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2014 ISDA Credit Derivatives Definitions

This advice is given on the 2014 ISDA Credit Derivatives Definitions (“**2014 Definitions**”) published by the International Swaps and Derivatives Association, Inc. (“**ISDA**”).

This advice replaces our earlier advice to you on credit derivatives documentation.

In this advice, we set out:

- the materials which we have reviewed;
- our opinion;
- the qualifications to which this opinion is subject;
- a brief discussion of the key changes made by the 2014 Definitions; and
- an outline of Australian legal and regulatory issues which arise in connection with the entry into credit derivative transactions.

1 **Materials reviewed**

- 1.1 For the purpose of providing this opinion, we have reviewed the 2014 Definitions. These are referred to in this letter as the “**Credit Derivative Definitions**”.
- 1.2 Terms used but not defined in this letter have the meaning given to them in the Credit Derivative Definitions.
- 1.3 In this letter, we make no comment on any ISDA Definitions or other ISDA documentation other than the Credit Derivative Definitions.

2 **Opinion¹**

2.1 If there is no connection between the Reference Entity and the Buyer (including by the Buyer having credit exposure on the Reference Entity) or between the Reference Entity and the Seller at any time then the Credit Derivative Definitions, of themselves, give rise to no regulatory or legal issues under the laws of the Australian Jurisdictions applicable to Credit Derivative Transactions² generally and which do not apply to other derivative transactions.

It may be that, in a particular factual scenario, a regulatory or legal issue will arise in connection with the Credit Derivative Definitions and a Credit Derivative Transaction, such as whether a particular event constitutes a Credit Event or a Succession Event or whether a particular obligation is an Obligation or a Deliverable Obligation. However, these issues are dependent on the particular facts surrounding the relevant Credit Derivative Transaction on which we cannot meaningfully comment in this letter.

2.2 In our opinion, a vanilla Credit Derivative Transaction entered into under the terms of the Credit Derivative Definitions:

- (a) would not constitute an insurance contract for the purposes of the common law definition of insurance in the Australian Jurisdictions unless there are relevant factual circumstances which result in the Credit Derivative Transaction being characterised as an indemnity for loss;
- (b) would constitute a derivative under the *Corporations Act 2001* (Cth) ("**Corporations Act**"); and
- (c) would not be invalid or unenforceable on the grounds that it constitutes a gambling contract under the gambling legislation of the Australian Jurisdictions.

Our reasoning for this is contained in paragraph 5.

2.3 If there is a connection between the Reference Entity and the Buyer or between the Reference Entity and the Seller then there are other regulatory and legal issues which could arise under the laws of the Australian Jurisdictions, particularly in connection with:

- (a) duties of confidentiality owed to the Reference Entity;
- (b) possession of inside information on the Reference Entity;
- (c) defamation of the Reference Entity;
- (d) dealings with the Reference Entity; and
- (e) insolvency of the Reference Entity if it is also the Seller.

These issues are briefly described in paragraph 6.

¹ This opinion remains subject to the detailed reasoning and the assumptions and qualifications contained in this letter.

² Please see paragraph 3.3 for a further explanation

3 Qualifications

- 3.1 In this opinion, we advise on the laws of the Commonwealth of Australia, New South Wales, Victoria, Queensland, Western Australia and the Australian Capital Territory ("**Australian Jurisdictions**"). We express no opinion about the laws of any other jurisdiction and the opinions expressed in this analysis are limited to the laws of the Australian Jurisdictions.
- 3.2 We make no comment on:
- (a) taxation issues, including in respect of stamp duty and goods and services tax;
 - (b) the enforceability of any particular Credit Derivative Transaction;
 - (c) issues which may arise in connection with ability to perform the settlement of any Credit Derivative Transactions in the manner set out in the Credit Derivative Definitions, such as the ability to Deliver particular Deliverable Obligations or issues arising in attempting to settle a transaction which has become subject to an illegality under the laws of the Australian Jurisdictions;
 - (d) the regulatory capital treatment of, or accounting issues in connection with, credit derivatives;
 - (e) amendments and supplements to the Credit Derivative Definitions for the purposes of this advice. Please note that the Credit Derivative Definitions are drafted on the assumption that the parties have entered into a 2002 ISDA Master Agreement. We make no comment on any master agreements in this opinion;
 - (f) legal or regulatory matters which arise in connection with derivatives generally. For example, we do not comment on the requirement to hold an Australian Financial Services Licence in order to "deal" in derivatives under the Corporations Act or the ability to bind a Calculation Agent which is not a party to the Credit Derivative Transaction or any obligation to report or clear Credit Derivative Transactions; or
 - (g) the commercial effect of the Credit Derivative Definitions or whether the terms of the Credit Derivative Definitions reflect current Australian or international market conventions or practice. For example, we make no comment on the appropriateness or suitability of any formula, election, timing or quotation conventions contained in the Credit Derivative Definitions. We assume that every market participant will make its own independent assessment as to whether they will adopt the Credit Derivative Definitions.
- 3.3 This opinion is given in respect of the Credit Derivative Definitions when used only to document vanilla Credit Derivative Transactions, meaning single name auction-settled, cash-settled or physically-settled credit default swaps. The Credit Derivative Definitions do not address first-to-default credit swaps, portfolio credit default swaps or total return swaps, although they can be adapted for this purpose. However, if the Credit Derivative Definitions are adapted appropriately,³ then our opinion contained in paragraph 2.1 should also be applicable to the Credit Derivative Definitions in these circumstances. In addition, in these circumstances, the principles underlying our opinion set out in paragraph 2.2 would be applicable, but it would be necessary to review the terms of the relevant Credit Derivative Transaction before the manner of application of those principles to that type of transaction could be confirmed. However, this opinion has no application to transactions

³ With drafting that ensures that all provisions are effective and in accordance with the parties' commercial intentions.

which involve a financial product that is linked to a Credit Derivative Transaction, such as synthetic credit-linked notes or synthetic collateralised debt obligations.

- 3.4 This opinion is of general legal advice only. This analysis is not intended to be an opinion upon which market participants can rely in actual situations. This is because the application of the Credit Derivative Definitions to a particular transaction ultimately depends on the terms of the transaction and the relevant facts. Accordingly, while every care has been taken in preparing this analysis, King & Wood Mallesons does not accept responsibility for any losses suffered or liabilities incurred arising from use of this analysis in respect of a particular transaction.

4 Summary of key changes made in the 2014 Definitions

Overview

- 4.1 The 2014 Definitions have refined, simplified in part, and amended the way in which Credit Derivative Transactions ("**Transactions**") operate.
- 4.2 Parties to existing or legacy Transactions and future Transactions entered into on or before the commencement date of the 2014 Definitions, (which is expected to be 20 September 2014), which incorporate the 2003 Credit Derivative Definitions, as amended and supplemented (the "**2003 Definitions**") can also incorporate the 2014 Definitions into the terms of these Transactions by adhering to a protocol which will be published by ISDA.⁴
- 4.3 From 20 September 2014, parties can also incorporate the 2014 Definitions into their Transactions by expressly stating in the relevant Confirmation that the 2014 Definitions apply.
- 4.4 The 2014 Definitions have introduced seven key amendments to the 2003 Definitions:
- (a) adds Governmental Intervention as a new Credit Event;
 - (b) creates a new concept of Financial Reference Entity Terms;
 - (c) creates a new concept of Asset Package Delivery for Physical Settlement;
 - (d) creates a new concept of Standard Reference Obligation;
 - (e) changes the provisions for determining a Successor;
 - (f) amends the guarantee provisions; and
 - (g) clarifies the impact of a currency redenomination on certain Credit Events.

Governmental Intervention Credit Event

- 4.5 The 2014 Definitions implement a new Credit Event for Transactions, referred to as Governmental Intervention.⁵ Together with the new concept of Asset Package Delivery, this is arguably the most fundamental change as compared with the existing 2003 Definitions.

⁴ To be confirmed.

⁵ Section 4.8 of the 2014 Definitions.

- 4.6 The rationale for the inclusion of this new Credit Event is to reflect changes occurring in markets to deal with the failure of institutions, including the introduction of “bail-in” legislation in many countries, particularly within Europe. This Credit Event has been included to ensure that the 2014 Definitions adequately cater to these new legislative developments and to reflect experience of operation of the 2003 Definitions during the global financial crisis and the inadequacies of the existing Restructuring Credit Event in such circumstances.
- 4.7 Governmental Intervention will apply as a Credit Event to a Transaction if it is elected by the parties as a Credit Event in the relevant Confirmation. A Governmental Intervention Credit Event will occur following certain events with respect to one or more Obligations as a result of action taken or announcements made by a Governmental Authority due to the imposition of a law or regulation relating to restructuring and resolution. These events, in part, are similar to those set out in the Restructuring Credit Event and include:
- (a) any event which affects creditors’ rights so as to cause:
 - (i) a reduction in the rate or amount or accrual of interest, principal or premium payable (including due to a redenomination);
 - (ii) a postponement or deferral of dates for either the payment or accrual of interest or payment of principal or premium; or
 - (iii) a change in the ranking in priority of payment of any Obligation, causing the Subordination of such Obligation to any other Obligation;
 - (b) an expropriation, transfer or other event which mandatorily changes the beneficial holder of the Obligation;
 - (c) a mandatory cancellation, conversion or exchange; or
 - (d) any event which has an analogous effect to any of the events specified in (a) to (c) above.
- 4.8 In contrast to the definition of a Restructuring Credit Event, it does not matter if the event is expressly catered for within the terms of the Obligation. Also, unlike the Restructuring Credit Event, there is no requirement for there to be a deterioration in creditworthiness or financial condition of the Reference Entity following the occurrence of the event.
- 4.9 The usual rules for settlement apply following the occurrence of a Governmental Credit Event, provided that, if Physical Settlement, Financial Reference Entity Terms and Governmental Intervention each apply to a Transaction and a Governmental Intervention Credit Event occurs, Asset Package Delivery will apply (see paragraphs 4.10 to 4.22 below).

Financial Reference Entity Terms

- 4.10 The 2014 Definitions include a new concept of “Financial Reference Entity Terms” which are to apply only where those terms are specified as applicable in the relevant Confirmation for a Transaction. ISDA also intends that these terms may be incorporated into Transactions by way of a new “Financial Corporate” Transaction Type which will be added to the existing Physical Settlement Matrix available on ISDA’s website.
- 4.11 By specifying in a Confirmation that “Financial Reference Entity Terms” apply to a Transaction certain other provisions of the 2014 Definitions will be activated. These include:

- (a) the application of Asset Package Delivery following the occurrence of a Governmental Intervention Credit Event or a Restructuring Credit Event where Physical Settlement applies⁶ (see paragraphs 4.15 to 4.22 below);
- (b) where the Transaction is determined to be a Senior Transaction,⁷ excluding Subordinated Obligations from the determination of whether a Governmental Intervention Credit Event or a Restructuring Credit Event has occurred;⁸
- (c) where the Transaction is determined to be a Subordinated Transaction,⁹ excluding Further Subordinated Obligations from the determination of whether a Governmental Intervention Credit Event or a Restructuring Credit Event has occurred;¹⁰
- (d) clarifying that provisions which would allow the Reference Entity's obligations to be altered, discharged, released or suspended in circumstances which would constitute a Governmental Intervention will not prevent an obligation from being a Deliverable Obligation or a Qualifying Guarantee;¹¹ and
- (e) applying the provisions for determining Successors separately to Senior and Subordinated Obligations¹² (see paragraphs 4.26 to 4.30 below).

- 4.12 These amendments are designed to "ring-fence" Subordinated Transactions from Senior Transactions in certain circumstances.
- 4.13 For a Senior Transaction, only Senior Obligations may be used to determine the occurrence of a Governmental Intervention Credit Event or Restructuring Credit Event. Only if Subordinated Obligations or Further Subordinated Obligations fulfil the "Not Subordinated Characteristic" may they be used in determining the occurrence of other Credit Events or be Deliverable Obligations. In addition, only Senior Obligations may be included in determining a Successor for a Senior Transaction.
- 4.14 In contrast, for a Subordinated Transaction, both Senior and Subordinated Obligations may be used to determine the occurrence of a Governmental Intervention Credit Event or Restructuring Credit Event, but Further Subordinated Obligations may not. In addition both Senior and Subordinated Obligations may be used in determining the occurrence of other Credit Events or be Deliverable Obligations, but Further Subordinated Obligations must fulfil the "Not Subordinated Characteristic" in order to do so. Only Subordinated Obligations may be used to determine a Successor for a Subordinated Transaction unless there are no Subordinated Relevant Obligations, in which case Senior Obligations may be used.

⁶ Section 8.9(a) of the 2014 Definitions

⁷ As set out in Section 2.22 of the 2014 Definitions, a Senior Transaction means a Credit Derivative Transaction for which (a) the Reference Obligation or Prior Reference Obligation is an obligation which is not Subordinated to any unsubordinated Borrowed Money obligation of the Reference Entity, or (b) there is no Reference Obligation or Prior Reference Obligation.

⁸ Section 3.6(b) of the 2014 Definitions

⁹ As set out in Section 2.24 of the 2014 Definitions, a Subordinated Transaction means a Credit Derivative Transaction for which the Reference Obligation or Prior Reference Obligation is an obligation which is Subordinated to any unsubordinated Borrowed Money obligation of the Reference Entity or would be Subordinated if any unsubordinated Borrowed Money obligation existed.

¹⁰ Section 3.6(c) of the 2014 Definitions

¹¹ Sections 3.15(f) and 3.21 of the 2014 Definitions

¹² Section 2.2(f)(iii) and (iv) of the 2014 Definitions

Asset Package Delivery

- 4.15 Asset Package Delivery is a new concept in the 2014 Definitions which modifies Physical Settlement for Transactions:
- (a) specifying that “Financial Reference Entity Terms” apply (a “**Financial Entity Transaction**”); or
 - (b) referencing Sovereign Reference Entities (a “**Sovereign Transaction**”).
- 4.16 The inclusion of the concept of Asset Package Delivery is intended to provide that any obligation which was previously a Deliverable Obligation will remain a Deliverable Obligation even if, following the occurrence of certain Credit Events, that obligation fails to satisfy the relevant Deliverable Obligation Characteristics. Similarly, it also provides that if such an obligation has been exchanged or converted into other Assets,¹³ those Assets will be permitted to be Delivered to Seller and will be treated as if they had the same currency, Outstanding Principal Balance or Due and Payable Amount, as applicable, as the Prior Deliverable Obligation or Package Observable Bond to which the Assets correspond.
- 4.17 Following the occurrence of an Asset Package Credit Event,¹⁴ the obligations of the Buyer to Deliver Deliverable Obligations to Seller on or prior to the Physical Settlement Date will be satisfied by:
- (a) in the case of a Financial Entity Transaction, Buyer Delivering any Prior Deliverable Obligation or Delivering a relevant Asset Package; or
 - (b) in the case of a Sovereign Transaction, Buyer Delivering any Package Observable Bond or Delivering a relevant Asset Package.¹⁵
- 4.18 A Prior Deliverable Obligation is either an obligation of the applicable Reference Entity which has been the subject of a Governmental Intervention and which fell within the definition of Deliverable Obligation immediately prior to the occurrence of such Credit Event, or the Reference Obligation the subject of the Restructuring Credit Event.¹⁶ A Package Observable Bond is an obligation of a Sovereign Reference Entity which is listed on ISDA’s website from time to time and which fell within the definition of Deliverable Obligation immediately prior to the occurrence of the Restructuring Credit Event.¹⁷
- 4.19 An Asset Package Credit Event need not be the Credit Event which triggered settlement of the Transaction, but it must have occurred on, or following, the Credit Event Backstop Date.
- 4.20 If the Prior Deliverable Obligation or Package Observable Bond, as applicable, is converted into different Assets (in whole or in part) then the 2014 Definitions provide a mechanism for determining which of those new Assets, referred to as an “Asset Package”, may be Delivered by Buyer to Seller. Buyer has an obligation to notify Seller of its intent to Deliver an Asset Package to Seller, specifying

¹³ The definition of Assets as set out in Section 8.7 of the 2014 Definitions includes obligations, equities, amounts of cash, securities, fees, rights and/or other assets, whether tangible or otherwise and whether issued, incurred, paid or provided for by the Reference Entity or a third party.

¹⁴ As set out in Section 8.9 of the 2014 Definitions, an Asset Package Credit Event means, (a) for a Financial Entity Transaction, a Governmental Intervention or a Restructuring, provided that such Restructuring is not also a Governmental Intervention; and (b) for a Sovereign Transaction, a Restructuring.

¹⁵ Sections 3.2(d) and 8.12(b) of the 2014 Definitions

¹⁶ Section 3.3 of the 2014 Definitions

¹⁷ Section 3.4 of the 2014 Definitions

the Assets which it intends to Deliver in lieu of the Prior Deliverable Obligation or Package Observable Bond, as applicable.

- 4.21 The 2014 Definitions provide that the Asset Package will be determined by reference to all of the Assets in the proportion received or retained by a holder of the Prior Deliverable Obligation or Package Observable Bond, as applicable. If the holder is offered a choice or combination of different Assets, the Asset Package will be deemed to be the package of Assets for which the greatest amount of principal has been or will be exchanged or converted, as determined by the Calculation Agent. This is intended to avoid the conversion of obligations into undesirable Assets in order to obtain the greatest economic gain under their Transaction. However, if the holder is offered, receives or retains nothing, the Asset Package will be deemed to be zero.¹⁸
- 4.22 To satisfy its obligations to deliver a Prior Deliverable Obligation or Package Observable Bond, as applicable, the Buyer may Deliver each Asset in the Asset Package to Seller in the correct proportion, or if the Asset is non-transferable, the Asset will be deemed to be an amount of cash equal to the market value of the Asset, calculated by reference to a valuation mechanism determined by the Credit Derivatives Determination Committee. If the Asset Package is deemed to be zero, then the Prior Deliverable Obligation or Package Observable Bond, as applicable, will be deemed to have been Delivered to Seller to satisfy the Physical Settlement requirements.

Standard Reference Obligation

- 4.23 The 2014 Definitions introduce a new concept of a Standard Reference Obligation for frequently traded Reference Entities. The ability to specify a Standard Reference Obligation as published by ISDA permits further standardisation of Credit Derivatives Transactions. The Standard Reference Obligation relating to the Reference Entity will apply to a Transaction if it is elected by the parties in its Confirmation. If the parties specify a Reference Obligation in the Confirmation then that will be a Non-Standard Reference Obligation.
- 4.24 The rationale for the inclusion of this new concept is to facilitate the standardisation of Credit Derivative Transactions for clearing, exchange trading and auction settlement. ISDA have noted that under the 2003 Definitions, Credit Derivatives Transactions are entered into with respect to the same Reference Entity, specifying a senior Obligation of that Reference Entity, but which have different economic effects due to the fact that they either do not specify the same Reference Obligation, or because it is the Calculation Agent who determines any Substitute Reference Obligation, not an industry body.
- 4.25 Under the 2014 Definitions, ISDA will publish a list of Standard Reference Obligations on its website and will update the list from time to time to cater for redemptions and substitutions. The Reference Obligation for a Transaction may be the Standard Reference Obligation, the Non-Standard Reference Obligation, or in circumstances where a Standard Reference Obligation has not yet been published by ISDA, the Non-Standard Reference Obligation until a Standard Reference Obligation is published, and then the Standard Reference Obligation.¹⁹ As noted above, the Non-Standard Reference Obligation is an obligation of the Reference Entity (or other entity) chosen by the parties and specified in the Confirmation for the Transaction. Substitution provisions are provided for in the 2014 Definitions in respect of Non-Standard Reference Obligations.

Successor provisions

¹⁸ Section 8.5 of the 2014 Definitions

¹⁹ Section 2.5 of the 2014 Definitions

- 4.26 The 2014 Definitions set out four key amendments to the Successor provisions – the introduction of the concept of a “Universal Successor”, elimination of the need for a Succession Event for corporates, clarification of Sovereign Successions and introduction of a “Joint Potential Successors” concept.
- 4.27 The new concept of a Universal Successor introduced by the 2014 Definitions provides that if one entity assumes all of the obligations of a non-Sovereign Reference Entity at any time from 1 January 2014 (including prior to the 90 calendar day look-back period) that entity will be the sole Successor.²⁰ The rationale behind this amendment is to provide certainty and clarity regarding a succession when an entity has assumed all of the obligations of the previous Reference Entity.
- 4.28 In order for an entity to be a Successor the Reference Entity must have had at least one Bond or Loan outstanding immediately prior to the Succession Date.²¹ This is consistent with the 2003 Definitions. However, the 2014 Definitions have acknowledged that in practical operation, a succession often occurs by way of a series of transactions or steps. The introduction of the concept of a “Steps Plan” provides that if there is a plan evidenced by Eligible Information contemplating that there will be a series of successions to some or all of the Relevant Obligations of the Reference Entity, by one or more entities, then these successions will be looked at collectively in order to determine who may be a Successor.²² The Succession Date will be the legally effective date of the final succession contemplated by the Steps Plan.
- 4.29 The 2014 Definitions have also clarified that in relation to Sovereigns, following the occurrence of a Sovereign Successor Event, which broadly includes existing concepts from the 2003 Definitions, including an “annexation, unification, secession, partition, dissolution, consolidation or reconstitution”,²³ the standard Succession provisions will apply. However, there is no concept of a Universal Successor applicable to Sovereigns.
- 4.30 In addition, the 2014 Definitions include a new concept of “Joint Potential Successors” which provides that in circumstances where two or more entities jointly succeed to one or more Reference Obligations, either directly, or as provider of a Qualifying Guarantee, in order to determine the relevant Successor pursuant to the calculations set out in Section 2.2(a), the calculations will be made separately for each succeeding entity as if the joint obligations were several obligations divided equally between the Joint Potential Successors.²⁴
- 4.31 More minor amendments made to the Successor provisions include:
- (a) replacing references to “indirect” succession to relevant obligations with references to succession as provider of a “Relevant Guarantee”; and
 - (b) introducing clarity around the Succession Date, not only with respect to a “Steps Plan” as described in paragraph 4.28 above, but also more generally.

Qualifying Guarantee provisions

- 4.32 The 2014 Definitions have amended and clarified the Qualifying Guarantee provisions. The definition of Qualifying Guarantee has been expanded to specify a list of circumstances or events in

²⁰ Section 2.2(a)(vii) of the 2014 Definitions

²¹ See definition of Relevant Obligation and Section 2.2(c)(ii) of the 2014 Definitions

²² Section 2.2(i) of the 2014 Definitions

²³ Section 2.2(e) of the 2014 Definitions

²⁴ Section 2.2(h) of the 2014 Definitions

which the principal payment obligations of the Reference Entity may be discharged, released, reduced, assigned or otherwise altered, but that will not cause the guarantee to fail the test of inclusion as a Qualifying Guarantee which includes:

- (a) by way of payment;
- (b) pursuant to new concepts of Permitted Transfer²⁵ and Fixed Cap,²⁶
- (c) due to operation of law;
- (d) due to provisions anticipating a Governmental Intervention in circumstances where “Financial Reference Entity Terms” has been specified as applicable in the Confirmation; or
- (e) due to the imposition of Solvency Capital Provisions if “Subordinated European Insurance Terms” has been specified as applicable in the Confirmation.

4.33 This widens the previous position under the 2003 Definitions under which only a discharge or reduction in principal payment obligations by way of payment would not cause the guarantee to fail the test of inclusion as a Qualifying Guarantee.

4.34 In addition, ISDA have made various other technical amendments to the definition of Qualifying Guarantee, including removing the need for the guarantee to be accelerated in order to be Delivered and removal of the requirement of the guarantee to arise by the agreement of the guarantor.

Currency redenomination

4.35 The 2014 Definitions address various key concerns regarding a currency redenomination of the Obligations of a Reference Entity, with a particular focus on an exit from the euro.

4.36 A Restructuring Credit Event will be triggered by a currency conversion of an Obligation to another currency which is not one contained on a specific list,²⁷ provided that the other conditions to the occurrence of the Restructuring Credit Event are met. In relation to a redenomination from euro to another currency there are additional conditions to meet.

4.37 A redenomination from euro will not trigger a Restructuring if a “freely available market rate of conversion” is available and there is no reduction in the amount or rate of interest, premium or principal payable, determined by reference to such rate. However, the 2014 Definitions clarify that no deterioration in creditworthiness of the Reference Entity is required regarding a redenomination from euro into another currency, provided that the redenomination is as a result of that country generally exiting the euro.²⁸

²⁵ As set out in Section 3.25 of the 2014 Definitions, a Permitted Transfer means a transfer to and the assumption by a single transferee of a Qualifying Guarantee on the same or substantially the same terms, in circumstances where there is also a transfer of all (or substantially all) of the assets of the Reference Entity to the same single transferee.

²⁶ As set out in Section 3.26 of the 2014 Definitions, a Fixed Cap is a specified numerical limit or cap on the liability of the Reference Entity in respect of some or all of the payments due under an Underlying Obligation, provided that it will exclude a limit or cap determined by reference to a formula.

²⁷ The permitted currencies which a redenomination will not trigger a Restructuring Credit Event are the currencies of Canada, Japan, Switzerland, the United Kingdom, the United States of America and the euro, or any successor currency to any of them.

²⁸ Section 4.7(b)(iv) of the 2014 Definitions

- 4.38 The definition of “Standard Specified Currency” has also been expanded to include the currencies of France and Germany and a successor to the euro has been clarified to mean a successor to the euro in whole, but not in part. However, if euro was included as a Specified Currency Deliverable Obligation Characteristic in a Transaction to which a Credit Event has occurred, any obligation which was previously payable in euro will still satisfy this Deliverable Obligation Characteristic provided that the redenomination is as a result of a redenomination by operation of law.²⁹
- 4.39 The 2014 Definitions also clarify that a redenomination of an obligation due to the operation of law within a jurisdiction at a freely available market rate of conversion will not cause any future Failure to Pay Credit Event if the currency later depreciates in value, unless the redenomination itself constituted a reduction in the rate or amount of interest, principal or premium payable at the time of the redenomination.³⁰

Miscellaneous – Single Reference Entity and Reference Obligation, Mod R / Mod Mod R

- 4.40 The 2014 Definitions only contemplate Transactions in relation one Reference Entity and one Reference Obligation. The rationale behind this amendment is simplification of the 2014 Definitions, although these amendments do not prevent the parties from providing amendments in the Confirmation for a Transaction to permit more than one Reference Obligation or Reference Entity.
- 4.41 The 2014 Definitions have also discarded the previous terms of “Restructuring Maturity Limitation and Fully Transferable Obligation” and “Modified Restructuring Maturity Limitation and Conditionally Transferable Obligation” as used in the 2003 Definitions and instead have used the terms “Mod R” and “Mod Mod R” as more commonly used in the market.³¹ In addition the 2014 Definitions have simplified the Restructuring Maturity Limitation Date concept by making various amendments including removal of the Enabling Obligation as well as clarifying that Limitation Dates do not apply for Asset Package Delivery where Financial Reference Entity Terms are applicable, and a Governmental Intervention Credit Event has occurred.
- 4.42 A high-level summary of some of the other less significant changes as compared to the 2003 Definitions are set out in the Schedule to this opinion. This is not a comprehensive list.

5 Key legal and regulatory issues arising under Credit Derivative Transactions

- 5.1 Three particular legal and regulatory issues could arise under Credit Derivative Transactions when documented under the Credit Derivative Definitions:³²
- (a) whether they constitute insurance contracts;
 - (b) whether they are derivatives under the Corporations Act; and
 - (c) whether they are gaming contracts.

²⁹ Section 3.13(b)(ii) of the 2014 Definitions

³⁰ Section 4.11 of the 2014 Definitions

³¹ Sections 3.31 and 3.32 of the 2014 Definitions

³² These issues could also arise under the 2003 Definitions

Insurance

Summary

- 5.2 In our view, most Credit Derivative Transactions entered into in accordance with the Credit Derivative Definitions should not constitute insurance under its common law definition assuming that the transaction terms and the intention of the Buyer and the Seller are consistent with the deemed agreement contained in Section 11.1(b)(i) of the Credit Derivative Definitions. This section provides that:

“the parties will be obligated to perform their respective obligations, in accordance with Section 5.1 (*Settlement*), irrespective of the existence or amount of the parties’ credit exposure to a Reference Entity, and Buyer need not suffer any loss nor provide evidence of any loss as a result of the occurrence of a Credit Event.”

This is because at common law an intention to indemnify another for its loss is required to constitute an insurance contract. However, if the terms of a Credit Derivative Transaction or the parties’ intention is inconsistent with this deemed agreement such that there is an intention for the Seller to indemnify the Buyer from loss then the Credit Derivative Transaction could be found to constitute insurance and the presence of Section 11.1(b)(i) should not be relied on to prevent this result in this circumstance.

Consequences

- 5.3 The general³³ legal and regulatory consequences of a Credit Derivative Transaction constituting an insurance contract can be classified into three categories:
- (a) *Regulatory.* persons carrying on insurance business are required to be authorised under the *Insurance Act 1973 (Cth)*. If a Credit Derivative Transaction is an insurance contract and the Seller is not authorised to carry on an insurance business by the Australian Prudential Regulatory Authority under the *Insurance Act 1973 (Cth)* then the Seller could be liable for heavy fines.³⁴ In addition, the characterisation of a Credit Derivative Transaction as an insurance contract will affect its treatment as a financial product under Chapter 7 of the Corporations Act and the requirements of the Buyer and Seller to hold licences under the Corporations Act;
 - (b) *Contractual.* The *Insurance Contracts Act 1984 (Cth)* imports terms into insurance contracts to which it applies, including the duty of “utmost good faith” (or “uberrimae fidei”) on both parties.³⁵ If this duty applies, any party with knowledge of material facts not known to the other party is under a duty to make full disclosure of them. A failure to do so gives a right to damages, and a fraudulent failure by the Buyer to notify the Seller of such material facts makes the contract voidable.³⁶ If a Credit Derivative Transaction were to be an insurance contract, these terms would be included, which would not be consistent with a typical credit

³³ There are other consequences which could arise with certain parties, for example Sellers who have restrictions on their powers may not have the power to issue insurance policies

³⁴ The corporation is liable for up to 60 penalty units (this penalty can increase five fold if the corporation is convicted of such an offence by a court); officers are liable for up to 60 penalty units (*Insurance Act 1973 (Cth)* section 9 and section 10)

³⁵ *Insurance Contracts Act 1984 (Cth)* section 13, section 14

³⁶ *Insurance Contracts Act 1984 (Cth)* section 28. These remedies will not apply if the insurer would have entered the agreement on the same terms and conditions regardless of the insured’s failure to disclose the relevant information.

derivatives contract. In relation to unenforceability, unlike contracts of life insurance,³⁷ there is no statutory protection for contracts of general insurance transacted by unauthorised issuers. However, based on the principles from two decisions of the High Court of Australia³⁸ the stronger view would be that a Credit Derivative Transaction which is an insurance contract would not be rendered unenforceable merely because it constituted an unauthorised insurance contract and remains enforceable. However, we must point out that these cases do not involve insurance contracts and the question of whether unauthorised insurance contracts are enforceable has yet to be considered by the courts of the Australian Jurisdictions. We also note that there may be adverse consequences on the enforceability of a Credit Derivative Transaction under Chapter 7 of the Corporations Act if the Seller is carrying on a business of issuing insurance contracts without an appropriate Australian Financial Services Licence; and

- (c) **Taxation.** Insurance contracts are subject to particular provisions of the various taxation and stamp duty laws of the Australian Jurisdictions, for example stamp duty may be payable on the amount which is regarded as the “premium.”

Meaning of insurance

5.4 The *Insurance Act 1973 (Cth)* and the *Insurance Contracts Act 1984 (Cth)* rely on the common law definition of insurance. The *Insurance Contracts Act 1984 (Cth)* purports to extend the definition.³⁹ However, even under the *Insurance Contract Act 1984*, there must still be provisions which pass the common law test before the contract will be taken to be a contract of insurance. We comment on the meaning of insurance for the purposes of Chapter 7 of the Corporations Act in paragraph 5.8 below.

5.5 Four elements must be present for a contract to satisfy the common law test of being an insurance policy:

- (a) **Consideration.** This will usually be in the form of a premium. It need not be proportional to the risk undertaken.⁴⁰ The Fixed Amount could satisfy this requirement.
- (b) **Benefit.** The occurrence of an event must result in a benefit being granted to the Buyer by the Seller. The concept of a benefit in the judgments is not limited merely to money.⁴¹ However, a broad extension of the concept of a benefit to non-monetary benefits has been cautioned against,⁴² and it would be reasonable to assume that benefits in non-monetary form should be limited to those which may be construed as being for money’s worth or as being paid for by the insurer or on the insured’s behalf. Thus an obligation on the Seller to purchase a Deliverable Obligation for its par price on the occurrence of a Credit Event may not qualify as a benefit, although a cash payment of the difference between the par and market value (such as the Cash Settlement Amount) would be considered a benefit.

³⁷ *Life Insurance Act 1995 (Cth)* section 230

³⁸ *Yango Pastoral Co Pty Ltd v First Chicago Australia Ltd (1978)* 139 CLR 410 and *Fitzgerald v F J Leonhardt Pty Ltd (1997)* 189 CLR 215

³⁹ *Insurance Contracts Act 1984 (Cth)* section 10(2): “a contract of insurance includesa contract that includes provisions of insurance in so far as those provisions are concerned although the contract would not ordinarily be regarded as a contract of insurance”

⁴⁰ *Australian Health Insurance Association v Esso Australia Pty Ltd (1993)* 116 ALR 253

⁴¹ *Medical Defence Union v Department of Trade [1979]* 2 WLR 686

⁴² See Megarry V.C. in *Medical Defence Union v Dept of Trade [1979]* 2 WLR 686

- (c) **Uncertainty** as to whether the event will happen.⁴³ The fact that the Settlement Method need only be performed if the Conditions to Settlement are satisfied fulfils this requirement.
- (d) **An intention to 'indemnify'**. Insurance contracts are indemnities for loss. In order to be construed as an indemnity the payment must "provide for the payment of a sum of money to meet a loss or detriment which will or may be suffered upon the happening of the event".⁴⁴ Hence the obligation of the Seller must be dependent on the *loss* of the Buyer. If the obligation to pay is triggered by a Credit Event, which may or may not lead to a loss, then it is not an indemnity, and hence not an insurance contract.

There will not be an intention to indemnify if the obligation to pay by the Seller is independent of the actual loss suffered. For example, if the payout is quantified by reference to:

- a fixed value agreed⁴⁵ between the parties at the beginning of the transaction; or
- the difference between the market value of the underlying asset at the start of the transaction and its market value on the occurrence of the credit event,

then the payment is not contingent on the loss suffered by the Buyer and hence is not an indemnity. This is because in the above examples, if the Buyer is separately hedged against that risk, sells the underlying asset or has no exposure to the Reference Entity, they will still be entitled to recover under the contract despite not having incurred a loss.⁴⁶

If the agreement is worded so that the payment by the Seller on a Credit Event is quantified by reference to the amount the Buyer does not receive following its enforcement against the Reference Entity, then the contract comes closer to being calculated on the Buyer's "*loss*", and not some objective "value", and hence may be construed as an insurance contract.

The fact that the economic effect of the contract is similar to that of insurance is not enough to characterise the contract as insurance.⁴⁷ The court will not look to the underlying purpose of the contract, but rather on whether the obligation to pay is dependent on the loss as a matter of law.

Should the Buyer not be a creditor of, or have credit exposure to, the Reference Entity, clearly the contract will not be indemnifying the Buyer for loss and hence it will not be considered an insurance contract.⁴⁸

⁴³ *Prudential Insurance Co v Inland Revenue Commissioners* [1904] 2 KB 658 at 663 per Channell J

⁴⁴ *Prudential Insurance Co v Inland Revenue Commissioners* [1904] 2 KB 658 at 663

⁴⁵ While pre-agreed fixed payouts have been held to be insurance (for example *Maurice v Goldsborough Mort & Co* [1939] AC 452), it is still necessary that there be an intention to indemnify against loss. These cases were explained by the court in *British Traders Insurance v Monson* (1964) 111 CLR 86 on the basis that the assessment of the loss suffered by the insured merely proceeded on the basis of a pre-agreed valuation. The entitlement to payment only arose if loss occurred. This type of provision is common with marine and fire insurance contracts.

⁴⁶ Although some types of insurance that are not referable to the Buyer's loss have been construed as an insurance contract (eg a life insurance contract - *Medical Defence Union v Dept of Trade* [1979] 2 WLR 686) they are limited to those cases where the loss is impossible to quantify, such as life, sickness and accident insurance policies.

⁴⁷ *Palette Shoes v Krohn* (1937) 58 CLR 1; *Lloyds & Scottish Finance v Cyril Lord Carpet Sales* [1992] BCLC 609

⁴⁸ *Aon Financial Products Inc v Société Générale* (US Court of Appeals, Second Circuit, February 5 2007), *Belmont Park Investments PTY Ltd v BNY Corporate Trustee Services Ltd* [2012] AC 383 at 22

Derivative

5.6 Section 761D(1) of the Corporations Act provides that:

“a *derivative* is an arrangement in relation to which the following conditions are satisfied:

- (a) under the arrangement, a party to the arrangement must, or may be required to, provide at some future time consideration of a particular kind or kinds to someone; and
- (b) that future time is not less than the number of days, prescribed by regulations made for the purposes of this paragraph, after the day on which the arrangement is entered into; and
- (c) the amount of the consideration, or the value of the arrangement, is ultimately determined, derived from or varies by reference to (wholly or in part) the value or amount of something else (of any nature whatsoever and whether or not deliverable), including, for example, one or more of the following:
 - (i) an asset;
 - (ii) a rate (including an interest rate or exchange rate);
 - (iii) an index; and
 - (iv) a commodity.”

5.7 A Credit Derivative Transaction satisfies this requirement provided that the Cash Settlement Date or the Delivery Date is in excess of the time prescribed for the purposes of section 761D(1)(b), currently 1 business day.

5.8 We note that the effect of section 764A(d) and section 761D(3)(c) is that contracts which amount to a “contract of insurance” as defined in Section 764A(2) of the Corporations Act are not derivatives for the purpose of Chapter 7. This definition of contract of insurance is inclusive of contracts “that would ordinarily be regarded as a contract of insurance even if some of its provisions are not by way of insurance” and “a contract that includes provisions of insurance insofar as those provisions are concerned, even if the contract would not ordinarily be regarded as a contract of insurance”. Although there is no clear authority on this point, it is our view that this provision still requires a contract to have the constituent elements of insurance in order to be characterised as such (whether or not there are additional provisions of the contract which do not constitute insurance). As a result, a Credit Derivative Transaction which does not have the elements of insurance required under the common law discussed in paragraph 5.5 above, will not constitute a contract of insurance for the purposes of Chapter 7 of the Corporations Act.

Gaming

5.9 Section 1101I of the Corporations Act provides protection from gaming and wagering legislation for all ‘financial products’, not just certain types of ‘futures contracts’ as was the case before the Financial Services Reform Acts in the early 2000’s.

5.10 This means that there is a safe harbour from gaming and wagering legislation for all financial products. Credit Derivative Transactions have the benefit of the safe harbour because, as noted above, Credit Derivative Transactions are derivatives for the purposes of the Corporations Act, and are therefore also financial products.

6 Relationship-based legal issues under Credit Derivative Transactions

- 6.1 In addition to the issue as to whether a Credit Derivative Transaction constitutes an insurance contract, there are a number of other regulatory or legal issues which could arise under Credit Derivative Transactions if there is a connection between the Reference Entity and the Buyer or between the Reference Entity and the Seller. As these depend on the nature of that connection, there is a range of possibilities. However, we set out below a brief description of the key issues of which we are aware may arise.

Confidentiality obligations owed to Reference Entity

- 6.2 A relationship between the Buyer or Seller and the Reference Entity may give rise to a duty of confidentiality. This would arise, for example, if the Buyer were a bank and the Reference Entity were a customer of the Buyer. In circumstances where such a duty of confidentiality is owed, communication of the confidential information which arises from that relationship to the other party to the Credit Derivative Transaction could breach that duty. As such communication may occur on entry into a Credit Derivative Transaction, declaration of a Credit Event or settlement, it is important that participants analyse their confidentiality position with respect to the Reference Entity prior to entering into Credit Derivative Transactions.

Insider Trading

- 6.3 The Corporations Act prohibits the entry into Credit Derivative Transactions by a person who is in possession of information which is not generally available and which, if it were generally available, would be expected by a reasonable person to have a material effect on the price or value of the Credit Derivative Transaction.⁴⁹ This can potentially cause legal issues in connection with Credit Derivative Transactions, for example, where the Buyer has credit information on the Reference Entity obtained through a banking relationship with the Reference Entity. Again, the impact of these laws on each participant's position needs to be determined prior to entry into of Credit Derivative Transactions.

Defamation

- 6.4 It could be argued that the publishing of pricing of credit protection against a Reference Entity is defamatory if it were to suggest that the Reference Entity is of a lower credit standing than it really is. A number of elements of such an action would need to be established and there are certain defences which might be available. However, in circumstances where a party is publishing statements on a Reference Entity's credit standing, advice should be taken on this issue.

Dealings with the Reference Entity

- 6.5 Section 11.1(b)(iii) of the Credit Derivative Definitions provides that the parties may conduct any dealings with the Reference Entity as if the Credit Derivative Transaction had not been entered into and regardless of any adverse effect that such action may have on the other party's position under the Credit Derivative Transactions. It should be noted that the Corporations Act and the *Australian Securities and Investments Commission Act 2001 (Cth)* contain prohibitions on certain types of conduct which cannot be contracted out of.

⁴⁹ This is not the only prohibition in connection with insider trading and credit derivative transactions. For example the communication of such information can also be prohibited.

Insolvency of Reference Entity where it is also the Seller

6.6 Section 11.4 of the 2014 Definitions provide that a Credit Derivative Transaction is terminated if the Seller or the Reference Entity consolidates, amalgamates with, merges into or transfers substantially all of its assets to the other or if they become Affiliates of each other. However, this does not prohibit a Credit Derivative Transaction being entered into under which the Seller and the Reference Entity are the same legal entity. Such "self-referenced" Credit Derivative Transactions raise complicated issues of public policy and insolvency law in circumstances where the Seller/Reference Entity becomes insolvent.⁵⁰ It is possible that such transactions could be unenforceable on the Seller's insolvency and separate advice should be taken on these transactions.

7 **Benefit**

This opinion 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 the Australian Financial Markets Association, people who are subscribing to the Guide 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; and
- (c) filed with a government or other agency or quoted or referred to in a public document.

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

This opinion is given in respect of the laws of the Relevant Jurisdictions which are in force at 9.00 am local time on the date of this letter.

Yours faithfully

A large, stylized handwritten signature in black ink, appearing to be the initials 'K+WM' followed by a flourish.

⁵⁰ The issues are discussed in cases such as *Ex p Mackay, ex p Brown, re Jeavons* (1873) LR 8 Ch App 643 and *British Eagle International Airlines Ltd v Cie Nationale Air France* [1975] 2 All ER 390 and *International Air Transport Association v Ansett Australia Holdings Limited* [2008] HCA3; (2008) 234 CLR 151

SCHEDULE

Additional amendments in the 2014 Definitions as compared with the 2003 Definitions⁵¹

- 1 There has been a comprehensive reordering of the 2014 Definitions compared to the 2003 Definitions. Consequently the amendments set out below are a comparison to the similar provisions contained in the 2003 Definitions as if they followed the numbering set out in the 2014 Definitions.

Article 1 – Certain General Definitions

- 2 Section 1.5 – “Calculation Agent” has been amended to remove previous wording setting out what calculations and determinations the Calculation Agent is responsible for making.
- 3 Section 1.16 – the definition of “Event Determination Date” has been amended so that the definition is effectively split in two. The definition in Section 1.16 is to apply in circumstances where Auction Settlement is applicable to a Transaction and Buyer or Seller is specified as the Notifying Party, and a new definition of “Non-Standard Event Determination Date” is now set out in Section 14.1 applicable to all other methods of settlement. The Event Determination Date has been simplified to provide that no Credit Event Notice is required following a DC Credit Event Announcement, unless the Credit Event is a M(M)R Restructuring. In addition the Trade Date must now occur prior to the DC Announcement Coverage Cut-off Date, which is defined in Section 1.17.
- 4 Section 1.17 – a “DC Announcement Coverage Cut-off Date” is a new definition but it incorporates previous concepts from the 2003 Definitions. As set out in the 2003 Definitions, with respect to a DC Credit Event Announcement (also a new definition incorporating wording from the 2003 Definitions as set out in Section 1.28), it means a date that occurs prior to the Auction Final Price Determination Date, the Auction Cancellation Date, or, the date that is fourteen calendar days following the No Auction Announcement Date. This shortens the previous period set out in the 2003 Definitions which was twenty one calendar days.
- 5 Sections 1.23 – “Notice Delivery Period”, 1.24 – “Post Dismissal Additional Period”, 1.25 “DC Credit Event Meeting Announcement”, 1.26 – “DC Credit Event Question”, 1.27 – “DC Credit Event Question Dismissal” and 1.28 – “DC Credit Event Announcement” are all new definitions but incorporate existing concepts from the 2003 Definitions.
- 6 Section 1.31 – the new definition of “M(M)R Restructuring” introduces the commonly used market terms of “Mod R” and “Mod Mod R” Restructuring instead of the terms “Restructuring Maturity Limitation and Fully Transferable Obligation” and “Modified Restructuring Maturity Limitation and Conditionally Transferable Obligation” as used in the 2003 Definitions.
- 7 Section 1.35 – the definition of “Publicly Available Information” has been simplified to remove the restriction if one of the parties as the sole source of information, to remove the need for a Managing Director of the Buyer to sign a certificate certifying the occurrence of a Credit Event if the Buyer is the sole source of information and is acting as trustee or agent and to clarify that information cannot be Publicly Available Information if it cannot be made public without violating a law or agreement regarding confidentiality.
- 8 Section 1.41 – similar to the amendments to the DC Announcement Coverage Cut-off Date, the “Exercise Cut-off Date” definition has been amended to shorten the period following the No Auction Announcement Date to fourteen days from twenty one calendar days.
- 9 Section 1.49 – “Provisions Relating to Timing” – this new section clarifies that in order to determine the day on when an event occurs, Greenwich Mean Time will be used, or if the transaction type relates to Japan, Tokyo time, regardless of the time zone in which such event occurred. Similarly, the new section “Payment Timing” in Section 1.50 confirms that if a payment is not made by the Reference Entity when due, such failure will be deemed to have occurred prior to midnight Greenwich Mean Time, or if the transaction type relates to Japan, Tokyo time.

⁵¹ This is a high-level summary only of some of the more material other amendments and does not describe every change

Article II – Terms relating to the Reference Entity and the Reference Obligation

- 10 Section 2.11 – “Substitution Event”. In relation to Non-Standard Reference Obligations, a specific reduction in aggregate amounts due under the Non-Standard Reference Obligation to below USD 10,000,000 (or its equivalent in the relevant Obligation Currency) may trigger a Substitution Event. In addition, a scheduled redemption to bring the aggregate amount due below this figure could also trigger a Substitution Event whereas previously under the 2003 Definitions this was carved out from this definition.
- 11 Section 2.12 – “Reference Obligation Only Trade”. This new provision clarifies that in respect of a Reference Obligation Only Trade a reduction in aggregate amounts due as set out in Section 2.11 will trigger the Termination Date of the Transaction. However, if the Reference Obligation continues but ceases to be a direct or indirect obligation of the Reference Entity, the Transaction will continue.

Article III – Terms Relating to Obligations and Deliverable Obligations

- 12 Section 3.2 – the “Deliverable Obligation” provisions have been simplified and expanded to include Asset Package Delivery.
- 13 Section 3.8 – “Outstanding Principal Balance” is a new definition which incorporates much of the “Non Contingent” Deliverable Obligation from the 2003 Definitions which has now been removed. It introduces the concept of “Permitted Contingencies” as set out in Section 3.11 and “Quantum of Claim”.
- 14 Section 3.9 – the “Due and Payable Amount” definition includes concepts from the 2003 Definitions and includes extra provisions to subtract any amounts subject to any Prohibited Actions (as defined in Section 3.10) or due to the effluxion of time or occurrence or non-occurrence of an event.
- 15 Section 3.11 – “Permitted Contingencies” is a new definition which sets out certain circumstances in which a reduction to the Reference Entity’s payment obligations would be permitted enabling the reduction to be fed into the calculations of Outstanding Principal Balance.
- 16 Section 3.13 – “Subordination” has been clarified to apply to principal payments only.
- 17 Section 3.15 – the “Interpretation of Provisions” section has been updated to confirm that if “Financial Reference Entity Terms” and “Governmental Intervention” are specified as applicable for a Transaction, if the terms of an obligation permit discharge or alteration of the obligations if a Governmental Intervention occurs, this will not prevent the obligation from satisfying the relevant Obligation Characteristic or Deliverable Obligation Characteristic (3.15(f)). In addition, if “Subordinated European Insurance Terms” is specified as applicable for a Transaction, the existence of Solvency Capital Provisions will not cause a Deliverable Obligation to fail to satisfy the Maximum Maturity Deliverable Obligation Characteristic (3.15(i)).

Article IV – Credit Events

- 18 Section 4.2 – amendments have been made to the “Bankruptcy” Credit Event definition:
- (a) to exclude situations where a Successor has been or could have been determined; and
 - (b) to include a general assignment, arrangement, scheme or composition with or for the benefit of creditors becoming effective, even if this has not been “made” by the Reference Entity.
- 19 Section 4.7 – in addition to the amendments discussed in the main body of this memorandum, the “Restructuring” Credit Event definition has been updated to clarify that a Bond exchange or a redenomination may also trigger a Restructuring.
- 20 Section 4.9 – the definition of Governmental Authority has been expanded to include intergovernmental and supranational bodies.

Article V – General Terms relating to Settlement

- 21 Section 5.1 – the “Settlement” definition has been simplified and it has been clarified that the Transaction will terminate if Physical Settlement is applicable and a Notice of Physical Settlement is not delivered by Buyer on or prior to the NOPS Cut-off Date.

Article VIII – Terms relating to Physical Settlement

- 22 Section 8.1 – the option to include or exclude accrued but unpaid interest has been removed and replaced with a reference to Outstanding Principal Balance.
- 23 Section 8.2 – the “Notice of Physical Settlement” provisions have been amended to provide that, if Asset Package Delivery is applicable, the Buyer will notify the Seller as soon as practicable on or after the NOPS Effective Date of the details of the Asset Package that the Buyer intends to deliver to the Seller.
- 24 Section 8.10 – “NOPS Cut-off Date” is a new definition incorporating existing concepts from the 2003 Definitions relating to the determination of the Physical Settlement Date.
- 25 Section 8.13 – the “Delivery” provisions have been updated to reflect the simplification in the Guarantee provisions and to include provisions relating to Asset Package Delivery, each as more fully set out in the main body of this memorandum. Also they include references to delivery of all equitable title where any equitable title is customarily conveyed.

Article IX – Fallback provisions applicable to Physical Settlement

- 26 Section 9.9 – “Alternative Procedures Relating to Assets Not Delivered” is a new provision following the introduction of the Asset Package Delivery concept. It provides alternative procedures for Physical Settlement if Buyer fails to Deliver the relevant Assets by the fifth Business Day following the Physical Settlement Date. In such circumstances Seller can specify a Deliverable Obligation that Buyer is required to Deliver instead subject to certain criteria being fulfilled.

Article X – Effect of DC Resolutions

- 27 Section 10.2 – “Effect of DC Resolutions”. This provision has been amended so as to provide that a DC Resolution may overturn a determination previously made by the Calculation Agent identifying one or more Successors, Substitute Reference Obligations or Settlement Dates, provided that the DC Resolution occurs within five Business Days of the Calculation Agent determination.

Article XI – Additional Representations and Agreements of the Parties

- 28 Section 11.3 – “No frustration” is a new provision stating that a Transaction will not be considered frustrated solely because the Reference Entity, any Obligations, any Deliverable Obligations or the Reference Obligation ceases to exist at any time on or following the Trade Date. This provision is not intended to override other rights granted in the 2014 Definitions.

Article XII – Initial Payment Amount, Fixed Amounts and Floating Rate Payer Calculation Amount

- 29 Section 12.10 – “Effective Date” has been amended to remove the concept of “Term” and to provide that if a date is not specified as the Effective Date it will be the Fixed Rate Payer Payment Date falling on or immediately prior to the calendar day immediately following the Trade Date.

Article XIV – Non-Standard Event Determination Date and Non-Standard Exercise Cut-off Date

- 30 Article XIV is a new section providing alternative definitions of Non-Standard Event Determination Date and Non-Standard Exercise Cut-off Date in circumstances where Auction Settlement is not specified to apply to a Transaction or Buyer or Seller are not specified as the Notifying Party.