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**BY POST AND BY E-MAIL**

27 May 2009

The Australian Consumer Law  
Consultation on draft unfair contract terms provisions  
Competition and Consumer Policy Division  
Treasury  
Langton Crescent  
PARKES ACT 2600  
[australianconsumerlaw@treasury.gov.au](mailto:australianconsumerlaw@treasury.gov.au)

Dear Sir/Madam,

**Consultation on draft provisions of unfair contract terms - Trade Practices Amendment (Australian Consumer Law) Bill 2009**

The International Swaps and Derivatives Association, Inc. (ISDA) is grateful for the opportunity to respond to the request by the Competition and Consumer Policy Division of the Commonwealth Treasury for submissions in relation to the consultation draft of Schedule 2 of the Trade Practices Amendment (Australian Consumer Law) Bill 2009 which was released for public comment on 11 May 2009 and intended to be incorporated in the *Australian Securities and Investments Commission Act 2001* (Cth).

By way of background, ISDA, which represents participants in the privately negotiated derivatives industry, is among the world's largest global financial trade associations as measured by number of member firms. ISDA was chartered in 1985, and today has over 830 member institutions from 57 countries on six continents. These members include most of the world's major institutions that deal in privately negotiated derivatives, as well as many of the businesses, governmental entities and other end users that rely on over-the-counter derivatives to manage efficiently the financial market risks inherent in their core economic activities.

ISDA supports the submission dated 22 May 2009 made by the Australian Financial Markets Association to the Treasury regarding the Bill to the extent that it relates to matters concerning the privately negotiated derivatives industry.

In particular, ISDA emphasises the adverse impact which uncertainty as to legal rights may have on the operation of the wholesale over-the-counter derivatives market. ISDA understands that any such impact may not be intended. In particular ISDA notes the following statement made by the three Australian financial authorities (the Australian Prudential Regulation Authority, the Australian Securities and Investment Commission and the Reserve Bank of Australia) in their joint report on the Australian over-the-counter derivatives market published on 22 May 2009:

“Although the Australian market remains relatively small, it plays an important part in the overall functioning of the Australian financial system. The OTC derivatives market contributes to price discovery, and facilitates bespoke hedging solutions and the establishment of tailored risk positions.

# ISDA

International Swaps and Derivatives Association, Inc.

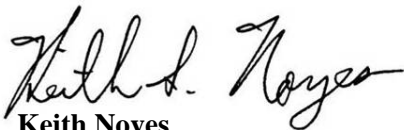
Furthermore, any disruption to activity in this market could have spillover effects in other linked markets.”

Accordingly, ISDA hopes that sufficient care is taken in the drafting of the Bill to ensure that it does not introduce uncertainty into contracts used in the wholesale derivatives market and, very importantly, to ensure that the enforceability of close-out netting permitted under the Australian *Payments System and Netting Act 1998* (Cth) is preserved.


ISDA would be happy to speak with the Treasury in relation to any further developments in relation to the Bill, to clarify any issues raised in this submission or generally to discuss any future regulatory developments in the derivatives market in Australia. In the meantime, if you or your colleagues have any questions regarding our comments, please do not hesitate to contact Mr Keith Noyes ([knoyes@isda.org](mailto:knoyes@isda.org); +852 2200 5900) Ms Jacqueline Low ([jlow@isda.org](mailto:jlow@isda.org); +65 6538 3879) of ISDA or Mr Scott Farrell ([scott.farrell@malleasons.com](mailto:scott.farrell@malleasons.com); +612 9296 2142) of Malleasons Stephen Jaques.

Yours faithfully,

**For the International Swaps and Derivatives Association, Inc.**



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**Regional Director**  
**Asia Pacific**



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