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ISDA Master Agreements governed by Australian law

CONTENTS

Part A	Introduction and summary	2
1	Introduction	2
1.1	Instructions	2
1.2	Scope	2
1.3	Summary of conclusions	2
1.4	Definitions	3
Part B	Netting opinion	3
1	<i>Close-out netting contract</i>	3
2	Close-out netting on the <i>external administration</i> of an <i>Australian company</i> and the insolvency regime applicable to an <i>Australian company</i>	3
3	Close-out netting under a <i>close-out netting contract</i> governed by Australian law	4
4	Collateral opinion	5
Part C	Assumptions and qualifications	6
1	Assumptions and qualifications	6
2	Benefit	6

Part A Introduction and summary

1 Introduction

1.1 Instructions

We refer to our legal opinion to the International Swaps and Derivatives Association, Inc. (“**ISDA**”) dated as of 28 February 2017 (“**ISDA Netting Opinion**”) in respect of, amongst other things, the enforceability of close-out netting against an *Australian company* under a Master Agreement (each defined in Part L of our ISDA Netting Opinion). You have asked us to consider whether our conclusions in the ISDA Netting Opinion with respect to a *Master Agreement* with an *Australian company* would apply where the *Master Agreement* is governed by Australian law.

We also refer to paragraph 4 of Part C (“Title Transfer Approach Pursuant to the Transfer Annex”) of our opinion dated 8 August 2017 to ISDA on the validity and enforceability under Australian Law of collateral arrangements under the ISDA Credit Support Documents (“**ISDA Collateral Opinion**”, and together with the Netting Opinion, “**ISDA Opinions**”). You have asked us to confirm whether our conclusion in that Part would apply if the *Master Agreement* and Transfer Annex were governed by Australian law.

We also refer in this memorandum to our memorandum dated 23 August 2018 entitled “Close-out netting: Summary of Australian Netting Legislation and Insolvency Proceedings” (“**Netting Summary**”), which summarises the relevant sections of the *Netting Act*.

1.2 Scope

In this memorandum, we advise on the laws of New South Wales, Victoria, Queensland, Western Australia, the Australian Capital Territory and the Commonwealth of Australia (each, an “**Australian Jurisdiction**”). This memorandum relates only to the laws of the Australian Jurisdictions and is given on the basis that it will be construed in accordance with the laws of New South Wales. We express no opinion about the laws of any jurisdiction other than the Australian Jurisdictions, commercial, accounting, financial, prudential or factual matters. However, the *Netting Act* and other statutes mentioned in the ISDA Netting Opinion are Acts of the Commonwealth Parliament applying throughout Australia.

Each part of this memorandum is subject to the rest of this memorandum, including the assumptions and qualifications.

1.3 Summary of conclusions

The conclusions in our ISDA Netting Opinion relating to the enforceability of the Netting Provisions (as defined in paragraph 1 of Part B below) of the *Master Agreement* on the *external administration* of an *Australian company* would apply where the *Master Agreement* is governed by Australian law. Those conclusions rely on section 14(2) of the *Netting Act*, which applies subject to the specified stay provisions and provided that neither section 14(4) nor section 14(5) of the *Netting Act* applies. The application of section 14(2) of the *Netting Act* to a *Master Agreement* that is governed by Australian law is described in paragraph 2 of Part B of this memorandum.

In addition, prior to the *external administration* of the *Australian company*, section 14(1) of the *Netting Act* is available to validate close-out netting against an *Australian company* where the *Master Agreement* is governed by Australian law. Section 14(1) of the *Netting Act* also applies subject to the specified stay provisions and provided that neither section 14(4) nor section 14(5) of the *Netting Act*

applies. The application of section 14(1) of the *Netting Act* to a *Master Agreement* that is governed by Australian law is described in paragraph 3 of Part B of this memorandum.

We also confirm that the Transfer Annex Conclusions (as defined in paragraph 4 of Part B below) in paragraph 4 of Part C of our Collateral Opinion would apply if the *Master Agreement* and Transfer Annex were governed by Australian law.

1.4 Definitions

Capitalised terms used but not defined in this memorandum have the meaning given to them in the ISDA Opinions, as the context requires, and italicised terms used but not defined in this memorandum have the meaning given in our Netting Summary, except where the context requires otherwise.

Part B Netting opinion

In this Part B we refer to the *Payment Systems and Netting Act 1998* (Cth) ("**Netting Act**"). The relevant sections of the *Netting Act* are summarised in our Netting Summary.

1 **Close-out netting contract**

The definition of "close-out netting contract" in the *Netting Act* is considered in paragraph 1.1 of Part B of our Netting Summary.

We conclude in our ISDA Netting Opinion that, in our view, each of the *1992 ISDA Master Agreement* and *2002 ISDA Master Agreement* is a "close-out netting contract" for the purposes of the *Netting Act*, provided that, in the case of the *1992 ISDA Master Agreement*, "Second Method" is chosen. Our reasons for this are set out in Part B.2 of our ISDA Netting Opinion. In our view, this conclusion applies equally where the *Master Agreement* is governed by Australian law.

2 **Close-out netting on the external administration of an Australian company and the insolvency regime applicable to an Australian company**

We confirm that the conclusion in our ISDA Netting Opinion that the termination rights and the rights flowing from an early termination which are given to the *solvent party* under either of the *Master Agreements* following the *external administration* of an *Australian company* are enforceable, subject to any specified stay provision which is applicable to the *Master Agreement*, would apply where the *Master Agreement* is governed by Australian law.

Section 14(2) of the *Netting Act*, which deals with the protection of close-out netting rights in circumstances where a person who is, or has been, a party to a *close-out netting contract* goes into *external administration*, is considered in detail in Part B of our Netting Summary. As noted in paragraph 1.11 of Part B of the Netting Summary, section 14(2) applies only if either:

- Australian law governs the *close-out netting contract*; or
- Australian law governs the *external administration*.

We assume for the purposes of this memorandum that the *Master Agreement* is governed by Australian law.

As considered in paragraph 1 of Part C of our Netting Summary,¹ the Insolvency Proceedings to which an *Australian company* may be subject under *Australian law* fall within the definition of “external administration” in the *Netting Act*.

Section 14(2)(c) of the *Netting Act* provides that where a person who is, or has been, a party to a *close-out netting contract* goes into *external administration*:

- (a) obligations under a *close-out netting contract* may be terminated;
- (b) termination values may be calculated; and
- (c) a net amount becomes payable,

in accordance with the *close-out netting contract*.²

Section 14(3) of the *Netting Act* provides that, relevantly, section 14(2) of the *Netting Act* applies subject to:

- (i) any specified stay provision which is applicable to the *Master Agreement*, as considered in paragraph 1.8 of Part B of our Netting Summary;³ and
- (ii) sections 14(4) and 14(5) of the *Netting Act*, as considered in paragraphs 1.4 and 1.5 of Part B of our Netting Summary.⁴

3 Close-out netting under a *close-out netting contract* governed by Australian law

Section 14(1) of the *Netting Act* contains an alternative statutory validation of close-out netting rights which is not dependent on a party to the contract being in *external administration*. In other words, if section 14(2) cannot apply because there is no *external administration*, then section 14(1) may still apply to validate the Netting Provisions provided its conditions are met.

The effect of section 14(1)(c) of the *Netting Act* is that, in respect of a *close-out netting contract*:

- obligations under a *close-out netting contract* may be terminated;
- termination values may be calculated; and
- a net amount become payable,

in accordance with the *close-out netting contract*.⁵

The requirements of section 14(1) of the *Netting Act* may be summarised for present purposes as follows:

¹ This is also considered in paragraph Part C and Part I of our ISDA Netting Opinion.

² The effect of section 14(2), including 14(2)(d) to (g), is considered further in paragraph 1.3 of Part B of our Netting Summary. Please also refer to paragraph 3.7 of Part D of our ISDA Netting Opinion in relation to section 14(2)(d), paragraph 4.3 of Part D of our ISDA Netting Opinion in relation to section 14(2)(e) and paragraph 2.4 of Part B of our ISDA Netting Opinion in relation to section 14(2)(g).

³ Please also refer to paragraphs 2.5 and 2.6 of Part B and Part J of our ISDA Netting Opinion.

⁴ Sections 14(4) and 14(5) of the *Netting Act* are also considered in paragraphs 3.5 and 3.6 of Part D of our ISDA Netting Opinion.

⁵ The effect of section 14(1) of the *Netting Act*, including section 14(1)(d) to (e), is considered further in paragraph 1.2 of Part B of our Netting Summary.

- (a) Australian law must govern the *Master Agreement*. As noted in paragraph 2 of Part B above, we assume for the purposes of this memorandum that the *Master Agreement* is governed by Australian law;
- (b) the *Master Agreement* must be entered into in circumstances that are within “Commonwealth constitutional reach” (as defined in the *Netting Act*). Please see paragraph 1.10 of Part B of our Netting Summary with respect to the circumstances which satisfy the requirement for a *close-out netting contract* being within the Commonwealth constitutional reach. In summary, these include that a “constitutional corporation” (as defined in the *Netting Act*) is a party to the contract;⁶ and
- (c) the *Master Agreement* must be a “*close-out netting contract*”. As considered in paragraph 2 of Part B above, we consider that each *Master Agreement* is a *close-out netting contract* for the purposes of the *Netting Act*, provided that in the case of the *1992 ISDA Master Agreement*, “Second Method” is chosen.

Sections 14(1)(d) and (e) of the *Netting Act* are intended to clarify that netting will not be affected by the interests of third parties in the obligations being netted.⁷

Section 14(3) of the *Netting Act* provides that, relevantly, section 14(1) of the *Netting Act* applies subject to:

- (i) any specified stay provision which is applicable to the *Master Agreement*, as considered in paragraph 1.8 of Part B of our Netting Summary;⁸ and
- (ii) sections 14(4) or 14(5) of the *Netting Act*, as considered in paragraphs 1.4 and 1.5 of Part B of our Netting Summary.⁹

4 Collateral opinion

We refer to the conclusions in Part C.4 of our Collateral Opinion relating to the inclusion of the Credit Support Balance under the *Transfer Annex* in the close-out netting calculations under the *Master Agreement* and enforceability of the *Transfer Annex* being a Transaction (“**Transfer Annex Conclusions**”). We confirm that the *Transfer Annex Conclusions* would apply if the *Master Agreement* and *Transfer Annex* were governed by Australian law.

⁶ A constitutional corporation is defined as a “foreign corporation” or a “trading or financial corporation formed within the limits of the Commonwealth”.

⁷ Sections 14(1)(d) to (e) of the *Netting Act* are considered further in paragraph 1.2 of Part B of our Netting Summary.

⁸ Please see footnote 3 above. We note that the sections referenced in the paragraphs referred to in footnote 3 are equally applicable to section 14(1) of the *Netting Act*.

⁹ Please see footnote 4 above. We note that the sections referenced in the paragraphs referred to in footnote 4 are equally applicable to section 14(1) of the *Netting Act*.

Part C Assumptions and qualifications

1 Assumptions and qualifications

This memorandum should be read in conjunction with our ISDA Opinions¹⁰ and our Netting Summary, and is subject to the assumptions and qualifications set out in our ISDA Opinions and our Netting Summary. This memorandum does not purport to update our ISDA Opinions or our Netting Summary, including to the extent they bring down the conclusions in our ISDA Opinions, and our opinion on the application of our ISDA Opinions is given as of the date of the Netting Summary.

This memorandum does not purport to be an analysis of all issues which could arise in entering the *Master Agreement*. For example, it does not deal with matters related to power and authority, use of power for a property purpose, general enforceability of contracts or corporate authorisations.

For the purposes of this memorandum, we also assume that any *external administration* of a party to the *Master Agreement* commences after 1 June 2016.

This memorandum is strictly limited to the matters stated in it and does not apply by implication to other matters.

2 Benefit

This memorandum is addressed to you personally and may not, without our prior written consent, be:

- (a) relied on by another person;
- (b) disclosed, except to members of AFMA, subscribers to the AFMA Guide to Australian OTC Transactions and persons who in the ordinary course of your or their business have access to your or their papers and records. Such disclosure is only made on the basis that such persons will make no further disclosure; or
- (c) filed with a government or other agency or quoted or referred to in a public document.

This memorandum is given in respect of the laws of the Australian Jurisdictions which are in force at 9.00am local time on the date of this memorandum and we are not obliged to update it.

Yours faithfully

A stylized, handwritten signature in black ink, consisting of the letters 'K' and 'W' joined together, with a large, sweeping flourish underneath.

¹⁰ As if references to English or New York law were to Australian law, where appropriate.