the laws of this jurisdiction, and which are relevant for the purposes of this opinion letter, are bankruptcy, debt agreements and personal insolvency agreements, (together, "**Insolvency Proceedings**").

The legislation applicable to Insolvency Proceedings is:

- 3.1.1 the Bankruptcy Act²;
- 3.1.2 the Bankruptcy Regulations 1996; and
- 3.1.3 the Partnerships Act in respect of the dissolution of partnerships.

We confirm that the events specified in the Insolvency Events of Default Clause adequately refer to all Insolvency Proceedings in relation to Partnerships, without the need for any additions.

3.2 Enforceability of the Set-Off Provisions

Paragraphs 2.5 (*Assumptions*), 3.6 (*Enforceability of the FOA Set-Off Provisions*), 3.8 (*Set-Off under a Clearing Agreement with a Clearing Module Set-Off Provision*) and 3.9 (*Set-Off under a Clearing Agreement with an Addendum Set-Off Provision*) shall be amended so as to refer to section 86 of the Bankruptcy Act.

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 3 (*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 FOA Netting Agreement or, as the case may be, the Clearing 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 FOA Netting Agreement or, as the case may be, the Clearing Agreement, or not all obligations are mutual, so that the Netting Provision would be ineffective to achieve (a) aggregation of values attributable to Transactions entered into after the change in

² As partnerships are not legal entities separate from their members, the creditors of partnerships may seek redress against the individual partners. A creditor of a partnership may present a petition against the partnership if he or she is entitled to present a petition against any one of the members of the partnership in respect of a partnership debt and may present a petition against any of the members of the partnership without including the others.

partners; or (b) aggregation of values attributable to Transactions entered into before the change in partners against values attributable to Transactions entered into after such change.

4.2 As non-mutual debts or obligations cannot be set off, a debt owed by a partner personally cannot be set off under statutory insolvency set-off against a debt owed by the creditors of the 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 1 (*Individuals*).

SCHEDULE 4
TRUSTEES OF TRUSTS (OTHER THAN CHARITABLE TRUSTS AND
SUPERANNUATION FUNDS)

Subject to the modifications set out in this Schedule 4 (*Trustees of Trusts (other than Charitable Trusts and Superannuation Funds)*), the opinions, assumptions and qualifications set out in this opinion letter (as modified and added to pursuant to Schedule 1 (*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 or a Superannuation Fund).

For the purpose of this Schedule 4 (*Trustees of Trusts (other than Charitable Trusts and Superannuation Funds)*), 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 1 (*Individuals*) in the case of a Trustee that is an individual, as applicable).

1. MODIFICATIONS TO TERMS OF REFERENCE AND DEFINITIONS

To the extent this opinion relates to Trustees, it is given in respect of a Party which, in entering into the FOA Netting Agreement or, as the case may be, the Clearing 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 FOA Netting Agreement or, as the case may be, the Clearing Agreement, except to the extent that the terms of the FOA Netting Agreement or, as the case may be, the Clearing 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.

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 FOA Netting Agreement or, as the case may be, the Clearing Agreement and Transactions; to perform its obligations under the FOA Netting Agreement or, as the case may be, the Clearing Agreement and Transactions; and that each Party has taken all necessary steps to execute, deliver and perform the FOA Netting Agreement or, as the case may be, the Clearing 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 2.11 is disapplied insofar as any lack of mutuality is based on the status of a Party as a Trustee.

3. MODIFICATIONS TO OPINIONS

On the basis of the terms of reference and assumptions and subject to the qualifications (in each case set out in this opinion letter as modified by or added to this Schedule), we are of the following opinion:

Where the defaulting Party acts as a Trustee and is the insolvent Party the operation of the Netting Provision will not be affected. The assets of the relevant Trust (which would include obligations owed by the non-defaulting Party) would fall outside the estate of the Trustee as insolvent Party and would therefore not be available for seizure by an insolvency officer or representative appointed to such insolvent Party for the benefit of its creditors. Furthermore, under the laws of this jurisdiction, the obligations "*of a Trust*" are the obligations of the Trustee(s), and it is not possible for a Trust to be subject to Insolvency Proceedings. Accordingly, (a) it is not possible for an Event of Default attributable to non-performance, bankruptcy, liquidation or similar circumstance to occur in relation to a Trust (as opposed to a Trustee of the Trust); and (b) if a Party which is a Trustee fails to perform its obligations under the FOA Netting Agreement or, as the case may be, the Clearing Agreement, owing to default, bankruptcy, liquidation or any other similar circumstance the Netting Provision would be effective in accordance with its terms.

4. ADDITIONAL QUALIFICATIONS

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

In relation to the assumption at section 2.2 of this Schedule 4 Schedule 4(*Trustees of Trusts (other than Charitable Trusts and Superannuation Funds)*) 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 (a) the FOA Netting Agreement or, as the case may be, the Clearing Agreement, is not binding on the incoming trustee, or (b) Transactions entered into by the former trustee are not binding on the incoming trustee. If, following a change of trustee, the incoming trustee does not adopt the FOA Netting Agreement or, as the case may be, the Clearing Agreement, and outstanding Transactions it could be the case that the Netting Provision would be ineffective to achieve (a) aggregation of values attributable to Transactions entered into after the change which are still outstanding upon the occurrence of an Event of Default; or (b) aggregation of values attributable to outstanding Transactions entered into before the change against values attributable to Transactions entered into after the change. It may be of assistance in defeating such arguments if the Transactions and the FOA Netting Agreement or, as the case may be, the Clearing Agreement, constitute a single Agreement, although we have not evaluated the reliability of this argument, since we recommend that after each change of trustee, the continuing and incoming trustees expressly adopt the FOA Netting Agreement or, as the case may be, the Clearing Agreement, and all Transactions

entered into before the change, and which remain outstanding at that time, by way of novation. We express no opinion as to the effectiveness of the Netting Provision in relation to any Transaction entered into between the time of a change of trustee and the time of operation of the Netting Provision where no such adoption has occurred.

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 1 (*Individuals*).

SCHEDULE 5 **TRUSTEES OF CHARITABLE TRUSTS**

Subject to the further additions and modifications set out in this Schedule 5 (*Trustees of Charitable Trusts*), the opinions, assumptions and qualifications set out in this opinion letter (as modified and added to pursuant to Schedule 4 (*Trustees of Trusts (other than Charitable Trusts and Superannuation Funds)*)) will also apply in respect of Parties which are acting as Trustees of a Charitable Trust.

For the purposes of this Schedule 5 (*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 4 (*Trustees of Trusts (other than Charitable Trusts and Superannuation Funds)*), 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 4 (*Trustees of Trusts (other than Charitable Trusts and Superannuation Funds)*) for the purposes of this Schedule 5 (*Trustees of Charitable Trusts*).

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 Netting Provision, as it might result in the legal separation of obligations under Transactions which are out of the money for the Charitable Trust (and, in the case of a Charitable Trust, are owed by its trustee) from entitlements under Transactions which are in the money for the Charitable Trust (and to which the trustee can no longer assert any rights).

5. **MODIFICATIONS TO QUALIFICATIONS**

None applicable.

SCHEDULE 6 **CHARITABLE ASSOCIATIONS**

Subject to the additions set out in this Schedule 6 (*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 6 (*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 *""Insolvency Proceedings"" means the procedures listed in section 3.1 of Schedule 6 (Charitable Associations), where governed by the Relevant Law.*
- 1.1.2 *""this jurisdiction"" means the State of New South Wales and the Commonwealth of Australia."*
- 1.1.3 *""Relevant Courts"" means the Supreme Court of New South Wales and the federal courts of Australia."*
- 1.1.4 *""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

On the basis of the terms of reference and assumptions and subject to the qualifications (in each case set out in this opinion letter as modified, or added to, by this Schedule), we are of the following opinion.

3.1 Insolvency Proceedings: Charitable Associations

The only bankruptcy, composition, rehabilitation or other insolvency or reorganisation procedures to which a Party that is a Charitable Association could be subject under the laws of this jurisdiction, and which are relevant for the purposes of this opinion letter, are administration and winding up.

The legislation applicable to such Insolvency Proceedings are:

- 3.1.1 the Associations Incorporation Act 2009 (NSW) (the "**Associations Incorporation Act**");
- 3.1.2 the Associations Incorporation Regulation 2010 (NSW); and

3.1.3 the Corporations Act.

We confirm that the events specified in the Insolvency Events of Default Clause adequately refer to all Insolvency Proceedings, in relation to Charitable Associations without the need for any additions.

3.2 Insolvency of Foreign Parties: Charitable Associations

The opinion in paragraph 3.15 (*Insolvency of Foreign Parties*) is not applicable if the Party in question is a Charitable Association.

4. ADDITIONAL QUALIFICATIONS

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

4.1 Section 60 of the Associations Incorporation Act states that, if the 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.

5. MODIFICATIONS TO QUALIFICATIONS

None applicable.

SCHEDULE 7
RESERVE BANK OF AUSTRALIA

Subject to the modifications and additions set out in this Schedule 7 (*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 7 (*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).

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

Paragraph 1.10.5 is deemed deleted and replaced with the following:

""Insolvency Proceedings"" means, in relation to the Reserve Bank of Australia, the procedures listed at section 3.1 of Schedule 7 (Reserve Bank of Australia) where governed by the Relevant Law."."

2. ADDITIONAL ASSUMPTIONS

None applicable.

3. MODIFICATIONS TO OPINIONS

On the basis of the terms of reference and assumptions and subject to the qualifications (in each case set out in this opinion letter as modified by or added to this Schedule), we are of the following opinion.

3.1 Insolvency Proceedings: Reserve Bank of Australia

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 counterparties could be.

We confirm that the events specified in the Insolvency Events of Default Clause adequately refer to all Insolvency Proceedings, in relation to the Reserve Bank of Australia, however we recommend the inclusion of the following:

"you are wound up, merged into another bank or your operations suspended or terminated by virtue of a new Act of Parliament or any other executive or legislative action."

3.2 Enforceability of Netting Provision, Set-Off Provisions and Title Transfer Provisions: Reserve Bank of Australia

As we state in section 3.1, if the Reserve Bank of Australia were to become insolvent, it is likely that specific legislation would be enacted to address the insolvency. We are therefore unable to confirm whether or not the Netting Provision, Set-Off Provisions or Title Transfer Provisions will be effective, however given the support of the Australia government for netting in the Payment Systems and Netting Act and set-off in the Corporations Act and Bankruptcy Act, it is likely that any such legislation would recognise the Netting Provision, Set-Off Provisions and Title Transfer Provisions.

3.3 Multibranch Parties: Reserve Bank of Australia

The opinion in paragraph 3.14 is not applicable to the Reserve Bank of Australia.

3.4 Insolvency of Foreign Parties: Reserve Bank of Australia

The opinion in paragraph 3.15 (*Insolvency of Foreign Parties*) is not applicable to the Reserve Bank of Australia.

4. ADDITIONAL QUALIFICATIONS

None applicable.

5. MODIFICATIONS TO QUALIFICATIONS

None applicable.

SCHEDULE 8

RESPONSIBLE ENTITIES (MANAGED INVESTMENT SCHEMES)

Subject to the modifications and additions set out in this Schedule 8 (*Responsible Entities (Managed Investment Schemes)*), the opinions, assumptions and qualifications set out in this opinion letter (as modified and added to pursuant to Schedule 4 (*Trustees of Trusts (other than Charitable Trusts and Superannuation Funds)*)) will also apply in respect of Parties which are Responsible Entities of Managed Investment Schemes.

For the purposes of this Schedule 8 (*Responsible Entities (Managed Investment Schemes)*), "**Responsible Entity**" means a company, for the purposes of the Corporations Act, which is named as the responsible entity for a registered Managed Investment Scheme (as defined in the Corporations Act) with the Australian Securities and Investments Commission ("ASIC") pursuant to Part 5C.1 of the Corporations 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

We assume the following:

- 2.1 Each Responsible Entity holds an "Australian financial services licence" (as defined in the Corporations Act) authorising it to operate a managed investment scheme and such licence has not been suspended or revoked.
- 2.2 Each Responsible Entity who holds an "Australian financial services licence" complies with its obligations in connection with that licence.

3. MODIFICATIONS TO OPINIONS

3.1 Insolvency of Foreign Parties: Responsible Entities

The opinion in paragraph 3.15 (*Insolvency of Foreign Parties*) is not applicable if the Party in question is a Responsible Entity.

4. ADDITIONAL QUALIFICATIONS

Paragraph 4 of Schedule 4 (*Trustees of Trusts (other than Charitable Trusts and Superannuation Funds)*) shall be deemed deleted.

5. MODIFICATIONS TO QUALIFICATIONS

Paragraph 5 of Schedule 4 (*Trustees of Trusts (other than Charitable Trusts and Superannuation Funds)*) does not apply to Responsible Entities.

SCHEDULE 9

TRUSTEES OF SUPERANNUATION FUNDS

Subject to the modifications and additions set out in this Schedule 9 (*Trustees of Superannuation Funds*), the opinions, assumptions and qualifications set out in this opinion letter (as modified and added to pursuant to Schedule 4 (*Trustees of Trusts (other than Charitable Trusts and Superannuation Funds)*)) will also apply in respect of Parties which are trustees of superannuation funds.

For the purposes of this Schedule 9 (*Trustees of Superannuation Funds*), "**Trustee of a Superannuation Fund**" means a company that is incorporated under the Corporations Act and acts as trustee of a superannuation entity pursuant to the Superannuation Industry (Supervision) Act 1993 (the "**SIS Act**"), but does not include any entity which is subject to industry specific legislation.

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

- 2.1 Each Trustee of a Superannuation Fund holds a "Registrable Superannuation Entity licence" (as defined in the SIS Act) authorising it to operate a superannuation fund and such licence has not been suspended or revoked.
- 2.2 Each Trustee of a Superannuation Fund who holds a "Registrable Superannuation Entity licence" complies with its obligations in connection with that licence.
- 2.3 That each Party has the capacity, power and authority under the terms of any applicable constitutional documents of which a Party is a Trustee of a Superannuation Fund to enter into the FOA Netting Agreement or, as the case may be, the Clearing Agreement and Transactions; to perform its obligations under the FOA Netting Agreement or, as the case may be, the Clearing Agreement and Transactions; and that each Party has taken all necessary steps to execute, deliver and perform the FOA Netting Agreement or, as the case may be, the Clearing Agreement.

3. MODIFICATIONS TO OPINIONS

- 3.1 In addition to insolvency events that may place a Trustee of a Superannuation Fund in an External Administration, the SIS Act contains powers for the Regulator to order the suspension or removal of a Trustee of a Superannuation Fund in a number of circumstances, including unsatisfactory conduct and breach of licence conditions, and the appointment of an acting or replacement Trustee of a Superannuation Fund or for

the amalgamation of superannuation funds. Accordingly, whilst we confirm that the events specified in the Insolvency Events of Default Clause adequately refer to all Insolvency Proceedings, in relation to the Trustee of a Superannuation Fund, we would also recommend the inclusion of the following:

"you are removed from your position, replaced, amalgamated into or with another superannuation fund or your operations are suspended or otherwise terminated by the Regulator pursuant to the Superannuation Industry (Supervision) Act 1993 or by virtue of a new Act of Parliament or any other executive or legislative action."

3.2 Insolvency of Foreign Parties: Trustee

The opinion in paragraph 3.15 (*Insolvency of Foreign Parties*) is not applicable if the Party in question is a Trustee of a Superannuation Fund.

4. ADDITIONAL QUALIFICATIONS

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

- 4.1 In the circumstances described above where the Regulator orders the suspension or removal of a Trustee of a Superannuation Fund, the Regulator has the power to determine the terms and conditions of such an appointment and, as part of the appointment, will make an order vesting all property with the incoming Trustee of a Superannuation Fund. It is unclear whether or not 'property', which is undefined in the SIS Act, would include liabilities.
- 4.2 Part 18 of the SIS Act also provides for the amalgamation or transfer of superannuation funds into other superannuation funds in certain circumstances. In such case, it is unclear whether any FOA Netting Agreement or, as the case may be, Clearing Agreement, would be transferred to the incoming Trustee of a Superannuation Fund.

Accordingly, it may be the case that (a) the FOA Netting Agreement or, as the case may be, the Clearing Agreement, is not binding on the incoming Trustee of a Superannuation Fund, or (b) Transactions entered into by the former Trustee of a Superannuation Fund are not binding on the incoming Trustee of a Superannuation Fund. If, following a change of trustee, the incoming Trustee of a Superannuation Fund does not adopt the FOA Netting Agreement or, as the case may be, the Clearing Agreement, and outstanding Transactions it could be the case that the Netting Provision would be ineffective to achieve (a) aggregation of values attributable to Transactions entered into after the change which are still outstanding upon the occurrence of an Event of Default; or (b) aggregation of values attributable to outstanding Transactions entered into before the change against values attributable to Transactions entered into after the change. It may be of assistance in defeating such arguments if the Transactions and the FOA Netting Agreement or, as the case may be,

the Clearing Agreement, constitute a single Agreement, although we have not evaluated the reliability of this argument, since we recommend that after each change of a Trustee of a Superannuation Fund, the continuing and incoming Trustee of a Superannuation Fund expressly adopt the FOA Netting Agreement or, as the case may be, the Clearing Agreement, and all Transactions entered into before the change, and which remain outstanding at that time, by way of novation. We express no opinion as to the effectiveness of the Netting Provisions in relation to any Transaction entered into between the time of a change of a Trustee of a Superannuation Fund and the time of operation of the Netting Provisions where no such adoption has occurred.

5. MODIFICATIONS TO QUALIFICATIONS

None applicable.

ANNEX 1
FORMS OF FOA NETTING AGREEMENTS

1. Master Netting Agreement - One-Way (1997 version) (the "**One-Way Master Netting Agreement 1997**")
2. Master Netting Agreement - Two-Way (1997 version) (the "**Two-Way Master Netting Agreement 1997**")
3. Default, Netting and Termination Module (One-Way Netting) (2007 version) (the "**Long-Form One-Way Clauses 2007**")
4. Short Form Default, Netting and Termination Module (One-Way Netting) (2007 version) (the "**Short-Form One-Way Clauses 2007**")
5. Short Form Default, Netting and Termination Module (One-Way Netting) (2009 version) (the "**Short-Form One-Way Clauses 2009**")
6. Short Form Default, Netting and Termination Module (One-Way Netting) (2011 version) (the "**Short-Form One-Way Clauses 2011**")
7. Default, Netting and Termination Module (Two-Way Netting) (2007 version) (the "**Long-Form Two-Way Clauses 2007**")
8. Default, Netting and Termination Module (Two-Way Netting) (2009 version) (the "**Long-Form Two-Way Clauses 2009**")
9. Default, Netting and Termination Module (Two-Way Netting) (2011 version) (the "**Long-Form Two-Way Clauses 2011**")
10. Short Form Default, Netting and Termination Module (Two-Way Netting) (2007 version) (the "**Short-Form Two-Way Clauses 2007**")
11. Short Form Default, Netting and Termination Module (Two-Way Netting) (2009 version) (the "**Short-Form Two-Way Clauses 2009**")
12. Short Form Default, Netting and Termination Module (Two-Way Netting) (2011 version) (the "**Short-Form Two-Way Clauses 2011**")
13. Professional Client Agreement (2007 Version), including Module G (Margin and Collateral) (the "**Professional Client (with Security Provisions) Agreement 2007**")
14. Professional Client Agreement (2009 Version), including Module G (Margin and Collateral) (the "**Professional Client (with Security Provisions) Agreement 2009**")
15. Professional Client Agreement (2011 Version) including Module G (Margin and Collateral) (the "**Professional Client (with Security Provisions) Agreement 2011**")
16. Professional Client Agreement (2007 Version), excluding Module G (**Margin and Collateral**) but incorporating the Title Transfer Securities and Physical Collateral Annex to the Netting Module (2007 or 2011 Version) (the "**Professional Client (with Title Transfer Provisions) Agreement 2007**")

17. Professional Client Agreement (2009 Version), excluding Module G (***Margin and Collateral***) but incorporating the Title Transfer Securities and Physical Collateral Annex to the Netting Module (2007 or 2011 Version) (the "**Professional Client (with Title Transfer Provisions) Agreement 2009**")
18. Professional Client Agreement (2011 Version), excluding Module G (***Margin and Collateral***) but incorporating the Title Transfer Securities and Physical Collateral Annex to the Netting Module (2007 or 2011 Version) (the "**Professional Client (with Title Transfer Provisions) Agreement 2011**")
19. Retail Client Agreement (2007 Version) including Module G (Margin and Collateral) (the "**Retail Client (with Security Provisions) Agreement 2007**")
20. Retail Client Agreement (2009 Version) including Module G (Margin and Collateral) (the "**Retail Client (with Security Provisions) Agreement 2009**")
21. Retail Client Agreement (2011 Version) including Module G (Margin and Collateral) (the "**Retail Client (with Security Provisions) Agreement 2011**")
22. Retail Client Agreement (2007 Version), excluding Module G (***Margin and Collateral***) but incorporating the Title Transfer Securities and Physical Collateral Annex to the Netting Module (2007 or 2011 Version) (the "**Retail Client (with Title Transfer Provisions) Agreement 2007**")
23. Retail Client Agreement (2009 Version), excluding Module G (***Margin and Collateral***) but incorporating the Title Transfer Securities and Physical Collateral Annex to the Netting Module (2007 or 2011 Version) (the "**Retail Client (with Title Transfer Provisions) Agreement 2009**")
24. Retail Client Agreement (2011 Version), excluding Module G (***Margin and Collateral***) but incorporating the Title Transfer Securities and Physical Collateral Annex to the Netting Module (2007 or 2011 Version) (the "**Retail Client (with Title Transfer Provisions) Agreement 2011**")
25. Eligible Counterparty Agreement (2007 Version) including Module G (***Margin***) (the "**Eligible Counterparty (with Security Provisions) Agreement 2007**")
26. Eligible Counterparty Agreement (2009 Version) including Module G (***Margin***) (the "**Eligible Counterparty (with Security Provisions) Agreement 2009**")
27. Eligible Counterparty Agreement (2011 Version) including Module G (***Margin***) (the "**Eligible Counterparty (with Security Provisions) Agreement 2011**")
28. Eligible Counterparty Agreement (2007 Version) excluding Module G (***Margin***) but incorporating the Title Transfer Securities and Physical Collateral Annex to the Netting Module (2007 or 2011 Version) (the "**Eligible Counterparty (with Title Transfer Provisions) Agreement 2007**")
29. Eligible Counterparty Agreement (2009 Version) excluding Module G (***Margin***) but incorporating the Title Transfer Securities and Physical Collateral Annex to the Netting Module (2007 or 2011 Version) (the "**Eligible Counterparty (with Title Transfer Provisions) Agreement 2009**")

30. Eligible Counterparty Agreement (2011 Version) excluding Module G (**Margin**) but incorporating the Title Transfer Securities and Physical Collateral Annex to the Netting Module (2007 or 2011 Version) (the "**Eligible Counterparty (with Title Transfer Provisions) Agreement 2011**")

Where an 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), provided that any election made does not constitute an Adverse Amendment.

Each of the Agreements listed at items 13 to 30 of this Annex 1 may be deemed to include FOA Netting 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, in which case references to the Insolvency Events of Default and FOA Netting Provision in respect of such FOA Netting Agreements shall mean the Insolvency Events of Default and FOA Netting Provision in relation to the Two Way Clauses.

ANNEX 2
List of Transactions

The following groups of Transactions may be entered into under the FOA Netting Agreements or Clearing Agreements:

- (A) (Futures and options and other transactions) Transactions as defined in the FOA Netting Agreements or Clearing Agreements:
 - (i) a contract made on an exchange or pursuant to the rules of an exchange;
 - (ii) a contract subject to the rules of an exchange; or
 - (iii) a contract which would (but in terms of maturity only) be a contract made on, or subject to the rules of, an exchange and which, at the appropriate time, is to be submitted for clearing as a contract made on, or subject to the rules of, an exchange,
in any of cases (i), (ii) and (iii) being a future, option, contract for difference, spot or forward contract of any kind in relation to any commodity, metal, financial instrument (including any security), currency, interest rate, index or any combination thereof; or
 - (iv) a transaction which is back-to-back with any transaction within paragraph (i), (ii) or (iii) of this definition, or
 - (v) any other Transaction which the parties agree to be a Transaction;
- (B) (fixed income securities) Transactions relating to a fixed income security or under which delivery of a fixed income security is contemplated upon its formation;
- (C) (equities) Transactions relating to an equity or under which delivery of an equity is contemplated upon its formation;
- (D) (commodities) Transactions relating to, or under the terms of which delivery is contemplated, of any base metal, precious metal or agricultural product.
- (E) (OTC derivatives) Transactions which fall within paragraphs (4) to (10) of Section C of Annex 1 to Directive 2004/39/EC, including (but not limited to) interest rate swaps, credit default swaps, derivatives on foreign exchange, and equity derivatives, provided that, where the Transaction is subject to the Terms of a Clearing Agreement, the Transaction (or a transaction which is back-to-back with the Transaction) is eligible to be cleared by a central counterparty.

ANNEX 3
DEFINITIONS RELATING TO THE AGREEMENTS

"Addendum Inconsistency Provision" means (subject to any selections or amendments required or permitted to be made on the face of the ISDA/FOA Clearing Addendum) Clause 1(b) (i) of the ISDA/FOA Clearing Addendum.

"Addendum Netting Provision" means (subject to any selections or amendments required or permitted to be made on the face of the ISDA/FOA Clearing Addendum):

- (a) Clause 8(b) (*Clearing Member Events*), 8(c) (*CCP Default*) and 8(d) (*Hierarchy of Events*) of the ISDA/FOA Clearing Addendum, together with the defined terms required properly to construe such Clauses; or
- (b) any modified version of such clauses provided that it includes at least those parts of paragraph 6 of Part 1 (*Core Provisions*) of Annex 4 which are highlighted in yellow,

"Addendum Set-Off Provision" means (subject to any selections or amendments required or permitted to be made on the face of the ISDA/FOA Clearing Addendum):

- (a) Clause 8(e) (*Set-Off*) of the ISDA/FOA Clearing Addendum, where constituted as part of a Clearing Agreement, together with the defined terms required properly to construe such Clause; or
- (b) any modified version of such clause provided that it includes at least those parts of paragraph 8 of Part 1 (*Core Provisions*) of Annex 4 which are highlighted in yellow,

"Adverse Amendments" means (a) any amendment to a Core Provision and/or (b) any other provision in an agreement that may invalidate, adversely affect, modify, amend, supersede, conflict or be inconsistent with, provide an alternative to, override, compromise or fetter the operation, implementation, enforceability or effectiveness of a Core Provision (in each case in (a) and (b) above, excepting any Non-material Amendment).

"Clearing Agreement" means an agreement:

- (a) on the terms of the FOA Netting Agreement when used (i) in conjunction with the FOA Clearing Module and/or the ISDA/FOA Clearing Addendum, or (ii) in conjunction with a Clearing Module Netting Provision and/or an Addendum Netting Provision and with or without a Clearing Module Set-Off Provision and/or an Addendum Set-Off Provision;
- (b) which is governed by the law of England and Wales; and
- (c) which contains an Addendum Inconsistency Provision, a Clearing Module Inconsistency Provision, or another provision with equivalent effect to either of them.

"Clearing Module Inconsistency Provision" means (subject to any selections or amendments required or permitted to be made on the face of the FOA Clearing Module):

- (a) Clause 1.2.1 of the FOA Clearing Module; or

(b) any modified version of such clauses provided that it includes at least those parts of paragraph 6 of Part 1 (*Core Provisions*) of Annex 4 which are highlighted in yellow,

"Clearing Module Netting Provision" means (subject to any selections or amendments required or permitted to be made on the face of the FOA Clearing Module) Clause 5.2 (*Firm Events*), 5.3 (*CCP Default*) and 5.4 (*Hierarchy of Events*) of the FOA Clearing Module, together with the defined terms required properly to construe such Clauses.

"Clearing Module Set-Off Provision" means (subject to any selections or amendments required or permitted to be made on the face of the FOA Clearing Module):

(a) Clause 5.5 (*Set-Off*) of the FOA Clearing Module together with the defined terms required properly to construe such Clause; or

(b) any modified version of such clause provided that it includes at least those parts of paragraph 7 of Part 1 (*Core Provisions*) of Annex 4 which are highlighted in yellow,

"Client" means, in relation to an FOA Netting Agreement or a Clearing Agreement, the Firm's or, as the case may be, Clearing Member's counterparty under the relevant FOA Netting Agreement or Clearing Agreement.

"Core Provision" means those parts of the clauses or provisions specified below in relation to a paragraph of this opinion letter (and any equivalent paragraph in any Schedule to this opinion letter), which are highlighted in Annex 4:

(a) for the purposes of paragraph 3.3 (*Enforceability of FOA Netting Provision*), the Insolvency Events of Default Clause and the FOA Netting Provision;

(b) for the purposes of paragraph 3.4 (*Enforceability of the Clearing Module Netting Provision*), the Clearing Module Netting Provision together with the defined terms "Aggregate Transaction Value", "Firm/CCP Transaction Value" and "Relevant Collateral Value";

(c) for the purposes of paragraph 3.5 (*Enforceability of the Addendum Netting Provision*), the Addendum Netting Provision together with the defined terms "Aggregate Transaction Value", "CM/CCP Transaction Value" and "Relevant Collateral Value";

(d) for the purposes of paragraph 3.6.1, the Insolvency Events of Default Clause, the FOA Netting Provision and either or both of the General Set-off Clause and the Margin Cash Set-off Clause;

(e) for the purposes of paragraph 3.6.2, the Insolvency Events of Default Clause, the FOA Netting Provision, either or both of the General Set-off Clause and the Margin Cash Set-off Clause, and the Clearing Module Set-Off Provision and/or the Addendum Set-Off Provision;

(f) for the purposes of paragraph 3.7.1, the Clearing Module Netting Provision together with the defined terms "Aggregate Transaction Value", "Firm/CCP Transaction Value" and "Relevant Collateral Value", and the Clearing Module Set-Off Provision;

(g) for the purposes of paragraph 3.7.2, the Clearing Module Netting Provision together with the defined terms "Aggregate Transaction Value", "Firm/CCP Transaction

Value" and "Relevant Collateral Value", the Clearing Module Set-Off Provision and the FOA Set-Off Provision;

- (h) for the purposes of paragraph 3.8 (*Set-Off under a Clearing Agreement with Addendum Set-Off Provision*), the Addendum Netting Provision together with the defined terms "Aggregate Transaction Value", "CM/CCP Transaction Value" and "Relevant Collateral Value", and the Addendum Set-Off Provision;
- (i) for the purposes of paragraph 3.9.1, (i) in relation to an FOA Netting Agreement, the Insolvency Events of Default Clause, the FOA Netting Provision and the Title Transfer Provisions; and (ii) in relation to a Clearing Agreement, the Clearing Module Netting Provision together with the defined terms "Aggregate Transaction Value", "Firm/CCP Transaction Value" and "Relevant Collateral Value" or, as the case may be, the Addendum Netting Provision together with the defined terms "Aggregate Transaction Value", "CM/CCP Transaction Value" and "Relevant Collateral Value", and the Title Transfer Provisions; and
- (j) for the purposes of paragraphs 3.9.3 and 3.9.4, the Title Transfer Provisions,

in each case, incorporated into an FOA Netting Agreement or a Clearing Agreement together with any defined terms required properly to construe such provisions, in such a way as to preserve the essential sense and effect of the highlighted parts.

References to "**Core Provisions**" include Core Provisions that have been modified by Non-material Amendments.

"Defaulting Party" includes, in relation to the One-Way Versions, the Party in respect of which an Event of Default entitles the Non-Defaulting Party to exercise rights under the FOA Netting Provision.

"Eligible Counterparty Agreements" means each of the Eligible Counterparty (with Security Provisions) Agreement 2007, the Eligible Counterparty (with Title Transfer Provisions) Agreement 2007, the Eligible Counterparty (with Security Provisions) Agreement 2009, the Eligible Counterparty (with Title Transfer Provisions) Agreement 2009, the Eligible Counterparty (with Security Provisions) Agreement 2011 or the Eligible Counterparty (with Title Transfer Provisions) Agreement 2011 (each as listed and defined at Annex 1).

"Firm" means, in relation to an FOA Netting Agreement or a Clearing Agreement which includes an FOA Clearing Module, the Party providing the services under the relevant FOA Netting Agreement or Clearing Agreement which includes an FOA Clearing Module.

"FOA Clearing Module" means the FOA Client Cleared Derivatives Module as first published on 9 October 2013 or any subsequent published version up to the date of this opinion letter.

"FOA Netting Agreement" means an agreement:

- (a) on the terms of the forms specified in Annex 1 to this opinion letter or which has broadly similar function to any of them, when not used in conjunction with

the FOA Clearing Module and/or the ISDA/FOA Clearing Addendum and/or a Clearing Module Netting Provision and/or an Addendum Netting Provision;

- (b) which is governed by the law of England and Wales; and
- (c) which contains the Insolvency Events of Default Clause and the FOA Netting Provision, with or without the FOA Set-Off Provision, and with or without the Title Transfer Provisions, with no Adverse Amendments.

"FOA Netting Agreements (with Title Transfer Provisions)" means each of the Professional Client (with Title Transfer Provisions) Agreement 2007, the Professional Client (with Title Transfer Provisions) Agreement 2009, the Professional Client (with Title Transfer Provisions) Agreement 2011, the Retail Client (with Title Transfer Provisions) Agreement 2007, the Retail Client (with Title Transfer Provisions) Agreement 2009, the Retail Client (with Title Transfer Provisions) Agreement 2011, the Eligible Counterparty (with Title Transfer Provisions) Agreement 2007, the Eligible Counterparty (with Title Transfer Provisions) Agreement 2009 and the Eligible Counterparty (with Title Transfer Provisions) Agreement 2011 (each as listed and defined at Annex 1) or an FOA Netting Agreement which has broadly similar function to any of the foregoing.

"FOA Netting Provision" means (in each case subject to any selections or amendments required or permitted to be made on the face of the document in the relevant form referred to in Annex 1):

- (a) in relation to the terms of the Long Form One-Way Clauses 2007 and the Long Form Two-Way Clauses, Clause 2.2 (***Liquidation Date***), Clause 2.4 (***Calculation of Liquidation Amount***) and Clause 2.5 (***Payer***);
- (b) in relation to the terms of the Short Form One-Way Clauses and the Short Form Two-Way Clauses, Clause 2.1 (***Liquidation Date***), Clause 2.3 (***Calculation of Liquidation Amount***) and Clause 2.4 (***Payer***);
- (c) in relation to the terms of the Master Netting Agreements, Clause 4.2, Clause 4.4 and Clause 4.5;
- (d) in relation to the terms of the Eligible Counterparty Agreements, Clause 10.1 (***Liquidation Date***), Clause 10.3 (***Calculation of Liquidation Amount***) and Clause 10.4 (***Payer***);
- (e) in relation to the terms of the Retail Client Agreements, Clause 11.2 (***Liquidation Date***), Clause 11.4 (***Calculation of Liquidation Amount***) and Clause 11.5 (***Payer***);
- (f) in relation to the terms of the Professional Client Agreements, Clause 11.2 (***Liquidation Date***), Clause 11.4 (***Calculation of Liquidation Amount***) and Clause 11.5 (***Payer***);
- (g) any modified version of such clauses provided that it includes at least those parts of paragraph 1 of Part 1 (***Core Provisions***) of Annex 4 which are highlighted in yellow.

"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.

"FOA Set-off Provisions" means:

- (a) the **"General Set-off Clause"**, being:
 - (i) in the case of Agreements in the form of the Professional Client Agreement (with Security Provisions) 2007 and Professional Client Agreement (with Security Provisions) 2009, clause 15.11 (***Set-off***);
 - (ii) in the case of Agreements in the form of the Professional Client Agreement (with Security Provisions) 2011, clause 15.13 (***Set-off***);
 - (iii) in the case of Agreements in the form of the Retail Client Agreement (with Security Provisions) 2007 and the Retail Client Agreement (with Security Provisions) 2009, clause 15.12 (***Set-off***);
 - (iv) in the case of Agreements in the form of the Retail Client Agreement (with Security Provisions) 2011, clause 15.13 (***Set-off***);
 - (v) in the case of Agreements in the form of the Eligible Counterparty Agreement (with Security Provisions) 2007 and the Eligible Counterparty Agreement (with Security Provisions) 2009, clause 14.8 (***Set-off***);
 - (vi) in the case of Agreements in the form of the Eligible Counterparty Agreement (with Security Provisions) 2011, clause 14.10 (***Set-off***);
 - (vii) in the case of the Agreements in the form of One-Way Master Netting Agreement (1997 version), clause 5 (***Set-Off***);
 - (viii) in the case of the Agreements in the form of Two-Way Master Netting Agreement (1997 version), clause 5 (***Set-Off***);
 - (ix) any modified version of such clauses provided that it includes at least those parts of paragraph 2 of Part 1 (*Core Provisions*) of Annex 4 which are highlighted in yellow; and/or
- (b) the **"Margin Cash Set-off Clause"**, being:
 - (i) in the case of Agreements in the form of the Professional Client Agreement (with Security Provisions) 2007 and the Professional Client Agreement (with Security Provisions) 2009, clause 8.5 (***Set-off on default***);
 - (ii) in the case of Agreements in the form of the Professional Client Agreement (with Security Provisions) 2011, clause 8.4 (***Set-off upon default or termination***);
 - (iii) in the case of Agreements in the form of the Retail Client Agreement (with Security Provisions) 2007 and the Retail Client Agreement (with Security Provisions) 2009, clause 8.7 (***Set-off on default***),

- (iv) in the case of Agreements in the form of the Retail Client Agreement (with Security Provisions) 2011, clause 8.6 (***Set-off upon default or termination***);
- (v) in the case of Agreements in the form of the Eligible Counterparty Agreement (with Security Provisions) 2007 and the Eligible Counterparty Agreement (with Security Provisions) 2009, clause 7.5 (***Set-off on default***);
- (vi) in the case of Agreements in the form of the Eligible Counterparty Agreement (with Security Provisions) 2011, clause 7.4 (***Set-off upon default or termination***); or
- (vii) any modified version of such clauses provided that it includes at least those parts of paragraph 3 of Part 1 (*Core Provisions*) of Annex 4 which are highlighted in yellow.

"Insolvency Events of Default Clause" means (in each case subject to any selections or amendments required or permitted to be made on the face of the document in the relevant form referred to in Annex 1):

- (a) where the FOA Member's counterparty is not a natural person:
 - (i) in relation to the terms of the Long-Form Two-Way Clauses and the Long Form One-Way Clauses 2007, Clause 1 (b) to (d) (inclusive) and Clause 1 (h) and (i);
 - (ii) in relation to the terms of the Short Form One-Way Clauses and Short Form Two-Way Clauses, Clauses 1.1 (a) to (c) (inclusive);
 - (iii) in relation to the terms of the Master Netting Agreements, Clause 4.1 (i) to (iii) (inclusive);
 - (iv) in relation to the terms of the Eligible Counterparty Agreements, Clause 9.1 (a) to (c) (inclusive);
 - (v) in relation to the terms of the Retail Client Agreements and the Professional Client Agreements, Clause 10.1(a) to (c) (inclusive); or
 - (vi) provided that any modification of such clauses include at least those parts of paragraph 4(a) of Part 1 (*Core Provisions*) of Annex 4 which are highlighted in yellow; and
- (b) where the FOA Member's counterparty is a natural person:
 - (i) in relation to the terms of the Long-Form Two-Way Clauses and the Long Form One-Way Clauses 2007, Clause 1 (b) to (d) (inclusive) and Clause 1 (h) and (i);
 - (iii) in relation to the terms of the Master Netting Agreements, Clause 4.1 (i) and (iv);
 - (v) in relation to the terms of the Retail Client Agreements and the Professional Client Agreements, Clause 10.1(a) and (d); or

- (iv) any modified version of such clauses provided that it includes at least those parts of paragraph 4(b) of Part 1 (*Core Provisions*) of Annex 4 which are highlighted in yellow.

"ISDA/FOA Clearing Addendum" means the ISDA/FOA Client Cleared OTC Derivatives Addendum as first published on 11 June 2013, or any subsequent published versions up to the date of this opinion letter.

"Limited Recourse Provision" means Clause 8.1 of the FOA Clearing Module or Clause 15(a) of the ISDA/FOA Clearing Module.

"Long Form Two-Way Clauses" means each of the Long-Form Two-Way Clauses 2007, the Long-Form Two-Way Clauses 2009 and the Long-Form Two-Way Clauses 2011 (each as listed and defined at Annex 1).

"Master Netting Agreements" means each of the One-Way Master Netting Agreement 1997 and the Two-Way Master Netting Agreement 1997 (each as listed and defined at Annex 1).

"Netting Provisions" means the FOA Netting Provision, the Clearing Module Netting Provision and/or the Addendum Netting Provision, as the context may require.

"Non-Defaulting Party" includes, in relation to the One-Way Versions, the Party entitled to exercise rights under the FOA Netting Provision.

"Non-material Amendment" means an amendment having the effect of one of the amendments set out at Annex 4.

"One-Way Versions" means the Long Form One-Way Clauses 2007, the Short Form One-Way Clauses, the One-Way Master Netting Agreement 1997, and the FOA Netting Provision as published in the Retail Client Agreements and the Professional Client Agreements in each case in the form of an FOA Published Form Agreement.

"Party" means a party to an FOA Netting Agreement or a Clearing Agreement.

"Professional Client Agreements" means each of the Professional Client (with Security Provisions) Agreement 2007, the Professional Client (with Title Transfer Provisions) Agreement 2007, the Professional Client (with Security Provisions) Agreement 2009, the Professional Client (with Title Transfer Provisions) Agreement 2009, the Professional Client (with Security Provisions) Agreement 2011 or the Professional Client (with Title Transfer Provisions) Agreement 2011 (each as listed and defined at Annex 1).

"Rehypothecation Clause" means:

- (a) in the case of Agreements in the form of the Professional Client Agreement 2011, clause 8.13 (*Rehypothecation*);
- (b) in the case of Agreements in the form of the Retail Client Agreement 2011, clause 8.15 (*Rehypothecation*);
- (c) in the case of Agreements in the form of the Eligible Counterparty Agreement 2011, clause 7.13 (*Rehypothecation*); or

(h) any modified version of such clauses provided that it includes at least those parts of paragraph 4 of Part 3 (*Security Interest Provisions*) of Annex 4 which are highlighted in yellow.

"Retail Client Agreements" means each of the Retail Client (with Security Provisions) Agreement 2007, the Retail Client (with Title Transfer Provisions) Agreement 2007, the Retail Client (with Security Provisions) Agreement 2009, the Retail Client (with Title Transfer Provisions) Agreement 2009, the Retail Client (with Security Provisions) Agreement 2011 or the Retail Client (with Title Transfer Provisions) Agreement 2011 (each as listed and defined at Annex 1).

"Non-Cash Security Interest Provisions" means:

(a) the **"Non-Cash 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***); or
- (x) any modified version of such clauses provided that it includes at least those parts of paragraph 1 of Part 3 (*Security Interest Provisions*) of Annex 4 which are highlighted in yellow; and

(b) 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***); or
- (x) any modified version of such clauses provided that it includes at least those parts of paragraph 2 of Part 3 (*Security Interest Provisions*) of Annex 4 which are highlighted in yellow.

(c) the "Client Money Additional Security Clause" means:

- (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); or
- (x) any modified version of such clauses provided that it includes at least those parts of paragraph 3 of Part 3 (*Security Interest Provisions*) of Annex 4 which are highlighted in yellow.

"Set-Off Provisions" means the FOA Set-Off Provisions, the Clearing Module Set-Off Provision and/or the Addendum Set-Off Provision, as the context may require.

"Short Form One Way-Clauses" means each of the Short-Form One-Way Clauses 2007, the Short-Form One-Way Clauses 2009 and the Short-Form One-Way Clauses 2011 (each as listed and defined at Annex 1).

"Short Form Two Way-Clauses" means each of the Short-Form Two-Way Clauses 2007, the Short-Form Two-Way Clauses 2009 and the Short-Form Two-Way Clauses 2011 (each as listed and defined at Annex 1).

"Title Transfer Provisions" means (in each case subject to any selections or amendments required or permitted to be made on the face of the document in the relevant form referred to in Annex 1):

- (a) clauses 5 and 7.2 of the Title Transfer and Physical Collateral Annex to the Netting Module (2007 or 2011 Version); or
- (b) any modified version of such clauses provided that it includes at least those parts of paragraph 5 of Part 1 (*Core Provisions*) of Annex 4 which are highlighted in yellow.

"Two Way Clauses" means each of the Long-Form Two Way Clauses and the Short-Form Two Way Clauses.

ANNEX 4

PART 1 CORE PROVISIONS

For the purposes of the definition of Core Provisions in Annex 3, the wording highlighted in yellow below shall constitute the relevant Core Provision:

1. FOA Netting Provision:

- a) **"Liquidation date:** Subject to the following sub-clause, at any time following the occurrence of an Event of Default in relation to a party, then the other party (the "Non-Defaulting Party") may, by notice to the party in default (the "Defaulting Party"), specify a date (the "Liquidation Date") for the termination and liquidation of Netting Transactions in accordance with this clause.
- b) **Calculation of Liquidation Amount:** Upon the occurrence of a Liquidation Date:
 - i. neither party shall be obliged to make any further payments or deliveries under any Netting Transactions which would, but for this clause, have fallen due for performance on or after the Liquidation Date and such obligations shall be satisfied by settlement (whether by payment, set-off or otherwise) of the Liquidation Amount;
 - ii. the Non-Defaulting Party shall as soon as reasonably practicable determine (discounting if appropriate), in respect of each Netting Transaction referred to in paragraph (a), the total cost, loss or, as the case may be, gain, in each case expressed in the Base Currency specified by the Non-Defaulting Party as such in the Individually Agreed Terms Schedule as a result of the termination, pursuant to this Agreement, of each payment or delivery which would otherwise have been required to be made under such Netting Transaction; and
 - iii. the Non-Defaulting Party shall treat each such cost or loss to it as a positive amount and each such gain by it as a negative amount and aggregate all such amounts to produce a single, net positive or negative amount, denominated in the Non-Defaulting Party's Base Currency (the "Liquidation Amount").
- c) **Payer:** If the Liquidation Amount is a positive amount, the Defaulting Party shall pay it to the Non-Defaulting Party and if it is a negative amount, the Non-Defaulting Party shall pay it to the Defaulting Party. The Non-Defaulting Party shall notify the Defaulting Party of the Liquidation Amount, and by which Party it is payable, immediately after the calculation of such amount."

2. General Set-Off Clause:

"Set-off: Without prejudice to any other rights to which we may be entitled, we may at any time and without notice to you set off any amount (whether actual or

contingent, present or future) owed by you to us against any amount (whether actual or contingent, present or future) owed by us to you. For these purposes, we may ascribe a commercially reasonable value to any amount which is contingent or which for any other reason is unascertained."

3. Margin Cash Set-Off Clause:

"Set-off upon default or termination: If there is an Event of Default or this Agreement terminates, we may set off the balance of cash margin owed by us to you against your Obligations (as reasonably valued by us) as they become due and payable to us and we shall be obliged to pay to you (or entitled to claim from you, as appropriate) only the net balance after all Obligations have been taken into account. [The net amount, if any, payable between us following such set-off, shall take into account the Liquidation Amount payable under the Netting Module of this Agreement.]"

4. Insolvency Events of Default Clause:

a) In the case of a Counterparty that is not a natural person:

"The following shall constitute Events of Default:

- i. a party fails to make any payment when due under or to make delivery of any property when due under, or to observe or perform any other provision of this Agreement, [and such failure continues for [one/two] Business Day[s] after notice of non-performance has been given by the Non-Defaulting Party to the Defaulting Party];
- ii. a party commences a voluntary case or other procedure seeking or proposing liquidation, reorganisation, moratorium, or other similar relief with respect to itself or to its debts under any bankruptcy, insolvency, regulatory, or similar law or seeking the appointment of a trustee, receiver, liquidator, conservator, administrator, custodian, examiner or other similar official (each a "Custodian") of it or any substantial part of its assets, or takes any corporate action to authorise any of the foregoing;
- iii. an involuntary case or other procedure is commenced against a party seeking or proposing liquidation, reorganisation, or moratorium, or other similar relief with respect to it or its debts under any bankruptcy, insolvency, regulatory, or similar law or seeking the appointment of a Custodian of it or any substantial part of its assets."

b) In the case of a Counterparty that is a natural person:

"The following shall constitute Events of Default:

- i. a party fails to make any payment when due under or to make delivery of any property when due under, or to observe or perform any other provision of this Agreement, [and such failure continues for [one/two] Business Day[s] after notice of non-performance has been given by the Non-Defaulting Party to the Defaulting Party];

- ii. you die, become of unsound mind, are unable to pay your debts as they fall due or are bankrupt or insolvent, as defined under any bankruptcy or insolvency law applicable to you; or any indebtedness of yours is not paid on the due date therefore, or becomes capable at any time of being declared, due and payable under agreements or instruments evidencing such indebtedness before it would otherwise have been due and payable, or any suit, action or other proceedings relating to this Agreement are commenced for any execution, any attachment or garnishment, or distress against, or an encumbrancer takes possession of, the whole or any part of your property, undertaking or assets (tangible and intangible)."

5. Title Transfer Provisions:

- a) **"Default:** If a Liquidation Date is specified or deemed to occur as a result of an Event of Default, the Default Margin Amount as at that date *will* be deemed to be [a gain (if we are the Non-Defaulting Party) or a cost (if you are the Non-Defaulting Party)] [a gain by us] for the purposes of calculating the Liquidation Amount. For this purpose, "**Default Margin Amount**" means the amount, calculated in the Base Currency of the aggregate value as at the relevant Liquidation Date (as determined by us) of the Transferred Margin.
- b) **Clean title:** Each party agrees that all right, title and interest in and to any Acceptable Margin, Equivalent Margin, Equivalent Dividends or Interest which it Transfers to the other party shall vest in the recipient free and clear of any security interest, lien, claims, charges, encumbrance or other restriction. Notwithstanding the use of terms such as "Margin" which are used to reflect terminology used in the market for such transactions, nothing in these provisions is intended to create or does create in favour of either party a mortgage, charge, lien, pledge, encumbrance or other security interest in any Acceptable Margin, Equivalent Margin, Equivalent Dividends or Interest Transferred hereunder."

6. Clearing Module Netting Provision / Addendum Netting Provision:

- a) [Firm Trigger Event/CM Trigger Event]

Upon the occurrence of a [Firm Trigger Event/CM Trigger Event], the Client Transactions in the relevant Cleared Transaction Set will, except to the extent otherwise stated in the [Core Provisions of the] relevant Rule Set, be dealt with as set out below:

- (a) each Client Transaction in the relevant Cleared Transaction Set will automatically terminate [upon the occurrence of a Firm Trigger Event] [at the same time as the related CM/CCP Transaction is terminated or Transferred] and, following such termination, no further payments or deliveries in respect of such Client Transaction [as specified in the Confirm] or any default interest, howsoever described, on such payment obligations *will be required to be made* but without prejudice to the other provisions of the Clearing Agreement, and the amount

payable following such termination will be the Cleared Set Termination Amount determined pursuant to this [Clause 5.22 Section 8(b)(ii)];

(b) the value of each such terminated Client Transaction for the purposes of calculating the applicable Cleared Set Termination Amount and Aggregate Transaction Values will be equal to the relevant [Firm/CM]/CCP Transaction Value or the relevant part thereof;

(c) the applicable Cleared Set Termination Amount will be determined by Client on, or as soon as reasonably practicable after, (x) if there were no outstanding Client Transactions immediately prior to the occurrence of a [Firm/CM] Trigger Event, the date on which the [Firm/CM] Trigger Event occurred, or (y) if there were outstanding Client Transactions immediately prior to the occurrence of a [Firm/CM] Trigger Event, the day on which the relevant Client Transactions [had all been/were] terminated (in either case, provided that, if [Firm/Clearing Member] gives notice to Client requiring it to determine such amount and Client does not do so within two Business Days of such notice being effectively delivered, [Firm/Clearing Member] may determine the applicable Cleared Set Termination Amount) and, in either case, will be an amount equal to the sum, but without duplication, of (A) the Aggregate Transaction Value, (B) any amount which became payable, or which would have become payable but for a condition precedent not being satisfied, in respect of any such Client Transaction on or prior to the termination of such transactions but which remains unpaid at the time of such termination, together with interest on such amount in the same currency as such amount for the period from, and including, the original due date for payment to, but excluding, the date of termination, if applicable (expressed as a positive amount if such unpaid amount is due from [Firm/Clearing Member] to Client and as a negative amount if such unpaid amount is due from Client to [Firm/Clearing Member]), (C) an amount [(which may be zero)] equal to the Relevant Collateral Value in respect of the relevant Client Transactions and (D) any other amount attributable to the relevant Client Transactions under the Clearing Agreement[or any related Collateral Agreement], pro-rated where necessary if such amount can be partially [attributed] [attributable] to transactions other than the relevant Client Transactions, which was payable but unpaid at the time of termination and is not otherwise included [Clauses 5.2.2(c)(4) to 5.2.2(c)(C)] [Sections 8(b)(ii)(3)(A) to 8(b)(ii)(3)(C)], together with interest on such amount in the same currency as such amount for the period from, and including, the original due date for payment to, but excluding, the date of termination, if applicable (expressed as a positive amount if such unpaid amount is due from [Firm/Clearing Member] to Client and as a negative amount if such unpaid amount is due from Client to [Firm/Clearing Member]);

(d) if a Cleared Set Termination Amount is a positive number, it will be due from [Firm/Clearing Member] to Client and if a Cleared Set Termination Amount is a negative number, the absolute value of the

Cleared Set Termination Amount will be due from Client to [Firm/Clearing Member], and in each case will be payable in accordance with this [Module/Addendum].

b) CCP Default

Upon the occurrence of a CCP Default, the Client Transactions in the relevant Cleared Transaction Set will, except to the extent otherwise stated in the [Core Provisions of the relevant] Rule Set, be dealt with as set out below:

1. each Client Transaction in the relevant Cleared Transaction Set will automatically terminate at the same time as the related [Firm/CM]/CCP Transaction and following such termination no further payments or deliveries in respect of such Client Transaction[as specified in the Confirm] or any default interest, howsoever described, on such payment obligations will be required to be made but without prejudice to the other provisions of the Clearing Agreement, and the amount payable following such termination will be the Cleared Set Termination Amount determined pursuant to this [Clause 5.3 Section 8(c)];
2. the value of each such terminated Client Transaction for the purposes of calculating the applicable Cleared Set Termination Amount and Aggregate Transaction Values will be equal to the relevant [Firm/CM]/CCP Transaction Value or relevant part thereof;
3. the applicable Cleared Set Termination Amount will be determined by [Firm/Clearing Member] on, or as soon as reasonably practicable after, (x) if there were no outstanding Client Transactions immediately prior to the occurrence of a CCP Default, the date on which the CCP Default occurred, or (y) if there were outstanding Client Transactions immediately prior to the occurrence of a CCP Default, the day on which the relevant Client Transactions had all been terminated and, in either case, will be an amount equal to the sum, but without duplication, of (1) the Aggregate Transaction Value, (2) any amount which became payable, or which would have become payable but for a condition precedent not being satisfied, in respect of any such Client Transaction on or prior to the termination of such transactions but which remains unpaid at the time of such termination, together with interest on such amount in the same currency as such amount for the period from, and including, the original due date for payment to, but excluding, the date of termination, if applicable (expressed as a positive amount if such unpaid amount is due from [Firm/Clearing Member] to Client and as a negative amount if such unpaid amount is due from Client to [Firm/Clearing Member]), (3) an amount [(which may be zero)] equal to the Relevant Collateral Value in respect of the relevant Client Transactions and (4) any other amount attributable to the relevant Client Transactions under the Clearing Agreement[and any related Collateral Agreement], pro-rated where necessary if such amount can be partially [attributable] to transactions other than the relevant Client Transactions, which was payable but unpaid at the time of termination and is not otherwise included in [Clauses 5.3.3(1) to 5.3.3(3)] [Sections

8(c)(iii)(1) to 8(c)(iii)(3)], together with interest on such amount in the same currency as such amount for the period from, and including, the original due date for payment to, but excluding, the date of termination, if applicable (expressed as a positive amount if such unpaid amount is due from [Firm/Clearing Member] to Client and as a negative amount if such unpaid amount is due from Client to [Firm/Clearing member]);

4. if a Cleared Set Termination Amount is a positive number, it will be due from [Firm/Clearing Member] to Client and if a Cleared Set Termination Amount is a negative number, the absolute value of the Cleared Set Termination Amount will be due from Client to [Firm/Clearing Member], and in each case will be payable, in accordance with this [Module/Addendum].

c) Hierarchy of Events

[If Client Transactions are capable of being terminated pursuant to more than one [Clause/Section], then the [clause/section] in respect of which a party first exercises any right to terminate Client Transactions (or, the [clause/section] pursuant to which Client Transactions are otherwise terminated, if earlier) will prevail for the purposes of the relevant Client Transactions.]

Or

[If Client Transactions are capable of being terminated pursuant to more than one [Clause/Section], then the [clause/section] in respect of which a party first exercises any right to terminate Client Transactions (or, the [clause/section] pursuant to which Client Transactions are otherwise terminated, if earlier) will prevail for the purposes of the relevant Client Transactions.]

Or

[If Client Transactions are capable of being terminated pursuant to more than one [Clause/Section], then the [clause/section] in respect of which a party first exercises any right to terminate Client Transactions (or, the clause pursuant to which Client Transactions are otherwise terminated, if earlier) will prevail for the purposes of the relevant Client Transactions.]

d) Definitions

"Aggregate Transaction Value" means, in respect of the termination of Client Transactions of a Cleared Transaction Set, an amount (which may be positive or negative or zero) equal to the aggregate of the [Firm/CM]/CCP Transaction Values for all Client Transactions in the relevant Cleared Transaction Set or, if there is just one [Firm/CM]/CCP Transaction Value in respect of all such Client Transactions, an amount (which may be positive or negative or zero) equal to such [Firm/CM]/CCP Transaction Value.

"[Firm/CM]/CCP Transaction Value" means, in respect of a terminated Client Transaction or a group of terminated Client Transactions, an amount equal to the value that is determined in respect of or otherwise ascribed to the

related [Firm/CM]/CCP Transaction or group of related [Firm/CM]/CCP Transactions in accordance with the relevant Rule Set following a [Firm/CM] Trigger Event or CCP Default (to the extent such Rule Set contemplates such a value in the relevant circumstance). If the value determined in respect of or otherwise ascribed to the related [Firm/CM]/CCP Transaction(s) under the relevant Rule Set reflects a positive value for [Firm/Clearing Member] vis-à-vis the Agreed CCP, the value determined in respect of such terminated Client Transaction(s) will reflect a positive value for Client vis-à-vis [Firm/Clearing Member] (and will constitute a positive amount for any determination under this [Module/Addendum]) and, if the value determined in respect of the related terminated [Firm/CCP]/CCP Transaction(s), under the relevant Rule Set reflects a positive value for the relevant Agreed CCP vis-à-vis [Firm/Clearing Member], the value determined in respect of [or otherwise ascribed to] such terminated Client Transaction(s) will reflect a positive value for [Firm/Clearing Member] vis-à-vis Client (and will constitute a negative amount for any determination under this [Module/Addendum]). The value determined in respect of or otherwise ascribed to the related [Firm/CM]/CCP Transaction(s) under the relevant Rule Set may be equal to zero.

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

- (a) is attributable to such Client Transactions;
- (b) has been transferred by one party to the other in accordance with the [Agreement/Collateral Agreement or pursuant to Section 10(b)] and has not been returned at the time of such termination or otherwise applied or reduced in accordance with the terms of the [Agreement/relevant Collateral Agreement]; and
- (c) is not beneficially owned by, or subject to any encumbrances or any other interest of, the transferring party or of any third person.

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

7. Clearing Module Set-Off Provision

Firm may at any time and without notice to Client, set-off any Available Termination Amount against any amount (whether actual or contingent, present or future) owed by Firm to Client under the Clearing Agreement or otherwise. For these purposes, Firm

may ascribe a commercially reasonable value to any amount which is contingent or which for any other reason is unascertained.

This Clause shall apply to the exclusion of all Disapplied Set-off Provisions in so far as they relate to Client Transactions; provided that, nothing in this Clause shall prejudice or affect such Disapplied Set-off Provisions in so far as they relate to transactions other than Client Transactions under the Agreement.

8. Addendum Set-Off Provision

- (i) Any Available Termination Amount will, at the option of (A) Client, in the case of an Available Termination Amount due in respect of a CM Trigger Event and without prior notice to Clearing Member, be reduced by its set-off against any other termination amount payable by Clearing Member to Client under the Clearing Agreement at such time ("**CM Other Amounts**"), or (B) either party, in the case of an Available Termination Amount due in respect of a CCP Default, and without prior notice to the other party, be reduced by its set-off against any other termination amount payable by or to X (where "X" means, in the case of Section 8(i)(A), Client or, in the case of Section 8(i)(B), the party electing to set off) under the Clearing Agreement at such time ("**EP Other Amounts**" and together with CM Other Amounts, "**Other Amounts**"), provided that in the case of Section 8(i)(A) or Section 8(i)(B), at the time at which X elects to set off, where Clearing Member is X, a CM Trigger Event has not occurred and is not continuing or, where Client is X, an event of default, termination event or other similar event, howsoever described, in respect of Client in the Agreement, has not occurred and is not continuing. To the extent that any Other Amounts are so set off, those Other Amounts will be discharged promptly and in all respects. X will give notice to the other party promptly after effecting any set-off under Section 8(i)(A) or Section 8(i)(B).
- (ii) For the purposes of this Section 8(ii):
 - (A) all or part of the Available Termination Amount or the Other Amounts (or the relevant portion of such amounts) may be converted by X into the currency in which the other amount is denominated at the rate of exchange at which such party would be able, in good faith and using commercially reasonable procedures, to purchase the relevant amount of such currency;
 - (B) if any Other Amounts are unascertained, X may in good faith estimate such Other Amounts and set off in respect of the estimate, subject to the relevant party accounting to the other when such Other Amounts are ascertained; and
 - (C) a "termination amount" may, for the avoidance of doubt, be another Cleared Set Termination Amount or another termination amount due under the Agreement including, in either case, any such amount that has previously been reduced in part by set-off pursuant to this Section 8(e).

(iii) Nothing in this Section 8(e) will be effective to create a charge or other security interest. This Section 8(e) will be without prejudice and in addition to any right of set-off, offset, combination of accounts, lien, right of retention or withholding or similar right or requirement to which Client or Clearing Member is at any time otherwise entitled or subject (whether by operation of law, contract or otherwise), provided that, notwithstanding anything to the contrary in the Clearing Agreement or any related Collateral Agreement, no party may exercise any rights of set-off in respect of Excluded Termination Amounts.

PART 2
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", using synonyms, changing the order of the words) 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 for the purposes of correct cross-referencing or 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. A change which provides that the agreement applies to existing Transactions outstanding between the parties on the date the agreement takes effect.
4. Any change to the scope of the agreement clarifying that certain transactions (e.g., OTC derivatives governed by an ISDA Master Agreement) shall not be transactions or contracts for purposes of the agreement.
5. 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), where such addition 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, and such addition may be expressed to apply to one only of the Parties.¹
6. 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.¹
7. 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.
8. 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.

¹ Counsel to delete and if any such provisions would alter agreement so as to prevent opinion from applying.

9. 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).¹
10. In the case of any agreement incorporating the Two-Way Clauses, any change to the Insolvency Events of Default which has the effect of providing that when one or several specified events (which would constitute Insolvency Events of Default) occur in relation to one specified Party, such event shall not constitute an Event of Default under the agreement.
11. Any change to the agreement requiring the Non-Defaulting Party when exercising its rights under the FOA Netting Provision, Clearing Module Netting Provision, Addendum Netting Provision, FOA Set-off Provisions, Clearing Module Set-Off Provision, Addendum Set-Off Provision or Title Transfer Provisions (or other provisions) or making determinations to act in good faith and/or a commercially reasonable manner.
12. Any change modifying the currency of Liquidation Amount, Available Termination Amount, Cleared Set Termination Amount or of any amount relevant to the FOA Set-Off Provisions, Clearing Module Set-Off Provision, Addendum Set-Off Provision or Title Transfer Provisions.
13. Any change to the FOA Netting Provision, the FOA Set-Off Provisions, the Clearing Module Netting Provision, the Clearing Module Set-Off Provision, the Addendum Netting Provision or the Addendum Set-Off Provision clarifying that (i) any account subject to set-off must be owned by the same party or (ii) the Non-Defaulting Party must, or may, notify the other party of its exercise of rights under such provision or other provision.
14. Any change to the FOA Set-Off Provision, the Clearing Module Set-Off Provision or the Addendum Set-Off Provision (a) clarifying (i) at which time set-off may be exercised by a Party (with or without limitation), (ii) the amounts that may be set-off (with or without limitation, whether in relation to the agreement(s) under which such amounts arise or to the parties from which they are due), (iii) the scope of the provision where a Party acts as agent, (iv) the use of currency conversion in case of cross-currency set-off, (v) the application or disapplication of any grace period to set-off, (vi) the exercise of any lien, charge or power of sale against obligations owed by one Party to the other; or (b) allowing the combination of a Party's accounts.
15. Any change to the FOA Netting Provision adding or taking from the amounts to be taken into account for the calculation of the Liquidation Amount.
16. Any addition to any of the Core Provisions that leaves both the plain English sense and legal effect of such provision unchanged.
17. Any change converting the Core Provisions of the FOA Netting Provision to a 'one-way' form in the style of the One-Way Master Netting Agreement 1997 (in which only the default of one Party is contemplated).
18. Including multiple forms of netting provision in respect of Client Transactions, in any of the following combinations:

- more than one ISDA/FOA Clearing Addendum or Addendum Netting Provision
- more than one FOA Clearing Module or Clearing Module Netting Provision
- one or more ISDA/FOA Clearing Addendum or Addendum Netting Provision and one or more FOA Clearing Module or Clearing Module Netting Provision

provided that the agreement specifies unambiguously that only one such netting provision shall apply in respect of any given Client Transaction.

19. Including the Title Transfer Provisions together with provisions which create a security interest over cash and/or non-cash margin, provided that a provision in the form of, or with equivalent effect to, clauses 4.3 and/or 4.4 of the FOA Clearing Module is used or the agreement otherwise unambiguously specifies the circumstances in which the security interest or the Title Transfer provisions apply in respect of any given item of margin so that it is not possible for both the security interest and the Title Transfer Provisions to apply simultaneously to the same item of margin.
20. Adding to the definition of "Firm Trigger Event" or, as the case may be, "CM Trigger Event" (or defined terms equivalent thereto) any further events of default in relation to the Firm or, as the case may be, the Clearing Member, including those in the definition of Events of Default appearing in a FOA Published Form Agreement (including as modified in accordance with paragraph 5 above).
21. Any change to the Clearing Module Netting Provision or, as the case may be, the Addendum Netting Provision providing that any applicable Cleared Set Termination Amount will be determined by the Firm or, as the case may be, the Clearing Member in any event (even in the case of a Firm Trigger Event or, as the case may be, a CM Trigger Event).
22. Any change to the FOA Netting Provision providing that any applicable Liquidation Amount will be determined by the Defaulting Party.
23. Any addition to the Clearing Module Netting Provision or the Addendum Netting Provision providing that, if any Firm/CCP Transaction or CM/CCP Transaction and its related collateral or margin has been ported to another clearing member of the Agreed CCP Service following a Firm Trigger Event or CM Trigger Event, the Party in charge of the calculation of the Cleared Set Termination Amount can ascribe an appropriately reduced value (including zero) to the Client Transaction and related margin or collateral corresponding to the Firm/CCP Transaction or CM/CCP Transaction and its related collateral or margin so ported.

PART 3 **SECURITY INTEREST PROVISIONS**

1. Security Interest Clause:

"As a continuing security for the performance of the Secured Obligations under or pursuant to this Agreement, you grant to us, with full title guarantee, a first fixed security interest in all non-cash margin now or in the future provided by you to us or to our order or under our direction or control or that of a Market or otherwise standing to the credit of your account under this Agreement or otherwise held by us or our Associates or our nominees on your behalf."

2. Power of Sale Clause:

"If an Event of Default occurs, we may exercise the power to sell all or any part of the margin. The restrictions contained in Sections 93 and 103 of the Law of Property Act 1925 shall not apply to this Agreement or to any exercise by us of our rights to consolidate mortgages or our power of sale. We shall be entitled to apply the proceeds of sale or other disposal in paying the costs of such sale or other disposal and in or towards satisfaction of the Secured Obligations."

3. Client Money Additional Security Clause

"As a continuing security for the payment and discharge of the Secured Obligations you grant to us, with full title guarantee, a first fixed security interest in all your money that we may cease to treat as client money in accordance with the Client Money Rules. You agree that we shall be entitled to apply that money in or towards satisfaction of all or any part of the Secured Obligations which are due and payable to us but unpaid."

4. Rehypothecation Clause

"You agree and authorise us to borrow, lend, appropriate, dispose of or otherwise use for our own purposes, from time to time, all non-cash margin accepted by us from you and, to the extent that we do, we both acknowledge that the relevant non-cash margin will be transferred to a proprietary account belonging to us (or to any other account selected by us from time to time) by way of absolute transfer and such margin will become the absolute property of ours (or that of our transferee) free from any security interest under this Agreement and from any equity, right, title or interest of yours. Upon any such rehypothecation by us you will have a right against us for the delivery of property, cash, or securities of an identical type, nominal value, description and amount to the rehypothecated non-cash margin, which, upon being delivered back to you, will become subject to the provisions of this Agreement. We agree to credit to you, as soon as reasonably practicable following receipt by us, and as applicable, a sum of money or property equivalent to (and in the same currency as) the type and amount of income (including interest, dividends or other distributions whatsoever with respect to the non-cash margin) that would be received by you in respect of such non-cash margin assuming that such non-cash margin was not rehypothecated by us and was retained by you on the date on which such income was paid.".

ANNEX 5
NECESSARY OR DESIRABLE AMENDMENTS

1. Necessary amendments for FOA Members entering into an FOA Netting Agreement or, as the case may be, Clearing Agreement with an individual:

For the purposes of our opinion at paragraph 3.3 where it is given in relation to individuals, the following amendments to the Insolvency Events of Default Clause:

"The following shall constitute Events of Default:

[...]

ii. you die, become of unsound mind, are unable to pay your debts as they fall due or are bankrupt or insolvent, as defined under any bankruptcy or insolvency law applicable to you; or any indebtedness of yours is not paid on the due date therefore, or becomes capable at any time of being declared, due and payable under agreements or instruments evidencing such indebtedness before it would otherwise have been due and payable, or any suit, action or other proceedings relating to this Agreement are commenced for any execution, any attachment or garnishment, or distress against, or an encumbrancer takes possession of, the whole or any part of your property, undertaking or assets (tangible and intangible), or an application for ancillary relief relating to your property or an entitlement of a contract you are a party to is made in any matrimonial proceedings relating to you".

2. Desirable amendments for FOA members entering into an FOA Netting Agreement or, as the case may be, Clearing Agreement with the Reserve Bank of Australia (as defined in Schedule 7 (*Reserve Bank of Australia*)):

For the purposes of our opinion at paragraph 3.3 where it is given in relation to the Reserve Bank of Australia, the following amendments to the Insolvency Events of Default Clause:

"The following shall constitute Events of Default:

[...]

you are wound up, merged into another bank or your operations suspended or terminated by virtue of a new Act of Parliament or any other executive or legislative action."

3. Desirable amendments for FOA members entering into an FOA Netting Agreement or, as the case may be, Clearing Agreement with a Trustee of a Superannuation Fund (as defined in Schedule 9 (*Trustees of Superannuation Funds*)):

For the purposes of our opinion at paragraph 3.3 where it is given in relation to the Reserve Bank of Australia, the following amendments to the Insolvency Events of Default Clause:

"The following shall constitute Events of Default:

[...]

you are removed from your position, replaced, amalgamated into or with another superannuation fund or your operations are suspended or otherwise terminated by the Regulator pursuant to the Superannuation Industry (Supervision) Act 1993 or by virtue of a new Act of Parliament or any other executive or legislative action."