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1 June 2009

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ISDA Master Agreement: Enforceability of close-out netting under Australian law

This opinion updates our legal opinion to you dated 22 June 2007, regarding the enforceability of close-out netting under the *1992 ISDA Master Agreement* and *2002 ISDA Master Agreement* as well as close-out netting where a party operates as a multibranch party ("**Netting Opinion**"). The Netting Opinion and this opinion do not cover the *1987 ISDA Master Agreement*.

Italicised terms have the meanings given to them in the Netting Opinion unless we specify otherwise. Capitalised terms not otherwise defined have the meanings given to them in the *1992 ISDA Master Agreement* and the *2002 ISDA Master Agreement*, as the case may be.

This opinion should be read in conjunction with our Netting Opinion.

You have asked us to advise whether there has been any developments (such as legislation, court decisions, administrative rulings or official interpretations) since our 22 June 2007 opinion that could materially and adversely affect the conclusions reached in the Netting Opinion. The only such developments which affect the conclusions reached in the Netting Opinion are detailed below.

(a) **Financial System Legislation Amendment (Financial Claims Scheme and Other Measures) Act**

In October 2008, the *Financial System Legislation Amendment (Financial Claims Scheme and Other Measures) Act 2008* (Commonwealth) ("**FSLA**") took effect. A primary objective of the FSLA was to introduce a Financial Claims Scheme for depositors with Australian Authorised Deposit-taking Institutions ("**ADIs**") and policy holders with Australian insurance companies. In addition, the FSLA amended legislation including:

(i) the *Banking Act 1959* (Commonwealth) ("**Banking Act**"), to (amongst other things) effect adjustments to the framework for statutory management and recapitalisation of an ADI;

(ii) the *Insurance Act 1973* (Commonwealth) ("**Insurance Act**"), to (amongst other things) provide for the judicial management and recapitalisation of a general insurer; and

(iii) the *Life Insurance Act 1995* (Commonwealth) ("**Life Insurance Act**"), to (amongst other things) effect adjustments to the framework for judicial management and recapitalisation of life insurers.

The effect of these amendments on the conclusions in the Netting Opinion is set out below.

(A) ***Statutory management of an ADI***

Our Netting Opinion describes the insolvency proceeding of statutory management to which an ADI may become subject in paragraph [VI.1].

The grounds for the appointment of a statutory manager to take control of the ADI's business under the Banking Act have been extended. Section 13A(1)(b) now provides that the Australian Prudential Regulation Authority ("**APRA**") may appoint a statutory manager if APRA considers that, in the absence of external support:

(a) the ADI may become unable to meet its obligations; or

(b) the ADI may suspend payment; or

(c) it is likely that the ADI will be unable to carry on banking business in Australia consistently with the interests of its depositors and financial system stability in Australia.

As described in our Netting Opinion, the *Netting Act* applies to *Master Agreements* governed by New York or English law or another non-Australian law to which an *Australian company* is a party if the *Australian company* is subject of an *external administration* governed by an Australian law. The definition of *external administration* in the *Netting Act* has three paragraphs. Paragraphs (a) and (b) describe proceedings taken against individuals in Australia and proceedings taken under the Australian Corporations Act. Paragraph (c) includes other proceedings (including those specific to particular types of entities) where:

> "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."

We concluded in paragraph [II.2] of our Netting Opinion that the appointment of a statutory manager would fall within the definition of "external administration" in the *Netting Act*. Following the amendments, statutory management under the Banking Act falls within this paragraph of the definition of "external administration" under the *Netting Act* as described in our Netting Opinion if the statutory manager takes such control because the ADI is, or is likely to become, insolvent. However, if a statutory manager is appointed to an ADI for other reasons and the ADI is not insolvent, or likely to become insolvent, then the appointment would not fall within the definition of "external administration" and the Netting Act would not apply. A reference to "insolvency proceedings" in our Netting Opinion does not include such appointments.

(B) ***Effect of the appointment of a statutory manager to an ADI***

Prior to the amendments to the Banking Act made by the FSLA, section 15C of the Banking Act provided that:

> "The fact that an ADI statutory manager is in control of an ADI's business is not a ground for any other party to a contract to which the ADI is a party to deny any obligations under that contract, accelerate any debt owed under that contract or close out any transaction relating to a contract".

The FSLA replaced section 15C of the Banking Act with the following:

> "(1) This section applies if an ADI is party to a contract, whether the proper law of the contract is Australian law (including the law of a State or Territory) or law of a foreign country (including the law of part of a foreign country).
>
> (2) The fact that an ADI statutory manager is in control of the ADI's business does not allow the contract, or a party to the contract, to do any of the following:
>
> (a) deny any obligations under that contract;
>
> (b) accelerate any debt under that contract;
>
> (c) close out any transaction relating to that contract."[1,2]

The amendments to section 15C of the Banking Act apply to contracts made after the FSLA commenced on 18 October 2008.[3] We consider that this means that it does not apply to *Master Agreements* entered into before this date. Also, we do not consider that section 15C applies where the close-out right is based on some event other than the appointment of a statutory manager (such as a failure to pay) even if a statutory manager has been appointed.

The new section 15C(2) of the Banking Act is potentially inconsistent with section 14(2) of the *Netting Act* (as described in paragraph [I.5] of our Netting Opinion) to the extent that section 14(2) would permit a party to close-out a *Master Agreement* in accordance with its terms due to the appointment of a statutory manager to an ADI. A general principle of Australian statutory interpretation is that:

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1 Section 18 of Schedule 2 of the FSLA.

2 Similar provisions have been added to take effect if an ADI (or its non-operating holding company) is given directions by APRA or if the ADI is recapitalised by a statutory manager under new provisions now included in the Banking Act. However, as these are not insolvency proceedings, we do not comment on them in the Netting Opinion.

3 Section 19 of Schedule 2 of the FSLA.

> "if there is an inconsistency between one statute and a later statue the later statute prevails."[4]

This principle was not of concern in relation to the previous section 15C because it was enacted before the *Netting Act*. However, as the FSLA was enacted after the *Netting Act*, there is a risk that inconsistency between section 14(2) of the *Netting Act* and section 15C(2) of the Banking Act inserted by the FSLA will result in an implied repeal of section 14(2) of the *Netting Act* to the extent of that inconsistency.[5]

Under Australian law, for a court to find that a later statute operates so as to repeal the terms of an earlier statute:

> "[t]he court must…be satisfied that the two enactments are so inconsistent or repugnant that they cannot stand together, before they can from the language of the later imply the repeal of an express prior enactment, ie, the repeal must, if not express, flow from necessary implication" (**Goodwin v Phillips**[6], per Barton J)

For the reasons explained below, in our view, the amendments to section 15C of the Banking Act should not have the effect of impliedly repealing section 14(2) of the *Netting Act* to the extent of its inconsistency with section 15C of the Banking Act. This is because:

(i) first, section 15C(2) should be interpreted as having the same substantive effect as the previous form of section 15C such that the previous Section 15C should not be seen as being "re-enacted".

The Explanatory Memorandum, published by the Commonwealth Government when the Bill to enact the FSLA was introduced to Federal Parliament ("**Explanatory Memorandum**"), acknowledged that the Banking Act already specified in section 15C that the appointment of a statutory manager is not grounds for the counterparty to deny any obligations, accelerate any debt or close out on any transaction under a contract. The Explanatory Memorandum noted that section 15C was silent on whether the provision applied to contracts governed by Australian law or the law of a foreign country and that the amendments to section 15C would clarify this.[7] In other words, it seems from this that the purpose of the amendment to section 15C was to introduce the new section 15C(1), not to change the operation of the existing provision.

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4 **South-Eastern Drainage Board (SA) v Savings Bank of South Australia** (1939) 62 CLR 603

5 As noted in paragraph [I.6] of the Netting Opinion, section 14(4) of the *Netting Act* provides that sections 14(1) and 14(2) of that Act "have effect despite any other law". However, in **South-Eastern Drainage Board (SA) v Savings Bank of South Australia**, the Australian High Court held that similar provisions were not sufficient to protect against implied repeal by later inconsistent legislation. The policy behind these decisions is that one parliament cannot seek to derogate the competency of a later parliament to pass legislation.

6 (1908) 7 CLR 1, 10.

7 Sections 5.22 and 5.23.

In addition, section 15AC of the *Acts Interpretation Act 1901* (Commonwealth) states that where an Act has expressed an idea in a particular form of words and a later Act appears to have expressed the same idea in a different form of words for the purpose of using a clearer style, the ideas shall not be taken to be different merely because different forms of words were used. Section 15C(2) of the Banking Act (as amended) restates the words of the previous form of section 15C except that whereas the section previously provided that the appointment of a statutory manager "is not a ground" for any other party to deny any obligations, accelerate any debt or close out any transaction, section 15C(2) states that the appointment of a statutory manager "does not allow" a person or the contract to do those things[8]. In addition, the formatting of section 15C(2) and the former section 15C differs. In our view, these formatting and style amendments should not be regarded as substantively amending the effect of section 15C.

If there is no substantive change to the previous section 15C, then the revision of it should not be taken to be new legislation which impliedly repeals any part of the *Netting Act*.

(ii) Second, it is arguable that there the maxim *generalia specialibus non derogant* applies such that there is not the inconsistency needed to cause any implied repeal of section 14(2) of the *Netting Act*.

The maxim provides:

> "[w]here there is a general provision which, if applied in its entirety, would neutralise a special provision dealing with the same subject-matter, the special provision must be read as a proviso to the general provision and the general provision, so far as it is inconsistent with the special provision, must be deemed not to apply (**Goodwin v Phillips**[9] per O'Connor J).

In considering the interaction of section 15C(2) of the Banking Act and 14(2) of the *Netting Act*, the maxim may arguably operate on the basis that:

(a) the new section 15C(2) of the Banking Act is a broad provision that, amongst other things, provides that the appointment of a statutory manager does not allow a contract, or any other party to the contract, to close out any transaction relating to that contract; and

(b) section 14(2) of the *Netting Act* is a special provision that only operates to protect the enforceability of close-out netting under certain types of contracts.

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8 We believe that the added reference to "the contract" was intended to cover Automatic Early Termination provisions which do not require an act by either party in order to close-out obligations.

9 (1908) 7 CLR 1, 14.

> According to the maxim, section 14(2) of the *Netting Act* would operate as a proviso to section 15C(2) of the Banking Act. That is, section 15C(2) would be interpreted as prohibiting close-out netting under any contract to which an ADI is a party following the appointment of a statutory manager to that ADI, other than close-out netting under a *close-out netting contract* that is permitted under the *Netting Act*[10].

However, the view that section 14(2) of the *Netting Act* is not impliedly repealed to the extent of its inconsistency with the new section 15C of the Banking Act is not beyond doubt[11].

We note that, in addition to replacing section 15C of the Banking Act, the FSLA also replaced section 13A(3) of the Banking Act which deals with priority of depositors to the assets of an ADI which is unable to meet its obligations or suspends payment. The amendments provide for a priority for APRA for liabilities incurred in connection with the Financial Claims Scheme. Although this means that the varied section 13A(3) has been enacted after the *Netting Act*, we do not consider that it raises the question of implied repeal in the manner which the amendments to section 15C of the Banking Act does. This is because section 13A(3) of the Banking Act and section 14(2) of the *Netting Act* are capable of being read together, such that section 13A(3) should be interpreted as dealing with the distribution of the assets of an ADI after close-out netting has occurred. Accordingly, the level of "repugnancy" required to cause the *Netting Act* to be impliedly repealed by the new section 13A(3) is not present.

(C) ***Judicial management of a general insurer***

Amendments made to the Insurance Act enable a judicial manager to take control of a general insurer's property for the benefit of that general insurer's creditors. Previously, judicial management was a process available for life insurance companies, not general insurance companies. The process which has been added for general insurers is broadly modelled on the judicial management arrangements in place for life insurance companies, as summarised in paragraph [VI.1] of our Netting Opinion. As is the case with life insurance companies, a judicial manager may be appointed to a general insurer in a range of circumstances not limited to insolvency. We consider that judicial management under the Insurance Act falls within paragraph (c) of the definition of "external administration" under the *Netting Act* (as described in paragraph 1(a)(A) of this opinion) if the judicial manager takes such control because the general insurer is, or is likely to become, insolvent.

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[10] However, it is also arguable that the *generalia specialibus non derogant* maxim has no application in these circumstances on the basis that both section 14(2) of the *Netting Act* and section 15C(2) of the Banking Act are special provisions that deal with particular circumstances, namely, the appointment of a statutory manager and close-out netting.

[11] For example, we note that section 5.20 of the Explanatory Memorandum considered the effect of the amendments to section 15C of the Banking Act, and in that context expressly referred to the *Master Agreements* containing clauses that make the appointment of a statutory manager a defaulting event. This may indicate an intention to prevail over the *Netting Act.*

However, if the judicial manager is appointed to a general insurer for other reasons and the general insurer is not insolvent then the appointment would not fall within the definition of "external administration" and the *Netting Act* would not apply. A reference to "insolvency proceedings" in our Netting Opinion does not include such appointments. Please see our discussions in paragraph (D) below in relation to exercising termination rights because of the appointment of a judicial manager.

(D) ***Effect of appointment of a judicial manager to a general insurance company or a life insurance company***

The FSLA inserted the following new section 62V into the Insurance Act:

> "(1) This section applies if the general insurer is party to a contract, whether the proper law of the contract is Australian law (including the law of a State or Territory) or law of a foreign country (including the law of part of a foreign country).
>
> (2) The vesting in the judicial manager of the management of the general insurer does not allow the contract, or any other party to the contract, to do any of the following:
>
> (a) deny any obligations under that contract;
>
> (b) accelerate any debt under that contract;
>
> (c) close out any transaction relating to that contract."[12]

The FSLA also inserted the following new section 165B into the Life Insurance Act:

> "(1) This section applies if a life company is party to a contract, whether the proper law of the contract is Australian law (including the law of a State or Territory) or law of a foreign country (including the law of part of a foreign country).
>
> (2) The vesting in the judicial manager of the management of the company, or of part of the business of the company, does not allow the contract, or any other party to the contract, to do any of the following:
>
> (a) deny any obligations under that contract;
>
> (b) accelerate any debt under that contract;
>
> (c) close out any transaction relating to that contract."[13][14]

[12] Section 18 of Schedule 2 of the FSLA.
[13] Section 11 of Schedule 3 of the FSLA.

These sections are potentially inconsistent with section 14(2) of the *Netting Act* in the same way as is the new section 15C of the Banking Act. However, given that sections 62V of the Insurance Act and 165B of the Life Insurance Act are completely new provisions which were passed after the *Netting Act*, the first of our reasons for the new section 15C of the Banking Act not repealing section 14(2) of the *Netting Act* is not applicable. Accordingly, we believe that there is a significant risk that section 14(2) of the *Netting Act* may not apply to the extent that it permits the termination of obligations because of the appointment of a judicial manager to a general insurer or a life company contrary to the provisions of the amended Life Insurance Act or Insurance Act.

The new sections 62V of the Insurance Act and 165B of the Life Insurance Act apply to contracts made after the FSLA commenced on 18 October 2008.[15] We consider that this means that they do not apply to *Master Agreements* entered into before this date. Also, we do not consider that either section 62V or section 165B applies where the close-out right is based on some event other than the appointment of a judicial manager (such as a failure to pay) even if a judicial manager has been appointed.

(b) Cross-Border Insolvency Act

In July 2008, the *Cross-Border Insolvency Act 2008* (Commonwealth) took effect, giving effect to the Model Law on Cross-Border Insolvency of the United Nations Commission on International Trade Law (*Model Law*). The *Model Law* does not apply to ADIs, life companies or general insurance companies.[16] Accordingly, the *Cross-Border Insolvency Act* changes the insolvency proceedings to which foreign corporations could become subject in Australia. However, they do not affect the overall conclusions in our Netting Opinion.

(i) ***Letter of request***

As noted in paragraph [VI.2] of the Netting Opinion, sections 581(2)(a) and 581(2)(b) of the Corporations Act provide that if a letter of request is received from a court of a prescribed country, the *Australian court* must act in aid of, and be auxiliary to, that foreign court[17] and if the letter of request is received from a court of a non-prescribed country, the *Australian court* has discretion whether to assist.

Both sections 581(2)(a) and 581(2)(b) are (to varying degrees) inconsistent with Article 25 of the *Model Law*, which requires the appropriate *Australian courts* to cooperate to the maximum extent possible with foreign courts and foreign

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14 Similar provisions have been added to take effect if an insurance company or a life insurance company is recapitalised under new provisions now included in the Insurance Act or the Life Insurance Act. However, as these are not insolvency proceedings, we do not comment on them in the Netting Opinion.

15 Section 12 of Schedule 3 and section 12(2) of Schedule 4 of the FSLA.

16 Article 2 of the *Model Law*; section 9 of the Cross-Border Insolvency Act and regulation 4 of the *Cross-Border Insolvency Regulations 2008* (Commonwealth).

17 In addition to the countries referred to in footnote 29 of the Netting Opinion, the prescribed countries include Bailiwick of Jersey, Papua New Guinea, Malaysia and New Zealand.

insolvency officials in connection with cross-border insolvency matters. As a result, Article 25 of the *Model Law* prevails over sections 581(2)(a) and (b) to the extent of the inconsistency.[18]

(ii) ***Insolvency Proceedings under UNCITRAL Model Law***

The insolvency proceedings which a foreign company could become subject to under *Australian law* now include the proceedings under the *Model Law* described below.

Under Article 15 of the *Model Law*, a foreign insolvency official[19] can apply to an *Australian court* for recognition of the 'foreign proceeding' in respect of which that foreign insolvency official has been appointed.[20]

Such a foreign proceeding will be recognised as a matter of course by an *Australian court* if the application is properly lodged by the foreign insolvency official in the prescribed form and is accompanied by the prescribed evidence,[21] unless to do so would be 'manifestly contrary' to public policy under *Australian law*.[22] The *Australian court* must decide whether the foreign proceeding should be recognised as the primary (or 'main') or ancillary (or 'non-main') foreign proceeding.[23]

A foreign proceeding will be the foreign main proceeding if it is taking place in the jurisdiction in which the foreign company has the centre of its main interests.[24] A foreign proceeding will be a foreign non-main proceeding if it is taking place in a jurisdiction in which the foreign company has an 'establishment'.[25] It follows that, if a foreign proceeding is taking place in a jurisdiction other than the one in which the foreign company has either its centre of main interests or an establishment, that foreign proceeding is not capable of recognition by an *Australian court* under Article 15 of the *Model Law*.

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18 Section 22(1)(a) of the Cross-Border Insolvency Act.

19 The *Model Law* uses the expression 'foreign representative', defined as 'a person or body, including one appointed on an interim basis, authorised in a foreign proceeding to administer the reorganisation or the liquidation of the debtor's assets or affairs or to act as a representative of the foreign proceeding'.

20 A 'foreign proceeding' is a collective judicial or administrative insolvency proceeding (including interlocutory proceedings) in which the assets and affairs of the foreign company are subject to the control or supervision of a foreign court or other competent foreign authority: Article 2(a) of the *Model Law*.

21 Article 17(1) of the *Model Law*.

22 Article 6 of the *Model Law*.

23 Under Article 19 of the *Model Law*, until an application for recognition is determined by the appropriate *Australian court*, that court has broad powers to grant provisional relief upon the request of the foreign insolvency official where such relief is urgently needed to protect the assets of the foreign company or the interests of its creditors.

24 Article 17(2)(a) of the *Model Law*. Under Article 16(3) of the *Model Law*, a foreign company's centre of main interests, in the absence of evidence to the contrary, will be presumed to be the jurisdiction in which the foreign company's registered office is located.

25 Article 17(2)(b) of the *Model Law*. Under Article 2(f), an 'establishment' is defined as a 'place of operations where the debtor carries out a non-transitory economic activity with human means and goods or services'.

If a foreign proceeding is recognised as the foreign main proceeding, then (unless an Australian *insolvency proceeding* is taking place at the time the application for recognition is filed)[26]:

(i) the commencement or continuation of individual actions or individual proceedings concerning the foreign company's assets, rights, obligations or liabilities is automatically stayed;

(ii) execution against the foreign company's assets is automatically stayed;

(iii) the right to transfer, encumber or otherwise dispose of any assets of the foreign company is automatically suspended,

in each case to the same extent as if such a stay or suspension arose under the relevant applicable parts of Chapter 5[27] of the Corporations Act.[28] In our opinion, a stay or suspension under Article 20 of the *Model Law* would not affect the application of the *Netting Act* (to the extent that the *Netting Act* is applicable).[29]

If a foreign proceeding is recognised as a foreign non-main proceeding or the foreign main proceeding at a time when an Australian *insolvency proceeding* has commenced, then an *Australian court* may grant relief upon request from the foreign insolvency official where it is necessary to protect the assets of the foreign company or the interests of its creditors.[30] In these circumstances, the foreign insolvency official does not have the benefit of the automatic stays and suspension provided by Article 20 of the *Model Law* and any relief that may be granted by an *Australian court* must be consistent with the concurrent Australian *insolvency proceeding*.[31]

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[26] Article 29 of the *Model Law* provides guidance to an *Australian court* to address circumstances where a foreign company is concurrently subject to a recognised foreign proceeding and an Australian insolvency *proceeding*. Where an Australian *insolvency proceeding* is pending at the time of the application for the foreign proceeding to be recognised by an *Australian court*, the foreign proceeding (if recognised as the foreign main proceeding) does not benefit from the automatic stays and suspension provided by Article 20 of the *Model Law*.

[27] The *Model Law* does not apply to Part 5.2 (which concerns receivers and other controllers) or Part 5.4A (which concerns winding up effected by the court other than in insolvency) of the Corporations Act.

[28] Article 20 of the *Model Law* and section 16 of the Cross-Border Insolvency Act.

[29] This is because these rights under the *Model Law* are to apply to the same extent as if they arose under the Corporations Act. The Corporations Act would not preclude a close out of a transaction to which the Netting Act applies. In any case, the *Netting Act* is expressed to apply "despite any other law", and the Cross-Border Insolvency Act is expressed to prevail only over the Corporations Act and the Bankruptcy Act (from which may be implied an intention that it is not intended to prevail over the *Netting Act*).

[30] See Article 21(1) of the *Model Law*.

[31] Article 29 of the *Model Law*. This is consistent with the expressed intention of the drafters of the Cross-Border Insolvency Act that the Model Law is 'in addition to, and not in derogation of, section 601CL of the Corporations Act 2001'. As a result, any relief granted by an *Australian court* under the *Model Law* should not adversely affect the ability of a foreign liquidator to obtain an ancillary liquidation order under section 601CL of the Corporations Act.

Such relief may include entrusting the administration or realisation or distribution of all or part of the foreign company's assets located in Australia to the foreign insolvency official or another person designated by the court, provided the court is satisfied that the interests of Australian creditors are adequately protected.[32]

In addition, upon recognition of a foreign proceeding by an *Australian court*, the foreign insolvency official has standing to:

(a) intervene in any proceedings to which the debtor is a party, provided that other requirements under *Australian law* are met;[33]

(b) participate in Australian *insolvency proceedings* regarding the foreign company under Chapter 5 of the Corporations Act (other than under Parts 5.2 and 5.4A);[34]

(c) initiate certain actions in respect of voidable transactions under the Corporations Act,[35] provided that, in circumstances where the foreign proceeding is recognised as a foreign non-main proceeding, the *Australian court* is satisfied that the action relates to assets that, under *Australian law*, should be administered in that proceeding.[36]

The above rights of standing do not vest the foreign insolvency official with any specific powers or rights in respect of such proceedings; rather, the effect of these rights of standing are to place the foreign insolvency official in the same position as an Australian insolvency official would be in respect of an *Australian company* in the same circumstances.

Due to the effect of the *Model Law*, the definition of "*Australian company*" in the Netting Opinion should be qualified so as to cover a company that falls within the existing definition and which is either an ADI, a life company or a general insurance company or has its centre of main interests (for the purposes of the *Model Law*) in Australia. This is because, if a company is not an ADI, a life company or a general insurance company and its centre of main interests is not in Australia, laws including the law of the jurisdiction in which the foreign company has the centre of its main interests may be relevant.

(iii) ***Winding up under Part 5.7***

The Cross-Border Insolvency Act specifies that the *Model Law* prevails to the extent that it is inconsistent with Part 5.7 of the Corporations Act. As a consequence, if an *Australian court* has recognised the winding up of a foreign company under the laws of its home jurisdiction as being the 'foreign main

32 Article 21 of the *Model Law*.
33 Article 24 of the *Model Law*.
34 Article 12 of the *Model Law.*
35 See Section 588FE of the Corporations Act.
36 Article 23 of the *Model Law*.

proceeding' for the purposes of the *Model Law*,[37] then a winding up under Part 5.7 may be commenced only if the foreign company has assets located in Australia and the effect of the winding up will be restricted to those Australian assets.[38]

The *Model Law* also provides guidance to *Australian courts* that addresses concurrent foreign and Australian insolvency proceedings in circumstances where the foreign proceeding is subject to an application for recognition or has been recognised under *Australian law*.[39]

(c) Banking (Foreign Exchange) Regulations and other regulations

In paragraph [VIII.4(m)] of the Netting Opinion, we note that the Banking (Foreign Exchange) Regulations and other regulations in Australia restrict or prohibit payments, transactions and dealings with assets having a prescribed connection with certain countries or named individuals or entities subject to United Nations sanctions or associated with terrorism.

The countries, individuals and entities identified in footnote number 49 of the Netting Opinion as requiring approval should be replaced with "supporters of the former government of the Federal Republic of Yugoslavia, the government of Zimbabwe, certain North Korean persons and organisations, certain Burmese individuals and certain Iranian individuals".

(d) Extension of "decision period" for administration

In paragraph [VI.1] of the Netting Opinion, we summarise the insolvency proceeding of administration. The last sentence is:

> "By way of exception a person who holds a charge over the whole or substantially the whole of the *Australian company's* property can enforce that charge provided the charge is enforced in relation to all that property within 10 business days from the commencement of the administration.

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37 It is likely that a winding up of a foreign company that is taking place in the jurisdiction in which the foreign company's registered office is located will be recognised as the 'foreign main proceeding' for the purposes of the *Model Law*. This is because, under Article 17(2)(a) of the *Model Law*, a foreign insolvency proceeding to which the *Model Law* applies will be recognised by an Australian court as the 'foreign main proceeding' if it takes place in the jurisdiction in which the foreign company has its 'centre of main interests'. In the absence of evidence to the contrary, a company's centre of main interests will be presumed to be its registered office: see Article 16(3) of the *Model Law*.

38 Article 28 of the *Model Law*. The effect of the winding up under Part 5.7 may extend to assets of the foreign company other than those located in Australia but only to the extent necessary to implement any cooperation or coordination under the *Model Law* and only to the extent that (as a matter of Australian law) those other assets should be administered in the winding up.

39 See Articles 29 and 30 of the *Model Law*, which require any relief granted by an *Australian court* to a foreign insolvency official in respect of a recognised foreign proceeding to be consistent with the concurrent Australian *insolvency proceeding*.

Due to changes in the Australian Corporations Act, the reference to "10" should now be a reference to "13".

(e) Alteration of Section 2(a)(iii)

We have reconsidered the reference on page 14 of the Netting Opinion to it being crucial to our opinion that Section 2(a)(iii) of the *Master Agreement* not be altered. On the basis of the protections afforded by the Netting Act as set out in our opinion, we do not think that this reference needs to be included in our opinion any longer. However, it remains crucial to our opinion that Sections 6(c) and 6(e) not be altered.

The conclusions set out in this update opinion are based on, and subject to, the assumptions and qualifications set out in the Netting Opinion (including, without limitation, all of the matters set out in paragraph [VII] of the Netting Opinion).

Yours faithfully