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BY POST AND BY E-MAIL

16 March 2010

The General Manager
Financial System Division
The Treasury
Langton Crescent
PARKES ACT 2600
Email: FSLAbill@treasury.gov.au

Dear Sir/Madam,

Exposure draft of the Financial Sector Legislation Amendment (Prudential Refinements and Other Measures) Bill 2010 (Cwth)

The International Swaps and Derivatives Association, Inc. (ISDA) is grateful for the opportunity to respond to the request by the Commonwealth Treasury for submissions in relation to the exposure draft of the Financial Sector Legislation Amendment (Prudential Refinements and Other Measures) Bill 2010 (Cwth) which was released for public comment on 19 January 2010. If passed in its current form, the Bill will vary the *Banking Act 1959* (Cth), the *Insurance Act 1973* (Cth), the *Life Insurance Act 1995* (Cth) and other Australian legislation.

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 810 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 recognises the importance of effective regulation and financial system stability in Australia and supports the promotion of these objectives in the wholesale over-the-counter derivatives market. ISDA understands that the Australian government is aware of the importance of this market, as it is shown by the following statement made by the three Australian financial regulatory 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. Furthermore, any disruption to activity in this market could have spillover effects in other linked markets.”

Given the importance of the over-the-counter derivatives market, ISDA suggests that consideration be given to including in the Bill provisions which clarify the interaction between the Australian legislation amended in

the Bill and another piece of legislation which is fundamental to stability in the OTC derivatives market, being the *Payment Systems and Netting Act 1998* (Cth).

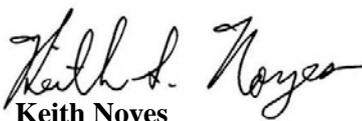
The need for clarification arises because of amendments which were made to the *Banking Act*, the *Life Insurance Act* and the *Insurance Act* by the *Financial System Legislation Amendment (Financial Claims Scheme and Other Measures) Act 2008* (Cth) which provided (in summary) that the appointment of a statutory manager or judicial manager to an Australian ADI, life insurance company or insurance company does not entitle the counterparty to close-out contracts. This does not appear consistent with the provisions of the *Payment Systems and Netting Act* which permits such close-out of close-out netting contracts in accordance with their terms “despite any other law”.

We understand that the technical result of this inconsistency could be that the protection provided by the *Payment Systems and Netting Act* has been qualified to the extent of the inconsistency. We are not aware of any statements of the Australian Government to indicate that this is the policy objective but the inconsistency has created some doubt in dealing with Australian banks, life insurance companies and insurance companies under new contracts.

As the Bill is amending the three pieces of legislation whose earlier amendment gave rise to the inconsistency, we suggest that the Bill presents an opportunity for the Australian government to clarify and support the effectiveness of its netting legislation, which is so important to the stability of the OTC derivative markets.

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; +852 2200 5900) Ms Jacqueline Low (jlow@isda.org; +65 6538 3879) of ISDA or Mr Scott Farrell (scott.farrell@malleasons.com; +612 9296 2142) of Mallesons Stephen Jaques.

Yours faithfully,
For the International Swaps and Derivatives Association, Inc.



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